manupatra®

Compilation of Leading Supreme Court Cases with Summaries

manupatra academy

Arrangement of Cases
[Alphabetically]

Back to Index

MANU/SC/0445/1973

Neutral Citation: 1973/INSC/91

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) 135 of 1970

Decided On: 24.04.1973

Appellants: Kesavananda Bharati Sripadagalvaru **Vs.** Respondent: State of Kerala

Hon'ble Judges/Coram:

S.M. Sikri C.J., A.N. Grover, A.N. Ray D.G. Palekar, H.R. Khanna, J.M. Shelat, K.K. Mathew, K.S. Hegde, M. Hameedullah Beg, P. Jaganmohan Reddy, S.N. Dwivedi, A.K. Mukherjea and Y.V. Chandrachud, JJ.

Subject: Constitution

Relevant Section:

CONSTITUTION OF INDIA - Article 31

Cases Overruled/Partly Overruled:

I.C. Golak Nath and Ors. vs. State of Punjab and Anr. (MANU/SC/0029/1967)

Disposition:
Disposed of

Authorities Referred:

American Jurisprudence, 2d. Vol. 16 p. 184 (2d. 16. p. 189) 2nd, Vol. 45, p. 351) Vol. 16, 2d. p. 731, Article 391 Vol. 16, 2d., p. 201 Vol. 50, 1962 Reprint at pp. 372, 373 (2d), Vol. 16, p. 251 2d. Vol. 16 Article 59 at pp. 231-232, Article 72 at p. 251, Article 287 at pp. 270-71 and Article 88 at pp. 273-74 Corpus Juris Secundum (Vol. XVI-Title Constitutional Law Article 1, p. 20)Vol. 16 pp. 48, 49 Craies on Statute Law, 5th Ed. p. 122. Halsbury Laws of England, 3rd Ed. Vol. 36 p. 370) Salmond on Jurisprudence, Twelfth Edition:Shorter Oxford English Dictionary, Third Edn. p. 57 (Wynes Legislative, Executive and Judicial Powers in Australia, Fourth Edn. p. 506) book Federal Government, 4th Edn. (1963) A Grammar of Politics; Fifth Edn. pp. 313-314).the Amending of the Federal Constitution (1942) page 155 (1971 Edn.)The National Prohibition 65 Law, edn. 994 cases decided earlier, the Prohibition Amendment (18th) Cooley Constitutional Law, 4th edition, 46-47; Burdick Law of American Constitution pp. 45 to 48. Journal of Indian

Law Institute, Vol. 10 (1968) 1, 26-28. Journal of the Indian Law Institute, Vol. 10 (1968) 1 Roscoe Pound, "Jurisprudence" Vol. 1, Section 46 (Twentieth Century)."Equal Protection Guarantee and the Right to Property under the Indian Constitution", by Jagat Narain, International And Comparative Law Quarterly, Vol. 15, 1966, pp. 206-7)."The History of the Indian Congress, Vol. I, page 386.

Case Note:

Constitution - basic structure of Constitution - Sections 2, 3, 6, 7, 8 (1), 18, 29 and 291 of Criminal Procedure Code, Constitution of India, Section 29 (1) of Indian Evidence Act and Indian Contract Act - batch of six writ petitions challenging validity of Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments of Constitution - majority upheld validity of twenty-fourth Amendment which inserted Clauses (3) and (4) in Article 13 - all Judges opined that by virtue of Article 368 as amended by twenty-fourth Amendment Parliament had power to amend any or all provisions of Constitution including those relating to fundamental rights although the same was not unlimited - majority were of view that power of amendment under Article 368 was subject to certain implied and inherent limitations - in exercise of amending power Parliament cannot amend basic structure or framework of Constitution - right to property did not form part of basic structure - individual freedom secured to citizens was basic feature of Constitution - grant of power is always qualified by implications of context and considerations arising out of general scheme of statute - inherent limitations under unamended Article 368 would still hold true even after amendment of Article 368 - Sections 2 (a) and 2 (b) and first part of Section 3 of twenty-fifth Amendment held valid - majority invalidated second part of Article 31-C introduced by twenty-fifth Amendment which excluded jurisdiction of Courts to inquire whether law protected under that Article gave effect to policy of securing directive principles mentioned therein - validity of twenty-ninth Amendment which inserted Kerala Land Reforms (Amendment) Act, 1969 and Kerala Land Reforms (Amendment) Act, 1971 was upheld.

JUDGMENT

S.M. Sikri, C.J.

1. I propose to divide my judgment into eight parts. Part I will deal with Introduction; Part II with interpretation of Golakhnath case; Part III with the interpretation of the original Article 368, as it existed prior to its amendment; Part IV with the validity of the Constitution (Twenty-fourth Amendment) Act; Part V with the validity of Section 2 of the Constitution (Twenty-fifth Amendment) Act; Part VI with the validity of Section 3 of the Constitution (Twenty-fifth Amendment) Act; Part VII with Constitution (Twenty-ninth Amendment) Act; and Part VIII with conclusions.

PART I-Introduction

2. All the six writ petitions involve common questions as to the validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments of the Constitution. I may give a few facts in Writ

petition No. 135 of 1970 to show how the question arises in this petition. Writ Petition No. 135 of 1970 was filed by the petitioner on March 21, 1970 under Article 32 of the Constitution for enforcement of his fundamental rights under Articles 25, 26, 14, 19(1)(f) and 31 of the Constitution. He prayed that the provisions of the Kerala Land Reforms Act, 1963 (Act 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act 1969 (Act 35 of 1969) be declared un-constitutional, ultra vires and void. He further prayed for an appropriate writ or order to issue during the pendency of the petition. This Court issued rule nisi on March 25, 1970.

3. During the pendency of the writ petition, the Kerala Land Reforms (Amendment) Act 1971 (Kerala Act No. 25 of 1971) was passed which received the assent of the President on August 7, 1971. The petitioner filed an application for permission to urge additional grounds and to impugn the Constitutional validity of the Kerala Land Reforms (Amendment) Act 1971 (Kerala Act No. 25 of 1971).

4. In the meantime, the Supreme Court by its judgment dated April 26, 1971 in Kunjukutty Sahib v. State of Kerala [1972] S.C.C. 364 (Civil Appeals Nos. 143, 203-242, 274 & 309 of 1971). Judgment dated April 26, 1971 upheld the majority judgment of the Kerala High Court in V.N. Narayanan Nair v. State of Kerala MANU/KE/0025/1971 : AIR1971Ker98 whereby certain, sections of the Act were struck down.

5. The Constitution (Twenty-fifth Amendment) Act came into force on November 5, 1971, the Constitution (Twenty-fifth Amendment) Act came into force on April 20, 1972 and the Constitution (Twenty-ninth Amendment) Act came into force on June 9, 1972. The effect of the Twenty-ninth Amendment of the Constitution was that it inserted the following Acts in the Ninth Schedule to the Constitution:

65. The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969).

66. The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).

6. The petitioner then moved an application for urging additional grounds and for amendment of the writ petition in order to challenge the above Constitutional amendments.

7. The Court allowed the application for urging additional grounds and for amendment of the writ petition on August 10, 1972 and issued notices to the Advocates-General to appear before this Court and take such part in the proceedings as they may be advised.

8. When the case was placed before the Constitutional bench, it referred this case to a larger bench to determine the validity of the impugned Constitutional amendments.

9. Similar orders were passed in the other writ petitions.

10. The larger bench was accordingly constituted. It was then felt that it would be necessary to decide whether I.C. Golak Nath v. State of Punjab MANU/SC/0029/1967 : [1967]2SCR762 was rightly decided or not. However, as I see it, the question whether Golak Nath's MANU/SC/0029/1967 : [1967]2SCR762 case was rightly decided or not does not matter because

the real issue is different and of much greater importance, the issue being : what is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2), on Parliament ?

11. The respondents claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one-party rule established. Indeed, short of repeal of the Constitution, any form of Government with no freedom to the citizens can be set up by Parliament by exercising its powers under Article 368.

12. On the side of the petitioners it is urged that the power of Parliament is much more limited. The petitioners say that the Constitution gave the Indian citizen freedoms which were to subsist for ever and the Constitution was drafted to free the nation from any future tyranny of the representatives of the people. It is this freedom from tyranny which, according to the petitioners, has been taken away by the impugned Article 31C which has been inserted by the Twenty-fifth Amendment. If Article 31C is valid, they say, hereafter Parliament and State Legislatures and not the Constitution, will determine how much freedom is good for the citizens.

13. These cases raise grave issues. But however grave the issues may be, the answer must depend on the interpretation of the words in Article 368, read in accordance with the principles of interpretation which are applied to the interpretation of a Constitution given by the people to themselves.

14. I must interpret Article 368 in the setting of our Constitution, in the background of our history and in the light of our aspirations and hopes, and other relevant circumstances. No other Constitution in the world is like ours. No other Constitution combines under its wings such diverse peoples, numbering now more than 550 millions, with different languages and religions and in different stages of economic development, into one nation, and no other nation is faced with such vast socio-economic problems.

15. I need hardly observe that I am not interpreting an ordinary statute, but a Constitution which apart from setting up a machinery for government, has a noble and grand vision. The vision was put in words in the Preamble and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of directive principles.

PART II-Interpretation of Golak Nath's Case.

16. Before proceeding with the main task, it is necessary to ask : what was decided in I.C. Golak Nath v. State of Punjab MANU/SC/0029/1967 : [1967]2SCR762 ? In order to properly appreciate that case, it is necessary first to have a look at Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 : [1952]1SCR89 and Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 .

17. The Constitution (First Amendment) Act, 1951, which inserted inter alia Articles 31A and 31B in the Constitution was the subject matter of decision in Sankari Prasad's MANU/SC/0013/1951 : [1952]1SCR89 case. The main arguments relevant to the present case which were advanced in

support of the petition before this Court were summarised by Patanjali Sastri, J. as he then was, as follows:

First, the power of amending the Constitution provided for under Article 368 was conferred not on Parliament but on the two Houses of Parliament as designated body and, therefore, the provisional Parliament was not competent to exercise that power under Article 379.

Fourthly, in any case Article 368 is a complete code in itself and does not provide for any amendment being made in the bill after it has been introduced in the House. The bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in Article 368.

Fifthly, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of Article 13(2).

X X X

As stated in the head note, this Court held:

The provisional Parliament is competent to exercise the power of amending the Constitution under Article 368. The fact that the said article refers to the two Houses of the Parliament and the President separately and not to the Parliament, does not lead to the inference that the body which is invested with the power to amend is not the Parliament but a different body consisting of the two Houses.

The words "all the powers conferred by the provisions of this Constitution on Parliament" in Article 379 are not confined to such powers as could be exercised by the provisional Parliament consisting of a single chamber,
but are wide enough to include the power to amend the Constitution conferred by Article 368.

18. I may mention that Mr. Seervai contends that the conclusion just mentioned was wrong and that the body that amends the Constitution under Article 368 is not Parliament.

19. The Court further held:

The view that Article 368 is a complete code in itself in respect of the procedure provided by it and does not contemplate any amendment of a Bill for amendment of the Constitution after it has been introduced, and that if the Bill is amended during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed by Article 368 and would be invalid, is erroneous.

Although "law" must ordinarily include Constitutional law there is a clear demarcation between ordinary law which is made in the exercise of legislative power and Constitutional law, which is made in the exercise of constituent power. In the context of Article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to

the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368.

20. Although the decision in Sankari Prasad's MANU/SC/0013/1951 : [1952]1SCR89 case was not challenged in Sajjan Singh's MANU/SC/0052/1964 : [1965]1SCR933 case, Gajendragadkar, C.J. thought it fit to give reasons for expressing full concurrence with that decision.

21. The only contention before the Court was that "since it appears that the powers prescribed by Article 226 are likely to be affected by the intended amendment of the provisions contained in Part III, the bill introduced for the purpose of making such an amendment, must attract the proviso, and as the impugned Act has admittedly not gone through the procedure prescribed by the proviso, it is invalid". According to Gajendragadkar, C.J. "that raised the question about the construction of the provisions contained in Article 368 and the relation between the substantive part of Article 368 with its proviso.

22. The Chief Justice came to the conclusion that "as a matter of construction, there is no escape from the conclusion that Article 368 provides for the amendment of the provisions contained in Part III without imposing on Parliament an obligation to adopt the procedure prescribed by the proviso.

23. The learned Chief Justice thought that the power to amend in the context was a very wide power and it could not be controlled' by the literal dictionary meaning of the word "amend". He expressed his agreement with the reasoning of Patanjali Sastri, J. regarding the applicability of Article 13(2) to Constitution Amendment Acts passed under Article 368. He further held that when Article 368 confers on Parliament the right to amend the Constitution, it can be exercised over all the provisions of the Constitution. He thought that "if the Constitution-makers had intended that any future amendment of the provisions in regard to fundamental rights should be subject to Article 13(2), they would have taken the precaution of making a clear provision in that behalf.

24. He seemed to be in agreement with the following observations of Kania, C.J. in A.K. Gopalan v. The State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 :

the inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid.

25. He was of the view that even though the relevant provisions of Part III can be justly described as the very foundation and the cornerstone of the democratic way of life ushered in this country by the Constitution, it cannot be said that the fundamental rights guaranteed to the citizens are eternal and inviolate in the sense that they can never be abridged or amended.

26. According to him, it was legitimate to assume that the Constitution-makers visualised that Parliament would be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country.

27. Hidayatullah, J., as he then was, agreed with the Chief Justice that the 17th Amendment was valid even though the procedure laid down in the proviso to Article 368 had not been followed. But he expressed his difficulty in accepting the part of the reasoning in Sankari Prasad's MANU/SC/0013/1951 : [1952]1SCR89 case.

He observed as follows:

It is true that there is no complete definition of the word "law"' in the article but it is significant that the definition does not seek to exclude Constitutional amendments which it would have been easy to indicate in the definition by adding "but shall not include an amendment of the Constitution".

28. He further observed:

The meaning of Article 13 thus depends on the sense in which the word "law" in Article 13(2) is to be understood. If an amendment can be said to fall within the term "law", the Fundamental Rights become "eternal and inviolate" to borrow the language of the Japanese Constitution. Article 13 is then on par with Article 5 of the American Federal Constitution in its immutable prohibition as long as it stands.

29. According to him "Our Preamble is more akin in nature to the American Declaration of Independence (July 4, 1776) then to the preamble to the Constitution of the United States. It does not make any grant of power but it gives a direction and purpose to the Constitution which is reflected in Parts III and IV. Is it to be imagined that a two-thirds majority of the two Houses at any time is all that is necessary to alter it without even consulting the States ? It is not even included in the proviso to Article 368 and it is difficult to think that as it has not the protection of the proviso it must be within the main part of Article 368.

30. He further observed:

I would require stronger reason than those given in Sankari Prasad's case to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States.

31. He held:

What Article 368 does is to lay down the manner of amendment and the necessary conditions for the effectiveness of the amendment....

The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play-things of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than one on which the articles mentioned in the proviso stand.

32. Mudholkar, J. although agreeing that the writ petition should be dismissed, raised various doubts and he said that he was reserving his opinion on the question whether Sankari Prasad's case was rightly decided. He thought:

The language of Article 368 is plain enough to show that the action of Parliament in amending the Constitution is a legislative act like one in exercise of its normal legislative power. The only difference in respect of an amendment of the Constitution is that the Bill amending the Constitution has to be passed by a special majority (here I have in mind only those amendments which do not attract the proviso to Article 368). The result of a legislative action of a legislature cannot be other than 'law' and, therefore, it seems to me that the fact that the legislation deals with the amendment of a provision of the Constitution would not make its result any the less a 'law'.

33. He observed:

It is true that the Constitution does not directly prohibit the amendment of Part III. But it would indeed be strange that rights which are considered to be fundamental and which include one which is guaranteed by the Constitution (vide Article 32) should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Article 368 some of which are perhaps less vital than fundamental rights. It is possible, as suggested by my learned brother, that Article 368 merely lays down the procedure to be followed for amending the Constitution and does not confer a power to amend the Constitution which, I think, has to be ascertained from the provision sought to be amended or other relevant provisions or the preamble.

34. Later, he observed:

Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indications of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution ?

35. He posed a further question by observing:

It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368 ?

36. He then stressed the prime importance of the preamble:

The Constitution indicates three modes of amendments and assuming that the provisions of Article 368 confer power on Parliament to amend the Constitution, it will still have to be considered whether as long as the preamble stands unamended, that power can be exercised with respect to any of the basic features of the Constitution.

To illustrate my point, as long as the words 'sovereign democratic republic' are there, could the Constitution be amended so as to depart from the democratic form of Government or its republic character? If that cannot be done, then, as long as the words "Justice, social, economic and political

etc.," are there could any of the rights enumerated in Articles 14 to 19, 21, 25, 31 and 32 be taken away ? If they cannot, it will be for consideration whether they can be modified.

It has been said, no doubt, that the preamble is not a part of our Constitution. But, I think, that if upon a comparison of the preamble with the broad features of the Constitution it would appear that the preamble is an epitome of those features or, to put it differently if these features are an amplification or concretisation of the concepts set out in the preamble it may have to be considered whether the preamble is not a part of the Constitution.

While considering this question it would be of relevance to bear in mind that the preamble is not of the common run such as is to be found in an Act of a legislature. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?

37. Coming now to Golak Nath's case, the petitioner had challenged the validity of the Constitution (Seventeenth Amendment) Act, 1964 which included in the Ninth Schedule, among other acts, the Punjab Security of Land Tenures Act, 1953 (Act 10 of 1953), and the Mysore Land Reforms Act (Act 10 of 1962) as amended by Act 14 of 1965.

38. It was urged before the Court that Sankari Prasad's MANU/SC/0013/1951 : [1952]1SCR89 case in which the validity of the Constitution (First Amendment) Act, 1951 and Sajjan Singh's MANU/SC/0052/1964 : [1965]1SCR933 case in which the validity of the Constitution (Seventeenth Amendment) Act was in question had been wrongly decided by this Court.

39. Subba Rao, C.J. speaking for himself and 4 other judges summarised the conclusions at page 815 as follows:

The aforesaid discussion leads to the following results:

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act X of 1953, and the Mysore Land Reforms Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Articles 13, 14 or 31 of the Constitution.

40. It must be borne in mind that these conclusions were given in the light of the Constitution as it stood then i.e. while Article 13(2) subsisted in the Constitution. It was then not necessary to decide the ambit of Article 368 with respect to the powers of Parliament to amend Article 13(2) or to amend Article 368 itself. It is these points that have now to be decided.

41. It may further be observed that the Chief Justice refused to express an opinion on the contention that, in exercise of the power of amendment, Parliament cannot destroy the fundamental structure of the Constitution but can only modify the provision thereof within the framework of the original instrument for its better effectuation.

42. As will be seen later, the first conclusion above, does not survive for discussion any longer because it is rightly admitted on behalf of the petitioners that the Constitution (Twenty Fourth Amendment) Act, 1971, in so far as it transfers power to amend the Constitution from the residuary entry (Entry 97 List 1) or Article 248 of the Constitution to Article 368, is valid; in other words Article 368 of the Constitution as now amended by the Twenty Fourth Amendment deals not only with the procedure for amendment but also confers express power on Parliament to amend the Constitution.

43. I will also not discuss the merits of the second conclusion as the same result follows in this case even if it be assumed in favour of the respondents that an amendment of the Constitution is not law within Article 13(2) of the Constitution.

44. Hidayatullah, J. as he then was, came to the following conclusions at page 902:

(i) that the Fundamental Rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;

(ii) that Sankari Prasad's case (and Sajjan Singh's case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of Articles 13(2) and 368.

(iii) that the First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the seventeenth Amendment;

(iv) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Article 368, any further inroad into these rights as

they exist today will be illegal and un-constitutional unless it complies with Part III in general and Article 13(2) in particular;

(v) that for abridging or taking away Fundamental Rights, a Constituent body will have to be convoked; and

(vi) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1,953 (X of 1953) and the Mysore Land Reforms Act, 1961 (X of 1962) as amended by Act XIV of 1965 are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by Article 31-A, and the President's assent.

45. I am not giving his reasons for these conclusions here because they will be examined when dealing with the arguments addressed to us on various points.

46. Wanchoo, J. as he then was, also speaking on behalf of 2 other Judges held that Sankari Prasad's MANU/SC/0013/1951 : [1952]1SCR89 case was correctly decided and the majority in Sajjan Singh's MANU/SC/0052/1964 : [1965]1SCR933 case was correct in following that decision.

47. Bachawat, J. held:

(1) Article 368 not only prescribes the procedure but also gives the power of amendment;

(2) Article 368 gives the power of amending each and every provision of the Constitution and as Article 13(2) is a part of the Constitution it is within the reach of the amending power;

(3) Article 368 is not controlled by Article 13(2) and the prohibitory injunction in Article 13(2) is not attracted against the amending power;

(4) Constitutional amendment under Article 368 is not a law within the meaning of Article 13(2);

(5) The scale of value embodied in Parts III and IV is not immortal. Parts III and IV being parts of the Constitution are not immune from amendment under Article 368. Constitution-makers could not have intended that the rights conferred by Part III could not be altered by giving effect to the policies of Part IV.

(6) The Preamble cannot control the unambiguous language of the articles of the Constitution.

48. Regarding the amendment of the basic features of the Constitution, he observed:

Counsel said that they could not give an exhaustive catalogue of the basic features, but sovereignty, the republican form of government, the federal structure and the fundamental rights were some of the features. The Seventeenth Amendment has not derogated from the sovereignty, the republican form of government and the federal structure, and the question whether they can be touched by amendment does not arise for decision. For the purposes of these cases, it is sufficient to say that the fundamental rights are within the reach of the amending power.

49. Ramaswami, J., held:

(1) The amending power under Article 368 is sui generis;

(2) "Law" in Article 13(2) cannot be construed so as to include "Law" made by Parliament under Articles 4, 169, 392, 5th Schedule Part D and 6th Schedule Para 21.

(3) The expression "fundamental rights" does not lift the fundamental rights above the Constitution itself;

(4) Both the power to amend and the procedure to amend are enacted in Article 368.

(5) There were no implied limitations on the amending power and all articles of the Constitution were amendable either under the proviso of Article 368 or under the main part of the article.

(6) The Federal structure is not an essential part of our Constitution.

(7) The power of amendment is in point of quality an adjunct of sovereignty. If so, it does not admit of any limitations.

50. In brief 6 Judges held that in view of Article 13(2) Fundamental Rights could not be abridged or taken away. Five Judges held that Article 13(2) was inapplicable to Acts amending the Constitution.

PART III-Interpretation of Article 368

51. Let me now proceed to interpret Article 368. Article 368, as originally enacted, read as follows:

An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in-

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

52. It will be noticed that Article 368 is contained in a separate part and the heading is "Amendment of the Constitution", but the marginal note reads "Procedure for amendment of the Constitution".

53. The expression "amendment of the Constitution" is not defined or expanded in any manner, although in other parts of the Constitution, the word "Amend" or "Amendment" has, as will be pointed out later, been expanded. In some parts they have clearly a narrow meaning.. The proviso throws some light on the problem. First, it uses the expression "if such amendment seeks to make any change in"; it does not add the words "change of ", or omit "in", and say "seeks to change" instead of the expression "seeks to make any change in".

54. The articles which are included in the proviso may be now considered. Part V, Chapter I, deals with "the Executive". Article 52, provides that there shall be a President of India, and Article 53 vests the executive power of the Union in the President and provides how it shall be exercised. These two articles are not mentioned in the proviso to Article 368 but Articles 54 and 55 are mentioned.

Article 54 provides:

54. The President shall be elected by the members of an electoral college consisting of-

(a) the elected members of both Houses of Parliament; and

(b) the elected members of the Legislative Assemblies of the States.

55. Article 55 prescribes the manner of election of the President.

56. Why were Articles 52 and 53 not mentioned in the proviso to Article 368 if the intention was that the States would have a say as to the federal structure of the country? One of the inferences that can be drawn is that the Constitution-makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India. In other words they did not contemplate a monarchy being set up in India or there being no President.

57. Another article which has been included in the proviso to Article 368 is Article 73 which deals with the extent of executive powers of the Union. As far as the Vice-President is concerned, the States have been given no say whether there shall be a Vice-President or not; about the method of his election, etc. But what is remarkable is that when we come to Part VI of the Constitution, which deals with the "States", the only provision which is mentioned in the proviso to Article 368 is Article 162 which deals with the extent of executive power of States. The appointment of a Governor, conditions of service of a Governor, and the Constitution and functions of the Council of Ministers, and other provisions regarding the Ministers and the conduct of government business are not mentioned at all in the proviso to Article 368. Another article which is mentioned in Clause

(a) of the proviso to Article 368 is Article 241 which originally dealt with High Courts for States in Part C of the First Schedule.

58. Chapter IV of Part V of the Constitution which deals with the Union Judiciary, and Chapter V of Part VI which deals with the High Courts in the State are included in the proviso to Article 368 but it is extra-ordinary that Chapter VI of Part VI which deals with subordinate Judiciary is not mentioned in Clause (b). Chapter I of Part XI is included and this deals with the Legislative Relations between the Union and the States, but Chapter II of Part XI which deals with Administrative Relations between the Union and the States, and various other matters in which the States would be interested are not included. Provisions relating to services under the State and Trade and Commerce are also not included in the proviso.

59. This analysis of the provisions contained in Clauses (a) and (b) of the proviso to Article 368 shows that the reason for including certain articles and excluding certain other from the proviso was not that all articles dealing with the federal structure or the status of the States had been selected for inclusion in the proviso.

60. Clause (c) of the proviso mentions the Lists in the Seventh Schedule, Clause (d) mentions the representation of States in Parliament, and Clause (e) the provisions of Article 368 itself. The provisions of Sub-clauses (c), (d) and (e) can rightly be said to involve the federal structure and the rights of the States.

61. What again is remarkable is that the fundamental rights are not included in the proviso at all. Were not the States interested in the fundamental rights of their people ? The omission may perhaps be understandable because of the express provision of Article 13(2) which provided that States shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall to the extent of the contravention be void, assuming for the present that Article 13(2) operates on Constitutional amendments.

62. In construing the expression "amendment of this Constitution I must look at the whole scheme of the Constitution.

It is not right to construe words in vacuum and then insert the meaning into an article. Lord Greene observed in Bidie v. General Accident, Fire and Life Assurance Corporation [1948] 2 All E.R. 995:
The first thing one has to do, I venture to think, in construing words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: "In this state, in this context, relating to this subject-matter, what is the true meaning of that word ?

63. I respectfully adopt the reasoning of Lord Greene in construing the expression "the amendment of the Constitution.

64. Lord Greene is not alone in this approach. In Bourne v. Norwich Crematorium [1967] 2 All E.R. 576 it is observed:

English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence defined separately by reference to the "dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language.

65. Holmes, J. in Towne v. Eigner 245 U.S. 418: 62 L. ed. 372 had the same thought. He observed:

A word is not crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.

66. What Holmes J. said is particularly true of the word "Amendment" or "Amend".

67. I may also refer to the observation of Gwyer C.J. and Lord Wright:

A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by the considerations arising out of what appears to be the general scheme of the Act". (Per Gwyer C.J.-The Central Provinces and Berar Act, 1939 F.C.R. 18

The question, then, is one of construction and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and the construction must hold a balance between all its parts". (Per Lord Wright-James v. Commonwealth of Australia 1936 A.C. 578.

68. In the Constitution the word "amendment" or "amend" has been used in various places to mean different things. In some articles, the word "amendment" in the context has a wide meaning and in another context it has a narrow meaning. In Article 107, which deals with legislative procedure, Clause (2) provides that "subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the House of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses." It is quite clear that the word "amendment" in this article has a narrow meaning. Similarly, in Article 111 of the Constitution, whereby the President is enabled to send a message requesting the Houses to consider the desirability of introducing amendments, the "amendments" has a narrow meaning.

69. The opening of Article 4(1) reads:

4(1) Any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law....

Here the word "amendment" has a narrower meaning. "Law" under Articles 3 and 4 must "*conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise...is not the power to over-ride the Constitutional scheme*. No state can, therefore, be formed, admitted or set up by law under Article 4 by the Parliament which has no effective legislative, executive and judicial organs". (Per Shah J.-Mangal Singh v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 .

(Emphasis supplied)

70. Article 169(2) reads:

Any law referred to in Clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

Here also the word "amendment" has a narrow meaning.

71. Para 7 of Part D, Fifth Schedule, which deals with amendment of the schedule, reads:

7. Amendment of the Schedule.-(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such schedule as so amended.

Here the word "amend" has been expanded by using the expression "by way of addition, variation or repeal", but even here, it seems to me, the amendments will have to be in line with the whole Constitution. Similarly, under para 21 of the Sixth Schedule,. which repeats the phraseology of para 7 of the Fifth Schedule, it seems to me, the amendments will have to be in line with the Constitution.

72. I may mention that in the case of the amendments which may be made in exercise of the powers under Article 4, Article 169, para 7 of the Fifth Schedule, and para 21 of the Sixth Schedule, it has been expressly stated in these provisions that they shall not be deemed to be amendments of the Constitution for the purposes of Article 368.

73. It is also important to note that the Constituent Assembly which adopted Article 368 on September 17, 1949, had earlier on August 18, 1949, substituted the following section in place of the old Section 291 in the Government of India Act, 1935:

291. Power of the Governor-General to amend certain provisions of the Act and orders made thereunder-

(1) The Governor-General may at any time by order make such amendments as he considers necessary whether by way of addition, modification or repeal, in the provisions of this Act or of any order made thereunder in relation to any Provincial Legislature with respect to any of the following matters, that is to say-

(a) the composition of the Chamber or Chambers of the Legislature;

(b) the delimitation of territorial constituencies for the purpose of elections under this Act.

* * *

Here, the word "amendment" has been expanded. It may be that there really is no expansion because every amendment may involve addition, variation or repeal of part of a provision.

74. According to Mr. Seervai, the power of amendment given by Article 4, read with Articles 2 and 3, Article 169, Fifth Schedule and Sixth Schedule, is a limited power limited to certain provisions of the Constitution, while the power under Article 368 is not limited. It is true every provision is prima facie amendable under Article 368 but this does not solve the problem before us.

75. I may mention that an attempt was made to expand the word "amend" in Article 368 by proposing an amendment that "by way of variation, addition, or repeal" be added but the amendment was rejected.

76. Again, in Article 196(2), the word "amendment" has been used in a limited sense. Article 196(2) reads:

196(2). Subject to the provisions of Articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

77. Similar meaning may be given to the word "amendment" in Article 197(2), which reads:

197(2). If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council-

(a) the Bill is rejected by the Council; or

(b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

(c) the Bill is passed by the Legislative Assembly does not agree, the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

78. Under Article 200 the Governor is enabled to suggest the desirability of introducing any such amendments as he may recommend in his message. Here again "amendment" has clearly a limited meaning.

79. In Article 35(b) the words used are:

Any law in force immediately before the commencement of this Constitution...subject to the terms thereof and to any adaptations and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.

80. Here, all the three words are used giving a comprehensive meaning. Reliance is not placed by the draftsman only on the word "amend".

81. Similar language is used in Article 372 whereby existing laws continue to be in force until "altered or repealed or amended' by a competent Legislature or other competent authority.

82. In the original Article 243(2), in conferring power on the President to make regulations for the peace and good government of the territories in part D of the First Schedule, it is stated that "any regulation so made may repeal or amend any law made by Parliament." Here, the two words together give the widest power to make regulations inconsistent with any law made by Parliament

83. In Article 252 again, the two words are joined together to give a wider power. Clause (2) of Article 252 reads:

252(2). Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

84. In the proviso to Article 254, which deals with the inconsistency between laws made by Parliament and laws made by the Legislatures of States, it is stated:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State;

85. In Article 320(5), "all regulations made under the proviso to Clause (3)" can be modified "whether by way of repeal or amendment" as both Houses of Parliament or the House or both Houses of the Legislature of the States may make during the session in which they are so laid.

86. I have referred to the variation in the language of the various articles dealing with the question of amendment or repeal in detail because our Constitution was drafted very carefully and I must presume that every word was chosen carefully and should have its proper meaning. I may rely for this principle on the following observations of the United States Supreme Court in Holmes v. Jennison (10) L. ed. 579 and quoted with approval in William v. United States (77) L. ed. 1372:

In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning: for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added....

87. Reference was made to Section 6(2) of the Indian Independence Act, 1947, in which the last three lines read:

...and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.

Here, the comprehensive expression "repeal or amend" gives power to have a completely new Act different from an existing act of Parliament.

88. So, there is no doubt from a perusal of these provisions that different words have been used to meet different demands. In view of the great variation of the phrases used all through the Constitution it follows that the word "amendment" must derive its colour from Article 368 and the rest of the provisions of the Constitution. There is no doubt that it is not intended that the whole Constitution could be repealed. This much is conceded by the learned Counsel for the respondents.

89. therefore, in order to appreciate the real content of the expression "amendment of this Constitution", in Article 368 I must look at the whole structure of the Constitution. The Constitution opens with a preamble which reads:

WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this Twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

90. This Preamble, and indeed the Constitution, was drafted in the light and direction of the Objective Resolutions adopted on January 22, 1947, which runs as follows:

(1) THIS CONSTITUENT ASSEMBLY declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution-

(2) wherein the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States, as well as such

other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in of assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) wherein shall be guaranteed and secured to all people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities backward and tribal areas, and depressed and other backward classes; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilized nations, and

(8) this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind.

91. While moving the resolution for acceptance of the Objectives Resolution, Pandit Jawaharlal Nehru said:

It seeks very feebly to tell the world of what we have thought or dreamt for so long, and what we now hope to achieve in the near future. It is in that spirit that I venture to place this Resolution before the House and it is in that spirit that I trust the House will receive it and ultimately pass it. And may I, Sir, also with all respect, suggest to you and to the House that, when the time comes for the passing of this Resolution let it be not done in the formal way by the raising of hands, but much more solemnly, by all of us standing up and thus taking this pledge anew.

92. I may here trace the history of the shaping of the Preamble because this would show that the Preamble was in conformity with the Constitution as it was finally accepted. Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution. This appears from the following brief survey of the history of the framing of the Preamble extracted from the Framing of India's Constitution (A study) by B. Shiva Rao. In the earliest draft the Preamble was something formal and read : "We, the people of India, seeking to promote the common good, do hereby, through our chosen representatives, enact, adopt and give to ourselves this Constitution, (Shiva Rao's Framing of India's Constitution-A study-p. 127.).

93. After the plan of June 3, 1947, which led to the decision to partition the country and to set up two independent Dominions of India and Pakistan, on June 8, 1947, a joint sub-committee of the Union Constitution and Provincial Constitution Committees, took note that the objective resolution would require amendment in view of the latest announcement of the British Government the announcement of June 3 had made it clear that full independence, in the form of Dominion Status, would be conferred on India as from August 15, 1947. After examining the implications of partition the sub-committee thought that the question of making changes in the Objectives Resolution could appropriately be considered only when effect had actually been given to the June 3 Plan.(Special Sub-Committee minutes June 9, 1947. Later on July 12, 1947, the special sub-committee again postponed consideration of the matter. Select Documents II, 20(ii), p. 617. (Shiva Rao's-Framing of India's Constitution-A study-(p. 127 footnote). The Union Constitution Committee provisionally accepted the Preamble as drafted by B.N. Rao and reproduced it in its report of July 4, 1947 without any change, with the tacit recognition at that stage that the Preamble would be finally based on the Objectives Resolution. In a statement circulated to members of the Assembly on July 18, 1947 Pandit Jawaharlal Nehru inter alia, observed that the Preamble was covered more or less by the Objectives Resolution which it was intended to incorporate in the final Constitution subject to some modification on account of the political changes resulting from partition. Three days later, moving the report of the Union Constitution Committee for the consideration of the Assembly, he suggested that it was not necessary at that stage to consider the draft of the Preamble since the Assembly stood by the basic principles laid down in the Objectives Resolution and these could be incorporated in the Preamble in the light of the changed situation(Shiva Rao's-Framing of India's Constitution-A study-pp. 127-128 (also see footnote 1 p. 128). The suggestion was accepted by the Assembly and further consideration of the Preamble was held over.

94. We need not consider the intermediate drafts, but in the meantime the declaration (See Constituent Assembly Debates, Vol. 8, page 2) was adopted at the end of April, 1949 by the Government of the various Commonwealth countries and the resolution was ratified by Constituent Assembly on May 17; 1949 after two days' debate.

95. In the meantime the process of merger and integration of Indian States had been completed and Sardar Vallabhbhai Patel was able to tell the Constituent Assembly on October 12, 1949, that the new Constitution was "not an alliance between democracies and dynasties, but a real union of the Indian people, built on the basic concept of the sovereignty of the people (Shiva Rao's-Framing of India's Constitution-A study-pp. 130-132).

96. The draft Preamble was considered by the Assembly on October 17, 1949. Shiva Rao observes that "the object of putting the Preamble last, the President of the Assembly explained, was to see that it was in conformity with the Constitution as accepted. "Once the transfer of power had taken place the question of British Parliament's subsequent approval which was visualised in the British Cabinet Commission's original plan of May 1946 could no longer arise. The sovereign character of the Constituent Assembly thus became automatic with the rapid march of events without any controversy, and the words in the Preamble "give to ourselves this Constitution" became appropriate. The Preamble was adopted by the Assembly without any alteration. Subsequently the words and figure "this twenty-sixth day of November 1949" were introduced in the last paragraph to indicate the date on which the Constitution was finally adopted by the Constituent Assembly.

97. Regarding the use which can be made of the preamble in interpreting an ordinary statute, there is no doubt that it cannot be used to modify the language if the language of the enactment is plain and clear. If the language is not plain and clear, then the preamble may have effect either to extend or restrict the language used in the body of an enactment. "If the language of the enactment is capable of more than one meaning then that one is to be preferred which comes nearest to the purpose and scope of the preamble." (see Tribhuban Parkash Nayyar v. The Union of India) MANU/SC/0029/1969 : [1970]2SCR732 .

98. We are, however, not concerned with the interpretation of an ordinary statute. As Sir Alladi Krishnaswami, a most eminent lawyer said, "so far as the Preamble is concerned, though in an ordinary statute we do not attach any importance to the Preamble, all importance has' to be attached to the Preamble in a Constitutional statute". (Constituent Assembly Debates Vol. 10, p. 417). Our Preamble outlines the objectives of the whole Constitution. It expresses "what we had thought or dreamt for so long.

99. In re. Berubari Union and Exchange of Enclaves MANU/SC/0049/1960 : [1960]3SCR250 this was said about the Preamble:

There is no doubt that the declaration made by the people of India in exercise of their sovereign will in the preamble to the Constitution is, in the words of Story, "a key to open the mind of the makers" which may show the general purposes for which they made the several provisions in the Constitution; but nevertheless the preamble is not a part of the Constitution, and, as Willoughby has observed about the" preamble to the American Constitution, "it has never been regarded as the source of any substantive power conferred on the Government of the United States or any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted".

What is true about the power is equally true about the prohibitions and limitations.

100. Wanchoo, J. in Golaknath v. Punjab MANU/SC/0029/1967 : [1967]2SCR762 relied on Berubari's case and said:

on a parity of reasoning we are of opinion that the preamble cannot prohibit or control in any way or impose any implied prohibitions or limitations on the power to amend the Constitution contained in Article 368.

101. Bachawat, J. in this case observed:

Moreover the preamble cannot control the unambiguous language of the articles of the Constitution, see Wynes, Legislative Executive and Judicial powers in Australia, third edition pp. 694-5; in Re. Berubari Union & Exchange of Enclaves. MANU/SC/0049/1960 : [1960]3SCR250 .

102. With respect, the Court was wrong in holding, as has been shown above, that the Preamble is not a part of the Constitution unless the court was thinking of the distinction between the Constitution Statute and the Constitution, mentioned by Mr. Palkhivala. It was expressly voted to

be a part of the Constitution. Further, with respect, no authority has been referred before us to establish the proposition that "what is true about the powers is equally true about the prohibitions and limitations." As I will show later, even from the preamble limitations have been derived in some cases.

103. It is urged in the written submission of Mr. Palkhivala that there is a distinction between the Indian Constitution Statute and the Constitution of India. He urges as follows:

This Constitution is the Constitution which follows the Preamble. It starts with Article 1 and ended originally with the Eighth Schedule and now ends with the Ninth Schedule after the First Amendment Act, 1951. The way the Preamble is drafted leaves no doubt that what follows, or is annexed to, the Preamble, is the Constitution of India.

104. He has also urged that the Preamble came into force on November 26, 1949 alongwith Articles 5, 6, 7 etc. as provided in Article 394 because Articles 5, 6, 7 and the other Articles mentioned therein could hardly come into force without the enacting clause mentioned in the Preamble having come into force. He says that the Preamble is a part of the Constitution statute and not a part of the Constitution but precedes it. There is something to be said for his contention but, in my view, it is not necessary to base my decision on this distinction as it is not necessary to decide in the present case whether Article 368 enables Parliament to amend the Preamble. Parliament has not as yet chosen to amend the Preamble.

105. The Preamble was used by this Court as an aid to construction in Behram Khurshed Pasikaka v. The State of Bombay MANU/SC/0065/1954 : 1955CriLJ215 . After referring to Part III, Mahajan, C.J., observed:

We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefits, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of Constitutional policy.

106. Similarly in In re. The Kerala Education Bill MANU/SC/0029/1958 : [1959]1SCR995 , Das C.J. while considering the validity of the Kerala Education Bill 1957 observed:

In order to appreciate the true meaning, import and implications of the provisions of the Bill which are said to have given rise to doubts, it will be necessary to refer first to certain provisions of the Constitution which may have a bearing upon the questions under consideration and then to the actual provision of the Bill. The inspiring and nobly expressed preamble to our Constitution records the solemn resolve of the people of India to constitute.... (He then sets out the Preamble). Nothing provokes and stimulates thought and expression in people more than education. It is education that clarifies our belief and faith and helps to strengthen our spirit of worship. To

implement and fortify these supreme purposes set forth in the preamble, Part III of our Constitution has provided for us certain fundamental rights.

107. In Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 Mudholkar, J. after assuming that the Preamble is not a part of the Constitution, observed:

While considering this question it would be of relevance to bear in mind that the preamble is not of the common run such as is to be found in an Act of a legislature. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?

108. Quick and Garran in their "Annotated Constitution of the Australian Commonwealth (1901 p. 283) "adopted the following sentence from Lord Thring's "Practical Legislation, p. 36":

A preamble may be used for other reasons to limit the scope of certain expressions or to explain facts or introduce definitions.

109. Thornton on "Legislative Drafting"-p. 137-opines that "construction of the preamble may have effect either to extend or to restrict general language used in the body of an enactment.

110. In Attorney-General v. Prince Ernest Augustus of Hanover [1957] A.C. 436 the House of Lords considered the effect of the preamble on the interpretation of Princes Sophia Naturalization Act; 1705. It was held that "as a matter of construction of the Act, there was nothing in the Act or its preamble, interpreted in the light of the earlier relevant statutes...capable of controlling and limiting the plain and ordinary meaning of the material words of the enacting provisions and that the class of lineal descendants "born or hereafter to be born" meant the class of such descendants in all degrees without any limit as to time." The House of Lords further held that "looking at the Act from the point of view of 1705 there was no such manifest absurdity in this construction as would entitle the court to reject it.

111. Mr. Seervai referred to the passage from the speech of Lord Normand, at p. 467. The passage is lengthy but I may quote these sentences:

It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail. If they admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.

112. Viscount Simonds put the matter at page 463, thus:

On the one hand, the proposition can be accepted that "it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms". I quote the words of Chitty L.J., which were cordially approved by Lord Davey in Powell v. Kempton Park Racecourse Co. Ltd. (1889) A.C. 143. On the other hand it must

often be difficult to say that any terms are clear and unambiguous until they have been studied in their context

113. This case shows that if on reading Article 368 in the context of the Constitution I find the word "Amendment" ambiguous I can refer to the Preamble to find which construction would fit in with the Preamble.

114. In State of Victoria v. The Commonwealth 45 A.L.J. 251 which is discussed in detail later, a number of Judges refer to the federal structure of the Constitution. It is in the preamble of the Commonwealth of Australia Constitution Act, 1902 that 'one indissoluble Federal Commonwealth' is mentioned.

115. There is a sharp conflict of opinion in Australia respecting the question whether an amendment can be made which would be inconsistent with the Preamble of the Constitution Act referring to the "indissoluble" character and the sections which refer to the "Federal" nature of the Constitution. After referring to this conflict, Wynes (Wynes Legislative, Executive and Judicial Powers in Australia, Fourth Edn. p. 506). observes:

Apart from the rule which excludes the preamble generally from consideration in statutory interpretation, it is clear that, when all is said and done, the preamble at the most is, only a recital of the intention which the Act' seeks to effect; and it is a recital of a present (i.e., as in 1900) intention. But in any event the insertion of an express reference to amendment in the Constitution itself must surely operate as a qualification upon the mere recital of the reasons for its creation.

116. I am not called upon to say which view is correct but it does show that in Australia, there is a sharp conflict of opinion as to whether the Preamble can control the amending power.

117. Story in his Commentaries on the Constitution of the United States states : [(1883) Vol. 1]

It (Preamble) is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are dear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention express in the preamble.

There does not seem any reason why, in a fundamental law or Constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions.

118. Story further states at page 447-448:

And the uniform doctrine of the highest judicial authority has accordingly been, that it was the act of the people, and not of the states; and that it bound the latter, as subordinate to the people. "Let us turn," said Mr. Chief Justice Jay, "to the Constitution. The people therein declare, that their design in establishing it comprehended six objects: (1) To form a more perfect union; (2) to establish justice; (3) to insure domestic tranquillity; (4) to provide for the common defence; (5) to

promote the general welfare; (6) to secure the blessings of liberty to themselves and their posterity. It would," he added, "be pleasing and useful to consider and trace the relations, which each of these objects bears to the others; and to show, that, collectively, they comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy." In Hunter v. Martin (1 Wheat. R. 305, 324), the Supreme Court say, (as we have seen) "the Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the "United States;" and language still more expressive will be found used on other solemn occasions.

119. "The Supreme Court of United States (borrowing some of the language of the Preamble to the Federal Constitution) has appropriately stated that the people of the United States erected their Constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence". (American Jurisprudence, 2d. Vol. 16 p. 184).

120. In the United States the Declaration of Independence is sometimes referred to in determining Constitutional questions. It is stated in American Jurisprudence (2d. 16. p. 189):

While statements of principles contained in the Declaration of Independence do not have the force of organic law and therefore cannot be made the basis of judicial decision as to the limits of rights and duties, yet: it has been said that it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence, and the courts sometimes refer to the Declaration in determining Constitutional questions.

121. It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.

122. Now I may briefly describe the scheme of the Constitution. Part I of the Constitution deals with "the Union and its Territory". As originally enacted, Article 1 read as follows:

1. India, that is Bharat, shall be a Union of States.

2. The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

3. The territory of India shall comprise-

(a) the territories of the States;

(b) the territories specified in Part D of the First Schedule; and

(c) such other territories as may be acquired.

123. Article 2 enabled Parliament to admit into the Union, or establish, new States on such terras and conditions as it thinks fit. Article 3 and 4 dealt with the formation of new States and alteration of areas, boundaries or names of existing States.

124. Part II dealt with "Citizenship". The heading of Part III is "Fundamental Rights". It first describes the expression "the State" to include "the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." (Article 12), Article 13 provides that laws inconsistent with or in derogation of the fundamental rights shall be void. This applies to existing laws as well as laws made after the coming into force of the Constitution. For the time being I assume that in Article 13(2) the word "law" includes Constitutional amendment.

125. The fundamental rights conferred by the Constitution include right to equality before the law, (Article 14), prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, (Article 15), equality of opportunity in matters of public employment, (Article 16), right to freedom of speech and expression, to assemble peaceably and without arms, to form association or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property; and to practice any profession or to carry on any occupation, trade or business. (Article 19). Reasonable restrictions can be imposed on the rights under Article 19 in respect of various matters.

126. Article 20 protects a person from being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence or to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It further provides that no person shall be prosecuted and punished for the same offence more than once, and no person accused of any offence shall be compelled to be a witness against himself.

127. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

128. Article 22 gives further protection against arrest and detention in certain cases. Article 22(1) provides that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice." Article 22(2) provides that "every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate".

129. Article 22(4) deals with Preventive Detention. Article 23 prohibits traffic in human beings and other similar forms of forced labour. Article 24 provides that "no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

130. Articles 25, 26, 27 and 28 deal with the freedom of religion. Article 25(1) provides that "subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion." Article 26 enables every religious denomination or section thereof, subject to public order, morality and health, to establish and manage institutions for religious and, charitable purposes; to manage their own affairs in matters of religion, to own and acquire movable and immovable property, and to administer such property in accordance with law. Article 27 enables persons to resist payment of any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Article 28 deals with freedom as to attendance at religious instruction or religious worship in certain educational institutions.

131. Article 29(1) gives protection to minorities and provides that "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." Article 29(2) provides that "no person shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

132. Article 30 gives further rights to minorities whether based on religion or language to establish and administer educational institutions of their choice. Article 30(2) prohibits the State from discriminating against any educational institution, in granting aid to educational institutions, on the ground that it is under the management of a minority, whether based on religion or language.

133. As will be shown later the inclusion of special rights for minorities has great significance. They were clearly intended to be inalienable.

134. The right to property comes last and is dealt with the Article 31. As originally enacted, it dealt with the right to property and prevented deprivation of property save by authority of law, and then provided for compulsory acquisition for public purposes on payment of compensation. It had three significant provisions, which show the intention of the Constitution-makers regarding property rights. The first is Article 31(4). This provision was intended to protect legislation dealing with agrarian reforms. The second provision, Article 31(5)(a), was designed to protect existing legislation dealing with compulsory acquisition. Some acts, saved by this provision did not provide for payment of full compensation e.g. U.P. Town Improvement Act, 1919. The third provision Article 31(6) provided a protective umbrella to similar laws enacted not more than eighteen months before the commencement of the Constitution.

135. The fundamental rights were considered of such importance that right was given to an aggrieved person to move the highest court of the land, i.e., the Supreme Court, by appropriate proceedings for the enforcement of the rights conferred by this part, and this right was guaranteed. Article 32(2) confers very wide powers on the Supreme Court, to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. Article 32(4) further provides that "the right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

136. Article 33 enables Parliament by law to "determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

137. This articles shows the care with which, the circumstances in which, fundamental rights can be restricted or abrogated were contemplated and precisely described.

138. Article 34 enables Parliament, by law, to indemnify any person in the service of the Union, or of a State or any other person in connection with acts done while martial law was in force in a particular area.

139. Part IV of the Constitution contains directive principles of State policy. Article 37 specifically provides that "the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." This clearly shows, and it has also been laid down by this Court, that these provisions are not justiciable and cannot be enforced by any Court. The Courts could not, for instance, issue a mandamus directing the State to provide adequate means of livelihood to every citizen, or that the ownership and control of the material resources of the community be so distributed as best to subserve the common good, or that there should be equal pay for equal work for both men and women.

140. Some of the directive principles are of great fundamental importance in the governance of the country. But the question is not whether they are important; the question is whether they override the fundamental rights. In other words, ran Parliament abrogate the fundamental rights in order to give effect to some of the directive principles ?

141. I may now briefly notice the directive principles mentioned in Part IV. Article 38 provides that "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." Now, this directive is compatible with the fundamental rights because surely the object of many of the fundamental rights is to ensure that there shall be justice, social, economic and political, in the country. Article 39, which gives particular directions to the State, reads thus:

39. The State shall, in particular, direct its policy towards securing-

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

142. Article 40 deals with the organisation of village panchayats. Articles 41 deals with the right to work, to education and to public assistance in certain cases. Article 42 directs that the State shall make provisions for securing just and humane conditions of work and for maternity relief. Article 43 direct that "the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

143. Article 44 enjoins that the "State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." Desirable as it is, the Government has not been able to take any effective steps towards the realisation of this goal. Obviously no Court can compel the Government to lay down a uniform civil code even though it is essentially desirable in the interest of the integrity, and unity of the country.

144. Article 45 directs that "the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free compulsory education for all children until they complete the age of fourteen years." This again is a very desirable directive. Although the Government has not been able to fulfil it completely, it cannot be compelled by any court of law to provide such education.

145. Article 46 supplements the directive given above and enjoins the State to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation.

146. Article 47 lays down as one of the duties of the State to raise the standard of living and to improve public health, and to bring about prohibition. Article 48 directs the State to endeavour to organise agriculture and animal husbandry on modern and scientific lines, and in particular, to take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.

147. Article 49 deals with protection of monuments and places and objects of national importance. Article 50 directs that the State shall take steps to separate the judiciary from the executive in the public services of the State. This objective has been, to a large extent, carried out without infringing the fundamental rights.

148. In his preliminary note on the fundamental Rights, Sir B.N. Rau, dealing with the directive principles, observed:

The principles set forth in this Part are intended for the general guidance of the appropriate Legislatures and Government in India (hereinafter referred to collectively as 'the State'). The application of these principles in legislation and administration shall be the care of the State and shall not be cognizable by any Court.

149. After setting out certain directive principles, he observed:

It is obvious that none of the above provisions is suitable for enforcement by the courts. They are really in the nature of moral precepts for the authorities of the State. Although it may be contended that the Constitution is not the proper place for moral precepts, nevertheless Constitutional declaration of policy of this kind are now becoming increasingly frequent. (See the Introduction to the I.L.O. publication Constitutional Provisions concerning Social and Economic Policy, Montreal, 1944). They have at least an educative value. (pages 33-34-Shiva Rao : Framing of Indian Constitution : Doc. Vol. II).

Then he referred to the genesis of the various articles mentioned in the preliminary note.

150. One must pause and ask the question as to why did the Constituent. Assembly resist the persistent efforts of Shri B.N. Rau to make fundamental rights subject to the directive principles. The answer seems plain enough : The Constituent Assembly deliberately decided not to do so.

151. Sir Alladi Krishnaswami Ayyar, in his note dated March 14, 1947, observed:

A distinction has necessarily to be drawn between rights which are justiciable and rights which are merely intended as a guide and directive objectives to state policy.

152. It is impossible to equate the directive principles with fundamental rights though it cannot be denied that they are very important. But to say that the directive principles give a directive to take away fundamental rights in order to achieve what is directed by the directive principles seems to me a contradiction in terms.

153. I may here mention that while our fundamental rights and directive principles were being fashioned and approved of by the Constituent Assembly, on December 10, 1948 the General Assembly of the United Nations adopted a Universal Declaration of Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of Human Rights. I may here quote only the Preamble:

Whereas recognition of the inherent dignity of the *equal and inalienable rights* of all members of the human family is the foundation of freedom, justice and peace in the world.

(emphasis supplied)

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relations between nations.

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge

154. In the Preamble to the International Covenant on Economic and Social and Cultural Rights 1966, inalienability of rights is indicated in the first Para as follows:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

155. Do rights remain inalienable if they can be amended out of existence ? The Preamble Articles 1, 55, 56, 62, 68 and 76 of the United Nations Charter had provided the basis for the elaboration in the Universal Declaration of Human Rights. Although there is a sharp conflict of opinion whether respect for human dignity and fundamental human rights is obligatory under the Charter (see Oppenheim's International Law; 8th ed. Vol. 1, pp. 740-41; footnote 3), it seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India. Article 51 reads:

51. The State shall endeavour to-

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and

(d) encourage settlement of international disputes by arbitration.

156. As observed by Lord Denning in Corocraft v. Pan American Airways (1969) 1 All E.R. 82 "it is the duty of these courts to construe our Legislation so as to be in conformity with international

law and not in conflict with it." (See also Oppenheim supra, pp. 45-46; American Jurisprudence 2nd, Vol. 45, p. 351).

157. Part V Chapter I, deals with the Executive; Chapter II with Parliament-conduct or its business, qualification of its members, legislation procedure etc. Article 83 provides that:

83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

(2) The House of the People unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House: ...

Under the proviso this period can be extended while a Proclamation of Emergency is in operation for a period not exceeding in any case beyond a period of six months after the Proclamation has ceased to operate. It was provided in Article 85(1) before its amendment by the Constitution (First Amendment) Act 1951 that the House of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sittings in one session and the date appointed for their first sitting in the next session.

158. Article 123 gives power to the President to promulgate ordinances during recess of Parliament Chapter IV deals with Union Judiciary.

159. Part VI, as originally enacted dealt with the States in Part A of the First Schedule-the Executive, the State Legislatures and the High Courts. Article 174 deals with the summoning of the House of Legislature and its provisions are similar to that of Article 85. Article 213 confers legislative powers on the Governor during the recess of State Legislature by promulgating ordinances.

169. Part XI deals with the relation between the Union and the States; Chapter I regulating legislative relations and Chapter II administrative relations.

160. Part XII deals with Finance, Property, Contracts and Suits. We need only notice Article 265 which provides that "no tax shall be levied or collected except by authority of law".

161. Part XIII deals with Trade, Commerce and Intercourse within the Territory of India. Subject to the provisions of this Chapter, trade, commerce and intercourse throughout the territory of India shall be free (Article 301).

162. Part XIV deals with Services under the Union and the States. Part XVI contains special provisions relating to certain classes-the Scheduled Castes, the Scheduled Tribes etc. It reserved seats in the House of the People for these classes. Article 331 enables the President to nominate not more than two members of the Anglo-Indian community if it is not adequately represented in the House of the People. Article 332 deals with the reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. In Article 334 it is provided that the

above mentioned reservation of seats and special representation to certain classes shall cease on the expiry of a period of ten years from the commencement of this Constitution. Article 335 deals with claims of scheduled castles and scheduled tribes to services and posts. Article 336 makes special provisions for Anglo-Indian community in certain services, and Article 337 makes special provisions in respect of educational grants for the benefit of Anglo-Indian community. Article 338 provides for the creation of a Special Officer for Scheduled Castes, Scheduled Tribes, etc. to be appointed by the President, and prescribes his duties. Article 340 enables the President to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India which shall present a report and make recommendations on steps that should be taken to remove difficulties and improve their condition. Article 341 enables the President to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State. Similarly, Article 342 provides that the President may specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall be deemed to be Scheduled Tribes in relation to that State.

163. Part XVII deals with Official Language, and Part XVIII with Emergency Provisions. Article 352 is important. It reads:

352.(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

164. Article 353 describes the effect of the Proclamation of Emergency. The effect is that the executive power of the Union shall be extended to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised, and the Parliament gets the power to make laws with respect to any matter including the power to make laws conferring powers and imposing duties, etc., notwithstanding that it is one which is not enumerated in the Union List. Article 354 enables the President by order to make exceptions and modifications in the provisions of Article 268 to 279. Under Article 355 it is the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. Article 356 contains provisions in case of failure of Constitutional machinery in a State.

165. Article 358 provides for suspension of the provisions of Article 19 during Emergency. It reads:

358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

166. Article 359 is most important for our purpose. It provides that:

359. (1) Where a Proclamation of Emergency is in operation the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under Clause (1) shall, as soon as maybe after it is made be laid before each House of Parliament.

167. These two articles, namely Article 358 and Article 359 show that the Constitution makers contemplated that fundamental rights might impede the State in meeting an emergency, and it was accordingly provided that Article 19 shall not operate for a limited time, and so also Article 32 and Article 226 if the President so declares by order. If it was the design that fundamental rights might be abrogated surely they would have expressly provided it somewhere.

168. I may here notice an argument that the enactment of Articles 358 and 359 showed that the fundamental rights were not treated as inalienable rights. I am unable to infer this deduction from these articles. In an emergency every citizen is liable to be subjected to extraordinary restrictions.

169. I may here notice some relevant facts which constitute the background of the process of drafting the Constitution. The British Parliament knowing the complexities of the structure of the Indian people expressly provided in Section 6(6) of the Indian Independence Act, 1947, that "the powers referred to in Sub-section (1) of this section extends to the making of laws limiting for the future the powers of the legislature of the Dominion." Sub-section (1) of Section 6 reads:

The legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extraterritorial operation.

That Section 6(1) included making *provision as to the Constitution* of the Dominion is made clear by Section 8(1) which provided : "In the case of each of the new Dominions, the powers of legislature of the Dominion shall for the purpose of making provision as to the Constitution of the Dominion be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the legislature of the Dominion shall be construed accordingly.

(Emphasis supplied).

170. These provisions of the Indian Independence Act amply demonstrate that when the Constituent Assembly started functioning, it knew, if it acted under the Indian Independence Act, that it could limit the powers of the future Dominion Parliaments.

171. No similar provisions exists in any of the Independence Acts in respect of other countries, enacted by the British Parliament, e.g., Ceylon Independence Act, 1947, Ghana Independence Act, 1957, Federation of Malaya Independence Act, 1957, Nigeria Independence Act, 1960, Sierra

Leone Independence Act, 1961, Tanganyika Independence Act, 1961, Southern Rhodesia Act, 1965, Jamaica Independence Act, 1962.

172. I may mention that the aforesaid provisions in the Indian Independence Act were enacted in line with the Cabinet Statement dated May 16, 1947 and the position of the Congress Party. Para 20(See : Shiva Rao-The Framing of India's Constitution, Vol. I, p. 216) of the Statement by the Cabinet Mission provided:

The Advisory Committee on the rights of citizens, minorities, and tribal and excluded areas should contain full representation of the interests affected, and their function will be to report to the Union Constituent Assembly upon the list of Fundamental Rights, the clauses for the protection of minorities, and a scheme for the administration of the tribal and excluded areas, and to advise whether these rights should be incorporated in the Provincial, Group, or Union Constitution.

173. In clarifying this statement Sir Stafford Cripps at a Press Conference dated May 16, 1946 stated:

But in order to give these minorities and particularly the smaller minorities like the Indian Christians and the Anglo-Indians and also the tribal representatives a better opportunity of influencing minority provisions, we have made provision for the setting up by the Constitution-making body of an influential advisory Commission which will take the initiative in the preparation of the list of fundamental rights, the minority protection clauses and the proposals for the administration of tribal and excluded areas. This Commission will make its recommendations to the Constitution making body and will also suggest at which stage or stages in the Constitution these provisions should be inserted, that is whether in the Union, Group or Provincial Constitutions or in any two or more of them. (P. 224, Supra).

174. In the letter dated May 20, 1946, from Maulana Abul Kalam Azad to the Secretary of State, it is stated:

The principal point, however, is, as stated above, that we look upon this Constituent Assembly as a sovereign body which can decide as it chooses in regard to any matter before it and can give effect to its decisions. The only limitation, we recognise is that in regard to certain major communal issues the decision should be by a majority of each of the two major communities. (P. 251, Supra).

175. In his reply dated May 22, 1946, the Secretary of State observed:

When the Constituent Assembly has completed its labours, His Majesty's Government will recommend to Parliament such action as may be necessary for the cession of sovereignty to the Indian people, subject only to two provisos which are mentioned in the statement and which are not, we believe, controversial, *namely, adequate provision for the protection of minorities* and willingness to conclude a treaty to cover matters arising out of the transfer of power.

(Emphasis supplied)

176. In the Explanatory statement dated May 22, 1946, it was again reiterated as follows:

When the Constituent Assembly has completed its labours, His Majesty's Government will recommend to Parliament such action as may be necessary for the cession of sovereignty to the Indian people, subject only to two matters which are mentioned in the statement and which, *we believe are not controversial, namely, adequate provision for the protection of the minorities (paragraph 20 of the statement)* and willingness to conclude a treaty with His Majesty's Government to cover matters arising out of the transfer of power (paragraph 22 of the statement) (P. 258, Supra).

(Emphasis supplied)

177. In pursuance of the above, a resolution for the setting up of an Advisory Committee on fundamental rights was moved by Govind Ballabh Pant in the Constituent Assembly on January 24, 1947. He laid special importance on the issue of minorities. The Advisory Committee met on February 27, 1947 to constitute various sub-committees including the Minorities Sub-Committee. The Sub-Committee on Minorities met later the same day. A questionnaire was drafted to enquire about political, economic, religious, educational and cultural safeguards. In other words all these safeguards were considered.

178. Divergent views were expressed, and the Minorities Sub-Committee met on April 17, 18 and 19, 1947 to consider this important matter. At these meetings the sub-committee considered the interim proposals of the fundamental rights Sub-Committee in so far as these had a bearing on minority rights. These discussions covered such important matters as the prohibition of discrimination on grounds of race, religion, caste, etc.; the abolition of untouchability and the mandatory requirements that the enforcement of any disability arising out of untouchability should be made an offence punishable according to law; freedom to profess, practise and propagate one's religion; the right to establish and maintain institutions for religious and charitable purposes; the right to be governed by one's personal, law; the right to use one's mother-tongue and establish denominational communal or language schools etc.

179. Having dealt with the question of fundamental rights for minorities, the Minorities Sub-Committee met again on July 21, 1947, to consider the political safeguards for minorities and their presentation in the public services.

180. In forwarding the report of the Advisory Committee on the subject of Minority Rights, Sardar Vallabhbhai Patel, in his report dated August 8, 1947, said:

...It should be treated as supplementary to the one forwarded to you with my letter No. CA/24/Com./47, dated the 23rd April 1947 and dealt with by the Assembly during the April session. That report dealt with justiciable fundamental rights; these rights, whether applicable to all citizens generally or to members of minority communities in particular offer a most valuable safeguard for minorities over a comprehensive field of social life. The present report deals with what may broadly be described as political safeguards of minorities and covers the following points:

(i) Representation in Legislature; joint versus separate electorates; and weightage.

(ii) Reservation of seats for minorities in Cabinets.

(iii) Reservation for minorities in the public services.

(iv) Administrative machinery to ensure protection of minority rights.

181. Sardar Patel, while moving the report for consideration on August 27, 1947, said:

You will remember that we passed the Fundamental Rights Committee's Report which was sent by the Advisory Committee; the major part of those rights has been disposed of and accepted by this House. They cover a very wide *range of the rights of minorities which give them ample protection*; and yet there are certain political safeguards which have got to be specifically considered. An attempt has been made in this report to enumerate those safeguards which are matters of common knowledge, such as representation in legislatures, that is, joint versus separate electorate.

(Emphasis supplied)

182. The above proceedings show that the minorities were particularly concerned with the fundamental rights which were the subject-matter of discussion by the Fundamental Rights Committee.

183. The above brief summary of the work of the Advisory Committee and the Minorities Sub-Committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British Plan, the setting up of Minorities Sub-Committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities.

184. Both sides relied on the speeches made in the Constituent Assembly. It is, however, a sound rule of construction that speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any of provisions of the statute. The same rule has been applied to the provisions of this Constitution by this Court in State of Travancore-Cochin and Ors. v. Bombay Co. Ltd. MANU/SC/0068/1952 : [1952]1SCR1112 Shastri, C.J., speaking for the Court observed:

'It remains only to point out that the use made by the learned Judges below of the speeches made by the Members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes-see Administrator-General of Bengal v. Prem Nath Mallick [1895] 22 I.A. 107. The reason behind the rule was explained by one of us in Gopalan's MANU/SC/0012/1950 : 1950CriLJ1383 case thus:

A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord,

or, as it is more tersely put in an American case-

Those who did not speak may not have agreed with those who did and those who spoke might differ from each other-United States v. Trans-Missouri Freight Association.

This rule of exclusion has not always been adhered to in America, and sometimes distinction is made between using such material to ascertain the purpose of a statute and using it for ascertaining its meaning. It would seem that the rule is adopted in Canada and Australia-see Craies on Statute Law, 5th Ed. p. 122.

185. In Golak Nath's MANU/SC/0029/1967 : [1967]2SCR762 case, Subba Rao, C.J., referred to certain portions of the speeches made by Pandit Nehru and Dr. Ambedkar but he made it clear at p. 792 that he referred to these speeches "not with a view to interpret the provisions of Article 368, which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution." Bachawat, J., at p. 922 observed:

Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft Constitution. These speeches cannot be used as aids for interpreting the Constitution-see State of Travancore Cochin and Ors. v. Bombay Co. Ltd. MANU/SC/0068/1952 : [1952] S.C.R. 1112. Accordingly I do not rely on them as aids to construction. But I propose to refer to them, as Shri A.K. Sen relied heavily on the speeches of Dr. B.R. Ambedkar. According to him, the speeches of Dr. Ambedkar show that he did not regard the fundamental rights as amendable. This contention is not supported by the speeches....

186. In H.H. Maharajadhiraja Madhav Rao v. Union of India MANU/SC/0050/1970 : [1971]3SCR9 Shah, J., in the course of the judgment made a brief reference to what was said by the Minister of Home Affairs, who was in charge of the States, when he moved for the adoption of Article 291. He referred to this portion of the speech for the purpose of showing the historical background and the circumstances which necessitated giving certain guarantees to the former rulers.

187. It is true that Mitter, J., in the dissenting judgment, at p. 121, used the debates for the purposes of interpreting Article 363 but he did not discuss the point whether it is permissible to do so or not.

188. In Union of India v. H.S. Dhillon, MANU/SC/0062/1971 : [1972]83ITR582(SC) I, on behalf of the majority, before referring to the speeches observed at p. 58 that

"we are, however, glad to find from the following extracts from the debates that our interpretation accords with what was intended."

There is no harm in finding confirmation of one's interpretation in debates but it is quite a different thing to interpret the provisions of the Constitution in the light of the debates.

189. There is an additional reason for not referring to debates for the purpose of interpretation. The Constitution, as far as most of the Indian States were concerned, came into operation only because of the acceptance by the Ruler or Rajpramukh. This is borne out by the following extract from the statement of Sardar Vallabhbhai Patel in the Constituent Assembly on October 12, 1949 (C.A.D. Vol. X, pp. 161-3):

Unfortunately we have no properly constituted Legislatures in the rest of the States (apart from Mysore, Saurashtra and Travancore and Cochin Union) nor will it be possible to have Legislatures constituted in them before the Constitution of India emerges in its final form. We have, therefore, no option but to make the Constitution operative in these States on the basis of its acceptance by the Ruler of the Rajpramukh, as the case may be, who will no doubt consult his Council of Ministers.

190. In accordance with this statement, declarations were issued by the Rulers or Rajpramukhs accepting the Constitution.

191. It seems to me that when a Ruler or Rajpramukh or the people of the State accepted the Constitution of India in its final form, he did not accept it subject to the speeches made during the Constituent Assembly debates. The speeches can, in my view, be relied on only in order to see if the course of the progress of a particular provision or provisions throws any light on the historical background or shows that a common understanding or agreement was arrived at between certain sections of the people. (See In re. The Regulation and Control of Aeronautics in Canada) [1932] A.C. 54.

192. In this connection reference was made to Article 305 of the draft Constitution which provided that notwithstanding anything contained in Article 304 of the Constitution, the provisions of the Constitution relating to the reservation of seats for the Muslims etc., shall not be amended during the period of ten years from the commencement of the Constitution. Although this draft Article 305 has no counterpart in our Constitution, it was sought to be urged that this showed that every provision of the Constitution was liable to be amended. I have come to the conclusion that every provision is liable to be amended subject to certain limitations and this argument does not affect my conclusion as to implied limitations.

193. A very important decision of the Judicial Committee of the Privy Council in The Bribery Commissioner v. Pedrick Ranasinghe [1965] A.C. 172 throws considerable light on the topic under discussion. The import of this decision was not realised by this Court in Golak Nath's MANU/SC/0029/1967 : [1967]2SCR762 case. Indeed, it is not referred to by the minority in its judgments, and Subba Rao, C.J., makes only a passing reference to it. In order to fully appreciate the decision of the Privy Council it is necessary to set out the relevant provisions of the Ceylon Independence Order in Council, 1947, hereinafter referred to as the Ceylon Constitution.

194. Part III of the Ceylon Constitution deals with "Legislature". Section 7 provides that "there shall be a Parliament of the Island which shall consist of His Majesty, and two Chambers to be known respectively as the Senate and the House of Representatives.

Section 18 deals with voting. It reads:

18. Save as otherwise provided in Sub-section (4) of Section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting. The President or Speaker or other person presiding shall not vote in the first instance but shall have and exercise a casting vote in the event of an equality of votes.

195. Section 29 deals with the power of Parliament to make laws. It reads:

29(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall-

(a) prohibit or restrict the free exercise of any religion, or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons or other communities or religions are not made liable; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

(d) alter the Constitution of any religious body except with the consent of the governing authority of that body. So, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

Provided, however, that the preceding provisions of this subsection shall not apply to any law making provision for, relating to, or connected with the, election of Members of the House of Representatives, to represent persons registered as citizens of Ceylon under the Indian & Pakistani Residents (Citizenship Act).

This proviso shall cease to have effect on a date to be fixed by the Governor-General by Proclamation published in the Gazette.

(3) Any law made in contravention of Sub-section (2) of this section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the Provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than twothirds of the whole number of members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

196. According to Mr. Palkhivala, Section 29(1) corresponds to Articles 245 and 246, and Section 29(4) corresponds to Article 368 of our Constitution, and Sections 29(2) and 29(3) correspond to Article 13(2) of our Constitution, read with fundamental rights.

197. The question which arose before the Judicial Committee of the Privy Council was whether Section 41 of the Bribery Amendment Act, 1958 contravened Section 29(4) of the Ceylon Constitution, and was consequently invalid. The question arose out of the following facts. The respondent, Ranasinghe, was prosecuted for a bribery offence before the Bribery Tribunal created by the Bribery Amendment Act, 1958. The Tribunal sentenced him to a term of imprisonment and fine. The Supreme Court on appeal declared the conviction and orders made against him null and inoperative on the ground that the persons composing the Tribunal were not validly appointed to the Tribunal.

198. Section 52 of the Ceylon Constitution provided for the appointment of the Chief Justice and Puisne Judges of the Supreme Court. Section 53 dealt with the setting up of the Judicial Service Commission, consisting of the Chief Justice, a Judge of the Supreme Court, and one other person who shall be, or shall have been, a Judge of the Supreme Court. It further provided that no person shall be appointed as, or shall remain, a member of the Judicial Service Commission, if he is Senator or a Member of Parliament. Section 55 provided for the appointment of other Judicial Officers. Section 55(1) reads:

55. (1) The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission.

199. The Judicial Committee deduced from these provisions thus:

Thus there is secured a freedom from political control, and it is a punishable offence to attempt directly or indirectly to influence any decision of the Commission (Section 56).

200. The Judicial Committee then described the position of the Bribery Tribunal as follows:

A bribery tribunal, of which there may be any number, is composed of three members selected from a panel (Section 42). The panel is composed of not more than 15 persons who are appointed by the Governor-General on the advice of the Minister of Justice (Section 41). The members of the panel are paid remuneration (Section 45).

201. The Judicial Committee held that the members of the Tribunal held judicial office and were judicial officers within Section 55 of the Ceylon Constitution. They found that there was a plain

conflict between Section 55 of the Constitution and Section 41 of the Bribery Amendment Act under which the panel was appointed.

202. Then the Judicial Committee examined the effect of this conflict. After setting out Section 18, Section 29(1) and Section 29(2)(a), the Judicial Committee observed:

There follow (b), (c) and (d), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. *They represent the solemn balance of rights, between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are, therefore unalterable under the Constitution*.

(Emphasis supplied)

203. After making these observations, the Judicial Committee set out Sub-sections (3) and (4) of Section 29 of the Ceylon Constitution. The observations, which I have set out above, are strongly relied on by Mr. Palkhivala in support of his argument that Part III similarly entrenched various religious and racial and other matters and these represented solemn balance of rights between the citizens of India, the fundamental conditions on which inter se they accepted the Constitution of India and these are, therefore, unalterable under the Constitution of India.

204. Mr. Seervai, in reply, submitted that the word "entrenched" meant nothing else that than these provisions were subject to be amended only by the procedure prescribed in Section 29(4) of the Ceylon Constitution. But I am unable to accept this interpretation because in that sense other provisions of the Constitution were equally entrenched because no provision of the Ceylon Constitution could be amended without following the procedure laid down in Section 29(4).

205. The interpretation urged by Mr. Palkhivala derives support in the manner the Judicial Committee distinguished McCawley's [1920] A.C. 691 case (McCawley v. King). I may set out here the observations of the Judicial Committee regarding McCawley's case. They observed:

It is possible now to state summarily what is the essential difference between the McCawley case and this case. There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as *pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change* nor so constructed as to require any special legislative process to pass upon the topic dealt with.

(Emphasis supplied)

206. It is rightly urged that the expression "which was neither fundamental in the sense of being beyond change" has reference to Section 29(2) of the Ceylon Constitution. I have no doubt that the Judicial Committee held that the provisions of Section 29(2) in the Ceylon Constitution were unamendable. I may mention that Prof. S A de Smith in reviewing the book "Reflections on the Constitution and the Constituent Assembly. (Ceylon's Constitution) "by L.J.M. Cooray, reads the

obiter dicta in Bribery Commissioner v. Ranasinghe [1965] A.C. 172 indicating that certain provisions of the Constitution were unalterable by the prescribed amending procedure.

207. It may be that these observations are obiter but these deserve our careful consideration, coming as they do from the Judicial Committee.

208. Why did the Judicial Committee say that the provisions of Section 29(2) were "unalterable under the Constitution" or "fundamental in the sense of being beyond change" ? There is nothing in the language of Section 29(4) to indicate any limitations on the power of the Ceylon Parliament. It could "amend or repeal" any provision of the Constitution, which included Section 29(2) and Section 29(4) itself. The reason could only be an implied limitation on the power to amend under Section 29(4) deducible from "the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution". Unless there was implied a limitation on the exercise of the amending power under Section 29(4), Section 29(4) could itself be amended to make it clear that Section 29(2) is amendable.

209. This case furnishes an exact example where implied limitations on the power to amend the Constitution have been inferred by no less a body than the Judicial Committee of the Privy Council.

210. Mr. Seervai relied on the portion within brackets of the following passage at pp. 197-198:

These passages show clearly that the Board in McCawley's case took the view which commends itself to the Board in the present case, that (a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled," as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides that if the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provisions.) But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process. And this is the proposition which is in reality involved in the argument.

211. The portion, not within brackets, which has been omitted in Mr. Seervai's written submissions, clearly shows that the Judicial Committee in this passage was not dealing with the amendment of Section 29(2) of the Ceylon Constitution and had understood McCawley's [1920] A.C. 691 case as not being concerned with the question of the amendment of a provision like Section 29(2) of the Ceylon Constitution. This passage only means that a legislature cannot disregard the procedural conditions imposed on it by the constituent instrument prescribing a particular majority but may amend them if the constituent instrument gives that power.

212. The next passage, a part of which I have already extracted, which deals with the difference between McCawley's case and Ranasinghe's [1965] A.C. 172 case shows that the Judicial

Committee in the passage relied on was dealing with the procedural part of Section 29(4) of Ceylon Constitution. It reads:

It is possible now to state summarily what is the essential difference between the McCawley case and this case. There the legislature having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of the Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which being in conflict with Section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in Section 29(4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under Section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its Section 9, namely, compelled to operate a special procedure in order to achieve the desired result.

213. I may mention that the Judicial Committee while interpreting the British North America Act, 1867 had also kept in mind the preservation of the rights of minorities for they say In re The Regulation and Control of Aeronautics in Canada: [1933] A.C. 54 "inasmuch as the Act (British North America Act) embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the Provisions of Sections 91 and 92 should impose a new and different contract upon the federating bodies.

214. The words of the Judicial Committee in Ranasinghe's case, are apposite and pregnant. "They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution and these are, therefore unalterable under the Constitution." It is true that the Judicial Committee in the context of minorities and religious rights in Ceylon used the word "unalterable". But the India context is slightly different. The guarantee of fundamental rights extends to numerous rights and it could not have been intended that all of them would remain completely unalterable even if Article 1. 3(2) of the Constitution be taken to include Constitutional amendments. A more reasonable inference to be drawn from the whole scheme of the Constitution is that some other meaning of "Amendment" is most appropriate. This conclusion is also reinforced by the concession of the Attorney-General and Mr. Seervai that the whole Constitution cannot be abrogated or repealed and a new one substituted. In other words, the expression "Amendment of this Constitution" does not include a revision of the whole Constitution. If this is true-I say that the concession was rightly made-then which is that meaning of the word "Amendment" that is most appropriate and fits in with the while scheme of the Constitution.

In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble.

215. I come to the same conclusion by another line of reasoning. In a written Constitution it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution. I will mention a few instances approved by the Judicial Committee and this Court and other Courts. I may first consider the doctrine that enables Parliament to have power to deal with ancillary and subsidiary matters, which strictly do not fall within the legislative entry with respect to which legislation is being undertaken.

216. Lefroy in "A short Treatise on Canadian Constitutional Law" (page 94), puts the matter thus:

But when it is (Dominion Parliament) is legislating upon the enumerated Dominion subject-matters of Section 91 of the Federation Act, it is held that the Imperial Parliament, by necessary implication, intended to confer on it legislative power to interfere with, deal with, and encroach upon, matters otherwise assigned to the provincial legislatures under Section 92, so far as a general law relating to those subjects may affect them, as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated. The Privy Council has established and illustrated this in many decisions.

217. This acts as a corresponding limitation on the legislative power of the Provincial or State legislatures.

218. This Court has in numerous decisions implied similar powers. (See Orient Paper Mills v. State of Orissa MANU/SC/0066/1961 : [1962]1SCR549 ; Burmah Construction Co. v. State of Orissa [1962] 1 Supp. S.C.R. 242; Navnit Lal Javeri v. Appellate Assistant Commissioner MANU/SC/0147/1964 : [1965]56ITR198(SC) ; to mention a few).

219. It often happens that what has been implied by courts in one Constitution is expressly conferred in another Constitution. For instance, in the Constitution of the United States, Clause 18 of Section 8 expressly grants incidental powers:

The Congress shall have power...to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

220. It would not be legitimate to argue from the above express provision in the United States Constitution that if the Constitution-makers wanted to give such powers to the Parliament of India they would have expressly conferred incidental powers.

221. Story says that Clause 18 imports no more than would remit from necessary implication (see pp. 112 and 113, Vol. 3) if it had not been expressly inserted.

222. In Ram Jawaya Kapur v. State of Punjab MANU/SC/0011/1955 : [1955]2SCR225 ; 236-37 this Court implied that "the President has thus been made a formal or Constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh....

223. In Sanjeevi Naidu v. State of Madras MANU/SC/0381/1970 : [1970]3SCR505 Hedge, J., held that the Governor was essentially a Constitutional head and the administration of State was run by the Council of Ministers.

224. Both these cases were followed by another Constitution bench in U.N.R. Rao v. Smt. Indira Gandhi MANU/SC/0059/1971 : AIR1971SC1002 .

225. This conclusion constitutes an implied limitation on the powers of the President and the Governors. The Court further implied in Ram Jawaya Kapur's MANU/SC/0011/1955 : [1955]2SCR225 case that the Government could without specific legislative sanction carry on trade and business.

226. To save time we did not hear Mr. Seervai on the last 3 cases just cited. I have mentioned them only to give another example.

227. It may be noted that what was implied regarding carrying on trade was made an express provision in the Constitution by the Constitution (Seventh Amendment) Act, 1956, when a new Article 298 was substituted. The Federal Court and the Supreme Court of India have recognised and applied this principle in other cases:

(i) "A grant of the power in general terms standing by itself would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act." (Per Gwyer C.J. The C.J. & Berar Act-1939 F.C.R. 18.

(ii) Before its amendment in 1955, Article 31(2) was read as containing an implied limitation that the State could acquire only for a public purpose (the Fourth Amendment expressly enacted this limitation in 1955).

(a) "One limitation imposed upon acquisition or taking possession of private property which is implied in the clause is that such taking must be for public purpose". (Per Mukherjea J. Chiranjitlal Chowdhuri v. Union of India MANU/SC/0009/1950 : [1950]1SCR869 ,

(b) "The existence of a 'public purpose' is undoubtedly an implied condition of the exercise of compulsory powers of acquisition by the State...." (Per Mahajan J. State of Bihar v. Maharajadhiraja of Darbhanga MANU/SC/0019/1952 : [1952]1SCR889 .

(iii) The Supreme Court has laid down that there is an implied limitation on legislative power: the Legislature cannot delegate the essentials of the legislative functions.

...the legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct...the limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and as I have said the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete. (Per Mukherjea J. in re The Delhi Laws Act-95 SCR 747.

The same implied limitation on the Legislature, in the field of delegation, has been invoked and applied in:

Raj Narain Singh v. Patna Administration MANU/SC/0024/1954 : [1955]1SCR290 . Hari Shankar Bagla v. State of Madhya Pradesh MANU/SC/0063/1954 : 1954CriLJ1322 .

Vasantilal Sanjanwala v. State of Bombay MANU/SC/0288/1960 : 1978CriLJ1281 . The Municipal Corporation of Delhi v. Birla Cotton Mills MANU/SC/0175/1968 : [1968]3SCR251 .

Garewal v. State of Punjab MANU/SC/0154/1958 : 1959 Supp. (1) SCR 792.

(iv) On the power conferred by Articles 3 and 4 of the Constitution to form a new State and amend the Constitution for that purpose limitation has been implied that the new State must-

conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise...*is not the power to over-ride the Constitutional scheme*. No State can therefore be formed, admitted or set up by law under Article 4 by the Parliament which has no effective legislative, executive and judicial organs. (Per Shah J.-Mangal Singh v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 .

(Emphasis supplied)

228. It would have been unnecessary to refer to more authorities but for the fact that it was strenuously urged that there could not be any implied limitations resulting from the scheme of the Constitution.

229. Before referring to a recent decision of the Australian High Court, observations in certain earlier cases may be reproduced here:

Since the Engineers" case 1920 CLR 129 a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments, a written Constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the Engineers' case meant to propound such a doctrine" (Per Dixon J. West v. Commissioner of Taxation (New South Wales)-56 CLR 657.

Some *implications* are necessary from the structure of the Constitution itself, but it is inevitable also, I should think, that these implications can only be defined by a gradual process of judicial decision" (Per Starke J., South Australia v. Commonwealth 65 CLR 373.

(Emphasis supplied)

The Federal character of the Australian Constitution carries *implications* of its own.... therefore it is beyond the power of either to abolish or destroy the other". (Per Starke J. Melbourne Corporation v. Commonwealth 74 CLR 31.

(Emphasis supplied)

The Federal system itself is the foundation of the restraint upon the use of the power to control the State...Restraints to be implied against any exercise of power by Commonwealth against State and State against Commonwealth calculated to destroy or detract from the independent exercise of the functions of the one or the other...." (Per Dixon J.-Melbourne Corporation v. Commonwealth 74 CLR 31.

230. I may now refer to State of Victoria v. The Commonwealth [1971] 45 A.L.R.J. 251 which discusses the question of implications to be drawn from a Constitution like the Australian Constitution which is contained in the Commonwealth Act. It gives the latest view of that Court on the subject.

231. The point at issue was whether the Commonwealth Parliament, in the exercise of its power under Section 51(ii) of the Constitution (subject to the Constitution, to make laws with respect to taxation, but so as not to discriminate between States or parts of States) may include the Crown in right of a State in the operation of a law imposing a tax or providing for the assessment of a tax.

232. Another point at issue was the status of the Commonwealth and the States under the Constitution, and the extent to which the Commonwealth Parliament may pass laws binding on the States, considered generally and historically, and with particular reference to the question whether there is any implied limitation on Commonwealth legislative power. It is the discussion on the latter question that is relevant to the present case.

233. There was difference of opinion among the Judges. Chief Justice Barwick held as follows:

The basic principles of construction of the Constitution were definitively enunciated by the Court in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920), 28 C.L.R. 129 (the Engineers' case) Lord Selborne's language in Reg. v. Burah (1878) 3 AC 889, was accepted and applied as was that of Earl Loreburn in Attorney-General for Ontario v. Attorney-General for Canada (1912) A.C. 583.

234. According to the Chief Justice, the Court in Engineers' case unequivocally rejected the doctrine that there was an "implied prohibition" in the Constitution against the exercise in relation to a State of a legislative power of the Commonwealth once ascertained in accordance with the ordinary rules of construction, a doctrine which had theretofore been entertained and sought to be founded upon some supposed necessity of "protection", as it were, "against the aggression of some outside and possibly hostile body". The Court emphasized that if protection against an abuse of power were needed, it must be provided by the electorate and not by the judiciary. 'The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light

of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it and then lucet ipsa per se.

235. Now this is the judgment which is relied on by Mr. Seervai and the learned Attorney General. On the other hand, reliance is placed by Mr. Palkhivala on Menzies J's judgment:

Does the fact that the Constitution is "federal" carry with it implications limiting the law-making powers of the Parliament of the Commonwealth with regard to the States ?

To this question I have no doubt, both on principle and on authority, that an affirmative answer must be given. A Constitution providing for an indissoluble federal Commonwealth must protect both Commonwealth and States. The States are not outside the Constitution. They are States of the Commonwealth; Section 106. Accordingly, although the Constitution does, clearly enough, subject the States to laws made by the Parliament, it does so with some limitation.

236. After making these observations, the learned Judge examined authorities and he found support in Melbourne Corporation v. The Commonwealth [1947] 74 C.L.R. 31, He then examined various other cases in support of the above principles.

237. The other passages relied on by the petitioners from the judgments of the other learned Judges on the Bench in that case are as follows:

Windeyar, J.

In each case an implication means that something not expressed is to be understood. But in the one case, this involves an addition to what is expressed : in the other it explains, perhaps limits, the effect of what is expressed. It is in the latter sense that in my view of the matter, implications have a place in the interpretation of the Constitution : and I consider it is the sense that Dixon J. intended when in Australian National Airways Ptv. Ltd. v. The Commonwealth (1945) 71 C.L.R. 29, he said (at p. 85) : "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications". His Honour, when Chief Justice, repeated this observation in Lamshed v. Lake (1958) 99 C.L.R. 132. I said in Spratt v. Hermes (1965) 114 C.L.R. 226, that it is well to remember it. I still think so. The only emendation that I would venture is that I would prefer not to say "making implications", because our avowed task is simply the revealing or uncovering of implications that are already there.

In Melbourne Corporation v. The Commonwealth (1947) 74 C.L.R. 31, Starke J. said (at p. 70) : "The federal character of the Australian Constitution carries implications of its own....

* * *

"The position that I take is this : The several subject matters with respect to which the Commonwealth is empowered by the Constitution to make laws for the peace, order and good government of the Commonwealth are not to be narrowed or limited by implications. Their scope and amplitude depend simply on the words by which they are expressed. But implications arising from the existence of the States as parts of the Commonwealth and as constituents of the federation

may restrict the manner in which the Parliament can lawfully exercise its power to make laws with respect to a particular subject-matter. These implications, or perhaps it were better to say underlying assumptions of the Constitution, relate to the use of a power not to the inherent nature of the subject matter of the law. Of course whether or not a law promotes peace, order and good government is for the Parliament, not for a court, to decide. But a law although it be with respect to a designated subject matter, cannot be for the peace, order and good government of the Commonwealth if it be directed to the States to prevent their carrying out their functions as parts of the Commonwealth....

* * *

Gibbs, J.

The ordinary principles of statutory construction do not preclude the making of implications when these are necessary to give effect to the intention of the legislature as revealed in the statute as a whole. The intention of the Imperial legislature in enacting the Constitution Act was to give effect to the wish of the Australian people to join in a federal union and the purpose of the Constitution was to establish a federal, and not a unitary, system for the government of Australia and accordingly to provide for the distribution of the powers of government between the Commonwealth and the States who were to be the constituent members of the federation. In some respects the Commonwealth was placed in a position of supremacy, as the national interest required, but it would be inconsistent with the very basis of the federation that the Commonwealth's powers should extend to reduce the States to such a position of subordination that their very existence, or at least their capacity to function effectually as independent units, would be dependent upon the manner in which the Commonwealth exercised its powers, rather than on the legal limits of the powers themselves. Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-a-vis each other....

238. Wynes (Wynes Legislative, Executive and Judicial Power in Australia, Fourth Edn. p. 503) in discussing the amendment of the Constitutions of the States of Australia sums up the position thus. I may refer only to the propositions which are relevant to our case.

(1) Every State legislature has by virtue of Section 5 full powers of amendment of any provision respecting its Constitution powers and procedures.

(2) But it cannot (semble) alter its "representative" character.

(3) The "Constitution" of a Legislature means its composition, form or nature of the House or Houses, and excludes any reference to the Crown.

* * *

(6) No Colonial Legislature can forever abrogate its power of amendment and thereby render its Constitution absolutely immutable. A law purporting to effect this object would be void under Section 2 of the Act as being repugnant to Section 5 thereof.

239. For proposition (2) above, reference is made in the footnote to Taylor v. The Attorney-General of Queensland. 23 C.L.R. 457 The relevant passages which bear out the second proposition are:

I take the Constitution of a legislature, as the term is here used, to mean the composition, form or nature of the House of Legislature where there is only one House, or of either House if the legislative body consists of two Houses. Probably the power does not extend to authorize the elimination of the representative character of the legislature within the meaning of the Act. (p. 468 per-Barton J.).

I read the words "Constitution of such legislature" as including the change from a unicameral to a bicameral system, or the reverse. Probably the "representative" character of the legislature is-a basic condition of the power relied on, and is preserved by the word "such," but, that being maintained, I can see no reason for cutting down the plain natural meaning of the words in question so as to exclude the power of a self-governing community to say that for State purposes one House is sufficient as its organ of legislation." (p. 474 per-Issacs J.).

(For proposition No. 3, see Taylor v. The Attorney-General of Queensland 23 C.L.R. 457 and Clayton v. Heffron.) [1960] 105 C.L.R. 214.

240. Then dealing with the Commonwealth Constitution, he states:

Another suggested limitation is based upon the distinction between the covering sections of the Constitution Act and the Constitution itself; it is admitted on all sides that Section 128 does not permit of any amendment to those sections. (And in this respect the Statute of Westminster does not confer any new power of amendment-indeed it is expressly provided that nothing in the statute shall be deemed to confer any power to repeal or alter the Constitution of the Constitution Act otherwise than accordance with existing law.) In virtue of their character of Imperial enactments the covering sections of the Constitution are alterable only by the Imperial Parliament itself. The question is, admitting this principle, how far does the Constitution Act operate as a limitation upon the amending power ? It has been suggested that any amendment which would be inconsistent with the preamble of the Act referring to the 'indissoluble' character and the sections which refer to the "Federal" nature of the Constitution, would be invalid. There has been much conflict of opinion respecting this matter; the view here taken is that the preamble in no wise effects the power of alteration.

241. In view of this conflict, no assistance can be derived from academic writing.

242. The case of The Attorney General of Nova Scotia and The Attorney General of Canada and Lord Nelson Hotel Company Limited [1951] S.C.R. 31 furnishes another example where limitations were implied. The Legislature of the Province of Nova Scotia contemplated passing an act respecting the delegation of jurisdiction of the Parliament of Canada to the Legislature of Nova Scotia and vice versa. The question arose whether, if enacted, the bill would be constitutionally

valid since it contemplated delegation by Parliament of powers, exclusively vested in it by Section 91 of the British North America Act to the Legislature of Nova Scotia, and delegation by that Legislature of powers, exclusively vested in Provincial Legislature under Section 92 of the Act, to Parliament.

243. The decision of the Court is summarised in the headnote as follows:

The Parliament of Canada and each Provincial Legislature is a sovereign body within the sphere, possessed of exclusive jurisdiction to legislate with regard to the subject matters assigned to it under Section 91 or Section 92, as the case may be. Neither is capable therefore of delegating to the other the powers with which it has been vested nor of the receiving from the other the powers with which the other has been vested.

244. The Chief Justice observed:

The Constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by Section 91 and that each Province can legislate exclusively on the subject matters referred to it by Section 92.

245. He further observed:

Under the scheme of the British North America Act there were to be, in the words of Lord Atkin in The Labour Conventions Reference (1937) A.C. 326)", "Water-tight compartments which are an essential part of the original structure.

246. He distinguished the cases of In re Gray [1918] 57 S.C.R. 150 and The Chemical Reference [1943] S.C.R. 1-Canada by observing that delegations such as were dealt with in these cases were "delegations to a body subordinate to Parliament and were of a character different from the delegation meant by the Bill now submitted to the Court.

247. Kerwin, J., referred to the reasons of their Lordships in In Re The Initiative and Referendum [1919] A.C. 935 Act as instructive. After referring to the actual decision of that case, he referred to the observations of Lord Haldane, which I have set out later while dealing with the Initiative & Referendum case and then held:

The British North America Act divides legislative jurisdiction between the Parliament of Canada and the Legislatures of the Provinces and there is no way in which these bodies may agree to a different division.

248. Taschereau, J., observed:

It is a well settled proposition of law that jurisdiction cannot be conferred by consent None of these bodies can be vested directly or indirectly with powers which have been denied them by the B.N.A. Act, and which therefore are not within their Constitutional jurisdiction.

249. He referred to a number of authorities which' held that neither the Dominion nor the Province can delegate to each other powers they do not expressly possess under the British North America Act. He distinguished cases like Hodge v. The Queen (1883) 9 AC 117. In Re Gray, (57) S.C.R. 150. Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708 and Chemicals Reference [1943] S.C.R. 1-Canada by observing:

In all these cases of delegation, the authority delegated its powers to subordinate Boards for the purpose of carrying legislative enactments into operation.

250. Justice Rand emphasized that delegation implies subordination and subordination implies duty.

251. Justice Fauteux, as he then was, first referred to the following observations of Lord Atkin in Attorney General for Canada v. Attorney General for Ontario [1937] A.C. 326:

No one can doubt that this distribution (of powers) is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect.

He then observed:

In the result, each of the provinces, enjoying up to the time of the union, within their respective areas, and quoad one another, an independent, exclusive and over-all legislative authority, surrender to and charged the Parliament of Canada with the responsibility and authority to make laws with respect to what was then considered as matters of common interest to the whole country and retained and undertook to be charged with the responsibility and authority to make laws with respect to local matters in their respective sections. This is the system of government by which the Fathers of Confederation intended-and their intentions were implemented in the Act-to "protect the diversified interests of the several provinces and secure the efficiency, harmony and permanency in the working of the union.

252. In the case just referred to, the Supreme Court of Canada implied a limitation on the power of Parliament and the Legislatures of the Provinces to delegate legislative power to the other although there was no express limitation, in terms, in Sections 91 and 92 of the Canadian Constitution. This case also brings out the point that delegation of law making power can only be to a subordinate body. Apply the ratio of this decision to the present case, it cannot be said that the State Legislatures or Parliament acting in its ordinary legislative capacity, are subordinate bodies to Parliament acting under Article 368 of the Constitution. therefore it is impermissible for Parliament under Article 368 to delegate its functions of amending the Constitution to either the State legislatures or to its ordinary legislative capacity. But I will refer to this aspect in greater detail later when I refer to the case In re the Initiative and Referendum Act.

253. In Canada some of the Judges have implied that freedom of speech and freedom of the Press cannot be abrogated by Parliament or Provincial legislatures from the words in the Preamble to the Canadian Constitution i.e. "with a Constitution similar in principle to that of the United Kingdom." Some of these observations are:

Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our Constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate." (Per Abbot J. Switzmen v. Elbling 1957 S.C. 285.

I conclude further that the opening paragraph of the preamble to the B.N.A. Act 1867 which provided for a 'Constitution similar in principle to that of the United Kingdom', thereby adopted the same Constitutional principles and hence Section 1025A is contrary to the Canadian Constitution, and beyond the competence of Parliament or any provincial legislature to enact so long as our Constitution remains in its present from of a Constitutional democracy." (Per O'Halloran J.A.-Rex v. Hess 1949 4 D.L.R. 199.

In Re Alberta Legislation, (1938) 2 D.L.R. 81, S.C.R. 100, Sir Lyman P. Dutt C.J.C. deals with this matter. The proposed legislation did not attempt to prevent discussion of affairs in newspapers but rather to compel the publication of statements as to the true and exact objects of Governmental policy and as to the difficulties of achieving them. Quoting the words of Lord Wright M.R. in James v. Commonwealth of Australia, (1936) A.C. 578 freedom of discussion means "'freedom governed by law'" he says at p. 107 D.L.R., p. 133 S.C.R. : "It is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

He deduces authority to protect it from the principle that the "*powers requisite for the preservation of the Constitution arise by a necessary implication of the Confederation Act as a whole*." (Per Rand J.-Samur v. City of Quebec (1953) 4 D.L.R. 641.

(Emphasis supplied)

254. It is, however, noteworthy that the Solicitor-General appearing on behalf of the Union of India conceded that implications can arise from a Constitution, but said that no implication necessarily arises out of the provisions of Article 368.

255. I may now refer to another decision of the Judicial Committee in Liyange's case, [1967] 1 A.C. 259 which was relied on by Mr. Seervai to show that an amendment of the Constitution cannot be held to be void on the ground of repugnancy to some vague ground of inconsistency with the preamble.

256. The Parliament of Ceylon effected various modifications of the Criminal Procedure Code by the Criminal Law (Special Provisions) Act, 1962. The appellants were convicted by the Supreme Court of Ceylon for various offences like conspiring to wage war against the Queen, etc.

257. The two relevant arguments were:

The first is that the Ceylon Parliament is limited by an inability to pass legislation which is contrary to fundamental principles of justice. The 1962 Acts, it is said, are contrary to such principles in

that they not only are directed against individuals but also ex post facto create crimes and punishment, and destroy fair safeguards by which those individuals would otherwise be protected.

The appellants' second contention is that the 1962 Acts offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which is outside the legislature's competence and is inconsistent with the severance of power between legislature, executive, and judiciary which the Constitution ordains.

258. Mr. Seervai relies on the answer to the first contention. According to Mr. Seervai, the answer shows that constituent power is different from legislative power and when constituent power is given, it is exhaustive leaving nothing uncovered.

259. The Judicial Committee after referring to passages from "The Sovereignty of the British Dominions" by Prof. Keith, and "The Statutes of Westminster and Dominion Status" by K.C. Wheare, observed at page 284:

Their Lordships cannot accept the view that the legislature while removing the fetter of repugnance to English law, left in existence a fetter of repugnance to some vague unspecified law of natural justice. The terms of the Colonial Laws Validity Act and especially the words "but not otherwise" in Section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy....

260. The Judicial Committee referred to the Ceylon Independence Act, 1947, and ...the Legislative Power of Ceylon and observed:

These liberating provisions thus incorporated and enlarged the enabling terms of the Act of 1865, and it is clear that the joint effect of the Order in Council of 1946 and the Act of 1947 was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State (see Ibralebbe v. The Queen (1964) A.C. 900

261. Mr. Seervai sought to argue from this that similarly the amending power of Parliament under Article 368 has no limitations and cannot be limited by some vague doctrine of repugnancy to natural and inalienable rights and the Preamble. We are unable to appreciate that any analogy exists between Mr. Palkhivala's argument and the argument of Mr. Gratien. Mr. Palkhivala relies on the Preamble and the scheme of the Constitution to interpret Article 368 and limit its operation within the contours of the Preamble. The Preamble of the Constitution of India does not seem to prescribe any vague doctrines like the law of natural justice even if the latter, contrary to many decisions of our Court, be considered vague.

262. The case, however, furnishes another instance where implied limitations were inferred. After referring to the provisions dealing with "judicature" and the Judges, the Board observed:

These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that

judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that hence-forth it should pass to or be shared by, the executive or the legislature.

263. The Judicial Committee was of the view that there "exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature." The Judicial Committee cut down the plain words of Section 29(1) thus:

"Section 29(1) of the Constitution says:

Subject to the provisions of this Order Parliament shall have power to make laws for the peace order and good government of the Island". These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of Section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature-e.g., by passing an Act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried-if in law such usurpation would otherwise be contrary to the Constitution.

264. In conclusion the Judicial Committee held that there was interference with the functions of the judiciary and it was not only the likely but the intended effect of the impugned enactments, and that was fatal to their validity.

265. Their Lordships uttered a warning which must always be borne in dealing with Constitutional cases : "what is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution." This was in reply to the argument that the Legislature had no such general intention to absorb judicial powers and it had passed the legislation because it was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. According to their Lordships that consideration was irrelevant and gave no validity to acts which infringed the Constitution.

266. McCawley v. The King [1920] A.C. 691 was strongly relied on by Mr. Seervai. The case was on appeal from the decision of the High Court of Australia, reported in 26 C.L.R. 9. Apart from the questions of interpretation of Sub-section (6), Section 6, of the Industrial Arbitration Act, 1916 and the construction of the Commission which was issued, the main question that was debated before the High Court and the Board was whether the Legislature of Queensland could amend a provision of the Constitution of Queensland without enacting a legislative enactment directly amending the Constitution. The respondents before the Board had contended as follows:

But an alteration to be valid must be made by direct legislative enactment. The Constitution can be altered but cannot be disregarded. So long as it subsists it is the test of the validity of legislation. The High Court of Australia so decided in Cooper's case [1907] 4 C.L.R. 1304.

267. The appellants, on the other hand, had contended that "the Legislature of Queensland has power, by ordinary enactment passed by both houses and assented to by the Governor in the name of the Crown, to alter the Constitution of Queensland, including the judicial institutions of the State, and the tenure of the judges.... All the laws applying to Queensland which it is competent to the Queensland Legislature to alter can be altered in the same manner by ordinary enactment.

268. There was difference of opinion in the High Court. Griffith, C.J., was of the opinion that the Parliament of Queensland could not merely by enacting a law inconsistent with the Constitution Act of 1867 overrule its provisions, although it might be proper formality pass an Act which expressly altered or repealed it. Isaacs and Rich JJ., with whom the Board found themselves in almost complete agreement, held to the contrary. The Board, in dealing with the question, first referred to the "distinction between Constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and Constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

269. Then Lord Birkenhead, L.C., observed at page 704:

Many different terms have been employed in the text-books to distinguish these two contrasted forms of Constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled Constitution as by any other nomenclature. Nor is a Constitution debarred from being reckoned as an uncontrolled Constitution because it is not, like the British Constitution, constituted by historic development but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the Constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision, Thus when one of the learned Judges in the Court below said that, according to the appellant, the Constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the Constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter.

270. Then, the Judicial Committee proceeded to deal with the Constitution of Queensland and held that it was an uncontrolled Constitution. Later, their Lordships observed:

It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own Constitutional salvation.

271. Mr. Seervai sought to deduce the following propositions from this case:

Firstly-(1) Unless there is a special procedure prescribed for amending any part of the Constitution, the Constitution was uncontrolled and could be amended by an Act in the manner prescribed for

enacting ordinary laws, and therefore, a subsequent law inconsistent with the Constitution would pro tanto repeal the Constitution;

Secondly-(2) A Constitution largely or generally uncontrolled may contain one or more provisions which prescribe a different procedure for amending them than is prescribed for amending an ordinary law, in which case an ordinary law cannot amend them and the procedure must be strictly followed if the amendment is to be effected;

Thirdly-(3) Implications of limitation of power ought not be imported from general concepts but only from express or necessarily implied limitations (i.e. implied limitation without which a Constitution cannot be worked); and

Fourthly-(4) The British Parliament in granting the colonial legislatures power of legislation as far back as 1865-Section 2-refused to put limitations of vague character, like general principles of law, but limited those limitations to objective standards like statutes and provisions of any Act of Parliament or order or regulation made under the Acts of Parliament.

272. I agree that the first and the second propositions are deducible from McCawley's case but I am unable to agree with the learned Counsel that the third proposition enunciated by him emerges from the case. The only implied limitation which was urged by the learned Counsel for the respondents was that the Queensland legislature should first directly amend the Constitution and then pass an act which would otherwise have been inconsistent if the Constitution had not been amended. It appears from the judgment of Isaac, J., and the Board that two South Australia Judges had earlier held that the legislation must be "with the object of altering the Constitution of the legislature". Lord Selborne, when Sir Roundell Palmer, and Sir Robert Collier expressed dissent from their view and recommended the enactment of a statute like the Colonial Laws Validity Act, 1865.

273. The fourth proposition states a fact. The fact that British Parliament in 1865 refused to put so called vague limitations does not assist us in deciding whether there cannot be implied limitations on the amending power under Article 368.

274. I shall examine a little later more cases in which limitations on lawmaking power have been implied both in Australia, U.S.A., and in Canada. McCawley's case is authority only for the proposition that if the Constitution is uncontrolled then it is not necessary for the legislature to pass an act labelling it as an amendment of the Constitution; it can amend the Constitution like any other act.

275. Attorney-General for New South Wales v. Trethowan [1932] A.C. 526 was concerned really with the interpretation of Section 5 of the Colonial Laws Validity Act, 1865, and its impact on the powers of the legislature of the New South Wales. The Constitution Act, 1902, as amended in 1929, had inserted Section 7A, the relevant part of which reads as follows:

7A.-(1) The Legislative Council shall not be abolished nor, subject to the provisions of Sub-section 6 of this section, shall its Constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within Sub-section 1 of this section shall not be presented to

the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, Sections 13, 14, 15, 18, 19, 20, 21 and 22.

276. Towards the end of 1930 two bills were passed by both Houses of the New South Wales legislature. The first Bill enacted that Section 7A above referred to was repealed, and the second Bill enacted by Clause 2, Sub-section 1. "The Legislative Council of New South Wales is abolished.

277. The contentions advanced before the Judicial Committee were:

The appellants urge : (1) That the King, with the advice and consent of the Legislative Council and the Legislative Assembly, had full power to enact a Bill repealing Section 7A.

(2) That Sub-section 6 of Section 7A of the Constitution Act is void, because : (a) The New South Wales Legislature has no power to shackle or control its successors, the New South Wales Constitution being in substance an uncontrolled "Constitution"; (b) It is repugnant to Section 4 of the Constitution Statute of 1855; (c) It is repugnant to Section 5 of the Colonial Laws Validity Act, 1865.

For the respondents it was contended : (1) That Section 7A was a valid amendment of the Constitution of New South Wales, validly enacted in the manner prescribed, and was legally binding in New South Wales.

(2) That the legislature of New South Wales was given by Imperial statutes plenary power to alter the Constitution, powers and procedure of such legislature.

(3) That when once the legislature had altered either the Constitution or powers and procedure, then the Constitution and powers and procedure as they previously existed ceased to exist, and were replaced by the new Constitution and powers.

(4) That the only possible limitations of this plenary power were : (a) it must be exercised according to the manner and form prescribed by any Imperial or colonial law, and (b) the legislature must continue a representative legislature according to the definition of the Colonial Laws Validity Act, 1865.

(5) That the addition of Section 7A to the Constitution had the effect of : (a) making the legislative body consist thereafter of the King, the Legislative Council, the Assembly and the people for the purpose of the Constitutional enactments therein described, or (b) imposing a manner and form of legislation in reference to these Constitutional enactments which thereafter became binding ton the legislature by virtue of the colonial Laws Validity Act, 1865, until repealed in the manner and mode prescribed.

(6) That the power of altering the Constitution conferred by Section 4 of the Constitution Statute, 1855, must be read subject to the Colonial Laws Validity Act, 1865, and that in particular the limitation as to manner and form prescribed by the 1865 Act must be governed by subsequent amendments to the Constitution, whether purporting to be made in the earlier Act or not.

278. The Judicial Committee considered the meaning and effect of Section 5 of the Act of 1865, read in conjunction with Section 4 of the Constitution Statute. It is necessary to bear in mind the relevant part of Section 5 which reads as follows:

Section 5. Every colonial legislature...and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the Constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law, for the time being in force in the said colony.

279. The Judicial Committee interpreted Section 5 as follows:

Reading the section as a whole, it gives to the legislatures of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the statute book. Beyond that, the words "manner and form" are amply wide enough to cover an enactment providing that a Bill is to be submitted to the electors and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty's assent.

280. The Judicial Committee first raised the question : "could that Bill, a repealing Bill, after its passage through both chambers, be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner ?", and answered it thus:

In their Lordships' opinion, the Bill could not lawfully be so presented. The proviso in the second sentence of Section 5 of the Act of 1865 states a condition which must be fulfilled before the legislature can validly exercise its power to make the kind of laws which are referred to in that sentence. In order that Section 7A may be repealed (in other words, in order that that particular law "respecting the Constitution, powers and procedure" of the legislature may be validly made) the law for that purpose must have been passed in the manner required by Section 7A, a colonial law for the time being in force in New South Wales.

281. This case has no direct relevance to any of the points raised before us. There is no doubt that in the case before us, the impugned Constitutional amendments have been passed according to the form and manner prescribed by Article 368 of our Constitution. It is, however, noteworthy that in contention No. (4), mentioned above, it was urged that notwithstanding the plenary powers conferred on the Legislature a possible limitation was that the legislature must continue a representative legislature according to the definition of the Colonial Laws Validity Act 1865. This is another illustration of a limitation implied on amending power.

282. I may also refer to some of the instances of implied limitations which have been judicially accepted in the United States. It would suffice if I refer to Cooley on Constitutional Limitations and Constitution of the United States of America edited by Corwin (1952).

283. After mentioning express limitations, imposed by the Constitution upon the Federal power to tax, Cooley on 'Constitutional Limitations' (page 989) states:

...but there are some others which are implied, and which under the complex system of American government have the effect to exempt some subjects otherwise taxable from the scope and reach, according to circumstances, of either the Federal power to tax or the power of the several States. One of the implied limitations is that which precludes the States from taxing the agencies whereby the general government performs its functions. The reason is that, if they possessed this authority, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operations of the national authority within its proper and Constitutional sphere of action.

284. Then he cites the passage from the Chief Justice Marshall in McCullock v. Maryland. 4 L. ed. 579; 607.

285. In "Constitution by the United States of America" by Corwin (1952)-page 728-729 it is stated:

Five years after the decision in McCullock v. Maryland that a State may not tax an instrumentality of the Federal Government, the Court was asked to and did re-examine the entire question in Osborn v. Bank of the United States. In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward the arguments of great importance. In the first place it was "contended, that, admitting Congress to possess the power, this exemption ought to have been expressly assented in the act of incorporation; and not being expressed, ought not to be implied by the Court." To which Marshall replied that : "It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. Secondly the appellants relied greatly on the distinction between the bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of Government, * * * Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors." Marshall accepted this analogy, but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the Government were entitled to immunity from taxation upon such transactions. Thus not only was the decision of McCullock v. Maryland reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

286. We need not examine the exact extent of the doctrine at the present day in the United States because the only purpose in citing these instances is to refute the argument of the respondents that there cannot be anything like implied limitations.

287. The position is given at p. 731, as it existed in 1952, when the book was written. Corwin sums up the position broadly at p. 736:

Broadly speaking, the immunity which remains is limited to activities of the Government itself, and to that which is explicitly created by statute, e.g. that granted to federal securities and to fiscal institutions chartered by Congress. But the term, activities, will be broadly construed.

288. Regarding the taxation of States, Cooley says at pp. 995-997:

If the States cannot tax the means by which the national government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the State governments. "The same supreme power which established the departments of the general government determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interest without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the Constitution which limits them, and independent of other agencies, except as thereby made dependent There is nothing in the Constitution of the United States which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation is quite as much beyond the power of the national legislature as if the interference were direct and extreme. It has, therefore, been held that the law of Congress requiring judicial process to be stamped could not Constitutionally be applied to the process of the State courts; since otherwise Congress might impose such restrictions upon the State courts as would put and end to their effective action, and be equivalent practically to abolishing them altogether. And a similar ruling has been made in other analogous cases. But "the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.

289. I may mention that what has been implied in the United States is the subject-matter of express provisions under our Constitution (see Articles 285, 287, 288 and 289).

290. It was urged before us that none of these cases dealt with implied limitations on the amending power. It seems to me that four cases are directly in point. I have referred already to:

1. The Bribery Commissioner v. Pedrick Ranasinghe [1965] A.C. 172.

2. Mongol Singh v. Union of India [1967] 3 S.C.R. 109.

3. Taylor v. The Attorney-General of Queensland 23 C.L.R. 457 and I will be discussing shortly In re The Initiative and Referendum Act [1919] A.C. 935.

291. What is the necessary implication from all the provisions of the Constitution ?

292. It seems to me that reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense.

293. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.

294. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.

295. This conclusion is reinforced if I consider the consequences of the contentions of both sides. The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra-Constitutional revolution. therefore, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless, because if their contention is accepted the very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility.

296. However, if the meaning I have suggested is accepted a social and economic revolution can gradually take place while preserving the freedom and dignity of every citizen.

297. For the aforesaid reasons, I am driven to the conclusion that the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that, while fundamental rights cannot be abrogated reasonable abridgements of fundamental rights can be effected in the public interest.

298. It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with wisdom of the amendment.

299. If this meaning is given it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen.

300. It is urged by Mr. Seervai that we would be laying down a very unsatisfactory test which it would be difficult for the Parliament to comprehend and follow. He said that the Constitution-makers had discarded the concept of "due process" in order to have something certain, and they substituted the words "by authority of law" in Article 21. I am unable to see what bearing the dropping of the words "due process" has on this question. The Constitution itself has used words like "reasonable restrictions" in Article 19 which do not bear an exact meaning, and which cannot be defined with precision to fit in all cases that may come before the courts; it would depend upon

the facts of each case whether the restrictions imposed by the Legislature are reasonable or not. Further, as Lord Reid observed in Ridge v. Baldwin [1964] A.C. 40:

In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But *I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist*. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that.

(emphasis supplied)

301. It seems to me that the concept of amendment within the contours of the Preamble and the Constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarians and the public would not be able to understand.

302. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position.

The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.
The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government.

(3) Secular character of the Constitution;

(4) Separation of powers between the Legislature, the executive and the judiciary;

(5) Federal character of the Constitution.

303. The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.

304. The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution, which I have already discussed.

305. In connection with the question of abrogation of fundamental rights, Mr. Seervai boldly asserted that there was no such thing as natural or inalienable rights because the scheme of Part III itself shows that non-citizens have not been given all the fundamental freedoms; for example, Article 19 speaks of only citizens. He says that if there were natural rights, why is it that they were not conferred on non-citizens. The answer seems to be that they are natural rights but our country

does not think it expedient to confer these fundamental rights, mentioned in Article 19, on non-citizens. Other rights have been conferred on non-citizens because the Constitution-makers thought that it would not be detrimental to the interests of the country to do so.

306. He then said that even as far as citizens are concerned, there is power to modify those rights under Article 33 of the Constitution, which enables Parliament to modify rights in their application to the Armed Forces. This power has been reserved in order to maintain discipline among the armed forces, which is essential for the security of the country. But it does not mean that the rights cease to be natural or human rights. He then said that similarly Article 34 restricts fundamental rights while martial law is in force in any area. This again is a case where the security of the country is the main consideration. Citizens have to undergo many restrictions in the interest of the country.

307. He then pointed out Articles 358 and 359 where certain rights are suspended during Emergency. These provisions are again based on the security of the country.

308. He also relied on the words "rights conferred" in Article 13(2) and "enforcement of any rights conferred by this Part" to show that they were not natural or inalienable and could not have been claimed by them. There is no question of the sovereign people claiming them from an outside agency. The people acting through the Constituent Assembly desired that the rights mentioned in Part III shall be guaranteed and, therefore, Part III was enacted. In the context 'conferred' does not mean that some superior power had granted these rights. It is very much like a King bestowing the title of 'His Imperial Majesty on himself.

309. I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Rights which I have already referred to and that Declaration describes some fundamental rights as inalienable.

310. Various decisions of this Court describe fundamental rights as 'natural rights' or 'human rights'.

Some of these decisions are extracted bellow.

There can be no doubt that the people of India have in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal, which assures to the citizen the dignity of the individual and other cherished *human values* as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, *reserved to themselves certain fundamental rights so-called, I apprehend, because they have been retained by the people* and made paramount to the delegated powers, as in the American Model." (Per Patanjali Sastri, J., in Gopalan v. State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 .

(emphasis supplied)

(ii) "That article (Article 19) enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognised and guaranteed as the *natural*

rights inherent in the status of a citizen of a free country." (Per Patanjali Sastri, C.J., in State of West Bengal v. Subodh Gopal Bose MANU/SC/0018/1953 : [1954]1SCR587 .

(emphasis supplied)

I have no doubt that the framers of our Constitution drew the same distinction and classed the *natural rights* or capacity of a citizen 'to acquire, hold and dispose of property' with other *natural rights* and freedoms inherent in the status of a free citizen and embodied them in Article 19(1)....

(emphasis supplied)

For all these reasons, I am of opinion that under the scheme of the Constitution, all those *broad and basic freedoms inherent in the status of a citizen as a free man* are embodied and protected from invasion by the State under Clause (1) of Article 19. ...

(emphasis supplied)

(iii) "The people, however, regard certain rights as paramount, because they embrace liberty of action to the individual in matters of private life, social intercourse and share in the Government of the country and other spheres. The people who vested the three limbs of Government with their power and authority, at the same time kept back these rights of citizens and also sometimes of noncitizens, and made them *inviolable* except under certain conditions. The rights thus kept back are placed in Part III of the Constitution, which is headed 'Fundamental Rights', and the conditions under which these rights can be abridged are also indicated in that Part." (Per Hidayatullah J., in Ujjambai v. State of U.P. MANU/SC/0101/1961 : [1963]1SCR778).

(emphasis supplied)

The High Court of Allahabad has described them as follows:

(iv) "...man has certain *natural or inalienable rights* and that it is the function of the State, in order that human liberty might be preserved and human personality developed, to give recognition and free play to those rights...

Suffice it to say that they represent a trend in the democratic thought of our age." (Motilal v. State of U.P. I.L.R. [1951] 1 All. 269.

(emphasis supplied)

311. Mr. Seervai relied on the observations of S.K. Das, J., in Basheshar Nath v. C.I.T. MANU/SC/0064/1958 : [1959] Supp. (1) S.C.R. 528:

I am of the view that the doctrine of 'natural rights' affords nothing but a foundation of shifting sand for building up a thesis that the doctrine of waiver does not apply to the rights guaranteed in Part III of our Constitution.

312. I must point out that the learned Judge was expressing the minority opinion that there could be a waiver of fundamental rights in certain circumstances. Das, C.J., and Kapur, J., held that there could be no waiver of fundamental rights founded on Article 14 of the Constitution, while Bhagwati and Subba Rao, JJ. held that there could be no waiver not only of fundamental rights enshrined in Article 14 but also of any other fundamental rights guaranteed by Part III of the Constitution.

313. Article 14 has been described variously as follows:

(1) "as the basic principle of republicanism" (per Patanjali Sastri C.J. in State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510

(2) "as a principle of republicanism" (per Mahajan, J., Ibid. p. 313)

(3) "as founded on a sound public policy recognised and valued in all civilized States" (per Das C.J., : Basheshar Nath v. C.I.T. MANU/SC/0064/1958 : [1959] Supp. (1) S.C.R. 528

(4) "as a necessary corollary to the high concept of the rule of law" (per Subba Rao, C.J., in Satwant Singh v. Passport Officer MANU/SC/0040/1967 : [1967]3SCR525 .)

(5) "as a vital principle of republican institutions" (American Jurisprudence, Vol. 16, 2d. p. 731, Article 391)

314. How would this test be operative vis-a-vis the Constitutional amendments made hitherto ? It seems to me that the amendments made by the Constitution (First Amendment) Act, 1951, in Articles 15 and 19, and insertion of Article 31A (apart from the question whether there was delegation of the power to amend the Constitution, and apart from the question as to abrogation), and the amendment made by the Constitution (Fourth Amendment) Act in Article 31(2), would be within the amending power of Parliament under Article 368.

315. Reference may be made to Mohd. Maqbool Damnoo v. State of Jammu and Kashmir MANU/SC/0175/1972 : 1972CriLJ597 where this Court repelled the argument of the learned Counsel that the amendments made to Sections 26 and 27 of the Constitution of Jammu and Kashmir were bad because they destroyed the structure of the Constitution. The arguments of the learned Counsel was that fundamentals of the Jammu and Kashmir State Constitution had been destroyed. This argument was refuted in the following words:

But the passage cited by him can hardly be availed of by him for the reason that the amendment impugned by him, in the light of what we have already stated about the nature of the explanation to Article 370 of our Constitution, does not bring about any alteration either in the framework or the fundamentals of the Jammu and Kashmir Constitution. The State Governor still continues to be the head of the Government aided by a council of ministers and the only change affected is in his designation and the mode of his appointment. It is not as if the State Government, by such a change, is made irresponsible to the State Legislature, or its fundamental character as a responsible Government is altered. Just as a change in the designation of the head of that Government was earlier brought about by the introduction of the office of Sadar-i-Riyasat, so too a change had been

brought about in his designation from that of Sadar-i-Riyasat to the Governor. That was necessitated by reason of the Governor having been substituted in place of Sadar-i-Riyasat. There is no question of such a change being one in the character of that Government from a democratic to a non-democratic system.

316. Before parting with this topic I may deal with some other arguments addressed to us. Mr. Seervai devoted a considerable time in expounding principles of construction of statutes, including the Constitution. I do not think it is necessary to review the decisions relating to the principles of interpretation of legislative entries in Article 245 and Article 246 of the Constitution. The Federal Court and this Court in this connection have followed the principles enunciated by the Judicial Committee in interpreting Sections 91 and 92 of the Canadian Constitution. I have no quarrel with these propositions but I am unable to see that these propositions have any bearing on the interpretation of Article 368. The fact that legislative entries are given wide interpretation has no relevance to the interpretation of Article 368. The second set of cases referred to deal with the question whether it is legitimate to consider consequences of a particular construction.

317. He referred to Vacher & Sons v. London Society of Compositors [1913] A.C. 107. This decision does not support him in the proposition that consequences of a particular construction cannot be considered, for Lord Machaghten observed at p. 117:

Now it is "the universal rule," as Lord Nensleydale observed in Grey v. Pearson [1857] 6 H.L.C. 61 that in construing statutes, as in construing all other written instruments "the grammatical and ordinary" sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

318. Then he observed at p. 118:

In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shown either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed.

Lord Atkinson observed at pp. 121-122:

It is no doubt well established that, in construing the words of a statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction for, as there are ma [1887] 12 A.C. 575; 586ny things which the Legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them. But, as Lord Halsbury laid down in Cooke v. Charles A. Vogsler Co. [1901] A.C. 102, a Court of Law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the Legislature has said. If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it

has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this; sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordship's House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous.

319. The next case referred to is Bank of Toronto v. Lambe [1887] 12 A.C. 575., but this case, is explained in Attorney-General for Alberta v. Attorney-General for Canada [1939] A.C. 117. The Judicial Committee first observed:

It was rightly contended on behalf of the appellant that the Supreme Court and the Board have no concern with the wisdom of the Legislature whose Bill is attacked; and it was urged that it would be a dangerous precedent to allow the views of members of the Court as to the serious consequences of excessive taxation on banks to lead to a conclusion that the Bill is ultra vires. Their Lordships do not agree that this argument should prevail in a case where the taxation in a practical business sense is prohibitive.

320. Then their Lordships made the following observations on the decision of the Judicial Committee in Bank of Toronto v. Lambe [1887] 12 A.C. 575:

That case seems to have occasioned a difficulty in the minds of some of the learned Judges in the Supreme Court. It must, however, be borne in mind that the Quebec Act in that case was attacked on two specific grounds, first, that the tax was not "taxation with the Province," and secondly, that the tax was not a "direct tax." It was never suggested, and there seems to have been no ground for suggesting, that the Act was by its effect calculated to encroach upon the classes of matters exclusively within the Dominion powers. Nor, on the other hand, was there any contention, however faint or tentative, that the purpose of the Act was anything other than the legitimate one of raising a revenue for Provincial needs.... It was never laid down by the Board that if such a use was attempted to be made of the Provincial power as materially to interfere with the Dominion power, the action of the province would be intra vires.

321. This case further shows that serious consequences can be taken into consideration.

322. I agree with the observations of Lord Esher in Queen v. Judge of City of London Court, [1892] 1 Q.B. 273 cited by him. These observations are:

If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion the rule has always been this-if the words or an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.

323. He then relied on the observations of Lord Greene, M.R., in Grundt v. Great Boulder Proprietary Mines Ltd. [1948] 1 Ch. 145:

There is one rule, I think, which is very clear-and this brings me back to where I started, the doctrine of absurdity-that although the absurdity or the non-absurdity of one conclusion as compared with another may be of assistance, and very often is of assistance, to the court in choosing between two possible meanings of ambiguous words, it is a doctrine which has to be applied with great care, remembering that judges may be fallible in this question of an absurdity, and in any event must not be applied so as to result in twisting language into a meaning which it cannot bear; it is a doctrine which must not be relied upon and must not be used to re-write the language in a way different from that in which it was originally framed.

Earlier, he had said at p. 158:

"Absurdity" I cannot help thinking, like public policy, is a very unruly horse...

324. As I read Lord Greene, what he meant to say was that "absurdity" was an unruly horse, but it can be of assistance, and very often is of assistance, in choosing between two possible meanings of ambiguous words, and this is exactly the use which this Court is entitled to make of the consequences which I have already mentioned.

Mr. Seervai referred to State of Punjab v. Ajaib Singh MANU/SC/0024/1952 : 1953CriLJ180 . Das, J., observed:

We are in agreement with learned Counsel to this extent only that if the language of the article is plain and unambiguous and admits of only one meaning then the duty of the court is to adopt that meaning irrespective of the inconvenience that such a construction may produce. If however two constructions are possible, then the court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory.

325. He also referred to the following passage in Collector of Customs, Baroda v. Digvijaysinghi Spinning & Weaving Mills Ltd. MANU/SC/0365/1961 : 1983ECR2163D(SC) :

It is one of the well established rules of construction that "if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature." It is equally well settled principle of construction that "Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty.

326. What he urged before us, relying on the last two cases just referred to, was that if we construed the word "amendment" in its narrow sense, then there would be uncertainty, friction and confusion in the working of the system, and we should therefore avoid the narrow sense.

327. If Parliament has power to pass the impugned amendment acts, there is no doubt that I have no right to question the wisdom of the policy of Parliament. But if the net result of my interpretation is to prevent Parliament from abrogating the fundamental rights, and the basic

features outlined above, I am unable to appreciate that any uncertainty, friction or confusion will necessarily result.

328. He also drew our attention to the following observations of Hegde, J. in Budhan Singh v. Nabi Bux MANU/SC/0353/1969 : [1970]2SCR10 :

Before considering the meaning of the word "held", it is necessary to mention that it is proper to assume that the law-makers who are the representatives of the people enact laws which the society considers as honest, fair and equitable. The object of every legislation is to advance public welfare. In other words, as observed by Crawford in his book on Statutory Construction the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature, there is little reason to believe that it represents the legislative intent.

329. I am unable to appreciate how these observations assist the respondents. If anything, these observations are against them for when I come to the question of interpretation of the 25th amendment I may well approach the interpretation keeping those observations in mind.

330. Both Mr. Seervai and the learned Attorney General have strongly relied on the decisions of the United States Supreme Court, Federal Courts and the State Courts on the interpretation of Article V of the Constitution of the United States and some State Constitution. Mr. Palkhiwala, on the other hand, relied on some State decisions in support of his submissions.

331. Article V of the Constitution of the United States differs greatly from Article 368 of our Constitution. For facility of reference Article V is reproduced below:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

332. It will be noticed that Article V provides for two steps to be taken for amending the Constitution. The first step is proposal of an amendment and the second step is ratification of the proposal. The proposal can be made either by two thirds of both Houses of Congress or by a convention called by the Congress on the application of the legislatures of two thirds of several States.

333. Congress determines which body shall ratify the proposal. It can either be the legislatures of three fourths of the States or by conventions in three fourth of the States.

334. If a proposal is made by a Convention and ratified by three fourth of the States in conventions it can hardly be doubted that it is amendment made by the people. Similarly if a proposal is made by the Congress and ratified by conventions there cannot be any doubt that it is the people who have amended the Constitution. Proposal by Congress and ratification by three fourth legislatures of the States can in this context be equated with action of the people. But what is important to bear in mind is that the Congress, a federal legislature, does not itself amend the Constitution.

335. In India, the position is different. It is Parliament, a federal legislature, which is given the power to amend the Constitution except in matters which are mentioned in the proviso. I may repeat that many important provisions including fundamental rights are not mentioned in the proviso. Can we say that an amendment made by Parliament is an amendment made by the people ? This is one of the matters that has to be borne in mind while considering the proper meaning to be given to the expression "amendment of this Constitution" in Article 368 as it stood before its amendment by the 24th Amendment.

336. Article V of the U.S. Constitution differs in one other respect from Article 368. There are express limitations on amending power. The first, which has spent its force, was regarding the first and fourth clauses in the ninth section of the first article and the second relates to deprivation of a State's suffrage in the Senate without its consent. Apart from the above broad differences in Article V as compared to Article 368, the Constitution of India is different in many respects which has a bearing on the extent of the power of Parliament to amend the Constitution. In brief they are : the background of the struggle for freedom, various national aspirations outlined during this struggle, the national objectives as recited in the Objectives Resolution dated January 22, 1947 and the Preamble, the complex structure of the Indian nation consisting as it does of various peoples with different religions and languages and in different stages of economic development. Further the U.S. Constitution has no Directive Principles as has the Indian Constitution. The States in U.S. have their own Constitutions with the right to modify them consistently with the Federal Constitution. In India the States have no power to amend that part of the Indian Constitution which lays down their Constitution. They have legislative powers on certain specified subjects, the residuary power being with Parliament.

337. I may before referring to the decisions of the Supreme Court of the United States say that that court has hitherto not been confronted with the question posed before us : Can Parliament in exercise of its powers under Article 368 abrogate essential basic features and one fundamental right after another including freedom of speech, freedom of religion, freedom of life ? The American decisions would have been of assistance if this fundamental question had arisen there and if the power to amend the Federal Constitution had been with two third majority of the Congress.

338. The question before the Court in Hawke v. Smith 64 L. Ed. 871 was whether the States while ratifying proposals under Article V of the Constitution were restricted to adopt the modes of ratification mentioned in Article V, i.e. by the legislatures or by conventions therein, as decided

by Congress, or could they ratify a proposed amendment in accordance with the referendum provisions contained in State Constitutions or statutes.

339. The Court held that "the determination of the method of ratification is the exercise of a national power specifically granted by the Constitution" and "the language of the article is plain, and admits of no doubt in its interpretation." The Court also held that the power was conferred on the Congress and was limited to two methods : by action of the legislatures of three fourths of the states, or conventions in a like number of states.

340. The Court further held that the power to ratify a proposed amendment to the Federal Constitution had its source in the Federal Constitution and the act of ratification by the state derived its authority from the Federal Constitution to which the state and its people had alike assented.

341. This case is of no assistance to us in interpreting Article 368 of the Constitution.

342. I may now refer to decision of the Supreme Court Rhode Island v. Palmer 64 L. Ed. 946. This case was concerned with the validity of the 18th Amendment and of certain general features of the National Prohibition Law known as Volstead Act. No reasons were given by the Court for the conclusions arrived at. The conclusions which may have some relevance for us are conclusion 4 and 5. The learned Counsel sought to deduce the reasons for these conclusions from the arguments addressed and reported in 64 L. Ed. and for the reasons given by the learned Judge in 264 FR 186 but impliedly rejected by the Supreme Court by reversing the decision.

343. Counsel sought to buttress this argument by citing views of learned American authors that the arguments against the validity of the 18th Amendment were brushed aside although no reasons are given. I have great respect for the judges of the Supreme Court of United States, but unless the reasons are given for a judgment it is difficult to be confident about the ratio of the decision. Apart from the decision, I would be willing to hold the 18th Amendment valid if it had been enacted by our Parliament and added to our Constitution, for I would discern no such taking away of Fundamental rights or altering the basic structure of the Constitution as would place it outside the contours of the Preamble and the basic features of the Constitution.

344. United States of America v. William H. Sorague (75) L. Ed. 640 was concerned with the validity of the 18th Amendment. The District Court had held 44 F. (d) 967 that the 18th Amendment had not been properly ratified so as to become part of the Constitution. It was the contention of the respondents before the Supreme Court that notwithstanding the plain language of Article V, conferring upon the Congress the choice of method of ratification, as between action by legislatures and by conventions, this Amendment could only be ratified by the latter. The respondents urged that there was a difference in the kind of amendments, as, e.g. "mere changes in the character of federal means or machinery, on the one hand, and matters affecting the liberty of the citizen on the other." There was no question as to ambit of the power of amendment. In other words, there was no question that the subject-matter of amendment, namely, prohibition, fell within Article V of the Constitution.

345. The Court held that the choice of the mode rested solely in the discretion of the Congress. They observed:

It was submitted as part of the original draft of the Constitution to the people in conventions assembled. They deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. Unless and until that Article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification.

346. The Court further held that the 10th Amendment had no limited and special operation upon the people's delegation by Article V of certain functions to the Congress.

347. I am unable to see how this case helps the respondents in any manner. On the plain language of the article the Court came to the conclusion that the choice of the method of ratification had been entrusted to the Congress. We are not concerned with any such question here.

348. Mr. Seervai urged that the judgment of the District Court showed that the invalidity of the 18th Amendment to the Constitution could be rested on two groups of grounds; group A consisted of grounds relating to the meaning of the word "amendment" and the impact of the 10th Amendment or the nature of the federal system on Article V of the Constitution, and that Article V by providing the two alternative methods of ratification by convention and legislature showed that the convention method was essential for valid ratification when the amendment affected the rights of the people. Group B consisted of the grounds on which the District Court declared the 18th amendment to be invalid and those were that "the substance of an amendment, and therefore of course, of an entirely new Constitution, might have to conform to the particular theories of political science, sociology, economics, etc. held by the current judicial branch of the Government.

349. He then pointed out that grounds mentioned in Group B, which were very much like Mr. Palkhiwala arguments, were not even urged by counsel in the Supreme Court, and, therefore we must regard these grounds as extremely unsound. I, however, do not find Mr. Palkhiwala's arguments similar to those referred to in Group B. It is true articles like Marbury's "The Limitations upon the Amending Power,-33 HLR 232", and Mc Goveney's "Is the Eighteenth Amendment void because of its content ?" (20 CLR 499), were brought to our notice but for a different purpose. Indeed the District Judge criticised these writers for becoming enmeshed "in a consideration of the Constitutionality of the substance of the amendment"- the point before us. As the District Judge pointed out, he was concerned with the subject-matter of the 18th Amendment because of the relation between that substance or subject-matter and the manner of its adoption.

350. I do not propose to decide the validity of the amendment on the touchstone of any particular theory of political science, sociology, economics. Our Constitution is capable of being worked by any party having faith in democratic institutions. The touchstone will be the intention of the Constitution makers, which we can discern from the Constitution and the circumstances in which it was drafted and enacted.

351. A number of decisions of State Courts were referred to by both the petitioners and the respondents. But the State Constitutions are drafted in such different terms and conditions that it is difficult to derive any assistance in the task before us. Amendments of the Constitution are in effect invariably made by the people.

352. These decisions on the power to amend a Constitution are nor very helpful because "almost without exception, amendment of a state Constitution is effected, ultimately, by the vote of the people. Proposed amendments ordinarily reach the people for approval or disapproval in one of two ways; by submission from a convention of delegates chosen by the people for the express purpose of revising the entire instrument, or by submission from the legislature of propositions which the legislature has approved, for amendment of the Constitution in specific respects. However, in some states Constitutional amendments may be proposed by proceedings under initiative and referendum, and the requirements governing the passage of statutes by initiative and referendum are followed in making changes in the state Constitutions." (American Jurisprudence, Vol. 16, 2d., p. 201). In footnote 9 it is stated:

Ratification or non-ratification of a Constitutional amendment is a vital element in the procedure to amend the Constitution." (Towns v. Suttles-20% Ga 69 SE 2d 742. The question whether the people may, by the terms of the Constitution, delegate their power to amend to others-for example, to a Constitutional convention-is one on which there is a notable lack of authority. An interesting question arises whether this power could be delegated to the legislature, and if so, whether the instrument which the legislature would then be empowered to amend would still be a Constitution in the proper sense of the term.

353. This footnote brings out the futility of referring to decisions to interpret a Constitution, wherein power to amend has been delegated to Parliament.

354. That there is a distinction between the power of the people to amend a Constitution and the power of the legislature to amend the same was noticed by the Oregon Supreme Court in Ex Parte Mrs. D.C. Kerby 36, A.L.R. 1451; 1455, one of the cases cited before us by the respondent. McCourt, J. speaking for the Court distinguished the case of Eason v. State in these words:

Petitioner cites only one authority that has any tendency to support the contention that a provision in the bill of rights of a Constitution cannot be amended-the case of Eason v. State, supra. Upon examination that case discloses that the Arkansas Constitution provided that the legislature might, by the observation of a prescribed procedure, amend the Constitution without submitting the proposed amendment to a vote of the people of the state, and the Bill of Rights in that Constitution contained a provision not found in the Oregon Constitution, as follows : "Everything in this article is excepted out of the general powers of government.

The court held that the clause quoted exempted the provisions in the Bill of Rights from the authority delegated to the legislature to amend the Constitution, and reserved the right to make any such amendment to the people themselves, so that the case is in fact an authority in support of the right of the people to adopt such an amendment.

The case is readily distinguished from the instant case, for every proposed amendment to the Oregon Constitution, in order to become effective, must be approved by a majority vote of the people, recorded at a state election, and consequently, when approved and adopted, such an amendment constitutes a direct expression of the will of the people in respect to the subject embraced by the particular measure, whether the same be proposed by initiative petition or by legislative resolution.

355. No report of the decision in Eason v. State is available to me but it appears from the annotation at page 1457 that it was conceded that a Constitutional provision might be repealed if done in the proper manner viz. by the people, who have the unqualified right to act in the matter. The Court is reported to have said:

And this unqualified right they can Constitutionally exercise by means of the legislative action of the general assembly in providing by law for the call of a convention of the whole people to reconstruct or reform the government, either partially or entirely. And such convention, when assembled and invested with the entire sovereign power of the whole people (with the exception of such of these powers as have been delegated to the Federal government), may rightfully strike out or modify any principle declared in the Bill of Rights,' if not forbidden to do so by the Federal Constitution.

356. Both sides referred to a number of distinguished and well-known authors. I do not find it advantageous to refer to them because the Indian Constitution must be interpreted according to its own terms and in the background of our history and conditions. Citations of comments on the Indian Constitution would make this judgment cumbersome. I have had the advantage of very elaborate and able arguments on both sides and I must apply my own mind to the interpretation.

357. The learned Attorney-General brought to our notice extracts from 71 Constitutions. I admire the research undertaken but I find it of no use to me in interpreting Article 368. First the language and the setting of each Constitution is different. Apart from the decisions of the Courts in United States there are no judicial decisions to guide us as to the meaning of the amending clauses in these Constitutions. Further, if it is not helpful to argue from one Act of Parliament to another (see Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan [1933] A.C. 378. much less would it be helpful to argue from one Constitution to another different Constitution (see Bank of Toronto v. Lambe [1887] 12 A.C. 575.

358. During the course of the arguments I had drawn the attention of the Counsel to the decision of the Supreme Court of Ireland in The State (at the prosecution of Jeremiah Ryan) v. Captain Michael Lennon and Ors. [1935] IR 170, and the respondents place great reliance on it. I may mention that this case was not cited before the Bench hearing Golak Nath's case. On careful consideration of this case, however. I find that this case is distinguishable and does not afford guidance to me in interpreting Article 368 of the Constitution.

359. In order to appreciate the difference between the structure of Article 50 of the Irish Constitution of 1922 and Article 368 of the Indian Constitution, it is necessary to set out Article 50 before its amendment. It reads:

50. Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded,

shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation, and as such shall be subject to the provisions of Article 47 hereof.

360. It will be noticed that after the expiry of the period of eight years mentioned in the article, the amending power was not with the Oireachtas as every amendment had to be first passed by the two Houses of the Oireachtas and then submitted to a referendum of the people, and the condition of the referendum was that a majority of the votes on the register shall have recorded their votes on such referendum, and either the votes of a majority of the votes on the register, or two-thirds of the votes recorded shall have been cast in favour of such amendment. So, in fact, after the expiry of the first eight years, the amendments had to be made by the people themselves. In our Article 368 people as such are not associated at all in the amending process.

361. Further, the Irish Constitution differed from the Indian Constitution in other respects. It did not have a Chapter with the heading of fundamental rights, or a provision like our Article 32 which is guaranteed. The words "fundamental rights" were deliberately omitted from the Irish Constitution (see foot note 9 page 67, The Irish Constitution by Barra O' Briain, 1929). At the same time, there was no question of any guarantee to any religious or other minorities in Ireland.

362. It will be further noticed that for the first eight years an amendment could be made by way of ordinary legislation, i.e., by ordinary legislative procedure. The sixth amendment had deleted from the end of this article the words "and as such shall be subject to the provisions of Article 47 which provided for a referendum hereof. In other words, for the first eight years it was purely a flexible Constitution, a Constitutional amendment requiring no special procedure.

363. With these differences in mind, I may now approach the actual decision of the Supreme Court.

364. The High Court and the Supreme Court were concerned with the validity of the Constitution (Amendment No. 17) Act 1931 (No. 37 of 1931) having regard to the provisions of the Constitution. The validity of that Act depended on the validity of the Constitution (Amendment No. 10) Act, 1928, No. 8 of 1928, and of the Constitution (Amendment No. 16) Act, 1929, No. 10 of 1929.

365. The Constitution (Amendment No. 17) Act 1931 was passed as an Act of the Oireachtas on October 17, 1931 i.e. some 11 months after the expiry of the period of 8 years mentioned in Article 50 of the Constitution, as originally enacted. It was not submitted to a referendum of the people. It was described in its long title as an "Act to amend the Constitution by inserting therein an Article making better provision for safeguarding the rights of the people and containing provisions for meeting a prevalence of disorder." But there is no doubt that it affected various human rights which were granted in the Irish Constitution.

366. The Constitution (Amendment No. 10) Act No. 8 of 1928 removed Articles 47 and 48 of the Constitution and also the words "and as such shall be subject to the provisions of Article 47 thereof" from the end of Article 50 as originally enacted. Constitution (Amendment No. 16) Act No. 10 of 1929 purported to amend Article 50 of the Constitution by deleting the words "eight years" and inserting in place thereof the words "sixteen years" in that Article.

367. The impugned amendment was held valid by the High Court. Sullivan P., J. interpreted the word "amendment" in Article 50 widely relying on Edwards v. Attorney General of Canada [1930] A.C. 124. Meredith J. relied on the fact that the width of the power of amendment for the period during the first eight years was co-extensive with the period after eight years and he could find no distinction between Articles of primary importance or secondary importance. O'Byrne J. could not see any distinction between the word "amendment" and the words "amend or repeal.

368. In the Supreme Court., the Chief Justice first noticed "that the Constitution was enacted by the Third Dail sitting as a Constituent Assembly, and not by the Oireachtas which, in fact, it created." He read three limitations in the Constitution. The first, he described as the over-all limitation. Thus:

The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend, or repeal), that all lawful authority comes from God to the people, and it is declared by Article 2 of the Constitution that "all powers of government and all authority, legislative, executive and judicial, in Ireland are derived from the people of Ireland....

369. The limitation was deduced thus : "It follows that every act, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God.

370. Now this limitation in so far as it proceeds from or is derived from the belief in the Irish State that all lawful authority comes from God to the people, can have no application to our Constitution.

371. The second limitation he deduced from Section 2 of the Irish Fret State Act and Article 50 of the Irish Constitution. It Was that any amendment repugnant to the Scheduled Treaty shall be void and inoperative.

372. The third limitation was put in these words:

The Third Dail Eireann has, therefore, as Constituent Assembly, of its own supreme authority, proclaimed its acceptance of and declared, in relation to the Constitution which it enacted, certain principles, and in language which shows beyond doubt that they are stated as governing principles which are fundamental and absolute (except as expressly qualified), and, so, necessarily, immutable. Can the power of amendment given to the Oireachtas be lawfully exercised in such a manner as to violate these principles which, as principles, the Oireachtas has no power to change ?. In my opinion there can be only one answer to that question, namely, that the Constituent Assembly cannot be supposed to have in the same breath declared certain principles to be fundamental and immutable, or conveyed that sense in other words, as by a declaration of inviolability, and at the same time to have conferred upon the Oireachtas power to violate them or to alter them. In my opinion, any amendment of the Constitution, purporting to be made under the power given by the Constituent Assembly, which would be a violation of, or be inconsistent with, any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void.

373. He further said that these limitations would apply even after the expiry of eight years. He said:

I have been dealing with limitations of the power of amendment in relation to the kinds of amendment which do not fall within the scope of the power and which are excluded from it always, irrespective of the time when, i.e. within the preliminary period of eight years or after, or the process by which, the amendment is attempted.

374. He then approached the validity of the 16th Amendment in these words:

Was, then, the Amendment No. 16 lawfully enacted by Act No. 10 of 1929 ? There are two principal grounds for impeaching its validity; the first, the taking away whether validly or not, in any case the effective removal from use, of the Referendum and the right to demand a Referendum; the second, that the Amendment No. 16 is not within the scope of the power of amendment, and therefore the Oireachtas was incompetent to enact it.

375. He thought:

The Oireachtas, therefore, which owes its existence to the Constitution, had upon its coming into being such, and only such, power of amendment (if any) as had been given it by the Constituent Assembly in the Constitution, that is to say, the express power set out in Article 50, and amendments of the Constitution could only be validly made within the limits of that power and in the manner prescribed by that power.

376. He then observed:

Now, the power of amendment is wholly contained in a single Article, but the donee of the power and the mode of its exercise are so varied with regard to a point of time as to make it practically two separate powers, the one limited to be exercised only during the preliminary period of eight years, the other, a wholly different and permanent power, to come into existence after the expiry of that preliminary period and so continue thereafter.

377. After referring to the condition (it shall be subject to the provisions of Article 47) he thought:

The Constituent Assembly, even during the preliminary period, would not relax the ultimate authority of the people, and expressly reserved to the people the right to intervene when they considered it necessary to restrain the action of the Oireachtas affecting the Constitution. The frame of this provision makes it clear to my mind that, even if, by amendment of the Constitution under the power, Article 47 might cease to apply to ordinary legislation of the Oireachtas, the provisions of that clause were declared, deliberately, expressly and in a mandatory way, to be kept in force and operative for the purpose of amendments of the Constitution during the preliminary period of eight years.

378. According to him "the permanent power of amendment, to arise at the expiry of the period of eight years, is a wholly different thing both as to the donee of the power and the manner of its exercise.

379. He held that it was apt competent for the Oireachtas to remove from the power granted to it by the Constituent Assembly the requisites for its exercise attached to it in the very terms of donation of the power. He observed:

That provision of the Statute, No. 8 of 1928, was bad, in my opinion as being what is called in the general law of powers 'an excessive execution.' It was outside the scope of the power. We have not been referred to, nor have I found, any precedent for such a use of a power. I do not believe that there can be a precedent because it defies logic and reason. It was, therefore, invalid in my opinion.

380. Regarding the substitution of "sixteen years" for the words "eight years" he said:

If this amendment is good there is no reason why the Oireachtas should not have inserted or should not even yet insert, a very much larger term of years or, indeed, delete the whole of Article 50 from the words "by the Oireachtas" in the second line to the end of the Article.

381. Later he observed:

The attempt to take from the people this right, this exclusive power and authority and to confer on the Oireachtas a full and uncontrolled power to amend the Constitution without reference to the people (even though for a period of years, whether it be until 1938 or Tibb's Eve, a matter of indifference in the circumstances) was described by counsel in, I think, accurate language, as a usurpation, for it was done in my opinion without legal authority.

382. He then repelled the argument that Section 50 conferred the power to amend the Article itself. His reasons for this conclusion are summarised thus at page 219:

In my opinion, on the true interpretation of the power before us, upon a consideration of express prohibition, limitations and requirements of the clause containing it, the absence of any express authority, the donation of the effective act in the exercise of the power to the people as a whole, the relevant surrounding circumstances to which I have already referred and the documents and their tenor in their entirety, there is not here, either expressly or by necessary implication, any power to amend the power of amendment itself.

383. I cannot agree with the learned Attorney-General that the sole basis of Kennedy C.J.'s decision was that Article 50 did not contain an express power of amending the provisions of Article 50 itself. He gave various reasons which I have referred to above.

384. Fitz Gibbon J. held that the word "amendment" was wide enough to include a power to amend or alter or repeal and there is no express prohibition in Article 50 itself that any article of the Constitution including Article 50 could not be amended. The only limitation that he could find was that the provisions of the Scheduled Treaty could not be amended. He observed:

I see no ground for holding that either of these Articles could not have been amended by the Oireachtas subject to a Referendum of the people after the period of eight years, and, if so, it follows that the same amendment, e.g., the deletion of the word "no" in Article 43 could be made

"by way of ordinary legislation" within that period, or within sixteen, years, after eight had been altered to sixteen.

385. In other words, according to him, if the Oireachtas subject to a referendum of the people mentioned in Article 50 could amend any Article, so could Oireachtas during the period of eight years. But he noticed that in other Constitutions, there are articles, laws or provisions which are specifically described as "Fundamental" e.g., Sweden, or "Constitutional" e.g., Austria, Czechoslovakia and France, in respect of which the Constitution expressly restricts the power of amendment, but in Constitution of the Saorstat there is no such segregation, and the power of amendment which applies to any Article appears to me to be equally applicable to all others, subject, of course, to the restriction in respect of the Scheduled Treaty. He, later observed:

Unless, therefore, these rights appear plainly from the express provisions of our Constitution to be inalienable, and incapable of being modified or taken away by any legislative act, I cannot accede to the argument that the Oireachtas cannot alter, modify, or repeal them. The framer of our Constitution may have intended "to bind man down from mischief by the chains of the Constitution," but if they did, they defeated their object by banding him the key of the padlock in Article 50. (P. 234)

386. Murnaghan J. stressed the point that "this direct consultation of the people's will does indicate that all matters, however fundamental, might be the subject of amendment. On the other hand the view contended for by the appellants must go to this extreme point, viz., that certain Articles or doctrines of the Constitution are utterly incapable of alteration at any time even if demanded by an absolute majority of the voters.

387. This observation really highlights the distinction between Article 50 of the Irish Constitution and Article 368 of the Indian Constitution. As I have already observed, there is no direct consultation of the people's will in Article 368 of our Constitution.

388. The only limitation he could find in Article 50 was that the amendment to the Constitution must be within the terms of the Scheduled Treaty.

489. As I have observed earlier, I find Article 50 of the Irish Constitution quite different in structure from Article 368 of the Indian Constitution and I do not think it is permissible to argue from Article 50 of the Irish Constitution to Article 368 of the Indian Constitution. Be that as it may, if I had to express my concurrence, I would express concurrence with the view of the learned Chief Justice in so far as he said that the Oireachtas could not increase its power of amendment by substituting sixteen years for the words "eight years".

390. I had also invited attention of Counsel to Moore and Ors. v. Attorney-General for the Irish Free State and Ors. [1935] A.C. 484 and the respondents rely heavily on it. In this case the validity of the Constitution (Amendment No. 22) Act, 1933 (Act 6 of 1933) was involved. It was alleged that this amendment was no bar to the maintenance by the petitioners, who were the appellants, of their appeal before the Judicial Committee, as it was Void.

391. On May 3, 1933, the Oireachtas passed an Act, No. 6 of 1933, entitled the Constitution (Removal of Oath) Act, 1933. That Act, by Section 2, provided that Section 2 of the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922, should be repealed, and, by Section 3, that Article 50 of the Constitution should be amended by deleting the words "within the terms of the Scheduled Treaty.

392. Finally, on November 15, 1933, the Oireachtas, enacted the Constitution (Amendment No. 22) Act, 1933, amending Article 66 of the Constitution so as to terminate the right of appeal to His Majesty in Council.

393. The Validity of the last amending Act depended on whether the earlier Act, No. 6 of 1933, was valid, namely, that which is directed to removing from Article 50 the condition that there can be no amendment of the Constitution unless it is within the terms of the Scheduled Treaty.

394. It appears that Mr. Wilfrid Greene, arguing for the petitioners, conceded that the Constitution (Amendment No. 16) Act, 1929 was regular and that the validity of the subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum.

395. It is true that the Judicial Committee said that Mr. Greene rightly conceded this point but we do not know the reasons which impelled the Judicial Committee to say that the concession was rightly made. In view of the differences between Article 50 of the Irish Constitution and Article 368 of our Constitution, this concession cannot have any importance in the present case. The actual decision in the case is of no assistance to us because that proceeds on the basis that the Statute of Westminster had removed the restriction, contained in the Constitution of the Irish Free State Act, 1922.

396. Mr. Greene challenged the validity of Act No. 6 of 1933 by urging:

The Constitution derived its existence not from any legislature of the Imperial Parliament but solely from the operations of an Irish body, the Constituent Assembly, which is called in Ireland the Third Dail Eireann. This body, it is said, though mentioned in the Irish Free State (Agreement) Act, 1922, was in fact elected pursuant to a resolution passed on May 20, 1922, by the Second Dail Eireann, an Irish Legislative Assembly. The Third Dail Eireann was thus, it was alleged, set up in Ireland by election of the people of Ireland of their own authority as a Constituent Assembly to create a Constitution, and having accomplished its work went out of existence, leaving no successor and no body in authority capable of amending the Constituent Act. The result of that argument is that a Constitution was established which Mr. Greene has described as a semi-rigid Constitution-that is, "one capable of being amended in detail in the different articles according to their terms, but not susceptible of any alteration so far as concerns the Constituent Act, unless perhaps by the calling together of a new Constituent Assembly by the people of Ireland. Thus the articles of the Constitution may only be amended in accordance with Article 50, which limits amendments to such as are within the terms of the Scheduled Treaty. On that view Mr. Greene argues that the law No. 6 of 1933 is ultra vires and hence that the amendment No. 22 of 1933 falls with it.

397. Mr. Greene referred their Lordships to State (Ryan and Ors.) v. Lennon and Ors. [1935] IR 170. In that case Chief Justice Kennedy is reported to have expressed a view which corresponds in substance to that contended for by Mr. Greene.

398. Now it is these contentions which I have just set out and which their Lordships could not accept. They observed:

In their opinion the Constituent Act and the Constitution of the Irish Free State derived their validity from the Act of the Imperial Parliament, the Irish Free State Constitution Act, 1922. This Act established that the Constitution, subject to the provisions of the Constituent Act, should be the Constitution of the Irish Free State and should come into operation on being proclaimed by His Majesty, as was done on December 6, 1922. The action of the House of Parliament was thereby ratified.

399. The position was summed up as follows:

(1) The Treaty and the Constituent Act respectively form parts of the Statute Law of the United Kingdom, each of them being parts of an Imperial Act. (2) Before the passing of the Statute of Westminster it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a dominion legislature to pass a law repugnant to an Imperial Act. (3) The affect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. That Legislature can now pass Acts repugnant to an Imperial Act In this case they have done so.

400. I think that summary makes it quite clear that it was because of the Statute of Westminster that the Irish Free State Parliament was enabled to amend the Constitution Act.

PART IV

Validity of 24th Amendment

401. Now I may deal with the question whether the Constitution (Twenty-Fourth Amendment) Act, 1971 is valid. It reads thus:

...

(2) In Article 13 of the Constitution, after Clause (3), the following clause shall be inserted, namely:

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

(3) Article 368 of the Constitution shall be re-numbered as Clause (2) thereof, and-

(a) for the marginal heading to that article, the following marginal heading shall be substituted, namely:

Power of Parliament to amend the Constitution and procedure therefore.;

(b) before Clause (2) as so re-numbered, the following clause shall be inserted, namely:

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article;

(c) in Clause (2) as so re-numbered, for the words "it shall be presented to the President for his ascent and upon such assent being given to the Bill", the words "it shall be presented to the President who shall give his attest to the Bill and thereupon" shall be substituted;

(d) after Clause (2) as so re-numbered, the following shall be inserted, namely:

(3) Nothing in Article 13 shall apply to any amendment made under this article.

402. According to the petitioner, the 24th Amendment has sought to achieve five results:

(i) It has inserted an express provision in Article 368 to indicate that the source of the amending power will be found in that Article itself.

(ii) It has made it obligatory on the President to give his assent to any Bill duly passed under that Article.

(iii) It has substituted the words "amend by way of addition, variation or repeal..." in place of the bare concept of "amendment" in the Article 368.

(iv) It makes explicit that when Parliament makes a Constitutional amendment under Article 368 it acts "in exercise of its constituent power.

(v) It has expressly provided, by amendments in Article 13 and 368, that the bar in Article 13 against abridging or taking away any of the fundamental rights should not apply to any amendment made under Article 368.

403. Mr. Palkhivala did not dispute that the amendments covered by (i) and (ii) above were within the amending power of Parliament. I do not find it necessary to go into the question whether Subba Rao, C.J., rightly decided that the amending power was in List I entry 97, or Article 248, because nothing turns on it now.

404. Mr. Palkhivala rightly conceded that Parliament could validly amend Article 368 to transfer the source of amending power from List I entry 97 to Article 368.

405. Mr. Palkhivala however contended that "if the amendments covered by (iii) and (iv) above are construed as empowering Parliament to exercise the full constituent power of, the people themselves, and as vesting in Parliament the ultimate legal sovereignty of the people, and as authorising Parliament to alter or destroy all or any of the essential features, basic elements and

fundamental principles of the Constitution (hereinafter referred to "essential features"), the amendments must be held, to be illegal and void." He further urges that "if the amendment covered by (v) is construed as authorising Parliament to damage or destroy the essence of all or any of the fundamental rights, the amendment must be held to be illegal and void." He says that the 24th Amendment is void and illegal for the following reasons : A creature of the Constitution, as the Parliament is, can have only such amending power as is conferred by the Constitution which is given by the people unto themselves. While purporting to exercise that amending power, Parliament cannot increase that very power. No doubt, Parliament had the power to amend Article 368 itself, but that does not mean that Parliament could so amend Article 368 as to change its own amending power beyond recognition. A creature of the Constitution cannot enlarge its own power over the Constitution, while purporting to act under it, any more than the creature of an ordinary law can enlarge its own power while purporting to act under that law. The power of amendment cannot possibly embrace the power to enlarge that very power of amendment, or to abrogate the limitations, inherent or implied, in the terms on which the power was conferred. The contrary view would reduce the whole principle of inherent and implied limitations to an absurdity.

406. It is contended on behalf of the respondents that the 24th Amendment does enlarge the power of Parliament to amend the Constitution, if Golak Nath's case limited it, and as Article 368 clearly contemplates amendment of Article 368 itself, Parliament can confer additional powers of amendment on it.

407. Reliance was placed on Ryan's [1935] IR 170 case and Moore's [1935] A.C. 484 case. I have already dealt with these cases.

408. It seems to me that it is not legitimate to interpret Article 368 in this manner. Clause (e) of the proviso does not give any different power than what is contained in the main article. The meaning of the expression "Amendment of the Constitution" does not change when one reads the proviso. If the meaning is the same, Article 368 can only be amended so as not to change its identity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two third majority to simple majority. Similarly it cannot get rid of the true meaning of the expression "Amendment of the Constitution" so as to derive power to abrogate fundamental rights.

409. If the words "notwithstanding anything in the Constitution" are designed to widen the meaning of the word "Amendment of the Constitution" it would have to be held void as beyond the amending power. But I do not read these to mean this. They have effect to get rid of the argument that Article 248 and Entry 97 List I contains the power of amendment. Similarly, the insertion of the words "in exercise of its constituent power" only serves to exclude Article 248 and Entry 97 List I and emphasize that it is not ordinary legislative power that Parliament is exercising under Article 368 but legislative power of amending the Constitution.

410. It was said that if Parliament cannot increase its power of amendment Clause (d) of Section 3 of the 24th Amendment which makes Article 13 inapplicable to an amendment of the Constitution would be bad. I see no force in this contention. Article 13(2) as existing previous to the 24th Amendment as interpreted by the majority in Golak Nath's case prevented legislatures from taking away or abridging the rights conferred by Article 13. In other words, any law which

abridged a fundamental right even to a small extent was liable to be struck down under Article 368 Parliament can amend every article of the Constitution as long as the result is within the limits already laid down by me. The amendment of Article 13(2) does not go beyond the limits laid down because Parliament cannot even after the amendment abrogate or authorise abrogation or the taking away of fundamental rights. After the amendment now a law which has the effect of merely abridging a right while remaining within the limits laid down would not be liable to be struck down.

411. In the result, in my opinion, the 24th Amendment as interpreted by me is valid.

PART V.-Validity of Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971.

412. Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971 enacted as follows:

(a) for Clause (2), the following clause shall be substituted, namely:

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(b) after Clause (2A), the following clause shall be inserted, namely:

(2B) Nothing in Sub-clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2).

413. There cannot be any doubt that the object of the amendment is to modify the decision given by this Court in Rustom Cavasjee Cooper v. Union of India MANU/SC/0011/1970 : [1970]3SCR530 where it was held by ten Judges that the Banking Companies (Acquisition and Transfer of Undertakings) Act violated the guarantee of compensation under Article 31(2) in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named Banks and by the method prescribed the amounts so declared could not be regarded as compensation.

414. If we compare Article 31(2) as it stood before and after the 25th Amendment, the following changes seem to have been effected. Whereas before the amendment, Article 31(2) required the law providing for acquisition to make provision for compensation by either fixing the amount of compensation or specifying the principles on which and the manner in which the compensation

should be determined after the amendment Article 31(2) requires such a law to provide for an "amount" which may be fixed by the law providing for acquisition or requisitioning or which may be determined in accordance with such principles and given in such manner as may be specified in such law. In other words, for the idea that compensation should be given, now the idea is that an "amount" should be given. This amount can be fixed directly by law or may be determined in accordance with such principles as may be specified.

415. It is very difficult to comprehend the exact meaning which can be ascribed to the word "amount". In this context, it is true that it is being used in lieu of compensation, but the word "amount" is not a legal concept as "compensation" is.

416. According to Shorter Oxford English Dictionary, Third Edn. p. 57, the word "amount" has the following meaning:

Amount (amount sb. 1710, (f. the vb.) 1). The sum total to which anything amounts up; spec. the sum of the principal and interest 1796. 2. fig. The full value, effect, or significance 1732. 3. A quantity or sum viewed as a total 1833.

417. According to Webster's Third New International Dictionary, p. 72, "amount" means:

amount 1a : the total number of quantity; AGGREGATE (the amount of the fine is doubled); SUM, NUMBER (add the same amount to each column) (the amount of the policy is 10,000 dollars) b : the sum of individuals (the unique amount of worthless IOU's collected during each day's business - R.L. Taylor) c : the quantity at hand or under consideration (only a small amount of trouble involved) (a surprising amount of patience) 2 : the whole or final effect, significance, or import (the amount of his remarks is that we are hopelessly beaten) 3 : accounting : a principal sum and the interest on it syn see SUM.

418. I have also seen the meaning of the word "amount" in the Oxford English Dictionary, Volume 1 p. 289, but it does not give me much guidance as to the meaning to be put in Article 31(2), as amended. The figurative meaning, i.e., the full value, I cannot give because of the deliberate omission of the word "compensation" and substitution of the word "amount" in lieu thereof.

419. Let us then see if the other part of the article throws any light on the word "amount". The article postulates that in some cases principles may be laid down for determining the amount and these principles may lead to an adequate amount or an inadequate amount. So this show that the word "amount" here means something to be given in lieu of the property to be acquired but this amount has to and can be worked out by laying down certain principles. These principles must then have a reasonable relationship to the property which is sought to be acquired, if this is so, the amount ultimately arrived at by applying the principles must have some reasonable relationship with the property to be acquired; otherwise the principles of the Act could hardly be principles within the meaning of Article 31(2).

420. If this meaning is given to the word "amount" namely, that the amount given in cash or otherwise is of such a nature that it has been worked out in accordance with the principles which have relationship to the property to be acquired, the question arises : what meaning is to be given,

to the expression "the amount so fixed". The amount has to be fixed by law but the amount so fixed by law must also be fixed in accordance with some principles because it could not have been intended that if the amount is fixed by law, the legislature would fix the amount arbitrarily. It could not, for example, fix the amount by a lottery.

421. Law is enacted by passing a bill which is introduced. The Constitution and legislative procedure contemplate that there would be discussion, and in debate, the Government spokesman in the legislature would be able to justify the amount which has been fixed. Suppose an amendment is moved to the amount fixed. How would the debate proceed ? Can the Minister say-"This amount is fixed as it is the government's wish." Obviously not. therefore, it follows that the amount, if fixed by the legislature, has also to be fixed according to some principles. These principles cannot be different from the principles which the legislature would lay down.

422. In this connection it must be borne in mind that Article 31(2) is still a fundamental right. Then, what is the change that has been brought about by the amendment ? It is no doubt that a change was intended, it seems to me that the change effected is that a person whose property is acquired can no longer claim full compensation or just compensation but he can still claim that the law should lay down principles to determine the amount which he is to get and these principles must have a rational relation to the property sought to be acquired. If the law were to lay down a principle that the amount to be paid in lieu of a brick of gold acquired shall be the same as the market value of an ordinary brick or a brick of silver it could not be held to be a principle at all. Similarly if it is demonstrated that the amount that has been fixed for the brick of gold is the current value of an ordinary brick or a brick of silver the amount fixed would be illegal. If I were to interpret Article 31(2) as meaning that even an arbitrary or illusory or a grossly low amount could be given which would shock not only the judicial conscience but the conscience of every reasonable human being, a serious question would arise whether Parliament has not exceeded its amending power under Article 368 of the Constitution. The substance of the fundamental right to property, under Article 31, consists of three things : one, the property shall be acquired by or under a valid law; secondly, it shall be acquired only for a public purpose; and, thirdly, the person whose property has been acquired shall be given an amount in lieu thereof, which, as I have already said, is not arbitrary, illusory or shocking to the judicial conscience or the conscience of mankind. I have already held that Parliament has no power under Article 368 to abrogate the fundamental rights but can amend or regulate or adjust them in its exercise of amending powers without destroying them. Applying this to the fundamental right of property, Parliament cannot empower legislatures to fix an arbitrary amount or illusory amount or an amount that virtually amounts to confiscation, taking all the relevant circumstances of the acquisition into consideration. Same considerations apply to the manner of payment. I cannot interpret this to mean that an arbitrary manner of payment is contemplated. To give an extreme example, if an amount is determined or fixed at Rs. 10,000 a legislature cannot lay down that payment will be made at the rate of Rs. 10 per year or Rs. 10 per month.

423. Reference may be made to two cases that show that if discretion is conferred it must be exercised reasonably.

424. In Roberts v. Hopwood [1925] A.C. 578 it was held that the discretion conferred upon the Council by Section 62 of the Metropolis Management Act, 1855, must be exercised reasonably. The following observations of Lord Buckmaster are pertinent:

It appears to me, for the reasons I have given, that they cannot have brought into account the consideration which they say influenced them, and that they did not base their decision upon the ground that the reward for work is the value of the work reasonably and even generously measured, but that they took an arbitrary principle and fixed an arbitrary sum, which was not a real exercise of the discretion imposed upon them by the statute.

425. I may also refer to Lord Wrenbury's observation at p. 613:

I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.

426. In James Leslie Williams v. Haines Thomas [1911] A.C. 381 the facts are given in the headnote as follows:

Under Section 4 of the New South Wales Public Service Superannuation Act, 1903, the plaintiff was awarded by the Public Service Board a gratuity of 23 £ 10 $. 1 d. per mensem, calculated for each year of service from December 9, 1875, the date of his permanent employment, upto December 23, 1895; and upon his claiming to have his service reckoned up to August 16, 1902, was awarded a further gratuity of one penny in respect of each year subsequent to December 23, 1895, up to August 16, 1902, the date of the commencement of the public Service Act of that year.

427. The Judicial Committee held the award to be illusory. The Judicial Committee observed:

...it seems to their Lordships to be quite plain that an illusory award such as this - an award intended to be unreal and unsubstantial - though made under guise of exercising discretion, is at best a colourable performance, and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament.

428. Although I am unable to appreciate the wisdom of inserting Clause (2B) in Article 31, the effect of which is to make Article 19(1)(f) inapplicable, I cannot say that it is an unreasonable abridgement of rights under Article 19(1)(f). While passing a law fixing principles, the legislatures are bound to provide a procedure for the determination of the amount, and if the procedure is arbitrary that provision may well be struck down under Article 14.

429. In view of the interpretation which I have placed on the new Article 31(2), as amended, it cannot be said that Parliament has exceeded its amending power under Article 368 in enacting the new Article 31(2).

430. For the reasons aforesaid I hold that Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, as interpreted by me, valid.

Part VI-Validity of Section 3 of the Constitution (Twenty-Fifth Amendment) Act, 1971.

431. Section 3 of the twenty-fifth amendment, reads thus:

3. After Article 31B of the Constitution, the following article shall be inserted, namely:

31. C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

432. It will be noted that Article 31C opens with the expression "notwithstanding anything contained in Article 13". This however cannot mean that not only fundamental rights like Article 19(1)(f) or Article 31 are excluded but all fundamental rights belonging to the minorities and religious groups are also excluded. The article purports to save laws which a State may make towards securing the principles specified in Clauses (b) or (c) of Article 39 from being challenged on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Articles 14, 19 or 31. This is the only ground on which they cannot be challenged. It will be noticed that the article provides that if the law contains a declaration that it is for giving effect to such policy, it shall not be called in question in any court on the ground that it does not give effect to such policy. In other words, once a declaration is given, no court can question the law on the ground that it has nothing to do with giving effect to the policy; whether it gives effect to some other policy is irrelevant. Further, a law may contain some provisions dealing with the principles specified in Clauses (b) or (c) of Article 39 while other sections may have nothing to do with it, yet on the language it denies any court power or jurisdiction to go into this question.

433. In the face of the declaration, this Court would be unable to test the validity of incidental provisions which do not constitute an essential and integral part of the policy directed to give effect to Article 39(b) and Article 39(c).

434. In Akadasi Padhan v. State of Orissa MANU/SC/0089/1962 : [1963] Supp. 2 S.C.R. 691 Gajendragadkar, C.J., speaking for the Court, observed:

"A law relating to" a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire

what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19(6).

435. These observations were quoted with approval by Shah, J., speaking on behalf of a larger Bench in R.C. Cooper v. Union of India MANU/SC/0011/1970 : [1970]3SCR530 . After quoting the observations, Shah, J., observed:

This was reiterated in Rashbihar Panda and Ors. v. The State of Orissa MANU/SC/0054/1969 : [1969]3SCR374 . Vrajlal Manilal & Co. and Anr. v. The State of Madhya Pradesh and Ors. MANU/SC/0045/1969 : [1970]1SCR400 and Municipal Committee, Amritsar and Ors. v. State of Punjab MANU/SC/0050/1969 : [1969]3SCR447 .

436. While dealing with the validity of the Bombay Prohibition Act (XXV of 1949), this Court in State of Bombay v. F.N. Balsara MANU/SC/0009/1951 : [1951]2SCR682 struck down two provisions on the ground that they conflicted with the fundamental rights of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. These provisions were Sections 23(a) and 24(1)(a), which read:

23. No person shall-

(a) commend, solicit the use of, offer any intoxicant or hemp, or....

24(1). No person shall print or publish in any newspaper news-sheet, book, leaflet, booklet or any other single or periodical publication or otherwise display or distribute any advertisement or other matter-

(a) which commends, solicits the use of, or offers any intoxicant or hemp....

437. Section 23(b) was also held to be void. It was held that "the words "incite" and "encourage" are wide enough to include incitement and encouragement by words and speeches and also by acts and the words used in the section are so wide and vague that the clause must be held to be void in its entirety.

438. Section 23(b) reads as follows:

23. No person shall-

(a) ...

(b) incite or encourage any member of the public or any class of individuals of the public generally to commit any act, which frustrates or defeats the provisions of this Act, or any rule, regulation or order made thereunder, or....

439. Mr. Palkhivala contends, and I think rightly, that this Court would not be able to strike these provisions down if a similar declaration were inserted now in the Bombay Prohibition Act that this law is for giving-effect to Article 47, which prescribes the duty of the State to bring about prohibition of the consumption of intoxicating drinks. If a similar provision were inserted in the impugned Kerala Acts making it a criminal offence to criticise, frustrate or defeat the policy of the Acts, the provisions would be protected under Article 31(C).

440. The only so-called protection which is given is that if the legislature of a State passes such a law it must receive the President's assent. It is urged before us that it is no protection at all because the President would give his assent on the advice of the Union Cabinet.

441. Article 31C in its nature differs from Article 31A, which was inserted by the Fourth Amendment.

31A. (1) Notwithstanding anything contained in Article 13, no law providing for-

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31 : Provided that....

442. In Article 31A the subject-matter of the legislation is clearly provided, namely, the acquisition by the State of any estate or any rights therein, (Article 31A(a)). Similarly, the subject-matter of legislation is specifically provided in Clauses (b), (c) and (d) of Article 31A. But in Article 31C the sky is the limit because it leaves to each State to adopt measures towards securing the principles specified in Clauses (b) and (c) of Article 39. The wording of Articles 39(b) and 39(c) is very wide. The expression "economic system" in Article 39(c) may well include professional and other services. According to Encyclopedia Americana (1970 Ed. Vol. 9p. p. 600) "economic systems are forms of social organization for producing goods and services and determining how they will be distributed. It would be difficult to resist the contention of the State that each provision in the law has been taken for the purpose of giving effect to the policy of the State.

443. It was suggested that if the latter part of Article 31C, dealing with declaration, is regarded as un-constitutional, the Court will be entitled to go into the question whether there is any nexus between the impugned law and Article 39(b) and Article 39(c). I find it difficult to appreciate this submission. There may be no statement of State policy in a law. Even if there is a statement of policy in the Preamble, it would not control the substantive provisions, if unambiguous. But assuming that there is a clear statement it would be for the State legislature to decide whether a provision would help to secure the objects.

444. The Courts will be unable to separate necessarily incidental provisions and merely incidental. Further, as I have pointed out above, this question is not justiciable if the law contains a declaration that it is for giving effect to such a policy. According to Mr. Palkhivala, Article 31C has four features of totalitarianism : (1) There is no equality. The ruling party could favour its own party members, (2) There need not be any freedom of speech, (3) There need be no personal liberty which is covered by Article 19(1)(b), and (4) The property will be at the mercy of the State. In other words, confiscation of property of an individual would be permissible.

445. It seems to me that in effect, Article 31C enables States to adopt any policy they like and abrogate Articles 14, 19 and 31 of the Constitution at will. In other words, it enables the State to amend the Constitution. Article 14, for instance, would be limited by the State according to its policy and not the policy of the amending body, i.e., the Parliament, and so would be Articles 19 and 31, while these fundamental rights remain in the Constitution. It was urged that when an Act of Parliament or a State Legislature delegates a legislative power within permissible limits the delegated legislation derives its authority from the Act of Parliament. It was suggested that similarly the State law would derive authority from Article 31C. It is true that the State law would derive authority from Article 31C but the difference between delegated legislation and the State law made under Article 31C is this : It is permissible, within limits, for a legislature to delegate its functions, and for the delegate to make law. Further the delegated legislation would be liable to be challenged on the ground of violation of fundamental rights regardless of the validity of the State Act. But a State legislature cannot be authorised to amend the Constitution and the State law deriving authority from Article 31C cannot be challenged on the ground that it infringes Articles 14, 19 and 31.

446. It will be recalled that Article 19 deals not only With the right to property but it guarantees various rights : freedom of speech and expression; right to assemble peaceably and without arms; right to form associations or unions; right to move freely throughout the territory of India; right to practice any profession or to carry on any occupation, trade or business. I am unable to appreciate the reason for giving such powers to the State legislature to abrogate the above freedoms. In effect, Parliament is enabling State legislatures to declare that "a citizen shall not be free; he will have no freedom of speech to criticise the policy of the State; he shall not assemble to protest against the policy; he shall be confined to a town or a district and shall not move outside his State; a resident of another state shall not enter the State which is legislating; he shall not, if a lawyer, defend people who have violated the law. It could indeed enable legislatures to apply one law to political opponents of the ruling party and leave members of the party outside the purview of the law. In short, it enables a State Legislature to set up complete totalitarianism in the State. It seems that its implications were not realised by Parliament though Mr. Palkhiwala submits that every implication was deliberately intended.

447. I have no doubt that the State legislatures and Parliament in its ordinary legislative capacity will not exercise this new power conferred on them fully but I am concerned with the amplitude of the power conferred by Article 31C and not with what the legislatures may or may not do under the powers so conferred.

448. I have already held that Parliament cannot under Article 368 abrogate fundamental rights. Parliament equally cannot enable the legislatures to abrogate them. This provision thus enables legislatures to abrogate fundamental rights and therefore must be declared un-constitutional.

449. It has been urged before us that Section 3 of the 25th amendment Act is void as it in effect delegates the constituent amending power to State legislatures. The question arises whether Article 368 enables Parliament to delegate its function of amending the Constitution to another body. It seems to me clear that it does not. It would be noted that Article 368 of this Constitution itself provides that amendment may be initiated only by the introduction of a bill for the purpose in either House of Parliament. In other words, Article 368 does not contemplate any other mode of amendment by Parliament and it does not equally contemplate that Parliament could set up another body to amend the Constitution.

450. It is well settled in India that Parliament cannot delegate its essential legislative functions.

See: (1) Per Mukherjea J. in re The Delhi Laws Act, 1912. MANU/SC/0010/1951 : [1951]2SCR747 .

(2) Raj Narain Singh v. Patna Administration MANU/SC/0024/1954 : [1955]1SCR290 .

(3) Hari Shankar Bagla v. State of Madhya Pradesh MANU/SC/0063/1954 : 1954CriLJ1322 .

(4) Vasantlal Sanjanwala v. State of Bombay MANU/SC/0288/1960 : 1978CriLJ1281 .

(5) The Municipal Corporation of Delhi v. Birla Cotton Mills MANU/SC/0175/1968 : [1968]3SCR251 .

(6) Garewal v. State of Punjab MANU/SC/0154/1958 : 1959 Supp. (1) SCR 792.

451. It is also well-settled in countries, where the courts have taken a position different than in Indian courts, that a legislature cannot create another legislative body. Reference may be made here to In re Initiative and Referendum Act (1919) A.C. 935 and Attorney-General of Nova Scotia v. Attorney-General of Canada (1951) S.C.R. 31. I have discussed the latter case while dealing with the question of implied limitation. Initiative and Referendum case is strongly relied on by Mr. Palkhivala to establish that an amending power cannot be delegated. In this case the Judicial Committee of the Privy Council was concerned with the interpretation of Section 92, head 1 of the British North America Act, 1867, which empowers a Provincial Legislature to amend the Constitution of the Province, "excepting as regards the office of the Lieutenant-Governor". The Legislative Assembly of Manitoba enacted the Initiative and Referendum Act, which in effect would compel the Lieutenant Governor to submit a proposed law to a body of voters totally distinct

from the legislature of which he is the Constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by these voters.

452. The judgment of the Court of Appeal is reported in 27 Man. L.R. 1, which report is not available to me, but the summary of the reasons of the learned Judges of the Court of Appeal are given at page 936 of (1919) A.C. as follows:

The British North America Act, 1867, declared that for each Province there should be a Legislature, in which Section 92 vested the power of law-making; the legislature could not confer that power upon a body other than itself. The procedure proposed by the Act in question would not be an Act of a Legislature within Section 92, would be wholly opposed to the spirit and principles of the Canadian Constitution, and would override the Legislature thereby provided. Further, the power to amend the Constitution given by Section 92, head 1, expressly expected "the office of the Lieutenant-Governor". Section 7 of the proposed Act, while preserving the power of veto and disallowance by the Governor-General provided for by Sections 55 and 90 of the Act of 1867, dispensed with the assent of the Lieutenant-Governor provided for by Sections 56 and 90 of that Act; even if Section 7 was not intended to dispense with that assent, Section 11 clearly did so. The proposed Act also violated the provisions of Section 54 (in conjunction with Section 90) as to money bills.

453. Their Lordships of the Judicial Committee held at page 944:

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the Constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in Section 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under Section 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Section 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.

454. I have set out this passage in extenso because this deals with one part of the reasoning given by the Court of Appeal. Regarding the Other part i.e. whether the Legislature could confer that power on a body other than itself, the Judicial Committee observed at page 945:

Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the

validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Section 92 of the Act of 1867 entrusts the legislative power in a Province to its legislature, and to that Legislature only. No doubt a body, with power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in Hodge v. The Queen 9 A.C. 117 the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; *but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence*. Their Lordships do no more than draw attention to the gravity of the Constitutional questions which thus arise.

(Emphasis supplied)

455. It is interesting to note that this position was indicated by Sir A. Hobhouse, a member of the Judicial Committee, while Hodge v. The Queen 9 A.C. 117 was being argued. This appears from Lefroy on Canadian Federal System at p. 387:

Upon the argument before the Privy Council in Hodge v. The Queen, Mr. Horace Davey contended that under this sub-section, (Section 92(1) of Canadian Constitution) provincial legislatures "could do what Lord Selborne, no doubt correctly, said in The Queen v. Burah [1878] 3 A.C. 905 the Indian legislature could not do, abdicate their whole legislative functions in favour of another body." But, as Sir A. Hobhouse remarked, this they cannot do. "They remain invested with a responsibility. Everything is done by them, and such officers as they create and give discretion to.

456. The learned Attorney-General submitted that this case decided only that in the absence of clear and unmistakable language in Section 92, head 1, the power which the Crown possesses through a person directly representing the Crown cannot be abrogated. It is true that this was the actual decision but the subsequent observations, which I have set out above, clearly show that the Judicial Committee was prepared to imply limitations as the Court of Appeal had done on the amending power conferred on the Provincial Legislature by Section 92, head 1.

457. The Attorney General said that the scope of this decision was referred to in Nadan v. The King (1926) A.C. 482 where at page 495 reference is made to this case in the following words:

In the case of In re Initiative and Referendum Act Lord Haldane, in declaring the judgment of the Board referred to "the impropriety in the absence of clear and unmistakable language of construing Section 92 as permitting the abrogation of any power which the Crown possesses through a person directly representing it"; an observation which applies with equal force to Section 91 of the Act of 1867 and to the abrogation of a power which remains vested in the Grown itself.

458. But this passage again dealt with the actual point decided and not the obiter dicta.

459. The first para of the head note in Nadan's (1926) A.C. 482 case gives in brief the actual decision of the Privy Council as follows:

Section 1025 of the Criminal Code of Canada, if and so far as it is intended to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, is invalid. The legislative authority of the Parliament of Canada as to criminal law and procedure, under Section 91 of the British North America Act, 1867, is confined to action to be taken in Canada. Further, an enactment annulling the royal prerogative to grant special leave to appeal would be inconsistent with the Judicial Committee Acts 1833 and 1844, and therefore would be invalid under Section 2 of the Colonial Laws Validity Act, 1865. The royal assent to the Criminal Code could not give validity to an enactment which was void by imperial statute; exclusion of the prerogative could be accomplished only by an Imperial statute.

460. For the aforesaid reasons I am unable to agree with the Attorney General and I hold that the Initiative and Referendum Act case shows that limitations can be implied in an amending power.

461. Mr. Seervai seeks to distinguish this case on another ground. According to him, these observations were obiter dicta, but even if they are treated as considered obiter dicta, they add nothing to the principles governing delegated legislation, for this passage merely repeats what had been laid down as far back as 1878 in The Queen v. Burah 5 I.A. 178 : (1878) 3 A.C. 889, where the Privy Council in a classical passage, observed:

But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further or to enlarge constructively those conditions and restrictions.

462. Mr. Seervai further says that having laid down the law as set out above, the Privy Council added:

Their Lordships agree that the Governor-General in Council could not, by any form of enactment; create in India, and arm with general legislative authority, a new legislative power, not created or authorised by the Council's Act.

463. We are unable to agree with him that the obiter dicta of the Judicial Committee deals with the same subject as Burah's 5 I.A. 178 case. Burah's' case was not concerned with the power to amend the Constitution but was concerned only with legislation enacted by the Indian Legislature. This

clearly appears from the passage just cited from Lefroy. The Governor-General in Council had no power to amend the Government of India Act, under which it functioned.

464. Reference was also made to the observations of one of us in Delhi Municipality v. B.C. & W. Mills MANU/SC/0175/1968 : [1968]3SCR251 where I had observed as follows:

Apart from authority, in my view Parliament has full power to delegate legislative authority to subordinate bodies. This power flows, in my judgment, from Article 246 of the Constitution. The word "exclusive" means exclusive of any other legislation and not exclusive of any subordinate body. There is, however, one restriction in this respect and that is also contained in Article 246. Parliament must pass a law in respect of an item or items of the relevant list. Negatively this means that Parliament cannot abdicate its functions.

465. Reference was also invited to another passage where I had observed:

The case of 1919 AC 935 provides an instance of abdication of functions by a legislature. No inference can be drawn from this case that delegations of the type with which we are concerned amount to abdication of functions.

466. It is clear these observations are contrary to many decisions of this Court and, as I said, I made these observations apart from authority.

467. But neither this Court nor the Judicial Committee in Queen v. Burah 5 I.A. 178 : (1878) 3 A.C. 889 were concerned with an amending power, and the importance of the obiter observations of the Privy Council lies in the fact that even in exercise of its amending power the legislature could not "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence," and the fact that in Canada the doctrine of limited delegated legislation does not prevail as it does in India.

468. It has been urged before us that in fact there has been no delegation of the amending powers to the State legislatures by Article 31C and what has been done is that Article 31C lifts the ban imposed by Part III from certain laws. I am unable to appreciate this idea of the lifting of the ban. Fundamental rights remain as part of the Constitution and on the face of them they guarantee to every citizen these fundamental rights. But as soon as the State legislates under Article 31C and the law abrogates or takes away these Constitutional rights, these fundamental rights cease to have any effect. The amendment is then made not by Parliament as the extent of the amendment is not known till the State legislates. It is when the State legislates that the extent of the abrogation or abridgement of the fundamental rights becomes clear. To all intents and purposes it seems to me that it is State legislation that effects an amendment of the Constitution. If it be assumed that Article 31C does not enable the States to amend the Constitution then Article 31C would be ineffective because the law which in effect abridges or takes away the fundamental rights would have been passed not in the form required by Article 368, i.e. by 2/3rd of the majority of Parliament but by another body which is not recognised in Article 368 and would be void on that ground.

469. The learned Solicitor General, relying on Mohamed Samsudeen Kariapper v. S.S. Wijesinha (1968) A.C. 717 urged that there can be implied amendment of the Constitution and Article 31C

may be read as an implied amendment of Article 368. What the Judicial Committee decided in this case was that a bill having received a certificate in the hands of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to no lass than two-thirds of the whole number of Members of the House in effect amounted to a bill for the amendment or repeal of any of the provisions of the order, and the words "amendment or repeal" included implied amendment.

470. Menzies, J., speaking for the Judicial Committee, observed:

Apart from the proviso to Sub-section (4) therefore the board has found no reason for not construing the words "amend or repeal" in the earlier part of Section 29(4) as extending to amendment or repeal by inconsistent law.... A bill which, if it becomes an Act, does amend or repeal some provision of the order is a bill "for the amendment or repeal of a provision of the order.

Later, he observed:

The bill which became the Act was a bill for an amendment of Section 24 of the Constitution simply because its terms were inconsistent with that section. It is the operation that the bill will have upon becoming law which gives it its Constitutional character, not any particular label which may be given to it. A bill described as one for the amendment of the Constitution, which contained no operative provision to amend the Constitution would not require the prescribed formalities to become a valid law whereas a bill which upon its passing into law would, if valid, alter the Constitution would not be valid without compliance with those formalities.

471. We are not here concerned with the question which was raised before the Judicial Committee because no one has denied that Article 31C is an amendment of the Constitution. The only question we are concerned with is whether Article 31C can be read to be an implied amendment of Article 368, and if so read, is it valid, i.e., within the powers of Parliament to amend Article 368 itself.

472. It seems to me that Article 31C cannot be read to be an implied amendment of Article 368 because it opens with the words "notwithstanding anything contained in Article 13" and Article 31C does not say that "notwithstanding anything contained in Article 368." What Article 31C does is that it empowers legislatures, subject to the condition laid down in Article 31C itself, to take away or abridge rights conferred by Articles 14, 19 and 31. At any rate, if it is deemed to be an amendment of Article 368, it is beyond the powers conferred by Article 368 itself. Article 368 does not enable Parliament to constitute another legislature to amend the Constitution, in its exercise of the power to amend Article 368 itself.

473. For the aforesaid reasons I hold that Section 3 of the Constitution (Twenty-fifth Amendment) Act 1971 is void as it delegates power to legislatures to amend the Constitution.

PART-VII.-Twenty-Ninth Amendment

474. The Constitution (Twenty-Ninth Amendment) reads:

2. Amendment of Ninth Schedule

In the Ninth Schedule to the Constitution after entry 64 and before the Explanation, the following entries shall be inserted, namely:

65. The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969).

66. The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).

475. The effect of the insertion of the two Kerala Acts in the Ninth Schedule is that the provisions of Article 31-B get attracted. Article 31-B which was inserted by Section 5 of the Constitution (First Amendment) Act, 1951, reads:

Insertion of new Article 31B.

After Article 31A of the Constitution as inserted by Section 4, the following article shall be inserted, namely:

31B. Validation of certain Acts and Regulations

Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it continue in force.

476. The First Amendment had also inserted Article 3-A and the ninth Schedule including 13 State enactments dealing with agrarian, reforms.

477. Before dealing with the points debated before us, it is necessary to mention that a new Article 31-A was substituted by the Constitution (Fourth Amendment) Act, 1955, for the original article with retrospective effect. The new article contained original Article 31A(1) as Clause (a) and added Clauses (b) to (e) and also changed the nature of the protective umbrella. The relevant part of Article 31A(1) as substituted has already been set out.

478. Under Article 31-A as inserted by the First Amendment a law was protected even if it was inconsistent with or took away or abridged any rights conferred by any provisions of Part III. Under the Fourth Amendment the protective umbrella extended to only Article 14, Article 19 or Article 31. The Seventeenth Amendment further amended the definition of the word "estate" in Article 31A. It also added seven Acts to the Ninth Schedule.

479. The argument of Mr. Palkhivala, on this part of the case, was two fold. First, he contended, that Article 31B, as originally inserted, had intimate relations with agrarian reforms, because at that stage Article 31-A dealt only with agrarian reforms. The words "without prejudice to the generality of the provisions contained in Article 31A", according to him, pointed to this

connection. He, in effect, said that Article 31-B having this original meaning did not change the meaning or its scope when a new Article 31-A containing Clauses (b) to (e) were included.

480. I am unable to accede to these contentions. The ambit of Article 31-B has been determined by this Court in three decisions. In State of Bihar v. Maharajadhiraja Sir Kameshwar Singh MANU/SC/0019/1952 : [1952]1SCR889 , Patanjali Sastri, C.J., rejected the limited meaning suggested above by Somayya, and observed:

"There is nothing in Article 31-B to indicate that the specific mention of certain statutes was only intended to illustrate the application of the general words of Article 31-A. The opening words of Article 31-B are only intended to make clear that Article 31-A should not be restricted in its application by reason of anything contained in Article 31-B and are in no way calculated to restrict the application of the latter article or of the enactments referred to therein to acquisition of "estates."

481. He held that the decision in Sibnath Banerji's MANU/FE/0009/1945 : (1945) F.C.R. 195 case afforded no useful analogy.

482. In Visweshwar Rao v. State of Madhya Pradesh MANU/SC/0020/1952 : [1952]1SCR1020 . Mahajan, J., repelled the argument in these words:

In my opinion the observations in Sibnath Banerji's case far from supporting the contention raised negatives it. Article 31-B specifically validates certain acts mentioned in the Schedule despite the provisions of Article 31-A and is not illustrative of Article 31-A. but stands independent of it.

483. In H.B. Jeejeebhoy v. Assistant Collector, Thana MANU/SC/0248/1964 : [1965]1SCR636 , to which decision I was a party, Subha Rao, C.J., observed that "Article 31-B is not governed by Article 31-A and that Article 31-B is a Constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution.

484. I may mention that the validity of the device was not questioned before the Court then.

485. But even though I do not accept the contention that Article 31-B can be limited by what is contained in Article 31-A, the question arises whether the Twenty-Ninth Amendment is valid.

486. I have held that Article 368 does not enable Parliament to abrogate or take away fundamental rights. If this is so, it does not enable Parliament to do this by any means, including the device of Article 31-B and the Ninth Schedule. This device of Article 31-B and the Ninth Schedule is bad insofar as it protects statutes even if they take away fundamental rights. therefore, it is necessary to declare that the Twenty-Ninth Amendment is ineffective to protect the impugned Acts if they take away fundamental rights.

487. In this connection I may deal with the argument that the device of Article 31B and the Ninth Schedule has up till now been upheld by this Court and it is now too late to impeach it. But the point now raised before us has never been raised and debated before. As Lord Atkin observed in Proprietary Articles Trade Association v. Attorney-General for Canada (1931) A.C. 310.

Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment.

488. If any further authority is needed, I may refer to Attorney-General for Australia v. The Queen and the Boilermakers' Society of Australia (1957) A.C. 288. The Judicial Committee, while considering the question whether certain sections of the Conciliation and Arbitration Act, 1904 1952 were ultra vires inasmuch as the Commonwealth Court of Conciliation and Arbitration had been invested with the executive powers alongwith the judicial powers, referred to the point why for a quarter of century no litigant had attacked the validity of this obviously illegitimate union, and observed:

Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged, so far a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment.

489. We had decided not to deal with the merits of individual cases and accordingly Counsel had not addressed any arguments on the impugned Acts passed by the Kerala State Legislature. It would be for the Constitution Bench to decide whether the impugned Acts take away fundamental rights. If they do, they will have to be struck down. If they only abridge fundamental rights, it would be for the Constitution Bench to determine whether they are reasonable abridgements essential in the public interest.

490. Broadly speaking, Constitutional amendments hitherto made in, Article 19 and Article 15 and, the agrarian laws enacted by various States furnish illustrations of reasonable abridgement of fundamental rights in the public interest.

491. It was said during the arguments that one object of Article 31-B was to prevent time-consuming litigation, which held up implementation of urgent reforms. If a petition is filed in the High Court or a suit is filed in a subordinate court or a point raised before a magistrate, challenging the validity of an enactment it takes years before the validity of an enactment is finally determined. Surely, this is not a good reason to deprive persons of their fundamental rights. There are other ways available to the Government to expedite the decision. It may for example propose ordinary legislation to enable parties to approach the Supreme Court for transfer of such cases to the Supreme Court for determination of substantial questions of interpretation of the Constitution.

PART VIII : Conclusions

492. To summarise, I hold that:

(a) Golak Nath's MANU/SC/0029/1967 : [1967]2SCR762 case declared that a Constitutional amendment would be bad if it infringed Article 13(2), as this applied not only to ordinary legislation but also to an amendment of the Constitution.

(b) Golak Nath's MANU/SC/0029/1967 : [1967]2SCR762 case did not decide whether Article 13(2) can be amended under Article 368 or determine the exact meaning of the expression "amendment of this Constitution" in Article 368.

(c) The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away, fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.

(d) The Constitution (Twenty-fourth Amendment) Act, 1971, as interpreted by me, has been validly enacted.

(e) Article 368 does not enable Parliament in its constituent capacity to delegate its function of amending the Constitution to another legislature or to itself in its ordinary legislative capacity.

(f) Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, as interpreted by me, is valid.

(g) Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is void as it delegates power to legislatures to amend the Constitution.

(h) The Constitution (Twenty-Ninth Amendment) Act, 1971 is ineffective to protect the impugned Acts if they abrogate or take away fundamental rights. The Constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them, and in the latter case whether they effect reasonable abridgements in the public interest.

493. The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with this judgment, and the law.

494. The cases are remitted to the Constitution Bench to be decided in accordance with this judgment, and the law. The parties will bear their own costs.

J.M. Shelat and A.N. Grover, JJ.

495. All the six writ petitions involve common questions as to the validity of the 24th, 25th and 29th amendments to the Constitution. It is not necessary to set out the facts which have already been succinctly stated in the judgment of the learned Chief Justice.

496. It was considered, when the larger bench was constituted, that the decision of the questions before us would hinge largely on the correctness or otherwise of the decision of this court in I.C. Golak Nath and Ors. v. State of Punjab and Anr. MANU/SC/0029/1967 : [1967]2SCR762 , according to which it was held, by majority, that Article 13(2) of the Constitution was applicable to Constitutional amendments made under Article 368 and that for that reason the fundamental rights in Part III could not be abridged in any manner or taken away. The decision in Golak Nath has become academic, for even on the assumption that the majority decision in that case was not correct, the result on the questions now raised before us, in our opinion, would just be the same. The issues that have been raised travel far beyond that decision and the main question to be

determined now is the scope, ambit and extent of the amending power conferred by Article 368. On that will depend largely the decision of the other matters arising out of the 25th and the 29th amendments.

497. The respective positions adopted by learned Counsel for the parties diverge widely and are irreconcilable. On the side of the petitioners, it is maintained inter alia that the power of the amending body (Parliament) under Article 368 is of a limited nature. The Constitution gave the Indian citizens the basic freedoms and a polity or a form of government which were meant to be lasting and permanent. therefore, the amending power does not extend to alteration or destruction of all or any of the essential features, basic elements and fundamental principles of the Constitution which power, it is said, vests in the Indian people alone who gave the Constitution to themselves, as is stated in its Preamble.

498. The respondents, on the other hand, claim an unlimited power for the amending body. It is claimed that it has the full constituent power which a legal sovereign can exercise provided the conditions laid down in Article 368 are satisfied. The content and amplitude of the power is so wide that, if it is so desired, all rights contained in Part III (Fundamental Rights) such as freedom of speech and expression; the freedom to form associations or unions and the various other freedoms guaranteed by Article 19(1) as also the right to freedom of religion as contained in Articles 25 to 28 together with the protection of interests of minorities (to mention the most prominent ones) can be abrogated and taken away. Similarly, Article 32 which confers the right to move this Court, if any fundamental right is breached, can be repealed or abrogated. The directive principles in Part IV can be altered drastically or even abrogated. It is claimed that democracy can be replaced by any other form of government which may be wholly undemocratic, the federal structure can be replaced by a unitary system by abolishing all the States and the right of judicial review can be completely taken away. Even the Preamble which declares that the People of India gave to themselves the Constitution, to constitute India into a Sovereign Democratic Republic for securing the great objectives mentioned therein can be amended; indeed it can be completely repealed. Thus, according to the respondents, short of total abrogation or repeal of the Constitution, the amending body is omnipotent under Article 368 and the Constitution can, at any point of time, be amended by way of variation, addition or repeal so long as no vacuum is left in the governance of the country.

499. These petitions which have been argued for a very long time raise momentus issues of great Constitutional importance. Our Constitution is unique, apart from being the longest in the world. It is meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiselled and shaped by great political leaders and legal luminaries, most of whom, had taken an active part in the struggle for freedom from the British yoke and who knew what domination of a foreign rule meant in the way of deprivation of basic freedoms and from the point of view of exploitation of the millions of Indians. The Constitution is an organic document which must grow and it must take stock of the vast socioeconomic problems, particularly, of improving the lot of the common man consistent with his dignity and the unity of the nation.

500. We may observe at the threshold that we do not propose to examine the matters raised before us on the assumption that Parliament will exercise the power in the way claimed on behalf of the

respondents nor did the latter contend that it will be so done. But while interpreting Constitutional provisions it is necessary to determine their width or reach in fact the area of operation of the power, its minimum and maximum dimensions cannot be demarcated or determined without fully examining the rival claims. Unless that is done, the ambit, content, scope and extent of the amending power cannot be properly and correctly decided.

501. For our purposes it is not necessary to go prior to the year 1934. It was in that year that the Indian National Congress made the demand for a Constituent Assembly as part of its policy. This demand was repeated in the Central Legislative Assembly in 1937 by the representatives of the Congress. By what is known as the Simla Conference 1945 the Congress repeated its stand that India could only accept the Constitution drawn by the people. After the end of World War II the demand was put forward very strongly by the Indian leaders including Mahatma Gandhi. Sir Stratford Cripps representing Britain had also accepted the idea that an elected body of Indians should frame the Indian Constitution.(The facts have been taken mainly from the Indian Constitution, Cornerstone of a Nation, by Granville Austin). In September 1945 the newly elected British Labour Government announced that it favoured the creation of a constituent body in India. Elections were to be held so that the newly elected provincial legislatures could act as electoral bodies for the Constituent Assembly. A parliamentary delegation was sent to India in January 1946 and this was followed by what is known as the Cabinet Mission. There were a great deal of difficulties owing to the differences between the approach of the Indian National Congress and the Muslim League led by Mr. M.A. Jinnah. The Cabinet Mission devised a plan which was announced on May 16, 1946. By the end of June, both the Muslim League and the Congress had accepted it with reservations. The Constituent Assembly was elected between July-August 1946 as a result of the suggestion contained in the statement of the Cabinet Mission. The Atlee Government's efforts to effect an agreement between the Congress and the Muslim League having failed, the partition of the country came as a consequence of the declaration of the British Government on June 3, 1947. As a result of that declaration certain changes took place in the Constituent Assembly. There was also readjustment of representation of Indian States from time to time between December 1946 and November 1949. Many Smaller States merged into the provinces, many united to from union of States and some came to be administered as commissioner's provinces. There was thus a gradual process by which the Constituent Assembly became fully representative of the various communities and interests, political, intellectual, social and cultural. It was by virtue of Section 8 of the Indian Independence Act 1947 that the Constituent Assembly was vested with the legal authority to frame a Constitution for India.

502. The first meeting of the Constituent Assembly took place on December 9, 1946 when the swearing in of members and election of a temporary president to conduct the business until the installation of a permanent head, took place. On December 13, 1946 Pandit Jawahar Lal Nehru moved the famous "Objectives Resolution" giving an outline, aims and objects of the Constitution. This resolution was actually passed on January 22, 1947 by all members of the Constituent Assembly (standing) and it declared among other matters that all power and authority of the sovereign Independent India, its constituent parts and organs of Government are derived from the people. By November 26, 1949 the deliberations of the Constituent Assembly had concluded and the Constitution had been framed. As recited in the Preamble it was on that date that the people of India in the Constituent Assembly adopted, enacted and gave to themselves "this Constitution" which according to Article 393 was to be called "The Constitution of India". In accordance with

Article 394 that Article and the other Articles mentioned therein were to come into force at once but the remaining provisions of the Constitution were to come into force on the 26th day of January 1950.

503. Before the scheme of the Constitution is examined in some detail it is necessary to give the pattern which was followed in framing it. The Constituent Assembly was unfettered by any previous commitment in evolving a Constitutional pattern "suitable to the genius and requirements of the Indian people as a whole". The Assembly had before it the experience of the working of the Government of India Act 1935, several features of which could be accepted for the new Constitution. Our Constitution borrowed a great deal from the Constitutions of other countries, e.g. United Kingdom, Canada, Australia, Ireland, United States of America and Switzerland. The Constitution being supreme all the organs and bodies owe their existence to it. None can claim superiority over the other and each of them has to function within the four-corners of the Constitutional provisions. The Preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence i.e. a Sovereign Democratic Republic. Parts III and IV which embody the fundamental rights and directive principles of state policy have been described as the conscience of the Constitution(The Indian Constitution by Granville Austin p. 50) The legislative power distributed between the Union Parliament and the State Legislatures cannot be so exercised as take away or abridge the fundamental rights contained in Part III. Powers of the Union and the States are further curtailed by conferring the right to enforce fundamental rights contained in Part III by moving the Supreme Court for a suitable relief See generally, Kania C.J. in A.K. Gopalan v. The State MANU/SC/0012/1950 : 1950CriLJ1383 , Article 32 itself has been constituted a fundamental right. Part IV containing the directive principles of State policy was inspired largely by similar provisions in the Constitution of the Eire Republic (1937). This Part, according to B.N. Rao; is like an Instrument of Instructions from the ultimate sovereign, namely, the people of India (B.N. Rao, India's Constitution in the Making p. 393).

The Constitution has all the essential elements of a federal structure as was the case in the Government of India Act 1935, the essence of federalism being the distribution of powers between the federation or the Union and the States or, the provinces. All the legislatures have plenary powers but these are controlled by the basic concepts of the Constitution itself and they function within the limits laid down in it Per Gajendragadkar C.J. in Special Reference No. 1 of 1964, [1965] 1 S.C.R. 413. All the functionaries, be they legislators, members of the executive or the judiciary take oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions. The Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights Ibid p. 446. It is a written and controlled Constitution.
It can be amended only to the extent of and in accordance with the provisions contained therein, the principal provision being Article 368. Although our Constitution is federal in its structure it provides a system modelled on the British parliamentary system. It its the executive that has the main responsibility for formulating the governmental policy by "transmitting it into law" whenever necessary. 'The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State." R.S. Ram Jawaya Kapur and

Ors. v. The State of Punjab MANU/SC/0011/1955 : [1955]2SCR225 . With regard to the civil services and the position of the judiciary the British model has been adopted inasmuch as the appointment of judges both of the Supreme Court of India and of the High Courts of the States is kept free from political controversies. Their independence has been assured. But the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections.

504. India is a secular State in which there is no State religion. Special provisions have been made in the Constitution guaranteeing the freedom of conscience and free profession, practice and propagation of religion and the freedom to manage religious affairs as also the protection of interests of minorities. The interests of scheduled castes and the scheduled tribes have received special treatment. The Rule of Law has been ensured by providing for judicial review. Adult suffrage, the "acceptance of the fullest implications of democracy" is one of the most striking features of the Constitution. According to K.M. Pannikar, "it may well be claimed that the Constitution is a solemn promise to the people of India that the legislature will do everything possible to renovate and reconstitute the society on new principles (Hindu Society at crossroads (By K.M. Pannikar) at pages 63-64).

505. We may now look at the Preamble.

It reads:

We, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

It may be mentioned that this Preamble and indeed the whole Constitution was drafted in the light of and directions contained in the "OBJECTIVES RESOLUTION" adopted on January 22, 1947.

506. According to Granville Austin (Cornerstone of a nation (Indian Constitution) by Granville Austin, p. 75), directive principles of State policy set forth the humanitarian socialist precepts that were the aims of the Indian social revolution. Granville Austin, while summing up the interrelationship of fundamental rights and directive principles, says that it is quite evident that the fundamental rights and the directive principles were designed by the members of the Assembly to

be the chief instruments in bringing about the great reforms of the social revolution. He gives the answer to the question whether they have helped to bring the Indian society closer to the Constitution's goal of social, economic and political justice for all in the affirmative (Indian Constitution (Cornerstone of a nation) by Granville Austin p. 113). Das C.J. in Re : Kerala Education Bill MANU/SC/0029/1958 : [1959]1SCR995 made the following observations with regard to Parts III and IV:

While our Fundamental Rights are guaranteed by Part III of the Constitution, Part IV of it on the other hand, lays down certain directive principles of State policy. The provisions contained in that Part are not enforceable by any court but the principles therein laid down are, nevertheless, fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Article 39 enjoins the State to direct its policy towards securing, amongst other things, that the citizens, men and women, equally, have the right to an adequate means of livelihood.

Although in the previous decisions of this Court in State of Madras v. Smt. Champakam Dorairajan MANU/SC/0007/1951 : [1951]2SCR525 and Mohd. Hanif Qureshi and Ors. v. The State of Bihar MANU/SC/0027/1958 : [1959]1SCR629 it had been held that the directive principles of State policy had to conform to and run subsidiary to the Chapter of Fundamental Rights, the learned Chief Justice was of the view which may be stated in his own words:

Nevertheless in determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body the court may not entirely ignore these directive principles of State policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible.

507. The first question of prime importance involves the validity of the Constitution Amendment Act 1971 (hereinafter called the 24th Amendment). It amended Article 368 of the Constitution for the first time. According to the Statement of Objects and Reasons in the Bill relating to the 24th amendment, the result of the judgment of this Court in Golak Nath's MANU/SC/0029/1967 : [1967]2SCR762 case has been that Parliament is considered to have no power to take away or curtail any of the fundamental rights guaranteed by Part III of the Constitution even if it becomes necessary to do so for giving effect tot the Directive Principles of State Policy and for attainment of the Objectives set out in the Preamble to the Constitution. It became, therefore, necessary to provide expressly that Parliament has the power to amend any provision of the Constitution including the provisions contained in Part III.

508. Article 368 is in a separate Part i.e. Part XX. Its marginal note before the 24th Amendment was "Procedure for amendment of the Constitution". It provided in the substantive portion of the Article how the Constitution "shall stand amended" when "An Amendment of this Constitution" was initiated by the introduction of a Bill in either House of Parliament. The following conditions had to be satisfied:

(i) The Bill had to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.

(ii) The Bill had to be presented for the assent of the President and his assent had to be obtained.

Under the proviso, it was necessary to obtain ratification of legislatures of not less than one half of the States by Resolutions before presenting the Bill to the President for assent if the amendment sought to make any change in the Articles, Chapters etc. mentioned in Clauses (a) to (e) Clause (e) was "the provisions of this Article".

509. The 24th Amendment made the following changes:

(i) The marginal heading has been substituted by "Power of Parliament to amend the Constitution and procedure there-for".

(ii) Article 368 has been re-numbered as Clause (2).

(iii) Before Clause (2), the following clause has been inserted:

Notwithstanding anything in this Constitution, Parliament may in exercise of the Constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(iv) In Clause (2) as renumbered, for the words "it shall be presented to President for his assent and upon such assent being given to the Bill" the words "it shall be presented to the President who shall give his assent to the Bill and thereupon" have been substituted.

(v) A new Clause (3) has been inserted, namely:

(3) Nothing in Article 13 shall apply to any amendment made under this article.

It may be mentioned that by the 24th amendment Clause (4) has been inserted in Article 13 itself. It is:

(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.

510. On behalf of the petitioners, Mr. Palkhivala stated that he need not for the purposes of this case dispute the 24th Amendment in so far as it leads to the following results:

(i) The insertion of the express provision in Article 368 that the source of the amending power is the Article itself.

(ii) The President is bound to give assent to any Bill duly passed under that Article.

The following three results have, however, been the subject of great deal of argument:

(i) The substitution of the words in Article 368 "amend by way of addition, variation or repeal..." in place of the concept 'amendment'.

(ii) Making it explicit in the said Article that when Parliament makes a Constitutional amendment under the Article it acts "in exercise of its constituent power".

(iii) The express provision in Article 13 and 368 that the bar in the former Article against abridging or taking away any of the fundamental rights should not apply to an amendment made under the latter Article.

In the judgment of Chief Justice Subba Rao with whom four learned judges agreed in GolaK Nath's case the source of the amending power was held to reside in Article 248 read with entry 97 of List I to the Seventh Schedule. Whether that view is sustainable or not need not be considered here now owing to the concession made by Mr. Palkhivala that by amendment of Article 368 such a power could be validly located in that Article even if it be assumed that it did not originally reside there. The real attack, therefore, is directed against the validity of the 24th Amendment in so far as the three results mentioned above are concerned. It has been maintained that if the effect of those results is that the Parliament has clothed itself with legal sovereignty which the People of India alone possess, by taking the full constituent power, and if the Parliament can in exercise of that power alter or destroy all or any of the 'essential features' of the Constitution, the 24th Amendment will be void. The fundamental rights embodied in Part III are a part of the 'essential features' and if their essence or core can be damaged or taken away, the 24th amendment will be void and illegal.

511. The position taken up on behalf of the respondents is that so far as Article 368 is concerned, the 24th Amendment has merely clarified the doubts cast in the majority judgment in Golak Nath. That Article, as it originally stood, contained the constituent power by virtue of which all or any of the provisions of the Constitution including the Preamble could be added to, varied or repealed. In other words, the power of amendment was unlimited and unfettered and was not circumscribed by any such limitations as have been suggested on behalf of the petitioners. therefore, the crux of the matter is the determination of the true ambit, scope and width of the amending provisions contained in Article 368 before the changes and alterations made in it by the 24th Amendment. If the Article conferred the power of the amplitude now covered by the 24th Amendment nothing new has been done and the amendment cannot be challenged. If, however, the original power though having the constituent quality was a limited one, it could not be increased. In other words the amending body cannot enlarge its own powers.

512. What then is the meaning of the word "amendment" as used in Article 368 of the Constitution. On behalf of the respondents it has been maintained that "amendment" of this Constitution" can have only one meaning. No question, can arise of resorting to other aids in the matter of interpretation or construction of the expression "amendment." On the other hand, the argument of Mr. Palkhivala revolves on the expression "amendment" which can have more than one meaning and for that reason it is essential to discover its true import as well as ambit by looking at and taking into consideration other permissible aids of construction. No efforts have been spared on both sides to give us all the meanings of the words "amendment" and "amend" from the various dictionaries as also authoritative books and opinions of authors and writers.

513. It is more proper, however, to look for the true 'meaning' of the word "amendment" in the Constitution itself rather than in the dictionaries. Let us first analyse the scheme of Article 368 itself as it stood before the 24th Amendment.

(i) The expression "amendment of the Constitution" is not defined or explained in any manner although in other Parts of the Constitution the word "amend" as will be noticed later has been expanded by use of the expression "amend by way of addition, variation or repeal.

(ii) The power in respect of amendment has not been conferred in express terms. It can be spelt out only by necessary implication.

(iii) The proviso uses the words "if such amendment seeks to make any change in". It does not use the words "change of" or "change" simpliciter.

(iv) The provisions of the Constitution mentioned in the proviso do not show that the basic structure of the Constitution can be changed if the procedure laid down therein is followed. For instance, Clause (a) in the proviso refers to Articles 54 and 55 which relate to the election of the President. It is noteworthy that Article 52 which provides that there shall be a President of India and Article 53 which vests the power of the Union in the President and provides how it shall be exercised are not included in Clause (a). It is incomprehensible that the Constitution makers intended that although the ratification of the legislatures of the requisite number of States should be obtained if any changes were to be made in Articles 54 and 55 but that no such ratification was necessary if the office of the President was to be abolished and the executive power of the Union was to be exercised by some other person or authority.

(v) Another Article which is mentioned in Clause (a) is Article 73 which deals with the extent of the executive power of the Union. So far as the Vice-President is concerned there is no mention of the relevant Articles relating to him. In other words the States have been given no voice in the question whether the office of the Vice-President shall be continued or abolished or what the method of his election would be.

(vi) The next Article mentioned in Clause (a) is 162 which deals with the extent of the executive power of the States. The Articles relating to the appointment and conditions of service of a Governor, Constitution and functions of his council of ministers as also the conduct of business are not mentioned in Clause (a) or any other part of the proviso.

(vii) Along with Articles 54, 55, 73 and 162. Article 241 is mentioned in Clause (a) of the proviso. This Article dealt originally only with the High Courts for States in Part C of the First Schedule.

(viii) Chapter IV of Part V of the Constitution deals with the Union Judiciary and Chapter V of Part VI with the High Courts in the States. Although these have been included in Clause (b) of the proviso it is surprising that Chapter VI of Part VI which relates to Subordinate Judiciary is not mentioned at all, which is the immediate concern of the States.

(ix) Chapter I of Part XI which deals with legislative relations between the Union and the States is included in Clause (b) of the proviso but Chapter II of that Part which deals with Administrative

Relations between the Union and the States and various other matters in which the States would be vitally interested are not included.

(x) The provisions in the Constitution relating to services under the State as also with regard to Trade and Commerce are not included in the proviso.

(xi) Clause (c) of the proviso mentions the lists in the Seventh Schedule. Clause (d) relates to the representation of States in Parliament and Clause (c) to the provisions of Article 368 itself.

514. The net result is that the provisions contained in Clauses (a) and (b) of the proviso do not throw any light on the logic, sequence or systematic arrangement in respect of the inclusion of those Articles which deal with the whole of the federal structure. These clauses demonstrate that the reason for including certain Articles and excluding other from the proviso was not that all Articles dealing with the federal structure or the States had been selected for inclusion in the proviso. The other unusual result is that if the fundamental rights contained in Part III have to be amended that can be done without complying with the provisions of the proviso. It is difficult to understand that the Constitution makers should not have thought of ratification by the States if such important and material rights were to be abrogated or taken away wholly or partially. It is also interesting that in order to meet the difficulty created by the omission of Articles 52 and 53 which relate to there being a President in whom the executive functions of the Union would vest, the learned Solicitor General sought to read by implication the inclusion of those Articles because according to him, the question of election cannot arise with which Articles 54 and 55 are concerned if the office of President is abolished.

515. We may next refer to the use of the words "amendment" or "amended" in other articles of the Constitution. In some articles these words in the context have a wide meaning and in another context they have a narrow meaning. The group of articles which expressly confer power on the Parliament to amend are five including Article 368. The first is Article 4. It relates to laws made under Articles 2 and 3 to provide for amendment of the First and the Second Schedules and supplemental, incidental and consequential matters. The second Article is 169 which provides for abolition or creation of Legislative Councils in States. The third and the fourth provisions are paras 7 and 21 of the 5th and 6th Schedules respectively which have to be read with Article 244 and which deal with the administration of Scheduled Areas and Tribal Areas. The expression used in Articles 4 and 169 is "amendment". In paras 7 and 21 it is the expanded expression "amend by way of addition, variation or repeal" which has been employed. Parliament has been empowered to make these amendments by law and it has been expressly provided that no such law shall be deemed to be an amendment of the Constitution for the purpose of Article 368.

516. It is apparent that the word "amendment" has been used in a narrower sense in Article 4. The argument that if it be assumed that Parliament is invested with wide powers under Article 4 it may conceivably exercise power to abolish the legislative and the judicial organs of the State altogether was refuted by this Court by saying that a State cannot be formed, admitted or set up by law under Article 4 by the Parliament which does not conform to the democratic pattern envisaged by the Constitution Mangol Singh and Anr. v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 . Similarly any law which contains provisions for amendment of the Constitution for the purpose of abolition or creation of legislative councils in States is only confined to that purpose and the word

"amendment" has necessarily been used in a narrow sense. But in Paras 7 and 21 the expanded expression is employed and indeed an attempt was made even in the Constituent Assembly for the insertion of a new clause before Clause (1) of draft Article 304 (Present Article 368). The amendment (Constituent Assembly Debates Vol. 9, p. 1663) (No. 3239) was proposed by Mr. H.V. Kamath and it was as follows:

Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner provided in this article.

Mr. Kamath had moved another amendment in draft Article 304 to substitute the words "it shall upon presentation to the President receive his assent". Both these amendments were negatived by the Constituent Assembly Ibid. It is noteworthy that the 24th amendment as now inserted has introduced substantially the same amendments which were not accepted by the Constituent Assembly.

517. The Constituent Assembly, must be presumed to be fully aware of the expanded expression, as on September 17, 1949 it had substituted the following section in place of the old Section 291 of the Government of India Act 1935 by means of Constituent Assembly Act 4 of 1949:

291. Power of the Governor General to amend certain provisions of the Act and order made thereunder.-

(1) The Governor General may at any time by Order make such amendments as he considers necessary whether by *way of addition, modification, or repeal*, (emphasis supplied) in the provisions of this Act or of any Order made thereunder in relation to any Provincial Legislature with respect to any of the following matters, that is to say,-

(a) ...

The word "amendment" has also been used in certain Articles like Article 107 dealing with legislative procedure and Article 111 which enables the President to send a message requesting the Houses to consider the desirability of introducing amendments etc., "Amendment" as used in these Articles could only have a limited meaning as is apparent from the context. On behalf of the petitioners a great deal of reliance has been placed on the contrast between the use of the word "amendment" in Article 4 and 169 and paras 7 and 21 of the 5th and 6th Schedules which use the composite expression "amend by way of addition, variation or repeal." It is pointed out that in Article 368 it is only the word "amendment" which has been used and if the Constitution makers intended that it should have the expanded meaning then there was no reason why the same phraseology would not have been employed as in paras 7 and 21 or as has been inserted now by the 24th amendment. The steps in this argument are:

(i) The contrast in the language employed in the different provisions of the Constitution in respect of amendment;

(ii) conferment of the wider power for the purpose of the 5th and 6th Schedules which empower the Parliament to alter and repeal the provisions of those Schedules relating to the institutions

contemplated by them, the law making authority set up under them and the fundamental basis of administration to be found in the two Schedules.

(iii) the wide language used in paras 7 and 21 of the two Schedules was meant for the purpose that at a proper time in the future or whenever considered necessary the entire basic structure of the Schedules could be repealed and the areas and tribes covered by them could be governed and administered like the rest of India.

(iv) the use of the word "amendment" simpliciter in Article 368 must have a narrower meaning than the composite expression "amend" or "amendment" by way of addition, variation or repeal and must correspond to the meaning of the word "amend" or "amendment" in Articles 4 and 169.

(v) The power of amending the Constitution is not concentrated in Article 368 alone but it is diffused as it is to be found in the other Articles and provisions mentioned. The reason why it was added that no law passed by the Parliament under those provisions shall be deemed to be an amendment of this Constitution for the purpose of Article 368 was only meant to clarify that the form and manner prescribed by Article 368 was not to be followed and the Parliament could, in the ordinary way, by following the procedure laid down for passing legislative enactments amend the Constitution to the extent mentioned in those Articles and provisions.

518. The learned Advocate General of Maharashtra, who appears for respondent No. 1, has laid a great deal of emphasis on the fact that Article 368 is the only Article which is contained in a separate Part having the title "Amendment of the Constitution". It is under that article that all other provisions including Article 4, 169 and paras 7 and 21 of the 5th and 6th Schedules respectively can be amended. The latter group of articles contain a limited power because those Articles are subordinate to Article 368. This is illustrated by the categorical statement contained in each one of those provisions that no such law amending the Constitution shall be deemed to be an amendment there of for the purpose of Article 368. As regards the composite expression "amend by way of addition, variation or repeal" employed in paras 7 and 21 of the two Schedules, it has been pointed out that Clause (2), in which the words "Amendment of this Constitution" are used clearly shows that addition, variation or repeal of any provision would be covered by the word "amendment". According to the learned Attorney General the word "amendment" must mean, variation addition or repeal. He has traced the history behind paras 7 and 21 of Schedules 5 and 6 to illustrate that the expression "amend by way of addition, variation or repeal" has no such significance and does not enlarge the meaning of the word "amendment". Our attention has been invited to a number of Articles in the Constitution itself out of which mention may be made of Articles 320(5) and 392(1) where the expressions used were "such modification, whether by way of repeal or amendment" and "such adoption whether by way of modification, addition or omission". It has been urged that the expression "amendment of this Constitution" has acquired substantive meaning over the years in the context of a written Constitution and it means that any part of the Constitution can be amended by changing the same either by variation, addition or repeal.

519. Dr. B.R. Ambedkar who was not only the Chairman of the Drafting Committee but also the main architect of the Constitution made it clear (Constituent Assembly Debates Vol. 9, page 1661) that the articles of the Constitution were divided into different categories; the first category was the one which consisted of articles which could be amended by the Parliament by a bare majority;

the second set of articles were such which required the two-third majority. This obviously had reference to the group of articles consisting of Articles 4, 169 and paras 7 and 21 of the two Schedules and Article 368 respectively. The scheme of the amending provisions outlined by Dr. B.R. Ambedkar seems to indicate that the Constitution makers had in mind only one distinction between the amending power conferred by the other Articles and Article 368. No such distinction was present to their mind of the nature suggested by the learned Advocate General that the amending power conferred by Articles other than Article 368 was of a purely subordinate nature. In one sense the power contained in the first group of Articles can be said to be subordinate in those Articles themselves could be amended by the procedure prescribed by Article 368. But that Article itself could be amended by the same procedure. It would not, therefore, be wrong to say that the amending power was of a diffused kind and was contained in more than one provision of the Constitution. It appears that the statement in the articles and provisions containing the amending power other than Article 368 that any amendment made under those articles would not amount to an amendment under Article 368 merely embodied the distinction emphasised by Dr. B.R. Ambedkar that one category could be amended by the Parliament by a bare majority and all the other articles could be amended by the said body but only by following the form and manner prescribed by Article 368. Although prima facie it would appear that the Constitution makers did not employ the composite expression in Article 368 for certain reasons and even rejected Mr. Kamath's amendment which pointedly brought to their notice that it was of material importance that the expanded expression should be used, it may not be possible to consider this aspect as conclusive for the purpose of determining the meaning of the word "amendment" in Article 368.

520. According to Mr. Palkhivala there can be three possible meanings of amendment:

(i) to improve or better; to remove an error, the question of improvement being considered from the standpoint of the basic philosophy underlying the Constitution but subject to its essential features.

(ii) to make changes which may not tall within (i) but which do not alter or destroy any of the basic features, essential elements or fundamental principles of the Constitution.

(iii) to make any change whatsoever including changes falling outside (ii).

He claims that the preferable meaning is that which is contained in (i) but what is stated in (ii) is also a possible construction. Category (iii) should be ruled out altogether. Category (i) and (ii) have a common factor, namely that the essential features cannot be damaged or destroyed.

521. On behalf of the respondents it is not disputed that the words "amendment of this Constitution" do not mean repeal or abrogation of this Constitution. The amending power, however, is claimed on behalf of the respondents to extend to addition, alteration, substitution, modification, deletion of each and every provision of the Constitution. The argument of the Attorney General is that the amending power in Article 368 as it stood before the 24th amendment and as it stands now has always been and continues to be the constituent power, e.g., the power to deconstitute or reconstitute the Constitution or any part of it. Constitution at any point of time cannot be so amended by way of variation, addition or repeal as to leave a vacuum in the government of the country. The whole object and necessity of amending power is to enable the

Constitution to continue and such a constituent power, unless it is expressly limited in the Constitution itself, can by its very nature have no limit because if any such limit is assumed, although not expressly found in the Constitution, the whole purpose of an amending power will be nullified. It has been pointed out that in the Constitution First Amendment Act which was enacted soon after the Constitution of India came into force, certain provisions were inserted, others substituted or omitted and all these were described as amendments of the article mentioned therein. In the context of the Constitution, amendment reaches every provision including the Preamble and there is no ambiguity about it which may justify having resort to either looking at the other Articles for determining the ambit of the amendatory power or taking into consideration the Preamble or the scheme of the Constitution or other permissible aids to construction.

522. A good deal of reliance has been placed on behalf of the respondents on Article 5 of the Constitution of the United States hereinafter called the 'American Constitution' which deals with amendment and its interpretation by the American courts. Reference has been made to the writings of authors and writers who have dealt with the meaning of the word "amendment" in the American Constitution. It has been argued that in Article 5 of that Constitution the word used is "amendments" and our Constitution makers had that word in mind when they employed the expression "amendment of this Constitution" in Article 368. We propose to refer to the decision from other countries including those of the Supreme Court of the United States later. We wish to observe, at this stage, that our founding fathers had primarily the Constitutions of Canada, Australia, Eire, U.S.A. and Switzerland in view apart from that of Japan. The whole scheme and language of Article 368 is quite different from the amending provisions in Constitutions of those countries. For instance, in U.S.A., Eire, Australia, Switzerland and Japan the people are associated in some manner or the other directly with the amending process. It would be purely speculative or conjectural to rely on the use of the word "amend" or "amendment" in the Constitution of another country unless the entire scheme of the amending section or article is also kept in mind. In India Parliament is certainly representative of the people but so are similar institutions in the countries mentioned above and yet there is a provision for ratification by convention or referendum or submission of the proposed law to electors directly. Another way of discovering the meaning on which both sides relied on is to refer to the various speeches in the Constituent Assembly by the late Prime Minister Pandit Jawahar Lal Nehru and late Dr. B.R. Ambedkar the Chief Architects of the Constitution. The position which emerges from an examination of their speeches does not lead to any clear and conclusive result. Their Speeches show that our Constitution was to be an amendable one and much rigidity was not intended. Pandit Nehru time and again emphasised that while the Constitution was meant to be as solid and as permanent a structure as it could be, nevertheless there was no permanence in the Constitution and there should be certain flexibility; otherwise it would stop a nation's growth. Dr. Ambedkar, while dealing with draft Article 25 corresponding to the present Article 32, said that the most important Article without which the Constitution would be a nullity and which was the very soul of the Constitution and the heart of it was that Article. But what he said at a later stage appears to suggest that that article itself could be amended and according to the respondents even abrogated. This illustration shows that nothing conclusive can emerge by referring to the speeches for the purpose of interpretation of the word "amendment".

523. It is not possible to accept the argument on behalf of the respondents that amendment can have only one meaning. This word or expression has several meanings and we shall have to

determine its true meaning as used in the context of Article 368 by taking assistance from the other permissible aids to construction. We shall certainly bear in mind the Well known principles of interpretation and construction, particularly, of an instrument like a Constitution. A Constitution is not to be construed in any narrow and pedantic sense. A broad and liberal spirit should inspire those whose duty it is to interpret it Gwyer C.J. In Re. C.P. & Berar Sales of Motor Spirit & Motor Lubricants Taxation Act 1938 [1939] F.C.R. 18 adopted the words of Higgins J., of the High Court of Australia from the decision in Attorney General for New South Wales v. The Brewery Employees Union of New South Wales etc. [1908] 6 C.L.R. 469 according to which even though the words of a Constitution are to be interpreted on the same principles of interpretation as are applied to any ordinary law, these very principles of interpretation require taking into account the nature and scope of the Act remembering that "it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be". [1939] F.C.R. 18. The decision must depend on the words of the Constitution as provisions of no two Constitutions are in identical terms. The same learned Chief Justice said that the "grant of the power in general terms standing by itself would no doubt be construed in the wider sense, but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act." ibid p. 42. The observations of Lord Wright in fames v. Commonwealth of Australia [1936] A.C. 578 were also quoted in the aforesaid judgment of the Federal Court of India at page 73:

The question, then, is one of construction and in the ultimate resort must be determined upon the actual words used read not in a vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and the construction must hold a balance between all its parts.

Apart from the historical background and the scheme of the Constitution the use of the Preamble has always been made and is permissible if the word "amendment" has more than one meaning. Lord Green in Bidis v. General Accident, Fire and Life Assurance Corporation [1948] 2 All. E.R. 998 pointed out that the words should never be interpreted in vacuo because few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method which he preferred was not to take the particular words and attribute to them a sort of prima facie meaning which may have to be displaced or modified. To use his own words "it is to read the statute as a whole and ask oneself the question.

In this state, in this context, relating to this subject matter, what is the true meaning of that word?"

We shall first deal with the Preamble in our Constitution. The Constitution makers gave to the preamble the pride of place. It embodied in a solemn form all the ideals and aspirations for which the country had struggled during the British regime and a Constitution was sought to be enacted in accordance with the genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the

Constituent Assembly. The preamble was, therefore, meant to embody in a very few and well defined words the key to the understanding of the Constitution.

524. It would be instructive to advert to the various stages through which the Preamble passed before it was ultimately adopted by the Constituent Assembly. In the earlier draft of the Union Constitution the Preamble was a somewhat formal affair. The one drafted by B.N. Rau said:

We, the People of India, seeking to promote the common good, do hereby, throughout chosen representatives, enact, adopt and give to ourselves this Constitution.

The Union Constitution Committee provisionally accepted the draft Preamble of B.N. Rau and reproduced it in its report of July 4, 1947 without any change with the tacit recognition, at that stage, that the Preamble would finally be based on the Objectives Resolution.

525. On July 18, 1947, Pandit Nehru in a statement observed that the Preamble was covered more or less by the Objectives Resolution which it was intended to incorporate in the final Constitution. Three days later, while moving the report of the Union Constitution Committee, he suggested that it was not at that stage necessary to consider the Preamble since the Assembly stood by the basic principles laid down in the Objectives Resolution and these could be incorporated in the Preamble later. The suggestion was accepted and further consideration of the Preamble was held over.

526. The Drafting Committee considered the Preamble at a number of its meetings in February 1948. The Committee omitted that part of the Objectives Resolution which declared that the territories of India would retain the status of autonomous units with residuary powers. By this time the opinion had veered round for a strong center with residuary powers. The Drafting Committee felt that the Preamble should be restricted "to defining the essential features of the new State and its basic socio-political objectives and that the other matters dealt with in the Resolution could be more appropriately provided in the substantial parts of the Constitution". Accordingly it drafted the Preamble, which substantially was in the present form.

527. Meanwhile important developments had taken place in regard to the Indian States. With the completion of the process of merger and integration of the Indian States the principle had been accepted (i) of sovereign powers being vested in the people, and (ii) that their Constitutions should be framed by the Constituent Assembly and should form integrated part of the new Constitution. On October 12, 1949, Sardar Patel declared in the Assembly that the new Constitution was "not an alliance between democracies and dynasties, but a real union of the Indian people, built on the basic concept of the sovereignty of the people.

528. The draft preamble was considered by the Assembly on October 17, 1949. The object of putting the Preamble last, the President of Assembly explained, was to see that it was in conformity with the Constitution as accepted. Various amendments were at this stage suggested, but were rejected. One of such was the proposal to insert into it the words "In the name of God". That was rejected on the ground that it was inconsistent with the freedom of faith which was not only promised in the Preamble itself but was also guaranteed as a fundamental right (Constituent Assembly Debates Vol. 10, pp. 432-442).

529. An amendment was moved in the Constituent Assembly to make it clear beyond all doubt that sovereignty vested in the people. It was not accepted on the short ground that "the Preamble as drafted could convey no other meaning than that the Constitution emanated from the people and sovereignty to make this Constitution vested in them (The Framing of India's Constitution by B. Shiva Rao, p. 131)

530. The history of the drafting and the ultimate adoption of the Preamble shows:

(1) that it did not "walk before the Constitution" as is said about the preamble to the United States Constitution;

(2) that it was adopted last as a part of the Constitution:

(3) that the principles embodied in it were taken mainly from the Objectives Resolution;

(4) the Drafting Committee felt, it should incorporate in it "the essential features of the "new State":

(5) that it embodied the fundamental concept of sovereignty being in the people.

531. In order to appreciate how the preamble will assist us in discovering the meaning of the word "amendment" employed in Article 368 we may again notice the argument presented by the respondents that the amending body can alter, vary or repeal any provision of the Constitution and enact it and apply that process to the entire Constitution short of total repeal and abrogation. It is maintained on behalf of the Respondents that by virtue of the amending power even the preamble can be varied, altered or repealed. Mr. Palkhivala, however, relics a great deal on the preamble for substantiating the contention that "amendment" does not have the widest possible meaning as claimed by the respondents and there are certain limitations to the exercise of the amending power and, therefore, the expression "amendment" should be construed in the light of those limitations. All the elements of the Constitutional structure, it is said, are to be found in the preamble and the amending body cannot repeal or abrogate those essential elements because if any one of them is taken away the edifice as erected must fall.

532. The learned Advocate General of Maharashtra, says that the preamble itself is ambiguous and it can be of no assistance in that situation. It has further been contended that the concepts recited in the preamble, e.g., human dignity, social and economic justice are vague; different schools of thought hold different notions of their concepts. We are wholly unable to accede to this contention. The preamble was finalised after a long discussion and it was adopted last so that it may embody the fundamentals underlying the structure of the Constitution It is true that on a concept such as social and economic justice there may be different schools of thought but the Constitution makers knew what they meant by those concepts and it was with a view to implement them that they enacted Parts III (Fundamental Rights) and Part IV (Directive Principles of State Policy) - both fundamental in character-on the one hand, basic freedoms to the individual and on the other social security, justice and freedom from exploitation by laying down guiding principles for future governments.

533. Our court has consistently looked to the preamble for guidance and given it a transcendental position while interpreting the Constitution or other laws. It was so referred in Behram Khurshid Pesikaka's MANU/SC/0065/1954 : 1955CriLJ215 case. Bhagwati J., in Basheshar Nath v. Commissioner of Income-tax [1959] Suppl. 1 S.C.R. 528 Rajasthan when considering the question of waiver of a fundamental right referred to the preamble and to the genesis of declaration of fundamental rights which could be traced to the report of the Nehru Committee of 1928. He proceeded to say "the object sought to be achieved was, as the preamble to the Constitution states...." In Re Kerala Education Bill MANU/SC/0029/1958 : [1959]1SCR995 this Court referred to the preamble extensively and observed that the fundamental rights were provided for "to implement and fortify the supreme purpose set forth in the preamble". The court also made use of the "inspiring and nobly expressed preamble to our Constitution" while expressing opinion about the legality of the various provisions of the Kerala Education Bill 1957. It is unnecessary to multiply citations from judgments of this Court in which the preamble has been treated almost as sacrosanct and has been relied on or referred to for the purpose of interpreting legislative provisions. In other countries also following the same system of jurisprudence the preamble has been referred to for finding out the Constitutional principles underlying a Constitution. In Rex v. Hess [1949] Bom. L.R. 199 it was said:

I conclude further that the opening paragraph of the preamble to the B.N.A. Act 1867, which provided for a "Constitution similar in principle to that of the United Kingdom" thereby adopted the same Constitutional principles and hence Section 1025A is contrary to the Canadian Constitution and beyond the competence of Parliament or any provincial legislature to enact so long as our Constitution remains in its present form of a Constitutional democracy.

In John Switzman v. Freda Elbling & Attorney General of the Province of Quebec [1957] Can L.R. 285 (Supreme Court), Abbot J., relied on the observations of Duff C.J., in an earlier decision in Re Alberta Statutes [1938] S.C.R. 100 which was affirmed in Attorney General for Alberta v. Attorney General for Canada [1939] A.C. 117-that view being that the preamble of the British North America Act showed plainly enough that the Constitution of the Dominion was to be similar in principle to that of the United Kingdom. The statute contemplated a Parliament working under the influence of public opinion and public discussion. In McCawley v. The King Lord Birkenhead [1920] A.C. 691 (Lord Chancellor) while examining the contention that the Constitution Act of 1867 (Queensland, Australia) enacted certain fundamental organic provisions of such a nature which rendered the Constitution stereotyped or controlled proceeded to observe at page 711:

It may be premised that if a change so remarkable were contemplated one would naturally have expected that the legislature would have given some indication, in the very lengthy preamble of the Act, of this intention. It has been seen that it is impossible to point to any document or instrument giving to, or imposing upon the Constitution of Queensland this quality before the year 1867. Yet their Lordships discern nowhere in the preamble the least indication that it is intended for the first time to make provisions which are sacrosanct or which at least can only be modified by methods never previously required.

534. In re: Berubari Union and Exchange of Enclaves MANU/SC/0049/1960 : [1960]3SCR250 an argument had been raised that the preamble clearly postulated that the entire territory of India was beyond the reach of Parliament and could not be affected either by ordinary legislation or even by

Constitutional amendment. The Court characterized that argument as extreme and laid down the following propositions:

1. A preamble to the Constitution serves as a key to open the minds of the makers, and shows the general purposes for which they made the several provisions in the Constitution;

2. The preamble is not a part of our Constitution;

3. It is not a source of the several powers conferred on government under the provisions of the Constitution;

4. Such powers embrace those expressly granted in the body of the Constitution "and such as may be implied from those granted";

5. What is true about the powers is equally true about the prohibitions and limitations;

6. The preamble did not indicate the assumption that the first part of preamble postulates a very serious limitation on one of the very important attributes of sovereignty, viz., ceding territory as a result of the exercise of the sovereign power of the State of treaty-making and on the result of ceding a part of the territory.

535. On behalf of the respondents reliance has been placed on this case for the proposition that no limitation was read by virtue of the preamble. A careful reading of the judgment shows that what was rejected was the contention that the preamble was the source of power. Indeed, it was held that the preamble was not even a part of the Constitution and that one must seek power and its scope in the provisions of the Constitution. The premise for the conclusion was that a preamble is not the source of power since it is not a part of the Constitution. The learned Advocate General of Maharashtra has himself disputed the conclusion in the aforesaid judgment that the preamble is not a part of the Constitution. It is established that it was adopted by the Constituent Assembly after the entire Constitution had been adopted.

536. Mr. Palkhivala has given an ingenious explanation as to why the preamble cannot be regarded as a part of our Constitution. He makes a distinction between the concept of the Constitution and the concept of the Constitution's statutes. The last words in the preamble "This Constitution is the Constitution which follows the preamble, "according to Mr. Palkhivala. It starts with Article 1 and ended originally with the Eighth Schedule and now ends with the Ninth Schedule after the First Amendment Act 1951. It is sought to be concluded from this that the way in which the preamble has been drafted, indicates that what follows or is annexed to the preamble is the Constitution of India. It is further argued that:

The Constitution statute of India consist of two parts-one, the preamble and the other the Constitution: The preamble is a part of the Constitution statute, but is not a part of the Constitution. It precedes it; The preamble came into force on Nov. 26, 1949 and not 26th January 1950 as contended on behalf of Respondent No. 1

537. There is a clear recital in the preamble that the people of India gave to themselves this Constitution on the 26th day of November 1949. Even if the preamble was actually adopted by the Constituent Assembly at a later date, no one can question the statement made in the Preamble that the Constitution came into force on the date mentioned therein. The preamble itself must be deemed by a legal fiction to have come into force with effect from 26th November 1949. Even if this is a plausible conclusion, it does not appear to be sufficient to support the observation in the Berubari case that the preamble was not a part of the Constitution. To our mind, it hardly makes any substantial difference whether the preamble is a part of the Constitution or not. The preamble serves several important purposes. Firstly, it indicates the source from which the Constitution comes viz. the people of India. Next, it contains the enacting clause which brings into force the Constitution. In the third place, it declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of government and polity which was to be established. From all these, if any provision in the Constitution had to be interpreted and if the expressions used therein were ambiguous, the preamble would certainly furnish valuable guidance in the matter, particularly when the question is of the correct ambit, scope and width of a power intended to be conferred by Article 368.

538. The stand taken up on behalf of the respondents that even the preamble can be varied, altered or repealed, is an extraordinary one. It may be true about ordinary statutes but it cannot possibly be sustained in the light of the historical background, the Objectives Resolution which formed the basis of the preamble and the fundamental position which the preamble occupies in our Constitution. It constitutes a land-mark in India's history and sets out as a matter of historical fact what the people of India resolved to do for moulding their future destiny. It is unthinkable that the Constitution makers ever conceived of a stage when it would be claimed that even the preamble could be abrogated or wiped out.

539. If the preamble contains the fundamentals of our Constitution, it has to be seen whether the word amendment in Article 368 should be so construed that by virtue of the amending power the Constitution can be made to suffer a complete loss of identity or the basic elements on which the Constitutional structure has been erected, can be eroded or taken away. While dealing with the preamble to the United States, Constitution it was observed by Story (Commentaries on the Constitution of the United States, 1833 edition, Volume I), that the preamble was not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the Government. Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution and not substantially to create them Story, para 462 at p. 445.

540. Now let us examine the effect of the declarations made and the statements contained in the preamble on interpretation of the word "amendment" employed in Article 368 of the Constitution. The first thing which the people of India resolved to do was to constitute their country into a Sovereign Democratic Republic. No one can suggest that these words and expressions are ambiguous in any manner. Their true import and connotation is so well known that no question of any ambiguity is involved. The question which immediately arises is whether the words "amendment or amended" as employed in Article 368 can be so interpreted as to confer a power on the amending body to take away any of these three fundamental and basic characteristics of our polity. Can it be said or even suggested that the amending body can make institutions created by

our Constitution undemocratic as opposed to democratic; or abolish the office of the President and, instead, have some other head of the State who would not fit into the conception of a "Republic" The width of the power claimed on behalf of the respondents has such large dimension that even the above part of the preamble can be wiped out from which it would follow that India can cease to be a Sovereign Democratic Republic and can have a polity denuded of sovereignty, democracy and Republican character.

541. No one has suggested-it would be almost unthinkable for anyone to suggest-that the amending body acting under Article 368 in our country will ever do any of the things mentioned above, namely change the Constitution in such a way that it ceases to be a Sovereign Democratic Republic. But while examining the width of the power, it is essential to see its limits, the maximum and the minimum; the entire ambit and magnitude of it and it is for that purpose alone that this aspect is being examined. While analysing the scope and width of the power claimed by virtue of a Constitutional provision, it is wholly immaterial whether there is a likelihood or not of such an eventuality arising.

542. Mr. Palkhivala cited example of one country after another in recent history where from a democratic Constitution the amending power was so utilized as to make that country wholly undemocratic resulting in the negation of democracy by establishment of rule by one party or a small oligarchy. We are not the least impressed by these instances and illustrations. In the matter of deciding the questions which are before us, we do not want to be drawn into the political arena which, we venture to think, is "out of bounds" for the judiciary and which tradition has been consistently followed by this Court. [See Wanchoo J, as he then was in Golak Nath MANU/SC/0029/1967 : [1967]2SCR762].

543. Since the respondents themselves claim powers of such wide magnitude that the results which have been briefly mentioned can flow apart from others which shall presently notice, the consequences and effect of suggested construction have to be taken into account as has been frequently done by this Court. Where two constructions are possible the court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory State of Punjab v. Ajaib Singh and Anr. [1953] S.C.R. 254 at page 264; Director of Customs, Baroda v. Dig Vijay Singhji Spinning & Weaving Mills Ltd. MANU/SC/0365/1961 : 1983ECR2163D(SC) .

544. In Don John Francis Douglas Liyange and Ors. v. The Queen [1967] (I) A.C. 259, Lord Pearson declined to read the words of Section 29(1) of the Ceylon Constitution as entitling the Parliament to pass legislation which usurped the judicial power of the judicature by passing an Act of Attainder against some persons or instructing a judge to bring in a verdict of guilty against someone who is being tried-if in law such usurpation would otherwise be contrary to the Constitution.

545. In Maxwell's Interpretation of Statutes (12th Edition), Chapter 5 deals with restrictive construction and the very first section contains discussion on the question whether the consequences of a particular construction being adopted can be considered and examples have been given from cases decided in England with reference to the consequences. According to

American Jurisprudence, Vol. 50, 1962 Reprint at pp. 372, 373 there are cases in which consequences of a particular construction are in and of themselves, conclusive as to the correct solution of the question.

546. The learned Advocate General of Maharashtra has contended that the proper way of construing an amending provision is not to take into consideration any such speculation that the powers conferred by it, would be abused. It has also been said that any court deciding the validity of a law cannot take into consideration extreme hypothetical examples or assume that a responsible legislature would make extravagant use of the power The Bank of Toronto v. Lambe (1887) 12 A.C. 575.

547. According to Mr. Palkhivala, the test of the true width of a power is not how probable it is that it may be exercised but what can possibly be done under it; that the abuse or misuse of power is entirely irrelevant; that the question of the extent of the power cannot be mixed up with the question of its exercise and that when the real question is as to the width of the power, expectation that it will never be used is as wholly irrelevant as an imminent danger of its use. The court does not decide what is the best what is the worst. It merely decides what can possibly be done under a power if the words conferring it are so construed as to have an unbounded and limitless width, as claimed on behalf of the respondents.

548. It is difficult to accede to the submission on behalf of the respondents that while considering the consequences with reference to the width of an amending power contained in a Constitution any question of its abuse is involved. It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution makers or for the parliament or the legislature. But that the real consequences can be taken into account while judging the width of the power is well settled. The Court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power. According to the learned Attorney General, the declaration in the preamble to our Constitution about the resolve of the people of India to constitute it into a Sovereign, Democratic Republic is only a declaration of an intention which was made in 1947 and it is open to the amending body now under Article 368 to change the Sovereign Democratic Republic into some other kind of polity. This by itself shows the consequence of accepting the construction sought to be put on the material words in that article for finding out the ambit and width of the power conferred by it.

549. The other part of the Preamble may next be examined. The Sovereign Democratic Republic has been constituted to secure to all the citizens the objectives set out. The attainment of those objectives forms the fabric of and permeates the whole scheme of the Constitution.

While most cherished freedoms and rights have been guaranteed the government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be balanced and harmonised-then alone the dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted. The three main organs of government legislative, executive and judiciary and the entire mechanics of their functioning were fashioned in the light of the objectives in the Preamble, the nature of polity mentioned therein and the grand vision of a united and free India in which every individual high or low will partake of all that is capable of achievement. We must, therefore, advert to the

background in which Parts III and IV came to be enacted as they essentially form a basic element of the Constitution without which its identity will completely change.

550. It is not possible to go back at any length to the great struggle for freedom from British Rule and the attainment of independence. The British executive's arbitrary acts, internments and deportations without trial and curbs on the liberty of the press and individuals are too well known to every student of Indian history to be specifically mentioned. This was before some essential rights based on British Common law and jurisprudence came to be embodied in various Parliamentary enactments. According to B.N. Rau Year Book of Human Rights 1947, human rights, with few exceptions, were not guaranteed by the Constitution (Government of India Act). Shiva Rao has in his valuable study Framing of India's Constitution (B. Shiva Rao) given the various stages beginning with 1895 Constitution of India Bill framed by the Indian National Congress which envisaged a Constitution guaranteeing a number of freedoms and rights. Two events at a later stage exercised a decisive influence on the Indian leaders. One was the inclusion of a list of fundamental rights in the Constitution of Irish Free State in 1921 and the other, the problem of minorities. Ibid p. 172.

551. The next steps were the report of the Nehru Committee in 1928, the reiteration of the resolve at the session of the Indian National Congress at its Karachi Session in March 1931 and omitting some details, the deliberations of the Sapru Committee appointed by the All India Parties Conference (1944-45). The British Cabinet Mission in 1946 recommended the setting up of an Advisory Committee for reporting inter alia on fundamental rights. Before reference is made to the Objectives Resolution adopted in January 22, 1947 it must be borne in mind that the post war period in Europe had witnessed a fundamental orientation in juristic thinking, particularly in West Germany, characterized by a farewell to positivism, under the influence of positivist legal thinking. During the pre-war period most of the German Constitutions did not provide for judicial review which was conspicuously absent from the Weimar Constitution even though Hugo Preuss, often called the Father of that Constitution, insisted on its inclusion. After World War II when the disastrous effects of the positivist doctrines came to be realized there was reaction in favour of making certain norms immune from amendment or abrogation. This was done in the Constitution of the Federal Republic of Germany. The atrocities committed during Second World War and the world wide agitation for human rights ultimately embodied in the U.N. Declaration of Human Rights on, which a number of the provisions in Parts III and IV of our Constitution are fashioned must not be forgotten while considering these matters. Even in Great Britain, where the doctrine of the legal sovereignty of Parliament has prevailed since the days of Erskinc, Blackstone, Austin and lastly Dicey, the new trend in judicial decisions is to hold that there can be at least procedural limitations (requirement of form and manner) on the legislative powers of the legislature. This follows from the decisions in Moore v. The Attorney General for the Irish Free State (1935) A.C. 484; Attorney General for New South Wales v. Trethowan (1932) A.C. 526. The Objective's Resolution declared, inter alia, the firm, and the solemn resolve to proclaim India as Independent Sovereign Republic and to draw up for her future governance a Constitution. Residuary powers were to vest in the States. All power and authority of the Sovereign Independent India, its constituent parts and organs of government, were derived from the people and it was stated:

(5) wherein shall be guaranteed and secured to all the people of India, justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations, and

552. It may be recalled that as regards the minorities the Cabinet Mission had recognised in their report to the British Cabinet on May 6, 1946 only three main communities; general, muslims and sikhs. General community included all those who were non-muslims or non-sikhs. The Mission had recommended an Advisory Committee to be set up by the Constituent Assembly which was to frame the rights of citizens, minorities, tribals and excluded areas. The Cabinet Mission statement had actually provided for the cession of sovereignty to the Indian people subject only to two matters which were; (1) willingness to conclude a treaty with His Majesty's Government to cover matters arising out of transfer of power and (2) adequate provisions for the protection of the minorities. Pursuant to the above and paras 5 and 6 of the Objectives Resolution the Constituent Assembly set up an Advisory Committee on January 24, 1947. The Committee was to consist of representatives of muslims, the depressed classes or the scheduled castes, the sikhs, christains, parsis, anglo-Indians, tribals and excluded areas besides the Hindus Constituent Assembly Debates Vol. 2 pages 330-349. As a historical fact it is safe to say that at a meeting held on May 11, 1949 a resolution for the abolition of all reservations for minorities other than the scheduled castes found whole hearted support from an overwhelming majority of the members of the Advisory Committee. So far as the scheduled castes were concerned it was felt that their peculiar position would necessitate special reservation for them for a period of ten years. It would not be wrong to say that the separate representation of minorities which had been the feature of the previous Constitutions and which had witnessed so much of communal tension and strife was given up in favour of joint electorates in consideration of the guarantee of fundamental rights and minorities rights which it was decided to incorporate into the new Constitution. The Objectives Resolution can be taken into account as a historical fact which moulded its nature and character. Since the language of the Preamble was taken from the resolution itself the declaration in the Preamble that India would be a Sovereign, Democratic Republic which would secure to all its citizens justice, liberty and equality was implemented in Parts III and IV and other provisions of the Constitution. These formed not only the essential features of the Constitution but also the fundamental conditions upon and the basis on which the various groups and interests adopted the Constitution as the Preamble hoped to create one unified integrated community. The decision of the Privy Council in the Bribery Commissioner v. Pedrick Ranasinghe [1965] A.C. 172 will require a more detailed discussion in view of the elaborate arguments addressed on both sides based on it. But for the present all that need be pointed out is that the above language is borrowed mainly from the judgment of Lord Pearce who, after setting out Section 29 of the Ceylon Constitutional Order which gave Parliament the power to make laws for the peace, order and good government of the island, said with regard to Clause (2) according to which no law could prohibit or restrict the free exercise of any religion,

There follow (b), (c) and (d), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution.

Another opposite observation in this connection was made in In re the Regulation and Control of Aeronautics in Canada [1932] A.C. 54 at p. 70 while interpreting the British North America Act 1867. It was said that inasmuch as the Act embodied a compromise under which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation and the foundation upon which the whole structure was subsequently erected.

553. Our Constitution is federal in character and not unitary. In a federal structure the existence of both the Union and the States is indispensable and so is the power of judicial review. According to Dicey: Law of the Constitution by A.V. Dicey p. 144.

A federal State derives its existence from the Constitution, just as a corporation derives its existence from the grant by which it is created. Hence every power, executive, legislative or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the Constitution. Law of the Constitution by A.V. Dicey p. 144.

The object for which a federal State is formed involves a division of authority between the national government and the separate States. Ibid p. 151. Federalism can flourish only among communities imbued with a legal spirit and trained to reverence the law. Swiss federalism, according to Dicey, "fails, just where one would expect it to fail, in maintaining that complete authority of the courts which is necessary to the perfect federal system". Ibid p. 180. The learned Advocate General of Maharashtra while relying a great deal on Dicey's well known work in support of his other points, has submitted that although he was one of the greatest writers on the law of English Constitution, his book was concerned with two or three guiding principles which pervade the modern Constitution of England. The discussion of federal government in his book was a subordinate part and the discussion was designed to bring out sharply the two or three guiding principles of the English Constitution by contrast with the different principles underlying the Constitution of the federal government. Reliance has been placed on Professor Wheare's statement in his book Federal Government, 4th Edn. (1963) that the Swiss Courts are required by the Constitution to treat all laws passed by the federal assembly as valid though they may declare Cantonal laws to be void and that does not constitute such a departure from the federal principle that the Swiss people cannot be regarded as having a federal Constitution and a federal government. Switzerland is probably the only country having a federal Constitution where full-fledged right of judicial review is not provided. We are unable to understand how that can have any relevancy in the presence of judicial review having been made an integral part of our Constitution.

554. It is pointed out on behalf of the petitioners that the scheme of Article 368 itself contains intrinsic pieces of evidence to give a limited meaning to the word "amendment". Firstly, Article 368 refers to "an amendment of this Constitution", and the result of the amendment is to be that "the Constitution shall stand amended". As the Constitution has an identity of its own, an amendment, made under a power howsoever widely worded cannot be such as would render the

Constitution to lose its character and nature. In other words, an amendment cannot be such as would denude the Constitution of its identity. The amending power is conferred on the two Houses of Parliament, whose identity is clearly established by the provisions in the Constitution. It must be the Parliament of the Sovereign Democratic Republic. It is not any Parliament which has the amending power, but only that Parliament which has been created by the Constitution. In other words, it must continue to be the Parliament of a sovereign and democratic republic. The institution of States must continue to exist in order that they may continue to be associated with the amending power in the cases falling under the proviso. If the respondents are right, the proviso can be completely deleted since Article 368 itself can be amended. This would be wholly contrary to the scheme of Article 368 because two agencies are provides for amending the provisions covered by the proviso. One agency cannot destroy the other by the very exercise of the amending power. The effect of limitless amending power in relation to amendment of Article 368 cannot be conducive to the survival of the Constitution because the amending power can itself be taken away and the Constitution can be made literally unamendable or virtually unamendable by providing for an impossible majority.

555. While examining the above contentions, it is necessary to consider the claim of the respondents that the amending body under Article 368 has the full constituent power. It has been suggested that on every occasion the procedure is followed as laid down in Article 368 by the two Houses of Parliament and the assent of the President is given there is the reproduction of the functions of a Constituent Assembly. In other words, the Parliament acts in the same capacity as a Constituent Assembly when exercising the power of amendment under the said Article. This argument does not take stock of the admission made on behalf of the respondents that the entire Constitution cannot be repealed or abrogated by the amending body. Indisputably, a Constituent Assembly specially convened for the purpose would have the power to completely revise, repeal or abrogate the Constitution. This shows that the amending body under Article 368 cannot have the same powers as a Constituent Assembly. Even assuming that there is reference on the nature of power between enacting a law and making an amendment, both the powers are derived from the Constitution. The amending body has been created by the Constitution itself. It can only exercise those powers with which it has been invested. And if that power has limits, it can be exercised only within those limits.

556. The respondents have taken up the position that even if the power was limited to some extent under Article 368, as it originally stood, that power could be enlarged by virtue of Clause (e) of the proviso. It must be noted that the power of amendment lies in the first part of Article 368. What Clause (e) in the proviso does is to provide that if Article 368 is amended, such an amendment requires ratification by the States, besides the larger majority provided in the main part. If the amending power under Article 368 has certain limits and not unlimited Article 368 cannot be so amended as to remove these limits nor can it be amended so as to take away the voice of the states in the amending process. If the Constitution makers were inclined to confer the full power of a Constituent Assembly, it could have been easily provided in suitable terms. If, however, the original power was limited to some extent, it could not be enlarged by the body possessing the limited power. That being so, even where an amending power is expressed in wide terms, it has to be exercised within the framework of the Constitution. It cannot abrogate the Constitution or frame a new Constitution or alter or change the essential elements of the Constitutional structure. It cannot be overlooked that the basic theory of our Constitution is that "Pouvoir Constituent", is

vested in the people and was exercised, for and on other behalf by the Constituent Assembly for the purpose of framing the Constitution.

557. To say, as has been said on behalf of the respondents, that there are only two categories of Constitutions, rigid or controlled and flexible or uncontrolled and that the difference between them lies only in the procedure provided for amendment is an over-simplification. In certain Constitutions there can be procedural and or substantive limitations on the amending power. The procedural limitations could be by way of a prescribed form and manner without the satisfaction of which no amendment can validly result. The form and manner may take different forms such as a higher majority either in the houses of the concerned legislature sitting jointly or separately or by way of a convention, referendum etc. Besides these limitations, there can be limitations in the content and scope of the power. To illustrate, although the power to amend under Article 5 of the U.S. Constitution resides ultimately in the people, it can be exercised in either of the modes as might be prescribed by the Congress viz. through ratification by the State legislatures or through conventions, specially convened for the purpose. The equal suffrage in the Senate granted to each of the States, cannot be altered without the consent of the State. The true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact that in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the legislature and the organ set up by it is subjected to the process of judicial review. Where there is a written Constitution which adopts the preamble of sovereignty in the people there is firstly no question of the law-making body being a sovereign body for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people. This is especially so where the Constitution contains a Bill of Rights for such a Bill imposes restraints on that body, i.e. it negates the equation of that body with the people.

558. Before concluding the topic on the interpretation or construction of the words "amendment of this Constitution" in Article 368, it is necessary to deal with some American decisions relating to Article 5 of the American Constitution on which a great deal of reliance was placed on behalf of the respondents for establishing that the word "amendment" has a precise and definite meaning which is of the widest amplitude. The first relates to the 18th amendment, known as the National Prohibition cases in the State of Rhode Island v. A. Mitchel Palmer 64 L. Ed. 946. In that case and other cases heard with it, elaborate arguments were addressed involving the validity of the 18th amendment and of certain features of the National Prohibition Law, known as Volstead Act, which was adopted to enforce the amendment. The relief sought in each case was an injunction against the execution of that Act. The Court merely stated its conclusions and did not give any reasons-a matter which was profoundly regretted by Chief Justice White. From, the conclusions stated and the opinion of the Chief Justice it appears that a good deal of controversy centered on Section 2 of the amendment which read "Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation". In the dissenting opinion of Mr. Justice Mckenna it was said that the Constitutional validity of the 18th amendment had also been attacked and although he dissented in certain other matters he agreed that the 18th amendment was a part of the Constitution of the United States. The learned Advocate General of Maharashtra has placed a great deal of reliance on this decision. His argument is that though the judgment in the Rhode Island case gives no reasons, yet it is permissible to look at the elaborate briefs filed by the counsel in several cases and their oral arguments in order to understand what was argued and what was

decided. One of the main contentions raised was that the 18th amendment was not in fact an amendment, for an amendment is an alteration or improvement of that which is already there in the Constitution and that term is not intended to include any addition of a new grant of power. The judgment shows that this argument was not regarded even worth consideration and was rejected outright. Now it is significant that most of the justices including the Chief Justice who delivered judgments dealt only with the questions which had nothing to do with the meaning of the word "amendment". It is not possible to derive much assistance from this judgment.

559. In J.J. Dhillon v. R.W. Gloss 65 L. Ed. 994 it was observed that an examination of Article 5 discloses that it was intended to invest Congress with a wide range of power in proposing amendments. However, the following observations are noteworthy and have been relied upon in support of the case of the petitioners that according to the United States Constitution it is the people who get involved in the matter of amendments. "A further mode of proposal-as yet never invoked-is provided, which is, that on application of two-third of the States, Congress shall call a convention for the purpose. When proposed in either mode, amendments, to be effective must be ratified by the legislatures or by convention in three fourths of the States as the one or the other mode of ratification may be proposed by the Congress". Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition for amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

560. Although all the amendments were made by the method of ratification by the requisite number of State legislatures, the convention mode was adopted when the 18th amendment was repealed by the 21st amendment Another case, United States of America v. William H. Sprague and William J. Howey 75 L. Ed. 640, will be discussed more fully while considering the question of implied limitations. All that it establishes for the purpose of meaning of amendment is that one must look to the plain language of the Article conferring the power of amendment and not travel outside it. Article 5, it was said, contained procedural provisions for Constitutional change by amendment without any present limitation whatsoever except that no State might be deprived of equal representation in the Senate without its consent. Mr. Justice Douglas while delivering the opinion of the court in Howard Joseph Whitehill v. Wilson Elkins 19 L. Ed. 228 stated in categorical terms that the Constitution prescribes the method of "alteration" by amending process in Article 5 and, while the procedure for amending it is restricted there is no restraint on the kind of amendment that may be offered. Thus the main submission on behalf of the counsel for the respondents has been that Article 5 of the United States Constitution served as model for Article 368 of our Constitution.

561. Article V provides different modes of amendment These may be analysed as follows:

The proposals can be made-,

(1) By two thirds of both Houses of the Congress or

(2) By a Convention for proposing amendments to be called by the Congress on the application of legislatures of two-thirds of the States.

The ratification of the proposals has to be made by

(1) Legislatures of three fourths of the States or

(2) by Conventions in three fourths thereof (as one of the other mode of ratification may be proposed by the Congress)

In Hawke v. Smith 64 L. Ed. 871, the question raised was whether there was any conflict between Article 5 of the U.S. Constitution which gave power to the Congress to provide whether the ratification should be by State Legislatures or Conventions and the Constitution of Ohio as amended. The Supreme Court held that Article 5 was grant of authority by the people to Congress. The determination of the method of ratification was the exercise of the national power specifically granted by the Constitution and that power was limited to two methods, by the State Legislatures or by Conventions. The method of ratification, however, was left to the choice of Congress. The language of the Article was plain and admitted of no doubt in its interpretation. In that case the Constitution of Ohio even after amendment which provided for referendum vested the legislative power primarily in a General Assembly consisting of a Senate and a House of Representatives. Though the law making power of a State was derived from the people the power to ratify a proposed amendment to the Federal Constitution had its source in that Constitution. The act of ratification by the State derived its authority from the federal Constitution. therefore, in order to find out the authority which had the power to ratify, it was Article 5, to which one had to turn and not to the State Constitution. The choice of means of ratification was wisely withheld from conflicting action in the several States.

562. On behalf of the respondents it is claimed that these decisions establish that the power of amendment conferred by Article 5 was of the widest amplitude. It could be exercised through the representatives of the people, both in the Congress and the State Legislatures. In the case of Article 368 also Parliament consists of representatives of the people and the same analogy can be applied that it is a grant of authority by the people to the Parliament. This argument loses sight of the fact that under the American theory of government, power is inherent in the people including the right to alter and amend the organic instrument of government. Indeed, practically all the State Constitutions associate the people with the amending process. The whole basis of the decisions of the Supreme Court of the United States and of some of the State Supreme Courts is that it is the people who amend the Constitution and it is within their power to make the federal Constitution or unmake it. The reason is quite obvious. So far as Article 5 of the American Constitution is concerned, out of the alternative methods provided for amendment, there is only one in which the people cannot get directly associated, whereas in the others they are associated with the amending process, e.g., proposal of amendment by two-thirds of both Houses of Congress and its ratification by conventions in three-fourths of the States or a proposal of amendment by a convention called on the application of two-thirds of the State Legislatures and its ratification by either convention in three-fourths of the States or by the Legislature of the same number of States.

563. The meaning of the words "amendment of this Constitution" as used in Article 368 must be such which accords with the true intention of the Constitution makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various Articles including Article 368. It is neither possible to give it a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution. Even the concession of the learned Attorney General and the Advocate General of Maharashtra that the whole Constitution cannot be abrogated or repealed and a new one substituted supports the conclusion that the widest possible meaning cannot be given to it.

564. Coming to the question of what has been called 'inherent and implied limitations' to the amending power in Article 368 of our Constitution. Mr. Palkhivala has maintained that inherent limitations are those which inhere in any authority from its very nature, character and composition whereas implied limitations are those which are not expressed but are implicit in the scheme of the Constitution conferring the power. He maintains that the "rule is established beyond cavil that in construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed", American Jurisprudence (2d), Vol. 16, p. 251 Although the courts have rejected in various cases a plea that a particular inherent or implied limitation should be put upon some specific Constitutional power, no court, says Mr. Palkhivala, has ever rejected the principle that such limitations which are fairly and properly deducible from the scheme of the Constitution should be read as restrictions upon a power expressed in general terms. Several decisions of our court, of the Privy Council, Irish courts, Canadian and Australian courts have been cited in support of the contention advanced by him. The approach to this question has essentially to be to look at our own decisions first. They fall in two categories. In one category are those cases where limitations have been spelt out of Constitutional provisions; the second category consists of such decisions as have laid down that there is an implied limitation on legislative power.

565. Taking up the cases of the first category, before 1955, Article 13(2) was read as containing an implied limitation that the State could acquire property only for a public purpose. (The Fourth Amendment expressly enacted this limitation in 1955). It was observed in Chiranjit Lal Chowdhauri v. The Union of India and Ors. MANU/SC/0009/1950 : [1950]1SCR869 that one limitation imposed upon acquisition or taking possession of private property which is implied in the clause is that such taking must be for a public purpose. Mahajan J., (later Chief Justice) said in the State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Ors. MANU/SC/0019/1952 : [1952]1SCR889 that the existence of a public purpose is undoubtedly an implied condition of the exercise of compulsory power of acquisition by the State. The power conferred by Articles 3 and 4 of the Constitution to form a new State and amend the Constitution for that purpose has been stated to contain the implied limitation that the new State must conform to the democratic pattern envisaged by the Constitution and the power which Parliament can exercise is not the power to override the Constitution Mangal Singh and Anr. v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 scheme. It may be mentioned that so far as Article 368 is concerned there seems to have been a good deal of debate in Golak Nath's case on the question whether there were any inherent or implied limitations. Dealing with the argument that in exercise of the power of amendment Parliament could not destroy the structure of the Constitution but it could only modify the provisions thereof within the framework of its original instrument for its better effectuation, Subba Rao C.J. observed that there was no necessity to express any opinion on

this all important question owing to the view which was being taken with regard to the meaning of the word "law" in Article 13(2). But it was recognised that the argument had considerable force. Wanchoo J. (as he then was) considered the question of implied limitations at some length but felt that if any implied limitation that basic features of the Constitution cannot be changed or altered, were to be put on the power of amendment, the result would be that every amendment made in the Constitution would involve legal wrangle. On the clear words of Article 368 it was not possible to infer any implied limitation on the power of amendment Hidayatullah J., (later Chief Justice) discussed the question of implied limitations and referred to the spate of writings on the subject. He expressed no opinion on the matter because he felt that in our Constitution Article 13(2) took in even constitutional amendments. Bachawat J., disposed of the matter by saying that the argument overlooked the dynamic character of the Constitution. Ramaswami J., clearly negatived the argument based on implied limitations on the ground that if the amending power is an adjunct of sovereignty it does not admit of any limitation.

566. The cases which fall in the second category are decidedly numerous. It has been consistently laid down chat there is an implied limitation on the legislative power; the legislature cannot delegate the essentials of the legislative function. Mukherjea J. (who later became Chief Justice) in Re. Delhi Laws Act 1912 case MANU/SC/0010/1951 : [1951]2SCR747 stated in clear language that the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete. The same implied limitation on the legislature, in the field of delegation, has been invoked in Raj Narain Singh v. Patna Administration MANU/SC/0041/1955 : [1955]27ITR709(SC) ; Hari Shankar Bagla v. State of Madhya Pradesh MANU/SC/0063/1954 : 1954CriLJ1322 ; Vasantlal Sanjanwala v. State of Bombay MANU/SC/0288/1960 : 1978CriLJ1281 ; The Municipal Corporation of Delhi v. Birla Cotton Mills MANU/SC/0175/1968 : [1968]3SCR251 and Grewal D.S. v. State of Punjabi MANU/SC/0154/1958 : [1959] Supp. 1 S.C.R. 792. Implied limitations have also been placed upon the legislature which invalidates legislation usurping the judicial power : See for instance Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality and Ors. MANU/SC/0057/1969 : [1971]79ITR136(SC) and Municipal Corporation of the City of Ahmedabad Etc. v. New Shorock Spg. and Wvg. Co. Ltd. etc. MANU/SC/0451/1970 : [1971]1SCR288 .

567. Before we go to cases decided by the courts in other countries it may be useful to refer to some of the Constitutional provisions which are illustrative of the concept of implications that can be raised from the language and context thereof. The first provision in point is Article 368 itself. It has been seen at the stage of previous discussion that the power to amend is to be found in that Article only by implication as there is no express conferment of that power therein. The learned Solicitor General made a concession that various Articles are included by implication in the clauses of the provision by reason of the necessity for giving effect to the express power contained therein, e.g., Articles 52 and 53 must be so read as to impliedly include the power to amend Articles 54 and 55 which are not expressly mentioned in Clause (a) of the proviso. It has been implied that the President has been made a formal or a Constitutional head of the executive and the real executive power vests in the council of ministers and the Cabinet R.S. Ram Jawaya Kapur and Ors. v. The State of Punjab MANU/SC/0011/1955 : [1955]2SCR225 . Article 53 declares that the executive power of the Union shall be vested in the President; Article 74 provides for a council of ministers headed by the Prime Minister to aid and advise the President in exercise of his functions. Article 75 says that the Prime Minister shall be appointed by the President and the other ministers shall be

appointed by him on the advice of the Prime Minister. The ministers shall hold office during the pleasure of the President and the council of ministers shall be collectively responsible to the House of the People. Although the executive power of the President is apparently expressed in unlimited terms, an implied limitation has been placed on his power on the ground that he is a formal or Constitutional head of the executive and that the real executive power vests in the council of ministers. This conclusion which is based on the implications of the Cabinet System of government can be said to constitute an implied limitation on the power of the President and the Governors.

568. It may be mentioned in all fairness to the Advocate General of Maharashtra that the court did not desire him to address in detail about the President or the Governor being a Constitutional head and the implications arising from the system of Cabinet Government. The decisions thereon are being referred to for the purpose of noticing that according to them the President or the Governor though vested with full executive powers cannot exercise them personally and it is only the council of ministers which exercises all the executive functions. This is so, notwithstanding the absence of any express provisions in the Constitution to that effect.

569. Next, reference may be made to the decisions of the Privy Council relied on by one side or the other for deciding the question under consideration. The Advocate General of Maharashtra laid much stress on the principle enunciated in Queen v. Burah (1878) 3 A.C. 889, which according to him, has been consistently followed by the Federal Court and this Court. The principle is that when a question arises whether the prescribed limits have been exceeded the court must look to the terms of the instrument "by which affirmatively, the legislative powers were created and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited...it is not for any court of justice to inquire further, or to enlarge constructively those conditions or restrictions". The ratio of that decision is that conditional legislation is to be distinguished from delegation of legislative power and that conditional legislation is within the power of the legislature in the absence of any express words prohibiting conditional legislation. The oft-quoted words about the affirmative conferment of power and absence of express restriction on the power are used only to repel the contention that conditional legislation was barred by implication. It is significant that if Queen v. Burah (1878) 3 A.C. 889 is to be treated as laying down the principle that the powers in a Constitution must be conferred only in affirmative words the argument of the respondents itself will suffer from the infirmity that it is only by necessary implication from the language of Article 368 (before the 24th Amendment) that the source of the amending power can be said to reside in that Article. There were no such words in express or affirmative terms which conferred such a power. Indeed in Golak Nath's MANU/SC/0029/1967 : [1967]2SCR762 case there was a sharp divergence of opinion on this point. Subba Rao C.J. with whom four other judges agreed held that the source of the amending power was to be found in the provisions conferring residuary provisions, namely, Article 248 read with Entry 97 in the Seventh Schedule. The other six judges including Hidayatullah J. were of the view that the power was to be found in Article 368 itself.

570. In The Initiative and Referendum Act [1919] A.C. 935 the position briefly was that the British North America Act 1867, Section 92, head I, which empowered a Provincial Legislature to amend the Constitution of the Province, "excepting as regards the office of the Lieutenant-Governor," excluded the making of a law which abrogated any power which the Crown possessed through the

Lieutenant Governor who directly represented the Crown. The Legislative Assembly of Manitoba passed the Initiative and Referendum Act. It compelled the Lieutenant Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he was the Constitutional head. The Privy Council was of the opinion that under the provisions of that law the Lieutenant Governor was rendered powerless to prevent a proposed law when passed in accordance with the Act from becoming actual law. The language of the Act could not be construed otherwise than as intended, seriously affecting the position of the Lieutenant Governor as an integral part of the legislature and to detract from the rights which were important in the legal theory of that position. Section 92 of the Act of 1867 entrusted the legislative power in a Province to its legislature and that legislature only. A body that has power of legislation on the subjects entrusted to it, the power being so ample as that enjoyed by a Provincial legislature in Canada, could while "preserving its own capacity intact seek the assistance of a subordinate agency...but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes own existence" Ibid at p. 945.

571. This case is more in point for consideration of validity of that part of the 25th Amendment which inserted Article 31-C but it illustrates that an implied limitation was spelt out from the Constitutional provisions of the British North America Act 1867 which conferred legislative power on the legislatures of provinces as constituted by that Act.

572. McCawley v. The King (1920) A.C. 691 was another case involving Constitutional questions. The legislature of Queensland (Australia) had power to include in an Act a provision not within the express restrictions contained in the Order in Council of 1959. But inconsistent with the term of the Constitution of Queensland, without first amending the term in question under the powers of amendments given to it, the Industrial Arbitration Act of 1916 contained provisions authorising the Government in Council to appoint any Judge of the Court of Industrial Arbitration to be a Judge of the Supreme Court of Queensland. After explaining the distinction between a controlled and an uncontrolled Constitution, their Lordships proceeded to examine the contention that the Constitution of Queensland could not be altered merely by enacting legislation inconsistent with its article; it could only be altered by an Act which in plain and unmistakable language referred to it; asserted the intention of the legislature to alter it, and consequentially gave effect to that intention by its operative provisions. That argument was repelled by saying Ibid p. 706.

It was not the policy of the Imperial Legislature at any relevant period to shackle or control in the manner suggested, the legislative power of the Nascent Australian Legislations.

Section 5 of the Colonial Laws Validity Act 1865 was held to have clearly conferred on the colonial legislatures a right to establish courts of judicature and to abolish and reconstitute them. A question had been raised that the Constitution Act of 1867 enacted certain fundamental organic provisions of such a nature as to render the Constitution controlled. It was said that if a change of that nature was contemplated, there would have been some indication in the very lengthy preamble of the Act, of that intention. Their Lordships could observe nowhere in the preamble the least indication that it was intended for the first time to make provisions which were sacrosanct, or which at least could only be modified by methods never previously required. It was finally held that the legislature of Queensland was the master of its own household except in so far as its power

had in special cases been restricted. No such restriction had been established and none in fact existed.

573. The Advocate General of Maharashtra has sought to deduce the following propositions from the dissenting judgment of Issacs and Rich JJ of the Australian High Court which was approved by the Privy Council in the above case:

(1) Unless there is a special procedure prescribed for amending any part of the Constitution, the Constitution is uncontrolled and can be amended by the manner laid down for enacting ordinary law and, therefore, a subsequent law inconsistent with the Constitution would pro-tanto repeal the Constitution.

(2) A Constitution largely or generally uncontrolled may contain one or more provisions which prescribe a different procedure for amending them. In that case an ordinary law cannot amend them and the procedure must be strictly followed if the amendment is to be effected.

(3) The implication on limitation of power ought not to be imported from general concepts but only from express or necessarily implied limitations (emphasis supplied).

(4) While granting powers to the colonial legislatures, the British Parliament as far back as 1865 refused to put limitations of vague character, but limited those limitations to objective standards e.g., statutes, statutory regulations, etc. to objective standards.

574. We have already repelled at an earlier stage Pp. 70-71 the contention that the only distinction between a controlled and an uncontrolled Constitution is that in the former the procedure prescribed for amending any part of the Constitution has to be strictly followed. The second proposition is of a similar nature and can hardly be disputed. As regards the third and fourth proposition all that need be said is that implied limitation which was sought in McCawley's case by counsel for the respondents was that the Queensland legislature should first amend the Constitution and then pass an Act which would otherwise have been inconsistent, for the Constitution had not been amended. That contention in terms was rejected. The Constitution in McCawley's case was uncontrolled and therefore the Queensland legislature was fully empowered to enact any Constitution breaking law. Moreover Lord Birkenhead in an illuminating passage in McCawley's [1920] A.C. 691 case has himself referred to the difference of view among writers upon the subject of Constitutional law which may be traced "mainly to the spirit and genius of the nation in which a particular Constitution has its birth". Some communities have "shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors". Those who haw adopted the other view probably believed that "certainty and stability were in such a matter the supreme desiderata". It was pointed out that different terms had been employed by the text book writers to distinguish between those who contrasted forms of Constitution. It was added:

Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled Constitution as by any other nomenclature.

Lord Birkenhead did not make any attempt to define the two terms "controlled" and "uncontrolled" as precise legal terms, but merely used them as convenient expressions.

575. The next case of importance is Attorney General for New South Wales v. Trethowan. (1932) A.C. 526 The Constitution Act, 1902 enacted by the legislature of New South Wales, was amended in 1929 by adding Section 7-A which provided that no Bill for abolishing the Legislative Council should be presented to the Governor for His Majesty's assent until it had been approved by a majority of the electors voting upon a submission made in accordance with the section. The same provision was to apply to a Bill for repealing that section. In 1930 two Bills were passed by the Legislature. One was to repeal Section 7-A and the other to abolish the Legislative Council. Neither of the two Bills had been approved in accordance with Section 7-A. Reference was made to Section 5 of the Colonial Laws Validity Act 1865, which conferred on the Legislature of the State full power to make laws inter alia in respect of the Constitution in such "manner and form" as might from time to time be provided by any Act of Parliament Letters Patent, Colonial law in force in the colony etc. It was held that the whole of Section 7-A was within the competence of the legislature of the State under Section 5 of the Colonial Laws Validity Act. The provision that the Bills must be approved by the electors before being presented was a provision as to form and manner and accordingly the Bills could not lawfully be presented unless and until they had been approved by a majority of the electors voting. A number of contentions were raised, out of which the following may be noted:

(a) The Legislature of New South Wales was given by the Imperial Statutes plenary power to alter the Constitution, powers and procedure of such Legislature.

(b) When once the Legislature had altered either the Constitution or powers and procedure, the Constitution and powers and procedure as they previously existed ceased to exist and were replaced by the new Constitution and powers.

576. According to their lordships the answer depended entirely upon a consideration of the meaning of Section 5 of the Colonial Laws Validity Act read with Section 4 of the Constitution statute assuming that the latter section still possessed some operative effect. The whole of Section 7-A was held to be competently enacted. The Privy Council, however, held that the repealing Bill after its passage through both Chambers could not be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner. In order to be validly passed, the law must be passed in the manner prescribed by Section 7-A which was in force for the time being. Trethowan's case (supra) fully illustrates how the Privy Council enforced such limitations even though they were of a procedural nature which had been provided in a Constitutional statute relating to the form and manner in which any such statute could be altered or repealed.

577. These decisions, in particular, (Trethowan's case) illustrate that the Privy Council has recognised a restriction on the legislative powers of a sovereign legislature even though that is confined only to the form and manner laid down in a Constitution for amending the Constitution Act In a country which still sticks to the theory of Parliamentary sovereignty, limitations of any other nature would be regarded as somewhat non-conformist and unorthodox.

578. The decision of the Privy Council in the Bribery Commissioner v. Pedrick Ranasinghe [1965] A.C. 172 has been heavily relied on by both sides. On behalf of the petitioners support has been sought from the observations relating to rights regarded as fundamental, being unalterable. What had happened there was that by virtue of Section 41 of the Bribery Amendment Act 1956, a provision was made for the appointment of a Bribery Tribunal which was in conflict with the requirement in Section 55 of the Ceylon Constitution (Order in Council 1946), hereinafter called the 'Ceylon Constitution Act', according to which the appointment of Judicial Officers was vested in the Judicial Service Commission. Section 29 of the Ceylon Constitution Act provided by Sub-section (1) that subject to the provisions of the Order, the Parliament had the power to make laws for the peace, order and good government of the island. By Sub-section (2) it was provided that no such law shall (a) prescribe or restrict the free exercise of any religion etc. This was followed by Clauses (b), (c) and (d) which set out further religious and racial matters, which according to their Lordships, could not be the subject of legislation. In the words of their Lordships "they represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution". By Sub-section (3) any law made in contravention of Sub-section (2) was to be void to the extent of such contravention. Sub-section (4) may be reproduced below:

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

The Bribery Amendment Act 1958 had not been enacted in accordance with the provisions contained in Sub-section (4) of Section 29 of the Ceylon Constitution Act. As it involved a conflict with the Constitution, it was observed that a certificate of the Speaker as required by Sub-section (4) was a necessary part of the Act making process. The point which engaged the serious attention of the Privy Council was that when a sovereign Parliament had purported to enact a Bill and it had received the Royal, Assent, could it be a valid Act in course of whose passing there was a procedural defect, or was it an invalid Act which Parliament had no power to pass in that manner ? A distinction was made while examining the appellant's arguments between Section 29(3) 'which expressly made void any Act passed in respect of the matters entrenched in and prohibited by Section 29(2); whereas Section 29(4) made no such provisions, but merely couched the prohibition in procedural terms. Reliance had been place on behalf of the appellant Bribery Commissioner on the decision in McCawley's case. It was pointed out that McCawley's case, so far as it was material, was in fact opposed to the appellant's reasoning. It was distinguished on the ground that the Ceylon legislature had purported to pass a law which being in conflict with Section 55 of the Ceylon Constitution Act, must be treated, if it was to be valid, as an implied alteration of the Constitutional

provisions about the appointment of judicial officers. It was held that such alterations, even if expressed, could only be made by laws which complied with the special legislative procedure laid down in Section 29(4). The Ceylon Legislature did not have the general power to legislate so as to amend its Constitution by ordinary majority resolutions such as the Queensland Legislature was found to have under Section 2 of its Constitution Act.

579. The learned Advocate General of Maharashtra has referred to the arguments in Ranasinghe's case and has endeavoured to explain the observations made about the entrenched provisions being unalterable by saying that the same were obiter. According to him it was not the respondent's case that any provision was unamendable. The references to the solemn compact etc. were also obiter because the appeal did not raise any question about the rights of religion protected by Sub-section (2) or Section 29 and the issues were entirely different. It is claimed that this decision supports the position taken up on behalf of the respondents that it is only the form and manner which is material in a controlled Constitution and that the above decision is an authority for the proposition that in exercise of the amending power a controlled Constitution can be converted into an uncontrolled one. Any implied limitations on Parliament's amending power here can be abrogated by an amendment of Article 368 itself and the amending power can be enlarged by an exercise of that very power. According to Mr. Palkhivala this argument is wholly fallacious. Firstly, the observations of the Privy Council Ibid p. 198 is merely on the form and manner of amendment and has nothing to do with substantive limitations on the power of amendment. Placing limits on the amending power cannot be confused with questions of special legislative process which is also referred to by their Lordships. Ibid portions D to E Secondly, the Ceylon Constitution authorised the Parliament to amend or repeal the Constitution, which power is far wider than the power of amendment simpliciter conferred by Article 368. It is suggested that Ranasinghe's case is a direct authority against the respondents since it held the religious and racial rights to be unalterable, which clearly implies that Parliament had no competence to take away those rights even in exercise of its power to amend the Constitution by following the prescribed form and manner in Sub-section (4) of Section 29 of the Ceylon Constitution Act. The material importance of this case is that even though observations were made by the Lordships which may in a sense be obiter those were based on necessary implications arising from Section 29 of the Ceylon Constitution Act and were made with reference to interpretation of Constitutional provisions which had a good deal of similarity (even on the admission of the Advocate General of Maharashtra) with some parts of our Constitution, particularly those which relate to fundamental rights.

580. Don John Francis Douglas Liyange v. The Queen [1967] 1 A.C. 259 is another decision on which strong reliance has been placed on behalf of the petitioners. The Ceylon Parliament passed an Act which substantially modified the Criminal Procedure Code inter alia by purporting to legalise an ex-post facto detention for 60 days of any person suspected of having committed an offence against the State. This class of offences for which trial without a jury by three Judges nominated by the Minister for Justice could be ordered was widened and arrest without a warrant for waging war against the Queen could be effected. New minimum penalties for that offence were provided. The Privy Council held that the impugned legislation involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the judiciary, manifested an intention to secure in the judiciary a freedom from political, legislative and executive control and in effect left untouched the judicial system established by the Charter of Justice of 1833. The

legislation was struck down as void. Their Lordships observed inter alia that powers in case of countries with written Constitutions must be exercised in accordance with the terms of the Constitution from which they were derived. Reference was made to the provisions in the Constitution for appointment of Judges by the Judicial Service Commission and it was pointed out that these provisions manifested an intention to secure in the judiciary a freedom from political, legislative and executive control. It was said that these provisions were wholly appropriate in a Constitution which intended that judicial power shall vest only in the judicature. And they would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature.

581. There seems to be a good deal of substance in the submission of Mr. Palkhivala that the above decision is based on the principle of implied limitations; because otherwise under Section 29(1) of the Ceylon Constitution Act Parliament was competent to make laws for the peace, order and good government of the island subject to the provisions of the Order. Strong observations were made on the true nature and purpose of the impugned enactments and it was said that the alterations made by them in the functions of the judiciary constituted a grave and deliberate incursion in the judicial sphere.

582. The following passage is noteworthy and enlightening:

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature has no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution.

583. Mohamed Samsudeen Kariapper v. S.S. Wijesinha and Anr. [1968] AC 717 has been cited on behalf of the State of Kerala for the proposition that judicial power could, by an amendment of our Constitution, be transferred to the legislature thus negativing the principle of implied limitation. In that case a report had been made under the Commission of Inquiry Act about certain allegations of bribery having been proved against some members of the Parliament of whom the appellant was one. Under a certain Act civil disabilities on persons to whom the Act applied were imposed. It also contained a provision that in the event of inconsistency with existing law, the Act should prevail. The appellant challenged the validity of that Act on the ground that it was inconsistent with the Constitution and was usurpation of the judicial power. It may be mentioned that the Speaker had, in accordance with the proviso to Section 29(4) of the Constitution of Ceylon, endorsed a certificate under his hand on the bill for imposition of civic disabilities (Special Provisions) Act. The Privy Council held that the said Act was an exercise of legislative power and not the usurpation of judicial power. The Constitution of Ceylon was a controlled Constitution and the Act was an inconsistent law; the Act was to be regarded as amending the Constitution unless some provisions denying the Act Constitutional effect was to be found in the Constitutional restrictions imposed on the power of amendment. Apart from the proviso to Section 29(4) of the Constitution Act, there was no reason for not construing the words "amend or repeal" in that provision as extending to amendment or repeal by inconsistent law. The Act, therefore, amended

the Constitution. Finally upon the merits it was observed that in view of the conclusion that the Act was a law and not an exercise of judicial power it was not necessary to consider the question whether Parliament could, by a law passed in accordance with the proviso to Section 29(4), both assume judicial power and exercise it in the one law.

584. The above decision can certainly be invoked as an authority for the proposition that even in a controlled Constitution where the form and manner had been followed of amending it, an Act, which would be inconsistent with it and which did not in express terms state that it was an amending Act, would have the effect of altering the Constitution. But it does not support any suggestion, as has been made on behalf of the respondents, that judicial power could, by an amendment of our Constitution, be transferred to the legislature. Moreover, as expressly stated by their lordships, the Ceylon Constitution empowered the Parliament "to amend or repeal" the Constitution and, therefore, there can be no comparison between the scope of the Ceylon Parliament's amending power and that of the amending body under Article 368.

585. We may next deal with the Australian decisions because there has been a good deal of discussion in them about implied limitations which can arise in the absence of express limitations. The subject matter of most of the decisions has been the Commonwealth's taxing power. Section 51 of the Australian Constitution grants power to legislate with regard to taxation to the Commonwealth in wide terms but with certain express reservations, viz., that duties of customs should be uniform, that the taxing laws must not discriminate between States, nor must revenue laws give preference to one State over another State. Section 114 bars the Commonwealth from taxing property of any kind belonging to a State. In Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] 28 C.L.R. 129 the High Court of Australia accepted the principles of construction of a Constitution laid down by the Privy Council in Reg v. Burah [1878] 3 A.C. 889 and Att. Gen. of Ontario v. Att. Gen. of Canada [1912] A.C. 571 viz., that the only way in which a court can determine whether the prescribed limits of legislative power had been exceeded or not was "by looking to the terms of the instrument by which affirmatively, the legislative powers are created, and by which negatively, they are restricted"; nothing was to be read into it on ground of policy of necessity arising or supposed to arise from the nature of the federal form of government nor were speculations as to the motives of the legislature to be entered into by the Court. These words would apparently appear to reject any proposition as to implied limitations in the Constitution against an exercise of power once it is ascertained in accordance with the ordinary rules of construction. Such an interpretation of the Engineers' case [1920] 28 C.L.R. 129 supposed to have buried for ever the principle of implied limitations, has not been unanimously accepted nor has the above criterion laid down been adhered to. In Att. Gen. of New South Wales v. Brewery Employees Union [1908] 6 C.L.R. 469, Higgins, J. cautioned that "although the words of the Constitution are to be interpreted on the same principles of interpretation as are applied to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act-"to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be". Sir Owen Dixon in Australian Railways Union v. Victorian Railway Commissioners [1930] 44 C.L.R. 319 and later in West v. Commissioner of Taxation [1937] 56 C.L.R. 657 formulated what in his view was the basic principle laid down in Engineers' case (Supra) and made observations relating to reservations of qualifications, which he thought had been made, concerning the prima facie rule of interpretation which that decision laid down. In Ex-parte Professional Engineers Association [1959] 107 C.L.R.

208 he once again adverted to the Engineers' case and suggested that perhaps "the reservations and qualifications therein expressed concerning the federal power of taxation and laws directed specially to the states and also perhaps the prerogative of the Crown received too little attention." The question as to implied limitations was directly raised and decided in the Melbourne Corporation v. Commonwealth. [1947] 74 C.L.R. 31 It was held that Section 48 of the Banking Act, 1945, prohibiting banks from conducting banking business for a state and for any authority of the state, including a local government authority was invalid. Two contentions were raised in that case : (1) that the impugned Act was not a law on banking within Section 51(xiii) because it was not a law with respect to banking, and (2) that the grant of power in Section 51(xiii) must be read subject to limitations in favour of the State because it appears in a federal Constitution, so that even if Section 48 could be treated as a law with respect to banking, it was stall invalid since its operation interfered with the states in the exercise of their governmental functions. The second contention was accepted by the majority. Latham C.J. stated that laws which discriminated against states or which unduly interfered with states in the exercise of their functions of government were not laws authorised by the Constitution, even if they were laws with respect to a subject matter within the legislative power of the Commonwealth Parliament. Rich J., held that the Constitution expressly provided for the continued existence of the States and that, therefore, any action on the part of the Commonwealth, in purported exercise of its Constitutional powers, which would prevent a State from continuing to exist or function as such was necessarily invalid because of inconsistency with the express provisions of the Constitution. Stark, J. said that the federal character of the Australian Constitution carried implications of its own, that the government was a dual system based upon a separation of organs and of powers and, consequently, maintenance of the States and their powers was as much the object of the Constitution as maintenance of the Commonwealth and its powers. therefore, it was beyond the power of either to abolish or destroy the other.

586. The same contention was raised in a recent case of Victoria v. The Commonwealth [1971] 45 A.L.J. 251, where the Pay-roll Tax Act, 1941 and the Pay-roll Tax Assessment Act, 1941-1969 were impugned. These Acts were passed by the Commonwealth Parliament for financing the provisions of the Child Endowment Act, 1941 and casting the burden on employers by taxing wages paid by them. The Crown in right of a State was in each State a considerable employer of labour, and in some States of industrial labour. The Crown in right of a State was included in the definition of 'employer' for the purpose of the Act. The question raised for decision was about the Constitutional validity of the Act in so far as it purported to impose upon the State of Victoria an obligation to payroll tax rated to the amount of salaries and wages paid to its public servants employed in certain department named in its statement of claim.

The contention raised by the State of Victoria as summarised by Barwick, C.J. was that though the impugned Act fell under the enumerated power of taxation in Section 51 of the Constitution Act, that section did not authorise the imposition of a tax upon the Crown in the right of a State because there was an implied Constitutional limitation upon that Commonwealth power operating universally, that is to say, as to all the activities of a State. The point most pressed, however, was in a somewhat limited form, viz., that the legislative power with respect to taxation did not extend to authorise the imposition of a tax upon "any essential governmental activity" of a State and therefore, at the least, the power under Section 51 did not authorise a tax upon the State in respect of wages paid to its civil servants. In other words such a limitation, whether of universal or of

limited operation, was derived by implication from the federal nature of the Constitution, and therefore, to levy a tax rated to the wages paid to its servants employed in departments of governments, so trenched upon the governmental functions of the State as to burden, impair and threaten the independent exercise of those functions. All the seven judges agreed, firstly, that the Act was valid, and secondly, upon the proposition laid down in the Engineers' case (Supra) as also in certain other decisions that where a power was granted to the Commonwealth by a specific provision such as Section 51(ii), the Commonwealth could pass a law which would bind the States as it would bind individuals. The difference amongst the judges, however, arose as regards the question of implied limitation on such a power, however, expressly granted. Barwick C.J. and Owen J. were of the view that a law which in substance takes a State or its powers or functions of government as its subject matter is invalid because it cannot be supported upon any granted legislative power but there is no implied limitation on a Commonwealth legislative power under the Constitution arising from its federal nature. McTiernan J. was also of the view that there was no necessary implication restraining the Commonwealth from making the law. However, Menzies, Windeyer, Walsh and Gibbs JJ. held in categorical terms that there is an implied limitation on Commonwealth legislative power under the Constitution on account of its federal nature. According to Menzies J. a Constitution providing for indissoluble federal Commonwealth must protect both Commonwealth and States. The States were not outside the Constitution. Accordingly although the Constitution clearly enough subjected the States to laws made by Commonwealth Parliament it did so with some limitation. Windeyer J., read the Melbourne Corporation case (Supra) as confirming the principle of implication and added that the court in reading the Constitution "must not shy away from the word `implication' and disavow every concept that it connotes." Walsh J. rejected the contention that it was inconsistent with the principles of construction laid down in Engineers' case that the ambit of power with respect to enumerated subject matter should be restricted in any way otherwise than by an express provision specially imposing some defined limitation upon it and observed:

there is a substantial body of authority for the proposition that the federal nature of the Constitution does give rise to implications by which some limitations are imposed upon the extent of the power of the Commonwealth Parliament to subject the States to its legislation.

According to Gibbs J., the ordinary principles of statutory interpretation did not preclude the making of implications when they were necessary to give effect to the intention of the legislature as revealed in the statute as a whole. The intention of the Imperial Parliament in enacting the Constitution was to give effect to the wishes of the Australian people to join in a federal union and to establish a federal and not a unitary system. In some respects the Commonwealth was placed in a position of supremacy as the national interest required but it would be inconsistent with the very basis of federation that the Commonwealth's power should extend to reducing the states to such a position of subordination that their very existence as independent units would be dependent upon the manner in which the Commonwealth exercises its powers, rather than on the legal limits of the powers themselves. He proceeded to say:

Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-a-vis each other.

587. The Advocate General of Maharashtra does not dispute that there are necessary implications in a federal Constitution such as, for example, that any law violating any provision of the Constitution is void even in the absence of an express declaration to that effect. Again it is a necessary implication of a republican Constitution that the sovereign of a foreign State-United Kingdom cannot place Indian territory in groups by Orders in Council as provided in the Fugitive Offenders Act, and, therefore, that Act is inconsistent with the Republican Constitution of India, and is not continued in force by Article 372; see State of Madras v. G.C. Menon MANU/SC/0062/1954 : [1955]1SCR280 . But he maintains that the principle of Queen v. Burah is not in any way displaced. Burah's case, according to him, laid down principles of interpretation and in doing so the Privy Council itself enunciated the doctrine of ultra vires which is a necessary implication of an Act of the British Parliament creating bodies or authorities with limited powers. An attempt has been made to show that the judgment of Chief Justice Barwick in the above Australian decision stated the basic principle of construction correctly and those principles are applicable to our Constitution also since the decision was based on Queen v. Burah [1878] 3 A.C. 889[1878] 3 A.C. 889 which has been consistently followed by this Court. We have already dealt with that decision and we are unable to agree that Queen v. Burah stands in the way of drawing implications where the purpose of the Constitution and the scheme by which it is intended to be given effect, necessarily give rise to certain implications.

588. Turning to the Canadian decisions we need refer only to those which have a material bearing on the questions before us. In The Attorney General of Nova Scotia v. The Att. Gen. of Canada [1951] Can. L. Rep. 31 the Constitutionality of an Act respecting the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa was canvassed. The Supreme Court of Canada held that since it contemplated delegation by Parliament of powers exclusively vested in it by Section 91 of the British North America Act to the Legislature of Nova Scotia; and delegation by that Legislature of powers, exclusively vested in Provincial Legislature under Section 92 of the Act to Parliament, it could not be Constitutionally valid. The principal ground on which the decision was based was that the Parliament of Canada and each Provincial Legislature is a sovereign body within its sphere, possessed of exclusive jurisdiction to legislate with regard to the subject matter assigned to it under Section 91 or Section 92 as the case may be. Neither is capable, therefore, of delegating to the other the powers with which it has been vested nor of receiving from the other the power with which the other has been vested. The learned Chief Justice observed that the Constitution of Canada "does not belong either to the Parliament or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled.

Although nothing was expressly mentioned either in Section 91 or Section 92 of the British North America Act a limitation was implied on the power of Parliament and the Provincial Legislatures to delegate legislative power. Mention may also made of John Switzman v. Freda Elbling (1957) Can. L.R. 285 (to which we have already referred while dealing with the question of the use of the preamble.) In that case the validity of the Act respecting communistic propaganda of the Province of Quebec was held to be ultra vires of the Provincial Legislature. Abbot J., after referring to various decisions of the Privy Council as also the Supreme Court of Canada See in particular the observation of Duff C.J. in Alberta Statutes Case (1938) SCR 100(1938) SCR 100 said that the Canada Election Act, the provisions of the British North America Act which provided for Parliament meeting at least once a year and for the election of a new Parliament at least every five

years and the Senate and House of Commons Act, were examples of enactments which made specific statutory provisions for ensuring the exercise of the right of public debate and public discussion. "Implicit in all such legislation is the right of candidates for Parliament or for a Legislature and of citizens generally, to explain, to criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be member". That right could not be abrogated by a Provincial Legislature and its power was limited to what might be necessary to protect purely private rights. He was further of the opinion that according to the Canadian Constitution, as it stood, Parliament itself could not abrogate this right of discussion and debate.

589. The Advocate General of Maharashtra has pointed out that these decisions relate to the legislative competence of provincial legislatures to effect civil liberties like freedom of speech, religion or to legislate in respect of criminal matters. They are not relevant for the purpose of determining the amending power under the Constitution. So far as the civil rights are concerned in Canada it is noteworthy, according to the Advocate General, that the Canadian Bill of Rights 1960 makes the rights therein defeasible by an express declaration that an Act of Parliament shall operate notwithstanding the Canadian Bill of Rights. It has also been submitted that the well known writers of Constitutional law both of Australia and Canada have not attached any significance or accepted the principle of implied limitations. See W.A. Wynes, Legislative, Executive and Judicial powers in Australia and Bora Laskin, The Canadian Constitutional Law. The opinions of authors and writers have been cited before us so extensively, by both sides, that we find a great deal of conflict in their expression of opinion and it will not be safe to place any reliance on them. The judges who have read limitations by implication are well known and of recognised eminence and it is not fair to reject their views for the reasons suggested by the Advocate General.

590. We need hardly deal at length with the Irish decisions. The principle emerging from the majority decision in The State (at the prosecution of Jermiah Ryan v. Captain Michael Lenons and Ors. (1935) IR 170 that under Section 50 of the 1922 Constitution (which provided for Constitutional amendment by ordinary legislation during the first period of 8 years which was subsequently extended to 16 years) an ordinary law inconsistent with the provisions of the Constitution had the effect of amendment of the Constitution, caused considerable debate. During the controversy it was strongly urged that the power of Constitutional amendment was not identical with pouvoir constituent; that it was not within the competence of agencies invested with the power of Constitutional amendment to drastically revise the structural organisation of a State, to change a monarchical into a republican and a representative into a direct form of government. The argument was based on the conception underlying Article 2 of the French Law of 1884 which provided that the republican form of government could not be made subject of Constitutional amendment. Section 50 of that Constitution, in particular, was criticized as being too pliant for the first period of 8 years and too rigid for the period following it Leo Kohn, The Constitution of the Irish Free State pp. 257-259. After the 1937 Constitution which became a model for our Constitution makers the trend of judicial thinking underwent a transformation and instead of treating an Act inconsistent with the Constitution as having the effect of impliedly amending the Constitution such an Act was regarded as invalid to the extent of its inconsistency with the Constitution. See Edmund Burke v. Lenon (1940) I R 136 and Margaret Buckley v. Att. Gen. of Eire (1950) I R 67. The 1922 Constitution was considered to be of such "light weight" that there

were no fewer than 27 Acts expressed to be Acts impliedly amending that Constitution See generally J.M. Kelly, Fundamental Rights on the Irish Law and Constitution (1968) 1-17 within a period of 15 years. During the period 1922-27 the judges were used to the British idea of sovereignty of Parliament and notions of fundamental; law were foreign to their training and tradition. The 1937 Constitution is more rigid than its predecessor though Article 51 permits the Oireachtas to amend the Constitution during the first three years by ordinary legislation. Such legislation, however, is expressly excepted unlike Article 50 of the 1922 Constitution from the amending power. Mention may be made of The State v. The Minister for Justice etc. [1967] IR 106 in which it was held that the provisions of Section 13 of the Lunatic Asylums (Ireland) Act 1875 which prevented an accused person from appearing before the District Court on the return date of his remand constituted interference with an exercise of judicial power to administer justice. This case and similar cases e.g., Margaret Buckley v. Att. Gen. of Eire [1950] Ir. Rep. 67 may not afford much assistance in determining the question about implied limitation to the amending power in a Constitution because they deal with the question mostly of repugnancy of ordinary legislation to Constitutional provisions. The main decision however, was in Ryan's [1935] Ir. Rep. 170 case in which Kennedy C.J. drew various implications from the Constitution but the majority of judges declined to do so and read the word "amendment" as wide enough to allow the repeal of a number of articles, however important in substance they might be.

It is equally unnecessary to deal with the argument on behalf of the respondents that the Privy Council in Moore v. Attorney General of Irish Free State [1935] A.C. 484 rejected the contention of the counsel based on the reasoning of Kennedy C.J. Moore's case was decided principally on the effect of the passing of the statute of Westminster as is clear from the summing up of the position by their Lordships. Ibid p. 498

591. As regards the position in the United States of America a great deal of reliance has been placed on behalf of the respondents on United States of America v. William H. Sprague. 75 L. Ed. 640. According to that decision the choice between submission of a proposed amendment to the federal Constitution to State Legislatures and submission to State Conventions under Article 5 of the Constitution was in the sole discretion of Congress irrespective of whether the amendment was one dealing with the machinery of government or with matters affecting the liberty of the citizen. It was argued that amendments may be of different kinds, e.g., mere changes in the character of federal means of machinery on the one hand, and matters affecting the liberty of the citizen, on the other. It was said that the framers of the Constitution accepted the former sort to be ratified by the legislature whereas they intended that the latter must be referred to the people because not only of lack of power in the legislature to ratify but also because of doubt as to their truly representing the people. The Court observed that where the intention was clear there was no room for construction and no excuse for interpolation or addition and it had been repeatedly and consistently declared in earlier decisions that the choice of mode rested solely in the discretion of the Congress. It is sought to be concluded from this decision that the Supreme Court of the United States refused to read any implications of the nature argued in that case.

592. Mr. Palkhivala says that the decision in U.S. v. W.H. Sprague (Supra) has no relevance to the questions before us. All that it laid down was that the Congress had the sole discretion to decide whether a proposed amendment should be submitted to State Legislatures or to the State conventions. The language of Article 5 itself shows that sole discretion in this matter is conferred

on the Congress irrespective of whether the amendment deals with the machinery of government or with matters affecting the rights and liberties of the citizen. Sprague's case it is suggested, was merely a fresh attempt after the decision of the Supreme Court in the State of Rhode Island v. A. Mitchell Palmer 64 L. Ed. 946 to argue that the 18th amendment which introduced prohibition was un-constitutional since it was ratified by the State Legislatures and the attempt rightly failed. For the reasons suggested by Mr. Palkhivala which appear to have a good deal of substance we are unable, to derive any help from U.S. v. W.H. Sprague.

593. The Advocate General of Maharashtra has invoked another principle to the effect that unless the power of amendment is co-extensive with the judicial power of invalidating laws made under the Constitution the judiciary would be supreme; therefore, the power of amendment should be co-extensive with judicial power. This follows from what has been repeatedly held by this Court that under our Constitution none of the three great departments of the State is supreme and it is only the Constitution which is supreme and which provides for a government of laws and not of men. The reply of Mr. Palkhivala is that if the Constitution is supreme, as it is, it necessarily follows that there must be limitation on the amending power because if there are 'no limitations the legislature would be supreme and not the Constitution. If the legislature's power of amending Constitution were coextensive with the judicial power of invalidating laws made under the Constitution, the legislature can bend the Constitution to its wheel in every way which will lead to a result contrary to what has been provided in the Constitution, namely, that there are three great departments of the State and no one can have supremacy over the other. When the judiciary places a limitation on the amending powers, says, Mr. Palkhivala, only as a matter of true construction the consequence is not that the judiciary is supreme but that the Constitution is supreme. It is claimed that on his arguments, the legislature, executive and judiciary remain coordinate which is the correct position under the Constitution. If the respondent's argument is accepted the amending power is absolute and limitless. It can make the judiciary and the executive completely subordinate to it or take over their powers.

594. We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process; (per Bose J., in Bidi Supply Co. v. The Union of India MANU/SC/0040/1956 : [1956]29ITR717(SC) .

The observations of Patanjali Sastri C.J. in State of Madras v. V.G. Row [1952] S.C.R. 597 which have become locus classicus need alone be repeated in this connection. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution." The respondents have also contended that to let the court have judicial review over Constitutional amendments would mean involving the court in political questions. To this the answer may be given in the words of Lord Porter in Commonwealth of Australia v. Bank of New South Wales [1950] A.C. 235:
The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue, it is vain to invoke the voice of Parliament.

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United Constitution but it envisages such a separation to a degree as was found in Ranasinghe's case. The judicial review provided expressly in our Constitution by means of Article 226 and 32 is one of the features upon which hinges the system of checks and balances.

Apart from that, as already stated, the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution (per Haldane, L.C. in Att. Gen. for the Commonwealth of Australia v. Colonial Sugar Refining Co. [1914] A.C. 237 and Ex parte Walsh and Johnson, In re Yates. (1925) 37 C.L.R. 36. The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the legislature conferred by the Constitution would always be a question of interpretation of the Constitution. It may be added that at no stage the respondents have contested the proposition that the validity of a Constitutional amendment can be the subject of review by this Court. The Advocate General of Maharashtra has characterised judicial review as undemocratic. That cannot, however, be so in our Constitution because of the provisions relating to the appointment of judges, the specific restriction to which the fundamental rights are made subject, the deliberate exclusion of the due process clause in Article 21 and the affirmation in Article 141 that judges declare but not make law. To this may be added the none two rigid amendatory process which authorises amendment by means of 2/3 majority and the additional requirement of ratification.

595. According to the learned Attorney General the entire argument on the basis of implied limitations is fundamentally wrong. He has also relied greatly on the decision in Burah's case and other similar decisions. It is pointed out that there can be no inherent limitation on the power of amendment having regard to the purpose for which the power is needed. The argument about the non-amendability of the essential framework of the Constitution is illusive because every part of a Constitutional document admits of the possibility of imperfect drafting or ambiguity. Even basic concepts or ideals undergo progressive changes. It has been strenuously urged that the Constitution read as a whole did not contemplate the perpetuation of the existing social and economic inequalities and a duty has been cast on the State to organise a new social order. The Attorney General quoted the opinion of several writers and authors in support of his contention that there must be express words of limitation in a provision which provides for amendment of the Constitution from which it follows that no implied limitations can be read therein.

596. The correct approach to the question of limitations which may be implied in any legislative provisions including a Constitutional document has to be made from the point of view of interpretation. It is not a novel theory or a doctrine which has to be treated as an innovation of those who evolve heterodox methods to substantiate their own thesis. The argument that there are no implied limitations because there are no express limitations is a contradiction in terms. Implied limitations can only arise where there are no express limitations. The contention of the learned Attorney General that no implications can be read in an amending power in a Constitution must

be repelled in the words of Dixon J. in West v. Commissioner of Taxation (N.S.W.) [1936] 56 C.L.R. 657:

Since the Engineers' case a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied

597. We are equally unable to hold that in the light of the Preamble, the entire scheme of the Constitution the relevant provisions thereof and the context in which the material expressions are used in Article 368 no implied limitations arise to the exercise of the power of amendment. The respondents do not dispute, that, certain limitations arise by necessary implication e.g., the Constitution cannot be abrogated or repealed in its entirety and that the India's polity has to be a Sovereign Democratic Republic, apart from several other implications arising from Article 368 which have been noticed.

598. The argument that the Nation cannot grow and that the objectives set out in the Preamble cannot be achieved unless the amending power has the ambit and the width of the power of a Constituent Assembly itself or the People themselves appears to be based on grounds which do not have a solid bask The Constitution makers provided for development of the country in all the fields social, economic and political. The structure of the Constitution has been erected on the concept of an egalitarian society. But the Constitution makers did not desire that it should be a society where the citizen will not enjoy the various freedoms and such rights as are the basic elements of those freedoms, e.g., the right to equality, freedom of religion etc., so that his dignity as an individual may be maintained. It has been strongly urged on behalf of the respondents that a citizen cannot have any dignity if he is economically or socially backward. No one can dispute such a statement but the whole scheme underlying the Constitution is to bring about economic and social changes without taking away the dignity of the individual. Indeed, the same has been placed on such a high pedestal that to ensure the freedoms etc. their infringement has been made justiciable by the highest court in the land. The dictum of Das C.J. in Kerala Education Bill case paints the true picture in which there must be harmony between Parts III and IV; indeed the picture will get distorted and blurred if any vital provision out of them is cut out or denuded of its identity.

599. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the Constitutional structure. (These cannot be catalogued but can only be illustrated).

1. The supremacy of the Constitution.

2. Republican and Democratic form of Government and sovereignty of the country.

3. Secular and federal character of the Constitution.

4. Demarcation of power between the legislature, the executive and the judiciary.

5. The dignity of the individual (secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

6. The unity and the integrity of the nation.

600. The entire discussion from the point of view of the meaning of the expression "amendment" as employed in Article 368 and the limitations which arise by implications leads to the result that the amending power under Article 368 is neither narrow nor unlimited. On the footing on which we have proceeded the validity of the 25th amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. The insertion of Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit amendment of each and every Article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity.

601. We may next deal with the validity of the Constitution (25th Amendment) Act. Section 2 of the Amending Act provides:

2. In Article 31 of the Constitution,-

(a) for Clause (2), the following clause shall be substituted, namely:

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for a amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided...

(b) after Clause (2A), the following clause shall be inserted, namely:

(2B) Nothing in Sub-clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2).

As stated in the Statement of Objects and Reasons to the Bill (No. 106 of 1971) the word "compensation" was sought to be omitted from Article 31(2) and replaced by the word "amount". It was being clarified that the said "amount" may be given otherwise than in cash. It was also provided that Article 19(1)(f) shall not apply to any law relating to acquisition or requisitioning of property for a public purpose. The position of the respondents is that "compensation" had been given the meaning of market value or the just equivalent of what the owner had been deprived of according to the decisions of this Court. See State of West Bengal v. Mrs. Bela Bannerji and Ors. MANU/SC/0017/1953 : [1954]1SCR558 . That had led to the 4th Amendment Act 1955.

The later decisions (2) Vajravelu Mudaliar v. Special Deputy Collector, Madras MANU/SC/0049/1964 : [1965]1SCR614 and Union of India v. Metal Corporation of India and Anr. MANU/SC/0117/1966 : [1967]1SCR255 had continued to uphold the concept of "compensation" i.e. just equivalent of the value of the property acquired in spite of the amendments made in 1955. In State of Gujarat v. Shantilal Mangaldas and Ors. MANU/SC/0063/1969 : [1969]3SCR341 the decision in Metal Corporation of India MANU/SC/0117/1966 : [1967]1SCR255 was overruled which itself was virtually overruled by R.C. Cooper v. Union of India. MANU/SC/0011/1970 : [1970]3SCR530 . According to the Advocate General of Maharashtra, if Shantilal Mangaldas etc. had not been overruled by R.C. Cooper v. Union of India there would have been no necessity of amending Article 31(2).

602. The first question that has to be determined is the meaning of the word "amount". Unlike the word "compensation" it has no legal connotation. It is a neutral, colourless word. The dictionary meanings do not help in arriving at its true import as used in a Constitutional provision. It can be anything from one paisa to an astronomical figure in rupees. Its meaning has, therefore, to be ascertained by turning to the context in which it is used and the words preceding it as well as following it.

603. The scheme of Article 31(2) now is:

(1) The property has to be compulsorily acquired or requisitioned.

(2) It has to be for a public purpose.

(3) It has to be by a law.

(4) The law must provide for an amount which may be-

(i) fixed by such law or

(ii) which may be determined in accordance with such principles as may be specified in such law.

(5) The law shall not be questioned in a Court on the ground:

(i) The amount so fixed or determined is not adequate or

(ii) the whole or any part of such amount is to be given otherwise than in cash.

It is significant that the amount can be determined in accordance with specified principles, if it is not fixed by the law itself. Moreover, its adequacy cannot be questioned in a court. The use of the word "principles" and the question of inadequacy can only arise if the amount has some norm. If it has no norm no question of specifying any principles arises nor can there be any occasion for the determination of its adequacy. The very fact that the court is debarred from going into the question of adequacy shows that the "amount" can be adequate or inadequate. Even if it is inadequate, the fixation or determination of that amount is immune from any challenge. It postulates the existence of some standard or norm without which any enquiry into adequacy

becomes wholly unnecessary and irrelevant Moreover, either method of giving an amount must bring about the same result In other words, if Rs. 1000 is the amount to be given for acquisition of a property, it must be either fixed or must be determinable by the principles specified in the event of its not being fixed. It could not be intended that the two alternative modes should lead to varying results, i.e., it could be fixed at Rs. 1000 but if the principles are specified they do not yield that figure.

604. The Advocate General of Maharashtra says that the right of the owner is just what the government determines it to be. It can give what it pleases and when it chooses to do so. Such an argument is untenable and introduces an element of arbitrariness which cannot be attributed to the Parliament.

605. In Shantilal Mangal Das, which, on the submission of the Advocate General, enunciated the correct principles relating to Article 31(2) as it then stood, it was laid down that something fixed or determined by the application of specified principles which was illusory or could in no sense be regarded as compensation was not bound to be upheld by the Courts, "for to do so would be to grant a charter of arbitrariness and permit a device to defeat the Constitutional guarantees". It was added that the principles could be challenged on the ground that they were irrelevant to the determination of compensation but not on the plea that what was awarded was not just or fair compensation. Thus it was open to the courts to go into the question of arbitrariness of the amount fixed or its being illusory even under the law laid down in Shantilal Mangaldas (supra). The relevance of the principles had also been held to be justiciable. R.C. Cooper's case did not lay down different principles. But the observations made therein were understood to mean that the concept of just equivalent not accepted in Shantilal's case was restored. The amendment now made is apparently aimed at removing that concept and for that reason the word "amount" has been substituted in place of "compensation". This is particularly so as we find no reason for departing from the well-settled rule that in such circumstances the Parliament made the amendment knowing full well the ratio of the earlier decisions.

606. The Advocate General of Maharashtra has submitted that the fixing of the amount or alternatively specifying the principles for determining that amount is entirely within the judgment of the legislature and the whole object of the amendment is to exclude judicial review which had been introduced by the courts on the basis of the concept of compensation. But even then the members of the legislature must have some basis or principles before them to fix the amount as the same cannot be done in an arbitrary way. He, however, gave an unusual explanation that in the Cabinet system of government it is for the government to determine the amount or specify such principles as it chooses to do. The legislators belonging to the ruling party are bound to support the measure whether the basis on which the amount has been determined is disclosed to them or not. It is wholly incomprehensible how there can be any legislative judgment or decision unless there is room for debate and discussion both by members of the ruling party and the opposition. For any discussion on the "amount" fixed or the principles specified the entire basis has to be disclosed. There can be no basis if there is no standard or norm.

607. The learned Solicitor General agrees that Article 31(2) after amendment still binds the legislature to provide for the giving to the owner a sum of money either in cash or otherwise. In fixing the "amount", the legislature has to act on some principle. This is not because of any

particular obligation arising out of Article 31(2), but from the general nature of legislative power itself. Whatever, the subject or the nature of legislation it always proceeds on a principle it is based on legislative policy. The principle may include considerations of social justice: Judicial review on the ground of inadequacy of the "amount" and the manner of payment is excluded by express language. No other question is excluded. The expropriated owner still continues to have a fundamental right. This argument is not quite the same as that of the learned Solicitor General.

608. It is true that the "amount" to be paid to an owner may not be the market value. The price of the property might have increased owing to various factors to which no contribution has been made by the owner. The element of social justice may have to be taken into consideration. But still on the learned Solicitor General's argument, the right to receive the "amount" continues to be a fundamental right That cannot be denuded of its identity. The obligation to act on some principle while fixing the amount arises both from Article 31(2) and from the nature of the legislative power. For, there can be no power which permits in a democratic system an arbitrary use of power. If an aggrieved owner approaches the court alleging that he is being deprived of that right on the grounds now open to him, the Court cannot decline to look into the matter. The Court will certainly give due weight to legislative judgment. But the norm or the principles of fixing or determining the "amount" will have to be disclosed to the Court. It will have to be satisfied that the "amount" has reasonable relationship with the value of the property acquired or requisitioned and one or more of the relevant principles have been applied and further that the "amount" is neither illusory nor it has been fixed arbitrarily, nor at such a figure that it means virtual deprivation of the right under Article 31(2). The question of adequacy or inadequacy, however, cannot be gone into.

609. As to the mode of payment, there is nothing to indicate in the amended Article that any arbitrary manner of payment is contemplated. It is well known that a discretion has to be exercised reasonably.

610. As regards Clause (2B) inserted in Article 31 which makes Article 19(1)(f) inapplicable, there is no reason for assuming that a procedure will be provided which will not be reasonable or will be opposed to the rules of natural justice. Section 2 of the 25th amendment can be sustained on the construction given to it above.

611. We now come to the most controversial provision of 25th Amendment, namely, Section 3 which inserted the following Article:

31C Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes way or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

According to the Statement of Objects and Reasons contained in Bill No. 106 of 1971, the new Article has been introduced to provide that if any law is passed to give effect to the Directive Principles contained in Clauses (b) and (c) of Article 39 and contains a declaration to that effect, such law shall not be deemed to be void on the ground that it takes away or abridges any of the rights contained in Articles 14, 19 or 31 and shall not be questioned on the ground that it does not give effect to these principles. For this provision to apply in case of laws made by State legislatures, it is necessary that the relevant Bill should be reserved for the consideration of the President and receive his assent.

612. Article 39 contains certain principles of policy to be followed by the State. It enjoins the State inter alia to direct its policy towards securing:

39 (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

613. These provisions together with the other provisions of the Constitution contain one of the main objectives, namely, the building of A welfare State and an egalitarian social order in our country. As stated before, the fundamental rights and the directive principles have been described as the "conscience of our Constitution". The Constitution makers had, among others, one dominant objective in view and that was to ameliorate and improve the lot of the common man and to bring about a socio-economic transformation based on principles of social justice. While the Constitution makers envisaged development in the social, economic and political fields, they did not desire that it should be a society where a citizen will not have the dignity of the individual. Part III of the Constitution shows that the founding fathers were equally anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of individual.

Our Constitution makers did not contemplate any disharmony between the fundamental rights and the directive principles. They were meant to supplement one another. It can well be said that the directive principles prescribed the goal to be attained and the fundamental rights laid down the means by which that goal was to be achieved.
While on behalf of the petitioners greater emphasis has been laid on the fundamental rights, counsel for the respondents say that the fundamental rights should be subordinate to the directive principles. The Constituent Assembly did not accept such a proposal made by B.N. Rau. It has been suggested that a stage has been reached where it has become necessary to abrogate some of the basic freedoms and rights provided the end justifies the means. At an earlier stage in the development of our Constitutional law a view was taken that the Directive Principles of State Policy had to conform and run subsidiary to the Chapter on Fundamental Rights, but Das C.J. in Kerala Education Bill, 1957, laid down the rule of harmonious construction and observed that an attempt should be made to give effect to both the fundamental rights and the directive principles.

614. According to Mr. Palkhivala, Article 31C destroys several essential features of the Constitution. He says that there is a vital distinction between two cases (a) where fundamental

rights are amended to permit laws to be validly passed which would have been void before the amendment and (b) the fundamental rights remain unamended, but the laws which are void as offending those rights are validated by a legal fiction that they shall not be deemed to be void. He further points out that on the analogy of Article 31(C) it would be permissible to have an omnibus Article that notwithstanding anything contained in the Constitution no law passed by Parliament or any State legislature shall be deemed to be void on any ground whatsoever. Article 31(C) according to him, gives a blank charter not only to Parliament but all the State Legislatures to amend the Constitution. On the other hand, the argument on behalf of the respondents is that Article 31(C) is similar to Articles 31(A) and 31(B) and that the object of inserting the Article is to free certain kinds of laws from the limitation on legislative power imposed by conferment of fundamental rights by Part III of the Constitution. As those rights were justiciable under Article 32, says the Advocate General of Maharashtra, the only way of doing so was to exclude judicial review of legislation in respect of those laws. If Article 31(A) is valid, there is no reason or justification for saying that Article 31(C) suffers from all the vices pointed out by Mr. Palkhivala.

615. According to the Solicitor General, Article 31(C) protects only law and not mere executive action. Law can be made by either Parliament or the State Legislatures. Article 31(C) has been enacted for the purpose of achieving the objectives set out in Clauses (b) and (c) of Article 39. The law enacted under it will operate on "material resources", concentration of wealth and "means of production". The legislative effort would generally involve (i) nationalisation of material resources of the community and (ii) imposition of control on the production, supply and distribution of the products of key industries and essential commodities. It, therefore, impinges on a particular kind of economic system only.

616. The question of the validity of Article 31(C) to our mind has to be examined mainly from two points of view; the first is its impact on the various freedoms guaranteed by Article 19, the abrogation of the right of equality guaranteed by Article 14 and the right to property contained in Article 31. The second is whether the amending body under Article 368 could delegate its amending power to the legislatures of the Union and the States. Alternatively, whether the Parliament and the State Legislatures can, under Article 31(C), amend the Constitution without complying with the form and manner laid down in Article 368. Now it is quite obvious that under Article 31(C) a law passed by the Parliament or the State Legislatures shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31 so long as the law is declared to be one for giving effect to the policy of the State towards securing the principles specified in Clause (b) and Clause (c) of Article 39. If Article 31(C) is aimed at the removal of a particular economic system, as suggested by the Solicitor General, it is difficult to understand why the freedoms contained in Clauses (a) to (d) of Article 19 as also the right of equality under Article 14 had to be taken away. The power of enacting Constitution breaking laws has been entrusted even to a small majority in a State Legislature. Mr. Palkhivala points out that the freedom of the Press, for instance, can be destroyed under Article 31(C) as the respondents claim the right to nationalise any industrial or economic activity. Moreover, a person can be put in prison for commending a policy contrary to the government's policy. Such legislation cannot be challenged as Article 19(1)(a) will not apply and Article 21 permits deprivation of personal liberty according to procedure established by law. The case in the State of Bombay and Anr. v. F.N. Balsara MANU/SC/0009/1951 : [1951]2SCR682 is in point. Commending the use of an intoxicant had been made an offence. It was struck down by this Court

as violative of Article 19(1)(a). If Article 31(C) is Constitutional, such a provision made in a law enacted under it relating to matters falling within Article 39(a) and (b) would be valid. As a matter of fact no cogent or convincing explanation has been given as to why it was necessary to take away all the freedoms guaranteed by Article 19 and for the abrogation of the prized right of equality under Article 14 of which has been described as the basic principle of republicanism. State of West Bengal v. Anwar Ali Sarkar (per Patanjali Sastri C.J.) MANU/SC/0033/1952 : 1952CriLJ510 , (Ibid p. 313 Mahajan J.). This Article combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Constitution. Basheshar Nath v. The Commissioner of Income Tax, Delhi and Rajasthan (per Das C.J.) MANU/SC/0064/1958 : [1959] Supp. 1 S.C.R. 528. It follows, therefore, that Article 31(C) impinges with full force or several fundamental rights which are enabled to be abrogated by the Parliament and the State Legislatures.

617. As regards the question of delegation of amending power, it is noteworthy that no amendment has been made in Article 368 itself to enable delegation of constituent power. The delegation of such power to the State Legislatures, in particular, involves serious consequences. It is well settled that one legislature cannot create another legislative body. This has been laid down very clearly in two decisions of the Privy Council. In the Initiative and Referendum Act [1919] A.C. 935 which has already been discussed See page 88 by us no doubt was entertained that a body that had the power of legislation on the subjects entrusted to it, even though, the power was so ample as that enjoyed by a provincial legislature in Canada, could not create and endow with its own capacity a new legislative power not created by the Act to which it owed its own existence. Attorney General of Nova Scotia v. The Attorney General of Canada [1951] Can. L.R. 31 is another direct authority for the view that the Parliament of Canada or any of the legislatures could not abdicate their powers and invest for the purpose of legislation bodies, which by the very terms of the British North American Act were not empowered to accept such delegation and to legislate on such matters. The distinction made by counsel on behalf of the respondents and the cases relied on by them have been fully discussed in the judgment of the learned Chief Justice and we need not go over the same ground.

618. The only way in which the Constitution can be amended, apart from Articles 4, 169 and the relevant paras in Schedules V and VI of the Constitution, is by the procedure laid down by Article 368. If that is the only procedure prescribed, it is not possible to understand how by ordinary laws the Parliament or the State Legislatures can amend the Constitution, particularly, when Article 368 does not contemplate any other mode of amendment or the setting up of another body to amend the Constitution. The other difficulty which immediately presents itself while examining Article 31(C) is the effect of the declaration provided for in the Article. It is possible to fit in the scheme of Article 31(C) any kind of social or economic legislation. If the courts are debarred from going into the question whether the laws enacted are meant to give effect to the policy set out in Article 39(b) and (c), the Court will be precluded from enquiring even into the incidental encroachment on rights guaranteed under Articles 14, 19 and 31. This is not possible with regard to laws enacted under Article 31(A). Those laws can be sustained if they infringe the aforesaid Articles only to the extent necessary for giving effect to them. Although on behalf of the respondents it is said that the Court can examine whether there is any nexus between the laws made under Article 31(C) and Article 39(b) and (c), there would hardly be any law which can be held to have no nexus with Article 39(b) and (c), the ambit of which is so wide.

619. The essential distinction between Article 31(A) and 31(C) is that the former is limited to specified topics; whereas the latter does not give the particular subjects but leaves it to the legislatures to select any topic that may purport to have some nexus with the objectives in Article 39(b) and (c). In other words, Article 31(C) deals with objects with unlimited scope.

620. The argument that Article 31(C) lifts the ban placed on State Legislature and Parliament under Articles 14, 19 and 31 and further that it may be considered as an amendment of Article 368, has been discussed by the learned Chief Justice in his judgment delivered today and we adopt, with respect, his reasoning for repelling them.

621. In our judgment Article 31(C) suffers from two kinds of vice which seriously affect its validity. The first is that it enables total abrogation of fundamental rights contained in Articles 14, 19 and 31 and, secondly, the power of amendment contained in Article 368 is of special nature which has been exclusively conferred on the Parliament and can be exercised only in the manner laid down in that Article. It was never intended that the same could be delegated to any other legislature including the State Legislatures.

622. The purpose sought to be achieved by Article 31(C) may be highly laudable as pointed out by the learned Solicitor General, but the same must be achieved by appropriate laws which can be Constitutionally upheld. We have no option, in view of what has been said except to hold that the validity of Article 31(C) cannot be sustained.

623. The last matter for determination is the validity of the 29th Amendment Act, 1972. The challenge is only against the inclusion of two Acts, namely, the Kerala Land Reforms (Amendment) Act 1969 and a similar Kerala Act of 1971 in the Ninth Schedule to the Constitution.

624. The main argument on behalf of the petitioners haw been confined to the relationship between Article 31(A) and Article 31(B). It has been contended that Article 31(B) is intimately linked with Article 31(A) and, therefore, only those legislative enactments which fall under Article 31(A) can be included in the 9th Schedule under Article 31(B). This matter is no longer open to argument as the same stands settled by a series of decisions of this Court See State of Bihar v. Maharajadhiraj Sir Kameshwar Singh of Darbhanga and Ors.; MANU/SC/0019/1952 : [1952]1SCR889 Visweshwar Rao v. The State of Madhya Pradesh MANU/SC/0020/1952 : [1952]1SCR1020 and N.B. Jeejeebhoy v. Assistant Collector, Thana Prant, Thana. MANU/SC/0248/1964 : [1965]1SCR636 . In all these cases it was held that Article 31 (B) was independent of Article 31(A). A matter which has been settled for all these years cannot be re-opened now. It will still be open, however, to the Court to decide whether the Acts which were included in the Ninth Schedule by 29th Amendment Act or any provision thereof abrogates any of the bask elements of the Constitutional structure or denudes them of their identity.

Our conclusions may be summarised as follows:

1. The decision in Golak Nath has become academic, for even if it be assumed that the majority judgment that the word 'law' in Article 13(2), covered Constitutional amendments was not correct, the result on the questions, wider than those raised in Golak Nath, now raised before us would be just the same.

2. The discussion on the 24th Amendment leads to the result that-

(a) the said amendment does no more than to clarify in express language that which was implicit in the unamended Article 368 and that it does not or cannot add to the power originally conferred thereunder;

(b) though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features;

(c) even if the amending power includes the power to amend Article 13(2), a question not decided in Golak Nath, the power is not so wide so as to include the power to abrogate or take away the fundamental freedoms; and

(d) the 24th Amendment Act, read as aforesaid, is valid.

3. Clause (2) of Article 31, as substituted by Section 2 of the 25th Amendment, does not abrogate any basic element of the Constitution nor does it denude it of its identity because-

(a) the fixation or determination of "amount" under that Article has to be based on some norm or principle which must be relevant for the purpose of arriving at the amount payable in respect of the property acquired or requisitioned;

(b) the amount need not be the market value but it should have a reasonable relationship with the value of such property;

(c) the amount should neither be illusory nor fixed arbitrarily; and

(d) though the courts are debarred from going into the question of adequacy of the amount and would give due weight to legislative judgment, the examination of all the matters in (a), (b) and (c) above is open to judicial review.

4. As regards Clause (2B) inserted in Article 31 which makes Article 19(1)(f) inapplicable, there is no reason to suppose that for determination of the amount on the principles laid down in the law any such procedure will be provided which will be unreasonable or opposed to the rules of natural justice.

5. On the above view Section 2 of the 25th Amendment is valid.

6. The validity of Section 3 of the 25th Amendment which introduced Article 31C in the Constitution cannot be sustained because the said Article suffers from two vices. The first is that it enables abrogation of the basic elements of the Constitution inasmuch as the fundamental rights contained in Articles 14, 19 and 31 can be completely taken away and, secondly, the power of amendment contained in Article 368 is of a special nature which has been exclusively conferred on Parliament and can be exercised only in the manner laid down in that Article. The same could

not be delegated to any other legislature in the country. Section 3, therefore, must be declared to be un-constitutional and invalid.

7. The 29th Amendment is valid. However, the question whether the Acts included in the Ninth Schedule by that amendment or any provision of those Acts abrogates any of the basic elements of the Constitutional structure or denudes them of their identity will have to be examined when the validity of those Acts comes up for consideration.

625. The petitions are remitted to the Constitution Bench to be decided in accordance with this judgment and the law. The Constitution Bench will also decide the validity of the 26th Amendment in the light of our judgment.

K.S. Hegde and A.K. Mukherjea, JJ.

626. In these writ petitions questions of great Constitutional importance have arisen for consideration. Herein we are called upon to decide the Constitutional validity of the 24th, 25th, 26th and 29th Amendments to the Constitution. We have had the advantage of hearing long and illuminating arguments covering over 65 working days. We have been referred to numerous decisions of this Court and of the courts in England, United States, Canada, Australia, Germany, Ireland and Ceylon. Our attention has also been invited to various writings of jurists, present and past, of several countries. For paucity of time, we have not taken up the question of the validity of the 26th Amendment. That question can be conveniently considered later after this bench decides certain fundamental questions of law arising for decision. For the same reason we have also refrained from going into the merits of various writ petitions at this stage. At present we are merely deciding the scope and validity of the 24th, 25th and 29th Amendments to the Constitution.

627. In order to decide the validity of the Amendments referred to earlier, it is necessary to go into the scope of the power conferred on Parliament under Article 368 of the Constitution as it stood prior to its amendment by the 24th Amendment Act which came into force on November 5, 1971. Article 368 is the only article found in Part XX of the Constitution. The title of that part is "Amendment of the Constitution." Its marginal note as it originally stood read "Procedure for amendment of the Constitution". The Article read thus:

An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in-

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

628. The petitioners' learned Counsel, Mr. Palkhivala, advanced twofold arguments as to the scope of that Article. His first contention was that in the exercise of its powers under. Article 368 as it stood before its amendment, it was impermissible for Parliament to take away or abridge any of the rights conferred by Part III of the Constitution. His second and more comprehensive argument was that the power conferred on the Parliament under Article 368 did not permit it to damage or destroy any of the basic or fundamental features or essential elements of the Constitution. The arguments on these two aspects naturally ran into each other. But for a proper legal approach, it is necessary to keep them apart as far as possible. Hence while considering the correctness of the first contention, we shall not take into consideration the importance of the Fundamental Rights. On this aspect, our approach to Article 368 will be purely based on the language of Article 368 and Article 13. The importance or transcendental character of the Fundamental Rights as well as the implied or inherent limitations on the amending power, if any, will be considered While dealing with the second of the two alternative contentions advanced by Mr. Palkhivala.

629. We shall first take up the question whether by the exercise of the power of amendment conferred by Article 368, as it originally stood, Parliament could have taken away any of the Fundamental Rights conferred by Part III. According to Mr. Palkhivala, Article 368 as it stood before its amendment merely laid down the procedure for amendment; the power to amend the Constitution must be found somewhere else in the Constitution; the power to be exercised by Parliament under Article 368 in legislative in character and the resulting product is 'law', hence such a law, in view of Article 13(2) which says "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void", cannot validly take away or abridge any of the Fundamental Rights. He further contended that the word 'law' in Article 13(1) means and includes not merely legislative enactments but also Constitutional measures. The Counsel urged, there is no reason why a different meaning should be given to the word 'law' in Article 13(2). A more important argument of his was that the power to amend the Constitution, even if, it is assumed to be contained in Article 368, is by no means an exclusive power because in certain respects and subject to certain conditions, the Constitution can also be amended by Parliament by a simple majority by enacting a law in the same manner as other legislative measures are enacted. In this connection he drew our attention to Articles 4, 169, Paragraph 7 of the Vth Schedule and Paragraph 21 of the VIth Schedule. Counsel urged that if the amendment of the provisions of the Constitution referred to therein is considered as the exercise of constituent power and consequently such an amendment is not a "law" within the meaning of that expression in Article 13, then Parliament by a simple majority of the members present and voting if the rule regarding the quorum is satisfied,

can take away or abridge any of the Fundamental Rights of certain sections of the public in this country.

630. On the other hand, the learned Attorney General, the learned Advocate General for the State of Maharashtra, appearing for the State of Kerala and the other Counsel appearing for the various States contended that a plain reading of Article 368 shows that the power to amend the Constitution as well as the procedure of amendment are both contained in that Article; once the form and the manner laid down in that Article have been complied with, the result is the amendment of the Constitution. According to them, the expression "an amendment of this Constitution" in Article 368 means an amendment of each and every provision or part of the Constitution; once the form and manner provided in Article 368 have been complied with, the amended Article is as effective as the original Article itself; and, therefore, as in the case of the original Article, the validity of the amended Article also cannot be challenged. They further contended that 'law' in Article 13 means only legislative enactments or ordinances, or orders or bye-laws or rules or regulations or notifications or customs or usages having the force of law in the territory of India and that expression does not include a Constitutional law, though in a comprehensive sense, a Constitutional law is also a law. They further contended that the word 'law' in Article 13 must be harmoniously construed with Article 368 and, if 'it is so construed, there is no room for doubt that the expression 'law' in Article 13 does not include a Constitutional law. They repudiated the contention of Mr. Palkhivala that there was any Constitutional law as such in force when the Constitution came into force. Hence according to them the expression 'law' in Article 13(2) does not take in the amendment of the Constitution. According to them, laws enacted under Article 4, Article 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI are not to be deemed as amendments to the Constitution as is laid down in those provisions, though in fact they do amend the Constitution in certain respects and they are no different from the other legislative measures enacted by Parliament; hence the laws enacted under those provisions cannot take away or abridge any of the Fundamental Rights. We have now to see which one of those lines of reasoning is acceptable.

631. The question whether Fundamental Rights can be abridged by Parliament by the exercise of its power under Article 368 in accordance with the procedure laid down therein came up for consideration before this Court very soon after the Constitution came into force. The validity of the Constitution (1st Amendment) Act 1951 came up for the consideration of this Court in Sankari Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 : [1952]1SCR89 . In that case the scope of Article 368 vis-a-vis Article 13(2) was debated. This Court rejecting the contention of the petitioners therein that it was impermissible for Parliament to abridge any of the Fundamental Rights under Article 368, held that "although 'law' must ordinarily include Constitutional law, there is a clear demarcation between ordinary law which is made in exercise of legislative power, and Constitutional law, which is made in exercise of constituent power". This Court held that "in the context of Article 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Article 13(2) does not affect the amendments made under Article 368". In the case this Court also opined that the power to amend the Constitution was explicitly conferred on Parliament by Article 368 and the requirement of a different majority was merely procedural. It rejected the contention that Article 368 is a complete code by itself and upheld the contention of the Government that while acting under Article 368, Parliament can adopt

the procedures to be adopted, except to the extent provided in Article 368, in enacting other legislative measures.

632. The power of Parliament to abridge Fundamental Rights under Article 368 was again considered by this Court in Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 . In that case two questions were considered viz. (1) Whether the amendment of the Constitution in so far as it purported to take away or abridge the rights conferred by Part III of the Constitution was within the prohibition of Article 13(2) and (2) Whether Articles 31-A and 31-B (as amended by the 17th Amendment Act) sought to make changes in Article 132, Article 136 and Article 226 or any of the Lists in the VIIth Schedule and therefore the conditions prescribed in the proviso to Article 368 had to be satisfied. It is clear from the judgment of the Court that the first question was not debated before the Court though the majority judges as well as the minority judges did consider that question evidently without any assistance from the bar. On both those questions Chief Justice Gajendragadkar speaking for himself and Wanchoo and Raghubar Dayal JJ. concurred with the view taken by this Court in Sankari Prasad's case. But Hidayatullah J. (as he then was) and Mudholkar J. doubted the correctness of that decision on the first question but concurred with the view taken by the majority of judges on the second question. Hidayatullah and Mudholkar JJ. agreed in dismissing the writ petitions as the petitioners had not challenged the correctness of the decision of this Court in Sankari Prasad's case on the first question.

633. The question whether any of the Fundamental Rights can be abridged or taken away by Parliament in exercise of its power under Article 368 again came up for consideration before this Court in I.C. Golaknath and Ors. v. State of Punjab (1957) 2 S.C.R. 762. This case was heard by a full court of eleven judges. In that case by a majority of six to five this Court came to the conclusion that Sankari Prasad's case as well as Sajjan Singh's case were not correctly decided. The majority held that the expression 'law' in Article 13(2) includes Constitutional amendments as well. The minority agreeing with the earlier decisions held that the expression 'law' in Article 13(2) does not include Constitutional amendments. Five of the majority judges namely Subba Rao C.J., Shah, Sikri, Shelat and Vaidialingam JJ. held that Article 368 in terms only prescribes the various steps in the matter of amendment and that the Article assumes the existence of the power to amend somewhere else in the Constitution. According to them the mere completion of the procedural steps mentioned in Article 368 cannot bring about a valid amendment of the Constitution. In their opinion, the power to amend cannot be implied from Article 368. They declined to infer such a power by implication in Article 368 as they thought it was not necessary since Parliament has under Article 248 read with Item 97 of List I of the VIIth Schedule plenary power to make any law including the law to amend the Constitution subject to the limitations contained therein. They observed that the power of Parliament to amend the Constitution may be derived from Article 245, Article 246 and Article 248 read with Item 97 of List I. The remaining six judges held that the power of amendment is not derived from Article 248 read with Entry 97 of List I of the VIIth Schedule. Wanchoo J. (as he then was) and Bhargava, Mitter and Bachawat JJ. held that the power to amend is to be found in Article 368 and Ramaswami J. held that Article 368 confers on Parliament the right (power) to amend the Constitution. Hidayatullah J. (as he then was) held that Article 368 outlines a process, which, if followed strictly, results in the amendment of the Constitution; that article gives the power to no particular person or persons, and that the power of amendment, if it can be called a power at all, is a legislative power but it is sui generis and exists outside the three Lists in Schedule VII of the Constitution. This reasoning of Hidayatullah J. may

be reasonably read to suggest that the power of amendment] is necessarily implied in Article 368. The majority of the judges who held that it was impermissible for Parliament to take away or abridge any of the Fundamental Rights by an amendment of the Constitution did not proceed to strike down the 1st, 4th and 17th Amendments. Five of them relied on the doctrine of "Prospective Overruling" (Subba Rao C.J., Shah, Sikri, Shelat and Vaidialingam JJ.) and Hidayatullah J. relied on the doctrine of acquiescence to save those amendments. Evidently in an attempt to get over the effect of the decision in Golak Nath's case, Parliament has enacted the 24th Amendment Act, 1971, and the same has been ratified by more than one half of the Legislatures of the States.

634. Now, turning back to the contentions advanced on behalf of the parties, we shall first deal with the contention of the Union and some of the States that once the "form and manner" prescribed in Article 368 are complied with, the Constitution stands amended and thereafter the validity of the amendment is not open to challenge. This contention does not appear to be a tenable one. Before a Constitution can be validly amended, two requirements must be satisfied. Firstly, there must be the power to amend the provision sought to be amended; and secondly, the "form and the manner" prescribed in Article 368 must be satisfied. If the power to amend the Article is wanting, the fact that Parliament has adhered to the form and manner prescribed in Article 368 becomes immaterial. Hence the primary question is whether Parliament has power to abridge or take away any of the Fundamental Rights prescribed in Part III of the Constitution ?

635. In order to find out whether Parliament has the power to take away or abridge any of the Fundamental Rights in exercise of its power under Article 368, we must first ascertain the true scope of that Article. As seen earlier in Sankari Prasad's case, this Court ruled that the power to amend the Constitution is to be found in Article 368. The same view was taken by the majority of judges in Sajjan Singh's case as well as in Golak Nath's case. We respectively hold that view to be the correct view. As mentioned earlier, Part XX of the Constitution which purports to deal with amendment of the Constitution contains only one Article, i.e. Article 368. The title of that Part is "Amendment of the Constitution." The fact that a separate part of the Constitution is reserved for the amendment of the Constitution is a circumstance of great significance-see Don John Francis Douglas Liyanage and Ors. v. The Queen [1967] 1 A.C. 259 and State of U.P. v. Manbodhan Lal Srivastava MANU/SC/0123/1957 : (1958)IILLJ273SC . The provisions relating to the amendment of the Constitution are some of the most important features of any modern Constitution. All modern Constitutions assign an important place to the amending provisions. It is difficult to accept the view expressed by Subba Rao C.J. and the learned judges who agreed with him that the power to amend the Constitution is not to be found even by necessary implication in Article 368 but must be found elsewhere. In their undoubtedly difficult task of finding out that power elsewhere they had to fall back on Entry 97 of List I. Lists I to III of the VIIth Schedule of the Constitution merely divide the topics of legislation among the Union and the States. It is obvious that these lists have been very carefully prepared. They are by and large exhaustive. Entry 97 in List I was included to meet some unexpected and unforeseen contingencies. It is difficult to believe that our Constitution-makers who were keenly conscious of the importance of the provision relating to the amendment of the Constitution and debated that question for several days, would have left this important power hidden in Entry 97 of List I leaving it to the off chance of the courts locating that power in that Entry. We are unable to agree with those learned judges when they sought to place reliance on Article 245, Article 246 and Article 248 and Entry 97 of List I for the purpose of locating the power of amendment in the residuary power conferred on the Union. Their reasoning in that regard

fails to give due weight to the fact that the exercise of the power under those articles is "subject to the provisions of this Constitution". Hardly few amendments to the Constitution can be made subject to the existing provisions of the Constitution. Most amendments of the Constitution must necessarily impinge on one or the other of the existing provisions of the Constitution. We have no doubt in our minds that Article 245 to Article 248 as well as the Lists in the VIIth Schedule merely deal with the legislative power and not with the amending power.

636. Now corning back to Article 368, it may be noted that it has three components; firstly, it deals with the amendment of the Constitution; secondly, it designates the body or bodies which can amend the Constitution, and lastly, it prescribes the form and the manner in which the amendment of the Constitution can be effected. The Article does not expressly confer power to amend; the power is necessarily implied in the Article. The Article makes it clear that the amendment of the Constitution can only be made by Parliament but in cases falling under the proviso, ratification by legislatures of not less than one-half of the States is also necessary. That Article stipulates various things. To start with, the amendment to the Constitution must be initiated only by the introduction of a Bill for that purpose in either House of Parliament. It must then be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting and if the amendment seeks to make any change in the provisions mentioned in the proviso, it must be ratified by not less than one-half of the State Legislatures. Thereafter, it should be presented to the President for his assent It further says that upon such assent being given to the Bill "the Constitution shall stand amended in accordance with the terms of the Bill". To restate the position, Article 368 deals with the amendment of the Constitution. The Article contains both the power and the procedure for amending the Constitution. No undue importance should be attached to the marginal note which says "Procedure for amendment of the Constitution". Marginal note plays a very little part in the construction of a statutory provision. It should have much less importance in construing a Constitutional provision. The language of Article 368 to our mind is plain and unambiguous. Hence we need not call into aid any of the rules of construction about which there was great deal of debate at the hearing. As the power to amend under the Article as it originally stood was only implied, the marginal note rightly referred to the procedure of amendment. The reference to the procedure in the marginal note does not negative the existence of the power implied in the Article.

637. The next question is whether the power conferred under Article 368 is available for amending each and every provision of the Constitution. The Article opens by saying "An amendment of this Constitution" which means an amendment of each and every provision and part of the Constitution. We find nothing in that Article to restrict its scope. If we read Article 368 by itself, there can be no doubt that the power of amendment implied in that Article can reach each and every Article as well as every part of the Constitution.

638. Having ascertained the true scope of Article 368, let us now turn to Article 13. A great deal of reliance was placed by the learned Counsel for the petitioners on the expression 'law' found in Article 13(1) and (2). As seen earlier, the two judges in Sajjan Singh's case as well as the majority of judges in Golak Nath's case opined that 'law' in Article 13(2) also includes Constitutional law i.e. law which amends the Constitution and we see no substance in the contention that the amendment of a Constitution is not 'law'. The Constitution is amended by enacting Amendment Acts. The Constitution is not only a law but the paramount law of the country. An amendment of

that law must necessarily be a law. The fact that the word 'law' is not used in Article 368 is of little significance. For that matter Article 110 also does not provide that a Bill when assented to by the President becomes law. The amendment of a Constitution is initiated by a Bill and it goes through the procedure laid down in Article 368, supplemented wherever necessary by the procedure prescribed in Article 107; see Sankari Prasad's case. The Bill when passed by both the Houses of Parliament and, in matters coming under the proviso to Article 368, after securing the necessary ratification by the State Legislatures, is presented to the President for his assent The procedure adopted is the same as that adopted in enacting an ordinary statute except to the extent provided in Article 368. Even if it had been different, there can be hardly any doubt that the amendment of a Constitution is 'law'. In Sankari Prasad's case, Patanjali Sastri J. (as he then was) speaking for the Court had no doubt in ruling that the expression 'law' must ordinarily include 'Constitutional law'. The same view was taken by all the judges in Sajjan Singh's case and also by most of the judges in Golak Nath's case.

639. But the question still remains whether our Constitution makers by using the expression 'law' in Article 13(2) intended that that expression should also include the exercise of Parliament's amending power under Article 368. We have earlier explained the scope and extent of Article 368. In understanding the meaning of the word 'law's in Article 13(2) we should bear in mind the scope of Article 368. The two Articles will have to be construed harmoniously. The expression 'law' may mean one of two things, namely, either those measures which are enumerated in Article 13(3) as well as statutes passed by legislatures or in addition thereto Constitutional laws (amendments) as well. In this connection reference may be made to a passage in Corpus Juris Secundum (Vol. XVI-Title Constitutional Law Article 1, p. 20), which says:

The term 'Constitution' is ordinarily employed to designate the organic law in contradistinction to the terms 'law' which is generally used to designate statutes or legislative enactments. Accordingly, the term 'law' under this distinction does not include a Constitutional amendment. However, the term 'law' may, in accordance with the context in which it is used, comprehend or include the Constitution or a Constitutional provision or amendment

640. It is true that Article 13(3) contains an inclusive definition of the term 'law' and, therefore, the question whether it includes Constitutional amendment also cannot be answered with reference to that clause. All the same, since the expression 'law' can have two meanings, as mentioned earlier, we must take that meaning which harmonises with Article 368. As mentioned earlier, Article 368 is unambiguous, whereas Article 13 is ambiguous because of the fact that the word 'law' may or may not include Constitutional amendment. Further, when we speak of 'law' we ordinarily refer to the exercise of legislative power. Hence, law' in Article 13(2) must be construed as referring to the exercise of an ordinary legislative power.

641. An examination of the various provisions of our Constitution shows that it has made a distinction between "the Constitution" and "the laws". The two are invariably treated separately-see Article 60, 61, proviso to Article 73(1), Article 75(4) read with the Third Schedule, Article 76(2); Article 124(6) read with the Third Schedule, Article 148(5), Article 159 and Article 219 read with the Third Schedule. These provisions clearly establish that the Constitution-makers have not used the expression 'law' in the Constitution as including Constitutional law.

642. Mr. Palkhivala contended that the term 'law' in Article 13(1) includes Constitutional law also. Wanchoo J. speaking for himself and on behalf of two other judges in Golaknath's case held that on the day the Constitution came into force, no Constitutional law was in force. therefore in his view, the term 'law' in Article 13(1) can only refer to legislative measures or ordinances or bye-laws, rules, regulations, notifications, customs and usages. Mr. Palkhivala contended that the said finding is not correct. In that connection he referred to the treaties and agreements entered into between the former Rulers of the Indian States and the Central Government as well as to certain other measures which were in force when the Constitution came into force which, according to him, are 'Constitutional law' and, on that basis, he contended that certain Constitutional laws were in force on the day when the Constitution came into force. We are not satisfied that this contention is correct. Under Article 395, the Indian Independence Act, 1947 as well as the Government of India Act, 1935, were repealed. The laws which were continued under Article 372 after the Constitution came into force did not operate on their own strength. For their validity they had to depend on Article 372 and that Article made it clear that those laws will continue to be in force "subject to the other provisions of the Constitution". Anyway it is not necessary to decide the question whether those laws are Constitutional laws. Article 13(1) does not refer to 'laws' as such. It refers to "laws in force in the territory of India immediately before the commencement of this Constitution". It identifies certain laws and determines the extent of their validity. The scope of Article 13(1) does not bear on the interpretation of the expression 'law' in Article 13(2).

643. We shall now examine the contention of Mr. Palkhivala based on Articles 4, 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. He contended and we have no doubt that he did so rightly,-that the Constitution can be amended not only under Article 368 but also under Article 4, Article 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. Amendments under these provisions can be effected by Parliament by a simple majority vote of the members present in the House and voting, if the prescribed quorum is there. If the two Houses do not agree on any amendment under those provisions, the same has to be decided by a Joint sitting of the two Houses as provided in Article 108. That is because of the express exclusion of the application of Article 368 to the amendments made under those provisions. According to Mr. Palkhivala, by the exercise of its power under the aforementioned provisions, Parliament can in certain respects take away or abridge the Fundamental Rights of a section of the people of this country. He painted a gloomy picture as to what can happen by the exercise of power by Parliament under those provisions. It is true that the power conferred under the aforementioned provisions is amending power but those provisions make it clear that the exercise of the power under those provisions shall not be "deemed to be the amendment of the Constitution for the purpose of Article 368".

644. This brings us to a consideration, what exactly is the intent of the expression "No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purpose of Article 368". There can be little doubt that these words merely mean that the form and manner prescribed in Article 368 need not be complied with. Once this position is accepted any law made under those provisions takes the character of an ordinary law and that law becomes subject to the other provisions of the Constitution including Article 13(2).

645. Counsel either side took us through the debates of the Constituent Assembly relating to Article 368. Naturally each one of them relied on those passages from the speeches of the various members who took part in the debate and, in particular, on the speeches of late Prime Minister Nehru and

the then Law Minister Dr. Ambedkar, which supported their contention. Having gone through those speeches, we feel convinced that no conclusive inference can be drawn from those speeches as to the intention of those speakers. Hence, we need not go into the question at this stage whether it is permissible for us to place reliance on those speeches for finding out the true scope of Article 368.

646. Mr. Palkhivala placed a great deal of reliance on the stages through which the present Article 13 passed. It is seen from the Constituent Assembly records that when the Constituent Assembly was considering the provision which resulted in Article 13(2), Mr. Santhanam one of the members of the Constituent Assembly moved an amendment to make it clear that the expression 'law' in Article 13(2) does not include an amendment of the Constitution under draft Article 304 (present Article 368) and that the amendment was accepted by Sardar Patel, Chairman of the Advisory Committee. On the basis of that decision, Sir B.N. Rau, the Constitutional Adviser redrafted the concerned provision by specifically excluding from its operation amendments of the Constitution. When this matter went before the Drafting Committee consisting of eminent lawyers, they redrafted the clause thus:

The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of contravention be void.

647. In other words, the drafting committee deleted from Sir B.N. Rau's draft those words which specifically excluded from the operation of the clause amendments of the Constitution. From these circumstances, Mr. Palkhivala seeks to draw the inference that the Constituent Assembly finally decided to bring within the scope of Article 13(2) Constitutional amendments also. We are unable to accept this contention. It is not clear why the drafting committee deleted the reference to the amendment of the Constitution in Article 13(2). It is possible that they were of the opinion that in view of the plain language of the provision relating to the amendment of the Constitution i.e. draft Article 304, it was unnecessary to provide in Article 13(2) that the amendment of the Constitution does not come within its scope.

648. It is true that this Court has characterised the Fundamental rights as "paramount" in A.K. Gopalan v. State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 , as "sacrosanct" in State of Madras v. Smt. Champakam Dorairajan, MANU/SC/0007/1951 : [1951]2SCR525 , as "rights served by the people" in Pandu M.S.M. Sharma v. Shri Sri Krishna Sinha, MANU/SC/0021/1958 : [1959] Supp. 1 S.C.R. 806 as "inalienable and inviolable" in Smt. Ujjam Bhai v. State of U.P. MANU/SC/0101/1961 : [1963]1SCR778 and as "transcendental" in several other cases. In so describing the Fundamental Rights in those cases, this Court could not have intended to say that the Fundamental Rights alone are the basic elements or fundamental features of the Constitution. Mr. Palkhiwala conceded that the basic elements and fundamental features of the Constitution are found not merely in Part III of the Constitution but they are spread out in various other parts of the Constitution. They are also found in some of the Directive Principles set out in Part IV of the Constitution and in the provisions relating to the sovereignty of the country, the Republic and the Democratic character of the Constitution. According to the Counsel, even the provisions relating to the unity of the country are basic elements of the Constitution.

649. It was urged that since even amendment of several provisions of minor significance requires the concurrence of the legislatures of the majority of the States it is not likely that the Constitution makers would have made the amendment of the provisions relating to Fundamental Rights a plaything of the Parliament This argument, however, does not lead to any definite conclusion. It is not unlikely that the Constitution-makers thought that the states are specially interested in the provisions mentioned in the proviso to Article 368, so that the amendment of those provisions should require ratification by the legislatures of the majority of the States. When the language of Article 368 is plain, as we think it is, no question of construction of that Article arises. There is no need to delve into the intention of the Constitution-makers.

650. Every Constitution is expected to endure for a long time. therefore, it must necessarily be elastic. It is not possible to place the society in a straight jacket. The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of the generation to come. Hence every Constitution wisely drawn up provides for its own amendment.
We shall separately consider the contention of Mr. Palkhivala that our Constitution embodies certain features which are so basic that no free and civilised society can afford to discard them and in no foreseeable future can those features become irrelevant in this country. For the present we shall keep apart, for later consideration. Mr. Palkhivala's contention that the Parliament which is only a constituted body cannot damage or destroy the essential features of the Constitution. Up till now we have merely confined our attention to the question as to the scope and reach of Article 368. This Court has always attached great importance to the Fundamental Rights guaranteed under our Constitution. It has given no less importance to some of the Directive Principles set out in Part IV. The Directive Principles embodied in Part IV of the Constitution or at any rate most of them are as important as the rights of individuals. To quote the words of Graville Austin (The Indian Constitution-Corner Stone of a Nation, page 50):
The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution by establishing the conditions necessary for its achievement yet despite the permeation of the entire Constitution by the aim of national renaissance, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and the Directive Principles of State Policy. These are the conscience of the Constitution.

therefore to implement the duties imposed on the States under Part IV, it may be necessary to abridge in certain respects the rights conferred on the citizens or individuals under Part III, as in the case of incorporation of Clause 4 in Article 15 to benefit the backward classes and Scheduled Castes and Scheduled Tribes and the amendment of Article 19(2) with a view to maintain effectively public order and friendly relations with foreign States. Hence we are unable to construe the amending power in a narrow or pedantic manner. That power, under any circumstance, must receive a broad and liberal interpretation. How large it should be is a question that requires closer examination. Both on principle as well as on the language of Article 368, we are unable to accede to the contention that no right guaranteed by Part III can be abridged.

651. This Court is always reluctant to overrule its earlier decisions. There must be compelling reasons for overruling an earlier decision of this Court. As seen earlier, there are already conflicting decisions as to the scope of Article 368. As far back as 1951, in Sankari Prasad's case, this Court

took the view that the power of amendment conferred under Article 368 included within itself the power to abridge and take away the Fundamental Rights incorporated in Part III of the Constitution. The correctness of that view was not challenged in several other decisions. The same view was taken in Sajjan Singh's case. That view was negatived in Golakhnath's case by a very narrow majority. Bearing in mind the disastrous effect that decision would have had on many important laws that had been enacted by the Union and the States between the years 1951 to 1967, this Court by relying on the doctrines of prospective overruling and the doctrine of acquiescence did not invalidate those laws.

652. One other circumstance of great significance is that the 1st Amendment to the Constitution was carried out by the provisional Parliament which consisted of the very members who were the members of the Constituent Assembly. It should be remembered that members of the Constituent Assembly continued as the members of the provisional Parliament till the General Election in 1952. They must have been aware of the intention with which Article 368 was enacted. These are important circumstances. The interpretation we place on a Constitutional provision, particularly on a provision of such great importance as Article 368 must subserve national interest. It must be such as to further the objectives intended to be achieved by the Constitution and to effectuate the philosophy underlying it. To quote the memorable words of Chief Justice Marshall we must not forget that we are expounding a Constitution.

653. We now come to the second contention of Mr. Palkhivala that the word 'amendment' has a limited meaning and Article 368 does not permit any damage to or destruction of the basic or fundamental features or essential elements of the Constitution. Mr. Palkhivala urged that the word "amendment" or "amend" ordinarily means 'to make certain changes or effect some improvements in a text'. Those words do not, according to him, except under special circumstances mean the widest power to make any and every change in a document, including a power to abrogate or repeal the basic features of that document. The same, he contended, is true of a power to amend a statute or a Constitution. In support of his contention, he invited our attention to the various meanings given to the word "amendment" or "amend" in several dictionaries. He further urged that in construing the meaning of the word "amendment" in Article 368, we must take into consideration the donee to whom the power to amend the Constitution is granted, the atmosphere in which the Constitution came to be enacted, the consequences of holding that power is unlimited in scope as well as the scheme of the Constitution. He urged that in the final analysis, the duty of the Court is to find out the true intention of the founding fathers and therefore the question before us is whether the founding fathers intended to confer on Parliament, a body constituted under the Constitution, power to damage or destroy the very basis on which our Constitution was erected. On the other hand it was contended on behalf of the Union of India, State of Kerala as well as the other States that the power of amendment conferred under Article 368 is of the widest amplitude. It brooks no limitation. It is a power which can be used to preserve the Constitution, to destroy the Constitution and to re-create a new Constitution. It was contended that the society can never be static, social ideals and political and economic theories go on changing and every Constitution in order to preserve itself needs to be changed now and then to keep in line with the growth of the society. It was further contended that no generation can impose its Will permanently on the future generations. Wise as our founding fathers were, wisdom was not their sole monopoly. They themselves realised it. They knew that in a changing world, there can be nothing permanent and, therefore, in order to attune the Constitution to the changing concepts of politics, economics and

social ideas, they provided in Article 368 a machinery which is neither too flexible nor too rigid and makes it possible to so reshape the Constitution as to meet the requirements of the time. According to them by following the form and manner prescribed in Article 368, Parliament can exercise the same power which the Constituent Assembly could have exercised. We have now to consider which one of the two contentions is acceptable.

654. While interpreting a provision in a statute or, Constitution the primary duty of the court is to find out the legislative intent. In the present case our duty is to find out the intention of the founding fathers in enacting Article 368. Ordinarily the legislative intent is gathered from the language used. If the language employed is plain and unambiguous, the same must be given effect to irrespective of the consequences that may arise. But if the language employed is reasonably capable of more meanings than one, then the Court will have to call into aid various well settled rules of construction and in particular, the history of the legislation-to find out the evil that was sought to be remedied and also in some cases the underlying purpose of the legislation-the legislative scheme and the consequences that may possibly flow from accepting one or the other of the interpretations because no legislative body is presumed to confer a power which is capable of misuse.

655. It was conceded at the bar that generally speaking, the word "amendment" like most words in English or for that matter in any language, has no precise meaning. Unlike "sale" or "exercise", it is not a term of law. It is capable of receiving a wide meaning as well as a narrow meaning. The power to amend a Constitution in certain context may include even a power to abrogate or repeal that Constitution. It may under certain circumstances mean a power to effect changes within narrow limits. It may sometime mean a power that is quite large but yet subject to certain limitations. To put it shortly, the word "amendment" without more, is a colourless word. It has no precise meaning. It takes its colour from the context in which it is used. It cannot be interpreted in vacuo. Few words in English language have a natural, or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of the context. As observed by Holmes J. in Towne v. Eiser. 215 U.S. 418 "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to circumstances and the time in which it is used". We must read the word "amendment" in Article 368 not in isolation but as occurring in a single complex instrument, Article 368 is a part of the Constitution. The Constitution confers various powers on legislatures as well as on other authorities. It also imposes duties on those authorities. The power conferred under Article 368 is only one such power. Unless it is plain from the Constitutional scheme that the power conferred under Article 368 is a super power and is capable of destroying all other powers, as contended on behalf of the Union and the States, the various parts of the Constitution must be construed harmoniously for ascertaining the true purpose of Article 368.

656. In our Constitution unlike in the Constitution of the United States of America the words "amendment" and "amend" have been used to convey different meanings in different places. In some Articles they are used to confer a narrow power, a power merely to effect changes within prescribed limits-see Articles 4, 107(2), 111, 169(2), 196(2), 197(2) and 200. Under Paragraph 7 of the Fifth Schedule as well as Paragraph 21 of the Sixth Schedule to the Constitution, a much larger power to amend those Schedules has been conferred on Parliament. That power includes power to amend "by way of addition, variation or repeal". Similar is the position under the repealed Article 243(2), Article 252(2) and 350(5). It is true that the power to amend conferred under the

Fifth and Sixth Schedules is merely a power to amend those Schedules but if the Constitution-makers were of the opinion that the word "amendment" or "amend" included within its scope, unless limited otherwise, a power to add, vary, or repeal, there was no purpose in mentioning in those Articles or parts "amend by way of addition, variation or repeal". In this connection it may also be remembered that the Constituent Assembly amended Section 291 of the Government of India Act, 1935 on August 21, 1949 just a few days before it approved Article 368 i.e. on September 17, 1949. The amended Section 291 empowered the Governor-General to amend certain provisions of the 1935 Act "by way of addition, modification or repeal". From these circumstances, there is prima facie reason to believe that our Constitution makers made a distinction between a mere power to amend and a power to amend by way of "addition, modification or repeal". It is one of the accepted rules of construction that the courts should presume that ordinarily the legislature uses the same words in a statute to convey the same meaning. If different words are used in the same statute, it is reasonable to assume that, unless the context otherwise indicates, the legislature intended to convey different meanings by those words. This rule of interpretation is applicable in construing a Constitution as well.

657. Now that we have come to the conclusion that the word "amendment" in Article 368 is not a word of precise import and has not been used in the various Articles and parts of the Constitution to convey always the same precise meaning, it is necessary to take the aid of the other relevant rules of construction to find out the intention of the Constitution makers.

658. The question whether there is any implied limitation on the amending power under Article 368 has not been decided by this Court till now. That question did not come up for consideration in Sankari Prasad's case. In Sajjan Singh's case neither the majority speaking through Gajendragadkar C.J. nor Hidayatullah J. (as he then was) went into that question. But Mudholkar J. did foresee the importance of that aspect. He observed in the course of his judgment:

We may also have to bear in mind the fact that ours is a written Constitution. The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted a written Constitution, created three organs of State, made the Union executive responsible to Parliament and the State executive to the State legislatures, erected a federal structure and distributed legislative power between Parliament and the State Legislatures; recognised certain rights as fundamental and provided for their enforcement, prescribed forms of oaths of office or affirmations which require those who subscribe to them to owe true allegiance to the Constitution and further require the members of the Union Judiciary and of the Higher judiciary in the States, to uphold the Constitution. Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution ?

It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368 ?

659. For the first time in Golak Nath's case, the contention that the power of amendment under Article 368 is subject to certain inherent and implied limitations was urged. Subba Rao C.J.

speaking for himself and four of his colleagues, while recognising the force of that contention refrained from pronouncing on the same. Wanchoo J. (as he then was) speaking for himself and two other judges opined that the power under Article 368 is a very wide power but it may not include a power to abrogate the Constitution. He did explain what he meant by "abrogate the Constitution". Hidayatullah J. (as he then was) did not address himself to that question. Bachawat J. side-stepped that question by saying that the impugned amendments did not destroy any, basic feature of the Constitution, The only judge who rejected the contention that there are inherent or implied limitations on the amending power was Ramaswami J. From the above discussion it is seen that in cases that came up for consideration before this Court in the past several judges did consider the possibility of having some limitation on the amending power under Article 368 though they did not definitely pronounce on that question.

660. One of the well-recognised rules of construction is the rule laid down in Heydon's case. What was the mischief that the Constitution-makers intended to remedy? What was the purpose intended to be achieved by the Constitution? To answer this question it is necessary to make a brief survey of our Nationalist movement ever since 1885 and the objectives sought to be achieved by that movement.

661. The objectives underlying our Constitution began to take their shape as a result of the forces that operated in the national struggle during the British rule when the British resorted to arbitrary acts of oppression such as brutal assaults on unarmed satyagrahis, internments, deportations, detention without trial and muzzling of the press. The harshness with which the executive operated its repressive measures strengthened the demand for Constitutional guarantees of Fundamental Rights. As far back as 1895, the Constitution of India Bill, prepared by some eminent Indians, envisaged for India a Constitution guaranteeing to everyone of our citizens freedom of expression, inviolability of one's house, right to property, equality before the law, equal opportunity of admission to public offices, right to present claims, petitions and complaints and right to personal liberty. After the publication of the Montague-Chelmsford Report, the Indian National Congress at its special session held in Bombay in August 1918 demanded that the new Government of India Act should contain "Declaration of Rights of the people of India as British citizens". The proposed declaration was to embody among other things, guarantees in regard to equality before the law, protection in respect of life and liberty, freedom of speech and press and right of association. In its Delhi Session in December of the same year, the Congress passed another resolution demanding the immediate repeal of all laws, regulations and ordinances restricting the free discussion of political questions and conferring on the executive the power to arrest, detain, intern, extern or imprison any British subject in India outside the process of ordinary civil or Criminal law and the assimilation of the law of sedition to that of England. The Commonwealth of India Bill, finalised by the National Convention in 1926 embodied a specific declaration of rights visualising for every person certain rights in terms practically identical with the relevant provisions of the Irish Constitution. The problems of minorities in India further strengthened the general argument in favour of inclusion of Fundamental Rights in the Indian Constitution. In its Madras Session in 1927, the Indian National Congress firmly laid down that the basis of the future Constitution must be a declaration of Fundamental Rights. In 1928, the Nehru Committee in its report incorporated a provision for enumeration of such rights, recommending their adoption as a part of the future Constitution of India. The Simon Commission, rejected the demand on the plea that an abstract declaration of such rights was useless unless there existed "the will and the means to make them

effective". In 1932, in its Karachi Session, the Indian National Congress reiterated its resolve to regard a written guarantee of Fundamental Rights as essential in any future Constitutional set up in India. The demand for the incorporation of the Fundamental Rights in the Constitutional document was reiterated by the Indian leaders at the Round Table Conferences. The Joint Select Committee of the British Parliament rejected those demands. The Sapru Committee (1944-45) was of the opinion that in the peculiar circumstances of India, the Fundamental Rights were necessary not only as assurance and guarantees to the minorities but also prescribing a standard of conduct for the legislatures, governments and the courts. The Committee felt that it was for the Constitution-making body to enumerate first the list of Fundamental Rights and then to undertake their further division into justiciable and non-justiciable rights and provide a suitable machinery for their enforcement.

662. The atrocities committed during the Second World War and the world wide agitation for human rights, the liberties guaranteed in the Atlantic Charter, the U.N. Charter and the Declaration of Human Rights by the Human Rights' Commission strengthened the demand for the incorporation of Fundamental Rights in our Constitution. The British Cabinet Mission in 1946 recognised the need for a written guarantee of Fundamental Rights in the Constitution of India. It accordingly recommended the setting up of an advisory committee for reporting, inter alia, on Fundamental Rights. By the Objectives Resolution adopted on January 22, 1947, the Constituent Assembly solemnly pledged itself to draw up for India's future governance a Constitution wherein "shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality and wherein adequate safeguard would be provided for minorities, backward and tribal areas and depressed and other backward classes". The close association between political freedom and social justice has become a common concept since the French Revolution. Since the end of the first World War, it was increasingly recognised that peace in the world can be established only if it is based on social justice. The most modern Constitutions contain declaration of social and economic principles, which emphasise, among other things, the duty of the State to strive for social security and to provide work, education and proper condition of employment for its citizens. In evolving the Fundamental Rights and the Directive Principles, our founding fathers, in addition to the experience gathered by them from the events that took place in other parts of the world, also drew largely on their experience in the past. The Directive Principles and the Fundamental Rights mainly proceed on the basis of Human Rights. Representative democracies will have no meaning without economic and social justice to the common man. This is a universal experience. Freedom from foreign rule can be looked upon only as an opportunity to bring about economic and social advancement. After all freedom is nothing else but a chance to be better. It is this liberty to do better that is the theme of the Directive Principles of State Policy in Part IV of the Constitution.

663. The Objectives Resolution passed by the Constituent Assembly in January 1947, is a definite landmark. It is a precursor to the preamble to our Constitution. It sets out in detail the objectives that were before our Constitution-makers. Those objectives have now been incorporated in the preamble to our Constitution which reads:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949 do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

664. From the preamble it is quite clear that the two primary objectives that were before the Constituent Assembly were (1) to constitute India into a Sovereign Democratic Republic and (2) to secure to its citizens the rights mentioned therein. Our founding fathers, at any rate, most of them had made immense sacrifices for the sake of securing those objectives. For them freedom from British rule was an essential step to render social justice to the teeming millions in this country and to secure to one and all in this country the essential human rights. Their Constitutional plan was to build a welfare state and an egalitarian society.

665. Now that we have set out the objectives intended to be achieved by our founding fathers, the question arises whether those very persons could have intended to empower the Parliament, a body constituted under the Constitution to destroy the ideals that they dearly cherished and for which they fought and sacrificed.

666. If the nature of the power granted is clear and beyond doubt the fact that it may be misused is wholly irrelevant. But, if there is reasonable doubt as to the nature of the power granted then the Court has to take into consideration the consequences that might ensue by interpreting the same as an unlimited power. We have earlier come to the conclusion that the word "amendment" is not an expression having a precise connotation. It has more than one meaning. Hence it is necessary to examine the consequence of accepting the contention of the Union and the States. therefore let us understand the consequences of conceding the power claimed. According to the Union and the States that power inter alia, includes the power to (1) destroy the sovereignty of this country and make this country a satellite of any other country; (2) substitute the democratic form of government by monarchical or authoritarian form of government; (3) break up the unity of this country and form various independent States; (4) destroy the secular character of this country and substitute the same by a theocratic form of government; (5) abrogate completely the various rights conferred on the citizens as well as on the minorities; (6) revoke the mandate given to the States to build a Welfare State; (7) extend the life of the two Houses of Parliament indefinitely; and (8) amend the amending power in such a way as to make the Constitution legally or at any rate practically unamendable. In fact, their contention was that the legal sovereignty, in the ultimate analysis rests only in the amending power. At one stage, Counsel for the Union and the States had grudgingly conceded that the power conferred under Article 368 cannot be used to abrogate the Constitution but later under pressure of questioning by some of us they changed their position and said that by 'abrogation' they meant repeal of the Constitution as a whole. When they were asked as to what

they meant by saying that the power conferred under Article 368 cannot be used to repeal the Constitution, all that they said was that while amending the Constitution, at least one clause in the Constitution must be retained though every other clause or part of the Constitution including the preamble can be deleted and some other provisions substituted. Their submission in short was this that so long as the expression the "Constitution of India" is retained, every other article or part of it can be replaced. They tried to tone down the effect of their claim by saying that, though legally, there is no limitation on the amending power, there are bound to be political compulsions which make it impermissible for Parliament to exercise its amending power in a manner unacceptable to the people at large. The strength of political reaction is uncertain. It depends upon various factors such as the political consciousness of the people, their level of education, strength of the various political organizations in the country, the manner in which the mass media is used and finally the capacity of the government to suppress agitations. Hence the peoples' will to resist an unwanted amendment cannot be taken into consideration in interpreting the ambit of the amending power. Extra legal forces work in a different plane altogether.

667. We find it difficult to accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals. There is no doubt as men of experience and sound political knowledge, they must have known that social, economic and political changes are bound to come with the passage of time and the Constitution must be capable of being so adjusted as to be able to respond to those new demands. Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself. Under Article 368 the amended Constitution must remain 'the Constitution' which means the original Constitution. When we speak of the 'abrogation' or 'repeal' of the Constitution, we do not refer to any form but to substance. If one or more of the basic features of the Constitution are taken away to that extent the Constitution is abrogated or repealed. If all the basic features of the Constitution are repealed and some other provisions inconsistent with those features are incorporated, it cannot still remain the Constitution referred to in Article 368. The personality of the Constitution must remain unchanged.

668. It is also necessary to bear in mind that the power to amend the Constitution is conferred on Parliament, a body constituted under the Constitution. The people as such are not associated with the amendment of the Constitution. From the preamble we get that it is the people of this country who conferred this Constitution on themselves. The statement in the preamble that the people of this country conferred the Constitution on themselves is not open to challenge before this Court. Its factual correctness cannot be gone into by this Court which again is a creature of the Constitution. The facts set out in the preamble have to be accepted by this Court as correct. Anyone who knows the composition of the Constituent Assembly can hardly dispute the claim of the members of that Assembly that their voice was the voice of the people. They were truly the representatives of the people, even though they had been elected under a narrow franchise. The Constitution framed by them has been accepted and worked by the people for the last 23 years and it is too late in the day now to question, as was sought to be done an one stage by the Advocate-

General of Maharashtra, the fact, that the people of this country gave the Constitution to themselves.

669. When a power to amend the Constitution is given to the people, its contents can be construed to be larger than when that power is given to a body constituted under that Constitution. Two-thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of the people of this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of the either House of Parliament. That is seen from our experience in the past. That apart, our Constitution was framed on the basis of consensus and not on the basis of majority votes. It provides for the protection of the minorities. If the majority opinion is taken as the guiding factor then the guarantees given to the minorities may become valueless. It is well known that the representatives of the minorities in the Constituent Assembly gave up their claim for special protection which they were demanding in the past because of the guarantee of Fundamental Rights. therefore the contention on behalf of the Union and the States that the two-thirds of the members in the two Houses of Parliament are always authorised to speak on behalf of the entire people of this country is unacceptable.

670. The President of India under Article 60 of the Constitution is required to take an oath before he assumes his office to the effect that he will "to the best of his ability preserve, protect and defend the Constitution". Somewhat similar oaths have to be taken by the Governors of States, Ministers at the center and in the States, Judges of the superior courts and other important functionaries. When the President of India is compelled to give assent to a Constitutional amendment which might destroy the basic features of the Constitution, can it be said that he is true to his oath to "preserve, protect and defend the Constitution" or does his oath merely mean that he is to defend the amending power of Parliament ? Can the amending power of Parliament be considered as the Constitution? The whole scheme and the structure of our Constitution proceeds on the basis that there are certain basic features which are expected to be permanent.

671. Implied limitations on the powers conferred under a statute constitute a general feature of all statutes. The position cannot be different in the case of powers conferred under a Constitution. A grant of power in general terms of even in absolute terms may be qualified by other express provisions in the same enactment or may be qualified by the implications of the context or even by considerations arising out of what appears to be the general scheme of the statute. In Re The Central Provinces and Berar (Central Provinces and Berar Act No. XIV of [1939] F.C.R. 18, Sir Maurice Gwyer C.J. observed at p. 42:

A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

672. Lord Wright in James v. Commonwealth of Australia [1936] A.C. 578 stated the law thus:

The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one

part may throw light on another. The Constitution has been described as the federal compact, and the construction must hold a balance between all its parts.

673. Several of the powers conferred under our Constitution have been held to be subject to implied limitations though those powers are expressed in general terms or even in absolute terms. The executive power of the Union is vested in the President and he is authorised to exercise the same either directly or through officers subordinate to him in accordance with the Constitution. Under Article 75, it is the President who can appoint the Prime Minister and the Ministers are to hold office during his pleasure. Despite this conferment of power in general and absolute terms, because of the scheme of the Constitution, its underlying principles and the implications arising from the other provisions in the Constitution, this Court has held in several cases that the President is a Constitutional head and the real executive power vests in the Cabinet. Similarly though plenary powers of legislation have been conferred on the Parliament and the State legislatures in respect of the legislative topics allotted to them, yet this Court has opined that by the exercise of that power neither Parliament nor the State legislatures can delegate to other authorities their essential legislative functions nor could they invade on the judicial power. These limitations were spelled out from the nature of the power conferred and from the scheme of the Constitution. But, it was urged on behalf of the Union and the States that, though there might be implied limitations on other powers conferred under the Constitution, there cannot be any implied limitations on the amending power. We see no basis for this distinction. The amending power is one of the powers conferred under the Constitution whatever the nature of that power might be. That apart, during the course of hearing the learned Solicitor-General had to concede that there are certain implied limitations on the amending power itself. The amending power of Parliament in certain respects is subject to the express limitations placed on it by the proviso to Article 368. Article 368 prescribes that if Parliament wants to amend Article 54, the Article dealing with the election of the President, the amendment in question must be ratified by the legislatures of not less than one half of the States. No such express limitation is placed on the amending power of Parliament in respect of Article 52 which provides that there shall be a President of India. If it be held that Article 52 can be amended without complying with the requirements of the proviso to Article 368, the limitation placed on Parliament in respect of the amendment of Article 54 becomes meaningless. When this incongruity was pointed out to the learned Solicitor-General, he conceded that in view of the fact that before Article 54 can be amended, the form and the manner laid down in proviso to Article 368 has to be followed, it follows as a matter of implication that the same would be the position for the amendment of Article 52. The only other alternative inference is that Article 52 can never be amended at all. It is not necessary to go into the other implications that may arise from the language of Article 368.

674. From what has been said above, it is clear that the amending power under Article 368 is also subject to implied limitations. The contention that a power to amend a Constitution cannot be subject to any implied limitation is negatived by the observations of the Judicial Committee in The Bribery Commissioner v. Rana Singhe [1965] A.C. 172. The decision of the Judicial Committee in Liyange's case (supra) held that Ceylon Parliament was incompetent to encroach upon the judicial power also lends support to our conclusion that there can be implied limitations on the amending power.

675. In support of the contention that there can be no implied limitations on the amending power, our attention was invited to writings of various jurists of eminence. Most of the writings relate to the amending power under Article 5 of the United States Constitution. It is true that in the United States most of the writers are of opinion that there is no implied limitation on the amending power under the United States Constitution. The Supreme Court of the United States has not specifically pronounced on this question. The only case in which the question of implied limitation on the amending power under the United States Constitution came up for consideration was Rhode Island v. Palmer 64 L. Edn. 946. In that case the Supreme Court of United States rejecting the contention that the 18th Amendment-National Prohibition Amendment-was outside the amending power under Article 5 because of implied limitations on that power, held that the Amendment was valid. The Supreme Court, however, did not discuss the question of implied limitations on the amending power as such. In fact the judgment that was rendered in that case gave no reasons. Only certain questions were formulated and answered. It is not clear from the judgment whether the particular limitation pleaded was rejected' or whether the plea of implied limitation on the amending power was rejected though writers of most text books have taken the view that the court rejected the plea of implied limitations on the amending power. It may be noted that in the United States not a single human right has been taken away or even its scope narrowed. There the controversy centered around two questions viz. (1) abolition of slavery and (2) prohibition of sale and consumption of liquor. We will not be justified in expounding our Constitution on the basis of the controversies relating to those issues. Article 5 of the U.S. Constitution is not similar to Article 368 of our Constitution. In the former Article, there is an express limitation on the amending power i.e. regarding the representation of the States in the Senate. Further the amendment under Article 5 of the United States Constitution can be proposed either by the Congress or by State Conventions. They may be ratified either by a minimum of 3/4th of the State Legislatures or by Conventions held in at least 3/4th of the States. Whether a particular amendment should be ratified by the State Legislatures or by the State Conventions is entirely left to the discretion of the Congress. As held by the United States Supreme Court, the decision of the Congress on that question is final. The Constitution makers must have proceeded on the basis that the Congress is likely to require the amendment of basic elements or fundamental features of the Constitution to be ratified by State Conventions. The scheme of no two Constitutions is similar. Their provisions are not similar. The language employed in the amending clauses differ from Constitution to Constitution. The objectives lying behind them also are bound to differ. Each country has its own needs, its own philosophy, its own way of life and above all its own problems. Hence in our opinion, we will be clouding the issues, if we allow ourselves to be burdened either by the writings of the various writers on other Constitutions or by the decisions rendered on the basis of the provisions of the other Constitutions, though Counsel on either side spared no efforts to place before us various opinions expressed by various writers as well as the decisions rendered by several courts including the State Courts in United States of America.

676. The rule laid down by the Judicial Committee in R. v. Burah (1878) I.A. 178 that "if what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any court of Justice to inquire further, or to enlarge constructively those conditions and restrictions" was heavily relied on by Mr. Seervai. That decision, however, has been confined to the interpretation of conditional legislations and the rule that it laid down has not been applied while

considering the question whether there are any implied limitations on any of the powers conferred under a statute or Constitution.

677. It was strenuously urged on behalf of the Union and the States that if we come to the conclusion that there are implied or inherent limitations on the amending power of Parliament under Article 368, it would be well nigh impossible for Parliament to decide before hand as to what amendments it could make and what amendments it is forbidden to make. According to the Counsel for the Union and the States, the conceptions of basic elements and fundamental features are illusive conceptions and their determination may differ from judge to judge and therefore we would be making the task of Parliament impossible if we uphold the contention that there are implied or inherent limitations on the amending power under Article 368. We are unable to accept this contention. The broad contours of the basic elements or fundamental features of our Constitution are clearly delineated in the preamble. Unlike in most of the other Constitutions, it is comparatively easy in the case of our Constitution to discern and determine the basic elements or the fundamental features of our Constitution. For doing so, one has only to look to the preamble. It is true that there are bound to be border line cases where there can be difference of opinion. That is so in all important legal questions. But the courts generally proceed on the presumption of Constitutionality of all legislations. The presumption of the Constitutional validity of a statute will also apply to Constitutional amendments. It is not correct to say that what is difficult to decide does not exist at all. For that matter, there are no clear guidelines before the Parliament to determine what are essential legislative functions which cannot be delegated, what legislations do invade on the judicial power or what restrictions are reasonable restrictions in public interest under Article 19(2) to 19(6) and yet by and large the legislations made by Parliament or the State legislatures in those respects have been upheld by courts. No doubt, there were occasions when courts were constrained to strike down some legislations as ultra vires the Constitution. The position as regard the ascertainment of the basic elements or fundamental features of the Constitution can by no means be more difficult than the difficulty of the legislatures to determine before hand the Constitutionality of legislations made under various other heads. Arguments based on the difficulties likely to be faced by the legislatures are of very little importance and they are essentially arguments against judicial review.

678. Large number of decisions rendered by courts in U.S.A., Canada, Australia, United Kingdom, Ceylon and Ireland, dealing with the question of implied limitations on the amending power and also as regards the meaning of the word "amendment" were read to us at the hearing. Such of those that are relevant have been considered by the learned Chief Justice in the judgment just now delivered. We entirely agree with the views expressed by him and we cannot usefully add to the same.

679. It was contended on behalf of the Union and the States that, the Constitution should not be treated as something sacred. It should be regarded just in the same way as we regard other human institutions. It should be possible to alter every part of it from time to time so as to bring it in harmony with the new and changed conditions. In support of this contention we were invited to the writings of the various writers such as Burgess, Bryce, Willis, Orfield, Weaver Livingston etc. It was further urged that the Constituent Assembly knowing that, it will disperse, had arranged for the recreation of a Constituent Assembly, under Article 368 in order to so shape the Constitution as to meet the demands of the time. However, attractive these theories may sound in the abstract,

on a closer examination, it will be seen that they are fallacious, more particularly in a Constitutionals set up like ours. We have earlier noticed chat under our electoral system, it is possible for a party to get a 2/3rd majority in the two Houses of Parliament even if that party does not get an absolute majority of votes cast at the election. That apart, when a party goes to election, it presents to the electorate diverse programmes and holds out various promises. The programmes presented or the promises held out need not necessarily include proposals for amending the Constitution. During the General Elections to Parliament in 1952, 1957, 1962 and 1967, no proposal to amend the Constitution appears to have been placed before the electorate. Even when proposals for amendment of the Constitution are placed before the electorate as was done by the Congress Party in 1971, the proposed amendments are not usually placed before the electorate. Under these circumstances, the claim that the electorate had given a mandate to the party to amend the Constitution in any particular manner is unjustified. Further a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet government are such that the people as a whole can have little control in the matter of detailed law-making. "...on practically every issue in the modern State, the serried millions of voters cannot do more than accept or reject the solutions; offered. The stage is too vast to permit of the nice shades of quantitative distinction impressing themselves upon the public mind. It has rarely the leisure, and seldom the information, to do more than indicate the general tendency of its will. It is in the process of law-making that the subtler adjustments must be effected." (Laski : A Grammar of Politics; Fifth Edn. pp. 313-314).

680. The assertion that either the majority of members of Parliament or even 2/3rd members of Parliament speak on behalf of the nation has no basis in fact. Indeed it may be possible for the ruling party to carry through important Constitutional amendments even after it has lost the confidence of the electorate. The members of Lok Sabha are elected for a term of five years. The ruling party or its members may or may not enjoy the confidence of the electorate throughout their terms of office. therefore it will not be correct to say that whenever Parliament amends the Constitution, it must be held to have done it as desired by the people.

681. There is a further fallacy in the contention that whenever Constitution is amended, we should presume that the amendment in question was made in order to adapt the Constitution to respond to the growing needs of the people. We have earlier seen that by using the amending power, it is theoretically possible for Parliament to extend its own life indefinitely and also, to amend the Constitution in such a manner as to make it either legally or practically unamendable ever afterwards. A power which is capable of being used against the people themselves cannot be considered as a power exercised on behalf of the people or in their interest.

682. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental' features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a Welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligations imposed on the State. It can also be used to reshape the Constitution within the limits mentioned

earlier, to make it an effective instrument for social good. We are unable to agree with the contention that in order to build a Welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution. Our Constitution envisages that the States should without delay make available to all the citizens of this country the real benefits of those freedoms in a democratic way. Human freedoms are lost gradually and imperceptibly and their destruction 'is generally followed by authoritarian rule. That is what history has taught us. Struggle between liberty and power is eternal. Vigilance is the price that we like every other democratic society have to pay to safeguard the democratic values enshrined in our Constitution. Even the best of governments are not averse to have more and more power to carry out their plans and programmes which they may sincerely believe to be in public interest. But a freedom once lost is hardly ever regained except by revolution. Every encroachment on freedoms sets a pattern for further encroachments. Our Constitutional plan is to eradicate poverty without destruction of individual freedoms.

683. In the result we uphold the contention of Mr. Palkhivala that the word "amendment" in Article 368 carries with it certain limitation and, further, that the power conferred under Article 368 is subject to certain implied limitations though that power is quite large.

684. Next, we shall take up for consideration the contentions of Mr. Palkhivala regarding the validity of the 24th, 25th and 29th Amendments.

685. It was contended on behalf of the petitioners that in enacting the 24th Amendment Act, the Parliament has exceeded its powers. It has purported to enlarge its limited power of amendment into an unlimited power, by the exercise of which it can damage or destroy the basic elements or fundamental features of the Constitution. It was said that such an exercise is an unlawful usurpation of power. Consequently, the 24th Amendment Act is liable to be struck down. To pronounce on that contention, it is necessary to examine at the very outset whether the 24th Amendment Act has really enlarged the powers of the Parliament. If we come to the conclusion that it has not enlarged the power of the Parliament, as we think it has not, the various contentions of Mr. Palkhivala do not arise for consideration.

686. Now let us see what is the true effect of the Constitution 24th Amendment Act, 1971. That Act amended Article 13 and Article 368. By that Act one more sub-article has been added to Article 13 viz. Sub-article (4) which reads thus:

Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

687. Section 3 of that Act which amends Article 368 reads.

Article 368 of the Constitution shall be renumbered as Clause (2) thereof, and-

(a) for the marginal heading to that article the following marginal heading shall be substituted, namely:

Power of Parliament to amend the Constitution and procedure therefor".

(b) before Clause (2) as so-renumbered, the following clause shall be inserted, namely:

Notwithstanding anything in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(c) in Clause (2) as so re-numbered, for the words "it shall be presented to the President for his assent and upon such assent being given to the Bill", the words "It shall be presented to the President who shall give his assent to the Bill and thereupon" shall be substituted;

(d) after Clause (2) as so re-numbered, the following clause shall be inserted, namely-

(3) Nothing in Article 13 shall apply to any amendment made under this Article.

688. The material changes effected under this Act are:

1. Addition of Clause (4) to Article 13 and Clause (3) to Article 368;

2. Change in the marginal heading;

3. Specific mention of the fact that the power is conferred on the Parliament to amend the Constitution;

4. The power conferred on the Parliament is claimed to be a constituent power;

5. That power is described as a power to "amend by way of addition, variation or repeal of any provision of this Constitution" and

6. Making it obligatory for the President to give assent to the Bill amending the Constitution.

689. In our opinion the 24th Amendment has not made any material change in Article 368 as it stood originally. It is true the original Article did not say specifically that the power to amend rested with Parliament. On the other hand, while setting out the procedure of amendment, it referred to the functions of the two Houses of Parliament and the President. Because of the fact that Parliament was not specifically referred to in Article 368, as it originally stood, the learned Advocate General of Maharashtra wanted us to spell out that the power conferred under Article 368, as it originally stood was not conferred on Parliament as such but on the two Houses of Parliament. We have earlier rejected that contention. We agree with the learned Attorney General that the power in question had been conferred on Parliament. Article 79 says that "There shall be a Parliament for the Union, which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People". Whether an enactment refers to the three components of Parliament separately or whether all the three of them are compendiously referred to as Parliament, in law it makes no difference. In Sankari Prasad's case, in Sajjan Singh's case as well as in Golaknath's case, each one of the Judges who delivered judgments specifically mentioned that the power to amend the Constitution was vested in Parliament though there was difference of opinion on the question whether that power could be

traced to Article 368 or Article 248 read with Entry 97 of List I. There is no ground for taking a different view.

690. We have already come to the conclusion that Article 368 as it originally stood comprehended both power as well as procedure to amend the Constitution. Hence the change effected in the marginal note has no significance whatsoever. The marginal note as it stood earlier was in a sense incomplete. The expression 'constituent power' is used to describe only the nature of the power of amendment. Every amending power, however large or however small it might be, is a fact of a constituent power. The power, though described to be 'constituent power', still continues to be an 'amending power'. The scope and ambit of the power is essentially contained in the word 'amendment'. Hence, from the fact that the new article specifically refers to that power as a constituent power, it cannot be understood that the contents of the power have undergone any change. The power conferred under the original Article being a limited power to amend the Constitution, the constituent power to amend the Constitution referred to in the amended Article must also be held to carry with it the limitation to which that power was subject earlier. There is also no significance in the substitution of the expression "amend by way of addition, variation or repeal of any provision of this Constitution" found in the amended Article in the place of the expression "amendment of the Constitution" found in the original Article. Every power to amend a statute must necessarily include within itself some power to make addition, variation or repeal of any provision of the statute. Here again, the power conferred under the original Article being a limited one, that limitation will continue to operate notwithstanding the change in the phraseology. The words 'addition, variation or repeal' only prescribe the modes or manner by which an 'amendment' may be made, but they do not determine the scope of the power of 'amendment'. The original Article 368 mentioned that after the bill for amendment of the Constitution is passed by the two Houses of Parliament in the manner prescribed in Article 368 "it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the bill". The amended Article makes a change. It prescribes that when the Bill is presented to the President, he "shall give his assent to the Bill". Some comment was made at the bar about the inappropriateness of commanding the President to give his assent to the Bill. That is a question of propriety. The substance of the matter is that when the Bill is presented to the President, he shall not withhold his assent. This change cannot be said to have damaged or destroyed any basic element of the Constitution. In fact Article 111 which deals with the assent to the Bills specifically prescribes that when a money Bill, after having been passed by the Houses of Parliament is presented to the President he "shall not withhold assent therefrom". Hence it cannot be said that the change made in Article 368 relating to the assent of the President has any great importance in the scheme of our Constitution. In fact under our Constitution the President is only a Constitutional head. Ordinarily he has to act on the advice of the cabinet. There is no possibility of the Constitution being amended in opposition to the wishes of the cabinet.

691. The only change that remains to be considered is as to the exclusion of the application of Article 13 to an amendment of the Constitution. We have earlier come to the conclusion that Article 13 as it stood earlier did not bar the amendment of the Constitution. Article 13(4) and 368(3) make explicit what was implicit.

692. It was contended that by means of the 24th Amendment Parliament intended to and in fact purported to enlarge its amending power. In this connection reliance was placed on the statement of objects and reasons attached to the Bill which resulted in the 24th Amendment. The power of Parliament does not rest upon its professed intention. It cannot acquire a power which it otherwise did not possess. We are unable to accept the contention that Clause (e) to the proviso to Article 368 confers power on Parliament to enlarge its own power. In our judgment the power to amend the Constitution as well as the ordinary procedure to amend any part of the Constitution was and is contained in the main part of the Article. The proviso merely places further restrictions on the procedure to amend the articles mentioned therein. Clause (e) to the proviso stipulates that Article 368 cannot be amended except in the manner provided in the proviso. In the absence of that clause, Article 368 could have been amended by following the procedure laid down in the main part. At best Clause (e) of the proviso merely indicates that Article 368 itself comes within its own purview. As we have already seen, the main part of Article 368 as it stood earlier, expressly lays down only the procedure to be followed in amending the Constitution. The power to amend is only implied therein.

693. It is difficult to accept the contention that an implied power was impliedly permitted to be enlarged. If that was so, there was no meaning in limiting that power originally. Limitation on the power to amend the Constitution would operate even when Article 368 is amended. A limited power cannot be used to enlarge the same power into an absolute power. We respectfully agree with the observation of Hidayatullah J. (as he then was) in Golaknath's case that what Parliament cannot do directly, it also cannot do indirectly. We have earlier held that the "amendment of this Constitution" means the amendment of every part of the Constitution. It cannot be denied that Article 368 is but a part of the Constitution. Hence, the mere fact that the mover of the 24th Amendment Act, in the Statement of Objects and Reasons laid claim to certain power does not go to show that Parliament either endorsed that claim or could have conferred on itself such a power. It must be deemed to have exercised only such power as it possessed. It is a well-accepted rule of construction that if a provision is reasonably capable of two interpretations the Court must accept that interpretation which makes the provision valid. If the power conferred on Parliament to amend the Constitution under Article 368 as it stood originally is a limited power, as we think it is, Parliament cannot enlarge the scope of that power-see Attorney General for the State of New South Wales v. The Brewery Employees Union of New South Wales; 6 C.L.R. 469 Ex Parte Walsh and Johnson; In Re Yates; 37, C.L.R. 36 and Australian Communist Party v. The Commonwealth 83 C.L.R. 1.

694. For the reasons mentioned heretofore, the scope of Parliament's power to amend the Constitution or any part thereof must be held to have remained as it was before the 24th Amendment notwithstanding the alterations made in the phraseology of Article 368. The 24th Amendment made explicit, what was implicit in the unamended Article 368. In this view of the matter the 24th Amendment must be held to be valid.

695. This takes us to the validity of the Constitution 25th Amendment Act. It is necessary to examine the scope and effect of that Act for deciding the question whether that Act or any one of its provisions can be held to be outside the amending power of the Parliament. That Act has three sections. We are not concerned with the first section which sets out the short title. Clause (a) of the second section amends Article 31(2). Clause (b) of that section incorporates into the

Constitution Article 31(2B). Section 3 introduces into the Constitution a new Article viz. Article 31C.

696. Let us first take up the newly substituted Article 31(2) in the place of the old Article 31(2) and examine its scope. To do so, it is necessary to examine the history of that Article.

697. Article 31(2) has undergone several changes. As originally enacted it read thus:

No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

698. That Article was amended first by the Fourth Amendment Act 1955 and, thereafter by the Twenty-fifth Amendment Act, 1971. At a later stage, it will be necessary for us to compare Article 31(2) as it stood after the Fourth Amendment Act and as it stands after the Twenty-fifth Amendment Act. Hence we shall quote them side by side.

Article 31(2) as substituted by the 4th Amendment Act 1955	Article 3(2) as substituted by the 25th Amendment Act 1971
No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given; and no such law be shall be called in question in any court on the ground that the compensation provided by that law is not adequate.	No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash: Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to Clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is Such as would not restrict or abrogate the right guaranteed under that clause.

699. For finding out the true scope of Article 31(2), as it stands now, the learned Advocate General of Maharashtra as well as the Solicitor General has taken us through the history of this Article. According to them the Article as it stands now truly represents the intention of the Constitution

makers. In support of that contention, we were asked to go through the Constituent Assembly debates relating to that article. In particular, we were invited to go through the speeches made by Pandit Nehru, Sir Alladi Krishnaswami Ayyar, Dr. Munshi and Dr. Ambedkar. In our opinion, it is impermissible for us to do so. It is a well settled rule of construction that speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any of the provisions of the statute. The same rule is applicable when we are called upon to interpret the provisions of a Constitution. This Court ruled in State of Travancore Cochin and Ors. v. Bombay Co. Ltd. [1952] S.C.R. 113[1952] S.C.R. 113 that speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution cannot be used as aid for interpreting the Constitution. In the course of his judgment Patanjali Sastri C.J. speaking for the Constitution Bench observed at p. 1121 of the Report:

It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian Statutes-see Administrator-General of Bengal v. Prem Nath Mallick (1895 22 I.A. 107. The reason behind the rule was explained by one of us in Gapalan's case MANU/SC/0012/1950 : 1950CriLJ1383 thus:

A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the Bill. Nor is it reasonable to assume that the minds of all those legislators were in accord", or as it is more tersely put in a American case-

Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other-United States v. Trans-Missouri Freight Association 169 U.S. 290.

700. No decision of this Court dissenting from the view taken in the above case was brought to our notice. But it was urged that this Court had ignored the rule laid down in Bombay Co.'s case (supra) in Golaknath's case as well as in what is popularly known as the Privy Purse MANU/SC/0050/1970 : [1971]3SCR9 case. We do not think that this statement is accurate. In Golaknath's case, Subba Rao C.J. referred to certain portions of speeches made by Pandit Nehru and Dr. Ambedkar. But he made it clear at p. 792 of the Report, the specific purpose for which he was referring to those speeches. This is what he stated:

We have referred to the speeches of Pandit Jawaharlal Nehru and Dr. Ambedkar not with a view to interpret the provisions of Article 368 which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution.

701. Bachawat J. in the course of his judgment also referred to some of the speeches made during the debates on Article 368. But before doing so this is what he observed at p. 922 of the report:

Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft Constitution. These speeches cannot be used as aids for interpreting the Constitution-see State of Travancore Cochin and Ors. v. The Bombay Co. Ltd. Accordingly I do not rely on them as aids to construction. But I propose to refer to them, as Shri A.K. Sen relied heavily on the speeches of Dr. B.R. Ambedkar. According to him, the speeches of Dr. Ambedkar show that he did not regard the fundamental rights as amendable. This contention is not supported by the speeches.

702. From these observations, it is clear that the learned judges were not referring to the speeches as aids for interpreting any of the provisions of the Constitution.

703. Now, let us turn to this Court's Judgment in the Privy Purse case. Shah J. (as he then was) in the course of his judgment (at p. 83 of the report) quoted a portion of the speech of the Home Minister Sardar Patel not for the purpose of interpreting any provision of the Constitution but for showing the circumstances which necessitated the giving of certain guarantees to the former ruler. That speech succinctly sets out why certain guarantees had to be given to the rulers. Hence it is not correct to say that Shah J. speaking for himself and six other Judges had used the speech of Sardar Patel in aid of the construction of any of the articles of the Constitution It is true Mitter J. in his dissenting judgment (at p. 121 of the report) used the speech of Shri T.T. Krishnamachari in aid of the construction of Article 363 but the learned judge no where in his judgment discussed the question whether the speeches made by the members of the Constituent Assembly were admissible in aid of interpreting any provision of the Constitution.

704. Before concluding the discussion on this topic, it is necessary to refer to one more decision of this Court i.e. Union of India v. H.S. Dhillon. MANU/SC/0062/1971 : [1972]83ITR582(SC) In that case this Court was called upon to decide whether the provision in the Wealth Tax Act, 1957 providing for the levy of tax on the capital value of agricultural property were Constitutionally sustainable. By a majority of four against three, this Court upheld the levy. Sikri C.J. who spoke for himself and two other judges after sustaining the validity of the provision on an examination of the relevant provisions of the Constitution as well as the decided cases referred to some of the speeches made during the debates in the Constituent Assembly in support of the conclusion already reached by him. Before referring to those speeches this is what the learned judge observed at p. 58:

We are, however, glad to find from the following extracts from the debates that our interpretation accords with what was intended.

705. From this it is clear that the learned Judge did not seek any aid from the speeches for the purpose of interpreting the relevant provision. It is necessary to note that the learned judge did not dissent from the view earlier taken by the Court in Bombay Co. Ltd.'s case (supra). Hence the law as laid down in Bombay Co.'s case is binding on us and its correctness was not challenged before us.

706. The learned Advocate General of Maharashtra is right in his contention that for finding out the true scope of Article 31(2), as it stands at present, it is necessary for us to find out the mischief that was intended to be remedied by the present amendment. In other words, we must find out what

was the objective intended to be achieved by that amendment. The original Article 31(2) first came up for consideration by this Court in State of West Bengal v. Mrs. Bela Bannerjee and Ors., MANU/SC/0017/1953 : [1954]1SCR558 wherein Patanjali Sastri C.J. speaking for the Court observed:

While it is true that the legislature is given the discretionary power of laying down the principle which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable Must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected is a justiciable issue to be adjudicated by the Court. This, indeed, was not disputed.

707. We are told that Article 31(2) came to be amended by means of the 4th Amendment Act in view of the decision of this Court in Mrs. Bela Banerjee's case. The scope of the article as amended by the 4th Amendment Act was considered by this Court in P. Vairayelu Mudaliar v. Special Deputy Collector, Madras and Anr. MANU/SC/0049/1964 : [1965]1SCR614 . Therein Subba Rao J. (as he then was) speaking for a bench consisting of himself, Wanchoo, Hidayatullah, Raghubar Dayal and Sikri JJ. observed (at p. 626):

The fact that Parliament used the same expressions namely "compensation" and "Principles" as were found in Article 31 before the Amendment is a clear indication that it accepted the meaning given by this Court to those expressions in Mrs. Bela Banerjee's case. It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the "just equivalent" of what the owner has been deprived of. If Parliament intended to enable a Legislature to make such a law without providing for compensation so defined, it would have used other expressions like "price", "consideration" etc.

Proceeding further the learned judge observed:

The real difficulty is, what is the effect of ouster of jurisdiction of the court to question the law on the ground that the "compensation" provided by the law is not adequate ? It will be noticed that the law of acquisition or requisition is not wholly immune from scrutiny by the Court. But what is excluded from the court's jurisdiction is that the said law cannot be questioned on the ground that the compensation provided by that law is not adequate. It will further be noticed that the clause excluding the jurisdiction of the Court also used the word "compensation" indicating thereby that what is excluded from the court's jurisdiction is the adequacy of the compensation fixed by the legislature. The argument that the word "compensation" means a just equivalent for the property acquired and, therefore, the court can ascertain whether it is a "just equivalent" or not makes the amendment of the Constitution nugatory. It will be arguing in a circle. therefore, a more reasonable interpretation is that neither the principles prescribing the "just equivalent" nor the "just equivalent" can be questioned by the court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. To illustrate; a law is made to acquire a house,

its value at the time of acquisition has to be fixed; there are many modes of valuation namely estimate by the engineer, value reflected by comparable sales, capitalisation of rent and similar others. The application of different principles may lead to different results. The adoption of one principle may give a higher value and the adoption of another principle may give a lesser value. But nonetheless they are principles on which and the manner in which compensation is determined. The court cannot obviously say that the law should have adopted one principle and not the other, for it relates only to the question of adequacy. *On the other hand, if a law lays down principles which are not relevant to the property acquired or to the value of the property at or about the time it is acquired, it may be said that they are not principles contemplated by Article 31(2) of the Constitution....*
In such cases the validity of the principles can be scrutinized. The law may also prescribe a compensation which is illusory it may provide for the acquisition of a property worth lakhs of rupees for a paltry sum of Rs. 100. The question in that context does not relate to the adequacy of the compensation for it is no compensation at all. The illustrations given by us are not exhaustive. There may be many others falling on either side of the line. But this much is clear. *If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the legislature committed a fraud on power,* and therefore, the law is bad. It is a use of the protection of Article 31 in a manner which the Article hardly intended.

(emphasis supplied)

708. The principles that emerge from the decision in Vajravelu's case are: (1) compensation means just equivalent of the value of the property acquired; (2) principles prescribed must be principles which provide for compensation; (3) adequacy of compensation fixed or to be determined on the basis of the principles set out cannot be gone into by the court; (4) the principles fixed must be relevant to the property acquired or to the value of the property at about the time it is acquired; (5) the compensation fixed should not be illusory and (6) courts have power to strike down a law on the ground of fraud on power if the principles fixed are irrelevant or if the compensation granted is illusory.

709. The next decision cited to us is the decision of this Court in Union of India v. Metal Corporation of India Ltd. and Anr. MANU/SC/0117/1966 : [1967]1SCR255 . It is a decision of a Division Bench consisting of Subba Rao C.J. and Shelat J. As that decision was overruled by this Court in State of Gujarat v. Shantilal Mangaldas and Ors. MANU/SC/0063/1969 : [1969]3SCR341 it is not necessary to refer to its ratio.

710. This takes us to the decision of this Court in Shantilal's case. This case related to the acquisition of some landed property on behalf of the Borough Municipality of Ahmedabad for making town planning scheme under the Bombay Town Planning Act, 1955. Sections 53 and 57 of that Act fixed certain principles for the determination of compensation for the land acquired. The High Court of Gujarat declared that those provisions were ultra vires in so far as they authorised the local authority to acquire land under a Town Planning Scheme and as a corollary to that view declared invalid the City Wall Improvement Town Planning Scheme No. 5 framed in exercise of the powers conferred under the Act. In doing so they purported to follow the decision of this Court in Vajravelu Mudaliar's case. A Constitution Bench of this Court reversed the

decision of the Gujarat High Court. In that case Shah J. speaking for the Court elaborately reviewed the earlier decisions of this Court bearing on Article 31(2). After doing so, he observed at p. 365 of the report:

Reverting to the amendment made in Clause (2) of Article 31 by the Constitution (Fourth Amendment) Act, 1955, it is clear that adequacy of compensation fixed by the Legislature or awarded according to the principles specified by the Legislature for determination is not justiciable. It clearly follows from the terms of Article 31(2) as amended that the amount of compensation payable if fixed by the Legislature, is not justiciable, because the challenge in such a case, apart from a plea of abuse of legislative power, would be only a challenge to the adequacy of compensation. *If compensation fixed by the Legislature-and by the use of the expression "compensation" we mean what the legislature justly regards as proper and fair recompense for compulsory expropriation of property and not something which by abuse of legislative power though called compensation is not a recompense at all or is something illusory-is not justiciable,* on the plea that it is not a just equivalent of the property compulsorily acquired is it open to the courts to enter upon an enquiry whether the principles which are specified by the Legislature for determining compensation do not award to the expropriated owner a just equivalent ? In our view, such an enquiry is not open to the Court under the statutes enacted after the amendments made in the Constitution by the Constitution (Fourth Amendment) Act.

If the quantum of compensation fixed by the Legislature is not liable to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent.
The right declared by the Constitution guarantees that compensation shall be given before a person is compulsorily expropriated of his property for a public purpose. What is fixed as compensation by statute, or by the application of principles specified for determination of compensation is guaranteed; *it does not mean however that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts, for, to do so, would be to grant a charter of arbitrariness and permit a device to defeat the Constitutional guarantee.* But compensation fixed or determined on principles specified by the Legislature cannot be permitted to be challenged on the somewhat indefinite plea that it is not a just or fair equivalent. *Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the Constitutional declaration that inadequacy of compensation provided is not justiciable.*

(emphasis supplied)

711. The Advocate General of Maharashtra contended that if only this decision had not been indirectly overruled by the Bank Nationalisation case R.C. Cooper v. Union of India MANU/SC/0011/1970 : [1970]3SCR530 there would have been no occasion to further amend Article 31(2). That being so, it is necessary to find out clearly as to what are the principles enunciated in this decision. This decision firmly laid down that any arbitrary fixation of recompense is liable to be struck down by the court as an abuse of legislative power. It further laid

down that the principles laid down may be challenged on the ground that they are not relevant for the purpose of determining the recompense payable to the owner of the property acquired. If the recompense fixed or determined is either not arbitrary or illusory or if the principles fixed are relevant to the purpose of acquisition or requisition of the property in question, the courts cannot go into the question of adequacy of the payment.

712. Then came the Bank Nationalisation case. The majority judgment in that case was delivered by Shah J. (as he then was). In that judgment he referred somewhat extensively to the decision in Shantilal Mangaldas's case and other cases rendered by this Court. He did not purport to deviate from the rule laid down in Shantital's case. The ratio of that decision relating to Article 31(2) is found at p. 598 of the report. The learned judge observed:

Both the lines of thought (in Vajravelu's case and Shantilal's case) which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of compensation and is a recognised principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in P. Vajravelu Mudaliar's case or in Shantilal Mangaldas's case, the Act in our judgment is liable to be struck down as it fails to provide to the expropriated banks compensation determined according to relevant principles.

738. Proceeding further the learned judge observed at p. 599:

We are unable to hold that a principle specified by the Parliament for determining compensation of the property to be acquired is conclusive. If that view be expressed, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process, the Constitutional guarantee of the right to compensation may be severely impaired. The principle specified must be appropriate to the determination of compensation for the particular class of property sought to be acquired. If several principles are appropriate and one is selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles is not open to the challenge for the selection must be left to the wisdom of the Parliament.

713. It is clear from the passages we have quoted above that this case also emphasised that the power of the Parliament to fix the compensation for the property acquired is not an arbitrary power. Further, the principles prescribed for determining the compensation must be relevant to the subject matter of acquisition or requisition. That decision also laid down that both the questions whether the compensation has been fixed arbitrarily or whether the principles laid down are irrelevant are open to judicial review.

714. Let us now examine Article 31(2) as it stands now in the light of the decisions already referred to. The only material changes made in that Article under the 25th Amendment Act are:

(1) in place of the word 'compensation', the word 'amount' has been used and

(2) an additional clause viz. "or that the whole or any part of such amount is to be given otherwise than in cash" has been added.

715. We are not concerned in this case as to the effect of the additional clause. No arguments were advanced on that aspect. All that we are concerned with is as to what is the effect of the substitution of the word "amount" in place of the word "compensation". As seen earlier, the word "compensation" has been interpreted in the various decisions referred to earlier as "just equivalent" of the value of the property taken. That concept has now been removed. In other respects, the Article has not been altered. It remains what it was. We have earlier noticed that the decisions of this Court have firmly laid down that while examining the validity of law made under Article 31(2) as it stood after it was amended under the 4th Amendment Act, it was open to the Court to go into the questions whether the compensation had been fixed arbitrarily and whether the same was illusory. Those decisions further ruled that the Court can go into the relevant of the principles fixed. Parliament would have undoubtedly known the ratio of those decisions. That is also the legal presumption. Hence if the Parliament intended to take away the judicial review in any respect other than relating to the adequacy of the amount fixed, it would have expressed its intention by appropriate words. We find no such words in the Article as it stands. therefore, it is reasonable to assume that it has accepted the interpretation placed by this Court in all respects except as regards the concept of compensation. That this is the mischief which the 25th Amendment seeks to remedy by amending Article 31(2) is also clear from the language of the amended Article itself. It says that the law shall not be called in question on the ground that the amount fixed or determined is not adequate. What is an adequate amount ? An amount can be said to be adequate only when the owner of the property is fully compensated, that is when he is paid an amount which is equivalent in value to the property acquired or requisitioned. And that is also what is connoted by the concept of 'compensation' as interpreted by this Court. therefore, stated briefly, what the 25th Amendment makes non-justiciable is an enquiry into the question whether the amount fixed or determined is an equivalent value of or 'compensation' for the property acquired or requisitioned.

716. The word "amount" is a neutral word. Standing by itself, it has no norm and is completely colourless. The dictionary meaning of the word appropriate to the present context is "sum total or a figure". We have to find out its connotation from the context. In so doing, we have to bear in mind the fact that Article 31(2) still continues to be a fundamental right. It is not possible to accept the contention of the learned Advocate General of Maharashtra and the learned Solicitor General that the right of the owner at present is just to get whatever the Government pleases to give, whenever it pleases to give and however it pleases to give. A position so nebulous as that cannot be considered as a right much less a fundamental right, which Article 31(2) still claims to be.

717. It is difficult to believe that Parliament intended to make a mockery of the fundamental right conferred under Article 31(2). It cannot be that the Constitution while purporting to preserve the fundamental right of the citizens to get an "amount" in lieu of the property taken for public purpose has in fact robbed him of all his right.

718. Undoubtedly Article 31 empowers the legislature to acquire or requisition the property of a citizen for an "amount". What does the word "amount" mean in that Article ? As we have already said, that word by itself does not disclose any norm. But then the word "amount" is followed by the words "which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate.

719. If the expression "amount" has no norm and is just what the Parliament stipulates, there can be no question of prescribing principles for determining that "amount"; nor is there any scope for finding out its adequacy. The legislatures are permitted under the amended Article 31(2) either to fix the "amount" to be paid in lieu of the property acquired or to lay down the principles for determining that "amount". These two alternative methods must bring about nearly the same result. If the relevancy of the principles fixed can be judicially reviewed-as indeed they must be-in view of the decision referred to earlier, we fail to see how the fixation of the "amount" which is the alternative method of determining the recompense to be paid in lieu of the property taken is excluded from judicial review.

720. The word "fixed" in Article 31(2) connotes or postulates that there must be some standard or principle by the application of which the legislature calculates or ascertains definitely the amount. In Bouviar's Law Dictionary (1946) at p. 421, the word 'fix' is defined thus: "To determine; to settle. A Constitutional provision to the effect that the General Assembly shall fix the compensation of officers means that it shall prescribe or 'fix' the rule by which such compensation is to be determined". (See also Fraser Henlein Pvy. Ltd. v. Cody (1945) 70, C.L.R. 100 cited in Saunders, Words and Phrases: Legally Defined Vol. 2, p. 258 (1969). This being the meaning of the word 'fix' it would be necessary for the legislature to lay down in the law itself or otherwise indicate the principles on the basis of which it fixes the amount for the acquisition or requisitioning of the property. If this construction is placed on the first mode of determining the amount, then there would be no difference between this method, and the other method whereby the legislature lays down the principles and leaves it for any other authority to determine the amount in accordance with such principles. Whether the legislature adopts one or the other method, the requirement of Article 31(2) would be the same, namely, there must be principles on the basis of which the amount is determined. Such an amount may be determined either by the legislature or by some other authority authorised by the legislature. The content of the right in Article 31(2) is not dependent upon whether the legislature chooses one or the other method of determining the amount. There is no contradiction between these two methods. It is true that in both cases, the judicial review is necessarily limited because it cannot extend to the examination of the adequacy of the amount fixed or to be determined. It was conceded on behalf of the contesting respondents that the court can go into the question whether the "amount" fixed is illusory. This very concession shows the untenability of the contention advanced on behalf of the Union. For determining whether the "amount" fixed is illusory or not, one has first to determine the value of the property because without knowing the true value of the property, no court can say that the "amount" fixed is illusory. Further, when Article 31(2) says that it is not open to the court to examine whether the "amount" fixed or determined is adequate or not, it necessarily means that the "amount" payable has to be determined on the basis or principles relevant for determining the value of the property acquired or requisitioned. There can be no question of adequacy unless the "amount" payable has been determined on the basis of certain norms and not arbitrarily, without having regard to the value of the property.

721. Further, Article 31(2) provides for fixing or determining the amount for the acquisition or requisitioning of the property. The State action is still described as 'acquisition or requisition' and not 'confiscation'. therefore, the principles for fixing or determining the amount must be relevant to the 'acquisition or requisition', and not to 'confiscation'. The amount fixed or determined should not make it appear that the measure is one of confiscation. The principles for fixing or determining

the amount may be said to be relevant to the acquisition or requisition when they bear reasonable relationship to the value of the property acquired or requisitioned.

722. Further there is practical difficulty in accepting the contention that the word "amount" in the context in which it is used, has no norm. The amount has to be fixed by the legislatures which means by the members of the legislatures. When a law for acquisition of certain types of property is enacted, it is not as if the members of the legislature-each and every one of them who participates in the making of the law would first go and inspect the property to be acquired and then assess the value of that property. In the very nature of things, the "amount" payable has to be determined on the basis of certain principles. If that be so, as it appears to us to be obvious, then the legislators must have some principles before them to determine the amount. In this connection the Advocate-General of Maharashtra tried to give an explanation, which appears to us to be unsatisfactory and unacceptable. His contention was that our democracy is worked on the basis of party system. The ruling party has the majority of the members of the legislature behind it. therefore, the members of the opposition party need not know the basis of fixation of the value of the property acquired. Even the members of the ruling party need not be told about the basis on which the value is fixed. The option before them is either to accept the amount fixed by the cabinet or by the Minister concerned or to reject the proposal and face the consequences. If this is the true position, it is, in our opinion, a negation of parliamentary democracy. Our democracy like all true parliamentary democracies is based on the principles of debate and discussion. As far as possible, decisions in the legislatures are arrived at on the basis of consensus. Our Constitution does not provide for one party rule where there is no room for opposition. Opposition parties have an important role to play under our Constitution. Members belonging to the opposition parties have as much right to participate in making laws as the members belonging to the ruling party. Further the learned Advocate General is not correct in his assumption that the function of the members belonging to the ruling party is to blindly support a measure sponsored by the executive. They also have a right, nay, a duty to mould every measure by debate and discussion. If the question of fixation of "amount" under Article 31(2) is considered as the exclusive function of the executive, then, not only the judicial review will be taken away, even the legislature will not have the opportunity of examining the correctness or appropriateness of the "amount" fixed. A power so arbitrary as that can speedily degenerate into an instrument of oppression and is likely to be used for collateral purposes. Our Constitution has created checks and balances to minimise the possibility of power being misused. We have no doubt that the theory propounded by the Advocate General of Maharashtra will be repudiated by our legislatures and the cabinets as something wholly foreign to our Constitution.

723. If we bear in mind the fact that the "amount" in question is to be paid in lieu of the property taken, then, it follows that it must have a reasonable relationship with the value of the property taken. It may not be the market value of the property taken. The market value of a property is the result of an inter-action of various forces. It may not have any reasonable relationship with the investment made by its successive owners. The price of the property acquired might have shot up because of various contributions made by the society such as improvements effected by the State in the locality in question or the conversion of a rural area into an urban area. It is undoubtedly open to the State to appropriate to itself that part of the market value of a property which is not the result of any contribution made by its owners. There may be several other relevant grounds for fixing a particular "amount" in a given case or for adopting one or more of the relevant principles

for the determination of the price to be paid. In all these matters the legislative judgment is entitled to great weight. It will be for the aggrieved party to clearly satisfy the Court that the basis adopted by the legislature has no reasonable relationship to the value of the property acquired or that the "amount" to be paid has been arbitrarily fixed or that the same is an illusory return for the property taken. So long as the basis adopted for computing the value of the property is relevant to the acquisition in question or the amount fixed can be justified on any such basis, it is no more open to the court to consider whether the amount fixed or to be determined is adequate. But it is still open to the court to consider whether "amount" in question has been arbitrarily determined or whether the same is an illusory return for the property taken. It is also open to the court to consider whether the principles laid down for the determination of the amount are irrelevant for the acquisition or requisition in question. To put it differently, the judicial review under the amended Article 31(2) lies within narrow limits. The court cannot go into the question whether what is paid or is payable is compensation. It can only go into the question whether the "amount" in question was arbitrarily fixed as illusory or whether the principles laid down for the purpose of determining the "amount" payable have reasonable relationship with the value of the property acquired or requisitioned.

724. If the amended Article 31(2) is understood in the manner as laid down above, the right to property cannot be said to have been damaged or destroyed. The amended Article 31(2) according to us fully protects the interests of the individual as well as that of the society. Hence its validity is not open to challenge.

725. Now, let us turn to Article 31(2B). It says that "Nothing in Sub-clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2)". This provision has no real impact on the right conferred under Article 31(2). Article 31(2) empowers the State to compulsorily acquire or requisition property for public purpose. When property is acquired or requisitioned for public purpose, the right of the owner of that property to hold or dispose of that property is necessarily lost. Hence there is no anti-thesis between Article 19(1)(f) and Article 31(2). That being so, the only assistance that the owner of the property acquired or requisitioned would have obtained from Article 19(1)(f) read with Sub-article (5) of that Article would be the right to insist that the law made under Article 31(2) as it stood before its recent amendment, should have to conform to some reasonable procedure both in the matter of dispossessing him as well as in the matter of determining the "amount" payable to him. In a way, those rights are protected by the principles of natural justice.

726. For the reasons mentioned above, we are unable to accept the contention urged on behalf of the petitioners that Section 2 of the 25th Amendment Act, 1971 is invalid.

727. This takes us to Section 3 of the 25th Amendment Act which now stands as Article 31C of the Constitution. This Article empowers the Parliament as well as the Local Legislatures to enact laws giving effect to, the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39, completely ignoring in the process, Articles 14, 19 and 31. Further it lays down that if the law in question contains a declaration that it is for giving effect to such policy, that law shall not be called in question in any court on the ground that it does not give effect to such policy. The proviso to that Article prescribes that where such law is made by the legislature of a State, the provisions of Article 31C shall not apply thereto unless such law, having been

reserved for the consideration of the President has received his assent. This Article has two parts. The first part says that laws enacted by Parliament as well as by the Local Legislatures for giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31 notwithstanding anything contained in Article 13 and the second part provides that no law containing a declaration that is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. Clauses (b) and (c) of Article 39 do not prescribe any subject matter of legislation. They contain certain objectives to be achieved. The methods to be adopted to achieve those objectives may be numerous. Those clauses cover a very large field of social and economic activities of the Union and the States. Clause (b) of Article 39 says that the State shall direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and Clause (c) of that Article says that the State shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These two provisions lay down a particular political philosophy. They in conjunction with some other provisions of the Constitution direct the State to build a Welfare State.

728. No one can deny the importance of the Directive Principles. The Fundamental Rights and the Directive Principles constitute the 'conscience' of our Constitution. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of bur society. It aims at making the Indian masses free in the positive sense.

729. Part IV of the Constitution is designed to bring about the social and economic revolution that remained to be fulfilled after independence. The aim of the Constitution is not to guarantee certain liberties to only a few of the citizens but for all. The Constitution visualizes our society as a whole and contemplates that every member of the society should participate in the freedoms guaranteed. To ignore Part IV is to ignore the substance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution. A society like ours steeped in poverty and ignorance satisfying the minimum economic needs of every citizen of this country. Any Government which fails to fulfil the pledge taken under the Constitution cannot be said to have been faithful to the Constitution and to its commitments.

730. Equally, the danger to democracy by an over emphasis on duty cannot be minimised. Kurt Reizler, a German Scholar, from his experience of the tragedy of the Nazi Germany warned:

If...these duties of man should be duties towards the "public welfare" of the "society" and the State, and rights are made conditional on the fulfilment of these duties, the duties will uproot the rights. The rights will wither away...(the) State can use the allegedly unfulfilled duties to shove aside rights.-Any Bill of Rights that makes the rights conditional on duties towards society or the State,

however strong its emphasis on human dignity, freedom, God or whatever else, can be accepted by any totalitarian leader. He will enforce the duties while disregarding the right.

731. Indeed the balancing process between the individual rights and the social needs is a delicate one. This is primarily the responsibility of the "State" and in the ultimate analysis of the courts as interpreters of the Constitution and the laws.

732. Our founding fathers were satisfied that there is no anti-thesis between the Fundamental Rights and the Directive Principles. One supplements the other. The Directives lay down the end to be achieved and Part III prescribes the means through which the goal is to be reached. Our Constitution does not subscribe to the theory that end justifies the means adopted. The Counsel for the petitioners urged that the Fundamental Rights are not the cause of our failure to implement the Directive Principles. According to him, it is not the Constitution that has failed as; but we have failed to rise up to its expectations. He urged that the attack against Fundamental Rights is merely an alibi and an attempt to find a scapegoat on the part of those who were unable or willing to implement the Directives. These allegations are 'denied on behalf of the Union and the States. It was urged on their behalf that interpretations placed by the courts on some of the Articles in Part III of the Constitution have placed impediments in the way of States, in implementing the Directives. These controversies are not capable of being decided by courts.

733. There is no doubt that the power conferred under Article 31C, if interpreted in the manner contended on behalf of the Union and the States would result in denuding substantially the contents of the right to equality, the right to the seven freedoms guaranteed under Article 19 and the right to get some reasonable return by the person whose property is taken for public purpose. Unlike Article 31A, Article 31C is not confined to some particular subjects. It can take in a very wide area of human activities. The power conferred under it, is an arbitrary power. It is capable of being used for collateral purposes. It can be used to stifle the freedom of speech, freedom to assemble peaceably, freedom to move freely throughout India, freedom to reside and settle in any part of India, freedom to acquire, hold and dispose of property and freedom to practise any profession or carry on any occupation, trade or business. The power conferred under that provision is a blanket power. Even a small majority in a legislature can use that power to truncate or even destroy democracy. That power can be used to weaken the unity and integrity of this country. That Article is wholly out of tune with our Constitution. Its implications are manifold. There is force in the contention of the petitioners that this Article has the potentiality of shaking the very foundation of our Constitution.

734. What is the nature of the power conferred under Article 31C ? It is claimed to have empowered Parliament and the State Legislatures to enact laws pro tanto abrogating Articles 14, 19 and 31. A power to take away directly or indirectly a right guaranteed or a duty imposed under a Constitution, by an ordinary law, is a power to pro tanto abrogate the Constitution. If the legislature is empowered to amend the Constitution by ordinary legislative procedure, any law enacted by it, even if it does not purport to amend the Constitution, but all the same, is inconsistent with one or more of the provisions of the Constitution has the effect of abrogating the Constitution to the extent of inconsistency. That position is clear from the judgment of the Judicial Committee in McCawley v. The King [1920] A.C. 691. In other words, the power conferred under the Article is a power to amend the Constitution in certain essential respects while enacting legislations coming within the

purview of that Article. It is a power not merely to abridge but even to take away the rights guaranteed under Articles 14, 19 and 31 by ordinary law. Further that power is conferred not only on the Parliament but also on the State Legislatures.

735. Article 368 specifically provides that amendment of the Constitution can be done only in the manner provided therein. It is true that there are provisions in the Constitution under which the Parliament can amend some parts of the Constitution by ordinary law-see Article 2 to 4, Article 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. But these provisions clearly provide that the laws enacted under those provisions "are not to be deemed as amendments to the Constitution for the purpose of Article 368". There are also some transitional provisions in the Constitution which can be changed by the Parliament by law. Leaving aside for separate consideration Article 31-A, which was first introduced by the 1st Amendment Act, 1951, there is no provision in the Constitution apart from Article 31(4) which permitted the State Legislatures to enact laws contravening one or more of the provisions in Part III. Article 31(4) relates to legislations pending before the State Legislatures at the time the Constitution came into force. Their scope was known to the Constitution-makers. That provision was enacted to protect certain Zamindari Abolition laws which were on the anvil. But it must be remembered that the original provisions in the Constitution were not controlled by Article 368. That Article is as much a creature of the Constitution as the other Articles are. The form and manner prescribed in Article 368 did not govern the procedure of the Constituent Assembly. The mandates contained in Article 368 are applicable only to the amendments made to the Constitution. The power to amend the Constitution was exclusively given to the Parliament and to no other body. The manner of exercising that power is clearly prescribed. Article 31C gives a very large power to the State Legislatures as well as to Parliament to pro tanto amend the Constitution by enacting laws coming within its ambit. To put it differently, Article 31C permits the State Legislatures and the Parliament to enact Constitution-breaking laws by a simple majority vote of the members present and voting, if the rule regarding quorum is satisfied.

736. It cannot be said that Article 31C is similar to Articles 4, 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. Each one of those Articles makes it clear that the laws passed under those Articles are not to be deemed to be an amendment of the Constitution for the purpose of Article 368. Those laws cannot affect the basic features of the Constitution. They operate within narrow fields.

737. The learned Advocate-General of Maharashtra contended that Article 31C lifts the ban placed on the State Legislatures and Parliament under Articles 14, 19 and 31. It is true that there are several provisions in the Constitution which lift the ban placed by one or the other Article of the Constitution on the legislative power of the State Legislatures and Parliament e.g. Articles 15(4), 16(3), 16(4), 16(5), 19(2) to 19(6), 22(3), 22(6), 23(2), 28(2), 31(4), 31(6) etc. Each one of these Articles lifts the limitations placed on the legislative power of the legislatures by one or more of the provisions of the Constitution particularly those contained in Part III. But when the limitation is so lifted, there will be no conflict between the law enacted and Article 13. In such a situation, there is no occasion for providing that the law enacted will not be deemed to be void notwithstanding anything contained in Article 13. The laws made under the provisions set out earlier cannot in their very nature take away any of the fundamental features of the Constitution. They can merely modify one or other of those features. Article 31C proceeds on the basis that the

laws enacted under that Article are in conflict with Article 13 and are prima facie void. Otherwise there was no purpose in providing in that Article "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any rights conferred by Article 14, Article 19 or Article 31. ..." Hence the contention that limitations imposed by Articles 14, 19 and 31 on the legislative power of the Union and the States are lifted to the extent provided in Article 31C cannot be accepted.

738. It is true that there is some similarity between the laws made under Article 31A and those made under Article 31C. The scope of the latter article is much wider than that of the former. The character of the laws made under both those Articles is somewhat similar. It was urged that if laws made under Article 31-A, without more, are valid even if they take away or abridge the rights conferred under Articles 14, 19 and 31, for the same reason, laws made under Article 31C must also be held valid. It was contended, now that this Court has upheld the validity of Article 31-A, we should also uphold the validity of Article 31C. In that connection, reliance was placed on the following observations of Brandies J. of the United States Supreme Court in Lesser v. Garnett : 66 L. Ed. 595=258 U.S.13.

This Amendment (19th Amendment) is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid...has been recognised and acted upon for half a century.... The suggestion that the 15th was incorporated in the Constitution not in accordance with law, but practically as a war measure which has been validated by acquiescence cannot be entertained.

739. These observations do not lay down any principle of law. The validity of the 19th Amendment was upheld on various grounds and not merely because the 15th amendment was upheld.

740. The laws enacted under Article 31A by their very nature can hardly abrogate the rights embodied in Articles 14, 19 and 31. Those laws can encroach upon the rights guaranteed under Articles 14, 19 and 31 only to the extent necessary for giving effect to them. The laws made must be those made under the topics of legislation mentioned in Article 31A. Hence the encroachment of the rights guaranteed under Article 14, 19 and 31 must necessarily be incidental. If the encroachment is found to be excessive, the same can be struck down. In this connection reference may be usefully made to the decision of this Court in Akadasi Padhan v. State of Orissa MANU/SC/0089/1962 : [1963] Supp. 2 S.C.R. 691. Therein the validity of a provision of a statute enacted under Article 19(6)(ii) i.e. law providing for State monopoly in Kendu Leaves, came up for consideration. The question for decision before the Court was whether that law can unreasonably encroach upon the right guaranteed under Article 19(1)(g). That question was answered by Gajendragadkar J. (as he then was) speaking for the Court, thus:

"A law relating to" a State monopoly cannot, in the context include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential feature. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter

part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19(6). In other words, the effect of the amendment made in Article 19(6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19(6) and would inevitably have to satisfy the test of the first part of Article 19(6).

741. The same principle was reiterated by the full Court in the Bank Nationalisation case.

742. As far back as in 1951 this Court ruled in State of Bombay and Anr. v. F.N. Balsara MANU/SC/0009/1951 : [1951]2SCR682 that merely because law was enacted to implement one of the Directive Principles, the same cannot with impunity encroach upon the Fundamental Rights. The ratio of Akadasi Padhan's case would be equally applicable in respect of the laws made under Article 31A which speaks of the "law providing for the" topics mentioned therein. But that ratio cannot be effectively applied when we come to laws made under Article 31C. The reach of Article 31C is very wide. It is possible to fit into the scheme of that Article almost any economic and social legislation. Further, the Court cannot go into the question whether the laws enacted do give effect to the policy set out in Article 39(b) and (c). We were told on behalf of the Union and the States that it is open to the courts to examine whether there is a nexus between the laws made under Article 31C and Article 39(b) and (c) and all that the courts are precluded from examining is the effectiveness of the law in achieving the intended purpose. But, such a power in its very nature is tenuous. There can be few laws which can be held to have no nexus with Article 39(b) and (c). At any rate, most laws may be given the appearance of aiming to achieve the objectives mentioned in Article 39(b) and (c). Once that facade is projected, the laws made can proceed to destroy the very foundation of our Constitution. Encroachment of valuable Constitutional guarantees generally begins imperceptibly and is made with the best of intentions but, once that attempt is successful further encroachments follow as a matter of course, not perhaps with any evil motives, and may be, out of strong convictions regarding the righteousness of the course adopted and the objectives intended to be achieved but they may all the same be wholly un-constitutional. Lord Atkin observed in Proprietary Articles Traders Association and Ors. v. Attorney General for Canada and Ors. [1931] A.C. 311`.

Both the Act and the sections have a legislative history which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment.

743. The observation of Lord Atkin "nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment" is extremely apposite for our present purpose. The First Amendment Act permitted enactment of Constitution breaking laws in respect of one subject; the Fourth Amendment Act enlarged that field and permitted the Legislatures to make laws ignoring Articles 14, 19 and 31 in respect of five subjects. Now the Twenty-Fifth Amendment has finally crossed the boundary.

744. It cannot be said that under Article 31C Parliament merely delegated its own amending power to State Legislatures and such a delegation is valid. The power conferred on Parliament under Article 368 in its very nature is one that cannot be delegated. It is a special power to be exclusively exercised by Parliament and that in the manner prescribed in Article 368. The State Legislatures are not institutions subordinate to Parliament. Parliament as well as State Legislatures in their respective allocated fields are supreme. Parliament cannot delegate its legislative powers-much less the amending power-to the State Legislatures. The question whether the legislatures can confer power on some other independent legislative body to exercise its legislative power came up for consideration before the Judicial Committee in re The Initiative and Referendum Act [1919] A.C. 935 P.C. Therein Viscount Haldane speaking for the Board observed:

Section 92 of the Act of 1867 (British North American Act) entrusts the legislative power in a Province to its legislature and to that legislature only. No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done in Hodge v. The Queen 19 AC 117 the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to Tavernes; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the Constitutional questions which thus arise.

745. In Queen v. Burah, (1878) 5 I.A. 178 the Judicial Committee observed:

Their Lordships agree that the Governor General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorised by the Councils' Act.

746. We respectfully agree with these observations. From these observations it follows that Parliament was incompetent to create a new power-a power to ignore some of the provisions of the Constitution-and endow the same on the State Legislatures. That power was exclusively conferred on Parliament so that the unity and integrity of this country may not be jeopardised by parochial considerations. The Constitution makers were evidently of the opinion that the sovereignty of the country, the democratic character of the polity, and the individual liberties etc. would be better safeguarded if the amending power is exclusively left in the hands of the Parliament. This exclusive conferment of amending power on the Parliament is one of the basic features of the Constitution and the same cannot be violated directly or indirectly. Article 31A made a small dent on this feature and that went unnoticed. That provision is now protected by the principle of stare decisis. Public interest will suffer if we go back on these decisions and take away the protection given to many statutes. Now, to use the words of Lord Atkin in the Proprietary Articles Traders Association's case, the 'boundary line has been crossed' and a challenge to the very basic conceptions of the Constitution is posed. Hence the neglect or avoidance of the question in previous cases cannot be accepted as a sound argument.

747. In Queen v. Kirby and Ors. (1956) 94 C.L.R. 295 Dixon C.J. observed:

These cases, and perhaps other examples exist, do no doubt add to the weight of the general considerations arising from lapse of time, the neglect or avoidance of the question in previous cases and the very evident desirability of leaving undisturbed assumptions that have been accepted as to the validity of the provisions in question. At the same time, the Court is not entitled to place very great reliance upon the fact that, in cases, before it where occasions might have been made to raise the question for argument and decision, this was not done by any member of the Court and that on the contrary all accepted the common assumption of the parties and decided the case accordingly. Undesirable as it is that doubtful questions of validity should' go by default, the fact is that, the court usually acts upon the presumption of validity until the law is specifically challenged.

748. Similar was the view expressed by Viscount Simonds speaking for the Judicial Committee in Attorney-General of Commonwealth of Australia v. The Queen and Ors. 95 C.L.R. 529

It is therefore asked and no one can doubt that it is a formidable question, why for a quarter of a century no litigant has attacked the validity of this obviously illegitimate unions. Why in Alexannder's case (1918) 25, C.L.R. 434 itself was no challenge made ? How came it that in a series of cases, which are enumerated in the majority and the dissentient, judgments it was assumed without question that the provisions now impugned were valid ?

It is clear from the majority judgment that the learned Chief Justice and the Judges who shared his opinion were heavily pressed by this consideration. It could not be otherwise. Yet they were impelled to their conclusion by the clear conviction that consistently with the Constitution the validity of the impugned provision could not be sustained. Whether the result would have been different if their validity had previously been judicially determined after full argument directed to the precise question and had not rested on judicial dicta and common assumption it is not for their Lordships to say. Upon a question of the applicability of the doctrine of stare decisis to matters of far reaching Constitutional importance they would imperatively require the assistance of the High Court itself. But here no such question arises. Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged, so far a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression, in the appropriate judgment.

749. The contention that Article 31C may be considered as an amendment of Article 368 is not tenable. It does not purport to be so. That Article does not find a place in Part XX of the Constitution. It is not shown as a proviso to Article 368, the only Article which deals with the amendment of the Constitution as such. Article 31C does not say that the powers conferred under that Article are available "notwithstanding anything contained in Article 368" or "notwithstanding anything in this Constitution". There is no basis for holding that the Parliament intended that Article 31C should operate as an amendment of Article 368. We have earlier come to the conclusion that the State Legislatures cannot be invested with the power to amend the Constitution.

750. If the purpose of Article 31C is to secure for the Government, the control of means of production in certain economic spheres exclusively or otherwise, the same can be achieved by the exercise of legislative power under Article 31(2) or under Article 31(2) read with Article 19(6)(ii).

If on the other hand, the object is to reduce the existing economic disparity in the country, that object can be achieved by exercising the various powers conferred on the legislatures under the Constitution, in particular by the exercise of the power to tax, a power of the largest amplitude. That power can be exercised without discriminating against any section of the people. One of the basic underlying principles of our Constitution is that every governmental power, which includes both the power of the executives as well as of the legislatures, must be so exercised as to give no room for legitimate complaint, that it was exercised with an evil eye or an uneven hand.

751. For the reasons mentioned above, we hold that Article 31C permits the destruction of some of the basic features of our Constitution and consequently, it is void.

752. Lastly, we come to the validity of the 29th Amendment Act, 1972. Contentions relating to the 29th Amendment Act of the Constitution lie within narrower limits. The only plea taken was that if any of the provisions in the two Acts included in the IXth Schedule to the Constitution by means of the 29th Amendment Act does not satisfy the requirements of Article 31A(1)(a), the said provision does not get the protection of Article 31-B.

753. As a result of the 29th Amendment Act, the Kerala Land Reforms (Amendment) Act, 1969, (Kerala Act 33 of 1969) and Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971) were added as items 65 and 66 in the IXth Schedule of the Constitution. The IXth Schedule is an appendage to Article 31-B, which says:

Without prejudice to the generality of the provisions contained in Article 31A none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by, any provisions of this Part and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each-of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

754. The learned Counsel for the petitioners did not challenge the validity of Article 31B. Its validity has been accepted in a number of cases decided by this Court. His only contention was that before any Act or any provision in an Act, included in the IXth Schedule can get the protection of Article 31B, the Act or the provision in question must satisfy the requirements of one or the other of the provisions in Article 31A. For this contention of his, he relied on the opening words of Article 31B namely "without prejudice to the generality of the provisions contained in Article 31A". He urged that, if Article 31B had been an independent provision having no connection whatsoever with Article 31A as contended on behalf of the contesting respondents, there was no occasion for using the words referred to earlier in Article 31B. He also attempted to trace the history of Articles 31A and 31B and establish that there is link between those two Articles. Though there is some force in those contentions, the question of law raised is no more res integra. It Is concluded by a series of decisions of this Court and we see no justification to reopen that question.

755. In State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Ors. MANU/SC/0019/1952 : [1952]1SCR889 a contention similar to that advanced by Mr. Palkhivala

was advanced by Mr. Somayya. That contention was rejected by Patanjali Sastri C.J. speaking for the Court with these observations:

Mr. Somayya, however, submitted that the opening words of Article 31-B, namely "Without prejudice to the generality of the provisions contained in Article 31A" showed that the mention of particular statutes in Article 31-B read with the Ninth Schedule was only illustrative, and that, accordingly, Article 31-B could not be wider in scope.. Reliance was placed in support of this argument upon the decision of the Privy Council in Sibnath Banerji's case. MANU/FE/0009/1945 : (1945) F.C.R. 195. I cannot agree with that view. There is nothing in Article 31-B to indicate that the specific intention of certain statutes was only intended to illustrate the application of the general words of Article 31-A. The opening words of Article 31-B are only intended to make clear that Article 31-A should not be restricted in its application by reason of anything contained in Article 31-B and are in no way calculated to restrict the application of the latter article or of the enactments referred to therein to acquisition of "estates".

756. In Vishweshwar Rao v. The State of Madhya Pradesh MANU/SC/0020/1952 : [1952]1SCR1020 Mahajan J. (as he then was) reiterated the same view. He observed:

It was contended that Article 31-B was merely illustrative of the rule stated in Article 31-A and if Article 31-A had no application, that article also should be left out of consideration....

On the basis of the similarity of the language in the opening part of Article 31-B with that of Sub-section (2) of Section 2 of the Defence of India Act "without prejudice to the generality of the provisions contained in Article 31-A", it was urged that Article 31-B was merely illustrative of Article 31-A and as the latter was limited in its application to estates as defined therein, Article 31-B was also so limited. In my opinion, the observations in Sibnath Bannerjee's case far from supporting the contention raised, negatives it. Article 31-B specifically validates certain Acts mentioned in the Schedule despite the provisions of Article 31-A, but stands independent of it. The impugned Acts in this situation qua the acquisition of the eight malguzari villages cannot be questioned on the ground that it contravenes the provisions of Article 31(2) of the Constitution or any of the other provisions of Part III.

757. A similar view was expressed by this Court in N.B. Jeejeebhoy v. Assistant Collector, Thana Prant. Thana MANU/SC/0248/1964 : [1965]1SCR636 Therein Subba Rao J. (as he then was) speaking for the Court observed thus:

The learned Attorney General contended that Article 31-A and Article 31-B should be read together and that if so read Article 31-B would only illustrate cases that would otherwise fall under Article 31-A and, therefore, the same construction as put upon Article 31-B should also apply to Article 31-A of the Constitution. This construction was sought to be based upon the opening words of Article 31-B, namely "without prejudice to the generality of the provisions contained in Article 31-A". We find it difficult to accept this argument. The words "Without prejudice to the generality of the provisions" indicate that the Acts and regulations specified in the Ninth Schedule would have the immunity even if they did not attract Article 31-A of the Constitution. If every Act in the 9th Schedule would be covered by Article 31-A, this article would become redundant. Indeed, some of the Acts mentioned therein, namely, items 14 to 20 and many other Acts added to the 9th

Schedule, do not appear to relate to estates as defined in Article 31-A(2) of the Constitution. We, therefore, hold that Article 31-B is not governed by Article 31A and that Article 31B is a Constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution....

Several other decisions of this Court proceed on the basis that Article 31-B is independent of the Article 31A. It is too late in the day to reopen that question. Whether the Acts which were brought into the IXth Schedule by the 29th Amendment Act or any provision in any of them abrogate any of the basic elements or essential features of the Constitution can be examined when the validity of those Acts is gone into.

758. For the foregoing reasons, we reject the contention of the petitioners that before an Act can be included in the IXth Schedule, it must satisfy the requirements of Article 31-A.

759. In the result we hold:

(1) The power to amend the Constitution under Article 368 as it stood before its amendment empowered the Parliament by following the form and manner laid down in that Article, to amend each and every Article and each and every Part of the Constitution.

(2) The expression "law" in Article 13(2) even before Article 13 was amended by the 24th Amendment Act, did not include amendments to the Constitution.

(3) Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution.

(4) The 24th Amendment Act did not enlarge the amending power of the Parliament It merely made explicit what was implicit in the original Article. Hence it is valid.

(5)(A) The newly substituted Article 31(2) does not destroy the right to property because-

(i) the fixation of "amount" under that Article should have reasonable relationship with the value of the property acquired or requisitioned;

(ii) the principles laid down must be relevant for the purpose of arriving at the "amount" payable in respect of the property acquired or requisitioned;

(iii) the "amount" fixed should not be illusory and

(iv) the same should not be fixed arbitrarily.

5(B) The question whether the "amount" in question has been fixed arbitrarily or the same is illusory or the principles laid down for the determination of the same are relevant to the subject matter of acquisition or requisition at about the time when the property in question is acquired or

requisitioned are open to judicial review. But it is no more open to the court to consider whether the "amount" fixed or to be determined on the basis of the principles laid down is adequate.

(6) Clause 2(b) of the 25th Amendment Act which incorporated Article 31 (2B) is also valid as it did not damage or destroy any essential features of the Constitution.

(7) Clause (3) of the 25th Amendment Act which introduced into the Constitution Article 31C is invalid for two reasons i.e. (1) it was beyond the amending power of the Parliament in so far as the amendment in question permits destruction of several basic elements or fundamental features of the Constitution and (2) it empowers the Parliament and the State Legislatures to pro tanto amend certain human freedoms guaranteed to the citizens by the exercise of their ordinary legislative power.

(8) The 29th Amendment Act is valid but whether the Acts which were brought into the IXth Schedule by that Amendment or any provision in any of them abrogate any of the basic elements or essential features of the Constitution will have to be examined when the validity of those Acts is gone into.

760. In the circumstances of the case we direct the parties to bear their own costs in these cases up till this stage.

A.N. Ray, J.

761. The validity of the Constitution 24th, 25th and 29th Amendment Acts is challenged. The Constitution 24th Amendment Act amended Article 368. Article 368 in the unamended form speaks of "Amendment of this Constitution" and how the Constitution shall stand amended. The Constitution 24th Amendment Act enacts that Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in that Article. The other part of the amendment is that nothing in Article 13 shall apply to any amendment under Article 368. The Constitution 25th Amendment Act has amended Article 31(2) and also Article 31(2A). The effect of these two amendments with regard to Articles 31(2) and 31 (2A) is two-fold. First, no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for an amount which may be fixed by law or which may be determined in accordance with such principles. Secondly, nothing in Article 19(1)(f) shall affect any law as is referred to in Article 31(2). The second part of the Constitution 25th Amendment Act is introduction of Article 31C which enacts that notwithstanding anything contained in Article 13 no law giving effect to the policy of the State towards securing principles prescribed in Clauses (b) and (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. By the Constitution 29th Amendment Act the Kerala Land Reforms Amendment Act 1969 and the Kerala Land Reforms Amendment Act 1971 have been introduced into the Ninth Schedule of the Constitution.

762. The principal question which falls for determination is whether the power to amend is under any express limitation of Article 13(2). Another question is whether there are implied and inherent limitation on the power of amendment. Can there be any implied or inherent limitation in the face of any express power of amendment without any exception? Question have been raised that essential features of the Constitution cannot be amended. Does the Constitution admit of distinction between essential and non-essential features ? Who is to determine what the essential features are? Who is the authority to pronounce as to what features are essential? The preeminent question is whether the power of amendment is to be curtailed or restricted, though the Constitution does not contain any exception to the power of amendment. The people gave the Constitution to the people. The people gave the power of amendment to Parliament. Democracy proceeds on the faith and capacity of the people to elect their representatives and faith in the representatives to represent the people. Throughout the history of man-kind if any motive power has been more potent than another it is that of faith in themselves. The ideal of faith in ourself is of the greatest help to us. Grote the historian of Greece said that the diffusion of Constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceful. By Constitutional morality Grote meant a paramount reverence for the forms of the Constitution, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of opponents than in his own. The question is "He that planted the car, shall he not hear? or he that made the eye, shall he not see".

763. The real question is whether there is any power to amend the Constitution and if so whether there is any limitation on the power. The answer to this question depends on these considerations. First, what is the correct ratio and effect of the decision in I.C. Golak Nath and Ors. v. State of Punjab and Anr. MANU/SC/0029/1967 : [1967]2SCR762 . Second, should that ratio be upheld. Third, is there any limitation on the power to amend the Constitution. Fourth, was the 24th Amendment validly enacted. If it was, is there any inherent and implied limitation on that power under Article 368 as amended.

764. The scope and power under Article 368 as it stood prior to the Constitution (24th) Amendment Act to amend the Constitution falls for consideration.

765. Two principal questions arise. First, is the Constitution as well as an amendment to the Constitution law within the meaning of Article 13(2). Second, is there any implied and inherent limitation on the power of amendment apart from Article 13(2).

766. Mr. Palkhivala contends that the unamended Article 368 was subject to Article 13(2). It is said that amendment of the Constitution is law, and, therefore, any law which contravenes fundamental rights is void. It is also said that Article 368 does not prevail over or override Article 13. The four bars under Article 13 are said to be these. The bar is imposed against the State, that is to say the totality of all the forces of the State. Second, all categories of law are covered by the bar, whether they are Constitutional amendments or bye-laws or executive Orders and Notifications. Third, all laws in force under Article 372 and all laws to be brought into force at any future date are brought within the scope of this bar. Fourth, the effect of the bar is to render the law void.

767. Mr. Palkhivala said that the preamble makes it clear that the object of the Constitution is to secure basic human freedom, and this guarantee will be meaningless if the Legislature against whom the guarantee is to operate is at liberty to abrogate the guarantees. It is said that law is comprehensive enough to include both ordinary law and Constitutional law. The various forms of oath in the Third Schedule of the Constitution refer to "Constitution as by law established". It is, therefore, submitted by the petitioner that the Constitution itself was originally established by law and every amendment has likewise to be established by law in order to take effect. It is emphasised that the Constitutional amendment is a law, and, therefore, the word "law" in Article 13(2) includes Constitutional amendments.

768. The Attorney General and Mr. Seervai said that the Constitution is the supreme higher law. An amendment to the Constitution is in exercise of constituent power. The amending power is not a legislative power. Law in Article 13(2) embodies the doctrine of ultra vires to render void any law enacted under the Constitution. MANU/SC/0013/1951 : [1952]1SCR89.

769. This Court in Shankari Prasad Singh Deo v. Union of India and State of Bihar (1952) S.C.R. 89 and Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 examined the power to amend the Constitution.

770. In Shankari Prasad case the Constitution First Amendment Act was challenged. The principal contention was that the First Amendment in so far as it purported to take away or abridge the rights conferred by Part III of the Constitution fell within the prohibition of Article 13(2) of the Constitution.

771. The unanimous view of this Court in Shankari Prasad case was that although law must ordinarily include Constitutional law there is a clear demarcation between ordinary law which is made in exercise of legislative power and Constitutional law which is made in exercise of constituent power. In the absence of a clear indication to the contrary it is difficult to hold that the framers of the Constitution intended to make the fundamental rights immune of Constitutional amendment The terms of Article 368 are general to empower Parliament to amend the Constitution without any exception. Article 13(2) construed in the context of Article 13 means that law in Article 13(2) would be relatable to exercise of ordinary legislative power and not amendment to the Constitution.

772. The Constitution Fourth Amendment Act came into existence on 5 October, 1963. The Constitution Seventeenth Amendment Act came into force on 20 June, 1964. By the Seventeenth Amendment Act Article 31A Clause (1) was amended by inserting one more proviso. A fresh Sub-clause (a) was substituted for original Sub-clause (a) of Clause (2) of Article 31 retrospectively. 44 Acts were added in the Ninth Schedule. The validity of the Seventeenth Amendment was challenged before this Court in Sajjan Singh case.

773. The main contention in Sajjan Singh case was that the power prescribed by Article 226 was likely to be affected by the Seventeenth Amendment, and, therefore, it was necessary that the special procedure laid down in the proviso to Article 368 should have been followed. The Seventeenth Amendment Act was said to be invalid because that procedure was not followed.

774. The majority view of this Court in Sajjan Singh case was that Article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution. The word "law" in Article 13(2) was held not to take in the Constitution Amendment Acts passed under Article 368. It was also said that fundamental rights in Article 19 could be regulated as specified in Clauses (2) to (6) and, therefore, it could not be said to have been assumed by the Constitution makers that fundamental rights were static and incapable of expansion. It was said that the concept of public interest and other important considerations which are the basis of Clauses (2) to (6) in Article 19 "may change and may even expand". The majority view said that "The Constitution makers knew that Parliament could be competent to make amendments in those rights (meaning thereby fundamental rights) so as to meet the challenge of the problem which may arise in the course of socio-economic progress and the development of the country".

775. The minority view in Sajjan Singh case doubted the correctness of the unanimous view in Shankari Prasad case. The doubt was on a question as to whether fundamental rights could be abridged by exercise of power under Article 368. The minority view in Sajjan Singh case was that the rights of society are made paramount and are placed above those of the individual. But the minority view was also that though fundamental rights could be restricted under Clause (2) to (6) of Article 19 there could be no "removal or debilitation" of such rights.

776. In Golak Nath case the Punjab Security of Land Tenures Act, 1953 was challenged as violative of fundamental rights and as not being protected by the Constitution First Amendment Act, 1951, the Constitution Fourth Amendment Act, 1955 and the Constitution Seventeenth Amendment Act, 1964. The validity of the Mysore Reforms Act, 1962 as amended by Act 14 of 1965 was also challenged on the same grounds. The Punjab Act and the Mysore Act were included in the Ninth Schedule. It was common case that if the Seventeenth Amendment Act adding the Punjab Act and the Mysore Act in the Ninth Schedule was valid the two Acts could not be impugned on any ground.

777. The majority decision of this Court in Golak Nath case was that an amendment of the Constitution was law within the meaning of Article 13(2). There were two reasonings in the majority view arriving at the same conclusion. The majority view where Subba Rao, C.J., spoke was as follows: The power to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368. Article 368 deals only with procedure. Amendment is a legislative process. Amendment is law within the meaning of Article 13. therefore, if an amendment takes away or abridges rights conferred by Part III of the Constitution it is void. The Constitution First Amendment Act, the Constitution Fourth Amendment Act and the Constitution Seventeenth Amendment Act abridged the scope of fundamental rights. On the basis of earlier decisions of this Court the Constitution Amendment Acts were declared to be valid. On the application of the doctrine of prospective over-ruling the amendments will continue to be valid. Parliament will have no power from the date of this decision (meaning thereby the decision in Golak Nath case) to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights. The Constitution Seventeenth Amendment Act holds the field. therefore, the Punjab Act and the Mysore Act cannot be questioned.

778. The concurring majority view of Hidayatullah, J. was this. The fundamental rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights. The

First, the Fourth and the Seventh Amendment Acts being Part of the Constitution by acquiescence for a long time cannot be challenged. These Constitution Amendment Acts contain authority for the Seventeenth Amendment Act. Any further inroad into fundamental lights as they exist on the date of the decision will be illegal and un-constitutional unless it complies with Part III in general and Article 13(2) in particular. The constituent body will have to be Convened for abridging or taking away fundamental rights. The Punjab Act and the Mysore Act are valid not because they are included in the Ninth Schedule of the Constitution but because they are protected by Article 31A and the assent of the President.

779. The two views forming the majority arrived at the same conclusion that an amendment of the Constitution being law within the meaning of Article 13(2) would be un-constitutional if such an amendment abridged any fundamental right. The leading majority view did not express any final opinion as to whether fundamental rights could be abridged by Parliament exercising its residuary power and calling a Constituent Assembly "for making a new Constitution or radically changing it". The concurring majority view held that the fundamental rights could be abridged by suitably amending Article 368 to convoke Constituent Assembly. The concurring majority view was that a Constituent Assembly could be called by passing a law under Entry 97 of List I and then that Assembly would be able to abridge or take away fundamental rights.

780. The minority view of five learned Judges expressed in 3 judgments as against the majority view of six learned Judges in Golak Nath case was this.

781. Wanchoo, J. spoke for himself and two concurring learned Judges as follows. Article 368 contains both the power and the procedure for amendment of the Constitution. It is incomprehensible that the residuary power of Parliament will apply to amendment of the Constitution when the procedure for amendment speaks of amendment by ratification by the States. When an entire part of the Constitution is devoted to amendment it will be more appropriate to read Article 368 as containing the power to amend because there is no specific mention of amendment in Article 248 or in any Entry of List I. The Constitution is the fundamental law and without express power to affect change legislative power cannot effect any change in the Constitution. Legislative Acts are passed under the power conferred by the Constitution. Article 245 which gives power to make law for the whole or any part of India is subject to the provisions of the Constitution. If, however, power to amend is in Article 248 read with the residuary Entry in List I that power is to be exercised subject to the Constitution and it cannot change the Constitution which is the fundamental law. It is because of the difference between the fundamental law and the legislative power under the Constitution that the power to amend cannot be located in the Residuary Entry which is law making power under the Constitution.

782. Article 368 confers power on Parliament subject to the procedure provided therein for amendment of any provision of the Constitution, It is impossible to introduce in the concept of amendment, any idea of improvement. The word "amendment" must be given its full meaning. This means that, by amendment an existing Constitution or law can be changed. This change can take the form either of addition to the existing provisions, or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether. An amendment of the Constitution is not an ordinary law made under the powers conferred under Chapter I of Part XI of the Constitution, and therefore, it cannot be subject to Article 13(2). It is strange that the power

conferred by Article 368 will be limited by putting an interpretation on the word "law" in Article 13(2) which will include Constitutional law also. The possibility of the abuse of any power has no relevance in considering the question about the existence of the power itself. The power of amendment is the safety valve which to a large extent provides for stable growth and makes violent revolution more or less unnecessary.

783. The two other supporting minority views were these. Bachawat, J. arrived at these conclusions. No limitation on the amending power can be gathered from the language of Article 368. therefore, each and every part of the Constitution may be amended under Article 368. The distinction between the Constitution and the laws is so fundamental that the Constitution is not regarded as a law or a legislative Act. It is because a Constitution Amendment Act can amend the Constitution that it is not a law and Article 368 avoids all reference to law making by Parliament. As soon as a Bill is passed in conformity with Article 368 the Constitution stands amended in accordance with the terms of the Bill. Amendment or change in certain Articles does not mean necessarily improvement.

784. Ramaswami, J. expressed these views. The definition of law in Article 13(3) does include in terms a Constitutional amendment though it includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage. The language of Article 368 is perfectly general and empowers Parliament to amend the Constitution without any exception whatever. If it had been intended by the Constitution makers that the fundamental right guaranteed under Part III should be completely outside the scope of Article 368 it is reasonable to assume that they would have made an express provision to that effect. The expression "fundamental" does not lift the fundamental rights above the Constitution itself. In a matter of Constitutional amendment it is not permissible to assume that there will be abuse of power and then utilise it as a test for finding out the scope of amending power.

785. The majority view in Golak Nath case was that an amendment of the Constitution pursuant to Article 368 is law within the meaning of Article 13(2), and, therefore, an amendment of the Constitution abridging fundamental rights will be void. The majority view was on the basis that there was conflict between Article 13(2) and Article 368 and this basis was the result of the nature and quality of fundamental rights in the scheme of the Constitution.

786. It is, therefore, to be seen at the threshold as to whether there is any conflict between Article 13(2) and Article 368, namely, whether amendment of Constitution is law within the meaning of law in Article 13(2). Article 368 provides in clear and unambiguous terms that an amendment bill after compliance with the procedure stated therein and upon the President giving assent to such bill the Constitution shall stand amended in accordance with the terms of the bill. This Constitutional mandate does not admit or provide any scope for any conflict with any other Article of the Constitution. This is the fundamental law. No other Article of the Constitution has limited its scope. The moment the President gives his assent to an amendment bill the amendment becomes a part of the Constitution. There cannot be a law before the assent of the President. therefore, the validity of any such supposed law cannot arise. An amendment of the Constitution becomes a part of the fundamental law. The legality of an amendment is no more open to attack than of the Constitution itself. The opening part of amended Article 368, viz., "An Amendment of this Constitution may be initiated" and its concluding part before the proviso, viz., "The Constitution

shall stand amended" show clearly that the whole Constitution can be amended and no part of the Constitution is excluded from the amendment. Herein lies the vital distinction between the Constitution and the ordinary law.

787. The distinction lies in the criterion of validity. The validity of an ordinary law can be questioned. When it is questioned it must be justified by reference to a higher law. In the case of the Constitution the validity is inherent and lies within itself. The validity of Constitutional law cannot be justified by reference to another higher law. Every legal rule or norm owes its validity to some higher legal rule or norm. The Constitution is the basic norm. The Constitution generates its own validity. It is valid because it exists. The Constitution is binding because it is the Constitution. Any other law is binding only if and in so far as it is in conformity with the Constitution. The validity of the Constitution lies in the social fact of its acceptance by the community. The Constitutional rules are themselves the basic rules of the legal system. The Constitution prevails over any other form of law not because of any provision to that effect either in the Constitution or else where but because of the underlying assumption to that effect by the community. If Parliament passes a law under any of the items in the Union List abridging a fundamental right and also provides in that law itself that it shall not be invalid notwithstanding anything in Article 13 or Part III of the Constitution, yet the law made by Parliament will be invalid to the extent of its inconsistency with Part III of the Constitution. It will be invalid because Article 13 occurs in the Constitution which is supreme. The impugned Act cannot enact that it will be valid notwithstanding the Constitution.

788. The real distinction is that Constitutional law is the source of all legal validity and is itself always valid. Ordinary law on the other hand must derive its validity from a higher legal source, which is ultimately the Constitution. Law in Article 13(2) of the Constitution could only mean that law which needs validity from a higher source and which can and ought to be regarded as invalid when it comes in conflict with higher law. It cannot possibly include a law which is self validating and which is never invalid. The definition of law in Article 13 enumerates more or less exhaustively all forms of law which need validation from higher source and which are invalid when they are in conflict with the Constitution. The definition does not mention Constitutional amendment. It is because an amendment being the Constitution itself can never be invalid. An amendment is made if the procedure is complied with. Once the procedure is complied with it is a part of the Constitution,

789. The expression "law" has been used in several Articles in Part III of the Constitution. These are Articles 17, 19 Clauses (2) to (6), 21, 22, 25, 26, 31, 33, 34 and 35. To illustrate, Article 17 states that untouchability is abolished and its practice in any form is forbidden. Article 17 also states that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The word "law" in Article 17 does not mean the Constitution. The Constitution leaves the matter of enforcement and punishment to law.

790. The foundation of the majority view in Golak Nath case that Article 13(2) takes in Constitutional law within its purview is that an amendment is a legislative process and is an exercise of legislative power. The majority relied on the decision in McCawley v. The King (1920) A.C. 691 and the Bribery Commissioner v. Pedrick Ranasinghe 1965 A.C. 172 in support of the view that there is no distinction between ordinary legislation and Constitutional amendment. The

basis of the unanimous decision in Shankari Prasad case was on the distinction between legislative power and the constituent power. therefore, the majority view in Golak Nath case overruled the view in Shankari Prasad case. Article 13(2) expressly declares that law taking away or abridging the rights conferred by Part III shall be void. This principle embodies the doctrine of ultra vires in a written Constitution. The observation of Kania, C.J. in A.K. Gopalan v. The State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 that Article 13(2) was introduced ex majore cautela because even if Article 13 were not there any law abridging or taking away fundamental rights would be void to the extent of contravention or repugnancy with fundamental rights in Part III refers to the doctrine of ultra vires which is a necessary implication of our Constitution. therefore, there is no distinction between Article 13(2) which expressly affirms the doctrine of ultra vires and the necessary implication of the doctrine of ultra vires which has been applied to every part of our Constitution. If the express doctrine of ultra vires prevented an amendment of Part III of the 'Constitution contrary to its terms, equally an amendment of other parts of the Constitution contrary to their terms would be prevented by the implied doctrine of ultra vires. The result would be that an amendment of the Constitution which contravened the terms of the existing Constitution would be void. This would result in absurdity. That is why Article 368 expressly provides for the amendment of the Constitution.

791. Mr. Palkhivala on behalf of the petitioner submitted that Constitution amendment was law, within Article 13(2) and was void to the extent to which it contravened the fundamental rights and Article 368 did not prevail over or override Article 13 for these reasons. Reference was made to the form of oath in the Third Schedule which uses the words "Constitution as by law established". This is said to mean that our Constitution was originally established by law and, therefore, every amendment thereto was likewise to be established by law. Article 13(1) is also said to cover Constitutional law because though Article 395 repealed the Indian Independence Act, 1947 and the Government of India Act 1935 the Constitutional laws of the Indian Princely States or some other Constitutional laws of British India were in existence. therefore, the word "Law" in Article 13(2) will also include Constitutional law. The word "law" in Article 13(2) will in its ordinary sense embrace Constitutional law, and there is no reason for reading the word "law", in a restricted sense to confine it to ordinary laws. The real question is not whether there are any words of limitation in Articles 368 but whether there are any words of limitation in Article 13(2). It was amplified to mean if a limitation has to be read in either of the two Articles 368 and 13(2) there is no reason why it should be read in such a way as to enable parliament to take away or abridge fundamental rights.

792. In Article 368 the word "law" is not used at all. Consequently the language of Article 368 raises no question about the applicability of Article 13(2). It is inconceivable that Constitutional laws of Indian Princely States or Constitutional laws of British India exist as Constitutional laws after the coming into existence of our Constitution. Our Constitution is the only fundamental law. All other laws which continue under our Constitution are ordinary laws. The fundamental error in including amendment of the Constitution in law under Article 13(2) is by overlooking the vital difference between the constituent and the legislative powers and in wrongly equating these powers. The definition of "State" in Article 12 includes Parliament. Part V of the Constitution contains provisions relating to the powers of the three organs of the Union Government. Chapter II of Part V relates to the legislative power of Parliament. Under Article 79 Parliament is the Union Legislature provided for by the Constitution. therefore, law in Article 13(2) must mean a law of

Parliament functioning under Chapter II of Part V. It cannot mean the Constitution itself or an amendment of the Constitution. The reason is that the Constitution with its amendment is the supreme authority and the three organs of the State derive their powers from this supreme authority.

793. The word "law" when used in relation to Constitutional law which is fundamental law and ordinary law is not a mere homonym. If the word "law" here is not a mere homonym then it is a mistake to think that all the instances to which it is applied must possess either a single quality or a single set of qualities in common. There is some general test or criterion whereby the rules of the fundamental law or the rules of the system of ordinary laws are tested and identified. When the word "law" is spoken in connection with Constitutional law it cannot have the same meaning as ordinary law. It is not arbitrary to use the word "law" in relation to Constitutional law in spite of its difference from ordinary law.

794. Mr. Palkhivala contended that Constitutional laws of Princely States and of British India prior to our Constitution survived as laws in force under Article 372. Article 372 became necessary to make a provision similar to Section 292 of the Government of India Act, 1935 following the repeal of the 1935 Act and the Indian Independence Act, 1947. The purpose of Article 372 is to negative the possibility of any existing law in India being held to be no longer in force by reason of the repeal of the law authorising its enactment. A saving clause of the type of Article 372 is put in to avoid challenge to laws made under the repealed Constitution. The total volume of law in the then British India had the legal authority up to 14 August 1947 by reason of the Government of India Act 1935. The Government of India Act 1935 with adaptations and the Indian Independence Act 1947 preserved the authority of those laws upto 25 January 1950. In so far as it is indisputable that the Government of India Act, 1935 and the Indian Independence Act, 1947 were repealed, the repeal of those Acts was repeal of the Constitutional law represented by those Acts. By our Constitution there was a repeal of all other Constitutional laws operating in our country. There was repeal of "Constitution" in Princely States.

795. A distinction arises between the provisions of a Constitution which are described as Constitutional law and provisions of a statute dealing with a statute which is treated to have Constitutional aspects. An example of the latter type is a statute which provides for the judicature. Mr. Seervai rightly said that the two distinct senses of Constitutional law are mixed up in the contention of Mr. Palkhivala. In the first sense, Constitutional law is applicable to a provision of the Constitution, and in the second sense, to a law enacted under the Constitution dealing with certain classes of subject matter. Laws of the second class fluctuate. An amendment of the Constitution becomes a part of the Constitution itself. Mr. Seervail rightly contended that in order to show that law in Article 13(2) includes amendment of the Constitution it is also necessary to show that the expression "laws in force" in Article 13(1) includes Constitution amendment or the Constitution itself It is impossible to accept the submission that the word "law" in Article 13(2) includes the Constitution. The Constitution itself cannot include the Constitution. It is the Constitution which continues the laws in force. therefore, law in Article 13 is law other than the Constitution and a fortiori it is other than amendment to the Constitution.

796. In non-British territory on the Constitution coming into force the Constitution of Princely States lost its character as Constitutional law in the strict sense. It is in that strict sense that

Wanchoo, J. rightly said in Golak Nath case that on our Constitution coming into existence no other Constitutional law survived. Article 393 of our Constitution says that the Constitution may be called the "Constitution of India". The Preamble recites that the People in the Constituent Assembly gave this Constitution meaning thereby the Constitution of India. therefore, the people gave themselves no other Constitution. All other laws whatever their previous status as strict Constitutional law became subordinate laws subject to the provisions of our Constitution and this position is clear from the language of Article 372.

797. In a broad sense law may include the Constitution and the law enacted by the legislature. There is however a clear demarcation between ordinary law in exercise of legislative power and Constitutional law which is made in exercise of constituent power. therefore, a power to amend the Constitution is different from the power to amend ordinary law. It was said by Mr. Palkhivala that legislative power is power to make law and constituent power is the power to make or amend Constitutional law and since law in its ordinary sense, includes Constitutional law the legislative power is the genus of which the constituent power is the species. The difference between legislative and constituent power in a flexible or uncontrolled Constitution is conceptual depending upon the subject matter. A Dog Act in England is prima facie made in exercise of legislative power. The Bill of Rights was made in the exercise of constituent power as modifying the existing Constitutional arrangement But this conceptual difference does not produce different legal consequences, since the provisions of a Dog Act inconsistent with the earlier provisions of the Bill of Rights would repeal those provisions pro tanto. In a rigid or controlled Constitution the distinction between legislative power and constituent power is not only conceptual but material and vital in introducing legal consequences. In a controlled Constitution it is not correct to say that legislative power is the genus of which constituent power is the species. The question immediately arises as to what the differentia is which distinguishes that species from other species of the same genus. It would be correct to say that the law making power is the genus of which legislative power and constituent power are the species. The differentia is found in the different procedure prescribed for the exercise of constituent power as distinguished from that prescribed for making ordinary laws. The distinction between legislative power and constituent power is vital in a rigid or controlled Constitution, because it is that distinction which brings in the doctrine that a law ultra vires the Constitution is void, since the Constitution is the touchstone of validity and that no provision of the Constitution can be ultra vires.

798. The legislatures constituted under our Constitution have the power to enact laws on the topics indicated in Lists I to III in the Seventh Schedule or embodied specifically in certain provisions of the Constitution. The power to enact laws carries with it the power to amend or repeal them. But these powers of legislatures do not include any power to amend the Constitution, because it is the Constituent Assembly which enacted the Constitution and the status given by Article 368 to Parliament and the State legislatures, is the status of a Constituent Assembly. The distinction between the power to amend the Constitution and the ordinary power to enact laws is fundamental to all federal Constitution. When Parliament is engaged in the amending process it is not legislating. It is exercising a particular power which is sui generis bestowed upon it by the amending clause in the Constitution. Thus an amendment of the Constitution under Article 368 is constituent law and not law within the meaning of Article 13(2) and law as defined in Article 13(3)(a).

799. The procedure that Bill for amendment of the Constitution has to be introduced in either House of Parliament and passed by both Houses does not alter the status of Parliament to amend the Constitution as a Constituent Assembly and does not assimilate it to that of the Union legislature. At this stage it may be stated that in Shankari Prasad case it was said that law in general sense may include the Constitution and the procedure of amendment is assimilated to ordinary legislative procedure. Assimilation of procedure does not make both the procedure same. Nor are the two separate powers to be lost sight of. The Constituent Assembly which has summoned on 19 December, 1946 to frame a Constitution was also invested after independence with legislative power. It framed the Constitution as the Constituent Assembly. It enacted ordinary laws as legislature. Under Article V of the American Constitution the Congress functions not as a legislature but as a Constituent Assembly. In Australia when a Bill for amendment has to be passed by Commonwealth Parliament and then has to be submitted to the verdict of the electorate the process is not ordinary legislative process of the Commonwealth Parliament. In our Constitution when the amendment falls within the proviso to Article 368 it requires that the amendment must be ratified by at least one half of the State legislatures and the process is radically different from ordinary legislative procedure. The Union legislature acting under Chapter II of Part V has no connection with the State legislatures. therefore, when amendment is affected under the proviso to Article 368 Parliament does not act as a Union legislature. The feature that in the passage of the bill for amendment of the Constitution the House of Parliament has to adopt the procedure for ordinary legislation has little bearing. If the intention of the framers of the Constitution was to leave to the Union legislature the power to effect amendments of the Constitution it would have been sufficient to insert a provision in Chapter II of Part V in that behalf without enacting a separate part and inserting a provision therein for amendment of the Constitution.

800. Under Clause (e) of Article 368 the Article itself can be amended. therefore, an amendment of Article 368 providing that provisions in Part III can be amended will be Constitutional. If it was intended by Article 13(2) to exclude Part III altogether from the operation of Article 368 Clause (e) would not have been enacted. The Constituent Assembly thus enacted Article 368 so that the power to amend should not be too rigid nor too flexible. Clause (s) of Article 368 requires an amendment to be ratified by not less than half the number of States. The title of Part XX and the opening words of Article 368 show that a provision is being made for "amendment of this Constitution" which in its ordinary sense means every part of the Constitution. This would include Article 368 itself. There is no limitation imposed upon or deception made to the amendments which can be made. It is not permissible to add to Article 368 words of limitation which are not there.

801. The initiative for an amendment of the Constitution is with Parliament and not with the States. A bill for amendment is to be introduced in either House of Parliament. Again, a bill must be passed by each House by not less than two thirds of the members present and voting, the requisite quorum in each House being a majority of its total membership. In cases coming under the proviso the amendment must be ratified by the legislatures of not less than half the number of States. Ordinary legislative process is very different; A bill initiating a law may be passed by majority of members present and voting at a sitting of each House and at a joint sitting of House, the quorum for the meeting of either House being one tenth of the total members of the House.

802. The legislative procedure is prescribed in Articles 107 to 111 read with Article 100. Article 100 states "save as otherwise provided in the Constitution all questions at any sitting of either

House or joint sitting shall be determined by a majority of votes of the members present and voting". Though Article 368 falls into two parts of the Article is one integral whole as is clear from the words "the amendment shall also require to be ratified". The first part of Article 368 requires that a bill must be passed in each House (1) by majority of the total membership of that House and (2) by a majority of not less than two thirds of the members of that House present and voting. These provisions rule out a joint sitting of either House under Article 108 to resolve the disagreement between the two Houses. Again the majority required to pass a bill in each House is not a majority of members of that House present and voting as in Article 100 but a majority of the total membership of each House and a majority of not less than two thirds of the members of that House present and voting. These provisions are not only important safeguards when amending the Constitution, but also distinguishing features of Constituent power as opposed to legislative power. Under the first part of unamended Article 368 when a bill is passed by requisite majority of each House the bill must be presented for the President's assent.

803. Parliament's power to enact laws is not dependent on State legislature, nor can it be frustrated by a majority of State legislatures. The provisions in the proviso to Article 368 for ratification by the legislatures of the State constitute a radical departure from the ordinary legislative process of Parliament, State legislative process of ratification cannot possibly be equated with ordinary legislative process. If the bill is not ratified the bill fails. If it is ratified it is to be presented to the President for his assent. If the President assents the procedure prescribed by Article 368 comes to an end and the consequence prescribed comes into operation that the Constitution shall stand amended in accordance with the bill. But the result is not law, but a part of the Constitution and no court can pronounce any part of the Constitution to be invalid.

804. The exercise of the power of ratification by the State legislatures is constituent power and not ordinary law making power. It cannot be said that Article 368 confers constituent power under its proviso but not under the main part. If the procedure has been followed the invalidity of an amendment cannot arise.

805. The provisions in Articles 4, 169, paragraph 7(2) of the Fifth Schedule and paragraph 21(2) of the Sixth Schedule were referred to for the purpose of showing that the word "law" is used in those provisions relating to amendments to the Constitution. It is, therefore, said that similar result will follow in the case of all amendments. These four provisions confer on Parliament limited power of amendment. There are two features common to all these provisions. First, they confer on Parliament a power to make a law which inter alia provides for the specific class of amendments. Second, each of these provisions states that "no such law as aforesaid shall be deemed to be an amendment of the Constitution for the purpose of Article 368". The power to amend under any of these four provisions is a specific power for specific amendments and not a legislative power contained in the Legislative List or Residuary Legislative List.

806. The amendment under Article 4 follows a law providing for the formation of new States and alteration of areas, boundaries and names of existing States. It is obligatory on Parliament to make amendment of Schedules 1 and 4 and it is necessary to make amendments which are supplemental, incidental and consequential. In making such a law in so far as it affects the State but not Union territory a special procedure has to be followed.

807. Under Article 169 which provides for the abolition or creation of a State legislative Council Parliament has power to make a necessary law on a resolution being passed by the State Legislative Assembly for such abolition or creation by a majority of the membership of the Assembly and by majority of not less than two thirds of the members present and voting. It Parliament makes such a law that law must make the necessary amendments to the Constitution.

808. Schedules 5 and 6 provide for the administration of the Scheduled and Tribal areas which are governed by Part X and not by Part XI by which the Union and States are governed. The Schedules provide a mode of governance of those areas which is radically different from the Government of the States and the Union. Part X of the Constitution unlike Part XI is not "subject to the provisions of this Constitution". Paragraph 7 of Schedule 5 and paragraph 21 of Schedule 6 confer on Parliament a power to amend the schedules by law but no special procedure is prescribed for making such a law.

809. No question relating to those four provisions, however arises in the present case. In Article 368 the word "law" is not based at all. These four provisions for amendment deal with matters in respect of which it was considered desirable not to impose requirements of Article 368, and, therefore, it became necessary expressly to provide that such amendments shall not be deemed to be amendments of the Constitution for the purpose of Article 368. These four provisions indicate the distinction between the constituent power and the legislative power. If the power of amendment was located in the residuary Entry No. 97 in the Union List it would not have been necessary to grant that power of amendment again in these four provisions. These four provisions indicate that the Constitution makers intended to confer on Parliament power to make amendments in the provisions of the Constitution and having provided for a particular procedure to be followed in respect of matters covered by those four provisions it conferred a general power on Parliament to make an amendment to the other Articles after complying with the requirements of Article 368.

810. The majority view in Golak Nath case said that Parliament could call a Constituent Assembly either directly under the residuary power or pass a law under the Residuary Entry to call a Constituent Assembly for amendment of fundamental rights. Of the two views forming the majority one view did not express any opinion as to whether such a Constituent Assembly could take away or abridge fundamental rights but the other view expressed the opinion that such a Constituent Assembly could abridge fundamental rights. The majority view in Golak Nath case was that Parliament is a constituted body and not a constituent body and a constituted body cannot abridge or take away fundamental rights. The majority view indicates that a constituent power was required to amend the fundamental rights.

811. The majority view has totally ignored the aspect that constituent power is located in Article 368, and, therefore, amendment under the Article is not a law within the meaning of Article 13(2). If Parliament is a constituted body as was said by the majority view in Golak Nath case it would be difficult to hold that such a body could bring about a Constituent Assembly. The well-known principle that what cannot be done directly cannot be achieved indirectly will establish the basic infirmity in that majority view. If fundamental rights can be abridged by Parliament calling a Constituent Assembly under the Residuary Entry such Constituent Assembly will be a body different from Parliament and will frame its own rules of business and Article 368 cannot have any application. That will have a strange and startling result.

812. In the scheme of the Constitution containing Article 368 a Constituent Assembly will be called extra Constitutional means and not one under the Constitution. A Constitution can be amended only in accordance with the process laid down in the Constitution. No other method is Constitutionally possible than that indicated in the provision for amendment of the Constitution. Once the Constitution has vested the power to amend in the bodies mentioned therein that is the only body for amending the Constitution. The people who gave the Constitution have expressed how it is to be changed.

813. The distinction between constituent and legislative power is brought out by the feature in a rigid Constitution that the amendment is by a different procedure than that by which ordinary laws may be altered. The amending power is, therefore, said to be a re-creation of the Constituent Assembly every time Parliament amends re-creation in accordance with Article 368.

814. The two decisions in McCawley v. The King 1920 A.C. 691 and The Bribery Commissioner v. Pedrick Ranasinghe 1965 A.C. 172 on which the majority view in Golak Nath case relied to hold that amendment to the Constitution is an ordinary legislative process do not support that conclusion. The difference between flexible or uncontrolled and rigid or controlled Constitutions in regard to amendment is that there may be special methods of amendment in rigid or controlled Constitution. In a rigid Constitution amendment is not by exercise of ordinary legislative power. The power to amend is, therefore, described in a rigid Constitution as constituent power because of the nature of the power. In a flexible Constitution the procedure for amendment is the same as that of making ordinary law. A Constitution being uncontrolled the distinction between legislative and constituent powers gets obliterated because any law repugnant to the Constitution pro tanto repeals a Constitution as was held in McCawley case. Dicey in his Law of the Constitution (10th Ed.) illustrates the view by his opinion that if the Dentists Act said anything contrary to the Bill of Rights which can be described as Constitutional document the Dentists Act would prevail. In a flexible or unwritten Constitution the word Constitutional law is imprecise as it is used in respect of subject matter of law, e.g. a law dealing with the legislature. In a rigid or written Constitution whatever is in the Constitution would be the law of the Constitution.

815. In McCawley case the validity of the appointment of McCawley as a Judge of the Supreme Court of Queensland was challenged as void on the allegation that Section 6 Sub-section (6) of the Industrial Arbitration Act of 1916 was contrary to the provisions of the Constitution of Queensland 1867. The Industrial Arbitration Act of 1916 by Section 6 Sub-section (6) authorised the Governor to appoint any Judge of the Court of Industrial Arbitration to be a Judge of the Supreme Court of Queensland and provided that a Judge so appointed shall have the jurisdiction of both offices and shall hold office as a Judge of the Supreme Court during good behavior. The sub-section further provided that Judge of the Court of Industrial Arbitration shall hold office for seven years. The Governor in Council by commission reciting Section 6 Sub-section (6) appointed McCawley who was a Judge and the President of the Court of Industrial Arbitration to be a Judge of the Supreme Court during good behavior. By Sections 15 and 16 of the Constitution of 1867 the period during which Judges of the Supreme Court were to hold office was during good behavior. The contention was that the appointment of McCawley under the Industrial Arbitration Act 1916 for a limited period of seven years was invalid since the Act was inconsistent with the Constitution Act 1867 and further that the Act of 1916 could not repeal or modify the provisions of the Constitution Act.

816. The Privy Council held that the Legislature of Queensland had power both under the Colonial Laws Validity Act 1865 Section 5 and apart therefrom under Clauses 2 and 22 of the Order-in-Council of 1859, Section 7 of the Act 18 & 19 Vict. c. 54 and Sections 2 and 9 of the Constitution Act of 1867 to authorise the appointment of a Judge of the Supreme Court for a limited period. Section 7 of the Act 18 & 19 Vict. c. 54 intended an order in Council to make provision for the government of the Colony and for the establishment of a legislature. The Order-in-Council 1859 by Clause 2 gave full power to the legislature of the Colony to make further provision in that behalf. The Order-in-Council of 1859 by Clause 22 gave the legislature full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in the same manner as any other laws for the good Government of the colony.

817. Section 5 of the Colonial Laws Validity Act gave the legislature full power to alter the Constitution.

818. Section 2 of the Constitution Act of 1867 gave the legislature power to make laws for the peace, welfare and good government of the Colony. Section 9 of the Constitution required a two thirds majority of the legislative Council and Legislative Assembly as a condition precedent of the validity of legislation altering the Constitution of the Legislative Council. Section 6 Sub-section (6) which authorised an appointment as a Judge of the Supreme Court only during the period during which the person appointed was a Judge of the Court of Industrial Arbitration was found to be valid legislation. It was found that the Constitution of Queensland was a flexible as distinct from rigid Constitution. Power to alter the Constitution by ordinary law was also said to exist both in virtue of the Colonial Laws Validity Act, 1865 Section 5 and independently of that Act in virtue of Clause 22 of the Order in Council 1859 and Sections 2 and 9 of the Constitution Act of 1867.

819. The decision in McCawlay case shows that unless there is a special procedure prescribed for amending any part of the Constitution the Constitution is uncontrolled and can be amended by the manner prescribed for enacting an ordinary law and therefore a subsequent law inconsistent with the Constitution would pro tanto repeal the Constitution. The decision also established that a Constitution largely or generally uncontrolled may contain one or more provisions which prescribe a different procedure for amending the provisions of the Constitution. If this is prescribed the procedure for amendment must be strictly followed.

820. The legislature of Queensland was found to be master of its own household except in so far as its powers were restricted in special cases. No such restriction was established in the case before the Privy Council. The legislature had plenary power there. The legislature was not required to follow any particular procedure or to comply with any specified conditions before it made any law inconsistent with any of the provisions of Constitutional document.

821. The contention of the respondent in McCawley case was that the Constitution of Queensland was controlled and that it could not be altered merely by enacting legislation inconsistent with its Articles but that it could be altered by an Act which in plain and unmistakable intention of the legislature to alter consequently gave effect to that intention by operative provisions. The Judicial Committee thought this Constitution would amount to a Constitution which was neither controlled nor uncontrolled. It was not controlled because the future generation could by a merely formal Act correct it at pleasure. It was said to be not uncontrolled because the framers prescribed to their

successors a particular mode by which they are allowed to effect Constitutional changes. Section 22 of the Order in Council conferred power and authority in legislature from time to time to make laws altering or repealing all or any of the provisions of the Order in Council in the same manner as any other laws for the good government of the country. The Constitution Act of 1867 was contended to enact certain fundamental organic provisions of such a nature as to render the Constitution controlled. It was found impossible to point to any document or instruction giving or imposing on the Constitution of Queensland such a quality. The decision in McCawley case related to uncontrolled Constitution which gave the legislature full power to make laws except on one subject and, therefore, a law made by the legislature under such a Constitution could pro tanto conflict with and repeal the Constitution. That is not our Constitution.

822. In Ranasinghe case the validity of the appointment of Bribery Tribunal was challenged. The Supreme Court of Ceylon took the view that the Bribery Tribunal was not appointed by the Judicial Service Commission in accordance with the provisions of Section 55 of the Ceylon Constitution Order in Council. It was, therefore, not lawfully appointed. It was common ground that the appointment of the Bribery Tribunal was not in accordance with Section 55 of the Ceylon Constitution Order in Council, 1946. Section 55 vested in the Judicial Service Commissioner the appointment, dismissal and disciplinary control of Judicial Officers, viz., Judges of lesser rank. The removal of Judges of the Supreme Court could be by the Governor General on an address of the Senate and the House of Representatives.

823. Section 29 of the Ceylon (Constitution) Order in Council provided in Sub-sections (1), (2), (3) and (4) as follows:

29(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall-(a) prohibit or restrict the free exercise of any religion;

(3) Any law made in contravention of Sub-section (2) of this section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this section Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

824. The Judicial Committee found that there was a conflict between Section 55 of the Ceylon Constitution Order and Section 41 of the Bribery Amendment Act. The Privy Council found that Section 29(4) of the order was attracted but the requirements of Section 29(4) had not been complied with and, therefore, the appointment of the Bribery Tribunal was invalid. The certificate of the Speaker under the proviso to Section 29(4) of the Ceylon Constitution Order was an essential part of the legislative process. There was no such certificate in the case of the legislation under which the appointment of the impugned Tribunal was made. The Judicial Committee said that a legislature has no power to ignore the conditions of law making that are imposed by the regulating instrument. This restriction exists independently of the question whether the legislature is sovereign as the legislature of Ceylon or whether the Constitution is uncontrolled as happened in McCawley case with regard to the Constitution of Queensland.

825. The Judicial Committee said "A Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with; and the alteration or amendment may include the change or abolition of these provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be valid law unless made by a different type of majority or by a different legislative process".

826. It was contended that just as the legislature of the Colony of Queensland had power by mere majority vote to pass an Act that was inconsistent with the provisions of the existing Constitution of that Colony as to the tenure of Judicial Office so the legislature of Ceylon had no less a power to depart from the requirements of a section such as Section 55 of the Ceylon Constitution, notwithstanding the wording of Sections 18 and 29(4). Section 18 in effect says that a legislation can be passed by a majority of votes subject to the provisions in Section 29(4) of the Constitution. The Judicial Committee said that in McCawley case the legislature had full power to make laws by a majority except upon one subject that was not in question and the legislation was held to be valid because it was treated as pro tanto an alternation of the Constitution which was neither fundamental in the sense of being beyond change nor so constituted as to require any special process to pass a law upon the topic dealt with. The word "fundamental" in the sense of "being beyond change" refers to express limitations as to power or manner and form of change. These words do not mean as Mr. Palkhivala contended that there are fundamental features of the Constitution which cannot be amended.

827. The legislature purported to pass a law which being in conflict with Section 55 of the Order in Council must be treated if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Such alterations could only be made by laws which complied with the special legislative procedure laid down in Section 29(4). The provisions in Section 29(4) were found not to confer on the Ceylon legislature the general power to legislature so as to amend the Constitution by ordinary majority resolution which the Queensland legislature was found to have under Section 2 of the Queensland Constitution Act

828. Ranasinghe case shows that Parliament which by its own Act imposed procedural conditions upon the legislative process is no more limited or non-sovereign than a legislature which has such conditions imposed on it by the Constitutional instrument. A Constitutional instrument which

places procedural restraints upon the forms of law making places the legislature under a compulsion to obey them. In McCawley case it was said that the Colonial Legislature with plenary powers could treat the Constitutional document which defined its powers as if it were a Dog Act This proposition as a result of Ranasinghe case is narrowed to the extent that where provisions for procedural special majority are laid down in the Constitutional document they cannot be treated as a provision in the Dog Act might be.

829. These decisions indicate the distinction between procedural and substantive limitations on the legislative process. In Ranasinghe case the issue was one of personal liberty in the sense that the respondent claimed the right not to be imprisoned except by a valid law. No question was raised about the right of religion protected by Sections 29(2) and (3) of the Ceylon Constitution. It was also not the respondent's case there that any provision was unamendable. It would be unusual for the Privy Council to say by way of an obiter dictum that a provision was not amendable contrary to the respondent's submission. Though the Privy Council did not use the words "legislative and constituent" in distinguishing ordinary law from law amending the Constitution, the Privy Council in referring to the Ceylon Constitution instrument showed that the familiar distinction is the basis of the judgment.

830. The Privy Council is dealing with Section 29 took note of the special heading under which Section 29 appears in the Constitution. That special heading is "legislative power and procedure". The opening words of Section 29 are that subject to the provisions of this order Parliament shall have powers to make laws. These are similar to the opening words in Article 245 of our Constitution. Section 18 of the Ceylon Constitution prescribes the ordinary legislative procedure for making laws by a bare majority unless otherwise provided for by the Constitution, which is to be found in Section 29(4) of the Ceylon Constitution. Our Constitution in Article 100 makes an identical provision for ordinary legislative procedure. Section 29(2) confers rights of freedom of religion and Section 29(3) states that no laws shall be made prohibiting or restricting such freedom. Part III of our Constitution contains among other fundamental rights, rights to freedom of religion. Section 29(3) expressly makes laws in contravention of Section 29(2) void to the extent of contravention. Article 13(2) of our Constitution expressly makes law which takes away or abridges fundamental rights void to the extent of the contravention. Section 29(4) of the Ceylon Constitution dealing with the amendment of the Constitution does not expressly make void a law amending the Constitution.

831. It follows from McCawley case and Ranasinghe case that a legislature has no power to ignore the conditions of law making imposed upon it which regulate its power to make law. The Ceylon legislature had no general power to legislate so as to amend its general power by ordinary majority resolution such as Queensland legislature was found to have under Section 2 of the Queensland Constitution. Peace, order and good government in Section 29(1) of the Ceylon Constitution is not the same as amendment contemplated in Section 29(4) of the Ceylon Constitution. In Ranasinghe case the Judicial Committee referred to the social compact. The compact is this. The inhabitants of Ceylon accepted the Ceylon Constitution on the footing that the various rights conferred, liabilities imposed and duties prescribed under the law cannot be altered in the ordinary course of legislation by a bare majority. But if all these were to be changed then such a change could only be made under the strongest safeguard of the amending process which in the case of Ceylon was not less than two-third of the absolute membership. These rights are the solemn compact. These

valuable rights are conferred on the people. Under ordinary law by ordinary majority they cannot be taken away.

832. The absence of an express provision in Section 29(4) of the Ceylon Constitution that an amendment of the Constitution in contravention of the terms of that sub-section shall be void need not support the conclusion that such an amendment was valid. Section 29(1) of the Ceylon Constitution is expressed to be "subject to the provisions of this Order" and any power under Section 29(4) is expressly subject to the proviso there. The Privy Council held that the opening words of Section 29 introduced into the Constitution of Ceylon the necessarily implied doctrine of ultra vires. The proposition will apply directly to the same opening words of our Article 245. The Privy Council accepted the distinction made in McCawlay case between controlled and uncontrolled Constitutions by emphasising the observation in McCawley case with reference to Section 9 of the Queensland Constitution. The description of Section 29(2) of the Ceylon Constitution as an entrenched provision means that it can be amended but only by special procedure in Section 29(4). That is the meaning of the word "entrenched". This meaning alone is consistent with the clear language of the amending power and also with the decision. Section 29(4) does not limit the sovereignty of the Ceylon legislature because the legislature can always pass the amendment after getting two-thirds majority and the certificate.

833. Counsel for the respondent in Ranasinghe case stated that there was no limitation except the procedure and even that limitation could be removed by amendment complying with Sub-section (4). The Privy Council affirmed that position. There is nothing to prevent by appropriate amendment a deletion of Section 29(4) of the Ceylon Constitution which would then empower Parliament to achieve the power to amend by an ordinary majority. Section 29(1) is not legislative power alone but a composite power when read along with Section 29(4) in the context of the Ceylon Constitution. It includes both legislative and constituent power. Sub-sections (2) and (3) of Section 29 are not the grant of power but limitation on power. Its terms show that limitation is at any rate on the legislative power of enacting laws contrary to Sub-sections (2) and (3) of Section 29. If Section 29(1) is a composite legislative and constituent power and Sub-section (2) and (3) are a restraint on legislative power the constituent power under Sub-section (4) remains unaffected. The sequitur is that Section 29(4) is consistent only with the view that so far as amendment of Sub-sections (2) and (3) is concerned amendment is permitted and there is no limitation on constituent power under Section 29(4). The Privy Council took the widest view of the amending power. In fact the narrower view was not argued.

834. Our Constitution in Article 13(2) by its express declaration with reference to law and the State widely defined has no higher efficacy in rendering a law in contravention of its terms void than the opening words of Article 245 have in rendering a law void in contravention of term mentioned therein. therefore, in treating Article 13(2) as having that effect in regard to Constitutional amendment the majority judgment in Golak Nath case was inept. In rejecting the distinction between legislative and constituent powers the leading majority view in Golak Nath case was induced by the absence of the use of the labels but the same concepts were clearly indicated by the Privy Council by wholly describing the characteristic features of legislative and constituent powers.

835. If Article 368 had begun with a non-obstante clause it could not have been said that amendment under Article 368 would be law within the meaning of Article 13(2). The Attorney General rightly said that there is no non-obstante clause in Article 368 because of the quality of amending power and because the amending power is a constituent power and not ordinary legislative power. This is the position of the amending clause in a written Constitution. When the power under Article 368 is exercised Parliament acts as a recreation of Constituent Assembly. therefore, such power cannot be restricted by or widened by any other provision. As soon as an amendment is made it becomes a part of the Constitution. An amendment prevails over the Article or Articles amended. The fact that Article 368 confers constituent powers is apparent from the special conditions prescribed in the Article. Those conditions are different from ordinary law making process. Article 368 puts restraints on the ordinary law making process and thus confers constituent power. The Constituent Assembly was fully aware that if any limitation was to be put on the amending power the limitation would have to be expressly provided for. Article 305 of the Draft Constitution provided reservation of seats for certain sections of people in the legislature for 10 years. This reservation was not accepted by the Constituent Assembly. This shows that if the Drafting Committee or the Constituent Assembly wanted to exclude fundamental rights from the operation of Article 368 corresponding to Article 304 in the Draft Constitution they could have expressly done so.

836. In Ghulam Sarwar v. Union of India MANU/SC/0062/1966 : 1967CriLJ1204 it was said there was a distinction between deprivation of fundamental rights by force of a Constitutional provision itself and such deprivation by an order made by President in exercise of a power conferred on him under Constitutional provision. The dissenting view in Ghulam Sarwar case was that an order of the President was not a law within the meaning of Article 13(2). In Mohd. Yakub v. State of Jammu & Kashmir MANU/SC/0035/1967 : 1968CriLJ977 the majority view of the Constitution Bench was that an order of the President under Article 359 was not law within the meaning of Article 13(2). There is no distinction between Article 358 and Article 359(1). Article 358 by its own force suspends the fundamental rights guaranteed by Article 19. Article 359(1) on the other hand does not suspend any fundamental rights of its own force but it gives force to order by the President declaring suspension of the enforcement of any fundamental right during the period of emergency. In Mohd. Yakub case it was said that it could not mean that an order under Article 359(1) suspending the enforcement of a particular fundamental right had still to be tested under the vary fundamental right which it suspended. Mohd. Yakub case establishes that the expression "law" in Article 13(2) is not all embracing in spite of the exclusive definition of law in Article 13(3)(a).

837. The word "law" appears in various Articles of our Constitution but not in Article 368. The reason is that the power under Article 368 is not a power to make ordinary laws under the Constitution but is the constituent power. There could be no law within the meaning of Article 13(2) at any stage before the amendment became a part of the Constitution under Article 368. There is no hiatus between an amendment being a law and thereafter a part of the Constitution. Immediately upon the passage of the Bill for the amendment the Constitution stands amended.

838. The historical background of Article 13(2) throws some light on the question as to whether Article 13(2) prevails over Article 368. On 17 March, 1947 the Constitutional Advisor Sir B.N. Rau had addressed a letter to the members of Central and Provincial legislatures. A questionnaire was annexed to that letter. Question No. 27 was "What provisions should be made regarding

amendments to the Constitution". A note was appended to that question which will be found in Shiva Rao Framing of India's Constitution referred to as Shiva Rao Vol. II pp. 448-451. The methods of amendment of Constitution in the United Kingdom, Canada, Australia, United States of America, Switzerland and Ireland were elucidated in that note. The note also drew attention that the fact that in various Constitution express limitations were put on amending certain provisions of the Constitution. The portion of the note relating to the Constitution of Australia indicated such limitations.

839. The draft report of the sub-Committee on fundamental rights dated 3 April 1947 contained an annexure which dealt with fundamental rights. See Shiva Rao Vol. II p. 137 seq. Clause 2 of the annexure was as follows:

Any law or usage in force within the territories of the Union immediately before the commencement of this Constitution and any law which may hereafter be made by the State inconsistent with the provisions of this Chapter/Constitution shall be void to the extent of such inconsistency.

840. The Constitutional Adviser suggested that the word "Constitution" was preferable to the word "chapter" because the entire Constitution was to prevail over law.

841. On 23 April, 1947 the Advisory Committee on Fundamental Rights presented an interim report addressed to the President of the Constituent Assembly containing an annexure providing for justiciable fundamental rights. See Shiva Rao Vol. II pp. 294-296 seq. Clause 2 of the Annexure to that report was as follows:

All existing laws, notification, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this part of the Constitution shall stand abrogated to the extent of such inconsistency nor shall the Union or any unit may make any law taking away or abridging any such right.

842. Clause 2 of the annexure to the interim report was discussed in the Constituent Assembly on 29 April, 1947. Shri K. Santhanam moved an amendment to Clause 2. The amendment was as follows : In Clause 2 for the words "nor shall the Union or any unit make any law taking away or abridging any such right" the following be substituted: "Nor shall any such right be taken away or abridged except by an amendment of the Constitution". The amendment was accepted as will appear in Constituent Assembly Debates Vol. III p. 416.

843. In October, 1947 the Draft Constitution was prepared by the Constitutional Advisor. Clause 9(2) of the said Draft Constitution which later on corresponded to Article 13(2) of our Constitution was as follows:

Nothing in this Constitution shall be taken to empower the State to make any law which curtails or taking away any of the rights conferred by Chapter II of this Part except by way of amendment of this Constitution under Section 232 and any law made in contravention of this sub-section shall, to the extent of the Contravention, be void.

844. It will be seen that Clause 9(2) in the Draft Constitution included the qualification "except by way of amendment of the Constitution under Section 232". Clause 232 in the Draft Constitution prepared by the Constitutional Advisor became Article 304 in the Constitution prepared by the Drafting Committee and eventually became Article 368 of our Constitution. In Shiva Rao, Vol. III p. 325 it appears that the Drafting Committee on 30 October, 1947 at a meeting gave a note forming the minutes of that meeting that Clause 9(2) should be revised as follows:

The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this sub-section shall, to the extent of the contravention, be void.

845. No reason is recorded in these minutes as to why the resolution adopted by the Constituent Assembly by passing Shri Santhanam's amendment was disregarded. No indication was given in the forwarding letter of Dr. Ambedkar in the Note appended thereto as to why the amendment of Shri Santhanam which had been accepted by the Constituent Assembly was deleted. Nor does the Draft Constitution indicate either by sidelines or in any other manner that the decision of the Constituent Assembly had been disregarded.

846. This history of the formation and framing of Article 13(2) shows that the intention of the Constituent Assembly was that Article 13(2) does not control the Article relating to the amending of the Constitution. It must be assumed that the Drafting Committee consisting of eminent men considered that an express exclusion of the amending Article from the operation of the clause corresponding to Article 13(2) was unnecessary and the fear that that Article would cover the amending Article was groundless. It also appears that no discussion took place after the Draft Constitution had been presented to the Constituent Assembly by Dr. Ambedkar on the deletion or disregard of Shri Santhanam's amendment. The history of Article 13(2) shows that the Constituent Assembly clearly found that it did not apply to an amendment of the Constitution.

847. The distinction between constituent and legislative power in a written Constitution is of enormous magnitude. No provision of the Constitution can be declared void because the Constitution is the touchstone of validity. There is no touchstone of validity outside the Constitution. Every provision in a controlled Constitution is essential or so thought by the framers because of the protection of being amendable only in accordance with the Constitution. Every Article has that protection. The historical background of Article 13(2) indicates that the Constitution-makers dealt separately with legislative power by providing for the same in Part XI and entrusted the constituent power to authorities mentioned in Article 368 and that authority has the same power as the Constituent Assembly because it has not put any fetter upon it. The draft Article 305 which provided for a limitation as to time for amendment of certain matters was eventually deleted. If the framers of the Constitution wanted to forbid something they would say so.

848. The vitality of the constituent power not only indicates that the Constitution is in the words of Maitland the suprema potestas but also the fact that the amending power is put in a separate Article and Part of the Constitution establishing that it deals with a topic other than legislative power and the power is meant to be exhaustive leaving nothing uncovered. The vary fact that amending power is not put in any legislative power or is not attached to a subject which is the

subject matter of legislative power leaving aside the four sets of provisions, namely, Articles 4, 169, paragraph 7 Schedule 5 and paragraph 21 Schedule 6 containing specific power of amendment shows that that amending power was meant to be exhaustive and plenary. If a power of amendment without any express limitation was given it was because a legal Constitutional way of bringing a change in the Constitution was desirable or necessary. Otherwise there would be no legal way of effecting the change. It cannot be attributed to the framers of the Constitution that they intended that the Constitution or any part of it could be changed by un-constitutional or illegal methods.

849. If an amendment of the Constitution is made subject to Article 13(2) the necessary conclusion then is that no amendment of the Constitution is possible. The opening words of Article 245 which deals with legislative power indicate that any law made under Article 246(1) read with List I of the Seventh Schedule is subject to the limitations on legislative power imposed by all the Articles in the Constitution. These limitations cannot be altered or amended in exercise of legislative power, if the power of amendment is said to be located in the Residuary Entry 97 in List I. The history of residuary power in the Government of India Act, 1935 whose scheme was adopted in the Constitution shows that the topic of amendment was not only present to the mind of the Constituent Assembly but also that the Constituent power could not reside in the residuary power.

850. The conclusions on the question as to whether Article 13(2) overrides Article 368 are these. Article 13(2) relates to laws under the Constitution. Laws under the Constitution are governed by Article 13 (2). Article 368 relates to power and procedure of amendment of the Constitution. Upon amendment of the Constitution the Constitution shall stand amended. The Constitution is self validating and self executing. Article 13(2) does not override Article 368. Article 13(2) is not a fundamental right. The Constitution is the touchstone. The constituent power is sui generis. The majority view in Golak Nath case that Article 13(2) prevails over Article 368 was on the basis that there was no distinction between constituent and legislative power and an amendment of the Constitution was law and that such law attracted the opening words of Article 245 which in its turn attracted the provisions of Article 13(2). Parliament took notice of the two conflicting views which had been taken of the unamended Article 368, took notice of the fact that the preponderating judicial opinion, namely, the decisions in Shankari Prasad case Sajjan Singh case and the minority views of five learned Judges in Golak Nath case were in favour of the view that Article 368 contained the power of amendment and that power was the constituent power belonging to Parliament Wanchoo, J. rightly said in Golak Nath case that the power under Article 368 is a constituent power to change the fundamental law, that is to say, the Constitution and is distinct from ordinary legislative power. So long as this distinction is kept in mind Parliament will have power under Article 368 to amend the Constitution and what Parliament does under Article 368 is not ordinary law making which is subject to Article 13(2) or any other Article of the Constitution. This view of Wanchoo, J. was adopted by Parliament in the Constitution 24th Amendment Act which made explicit that under Article 368 Parliament has the constituent power to amend this Constitution.

851. In order to appreciate and assess Mr. Palkhivala's other contention of implied and inherent limitations on the amending power, it is necessary to find out the necessity and importance of the amending power to arrive at the true meaning of the expression "amendment".

852. Mr. Palkhivala made these submissions. The word "amendment" means on the one hand not the power to alter or destroy the essential features and on the other there are inherent and implied limitations on the power of amendment. It is imperative to consider the consequences of the plea of limited power and also of the plea of limitless power. The test of the true width of a power is not how probable it is that it may be exercised, but what can possibly be done under it. The hope and expectation that it will never be used is not relevant. Reliance is placed on the observations in Maxwell on the Interpretation of Statutes, 12th (1969) Ed. 103 that it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words, before adopting any proposed construction of a passage susceptible of more than one meaning. The reasonableness of the consequences which follow from a particular construction on the one hand and the unreasonable result on the other are the two alternatives in the quest for the true intention of Parliament. Crawford Construction of Statutes 1940 Ed. 286 was referred to for the proposition that where the statute is ambiguous or susceptible to more than one meaning, the construction which tends to make the statute unreasonable should be avoided. Uncertainty, friction or confusion on a construction is to be avoided because preference is to be given to the smooth working of the statute. The Court adopts which is just reasonable and sensible rather than that which is none of these things. It is not to be presumed that the legislature intended the legislation to produce inequitable results. Usurpation of power contrary to the Constitution is to be avoided.

853. Reliance was placed by Mr. Palkhivala on American Jurisprudence 2d. Vol. 16 Article 59 at pp. 231-232, Article 72 at p. 251, Article 287 at pp. 270-71 and Article 88 at pp. 273-74 in support of these propositions. First, questions of Constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments particularly statutes. External aids or arbitrary rules applied to the construction of a Constitution are of uncertain value and should be used with hesitation and circumspection. Second, Constitutions are general and many of the essentials with which Constitutions treat are impliedly controlled or dealt with by them and implication plays a very important part in Constitutional construction. What is implied is as much a part of the instrument as what is expressed. Third, a Court may look to the history of the times and examine the state of things existing when the Constitution was framed and adopted. The Court should look to the nature and object of the particular powers, duties and rights in question with all the light and aids of the contemporary history. Fourth, proceedings of conventions and debates are of limited value as explaining doubtful phrases. Similarly, the opinions of the individual members are seldom considered as of material value.

854. Mr. Palkhivala said that the word "amend" may have three meanings. First, it may mean to improve or better to remove an error, the quality of improvement being considered from the stand point of the basic philosophy underlying the Constitution. Second, it may mean to make changes which may not fall within the first meaning but which do not alter or destroy any of the basic essential or any of the essential features of the Constitution. Third, it may mean to make any changes in the Constitution including changes falling outside the second meaning. The first meaning was preferred. The second was said to be a possible construction. The third was ruled out.

855. The crux of the matter is the meaning of the word "amendment" The Oxford Dictionary meaning of the word is to make professed improvements in a measure before Parliament; formally,

to alter in detail, though practically it may be to alter its principle, so as to thwart it. The Oxford Dictionary meanings are also alteration of a bill before Parliament; a clause, paragraph, or words proposed to be substituted for others, or to be inserted in a bill (the result of the adoption of which may even be to defeat the measure). In Words and Phrases Permanent Edition, Volume 3 the meaning of the word "amend" and "amendment" are change or alteration. Amendment involves an alteration or change, as by addition, taking away or modification. A broad definition of the word "amendment" will include any alteration or change. The word "amendment" when used in connection with the Constitution may refer to the addition of a provision on a new independent subject, complete in itself and wholly disconnected from other provisions, or to some particular article or clause, and is then used to indicate an addition to, the striking out, or some change in that particular article or clause.

856. The contention that the word "amendment" in Article 368 should bear a limited meaning in view of the expression "amend by way of addition, variation or repeal any of the provisions of this Schedule" occurring in paragraphs 7 and 21 in Schedules 5 and 6, is unsound for the following reasons.

857. First, the power of amendment conferred by the four provisions, namely, Article 4 read with Articles 2 and 3, Article 169, paragraphs 7 and 21 in Schedules 5 and 6 is a limited power. It is limited to specific subjects. The exercise of the power of amendment under those four provisions, if treated by Articles themselves, is an uncontrolled power since the power can be exercised by an ordinary law. But as a part of the Constitution the power is a subordinate power because these Articles themselves are subject to the amending provisions of Article 368. Article 368 is the only provision of the Constitution which provides for the amendment of this Constitution which means the Constitution of India and every part hereto. It may be mentioned that in construing Article 368 the title of the part "Amendment of the Constitution" is an important aid to construction. The marginal note which speaks of the procedure of amendment is not complete by itself because the procedure when followed results in the product, namely, an amendment of the Constitution which is not only a matter of procedure.

858. Second, these four provisions which are in the same terms, namely, "no such law shall be deemed to be an amendment of this Constitution for the purpose of Article 368" show that but for these terms the amendment would have fallen within Article 368 and was being taken out of it This is an important consideration particularly in connection with Schedules 5 and 6 which provide that Parliament may, from time to time by law, amend by way of addition, variation or repeal any of the provisions of this Schedule. These provisions show that an amendment by way of addition, variation or repeal will also fall within the amendment of the Constitution provided for in Article 368 but is being taken out of Article 368. This express exclusion contains intrinsic evidence that the meaning of the word "amendment" in Article 368 includes amendment by way of addition, alteration or repeal.

859. Third, paragraphs 7 and 21 in Schedules 5 and 6 which provide that Parliament may from time to time by law, amend by way of addition, variation or repeal indicate the necessity of amendments from time to time. The expression "by way of" does not enlarge the meaning of the word "amendment" but clarifies. The expression "by way of" shows that the words addition, variation or repeal are substitutes of the word "amendment" and are forms of intention. The whole

Schedule cannot be repealed either by paragraph 7 or by paragraph 21, because Article 244 provides for the administration of Scheduled Areas and tribal areas on the application of the two respective Schedules. The words "from time to time" also indicate that because of subject matter amendments may be from time to time. The history behind the two Schedules originates in Section 91 and 92 of the Government of India Act, 1935 dealing with excluded areas and partially excluded areas.

860. Fourth, reference was made to Section 9(1)(c) of the India Independence Act 1947 which empowered the Governor General to make omissions from, additions to and adaptations and modification to the Government of India Act, 1935. The Government of India Third Amendment Act 1949 amended Section 291 of the 1935 Act and empowered the Governor General to make such amendments as he considers necessary whether by way of addition, modification or repeal. It was, therefore, said that when our Constitution did not use the expression "by way of addition, modification or repeal" the word "amendment" in Article 368 will have a narrower meaning. The expression "amendment" has been used in several Articles of the Constitution. These are Articles 4(1) and (2), 108(4), 109(3), and 4, 111, 114(2), 169(2), 196(2), 198(3) and (4), 200, 201, 204(2), 207(1), (2), 240(2), 274(1), 304(b) and 349. In every case amendment is to be by way of variation, addition or repeal. Again, different expression have been used in other Articles. In Article 35(b) the words are alter, repeal. In Article 243(1) the words are repeal or amend. In Article 252(2), the expression is amend or repeal. In Article 254(2) proviso the words are add to, amending, variation or repeal. In Article 320(4) the words are such modifications whether by way of repeal or amendment. In Article 372(1) the words are altered or repealed or amended. In Article 372(2) the words are such adaptations and modifications by way of repeal or amendment. In Article 392(1) the expression is such adaptations by way of modification, addition or commission. Again, in Article 241(2) the words are modification or exceptions. In Article 364 the words used are exceptions or modifications. In Article 370(1)(d) and (3) the words are modifications and exceptions. Again, in Schedule 5 paragraph 5(1) and Schedule 6 paragraphs 12(a), (b), 19(1)(a) the word used are exceptions or modifications. Modifications in Article 370(1)(d) must be given the widest meaning in the context of a Constitution and in that sense it includes an amendment and it cannot be limited to such modifications as do not make any radical transformation.

861. The several Constitution Amendment Acts show that amendments to the Constitution are made by way of addition, substitution, repeal. The Attorney General is right in his submission that the expression "amendment of this Constitution" has a clear substantive meaning in the context of a written Constitution and it means that any part of the Constitution can be amended by changing the same either by variation, addition of repeal.

862. The words "Amendment of this Constitution may be initiated" and the words "Constitution shall stand amended in accordance with the terms of the Bill" in Article 368 indicate that the word "amendment" is used in an unambiguous and clear manner. The Attorney General said that our Constitution is not the first nor is the last one to use the word "amendment". The American Constitution in 1787 used the word "amend". Several Constitutions of other countries have used the word "amend". The word "amend" is used in a Constitution to mean any kind of change. In some Constitutions the words alteration or revision have been used in place of the word amend or along with the word amendment. Some times alteration and revision of the Constitution are also spoken of as amendment of the Constitution.

863. Constitutional provisions are presumed to have been carefully and deliberately framed. The words alterations or amendments, the words amendments or revisions, the words revision and alteration are used together to indicate that these words have the same meaning in relation to amendment and change in Constitution.

864. The meaning and scope of amending power is in the object and necessity for amendment in a written Constitution.

865. The various amendments which have already been carried out to our Constitution indicate that provisions have been added, or varied or substituted. The Attorney General gave two correct reasons for the object and necessity of the power of amendment in a written Constitution. First, the object and necessity of amendment in a written Constitution means that the necessity is for changing the Constitution in an orderly manner, for otherwise the Constitution can be changed only by an extra Constitutional method or by revolution, Second, the very object of amendment is to make changes in the fundamental law or organic law to make fundamental changes in the Constitution, to change the fundamental or the basic principles in the Constitution. Otherwise there will be no necessity to give that importance to the high amending power to avoid revolution.

866. The object of amendment is to see that the Constitution is preserved. Rebellion or revolution is an illegal channel of giving expression to change. The "consent of the governed" is that each generation has a right to establish its own law. Conditions change. Men Change, Opportunities for corresponding change in political institutions and principles of Government therefore arise. An unamendable Constitution was the French Constitution which by an amendment to the Constitution adopted in 1884 declared that the National Assembly shall never entertain a proposal for abolition of the republican form of Government. The United States Constitution provided that no amendment could be made prior to 1808 affecting the First and Fourth Clauses of Section 9 of Article 1 relative to the prohibition of the importation of slaves, and that no State without its consent shall be deprived of equal suffrage in the Senate. These are examples of limiting the sovereign power of the people to change the Constitution.

867. An unamendable Constitution is said to be the worst tyranny of time. Jefferson said in 1789 that each generation has a right to determine a law under which it lives. The earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The machinery of amendment is like a safety valve. It should not be used with too great facility nor should be too difficult. That will explode and erode the Constitution.

868. Most Constitutions are rigid in the sense that they are amendable only by a different process than that by which ordinary laws may be altered. Thus they distinguish clearly between the constituent power and the legislative power, each being exercisable by different organs according to different processes. Chief Justice Marshall said that the opponents of change want changes just as much as any one else. They want however to determine what the changes shall be.

869. Amendment is a form of growth of the Constitution inasmuch as amendment means fundamental changes. The Constitution devises special organs or special methods to amend or change the fundamental principles that create the Government. The methods of amendment may be by ordinary law making body as in Great Britain or by the ordinary law making body with

special procedure or unusual majority or by special organs of government created for the purpose such as Constitutional convention or by the electorate in the form of referendum or of initiating a referendum. In case a written Constitution makes no provision for amendment it is usually held that the national law making body by ordinary procedure may amend the Constitution. If a Constitution provides the method of amendment that method alone is legal. Any other method of amendment would be a revolution. The deliberative and restrictive processes and procedure ensure a change in the Constitution in an orderly fashion in order to give the expression to social necessity and to give permanence to the Constitution.

870. The people expressed in the Preamble to our Constitution gave the Constitution including the power to amend the Constitution to the bodies mentioned in Article 368. These bodies represent the people. The method to amend any part of the Constitution as provided for in Article 368 must be followed. Any other method as for example convening Constituent Assembly or Referendum will be extra Constitutional or revolutionary. In our Constitution Article 368 restricts only the procedure or the manner and form required for amendment but not the kind or the character of the amendment that may be made. There are no implied limitations to the amending power. The Attorney General summed up pithily that the Constitution Acts not only for the people but on the people.

871. The Attorney General relied on several American decisions in support of these propositions. First, the word "amendment" does not mean improvement. The view in Livermore v. Waite 102 Cal. 118 of a single learned Judge that amendment means improvement was not accepted in Edwards v. Lesseur South Western Reporter Vol. 33, p. 1130. Second, ratification by people of States would be void when a federal amendment proposed by Congress is required to be ratified by the legislatures of the States. Ex-parte Dillon Federal Reporter No. 262 p. 563. The legislature is a mere agency for ratification of a proposed amendment. Ex-parte Dillon did not accept the view of the learned single Judges in Livermore v. Waite that amendment means only improvement. Third, the argument that the word "amendment" carries its own limitations regarding fundamental principles or power of State or control of the conduct of the individuals by devising a method of referendum by State legislatures is adding a new method of amendment. This is not permissible. Feigenspan v. Bodine 264 Federal Reporter 186. The only method of amendment is that prescribed by the Constitution. The theory of referendum by State legislatures is not valid. Fourth, the assumption that ratification by State legislatures will voice the will of the people is against the prescribed method of amendment and grant of authority by the people to Congress in the manner laid down in Article V of the American Constitution. It is not the function of Courts or legislative bodies to alter the method which the Constitution has fixed. Ratification is not an act of legislation. It derives its authority from the Constitution. Hawke v. Smith 253 U.S. 221; Dillon v. Gloss 256 U.S. 358, Leser v. Garnett 258 U.S. 130. Fifth, the power of amendment extends to every part of the Constitution. In amending the Constitution the General Assembly acts in the character and capacity of a convention expressing the supreme will or the sovereign people and is unlimited in its power save by the Constitution. Ex-parte Mrs. D.C. Kerby American Law Reports Annotated, Vol. 36, p. 1451. Sixth, the argument that amendments which touch rights of the people must be by convention is rejected by Supreme Court in American Article V of the American Constitution is clear in statement and meaning and contains no ambiguity. Where the intention is clear there is no room for construction. Rhode Island v. Palmer 253 U.S. 350; U.S. v. Sprague 282 U.S. 716. Seventh, principles of the Constitution can be changed under Article V Schneiderman v. United

States of America 320 U.S. 118. Eight, the Constitution provides the method of alteration. While the procedure for amending the Constitution is restricted here is no restraint on the kind of amendment that may be made. Whitehall v. Elkins 389 U.S. 54.

872. Except for special methods of amendment in a rigid or controlled Constitution although the methods may vary in different Constitutions and except for express limitations, if any, in rigid or controlled Constitutions, the meaning and scope of the amending power is the same in both the flexible and rigid forms.

873. The flexible Constitution is one under which every law of every description can be legally changed with the same case and in the same manner by one and the same body. Laws in a flexible Constitution are called Constitutional because they refer to subjects supposed to affect the fundamental institutions of the State, and not because they are legally more sacred or difficult to change than other laws.

874. A rigid Constitution is one under which certain laws generally known as Constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. The rigidity of the Constitution consists in the absence of any right of the legislatures when acting in its ordinary capacity to modify or repeal definite laws termed Constitutional or fundamental. In a rigid Constitution the term "Constitution" means a particular enactment belonging to the Articles of the Constitution which cannot be legally changed with the same case and in the same manner as ordinary laws.

875. The special machinery for Constitutional amendment is the limitation of the power of the legislature by greater law than by the law of the ordinary legislation. The Constituent Assembly knowing that it will disperse and leave the actual business of legislation to another body, attempts to bring into the Constitution that it promulgates as many guides to future action as possible. It attempts to arrange for the "recreation of a constituent assembly" whenever such matters are in future to be considered, even though that assembly be nothing more than the ordinary legislature acting under certain restrictions. There may be some elements of the Constitution which the constituent assembly wants to remain unalterable. These elements are to be distinguished from the rest. The Fifth Clause in the United States Constitution is that no State without its own consent shall be deprived of its equal suffrage in the Senate. The Attorney General rightly said that just as there are no implied limitation in flexible Constitutions similarly there are no implied limitations in a rigid Constitution. The difference is only in the method of amendment. Amendment can be made by ordinary legislature under certain restrictions, or by people through referendum or by majority of all the units of a federal State or by a special convention.

876. In a rigid Constitution the legislatures by reason of their well matured long and deliberately formed opinion represent the will of the undoubted majority. But even such will can be thwarted in the amendment of the organic law by the will of the minority. In case where the requisite majority is not obtained by the minority thwarting an amendment, there is just as much danger to the State from revolution and violence as there is from what is said to be the caprice of the majority. The safeguards against radical changes' thus represent a better way and a natural way of securing deliberation, maturity and clear consciousness of purpose without antagonising the actual source of power in the democratic state.

877. The term "amendment" connotes a definite and formal process of Constitutional change. The force of tradition and custom and the judicial interpretation may all affect the organic structure of the State. These processes of change are the evolution of Constitution.

878. The background in which Article 368 was enacted by the Constituent Assembly has an important aspect on the meaning and scope of the power of amendment.

879. On 12 November, 1946 Sir B.N. Rau Constitutional Adviser prepared a brochure containing Constitution of the British Commonwealth Countries and the Constitutions of other countries. Different countries having different modes of amendments were referred to. In the same volume the fundamental rights under 13 heads were extracted from 13 selected countries like U.S.A., Switzerland, Germany, Russia, Ireland, Canada, Australia. Two features follow from that list. First, there is no absolute standard as to what constitutes fundamental right. There is no such thing as agreed fundamental rights of the world. Second, fundamental rights which are accepted in our Constitution are not superior to fundamental rights in other Constitutions nor can it be said that the fundamental rights are superior to Directive Principles in our Constitution.

880. On 17 March, 1947 a questionnaire was circulated under the subject as to what provisions should be made regarding the amendment of the Constitution. The draft clause of amendment to the Constitution prepared by the Constitutional Adviser at that time indicates that an amendment may be initiated in either House of the Union Parliament and when the proposed amendment is passed in each House by a majority of not less than two thirds of the total number of members of that House and is ratified by the legislatures of not less than two thirds of the units of the Union, excluding the Chief Commissioners' Provinces, it shall be presented to the President for his assent; and upon such assent being given the amendment shall come into operation. There were two explanations to that clause.

881. On 29 April, 1947 Shri Santhanam's amendment to the draft clause was accepted. The amendment was "that this clause also if necessary may be amended in the same way as any other clause in the Constitution". In June, 1947 the drafting of the amending clause started. Originally it was Numbered 232. Eventually, Articles 304 and 305 came into existence in place of draft Article 232. The first draft of the amendment clause was given by Sir B.N. Rau in March, 1947. By June, 1947 and thereafter he recommended the procedure favoured by Sir Alladi Krishnaswami Ayyar and Sir Gopalswami Ayyangar, namely, passage by two thirds majority in Parliament and ratification by like majority of Provincial legislatures. On 21 February, 1948 the draft Constitution was ready. Draft Articles 304 and 305 related to amendment Article 305 provided for reservation of seats for minorities for ten years unless continued in operation by an amendment of the Constitution.

882. The following features emerge. First, the Constituent Assembly made no distinction between essential and non-essential features. Secondly, no one in the Constituent Assembly said that fundamental rights could not be amended. The framers of the Constitution did not have any debate on that. Thirdly, even in the First Constitution Amendment debate no one doubted change or amendment of fundamental rights. At no stage it appeared that fundamental rights are absolute. While a Constitution should be made sound and basic it should be flexible and for a period it should be possible to make necessary changes with relative facility.

883. Certain amendments to Article 304 were proposed. One proposed amendment No. 118 was that amendment was to be passed in two Houses by a clear majority of the total membership of each House. Another proposed amendment No. 210 was that for a period of three years from the commencement of the Constitution, any amendment certified by the President to be not one of substance might be made by a simple majority. This also' stated that it would include any formal amendment recommended by a majority of the Judges of the Supreme Court on the ground of removing difficulties in the administration of the Constitution or for the purpose of carrying out the Constitution in public interest. The third proposed amendment No. 212 was that no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise, shall be permissible and any amendment which is or is likely to have such an effect shall be void and ultra vires of any legislature. It is noteworthy that this amendment was withdrawn. See Constituent Assembly Debates Vol. IX p. 1665.

884. In the first category the framers devised amendment by Parliament by a simple majority. These are Articles 2 and 4 which deal with States. As far as creation or re-Constitution of States is concerned, it is left to Parliament to achieve that by a simple majority. Again, draft Article 148A which eventually became Article 169 dealing with Upper Chambers in the States gave Parliament power to abolish the Upper Chambers or to create new Second Chambers. Schedules 5 and 6 were left to be amended by Parliament by simple majority. The second category of amendment requires two thirds majority. It is in that connection that the statement of Dr. Ambedkar "If the future Parliament wishes to amend any particular Article which is not mentioned in Part III or Article 304 all that is necessary for them is to have the two thirds majority then they can amend it" was invoked by Mr. Palkhivala to support his submission that Part III was unamendable. That is totally misreading the speech. The speech shows that some Articles would be amendable by bare majority, others would require two thirds majority and the third category would require two thirds majority plus ratification by the States.

885. Proceedings in the Constituent Assembly show that the whole Constitution was taken in broad prospective and the amendments fell under three categories providing for simple majority, or two thirds; majority or two thirds majority and ratification by the States. These different procedures were laid down to avoid rigidity.

886. The Constitution First Amendment Act which added Article 15 (4), substituted words in Articles 19(2) and Article 19(6), inserted Article 31A indicates interesting features. The two criticisms at that time were as to what was the hurry and secondly that the Government was trying to take more power to itself. The answers are that a Constitution which is responsive to the people's will and their ideas and which can be varied here and there, will command respect and people will not fight against change. Otherwise, if people feel that it is unchangeable and cannot be touched, the only tiling to be done by those who wish to change it is to try to break it. That is a dangerous thing and a bad thing.

887. In this background there is no doubt about the meaning and scope of Article 368. The Attorney General rightly said that if there be any doubt contemporaneous practical exposition of the Constitution is too strong and obstinate to be shaken or controlled. In Mopherson v. Blacker 146 U.S. 1 it is said that where plain and clear words occur there is no difficulty but where there is

doubt and ambiguity contemporaneous and practical exposition is a great weight. In The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and Ors. MANU/SC/0065/1962 : [1963]1SCR491 this Court took notice of the feature that Constitution makers had deep knowledge of Constitutions and Constitutional problems of other countries.

888. Mr. Seervai relying on British Coal Corporation v. King (1935) A.C. 500 submitted that in interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of powers must be adopted. A strict construction applicable to penal or taxing statute will be subversive of the real intention of Parliament if applied to an Act passed to ensure peace, order and good government. Largest meaning is given to the allocated specific power. If there are no limitations on the power it is the whole power. Grant of power of amendment cannot be cut down except by express or implied limitations. The conclusion is that the meaning of the word amendment is wide and not restricted.

889. The contention of Mr. Palkhivala on behalf of the petitioner is that under Article 368 as it stood prior to the amendment there were implied and inherent limitations on the power of amendment. It was said that the word "amendment" would preclude the power to alter or destroy the essential features and the basic elements and the fundamental principles of the Constitution. This contention was amplified as follows. The Constitution is given by the people unto themselves. The power to decide upon amendment is given to the 5 year Parliament which is a creature of the Constitution. Article 368 does not start with the non-obstante clause. Article 368 uses the word "amendment" simpliciter. Less significant amendment powers in others parts of the Constitution use the words "add, alter, repeal or vary" in addition to the word "amendment", as will appear in Articles 31B, 25(b), 252(2), 372, 372A(2), paragraph 7 Schedule 5, paragraph 21 Schedule 6. Article 368 talks of an amendment of this Constitution and does not extend the amending power to "all or any of the provisions of this Constitution". On a wide construction of the word "amendment" all fundamental rights can be taken away by the requisite majority whereas much less significant matters require the concurrence of at least half the States under the proviso to that Article.

890. The basic human freedom are all of the most fundamental importance to all the States and all the citizens. Article 32 is no less important to the citizens of States than Article 226. The Preamble is not a part or provision of the Constitution. therefore, the Preamble cannot be amended under Article 368. The nature and the contents of the Preamble are such that it is incapable of being amended. If the Preamble is unalterable it necessarily follows that those features of the Constitution which are necessary to give effect to the Preamble are unalterable. Fundamental rights are intended to give effect to the Preamble. They cannot, therefore, be abridged or taken away. The provisions of Article 368 themselves can be amended under that very Article. If the word "amendment" is read in the widest sense Parliament will have the power to get rid of the requisite majority required by Article 368 and make any Constitutional amendments possible by bare majority, Parliament can provide that hereafter the Constitution shall be unamendable. Parliament can reduce India to a status which is neither sovereign nor democratic nor republic and where the basic human rights are conspicuous by their absence.

891. Mr. Palkhivala submits that the principle of inherent or implied limitations on power to amend the controlled Constitution stems from three basic features. First, the ultimate legal sovereignty

resides in the people. Second, Parliament is only a creature of the Constitution. Third, power to amend the Constitution or destroy the essential features of the Constitution is an application of ultimate legal sovereignty.

892. Mr. Palkhivala enumerated 12 essential features. These were as follows : (1) The supremacy of the Constitution. (2) The sovereignty of India. (3) The integrity of the country. (4) The democratic way of life. (5) The republican form of Government. (6) The guarantee of basic human rights elaborated in Part III of the Constitution. (7) A secular State. (8) A free and independent judiciary. (9) The dual structure of the Union and the States. (10) The balance between the legislature, the executive and the judiciary. (11) a Parliamentary form of Government as distinct from the presidential form of Government. (12) Article 368 can be amended but cannot be amended to empower Parliament to alter or destroy any of the essential features of the Constitution, make the Constitution literally or practically unamendable, make it generally amendable by a bare majority in Parliament, confer the power of amendment either expressly or in effect on the State Legislatures and delete the proviso and deprive the States of the power of ratification which is today available to them in certain broad areas.

893. The Constitution 24th Amendment Act was impeached by Mr. Palkhivala on three grounds. First, by substituting the words "amend by way of addition, variation or repeal" in place of the word "amendment" in Article 368 the power was widened. Second, the 24th Amendment made explicit that when Parliament makes a Constitutional amendment under Article 368 it acts in exercise of constituent power. Third, it had provided by amendment in Articles 13 and 368 that the power in Article 13(2) against abridging or taking away of the fundamental rights shall not apply to any amendment under Article 368. The Constitution 24th Amendment Act is, therefore, to be construed as empowering Parliament to exercise full constituent power of the people and to vest in Parliament the ultimate legal sovereignty of the people as authorising Parliament to alter or destroy all or any of the essential features, basic elements and fundamental principles of the Constitution. Likewise, Parliament is construed by the Constitution 24th Amendment Act to be authorised to damage or destroy the essence of all or any of the fundamental rights. therefore, the amendment must be illegal and invalid.

894. In the alternative it was submitted on behalf of the petitioner that if the Constitution 24th Amendment is valid it can be only on a reading down of the amended provisions of Article 13 and 368 which reading would preserve the original inherent and implied limitations. Even after the Constitution 24th Amendment Act Parliament will have no power to alter or destroy the essential features of the Constitution and secondly, fundamental rights are among the essential features of the Constitution and, therefore, the essence of any of the fundamental rights cannot be altered or destroyed or damaged even when they are sought to be abridged.

895. The Attorney General stressed the background in which Article 368 was enacted by the Constituent Assembly to show that any limitation on the amending power was never in controversy. The only controversy was regarding the degree of flexibility of an amendment of all the provisions of the Constitution. Our Constitution has adopted three methods of amendment of the Constitution. Certain provisions of the Constitution may be amended by a simple majority in Parliament. Others may be amended by two-thirds majority. The third category relates to provisions where amendments must be ratified by one half of the States. This scheme strikes a

good balance by protecting the rights of the States while leaving the remainder of the Constitution easy to amend. Of the three ways of amending the Constitution two are laid down in Article 368 itself and the third is provided for in about 24 other Articles.

896. The Constitutional Adviser incorporated in his draft Constitution prepared by him in October, 1947 a recommendation contained in the supplementary Report of the Union Constitution Committee. Following the recommendation of the Advisory Committee he included a proviso that the provisions in the Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes, the Indian Christians and the Sikhs, either in the Federal Parliament or in any Provincial Legislature, should not be amended before the expiry of ten years from the commencement of the Constitution.

897. The Drafting Committee in February, 1948 considered the provisions for amendment. It made three material changes in the provisions made by the Constitution Adviser. First, the Committee framed a self contained and independent Article regarding the reservation of seats in the legislatures for minorities. These provisions could not be amended for a period of ten years and would then cease to have effect unless continued in operation by an amendment of the Constitution. The second proposed change gave a limited power of initiating Constitutional amendments to the State legislatures. This power related to two matters. These were the methods of choosing Governors and the establishment or abolition of Legislative Councils in the States. The third amendment suggested was that changes in any of the legislative lists (not merely federal List) should receive ratification of at least one half of the Provincial legislatures and one third of the legislatures of Indian States.

898. The entire history of the power of amendment of the Constitution shows first that the Draft Constitution eliminates the elaborate and difficult procedures such as a decision by convention or a referendum. The powers of amendments are left with the legislatures of the Union and the States. Secondly, it is only for amendments of specific matters that the ratification by the State legislatures is required. All other Articles are left to be amended by Parliament with only limitation of majority of not less than a two-thirds of the members of each House present and voting and the majority of the total membership of each House. Thirdly, the provisions for amendment of the Constitution Were made simple and not difficult when comparison is made with the American and the Australian Constitutions.

899. The theory of inherent and implied limitations on the amending power is based on the assumption of a narrow and restricted meaning of the word amendment to suggest that the basic features or the essential features and the democratic republican character of the Constitution cannot be damaged and destroyed. Emphasis is laid on the Preamble of the Constitution to suggest that inherent and implied limitations all spring from the Preamble. The Preamble is said not to be a part of the Constitution. The Preamble is said to be unalterable. therefore, it is contended that other provisions which gave effect to the Preamble cannot be amended.

900. Reliance is placed on the decision of this Court in Berubari case MANU/SC/0049/1960 : [1960]3SCR250 in support of the proposition that the Preamble is not a part of the Constitution. The conclusion drawn is that no amendment of the Constitution inconsistent with the Preamble can be made. The Preamble is said to be an implied limitation on the power of amendment. This

Court in Berubari case said that the Preamble has never been regarded as the source of any substantive power, because such powers are expressly granted in the body of the Constitution. This Court said "what is true about the powers is equally true about prohibitions and limitations". In Berubari case it was suggested that the Preamble to the Constitution postulated that like a democratic republican form of the Government the entire territory of India was beyond the reach of Parliament and could not be affected either by ordinary legislation or even by Constitutional amendment. The Preamble was invoked to cut down the power to cede territory either by ordinary law or by amendment of the Constitution. This Court said that the Preamble is, in the words of Story "a key to open the minds of the makers, but nevertheless the Preamble could not be said to postulate a limitation on one of the very important attributes of sovereignty". This Court rejected the theory that the Preamble can impose serious limitations on the essential attribute of sovereignty. The suggested limitation that the Preamble affirmed the inviolability of the territory of India so that the power of amendment should be implied limited to exclude the ceding territory, is negatived by this decision.

901. The petitioner's contention that the Preamble is not a part of the Constitution is nullified by the petitioner's reference to and reliance on the Preamble as the source of all inherent limitations. The Berubari case held that Article I could be amended under Article 368 and a part of the territory of India could be ceded by such amendment. The Preamble did not limit the power to cede territory by-amendment of Article I.

902. In the Berubari case there is an observation that the Preamble is not a part of the Constitution. The Preamble was taken up by the Constituent Assembly at the end as it had to be in conformity with the Constitution. The Preamble was debated and voted upon and the motion "The Preamble stand part of the Constitution" was adopted. therefore, Mr. Seervai rightly contended that the Preamble is an integral part of the status. The Preamble can be repealed (See Craies on Statute 6th Ed. page 200 seq. and Halsbury Laws of England, 3rd Ed. Vol. 36 p. 370).

903. In Gopalan case MANU/SC/0012/1950 : 1950CriLJ1383 an argument was advanced on the Preamble that the people gave themselves guaranteeing to the citizens fundamental rights, and, therefore, the provisions of Part III must be construed as being paramount to the legislative will as otherwise the fundamental rights to life and personal liberty would have no protection against legislative action. Patanjali Sastri, J., said that the high purpose and spirit of the Preamble as well as the Constitutional significance of a declaration of Fundamental Rights should be borne in mind. The language of the provisions, it was said there, could not be stretched in disregard of the cardinal rule of interpretation of any enactment, Constitution or other, that its spirit no less than its intendment should be collected primarily from the natural meaning of the words used. The words "procedure established by law" in Article 21 must be taken to refer to a procedure which had a statutory origin. The word "law" was said not to mean the immutable and universal principle of natural justice. The reasoning given by Patanjali Sastri, J. was "no procedure is known or can be said to have been established by such vague and uncertain concepts as the immutable and universal principles of natural justice". This Court in Gopalan case refused to read due process as an implication of the Constitution.

904. In the Kerala Education Bill 1957 case MANU/SC/0029/1958 : [1959]1SCR995 Das, C.J. referred to the Preamble and said "to implement and fortify the supreme purpose set forth in the

Preamble, Part III of our Constitution has provided for us certain fundamental rights". In the same case, Das, C.J. said "so long as the Constitution stands as it is and is not altered, it is inconceivably the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority community who are of our own". This observation shows that fundamental rights can be amended and the Preamble does not stand in the way.

905. In Basheshar Nath v. The C.I.T. Delhi (1955) Supp. 1 S.C.R. 528 Bhagwati, J. referred to the Preamble in discussing the question of waiver of fundamental right and compared our Preamble to the Preamble to the United States Constitution. The Preamble to the American Constitution is without the Bill of Rights and the Bill of Sights which became part of the United States Constitution substantially altered its character and broadly speaking, differed in no way, in principle, from our fundamental rights.

906. The Preamble is properly resorted to where doubts or ambiguities arise upon the words of the enacting part. If the enacting words are clear and unambiguous, there is little room for interpretation, except the cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the Preamble. This is the view of Story. The Preamble can never be resorted to enlarge the powers confided to the general government The Preamble can expound the nature, extent and application of the powers actually conferred by the Constitution and not substantively create them.

907. The decision of this Court in Gopalan case, the Coal Bearing Areas Act case (MANU/SC/0106/1961 : [1962]1SCR44 , and State of Rajasthan v. Leela Jain MANU/SC/0013/1964 : [1965]1SCR276 are that if the language of the enactment is clear the Preamble cannot nullify or cut down the enactment. The Judicial Committee in The Secretary of State for India in Council v. Maharajah of Bobbili I.L.R. 43 Mad. 529 said that the legislature may well intend that the enacting part should extend beyond the apparent ambit of the Preamble or the immediate mischief. See also Attorney General v. Prince Ernest Augustus of Haneyar 1957 A.C. 436. The American decision in Henning Jacobson v. Commonwealth of Massachusetts 197 U.S. 11 indicates that power is not conferred by the Preamble but must be found in the Constitution.

908. The Preamble may be relevant in the case of an ambiguity in an enactment in a statute. A statute does not contain an amending power for the simple reason that the statute can be amended under legislative power. The Attorney General rightly said that the Preamble in a Constitution refers to the frame of the Constitution at the time of the Preamble, and, therefore, it can possibly have no relevance to the constituent power in the future, when that Constitution itself can be changed. The position would be the same so far as the Preamble is concerned whether the constituent power is exercised by the amending body provided for by the people themselves in the Constitution or by referendum if so provided for in the Constitution. The Attorney General supported his submission by relying on the views of Canaway and Wynes on the similar interpretation of Section 128 of the Australian Constitution.

909. Canaway in the Failure of Federalism in Australia in discussing Section 128 of the Australian Constitution under the heading "Alteration of the Constitution" expresses the view that the section must be read as a substantive grant of power to alter the Constitution and that the negative form of the section in no way detracts from the amplitude of that power. Canaway further says that it is not

permissible to refer to the Preamble in connection with the effect of Section 128 and if nevertheless such reference is made there is nothing adverse to the conclusion that there is full power of amendment. The Preamble recites a preliminary agreement to unite in one indissoluble Federal Commonwealth. Section 128 of the Australian Constitution forms an integral part of the Constitution. As from the time of the agreement it must have been contemplated that the Constitution should be alterable to the full extent of power conferred by that section. therefore, the word "alter" in Section 128 of the Australian Constitution is not restricted by any reference to the Preamble.

910. Wynes in Legislative, Executive and Judicial Powers in Australia 4th Ed. at pp. 505-506 expresses the view that apart from the rule which excludes the Preamble generally from consideration in statutory interpretation it is clear that, when all is said and done, the Preamble at the most is only a recital of a present intention. The insertion of an express reference to an amendment in the Constitution itself is said to operate as a qualification upon the mere recital of the reasons for its creation.

911. At the second reading of the Draft Constitution in the Constituent Assembly a resolution was adopted that the Preamble do form part of our Constitution. The Preamble is a part of the Constitution. On 26 November, 1949 certain Articles of the Constitution were brought into force. Article 393 did come into force on 26 November, 1949. therefore, the Preamble did not come into force on 26 November, 1949. As regards general laws the position is that the Preamble has been treated as part of the statute.

912. Clear Constitutional provisions are imperative both on the legislatures and the Courts. Where a Constitutional provision is comprehensive in scope and leaves no room for interpretation the Court is without power to amend, add to or detract from a Constitutional provision or to create exceptions thereof by implication (See Corpus Juris Secumdum Vol. 16 p. 65). Where the people express themselves in careful and measured terms in framing the Constitution and they leave as little as possible to implications, amendments or changes in the existing order or conditions cannot be left to inserting implications by reference to the Preamble which is an expression of the intention at the time of the framing of the Constitution. therefore, the power to amend the Constitution is not restricted and controlled by the Preamble.

913. The contention that essential features are not amendable under Article 368 as it stood before the Constitution 24th Amendment Act is not only reading negative restrictions on the express power of amendment but is also putting the clock back. One of the salutary principles of construction of a statute is to be found in R.V. Burah 3 A.C. 889. It was a case to determine whether the prescribed limitations of a colonial legislature had been exceeded. The Judicial Committee said that a duty must be performed by looking to the terms of the instrument by which affirmatively legislative powers are created, and by which, negatively, they are restricted. "If what has been done is legislation within the general scope of the affirmative words which give power, and if it violates no express condition or restriction by which that power is limited, it is not for, any court of justice to enquire further or to enlarge constructively those conditions and restrictions". The maxim Expressum facit cessare taciturn was similarly applied in Webb v. Outrim 1907 A.C. 89. The theory of implied and inherent limitations can be best described as a subtle attempt to annihilate the affirmative power of amendment. Lord Halsbury in Fielding v. Thomas 1896 A.C. 600 said

that if the legislature had full power to make laws it was difficult to see how the power was taken away. The power is always sufficient for the purpose. Lord Dunedin in Whiteman v. Sadler 1910 A.C. 514 said "express enactment shuts the door to further implication".

914. It was said that the essential features could be amended by way of improvement but could not be damaged or destroyed. It was said India could not be converted into a totalitarian dictatorship. The entire approach of the petitioner to the power of amendment contained in Article 368 ignores the fact that the object of the Constitution is to provide for the organs of State like the judicature, legislature and the executive for the governance of the country. Apart from the essential functions of defence against external aggression and of maintenance of internal order a modern State is organised to secure the welfare of the people. India is a sovereign democratic republic which means that Parliament and State legislatures are elected on adult universal suffrage. The country is governed by the Cabinet system of government with ministries responsible to the House of the People and to the Legislative Assemblies respectively. In a democracy the determination of policies to be pursued can only be determined by a majority vote cast at election and then by a majority of the elected representatives in the legislature. Holmes, J., said "In a democracy the people have the right to embody their opinion in law".

915. The argument that if unbridled power were conferred the Constitution could be subverted or destroyed is not supported by actual experience in India. Mr. Seervai emphasised that since 1951 when Shankari Prasad case recognised unlimited power of amendment till Golak Nath case in 1967 the normal democratic process of the departments of the State functioned as provided by the Constitution. Elections have been held as provided by the Constitution. If any body or organised party were bent upon subverting our free Constitution, then even if there were no power of amendment, Parliament has powers which would enable such destruction to be brought about. Great and wide powers are conferred for the governance of great sovereign countries and such powers cannot be withheld on the ground that they may be used externally or oppressively. Well settled principles of construction in interpreting Constitutions preclude limiting the language of the Constitution by political, juristic or social concepts independently of the language of the Constitution to be interpreted. This Court in Deep Chand v. State of Uttar Pradesh and Ors. (1959) Supp. 2 S.C.R. 8 relied on the test laid down in Queen v. Burah (1878) 5 I.A. 179 that the terms of the instrument by which affirmatively the powers are created, and by which they are negatively restricted are to be looked into. The Judicial Committee in Attorney General for Ontario v. Attorney General for Canada 1912 A.C. 571 tersely stated the legal principles as follows : "If the text is explicit the text is conclusive, alike in what it directs and what it forbids". This is the golden rule of construction of a written Constitution.

916. In Gopalan case MANU/SC/0012/1950 : 1950CriLJ1383 this Court was invited to read into the Constitution implications derived from the "spirit of the Constitution". Kania, C.J. said that to strike down the law on an assumed principle of construction would be "to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights". Kania, C.J. also said that a large and liberal interpretation should be given to the Constitution. That does not mean that a Court is free to stretch or pervert the language of the Constitution in the interest of any legal or Constitutional theory. This Court in Keshavan Madhavan Menon v. The State of Bombay MANU/SC/0020/1951 : 1951CriLJ680 rejected the contention that the spirit of the Constitution should be invoked in interpreting the Constitution. In

Benoari Lal Sharma case 72 I.A. 57, the Privy Council reversed the judgment of the Federal Court observing that questions of jurisprudence or policy were not relevant to the construction of power conferred in an affirmative language and not restricted in any negative terms.

917. A Constitution is essentially a frame of government laying down governmental powers exercisable by the legislature, executive and the judiciary. Even so other provisions are included in the Constitution of a country which provisions are considered by the framers of that Constitution to have such special importance that those should be included in the Constitution or organic law. Thus all provisions of the Constitution are essential and no distinction can be made between essential and non-essential features from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself. The Attorney General rightly said that if the positive power of "amendment of this Constitution" in Article 368 is restricted by raising the walls of essential features or core of essential features, the clear intention of the Constituent Assembly will be nullified and that would make a mockery of the Constitution and that would lead to destruction of the Constitution by paving the way for extra Constitutional or revolutionary changes in the Constitution. The theory of implied and inherent limitations cannot be allowed to act as a boa constrictor to the clear and unambiguous power of amendment.

918. If there is no express prohibition against amendment in Article 368 the omission of any such restriction did not intend to impose any restriction. When certain restrictions are imposed it is not intended that other undefined restrictions should be imposed by implication. The general rule is not to import into statutes words which are not found there. Words are not to be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context. If a matter is altogether omitted from statute it is not allowable to insert it by implication. Where the language of an Act is clear and explicit, effect is to be given to it whatever may be the consequences. The words of the statute speak the intention of the legislature. Where the reading of a statute produces an intelligible result there is no ground for reading any words or changing any words according to what may be supposed intention of the legislature. If a statute is passed for the purpose of enabling something to be done but omits to mention in Terms some detail which is of great importance to the proper performance of the work which the statute has in contemplation the courts are at liberty to infer that the statute by implication empowers the details to be carried out. The implication is to empower the authority to do that which is necessary in order to accomplish the ultimate object.

919. The implication sought to be raised by Mr. Palkhivala is for the purpose of reading negative words into Article 368 to destroy the positive power to amend. The provisions of out Constitution in the light of historical background and special problems of the country will show that no provision can be considered as non-essential. The Constitution-makers did not think so. The Attorney General rightly contended that no one has the power or authority to say that any single provision is more essential than another or that the amending power under Article 368 does not operate on any provision on the ground of alleged essentiality when Article 368 provides amendment of this Constitution which obviously means the whole Constitution including every provision. In a Constitution different methods of amendment may be laid down depending upon the degree of importance attached to particular parts of the Constitution. Apart from the language of Article 368 the draft Constitution as it emerged through the Constituent Assembly shows that no provision of the Constitution was excepted from the amending power.

920. The provisions for the purpose of amendment were divided into four categories. The first two categories are to be found in Article 368. Certain provisions require ratification by the requisite number of States as are mentioned in the proviso. Other provisions which do not fall within the proviso are amendable by a double majority provided there. The third category consists of Articles 4, 169, 240(1), paragraph 7 Schedule 5, and paragraph 21 Schedule 6. The fourth category consists of provisions which were said by the Attorney General to confer enabling power on Parliament to change the provisions by by the expression "unless Parliament otherwise provides" or similar expression. He gave the examples which are Articles 73(2), 100(3), 105(3), 118(2), 120(2), 125, 133(3), 171(2), 189(3), 194(3), 210(2), 241(2), 283(1) and (2), 285(1) and (2), 343(3), 345, 348(1).

921. The character of the provisions which are amendable under the proviso to Article 368 itself shows that petitioner's submission that essential features are unamendable is a baseless vision. Article 54 speaks of the method of election of the President. This may be changed. The manner or scale of representation of the different States in regard to the election of the President may also be changed. The executive power of the Union and the States may be changed. Chapter IV of Part V (the Union Judiciary), Chapter V of Part VI (the High Courts in the States) are also mentioned in Article 368 as liable to be changed. Article 141 may also be changed. Chapter I of Part XI and the Seventh Schedule (legislative relations between Union and the States) may be changed. The representation of the States in Parliament (Articles 80 and 81) may be changed. The number of representation may be increased or reduced. The method of election of such representatives as Parliament may by law prescribe and the number of the members of the House of the People may be increased or reduced. The method of election to the House of People may be changed. Finally the provisions of Article 368 itself, which is the most important part of the Constitution may be changed.

922. To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made. Again, the question arises as to who will make such a distinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable. Who is to judge what the essential features are ? On what touchstone are the essential features to be measured? Is there any yardstick by which it can be gauged ? How much is essential and how much is not essential? How can the essential features or the core of the essential features be determined? If there are no indications in the Constitution as to what the essential features are the task of amendment of the Constitution becomes an unpredictable and indeterminate task. There must be an objective data and standard by which it can be predicated as to what is essential and what is not essential. If Parliament cannot judge these features Parliament cannot, amend the Constitution. If, on the other hand, amendments are carried out by Parliament the petitioner contends that eventually court will find out as to whether the amendment violates or abridges essential features or the core of essential features. In the ultimate analysis it is the Court which will pronounce on the amendment as to whether it is permissible or not. This construction will have the effect of robbing Parliament of the power of amendment and reposing the final power of expressing validity of amendment in the courts.

923. Mr. Palkhivala said that though the essential features could be amended the core of essential features could not be amended. He said that there was no esoteric test to find out what is essential

and what is not essential and if no precise definition could be given that was no reason to hold that the essential features and the core of essential features could be amended. It was said that the appreciation of the trained judicial mind is the only way to find out what essential features are.

924. Mr. Seervai rightly contended that there is no foundation for the analogy that just as Judges test reasonableness in law, similarly the judicial mind will find out the essential features on the test of, reasonableness. Reasonableness in law is treated as an objective criterion because reason inheres in man as rational being. The citizen whose rights are affected applies reason and when he assails a law he possesses a standard by which he can persuade the Court that the law is unreasonable. The legislature which makes a law has the standard of reasonableness and has the further qualification to apply the standard because of familiarity with the needs, desires and the wants of the people whom the legislature represents. As regards the Judge not only does he share the reasonableness of the reasonable man but his trained mind enables him to see certain aspects clearly. The process of judicial review of legislation as laid down by Courts is that the Court will start with the presumption that laws enacted are reasonable. The objective standard is reasonableness. That is why in the law of contract reasonable price is to be ascertained by the Courts. In the law of torts the Courts find out what reasonable care is. In the law of property reasonable conduct is found out by the Courts to avoid evil consequences. Reasonableness is to be judged with reference to the right which is restricted when Article 19 is considered.

925. The American Courts evolved a test of reasonableness by the doctrine of substantive due process which means not that the law is unreasonable but that on political, social and economic grounds the majority of Judges consider that the law ought not be permitted to be made. The crucial point is that in contradistinction to the American Constitution where rights are couched in wide general terms leaving it to the Courts to evolve necessary limitations our Constitution limited it by precise words of limitation as for example in Articles 19 and 21. In Article 21 the Constitution-makers substituted "procedure established by law" for the words "due process of law". The reason for the change was that the procedure established by law was specific. The framers of the Constitution negatived the vague indefinite reasonableness of laws on political, social and economic grounds. In Gopalan case due process was rejected, by clearly limiting the rights acquired and by eliminating the indefinite due process. The Constitution makers freed judicial review of subjective determination. Due process as a test of invalidity of law was deliberately withheld or denied. Courts are not concerned with the wisdom or policy of legislation. The Courts are equally not concerned with the wisdom and policy of amendments to the Constitution.

926. Reliance was placed by Mr. Palkhivala on Ridge v. Baldwin 1964 A.C. 40 where it is said that opinions that natural justice is so vague as to be practically meaningless, are tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. In the same case it was said that the idea of negligence is equally insusceptible or exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law. Extracting those observations it was said by Mr. Palkhivala that though the border-line between essential features and non-essential features could not be stated or it was not possible to specify exhaustively the amendment which could be invalid on that principle yet there was no reason why the principle of inherent and implied limitations to amend our Constitution should not be accepted. Inherent and implied limitations cannot originate

in an oracle when the Constitution does not contain any express prohibition against amending any provision. When Article 368 speaks of changes in the provisions of the Constitution as are set out in Clauses (a) to (d) of the proviso it is manifest that the makers of the Constitution expressed their intention with unerring accuracy that features which can broadly be described as federal features, and from that point of view "Essential features" could be amended. In the face of these express provisions it is impossible to hold that the Constitution does not contemplate an amendment of the so called essential features of the Constitution. The proviso confers that power with relation to the judiciary, the executive and the legislature, none of which could be said to be inessential. Indeed it is difficult to imagine that the Constitution contained any provision which was inessential. It need be hardly said that amendment not only means alteration, addition or repeal of provision but also deletion of some part, partial repeal and addition of a new part.

927. It was said that if our Parliamentary system was changed to a Presidential system it would be amending the core of our Constitution. But such a change is permissible under Article 368. Whether the people would adopt such an amendment is a different matter and does not fall for consideration here. The core of the federal form of Government in our country is greater power in the Union Parliament than States for preserving the integrity of the country. There can be changes by having a confederation or by conferring greater power on the center. Those contentions about unamendability of essential features do not take into consideration that the extent and character of any change in the provisions of the Constitution is to be determined by legislatures as amending bodies under Article 368 and as representatives of the people in a democracy and it is not the function of the Courts to make any such determination.

928. Mr. Palkhivala contends that the Constitution 24th Amendment Act is un-constitutional because Parliament cannot exceed the alleged implied and inherent limitations on the amending power as it stood before the 24th Amendment. The 24th Amendment has substituted the marginal note "Power of Parliament to amend the Constitution and procedure therefor" for the original note "procedure for amendment of the Constitution". This change is due to the fact that according to the leading majority judgment in Golak Nath case the unamended Article dealt only with the procedure for amendment and that the power of amendment was in the residuary power of legislation. The 24th Amendment has declared that the power to amend the Constitution is in Article 368. That was the view of this Court in earlier decisions. That was the minority view in Golak Nath case. By amendment that view has become the Constitutional mandate.

929. The other change as a result of the 24th Amendment is that "Parliament may in the exercise of its constituent power amend" in place of words "amendment of this Constitution may be initiated". The reasons for this change are to give effect to the decisions of this Court in Shankari Prasad case which in considering the validity of the First Amendment recognised and affirmed the vital distinction between constituent power and legislative power and decided that the word "law" in Article 13(2) applied to the exercise of legislative power and did not apply to an amendment of the Constitution. In Sajjan Singh case the same distinction was upheld by the majority of this Court. In Golak Nath case the majority and the concurring judgment denied the distinction between legislative and constituent power and held that Article 13(2) applied to an amendment of the Constitution under Article 368 because there was no distinction between legislative and constituent power. As a consequence the leading majority judgment in Golak Nath case held that Parliament could not amend fundamental rights. The dissenting judgments in Golak Nath case upheld the vital

distinction between legislative and constituent powers and held that the decision in Shankari Prasad case and the majority decision in Sajjan Singh case were correct and that Parliament had power to amend the fundamental rights since an amendment of the Constitution was not law within the meaning of Article 13(2). These features give the reason why the expression "Parliament may in the exercise of constituent power" was introduced by the 24th Amendment. Parliament took notice of two conflicting views and the unamended Article 368. Parliament took notice of the preponderating judicial opinion in favour of the view that Article 368 contained the power of amendment and that power was a constituent power. Wanchoo, J. held that the power under Article 368 is constituent power to change the fundamental law, that is to say the Constitution. The constituent power under the Constitution belonged to Parliament because the Constitution gave it. The Amendment made explicit what the judgment in Shankari Prasad case and the majority judgment in Sajjan Singh case and the dissenting judgment in Golak Nath case said, namely that Parliament has the constituent power to amend the Constitution.

930. The unamended Article used the words "An amendment of this Constitution". The 24th Amendment used the words "Parliament may...amend by way of addition, variation or repeal any provision of this Constitution". This has been done because the leading majority judgment in Golak Nath case expressed the view that there is considerable force in the argument that the expression "amendment" in Article 368 has a positive and negative content in exercise of which Parliament cannot destroy the structure of the Constitution but it can only modify the provisions thereof within the framework of the original instrument for its better effect. This observation in Golak Nath case raised a doubt as to the meaning of the word "amendment". The 24th Amendment has expressly clarified that doubt.

931. The leading majority judgment and the concurring judgment in Golak Nath case both held that the fundamental rights could not be amended by Parliament. The leading majority judgment with reference to the meaning of the word "amendment" and without deciding the matter observed that there was great force in the argument that certain fundamental features e.g. the concept of federalism, the institutions of the President and the Parliamentary executive could not be abolished by amendment. Shankari Prasad case, Sajjan Singh case and the dissenting minority judgment in Golak Nath case took the view that every provision of the Constitution could be amended in exercise of constituent power. As a necessary corollary, the 24th Amendment excludes the operation of Article 13 by amending Article 13 by a new Sub-article (4) that nothing in Article 13 shall apply to any amendment of this Constitution under Article 368. The amendment of Article 13 by an insertion of Sub-article (4) is also reinforced by the opening words introduced in Article 368 by the 24th Amendment, viz., notwithstanding anything contained in this Constitution, which would certainly exclude Article 13.

The Constitution 24th Amendment Act raises three aspects. First, does the word "amend" include abrogation or repeal of the whole Constitution? Does amendment mean that there is some feature of the Constitution which cannot be changed. Secondly, what light does the proviso to Article 368 throw on the nature of the amending power and on the doctrine of inherent and implied limitations on the amending power that essential features of the Constitution cannot be damaged or destroyed. Thirdly, does Clause (e) of the proviso to Article 368 enable Parliament and the requisite majority of the States to increase the power of amendment that was conferred by Article 368.

932. Article 368 in the unamended form contained power as well as self executing procedure which if followed by the prescribed authorities would result in an amendment of the Constitution. Both the Attorney General and Mr. Seervai rightly said that the words "Constitution shall stand amended" in Article 368 will exclude a simple repeal that is without substituting anything in place of the repealed Constitution. If the Constitution were totally repealed and a vacuum was created it could not be said that the Constitution stands amended. The Constitution means the mode in which a State is constituted or organised specially as to the location of sovereign power. The Constitution also means the system or body of fundamental principles according to which the nation, State and body politic is constituted and governed. In the case of a written Constitution the Constitution is more fundamental than any particular law and contains a principle with which all legislation must be in harmony. therefore, an amendment of the Constitution is an amendment of something which provides a system according to which a State or nation is governed. An amendment of the Constitution is to make fundamental changes in the Constitution. Fundamental or basic principles can be changed. There can be radical change in the Constitution like introducing a Presidential system of government for a cabinet system or a unitary system for a federal system. But such amendment would in its wake bring all consequential changes for the smooth working of the new system.

933. However radical the change the amendment must provide for the mode in which the State is constituted or organised. The question which was often put by Mr. Palkhivala drawing a panorama of a totalitarian State in place of the existing Constitution can be simply answered by saying that the words "The Constitution shall stand amended" indicate that the Constitution of India is being referred to. The power of amendment is unlimited so long as the result is an amended Constitution, that is to say, an organic instrument which provides for the making interpretation and implementation of law.

934. The theory of unamendability of so called essential features is unmeritorious in the face of express provisions in Article 368 particularly in Clauses (a) to (d) of the proviso. Clauses (a) to (d) relate to 66 Articles dealing with some of the most important features of the Constitution. Those Articles relate to the judiciary, the legislature and the executive. The legislative relations between the Union and the States and the distribution of legislative power between them are all within the ambit of amendment.

935. The question which was raised by Mr. Palkhivala as to whether under proviso (e) to the unamended Article 368 the power of amendment could be increased is answered in the affirmative. The reasons broadly stated are three.

936. First, under Article 368 proviso (e) any limitation on the power of amendment alleged to be found in any other Article of the Constitution can be removed. The full magnitude of the power of amendment which would have existed but for the limitation could be restored and the power of amendment increase. In Golak Nath case the majority view was that Article 13(2) operated as a limitation on the power of amendment. The 24th Amendment took note of that decision and removed all doubts by amending Article 13(2) and providing a new Sub-article (4) there and also by amending Article 368 to the effect that Article 13(2) shall not apply to any amendment of the Constitution. If the express limitation which had been judicially held to constitute a bar to the

amendment of fundamental rights could be removed by amending Article 368 under Clause (e) to the proviso any other alleged implied limitation can be similarly removed.

937. Secondly, judicial decisions show that by amending the Article conferring the power of amendment a greater power to amend the Constitution can be obtained than was conferred by the original Article. In Ryan case 1935 IR 170 all the learned Judges excepting the Chief Justice held that by first amending Section 50 of the Irish Constitution which conferred the power of amendment subject to certain restrictions thereon so as to remove the restrictions contained in that section, the Irish Parliament effectively increased its power in the sense that an amendment could be made which those express restrictions would have prohibited. Again in Ranasinghe case 1965 A.C. 172 it was said that a legislature has no power to ignore the conditions of law making that are imposed by the instrument which regulates its power. This restriction created by the instrument exists independently of the question whether the legislature is sovereign or whether the Constitution is uncontrolled. The Judicial Committee held that "such a Constitution can indeed be altered or amended by the legislature if the regulating instrument so provides and if the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provision". Thus a controlled Constitution can be converted into an uncontrolled Constitution vastly increasing the power of amendment.

938. Thirdly, the power to amend the amending Article must include the power to add, alter or repeal any part of that Article and there is no reason why the addition cannot confer a power of amendment which the authorities named in Article 368 did not possess. By the exercise of the amending power provision can be made which can increase the powers of Parliament or increase the powers of the States. Again, by amendment future amendments can be made more difficult. The picture drawn by Mr. Palkhivala that a future amendment would be rendered impossible either by absolutely forbidding amendment or by prescribing an impractically large majority does not present any legal impediment to such an amendment. The safeguard against such action is external. The contingency of any such amendment being proposed and accepted is extremely remote because such an amendment might sow the seeds of revolution which would be the only way to bring about the change in the Constitution. The Solicitor General rightly said that the effect of the amendment is that "it shall stand amended in accordance with the terms of the Bill". The product is not required to be "this Constitution". It will not be identically the old Constitution. It will be a changed or amended Constitution and its resemblance will depend on the extent of the change. More rigid process like referendum or initiative or greater majority or ratification by a larger number of States might be introduced by amendment.

939. It is important to note that proviso (e) to Article 368, namely, the power to amend Article 368 is unlike perhaps some Constitutions which were before the Constituent Assembly when our Constitution was framed. Neither the American nor the Australian Constitution provided for any power to amend the amending provision itself. The Attorney General rightly contended that this forcefully expresses a clear and deliberate intention of the Constituent Assembly that apart from providing for a less rigid amending formula the Constituent Assembly took care to avoid the controversy in America as to whether express limitation on Article V of the American Constitution itself regarding equal suffrage of the States in the Senate could be amended or the controversy in Australia as to whether Section 128 of the Australian Constitution itself could be amended as there

was no express limitation on such amendment. The Constituent Assembly provided in Clause (e) to Article 368 express and specific power of amendment of Article 368 itself.

940. The amplitude of the amending power in our Constitution stands in bold relief in comparison with Article V of the American Constitution, Section 128 of the Australian Constitution and Section 50 of the Irish Constitution none of which confers such a power. Dr. Wynes in his Legislative Powers in Australia 4th Ed. p. 505 expresses the view that though Section 128 is negative in form but the power of amendment extends to alteration "of this Constitution" and this power is implied by its terms. Dr. Wynes also states that by the consent of the States the last part of Section 128 could be amended. This is only to illustrate as to how other Constitutions are understood by jurists in their countries. Our Article 368 contains no express limitation on the power of amendment. The provision of Clause (e) in the proviso to Article 368 is not limited to federal features.

941. The words "amendment of this Constitution" in Section 50 of the Irish Constitution which formed the subject of decision in Ryan case 1935 IR 170 were read by Kennedy, C.J. in his dissenting view to mean that if power to amend Section 50 itself was intended to be given the framers of the Constitution would have said so. Mr. Palkhivala relied on this dissenting view. Other learned Judges who formed the majority held that the words "amendment of this Constitution" conferred power to amend that Section 50 as well. If no intention to amend that section itself is expressed there is nothing which can be implied was the dissent. therefore, it would follow even according to the dissent that no implied limitations on the power of amendment can be read in Section 50 if an express power of amendment has been conferred by the Constitution.

942. Mr. Palkhivala contended that the people reserved the power to themselves to amend the essential features of the Constitution and if any such amendment were to be made it should be referred to the people by referendum. It was said that the Constitution makers did not intend that essential features should be damaged or destroyed even by the people, and therefore, the Constitution did not provide for referendum. The other contention on behalf of the petitioner was that referendum was not provided for because it might have been difficult to have the Constitution accepted on those terms. The second view would not eliminate the introduction of referendum as a method of amendment. If a referendum were introduced by an amendment people would have complete power to deal with essential features. The other question would be as to whether the Preamble and the fundamental rights would be a limitation on the power of the people. On behalf of the petitioner it was said that it was not necessary to decide the questions. Both the Attorney General and Mr. Seervai correctly said that the submissions made on behalf of the petitioner indicated that if essential features could be amended by the people the very fact that the Constituent Assembly did not include referendum as one of the methods of amendment and that the Constitution makers excluded no part of the Constitution from amendment established that the amendment of a written Constitution can be legally done only by the method prescribed by the Constitution. If the method of referendum be adopted for purpose of amendment as suggested by Mr. Palkhivala that would be extra Constitutional or revolutionary. The amending body to amend the Constitution represents the will of the people.

943. therefore, as long as Article 368 may be amended under proviso (e) any amendment of the Constitution by recourse to referendum would be revolutionary. Mr. Palkhivala on behalf of the

petitioner did not rely on the majority decision in Golak Nath case that the fundamental rights could be abridged or taken away only by convening a Constituent Assembly, but based his argument on a theory of legal sovereignty of the people. The Constitution is binding on all the organs of government as well as on the people. The Attorney General rightly submitted that the concept of popular sovereignty is well settled in parliamentary democracy and it means that the people express their will through their representatives elected by them at the general election as the amending body prescribed by the Constitution.

944. Are fundamental rights unamendable? Mr. Palkhivala contended that apart from Article 13(2) fundamental rights are based on Universal Declaration of Human Rights and are natural rights, and, therefore, they are outside the scope of amendment. In Golak Nath case the majority view declined to pronounce any opinion on alleged essential features other than fundamental rights. The concurring view was that fundamental rights were unamendable because they were fundamental. Wanchoo, J. for himself and two other learned Judges and Ramaswami, J. rightly rejected the theory of implied limitations. The three reasons given by Wanchoo, J. are these. First, the doctrine of essential and non-essential features would introduce uncertainty. Secondly, constituent power of amendment does not admit of any impediment of implied restrictions. Thirdly, because there is no express limitation there can be no implied limitation.

945. Mr. Seervai correctly contended that there is intrinsic evidence in the provisions of Part III itself that our Constitution does not adopt the theory that fundamental rights are natural rights or moral rights which every human being is at all times to have simply because of the fact that as opposed to other things he is rational and moral. The language of Article 13(2) shows that these rights are conferred by the people of India under the Constitution and they are such rights as the people thought fit to be in the organised society or State which they were creating. These rights did not belong to the people of India before 26 January 1950 and would not have been claimed by them. Article 19 embodies valuable rights. Rights under Article 19 are limited only to citizens. Foreigners are human beings but they are not given fundamental rights because these rights are conferred only on citizens as citizens.

946. Article 33 enacts that Parliament may by law modify rights conferred by Part III in their application to Armed Forces. Parliament may restrict or abrogate any of the rights conferred by Part III so as to ensure the proper discharge of the duties of the Armed Forces and the maintenance of discipline among them. therefore, Article 33 shows that citizens can be denied some of these rights. If these are natural rights these cannot be abrogated. Article 34 shows that Parliament may by law indemnify any person in respect of any act done by him in connection with the maintenance or restoration of order in any area where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area. Article 34 again shows restriction on rights conferred by Part III while martial law is in force in any area. The dominant concept is social good. Where there is no restraint the society fails.

947. Articles 352 and 358 also illustrate as to how while the proclamation of emergency is in operation provisions of Article 19 are suspended during emergency. The framers of the Constitution emphasised the social content of those rights. The basic concept of fundamental right is therefore a social one and it has a social function. These rights are conferred by the Constitution. The nature of restriction on fundamental rights shows that there is nothing natural about those

rights. The restrictions contemplated under Article 19(2) with regard to freedom of speech are essential parts of a well organised developed society. One must not look at location of power but one should see how it acts. The restrictions contemplated in Article 19 are basically social and political. Friendly relations with foreign states illustrate the political aspect of restrictions. There are similar restrictions on right to move freely. The protection of Scheduled Tribes is also reasonable in the interest of society. This Court in Basheshar Nath v. C.I.T. Delhi MANU/SC/0064/1958 : (1959) Supp. 1. S.C.R. 528 said that there are no natural rights under our Constitution and natural rights played no part in the formulation of the provisions therein.

948. Articles 25 and 26 by their opening words show that the right to the freedom of religion is subject to the paramount interest of society and there is no part of the right however important to devotee which cannot and in many cases have not been denied in civilised society.

949. Subba Rao, C.J. in Golak Nath case equated fundamental rights with natural rights or primordial rights. The concurring majority view in Golak Nath case, however, said that there is no natural right in property and natural rights embrace the activity outside the status of citizen. Fundamental rights as both the Attorney General and Mr. Seervai rightly contended are given by the Constitution, and, therefore, they can be abridged or taken away by the people themselves acting as an organised society in a State by the representatives of the people by means of the amending process laid down in the Constitution itself. There are many Articles in Part III of our Constitution which cannot in any event be equated with any fundamental right in the sense of natural right. To illustrate Article 17 deals with abolition of untouchability. Article 18 speaks of abolition of titles. Article 20 deals with protection in respect of conviction for offences. Article 23 refers to prohibition of traffic in human beings and forced labour. Article 24 deals with prohibition of employment of children in factories, etc. Article 27 speaks of freedom as to liability for taxes levied for promotion of any particular religion. Article 28 contemplates freedom as to attendance at religious instruction or religious worship in certain educational institutions. Article 29 deals with protection of interests of minorities. Article 31(2) prior to the Constitution 25th Amendment Act spoke of payment of just equivalent for acquisition or requisition of property. Article 31(4) deals with legislation pending at the commencement of the Constitution. Articles 31(5) and (6) save certain types of laws. Article 31A saves laws providing for acquisition of estates etc. Article 32 confers right to move the Supreme Court.

950. The Constitution is the higher law and it attains a form which makes possible the attribution to it of an entirely new set of validity, the validity of a statute emanating from the sovereign people. Invested with statutory form and implemented by judicial review higher law becomes juristically the most fruitful for people. There is no higher law above the Constitution.

951. Mr. Palkhivala relied on an Article by Conrad on Limitation of Amendment Procedure and the Constitutional Power. The writer refers to the West German Provincial Constitution which has expressly excluded basic rights from amendment. If that is so the question of basic rights being unamendable on the basis of higher law or natural law does not arise. The conclusion of the writer is that whereas the American courts did not consider declaring a Constitutional norm void because of a conflict with higher law the German Jurisprudence broadened the concept of judicial review by recourse to natural law. The post-war Constitution of West Germany distinguished between

superior and inferior Constitutional norms in so far as certain norms are not subject to amendment whereas others are.

952. The Attorney General relied on Friedmann Legal Theory 5th Ed. on pp. 350 seq. to show that there was a revival of natural law theory in contemporary German Legal Philosophy. This theory of natural law springs from the reaction against the excess of the Nazi regime. The view of Friedmann is that natural law may disguise to pose itself the conflict between the values which is a problem of constant and painful adjustment between competing interests, purposes and policies. This conflict is resolved by ethical or political evolution which finds place in legislative policies and also on the impact of changing ideas on the growth of law.

953. Fundamental rights are social rights conferred by the Constitution. There is no law above the Constitution. The Constitution does not recognise any type of law as natural law. Natural rights are summed up under the formula which became common during the Puritan Revolution namely life, liberty and property.

954. The theory of evolution of positive norms by supra-positive law as distinguished from superior positive law had important consequences in the post-war revival of natural law in some countries particularly Germany. Most of the German Constitutions from the early 19th Century to the Nazi Regime did not provide for judicial review. Under the Weimar regime, the legislature reigned supreme and legal positivism was brought to an extreme. The re-action after World War II was characterised by decreases of legislative power matched by an increase of judicial power. It is in this context that Conrad's writing on which Mr. Palkhivala relied is to be understood. The entire suggestion is that norms could not only be judged by a superior law namely Constitutional law but by natural law to broaden the scope of judicial review. The acceptance of the doctrine of judicial review has been considered as a progress in Constitutional theory made between Declaration of Independence and the Federal Convention at Philadelphia.

955. On the one hand there is a school of extreme natural law philosophers who claim that a natural order establishes that private capitalism is good and socialism is bad. On the other hand, the more extreme versions of totalitarian legal philosophy deny the basic value of the human personality as such. Outside these extremes, there is a far greater degree of common aspirations. The basic autonomy and dignity of human personality is the moral foundation of the teaching of modern natural law philosophers, like Maritain. It is in this context that our fundamental rights and Directive Principles are to be read as having in the ultimate analysis a common good. The Directive Principles do not constitute a set of subsidiary principles to fundamental rights of individuals. The Directive Principles embody the set of social principles to shape fundamental rights to grant a freer scope to the large scale welfare activities of the State. therefore, it will be wrong to equate fundamental rights as natural, inalienable, primordial rights which are beyond the reach of the amendment of the Constitution. It is in this context that this Court in Basheshar Nath v. C.I.T. Delhi MANU/SC/0064/1958 : (1959) Supp. 1 S.C.R. 528 said that the doctrine of natural rights is nothing but a foundation of shifting sand.

956. Mr. Seervai rightly said that if the power of amendment of the Constitution is co-extensive with the power of the judiciary to invalidate laws, the democratic process and the co-ordinate nature of the great departments of the State are maintained. The democratic process is maintained

because the will of the people to secure the necessary power to enact laws by amendment of the Constitution is not defeated. The democratic process is also respected because when the judiciary strikes down a law on the ground of lack of power, or on the ground of violating a limitation on power, it is the duty of the legislature to accept that position, but if it is desired to pass the same law by acquiring the necessary power, an amendment validly enacted enables the legislatures to do so and the democratic will to prevail. This process harmonises with the theory of our Constitution that the three great departments of the State, the legislature, the judiciary and the executive are co-ordinate and that none is superior to the other. The normal interaction of enactment of law by the legislation, of interpretation by the courts, and of the amendment of the Constitution by the legislature, go on as they were intended to go on.

957. If the power of amendment does not contain any limitation and if this power is denied by reading into the Constitution inherent limitations to extinguish the validity of all amendments on the principles of essential features of the Constitution which are undefined and untermed, the courts will have to lay down a new Constitution.

958. It is said that the frame of the Government cannot be changed or abrogated by amendment of the Constitution. There is before us no aspect of abrogation of the form of Government of the changes apprehended by the petitioners like the abrogation of the judiciary or extending the life of Parliament.

959. The problems of the times and the solutions of those problems are considered at the time of framing the Constitution. But those who frame the Constitution also know that new and unforeseen problems may emerge, that problems once considered important may lose their importance, because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of government to another. Changes in the Constitution are thus actuated by a sense of duty to the people to help them get what they want out of life. There is no destiny of man in whose service some men can rightfully control others; there are only the desires and performances and ambitions that men actually have. The duty to maximise happiness means that it is easier to give people what they want than to make them want what you can easily give. The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and well being of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution.

960. The way in which the doctrine of inherent and implied limitations was invoked by Mr. Palkhivala in interpreting the Constitution was that the test of power under the Constitution must be to ascertain the worst that can be done in exercise of such power. Mr. Palkhivala submitted that if unbridled power of amendment were allowed the basic features of our Constitution, namely, the republican and/or democratic form of government and fundamental Rights could be destroyed and India could be converted into a totalitarian dictatorship. The Court was invited to take into account the consequences of the kind described. Mr. Palkhivala suggested that a wide power of amendment would lead to borrow his words to the liquidation of our Constitution.

961. The Attorney General rightly said that the unambiguous meaning of amendment could not be destroyed to nurse the theory of implied limitations. He also said that the live distinction between power and exercise of power is subject to popular will and popular control. The theory of implied and inherent limitation was a repudiation of democratic process. The Attorney General and Mr. Seervai also rightly said that the approach of the petitioner to the power of amendment contained in Article 368 of the Constitution ignores the fact that the object of the Constitution is to provide for departments of States like the judiciary, the legislature and the executive for the governance of a country. Apart from the essential functions of defence against external aggression and of maintenance of internal order a modern State is organised to secure the welfare of the people. Parliament and State legislatures are elected on adult universal suffrage. The country is governed by the Cabinet system of Government with ministries responsible to the Houses of Parliament and to the Legislative Assemblies.

962. In a democracy the determination of the right policies to be pursued can only be determined by a majority vote cast at election and then by a majority of the elected representatives in the legislature. Democracy proceeds on the faith in the capacity to elect their representatives, and faith in the representatives to represent the people. The argument that the Constitution of India could be subverted or destroyed might have hortative appeal but it is not supportable by the actual experience in our country or in any country. The two basic postulates in democracy are faith in human reason and faith in Human nature. There is no higher faith than faith in democratic process. Democracy on adult suffrage is a great experiment in our country. The roots of our democracy are in the country and faith in the common man. That is how Mr. Seervai said that between 1951 when this Court recognised in Sankari Prasad case unlimited power of amendment till Golak Nath decision in 1967 the normal democratic process in our country functioned as provided by the Constitution.

963. The principle underlying the theory of taking consequences into account is best expressed in Vacher & Sons v. London Society of Compositors 1913 A.C. 107, where it was said that if any particular construction in construing the words of a statute was susceptible to more than one meaning, it was legitimate to consider the consequences which would result from any particular construction. The reason is that there are many things which the legislation is presumed not to have intended to bring about and therefore a construction which would not lead to any of these things should be preferred to one which would lead to one or more of them.

964. The doctrine of consequences has no application in construing a grant of power conferred by a Constitution. In considering a grant of power the largest meaning should be given to the words at the power in order to effectuate it fully. The two exceptions to this rule are these. First, in order to reconcile powers exclusively conferred on different legislatures, a narrower meaning can be given to one of the powers in order that both may operate as fully as is possible. (See C.P. & Berar case 1938 F.C.R. 18 and Province of Madras v. Governor General 72 I.A. 93. Second, technical terms must be given their technical meaning even though it is narrower than the ordinary or popular meaning. The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. MANU/SC/0152/1958 : [1959]1SCR379 . In our Constitution powers are divided between federation and the States. An attempt must be made to find the power in some entry or other because it must be assumed that no power was intended to be left out.

965. The theory of consequences is misconstrued if it is taken to mean that considerations of policy, wisdom and social or economic policies are included in the theory of consequences. In Vacher case it was said that the judicial tribunal, has nothing to do with the policy of any Act and the only duty of the Court is to expound the language of the Act in accordance with the settled rules of construction. In Attorney General for Ontario v. Attorney General for Dominions 1912 A.C. 571 the Privy Council refused to read an implication in the Constitution of Canada that there was no power to refer a matter for the advisory opinion of the highest Court because advisory opinions were prejudicial to the correct administration of justice and were embarrassing to Judges themselves who pronounced them, for humanly speaking it would be difficult for them to hear a case on merits if they have already expressed an opinion. The Privy Council rejected this argument and said that so far as it was a matter of wisdom and policy it was for the determination of Parliament. In Bank of Toronto v. Lambe (1887) 12 A.C. 575 the Privy Council was invited to hold that the legislature of a province could not levy a tax on capital stock of the Bank, for that power might be exercised to destroy the Bank altogether. The Privy Council observed that if on a true construction of Section 92 of the British North America Act the power fell within the section, it would be wrong to deny its existence because by some possibility it might be abused.

966. The absurdity of the test of the worst that can be done in exercise of power is demonstrated by the judgment of Chief Justice Taft in Gross-man 69 L.Ed. 52769 L.Ed. 527 where it was said that if those who were in separate control of each of the three branches of Government were bent upon defeating the action of the other, normal operations of Government would come to a halt and could be paralysed. Normal operations of the Government assume that all three branches must co-operate if Government is to go on. Where the meaning is plain the Court must give effect to it even if it considers that such a meaning would produce unreasonable result. In the Bihar Land Reforms case MANU/SC/0019/1952 : [1952]1SCR889 Mahajan, J. said that agrarian laws enacted by the legislature and protected by Articles 31(3) and (4) provided compensation which might appear to the Court unjust and inequitable. But the Court gave effect to Articles 31(3) and (4) because the results were intended and the remedy for the injustice lay with the legislature and not with the Court. The construction to avoid absurdity must be used with great caution.

967. In Grundt case 1948 Ch. 145 it was said in choosing between two possible meanings of ambiguous words, the absurdity or the non-absurdity of one conclusion as compared with another might be of assistance and in any event was not to be applied as to result in twisting the language into a meaning which it could not bear.

968. The Attorney General rightly submitted that if power is conferred which is in clear and unambiguous language and does not admit of more than one construction there can be no scope for narrowing the clear meaning and width of the power by considering the consequences of the exercise of the power and by so reading down the power. The question is not what may be supposed to be intended but what has been said. See Ross v. Illison 1930 A.C. 1. The Supreme Court in Damselle Howard v. Illinois Central Rail Road Co. 207 U.S. 463 said that you cannot destroy in order to save or save in order to destroy. The real import is that a new law cannot be made by construction. The question is one of intention. A meaning cannot be different which it cannot reasonably bear or will be inconsistent with the intention. The very basis of Parliamentary democracy is that the exercise of power is always subject to the popular will and popular control. The petitioner's theory of implied and inherent limitations is a repudiation of this democratic

process. The underlying theory of democratic government is "the right of a majority to embody their opinion in law subject to the limitations imposed by the Constitution", per Holmes, J. in Lochner v. New York 198 U.S. 45. In our Constitution Article 368 contains no express limitation on the amendment of any provision of the Constitution.

969. Mr. Palkhivala relied on the amending provisions in the Constitution of America, Canada, Australia, Ireland and Ceylon and also decisions on the power of amendment in those countries in support of his submissions that a restricted meaning should be attributed to the word "amendment" and implied and inherent limitations should be read into the meaning and power of amendment.

970. Mr. Palkhivala also relied on the opinion of Cooley in a Treatise on the Constitutional Limitations at pages 36-37 that "a written Constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extern, and incapable of definition". This view of Cooley is not relevant to the amending power in Article V of the American Constitution. This view relates to the legislative power that a written Constitution is a limitation upon the powers of the Government, namely, the legislature, the executive and the judiciary.

971. The other views of Cooley in Constitutional Limitations at pages 341-343, 345-348, 351-354 are these. First except where the Constitution has imposed limitations upon the legislative power it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. Second, in the absence of Constitutional restraint the legislative department of a State Government has exclusive and ample power and its utterance is the public policy of the State upon that subject, and the Courts are without power to read into the Constitution a restraint of the legislature with respect thereto. Third, if the Courts are not at liberty to declare statutes void because of their apparent injustice of impolicy, neither can they do so because they appear to the minds of the Judges to violate fundamental principles of republican Government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of republican government are not a set of inflexible rules, vital and active in the Constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity. Fourth, the Courts are not at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words.

972. Mr. Palkhivala relied on the views of George Skinner published in (1919) 18 MLR 21 to build the theory of implied and inherent limitations. The views extracted are these. The power given by the Constitution cannot be construed to authorise a destruction of other powers in the same instrument. The essential form and character of the Government, being determined by the location and distribution of power, cannot be changed, only the exercise of governmental functions can be regulated. A somewhat different view of Skinner in the same Law Review is that it is not likely that the Supreme Court would put any limitations upon the power of Congress to propose amendments and in construing the Fifth Article it would be unwilling to say Congress had proposed an amendment which it did not deem necessary. The discretion is left entirely with Congress.

973. The other view on which Mr. Palkhivala relied is of William L. Marbury published in (1919) 33 HLR 223. The views which Mr. Palkhivala extracted are that it may be safely premised that the power to amend the Constitution was not intended to include the power to destroy it. Marbury relies on Livermore v. Waite 102 Cal. 118 where it is stated that the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.

974. There are other views of Marbury on which the Attorney General relied and which were not extracted by Mr. Palkhivala. Those views are that after excluding from the scope of its amending power in Article V of the American Constitution such amendments as take away legislative powers of the State there is still left a very broad field for its operation. All sorts of amendments might be adopted which would change the framework of the federal Government, the thing which the Constitution was created to establish, which would change the distribution of power among the various departments of the Government, place additional limitations upon them, or abolish old guarantees of civil liberty and establish new ones.

975. The Attorney General also relied on the view of Frierson published in 33 HLR 659 as a reply to Marbury. Frierson's view is that the security for the States was provided for by the provision for the necessity of ratification by three-fourths of the States. The Constitution committed to Congress and not to the Courts the duty of determining what amendments were necessary. The rights of the States would certainly be safer in the hands of three-fourths of the States themselves. This is considered by the framers of the Constitution to ensure integrity of States.

976. The Attorney General also relied on the view of McGovney published in Vol. 20 Columbia Law Review. McGovney points out a distinction between a political society or State on the one hand and governmental organs on the other to appreciate that Constitutional limitations are against governmental organs. The writer's view is that an individual has no legal rights against a sovereign organised political society except what the society gives. The doctrine of national sovereignty means that people who made the existing distribution of powers between the federal and the State Governments may alter it. Amendment is left to legislatures because as a matter of convenience the legislatures generally express the will of the people. In the Constitution the people prescribe the manner in which they shall amend the Constitution. McGovney states that an amendment of a particular statute means usually it is a change germane to the subject matter of that statute. Any change in the Government of the nation is germane to the Constitution. Any change altering the dispositions of power would therefore be germane to the purposes of the instrument. McGovney's view is that it is clear that no limitation on the amending power can be found in this notion of necessity for germaneness.

977. The Attorney General also relied on an Article "On the views of W.F. Dodd published in 30 Yale Law Journal p. 321 seq. and of H.W. Taft, published in 16 Virginia Law Review p. 647 seq. The view of Dodd is this. There are no implied limitations on the amending power. The Supreme Court in the National Prohibition cases rejected the arguments presented in favour of implied limitations. To narrow down the meaning of amendment or to adopt implied limitations would not only narrow down the use of the amending power but would also leave the question of amending power in each case to judicial decision without the guidance of any legal principle. Taft's view is that by reason of the Tenth Amendment which provided that the powers not delegated to the United

States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people, the amending power in Article V of the American Constitution was not limited by the Tenth Amendment

978. The question which has arisen on the Fifth Article of the American Constitution is whether there are implied limitations upon the power to amend. The two express limitations were these. First, no amendment which may be made prior to 1808 shall in any manner effect the First and the Fourth clauses in the Ninth Section of the First Article. That Limitation became exhausted by passage of time. The second express limitation is that no State without its consent shall be deprived of its equal suffrage in the Senate. The express limitation is to safeguard the equal representation of the smaller States in the Senate. The limitation can only be changed by unanimous consent of the States.

979. The 18th Amendment was vigorously attacked in the National Prohibition Cases on the ground that it overstepped alleged implied limitations on the Constitution amending power. The arguments advanced were these. First, the 18th Amendment which introduced prohibition was not in fact an amendment for an amendment is an alteration or improvement of that which is already contained in the Constitution and the term is not intended to include any addition of entirely new grants of power. Secondly, the amendment was not an amendment within the meaning of the Constitution because it is in its nature legislation and that an amendment of the Constitution can only affect the powers of government and cannot act directly upon the rights of individuals. Third, that the Constitution in all its parts looks to an indestructible nation composed of indestructible States. The power of amendment was given for the purpose of making alterations and improvements and any attempt to change the fundamental basis of the Union is beyond the power delegated by the Fifth Article. The decision in the National Prohibition Cases is that there is no limit on the power to amend the Constitution except that State may not without its consent be deprived of its equal suffrage in the Senate.

980. In Rhode Island v. Palmer 253 U.S. 350 the 18th Amendment was challenged to be not within the purview of Article V. The judgment in Rhode Island case was that the amendment was valid. In Rhode Island case the grounds of attack were that the amendment was legislative in character and an invasion of natural rights and an encroachment on the fundamental principles of dual sovereignty but the contentions were overruled.

981. In Hawke v. Smith 253 U.S. 221 a question arose as to whether the action of the General Assembly of Ohio ratifying the 18th Amendment known as National Prohibition could be referred to the electors of the State under the provisions of the State Constitution. It was held that these provisions of the State were inconsistent with the Constitution of the United States. The decision of the Court was unanimous. The two methods of ratification prescribed by Article V of the Constitution are by action of the legislatures of the three-fourths of the States or conventions in the like number of States. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution. That power is conferred upon Congress. Article V was held to be plain and to admit of no doubt in its interpretation. The choice of means of ratification was wisely withheld from conflicting action in the several States.

982. Again, in Lesser v. Garnett 258 U.S. 130 there was a suit to strike out the names of women from the register of voters on the ground that the State Constitution limited suffrage to men and that the 19th Amendment to the Federal Constitution was not validity adopted. The 19th Amendment stated that right of citizens to vote shall not be denied on account of sex. It was contended that the amending power did not extend to that situation. The Supreme Court there rejected that contention. The Supreme Court said that the function of a State legislature in ratifying the proposed amendment to the federal Constitution like the function of Congress in proposing the amendment is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.

983. In United States v. Sprague 282 U.S. 716 a contention was advanced that the 10th Amendment recognised a distinction between powers reserved to the States and powers reserved to the people and that State legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several states. The 18th Amendment being of the latter character, the ratification by State legislatures was contended to be invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exceptions into it by implication.

984. The decisions in Rhode Island v. Palmer 253 U.S. 350, Hawke v. Smith 253 U.S. 221, Leser v. Garnett 258 U.S. 130 and United States v. Sprague 282 U.S. 716 are all authorities for the proposition that there is no implied limitation on the power to amend. The 18th Amendment was challenged on the ground that ordinary legislation could not be embodied in a Constitutional amendment and that Congress cannot Constitutionally propose any amendment which involves the exercise or relinquishment of the sovereign powers of a State. The 19th Amendment was attacked on the narrower ground that a State which had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing. The Supreme Court brushed aside these arguments as wholly unworthy of serious attention and held both the amendments valid.

985. Mr. Palkhivala contended the word "amendment" in Article 368 would take its colour from the words "change in the provisions" occurring in the proviso. The American decisions illustrate how the Supreme Court consistently rejected the attempts to limit the meanings of the word "amend" in Article V of their Constitution because of the reference to ratification by legislatures or conventions. Where words are read in their context there is no question of implication for context means parts that precede or follow any particular passage or text and fix its meaning.

986. The rule of noscitur a sociis means that where two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.

987. This rule has been found to have no application to Article V of the American Constitution because conventions and legislatures are both deliberative bodies and if an amendment can be submitted either to the legislatures of States or to conventions at the absolute discretion of the Congress, it is difficult to say that the character of the amendment is in any way affected by the machinery by which the amendment is to be ratified. In Rhode Island case the contention that an

amendment of the Constitution should be ratified by conventions and not by legislatures was rejected. In Sprague case the contention that matters affecting the liberty of citizens could only be ratified by conventions was not accepted and the Supreme Court refused to read any implication into Article V of the American Constitution. The Supreme Court said that in spite of the clear phraseology of Article V, the Court was asked to insert into it a limitation on the discretion conferred on it by the Congress. The Supreme Court did not accept any implied limitation. Where the intention is clear there is no room for construction and no excuse for interpolation or addition. In Feigenspan v. Bodine 264 F. 186 it has been said when the people delegated the power of amendment to their representatives the power of amendment cannot be excluded in any way other than prescribed nor by any instrumentality other than there designated.

988. Mr. Palkhivala relied on some Canadian decisions the Initiative and Referendum case 1919 A.C. 935, Switzmen v. Elbling 1957 Canada Law Reports 285, Rex v. Hess (1949) 4 DLR 199; and Saumur v. City of Quebec and Attorney General of Quebec (1953) 4 D.L.R. 641 and Chabot v. School Commissioners of Lamorandiere and Attorney General for Quebec (1958) 12 D.L.R. 796, in support of three propositions. First, unlimited legislative jurisdiction of the Dominion Parliament in Canada is under inherent limitation by reason of the preamble to the British North America Act which states that the Constitution is similar in principle to the United Kingdom. Second, the Dominion legislature cannot detract from the basic rights of freedom of speech and political association which are available in the United Kingdom. Third, rights which find their source in natural law cannot be taken away by positive law.

989. In the Initiative and Referendum case the Judicial Committee said that Section 92 of the British North America Act entrusted legislative power in a province to its legislature and to that legislature only. A power of legislation enjoyed by a provincial legislature in Canada can while preserving its own capacity intact seek the assistance of subordinate agencies as in Hodge v. Queen 9 AC 117 the legislature of Ontario was held to be entitled to entrust to the Board of Commissioners authority to enact regulations. It does not follow that such a legislature can create and endow with its own capacity a legislative power. The Initiative and Referendum case decided that in the absence of clear and unmistakable language the power which the Crown possessed through a person directly representing the Crown could not be abrogated. The Lieutenant Governor under the British North America Act referred to as the B.N.A. Act was an integral part of the legislature. The Initiative and Referendum Act was found to be one which wholly excluded the Lieutenant Governor from legislative authority. The only powers of veto and disallowance preserved by the Initiative and Referendum Act were related to acts of legislative Assembly as distinguished from Bills. therefore the powers of veto and disallowance referred to could only be those of the Governor General under Section 90 of the B.N.A. Act and not the powers of the Lieutenant Governor which are at an end when a Bill has become an Act. Section 11 of the Act provided that when a proposal for repeal of some law has been approved by majority of the electors voting that law is automatically to be deemed repealed, at the end of 30 days after the publication in the Gazette. Thus the Lieutenant Governor appears to be wholly excluded from the legislative authority. The Initiative and Referendum decision related to an Act of the legislature and secondly to the Act being ultra vires the provisions of the B.N.A. Act. This is not at all, relevant to the amending power of a Constitution. The Act was found to be invalid because the machinery which it provided for making the Laws was contrary to the machinery set up by the B.N.A. Act. The impugned Act rendered the Lieutenant Governor powerless to prevent a law which had been

submitted to voters from becoming an actual law if approved by the voters. The impugned Act set up a legislature different from that constituted by the B.N.A. Act and this the legislature had no power to do.

990. The other Canadian decisions are based on three views. The first view is based on the preamble to the B.N.A. Act that the Provinces expressed their desire to be federally united into one Dominion, with a Constitution similar to that of the United Kingdom. The corollary extracted from the preamble is that neither Parliament nor Provincial legislatures may infringe on the traditional liberties because of the Preamble to the B.N.A. Act and a reference to British Constitutional History. The second view expressed in the decisions is that the basic liberties are guaranteed by implication in certain sections of the B.N.A. Act. Section 17 establishes a Parliament for Canada. Section 50 provides that no House of Commons shall continue longer than five years. These sections are read by the Canadian decisions to mean that freedom of speech and freedom of political association should continue. The third view is that some rights find their source in natural law which cannot be taken away by positive law.

991. The first view found expression in Switzman case. There was an Act respecting communistic propaganda. The majority Judges found that the subject matter was not within the powers assigned to the Province by Section 92 of the B.N.A. Act. They further held that the Act constituted unjustifiable interference with freedom of speech and expression essential under the democratic form of government established in Canada. The Canada Elections Act, the B.N.A. Act provided for election of Parliament every five years, meeting of Parliament once a year. It was contended that it was implicit in all legislations the right of candidates to criticise, debate and discuss political, economic and social principles.

992. This case raised a question of jurisdiction of the Court to grant bail. Under Section 1025A of the Criminal Code a person was detained in custody. Section 1025A provided that an accused might be detained in custody without bail pending an appeal to the Attorney General.

993. The Saumur case related to a municipal bye-law requiring permission for distribution of books and tracts in the city streets. The Saumur case relied on the observations of Duff, C.J. in Re Albert Legislation 1938 S.C.R. 100 that the right of free public discussion on public affairs is the breath of life for parliamentary institutions.

994. In Chabot case public schools in the Province of Quebec were operated by School Commissioners elected by tax payers of whom the religious majority were Catholics. A dissident tax payer raised the question as to whether dissidents might establish their own schools or they might send them to a school of a neighbouring municipality and thereupon become exempt from paying tax. The majority held that certain regulations passed by the Catholic Committee were intra vires because they must be construed as confined to Catholic children.

995. The Canadian decision show first that certain Judges relying on the Preamble to the B.N.A. Act that the Canadian Constitution is to be similar in principle to that of the United Kingdom raised the vires of some of the legislations affecting freedom of speech. Secondly, the Canadian Constitution was given by the British Parliament and if the Judges who used such dicta referred to that part of the Preamble they were emphasising that the rights of the Canadian people were similar

to those in England. Thirdly, it has to be remembered that the Canadian Constitution has been developed through usage and conventions.

996. None of these decisions relates to amendment of the Constitution. None of these decisions indicates that there is any inherent limitation on the amendment of the Constitution. The Preamble to the B.N.A. Act shows that the Canadian Constitution enjoined observance of fundamental principles in British Constitutional practice. The growth of the Canadian Constitution was through such usage and convention. Our Constitution is of a sovereign independent republican country. Our Constitution does not draw sustenance from any other Constitution. Our Constitution does not breathe through conventions and principles of foreign countries.

997. There are no explicit guaranteed liberties in the British North America Act. In Canada the Constitutional issue in civil liberties legislation is simply whether the particular supersession or enlargement is competent to the Dominion or the Province as the case may be. Apart from the phrase "civil rights in the Province" in Section 92(13) there is no language in Sections 91 and 92 which even remotely expresses civil liberties values.

998. The Canadian Bill of Rights assented to in 1960 in Section 2 states that every law of Canada shall unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill, of Rights be so construed and applied as not to abrogate, or infringe or authorise abrogation abridgement or infringement of any of the rights of freedom recognised and declared. The view of Laskin in Canadian Constitutional Law (3rd Edition) (1969) is that in terms of legislative power the political liberties represent independent Constitutional values which are exclusively in federal keeping. Since the enactment of the Canadian Bill of Rights the question has hardly any substantive effect because the Canadian Parliament can make a declaration in terms of Section 2 of the Bill of Rights that a law abrogating a freedom in the Bill of Rights is operative.

999. Mr. Palkhivala relied on the Australian decisions in Taylor v. Attorney General of Queensland 23 C.L.R. 457 and Victoria v. Commonwealth 45 ALJ 251 in support of the proposition that there is inherent and implied limitation on the power of amendment.

1000. In Taylor case the Parliamentary Bills Referendum Act of 1908 was challenged. The Parliament Bills Referendum Act provided that when a Bill passed by the Legislative Assembly in two successive sessions has in the same two sessions been rejected by the Legislative Council, it may be submitted by referendum to the electors, and, if affirmed by them, shall be presented to the Governor for His Majesty's assent, and upon receiving such assent the Bill shall become an Act of Parliament in the same manner as if passed by both Houses of Parliament, and notwithstanding any law to the contrary. The Australian States Constitution Act, 1907 provided that it shall not be necessary to reserve, for the signification of His Majesty's pleasure thereon, any Bill passed by the legislatures of any of the States if the Governor has previously received instructions from His Majesty to assent and does assent accordingly to the Bill.

1001. In 1915 the Legislative Assembly of Queensland passed a Bill to amend the Constitution of Queensland by abolishing the Legislative Council. The Bill was passed by the Legislative Assembly. The Legislative Council rejected the Bill. The Legislative Assembly again passed the

Bill The Legislative Council again rejected the Bill. The Governor in accordance with the Parliamentary Bills Referendum Act 1908 issued regulations providing for the taking of the Referendum polls. It was argued that the Constitution ought to have been first amended.

1002. The questions for the opinion of the Court were : (1) Is the Constitution Act, Amendment Act of 1908 a valid and effective Act of Parliament? (2) Is the Parliamentary Bills Referendum Act of 1908 a valid and effective Act of Parliament ? (3) Is there power to abolish the Legislative Council of Queensland by an Act passed in accordance with the provisions of the Parliamentary Bills Referendum Act of 1908 ? (4) Was the Referendum valid ?

1003. The Colonial Laws Validity Act 1865 in Section 5 conferred full power on every representative legislature to make laws respecting the Constitution, powers and procedures of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial laws for the time being in force in the said colony. The Parliamentary Bills Referendum Act was held to be an Act respecting the powers of the legislature. Section 5 of the Colonial Laws Validity Act provided the authority for the legislation.

1004. Mr. Palkhivala extracted three propositions from the Taylor case. First, probably the power to make laws respecting the Constitution, power and procedure of such legislature does not extend to authorise the elimination of the representative character of the legislature within the meaning of the Act p. 468 per Barton, J. Second, probably the representative character of the legislature is a basic condition of the power relied on, and is preserved by the word "such" in the collocation of words in the Constitution "of such legislature" p. 474 per Issacs, J. Third, when power is given to a Colonial legislature to alter the Constitution of the legislature that must be read subject to the fundamental conception that consistently with the very nature of the Constitution as an Empire, the Crown is not included in the ambit of such power p. 474 per Issacs, J.

1005. The decision in Taylor case was to the effect that the Acts did not alter the representative character of the legislature as defined in Section 1 of the Colonial Laws Validity Act, 1865, nor did they affect the position of the Crown. The first two propositions on which Mr. Palkhivala relied, namely, the observations of Barton and Issacs, JJ. p. 468 and p. 474 were both prefaced by the word "probably" which amply shows that the observations are obiter. The question whether the representative character of the legislature could be changed or whether the Crown could be eliminated did not call for decision. The other learned Judges Gavan Duffy and Rich, JJ. said "It may perhaps be that the legislature must always remain a representative legislature as defined by the statute, but it is unnecessary in the present case to determine whether that is so or not".

1006. Issacs, J. held in that case that the word "legislature" did not include the Crown because Section 7 of the Colonial Laws Validity Act used the expression "legislature" followed by the words "or by persons or bodies of persons for the time being acting as such legislature" to show that the legislature was exclusive of the Crown. The assent of the Queen or the Governor was thus regarded as an additional factor. therefore, Issacs, J. said that when a power is given to the Colonial legislature to alter the Constitution that must be read subject to the fundamental conception, that the Crown is not included in the ambit of such power. Those observations are made in the context of the provisions of the Colonial Laws Validity Act where a "colony" as defined to include all of

Her Majesty's possessions abroad". The observations therefore mean that when power to alter the Constitution was conferred upon a colony which is a part of Her Majesty's possessions abroad it is reasonable to assume that such power did not include power to eliminate the Queen as a part of a colonial legislature.

1007. The representative character of the legislature does not involve any theory of implied limitation on the power of amendment. Such legislature as was emphasised by Issacs, J. shows that the limitation on the power of amendment flowed from express language of Section 5 of the Colonial Laws Validity Act and was not dependent upon any implication.

1008. In the State of Victoria case the validity of the Pay-Roll Tax Act, 1941 was impugned on the ground that it was beyond the legislative competence of the Commonwealth. The Pay Roll Tax Assessment Act 1941-69 made the Crown liable to pay tax on the wages payable to named categories of employees of the State of Victoria. The Commonwealth Parliament, in the exercise of its power under Section 51(ii) of the Constitution to make laws with respect to taxation, but so as not to discriminate between States or parts of State was held competent to include the Crown in right of a State in the operation of a law imposing tax or providing for the assessment of a tax. The inclusion of the Crown in right of a State in the definition of "employed" in Section 3(1) of the Pay-Roll Tax Assessment Act 1941-1969 thus making the Crown in right of a State liable to pay the tax in respect of wages paid to employees including employees of departments engaged in strictly governmental functions was also held to be a valid exercise of the power of the Commonwealth under Section 51 of the Constitution. Section 114 of the Constitution enacts ban on the imposition by the Commonwealth of a tax on property of a State. This ban was not offended. A law which in substances takes a State or its powers or functions of government as its subject matter is invalid because it cannot be supported upon any grant of legislative power, but there is no implied limitation on Commonwealth legislative power under the Constitution arising from the federal nature of the Constitution. There was no necessary implication restraining the Commonwealth from making a law according to the view of three learned Judges. Four other learned Judges held that there is an implied limitation as lack of Commonwealth legislative power but the Act did not offend such limitation.

1009. The limitation which was suggested to be accepted was that a Commonwealth law was bad if it discriminated against States in the sense that it imposed some special burden or disability upon them so that it might be described as a law aimed at their restriction or control.

1010. In the Australian case Barwick, C.J. stated that the basic principles of construction of the Australian Constitution were definitely enunciated in the Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129 which unequivocally rejected the doctrine that there was an implied prohibition in the Constitution against the exercise in relation to a State of a legislative power of the Commonwealth in accordance with the ordinary rules of Constitution.

1011. Mr. Palkhivala relied on some Irish cases in support of theory of implied and inherent limitations.

1012. In Rayan case 1935 Irish Report 170 the validity of amendment of Article 50 of the Irish Constitution which came into existence in 1922 fell for consideration. Article 50 provided that

within 8 years from the commencement of the Constitution amendments to the Constitution were to be made by ordinary legislation. After the expiry of 8 years amendments were to be made by referendum. The other provision in Article 50 was that amendment "shall be subject to the provisions of Article 47" of the Constitution. Article 47 made provisions for the suspension in certain events of any Bill for a period of 90 days and for the submission of any bill so suspended to referendum if demand should be made. By an Amendment Act in 1928 reference to the provisions of Article 47 was repealed. In 1929 before the expiry of 8 years there was an amendment of the Constitution whereby the period of 8 years was changed to 16 years. Both the amendments were upheld. Amendment were challenged on two grounds : First, that many Articles of the Constitution are so fundamental as to be-incapable of alteration. Second, Article 50 does not authorise any change in these fundamental Articles.

1013. The decision of the Judicial Committee in Moore and Ors. v. Attorney General for the Irish Free State and Ors. 1935 A.C. 484 throws a flood of light on the question of amendment of the amending power in a written Constitution. The Treaty and the Constituent Act scheduled to the Irish Free Constitution Act, 1922 being parts of an Imperial Act formed parts of the statute law of the United Kingdom. The first clause of the Treaty provided that Ireland shall have the same Constitutional status in the community of nations known as the British Empire as the Dominion of Canada, Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa with a Parliament having force to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament and shall be styled and known as the Irish Free State. The second clause of the Treaty provided that the law practice and Constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State. Of the Articles of the Constitution, Article 12 created a legislature known as the Oireachtas and the sole and exclusive power of making laws for the peace, order and good government of the Irish Free State was vested in the Oireachtas.

1014. Article 50 provided that amendments of the Constitution within the terms of the Scheduled Treaty might be made by the Oireachtas. Article 66 provided that the Supreme Court of the Irish Free State would have appellate jurisdiction from all decisions of the High Court and the decision of the Supreme Court would be final and conclusive. The proviso to that Article stated that nothing in the Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council. The proviso to Article 66 was inserted to give effect to Article 2 of the Treaty and hence under Article 50 of the Constitution it was argued that the proviso to Article 66 could not be amended in the way it was sought to amend it by abolishing the right of appeal. Article 50 contained another limitation that amendments within the terms of the Treaty might be made. Clause 2 of the Treaty provided that relations with the Imperial Parliament should be the same as the Canadian. By Amendment Act No. 6 of 1933 the words "within the terms of the Treaty" were deleted from Article 50. Thereafter Amendment Act No. 22 of 1933 was passed abrogating right of appeal to the Privy Council.

1015. The Judicial Committee in Moore case noticed that "Mr. Wilfrid Greene for the petitioners rightly conceded that Amendment Act No. 16 of 1929 which substituted for the 8 years specified in Article 50 as the period during which amendment might be made without a referendum a period

of 16 years was regular and that the validity of the subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum.

1016. It was argued by Mr. Greene in that case that the Constituent Assembly having accomplished its work went out of existence leaving no successor and no body in authority capable of amending the Constituent Act. The argument was in effect that the Constitution was a semi rigid Constitution that is one capable of being amended in detail in the different Articles according to their terms, but not susceptible of any alteration so far as concerns the Constituent Act, unless perhaps by the calling together of a new Constitution assembly by the people of Ireland. The decision of the Supreme Court of Ireland in Ryan case was referred to by the Judicial Committee. The Judicial Committee held that the Oireachtas had power to repeal or amend the Constitution Act and in repealing or amending of parts of an imperial Statute, namely, the Irish Free State Constitution Act, 1922 what the Oireachtas did must be deemed to have been done in the Way in which alone it could legally be done, that is by virtue of the powers given by the statute. The abolition of appeals to Privy Council was a valid amendment.

1017. The decision in Liyanage v. Queen (1967) 1 A.C. 259 was also relied on by Mr. Palkhivala for the theory of implied and inherent limitations. The Criminal Law Amendment Act passed by the Parliament of Ceylon in 1962 contained substantial modifications of the Criminal Procedure Code. There was ex post facto legislation of detention for 60 days of any person suspected of having committed an offence against the State by widening the class of offences for which trial without jury by three judges nominated by the Minister of Justice would be ordered. An arrest without warrant for waging war against the Queen became permissible and new minimum penalties for that offence were prescribed and for conspiring to wage war against the Queen and overawe the government by criminal force, and by widening the scope of that offence. The Act also provided for the admission in evidence of certain confessions and statements to the police inadmissible under the Evidence Code. The Act was expressed to be retrospective to cover an abortive coup d'etat on 27 January, 1962 in which Liyanage and others took part, and was to cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about the date of the commencement of the Act, whichever was later. The second Criminal Law Amendment Act of 1962 (No. 31 of 1962) substituted the Chief Justice for the Minister of Justice as the person to nominate the three Judges but left unaffected other provisions for the former Act.

1018. The Supreme Court of Ceylon convicted the appellants and sentenced them to 10 years rigorous imprisonment the minimum prescribed by the Criminal Law Act 1 of 1962.

1019. The Privy Council, held the legislation to be ultra vires on two grounds. The Acts could not be challenged on the ground that they were contrary to fundamental principles of Justice. The Colonial Laws Validity Act 1865 which provided that colonial laws should be void to the extent of repugnancy to an Act of the United Kingdom, and should not be void on the ground of repugnancy to the law of England did not leave in existence a fetter or repugnancy to some vague and unspecified law of natural justice. The Ceylon Independence Act 1947 conferred on the Ceylon Parliament full legislative powers of a sovereign independent State. The Acts were declared to be bad because they involved a usurpation and infringement, by the legislature of judicial powers inconsistent with the written Constitution of Ceylon. The silence of the Constitution as to the

vesting of judicial power was inconsistent with any intention that it should pass to or be shared by the executive or the legislature. The ratio of the decision is that the legislature could not usurp judicial power. There is an observation at page 289 of the report that Section 29(1) of the Ceylon Constitution confers power on Parliament to pass legislation which does not enable a law to usurp the judicial power of the judicature. The Judicial Committee answered the question which was posed as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority by stating that such a situation did not arise there and if any Act was passed without recourse to Section 29(4) of the Ceylon Constitution it would be ultra vires. The Judicial Committee found that under Section 29(4) of the Ceylon Constitution there could be an amendment only by complying with the proviso, which would be the manner and form and would not be a limitation on the width of the power. The Ceylon case is not an authority for the proposition of implied and inherent limitation on the amending power.

1020. In Liyanage case the Privy Council rejected the contention that powers of the Ceylon Legislation should be cut down by reference to the vague and uncertain expression "fundamental principles of British Law". In deciding whether the Constitution of Ceylon provided for a separation between the legislature and the judiciary the Privy Council did not refer to consequences at all, but referred to the fact that the provisions relating to the legislature and the judicature were found in two separate parts of the Constitution. The provisions for appointment of the subordinate judiciary by a Commission consisting exclusively of Judges with a prohibition against any legislator being a member thereof and the further provision that any attempt to influence the decision was a criminal offence were held by the Judicial Committee to show that the judiciary was intended to be kept separate from the legislature and the executive. This conclusion was based on a pure construction of the provisions of the Act. The reference to consequences was in a different context. The Privy Council recognised that the impugned law dealt with a grave exceptional situation and were prepared to assume that the legislature believed that it had power to enact it.

1021. Again in Kariappar case 1968 A.C. 717 the Judicial Committee considered a Ceylon Act which was inconsistent with the Ceylon Constitution. The Act imposed civic disabilities for 7 years on person to whom the Act applied and provided for the vacation of the scat as a Member of Parliament. The words amend or repeal in Section 29(4) of the Ceylon Constitution were read by the Judicial Committee to cover an amendment or repeal by inconsistent act. The plain words amend or repeal did not admit ambiguity.

1022. To introduce into our Constitution the doctrine of implied and inherent limitations on the meaning of the word "amendment" by upholding the power to amend the essential features but not the core on the theory that only people can change by referendum is to rewrite the Constitution. The decisions in Ranasinghe case 1965 A.C. 172 and Kariappar case 1968 A.C. 717 are authorities for two propositions. First, that in the exercise of the pouter of amendment a controlled Constitution can be converted into an uncontrolled one. Second, the word "amendment" means alteration. In Ibralebbe case 1964 A.C. 900 the Judicial Committee said that if the Ceylon legislature abrogated the appeal to the Privy Council it would be an amendment of its judicial structure.

1023. The decision in Mangal Singh v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 has been relied on by Mr. Palkhivala in support of the proposition that the power of amendment is subject to implied limitation. Article 4 of the Constitution which was interpreted in Mangal Singh case has to be read with Articles 2 and 3. Article 4 contains a limited power of amendment, limited to amend Schedules 1 and 4 as may be necessary to give effect to a law mentioned in Articles 2 and 3 and of making supplemental, incidental and consequential provisions. Shah, J. in Mangal Singh case said that power with which Parliament is invested by Articles 2 and 3 is a power to admit, establish or form new States or to admit, establish or admit new States which conform to the democratic pattern envisaged by the Constitution and is not a power to override the Constitutional scheme. It is manifest that when a new State is created in accordance with Articles 2 and 3 the amendment under Article 4 will be followed up as necessary to give effect to the same. Such an amendment does not override the Constitutional scheme. It is an amending power of a limited nature and is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution. This decision does not say that there are implied limitations to the amending power.

1024. The petitioner challenges the legality and the validity of the Constitution (25th) Amendment Act.

1025. The Constitution (25th) Amendment Act has first amended Article 31(2), second added Article 31 (2B) and third introduced Article 31C. Article 31(2) is amended in two respects. First, it substituted the word "amount" for the word "compensation" for property acquired or requisitioned. Second, it is provided that the acquisition or requisition law shall not be called in question on the ground that whole or any part of the amount is to be given otherwise than in cash. Article 31 (2B) has been inserted to the effect that nothing in Sub-clause (f) of Clause (1) of Article 19 shall effect any such law as is referred to in Clause (2).

1026. Article 31C states that notwithstanding anything contained in Article 13 no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19 or Article 31 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. It is provided that where such law is made by the legislature of a State the provisions of this Article shall not apply thereto unless such law having been reserved for the consideration of the President has received his assent.

1027. The basic controversy is really regarding the right to property and the acquisition of property by the State. The Constitution of India was intended to achieve political liberty on the one hand and economic and social, liberty on the other for all citizens of India. The Directive Principles in the Constitution are also fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. That is Article 37. It can be achieved by making changes in the economic and social structure of the society.

1028. The resolutions of the Congress in 1929, 1931, 1945 and the objective resolution of 22 January, 1947 and the resolution of All-India Congress Working Committee in 1947 are not only a remembrance of things past. In 1929 the Congress resolution was that it was essential to make

revolutionary changes in the economic and social structure of the society and to remove the gross inequalities. It was also resolved that political freedom must include the economic freedom of the starving millions. In such economic and social programme the State is to own or control the key industries and services, mineral resources, railways, waterways, shipping and other means of public transport. In 1945 the Working Committee said that the concentration of wealth and power in the hands of individuals and groups was to be prevented. Social control of the mineral resources and of the principal methods of production and distribution in land, industry and in other departments of national activity would be necessary to develop the country into cooperative commonwealth. In the case of industries which in their nature must be run on a large scale and on centralised basis, it was felt that they should belong to the community and they should be so organised that the workers become not only co-sharers in the profits but also increasingly associated with the management and administration of the industry. Land and all other means of production as well as distribution and exchange must belong to and be regulated by the community in its own interest. The framers of the Constitution wanted a social structure which would avoid the acquisitive economy of private capitalism and the regimentation of a totalitarian State.

1029. In this background the Constitution was created with the object of effecting social revolution. The core of the commitment to the social revolution lies in Part III and Part IV of the Constitution. They are described to be "conscience of the Constitution". The object of Part III was to "liberate the power of man equally for distribution to the common good". The State would have to bear the responsibility for the welfare of citizens. The Directive Principles are a declaration of economic independence so that our country men would have economic as well as political control of the country.

1030. The center of the fundamental rights is said by Mr. Palkhivala to be Articles 14, 19 and 31. It is right to property. But the Directive Principles are also fundamental. They can be effective if they are to prevail over fundamental rights of a few in order to subserve the common good and not to allow economic system to result to the common detriment. It is the duty of the State to promote common good. If the motives for co-operating with others consist in the mere desire to promote their private good they would be treating their fellowmen as means only and not also an end. The notion of common good was needed to explain away the difference between the principles of reasonable self love and benevolence. The distribution of material resources is to subserve the common good. The ownership and control of the material resources is to subserve common good. The economic system is to work in such a manner that there is no concentration of wealth to the common detriment. Again, the economic system is to work in such a manner that the means of production are not used to the common detriment.

1031. The declaration of human rights on which Mr. Palkhivala relied for the unamendability of fundamental rights is rightly said by the Attorney General to be no impediment to the power of amendment nor to support the petitioner's contention regarding the inviolability of the right to property. For the purpose of promoting the general welfare in a democratic State the Directive Principles were said by the Attorney General to be fundamental in achieving rights of men and economic and social rights for human dignity. Every citizen asserts enjoyment for fundamental rights under the Constitution. It becomes the corresponding duty of every citizen to give effect to fundamental rights of all citizens, dignity of all citizens, by allowing the State to achieve the Directive Principles. The duty of the State is not limited to the protection of individual interest but

extends to acts for the achievement of the general welfare in all cases where it can safely act and the only limitations on the governmental actions are dictated by the experience of the needs of time. A fundamental right may be regarded as fundamental by one generation. It may be considered to be inconvenient limitation upon legislative power by another generation. Popular sovereignty means that the interest which prevails must be the interest of the mass of men. If rights are built upon property those who have no property will have no rights. That is why the State has to balance interest of the individual with the interest of the society. Industrial democracy is the necessary complement to political democracy. The State has to serve its members by organising an avenue of consumption. This can be done by socialisation of those elements in the common welfare which are integral to the well being of the community.

1032. The petitioner's challenge to the amendment on Article 31(2) is as follows. The right to property is one of the essential features of the Constitution. It is the hand maid to various other fundamental rights. The right to freedom of the Press under Article 19(1)(a) is meaningless if the publisher could be deprived of his printing plant and the building in which it is housed without compensation. The fundamental right under Article 19(1)(c) to form trade unions will be denuded of its true content if the property of a trade union could be acquired by the State without compensation. The right to practise any profession or carry on any occupation, trade or business under Article 19(1)(g) will be the right to do forced labour for the State if the net savings from the fruits of a citizen's personal exertion are liable to be acquired by the State without compensation. The freedom of religion in Article 26 will lose a great deal of its efficacy if the institutions maintained by a community for its religious and charitable purposes could be acquired without compensation. The implication of the proviso to Article 31(2) is that the State may fix such an amount for acquisition of the property as may abridge or abrogate any of the other fundamental rights. Exercise of fundamental rights would be affected by the deprivation of property without compensation in the legal sense and the only exception to this power of the State is the case of educational institution dealt with in the proviso. Article 31(2) as a result of the Constitution (25th) Amendment Act will empower the State to fix an amount on a basis which need not be disclosed even to the members of the legislature and which may have no relation to the property sought to be acquired. The amount is not to satisfy any of the principles of compensation. It need not be paid in cash and it will yet not be considered to be a ground of challenge to the validity of law. Article 31(2) has nothing to do with estate, zamindaries, land reforms or agrarian reforms which are specifically dealt with by Article 31A.

1033. The right to acquire, hold and dispose of property under Article 19(1)(f) is subject under Article 19(5) to reasonable restrictions in the interests of the general public If Article 19(5) permits such reasonable restrictions it is said by the petitioner that the only object of making Article 19(1)(f) inapplicable by Article 31(2B) is to enable acquisition and requisition laws to contain restrictions or provisions which are unreasonable and not in the public interest. Reliance was placed by Mr. Palkhivala on the Bank Nationalisation case MANU/SC/0011/1970 : [1970]3SCR530 and the observations at p. 577 that if Article 19(1)(f) applied to acquisition or requisition, law which permitted a property to be taken without the owner being heard where the rules of natural justice would require the owner to be heard, would be void as offending Article 19(1)(f). Extracting that observation it is said that the amount fixed without giving him a hearing or amending the Land Acquisition Act to provide that any man's land or house can be acquired

without notice to the owner to show cause or to prove what amount should be fairly paid to him for the property acquired will damage the essence or core of fundamental right to property.

1034. After the substitution of the neutral expression "amount" for "compensation" in Article 31(2) by the Constitution (25th) Amendment Act the Article still binds the legislature to provide for the giving to the owner a sum of money either in cash or otherwise. The legislature may either lay down principles for the determination of the amount or may itself fix the amount. Before the amendment the interpretation of Article 31(2) was that the law was bound to provide for the payment of compensation in the sense of equivalent in value of the property acquired. This was the interpretation given in the Bank Nationalisation case even after the Constitution 24th Amendment Act, which said that the adequacy of compensation could not be challenged. The Constitution 25th Amendment Act states that the law no longer need provide for the giving of equivalent in value of the acquired property. The quantum of the amount if directly fixed by the law and the principles for its quantification are matters for legislative judgment. Specification of principles means laying down general guiding rules applicable to all persons or transactions covered thereby. In fixing the amount the legislature will act on the general nature of the legislative power. The principle may be specified. The principle which may be acted upon by the legislature in fixing the amount may include considerations of social justice as against the equivalent in value of the property acquired. Considerations of social justice will include the relevant Directive Principles particularly in Article 39(b) and (c). These principles are to subserve the common good and to prevent common detriment. The question of adequacy has been excluded from Article 31(2) by the Constitution Fourth Amendment Act. It cannot be said that the legislature would be under the necessity of providing a standard to measure an adequacy with reference to fixing the amount. The Constitution does not allow judicial review of a law on the ground of adequacy of the amount and the manner as to how such amount is to be given otherwise than in cash.

1035. If the word "compensation" as it stood prior to the amendment of Article 31(2) must mean equivalent value in cash it is said by the Solicitor General that the concentration of wealth will remain unchanged and justice social, economic, and political amplified in Articles 39, 41, 42, 43, 45, 46 and 47 will be thwarted. The fulfilment of the Directive Principles is in a sense more fundamental than the mere right to property. Re-adjustment in the social order may not be practicable in a smooth manner unless the Directive Principles are effectively implemented. The emergence of a new social order is a challenge to present day civilisation. If nations wanted independence and supremacy in the latter half of the 19th century and the first half of the 20th century individual dignity, individual freedom, individual status in a well organised and well planned society are opening the frontiers since the mid-century. In this background the 25th Amendment protects the law in one respect, namely, that amount payable to the owner is no longer to be measured by the standard of equivalent in value of the acquired property. The quantum cannot be a matter for judicial review. Ever since the Fourth Amendment the adequacy of compensation is excluded by the Constitution. The reason is that the Constitution declares in clear terms that adequacy is not justiciable and therefore, it cannot be made justiciable in an indirect manner by holding that the same subject matter which is expressly barred is contained implicitly in some other provision and is, therefore, open to examination.

1036. Just as principles which were irrelevant to compensation were invalid prior to the Constitution 25th Amendment it was said that if any principles are adopted which are irrelevant to

the concept of amount as a legal concept or as having a norm the law would be invalid because the amount would be purely at the will or at the discretion of the State. therefore, it was said that when the law fixes the amount it might indicate the principles on which the amount had been arrived at or the Court might enquire into on which the amount had been fixed. Any contrary view according to the petitioner would mean that under Article 31(2) state would have authority to specify principles which could be arbitrary or specify the amount which could be arbitrary.

1037. It was also said that as a result of the proviso to Article 31(2) after the 25th Amendment the law providing for compulsory acquisition of property of an educational institution established by a minority referred to in Article 31(1) the State was to ensure that the amount fixed or determined was such as would not restrict or abrogate the right guaranteed under that clause. The amount would have to be higher than the amount which would be sufficient not to damage the essence of that right. But under Article 31(2) after the 25th Amendment where the proviso did not apply it was said that the core or essence of the fundamental rights would be damaged or destroyed.

1038. The word "amount" in Article 31(2) after the 25th Amendment is to be read in the entire collocation of words. No law shall be called in question in any Court on the ground that the amount so fixed or determined is inadequate or the whole or part of it or any part of such amount is given in cash. In Article 31(2) the use of the word "amount" in conjunction with payment in cash shows that a sum of money is being spoken of. Amount is a sum meaning a quantity or amount of money, or, in other words, amount means a sum of money.

1039. Article 31(2) prior to as well as after the 25th Amendment indicates two alternatives to the legislatures either to specify the principles for determination of the amount or to fix the amount or "compensation" prior to the amendment. In fixing the amount or compensation the legislature is not required to set out in the law the principles on which compensation had been fixed in the unamended clause or the amount is fixed in the amended clause.

1040. Article 19(1)(f) provides that all citizens shall have the right to hold, acquire or dispose of property whereas Article 31(2) deals with law by which the property is acquired. Such law acquiring property directly extinguishes the right to hold or dispose of property acquired. Article 19(1)(f) is excluded from Article 31(2) in order to make Article 31(2) self contained. The right to hold property cannot coexist with the right of the State to acquire property. That is why Article 31(2) is to be read with Article 31A, 31B and 31C, all the Articles being under the heading "Right to Property".

1041. It has been held by this Court in F.N. Rana case MANU/SC/0046/1963 : [1964]5SCR294 that Land Acquisition Act does not give the right of quasi-judicial procedure or the requirements of natural justice as Section 5A of that Act has been held to be administrative. It has also been held by this Court that a Requisition Act which did not give a right of representation before an order for requisition was made did not violate Article 19(1)(f). (See S.N. Nandi v. State of West Bengal MANU/SC/0049/1971 : [1971]3SCR791).

1042. The other part of the 25th Amendment which is challenged by the petitioner is Article 31C. Article 31C is said by Mr. Palkhivala to destroy several essential features of the Constitution for these reasons. First, there is a distinction between cases where the fundamental rights are amended

and laws which would have been void before the 25th Amendment are permitted to be validly passed and cases where the fundamental rights remain unamended but the laws which are void as offending those rights are validated by a legal fiction that they shall not be deemed to be void. The law is in the first case Constitutional in reality whereas in the second case the law is un-constitutional in reality but is deemed by a fiction of law not to be void with the result that laws which violate the Constitution are validated and there is a repudiation of the Constitution. If Article 31C is valid it would be permissible to Parliament to amend the Constitution so as to declare all laws to be valid which are passed by Parliament or State legislatures in excess of legislative competence or which violate basic human rights enshrined in Part III or the freedom of inter-State Trade in Article 301. Article 31C gives a blank charter to Parliament and the State legislatures to defy the Constitution or damage or destroy the supremacy of the Constitution. Secondly, Article 31C subordinates fundamental rights to Directive Principles. The right to enforce fundamental rights is guaranteed under Article 32. The Directive Principles are not enforceable by reason of Article 37. Yet it is said that while giving effect to Directive Principles fundamental rights are abrogated. Thirdly, whereas an amendment of a single fundamental right would require a majority of at least two-thirds of the members of Parliament present and voting, a law within Article 31C which overrides and violates several fundamental rights can be passed by a simple majority. Fourthly, every fundamental right is an essential feature of the Constitution and Article 31C purports to take away a large number of those fundamental rights. Fifthly, the Court is precluded from considering whether law under Article 31C is such that it can possibly secure Directive Principles in question. Sixthly, no State legislature can amend the fundamental rights or any other part of the Constitution but Article 31C empowers the State legislature to pass laws which virtually involve repeal of the fundamental rights. Power of amending the Constitution is delegated to State legislatures.

1043. Finally, it is said that the fundamental rights under Article 14, 19 and 31 which are sought to be superseded by Article 31C are necessary to make meaningful specific rights of the minorities which are guaranteed by Articles 25 to 30. The proviso to Article 31(2) shows that in the case of acquisition of property of an educational institution established by a minority an amount fixed should be such as not to restrict or abrogate the right of the minorities under Article 31. It is, therefore, said that the implication is that if property is acquired in cases other than those of minorities an amount can be fixed which restricts or abrogates any of the fundamental rights. Again, it is said that if a law violates the right of the minority under Articles 25 to 30 such a law would be no law. therefore, deprivation of property under such law would violate Article 31(1). But the 25th Amendment by Article 31C abrogates Article 31(1) and minorities can be deprived of their properties held privately or upon public, charitable or religious trusts by law which violates Articles 25 to 30.

1044. The pre-eminent feature of Article 31C is that it protects only law. therefore, any question of violation of Article 31(1) does not arise. Law referred to in Article 31C must be made either by Parliament or by the State legislature, according to the legislative procedure for enacting a law. There are several Articles in the Constitution where the expression "law" with reference to the authority to make law has been used. These are Articles 17, 19(2) to (6), 21, 22, 23(1), 26, 31, 33, 34 and 35. These Articles indicate that the expression "law" there means law made by the legislature in accordance with its ordinary legislative procedure. The expression "law" does not include within itself ordinance, order, bye-law; rule, regulation, notification, custom or usage

having the force of law nor an amendment of the Constitution in accordance with the procedure prescribed in Article 368. In Article 13 the term "law" has been used in a wide sense. For this a definition was given in Article 13(3) to include certain other categories. The definition in Article 13(3) is expressly limited for Article 13. Law in Article 31C must have the same meaning as it has in other Articles generally, namely, a statute passed by the legislature.

1045. It is true that such law may need details to be filled up by other agencies but the essential elements of Article 31C must be supplied directly by that enactment. A question arose with reference to Article 254 as to whether a clause of the Sugar Control Order 1955 made under the Essential Commodities Act had the effect of repealing the corresponding Uttar Pradesh State Law. This Court held that the power of repeal was vested in Parliament and Parliament alone could exercise it by enacting an appropriate provision in that regard. Parliament could not delegate the power of repeal to any executive authority. (See Ch. Tika Ramji and Ors. Etc. v. The State of Uttar Pradesh and Ors. MANU/SC/0008/1956 : [1956]1SCR393 .

1046. Article 31C is inextricably bound up with Article 39(b) and (c) because the purpose and the phraseology in both the Articles are essentially identified. The legislative efforts to implement Directive Principles in Article 39 (b) and (c) were set in motion in some States to achieve reforms in land law. Articles 31A and 31B were introduced by the Constitution First Amendment Act 1951. The main reason for introducing Articles 31A and 31B was to exclude the operation of Part III as a whole from those provisions. The true relationship between Directive Principles in Part IV and the fundamental rights in Part III became clear. It was realised that though the liberty of individual was valuable it should not operate as an insurmountable barrier against the achievement of Directive Principles. In Sajjan Singh case MANU/SC/0052/1964 : [1965]1SCR933 it was said that "the rights of society are made paramount and they are placed above those of the individual". In the Bihar Land Reforms case 1952 S.C.R. 889 it was said that "a fresh outlook which placed the general `interest of the community above the interest of the individuals, pervades over Constitution".

1047. Law contemplated in Article 31C will operate on the ownership and control of the material resources of the community to be distributed as best to subserve the common good. The operation of the economic system should not result in concentration of wealth. Means of production should not be used to the common detriment. The ownership and control of the material resources of the community can be achieved by nationalisation and planned economy. The operation of the economic system will mean imposition of control on the production, supply and distributions of products of key industries and essential commodities. There can be laws within Schedule 7 List III Entries No. 42, 43; List I Entry No. 52 to 54 and List II Entries No. 23, 24, 26 and 27.

1048. The provisions in Article 31C that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy was questioned by the petitioner to exclude judicial review and, therefore, to be illegal. Article 31C was in the second place said to enable the State legislatures to make discriminatory laws destructive of the integrity of India. Thirdly, Article 31C was said to delegate the amending power to State legislatures or Parliament in its ordinary legislative capacity.

1049. The declaration mentioned in Article 31C is for giving effect to the policy of the State towards securing the principles in Article 39 (b) or (c). Such a declaration in a law shall not be called in question on the ground that it does not give effect to such policy. The laws which receive protection under Article 31C are laws for securing the Directive Principles of Articles 39(b) and (c). The nexus or connection between the law and the objectives set out in Article 39(b) and (c) is a condition precedent for the applicability of Article 31C. On behalf of the Union and the State it was not contended that whether there was such nexus or not was not justiciable. The real reason for making the declaration free from question in a Court of law on the ground that it does not give effect to such policy is to leave legislative policy and wisdom to the legislature. The legislative measure might not according to some views give effect to Directive Principles. therefore, legislatures are left in charge of formulating their policy and giving effect to it through legislation. It is the assessment and judgment of such measures which is sought to be excluded from judicial review by the declaration.

1050. In order to decide whether a statute is within Article 31C the court may examine the nature and the character of legislation and the matter dealt with as to whether there is any nexus or the law to the principles mentioned in Article 39(b) and (c). If it appears that there no nexus between the legislation and the objectives and principles mentioned in Article 39(b) and (c) the legislation will not be within the protective umbrella.

The Court can tear the veil to decide the real nature of the statute if the facts and circumstances warrant such a course.

1051. The reason for excepting Articles 14, 19 and 31 from Article 31C is the same as in Article 31A. The Solicitor General rightly said that the fear of discrimination is allayed by three safeguards. The first and the foremost safeguard is the good sense of the legislature and the innate good sense of the community. The second safeguard is the President's assent. The third safeguard is that in appropriate cases it can be found as to whether there is any nexus between law and Directive Principles sought to be achieved. There is no better safeguard than the character of the citizen, the character of the legislature, the faith of the people in the representatives and the responsibility of the representatives to the nation. No sense of irresponsibility can be ascribed or attributed to the representatives of the people. The exclusion of Article 14 is to evolve new principles of equality in the light of Directive Principles. The exclusion of Article 19 is on the footing that laws which are to give effect to Directive Principles will constitute reasonable restrictions on the individual's liberty. The exclusion of Article 31(2) is to introduce the consideration of social justice in the matter of acquisition. Directive Principles are not limited to agrarian reforms. Directive Principles are necessary for the uplift and growth of industry in the country.

1052. Article 31(4) and 31(6) speak of certain class of laws not being called in question on the ground of contravention of Article 31(2). Article 31A relates to law of the class mentioned therein not to be void on the ground that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by Articles 14, 19 and 31. Article 15(4) states that nothing in Article 15 or in Article 29(2) shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 31(5)(b)(ii) states that nothing in Article 31(2) shall affect

the provisions of any law which the State may make for the promotion of public health. Article 33 speaks of law with regard to members of the Armed Forces charged with the maintenance of public order, so as to ensure the proper discharge of their duties and the maintenance of discipline among them and for that purpose the operation of some fundamental right in Part III is modified.

1053. The Solicitor General rightly said that similarly Article 31C creates a legislative field with reference to the object of legislation. It is similar to laws contemplated in Article 15(4), Article 31(5)(b)(ii) and Article 33. Each of these Articles carves out an exception to some Article or Articles conferring fundamental rights. The field carved out by the various Articles are of different dimensions. The entire process of exception of the legislative field from the operation of some of the Articles relating to fundamental rights is the mandate of the Constitution. It is wrong to say that the Constitution delegates power of amendment to Parliament or the States. As a result of the 25th Amendment the existing legislative field is freed from the fetters of some provisions of Part III of our Constitution on the legislative power.

1054. Article 31C substantially operates in the same manner in the industrial sphere as Article 31A operates in the agrarian sphere. The problems are similar in nature though of different magnitude. The Constitutional method adopted to solve the problem is similar. The Solicitor General is correct in summing up Article 31C as an application of the principles underlying Articles 31(4) and 31(6) and Article 31A to the sphere of industry.

1055. A class of legislation can be identified and the legislative field can be carved out from the operation of fundamental rights or some of those can be excluded by a provision of the Constitution. Articles 31(4) and 31(6) identify the laws with reference to the period during which they were made. Article 31(4) relates to a bill pending at the commencement of the Constitution in the legislature of a State to have been passed by such legislature and to have received the assent of the President to be not called in question on the ground that it contravenes Article 31(2). Article 31(6) relates to law of the State enacted not more than 18 months from the commencement of the Constitution to be submitted to the President for his certification and upon certification by the President not to be called in question on the ground of contravention of Article 31(2). Articles 31(2) and 31A identify the legislative field with reference to the subject matter of law. Articles 15(4) and 33 and Article 31(5)(b)(ii) identify laws with reference to the objective of the legislature. The exceptions to some part or some Articles of Part III of the Constitution is created by the Constitution and any law which is made pursuant to such power conferred by the Constitution does not amend the operation or application of these Articles in Part III of the Constitution. The crux of the matter is that modification or exception regarding the application of some of the Articles in Part III is achieved by the mandate of the Constitution and not by the law which is to be made by Parliament or State under Article 31C. therefore, there is no delegation of amending powers. There is no amendment of any Constitutional provision by such law.

1056. The Constitution First Amendment Act 1951 introduced Articles 31A and 31B and Schedule 9 which are to be read together. Article 31A excluded a challenge under the whole of Part III for the laws of the kind mentioned in that Article. Article 31B retrospectively validated laws mentioned in Schedule 9 from challenge under Part III and also on the ground that they violated Section 299 of the Government of India Act, 1935. It may be stated here that Parliament which passed the Constitution First Amendment Act 1951 was the Constituent Assembly functioning as

a legislature, till elections were held and a Parliament as provided for under the Constitution could be formed. Articles 31A and 31B carried out the intention of the framers of the Constitution as stated in Articles 31(4) and 31(6) that land legislation or agrarian reform was to be enforced and fundamental rights were not to be allowed to stand in the way of implementing the Directive Principles of State Policy contained in Article 39. The fundamental right conferred under Article 31(2) was subordinated to Article 39(b) and (c) in order to protect laws referred to in Article 31(4) and 31(6). When that object failed and the law was struck down under Article 14, Parliament gave effect to the policy underlying Articles 31(4) and 31(6) by excluding a challenge under every Article in Part III. In the Bihar Land Reforms case this Court said that the purpose behind the Bihar Land Reform Act was to bring about a reform of the land distribution system in Bihar for the general benefit of the community and the legislature was the best judge of what was good for the community and it was not possible for this Court to say that there was no public purpose behind the acquisition contemplated in the statute.

1057. This Court in State of West Bengal v. Bela Banerjee MANU/SC/0017/1953 : [1954]1SCR558 held that the word "compensation" means just equivalent or full indemnity for the property expropriated. In Dwarkadas Srinivas v. Sholapur Spg & Wvg. Co. Ltd. MANU/SC/0019/1953 : [1954]1SCR674 this Court struck down the law for taking over the management of Sholapur Mills on the ground that it amounted to acquisition and since no compensation was provided for, the law was held to be void. The Constitution Fourth Amendment Act 1955 came to remedy the implementation of essential welfare legislation. One of the measures in the Fourth Amendment Act was the amendment of Article 31 by making adequacy of compensation non-justiciable and the other was to amend Article 31A. The formula which had been used in Articles 31(4) and 31(6) to exclude the contravention of Article 31(2) was adopted with regard to adequacy of compensation. As a result of the amendment of Article 31A new categories were added to the Article and new Acts were added to the Ninth Schedule. The 17th Amendment Act made changes in Article 31A(1) and the proviso and amended Schedule 9 by inserting new Acts therein.

1058. The successive amendments of the Constitution merely carried out the principle embodied in Article 31 Clauses (4) and (6) that legislation designed to secure the public good and to implement the Directives under Article 39(b) and (c) should have priority over individual rights and that therefore fundamental rights were to fee subordinate to Directive or State Policy.

1059. Article 31(2) as it originally stood spoke of compensation for acquisition or requisition of property. The meaning given to compensation by the Court was full market value. There was no scope for giving effect to the word "compensation". There was no flexibility of social interest in Article 31(2). Every concept of social interest became irrelevant by the scope of Article 13(2). It is this mischief which was sought to be remedied by the 25th Amendment. If Directive Principles are to inter-play with Part III legislation will have to give expression to such law. Parts III and IV of the Constitution touch each other and modify. They are not parallel to each other. Different legislation will bring in different social principles. These will not be permissible without social content operating in a flexible manner. That is why in the 25th Amendment Article 31(2) is amended to eliminate the concept of market value for property which is acquired or requisitioned.

1060. If compensation means an amount determined on principles of social justice there will be general harmony between Part III and Part IV. Secondly, if compensation means market price then the concept of property right in Part III is an absolute right to own and possess property or to receive full price, while the concept of property right in Part IV is conditioned by social interest and social justice. There would be an inherent conflict in working out the Directive Principles of Part IV with the guarantee in Part III. That is why Clauses (4) and (6) of Article 31 illustrate the vital principle that to make effective a legislative effort to bring about changes in accordance with Directive Principles particularly those contained in Article 39(b) and (c) Article 31(2) may have to be abridged. The social interest and justice may vary from time to time and territory to territory and individual rights may have to be limited.

1061. Just as the amount can be fixed on principles of social justice the principles for determining the amount can be specified on the same consideration of social justice. Amount is fixed or the principles are specified by the norm of social justice in accordance with Directive Principles.

1062. In amending Article 31(2) under the 25th Amendment by substituting the word "amount" for "compensation" the amount fixed is made non-justiciable and the jurisdiction of the Court is excluded because no reasons for fixing such amount would or need appear in the legislation. If any person aggrieved by the amount fixed challenges the Court can neither go into the question of adequacy nor as to how the amount is fixed. If adequacy cannot be questioned any attempt to find out as to why the particular amount is fixed or how that amount has been fixed by law will be examining the adequacy which is forbidden as the Constitutional mandate. If one alleges that the amount is illusory one will meet the insurmountable Constitutional prohibition that the adequacy or the alleged arbitrariness of the amount fixed is not within the area of challenge in courts.

1063. The amount fixed is not justiciable. The adequacy cannot be questioned. The correctness of the amount cannot be challenged. The principles specified are not justiciable.

1064. If on the other hand, the legislature does not fix the amount but specifies the principles for determining the amount, the contention that principles for determining the amount must not be irrelevant loses all force because the result determining the amount by applying the specified principles cannot be challenged on the ground of inadequacy. If principles are specified for determining the amount and as a result of the application of the principles the result is less than the market value it will result in the same question of challenging adequacy.

1065. The relevancy of the principles cannot be impugned. Nor can the reasonableness of the principles be impeached.

1066. Article 14 has the flexibility of classification. Article 19 has the flexibility of reasonable restrictions. Social justice will determine the nature of the individual right and also the restriction on such right. Social justice will require modification or restriction of rights under Part III. The scheme of the Constitution generally discloses that the principles of social justice are placed above individual rights and whenever or wherever it is considered necessary individual rights have been subordinated or cat down to give effect to the principles of social justice. Social justice means various concepts which are evolved in the Directive Principles of the State.

1067. The 25th Amendment has amended Article 31(2) and also introduced Article 31(2B) in order to achieve two objects. The first is to eliminate the concept of market value in the amount fixed for acquisition or requisition of the property. The second is to exclude in Clause (2B) of Article 31 the applicability of Article 19(1)(f). Articles 31A and 31B applied to acquisition and requisition of property. The purpose of Article 31C is to confer by Constitutional mandate power on Parliament and State to make laws for giving effect to Directive Principles. The significance of the total exclusion of Part III from Articles 31A and 31B is that it brings about in unmistakable manner the true relationship between the provisions of Part IV and Part III of the Constitution.

1068. With reference to land legislation subordination of fundamental rights of individual to the common good was clear in Clauses (4) and (6) of Article 31. It was made clearer by the Constitution First Amendment Act which introduced Articles 31A, 31B and Schedule 9. Articles 31A, 31B, Schedule 9 and Article 31C merely removed the restrictions which Part III of the Constitution imposes on legislative power. Article 31A after the Fourth Amendment removed the restrictions on legislative power imposed by Articles 14, 19 and 31. In enacting Clauses (b), (c) and (d) in Article 31A Parliament was giving effect to social control which though less urgent than land reform became in course of time no less vital. Article 31B by the First Amendment retrospectively validated the laws specified in Schedule 9 by retrospectively removing all invalidity from the law because of the transgression of rights in Part III. Again, the seven new Acts added in the Ninth Schedule by the Fourth Amendment Act had nothing to do with agrarian reform, but dealt with subjects of great national importance. The Constitution Fourth Amendment Act was intended to remove the barriers of Articles 14, 19 and 31(2) in respect of land legislation considered essential for public good.

1069. State legislatures cannot remove the fetter. They have no power to amend the Constitution. Parliament cannot remove the fetter by ordinary law. By amendment of the Constitution Parliament can remove the fetter by either deleting one or more fundamental right or rights or by excluding certain laws or certain kinds of laws from the fetter.

1070. The pattern of Articles 31A, 31B, the Ninth Schedule and Article 31C is best understood by the observations of Patanjali Sastri, C.J. in Shankari Prasad case and of Wanchoo, J. in Golak Nath case. Patanjali Sastri, C.J. said in Shankari Prasad case "Articles 31A and 31B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of Article 13 read with other relevant Articles of Part III. The new Articles being thus essentially amendments of the Constitution have the power of enacting them. It was said that Parliament could not validate the law which it has no power to enact. The proposition holds good whether the validity of the impugned provision turns on whether the subject matter, falls within or without the jurisdiction of the legislature which passed it. But to make law, which contravenes the Constitution, Constitutionally valid is a matter of Constitutional amendment and as such it falls within the exclusive power of Parliament". Wanchoo, J. said of Article 31B "The laws had already been passed by the State legislature and it was their Constitutional infirmity, if any, which was being cured by the device adopted in Article 31B read with the Ninth Schedule.... Parliament alone could do it under Article 368 and there was no need for any ratification under the proviso for amendment of Part III is not entrenched in the proviso".

1071. The conclusiveness of declaration introduced by the 25th Amendment in a law under Article 31C is to be appreciated in the entire context of Article 31C. In removing restrictions of Part III in respect of a law under Article 31C there is no delegation of power to any legislature. There is only removal of restriction on legislative power imposed by Articles 14, 19 and 31. Article 31C does not confer any power to amend the Constitution. The exclusion of Article 31 is a necessary corollary to protecting the impugned law from challenge under Articles 14, 19 and 31 because Article 13(2) would but for its exclusion in Article 31C render such laws void. The declaration clause is comparable to Section 6(3) of the Land Acquisition Act "1894 which contains a conclusive evidence clause that declaration shall be conclusive evidence that the land is needed for a public purpose and for a company as the case may be.

A conclusive declaration would not be permissible so as to defeat a fundamental right.
In Article 31(5) it is provided that nothing in Clause (2) shall effect (a) the provisions of any existing law other than a law to which the provisions of Clause (6) apply and since the Land Acquisition Act 1894 is an existing law the conclusive declaration clause prevails and is not justiciable. See Babu Barkya Thakur v. The State of Bombay and Ors. MANU/SC/0022/1960 : [1961]1SCR128 . The same view was reiterated by this Court in Smt. Somavanti and Ors. v. The State of Punjab and Ors. MANU/SC/0034/1962 : [1963]2SCR774 that a declaration under the Land Requisition Act was not only conclusive about the need but was also conclusive for the need was for a public purpose.

1072. Conclusive proof is defined in the Indian Evidence Act. It is, therefore, seen that the legislative power carries with it the power to provide for conclusive proof so as to oust the jurisdiction of a Court. The declaration is for the purpose of excluding the process of evaluation of legislation on a consideration of the virtues and defects with a view to seeing if the laws has led to the result intended. If a question arises as to whether a piece of legislation with such declaration has a nexus with the Directive Principles in Article 39(b) and (c) the Court can go into the question for the purpose of process of identification of the legislative measure on a consideration of the scope and object and pith and substance of the legislation. therefore, the 25th Amendment is valid.

1073. A contention was advanced on behalf of the petitioner that Article 31B applies to agrarian reforms or in the alternative Article 31B is linked to Article 31A and is to be read as applying to laws in respect of five subject matters mentioned in Article 31A. The 13 Acts mentioned in the Ninth Schedule as enacted by the First Amendment Act, 1951 dealt with estates and agrarian reforms. There is nothing in Article 31B to indicate that it is linked with the same subject matter as Article 31A. In the Bihar Land Reforms case Patanjali Sastri, C.J. said at pp. 914-915 of the report MANU/SC/0019/1952 : [1952]1SCR889 that the opening words of Article 31B are only intended to make clear that Article 31A should not be restricted in 'its application by reason of anything contained in Article 31B and are not in any way calculated to restrict the application of the latter Article or of the enactments referred to therein to acquisition of estates.

1074. In Vishweshwar Rao v. State of Madhya Pradesh MANU/SC/0020/1952 : [1952]1SCR1020 it was urged that Article 31B was merely illustrative of Article 31A and as the latter was limited in is application to estates as defined therein Article 31B was also similarly limited. That contention was rejected and it was said that Article 31B specifically validates certain Acts

mentioned in the Schedule despite the provisions of Article 31A and is not illustrative of Article 31A but stands independent of it.

1075. Again, in Jeejibhoy v. Assistant Collector (1965) 1 S.C.R. 616 it was contended that Articles 31A and 31B should be read together and if so read Article 31B would only illustrate the cases that would otherwise fall under. Article 31B, and, therefore, the same construction as put upon Article 31B should apply to Article 31A. This Court did not accept the argument It was said that the words "without prejudice to the generality of the provisions contained in Article 31A" indicate that the Acts and Regulations specified in the Ninth Schedule would have the same immunity even if did not attract Article 31A of the Constitution. If every Act in the Ninth Schedule would be covered by Article 31A, Article 31B would be redundant Some of the Acts mentioned in the Ninth Schedule, namely, items 14 to 20 and many other Acts added to the Ninth Schedule, do not appear to relate to estates as defined in Article 31A(2) of the Constitution. It was, therefore, held in Jeejibhoy case that Article 31B was a Constitutional device to place the specific statute beyond any attack on the ground that they infringe Part III of the Constitution.

1076. The words "without prejudice to the generality of the provisions contained in Article 31A" occurring in Article 31B indicate that Article 31B stands independent of Article 31A. Article 31B and the Schedule are placed beyond any attack on the ground that they infringe Part III of the Constitution. Article 31B need not relate to any particular type of legislation. Article 31B gives a mandate and complete protection from the challenge of fundamental rights to the Scheduled Acts and the Regulations. Article 31A protects laws in respect of five subject matters from the challenge of Articles 14, 19 and 31, but not retrospectively. Article 31B protects Scheduled Acts and the Regulations and none of the Scheduled Acts are deemed to be void or even to have become void on the ground of contravention of any fundamental right.

1077. The validity of the Constitution 29th Amendment Act lies within a narrow compass. Article 31B has been held by this Court to be a valid amendment. Article 31B has also been held by this Court to be an independent provision. Article 31B has no connection with Article 31A. The Bihar Land Reforms case and Jeejibhoy case are well settled authorities for that proposition. It, therefore, follows that Mr. Palkhivala's contention cannot be accepted that before the Acts can be included in the Ninth Schedule requirements of Article 31A are to be complied with.

1078. For the foregoing reasons these are the conclusions.

First, the power to amend the Constitution is located in Article 368. Second, neither the Constitution nor an amendment of the Constitution can be or is law within the meaning of Article 13. Law in Article 13 means laws enacted by the legislature subject to the provision of the Constitution. Law in Article 13(2) does not mean the Constitution. The Constitution is the supreme law. Third, an amendment of the Constitution is an exercise of the constituent power. The majority view in Golak Nath case is with respect wrong. Fourth, there are no express limitations to the power of amendment. Fifth, there are no implied and inherent limitations on the power of amendment. Neither the Preamble nor Article 13(2) is at all a limitation on the power of amendment. Sixth, the power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential and in-essential features of the Constitution to raise any impediment to

amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of this Constitution. Under Article 368 the power to amend can also be increased. The 24th Amendment is valid. The contention of Mr. Palkhivala that unlimited power of amendment would confer power to abrogate the Constitution is rightly answered by the Attorney General and Mr. Seervai that amendment does not mean mere abrogation or wholesale repeal of the Constitution. The Attorney General and Mr. Seervai emphasised that an amendment would leave an organic mechanism providing the Constitution organisation and system for the State. If the Constitution cannot have a vital growth it needs must wither. That is why it was stressed on behalf of the respondents that orderly and peaceful changes in a Constitutional manner would absorb all amendments to all provisions of the Constitution which in the end would be "an amendment of this Constitution".

The 25th Amendment is valid. The adequacy of amount fixed or the principles specified cannot be the subject matter of judicial review. The amendment of Article 31(2B) is valid. Article 31(2) is self contained and Articles 31(2) and 19(1)(f) are mutually exclusive. Amendment of fundamental right prior to the amendment was and is now after the 24th Amendment valid. Article 31C does not delegate or confer any power on the State legislature to amend the Constitution. Article 31C merely removes the restrictions of Part III from any legislation giving effect to Directive Principles under Article 39(b) and (c). The power of Parliament and of State legislatures to legislate on the class of legislation covered by Article 31C is rendered immune from Articles 14, 19 and 31.

The inclusion of the Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 by the 29th Amendment in the Ninth Schedule is valid. Article 31B is independent of Article 31A.

1079. In the result the contentions of Mr. Palkhivala fail. Each party will pay and bear its own costs. The petitions will be placed before the Constitution Bench for disposal in accordance with law.

P. Jaganmohan Reddy, J.

1080. The detailed contentions addressed before us for 66 days have been set out in the judgment of My Lord the Chief Justice just pronounced, and I would only refer to such of those as are necessary for dealing with the relevant issues. Though I agree with some of the conclusions arrived at by him, but since the approach in arriving at a conclusion is as important as the conclusion itself, and particularly in matters involving vital Constitutional issues having a far-reaching impact on fundamental freedoms of the people of this country and on the social objectives which the State is enjoined to achieve under the Directive Principles of State Policy, I consider it my duty to express my views in my own way for arriving at those conclusions.

1081. In this case the validity of the Constitution (Twenty-fourth) and (Twenty-fifth) Amendment Acts of 1971 and the Constitution (Twenty-ninth) Amendment Act of 1972 has been challenged as being outside the scope of the power of amendment conferred on Parliament by Article 368 of the Constitution and consequently void.

1082. The validity of the Twenty-fourth Amendment would depend upon the interpretation of two crucial articles, Article 13 and Article 368, and two words, one in each article, namely, `law' in the

former, and 'amendment' in the latter. For the purposes of ascertaining the true intent and scope of these articles in I.C. Golaknath and Ors. v. State of Punjab, MANU/SC/0029/1967 : [1967]2SCR762 the basic question which the Court first considered was, where was power to amend the Constitution of India to be found? Subba Rao, C.J., with whom Shah and Sikri, JJ., as they then were, and Shelat and Vaidialingam, JJ., concurred, (hereinafter referred to as the leading majority judgment), held that the power was contained in Articles 245, 246 and 248 read with Entry 97 of List I of Schedule VII, and not in Article 368 which only provided for the procedure to amend the Constitution. Hidayatullah, J., as he then was, in his concurring judgment held that the procedure of amendment, if it can be called a power at all, is a legislative power, but it is sui generis and outside the three Lists of the Constitution, and that Article 368 outlines a process which, if followed strictly, results in the amendment of the Constitution. He was, therefore, of the view that the Article gives power to no particular person or persons. All the named authorities have to act according to the letter of the Article to achieve the result.

1083. Wanchoo, J. as he then was, for himself and two other Judges, Bachawat and Ramaswami, JJ., found the power in Article 368 itself and not in Articles 245, 246 and 248 read with Entry 97 of List I.

1084. It is, therefore, contended by the learned Advocate-General of Maharashtra, firstly, that the finding in the leading majority judgment that the fundamental rights cannot be amended is based on the decision that the amending power is to be found in the residuary Article 248 read with Entry 97 of List I of Schedule VII. This finding is deprived of its foundation, since six Judges held that the amending power is not to be found in the residuary Article and Entry 97 of List I. Secondly, the conclusion that the fundamental rights cannot be amended was reached by the leading majority judgment on the basis that Article 13(2) was attracted by the opening words of Article 245 and, therefore, a law amending the Constitution under entry 97 of List I was a law referred to in Article 245, and as it was in conflict with Article 13(2) the law was void.

1085. It is again contended that this conclusion loses its validity once its basis is destroyed by five Judges holding that the amending power is not to be found in entry 97 of List I, but in Article 368. In view of the conclusion of Hidayatullah, J., that the power of amendment as well as procedure therefore was contained in Article 368 itself, he submits that there is no ratio binding on this Court unless it be that the power of amendment is not in the residuary article but in Article 368. This argument is of little validity, because the ratio of the decision, where a question is directly raised before the Court for decision, is that which it decides, and in that case wherever the power may have been found, whether in Article 368 or in the residuary entry 97 of List I of Schedule VII, the controversy was whether an amendment made under Article 368 is a 'law' within the meaning of Article 13(2), and if it is so, a State cannot make a law taking away or abridging fundamental rights conferred by Part III of the Constitution. That question being answered in the affirmative by the majority, the ratio of Golaknath's decision is that an amendment under Article 368 is a 'law' within the meaning of Article 13(2). What the leading majority judgment in that case did not decide, however, is whether Article 368 itself could be amended under the proviso of that article conferring a power to amend the whole Constitution. At p. 805, Subba Rao, C.J., observed, "In the view we have taken on the scope of Article 368 vis-a-vis the fundamental rights, it is also unnecessary to express our opinion on the question whether the amendment of the fundamental rights is covered by the proviso to Article 368. " While five Judges who were in minority held that each and every

article of the Constitution could be amended in exercise of the power under, and by following the procedure in, Article 368, Hidayatullah, J., held that by amending. Article 368, Parliament could not do indirectly what it could not do directly, namely, amend Article 13(2) or override the provisions thereunder, because as he said, "The whole Constitution is open to amendment. Only two dozen articles are outside the reach of Article 368. That too because the Constitution has made them fundamental." (See p. 878). There is, therefore, warrant for the submission that Golaknath's case is not determinative of the question now raised before this Court as to whether the power to amend Article 368 could be exercised to amend the fundamental rights in Part III. At any rate, five of the six Judges who expressed an opinion on this aspect support the proposition that this can be done.

1086. It was also submitted that no question in fact arose for decision in Golaknath's case that in future Parliament could not amend the fundamental rights, because what that case was concerned with was the past exercise of the power to amend the fundamental rights, and, therefore, the observations in the majority judgments of Subba Rao, C.J., and Hidayatullah, J., as he then was, about the future exercise of that power are clearly obiter. It may be pointed out that the majority judgment as well as the minority judgment concurred in dismissing the petition, the former on the ground that the First, Fourth and Seventeenth Amendments were not affected either on the basis of the doctrine of prospective overruling or on the basis of acquiescence or on the ground that they were made by virtue of a valid exercise of the amending power under Article 368. On this basis it is submitted that no ratio can be found in that case for the majority declaring that Parliament in future cannot amend fundamental rights which is binding on this Court nor can it amend the amending article to take away or abridge fundamental rights.

1087. Whether the First, Fourth and Seventeenth Amendments have been rightly held to be valid or not, the ratio of the decision as was observed earlier is that under Article 368 as it was before its amendment, Parliament could not amend the Constitution to take away or abridge any of the fundamental rights conferred by Part III of the Constitution, and that question will only assume importance if this Court comes to the conclusion, following Hidayatullah, J.'s, decision, that Parliament cannot amend Article 368 under proviso (e) thereof to take away or abridge any of the fundamental rights or to amend Article 13(2) making it subject to an amendment under Article 368. If such a power exists, the question whether an amendment in Article 368 is a 'law' 'within the meaning of Article 13(2) may not prima facie be of significance. There are, however, two aspects to this problem, firstly, whether 'law' in Article 13(2) includes an amendment of the Constitution under Article 368: and secondly, if this Court holds that 'law' in Article 13(2) does not include an amendment under Article 368, then the question would be, has the Constitution (Twenty-fourth) Amendment purported to exercise a power in effecting that amendment which was not granted under that Article ? In other words, are there any limitations to the amending power under Article 368 ? If, as was held by Hidayatullah, J., that the power of amendment conferred on Parliament under Article 368 is not a constituent power, and any amendment made thereunder is a legislative power, which is 'law' within the meaning of Article 13(2), then Parliament cannot do indirectly what it cannot do directly.

1088. The first question which would arise for decision is what does 'law' in Article 13(2) signify, and is there any internal evidence which would indicate that that word has been used to include an amendment under Article 368, and if it does, whether it is subject to any limitations, and if so,

what ? It is contended that the word 'law' in Article 13(2) not only includes ordinary legislative law, but also Constitutional law.

1089. It may not, in my view, be necessary to examine the submission, that an amendment under Article 368 is not made in exercise of the constituent power but has been made by a constituent body, if on examination of the provisions of Part III, there is intrinsic evidence therein which points to the irresistible conclusion that Article 13(2) was meant only to place an embargo on a law made by a Legislature so-called in contradistinction to an amendment of the Constitution under Article 368 which no doubt is also a law in its generic sense, as indeed was the view taken in Sankari Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 : [1952]1SCR89 , Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 and Golaknath's case by some of the learned Judges. The framers of the Constitution have defined "law" in Sub-clause (a) of Clause (3) of Article 13 and that this definition would on the first impression appear to apply to only Clause (2) of that Article. But it would also, having regard to the words "unless the context otherwise requires", apply to Clause (1) thereof. While the expression "laws in force" has been defined in Sub-clause (b) of Clause (3) for the purposes of Clause (1) as including laws passed or made by Legislatures or other competent authorities before the commencement of the Constitution, an Ordinance, a bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law saved by Article 372 would, by virtue of Sub-clause (a) of Clause (3), equally apply to Clause (1) of Article 13.

1090. Again, though Sub-clause (a) of Clause (3) contains an inclusive definition of the word 'law' and does not specifically refer to a law made by Parliament or the Legislatures of States, it cannot be, nor has it been denied, that laws made by them are laws within the meaning of Article 13(2). What is contended, however, is that it also includes an amendment of the Constitution or Constitutional laws. No elaborate reasoning is necessary in support of the proposition that the word "law" in Article 13(2) includes a law made by Parliament or a Legislature of the State. When an Ordinance made either by the President under Article 123 or by a Governor under Article 213, in exercise of his legislative power which under the respective Sub-clause (2) has the same force and effect as an act of Parliament or the Legislature of a State assented to by the President or the Governor, as the case may be, is included in Article 13(3)(a), a law passed by Parliament or a Legislature of a State under Article 245 which specifically empowers Parliament for making laws for the whole or any part of India or any part of a State and the Legislature of a State for the whole or any part of a State, would be equally included within the definition of "law". Article 246 to 255 deal with the distribution of legislative powers between Parliament and the State Legislatures to make laws under the respective Lists in the Seventh Schedule, and further provides under Article 248(1) and (2) that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List including the power of imposing tax not mentioned in either of those Lists.

1091. Whereas Article 13(3)(a) has specifically included within the definition of 'law', custom or usage having in the territory of India the force of law, and even though it has not specifically mentioned an amendment made under Article 368 or a law made by Parliament or a Legislature it would certainly include a law made by the latter organs by reason of the legislative provisions of the Constitution referred to above. Having regard to the importance of the amending power, whether it is considered as a constituent power or as a constituted power, the omission to include

it specifically would, it is contended, indicate that it was not in the contemplation of the framers of the Constitution to extend the embargo in Article 13(2) to an amendment under Article 368. To my mind what is difficult to envisage is that while the framers included minor legislative acts of the State within the definition of 'law' in Article 13(3), they did not think of including an amendment of the Constitution therein, even though attempts were made towards that end till the final stages of its passage through the Constituent Assembly. It is contended that the answer to this could be that the framers did not include specifically a law made by the Legislature in that definition, and as such all laws whether legislative or amendments of the Constitution would come within its purview. This argument loses its significance in view of the fact that the enumeration of laws like rule, bye-law, regulation and notification which have their source and existence in the legislative law clearly indicate the inclusion of a law made by Parliament or a Legislature of a State. It is not that the framers did not consider meticulously any objections to or defects in the definitions as I will show when dealing with the various stages of the consideration of the draft article.

1092. It may be necessary first to examine whether in the context of the inclusive definition of 'law', and not forgetting that an amendment under Article 368 could also be termed 'law', the prohibition that the State cannot take away or abridge the rights conferred under any of the provisions of Part III is confined to those categories of law to which I have specifically referred, namely, to the law made by Parliament or a Legislature of the State and to those indicated in Article 13(3)(a). The law referred to in Article 14, Clauses (3) and (5) of Article 16, Article 17, Clauses (2) to (6) of Article 19, Article 20, Article 21, Clauses (4) and (7) of Article 22, Clause (1) of Article 23, Clause (2) of Article 25, Article 31, Clause (3) of Article 32, Articles 33, 34 and Clause (a) of Article 35, is, in my view, a law which the Parliament or a Legislature of the State or both, as the case may be, is required to make for giving force to the rights or is permitted to make to restrict the rights conferred by Part III. In other words, the permissible limits are indicated therein. Further under Article 15 the words 'special provision' and in Clause (4) of Article 16 the making of any provision by the State, and Clause (2) of Article 23 imposing of a compulsory service by the State for public purposes, or preventing the State from doing or permitting it to take certain actions under Article 28, Clause (2) of Article 29 and Clause (2) of Article 30 can either be by an ordinary legislative law or by an order or notification issued by the Government which may or may not be under any law but may be in the exercise of a purely executive power of the Government of India or the Government of a State having the force of law.

1093. Even where reasonable restrictions are permitted as in Clauses (2) to (6) of Article 19 or where restrictions or abrogation of the totality of fundamental rights contained in Part III have been permitted in respect of members of the armed forces or the forces charged with the maintenance of public order under Article 33, or where it is sought to indemnify persons in the service of the Union or a State or any other person, it is the Parliament that has been empowered to make a law in that re-regard. Article 35, it may be noticed, begins with a non obstante clause, "Notwithstanding anything in this Constitution - (a) Parliament shall have, and the Legislature of a State shall not have, power to make laws...." This non obstante clause has the effect of conferring the power of legislation in respect of matters mentioned therein to Parliament exclusively which it would not have otherwise had, because some of the powers were exercisable by the State Legislatures. Hidyatullah, J., however, thought that the opening words in Article 35 were more than the non obstante clause and excluded Article 368 - a conclusion based on comparison of that

Article with Article 105-A of the Australian Constitution in respect of which New South Wales v. The Commonwealth 36 C.L.R. 155 had held that it was an exception to Section 128 (See Golaknath's case at p. 902). Wynes, however, did not agree with this view of the High Court of Australia: See Legislative, Executive and Judicial powers in Australia, pp. 695-698. With this view, Hidayatullah, J., did not agree. In my view it is unsafe to rely on cases which arise under other Constitutions. Apart from this, Article 35 is not in pari materia with Article 105-A of the Australian Constitution which deals with the binding nature of the financial agreement made thereunder. The analogy is, therefore, inapplicable, nor is there anything in the subject-matter of Article 35 to safeguard it from being amended under Article 368. On the other hand, this article empowers Parliament to give effect to fundamental rights and gives no indication to delimit the power of amendment under Article 368.

1094. It is true that the Constitution itself has provided the limitations that can be imposed on the fundamental rights guaranteed in Part III, but those limitations can only be effected by ordinary law as opposed to Constitutional law and nor imposing those limitations an amendment of the Constitution is not needed. Once a right is conferred on the citizen, to what extent the right can be restricted, or where a State is prohibited from acting in any particular manner to what extent it is permitted, is to be regulated only by an ordinary law. If so, the bar against exceeding the permissible limits must prima facie be against the State making such a law. In the circumstances, could it be said that the framers of the Constitution contemplated the inhibition in Article 13(2) to operate on any thing other than ordinary law ? To limit the extent and ambit of the power under Article 368 in which there is no reference to a law, by including within the ambit of the definition of 'law' in Article 13(3)(a) for purposes of Article 13(2), an amendment effected under Article 368, is to restrict the power of amendment by a strained construction or to impute to the framers of the Constitution a lack of respect to the amending power by making the bar of Article 13(2) applicable to it by mere implication, when in respect of minor instruments they were careful enough to include them in the definition of 'law'.

1095. While this is so, a consideration of the conspectus of various rights in Part III when read with Article 13(2) would, in my view, prohibit the taking away or abridging of those rights by a law made by the Legislature namely the Parliament, Legislature of a State, or by executive action. This conclusion of mine will be substantiated if Article 13(2) is read along with each of the Articles in Part III, in so far as any of them contain the word 'law' which indeed it can be so read. The object of incorporating Article 13(2) was to avoid its repetition in each of the Articles conferring fundamental rights. Only one instance of this may be given in support of my conclusion. Clauses (2) to (6) of Article 19 which are limitations on the freedoms in Article 19(1)(a) to (g) respectively are couched in similar terms, and if I were to take one of these clauses for illustrating the point, it would amply demonstrate that the framers used the word 'law' in both Article 13(2) and Clauses (2) to (6) of Article 19 only in the sense of an ordinary law. Sub-clause (a) of Clause (1) of Article 19 and Clause (2) of that Article, if so read with Article 13(2) of the Constitution as it stood on January 26, 1950, may be redrafted as under:

19(1). All citizens shall have the right-

(a) to freedom of speech and expression;

...

(2) The State shall not make any law which takes away or abridges the rights conferred by this article and any law made in contravention of this clause shall, to the extent of the contravention, be void:

Provided that nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, tends to overthrow, the State.

Clause (2) in the above draft incorporates the entire Clause (2) of Article 79 except that instead of Part III the word 'article' has been used, and Clause (2) of Article 19 has been incorporated as a proviso.

1096. In the alternative, if Clauses (2) to (6) of Article 19 are read as a proviso to Article 13(2), they would appear as follows:

The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:

Provided nothing in Sub-clause (a) of Clause (1) of Article 19 shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against the decency or morality or which undermines the security of, tends to overthrow, the State.

In each of the Clauses (3) to (6) of Article 19 the expression 'any existing law in so far as it imposes or prevents the State from making any law imposing' has been uniformly used, and if these clauses are read as provisos just in the same way as Clause (2) of Article 19 has been read in either of the manner indicated above, the word 'law' in all these clauses as well as in Clause (2) of Article 13 would be the same and must have the same meaning. Similarly, Article 16(3) and (5) and Article 22(3) may also be so read. In reading the above articles or any other article in Part III with Article 13(2) it appears to me that the words `law', 'in accordance with law', or 'authority of law' clearly indicate that 'law' in Article 13(2) is that which may be made by the ordinary legislative organs. I shall also show, when I examine the various stages through which the corresponding draft article which became Article 13(2), passed through the Drafting Committee and the Constituent Assembly, that the proviso to Article 8 would lead to a similar conclusion.

1097. Though the word 'State' has a wider meaning and may include Parliament or Parliament and the State Legislature acting together when to effect an amendment under Article 368, in the context of the restrictions or limitations that may be imposed by law on certain specified grounds mentioned in any of the provisions of Part III, particularly those referred to above, could only be a law made by the Legislature otherwise than by amendment of the Constitution, or to impose any restriction or limitation within the permissible limits on the fundamental rights under any of the provisions of Part III, an amendment of the Constitution is not necessary and hence could not have been so intended. It is also submitted that the definition of the word 'State' in Article 12 read with

Article 13(2) would prohibit the agencies of the State jointly and separately from effecting an amendment, the same being a law, from abridging or taking away any of the rights conferred by Part III or in amending Article 13(2) itself. In this connection Hidayatullah, J., in Golaknath's case at p. 865 - read the definition of the word 'State' in Article 12 as connoting, "the sum total of all the agencies which are also individually mentioned in Article 12", and hence, "by the definition all the parts severally are also included in the prohibition". In other words, he has taken the definition to mean and connote that all the agencies acting together, namely, the Parliament and the Legislatures, and if the two Houses of Parliament under Article 368(1) or the two Houses of Parliament and the Legislatures acting together under the proviso, can effect an amendment that amendment would be a law made by the State within the meaning of Article 13(2). At p. 866 this is what he said: "If the State wields more power than the functionaries there must be a difference between the State and its agencies such as Government, Parliament, the Legislatures of the States and the local and other authorities. Obviously, the State means more than any of these or all of them put together. By making the State subject to Fundamental Rights it is clearly stated in Article 13(2) that any of the agencies acting alone or all the agencies acting together are not above the Fundamental Rights. therefore, when the House of the people or the Council of States introduces a Bill for the abridgement of the Fundamental rights, it ignores the injunction against it and even if the two Houses pass the Bill the injunction is next operative against the President since the expression "Government of India" in the General Clauses Act means the President of India. This is equally true of ordinary laws and laws seeking to amend the Constitution". He drew support from Article 325 of the Constitution of Nicargua in which specifically it was stated that, "That agencies of the Government, jointly or separately, are forbidden to suspend the Constitution or to restrict the rights granted by it, "except in the cases provided therein". In our Constitution he observed, "the agencies of the State are controlled jointly and separately and the prohibition is against the whole force of the State acting either in its executive or legislative capacity". With great respect this argument is based on an assumption which is not warranted by the definition of the word 'State' in Article 12. Nor is it in my view permissible to draw support from a provision of another Constitution which is differently worded. The assumption that 'State' would mean all the agencies of the Government jointly or separately when the agencies of the State have been separately enumerated, is not justified. The prohibition in Article 13(2) would be against each of them acting separately. There is no question of Parliament or the State Legislatures or Parliament or either local authorities or other authorities acting together or any one of these acting in combination. Nor under the Constitution can such combination of authorities acting together make a law. The State as Hidayatullah, J., envisages, because of the inclusive definition, means "more than any of them or all of them put together" which in my view is a State in the political sense and not in a legal sense. Under Article 51 of the Directive Principles, it is enjoined that the State shall endeavour to promote international peace and security; or maintain just and honourable relations between nations, etc., which in the context, can only mean Government or Parliament of India. Item 10 of List I of the Seventh Schedule read with Article 246 vests the power of legislation in respect of "foreign affairs, all matters which bring the Union into relation with the foreign countries" in those agencies. The words 'unless the context otherwise requires', in my view, refer to those agencies acting separately. If drawing an inference from other Constitutions is permissible in interpreting a definition, and I have said that it is not, a reference to Article 9 in the Burmese Constitution would show that the definition, of the State is not an inclusive definition, but it defines the State as meaning the several organs referred therein. I do not, therefore, think that reasoning would indicate that Article 13(2) puts an embargo on an amendment made under Article 368, nor

does it warrant the making of a distinction between the State and the Government in order to hold that these organs cannot acting together make an amendment affecting rights in Part III.

1098. Another reason for arriving at this conclusion is that if amendment to the Constitution is a 'law', the Constitution as such would also be a law. But the framers of the Constitution distinguished the 'Constitution' from 'law' or 'laws', by making evident their intention by using the word 'law' in contradistinction to the 'Constitution' indicating thereby that the word 'law' wherever referred to, means only an ordinary legislative law, while the 'Constitution' as something distinct from it. In Article 60 the President, and in Article 159 the Governor, is required to take oath when assuming office, to preserve, protect and defend the Constitution and the law. Under Article 61 the President can only be impeached for the violation of the Constitution. While specifying the extent of the executive power in Sub-clauses (a) and (b) of Clause (1) of Article 73 it is provided by the proviso that the power referred to in Sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws. Here the words 'law' and 'laws' are definitely referable to the law made by Parliament and the Legislature of the State. The oath that a Minister of the Union is to take under Article 75(1) is set out in Schedule III, that he will do right to all manner of people in accordance with the Constitution and the law. Judges of the Supreme Court and the High Court are required to uphold the Constitution and the laws : see Articles 124(6) and 219 each read with Schedule III. It is provided in Article 76(2) that the Attorney-General is required to discharge the function conferred on him by or under this Constitution or any other law for the time being in force. Again in Article 148(5) dealing with the conditions of service of persons serving in the Indian Audit and Accounts Department, etc., they are made subject to the provisions of this Constitution and of any law made by Parliament. Even though the framers referred to the Constitution as by law established in some of the provisions, they have, when dealing distinctly with the Constitution and the law or laws, specified them as referable to the legislative law. The Constitution, however, was not so described except where it is intended to be emphasised that it had the force of law as envisaged by the words 'as by law established'.

1099. If this view is correct, and I venture to suggest that it is, a question would arise as to whether Article 13(2) is really redundant, and should the Court so construe it as to impute to the framers an intention to incorporate something which has no purpose. The Court, it is well established, should not ordinarily construe any provision as redundant and, therefore, must give effect to every provision of a Statute or law. In support of this line of reasoning it is contended that in so far as Article 13(1) is concerned, 'a law in force' has been defined in Article 13(3)(b), but by virtue of Article 372(1) and Explanation I therein the same result would be achieved and any pre-Constitution Constitutional law which acquires the force of law by virtue of that Article is "subject to the other provisions" of the Constitution and consequently to the provisions in Part III. Similarly any law made after the Constitution came into force would be void to the extent of its repugnancy with any of the provisions of the Constitution including those in Part III because of the doctrine of ultra vires. If so, it is argued, there was no purpose in enacting Article 13(2). On the other hand, the petitioner's learned advocate submits that Article 13(2) has a purpose, in that among the laws in force there would be saved some laws of a Constitutional nature which were in force in the erstwhile princely States or even under the Government of India Act, 1935 where the Governor-General had made orders of that nature. As it was pointed out to the Constituent Assembly by Sardar Vallabhbhai Patel on the 29th April, 1947 that such may be the position, Article 13(1), it is

said, has been incorporated in Part III, and for the same reason in order to protect fundamental rights which were basic human freedoms from being taken away or abridged even by an amendment of the Constitution, that Article has been incorporated. A reference to the latter would show that what Sardar Vallabhbhai Patel said was that they had not sufficient time to examine in detail the effect of Clause (2) of the draft article on the mass of existing legislation and that clause was, therefore, subject to examination of its effect on the existing laws which will be done before the Constitution is finally drafted and the clause finally adopted. There is nothing in the proceedings or debates to indicate that certain Constitutional laws were intended to be saved or that that law was to include an amendment of the Constitution, nor is the contention that Article 13(1) was specially designed to save pre-existing Constitutional laws notwithstanding that the Government of India Act and the Indian Independence Act were repealed by Article 395. If there be in force any Constitutional laws other than those repealed these are by Article 372(1) given the same force as any of the ordinary legislative law subject to the other provisions of the Constitution and such laws continue to be in force only until altered, repealed or amended by a competent legislature or other competent authority. There is no indication whatever that these laws were accorded a status similar to any of the provisions of the Constitution, nor could they co-exist with them in the sense that they can only be dealt with by an amendment under Article 368. Kania, C.J. in A.K. Gopalan's case had no doubt pointed out that, the inclusion of Article 13(1) & (2) appear to be. "a matter of abundant caution", and that, "Even in their absence if any of the fundamental rights was "infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid". Hidayatullah, J., as he then was, in Sajjan Singh's case at p. 961 - commenting on the above passage of Kania, C.J., pointed out that, The observation is not clear in its meaning. There was undoubtedly a great purpose which this article achieves. It is probable that far from belittling the importance of Article 13 the learned Chief Justice meant rather to emphasise the importance and the commanding position of Fundamental Rights in that even without Article 13 they would have the same effect on other laws. To hold that Article 13 framed merely by way of abundant caution, and serves no additional or intrinsic function of its own, might, by analogy persuade us to say the same of Article 32(1) because this Court would do its duty under Article 32(2) even in the absence of the guarantee. No one can deny that Article 13(2) has a purpose and that purpose, as Hidayatullah, J., pointed out, was meant rather to emphasise the importance and the commanding position of Fundamental Rights, because having regard to the history of the agitation for a Bill of Rights being inscribed in a Constitution, to which I have adverted earlier, and the great hope that was inspired in the people of this country that there are some fundamental basic rights which are guaranteed to them and which cannot be subject to the vagaries of the legislatures, the State was enjoined not to take away or abridge those rights. Rights in Part III were intended to be made self-contained with the right of redress guaranteed to them by Article 32 - unlike in the United States where the judiciary had to invoke and evolve the doctrine of judicial review over the years. Mere general declarations of rights were without enforceability. As experience showed such general rights were found ineffective to check the growing power of the modern State, our framers examined judicial review of fundamental rights in various Constitutions and provided in our Constitution an effective remedy against encroachment of these rights. Article 32(2) provided for a direct approach to the Supreme Court in cases where fundamental rights are infringed, which without that provision would only come before it by way of an appeal under Article 133 or by special leave under Article 136 from a decision of the High Court rendered under Article 226. It is this purpose that Article 13(2) read with Article 12 emphasises. The framers of our Constitution conscious of the pitfalls and

difficulties that were confronted by the varying exercise of judicial review in America wanted to ensure that the doctrine of void and relatively void-a typically American concept - should find no place in our Constitution. If as stated in Golaknath's case by the leading majority judgment and by Hidayatullah, J., that fundamental rights were not to be subject to an amending process, it is inconceivable that our framers who gave such meticulous care in inscribing those rights in the Constitution, as is evident from the proceedings in the Constituent Assembly, should not have specifically entrenched them against chat process. I am aware of the contrary argument that if they wanted that the amending process in Article 368 should not be fettered by Article 13(2) they would have expressly provided for it either in Article 368 or in Article 13(2) as indeed attempts were made to that effect by moving suitable amendments which, later, at the concluding stages of the final Draft Constitution, as we shall presently see, were either withdrawn, not pressed or negatived. But this is neither here nor there, as indeed if the framers took the view that the embargo in Article 13(2) is only against legislative law, they may have felt that there was no need for any words of limitation which will make it inapplicable to Article 368.

1100. Before I refer to the proceedings of the Constituent Assembly, I must first consider the question whether the Constituent Assembly Debates can be looked into by the Court for construing those provisions. The Advocate-General of Maharashtra says until the decision of this Court in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and Ors. v. Union of India MANU/SC/0050/1970 : [1971]3SCR9 commonly known as Privy Purses case-debates and proceedings were held not to be admissible. Nonetheless counsel on either side made copious reference to them. In dealing with the interpretation of ordinary legislation, the widely held view is that while it is not permissible to refer to the debates as an aid to construction, the various stages through which the draft passed, the amendments proposed to it either to add or or delete any part of it, the purpose for which the attempt was made and the reason for its rejection may throw light on the intention of the framers or draftsmen. The speeches in the legislatures are said to afford no guide because members who speak in favour or against a particular provision or amendment only indicate their understanding of the provision which would not be admissible as an aid for construing the provision. The members speak and express views which differ from one another, and there is no way of ascertaining what views are held by those who do not speak. It is, therefore, difficult to get a resultant of the views in a debate except for the ultimate result that a particular provision or its amendment has been adopted or rejected, and in any case none of these can be looked into as an aid to construction except that the legislative history of the provision can be referred to for finding out the mischief sought to be remedied or the purpose for which it is enacted, if they are relevant. But in Travancore Cochin and Ors. v. Bombay Co. (1952) S.C.R. 113, the Golaknath's case, the Privy Purses case and Union of India v. H.S. Dhillon (1972) 3 S.C.R. 33 there are dicta it is drafted by people who wanted it to be a national instrument to against referring to the speeches in the Constituent Assembly and in the last mentioned case they were referred to as supporting the conclusion already arrived at. In Golaknath's case as well as Privy Purses case the speeches were referred to though it was said not for interpreting a provision but for either examining the transcendental character of Fundamental rights or for the circumstances which necessitated the giving of guarantees to the rulers. For whatever purpose speeches in the Constituent Assembly were looked at though it was always claimed that these are not admissible except when the meaning was ambiguous or where the meaning was clear for further support of the conclusion arrived at. In either case they were looked into. Speaking for myself, why should we not look into them boldly for ascertaining what was the intention of our framers and how they

translated that intention ? What is the rationale for treating them as forbidden or forbidding material. The Court in a Constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned. Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations. The Assembly constituted Committees of able men of high calibre, learning and wide experience, and it had an able adviser, Shri B.N. Rau to assist it. A memorandum was prepared by Shri B.N. Rau which was circulated to the public of every shade of opinion, to professional bodies, to legislators, to public bodies and a host of others and was given the widest publicity. When criticism, comments and suggestions were received, a draft was prepared in the light of these which was submitted to the Constituent Assembly, and introduced with a speech by the sponsor Dr. Ambedkar. The Assembly thereupon constituted three Committees: (1) Union Powers Committee; (2) Provincial Powers Committee; and (3) Committee on the Fundamental Rights and Minorities Committee. The deliberations and the recommendations of these Committees, the proceedings of the Drafting Committee, and the speech of Dr. Ambedkar introducing the draft so prepared along with the report of these Committees are all valuable material. The objectives of the Assembly, the manner on which they met any criticism, the resultant decisions taken thereon, amendments proposed, speeches in favour or against them and their ultimate adoption or rejection will be helpful in throwing light on the particular matter in issue. In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a Constituent Assembly have no such partisan nuances and their only concern is to give the nation a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of fortes which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly. Be that as it may, all I intend to do for the present is to examine the stages through which the draft passed and whether and that attempts were made to introduce words or expressions or delete any that were already there and for what purpose. If these proceedings are examined from this point of view, do they throw any light on or support the view taken by me ?

1101. The various stages of the Constituent Assembly proceedings, while considering the draft Articles 8 and 304 corresponding to Articles 13 and 368 respectively, would show that attempts were made to introduce amendments to both these articles to clarify that the embargo in Article 13(2) does not apply to an amendment made under Article 368. First, Shri K. Santhanam, one of the members of the Constituent Assembly moved an amendment on April 29, 1947 to Clause (2) of the draft submitted to the Constituent Assembly along with the Interim Report on Fundamental Rights. This amendment was that for the words "nor shall the Union or any unit make any law taking away or abridging any such right", the following be substituted:

Nor shall any such right be taken away or abridged except by an amendment of the Constitution.

The sponsor explained "that if the clause stands as it is even by an amendment of the Constitution we shall not be able to change any of these rights if found unsatisfactory. In some Constitutions they have provided that some Parts of the Constitution may be changed by future Constitutional amendments and other Parts may not be changed. In order to avoid any such doubts, I have moved this amendment and I hope it will be accepted." This amendment was accepted by Sardar Vallabhbhai Patel and adopted by the Constituent Assembly. Clause (2), after it was so amended, was as follows:

All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this Part of the Constitution shall stand abrogated to the extent of such inconsistency. Nor shall any such right be taken away or abridged except by an amendment of the Constitution.

Even as the clause stood originally in the draft, it was only the 'Union' or any 'unit' that was prohibited from making a law taking away or abridging any such right. At that stage there was nothing to show that a provision for amendment of the Constitution was either drafted or was before the Constituent Assembly for consideration. But otherwise also, it was not a case of the 'Union' or 'Union' and `the unit' being prevented from making a law. In order to justify the submission that all the organs of the State including the 'Union' or the `Union' and the 'Unit' were prevented from effecting an amendment of the Constitution, the only indication is that the law which was prohibited from taking away or abridging fundamental rights was the law of the 'Union' or any 'unit'. The amendment of Shri Santhanam was incorporated by the draftsmen in the Supplementary Report on Fundamental Rights which was presented to the Constituent Assembly on August 25, 1947, but subsequently this amendment of Shri K. Santhanam incorporated in the draft Article was deleted by the Drafting Committee. After the Draft Constitution was submitted to the President of the Constituent Assembly on February 21, 1948, and was given wide circulation, there appears to have been some criticism with respect to what had then become draft Article 8(2), which was in the following terms:

The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:

Provided that nothing in this clause shall prevent the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law.

The note relating to the addition of the proviso is stated thus:

The proviso has been added in order to enable the State to make laws removing any existing discrimination. Such laws will necessarily be discriminatory in a sense, because they will operate only against those who hitherto enjoyed an undue advantage. It is obvious that laws of this character should not be prohibited.

The Constitutional Adviser's note to the Drafting Committee showed that a critic had pointed out that "Clause (2) of Article 8 may be held as a bar to the amendment of the provisions of the Constitution relating to the fundamental rights by a law passed under draft Article 304, and it should, therefore, be made clear that there is no restriction on the power of Parliament to amend

such provisions under Article 304. " The comment of the Constitutional Adviser to this objection was that "Clause (2) of Article 8 does not "override the provisions of Article 304 of the Constitution. The expression "law" used in the said clause is intended to mean "ordinary legislation". However, to remove any possible doubt, the following amendment may be made in Article 8:

'In the proviso to Clause (2) of Article 8, after the words "nothing in this clause shall" the words "affect the provisions of Article 304 of this Constitution or" be inserted'."

The Drafting Committee does not appear to have accepted this suggestion, because the proviso remained as previously drafted, until it was deleted as a result of Amendment No. 252 which was standing in the name of Mehboob Ali Beg. On November 25, 1948, Pandit Lakshmi Kanta Maitra in moving this Amendment said - "The purpose of this amendment is self-evident, and as I have been strictly enjoined not to make any speech I simply move this amendment." This amendment was adopted on November 29, 1948, and the proviso was deleted. (See C.A.D. Vol. VII, pp. 611 & 645).

1102. How meticulously this article was considered, can be seen from the proceedings on the objection of Naziruddin Ahmed that the words "custom or usage" in the definition of 'law' in Article 8(3)(a) (corresponding to Article 13(3)(a) would apply to Article 8(2), but the State does not make a 'usage or custom'. Dr. Ambedkar pointed out that that will apply to Article 8(1) which deals with 'laws in force', but Naziruddin Ahmed insisted that it does not, and that he was no wiser after the explanation given by Dr. Ambedkar that the definition of law is distributive. Dr. Ambedkar then said that the amendment of Naziruddin Ahmed creates some difficulty which it is necessary to clear up and ultimately to avoid any difficulty he moved an amendment to Clause (3) of Article 8 to read "unless the context otherwise requires" which governed Clauses (a) and (b). This was adopted. (See C.A.D. Vol. VII, p. 644). It was after this that the proviso was deleted.

1103. It would appear from the proviso before it was deleted, if read with Clause (2) of draft Article 8, as also the note showing the purpose for which it was incorporated, that the law referred to therein was a legislative law. It could not by any stretch of the language be construed as including an amendment under draft Article 304, because the proviso was making the restriction in Clause (2) of Article 8 inapplicable to the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law. If the 'State' and the 'law' have to be given a particular meaning in the proviso the same meaning has to be given to them in Clause (2) and since the proviso clearly envisages a legislative law it furnishes the key to the interpretation of the word 'law' in Clause (2) of draft Article 8 that it is also a legislative law that is therein referred.

1104. To Article 304 also amendments were moved-one of them, Amendment No. 157 was in the name of Shri K. Santhanam, but he said he was not moving it. (See C.A.D. Vol. IX, p. 1643). Both the Attorney-General as well as the Advocate-General of Maharashtra said that they were not able to find out what these amendments were. But even assuming that this Amendment was designed to make the embargo under Article 13(2) applicable to Article 368, no inference can be derived therefrom. On the other hand an attempt was made by Dr. Deshmukh to entrench Fundamental Rights. He moved Amendment No. 212 to insert the following Article 304-A after 304:

304-A. Notwithstanding anything contained in this Constitution to the contrary, no amendment which is calculated to infringe or restrict or diminish the scope of any individual right, any rights of a person or persons with respect to property or otherwise shall be permissible under this Constitution and any amendment which is or is likely to have such an effect shall be void and ultra vires of any Legislature.

This amendment after Dr. Ambedkar's speech regarding the scope of the amendment under Article 304 was, by leave, withdrawn. (See C.A.D. Vol. IX p. 1665).

1105. Earlier when the Drafting Committee was considering the objectives, there was a proposal by Shri K. Santhanam, Mr. Ananthasayanam Ayyangar, Mr. T.T. Krishnamachari and Shrimati G. Durgabai that parts III, IV, IX and XVI be added in the proviso to Article 304, but it was pointed out by the Constitutional Adviser that that amendment involved a question of policy. The Drafting Committee did not adopt this amendment. If this amendment had been accepted, the amendment of the fundamental rights could be effected by the procedure prescribed for amendment which would be by two-thirds majority of each of the Houses of Parliament as well as by ratification by resolutions of not less than half the State Legislatures. Even this attempt does not give any indication that fundamental rights in Part III could not be amended under Article 368 or that 'law' in Article 13(2) is not the ordinary legislative law, but would include an amendment under Article 368. An attempt was made to show that on September 17, 1949, Dr. Ambedkar while speaking on draft Article 304 had said that Part III was not amendable. While adverting to the fact that they had divided the articles into three categories, he pointed out that the first) category was amendable by a bare majority, and as to the second category he had said: "If future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304, all that was necessary for them is to have two-thirds majority." The third category for the purposes of amendment he explained required two-thirds majority plus ratification. It is submitted on behalf of the first respondent that what was stated about Part III being excepted from the second category was a mistake and that he must be thinking that, along with Article 304, Part III was also included in the third category. The Advocate-General of Nagaland said Part III was a mistake for third category. Instead of third category, he either said or is reported to have said, Part III. Whether it is a correct reading of his speech or not, it is not relevant, for in interpreting a provision the words used, the context in which it was used, the purpose which it intended to subserve in the scheme of the Constitution, will alone have to be considered. For the same reasoning the fact that none of the members who were also members of the Provisional Parliament ever entertained a doubt as to the non-amendability of Part III when the Constitution (First Amendment) Bill was debated and later enacted as an Act is not relevant.

1106. In the view I take on the construction of Article 13 read with the other provisions of Part III, Article 13(2) does not place an embargo on Article 368 for amending any of the right in Part III, and it is, therefore, not necessary to go into the question whether the leading majority judgment is right in finding the power of amendment in the residuary entry 97 of List I of Schedule VII, nor is it called for, having regard to the majority decision that the power of amendment is to be found in Article 368 itself. Whether the power is implied, what is the width and whether Parliament can enlarge that power may have to be considered, but that Article 368 contains the power and the procedure of amendment can admit of little doubt, as was held by the majority in Golaknath's case by five judges and Hidayatullah, J., it may, also be noticed that the leading majority judgment did

not express any view as to whether under the proviso to Article 368, by amending that article itself, fundamental nights could be amended. (See Subba Rao, C.J., at p. 805).

1107. The question then arises, whether the Twenty-Fourth Amendment is valid, and if it is valid, whether Article 368 as amended is subject to any limitation, and if so, what ? The objects and reasons of the Twenty-Fourth Amendment Bill set out the purpose for which it was enacted and the mischief it sought to remedy. It is stated in Para 2 thereof thus:

The Bill seeks to amend Article 368 suitably for the purpose and makes it clear that Article 368 provides for amendment of the Constitution as well as procedure therefore. The Bill further provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent thereto. The Bill also seeks to amend Article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under Article 368.

What in fact the amendment effected will become clear, if the relevant provisions of Article 368, both before and after the amendment was made, are read in juxtaposition along with a new Sub-clause (4) added to Article 13.

Before the Amendment:	After the Amendment:
368. Procedure for amendment of the Constitution:--An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in-- the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that	368. (1) Power of Parliament to amend the Constitution and procedure therefor:--Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. (2) An Amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his

effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent	assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in-- the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent (3) Nothing in Article 13 shall apply to any amendment made under this article. 13 (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

1108. The above amendment seeks to provide-(i) that the source of power to amend is in Article 368; (ii) that when Parliament seeks to make a Constitutional amendment it does so "in exercise of its constituent power"; (iii) that the power to amend was by way of addition, variation or repeal; (iv) that the bar in Article 13 against abridging or taking away any of the fundamental rights does not apply to any amendment made under Article 368; (v) that nothing in Article will apply to an amendment of the Constitution under Article 368; (vi) that the words "any provision of the Constitution" were added so that "any" were to mean "every provision"; and (vii) that it is obligatory on the President to give his assent to any Bill duly passed under that Article.

1109. In so far as the contention that Article 13(2) is a bar to Constitutional amendments is concerned, I have already given my reasons why I consider that argument as not available to the petitioner inasmuch as the inhibition contained therein is only against ordinary legislative actions. The question, however, is whether Article 13(2) which bars the taking away or abridging the fundamental rights by Parliament, or Legislatures of the States and other enactments, specified in Article 13(3)(a) is or is not an essential feature. If it is not, it can be amended under Article 368. Recognising this position the petitioner submits that if the effect of amending Article 368 and

Article 13 is to permit the removal of the fetter of Article 13 on the ordinary legislative laws which can thereafter be empowered and left free to abrogate or take away fundamental rights, it would be an essential feature.

1110. The question whether there are any implied limitations on the power to amend under Article 368 or whether an amendment under that Article can damage or destroy the basic features of the Constitution would depend, as I said earlier, on the meaning of the word "amendment" before the Twenty-Fourth Amendment. If that word has a limited meaning, which is the case of the petitioner, it is contended that that power of amendment could not be enlarged by the use of the words "amend by way of addition, variation and repeal".

1111. It may be mentioned that arguments similar to those which were addressed before us were advanced in Golaknath's case, namely, (i) that the expression 'amendment' in Article 368 has a positive and negative content and that in exercise of that power Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation; (ii) that if the fundamentals would be amendable to the ordinary process of amendment with a special majority the institution of the President can be abolished, the Parliamentary executive can be abrogated, the concept of federation can be obliterated and in short, the sovereign democratic republic can be converted into a totalitarian system of Government The leading majority judgment, though it found that there was considerable force in the argument, said that they were relieved of the necessity to express an opinion on this all important question, but so far as the fundamental rights are concerned, the question raised can be answered on a narrow basis. Subba Rao, C.J., observed at p. 805: "This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in the provisions other than in Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard".

1112. Hidayatullah, J., on the other hand, dealing with implied limitations by reference to Article V of the United States Constitution, and the decisions rendered thereunder pointed out that although there is no clear pronouncement of the United States Supreme Court a great controversy exists as to whether questions of substance can ever come before the Court and whether there are any implied limitations upon the amendatory power. After considering the view of text-book writers, particularly that of Orfield, and the position under the English and the French Constitutions (see pp. 870-877), he observed at p. 878 : "It is urged that such approach makes society static and robs the State of its sovereignty. It is submitted that it leaves revolution as the only alternative if change is necessary. The whole Constitution is open to amendment. Only two dozen articles are outside the reach of Article 368. That too because the Constitution has made them fundamental. What is being suggested by the counsel for the State is itself a revolution because as things are that method of amendment is illegal".

1113. Wanchoo, J., rejected the doctrine of implied limitations though he was doubtful if the Constitution can be abrogated or another new Constitution can be substituted, (see p. 838). At p. 836 he said, "We have given careful consideration to the argument that certain basic features of our Constitution cannot be amended under Article 368 and have come to the conclusion that no limitations can be and should be implied upon the power of amendment under Article 368. ... We fail to see why if there was any intention to make any part of the Constitution unamendable, the

Constituent Assembly failed to include it expressly in Article 368...on the clear words of Article 368 which provides for amendment of the Constitution which means any provision thereof, we cannot infer any implied limitations on the power of amendment of any provision of the Constitution, be it basic or otherwise." It was further observed at p. 831: "that the President can refuse to give his assent when a Bill for amendment of the Constitution is presented to him, the result being that the Bill altogether, falls, for there is no specific provision for anything further to be done about the Bill in Article 368 as there is in Article 111".

1114. Bachawat, J., noticed the argument on the basic features but did not express any opinion because he said "it is sufficient to say that the fundamental rights are within the reach of the amending power". Ramaswami, J., on the other hand rejected the thesis of implied limitations, because Article 368 does not expressly say so. He said at p. 933: "If the Constitution-makers considered that there were certain basic features of the Constitution which were permanent it is most unlikely that they should not have expressly said in Article 368 that these basic features were not amendable".

1115. During the course of the lengthy arguments on behalf of the petitioners and the respondents, we have been taken on a global survey of the Constitutions of the various countries. In support of the rival contentions, there were cited before us innumerable decisions of the Supreme Court and the State Courts of the United States of America, and of the Courts in Canada, Ireland, Australia and of the Privy Council. A large number of treatise on Constitutional law, views of academic lawyers, the applicability of natural law or higher law principles, extracts from Laski's Grammar of Politics, history of the demand for fundamental rights, and the speeches in the Constituent Assembly and the Provisional Parliament during the deliberations on the Constitution (First Amendment) Bill, were also referred to. The able arguments addressed to us during these long hearings, with great industry and erudition and the alacrity with which the doubts expressed by each of us have been sought to be cleared by the learned Advocates for the petitioner, the learned Attorney-General, the learned Solicitor-General and by the learned Advocates-General of the States and the learned Advocates who intervened in those proceedings, have completely eviscerated the contents of the vital and far reaching issues involved in this case, though sometimes some aspects tended to hover over the terra ferma and sometimes skirted round it, particularly when the views of academic writers who had the utmost freedom to express on hypothetical problems unrelated to concrete issues falling for a decision in any case, were pressed on us. The a priori postulates of some of the scholars are not often easy of meeting the practical needs and limitations of the tenacious aspects of the case precedents which makes our law servicable. There have again been arguments for taking consequences into consideration which really highlighted what would be the dire consequences if the result of the decision being one way or the other but this court ought not to be concerned with these aspects, if otherwise our decision is in accordance with the view of the law it takes. We should free ourselves of any considerations which tend to create pressures on the mind. In our view, it is not the gloom that should influence us, as Milton said, "we cannot leave the real world for a Utopia but instead ordain wisely", and, if I may add, according to the well-accepted rules of construction and on a true interpretation of the Constitutional provisions.

1116. Lengthy arguments on the rules of construction were addressed, by referring particularly to a Urge number of American cases to show what our approach should be in determining

Constitutional matters, having regard to the paramount need to give effect to the will of the people which the Legislatures and the Governments represent and for exercising judicial restraint. I must confess that some of these arguments show that the tendency has been to depend more on the views of Judges from other lands, however eminent when have in this, the Highest Court of the land during the last over two decades, forged an approach of our own and set out the rules applicable to the interpretation of our Constitution. There is no Constitutional matter which is not in some way or the other involved with political, social or economic questions, and if the Constitution-makers have vested in this Court a power of Judicial review, and while so vesting, have given it a prominent place describing it as the heart and soul of the Constitution, we will not be deterred from discharging that duty, merely because the validity or otherwise of the legislation will affect the political or social policy underlying it. The basic approach of this Court has been, and must always be, that the Legislature has the exclusive power to determine the policy and to translate it into law, the Constitutionality of which is to be presumed, unless there are strong and cogent reasons for holding that it conflicts with the Constitutional mandate. In this regard both the Legislature, the executive, as well as the judiciary are bound by the paramount instrument, and, therefore, no court and no Judge will exercise the judicial power de hors that instrument, nor will it function as a supreme legislature above the Constitution. The bona fides of all the three of them has been the basic assumption, and though all of them may be liable to error, it can be corrected in the manner and by the method prescribed under the Constitution and subject to such limitations as may be inherent in the instrument.

1117. This Court is not concerned with any political philosophy, nor has it its own philosophy, nor are Judges entitled to write into their judgments the prejudices or prevalent moral attitudes of the times, except to judge the legislation in the light of the felt needs of the society for which it was enacted and in accordance with the Constitution. No doubt, political or social policy may dominate the legal system. It is only when as I said, the Legislatures in giving effect to them translate it into law, and the Courts, when such a measure is challenged, are invited to examine those policies to ascertain its validity, it then becomes a legal topic which may tend to dominate sometimes to its detriment.

1118. The citizen whose rights are affected, no doubt, invokes the aid of the judicial power to vindicate them, but in discharging its duty, the Courts have nothing to do with the wisdom or the policy of the Legislature. When the Courts declare a law, they do not mortgage the future with intent to bind the interest of the unborn generations to come. There is no everlasting effect in those judgments, nor do they have force till eternity as it were. The concept, on the other hand, is that the law declared in the past was in accord with the settled judgment of the society, the social and economic conditions then existing, and that if those judgments are not likely to subserve the subsequent generations or the requirements and needs of the society as it may be then conditioned, they will have to be changed by the process known to law, either by legislative action or judicial re-review where that is possible. The Courts, therefore, have a duty, and have indeed the power, to re-examine and re-state the law within the limits of its interpretative function in the full-fulness of the experience during which it was in force so that it conforms with the socio-economic changes and the jurisprudential outlook of that generation. The words of the law may be like coats of Biblical Joseph, of diverse colours and in the context in which they are used they will have to be interpreted and wherever possible they are made to subserve the felt-needs of the society. This

purpose can hardly be achieved without an amount of resilience and play in the interpretative process.

1119. On the desirability of drawing heavily or relying on the provisions of the Constitutions of other countries or on the decisions rendered therein, a word of caution will be necessary. It cannot be denied that the provisions of the Constitutions of other countries are designed for the political, social and economic outlook of the people of those countries for whom they have been framed. The seed of the Constitution is sown in a particular soil and it is the nature and the quality of the soil and the climatic conditions prevalent there which will, ensure its growth and determine the benefits which it confers on its people. We cannot plant the same seed in a different climate and in a different soil and expect the same growth and the same benefit therefrom. Law varies according to the requirements of time and place. Justice thus becomes a relative concept varying from society to society according to the social milieu and economic conditions prevailing therein. The difficulty, to my mind, which foreign cases or even cases decided within the Commonwealth where the Common Law forms the basis of the legal structure of that unit, just as it is to a large extent the basis in this country, is that they are more often than not concerned with expounding and interpreting provisions of law which are not in pari materia with those we are called upon to consider. The problems which confront those Courts in the background of the State of the society, the social and economic set-up, the requirements of a people with a totally different ethics, philosophy, temperament and outlook differentiate them from the problems and outlook which confront the courts in this country. It is not a case of shutting out light where that could profitably enlighten and benefit us. The concern is rather to safeguard against the possibility of being blinded by it. At the very inception of a Constitutional democracy with a Federal structure innovated under the Government of India Act, 1935, a note of caution was struck by the Chief Justice of India against following even cases decided on the Constitutions of the Commonwealth units, which observations apply with equal force, if not greater, to cases decided under the American Constitution. Gwyer, C.J., in In Re : The Central Provinces and Berar Act No. XIV of 1938, (1939) F.C.R. 18 which was the very first case under the 1935 Act, observed at p. 38: "But there are few subjects on which the decisions of other Courts require to be treated with greater caution than of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another." This observation was approved and adopted by Gajendragadkar, C.J., (speaking for 7 Judges) in Special Reference 1 of (1965) 1 S.C.R. 413.

1120. The American decisions which have been copiously cited before us, were rendered in the context of the history of the struggle against colonialism of the American people, the sovereignty of several States which came together to form a Confederation, the strains and pressures which induced them to frame a Constitution for a Federal Government and the underlying concepts of law and judicial approach over a period of nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution.

For one thing, the decisions of the Supreme Court of the United States though were for the benefit of the people and yet for decades those inconvenient decisions were accepted as law by the Government until the approach of the Court changed. The restraint of the people, the Government and the Court, and the patience with which the inconveniences, if any, have been borne, have all

contributed to the growth of the law and during this long period the Constitution of the United States has been only amended 24 times. The amending power under the American Constitution is a difficult process in that it is vitally linked with its ratification by the people through their representatives in the State Legislatures or in the Conventions. These decisions, therefore, are of little practical utility in interpreting our Constitution which has devised altogether different methods of amendments. No doubt, the rules of construction which our Courts apply have been drawn from the English decisions and the decisions of the Privy Council, the latter of which declared the law for the country until its jurisdiction was abolished; and even today the decisions of the Courts in England, the Commonwealth countries, and the United States of America on matters which are pari materia are considered as persuasive.

1121. For the proposition that for ascertaining the meaning of the word 'amendment', the object of and the necessity for amendment in a written Constitution must be considered, namely,-

(a) it is necessary for changing the Constitution in an orderly manner, as otherwise the Constitution can be wrecked by extra Constitutional method or by a revolution;

(b) as the very object is to make changes in the fundamental or organic law, namely, to change the fundamental or basic principles of the Constitution, the power of amendment cannot be said to be confined to only changing non-essential features.

The Attorney-General has cited from the writings of several authors of whom I may refer to a few passages from the following:

1122. Woodrow Wilson in his book on 'Constitutional Government' in the United States, said:

A Constitutional government, being an instrumentality for the maintenance of liberty, is an instrumentality for the maintenance of a right adjustment, and must have a machinery of constant adaptation" (page 4-6).

It is, therefore, peculiarly true of Constitutional government that its atmosphere is opinion, the air from which it takes its breath and vigor. The underlying understandings of a Constitutional system are modified from age to age by changes of life and circumstances and corresponding alterations of opinion. It does not remain fixed in any unchanging form, but grows with the growth and is altered with the change of the nation's needs and purposes" (page 22).

1123. Roger Sherman Hoar in his book on "Constitutional Conventions-Their Nature, Powers and Limitations", speaking of the American Constitution as the one based upon popular sovereignty, says:

The Federal Constitution was ordained and established by the people of the United States" (U.S. Constitution, Preamble) and guarantees to each of the several states "a republican form of government" (U.S. Constitution, Article IV). This means, in other words, a representative form. It is founded upon the theory that the people are fit to rule, but that it would be cumbersome for them to govern themselves directly. Accordingly, for the facilitation of business, but for no other

purposes the people choose from their own number representatives to represent their point of view and to put into effect the collective will (page 11).

Quoting from Jameson's "Works of Daniel Webster", it is again stated at p. 12:

These principles were recognised by our forefathers in framing the various Bills of Rights, which declare in substance that, as all power resides originally in the people, and is derived from them, the several magistrates and officers of government are their substitutes and agents and are at all times accountable to them.

The various agents of the people possess only such power as is expressly or impliedly delegated to them by the Constitution or laws under which they hold office; and do not possess even this, if it happen to be beyond the power of such Constitution or laws to grant.

A question that naturally arises is, are the above postulates basic to our Constitution ?

1124. After referring to these passages, the learned Attorney-General submitted that the people of India have, as expressed in the Preamble, given the power to amend the Constitution to the bodies mentioned in Article 368. These bodies represent the people, and the method to amend any part of the Constitution as provided for in Article 368 must alone be followed. In his submission any other method, for example, Constituent Assembly or Referendum would be extra-Constitutional or revolutionary. Article 368 restricts only the procedure or the manner or form required for amendment, but not the kind or character of the amendment that may be made. There are no implied limitations on the amending power under Article 368. It is the people who have inscribed Article 368 in the Constitution. In the numerous American cases cited before us, there is a constant reference to the people taking part in the amending process through the Conventions or ratification by the Legislatures which the judiciary has been treating as ratification by the people. In that context the word 'amendment' has been construed widely because when the sovereign will of the people is expressed in amending the Constitution, it is as if it were they who were expressing the original sovereign will represented in the convention which drafted the Constitution. There has been even a divergence of opinion among the writers in the U.S. as to whether the entrenched provisions for the representation of the States in the Senate which could not be amended without the consent of the State affected can be amended even where all the States except the State concerned have ratified the taking away or abridging that right. With this or the several aspects of the American Constitution we are not called upon to expound nor have we any concern with it except with the claim of the petitioner that the fundamental; rights have been reserved by the people to themselves and the counter-claim by the learned Attorney-General that it is the people who have inscribed Article 368 by investing that Article with the totality of the sovereignty of the people which when exercised in the form and manner prescribed in that Article would amend any provision of the Constitution without any limitations as to the nature or kind of the amendment. The people, the learned Attorney-General submitted, have been eliminated from the amending process because being illiterate and untutored they would not be able to take part in that process with proper understanding or intelligence. This to my mind, appears somewhat incongruous. When they can be trusted to vote in much more complicated issues set out in election manifestos involving economic and political objectives and social benefits which accrue by following them, surely they could be trusted with deciding on direct issues like amending the Constitution. But the

whole scheme of the Constitution shows it is insulated against the direct impact from the people's vote, as can be seen, firstly, by the electoral system under which it may often happen that a minority of voters can elect an overwhelming majority in Parliament and the Legislatures of the States, while the majority vote is represented by a minority of representatives, as is evident from the affidavit filed in respect of the recent elections by the Union of India on March 12, 1973, and secondly, where a President is elected by proportional representation of the members of the Legislatures. This situation could not have been unknown to the framers can be gathered from the speech of Dr. Ambedkar who said: "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic". (C.A.D., Vol. VII, p. 38). In any case this aspect need not concern this Court as it deals with what has already been done, but since so much has been said about the people and the amending power in Article 368 as representing the sovereign will of the people, I have ventured to refer to this topic.

1125. There is no doubt some warrant in support of the proposition that people have reserved to themselves the fundamental rights, as observed by Patanjali Sastri, J., in A.K. Gopalan v. State Madras MANU/SC/0012/1950 : 1950CriLJ1383 , to which a reference has been made earlier, and, therefore, it is submitted that these rights cannot be taken away or abridged even by an amendment of the Constitution. Neither of these submissions accord with the facts of history though the Preamble which was adopted as a part of the Constitution on October 17, 1949 says so. (See with respect to the adoption of the Preamble as a part of the Constitution, C.A.D., Vol. X, p. 456). To digress somewhat, it appears that the observations in In Re : Berubari Union & Exchange of Enclaves MANU/SC/0049/1960 : [1960]3SCR250 , that the Preamble was not part of the Constitution does not seem to have taken note of the fact that the Constituent Assembly had debated it and adopted the resolution. "That the Preamble stand part of the Constitution". It appears to me that a comparison with Article V of the U.S. Constitution providing for an amendment of that Constitution, with Article 368 of our Constitution, would show that there is no resemblance between the amending procedure provided in either of them. Such a comparison would, in my view, be misleading, if we were to apply the concepts and dicta of the eminent Judges of the Supreme Court of the U.S. in interpreting our Constitution. If we were to accept the contention of the learned Attorney-General that the sovereignty is vested in Article 368, then one is led to the conclusion on an examination of the history of the Constitution-making that the people of India had never really taken part in the drafting of the Constitution or its adoption, nor have they been given any part in its amendment at any stage except indirectly through representatives elected periodically for conducting the business of the Government of the Union and the States. It cannot be denied that the members of the Constituent Assembly were not elected on adult franchise, nor were the people of the entire territory of India represented therein even on the very limited franchise provided for under the Cabinet Mission Plan of May 16, 1946 which was restricted by the property, the educational and other qualification to approximately 15% of the country's population comprising of about 40 million electors. The people of the erstwhile princely States were not elected to the assembly though the representatives of those States may have been nominated by the rulers. A day before the transfer of power on August 15, 1947, the Indian States were only subject to the paramountcy of the British Crown. On August 15, 1947, all of them, except Hyderabad, Junagadh and Jammu & Kashmir, had voluntarily acceded to the Dominion of India.

1126. The objectives Resolution which claims power from the people to draft the Constitution was introduced in the Constituent Assembly on December 13, 1946, when the Constituent Assembly met for the first time and at a time when the Muslim League boycotted the session (See C.A.D., Vol. I, p. 59). The 4th clause of that Resolution provided that all power and authority of the Sovereign Independent India, its constituent parts and organs of government are derived from the people. The Resolution also said that in proclaiming India as an Independent Sovereign Republic and in drawing up for her future governance a Constitution there shall be guarantee and secured to all the people of India, justice, social, economic and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes. This Resolution was adopted on January 22, 1947 with utmost solemnity by all members standing. (See C.A.D., Vol. II. p. 324).

1127. While the claim was so made and at the time when the Resolution was adopted, the legal sovereignty over India remained vested in the British Crown and British Parliament, and when that power was transferred, it was transferred to the Constituent Assembly by the Indian Independence, Act, 1947, Sections 6 and 8 of which conferred on the Constituent Assembly the power to enact a Constitution, as well as the full powers to make laws which were not to be void or inoperative on the ground that they are repugnant to the laws of England, or to the provisions of the Indian Independence Act or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of the Dominion of India shall include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion (See Sub-section (2) of Section (6). These powers of the Legislature of the Dominion, under Sub-section (1) of Section 8, for the purposes of making a Constitution, were conferred on the Constituent Assembly and reference in the Act to the Legislature of the Dominion was to be construed accordingly.

1128. It was only in November 1949 after the work of the framing of the Constitution was completed that the ruling Princes accepted it on behalf of themselves and the people over whom they ruled. The Constitution was not ratified by the people but it came into force, by virtue of Article 394, on January 26, 1950. Article 395 repealed the Indian Independence Act, 1947 and the Government of India Act, 1935.

1129. Reference may also be made to the fact that during the debates in the Constituent Assembly it was pointed out by many speakers that that Assembly did not represent the people as such, because it was not elected on the basis of adult franchise, that some of them even moved resolutions suggesting that the Constitution should be ratified by the people. Both the claim and the demand were rejected. Dr. Ambedkar explained that, "the Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable Constitution it has no axe to grind. In considering the articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate to the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected

on limited franchise, can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it". (C.A.D., Vol. VII, pp. 43-44).

1130. At the final stages of the debate on the amending article, Dr. Ambedkar replying to the objection that the Constituent Assembly was not a representative assembly as it has not been elected on an adult franchise, that a large mass of the people are not represented, and consequently in framing the Constitution the Assembly has no right to say that this Constitution should have the finality which Article 304 proposes to give it, said - "Sir, it may be true that this Assembly is not a representative assembly in the sense that Members of this Assembly have not been elected on the basis of adult suffrage. I am prepared to accept that argument, but the further inference which is being drawn that if the Assembly had been elected on the basis of adult suffrage, it was then bound to possess greater wisdom and greater political knowledge is an inference which I utterly repudiate". (C.A.D., Vol. IX, p. 1663).

1131. The fact that the preamble professed in unambiguous terms that it is the people of India who have adopted, enacted and "given to themselves this Constitution"; that the Constitution is being acted upon unquestioned for the last over twenty-three years and every power and authority is purported to be exercised under the Constitution; and that the vast majority of the people have, acting under the Constitution, elected their representatives to Parliament and the State Legislatures in five general elections, makes the proposition indisputable that the source and the binding force of the Constitution is the sovereign will of the people of India.

1132. On this assumption no state need have unlimited power and indeed in Federal Polities no such doctrine is sustainable. One has only to take the examples of U.S.A., Australia or Canada, and our own where the Central and the State Legislatures are supreme within the respective fields allotted to them. Any conflict between these is determined by the Supreme Court, whose duty is to declare the law. Those brought up in the unitary State find it difficult to recognise such of those limitations as are found in Federal Constitutions. Constitutions have been variously described as rigid or flexible, controlled or uncontrolled, but without going into these concepts it is clear that' if the State is considered as a society, "to which certain indefinite but not unlimited powers are attributed then there is no difficulty in holding that the exercise of State power can be limited" (A.L. Goodhart, "English Law and the Moral Law", p. 54). Even in a unitary State like the United Kingdom where it is believed that the Queen in Parliament is supreme, Professor A.L. Goodhart in the book referred to above points out that this is as misleading as the statement that the Queen's consent is necessary. After referring to Dicey, Coke and Blackstone, that parliamentary government is a type of absolute despotism, he says, "Such a conclusion must be in conflict not only with our sense of what is fitting, but also with our recognition of what happens in fact. The answer is, I believe, that the people as a whole, and Parliament itself, recognise that under the unwritten Constitution there are certain established principles which limit the scope of Parliament. It is true that the Courts cannot enforce these principles as they can under the Federal system in the United States, but this does not mean that these principles are any the less binding and effective. For that matter some of them receive greater protection today in England than they do in the United States. These basic principles are, I believe, four in number". (A.L. Goodhart, p. 55). Then he narrates what these four principles are : First, that no man is above the law, the second, that those who govern Great Britain do so in a representative capacity and are subject to change but "an

immortal government tends to be an immoral government"; the third, freedom of speech or thought and assembly are essential part of any Constitution which provides that people govern themselves because without them self-government becomes impossible; and the fourth, which is a basic part of the English Constitution is the independence of the judiciary and it is inconceivable that Parliament should regard itself as free to abolish the principle which has been accepted as a cornerstone of freedom ever since the Act of Settlement in 1701. Professor Goodhart then concludes:

It is therefore, I believe, true to say that it is as wrong in theory as it is in fact to suggest that the British Constitution is a form of enlightened despotism. Those who exercise power in the name of the State are bound by the law, and there are certain definite principles which limit the exercise of the power.

1133. Before considering the detailed contentions it is necessary to see what was intended to be achieved by the Twenty-fourth Amendment. I have already set out the changes made in Article 368. These are-

(a) In the marginal note, instead of the expression "Procedure for amendment of the Constitution", it was substituted by "Power of Parliament to amend the Constitution and Procedure therefor". This was to meet any possible doubt that the marginal note only indicated a procedure and not the power of amendment, though the majority in Golaknath's case had held that Article 368 contains both power and procedure;

(b) By the addition of Clause (1), three changes were effected namely, (i) a non obstante clause "Notwithstanding anything in this Constitution", (ii) "Parliament may in exercise of its constituent power"; and (iii) "amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in this article".

It has already been seen that both in Sankari Prasad's and Sajjan Singh's cases, the two Houses of Parliament have been construed as Parliament and not a different body. In Golaknath's case also all the Judges held that it is only Parliament which makes the amendment. The question Whether the power in Article 368 is a constituent power or a legislative power has of course been debated. The law in its generic terms includes a constituent law, namely, the Constitution itself made by a Constituent Assembly-as indicated by the wards "The Constitution as by law established", or an amendment made in accordance with the provision contained in the Constitution, as well as an ordinary legislative law made by the legislative organs created by the organic instrument. The quality and the nature of the law has been differently described, but broadly speaking the Constitution or the amendments thereof are termed as law which is made in exercise of its constituent power, though the reach of each may differ. If it is true, as is contended, that both these in the plenitude of power are co-extensive, on any view of the matter, no difficulty is encountered in describing the amending power as the constituent power. Even otherwise without resort to any great subtlety or distinction between the exercise of power by a constituent body and a constituted body inasmuch as both are concerned in the making of the Constitution or in amending it, they can be considered as a constituent power. The amending power is a facet of the constituent power, but not the whole of it. The power under Article 368 after the amendment is still described as amending power. The Twenty-fourth Amendment makes this explicit because it did not want a doubt to linger

that because the same body, namely, Parliament makes both the ordinary law in terms of the grant in Articles 245 to 248 and an amendment in terms of Article 368, it should not be considered that both these are legislative laws within the meaning of Article 13(2) which was what the majority in Golaknath's case had held. In the view I have taken that Article 13(2) was confined only to the ordinary legislative laws and not one made under Article 368, the addition of Clause (1) to Article 368 in so far as it declares that when Parliament exercises the power under that provision if exercises its constituent power and makes explicit what was implicit. In my view, the amendment, therefore, makes no change in the position which prevailed before the amendment.

1134. It has also been seen that the amendment added Clause (3) to Article 368 that "Nothing in Article 13 shall apply to any amendment made under this article", and has added Clause (4) to Article 13 that "Nothing in this article shall apply to any amendment of this Constitution made under Article 368". These additions, having regard to the view I have taken that Article 13(2) does not impose any express limitation on Article 368, unless of course, there is a limitation in Article 368 itself on the width of the power which the word 'amendment' in the context of that article and the other provisions of the Constitution might indicate, again make explicit what was implicit therein.

1135. The outstanding question then is, what is the meaning of the word 'amendment'-whether it has wide or a restricted meaning, whether the word 'amendment' includes repeal or revision, and whether having regard to the other provisions of the Constitution or the context of the word 'amendment' in Article 368 itself it has a restricted meaning, and consequently does not confer a power to damage or destroy the essential features of the Constitution.

1136. The existence or non-existence of any implied limitations on the amending power in a written Constitution, which does not contain any express limitations on that power has been hotly debated before us for days. I have earlier set out some of these contentions. If the word 'amendment' has the restricted meaning, has that power been enlarged by the use of the words "amend by way of addition, variation or repeal" or do they mean the same as amendment? If they are wider than amendment, could Parliament in exercise of its amending power in Article 368 enlarge that power? This aspect has been seriously contested and cannot on a superficial view be brushed aside as not worthy of merit. There can be two ways of looking at it. One approach can be, and it would be the simplest solution to the problem that confronts us, to assume that the amending power is omni-sovereign and thereafter the task will be easy because so much has been written by academic writers that it will not be difficult to find expression of views which support that conclusion. Long years ago, Oliver Wendall Holmes had written, "you can give any conclusion a logical form" and one can only say how true it is. This course, however, should be eschewed, firstly, because of the a priori assumption and the speculation inherent in drawing upon such writings, and secondly, because the interpretation placed by these learned writers on Constitutions which are different will, if drawn upon, in effect allow them to interpret our Constitution, which though derivative it may be, has to be interpreted on the strength of its provisions and the ethos it postulates. It is, therefore, necessary to ascertain from the background of our national aspirations, the objectives adopted by the Constituent Assembly as translated into a working organic instrument which established a sovereign democratic Republic with a Parliamentary system of Government whereunder individual rights of citizens, the duties towards the community which the State was enjoined to discharge; the diffusion of legislative power between Parliament and State Legislatures and the

provision for its amendment, etc., are provided for. All these aspects were sought to be well balanced as in a ship built for fair weather as well as for foul. This then will be the proper approach.

1137. The learned Attorney-General contends that the word 'amendment has a clear, precise, definite and unambiguous legal meaning and has been so used in all the written Constitutions of other countries also ever since written Constitutions have been innovated. The word "amendment" according to him has received a well accepted construction which gives it the widest amplitude unrestricted by any limitations thereon. While making this submission, however, he has pointed out that though our Constitution has used different expressions at several places, it does not follow that they do not necessarily mean the same thing. The Advocate for the petitioner on the other hand says that this word has no precise and definite or primary and fundamental meaning and hence the cases on construction cited by the respondents that the Court is not concerned with the policy of the Legislature are not applicable. On the contrary, he points out, that since the word is ambiguous, the width of the power has to be ascertained by courts from the general scheme and context of the Constitution in which it appears and other relevant indications and principles. He relies on the observations of Lord Wright in James v. Commonwealth of Australia, [1936] A.C. 578 cited on behalf of the first respondent that, "A Good draftsman would realise that the mere generality of the word must compel limitation in its interpretation. 'Free' in itself is vague and indeterminate. It must be its colour from the context".

1138. The learned Attorney-General further submits, relying again on the decisions of the American Courts that revision and amendment have been held as synonymous terms and that if you give the power to amend the amending power, the amending power will become very wide. It is also his contention, relying on Strong on "Modern Political Constitutions" that the amending provisions re-create the Constituent Assembly, provide some elements to be 'unaltered, and since our Constitution-makers who were aware of this position in the United States have used the same words, they must be intended to use that word as giving the widest power, and since there are no express limitations, no restriction on that power can be read into it by implication. A reference to the provision relating to amendment either in the United States or in the States' Constitutions where people have a vital part in the amending process in my view inapt and inapplicable to the interpretation of our Constitution where the people have been designedly excluded. I say this, because we have been referred to the attempts made in the Constituent Assembly to involve people of this country in the amendment of the Constitution, but such attempts did not succeed. Brajeshwar Prasad had actually proposed an amendment to make the amending provision similar to the one in Australia Constitution and had said, "What is possible in Australia is possible here. If the people in Australia are competent and advanced to adopt this method of amendment, certainly we, who are as competent as the Australians, if not more, are entitled to adopt the same. I do not want to associate the State Legislatures in the process of amending the Constitution." He also said that, "If you want to abolish landlordism, you cannot afford to look for the consent of the landlords, and similarly, if you want to abolish capitalism, you cannot afford to look for the consent of the capitalists". (C.A.D., Vol. IX, p. 1646). This amendment, however, was negatived. (C.A.D., Vol. IX, p. 1665).

1139. A reference was also made in this connection to draft Article 305 as indicating that the word 'amendment' would mean repeal or whittling down. Even assuming that that Article had been incorporated in the Constitution, what does the word `amendment' in that context imply ? First,

draft Article 305 starts with the non-obstante clause, "Notwithstanding anything contained in Article 304" (present Article 368), and, secondly, the provisions relating to the reservation of seats for the minorities "shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution". This clause instead of throwing any light on the width of the power of amendment shows that it is completely restricted in that nothing can be done to affect that provision for ten years which limitation with the non-obstante clause excludes Article 304 altogether during that period. If after that period it is to be extended that Article can be amended but this does not mean that it can be repealed, for it is only concerned with either extension of the period or change in the terms or conditions under which the reservation would continue to apply.

1140. It was contended that the word 'amendment' in Article 368 must be construed as meaning change for the better, improvement, etc. In Golaknath's case a similar contention was rejected by some of the learned Judges. Subba Rao, C.J., (speaking for 5 Judges) did not express any view though he said that the argument that Parliament cannot destroy the structure of the Constitution but it can modify the provisions thereof within the framework of the original instrument for its better effectuation, has considerable force, but they were relieved of the necessity to express their opinion as the question raised can be answered on a narrower basis. He observed that : "This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in the provisions other than in Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard" (pp. 804-805).

Hidayatullah, J., at p. 862 said:

I do not take the narrow view of the word 'amendment' as including only minor changes within the general framework. By an amendment new matter may be added, old matter removed or altered.

Wanchoo, J., (speaking for himself and two other Judges), observed at p. 834:

To say that 'amendment' in law only means a change which results in improvement would make amendments impossible, for what is improvement of an existing law is a matter of opinion and what, for example, the legislature may consider an improvement may not be so considered by others. It is, therefore, in our opinion impossible to introduce in the concept of amendment as used in Article 368 any idea of improvement as to details of the Constitution. The word 'amendment' used in Article 368 must, therefore, be given its full meaning as used in law and that means that by amendment an existing Constitution or law can be changed, and this change can take the form either of addition to the existing provisions, or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether.

After noting that the word "amend" in the VI Schedule, paragraph 21, where it was preceded by words "by way of addition, variance or repeal" and more or less similar expressions in other Articles of the Constitution, he observed, "it is very difficult to say why this was done. But the fact that no such words appear in Article 368 does not in our mind make any difference, for the meaning of the word 'amendment' in a law is clearly as indicated above by us and the presence or absence

of explanatory words of the nature indicated above do not in our opinion, make any difference". Bachawat J., at pp. 915-916, says:

Article 368 indicates that the term 'amend' means 'change'. The proviso is expressed to apply to amendments which seek to make any 'change' in certain articles. The main part of Article 368 thus gives the power to amend or to make changes in the Constitution. A change is not necessarily an improvement Normally the change is made with the object of making an improvement, but the experiment may fail to achieve the purpose. Even the plain dictionary meaning of the word 'amend' does not support the contention that an amendment must take an improvement, see Oxford English Dictionary, where the word 'amend' is defined thus : "4. To make professed improvements (in a measure before Parliament) formally to alter in detail though practically it may be to alter its principle so as to thwart it". The 1st, 4th, 16th and 17th Amendment Acts made changes in Part III of the Constitution. All the changes are authorised by Article 368".

Ramaswami, J., has not specifically dealt with the meaning of the word 'amendment'.

1141. It is obvious from these observations that the attempt to restrict the meaning of the word 'amendment' to 'improvement' has been rejected by five of the learned Judges in Golaknath's case.

1142. The learned Attorney-General, however, in the written summary of his arguments, said "The majority of the learned Judges in Golaknath's case rejected the arguments that the expression amendment of a Constitution has a narrow meaning. Thus the petitioner seeks to have the majority judgment overruled on this point". (Page 30, Para 9). This statement does not seem to be accurate, unless he has linked the rejection of the argument regarding the existence of implied limitations as recognising that the word amendment has a wide meaning. That implied limitations and the width of the meaning of word amendment were two different concepts admits of no doubt, because the former flows from the implications of the provisions of the Constitution whether general or specific, while the latter deals with scope and the ambit of the word amendment itself. If the power is wide, even implied limitations can also be abrogated, but it has nothing to do with the existence of the implied limitations. On the other hand, Hidayatullah, J. though he dealt with the narrowness or otherwise of the meaning of the word 'amendment' did not deal with the existence or non-existence of implied limitations under our Constitution. Bachawat, J., at pp. 915 and 916 also did not think it necessary to pronounce on implied limitations and like Wanchoo, J., has separately considered these two concepts (see pages 833-834, 835-836). These instances illustrate what I have said above. Even on this basis there would not be a majority of Judges who have held that there are no implied limitations.

1143. The learned Advocate-General for Maharashtra submits that when a person proposes an amendment and he is asked whether it is intended to be an improvement, the answer will always be 'Yes'; because he cannot very well say that it was not intended to be an improvement; that the meaning of the word 'amendment' in several Dictionaries which relate the word 'amendment' with 'improvement' is euphemistic. This is the reason why the word 'amendment' according to him is used in the earlier sense in common parlance, in public speeches, textbooks or articles by learned writers, which is far from saying that an amendment must be only a change for effecting an improvement.

1144. Bachawat, J., earlier at p. 915 in Golaknath's case referred to the decision Livermore v. E.C. Waite, (102) Cal. 113-25 L.R.A. 312 in support of the submission that an amendment must be an improvement of the Constitution. The following observations in Livermore's case were cited by him:

On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.

With respect to this passage, Bachawat, J., observed:

Now an attack on the eighteenth amendment of the U.S. Constitution based on this passage was brushed aside by the U.S. Supreme Court in the decision in the National Prohibition case (Rhode Island v. Palmer, 253 US 350; 64 L. ed. 947. The decision totally negatived the contention that an amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government nor relinquish in the State those which already have been granted to it. (See Cooley on Constitutional Law, Chapter III, Article V, pp. 46 & 47).

I find from the reference to the National Prohibition case and the pages of that report given by Bachawat, J., namely, 64 L. ed. 947, 960 and 978, that no observations to that effect have been made at page 978 by Mr. Justice Van Devanter. In that case the Supreme Court was considering an appeal from a District Court which had rejected the contention that 18th Amendment was not valid on the ground that, "The definition of the word 'amendment' include additions as well as corrections of matters already treated and there is nothing in its immediate context (Article V) which suggests that it was used in a restricted sense". The decree of the Court below was affirmed in the National Prohibition case. (Rhode Island v. Palmer). 64 L. ed. 946 the briefs filed by the Attorney-General of Rhode Island and others did, however, refer to the passage cited by Bachawat, JJ., in Livermore v. Waite. But none of the Judges in the National Prohibition case either referred to the passage in Livermore's case nor did they deal with the scope of the power of amendment and, therefore, it cannot either be said that the submission was brushed aside, nor can it be said that the National Prohibition case totally negatived that contention. It may be the opinion of Cooley in his Book on "Constitutional Law" that the passage in Livermore's case cited by Bachawat, J., did not support the proposition therein stated. But all arguments in that case against the amendment could not be taken to be negatived, if they were not necessary for the decision. What arguments were brushed aside, no one can say with any amount of definiteness. If the judgment of the Supreme Court in National Prohibition case is read with the judgment of the District Court whose decree was affirmed, it may be taken to have laid down that the word amendment would include addition of a provision to the Constitution and beyond this nothing more can be inferred from this judgment.

1145. The argument of the learned Advocate-General is that the words "amendment of this Constitution" in sub-para (2) of para 7 and sub-para (2) of para (21) of the respective Schedules refers to the words used in sub-para (1) of sub-para 7 and 21 of the Schedules, and, therefore, the words "amendment of this Constitution" must be read to mean that it is an amendment by way of addition, variation or repeal. It was noticed that in Golaknath's case while Wanchoo, J., could not

fathom the reason why the expression 'by way of addition, variation or repeal' was used in Schedule V para 7 and Schedule VI, Para 21, he none the less thought the presence or absence of the explanatory words made no difference to the meaning of the word 'amendment'. In other words, according to the learned Advocate-General, the word 'amendment' in Article 368 is synonymous with the expression 'amend by way of addition, variation or repeal' so that the Twenty-Fourth Amendment according to this view, and probably to conform with it, used the clarificatory words and means even after this amendment the same meaning as the word 'amendment' had before Article 368 was amended. What an amendment can do has also been stated, by Wanchoo J., namely, that the existing Constitution can be changed and this change can take the form either of addition to the existing provisions or alteration of the existing provisions and their substitution by others or deletion of certain provisions altogether. Though all this can be done, he said, it may be open to doubt whether the power of amendment contained in Article 368 goes to the extent of completely abrogating the present Constitution and substituting it by an entirely new one .

1146. It is also not disputed by the learned Attorney-General, the learned Solicitor-General and the learned Advocate-General for Maharashtra that an amendment of the Constitution dose not extend to abrogation of the Constitution, and on the contention of the learned Advocate-General, abrogation means repeal, both words being synonymous, and that the Constitution cannot be substituted by a new Constitution.

1147. In further explaining his submission the learned Attorney-General said that the amending power in Article 368 as it stood before the Twenty-fourth Amendment and as it stands now has always been, and continues to be, a constituent power, that is to say, the power to deconstitute or re-constitute the Constitution or any part of it. Such power extends to the addition to or variation of any part of the Constitution. But the amending power does not mean that the Constitution at any point of time would be so amended by way of addition, variation or repeal as to leave a vacuum in the governance of the country. According to him that is the whole object and necessity of the amending power in a Constitution so that the Constitution continues, and a constituent power, unless it is expressly limited in the Constitution itself, can by its very nature have no limits, because if any such limit is assumed although not expressed in the Constitution, the whole object and purpose of the amending power will be nullified.

1148. If amendment does not mean abrogation or repeal as submitted in the note of the Advocate-General, dated February 23, 1973 in which he said, "that repeal and abrogation mean the same thing since "repeal" has 'abrogation' as one of its meaning and 'abrogation' has 'repeal' as one of its meanings", a question arises, where, is the line to be drawn ?

1149. The learned Attorney-General said that Article 368, Clause (e) of the proviso by giving a power to amend the amending power, has conferred a wider power of amendment but that does not imply that the power of amendment had a limited meaning in the unamended article; that the word 'amendment' has only one meaning and it is a wide power and in Article 368 there is a recreation of the Constituent Assembly. If this submission is correct, how can it not extend to abrogation of the Constitution or substituting it by another?

1150. To this question the answer of the Attorney-General was that Clause (e) of the proviso was added by way of abundant caution to meet a similar criticism which was directed against Article

V of the U.S. Constitution. According to Advocate-General for Maharashtra, Clause (e) of the proviso was inserted to meet the assumption of Chief Justice in the Irish case of The State (Ryan and Ors.) v. Lennon and Ors. (1935) IR 170 that if amending provision could have been amended, then no limitation can be read. Hon'ble the Chief Justice has dealt with this aspect in full and I do not, therefore, propose to refer to it except to say that the analogy is inapplicable to the interpretation of Article 368.

1151. Apart from the power of amendment not extending to the abrogation of the Constitution, it will appear on the submission of respondents, the Union of India and the State of Kerala, that the office of the President cannot be abolished without the concurrence of at least half the States even though Articles 52 and 53 are not included in the proviso to Article 368. The very fact that Article 54 and Article 55 are included in the proviso, it would, according to the learned Solicitor-General imply that the office of the President cannot be abolished without the concurrence of the States. Wanchoo, J., in Golaknath's case dealt with a similar contention at p. 844. Though he thought that the supposition was impossible, and I entirely agree with him that it is not likely, yet in such a case, "it would be right to hold that Article 52 could not be altered by Parliament to abolish the office of President...it will require ratification". Nor do I think having regard to the basic structure of the Constitution is it possible to abolish the office of the President by resort to Article 368 and as assent is necessary, no President true to his oath to protect and defend the Constitution, will efface himself. It would, therefore, appear from this specific instance that an implied limitation is read into Article 368 by reason of the proviso entrenching Article 54. The learned Advocate-General says even Article 53 which vests the executive power of the Union in the President by Sub-clause (2), vests the Supreme Command of the Defence Forces of the Union in the President, would also necessitate an amendment similar to Article 52 by ratification by the states. Yet another instance is, that art implied power to amend is found in Article 368. When the form and manner is complied with, the Constitution stands amended, from which provision as well as the fact that Article 368 is in a separate Part entitled 'amendment of the Constitution', the above conclusion was reached. The petitioner's counsel naturally asks that if The Queen v. Burah (1877) J.C. 179 is read as an authority as contended on behalf of Kerala State against the existence of powers which are not conferred by affirmative words and against the existence of limitations, this proposition clearly negatives the respondents' other submission that the source of the amending power must be impliedly found in Article 368 although such a power is not to be found affirmatively conferred.

1152. Though there are naturally some limitations to be found in every organic instrument, as there are bound to be limitations in any institution or any other set up brought into existence by human agencies, and though my Lord the Chief Justice has gone into this aspect fully, it is in my view not necessary to consider in this case the question of the existence or non-existence of implied or inherent limitations, because if the amending power is wide and plenary, those limitations can be overridden as indeed the non-obstante clause in the amended Clause (1) of Article 368 was intended to subserve that end. What has to be considered is whether the word 'amendment' is wide enough to confer a plenitude of power including the power to repeal or abrogate.

1153. The learned Advocate-General has further submitted that there is intrinsic evidence in the Constitution itself that the word 'amendment' in Article 368 means 'amend by way of addition, variation or repeal', because if that were not so, sub-para (2) of para 7 of Schedule V would not have taken out the law made under sub-para (1) empowering Parliament to "amend by way of

addition, variation or repeal" any of the provisions of the Schedule from the operation of Article 368. The same meaning should also be given to para 21 of Schedule VI. The learned Attorney-General has referred to several articles in which the word 'amendment' has been used, as also to several others in which that word or its variation has been used in continuation with other words. But these expressions do not show that the word 'amendment' is narrow or limited. In every case where an amendment has been made in the Constitution, he says, something has been added, something substituted, something repealed and re-enacted and certain parts omitted. The Constitution (First Amendment) Act is given as an instance of this, nor according to him does anything turn on the fact that Section 291 of the Government of India Act, 1935, was amended just about a few weeks before Article 368 was finalised, and in which the word 'amendment' was substituted for the words 'amend by way of addition, variation or repeal'. According to him what this Court must consider is that since Article 368 arranges to recreate the Constituent Assembly and exercise the same power as the Constituent Assembly, it should be read in a wide sense.

1154. If the power of amendment is limitless and Parliament can do all that the petitioners contend it can do under Article 368, the respondents say it should not be assumed that power will be abused, but on the other hand the presumption is that it will be exercised wisely and reasonably, and the only assurance against any abuse is the restraint exercised by the people on the legislative organs. But the recognition of the truism that power corrupts and absolute power corrupts absolutely has been the wisdom that made practical men of experience in not only drawing up a written Constitution limiting powers of the legislative organs but in securing to all citizens certain basic rights against the State. If the faith in the rulers is so great and the faith in the people to curb excessive exercise of power or abuse of it is so potent, then one needs no elaborate Constitution, because all that is required is to make Parliament omni-potent and omni-sovereign. But this the framers did not do and hence the question will be whether by an amendment under Article 368, can Parliament effect a metamorphosis of power by making itself the supreme sovereign. I do not suppose that the framers were unaware of the examples which must be fresh in their minds that once power is wrested which does not legitimately belong to a limited legislature, the efforts to dislodge it must only be by a painful process of struggle, bloodshed and attrition-what in common parlance would be a revolution. No one suggests this will be done, but no one should be complacent, that this will not be possible, for if there is power it can achieve even a destructive end. It is against abuse of power that a Constitutional structure of power relationship with checks and balances is devised and safeguards provided for whether expressly or by necessary implication. And the question is whether there are any such in our Constitution, and if so, whether they can be damaged or destroyed by an amending power?

1155. The petitioner's counsel, learned Advocate-General and the learned Attorney-General have furnished us with the extracts from various Dictionaries, and the learned Attorney-General has further referred us to a large number of Constitutions in which the word 'amendment' or words used for amending the Constitution have been employed, to show that there is no difference or distinction between these words and the word 'amendment'. In all these Constitutions, subject to which I said of the inappropriateness of comparing other world Constitutions made for different people with their differing social, political and economic outlook, the words used are either 'amendment' or a combination of that word with others or a totally different word. In some of the Constitutions given in the compilations made available to us where the word 'amendment' alone is used, the exercise of the power of amendment was inextricably linked with the ratification by the

people in whom the sovereignty rests, either by referendum or by convention or by the Legislatures. The Constitutions of other countries which have been referred to specifically by the learned Attorney-General are of Liberia, Trinidad & Tobago, Somalia, Jordan, Kuwait, Lebanon, Vietnam Democratic Republic, Belgium, Costa Rica, Cuba and Nicaragua. I have examined the relevant provisions of these Constitutions regarding the amendatory process. These Constitutions have used different words than the words used in our Constitution. When the word 'amendment' or 'amend' is used, it has been invariably used with the words 'alter', or 'repeal', or 'revise', or 'variation, addition or repeal', or 'modification', or 'suspension', or 'addition', or 'deleting', or 'partially amend', or 'general amendment', or 'specific, partial or complete', or 'wholly or partially amend', or by a combination of one or more of these expressions. In one of the Constitutions, namely, Trinidad & Tabago, the word 'alteration.' was defined to include 'amendment, modification or modification or that provision, the suspension or repeal of that provision and the making of a different provision in lieu of the provision'.

1156. In some of the other Constitutions not referred to by the learned Attorney-General where the amending process is not referable to the voters by referendum or to be ratified in a convention with the word 'amend', the words 'alter', 'add', 'supplement', 'repeal' or similar words have been used to indicate the plenitude of power of amendment. Section 29(4) of the Ceylon Constitutional Order, 1946, which Was the subject-matter of decisions in Liyanage v. The Queen (1967) 1 A.C. 259 and The Bribery Commissioner v. Rana Singh (1964) 2 W.L.R. 1301 cases, and had been debated in this Court by counsel on either side, provides that in the exercise of its powers under the section "Parliament may amend or repeal any of the provisions of this Order, or of any other Order". But this sub-section entrenches by Sub-section (2) certain matters from being amended because as the Privy Council observed that "They represented a solemn "balance of rights between the citizens of Ceylon". In the Constitution of Finland the words used are adoption,, amendment, or abrogation of a fundamental law. The Irish Constitution, 1937, provided by Article 46(1) that any provision of the Constitution may be amended, whether by way of variation, addition, or repeal in the manner provided by the Article, and the Constitution of Malaya has defined the word in Clause (6) of Article 159 that 'amendment' includes addition and repeal. Even the Constitution of the Islamic Republic of Pakistan has used the words amended or repealed. The Constitution of the Union of South Africa has used the words repeal or alter and the Constitution of the United States of Brazil has an entrenched provision in Clause (6) of Article 217 that the Bills tending to abolish the Federation and the Republic shall not be admitted to consideration.

1157. These references not only do not show that the word 'amendment' has been used by itself to denote the plenitude of power but on the other hand show that these prescribe a procedure in which the people have been associated or a Constituent Assembly has to be called or fresh elections are required to be held to consider the amendments. In some of these Constitutions there was also difference made between total and partial amendments and where the word 'alteration' has been used, it has been defined as to what is included therein. No assistance can, therefore, be derived from the Constitutions either referred to by the Attorney-General or by the ones to which I have referred, and if at all, they only show that the word 'amendment' has not, as contended, unambiguous, precise or wide connotation.

1158. It is said that the words "amend by way of addition, variation or repeal" by reference to Clause (2) of Para 7 and Para 21 of the Fifth and Sixth Schedule respectively, mean the same as

amendment, and consequently Article 368 empowers the repeal of any provision of the Constitution. If the word "repeal" means abrogation, then an amendment under Article 368 can even abrogate any provision of the Constitution, short of abrogating the entire Constitution and substituting a new one. In my view, the phrase "by way of" call it a padding, call it explanatory, is idiomatic and difficult to render into exact phraseology . An idiom is an accepted phrase, construction or expression contrary to the usual pattern of the language or having a meaning different from the literal. As the Words & Phrases-Permanent Edition, Vol. 5, p. 1111, would show that "by way of" may be taken to mean "as for the purpose of", "in character of", "as being" and was so intended to be construed in an Act providing that certain companies should pay an annual tax for the use of the State, "by way of" a licence for their corporate franchise. The illustration given should show that in fact the payment of a licence fee is not a tax, but it is so considered to be by way of tax. In my view, therefore, the substitution of the word "amendment" by the expression "amend by way of addition, variation or repeal" makes no difference as it bears the same meaning as the word "amendment".

1159. In its ordinary meaning the word "amend" as given in Shorter Oxford Dictionary is to make alterations. In some of the Dictionaries it is given as meaning "to alter, modify, rephrase, or add to or subtract from". Judicial and Statutory Definitions of Words and Phrases, Second Series, Vol. I- the word "amend" has been treated as synonymous with correct, reform and rectify. It is also stated that "amendment" of a statute implies its survival and not destruction. The word "amend" in legal phraseology, does not generally mean the same thing as "repeal", because there is a distinction between a "repeal" but it does not follow that "amendments of statute may not often be accomplished by repeals of some of its parts" and though "amendment may not directly amount to repeal, it may have such a consequential effect". Crawford in his book on "The Construction of Statutes" 1940, pp. 170-171 which is quite often referred to and used in this Court, states that "a law is amended when it is in whole or in part permitted to remain and something is added to, or taken from it, or it is in some way changed or altered in order to make it more complete, or perfect or effective. It should be noticed, however, that an amendment is not the same as a repeal, although it may operate as a repeal to a certain degree. A repeal is the abrogation or destruction of a law by a legislative act. Hence we may see that it is the effect of the Legislative act which determines its character". The first part of this definition may be compared with the meaning indicated by Wanchoo, J. in Golaknath's case at p. 833 to which a reference has already been made.

1160. Both the learned Advocate for the petitioner and the learned Attorney-General have referred to the decisions of the State Courts of the United States for the meaning of the word 'amend' in support of their respective contentions, but these decisions which are rendered in the context of the Constitutions of the respective States in America where ratification by the people is a condition for amending the Constitution do not carry the matter any further. Even in these cases the word 'Amendment' has been used in the contradistinction with the word 'revision'. Words and Phrases, Permanent Edition, Vol. 37 says, "The term 'repeal' is synonymous with abolish, rescind and annul. An amendment has been distinguished from alteration or change. It is said that an amendment keeps alive while a 'repeal' destroys." See State ex rel. Strutx v. Baker 299 N.W. 574, N.D. 153. It is, therefore, apparent from the meaning of the word 'amendment' that it does not include 'repeal' or 'abrogation' nor is it the same as revision.

1161. I would now refer to certain provisions of the Constitution where the words "amend" or "repeal" have been used to indicate that the ambit of the power of amendment does not extend to repeal. A repeal of a provision of a law is different from the repeal of the law itself. The Constitution itself has made a distinction between the amendment of the law and repeal of the law. This becomes clear if we refer to Article 372(2) in which power has been given to the President by order to make such adaptations and modifications of any law whether by way of repeal or amendment, as may be necessary or expedient, to bring it in conformity with the provisions of the Constitution. See also Article 372(2)(b). Clause (2) of Article 252 provides that any Act passed by Parliament in respect of two or more States may be amended, or repealed by an act of Parliament. In this clause the word 'repeal' is used in contradistinction to 'amendment' as clearly implying that amendment does not include repeal of the Act itself. Even in Article 372(1), this distinction is brought out where a law in force immediately before the commencement of the Constitution was to continue in force until "altered or repealed or amended" by a competent authority. Similarly in Article 35(b) also any law in force immediately before the commencement of the Constitution in the territory with respect to any of the matters specified therein and to any adaptations and modifications that may be made therein under Article 372 continue in force until "altered or repealed or amended" by Parliament. See proviso to Clause (2) of Article 254 and Clause (5) of Article 350. It may also be noticed that before the repeal of Article 243, Clause (2) thereof provided that the President may make regulations for the peace and good government of territories in Part D of the First Schedule and any regulation so made may repeal or, amend any law made by Parliament or any existing law. It will, therefore, be observed that even where power has been given to a competent legislature or any other competent authority over a law in force to continue by virtue of the above referred; provisions, the framers have used the word 'repeal' of a law in contradistinction to the word 'amend' of a law. It may be contended with some force that where the framers intended to give full and plenary powers to competent legislatures to deal with laws in force, they were meticulous enough to use two distinct words. If the word 'amend' or 'amendment' in its generic connotation meant 'repeal' then this word would not have been used in contradistinction with the word amendment or amend in some articles, and only the word 'amend' or 'amendment' in others. In so far as the laws in force are concerned, it would appear that the intention was not to add to them, though the word 'alter' could imply also a variation. Nonetheless it is apparent that the word 'amendment' as used in Article 368 does not connote a plenitude of power. This is also clear from Sub-section (2) of Section 6 of the Indian Independence Act, 1947 which, as already seen, even in the context of the power to be possessed by the Constituent Assembly, uses the word 'repeal' or 'amend' to indicate the plenitude of the power of abrogation and repeal. Sections 32, 37, 74, 82 and 107(2) of the Government of India Act also use the word 'amendment' in the sense of change and not repeal of the law. On the other hand, Sections 106(2) of Government of India Act and Article 372(1) use the word 'repeal'. In the former, power is given to repeal a law, and in the latter it was provided that notwithstanding the repeal of enactments referred to in Article 395 to which included the Indian Independent Act, etc., all the laws in force and also be replaced in the sense that they could be abrogated. Further in Clauses (3) and (4) of Article 109, the Council of State is empowered to make amendments in money bill which the House of the People may or may not accept and if it does not, it will be passed without any such amendment. The Council of States, cannot reject the bill altogether but can only make a change therein.

1162. The argument that if wide construction is given to the word 'amendment' all fundamental rights can be taken away by the requisite majority, whereas much less significant matters require the concurrence of not less than one-half of the States under the proviso is based on the misconception that unlike in the United States where there is a dual citizenship-one as a citizen of United States and the other as a citizen of the particular State in the Union, we have only one citizenship and that is as a citizen of India and it is Parliament and Parliament alone which can legislate in respect of that right. No State has the legislative power to affect that right, and, therefore, have not been given a power of ratification where the fundamental rights are sought to be amended under Article 368. This aspect is not, however, determinative of the extent of the power of amendment under Article 368. The word 'amendment' read with the other provisions indicates that it is used in the sense of empowering a change in contradistinction to destruction which a repeal or abrogation would imply. Article 368 empowers only a change in the Constitution as is evident from the proviso which requires that where the provisions specified in Clauses (a) to (e) have to be amended they have to be ratified by the resolution of not less than one-half of the Legislatures of the States. This proviso furnishes a key to the meaning of the word 'amendment', that they can be changed without destroying them just in the same way as the entire Constitution cannot be abrogated and a new Constitution substituted therefore. In this view, I agree with My Lord the Chief Justice, for the reasons given by him, that the amplitude of the power of amendment in Article 368 cannot be enlarged by amending the amending power under proviso (e) to Article 368.

1163. What follows from this conclusion is the next question to be considered. It is submitted that an amendment should not alter the basic structure of the Constitution or be repugnant to the objectives set out in the Preamble and cannot be exercised to make the Constitution unidentifiable by altering its basic concept governing the democratic way of life accepted by the people of this country. If the entire Constitution cannot be abrogated, can all the provisions of the Constitution leaving the Preamble, or one article, or a few articles of the original Constitution be repealed and in their place other provisions replaced, whereby the entire structure of the Constitution, the power relationship inter se three Departments, the federal character of the State and the rights of the citizens vis-a-vis the State, are abrogated and new institutions, power relationships and the fundamental features substituted therefor? In my view, such an attempt would equally amount to abrogation of the Constitution, because any such exercise of the power will merely leave the husk and will amount to the substitution of an entirely new Constitution, which it is not denied, cannot be done under Article 368.

1164. The Preamble to the Constitution which our founding fathers have, after the Constitution was framed, finally settled to conform to the ideals and aspirations of the people embodied in that instrument, have in ringing tone declared the purposes and objectives which the Constitution was intended to subserve. How far the Preamble can be resorted to for interpreting the Constitution has been the subject of debate. It was contended that it is not a part of the Constitution, and as we have been shown, that this concept had found approval of this Court in In Re: Berubari Union & Exchange of Enclaves, but the Court did not appear to have noticed that it was adopted by the Constituent Assembly as part of the Constitution. The observations of Gajendragadkar, C.J., must be understood in the context of his assumption that the Preamble is not a part of the Constitution. After referring to Story that the Preamble is "a key to open the mind of the makers" and a passage

from Willoughby that it has never been regarded as source of any substantive power, etc., the learned Chief Justice concluded thus :

What is true about the powers is equally true about the prohibitions and limitations. Besides, it is not easy to accept the assumption that the first part of the preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself. As we will point out later, it is universally recognised that one of the attributes of sovereignty is the power to cede parts of national territory, if necessary. At the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the preamble. therefore, Mr. Chatterjee is not right in contending that the preamble imports any limitation on the exercise of what is generally regarded as a necessary and essential attribute of sovereignty.

It may be pointed out that the passage from Story and Willoughby cited therein have not been fully extracted. For a proper appreciation of the views of these authors it is necessary to examine the relevant passages in, full. Story says, "It is an admitted maxim...that the preamble of a statute is a key to open the mind of the makers as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute...the will and intention of the legislature is to be regarded and followed. It is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble. There does not seem any reason why, in a fundamental law or Constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble.... The preamble can never be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the Constitution, and not substantively to create them.... We have the strongest assurances, that this preamble was not adopted as a mere formulary but as a solemn promulgation of a fundamental fact, vital to the character and operations of the government". (Story, Constitution of the United States, Vol. I, pp. 443-446).

1165. It is clear from the above views of Story that: (a) the preamble is a key to open the mind of the makers as to the mischiefs, which are to be remedied; (b) that it is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; (c) even where the words are clear and unambiguous, it can be used to prevent an obvious absurdity or to a direct overthrow of the intention expressed in the preamble, and it would be much more so, if they were ambiguous; (d) there is no reason why, in a fundamental law or Constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble; (e) the preamble can never be resorted to, to enlarge the powers expressly given, nor to substantively create any power or to imply a power which is otherwise withdrawn from the Constitution; (f) its true function is to expound the nature, extent, and application of the powers actually conferred by the Constitution.

1166. The passage extracted from Willoughby no doubt shows that the Preamble may not be resorted to as a source of Federal Authority but in dealing with its value and use the learned author has stated thus:

Special significance has at various times been attached to several of the expressions employed in the Preamble to the Constitution. These expressions are:

1. The use of the phrase "We, the People of the United States", as indicating the legislative source of the Constitution.

2. The denomination of the instrument as a "Constitution".

2. The description of the federation entered into as "a more perfect Union.

3. The enumeration of "the common defence" and "general welfare" among the objects which the new Government is established to promote" (Willoughby, Vol. I, p. 62).

4. These American authors, therefore, recognise the use of the Preamble to ascertain the essential concepts underlying the Constitution.

1167. The English cases show that the preamble can be resorted to as a means to discover the legislative intent of which one may be cited. In the Attorney-General v. Prince Earnest Augustus of Hanover, (1957) A.C. 436 the House of Lords considered the question whether and to what extent Preamble of a statute can be relied upon to construe the enacting part of the statute. Viscount Simond (with whom Lord Tucker agreed), observed at p. 461 : "For Words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state or the law, other statutes in Pari materia, and mischief which I can, by those and other legitimate means, discern the statute was intended to remedy". Referring to the observations in Powell v. Kempton Park Racecourse Co. Ltd., (1899) A.C. 143 that 'the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms', Viscount Simond said at p. 463: "it is often difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It only means that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.... I would suggest that it is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it And I do not propose to define that expression except negatively by saying...that it is not to be found merely in the fact that the enacting words go further than the preamble has indicated. Still less can the preamble affect the meaning of the enacting words when its own meaning is in doubt".

1168. On this aspect Lord Normand said at pp. 467468: "when there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provision. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts.... It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail...it is the court's business in any case of some difficulty, after informing itself of...the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward.... If they admit of only one construction that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred." Lord Somervell said at p. 474, that, "The word 'unambiguous' must mean unambiguous in their context". Lord Thring, one of the great draftsmen of England in his book on "Practical Legislation", Chapter IV, pp. 92-93, made this pertinent observation as to preambles. He said, "a preamble may also be used to limit the scope of certain expressions in the Act, and sometimes a preamble is inserted for political reasons when the object of an Act is popular, and admits of being stated in a telling sentence or sentences." In Sajjan Singh's case at p. 968, Mudholkar, J., while taking note of the contention that it has been said that the preamble is not a part of the Constitution observed: "But, I think, that if upon a comparison of the preamble with the broad features of the Constitution it would appear that the preamble is an epitome of those features or, to put it differently, if these features are an amplification or concretisation of the concepts set out in the preamble it may have to be considered whether the preamble is not a part of the Constitution. While considering this question it would be of relevance to bear in mind that the preamble is not of the common run such as is to be found in an Act of a legislature. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?" With great respect, I agree with the view expressed by him.

1169. These observations of the House of Lords, of the learned writers and of the Judges referred to above clearly point to the fact that the preamble will furnish a guide to the construction of the statute where the words are ambiguous, or even where the words are unambiguous to aid a construction which will not lead to an absurdity. Where the preamble conveys a clear and definite meaning, it would prevail over the enacting words which are relatively obscure or indefinite or if the words are capable of more than one construction, the construction which fits the preamble may be preferred.

1170. In In Re: Berubari Union & Exchange of Enclaves case the Court failed to refer to and consider the view of Story that the preamble can be resorted to, to expound the nature, the extent and the application of the powers or that the preamble can be resorted to, to prevent obvious absurdity or to a direct overthrow of the intention expressed therein. It may also be observed that the Court in that case did categorically say that the first part of the preamble is not a serious limitation. If the Court had taken a definite view that the preamble was not a source of limitation, the observation that, "it is not easy to accept the assumption that the first part of the preamble postulates a very serious limitation on one of the very important attributes of sovereignty" (emphasis supplied) was not necessary, because it implies that certain parts of the Preamble can be established to be a source of serious limitation if such exists. In any case though the advisory

opinion is entitled to the greatest respect, it is not binding when any concrete issue arise for determination, particularly when the width of the power of amendment had not fallen for consideration in that case, nor was it in fact considered at all.

1171. I will now consider the question which has been strenuously contended, namely, that there are no essential features, that every feature in the Constitution is essential, and if this were not so, the amending power under the Constitution will apply only to non-essential features which it would be difficult to envisage was the only purpose of the framers in inscribing Article 368 and that, therefore, there is no warrant for such a concept to be read into the Constitution. The argument at first flush is attractive, but if we were to ask ourselves the question whether the Constitution has any structure or is structureless or is a "jelly fish" to use an epithet of the learned Advocate for the petitioner, the answer would resolve our doubt. If the Constitution is considered as a mechanism, or call it an organism or a piece of Constitutional engineering, whichever it is, it must have a structure, or a composition or a base or foundation. What it is can only be ascertained, if we examine the provisions which the Hon'ble Chief Justice has done in great detail after which he has instanced the features which constitute the basic structure. I do not intend to cover the same field once again. There is nothing vague or unascertainable in the preamble and if what is stated therein is subject to this criticism it would be equally true of what is stated in Article 39(b) and (c) as these are also objectives fundamental in the governance of the country which the State is enjoined to achieve for the amelioration and happiness of its people. The elements of the basic structure are indicated in the preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice, social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and of opportunity. Each one of these is important and collectively they assure a way of life to the people of India which the Constitution guarantees. To withdraw any of the above elements the structure will not survive and it will not be the same Constitution, or this Constitution nor can it maintain its identity, if something quite different is substituted in its place, which the sovereign will of the people alone can do. There can be a Democratic Republic in the sense that people may be given the right to vote for one party or only one candidate either affirmatively or negatively, and are not given the choice to choose another opposed to it or him. Such a republic is not what has been assured to our people and is unthinkable by any one foresworn to uphold, defend, protect, or preserve or work the Constitution. A democratic republic that is envisaged is the one based on a representative system in which people holding opposing view to one another can be candidates and invite the electorate to vote for them. If this is the system which is the foundation of a democratic republic, it is unthinkable that it can exist without elements (2) to (4) above either collectively or separately. What is democracy without social, economic and political justice, or what value will it have, where its citizens have no liberty of thought, belief, faith or worship or where there is no equality of status and of opportunity? What then are the essential features or the basic elements comprising the structure of our Constitution need not be considered in detail as these will fall for consideration in any concrete case where they are said to have been abrogated and made non-existent. The fact that a complete list of these essential elements constitution the basic structure are not enumerated, is no ground for denying that these exist. Are all the elements which make a law void and un-constitutional ever required to be concatenated for the recognition of the validity or invalidity of laws judged on the anvil of the Constitution? A sovereign democratic republic, Parliamentary democracy, the three organs of the State, certainly in my view constitute

the basic structure. But do the fundamental rights in Part III and Directive Principles in Part IV constitute the essential element of the basic structure of our Constitution in that the Constitution will be the Constitution without them ? In other words, if Parts III and IV or either of them are totally abrogated, can it be said that the structure of the Constitution as an organic instrument establishing sovereign democratic republic as envisaged in the preamble remains the same? In the sense as I understand the sovereign democratic republic, it cannot: without either fundamental rights or directive principles, what can such a government be if it does not ensure political, economic, or social justice?

1172. The History of the agitation for political freedom, fundamental rights and self-government is well known. As I said earlier, ever since the second half of the 19th century the struggle has been going on and when ultimately India in spite of the partition, achieved its cherished dream of independence and territorial unity from north to south, and east to west, which in millennium it could not achieve, the fundamental objectives formed the corner stone of the nation. As Granville Austin so aptly puts it in his book "The Indian Constitution" at page 50, "The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principle of State Polity. These are the conscience of the Constitution. The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence And they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India The Rights and Principles thus connect India's future, present, and past, adding greatly to the significance of their inclusion in the Constitution, and giving strength to the pursuit of the social revolution in India.

1173. The demand for fundamental rights had its inspiration in the Magna Charta and the English Bill of Rights, the French Revolution, the American Bill of Rights incorporated in the Constitution of the United States in 1791. For the first rime, the Indian National Congress which was formed in 1885, made a demand for them in the Constitution of India Bill. 1895 and these demands were reiterated from time to time. Annie Besant's Commonwealth of India Bill contained a demand for 7 fundamental rights. The Simon Commission rejected these demands for inclusion of fundamental rights, but Moti Lal Nehru Committee drafted a Swaraj Constitution for India incorporating therein the declaration of rights. In respect of these rights, the report said:

It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances....

The Karachi Resolution of March 1931 on Fundamental Rights on economic and social change added a new dimension to Constitutional rights because till then State's negative obligations were alone being emphasised. By that Resolution "the demand now equally emphasised the State's positive obligations to provide its people with the economic and social conditions in which their negative rights would have actual meaning". (Granville Austin, p. 56). The Sapru Committee also incorporated these fundamental rights and for the first time divided them into justiciable and non-justiciable rights. During the Constituent Assembly Debates, Pt. Jawahar Lal Nehru in dealing with the confusion existing in the minds of the members in respect of the fundamental rights, said:

"There is this confusion, this overlapping, and hence I think a great deal of difficulty has been brought into the picture. A fundamental rights should be looked upon not from the point of view of any particular difficulty of the moment, but as something that you want to make permanent in the Constitution. The other matter should be looked upon - however important it might be - not from this permanent and fundamental point of view, but from the more temporary point of view" (emphasis supplied). Dr. Radhakrishnan described the declaration of basic freedoms as a pledge to our own people and a pact with the civilised world". (Constituent Assembly Debates, Vol. II, p. 273). Dr. Ambedkar speaking on the Objectives Resolution, said that "when one reads that part of the Resolution, it reminds one of the declaration of the Rights of Man which was pronounced by the French Constituent Assembly. I think I am right in suggesting that, after the lapse of practically 450 years, the Declaration of the Rights of Man and the principles which are embodied in it has become part and parcel of our mental makeup, I say they have become not only the part and parcel of the mental makeup of modern man in every civilised part of the world, but also in our own country which is so orthodox, so archaic in its thought and its social structure, hardly anyone can be found to deny its validity. To repeat it now as the Resolution does, is to say the least, pure pedantry. These principles have become the silent immaculate premise of our outlook. It is therefore unnecessary to proclaim as forming a part of our creed. The Resolution suffers from certain other lacuna. I find that this part of the Resolution, although it enunciates certain rights, does not speak of remedies. All of us are aware of the fact that rights are nothing unless remedies are provided whereby people can seek to obtain redress when rights are invaded." The reference to the remedy that was absent in the Objectives Resolution, was made good by the inclusion of Article 32, with respect to which he said: "an article without which this Constitution would be a nullity.... I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance.... It is remedy that makes a right real. If there is no remedy there is no right at all..." (emphasis supplied) - Constituent Assembly Debates, Vol. VII, p. 953. Although he said while dealing with appropriateness of the English high prerogative writs as affording an effective remedy that these could be amended he did not say that either the judicial review could be abrogated or taken away by an amendment or the Court itself can be abolished. Nor was any question raised by any one in this regard. Dr. Ambedkar's observations cannot be read to suggest that by an amendment of the Constitution, Article 32 could be abrogated, for if it were so, his observations could be in clear conflict with the express language of Clause 4 of Article 32. The guarantee in Clause 4 of Article 32 could be conceived of only against amending power, for no ordinary law can suspend a right given by the Constitution unless permitted by the Constitution itself. When Clause 4 of Article 32 does not even permit suspension of the right under Article 32 except as otherwise provided in the Constitution, that is, by Article 359, it is highly unthinkable that by an amendment this right could be abrogated. This pivotal feature of the Fundamental Rights demonstrates that this basic structure cannot be damaged or destroyed. When a remedy cannot be abrogated, it should follow that the fundamental rights cannot be abrogated for the reason that the existence of a remedy would be meaningless without the rights. There is nothing else in the debates which would suggest that any of the members ever entertained any notion of abrogation of any of the fundamental rights. It was in the light of the makeup of the members and the dedicated way in which they spoke of these rights that these rights were cherished by the people. It could not be imagined that any one would have suggested anything to the contrary. In respect of the Directive Principles, though every one recognised these as of great importance, Shri B.N. Rau made several attempts to persuade the Drafting Committee to make the fundamental rights subordinate to the Directive Principles but he

did not succeed. Sir Alladi Krishnaswami Ayyar, an eminent lawyer, had in his note of March 14, 1947, made a distinction between the Directive Principles and fundamental rights and said that it is impossible to equate those though it could not be denied that they were important. There can be no doubt that the object of the fundamental rights is to ensure the ideal of political democracy and prevent authoritarian rule, while the object of the Directive Principles of State policy is to establish a welfare State where there is economic and social freedom without which political democracy has no meaning. What is implicit in the Constitution is that there is a duty on the Courts to interpret the Constitution and the laws to further the Directive Principles which under Article 37, are fundamental in the governance of the country. As My Lord, the Chief Justice has put it, to say that the Directive Principles give a directive to take away fundamental rights, seems a contradiction in terms. There is no rationale in the argument that the Directive Principles can only be given effect to, if fundamental rights are abrogated. If that were the desiderata then every Government that comes into power and which has to give effect to the Directive Principles of State policy in securing the welfare of its citizens, can say that since it cannot give effect to it so long as fundamental rights subsist, they must be abrogated. I do not think there is any such inherent postulate in the Constitution. Some of these rights, though limited, were subsisting from even the British days under the laws then in force, yet there were others which were repressive like the Bengal Regulation III of 1818, Madras Regulation II of 1819, Bombay Regulation XXV of 1827, the Indian Criminal Law Amendment Act XIV of 1908, etc., which were used to suppress the freedom of the people and detain persons on political grounds when they were found inconvenient to the rulers. The demand for securing fundamental rights since then became an Article of faith, which, as Dr. Ambedkar said, became part and parcel of the mental makeup and the silent immaculate premise of their outlook. The outlook of the framers of the Constitution could not have provided for such a contingency where they can be abrogated, nor in any view, is it a necessary concomitant of the Jeffersonian theory that no one can bind the succeeding generations who by the will of the majority of the people of the country, can bind themselves. One of the views in America since then held and which still persists, was expressed by Justice Hugo Black, one of the eminent Judges of the Supreme Court in these terms: "I cannot consider the Bill of Rights to be an outworn 18th century 'straight-jacket'. Its provisions may be thought out-dated abstractions by some. And it is true that they are designed to meet ancient evils. But they are the same against all human evils that have emerged from century to century whenever excessive power is sought by the few at the expense of many". In 1895, famous Jurist Maitland, even where Parliament was Supreme, said of Magna Charta that, "this document becomes and rightly becomes the sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had". [Pollock & Maitland, (1898) Volume I, p. 173] .

1174. In the frame of mind and with the recognition of the dominant 'mental make up and the silent immaculate premise of our outlook' which became the outlook of the people, the framers of our Constitution could not have provided for the freedoms inherent as a part of the right of civilised man to be abrogated or destroyed. The interest of the community and of the society will not be jeopardised and can be adjusted without abrogating, damaging, emasculating or destroying these rights in such a way as to amount to abrogation of the fundamental rights. The Advocate-General of Mysore said that even if fundamental rights are totally abrogated, it is not as if the people will be without any rights. They will be subject to ordinary rights under the law. I must repudiate this contention, because then the clock will be put back to the same position as existed when Britain ruled India and against which rule our leaders fought for establishing freedom, dignity and basic

rights. In this view, my conclusion is that Article 13(2) inhibits only a law made by the ordinary legislative agency and not an amendment under Article 368; that Parliament could under Article 368 amend Article 13 and also the fundamental rights, and though the power of amendment under Article 368 is wide, it is not wide enough to totally abrogate or what would amount to an abrogation or emasculating or destroying in a way as would amount to abrogation of any of the fundamental rights or other essential elements of the basic structure of the Constitution and destroy its identity. Within these limits, Parliament can amend every article. In this view of the scope of the amending power in Article 368, I hold the Twenty-fourth Amendment valid, for it has the same amending power as it existed before the amendment.

1175. The Twenty-fifth Amendment, as the objects and reasons of the Bill showed, was enacted mainly to get over the decision in the case of R.C. Cooper v. Union of India MANU/SC/0011/1970 : [1970]3SCR530 , (hereinafter referred to as the 'Bank Nationalisation' case). The previous decisions of this Court beginning from the State of West Bengal v. Mrs. Bela Banerjee MANU/SC/0017/1953 : [1954]1SCR558 on account of which the Constitution (Fourth Amendment) Act, 1955, was enacted and the subsequent cases in P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and Anr. MANU/SC/0049/1964 : [1965]1SCR614 Union of India v. The Metal Corporation of India Ltd., and Anr. MANU/SC/0117/1966 : [1967]1SCR255 State of Gujarat v. Shantilal Mangaldas and Ors. MANU/SC/0063/1969 : [1969]3SCR341 have been examined by my learned brother Hegde, J., in his judgment just pronounced, in the light of the contentions urged by the respondents, as such I do not find it necessary to refer to them or set out the ratio of these decisions again.

1176. It will be observed from the amendment in Clause (2) of Article 31 enacted by Section 2 of the above amendment that: (1) the word 'amend' has been substituted for the word 'compensation'; and (2) that the words "or that the whole or any part of such amount is to be given otherwise than in cash" have been added. The effect of the amendment is that the law now need not provide for giving 'compensation' in the sense of equivalent in value or just equivalent of the value of the property acquired and that the whole or part of the amount may be paid otherwise than in cash. The question then arises that if the word 'amount' which has no legal concept, and as the amended clause indicates, means only cash, which would be in the currency of the country, can the lowest amount of the current coin be fixed, and if fixed, will it amount to payment in lieu of the property acquired ?

1177. Ever since the Constitution (Fourth Amendment) Act, this Court has consistently held that where what is given in lieu of expropriating property of a citizen is illusory, arbitrary, or cannot be regarded as compensation, and bears no reasonable relation to the property acquired, the Court can go into it, and, secondly, where principles are fixed for determining the compensation, it can examine the question whether they are relevant to the subject-matter of the acquisition. That position has not in any way been affected by the amendment by merely substituting the word 'amount' for 'compensation', so that if the amount is illusory or arbitrary, and is such that it shocks the conscience of any reasonable man, and bears no reasonable relation to the value of the property acquired, the Court is not precluded from examining it.

1178. It has been contended that Parliament or the Legislature can either fix an amount without setting out any principles for determining the amount or set out the principles for determining the

amount. In the former case, the respondents contend that it will not be open to the Court to examine on what principles the amount has been fixed. If the Legislature merely names an amount in the law for acquisition or requisition, it may be an arbitrary amount, or it may have some relationship or relevance to the value of the property acquired or requisitioned. The former cannot be, because it is provided that the acquisition is for an amount which may be fixed. If it is fixed, and as the term denotes, it must necessarily be fixed on some principle or criteria. Otherwise, no question of fixing an amount would arise: it would be merely naming an amount arbitrarily. The learned Advocate-General of Maharashtra was frank enough to admit that if principles are fixed, the amount to be determined thereunder becomes justiciable, but if the amount is fixed without stating any principles it is not justiciable and for this reason even the members of the Legislature, either of the opposition or of the ruling party, need not be told on what basis or principles the amount has been fixed, lest if this was disclosed the Courts would examine them. But how can this be avoided because if principles are fixed, the relevancy can be gone into as has been the consistent view of this Court, and yet it is said that if an amount is fixed without reference to any principles and arbitrarily, the Court cannot examine it. Such a view has no rational or logical basis. The Legislature, even in cases where it fixes an amount for the acquisition or requisition of a property, must be presumed to have fixed it on some basis, or applied some criteria or principles to determine the amount so fixed, and, therefore, where the law is challenged on the ground of arbitrariness, illusoriness or of having been based on irrelevant principles or any other ground that may be open to challenge by an expropriated owner, the State will have to meet the challenge, and the Court will have to go into these questions. This will be so even in respect to the manner of payment. Once it is satisfied that the challenge on the ground that the amount or the manner of its payment is neither arbitrary or illusory or where the principles upon which it was fixed were found to bear reasonable relationship to the value of the property acquired, the Court cannot go into the question of adequacy of the amount so fixed on the basis of such principles.

1179. Clause (2B) makes Sub-clause (f) of Article 19(1) inapplicable to Clause (2) of Article 31. In the Bank Nationalisation case by fa majority of ten to one, this Court held after an exhaustive review of all the cases beginning from A.K. Gopalan's case that, "If the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation, may unless otherwise established, be presumed, but enquiry into reasonableness of the procedural provisions will not be excluded. For instance, if a tribunal is authorised by an Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19(1)(f) .

1180. Thus, it will appear that where the acquisition is for a public purpose, what is sought to be excluded by Clause (2B) is the reasonableness of the procedural provisions by making Article 19(1)(f) inapplicable. Notwithstanding this amendment, it is apparent that the expropriated owner still continues to have the fundamental rights that his property will not be acquired save by the authority of law and for a public purpose. These propositions have been admitted by the learned Solicitor-General. The question whether an acquisition is for a public purpose is justiciable. Only the adequacy of the amount is not. If so, how can the expropriated owner establish that the acquisition is not for public purpose unless there are some procedural requirements to be complied with under the law? A notice will have to be served; he will have to be given an opportunity to contest the acquisition. Clause (2B) provides that "nothing in Sub-clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2)". Does this mean that the fundamental

right to reasonable restriction of procedural nature under Article 19(1)(f) which was available against any law of acquisition or requisition of property as held in the Bank Nationalisation case, is abrogated or destroyed? The answer to this question would depend upon what is the meaning to be given to the word "affect". Two constructions are possible: one is that Article 19(1)(f) will not be available at all to an expropriated owner under a law of acquisition made under Article 31(2) or to put it in another way, any law made under Article 31(2) for acquisition or requisitioning of any property abrogates Article 19(1)(f). Secondly, Clause (2B) was intended to provide that the law of acquisition or requisition will not be void on the ground that it abridges or affects the right under Article 19(1)(f). In choosing either of these constructions, regard must be had to that construction which would not result in the amendment being held invalid and void. Applying this approach, the second construction is more in consonance with the amendment because what the amendment provides for is that Article 19(1)(f) shall not affect any such law and this would imply that the bar against the application of Article 19(1)(f) to such a law may vary from a slight or partial encroachment to total prohibition or inapplicability. But since an amendment cannot totally abrogate a fundamental right, it can only be read by the adoption of the doctrine of "severability in application" and, accordingly, Clause (2B) must be held to be restricted only to the abridgement of, as distinct from abrogation, destroying or damaging the right under Article 19(1)(f). As I said earlier, the right to a reasonable procedure in respect of a law of acquisition or requisition for the effective exercise of the rights under Article 31(2), for a reasonable notice, a hearing opportunity to produce material and other evidence may be necessary to establish that a particular acquisition is not for a public purpose and for proving the value of the property and other matters that may be involved in a particular principle adopted in fixing the amount or for showing that what is being paid is illusory, arbitrary, etc.

1181. That apart, there is nothing in Clause (2B), to prohibit principles of natural justice which are part of the law of the land wherein the rule of law reigns supreme, from being applicable when the liberty of the individual or his property is affected by a law. I cannot read a sinister design in that amendment requiring the legislative organs to abrogate the rule of law in this country or deny to its citizens the benefit of the maxim 'audi alteram partem' that no man shall be condemned unheard, a concept of natural justice, "deeply rooted in our ancient history", which as Bylas, J., in Cooper v. The Wadsworth Board of Works 14 C.B. 180, expressed in the picturesque aphorism, "The laws of God and man both give the party an opportunity to make his defence, if he has any".

1182. There is one other aspect that has been stressed by the learned Advocate for the petitioner, which is more in the nature of the dire consequences that would ensue if the amendment is upheld, namely, that the citizen's right to property has now been transferred into the State's right to confiscation, that acquisition under the Land Acquisition Act and under other similar laws can be for the benefit of even Limited Companies in the private sector, and that religious freedoms guaranteed by Articles 25 to 30 can be virtually stifled by the taking away of the properties held by religious and charitable purposes. If Parliament under the law can do any of the things which are referred, this Court cannot prevent the consequences of a law so made. I have spelt out what can be done. The law made for acquisition under Clause (2) of Article 31 has still to satisfy that it is being taken for a public purpose. The question whether acquisition for a private person or company is for public purpose may be open to challenge and determined by Courts in an appropriate action. As for the principles applicable in the Bill for the acquisition of Bardoli lands for determining the amount payable for acquisition, as admitted by both the learned Solicitor-

General for the Union and the Advocate-General of Maharashtra will be applicable, then at any rate that will not be a case of confiscation, because an owner will at any rate get the amount paid by him together with the loss of interest for the years he had it. The plea that religious freedoms will be stifled also is not sustainable, because it has been already held by this Court in Khajamain Wakf Estates etc. v. The State of Madras MANU/SC/0416/1970 : [1971]2SCR790 , that Article 26(c) and (d) of the Constitution provide that religious denominations shall have the right to own and acquire property and administer them according to law. But that does not mean that the properties owned by them cannot be acquired by the State. In the view I have taken, and for the reasons set out above, I hold Section 2 of the Twenty-fifth Amendment valid.

1183. Section 3 of the Twenty-fifth Amendment has caused me considerable difficulty because on the one hand the amendment is designed to give effect to Article 39(b) and (c) of the Directive Principles of the State policy in the larger interest of the community, and on the other the basic assumption underlying it is that this cannot be done without taking away or abridging any of the rights conferred by Articles 14, 19 and 31, and that such a law, where it contains a declaration that it is to give effect to the above policy, shall not be called in question in any Court on the ground that it does not give effect to such policy. The predominant articulate as well as inarticulate premise is not to hold invalid an amendment made under Article 368, if it conforms to the form and manner prescribed therein and is within the ambit of the amending power, but if the inexorable conclusion on a close scrutiny leads to a different conclusion it has to be so held. Article 31C is as follows:

Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy;

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent.

1184. The learned advocate for the petitioner submits that Article 31C subverts seven essential features of the Constitution : (i) it destroys the supremacy of the Constitution by giving a blank charter to Parliament and all the State Legislatures to defy and ignore the Constitution; (ii) it subordinates the Fundamental Rights to Directive Principles of State Policy and thus destroys one of the foundations of the Constitution; (iii) the "manner and form" of amendment laid down in Article 368 is virtually abrogated, inasmuch as while the Fundamental Rights still remain ostensibly on the Statute Book and Article 368 remains unamended, the Fundamental Rights can be effectively silenced by a law passed by a simple majority in the Legislature; (iv) ten Fundamental Rights which are vital for the survival of democracy, the rule of law, and the integrity and unity of the Republic, are in effect abrogated. Seven of these ten Fundamental Rights are unconnected with property; (v) Judicial Review and enforceability of Fundamental Rights another essential feature of the Constitution is destroyed, in that the Court is prohibited from going into the question whether the impugned law does or does not give effect to the Directive Principles; (vi) the State Legislatures which cannot otherwise amend Article 368 are permitted to supersede a

whole series of Fundamental Rights with the result that Fundamental Rights may prevail in some States and not in others, depending upon the complexion of the State Government; and (vii) the protection to the minorities and their religious, cultural, linguistic and educational rights can be seriously affected on the ground that the law was intended to give effect to the Directive Principles.

1185. On behalf of the respondent-State of Kerala-the learned Advocate-General of Maharashtra submitted "that Article 31C was introduced because of the reversal of Gujarat v. Shantilal in the Bank Nationalisation case which reverted, in substance, to the concept of full compensation", and in order to "exclude judicial review where the law provided for securing the principles provided in Clause (b) or (c) of Article 39". There is, according to him, no delegation of power under Article 31C on the State Legislatures to alter or amend the Constitution, but it merely removes the restrictions on the legislative power of the State Legislatures and Parliament imposed by the fundamental rights contained in Articles 14, 19 and 31 of the Constitution, which rights have been conferred by Part III and the contravention of which would have rendered any law void. In this submission what it amounts to is only a removal of the restriction which can only be effected by making Article 13 inapplicable. Answering the question whether a law containing a declaration as envisaged in Article 31C the major portion of which has no connection with Clause (b) or Clause (c) of Article 39 would protect the law, it was submitted "that on the principle laid down by the Supreme Court in Akadasi Padhan v. State of Orissa MANU/SC/0089/1962 : (1963) Supp. 2 S.C.R. 691 the answer must be in the negative", and that the proper construction to be put on the declaration referred to in Article 31C is that the impugned law must satisfy the condition precedent that it is designed to secure the principles specified in Clause (b) or Clause (c) of Article 39, and if it does not give effect to the principles, Akdasi's case would justify the Court in reading the provision relating to declaration as not covering a case, where only a few sections are in furtherance of Article 39(b) & (c) while others are unrelated to it. Another way of arriving at the same conclusion, according to him, is that Article 31C postulates that there must be some nexus, however remote, between the law and the directives of State policy embodied in Article 39(b) and (c)", and that "if no reasonable person could come to the conclusion that the impugned provisions of an Act protected by Article 31C and the declaration made under it had any connection with Article 39(b) and (c), the Court could hold that the Act showed that the legislature had proceeded on a mistaken view of its power, and that, therefore, the Court was not bound to give effect to the erroneous assumptions of the legislature". The observations of Das Gupta, J., in The Provincial Transport Service v. State Industrial Court MANU/SC/0271/1962 : (1962)IILLJ360SC , were cited. Answering the contention that since the principles in Article 39(b) & (c) are widely expressed and as such there would always be some connection between them and practically any kind of law, the learned Advocate-General of Maharashtra said that the principles in Article 39(b) & (c) were designedly widely expressed but "that is not an objection to a law implementing those directives" because "public interest is a very wide concept and several rights are made subject to public interest," and that should not be the objection for upholding the validity of a law. This answer appears to be vague and uncertain, for what is conceded in the earlier part is withdrawn in the latter.

1186. The submission of the learned Solicitor-General is, firstly, that Article 31C protects only law and not mere executive action; secondly, the law referred to therein must be made either by Parliament or State Legislature and does not include within itself ordinance, order, rule, regulation, notification, custom or usage in accordance with the procedure prescribed in Article 368; thirdly,

the intention of the founding fathers who had enacted Clauses (4) and (6) of Article 31 to give effect to the Directive Principles of State policy set out in Article 39(b) & (c), as the experience shows, could not be given effect to because of the Constitutional hurdles which necessitated the Constitution (First Amendment) Act by which Article 31A and 31B was added under which the operation of Part III as a whole was excluded. According to him, the significance of this total exclusion of Part III is that it brings out in an unmistakable manner the true relationship between the provisions of Part IV and Part III of the Constitution, namely, that the liberty of the individual, valuable as that is, will not operate as unsurmountable barrier in the path of legislative efforts towards the achievement of the goal of a society envisaged in Part IV, and whenever and to whatever extent such a problem arose the amending process would be able to resolve it. He cited the observations of Das, J., in The State of Bihar v. Maharajadhiraja Sir Kameshwar Singh and Ors. MANU/SC/0019/1952 : [1952]1SCR889 , that, "a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution," and of Hidayatullah, J., in his dissenting judgment in Sajjan Singh's case that, "the rights of society are made paramount and they are placed above those of the individual". These two observations, if I may say so, are torn out of context, particularly those of Hidayatullah, J., where after stressing the fact that Article 19 by Clauses (2) to (6) allows the curtailment of rights in the public interest, which goes to show that Part III is not static and visualises change and progress, but at the same time it preserves the individual rights, he said after citing the observation above referred, that, "This is as it should be" (p. 962). It is further the case of the Union of India that the only laws which will receive the protection of Article 31C must disclose a nexus between the law and the objectives set out in Article 39(b) & (c) which is a condition precedent for the applicability of Article 31C and as such the question is justiciable and the only purpose of the declaration is to remove from the scope of judicial review question of a political nature. As an example the learned Solicitor-General instanced a law dealing with divorce which could not be protected by a declaration nor can a law not attracting Article 31C be protected by a declaration by merely mixing it with other laws really falling within Article 31C with those under that Article. In such a case, therefore, the Court will always be competent to examine "the true nature and character of the legislation in the particular instance under discussion-its design and the primary matter dealt with-its object and scope (1882) 7 A.C.". It was further averred that if a legislation enacted ostensibly under one of the powers conferred by the Constitution, is in truth and fact, really to accomplish an unauthorised purpose, the Court would be entitled to tear the veil and decide according to the real nature of the statute, as in Attorney-General v. Queen Insurance Co. [1873] 3 A.C. 1090, and that except Articles 14, 19 and 31 the rest of the relevant provisions of the Constitution will apply and the Court is entitled to go into and consider the challenge of infringement of other rights, and that there are only three safeguards against the evil of discrimination, namely, (a) the innate good sense of the community and of the legislature and the administrator; (b) the proviso to Article 31C requiring the President's assent; (c) the power of judicial review of the Courts to the extent not excluded, and of these, "The first safeguard is the only real safeguard ultimately and there is no real substitute for the character of the citizens". What is still open to the Court to examine is whether there is any violation of the provisions of Articles 15, 16, 286 and Part XIII (Articles 301, 303 and 304). The exclusion of Article 14, without excluding Articles 15, 16 etc., is only to enable the Legislatures and the Parliament to evolve new principles of equality in the light of the objectives set out in the Directive Principles without discrimination. The exclusion of Article 19 is on the footing that laws which are to give effect to the directives set out in Part IV must constitute

reasonable restrictions on the individual's liberty and the exclusion of Article 31(2) is to introduce the considerations of social justice in the matter of acquisition.

1187. In so far as the question whether Article 31C amounts to delegation of amending power to State Legislature or to Parliament in its ordinary legislative capacity is concerned, the learned Solicitor-General submits that a class of legislation or a legislative field may be identified or categorised in several ways, for instance, with reference to the period within which the law is passed [Article 31(4) and Article 31(6)] or the topic of the legislation [Article 21(2) and Article 31A]; or the objective or purpose of the legislation [Article 15(4)] for the advancement of the backward class of citizens; Article 31(5)(ii) for promotion of health and Article 33 for proper discipline in the forces etc. Article 31C likewise carves out a legislative field with reference to the object of the legislation and in this respect it is similar to Articles 15(4), 31(b)(ii) and 33. Each of these articles creates a legislative field to achieve a social objective and for this purpose modifies the operation of some fundamental rights contained in Part III. Even assuming that Article 31C involves an element of delegation of the amending power, he contends there is no violation of Article 368 and the absence of non-obstante clause or the label cannot make any difference, and since Article 368 empowers its own amendment, it follows that Article 31C, if there is a partial substitution of an amending machinery and procedure, will operate as a partial modification of Article 368.

1188. It is contended that Article 31C is similar to the legislative device adopted in Articles 31A and 31B, which was added by the Constitution (First Amendment) Act, 1950, the first of which declared that "Notwithstanding anything in the foregoing provisions of this Part (i.e. Part III), no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part", namely, Part III. Article 31B is also in similar terms and gives complete protection to the Acts specified in the Ninth Schedule from any of the provisions of Part III.

1189. In so far as Article 31A was concerned, it authorised a law for the acquisition of an estate as defined in Clause (2). Article 31B as introduced by the First Amendment protected from challenge, on the ground of infringement of the rights in Part III, certain Acts enacted for agrarian reforms which, after very careful scrutiny that they pertain to agrarian reforms, were added to the Ninth Schedule. Zamindari abolition and agrarian reform had become an article of faith of free India and in respect of which the Bills either were pending at the time when the Constitution was being framed or they had been enacted into law after the commencement of the Constitution. The debates in the Constituent Assembly on Article 31 will disclose that after postponing its consideration for nearly a year, in the end a compromise was arrived at between those who were for the acquisition law to provide for payment of full compensation and those who wanted the right in Article 31 not to extend to the acquisition of land for giving effect to agrarian reforms. This compromise resulted in the inclusion of Clauses (4) and (6) giving protection to laws made thereunder from being questioned in any Court; in the case of the former, to laws dealing with agrarian reforms in respect of which Bills were pending in any of the Legislatures of the States at the commencement of the Constitution and had been reserved for the consideration of the President who subsequently assented to them and to those laws which were passed not more than eighteen months before the commencement of the Constitution, and if submitted within three months after such

commencement to the President for his certification had been so certified by him by public notification. It was thought that the jurisdiction of the Courts would be barred in respect of the legislation of the character above mentioned, but the Patna High Court had held Article 14 was applicable and even when the appeals were pending in this Court, the Constitution (First Amendment) Act, 1950, was passed and Article 31A and Article 31B were added by an amendment of the Constitution. At the time only 13 Acts were added to the Ninth Schedule, but when some of the members of the Provisional Parliament wanted to add several other Acts after the Bill had been scrutinised by the Select Committee, the Prime Minister pleaded with them not to do so. He said:

I would beg to them not to press this matter. It is not with any great satisfaction or pleasure that we have produced this long Schedule.

These debates animated as they were, make interesting reading and one gets the impression that what was being done was what the original framers had intended to do but could not give effect to the object because of lacunae in the language of the Article. The Prime Minister said:

If there is one thing to which we as a party have been committed in the past generation or so it is the agrarian reforms and the abolition of the Zamindari system.

Shri Hussain Imam (Bihar) : "With compensation.

Shri Jawaharlal Nehru : "With adequate proper compensation not too much".

Shri Hussain Imam : "Adequate is quite enough".

Shri Shyama Prasad Mukherjee, representing the opposite view, pointed out the dangers inherent in the amendment, not because he was against the agrarian reforms but because of the precedent this would create. He said : "By this amendment to the Constitution you are saying that whatever legislation is passed it is deemed to be the law. Then why have your fundamental rights? Who asked you to have these fundamental rights at all? You might have said : Parliament is supreme and Parliament may from time to time pass any law in any matter it liked and that will be the law binding on the people". In referring to a few excerpts, I merely want to show what was the object of the amendment and what were the fears entertained in respect thereof.

1190. The First Amendment was challenged in Sankari Prasad's case, but this Court held it valid. The question, as we have seen earlier, was whether Article 13(2) imposed a bar on Article 368 from amending fundamental rights? It was held that it did not, but no contention was urged or agitated before it that even apart from Article 13(2), the amending power did not extend to the abrogation of fundamental rights. In Sajjan Singh's case the principal point which was urged was that the impugned Constitution (Seventeenth Amendment) Act was invalid for the reason that before presenting it to the President for his assent the procedure prescribed, by the proviso to Article 368 had not been followed, though the Act was one which fell within the scope of the proviso. It was, however, not disputed before the Court that Article 368 empowered Parliament to amend any provision of the Constitution including the provisions in respect of fundamental rights enshrined in Part III. Hidayatullah and Mudholkar. JJ., did, however, express doubts as to whether

it is competent for Parliament to make any amendment at all to Part III of the Constitution (see pp. 961 and 968). Mudholkar, J., further raised the question whether the Parliament could "go to the extent it went when it enacted the First Amendment Act and the Ninth Schedule and has now added 44 agrarian laws to it? Or was Parliament incompetent to go beyond enacting Article 31A in 1950 and now beyond amending the definition of estate"? (p. 969) Even in Golaknath's case the question raised before us was not conclusively decided. In this state of law to say that since Article 31C is similar to Article 31A and 31B and since the latter were held to be valid in Sankari Prasad's case, fundamental rights could be abrogated by an amendment, would not be justified. It may be observed that both in Sajjan Singh's case and Golaknath's case one of the grounds which was taken into consideration was that if the amendment was held invalid, millions of people will be affected and since in the latter case the majority had held that Parliament could not by amendment under Article 368 affect fundamental rights, the doctrine of prospective overruling or acquiescence was resorted to. But since the crucial question of the extent of the power of amendment has been mooted in this case before the largest Bench constituted so far and has been fully argued, this aspect can be reconsidered. In this regard Gajendragadkar, C.J., while considering the question of stare decisis, observed in Sajjan Singh's case at pp. 947-948):

It is true that the Constitution does not place any restriction on our powers to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decision of Constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good. The doctrine of stare decisis may not strictly apply in this context, and one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this Court to the detriment of general welfare. Even so, the normal principle that judgments pronounced by this Court would be final, cannot be ignored and unless considerations of substantial and compelling character make it necessary to do so, we should be slow to doubt the correctness of previous decisions or to depart from them.

I have already pointed out that two of the learned Judges did doubt the power of Parliament to amend fundamental rights and since then this question has not remained unchallenged either on the ground of Article 13(2) preventing such amendments or on other grounds urged before us. In these circumstances, it is not correct to say that just because the validity of Article 31A and 31C was sustained by this Court, though in Golaknath's case it may have been on the grounds of expediency, Article 31C must also on that account be sustained. However, an analogy of other Articles like Article 33, Article 15(4) and Article 16(4) is sought to be put forward in support of the contention that a similar device has been adopted in Article 31C. I find that in none of the articles to which the learned Solicitor-General has drawn our attention, is there a total abrogation of any of the rights as sought to be affected by Article 31C. Article 33 for example, restricts or abrogates fundamental rights in Part III only in respect of the discipline of Armed Forces or forces charged with the maintenance of public order and nothing more. It does not extend to discrimination in recruitment to the service nor to any other rights possessed by the citizens in the Armed Forces which are unrelated with the proper discharge of their duties and the maintenance of discipline among these forces. Article 15(4) which was referred to as an example of empowerment based on objective or purpose of legislation, has no analogy with Article 31C. In the first place, Article 15 is an exception to the classification which would have been permissible under Article 14, for instance on the basis of religion, race, caste, sex and place of birth and hence

Article 15 prohibits such a classification in the case of citizens, and Article 16 makes a like provision in the case of public employment with the addition of descent. The restriction is only to a limited extent from out of an area which permits the making of wide variety of classification. Clause (4) of Article 15 was added by the Constitution (First Amendment) Act, 1950, to enable a state to make provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes. Clause (4) of Article 16 likewise enables the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The effect of these amendments is to permit the making of classification for favourable treatment on the ground that the persons so favoured were Scheduled Castes, Scheduled tribes, etc., which would otherwise have been permissible under Article 14 to the extent of its reasonable relationship with the objects of the law, had the same not been prohibited by Article 15(1) and Article 16(2). These provisions do not in anyway abrogate the right in Article 14 and I do not think the analogy between these provisions and Article 31C is apt.

1191. The Directives under Article 39(b) & (c) are wide and indeterminate. They affect the whole gamut of human activity vis-a-vis the society. The State is enjoined to ensure that ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These objectives are ends which may be implemented by a party in power through legislative action by resort to any one of the diverse philosophies, political ideologies and economic theories. The implementation of these objectives is the means. These theories and ideologies both political, economic and sociological may vary and change from generation to generation and from time to time to suit the social conditions, existing during any particular period of history. We have in the world to-day countries adopting different political systems, according to the historical development of economic thought, the philosophy and ideology which is considered best to subserve the common good of that particular society. There is no standardisation, and what is good for the one country may not be suitable to another. The accelerating technological advance and the exploitation of these development and discoveries indicate the economic thought prevalent in that society. The various theories are, therefore, related to the development and the practical means which are adopted for achieving the ends. In a developing country such as ours, where millions are far below the standard of sustenance and have not the means of having the normal necessities of life, there is further a deeper philosophical question of the kind of society and the quality of life which has to be achieved. It is, therefore, the duty of the State to devise ways and means of achieving the ends. A Government which comes to power with a particular political philosophy and economic theory as having been endorsed by the electorate, has to give effect to that policy in the manner which it considers best to subserve the end. Any legislation to give effect to the principles and policy to achieve these ends is the legislative judgment which is not within the province of Courts to examine as to whether they in fact subserve these ends as "otherwise there would be a conflict between the Judges and Parliament as to whether something was good for the country or not, and the whole machinery of justice was not appropriate for that consideration" (See Liyanage's case at p. 267). The Government and Parliament or the Government and Legislature of a State have, within the sphere allotted to each other, the undoubted right to embark on legislative action which they think will ensure the common good, namely, the happiness of the greatest number and so they have the right to make mistakes and retrace any steps taken earlier to correct such mistakes when that realisation dawns

on them in giving effect to the above objectives. But if the power to commit any mistake through democratic process is taken away as by enabling an authoritarian system, then it will be the negation of parliamentary democracy. The State, therefore, has the full freedom to experiment in implementing its policy for achieving a desired object. Though the Courts, as I said, have no function in the evaluation of these policies or in determining whether they are good or bad for the community, they have, however, in examining legislative action taken by the State in furthering the ends, to ensure that the means adopted do not conflict with the provisions of the Constitution within which the State action has to be confined. It is, therefore, necessary to keep in view, the wide field of Governmental activity enjoined in Article 39(b) & (c) in determining the reach of the means to achieve the ends and the impact of these means on the Fundamental Rights which Article 31C effects.

1192. The impugned Article 31C enables Parliament and the State legislatures to make laws unfettered by Articles 14, 19 and 31 in respect of the wide and undefined field of objectives indicated in Article 39(b) & (c). All these objectives before the amendment had to be achieved by the exercise of the legislative power enumerated in VII Schedule which would ordinarily be exercised within the limitations imposed by the Constitution and the fundamental rights. The amendment removes these limitations, though the law made must still be within the legislative power conferred under the VII Schedule, and enables Parliament and the State legislatures, subject to one tenth quorum of its members present and by a simple majority, to enact laws which contravene the fundamental rights conferred under Articles 14, 19 and 31 and which Parliament by complying with the form and manner provided under Article 368, could alone have effected. Whether one calls this removing restrictions on the legislative organs or of conferring complete sovereignty on them within the wide field inherent in Article 39(b) & (c) is in effect one and the same. It is contended that in conferring this power by Article 31C on Parliament and the State Legislatures, acting under Articles 245 to 248, Parliament has abdicated its function under Article 368 and has permitted amendments being made without complying with the form and manner provided thereunder.

1193. It is not necessary in the view I am taking to consider the question whether Article 31C delegates the power of amendment to the State Legislatures and Parliament or that it does not indicate the subject-matter of legislation as in Article 31A but merely purports to enable the legislative organs to choose the subject-matter from a field which, as I said; is as wide and indeterminate as the term 'operation of the economic system' would denote. I would prefer to consider Article 31C as lifting the bar of the articles specified therein, and in so far as the subject-matter of the legislation is concerned, though the field is wide, any of the modes to give effect to the directives can only be a mode permissible within the legislative power conferred on the respective legislative organ under the VII Schedule to the Constitution.

1194. If Parliament by an amendment of the Constitution under Article 368, cannot abrogate, damage or destroy the basic structure of the Constitution or any of the essential elements comprising that basic structure, or run counter to defeat the objectives of the Constitution declared in the Preamble and if each and every fundamental right is an essential feature of the Constitution, the question that may have to be considered is whether the amendment by the addition of Article 31C as a fundamental right in Part III of the Constitution has abrogated, damaged or destroyed any of the fundamental rights.

1195. Article 31C has 4 elements : (i) it permits the legislature to make a law giving effect to Article 39(b) and Article 39(c) inconsistent with any of the rights conferred by Articles 14, 19 and 31; (ii) it permits the legislature to make a law giving effect to Article 39(b) and Article 39(c) taking away any of the rights conferred by Articles 14, 19 and 31; (iii) it permits the legislature to make a law giving effect to Article 39(b) and (c) abridging any of the rights conferred by Articles 14, 19 and 31; and (iv) it prohibits calling in question in any Court such a law if it contains a declaration that it is for giving effect to the policy of State towards securing the principles specified in Clauses (b) and (c) of Article 39 on the ground that it does not give effect to such a policy of the State.

1196. The first element seems to have been added by way of abundant caution, for it takes in the other two elements, namely, taking away and abridging of the rights conferred by Articles 14, 19 or 31. However, it would be ultra vires the amending power conferred by Article 368, if it comprehends within it the damaging or destruction of these fundamental rights. The second element, namely, taking away of these fundamental rights would be ultra vires the amending power, for taking away of these fundamental rights is synonymous with destroying them. As for the third element, namely, abridging of these rights, the validity will have to be examined and considered separately in respect of each of these fundamental rights, for an abridgement of the fundamental rights is not the same thing as the damaging of those rights. An abridgement ceases to be an abridgement when it tends to effect the basic or essential content of the right and reduces it to a mere right only in name. In such a case it would amount to the damaging and emasculating the right itself and would be ultra vires the power under Article 368. But a right may be hedged in to a certain extent but not so as to affect the basic or essential content of it or emasculate it. In so far as Article 31C authorises or permits abridgement of the rights conferred by Article 19, it Would be intra vires the amending power under Article 368 as thereby the damaging or emasculating of these rights is not authorised. It will, therefore, be necessary to examine what exactly Article 14 and Article 19 guarantee.

1197. The guarantee of equality contained in Article 14 has incorporated the principle of "liberty" and "equality" embodied in the Preamble to the Constitution. The prohibition is not only against the legislatures but also against the executive and the local authorities. Two concepts are inherent in this guarantee-one of 'equality before law', a negative one similar to that under the English Common Law; and the other 'equal protection of laws', a positive one under the United States Constitution. The negative aspect is in the prohibition against discrimination and the positive content is the equal protection under the law to all who are situated similarly and are in like circumstances. (See Subba Rao, J., in State of U.P. v. Deoman Upadhyaya MANU/SC/0060/1960 : 1960CriLJ1504 .

1198. The impact of the negative content on the positive aspect has not so far been clearly discerned in the decisions of this Court which has been mostly concerned with the positive aspect Again, Subha Rao, J., in his dissenting judgment in Lachhman Das on behalf of Firm Tilak Ram Ram Bux v. State of Punjab MANU/SC/0032/1962 : [1963]2SCR353 while holding that the Patiala Recovery of State Dues Act did not offend Article 14 of the Constitution, said at p. 395:

It shall also be remembered that a citizen is entitled to a fundamental right of equality before the law and that the doctrine of classification is only a subsidiary rule evolved by Courts to give a

practical content to the said doctrine. Over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the article of its glorious content That process would inevitably and in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before the law and equal protection of the laws may be replaced by the doctrine of classification.

In Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors. MANU/SC/0024/1958 : [1959]1SCR279 , Das, C.J., summed up the principle enunciated in several cases referred to by him and consistently adopted and applied in subsequent cases, thus:

It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act tinder consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

1199. In subsequent cases a further principle has been recognised by which Article 14 was also not to be violated by two laws dealing with the same subject-matter, if the sources of the two laws are different. (See State of Madhya Pradesh v. G.C. Mandawar MANU/SC/0135/1954 : (1954)IILLJ673SC . I am not for the present concerned whether this latter principle is likely to mislead but would refer only to the various aspects of the classification recognised in this Court so far. It may, however, be pointed out that though the categories of classification are never closed, and it may be that the objectives of Article 39(b) & (c) may form a basis of classification depending on the nature of the law, the purpose for which it was enacted and the impact which it has on the rights of the citizens, the right to equality before the law and equal protection of laws in Article 14 cannot be disembowelled by classification.

1200. The lifting of the embargo of Article 14 on any law made by Parliament or the Legislature of a State under Article 31C, by providing that no law made by these legislative organs to give effect to the policy of the State towards securing the principles specified in Clauses (b) and (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the right conferred therein, would, in my view, abrogate that right altogether. I have held that Parliament cannot under Article 368 abrogate, damage or destroy any of the fundamental rights though it can abridge to an extent where if does not amount to abrogation, damage or destruction. The question is, whether the words 'inconsistent with or takes away, or', if severed, will achieve the purpose of the amendment? In what way can the abridgement of Article 14 be effected without robbing the content of that right? Can a law permitted under Article 31C affect persons similarly situated unequally or would equal protection of laws not be available to persons similarly situated or placed in like circumstances? While Article 39(b) & (c) can provide for a classification, that classification must have a rational relation to the objectives sought to be achieved by the statute in question.

1201. In so far as the abridgement of the right conferred by Article 14 is concerned, it would be ultra vires for the reason that a mere violation of this right amounts to taking away or damaging the right. The protection of the right was denied in Article 31A because the Courts had held invalid under Article 14, the provisions of certain land reform legislations relating to compensation for the acquisition etc., of the estates. The necessity for the exclusion of Article 14 from being applied to laws under Article 31C is not apparent or easy to comprehend. No law under Article 31C could possibly be challenged under Article 14 by the owners or the holders of the property, for the reason that to treat all owners or holders of property equally in matters of compensation would be contrary to the very objects enshrined in Article 39(b) & (c). Any rational principles of classification devised for giving effect to the policies adumbrated in Article 39(b) & (c) will not be difficult to pass the test of equal protection of the laws under Article 14. The exclusion of Article 14 in Article 31A was confined to the aspect of acquisition and compensation in respect of land reforms laws, but, however, the laws under Article 31A were not immune from attack under Article 14, if the measures of agrarian reforms were tainted with arbitrariness. Though this question has not been finally decided by this Court in any of the cases under Article 31A, it was raised in Balmadies Plantations Ltd. and Ors. v. State of Tamil Nadu (1972) 2 S.C.R. 133, where the appellants contended that it would not be open to the Government under Section 17 of the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969, to terminate by notice the right of the lessee as that would be violative of the rights under Articles 14, 19 and 31 of the Constitution. This Court, however, did not find it necessary to deal with this aspect of the matter, because it was admitted that no notice about the termination of the lessee's rights had been issued under Section 17 of the Act to any of the appellants, and that question can only arise after the Act came into force. It was further observed by one of us, Khanna, J., speaking for the Court:

Even after the Act comes into force, the Government would have to apply its mind to the question as to whether in its opinion it is in public interest to terminate the rights of the plantation lessees. Till such time as such a notice is given, the matter is purely of an academic nature. In case the Government decides not to terminate the lease of the plantation lessees, any discussion in the matter would be an exercise in futility. If, on the contrary, action is taken by the Government under Section 17 in respect of any lease of land for purposes of the cultivation of plantation crop, the aggrieved party can approach the court for appropriate relief.

It may be mentioned that in that case Section 3 of the Act, in so far as it related to the transfer of forests in Janman estates to the Government was concerned, was held to be violative of the Constitution. It cannot, therefore, be said that this aspect of the matter is not res integra. On the other hand, it lends support to the view that the law can be challenged.

1202. The decisions of this Court in Nagpur Improvement Trust v. Vithal Rao[(2)], and the other two cases following it also do not affect my view that Article 14 is inapplicable to matters dealing with compensation under laws enacted to give effect to policies of Article 39(b) & (c). In the above case it was the State which was given the power to acquire property for the same public purpose under two different statutes, one of them providing for lesser compensation and the other providing for full compensation. My Lord the Chief Justice, delivering the judgment of the Constitution Bench of seven Judges, while holding that these provisions contravened Article 14, observed at p. 506:

It would not be disputed that different principles of compensation cannot be formulated for lands acquired on the basis that the owner is old or young, healthy or ill, tall or short, or whether the owner has inherited the property or built it with his own efforts, or whether the owner is a politician or an advocate. Why is this sort of classification not sustainable? Because the object being to compulsorily acquire for a public purpose, the object is equally achieved whether the land belongs to one type of owner or another type.

There was no question in the above case of either distribution of ownership and control of material resources or the breaking up of concentration of wealth or the means of production which is an object different from that envisaged in Article 31(2). If in two given cases similarly circumstanced, the property of one is taken under Article 31C and that of the other under Article 31(2), then it will amount to discrimination and the Nagpur Improvement Trust case will apply. In a case of this nature, the objection is not so much to Article 14 being applied, but of adopting methods which run counter to Article 39(b) & (c), because the person who though similarly situated as that of the other is certainly favoured for reasons unconnected with Article 39(b) & (c). It cannot, therefore, be said that Article 14 has been misapplied or was a hindrance to the furtherance of the directive principles in Article 39(b) and (c), which is professed to be the object of implementation in such a case. If no such abuse is to be presumed, then there is no warrant for the apprehension that Article 14 will hinder the achievement of the said Directives.

1203. The sweep of Article 31C is far wider than Article 31A, and Article 14 is excluded in respect of matters where the protection was most needed for the effectuation of a genuine and bona fide desire of the State contained in the directives of Article 39(b) & (c). For instance, persons equally situated may be unequally treated by depriving some in that class while leaving others to retain their property or in respect of the property allowed to be retained or in distributing the material resources thereby acquired unequally, showing favour to some and discriminating against others. To amplify this aspect more fully, it may be stated that in order to further the directives, persons may be grouped in relation to the property they own or held, or the economic power they possess or in payment of compensation at different rates to different classes of persons depending on the extent or the value of the property they own or possess, or in respect of classes of persons to whom the material resources of the country are distributed. The object of Clauses (b) and (c) of Article 39 is the breaking up of concentration of wealth or the distribution of material resources. If full compensation is paid for the property taken in furtherance of the objectives under Article 39(b) & (c), that very objective sought to be implemented would fail, as there would in fact be no breaking up of concentration of wealth or distribution of material resources. It is, therefore, clear that the very nature of the objectives is such that Article 14 is inapplicable, firstly, because in respect of compensation there cannot be a question of equality, and, secondly, the exclusion thereof is not necessary because any law that makes a reasonable classification to further the objectives of Article 39(b) & (c) would undoubtedly fulfil the requirements of Article 14. The availability of Article 14 will not really assist an expropriated owner or holder because the objectives of Article 39(b) & (c) would be frustrated if he is paid full compensation. On the other hand, he has no manner of interest in respect of equality in the distribution of the property taken from him, because he would have no further rights in the property taken from him. The only purpose which the exclusion of Article 14 will serve would be to facilitate arbitrariness, inequality in distribution or to enable the conferment or patronage etc This right under Article 14 will only be available to the person or class of persons who would be entitled to receive the benefits of distribution under the law. In fact the availability

of Article 14 in respect of laws under Article 31C would ensure 'distributive justice', or 'economic justice', which without it would be thwarted. In this View of Article 31C vis-a-vis Article 14, any analogy between Article 31C and Article 31A which is sought to be drawn is misconceived, because under the latter provision the exclusion of Article 14 was necessary to protect the subject-matter of legislation permissible thereunder in respect of compensation payable to the expropriated owner. There is another reason why there can be no comparison between Article 31A and Article 31C, because in Article 31A the exclusion of Article 14 was confined only to the acquisition etc. of the property and not to the distribution aspect which is not the subject-matter of that Article, whereas, as pointed out already, the exclusion of Article 14 affects distribution which is the subject-matter of Article 39 (b) & (c).

1204. It is not necessary to examine in detail the mischief that the abridgement or taking away of Article 14 will cause, It is not an answer to say that this may not be done and abuse should not be presumed. This may be true, but what I am concerned with is the extent of the power the legislative organs will come to possess. Once the power to do all that which has been referred above is recognised, no abuse can be presumed. But if the power does not extend to destruction, damage or abrogation of the right, the question of abuse, if any, has no relevance. It cannot be presumed that Parliament by exercising its amending power under Article 368, intended to confer a right on Parliament and the Legislatures of the States to discriminate persons similarly situated or deprive them of equal protection of laws. The objectives sought to be achieved under Article 39(b) & (c) can be achieved even if this article is severed.

1205. In respect of the exclusion of Article 19 by Article 31C a question was asked by one of us during the course of arguments addressed by the learned Advocate-General for Maharashtra on January 12, 1973, the thirty-fifth day, as to, what is the social content of the restriction on freedom of speech and freedom of movement which are not already contained in the restrictions to which those rights are subject? The learned Advocate-General said he would consider and make his submissions. On March, 1, 1973, he made his submissions on the understanding that the question was asked in the context of Article 31C which excludes the operation of whole of Article 19 and not only Article 19(1)(f) and Article 19(1)(g). The learned Advocate-General characterised the question as raising a matter of great importance. In my view, what was implied in the question was the core of the issue before us, as to whether there can be any justification for imposing more restrictions on such valuable rights as freedom of movement and freedom of speech than what the framers of the Constitution had already provided for in Article 19(2) to (6). After referring to the history and objects and reasons for enacting Constitution First, Fourth and Seventeenth Amendments, and after referring to the decisions of this Court, all of which relate to acquisition of property and have nothing to do either with freedom of speech or freedom of movement, he considered and answered the question posed under the following heads as under:

(i) Generally, with reference to reasonable restrictions to which the fundamental rights conferred by Article 19(1)(a) to (g) are subject under Article 19(2) to (6);

(ii) the reasonable restrictions to which the right to freedom of speech and the right to move throughout the territory of India should be made subject under Article 19(2) and (5) respectively.

1206. Under the first head he submitted the proposition that the social content of the restrictions to which the fundamental rights under Article 19(1)(a) to (g) are subject is narrower than all relevant social considerations to which the fundamental rights could be made subject. The reasons given were again the historical ones particularly the fact that the Constituent Assembly had rejected the suggestion made by Shri B.N. Rau that in case of conflict between fundamental rights and the Directives, the directives should prevail, otherwise necessary social legislation might be hampered. This meant that the social content of the Directive Principles was wider than the social content of permissible restrictions on fundamental rights. For, if this were not so, no question of giving primacy to Directive Principles in the case of conflict with fundamental rights could arise as the social content of fundamental rights and the Directive Principles would be the same. Since the Constitution gave primacy to fundamental rights over the Directives, making fundamental rights enforceable in a Court of law and the directives not so enforceable, the social content of the restrictions on fundamental rights was placed in the framework of the enforcement of rights by citizens or any person. This enforcement of individual fundamental rights naturally disregarded the injury to the public good caused by dilatory litigation which can hold up large schemes of necessary social legislation affecting a large number of people. To prevent this social evil, the First and the Fourth Amendments to the Constitution were enacted.

1207. The social content of restrictions which can be imposed under Article 19(2) to (6) naturally does not take in the injury to the public good by dilatory litigation holding up large schemes of social legislation. The fundamental rights conferred by Article 19(1)(a) to (g) are not mutually exclusive but they overlap. For example, the right to move peaceably and without arms conferred by Article 19(1)(b) may be combined with the right to freedom of speech and expression, if those who assemble peaceably carry placards or deliver speeches through microphones. Again, the right to carry on business under Article 19(1)(g) would overlap the right to hold, acquire and dispose of property, for ordinarily, business cannot be carried on without the use of property. This consideration must be borne in mind in considering the question why Article 31C excluded the challenge to the laws protected by Article 31C under the whole of Article 19, instead of excluding a challenge only under Article 19(1)(f) which relates to property; and Article 19(1)(g) which relates to business which would ordinarily require the use of property.

1208. Under the second head, he submitted that it is well settled that the right to freedom of speech includes the freedom of the Press, and thereafter referred to 'Press in a Democracy'-Chapter X of Modern Democracies by Lord Bryce, and long extracts were given from the above chapter, dealing with the change which had come over the Press and the dictatorship of a syndicated Press. The First Amendment of the U.S. Constitution was also referred. He thereafter submitted that our Constitution guarantees a freedom of speech and expression and by judicial construction that freedom has been held to include freedom of the Press. But according to him the freedom of speech as an individual right must be distinguished from the freedom of the Press and since ordinarily people asserting their individual right to the freedom of speech are not carrying on any trade or business and a law of acquisition has no application to individual exercise of the right to the freedom of speech and expression Article 31C can equally have no application to such individual right to the freedom of speech and expression. But different considerations apply when the freedom of speech and expression includes the Press, the running of which is clearly a business.

1209. Article 19(1)(a) is so closely connected with Article 19(1)(g) and (f) that if the last two sub-Articles are excluded by a law relating to the acquisition of property, it is necessary to exclude Article 19(1)(a) to prevent an argument that the rights are so inextricably mixed up that to impair the right to carry on the business of running a Press or owning property necessary for running the Press is to impair the right to freedom of speech. Again, the right to freedom of movement throughout the territory of India has been clubbed together by Article 19(5) with the right to reside and settle in any part of the territory of India, conferred by Article 19(1)(c) and the right to acquire, hold and dispose of property conferred by Article 19(1)(f) for the purpose of imposing reasonable restrictions in the interest of general public or for the protection of the interest of any scheduled Tribe.

1210. After referring to the observations of Patanjali Sastri and Mukherjea, JJ., in Gopalan's case, the learned Advocate-General submitted that those observations show that if a law of land acquisition was to be protected from challenge under Article 19(1)(f), it was necessary to protect it from challenge under Article 19(1)(d) and (e) to foreclose any argument that the rights under Article 19(1)(d), (e) and (f) are so closely connected that to take away the right under Article 19(1)(f) is to drain the rights under Article 19(1)(d) and (e) of their practical content. For these reasons, Parliament in enacting the First, Fourth and Seventeenth Amendments rightly excluded the challenge under the whole of Article 19 to the laws protected by those amendments and not merely a challenge under Article 19(1)(f) and (g). In the result, it was submitted that Article 31C only contemplates the process of giving primacy to the Directive Principles of State policy over fundamental rights, first recognised in Article 31(4) and (6) and then extended by Articles 31A and 31B and Schedule IX as first enacted and as subsequently amplified by the Fourth and the Seventeenth Amendments all of which have been held to be valid. Directive Principles are also fundamental and the amending power is designed to enable future Parliament and State Legislatures to provide for the changes in priorities which take place after the Constitution was framed and the amending power is extended to enacting Article 31C.

1211. I have set out in detail what according to the learned Advocate-General is the basis and the raison d'etre for excluding Article 19 by Article 31C. This able analysis surfaces the hidden implications of Article 31G in excluding Article 19. On those submissions the entire fundamental rights guaranteed to the citizens are in effect abrogated. Article 14 is taken away; Article 19(1)(a) to (g) is excluded on the ground that each of them have their impact on one or the other of the rights in Part III and since these rights are not mutually exclusive and any property and trade or business affected by legislation under Article 31C which necessarily must deal with property, if the directives in Article 39(b) and (c) are to be given effect, will in turn, according to the learned Advocate-General, come into conflict not only with Article 19(1)(f) & (g), but with the other Sub-clauses (a) to (e) of Clause (1) of that article.

1212. As far as I can see, no law, so far enacted under Article 31A and challenged before this Court has attempted to affect any of the rights in Article 19(1)(a) to (e), except Article 19(1)(f) & (g) and, therefore, this question did not fall for consideration of this Court. But that apart, I cannot understand by what logic the freedom to assemble peaceably and without arms, or for a citizen to move freely throughout India or to reside and settle in any part of the territory of India, has anything to do with the right to acquire and dispose of property or to practice any profession or to carry on any occupation, trade or business. Are persons whose trade and business is taken away,

or are deprived of their property not entitled to the guaranteed rights to move freely throughout India or settle in any part of India or to practise any profession or occupation? What else can they do after they are deprived of their property but to find ways and means of seeking other employment or occupation and in that endeavour to move throughout India or settle in any part of India? If they are prohibited from exercising these basic rights, they will be reduced to mere serfs for having owned property which the State in furtherance of its policy expropriates. If the law made under the directives has nothing to do with property, how does the duty to prevent the operation of the economic system from resulting in concentration of wealth and means of production, has any relevance or nexus with the movement of the citizens throughout India or to settle in any part of India ? Are those to whom property is distributed in furtherance of the directive principles, ought not to be secured against infringement of those rights in property so distributed by laws made under Article 31C? It would seem that those for whose benefit legislation deprives others in whom wealth is concentrated themselves may not be protected by Article 19 and Article 14, if Article 31C can take away or destroy those rights. Without such a protection they will not have a stake in the survival of democracy, nor can they be assured that economic justice would be meted out to them. Nor am I able to understand why where an industry or undertaking is taken over, is it necessary to take away the right of the workers in that industry or undertaking to form associations or unions. The industry taken away from the owners has nothing to do with the workers working therein, and merely because they work there they will also be deprived of their rights. I have mentioned a few aspects of the unrelated rights which are abridged by Article 31C. No doubt, the recognition of the freedom of Press in the guarantee of freedom of speech and expression under Article 19(1)(a) was highlighted by the learned Advocate-General of Maharashtra. Does this mean that if a monopoly of the Press is prohibited or where it is sought to be broken up under Article 39(b) and (c) and the Printing Presses and undertakings of such a Press are acquired under a law, should the citizens be deprived of their right to start another Press, and exercise their freedom of speech and expression? If these rights are taken away, what will happen to the freedom of speech and expression of the citizens in the country, which is a concomitant of Parliamentary democracy? In the State of Bombay and Anr. v. F.N. Balsara MANU/SC/0009/1951 : [1951]2SCR682 , it was held under the unamended Clause (2) of Article 19 that Section 23(a) and Section 24(1)(a) which prohibited "commending" or advertising intoxicants to public were in conflict with the right guaranteed in Article 19(1)(a) as none of the conditions in Clause (2) of that Article applied. But the first Amendment has added 'incitement to an offence' as a reasonable restriction which the State can provide by law. In any case, the absence of such a law making power is no ground to abrogate the entire right of free speech and expression of the citizens.

1213. Article 15 merely confines the right to those who are not women socially and educationally backward classes of citizens, scheduled castes or scheduled tribes all of whom were afforded protective discrimination. Article 16 is again similarly conditioned. Articles 17, 18, 23 and 24 are prohibitions which the State is enjoined to give affect to. Articles 25 to 28 which guarantee religious freedom, can be affected by Article 31C in furtherance of directive principles because these denominations own properties, schools, institutions, etc., all of which would be meaningless without the right to hold property. Likewise, Articles 29 and 30 would become hollow when Articles 19 and 14 are totally abrogated. The only rights left are those in Articles 20, 21 and 22, of which Article 22 has abridged by reason of Clauses (4) to (7) by providing for preventive detention, which no doubt, is in the larger interest of the security, tranquillity and safety of the citizens and the States. I have pointed out the implications of the contentions on behalf of the respondents to

show that if these are accepted, this country under a Constitution and a Preamble proclaiming the securing of fundamental rights to its citizens, will be without them. The individual rights which ensure political rights of the citizens in a democracy may have to be subordinated to some extent to the Directive Principles for achieving social objectives but they are not to be enslaved and driven out of existence. Such could not have been contemplated as being within the scope of the amending power.

1214. Although Article 31A protected the laws coming within its purview from the rights conferred by Article 19, such a protection could only be against the rights conferred by Clauses (f) and (g) of Article 19(1), as its subjected-matter was expressly stated to be the acquisition of or extinguishment or modification of rights in any estate as defined in Clause (2) thereof, and the taking over or amalgamation or termination etc., of rights of management and certain leasehold interests. Article 31C protects laws giving effect to the policies in Article 39(b) & (c). For achieving these twin objects the rights of the persons that have to be abridged could only be those rights in Article 19 which relate to property and trade, business, profession or occupation. Though the expression 'economic system' is used in Article 39(c), that article has not the object of changing the economic system generally, but is confined to only preventing concentration of wealth and means of production to the common detriment. What this Clause envisages is that the State should secure the operation of the economic system in such a way as not to result in the concentration of wealth and means of production to the common detriment Where there is already concentration of wealth and means of production which is to the common detriment, the law under Article 39(c) would be only to break up or regulate as may be necessary the concentration of wealth and means of production. All other rights are outside the purview of Article 31C and in this respect Article 31A and Article 31C can be said to be similar in scope and no different. In my view, therefore, the learned Solicitor-General has rightly submitted that the law under Article 31C will only operate on "material resources", "concentration of wealth", and "means of production", and if this is so, the rights in Article 19(1)(a) to (e) would have no relevance and are inapplicable.

1215. With respect to the exclusion of Article 31 by Article 31C, Clause (1) of Article 31 is not in fact affected by Article 31C, because under the latter any rights affected must be by law only. Even if Article 31C was enacted for making laws in the furtherance of the directive principles in Article 39(b) and (c) affecting property, those laws have to conform to Article 31(1) for they would be laws depriving persons of their property. Article 31C also contemplates the making of a law to give effect to the Directives in Article 39(b) and (c). In so far as Article 31(2) is concerned, Section 2 of the Twenty-fifth Amendment has already abridged the right contained in Article 31(2) and a further abridgement of this right authorised by Article 31C may amount in a given case to the destruction or abrogation of that right and it may then have to be considered in each case whether a particular law provides for such an amount for the acquisition or requisitioning of the property in question as would constitute an abrogation or the emasculation of the right under Article 31(2) as it stood before the Constitution (Twenty-fifth) Amendment.

1216. On the fourth element, I agree with the reasoning and conclusion of my learned brother Khanna, J., whose judgment I have had the advantage of perusing, in so far as it relates only to the severance of the part relating to the declaration, and with great respect I also adopt the reasoning on that aspect alone as an additional reason for supporting my conclusions on the first three elements also.

1217. If the first part of Article 31C is read in this manner, then it may be held to be intra vires the amending power only if those portions of the Article which make it ultra vires the amending power are severed from the rest of it. The portions that may have to be severed are the words, "is inconsistent with or takes away, or" and the words "Article 14" and the part dealing with the declaration by reason of which judicial review is excluded. The severability of these portions is permissible in view of the decision of the Privy Council in Punjab Province v. Daulat Singh and Ors. (1946) 73 IA 59 and the principles laid down by this Court in B.M.D. Chamarbdugwalla v. The Union of India MANU/SC/0020/1957 : [1957]1SCR930 .

1218. The doctrine that the general words in a statute ought to be construed with reference to the powers of the Legislature which enacts it, and that the general presumption is that the Legislature does not intend to exceed its jurisdiction, is well established. In in Re. The Hindu Women's Rights to Property Act, [1941] F.C.R. 12 and in Daulat Singh's case it has been held that on the general presumption the Legislature does not intend to exceed its jurisdiction, and that the Court could sever that part of the provision in excess of the power if what remained could be given effect to. In the former case, the Act being a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief, was given the beneficial interpretation. (See the observations of Gwyer, C.J. at p. 31). In the latter case, the provisions of Section 13A of the Punjab Alienation of Land Act, 1900, which were added by Section 5 of the Punjab Alienation of Land (Second Amendment) Act No. X of 1933, providing for the avoidance of benami transactions as therein specified which were entered into either before or after the commencement of the Act of 1938, and for recovery of possession by the alienor would have been ultra vires the Provincial Legislature as contravening Sub-section (1) of Section 281 of the Government of India Act, 1935, in that in some cases Section 13A would operate as a prohibition on the ground of descent alone, but it was authorised and protected from invalidity as regards future transactions by Sub-section 2(a) of Section 298 of the Act of 1935 as amended by Section 4 of the India & Burma (Temporary and Miscellaneous Provisions) Act, 1942. As the provisions of Section 13A would have been ultra vires and void in so far as they purported to operate retrospectively, the Privy Council severed the retrospective element by the deletion of the words "either before or" in the section and the rest of the section was left to operate validly. Lord Thankerton, delivering the opinion of the Privy Council, observed at pp. 19-20:

It follows, in the opinion of their Lordships, that the impugned Act, so far as retrospective, was beyond the legislative powers of the Provincial Legislature and, if the retrospective element were not severable from the rest of the provisions, it is established beyond controversy that the whole Act would have to be declared ultra vires and void. But, happily, the retrospective element in the impugned Act is easily severable, and by the deletion of the words, "either before or" from Section 5 of the impugned Act, the rest of the provisions of the impugned Act, may be left to operate validly.

In Chamarbaugwalla's case, Venkatarama Aiyer, J., after referring to the various cases including F.N. Balsara's case accepted the principle that when a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by, reason of its provisions contravening Constitutional prohibitions. He enunciated seven rules of separability. In F.N. Balsara's case, apart from Section

23(a) and (b) and Section 24(1)(a) relating to commendation and incitement from the definition of the word 'liquor' in Section 2(24)(a) the words "all liquids consisting of or containing alcohol" were severed as these would include medicinal preparations. It will be seen that neither the whole Sub-clause (a) was deleted nor the whole of Clause (24) was separated. It is only the above words that were severed and held to make the remaining part of the definition valid.

1219. In Corporation of Calcutta v. Calcutta Tramways Co. Ltd. MANU/SC/0043/1963 : 1964CriLJ354 the question was whether Section 437(1)(b) of the Calcutta Municipal Act, 1851, was invalid under Article 19(1)(g) in so far as is made the opinion of the Corporation conclusive and non-challengeable in any court. The Sub-clause (b) of Section 437(1) reads as follows:

any purpose which is, in the opinion of the Corporation (which opinion shall be conclusive and shall not be challenged in any court) dangerous to life, health or property, or likely to create a nuisance;

This Court held the portion in the parenthesis as violative of Article 19(1)(g). It was contended that the above portion in the sub-clause was inextricably mixed up with the rest and hence cannot be separated. The Court held that the third proposition in the Chamarbaugwalla's case, namely, that even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole, was inapplicable. Wanchoo, J., expressed the view that the parenthetical clause consisting of the words "which opinion shall be conclusive and shall not be challenged in any court" is severable from the rest of the clause referred to above.

In the case of Kameshwar Prasad v. State of Bihar MANU/SC/0410/1962 : (1962) Supp. 3 S.C.R. 369 Rule 4-A of the Bihar Government Servants Conduct Rules, 1956, had provided that "No Government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service". The Court held the rule violative of Article 19(1)(a) and (b) in so far as it prohibited any form of demonstration, innocent or otherwise, and as it was not possible to so read it as to separate the legal from the un-constitutional portion of the provision, the entire rule relating to participation in any demonstration must be declared as ultra vires. The Court, however, did not strike down the entire Rule 4-A, but severed only that portion which elated to demonstration from the rest of it, and the portion dealing with the strike which was upheld continued to exist after severing the above, portion. However, in State of Madhya Pradesh v. Ranojirao Shinde and Anr. MANU/SC/0030/1968 : [1968]3SCR489 the doctrine of severability was not applied. In that case the term 'grant' was defined in Section 2(1) of the Madhya Pradesh Abolition of Cash Grants Act, 1963, in a language which was wide without making a distinction between various types of cash grants. This Court did not find any basis for severing some out of the several grants included therein and hence expressed the view that it is impermissible to rewrite that clause and confine the definition to such of the cash grants which the Legislature might be competent to abolish. The case is, therefore, distinguishable as the rule is inapplicable to such instances.

1220. I have considered the validity of Article 31C by applying the doctrine of severability although neither side dealt with this aspect in relation to Article 31C, because both had taken an

extreme position, which if accepted, will either result in the total invalidation or in upholding its validity in entirety. If as the petitioner had contended that by an amendment any of the fundamental rights cannot be damaged or destroyed, the next logical step of the argument on his behalf should have been to establish that the entire Article 31C is bad on that account, and if not, to what extent it would have been sustained by applying the doctrine of severability particularly when the severability of the declaration' part of Article 31C was very much in the forefront during the arguments. Likewise the respondents knowing what the petitioner's case is, should have examined and submitted to what extent Article 31C is invalid on the petitioner's argument. When a question was asked on February 19, 1973 that "if once it is conceded that a Constitution cannot be abrogated, then what one has to find out is to what extent an amendment goes to abrogation" and the answer was that "the whole of the Constitution cannot be amended", and also when a question was raised that on the language of Article 31C it appears to be ineffective, neither side advanced any argument on this aspect. Nor when the question of severability of the declaration portion was mooted on several occasions during the arguments was any submission made by either party as to whether such a severance is, or is not, possible. In the circumstances, the Court is left to itself to examine and consider what is the correct position in the midst of these two extremes in a case of Constitutional amendment which has been enacted after following the form and manner prescribed in Article 368, as I said earlier, it should not be held invalid, if it could be upheld even by severing the objectionable part, where the valid part can stand on its own. It is not always in public interest to confine the consideration of the validity of a Constitutional amendment to the arguments, the parties may choose to advance, otherwise we will be constrained to interpret a Constitution only in the light of what is urged before us, not what was understand it to be is the true nature of the impugned amendment Happily, even if I am alone in this view, the portions indicated by me are severable, leaving the unsevered portion operative and effective so as to enable laws made under Article 31C to further the directives of State Policy enshrined in Article 39(b) and (c). In the view I have entertained, the words "inconsistent with, or takes away or" and the words "Article 14" as also the portion "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" being severable, be deleted from Article 31C. In the result, on the construction of Article 31C after severing the portions indicated above, I hold Section 3 of the Twenty-fifth Amendment valid.

1221. On the validity of the Constitution (Twenty-ninth) Amendment, my Lord the Chief Justice has come to the conclusion that notwithstanding this amendment the Constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them and whether they effect reasonable abridgements in public interest, and if they take away, they will have to be struck down. My learned brothers Hegde and Mukherjea, JJ., have in effect come to the same conclusion, when they hold that this amendment is valid, but whether the Acts which were brought into the IXth Schedule by that Amendment or any provision in any of them abrogate any of the basic elements or essential features of the Constitution will have to be examined when the validity of those Acts is gone into. With respect, I agree in effect with these conclusions which are consistent with the view I have expressed in respect of Articles 31A and 31B. I also agree that the contention of the learned Advocate for the petitioner that Article 31B is intimately connected with Article 31A is unacceptable and must be rejected for the reasons given in these judgments. The question whether fundamental rights are abrogated or emasculated by any of the Acts or provisions of these Acts included by the impugned Amendment, will be open for examination when the

validity of these Acts is gone into, and subject to this reservation, I hold the Constitution (Twenty-ninth) Amendment valid.

1222. I now state my conclusions which are as follows:

(1) On the construction placed on Articles 12, 13 and other provisions of Part III and Article 368, Article 13(2) does not place an embargo on Article 368, for amending any of the rights in Part III, and on this view it is unnecessary to decide whether the leading majority judgment in Golaknath's case is right in finding the power of amendment in the residuary entry 97 of List I of Schedule VII, nor is it called for, having regard to the majority decision therein that the power of amendment is to be found in Article 368 itself.

(2) Twenty-fourth Amendment:

The word 'amendment' in Article 368 does not include repeal. Parliament could amend Article 368 and Article 13 and also all the fundamental rights and though the power of amendment is wide, it is not wide enough to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements in the basic structure of the Constitution or of destroying the identity of the Constitution. Within these limits, Parliament can amend every article of the Constitution.

Parliament cannot under Article 368 expand its power of amendment so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution,
and on the construction placed by me, the Twenty-fourth Amendment is valid, for it has not changed the nature and scope of the amending power as it existed before the Amendment.

Twenty-fifth Amendment:

(i) SECTION 2

(a) Clause (2) to Article 31 at substituted.-Clause (2) of Article 31 has the same meaning and purpose as that placed by this Court in the several decisions referred to except that the word 'amount' has been substituted for the word 'compensation', after which the principle of equivalent in value or just equivalent of the value of the property acquired no longer applies. The word 'amount' which has no legal concept and, as the amended clause indicates, it means only cash which would be in the currency of the country, and has to be fixed on some principle. Once the Court is satisfied that the challenge on the ground that the amount or the manner of its payment is neither arbitrary or illusory or where the principles upon which it is fixed are found to bear reasonable relationship to the value of the property acquired, the Court cannot go into the question of the adequacy of the amount so fixed or determined on the basis of such principles.

(b) Clause (2B) as added.-On the applicability of Article 19(1)(f) to Clause (2) of Article 31, the word 'affect' makes two constructions possible, firstly, that Article 19(1)(f) will not be available at all to an expropriated owner, and this, in other words, means that it totally abrogates the right in such cases, and secondly, Clause (2B) was intended to provide that the law of acquisition or

requisition will not be void on the ground that it abridges or affects the right under Article 19(1)(f). The second construction which makes the amendment valid is to be preferred, and that Clause (2B) by the adoption of the doctrine of severability in application is restricted to abridgement and not abrogation, destroying or damaging the right of reasonable procedure in respect of a law of acquisition or requisition for the effective exercise of the right under Article 31(2); for, a reasonable notice, a hearing opportunity to produce material and other evidence, may be necessary to establish that a particular acquisition is not for public purpose and for providing the value of the property and other matters that may be involved in a particular principle adopted in fixing the amount or for showing chat what is being paid is illusory, arbitrary etc. therefore, in the view taken, and for the reasons set out in this judgment, Section 2 of the Twenty-fifth Amendment is valid.

(ii) SECTION 3 OF THE TWENTY-FIFTH AMENDMENT

New Article 31C is only valid if the words "inconsistent with or takes away or", the words "Article 14" and the declaration portion "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy", are severed, as in my view they are severable. What remains after severing can be operative and effective on the interpretation given by me as to the applicability of Articles 19 and 31, so as to enable laws made under Article 31C to further the directives enshrined in Article 39(b) & (c). In the result on the construction of Article 31C, after severing the portions indicated above, I hold Section 3 of the Twenty-fifth Amendment valid.

(4) Twenty-ninth Amendment:

The contention that Articles 31A and 31B are inter-connected is unacceptable and is rejected. The Constitution (Twenty-ninth) Amendment is valid, but whether any of the Acts included thereby in Schedule IX abrogate, emasculate, damage or destroy any of the fundamental rights in Part III or the basic elements or essential features of the Constitution will have to be examined when the validity of those Acts is challenged.

1223. The petitions will now be posted for hearing before the Constitution Bench for disposal in accordance with the above findings. In the circumstances the parties will bear their own costs.

D.G. Palekar, J.

1224. The facts leading to this petition have been stated in judgment delivered by my lord the Chief Justice and it is not therefore necessary to recount the same.

1225. In this petition the Constitutional validity of the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971 has been challenged. As the petitioner apprehended that he would not succeed in the challenge in view of the recently passed Constitution Amendment Acts, he has also challenged the validity of these Acts. They are:

(1) The Constitution 24th Amendment Act, 1971;

(2) The Constitution 26th Amendment Act, 1971 and

(3) The Constitution 29th Amendment Act, 1972.

The crucial point involved is whether the Constitution is liable to be amended by the Parliament so as to abridge or take away fundamental rights conferred by Part III of the Constitution.

1226. By the 24th Amendment, some changes have been made in Articles 13 and 368 with the object of bringing them in conformity with the views expressed by a majority of Judges of this Court with regard to the scope and ambit of Articles 13 and 368. In Sankari Prasad Singh v. Union of India [1952] S.C.R. 89 the Constitutional Bench of five Judges of this Court unanimously held that fundamental rights could be abridged or taken away by ah amendment of the Constitution under Article 368. In the next case of Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 a majority of three Judges expressed the view that Sankari Prasad's case was correctly decided. Two Judges expressed doubts about that view but considered that it was not necessary to dissent from the decision as the point was not squarely before the court In the third case namely Golak Nath v. State of Punjab MANU/SC/0029/1967 : [1967]2SCR762 the, view taken in the earlier cases by eight Judges was overruled by a majority of six Judges to five. The majority held that Parliament had no power to amend the Constitution under Article 368 so as to abridge or take away the fundamental rights, one of them (Hidayatullah, J), who delivered a separate judgment, expressing the view that this could not be done even by amending Article 368 with the object of clothing the Parliament with the necessary powers. In this state of affairs the Union Government was obliged to take a definite stand. It would appear that the Union Government and the Parliament agreed with the view taken in Sankari Prasad's case by the majority in Sajjan Singh's case and the substantial minority of Judges in Golak Nath's case. They were out of sympathy with the view adopted by the majority in Golak Nath's case. Hence the 24th Amendment. That amendment principally sought to clarify what was held to be implicit in Articles 13 and 368 by a majority of Judges of this Court over the years, namely, (1) that nothing in Article 13 applied to an amendment to the Constitution made under Article 368; (2) that Article 368 did not merely lay down the procedure for a Constitutional amendment but also contained the power to amend the Constitution; (3) that the Parliament's power under Article 368 was a constituent power as distinct from legislative power; (4) that this power to amend included the power to amend by way of addition, variation or repeal of any provision of the Constitution.

1227. After passing the 24th Amendment the other two amendments were passed in accordance with the Constitution as amended by the 24th Amendment.

1228. In his argument before us Mr. Palkhivala, appearing on behalf of the petitioner, supported the majority decision in Golak Nath with supplemental arguments. In any event, he further contended, the power of Parliament to amend the Constitution under Article 368 did not extend to the damaging or destroying what he called the essential features and basic principles of the Constitution and since fundamental rights came in that category, any amendment which damaged or destroyed the core of these rights was impermissible. The argument on behalf of the State of Kerala and the Union of India was that an amendment of the Constitution abridging or taking away fundamental rights was not only permissible after the clarificatory 24th Amendment but also under the unamended Articles 13 and 368, notwithstanding the refinement in the arguments of Mr. Palkhivala with regard to essential features and basic principles of the Constitution. We are, therefore, obliged to go back to the position before the 24th Amendment and consider whether the

majority view in Golak Nath was not correct. A fuller bench of 13 Judges was, therefore, constituted and it will be our task to deal with the crucial question involved. This course cannot be avoided, it is submitted; because if the fundamental rights were unamendable by the Parliament so as to abridge or take them away, Parliament could not increase its power to do so by the device of amending Articles 13 and 368 whether one calls that amendment clarificatory or otherwise. The real question is whether the Constitution had granted Parliament the power to amend the Constitution in that respect, because, if it did not, no amendment of Articles 13 and 368 would invest the Parliament with that power. We have, therefore, to deal with the Constitution as it obtained before the 24th Amendment.

1229. Since fundamental questions with regard to the Constitution have been raised, it will be necessary to make a few prefatory remarks with regard to the Constitution. The Constitution is not an indigenous product. Those who framed it were, as recognised by this Court in The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and Ors. MANU/SC/0065/1962 : [1963]1SCR491 thoroughly acquainted with the Constitutions and Constitutional problems of the more important countries in the world, especially, the English speaking countries. They knew the Unitary and Federal types of Constitutions and the Parliamentary and Presidential systems of Government. They knew what Constitutions were regarded as "Flexible" Constitutions and what Constitutions were regarded as "rigid" Constitutions. They further knew that in all modern written Constitutions special provision is made for the amendment of the Constitution. Besides, after the Government of India Act, 1935 this country had become better acquainted at first hand, both with the Parliamentary system of Government and the frame of a Federal Constitution with distribution of powers between the center and in the State. All this knowledge and experience went into the making of our Constitution which is broadly speaking a quasi - Federal Constitution which adopted the Parliamentary System of Government based on adult franchise both at the center and in the States.

1230. The two words mentioned above 'flexible' and 'rigid' were first coined by Lord Bryce to describe the English Constitution and the American Constitution respectively. The words were made popular by Dicey in his Law of the Constitution first published in 1885. Many generations of lawyers, thereafter, who looked upon Dicey as one of the greatest expositors of the law of the Constitution became familiar with these words. A 'flexible' Constitution is one under which every law of every description (including one relating to the Constitution) can legally be changed with the same case and in same manner by one and the same body. A 'rigid' Constitution is one under which certain laws generally known as Constitutional or fundamental laws cannot be changed in the same manner (as ordinary laws). See 'Dicey's Law of the Constitution 10th edition, 1964 p. 127. It will be noted that the emphasis is on the word 'change' in denoting the distinction between the two types Constitutions. Lord Birkanhead in delivering the judgment of the judicial Committee of the Privy Council in McCawley v. The King [1920] A.C. 691 used the words 'uncontrolled' and 'controlled' for the words 'flexible' and 'rigid' respectively which were current then. He had to examine the type of Constitution Queensland possessed, whether it was a 'flexible' Constitution or a 'rigid' one in order to decide the point in controversy. He observed at page 703 The first point which requires consideration depends upon the distinction between Constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and Constitutions which can only be altered with some special formality and in some cases by a specially convened assembly.' He had to do that because the distinction between the

two types of Constitutions was vital to the decision of the controversy before the privy Council. At page 704 he further said 'Many different terms have been employed in the text-books to distinguish these two contrasted forms of Constitution. Their special qualities may perhaps be exhibited as clearly by oiling the one a 'controlled' and the other an 'uncontrolled' Constitution as by any other nomenclature'. Perhaps this was an apology for not using the words 'rigid' and 'flexible' which were current when he delivered the judgment. In fact, sic John Simon in the course of his argument in that case had used the words 'rigid' and 'flexible' and he had specifically referred to 'Dicey's Law of the Constitution' Strong in his text-book on Modern Political Constitution, Seventh revised edition, 1968 reprinted in 1970 says at p. 153 "The sole criterion of a rigid Constitution is whether the Constituent Assembly which drew up the Constitution left any special directions as to how it was to be changed. If in the Constitution there are no such directions, or if the directions, explicitly leave the Legislature a free hand, then the Constitution is 'flexible'.

1231. The above short disquisition into the nature of Constitutions was necessary in order to show that when our Constitution was framed in 1949 the framers of the Constitution knew that there were two contrasted types of democratic Constitutions in vogue in the world-one the 'flexible' type which could be amended by the ordinary procedure governing the making of a law and the other the 'rigid' type which cannot be so amended but required a special procedure for its amendment. Which one of these did our framers adopt the 'flexible' or the 'rigid'? On an answer to the above question some important consequences will follow which are relevant to our enquiry.

1232. Our Constitution provides for a Legislature at the center and in the States. At the center it is the Parliament consisting of the Lok Sabha and the Rajya Sabha. In the States the Legislature consists of the State Assembly and, in some of them, of an Upper Chamber known as the Legislative Council. Legislative power is distributed between the center and the States, Parliament having the power to make laws with regard to subject matters contained in List I of the Seventh Schedule and the State Legislatures with regard to those in List II. There is also List III enumerating matters in respect of which both the Parliament and the State Legislatures have concurrent powers to make laws. This power to make laws is given to these bodies by Articles 245 to 248 and the law making procedure for the Parliament is contained in Articles 107 to 122 and for the State Legislatures in Articles 196 to 213. The three Lists in the Seventh Schedule no where mention the 'Amendment of the Constitution' as one of the subject matters of legislation for either the Parliament or the State Legislatures. On the other hand, after dealing with all important matters of permanent interest to the Constitution in the first XIX parts covering 367 Articles, the Constitution makes special provision for the 'Amendment of the Constitution' in Part XX in one single Article, namely, Article 368. A special procedure is provided for amendment which is not the same as the one provided for making ordinary laws under Articles 245 to 248. The principle features of the legislative procedure at the center are that the law must be passed by both Houses of Parliament by a majority of the members present and voting in the House, and in case of an impasse between the two Houses of Parliament, by a majority vote at a joint sitting. All that is necessary is that there should be a coram which we understand is 10% of the strength of the House and if such a coram is available the two houses separately or at a joint meeting, as the case may be, may make the law in accordance with its legislative procedure laid down in Articles 107 to 122. The point to be specially noted is that all ordinary laws which the Parliament makes in accordance with Articles 245 to 248 must be made in accordance with this legislative procedure and no other. Under Articles 368 however, a different and special procedure is provided for

amending the Constitution. A Bill has to be introduced in either House of Parliament and must be passed by each House separately by a special majority. It should be passed not only by 2/3rd majority of the members present and voting but also by a majority of the total strength of the House. No joint sitting of the two Houses is permissible. In the case of certain provisions of the Constitution which directly or indirectly affect interstate relations, the proposed amendment is required to be ratified by the Legislatures which is not a legislative process of not less than one half of the States before the Bill proposing the amendment is presented to the President for his assent. The procedure is special in the sense that it is different and more exacting or restrictive than the one by which ordinary laws are made by Parliament. Secondly in certain matters the State Legislatures are involved in the process of making the amendment. Such partnership between the Parliament and the State Legislatures in making their own laws by the ordinary procedure is not recognised by the Constitution. It follows from the special provision made in Article 368 for the amendment of the Constitution that our Constitution is a 'rigid' or 'controlled' Constitution because the Constituent Assembly has "left a special direction as to how the Constitution is to be changed." In view of Article 368, when the special procedure is successfully followed, the proposed amendment automatically becomes a part of the Constitution or, in other words, it writes itself into the Constitution.

1233. The above discussion will show that the two separate procedures one for law making and the other for amending the Constitution were not just an accident of drafting. The two procedures have been deliberately provided to conform with well-know Constitutional practices which make such separate provisions to highlight the different procedures one commonly known as the legislative procedure and the other the constituent procedure. The word 'constituent' is so well-known in modern Political Constitutions that it is defined in the dictionaries as 'able to frame or alter a Constitution.' And the power to frame or alter the Constitution is known as constituent power. See The Concise Oxford Dictionary.

1234. Where then in our Constitution lie the legislative power and the constituent power? The legislative power is given specifically by Articles 245 to 248, subject to the Constitution, and these Articles are found under the heading 'Distribution of legislative powers'. That alone is enough to show that these articles do not deal with the constituent power. The point is important because the leading majority judgment in Golak Nath's case proceeds on the footing that the power lies in Article 248 read with the residuary entry 97 in List I of the Seventh Schedule. That finding was basic to the decision because unless an amendment of the Constitution is equated with a law made by Parliament under one or the other of the entries in List I of the Seventh Schedule it was not easy to invoke the bar of Article 13(2). Mr. Palkhivala says that he is indifferent as to whether the power is found in Article 248 or elsewhere. But that does not conclude the question because if we agree with the view that it falls in Article 248 the decision that an amendment abridging or taking away fundamental rights, being a law under Article 248, would be barred by Article 13(2) would be unassailable.

1235. In Golak Nath's case Subha Rao, C.J. who spoke for himself and his four learned colleagues held that the power to amend the Constitution was not found in Article 368 but in Article 248 read with the residuary entry 97 of List I of the Seventh Schedule. The five learned Judges who were in a minority held that the power is in Article 368, Hidayatullah, J. on the other hand, held that Article 368 did not give the power to any particular person or persons and that if the named

authorities acted according to the law of Article, the result of amendment was achieved. And if the procedure could be deemed to be a power at all it was a legislative power, sui generis, to be found outside the three lists in Schedule Seven of the Constitution. In other words, six learned Judges did not find the power in the residuary entry 97 of List I, while five found it there. We have, therefore, to see whether the view of Subba Rao, C.J. and his four colleagues who held that the power lay in Article 248 read with the residuary entry 97 is correct. In my view, with respect, it is not.

1236. Article 368 is one single article in Part XX entitled. The amendment of the Constitution.' It is a special topic dealt with by that Part. In other articles like Articles 4, 169, para 7 of Schedule V and para 31 of Schedule VI a power is granted to the Parliament to amend specific provisions 'by law' i.e., by adopting the ordinary procedure of legislation, though it altered certain provisions of the Constitution. The alterations are 'a law' made by the Parliament and, therefore, liable to be struck down, unless specifically saved, in case of inconsistency with the provisions of the Constitution. Secondly in every such case a provision is deliberately added explaining that the amendment so made by law is not to be deemed an amendment of the Constitution for the purpose of Article 368. The warning was necessary to emphasise that an amendment of the Constitution in accordance with the procedure laid down in Article 368 was of a special quality-a quality different from amendments made 'by law' by the Parliament. The special quality flowed from the fact that the Parliament and the States which were to participate in the process performed not their ordinary legislative function but a special function known in all Federal or quasi-federal or controlled Constitutions as a 'constituent' function. The difference between the ordinary function of making law and the function of amending the Constitution loses its significance in the case of a sovereign body like the British Parliament or a Parliament like that of New Zealand which has a written Constitution of the Unitary type. These bodies can amend a Constitutional law with the same case with which they can make an ordinary law. The reason is that their Constitutions are 'flexible' Constitutions. But in countries which have a written Constitution which is a 'rigid' or 'controlled' Constitution the Constitution is liable to be amended only by the special procedure, and the body or bodies which are entrusted with the amendment of the Constitution are regarded as exercising constituent power to distinguish it from the power they exercise in making ordinary legislation under the Constitution. So far as we are concerned, our Constitution gives specific powers of ordinary legislation to the Parliament and the State legislatures in respect of well demarcated subjects. But when it comes to the amendment of the Constitution, a special procedure has been prescribed in Article 368. Since the result of following the special procedure under the Article is the amendment of the Constitution the process which brings about the result is known as the exercise of constituent power by the bodies associated in the task of amending the Constitution. It is, therefore, obvious, that when the Parliament and the State Legislatures function in accordance with Article 368 with a view to amend the Constitution, they exercise constituent power as distinct from their ordinary legislative power under Articles 245 to 248. Article 368 is not entirely procedural. Undoubtedly part of it is procedural. But there is a clear mandate that on the procedure being followed the 'proposed amendment shall become part of the Constitution, which is the substantive part of Article 368. therefore, the peculiar or special power to amend the Constitution is to be sought in Article 368 only and not elsewhere.

1237. Then again if the constituent assembly had regarded the power to amend the Constitution as no better than ordinary legislative power the framers of the Constitution who were well-aware of

the necessity to provide for the power to amend the Constitution would not have failed to add a specific entry to that effect in one or the other of the lists in the Seventh Schedule instead of leaving it to be found in a residuary entry. The very fact that the framers omitted to include it specifically in the list but provided for it in a special setting in Part XX of the Constitution is eloquent of the fact that the power was not to be sought in the residuary entry or the residuary Article 248. In this connection it may be recalled that in the Draft Constitution Article 304 had a separate provision in Clause 2. Clause 1 of that article fairly corresponds with our present Article 368. In Clause 2 power was given to the States to propose amendments in certain matters and Parliament had to ratify such amendments. There was thus a reverse process of amendment. There was no residuary power in the States and the amendment of the Constitution was not a specific subject of legislative power in draft List II. This goes to show that in the Draft Constitution, in all but two matters, the proposal for amendment was to be made by the Parliament and in two specified matters by the State Legislatures. If the power for the latter two subjects was to be found in Clause 2 of Article 304 of the Draft Constitution it is only reasonable to hold that the power of Parliament to amend the rest of the Constitution was to be found in Article 304(1) which corresponds to the present Article 368.

1238. Moreover the actual wording of Article 245 which along with Articles 246 to 248 comes under the topic "Distribution of legislative powers" is important. Article 245 provides that Parliament may make laws for the whole or any part of India and the legislature of a State may make laws for the whole or any part of the State. Thus Article 245 confers the power to make laws on Parliament and the Legislatures of the State for and within the territory allocated to them. Having conferred the power, Articles 246 to 248 distribute the subject matters of legislation in respect of which the Parliament and the State Legislatures have power to make the laws referred to in Article 245. But there is an important limitation on this power in the governing words with which Article 245 commences. It is that the power was subject to the provisions of the Constitution thereby lifting the Constitution above the 'laws'. That would mean that the Parliament and the State Legislatures may, indeed make laws in respect of the areas and subject matters indicated, but the exercise must be "subject to the provisions of the Constitution" which means that the power to make laws does not extend to making a law which contravenes or is inconsistent with any provision of the Constitution which is the supreme law of the land. A law is inconsistent with the provision of the Constitution when, being given effect to, it impairs or nullifies the provision of the Constitution. Now no simpler way of impairing or nullifying the Constitution can be conceived than by amending the text of the provision of the Constitution. therefore, since a law amending the text of a Constitutional provision would necessarily entail impairing or nullifying the Constitutional provision it would contravene or be inconsistent with the provision of the Constitution and hence would be impermissible and invalid under the governing words "subject to the provisions of the Constitution" in Article 245. It follows that a law amending the Constitution if made on the assumption that it falls within the residuary powers of the Parliament under Article 248 read with entry 97 of List I would always be invalid. Then again a law made under Articles 245 to 248 must, in its making, conform with the ordinary legislative procedure for making it laid down for the Parliament in Part V, Chapter II and for the State Legislature in Part VI, Chapter III of the Constitution and, no other. To say that the power to make law lies in Article 245 and the procedure to make it in Article 368 is to ignore not only this compulsion, but also the fundamental Constitutional practice followed in our Constitution, as in most modern controlled Constitutions, prescribing special procedure for the amendment of the Constitution which is different from the procedure laid down for making ordinary laws. The conclusion, therefore, is that the power of

amendment cannot be discovered in Article 248 read with the residuary entry. The argument that Article 368 does not speak of the power to amend but only of the procedure to amend in pursuance of the power found elsewhere is clearly untenable. The true position is that the alchemy of the special procedure prescribed in Article 368 produces the constituent power which transports the proposed amendment into the Constitution and gives it equal status with the other parts of the Constitution.

1239. Moreover, if an amendment of the Constitution is a law made under Article 248 read with entry 97 List I strange results will follow. If the view taken in Golak Nath's case is correct, such 'a law being repugnant to Article 13(2) will be expressly invalidated so far as Part III of the Constitution is concerned. And such a law amending any other article of the Constitution will also be invalid by reason of the governing words "subject to the provisions of the Constitution" by which Article 245 commences. In that event no article of the Constitution can be amended. On the other hand, if the law amending an article of the Constitution is deemed to be not repugnant to the article which is amended, then every article can be amended including those embodying the fundamental rights without attracting the bar of Article 13(2) which can only come in on a repugnancy. On the argument, therefore, that an amendment is a law made under Article 248 the whole of the Constitution becomes unamendable, and on the argument that such a law never becomes repugnant to the article amended the whole of the Constitution becomes amendable, in which case, we are unable to give any determinate value to Article 13(2). Instead of following this complicated way of tracing the power in Article 248 read with the residuary entry 97 of List I it would be correct to find it in Article 368 because that is a special article designed for the purposes of the amendment of the Constitution which is also the subject heading of Part XX. In my opinion, therefore, the power and the procedure to amend the Constitution are in Article 368.

1240. The next question which requires to be examined is the nature of this constituent power, specially, in the case of 'controlled' or 'rigid' Constitutions. A student of Modern Political Constitutions will find that the methods of modern Constitutional amendment are (1) by the ordinary legislature but under certain restrictions; (2) by the people through a referendum; (3) by a majority of all the unions of a Federal State; (4) by special convention; and (5) by a combination of two or more of the above methods which are mentioned in order of increasing rigidity as to the method. Where the power of amending the Constitution is given to the legislature by the Constituent Assembly the Legislature working under restrictions assumes a special position. Strong in the book, already referred to, observes at page 152 "The constituent assembly, knowing that it will disperse and leave the actual business of legislation to another body, attempts to bring into the Constitution that it promulgates as many guides to future action as possible. If it wishes, as it generally does, to take out of the hands of the ordinary legislature the power to alter the Constitution by its own act, and since it cannot possibly foresee all eventualities, it must arrange for some method of amendment. *In short, it attempts to arrange for the recreation of a constituent assembly whenever such matters are in future to be considered, even though that assembly be nothing more than the ordinary legislature acting* under certain restrictions.

(emphasis supplied)

1241. Authorities are not wanting who declare that such amending power is sovereign constituent power. Orfield in his book, the Amending of the Federal Constitution (1942) page 155 (1971 Edn.)

says that in America the amending body is sovereign in law and in fact Herman Finer in his book The Theory and Practice of Modern Government, fourth edition 1961 reprinted in 1965, pages 156/157 says "Supremacy is shown and maintained chiefly in the amending process.... Too difficult a process, in short, ruins the ultimate purpose of the amending clause.... The amending clause is so fundamental to a Constitution that I am tempted to call it the Constitution itself." Geoffery Marshall in his Constitutional Theory (1971) p. 36 says "there will in most Constitutional systems, be an amending process and some "collection" of persons, possibly complex, in whom sovereign authority to alter any legal rule inheres....Constitutions unamendable in all or some respects are non-standard cases and a sovereign entity whether (as in Britain) a simple legislative majority, or a complex specially convened majority can be discovered and labelled "sovereign" in almost all systems." Wade in his Introduction to Dicey's Law of the Constitution, 10th edition says as follows at page 36 "Federal government is a system of government which embodies a division of powers between a central and a number of regional authorities. Each of these "in its own sphere is co-ordinate with the others and independent of them." This involves a division of plenary powers and such a division is a negation of sovereignty. Yet somewhere lies the power to change this division. Wherever that power rests, there is to be found legal sovereignty." Having regard to this view of the jurists, it was not surprising that in Sankari Prasad's case Patanjali Shastri, J., speaking for the court, described the power to amend under Article 368 as "sovereign constituent power" (p. 106). By describing the power as "sovereign" constituent power it is not the intention here to declare, if somebody is allergic to the idea, that legal sovereignty lies in this body or that. It is not necessary to do so for our immediate purpose. The word 'sovereign' is used as a convenient qualitative description of the power to highlight its superiority over other powers conferred under the Constitution. For example, legislative power is subject to the Constitution but the power to amend is not. Legislative activity can operate only under the Constitution but the power of amendment operates over the Constitution. The word 'sovereign', therefore, may, for our purpose, simply stand as a description of a power which is superior to every one of the other powers granted to its instrumentalities by the Constitution.

1242. The amplitude and effectiveness of the constituent power is not impaired because it is exercised by this or that representative body or by the people in a referendum. One cannot say that the power is less when exercised by the ordinary legislature as required by the Constitution or more when it is exercised-say by a special convention. This point is relevant because it was contended that our Parliament is a constituted body-"a creature of the Constitution" and cannot exercise the power of amending the Constitution to the same extent that a constituent assembly specially convened for the purpose may do. It was urged that the sovereignty still continues with the people and while it is open to the people through a convention or a constituent assembly to make any amendments to the Constitution in any manner it liked, there were limitations on the power of an ordinary Parliament-'a constituted body', which precluded it from making the amendments which damaged or destroyed the essential features and elements of the Constitution. We shall deal with the latter argument in its proper place. But for the present we are concerned to see whether the power to amend becomes more or less in content according to the nature of the body which makes the amendment. In my view it does not. Because as explained by Strong in the passage already quoted "In short it (i.e. the constituent assembly which framed the Constitution) attempts to arrange for the recreation of a constituent assembly whenever such matters are in future to be considered even though that assembly be nothing more than the ordinary legislature acting under certain restrictions." Only the methods of making amendments are less rigid or more rigid

according to the historical or political background of the country for which the Constitution is framed. For example Article V of the American Constitution divides the procedure for formal amendment into two parts-proposal and ratification. Amendments may be proposed in two ways; (1) by two-thirds vote of both Houses of Congress; (2) by national Constitutional conventions called by Congress upon application of two-thirds of the State Legislatures. Amendments may be ratified by two methods, (1) by the legislatures of three-fourths of the States; (2) by special conventions in three-fourths of the States. Congress has the sole power to determine which method of ratification is to be used. It may direct that the ratification may be by the state legislatures or by special conventions.

1243. One thing which stands out so far as Article V is concerned is that referendum as a process of Constitutional amendment has been wholly excluded. In fact it was held by the Supreme Court of America in Dodge v. Woolsey (1855) 18 How 331 "the Constitution is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them." In other words, the people, having entrusted the power to amend the Constitution to the bodies mentioned in Article V, had completely withdrawn themselves from the amending process. Out of the two combinations of the bodies referred to in Article V-one is a combination of the Congress and the State Legislatures and between them, though they are constituted bodies, they can qualitatively amend the Constitution to the same extent as if the proposal made by the Congress was to be ratified by convention by 3/4th number of States. As a matter of fact on the proposal made by the Congress all the amendments of the U.S. Constitution, with the exception of the twenty first which repealed the 18th amendment, have been ratified by State legislatures. Such an amendment accomplished by the participation of the Congress and the State Legislatures has not been held by the U.S. Supreme Court as being any less effective because the Congress had not obtained the ratification from a convention of the States. The question arose in United States v. Sprague. 282 U.S. 716 That case was on the 28th (Prohibition) Amendment. The amendment became part of the Constitution on a proposal by the Congress and ratification by the State legislatures. Objection was raised to the validity of the amendment on the ground that since the amendment affected the personal liberty of the subject and under Article X the people had still retained rights which had not been surrendered to the Federal Constitution, the ratification ought to have been by the representatives of the people at a special convention and not by the State legislatures. That objection was rejected on the ground that the Congress alone had the choice as to whether the State legislatures or the conventions had to ratify the amendment. Conversely, in Hawke v, Smith 253 U.S. 221 which also related to the 18th amendment it was held that the State of Ohio could not provide for the ratification of the 18th amendment by popular referendum since such a procedure altered the plain language of Article V which provides for ratification by State legislatures rather than by direct action of the people. It will be seen from this case that the State legislature for Ohio, instead of deciding on the ratification itself as it was bound to do under Article V, decided to obtain the opinion of the people by a referendum but such a procedure was held to be illegal because it did not find a place in Article V. This establishes that an amendment of the Constitution must be made strictly in accordance with the method laid down in the Constitution and any departure from it even for the purpose of ascertaining the true wishes of the people on the question would be inadmissible. An amendment of the Constitution must be made only in accordance with the procedure laid down in the

Constitution and whatever individuals and bodies may think that it had better be made by a representative constituent assembly or a convention or the like is of really no relevance.

1244. Under Article 368 the Parliament is the Principal body for amending the Constitution except in cases referred to in the proviso. Parliament need not be associated with the State legislatures in making an amendment of the Constitution in cases excepted from the proviso. It cannot be lost sight of that Parliament in a very large way represents the will of the people. Parliament consists of two Houses-the Lok Sabha and the Rajya Sabha. The Lok Sabha is elected for five years on the basis of adult franchise. The Rajya Sabha is a permanent body-members of which retire by rotation. The Rajya Sabha consists of members elected by the State legislatures who are themselves elected to those legislatures on the basis of adult franchise. Then again there is a striking difference between the position occupied by the Congress in relation to the President in United States and the position of the Executive in relation to the Parliament and the State legislatures in India. In America the President is directly elected by the people for a term and is the Executive head of the Federal Government. The Congress may make laws but the President is not responsible to the Congress. In India, however, in our Parliamentary system of democracy, as in Great Britain, the Executive is entirely responsible to the legislature. The Congress in U.S.A. will not be held responsible by the people for what the President had done in his Executive capacity. The same is true in respect of State legislatures in America. In India people will hold the Parliament responsible for any executive action taken by the Cabinet. While in the context of a Constitutional amendment it is facile to decry the position of Parliament as a constituent body, we cannot ignore the fact that in both Great Britain and New-Zealand-one with an unwritten Constitution and the other with a written Constitution-governed by Parliamentary democracy, the Constitution could be changed by an ordinary majority.

1245. Why the power to amend the Constitution was given in the main to Parliament is not fully clear. But two things are clear. One is that as in America the people who gave us the Constitution completely withdrew themselves from the process of amendment. Secondly, we have the word of Dr. Ambedkar-one of the principal framers of our Constitution that the alternative methods of referendum or convention had been considered and definitely rejected. See Constituent Assembly Debates, Vol. VII page 43. They decided to give the power to Parliament, and Dr. Ambedkar has gone on record as saying that the amendment of the Constitution was deliberately made as easy as was reasonably possible by prescribing the method of Article 368. The Constituent Assembly Debates show that the chief controversy was as to the degree of flexibility which should be introduced into the Constitution. There may have been several historical reasons for the constituent assembly's preference for Parliament. Our country is a vast continent with a very large population. The level of literacy is low and the people are divided by language, castes and communities not all pulling in the same direction. On account of wide-spread illiteracy, the capacity to understand political issues and to rise above local and parochial interests is limited. A national perspective had yet to be assiduously fostered. It was, therefore, inevitable that a body which represented All-India leadership at the center should be the choice. Whatever the reasons, the Constituent Assembly entrusted the power of amendment to the Parliament and whatever others may think about a possible better way, that was not the way which the constituent assembly commanded. The people themselves having withdrawn from the process of amendment and entrusted the task to the Parliament instead of to any other representative body, it is obvious that the power of the authorities designated by the Constitution for amending the Constitution must be co-extensive with

the power of a convention or a constituent assembly, had that course been permitted by the Constitution.

1246. We have already shown that constituent power is qualitatively superior to legislative power. Speaking about the legislative competence of the Canadian Parliament, Viscount Sankey L.C. speaking for the Judicial Committee of the Privy Council observed in British Coal Corporation v. The King [1935] A.C. 500 "Indeed, in interpreting a constituent or organic statute such as the Act (British North America Act) that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in Edwards v. Attorney-General for Canada [1930] A.C. 124. "Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs". If that is the measure of legislative power the amplitude of the power to amend a Constitution cannot be less.

1247. The width of the amending power can be determined from still another point of view. The Attorney-General has given to us extracts from nearly seventy one modem Constitutions of the world and more than fifty of them show that those Constitutions have provided for their amendment. They have used the word 'amend', 'revise', or 'alter', as the case may be, and some of them have also used other variations of those words by showing that the Constitutional provisions may be changed in accordance with some special procedures laid down. Some have made the whole of the Constitution amendable some others have made some provisions unamendable; and two Constitutions - that of Somalia and West Germany have made provisions relating to Human Rights unamendable. In some of the Constitutions a few provisions are made partially amendable and other provisions only under special restrictions. But all have given what is commonly known as the 'Amending power' to be exercised in circumstances of more or less rigidity. The methods or processes may be more rigid or less rigid-but the power is the same, namely, the amending power.

1248. The raison d'etre for making provisions for the amendment of the Constitution is the need for orderly change. Indeed no Constitution is safe against violent extra-Constitutional upheavals. But the object of making such a provision in a Constitution is to discourage such upheavals and provide for orderly change in accordance with the Constitution. On this all the text-books and authorities are unanimous. Those who frame a Constitution naturally want it to endure but, however gifted they may be, they may not be able to project into the future, when, owing to internal or external pressures or the social, economic and political changes in the country, alterations would be necessary in the Constitutional instrument responding all the time to the will of the people in changed conditions. Only thus an orderly change is ensured. If such a change of Constitution is not made possible, there is great danger of the Constitution being overtaken by forces which could not be controlled by the instruments of power created under the Constitution. Wide-spread popular revolt directed against the extreme rigidity of a Constitution is triggered not by minor issues but by major issues. People revolt not because the so-called 'unessential' parts of a Constitution are not changed but because the 'essential' parts are not changed. The essential parts are regarded as a stumbling block in their progress to reform. It is, therefore, evident that if for any reason, whether it is the extreme rigidity of a Constitution or the disinclination of those who are in power to

introduce change by amendment, the essential parts looked upon with distrust by the people are not amended, the Constitution has hardly a chance to survive against the will of the people. If the Constitution is to endure it must necessarily respond to the will of the people by incorporating changes sought by the people. The survival of the American Constitution is generally attributed not so much to the amending Article V of the Constitution but to its vagueness which was exploited by the great judges of the Supreme Court of America who by their rulings adapted the Constitution to the changing conditions. Legislative enactments, custom and usage also played a part. If the Constitution were to merely depend upon Constitutional amendments there are many who believe that the Constitution would not have survived. The reason was the extreme rigidity of the process of amendment. But framers of modern Constitutions as of India learning from experience of other countries have endeavoured to make their Constitution as precise and as detailed as possible so that one need not depend upon judicial interpretation to make it survive. Correspondingly they have made it more flexible so that it is amenable to amendment whenever a change in the Constitution is necessary.

1249. A good deal of unnecessary dust was raised over the question whether the amendment of the Constitution would extend to the repeal of the Constitution. That is an interesting subject for speculation by purists and theoretical jurists, but politicians who frame a Constitution for the practical purposes of government do not generally concern themselves with such speculations. The pre-eminent object in framing a Constitution is orderly government. Knowing that no Constitution, however, good it may seem to be when it was framed, would be able to bear the strain of unforeseen developments, the framers wisely provide for the alteration of the Constitution in the interest of orderly change. Between these two co-ordinates, namely, the need for orderly government and the demands for orderly change, both in accordance with the Constitution, the makers of the Constitution provide for its amendment to the widest possible limit. If any provision requires amendment by way of addition, alteration or repeal, the change would be entirely permissible. If one were to ask the makers of the Constitution the rhetorical question whether they contemplated the repeal of the Constitution, the answer would be, in all probability, in the negative. They did not toil on the Constitution for years in order that it may be repealed by the agencies to whom the amendment of the Constitution is entrusted. They wished it to be permanent, if not eternal, knowing that as time moved, it may continue in utility incorporating all required changes made in an orderly manner. Declaring their faith in the Constitution they will express their confidence that the Constitution which they had framed with the knowledge of their own people and their history would be able to weather all storms when it is exposed to orderly changes by the process of amendment To them the whole-sale repeal would be unthinkable; but not necessary changes in response to the demands of time and circumstance which, in the opinion of the then amending authorities, the current Constitutional instrument would be able to absorb. This is sufficient for the courts to go on as it was sufficient for the framers of the Constitution. Quibbling on the meaning of the word 'amendment' as to whether it also involved repeal of the whole Constitution is an irrelevant and unprofitable exercise. Luckily for us besides the word 'amendment' in Article 368 we have also the uncomplicated word 'change' in that article and thus the intention of the framers of the Constitution is sufficiently known. Then again the expression 'amendment of the Constitution' is not a coinage of the framers of our Constitution. That is an expression well-known in modern Constitutions and it is commonly accepted as standing for the alteration, variation or change in its provisions.

1250. Whichever way one looks at the amending power in a Constitution there can be hardly any doubt that the exercise of that power must correspond with the amplitude of the power unless there are express or necessarily implied limitations on the exercise of that power. We shall deal with the question of express and implied limitations a little later. But having regard to the generality of the principle already discussed the meaning of the word 'amendment of the Constitution' cannot be less than 'amendment by way of addition, variation or repeal of any provision of the Constitution'' which is the clarification of that expression accepted by the Constitutional 24th Amendment.

1251. We shall now see if there are express or implied limitations in Article 368 itself. Article 368 is found in Part XX of the Constitution which deals with only one subject, namely, the Amendment of the Constitution. The article provides that when the special procedure directed by it is successfully followed the Constitution stands amended in terms of the proposal for amendment made in the Bill. Whatever provision of the Constitution may be sought to be amended, the amendment is an Amendment of the Constitution. The range is the whole of this Constitution which means all the provisions of the Constitution. No part of the Constitution is expressly excepted from amendment. Part XX and Article 368 stand in supreme isolation, after the permanent provisions of the Constitution are exhausted in the previous XIX parts. The power to amend is not made expressly subject to any other provision of the Constitution. There are no governing words like "subject to the Constitution" or this or that part of the Constitution. If the framers of the Constitution had thought it necessary to exclude any part or provision of the Constitution from amendment, they would have done so in this part only as was done in the American Constitution. Article V of that Constitution, which was undoubtedly consulted before drafting Article 368, made two specific exceptions. The language structure of Article V has a close resemblance to the language structure of our Article 368. therefore, if any part of the Constitution was intended to be excluded from the operation of the power to amend it would have normally found a place in or below Article 368. As a matter of fact, in the draft Constitution below Article 304, which corresponds to the present Article 368, there was Article 305 which excluded certain provisions from amendment, but later on Article 305 itself was deleted. Even Article 368 itself was not safe from amendment because the proviso to Article 368 shows that the provisions of the article could be changed. Then again we find that when the people through the constituent assembly granted the power to amend, they made no reservations in favour of the people. The people completely withdrew from the process of amendment. In other words, the grant of power was without reservation. Another thing which is to be noted is that when the Constituent Assembly directed that amendments of the Constitution must be made by a prescribed method, they necessarily excluded every other method of amending the Constitution. As long as the article stood in its present form the Parliament could not possibly introduce its own procedure to amend the Constitution by calling a constituent assembly, a convention or the like. Altogether, it will be seen that the grant of power under Article 368 is plenary, unqualified and without any limitations, except as to the special procedure to be followed.

1252. The character of an amendment which can be made in a Constitution does not depend on the flexibility or rigidity of a Constitution. Once the rigidity of the restrictive procedure is overcome, the Constitution can be amended to the same degree as a flexible Constitution. So far as a flexible Constitution like that of Great Britain is concerned, we know there are no limits to what the Parliament can do by way of amendment. It can, as pointed out by Dicey, repeal the Act of Union of Scotland by appropriate provisions even in a Dentist's Act. (Law of the Constitution page 145).

We know that by the statute of Westminster the British Parliament removed most of the Imperial fetters from the self governing colonies and by the Independence of India Act, 1947 surrendered its Indian Empire. Recently the British Parliament invited inroads on its sovereignty by joining the Common Market. Similarly, as we have seen in McCawley's case, referred to earlier, the legislature of queensland, whose Constitution was a flexible Constitution, was held competent to amend its Constitutional provisions with regard to the tenure of office of the Judges of the Supreme Court by a subsequent Act passed in 1916 on the subject of Industrial Arbitration. To the objection that so important a provision of the Constitution was not permissible to be amended indirectly by a law which dealt with Industrial arbitration, Lord Birkenhead made the reply at page 713. "Still less is the Board prepared to assent to the argument, at one time pressed upon it, that distinctions may be drawn between different matters dealt with by the Act, so that it becomes legitimate to say of one section: "This section is fundamental or organic; it can only be altered in such and such a manner"; and of another: "This section is not of such a kind; it may consequently be altered with as little ceremony as any other statutory provision." Their Lordships therefore fully concur in the reasonableness of the observations made by Isaacs and Rich JJ that, in the absence of any indication to the contrary, no such character can be attributed to one section of the Act which is not conceded to all; and that if Sections 15 and 16 (relating to the tenure of office of the Judges) are to be construed as the respondents desire, the same character must be conceded to Section 56, which provides that in proceedings for printing any extract from a paper it may be shown that such extract was bona fide made". This only emphasizes that all provisions in a Constitution must be conceded the same character and it is not possible to say that one is more important and the other less important. When a legislature has the necessary power to amend, it can amend an important Constitutional provision as unceremoniously as it can amend an unimportant provision of the Constitution. Dicey observes in his Law of the Constitution, 10th edition p. 127: "The "flexibility" of our Constitution in the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London.

1253. As already pointed out what distinguishes a 'rigid' Constitution from a 'flexible' Constitution is that it requires a special procedure for its amendment. It cannot be legally changed with the same case and in the same manner as ordinary laws. But if the rigid procedure is successfully followed, the power to amend operates equally on all provisions of the Constitution without distinction. Indeed, rigid Constitutions may safeguard certain provisions from amendment even by the special procedure. But where no such provision is protected the power of amendment is as wide as that of a Parliament with a flexible Constitution. Rigidity of procedure in the matter of amendment is the only point of primary distinction between a 'rigid' and 'flexible' Constitution and when this rigidity is overcome by following the special procedure, the power of amendment is not inhibited by the fact that a Constitutional provisions is either important or unimportant. The amending power operates on all provisions as effectively as it does in a flexible Constitution. If the nature of the provision is so important that the Constitution itself provides against its amendment the amending power will have to inspect the provision. But if it is not so protected, every provision, important or otherwise, can be amended by the special procedure provided. In that respect the fact that the Constitution is a 'rigid' Constitution does not place any additional restraint.

1254. We have already referred to the principle underlying the Amending provision in a written Constitution. In some Constitutions, the special procedure is very 'rigid' as in the American Constitution. In others, especially in more modern Constitutions, having regard to the disadvantages of providing too rigid and restrictive procedures, amending procedures have been made more and more flexible. Our Constitution which learnt from the experience of other similar Constitutions made the amending procedure as flexible as was reasonably possible. There are several articles in the Constitution which permit the Parliament to make laws which are of a Constitutional character. There are some other articles which permit amendments to certain other specified provisions of the Constitution by the ordinary legislative procedure. For the rest there is Article 368 which provides a much more flexible procedure than does the American Constitution. The following passages from the book 'Political Science and Comparative Constitutional Law, Vol. I' written by the great jurist John W. Burgess will show both the rationale for including an amendment clause in a Constitution and the need of making the amending procedure as less rigid as possible. At page 137 he says "A complete Constitution may be said to consist of three fundamental parts. The first is the organisation of the state for the accomplishment of future changes in the Constitution. This is usually called the amending clause, and the power which it describes and regulates is called the amending power. This is the most important part of a Constitution. Upon its existence and truthfulness, i.e. its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceable continuity or shall suffer alterations of stagnation, retrogression and revolution. A Constitution, which may be imperfect and erroneous is its other parts, can be easily supplemented and corrected, if only the state be truthfully organised in the Constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the state". Than at pages 150/151 commenting on the disadvantages of the amending procedure of the American Constitution he remarks "When I reflect that, while our natural conditions and relations have been requiring a gradual strengthening and extension of the powers of the Central Government, not a single step has been taken in this direction through the process of amendment prescribed in that article, except as the result of civil war, I am bound to conclude that the organization of the sovereign power within the Constitution has failed to accomplish the purpose for which it was constructed.... But I do say this that when a state must have recourse to war to solve the internal questions of its own politics, this is indisputable evidence that the law of its organization within the Constitution is imperfect; and when a state cannot so modify and amend its Constitution from time to time as to express itself truthfully therein, but must writhe under the bonds of its Constitution until it perishes or breaks them asunder, this is again indisputable evidence that the law of its organization within the Constitution is imperfect and false. To my mind the error lies in the artificially excessive majorities required in the production of Constitutional changes." These passages express the deep anguish of the jurist and his disappointment with the current process of amendment prescribed in the U.S. Constitution. He gives the amending provision supreme importance in the Constitution and wants it to be very much less rigid than what it is, so that the Constitution can correspond with the truth of contemporary, social and political changes. The whole object of providing for amendment is to make the Constitution as responsive to contemporary conditions as possible because, if it is not the danger of popular revolt, civil war or even revolution in a rapidly changing world may soon overtake the people. That being the political philosophy behind the amending provision it is obvious that the provision must serve the same purpose as in a Parliamentary democracy with a flexible Constitution. The latter can adjust itself more readily with changing conditions and thus discourage violent revolts. If the object of a Constitution is the same, namely,

orderly government and orderly change in accordance with the law, it must be conceded that all Constitutions whether flexible or rigid must have the power to amend the Constitution to the same degree; and if flexible Constitutions have the power to make necessary changes in their most cherished Constitutional principles, this power cannot be denied to a Constitution merely because it is a rigid Constitution. The amending power in such a Constitution may therefore, reach all provisions whether important or unimportant, essential or unessential.

1255. The above proposition is supported by several decisions of the Supreme Court of America and the Supreme Courts of the American States, the Constitutions of which are all 'rigid'. In Edwards v. Lesueur South Western Reporter Vol. 33, 1130 it was held that if a State Constitution provides that General Assembly may at any time propose such amendments to that instrument as a majority of the members elected to each house deem expedient the substance and extent of amendment are left entirely to the discretion of the General Assembly. In Livermore v. Waite 102 Cal. 118 only one of the judges, Judge Harrison, held the view that the word 'amendment' in the State Constitution implied such an addition or change within the lines of the original instrument as will effect an improvement or better carrying out of the purpose for which it was framed. But that view is not shared by others. In the State Constitution of California the word 'amendment' was used in addition to the word 'revision' and that may have influenced the judge to give the word 'amendment' a special meaning. The actual decision was dissented from in Edwards v. Lesueur referred to above, decided about 10 years later, and the opinion of Judge Harrison with regard to the meaning of the word 'amendment' was dissented from in Ex-parte Dillon. 262 Federal Reporter 563 decided in 1920 This case went to the Supreme Court of America in Dillon v. Gloss 65 Led 994 and the decision was affirmed. The challenge was to the Prohibition Amendment (18th) and the court observed at p. 996 "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired (that provision expired in 1808) it subjects this power to only two restrictions: one that the proposal shall have the approval of two thirds of both Houses, and the other excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the Senate. A further mode of proposal-as yet never invoked-is provided, which is, that on application of the two thirds of the states Congress shall call a convention for the purpose. When proposed in either mode, amendments, to be effective, must be ratified by the legislatures, or by conventions, in three fourths of the states, "as the one or the other mode of ratification may be proposed by the Congress." Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three fourths of them. The plain meaning of this is (1) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three fourths of the states shall be taken as a decisive expression of the people's will and be binding on all". The above passage is important from two points of view. One is that Article V subjects the amending power to no restrictions except the two expressly referred to in the article itself, and the second point which is relevant for our purpose is that the people's ratification may be obtained in one of two ways, namely, by the State legislatures or by State conventions. It was for the Congress to choose between these two ways of ratification. But whichever method was chosen, the ratification whether by the State legislatures or by special conventions, was the ratification on behalf of the people because they were representative assemblies who could give a decisive expression of the people's will. As a matter of fact although

several amendments have been made to the Constitution under Article V there has been only one, namely, the 21st Amendment which had been referred to state conventions. All other amendments were proposed by the Congress and ratified by the State legislatures-the ratification being regarded as by people's representatives who could decisively express the people's will. If the State legislatures in America which have no responsibility for the executive government of the State are deemed to reflect the will of the people there is greater reason to hold that our Parliament and State legislatures are no less representative of the will of the people when they participate in the process of amendment of the Constitution.

1256. But reverting to the consideration of the character of "an amendment of the Constitution", we find from decided American cases that there are no limits except those expressly laid down by the Constitution. In Ex-parte Mrs. D.C. Kerby 103 Ori. 612 decided by the Oregon Supreme Court in 1922 which concerned an amendment restoring the death penalty which had been abolished by a previous amendment to the Bill of Rights of the State Constitution, the following observations in State v. Cox 8 Ark. 436 were quoted with approval. "The Constitution, in prescribing the mode of amending that instrument, does not limit the power conferred to any particular portion of it, and except other provisions by declaring them not to be amendable. The general assembly, in amending the Constitution, does not act in the exercise of its ordinary legislative authority of its general powers; but it possesses and acts in the character and capacity of a convention, and is, quoad hoc, a convention expressing the supreme will of the sovereign people and is unlimited in its powers save by the Constitution of the United States. therefore, every change in the fundamental law, demanded by the public will for the public good, may be made, subject to the limitation above named.

1257. In Downs v. City of Birmingham 198 Southern Reporter, 231 the Supreme Court of Alabama held that an amendment to state Constitution may extend to a change in form of the state's government, which may be in any respect except that the government must continue to be a republican form of government as required by the U.S. federal Constitution, which was inviolable, and that rights acquired under the Constitution are subject to Constitutional provisions permitting amendments to the Constitution, and no right can be acquired under the State Constitution which cannot be abridged by an amendment of the Constitution and such a rule extends to contract and property rights.

1258. In Schneiderman v. United States of America 87 Led. 1796 which was a denaturalization case on the ground of non-allegiance to the "principles" of the American Constitution, Murphy J. delivering the opinion of the court said, pp. 1808-1809: "The Constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead they wrote Article V and the First Amendment, guaranteeing freedom of thought, soon followed. Article V contains procedural provisions for Constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent. Cf. National Prohibition Cases (Rhode Island v. Palmer) 65 Law. ed. 946. This provision and the many important and far-reaching changes made in the Constitution since 1787 refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution.

1259. In Ullmann v. United States 100 L. ed. 511 Frankfurter, J. delivering the opinion of the Supreme Court on the privilege against self-incrimination (Vth amendment) which, by the way, is recognized by our Constitution as a fundamental right, quoted with approval Chief Judge Macgruder who said "if it be thought that the privilege is out-moded in the conditions of this modern age then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.

1260. Recently in Whitehill v. Elkins, 19 L ed. 228 Douglas, J. delivering the opinion of the court, observed at p. 231 "If the Federal Constitution is our guide, a person who might wish to "alter" our form of Government may not be cast into the outer darkness. For the Constitution prescribes the method of "alteration" by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered.

1261. It is unnecessary to multiply cases to appreciate the width of the amending power in a 'rigid' Constitution. Even the dictionaries bring out the same sense. The word 'amend' may have different nuances of meaning in different contexts, like "amend once conduct", "amend a letter or a document", "amend a pleading", "amend a law" or "amend a Constitution". We are concerned with the last one, namely, what an amendment means in the context of a Constitution which contains an amending clause. In the Oxford English Dictionary, Vol. I the word 'amend' is stated to mean "To make professed improvements in (a measure before Parliament); formally, to alter in detail, though practically it may be to alter its principle so as to thwart it.

1262. Sutherland in his Statutes and Statutory Construction, third edition, Vol. I, p. 325 has explained an "amendatory act", as any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form.

1263. In Words and Phrases, Permanent edition Vol. 3, p. 447 it is generally stated that the word 'amendment' involves an alteration or change, as by addition, taking away or modification. It is further explained that the words 'amend', 'alter', and 'modify' are in general use and their meaning is not uncertain. Each means to change. A broad definition of the word 'amendment' would include any alteration or change. Further on (458) it is explained in the context of a Constitution that an 'amendment' of a Constitution, repeals or changes some provision in, or adds something to, the instrument amended. Then citing Downs v. City of Birmingham, already referred to, it is stated that every proposal which effects a change in a Constitution or adds to or takes away from it is an 'amendment', and the proposal need not be germane to any other feature of the Constitution, nor to the feature which is amended.

1264. Similarly citing State v. Fulton 124 N.E. 172 it is explained that the word 'amendment', when used in connection with the Constitution, may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provisions, or to some particular article, or section, and is then used to indicate an addition to, the striking out, or some change in that particular section.

1265. In Standard Dictionary of Funk and Wagnalls 'amendment' is defined as an act of changing a fundamental law as of a political Constitution or any change made in it according to a prescribed mode of procedure; as to alter the law by amendment, an amendment of the Constitution.

1266. In a Dictionary of the Social Sciences edited by Julius Gould and William L. Kolb compiled under the auspices of the Unesco p. 23, the word 'amendment' has been explained. "The term 'amendment', whenever used, has the core denotation of alteration or change. Historically the change or alteration denoted was for the sake of correction or improvement. In the realities and controversies of politics, however, the nature of correction or improvement becomes uncertain, so that alteration or change remains the only indisputable meaning as the term is applied. Probably the most fundamental type of formal amendment is that which is constituted by the alteration of the formal language of written Constitutions. The importance of the amending procedure in a time of serious social change has been stated by C.J. Friedrich. 'A well drawn Constitution will provide for its own amendment in such a way as to forestall as far as is humanly possible revolutionary upheavals. That being the case the provisions for amendment form a 'vital part of most modern Constitutions.' (Constitutional Government and Democracy-Boston 1941 p. 135)." It will be thus seen that having regard to the object of providing an amendment clause in a modern Constitution, amendment must stand for alteration and change in its provisions.

1267. That this was intended is clear from the wording of Article 368. The main part of the Article speaks only of "an amendment of this Constitution." It shows how a proposal for amendment becomes part of the Constitution. The language structure of Article 368 recalls the language structure of Article V of the American Constitution. There also the words used are "amendment of this Constitution", and nothing-more. No such supplementary words like "by addition, alteration or repeal" are used. Yet we have seen that so far as Article V is concerned an amendment under Article V involves alteration and change in the Constitution. Article 368 has a proviso which begins with these words "provided that if such amendment seeks to make any change in-(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (c) any of the Lists in the Seventh Schedule, or (d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the legislatures etc. etc." The proviso, therefore, clearly implies that an amendment under Article 368 seeks to make a change in the provisions of the Constitution. If the amendment seeks to make a change in the provisions referred to in Sub-clause (a) to (e) then only the amendment which makes such a change in these provisions requires ratification by the State legislatures. Otherwise, the amendment making a change in other provisions does not require ratification. We have already observed that the, meaning of the word 'change' is uncomplicated and can be easily felt and understood. The noun 'change' according to the Shorter Oxford English Dictionary means "substitution or succession of one thing in place of another; substitution of other conditions; variety." It also means "alteration in the state or quality of anything; variation, mutation." There can be no doubt, therefore, that, having regard to the importance of the amending clause in our Constitution, an amendment contemplates changes in the provisions of the Constitution which are capable of being effected by adding, altering or repealing them, as found necessary, from time to time. As a matter of fact it is impossible to conceive of even the simplest form of amendment without adding, altering or repealing. If you add some words to a provision of the Constitution you thereby alter

the provision. If you substitute a few words, you alter and repeal. Mr. Palkhivala admitted that he had no objection whatsoever to an amendment improving the Constitution so that it can serve the people better. He said that it was open to the Parliament to improve the content of the Constitution by making necessary changes. All that would necessarily imply amendment by way of addition, variation or repeal of a provision of the Constitution which is just what the 24th amendment seeks to do. As a matter of fact any amendment to the Constitution which the representatives of the people want to make is professedly an improvement. No proposer of an amendment of a Constitution, whatever his opponents may say to the contrary, will ever agree that his proposal is retrogressive. therefore, improvement or non-improvement cannot be the true test of an amendment. Alteration and change in the provisions is the only simple meaning, which the people for whom the Constitution is made, will understand.

1268. Having seen the importance of the amending clause in a Constitution, the philosophy underlying it and the amplitude of its power, it will be improper to try to cut down the meaning of the word 'amendment' in the expression 'amendment of the Constitution' by comparing it with the same word used in other provisions of the Constitution or other statutes in a different context. Not that such a comparison will in any way serve the object with which it is made, but it will amount to comparing, in effect, two words-one operating on a higher plane and the other on a lower. The word amendment in the expression "amendment of the Constitution" operates on a higher plane and is substantially different in connotation from the same word used on a lower plane in some other provision of the Constitution or any other statute in an entirely different context. To say that the word 'amendment' in 'amendment of the Constitution' is used in a low key because padding words like amendment "by way of addition, variation or repeal" are used elsewhere in the Constitution would be to ignore the status of the word 'amendment' when used in the context of amending the Constitution. Indeed the expression "amendment by way of addition, variation or repeal" would also amount to 'amendment'. But it is more appropriately used when some distinct provisions of a statute are under consideration and even the extreme limit of a repeal of such provisions is contemplated. In the case of an amendment of the Constitution this extreme limit of the repeal of the Constitution is not, as already pointed out, ordinarily contemplated. In the present case the comparison was principally made with "amend by way of addition, variation or repeal in sub-paragraphs (1) of para 7 and 21 in the Fifth and Sixth Schedules respectively. In both these cases, Parliament is authorized from time to time, by law, to make the amendment in any of the provisions of the two schedules. The authority is not only to add to the provision or vary the provision but even repeal the provision. Having provided that way in sub-paragraph 1 the framers of the Constitution added sub-para (2) in each case, but for which, what was done in accordance with sub-para (1) was likely to be misunderstood as an amendment of the Constitution as described in Article 368. Textually the provisions in the Schedules would stand amended. But this amendment is carried out 'by law'. On the other hand, if even a word in any provision of the Constitution is changed in accordance with Article 368, it is not described as an amendment of the provision but an Amendment of the Constitution with all its wide connotations.

1269. In Articles 4 and 169 (2) we have just the word 'amendment' for amending certain provisions of the Constitution by law, and both of them show in their context, without even the use of the padding words, that such an amendment would be really by way of addition, alteration and repeal. Then again such amendments are expressly taken out of the class of "amendment of the

Constitution for the purposes of Article 368" but for which they would have amounted textually to an amendment.

1270. Reference was also made to the amendment made by the constituent assembly in Section 291 of the Government of India Act, 1935 where similar padding words were used along with the word 'amend'. Here again it will be seen that the amendment was not an amendment of the Constitution but an authorization of the Governor General to amend, by Order, certain provisions relating to the Provincial Legislatures which were liable even to be repealed. No implications can be drawn with regard to the power under Article 368 by a reference to another statute where a particular phraseology is adopted in its own context. On the other hand this may be contrasted with the wording of Section 308 (later repealed) which provided for 'the amendment of the Act and the Orders in Council' on the proposals made by the Federal and State legislatures. The Act referred to is the Government of India Act, 1935. No padding words are used in the section although the context shows that amendment would inevitably involve adding, altering or repealing certain provisions of the Government of India Act or Orders in Council.

1271. The structure of Article 368 is now changed by the 24th amendment and the expanded expression "amendment by way of addition, variation or repeal, any provision of this Constitution" is adopted. The language structure of the original Article 368 was, however, different and there was no reference to "the provisions" of the Constitution therein. The article commenced with the words "An amendment of this Constitution" without reference to any provisions. Reference to "provisions of the Constitution" having been eschewed, to pad the expression "amendment of the Constitution" by the words "by way of addition, variation or repeal" would have been inappropriate; because such padding was likely to give the impression that the intention was to amend by addition to and, alteration and repeal of, the Constitution, considered as a whole. Neither the alteration nor the repeal of the Constitution, as a whole, could have been intended and hence the padding words would not have commended themselves to the Draftsmen. And because that was not the intention, we have to take the first step of legally construing "this Constitution" as "every provision of the Constitution" and then import the padding words with reference to the provision. Such a construction is perfectly permissible having regard to the general meaning of the word 'amendment'. Since doubts were expressed in the leading majority judgment of five judges in opposition to the view of the other six judges, who agreed that the word 'amendment' was wide in its application, the 24th amendment had to clarify the position.

1272. Article V of the American Constitution used only the words 'amendment to the Constitution' without any padding like "by way of addition, variation or repeal" and yet no body questions the fact that after 1789, when the Constitution was framed, there have been several additions, alterations and repeals. Actually the 18th amendment was repealed by the 21st.

1273. We thus come to the conclusion that so far as the wording of Article 368 itself is concerned, there is nothing in it which limits the power of amendment expressly or by necessary implication. Admittedly it is a large power. Whether one likes it or not, it is not the function of the court to invent limitations where there are none. Consequences of wreckless use of the power are political in character with which we are not concerned. Consequences may well be considered in fixing the scope and ambit of a power, where the text of the statute creating the power is unclear or ambiguous. Where it is clear and unambiguous, courts have to implement the same without regard

to consequences good or bad, just or unjust. In Vacher's [1913] A.C. 107 case Lord Shaw observed at page 126 "Were they (words) ambiguous, other sections or sub-sections might have to be invoked to clear up their meaning; but being unambiguous, such a reference might distort that meaning and so produce error. And of course this is a fortiori the case, if a reference is suggested, not to something within, but to considerations extraneous to, the Act itself. If, for instance, it be argued that the mind of Parliament "looking before and after," having in view the past history of a question and the future consequences of its language, must have meant something different from what is said, then it must be answered that all this essay in psychological dexterity may be interesting, may help to whittle language down or even to vaporize it, but is a most dangerous exercise for any interpreter like a Court of law, whose duty is loyally to accept and plainly to expound the simple words employed.

1274. We have to see next whether there are express limitations on the amending power elsewhere in the Constitution. The only provision to which our attention is drawn in Article 13(2). The article, before its amendment by the 24th amendment, was as follows:

13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or otherwise competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

It is obvious from Articles 13(1) and (2) that the intention was to make the fundamental rights paramount and invalidate all laws which were inconsistent with the fundamental rights. On the commencement of the Constitution of India there could not possibly be a vacuum with regard to laws and, therefore, by Article 372(1) all the laws in force in the territory of India immediately before the commencement of the Constitution were continued in force until altered or repealed or amended by a competent legislature or other competent authority. Such laws which were in force before the commencement of the Constitution and were continued under Article 372(1) were, in the first instance, declared void to the extent of their inconsistency with the provisions of Part III containing the fundamental rights. As to future laws provision was made under Clause (2) which commanded that the State shall not make a law which takes away or abridges the rights conferred by Part III and further added that any law made in contravention of the clause would be void to the extent of the contravention.

1275. It was contended before us that an amendment of the Constitution under Article 368 was a law made by the State and, therefore, to the extent that it contravened Clause (2) it would be void. The submission was similar to the one made in Golak Nath's case which was upheld by the majority of six judges. In the leading majority judgment it was held that it was a law which was made under Article 248 read with the residuary entry 97 of List I of the Seventh Schedule and, therefore, would be void if it took away or abridged any of the fundamental rights. Hidayatullah, J. who agreed with the conclusion did not agree that the power to amend was traceable to the residuary article referred to above. Nevertheless he held "it was indistinguishable from the other laws of the land for the purpose of Article 13(2)." The other five judges who were in the minority agreed substantially with the view taken in Sankari Prasad's case and by the majority in Sajjan Singh's case that this was not a law within the meaning of Article 13(2) because, in their opinion, an amendment of the Constitution under Article 368 was an act in exercise of the constituent power and was, therefore, outside the control of Article 13(2).

1276. Mr. Palkhivala submitted that he was not interested in disputing where the power to amend actually lay. Even assuming, he contended, the power to amend was to be found in Article 368, the worst that could be said against him was that the amendment was a Constitutional law and in his submission even such a law would be taken in by Article 13(2). In this connection he argued that there were certain laws made in the Indian States or even other laws which could be properly described as Constitutional laws which continued in force after the commencement of the Constitution and came within the category described in Article 13(1) and, therefore, there was no reason why an amendment of the Constitution which was also a Constitutional law should not come within the prohibition of Article 13(2). The Indian Independence Act, 1947 and the Government of India Act, 1935 which were the two main Constitutional statutes in accordance with which the country had been governed had been specifically repealed by Article 395. No other statute of similar competence and quality survived our Constitution. It may be that certain statutes of the States and other Constitutional documents may have continued in force as laws under Article 13(1) but it would be wrong to conclude therefrom that an amendment of the Constitution, also being a Constitutional law, would be deemed to have been included in the word 'law' in Article 13(2). We must be clear as to what 'Constitutional law' means in a written Constitution. Jennings in his The Law and the Constitution (fifth edition), pp. 62-65 points out that there is a fundamental distinction between Constitutional law and the rest of the law and that the term 'Constitutional law' is never used in the sense of including the law of the Constitution and the law made under it. In the context of the question in issue, we are concerned with our Constitution which is the supreme fundamental law, on the touch-stone of which the validity of all other laws-those in force or to be made by the State-is to be decided and since an amendment of the supreme law takes an equal place, as already pointed out, with the rest of the provisions of the Constitution we have to see whether an amendment of such quality and superiority is sought to be invalidated by Article 13(2). Other laws in force at the time of the commencement of the Constitution consisting of state treaties or state statutes were not laws of this superior category. In fact Article 372(1) itself shows that if they were to continue in force they were to do so subject to the other provisions of this Constitution and were liable to be altered or repealed or amended by a competent legislature or the other competent authority. All such laws though vaguely described as Constitutional were made absolutely subordinate to the Constitution. In that respect they were no better than any other laws which were continued in force after the commencement of the Constitution and to the extent that they were inconsistent with the fundamental rights, they stood on the same footing as any other

laws which continued in force after the commencement of the Constitution. Their status was entirely subordinate to the Constitution. On the other hand, the stature of a Constitutional amendment, as already seen, is the stature of the Constitution itself and, therefore, it would be wrong to equate the amendment of the Constitution with a so-called Constitutional law or document which survived after the commencement of the Constitution under Article 372(1).

1277. An amendment of the Constitution cannot be regarded as a law as understood in the Constitution. The expressions 'law', 'by law', 'make a law', are found scattered throughout the Constitution. Some articles, as shown by Bachawat, J. in Golak Nath's case at pages 904 and 905, are expressly continued until provision is made by law. Some articles of the Constitution continue unless provision is made otherwise by law; some continue save as otherwise provided by law. Some articles are subject to the provisions of any law to be made and some are expressed not to derogate from the power of making laws. Articles 4, 169, para 7 of the Fifth Schedule and para 21 of the Sixth Schedule empower the Parliament to amend the provisions of the first, fourth, fifth and sixth schedules by law. A reference to all these articles will show that in all these articles the expression 'law' means a law made by the Parliament in accordance with its ordinary legislative procedure. On the other hand, it is a point worthy of note that Article 368 scrupulously avoids the use of the word 'law'. After the proposal for amendment, introduced in Parliament in the form of a Bill, is passed by the two Houses separately with the requisite majority and is assented to by the President with prior ratification by the requisite number of States in certain cases mentioned in the proviso, the proposed amendment writes itself into the Constitution as a part of it. It is not passed, as already pointed out, as any other law is passed by the ordinary procedure by competent legislatures. The ratification by the State legislatures by a resolution is not a legislative act. The whole procedure shows that the amendment is made by a process different from the one which is compulsory for any other laws made by the Parliament or the State legislatures, and hence advisedly the term 'law' seems to have been avoided. In doing this the framers of the Constitution might have been influenced by the view held by many jurists in America that Article V of the American Constitution to which Article 368 conforms to some extent in its language structure don't regard an amendment of the Constitution as a legislative act. Finer called it, as we have already seen, the Constitution itself. "In proposing a Constitutional amendment, the legislature is not exercising its ordinary legislative function." Corpus Juris Secundum, Vol. 16 pp. 48, 49. "Under Article V of the American Constitution the proposal by the Congress for amendment and the ratification by the States are not acts of legislation". Burdick-The Law of the American Constitution, pp. 40-42. "Ratification by the States is not a legislative act"-Weaver Constitutional Law and its Administration, p. 50.

1278. Secondly, we find in several places in our Constitution the two words 'Constitution' and the 'law' juxtaposed which would have been unnecessary if the word 'law' included the Constitution also. For example, in the oath of the President mentioned in Article 60 and of the Governor of a State in Article 159 it would have been sufficient for him to swear that he would "preserve, protect and defend the laws" instead of swearing that he would "preserve, protect and defend the Constitution and the law". Similarly the Attorney General under Article 76 and the Advocate Generals of the States under Article 165 need have merely sworn that he would "discharge the functions conferred on him by law" instead of that "he would discharge the functions conferred by and under this Constitution or any other law for the time being in force". Similar is the case with the oaths prescribed in the IIIrd Schedule for the judges of the Supreme Court and the High Courts

and the Comptroller and Auditor General. Indeed it is quite possible to urge that the Constitution has been specially mentioned in order to emphasize its importance. But that is the very point. Its importance lies in its supremacy over all kinds of others laws-a special position which the framers of the Constitution, thoroughly acquainted with federal and quasi-federal Constitutions of the more important countries in the world, must have always known. In any case they knew that the Constitution was distinct from other laws. On that footing it would be only reasonably expected that if an Amendment, not being of the nature of an ordinary law, was intended to be included in word 'law' in Article 13(2), it would have been specifically mentioned in the definition of the word 'law' given in Clause 3(1) of Article 13. The definition is an inclusive definition. It does not mention enacted law or statute law in the definition, apparently because no-body needs to be told that an act of a legislature is law. But it includes such things like an Ordinance, Order, bye-law, rule, regulation, notification, custom or usage in order to clarify that although the aforesaid are not enactments of a legislature, they were still 'law' falling within the definition. An objection seems to have been anticipated that ordinances, orders, bylaws etc., not being the acts of a legislature, are not laws. That apparently was the reason for their specific inclusion. If, therefore, an amendment of the Constitution was intended to be regarded as 'law', not being an ordinary statute of the legislature, it had the greatest claim to be included specifically in the definition. Its omission is, therefore, very significant.

1279. The significance lies in the fact that the Constitution or its amendment is neither a law in force within the meaning of Article 13(1) continued under Article 372(1); nor can it be regarded as a law made by the State within the meaning of Article 13(2). The bar under Article 13(2) is not merely against law but a law made by the State. A fundamental right conferred by Part III could not be taken away or abridged by law made by the "State". To leave no doubt as to what the 'State' means, Part III, containing the fundamental rights, opens with the definition of the word "State" in Article 12. According to that definition the State includes the Government and the Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The definition thus includes all governmental organs within the territories of India and these governmental organs are either created under the Constitution or under the laws adopted by the Constitution under Article 372. In other words, they are all organs or agencies operating under the Constitution owing superior obligation to the Constitution. It would be, therefore, wrong to identify 'state' in Article 13(2) with anything more than the instruments created or adopted by the Constitution and which are required to work in conformity with the Constitution. Nor can the word 'state' be regarded as standing for a Nation or a Conglomeration of all the governmental Agencies. The Nation is an amorphous conception. The bar under Article 13(2) is against concrete instrumentalities of the State, instrumentalities which are capable of making a law in accordance with the Constitution.

1280. By its very definition as discussed earlier, a body or set of bodies exercising, as indicated in the Constitution, sovereign constituent power whether in a 'flexible' or a 'rigid' Constitution is not a governmental organ owing supreme obligation to the Constitution. The body or bodies operate not under the Constitution but over the Constitution. They do not, therefore, while amending the Constitution, function as governmental organs and, therefore, cannot be regarded as the State for the purposes of Part III of the Constitution.

1281. We thus reach the conclusion that an amendment of the Constitution is not a law made by the State and hence Article 13(2) would not control an amendment of the Constitution.

1282. The same conclusion is arrived at by a slightly different approach. Article 13(2) speaks of a law which becomes void to the extent it takes away or abridges a fundamental right as conferred by certain articles or provisions in Part III of the Constitution. Thus it embodies the doctrine of ultra vires well-known in English law. In other words, it is a law about which one can predicate voidability with reference to the provisions of the Constitution. This is possible only when it is a law made by the organs of the State. When an amendment is made, we have already shown, it becomes part of the Constitution, taking an equal status with the rest of the provisions of the Constitution. Voidability is predicated only with reference to a superior law and not an equal law. There is no superior law with reference to which its voidability can be determined. Indeed, if the amendment cannot entirely fit in with some other provisions of the Constitution the courts might have to reconcile the provisions, as was done in Sri Venktaramana v. The State of Mysore MANU/SC/0026/1957 : [1958]1SCR895 in which the fundamental right under Article 26(b) was read subject to Article 25(2)(b) of the Constitution. The point, however, is that courts have no jurisdiction to avoid one provision of the law with reference to another provision of the same law. It becomes merely a matter of construction. It follows, therefore, that an amendment of the Constitution not being liable to be avoided with reference to a superior law is not a law about which you can predicate avoidability and, hence, stands outside the operation of Article 13(2).

1283. If the fundamental rights in Part III were unamendable, nothing would have been easier than to make a specific provision about it in Part XX which dealt specifically with the subject of the amendment of the Constitution. That was the proper place. Article V of the American Constitution clearly indicated the two subjects which were unamend able. The Draft Constitution shows that, as a matter of fact, there was Article 305 under the subject "amendment of the Constitution" and that article had specifically made some parts of the Constitution unamendable. Later, Article 305 was deleted and the main amending article in the Draft Constitution, namely, Article 304 appeared in the garb of Article 368 of the Constitution with some additional subjects in the proviso.

1284. In adopting the distinction between the 'Constitution' and 'the law' the framers of the Constitution did not create any new concept of the law being subordinate to the Constitution. That was a concept which was well-recognized in Federal Constitutions specially providing for the amendment of the Constitution by a special procedure.

1285. No body disputes that law in its widest sense includes Constitutional law as it does natural law, customary law or ecclesiastical law. The point is whether in our Constitution 'law' includes an "amendment of the Constitution". As already shown our Constitution has maintained a meticulous distinction between ordinary law made by the legislature by ordinary legislative procedure and an amendment of the Constitution under Article 368. This is highlighted even when certain provisions of the Constitution are amended by ordinary law. As already shown Articles 4, 169 and paras 7 and 22 of the Fifth and Sixth Schedules respectively permit the Parliament to make 'by law' certain amendments in the Constitution, but in every case it is further provided that such an amendment made 'by law' shall not be deemed to be an amendment of the Constitution for the purposes of Article 368. When such a distinction is maintained between 'law' and 'an amendment of the Constitution' the same cannot be impaired by reference to the word 'law' used by the Privy

Council in a more comprehensive sense in McCawley's case and Rana Singhe's [1965] A.C. 172 case. In the former the Constitution was a flexible Constitution. In the latter, though it was a controlled Constitution the provision with regard to the amendment of the Constitution namely Section 29(4) of the Ceylon (Constitution) Order in Council was part of Section 29 which specifically dealt with the making of laws and came under the subject heading of Legislative power and procedure. In both cases the legislature was sovereign and as often happens in legislatures, principally modelled after the British Parliament, the distinction between Constitutional law and ordinary law becomes blurred and the use of the word 'law' to describe a Constitutional law is indeterminate. We are, however, concerned with our Constitution and cannot ignore the distinction maintained by it in treating ordinary laws as different from the amendment of the Constitution under Article 368. The forms of oath in the IIIrd Schedule referring to "Constitution as by law established" prove nothing to the contrary because as "by law established" merely means Constitution "as legally established." There is no indication therein of any intended dichotomy between 'law' and 'the Constitution'.

1286. Reference was made to the constituent assembly debates and to the several drafts of the Constitution to show how the original provision which culminated in Article 13 underwent" changes from time to time. They hardly prove anything. The fact that initially Article 13 was so worded as not to override the amendment of the fundamental rights, but later the Drafting Committee dropped that provision does not prove that the framers of the Constitution were of the view that Article 13(2) should reach an amendment of the Constitution if it abridged fundamental rights. It had been specifically noted in one of the notes accompanying the first draft that Article 13(2) would not control an amendment of the Constitution and, therefore, any clarification by a special provision to the effect that fundamental rights are amendable was not necessary except by way of abundant caution. (See : Shiva Rao "The Framing of India's Constitution, Vol. IV, page 26). That was apparently the reason for deleting that part of Article 13 which said that Article 13 should not come in the way of an amendment to the Constitution by which fundamental rights were abridged or taken away. Neither the speeches made by the leaders connected with the drafting of the Constitution nor their speeches (the same constituent assembly had continued as the provisional Parliament) when the first amendment was passed incorporating serious inroads into the fundamental rights conferred by Articles 15, 19 and 31 show that the fundamental rights were intended or understood to be unamendable-rather the contrary.

1287. The further argument that fundamental rights are inalienable natural rights and, therefore, unamendable so as to abridge or take them away does not stand close scrutiny. Articles 13 and 32 show that they are rights which the people have "conferred" upon themselves. A good many of them are not natural rights at all. Abolition of untouchability (Article 17), abolition of titles (Article 18); protection against double jeopardy (Article 20(2)); protection of children against employment in factories (Article 24); freedom as to attendance at religious instruction or religious worship in certain educational institutions (Article 28) are not natural rights. Nor are all the fundamental rights conceded to all as human beings. The several freedoms in Article 19 are conferred only on citizens and not non-citizens. Even the rights conferred are not in absolute terms. They are hedged in and restricted in the interest of the general public, public order, public morality, security of the State and the like which shows that social and political considerations are more important in our organized society. Personal liberty is cut down by provision for preventive detention which, having regard to the conditions prevailing even in peace time, is permitted. Not a few members of the

constituent assembly resented the limitations on freedoms on the ground that what was conferred was merely a husk. Prior to the Constitution no such inherent inalienability was ascribed by law to these rights, because they could be taken away by law.

1288. The so called natural rights which were discovered by philosophers centuries ago as safeguards against contemporary political and social oppression have in course of time, like the principle of laissez faire in the economic sphere, lost their utility as such in the fast changing world and are recognized in modern political Constitutions only to the extent that organized society is able to respect them. That is why the Constitution has specifically said that the rights are conferred by the people on themselves and are thus, a gift of the Constitution. Even in the most advanced and orderly democratic societies in the world in which political equality is to a large extent achieved, the content of liberty is more and more recognized to be the product of social and economic justice without which all freedoms become meaningless. To claim that there is equal opportunity in a society which encourages or permits great disparities in wealth and other means of social and political advancement is to run in the face of facts of life. Freedoms are not intended only for the fortunate few. They should become a reality for those whose entire time is now consumed in finding means to keep alive. The core philosophy of the Constitution lies in social, economic and political justice-one of the principal objectives of our Constitution as stated in the Preamble and Article 38, and any move on the part of the society or its government made in the direction of such justice would inevitably impinge upon the "sanctity" attached to private property and the fundamental right to hold it. The Directive Principles of State Policy, which our Constitution commands should be fundamental in the governance of the country, require the state to direct its policy towards securing to the citizens adequate means of livelihood. To that end the ownership and control of the material resources of the community may be distributed to serve 'the common good, and care has to be taken that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. See : Articles 37 to 39. This mandate is as important for the State as to maintain individual freedoms and, therefore, in the final analysis it is always a continuous endeavour of a State, having the common good of the people at heart, so to harmonize the Directive Principles and the fundamental rights that, so far as property rights are concerned, the unlimited freedom to hold it would have to undergo an adjustment to the demands of the State policy dictated by the Directive Principles. Deprivation of property in one form or other and even expropriation would, in the eyes of many, stand justified in a democratic organization as long as those who are deprived do not earn it by their own effort or otherwise fail to make adequate return to the society in which they live. The attribute at 'sacredness' of property vanishes in an egalitarian society. And once this is accepted and deprivation and expropriation are recognized as inevitable in the interest of a better social organization in which the reality of liberty and freedom can be more widely achieved, the claim made on behalf of property that it is an immutable and inalienable natural right loses its force. One cannot lift parts of the Constitution above it by ascribing ultra-Constitutional virtues to them. The Constitution is a legal document and if it says that the whole of it is amendable, we cannot place the fundamental rights out of bounds of the amending power. It is essential to note in the present case that though the plea was generally made on behalf of all fundamental rights, the fundamental right with which we are concerned, principally, is the right to property. It will be sufficient to note here that in modern democracies the tendency is not to recognize right to property as an inalienable natural right. We can do no better than quote here a few passages from W. Friedmann's Legal Theory, fifth edition, 1967.

The official doctrine of the modern Roman Catholic Church, from Rerum Novarum (1891) onwards, and of most neo-scholastic philosophers, is that the right of private property is a dictate of natural law. But St. Thomas Aquinas and Suarez strongly deny the natural law character of the right of private property and regard it (rightly as I believe) merely as a matter of social utility.

When faced with the solution of concrete legal problems, we find time and again that natural law formulae may disguise but not solve the conflict between values, which is a problem of constant and painful adjustment between competing interest, purposes and policies. How to resolve this conflict is a matter of ethical or political evaluation which finds expression in current legislative policies and to some extent in the impact of changing ideas on judicial interpretations. And, of course, we all have to make up our minds as responsible human beings and citizens what stand we will take, for example, in the tension between state security and individual freedom. The danger is that by giving our faith the halo of natural law we may claim for it an absolute character from which it is only too easy to step to the condemnation or suppression of any different faith". pp. 357-358.

The time is past when Western beliefs can be regarded as a measure of all things. Nor will the natural law hypothesis aid much in the solution of the agonising problem of the limits of obedience to positive law. p. 359;

The main forces in the development of modern democratic thought have been the liberal idea of individual rights protecting the individual and the democratic idea proper, proclaiming equality of rights and popular sovereignty. The gradual extension of the idea of equality from the political to the social and economic field has added the problems of social security and economic planning. The implementation and harmonisation of these principles has been and continues to be the main problem of democracy.

But democratic communities have universally, though with varying speed and intensity, accepted the principle of social obligation as limiting individual right.

But modern democracy, by the same process which has led to the increasing modification of individual rights by social duties towards neighbours and community, has every-where had to temper freedom of property with social responsibilities attached to property. The limitations on property are of many different kinds. The State's right of taxation, its police power and the power of expropriation-subject to fair compensation-are examples of public restrictions on freedom of property which are now universally recognised and used. Another kind of interference touches the freedom of use of property, through the growing number of social obligations attached by law to the use of industrial property, or contracts of employment.

The degree of public control over private property depends largely on the stringency of economic conditions. Increasing prosperity and availability of consumer goods has led to a drastic reduction of economic controls, and a trend away from socialisation in Europe. But in the struggling new democracies such as India, poor in capital and developed resources, and jealous of their newly-won sovereignty, public planning and control over vital resources are regarded as essential. The Constitution of the West German Republic of 1949, which reflects a blend of American British and post-war German ideas on the economic aspects of democracy, lays down that land, minerals

and means of production may be socialised or be subjected to other forms of public control by a statute which also regulates compensation. Such compensation must balance the interests of the community and those of the individual and leave recourse to law open to the person affected. This still permits wide divergencies of political and economic philosophy, but in the recognition of social control over property, including socialisation as a, legitimate though not a necessary measure, it reflects the modern evolution of democratic ideas. Between the capitalistic democracy of the United States and the Social democracy of India there are many shades and variations. But modern democracy looks upon the right of property as one conditioned by 'social responsibility by the needs of society, by the "balancing of interests" which looms so large in modern jurisprudence, and not as preordained and untouchable private right.

1289. Nor is it correct to describe the fundamental rights, including the right to property, as rights "reserved" by the people to themselves. The Constitution does not use the word "reserved". It says that the rights are "conferred" by the people upon themselves, suggesting thereby that they were a gift of the Constitution. The Constitution had, therefore, a right to take them away. This is indirectly recognised in Golak Nath's case where the majority has conceded that all the fundamental rights could be taken away by a specially convened constituent assembly. When rights are reserved by the people the normal mode, as in the several states of America, is a referendum, the underlying principles being that ultimately it is the people, who had given the Constitution and the rights therein, that could decide to take them away. In our Constitution the people having entrusted the power to the Parliament to amend the whole of the Constitution have withdrawn themselves from the process of amendment and hence clearly indicated that there was no reservation. What the Constitution conferred was made revocable, if necessary, by the amendatory process. In my view, therefore, Article 13(2) does not control the amendment of the Constitution. On that conclusion, it must follow that the majority decision in Golak Nath's case is not correct.

1290. No reference was made to any other provision in the Constitution as expressly imposing a limitation on the Amending Power.

1291. It was next contended that there are implied or inherent limitations on the amendatory power in the very structure of the Constitution, the principles it embodies, and in its essential elements and features (described briefly as essential features). They are alleged to be so good and desirable that it could not have been intended that they were liable to be adversely affected by amendment. Some of the essential features of the Constitution were catalogued as follows:

(1) The supremacy of the Constitution;

(2) The sovereignty of India;

(3) The integrity of the country;

(4) The democratic way of life;

(5) The Republican form of Government;

(6) The guarantee of basic human rights referred to in the Preamble and elaborated as fundamental rights in Part III of the Constitution;

(7) A secular State;

(8) A free and independent judiciary;

(9) The dual structure of the Union and the States;

(10) The balance between the legislature, the executive and the judiciary;

(11) A Parliamentary form of Government as distinct from Presidential form of Government;

(12) The amendability of the Constitution as per the basic scheme of Article 368.

1292. These, according to Mr. Palkhivala, are some of the essential features of the Constitution and they cannot be substantially altered by the amendatory process.

1293. A question of very wide import is raised by the submission. So far as the present case is concerned, the 24th amendment does no more than give effect to Parliament's acceptance of the view taken in Sankari Prasad's case, the majority in Sajjan Singh's case and the minority in Golak Nath's case with regard to the nature of the amending power in relation to fundamental rights. It is clarificatory of the original Article 368. What was implicit in Article 368 is now made explicit and the essence of Article 368 is retained. therefore, there can be no objection to the 24th Amendment on the ground that any essential feature of the Constitution is affected.

1294. The 25th Amendment introduces some abridgement of the fundamental right to property. Right to property has been subject to abridgement right from the Constitution itself (See : Article 31(4) & (6)) and the 25th amendment is a further inroad on the right to property. In Golak Nath's case, the first, fourth and the seventeenth amendments were held by the majority as having contravened Article 13(2). Nevertheless the amendments were not struck down but permitted to continue as if they were valid. Since I have come to the conclusion that Article 13(2) does not control an amendment of the Constitution, it must be held that all previous amendments to the Constitution, so far made, could not be challenged on the ground of repugnancy to Article 13(2). It follows that any amendment of the Constitution cannot be challenged on that ground, and that would be true not only of the 24th amendment but also the 25th amendment, and the 29th amendment.

1295. The question still survives whether the 25th amendment and the 29th amendment are invalid because, as contended by Mr. Palkhivala, an essential feature of the Constitution has been substantially affected. The argument proceeds on the assumption that in the absence of any express limitation on the power of amendment, all the provisions in the Constitution are liable to be amended. He agrees, on this assumption, that even fundamental rights may be somewhat abridged if that is necessary. In this connection, he referred to the first amendment by which Articles 15 and 19 were amended and in both these cases the amendment did abridge the fundamental rights. Similarly he conceded that Articles 31A and 31B were amendments whereby the rights in landed

estates were extinguished or substantially affected, but that was in the interest of agrarian reform, a fact of supreme importance in the Indian polity which could not have been ignored for long and to which the Ruling party was committed for a long time. Thus although there had been amendments which abridged fundamental rights, these amendments in his submission did not go to the length of damaging or destroying the fundamental rights. According to him they had not reached the 'core' of the rights. In other words, his submission is that there are some very good and desirable things in the Constitution. One of them is fundamental rights, and though these fundamental rights could be abridged somewhat, it was not permissible to affect by amendment the core of the fundamental rights, including the core of the right to property. For this argument he relies on the basic scheme of the Constitution as first promulgated and contends that any Amendments made thereafter, including the 24th Amendment, would not affect his argument, because, according to him, every one of them, must be evaluated on the principles and concepts adopted in that basic scheme. His further submission was that if such a core of a fundamental right is damaged or destroyed by an amendment, such an amendment is illegal and, therefore, liable to be struck down by this Court as the guardian of the Constitution. It necessarily follows from the submission that Mr. Palkhivala wanted this Court to decide whether by any particular amendment the core of an essential feature like a fundamental right has been damaged or destroyed-undoubtedly a terrifying responsibility for this Court to undertake. It may appear as very odd that while the framers of the Constitution did not think it necessary to expressly exclude even one provision of the Constitution from being amended, they still intended that this Court, as the guardian of the Constitution, should make parts of it unamendable by implying limitations on the Amending power. Indeed this Court is a guardian of the Constitution in the sense that will not permit its contravention by any of its instrumentalities, but it cannot constitute itself a guardian against change Constitutionally effected.

1296. Though the argument had a wide sweep, namely, that the several essential features catalogued by Mr. Palkhivala were not liable to be damaged or destroyed, in the ultimate result the case really boils down to whether the core of the fundamental right to property has been damaged or destroyed principally by the 25th amendment, and, if so whether there was any implied or inherent limitation on the amending power which prohibited such an amendment. The several essential features listed by Mr. Palkhivala do not come into the picture in the present case. It is not the case that by the recent 25th amendment either the sovereignty of India is affected or the Republican form of Government has been destroyed. One of the several essential features listed by him is fundamental rights. Amongst fundamental rights also most are untouched by the amendment. The 25th amendment deals principally with property rights and Articles 14, 19 and 31 in relation to them. By that amendment chiefly two things are sought to be accomplished (1) There shall be no right to receive 'compensation', as judicially interpreted, for a State acquisition for a public purpose, but only to receive an 'amount', (2) A law made to achieve the aims of equitable distribution of community resources or for the prevention of concentration of wealth and means of production shall not be challenged on the ground of repugnancy to Articles 14, 19 and 31. Since it is not the practice of this Court to decide questions which are not 'in immediate controversy it would not be proper to pronounce whether this or that particular so-called essential feature can or cannot be damaged or destroyed by amendment. But since it is argued on behalf of the State that there can be no limitations on the amending power except those expressly provided in the Constitution and since that will affect our decision as to the 25th amendment, we shall have

to deal briefly with the question of implied and inherent limitations with special reference to fundamental rights including property rights.

1297. Whatever one may say about the legitimacy of describing all the Rights conferred in Part III as essential features, one thing is clear. So far as the right to property is concerned, the Constitution, while assuring that no-body shall be deprived of property except under the authority of law and that there shall be a fair return in case of compulsory acquisition (Article 31(1) & (2)), expressly declared its determination, in the interest of the common good, to break up concentration of wealth and means of production in every form and to arrange for redistribution of ownership and control of the material resources of the community. See : Article 39(b) & (c). If anything in the Constitution deserves to be called an essential feature, this determination is one. That is the central issue in the case before us, however dexterously it may have been played down in the course of an argument which painted the gloom resulting by the denial of the fundamental rights under Articles 14, 19 and 31 in the implementation of that determination. The Constitution had not merely stopped at declaring this determination but actually started its implementation from the commencement of the Constitution itself by incorporating Clauses (4) & (6) under Article 31, the first two clauses of which spelt out the fundamental right to property. Apart front what Pandit Jawaharlal Nehru said about the Article in the Constituent Assembly Debates-and what he said was not at all sympathetic to Mr. Palkhivala's argument before us-the fundamental right to receive compensation under Clause (2), as then framed, was completely nullified by Clauses (4) & (6) in at least one instance of concentration of wealth and material resources viz. Zamindaris and landed estates. These clauses were deliberately inserted in the original Article 31 leaving no manner of doubt that Zamindaris and Estates were sought to be abolished on payment of even illusory compensation. The various States had already passed laws or were in the process of passing laws on the subject, and specific provision was made in the two clauses, securing such laws from challenge on the ground that they were not acquired by the State for a public purpose or that adequate compensation was not paid. The first case under the Bihar Land Reforms Act, 1950, State of Bihar v. Kameshwar Singh MANU/SC/0019/1952 : [1952]1SCR889 shows that the law was highly unjust (from the prevailing point of view of 'justice') and the compensation payable was in some cases purely illusory. (See : Mahajan J. p. 936). And yet by virtue of Article 31(4) there could be no challenge to that Act and other similar laws on those grounds. By oversight, challenge to such laws under Articles 14 and 19 had not been expressly excluded, and so when the case was pending in this Court, the first Amendment Act was passed inserting Articles 31A and 31B by which, to take no chances, a challenge based on all fundamental rights in Part III was wholly excluded. The course taken by the Constitution and its first Amendment leaves no doubt that Zamindaris and Estates were intended to be expropriated from the very beginning and no 'core' with regard to payment of compensation was sought to be safeguarded. By the time the 4th Amendment was made in 1955, it became apparent that the challenge to any scheme of redistribution or breaking up of concentration of property was confined generally to Articles 14, 19 and 31, and hence Article 31A Was amended. By the amendment all intermediaries, including small absentee landlords, were permitted to be eliminated and challenge to Article 31A was excluded only under Articles 14, 19 and 31. In short, rights in landed agricultural property were extinguished without a thought to the necessity of paying fair compensation. In a real sense concentration of wealth in the form of agricultural lands was broken and community resources were distributed. On the other hand, a protectionist economic system, reinforced by controls, followed in the realm of trade and industry with a view to achieve greater production of goods and

services led to other forms of concentration of wealth and means of production in the wake of Independence. So comes the 25th Amendment, the object of which is the same viz implementation of Article 39(b) & (c). It has made clear that owners of property when it is acquired for a public purpose are not entitled to compensation as interpreted by this Court, and any law made with the aforesaid object cannot be challenged on the grounds arising out of Articles 14, 19 and 31. In principle, there is no difference in Article 31A and the new Article 31C inserted by the 25th Amendment. In trying to support his arguments on the core principle of essential features, Mr. Palkhivala tried to play down the role of Article 31(4) & (6) and Article 31A excusing them on the ground that they related to very necessary agrarian reforms to which the majority party in the Constituent Assembly was for years before the Constitution, committed. But that is not a legal argument. Articles 31(4)(6) and Article 31A clearly show that community interests were regarded as supreme and those Articles were only a step in the implementation of the Directive Principles in Article 39(b) & (c). (Compare the observations of Das J. in 1952 S.C.R. 889 at pages 996 to 999.) The Constitution definitely refused to accept the 'core' principle with regard to property rights, if property was required to be expropriated in the common interest in pursuance of the Directive Principles. The mood of the majority party is reflected in the speech of Pandit Govind Vallabh Pant, the then Chief Minister of Uttar Pradesh. Speaking in the Constituent Assembly on Article 31 and after justifying the provision of Article 31(4) & (6) in relation to laws regarding Zamindaris and agricultural estates (there were 20 lakh Zamindars) according to him, in U.P. alone the said "I presume that if at any time this legislature chooses to nationalise industry, and take control of it, whether it be all the industries or any particular class of it, such as the textile industry or mines, it will be open to it to pass a law and to frame the Principles for such purpose, and those principles will be invulnerable in any court. They will not be open to question, because the only condition for disputing them, as has been pointed out by Shri Alladi, (Krishnaswamy Iyer) one of the most eminent jurists which our country has ever produced, is this, that it should be a fraud on the Constitution)." (See : Constituent Assembly Debates Vol. IX page 1289). It shows that Article 31(4)(6) were the first step as applied to land legislation, in the direction of implementing the Directive Principles of Article 39(b) & (c), and it was only a matter of time when the principles would be applied to other types of concentration of wealth and its distribution. As Mahajan, observed in State of Bihar v. Kameshwar Singh at pages 929-30, our Constitution raised the obligation to pay compensation for compulsory acquisition of property to the status of a fundamental right. At the same time by specifically inserting Clauses (4) & (6) in Article 31, it made the issues of public purpose and compensation prescribed in Article 31(2) non-justiciable in some specified laws dealing with concentration and distribution of wealth in the form of landed agricultural property. This clearly negatived the idea of protecting concentration of wealth in a few hands as an essential feature of the Constitution. Hidyatullah, J. was saying practically the same thing when he remarked in Golak Nath's case that it was an error to include property rights in Part III and that they were the weakest of fundamental rights.

1298. I have already discussed the amplitude of power conferred by the amending clause of the Constitution. In countries like America and Australia where express limitations have been imposed in the amending clause itself there is substantial authority for the view that even these express limitations can be removed by following the procedure laid down in the amending clause. According to them this could be done in two steps the first being to amend the amending clause itself. It is not necessary for us to investigate the matter further because Article 368 does not contain any express limitation. On the other hand, the power is wide enough even to amend the

provisions of Article 368. See : proviso (e) of that article. In other words, Article 368 contains unqualified and plenary powers to amend the provisions of the Constitution including the Amending clause. Prima facie, therefore, to introduce implied prohibitions to cut down a clear affirmative grant in a Constitution would be contrary to the settled rules of construction. (See the dissenting judgment of Isaacs and Rich JJ in McCawley v. The King 26 C.L.R. 43 approved by the Privy Council in 1920 A.C. 691.

1299. When such an Amending clause is amended without affecting the power the amendment will principally involve the Amending procedure. It may make amendment easier or more difficult. The procedure may also differ substantially. Parliament may be eliminated from the process leaving the amendment to the States. The proviso might be dropped, enlarging the role of the Parliament. On the other hand, the Parliament and State Assemblies may be divested of the function by providing for a referendum plebiscite or a special convention. While, thus the power remains the same, the instrumentalities may differ from time to time in accordance with the procedure prescribed. Hidayatullah, J., with respect, was right in pointing out that the power to amend is not entrusted to this or that body. The power is generated when the prescribed procedure is followed by the instrumentalities specified in the Article. Since the instrumentalities are liable to be changed by a proper amendment it will be inaccurate to say that the Constituent Assembly had entrusted the power to any-body. If the authority which is required to follow the procedure is the Parliament for the time being, it may be convenient to describe Parliament as the authority to whom the power is granted or entrusted, but strictly that would be inaccurate, because there is no grant to any body. Whichever may be the instrumentality for the time being, the power remains unqualified.

1300. If the theory of implied limitations is sound-the assumption made being that the same have their origin in the rest of the Constitutional provisions including the Preamble and the fundamental rights-then these limitations must clog the power by whatever Agency it is exercised. The rest of the Constitution does not change merely because the procedure prescribed in Article 368 is changed. therefore, the implied limitations should continue to clog the power. Logically, if Article 368 is so amended as to provide for a convention or a referendum, the latter will be bound to respect the implied limitations-a conclusion which Mr. Palkhivala is not prepared to accept. He agrees with the jurists who hold that a convention or a referendum will not be bound by any limitations. The reason given is that the people directly take part in a referendum or, through their elected representatives, in a convention. Even in Golak Nath it was accepted that any part of the Constitution including the fundamental rights could be amended out of existence by a Constituent Assembly.

1301. The argument seems to be that a distinction must be made between the power exercised by the people and the power exercised by Parliament. In fact Mr. Palkhivala's whole thesis is that the Parliament is a creature of the Constitution and the limitation is inherent in its being a constituted authority. We have already examined the question and shown that where the people have withdrawn completely from the process of Amendment, the Constituent body to whom the power is entrusted can exercise the power to the same extent as a Constituent Assembly and that the power does not vary according to the Agency to whom the power is entrusted. therefore, this reason also viz. that Parliament is a constituted body and, therefore, it suffers from inherent limitations does not hold good.

1302. From the conclusion that the power of Amendment remains unqualified by whomsoever it is exercised, it follows that there can be no implied or inherent limitations on the Amending power. If a special convention admittedly does not suffer from limitations, any other constituent body cannot be subject to it.

1303. The leading majority judgment in Golak Nath's case had seen some force in this, doctrine of implied limitations (808), but did not find it necessary to decide on the issue. To remove all doubts on that score the 24th Amendment is now suitably amended. Its first clause says that Parliament may amend any provision of the Constitution notwithstanding anything in it. therefore, in the matter of amendment Parliament may not, now, be inhibited by the other express provisions of the Constitution, which would mean that it may also ignore all implications arising therefrom.

1304. Where power is granted to amend the Amending power, as in our Constitution, there is no limit to the extent this may be done. It may be curtailed of 'enlarged'. This is well illustrated in Ryan v. Lennox [1935] IR 170. Under the Irish State Constitution Act of 1922, the Parliament (Oireachtas) had been given power to amend the Constitution under Article 50 of the Act. Under that Article, amendments during the first eight years of the Constitution, could be validly made without having recourse to a referendum unless specially demanded by the persons, and in the manner specified in Article 47, but amendments made after that period had to be approved in every case by a referendum and the people. By a Constitutional amendment of 1928 (Amendment NO. 10) the compulsion of Article 47 was got rid of, and by an amendment of 1929 (Amendment No. 16) made within the eight year period already referred to, the period of 8 years was extended to 16 years. The result was that the Constitution now authorized the Parliament to amend by ordinary legislation its Constitution for the period of 16 years from the commencement of the Constitution without being required to have recourse to a referendum. In 1931 by a further Amendment (Amendment No. 17) extensive alterations were made by which inter alia, personal liberty was curtailed, denying trial by Jury or by the regular courts. Ryan who was one of the victims of the new law applied to the High Court for a Writ of Habeas Corpus on the ground that the several amendments were invalid, especially No. 16, by which the period of 8 years had been extended to 16 years. If Amendment No. 16 was invalid, that would have automatically resulted in Amendment No. 17 being invalid, having been made after the first period of 8 years. The High Court (3 JJ) unanimously held that all the Amendments were valid. In appeal to the Supreme Court that decision was confirmed by a majority, Kennedy, Chief Justice, dissenting. One of the chief contentions directed against Amendment No. 16 was that the Parliament could not have 'enlarged' its power from 8 to 16 years to change the Constitution without a referendum by ordinary legislation. This contention was rejected by the majority. Kennedy, C.J. took a different view of the amendment. He held that Article 50 did not provide for the amending of the Amendatory power, conceding that otherwise the power could have been so 'enlarged'. Since there is no dispute in our case that by reason of Clause (e) of proviso of Article 368 power is given to amend the amendatory power, it was open to Parliament to 'enlarge' the power by amendment. If it is assumed-and we have shown there is no ground to make such an assumption-that there was some implied limitation to be derived from other provisions of the Constitution, that limitation, if any, is now removed by the non-obstante clause in Clause 1 of the Amended Article 368.

1305. It is of some interest to note here that in a case which later went to the Privy Council, Moore v. Attorney General for the Irish State [1935] A.C. 484 and in which a Constitutional amendment

made by the Irish Parliament in 1933 (Amendment No. 22) was challenged, Mr. Greene (Later Lord Greene) conceded before the Privy Council that Amendment No. 16 of 1929 was valid and their Lordships observed (494) "Mr. Wilfrid Greene for the petitioners rightly conceded that Amendment No. 16 was regular and that the validity of these subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum." The question of validity of Amendment No. 16 was so vital to the petitioner's case that it is impossible to believe that a counsel of the standing of Lord Greene would not have challenged the same and, in the opinion of their Lordships, 'rightly'. According to Keith the judgment of Kennedy, C.J. in Rayan's case was wrong. See : Letters on Imperial Relations Indian Reform Constitutional and International Law 1916-1935 page 157.

1306. The importance of Rayan's case lies in the fact that though Article 50 of the Irish Free State Constitution did not expressly say that Article 50 itself is liable to be amended, no less than five judges of the Irish Courts held it could be amended though the amendment resulted in the 'enlargement' of the power of the Irish Parliament to amend the Constitution. How wide the power was further established in Moore's case which held that Amendment No. 22 was valid, though by this Amendment even the Royal Prerogative regarding appeals to the Privy Council was held to have been abrogated by the combined operation of the, Statute of Westminster and the Constitutional Amendment, in spite of Article 50 having been originally limited by the terms of the Scheduled Treaty of 1922. In our case Article 368 authorizes its own amendment and such an amendment can enlarge the powers of the Parliament, if such was the need.

1307. Apart from reasons already given, we will consider, on first principles, whether the constituent body is bound to respect the so-called 'essential feature' of the fundamental rights especially that of right to property. The fact that some people regard them as good and desirable is no adequate reason. The question really is whether the constituent body considers that they require to be amended to meet the challenge of the times. The philosophy of the amending clause is that it is a safety-valve for orderly change and if the good and desirable feature has lost its appeal to the people the constituent body would have undoubtedly the right to change it.

1308. Indeed, if there are some parts of the Constitution which are made expressly unamendable the constituent body would be incompetent to change them, or if there is anything in the provisions of the Constitution embodying those essential features which by necessary implication prohibit their amendment those provisions will also become unamendable. The reason is that in law there is no distinction between an express limitation and a limitation which must be necessarily implied. Secondly, it is an accepted rule of construction that though a provision granting the power does not contain any limitation that may not be conclusive. That limitation may be found in other parts of the statute. But we have to remember that Article 368 permits the amendment of all the provisions of the Constitution expressly. And if that power is to be cut down by something that is said in some other provision of the Constitution the latter must be clear and specific. As far back as 1831 Tindal, C.J. delivering the unanimous opinion of the Judges in the House of Lords in Warburton v. Loveland (1831) 2 Dow & Clark, 480 observed at page 500 "No rule of construction can require that, when the words of one part of a statute convey a clear meaning...it shall be necessary to introduce another part of the statute which speaks with less perspicuity, and of which the words may be capable of such construction as by possibility to diminish the efficacy of the other provisions of the Act." To control the true effect of Article 368 "you must have a context

even more plain or at least as plain as the words to be controlled". See : Jessel M.R. in Bentley v. Rotherham (1876) 4 Ch. D. 588. Neither the text nor the context of the articles embodying the fundamental rights shows that they are not exposed to Article 368. Moreover, when we are concerned with a power under a statute, it is necessary to remember the following observations of Lord Selborne in Reg. v. Burah (1878) 3 AC 889 "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions." Similarly Earl Loreburn in Attorney-General for the Province of Ontario v. Attorney-General for the Dominion of Canada (1912) AC 571 observed at page 583 "In the interpretation of a completely self-governing Constitution founded upon a written organic instrument such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as for example, when the words establishing too mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act." The only course which is open to courts is to determine the extent of power expressly granted after excluding what is expressly or by necessary implication excluded. That is the view of the Privy Council in Webb v. Outrim [1907] A.C. 81 the effect of which is summarized by Isaacs, J. in The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Limited and Ors. 28 C.L.R. 129 as follows:

...we should state explicitly that the doctrine of "implied prohibition" against the exercise of a power once ascertained in accordance with ordinary rules of construction, was definitely rejected by the Privy Council in Webb v. Outrun.

1309. Having regard to the rules of construction relating to power referred to above, we have to see if either the provisions relating to the fundamental right to property or any related provisions of the Constitution contain words of prohibition or limitation on the amending power. Right to property is sought to be safeguarded under Article 31, and Article 19 deals with freedoms having relation to property, profession, trade and business. We find nothing in these provisions to suggest that rights to property cannot be abridged by an amendment of the Constitution. On the other hand, Article 31(1) suggests that one can be deprived of property under the authority of law. The right to receive compensation under Clause (2) of Article 31, as it stood at the time of the commencement of the Constitution, had been considerably cut down by several provisions contained in the other clauses of that article. Article 31(4) & (6) not only envisaged breaking up of concentration of landed property in the hands of Zamindars and the like but also expropriation without payment of just compensation. That necessarily called for the exclusion of Articles 14, 19 and 31, because no scheme for expropriation or extinguishment of rights in property would succeed without their exclusion. Thereafter there has been a spate of amendments curtailing property rights and none of them seems to have been challenged on the ground that there was something in the provisions themselves (apart from the fact that they affect a 'transcendental' fundamental right) suggesting an implied or inherent limitation on the amending power. The last sentence from Lord Loreburn's judgment quoted about embodies a well-known rule of construction which is useful when the text of a statute is ambiguous. Where the text is clear and unambiguous there can be no

recourse to the context or the scheme of the Act; nor can the context or the scheme be utilised to make ambiguous what is clear and unambiguous. Moreover the rule does not permit in case of ambiguity recourse to the scheme and context which is unhelpful in resolving the ambiguity. It does not authorize investigating the scheme and context with an effect of delimiting the power referred to in the 'ambiguous' text, if the scheme and the context do not contain words which expressly or by necessary implication have the effect. All this is important in connection with the construction of the word 'Amendment in Article 368. We have already shown that the word 'Amendment' used in the context of a Constitution is clear and unambiguous. therefore, the scheme and the context are irrelevant. The scheme and the context on which reliance is placed before us consist principally of the alleged dominating status of the Preamble and the alleged transcendental character of the fundamental rights neither of which helps us in the legal interpretation of the word 'Amendment'. They are being pressed into service merely to create an ambiguity where there is none. Actually the context and scheme are here used to cut down the ambit and scope of the expression 'amendment of the Constitution' by investing them with that effect where neither expressly nor by necessary implication do they contain any prohibition or limitation on the Amending power. therefore, as a matter of construction no implied limitations can be inferred from the Preamble or the fundamental rights, being as much part of a legal document as any other provision of the Constitution, are subject to equal consideration in the matter of legal construction. To be relevant, the scheme and context must say or reasonably suggest something with regard to Amending power.

1310. Mr. Palkhivala sought to draw support for his doctrine of implied limitations from the preamble. According to him the Preamble sets out the objectives of the Constitution and, therefore, any tampering with these objectives would destroy the identity of the Constitution. And since an amendment of the Constitution, howsoever made, must preserve the identity of the Constitution the objectives of the Preamble should be treated as permanent and unamendable. On that basis he further contended that since the fundamental rights are mostly an elaboration of the objectives of the Preamble, it was implied that the fundamental rights or, at least, the essence of them was not liable to be damaged or destroyed by an amendment.

1311. The submission that the fundamental rights are an elaboration of the preamble is an over-statement and a half truth. According to the Preamble the people of India have given unto themselves the Constitution to secure to all its citizens (a) JUSTICE, social, economic and political; (b) LIBERTY of thought, expression, belief, faith and worship; (c) EQUALITY of status and of opportunity; and to promote among the citizens (d) FRATERNITY assuring the dignity of the individual and the unity of the Nation. There is no doubt that the Constitution is intended to be a vehicle by which the goals set out in it are hoped to be reached. Indeed, being a part of the Constitution, strictly speaking, it is amendable under Article 368. But we will assume that the people of India will not be rash enough to amend the glorious words of the Preamble; and as long as the Preamble is there the Governments will have to honour the Preamble and the Constitution will have to continue as a vehicle which would lead us to the goals. But to say that the fundamental rights are an elaboration of these goals would be a caricature. Most of the fundamental rights may be traced to the principles of LIBERTY and EQUALITY mentioned in the Preamble. But whereas the concepts of LIBERTY and EQUALITY are mentioned in absolute terms in the Preamble the fundamental rights including the several freedoms are not couched in absolute terms. They reflect

the concepts of LIBERTY and EQUALITY in a very attenuated form with several restrictions imposed in the interest of orderly and peaceable Government.

1312. The pre-eminent place in the Preamble is given to JUSTICE-social, economic and political, and it is obvious that without JUSTICE the other concepts of LIBERTY, EQUALITY and FRATERNITY would be illusory. In a democratic country whose institutions are informed by JUSTICE-social, economic and political, the other three concepts of LIBERTY, EQUALITY and FRATERNITY will be automatically fostered. Social and political Justice takes care of Liberty; and Justice, social and economic, takes care of Equality of status and of opportunity. therefore, even in the Directive Principles the supreme importance of Justice-social, economic and political-is highlighted in Article 38, in which the State is given a mandate to strive to promote the welfare of the people by securing and protecting a social order in which justice-social, economic and political shall inform all the institutions of the National life. Where genuine and honest efforts are made in the implementation of this mandate the content and ambit of the concepts of Liberty and Equality are bound to increase and expand. As Wade has pointed out in his introduction to Dicey's Law of the Constitution at page "xxxii" Liberty today involves the ordering of social and economic conditions by governmental authority, even in those countries where political, if not economic equality of its citizens, has been attained. Without expansion of that authority, which Federal States must find more difficult to achieve than a unitary State like the United Kingdom, there is inevitably a risk that the Constitution may break down before a force which is not limited by considerations of Constitutional niceties." Again he points out at pages xxiv and xxv that the modern House of Commons is a forum in which both parties put forward incessant demands for the remedying of some social or economic ill of the body politic...and the changing conditions have all been brought about by the action of Parliament. In doing that, Wade says, it could not be denied that legislation has shifted the emphasis on individual liberty to the provision of services for the public good. In the terms of our Constitution especially the Preamble and Article 38, the shift of emphasis is from individual liberty to Justice-social, economic and political.

1313. The absolute concepts of Liberty and Equality are very difficult to achieve as goals in the present day organised society. The fundamental rights have an apparent resemblance to them but are really no more than rules which a civilized government is expected to follow in the governance of the country whether they are described as fundamental rules or not. England developed these rules in its day to day Government under the rule of law and does not make a song and dance about them. British rulers of India tried to introduce these rules in the governance of this country, as proof of which we can point out to the vast mass of statutes enacted during the British period which have been continued, practically without change, under our Constitution. No body can deny that when Imperial interests were in jeopardy, these rules of good government were applied with an unequal hand, and when the agitation for self rule grew in strength these rules were thrown aside by the rulers by resorting to repressive laws. It was then that people in this country clamoured for these elementary human rights. To them their value in our social and political life assumed such importance that when the Constitution was framed we decided that these rules of Civilized government must find a place in the Constitution, so that even our own Governments at the center and the States should not overlook them. That is the genesis of our fundamental rights. The importance of these rights as conferred in the Constitution lies not in their being something extraordinary but in the bar that the Constitution imposed against laws which contravened these rights and the effective remedy supplied under Article 32. Indeed the framers of the Constitution

took good care not to confer the fundamental rights in absolute terms because that was impractical. Knowing human capacity for distorting and misusing all liberties and freedoms, the framers of the Constitution put restrictions on them in the interest of the people and the State thus emphasizing that fundamental rights i.e. rules of civilized government are liable to be altered, if necessary, for the common good and in the public interest.

1314. And yet, as we have seen above, even in U.K. individual Liberty as it was understood a generation or two ago is no longer so sacrosanct, especially, in relation to ownership of property Several statutes in the economic and social field have been passed which while undoubtedly impinging upon the individual liberties of a few have expanded social and economic justice for the many; If U.K. had stood staunchly by its Victorian concept of laissez faire and individual liberty, the progress in social and economic justice which it has achieved during the last half a century would have been difficult. Even so, though very much more advanced than our country, U.K. cannot claim that it has fully achieved social and economic justice for all its citizens. But there is no doubt that the parties which form the Governments there have always this goal in view though their methods may be different. In a country like ours where we have, on the one hand, abject poverty on a very large scale and great concentration of wealth on the other, the advance towards social and economic justice is bound to be retarded if the old concept of individual liberty is to dog our footsteps. In the ultimate analysis, liberty or freedoms which are so much praised by the wealthier sections of the community are the freedom to amass wealth and own property and means of production, which, as we have already seen, our Constitution does not sympathise with. If the normal rule is that all rules of civilized government are subject to public interest and the common weal, those rules will have to undergo new adjustments in the implementation of the Directive Principles. A blind adherence to the concept of freedom to own disproportionate wealth will not take us to the important goals of the Preamble, while a just and sympathetic implementation of the Directive Principles has at least the potentiality to take us to those goals, although, on the way, a few may suffer some diminution of the unequal freedom they now enjoy. That being the philosophy underlying the Preamble the fundamental rights and the Directive Principles taken together, it will be incorrect to elevate the fundamental rights as essentially an elaboration of the objectives of the Preamble. As a matter of fact a law made for implementing the Directive Principles of Article 39(b) and (c), instead of being contrary to the Preamble, would be in conformity with it because while if may cut down individual liberty of a few, it widens its horizon for the many.

1315. It follows that if in implementing such a law the rights of an individual under Articles 14, 19 and 31 are infringed in the course of securing the success of the scheme of the law, such an infringement will have to be regarded as a necessary consequence and, therefore, secondary. The Preamble read as a whole, therefore, does not contain the implication that in any genuine implementation of the Directive Principles, a fundamental right will not suffer any diminution. Concentration and control of community resources, wealth and means of production in the hands of a few individuals are, in the eyes of the Constitution, an evil which must be eradicate from the social organization, and hence, any fundamental right, to the extent that it fosters this evil, is liable to be abridged or taken away in the interest of the social structure envisaged, by the Constitution. The scheme of the fundamental rights in Part III itself shows that restrictions on them have been placed to guard against their exercise in an evil way.

1316. Nor is there anything in the Preamble to suggest that the power to amend the fundamental right to property is cut down. Actually there is no reference to the right to property. On the other hand, while declaring the objectives which inspired the framers of the Constitution to give unto themselves the Constitution which, they hoped, would be able to achieve them, they took good care to provide for the amendment of "this Constitution". It was clearly implied that if the operative parts of the Constitution failed to put us on the road to the objectives, the Constitution was liable to be appropriately amended. Even the Preamble, which, as we know, had been adopted by the constituent assembly as a part of the Constitution. (Constituent Assembly Debates Vol. X p. 456) was liable to be amended. Right to property was, perhaps, deliberately not enthroned in the Preamble because that would have conflicted with the objectives of securing to all its citizens justice, social, economic and political, and equality of opportunity, to achieve which Directive Principles were laid down in Articles 38 to 51. Moreover the Preamble, it is now well settled-can neither increase nor decrease the power granted in plain and clear words in the enacting parts of a statute. See : The Berubari Union and Exchange of Enclaves MANU/SC/0049/1960 : [1960]3SCR250 . Further, the legislature may well-intend that the enacting part do extend beyond the apparent ambit of the Preamble. See : Secretary of State v. Maharajah of Bobbili 43 Madras 529 P.C. at 536. As a matter of fact if the enacting part is clear and unambiguous it does not call for construction. In Sprague's case the Supreme Court of America had been called upon to construe Article V, the amending clause, so as to cut down the amending power by implications arising out of certain other provisions of the Constitution itself. Replying to the argument the court observed, "the United 'State asserts that Article V is clear in statement and in meaning contains no ambiguity and calls for no resort to rules of construction. A mere reading demonstrates that this is true." These observations apply with greater force to our amending clause namely Article 368, for in Article V of the American Constitution there was some room for play of argument on the basis of alternative methods permitted for the ratification of the proposed amendments. On the basis of the alternative methods provided in Article V-one by the State legislature and the other by the State convention-it was argued that, the State convention was the appropriate method to the exclusion of the State legislature, because the prohibition amendment (18th amendment) directly affected personal liberty. Where personal liberty was involved, it was submitted, the people alone through their convention could ratify an amendment, especially, as under Article X the people had reserved to themselves the powers which were not expressly conferred on the federal Constitution. This argument was rejected by the Supreme Court on the ground that the language of Article V was clear and unambiguous and though alternative methods were provided for, the ultimate authority as to which alternative method should be adopted was the Congress and if the Congress chose the method of ratification by the State legislature there was an end of the matter. The court observed "In the Constitution words and phrases were used in their normal and ordinary as distinct from technical meaning. When the intention is clear, there is no room for construction and no excuse for interpolation". By interpolation the court specifically meant an addition in the nature of a proviso to Article V limiting the power of the Congress as to the choice of the body it would make for the purposes of ratification.

1317. Reference was made to certain cases with a view to show that though there were no words suggesting a limitation on a power, implied limitations or prohibitions are noticed by courts. In a recent Australian case of Victoria v. The Commonwealth 45 A.L.R. 251 the question arose as to the power of the Commonwealth Parliament under Section 51(ii) of the Constitution to make laws with respect to taxation under the Pay-roll Tax Assessment Act, 1941-1969. It was unanimously

held by the court that the Commonwealth Parliament had the power. During the course of arguments, the question arose, which has been troubling the Australian courts for years, whether there were implied limitations on commonwealth Legislative power under the Constitution in view of the fact that the Preamble to the Constitution recited that the people had agreed "to unite in one indissoluble federal commonwealth under the Crown." In Amalgamated Engineers case, already referred to, which had been regarded for a long time as the final word on the question, the alleged implied prohibition or limitation had been rejected. The question was held to be a question of construction with regard to the extent of power and if the power was ascertained from the express words, there could be no further limitation thereon by implication. But in the case referred to above, while three Judges accepted that view as still good, the other four were of the contrary opinion. Whichever view is correct that really makes no difference to me question before us. We are concerned with the amending power. In the Australian case the Judges were concerned with legislative power and that had to be ascertained within the four corners of the Constitution by which the power had been created and under which it had to be exercised. There was room for construction on the basis of the words and structure of the Constitution, especially, the Preamble which was not liable to be amended by the Commonwealth. On the other hand, since the power to amend the Constitution is a superior power it cannot Be bound by any provision of the Constitution itself, the obvious reason being that even such a provision is amendable under the Constitution. In re The Initiative and Referendum Act, [1919] A.C. 935 it was held by the Privy Council that the British North America Act, 1867, Section 92, head 1, which empowers a Provincial legislature to amend the Constitution of the Province, "excepting as regards the office of Lieutenant-Governor," excludes the making of a law which abrogates any power which the Crown possesses through the Lieutenant-Governor who directly represents the Crown. By the Initiative and Referendum Act the legislative assembly of Manitoba-a Province in Canada-compelled the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he is the Constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by those voters. It was held that this directly affected the office of the Lieutenant-Governor as part of the legislature and since the amendment to the Constitution had the effect of affecting that office which was expressly excepted from the amending power the law was void. It is thus seen that there was no question of an implied limitation. In the other case cited before us namely Don John Francis Douglas Livanage and Ors. v. The Queen [1967] A.C. 259 no question of amending the Constitution arose. There by an ordinary act of the legislature made in 1962 under Section 29(1) of the Ceylon (Constitution and Independence) Orders in Council, 1946-47 an attempt was made to partially vest in the legislature and the executive the judicial powers of the judges which vested in them under a separate Imperial Charter viz. the Charter of Justice, 1833 the effective operation of which was recognized in the Constitution of 1946-47. It was held that the Act was ultra vires the Constitution. Some more cases like Ranasinghe's [1965] A.C. 172 case, Taylor v. Attorney General of Queensland 23 C.L.R. 457, Mangal Singh v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 were cited to show that Constitutional laws permit implications to be drawn where necessary. No body disputes that proposition. Courts may have to do so where the implication is necessary to be drawn. In Ranasinghe's case the Privy Council is supposed to have expressed the opinion on a construction of Section 29 of the Ceylon (Constitution) Order in Council, 1946 that Sub-sections 2 and 3 are unamendable under the Constitution. In the first place, the observation is obiter, and it is doubtful if their Lordships intended to convey that even under Section 29(4), they were unamendable. A plain reading of the latter provision shows they were amend able by a special majority. Secondly, in an earlier portion

of the judgment provisions 29(2) & (3) are described as 'entrenched', the plain dictionary meaning of which is that they are not to be repealed except under more than stringent conditions. See also Wade's Introduction to Dicey pages xxxvi to xxxvii. Jennings in his Constitution of Ceylon (1949) points out at page 22 that the limitations of 29(2) & (3) can be altered or abridged by the special procedure under Section 29(4). Similarly we are in Constitutional Structure of the Commonwealth 1960 reprinted in 1963 pages 83-84. In any event, that was a pure matter of construction on a reading of Sub-sections 1 to 4 of Section 29 together. In Taylor's case the question for consideration was as to the interpretation of the expression 'Constitution of such legislature' in Section 5 of the Colonial Laws Validation Act, 1865. At the time in question the legislature consisted of a lower house and an upper house and it was held that the expression 'Constitution of such legislature'' 'was wide enough to include the conversion of a bicameral legislature into a unicameral one. Issacs, J. also held 'legislature' in the particular context meant the houses of legislature and did not include the Crown. In Mangal Singh's case it was merely held that if by law made under Article 4 of our Constitution a state was formed, that state must have legislative, executive and judicial organs which are merely the accoutrements of a state as understood under the Constitution. The connotation of a 'state' included these three organs. That again was a matter of pure construction. None of the cases sheds any light on the question with which we are concerned viz. whether an unambiguous and plenary power to amend the provisions of the Constitution, which included the Preamble and the fundamental rights, must be frightened by the fact that some superior and transcendental character has been ascribed to them.

1318. On the other hand, in America where implied limitations were sought to be pressed in cases dealing with Constitutional amendments, the same were rejected. In Sprague's case the Supreme Court rejected the contention of implied limitation supposed to arise from some express provisions in the Constitution itself. Referring to this case Dodd in Cases in Constitutional Law, 5th edition pages 1375-1387 says "This case it is hoped puts an end to the efforts to have the court examine into the subject matter of Constitutional amendment" In The National Prohibition 65 Law, edn. 994 cases decided earlier, the Prohibition Amendment (18th) was challenged, as the briefs show, on a host of alleged implied limitations based on the Constitution, its scheme and its history. The opinion of the court did not accept any of them, in fact, did not even notice them. American jurists are clearly of the opinion that the Supreme Court had rejected the argument of implied limitations. See for example Cooley Constitutional Law, 4th edition, 46-47; Burdick Law of American Constitution pp. 45 to 48.

1319. The argument that essential features (by which Mr. Palkhivala means "essential features, basic elements or fundamental principles")' of the Constitution, though capable of amendment to a limited extent are not liable to be damaged or destroyed is only a variation on the argument previously urged before this Court on the basis of the so called "spirit of the Constitution" which had been rejected as far back as 1952. See : State of Bihar v. Kameshwar Singh MANU/SC/0019/1952 : [1952]1SCR889 . That case arose out of the Bihar Land Reforms Act, 1950 which was pending in the Bihar Legislature at the time of the commencement of the Constitution. After it became law it was reserved for the consideration of the President who gave assent to it. Thus it became one of the laws referred to in Article 31(4) of the Constitution and in virtue of that provision it could not be called in question on the ground that it contravened the provisions of Clause 2 of Article 31. Under that law Zamindari was abolished and the lands vested in the State. The Zamindars received what was described as illusory compensation. As there was

danger of challenge under Articles 14, 19 and 31, the Constitution was amended to incorporate Article 31A and Article 31B to take effect from the date of the commencement of the Constitution and this Act along with similar other Acts were included in the Ninth Schedule. In Sankari Prasad's case Che amendment was held valid and when the case came before this Court the arguments became limited in scope. Mr. P.R. Das who appeared for the Zamindars tried to skirt the bar under Article 31(4) by relying on Entry 36 List II and Entry 42 in List III arguing that the law in so far as it did not acquire the Zamindaris for a public purpose or make provision for adequate compensation was incompetent under those entries. Dr. Ambedkar who appeared for other Zamindars took a different stand. In the words of Patanjali Shastri, C.J. "He maintained that a Constitutional prohibition against compulsory acquisition of property without public necessity and payment of compensation was deducible from what he called the "spirit of the Constitution", which, according to him was a valid test for judging the Constitutionality of a statute. The Constitution, being avowedly one for establishing liberty, justice and equality and a government of a free people with only limited powers, must be held to contain an implied prohibition against taking private property without just compensation and in the absence of a public purpose. (Emphasis is supplied) He relied on certain American decisions and text-books as supporting the view that a Constitutional prohibition can be derived by implication from the spirit of the Constitution where no express prohibition has been enacted in that behalf. Articles 31-A and 31-B barred only objections based on alleged infringements of the fundamental rights conferred by Part III, but if, from the other provisions thereof, it could be inferred that there must be a public purpose and payment of compensation before private property could be compulsorily acquired by the State, there was nothing in the two articles aforesaid to preclude objection on the ground that the impugned Acts do not satisfy these requirements and are, therefore, un-constitutional." (Emphasis supplied) This argument was rejected in these words "In the face of the limitations on the State's power of compulsory acquisition thus incorporated in the body of the Constitution, from which "estates" alone are excluded, it would, in my opinion, be contrary to elementary canons of statutory construction to read, by implication, those very limitations into entry 36 of List II, alone or in conjunction with entry 42 of List III of the Seventh Schedule, or to deduce them from "the spirit of the Constitution", and that too, in respect of the very properties excluded." The argument was that having regard to the Preamble and the fundamental rights which established liberty, justice and equality and a government of a free people with only limited powers, taking of private property without just compensation and in the absence of a public purpose was un-constitutional, and this conclusion should be drawn by implied prohibition in spite of Article 31(4), 31A & 31B expressly barring challenge on those very grounds. In other words, an express provision of the Constitution validating a state law was sought to be nullified on the basis of 'essential features and basic principles' underlying the Preamble and the fundamental rights, but the attempt was negatived. I see no distinction between Dr. Ambedkar's argument in the above case and the case before us, because the plenary power of amendment under Article 368 is sought to be limited by implications supposed to arise from those same 'essential features and basic principles'.

1320. A legislature functioning under a Constitution is entitled to make a law and it is not disputed that such a law can be amended in any way the legislature likes by addition, alteration or even repeal. This power to amend is implicit in the legislative power to make laws. It can never be suggested that when the legislature amends its own statute either directly or indirectly it is inhibited by any important or essential parts of that statute. It can amend the important, desirable, parts as unceremoniously as it can any other unimportant parts of the statute. That being so, one does not

see the reasonableness of refusing this latitude to a body which is specifically granted the unqualified power to amend the Constitution. While the legislature's power to amend operates on each and every provision of the statute it is difficult to see why the amending clause in a Constitution specifically authorising the amendment of the Constitution should stand inhibited by any of the Constitution. Essential parts and unessential parts of a Constitution should make no difference to the amending power (Compare passage from McCawley's case already quoted at p. 43-4) That a legislature can repeal an act as a whole and the constituent body does not repeal the Constitution as a whole is not a point of distinction. A legislature repeals an Act when it has outlived its utility. But so far as a Constitution is concerned it is an organic instrument continuously growing in utility and the question of its repeal never arises as long as orderly change is possible. A Constitution is intended to last. Legislative acts do not have that ambition. It is the nature and character of the Constitution as a growing, organic, permanent and sovereign instrument of government which exclude the repeal of the Constitution as a whole and not the nature and character of the Amending power.

1321. Since the 'essential features and basic principles' referred to by Mr. Palkhivala are those culled from the provisions of the Constitution it is clear that he wants to divide the Constitution into parts-one of provisions containing the essential features and the other containing non-essential features. According to him the latter can be amended in any way the Parliament likes, but so far as the former provisions are concerned, though they may be amended, they cannot be amended so as to damage or destroy the core of the essential features. Two difficulties arise. Who is to decide what are essential provisions and nonessential provisions ? According to Mr. Palkhivala it is the court which should do it If that is correct, what stable standard will guide the court in deciding which provision is essential and which is not essential? Every provision, in one sense, is an essential provision, because if a law is made by the Parliament or the State legislatures contravening even the most insignificant provision of the Constitution, that law will be void. From that point of view the courts acting under the Constitution will have to look upon its provisions with an equal eye. Secondly, if an essential provision is amended and a new provision is inserted which, in the opinion of the constituent body, should be presumed to be more essential than the one repealed, what is the yardstick the court is expected to employ? It will only mean that whatever necessity the constituent body may feel in introducing a change in the Constitution, whatever change of policy that body may like to introduce in the Constitution, the same is liable to be struck down if the court is not satisfied either about the necessity or the policy. Clearly this is not a function of the courts. The difficulty assumes greater proportion when an amendment is challenged on the ground that the core of an essential feature is either damaged or destroyed. What is the standard? Who will decide where the core lies and when it is reached ? One can understand the argument that particular provisions in the Constitution embodying some essential features are not amendable at all. But the difficulty arises when it is conceded that the provision is liable to be amended, but not so as to touch its 'core'. Apart from the difficulty in determining where the 'core' of an 'essential feature' lies, it does not appear to be sufficiently realized what fantastic results may follow in working the Constitution. Suppose an amendment of a provision is made this year. The mere fact that an amendment is made will not give any body the right to come to this Court to have the amendment nullified on the ground that it affects the core of an essential feature. It is only when a law is made under the amended provision and that law affects some individual's right, that he may come to this Court. At that time he will first show that the amendment is bad because it affects the core of an essential feature and if he succeeds there, he will automatically succeed and

the law made by the Legislature in the confidence that it is protected by the amended Constitution will be rendered void. And such a challenge to the amendment may come several years after the amendment which till then is regarded as a part of the Constitution. In other words, every amendment, however innocuous it may seem when it is made is liable to be struck down several years after the amendment although all the people have arranged their affairs on the strength of the amended Constitution. And in dealing with the challenge to a particular amendment and searching for the core of the essential feature the court will have to do it either with reference to the original Constitution or the Constitution as it stood with all its amendments upto date. The former procedure is clearly absurd because the Constitution has already undergone vital changes by amendments in the meantime. So the challenged amendment will have to be assessed on the basis of the Constitution with all its amendments made prior to the challenged amendment. All such prior amendments will have to be accepted as good because they are not under challenge, and on that basis Judges will have to deal with the challenged amendment. But the other amendments are also not free from challenge in subsequent proceedings, because we have already seen that every amendment can be challenged several years after it is made, if a law made under it affects a private individual. So there will be a continuous state of flux after an amendment is made and at any given moment when the court wants to determine the core of the essential feature, it will have to discard, in order to be able to say where the core lies, every other amendment because these amendments also being unstable will not help in the determination of the core. In other words, the courts will have to go by the original Constitution to decide the core of an essential feature ignoring altogether all the amendments made in the meantime, all the transformations of rights that have taken place after them, all the arrangements people have made on the basis of the validity of the amendments and all the laws made under them without question. An argument which leads to such obnoxious results can hardly be entertained. In this very case if the core argument were to be sustained, several previous amendments will have to be set aside because they have undoubtedly affected the core of one or the other fundamental right. Prospective overruling will be the order of the day.

1322. The argument of implied limitations in effect invites us to assess the merits and demerits of the several provisions of the Constitution as a whole in the light of social, political and economic concepts embodied therein and determine on such an assessment what is the irreducible minimum of the several features of the Constitution. Any attempt by amendment, it is contended, to go beyond such irreducible minimum-also called the 'core' of essential features-should be disallowed as invalid. In other words, we are invited to resort to the substantive due process doctrine of the Supreme Court of America in the interpretation of a Constitutional Amendment. That doctrine was rejected long ago by this Court (Gopalan's case) even in its application to ordinary legislation. See MANU/SC/0012/1950 : 1950CriLJ1383 (Kania, C.J. 110) (Das, J. 312). The argument does not have anything to do with the meaning of the expression 'Amendment of the Constitution' because it is conceded for the purpose of this argument that 'amendment of this Constitution' means amendment of all provisions by way of addition, alteration or repeal' What is contended, is that by the very implications of the structure, general principles and concepts embodied in the Constitution, an amendment can go only thus far and no further. In other words, the scope of amendment is circumscribed not by what the constituent body thinks, but by what the Judges ultimately think is its proper limits. And these limits, it is obvious, will vary with individual Judges, and as in due process, the limits will be those fixed by a majority of Judges at one time, changed, if necessary, by a bigger majority at another. Every time an amendment is made of some magnitude as by the Twenty-fifth Amendment we will have, without anything to go on, to consider how, in

our opinion, the several provisions of the Constitution react on one another, their relative importance from our point of view, the limits on such imponderable concepts as liberty, equality, justice, we think proper to impose, whether we shall give preponderance to directive principles in one case and fundamental rights in another-in short, determine the 'spirit of the Constitution' and decide how far the amendment conforms with that 'spirit'. We are no longer, than construing the words of the Constitution which is our legitimate province but determining the spirit of the Constitution-a course deprecated by this Court in Gopalan's case at pages 120-121. When concepts of social or economic justice are offered for our examination in their interaction on provisions relating to right to property-matters traditionally left to legislative policy and wisdom, we are bound to flounder "in labyrinths to the character of which we have no sufficient guides.

1323. It is true that Judges do judicially determine whether certain restrictions imposed in a statute are reasonable or not. We also decide questions involving reasonableness of any particular action. But Judges do this because there are objective guides. The Constitution and the Legislatures specifically leave such determination to the higher courts, not because they will be always right, but because the subject matter itself defies definition and the legislatures would sooner abide by what the judges say. The same is true about limits of delegated legislation or limits of legislative power when it encroaches on the judicial or any other field. Since the determination of all these questions is left to the higher judiciary under the Constitution and the law, the judges have to apply themselves to the tasks, however difficult they may be, in order to determine the legality of any particular legislative action. But all this applies to laws made under the Constitution and have no relevance when we have to deal with a Constitutional amendment. The Constitution supplies the guides for the assessment of any statute made under it. It does not supply any guides to its own amendment which is entirely a matter of policy.

1324. The 'core' argument and the division into essential and nonessential parts are fraught with the greatest mischief and will lead to such insuperable difficulties that, if permitted, they will open a Pandora's box of endless litigation creating uncertainty about the provisions of the Constitution which was intended to be clear and certain. Every single provision embodies a concept, a standard, norm or rule which the framers of the Constitution thought was so essential that they included it in the Constitution. Every amendment thereof will be liable to be assailed on the ground that an essential feature or basic principle was seriously affected. Our people have a reputation of being litigious lot. We shall be only adding to this.

1325. When an amendment is successfully passed, it becomes part of the Constitution having equal status with the rest of the provisions of the Constitution. If such an amendment is liable to be struck down on the ground that it damages or destroys an essential feature, the power so claimed should, a fortiori, operate on the Constitution as it stands. It will be open to the court to weigh every essential feature like a fundamental right and, if that feature is hedged in by limitations, it would be liable to be struck down as damaging an essential feature. Take for example personal liberty, a fundamental right under the Constitution. If the court holds the opinion that the provision with regard to preventive detention in Article 22 damages the core of personal liberty it will be struck down. The same can be said about the freedom in Article 19. If this Court feels that the provision with regard to, say State monopolies damages the fundamental right of trade of a citizen, it can be struck down. In other words, if an amendment which has become part of the Constitution is liable to be struck down because it damages an essential feature it should follow that every restriction

originally placed on that feature in the Constitution would necessarily come under the pruning knife of the courts.

1326. In short, if the doctrine of unamendability of the core of essential feature is accepted, it will mean that we add some such proviso below Article 368 : "Nothing in the above Amendment will be deemed to have authorized an Amendment of the Constitution, which has the effect of damaging or destroying the core of the essential features, basic principles and fundamental elements of the Constitution as may be determined by the Courts." This is quite impermissible.

1327. It is not necessary to refer to the numerous authorities cited before us to show that what are described as some of the essential features are not unamendable. It will be sufficient to refer to only a few. Bryce in his book "The American Commonwealth" New and revised edition, Vol. I says at pages 366-67 with reference to Article V of the American Constitution "But looking at the Constitution simply as a legal document, one finds nothing in it to prevent the adoption of an amendment providing a method for dissolving the existing Federal tie, whereupon such method would be applied so as to form new unions, or permit each State to become an absolutely sovereign and independent commonwealth. The power of the people of the United States appears competent to effect this, should it ever be desired, in a perfectly legal way, just as the British Parliament is legally competent to redivide Great Britain into the sixteen or eighteen independent kingdoms which existed within the island in the eighth century." Randall in his revised edition, 1964 The Constitutional Problems under Lincoln, says at page 394 with reference to Article V "Aside from the restriction concerning the "equal suffrage" of the States in the Senate, the Constitution, since 1808, has contained no amendable part, and it designates no field of legislation that may not be reached by the amending power. An Amendment properly made becomes "valid, to all intents and purposes, as part of this Constitution", having as much "force as any other article. There is no valid distinction between "the Constitution itself" and the amendments. The Constitution at any given time includes all up to the latest amendments, and excludes portions that have not survived the amending process. We should think not of "the Constitution and its amendments," but of "the Constitution as amended". This is especially true when we reflect that certain of the amendments supplant or construe portions of the original document." Colley in his book, The General Principles of Constitutional Law in the United States of America, fourth edition, says at pages 46-47 "Article V of the Constitution prohibits any amendment by which any State "without its consent shall be deprived of its equal suffrage in the Senate". Beyond this there appears to be no limit to the power of amendment. This, at any rate, is the result of the decision in the so-called National Prohibition Cases.... The amendment was attacked on the grounds that it was legislative in its character, an invasion of natural rights and an encroachment on the fundamental principles of dual sovereignty, hut the contention was overruled. The decision totally negatived the contention that "An amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government, nor relinquish to the State those which already have been granted to it." Quick and Carran writing in the "Annotated Constitution of the Australian Commonwealth" (1901) observe as follows at p. 989 with regard to the amending clause of the Constitution namely Section 128. "It may be concluded that there is no limit to the power to amend the Constitution, but that it can only be brought into action according to certain modes prescribed. We will consider the modes and conditions of Constitutional reforms further; meanwhile it is essential to grasp the significance and comprehensiveness of the power itself. For example, the Constitution could be

amended either in the direction of strengthening or weakening the Federal Government; strengthening it, by conferring on it new and additional powers; weakening it, by taking away powers. The Constitution could be amended by reforming the structure of the Federal Parliament and modifying the relation of the two Houses; by increasing or diminishing the power of the Senate in reference to Money Bills; by making the Senate subject to dissolution at the same time as the House of Representatives. It is even contended by some daring interpreters that the Constitution could be amended by abolishing the Senate. It could certainly be amended by remodelling the Executive Department, abolishing what is known as Responsible Government, and introducing a new system, such as that which prevails in Switzerland; according to which the administration of the public departments is placed in the hands of officers elected by the Federal legislature. The Constitution could be amended by altering the tenure of the judges, by removing their appointment from the Executive, and authorizing the election of judges by the Parliament or by the people. The Constitution could be amended in its most vital part, the amending power itself, by providing that alterations may be initiated by the people, according to the plan of the Swiss Popular Initiative; that proposed alterations may be formulated by the Executive and submitted to the people; that proposed alterations may, with certain Constitutional exceptions, become law on being approved of by a majority of the electors voting, dispensing with the necessity of a majority of the States.

1328. On a consideration, therefore, of the nature of the amending power, the unqualified manner in which it is given in Article 368 of the Constitution it is impossible to imply any limitations on the power to amend the fundamental rights. Since there are no limitations express or implied on the amending power, it must be conceded that all the Amendments which are in question here must be deemed to be valid. We cannot question their policy or their wisdom.

1329. Coming to the actual amendments made in the Constitution by the twenty-fifth amendment Act, we find in the first place that the original Clause (2) of Article 31 is recast to some extent by deleting any reference to 'compensation' in cases of compulsory acquisition and requisition for a public purpose. The fundamental right now is not to receive 'compensation' which this Court construed to mean 'a just equivalent' but to receive an "amount" which the legislature itself may fix or which may be determined in accordance with the principles as may be specified by the law. Then again the "amount" may be given in cash or in such manner as the law may specify. The principal objection to the amendment is that the clause arms the legislature with power to fix any amount which it considers fit and such fixation may be entirely arbitrary having no nexus whatsoever with the property of which a person is actually deprived. In similar cases, it is submitted, the amount fixed may be more in one and very much less in another depending entirely on the whim of the legislature. Conceivably the amount may be illusory having regard to the value of the property. The principles for determining the amount may equally be arbitrary and unrelated to the deprivation. therefore, it is contended, the amendment is bad. It is difficult to understand how an amendment to the Constitution becomes invalid because the Constitution authorizes the legislatures to fix an "amount" or to specify the principles on which the "amount" is to be determined instead of fixing the "compensation" or specifying the principles for determining "compensation". Even compensation ultimately is an "amount". All that the amendment has done is to negative the interpretation put by this Court on the concept of compensation, Clause (2) recognizes the fundamental right to receive an amount in case of compulsory acquisition or requisition and all that it wants to clarify is that the fundamental right is not to receive compensation as interpreted by this Court but a right to receive an amount in lieu of the deprivation

which the legislature thinks fit. It is not the case that if a fair amount is fixed for the acquisition or fair principles to determine it are laid down, the amendment would still be invalid. The contention is that it becomes invalid because there is a possibility of the abuse of the power to fix the amount. There is no power which cannot be abused. All Constitutions grant power to legislatures to make laws on a variety of subjects and the mere possibility of the power being used unwisely, injuriously or even abused is not a valid ground to deny legislative power. See : Bank of Toronto v. Lambe 1887, Vol. XII-Appeal Cases 575 at pages 586-587. If that is the position with regard to legislative power, there does not appear to be any good reason why the possibility of abuse of it by the legislature should inhibit an amendment of the Constitution which gives the power. Whether a particular law fixes an amount which is illusory or is otherwise a fraud on power denying the fundamental right to receive an amount specifically conferred by Clause (2) will depend upon the law when made and is tested on the basis of Clause (2). One cannot anticipate any such matters and strike down an amendment which, in all conscience, does not preclude a fair amount being fixed for payment in the circumstances of a particular acquisition or requisition. The possibility of abuse of a power given by an amendment of the Constitution is not determinative of the validity of the amendment.

1330. The new Clause 2B inserted in Article 31 having the consequence of excluding the application of Article 19(1)(f) to a law referred to in Clause (2) of Article 31 is merely a re-statement of the law laid down by this Court after the Constitution came into force. The mutual exclusiveness of Article 19(1)(f) and Article 31(2) had been recognized by this Court in a series of cases. See : Sitabati Debi and Anr. v. State of West Bengal and Anr. MANU/SC/0102/1961 : [1967]2SCR949 . That principle is now embodied in the new amendment.

1331. The only substantial objection to the twenty-fifth amendment is based on the new Article 31C inserted in the Constitution by Section 3 of the twenty-fifth amendment act.

The new article is as follows:

31C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration chat it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

1332. Ignoring the proviso for the moment, one finds that the main clause of the article falls into two parts. The first part provides that a law of a particular description shall not be deemed to be void on the ground that it affects injuriously somebody's fundamental rights under Articles 14, 19 and 31. The second part provides that if such a law contains a particular declaration, courts shall not entertain a particular kind of objection.

1333. In the first place, it should be noted that what is saved by Article 31C is a law i.e. a law made by a competent legislature. Secondly since Article 31C comes under the specific heading 'Right to property' in Part III dealing with fundamental rights it is evident that the law must involve right to property. That it must of necessity do so is apparent from the description of the law given in the article. The description is that the law gives effect to the policy of the State towards securing the principles specified in Clauses (b) & (c) of Article 39. That article is one of the several articles in Part IV of the Constitution dealing with Directive Principles of State Policy. Article 37 provides that though the Directive Principles are not enforceable by any court, they are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows from this that the Governments and Legislatures are enjoined to make laws giving effect to the Directive Principles. We are immediately concerned with the Directive Principles contained in Article 39(b) and (c) namely, that the State shall direct its policy towards securing (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. In short Clause (b) contemplates measures to secure what is known as equitable distribution of community resources and Clause (c) contemplates measures for preventing concentration of wealth and means of production in a few private hands. Read along with Article 38 and other principles in this Part, they justify the conclusions of Granville Austin in his Indian Constitution : Cornerstone of a Nation-that our Constitution is informed by social democratic principles. See : pages 41-52 of the book. The final conclusion he came to is expressed in this way:

By establishing these positive obligations of the state, the members of the Constituent Assembly made it the responsibility of future Indian governments to find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate the powers of all men equally for contributions to the common good. p. 52.

The philosophy which informs the Constitution looks on concentration of wealth and means of production as a social evil because such concentration, resulting in the concentration of political and economic power in the hands of a few private individuals, not only leads to unequal freedom, on the one hand, but results, on the other, in undermining the same in the case of many. In such conditions it is widely believed that the goals of Equality and Justice, social, economic and political, become unreal, and since the Constitution itself directs that laws may be made to inhibit such conditions it is inevitable that these laws aimed at the reduction of unequal freedoms enjoyed by a few will impair to some extent their fundamental rights under Articles 14, 19 and 31. That would be justified even on the 'core' theory of Mr. Palkhivala because he admits the possibility of an abridgement of a fundamental right in similar cases. therefore, Article 31C provides, even as Article 31A provided many years ago, that such laws should not be called in question on the grounds furnished by Articles 14, 19 and 31. If a law is made with a view to giving effect to the Directive Principles mentioned in Article 39(b) and 39(c) the law is in conformity with the direct mandate of the Constitution and must be deemed to be Constitutional. The effect of the first part of Article 31C is the I same as if, a proviso had been inserted below Article 13(2) or each of the several Articles 14, 19 and 31 excluding its application to the particular type of law mentioned in Article 31C. If the law does not genuinely purport to give effect to the specified Directive Principles it will not be secure against the challenge under Articles 14, 19 and 31. Indeed since the

Directive Principles are couched in general terms they may present some difficulty in judging whether any individual law falls within the ambit of the description given in Article 31C but such a difficulty is no reason for denying, the validity of the amendment. Courts had no difficulty in deciding whether any particular law did fall under Article 31A or not.

1334. The real difficulty is raised by the second part of Article 31C which provides "No law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy." The contention is that if any law makes a declaration as stated, that is conclusive of the fact that it is covered by Article 39(b) or (c) and courts will be debarred from entertaining any objection on the ground that it is not so covered. In other words, it is submitted, the declaration when made in a law whether genuinely falling under Article 39(b) or (c) or not will conclude the issue and the courts will be debarred from questioning the declaration. The result is, according to the submission, that the legislatures may with impunity make a law contravening provisions of the Constitution and by the simple device of a declaration insert the law as an exception to Articles 14, 19 and 31-i.e. in other words amend the Constitution which the legislature cannot do. The Constitution, it is pointed out, may be amended only in the way prescribed in Article 368 and no other and, therefore, Article 31C authorising an amendment in a way other than the one laid down in Article 368, which still forms part of the Constitution with full force, is invalid.

1335. On behalf of the Union, however, it is claimed that the new Article 31C does not have the effect, attributed to it on behalf of the petitioners. It is, submitted, that Article 31C does not prevent judicial review as to whether the law referred to therein is of the description it maintains it is. If on a consideration of its true nature and character the court considers that the legislation is not one having a nexus with the principles contained in Article 39(b) or (c), it will not be saved under Article 31C. The sole purpose of the declaration', according to the submission is to remove from the scope of judicial review a question of a political nature the reason for it being, as explained in Beauharanis v. Illinois 343 U.S. 250. "The legislative remedy in practice might not mitigate the evil or might itself give rise to new problems which would only manifest once again the paradox of reform. It is the price to be paid for the trial and error inherent in legislative efforts to deal with obstinate social issues.

1336. It appears to us that the approach suggested on behalf of the Union is the correct approach to the interpretation of Article 31C.

1337. The State's functional policy is to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall, inform all the institutions of the national life. (Article 38). That is the goal of the State policy. As practical steps, the State is commanded in the next following articles from Articles 39 to 51 to direct its policy towards securing some aims which, being well-known concepts of social democratic theory, are described as 'principles'. See for example the marginal note of Article 39. Compendiously these are described as Directive Principles of State Policy under the heading of Part IV.

1338. We are concerned with Article 39(b) and (c). The State is commanded, in particular, to direct its policy towards securing two aims, one described in (b) and the other in (c). In directing its

policy towards securing the aims, the State will evidently have to make laws. A description of such a law is given in the first part of Article 31C-as a law giving effect to the policy of the State towards securing the principles (aims) specified in Articles 39(b) or (c). If a law truly answers that description it will be secure against a challenge under Articles 14, 19 and 31; otherwise not. When such a challenge is made, it will be the obvious duty of the court to ascertain on an objective consideration of the law whether it falls within the description. What the court will have to consider is whether it is a law which can reasonably be described as a law giving effect to the policy of the State towards securing the aims of Article 39(b) or (c). That is an issue which is distinct from the other issue whether the law does not give effect to the policy of the State towards securing the said aims. A law reasonably calculated to serve a particular aim or purpose may not actually serve that aim or purpose; and it is this latter issue which is excluded from judicial review. In doing so the declaration does no more than what the courts themselves have been always saying viz. that they are not concerned with the wisdom or policy of the legislation. Prohibition laws-for example in U.S.A. and elsewhere, though made in order to give effect to the policy of the State to secure the eradication of the evil of drink did not have that effect. That may have been so because the law was inadequate or because the law gave rise to problems which were unforeseen. But that did not impair the genuineness of the law as being reasonably calculated to achieve a certain result. The two questions are different. One involves the process of identification of the type of legislation by considering its scope and object, its pith and substance. The other involves a process of evaluation by considering its merits and defects, the adequacy or otherwise of the steps taken to implement it or their capability of producing the desired result. A law made to give effect to the State's policy of securing eradication of the drink evil can be properly identified, as such, if such identification is necessary to be made by a court in order to see the application of a Constitutional provision. But it is an entirely different proposition to say that the law does not actually give effect to the State's policy of securing the eradication of drink. That would require an enquiry which courts cannot venture to undertake owing to lack of adequate means of knowledge and sources of information. An enquiry, like that of a Commission, will lead to debatable questions as to the adequacy of the provisions of the law, its deficiencies, the sufficiency and efficiency of the executive side of the Government to implement it effectively, the problems that arise in the course of implementation of the law and the like, all of which do not legitimately fall within the ambit of an enquiry by a court. The problems are problems of legislative policy. It is for the legislature to decide what should go into the law to give effect to its policy towards securing its purpose. The legislature will have to consider the divergent views in the matter and make its own choice as to how it can effectuate its policy. The courts are not concerned with that aspect of the matter and even if a law is considered a failure, courts cannot refuse to give effect to the same. The declaration does no more than forbid such an enquiry by the courts which the courts themselves would not have undertaken. The declaration is only by way of abundant caution.

1339. No other ground is precluded from judicial review under Article 31C. It was rightly conceded on behalf of the Union that the court in deciding whether the law falls within the general description given of it in Article 31C will be competent to examine the true nature and character of the legislation, its design and the primary matter dealt with, its object and scope. See : e.g. Charles Russell v. The Queen [1882] 7 AC 829. If the court comes to the conclusion that the above object of the legislation was merely a pretence and the real object was discrimination or something other than the object specified in Article (b) and (c), Article 31C would not be attracted and the validity of the Statute would have to be tested independently of Article 31C. Similarly as observed

in Attorney-General v. Queen Insurance Co. [1878] 3 AC 1090 "if the legislation ostensibly under one of the powers conferred by the Constitution is in truth and fact really to accomplish an unauthorised purpose the court would be entitled to tear the veil and decide according to the real nature of the statute.

1340. In that view of the true nature of Article 31C it cannot be said that the amendment is invalid.

1341. The twenty-fifth Amendment Act is, therefore, valid.

1342. By the twenty-ninth Amendment, the two Kerala Acts challenged in this petition were included in the Ninth Schedule. Like other Acts included in that Schedule they are immune from challenge by reason of the protection given to the Schedule by Article 31B. It was sought to be argued that unless the Acts related to agrarian reform, implicit in the words 'Without prejudice to the generality of the provisions contained in Article 31A' with which Article 31B opens, the protection was not available. That argument has been rejected previously. See for example N.B. Jeejeebhoy v. Assistant Collector, Thana MANU/SC/0248/1964 : [1965]1SCR636 . Actually the argument does not amount to a challenge to the validity of the Amendment, hut an attempt to show that in spite of the Amendment, the two laws would not be saved by Article 316. The twenty-ninth Amendment is not different from several similar Amendments made previously by which Statutes were added from time to time to the ninth schedule and whose validity has been upheld by this Court. The twenty-ninth Amendment is, therefore, valid.

1343. My conclusions are:

(1) The power and the procedure for the amendment of the Constitution were contained in the unamended Article 368. An Amendment of the Constitution in accordance with the procedure prescribed in that Article is not a 'law' within the meaning of Article 13. An Amendment of the Constitution abridging or taking away a fundamental right conferred by Part III of the Constitution is not void as contravening the provisions of Article 13(2). The majority decision in Golak Nath v. State of Punjab is with respect, not correct.

(2) There were no implied or inherent limitations on the Amending power under the unamended Article 368 in its operation over the fundamental rights. There can be none after its amendment.

(3) The twenty fourth, the twenty-fifth and the twenty-ninth Amendment Acts are valid.

1344. The case will now be posted before the regular bench for disposal in accordance with law.

H.R. Khanna, J.

1345. Questions relating to the validity of the Constitution (Twenty-fourth Amendment) Act, Constitution (Twenty-fifth Amendment) Act and Constitution (Twenty-ninth Amendment) Act, as well as the question whether the Parliament acting under Article 368 of the Constitution can amend the provisions of Part III of the Constitution so as to take away or abridge fundamental rights arise for determination in this petition under Article 32 of the Constitution. A number of other important questions, to which reference would be made hereafter, have also been posed during discussion,

and they would be dealt with at the appropriate stage. Similar questions arise in a number of other petitions, and the counsel of the parties in those cases have been allowed to intervene.

1346. The necessary facts may now be set out, while the details which have no material bearing for the purpose of this decision can be omitted. Kerala Land Reform's Act, 1963 (Act 1 of 1964) as originally enacted was inserted as item No. 39 in the Ninth Schedule to the Constitution. The said Act was subsequently amended by Kerala-Land Reforms (Amendment) Act, 1969 (Act 35 of 1969). The petitioner filed the present writ petition on March 21, 1970 challenging the Constitutional Validity of the Kerala Land Reforms Act,. 1963 (Act 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969). The aforesaid Act was also challenged in a number of petitions before the Kerala High Court. A Full Bench of the Kerala High Court as per its decision in V.N. Narayanan Nair v. State of Kerala ILR [1970] Ker 315 upheld the validity of the said Act, except in respect of certain provisions. Those provisions were declared to be invalid. The State of Kerala came up in appeal to this Court against the judgment of the Kerala High Court in so far as that court had held a number of provisions of the Act to be invalid. This Court dismissed the appeals of the State as per judgment dated April 26, 1972. MANU/SC/0634/1972 : [1973]1SCR326 . Appeals filed by private parties against the judgment of the Kerala High Court upholding the validity of the other provisions too were dismissed. Some writ petitions filed in this Court challenging the validity of the above mentioned Act were also disposed of by this Court in accordance with its decision in the appeals filed by the State of Kerala and the private parties.

1347. The Kerala High Court as per judgment dated October 21, 1970 declared some other provisions of the Kerala Land Reforms Act as amended by Act 35 of 1969 to the invalid and un-constitutional. After the above judgment of the High Court the Kerala Land Reforms Act was amended by Ordinance 4 of 1971 which was promulgated on January 30, 1971. The Kerala Land Reforms (Amendment) Bill, 1971 was thereafter introduced in the Legislative Assembly to replace the ordinance. The Bill was passed by the Legislative Assembly on April 26, 1971 and received the assent of the President on August 7, 1971. It was thereafter published as the Kerala Land Reforms Act, 1971 (Act 25 of 1971) in the Gazette Extraordinary on August 11, 1971. By the Constitution (Twenty-ninth Amendment) Act, 1972 which was assented to by the President on June 9, 1972 the Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969) and Kerala Land Reforms (Amendment) Act, 1971 (Act 25 of 1971) were included in the Ninth Schedule to the Constitution.

1348. The writ petition was amended twice. The first amendment was made with a view to enable the petitioner to impugn the Constitutional validity of the Kerala Reforms (Amendment) Act (Act 25 of 1971). The second amendment of the petition was made with a view to include the prayer to declare the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments to the Constitution as un-constitutional, ultra vires, null and void.

1349. It may be mentioned that the Twenty-fourth Amendment related to the amendment of the Constitution. Section 2 of the Amendment Act added Clause (4) in Article 13 as under:

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

Section 3 of the Amendment Act read as under:

3. Article 368 of the Constitution shall be renumbered as Clause (2) thereof, and

(a) for the marginal heading to that article, the following marginal heading shall be substituted, namely:

Power of Parliament to amend the Constitution and procedure therefore.;

(b) before Clause (2) as so re-numbered, the following clause shall be inserted, namely:

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provisions of this Constitution in accordance with the procedure laid down in this article,;

(c) in Clause (2) as so re-numbered, for the words "it shall be presented to the President for his assent and upon such assent being given to the Bill," the words "it shall be presented to the President who shall give his assent to the Bill and thereupon" shall be substituted;

(d) after Clause (2) as so re-numbered, the following clause shall be inserted, namely:

(3) Nothing in Article 13 shall apply to any amendment made under this article.

We may set out Articles 13 and 368 as they existed both before and after amendment made by the Twenty-fourth Amendment Act:

Before the Amendment	After the Amendment
13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, so far as they are inconsistent with the provisions of this part, shall to the extent of such inconsistency, be void.	13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in far so as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistenc be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.	(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires.	(3) In this article, unless the context otherwise requires,
(a) "law" includes any Ordinance, order byelaw, rules, regulation, notification, custom or usage having in the territory of India the force of law;	(a) "law" includes any Ordinance order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force, of law;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of the Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.	(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then of operation either at all or in particular areas
	(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.
368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than twothirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :	368. (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitut in accordance with the procedure laid dov in this article
	(2) An amendment of this Constitution may be initiated only by the introductio of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall Stand amended in accordance with the terms of the Bill :
Provided that if such amendment seeks to make any change in-	Provided that if such amendment seeks to make any change in-
(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or	(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI or	(b) Chapter IV of Part V, Chapter : V of Part VI, or Chapter I of Part XI or
(c) any of the Lists in the Seventh Schedule, or	(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or	(d) the representation of States in Parliament, or
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.	(e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision of or such amendment is presented to the President for assent.
	(3) Nothing in Article 13 shall apply to any amendment made under this article.

1350. The Constitution (Twenty-fifth Amendment) Act, 1971 amended Article 31 of the Constitution. The scope of the amendment would be clear from Section 2 of the Amendment Act which reads as under:

2. In Article 31 of the Constitution,-

(a) for Clause (2), the following clause shall be substituted namely:

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause";

(b) after Clause (2A), the following clause shall be inserted, namely:

(2B) Nothing in Sub-clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2).

The Constitution (Twenty-fifth Amendment) Act also added Article 31C after Article 31B as under:

31C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

1351. The Constitution (Twenty-ninth Amendment) Act, as mentioned earlier, inserted the following as entries No. 65 and 66 respectively in the Ninth Schedule to the Constitution:

(i) The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969); and

(ii) The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).

1352. The question as to whether the fundamental rights contained in Part III of the Constitution could be taken away or abridged by amendment was first considered by this Court in the case of Sri Sankari Prasad Singh Deo v. Union of India And Anr. MANU/SC/0013/1951 : [1952]1SCR89 In that case the appellant challenged the First Amendment of the Constitution. The First Amendment made changes in Articles 15 and 19 of the Constitution. In addition, it provided for insertion of two Articles, 31A and 31B, in Part III. Article 31A provided that no law providing for acquisition by the State of any estate or of any such rights therein or the extinguishment or modification of any such right, shall be deemed to be void on the ground that it was inconsistent with or took away or abridged any of the rights conferred by any provision in Part III. The word "estate" was also defined for the purpose of Article 31A. Article 31B provided for validation of certain Acts and Regulations which were specified in the Ninth Schedule to the Constitution. The said Schedule was added for the first time in the Constitution. The Ninth Schedule at that time contained 13 Acts, all relating to estates, passed by various Legislatures off the Provinces or States. It was provided that those Acts and Regulations would not be deemed to be void or ever to have become void on the ground that they were inconsistent with or took away or abridged any of the rights conferred by any provision of Part III. It further provided that notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, all such Acts and Regulations, subject to the power of any competent Legislature to repeal or amend them, would continue in force.

1353. The attack on the validity of the First Amendment was based primarily on three grounds. Firstly, that amendments to the Constitution made under Article 368 were liable to be tested under Article 13(2); secondly, that in any case as Articles 31A and 31B inserted in the Constitution by the First Amendment affected the powers of the High Court under Article 226 and of this Court under Articles 132 and 136, the Amendment required ratification under the proviso to Article 368; and thirdly, that Articles 31A and 31B were invalid on the ground that they related to matters covered by the State List. This Court rejected all the three contentions. It held that although "law" would ordinarily include Constitutional law, there was a clear demarcation between ordinary law made in the exercise of legislative power and Constitutional law made in the exercise of constituent power. In the context of Article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to Constitution made in the exercise of constituent power. Article 13(2), as such, was held not to affect amendments made under Article 368. This Court further held that Articles 31A and 31B did not curtail the power, of this Court and of the High Court and as such did not require ratification under the proviso contained in Article 368. Finally, it was held that Articles 31A and 31B were essentially amendments to the Constitution and the Parliament had the power to make such amendments. In consequence, the First Amendment to the Constitution was held to be valid.

1354. The second case in which there arose the question of the power of the Parliament to amend fundamental rights was Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 . In this case the Seventeenth Amendment made on June 29, 1964 was challenged. By the Seventeenth Amendment changes were made in Article 31A of the Constitution and 44 Acts were included in the Ninth Schedule to the Constitution to give them complete protection from attack under any provision of Part III of the Constitution. One of the contentions advanced in Sajjan Singh's case was that, as Article 226 was likely to be affected by the Seventeenth Amendment, it required ratification under the proviso to Article 368 and that the decision in Sankari Prasad's case (supra) which had negatived such a contention required reconsideration. It

was also urged that the Seventeenth Amendment was legislation with respect to land and the Parliament had no right to legislate in that respect. It was further argued that as the Seventeenth Amendment provided that Acts put in the Ninth Schedule would be valid in spite of the decision of the courts, it was un-constitutional. This Court by a majority of 3 to 2 upheld the correctness of the decision in Sankari Prasad's case. This Court further held unanimously that the Seventeenth Amendment did not require ratification under the proviso to Article 368. The Parliament, it was held, in enacting the amendment was not legislating with respect to land and that it was open to Parliament to validate legislation which had been declared invalid by courts. By a majority of 3 to 2 the Court held that the power conferred by Article 368 included the power to take away fundamental rights guaranteed by Part III and that the power to amend was a very wide power which could not be controlled by the literal dictionary meaning of the word "amend". The word "law" in Article 13(2), it was held, did not include an amendment of the Constitution made in pursuance of Article 368. The minority, however, doubted the correctness of the view taken in Sankari Prasad's case to the effect that the word "law" in Article 13(2) did not include amendment to the Constitution made under Article 368.

1355. The correctness of the decision of this Court in Sankari Prasad's case and of the majority in Sajjan Singh's case was questioned in the case of I.C. Golak Nath and Ors. v. State of Punjab and Anr. MANU/SC/0029/1967 : [1967]2SCR762 . The case was heard by a special bench consisting of 11 judges. This Court in that case was concerned with the validity of the Punjab Security of Land Tenures Act, 1953 and of the Mysore Land Reforms Act. These two Acts had been included in the Ninth Schedule to the Constitution by the Constitution (Seventeenth Amendment) Act, 1964. It was held by Subba Rao C.J., Shah, Sikri, Shelat and Vaidialingam JJ. Hidayatullah J. concurring) that fundamental rights cannot be abridged or taken away by the amending procedure in Article 368 of the Constitution. An amendment of the Constitution, it was observed, is "law" within the meaning of Article 13(2) and is, therefore, subject to Part III of the Constitution. Subba Rao C.J., who gave the judgment on his own behalf as well as on behalf of Shah, Sikri, Shelat and Vaidialingam JJ. gave his conclusions as under:

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951 Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act X of 1953, and the Mysore Land-Reforms Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Articles 13, 14 or 31 of the Constitution.

Hidayatullah J. summed up his conclusions as under:

(i) that the Fundamental Rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;

(ii) that Sankari Prasad's case (and Sajjan Singh's case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of Articles 13(2) and 368;

(iii) that the Fast, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment

(iv) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Article 368, any further inroad into these rights as they exist today will be illegal and un-constitutional unless it complies with Part III in general and Article 13(2) in particular;

(v) that for abridging or taking away Fundamental Rights, a Constituent body will have to be convoked; and

(vi) that, the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (X of 1953) and the Mysore Land Reforms Act, 1961 (X of 1962) as amended by Act XIV of 1965 are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by Article 31-A, and the President's assent.

As against the view taken by the majority, Wanchoo, Bachawat, Ramaswami, Bhargava and Mitter, JJ. gave dissenting judgments. According to them, Article 368 carried the power to amend all parts of the Constitution including the fundamental rights in Part III of the Constitution. An amendment, according to the five learned Judges, was not "law" for the purpose of Article 13(2) and could not be tested under that article. The learned Judges accordingly reaffirmed the correctness of the decision in the cases of Sankari Prasad and Sajjan Singh. Some of the conclusions arrived at by Wanchoo J., who gave the judgment on his own behalf as well as on behalf of Bhargava and Mitter JJ. may be reproduced as under:

(i) The Constitution provides a separate part headed 'Amendment of the Constitution' and Article 368 is the only article in that Part. There can therefore, be no doubt that the power to amend the Constitution must be contained in Article 368.

(ii) There is no express limitation on power of amendment in Article 368 and no limitation can or should be implied therein. If the Constitution makers intended certain basic provisions in the Constitution, and Part III in particular, to be not amendable there is no reason why it was not so stated in Article 368.

(iii) The power conferred by the words of Article 368 being unfettered, inconsistency between that power and the provision in Article 13(2) must be avoided therefore in keeping with the unfettered power in Article 368 the word "law" in Article 13(2) must be read as meaning law passed under the ordinary legislative power and not a Constitutional amendment.

(iv) Though the period for which Sankari Prasad's case has stood unchallenged is not long, the effects which have followed on the passing of State laws on the faith of that decision, are so overwhelming that the decision should not be disturbed, otherwise chaos will follow. This is the fittest possible case in which the principle of stare decisis should be applied.

(v) The doctrine of prospective overruling cannot be accepted in this country. The doctrine accepted here is that courts declare law and that a declaration made by a court is the law of the land and takes effect from the date the law came into force. It would be undesirable to give up that doctrine and supersede it with the doctrine of prospective overruling.

The main conclusions of Bachawat J. were as under:

(i) Article 368 not only prescribes the procedure but also gives the power of amendment.

(ii) The power to amend the Constitution cannot be said to reside in Article 248 and List I, item 97 because if amendment could be made by ordinary legislative process Article 368 would be meaningless.

(iii) The contention that a Constitutional amendment under Article 368 is a law within the meaning of Article 13 must be rejected.

(iv) There is no conflict between Articles 13(2) and 368. The two articles operate in different fields, the former in the field of law, the latter in that of Constitutional amendment.

(v) If the First, Fourth, Sixteenth & Seventeenth Amendment Acts are void they do not legally exist from their inception. They cannot be valid from 1951 to 1957 and invalid thereafter. To say that they were valid in the past and will be invalid in the future is to amend the Constitution. Such a naked power of amendment is not given to the Judges and therefore the doctrine of prospective overruling cannot be adopted.

We may now set out some of the conclusions of Ramaswami J. as under:

(i) In a written Constitution the amendment of the Constitution is a substantive constituent act which is made in the exercise of the sovereign power through a predesigned procedure unconnected with ordinary legislation. The amending power in Article 368 is hence sui generis and cannot be compared to the lawmaking power of Parliament pursuant to Article 246 read with

Lists I and III. It follows that the expression 'law' in Article 13(2) cannot be construed as including an amendment of the Constitution which is achieved by Parliament in exercise of its sovereign constituent power, but must mean law made by Parliament in its legislative capacity under Article 246 read with List I and List III of the 7th Schedule.

(ii) The language of Article 368 is perfectly general and empowers Parliament to amend the Constitution without any exception whatsoever. The use of the word 'fundamental' to describe the rights in Part III and the word 'guaranteed' in Article 32 cannot lift the fundamental lights above the Constitution itself.

(iii) There is no room for an implication in the construction of Article 368. If the Constitution makers wanted certain basic features to be unamendable they would have said so.

(iv) It cannot be assumed that the Constitution makers intended to forge a political strait-jacket for generations to come. Today at a time when absolutes are discredited, it must not be too readily assumed that there are basic features of the Constitution which shackle the amending power and which take precedence over the general welfare of the nation and the need for agrarian and social reform.

(v) If the fundamental rights are unamendable and if Article 368 does not include any such power it follows that the amendment of, say Article 31 by insertions of Articles 31A and 1B can only be made by a violent revolution. It is doubtful if the proceedings of a new Constituent Assembly that may be called will have any legal validity for if the Constitution provides its own method of amendment, any other method will be un-constitutional and void.

(vi) It was not necessary to express an opinion on the doctrine of prospective overruling of legislation.

1356. Before dealing with Article 368, we may observe that there are two types of Constitutions, viz., rigid and flexible. It is a frequently held but erroneous impression that this is the same as saying non-documentary or documentary. Now, while it is true that a non-documentary Constitution cannot be other than flexible, it is quite possible for a documentary Constitution not to be rigid. What, then, is that makes a Constitution flexible or rigid? The whole ground of difference here is whether the process of Constitutional law-making is or is not identical with the process of ordinary law-making. The Constitution which can be altered or amended without any special machinery is a flexible Constitution. The Constitution which requires special procedure for its alteration or amendment is a rigid Constitution (see p. 66-68 of the Modern Political Constitutions by C.F. Strong). Lord Birkenhead L.C. adopted similar test in the Australian (Queensland) case of McCawley v. The King [1920] A.C. 763 though he used the nomenclature controlled and uncontrolled Constitutions in respect of rigid and flexible Constitutions. He observed in this connection:

The difference of view, which has been, the subject of careful analysis by writers upon the subject of Constitutional law, may be traced mainly to the spirit and genius of the nation in which a particular Constitution has its birth. Some communities, and notably Great Britain, have not in the framing of Constitutions felt it necessary, or thought it useful, to shackle the complete

independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived. Those Constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were in such a matter the supreme desiderata. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the Constitution.

1357. Let us now deal with Article 368 of the Constitution. As amendments in Articles 13 and 368 of the Constitution were made in purported exercise of the powers conferred by Article 368 in the form it existed before the amendment made by the Twenty-fourth Amendment, we shall deal with the article as it was before that amendment. It may be mentioned in this context that Article 4, Article 169, Fifth Schedule Para 7 and Sixth Schedule Para 21 empower the Parliament to pass laws amending the provisions of the First, Fourth, Fifth and Sixth Schedules and making amendments of the Constitution consequential on the formation of new States or alteration of areas, boundaries, or names of existing States, as well as on abolition or creation of legislative councils in States. Fifth Schedule contains provisions as to administration of controlled areas and scheduled tribes while Sixth Schedule contains provisions as to the administration of tribal areas. It is further expressly provided that no such law would be deemed to be an amendment of the Constitution for the purpose of Article 368. There are a number of articles which provide that they would continue to apply till such time as a law is made in variance of them. Some of those articles are:

10, 53(3), 65(3), 73(2), 97, 98(3), 106, 120(2), 135, 137, 142(1), 146(2), 148(3), 149, 171(2), 186, 187(3), 189(3), 194(3), 195, 210(2), 221(2), 225, 229, 239(1), 241(3), 283(1) and (2), 285 (2), 287, 300(1), 313, 345 and 373.

1358. The other provisions of the Constitution can be amended by recourse to Article 368 only.

1359. Article 368 finds its place in Part XX of the Constitution and is the only article in that part. The part is headed "Amendment of the Constitution". It is not disputed that Article 368 provides for the procedure of amending the Constitution. Question, however, arises as to whether Article 368 also contains the power to amend the Constitution. It may be stated in this connection that all the five Judges who gave the dissenting judgment in the case of Golaknath, namely, Wanchoo, Bachawat, Ramaswamil, Bhargava and Mitter JJ. expressed the view that Article 368 dealt with not only the procedure of amending the Constitution but also contained the power to amend the Constitution. The argument that the power to amend the Constitution was contained in the residuary power of Parliament in Article 248 read with item 97 of List I was rejected. Hidayatullah J. agreed with the view that amendment to the Constitution is not made under power derived from Article 248 read with entry 97 of List I. According to him, the power of amendment was sat generis. As against that, the view taken by Subha Rao C.J., Shah, Sikri, Shelat and Vaidialingam JJ. was that Article 368 merely prescribed the various steps in the matter of amendment of the Constitution and that power to amend the Constitution was derived from Articles 245, 246 and 248 read with item 97 of List I. It was said that the residuary power of Parliament can certainly take in the power to amend the Constitution.

1360. Amendment of the Constitution, according to the provisions of Article 368, is initialed by the introduction of a Bill in either House of Parliament The Bill has to be passed in each House by a majority of total membership of that House and by a majority of not less than two-thirds members of the House present and voting. After it has been so passed, the Bill is to be presented to the President for his assent. When the President gives his assent to the Bill, the Constitution, according to Article 368, shall stand amended in accordance with the terms of the Bill. There is a proviso added to Article 368 with respect to amendment of certain articles and other provisions of the Constitution including Article 368. Those provisions can be amended only if the Bill passed by the two Houses of Parliament by necessary majority, as mentioned earlier, is ratified by the Legislatures of not less than one-half of the States by resolutions to that effect. In such a case, the Bill has to be presented to the President for his assent only after the necessary ratification by the State Legislatures. On the assent being given, the Constitution stands amended in accordance with the terms of the Bill.

1361. The words in Article 368 "the Constitution shall stand amended in accordance with the terms of the Bill", in my opinion, clearly indicate that the said article provides not merely the procedure for amending the Constitution but also contains the power to amend Article 368. The fact that a separate Part was provided with the heading "Amendment of the Constitution" shows that the said part was confined not merely to the procedure for making the amendment but also contained the power to make the amendment. It is no doubt true that Article 248 read with item 97 of List I has a wide scope, but in spite of the width of its scope, it cannot, in my opinion, include the power to amend the Constitution. The power to legislate contained in Articles 245, 246 or 248 is subject to the provisions of the Constitution. If the argument were to be accepted that the power to amend the Constitution is contained in Article 248 read with item No. 97 List I, it would be difficult to make amendment of the Constitution because the amendment would in most of the cases be inconsistent with the article proposed to be amended. The only amendments which would be permissible in such an event would be, ones like those contemplated by Articles 4 and 169 which expressly provide for a law being made for the purpose in variance of specified provisions of the Constitution. Such law has to be passed by ordinary legislative process. Article 368 would thus become more or less a dead letter.

1362. Article 248 read with entry 97 List I contemplates legislative process. If the amendment of the Constitution were such a legislative process, the provision regarding ratification by the legislatures of not less than one-half of the States in respect of certain amendments of the Constitution would be meaningless because there is no question of ratification of a legislation made by Parliament in exercise of the power conferred by Article 248 read with entry 97 List I. It is noteworthy that ratification is by means of resolutions by State Legislatures. The passing of resolution can plainly be not considered to be a legislative process for making a law. The State Governors also do not come into the picture for the purpose of ratification. The State Legislatures in ratifying, it has been said, exercise a constituent function. Ratifying process, according to Orfield, is equivalent to roll call of the States. Ratification by a State of Constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the States to the proposed amendment (see The Amending of the Federal Constitution p. 62-63).

1363. The fact that the marginal note of Article 368 contained the words "Procedure for Amendment of the Constitution" would not detract from the above conclusion as the marginal note cannot control the scope of the article itself. As mentioned earlier, the words in the article that "the Constitution shall stand amended in accordance with the terms of the Bill" indicate that the power to amend the Constitution is also contained in Article 368. The existence of such a power which can clearly be discerned in the scheme and language of Article 368 cannot be ruled out or denied by invoking the marginal note of the article.

1364. The various subjects contained in entries in List I, List II and List III of Seventh Schedule to the Constitution were enumerated and specified at great length. Our Constitution in this respect was not written on a tabula rasa. On the contrary, the scheme of distribution of legislative lists in the Government of India Act, 1935 was to a great extent adopted in the Constitution. Referring to the said distribution of lists and the residuary provisions in the Government of India Act, Gwyer C.J. observed in the case In re. The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, [1939] F.C.R. 38.

The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists.

Our Constitution-makers made list of the legislative entries still more exhaustive and the intention obviously was that the subjects mentioned should be covered by one or other of the specific entries, so that as few subjects as possible and which did not readily strike to the Constitution-makers should be covered by the residuary entry 97 in List 1. The Constitution-makers, in my opinion, could not have failed to make an entry in the lists in the Seventh Schedule for amendment of the Constitution if they had wanted the amendment of Constitution to be dealt with as an ordinary legislative measure under Articles 245, 246 and 248 of the Constitution. The fact that they provided separate Part in the Constitution for amendment of the Constitution shows that they realised the importance of the subject of amendment of the Constitution. It is difficult to hold that despite their awareness of the importance of Constitutional amendment, they left it to be dealt with under and spelt out of entry 97 List I which merely deals with "any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists.

1365. The residuary entry is essential in a federal Constitution and the sole object of the residuary entry is to confer on the federal legislature or the State Legislatures, as the case may be, the power to make ordinary laws under and in accordance with the Constitution in respect of any matter, not enumerated in any other list for legislation. By the very nature of things the power to amend the Constitution cannot be in the residuary entry in a federal Constitution because the power to amend the Constitution would also include the power to alter the distribution of subjects mentioned in different entries. Such a power can obviously be not a legislative power.

1366. It was originally intended that the residuary power of legislation should be vested in the States. This is clear from the Objective Resolution which was moved by Pt. Nehru in the Constituent Assembly before the partition of the country on December 13, 1946 (see Constituent Assembly debates, Vol. I, p. 59). After the partition, the residuary power of legislation was vested in the center and was taken out of the State List. If the intention to vest residuary powers in States

had been eventually carried out, no argument could possibly have been advanced that the power to amend the Constitution was possessed by the States and not by the Union. The fact that subsequently the Constituent Assembly vested the residuary power in the Union Parliament subject to ratification by State Legislatures in certain cases, would not go to show that the residuary clause included the power to amend the Constitution.

1367. I am therefore of the view that Article 368 prescribes not only the procedure for the amendment of the Constitution but also confers power of amending the Constitution.

1368. Irrespective of the source of power, the words in Article 368 that "the Constitution shall stand amended" indicate that the process of making amendment prescribed in Article 368 is a self-executing process. The article shows that once the procedure prescribed in that article has been complied with, the end product is the amendment of the Constitution.

1369. Question then arises as to whether there is any power under Article 368 of amendment of Part III so as to take away or abridge fundamental rights. In this respect we find that Article 368 contains provisions relating to amendment of the Constitution. No words are to be found in Article 368 as may indicate that a limitation was intended on the power of making amendment of Part III with a view to take away or abridge fundamental rights. On the contrary, the words used in Article 368 are that if the procedure prescribed by that article is complied with, the Constitution shall stand amended. The words "the Constitution shall stand amended" plainly cover the various articles of the Constitution, and I find it difficult in the face of those clear and unambiguous words to exclude from their operation the articles relating to fundamental rights in Part III of the Constitution. It is an elemental rule of construction that while dealing with a Constitution every word is to be expounded in its plain, obvious and commonsense unless the context furnishes some ground to control, qualify or enlarge it and there cannot be imposed upon the words any recondite meaning or any extraordinary gloss (see Story on Constitution of the United States, Vol. I, Para 451). It has not yet been erected into a legal maxim of Constitutional construction that words were meant to conceal thoughts. If framers of the Constitution had intended that provisions relating to fundamental rights in Part III be not amended, it is inconceivable that they would not have inserted a provision to that effect in Article 368 or elsewhere. I cannot persuade myself to believe that the framers of the Constitution deliberately used words which cloaked their real intention when it would have been so simple a matter to make the intention clear beyond any possibility of doubt.

1370. In the case of The Queen v. Burah [1878] 3 A.C. 889 Lord Selborne observed:

The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited,...it is not for any court of justice to inquire further, or to enlarge constructively those conditions or restrictions.

Although the above observations were made in the context of the legislative power, they have equal, if not greater, relevance in the context of the power of amendment of the Constitution.:

1371. It also cannot be said that even though the framers of the Constitution intended that Part III of the Constitution relating to fundamental rights should not be amended, by inadvertent omission they failed to make an express provision for the purpose. Reference to the proceedings dated September 17, 1949 of the Constituent Assembly shows that an amendment to that effect was moved by Dr. P.S. Deshmukh. This amendment which related to insertion of Article 304A after Article 304 (which corresponded to present Article 368) was in the following words:

Notwithstanding anything contained in this Constitution to the contrary, no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise, shall be permissible under this Constitution and any amendment which is or is likely to have such an effect shall be void and ultra vires of any Legislature.

The above amendment, which was subsequently withdrawn, must have been incorporated in the Constitution if the framers of the Constitution had intended that no amendment of the Constitution should take away or abridge the fundamental rights in Part III of the Constitution.

1372. Before the Constitution was framed, Mr. B.N. Rau, Constitutional Adviser, sent a questionnaire along with a covering letter on March 17, 1947 to the members of the Central and Provincial Legislatures. Question 27 was to the effect as to what provision should be made regarding the amendment of the Constitution. The attention of the members of the Central and Provincial Legislatures was invited in this context to the provisions for amendment in the British, Canadian, Australian, South African, US, Swiss and Irish Constitutions. Some of those Constitutions placed limitations on the power of amendment and contained express provisions in respect of those limitations. For instance, Article 5 of the United States contained a proviso "that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article and that no State, without its consent, shall be deprived of its equal suffrage in the Senate". It is inconceivable that, despite the awareness of the fact that in the Constitutions of other countries where restriction was sought to be placed on the power of amendment an express provision to that effect had been inserted, the framers of our Constitution would omit to insert such a provision in Article 368 or in some other article if, in fact, they wanted a limitation to be placed on the power of amendment in respect of articles relating to fundamental right. On the contrary, there is clear indication that the Drafting Committee was conscious of the need of having an express provision regarding limitation on the power of amendment in case such a limitation was desired. This is clear from Article 305 of the Draft Constitution which immediately followed Article 304 corresponding to Article 368 of the Constitution as finally adopted. Article 305 of the Draft Constitution, which was subsequently dropped, was in the following terms:

305. Notwithstanding anything contained in Article 304 of this Constitution, the provisions of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes or the Indian Christians either in Parliament or in the Legislature of any State for the time being specified in Part I of the First Schedule shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution.

Article 305 of the Draft Constitution reproduced above makes it manifest that the Drafting Committee made express provision for limitation on the power of, amendment in case such a limitation was desired. The fact that in the Constitution as ultimately adopted, there was no provision either in Article 368 or in any other article containing a limitation on the power of amendment shows that no such limitation was intended.

1373. The speech of Dr. Ambedkar made on September 17, 1949 while dealing with the provision relating to amendment of the Constitution also makes it clear that he divided the various articles of the Constitution into three categories. In one category were placed certain articles which would be open to amendment by Parliament by simple majority. To that category belonged Articles 2 and 3 of the Draft Constitution relating to the creation and re-constitution of the existing States as well as some other articles like those dealing with upper chambers of the State Legislatures. The second category of articles were those which could be amended by two-thirds majority of members present and voting in each House of Parliament. The third category dealt with articles which not only required two-thirds majority of each House of Parliament but also the ratification of not less than half of the Legislatures of the States. There was nothing in the speech of Dr. Ambedkar that apart from the three categories of articles, there was a fourth category of articles contained in Part III which was not amendable and as such, could not be the subject of amendment.

1374. It may be mentioned that according to the report of the Constituent Assembly debates, the speech of Dr. Ambedkar delivered on September 17, 1949 contains the following sentence:

If the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304, all that is necessary for them is to have two-thirds majority. (Vol IX. P. 1661)

The words "Part III" in the above sentence plainly have reference to the third category of articles mentioned in the proviso to draft Article 304 (present Article 368) which required two-thirds majority and ratification by at least half of the State Legislatures. These words do not refer to Part III of the Constitution, for if that were so the sentence reproduced above would appear incongruous in the context of the entire speech and strike a discordant note against the rest of the speech. Indeed, the entire tenor of the above speech, as also of the other speeches delivered by Dr. Ambedkar in the Constituent Assembly, was that all the articles of the Constitution were subject to the amendatory process.

1375. Another fact which is worthy of note is that the Constitution (First Amendment) Act, 1951 was passed by the Provisional Parliament which had also acted as the Constituent Assembly for the drafting of the Constitution. By the First Amendment, certain fundamental eights contained in Article 19 were abridged and amended. Speeches in support of the First Amendment were made by Pt. Nehru and Dr. Ambedkar. It was taken for granted that the Parliament had by adhering to the procedure prescribed in Article 368 the right to amend the Constitution, including Part III relating to fundamental rights. Dr. Shyama Prasad Mukherjee who opposed the First Amendment expressly conceded that Parliament had the power to make the aforesaid amendment. If it had ever been the intention of the framers of the Constitution that the provisions relating to fundamental rights contained in Part III of the Constitution could not be amended, it is difficult to believe that Pt. Nehru and Dr. Ambedkar who played such an important role in the drafting of the Constitution would have supported the amendment of the Constitution or in any case would have failed to take

note of the fact in their speeches that Part III was not intended to be amended so as to take away or abridge fundamental rights. Pt. Nehru in the course of his speech in support of the First Amendment after referring to the need of making the Constitution adaptable to changing social and economic conditions and changing ideas observed:

It is of the utmost importance that people should realise that this great Constitution of ours, over which we laboured for so long, is not a final and rigid thing, which must either be accepted or broken. A Constitution which is responsive to the people's will which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it. Otherwise, if you make them feel that it is unchangeable and cannot be touched, the only thing to be done by those who wish to change it is to try to break it. That is a dangerous thing and a bad thing. therefore, it is a desirable and a good thing for people to realise that this very fine Constitution that we have fashioned after years of labour is good in so far as it goes but as society changes, as conditions change we amend it in the proper way. It is not like the unalterable law of the Medes and the Persians that it cannot be changed, although the world around may change.

1376. The First Amendment is contemporaneous practical exposition of the power of amendment under Article 368. Although as observed elsewhere, the provisions of Article 368 in my view are plain and unambiguous and contain no restrictions so far as amendment of Part III is concerned, even if it may be assumed that the matter is not free from doubt the First Amendment provides clear evidence of how the provisions of Article 368 were construed and what they were intended and assumed to convey by those who framed the Constitution and how they acted upon the basis of the said intention and assumption soon after the framing of the Constitution. The contemporaneous practical exposition furnishes considerable aid in resolving the said doubt and construing the provisions of the article. It would be pertinent to reproduce in this context the observations of Chief Justice Puller while speaking for the US Supreme Court in the case of William McPherson v. Robert R. Blacker : 146 U.S. 1.

The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow of enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained contemporaneous and subsequent practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled.

1377. I may also reproduce in this context the following passage from pages 49-50 of Willoughby's Constitution of the United States, Vol. I:

In Lithographic Co. v. Sarony 111 U.S. 53 the court declared : The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with

its formation, many of whom were members of the Convention who framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

1378. So far as the question is concerned as to whether the speeches made in the Constituent Assembly can be taken into consideration, this Court has in three cases, namely, I.C. Golak Nath and Ors. v. State of Punjab and Anr. (supra), H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and Ors. v. Union of India MANU/SC/0050/1970 : [1971]3SCR9 and Union of India v. H.S. Dhillon MANU/SC/0062/1971 : [1972]83ITR582(SC) taken the view that such speeches can be taken into account. In Golak Nath's case Subba Rao C.J. who spoke for the majority referred to the speeches of Pt. Jawaharlal Nehru and Dr. Ambedkar on page 791. Reference was also made to the speech of Dr. Ambedkar by Bachawat J. in that case on page 924. In the case of Madhav Rao, Shah J. who gave the leading majority judgment relied upon the speech of Sardar Patel, who was Minister for Home Affairs, in the Constituent Assembly (see page 83). Reference was also made to the speeches in the Constituent Assembly by Mitter J. on pages 121 and 122. More recently in H.S. Dhillon's case relating to the validity of amendment in Wealth Tax Act, both the majority judgment as well as the minority judgment referred to the speeches made in the Constituent Assembly in support of the conclusion arrived at. It can, therefore, be said that this Court has now accepted the view in its decisions since Golak Nath's case that speeches made in the Constituent Assembly can be referred to while dealing with the provision of the Constitution.

1379. The speeches in the Constituent Assembly, in my opinion, can be referred to for finding the history of the Constitutional provision and the background against which the said provision was drafted. The speeches can also shed light to show as to what was the mischief which was sought to be remedied and what was the object which was sought to be attained in drafting the provision. The speeches cannot, however, form the basis for construing the provisions of the Constitution. The task of interpreting the provision of the Constitution has to be done independently and the reference to the speeches made in the Constituent Assembly does not absolve the court from performing that task. The draftsmen are supposed to have expressed their intentions in the words' used by them in the provisions. Those words are final repositories of the intention and it would be ultimately from the words of the provision that the intention of the draftsmen would have to be gathered.

1380. The next question which arises for consideration is whether the word "law" in Article 13(2) includes amendment of the Constitution. According to Article 13(2), the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. "State" has been defined in Article 12 to include, unless the context otherwise requires, the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The stand taken on behalf of the petitioners is that amendment of the Constitution constitutes "law" for the purpose of Article 13(2). As such, no amendment of the Constitution can take away or abridge the fundamental rights conferred by Part III of the Constitution. Reference has also been made to Clause (1) of Article 13, according to which all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. It is urged that word "law" in Article

13(2) should have the same meaning as that word in Article 13(1) and if law in Article 13(1) includes Constitutional law, the same should be its meaning for the purpose of Article 13(2). Our attention has also been invited to Article 372(1) of the Constitution which provides that notwithstanding the repeal by this Constitution of the enactment referred to in Article 395 but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. According to Explanation I to Article 372, the expression "law in force" shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed notwithstanding that it or parts of it may not be then in operation either at all or in particular areas. The same is the definition of "law in force" in Article 13(3).

1381. I find it difficult to accept the contention that an amendment of Constitution made in accordance with Article 368 constitutes law for the purpose of Article 13(2). The word "law" although referred to in a large number of other articles of the Constitution finds no mention in Article 368. According to that article, the Constitution shall stand amended in accordance with the terms of the Bill after it has been passed in compliance with the provisions of that article. Article 368 thus contains an indication that what follows as a result of the compliance with Article 368 is an amendment of the Constitution and not law in the sense of being ordinary legislation. In a generic sense. "law" would include Constitutional laws, including amendment of the Constitution, but that does not seem to be the connotation of the word "law" as used in Article 13(2) of the Constitution. There is a clear distinction between statutory law made in exercise of the legislative power and Constitutional law which is made in exercise of the constituent power and the distinction should not be lost sight of A Constitution is the fundamental and basic law and provides the authority under which ordinary law is made. The Constitution of West Germany, it may be stated, is called the basic law of the Federal Republic of Germany. A Constitution derives its authority generally from the people acting in their sovereign capacity and speaking through their representatives in a Constituent Assembly or Convention. It relates to the structure of the government, the extent and distribution of its powers and the modes and principles of its operation, preceding ordinary laws in the point of time and embracing the settled policy of the nation. A statute on the other hand is law made by the representatives of the people acting in their legislative capacity, subject to the superior authority, which is the Constitution. Statutes are enactments or rules for the government of civil conduct or for the administration or for the defence of the government. They relate to law and order, criminal offences, civil disputes, fiscal matters and other subjects on which it may become necessary to have law. Statutes are quite often tentative, occasional, and in the nature of temporary expedients (see Constitutional Law and Its Administration by S.P. Weaver, p. 3), Article 13(2) has reference to ordinary piece of legislation. It would also, in view of the definition given in Clause (a) of Article 13(3), include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The Constitution has thus made it clear in matters in which there could be some doubt as to what would constitute "law". If it had been the intention of the framers of the Constitution that the "law" in Article 13 would also include Constitutional law including laws relating to the amendment of Constitution, it is not explained as to why they did not expressly so state in Clause (a) of Article 13(3). The Constitution itself contains indications of the distinction between the Constitution and the laws framed under the Constitution. Article 60 provides for the oath or

affirmation to be made and subscribed by the President before entering upon office. The language in which that oath and affirmation have been couched, though not crucial, has some bearing. The form of the oath or affirmation is as under:

I, A.B., do swear in the name of God
solemnly affirm

that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.

The facts that both the words "the Constitution and the law" have been used in the above form tends to show that for the purpose of the Constitution the law and the Constitution are not the same.

1382. It may be mentioned that Articles 56(1)(b) and 61(1) which deal with impeachment of the President refer only to "violation of the Constitution". There is no reference in those articles to violation of law. Article 69 which prescribes the oath for the Vice-President refers to "allegiance to the Constitution as by law established". The words "as by law established" indicate the legal origin of the Constitution. Article 143, to which our attention has been invited, gives power to the President to refer to the Supreme Court a question of law or fact of such importance that it is expedient to obtain the opinion of this Court. It is pointed out that question of law in that article would include a question relating to Constitutional law. This no doubt is so but this is due to the fact that words "questions of law or fact" constitute a well known phrase in legal terminology and have acquired a particular significance. From the use of those words in Article 143 it cannot be inferred that the framers of the Constitution did not make a distinction between the Constitution and the law.

1383. Articles 245, 246 and 248 deal with the making of laws. The words "shall not make any law" in Article 13(2) seem to echo the words used in Articles 245, 246 and 248 of the Constitution which deal with the making of laws. The words "make any law" in Article 13 as well as the above three articles should carry, in my opinion, the same meaning, namely, law made in exercise of legislative power. In addition to that, the law in Article 13 in view of the definition in Article 13(3) shall also include special provisions mentioned in Clause (3).

1384. It has already been mentioned above that there is no question in the case of a law made by the Parliament of its ratification by the resolutions passed by the State Legislatures. The fact that in case of some of the amendments made under Article 368 such ratification is necessary shows that an amendment of the Constitution is not law as contemplated by Article 13(2) or Articles 245, 246 and 248.

1385. Article 395 of the Constitution repealed the Indian Independence Act, 1947 and the Government of India, Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949. The law in force

mentioned in Article 372(1) has reference not to any Constitutional law in the sense of being a law relating to the Constitution of either the territory of erstwhile British India or the territory comprised in the Indian States. So far as the territory of British India was concerned, the law before January 26, 1950 relating to the Constitution was contained in the Government of India Act, 1935 and the Indian Independence Act, 1947. Both these Acts were repealed by Article 395 when the Constitution of India came into force. As regards the territory comprised in Indian States, the law relating to their Constitutions in so far as it was inconsistent with the provisions of the Constitution of India also came to an end before January 26, 1950 when the said Constitution came into force. The only Constitution which was in force since that date was the Constitution of India and it applied to the whole of India, including the erstwhile Indian States and the British India. The various notifications which were issued before January 26, 1950 mentioned that with effect from that date "the Constitution of India shortly to be adopted by the Constituent Assembly of India shall be the Constitution for the States as for other parts of India and shall be enforced as such" (see White Paper on Indian States, pages 365 to 371). It would thus appear that hardly any law containing the Constitutions of territory of erstwhile Indian States remained in force after the coming into force of the Constitution of India with all its exhaustive provisions. If the law in force contemplated by Article 372(1) must be such as was continued after January 26, 1950, it would follow that Article 372 does not relate to the Constitutional law in the sense of being law relating to the Constitution of a territory.

1386. Although the law in force referred to in Article 372(1) would not include law relating to the Constitutions of the territory of erstwhile British India or the Indian States, it did include law relating to subjects dealt with by the Constitutions in force in those territories. Such a law which partakes of the nature of either a statutory law or an Order made under the organic provisions of those Constitutions, continued in force under Article 372(1). A statutory law or Order is obviously of an inferior character and cannot have the same status as that of a Constitution. Article 372(1) in the very nature of things deals with laws made under the provisions of Constitutions which were in force either in the erstwhile British India or the territory comprised in Indian States. The opening words of Article 372(1) "notwithstanding the repeal by this Constitution of the enactments referred to in Article 395" indicate that the laws in force contemplated by Article 372 are those laws which were framed under the repealed Indian Independence Act, 1947 and the Government of India Act, 1935 or similar other legislative enactments or orders made under the provisions of Constitutions of erstwhile Indian States. Such legislative enactments or Orders were inferior in status to a Constitution. I am, therefore, of the view that the word "law" in Article 372 has reference to law made under a Constitution and not to the provisions of a Constitution itself.

1387. Article 372(1) is similar to the provisions of Section 292 of the Government of India Act, 1935. As observed by Gwyer C.J. in the case of The United Provinces v. Mst. Atiqa Begum and Ors. [1940] 2 F.C.R. 110 such a provision is usually inserted by draftsmen to negative the possibility of any existing law being held to be no longer in force by reason of the repeal of the law which authorized its enactment. The question with which we are concerned is whether law in Article 13 or Article 372 could relate to the provisions of the Constitution or provisions relating to its amendment. So far as that question is concerned, I am of the opinion that the language of Articles 372 and 13 shows that the word "law" used therein did not relate to such provisions. The Constitution of India was plainly not a law in force at the time when the Constitution came into force. An amendment of the Constitution in the very nature of things can be made only after the

Constitution comes into force. As such, a law providing for amendment of the Constitution cannot constitute law in force for the purpose of Article 13(1) or Article 372(1).

1388. The language of Article 13(2) shows that it was not intended to cover amendments of the Constitution made in accordance with Article 368. It is difficult to accede to the contention that even though the framers of the Constitution put no express limitations in Article 368 on the power to make amendment, they curtailed that power by implication under Article 13(2). In order to find the true scope of Article 13(2) in the context of its possible impact on the power of amendment, we should read it not in isolation but along with Article 368. The rule of construction, to use the words of Lord Wright M.R. in James v. Commonwealth of Australia [1936] A.C. 578 is to read the actual words used "not in vacuo but as occurring in a single complex instrument in which one part may throw light on another". A combined reading of Article 13(2) and Article 368, in my view, clearly points to the conclusion that extinguishment or abridgement of fundamental rights contained in Part III of the Constitution is not beyond the amendatory power conferred by Article 368. The alleged conflict between Article 13(2) and Article 368 is apparent and not real because the two provisions operate in different fields and deal with different objects.

1389. The Constitution itself treats the subject of ordinary legislation as something distinct and different from that of amendment of the Constitution. Articles 245 to 248 read with Seventh Schedule deal with ordinary legislation, while amendment of Constitution is the subject matter of Article 368 in a separate Part. Article 368 is independent and self-contained. Article 368 does not contain the words "subject to the provisions of this Constitution" as are to be found at the beginning of Article 245. The absence of those words in Article 368 thus shows that an amendment of the Constitution made under that article has a status higher than that of legislative law and the two are of unequal dignity. If there is any limitation on power of amendment, it must be found in Article 368 itself which is the sole fountain-head of power to amend, and not in other provisions dealing with ordinary legislation. As stated on pages 24-26 in the Amending of Federal Constitution by Orfield, 'limitation on the scope of amendment should be found written in the amending clause and the other articles of the Constitution should not be viewed as limitations'. The very fact that the power of amendment is put in a separate Part (Part XX) and has not been put in the Part and Chapter (Part XI Chapter I) dealing with legislative powers shows that the two powers are different in character and operate in separate fields. There is also a vital difference in the procedure for passing ordinary legislation and that for bringing about a Constitutional amendment under Article 368. The fact that an amendment Bill is passed by each House of Parliament and those two Houses also pass ordinary legislation does not obliterate the difference between the constituent power and the legislative power nor does it warrant the conclusion that constituent power is a species of legislative power.

1390. Our attention has been invited on behalf of the petitioners to the proceedings of the Constituent Assembly on April 29, 1947. Sardar Patel on that day made a move in the Constituent Assembly that Clause (2) be accepted. Clause (2) which provided the basis for Clauses (1) and (2) of Article 13 as finally adopted was in the following words:

All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this part of the Constitution shall stand

abrogated to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right.

Mr. K. Santhanam then moved an amendment for substituting the concluding words of Clause (2) by the following words:

Nor shall any such right be taken away or abridged except by an amendment of the Constitution.

The above amendment was accepted by Sardar Patel. Motion was thereafter adopted accepting the amended clause which was in the following words:

All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under that part of the Constitution shall stand abrogated to the extent of such inconsistency, nor shall any such right be taken away or abridged except by an amendment of the Constitution.

1391. In October 1947 the Constitutional Adviser prepared the Draft Constitution, Sub-clause (2) of Clause 9 of which was as under:

(2) Nothing in this Constitution shall be taken to empower the State to make any law which curtails or takes away any of the rights conferred by Chapter II of this Part except by way of amendment of this Constitution under Section 232 and any law made in contravention of this sub-section shall, to the extent of the contravention, be void.

Minutes of the Drafting Committee of October 13, 1947 show that it was decided to revise Clause 9. Revised Clause 9 was put in the appendix as follows:

9. (1) All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with any of the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make law which takes away or abridges the rights conferred by this Part and any law made in contravention of this sub-section shall, to the extent of the contravention be void.

(3) In this section, the expression 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India or any part thereof.

On February 21, 1948 Dr. Ambedkar forwarded the Draft Constitution of India to the President of the Constituent Assembly along with a covering letter. Clause 9 in this Draft Constitution was numbered as Clause 8. Sub-clause (2) of Clause 9 was retained as Sub-clause (2) of Clause 8. A proviso was also added to that sub-clause, but that is not material for the purpose of the present discussion. The Constitution was thereafter finally adopted and it contained Article 13, the provisions of which have been reproduced earlier.

1392. It has been argued on behalf of the petitioners that the members of the Drafting Committee who were eminent lawyers of India, deliberately revised Clause 9 of the Draft Constitution prepared by the Constitutional Adviser with a view to undo the effect of the amendment moved by Mr. Santhanam which had been accepted by the Constituent Assembly, because the members of the Drafting Committee wanted that the fundamental rights should not be abridged or taken away by the amendment of the Constitution.

1393. I find it difficult to accept the above argument. It is inconceivable that the members of the Drafting Committee would reverse the decision which had been taken by the Constituent Assembly when it accepted the amendment moved by Mr. Santhanam and adopted the motion for the passing of clause containing that amendment. It would appear from the speech of Mr. Santhanam that he had moved the amendment in order to remove doubt. Although there is nothing in the minutes to show as to why the members of the Drafting Committee did not specifically incorporate Mr. Santhanam's amendment in the revised clause, it seems that they did so because they took the view that it was unnecessary. In his letter dated February 21, 1948 Dr. Ambedkar, Chairman of the Drafting Committee wrote to the President of the Constituent Assembly;

In preparing the Draft the Drafting Committee was of course expected to follow the decisions taken by the Constituent Assembly or by the various Committees appointed by the Constituent Assembly. This the Drafting Committee has endeavoured to do as far as possible. There were however some matters in respect of which the Drafting Committee felt it necessary to suggest certain changes. All such changes have been indicated in the draft by underlining or side-lining the relevant portions. Care has also been taken by the Drafting Committee to insert a footnote explaining the reason for every such change.

It is, therefore, plain that if it had been decided to make a material change in the draft article with a view to depart from the decision of the Constituent Assembly, the change would have been indicated by underlining or sidelining the relevant provision and also by inserting a footnote explaining reasons for the change. In the absence of any underlining, sidelining or footnote, it can be presumed that members of the Drafting Committee did not intend to make a change. A very material fact which should not be lost sight of in this context is the note which was put in October 1948 under the draft Article 8. It was stated in the Note:

Clause (2) of Article 8 does not override the provisions of Article 304 of the Constitution. The expression "law" used in the said clause is intended to mean "ordinary legislation". However, to remove any possible doubt, the following amendment may be made in Article 8:

In the proviso to Clause (2) of Article 8, after the words "nothing in this clause shall" the words "affect the provisions of Article 304 of this Constitution or be inserted." (see page 26 Shiva Rao's "The Framing of India's Constitution" Vol. IV).

The above note and other such notes were made by the Constitutional Adviser and reproduced fully the views of the Drafting Committee and/or of the Special Committee (see page 4 Shiva Rao's "The Framing of India's Constitution" Vol. I). It would thus appear that there is no indication that the members of the Drafting Committee wanted to deviate from the decision of the Constituent

Assembly by making the provisions relating to fundamental rights unamendable. On the contrary, the note shows that they accepted the view embodied in the decision of the Constituent Assembly.

1394. Apart from that I am of the view that if the preservation of the fundamental rights was so vital an important a desideratum, it would seem logical that a proviso would have been added in Article 368 expressly guaranteeing the continued existence of fundamental rights in an unabridged form. This was, however, not done.

1395. The next question which should now engage our attention is about the necessity of amending the Constitution and the reasons which weighed with the framers of the Constitution for making provision for amendment of the Constitution. A Constitution provides the broad outlines of the administration of a country and concerns itself with the problems of the Government. This is so whether the Government originates in a forcible seizure of power or comes into being as the result of a legal transfer of power. At the time of the framing of the Constitution many views including those emanating from conflicting extremes are presented. In most cases the Constitution is the result of a compromise between conflicting views. Those who frame a Constitution cannot be oblivious of the fact that in the working of a Constitution many difficulties would have to be encountered and that it is beyond the wisdom of one generation to hit upon a permanently workable solution for all problems which may be faced by the State in its onward march towards further progress. Sometimes a judicial interpretation may make a Constitution broad-based and put life into the dry bones of a Constitution so as to make it a vehicle of a nation's progress. Occasions may also arise where judicial interpretation might rob some provision of a Constitution of a part of its efficacy as was contemplated by the framers of the Constitution. If no provision were made for the amendment of the Constitution, the people would be left with no remedy or means for adapting it to the changing need of times and would per force have recourse to extra-Constitutional methods of changing the Constitution. The extra-Constitutional methods may sometimes be bloodless but more often they extract a heavy toll of the lives of the citizen and leave a trail of smouldering bitterness. A State without the means of some change, as was said by Burke in his Reflections on Revolution, is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve. According to Dicey, twelve unchangeable Constitutions of France have each lasted on an average for less than ten years, and have frequently perished by violence. Louis Phillipe's monarchy was destroyed within seven years of the time when Tocqueville pointed out that no power existed legally capable of altering the articles of the Charter. On one notorious instance at least-and other examples of the same phenomenon might be produced from the annals of revolutionary France-the immutability of the Constitution was the ground or excuse for its violent subversion. To quote the words of Dicey:

Nor ought the perils in which France was involved by the immutability with which the statement of 1848 invested the Constitution to be looked upon as exceptional; they arose from a defect which is inherent in every rigid Constitution. The endeavour to create laws which cannot be changed is an attempt to hamper the exercise of sovereign power; it therefore tends to bring the letter of the law into conflict with the will of the really supreme power in the State. The majority of the French electors were under the Constitution the true sovereign of France; but the rule which prevented the legal re-election of the President in effect brought the law of the land into conflict with the will of the majority of the electors, and produced, therefore, as a rigid Constitution has a natural tendency

to produce, an opposition between the letter of the law and the wishes of the sovereign. If the inflexibility of French Constitutions has provoked revolution, the flexibility of English Constitutions has, once at least, saved them from violent overthrow.

The above observations were amplified by Dicey in the following words:

To a student, who at this distance of time calmly studies the history of the first Reform Bill, it is apparent, that in 1832 the supreme legislative authority of Parliament enabled the nation to carry through a political revolution under the guise of a legal reform.

The rigidity in short, of a Constitution tends to check gradual innovation; but, just because it impedes change, may, under unfavourable circumstances occasion or provoke revolution.

According to Finer, the amending clause is so fundamental to a Constitution that it may be called the Constitution itself (see The Theory and Practice of Modern Government, p. 156-157). The amending clause, it has been said, is the most important part of a Constitution. Upon its existence and truthfulness, i.e. its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceable continuity or shall suffer alterations of stagnation, retrogression, and revolution. A Constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the state be truthfully organized in the Constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the state (see Political Science and Comparative Constitutional Law, Vol. I by Burgess, p. 137). Burgess further expressed himself in the following words:

It is equally true that development is as much a law of state life as existence. Prohibit the former, and the latter is the existence of the body after the spirit has departed. When, in a democratic political society, the well-matured, long and deliberately formed will of the undoubted majority can be persistently and successfully thwarted, in the amendment of its organic law, by the will of the minority, there is just as much danger to the state from revolution and violence as there is from the caprice of the majority, where the sovereignty of the bare majority is acknowledged. The safeguards against too radical change must not be exaggerated to the point of dethroning the real sovereign. (ibid p. 152)

Justifying the amendment of the Constitution to meet the present conditions, relations and requirements, Burgess said we must not, as Mirabeau finely expressed it, lose the grande morale in the petite morale.

1396. According to John Stuart Mill, no Constitution can expect to be permanent unless it guarantees progress as well as order. Human societies grow and develop with the lapse of time, and unless provision is made for such Constitutional readjustments as their internal development requires, they must stagnate or retrogress (see Political Science and Government by J.W. Garner p. 536, 537).

1397. Willis in his book on the Constitutional Law of the United States has dealt with the question of amendment of the Constitution in the following words:

Why should change and growth in Constitutional law stop with the present? We have always had change and growth, We have needed change and growth in the past because there have been changes and growth in our economic and social life. There will probably continue to be changes in our economic and social life and there should be changes in our Constitutional law in the future to meet such changes just as much as there was need of change in the past. The Fathers in the Constitutional Convention expected changes in the future : otherwise they would not have provided for amendment. They wanted permanency or our Constitution and there was no other way to obtain it. The people of 1789 had no more sovereign authority than do the people of the present.

Pleading for provision for amendment of a Constitution and at the same time uttering a note of caution against a too easy method of amendment, Willis wrote:

If no provision for amendment were provided, there would be a constant danger of revolution. If the method of amendment were made too easy, there would be the danger of too hasty action all of the time. In either case there would be a danger of the overthrow of our political institutions. Hence the purpose of providing for amendment of the Constitution is to make it possible gradually to change the Constitution in an orderly fashion as the changes in social conditions make it necessary to change the fundamental law to correspond with such social change.

1398. We may also recall in this connection the words of Harold Laski in his tribute to Justice Holmes and the latter's approach to the provision of the US Constitution. Said Laski:

The American Constitution was not made to compel the twentieth-century American to move in the swaddling clothes of his ancestors' ideas. The American Constitution must be moulded by reason to fit new needs and new necessities.... The law must recognize change and growth even where the lawyer dislikes their implications. He may be skeptical of their implications; he has not the right to substitute his own pattern of Utopia for what they seek to accomplish.

1399. According to Ivor Jennings, flexibility is regarded as a merit and rigidity a defect because it is impossible for the framers of a Constitution to foresee the conditions in which it would apply and the problems which will arise. They have not the gift of prophecy. A Constitution has to work not only in the environments it was drafted, but also centuries later (see Some Characteristics of Indian Constitution, p. 14-15). It has consequently been observed by Jennings:

The real difficulty is that the problems of life and society are infinitely variable. A draftsman thinks of the problems that he can foresee, but he sees through a glass, darkly. He cannot know what problems will arise in ten, twenty, fifty or a hundred years. Any restriction on legislative power may do harm, because the effect of that restriction in new conditions cannot be foreseen.

1400. The machinery of amendment, it has been said, should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order to set it in motion, an accumulation of force sufficient to explode it. In arranging it, due consideration should be given on the one hand to the requisites of growth and on the other hand to those of conservatism. The letter of the Constitution must neither be idolized as a sacred instrument with that mistaken conservatism which ding to its own worn out garments until the body is ready to perish from cold,

nor yet ought it to be made a plaything of politicians, to be tampered with and degraded to the level of an ordinary statute (see Political Science and Government by J.W. Garner, p. 538).

1401. The framers of our Constitution were conscious of the desirability of reconciling the urge for change with the need of continuity. They were not oblivious of the phenomenon writ large in human history that change without continuity can be anarchy; change with continuity can mean progress; and continuity without change can mean no progress. The Constitution-makers have, therefore, kept the balance between the danger of having a non-amendable Constitution and a Constitution which is too easily amendable. It has accordingly been provided that except for some not very vital amendments which can be brought about by simple majority, other amendments can be secured only if they are passed in each House of Parliament by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of each House present and voting. Provision is further made that in respect of certain matters which affect the interest of the States the amendment must also be ratified by the legislatures of not less than one half of the States by resolution to that effect. It can, therefore, be said that while a provision has been made for amendment of the Constitution, the procedure for the bringing about of amendment is not so easy as may make it a plaything of politicians to be tampered with and degraded to the level of ordinary statute. The fact that during the first two decades after the coming into force of the Constitution the amending Bills have been passed without much difficulty with requisite majority is a sheer accident of history and is due to the fact that one party has happened to be in absolute majority at the center and many of the States. This circumstance cannot obliterate the fact that in normal circumstances when there are well balanced parties in power and in opposition the method of amending the Constitution is not so easy.

1402. Another circumstance which must not be lost sight of is that no generation has monopoly of wisdom nor has any generation a right to place fetters on future generations to mould the machinery of government and the laws according to their requirements. Although guidelines for the organization and functioning of the future government may be laid down and although norms may also be prescribed for the legislative activity, neither the guidelines should be so rigid nor the norms so inflexible and unalterable as should render them to be incapable of change, alteration and replacement even though the future generations want to change, alter or replace them. The guidelines and norms would in such an event be looked upon as fetters and shackles upon the free exercise of the sovereign will of the people in times to come and would be done away with by methods other than Constitutional. It would be nothing short of a presumptuous and vain act and a myopic obsession with its own wisdom for one generation to distrust the wisdom and good sense of the future generation and to treat them in a way as if the generations to come would not be sui juris. The grant of power of amendment is based upon the assumption that as in other human affairs, so in Constitutions, there are no absolutes and that the human mind can never reconcile itself to fetters in its quest for a better order of things. Any fetter resulting from the concept of absolute and ultimate inevitably gives birth to the urge to revolt. Santayana once said : "Why is there sometimes a right to revolution? Why is there sometimes a duty to loyalty? Because the whole transcendental philosophy, if made ultimate, is false, and nothing but a selfish perspective hypostasized, because the will is absolute neither in the individual nor in the humanity..." (see German Philosophy and Politics (1915) 645-649 quoted by Frankfurter J. in "Mr. Justice Holmes" 931 Ed. page 117). What is true of transcendental philosophy is equally true in the mundane sphere of a Constitutional provision. An unamendable Constitution, according to Mulford, is the worst

tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which was adjourned without day. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres (see Political Science and Government by J.W. Garner pages 537, 538).

1403. According to Woodrow Wilson, political liberty is the right of those who are governed to adjust government to their own needs and interest. Woodrow Wilson in this context quoted Burke who had said that every generation sets before itself some favourite object which it pursues as the very substance of liberty and happiness. The ideals of liberty cannot be fixed from generation to generation; only its conception can be, the large image of what it is. Liberty fixed in unalterable law would be no liberty at all. Government is a part of life, and, with life, it must change, alike in its objects and in its practices; only this principle must remain unaltered, this principle of liberty, that there must be the freest right and opportunity of adjustment. Political liberty consists in the best practicable adjustment between the power of the government and the privilege of the individual; and the freedom to alter the adjustment is as important as the adjustment itself for the case and progress of affairs and the contentment of the citizen (see Constitutional Government in the United States by Woodrow Wilson, p. 4-6).

1404. Each generation, according to Jefferson, should be considered as a distinct nation, with a right by the will of the majority to bind themselves but none to bind the succeeding generations, more than the inhabitant of another country. The earth belongs in usufruct to the living, the dead have neither the power nor the right over it. Jefferson even pleaded for revision or opportunity for revision of Constitution every nineteen years. Said the great American statesman:

The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their and, because of rights gratuitously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine and suppose that preceding generations held the earth more freely than we do, had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine that the earth belongs to the dead and not the living.

The above words were quoted during the course of the debate in the Constituent Assembly (see Vol. XI Constituent Assembly debates, p. 975)

1405. Thomas Paine gave expression to the same view in the following words:

There never did, there never will, and there never can, exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the 'end of time', or of commanding for ever how the world shall be governed, or who shall govern it; and therefore all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right not the power to do, nor take power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it The vanity and presumption of

governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow.

We may also reproduce the words of Pt. Nehru in His speech to the Constituent Assembly on November 11, 1948:

And remember this that while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. Their should be a certain flexibility. If you make anything rigid and permanent you stop a Nation's growth, the growth of living vital organic people. therefore it has to be flexible.

1406. If it is not permissible under Article 368 to so amend the Constitution as to take away or abridge the fundamental rights in Part III, as has been argued on behalf of the petitioners, the conclusion would follow that the only way to take away or abridge fundamental rights, even if the overwhelming majority of people, e.g. 90 per cent of them want such an amendment, is by resort to extra-Constitutional methods like revolution. Although, in my opinion, the language of Article 368 is clear and, contains no limitation on the power to make amendment so as to take away or abridge fundamental rights, even if two interpretations were possible, one according to which the abridgement or extinguishment of fundamental rights is permissible in accordance with the procedure prescribed by Article 368 and the other according to which the only way of bringing about such a result is an extra-Constitutional method like revolution, the court, in my opinion, should lean in favour of the first interpretation. It hardly needs much argument to show that between peaceful amendment through means provided by the Constitution and the extra-Constitutional method with all its dangerous potentialities the former method is to be preferred. The contrast between the two methods is so glaring that there can hardly be any difficulty in making our choice between the two alternatives.

The aforesaid discussion would also reveal that the consequences which would follow from the acceptance of the view that there is no power under Article 368 to abridge or take away fundamental rights would be chaotic because of the resort to extra-Constitutional methods. As against that the acceptance of the opposite view would not result in such consequences. Judged even in this light, I find it difficult to accede to the contention advanced on behalf of the petitioner.

1407. I may at this stage deal with the question, adverted to by the learned Counsel for the petitioners as to how far the consequences have to be taken into account in construing the provisions of the Constitution. In this connection, I may observe that it is one of the well-settled rules of construction that if the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature. It is equally well-settled that where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction, or confusion into the working of the system (see Collector of Customs, Baroda v. Digvijaysinhji Spinning & Weaving Mills Ltd. MANU/SC/0365/1961 : 1983ECR2163D(SC)). These principles of construction apply with greater force when we are dealing with the provisions of a Constitution.

1408. I have kept the above principles in view and am of the opinion that as the language of Article 368 is plain and unambiguous, it is not possible to read therein a limitation on the power of Parliament to amend the provisions of Part III of the Constitution so as to abridge or take away fundamental rights; Apart from that, I am of the view that if two constructions were possible, the construction which I have, accepted would, as mentioned above, avoid chaotic consequences and would also prevent the introduction of uncertainty, friction or confusion into the working of our Constitution.

1409. It is also, in my opinion, not permissible in the face of the plain language of Article 368 to ascertain by any process akin to speculation the supposed intention of the Constitution-makers. We must act on the principle that if the word's are plain and free from any ambiguity the Constitution-makers should be taken to have incorporated their intention in those words.

1410. It seems inconceivable that the framers of the Constitution in spite of the precedents of the earlier French Constitutions which perished in violence because of their non-amendability, inserted in the Constitution a Part dealing with fundamental rights which even by the unanimous vote of the people could not be abridged or taken away and which left with people no choice except extra-Constitutional methods to achieve that object. The mechanics of the amendment of the Constitution, including those relating to extinguishment or abridgement of fundamental rights, in my opinion, are contained in the Constitution itself and it is not necessary to have recourse to a revolution or other extra-Constitutional methods to achieve that object.

1411. Confronted with the situation that if the stand of the petitioners was to be accepted about the inability of the Parliament to amend Part III of the Constitution except by means of a revolution or other extra-Constitutional methods, the learned Counsel for the petitioners has argued that such an amendment is possible by making law for convening a Constituent Assembly or for holding a referendum. It is urged that there would be an element of participation of the people in the convening of such a Constituent Assembly or the holding of a referendum and it is through such means that Part III of the Constitution can be amended so as to take away or abridge fundamental rights. The above argument, in my opinion, is untenable and fallacious. If Parliament by a two-thirds majority in each House and by following the procedure laid down in Article 368 cannot amend Part III of the Constitution so as to take away or abridge fundamental rights, it is not understood as to how the same Parliament can by law create a body which can make the requisite amendment. If it is not within the power of Parliament to take away or abridge fundamental rights even by a vote of two-thirds majority in each House, would it be permissible for the same Parliament to enact legislation under entry 97 List I of Seventh Schedule by simple majority for creating a Constituent Assembly in order to take away or abridge fundamental rights ? Would not such a Constituent Assembly be a creature of statute made by parliament even though such a body has the high-sounding name of Constituent Assembly ? The nomenclature of the said Assembly cannot conceal its real nature as being one created under a statute made by the Parliament. A body created by the Parliament cannot have powers greater than those vested in the Parliament. It is not possible to accept the contention that what the Parliament itself could not legally do, it could get done through a body created by it. If something is impermissible, it would continue to be so even though two steps are taken instead of one for bringing about the result which is not permitted. Apart from the above if we were to hold that the Parliament was entitled under entry 97 List I to make a law for convening a Constituent Assembly for taking away or abridging fundamental

rights, some startling results are bound to follow. A law made under entry 97 List I would need a simple majority in each House of the Parliament for being brought on statute book, while an amendment of the Constitution would require a two-thirds majority of the members of each House present and voting. It would certainly be anomalous that what Parliament could not do by two-thirds majority, it can bring about by simple majority. This apart, there are many articles of the Constitution, for the amendment of which ratification by not less than half of the State Legislatures is required. The provision regarding ratification in such an event would be set at naught. There would be also nothing to prevent Parliament while making a law for convening a Constituent Assembly to exclude effective representation or voice of State Legislatures in the convening of Constituent Assembly.

1412. The argument that provision should be made for referendum is equally facile. Our Constitution-makers rejected the method of referendum. In a country where there are religious and linguistic minorities, it was not considered a proper method of deciding vital issues. The leaders of the minority communities entertained apprehension regarding this method. It is obvious that when passions are roused, the opinion of the minority in a popular referendum is bound to get submerged and lose effectiveness.

1413. It also cannot be said that the method of bringing about amendment through referendum is a more difficult method. It is true that in Australia over 30 amendments were submitted to referendum, out of which only four were adopted and two of them were of trivial nature. As against that we find that the method of referendum for amending the Constitution has hardly provided much difficulty in Switzerland. Out of 64 amendments proposed for amending the federal Constitution, 49 were adopted in a popular referendum. So far as the method of amendment of the Constitution by two-third majority in either House of the Central Legislature and the ratification by the State Legislatures is concerned, we find that during first 140 years since the adoption of the United States Constitution, 3,113 proposals of amendment were made and out of them, only 24 so appealed to the Congress as to secure the approval of the Congress and only 19 made sufficient appeal to the State legislatures to secure ratification (see Constitutional Law of United States by Willis, p. 128). It, therefore, cannot be said that the method of referendum provides a more effective check on the power of amendment compared to the method of bringing it about by prescribed majority in each house of the Parliament.

1414. Apart from that I am of the view that it is not permissible to resort to the method of referendum unless there be a Constitutional provision for such a course in the amendment provision. In the case of George S. Hawkes v. Harvey C. Smith as Secretary of State of Ohio 64 L Ed. 871 the US Supreme Court was referred in the context of ratification by the States of the Eighteenth Amendment to the Constitution of the Ohio State which contained provision for referendum. It was urged that in the case of such a State ratification should be by the method of referendum. Repelling this contention, the court held:

Referendum provisions of State Constitutions and statutes cannot be applied in the ratification or objection of amendments to the Federal Constitution without violating the requirement of Article 5 of such Constitution, that such ratification shall be by the legislatures of the several states, or by conventions therein, as Congress shall decide.

The same view was reiterated by the US Supreme Court in State of Rhode Island v. A. Mitchell Palmer Secretary of State and other connected cases better known as National Prohibition Cases 253 S.C.R. 350 64 Lawyers Edition 946.

1415. Argument has been advanced on behalf of the petitioner that there is greater width of power for an amendment of the Constitution if the amendment is brought about by a referendum compared to the power of amendment vested in the two Houses of Parliament or Federal Legislature even though it is required to be passed by a prescribed majority and has to be ratified by the State Legislatures. In this respect we find that different Constitutions have devised different methods of bringing about amendment. The main methods of modern Constitutional amendment are:

(1) by the ordinary legislature, but under certain restrictions;

(2) by the people through a referendum;

(3) by a majority of all the units of a federal state;

(4) by a special convention.

In some cases the system of amendment is a combination of two or more of these methods.

1416. There are three ways in which the legislature may be allowed to amend the Constitution, apart from the case where it may do so in the ordinary course of legislation. The simplest restriction is that which requires a fixed quorum of members for the consideration of proposed amendments and a special majority for their passage. The latter condition operated in the now defunct Constitution of Rumania. According to Article 146 of the Constitution of USSR the Constitution may be amended only by a decision of Supreme Soviet of USSR adopted by a majority of not less than two-thirds of the votes in each of its chambers. A second sort of restriction is that which requires a dissolution and a general election on the particular issue, so that the new legislature, being returned with a mandate for the proposal, is in essence, a constituent assembly so far as that proposal is concerned. This additional check is applied in Belgium, Holland, Denmark and Norway (in all of which, however, also a two-thirds parliamentary majority is required to carry the amendment after the election) and in Sweden. A third method of Constitutional change by the legislature is that which requires a majority of the two Houses in joint session, that is to say, sitting together as one House, as is the case, for example, in South Africa.

1417. The second method is that which demands a popular vote or referendum or plebiscite. This device was employed in France during the Revolution and again by Louis Napoleon, and in Germany by Hitler. This system prevails in Switzerland, Australia, Eire, May, France (with certain Presidential provisions in the Fifth Republic) and in Denmark.

1418. The third method is peculiar to federations. The voting on the proposed measure may be either popular or by the legislatures of the states concerned. In Switzerland and Australia the referendum is in use; in the United States any proposed amendment requires ratification by the legislatures, or special conventions of three fourth of the several states.

1419. The last method is one in which a special body is created ad hoc for the purpose of Constitutional revision. In some of the states of the United States, for example, this method is in use in connection with the Constitution of the states concerned. Such a method is also allowed if the Federal Congress proposes this method for amendment of the United States Constitutions. This method is prevalent in some of the states in Latin America also (see Modern Political Constitutions by C.F. Strong, p. 153-154).

1420. The decision as to which method of amending the Constitution should be chosen has necessarily to be that of the Constituent Assembly. This decision is arrived at after taking into account the national requirements, the historical background, conditions prevailing in the country and other factors or circumstances of special significance for the nation. Once a method of amendment has been adopted in a Constitution, that method has to be adhered to for bringing about the amendment. The selection of the method of amendment having been made by the Constituent Assembly it is not for the court to express preference for another method of amendment. Amendment brought about by one method prescribed by the Constitution is as effective as it would have been if the Constitution had prescribed another method of bringing about amendment unless there be something in the Constitution itself which restricts the power of amendment. Article 138 of the Italian Constitution makes provision for referendum to bring about amendment of the Constitution. It has however, been expressly provided in the article that referendum does not take place if a law has been approved in its second vote by a majority of two-thirds of the members of each chamber. The Italian Constitution thus makes a vote of majority of two-thirds of the members of each chamber at the second voting as effective as a referendum. Article 89 of the Constitution of the French Fifth Republic like-wise makes provision for referendum for amendment of Constitution. It is, however, provided in that article that the proposed amendment is not submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in that case the proposed amendment is approved only if it is accepted by three-fifth majority of the votes cast.

1421. We may at this stage advert to Article 5 of the United States Constitution which reads as under:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislature of two-thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourth thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

The above article makes it clear that there are two methods of framing and proposing amendments.

(A) Congress may itself, by a two-thirds vote in each house, prepare and propose amendments.

(B) The legislatures of two-thirds of the States may require Congress to summon a Constitutional Convention. Congress shall thereupon do so, having no option to refuse; and the Convention when called shall draft and submit amendments. No provision is made as to the election and composition of the Convention, matters which would therefore appear to be left to the discretion of Congress.

1422. There are the following two methods of enacting amendments framed and proposed in either of the foregoing ways. It is left to Congress to prescribe one or other method as Congress may think fit.

(X) The legislatures of three-fourths of the States may ratify any amendments submitted to them.

(Y) Conventions may be called in the several States, and three-fourths of these conventions may ratify.

1423. Except for Twenty-first Amendment, on all the occasions on which the amending power has been exercised, method A has been employed and method X for ratifying-i.e., no drafting conventions of the whole Union or ratifying conventions in the several States have ever been summoned. The consent of the President is not required to a Constitutional amendment (see American Commonwealth by James Bryce, pp. 365-366).

1424. There is one provision of the Constitution which cannot be changed by this process. It is that which secures to each and every State equal representation in one branch of the legislature because according to proviso to Article V, no State without its consent shall be deprived of its equal suffrage in the Senate.

1425. The question as to whether the width of power of amendment is greater in case the amendment is passed by a people's convention compared to the width of the power if it is passed by the prescribed majority in the legislatures arose in the case of United States v. Sprague 282 U.S. 716 decided by the Supreme Court of the United States. In that case the Constitutional validity of the Eighteenth Amendment was assailed on the ground that it should have been ratified by the Conventions because it took away the powers of the States and conferred new direct powers over individuals. The trial court rejected all these views and yet held the Eighteenth Amendment un-constitutional on theories of "political science," the "political thought" of the times, and a "scientific approach to the problem of government." The United States Supreme Court on appeal upheld the Eighteenth Amendment. After referring to the provisions of Article 5 Roberts J., who gave the opinion of the court, observed:

The choice, therefore, of the mode of ratification, lies in the sole discretion of Congress. Appellees, however, pointed out that amendments may be of different kinds, as e.g., mere changes in the character of federal means or machinery, on the one hand, and matters affecting the liberty of the citizen on the other. They say that the framers of the Constitution expected the former sort might be ratified by legislatures, since the States as entities would be wholly competent to agree to such alterations, whereas they intended that the latter must be referred to the people because not only of lack of power in the legislatures to ratify, but also because of doubt as to their truly representing the people.

Repelling the contention on behalf of the appellees, the court observed:

If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article 5 as to exclude implication or speculation, The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.

The court referred to the Tenth Amendment which provided that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people." The argument that the language of the Tenth Amendment demonstrates that the people reserved to themselves powers over their personal liberty, that the legislatures were not competent to enlarge the powers of the Federal Government in that behalf and that the people never delegated to the Congress the unrestricted power of choosing the mode of ratification of a proposed amendment was described by the Court to be complete non sequitur. The fifth Article, it was observed, does not purport to delegate any governmental power to the United States, nor to withhold any from it. On the contrary, that article is a grant of authority by the people to Congress, and not to the United States. The court further observed:

They (the people) deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. Unless and until that Article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification.

1426. I am, therefore, of the view that there is no warrant for the proposition that as the amendments under Article 368 are brought about by the prescribed majority of the two Houses of Parliament and in certain cases are ratified by the State Legislatures and the amendments are not brought about through referendum or passed in a Convention, the power of amendment under Article 368 is on that account subject to limitations.

1427. Argument has then been advanced that if power be held to be vested in Parliament under Article 368 to take away or abridge fundamental rights, the power would be, or in any case could be, so used as would result in repeal of all provisions containing fundamental rights. India, it is urged, in such an event would be reduced to a police state wherein all cherished values like freedom and liberty would be non-existent. This argument, in my opinion, is essentially an argument of fear and distrust in the majority of representatives of the people. It is also based upon the belief that the power under Article 368 by two-thirds of the members present and voting in each House of Parliament would be abused or used extravagantly. I find it difficult to deny to the Parliament the power to amend the Constitution so as to take away or abridge fundamental rights by complying with the procedure of Article 368 because of any such supposed fear or possibility of the abuse of power. I may in this context refer to the observations of Marshall C.J. regarding the possibility of the abuse of power of legislation and of taxation in the case of The Providence Bank v. Alpheus Billings. 29 U.S. 514

This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally.

1428. That power may be abused furnishes no ground for denial of its existence if government is to be maintained at all, is a proposition, now too well established (fee the unanimous opinion of US Supreme Court in Ex Parte John L. Rapier 15 U.S. 93. Same view was expressed by the Judicial Committee in the case of Bank of Toronto and Lambe 12, A.C. 575 while dealing with the provisions of Section 92 of the British North America Act relating to the power of Quebec legislature.

1429. Apart from the fact that the possibility of abuse of power is no ground for the denial of power if it is found to have been legally vested, I find that the power of amendment under Article 368 has been vested not in one individual but in the majority of the representatives of the people in Parliament. For this purpose, the majority has to be of not less than two-thirds of the members present and voting in each House. In addition to that, it is required that the amendment Bill should be passed in each House by a majority of the total membership of that House. It is, therefore, not possible to pass an amendment Bill by a snap vote in a House wherein a small number of members are present to satisfy the requirement of the rule of quorum. The condition about the passing of the Bill by each House, including the Rajya Sabha, by the prescribed majority ensures that it is not permissible to get the Bill passed in a joint sitting of the two Houses (as in the case of ordinary legislation) wherein the members of the Rajya Sabha can be outvoted by the members of the Lok Sabha because of the latter's greater numerical strength. The effective voice of the Rajya Sabha in the passing of the amendment Bill further ensures that unless the prescribed majority of the representatives of the states agree the Bill cannot be passed. The Rajya Sabha under our Constitution is a perpetual body; its members are elected by the members of the State Assemblies and one-third of them retire every two years. We have besides that the provision for the ratification of the amendment by not less than one-half of the State Legislature in case the amendment relates to certain provisions which impinge upon the rights of the States. The fact that a prescribed majority of the people's representatives is required for bringing about the amendment is normally itself a guarantee that the power would not be abused. The best safeguard against the abuse or extravagant use of power is public opinion and not a letter on the right of people's representatives to change the Constitution by following the procedure laid down in the Constitution itself. It would not be a correct approach to start with a distrust in the people's representatives in the Parliament and to assume that majority of them would have ah aversion for the liberties of the people and would act against the public interest. To quote the words of Justice Holmes in Missouri Kansas & Texas Ry. v. May 194 U.S. 267

Great Constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

1430. L.B. Orfield has dealt with the question of the abuse of power in his book "The Amending of Federal Constitution", in the following words on page 123:

'Abuse' of the amending power is an anomalous term. The proponents of implied limitations resort to the method of reductio ad absurdum in pointing out the abuses which might occur if there were no limitations on the power to amend.... The amending power is a power of an altogether different kind from the ordinary governmental powers. If abuse occurs, it occurs at the hands of a special organization of the nation and of the states representing an extraordinary majority of the people, so that for all practical purposes it may be said to be the people, or at least the highest agent of the people, and one exercising sovereign powers. Thus the people merely take the consequences of their own acts :

It has already been mentioned above that the best safeguard against the abuse of power is public opinion. Assuming that under the sway of some overwhelming impulse, a climate is created wherein cherished values like liberty and freedom lose their significance in the eyes of the people and their representatives and they choose to do away with all fundamental rights by amendment of the Constitution, a restricted interpretation of Article 368 would not be of much avail. The people in such an event would forfeit the claim to have fundamental rights and in any case fundamental rights would not in such an event save the people from political enslavement, social stagnation or mental servitude. I may in this context refer to the words of Learned Hand in his eloquent address on the Spirit of Liberty:

I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law no court can save it; no Constitution, no law, no court can even do much to help it. While it lies there it needs no Constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow. (see pages 189-190 Spirit of Liberty edited by Irving Dilliard).

Similar idea was expressed in another celebrated passage by Learned Hand in the Contribution of an Independent Judiciary to Civilization:

You may ask what then will become of the fundamental principles of equity and fair play which our Constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. (see p. 164 supra).

1431. It is axiomatic that the involvement of a nation in war by a declaration of war against another country can change the entire course of history of the nation. A wrong decision in this respect can cause untold suffering, result in national humiliation, take toll of thousands of lives and cripple the economy of the nation for decades to come. If the Government and the Parliament can be entrusted with power of such far reaching magnitude on the assumption that such a power would not be abused but would be exercised reasonably in the national interest, it would seem rather anomalous

to have an approach of distrust in those very organs of the state and to deny to the Parliament the power of amendment of fundamental rights because of the supposed possibility of the abuse of such power.

1432. There is one other aspect of the matter which may be not lost sight of. Part III deals with a number of fundamental rights. Assuming that one relating to property, out-of the many fundamental rights, is found to be an obstacle in pushing forward certain ameliorative measures and it is proposed to abridge that fundamental right and it is also decided not to abridge or take away any other fundamental right, the present position, according to the stand taken on behalf of the petitioners, is that there is no power under Article 368 to abridge the obstructive fundamental right. The result is that even though reference is made on behalf of the petitioners to those fundamental rights as enshrine within themselves the valued concept of liberty of person and freedom of expression, the protection which is, in fact, sought is for the fundamental right to property which causes obstruction to pushing forward ameliorative measures for national weal. It is not, in my opinion, a correct approach to assume that if Parliament is held entitled to amend Part III of the Constitution so as to take away or abridge fundamental rights, it would automatically or necessarily result in the abrogation of all fundamental rights. I may mention in this context that for seventeen years, from 1950 till 1967 Golak Nath case (supra) was decided, the accepted position was that the Parliament had the power to amend Part III of the Constitution so as to take away or abridge fundamental rights. Despite the possession of that power by the Parliament, no attempt was made by it to take away or abridge fundamental rights relating to cherished values like liberty of person and freedom of expression. If it was not done in the past, why should we assume that the majority of members of the Parliament in future would acquire sudden aversion and dislike for these values and show an anxiety to remove them from the Constitution. There is a vital distinction, in my opinion, between the vesting of a power, the exercise of the power and the manner of its exercise. What we are concerned with is as to whether on the true construction of Article 368, the Parliament has or has not the power to amend the Constitution so as to take away or abridge fundamental rights. So far as this question is concerned, the answer, in my opinion, should be in the affirmative, as long as the basic structure of the Constitution is retained.

1433. In the context of abuse of power of the amendment, reference has been made on behalf of the petitioners to the Constitution of Weimar Republic and it is urged that unless there are restrictions on the power of amendment in so far as fundamental rights are concerned, the danger is that the Indian Constitution may also meet the same fate as did the Weimar Constitution at the hands of Hitler. This argument, in my opinion, is wholly misconceived and is not based upon correct appreciation of historical facts. Following military reversals when Kaiser fled to Holland in 1918 his mutinous subjects proclaimed a republic in Germany. There was thus a break in the continuity of the authority and the Weimar Republic had to face staggering political problems. It had to bear the burden of concluding a humiliating peace. It was later falsely blamed for the defeat itself by some of the politicians who were themselves responsible for the collapse and capitulation of 1918. The Republic had to wrestle, within a decade and a half, with two economic crises of catastrophic proportions which ruined and made desperate the ordinarily stable elements of society. The chaos with political party divisions in the country was reflected in Reichstag where no party obtained a clear majority. There were 21 cabinets in 14 years. It was in those conditions that Hitler emerged on the scene. He made use of Article 48 of the Weimar Constitution which dealt with emergency powers. Under Article 48 of the Constitution, the President was empowered

to issue decrees suspending the rights guaranteed by the basic law and to make direct use of the army and navy should emergency conditions so require. The purpose of the provisions was, of course, to provide the executive with means to act in the event of some grave national emergency where the immediate and concentrated use of the power of the state might become suddenly necessary. But what happened was that almost from its beginning the government found itself in one emergency after another, so that rule by executive decrees issued under the authority provided for by Article 48 supplanted the normal functioning of the legislative branch of government. The increasing division among the political parties, the staggering economic problem and the apparent failure of the parliamentary government to function, were accompanied by the steady growth in power of the National Socialist under Hitler. In less than two years, the Weimar Republic was transformed into a totalitarian dictatorship. The Enabling Act of March 23, 1933, pushed through the Reichstag by a narrow Nazi majority, provided government by decree without regard to Constitutional guarantees. The Act empowered the Government to enact the statutes without the sanction of the Parliament. Hitler made a show of following the Constitution, but the acts of his party in and out of the government in practice violated the basic law. The few limitations imposed upon the government were ignored, and Hitler's Third Reich was launched (see Modern Constitutions by R.F. Moore, p. 86-87 and The Constitutions of Europe by E.A. Goerner, p. 99-100). It would thus appear that it was not by use of the power of amending the Constitution but by acting under the cover of Article 48 of the Constitution dealing with emergency powers that Hitler brought about the Nazi dictatorship. He thus became what has been described as "...the supreme political leader of the people, supreme tender and highest superior of the administration, supreme judge of the people, supreme commander of the armed forces and the source of all law.

1434. Apart from the fact that the best guarantee against the abuse of power of amendment is good sense of the majority of the members of Parliament and not the unamendability of Part III of the Constitution, there is one other aspect of the matter. Even if Part III may be left intact, a mockery of the entire parliamentary system can be made by amending Articles 85 and 172, which are not in Part III and according to which the life of the Lok Sabha and Vidhan Sabhas of the States, unless sooner dissolved, would be five years, and by providing that the life of existing Lok Sabha and Vidhan Sabhas shall be fifty years. This would be a flagrant abuse of the power of amendment and I refuse to believe that public opinion in our country would reach such abysmal depths and the standards of political and Constitutional morality would sink so low that such an amendment would ever be passed. I need express no opinion for the purpose of this case as to whether this Court would also not quash such an amendment In any case such an amendment would be an open invitation for and be a precursor of revolution.

1435. Even without amending any article, the emergency provisions of the Constitution contained in Article 358 and 359 can theoretically be used in such a manner as may make a farce of the democratic set up by prolonging the rule of the party in power beyond the period of five years since the last general election after the party in power has lost public support. A Proclamation of Emergency under Article 352 can be issued by the President if he is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or even by internal disturbance. Such a Proclamation has to be laid before each House of Parliament. Resolution approving the Proclamation has thereafter to be passed by the Houses of Parliament. According to Article 83, the House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no

longer and the expiration of the said period of five years shall operate as a dissolution of the House provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate. As the Government and Parliament play a vital part in the Proclamation and continuation of emergency, the emergency provisions can theoretically be used for avoiding the election and continuing a party in power even though it has lost popular support by extending the life of House of the People in accordance with Article 83(2). The effective check against such unabashed abuse of power is the sense of political responsibility, the pressure of public opinion and the fear of popular uprising. We need not go into the question as to whether the court would also intervene in such an event. It is, in my opinion, inconceivable that a party would dare to so abuse the powers granted by the emergency provisions. The grant of the above power under Article 83 (2) is necessarily on the assumption that such a power would not be abused.

1436. Argument has then been advanced on behalf of the petitioners that the power of amendment might well be used in such a manner as might result in doing away with the power of amendment under Article 368 or in any case so amending that articles as might make it impossible to amend the Constitution. It is, in my opinion, difficult to think that majority of members of future Parliament would attempt at any time to do away with the power of amendment in spite of the knowledge as to what was the fate of unamendable Constitutions in other countries like France. Assuming that at any time such an amendment to abolish all amendments of Constitution is passed and made a part of the Constitution, it would be nothing short of laying the seeds of a future revolution or other extra-Constitutional methods to do away with unamendable Constitution. It is not necessary for the purpose of this case to go into the question of the Constitutional validity of such an amendment.

1437. We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word "amendment". Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it.

The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.
As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, "howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under

the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the state according to which the state shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368.

1438. The words "amendment of this Constitution" and "the Constitution shall stand amended" in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form. The language of Article 368 thus lends support to the conclusion that one cannot, while acting under that article, repeal the existing Constitution and replace it by a new Constitution.

1439. The connotation of the amendment of the Constitution was brought out clearly by Pt. Nehru in the course of his speech in support of the First Amendment wherein he said that "a Constitution which is responsive to the people's will, which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it." It is, therefore, plain that what Pt. Nehru contemplated by amendment was the varying of the Constitution "here and there" and not the elimination of its basic structure for that would necessarily result in the Constitution losing its identity.

1440. Reference to some authorities in the United States so far as the question is concerned as to whether the power to amend under Article 5 of US Constitution would include within itself the power to alter the basic structure of the Constitution are not helpful because there has been no amendment of such a character in the United States. No doubt the Constitution of the United States had in reality, though not in form, changed a good deal since the beginning of last century; but the change had been effected far less by formally enacted Constitutional amendments than by the growth of customs or institutions which have modified the working without altering the articles of the Constitution (see The Law of the Constitution by A.V. Dicey Tenth Ed. p. 129).

1441. It has not been disputed during the course of arguments that the power of amendment under Article 368 does not carry within itself the power to repeal the entire Constitution and replace it by a new Constitution. If the power of amendment does not comprehend the doing away of the entire Constitution but postulates retention or continuity of the existing Constitution, though in an amended form, question arises as to what is the minimum of the existing Constitution which should be left intact in order to hold that the existing Constitution has been retained in an amended form and not done away with. In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change. On the contrary, if the basic structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues and survives.

1442. Although there are some observations in "Limitations of Amendment Procedure and the Constituent Power" by Conrad to which it is not possible to subscribe, the following observations, in my opinion, represent the position in a substantially correct manner:

Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its Constitutional authority.

It has further been observed:

The amending procedure is concerned with the statutory framework of which it forms part itself. It may effect changes in detail, remould the legal expression of underlying principles, adapt the system to the needs of changing conditions, be in the words of Calhoun 'the medicatrix of the system', but should not touch its foundations.

A similar idea has been brought out in the, following passage by Carl J. Friedrich page 272 of "Man and His Government" (1963):

A Constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay yet the basic structure or pattern remains the same with each of the organs having its proper function, so also in a Constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts is destroyed. The United States may retain some kind of Constitutional government, without, say, the Congress or the federal division of powers, but it would not be the Constitutional system now prevailing. This view is uncontested even by many who do not work with the precise concept of a Constitution here insisted upon.

1443. According to "The Construction of Statutes" by Crawford, a law is amended when it is in whole or in part permitted to remain and something is added to or taken from it or in some way changed or altered in order to make it more complete or perfect or effective. It should be noticed, however, that an amendment is not the same as repeal, although it may operate as a repeal to a certain degree. Sutherland in this context states that any change of the scope or effect of an existing statute whether by addition, omission or substitution of provisions which does not wholly terminate its existence whether by an Act purporting to amend, repeal, revise or supplement or by an Act independent and original in form, is treated as amendatory.

1444. It is, no doubt, true that the effect of the above conclusion at which I have arrived is that there would be no provision in the Constitution giving authority for drafting a new and radically different Constitution with different basic structure or framework. This fact, in my opinion, would not show that our Constitution has a lacuna and is not a perfect or a complete organic instrument, for it is not necessary that a Constitution must contain a provision for its abrogation and replacement by an entirely new and different Constitution. The people in the final analysis are the ultimate sovereign and if they decide to have an entirely new Constitution, they would not need the authority of the existing Constitution for this purpose.

1445. Subject to the retention of the basic structure or framework of the Constitution, I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights. During the course of years after the Constitution comes into force, difficulties can be experienced in the working of the Constitution. It is to overcome those difficulties that the Constitution is amended. The amendment can take different forms. It may sometimes be necessary to repeal a particular provision of the Constitution without substituting another provision in its place. It may in respect of a different article become necessary to replace it by a new provision. Necessity may also be felt in respect of a third article to add some further clauses in it. The addition of the new clauses can be either after repealing some of the earlier clauses or by adding new clauses without repealing any of the existing clauses. Experience of the working of the Constitution may also make it necessary to insert some new and additional articles in the Constitution. Likewise, experience might reveal the necessity of deleting some existing articles. All these measures, in my opinion, would lie within the ambit of the power of amendment. The denial of such a broad and comprehensive power would introduce a rigidity in the Constitution as might break the Constitution. Such a rigidity is open to serious objection in the same way as an unamendable Constitution.

1446. The word "amendment" in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution.

No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental right and the scope and width of chat power when it deals with provisions not concerned with fundamental rights.

1447. We have been referred to the dictionary meaning of the word "amend", according to which to amend is to "free from faults, correct, rectify, reform, make alteration, to repair, to better and surpass". The dictionary meaning of the word "amend" or "amendment", according to which power of amendment should be for purpose of bringing about an improvement, would not, in my opinion, justify a restricted construction to be placed upon those words. The sponsors of every amendment of the Constitution would necessarily take the position that the proposed amendment is to bring about an improvement on the existing Constitution. There is indeed an element of euphemism in every amendment because it proceeds upon the assumption on the part of the proposer that the amendment is an improvement. In the realities and controversies of politics, question of improvement becomes uncertain with the result that in legal parlance the word amendment when used in reference to a Constitution signifies change or alteration. Whether the amendment is, in fact, an improvement or not, in my opinion, is not a justiciable matter, and in judging the validity of an amendment the courts would not go into the question as to whether the amendment has in effect brought about an improvement. It is for the special majority in each House of Parliament to decide as to whether it constitutes an improvement; the courts would not be substituting their own opinion for that of the Parliament in this respect. Whatever may be the personal view of a judge regarding the wisdom behind or the improving quality of an amendment, he would be only

concerned with the legality of the amendment and this, in its turn, would depend upon the question as to whether the formalities prescribed in Article 368 have been complied with.

1448. The approach while determining the validity of an amendment of the Constitution, in my opinion, has necessarily to be different from the approach to the question relating to the legality of amendment of pleadings.

A Constitution is essentially different from pleading filed in court by litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State, viz., the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or a written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. It had its roots in the past, its continuity is reflected in the present and it is intended for the unknown future. The words of Holmes while dealing with the US Constitution have equal relevance for our Constitution. Said the great Judge:
...the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. (See Gompers v. United States 233 U.S. 604, 610(1914).

It is necessary to keep in view Marshall's great premises that "it is a Constitution we are expounding". To quote the words of Felix Frankfurter in his tribute to Holmes:

Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the world. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society: (See "Mr. Justice Holmes" edited by Felix Frankfurter, p. 58).

1449. The principles which should guide the court in construing a Constitution have been aptly laid down in the following passage by Kania C.J. in the case of A.K. Gopalan v. The State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 :

In respect of the construction of a Constitution Lord Wright in James v. The Commonwealth of Australia (1936) A.C. 578 observed that 'a Constitution most not be construed in any narrow or pedantic sense'. Mr. Justice Higgins in Attorney-General of New South Wales v. Brewery Employees Union [1908] 6 Com. L.R. 469 observed : "Although we are to interpret words of the

Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting-to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be." In In re The Central Provinces and Berar Act XIV of [1939] F.C.R. 18, Sir Maurice Gwyer C.J. after adopting these observations said : "Especially is this true of a Federal Constitution with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert to language of the enactment in the interest of any legal or Constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors." There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a Statute on that ground alone. But it is only in express Constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights.

1450. Reference has been made on behalf of the petitioners to para 7 of the Fifth Schedule to the Constitution which empowers the Parliament to amend by way of addition, variation or repeal any of the provisions of that Schedule dealing with the administration and control of scheduled areas and scheduled tribes. Likewise, para 21 of the Sixth Schedule gives similar power to the Parliament to amend by way of addition, variation or repeal any of the provisions of the Sixth Schedule relating to the administration of tribal areas. It is urged that while Article 368 contains the word "amendment" simpliciter, the above two paragraphs confer the power to amend by way of addition, variation or repeal and thus enlarge the scope of the power of amend merit. This contention, in my opinion, is not well founded. The words "by way of addition, variation or repeal" merely amplify the meaning of the word "amend" and clarify what was already implicit in that word. It, however, cannot be said that if the words "by way of addition, variation or repeal" had not been there, the power of amendment would not have also included the power to add, vary or repeal. These observations would also hold good in respect of amended Section 291 of the Government of India Act, 1935 which gave power to the Governor-General at any time by Order to make such amendments as he considered necessary whether by way of addition, modification or repeal, in the provisions of that Act or of any Order made thereunder in relation to any Provincial Legislature with respect to the matters specified in that section. A clarification by way of abundant caution would not go to show that in the absence of the clarification, the power which inheres and is implicit would be nonexistent. Apart from that, I am of the view that sub-paragraph (2) of paragraph 7 of the Fifth Schedule indicates that the word "amendment" has been used in the sense so as to cover amendment by way of addition, variation or repeal. According to that paragraph, no

law mentioned in sub-paragraph (1) shall be deemed to be an amendment of the Constitution for purpose of Article 368. As sub-paragraph (1) deals with amendment by way of addition, variation or repeal, the amendment of Constitution for purpose of Article 368 referred to in sub-paragraph (2) should be construed to be co-extensive and comprehensive enough to embrace within itself amendment by way of addition, variation or repeal. The same reasoning would also apply to sub-paragraph (2) of paragraph 21 of the Sixth Schedule.

1451. The Judicial Committee in the case of British Coal Corporation v. The King [1935] A.C. 500 laid down the following rule:

In interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted.

The Judicial Committee also quoted with approval the following passage from Clement's Canadian Constitution relating to provision of British North America Act:

But these are statutes and statutes, and the strict construction deemed proper in the case, for example of a penal or taxing statute, or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government....

Orfield, while dealing with the amendment of the Constitution has observed that the amendment of a Constitution should always be construed more liberally. To quote from his book "The Amending of the Federal Constitution:

Is there a restriction that an amendment cannot add but only alter? An argument very much like the foregoing is that an amendment may alter but may not add. This contention is largely a quibble on the definition of the word 'amendment'. It is asserted that by amending the Constitution is meant the changing of something that is already in the Constitution, and not the addition of something new and unrelated. Cases prescribing the very limited meaning of amendments in the law of pleading are cited as authoritative. It would seem improper however, to accept such a definition, as amendments to Constitutions have always been construed more liberally and on altogether different principles from those Applied to amendments of pleadings.

1452. It may also be mentioned that Article 5 of the US Constitution confers powers of amendment. The word used in that article is amendment simpliciter and not amendment by way of addition, alteration or repeal. In pursuance of the power conferred by Article 5, Article 18 was added to the American Constitution by the Eighteenth Amendment. Subsequently that article (Article 18) was repealed by the Twenty-first Amendment. Section 1 of Article 21 was in the following words:

The Eighteenth article of amendment to the Constitution of the United States is hereby repealed.

The addition of the eighteenth article, though challenged, was upheld by the Supreme Court. No one has questioned the repeal of the eighteenth article on the ground that the power of amendment would not include the power to repeal.

1453. I cannot subscribe to the view that an amendment of the Constitution must keep alive the provision sought to be amended and that it must be consistent with that provision. Amendment of Constitution has a wide and broad connotation and would embrace within itself the total repeal of some articles or their substitution by new articles which may not be consistent with or in conformity with earlier articles. Amendment in Article 368 has been used to denote change. This is clear from the opening words of the proviso to Article 368 according to which ratification by not less than half of State Legislatures would be necessary if amendment seeks to make a change in the provisions of the Constitution mentioned in the proviso. The word change has a wide amplitude and would necessarily cover cases of repeal and replacement of earlier provisions by new provisions of different nature. Change can be for the better as well as for the worse. Every amendment would always appear to be a change for the worse in the eyes of those who oppose the amendment. As against that, those who sponsor an amendment would take the stand that it is a change for the better. The court in judging the validity of an amendment would not enter into the arena of this controversy but would concern itself with the question as to whether the Constitutional requirements for making the amendment have been satisfied. An amendment of the Constitution in compliance with the procedure prescribed by Article 368 cannot be struck down by the court on the ground that it is a change for the worse. If the court were to strike down the amendment on that ground, it would be tantamount to the court substituting its own opinion for that of the Parliament, reinforced in certain cases by that of not less than half of State Legislatures, regarding the wisdom of making the impugned Constitutional amendment. Such a course, which has the effect of empowering the court to sit in appeal over the wisdom of the Parliament in making Constitutional amendment, on the supposed assumption that the court has superior wisdom and better capacity to decide as to what is for the good of the nation is not permissible. It would, indeed, be an unwarranted incursion into a domain which essentially belongs to the representatives of the people in the two Houses of Parliament, subject to ratification in certain cases by the State Legislatures. We may in this context recall the words of Holmes J. in Lochner v. New York (1904) 198 U.S. 45.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

The above observations were contained in the dissent of Holmes J. The above dissent has subsequently been accepted by the US Supreme Court to lay down the correct law (see Ferguson v. Skrupa (1963) 372 U.S. 726 wherein it has been observed by the court:

In the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on Adams v. Tanner is as mistaken as would be adherence to Adkins v. Children's Hospital, overruled by West Coast Hotel Co. v. Parrish AIR 1330 We refuse to sit as a 'super legislature to weigh the wisdom of legislation', and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought'.

1454. It has also been urged on behalf of the petitioners that the framers of the Constitution could not have intended that even though for the amendment of articles referred to in the proviso to Article 368, ratification of not less than one half of the State Legislatures would be necessary, in the case of an amendment which deals with such a vital matter as the taking away or abridgement of fundamental rights, the amendment could be brought about without such a ratification. This argument, in my opinion, is untenable. The underlying fallacy of this argument is that it assumes that ratification by the State Legislatures is necessary under the proviso in respect of Constitutional amendments of great importance, while no such ratification is necessary in the case of comparatively less important amendments. Plain reading of Article 368, however, shows that ratification by the State Legislatures has been made imperative in the case of those Constitutional amendments which relate to or affect the rights of the States. In other cases no such ratification is necessary. The scheme of Article 368 is not to divide the articles of the Constitution into two categories, viz., important and not so important articles. What Article 368 contemplates is that the amending power contained in it should cover all the articles, leaving aside those provisions which can be amended by Parliament by bare majority. In the case, however, of such of the articles as relate to the federal principle or the relations of the States with the Union, the framers of the Constitution put them in the proviso and made it imperative to obtain ratification by not less than half of the State Legislatures in addition to the two-thirds majority of the members present and voting-in each House of the Parliament for bringing about the amendment. It is plain that for the purpose of ratification by the State Legislatures, the framers of the Constitution attached greater importance to the federal structure than to the individual rights. Such an approach is generally adopted in the case of a provision for amendment of the federal Constitution. K.C. Wheare in his book on the Federal Government has observed on page 55:

It is essential in a federal government that if there be a power of amending the Constitution, that power, so far at least as concerns those provisions of the Constitution which regulate the status and power of the general and regional governments, should not be confided exclusively either to the general governments or to the regional governments.

We may in this context refer to the speech of Dr. Ambedkar who while dealing with the category of articles for the amendment of which ratification by the States was required, observed:

Now, we have no doubt put certain articles in a third category where for the purposes of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States. I shall explain why we think that in the case of certain articles it is desirable to adopt this procedure. If Members of the House who are interested in this matter are to examine the articles that have been put under the proviso, they will find that they refer not merely to the center but to the relations between the center and the Provinces. We cannot forget the fact that while we have in a large number of cases invaded provincial autonomy, we still intend and have as a matter of fact seen to it that the federal structure of the Constitution remains fundamentally unaltered. We have by our laws given certain rights to provinces, and reserved certain rights to the center. We have distributed legislative authority; we have distributed executive authority and we have distributed administrative authority. Obviously to lay that even those articles of the Constitution which pertain to the administrative, legislative, financial and other powers, such as the executive powers of the provinces should be made liable to alteration by the Central

Parliament by two-thirds majority, without permitting the provinces or States to have any voice, is in my judgment altogether nullifying the fundamentals of the Constitution.

1455. learned Counsel for the petitioners has addressed us at some length on the point that even if there are no express limitations on the power of amendment, the same is subject to implied limitations, also described as inherent limitations. So far as the concept of implied limitations is concerned, it has two facets. Under the first facet, they are limitations which flow by necessary implication from express provisions of the Constitution. The second facet postulates limitations which must be read in the Constitution irrespective of the fact whether they flow from express provisions or not because they are stated to be based upon certain higher values which are very dear to the human heart and are generally considered essential traits of civilized existence. It is also stated that those higher values constitute the spirit and provide the scheme of the Constitution. This aspect of implied limitations is linked with the existence of natural rights and it is stated that such rights being of paramount character, no amendment of Constitution can result in their erosion.

1456. I may at this stage clarify that there are certain limitations which inhere and are implicit in the word "amendment". These are limitations which flow from the use of the word "amendment" and relate to the meaning or construction of the word "amendment" This aspect has been dealt with elsewhere while construing the word "amendment". Subject to this clarification, we may now advert to the two facets of the concept of implied limitations referred to above.

1457. So far as the first facet is concerned regarding a limitation which flows by necessary implication from an express provision of the Constitution, the concept derives its force and is founded upon a principle of interpretation of statutes. In the absence of any compelling reason, it may be said that a Constitutional provision is not exempt from the operation of such a principle. I have applied this principle to Article 368 and despite that, I have not been able to discern in the language of that article or other relevant articles any implied limitation on the power to make amendment contained in the said article.

1458. We may now deal with the second aspect of the question which pertains to limitation on the power of making amendment because such a limitation, though not flowing from an express provision, is stated to be based upon higher values which are very dear to the human heart and are considered essential traits of civilized existence. So far as this aspect is concerned, one obvious objection which must strike every one is that the Constitution of India is one of the lengthiest Constitutions, if not the lengthiest, of the world. The framers of the Constitution dealt with different Constitutional matters at considerable length and made detailed and exhaustive provisions about them. Is it then conceivable that after having dealt with the matter so exhaustively and at such great length in express words, they would leave things in the realm of implication in respect of such an important article as that relating to the amendment of the Constitution. If it was intended that limitations should be read on the power of making amendment, question would necessarily arise as to why the framers of the Constitution refrained from expressly incorporating such limitations on the power of amendment in the Constitution itself. The theory of implied limitations on the power of making amendment may have some fascination and attraction for political theorists, but a deeper reflection would reveal that such a theory is based upon a doctrinaire approach and not what is so essential for the purpose of construing and working a Constitution, viz., a pragmatic and practical approach. This circumstance perhaps accounts for the

fact that the above theory of implied limitations has not been accepted by the highest court in any country.

1459. As the concept of implied limitations on the power of amendment under the second aspect is not based upon some express provision of the Constitution, it must be regarded as essentially nebulous. The concept has no definite contours and its acceptance would necessarily introduce elements of uncertainty and vagueness in a matter of so vital an importance as that pertaining to the amendment of the Constitution. Whatever might be the justification for invoking the concept of implied limitations in a short Constitution, so far as the Constitution of India with all its detailed provisions is concerned, there is hardly any scope or justification for invoking the above concept. What was intended by the framers of the Constitution was put in express words and, in the absence of any words which may expressly or by necessary implication point to the existence of limitations on the power of amendment, it is, in my opinion, not permissible to read such limitations in the Constitution and place them on the power of amendment. I find it difficult to accede to the submission that the framers of the Constitution after having made such detailed provisions for different subjects left something to be decided by implication, that in addition to what was said there were things which were not said but which were intended to be as effective as things said. The quest for things not said, but which were to be as effective as things said, would take us to the realm of speculation and theorising and must bring in its wake the uncertainty which inevitably is there in all such speculation and theorising. All the efforts of the framers of the Constitution to make its provisions to be definite and precise would thus be undone. We shall be in doing so, not merely ignoring but setting at naught what must be regarded as a cardinal principle that a Constitution is not a subject of fastidious and abstract dialectics but has to be worked on a practical plane so that it may become a real and effective vehicle of the nation's progress. As observed by Story in para 451 of the Constitution of the United States, Volume I Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings.

1460. In the National Prohibition Cases (supra) the petitioners challenged before the US Supreme Court the validity of the Eighteenth Amendment relating to prohibition. It was urged that the aforesaid amendment had resulted in encroachment upon the police power of the States. There was implied limitation on the power to make such an amendment, according to the petitioners in those cases under Article 5 of the US Constitution. Although the Supreme (Joint gave no reasons in support of its conclusion, it upheld the validity of the Eighteenth Amendment. Argument about the implied limitations on the power of amendment was thus tacitly rejected.

1461. Eminent authors like Rottschaefer and Willis have taken the view that the theory of implied limitations should be taken to have been rejected in the National Prohibition Cases (supra) by the US Supreme Court. Rottschaefer in Handbook of American Constitutional Law has observed on pages 8 to 10:

The only assumption on which the exercise of the amending power would be inadequate to accomplish those results would be the existence of express or implied limits on the subject matter of amendments. It has been several times contended that the power of amending the federal

Constitution was thus limited, but the Supreme Court has thus far rejected every such claim, although at least one state court has subjected the power of amending the state Constitution to an implied limit in this respect. The former position is clearly the more reasonable, since the latter implies that the ultimately sovereign people have inferentially deprived themselves of that portion of their sovereign power, once possessed by them, of determining the content of their own fundamental law.

1462. Question of implied limitation on the powers to make amendment also arose the case of Jeremish Ryan and Ors. v. Captain Michael Lennon [1935] IR 170 Article 50 of the Constitution of the Irish Free State which came into force on December 6, 1922, as originally enacted, provided as follows:

Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the votes on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters in the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.

1463. By the Constitution (Amendment No. 10) Act, 1928, passed within the said period of eight years, the Constitution was amended by, inter alia, the deletion of Article 47 (dealing with referendum) and the deletion from Article 50 of the words "and as such shall be subject to the provisions of Article 47 thereof". By the Constitution (Amendment No. 15) Act, 1929, also passed within the said period of eight years, Article 50 was amended by the substitution of the words "sixteen years" for the words "eight years" therein. By the Constitution (Amendment No. 17) Act, 1931 the Constitution was amended by inserting therein a provision relating to the establishment of a Tribunal consisting of officers of Defence Forces to try a number of offences. Power of detention on suspicion in certain cases was also conferred. It was in the context of the validity of the establishment of such Tribunals that the question arose as to whether there was an implied limitation on the power to make amendment. It was held by the Supreme Court (Fitz Gibbon and Murnaghan JJ. and Kennedy C.J. dissenting), while dealing with the first two amendments, that these enactments were within the power of amendment conferred on the Oireachtas by Article 50 and were valid amendments of the Constitution; and that, consequently, an amendment of the Constitution; enacted after the expiry of the original period of eight years was not invalid by reason of not having been submitted to a referendum of the people under Article 50 or Article 47 as originally enacted. Dealing with the Constitution (Amendment No. 17) Act, 1931 it was held by the same majority that it was a valid amendment and was not ultra vires by reason of involving a partial repeal of the Constitution or by reason of conflicting with specific articles of the Constitution such as Article 6 relating to the liberty of the person, Article 64 relating to the exercise of judicial power or Article 72 relating to the trial by jury or by reason of infringing or abrogating other articles of the Constitution or principles underlying the various articles of the Constitution which were claimed to be fundamental and immutable. Kennedy C.J., after referring to the

different articles of the Constitution, held that there was not, either expressly or by necessary implication, any power to amend the power of amendment itself. He observed in this connection:

No doubt the Constituent Assembly could, if it had so intended, have given a power of amendment of the power to amend the Constitution, but in that case it would seem far more likely that it would rather have conferred on the Oireachtas a general open and free power of amendment of the Constitution, unlimited in scope and without limiting and restraining requirements for its exercise, than have done the same thing indirectly by giving a strictly limited power with power to remove the limitations. The Constituent Assembly clearly, to my mind, did not so intend. In my opinion on the true interpretation of the power before us, upon a consideration of the express prohibition, limitations and requirements of the clause containing it, the absence of any express authority, the donation of the effective act in the exercise of the power to the people as a whole, the relevant surrounding circumstances to which I have already referred, and the documents and their tenor in their entirety, there is not here, either expressly or by necessary implication, any power to amend the power of amendment itself.

Fitz Gibbon J. dealt with this question in these words:

Unless, therefore, these rights appear plainly from the express provisions of our Constitution to be inalienable, and incapable of being modified or taken away by any legislative act, I cannot accede to the argument that the Oireachtas cannot alter, modify, or repeal them. The framers of our Constitution may have intended 'to bind man down from mischief by the chains of the Constitution', but if they did, they defeated their object by handing him the key of the padlock in Article 50.

Murnaghan J. observed:

The terms in which Article 50 is framed does authorise the amendment made and there is not in the Article any express limitation which excludes Article 50 itself from the power of amendment. I cannot, therefore, find any ground upon which the suggested limitation can be properly based.

1464. The theory of implied limitations on the power of amendment was thus rejected by the majority of the Judges of the Irish Supreme Court. It would further appear that the crucial question which arose for determination in that case was whether there was any power to amend the article relating to amendment of the Constitution or whether there was any restriction in this respect. No such question arises under our Constitution because there is an express provision in Clause (e) of the proviso to Article 368 permitting such amendment. Apart from that I find that in the case of Moore and Ors. v. The Attorney-General for the Irish Free State and Ors. [1935] A.C. 484 the counsel for the appellant did not challenge the Constitutional validity of the 1929 Amendment. The counsel conceded that the said Amendment was regular and that the validity of the subsequent amendments could not be attacked on the ground that they had not been submitted to the people in a referendum. Dealing with the above concession, the Judicial Committee observed that the counsel had rightly conceded that point. The Judicial Committee thus expressed its concurrence with the conclusion of the majority of the Irish Supreme Court relating to the Constitutional validity of the Amendment Act of 1929.

1465. A.B. Keith has also supported the view of the majority and has observed that the view of the Chief Justice in this respect was wrong (see Letters on Imperial Relations Indian Reform Constitutional & International Law 1916-1935, p. 157). Keith observed in this connection:

But that the Chief Justice was wrong on this head can hardly be denied. Article 50 of the Constitution, which gave the power for eight years to effect changes by simple Act, did not prevent alteration of that Article itself, and, when the Constitution was enacted, it was part of the Constitutional law of the Empire that a power of change granted by a Constitution applies to authorize change of the power itself, unless it is safeguarded, as it normally is, by forbidding change of the section giving the power. The omission of this precaution in the Free State Constitution must have been intentional, and therefore, it was natural that the Dail, at Mr. Consgrave's suggestion, and with the full approval of Mr. de Valera, then in opposition should extend the period for change without a referendum.

1466. Dealing with the doctrine of implied limitations on the power of amendment, Orfield observes:

Today at a time when absolutes are discredited, it must not be too readily assumed that there are fundamental purposes in the Constitution which shackle the amending power and which take precedence over the general welfare and needs of the people of today and of the future. (see The Amending of the Federal Constitution (1942), p. 107).

If has been further observed:

An argument of tremendous practical importance is the fact that it would be exceedingly dangerous to lay down any limitations beyond those expressed. The critics of an unlimited power to amend have too often neglected to give due consideration to the fact that alteration of the federal Constitution is not by a simple majority or by a somewhat preponderate majority, but by a three-fourths majority of all the states. Undoubtedly, where a simple majority is required, it is not an especially serious matter for the court to supervise closely the amending process both as to procedure and as to substance. But when so large a majority as three-fourths has finally expressed its will in the highest possible form outside of revolution, it becomes perilous for the judiciary to intervene." (see ibid. p. 120).

Orfield in this context quoted the following passage from a judicial decision:

Impressive words of counsel remind us of our duty to maintain the integrity of Constitutional government by adhering to the limitations laid by the sovereign people upon the expression of its will.... Not less imperative, however, is our duty to refuse to magnify their scope by resort to subtle implication.... Repeated decisions have informed us that only when conflict with the Constitution is clear and indisputable will a statute be condemned as void. Still more obvious is the duty of caution and moderation when the act to be reviewed is not an act of ordinary legislation, but an act of the great constituent power which has made Constitutions and hereafter may unmake them. Narrow at such times are the bounds of legitimate implications." (see ibid. p. 121).

H.E. Willis has rejected the theory of implied limitations in his book "Constitutional Law of the United States" in the following words:

But it has been contended that there are all sorts of implied limitations upon the amending power. Thus it has been suggested that no amendment is valid unless it is germane to something else in the Constitution, or if it is a grant of a new power, or if it is legislative in form, or if it destroys the powers of the states under the dual form of government, or if it changes the protection to personal liberty. The United States Supreme Court has brushed away all of these arguments....

1467. We may now deal with the concept of natural rights. Such rights are stated to be linked with cherished values like liberty, equality and democracy. It is urged that such rights are inalienable and cannot be affected by an amendment of the Constitution. I agree with the learned Counsel for the petitioners that some of the natural rights embody within themselves cherished values and represent certain ideals for which men have striven through the ages. The natural rights have, however, been treated to be not of absolute character but such as are subject to certain limitations. Man being a social being, the exercise of his rights has been governed by his obligations to the fellow beings and the society, and as such the rights of the individual have been subordinated to the general weal. No one has been allowed to so exercise his rights as to impinge upon the rights of others. Although different streams of thought still persist, the later writers have generally taken the view that natural rights have no proper place outside the Constitution and the laws of the state. It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. The courts look to the provisions of the Constitution and the statutory law to determine the rights of individuals. The binding force of Constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights. Further, as natural rights have no place in order to be legally enforceable outside the provisions of the Constitution and the statute, and have to be granted by the Constitutional or statutory provisions, and to the extent and subject to such limitations as are contained in those provisions, those rights, having been once incorporated in the Constitution or the statute, can be abridged or taken away by amendment of the Constitution or the statute. The rights, as such, cannot be deemed to be supreme or of superior validity to the enactments made by the state, and not subject to the amendatory process.

1468. It may be emphasised in the above context that those who refuse to subscribe to the theory of enforceability of natural rights do not deny that there are certain essential values in Me, nor do they deny that there are certain requirements necessary for a civilized existence. It is also not denied by them that there are certain ideals which have inspired mankind through the corridor of centuries and that there are certain objectives and desiderata for which men have struggled and made sacrifices. They are also conscious of the noble impulses yearning for a better order of things, of longings natural in most human hearts, to attain a state free from imperfections where higher values prevail and are accepted. Those who do not subscribe to the said theory regarding natural rights, however, do maintain that rights in order to be justiciable and enforceable must form part of the law or the Constitution, that rights to be effective must receive their sanction and sustenance from the law of the land and that rights which have not been codified or otherwise made a part of

the law, cannot be enforced in courts of law nor can those rights override or restrict the scope of the plain language of the statute or the Constitution.

1469. Willoughby while dealing with the concept of natural rights has observed in Vol. I of Constitution of the United States:

The so-called 'natural' or unwritten laws defining the natural, inalienable, inherent rights of the citizen, which, it is sometimes claimed, spring from the very nature of free government, have no force either to restrict or to extend the written provisions of the Constitution. The utmost that can be said for them is that where the language of the Constitution admits of doubt, it is to be presumed that authority is not given for the violation of acknowledged principles of justice and liberty.

1470. It would be pertinent while dealing with the natural rights to reproduce the following passage from Salmond on Jurisprudence, Twelfth Edition:

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognized and protected by a rule of morality-an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognized and protected by a rule of law-an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty.

Bentham set the fashion still followed by many of denying that there are any such things as natural rights at all. All rights are legal rights and the creation of the law. 'Natural law, natural rights', he says, 'are two kinds of fictions or metaphors, which play so great a part in books of legislation, that they deserve to be examined by themselves.... Rights properly so called are the creatures of law properly so called; real laws give rise to real rights. Natural rights are the creatures of natural law; they are a metaphor which derives its origin from another metaphor.' Yet the claim that men have natural rights need not involve us in a theory of natural law. In so far as we accept rules and principles of morality prescribing how men ought to behave, we may speak of there being moral or natural rights; and in so far as these rules lay down that men have certain rights, we may speak of moral or natural rights. The fact that such natural or moral rights and duties are not prescribed in black and white like their legal counterparts points to a distinction between law and morals; it does not entail the complete non-existence of moral rights and duties. (see p. 218-219).

1471. The observations on page 61 of P.W. Peterson's "Natural Law and Natural Rights" show that the theory of natural rights which was made so popular by John Locke has since ceased to receive general acceptance. Locke had propounded the theory that the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject (see Principles of civil Government Book 2 S 149).

1472. While dealing with natural rights, Roscoe Pound states on page 500 of Vol. I of his Jurisprudence:

Perhaps nothing contributed so much to create and foster hostility to courts and law and Constitutions as this conception of the courts as guardians of individual natural rights against the

state and against society; this conceiving of the law as a final and absolute body of doctrine declaring these individual natural rights; this theory of Constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state; this theory of Constitutions as having for their purpose to guarantee and maintain the natural rights of individuals against the government and all its agencies. In effect, it set up the received traditional social, political, and economic ideals of the legal profession as a super-Constitution, beyond the reach of any agency but judicial decision.

1473. I may also in this connection refer to a passage on the inherent and inalienable rights in A History of American Political Theories by C. Marriam:

By the later thinkers the idea that men possess inherent and inalienable rights of a political or quasi-political character which are independent of the state, has been generally given up. It is held that these natural rights can have no other than an ethical value, and have no proper place in politics. There never was, and there never can be,' says Burgess, 'any liberty upon this earth and among human beings, outside of state organization'. In speaking of natural rights, therefore, it is essential to remember that these alleged rights have no political force whatever, unless recognized and enforced by the state. It is asserted by Willoughby that 'natural rights' could not have even a moral value in the supposed 'state of nature'; they would really be equivalent to force and hence have no ethical significance. (see p. 310).

1474. It is then argued on behalf of the petitioners that essential features of the Constitution cannot be changed as a result of amendment. So far as the expression "essential features" means the basic structure or framework or the Constitution, I have already dealt with the question as to whether the power to amend the Constitution would include within itself the power to change the basic structure or framework of the Constitution. Apart from that, all provisions of the Constitution are subject to amendatory process and cannot claim exemption from that process by being described essential features.

1475. Distinction has been made on behalf of the petitioners between a fundamental right and the essence, also described as core, of that fundamental right. It is urged that even though the Parliament in compliance with Article 368 has the right to amend the fundamental right to property, it has no right to abridge or take away the essence of that right. In my opinion, this differentiation between fundamental right and the essence or core of that fundamental right is an over-refinement which is not permissible and cannot stand judicial scrutiny. If there is a power to abridge or take away a fundamental right, the said power cannot be curtailed by invoking the theory that though a fundamental; right can be abridged or taken away, the essence or core of that fundamental right cannot be abridged or taken away. The essence or core of a fundamental right must in the nature of things be its integral part and cannot claim a status or protection different from and higher than of the fundamental right of which it is supposed to be the essence or core. There is also no objective standard to determine as to what is the core of a fundamental right and what distinguishes it from the periphery. The absence of such a standard is bound to introduce uncertainty in a matter of so vital an importance as the amendment of the Constitution. I am, therefore, unable to accept the argument, that even if a fundamental right be held to be amendable, the core or essence of that right should be held to be immune from the amendatory process.

1476. The enforcement of due process clause in Fourteenth Amendment of US Constitution, it is submitted on the petitioners' behalf, has not caused much difficulty and has not prevented the US courts from identifying the area wherein that clause operates. This fact, according to the submission, warrants the conclusion that the concept of implied limitation on the power of amendment would also not cause much difficulty in actual working. I find considerable difficulty to accede to the above submission. The scope of due process clause in Fourteenth Amendment and of power of amendment of Constitution in Article 368 is different; the two provisions operate in different areas, they are meant to deal with different subjects and there is no similarity in the object of Fourteenth Amendment and that of Article 368. Any attempt to draw analogy between the two, in my opinion, is far fetched.

1477. It may be mentioned that the Draft Report of the Sub-Committee on Fundamental Rights initially contained Clause 11, according to which "no person shall be deprived of his life, liberty or property without due process of law". It was then pointed out that a vast volume of case law had gathered around the words "due process of law" which were mentioned in the Fifth and the Fourteenth Amendment of the US Constitution. At first those words were regarded only as a limitation on procedure and not on the substance of legislation. Subsequently those words were held to apply to matters of substantive law as well. It was further stated that "in fact, the phrase 'without due process of law' appears to have become synonymous with 'without just cause' the court being the judge of what is 'just cause'; and since the object of most legislation is to promote the public welfare by restraining and regulating individual rights of liberty and property the court can be invited, under this clause, to review almost any law". View was also expressed that Clause 11 as worded might hamper social legislation. Although the members of the Committee felt that there was no case for giving a carte blanche to the Government to arrest, except in a grave emergency, any person without 'due process of law', there was considerable support for the view that due process clause might hamper legislation dealing with property and tenancy. A compromise formula was then suggested by Mr. Panikkar and with the support of Mr. Munshi, Dr. Ambedkar and Mr. Rajagopalachari the suggestion was adopted that the word "property" should be omitted from the clause. In the meanwhile, Mr. B.N. Rau during his visit to America had discussion with Justice Frankfurter of the US Supreme Court who expressed the opinion that the power of review implied in the "due process" clause was not only undemocratic (because it gave a few judges the power of vetoing legislation enacted by the representatives of the nation) but also threw an unfair burden on the judiciary. This view was communicated to the Drafting Committee which replaced the expression "without due process of law" by the expression "except according to procedure established by law". The newly inserted words were borrowed from Article 31 of the Japanese Constitution (see pages 232-235 of the Framing of India's Constitution A Study by Shiva Rao). Reference to the proceedings of the Drafting Committee shows that a major factor which weighed for the elimination of the expression "due process of law" was that it had no definite contours. In case the view is now accepted that there are implied limitations on the power of making amendment, the effect would necessarily be to introduce an element of vagueness and indefiniteness in our Constitution which our Constitution-makers were so keen to avoid.

1478. Our attention has been invited to the declaration of human rights in the Charter of the United Nations. It is pointed out that there is similarity between the fundamental rights mentioned in Part II of the Constitution and the human rights in the Charter. According to Article 56 of the Charter, all members pledge themselves to take joint and separate action in co-operation with the

Organization for the achievement of the purposes set forth in Article 55. Article 55, inter alia, provides that the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. It is submitted on behalf of the petitioners that if the power of amendment of the Constitution under Article 368 were to include the power to abridge or take away fundamental rights, the amendment might well have the effect of curtailing or doing away with some of the human rights mentioned in the United Nations Charter. In this respect I am of the view that the width and scope of the power of amendment of the Constitution would depend upon the provisions of the Constitution. If the provisions of the Constitution are clear and unambiguous and contain no limitations on the power of amendment, the court would not be justified in grafting limitations on the power of amendment because of an apprehension that the amendment might impinge upon human rights contained in the United Nations Charter. It is only in cases of doubt or ambiguity that the courts would interpret a statute as not to make it inconsistent with the comity of nations or established rules of international law, but if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal law and international law which results (see Maxwell on The Interpretation of Statutes, Twelfth Edition, p. 183). It has been observed on page 185:

But if a statute is clearly inconsistent with international law or the comity of nations, it must be so construed, whatever the effect of such a construction may be. There is, for instance, no doubt that a right conferred on an individual by a treaty made with the Crown may be taken from him by act of the legislature.

The above observations apply with greater force to a Constitutional provision as such provisions are of a paramount nature. It has already been mentioned above that the provisions of our Constitution regarding the power of making amendment are clear and unambiguous and contain no limitation on that power. I, therefore, am not prepared to accede to the contention that a limitation on the power of amendment should be read because of the declaration of Human Rights in the UN Charter.

1479. I may mention in the above context that it is always open to a State to incorporate in its laws the provisions of an international treaty, agreement or convention. In India the provisions of the Geneva Conventions have been incorporated in the Geneva Conventions Act, 1960 (Act 6 of 1960). According to the Treaties of European Communities, a State on becoming a member of the European Economic Communities (EEC) has to give primacy to the Community laws over the national laws. The principle of primacy of Community law was accepted in six countries of the European communities. Three of them, namely, Netherlands, Luxembourg and Belgium specifically amended their written Constitutions to secure, as far as possible, the principle of the primacy of the Community law. The other three, namely, France, Germany and Italy have also Constitutional provisions under which it would be possible for the courts in those countries to concede primacy to the Treaties of European Communities, and thus through them secure the primacy of the Community law. Ireland which became a new member of EEC with effect from January 1, 1973 has amended its Constitution by the Third Amendment of the Constitution Bill, 1971. This Bill has been approved in a referendum. The relevant part of the Amendment reads as under:

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.

In Britain also, primacy of the European Community law over the domestic law has been recognized by Section 2 of the European Communities Act, 1972. Question is now engaging the attention of Constitutional experts as to whether it has become necessary to place limitations on the legislative powers of the British Parliament and whether it is on that account essential to have a written Constitution for the United Kingdom (see July 1972 Modern Law Review, p. 375 onwards on the subject of Parliamentary Sovereignty and the Primacy of European Community Law).

1480. I am also of the view that the power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing the fundamental rights as natural rights or human rights. The basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living. There was no Constitutional provision for fundamental rights before January 26, 1950 and yet can it be said that there did not exist conditions for dignified way of living for Indians during the period between August 15, 1947 and January 26,. 1950. The plea that provisions of the Constitution, including those of Part III, should be given retrospective effect has been rejected by this Court. Article 19 which makes provision for fundamental rights, is not applicable to persons who are not citizens of India. Can it, in view of that, be said that the non-citizens cannot while staying in India lead a dignified life ? It would, in my opinion, be not a correct approach to say that amendment of the Constitution relating to abridgement or taking away of the fundamental rights would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life.

1481. It may be mentioned that the provisions of Article 19 show that the framers of the Constitution never intended to treat fundamental rights to be absolute. The fact that reasonable restrictions were carved in those rights clearly negatives the concept of absolute nature of those rights. There is also no absolute standard to determine as to what constitutes a fundamental right. The basis of classification varies from country to country. What is fundamental right in some countries is not so in other countries. On account of the difference between the fundamental rights adopted in one country and those adopted in another country, difficulty was experienced by our Constitution-makers in selecting provisions for inclusion in the chapter on fundamental rights (see in this connection Constitutional Precedents III Series on Fundamental Rights p. 25 published by the Constituent Assembly of India).

1482. Reference has been made on behalf of the petitioners to the Preamble to the Constitution and it is submitted that the Preamble would control the power of amendment. Submission has also been made in the above context that there is no power to amend the Preamble because, according to the submission, Preamble is not a part of the Constitution but "walks before the Constitution". I am unable to accept the contention that the Preamble is not a part of the Constitution. Reference to the debates of the Constituent Assembly shows that there was considerable discussion in the said Assembly on the provisions of the Preamble. A number of amendments were moved and were

rejected. A motion was thereafter adopted by the Constituent Assembly that "the Preamble stands part of the Constitution" (see Constituent Assembly debates, Vol. X, p. 429-456). There is, therefore, positive evidence to establish that the Preamble is a part of the Indian Constitution. In view of the aforesaid positive evidence, no help can be derived from the observations made in respect of other Constitutions on the point as to whether preamble is or is not a part of the Constitution. Apart from that, I find that the observations on p. 200-201 in Craise on Statute Law Sixth Edition show that the earlier view that preamble of a statute is not part thereof has been discarded and that preamble is as much a part of a statute as its other provisions.

1483. Article 394 of the Constitution shows that the said article as well as Article 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 came into force at once, i.e. on 26th day of November 1949 when the Constitution was adopted and enacted and the remaining provisions of the Constitution would come into force on the 26th day of January, 1950 "which day is referred to in this Constitution as the commencement of this Constitution". Article 394 would thus show that except for sixteen articles which were mentioned in that article, the remaining provisions of the Constitution came into force on the 26th day of January, 1950. The words "the remaining provisions", in my opinion, would include the Preamble as well as Part III and Part IV of the Constitution. It may also be mentioned that a proposal was made in the Constituent Assembly by Mr. Santhanam that Preamble should come into force on November 26, 1949 but the said proposal was rejected.

1484. As Preamble is a part of the Constitution, its provisions other than those relating to basic structure or framework, it may well be argued, are as much subject to the amendatory process contained in Article 368 as other parts of the Constitution. Further, if Preamble itself is amendable, its provisions other than those relating to basic structure cannot impose any implied limitations on the power of amendment. The argument that Preamble creates implied limitations on the power of amendment cannot be accepted unless it is shown that the Parliament in compliance with the provisions of Article 368 is debarred from amending the Preamble in so far as it relates to matters other than basic structure and removing the supposed limitations which are said to be created by the Preamble. It is not necessary to further dilate upon this aspect because I am of the view that the principle of construction is that reference can be made to Preamble for purpose of construing when the words of a statute or Constitution are ambiguous and admit of two alternative constructions. The preamble can also be used to shed light on and clarify obscurity in the language of a statutory or Constitutional provision. When, however, the language of a section or article is plain and suffers from no ambiguity or obscurity, no loss can be put on the words of the section or article by invoking the Preamble. As observed by Story on Constitution, the preamble can never be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the Constitution, and not substantively to create them (see para 462). The office of the Preamble has been stated by the House of Lords in Att.-Gen. v. H.R.H. Prince Ernest Augustus of. Hanover. [1957] A.C. 436 In that case, Lord Normand said:

When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble. Again, the preamble cannot be of much or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail.... If they (the enacting words) admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.

1485. In the President's reference In Re : The Berubari Union and Exchange of Enclaves, [1963] S.C.R. 250 the matter related to the implementation of the agreement between the Prime Ministers of India and Pakistan regarding the division of Berubari Union and for exchange of Cooch-Bihar Enclaves in Pakistan and Pakistan enclaves in India. The contention which was advanced on behalf of the petitioner in that case was that the agreement was void as it ceded part of India's territory, and in this connection, reference was made to the Preamble to the Constitution. Rejecting the contention this Court after referring to the words of Story that preamble to the Constitution is "a key to open the minds of the makers" which may show the general purposes for which they made the several provisions, relied upon the following observations of Willoughby about the Preamble to the American Constitution:

It has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such power embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted.

To the above observations this Court added:

What is true about the powers is equally true about the prohibitions and limitations.

1486-87. Apart from what has been stated above about the effect of Preamble on the power of amendment, let us deal with the provisions of the Preamble itself. After referring to the solemn resolution of the people of India to constitute India into a sovereign democratic republic, the Preamble makes mention of the different objectives which were to be secured to all its citizens. These objectives are:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation.

It would be seen from the above that the first of the objectives mentioned in the Preamble is to secure to all citizens of India justice, social, economic and political. Article 38 in Part IV relating to the Directive Principles or State Policy recites that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

1488. Since the later half of the eighteenth century when the idea of political equality of individuals gathered force and led to the formation of democratic governments, there has been a great deal of extension of the idea of equality from political to economic and social fields. Wide disparities in the standard of living of the upper strata and the lower strata as also huge concentration of wealth in the midst of abject poverty are an index of social maladjustment and if continued for long, they give rise to mass discontent and a desire on the part of those belonging to the lower strata to radically alter and, if necessary, blow up the social order. As those belonging to the lower strata constitute the bulk of the population, the disparities provide a fertile soil for violent upheavals. The prevention of such upheavals is not merely necessary for the peaceful evolution of society, it is also in the interest of those who belong to the upper strata to ensure that the potential causes for violent upheaval are eliminated. Various remedies have been suggested in this connection and the stress has been laid mainly upon having what is called a welfare state. The modern states have consequently to take steps with a view to ameliorate the conditions of the poor and to narrow the chasm which divides them from the affluent sections of the population. For this purpose the state has to deal with the problems of social security, economic planning and industrial and agrarian welfare. Quite often in the implementation of these policies, the state is faced with the problem of conflict between the individual rights and interests on the one side and rights and welfare of vast sections of the population on the other. The approach which is now generally advocated for the resolving of the above conflict is to look upon the rights of the individuals as conditioned by social responsibility. Harold Laski while dealing with this matter has observed in Encyclopaedia of the Social Sciences:

The struggle for freedom is largely transferred from the plane of political to that of economic rights. Men become less interested in the abstract fragment of political power an individual can secure than in the use of massed pressure of the groups to which they belong to secure an increasing share of the social product.... So long as there is inequality, it is argued, there cannot be liberty. The historic inevitability of this evolution was seen a century ago by De Tocqueville. It is interesting to compare this insistence that the democratization of political power mean equality and that its absence would be regarded by the masses as oppression with the argument of Lord Acton that liberty and equality are antitheses. To the latter liberty was essentially an autocratic ideal; democracy destroyed individuality, which was the very pith of liberty, by seeking identity of conditions. The modern emphasis is rather toward the principle that material equality is growing inescapable and that the affirmation of personality must be effective upon an immaterial plane. (see Vol. IX, p. 445).

1489. I may also refer to another passage on page 99 of Grammar of Politics by Harold Laski:

The State, therefore, which seeks to survive must continually transform itself to the demands of men who have an equal claim upon that common welfare which is its ideal purpose to promote.

We are concerned here, not with the defence of anarchy, but with the conditions of its avoidance. Men must learn to subordinate their self-interest to the common welfare. The privileges of some must give way before the rights of all. Indeed, it may be urged that the interest of the few is in fact the attainment of those rights, since in no other environment is stability to be assured.

1490. A modern state has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, uplift of the downtrodden, the raising of the standards of the vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with the larger interests of the society, the state acquires the power to subordinate the individual rights to the larger interests of society as a step towards social justice. As observed by Roscoe Pound on page 434 of Volume I of Jurisprudence under the heading "Limitations on the Use of Property":

Today the law is imposing social limitations-limitations regarded as involved in social life. It is endeavouring to delimit the individual interest better with respect to social interests and to confine the legal right or liberty or privilege to the bounds of the interest so delimited.

1491. To quote the words of Friedmann in Legal Theory:

But modern democracy looks upon the right to property as one conditioned by social responsibility by the needs of society, by the 'balancing of interests' which looms so large in modern jurisprudence, and not as preordained and untouchable private right. (Fifth Edition, p. 406).

1492. With a view to bring about economic regeneration, the state devises various methods and puts into operation certain socio-economic measures. Some of the methods devised and measures put into operation may impinge upon the property rights of individuals. The courts may sometimes be sceptical about the wisdom behind those methods and measures, but that would be an altogether extraneous consideration in determining the validity of those methods and measures. We need not dilate further upon this aspect because we are only concerned with the impact of the Preamble. In this respect I find that although it gives a prominent place to securing the objective of social, economic and political justice to the citizens, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. There is, as a matter of fact, no clause or indication in the Preamble which stands in the way of abridgement of right to property for securing social, economic and political justice. Indeed, the dignity of the individual upon which also the Preamble has laid stress, can only be assured by securing the objective of social, economic and political justice.

1493. Reference has been made on behalf of the petitioners to the Nehru Report in order to show that in the pre-independence days, it was one of the objectives of nationalist leaders to have some kind of charter of human rights. This circumstance, in my opinion has not much material bearing on the point of controversy before us. Our Constitution-makers did incorporate in Part III of the Constitution certain-rights and designated them as fundamental rights. In addition to that, the

Constitution-makers put in Part IV of the Constitution certain Directive Principles. Although those Directive Principles were not to be enforceable by any court, Article 37 declared that those principles were nevertheless fundamental in the governance of the country and it should be the duty of the State to apply those principles in making laws. The Directive Principles embody a commitment which was imposed by the Constitution-makers on the State to bring about economic and social regeneration of the teeming millions who are steeped in poverty, ignorance and social backwardness. They incorporate a pledge to the coming generations of what the State would strive to usher in. No occasion has arisen for the amendment of the Directive Principles. Attempt have, however, been made from time to time to amend the fundamental rights in Part III. The question with which we are concerned is whether there is power of amendment under Article 368 so as to take away or abridge the fundamental rights. This question would necessarily have to depend upon the language of Article 368 as well as upon the width and scope of the power of amendment under Article 368 and the consideration of the Nehru Report in this context would be not helpful. If the language of Article 368 warrants a wide power of amendment as may include the power to take away or abridge fundamental rights, the said power cannot be held to be non-existent nor can its ambit be restricted by reference to Nehru Report. The extent to which historical material can be called in aid has been laid down in Maxwell on Interpretation of Statutes on page 47-48 as under:

In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject-matter, and may also consider whether a statute was intended to alter the law or to leave it exactly where it stood before. But although we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge...we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act.

The above observations hold equally good when we are construing the provisions of a Constitution. Keeping them in view we can get no material assistance in support of the petitioners contention from the Nehru Report.

1494. Apart from what has been stated above, we find that both before the dawn of independence as well as during the course of debates of the Constituent Assembly stress was laid by the leaders of the nation upon the necessity of bringing about economic regeneration and thus ensuring social and economic justice. The Congress Resolution of 1929 on social and economic changes stated that "the great poverty and misery of the Indian people are due, not only to foreign exploitation in India but also to the economic structure of society, which the alien rulers support so that their exploitation may continue. In order therefore to remove this poverty and misery and to ameliorate the condition of the Indian masses, it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities". The resolution passed by the Congress in 1931 recited that in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions. The Objectives Resolution which was moved by Pt. Nehru in the Constituent Assembly on December 13, 1946 and was subsequently passed by the Constituent Assembly mentioned that there would be guaranteed to all the people of India, "justice, social, economic, and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and

action subject to law and public morality". It would, therefore, appear that even in the Objectives Resolution the first position was given to justice, social, economic and political. Pt. Nehru in the course of one of his speeches, said:

The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over.

Granville Austin in his book "Extracts from the Indian Constitution : Cornerstone of a Nation" after quoting the above words of Pt. Nehru has stated:

Two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With independence, the national revolution would be completed, but the social revolution must go on. Freedom was not an end in itself, only 'a means to an end', Nehru had said, 'that end being the raising of the people...to higher levels and hence the general advancement of humanity'.

The first task of this Assembly (Nehru told the members) is to free India through a new Constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.

K. Santhanam, a prominent southern member of the Assembly and editor of a major newspaper, described the situation in terms of three revolutions. The political revolution would end, he wrote, with independence. The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'. The third revolution was an economic one : The transition from primitive rural economy to scientific and planned agriculture and industry'. Radhakrishnan (now President of India) believed India must have a 'socio-economic revolution' designed not only to bring about 'the real satisfaction of the fundamental needs of the common man', but to go much deeper and bring about 'a fundamental change in the structure of Indian society'.

On the achievement of this great social change depended India's survival. 'If we cannot solve this problem soon, 'Nehru warned the Assembly, 'all our paper Constitutions will become useless and purposeless....

* * *

'The choice for India, 'wrote Santhanam,'...is between rapid evolution and violent revolution...because the Indian masses cannot and will not wait for a long time to obtain the satisfaction of their minimum needs.'

* * *

What was of greatest importance to most Assembly members, however, was not that socialism be embodied in the Constitution, but that a democratic Constitution and with a socialist bias be framed so as to allow the nation in the future to become as socialist as its citizens desired or its needs demanded. Being, in general, imbued with the goals, the humanitarian bases, and some of the techniques of social democratic thought, such was the type of Constitution that Constituent Assembly members created.

Dealing with the Directive Principles, Granville Austin writes:

In the Directive Principles, however, one finds an even clearer statement of the social revolution. They aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves.

* * *

By establishing these positive obligations of the state, the members of the Constituent Assembly made it the responsibility of future Indian governments to find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate 'the powers of all men equally for contributions to the common good'.

* * *

The Directive Principles were a declaration of economic independence, a declaration that the privilege of the colonial era had ended, that the Indian people (through the democratic institutions of the Constitution) had assumed economic as well as political control of the country, and that Indian capitalists should not inherit the empire of British colonialists.

Pt. Nehru, in the course of his speech in support of the Constitution (First Amendment) Bill, said:

And as I said on the last occasion the real difficulty we have to face is a conflict between the dynamic ideas contained in the Directive Principles of Policy and the static position of certain things that are called 'fundamental' whether they relate to property or whether they relate to something else. Both are important undoubtedly. How are you to get over them ? A Constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a Constitution that has past its use.

Again in the course of his speech in support of the Constitution (Fourth Amendment) Bill, Pt. Nehru said:

But, I say, that if that is correct, there is an inherent contradiction in the Constitution between the fundamental rights and the Directive Principles of State Policy. therefore, again, it is up to this Parliament to remove that contradiction and make the fundamental rights subserve the Directive Principles of State Policy.

1495. It cannot, therefore, be said that the stress in the impugned amendments to the Constitution upon changing the economic structure by narrowing the gap between the rich and the poor is a recent phenomenon. On the contrary, the above material shows that this has been the objective of the national leaders since before the dawn of independence, and was one of the underlying reasons for the First and Fourth Amendments of the Constitution. The material further indicates that the approach adopted was that there should be no reluctance to abridge or regulate the fundamental right to property if it was felt necessary to do so for changing the economic structure and to attain the objectives contained in the Directive Principles.

1496. So far as the question is concerned as to whether the right to property can be said to pertain to basic structure or framework of the Constitution, the answer, in my opinion, should plainly be in the negative. Basic structure or framework indicates the broad outlines of the Constitution, while the right to property is a matter of detail. It is apparent from what has been discussed above that the approach of the framers of the Constitution was to subordinate the individual right to property to the social good. Property right has also been changing from time to time. As observed by Harold Laski in Grammar of Politics, the historical argument is fallacious if it regards the regime of private property as a simple and unchanging thing. The history of private property is, above all, the record of the most varied limitations upon the use of the powers it implies. Property in slaves was valid in Greece and Rome; it is no longer valid today. Laski in this context has quoted the following words of John Stuart Mill:

The idea of property is not some one thing identical throughout history and incapable of alteration...at any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time; but neither on this point, nor on any other, has the law and custom of a given time and place, a claim to be stereotyped for ever. A proposed reform in laws or customs is not necessarily objectionable because its adoption would imply, not the adaptation of all human affairs to the existing idea of property, to the growth and improvement of human affairs.

1497. The argument that Parliament cannot by amendment enlarge its own powers is untenable. Amendment of the Constitution, in the very nature of things, can result in the conferment of powers on or the enlargement of powers of one of the organs of the state. Likewise, it can result in the taking away or abridgement of the powers which were previously vested in an organ of the state. Indeed nearly every expansion of powers and functions granted to the Union Government would involve consequential contraction of powers and functions in the Government of the States. The same is true of the converse position. There is nothing in the Constitution which prohibits or in any other way prevents the enlargement of powers of Parliament as a result of Constitutional amendment and, in my opinion, such an amendment cannot be held to be impermissible or beyond the purview of Article 368. Indeed, a precedent is afforded by the Irish case of Jeremish Ryan (supra) wherein amendment made by the Oirechtas as a result of which it enlarged its powers inasmuch as its power of amending the Constitution without a referendum was increased from eight years to 16 years was held to be valid. Even Kennedy C.J. who gave a dissenting judgment did not question the validity of the amendment on the ground that Oirechtas had thereby increased its power. He struck it down on the ground that there was no power to amend the amending clause. No such difficulty arises under our Constitution because of the existence of an express provision. I am also unable to accede to the contention that an amendment of the Constitution as a result of

which the President is bound to give his assent to an amendment of the Constitution passed in accordance with the provisions of Article 368 is not valid. Article 368 itself gives, inter alia, the power to amend Article 368 and an amendment of Article 368 which has been brought about in the manner prescribed by that article would not suffer from any Constitutional or legal infirmity. I may mention in this context that an amendment of the US Constitution in accordance with Article 5 of the US Constitution does not require the assent of the President. The change made by the Twenty-fourth Amendment in the Constitution of India, to which our attention has been invited, has not done away with the assent of the President but has made it obligatory for him to give his assent to the Constitution Amendment Bill after it has been passed in accordance with Article 368. As it is not now open to the President to withhold his assent to a Bill in regard to a Constitutional amendment after it has been duly passed, the element of personal discretion of the President disappears altogether. Even apart from that, under our Constitution the position of the President is that of a Constitutional head and the scope for his acting in exercise of his personal discretion is rather small and limited.

1498. Reference was made during the course of arguments to the provisions of Section 6 of the Indian Independence Act, 1947. According to Sub-section (1) of that section, the Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation. Sub-section (6) of the section provided that the power referred to in Sub-section (1) of this section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion. No help, in my opinion, can be derived from the above provisions because the Constituent Assembly framed and adopted the Constitution not on the basis of any power derived from Section 6 of the Indian Independence Act. On the contrary, the members of the Constituent Assembly framed and adopted the Constitution as the representatives of the people and on behalf of the people of India. This is clear from the opening and concluding words of the Preamble to the Constitution. There is, indeed, no reference to the Indian Independence Act in the Constitution except about its repeal in Article 395 of the Constitution.

1499. Apart from the above, I find that all that Sub-section (6) of Section 6 of the Indian Independence Act provided for was that the power referred to in Sub-section (1) would extend to the making of laws limiting for the future the powers of the Legislature of the Dominion. The Provisional Parliament acting as the Constituent Assembly actually framed the Constitution which placed limitations on the ordinary legislative power of the future Parliaments by providing that the legislative laws would not contravene the provisions of the Constitution. At the same time, the Constituent Assembly inserted Article 368 in the Constitution which gave power to the two Houses of future Parliaments to amend the Constitution in compliance with the procedure laid down in that article. There is nothing in Section 6 of the Indian Independence Act which stood in the way of the Constituent Assembly against the insertion of an article in the Constitution conferring wide power of amendment, and I find it difficult to restrict the scope of Article 368 because of anything said in Section 6 of the Indian Independence Act.

1500. Argument on behalf of the petitioners that our Constitution represents a compact on the basis of which people joined the Indian Union and accepted the Constitution is wholly misconceived. The part of India other than that comprised in erstwhile Indian States was already one territory on August 15, 1947 when India became free. So far as the erstwhile Indian States were concerned, they acceded to the Indian Union long before the Constitution came into force on January 26, 1950

or was adopted on November 26, 1949. There thus arose no question of any part of India comprising the territory of India joining the Indian Union on the faith of any assurance furnished by the provisions of the Constitution. Some assurances were given to the minorities and in view of that they gave up certain demands. The rights of minorities are now protected in Articles 25 to 30. Apart from the articles relating to protection to the minorities, the various articles contained in Part III of the Constitution are applicable to all citizens. There is nothing to show that the people belonging to different regions would have or indeed could have declined to either join the Indian Union or to remain in the Indian Union but for the incorporation of articles relating to fundamental rights in the Constitution. The Constitution containing fundamental rights was framed by the people of India as a whole speaking through their representative and if the people of India as a whole acting again through their representatives decide to abridge or take away some fundamental right like one relating to property, no question of breach of faith or violation of any alleged compact can, in my opinion, arise.

1501. This apart, compact means a bargain or agreement mutually entered into, which necessarily connotes a choice and volition for the party to the compact. Whatever may be the relevance or significance of the concept of compact in the context of the US Constitution where different States joined together to bring into existence the United States of America and where further each one of the States ratified the Constitution after it had been prepared by the Philadelphia Convention, the above concept has plainly no relevance in the context of the Indian Constitution. The whole of India was, as already mentioned, one country long before the Constitution was adopted. There was also no occasion here for the ratification of the Constitution by each State after it had been adopted by the Constituent Assembly.

1502. Reference has been made on behalf of the petitioners to the case of Mangal Singh and Anr. v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 which related to the Punjab Reorganization Act, 1966. This Court while upholding the validity of the Act dealt with Article 4, according to which any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary, and observed:

Power with which the Parliament is invested by Articles 2 and 3, is power to admit, establish, or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution, and is not power to override the Constitutional scheme. No State can therefore be formed, admitted or set up by few under Article 4 by the Parliament which has not effective legislative, executive and judicial organs.

1503. The above passage, in my opinion, does not warrant an inference of an implied limitation on the power of amendment as contended on behalf of the petitioners. This Court dealt in the above passage with the import of the words "supplemental, incidental and consequential provisions" and held that these provisions did not enable the Parliament to override the Constitutional scheme. The

words "Constitutional scheme" had plainly reference to the provisions of the Constitution which dealt with a State, its legislature, judiciary and other matters in Part VI. Once the State of Haryana came into being, it was to have the attributes of a State contemplated by the different articles of Part VI in the same way as did the other States. No question arose in that case about limitation on the power of amendment under Article 368 and as such, that case cannot be of any avail to the petitioners.

1504. learned Counsel for the petitioner has invited our attention to the Constitutional position specially in the context of civil liberties in Canada. In this respect we find that the opening words of the Preamble to the British North America Act, 1867 read as under:

Whereas the provisions of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom;

Section 91 of the above mentioned Act deals with the legislative authority of Parliament of Canada. The opening words of Section 91 are as under:

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of the section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say, ---.

There follows a list of different subjects. The first amongst the subjects, which was inserted by British North America Act 1949, is : "The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or...." It is not necessary to give the details of other limitations on the power of amendment. Section 92 of the British North America Act enumerates the subjects of exclusive provincial legislation. According to this section, in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated. There then follows a list of subjects, the first amongst which is "The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the province, except as regards the office of the Lieutenant Governor". In view of the fact that amendment of the Constitution is among the subjects of legislation, the only distinction in Canada, it has been said, between ordinary legislation by Parliament and Constitutional law is that the former concerns all matters not specially stated as within the ambit of provincial legislation while the latter concerns any fundamental change in the division of rights. Further, although because of the federal character of the State, the Canadian Constitution cannot be called flexible, it is probably the least rigid of any in the modern federal states (see Modern Political Constitutions by C.F. Strong).

1505. It appears that at least six different views have been propounded in Canada about the Constitutional position of basic liberties. To date, the Supreme Court of Canada has not given

Judicial approval to any of these views. Different members of the Court have voiced various opinions on the matter, but all of these fall far short of settling the issue. It should also be noted that the fundamental problem is not whether Parliament or the legislature may give to the people basic freedom, but rather which one may interfere with them or take them away (see civil Liberties in Canada by D.A. Schmeiser P. 13).

1506. An important case which had bearing on the question of civil liberties was the Alberta Press case [1938] S.C.R. 100. That case related to the validity of an Act which had placed limitations on the freedom of the Press and the Supreme Court of Canada held that the Act was ultra vires, since it was ancillary to and dependent upon the Alberta Social Credit Act, which itself was ultra vires. Three or judges, including Duff C.J., went further than this, and dealt with the freedom of speech and freedom of Press. It was observed that curtailment of the exercise of the right of the public discussion would interfere with the working of parliamentary institutions of Canada. Opinion of Duff C.J. was based not on the criminal law power but on the necessity for maintaining democratic society as contemplated by the Constitution. A later decision dealing with free speech was Switzmand v. Elbing and Attorney-General of Quebec [1957] S.C.R. 285. In that case the Supreme Court declared invalid the Quebec Communistic Propaganda Act. All the judges but one were agreed that the statute did not fall within provincial competence under property and civil rights or matters of a merely local or private nature in the province. Abbott J. held that the Parliament itself could not abrogate the right of discussion and, debate.

1507. An article by Dale Gibson in Volume 12-1966-67 in Mc Gill Law Journal shows that though the proposition enunciated by Duff C.J. has commanded the allegiance of an impressive number of judges and has not been decisively rejected, it has never been accepted by a majority of the members of the Supreme Court of Canada or of any other court. Some judges have assumed that basic freedoms may properly be the subject matter of legislation separate and apart from any other-subject matter. Others have taken the view that unlimited jurisdiction falls within Dominion control under its general power to make laws "for the peace, order and good government of Canada". A third view which has been taken is mat the creation of a Parliament and reference in the Preamble to "a Constitution similar in principle to that of the United Kingdom" postulates that legislative body would be elected and function in an atmosphere of free speech. It is not necessary to give the other views or dilate upon different views. Bora Laskin while dealing with the dictum of Abbott J. has observed in Canadian Constitutional Law:

Apart from the dictum by Abbott J. in the Switzman case, supra, there is no high authority which places civil liberties beyond the legislative reach of both Parliament and the provincial Legislatures. There are no explicit guarantees of civil liberties in the B.N.A. Act nothing comparable to the Bill of Rights (the 1st ten amendments) in the Constitution of the United States, which, within limits and on conditions prescribed by the Supreme Court as ultimate expounder of the meaning and range of the Constitution, prohibits both federal and state action infringing, inter alia, freedom of religion, of speech, of the press and of assembly. (see p. 970).

1508. It would appear from the above that the different views which have been expressed in Canada are in the context of the preamble and section of the British North America Act, the provisions of which are materially different from our Constitution. Even in the context of the British. North America Act, the observations of Abbott J. relied upon on behalf of the petitioners

have not been accepted by the majority of the judges of the Canadian Supreme Court, and in my opinion, they afford a fragile basis for building a theory of implied limitations.

1509. It may be mentioned that in August 1960 the Parliament of Canada passed the Canadian Bill of Rights. Section 1 of the Bill declared certain human rights and fundamental freedoms and reads as under:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

According to Section 2 of the Bill, every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgement or infringement of any of the rights or freedoms therein recognized and declared. The relevant part of Section 2 reads as under:

Every law of Canada shall, *unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to....

(underlining supplied).

Plain reading of Section 2 reproduced above makes it manifest that the human rights and fundamental freedoms mentioned in Section 1 of the Bill are not absolute but are subject to abrogation or abridgement if an express declaration to that effect be made in a law of Canada. Section 2 of the Bill shows that if an express declaration to that effect be made an Act of the Parliament can override the provisions of the Bill of Rights. Section 2 is thus inconsistent with the theory of implied limitations based on human rights on the power of the Canadian Parliament.

1510. Another case from Canada which has been referred to on behalf of the petitioners and which in my opinion is equally of no avail to them is The Attorney General of Nova Scotia and The Attorney General of Canada [1950] S.C.R. 31 decided by the Supreme Court of Canada. It was held in that case that an Act respecting the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa, if enacted, would not be Constitutionally valid since it contemplated delegation by Parliament of powers, exclusively vested in it by Section 91 of the British North America Act, to the Legislature of Nova Scotia; and delegation by that Legislature of powers, exclusively vested in Provincial Legislature under Section 92 of the Act, to Parliament. The Parliament of Canada and each Provincial Legislature, according to the Supreme Court of Canada, was sovereign body within its sphere, possessed of exclusive jurisdiction to legislate with regard to the subject matters assigned to it under Section 91 or Section 92, as the case may be. Neither was capable therefore of delegating to the other the powers with which it had been vested nor of receiving from the other the powers with which the other had been vested. It is plain that that case related to the delegation of powers which under the British North America Act had been assigned exclusively to Parliament or to the Provincial Legislatures. Such a delegation was held to be not permissible. No such question arises in the present case.

1511. We may now deal with some of the other cases which have been referred to on behalf of the petitioner. Two of those cases are from Ceylon. The Constitutional position there was that Section 29 of the Ceylon (Constitution) Order in Council, 1946 gave the power to make laws as well as the power to amend the Constitution though the procedure prescribed for the two was different. Section 29 reads as under:

29 (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall-

(a) prohibit or restrict the free exercise of any religion; or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

(d) alter the Constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body:

Provided, however, that the preceding provisions of this, subsection shall not apply to any law making provision for, relating to, or connected with, the election of Members of the House of Representatives, to represent persons registered as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act.

This proviso shall cease to have effect on a date to be fixed by the Governor-General by Proclamation published in the Gazette.

(3) Any law made in contravention of Sub-section (2) of this section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order or of any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

1512. In Liyanage and Ors. v. The Queen [1966] All E.R. 650 the appellants had been charged with offences arising out of an abortive coup d'etat on January 27, 1962. The story of the coup d'etat was set out in a White Paper issued by the Ceylon Government. On March 16, 1962 the Criminal Law (Special Provisions) Act was passed and it was given retrospective effect from January 1, 1962. The Act was limited in operation to those who were accused of offences against the State in or about January 27, 1962. The Act legalised the imprisonment of the appellants while they were awaiting trial, and modified a section of the Penal Code so as to enact ex post facto a new offence to meet the circumstances of the abortive coup. The Act empowered the Minister of Justice to nominate the three judges to try the appellants without a jury. The validity of the Act was challenged as well as the nomination which had been made by the Minister of Justice of the three judges. The Ceylon Supreme Court upheld the objection about the vires of some of the provisions of the Act as well as the nomination of the judges. Subsequently the Act was amended and the power of nomination of the judges was conferred on the Chief Justice. The appellants having been convicted at the trial before a court of three judges nominated under the amended Act, went up in appeal before the Judicial Committee. The conviction of the appellants was challenged on three grounds but the Judicial Committee dealt with only two grounds. The first ground was that the Ceylon Parliament was limited by an inability to pass legislation which was contrary to fundamental principles of justice. The two Acts of 1962, it was stated, were contrary to such principles in that they were not only directed against individuals but also ex post facto created crimes and for which those individuals would otherwise be protected. The second contention was that the Acts of 1962 offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which was outside the legislature's competence and was inconsistent with the severance of power between legislature, executive, and judiciary which the Constitution ordained. Dealing with the first contention, the Judicial Committee referred to the provisions of the Ceylon (Constitution) Order in Council, 1946 and the Ceylon Independence Act,

1947 and observed that the joint effect of the said Order and Act was intended to and resulted in giving the Ceylon Parliament the full legislative powers of an independent sovereign state. The legislative power of the Ceylon Parliament, it was held, was not limited by inability to pass laws which offended fundamental principles of justice. On the second ground, the Judicial Committee held the Acts of 1962 to be invalid as they involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written Constitution of Ceylon, which, while not in terms vesting judicial functions in the judiciary, manifested an intention to secure in the judiciary a freedom from a political, legislative and executive control.

1513. It would thus appear that the decision is based upon the ground of severance of powers between legislature, judiciary and executive under the Ceylon Constitution and furnishes no support for the theory of implied limitations on the power of Parliament. On the contrary, the Judicial Committee while dealing with the first contention rejected the theory of limitations on the power of Parliament to make a law in violation of the fundamental principles of justice. The Judicial Committee, it is also noteworthy, expressly pointed out that there had been no amendment of the Constitution in accordance with Section 29(4) of the Constitution by two-thirds majority and as such they had not to deal with that situation.

1514. Another case to which reference was made on behalf of the petitioners was The Bribery Commissioner v. Pedrik Ranasinghe [1965] A.C. 172. In that case it was found that the members of the Bribery Tribunal had been appointed by the Governor-General on the advice of the Minister of Justice in accordance with Bribery Amendment Act but in contravention of Section 55 of the Ceylon Constitution. [Ceylon (Constitution) Order in Council, 1946] according to which the appointment of judicial officers was vested in the Judicial Service Commission. It was held that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is that of Ceylon.

1515. It would appear from the above that the point of controversy which arose for determination in that case was different from that which arises in the present case because we are not in this case concerned with any law made by a legislature in contravention of the Constitutional provisions Reference has been made on behalf of the petitioners to a passage in the judgment wherein while dealing with Sub-section (2) of Section 29 of the Ceylon Constitution, the provisions of which have been reproduced earlier, the Judicial Committee observed that the various clauses of Sub-section (2) set out entrenched religious and racial matters which shall not be the subject of legislation. It was further observed that those provisions represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution and these are therefore unalterable under the Constitution. It is contended that those observations show that the rights mentioned in Section 29(2) of the Ceylon Constitution which were similar to the fundamental rights in Part III of the Indian Constitution, were held by the Judicial Committee to be unalterable under the Constitution. There was, it is further submitted, similarity between the provisions of Section 29(3) of the Ceylon Constitution and Article 13(2) of the Indian Constitution because it was provided in Section 29(3) that any law made in contravention of Section 29(2) shall to the extent of such contravention be void.

1516. I find it difficult to accede to the contention that the Judicial Committee laid down in the above case that Sections 29(2) and 29(3) placed a restriction on the power of amendment of the Constitution under Section 29(4) of the Constitution. The question with which the Judicial Committee was concerned was regarding the validity of the appointment of the members of the Bribery Tribunal. Such appointment though made in compliance with the provisions of the Bribery Amendment Act, was in contravention of the requirements of Section 55 of the Ceylon Constitution. No question arose in that case relating to the validity of a Constitutional amendment brought about in compliance with Section 29(4) of the Constitution. Reference to the argument of the counsel for the respondent on the top of page 187 of that case shows that it was conceded on his behalf that "there is no limitation at the moment on the right of amendment or repeal except the requirement of the requisite majority". The Judicial Committee nowhere stated that they did not agree with the above stand of the counsel for the respondent. Perusal of the judgment shows that the Judicial Committee dealt with Sections 18 and 29 together and pointed out the difference between a legislative law, which was required to be passed by a bare majority of votes under Section 18 of the Constitution, and a law relating to a Constitutional amendment which was required to be passed by a two-thirds majority under Section 29(4). Dealing with the question of sovereignty, the Judicial Committee observed:

A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign power of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.

It has been submitted on behalf of the respondents that the above passage indicates that the Judicial Committee took the view that the amendment of all the provisions of the Ceylon Constitution including those contained in Sub-sections (2) and (3) of Section 29 could be passed by a two-thirds majority. It is also stated that the restrictions imposed by Sub-section (2) of Section 29 of the Ceylon Constitution are on the power of ordinary legislation by simple majority and not on the power of making Constitutional amendment by two-thirds majority in compliance with Section 29(4) of the Constitution. It was in that sense that the Judicial Committee, according to the submission, used the word "entrenched". Our attention has also been invited to the observations on pages 83 and 84 of the Constitutional structure by K.C. Wheare 1963 Reprint that "these safeguards (contained in Section 29) of the rights of communities and religions could be repealed or amended by the Parliament of Ceylon provided it followed the prescribed procedure for amendment of the Constitution". These submissions may not be bereft of force, but it is, in my opinion, not necessary to dilate further upon this matter and discuss the provisions of the Ceylon Constitution at greater length. The point of controversy before us would have to be decided in the light essentially of the provisions of our own Constitution. Suffice it to say that Ranasinghe's case does not furnish any material assistance to the stand taken on behalf of the petitioners.

1517. We may now advert to the case of McCawley v. The King [1920] A.C. 691 The said case related to the Constitution of Queensland in Australia. Queensland was granted a Constitution in

1859 by an Order in Council made on June 6. The Order in Council set up a Legislature in the territory consisting of the Queen, a Legislative Council and a Legislative Assembly and the law making power was vested in the Queen acting with the advice and consent of the Council and Assembly. Any law could be made for the "peace, welfare and good government of the colony", the phrase generally employed to denote the plenitude of sovereign legislative power even though that power be confined to certain subjects or within certain reservations. The Legislature passed a Constitution Act in 1867. By Section 2 of that Act the legislative body was declared to have power to make laws for the peace, welfare and good government of the colony in all cases whatsoever. The only express restriction on this comprehensive power was in Section 9 which required a two-thirds majority of the Council and of the Assembly as a condition precedent to the validity of legislation altering the Constitution of the Council. In 1916 the Industrial Arbitration Act was passed. The said Act authorised the Governor in Council to appoint the President or a judge of the Court of Industrial Arbitration to be a judge of the Supreme Court of Queensland. It was also provided that the judge so appointed shall have the jurisdiction of both offices, and shall hold office as a judge of the Supreme Court during good behavior. The Governor in Council, by a commission, appointed the appellant who was the President of the Court of Industrial Arbitration to be a judge of the Supreme Court during good behavior. The Supreme Court of Queensland held that the appellant was not entitled to have the oath of office administered to him or to take his seat as a member of the Supreme Court. Subsequently, the Supreme Court of Queensland gave a judgment in ouster against the appellant. The provisions of Section 6 of the Industrial Arbitration Act of 1916 under which the appellant had been appointed a judge of the Supreme Court were held to be inconsistent with the provisions of the Constitution Act and as such void. On appeal four out of the seven judges of the High Court of Australia agreed with the Supreme Court of Queensland, while the three other judges took the opposite view and expressed the opinion that the appeal should be allowed. The matter was then taken up in appeal to the Privy Council. Lord Birkenhead giving the opinion of the Judicial Committee held (1) that the Legislature of Queensland had power, both under the Colonial Laws Validity Act, 1865, and apart therefrom, to authorise the appointment of a judge of the Supreme Court for a limited period; and (2) that Section 6 of the Industrial Arbitration Act authorised an appointment as a judge of the Supreme Court only for the period during which the person appointed was a judge of the Court of Industrial Arbitration. The appellant was further held to have been validly appointed. The above case though containing observations that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law, laid down the proposition that in the absence of a restriction, it is not possible to impose a restriction upon the legislative power. It was observed:

The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal.

It was also observed:

Still less is the Board prepared to assent to the argument, at one time pressed upon it, that distinctions may be drawn between different matters dealt with by the Act, so that it becomes legitimate to say of one section : 'This section is fundamental or organic; it can only be altered in

such and such manner'; and of another : 'This section is not of such a kind; it may consequently be altered with as little ceremony as any other statutory provision.'

The decision in the above cited case can hardly afford any assistance to the petitioners. On the contrary, there are passages in the judgment which go against the stand taken on behalf of the petitioners.

Section 5 of the Colonial Laws Validity Act, 1865 to which there was a reference in the McCawley's case reads as under:

Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction have, and be deemed at all times to have had, full power to make laws respecting the Constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council or colonial law for the time being in force in the said colony.

Reference has been made during arguments to the decision of the Privy Council in the case of Attorney-General for New South Wales v. Trethowan [1932] A.C. 526. The said case related to a Bill passed by the New South Wales Parliament for repeal of a section providing for referendum as well as to another Bill for abolition of the Legislative Council. The Privy Council affirmed the decision of the Australian High Court which had held by majority that the Bills had not been passed in the "manner and form" within the meaning of Section 5 of the Colonial Laws Validity Act, and as such could not be presented for Royal assent. The Privy Council based its decision upon the language of the above section and the meaning of the word "passed" in that section. We are not concerned in the present case with the aforesaid provisions. There is also nothing in the conclusions at which I have arrived which runs counter to the principles laid down in the Trethowan's case.

1518. Another Australian case to which reference has been made during the course of arguments is The State of Victoria v. The Commonwealth. 45 Australian Law Journal Reports 251 It has been laid down by the High Court of Australia in that case that the Commonwealth Parliament in exercise of its powers under Section 51(ii) of the Constitution may include the Crown in right of a State in the operation of a law imposing a tax or providing for the assessment of a tax. The inclusion of the Crown in right of a State, according to the court, in the definition of "employer" in the Pay-roll Tax Assessment Act, thus making the Crown in right of a State liable to pay the tax in respect of wages paid to employees, including employees of departments engaged in strictly governmental functions, is a valid exercise of the power of the Commonwealth under the above provisions of the Constitution. There was discussion in the course of the judgment on the subject of implied limitation on the Commonwealth legislative power under the Constitution arising from the federal nature of the Constitution and different views were expressed. Three of the Judges, including Barwick C.J. took the view that there was no such limitation. As against that, four Judges were of the opinion that there was an implied limitation on Commonwealth legislative power under the Constitution but the impugned Act did not offend such limitation. Opinion was expressed that the Commonwealth Parliament while acting under the legislative entry of taxation could not so use

the power of taxation as to destroy the States in a federal structure. The question as to what is the scope of the power of amendment was not considered in that case. The above case as such cannot be of much assistance for determining as to whether there are any implied limitations on the power to make Constitutional amendment.

1519. I am, therefore, of the opinion that the majority view in the Golak Nath's case that Parliament did not have the power to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights cannot be accepted to be correct. Fundamental rights contained in Part III of our Constitution can, in my opinion, be abridged or taken away in compliance with the procedure prescribed by Article 368, as long the basic structure of the Constitution remains unaffected.

1520. We may now deal with the Twenty-fourth Amendment. It has sought to make clear matters regarding which doubt had arisen and conflicting views had been expressed by this Court. We may in this context set forth the Statement of Objects and Reasons of the Constitution (Twenty-fourth Amendment) Bill. The Statement of Objects and Reasons reads as under:

STATEMENT OF OBJECTS AND REASONS

The Supreme Court in the well-known Golak Nath's case MANU/SC/0029/1967 : [1967]2SCR762 reversed, by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. The result of the judgment is that Parliament is considered to have no power to take away or curtail any of the fundamental rights guaranteed by Part III of the Constitution even if it becomes necessary to do so for giving effect to the Directive Principles of State Policy and for the attainment of the objectives set out in the Preamble to the Constitution. It is, therefore, considered necessary to provide expressly that Parliament has power to amend any provision of the Constitution so as to include the provisions of Part III within the scope of the amending power.

2. The Bill seeks to amend Article 368 suitably for the purpose and makes it clear that Article 368 provides for amendment of the Constitution as well as procedure therefore. The Bill further provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give has assent thereto. The Bill also seeks to amend Article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under Article 368.

1521. Section 2 of the Bill which was ultimately passed as the Constitution (Twenty-fourth Amendment) Act has added a clause in Article 13 that nothing in that article would apply to any amendment of the Constitution made under Article 368. As a result of Section 3 of the Amendment Act, Article 368 has been re-numbered as Clause (2) thereof and the marginal heading now reads "Power of Parliament to amend the Constitution and procedure therefor". Non-obstante Clause (1) has been inserted in the article to emphasise the fact that the power exercised under that article is constituent power, not subject to the other provisions of the Constitution, and embraces within itself addition, variation and repeal of any provision of the Constitution. Amendment has also been made so as to make it obligatory for the President to give his assent to the Amendment Bill after it has been passed in accordance with the article. Clause (3) has further been added in Article 368

to the effect that nothing in Article 13 would apply to an amendment made under Article 368. Although considerable arguments have been addressed before us on the point as to whether the power of amendment under Article 368 includes the power to amend Part III so as to take away or abridge fundamental rights, it has not been disputed before us that the Constitution (Twenty-fourth Amendment) Act was passed in accordance With the procedure laid down in Article 368 of the Constitution as it existed before the passing of the said Act. In view of what has been discussed above at length. I find no infirmity in the Constitution (Twenty-fourth Amendment) Act. 1, therefore, uphold the validity of the said Act.

1522. We may now deal with the Constitution (Twenty-fifth Amendment) Act, 1971. The Twenty-fifth Amendment has made three material changes:

(i) It has amended Article 31(2) in two respects.

(a) It substitutes the word "amount" for the word "compensation" for property acquired or requisitioned.

(b) It has provided that the law for the purpose of acquisition or requisition shall not be called in question on the ground that the whole or any part of the "amount" is to be given otherwise than in cash.

(ii) It has provided that the fundamental right to acquire, hold and dispose of property under Article 19(1)(f) cannot be invoked in respect of any such law as is referred to in Article 31(2).

(iii) It has inserted Article 31C as an overriding article which makes the fundamental rights conferred by Articles 14, 19 and 31 inapplicable to certain categories of laws passed by the Parliament or by any State Legislature.

So far as the substitution of the word "amount" for the word "compensation" for property acquired or requisitioned in Article 31(2) is concerned, we find that this Court held in Mrs. Bela Bose MANU/SC/0017/1953 : [1954]1SCR558 case that by the guarantee of the right to compensation for compulsory acquisition under Article 31(2), before it was amended by the Constitution (Fourth Amendment) Act, the owner was entitled to receive a "just equivalent" or "full indemnification". In P. Vajravelu Mudaliar's MANU/SC/0049/1964 : [1965]1SCR614 case this Court held that notwithstanding the amendment of Article 31(2) by the Constitution (Fourth Amendment) Act and even after the addition of the words "and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate", the expression "compensation continued to have the same meaning as it had in Article 31(2) before it was amended, viz., just equivalent or full indemnification. Somewhat different view was taken by this Court thereafter, in the case of Shantilal Mangaldas MANU/SC/0063/1969 : [1969]3SCR341 . In the case of P. Vajravelu Mudaliar (supra) it was observed that the Constitutional guarantee was satisfied only if a just equivalent of the property was given to the owner. In the case of Shantilal Mangaldas (supra) it was held that "compensation" being itself incapable of any precise determination, no definite connotation could be attached thereto by calling it "just equivalent" or "full indemnification", and under Acts enacted after the amendment of Article 31(2) it is not open to the Court to call in question the law providing for compensation on the ground that it is

inadequate, whether the amount of compensation is fixed by the law or is to be determined according to principles specified therein (see observations of Shah J. on page 596 in the case of R.C. Cooper v. Union MANU/SC/0011/1970 : [1970]3SCR530 . After further discussion of the views expressed in those two cases, Shah J. speaking for the majority, observed:

Both the lines of thought which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge if it is relevant to the determination of compensation and is a recognized principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in P. Vajravelu Mudaliar's case (supra) or in Shantilal Mangaldas's case (supra) the Act, in our judgment, is liable to be struck down as it fails to provide to the expropriated banks compensation determined according to relevant principles.

1523. The amendment in Article 31(2) made by the Twenty-fifth Amendment by substituting the word "amount" for the word "compensation" is necessarily intended to get over the difficulty caused by the use of the word "compensation". As the said word was held by this Court to have a particular connotation and was construed to mean just equivalent or full indemnification the amendment has replaced that word by the word "amount". In substituting the word "amount" for "compensation" the Amendment has sought to ensure that the amount determined for acquisition or requisition of property need not be just equivalent or full indemnification and may be, if the legislature so chooses, plainly inadequate. It is not necessary to further dilate upon this aspect because whatever may be the connotation of the word "amount", it would not affect the validity of the amendment made in Article 31(2).

1524. Another change made in Article 31(2) is that the law for the purpose of acquisition or requisition shall not be called in question on the ground that the whole or any part of the "amount" fixed or determined for the acquisition or requisition of the property is to be given otherwise than in cash. I have not been able to find any infirmity in the above changes made in Article 31(2).

1525. According to Clause (2B) which has been added as a result of the Twenty-fifth Amendment in Article 31, nothing in Sub-clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2). In this connection we find that this Court held in some cases that Articles 19(1)(f) and 31(2) were exclusive. In A.K. Gopalan v. The State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act applied to this Court for a writ of habeas corpus claiming that the Act contravened the guarantee under Articles 19, 21 and 22 of the Constitution. The majority of this Court (Kania C.J., and Patanjali Sastri, Mahajan, Mukherjea and Das JJ.) held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19(1)(c) was infringed by his detention, and that validity of the law providing for making orders of detention will not be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than according to the procedure established by law. Fazl Ali, J. expressed a contrary view. This case formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom

must be adjudged in the light of the object of State action in relation to the individual's right and not upon its effect upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive-each article enacting a code relating to protection of distinct rights (see p. 571 in the case of R.C. Cooper, (supra). The view expressed in Gopalan's case (supra) was reaffirmed in Ram Singh and Ors. v. The State of Delhi MANU/SC/0005/1951 : [1951]2SCR451 . The principle underlying the judgment of the majority was extended to the protection of the right to property and it was held that Article 19(1)(f) and Article 31(2) were mutually exclusive in their operation. In the case of State of Bombay v. Bhanji Munji and Anr. MANU/SC/0034/1954 : [1955]1SCR777 this Court held that Article 19(1)(f) read with Clause (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by Clause (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold or dispose it of. In Kavalappara Kottarathil Kochuni's MANU/SC/0019/1960 : [1960]3SCR887 case, Subba Rao J. delivering the judgment of the majority of the Court, observed that Clause (2) of Article 31 alone deals with compulsory acquisition of property by the State for a public purpose, and not Article 31(1) and he proceeded to hold that the expression "authority of law" means authority of a valid law, and on that account validity of the law seeking to deprive a person of his property is open to challenge on the ground that it infringes other fundamental rights, e.g., under Article 19(1)(f). It was also observed that after the Constitution (Fourth Amendment) Act, 1955 Bhanji Munji's case (supra) "no longer holds the field". After the decision in K.K. Kochuni's case (supra) there arose two divergent lines of authority. According to one view, "authority of law" in Article 31(1) was liable to be tested on the ground that it violated other fundamental rights and freedoms, including the right to hold property guaranteed by Article 19(1)(f). The other view was that "authority of a law" within the meaning of Article 31(2) was not liable to be tested on the ground that it impaired the guarantee of Article 19(1)(f) in so far as it imposed substantive restrictions-though it may be tested on the ground of impairment of other guarantees. In the case of R.C. Cooper (supra), Shah J. speaking for the majority held that in determining the impact of State action upon Constitutional guarantees which are fundamental, the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights. It was further observed:

We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Article 19(1)(f) and 31(2) are mutually exclusive.

1526-27. The Twenty-fifth Amendment seeks to overcome the effect of the above decision in R.C. Cooper's case. It has sought to resolve the earlier conflict of views noticeable in this respect in the judgments of this Court. Provision has accordingly been made that the fundamental right to acquire, hold or dispose of property under Article 19(1)(f) cannot be invoked in respect of any such law as is referred to in Article 31(2). In view of what has been discussed earlier while dealing

with the Twenty-fourth Amendment, the change made by addition of Clause (2B) in Article 31(2) is permissible under Article 368 and cannot be held to be invalid.

1528. We may now deal with Article 31C, introduced as a result of the Twenty-fifth Amendment. Perusal of this article which has been reproduced in the earlier part of this judgment shows that the article consists of two parts. The first part states that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. According to the second part of this article, no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. There then follows the proviso, according to which where such law is made by the Legislature of a State, the provisions of the article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

1529. The first part of Article 31C is similar to Article 31A except in respect of the subject matter. Article 31A was inserted by the Constitution (First Amendment) Act, 1951. Clause (1) of Article 31A as then inserted was in the following words:

(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Subsequently, Clause (1) of Article 31A was amended by the Constitution (Fourth Amendment) Act, 1955. New Clause (1) was in the following words:

(1) Notwithstanding anything contained in Article 13, no law providing for-

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Clause (b) and (c) of Article 39 referred to in Article 31C read as under:

39. The State shall, in particular, direct its policy towards securing-

...

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

...

1530. It would appear from the above that while Article 31A dealt with a law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of such rights or other matters mentioned in Clauses (b) to (e) of that article, Article 31C relates to the securing of the objective that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. But for the difference in subjects, the language of the first clause of Article 31A and that of the first part of Article 31C is identical. Both Articles 31A and 31C deal with right to property. Article 31A deals with certain kinds of property and its effect is, broadly speaking, to take those kinds of property from the persons who have rights in the said property. The objective of Article 31C is to prevent concentration of wealth and means of production and to ensure the distribution of ownership and control of the material resources of the community for the common good. Article 31C is thus essentially an extension of the principle which was accepted in Article 31A. The fact that the provisions of Article 31C are more comprehensive and have greater width compared to those of Article 31A would not make any material difference. Likewise, the fact that Article 31A deals with law providing for certain subjects, while Article 31C deals with law giving effect to the policy towards securing the principles specified in Clause (b) or Clause (c) of Article 39, would not detract from the conclusion that Article 31C is an extension of the principle which was accepted in Article 31A. Indeed, the legislature in making a law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 acts upon the mandate contained in Article 37, according to which the Directive Principles are

fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws. If the amendment of the Constitution by which Article 31A was inserted was valid, I can see no ground as to how the Twenty-fifth Amendment relating to the insertion of the first part of Article 31C can be held to be invalid. The validity of the First Amendment which introduced Article 31A was upheld by this Court as long ago as 1952 in the case of Sankari Prasad v. Union of India (supra). Article 31A having been held to be valid during all these years, its validity cannot now be questioned on account of the doctrine of stare decisis. Though the period for which Sankari Prasad's case stood unchallenged was not very long, the effects which have followed in the passing of the State laws on the faith of that decision, as observed by Wanchoo J. in Golak Nath's case, are so overwhelming that we should not disturb the decision in that case upholding the validity of the First Amendment. It cannot be disputed that millions of acres of land have changed hands and millions of new titles in agricultural lands which have been created and the State laws dealing with agricultural land which have been passed in the course of the years after the decision in Sankari Prasad's case have brought about an agrarian revolution. Agricultural population constitutes a vast majority of the population in this country. In these circumstances, it would in my opinion be wrong to hold now that the decision upholding the First Amendment was not correct, and thus disturb all that has been done during these years and create chaos into the lives of millions of our countrymen who have benefited by these laws relating to agrarian reforms. I would, therefore, hold that this is one of the fittest cases in which the principle of stare decisis should be applied. The ground which sustained the validity of Clause (1) of Article 31A, would equally sustain the validity of the first part of Article 31C. I may in this context refer to the observations of Brandeis J. in Leser v. Garnett (258) U.S. 130 while upholding the validity of the 19th Amendment, according to which the right of citizens of the United States to vote shall not be denied or abridged by the United States or by States on account of sex. This case negatived the contention that a vast addition to the electorate destroyed the social compact and the residuary rights of the States. Justice Brandeis observed:

This amendment is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid...has been recognized and acted upon for half a century.... The suggestion that the 15th was incorporated in the Constitution not in accordance with law, but practically as a war measure which has been validated by acquiescence cannot be entertained.

1531. We may now deal with the second part of Article 31C, according to which no law containing a declaration that it is for giving effect to the policy of State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be called in question in any court on the ground that it does not give effect to such policy. The effect of the second part is that once the declaration contemplated by that article is made, the validity of such a law cannot be called in question in any court on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31 of the Constitution. The declaration thus gives a complete protection to the provisions of law containing the declaration from being assailed on the ground of being violative of Articles 14, 19 or 31. However tenuous the connection of a law with the objective mentioned in Clause (b) and Clause (c) of Article 39 may be and however violative it may be of the provisions of Articles 14, 19 and 31 of the Constitution, it cannot be assailed in a court of law on the said ground because of the insertion of the declaration in question in the law. The result is that if an Act contains 100 sections and 95 of them relate to matters not connected

with the objectives mentioned in Clauses (b) and (c) of Article 39 but the remaining five sections have some nexus with those objectives and a declaration is granted by the Legislature in respect of the entire Act, the 95 sections which have nothing to do with the objectives of Clauses (b) and (c) of Article 39, would also get protection. It is well-known that State Legislatures are quite often swayed by local and regional considerations. It is not difficult to conceive of laws being made by a State Legislature which are directed against citizens of India who hail from other States on the ground that the residents of the State in question are economically backward. For example, a law might be made that as the old residents in the State are economically backward and those who have not resided in the State for more than three generations have an affluent business in the State or have acquired property in the State, they shall be deprived of their business and property with a view to vest the same in the old residents of the State. Such a law if it contains the requisite declaration, would be protected and it would not be permissible to assail it on the ground of being violative of Articles 14, 19 and 31 of the Constitution even though such a law strikes at the integrity and unity of the country. Such a law might also provoke the Legislatures of other States to make laws which may discriminate in the economic sphere against the persons hailing from the State which was the first to enact such discriminate law. There would thus be a chain reaction of laws which discriminate between the people belonging to different States and which in the very nature of things would have a divisive tendency from a national point of view. The second part of Article 31C would thus provide the cover for the making of laws with a regional or local bias even though such laws imperil the oneness of the nation and contain the dangerous seeds of national disintegration. The classic words of Justice Holmes have a direct application to a situation like this. Said the great Judge:

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." (Holmes, Collected Legal Papers (1920) 295-96).

The fact that the assent of the President would have to be obtained for such a law might not provide an effective safeguard because occasions can well be visualized when the State concerned might pressurise the center and thus secure the assent of the President. Such occasions would be much more frequent when the party in power at the center has to depend upon the political support of a regional party which is responsible for the law in question passed by the State Legislature.

1532. It seems that while incorporating the part relating to declaration in Article 31C, the sinister implications of this part were not taken into account and its repercussions on the unity of the country were not realised. In deciding the question relating to the validity of this part of Article 31C, we should not, in my opinion, take too legalistic a view. A legalistic judgment would indeed be a poor consolation if it affects the unity of the country. It would be apposite in this context to reproduce a passage from Story's Commentaries on the Constitution of the United States wherein he adopted the admonition of Burke with a slight variation as under:

The remark of Mr. Burke may, with a very slight change of phrase be addressed as an admonition to all those, who are called upon to frame, or to interpret a Constitution. Government is a practical thing made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians. The business of those, who are called to administer it, is to rule, and not to wrangle. It would "be a poor compensation, that one had triumphed in a dispute,

whilst we had lost an empire; that we had frittered down a power, and at the same time had destroyed the republic (para 456).

1533. The evil consequences which would flow from the second part of Article 31C would not, however, be determinative of the matter. I would therefore examine the matter from a legal angle. In this respect I find that there can be three types of Constitutional amendments which may be conceived to give protection to legislative measures and make them immune from judicial scrutiny or attack in court of law.

1534. According to the first type, after a statute has already been enacted by the Legislature a Constitutional amendment is made in accordance with Article 368 and the said statute is inserted in the Ninth Schedule under Article 31B. Such a statute or any of the provisions thereof cannot be struck down in a court of law and cannot be deemed to be void or ever to have become void on the ground that the statute or any provisions thereof is inconsistent with or takes away or abridges any of the rights conferred by any provision of Part III. In such a case, the provisions of the entire statute are placed before each House of Parliament. It is open to not less than one-half of the members of each House and not less than two-thirds of the members of each House voting and present after applying their mind to either place the statute in the Ninth Schedule in its entirety or a part thereof or not to do so. It is only if not less than one-half of the total members of each House of Parliament and not less than two-thirds of the members present and voting in each House decide that the provisions of a particular statute should be protected under Article 31B either in their entirety or partly that the said provisions are inserted in the Ninth Schedule. A Constitutional amendment of this type relates to an existing statute of which the provisions can be examined by the two Houses of Parliament and gives protection to the statute from being struck down on the ground of being violative of any provision of Part III of the Constitution. Such an amendment was introduced by the Constitution (First Amendment) Act, 1951 and its validity was upheld in Sankari Prasad's case (supra).

1535. The second type of Constitutional amendment in that where the Constitutional amendment specifies the subject in respect of which a law may be made by the Legislature and the amendment also provides that no law made in respect of that subject shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution. In such a case the law is protected even though it violates the provisions of Part III of the Constitution. It is, however, open in such a case to the court, on being moved by an aggrieved party, to see whether the law has been made for the purpose for which there is Constitutional protection. The law is thus subject to judicial review and can be struck down if it is not for the purpose for which protection has been afforded by the Constitutional amendment. To this category belong the laws made under Article 31A of the Constitution which has specified the subjects for which laws might be made, and gives protection to those taws. It is always open to a party to assail the validity of such a law on the ground that it does not relate to any of the subjects mentioned in Article 31A. It is only if the court finds that the impugned law relates to a subject mentioned in Article 31A that rite protection contemplated by that article would be afforded to the impugned law and not otherwise. Article 31A was introduced by the Constitution (First Amendment) Act, 1951 and as mentioned earlier, the validity of the First Amendment was upheld in Sankari Prasad's case (supra).

1536. The third type of Constitutional amendment is one, according to which a law made for a specified object is protected from attack even though it violates Articles 14, 19 and 31. The Constitutional amendment further provides that the question as to whether the law is made for the specified object is not justiciable and a declaration for the purpose made by the legislature is sufficient and would preclude the court from going into the question as to whether the law is made for the object prescribed by the Constitutional amendment. To such category belongs that part of Twenty-fifth Amendment which inserted Article 31C when taken along with its second part. The law made under Article 31C is not examined and approved for the purpose of protection by not less than one-half of the members of each House of Parliament and not less than two-thirds of the members present and voting in each House, as is necessary in the case of laws inserted in the Ninth Schedule of the Constitution. Nor can the law made under Article 31C be subject to judicial review with a view to find out whether the law has, in fact, been made for an object mentioned in Article 31C. Article 31C thus departs from the scheme of Article 31A, because while a judicial review is permissible under Article 31A to find out as to whether a law has been made for any of the objects mentioned in Article 31A, such a judicial review has been expressly prohibited under Article 31C. The result is that even if a law made under Article 31C can be shown in court of law to have been enacted not for the purpose mentioned in Article 31C but for another purpose, the law would still be protected and cannot be assailed on the ground of being violative of Articles 14, 19 and 31 of the Constitution because of the declaration made by the legislature as contemplated by second part of Article 31C. It may also be mentioned in this context that such a law can be passed by a bare majority in a legislature even though only the minimum number of members required by the quorum, which is generally one-tenth of the total membership of the legislature, are present at the time the law is passed.

1537. The effect of the above amendment is that even though a law is in substance not in furtherance of the objects mentioned in Articles 39(b) and (c) and has only a slender connection with those objects, the declaration made by the Legislature would stand in the way of a party challenging it on the ground that it is not for the furtherance of those objects. A power is thus being conferred upon the Central and State Legislatures as a result of this provision to make a declaration in respect of any law made by them in violation of the provisions of Articles 14, 19 and 31 and thus give it protection from being assailed on that ground in a court of law. The result is that even though for the purpose of making an amendment of the Constitution an elaborate procedure is provided in Article 368, power is now given to a simple majority in a State or Central Legislature, in which only the minimum number of members are present to satisfy the requirement of quorum, to make any law in contravention of the provisions of Articles 14, 19 and 31 and make it immune from attack by inserting a declaration in that law. It is natural for those who pass a law to entertain a desire that it may not be struck down. There would, therefore, be an inclination to make an Act immune from attack by inserting such a declaration even though only one or two provisions of the Act have a connection with the objects mentioned in Article 39(b) and (c). Articles 14, 19 and 31 can thus be reduced to a dead letter, an ineffective purposeless showpiece in the Constitution.

1538. The power of making an amendment is one of the most important powers which can be conferred under the Constitution. As mentioned earlier, according to Finer, the amending clause is so fundamental to a Constitution that it may be called the Constitution itself while according to Burgess, the amending clause is the most important part of a Constitution. This circumstance accounts for the fact that an elaborate procedure is prescribed for the amending of the Constitution.

The power of amendment being of such vital importance can neither be delegated nor can those vested with the authority to amend abdicate that power in favour of another body. Further, once such a power is granted, either directly or in effect, by a Constitutional amendment to the State Legislatures, it would be difficult to take away that power, because it can be done only by means of a Constitutional amendment and the States would be most reluctant, having got such a power, to part with it. In empowering a State Legislature to make laws violative of Articles 14, 19 and 31 of the Constitution and in further empowering the State Legislature to make laws immune from attack on the ground of being violative of Articles 14, 19 and 31 by inserting the requisite declaration, the authority vested with the power to make amendment under Article 368 (viz., the prescribed majority in each House of Parliament) has, in effect, delegated or granted the power of making amendment in important respects to a State Legislature. Although the objects for which such laws may be made have been specified, the effect of the latter part of Article 31C relating to the declaration is that the law in question may relate even to objects which have not been specified. Article 31C taken along with the second part relating to the declaration departs from the scheme of Article 31A because while the protection afforded by Article 31A is to laws made for specified subjects, the immunity granted under Article 31C can be availed of even by laws which have not been made for the specified objects. The law thus made by the State Legislatures would have the effect of pro-tanto amendment of the Constitution. Such a power, as pointed out earlier, can be exercised by the State Legislature by a simple majority in a House wherein the minimum number of members required by the rule of quorum are present.

1539. In Re Initiative and Referendum Act [1919] A.C. 935 the Judicial Committee after referring to a previous decision wherein the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to Taverns observed on page 945:

But it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the Constitutional questions which thus arise.

If it is impermissible for a legislature to create and endow with its own capacity a legislative power not created by the Act to which it owes its own existence, it should, in my opinion, be equally impermissible in the face of Article 368 in its present form under our Constitution, for the amending authority to vest its amending power in another authority like a State Legislature. It has to be emphasised in this context that according to Article 368, an amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament. The word "only" has a significance and shows that as long as Article 368 exists in its present form, the other methods of amendment are ruled out.

1540. It may be mentioned that apart from the question of legislative competence, the articles for the violation of which statutes have been quashed in overwhelming majority of cases are Articles 14, 19 and 31. The question as to whether the impugned statute is beyond legislative competence can be agitated despite the protection of Article 31C in the same way as that question can be agitated despite the protection of Article 31A, but in other respects, as would appear from what has been stated above, Article 31C goes much beyond the scope of Articles 31A and 31B.

1541. In a federal system where the spheres of legislative powers are distributed between the Central Legislature and the State Legislatures, there has to be provided a machinery to decide in case of a dispute as to whether the law made by the State Legislatures encroaches upon the field earmarked for the Central Legislature as also a dispute whether a law made by the Central Legislature deals with a subject which can be exclusively dealt with by the State Legislatures. This is true not only of a federal system but also in a Constitutional set up like ours wherein the Constitution-makers, though not strictly adopting the federal system, have imbibed the features of a federal system by distributing and setting apart the spheres of legislation between the Central Legislature and the State Legislatures. The machinery for the resolving of disputes as to whether the Central Legislature has trespassed upon the legislative field of the State Legislatures or whether the State Legislatures have encroached upon the legislative domain of the Central Legislature is furnished by the courts and they are vested with the powers of judicial review to determine the validity of the Acts passed by the legislatures.

The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four comers of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not - in violation of the other provisions of the Constitution.
Our Constitution-makers have provided for fundamental rights in Part III and made them justiciable.
As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened.
Dealing with draft Article 25 (corresponding to present Article 32 of the Constitution) by which a right is given to move the Supreme Court for enforcement of the fundamental rights, Dr. Ambedkar speaking in the Constituent Assembly on December 9, 1948 observed:
If I was asked to name any particular article in this Constitution as the most important-an article without which this Constitution would be a nullity-I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance. (CAD debates, Vol. VII, p. 953).

Judicial review has thus become an integral part of our Constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the Constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions. The one sphere where there is no judicial review for finding out whether there has been infraction of the provisions of Part III and there is no power of striking down an Act, regulation or provision even though it may be inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution is that incorporated in Article 31B taken along with the Ninth Schedule. Article 31B was inserted, as mentioned earlier, by the Constitution (First Amendment) Act. According to Article 31B, none of the Acts and regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that such Act, regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by any provision of Part III of the Constitution. The one thing significant to be noted in this connection, however, is that the power under Article 31B of exclusion of judicial review, which might be undertaken for the

purpose of finding whether there has been contravention of any provision of Part III, is exercised not by the legislature enacting the impugned law but by the authority which makes the Constitutional amendment under Article 368, viz., the prescribed majority in each House of Parliament. Such a power is exercised in respect of an existing statute of which the provisions can be scrutinized before it is placed in the Ninth Schedule. It is for the prescribed majority in each House to decide whether the particular statute should be placed in the Ninth Schedule, and if so, whether it should be placed there in its entirety or partly. As against that, the position under Article 31C is that though judicial review has been excluded by the authority making the Constitutional amendment, the law in respect of which the judicial review has been excluded is one yet to be passed by the legislatures. Although the object for which such a law can be enacted has been specified in Article 31C, the power to decide as to whether the law enacted is for the attainment of that object has been vested not in the courts but in the very legislature which passes the law. The vice of Article 31C is that even if the law enacted is not for the object mentioned in Article 31C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The kind of limited judicial review which is permissible under Article 31A for the purpose of finding as to whether the law enacted is for the purpose mentioned in Article 31A has also been done away with under Article 31C. The effect of the declaration mentioned in Article 31C is to grant protection to the law enacted by a legislature from being challenged on grounds of contravention of Articles 14, 19 and 31 even though such a law can be shown in the court to have not been enacted for the objects mentioned in Article 31C. Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State legislature, contemplated by Article 31C, in my opinion strikes at the basis structure of the Constitution. The second part of Article 31C thus goes beyond the permissible limit of what constitutes amendment under Article 368.

1542. It has been argued on behalf of the respondents that the declaration referred to in Article 31C would not preclude the court from finding whether a law is for giving effect to the policy of the State towards securing the principles specified in Clauses (b) and (c) of Article 39 and that if an enactment is found by the court to be not for securing the aforesaid objectives, the protection of Article 31C would not be available for such legislation.

1543. I find it difficult to accede to this contention in view of the language of Article 31C pertaining to the declaration. The above contention would have certainly carried weight if the second part of the article relating to the declaration were not there. In the absence of the declaration in question, it would be open to, and indeed necessary, for the court to find whether the impugned law is for giving effect to the policy of the State towards securing the principles specified in Clauses (b) or (c) of Article 39 before it can uphold the validity of the impugned law under Article 31C. Once, however, a law contains such a declaration, the declaration would stand as bar and it would not be permissible for the court to find whether the impugned law is for giving effect to the policy mentioned in Article 31C. Article 31C protects the law giving effect to the policy of the State towards securing the principles specified in Clauses (b) or (c) of Article 39 and at the same time provides that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. It is, therefore, manifest that once a law contains the requisite declaration, the court would be precluded

from going into the question that the law does not give effect to the policy of the State towards securing the principles specified in Clauses (b) or (c) of Article 39. In view of the conclusive nature of the declaration, it would, in my opinion, be straining the language of Article 31C to hold that a court can despite the requisite declaration go into the question that it does not give effect to the policy of the State towards securing the principles specified in Clauses (b) or (c) of Article 39. The result is that if a law contains the declaration contemplated by Article 31C, it would have complete protection from being challenged on the ground of being violative of Articles 14, 19 and 31 of the Constitution, irrespective of the fact whether the law is or is not for giving effect to the policy of the State towards securing the principles specified in Clauses (b) or (c) of Article 39. To put it in other words, even those laws which do not give effect to the policy of the State towards securing the principles specified in Clauses (b) or (c) of Article 39 would also have the protection if they contain the declaration mentioned in Article 31C.

1544. I am also of the view that the validity of the latter part of Article 31C relating to declaration cannot be decided on the basis of any concession made during the course of arguments on behalf of the respondents. Such a concession if not warranted by the language of the impugned provision, cannot be of much avail. Matters relating to construction of an article of the Constitution or the Constitutional validity of an impugned provision have to be decided in the light of the relevant provisions and a concession made by the State counsel or the opposite counsel would not absolve the court from determining the matter independently of the concession. A counsel may sometimes make a concession in order to secure favourable verdict on an other important point, such a concession would, however, not be binding upon another counsel. It is well-settled that admission or concession made on a point of law by the counsel is not binding upon the party represented by the counsel, far less would such admission or concession preclude other parties from showing that the concession was erroneous and not justified in law. It may, therefore, be laid down as a broad proposition that Constitutional matters cannot be disposed of in terms of agreement or compromise between the parties, nor can the decision in such disputes in order to be binding upon others be based upon a concession even though the concession emanates from the State counsel. The concession has to be made good and justified in the light of the relevant provisions.

1545. The position as it emerges is that it is open to the authority amending the Constitution to exclude judicial review regarding the validity of an existing statute. It is likewise open to the said authority to exclude judicial review regarding the validity of a statute which might be enacted by the legislature in future in respect of a specified subject. In such an event, judicial review is not excluded for finding whether the statute has been enacted in respect of the specified subject Both the above types of Constitutional amendments are permissible under Article 368. What is not permissible, however, is a third type of Constitutional amendment, according to which the amending authority not merely excludes judicial review regarding the validity of a statute which might be enacted by the legislature in future in respect of a specified subject but also excludes judicial review for finding whether the statute enacted by the legislature is in respect of the subject for which judicial review has been excluded.

1546. In exercising the power of judicial review, it may be mentioned that the courts do not and cannot go into the question of wisdom behind a legislative measure. The policy decisions have essential to be those of the legislatures. It is for the legislatures to decide as to what laws they should enact and bring on the statute book. The task of the courts is to interpret the laws and to

adjudicate about their validity, they neither approve nor disapprove legislative policy. The office of the courts is to ascertain and declare whether the impugned legislation is in consonance with or in violation of the provisions of the Constitution. Once the courts have done that, their duty ends. The courts do not act as super legislature to suppress what they deem to be unwise legislation for if they were to do so the courts will divert criticism from the legislative door where it belongs and will thus dilute the responsibility of the elected representatives of the people. As was observed by Shri Alladi Krishnaswamy Iyer in speech in the Constituent Assembly on September 12, 1949 "The Legislature may act wisely or unwisely. The principles formulated by the Legislature may commend themselves to a Court or they may not. The province of the Court is normally to administer the law as enacted by the Legislature within the limits of its power".

1547. In exercising the power of judicial review, the courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error.
Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience.
Judicial review is not intended to create what is sometimes called Judicial Oligarchy, the Aristocracy of the Robe, Covert Legislation, or Judge-made law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena.
That all Constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision.
The sobering reflection has always to be there that the Constitution is meant not merely for people of their way of thinking but for people of fundamentally differing views. As observed by Justice Holmes while dealing with the Fourteenth Amendment to the US Constitution:
The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.... Some of these laws embody convictions or prejudices which judges are likely to share. Some may not But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. (see Mr. Justice Holmes, p. 82-83 (1931 Edition).

It would also be pertinent in this context to reproduce the words of Patanjali Sastri C.J. in the case of State of Madras v. V.G. Row MANU/SC/0013/1952 : 1952CriLJ966 while dealing with reasonable restrictions:

In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of

responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

1548. In my opinion, the second part of Article 31C is liable to be quashed on the following grounds:

(1) It gives a carte blanche to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution.

(2) The legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31C. The vice of second part of Article 31C lies in the fact that even if the law enacted is not for the object mentioned in Article 31C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31C can be severed from the remaining part of Article 31C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31C:

and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

1549. We may now deal with the Constitution (Twenty-ninth Amendment) Act. This Act, as mentioned earlier, inserted the Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries No. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty-ninth Amendment) Act. It may be mentioned that an argument was advanced before us that Articles 31B and 31A are linked together and that only those enactments can be placed in the Ninth Schedule as fall within the ambit of Article 31A. Such a contention was advanced in the case of N.B. Jeejeebhoy v. Assistant Collector, Thana Prant, Thana MANU/SC/0248/1964 : [1965]1SCR636 . Repelling the contention Subba Rao J. (as he then was) speaking for the Constitution Bench of this Court observed:

The learned Attorney-General contended that Articles 31-A and Article 31-B should be read together and that if so read Article 31-B would only illustrate cases that would otherwise fall under Article 31-A and, therefore, the same construction as put upon Article 31-B should also apply to Article 31-A of the Constitution. This construction was sought to be based upon the opening words of Article 31-B, namely, 'without prejudice to the generality of the provisions contained in Article 31-A. We find it difficult to accept this argument. The words 'without prejudice to the generality of the provisions', indicate that the Acts and regulations specified in the Ninth Schedule would

have the immunity even if they did not attract Article 31-A of the Constitution. If every Act in the Ninth Schedule would be covered by Article 31-A, this article would become redundant. Indeed, some of the Acts mentioned therein, namely, items 14 to 20 and many other Acts added to the Ninth Schedule, do not appear to relate to estates as defined in Article 31-A(2) of the Constitution. We, therefore, hold that Article 31-B is not governed by Article 31-A and that Article 31-B is a Constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution.

I see no cogent ground to take a different view. In the result I uphold the validity of the Constitution (Twenty-ninth Amendment) Act.

1550. I may now sum up my conclusions relating to power of amendment under Article 368 of the Constitution as it existed before the amendment made by the Constitution (Twenty-fourth Amendment) Act as well as about the validity of the Constitution (Twenty-fourth Amendment) Act, the Constitution (Twenty-fifth Amendment) Act and the Constitution (Twenty-ninth Amendment) Act:

(i) Article 368 contains not only the procedure for the amendment of the Constitution but also confers the power of amending the Constitution.

(ii) Entry 97 in List I of the Seventh Schedule of the Constitution does not cover the subject of amendment of the Constitution.

(iii) The word "law" in Article 13(2) does not include amendment of the Constitution. It has reference to ordinary piece of legislation. It would also in view of the definition contained in Clause (a) of Article 13(3) include an ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

(iv) Provision for amendment of the Constitution is made with a view to overcome the difficulties which may be encountered in future in the working of the Constitution. No generation has a monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of governments. If no provision were made for amendment of the Constitution, the people would have recourse to extra-Constitutional method like revolution to change the Constitution.

(v) Argument that Parliament can enact legislation under entry 97 List I of Seventh Schedule for convening a Constituent Assembly or holding a referendum for the purpose of amendment of Part III of the Constitution so as to take away or abridge fundamental rights is untenable. There is no warrant for the proposition that as the amendments under Article 368 are not brought about through referendum or passed in a Convention the power of amendment under Article 368 is on that account subject to limitations.

(vi) The possibility that power of amendment may be abused furnishes no ground for denial of its existence. The best safeguard against abuse of power is public opinion and the good sense of the majority of the members of Parliament, It is also not correct to assume that if Parliament is held entitled to amend Part III of the Constitution, it would automatically and necessarily result in abrogation of all fundamental rights.

(vii) The power of amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

(viii) Right to property does not pertain to basic structure or framework of the Constitution.

(ix) There are no implied or inherent limitations on the power of amendment apart from those which inhere and are implicit in the word "amendment". The said power can also be not restricted by reference to natural or human rights. Such rights in order to be enforceable in a court of law must become a part of the statute or the Constitution.

(x) Apart from the part of the Preamble which relates to the basic structure or framework of the Constitution, the Preamble does not restrict the power of amendment.

(xi) The Constitution (Twenty-fourth Amendment) Act does not suffer from any infirmity and as such is valid.

(xii) The amendment made in Article 31 by the Constitution (Twenty-fifth Amendment) Act is valid.

(xiii) The first part of Article 31C introduced by the Constitution (Twenty-fifth Amendment) Act is valid. The said part is as under.

31C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:

Provided that where such law is made by the Legislature of a State, the provisions of the article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(xiv) The second part of Article 31C contains the seed of national disintegration and is invalid on the following two grounds:

(1) It gives a carte blanche to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution in important respects.

(2) The legislature has been made the final authority to decide as to whether the law made by it is for objects mentioned in Article 31C. The vice of second part of Article 31C lies in the fact that even if the law enacted is not for the object mentioned in Article 31C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31C can be severed from the remaining part of Article 31C and its invalidity would not affect the validity of remaining part 1 would, therefore, strike down the following words in Article 31C:

and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

(xv) The Constitution (Twenty-ninth Amendment) Act does not suffer from any infirmity and as such is valid.

1551. The petition shall now be posted for hearing before the Constitution Bench for disposal in the light of our findings.

K.K. Mathew, J.

1552. In the cases before us, the Constitution of our country, in its most vital parts has to be considered and an opinion expressed which may essentially influence the destiny of the country. It is difficult to approach the question without a deep sense of its importance and of the awesome responsibility involved in its resolution.

1553. I entertain little doubt that in important cases it is desirable for the future development of the law that there should be plurality of opinions even if the conclusion reached is the same. There are dangers in there being only one opinion. "Then the statements in it have tended to be treated as definitions and it is not the function of a Court to frame definitions. Some latitude should be left for future developments. The true ratio of a decision generally appears more clearly from a comparison of two or more statements in different words which are intended to supplement each other" see Lord Reid in Gallie v. Lee, [1970] 3 W.L.R. 1078. In Cassell and Co. Ltd. v. Brome and Anr. [1972] 1 All E.R. 801, Lord Chancellor Lord Hailsham said that Lord Devlin's statement of the law in Rookes v. Barnard [1964] 1 All E.R. 367 has been misunderstood particularly by his critics and that the view of the House of Lords has suffered to some extent from the fact that its reasons were given in a single speech and that whatever might be the advantages of a judgment delivered by one voice, the result may be an unduly fundamentalist approach to the actual language employed. In Graves v. New York 306 U.S. 466. Frankfurter, J. in his concurring judgment, characterised the expression of individual opinions by the justices as a healthy practice rendered impossible only by the increasing volume of the business of the Court.

1554. As the arguments were addressed mainly in Writ Petition No. 135/1970, I will deal with it now. In this writ petition the petitioner challenged the validity of the Kerala Land Reforms Amendment Act, 1969, and the Kerala Land Reforms Amendment Act, 1971, for the reason that some of the provisions thereof violated Article 14, 19(1)(f), 25, 26 and 31 of the Constitution.

1555. During the pendency of the Writ Petition, the Amending Body under the Constitution passed three Constitutional amendments, namely, the Constitution 24th, 25th and 29th Amendment Acts.

1556. The 24th Amendment made certain changes in Article 368 to make it clear that the Parliament, in the exercise of its constituent power, has competence to amend by way of addition, variation or repeal, any of the provisions of the Constitution in accordance with the procedure laid down in the article and that Article 13(2) would not be a bar to any such amendment. By the 25th Amendment, the word 'amount' was substituted for the word 'compensation' in Clause (2) of Article 31. That was done in order to make it clear that the law for acquisition or requisition of the property need only fix an amount or lay down the principles for determining the amount and not the just equivalent in money of the market value of the property acquired or requisitioned. The Amendment also makes it clear that no such law shall be called in question in any Court on the ground that the whole or any part of such amount is to be given otherwise than in cash. The 29th Amendment put the two Acts in question, viz., the Kerala Land Reforms (Amendment) Act, 1969, and the Kerala Land Reforms (Amendment) Act, 1971, in the Ninth Schedule with a view to make the provisions thereof immune from attack on the ground that the Acts or the provisions thereof violate any of the Fundamental Rights.

1557. The petitioner challenges the validity of these Amendments.

1558. As the validity of the 25th and the 29th Amendments essentially depends upon the validity of the 24th Amendment, it is necessary to consider and decide that question first. I, therefore, torn to the circumstances which necessitated the Constitutional 24th Amendment Act.

1559. The Constitution (First Amendment) Act, 1951, was passed by Parliament on June 18, 1951. Sections 2, 3 and 4 of the Act made amendments in some of the articles in Part III of the Constitution. The validity of the Amendment was challenged before this Court in Sankari Prasad v. The Union of India MANU/SC/0013/1951 : [1952]1SCR89 , and one of the questions which fell for decision was whether, in view of Clause 2 of Article 13, Parliament had power to amend the Fundamental Rights in such a way as to take away or abridge them. And the argument was that the word "State" in Clause 2 of Article 13 includes Parliament and the word 'law' would take in an amendment of the Constitution and, therefore, Parliament had no power to pass a law amending the Constitution in such a way as to take away or abridge the Fundamental Rights. Patanjali Sastri, J. who delivered the judgment of the Court said that although the word 'law' would ordinarily include Constitutional law, there is a distinction between ordinary law made in the exercise of legislative power and Constitutional law made in the exercise of constituent power and that in the context of Clause 2 of Article 13, the word 'law' would not include an amendment of the Constitution.

1560. This decision was followed in Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 . There, Gajendragadkar, C.J., speaking for himself and two of his colleagues,

substantially agreed with the reasoning of Patanjali Sastri, J. in Sankari Prasad v. The Union of India MANU/SC/0013/1951 : [1952]1SCR89 . Hidayatullah and Mudholkar, JJ. expressed certain doubts as to whether Fundamental Rights could be abridged or taken away by amendment of the Constitution under Article 368.

1561. The question again came up before this Court in Golaknath v. State of Punjab MANU/SC/0029/1967 : [1967]2SCR762 , hereinafter called 'Golaknath Case' where the validity of the 17th Amendment was challenged on much the same grounds. The majority constitution the Bench decided that Parliament has no power to amend the Fundamental Rights in such a way as to take away or abridge them, but that the 1st, 4th and 17th Amendments were valid for all time on the basis of the doctrine of prospective overruling and that the Acts impugned in the case were protected by the Amendments.

1562. The reasoning of the leading majority (Subba Rao, C.J., and the colleagues who concurred in the judgment pronounced by him) was that Article 368, as it stood then, did not confer the substantive power to amend the provisions of the Constitution but only prescribed the procedure for the same that the substantive power to amend is in Articles 245, 246 and 248 read with entry 97 of List I of the Seventh Schedule, that there is no distinction between a law amending the Constitution and an ordinary law passed in the exercise of the legislative power of Parliament and that the word law' in Clause 2 of Article 13 would include an amendment of the Constitution.

1563. Hidayatullah, J. who wrote a separate judgment concurring with the conclusion of the leading majority, however, took the view that Article 368 conferred the substantive power to amend the Constitution but that Fundamental Rights cannot be amended under the article so as to take away or abridge them. He said that there is no distinction between Constitutional law and ordinary law, that both are laws that the Constitution limited the powers of the Government but not the sovereignty of the State, that the State can, in the exercise of its supremacy, put a limit on its supremacy, echoing in effect the view that there could be 'auto-limitation' by a sovereign of his own supreme power and that, by Clause 2 of Article 13, the State and all its agencies, including the Amending Body, were prohibited from making any law, including a law amending the Constitution, in such a way as to take away or abridge the Fundamental Rights.

1564. Let me first take up the question whether Article 368 as it stood before the 24th Amendment gave power to Parliament to amend the rights conferred by Part III in such a way as to take away or abridge them.

1565. In Golaknath Case MANU/SC/0029/1967 : [1967]2SCR762 , Hidayatullah, J. said that it is difficult to take a narrow view of the word 'amendment' as including only minor changes within the general framework, that by an amendment, new matter may be added, old matter removed or altered, and that except two dozen articles in Part III, all the provisions of the Constitution could be amended. Wanchoo, J. speaking for the leading minority in that case was of the view that the word 'amendment' in its setting in the article was of the widest amplitude and that any provision of the Constitution could be amended. Bachawat, J. was also inclined to give the widest meaning to the word. Ramaswami, J. did not specifically advert to the point, but it seems clear from the tenor of his judgment that he was also of the same view.

1566. Mr. Palkhivala for the petitioner contended that the word 'amendment' in the article could only mean a change with a view to make improvement; that in the context, the term connoted only power to make such changes as were consistent with the nature and purpose of the Constitution, that the basic structure and essential features of the Constitution cannot be changed by amendment, and that the assumption made by these judges that the word 'amendment' in the article was wide enough to make any change by way of alteration, addition or repeal of any of the provisions of the Constitution was unwarranted. He said that the article was silent as regards the subject matter in respect of which amendments could be made or the extent and the width thereof, that it was set in a low key as it did not contain the words "amend by way of addition, variation or repeal", that these circumstances should make one pause before ascribing to the word 'amendment' its widest meaning and that, in the context, the word has only a limited meaning.

1567. I do not think that there is any substance in this contention.

1568. In the Oxford English Dictionary, the meanings of the word 'amend' are given as:

to make professed improvements (in a measure before Parliament); formally to alter in detail, though practically it may be to alter its principle so as to thwart it.

According to "Standard Dictionary", Funk and Wagnalls (1894), the meanings of 'amendment' are:

The act of changing a fundamental law, as of political Constitution, or any change made in it according to a prescribed mode of procedure; as, to alter the law by amendment; an amendment of the Constitution.

1569. The proviso to Article 368 used the expression 'change' and that could indicate that the term 'amend' really means 'change'. The main part of Article 368 thus gave power to amend or to make changes in the Constitution. Normally, a change is made with the object of making an improvement; at any rate, that is the professed object with which an amendment is sought to be made. The fact that the object may not be achieved is beside the point. Amendment contains in it an element of euphemism of conceit in the proposer, an assumption that the proposal is an improvement. Beyond this euphemistic things, amendment as applied to alteration of laws according to dictionaries means 'alter' or 'change' see McGovney, "Is the Eighteenth Amendment Void Because of its Contents?" Columbia Law Review, Vol. 20.

1570. In the National Prohibition Cases Rhode Island v. Palmer 253 U.S. 350, it was argued before the United States Supreme Court that an amendment under Article V of the United States Constitution must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic features but this argument was overruled.

1571. In Rvan's Case The State (At the Prosecution of Jeremiah Ryan and Ors. v. Captain Michael Lennon and Ors. (1935) IR 173 the Supreme Court of Ireland held by a majority that the word 'amendment' occurring in Article 50 of the Irish Constitution was of the widest amplitude. Fitz Gibbon, J. observed after reading the various meanings of the word 'amendment' that the word as it occurred in a Constitution Act must be given its widest meaning. Murnaghan, J. observed that although complete abolition of the Constitution without any substituted provisions might not

properly be called in law an 'amendment', the word is wide enough to allow of the repeal of any number of articles of the Constitution, however important they might be. Kennedy, C.J. did not specifically deal with the meaning of the word.

1572. In this context it is relevant to keep in mind the general rules of construction for interpreting a word like 'amendment' occurring in a constituent Act like the Constitution of India.

1573. In In Re the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, etc (1939) F.C.R. 18. Sir Maurice Gwyer said that a broad and liberal spirit should inspire those whose duty it is to interpret a Constitution, that a Court should avoid a narrow and pedantic approach and that when a power is granted without any restriction, it can be qualified only by some express provision or by scheme of the instrument.

1574. The basic principles of construction were definitively enunciated by the Privy Council in The Queen v. Burah (1878) 3 A.C. 889 and those principles were accepted and applied by Earl Loreburn in Attorney General for Ontario v. Attorney General for Canada (1912) A.C. 572 Lord Selborne said in the former case that the question whether the prescribed limits of a power have been exceeded has to be decided by looking to the terms of the instrument by which, affirmatively, the power was created, and by which, negatively, it is restricted and that if what has been done is within the general scope of the affirmative words which give the power, and if it violates no express condition of restriction by which that power is limited, it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions. In other words, in interpreting a Constitution, as Lord Loreburn said in the latter case, if the text is explicit, the text is conclusive alike in what it directs and what it prohibits.

1575. I should think that in such matters everything turns upon the spirit in which a judge approaches the question before him. The words must construe are, generally speaking, mere vessels in which he can pour nearly anything he will. "Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than Verbal problems; more than final solutions cast in generalisations in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined" See the passage of Learned Hand quoted in "Cases and Materials on the Legal Process" by F.K.H. Maher and Ors., 2nd ed., p. 498. An this is why President Roosevelt said that the judges of the Supreme Court must be not only great justices, but they must be great constructive :statesmen See the passage quoted by Frederic R. Coudert in 13 Yale Law Journal, p. 338.

1576. Therefore, although the word 'amendment' has a variety of meanings, we have to ascribe to it in the article a meaning which is appropriate to the function to be played by it in an instrument apparently intended to endure for ages to come and to meet the various crises to which the body politic will be subject. The nature of that instrument demands awareness of certain presupposition. The Constitution has no doubt its roots in the past but was designed primarily for the unknown future. The reach of this consideration was indicated by Justice Holmes in language that remains fresh no matter how often repeated : Missouri v. Holland 252 U.S. 416

...when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters....

1577. Every well drawn Constitution will therefore provide for its own amendment in such a way as to forestall as is humanly possible, all revolutionary upheavals See Carl J. Friedrich, "Constitutional Government and Democracy", p. 135.

That the Constitution is a framework of great governmental power to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forth with an intensity that exacts more than reasonable satisfaction See Felik Frankfurter, "Of Law and Men", p. 35. As Wilson said, a living Constitution must be Darwinian in structure and practice See Constitutional Government in the United States, p. 25. The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment." See Justice Holmes in Abrams v. United States 250 U.S. 616.
If the experiment fails, there must be provision for making another. Jefferson said that there is nothing sanctimonious about a Constitution and that nobody should regard it as the ark of the covenant, too sacred to be touched. Nor need we ascribe to men of preceding age, a wisdom more than human and suppose that what they did should be beyond amendment. A Constitution is not end in itself, rather a means for ordering the life of a nation. The generation of yesterday might not know the needs of today, and, 'if yesterday is not to paralyse today', it seems best to permit each generation to take care of itself. The sentiment expressed by Jefferson in this behalf was echoed by Dr. Ambedkar Constitution Assembly Debates, Vol. X, pp. 296-297. If there is one sure conclusion which I can draw from this speech of Dr. Ambedkar, it is this : He could not have conceived of any limitation upon the amending power. How could he have said that what Jefferson said is "not merely true, but absolutely true", unless he subscribed to the view of Jefferson that "each generation as a distinct nation with a right, by the will of the majority to bind themselves but none to bind the succeeding generations more than the inhabitants of another country", and its corollary which follows as 'the night the day' that each generation should have the power to determine the structure of the Constitution under which they live. And how could this be done unless the power of amendment is plenary, for it would be absurd to think that Dr. Ambedkar contemplated a revolution in every generation for changing the Constitution to suit its needs and aspirations. I should have thought that if there is any implied limitation upon any power, that limitation is that the amending body should not limit power of amendment of the future generation by exercising its power to amend the amending power. Mr. Palkhivala said that if the power of amendment of the amending power is plenary, one generation can, by exercising that power, take away the power of amendment of the Constitution from the future generations and foreclose them from ever exercising it. I think the argument is too speculative to be countenanced. It is just like the argument that if men and women are given the freedom to choose their vocations in life, they would all jump into a monastery or a nunnery, as the case may be, and prevent the birth of a new

generation; or the argument of some political thinkers that if freedom of speech is allowed to those who do not believe in it, they would themselves deny it to others when they get power and, therefore, they should be denied that freedom today, in order that they might not deny it to others tomorrow.

1578. Seeing, therefore, that it is a "Constitution that we are expounding" and that the Constitution-makers had before them several Constitutions where the word 'amendment' or 'alteration' is used to denote plenary power to change the fundamentals of the Constitution, I cannot approach the construction of the word 'amendment' in Article 368 in niggardly or petty fogging spirit and give it a narrow meaning; but "being a familiar expression, it was used in its familiar legal sense" See Justice Holmes in Henry v. United States 251 U.S. 293.

1579. However, Mr. Palkhivala contended that there are provisions in the Constitution which would militate against giving the word 'amendment' a wide meaning in the article and he referred to the wording in Schedule V, para 7(1) and Schedule VI, para 21(1). These paragraphs use along with the word 'amend', the expression "by way of addition, variation or repeal". Counsel said that these words were chosen to indicate the plenitude of the power of amendment and that this is in sharp contrast with the wording of Article 368 where only the word 'amendment' was used. But Schedule V, para 7(2) and Schedule VI, para 21(2) themselves indicate that, but for these provisions, an amendment of the schedule by way of addition, variation or repeal would be an amendment of the Constitution under Article 368. In other words, the sub-paragraphs show clearly that the expression "amend by way of addition, variation or repeal" in para 7(1) of Schedule V and para 21(1) of Schedule VI has the same content as the word 'amendment' in Article 368.

1580. Reliance was also placed by counsel on Section 291 of the Government of India Act, 1935, as amended by the Third Amendment Act 1949, which provided that "such amendments as he considers necessary whether by way of addition, modification or repeal in the Act". No inference can be drawn from the use of these words as to the meaning to be assigned to the word 'amendment' in Article 368 or its width as it is well known that draftsmen use different words to indicate the same idea for the purpose of elegance or what is called "the graces of style" or their wish to avoid the same word, or sometimes by the circumstance that the Act has been compiled from different sources and sometimes by alteration and addition from various hands which the Acts undergo in their progress in Parliament See Maxwell on the Interpretation of Statutes, 12th ed., p. 286.

1581. It was submitted that if the word 'amendment' is given an unlimited amplitude, the entire Constitution could be abrogated or repealed and that certainly could not have been the intention of the makers of the Constitution. The question whether the power of amendment contained in Article 368 as it stood before the amendment went to the extent of completely abrogating the Constitution and substituting it by an entirely new one in its place is not beyond doubt I think that the power to amend under that article included the power to add any provision to the Constitution, to alter any provision, substitute any other provision in its place and to delete any provision. But when the article said that, on the bill for the amendment of the Constitution receiving the President's assent, "the Constitution shall stand amended", it seems to be fairly clear that a simple repeal or abrogation of the Constitution without substituting anything in the place of the repealed Constitution would be beyond the scope of the amending power, for, if a Constitution were simply repealed, it would not stand amended. An amendment which brings about a radical change in the Constitution like

introducing presidential system of government for cabinet system, or, a monarchy for a republic, would not be an abrogation or repeal of the Constitution. However radical the change might be, after the amendment, there must exist a system by which the State is constituted or organised. As already stated, a simple repeal or abrogation without more, would be contrary to the terms of Article 368 because it would violate the Constitutional provision that "the Constitution shall stand amended".

1582. Even if the word 'amendment' in Article 368 as it stood originally was wide enough to empower the amending body to amend any of the provisions of the Constitution, it was submitted by the petitioner, that Article 13(2) was a bar to the amendment of the Fundamental Rights by Parliament in such a way as to take away or abridge them:

13(2) The State snail not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

In this context it is necessary to understand the basic distinction between a flexible and a rigid Constitution to appreciate the argument that an amendment of the Constitution is 'law' within the purview of the sub-article.

1583. The outstanding characteristic of a flexible Constitution like the British Constitution as contrasted with a rigid one like ours is the unlimited authority of the Parliament to which it applies, to pass any law without any restriction. In rigid Constitution, there is a limitation upon the power of the legislature by something outside itself. There is a greater law than the law of the ordinary legislature and that is the law of the Constitution which is of superior obligation unknown to a flexible Constitution. It does not follow that because a Constitution is written, it is therefore rigid. There can be a written Constitution which is flexible. "The stole criterion of a rigid Constitution is whether the constituent assembly which drew up the Constitution left any special direction as to how it was to be changed See generally C.F. Strong, Modern Political Constitutions (1963). pp. 152-153". If a special procedure is prescribed by the Constitution for amending it, different from the procedure for passing ordinary law, then the Constitution is rigid.

1584. It is said that Articles 4 and 169, paragraph 7 of the Fifth Schedule and paragraph 21 of the Sixth Schedule show that amendment of the Constitution can be made by the ordinary law-making procedure. These provisions themselves show that the amendment so effected shall not be deemed to be amendment for the purpose of Article 368. This is because the procedure prescribed by them is different from the procedure laid down in Article 368.

1585. Mr. Palkhivala did not contend that the power to amend is located in Articles 245, 246 and 248 read with entry 97 of List I of the Seventh Schedule. He only submitted that it is immaterial whether the power is located in Articles 245, 246 and 248 read with entry 97 of List I of the Seventh Schedule or in Article 368, I do not think that there could be any doubt that Article 368 as it stood before the 24th Amendment contained not only the procedure but also the substantive power of amendment. As the article laid down a procedure different from the procedure for passing ordinary laws, our Constitution is a rigid one and the power to amend a constituent power.

1586. The vital distinction between Constitutional law and ordinary law in a rigid Constitution lies in the criterion of the validity of the ordinary law. An ordinary law, when questioned, must be justified by reference to the higher law embodied in the Constitution; but in the case of a Constitution, its validity is, generally speaking, inherent and lies within itself. Kelsen has said, the basic norm (the Constitution) is not created in a legal procedure by a law-creating organ. It is not-as a positive legal norm is-valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because, without this presupposition, no human act could be interpreted legal, especially as a norm-creating act. In other words, the validity of the Constitution generally lies in the social fact of its being accepted by the community and for the reason that its norms have become efficacious. Its validity is meta-legal See Hans Kelsen, "General Theory of Law and State", p. 116.

1587. Whether the observations of Kelsen would apply to our Constitution would depend upon the answer to the question whether the legal source of the Constitution should be traced to the Indian Independence Act, 1947, or, whether the Constitution was the result of the exercise of the revolutionary constituent power of the people.

1588. It does not follow from what has been said that there are no basic rules in a flexible Constitution like that of Great Britain. The principle of the English Constitution, namely, that the Court will enforce Acts of Parliament is not derived from any principle of common law, but is itself an ultimate principle of English Constitutional Law See H.W.R. Wade, "The Basis of Legal Sovereignty", (1955) CLJ 172.

1589. Once it is realised that a Constitution differs from law in that a Constitution is always valid whereas a law is valid only if it is in conformity with the Constitution and that the body which makes the Constitution is a sovereign body and generally needs no legal authority whereas a body which makes the ordinary law is not sovereign, but derives its power from the Constitution, an amendment to the Constitution has the same validity as the Constitution itself, although the question whether the amendment has been made in the manner and form and within the power conferred by the Constitution is always justiciable. Just as an ordinary law derives its validity from its conformity with the Constitution, so also, an amendment of the Constitution derives its validity from the Constitution. An amendment of the Constitution can be ultra vires just as an ordinary law can be.

1590. When a legislative body is also the sovereign Constitution-making body, naturally the distinction between Constitution and an ordinary law becomes conceptual and, in fact, disappears as that body has both the constituent power of the sovereign as well as legislative power. The British Constitution under which the distinction between the sovereign and the ordinary legislature is eclipsed due to the theory of the sovereignty of the British Parliament, is certainly not the ideal Constitution to choose for appreciating the distinction between Constitutional law and ordinary law under our polity. Sir Ivor Jennings said that there is no clear distinction between Constitutional law and ordinary law in England and that the only fundamental law there is that parliament is supreme See Jennings, "The Law and the Constitution" (1933). p. 614. Strictly speaking, therefore, there is no Constitutional law at all in Britain; there is only arbitrary power of parliament.

1591. It is said that The Bill of Rights (1689), Act of Settlement (1701), etc., partake the character of Constitutional law and there is no reason to exclude that type of law from the ambit of the word 'law' in Clause (2) of Article 13.

1592. In a flexible Constitution like the British Constitution the only dividing line between Constitutional law and ordinary law is that Constitutional law deals with a particular subject matter, namely, the distribution of the sovereign power among the various organs of the State and other allied matters; but in India, as I have said, that distribution may not be quite relevant. For our purpose, the only relevant factor to be looked into is whether a provision is embodied in the Constitution of India. Any provision, whether it relates strictly to the distribution of sovereign power among the various organs of the State or not, if it is validly embodied in the document known as "The Constitution of India", would be a law relating to the Constitution. In other words, irrespective of the subject matter, the moment a provision becomes validly embodied in the Constitution, it acquires a validity of its own which is beyond challenge and the question whether it relates to Constitutional law with, reference to the subject matter is wholly irrelevant. "Where a written Constitution exists, it is approximately true to say that the Constitution itself provides such a supreme norm...even so, the Constitution may not be altogether identified with the supreme norm; for there may be rules for its interpretation which judges accept as binding but which are not prescribed in the Constitution. Effectively, therefore, it is the traditional judicial interpretation of the Constitution that is the supreme norm" See Stanley I. Benn, "The Use of Sovereignty", in the book "In Defence of Sovereignty", edited by W.J. Stankiewicz, 67, 70. For, as Bishop Hoadley said in his sermon "Whoever hath absolute authority to interpret any written or spoken laws, it is he who is the law-giver to all indents and purposes and not the person who first wrote or spoke them" See Gry, Nature and Sources of the Law, 102, 125, 172 (2nd ed.) (1921).

1593. As I said, for the purpose of Article 13(2), the only relevant question is whether an amendment of the Constitution is 'law'. Since both an amendment of the Constitution and an ordinary law derive their validity from the Constitution, the criterion that an ordinary law can be tested for its validity on the touchstone of the Constitution must equally apply to an amendment of the Constitution. therefore, by and large, the only distinction between a law amending the Constitution and an ordinary law in a rigid Constitution is that an amendment of the Constitution has always to be made in the manner and form specially prescribed by the Constitution.

1594. Mr. Palkhivala contended that when Article 13(1) and 372 speak of "laws in force" in the territory of India immediately before the commencement of the Constitution, the expression would take in also all Constitutional law existing in the territory of India immediately before the coming into force of the Constitution, and therefore, the word 'law' in Clause (2) of Article 13 must also include Constitutional law. Assuming that the expression "laws in force" in Article 13(1) and 372 is wide enough to include Constitutional law, the question is, what is the type of Constitutional law that would be included? So far as British India was concerned, Article 395 repealed the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending and supplementing the latter Act. I am not sure whether there were any Orders passed under the Government of India Act which could be called Constitutional law. That apart, I doubt whether the Government of India Act, 1935, and the Indian Independence Act, 1947, were Constitutional laws in the sense of their being the supreme law of the land like the Constitution of India, for, both of them could have been repealed by the legal sovereign, namely, the British

Parliament. And the reason why their provisions could not have been challenged in a Court of Law was not that they were the supreme law of the land but because they were laws in conformity with the supreme law, namely, the will of the British Parliament. As regards the native States, the fact that the Courts therein could not have challenged the validity of the provisions of a Constitution promulgated by an absolute monarch would not show that those provisions could be equated with the provisions of the Constitution of India. A Constitution established by an absolute monarch will be enforced by the Court of the State, not because the Constitution is the supreme law of the State but because it is a law in conformity with the supreme law, namely, the supreme will of the monarch which alone is the supreme law, unless, as Alf Ross said, the Constitution was granted by the monarch with the intention that it should not be revocable Alf Ross, "On Law and Justice", p. 82. therefore, those Constitutional laws cannot be characterised as Constitutional laws in the sense in which we speak of the Constitution of India, for, such of the provisions of those Constitutions in the native States existing before the commencement of the Constitution of India which contravened the provisions of Part III became void (Article 13(1)) and others which continued, continued subject to the provisions of the Constitution (Article 372). In other words, for the purpose of Article 13(2), what is relevant is whether the word 'law' there, is comprehensive enough to take in Constitutional law in the sense of a law embodied in a Constitution which is the supreme law of the land and from which all other laws derive their validity. The Constitutional laws in force in the territory of India immediately before the commencement of the Constitution did not have the status of Constitutional law in the sense of a law which is supreme. Were it otherwise, none of them would have been void under Article 13(1) and none of them subject to the provisions of the Constitution under Article 372.

1595. It seems to me to he clear that the word 'law' in Article 13(2), in the context, could only mean an ordinary law. When Article 13 (2) said that the State shall not make any 'law' the meaning of the expression 'law' has to be gathered from the context. Though, analytically, it might be possible to say that the word 'law' would include an amendment of the Constitution also, from the context it would be clear that it only meant ordinary law. A word by itself is not crystal clear. It is the context that gives it the colour. In the setting of Article 13(2), what was prohibited that the Parliament shall not pass a law in pursuance of its powers under Chapter I of Part XI or any other provisions enabling it to pass laws, which were legislative in character. The Constitution-makers only wanted to provide against the more common invasion of Fundamental Rights by ordinary legislation.

1596. If the power to amend was to be found within Article 368 and not under Article 248 read with entry 97 of List I of the Seventh Schedule, it stands to reason to hold that constituent power for amend ment of the Constitution is distinct from legislative power. The leading majority in the Golaknath Case MANU/SC/0029/1967 : [1967]2SCR762 took pains to locate the power to amend in Article 248 read with entry 97 of List I of the Seventh Schedule to show that the Constitution can be amended by an ordinary law and that such a law would be within the purview of Article 13(2). But if the power to amend the Constitution is a legislative power and is located in the residuary entry (97 of List I of the Seventh Schedule), then any law amending the Constitution by virtue of that power, can be passed only "subject to the provisions of the Constitution" as mentioned in Article 245. A power of amendment by ordinary law "subject to the provisions of the Constitution" seems to me a logical contradiction; for, how can you amend the provisions of

the Constitution by an ordinary law which can be passed only subject to the provisions of the Constitution?

1597. It would be strange that when a whole chapter has been devoted to the "Amendment of the Constitution" and when the question of amendment loomed large in the mind of the Constitution-makers that, even if the power to amend the Constitution was thought to be legislative in character, it was not put as a specific entry in List I but relegated to the residuary entry. And, considering the legislative history of the residuary entry, it is impossible to locate the power of amendment in that entry. The legislative power of Parliament under entry 97 of List I of the Seventh Schedule is exclusive and the power to amend cannot be located in that entry because, in respect of the matters covered by the proviso to Article 368, Parliament has no exclusive power to amend the Constitution.

1598. That apart, the power to amend a rigid Constitution, not being an ordinary legislative power but a constituent one, it would be strange that the Constitution-makers put it sub-silentio in the residuary legislative entry.

1599. Article 368 was clear that when the procedure prescribed by the article was followed, what resulted was an amendment of the Constitution. The article prescribed a procedure different from the legislative procedure prescribed in Articles 107 to 111 read with Article 100. Article 100 runs as follows : "Save as otherwise provided in this Constitution all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting...." Certain types of amendment, as is clear from Article 368, also require to be ratified. The first part of Article 368 required that a bill must be passed in each House (1) by a majority of the total membership of that House and (2) by a majority of not less than two-thirds of the members of that House present and voting. These provisions rule out a joint sitting of both the Houses under Article 108 to resolve disagreement between the two Houses. Again, the majority required to pass a bill in each House is not a majority of the members of that House present and voting but a majority of the total membership of each House and a majority of not less than two-thirds of the members of that House present and voting. As regards matters covered by the proviso, there is a radical departure from the legislative procedure prescribed for Parliament by Articles 107 to 111. Whereas in ordinary legislative matters Parliament's power to enact laws is not dependent on the State legislatures, in matters covered by the proviso to Article 368, even if the two Houses pass a bill by the requisite majorities, the bill cannot be presented to the President for his assent unless she bill has been ratified by resolutions to that effect passed by the legislatures of not less than half the number of States.

1600. Subba Rao, C.J., in his judgment in Golaknath case MANU/SC/0029/1967 : [1967]2SCR762 relied on McCawley v. The King (1920) A.C. 691 and The Bribery Commissioner v. Pedrick Ranasinghe (1964) 2 W.L.R. 1301; (1965) A.C. 172 to show that the power to amend the Constitution was a legislative power. In McCawley's Case, Lord Birkenhead said that it is of the utmost importance to notice that where the Constitution is uncontrolled the consequences of its freedom admit of no qualification whatever and that it would be an elementary common place that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as the Dog Act or any other Act, however humble its subject matter and that the so called Constitutional law (I call them so called because it is Constitutional law only with

reference to the subject matter, not with reference to its superior character) will stand amended by the Dog Act, if it is in any way repugnant to the legislative document or documents.

1601. In Ranasinghe's case, the question for determination before the Privy Council was whether the statutory provision for the appointment of members of the panel of the Bribery Tribunal, otherwise than by the Judicial Service Commission, violated Section 55 of the Constitution Order and, if so, whether that provision was void. Sections 18 and 29 of the Order provide as follows:

Section 18 : Save as otherwise provided in Sub-section (4) of Section 29 any question proposed' for decision by either Chamber shall be determined by a majority of votes or the Senators or Members, as the case may be, present and voting. The President or Speaker or other person presiding shall not vote in the first instance but shall have and exercise a casting vote in the event of an equality of votes.

Section 29: (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island. (2) No such law shall-(a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions: or (d) alter the Constitution of any religious body except with the consent of the governing authority of that body : Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body. (3) Any law made in contravention of Sub-section (2) of this section shall, to the extent of such contravention, be void. (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of His Majesty in Council in its application to the Island : Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented to the Royal Assent unless it has endorsed on it a certificate under the hand of the speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present). Every certificate of the Speaker under this sub-section shall be conclusive for all purpose and shall not be questioned in any court of law.

The appellant contended that whereas Section 29(3) expressly provided that a law which contravened Section 29(2) was void, there was no such provision for the violation of Section 29(4) which was merely procedural and that as Ceylon was a sovereign State, and had the power to amend the Constitution, any law passed by the legislature was valid even if it contravened the Constitution, and McCawley's case was cited as supporting this contention. But the Privy Council said that the law impugned in McCawley's case was not required to be passed by a special procedure, but in the present case the law which contravened Section 55 could only be passed as required by Section 29(4) for the amendment of the Constitution and as it was not so passed, it was ultra vires and void.

1602. It is not possible to draw the inference which Subba Rao, C.J. drew from these two cases. There is a distinction between a general power to legislate and a power to legislate by special legislative procedure and the results of the exercise of the two powers are different. In McCawley's

case it was observed that if a legislature has full power to make a law which conflicted with the Constitution, the law was valid since it must be treated as a pro-tanto amendment of the Constitution which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with, and an ordinary law in conflict with the Constitution must, in such a case be treated as an implied alteration of the Constitution. In Ranasinghe's Case, the Privy Council said that where even an express power of a legislature to alter can be exercised only by laws which comply with the "Special legislative procedure laid down in the Constitution", such a legislature has no general power to legislate for the amendment of the Constitution, and a law passed in the exercise of such general power is void if the law contravenes the Constitution. And, where a legislative power is "subject to the provisions of the Constitution", any exercise of it in contravention of such provisions renders it invalid and ultra-vires: As already stated, in a controlled Constitution which confers general legislative power subject to the provisions of the Constitution and provides a special procedure for amendment of the Constitution, law passed in the exercise of the general legislative power and conflicting with the Constitution must be void because the Constitution can be amended only by special procedure. In a Constitution which confers general legislative power including a power to amend the Constitution, the Constitution is uncontrolled and is not a fundamental document by which the laws made under it are to be tested, for, any law contrary to the Constitution impliedly alters it. The result is that no law passed under an uncontrolled Constitution is ultra vires See Seervai "Constitutional Law", Vol. 2, pp. 1102-1103; also Dr. Wynes "Legislative, Executive and Judicial Powers in Australia", footnote at p. 508.

1603. The Substance of the decision in Ranasinghe's Case is that though Ceylon Parliament has plenary power of ordinary legislation, in the exercise of its Constitution power it was subject to the special procedure laid down in Section 29(4). The decision, therefore, makes a clear distinction between legislative and constituent powers.

1604. It was contended that the amending power can be a legislative power as in Canada and, therefore, there was nothing wrong in the leading majority in Golaknath Case MANU/SC/0029/1967 : [1967]2SCR762 , locating the power of amendment in the residuary entry.

1605. Section 91(1) of the British North America Act provides for a restricted power of amendment of the Constitution. This power, undoubtedly, is a legislative power and the Constitution, therefore, to that extent is an uncontrolled or a flexible one. There is no analogy between the power of amendment in Canada which is legislative in character and the power of amendment under Article 368 which is a constituent power. As I indicated, even if there was an entry for amending the Constitution in List I of the Seventh Schedule, that would not have enabled the Parliament to make any amendment of the Constitution because the opening words of Article 245 "subject to the provisions of this Constitution" would have presented an insuperable bar to amend any provision of the Constitution by the exercise of legislative power under the Constitution. Under a controlled Constitution like ours, the power to amend cannot be a legislative power; it can only be a constituent power. Were it otherwise, the Constitution would cease to be a controlled one.

1606. It was submitted that if Fundamental Rights were intended to be amended by the Constitution-makers in such a way as to abridge or take them away, considering the paramount importance of these rights, the procedure required by the proviso to Article 368 would, at any rate,

have been made mandatory and that not being so, the intention of the Constitution-makers was that the Fundamental Rights should not be amended in such a way as to abridge or take them away. This argument overlooks the purpose of the proviso. The proviso was mainly intended to safeguard the rights and powers of the States in their juristic character as persons in a federation. The purpose of the proviso was that the rights, powers and privileges of the States or their status as States should not be taken away or impaired without their participation to some extent in the amending process. Fundamental Rights are rights of individuals or minorities, and they are represented in Parliament. The States, as States, are not particularly affected by amendment of Fundamental Rights. As Wheare said, it is essential in a federal government that if there be a power of amending the Constitution, that power, so far at least as concerns those provisions of the Constitution which regulate the status and powers of the general and regional governments, should not be confided exclusively either to the general governments or to the regional governments Wheare, "Federal Government", 4th ed., p. 55.

1607. The Constitution (First Amendment) Act amended the Fundamental Rights under Articles 15 and 19 in such a way as to abridge them. The speech of Pandit Jawaharlal Nehru in moving the amendment and those of others who were responsible for drafting the Constitution make it clear that they never entertained any doubt as to the amendability of the Fundamental Rights in such a way as to abridge them. Strong opponents of the amendments like S.P. Mukherjee, never made even the whisper of a suggestion in their speeches that Fundamental Rights were not amendable in such a way as to abridge them. Contemporaneous practical exposition is a valuable aid to the meaning of a provision of the Constitution or a statute See McPherson v. Blacker, 146 U.S. 27.

1608. Mr. Palkhivala also relied upon the speech of Dr. Ambedkar made on September 17, 1949, in the Constituent Assembly to show that Fundamental Rights could not be taken away or abridged by an amendment of the Constitution.

1609. The question whether speeches made in the Constituent Assembly are admissible to ascertain the purpose behind a provision of the Constitution is not free from doubt. In A.K. Gopalan v. The State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 Kania, C.J. said that while it is not proper to take into consideration the individual opinions of members of Parliament or Convention to construe the meaning of a particular clause when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. In the same case, Patanjali Sastri, J. said that in construing the provisions of an Act, speeches made in the course of the debates on a bill could at best be indicative of the subjective intent of the speaker but they could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Mukherjea, J. said that in construing a provision in the Constitution it is better to leave out of account the debates in the Constituent Assembly, but a higher value may be placed on the report of the Drafting Committee. In State of Travancore-Cochin and Ors. v. The Bombay Co. Ltd., etc. MANU/SC/0068/1952 : [1952]1SCR1112 Patanjali Sastri, C.J. delivering the judgment of the Court said that speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution cannot be used as aids for interpreting the Constitution. In Golaknath Case MANU/SC/0029/1967 : [1967]2SCR762 Subba Rao, C.J. referred to the speech of Pandit Jawaharlal Nehru made on April 30, 1947, in proposing the adoption of the interim report on Fundamental Rights and that of Dr. Ambedkar made on September 18, 1949, on the amendment proposed by Mr. Kamath to Article 304 of the

draft Constitution (present Article 368) and observed that the speeches were referred to, not for interpreting the provisions of Article 368 but to show the transcendental character of Fundamental Rights. I am not clear whether the speech of Dr. Ambedkar throws any light on the transcendental character of Fundamental Rights. That speech, if it is useful for any purpose, is useful only to show that Fundamental Rights cannot be amended. In the Privy Purse Case Madhav Rao Union of India [1971] 3 S.C.R. 983 Shah, J. referred to the speech of Sardar Vallabhbhai Patel for understanding the purpose of Article 291 of the Constitution. Speeches made by members of the Constituent Assembly were quoted in profusion in the Union of India v. Harbhajan Singh Dhillon 2 S.C.C. 779 both in the majority as well as in the minority judgments. In the majority judgment it was said that they were glad to find that the construction placed by them on the scope of entry 91 in the draft Constitution corresponding to the present entry 97 of List I of the Seventh Schedule agreed with the view expressed in the speeches referred to by them. The minority referred to the speeches made by various members to show that their construction was the correct one. Cooley said : "When a question of Federal Constitutional law is involved, the purpose of the Constitution, and the object to be accomplished by any particular grant of power, are often most important guides in reaching the real intent; and the debates in the Constitutional Convention, the discussions in the Federalist, and in the conventions of the States, are often referred to as throwing important light on clauses in the Constitution which seem blind or of ambiguous import" See Cooley on Constitutional Law, 4th ed. (1931), pp. 195-196. Julius Stone, the Australian jurist, has expressed the opinion that in principle the Court should be free to inform itself concerning the social context of the problems involved from all reliable sources and that it is difficult to see in principle why British courts should exclude rigidly all recourse to the debates attending the legislative process. He asked the question on what basis is it explicable that lawyers can regard with equanimity cases in which judges may pronounce ex-cathedra that so and so clearly could not have been in the legislators' minds when the parliamentary debates ready at hand might show that that was precisely what was in their minds See Julius Stone, "Legal System and Lawyer's Reasoning", p. 351; See also H.C.L. Merillat, "The Sound Proof Room : A Matter of Interpretation" (1967) 9 JILI 521.

1610. Logically, there is no reason why we should exclude altogether the speeches made in the Constituent Assembly by individual members if they throw any light which will resolve latent ambiguity in a provision of the Constitution. Chief Justice Marshall struck at the core of the matter when he said : United States v. Fisher, 2 Cranch 358, 386 U.S. 1805

Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived.

If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should, as a matter of theory, be excluded. The rigidity of English Courts in interpreting language merely by reading it, disregards the fact that enactments are, as it were, organisms which exist in their environment. It is, of course, difficult to say that judges who profess to exclude from their consideration all extrinsic sources are confined psychologically as they purport to be legally. A judge who deems himself limited to reading the provisions of the Constitution without an awareness of the history of their adoption in it would be taking a mechanical view of the task of construction See Frankfurter "On reading the statute" in "Of Law and Men", p. 64.

1611. If the debates in the Constituent Assembly can be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading up to and attending its enactment, to ascertain the intention of the makers of the Constitution, it is difficult to see why the debates are inadmissible to throw light on the purpose and general intent of the provision. After all, legislative history only tends to reveal the legislative purpose in enacting the provision and thereby sheds light upon legislative intent. It would be drawing an invisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent in case of latent ambiguity in the provision. Mr. W. Anderson said : "The nearer men can get to knowing what was intended the better. Indeed the search for intention is justified as a search for the meanings that the framers had in mind for the words used. But it is a search that must be undertaken in humility and with an awareness of its great difficulties" See "The Intention of the Framers" : A Note on the Constitutional Interpretation, American Political Science Review, Vol. XLIX, June, 1955. That awareness must make one scrutinize the solemnity of the occasion on which the speech was made, the purpose for which it was made, the preparation and care with which it was made and the reputation and scholarship of the person who made it. A painstaking detailed speech bearing directly on the immediate question might be given the weight of an "encyclical" and would settle the matter one way or the other; but a loose statement made impromptu in the heat of the debate will not be given a decisive role in decision making process. I should have thought that if there was a definitive pronouncement from a person like Dr. Ambedkar in the Constituent Assembly, that would have thrown considerable light upon the matter in controversy. In the speech relied on by counsel Dr. Ambedkar is reported to have said Constituent Assembly Debates, Vol. IX, p. 1661:

We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304, all that is necessary for them is to have two-thirds majority. Then they can amend it.

Mr. President : Of Members present.

Yes. Now we have no doubt put certain articles in a third category where for the purposes of amendment the mechanism is somewhat different or double It requires two-thirds majority plus ratification by the States".

There is scope for doubt whether the speech has been correctly reported. That apart, from the speech as reported, it would seem that according to Dr. Ambedkar, an amendment of the articles mentioned in Part III and Article 368 requires two-thirds majority plus ratification by the States. He seems to have assumed that the provisions of Part III would also fall within the proviso to Article 368 but he never said that Part III was not amendable. That it was his view that all the articles could be amended is clear from his other speeches in the Constituent Assembly. He said on November 4, 1948 Constituent Assembly Debates, Vol. VII, p. 43:

...It is only for amendments of specific matters and they are only few, that the ratification of the State legislatures is required. All other articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of

the members of each House present and voting and a majority of the total membership of each House....

Dr. Ambedkar, speaking on draft Article 25 (present Article 32) on December 9, 1948, stressed its importance in the following words Constituent Assembly Debates, Vol. VII, p. 953:

If I was asked to name any particular article in this Constitution as the most important-an article without which this Constitution would be a nullity-I could not refer to any other article except, this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realized its importance.

But having said that, he proceeded:

...The Constitution has invested the Supreme Court with these rights and these writs could not be taken away unless and until the Constitution itself is amended by means left open to the Legislature (emphasis added).

On November 25, 1949, Dr. Ambedkar refuted the suggestion that Fundamental Rights should be absolute and unalterable. He said after referring to the view of the Jefferson already referred to, that the Assembly has not only refrained from putting a seal of finality and infallibility upon the Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or Australia but has provided a most facile procedure for amending the Constitution Constituent Assembly Debates, Vol. XI, pp. 975-976.

1612. It is difficult to understand why the Constitution-makers did not specifically provide for an exception in Article 368 if they wanted that the Fundamental Rights should not be amended in such a way as to take away or abridge them. Article 304 of the draft Constitution corresponds to Article 368 of the Constitution. Article 305 of the draft Constitution provided:

Article 305 : Reservation of seats for minorities to remain in force for only ten years unless continued in operation by amendment of the

Constitution

Notwithstanding anything contained in Article 304 of the Constitution, the provisions of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes or the Indian Christians either in Parliament or in the legislature of any State for the time being specified in Part I of the First Schedule shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution.

If it had been the intention of the Drafting Committee to exclude Fundamental Rights from the purview of the constituent power intended to be conferred by Article 304, following the analogy of Article 305, it could have made an appropriate provision in respect of the said rights.

1613. In A.K. Gopalan v. State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 Kania, C.J. said that Article 13 was inserted by way of abundant caution, that even if the article were absent, the result would have been the same. Mr. Palkhiwala submitted that the view of the learned Chief Justice was wrong, that Article 13 in the context of Article 368 before the 24th Amendment, had a function to play in the scheme of the Constitution, namely, that it stated the authorities against which the inhibition in Article 13(2) operated, the categories of law to which the inhibition applied and the effect of a violation of the inhibition. Whether the latter part of Article 13(2) was enacted by way of abundant caution or not would depend upon the answer to the question whether the word 'law' in that article would include an amendment of the Constitution also. If the word 'law' would include amendment of the Constitution, it cannot be said that the latter part of the article was redundant. The dictum of Chief Justice Kania is helpful only to show his reading of the meaning of the word 'law' in the article. Had the learned Chief Justice read the word 'law' in the article as including an amendment of the Constitution also, he would certainly not have said that the article was redundant. Sir Ivor Jennings has taken the view that it was quite unnecessary to have enacted Article 13(2), as, even otherwise, under the general doctrine of ultra vires, any law which is repugnant to the provisions of the Constitution, would, to the extent of the repugnancy, become void and inoperative See Ivor Jennings, "Some Characteristics of the Indian Constitution", pp. 38-39.

1614. However, I think that Article 13(2) was necessary for a different purpose, namely, to indicate the extent of the invasion of the fundamental right which would make the impugned law void. The word 'abridge' has a special connotation in the American Constitutional jurisprudence; and, it is only fair to assume that when the Constitution-makers who were fully aware of the language of the First Amendment to the United States Constitution, used that expression, they intended to adopt the meaning which that word had acquired there. Every limitation upon a fundamental right would not be an abridgement of it. Whether a specific law operates to abridge a specifically given fundamental right cannot be answered by any dogma, whether of a priori assumption or of mechanical jurisprudence. The Court must arrive at a value judgment as to what it is that is to be protected from abridgement, and then, it must make a further value judgment as to whether the law impugned really amounts to an abridgement of that right. A textual reading might not always be conclusive. A judge confronted with the question whether a particular law abridges a Fundamental Right must, in the exercise of the judicial function, advert, to the moral right embodied in the Fundamental Right and then come to the conclusion whether the law would abridge that right In this process, the Court will have to look to the Directive principles in Part IV to see what exactly is the content of the Fundamental Right and whether the law alleged to be in detraction or abridgement of the right is really so. The Court would generally be more astute to protect personal rights than property rights. In other words, Fundamental Rights relating to personal liberty or freedom would receive greater protection from the hands of the Court than property rights, as those rights come with a momentum lacking in the case of shifting economic arrangements. To put it differently, the type of restriction which would constitute abridgement might be different for personal rights and property rights as illustrated by the doctrine of preferred freedoms. However, it is unnecessary to pursue the matter further for the purpose of this case.

1615. Mr. Palkhivala contended that even if the word 'amendment' in Article 368 before it was amended is given its widest meaning and the word 'law' in Article 13(2) is assumed not to include an amendment of the Constitution there were and are certain inherent and implied limitations upon

the power of amendment flowing from three basic features which must be present in the Constitution of every republic. According to counsel, these limitations flow from the fact that the ultimate legal sovereignty resides in the people; that Parliament is a creature of the Constitution and not a constituent body and that the power to alter or destroy the essential features of the Constitution belongs only to the people, the ultimate legal sovereign. Counsel submitted that if Parliament has power to alter or destroy the essential features of the Constitution, it would cease to be a creature of the Constitution and would become its master; that no constituted body like the Amending Body can radically change the Constitution in such a way as to damage or destroy the basic Constitutional structure, as the basic structure was decided upon by the people, in the exercise of their constituent revolutionary power. Counsel also argued that it is Constitutionally impermissible for one constituent assembly to create a second perpetual constituent assembly above the nation with power to alter its essential features and that Fundamental Rights constitute an essential feature of the Constitution.

1616. The basic premise of counsel's argument was that the ultimate legal sovereignty under the Constitution resides in the people. The preamble to the Constitution of India says that "We the people of India...adopt, enact and give unto ourselves this Constitution". Every one knows that historically this is not a fact. The Constitution was framed by an assembly which was elected indirectly on a limited franchise and the assembly did not represent the vast majority of the people of the country. At best it could represent only 28.5 per cent of the adult population of the provinces, let alone the population of the Native States See Granville Austin, "The Indian Constitution" (1972), p. 10 and Appendix I, pp. 331-332, And who would dare maintain that they alone constituted the "people" of the country at the time of framing the Constitution? As to who are the people in a Country, see the Chapter "The People" in "Modern Democracies" by Bryce, Vol. 1, pp. 161-169 The Constituent Assembly derived its legal competence to frame the Constitution from Section 8(1) of the Indian Independence Act, 1947. The British Parliament, by virtue of its legal sovereignty over India, passed the said enactment and invested the Assembly with power to frame the Constitution. Whatever might be the Constitutional result flowing from the doctrine that sovereignty is inalienable and that the Indian Independence Act itself could have been repealed by Parliament, independence, once granted, cannot be revoked by an erstwhile sovereign; at any rate, such revocation will not be recognised by the Courts of the country to which independence was granted. What makes a transfer of sovereignty binding is simply the possession on the part of the transferee of power and force sufficient to prevent the transferor from regaining it See V. Willoughby, "Nature of state" (1896), p. 229; also 'Dicey's Law of the Constitution 5th ed, (1897), pp. 65n and 66n. The assertion by some of the makers of the Constitution that the Constitution proceeded from the people can only be taken as a rhetorical flourish, probably to lay its foundation on the more solid basis' of popular will and to give it an unquestioned supremacy, for, ever since the days of Justinian, it was thought that the ultimate legislative power including the power to frame a Constitution resides in the people, and, therefore, any law or Constitution must mediately or immediately proceed from them. "It is customary nowadays to ascribe the legality as well as the supremacy of the Constitution-the one is, in truth, but the obverse of the other-exclusively to the fact that, in its own phraseology, it was 'ordained' by 'the people of the United States'. Two ideas are thus brought into play. One is the so-called 'positive' conception of law as a general expression merely for the particular commands of a human law-giver, as a series of acts of human will; the other is that the highest possible embodiment of human will, is 'the people'. The same two ideas occur in conjunction in the oft-quoted next of Justinian's Institutes : "Whatever has pleased the

prince has the force of law, since the Roman people by the lex regia enacted concerning his imperium have yielded up to him all their power and authority. The sole difference between the Constitution of the United States and the imperial legislation justified in this famous text is that the former is assumed to have proceeded immediately from the people, while the latter proceeded from a like source only mediately" See Edward Gorwin, 'The Higher Law' Background of American Constitutional Law", pp. 3-4.

1617. It is said that the assertion in the preamble that it was the people who enacted the Constitution raises an incontrovertible presumption and a Court is precluded from finding out the truth. There is a similar preamble to the Constitution of the U.S.A. Yet, when Chief Justice Marshall was called upon to decide the question whether that Constitution proceeded from the people, he did not seek shelter under the preamble by asserting that the Court is concluded by the recital therein, but took pains to demonstrate by referring to historical facts that the Constitution was ratified by the people in the State conventions and, therefore, in form and substance, it proceeded from the people themselves See McCulloch v. Maryland, 4 Wheaton 316. It does not follow that because the people of India did not frame the Constitution or ratified it the Constitution has no legal validity. The validity of a Constitution is one thing; the source from which it proceeds is a different one. Apart from its legal validity derived from the Indian Independence Act, its norms have become efficacious and a Court which is a creature of the Constitution will not entertain a plea of its invalidity. If the legal source for the validity of the Constitution is not that it was framed by the people, the amending provision has to be construed on its own language, without reference to any extraneous consideration as to whether the people did or did not delegate all their constituent power to the Amending Body or that the people reserved to themselves the Fundamental Rights.

1618. Let me, however, indulge in the legal fiction and assume, as the preamble has done, that it was the people who framed the Constitution. What follows? Could it be said that, after the Constitution was framed, the people still retain and can exercise their sovereign constituent power to amend or modify the basic structure or the essential features of the Constitution by virtue of their legal sovereignty?

1619. According to Austin, a person or body is said to have legal sovereignty, when he or it has unlimited law-making power and that there is no person or body superior to him or it. Perhaps, it would be correct to say that the possession of unlimited law-making power is the criterion of legal sovereignty in a State, for, it is difficult to see how there can be any superior to a person or group that can make laws on all subjects since that person or group would pass a law abolishing the powers of the supposed superior. The location of sovereignty in a quasi-federal Constitution like ours is a most difficult task for any lawyer and I shall not attempt it. Many writers take the view that sovereignty in the Austinian sense does not exist in any State See W.J. Ress, "Theory of Sovereignty Re-stated" in the book "In Defense of Sovereignty" by W.J. Stankiewicz, p. 209 and that, at any rate, in a Federal State, the concept of sovereignty in that sense is incapable of being applied See Salmond's Jurisprudence, 7th ed., p. 531. This Court has said in State of West Bengal v. Union of India MANU/SC/0086/1962 : [1964]1SCR371 that the "legal theory on which the Constitution was based was the withdrawal or resumption of all the powers of sovereignty into the people of this country" and that the"...Legal sovereignty of the Indian nation is vested in the people of India, who, as stated by the preamble, have solemnly resolved to constitute India into a Sovereign Democratic Republic...." I am not quite sure of the validity of the assumption implicit

in this dictum. The Supreme Court: of U.S.A. has held that sovereignty vests in the people See Chisholm v. Georgia (1973) 2 Dal 419. The same view has been taken by writers like Jameson, Willis, Wilson and others, But it is difficult to understand how the unorganised mass of the people can legally be sovereign. In no country, except perhaps in a direct democracy, can the people in masse be called legally sovereign. This is only to put more explicitly what Austin meant when he said that political power must be in a determinate person or body of persons, for, the people at, large, the whole people, as distinct horn particular person or persons, are incapable of concerted action and hence, of exercising political power and therefore of legal supremacy See "From John Austin to John C. Hurd" by Irving B. Richman in "Harward Law Review, Vol. 14, p. 364. "When the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are Rules of law logically prior to him.... It is not impossible to ascertain the will of an individual without the aid of rules: he may be presumed to mean what he says, and he cannot say more than one thing at a time. But the extraction of a precise expression of will from a multiplicity of human beings is, despite all the realists say, an artificial process and one which cannot be accomplished without arbitrary rules. It is, therefore, an incomplete statement to say that in a state such and such an assembly of human beings is sovereign. It can only be sovereign when acting in a certain way prescribed by law. At least some rudimentary manner and form is demanded of it : the simultaneous incoherent cry of a rabble, small or large, cannot be law, for it is unintelligible" See Latham, "What is an Act of Parliament" (1939) KC 152. While it is true that the sovereign cannot act otherwise than in compliance with law, it is equally true that it creates the law in accordance with which it is to act See Orfield, "The Amending of the Federal Constitution", p. 155. And what is the provision in the Constitution or the law for the people to act as legal sovereign or as regards the manner and form when they act as legal sovereign?

1620. The supremacy enjoyed by the Constitution has led some to think that the document must be regarded as sovereign. They talk about the government of laws and not of men; but sovereignty, by definition, must be vested in a person or body of persons. The Constitution itself is incapable of action. Willoughby has said that sovereignty of the people, popular sovereignty and national sovereignty cannot accurately be held to mean that, under an established government, the sovereignty remains in the people. It may mean, however, that the Constitutional jurisprudence of the State to which it is applied is predicated upon the principle that no political or individual or organ of the government is to be regarded as the source whence, by delegation, all other public powers are derived, but that, upon the contrary, all legal authority finds its original source in the whole citizen body or in an electorate representing the governed See Willoughby, "Fundamental Concepts of Public Law", pp. 99-100. Probably, if sovereignty is dropped as a legal term and viewed as a term of political science, the view of the Supreme Court of the U.S.A. and the writers who maintain that the people are sovereign might be correct. No concept has raised so many conflicting issues involving jurists and political theorists in so desperate a maze as the genuine and proper meaning of sovereignty.

1621. Seeing, however, that the people have no Constitutional or legal power assigned to them under the Constitution and that by virtue of their political supremacy they can unmake the Constitution only by a method not sanctioned by the juridical order, namely, revolution, it is difficult to agree with the proposition of counsel that the legal sovereignty under the Constitution

resides in the people, or, that as ultimate legal sovereign the people can Constitutionally change the basic structure of the Constitution even when the Constitution provides for a specific mechanism for its amendment. In the last, analysis, perhaps, it is right to say that if sovereignty is said to exist in any sense at all, it must exist in the Amending Body, for, as Willoughby has said : "In all those cases in which owing to the distribution of governing power there is doubt as to the political body in which sovereignty rests, the test to be applied is, the determination of which authority has, in the last instance the legal power to determine its own competence as well as that of Ors. Willoughby, "The Nature of the State" (1928), p. 197. In Germany, the publicists have developed a similar theory known as the "kompetenz kompetenz theory" See Merriam, "History of the Theory of Sovereignty since Rosseau" (1900), 190-196.

1622. This, however, does not mean that the people have no right to frame the Constitution by which they would be governed. Of the people as well as the body politic, all that one can say is, not that they are sovereign, but that they have the natural right to full autonomy or to self-government. The people exercise this right when they establish a Constitution see Jacques Maritain, "Man and the State", p. 25. And, under our Constitution, the people have delegated the power to amend the instrument which they created to the Amending Body.

1623. When a person holds a material good, it cannot be owned by another. He cannot give it to another without his losing possession of it and there can only be a question of transfer of ownership or a donation. But, when it is a question of a moral or spiritual quality such as a right or power, one can invest another with a right or power without losing possession of it, if that, man receives it in a vicarious manner, as a vicar of the man who transferred it. The people are possessed of their right to govern themselves in an inherent and permanent manner, their representatives are invested with power which exists in the people, but in a vicarious manner see Jacques Maritain, "Man and the State", pp. 134-135.

1624. Delegation does not imply a parting with powers of one who grants the delegation but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. It does not mean that the delegating person parts with the power in such a way as to denude himself of his rights See Huth v. Clarke (1890) 25 Q.B.D. 391: also John Willis, "Delegates non potest delegare", 21 Canadian Bar Review, p. 257.

1625. I will assume that the people, by designating their representatives and by transmitting to them the power to amend the Constitution, did not lose or give up possession of their inherent, constituent power. (There was great controversy among the civilians in the Middle Ages whether, after the Roman people had Transferred their authority to legislate to the emperor, they still retained it or could reclaim it See Carlyle, "A History of Medieval Political Theory in the West" Vol. VI, pp. 514-515. There is always a distinction between the possession of a right or power and the exercise of it. It was in the exercise of the constituent power that the people framed the Constitution and invested the Amending Body with the power to amend the very instrument they created with a super-added power to amend that very power. The instrument they created, by necessary implication, limits the further exercise of the power by them, though not the possession of it. The Constitution, when it exists, is supreme over the people and as the people have voluntarily excluded themselves from any direct or immediate participation in the process of making amendment to it, and have directly placed that power in their representatives without reservation,

it is difficult to understand how the people can juridically resume the power to continue to exercise it See Dodge v. Woolsey (1856) 18 How. 331. It would be absurd to think that there can be two bodies for doing the same thing under the Constitution. It would be most incongruous to incorporate in the Constitution a provision for its amendment, if the constituent power to amend can also be exercised at the same time by the mass of the people, apart from the machinery provided for the amendment. In other words, the people having delegated the power of amendment, that power cannot be exercised in any way other than that prescribed nor by any instrumentality other than that designated for that purpose by the Constitution. There are many Constitutions which provide for active participation of the people in the mechanism for amendment either by way of initiative or referendum as in Switzerland, Australia and Eire. But, in our Constitution, there is no provision for any such popular device and the power of amendment is vested only in the Amending Body.

1626. It is said that "it is within the power of the people who made the Constitution to un-make it, that it is the creature of their own will and exists only by their will See Cohens v. Virginia 6 Wheat 19 U.S. 264. This dictum has no direct relevancy on the question of the power of the people to amend the Constitution. It only echoes the philosophy of John Locke that people have the political right to revolution in certain circumstances and to frame a Constitution in the exercise of their revolutionary constituent power.

1627. When the French political philosophers said that the nation alone possesses the constituent power, and an authority set up by a Constitution created by the nation has no constituent power apart from a power to amend that instrument within the lines originally adopted by the people, what is meant is that the nation cannot part with the constituent power, but only the power to amend the Constitution within the original scheme of the Constitution in minor details. Some jurists refer to these two powers, namely, the "constituent power" and the "amending power" as distinct. According to Carl J. Friedrich, the constituent power is the power which seeks to establish a Constitution which, in the exact sense, is to be understood the de-facto residuary power of a not inconsiderable part of the community to change or replace an established order by a new Constitution. The constituent power is the power exercised in establishing a Constitution, that is the fundamental decision on revolutionary measures for the organisation and limitation of a new government. From this constituent power must be distinguished the amending power which changes an existing Constitution in form provided by the Constitution itself, for the amending power is itself a constituted authority. And he further points out that in French Constitutional Law the expression pouvoir constituent is often used to describe the 'amending authority' as well as the constituent power, but the expression constituent power used by him is not identical with the pouvoir constituent of the French Constitutional Law See Carl J. Friedrich, "Constitutional Government and Politics" (1937), pp. 113, 118, 162 & 521. It is, however, unnecessary to enter this arid tract of what Lincoln called 'pernicious abstraction' where no green things grow, or resolve the metaphysical niceties, for under our Constitution, there is no scope for the constituent power of amendment being exercised by the people after they have delegated power of amendment to the Amending Body. To what purpose did that instrument give the Amending Body the power to amend the amending power itself, unless it be to confer plenary power upon the Amending Body to amend all or any of the provisions of the Constitution? It is no doubt true that some German thinkers, by way of protest against indiscriminate use of the amending power under the Weimar Constitution of Germany, asserted that the power of amendment is confined to alteration within

the Constitutional text and that it cannot be used to change the basic structure of the Constitution. But, as I said, to say that a nation can still exercise unlimited constituent power after having framed a Constitution vesting plenary power of amendment under it in a separate body, is only to say that the people have the political power to change the existing order by means of a revolution. But this doctrine cannot be advanced to place implied limitations upon the amending power provided in a written Constitution.

1628. It is, therefore, only in a revolutionary sense that one can distinguish between constituent power and amending power. It is based on the assumption that the constituent power cannot be brought within the framework of the Constitution. "To be sure, the amending power is set up in the hope of anticipating a revolution by legal change and, therefore, as an additional restraint upon the existing government. But should the amending power fail to work, the constituent power may emerge at the critical point" See Carl J. Friedrich, "Constitutional Government and Democracy" (1950), p. 130. The proposition that an unlimited amending authority cannot make any basic change and that the basic change can be made only by a revolution is something extras legal that no Court can countenance it. In other words, speaking in conventional phraseology, the real sovereign, the hundred per cent sovereign-the people-can frame a Constitution, but that sovereign can come into existence thereafter unless otherwise provided, only by revolution. It exhausts itself by creation of minor and lesser sovereigns who can give any command. And,

under the Indian Constitution, the original sovereign-the people-created, by the amending clause of the Constitution, a lesser sovereign, almost coextensive in power with itself. This sovereign, the one established by the revolutionary act of the full or complete sovereign has been called by Max Radin the "pro-sovereign", the holder of the amending power under the Constitution.
The hundred per cent sovereign is established only by revolution and he can come into being again only by another revolution See Max Radin, "Intermittent Sovereign", 39 YLJ 514. As Wheare clearly puts it, once the Constitution is enacted, even when it has been submitted to the people for approval, it binds thereafter, not only the institutions which it establishes, but also the people themselves. They may amend the Constitution, if at all, only by the method which the Constitution itself provides See Wheare, "Modern Constitutions" (1966), p. 62. This is illustrated also in the case of the sovereign power of the people to make laws. When once a Constitution is framed and the power of legislation which appertains to the people is transferred or delegated to an organ constituted under the Constitution, the people cannot thereafter exercise that power. "The legal assumption that sovereignty is ultimately vested in the people affords no legal basis, for the direct exercise by the people of any sovereign power, whose direct exercise by them has not been expressly or impliedly reserved. Thus the people possess the power of legislating directly only if their Constitution so provides" See Rottschaefer on Constitutional Law (1939), p. 8

1629. It is said that although the Constitution does not provide for participation of the people in the process of amendment, there is nothing in the Constitution which prohibits the passing of a law under the residuary entry 97 of List I of the Seventh Schedule for convoking a constituent assembly for ascertaining the will of the people in the matter of amendment of Fundamental Rights. Hoar says; "The whole people in their sovereign capacity, acting through the forms of law at a regular election, may do what they will with their own frame of government, even though that frame of government does not expressly permit such action, and even though the frame of government attempts to prohibit such action" Hoar "Constitutional Convention : Their Nature, Power and

Limitations", p. 115. Again, he says: "Thus we come back to the fact that all convention are valid if called by the people speaking through the electorate at a regular election. This is true regardless of whether the Constitution attempts to prohibit or authorize them, or is merely silent on the subject Their validity rests not upon Constitutional provisions, nor upon legislative act, but upon the fundamental sovereignty of the people themselves" Hoar, "Constitutional Convention : Their Nature, Power and Limitations", p. 52. As to this I think the answer given by Willoughby is sufficient. He said: "The position has been quite consistently taken that Constitutional amendments or new Constitutions adopted in modes not provided for by the existing Constitutions cannot be recognized as legally valid unless they have received the formal approval of the old existing government. Thus, in the case of the State of Rhode Island, the old Constitution of which contained no provision for its own amendment, the President of the United States refused to recognize de jure a government established under a new Constitution which, without the approval of the old government, had been drawn up and adopted by a majority of the adult male citizens of that State. But, when, somewhat later, a new Constitution was adopted in accordance with provisions which the old government laid down and approved, it was, and has since been held a valid instrument both by the people of the State and by the National Government of the United States" Willoughby, "The Fundamental Concepts of Public Law", p. 96.

1630. I think it might be open to the Amending Body to amend Article 368 itself and provide for referendum or any other method for ascertaining the will of the people in the matter of amendment of Fundamental Rights or any other provision of the Constitution. If the basic and essential features of the Constitution can be changed only by the people, and not by a constituted authority like the Amending Body, was it open to the Amending Body, or, would it be open to the Amending Body today to amend Article 368 in such a way as to invest the people with that power to be exercised by referendum or any other popular device ? If counsel for the petitioner is right in his submission that the power to amend the amending power is limited, this cannot be done, for the Constitution would lose its identity by making such a radical change in the Constitution of the Amending Body, and, therefore, there would be implied limitation upon the power to amend the amending power in such a way as to change the locus of the power to amend from the Amending Body as constituted to any other body including the people. The result is that ex-hypothesi, under Article 368 there was, or is, no power to amend the Fundamental Rights and the other essential or basic features in such a way as to destroy or damage their essence or core. Nor can the article be amended in such a way as to invest the people-the legal sovereign according to counsel for the petitioner-with power to do it. This seems to me to be an impossible position.

1631. Counsel for the petitioner submitted that the preamble to the Constitution would operate as an implied limitation upon the power of amendment, that the preamble sets out the great objectives of the people in establishing the Constitution, that it envisages a sovereign democratic republic with justice, social, economic and political, liberty of thought, belief and expression, equality of status and opportunity and fraternity as its fulcrums and that no succeeding generation can amend the provisions of the Constitution in such a way as to radically alter or modify the basic features of that form of government or the great objectives of the people in establishing the Constitution. Counsel said that the preamble cannot be amended as preamble is not a part of the Constitution, and so, no amendment can be made in any provision of the Constitution which would destroy or damage the basic form of government or the great objectives. The proceedings in the Constituent Assembly make it clear that the preamble was put to vote by a motion which stated that the

"preamble stands part of the Constitution" and the motion was adopted See the proceedings of the Constituent Assembly dated October 17, 1949, Constituent Assembly Debates, Vol. X, p. 429. Article 394 of the Constitution would show that the preamble, being a part of the provisions of the Constitution, came into operation on the 26th of January, 1950, not having been explicitly stated in the article that it came into force earlier. And there seems to be no valid reason why the preamble, being a part of the Constitution, cannot be amended.

1632. A preamble, as Dr. Wynes said, represents, at the most only an intention which an Act seeks to effect" and it is a recital of a present intention See Wynes, "Legislative, Executive and Judicial Powers in Australia", (4th ed., p. 506). In the Berubari Case MANU/SC/0049/1960 : [1960]3SCR250 it was argued that the preamble to the Constitution clearly postulates that like the democratic republican form of government, the entire territory of India is beyond the reach of Parliament and cannot be affected either by ordinary legislation or even by Constitutional amendment, but the Court said: "it is not easy to accept the assumption that the first part of the preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself". This case directly negatived any limitation of what is generally regarded as a necessary and essential attribute of sovereignty on the basis of the objectives enshrined in the preamble.

1633. Story's view of the function of the preamble, that it is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the Act or a Constitution is not in dispute. There is also no dispute that a preamble cannot confer any power per se or enlarge the limit of any power expressly given nor can it be the source of implied power. Nor is it necessary to join issue on the proposition that in case of ambiguity of the enacting part, an unambiguous preamble may furnish aid to the interpretation of the enacting part.

1634. The broad concepts of justice, social, economic and political, equality and liberty thrown large upon the canvas of the preamble as eternal verities are mere moral adjurations with only that content which each generation must pour into them a new in the light of its own experience. "An independent judiciary cannot seek to fill them from its own bosom as, if it were to do so, in the end it will cease to be independent. "And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs. It must be content to stand aside from these fateful battles as to what these concepts mean and leave it to the representatives of the people. See Learned Hand, "The Spirit of Liberty", p. 125.

1635. To Hans Kelsen, justice is an irrational ideal, and regarded from the point of rational cognition, he thinks there are only interests and hence conflict of interest. Their solution, according to him, can be brought about by an Order that satisfies one interest at the expense of the other or seeks to achieve a compromise between opposing interests See Kelsen, "General Theory of Law and State" (1946), p. 13. Allen said that the term "social justice" has no definite content that it means different things to different persons. Allen, "Aspects of Justice", p. 31. Of liberty, Abraham Lincoln said, that the world never has had a good definition of it. The concept of equality appears to many to be a myth and they say that if the concept is to have any meaning in social and economic sphere the State must discriminate in order to make men equal who are otherwise unequal. It does not follow that because these concepts have no definite contours. They do not exist, for, it is a perennial fallacy to think that because something cannot be cut and dried or nicely weighed or

measured, therefore it does not exist See Lord Reid in Ridge v. Baldwin (1964) A.C. 40. But for a country struggling to build up a social order for freeing its teeming millions from the yoke of poverty and destitution, the preamble cannot afford any clue as to the priority value of these concepts inter se. Justice Johnson, with one of his flashes of insight, called the science of government "the science of experiment" See Anderson v. Dunn 6 Wheat 206 U.S. 1821. And for making the experiment for building up the social order which the dominant opinion of the community desires, these Delphic concepts can offer no solution in respect of their priority value as among themselves. They offer no guide in what proportion should each of them contribute, or which of them should suffer subordination or enjoy dominance in that social order. How then can one of them operate as implied limitation upon the power of amendment when the object of the amendment is to give priority value to the other or others?

1636. Mr. Palkhivala in elaborating his submission on implied limitations said that in a Constitution like ours there are other essential features besides the Fundamental Rights, namely, the sovereignty and integrity of India, the people's right to vote and elect their representatives to Parliament or State legislatures, the republican form of government, the secular State, free and independent judiciary, dual structure of the Union, separation of the executive, legislative and judicial powers, and so on, and for changing these essential features, the Parliament being a constituted authority, has no power.

1637. Whenever the question of implied limitation upon the power of amendment was raised in the U.S.A. the Supreme Court has not countenanced the contention,

1638. In Leser v. Garnett 258 U.S. 130258 U.S. 130 the U.S. Supreme Court upheld the validity of the 19th Amendment, rejecting the contention that the power of amendment conferred by the federal Constitution did not extend to that amendment because of its character Emphasis added as so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body Emphasis added. In U.S. v. Sprague 282 U.S. 716, the Supreme Court rejected the contention that an amendment, conferring on the United States, power over individuals, should be ratified in conventions instead of by State Legislatures. The argument before the Court was that although Congress has absolute discretion to choose the one or the other mode of ratification, there was an implied limitation upon that discretion when rights of individuals would be directly affected and that in such a case the amendment must be ratified by convention. The Court said that there was no limitation upon the absolute discretion of the Congress to have the amendment ratified either by conventions or State legislatures. In, the National Prohibition Cases See Rhode Island v. Palmer 253 U.S. 350 which upheld the validity of the 18th Amendment to the United States Constitution, the Supreme Court brushed aside the argument that there are implied limitations upon the power of amendment. Although the majority judgment gave no reasons for its conclusion, it is permissible to look at the elaborate briefs filed by counsel in the several cases and oral arguments in order to understand what was argued and what was decided See U.S. v. Sprague 282, U.S. 716 The arguments advanced in National Prohibition Cafes before the Supreme Court were that an amendment is an alteration or improvement of that which is already contained in the Constitution, that the Amendment was really in the nature of a legislation acting directly upon the rights of individual, that since the Constitution contemplated an indestructible Union of States, any attempt to change the fundamental basis of the Union was beyond the power delegated to the amending body by Article V and that the Amendment invaded the police power which inheres in the State

for protection of health, safety and morals of their inhabitants. The only inference to be drawn from the Court upholding the validity of the Amendment is that the Court did not countenance any of the arguments advanced in the case.

1639. The result of the National Prohibition Cases See Rhode Island v. Palmer 253 U.S. 350 seems to be that there is no limit to the power to amend the Constitution except that a State may not be deprived of its equal suffrage in the Senate. This means that by action of two-third of both Houses of Congress and of the legislatures in three-fourth of the States, all the powers of the national, government could be surrendered to the State and all the reserved powers of the States could be transferred to the Federal Government See Burdick, "The Law of the American Constitution", pp. 44-49.

1640. Dodd, speaking about the effect of the decision of the Supreme Court in National Prohibition Cases See Rhode Island v. Palmer 253 U.S. 350 said that the Court has necessarily rejected substantially all of the arguments presented in favour of the implied limitations upon the amending power, although this statement does not necessarily go to the extent of denying all limitation other than those clearly expressed in the Constitutional language itself See 30 Yale Law Journal 329.

1641.

Article Five of Constitution prohibits any amendment by which any State "without its consent shall be deprived of its equal suffrage in the Senate". Beyond this there appears to be no limit to the power of amendment. This, at any rate is the result of the decision in the so-called National Prohibition Cases" See Thomas M. Colley, "The General Principles of Constitutional Law in the U.S.A.", 4th ed., pp. 46-47.

1642. In Schneiderman v. U.S. 320 U.S. 118 Justice Murphy, after referring to National Prohibition Cases said that Article V contains procedural provisions for Constitutional change by amendment without any present limitation whatsoever except that relating to equal suffrage in the Senate.

1643. In U.S. v. Dennis 183 FR 201 Learned Hand was of the opinion that any amendment to Constitution passed in conformity with the provision in Constitution relating to amendments is as valid as though the amendment had been originally incorporated in it, subject to the exception that no State shall be denied its equal suffrage in the Senate.

1644. The latest authority is the obiter dictum or Douglas, J. for the majority of the Supreme Court in Whitehill v. Elkins (1967) 389 U.S. 54:

If the Federal Constitution is our guide, a person who might wish to "alter" our form of government may not be cast into the outer darkness. For the Constitution prescribes the method of 'alteration' by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered.

1645. Perceptive writers on the Constitution of the U.S.A. have also taken the view that there are no implied limitations whatever upon the power of amendment, that an amendment can change the dual form of government or the Bill of Rights and that the framers of the Constitution did not

intend to make an unalterable framework of Government in which only the minor details could be changed by amendment See Willis, "(1936) CL 123; Orfield, "The Amending of the Federal Constitution" (1942), p. 99; Livingstone, "(1956) F & CC 240; Rottschaefer, "Constitutional Law", pp. 8-9; John W. Burgess, "1 PS & CCL 153; Colley, "Constitutional Limitations", pp. 41-43; D.O. McGovney, "Is the Eighteenth Amendment Void Because of Its Contents ", Columbia Law Review, Vol. 20, May 1920 No. 5; W.F. Dodd, "Amending the Federal Constitution", 30 YLJ 329; W.W. Willoughby, "Constitutional Law of the United States", 2nd ed., Vol. 1, 598.

1646. In Ryan's Case [1935] IR 170, the Supreme Court of Ireland has occasion to discuss and decide two questions: (1) the meaning to be given to the word 'amendment' in Article 50 of the Irish Constitution which provided for the amendment of the Constitution and (2) whether there are any implications to be drawn from the Constitution which would cut down the scope of the amendment which could be made under Article 50. I have already dealt with the decision in the case with respect to the first point.

1647. As regards the second point, Kennedy, C.J. was of the opinion that there were certain implied limitations upon the power of amendment while the other two learned judges held that there were no such limitations. However, it is not necessary to deal with the suggested implied limitations relied on by the learned Chief Justice in the light of his observation: "the only argument advanced in support of this position is that the power to amend the Constitution gives power to amend the power itself. It certainly does not say so. One would expect (if it were so intended) that the power would express that intention by the insertion of a provision to that effect by some such words as "including amendment of this power of amendment", but no such intention is expressed and there is nothing from which it can be implied". There might be some justification for the view of Kennedy, C.J. that "power of amending a Constitution is something outside and collateral to the Constitution itself" and that unless there is express power to amend the amending power, the amending power cannot be enlarged. Alf Ross, the Scandinavian Jurist, has said that in the United States the highest authority is the constituent power constituted by the rules in Article V of the Constitution. These rules embody the highest ideological presupposition of the American Law system. But they cannot be regarded as enacted by any authority and they cannot be amended by any authority. Any amendment of Article V of the Constitution which, in fact, is carried out, is an a-legal fact and not the creation of law by way of procedure that has been instituted Alf Ross, "Law and Justice", p. 81. Now, whereas Article 50 of the Irish Constitution did not contain any power to amend that article, proviso (c) of Article 368 makes it clear that Article 368 itself can be amended and so, the whole line of the reasoning of Kennedy, C.J. has no relevance for our purpose. It is interesting to note that in Moore v. Attorney General for the Irish State (1935) A.C. 484 where the Constitutional amendment made by the Irish Parliament in 1933 (Amendment No. 22) was challenged, Mr. Green conceded before the Privy Council that Amendment No. 16 of 1929 (the amendment challenged in Ryan's Case) was regular. The validity or otherwise of Amendment No. 16 was vital for the success of his client's case and the concession of counsel was, in their Lordship's view, "rightly" made.

1648. The decision of the Privy Council in Liyanage v. the Queen (1967) 1 A.C. 259 was relied on by the petitioner to show that there can be implied limitation upon legislative power. The question for consideration in that case was whether Criminal Law (Special Provisions) Act No. 1 of 1962 passed by Parliament of Ceylon was valid. The Act purported ex-post facto to create new

offences and to alter the rules of evidence and the criminal procedure obtaining under the general law at the time of the commission of the offence and also to impose enhanced punishment. The appellants contended that the Act was passed to deal with the trial of the persons who partook in the abortive coup in question and the arguments before the Privy Council were that the Act of 1962 was contrary to fundamental principles of justice in that it was directed against individuals, that it ex-post facto created crimes and their punishments, and that the Act was a legislative plan to secure the conviction of these individuals and this constituted an usurpation of the judicial power by the legislature.

1649. The Privy Council rejected the contention that the powers of the Ceylon Legislature could be cut down by reference to vague and uncertain expressions like fundamental principles of British Law, and said that although there are no express provisions in the Ceylon Constitution vesting judicial power in the judiciary, the judicial system in Ceylon has been established by the Charter of Justice of 1833, that the change of sovereignty did not produce any change in the functioning of the judicature, that under the provisions of the Ceylon Constitution there is a broad separation of powers and that, generally speaking, the legislature cannot exercise judicial power in spite of the difficulty occasionally felt to tell judicial power from legislative power. Even since the days when John Locke wrote his "Second Treatise on civil Government" See the Chapter, "Of the Extent of Legislative Power.", it was considered axiomatic that the legislative power does not include judicial power. And I think what the Privy Council said in effect was that the power to pass a law for peace, order, or good government under Section 29(1) of the Constitution of Ceylon would not take in a power to settle a controversy between Richard Doe and John Doe in respect of Black Acre and label it a law. It is a bit difficult to see how the doctrine of implied limitation has anything to do with the well understood principle that the power to pass law would not include judicial power As to the distinction between legislative power and judicial power, see the observation of Holmes in Prentis v. Atlantic Coast Line Co. (1908) 211 U.S. 210.

1650. Nor am I able to understand how the doctrine of implied limitations can draw any juice for its sustenance from the fact that President or Governor is bound to act according to the advice of the Council of Ministers, although the expression "aid and advise" taken by itself, would not denote any compulsion upon the President or Governor to act according to the advice. The expression, when it was transplanted into our Constitution from the English soil, had acquired a meaning and we cannot read it divested of that meaning.

1651. The doctrine of implied limitation against the exercise of a power once ascertained in accordance with the rules of construction was rejected by the Privy Council in Web v. Outrim (1907) A.C. 81.

1652. Counsel for the petitioner relied on certain Canadian Cases to support his proposition that there are implied limitations upon the power of amendment. In Alberta Press Case (1938) 2 D.L.R. 81 Chief Justice Sir Lyman P. Duff said that the British North America Act impliedly prohibits abrogation by provincial legislatures of certain important civil liberties. He said that the reason was that the British North America Act requires the establishment of one Parliament for Canada and since the term 'parliament' means, when interpreted in the light of the preamble's reference to "a construction similar in principle to that of the United Kingdom", a legislative body elected and functioning in an atmosphere of free speech, and that a legislation abrogating freedom of speech

in a particular province would be an interference with the character of the federal parliament, and therefore, ultra vires the provincial legislature. This dictum logically involves a restriction of the powers of the dominion parliament also as was pointed out by Abbott, J. in the Padlock Law case See Switzman v. Elbling, (1957) 7 D.L.R. 337. In that case he expressed the view, although it was not necessary so to decide, that parliament itself could not abrogate the right of discussion and debate since the provisions of the British North America Act are as binding on Parliament as on the provincial legislatures.

1653. In Saumur v. City Quebec [1953] 4 D.L.R. 641 the preamble of the British North America Act was referred to as supporting the Constitutional requirement of the religious freedom especially by Rand, J. The basic issue in that case was whether or not the Provinces had legislative authority to enact law in relation to the religious freedom, and whether the city of Quebec was justified by one of its bye-laws under a Provincial Act from prohibiting the distribution of booklets etc. in the streets without the written permission of the Chief of Police. The petitioner, a member of Jehovah's Witnesses contended that the right to distribute booklets was guaranteed by the statement in the preamble to the British North America Act and that freedom of religion was secured by the Constitution of the United Kingdom, and that fundamental principles of that Constitution were made a part of the Canadian Constitution by implication of the preamble and accordingly the impugned Quebec bye-law was null and void. This contention was rejected by a majority of the Court. Rinfret, C.J.C., Taschereau, J. concurring, stated that the Privy Council, on several occasions had declared that powers distributed between Parliament and the Legislatures covered absolutely all the powers which Canada could exercise as a political entity. Kerwin, J. stated that the British North America Act effected a complete division of legislative powers. Cartwright, J. (Fauteux, J. concurring) went even further: He said that there were no rights possessed by the citizens of Canada which could not be modified by either Parliament or the Legislatures of the Provinces. Rand, J. found some support in the preamble for freedom of speech, but did not mention freedom of religion in this context. Estey and Locke, JJ. assume that any topic of internal self-government was withheld from derived from it.

1654. It should be noted the view that neither the provinces nor the dominion Parliament could legislate on civil liberties so as to affect them adversely is contrary to the view of the Privy Council that no topic of internal self-Government was withheld from Canada. "It would be subversive of the entire scheme and policy of the Act to assume that any topic of internal self-government was withheld from Canada A.G. Ontario v. A.G. Canada [1912] A.C. 571.

1655. The main objection however to the proposition that the British "North America Act contains an implied bill of rights is that it is inconsistent with the doctrine of parliamentary supremacy. If the "Constitution is similar in principle to that of Great Britain, it must follow that the legislature is supreme as that is the fundamental law of the British Constitution. therefore no subject would be beyond the legislative competence of both parliament and provincial legislatures. Whether there are any implied limitations upon the power of parliament or not, it is clear that the dictum of Abbott, J. in Switzman's case is based on no high authority as there is nothing in the British North America Act to indicate that civil liberties are beyond the legislative reach of the parliament and the provincial legislatures. "There was no express guarantee of civil liberties in the British North America Act, nothing comparable to the Bill of Rights in the American Constitution or to the Fundamental Rights under our Constitution.

1656. It is, however, impossible to see the relevance of these dicta so far as the interpretation of Article 368 is concerned as none of these cases are cases relating to implied limitation on the power of amendment of any Constitution. They are cases on the legislative competence of legislatures to affect civil liberties. The Canadian Bill of Rights 1960, makes it clear that parliament of Canada can dispense with the application of the Canadian Bill of Rights in respect of any legislation which it thinks proper. Section 2 of the Canadian Bill of Rights provides:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared and in particular, no law of Canada shall be construed or applied so as to....

1657. Nor is there anything in the actual decision of the Privy Council in Re the Initiative and Referendum Act to show that there are implied limitations upon the power to amend any provision of the Constitution. The only point decided in that case was that in the absence of clear and unmistakable language in Section 92(1) of the, British North America Act, 1867, the power of the Crown possessed through a person directly responsible to the Crown cannot be abrogated. That was because Section 92(1) provides for an express exception to the power of amendment and that the Act in question, on a true construction of it, fell within the exception. The case is an authority only as to the true meaning of the expression "excepting as regards the office of Lieutenant Governor" in Section 92(1) of the aforesaid Act. I am not concerned with the obiter dictum of Lord Haldane to the effect that a provincial legislature cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence".

1658. However, it is relevant in this context to refer to the comment of Bora Laskin on the obiter dictum of Lord Haldane in the above case: "This oft-quoted passage remains more a counsel of caution than a Constitutional limitation". He then read the above passage and continued : "This proposition has in no way affected the widest kind of delegation by Parliament and by a provincial legislature to agencies of their own creation or under their control; see Reference re Regulations (Chemicals.) (1943) 1 D.L.R. 248; Shannon v. Lower Mainland Dairy Products Board (1938) A.C. 708 [1919] A.C. 935.

1659. Reference was made by counsel for the petitioner to Taylor v. Attorney General of Queensland (1) as authority for the proposition that power of amendment can be subject to implied limitation. The questions which the Court had to consider in the case were: (1) Was the Parliamentary Bills Referendum Act of 1908 a valid and effective Act of Parliament? and (2) Was there power to abolish the Legislative Council of Queensland by an Act passed in accordance with the provisions of the Parliamentary Bills Referendum Act of 1908? These Acts did not alter the 'representative' character of the Legislature as defined in Section 1 of the Colonial Laws Validity Act, 1865, nor did they affect the position of the Crown. therefore, the question whether the representative character of the Legislature could be changed, or the Crown eliminated did not call for decision. This will be clear from the observations of Gavan Duffy and Rich, JJ. at p. 477.

1660. The judgment of Issacs, J. shows that the opinion expressed by him as regards the "representative" character of the legislature is based on the meaning to be given to the expression

'Constitution of such legislature' on a true construction of Section 5 of the Colonial Laws Validity Act. Issacs, J. held that the word 'legislature' did not include the Crown. Having reached this conclusion on the express language of the Colonial Laws Validity Act, he made the observation:

When power is given to a colonial legislature to alter the Constitution of the legislature, that must be read subject to the fundamental conception that consistently with the very nature of our Constitution as an Empire, the Crown is not included in the ambit of such power.

1661. These observations are made in the context of the provisions of the Colonial Laws Validity Act where a "colony" is defined to include "all of Her Majesty's possessions abroad in which there shall exist a legislature as hereinafter defined, except the Channel Islands, the Isle of Man". The observation of Issacs, J. can only mean that when power to alter the Constitution of the legislature is conferred upon a colony which is a part of Her Majesty's possessions abroad (the Empire), it is reasonable to assume that such power did not include the power to eliminate the Queen as a part of a colonial legislature. It is to be noted that Issacs, J. had arrived at that conclusion on the true construction of the Colonial Laws Validity Act, namely, that the word 'legislature' did not include the Crown.

1662. Mangal Singh v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 was also relied on as authority for the proposition that the power of amendment is subject to implied limitation. The only question which was considered in the case was that when by a law made under Article 4 of the Constitution, a State was formed, that State should have the legislative, executive and judicial organs; the Court said:

...Power with which the Parliament is invested by Article 2 and 3, is power to admit, establish, or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission establishment or formation of a State as contemplated by the Constitution, and not power to override the Constitutional scheme. No State can therefore be formed, admitted, or set up by law under Article 4 by the Parliament which has not effective legislative, executive and judicial organs. [1967] 2 S.C.R. 112.

1663. I am unable to understand how this case lends any assistance to the petitioner for it is impossible to imagine a modern State without these organs.

1664. Section 128 of the Australian Constitution Act provides for alteration of that Constitution. There are certain restrictions upon the power of amendment. We are not concerned with the controversy whether those restrictions can be taken away in the exercise of the power of amendment, as proviso (e) of Article 368 makes it clear that the amending power itself can be amended. Leading writers on the Constitution of Australia have taken the view that there are no other limitations upon the power of alteration and that all the provisions of the Constitution can be amended. See A.P. Canaway, K.C., "The Safety Valve of the commonwealth Constitution", Australian Law Journal, vol. 12, (1938-39), p. 108 at 109; A.P. Canaway, K.C. (N.S.W.), "The Failure of the Federalism in Australia", Appendix : Power to Alter the Constitution, A Joint Legal Opinion, p. 211; John Quick and Robert Randolph Garran, "Annotated Constitution of the Australian Commonwealth", pp. 988-9; W. Anstey Wynes, "Legislative, Executive and Judicial

Powers in Australia", Third Ed. pp. 695-698; Colin Howard, "Australian Federal Constitutional Law" (1968).

1665. Reference was made to the case of Victoria v. Commonwealth 45 Australian Law Journal 251 in support of the proposition that there are implied limitations upon the power of Commonwealth Parliament in Australia and therefore, there could be implied limitation upon the power of amendment. The pay roll tax imposed by the Pay Roll Tax Act, 1941 (Com.) was, according to the Pay Roll Tax Assessment Act, 1941-69, to be levied and paid or payable by any employer. Section 3(1) of the Pay Roll Tax Assessment Act defined 'employer' to include the Crown, in the right of a State. The State of Victoria sought declaration that it was beyond the legislative competence of the Commonwealth to levy tax on wages paid by the Crown in the right of the State to officers and employees in the various departments. Menzies, Windeyer, Walsh and Gibbs, JJ. held that there was implied limitation on Commonwealth legislative power under the Constitution, but the Act did not offend such limitation. Barwich, C.J. and Owen, J. held that a law which in substance cakes a State or its powers or functions of government as its subject matter is invalid because it cannot be supported upon any granted legislative power, but there is no implied limitation on Commonwealth legislative power under the Constitution arising from the federal nature of the Constitution. McTiernan, J. held that there was no necessary implication restraining the Commonwealth from making the law.

1666. As to the general principle that non-discriminatory laws of the Commonwealth may be invalid in so far as they interfere with the performance by the States of their Constitutional functions, it must be noted that that is not claimed to rest on any reservation made in the Engineers' Case Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129 itself to the general principle it advanced. It must also be noted that Menzies, Walsh and Gibbs, JJ. were not prepared to formulate the proposition as a single test in precise and comprehensive terms and that they were alive to the great difficulties which would be encountered in the formulation.

1667. If there are difficulties in formulating an appropriate test, is it not legitimate to ask whether the proposed principle is one that is capable of formulation? Is it not legitimate to ask whether there is a judicially manageable set of criteria available by which the proposed general principle may be formulated? The theory of the implied limitation propounded might invite the comment that "it is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact". It is difficult to state in clear terms from the judgments of these judges as to what kind of legislative action by the Commonwealth will be invalid because of the application of the general principle.

1668. The stated purpose of the general principle is to protect the continued existence and independence of the States. Do the judgments of Menzies, Walsh and Gibbs, JJ. disclose any reason why that existence and independence of the States will be threatened in the absence of the implied general principle?

1669. Windeyer, J.'s judgment is a little uncertain. He said that once a law imposes a tax it is a law with respect to taxation and that if it is invalid it must be for reasons that rest on other Constitutional prohibitions, e.g., an implied prohibition on a tax discriminating against a State. However, many

cases arise in which competing possible characterizations of a Commonwealth law are possible; on one characterization it is valid, on another it is invalid. The Courts, when faced with competing possible characterizations, may not hold a law valid because one possible characterization is that the law is with respect to one of the enumerated heads of legislative power.

1670. Windeyer, J. said that a law of the Commonwealth which is directed against the States to prevent their carrying out of their functions, while it may be with respect to an enumerated subject-matter, is not for the peace, order and good government of the Commonwealth.

1671. The basic principle of construction which was definitely enunciated by the Court was that adopted by Lord Selborne in Queen v. Burah [1878] 3 A.C. 889. The judges who took the view that there was implied limitation on the power of Commonwealth to aim their legislation against the State did not differ in substance from the theory propounded by Barwick, C.J. and Owen, J. who said that it is a question of lack of power as the legislation is not with respect to a subject within the power of taxation conferred by Section 51 of Australian Constitution See generally Faigenbaum and Hanks, "Australian Constitutional Law".

1672. I am unable to understand the relevancy of this decision. In a federal or quasi-federal State, the continued existence of the federated States, when the Constitution exists, is a fundamental pre-supposition and the legislative power of the federal legislature cannot be exercised in such a way as to destroy their continued existence. But when we are dealing with an amending power, is there any necessity to make that fundamental assumption? There might be some logic in implying limitation upon the legislative power of the federal legislature, as that power can be exercised only subject to the fundamental assumption underlying a federal state, namely, the continued existence of States. But what is its relevancy when we are dealing with implied limitation on the amending power, which is a power to alter or change the Constitution itself?

1673. It is relevant in this connection to note the vicissitudes in the fortune of the doctrine of immunity of instrumentalities which was based on the theory of implied prohibition. Marshal, C.J. said in McCulloch v. Maryland (1819) 4 Wheaten 316. "The rule thus laid down was based upon the existence of an implied prohibition that, the Federal and State Governments respectively being sovereign and independent, each must be free from the control of the other; me doctrine was thus based upon the necessity supposed to arise in a federal system". The progressive retreat from the doctrine in its original form has been traced by Dixon, J. in Essendon Corporation v. Criterion Theatres (1947) 74 C.L.R. 19. He said:

The shifting of judicial opinion shown in the foregoing formed a prelude to the decision of the Court in Graves v. New York 306 U.S. 466 where the Court thought it imperative to "consider anew the immunity...for the salary of an employee of a Federal instrumentality (at p. 485) from State Income tax and decided that there should be no immunity". Frankfruter, J. remarked: "In this Court dissents have gradually become majority opinions and even before the present decision the rationale of the doctrine had been undermined" (at p. 491). This case marked the end of the old doctrine

1674. I would add that the theory of immunity of instrumentalities was definitely rejected by this Court in State of West Bengal v. Union of India MANU/SC/0086/1962 : [1964]1SCR371 .

1675. Mr. Palkhivala argued with considerable force that if there are no limitations upon the power of amendment, the consequences would be far reaching. He said that it will be open to the Parliament to prolong the period of its existence, to make India a satellite of a foreign country, do away with the Supreme Court and the High Courts, abolish the Parliamentary system of Government and take away the power of amendment or, at any rate, make the exercise of the power so difficult that no amendment would be possible. As I said there is no reason to think that the word 'amendment' was used in any narrow sense in Article 368 and that the power to amend under the article was in any way limited. If there is power, the fact that it might be abused is no ground for cutting down its width.

1676. In Vacher and Sons v. London Society of Compositors [1913] A.C. 107. Lord Atkinson said that it is well established that, in construing the words of a statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction, for, as there are many things which the Legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them. In the same case, Lord McNaughton said that a judicial tribunal has nothing to do with the policy of any Act and that the duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction.

1677. In Bank of Toronto v. Lambe [1887] 12 A.C. 575 the Privy Council was concerned with the question whether the Legislature of a Province could not levy a tax on capital stock of the Bank, as that power may be so exercised as to destroy the Bank altogether. The Privy Council said that if on a true construction of Section 92 of the British North America Act, the power fell within the ambit of the section, it would be quite wrong to deny its existence because by some possibility that it may be abused or may limit the range which otherwise would be open to the Dominion Parliament. The Privy Council observed that "Their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy a tax".

1678. In Ex-parte Crossman 267 U.S. 120 it was held that the presumption is that every organ of a State will act in coordination, that though one organ can, by its action, paralyse the functions of the other organs and make the Constitution come to a standstill, yet no Constitution proceeds on the assumption that one organ will act in such a way as to defeat the action of the other.

1679. Our Constitution, in its preamble has envisaged the establishment of a democratic sovereign republic. Democracy proceeds on the basic assumption that the representatives of the people in Parliament will reflect the will of the people and that they will not exercise their powers to betray the people or abuse the trust and confidence reposed in them by the people. Some of the great powers appertaining to the sovereignty of the State are vested in the representatives of the people. They have the power to declare war. They have power over coinage and currency. These disaster-potential powers are insulated from judicial control. These powers, if they are imprudently, exercised, can bring about consequences so extensive as to carry down with them all else we value: War and inflation have released evil forces which have destroyed liberty. If these great powers

could be entrusted to the representatives of the people in the hope and confidence that they will not be abused, where is the warrant for the assumption that a plenary power to amend will be abused? The remedy of the people, if these powers are abused, is in the polling booth and the ballot box.

1680. The contention that if the power to amend Fundamental Rights in such a way as to take away or abridge them were to vest in Parliament, it would bring about the catastrophic consequences apprehended by counsel has an air of unreality when tested in the light of our experience of what has happened between 1951 when Sankari Prasad's case MANU/SC/0013/1951 : [1952]1SCR89 recognised the power of the Parliament to amend the Fundamental Rights and 1967 when the Golaknath Case MANU/SC/0029/1967 : [1967]2SCR762 was decided. It should be remembered in this connection that the Parliament when it exercises its power to amend Fundamental Rights is as much the guardian of the liberties of the people as the Courts.

1681. If one of the tests to judge the essential features of the Constitution is the difficulty with which those features can be amended, then it is clear that the features which are broadly described as "federal features" contained in Clauses (a) to (d) of the proviso to Article 368 are essential features of the Constitution. The articles referred to in Clause (a) to (d) deal with some of the essential features of the Constitution like the Union Judiciary, the High Courts, the legislative relation between the Union and the States, the conferment of the residual power and so on. The power to amend the legislative lists would carry with it the power to transfer the residuary entry from the Union List to the State List. This would also enable Parliament to increase its power by transferring entries from the State List or Concurrent List to the Union List. The proviso to Article 368 thus makes it clear that the Constitution-makers visualised the amendability of the essential features of the Constitution.

1682. Mr. Palkhivala contended that Fundamental Rights are an essential feature of the Constitution, that they are the rock upon which the Constitution is built, that, by and large, they are the extensions, combinations or permutations of the natural rights of life, liberty and equality possessed by the people by virtue of the fact that they are human beings and that these rights were reserved by the people to themselves when they framed the Constitution and cannot be taken away or abridged by a constituted authority like Parliament. He said that the implied limitation stems from the character of those rights as well as the nature of the authority upon which the power is supposed to be conferred.

1683. On the other hand, the respondents submitted that the people of India have only such rights as the Constitution conferred upon them, that before the Constitution came into force, they had no Fundamental Rights, that the rights expressly conferred upon the people by Part III of the Constitution and that there is no provision in our Constitution like Article 10 of the United States Constitution which reserved the rights of the people to themselves. They also said that the characterisation of Fundamental Rights, as transcendental, sacrosanct or primordial in the sense that they are "not of today or yesterday but live eternally and none can date their birth" smacks of sentimentalism and is calculated to cloud the mind by an out-moded political philosophy, and would prevent a dispassionate analysis of the real issues in the case.

1684. The question presented for decision sounds partly in the realm of political philosophy but that is no reason why the Court should not solve it, for, as De Tocqueville wrote: "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question" See De Tocqueville, "Democracy in America" (1948), Bed. 280. For the purpose of appreciating the argument of Mr. Palkhivala that there is inherent limitation on the power of Parliament to amend Fundamental Rights, it is necessary to understand the source from which these rights arise and the reason for their fundamentalness.

1685. Let it be understood at the very outset that I mean by natural rights those rights which are appropriate to man as a rational and moral being and which are necessary for a good life. Although called 'rights', they are not per se enforceable in Courts unless recognized by the positive law of a State. I agree that the word 'right' has to be reserved for those claims and privileges which are recognized and protected by law. But to identify rights with legally recognized rights is to render oneself helpless before the authoritarian state. Your rights, on this theory, are precisely those which the State provides you and no more. To say that you have rights which the State ought to recognize is, from this point of view, a plain misuse of the language. "However, from the point of view of the Declaration of Independence, to recognize the existence of rights prior to and independent of political enactment, is the beginning of political wisdom. If the governments are established to 'secure these rights', the pre-existence of these rights is the whole basis of the political theory" See Hocking, "Freedom of the Press", footnote at p. 59. The preamble to our Constitution shows that it was to 'secure' these rights that the Constitution was established, and that, by and large, the Fundamental Rights are a recognition of the pre-existing natural rights. "They owe nothing to their recognition in the Constitution-such recognition was necessary if the Constitution was to be regarded complete" See Corwin "The Higher Background of the American Constitutional Law", p. 5.

1686. The philosophical foundation of the rights of man is natural law and the history of rights of man is bound up with the history of natural law See Jacques Maritain, "Man and the State", pp. 80-81. That law is deduced not from any speculative void but from the general condition of mankind in society. According to St. Thomas Aquinas the order of the precepts of the natural law follows the order of natural inclinations, because, in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances in as much as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life, and the warding off its obstacles, belongs to the natural law See Summa Theologica, Part II, Section I, Question 91, Article 2 (translated by the English Dominicans), Vol. 3. In a different context Spinoza proclaimed the very same principle in his famous words "Every being strives to persevere in being See "Ethics", Part III, Proposition No. 6". Secondly, according to St. Thomas Aquinas, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law which nature has taught to all animals, such as sexual intercourse, the education of the offspring and so forth See Summa Theologica, Part II, Section I, Question 91, Article 2 (translated by the English Dominicans), Vol. 3. And thirdly, there is in man an inclination to good according to the nature of his reason which inclination prompts him to know the truth and to live in society.

1687. The law of nature is both an expression of reality and a standard to measure the rightness and justice of positive law. The influence of natural law on the concept of natural justice and of the reasonable man of the common law, on the conflict law, the law of merchants and the law of quasi-contract, with special reference to the common law of India has been traced with great learning by Sir Frederic Pollock in his essay on the "History of the Law of Nature" See "Essays in Law", p. 31.

1688. It is true that law of nature has incurred the charge of being fanciful and speculative and several of the theories advanced in support of natural law have been discredited. Mr. Max M. Laserson has rightly said that the doctrines of natural law must not be confused with natural law itself. The doctrines of natural law, like any other political and legal doctrines, may propound various arguments or theories in order to substantiate or justify natural law, but the overthrow of these theories cannot signify the overthrow of natural law itself, just as the overthrow of some theory of philosophy of law does not lead to the overthrow of law itself See "Positive and Natural Law and their correlation in Interpretation of Modern Legal Philosophies" Essays in Honour of Roscos Pound (New York Oxford University Press), (1947).

1689. The social nature of man, the generic traits of his physical and mental Constitution, his sentiments of justice and the morals within, his instinct for individual and collective preservation, his desire for happiness his sense of human dignity, his consciousness of man's station and purpose in life, all these are not products of fancy but objective factors in the realm of existence
See Lauterpacht, "International Law and Human Rights", p. 101. The Law of Nature is not, as the English utilitarians in their ignorance of its history supposed, a synonym for arbitrary individual preference, but that on the contrary, it is a living embodiment of the collective reason of civilized mankind, and as such is adopted by the Common Law in substance chough not always by name See Sir Frederic Pollock, "The Expansion of the Common Law" (1904), p. 128.

The sacred rights of mankind are not to be rummaged for among old parchments of musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured by mortal power (See Canadian Bar Review, Vol. XXXIV (1956), footnote on p. 219).

1690. In State of West Bengal v. Subodh Gopal MANU/SC/0018/1953 : [1954]1SCR587 . Patanjali Sastri, J. said that article (Article 19) enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country.

1691. In the United States of America, reliance upon natural law on the part of vested interests inimical to the economic freedom of man was destined to prove a persistent feature in the 19th century. In the second half of the 19th century, the ideas of natural law and of natural rights were resorted to in an attempt to curb State interference with rights of private property and freedom of contract. The ideas of natural law and natural rights were revived and endowed with fresh vigour for that purpose See Haines, "The Revival of Natural Law Concepts", pp. 117-123. By reference to natural rights of man, Courts in the United States often declared to be un-constitutional legislation for securing humane conditions of work, for protecting the employment of women and children, for safeguarding the interests of consumers, and for controlling the powers of trusts and

corporations. This past history explains why natural rights have been regarded in some quarters with suspicion and why writers affirming the supremacy of a higher law over the legislature or the Constitution have spoken with impatience of the damnosa hereditas of natural rights. This idea of natural law in defence of causes both paltry and iniquitous has caused many to reject it with impatience. A great practical reformer like Jeremy Bentham, a great judge like Mr. Justice Holmes and a great legal philosopher like Hans Kelsen-all believers in social progress-have treated the law of nature with little respect and have rejected it as fiction. Mr. Justice Holmes remarked : "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere" Holmes, "Collected Legal Papers", p. 312. Professor Kelsen considers the typical function of the natural law school to have been the defence of established authority and institutions-of established governments, of private property, of slavery, of marriage See Kelsen, "General Theory of Law and State", pp. 413-418.

1692. Despite these attacks and the ebb and flow in its fortune, there has been a revival of the law of nature in the 20th century and there is no gainsaying the fact that the doctrine of the law of nature was the bulwark and the lever of the idea of the rights of mare embodied in the International Bill of Human Rights with a view to make the recognition of these rights more effective and to proclaim to the world that no State should violate these rights See Lauterpacht, "International Law and Human Rights", pp. 112-113. Whether you call these rights, natural rights or not, whether they flow from the law of nature or not, as I said, these are rights which belong to man as a rational and moral being. "Man's only right, in the last analysis is the right to be a man, to live as a human person. Specific human rights are all based on man's right to live a human life See "Weapons for Peace" by Thomas P. Neill, quoted in "The Natural Law" by Rommnen, footnote at p. 243. Harold Laski said : Harold Laski, "Grammar of Politics" (New Haven) (1925), pp. 39-40.

I have rights which are inherent in me as a member of society; and I judge the state, as the fundamental instrument of society, by the manner in which it seeks to secure for me the substance of those rights.... Rights in this sense, are the groundwork of the state. They are the quality which gives to the exercise of its power a moral penumbra. And they are natural rights in the sense that they are necessary to good life.

1693. Mr. Seervai submitted that Article 33 of the Constitution which states that Parliament may, by law determine to what extent the Fundamental Rights, in their application to members of the Armed Forces or forces charged with the maintenance of public order be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them, would show that no natural rights are recognised by our Constitution, as otherwise, the limitation on the exercise of the Fundamental Rights by Parliament would be unwarranted. In support of this position, he has relied upon the observations of S.K. Das, J. in Basheshar Nath v. Commissioner of Income Tax, Delhi, etc. MANU/SC/0064/1958 : [1959] Supp. 1 S.C.R. 528 where he said:

There are, in my opinion, clear indications in Part III of the Constitution itself that the doctrine of "natural rights" had played no part in the formulation of the provisions therein. Take Articles 33, 34 and 35 which give Parliament power to modify the rights conferred by Part III. If they were natural rights the Constitution could not have given power to Parliament to modify them.

I do not think that it was the contention of Mr. Palkhivala chat natural rights as such are enforceable by Courts without the backing of positive law or that they are not liable to be limited in certain circumstances.

1694. That all natural rights are liable to be limited or even taken away for common good is itself a principle recognized by all writers on natural law. "However, even though man's natural rights are commonly termed absolute and inviolable, they are limited by the requirements of the universal Order to which they are subordinated. Specifically, the natural rights of man are limited intrinsically by the end for which he has received them as well as extrinsically by the equal rights of other men, by his duties towards others". See Romen, "The Natural Law" (1947), footnote 49, p. 253. And when the Parliament restricts or takes away the exercise of the Fundamental Rights by military personnel or the police charged with the duty of maintaining the peace, that does not mean that there are no natural rights, or, that by and large, the Fundamental Rights are not a recognition of the natural rights. It only shows that Fundamental Rights like natural rights are liable to be limited for the common good of the society. John Locke himself did not understand that natural rights were absolute and nowhere did he say so. In other words, because Parliament can restrict the exercise of or even take away the Fundamental Rights of the military personnel or the police charged with the duty of maintaining peace by law, it does not follow that Fundamental Rights, by and large, are not a recognition of the bask human rights or that those rights are not liable to be limited by positive law for common good. Natural law cannot supplant positive law; positive law must provide the practical solution in the choice of one measure rather than another in a given situation. Sir Frederick Pollock said that natural justice has no means of fixing any rule to terms defined in number or measure, nor of choosing one practical solution out of two or more which are in themselves equally plausible. Positive law whether enacted or customary, must come to our aid in such matters. It would be no great feat for natural reason to tell us that a rule of the road is desirable; but it could never have told us whether to drive to the right hand or to the left, and in fact custom has settled this differently in different countries, and even, in some parts of Europe, in different provinces of one State. See Pollock, "The Expansion of the Common Law" (1904), p. 128.

1695. Nor am I impressed by the argument that because non-citizens are not granted all the Fundamental Rights, these rights, by and large, are not a recognition of the human or natural rights. The fact that Constitution does not recognize them or enforce them as Fundamental Rights for non-citizens is not an argument against the existence of these rights. It only shows that our Constitution has chosen to withhold recognition of these rights as fundamental rights for them for reasons of State policy. The argument that Fundamental Rights can be suspended in an emergency and, therefore, they do not stem from natural rights suffers from the same fallacy, namely the natural rights have no limits or are available as immutable attributes of human person without regard to the requirement of the social order or the common good.

1696. Mr. Palkhivala contended that there are many human rights which are strictly inalienable since they are grounded on the very nature of man which no man can part with or lose. Although this may be correct in a general sense, this does not mean that these rights are free, from any limitation. Every law, and particularly, natural law, is based on the fundamental postulate of Aristotle that man is a political animal and that his nature demands life in society. As no human being is an island, and can exist by himself, no human right which has no intrinsic relation to the

common good of the society can exist. Some of the rights like the right to life and to the pursuit of happiness are of such a nature that the common good would be jeopardised if the body politic would take away the possession that men naturally have of them without justifying reason. They are, to a certain extent, inalienable. Others like the right of free speech or of association are of such a nature that the common good would be jeopardised if the body politic could not restrict or even take away both the possession and the exercise of them; They cannot be said to be inalienable. And, even absolutely inalienable rights are liable to limitation both as regards their possession and as regards their exercise. They are subject to conditions and limitations dictated in each case by justice, or by considerations of the safety of the realm or the common good of the society. No society has ever admitted that in a just war it could not sacrifice individual welfare for its own existence. And as Holmes said, if conscripts are necessary for its army, it seizes them and marches them, with bayonets in their rear to death. See Common Law, p. 43. If a criminal can be condemned to die, it is because by his crime he has deprived himself of the possibility of justly asserting this right. He has morally cut himself off from the human community as regards this right. See Jacques Maritain, Man and State, p. 102.

1697. Perceptive writers have always taken the view that human rights-are only prima facie rights to indicate that the claim of any one of them may be overruled in special circumstances. As I said the most fundamental of the pre-existing rights-the right to life-is sacrificed without scruple in a war. A prima fade right is one whose claim has prima facie justification, i.e., is justified, unless there are stronger counterclaims in the particular situation in which it is made, the burden of proof resting always on the counter-claims. To say that natural rights or human rights are prima fade rights is to say that there are cases in which pit is perfectly just to disallow their claim. Unless we have definite assurance as to the limits within which this may occur, we may have no way of telling whether we are better off with these prima fade rights than we would be without them. "Considerations of justice allow us to make exceptions to a natural right in special circumstances as the same considerations would require us to uphold it in general. See generally "Justice and Equality" by Gregory Vlastos in "Social Justice", p. 31 ed. by Richard B. Brandt.

1698. Owing to the complexity of social relations, rights founded on one set of relations may conflict with rights founded on other relations. It is obvious that human reason has become aware not only of the rights of man as a human and civil person but also of his social and economic rights, for instance, the right of a worker to a just wage that is sufficient to secure his family's living, or the right to unemployment relief or unemployment insurance, sick benefits, social security and other just amenities, in short, all those moral rights which are envisaged in Part IV of the Constitution. But there was a natural tendency to inflate and make absolute, unrestricted in every respect, the familiar fundamental rights, at the expense of other rights which should counter-balance them. The economic and social rights of man were never recognised in actual fact without having had to struggle against and overcome the bitter opposition of the fundamental rights. This was the story of the right to a just wage and similar rights in the face of the right to free mutual agreement and right to private ownership.

1699. To determine what is finally right involves a balancing of different claims. From an ethical point of view, all one can say is that particular rights are subject to modification in a given situation by the claims arising out of other rights or of the body of rights as a whole. Since no single right whether natural or not is absolute, claims based on any one right may be subject to qualifications

in accordance with claims based on other rights or the requirements of the total order or way of life, namely, the principle of the common good. See Morris Ginsberg, Justice in Society, p. 77. It is significant to note that Article 29(2) of the Declaration of Human Rights provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

1700. It shall be my endeavour to show in a subsequent part of this judgment how the general welfare of our democratic society requires limitation or even taking away of Fundamental Rights in certain circumstances.

1701. The framers of our Constitution realised that the Fundamental Rights, like natural rights, were not absolute and it was because of this that they provided for restrictions being imposed upon the exercise of these rights by law. But it was impossible for them, or for that matter, for any person, however, gifted they or he might be, to foresee the type of restrictions which would be necessary to meet the changing needs of a society. Even men with the most prophetic vision could not have foreseen all the developments of the body politic in the future and the type of restrictions necessary upon the Fundamental Rights to meet them. The question whether a particular Fundamental Right should be taken away or abridged for the common good of the society must be decided in the light of the experience of each generation and not by what was said or laid down at the time of the framing of the Constitution. It would be asking the impossible to expect one generation to plan a government that would pass through all the revolutionary changes in every aspect of life.

1702. Let us now see whether in the past the Parliament was justified in amending some of the Fundamental Rights and whether the fear expressed by the counsel for the petitioner, that great catastrophic consequences will follow if the Fundamental Rights are permitted to be abridged by Constitutional Amendments is justified.

1703. The First Amendment made certain changes in Article 15 which deals with prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Clause (3) of Article 15 allowed the state to make special provision for women and children. A new clause was added by the Amendment which reads as follows:

(4) Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

1704. This Amendment was necessitated on account of the decision of this Court in the State of Madras v. Champakam MANU/SC/0007/1951 : [1951]2SCR525 to the effect that reservation of seats for backward classes, Scheduled Castes and Tribes in public institutions was invalid, as it would offend the Fundamental Rights guaranteed under Article 29(2). When this Court said that the reservation of seats for these classes offended the Fundamental Right guaranteed under Article 29(2), what option was left but for the Parliament to enact the Amendment, for, social justice

required discriminatory treatment in favour of the weaker sections of the people and in particular the Scheduled Castes and Tribes in order to promote their educational and economic interest and to give them a position of equality. It is possible to sympathise with those who bewail the decision in the case as a 'self-inflicted wound'. But when a Bench of five Judges held so, not all the tears in the world can recall a word of what was written, but only an amendment by Parliament, since the chance of the decision being overruled was remote and problematical.

1705. The second and sixth clauses of Article 19 were also amended by the First Amendment. Article 19(1)(a) provides that all citizens shall have the right to freedom of speech and expression. Before the amendment, Article 19(2) read:

Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

After the amendment, the same clause reads:

Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the...security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

This amendment was necessitated by the decision of this Court in Romesh Thapar v. State of Madras MANU/SC/0006/1950 : 1950CriLJ1514 wherein it was held that the disturbance of public order did not come within the expression "undermines the security of the State.... No doubt, in State of Bihar v. Shaila bala Devi MANU/SC/0015/1952 : 1952CriLJ1373 this Court said that it did not intend to by down in Romesh Thapar's case that in no case will an offence against public order affect the security of the State, but that point if not of much interest in view of the Amendment. When this Court held that the word 'public order' would not come within the expression "undermines the security of State", no option was left to Parliament but to make the Amendment. The words "friendly relations with foreign States" introduced a further abridgement of the freedom of speech but nobody would contend that maintenance of friendly relations with foreign States is unnecessary and that speech which would prejudicially affect these relations should not be curbed even as England and America have done.

1706. The 16th Amendment added after the words "in the interests of" the words "the sovereignty and integrity of India" in Clauses (2), (3) and (4) of Article 19. This means that the Fundamental Rights to freedom of speech and freedom of assembly were abridged for the sake of maintaining the sovereignty and integrity of India. Freedom of speech is the matrix upon which all other freedoms are founded and nobody would deny that it is an essential feature of the Constitution. But that had to be damaged for the sake of a greater good, namely, the maintenance of the sovereignty and integrity of India. And who would dare maintain that the amendment was unnecessary? These amendments illustrate that exigencies not visualized by the makers of the

Constitution would arise and that Fundamental Rights will have to be abridged for the common good or for securing higher values.

1707. It was because counsel for the petitioner realised the necessity for amendment of Fundamental Rights in certain circumstances in such a way as to abridge them that he advanced the further contention that although Parliament should have the power to amend the Fundamental Rights, there is implied limitation upon its power to amend them in such a way as to damage or destroy their core or essence, and that the Court must, in the case of each amendment, pass upon the question whether the amendment has destroyed or damaged the essence or the core of the right. Counsel said that if the task of adjudging what is "reasonable restriction in the interest of public" could be undertaken successfully by Court there is no reason why the Court could not undertake the task of finding the core or essence of a right and whether the amendment has damaged or destroyed it.

1708. Mr. Seervai for the State of Kerala submitted that no objective standard was suggested for the Court to decide what is the core or essence of a right except the perception of the trained judicial mind and that whereas judicial review of the question whether a restriction imposed by a law is reasonable or not is based on the objective standard of reason, there is no divining rod for the Court to locate and find the core of a right. He referred to the dissenting judgment of Holmes in Lochner v. New York 198 U.S. 45 and to the dictum of Patanjali Sastri, J. in State of Madras v. V.G. Row MANU/SC/0013/1952 : 1952CriLJ966 and said that the concept of 'reasonable man', that latch key to many legal doors, or, 'reasonable, restriction in the interest of public' mentioned in Clauses 2 to 6 of Article 19 or "reasonable restrictions" in Article 304(b) are objective in character, though there might be difference of opinion in a particular case in the application of the concepts; but the task of finding the core of a Fundamental Right is like the quest for the "philosopher's stone", and that the Amending Body will be left without chart or compass when it proceeds to make an amendment. Mr. Seervai further submitted that our Constitution makers deliberately omitted the phrase 'due process' in Article 21 to avoid flirtation by Court with any gossamer concepts drawn from higher law philosophy to annul legislation and that even in America, invalidation of law on the ground of violation of substantive due process has become practically obsolete.

1709. When a court adjudges that a legislation is had on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources. In fact, you measure the reasonableness of a restriction imposed by law by indulging in an authentic bit of "special legislation See Learned Hand, "Bill of Rights", p. 26". The words 'reason' and 'reasonable' denote for the common law lawyer ideas which the "Civilians" and the Canonists' put under the head of the 'law of nature'. Thus the law of nature may finally claim in principle, though not by name, the reasonable man of English and American law and all his works which are many". See History of the Law of Nature by Pollock, pp. 57-59. Lord Coke said in Dr. Bonham's case 8 Rep. 107, 118(a) that the common law will adjudge an Act of Parliament as void if it is against common right and reason and substantive due process in its content means nothing but testing an act or legislation on the touchstone of reason.

The reason why the expression "due process" has never been defined is that it embodies a concept of fairness which has to be decided with reference to the facts and circumstances of each case and

also according to the mores for the time being in force in a society to which the concept has to be applied. As Justice Frankfurter said, "due process" is not a technical conception with a fixed content unrelated to time, place and circumstances See Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123.<mpara>
The limitations in Article 19 of the Constitution open the doors to judicial review of legislation in India in much the same manner as the doctrine of police power and its companion, the due process clause, have done in the United States. The restrictions that might be imposed by the legislature to ensure the public interest must be reasonable and, therefore, the Court will have to apply the Yardstick of reason in adjudging the reasonableness. If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that, all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause. In Municipal Committee v. The State of Punjab MANU/SC/0050/1969 : [1969]3SCR447 this Court said that due process clause has no application in India and that a law cannot be struck down as constitution an unreasonable restriction upon Fundamental Rights merely because its terms were vague. The Court said that a law whose terms were vague would be struck down as violative of due process in America but, nevertheless, the principle has no application here because there is no "due process clause" in our Constitution. With great respect, I should think that this is not correct, as the concept of "due process" enters into the meaning of reasonableness of restrictions in Clauses 2 to 6 of Article 19. In Collector of Customs v. Sampathu [1962] 3 S.C.R. 786, Rajagopala Ayyangar, J. said that though the tests of 'reasonableness' laid down by Clauses (2) to (6) of Article 19 might in great part coincide with that for judging for 'due process' it might not be assumed that these are identical, as the Constitution-framers deliberately avoided in this context the use of the expression 'due process' with its comprehensiveness, flexibility and attendant vagueness in favour of a somewhat more definite word 'reasonable'. In the light of what I have said, I am unable to understand how the word 'reasonable' is more definite than the words due process'. As the concept of 'due process' draws its nourishment from natural or higher law so also the concepts of 'reason' and reasonableness' draw the juice for their life from the law of reason which for the common law lawyer is nothing but natural law. See Pollock, the Expansion of Common Law, 108-109. In Abbas v. Union of India MANU/SC/0053/1970 : [1971]2SCR446 Hidayatullah, C.J. speaking for the Court said:
...it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered.

Where a law imposes a restriction upon a Fundamental Right which is vague in character, it would be struck down as unreasonable under Clauses (2) to (6) of Article 19 for the same reason as an American Court would strike it down as violative of due process, viz., a person cannot be deprived of his Fundamental Right by a law whose command is uncertain and does not sufficiently indicate to the individual affected by it how he could avoid coming within the mischief of the law. Our Constitution-makers, under the guise of testing the reasonableness of restrictions imposed by law on Fundamental Rights, brought in by the back door practically the same concept which they openly banished by the front.

1710. I am not dismayed by the suggestion that no yardstick is furnished to the Court except the trained judicial perception for finding the core or essence of a right, or the essential features of the Constitution. Consider for instance, the test for determining citizenship in the United States that

the alien shall be a person of "good moral character" the test of a crime involving "moral turpitude", the test by which you determine the familiar concept of the "core of a contract", the "pith and substance" of a legislation or the "essential legislative function" in the doctrine of delegation. Few Constitutional issues can be presented in black and white terms. What are essential features and non essential features of the Constitution ? Where does the core of a right end and the periphery begin? These are not matters of icy certainty; but, for that reason, I am not persuaded to hold that they do not exist, or that they are too elusive for judicial perception. Most of the things in life that are worth talking about are matters at degree and the great judges are those who are most capable of discerning which of the gradations make genuine difference.

1711. Nor do I think that all the provisions in the Constitution are equally essential. Gladstone said, the most wonderful work ever struck off at a given time by the brain and purpose of man is the Constitution of the United States of America. Lord Bryce said much the same thing when he observed that it is one of the greatest contributions ever made to politics as a practical art. Yet it consists only of VII articles with the Amendments. A Constitution need not partake the prolixity of a code." And our Constitution could very well have dropped many of its provisions. Merely because all the provisions of the Constitution have equal importance in one respect, namely, they are all embodied in one document, and can be amended only by the procedure prescribed in Article 368, it does not follow that all of them are essential features of the document in all other respects.

1712. But the question will still remain, even when the core or the essence of a Fundamental Right is found, whether the Amending Body has the power to amend it in such a way as to destroy or damage the core. I have already said that considerations of justice, of the common good, or "the general welfare in a democratic society" might require abridging or taking away of the Fundamental Rights.

1713. I have tried, like Jacob of the Old Testament to wrestle all the night with the angel, namely, the theory of implied limitation upon the power of amendment. I have yet to learn from what source this limitation arises. Is it because the people who were supposed to have framed the Constitution intended it and embodied the intention in an unalterable framework? If this is so, it would raise the fundamental issue whether that intention should govern the succeeding generations for all time. If you subscribe to the theory of Jefferson, to which I have already referred and which was fully adopted by Dr. Ambedkar, the principal architect of our Constitution and that is the only sane theory. I think there is no foundation for the theory of implied limitations. Were it otherwise, in actual reality it would come to this : The representatives of some people the framers of our Constitution could bind the whole people for all time and prevent them from changing the Constitutional structure through their representatives. And, what is this sacredness about the basic structure of the Constitution ? Take the republican form of Government, the supposed cornerstone of the whole structure. Has mankind, after its wandering through history, made a final and unalterable verdict that it is the best form of government? Does not history show that mankind has changed its opinion from generation to generation as to the best form of government? Have not great philosophers and thinkers throughout the ages expressed different views on the subject? Did not Plato prefer the rule by the Guardians? And was the sapient Aristotle misled when he showed his proclivity for a mixed form of government? If there was no consensus yesterday, why expect one tomorrow?

1714. The object of the people in establishing the Constitution was to promote justice, social and economic, liberty and equality. The modus operandi to achieve these objectives is set out in Parts III and IV of the Constitution. Both Part III and IV enumerate certain moral rights. Each of these Parts represents in the main the statements in one sense of certain aspirations whose fulfilment was regarded as essential to the kind of society which the Constitution-makers wanted to build. Many of the articles, whether in Part III or Part IV, represent moral rights which they have recognized as inherent in every human being in this country. The task of protecting and realising these rights is imposed upon all the organs of the State, namely, legislative, executive and judicial. What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a Court and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and aspirations reflected in the provisions of Part IV? I think not. Free and compulsory education under Article 45 is certainly as important as freedom of religion under Article 25. Freedom from starvation is as important as right to life. Nor are the provisions in Part III absolute in the sense that the rights represented by them can always be given full implementation in all, circumstances whereas practical exigencies may sometimes entail some compromise in the implementation of the moral claims in Part IV. When you translate these rights into socio-political reality, some degree of compromise must always be present. Part IV of the Constitution translates moral claims into duties imposed on government but provided that these duties should not be enforceable by any Court. See generally A.R. Blackshield "Fundamental Rights & Economic Viability of the Indian Nation", Journal of Indian Law Institute, Vol. 10 (1968) 1, 26-28. The question has arisen what will happen when there is a conflict between the claims in Part IV and the rights in Part III and whether the State would be justified at any given time in allowing a compromise or sacrifice the one at the expense of the other in the realisation of the goal of the Good life of the people. What is the relationship between the rights guaranteed by Part III and the moral rights in Part IV? In the State of Madras v. Champakam already referred to this Court held that the Fundamental Rights being sacrosanct, the Directive Principles of State Policy cannot override them but must run as subsidiary to them. This view was affirmed by this Court in Quareshi v. State of Bihar MANU/SC/0027/1958 : [1959]1SCR629 . S.R. Das, C.J. who delivered the judgment of the Court said that the argument that the laws were passed in the discharge of the fundamental obligation imposed on the State by the Directive Principles and therefore, they could override the restrictions imposed on the legislative power of the State by Article 13(2) or that a harmonious interpretation has to be placed upon the provisions of the Act was not acceptable. It was held that the State should implement the Directive Principles but that it should do so in such a way that its laws do not take away or abridge the Fundamental Rights : as otherwise, the protecting provisions of Part III will be a mere rope of sand. In Golaknath Case, Subba Rao, C.J. said that Fundamental Rights and Directive Principles of State Policy form an integrated whole and were elastic enough to respond to the changing needs of the society. There are observations in later cases of this Court that it is possible to harmonize Part III and Part IV.

1715. The significant thing to note about Part IV is that, although its provisions are expressly made un-enforceable, that does not affect its fundamental character. From a juridical point of view, it makes sense to say that Directive Principles do form part of the Constitutional Law of India and they are in no way subordinate to Fundamental Rights. Prof. A.L. Goodhart said:

...if a principle is recognized as binding on the legislature, then it can be correctly described as a legal rule even if there is no court that can enforce it. Thus, most of Dicey's book on the British

Constitution is concerned with certain general principles which Parliament recognizes as binding on it.(1)

Enforcement by a Court is not the real test of a law. See "A note on the theory of Law", "Law and the Constitution" 5th ed. p. 330 by Ivor Jennings. The conventions of English Constitution are not enforceable in a Court of law but they are, nevertheless, binding and form part of the Constitutional law of the land. The similarity between the Constitutional conventions in England and Directive Principles of State Policy in India cannot be disputed.

1716. The only purpose of Article 37 is to prevent a citizen from coming forward and asking for specific performance of the duties cast upon the State by the Directive Principles. But if a State voluntarily were to implement the Directive Principles, a Court would be failing in its duty, if it did not give effect to the provisions of the law at the instance of a person who has obtained a right under the legislation. As the implementation of the Directive Principles involves financial commitments on the part of the Government and depends upon financial resources, it was thought meet that no private citizen should be allowed to enforce their implementation. But nevertheless, when the State, in pursuance of its fundamental obligation makes a law implementing them, it becomes the law of the land and the judiciary will be found to enforce the law. What is to happen if a State were to make a law repugnant to the Directive Principles? Would the Court be justified in striking down the law as contrary to the Law of the Constitution or, on what basis will a conflict between Part III and Part IV be solved? The questions require serious consideration.

1717. The definition of the word 'State' both for the purpose of Part III and Part IV is the same. Whereas Article 45 of the Irish Constitution addresses the directive only for the guidance of the Oireachtas, i.e., the legislature, all the directives from Articles 38 to 51 of our Constitution are addressed to the 'State' as defined in Article 12. That judicial process is also "State Action" seems to be clear. Article 20(2) which provides that no person shall be prosecuted and punished for the same offence more than once is generally violated by the judiciary and a writ under Article 32 should lie to quash the order. In his dissenting judgment in Naresh v. State of Maharashtra MANU/SC/0044/1966 : [1966]3SCR744 Hidayatullah, J. took, the view. I think rightly that the judiciary is also "State" within the definition of the word "State" in Article 12 of the Constitution. See also Shelley v. Kraemer 334 U.S., 1; Eudhan v. State of Maharashtra MANU/SC/0047/1954 : 1955CriLJ374 . Frankfurter, J. asked the question that if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situation, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws. See Backus v. Fort Street Union Depot Co., 169 U.S. 557; also Snowden v. Hughes, 321 U.S. 1.? In Carter v. Texas 177 U.S. 442 the Court observed that whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or colour, from serving as...jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied.

1718. If convicting and punishing a person twice for an offence by a judgment is equivalent to the "State passing a law in contravention of the rights conferred by Part III" for the purpose of enabling the person to file a petition under Article 32 to quash the judgment, I can see no incongruity in holding, when Article 37 says in its latter part. "it shall be the duty of the State to apply these

principles in making laws", that judicial process is 'state action' and that the judiciary is bound to apply the Directive Principles in making its judgment.

1719. The judicial function is, like legislation, both creation and application of law. The judicial function is ordinarily determined by the general norms both as to procedure and as to the contents of the norm to be created, whereas legislation is usually determined by the Constitution only in the former respect. But that is a difference in degree only. From a dynamic point of view, the individual norm created by the judicial decision is a stage in a process beginning with the establishment of the first Constitution, continued by legislation and customs and leading to the judicial decisions. The Court not merely formulates already existing law although it is generally asserted to be so. It does not only 'seek' and 'find' the law existing previous to its decision, it does not merely pronounce the law which exists ready and finished prior to its pronouncement. Beth in establishing the presence of the conditions and in stipulating the sanction, the judicial decision has a constitutive character. The law-creating function of the courts is especially manifest when the judicial decision has the character of a precedent, and that means when the judicial decision creates a general norm. Where the courts are entitled not only to apply pre-existing substantive law in their decisions, but also to create new law for concrete cases, there is a comprehensible inclination to give these judicial decisions the character of precedents. Within such a legal system, courts are legislative organs in exactly the same sense as the organ which is called the legislator in the narrower and ordinary sense of the term.
Courts are creators of general legal norms. See Kelsen, "General Theory of Law and State" pp. 134-5 & 149-150. Lord Reid said : See the recent address of Lord Reid, "The Judge as Law Maker" (1972) 12 J.S.P.T.L. 22.
There was a time when it was thought almost indecent to suggest that judges make law-they only declare it. Those with a taste for fairy-tales seem to have thought that in some Aladdin's Cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame.... But we do not believe in fairy tales any more.

I do not think any person with a sense of realism believes today as Blackstone did that the law declared by the courts has a platonic or ideal existence before it is expounded by judges. John Chipman Gray said that in the last analysis the courts also make our statute law and quoted the passage from the famous sermon of Bishop Hoadly that whoever has absolute power to interpret the law, it is he who is the law-giver, not the one who originally wrote it. See "Nature and Sources of the Law" pp. 102, 125, 172.

1720. It is somewhat strange that judicial process which involves law-making should be called 'finding the law'. "Some simple-hearted people believe that the names we give to things do not matter. But though the rose by any other name might smell as sweet, the history of civilization bears ample testimony to the momentous influence of names. At any rate, whether the process of judicial legislation should be called finding or making the law is undoubtedly of great practical moment". See M.R. Cohen, "Law and the Social Order" (1933), pp. 121-124. Nobody doubts today that within the confines of vast spaces a judge moves with freedom which stamps his action as creative. "The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom". See Benjamin N. Cardozo, "The Nature of the Judicial process", p. 115.

1721. It is relevant in this context to remember that in building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to Directive Principles. The makers of the Constitution had the vision of a future where liberty, equality and justice would be meaningful ideals for every citizen. There is a certain air of unreality when you assume that Fundamental Rights have any meaningful existence for the starving millions. What boots it to them to be told that they are the proud possessors of the Fundamental Rights including the right to acquire, hold and dispose of property if the society offers them no chance or opportunity to come by these rights? Or, what boots it to the beggar in the street to be told that the Constitution in its majestic equality, holds its scales even and forbids by law both his tribe and the rich to beg in the street, to steal bread or sleep under the bridge? This is not to say that the struggle for a just economic order should be allowed to take priority over the struggle for the more intangible hopes of man's personal self-fulfilment. But in particular contexts, fundamental freedoms and rights must yield to material and practical needs. Economic goals have an un-contestable claim for priority over ideological ones on the ground that excellence comes only after existence. See generally A.R. Blackshield "Fundamental Rights and Economic Viability of the Indian Nation", Journal of the Indian Law Institute, Vol. 10 (1968) 1. It is only if men exist that there can be fundamental rights. "Tell an unprovisioned man lost in the desert that he is free to eat, drink, bathe, read.... No one is hindering him. For the attainment of most of these ends he might better be in prison. Unrestraint without equipment is not liberty for any end which demands equipment.... Unemployment is a literal unrestraint, a marked freedom from the coercions of daily toil but as destructive of means it is the opposite of freedom for.... To contemporary consciousness it has become an axiom that there can be no freedom without provision. See Hocking "Freedom of the Press", pp. 55-56.

1722. The twentieth century juristic thinking has formulated two jural postulates. They are (1) Every one is entitled to assume that the burdens incidental to life in society will be borne by society; (2) Every one is entitled to assume that at least a standard of human life will be assured to him; not merely equal opportunities of providing or attaining it but immediate material satisfaction. See Roscoe Pound, "Jurisprudence" Vol. 1, Section 46 (Twentieth Century).

1723. The concept of liberty or equality can have meaning only when men are alive today and hope to be alive tomorrow. "One hates to think how few Indians, for example, have any idea that their Constitution provides basic rights, let alone what those rights are or how they could be defended when violated by Government". See Carl J. Friedrich, Man and His Government, p. 272. So the main task of freedom in India for the large part of the people is at the economic level.

1724. Roscoe Pound who expounded his theory of interest as a criterion of justice insists without qualification that the "interest" or "claims" or "demands" with which he is concerned are de facto psychological phenomena which pre-exist and are not merely the creation of the legal order. See Pound, 3 Jurisprudence, 5-24, esp. 16-21.

1725. Pound's proposals seem, in the last analysis, to be an attempt to implement the familiar thought that there should be a correspondence between the demands made by man in a given society at a given time and its law at that time.

1726. The scheme of interests should include, all the de facto claims actually made. This, of course, is not to say that every de facto claim or interest which finds a place in the scheme of interests will

be given effect in all circumstances. Claims within a legal order which are not necessarily mutually incompatible may nevertheless come into conflict in particular situations. Indeed most of the problems in which the judgment of justice is called for arise from a conflict of two or more of such de facto claims, none of which can be given effect to completely without prejudice to the others. The scheme of interests, like the jural postulates, is a device for presenting to the mind of the legislator a rough picture of the actual claims made by men in a given society at a given time, to which justice requires them to give effect so far as possible. See Julius Stone, Human Law and Human Justice, pp. 269-270. And what are the de facto claims crying aloud for recognition as interests for the millions of people of this country? That can probably admit of only one answer, by those who have eyes to see and ears to hear. By and large the rough picture of the actual claims made by the millions of people in this country and which demand recognition as interests protected by law is sketched in Part IV of the Constitution. A judgment of justice is called for when these claims which call for recognition in law as interest conflict with other rights and interests. That judgment has to be made by the dominant opinion in the community. For a Judge to serve as a communal mentor, as Learned Hand said, appears to be a very dubious addition to his duties and one apt to interfere with their proper discharge. The court is not the organ intended or expected to light the way to a saner world, for, in a democracy, that choice is the province of the political branch i.e. of the representatives of the people, striving however blindly or inarticulately, towards their own conception of the Good Life.

1727. It is inevitable that there should be much gnashing of teeth when a society opts for change and breaks with its older laissez faire tradition, which held before the eyes of both the rich and the poor a golden prize for which each may strive though all cannot attain it and which in particular provided the rich with an enchanting vision of infinite expansion, and switches on to a new social order where claims of individual self assertion and expansion are subordinated to the common good.

1728. To sum up this part of the discussion, I think there are rights which inhere in human beings because they are human beings-whether you call them natural rights or by some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality that the people gave unto themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people to secure justice, political, social and economic. therefore, the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a Court of law in case the State fails to implement its duty but, nevertheless, they are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives.

The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience.
Restrictions, abridgement; curtailment, and even abrogation of these rights in circumstances not visualized by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV. Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claim embodied in Part IV or must yield

to them is a matter which must be left to be decided by each generation in the light of its experience and its values. And, if Parliament, in its capacity as the Amending Body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution, the Court cannot adjudge the Constitutional amendment as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant. Judicial review of a Constitutional amendment for the reason that it gives priority value to the moral claims embodied in Part IV over the Fundamental Rights embodied in Part III is impermissible. Taking for granted, that by and large the Fundamental Rights are the extensions, permutations and combinations of natural rights in the sense explained in this judgment, it does not follow that there is any inherent limitation by virtue of their origin or character in their being taken away or abridged for the common good. The source from which these rights derive their moral sanction and transcendental character, namely, the natural law, itself recognizes that natural rights are only prima facie rights liable to be taken away or limited in special circumstances for securing higher values in a society or for its common good. But the responsibility of the Parliament in taking away or abridging a Fundamental Right is an awesome one and whenever a question of Constitutional amendment which will have the above effect comes up for consideration, Parliament must be aware that they are the guardians of the rights and liberties of the people in a greater degree than the courts, as the courts cannot go into the validity of the amendment on any substantive ground.

1729. In the light of what I have said, I do not think that there were any express or implied limitations upon the power of Parliament to amend the Fundamental Rights in such a way as to destroy or damage even the core or essence of the rights and the 24th Amendment, by its language, makes it clear beyond doubt. The opening words of the amended article should make it clear that no invisible radiation from any other provision of the Constitution would operate as implied limitation upon the power of amendment. Further, the amended Article 368 puts it beyond doubt that the power to amend the provisions of the Constitution is in the article itself that the power includes the power to add, vary or repeal any provision of the Constitution, that the power is a constituent power, that the assent of the President to a bill for amendment is compulsory and that nothing in Article 13(2) will apply to an amendment under the article.

1730. Article 368, as it stood before the Amendment, conferred plenary power to amend all the provisions of the Constitution and the 24th Amendment, except in one respect, namely, the compulsory character of the assent of the President to a bill for amendment, is declaratory in character. To put it in a different language, as the majority decision in the Golaknath case MANU/SC/0029/1967 : [1967]2SCR762 negatived the constituent power of the Parliament to amend the Fundamental Rights in such a way as to take away or abridge them which, according to the Amending Body, was wrong, the Amending Body passed the amendment to make it clear that the power to amend is located in the article, that it is a constituent power and not a legislative power as held by the majority decision in the Golaknath case, that the power is plenary in character and that Article 13(2) is not a bar to the amendment of the Fundamental Rights in such a way as to take away or abridge them under Article 368. That the object of the amendment was declaratory in character in clear from the statement of Objects and Reasons for the Amendment. That says that the Amendment was made to provide expressly that the Parliament has competence, in the exercise of its amending power, to abridge or take away the Fundamental Rights since the majority in the Golaknath Case held that the Parliament had no such power. As I have already said, the

Amendment has added nothing to the content of the article except the requirement as to the compulsory character of the assent of the President to the bill for amendment. That an Amending Body, in the exercise of its power to amend, if the power to amend is plenary, can make an amendment in order to make clear what was implicit in the article and to correct a judicial error in the interpretation of the article appears to me to be clear.

1731. Mr. Palkhivala contended that as the power to amend under Article 368 as it stood before the 24th Amendment was itself limited, the power to amend that power cannot be utilised to enlarge the amending power.

1732. There is nothing illegal or illogical in a donor granting a limited power coupled with a potential power or capacity in the donee to enlarge the limit of that power according to the discretion of the donee. It is a mistake to suppose even on the assumption that the actual power to amend under Article 368 as it stood before the 24th Amendment was limited, the Amending Body cannot enlarge the limit of the power. As I said, even if it be assumed that the actual power for amendment under the article was limited, the article gave the Amending Body a potential power, to enlarge or contract the limit of the actual power. The potential power when exercised by the Amending Body makes the actual power either enlarged or contracted. The wording of proviso to Article 368, viz., "If the amendment seeks to make any change...(e) in the provision of this article" makes it clear chat the object of the amendment of the article is to make change in Article 368. On what basis is the assumption made that by making change in the article, the area of the power, if actually limited, cannot be enlarged? I must confess my inability to perceive any limit as to the character of the change that might be made in the amending power. It was assumed by Hidayatullah, J. in his judgment in Golaknath Case that the article can be so amended and a Constituent Assembly convoked to amend the Fundamental Rights. Is such an amendment of Article 368 possible if the argument of the petitioner is right that the power to amend the amending power cannot be exercised so as to change the locus or the width of the amending power? The only thing required would be that the amending power should be amended in the manner and form prescribed by the article itself. And there is no case that that has not been done.

1733. Counsel also submitted that the operation of Article 13(2) was not liable to be taken away by the amendment. He said that although there was no express provision in Article 13(2) or in Article 368 which prevented the operation of Article 13(2) being taken away, there was implied limitation for the reason that, if the Fundamental Rights could not have been amended in such a way as to take away or abridge them because of the inhibition contained in Article 13(2), that inhibition could not have been removed indirectly by amending Article 368 and Article 13(2). In other words, the argument was, as the word 'law' in Article 13(2) included an amendment of the Constitution, that was an express bar to the amendment of the Fundamental Rights in such a way as to take away or abridge them and, therefore, the Amending Body cannot do in two stages what it was prohibited from doing in one stage. Even on the assumption that the word 'law' in Article 13(2) included an amendment of the Constitution, I think there was nothing which prevented the Amending Body from amending Article 368 and Article 13(2) in such a way as to exclude the operation of Article 13(2) as there was no express or implied prohibition for doing so.

1734. The next question for consideration is whether the 25th Amendment is valid. By that Amendment, Article 31(2) was amended and the amended article says that no property shall be

acquired save by the authority of law which provides for acquisition or requisition of the property for an 'amount' which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law and that no such law shall be called in question in any Court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash. An exception has been made in the case of acquisition of property belonging to an educational institution established and administered by a minority referred to in Clause (1) of Article 30 by providing that the State shall ensure that the amount fixed by or determined under the law for acquisition of such property must be such as would not restrict or abrogate the right guaranteed under than clause. Clause (2B) to Article 31 provides for dispensing with the application of Article 19(1)(f) to any law as is referred to in Sub-clause (2) of Article 31. A new article was also inserted viz., Article 31C which provides that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy : Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent.

1735. Mr. Palkhivala contended that the Fundamental Right to acquire, hold and dispose of property is an essential feature of the Constitution, that there can be no dignified citizens in a State unless they have the right to acquire and hold property, that the right to acquire and hold property is essential for the enjoyment of all other Fundamental Rights as it is the basis on which all other rights are founded, that the Fundamental Rights guaranteed to the minorities would become a rope of sand if the right to hold and dispose of property can be taken away and as power to acquire property for an 'amount' inadequate or illusory is given to the Parliament or State Legislature, that would damage the essence or core of the Fundamental Right to property. Counsel said that if the core or the essence of the right to hold property could be taken away by a law, the right to freedom of press under Article 19(1)(a) would become meaningless as a publisher could be deprived of his printing press by paying him a nominal amount and that the fundamental right of the workers to form associations and of the religious denominations to establish and maintain institutions for religious and charitable purposes would become empty words.

1736. The framers of the Constitution regarded the right to acquire and hold property as a Fundamental Right for the reason that a dignified human life is impossible without it. Whether it is the weakest of all Fundamental Rights would depend upon the question whether there is a hierarchy of values among the Fundamental Rights. The concept of preferred freedoms is an indication that some judges are inclined to put the right to hold property low in the scale of values.

1737. The exponents of natural law like Aristotle, St. Thomas Aquinas, Hobbes and even positivists are agreed that right to life and property is the presupposition of a good legal order. Property, according to Aristotle, is an instrument of the best and highest life. Property is the necessary consequence and condition of liberty. Liberty and property demand and support each other.

1738. The doctrine of natural rights has exercised a profound influence upon the conception of private property. In its most modern form it insists that property is indispensable to man's individual development and attainment of liberty, Without dominion over things, man is a slave. See John Moffatt Mecklin, "An Introduction to Social Ethics", pp. 302-321.

1739. The most that we can claim, as a general principle applicable to all stages of social development, is that without some property or capacity for acquiring property there can be no individual liberty, and that without some liberty there can be no proper development of character. See Rashdall, "Property : Its Duties and Rights", pp. 52-64.

1740. Persons without property enjoy no sense of background such as would endow their individual lives with a certain dignity. They exist on the surface; they cannot strike roots, and establish permanency. Holland, "Property : Its Duties and Rights", pp. 183-192.

1741. In short, the concept of property is not an arbitrary ideal but is founded on man's natural impulse to extend his own personality. In the long run, a man cannot exist, cannot make good his right to marriage or found a family unless he is entitled to ownership through acquisition of property.

1742. However, it is a very common mistake to speak of property as if it were an institution having a fixed content constantly remaining the same; whereas in reality, it has assumed the most diverse forms and is still susceptible to great unforeseen modifications.

1743. The root of the difficulty is that in most of the discussions the notion of private property is used too vaguely. It is necessary to distinguish at least three forms of private property : (i) property in durable and non-durable consumer's goods; (ii) property in the means of production worked by their owners; (iii) property in the means of production not worked or directly managed by their owners, especially the accumulations of masses of property of this kind in the hands of a relatively narrow class. While the first two forms of property can be justified as necessary conditions of a free and purposeful life, the third cannot. For this type of property gives power not only over things, but through things over persons. It is open to the charge made that any form of property which gives man power over man is not an instrument of freedom but of servitude. See Professor Morris Ginsberg, "Justice in Society", p. 101.

1744. The foundation of our society today is found not in functions, but in rights; that rights are not deducible from the discharge of function, so that the acquisition of wealth and the enjoyment of property are contingent upon the performance of services but that the individual enters the world equipped with rights to the free disposal of this property and the pursuit of his economic self-interest, and that these rights are anterior to, and independent of any service which he may render. In other words, "the enjoyment of property and the direction of industry are considered to require no social justification" (See the passage quoted in "Equal Protection Guarantee and the Right to Property under the Indian Constitution", by Jagat Narain, International And Comparative Law Quarterly, Vol. 15, 1966, pp. 206-7).

1745. The framers of our Constitution made the right to acquire, hold and dispose of property a Fundamental Right thinking that every citizen in this country would have an opportunity to come

by a modicum of that right. therefore, as the learned Attorney General rightly contended any defence of the right to own and hold property must essentially be the defence of a well distributed property and not an abstract right that can, in practice, be exercised only by the few.

1746. Article 39(b) provides that the State shall direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 39(c) states that the State shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

1747. Sir Ivor Jennings has said that the propositions embodied in these sub-articles are derived from Article 45 of the Irish Constitution and that in turn is based upon Papal Bulls. See Sir Ivor Jennings, "Some Characteristics of the Indian Constitution", pp. 31-32.

1748. His Holiness Pope Paul VI, following the previous encyclicals on the subject has said : See Encyclical Letter of Pope Paul VI (1967), "On the Development of Peoples", pp. 18, 58, footnote at p. 58.

To quote St. Ambrose : "...the world is given to all, and not only to the rich". That is, private property does not constitute for anyone as absolute and unconditioned right. No one is justified in keeping for his exclusive use what he does not need, when others lack necessities. In a word, 'according to the traditional doctrine as found in the Fathers of the Church and the great theologians, the right to property must never be exercised to the detriment of the common good.

God has intended the earth and all that it contains for the use of all men and all peoples. Hence, justice, accompanied by charity, must so regulate the distribution of created goods that they are actually available to all in an equitable measure.

Moreover, all have the right to possess a share of earthly goods sufficient for themselves and their families.

In extreme necessity all goods are common, that is, are to be shared.

1749. The basic institution of property is not to be confused with particular forms it may assume in different ages or regions. These will be justified according as they continue to show that they are achieving the general aim of ministering to the good of human life. Natural right may also be violated under a regime in which a great number, although theoretically free, are in practice excluded from the possibility of acquiring property. See William J. McDonald, "The Social Value of Property according to St. Thomas Aquinas", p. 183.

1750. When property is acquired for implementing the directive principles under Article 39(b) or 39(c), is there an ethical obligation upon the State to pay the full market value? In all civilized legal systems, there is a good deal of just expropriation or confiscation without any direct compensation. Indeed, no one, in fact, had the courage to argue that the State has no right to deprive an individual of property to which he is so attached that he refuses any money for it. Article 31(2A) proceeds on the assumption that there is no obligation upon the State to pay compensation to a

person who is deprived of his property. What does it matter to the person who is deprived of his property whether after the deprivation, the State or a Corporation owned or controlled by the State acquires title to it? Every acquisition by State pre-supposes a deprivation of the owner of the property. If when depriving a person of his property, the State is not bound to pay compensation, what is the principle of justice which demands that he should be compensated with full market value merely because the title to the property is transferred to State or the Corporation as aforesaid after the deprivation. No absolute principle of justice requires it. The whole business of the State depends upon its rightful power to take away the property of Dives in the form of taxation and use it to support Lazarus. When slavery was abolished in America, by law, the owners had their property taken away. The State did not consider itself ethically bound to pay them the full market value of their slaves. It is certainly a grievous shock to a community to have a large number of slave owners, whose wealth made them leaders of culture, suddenly deprived of their income. Whether it was desirable for the slaves themselves to be suddenly taken away from their masters and cut adrift on the sea of freedom without compensation is another matter. "When prohibition was introduced in America, there was virtual confiscation of many millions of dollars' worth of property. Were the distillers and brewers entitled to compensation for their losses?. The shock to the distillers and brewers was not as serious as to others e.g., saloon keepers and bartenders who did not lose any legal property since they were only employees, but who found it difficult late in life to enter new employments. These and other examples of justifiable confiscation without compensation are inconsistent with the absolute theory of private property". See generally M.R. Cohan, "Property and Sovereignty", Law and Social Order, p. 45 onwards.

1751. An adequate theory of social justice should enable one to draw the line between justifiable and unjustifiable cases of confiscation.

1752. The intention of the framers of the Constitution, when they drafted Article 24 [the original Article 31(2)], can be seen from the speech of Pandit Jawaharlal Nehru in the Constituent Assembly on September 10, 1949. Constituent Assembly Debates, Vol. IX, 1193.

...Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason, where it is thought that there has been a gross abuse of the law, where in fact there has been a fraud on the Constitution.

1753. Shri K.M. Munshi (who spoke in the Constituent Assembly on the draft Article 24 on September 12, 1949, observed : Constituent Assembly Debates, Vol. IX, p. 1299.

We find on the English Statute Book several Acts, the Land Acquisition Act, the Land Clauses Act, the Housing Act, in all of which a varying basis of compensation has been adopted to suit not only to the nature of the property but also the purpose for which it is to be acquired. Parliament therefore is the judge and master of deciding what principles to apply in each case.

1754. In the State of West Bengal v. Bela Banerjee MANU/SC/0017/1953 : [1954]1SCR558 , the expectation entertained by the Constituent Assembly that the Court will not interfere with the fixation of compensation by Parliament was belied. The Court said in that case that the owner of

the property expropriated must be paid the just equivalent of what he has been deprived of and that within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable.

1755. In order to bring Article 31(2) in conformity with the clear intention of the framers of the Constitution, the Fourth Amendment to the Constitution was passed and it came into effect on April 27, 1955. At the end of Article 31(2) the following words were introduced by the Amendment : "...and no such law shall be called in question in any Court on the ground that the compensation provided by the law is not adequate." The effect of the amendment was considered by this Court in P. Vajravelu Mudaliar v. Deputy Collector MANU/SC/0049/1964 : [1965]1SCR614 . Subba Rao, J. (as he then was) said that the fact that Parliament used the same expressions namely, 'compensation' and 'principles' as were found in Article 31 before the amendment is a clear indication that it accepted the meaning given by this Court to those expressions in Mrs. Bela Banerjee's Case and that it follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of.

1756. In Union of India v. Metal Corporation MANU/SC/0117/1966 : [1967]1SCR255 , it was laid down that to provide written down value of a machinery (as it was understood under the Income Tax Act) was not in compliance with Article 31(2) because it did not represent the just equivalent of the machinery, meaning thereby, the price at or about the time of its acquisition. Subba Rao, J. said that the law to justify itself has to provide for the payment of a 'just equivalent' to the land acquired or lay down principles which will lead to that result.

1757. Two years later, in Gujarat v. Shantilal MANU/SC/0063/1969 : [1969]3SCR341 , this Court overruled the decision in the Metal Corporation Case and Shah, J. observed that if the quantum of compensation fixed by the Legislature is not Habile to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent.

1758. In the Bank Nationalisation Case R.C. Cooper v. Union of India MANU/SC/0011/1970 : [1970]3SCR530 , the majority decision virtually overruled the decision in Gujarat v. Shantilal. The majority was of the view that even after the Fourth Amendment 'compensation' meant "the equivalent in terms of money of the property compulsorily acquired" according to 'relevant principles' which principles must be appropriate to the determination of compensation for the particular class of property sought to be acquired.

1759. It was in these circumstances that the word 'amount' was substituted for 'compensation' in the sub-article by the 25th Amendment.

1760. It was submitted on behalf of the petitioner that the word 'amount' implies a norm for fixing it and that at any rate, when principles for fixing the amount are referred to, the principles must have some relevancy to the amount to be fixed.

1761. The whole purpose of the amendment was to exclude judicial review of the question whether the 'amount' fixed or the principle laid down by law is adequate or relevant.

1762. Mukherjea, C.J. said in Rai Sahib Ram Jawaya Kapur v. State of Punjab MANU/SC/0011/1955 : [1955]2SCR225 , that the Cabinet, enjoying as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constitution the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

1763. Much the same sentiment was expressed by Hegde, J. see Sita Ram Bishambhar Dayal v. State of U.P. (1972) 29 STC 206:

In a Cabinet form of Government, the executive is expected to reflect the views of the Legislature. In fact in most matters it gives the lead to the Legislature. However much one might deplore the "New Despotism" of the executive, the very complexity of the modern society and the demand it makes on its government have set in motion forces which have made it absolutely necessary for the legislatures to entrust more and more powers to the executive. Text book doctrines evoked in the 19th century have become out of date....

1764. When the Cabinet formulates a proposal for acquisition of property, it will have the relevant materials to fix the amount to be paid to the owner or the principles for its fixation. Several factors will have to be taken into account for fixing the amount or laying down the principles; the nature of the property sought to be acquired, the purpose for which the acquisition is being made, the real investment of the owner excluding the fortuitous circumstances like unearned increment and also marginal utility of the property acquired to the owner. Principles of social justice alone will furnish the yardstick for fixing the amount or for laying down the principles. The proposal becomes embodied in law, if the Parliament agrees to the Bill embodying the proposal. The whole point is that the fixation of the amount or the laying down of the principle for fixing it is left to the absolute discretion of the Parliament or the State Legislatures on the basis of consideration of social justice. That the fixation is in the absolute discretion of Parliament or the State Legislature is further made clear when it is laid down that "no such law shall be called in question in any Court on the ground that the amount so fixed or determined is not adequate." If the Parliament or State legislature can fix any amount, on consideration of principles of social justice, it can also formulate the principle for fixing the amount on the very same consideration. And the principle of social justice will not furnish judicially manageable standards either for testing the adequacy of the amount or the relevancy of the principle.

1765. The article as amended provides no norm for the Court to test the adequacy of the amount or the relevancy of the principle. Whereas the word 'compensation', even after the Fourth Amendment, was thought to give such a norm, namely, the just' equivalent in money of the property acquired or full indemnification of the owners the word 'amount' conveys no idea of any norm. If supplies no yard-stick. It furnishes no measuring rod. The neutral word 'amount' was deliberately chosen for the purpose. I am unable to understand the purpose in substituting the word 'amount' for the word 'compensation' in the sub article unless it be to deprive the Court of any yardstick or norm for determining the adequacy of the amount and the relevancy of the principles

fixed by law. I should have thought that this coupled with the express provision precluding the Court from going into the adequacy of the amount fixed or determined should put it beyond any doubt that fixation of the amount or determination of the principle for fixing it is a matter for the Parliament alone and that the Court has no say in the matter.

1766. This Court said in Shantilal's Case MANU/SC/0063/1969 : [1969]3SCR341 :

...it does not however mean that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the courts, for, to do so, would be to grant a charter of arbitrariness.

1767. These observations were made with reference to the sub-article as it stood before the 25th Amendment, namely, before the substitution of the word 'amount' for the word 'compensation' in it Even if the decision of this Court in Shantilal's Case is assumed to be correct, what is its relevancy after the substitution of the word 'amount' in Article 31(2) as regards the jurisdiction of the Court to test the adequacy of the amount on the ground of arbitrariness.

1768. I do not propose to decide nor is it necessary for the purpose of adjudging the validity of the 25th Amendment whether a law fixing an amount which is illusory or which is a fraud on the Constitution, can be struck down by Court. It is said that the instances in which the Court can interfere to test the adequacy of compensation or the relevancy of the principles for determination of compensation had been laid down in the Bank Nationalisation Case and when the 25th Amendment did not make any change in the clause, namely, "no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate" but retained it in its original form, the only inference is that the Parliament approved the interpretation placed upon the clause by this Court and, therefore, the Court has power to examine the question Whether the amount fixed by law is adequate or illusory or that the principles for fixation of the amount are relevant. I am not quite sure about the nature of the presumption when the word "compensation" has, been deleted from the sub-article and the word "amount" substituted.

1769. In The Royal Court Derby Procelain Co. Ltd. v. Raymond Russel [1949] 2 K.B. 417 Denning, L.J. said:

I do not believe that whenever Parliament re-enacts a provision of a statute if thereby gives statutory authority to every erroneous interpretation which has been put upon it. The true view is that the Court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms.

1770. See also the speech of Lord Radcliffe in Galloway v. Galloway [1956] A.C. 299. The presumption, if there is any, is always subject to an intention to the contrary.

1771. Counsel for the petitioner argued that as Article 19(i)(f) is still retained it would be paradoxical if a law could provide for acquisition or requisition of property on payment of an inadequate or illusory amount. He said, even if the amount given is not the just equivalent in money of the value of the property acquired, it must at least be an amount having reasonable relation to

its value as Parliament cannot be deemed to have intended by the Amendment to enable a law being passed fixing an unreasonably low amount as the right to acquire and hold property is still a Fundamental Right under Article 19. If we are to import into the concept of 'amount' the implication of reasonableness with reference to the market value of the property, it would immediately open the door to the justiciability of the question of the adequacy of the amount fixed or determined which the sub-article expressly says it is not open to the Court to go into.

1772. The Fundamental Right to property is attenuated to a certain extent. But it is not wholly taken away. The right that the property could be acquired only under a law fixing an amount or the principles for determining it and for a public purpose would still remain. This Court can strike down an amendment of the Constitution only on the ground that the amendment was not made in the manner and form required by Article 368, or that the amendment was made in violation of some express or implied limitation upon the power of amendment.

1773. A Constitutional amendment which provides for the law fixing the 'amount' or the principles for determining the amount instead of compensation or the principles for its determination and which deprives the Court of the power of judicial review of the question whether the amount or the principles fixed by law is adequate or are relevant, cannot be adjudged bad on the ground of some invisible radiation from the concept that the right to acquire, hold or dispose of property is a Fundamental Right.

1774. If full moon compensation has to be paid, concentration of wealth in the form of immovable or movable property will be transformed into concentration of wealth in the form of money and how is the objective underlying Article 39(b) and (c) achieved by the transformation ? And with there be enough money in the coffers of the State to pay full compensation?

1775. As the 24th Amendment which empowers Parliament to take away or abridge Fundamental Right has been held by me to be valid, I do not think there is any conceivable basis on which I can strike down the amendment to Article 31(2). Nor can I read any implication in to the word 'amount' and say that it must be reasonable as that would imply a standard. Having regard to the neutral and colourless character of the word 'amount' and the express provision excluding judicial review of the question of the adequacy of the amount, the question of reasonableness of the amount or the relevancy of the principle is entirely outside the judicial ken.

1776. Now I turn to the question of the validity of Article 31C.

1777. Counsel for the petitioner submitted that there is a fundamental distinction between amending Fundamental, Rights in such a way as to abridge or take them away and making an amendment in the Constitution which enables Parliament in its legislative capacity and the legislatures of the States to pass a law violating Fundamental Rights and making it valid. According to counsel what has been done by Article 31C is to enable Parliament and State Legislatures to make Constitution-breaking laws and put them beyond challenge in any Court with the result that laws which would be void as contravening the Fundamental Rights are deemed, by a fiction of law, to be not void and that is a repudiation of the supremacy of the Constitution which is an essential feature of the Constitution. Counsel further said the Directive Principles which were intended by the Constitution-makers to run as subsidiary to Fundamental Rights have been made

paramount to them and laws to implement the Directive Principles specified in Article 39(b) and (c) are made immune from attack, even if they violate Fundamental Rights under Articles 14, 19 and 31. He further said that a declaration by Parliament of the State legislature that a law is to give effect to the policy of the State towards securing the principles specified in Article 39(b) or (c) has been made final which, in effect, means that Parliament and State legislatures can pass any laws in the exercise of their legislative power, whether they give effect to the policy of State towards securing the Directive Principles contained in Article 39(b) and (c) or not, and get immunity for those laws from attack under Articles 14, 19 and 31.

1778. I should have thought that Article 31C is a proviso to Article 13(2) in that it enables Parliament or State Legislatures to pass laws of a particular type which would not be deemed to be void even if they violate the provision of Articles 14, 19 and 31.

1779. I have no doubt that 'law' in Article 31C can only mean a law passed by Parliament or the State legislatures. The word must take its colour from the context.

1780. The makers of the Constitution imposed a ban by Article 13(2) upon the 'State' passing a law in contravention of the rights conferred by Part III. If 24th Amendment which enables Parliament to make an amendment of the Fundamental Rights in such a way as to take away or abridge them is valid, what is there to prevent Parliament or state legislatures to pass law for implementing the Directive Principles specified in Article 39(b) and (c) which would be immune from attack on the ground that those laws violate Articles 14, 19 and 31? Is it not open to the Amending Body to enact an amendment saying in effect that although all laws passed by Parliament and State legislatures, which violate fundamental rights are void, laws passed by Parliament and State legislatures for giving effect to the policy of the State towards securing directive principles specified in Article 39(b) and (c) would not be void, even if they contravene some of the fundamental rights, namely, those under Articles 14, 19 and 31? Article 31C merely carves out a legislative field with reference to a particular type of law, and exempts that law from the ambit of Article 13(2) in some respects. Parliament or State legislatures pass a law for giving effect to the Directive Principles specified in Article 39(b) or (c), not by virtue of Article 31C, but by virtue of their power under the appropriate legislative entries. What Article 31C does is to confer immunity on those laws from attack on the ground that they violate the provision of Articles 14, 19 and 31.

1781. The material portion of Article 31A is in pari materia with the first part of Article 31G. Article 31A has been held to be valid by this Court in Sankari Prasad's Case MANU/SC/0013/1951 : [1952]1SCR89 . The fact that the argument now urged did not occur to counsel who appeared in the case or the great judges who decided it is a weighty consideration in assessing its validity. To make a distinction between Article 31A on the ground that Article 31A provides for laws dealing with certain specified subjects only whereas Article 31C makes provisions for laws to give effect to the State policy for securing the directive principles specified in Article 39(b) and (c) is, to my mind, to make a distinction between Tweedledum and Tweedledee. One can very well say that the subject matter of the law referred to in Article 31C is that dealt with by Article 39(b) and (c) or that 31A provides for immunity of the laws for securing the objects specified therein from attack on the ground that they violate Articles 14, 19 and 31. Does the artificial characterisation of a law as one with reference to the object or subject make any difference in this context ? think not.

1782. It is a bit difficult to understand how Article 31C has delegated or, if I may say so more accurately, invested the Parliament in its legislative capacity or the State legislatures, with any power to amend the Constitution. Merely because a law passed by them to give effect to the policy of the State towards securing the Directive Principles specified in Article 39(b) and (c) in pursuance to valid legislative, entries in the appropriate Lists in the Seventh Schedule might violate the Fundamental Rights under Articles 14, 19 and 31 and such law is deemed not void by virtue of Article 31C, it would not follow that Article 31C has invested the Parliament in its legislative capacity or the State legislatures with power to amend the Constitution. It is by virtue of the 25th Amendment that the law, although it might violate the Fundamental Rights under Articles 14, 19 and 31 is not deemed void. Whenever Parliament or State legislatures pass such a law, the law so passed gets immunity from attack on the ground that it violates the Fundamental Rights under Articles 14, 19 and 31 by Virtue of Article 31C which in effect has made a pro-tanto amendment of Article 13(2) in respect of that category of laws. It is a mistake to suppose that every time when Parliament in its legislative capacity or a State legislature passes such a law and if the law violates the Fundamental Rights under Articles 14, 19 and 31, it is that law which amends the Constitution and makes it valid. The amendment of the relevant provision of the Constitution, namely Article 13(2), has already been made by the 25th Amendment. And as I said it is that amendment which confers upon the law immunity from attack on the ground that it violates the Fundamental Rights under the above said articles.

1783. Parliament in its legislative capacity or the State legislatures cannot confer any immunity upon the laws passed by them from the attack and they do not do so. They rely upon the 25th Amendment as conferring the immunity upon the law which gives effect to the State Policy towards securing the above mentioned purpose. I confess my inability to understand the distinction between a law passed in pursuance of an amendment of the Constitution which lifts the ban of Article 13(2) and a law passed in pursuance of an amendment which says that the law shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by the articles in Part III. The distinction, to my mind, is invisible. Take one illustration : Article 15(4) says:

Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

Suppose the sub-article had said:

Notwithstanding anything contained in this article, or Clause 2 of Article 29 the State shall be competent to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and such a law shall not be deemed to be void under Article 13(2).

In both the cases, the amendment has brought about the same effect, namely, the law shall not be deemed to be void for contravention of the right conferred by Article 15 or Article 29(2), notwithstanding the difference in the wording by which the effect was brought about. And, in both cases it is the amendment of the Constitution which gives the law the immunity from attack on the ground that it is in contravention of the rights conferred by Part III.

1784. If Article 31C is assumed to invest Parliament in its legislative capacity or State legislatures with power to pass a law of the description in question amending Fundamental Rights under Articles 14, 19 and 31 in such a way as to take away or abridge them is the grant of such a power valid. The answer seems to me to be simple. If the effect of Article 31C is as assumed, then it is a pro-tanto amendment of Article 368. It is not necessary that Article 31C should in such a case purport to amend Article 368. See Mohamed Samsudeen Kariapper v. S.S. Wijesinha and Anr. (1968) A.C. 717. Nor is it necessary that Article 31C should commence with the words "Notwithstanding anything contained in Article 368". Just as the Dog Act under an uncontrolled Constitution, pro-tanto amends the so called Constitution if it is inconsistent with it, so also under a controlled Constitution an amendment of the Constitution, if inconsistent with any provision of the Constitution would pro-tanto amend it. The 25th Amendment was passed in the manner and form required for amendment of Article 368. I cannot read any limitation upon the power to amend the amending power which would preclude Article 368 from being amended in such a way as to invest part of the amending power in Parliament in its ordinary legislative capacity or in State legislature, to be exercised by them in a form and manner different from that prescribed by Article 368.

1785. The supposed bad odour about the article should not upset our judgment in adjudging its Constitutionality. We have no power under the Constitution to adjudge a Constitutional amendment as un-constitutional on the ground that the amendment would in effect vest large powers in Parliament and State legislatures to pass laws which might violate Articles 14, 19 and 31.

1786. Counsel for the petitioner asked the question why the right to pass laws violating the freedom of speech guaranteed under Article 19(1)(a) is given to Parliament in its legislative capacity and to the State legislatures by Article 31C when it is seen that Clauses (b) and (c) of Article 39 are concerned with matters which have no connection with that freedom.

1787. In my dissenting judgment in Bennett Coleman and Co. and Ors. v. Union of India and Ors. etc. MANU/SC/0038/1972 : [1973]2SCR757 , I had occasion to deal with certain aspects of the modern press. Mr. Seervai has rightly emphasized its commercial character and how that aspect, though connected with freedom of speech might require control. Though the press stands as the purveyor of truth and the disinterested counsellor of the people, it is now primarily a business concern; an undertaking conducted for profit like any other, that the proprietor is a man of business and though he may desire power as well as money, profit comes before political opinions. According to Lord Bryce the power of the newspaper has two peculiar features. It has no element of Compulsion and no element of Responsibility. Whoever exposes himself to its influence does so of his own free will. He need not buy the paper, nor read it nor believe it. If he takes it for his guide, that is his own doing. The newspaper, as it has no legal duty, is subject to no responsibility, beyond that which the law affixes to indefensible attacks on private character or incitements to illegal conduct. The temptations to use the influence of a newspaper for the promotion of pecuniary interests, whether of its proprietors or of others, have also increased. Newspapers have become one of the most available instruments by which the Money power can make itself felt in politics, and its power is practically irresponsible, for the only thing it need fear is the reduction of circulation, and the great majority of its readers, interested only in business and sport, know little

of and care little for the political errors it may commit. See Lord Bryce, "Modern Democracies", Vol. I, the Chapter on "The Press in a Democracy", pp. 104-124.

1788. The news content of the press enters at once into the thought process of the public. The fullness and unbent integrity of the news thus becomes a profound social concern. That which is a necessary condition of performing a duty is a right; we may therefore speak of the moral right of a people to be well served by its press. Since the citizen's political duty is at stake, the right to have an adequate service of news becomes a public responsibility as well. So freedom of the press must now cover two sets of rights and not one only. With the rights of editors and publishers to express themselves there must be associated a right of the public to be served with a substantial and honest basis of fact for its judgments of public affairs. Of these two, it is the latter which today tends to take precedence in importance. The freedom of the press has changed its point of focus from the editor to the citizen. This aspect of the question was considered by the United States Supreme Court in United States v. Associated Press 326 U.S. 20. Mr. Justice Black who wrote the majority opinion sees the welfare of the public as the central issue. The fundamental acknowledgement that press functions are now, in the eyes of the law as well as common sense "clothed with a public interest" suggest an affirmative obligation on the part of the Government.

1789. Nobody demurs when a law preventing adulteration of food is passed. Is the adulteration of news, the everyday mental pabulum of the citizen, a less serious matter? The need of the consumer to have adequate and uncontaminated mental food is such that he is under a duty to get it. Because of this duty his interest acquires the status of a right since the consumer is no longer free not to consume and can get what he requires only through the existing press organs, the protection of the freedom of the issuer is no longer sufficient to protect automatically the consumer or the community. The general policy of laissez faire in this matter must be reconsidered. The press is a public utility in private hands and cannot be left free from all kinds of regulation. The ante-thesis between complete laissez faire and complete governmental operation or control of the press is for our society unreal therefore, the question is whether, without intruding on the press activity, the State may regulate the conditions under which those activities take place so that the public interest is better served. See Hocking, "The Freedom of the Press", pp. 167-9. As I said in my judgment, concentration of power substitutes one controlling policy for many independent policies, it lessens the number of competitors. The influential part of the nation's press is large scale enterprise closely inter-locked with the system of finance and industry. It will not escape the natural bias of what it is. Yet, if freedom is to be secure, the bias must be known and overcome. It may also be necessary for the State to extend the scope of present legal remedies, if a given type of abuse amounts to poisoning the wells of the public opinion. It might be necessary in passing a law for giving effect to the State policy towards securing the Directive Principles contained in Article 39(b) and (c) to deal with the commercial aspect of the press, and that aspect being connected with the freedom of speech, it might become inevitable for the law to abridge that freedom.

1790. Whatever one's personal views might be about the wisdom of Article 31C, whatever distrust one might have in the attempt at improving society by what one may think as futile if not mischievous economic tinkering, it is not for us to prescribe for the society or deny the right of experimentation to it within very wide limits.

1791. It was said that, as Article 31C bars judicial scrutiny of the question that a law containing the declaration gives effect to the policy of the State, Parliament and State legislatures can pass laws having no nexus with the Directive Principles specified in Article 39(b) or (c) and violate with impunity the Fundamental Rights under Articles 14, 19 and 31.

1792. The purpose of Article 31C is only to give immunity to a law for giving effect to the policy of the State towards securing the Directive Principles under Article 39(b) and (c) from attack on the ground that its provisions violate Articles 14, 19 and 31. A law which will never give effect the State policy towards securing these principles will enjoy no immunity, if any of its provisions violates these articles. It is only a law for giving effect to the State policy towards securing the principles specified in Article 39 (b) and (c) that can contain a declaration that it is for giving effect to such a policy and it is only such a declaration that will bar the scrutiny by the Court of the question that the law does not give effect to the policy. The expression 'no law' in the latter part of Article 31C can only mean the type of law referred to in the first part. To be more specific the expression 'no law' occurring in the latter part of the article can only mean 'no such law' as is referred to in the first part. It would be very strange were it otherwise. If any other construction were to be adopted, a declaration could shield any law, even if it has no connection with the principles specified in Article 39(b) or (c) from attack on the ground of violation of these articles. Any law under the Sun can be brought under the protective umbrella of the declaration. therefore, as I said, it is only a law for giving effect to the policy of the State towards securing the principles specified in Clauses (b) and (c) of Article 39, that can contain a declaration. If a declaration is contained in any law which does not give effect to the policy of the State towards securing the principles specified in these clauses, the Court can go into the question whether the law gives effect to the said policy.

Whenever a question is raised that the Parliament or State legislatures have abused their power and inserted a declaration in a law not for giving effect to the State policy towards securing the Directive Principles specified in Article 39(b) or (c), the Court must necessarily go into that question and decide it.
To put it in other words, the legislative jurisdiction to incorporate a declaration that the law gives effect to the policy of the State is conditioned upon the circumstances that the law gives effect to the policy of the State towards securing the Directive Principles specified in Article 39(b) and (c). If this is so, the declaration that the law is to give effect to the policy of the State cannot bar the jurisdiction of the Court to go into the question whether the law gives effect to the policy. The declaration can never oust the jurisdiction of the Court to see whether the law is one for giving effect to such a policy, as the jurisdiction of the legislature to incorporate the declaration is founded on the law being one to give effect to the policy of the State towards securing these principles.

1793. In order to decide whether a law gives effect to the policy of the State towards securing the Directive Principles specified in Article 39(b) or (c), a Court will have to examine the pith and substance, the true nature and character of the law as also its design and the subject matter dealt with by it together with its object and scope.

If the Court comes to the conclusion that the declaration was merely a pretence and that the real purpose of the law is the accomplishment of some object other than to give effect to the policy of the State towards securing the Directive Principles in Article 39(b) and (c), the declaration would

not be a bar to the Court from striking down any provision therein which violates Articles 14, 19 or 31. In other words, if a law passed ostensibly to give effect to the policy of the State is, in truth and substance, one for accomplishing an unauthorized object, the Court would be entitled to tear the veil created by the declaration and decide according to the real nature of the law.

1794. Apart from the safeguard furnished by judicial scrutiny, there is sufficient guarantee in Article 31C that a State legislature will not abuse the power as the law passed by it will be valid only when it has been reserved for the assent of the President and has obtained his assent. In the light of what I have said, the apprehension expressed in some quarters that if judicial scrutiny of the question whether the law gives effect to the policy of the State towards securing these Directive Principles is barred, it will lead to the disintegration of the country has no real foundation. Nor has the dictum of Justice Holmes : Holmes, "Collected Legal Papers", pp. 295-296. "I do not think that the United States would come to an end if the Supreme Court lost our power to declare an Act of the Congress void. But I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several States", any relevance in the context.

1795. It was said that the Constitution-makers never intended that Fundamental Rights should be subservient to Directive Principles and that they visualized a society where the rights in Part III and the aspirations in Part IV would co-exist in harmony. (The doctrine of harmonious construction has been a panacea for many of our ills. But I am not sure of its efficiency.) A succeeding generation might view the relative importance of the Fundamental Rights and Directive Principles in a different light or from a different perspective. The value judgment of the succeeding generations as regards the relative weight and importance of these rights and aspirations might be entirely different from that of the makers of the Constitution. And it is no answer to say that the relative priority value of the Directive Principles over Fundamental Rights was not apprehended or even if apprehended was not given effect to when the Constitution was framed or to insist that what the Directive Principles meant to the vision of that day, it must mean to the vision of our time.

1796. I have no doubt in my mind as regards the validity of the 29th Amendment. For the reasons given in the judgment of my learned brother Ray, J., I hold that the 29th Amendment is valid.

1797. The argument in these cases lasted for well nigh six months. Acres of paper and rivers of ink have been employed before and during the argument in supplying the Court with materials from all sources. It will be a tragedy if our conclusion were to fail to give adequate guidance to the Bench concerned in disposing of these cases. I do not, want the conclusions to which I have reached to remain a Delphic oracle. I would, therefore, sum up my findings.

1798. I hold that the decision in Golaknath Case that the Parliament had no power to amend Fundamental Rights in such a way as to take away or abridge them was wrong, that the power to amend under Article 368 as it stood before the 24th Amendment was plenary in character and extended to all the provisions of the Constitution, that the 24th Amendment did not add anything to the content of Article 368 as it stood before the amendment, that it is declaratory in character except as regards the compulsory nature of the assent of the President to a bill for amendment and that the article as amended makes it clear that all the provisions of the Constitution can be amended by way of addition, variation or repeal. The only limitation is that the Constitution cannot be

repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organized. That limitation flows from the language of the article itself.

1799. I do not think there were or are any implied or inherent limitations upon the power of amendment under the article.

1800. The 24th Amendment is valid.

1801. The 25th Amendment, including Article 31C, is valid. The word 'amount' in Article 31(2), as amended, does not convey the idea of any norm. The fixation of the amount or the principle for determining the amount is a matter within the absolute discretion of the Parliament or the State Legislatures. The Court cannot go into the question whether the amount fixed by law or the principle laid down for determining the amount is adequate or relevant.

1802. The declaration visualized in Article 31C that the law gives effect to the policy of the State towards securing the principles specified in Article 39(b) and (c) of the Constitution would not oust the jurisdiction of the Court to go into the question whether the law gives effect to the policy. The jurisdiction of Parliament or the State legislatures to incorporate the declaration in a law is conditioned upon the circumstance that the law is one for giving effect to the State policy towards securing the aforesaid principles.

1803. The 29th Amendment is valid.

1804. I would have the writ petitions disposed of in the light of these findings. I would make no order as to costs here.

M. Hameedullah Beg, J.

1805. This reference to a special bench of thirteen Judges, larger than any previous bench hearing a case in this Court, was made so that the correctness of a view which became binding law of this country by a narrow majority of one, as a result of the eleven Judge decision of this Court, in Golak Nath and Ors. v. State of Punjab and Anr. MANU/SC/0029/1967 : [1967]2SCR762 may be if need be reconsidered. That view was that the prohibition contained in Article 13(2) of our Constitution against the making of any law by the State "which takes away or abridges the rights conferred" by the chapter on Fundamental Rights making laws made in contravention of this provision void "to the extent of the contravention" applies to Constitutional amendments also. Although that was a decision on a limitation held to exist, under our Constitution, as it then stood, on the power of amendment contained in Article 368 of the Constitution, yet, it did not decide what the position would be, if Article 368 was itself amended under the express power of such amendment recognised by Clause (e) of the proviso to Article 368 (2) of the Constitution. Although, that question, which then neither arose nor was decided, is before us now directly for decision, yet, I think, we cannot avoid pronouncing upon the correctness of the majority decision in the Golak Nath's case (Supra), which has a bearing upon the scope of the power of amendment contained in the unamended Article 368.

1806. The cases before us have become so much loaded with learning and marked by brilliance of exposition of all the points involved, either directly or indirectly, both by my learned brethren and the members of the Bar of this Court, in view of the crucial importance, for the future Constitutional history of this country, of the issues placed before us, that it would be presumptuous on my part to attempt to deal with every point which has been raised. Indeed, it is not necessary for me to repeat such views as I accept as correct expressed by my learned brethren with whose conclusion I agree. The reasons for my very respectful disagreement with those conclusions of some of my other learned brethren with which I do not concur will become evident in the course of the few observations with which I shall content myself before recording my conclusions. I venture to make these observations because, as my learned Brother Mathew has pointed out, in cases of the nature before us, the healthier practice is to follow the example of House of Lords even though a multiplicity of opinions may produce a "thicket", which, according to Judge Learned Hand, it is the function of judicial learning and wisdom to remove. I do hope that my observations will not add to the thickness of this thicket without some useful purpose served by making them.

1807. I think that we do stand in danger, in the circumstances stated above, of losing sight of the wood for the trees, and, if we get entangled in some of the branches of the trees we may miss reaching the destination; the correct conclusion or decision. I think I can speak for all my learned brethren as well as myself when I say that we are all conscious of the enormous burden which rests upon our shoulders in placing before the country the solution or solutions which may not only be correct but beneficial for it without doing violence to the law embodied in our Constitution to which we take oaths of allegiance.

1808. I am reminded here of what, Prof. Friedmann wrote in "Law in a Changing Society'. He said at page 61:

The task of the modern judge is increasingly complex. Hardly any major decision can be made without a careful evaluation of the conflicting values and interests of which some examples have been given in the preceding pages. Totalitarian government eliminates much of the conflict by dictating what should be done".

The lot of the democratic judge is heavier and nobler. He cannot escape the burden of individual responsibility, and the great, as distinct from the competent, judges have, I submit, been those who have shouldered that burden and made their decisions as articulate a reflection of the conflicts before them as possible. They do not dismiss the techniques of law, but they are aware that by themselves, they provide no solution to the social conflicts of which the law is an inevitable reflection".

He also wrote there (at page 62):

The law must aspire at certainly at justice, at progressiveness, but these objectives are constantly in conflict one with the other. What the great judges and jurists have taught is not infallible knowledge, or a certain answer to all legal problems, but an awareness of the problems of contemporary society and an acceptance of the burden of decision which no amount of technical legal knowledge can take from us.

1809. The 'Core', a term and concept which Mr. Palkiwala has tried to impress upon us repeatedly with his extra-ordinary forensic ability and eloquence, or crux of the problem before us is thus stated in writing, in part 10 of Book 3, containing the concluding written submission of Mr. Palkiwala.

It is submitted that it would be impossible to dispose of these petitions without dealing with the most crucial question the true ambit of the amending power. This question can be decided either on the ground of the meaning of the word "amendment" in the unamended Article 368 or on the ground of inherent and implied limitations or on both the grounds, since they converge on the same point.

It is submitted with great respect that it would be impossible to deal with the questions relating to the 24th and 25th Amendments without deciding the true ambit of the amending power".

The questions of the correct interpretation of the 24th Amendment and its validity cannot be decided unless this Hon'ble Court first comes to a conclusion as to whether the original power was limited or unlimited. If it was originally limited the question would arise whether the 24th Amendment should be "read down" or whether it should be held to be un-constitutional. Even the question of the correct construction of the 24th Amendment cannot be decided unless the starting point is first established, namely, the true, scope of the original amending power".

Again, it would be impossible to decide the question whether Article 31(2) which has been altered by the 25th Amendment should be "read down" in such a way as to preserve the right to property or should be declared un-constitutional as abrogating the right to property,-unless and until it is first decided whether Parliament has the right to abrogate the right to property. This directly involves the question whether the amending power is limited or unlimited.

When one comes to Article 31C the necessity of deciding the limits of the amending power becomes unmistakable. The Article violates 7 essential features of the Constitution and makes the Constitution suffer a loss of identity. There can be no question of 'reading down' Article 31C. It can only be held to be un-constitutional on the ground that Parliament's amending power was limited".

To decide the question of the validity of Article 31C only on the ground that it virtually provider for amendment of the Constitution in a "manner and form" different from that prescribed by Article 368 would be a most unsatisfactory ground of decision. The question of prune importance is the limit on the amending power. The question of manner and form pales into total insignificance compared to the question of substantive limitation on the amending power".

It is submitted with the greatest respect that the 69 days hearing would be virtually wasted if the judgment were to rest merely on the point of manner and form, avoiding the real issue of momentous significance, namely, the scope of the amending power. It is this vital issue which has really taken up the time of the Court for almost five months".

1810. Before tackling the core or crux of the case which, as Mr. Palkiwala has rightly pointed out, is the question of the limits of the amending power found in Article 368 of the Constitution, I must

make some preliminary observations on the very concepts of a Constitution and of legal sovereignty embodied in it, and the nature of the amending power as I conceive it. This and other parts of my judgment may also disclose what I think a judge should not hesitate to explore and expose leaving it merely to be inferred from the judgment as his "undisclosed major premises". It is part of judicial function, in my estimation, to disclose and to justify to the citizens of this country what these premises are.

1811. I think that it is clear from the Preamble as well as the provisions of Parts III and IV of our Constitution that it seeks to express the principle : "Solus Populi Suprema Lex". In other words, the good of the mass of citizens of our country is the supreme law embodied in our Constitution prefaced as it is by the preamble or the 'key' which puts "justice, social, economic and political" as the first of the four objectives of the Constitution by means of which "the people" of India constituted "a sovereign democratic Republic".

1812. A modern democratic Constitution is to my mind, an expression of the sovereign will of the people, although, as we all know, our Constitution was drawn up by a Constituent Assembly which was not chosen by adult franchise. Upon this Constituent Assembly was conferred the legal power and authority, by Section 8 of the Indian Independence Act, passed by the British Parliament, to frame our Constitution. Whether we like it or not, Section 6 and 8 of an Act of the British Parliament transferred, in the eye of law, the legal sovereignty, which was previously vested in the British Parliament, to the Indian Parliament which was given the powers of a Constituent Assembly for framing our Constitution.

1813. The result may be described as the transfer of political as well at legal sovereignty from one nation to another, by means of their legally authorised channels. This transfer became irrevocable both as a matter of law and even more so of fact. Whatever theory some of the die-hard exponents of the legal omnipotence of the British Parliament may have expounded, the modern view, even in Britain, is that what was so transferred from one nation to another could not be legally revoked. The vesting of the power of making the Constitution was however, legally in the Constituent Assembly thus constituted and recognised and not in "the people of India", in whose name the Constituent Assembly no doubt spoke in the Preamble to the Constitution. The Constituent Assembly thus spoke for the whole of the people of India without any specific or direct legal authority conferred by the people themselves to perform this function.

1814. The voice of the people speaking through the Constituent Assembly constituted a new "Republic" which was both "Sovereign and Democratic". It no doubt sought to secure the noble objectives laid down in the Preamble primarily through both the Fundamental rights found in Part III and the Directive Principles of State Policy found in Part IV of the Constitution. It would, however, not be correct, in my opinion, to characterise, as Mr. Palkiwala did, the Fundamental rights contained in Part III, as merely the means whereas the Directive Principles, contained in Part IV as the ends of the endeavours of the people to attain the objectives of their Constitution. On the other hand, it appears to me that it would be more correct to describe the Directive Principles as laying down the path which was to be pursued by our Parliament and State Legislatures in moving towards the objectives contained in the Preamble. Indeed, from the point of view of the Preamble, both the fundamental rights and the Directive Principles are means of

attaining the objectives which were meant to be served both by the fundamental rights and Directive Principles.

1815. If any distinction between the fundamental rights and the Directive Principles on the basis of a difference between ends or means were really to be attempted, it would be more proper, in my opinion to view fundamental rights as the ends of the endeavours of the Indian people for which the Directive principles provided the guidelines. It would be still better to view both fundamental rights and the "fundamental" Directive Principles as guide lines.

1816. Perhaps, the best way of describing the relationship between the fundamental rights of individual citizens, which imposed corresponding obligations upon the States and the Directive Principles, would be to look upon the Directive principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits of that path, like the banks of a flowing river, which could, be mended or amended by displacements replacements or curtailments or enlargements of any part according to the needs of those who had to use the path. In other words, the requirements of the path itself were more important. A careful reading of the debates in the Constituent Assembly also lead me to this premise or assumption. If the path needed widening or narrowing or changing, the limits could be changed. It seems to be impossible to say that the path laid down by the Directive Principles is less important than the limits of that path. Even though the Directive Principles are "non-justiciable," in the sense that they could not be enforced through a Court, they were declared, in Article 37, as "the principles...fundamental in the governance of the country". The mandate of Article 37 was : "it shall be the duty of the State to apply these principles in making laws". Primarily the mandate was addressed to the Parliament and the State Legislatures, but, in so far as Courts of justice can indulge in some judicial law making, within the interstices of the Constitution or any Statute before them for construction, the Courts too are bound by this mandate.

1817. Another distinction, which seems to me to be valid and very significant it that, whereas, the fundamental rights were "conferred" upon citizens, with corresponding obligations of the State, the Directive Principles lay down specific duties of the State organs. In conferring fundamental rights, freedom of individual citizens, viewed as individuals, were sought to be protected, but, in giving specific directives to State organs, the needs of social welfare, to which individual freedoms may have to yield, were put in the forefront. A reconciliation between the two was, no doubt, to be always attempted whenever this was reasonably possible. But, there could be no doubt, in cases of possible conflict, which of the two had to be subordinated when found embodied in laws properly made.

1818. Article 38 shows that the first of the specific mandates to State organs says:

38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

In other words, promotion of a social order in which "justice, social, economic, and political" was the first duty of all the organs of the State.

1819. The second specific mandate to State, organs, found in Article 39, contains the principles of what is known as the socialistic "welfare State". It attempts to promote social justice by means of nationalisation and State action for a better distribution of material resources of the country among its citizens and to prevent the exploitation of She weak and the helpless. It runs as follows:

39. The State shall, in particular, direct its policy towards securing:

(a) that the citizens, men and women equally, have the light to an adequate means of livelihood.

(b) that the ownership and control of the material resources or the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

1820. On the views stated above, it would be difficult to hold that, the necessarily changeable limits of the path, which is contained in the Directive Principles, are more important than the path itself. I may mention here that it was observed in one of the early Full Bench decisions of the Allahabad High Court in Motilal and Ors. v. The Government of the State of Uttar Pradesh and Ors. MANU/UP/0312/1950 : AIR1951All257 by Sapru J.:

I shall also say a few words about the directives of State policy which, though not justiciable, may be taken info account in considering the Constitution as a whole. These directives lay down the principles which it will be the duty of the State to apply in the making of laws and their execution. Article 38 states that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life".

Article 39 lays down the principles which must inspire State policy. Articles 40 to 51 concern themselves with such questions inter alia, as, for example, the right to work, to education and to public assistance, the promotion of education and economic interest of scheduled castes and the duty of the State to raise the level of nutrition and to improve public health".

My object in drawing attention to the nature of these objectives is to show that what the framers of the Constitution were after was to establish, what is generally known, now as the 'welfare' or the 'social service state', in this country. They had taken a comprehensive view of State activities

and it is quite clear that they were not dominated by the laissez faire thought of the last century. So much about Directives. Now we come to fundamental rights".

The object of these fundamental rights, as far as I can gather from a reading of the Constitution itself, was not merely to provide security to and equality of citizenship of the people living in this land and thereby helping the process of nation-building, but also and not less importantly to provide certain standards of conduct, citizenship, justice and fair play. In the background of the Indian Constitution, they were intended to make all citizens and persons appreciate that the paramount law of the land has swept away privilege and has laid down that there is to be perfect equality between one section of the community and another in the matter of all those rights which are essential for the material and moral perfection of man".

1821. Indeed, in Balwant Rai v. Union of India MANU/UP/0004/1968 : (1967)IILLJ363All , Dhavan J. went so as far to hold that "the duty of the State" under Article 37 to apply these principles in "making laws" was to be carried out even by the judiciary of the State whenever it had a choice between two possible constructions that is to say, when it could indulge in judicial "law making".

1822. The next topic on which I will venture to make some observations is the significance and meaning of the word "sovereign". What was constituted by the Constituent Assembly, speaking for the people of India, was a "Sovereign Democratic Republic".

1823. Here, I may, mention the well-known distinction between "political sovereignty" and "legal sovereignty". Dicey in his Law of the Constitution (tenth edition), discussing the nature of Parliamentary Sovereignty said (at page 73):

The matter indeed may be carried a little further, and we may assert that the arrangements of the Constitution are now such as to ensure that the will of the electors shall by regular and Constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run, always enforce their will. But the courts will take no, notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will be expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word 'sovereignty' is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some part of his work Austin has apparently confused the one sense with the other".

1824. Legally, the British Parliament transferred the whole of its legal sovereignty over the people and territories of this country in British India to the Constituent Assembly which spoke in the name of the people of India. The Princely States came in through "Instruments of accession". This means that the legal sovereignty was vested in the Constituent Assembly whereas the people of India may be said to be only politically "sovereign". Their views were carefully ascertained and expressed, from various angles, by the Members of the Constituent Assembly, political sovereign thus operated outside the ambit of law yet made its impact and effect felt upon the legal sovereign, that is to say, the Constituent Assembly. In recognition of this fact and to bring out that it was really

speaking on behalf of the people of India, the Constituent Assembly began the Preamble with the words : "We, the people of India". This meant, in my estimation, nothing more than that the Constituent Assembly spoke for the people of India even though it was vested with the legal authority to shape the destiny of this country through the Constitution framed by it. There is not to be found, anywhere in our Constitution, any transfer of legal sovereignty to the people of India.

1825. The people of India speak through their representatives in the two Houses of Parliament. They approach the courts for the assertion of their rights. The courts adjudicate upon the rights claimed by them and speak for the Constitution and not directly for the people. Judges and other dignitaries of State as well as Members of Parliament take oaths of allegiance to the Constitution and not to the people of India. In other words, the Constitution is the "Legal sovereign" recognised by Courts, although the ultimate 'political' sovereignty may and does reside in "the people".

1826. We need not, I think", embark on any academic discourse upon the various meanings of the term "sovereignty" which has given much trouble to political thinkers and jurists such as Luguit, Grierke, Maitland, Laski, Cole and others. I will be content with quoting the views of Prof. Ernest Barker expressed in his "Principles of Social & Political Theory" and the nature and meaning of the term "sovereignty", as the lawyers generally understand it. He says (at page 59):

There must exist in the State, as a legal association, a power of final legal adjustment of all legal issues which arise in its ambit. The legal association will not be a single unit, and law will not be a unity, unless there is somewhere one authority to which crucial differences ultimately come, and which gives, as the authority of last resort, the ultimate and final decision. Different social groups may press different views of what is, or ought to be, law; it is even possible that different departments of the State may hold, and seek to enforce, different notions of what is legally right; there must be a final adjustment center. That final adjustment-center is the sovereign, the topmost rung of the ladder, the superanus or soverano, the 'authority of the last word'. Sovereignty is not the same as general State-authority, or puissance publique : it is the particular sort of State authority which is the power and the right of ultimate decision".

In one sense sovereignty is 'unlimited-unlimited and illimitable. There is no question arising in the legal association, and belonging to the sphere of its operation, which may not come up to the sovereign, and which will not be finally decided by the sovereign if it so comes up to the topmost rung. The adjustment-center must be competent to adjust every issue, without exception, which may stand in need of adjustment. But there are other considerations also to be noticed; and these will show us that sovereignty, if it is not limited to particular questions and definite objects (limited, that is to say, in regard to the things which it handles), is none the less limited and defined by its own nature and its own mode of action".

In the first place, and as regards its nature, sovereignty is the authority of the last word. Only questions of the last resort will therefore be brought to the sovereign. Much will be settled in the lower ranges and in the ordinary course of the action of general State-authority. In the second place, and as regards its mode of action, the sovereign is a part : and an organ of the legal association. Nothing will therefore come to the sovereign which does not belong to the nature and operation of the legal association, as such.

Sovereignty moves within the circle of the legal association, and only within that circle; it decides upon questions of a legal order, and only upon those questions. Moving within that circle, and deciding upon those questions, sovereignty will only make legal pronouncements, and it will make them according to regular rules of legal procedure. It is not a capricious power of doing anything in any way : it is legal power of settling finally legal questions in a legal way".

Prof. Ernest Barker went on to say

(a) Ultimately, and in the very last resort, the sovereign is the Constitution itself-the Constitution which is the efficient and formal cause of the association; which brings it into being; which forms and defines the organs and methods of its operations, and may also form and define (if the Constitution either contains or is accompanied by a 'declaration of right') the purposes of its operation. It may be objected to this view that the sovereign is a body of living persons, and not an impersonal scheme; and that ultimate sovereignty must accordingly be ascribed, not to the Constitution, but to the Constitution-making body behind it which can alter and amend its provisions. But there is an answer to that objection. The impersonal scheme of the Constitution is permanently present, day by day, and year by year; it acts continuously, and without interruption, as the permanent control of the whole operation of the State. The body of persons which can alter and amend the Constitution (and which, by the way, can act only under the Constitution, and in virtue of the Constitution) is a body which acts only at moments of interruption,, and therefore at rare intervals. The continuous control may more properly be termed sovereign than the occasional interruption; and we may accordingly say that the Constitution itself, in virtue of being such a control, is the ultimate sovereign".

(b) Secondarily, however, and subject to the ultimate sovereignty of the Constitution we may say that the body which makes ordinary law, in the sense of issuing the day-to-day and the year-by-year rules of legal conduct, is the immediate sovereign. That body may be differently composed in different political systems. In the United States, for example, it is composed of Congress and President acting independently (though with mutual checks and reciprocal powers of overriding one another's authority) on a system of co-ordination. In the United Kingdom it is composed of Parliament and His Majesty's Ministers acting interdependently, and with a mutual give and take (though here too there are mutual checks, the Parliament can dismiss the Ministers by an adverse vote as vice versa they can dismiss Parliament by advising His Majesty to use his power of dissolution), on a system which is one of connection rather than co-ordination. However composed, the body which makes the ordinary law of the land is the immediate sovereign, which issues final legal pronouncements on ordinary current questions to the extent and by the methods authorized under the Constitution. The immediate sovereign which makes the ordinary law in the United Kingdom is authorized by the Constitution to a greater extent of action, and to action by easier and speedier methods, than the immediate sovereign which makes the ordinary law in the United States; but in either case the immediate sovereign is a body authorized by the Constitution, acting and able to act because it is so authorized".

On the argument which is here advanced the Constitution is the ultimate sovereign, in virtue of being the permanent scheme, or standing expression, of what may be called the primary law of the political association; and the law and rule-making body is the immediate sovereign, in virtue of being the constant source and perennially active fountain of what may be called the secondary law

of the land. Two difficulties confront the argument, one of them largely formal, but the other more substantial The first and largely formal difficulty is that it would appear to be inconsistent to begin by ascribing ultimate sovereignty to the Constitution rather than to the Constitution-making body, and then to proceed to ascribe immediate sovereignty to the law and rule making body rather than to the law. Does not consistency demand either that both sovereigns should be impersonal systems, or that both should be personal bodies; either that the ultimate sovereign should be 'the rule of the Constitution' and the immediate sovereign 'the rule of law', or that the ultimate sovereign should be the Constitution-making body and the immediate the law and rule-making body ? We may answer that inconsistency is inherent in the nature of the case. The position of the primary law of the State is different from that of the secondary law".

1827. I have quoted rather extensively from the views of Prof. Ernest Barker as they appeared to me to have a special significance for explaining the relevant provisions of our Constitution. Indeed, Prof. Ernest Barker begins his exposition by citing the Preamble to the Constitution of India; and, he gives this explanation in his preface for such a beginning:

I ought to explain, as I end, why the preamble to the Constitution of India is printed after the table of contents. It seemed to me, when I read it, to state in a brief and pithy form the argument of much of the book; and it may accordingly serve as a key-note. I am the more moved to quote it because I am proud that the people of India should begin their independent life by subscribing to the principles of a political tradition which we in the West call Western, but which is now something more than Western.

1828. The "sovereignty of the Constitution", as I see it, is "a feature", as Bosanquet put it in his Theory of the State, "inherent in a genuine whole". This means that it is not vested in all its aspects in any one of the three organs of the State but may be divided between them A mark of such sovereignty is certainly the possession of "Constituent Power", although the totality of sovereign power may be divided. Laski wrote, in his "Grammar of Politics" (pages 296-297):

It may yet be fairly argued that, in every State, some distinction between the three powers is essential to the maintenance of freedom. Since the work of Locke and Montesquieu, we have come generally to admit the truth of Madison's remark that the accumulation of all powers...in the same hands...may justly be pronounced the very definition of tyranny.

1829. In order to avoid concentration of such excessive power in few hands that it may corrupt or be misused by chose who wield it, our Constitution also divides or distributes legal sovereignty into three branches or organs of the State the Legislative, the Executive, and the Judicature. The sphere of the sovereignty of each is sought to be so demarcated by our. Constitution that the "genuine whole" appears in the form of three intersecting circles. In those portions of these circles where the judicial power intersects the legislative and the executive powers, the judicature acts as the supervisor or guardian of the Constitution and can check legislative or executive action. But, in the remaining parts of the two intersecting circles of the Legislative and the Executive spheres, the two other branches are supreme legally, just as the judicature is in its own, so that their decisions there cannot be questioned by the judicial branch of the State.

1830. Here we are concerned only with the relationship between judicial and the legislative organs. Our Constitution makes the judicature the ultimate testing authority, as the guardian of the Constitution, in so far as the ordinary law making is concerned. In the sphere of the primary fundamental law of the Constitution lies also the amending power contained in Article 368 of the Constitution over which the control of the judicature is limited to seeing that the form and the manner of the amendment is properly observed. Beyond that, the authority of the judicial organ over the Constituent power vested in the Constitutional bodies or organs mentioned in Article 368 of the Constitution ceases.

No doubt the judicial organ has to decide the question of the limits of a sovereign authority as well as that of other authorities in cases of dispute. But, when these authorities act within these limits, it cannot interfere.

1831. After having made a few observations about the nature of the sovereignty of the Constitution and the judicial function connected with it. I will say something about the urge for dynamic changes amply disclosed by the speeches in the Constituent Assembly, which is found embodied in the Preamble as well as the Directive Principles of our Constitution. Granville Austin observed in the "Indian Constitution : Cornerstone of a Nation" (at page 43):

What was of greatest importance to most Assembly members, however, was not that socialism be embodied in the Constitution, but that a democratic Constitution, with a socialist bias be framed so as to allow the nation in the future to become as socialist as its citizens desired or as its needs demanded. Being, in general, imbued with the goals, the humanitarian bases, and some of the techniques of social democratic thought, such was the type of Constitution that Constituent Assembly members created.

1832. Thus, the direction towards which the nation was to proceed was indicated but the precise methods by which the goals were to be attained, through socialism or state action, were left to be determined by the State organs of the future. In laying down the principles, by means of which the poverty-stricken, exploited, down-trodden, ignorant, religion and superstition ridden masses of India, composed of diverse elements, were to be transferred into a strong united, prosperous, modern nation, it was assumed and said repeatedly that India's economy must change its feudal character. Its social patterns, modes of thought and feeling, were to be changed and guided by scientific thinking and endeavour so as to lead its people on towards higher and higher ranges of achievement in every direction.

1833. Our Constitution-makers, who included some of the most eminent jurists in the country, could not have been ignorant of the teachings of our own ancient jurists, Manu and Parashara, who had pointed out that the laws of each age are different. In support of this view, the late Dr. Ganga Nath Jha, in his treatise on Hindu Law, has cited the original passages from Manu and Parashara which run as follows:

(1) Anye krita yugay dharmaah tretaayam dvaaparey parey anye kali yugey nreenaam yoga roopaanusaaratah-Manu.

(2) anye krita yugev dharma tretaayaama dvaaparey parey anye kali yugey nreenaam yuga roopaanusaratah-Parashara.

1834. An English translation of the sense of the above passages runs as follows:

"The fundamental laws (imposing fundamental duties or conferring fundamental rights) differ from age to age; they are different in the age known as krita from those in the dvaapara age; the fundamental, laws of the kali age are different from all previous ages; the laws of each age conform to the distinctive character of the age (yuga roopa nusaara tah)". In other words, even our ancient jurists recognised the principle that one generation has no right to down future generations to its own views or laws even on fundamentals. The fundamentals may be different not merely as between one society and another but also as between one generation and another of the same society or nation.

1835. At any rate, I am convinced that we cannot infer from anything in the language of the unamended Article 368 any distinction, beyond that found in the more difficult procedure prescribed for amendment of certain Articles, between more and less basic parts of the Constitution. None are sacrosanct and transcendental, in the sense that they are immune from and outside the process of amendment found in Article 368 and while others only are subject to and within its ambit even before its amendment.

1836. My learned Brother Dwivedi, J., has, very, aptly, compared the mode of progress visualized by the Constitution as the movement of the chakra. Such a movement naturally involves that a part of the nation which may have been at the top at one time may move towards the bottom and then come back to the top again. The Constitution, however, visualizes the progress of the whole nation towards greater equality as well as prosperity. The function of the amending provision, in such a Constitution, must necessarily be that of an instrument for dynamic and basic changes in the future visualized by our Constitution makers. The whole Constitution is based on the assumption that it is a means of progress of all the people of India towards certain goals. The course of progress may involve, as choices of lesser of two evils, occasional abrogations or sacrifices of some fundamental rights, to achieve economic emancipation of the masses without which they are unable to enjoy any fundamental rights in any real sense. The movement towards the goals may be so slow as to resemble the movement of a bullock-cart. But, in this age of the automobile and the aeroplane, the movement could be much faster.

1837. The Constitutional function with which the judiciary is entrusted, in such a Constitution, is to see that the chosen vehicle does not leave the charted course or path or transgress the limits prescribed by the Constitution at a particular time. The fundamental rights, as I have said earlier, may be viewed as such limits. The power of amendment, in a Constitution such as ours, must include the power to change these limitations to suit the needs of each age and generation. As the celebrated Justice Holmes said in his "Common Law", the life of law has not been logic, but the "felt necessities" of the times. Every kind of law, whether fundamental or ordinary, has to be an attempted adaptation to the needs of the people at a particular time. The power of adaptation in a progressive nation, with a Constitution which visualizes a movement towards socialism must, therefore, be construed in the context of the whole setting of urges enshrined in the Constitution

and what their satisfaction demands. So construed, it may involve changes in the very features considered basic today.

1838. I think it has been properly pointed out by Mr. Niren De, the Attorney General, and Mr. Seeravai, the Advocate-General of Maharashtra, that the proper function of Article 368, in a Constitution is to act as a safety valve against violent revolution. It can only so operate as a safety valve if we do not construe the powers of amendment contained in it so narrowly as to import, contrary to the clear meaning of its explicit language, any bar against the alteration or change of any features of our Constitution which may be characterised as basic.

1839. We have been taken through a number of principles of interpretation and construction of documents, including a document such as our Constitution, containing the fundamental law of the land. It has been properly pointed out that the amending power, in so elaborate a Constitution, could not possibly omit from its ambit or scope the power of amendment of any part of it so that the 24th Amendment merely clarifies the original intention to lodge a wide amending power within the bosom of Article 368. It has been rightly pointed out that the careful manner in which the Constitution, and, particularly, the amending Article 368 was framed precludes the possibility of a deliberate casus omissus so as to exclude from its scope the making of any provision which may either take away or abridge or affect a fundamental right or any other basic feature. In any case, in such a Constitution as ours, we must strongly lean against a construction which may enable us to hold that any part of the Constitution is exempt from the scope of Article 368 as originally framed. Without express words in Article 368 itself to that effect, I am not prepared to merely presume or infer the presence of any casus omissus here.

1840. It was no doubt argued, on the strength of the Golak Nath case (supra), that direct or indirect abridgement or taking away of a fundamental right by an amendment under Article 368 was expressly barred by the language of Article 13(2) of the Constitution. I am in agreement with the views of my learned brethren who hold that Article 13(2) is meant to deal with ordinary laws or the functions of the Parliament and of State Legislatures in their ordinary law-making capacities. It was not intended to extend its scope indirectly to Article 368 which deals with the amendment of the fundamental law itself of which Article 13(2) is a part. The language and the context as well as the subject matter of it, found stated in Article 13(2) of the Constitution itself, preclude me from holding that it could possibly operate as a restriction on the powers of amendment of any part of the Constitution contained in Article 368 of the Constitution even before it was amended by the 24th Amendment.

1841. The majority of the learned Judges of this Court in Golak Nath case (Supra) held that the power of amendment itself and not merely its procedure was contained in Article 368 of the Constitution. They also held this power of amendment to be wide. Hidayatullah, J., however, thought that the ambit of the term "law", as used in Article 13(2) of the Constitution, was wide enough to cover a change in the fundamental law on which Article 368 exclusively operates. The view of Hidayatullah, J., turned the scales by a narrow majority of one in favour of the opinion that Article 13(2) operates as an express restriction upon the powers contained in Article 368 even though it does not say so expressly. The limitation was inferred from the wide meaning given to the term "law". But the view of the majority of Judges of this Court who have had the occasion to consider this question, that is, if we include or add the number of those who gave decisions in

Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 and Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 : [1952]1SCR89 , is still in favour of the view that the word "law", as used in Article 13(2) of the Constitution, does not extend to the fundamental law or the Constitution. If it was really the intention to so extend it, at least Article 13(2) would have clarified it.

1842. I am not impressed by the contention that Article 13(2), as originally passed by the Constituent Assembly, contained a specific exemption of the powers of amendment exercised under Article 368 of the Constitution which was dropped afterwards. If the dropping of this clause was intended to bring about also drastic a change in the intention of the Constitution makers as the counsel for the petitioners contends for, there would have been some explanation given by the drafting Committee for such a change. Moreover, we have not been shown what authority the drafting committee had to adopt language implying so drastic a change of intention of the Constituent Assembly without even bringing the matter to the notice of the Constituent Assembly. The safer presumption is that the drafting committee dropped the addition proposal by Mr. Santhanam and adopted by the Constituent Assembly merely because it considered the additional words to be otiose and unnecessary.

1843. Our Constitution itself contains in various places a distinction between the Constitution and the law. It mentions both the "Constitution and the law" suggesting that there is a difference between them made by the Constitution itself. See : e.g. :

(1) Form of oath of the President prescribed by Article 60 of the Constitution to "preserve protect, and defend "the Constitution and the law".

(2) The form of oath or affirmation, prescribed by Article 159 of the Constitution for the Governor of a State to "protect and defend the Constitution and the law".

(3) The form of oath prescribed by Article 75(4) for a Union Minister given in Schedule III-Form I to do "right to all manner of people in accordance with the Constitution and the law",

(4) The form of oath prescribed for a Judge of the Supreme Court, under Article 124(6) of the Constitution, given in Third Schedule-Form IV, to "uphold the Constitution and the laws". The form is the same for the Comptroller and Auditor-General of India under Article 148(2) of the Constitution.

(5) The form of the oath prescribed by Article 164(4) of the Constitution for a Minister of a State Government given in Third Schedule Form V to "do right to all manner of people in accordance with Constitution and the law".

(6) The form of oath prescribed by Article 219 of the Constitution for a High Court judge given in Form VIII-Third Schedule to "uphold the Constitution and the laws".

1844. Clause 7 of the Fifth Schedule part D, of the Constitution only explains the meaning of word amend as covering an "addition, variation or repeal" and similar is the case with Clause 21 of the Sixth Schedule. I am not attracted by the distinction between amendments, which are "deemed"

not to be amendments, falling within Article 368, mentioned in the Fifth and Sixth Schedules, and actual amendments covered by Article 368. The word "deemed" was used in these provisions and Articles 4 and 169 merely to indicate that the procedure required by Article 368 was not required here. These provisions certainly furnish an aid in construing and fixing the meaning of the word "amendment" wherever used in the Constitution. And, as I have already held, the scope of amendment must necessarily be wide in the context of the whole Constitution.

1845. It may also be noticed that the term "law", which is not used in Article 368 at all, is sought to be defined in Article 13, Sub-article (3) of the Constitution, after stating explicitly "unless the context otherwise requires". I have already dealt with the context of Article 368 containing the power of amendment which necessarily operates on every part of the Constitution so long as its operation on any part is not found expressly excluded.

1846. However, even ignoring the context in which Article 13(3) itself occurs and other foregoing reasons, if we were to assume, for the sake of argument, that, because law is not exhaustively defined by Article 13(3) of the Constitution, the term "law" used there could include the law of the Constitution, another principle of construction could also apply here. This is that even a prior general provision followed by an express provision dealing with a particular type of law could reasonably exclude the particular and special from the purview and scope of the general. It is immaterial if the general provision precedes the provision containing a special law. This could not really affect the basis of the principle applicable.

1847. The principle indicated above has been usually applied between different pieces of legislation or to different Acts. There is no doubt that when the subsequent Act is general and the prior Act is special, the Special Act is not repealed by the provisions of the general Act by the application of the maxim : "Generalia specialibus non derogant" i.e. provisions will not abrogate special provisions (See : Crates on Statute Law p. 376). Again, "if a special enactment, whether it be in a public or private Act, and a subsequent general Act or absolutely repugnant and inconsistent with one another", it has been said that "the Courts have no alternative but to declare the prior special enactment repealed by the subsequent general Act". See : Craies on Statute Law p. 380). On the same principle, it has been held that a subsequent particular Act may have the effect of partially repealing the earlier general Act. (See : Mirfin v. Attwood [1869] L.R. 4 Q.B. 330 Heston & Isleworth U.D.C. v. Grout [1897] 2 Ch. 306 Harishankar Bagla v. M.P. State). MANU/SC/0063/1954 : 1954CriLJ1322 .

1848. The above mentioned principle has been applied generally where the question has arisen whether the particular law prevails over, and, therefore, repeals the general law. It has, however, also been held that the principle may operate to merely curtail the operation of the general law by exempting from its scope the special cases dealt with by the particular law (See : Re Williams; [1887] 36 Ch. D. 573 Mirfin v. Atttwood, Harishanker Bagla v. M.P. State (Supra).). In other words, the principle may so operate as to curb or reduce the extent or ambit of applicability of the general law. An application of this principle would also show that Constitutional law, as Special Law, may be removed from the purview of "law", as found in Article 13 of the Constitution, even if, by stretching one's imagination, it was really possible to so stretch the scope of the term "law", as used in Article 13 of the Constitution, as would include, but for such a principle, amendments of the Constitution. Prima facie, however, amendments of the Constitution operate on every

provision of the Constitution unless any part of it is expressly excluded from the scope of such operation. The use of such a principle to remove an assumed conflict does not appear necessary.

1849. Mr. Palkiwala, presumably faced with insurmountable difficulties in relying entirely upon the very narrow majority decision in Golak Nath's case (Supra), in favour of the view that Article 13(2) operates as a restriction upon the power of amendment contained in Article 368 of the Constitution, relied primarily upon a theory of implied limitations. The only "implied" limitation which I can read into the word amendment, as "perhaps" necessarily implied, or, as part of the meaning of the word "amendment" is the one so characterised by Wanchoo J., in Golak Nath's case (supra). In other words, it may not include the power of completely abrogating the Constitution at one stroke. It, however, seems wide enough to erode the Constitution completely step by step so as to replace it by another.

1850. The Attorney General himself had, very properly, conceded that the scope of amendment could not be so wide as to create a vacuum by abrogating the rest of the Constitution leaving nothing behind to amend. The Attorney General's argument was that, short of creating such a vacuum, the power is wide enough to cover a replacement of the present Constitution by another. It seems to me that the necessary implication of the word "amendment" or the meaning of the term itself may exclude a possible complete abrogation of the present Constitution although that could be done, step by step, by the bodies empowered to amend if they so desired and followed the appropriate procedure.

1851. For the reasons already given at length by my brethren Ray, Palekar, Mathew and Dwivedi with whom I concur, I find that there is nothing in cases cited which could enable us to put in implied limitations, in a Constitution such as ours, on Article 368, containing expressly the sovereign law-making power of amendment of every part of it. The cases have really little bearing on the interpretation of such a provision containing the constituent power. As they were cited before us and examined by us, I will very briefly refer to the main cases cited.

1852. The American cases really go against the submission that relied limitations could be put on expressly stated Constitutional powers. They were : Oscar Leser v. J. Mercer Garnett 258 U.S. 130 U.S.A. v. William H. Sprague & William J. Howey 282 U.S. 716 State of Rhode Island v. A. Mitchell Palmer, Attorney General etc. 253 U.S. 350. Schneiderman v. U.S. 320 U.S. 118.

1853. The cases from Australia decided by the Privy Council were : McCawley v. The King 1920 A.C. 691., Taylor v. Attorney General of Queensland 23 C.L.R. 457 where an interpretation of Section 5 of the Colonial Law Validity Act was given in the light of a presumption that the power transferred to a British Colonial Legislature must be read subject to the fundamental assumption underlying the Constitution of the British Empire that the position of the Crown has not been affected; Webb v. Outrim [1907] A.C. 81 where the theory of implied restrictions on powers found in the Commonwealth Parliament Act was rejected; Victoria v. Commonwealth, 45 AL.J. 251 where, without questioning the basic principle of grant of plenary powers of legislation, laid down by Lord Selborne in Q. v. Burah (1878) 3 A.C. 889 a decision was given on the lack of powers in the Federal Legislature, to tax a State, on a subject falling outside Section 51 of the Australian Constitution, which laid down the powers of taxation of the Federal Legislature, in the course of

which some observations were made on the implications of Federalism which assumes the continued existence of States.

1854. The cases from Canada may lend some support to the implications of a grant of power contained by an enactment of the sovereign British Parliament, but they do not appear to me to be helpful in the context of the theory of the sovereignty of our Constitution, of which Article 368 is a pivotal part, which we have adopted. The cases from Canada cited before us were : Alberta Press cases 1938 (2) D.L.R. 81 Switzman v. Elbing & Attorney General of Quebec 1957 (7) D.L.R. 337 Saumur v. City of Quebec & Attorney General of Quebec 1953 (4) D.L.R. p. 461 A.G. for the Province of Ontario and Ors. v. A.G. for the Dominion of Canada and Anr. [1912] A.C. 571 where the assumption, underlying some of the decisions, that Canada did not possess fully blossomed legislative power, seems to have been repelled; In Re the Initiative and Referendum Act, where legislation offending Section 92 head 1 of the British North America Act, 1867; was held to be invalid.

1855. So far as Ryan's case, [1935] IR 170 is concerned, Mr. Palkiwala could only rely on the minority judgment of Kennedy, C.J. In Moore v. Attorney General for the Irish State [1935] A.C. 484 it was conceded on behalf of a petitioner who had challenged the validity of an Act of the Irish Parliament that the majority decision in Ryan's case was correct. I do not think that the Irish cases give much help to the petitioners' submissions on implied limitation.

1856. Cases coming up from Ceylon also do not assist the petitioners. In the Bribery Commissioner v. Pedrick Ranasinghe 1965 A.C. 172 a provision of the Bribery Amendment Act, 1958, was held to be bad because it conflicted with the provisions of Section 29 of the Ceylon (Constitution) Order in Council, 1946, by which the Constitution of Ceylon was governed. It is, therefore, a simple case of conflict of an enactment of subordinate law making authority with the instrument of Government which regulated subordinate law-making powers and was, therefore, supreme. In that case the requirements of manner and form as laid down in Attorney-General for New South Wales and Ors. v. Trethowan and Ors. 1932 A.C. 526 were also held not to have been complied with. In Don John Francis Douglas Liyanage and Ors. v. The Queen 1967 (1) A.C. 259 it was held, with regard to the Acts the validity of which was impugned:

...the Acts could not be challenged on the ground that they were contrary to the fundamental principles of justice. The Colonial Laws Validity Act, 1865, which provided that "colonial laws should be void to the extent that they were repugnant to an Act of the United Kingdom applicable to the colony but not otherwise and should not be void on the grounds of repugnancy to the law of England, did not leave in existence a fetter of repugnancy to some vague and unspecified law of natural justice : those liberalising provisions were incorporated in, and enlarged by, the Ceylon Independence Act, 1947, of the British Parliament, the joint effect of which, with the Ceylon (Constitution) Order in Council, 1946, was to confer on the Ceylon Parliament the full legislative powers of a sovereign independent state.

This case shows that repugnancy to some vague principle of "natural justice" could not invalidate the enactments of a fully competent legislative authority.

1857. There can be no question of delegation of the power of amendment if, as I have already indicated, I hold that the Constitution is the principal and the source of all Constitutionally valid power and authority in the eye of law. The principle delegatus non potest delegare is only applicable against a delegate but not against the principal. When an amendment is made by an appropriate procedure, the amendment becomes a part of the principal's own will and intention and action. Of course, if the principal is and must necessarily be a human authority, the bodies of persons authorised to amend under Article 368 of the Constitution would share the legislative sovereignty and would constitute the "Principal" whose will is expressed in the amendment.

1858. It may be possible to use the test of consequences in order to check an abuse of power by a legally non-sovereign law-making body as the Parliament is when it does not exercise the Constituent power by the use of the two-thirds' majorities in both Houses of Parliament as required by Article 368 of the Constitution. It may also be possible to use the theory of implied limitations by implying and annexing rules of natural justice to particular kinds of non-legislative functions laid down by statutory or even Constitutional law. But, this is done only by presuming that the Constitution did not intend abrogation of the fundamental rules of natural justice. If these rules are sought to be dispensed with by any particular ordinary enactment it may be possible to assail the validity of that enactment when Articles 14 and 19 of the Constitution apply. The exclusion of Articles 14 and 19 by a Constitutionally valid amendment only carves out or creates a new legislative field by a provision which becomes a part of the Constitution by amendment, so that the Constitutional validity of its creation cannot be assailed in any court of law so long as the form and manner prescribed by Article 368 of the Constitution have been observed in making the necessary amendment. Enactments properly falling within this field would be immune from attack for any alleged violations of Articles 14 and 19 and 31.

Mr. Palkiwala then made an impassioned appeal to the theories of natural law and natural rights sought to be embodied in present day international laws as well as Constitutional laws. It is not necessary for me to deal at length with the political philosophy or the juristic implications of various and conflicting natural law theories, such as those of Spinoza, Hobbes, Locke or Rousseau, discussed by T.H. Green in his "Principles of Political Obligation". I also do not find it necessary to embark on an academic discussion of ancient and medieval theories of natural law. I will, however, quote a passage from Friedmann on Legal Theory (5th Edition-p. 95-96), where the position, place, and uses of "natural law" theories are thus summarised:

The history of natural law is a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. With changing social and political conditions the notions about natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law. The object of that appeal has been as often the justification of existing authority as a revolt against it.

Natural law has fulfilled many functions. It has been the principal instrument in the transformation of the old civil law of the Romans into a broad and cosmopolitan system; it has been a weapon used by both sides in the fight between the medieval Church and the German emperors; in its name the validity of international law has been asserted, and the appeal for freedom of the individual

against absolutism launched. Again it was by appeal to principles of natural law that American judges, professing to interpret the Constitution, resisted the attempt of state legislation to modify and restrict the unfettered economic freedom of the individual.

It would be simple to dismiss the whole idea of natural law as a hypocritical disguise for concrete political aspirations and no doubt it has sometimes exercised little more than this function. But there is infinitely more in it. Natural law has been the chief though not the only way to formulate ideals and aspirations of various peoples and generations with reference to the principal moving forces of the time. When the social structure itself becomes rigid and absolute, as at the time of Schoolmen, the ideal too will take a static and absolute content. At other times, as with most modern natural law theories, natural law ideals become relative or merely formal, expressing little more than the yearning of a generation which is dissatisfied with itself and the world, which seeks something higher, but is conscious of the relativity of values. It is as easy to deride natural law as it is to deride the futility of mankind's social and political life in general, in its unceasing but hitherto vain search for a way out of the injustice and imperfection for which Western civilisation has found no other solution but to move from one extreme to another".

The appeal to some absolute ideal finds a response in men, particularly at a time of disillusionment and doubt, and in times of simmering revolt. therefore natural law theories, far from being theoretical speculations, have often heralded powerful political and legal developments".

1859. I am not prepared to use any natural law theory for putting a construction on Article 368 of the Constitution which will defeat its plain meaning as well as the objects of the Constitution as stated in the Preamble and the Directive Principles of State Policy. I do not know of any case in which this has been done. Even in the Golak Nath's case (supra) Subba Rao, C.J. relied on a natural law theory to strengthen his views really based on an application of the supposed express bar contained in Article 13(2).

1860. I have already stated my point of view, that we should approach the questions placed before us from the pragmatic angle of the changing needs of social and economic orders visualised by those who were or are the final Judges of these needs in exercise of the Constituent power. Checks on possible abuses of such powers do not lie through actions in Courts of law. The pressure of public opinion, and the fear of revolt due to misuse of such powers of amendment are the only practically possible checks which can operate if and when such contingencies arise. These checks lie only in the political fields of operation. They are not subject to judicial review or control. In other words, what Dicey calls the external and the internal limits may operate to control and check possible misuses of such power. Courts of justice have no means of control over a power expressly sanctioned by the Constitution which is the legal sovereign. They can only speak for the Constitution. Through their pronouncements must be heard the voice of the Constitution and of nothing beyond it.

1861. Although the Courts must recognise the validity of the exercise of a legally sovereign constituent power, such power may itself be ineffective for actually bringing about the desired results. Whether the change is in the direction of what may be considered better may itself be a matter of dispute. The answers to such questions and disputes depend upon many conditions which are outside the control of law courts. The very existence or absence of such conditions cannot be

appropriately investigated or determined in law Courts. therefore, such investigations lie outside the judicial domain when once a change is brought in by the exercise of constituent or sovereign law making power in accordance with the prescribed procedure.

1862. A socialistic state, must have the power and make the attempt to build a new social and economic order free from exploitation, misery and poverty, in the manner those in charge of framing policies and making appropriate laws think best for serving the public good. We do not today conceive of public good or progress in terms of a "movement from status to contract", but in terms of a movement for control of economic and other kinds of powers of exploitation by individuals so as to ensure that public good not merely appears to be served but is actually served by all individuals wherever or however placed. The emphasis today is upon due performance of their social obligations by individuals before claiming any right however fundamental or important it may be because rights and duties are correlative.

1863. Another contention advanced was that a creature of the Constitution could not possibly possess the power to create or recreate the Constitution. therefore, it was contended, resort could not be had to Article 368 to expand the power of amendment. I am unable to accept this contention in the face of the express provision in Clause (e) to the proviso to the Article 368(2) of the Constitution. There Article 368 expressly provided either for the expansion or diminution of the scope of the powers of amendment. It cannot, therefore, be reasonably contended that the power of recreation even of the whole Constitution by stages was not already contained in the unamended Article 368. This part of proviso also shows that the Constitution makers contemplated a wide amending power so as to meet the challenges of the times offered by rapidly changing social, political, economic, national and international conditions and situations. We cannot contract what the Constitution makers clearly intended to make elastic and expansible.

1864. For the foregoing reasons, I hold that the 24th Amendment of the Constitution is valid. It would, therefore, follow that the 25th and 29th Amendments are also valid. The reasons for the validity of each of these amendments have been so fully dealt by my learned brethren Ray, Palekar, Mathew, and Dwivedi, with most of which I respectfully concur, that I need not discuss or repeat any of them here. Nor have I, for this very reason, attempted to discuss the enormous array of cases, both Indian and foreign, or the great many juristic writings, placed before and closely examined by us. I will, however, indicate before I conclude, my special reasons for holding Section 3 of the Constitution (25th Amendment) Act 1971, adding Article 31C to the Constitution also as valid.

1865. Article 31C has two parts. The first part is directed at removing laws passed for giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 of the Constitution from the vice of invalidity on the ground that any such law "is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31 of the Constitution". If we, stop here, the question whether the law is really for the purpose of giving effect to the principles specified in Clauses (b) or (c) of Article 39 would still be justiciable whenever laws passed under this provision come up before Courts. In other words, the question of relevancy of the law passed to the specified principles could still be examined by courts although the effect of invalidity for alleged violations of Articles 14 or 19 or 31 would vanish so long as the law was really meant to give effect to the principles of Article 39(b) and (c). A colourable piece

of legislation with a different object altogether but merely dressed up as a law intended for giving effect to the specified principles would fail to pass the test laid down by the first part. The second part of Article 31C goes on to provide that, if such a law contains a declaration that it is for giving effect to such policy, it will become immune from judicial review altogether. In cases of laws passed by State legislatures there is a further safeguard that such laws must have been reserved for consideration by the President and assented to by him. The purpose of the declaration is, therefore, to take the place of a judicial verdict on relevancy of the grounds to the principles found in Clauses (b) and (c) of Article 39 as well as on effectiveness of these laws for the intended purposes. Nevertheless, the Attorney General and the Solicitor General, appearing for the Union of India, conceded, both in written submissions and in the course of arguments, that the question of relevancy or nexus with the specified principles would be open to judicial scrutiny in such cases of declarations annexed to laws passed.

1866. My learned brother Khanna has been pleased, despite the concession mentioned above, to declare the second part of Article 31C to be void on the ground among others, that it involves a trespass on the judicial field. It was said that, under the guise of exercise of the power of amendment, one of the pillars of the Constitution or one of the essential features of its basic structure, that is to say, judicial review, had been removed.

1867. I think that the concession made on behalf of the Union of India is quite justifiable on a ground which I now proceed to adopt. It is that a declaration by itself is not part of the law made, but it is something only attached to the law even though this annexation is by a purported law. In other words, the declaration, though provided for by law, takes the place of judicial consideration by the Courts and involves consideration of the question whether it is reasonable and necessary to attach such a declaration to a particular law.

1868. I do not think that it is necessary for me to decide what the exact nature of the function in giving the declaration is or whether it carries with it, by implication, the proposition that some rules of natural justice must be complied with. Such questions were not argued before us by any party. Nevertheless, I think that the concession could only be made on the strength of the view that the declaration by itself would not preclude a judicial examination of the nexus so that Courts can still determine whether the law passed is really one covered by the field carved out by Article 31C or merely pretends to be so protected by parading under cover of the declaration. I, therefore, adopt this reason as perfectly good one for making the concession. Hence, I hold that both parts of Article 31C are valid.

1869. On questions relating to the Amendment of Article 31(2) and the 29th Amendment of the Constitution, I adopt the reasons of my learned brethren Ray, Mathew and Dwivedi with whose conclusions I concur on these and other questions.

1870. My conclusions may now be stated as follows:

(1) The majority view in Golak Nath's case (supra), holding that Article 13 operated as a limitation upon the powers of Constitutional amendment found in Article 368, was erroneous. The minority view there was correct on this question.

(2) The 24th Amendment is valid.

(3) The 25th Amendment, including addition of Article 31C, is valid.

(4) The word 'amount' in Article 31(2), as amended, does not convey the idea of any prescribed norm. The fixation of the amount or the laying down of a principle for determining the amount are matters within the exclusive power of Parliament or the State Legislature concerned. In other words, the norms and their satisfaction on the question of adequacy of compensation or its reasonableness, are matters within the exclusive competence of the legislative authorities to determine.

(5) The declaration contemplated by Article 31C is like a certificate given after considering the relevancy of the principles specified in Article 39(b) and (c) of the Constitution, and, therefore, the jurisdiction of the Court is not ousted. The Courts can still consider and decide whether the declaration is really good or a mere pretence attached to a colourable piece of legislation or to a law which has no bearing on or nexus with the principles found in Article 39(b) and (c) of the Constitution. Out of two equally acceptable views, even on the question of nexus, the one in conformity with the legislative verdict should prevail.

(6) The 29th Amendment is valid.

1871. I would also have the petitions disposed of in the light of decisions given above. I make no order as to costs incurred by parties for this stage of hearing

S.N. Dwivedi, J.

1872. I concur with the conclusions reached by brother Ray with respect to the Constitutionality, of the 24th, 25th and 29th amendments. But in view of the importance of the case I wish to add my own reasons in support of those conclusions.

1873. Ideas which failed to win the minds of Englishmen in the Stuart period and died in discomfiture are seeking transmigration into the Constitution of India now. Perceive some resemblances:

Ideas during the Stuart Period	Arguments of Sri Palkhiwala
1. "Acts of Parliament may take away flowers and ornaments of the crown but not the crown itself....(Sir John Finch C.J., Fundamental Law in English Constitutional History by J.W. Gough, 1955 Edn. p. 73.)	1. By virtue of Article 368 Parliament cannot so amend the Constitution as to take away or abridge the essential features of the Constitution.
2. "The Parliament cannot deliver over free, people of England to a foreign government, or to laws imposed by foreigners...." (William Ball of Barkham Esquire, Ibid. p. 107.)	2. Parliament cannot so amend the Constitution as to make the Republic of India a satellite of a foreign country.
3. "The Parliament cannot deprive the free people of England of their innate rights of electing knights, citizens and burgesses for Parliament. In these things of the nature of these tending to the fund mental rights and laws of the people the parliament cannot nor ought not any way to violate the people or nation." (William Ball of Barkham Esquire, Ibid. p. 107.)	3. Parliament cannot so amend the Constitution as to damage or destroy the core of the fundamental rights in Part III of the Constitution.
4. "Properties are the foundation of Constitutions,and not the Constitutions of property. Or if so be there were no Constitution yet Law of Nature does give a principle for every man to have a property of what he has or may have which is not another man's." (Captain Clarke Gough, supra, p. 115.)	4. The right to property is a humam. right and is necessary for the enjoyment of every other right. It is based on Natural Law. It cannot be taken away or abridged by an amendment of the Constitution.
5. "How any representative, that has not only a more trust to preserve fundamental but that is a representative that makes laws, by virtue of this fundamental law, viz. that the people have a power in legislation...can have a right to remove or destroy that fundamental? The fundamental makes the people free : this free people makes a representative; can this creature unqualify the creator ?" (Quaker William Penn, Ibid., p. 155.)	5. Parliament is a creature of the Constitution. It cannot rise above its creator i.e., the Constitution. So it cannot damage or destroy the core of the fundamental rights.
6. "When an act of Parliament is against common right or reason...the Common Law will control it and adjudge such act to be void." (Coke in Dr. Bonham's case, quoted in the Revival of Natural Law concepts by C.G. Heines, 1930 Edn. pages 33-34.)	6. Amending power in Article 368 is limited by the principles of Natural Law and an amendment in violation of these principles will be void.
7. "Cases which concern the life or inheritance, or goods or fortunes of subjects...are not to be decided by natural reason, but by artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it." (Coke as quoted in the English Constitutional Conflicts of the Seventeenth Century 1603-1689 by J.R. Tanner, 1961 Student Edn. p. 37.)	7. The inherent and implied limitations to the amending power in Article 368 will be determined by judges possessing a trained and perceptive judicial mind.

1874. Of the three contenders for primacy in the Stuart period-King, Parliament, Common Law-Parliament came out victorious. F.W. Maitland, Constitutional History of England (Paper back reprint (1963) pages 300-301. The King and the Common Law accepted its supremacy. Stuart England was passing through an age of transition. So is India today. "We are passing through the great age of transition when we are passing through the great age of transition the various systems-even systems of law-have to undergo changes. Conceptions which had appeared to us basic

undergo changes" Jawaharlal Nehru : C.A.D. Vol. 9 page 1194 (emphasis added). At bottom the controversy in these cases is as to whether the meaning of the Constitution consists in its being or in its becoming. The Court is called upon to decide whether it is a prison-house or a freeland, whether it speaks for the few or for the many. These issues can hardly be resolved with the aid of foreign legal know-how. Decisions of foreign courts and treatises and articles written on various Constitutions by foreign writers would not be safe guide in construing our Constitution. "(I)n the last analysis the decision must depend upon the words of the Constitution and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are same in both cases, for a word or phrase may take a colour from its context and bear different senses accordingly." (In Re. C.P. & Berar Sales of Motor Spirit Lubricants Taxation Act, 1938). [1939] F.C.R. 18 per Gwyer C.J. For instance, law-making and Constitution-amending are both called 'law' in Canada and Ceylon because a Constitutional amendment there is really a subordinate enactment passed under a statute of the British Parliament or under an Order-in-Council which is delegated legislation. Our Constitution "is something fresh and in that sense unique.... It seems to me therefore that it is useless to try and look at this through the eyes of another country or of their courts." (In re. The Delhi Laws Act, 1912). MANU/SC/0010/1951 : [1951] S.C.R. 747 at page 1112 per Bose J.

"A Constitution is the expression in national life of the genius of a people. It reflects the tendencies of the age and the articles have to be interpreted, without doing violence to the language, in the light of the prevailing phase of sentiments in the country in which the Constitution is intended to operate." (Motilal v. State of U.P.) A.I.R. 1911 All. 251 per Sapru J. Constitutions which grew up in the 17th, 18th and 19th centuries reflected the hopes and aspirations of men of those times; the Constitution of India reflects the hopes and aspirations of the people of India emerging from colonial economy in the second half of the 20th century. Constitutions framed in the past for organising political democracy cannot serve as a safe guide in construing the Constitution of India framed for ushering in social and economic democracy.

1875. Constitutions which grew up in the preceding three centuries were understood to sanctify the Supremacy of Property. Said Tocqueville : "The French Revolution has allowed one exclusive right to remain, the right of property, and the main problems of politics will deal with the alterations to be brought about in the right of property-holders." As quoted in French Political Thought in the 19th Century by Roger Henry Soltau, p. 55. Our Constitution is conceived in a radically different tradition. Our forbears did not believe in the acquisition of things of pleasure (Preya); they stood for the good and the wholesome (Shrey). They addressed their king as Rajan because it was his duty to secure the welfare of his people (See Richard Henry Tawney, "The Acquisitive Society", Chapter II & IV) Their rule of law (Dharma) was intended to help the power-minus keep the power-plus in check. Their rule of law (rita) was a stream, not a puddle. It recognised the inevitability of change. They believed in the moral precept : distribute and enjoy the residue of wealth.(Mahabharata, Shanti Prava, 57 : 11.)

1876. The Constitution bears the imprint of the philosophy of our National Movement for Swaraj. That philosophy was shaped by two pre-eminent leaders of the Movement-Mahatma Gandhi and Jawaharlal Nehru. Mahatma Gandhi gave to the Movement the philosophy of Ahimsa. Two essential elements of his Ahimsa are : (1) equality; and (2) absence of the desire of self-acquisition

(Aparigrah). He declared that "to live above the means befitting a poor country is to live on stolen food." Dr. P. Sitaramaya, "The History of the Indian Congress, Vol. I, page 386. And he also said : "I consider it a sin and injustice to use machinery for the purpose of concentration of power and riches in the hands of the few. Today the machinery is used in this way." Jawaharlal Nehru : Discovery of India, Signet Press, 1956, page 432.

1877. While Mahatma Gandhi laid stress on the ethics of the Movement, Jawaharlal Nehru enriched its economic content. In his presidential address to the Lahore Congress Session of 1929 he said : "The philosophy of socialism has gradually permeated the entire structure of the society the world over and almost the only point in dispute is the phase and methods of advance to its full realisation. India will have to go that way too if she seeks to end her poverty and inequality though she may evolve her own methods and may adopt the ideal to the genius of her race." R.D. Agarwala, Economic Aspect of a Welfare State in India, page 32.

Emphasising the intimate and inseverable connection between national liberation and social liberation, he said : "(I)f an indigenous Government took place of the foreign government and kept all the vested interests intact, this would not be even the shadow of freedom. India's immediate goal can only be considered in terms of the ending of the exploitation of her people. Politically it must mean independence and cession of the British connection; economically and socially it must mean the ending of all special class privileges and vested interests. Jawaharlal Nehru Whither India, 1933.

1878. The philosophy of Mahatma Gandhi was rooted in our ancient tradition; the philosophy of Jawaharlal Nehru was influenced by modern progressive thinking. But the common denominator in their philosophies was humanism. The humanism of the Western Enlightenment comprehended mere political equality; the humanism of Mahatma Gandhi and Jawaharlal Nehru was instinct with social and economic equality. The former made man a political citizen; the latter aims to make him a 'perfect' citizen. This new humanist philosophy became the catalyst of the National Movement for Swaraj.

1879. In 1929 the All India Congress Committee resolved that the great poverty and misery of the Indian people was due also "to the economic structure of the society." Indian National Congress Resolutions on Economic Policy, Programme and Allied Matters, 1924-1969, p. 3. The Karachi Congress resolution, on fundamental rights and economic programme revised in the All India Congress Session of Bombay in 1931 declare that in order to end the exploitation of the masses political freedom must include economic freedom of the starving millions. Resolutions, supra pp. 6-9. It provided that "property was not to be sequestered or confiscated "save in accordance with law" Ibid (emphasis added). It also provided that the State shall own or control the key industries and services, mining resources, railways waterways, shipping and other means of public transport." Ibid. According to the Congress Election Manifesto of 1945, "the most vital and urgent of India's problems is how to remove the curse of poverty and raise the standard of masses. Ibid p. 14. It declared that for that purpose it was "necessary...to prevent the concentration of wealth and power in the hands of individuals and groups, and to prevent vested interests inimical to society from growing." Ibid. p. 14. It proposed acquisition of the land of intermediaries on payment of equitable compensation. Ibid. pp. 15-16. In November 1947 the All India Congress Committee Session at Delhi passed a resolution to the effect that the object of the Congress should be to secure "an

economic structure which would yield maximum production without the creation of private monopolies and the concentration of wealth." Ibid. pp. 18-19. It was thought that such "social structure can provide an alternative to the acquisition of economic and political equality." Ibid. pp. 18-19.

1880. In sum, the National Movement was committed : (1) to work for social, economic and political equality of the weaker sections of the people; (2) to disperse concentration of wealth in any form in a few hands; and (3) to acquire property in accordance with law. Payment of compensation would be determined by equitable considerations and not by market value. The men who took the leading part in framing the Constitution were animated by these noble ideals. They embodied them in the Preamble to the Constitution; they proliferated them in the Directive Principles of the State Policy; they gave them ascendancy over the rights in Part III of the Constitution. (See Articles 15(3), 16(4), 17, 19(2) to (6), 24, 25(a) and (b), 31(4), (5) and (6)). They made them 'fundamental' in the governance of the country. Pandit Govind Ballabh Pant called them 'vital principles'. C.A.D. Vol 9 p. 1288. And indeed so they are, for when translated into life, they will multiply the number of owners of fundamental rights and transform liberty and equality from a privilege into a universal human right.

1881. However, pleasing its name-plate or its trumpet, every form of focussed power was suspect in the eyes of the Constitution-makers. They apprehended that concentration of the ownership of the means of production and material resources and the resultant incarceration of wealth in a few profit-seeking hand may bring into being an economic power as all-assimilating and omnicompetent as the Hegelian State. It may manipulate a fall in the prices of raw-materials; it may inflate the prices of manufactures by low production and hoarding; it may increase unemployment and bring down wages; it may shrink investments and control the industrial progress of the nation. J.K. Gailbraith : American Capitalism, pp. 21, 40 and 64; Report of the Monopolies Inquiry Commission (1965) Vol. 1 pp. 125, 128, 132 and 134. It may seek to influence politics and public opinion. J.K. Gailbraith, Ibid, p. 123; Bertrand Russel : Power (Unwin Books) p. 85; Monopolies Inquiry Commission Report p. 136. It may try to threaten, restrain and change governments in self-interest. B. Russel, Ibid. pp. 86, 88 and 124; Monopolies Inquiry Commission Report pp. 1, 135 and 193. It may endanger liberty, the rule of law and peace. J.K. Gailbraith, Ibid, pp. 67 and 70; W. Friedmann. An Introduction to World Politics : London Macmillan and Co. Ltd. 1962, p. 4. It may retard national unity, the growth of culture and education. Monopolies Inquiry Commission Report, p. 136. To prevent these manifold abuses of the economic power, the Constitution-makers enacted Articles 39(b) and (c). It will be legitimate to bear in mind the preemptive significance of Part IV in understanding the Constitution.

1882. It is now necessary to consider whether the majority decision in Golaknath MANU/SC/0029/1967 : [1967]2SCR762 is correct.

Residence of Amending Power

1883. In Golaknath Wanchoo J. and two other Judges who associated with him and Hidayatullah, Bachawat and Ramaswami JJ. took the view that the power to amend the Constitution is located in Article 368. Subba Rao C.J. and four other learned Judges who associated with him, on the contrary, held that Article 368 does not grant the power of amending the Constitution. It merely

provides for the procedure for amendment of the Constitution. I respectfully agree with the view that the amending power resides in the original Article 368.

1884. Despite the marginal note to Article 368, which indicates that Article 368 is prescribing the procedure for amendment, several considerations clearly show that the amending power is located in Article 368. Article 368 provides specifically for a procedure for amending the Constitution. When the prescribed procedure is strictly followed, "the Constitution shall stand amended in accordance with the terms of the Bill." Parliament can bring about this result by strictly following the prescribed procedure. Who can bring about a certain result may truly be said to have the power to produce that result. Power to amend the Constitution is accordingly necessarily implied in Article 368.

1885. Article 368 finds place in Part XX of the Constitution. It is the solitary Article in that part. If provision was being made in Article 368 merely for procedure for amending the Constitution by Parliament, the Constitution-makers would have placed it logically under the heading "Legislative procedure" in Part V of the Constitution. Including the solitary Article 368 in a separate part suggests that it was intended to confer the amending power as well as to provide for the amending procedure. The heading of Part XX is "amendment of the Constitution" and not "procedure for amendment of the Constitution". The heading will include both power as well as procedure. The proviso to Article 368 also shows that the amending power is lodged therein.

1886. Power to amend the Constitution cannot reasonably be located in Entry 97 of List I of Schedule VII read with Article 248 of the Constitution. The idea of a provision for amending the Constitution was indisputably present in the minds of the Constitution-makers. If they had considered that the power to amend the Constitution was in its nature legislative, they would have surely included in express words this power in a specific entry in List I. Article 248 and Entry 97 of List I confer residuary power on Parliament. Article 246 and List I confer certain specific powers on Parliament. Residuary power is intended to comprehend matters which could not be foreseen by the Constitution-makers at the time of the framing of the Constitution. As the topic of amending the Constitution was foreseen by them, it could not have been put in the residuary power. Article 245(1) confers power on Parliament "subject to the provisions of this Constitution." Articles 246 and 248 are subject to Article 245. Accordingly, a law made under Article 348 and Entry 97 of List I cannot be inconsistent with any provision of the Constitution. But a law made under Entry 97 for amending any provision of the Constitution would be inconsistent with that provision. Accordingly it would be invalid. But on following the prescribed procedure in Article 368 there ensues a valid amendment of the Constitution. So Article 248 and Entry 97 cannot include the power to amend the Constitution. The history of residuary power in our country also indicates that the power to amend the Constitution cannot be subsumed in the residuary power. Section 104 of the Government of India Act, 1935 provided for residuary power. The Governor-General could by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in Schedule VII. Acting under Section 104, the Governor-General could not empower either Legislature to make a law for, amending the Government of India Act. The power to amend the said Act vested exclusively in the British Parliament. While the Constitution was on the anvil, residuary power was proposed to be vested in the States. If that power had been vested in the States, it could not have been possible to argue that the Constitution could be amended by resort to residuary power because the amending

bill is to be initiated in Parliament and not in the States. It was only at a later stage that the residuary power was included in List I. The foregoing considerations show that the amending power does not reside in Article 248 and Entry 97 of List I. As already stated, it is located in Article 368 of the Constitution. Article 304(1) of the Draft Constitution was similar to Article 368. Article 304(2) enabled States to amend the Constitution as regards the method of choosing a Governor or the number of Houses of the State Legislature. In Clause 18 of his letter dated February 21, 1948 to the President of the Constituent Assembly, Dr. B.R. Ambedkar, while forwarding the Draft Constitution, said that a provision giving 'a limited constituent power' to the State Legislature has been inserted in Article 304.

1887. The procedure prescribed in Article 368 is the exclusive procedure for amendment of the Constitution. The word 'only' in Article 368 rules out all other procedures for amendment. So no law can be made for a referendum or a constituent assembly. A referendum or a constituent assembly will reduce Article 368 to redundance. Referendum was not accepted by the framers of the Constitution. Dr. B.R. Ambedkar said : "The Draft Constitution has eliminated the elaborate and difficult procedure such as a decision by a convention or a referendum. The powers of amendment are left with the Legislatures, Central and Provincial". C.A.D. Vol. 7, page 43.

Nature of Amending Power

1888. With respect I find it difficult to share the view of Hidayatullah J. that the amending power in Article 368 is a legislative power.' (Golaknath, Supra at page 900).

1889. During the British period neither the people of this country nor their elected representatives were endowed with the power to make or amend their Constitution Act. The Constitution Act by which they were governed until August 14, 1947 was enacted by the British Parliament. The power to amend that Act was vested in that Parliament. The elected representatives of the people could until that date make only legislative laws under the Constitution Act. The Constitution Act endowed them with a legislative power. Under Sections 99 and 100 of the Government of India Act, 1935, the Union and Provincial Legislatures made legislative laws. Under Sections 42, 43 and 44 and Section 72 of Schedule IX the Governor General made ordinances. The Governor made ordinances and Acts under Sections 88, 89 and 90. The headings of all those provisions describe the law-making power as 'legislative power'. The framers of the Constitution were familiar with the historical meaning of the expression 'legislative power' in this country. They were also aware of the meaning of 'constituent power'. Accordingly, it is reasonable to believe that they have made a distinction between legislative power' and 'constituent power'. Indeed they have described the power of making legislative laws as a 'legislative power'. The heading of Part XI is 'Distribution of Legislative Powers'; the heading of Article 123 is 'legislative power of the President'; the heading of Article 213 is 'legislative power of the Governor'. It may be observed that the framers did not include Article 368 under the heading legislative power' or in Part XI or in the company of the provisions dealing with the legislative procedure in Part V of the Constitution. They placed it in a separate part. This omission is explained by the fact that they were making a distinction between 'legislative power' and 'constituent power'.

1890. Broadly speaking, 'constituent power' determines the frame of primary organs of Government and establishes authoritative standards for their behavior. In its ordinary sense,

legislative power means power to make laws in accordance with those authoritative standards. Legislative power may determine the form of secondary organs of Government and establish subordinate standards for social behavior. The subordinate standards are derived from the authoritative standards established by the constituent power. Discussing the concept of 'legislative power', Bose J. said : "We have to try and discover from the Constitution itself what the concept of legislative power looked like in the eyes of the Constituent Assembly which conferred it. When that body created an Indian Parliament for the first time and endowed it with life, what did they think they were doing ? What concept of legislative power had they in mind ? ...First and foremost, they had the British model in view where Parliament is supreme in the sense that it can do what it pleases and no Court of law can sit in judgment over its Acts. That model it rejected by introducing a federation and dividing the ambit of legislative authority. It rejected by drawing a distinction between the exercise of constituent powers and ordinary legislative activity..." (In re. The Delhi Laws Act 1912 (Supra) at page 1112).

1891. Parliament's additional power to amend certain provisions of the Constitution by ordinary law would not obliterate the distinction between constituent power and legislative power. Constitutions may be uncontrolled like the British Constitution, or controlled like the Constitution of the United States of America. There may be a hybrid class of Constitutions, partly controlled and partly uncontrolled. In an uncontrolled Constitution the distinction between constituent power and legislative power disappears, because the legislature can amend by the law-making procedure any part of the Constitution as if it were a statute. In a controlled Constitution the procedure for making laws and for amending the Constitution are distinct and discrete. No part of the Constitution can be amended by the law-making procedure. This destination between constituent power and legislative power in a controlled Constitution proceeds from the distinction between the law-making procedure and the Constitution-amending procedure. Our Constitution is of a hybrid pattern. It is partly controlled and partly uncontrolled. It is uncontrolled with respect to those provisions of the Constitution which may be amended by an ordinary law through the legislative procedure; it is controlled with respect to the remaining provisions which may be amended only by following the procedure prescribed in Article 368. When any part of the Constitution is amended by following the legislative procedure, the amendment is the result of the exercise of the legislative power; when it is amended through the procedure prescribed by Article 368, the amendment is the result of the exercise of the constituent power. The amending power conferred by Article 368 is a constituent power and not a legislative power.

Dominion of Amending Power

1892. The phrase "amendment of this Constitution" is the nerve-center of Article 368. It is determinative of the dominion as well as the magnitude of the amending power. The words "this Constitution" in the phrase embrace the entire Constitution, as according to Article 393 "this Constitution" is called "the Constitution of India". These words are also used in Articles 133(2) and 367(1), (2) and (3). In those provisions these words would envelop each and every provision of the Constitution. They should convey the same meaning in Article 368. Accordingly each and every provision of the Constitution including Part III falls within the sway of the amending power.

1893. In re : Barubari Union and Exchange of Enclaves MANU/SC/0049/1960 : [1960]3SCR250 it is said that "the preamble is not a part of the Constitution". This remark cannot assist the

argument that a Preamble is not liable to amendment. It seems to me that the Court really intended to say that the Preamble is not enacting part of the Constitution. On October 17, 1949 the Constituent Assembly passed a resolution to the effect that "the Preamble stand part of the Constitution." C.A.D. Vol. X, p. 456.

1894. According to Article 394 that article and Articles 5 to 9, Articles 60, 324, 366, 367, 379, 380, 388 and 391 to 393 came into force on November 26, 1949, while "the remaining provisions of this Constitution" were to come into force on January 26, 1950. It is clear from the phrase "the remaining provisions of this Constitution" that the Preamble also came into force on January 26, 1950. Replying to Sri K. Santhanam's question in regard to the date of the coming into force of the Preamble, Shri Alladi Krishnaswami Ayyar said : "The Preamble will come into force in all its plentitude when the Constitution comes into force." C.A.D. Vol. X, p. 418.

1895. A statute has four parts-title, preamble, enacting clause and purview or body. Crawford : Statutory Construction (1948 Edn.) p. 123 : Sutherland : Statutory Construction (1943 Edn.) Vol. 2, pp. 348-349; Haloburg's : Laws of England, Vol. 36, p. 370, Craies on Statute Law (1963 Edn.) pp. 190 and 201. The Preamble to the Constitution of the United States of America is regarded as a part of the Constitution. Willoughby, Constitutional Law of the United States (1929 Edn.), Vol. I, p. 62. The heading "the Constitution of India" above the Preamble shows that the Preamble is a part of it.

1896. As the Preamble is a part of the Constitution, it is liable to amendment under Article 368. Those parts of the Preamble which operate on the past such as "this 26th day of November, 1949" may perhaps not be capable of modification. 'Even Jove hath not power on the past'. But there is little doubt that such parts can be deleted by the exertion of the amending power.

1897. In sum, no provision of the Constitution can claim immunity from the sway of the amending power. The amending power can amend each and every provision of the Constitution including the Preamble and Part III.

Magnitude of Amending Power

1898. The magnitude of amending power is measurable by the broad-shouldered word "amendment" in Article 368. According to Wanchoo J., the word "amendment" should be given its full meaning as used in law and that means that by amendment an existing Constitution...can be changed, and this change can take the form either of addition to the existing provisions or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether." (Golaknath, supra at page 834). Hidayatullah J. said : "I do not take a narrow view of the word "amendment" as including only minor changes within the general frame-work. By amendment new matter may be added, old matter removed or altered." (Ibid, p. 862) Bachawat and Ramaswami JJ. gave the same extensive meaning to the word "amendment". Thus according to six out of eleven judges in Golaknath, the word "amendment" means amending by addition, alteration or repeal. According to the Shorter Oxford English Dictionary "amendment" means "removal of faults or errors; reformation esp. (law) in a writ or process 1607." According to Webster's Third New International Dictionary, it means "act of amending esp. for the better, correction of a fault or faults, the process of amending as a motion, bill, act or Constitution that

will provide for its own amendment; an alteration proposed or effected by such process." According to the Random House Dictionary of the English Language (Unabridged Edn.) "amendment" means "to alter, modify, rephrase or add to, subtract from (a motion, bill, Constitution etc.) by formal procedure, to change for the better, improve, to remove or correct faults." According to Crawford (Statutory Construction (1940 Edn.) page 170) there "are many different definitions of the term amendment, as it applies to legislation. Generally, it may be defined as an alteration or change of something, proposed in a bill or established as law. We are not, however, here concerned with the amendment of the proposed bills, but with the amendment of existing laws. Thus limited, a definition as suitable as any, defines an amendment as a change in some of the existing provisions of a statute. Or stated in more detail, a law is amended when it is in whole or in part permitted to remain and something is added to or taken from it or it is in some way changed or altered in order to make it more complete or perfect or effective." According to these definitions the power to amend means the power to make an addition to or alteration in or subtraction from the text The purpose of addition, alteration or subtraction may vary; it may be to make the text or some part of it more complete or perfect or effective. It also appears that the whole text of a law cannot be repealed or abrogated in one step; some part of it must remain while the other is repealed.

1899. The Constitution does not define the word "amendment". Article 367(1) applies the General Clauses Act to the interpretation of the Constitution. The Act also does not define "amendment". However, Section 6A provides that where any Central Act repeals any enactment by which, the text of any Central Act was "amended by express omission, insertion or substitution of any matter" the repeal unless different intention appears, shall not affect the continuance of "any such amendment made by the enactment so repealed" and in operation at the time of such repeal. Section 6A shows that "amendment" includes addition, substitution and omission. There is no reason why this definition which was known to the Constitution-makers should not apply to "amendment" in Article 368.

1900. According to the petitioners, "amendment" in Article 368 is used in the narrow sense of making improvements. Now, an improvement may be made not only by an addition, but also by omission or repeal. Thus the curing of an error in the text undoubtedly improves it. According to Hidayatullah J. it "was an error to include (the right of property) in (Part III)". (Golaknath, supra at page 887). The removal of this error by an amendment under Article 368 will surely improve the text of the Constitution. It will remove the roadblock in the way of implementing Part IV of the Constitution. Further, every mover of an amendment considers his proposal as an improvement in the existing text and the Court should not substitute its own evaluation for that of the mover of the amendment.

1901. The grants of legislative power are ordinarily accorded the widest amplitude. A fortiori, the constituent power in Article 368 should receive the same hospitable construction. The word "amendment" should be so construed as to fructify the purpose underlying Article 368. The framers of the Constitution have enacted Article 368 for several reasons. First, the working of the Constitution may reveal errors and omissions which could not be foreseen by them. Article 368 was designed to repair those errors and omissions. Second, the Court's construction of the Constitution may not correspond with the Constitution-makers' intention or may make the process of orderly government difficult. The first Amendment to the Constitution became necessary on

account of the decision of this Court in the State of Madras v. Srimathi Champakam Dorairajan MANU/SC/0007/1951 : [1951]2SCR525 and the decision of the Patna High Court in Kameshwar Singh v. State of Bihar MANU/BH/0075/1951 : A.I.R. 1951 Pat 91. Third, the Constituent Assembly which framed the Constitution was not elected on adult franchise and was in fact not fully representative of the entire people. On January 22, 1947 Jawaharlal Nehru said : "We shall frame the Constitution, and I hope it will be a "good Constitution, but does anyone in this House imagine that when a free India emerges it will be bound down by anything that even this House might lay down for it ? A free India will see the bursting forth of the energy of a mighty nation. What it will do and what it will not, I do not know, but I do know that it will not consent to be bound down by anything.... It may be that the Constitution, this House may frame may not satisfy an India, that free India. This House cannot bind down the next generation or people who will duly succeed us in this task." C.A.D. Vol. 2, pages 322-323. On November 8, 1948 he reiterated : "While we who are assembled in this House undoubtedly represent the people of India, nevertheless, I think it can be said and truthfully that when a new House, by whatever name it goes, is elected in terms of this Constitution and every adult in India has the right to vote, the House that emerges then will certainly be fully representative of every section of the Indian people. It is right that that House elected so...should have an easy opportunity to make such changes as it wants to...." C.A.D. Vol. V, pp. 322-323. The Constitution-makers conferred very wide amending power on Parliament because it was believed that Parliament elected on adult franchise would be fully representative of the entire people and that such a Parliament should receive a right to have a fresh look at the Constitution and to make such changes therein as the entire people whom it represents desire. Fourth, at the apex of all human rights is the right of self-preservation. People collectively have a similar right of self-preservation. Self-preservation implies mutation, that is adaptation to the changing environment. It is in the nature of man to adjust himself to the changing social, economic and political conditions in the country. Without such adaptation the people decays and there can be no progress. Kant said : "One age cannot enter into an alliance on oath to put the next age in a position when it would be impossible for it to extend and correct its knowledge; or to make any progress whatsoever in enlightenment. This would be a crime against human nature whose original destiny lies precisely in such progress. Later generations are thus perfectly entitled to dismiss these agreements as unauthorised and criminal." Kant's Political Writings, Edited by Hans Reiss, Cambridge University Press, 1970, p. 57.

1902. Speaking in the same vein, Jawaharlal Nehru said : "In any event we should not make a Constitution such as some other great countries have, which are so rigid that they do not and cannot be adapted to changing conditions. Today-especially, when the world is in turmoil and we are passing through a very swift period of transition, what, we may do today may not be wholly applicable tomorrow. therefore, while we make a Constitution which is sound and as basic as we can, it should also be flexible. C.A.D. Vol. 7, p. 322.

1903. Article 368 is shaped by the philosophy that every generation should be free to adapt the Constitution to the social, economic and political conditions of its time. Most of the Constitution-makers were freedom-fighters. It is difficult to believe that those who had fought for freedom to change the social and political organisation of their time would deny the identical freedom to their descendents to change the social, economic and political organisation of their times. The denial of power to make radical changes in the Constitution to the future generation would invite the danger of extra Constitutional changes of the Constitution. "The State without the means of some change

is without means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve." Burke : Recollections on the Revolution in France and other writings Oxford University Press, 1958 Reprint, p. 23.

1904. The context also reinforces the widest meaning of the word "amendment". The proviso to Article 368 states that if an amendment of the Constitution seeks to make any "change" in the provisions specified therein, such amendment shall also require the ratification by at least half of the State Legislatures. Thus the proviso contemplates an amendment by way of a 'change' in certain provisions of the Constitution. According to the Shorter Oxford English Dictionary (3rd Edition Vol. 1, page 291) "change" means "substitution, or succession of anything in place of another; alteration in the State or quality of anything; variation, mutation, that which is or may be substituted for another of the same kind." The power to amend accordingly includes the power to substitute one provision for another. For instance, it will be open to Parliament to remove List II in the Seventh Schedule and substitute another List therefore by strictly following the procedure prescribed in Article 368 and its proviso. The words "amendment" and "amend" have been used in Articles 107(2), 108(1) and (4), 190(3), 110(1)(b), proviso to Article 111, Articles 147, 196(2), 197(1)(c) and (2)(c), 198(3), 199(1)(b), 200, 201 and 395. In all these provisions those words include the power of repeal or abrogation. Article 110(1)(b) provides that a Bill shall be deemed to be a Money Bill if it contains a provision dealing with "the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India." Without doubt, the word "amendment" would also include repeal or abrogation of a law with respect to any financial obligation undertaken or to be undertaken by the Government of India. The word "amendment" cannot be confined to mere minor changes. To the same effect is Article 199(1)(b) in relation to the States. Article 147 provides that in Chapter IV of Part V and in Chapter V of Part VI references to any substantial question of law as to the interpretation of the Constitution shall be construed as including reference to any substantial question of law as to the interpretation) of the Government of India Act, 1935 (including any enactment "amending or supplementing that Act"). Here also the word "amending" would take in any enactment which has repealed any provision of the Government of India Act, 1935. Article 395 provides that the "Indian Independence Act, 1947 and the Government of India Act, 1935, together with all other enactments amending or supplementing the law...are hereby repealed." Here again, the word "amending" includes an enactment which has repealed any provision of the Government of India Act, 1935. It cannot be said that the framers of the Constitution intended to continue an enactment which has repealed an essential provision of the Government of India Act, 1935.

1905. Paragraph 7 of Schedule V to the Constitution reads : "(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as reference to such Schedule as so amended : (2) No such law as is mentioned in sub-paragraph (I) of this paragraph shall be deemed to be an amendment of this Constitution for the purpose of Article 368.

1906. In paragraph 7(1) the words, "addition, variation, or repeal" do not enlarge the meaning of 'amend'; they are expositive of it. If the word "amendment" in Article 368 did not include the power of repealing a provision of the Constitution, sub-paragraph (2) could not have been enacted. It has been held by this Court that Parliament may change the boundaries of a State by a law enacted

under Article 3 or by an amendment of the Constitution under Article 368. (Berubari Union, supra). It would follow from this decision that Parliament may repeal any provision of Schedule V by an ordinary law enacted under paragraph 7 of Schedule V or by an amendment under Article 368. The amending power under Article 368 which provides for amendment of the Constitution by a more difficult procedure than the one by which any provision of Schedule V may be repealed under paragraph 7 cannot surely be narrower than the power under paragraph 7 of Schedule V. The same consideration equally applies to paragraph 21 of Schedule VI to the Constitution.

1907. According "to Article 33 Parliament may by law determine to what extent any of the rights conferred by Part III shall in their application to the members of the Armed forces or forces charged with the maintenance of public order be restricted or abrogated so as to ensure better discharge of their duties and the maintenance of discipline amongst them. It is open to Parliament to make a law abrogating the fundamental rights of the citizens for the time being employed in the Army and the forces charged with the maintenance of public order. For instance, it is open to it to make a law abrogating the freedom of speech of persons employed in the Army. For the reasons already discussed in relation to paragraph 7 of Schedule V, it cannot be disputed that Parliament may abrogate the fundamental rights of the citizens employed in the Army or forces charged with the maintenance of public order in the exercise of the amending power under Article 368.

1908. The power of a Constituent Assembly, which is a representative body, to frame a Constitution is unlimited and unconfined. Its absolute power is explained by the fact that it is called upon to chart a process of government of a country. In carrying out its task it has to take decisions on matters of high policy. The high power is made to match the high purpose. The nature of the power conferred on Parliament by Article 368 is similar to the power exercisable by a Constituent Assembly. therefore the amending power in Article 368 is as unlimited and unconfined as the power of a Constituent Assembly. Indeed, it may truly be said that Parliament acts as a Continual Constituent Assembly.

1909. The history of Article 368 supports the broadest construction of the word "amendment". Article 368 is similar to Article 304 of the Draft Constitution. Article 305 of the Draft Constitution is material for our purpose. It relevantly read : "Notwithstanding anything contained in Article 304, the provisions of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes or the Indian Christians either in Parliament or in the legislature of any State...shall not be amended during a period of 10 years from the commencement of this Constitution.

1910. Part XIV of the Draft Constitution made reservation of seats in Parliament and State Legislatures for Muslims, Scheduled Castes, Scheduled Tribes and Indian Christians. The word "amended" in Article 305 unmistakably include the repeal of the provisions prescribing the reservations. As Article 305 was an exception to Article 304, the word "amendment" in Article 304 would include the power of abrogating the reservations. As in Article 304, so in Article 368 "amendment" should include the sense of repeal and abrogation.

1911. According to Sri Palkhiwala, whenever the Constitution-makers intended to confer the power of repeal on any authority, they have expressly said so as in Articles 35(b), 252(2), the proviso to Article 254(2) and Article 372(1) and (2). In all these provisions the Words "alter, repeal

or amend" are used with reference to a law. As "amend" would not authorise repeal simpliciter of the entire law, the framers of the Constitution have expressly conceded the power of repealing the entire law. So these provisions do not help the argument of Sri Palkhiwala that "amendment" in Article 368 should be given a narrow meaning.

1912. To sum up, the nature, object and history of the amending power and the context of Article 368 leave little room for doubt that the word "amendment" includes the power of repealing or abrogating each and every provision of the Constitution. It may be that Parliament may not be able to annihilate the entire Constitution by one stroke of pen. But it can surely repeal or abrogate all provisions in Part III. Article 368 permits Parliament to apply not only the physician's needle but also the surgeon's saw. It may amputate any part of the Constitution if and when it becomes necessary so to do for the good health and survival of the other parts of the Constitution.

Meaning of 'Law' in Article 13(2)

1913. There is a distinction between 'Constitution' and 'law'. (Ordinarily) a 'Constitution' signifies a politico-legal document. President Wilson once said that the U.S. Constitution has been, to a considerable extent, a political document and not a mere 'lawyers document'. C.G. Hains : Role of the Supreme Court in American Government and Politics, 1944 Edn., p. 44. On the other hand, in its ordinary sense 'law' signifies a statute or a legislative enactment. Again, a 'Constitution' prescribes the paramount norm or norms; a law prescribes derivative norms. They are derived from the paramount norms. The reckoning of a Constitutional amendment in the eye of law is the same as that of a Constitution. therefore ordinarily a Constitutional amendment is not law. Significantly, there is not a whisper of the word 'law' in Article 368.

1914. The context of the word 'law' in Article 13(2) does not show that it includes an amendment of the Constitution made under Article 368. The word 'law' in Article 13(1) obviously does not include a Constitution. No Constitution existing at the time of the commencement of our Constitution and taking away or abridging the fundamental rights of the people conferred by Part III of the Constitution has been brought to our notice in spite of the assiduous research of Sri Palkhiwala. Article 13(3)(a) provides for an extensive definition of the word 'law' by including things which are not ordinarily regarded as included in it. It mentions an ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law. But it does not include the Constitution which in the ordinary sense does not mean 'law'.

1915. A distinction between 'Constitution' and 'law' is made in the Constitution itself. According to Article 60 the President of India has to take the oath that he will preserve, protect and defend "the Constitution and the law". Article 159 requires the Governor of a State to take the same oath. A Minister of the Union and a State, the Judges of the Supreme Court and High Courts and the Comptroller and Auditor General also take the same kind of oath. If the framers of the Constitution had regarded the Constitution as 'law', they would not have separately mentioned the Constitution in various oaths.

1916. Various provisions of the Constitution indicate that the product which comes into being by fallowing the legislative procedure prescribed in Articles 107 to 111 is called 'law'. The heading over Articles 107 and 196 reads as "Legislative Procedure". When the prescribed legislative

procedure is followed, the end-product is law. But when the procedure prescribed in Article 368 is strictly followed, it results in the amendment of the Constitution. The Constitution-makers did not call it 'law'.

1917. Ordinarily fundamental rights avail against the State organs, that is, the Legislature, the Executive and the Judiciary and other agencies of the State. While making an amendment under Article 368, Parliament acts as a constituent authority and not as a State organ. The body making a law in accordance with the procedure prescribed under Articles 107 to 111 and an amendment according to the procedure prescribed in Article 368 may be the same, but the two functions are fundamentally different in character. It is common knowledge that often there is a polarisation of various functions in one and the same body. For instance, the House of Lords in Great Britain exercises legislative functions as well as judicial functions. It may pass a Bill by a bare majority of the Lords assembled in a particular session. But all the Lords minus the Lord Chancellor, the Law Lords and such other Lords as have held or are holding high judicial offices cannot decide a civil appeal. On the other hand, three Lords selected from any one of the last three categories of Lords may decide a civil appeal. The functional difference accounts for this apparent paradox of numbers. The members of the Dominion Parliament of India could not, by their unanimous vote, make the Constitution of India. But the same members-acting as the Constituent Assembly could, by a bare majority, make the Constitution. The functional difference in making a legislative law and an amendment of the Constitution likewise explains the basic difference in the procedures prescribed in Articles 107 to 111 and Article 368. In case of difference on a Bill between the House of the People and the Council of States, the two Houses may meet unicamerally and pass a legislative measure. The President cannot refuse his assent to a Bill passed by both Houses bicamerally or unicamerally. But an amendment of the Constitution under Article 368 cannot be made by a vote in a joint sitting of the two Houses. The two Houses must meet separately and pass the amending bill by the requisite majority. The President may withhold his assent to the Constitution amending bill. It is on account of the functional difference between law making and Constitution amending that a law passed by the unanimous vote of Parliament according to the procedure in Articles 107 to 111 cannot override any fundamental right. A Bill passed by more than half of the members of each House assembled separately and by two third of the members present and voting will, however, result in the amending of the fundamental rights.

1918. Legislative power in Article 245 is made 'subject to the provisions of this Constitution'. But Article 368 is not made 'subject to the provisions of this Constitution'. Article 368 places only one express fetter on the amending power, that is, the procedural fetter. A substantive fetter on the amending power is accordingly not contemplated by Article 368. The framers of the Constitution were aware of the fact that certain foreign Constitutions have expressly put the amending power in substantive fetters. Indeed Article 305 sought to place such a fetter on the Draft Article 304 (corresponding to Article 368). In the absence of clear textual evidence, I am unable to expand the meaning of 'law' in Article 13(2), for an expansive construction would permanently rule out the lawful making of structural reforms in the social, economic and political frame of the country. Speaking on the First amendment to the Constitution following the decision of this Court in State of Madras v. Srimathi Champakam Dorairajan, MANU/SC/0007/1951 : [1951]2SCR525 on May 29, 1951 Jawaharlal Nehru said : "We have to give them (the weaker sections of the society) opportunities-economic opportunities, educational opportunities and the like. Now in doing that we have been told that we come up against some provisions in the Constitution which rather lay

down some principles of equality or some principles of non-discrimination etc. So we arrive at a peculiar tangle. We cannot have equality because in trying to attain equality we come up against some principles of equality. That is a very peculiar position. We cannot have equality because we cannot have non-discrimination because if you think in terms of giving a lift to those who are down, you are somehow affecting the present status quo undoubtedly. therefore, if this argument is correct, then we cannot make any major change in the status quo, whether economic or in any sphere of public or private activity." Parliamentary Debates Vols. XII-XIII, Part II-1951, pages 9616-9617.

1919. The word 'compensation' in the unamended Article 31(2) has been construed by this Court to mean full market value of the acquired property. This construction creates a direct conflict between Article 31(2) and Article 39(c). Article 39(c) enjoins the State to direct its policy towards securing "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment." This object can never be achieved if full market value of the acquired properly is to be paid to its owner. The payment of full market value to the owner will change the form of the concentration of wealth from property to cash. The concentration would remain. The history of our National Movement clearly shows that the Constitution-makers were committed to the accomplishment of the objects specified in Part IV of the Constitution. They have expressly declared that those objects are 'fundamental'. in the governance of the country. It is accordingly reasonable to think that they have provided for the means of resolving the conflict between Articles 31(2) and 39(c) or between Articles 29 and 46. They must have intended that when a conflict arises between the rights in Part III and the obligations of the State in the Part IV, that conflict may be resolved by an amendment of the Constitution under Article 368. "My concept of a fundamental right is something which Parliament cannot touch save by an amendment of the Constitution" (emphasis added) (S. Krishnan versus State of Madras) MANU/SC/0008/1951 : [1951]2SCR621 per Bose J.

1920. The phrase 'notwithstanding anything in the Constitution' is used in a provision granting power for emancipating the grant from any restrictive provision in the Constitution. As the word 'law' in the Article 13(2) is not intended to include an amendment of the Constitution, Article 368 does not open with the non-obstante clause.

1921. No unmistaking conclusion can be drawn from the history of Article 13(2) as to the meaning of the word 'law'. The Draft Report of the Sub-Committee on Fundamental Rights, dated April 3, 1947, contained an annexure dealing with Fundamental Rights. Shiva Rao, Framing of India's Constitution, Vol. II, p. 137. Clause 2 of the annexure relevantly provided that "any law which may hereafter be made by the State inconsistent with the provisions of this Chapter/Constitution shall be void to the extent of such inconsistency." By a letter of April 16, 1947, the Chairman of the Fundamental Rights sub-Committee forwarded an annexure on Fundamental Rights to the Chairman, Advisory Committee on Fundamental Rights. Clause 2 of the annexure materially read: "All existing laws or usages in force...inconsistent with the rights guaranteed under this Constitution shall stand abrogated to the extent of such inconsistency : nor shall the Union or any unit make any law taking away or abridging any such right." Ibid, p. 171. On April 23, 1947, the Advisory Committee on Fundamental Rights presented an interim report to the President of the Constituent Assembly. The Report contained an annexure providing for fundamental rights. Clause (2) of the annexure materially read : "All existing laws, notifications, regulations, customs or

usages in force...inconsistent with the rights guaranteed under this Part of the Constitution shall stand abrogated to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right." Ibid, p. 290. Shri K. Santhanam proposed an amendment substituting for the last words in Clause (2) the words "Nor shall any such right be taken away or abridged except by an amendment of the Constitution." In his speech he explained that "if the clause stands as it is even by an amendment of the Constitution we shall not be able to change any of these rights if found unsatisfactory or inconvenient.... In order to avoid any such doubts I have moved this amendment." C.A.D. Vol. 3, pp. 415-416. So according to him the amendment was by way of abundant caution. Sardar Vallabh Bhai Patel accepted the amendment. It was put to vote and adopted. Ibid, p. 415. The Constituent Assembly thus accepted the position that fundamental rights could be abrogated by a Constitutional amendment.

1922. In October, 1947, a Draft Constitution was prepared by the Constitutional Adviser. Shiva Rao, supra, p. 7. Section 9(2) of his Draft Constitution materially read : "Nothing in this Constitution shall be taken to empower the State to make any law which curtails, or takes away any of the rights conferred by Chapter II of this Constitution except by way of amendment of this Constitution under Section 232 and any law made in contravention of this section shall to the extent of such contravention be void." Although the Constituent Assembly had expressly accepted the amendment of Sri K. Santhanam, the Drafting Committee omitted the words "except by way of amendment of this Constitution." The relevant portion of Article 8(2) of the Draft Constitution read : "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this Part shall to the extent of the contravention be void." No explanation for excluding the words "except by way of amendment of this Constitution", which were approved by the Constituent Assembly, is to be found in the records. It is, however, important to observe that when the words "except by way of amendment of the Constitution" are omitted from Sri K. Santhanam's amendment, the remaining words "nor shall any such rights be taken away or abridged" are quite wide to prohibit the abrogation or abridgment of fundamental rights even by a Constitutional amendment. The same effect seems to be produced by the words "nothing in this Constitution" in Section 9(2) of the Draft Constitution prepared by the Constitutional Adviser. But the Drafting Committee substituted Section 9(2) by Article 8(2) of the Draft Constitution. Article 8(2) of the Draft Constitution does not enmesh in plain words all the provisions of the Constitution including Article 304. This may perhaps explain the omission of the words "except by way of amendment of this Constitution." from Article 8(2) of the Draft Constitution. In any case, this history of Article 13(2) does not prove that the Drafting Committee intended Up give supremacy to fundamental rights over the Constitution amending power. In this connection it is important to refer to a note from the Constitutional Adviser's office that 'law' in Section 9(2) did not include an amendment of the Constitution. Shiva Rao, Vol. IV, p. 26.

1923. A careful reading of Dr. B.R. Ambedkar's speeches would show that the Constitution amending power can be used to abrogate or abridge the fundamental rights. On November 4, 1948 he said:

The provisions of the Constitution relating to the amendment of the Constitution divide the Articles of the Constitution into two groups. In the one group are placed Articles relating to : (a) the distribution of legislative powers between the center and the State, (b) the representation of the States in Parliament; and (c) the powers of the Courts, All other Articles are placed in another

group. Articles placed in the second group cover a very large part of the Constitution and can be amended by Parliament by a double majority, namely, a majority of not less than two third of the members of each House present and voting and by a majority of the total membership of each House. The amendments of these articles did not require ratification by the States." C.A.D. Vol. VII, p. 36. (emphasis added).

1924. He reiterated:

It is only for amendments of specific matters-and they are only few-that the ratifications of the State legislatures is required. All other articles of the Constitution are left to be amended by Parliament." C.A.D. Vol. VII, p. 43. (emphasis added).

1925. On another occasion he repeated:

Now, what is it we do ? We divide the articles of the Constitution under three categories. The first category is one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304, all that is necessary is to have two-thirds majority. Then, they can amend it.

Mr. President : Of members present

The Honourable Dr. B.R. Ambedkar : Yes, Now, we have no doubt put certain articles in a third category where for the purpose of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States." C.A.D. Vol. IX, pp. 660-663.

1926. It would appear from these speeches that for the purpose of amendment Dr. Ambedkar has classified all the Articles of the Constitution in three categories. The Articles must fit in one or the other of the three categories, for according to him there is no fourth category. Articles in Part III of the Constitution should accordingly fit into one of these categories. It seems to me that having regard to his threefold classification of the Articles it is not fair to interpret his speeches as showing that the Articles in Part III are not at all amendable. The word "not" in the sentence "if the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304" is presumably either a slip of tongue or a printer's devil. When Jawaharlal Nehru said that the fundamental rights were intended to be "permanent in the Constitution", he did not really mean that they are not amendable. His speeches, already quoted by me, would clearly show that he regarded the entire Constitution to be subject to amendment by any future Parliament.

1927. Sri Kamath had moved an amendment to Article 304 which expressly provided for amendment in the provisions of Part III, but that amendment was rejected by the Constituent Assembly. No inference of unamendability of those provisions can be drawn from the rejection of his motion, for the members of the Constituent Assembly might have thought that the language of Article 304 of the Draft Constitution was sufficiently spacious to include an amendment of the provisions of Part III and that accordingly Sri Kamath's motion was unnecessary.

1928. The phrase "Constitution as by law established" in the President's oath would not establish that the Constitution is a law in the ordinary sense of the term. The word 'law' in the phrase, in my view, means lawful. The phrase would mean "Constitution established in a lawful manner, that is, by the people through their representatives.

1929. The oath of the President to defend "the Constitution and the law" does not bind him to the Constitution as it stood on the day he took the oath. The word 'law' undoubtedly means the law for the time being in force. A variation or repeal of a part of a law would not compromise the oath. In the context of law, the 'Constitution' would mean the Constitution as varied or repealed from time to time.

1930. Sri Palkhiwala has contended vigorously that people have reserved to themselves the fundamental rights and that those rights are sacred and immutable natural rights. It seems to me that it is an error to consecrate the rights enumerated in Part III of the Constitution as "Sacrosanct" or "transcendental" or to romanticise them as "natural rights" or "primordial rights" or to embalm them in the shell of "inalienable and inviolable" and "immutable.

1931. To regard them as sacrosanct does not seem to comport with the secular virtue of our Constitution. To regard them as "natural rights" or "primordial rights" overlooks the fact that the rights specified in Articles 15, 16, 17, 18, 21, 22, 23, 24, 25, 27, 28. 29, 30 and 32 were begotten by our specific national experience. They did not exist in India before the Constitution.

1932. The Constitution-makers did not regard the rights mentioned in Part III as 'sacrosanct' or as 'inalienable' and 'inviolable' or as 'immutable'. Jawaharlal Nehru said : "So, if you wish to kill this Constitution make it sacred and sacrosanct certainly. But if you want it to be a dead thing, not a growing thing, a static, unwieldy, unchanging thing, then by all means do so, realising that that is the best way of stabbing it in the front and in the back. Because whatever the ideas of the 18th century philosophers or the philosophers of the early 19th century...nevertheless the world has changed within a hundred years-changed mightily" Parliamentary Debates Vols. XII-XIII, Part II, pp. 9624-9625.

1933. Articles 15(3), 16(4) and (5), 19(2) to (6), 21, 22(3), 4(b) and 7(a) and (b), 23(2), 25(1) and (2), 26, 28(2), 31(4), (5), and (6) encumber the rights with manifold unpredictable limitations. Article 19(2) has invented a completely new restriction to free speech, namely, 'friendly relations with foreign states' Article 33 expressly empowers Parliament to restrict or abrogate the rights in their application to the Army and forces responsible for the maintenance of public order. For a period of five years from May 14, 1954, the 'reasonableness' of restrictions on the rights specified in Article 19 was made unjusticiable in the State of Jammu and Kashmir. Clause (7) added to Article 19 by the President provided that 'reasonable restrictions' in Clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate legislature in Jammu and Kashmir "deems reasonable". Article 35A applied to that State by the President made inroads into the rights of employment under the State, the right to acquire property the right to settlement and the right to scholarships and other aids in the State. Article 303(2) empowers Parliament to make law giving preferences and making discrimination in the matter of inter-State trade if it is necessary to do so for dealing with a situation arising from scarcity of goods in any part of the country. Article 358 suspends rights under Article 19 during the operation of the Proclamation of

Emergency under Article 352. Article 359 empowers the President to suspend the rights under Article 32 during Emergency, so that all fundamental rights may be made quiescent. All these provisions prove that the fundamental rights may be taken away or abridged for the good of the people. (Basheskar Nath v. The Commissioner of Income Tax MANU/SC/0064/1958 : [1959] Supp. 1 S.C.R. 528 per S.K. Das J.).

1934. Rights in Part III are downright man made. According to Dr. B.R. Ambedkar, they are the 'gift of law' C.A.D. Vol. VII, p. 40. Article 13(2) and 32(1) and (2) and 359 expressly speak of the fundamental rights as "conferred by Part III". They are thus the creatures of the Constitution. They are called fundamental rights not because they are reserved by the people to themselves but because they are made indestructible by legislative laws and executive action. There is no analogue in the Constitution to the X Amendment of the U.S. Constitution which expressly speaks of the reservation of powers by the people. It is well to remember that the I Amendment taking away or abrogating certain rights was passed by the Constituent Assembly acting as the Provisional Parliament. It reflects the Constitution-makers' intention that the rights can be abrogated.

1935. The prescription of a more rigid procedure for changing the provisions specified in the provisio to Article 368 underscores the fact that the framers of the Constitution regarded them as more valuable than the provisions of Part III. They attached more value to federalism than to the fundamental rights.

Inherent and implied limitations on amending power

1936. Wanchoo J. and two other learned Judges who associated with him have held that there are no inherent and implied limitations on the amending power in Article 368 (Golaknath, Supra at page 836). Bhachawat and Ramaswami JJ. shared their opinion. (ibid, pages 910 and 933). It seems to me that Hidayatullah J. also did not favour the argument of inherent and implied limitations on the amending power, for he has said : "The whole Constitution is open to amendment. Only two dozen articles are outside the reach of Article 368. That too because the Constitution has made them fundamental." (ibid, p. 878).

1937. Sri Palkhiwala's argument of inherent and implied limitations may be reduced to the form of a syllogism thus. All legislative powers are subject to inherent and implied limitations.

The constituent power in Article 368 is a legislative power.

The constituent power is subject to inherent and implied limitations.

1938. If the major and minor premises in the syllogism are valid, the conclusion also must be valid. But both premises are fallacious. Some legislative powers are not subject to any inherent and implied limitations. Take the case of the War Power. During the course of arguments I had asked Sri Palkhiwala to point out any inherent and implied limitation on the War Power, but he could point out none. When the President has issued a Proclamation of Emergency under Article 352, the cardinal principle of federalism is in eclipse. Parliament may make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List. (See Article 250(1)). The executive power of the Union shall extend to the giving of directions to any

State as to the manner in which the executive power thereof is to be exercised. Parliament may confer powers and impose duties or authorise the conferring of powers and the imposition of dudes upon the Union officers and authorities in respect of a matter not enumerated in the Union List. (See Article 353). The teeth, of Article 19 become blunted. (See Article 358). The President may suspend the right to move any Court for the enforcement of fundamental rights. (See Article 359) it would virtually suspend the fundamental rights during Emergency. Article 83(2) provides that the House of the People shall continue for five years from the date appointed for its first meeting. According to its proviso, the period of five years may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time. Evidently during Emergency the War Power of Parliament and the President is at its apogee, uncribbed and uncabined. It has already been shown earlier that the constituent power in Article 368 is not a legislative power. As both premises of the syllogism are fallicious, the conclusion cannot be valid.

1939. According to Sri Palkhiwala, an inherent limitation is one which inheres in the structure of Parliament. Parliament consists of two Houses and the President. The House of the People is elected by adult franchise. It is argued that Parliament cannot make any amendment doing away with its structure. Its structure limits its amending potency. It is a big assumption and should not be accepted without proof from the text of the Constitution. The Constitution does not embody any abstract philosophy. It is still seriously debated whether 'birds fly because they have wings' or 'birds have wings because they fly'. Many maintain that function works change in structure. Proviso to Article 83(2), Articles 250, 353, 358 and 359 demonstrate that the structure of our polity and of Parliament suffer change from the tasks of Emergency. Article 368 itself can be amended to enlarge the amending power. The magnitude of the amending power is to be measured by the purposes which it is designed to achieve than by the structure of Parliament.

1940. Implied limitations cannot be spelt out of the vague emotive generalities of the Preamble. 'People', 'Sovereign', 'Democratic', 'Republic', 'Justice', 'Liberty', 'Equality' and 'Fraternity' are plastic words, and different people have impressed different meanings on them. Slavery had coexisted with democracy and republic. Liberty and religious persecution have walked hand in hand. It was once believed that equality was not compromised by denying vote to the propertyless. Preamble is neither the source of powers nor of limitations on power. (In re. Barubari Union, Supra, p. 282).

1941. According to Sri Palkhiwala, an implied limitation is one which is implicit in the scheme of various provisions of the Constitution. The scheme "of various provisions is to create primary organs of State and to define, demarcate and limit their powers and functions. The scheme of Article 368, on the other hand, is to re-create the primary organs of State and to re-define, re-demarcate and re-limit their powers and functions if and when it becomes imperative to do so for the good of the people. Accordingly it must plainly have been the intention of the Constitution-makers that Article 368 should control and condition rather than be controlled and conditioned by other provisions of the Constitution. Article 368 is the master, not the slave of the other provisions. Acting under Article 368, Parliament is the creator, not the creature of the Constitution. In one word, it is supreme. As Lord Halifax has said : The "reverence that is given to a fundamental...would be much better applied to that supremacy or power, which is set up in every nation in differing shapes, that altered the Constitution as often as the good of the people requireth

it.... I lay down, then, as a fundamental first, that in every Constitution there is some power which neither will nor ought to be bounded. Gough, Supra, at page 170." Jawaharlal Nehru also said : "Ultimately the whole Constitution is a creature of Parliament." C.A.D. Vol. IX, p. 1195.

1942. It is said that Article 368 cannot be used to abrogate any basic, fundamental or essential feature of the Constitution or to damage or destroy the core of any fundamental right. But no accurate test for ascertaining a basic, fundamental or essential feature or the core of a fundamental right has been suggested by Sri Palkhiwala. An appeal is made to the trained and perceptive judicial mind to discover the essential features of the Constitution and their core. During the Stuart period in England the King as well as the Parliament were both claiming to defend the fundamentals of English polity. Charles I declared that he had taken up arms only "to defend the fundamental laws of this Kingdom." Gough, supra, p. 78. On the other hand, Parliamentarians maintained that the right of the people was more truly fundamental than anything based merely on tradition or prescription Ibid, p. 99. Commenting on the remark of Sir John Finch C.J. (quoted in the opening of this judgment) Maitland said: Who is to decide what is an ornament and what a substantial part of the crown. The notion of a Constitution above both king and parliament, limiting to statutes a proper sphere, was nowhere to be found expressed in any accurate terms, and would satisfy neither king nor nation.

1943. At the end of the 17th century Lord Halifax derisively remarked : "Fundamental is a pedestal that men set everything upon that they would not have broken. It is a nail everybody would use to fix that which is good for them; for all men would have that principle to be immutable that serves their use at the time.

Fundamental is a word used by the laity as the word sacred is by the clergy, to fix everything to themselves they have a mind to keep, that nobody else may touch it Gough, supra, pp. 169-170.

1944. The Constitution-makers who were familiar with the English Constitutional history could not conceivably have left undetermined the test of distinguishing the essential features from the non-essential features or their core. The test is writ large in Article 368 itself. Every provision of the Constitution which may be amended only by the procedure prescribed in Article 368 is an essential feature of the Constitution, for it is more set than legislative laws. The test is the rigid procedure. The more rigid the procedure, the more essential the provision amendable thereby. Thus the provisions specified in the proviso to Article 368 are more essential than the rights in Part III. It has already been shown earlier that the fundamental rights, even though an essential feature of the Constitution, are within the sway of the amending power in Article 368. On a parity of reasoning, judicial review of legislation is also amendable. The Constitution creates, enlarges, restricts and excludes judicial review of legislation. (See Articles 32(2), 138, 139, 143, 77(2), 166(2) and 31(4), (5) and (6)). Article 32(2) is as amendable as any fundamental right in Part III. The word "guaranteed" in Article 32(1) does not testify to its unamendable character. The guarantee is good against the Government organs and not against the constituent power. It may be recalled that on December 9, 1948, Dr. B.R. Ambedkar, while speaking on Article 25 of the Draft Constitution (present Article 32) said : "The Constitution has invested the Supreme Court with these writs and these write could not be taken away Unless and until the Constitution itself is amended by means left open to the Legislature C.A.D. Vol. VII, p. 953." And this he said in spite of his affirmation that Article 25 is the "very soul" and the "very heart" of the Constitution.

1945. Article 368 places no express limits on the amending power. Indeed, it expressly provides for its own amendment. Parliament and more than half of the States may jointly repeal Article 368 and thus make fundamental rights immutable if they so desire. It is not permissible to enlarge constructively the limitations on the amending power. Courts are not free to declare an amendment void because in their opinion it is opposed to the spirit supposed to pervade the Constitution but not expressed in words. (A.K. Gopalan v. The Union of India MANU/SC/0012/1950 : 1950CriLJ1383 per Kania C.J. and p. 220 per Mahajan J.; Raja Suriya Pal Singh v. State of U.P. MANU/SC/0061/1952 : [1952]1SCR1056 per Mahajan J.). In Babu Lal Pavate versus State of Bombay [1960] 1 S.C.R. 905 the Constitutionality of the States Reorganisation Act, 1956 was questioned by this Court. The Act provided for the formation of two separate units out of the former State of Bombay: (1) The State of Maharashtra and (2) The State of Gujarat. It also provided for transfer of certain territories from one State to another. The Act was passed under Article 3 of the Constitution. Article 3 has a proviso to the effect that no Bill under the main part of Article 3 shall be introduced in either of the Houses unless, where the proposal contained in the Bill affects the area, boundary or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon. The Bill carved out three units out of the State of Bombay, but the Act carved out only two units. It was urged that the word "State" in Article 3 should be given a larger connotation so as to mean not merely the State but its people as well. This according to the argument was the "democratic process" incorporated in Article 3. According to this "democratic process" the representatives of the people of the State of Bombay assembled in the State Legislature should have been given an opportunity of expressing their views not merely on the proposal contained in the Bill but on any subsequent modification thereof. Rejecting this argument, S.K. Das, J. said:

(I)t will be improper to import into the question of construction doctrines of democratic theory and practice obtaining in other countries, unrelated to the tenor, scheme and words of the provisions which we have to construe.... It does not appear to us that any special or recondite doctrine of "democratic process" is involved therein.

1946. In the South India Corporation (P) Ltd. v. The Secretary, Board of Revenue, Trivandrum MANU/SC/0215/1963 : [1964]4SCR280 , Subba Rao J., while construing Article 372 observed:

Whatever it may be, the inconsistency must be spelled out from the other provisions of the Constitution and cannot be built up on the supposed political philosophy underlying the Constitution.

1947. Counsel for the petitioners has relied on Mangal Singh v. Union of India MANU/SC/0278/1966 : [1967]2SCR109 . The Punjab Reorganisation Act, 1966 was enacted with the object of reorganising the State of Punjab. Its Constitutionality was questioned in this Court. The argument of the respondent that a law made under Articles 2, 3 and 4 may also make supplemental, incidental and consequential provisions which shall include provisions relating to the set-up of the legislative, executive and judicial organs of the State was countered by the appellant with the argument that such a wide power Parliament might conceivably exercise to abolish the legislative and judicial organs of the state altogether. Rejecting the counter-argument Shah J. said:

We do not think that any such power is contemplated by Article 4. Power with which the Parliament is invested by Articles 2 and 3 is power to admit, establish or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution and is not power to override the Constitutional scheme. No State can therefore be formed, admitted or set up by law under Article 4 by the Parliament which has no effective legislative, executive and judicial organs.

1948. Under Articles 2 and 3 Parliament may by law form a new State, increase or diminish the area of any State, and alter the boundary or name of any State. The power is thus exercisable with reference to a State. The observation, of Shah J. is to be read in the context of Chapters II, III and IV of Part VI. Chapter II of Part VI provides for the executive structure of a State. Article 155 states that there shall be a Governor for each State. Chapter III of Part VI deals with the structure of the State Legislature. Article 168 provides that for every State there shall be a Legislature. The composition of the Legislature, its powers and functions are laid down in this Chapter. Chapter V provides for the structure of the State Judiciary. Article 214 provides that there shall be a High Court for each State. The provisions in these Chapters are mandatory. Parliament, while making a law under Articles 2, 3 and 4, cannot make radical changes in the legislative, executive and judicial administration of a State, for its law-making power is subject to Chapter II, III and V of Part VI.

1949. Sri Palkhiwala has invoked natural law as the higher law conditioning the constituent power in Article 368. Natural Law has been a sort of religion with many political and Constitutional thinkers. But it has never believed in a single Godhead. It has a perpetually growing pantheon. Look at the pantheon, and you will observe there : 'State of Nature', 'Nature of Man', 'Reason', 'God', 'Equality', 'Liberty', 'Property', 'Laissez Faire', 'Sovereignty', 'Democracy', 'Civilised Decency', 'Fundamental Conceptions of Justice' and even 'War' "In justifying and extolling war as an institution Treitschke appealed "to the laws of human thought and of human nature" which forbid any alternative." H. Lauterpacht : International Law and Human Rights, (1950 Edn.) p. 108.

1950. The religion of Natural Law has its illustrious Priestly Heads such as Chrysippus, Cicero, Seneca, St. Thomas Acquinas, Grotius, Hobbes, Locke, Paine, Hamilton, Jefferson and, Trietschke. The pantheon is not a heaven of peace. Its gods are locked in constant internecine conflict.

1951. Natural Law has been a highly subjective and fighting faith. Its bewildering variety of mutually warring gods has provoked Kelson to remark: "Outstanding representatives of the natural law doctrine have proclaimed in the name of Justice or Natural Law principles which not only contradict one another, but are in direct opposition to many positive legal orders. There is no positive law that is not in conflict with one or the other of these principles; and it is not possible to ascertain which of them has a better claim to be recognised than any other. All these principles represent the highly subjective value judgments of their various authors about what they consider to be just of natural What is Justice? University of California Press, 1960, page 259".

1952. Article 368 should be read without any preconceived notions. The framers of the Constitution discarded the concept of "due process of law" and adopted the concept of "procedure established by law" in Article 21. It is therefore reasonable to believe that they have discarded the

vague standard of due process of law for testing the legitimacy of a Constitutional amendment. Due Process of Law is another name of natural law. The Constitution-makers could have easily imposed any express limitation on the content of the amending power. The absence of any express limitation makes me think that they did not surround the amending power with the amorphic penumbra of any inherent and implied limitations.

Judicial Review of Constitutional amendments

1953. The history of this Court from Gopalan (Supra) to Golaknath (Supra) brings out four variant judicial attitudes. In Gopalan the majority of the Court expressly or tacitly acknowledged "the omnipotence of the sovereign legislative power." The Court displayed humility and self-restraint. But two years later in 1952 the Court assumed the posture of a sentinel. In the State of Madras v. V.G. Row MANU/SC/0013/1952 : 1952CriLJ966 a unanimous Court spoke thus: "(A)s regards the fundamental rights'...this Court has been assigned the role of a sentinel on the qui vive." While the Court took care to assure that it has no 'desire to tilt at legislative authority in a crusader's spirit', it added by way of warning that "it cannot desert its own duty to determine finally the Constitutionality of an impugned statute." The Court moved away from its Gopalan attitude of humility and self-restraint to the sentinel's role, compounded of self-restraint and self-consciousness. In 1954 the Court moved away a step further. In Virendra Singh and Ors. v. State of Uttar Pradesh MANU/SC/0025/1954 : [1955]1SCR415 the Court, making the people its mouthpiece, asserted : "(W)e do not found on the will of the Government, we have upon us the whole armour of the Constitution wearing the breastplate of its protecting provisions and flashing the sword of its inspirations." Perhaps this passage is a faithful drawing of a crusader. But the picture is of a crusader getting ready to set out on a new path. This is the Third attitude of the Court. It displays more of self-assertion than of self-suppression. By 1963 Gopalan attitude of humility and self-restraint had lost its appeal. With the banner of "natural", "sacrosanct", and "transcendental" rights in one hand and 'the flaming sword of (the Constitution's) inspiration' in the other, the Court announced in Golaknath that Parliament cannot take away or abridge the fundamental rights in Part III. This is the fourth attitude of the Court towards judicial review. From Gopalan to Golaknath, the Court has shifted from one end to the other end of the diagonal, from Parliament's supremacy to its own supremacy.

1954. At the center of the Court's legal philosophy, there is the rational free-will of the individual. The Court's claim to the guardianship over fundamental rights is reminiscent of the Platonic guardians, the philosopher kings who were to rule over the Republic. The Courts's elevation of the fundamental rights recalls Locke, 'whose notion of liberty involves nothing more spiritual than the security of property and is consistent with slavery and persecution' Acton. The History of Freedom and Power, p. 104. When the Court surrounds the fundamental rights with the nimbus of 'sacred' and 'sacrosanct', we are reminded of the theories of Grotius and Pufendorf with their theological strains. When the Court declares that the fundamental rights are 'primordial', 'immutable' and 'inalienable' it is presumably banking on Blackstone with the difference that unlike him it is negating the omnipotence of Parliament. When it is claimed that fundamental rights are accorded a "transcendental position" in the Constitution, it is seeking to read Kant's transcendental idealism into the Constitution.

1955. This philosophy has entailed the subservience of the Directive Principles of State Policy to the fundamental rights. January 26, 1950 became the great divide : on one side of it were those who became endowed with the fundamental rights and enjoyed their blessings; on the other side were those who were formally granted fundamental rights but had no means and capacity to enjoy their blessings. This great divide is to remain for all time to come. But the Constitution-makers had a contrary intention. Said Jawaharlal Nehru: "These (the Directive Principles of State Policy) are, as the Constitution says, the fundamentals in the governance of the country. Now, I should like the House to consider how you can give effect to these principles if the argument which is often being used...is adhered to, you can't. You may say you must accept the Supreme Court's interpretation of the Constitution. But, I say, then if that is correct, there is an inherent contradiction in the Constitution between the fundamental rights and the Directive Principles of State Policy. therefore, again, it is upto this Parliament to remove that contradiction and make the fundamental rights subserve the Directive Principles of State Policy Lok Sabha Debates, 1955-Vol. II, p. 1955".

1956. Article 31(4), (5) and (6) establish beyond doubt that the Constitution-makers intended to give ascendency to the Directive Principles of State Policy over fundamental" rights. "It is futile to cling to our notions of absolute sanctity of individual liberty or private property and to wishfully think that our Constitution-makers have enshrined in our Constitution the notions of individual liberty and private property that prevailed in the 16th century when Hugo Grotius flourished or in the 18th century when Blackstone wrote his Commentaries and when the Federal Constitution of the United States of America was framed. We must reconcile ourselves to the plain truth that emphasis has now unmistakably shifted from the individual to the community. We cannot overlook that the avowed purpose of our Constitution is to set up a welfare State by subordinating the social...interest in the rights of the community. Social interests are ever expanding and are too numerous to enumerate or even to anticipate and therefore, it is not possible to circumscribe the limits of social control to be exercised by the State.... It must be left to the State to decide when and how and to what extent it should exercise this social control State of West Bengal v. Subodh Gopal MANU/SC/0018/1953 : [1954]1SCR587 per Das J.".

1957. The Constitution does not recognise the supremacy of this Court over Parliament. We may test legislative laws only on the touchstone of authoritative norms established by the Constitution. Its procedural limitations aside, neither Article 368 nor any other part of the Constitution has established in explicit language any authoritative norms for testing the substance of a Constitutional amendment. I conceive that it is not for us to make ultimate value choices for the people. The Constitution has not set up a government of judges, in this country. It has confided the duty of determining paramount norms to Parliament alone. Courts are permitted to make limited value choices within the parameters of the Constitutional value choices. The Court cannot gauge the urgency of an amendment and the danger to the State for want of it, because all evidence cannot come before it. Parliament, on the other hand, is aware of all factors, social, economic, political, financial, national and international pressing for an amendment and is therefore in a better position to decide upon the wisdom and expediency of it.

1958. Reason is a fickle guide in the quest for structural socio-political values. In the trilogy of Sankari Prasad Singh v. Union of India MANU/SC/0013/1951 : [1952]1SCR89 , Sajjan Singh of State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 and Golaknath (Supra) the opinion of seven judges prevailed over the opinion of thirteen judges. The reason of the author of the

Nicomochean Ethics found reason in slavery. The reason of the impassioned advocate of Unlicensed Printing saw reason in denying freedom of speech to the Catholics. So Schanupenhaur has said : "We do not want a thing because we have sound reasons for it; we find a reason for it because we want it" As quoted in the Story of Philosophy by Will Durant at p. 339. Pure reason is a myth. Structuring reason is also calculating expediency, computing the plus and minus of clashing values as a particular time, in a particular place and in particular conditions, striking difficult balances.

1959. Structural socio-political value choices involve a complex and complicated political process. This Court is hardly fitted for performing that function. In the absence of any explicit Constitutional norms and for want of complete evidence, the Court's structural value chokes will be largely subjective. Our personae predilections will unavoidably enter into the scale and give colour to our judgment. Subjectivism is calculated to undermine legal certainty, an essential element of the rule of law.

1960. Judicial review of Constitutional amendments will blunt the people's vigilance, articulateness and effectiveness. True democracy and true republicanism postulate the settlement of social, economic and political issues by public discussion and by the vote of the people's elected representatives, and not by judicial opinion. The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed that they can understand and appreciate it. The more they understand it, the more they love it and the more they prize it.

1961. I do not believe that unhedged amending power would endanger the interests of the religious, linguistic and cultural minorities in the country. As long as they are prepared to enter into the political process and make combinations and permutations with others, they will not remain permanently and completely ignored or out of power. As an instance, while the Hindu Law of Succession has been amended by Parliament, no legislature from 1950 to this day has taken courage to amend the Muslim Law of Succession. A minority party has been sharing power in one State for several years. Judicial review will isolate the minorities from the main stream of the democratic process. They will lose the flexibility to form and re-form alliances with others. Their self-confidence will disappear, and they will become as dependent on the Court's protection as they were once dependent on the Government's protection. It seems to me that a two-third majority in Parliament will give them better security than the close vote of this Court on an issue vitally affecting them.

1962. Great powers may be used for the good as well as to the detriment of the people. An apprehended abuse of power would not be a legitimate reason for denying unrestricted amending power to Parliament, if the language of Article 368 so permits without stretch or strain. While construing the Constitution, it should be presumed that power will not be abused. (A.K. Gopalan v. State MANU/SC/0012/1950 : 1950CriLJ1383 per Das J.; Dr. N.B. Khare v. The State of Delhi MANU/SC/0004/1950 : [1950]1SCR519 per Kania C.J.; In Re. Delhi Laws Act MANU/SC/0010/1951 : [1951]2SCR747 per Das J.), There is a general presumption in favour of an honest and reasonable exercise of power. (State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 per Patanjali Sastri J.). We should have faith in Parliament. It is responsible to the people; it cannot ignore any section of them for all time.

1963. Repelling the abuse of power argument, Das J. observed:

(W)hat, I ask, is our protection against the legislature in the matter of deprivation of property by the exercise of the power of taxation? None whatever. By exercising its power of taxation by law, the State may deprive us of almost sixteen annas in the rupee of our income. What, I ask, is the protection which our Constitution gives to any person against the legislature in the matter of deprivation even of life or personal liberty. None, except the requirement of Article 21, namely, a procedure to be established by the legislature itself and skeleton procedure prescribed in Article 22. ... What is abnormal if our Constitution has trusted the legislature as the people of Great Britain have trusted their Parliament ? Right to life and personal liberty and the right to private property still exist in Great Britain in spite of the supremacy of Parliament. Why should we assume or apprehend that our Parliament...should act like mad man and deprive us of our property without any rhyme or reason? After all our executive government is responsible to the legislature and the legislature is answerable to the people. Even if the legislature indulges in occasional vagaries, we have to put up with it for the time being. That is the price we must pay for democracy. But the apprehension of such vagaries can be no justification for stretching the language of the Constitution to bring it into line with our notion of what an ideal Constitution should be. To do so is not to interpret the Constitution but to make a new Constitution by unmaking the one which the people of India have given to themselves. That, I apprehend, is not the function of the Court. MANU/SC/0018/1953 : [1954]1SCR587

1964. The argument of fear therefore is not a valid argument. Parliament as a legislature is armed with at least two very vast powers in respect of war and currency. Any imprudent exercise of these two powers may blow the whole nation into smithereens in seconds, but no court has so far sought to restrict those powers for apprehended abuse of power. Democracy is founded on the faith in self-criticism and self-correction by the people. There is 'nothing to fear from a critical and cathartic democracy.

1965. The conflicts of the mediaeval Pope and the Emperor put on the Wane their power as well as their moral authority. Conditions in India today are not propitious for this Court to act as a Hildebrand. Unlike the Pope and the Emperor, the House of the People, the real repository of power, is chosen by the people. It is responsible to the people and they have confidence in it. The Court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will win for itself a permanent place in the hearts of the people and thereby augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of protection of the weaker sections of the people.

1966. It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of an explicit mandate, the Court should abstain from striking down a Constitutional amendment which makes art endeavour to 'wipe out every tear from every eye'. In so doing the Court will not be departing from but will be upholding the national tradition. The Brihadaranyaka Upanishad says : "Then was born the Law (Dharma), the doer of good. By the law the weak could control the strong." (I. IV, 14). Look at the national emblem, the chakra and satyameva jayate. The chakra is motion; satyam is sacrifice. The chakra signifies that the Constitution is a becoming, a moving equilibrium; satyam is symbolic of

the Constitution's ideal of sacrifice and humanism. The Court will be doing its duty and fulfilling its oath of loyalty to the Constitution in the measure judicial review reflects these twin ideals of the Constitution.

Twenty-fourth Amendment

1967. It consists of two relevant sections, Sections 2 and 3, These sections have been drawn in the light of various judgments in Golaknath (supra). Section 2 adds Clause (4) to Article 13. As the majority decision in Golaknath had taken the view that Article 13(2) is a limitation on the amending power to take away or abridge the fundamental rights, Clause (4) removes that limitation. Section 3 consists of four clauses. Clause (a) substitutes the marginal note to the unamended Article 368. The substituted marginal note reads as "Power of Parliament to amend the Constitution and procedure therefor". Clause (b) renumbers the unamended Article 368 as Clause (2) and adds Clause (1) to it. The new Clause (1) calls the amending power as 'constituent power'. It empowers Parliament to amend 'by way of addition, variation or repeal' any provision of the Constitution in accordance with the prescribed procedure. It opens with the well known phrase "Notwithstanding anything in this Constitution". In the renumbered Clause (2) also, that is, the unamended Article 368, there is an amendment It says that the President shall give his assent to the Bill. Clause (d) adds Clause (3) no Article 368. It provides that nothing in Article 13 shall apply to any amendment made under Article 368:

1968. It may be observed that except as regards the assent of the President to the Bill, everything else in the 24th Amendment was already there in the unamended Article 368. I have already held to that effect earlier in this judgment. Accordingly, the amendment is really declaratory in nature. It removes doubts cast on the amending power by the majority judgment in Golaknath (supra) I am of opinion that the 24th Amendment is valid.

1969. The unamended Article 368 imposed a procedural limit to the amending power. The amending Bill could not become a part of the Constitution until it had received the assent of the President. I have held earlier that the President could withhold his assent. After the amendment the President cannot withhold assent. The procedural restrictions are a part of Article 368. The unamended Article 368 provided for its own amendment. It was accordingly open to Parliament to amend the procedure. So I find no difficulty in upholding the amendment that the President "shall give his assent to the Bill

1970. One thing more. Let us assume for the sake of argument that the amending power in the unamended Article 368 was subject to certain inherent and implied limitations. Let us also assume that it was restricted by the provisions of Article 13(2). The unamended Article 368 would impliedly read as "subject to Article 13(2) and any inherent and implied limitations." So the restrictions imposed by Article 13(2) and inherent and implied limitations were a part of the body of Article 368. As Article 368 is itself liable to amendment, these restrictions are now removed by Parliament for they will fall within the ambit of the word "amendment". The phrase "notwithstanding anything in this Constitution" in the newly added Clause (1) of Article 368 is apt to sweep away all those restrictions. In the result, the amending power is now free of the incubus of Article 13(2) and inherent and implied limitations, if any.

1971. In my opinion, the whole of the 24th amendment is perfectly valid.

Section 2 of the 25th Amendment

1972. Section 2 amends Article 31(2). The unamended Article 31(2) obligated the State to pay 'compensation' for any property acquired or requisitioned by it. Section 2 substitutes the word 'compensation" by the words "an amount". It also provides that the amount fixed by law or determined in accordance with the principles prescribed by law may be "given in such a manner as may be specified in such law.

1973. The last part of the main part of the amended Article 31(2) also states that "No such law shall be called in question in any Court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash.

1974. A proviso has also been added to Article 31(2). According to the proviso, while making any law-providing for the compulsory acquisition of any property of educational institution, established and administered by a minority referred to in Clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under the law is such as would not restrict or abrogate the rights guaranteed under that clause.

1975. Section 2 adds Clause (2B) to Article 31. Clause (2B) states that the provisions of Article 19(1)(f) shall not affect any law referred to in the amended Article 31(2).

1976. The birth of Section 2 is dictated by the history of Article 31(2). Article 24 of the Draft Constitution became Article 31(2). Article 24 was moved by Jawaharlal Nehru in the Constituent Assembly on September, 10, 1949. Then he said that compensation could not be questioned "except where it is thought that there has been a gross abuse of law, where in fact there has been a fraud on the Constitution C.A.D. Vol. IX, p. 1193". His construction of Article 24 received support from Sri Alladi Krishnaswami Ayyar and Sri K.M. Munshi. Sri K.M. Munshi narrated his personal experience. In 1938 Bombay Government acquired the Bardoli lands. In one case the property acquired was worth over rupees five lacs. It was sold during the Non-cooperation Movement to an old Diwan of a native State for something like Rs. 6000. The income from the property was about Rs. 80,000.00 a year. The Diwan had received that income for about 10 years. The Bombay Legislature acquired the property by paying compensation equal to the amount invested by the Diwan in the property plus 6%. In direct opposition to the manifest intention of the Constitution makers, this Court held that the word "compensation" in Article 31(2) means "full cash equivalent" (The State of West Bengal v. Mrs. Bela Banerjee) (1954) S.C.R. 558.

1977. To give effect to the intention of the Constitution-makers, Article 31(2) was amended by the 24th Amendment to the Constitution in 1955. The 4th Amendment added to Article 31(2) these words: "and no such law shall be called in question in any court on the ground that the compensation provided by law is not adequate." The effect of the 4th amendment was considered by this Court in P. Vajravelu v. Special Deputy Collector, Madras MANU/SC/0049/1964 : [1965]1SCR614 . Subba Rao J. said:

The fact that Parliament Used the same expressions, namely, 'compensation' and 'principles' as were found in Article 31 before the amendment is a clear indication that it accepted the meaning given by this Court to those expressions in Mrs. Bela Banerjee's case. It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of. If Parliament intended to enable a Legislature to make such a law without providing for compensation so defined, it would have used other expressions like 'price', 'consideration' etc. Ibid. at page 626.

1978. Regarding the amendment he said:

(A) more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. To illustrate, a law is made to acquire a house; its value at the time of the acquisition has to be fixed; there are many modes of valuation, namely, estimate by an engineer, value reflected by comparable sales, capitalisation of rent and similar others. The application of different principles may lead to "different results. The adoption of one principle may give a higher value and the adoption of another principle may give a lesser value. But none the less they are principles on which and the manner in which compensation is determined. The Court cannot obviously say that the law should have adopted one principle and not the other, for it relates only to the question of adequacy. On the other hand, if a law lays down principles which are not relevant to the property acquired or to the value of the property at or about the time it is acquired it may be said that they are not principles contemplated by Article 31(2) [1965] 1 S.C.R. Supp 627.

1979. In Union v. Metal Corporation [1967] 2 S.C.R. 255 Subba Rao J. spoke again on the implications of the Fourth Amendment. He said:

The law to justify itself has to provide for the payment of a 'just equivalent' to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be questioned in a court of law. The validity of the principles judged by the above tests falls within judicial scrutiny, and if they stand the tests, the adequacy of the product falls outside its jurisdiction.

1980. These two decisions neutralised the object of the 4th Amendment. In State of Gujarat v. Shantilal Mangaldas MANU/SC/0063/1969 : [1969]3SCR341 this Court overruled the Metal Corporation. Shah J. said at page 363 of the Report:

Right to compensation in the view of this Court was intended by the Constitution to be a right to a just equivalent of the property of which a person was deprived. But the just equivalent was not capable of precise determination by the application of any recognised principles. The decisions of this Court in the two cases-Mrs. Bela Banerjee's case and Subodh Gopal Bose's case were therefore likely to give rise to formidable problems, when the principles specified by the Legislature as well as the amounts determined by the application of those principles were declared justiciable. By qualifying 'equivalent' by the adjective 'just' the enquiry was made more controversial; and apart

from the practical difficulties the law declared by this Court also placed serious obstacles in giving effect to the directive principles of State policy incorporated in Article 39. (emphasis added).

He added:

If the quantum of compensation fixed by the Legislature is not liable to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent...
(I)t does not mean however that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be held by the Courts, for, to do so would be to grant a charter of arbitrariness, and permit a "device to defeat the Constitutional guarantee. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the Constitutional declaration that adequacy of compensation provided is not justiciable.
[1969] 3 S.C.R. 365.

1981. Shantilal Mangaldas transfused blood in the 4th Amendment made anaemic by Vajravelu and Metal Corporation. But soon thereafter came the majority decision in R.C. Cooper v. Union of India MANU/SC/0011/1970 : [1970]3SCR530 . Cooper in substance overruled Shantilal Mangaldas and restored the old position. More, it also added the test of Article 19(1)(f) to valid acquisition of property. These decisions of the Court constrained Parliament to enact Section 2 of the 25th Amendment.

1982. Having regard to this history, it will not be proper to import the concept of compensation in Article 31(2), Section 2 has substituted the word 'compensation' by the word 'amount' at every relevant place in Article 31(2). The Court should not minimize or neutralize its operation by introducing notions taken from or inspired by the old Article 31(2) which the words of Section 2 are intended to abrogate and do abrogate.

1983. According to Webster's Dictionary on Synonyms (1st Edn. page 47) the word 'amount' means 'sum, total, quantity, number, aggregate, whole'. According to the Shorter Oxford English Dictionary, the word 'principle' means 'that from which something takes its rise originates or derives'. The word 'adequate', according to the same Dictionary, means 'equal in magnitude or extent, commensurate in fitness, sufficient, suitable'. According to the Words and Phrases (Permanent Ed. Vol. II, p. 363) the word "adequate" some time means that which is equal to the value; but in its primary and more properly significance nothing can be said to be adequate which is not equal to what is required suitable to the case or occasion, wholly sufficient, proportionate and satisfactory.

1984. Unlike 'compensation' the word 'amount' is not a term of art. It bears no specific legal meaning. The amount fixed by law or determined in accordance with the principles specified by law may be paid partly in cash and partly in kind. In such a case it may often be difficult to quantify the aggregate value of the cash and the thing given. Again, the amount may be paid in such a manner as may be specified in the law. Thus the law may provide for payment of the amount over a long period of years. Article 19(1)(f) shall now have no impact on Article 31(2). Having regard

to all these circumstances, it is, I think, not permissible to import the notion of reasonableness in Article 31(2) as amended by Section 2. The phrase 'principle on which and the manner in which the compensation is to be determined and given' in the old Article 31(2) is now substituted by the phrase 'amount which may be determined in accordance with such principles and given in such a manner as may be specified in such law? As the word 'compensation' found place in the former phrase, the Court has held that the principles should be relevant to 'compensation', that is, to the 'just equivalent' of the property acquired. That phrase is no more there now in Article 31(2). The notion of 'the relevancy of principles to compensation' is jettisoned by Section 2. Obviously, where the law fixes the amount, it cannot be questioned in any court on the ground that it is not adequate, that is, not equal to the value of the property acquired or requisitioned. The legislative choice is conclusive. It would accordingly follow that the amount determined by the principles specified in the law is equally unquestionable in courts.

1985. The newly added proviso to Article 31(2) appears to me to fortify this construction. According to the proviso, the law providing for compulsory acquisition of any property of an educational institution which would receive the protection of Clause (1) of Article 30, should ensure that the amount fixed by or determined under it for the acquired property would not restrict or 'abrogate' the right guaranteed under that clause. Now, the object of a proviso is to take out something which is included in the main part of a provision. So the amount payable under the main part of the amended Article 31(2) may be such as would 'abrogate' the right of property of all and sundry. Accordingly it is not permissible to import in the amended Article 31(2) the notions of 'arbitrary amount' or 'illusory amount' or 'fraudulent amount'. As some amount must be paid, the law may be virtually confiscatory, but not literally confiscatory. The position now is akin to the legal position in Section 25 of the Contract Act. Under that provision the adequacy of consideration negotiated by the contracting parties cannot be questioned in court. Most trifling benefit or detriment is sufficient. There is however this difference between Section 25 and Article 31(2). While the consideration is settled by the contracting parties, the amount payable for the acquisition or requisitioning of property is settled by the legislature. Like the former, the latter is also not to be questioned in courts.

1986. Article 31(2) is distinguishable from Articles 31A, 31B and 31C. While some amount is payable under a law protected by Article 31(2), no amount whatsoever may be paid under a law protected by Articles 31A, 31B and 31C. The former may be virtually confiscatory, the latter may be wholly confiscatory. The amount fixed by law or determined in accordance with the principles in such a law is now not justiciable even though it may seem to be an 'arbitrary amount' or 'illusory amount' or 'fraudulent amount' by the measure of compensation. The ouster of judicial oversight does not imply that the legislature would act whimsically. The value of the property acquired or requisitioned, the nature of the property acquired or requisitioned, the circumstances in which the property is being acquired or requisitioned and the object of acquisition or requisition will be the guiding principles for legislative determination of amount. The second principle may involve, inter alia, consideration of the income already received by the owner of the property and the social contribution to the value of the property by way of public loans at lower rates of interest, cheap state supply of energy and raw materials subsidies and various kinds of protection, tax holidays, etc. It should be remembered that the value of a property is the resultant of the owner's industry and social contribution. The owner ought not to receive any amount for the value contributed by society. He is entitled to payment for his own contribution. The third principle will include the

element of social justice. It is thus wrong to say that on my interpretation of Article 31(2) the legislatures will act arbitrarily in determining the amount. The amended Article 31(2) does not remove the bar of Article 14. If the amount paid to the owner of property is in violation of the principles of Article 14, the law may even now be struck down. Although the amended Article 31(2), according to my construction of it, will abrogate the right of property, it is Constitutional as it falls within the scope of the 24th Amendment which I have held to be Constitutional.

Section 3 of the 75th Amendment

1987. Section 3 adds Article 31C to Part III of the Constitution. It reads : "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) and (c) of Article 39, shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

Provided that where such law is made by the Legislatures of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

1988. Section 3, like Section 2, is made under Article 368 as amended by the 24th Amendment. The provisions of Article 31C fall within the scope of the amended Article 368, and its validity, too, cannot be assailed.

1989. It is pointed out by Sri Palkhiwala that Article 31C authorises State Legislatures and Parliament as a legislative body to make laws contravening the rights conferred by Articles 14, 19 and 31 and that it, in effect, delegates the power of making amendments in those articles. Pointedly, the argument is that the Parliament as the constituent power has delegated the constituent power to the Parliament as a legislative body and the State Legislatures.

1990. It is also stressed that the second part of Section 3 arms the legislatures with the absolute power of sheltering laws which violate Articles 14, 19 and 31 and have no relation to the principles specified in Article 39(b) and (c).

1991. The second part prohibits any court from inquiring whether the law protected by Article 31C has relevancy to Article 39(b) and (c) if it contains a declaration that it gives effect to the policy specified in that provision. Howsoever shocking it may seem, it is not an innovation. You will find several articles having a close resemblance to it. Article 77(2) provides that the validity of an order or instrument which is authenticated as provided therein 'shall not be called in question on the ground that it is not an order or instrument made or executed by the President'. A similar provision is made in Article 166(2) in relation to the Governor. Article 103(1) provides that if any question arises as to whether a member of either House of Parliament has become subject to any of the qualifications mentioned in Article 102(1), the question shall be decided by the President and 'his decision shall be final.' A similar provision is to be found in Article 192(1) as regards the members of the State Legislature with respect to the decision of the Governor, Article 311(2) gives a right

of hearing to an employee sought to be dismissed or removed or reduced in rank. Clause (b) of the proviso to the article enacts that where the appointing authority' is satisfied that for some reason it is not reasonably practicable to hold such inquiry, the pre-requisite of hearing may be dispensed with. Clause (3) of Article 311 then enacts that if a question arises whether it is reasonably practicable to hold an inquiry, 'the decision thereon of the authority...shall be final'. Article 329(a) enacts that notwithstanding anything in the Constitution the validity of any law relating to the delimitation of constituencies or allotment of seats to such constituencies made or purporting to be made under Article 327 or Article 328 shall not be called in question in any court. Like these articles, the second part of Section 3 excludes judicial review to a limited extent.

1992. The main part of Article 31C consists of two parts; The first part provides that no law giving effect to the policy of the State towards securing the principles specified in Article 39(b) and (c) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31. The fast part may be split up into two : (a) giving effect to the policy of the State towards securing (b) the principles specified in Article 39(b) and (c). Under the first part the Court has to see two things before a particular law can receive protection of Article 31C. Firstly, the law must have relevancy to the principles specified in Article 39(b) and (c); secondly, the law should give effect to those principles. Article 39(b) provides that the State shall strive to secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 39(c) urges the State to strive to secure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment, It may be observed that "subserve the common good" in Clause (b) and 'common detriment' in Clause (c) raise questions of fact Now, it is possible to imagine a state of affairs where a law having relevancy to the principles specified in Article 39(b) and (c) may not appear to the Court to subserve the common good or to prevent common detriment. Such a law will not prevail over Articles 14, 19 and 31. Thus the first part retains the Court's power to decide the legal question of the law's relevancy to the principles specified in Article 39(b) and (c) as well as the factual question of the law's efficacy to subserve the common good or to prevent common detriment. It can test the ends as well as the means of the law.

1993. Coming to the second part, it excludes judicial review 'on the ground that (the law) does not give effect to such policy'. So the law cannot be challenged on the ground that the means adopted by the law are not sufficient to subserve the common good and prevent common detriment. In other words, the sufficiency of the law's efficacy alone is made non-justiciable. The Court still retains power to determine whether the law has relevancy to the distribution of the ownership and control of the material resources of the community and to the operation of the economic system and concentration of wealth and means of production. If the Court finds that the law has no such relevancy, it will declare the law void if it offends the provisions of Articles 14, 19 and 31.

1944. The fate of a provision included in a law containing the requisite declaration but having no relevancy as discussed will be no better. It will also be void if it offends against Articles 14, 19 and 31 unless it is subordinate, ancillary or consequential to any provision having such relevancy or forms an integral part of the scheme of such provision.

Delegation of Amending Power

1995. As Article 368(2) as now amended provides that 'only' Parliament may amend the Constitution by the prescribed procedure, it is said that Parliament may not delegate the constituent power to any extraneous authority. It is not necessary to decide this question. Assuming that Parliament may not delegate the constituent power, the question still remains whether Article 31C authorise the State Legislatures and Parliament as a legislative body to amend any part of the Constitution.

1996. The power of the Parliament and State Legislatures to make a law with respect to the principles specified in Articles 39(b) and (c) is derived from Article 246 read with Lists I, II and III of the Seventh Schedule. Their legislative power is however not absolute. It is restricted by various fundamental rights including those in Articles 14, 19 and 31, for Article 13(2) expressly prohibits the legislatures from making a law which will be violative of those rights.

1997. What does Article 31C seek to do? One, the non-obstante clause in Article 31C removes the bar of Article 13(2) against law making with respect to the principles specified in Article 39(b) and (c). The bar, however, is not removed in respect of all the fundamental rights. It is removed in respect of the rights in Articles 14, 19 and 31 only. Second, Articles 14, 19 and 31 remain operative as a bar against law-making with respect to all matters other than the principles specified in Articles 39(b) and (c). They are in partial eclipse as regards laws having relevancy to the principles specified in Article 39(b) and (c). This is the true nature and character of Article 31C. We should be guided by what it really does and not by how it seems, by its effect and not by its semantic garb. Looked at in this manner, Article 31C is in the nature of a saving clause to Articles 14, 19 and 31. Instead of being placed at the end of each of these articles, it is placed at one place for the sake of drafting elegance and economy. As a saving clause, Article 31C saves certain kinds of laws from destruction at the hands of Articles 14, 19 and 31.

1998. This effect is brought about directly and immediately by the choice of the constituent power expressed in Article 31C itself and not by the laws which claim its protection. Those laws do not expressly or impliedly take away or abridge the rights in Articles 14, 19 and 31. The constituent power itself has brought about that effect through Article 31C. There is therefore no delegation of the constituent power. In Harishankar Bagla v. The State of Madhya Pradesh MANU/SC/0063/1954 : 1954CriLJ1322 this Court has considered the question of delegation of legislative power. Section 3 of the Essential Supplies. (Temporary Powers) Act, 1946 enabled the Central Government to make orders for maintaining or increasing supplies of any essential commodity or for securing for their equitable distribution and availability at fair prices and for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein Section 6 provided that any order made under Section 5 would have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or any instrument having effect by virtue of any enactment other than the Act. It was argued before the High Court that Section 6 delegated legislative power to the Central Government because an order made under Section 3 had the effect of repealing an existing law. The High Court accepted the argument. But on appeal this Court reversed the judgment of the High Court and held that Section 6 did not delegate legislative power. The Court said:

The effect of Section 6 certainly is not to repeal any one of these laws or abrogate them. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies

(Temporary Powers) Act, 1946 or the orders made thereunder. In other words, the orders made under Section 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the order made under Section 3 it does not operate in that field for the time being. The ambit of its operation is just limited without there being any repeal of any one of its provisions. Conceding, however, for the sake of argument that to the extent of a repugnancy between an order made under Section 3, and the provisions of an existing law the existing law stands repealed by implication, it seems to us that the repeal is not by any Act of the Parliament itself. By enacting Section 6 Parliament itself has declared that an order made under Section 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than that Act. This is not a declaration made by the delegate but the Legislature itself has declared its will that way in Section 6. The abrogation or the implied repeal is by force of the order made by the delegate under Section 3. The power of the delegate is only to make an order under Section 3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act.... There is no delegation involved in the provisions of Section 6 at all... MANU/SC/0063/1954 : 1954CriLJ1322 .

1999. These observations squarely apply to the provisions of Article 31C accordingly hold that there is no delegation of the constituent power.

2000. Since the laws claiming protection of Article 31C themselves do not work an amendment in Articles 14, 19 and 31, it is not necessary that they should pass through the procedure prescribed in Article 368.

The meaning of 'distributed' in Article 39(b)

2001. Sri Palkhiwala has submitted that the nationalisation of property is not contemplated by the word 'distributed' in Article 39(b). But the question will be sufficient at this stage to refer to certain aspects briefly. The State is the representative and trustee of the people. A nationalised property is vested in the State. Through the State, the entire people collectively may be said to own property. It may be said that in this way the ownership of the nationalised property is distributed amongst the people represented by the State. (See Essays in Fabian Socialism, Constable & Co. Ltd. 1949 Edn; p. 40; C.E.M. load, Introduction to Modern Political Theory, Oxford University Press, 1959, pp. 49-50; W.A. Robson, Nationalised Industry and Public Ownership, George Allen and Lenwin Ltd. 1960, pages 461, 462, 476, 477 and 485).

2002. The draft Article 31(ii) became Article 39(b). Prof. K.T. Shah moved an amendment to the draft article to this effect: "that the ownership, control and management of the natural resources of the country in the shape of mines and minerals, wealth, forests, rivers and flowing waters as well as in the shape of the seas along the coast of the country shall be vested in and belong to the country collectively and shall be exploited and developed on behalf of the community by the State as

represented by the Central or Provincial Governments or local governing authority or statutory corporation as may be provided for in each case by Act of Parliament C.A.D. Vol. VII, p. 506.

2003. Replying to Prof. K.T. Shah, Dr. B.R. Ambedkar said : "with regard to his other amendment, viz, substitution of his own clause for Sub-clause (ii) of Article 31, all I want to say is this that I would have been quite prepared to consider the amendment of Prof. Shah if he had shown that what he intended to do by substitution of his own clause was not possible to be done under the language as it stands. So far as I am able to see, I think the language that has been used in the Draft is much more extensive language which includes the propositions which have been moved by Prof. Shah, and I therefore do not see the necessity C.A.D. Vol. VII, p. 518.

2004. In Dr. Ambedkar's view the nationalisation of property is included in the word 'distributed' in Article 39(b).

29th Amendment

2005. This amendment has added to the Ninth Schedule the Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969) and the Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971). The effect of the inclusion of these Acts in the Ninth Schedule is that the Acts get me protection of Article 31B. The argument of Sri Palkhiwala is twofold. First Article 31B is inextricably dovetailed with Article 31A and that accordingly any law which is included in the Ninth Schedule should be connected with agrarian reforms which is the object of Article 31A. If a law included in the Ninth Schedule is not related to agrarian reforms, it cannot by-pass Articles 14, 19 and 31. It is not possible to accept this argument In State of Bihar v. Maharajadhiraja Sir Kameshwar Singh MANU/SC/0019/1952 : [1952]1SCR889 , Patanjali Sastri C.J. rejected this limited meaning of Article 31B. The learned Chief Justice observed:

There is nothing in Article 31B to indicate that the specific mention of certain statutes was only intended to illustrate the application of the general words of Article 31A. The opening words of Article 31B are not only intended to make clear that Article 31A should not be restricted in its application by reason of anything contained in Article 31B and are in no way calculated to restrict the application of the latter article or of the enactments referred to therein to acquisition of estates Ibid, at pages 914-915.

2006. In Wisheshwar Rao v. State of Madhya Pradesh MANU/SC/0020/1952 : [1952]1SCR1020 , Mahajan J. said:

In my opinion, the observation far from supporting the contention, raised negatives it. Article 31B specifically validates certain Acts mentioned in the Schedule despite the provisions of Article 31A and is not illustrative of Article 31A, but stands independent; of it.

(See also N.B. Jeejeebhoy v. Assistant Collector, Thana MANU/SC/0248/1964 : [1965]1SCR636 per Subba Rao J.)

2007. The next argument is that the two Kerala Acts which abrogate the fundamental rights of property are void because the amending power in Article 368 cannot be used for that purpose. I

have already rejected this argument in connection with the 24th and 25th Amendments. So nothing more need be said about it. I hold that the 29th Amendment is valid.

2008. Let me summarise the discussion:

(1) The majority decision in Golaknath is not correct and should be overruled.

(2) The word 'amendment' in Article 368 is broad enough to authorise the varying, repealing or abrogating of each and every provision in the Constitution including Part III.

(3) There are no inherent and implied limitations on the amending power in Article 368.

(4) The 24th, 25th and 29th Amendments are valid in their entirety.

(5) According to Article 31(2) the amount fixed by law or determined in accordance with the principles prescribed by such law for the acquired or requisitioned property cannot be questioned in any court.

(6) The last part of Article 31C does not oust the jurisdiction of courts to examine whether the impugned law has relevancy to the distribution of the ownership and control of the material resources of the community or to the operation of the economic system and the concentration of wealth and means of production.

The Constitution Bench will now decide the case according to law.

Y.V. Chandrachud, J.

2009. I wanted to avoid writing a separate judgment of my own but such a choice seems no longer open. We sat in full strength of 13 to hear the case and I hoped that after a free and frank exchange of thoughts, I will be able to share the views of someone or the other of my esteemed Brothers. But, we were overtaken by adventitious circumstances. Counsel all round consumed so much time to explain their respective points of view that very little time was left for us to elucidate ours. And the time factor threatened at one stage to assume proportion as grave as the issues arising in the case. The Court, very soon will be poorer by the retirement of the learned Chief Justice and that has set a date-line for the judgment. There has not been enough time, after the conclusion of the arguments, for an exchange of draft judgment amongst us all and I have had the benefit of knowing fully the views of only four of us. I deeply regret my inability to share the views of the learned Chief Justice and of Hegde J., on some of the crucial points involved in the case. The views of Ray J. and Palekar J. are fairly near my own but I would prefer to state my reasons a little differently. It is tall to think that after so much has been said by so many of us, I could still present a novel point of view but that is not the aim of this judgment. The importance of the matter under consideration would justify a personal reflection and it is so much more satisfactory in a matter ridden, albeit wrongly, with political over-tones, to state one's opinion firmly and frankly so that one can stand one's ground without fear or favour.

2010. I do not propose to pin-point every now and then what the various counsel have urged before us, for I apprehend that a faithful reproduction of all that has been said will add to the length, not necessarily to the weight, of this judgment. However, lest I may be misunderstood, particularly after the earlier reference to the counsel consuming so much time, let me in fairness say that I acknowledge with gratitude the immense contribution of the learned Counsel to the solution of the intricate problems which arise for decision. Such brilliance, industry, scholarship and precision as characterised the arguments of Mr. Palkhivala, the learned Attorney-General, the learned Advocate-General of Maharashtra and the learned Solicitor-General are rarely to be surpassed. What my judgment contains is truly theirs-if this the least be good, the praise be theirs, not mine.

2011. Lester Barnhardt Orfield, an extreme exponent of the sovereignty of amending power under Article V of the American Constitution, has described that power as 'sui generis'. I will borrow that expression to say that the whole matter before us is truly sui generis. The largest Bench sat for the longest time to decide issues described as being of grave moment not merely to the future of this country but to the future of democracy itself. For a proper understanding of the meaning and scope of the amending provisions contained in Article 368 of our Constitution. We were invited to consider parallel clauses in the Constitutions of 71 countries of the world spread far and wide, with conflicting social and political philosophies. We travelled thus to new lands like Bolivia, Costa Rica, El Salvador, Gautemala, Honduros, Liberia, Nicaragua, Paraguay, Uruguay and Venezuela. Constitutional sojourns to Australia, Canada, Ceylon, France, Germany, Ireland, Switzerland, U.S.S.R. and U.S.A. were of course of frequent occurrence. These excursions were interesting but not proportioned to their utility, for I believe there is no international yardstick with which" to measure the width of an amending power.

2012. We were then taken through the writings of scores of scholars, some of whom have expressed their beliefs with a dogmatism not open to a Judge. There was a faith controversy regarding the credentials of some of them, but I will mention the more-often quoted amongst them, in order to show what a wide and clashing variety of views was fed to us. They are : Granville Austin, James Bryce, Charles Bumdick, John W. Burgess, A.P. Canaway, Dr. D. Conrad, Thomas M. Cooley, Edward S. Crowin, S.A. DeSmith, de Tocqueville, A.V. Dicey, Herman Finer, W. Friedmann, Carl J. Friedrich, James, W. Garner, Sir Ivor Jennings, Arthur Berriedale Keith, Leo Kohn, Harold J. Laski, Bora Laskin, A.H.F. Lefroy, William S. Livingston, William Marbury, C.M. McIlwain, Charles E. Merriam, William B. Munro, Lester B. Orfield, Henry Rottschaeffer, George Skinner, Joseph Story, C.F. Strong, Andre Tunc, Samuel P. Weaver, K.C. Wheare, E. Willis, Westel W. Willoughby, Woodrow Willson, W. Anstay Wynes and Arnold Zurcher.

2013. At one end is the view propounded by writers like James Garner ('Political Science and Government') and William B. Munro ('The Government of the United States') that an unamendable Constitution is the worst tyranny of time or rather the very tyranny of time and that such a Constitution constitutes government by the graveyard. At the other end is the view expressed with equal faith and vigour by writers like Dr. Conrad ('Limitation of Amendment Procedures and the Constituent Power'), William Marbury ('The Limitations upon the Amending Power'-Harvard Law Review, Vol. XXXIII) and George Skinner 'Intrinsic Limitations on the Power of Constitutional Amendment' - Michigan Law Review, Vol. 18 that any amending body organised within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its Constitutional authority; that the constituent assembly cannot

create a second perpetual pouvoir constituent above the nation; that it may be safely premised that the power to amend the Constitution cannot include the power to destroy it; that the greatest delusion of the modern political world is the delusion of popular sovereignty-a fiction under which all the dictators have sprung up and thrived; and that men should be afraid that any Judge complaint enough to read into a Constitution a beneficial power patently not there, might at another time be compliant enough to read within it any or all of the guarantees of their liberty for, a Judge willing to take orders from a benevolent despot might be equally subservient to a malevolent one. Someone has said in a lighter vein that Law comes from the west and Light from the east, but brushing aside such considerations, the conflicting views of these writers, distinguished though they be, cannot conclude the controversy before us, which must be decided on the terms of our Constitution and the genius of our Nation. The learning of these scholars has lighted my path and their views must be given due weight and consideration. But the danger of relying implicitly on everyone of the standpoints of everyone of these authors is apparent from what Andre Tune said in answer to a question put to him at the end of his lecture on 'Government under Law : A Civilian View'. He confessed that the picture drawn by him at one time, of the French Law was too rosy and, on a misconception, it was too gloomy of American law and American life; and that, Frenchmen had by and large rectified to some extent their first impression that it could be extremely dangerous to have a 'Government of Judges', according to the famous slogan. That reminds me of what Sir Ivor Jennings has said in his book 'Some Characteristics of the Indian Constitution' that "It is a useful principle that one should never trust politicians; but it is equally true that in the context of the future one should never trust Constitutional lawyers. On the whole the politician of tomorrow is more likely to be right than the Constitutional lawyer of today." I will therefore make a spare and studied use of the views of some of these men of earning. But I cannot restrain the reflection, in the strain of Dr. Conrad, that after going through all this erudition, one may well conclude this tour d'horizon with the opening quotation of Walter Bagehot's famous treatise: 'On all great subjects, says Mr. Mill, much remains to be said.

2014. Theories of political science, sociology, economics and philosophy were copiously quoted before us. Some of these contain a valiant defence of the right of property without which, it is said, all other fundamental freedoms are as writ in water. Others propound the view that of all fundamental rights, the right to property is the weakest, from which the conclusion is said to follow that it was an error to include it in the chapter on Fundamental Rights. Our decision of this vexed question must depend upon the postulate of our Constitution which aims at bringing about a synthesis between 'Fundamental Rights' and the 'Directive Principles of State Policy', by giving to the former a pride of place and to the latter a place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience.

2015. The charter of United Nations, the Universal Declaration of Human Rights and the European Convention of 1950 were cited to show the significant change in the world thinking towards the rights of individuals which, by these documents have been accorded recognition on an international plane. Will India, the largest democracy in the world, do mere lip service to these precious freedoms and shall it not accord to them their rightful place in the lives of men and in the life of the nation? Such is the dialectical query. Apart from whether the so-called intellectuals-the 'classes non classe' - believe in the communistic millennium of Marx or the individualistic Utopia of Bastiat, the answer to this question must depend upon the stark urgency for striking a balance between the rights of individuals and the general good of the society.

2016. We were also invited to have a glimpse of the social and political philosophies of Grotius (1583-1645), Hobbes (1588-1679), Locke (1632-1704), Wolff (1679-1784), Rousseau (1712-1778), Blackstone (1723-1780), Kant (1724-1804), Bentham (1748-1832) and Hegel (1770-1831). These acknowledged giants of the past-their opinions have a high persuasive value-have expounded with care and deliberation the controversial theory of 'Natural Law' and 'Natural Rights'. Each has his own individualistic approach to the question but arising out of their writings is a far-reaching argument that there are rights which inhere in every man as a rational and moral being; that these rights are inalienable and inviolable; and that the core of such of these rights as are guaranteed by the Constitution cannot be damaged or destroyed. The answer to this contention would consist in the inquiry, firstly as regards the validity of the core and hence the consequences of natural law thinking; and secondly, on whether our organic document supports the inference that natural rights were either recognised by it-explicitly or implicitly-and if so, whether any of such rights were permitted to be reserved by the people without any qualification, so that an individual would be entitled to protect and nurse a minimal core of such rights, uninfluenced by social considerations.

2017. The debates of the Constituent Assembly and of the first Provisional Parliament on which none declined to rely furnished a lively experience. The speeches of Pandit Jawaharlal Nehru, Sardar Vallabhbhai Patel, Dr. Rajendra Prasad, Dr. S. Radhakrishnan, Dr. Ambedkar, Govind Ballabh Pant, Dr. K.M. Munsi, Alladi Krishnaswamy Ayyar, Dr. Shyama Prasad Mookherjee, Acharya Kripalani, Rev. Jerome D'Souza, K. Santhanam, Dr. Punjabrao Deshmukh, H.V. Kamath and others were read out to us in support of the rival stands mainly touching the question of 'inalienability' of fundamental rights and what in those days was freely referred to as the power of 'Eminent Domain'. Some of the speakers were acknowledged national leaders of high stature, some were lawyers of eminence and some had attained distinction in the undefined field of politics and social reform. Their speeches are inspiring and reflect the temper of the times but we cannot pass on the amplitude of the power of amendment of the Constitution by considering what amendments were moved to the corresponding Article 13 of the Constitution and why those proposals for amendment were dropped or not pursued. Similarly, the fact that the First Amendment to the Constitution was passed in 1951 by members of the Constituent Assembly sitting as the Provisional Parliament cannot relieve us of the task of judicially interpreting the validity of the contention that the Fundamental Rights cannot be abridged or taken away or that the core of the essential features of the Constitution cannot be damaged or destroyed. Jawaharlal Nehru undoubtedly said in the Constituent Assembly that "Hundreds of millions of our own people look to us and hundreds of millions of others also look to us; and remember this, that while we want this Constitution to be as solid and as permanent a structure as we can make it nevertheless there is no permanence in Constitution. There should be a certain flexibility. If you make anything rigid and permanent you stop a Nation's growth, the growth of a living vital organic people,"; and again in the Provisional Parliament that "A Constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a Constitution that has past its use. It is in its old age already and gradually approaching its death. A Constitution to be living must be growing; must be adaptable; must be flexible; must be changeable. And if there is one thing which the history of political developments has pointed out, I say with great force, it is this that the great strength of the British Nation and the British people has laid in their flexible Constitution. They have known how to adapt themselves to changes, to the biggest changes, Constitutionally. Sometimes they went through the process of fire and revolution". But he also said when the Constitution (First

Amendment) Bill, 1951, was on the anvil that "so far as this House is concerned, it can proceed in the manner provided by the Constitution to amend it, if this House so choose.

"Now there is no doubt that this House has that authority. There is no doubt about that, and here, I am talking not of the legal or Constitutional authority, but of moral authority, because it is, roughly speaking, this House that made the Constitution." Our task is not to pass on the "moral authority" of the Parliament to amend the Constitution but to determine whether it has "legal or Constitutional authority" to do so. Applying the same test, the speech which the other of the two chief architects of the Constitution-Dr. Ambedkar-made in the Constituent Assembly can raise no estoppel and decide no Constitutional issue. He said: "Now, what is it we do? We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in part III or Article 304, (corresponding to present Article 368), all that is necessary for them is to have two-thirds majority. Then they can amend it." Perhaps, there is a slip in the reference to Part III"-even Homer nods. Perhaps, there is an error on the part of the typist-they often nod. But even granting that the eminent cannot ever err, what was said by Dr. Ambedkar and others in the Constituent Assembly and the Parliament was at best their opinion of law. The true legal position is for us and none else to decide, though within the limits set by the Constitution.

2018. During the course of arguments, a catena of decisions of several courts were cited before us. I thought when the arguments began-yes, I remember it because the commencement of the case is not that lost in antiquity-that the judgments of this Court will form the focus of discussion, foreign decisions making a brief appearance. But in retrospect, I think I was wrong. Learning, like language, is no one's monopoly and counsel were entitled to invite us to consider how heroically courts all over the world had waged battles in defence of fundamental freedoms and on the other hand how, on occasions, the letter of law was permitted to prevail in disregard of evil consequences. Between such extremes, the choice is always difficult and delicate but it has to be made for, in a matter involving the cherished freedoms of the subject and the powers of the Parliament, I do not want to project my freedom to say, as Justice McReynolds of the American Supreme Court did in the National Prohibition Cases involving the validity of the Eighteenth Amendment to the American Constitution, that I am unable to come to any conclusion. But I am quite clear that I have no use for the advice of Walter Berns ('Freedom, Virtue & The First Amendment' 1957), that since there can be no freedom to end freedom even if the people desire to enslave themselves, "the Supreme Court must act undemocratically in order to preserve democracy". Nor indeed shall I walk down the garden-path laid by Dale. Gibson ('Constitution Amendment and the implied Bill of Rights', McGill Law Journal, Volume 12), that "where an issue as vital as the protection of civil liberties is concerned, and where the legislators have demonstrated their inability to provide adequate safeguards, the courts are entirely justified (perhaps even morally obliged) in employing all the ingenuity and imagination at their command to preserve individual rights". Such exhortations have a spartan air which lends colourfulness to arid texts but they overlook the fundamental premise that judges, unlike Manu, are not law-givers. Besides, it cannot ever be too strongly stressed that the power of substantive 'due process of law' available under the Fourteenth Amendment to the American Constitution was considered and rejected by our Constituent Assembly which contained a galaxy of legal talent. In America, under the due process clause, there was a time when the Supreme Court used to invalidate laws because they

were thought to be unwise or incompatible with some particular economic or social philosophy. Thus, in Lochner v. New York, 49 L. ed. 937 the law restricting employment in baker to 10 hours per day and 60 hours per week was regarded as an un-constitutional interference with the right of adult labourers, tut juris, to contract with respect to their means of livelihood. It was decades later that the Court recognised the value and the validity of the dissenting opinion recorded by Justice Holmes:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that State Constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract.* * * The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. * * * But a Constitution...is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution.

In course of time such shining dissents became the majority view and the due process clause came to be construed as permitting enactment of laws limiting the hours of labour in mines, prohibiting employment of children in hazardous occupations, regulating payment of wages, preserving minimum wages for women and children, the 'Blue Sky laws' and the 'Man's Best Friend (Dog) laws'. Even laws like the Kentuky Statutes requiring Banks to turn over to the protective custody of that State deposits that were inactive for 10 or 25 years were upheld, as not involving taking over the property of the banks Anderson National Bank v. Luckett 321 U.S. 233. With this American history before them, the Drafting Committee of the Constituent Assembly chose in Article 21 of our Constitution a phrase of certain import, 'procedure established by law' in place of the vague and uncertain expression 'due process of law'.

2019. We were taken through an array of cases decided by the Privy Council, the Supreme Court of the United States of America, the Supreme Courts of American States, the High Court of Australia, the Supreme Court of Ireland, the High Court of Ireland, the Supreme Court of South Africa and of course our own Supreme Court, the Federal Court and the High Courts. Why, consistently with American practice, we were even referred to briefs which counsel had filed before the Supreme Court in the Rhode Island case. We also spent a little time on the judgment of the District Court of New Jersey in the Sprague case, a judgment which though reversed in appeal by the Supreme Court, was thought to have a certain relevance.

2020. We began, speaking chronologically, with the decision rendered in 1803 by the American Supreme Court in William Marbury v. James Madison 2 L. ed. 69 in which the opinion of the Court was delivered by Chief Justice John Marshall in words whose significance custom has still not staled:

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution is void.

We ended with some of the very recent decisions of this Court like the Bank Nationalisation Case MANU/SC/0011/1970 : [1970]3SCR530 in which a Bench of 11 Judges held by a majority of 10 to 1 that the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 violated the guarantee of compensation under Article 31(2) in that, it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named Banks and by the method prescribed, the amounts so declared could not be regarded as compensation. In between come several decisions, prominent amongst which are: (1) The Privy Council decision in Burah's case (1878, Attorney-General of Ontario case (1911), Vacher & Son's case (1912), McCawley's case (1919), In Re the Initiative and Referendum Act case (1919), Trethowan's case (1932), Moore's case (1935), Ibralabee's case (1964), Ranasinghe's case (1965), Don John Liyanage's case (1965) and Kariapper's case (1967); (2) The decisions of the Federal Court in the C.P. & Berar Reference (1938), Subramaniam Chettiyar's case (1940) and Suraj Narain Anand's case (1941); (3) The decisions of the American Supreme Court in Lochner's case (1904), Hawke v. Smith (1920), the Rhode Island Case (1920), Dillon v. Gloss (1920), Lesser v. Garnett (1922), Ex parte Grossman (1925), Sprague's case (1931); Schneiderman's case (1943) and Skrupa's case (1963); (4) The decisions of the American State Supreme Courts in Livermore v. Waite (1894), Edwards v. Lesseur (1896), Ex parte Dillon (1920) and Geigenspan v. Boding (1920); (5) The decision of the Irish Supreme Court in Ryan's case (1935); (6) The decisions of the Appellate Division of the Supreme Court of South Africa in Harris' case (1952) and in the 'High Court of Parliament Case' (1952); (7) The decisions of the Canadian Supreme Court in the Alberta Press Case (1938), the case of Attorney-General of Nova Scotia (1950), Samur's case (1953) and Switzman's case (1957); and (8) The decisions of the High Court of Australia in Engineer's case (1920), West v. Commonwealth of Australia in (1937), South Australia v. Commonwealth (1942) and State of Victoria v. Commonwealth (1970).

2021. Most of the decisions of the Privy Council noticed above have an important bearing on the issues arising before us and some of these decisions present a near parallel to our Constitutional provisions which require interpretation. They will help a clearer perception of the distinction between 'controlled' and 'uncontrolled' Constitutions, which in turn has an important bearing on the patent distinction between laws made in the exercise of constituent power and those made in the exercise of ordinary legislative power conferred by the Constitution. In this distinction would seem to lie an answer to some of the basic contentions of the petitioner in regard to the interpretation of Articles 13 and 368 of the Constitution.

2022. The decisions of American courts may bear examination, but in their application to the problems arising under our Constitution it would be necessary to keep in constant sight some of the crucial differences between the circumstances attendant on the birth of the two Constitutions, the purposed vagueness of theirs and the finical content of ours and the significant disparity in the structure of their Article 5 and our Article 368. In America, an important principle of Constitutional liberty is that the sovereignty resides in the people and as they could not in their collective character exercise governmental powers, a written document was by common consensus agreed upon in each of the States. The American Constitution, thus, is covenant of the sovereign people with the

individuals who compose the nation. Then, the Supreme Court of America, as said by Sir Henry Main, is not only a most interesting but a unique creation of the fathers of the Constitution. "The success of the experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or modern world." In fact, it is said that the history of the United States has been written not merely in the halls of Congress or on the fields of battle but to a great extent in the Chambers of the Supreme Court. The peculiar role played by that court in the development of the nation is rooted, apart from the implications arising out of the due process clause, in the use of a few skeleton phrases in the Constitution. We have drawn our Constitution differently. It is, however, relevant that American courts were time and again asked to pass on the existence of inherent limitations on the amending power and their attitude to that question requires examination of the claim of writers like Edward Corwin that such arguments were brushed aside by the court as unworthy of serious attention. Another aspect of American decisions which has relevance in this matter is the explication of the concept of amendment in cases like Livermore's (California, 1894), McCleary's (Indiana, 1917) and Ex Parte Dillon's (California, 1920).

2023. Decisions of the Australian High Court like the Engineers' case, the State of Victoria case and the Melbourne Corporation case bear on the central theme of the petitioner's argument that the Parliament which is a creature of the Constitution cannot in exercise of its powers act in derogation of the implications to be derived, say, from the federal nature of the Constitution. That is, some implications must arise from the structure of the Constitution itself.

2024. The two decisions of the South African Supreme Court (Harris' case and the High Court of Parliament case) may serve to throw some light on the concept that the sovereignty of a legislature is not incompatible with its obligation to comply with the requirements of form and manner prescribed by the instrument which regulates its power to make law, for a legislature has no power to ignore the conditions of law-making.

2025. The Canadian cases really bear on the legislative competence of provincial legislatures in regard to individual freedoms or in regard to criminal matters. In Canada, as many as six different views have been propounded on civil liberties and it would appear that though different judges have voiced their opinion in favour of one or the other of such views, none has pronounced finally in favour of any particular view.

2026. A special word must be said of Ryan's case which was decided by the Irish Supreme Court. It was read out in extenso to us and I am free to confess that it evoked in me a quick response. In that case, the three Judges of the Irish High Court and two of the 3 Judges of their Supreme Court rejected contentions similar to those of the petitioner herein but Chief Justice Kennedy, though he did not deal directly with the meaning of the word 'amendment', read limitations on the meaning of that word as a result of various implications derived from the Irish Constitution. Petitioner relies on the lone voice of the Chief Justice. That it is lone is immaterial for our purpose for, after all, the decision has but a persuasive value. Respondents not only distinguished the judgment of the learned Chief Justice but contended that the ratio of the decision is clearly in their favour. Ryan's case became for both sides an 'Irish Golak Nath'.

2027. I have made this compact summary of the decisions to indicate, in the first place, that these perhaps are the only decisions which require close consideration out of the vast multitude of those

that were canvassed before us and secondly, to show the broad trend of judicial thinking on the points pressed upon us. It is impossible, in what I consider to be the true scope of this judgment and unnecessary for what I feel is its real purpose, to deal at length with everyone of these decisions. That task, I think, may well be left to receive a scholarly treatment at the hands of a Constitutional writer. As Judges, we are confronted and therefore concerned with practical problems and it is well to remind ourselves that our principal task is to construe the Constitution and not to construe judgments. Those judgments are without doubt, like lamp-posts on the road to freedom and judges who have shed on that road the light of their learning and the impress of their indepedence, have carved for themselves a niche in the history of civil liberties. See what Frankfurter J. said in Joint Anti-Fascist Ref. Comm. v. McGraths 341 U.S. 123 "Man being what he is, cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights"; or, what Jackson J. said in American Comm. Assoc. v. Doudds 339 U.S. 382 "Our protection against all kinds of fanatics and extremistes, none of whom can be misted with unlimited power over others, lies not in their forbearance but in the limitations of our Constitution"; or, what Patterson J. said in his famous charge to the Jury in Van Home's lessee v. Dorrance 1 L. ed. 391: "The Constitution...is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events.... One encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the Constitution eventually destroyed." These are sonorous words and they will resound through the corridor of Times. But these landmarks in the development of law cannot be permitted to be transformed into weapons for defeating the hopes and aspirations of our teeming millions,-half-clad, half-starved, half-educated. These hopes and aspirations representing the will of the people can only become articulate through the voice of their elected representatives. If they fail the people, the nation must face death and destruction. Then, neither Court nor Constitution will save the country. In those moments of peril and disaster, rights and wrongs are decided not before the blind eyes of justice, not under the watchful eyes of the Speaker with a Marshal standing by but, alas, on streets and in by-lanes, Let us, therefore, give to the Parliament the freedom, within the framework of the Constitution, to ensure that the blessings of liberty will be shared by all. It is necessary, towards that end, that the Constitution should not be construed in a "narrow and pedantic sense Per Lord Wright in James v. Commonwealth of Australia, (1936) A.C. 578" Rules of interpretation which govern other statutes also govern a Constitutional enactment but those "very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting,-to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be Per Higgins J. in Att. Genl. for New South Wales v. Brewery Employees Union, (1908) 6 C.L.R. 469" To put it in the language of Sir Maurice Gwyer C.J., "a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or Constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of government is a living and organic thing, which of all instruments has the greatest claim to be construed ut res magis valeat quam pereat In re. The Central Provinces and Berar Act No. XIV of 1939. (1938) F.C.R. 18." In the exercise of our powers of judicial review, let us therefore not act as a check of the past on the present and the future "...it is the present that represents the will of the people and it is that will that must ultimately be given effect in a democracy Schwartz : A Basic History of the U.S. Supreme Court" The core of social

commitment is the quint-essence of our Constitution and we must approach it in the spirit in which it was conceived. We erected the edifice of our Constitution in the hope that it will last, unlike the French who, on the establishment of the Third Republic in 1875, framed a Constitution in the hope that it will fail, since the majority of the Constitution-makers were not Republicans but Royalists. In the peculiar conditions in which the French Republic found itself, there was only one throne but three claimants for a seat on it. The social philosophy of our Constitution defines expressly the conditions under which liberty has to be enjoyed and justice is to be administered in our country; and shall I say of our country what Justice Fitz gibbon said of his in Ryan's case : "this other Eden demi-Paradise, this precious stone, set in the silver sea, this blessed plot, this earth, this, realm, this" India. If it is not that to-day, let us strive to make it so by using law as a flexible instrument of social order. Law is not, in the phrase of Justice Holmes, a "brooding omnipotence in the sky.

2028. All through the hearing of the case, there was hardly a point on which Dictionaries and Law Lexicons were not cited. See this long list: The Shorter Oxford English Dictionary on historical Principles, 3rd Ed.; Shorter Oxford English Dictionary; Webster's Third New International Dictionary of the English Language; Webster's English Dictionary, 1952; The Random House Dictionary of the English Language; The Reader's Digest Great Encyclopaedic Dictionary; The Dictionary of English Law, Earl Jowitt; The Cyclopaedic Law Dictionary by Frank D. Moore; Prem's Judicial Dictionary-Words & Phrases judicially defined in India England, U.S.A. & Australia; Bouvier's Law Dictionary; Universal English Dictionary; Chamber's 20th Century Dictionary; Imperial Dictionary by Ogilvie; Standard Dictionary by Funk & Wagnalls; Stroud's Judicial Dictionary; Judicial and Statutory Definitions of Words and Phrases, Second Series; Words and Phrases legally defined, John B. Saunders; Wharton's Law Lexicon; Venkataramaiya's Law Lexicon; Law Lexicon of British India-compiled and edited by P. Ramanatha Aiyer; Words and Phrases, Permanent Edition; The Construction of Statutes by Earl T. Crawford; Corpus Juris Secundum and American Jurisprudence. These citations were made in order to explain the meaning, mainly, of the words 'Amendment', 'Constituent', 'Constitution', 'Constitutional law', 'Distribute' and 'law'. This is of course in addition to several decisions which have dealt with these words and phrases in some context or the other. It is useful to have a dictionary by one's side and experience has it that a timely reference to a dictionary helps avert many an embarrassing situation by correcting one's inveterate misconception of the meaning of some words. But I do not think that mere dictionaries will help one understand the true meaning and scope of words like 'amendment' in Article 368 or 'law' in Article 13(2).

These are not words occurring in a school text-book so that one can find their meaning with a dictionary on one's right and a book of grammar on one's left. These are words occurring in a Constitution and one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in "a single complex instrument, in which one part may throw light on another", so that "the construction must hold a balance between all its parts
Per Lord Wright in James v. Commonwealth of Australia (1936) A.C. 578. Such words, having so significant an impact on a power as important as the power to amend the Constitution cannot be read in vacuo. The implication of the social philosophy of the instrument in which they occur and the general scheme of that instrument under which the very object of the conferment of freedoms entrenched in Part III is the attainment of ideals set out in Part IV, must play an important role in the construction of such words. "A word, is not a crystal, transparent and unchanged; it is the skin

of living thought and may vary greatly in colour and content according to circumstances and the time in which it is used Per Holmes J. in Towne v. Eisner 62 L. ed. 372, 376".

2029. 'Sui generis', I called this case. I hope I have not exaggerated its uniqueness. It is manifest that the case has a peculiar delicacy. And now through the cobwebs of 71 Constitutions, dozens of dictionaries, scores of texts and a multitude of cases, I must find a specific answer to the questions raised before us and state it as briefly as I may.

2030. The main argument was made in Writ Petition No. 135 of 1970. The Kerala Land Reforms Amendment Act (35 of 1969) came into force in the State of Kerala on January 1, 1970. The Kerala Land Reforms Amendment Act (25 of 1971) came into force on August 7, 1971. The High Court of Kerala struck down some of the provisions of the Act of 1969 and that judgment was upheld by this Court on April 26, 1972 in Kunjukutty Sahib, etc. v. The State of Kerala and Anr. MANU/SC/0634/1972 : [1973]1SCR326 .

2031. Writ Petition No. 135 of 1970 was filed in this Court under Article 32 of the Constitution on March 21, 1970. During the pendency of this Petition, the Constitution, 24th 25th, 26th and 29th Amendment Acts were passed by the Amending body, that is, the Parliament. The 24th Amendment Act received the President's assent on November 5, 1971. In a House of 518 members of the Lok Sabha, 384 members voted in favour of the 24th Amendment and 23 against it. In a House of 243 members of the Rajya Sabha 177 members voted in favour and 8 against it. As regards 25th Amendment, 355 voted in favour and 20 against it in the Lok Sabha; while in the Rajya Sabha, 166 voted in favour and 20 against it. The voting on the 29th Amendment in the Lok Sabha was 286 in favour and 4 against. In the Rajya Sabha, 170 voted in favour and none against it.

2032. In August, 1972, the Petitioner was permitted by an amendment to challenge the validity of the 24th, 25th and 29th Amendments to the Constitution. These Amendments, after receiving the President's assent, came into force on November 5, 1971, April, 20, 1972 and June 9, 1972.

2033. The Constitution (Twenty-Fourth Amendment) Act, 1971 has by Section 2 thereof added a new Clause (4) to Article 13 of the Constitution providing that nothing in that article "shall apply to any amendment of this Constitution made under Article 368". Section 3(a) of the Amending Act substitutes a new marginal heading to Article 368 in place of the old. The marginal heading of the unamended Article 368 was : "Procedure for amendment of the Constitution." The new heading is: "Power of Parliament to amend the Constitution and procedure therefore." Section 3(b) of the Amending Act inserts a new Sub-section (1) in Article 368 : "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article." Section 3(c) makes it obligatory for the President to give his assent to the Amendment Bill. Section 3(d) adds a new Clause (3) to Article 368 stating that "Nothing in Article 13 shall apply to any amendment

2034. The Constitution (Twenty-Fifth Amendment) Act, 1971 brings about significant changes in Article 31 and introduces a new Article 31C. By Section 2(a) of the Amendment Act, 1971, Clause (2) of Article 31 is substituted by a new clause which permits compulsory acquisition or

requisitioning of the property for a public purpose by authority of law, which provides for acquisition or requisitioning of the property "for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law." No such law can be called in question on the ground that the amount is not adequate or that the whole or any part of it is to be given otherwise than in cash. The newly added proviso to Article 31(2) makes an exception in regard to properties of educational institutions of minorities. If such properties are compulsorily acquired, the State has to ensure that the amount fixed for acquisition is such as would not restrict or abrogate the right guaranteed under Article 30(1) of the Constitution. Section 2(b) of the Amendment Act, 1971 adds a new Clause 2(b) to Article 31 which provides that nothing in Article 19(1)(f) shall affect any such law as is referred to in Article 31(2) as substituted. Section 3 of the Amendment Act, 1971, introduces a new Article 31C, which provides that notwithstanding anything contained in Article 79, no law giving effect to the policy of the State towards securing the principles mentioned in Article 39(b) or (c) shall be deemed to be void on the ground that it takes away or abridges the rights conferred by Articles 14, 19 and 31. No law containing a declaration that it is for giving effect to such policy can be called in question in any court on the ground that it does not give effect to such policy. If such a law is made by the Legislature of a State, the provisions of Article 31C can apply only if the law received the assent of the President.

2035. By the Constitution (Twenty-Ninth Amendment) Act, 1972, the two Kerala Acts - Act 35 of 1969 and Act 25 of 1971 - were included in the Ninth Schedule thereby giving them the protection of Article 31B. By such inclusion, the challenge made by the petitioner to these two Acts by his Writ Petition filed in March, 1970 became infructuous depending upon the validity of the 29th Amendment Act.

2036. Shorn of refinements, the main questions which arise for decision are: (1) What is the true ratio and effect of the decision in the Golak Nath case? (2) Should that ratio be upheld? (3) If the majority decision in the Golak Nath case be incorrect, what is the extent of the inherent or implied limitations, if any, on the power of the Parliament to amend the Constitution by virtue of its power under Article 368? and (4) Are the 24th, 25th and 29th Constitution Amendment Acts valid?

2037. The Constitution of India came into force on January 26, 1950 and on June 18, 1951 the Constitution (First Amendment) Act, 1951 was passed by the Parliament, Sections 2, 3, 4 and 5 of the Amending Act made significant amendments resulting to a large extent in the abridgement of Fundamental Rights conferred by Part III of the Constitution. By Section 4, a new Article 31A was inserted and by Section 5 was inserted Article 31B for the validation of certain Acts and Regulations. These Acts and Regulations were enumerated in the Ninth Schedule to the Constitution, which itself was added by Section 14 of the Amendment Act.

2038. The validity of the Amendment Act, 1951 was challenged in this Court in Sri Shankar Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 : [1952]1SCR89 . It was urged in that case that the Amendment. Act in so far as it purported to take away or abridge the rights conferred by Part III felt within the prohibition of Article 13(2) and was therefore un-constitutional. Patanjali Sastri J. who spoke for the unanimous court rejected this argument by holding that although 'law' would ordinarily include Constitutional law, there was a clear demarcation between ordinary law made in the exercise of legislative power and Constitutional

law made in exercise of constituent power; and therefore, in the absence of a clear indication to the contrary, Fundamental Rights were not immune from Constitutional amendment. The challenge to the Amendment Act, 1951 was on these grounds rejected.

2039. The Constitution (Fourth Amendment) Act, 1955 abridging the Fundamental Rights guaranteed by Article 31 was passed on April 27, 1955. Section 2 of this Act introduced a radical change by providing that no law to which Article 31(2) was applicable shall be called in question in any court on the ground that the compensation provided by that law was not adequate. By Section 3 of the Amending Act a new and extensive Clause (1) was substituted for the old Clause (1) of Article 31A, with retrospective effect. The newly added provision opens with a non-obstante clause: "Notwithstanding anything contained in Article 13" and provides that no law providing for matters mentioned in new Clauses (a) to (s) Article 31A(1), shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. No challenge was ever made to these amendments.

2040. The Constitution (Seventeenth Amendment) Act, 1964 came into force on June 20, 1964. This Act, by Section 2(ii) inserted a new definition of "estate" in Article 31A(2)(a) with retrospective effect and added as many as 44 Acts in the Ninth Schedule, thus extending the protection of the Schedule to 64 Acts in all.

2041. The validity of the Seventeenth Amendment Act was challenged before this Court in Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 . Out of the several arguments which were urged in that case the only one which is relevant for the present purpose is that the Amendment Act was void in view of the provisions of Article 13(2), in so far as the Act purported to abridge the Fundamental Rights guaranteed by Part III. Delivering the majority judgment, Gajendragadkar C.J. took the view on behalf of himself, Wanchoo and Raghubar Dayal JJ. that the expression 'amendment of the Constitution' plainly and unambiguously means amendment of all the provisions of the Constitution and therefore the amending power conferred by Article 368 extended to all the provisions of the Constitution. The majority judgment rejected the contention that the word 'law' in Article 13(2) would take in Constitution Amendment Acts passed under Article 368, as there was a clear distinction between the constituent power conferred by Article 368 and the ordinary legislative power and Article 13(2) would take in laws made in the exercise of the latter power only. Hidayatullah J. and Mudholkar J. concurred in the final conclusion but by separate judgments they doubted the majority view and observed that it was possible that Article 368 merely laid down the procedure for amending the Constitution but did not confer the power to amend the Constitution. Both the learned Judges however stated expressly that they should not be taken to have expressed a final opinion on that question. The seeds of the controversial decision in I.C. Golak Nath and Ors. v. State of Punjab and Anr. MANU/SC/0029/1967 : [1967]2SCR762 were sown by the doubt thus expressed by Hidayatullah J. and Mudholkar J.

2042. The decision in the Golak Nath case was rendered by a Bench of 11 Judges of this Court on February 27, 1967. The petitioners therein had challenged the validity of Punjab Act 10 of 1953 and the Mysore Act 10 of 1962 as amended by Act 14 of 1965, on the ground that these Acts violated their Fundamental Rights, alleging that though the impugned acts were included in the Ninth Schedule, they did not receive the protection of the 1st, 4th and 17th Amendment Acts. It

was common case that if the 17th Amendment which included the impugned Acts in the Ninth Schedule was valid, the Acts would not be open to challenge on any ground.

2043. Chief Justice Subba Rao delivered the leading majority judgment for himself and for Justices Shah, Sikri, Shelat and Vaidilingam. Hidayatullah J. concurred with their conclusion but delivered a separate judgment. Wanchoo J. delivered the leading minority judgment on behalf of himself and Justices Bhargava and Mitter. Justice Bachawat and Justice Ramaswami concurred by their separate judgments with the view expressed in the leading minority judgment.

2044. The leading majority judgment recorded the following conclusions:

1. That Fundamental Rights are the primordial rights necessary for the development of human personality and as such they are rights of the people preserved by the Constitution.

2. The Constitution has given by its scheme a place of permanence to the fundamental freedoms. In giving to themselves the Constitution the people have reserved the fundamental freedoms to themselves. The incapacity of the Parliament, therefore, in exercise of its amending power to modify, restrict or impair fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms.

3. Article 368 assumes the power to amend found elsewhere. In other words, Article 368 does not confer power on Parliament to amend the Constitution but merely prescribes the procedure for the exercise of such power to amend.

4. The power to amend is to be found in Articles 245 and 248 read with Entry 97 in List I of the Seventh Schedule to the Constitution.

5. In the exercise of the power of amendment, Parliament could not destroy the structure of the Constitution but it could only modify the provisions thereof within the framework of original instrument for its better effectuation. In other words, the provisions of the Constitution could undoubtedly be amended but not so as to take away or abridge the Fundamental Rights.

6. There is no distinction between the power to amend the Constitution and the ordinary power to make laws.

7. Article 13(2) which contains an inclusive definition, prima facie takes in Constitutional law.

8. The residuary power of Parliament could be relied upon to call for a Constituent Assembly for making the new Constitution or radically changing it. (This opinion however was tentative and not final).

9. The Seventeenth Amendment Act impugned before the court as also the First, Fourth and Sixteenth Amendments were Constitutionally invalid. Declaring these amendments invalid was, however, likely to lead to confusion and chaos and therefore these amendments would be deemed to be valid except for future purposes, by application of the principle of 'prospective invalidation'.

10. In future, Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the Fundamental Rights.

2045. Hidayatullah J. agreed with the final decision expressed in the leading majority judgment and his views can be summarised as follows:

1. The power of amendment must be possessed by the State. One could not take a narrow view of the word 'amendment' as including only minor changes within the general framework. By an amendment, new matter may be added, old matter removed or altered.

2. Article 368 outlines a process which if followed strictly results in the amendment of the Constitution. The article gives power to no particular person or persons.

3. The procedure of amendment, if it can be called a power at all is a legislative power but it is sui generis and outside the three Lists of Schedule Seven of the Constitution.

4. There is no distinction in our Constitution between laws made ordinarily and laws made occasionally for the amendment of the Constitution. therefore, Constitutional amendments must fall within the scope of Article 13(2).

5. The whole Constitution is open to amendment, only two dozen articles being outside the reach of Article 368; that too, because the Constitution has made them fundamental.

6. Fundamental Rights cannot be abridged or taken away by the ordinary amending process. Parliament must amend Article 368 to convoke another Constituent Assembly, pass a law under Item 7 of List I to call a Constituent Assembly and then that Assembly may be able to abridge or take away the Fundamental Rights. The Parliament was constituted with powers of legislation which included amendments of the Constitution but only so far as Article 13(2) allowed.

7. Parliament had no power to amend Article 368 so as to confer on itself constituent powers over the Fundamental Rights. This would be wrong and against Article 13(2).

8. The conclusion recorded by the leading majority judgment was correct, not on the ground of prospective invalidation of laws but on the ground of acquiescence. The First, Fourth and Seventh Amendments were part of the Constitution by acquiescence for a long time and could not therefore be challenged. They also contained authority for the Seventeenth Amendment.

2046. Wanchoo J. who delivered the leading minority judgment came to the following conclusions:

1. Both the procedure and the power to amend the Constitution are to be found in Article 368 and not in Entry 97 of List I.

2. The word 'amendment' must be given its full meaning, that is, that the power was not restricted to improvement of details but extended to the addition to or substitution or deletion of existing provisions.

3. In exercise of the power conferred by Article 368 it was competent to the Parliament by observing the procedure prescribed therein to amend any provision of the Constitution.

4. The word 'law' in Article 13(2) could only take in laws made by Parliament and State Legislatures in the exercise of their ordinary legislative power but not amendments made under Article 368.

5. The power to amend being a constituent power cannot be held to be subject to any implied limitations on the supposed ground that the basic features of the Constitution could not be amended.

2047. Bachawat J. agreed with Wanchoo J. and stated:

1. No limitation on the amending power could be gathered from the language of Article 368. Each and every part of the Constitution could therefore be amended under that Article.

2. The distinction between the Constitution and the laws is so fundamental that the Constitution cannot be regarded as a law or a legislative act.

3. Article 368 indicates that the term 'amend' means 'change'. A change is not necessarily an improvement.

4. It was unnecessary to decide the contention whether the basic features of the Constitution, as for example, the republic form of government or the federal structure thereof could be amended, as the question did not arise for decision.

2048. Ramaswami J. adopted a similar line of reasoning and held:

1. That the definition of 'law' in Article 13(3) did not include in terms 'Constitutional amendment'. Had it been intended by the Constitution-makers that the Fundamental Rights guaranteed by Part III should be completely outside the scope of Article 368 it is reasonable to assume that they would have made an express provision to that effect.

2. The Preamble to the Constitution which declared India as a sovereign democratic republic was not beyond the scope of the amending power; similarly certain other basic features of the Constitution like those relating to distribution of legislative power, the parliamentary power of Government and the establishment of the Supreme Court and the High Courts were also not beyond the power of amendment.

3. Every one of the articles of the Constitution is amendable under Article 368 and there was no room for any implication in the construction of that article.

2049. It is thus clear that the majority of Judges in the Golak Nath case consisting of Justices Wanchoo, Hidayatullah, Bhargava, Mitter, Bachawat and Ramaswami rejected the argument that Article 368 merely prescribes the procedure to be followed in amending the Constitution. They held that Article 368 also conferred the power to amend the Constitution. They rejected the

argument that the power to amend could be found in Entry 97 of List I. The majority of Judges consisting of Subba Rao, C.J. and his 4 colleagues as well as Hidayatullah J. held that there was no distinction between constituent power and legislative power and that the word 'law' used in Article 13(2) includes a law passed by Parliament to amend the Constitution. Subba Rao C.J. and his 4 colleagues suggested that if a Constitution had to be radically altered the residuary power could be relied upon to call for a Constituent Assembly. Hidayatullah J. took a different view and held that for making radical alterations so as to abridge Fundamental Rights Article 368 should be suitably amended and the Constituent Assembly should be called after passing a law under Entry 97 in the light of the amended provisions of Article 368. It is important to mention that all the eleven Judges who constituted the Bench were agreed that even Fundamental Rights could be taken away but they suggested different methods for achieving that purpose. Subba Rao C.J. and his 4 colleagues suggested calling of a Constituent Assembly; Hidayatullah J. suggested an amendment of Article 368 for calling a Constituent Assembly after passing a law under Entry 97; the remaining 5 Judges held that the Parliament itself had the power to amend the Constitution so as to abridge or take away the Fundamental Rights.

2050. The leading majority judgment did not decide whether Article 368 itself could be amended so as to confer a power to amend every provision of the Constitution. The reason for this was that the Golak Nath case was decided on the basis of the unamended Article 368. The question whether Fundamental Rights could be taken away by amending Article 368 was not before the Court. The question also whether in future Parliament could by amending Article 368 assume the power to amend every part and provision of the Constitution was not in issue before the Court. Such a question could arise directly, as it arises now, only after an amendment was in fact made in Article 368, and the terms of that amendment were known. The observation in the leading majority judgment putting restraints on the future power of the Parliament to take away Fundamental Rights cannot therefore constitute the ratio of the majority judgment. The learned Judges did not evidently consider that in future the chapter on Fundamental Rights could be made subject to an amendment by first amending Article 368 as is now done under the Twenty-Fourth Amendment.

2051. It shall have been seen that the petitioners in the Golak Nath case won but a Pyrrhic victory. They came to the Court, not for the decision of an academic issue, but to obtain a declaration that laws which affected their fundamental rights were un-constitutional. Those laws were upheld by the court but I suppose that the petitioners left the court with the consolation that posterity will enjoy the fruits of the walnut tree planted by them. But it looks as if a storm is brewing threatening the very existence of the tree.

2052. As stated above, 6 out of the 11 learned Judges held in the Golak Nath case that Article 368 prescribed not merely the procedure for amendment but conferred the power to amend the Constitution and that the amending power cannot be traced to the Residuary Entry 97 of List I, Schedule VII read with Articles 245, 246 and 248 of the Constitution. I respectfully adopt this view taken by the majority of Judges.

2053. Part XX of the Constitution is entitled "Amendment of the Constitution", not "Procedure for Amendment of the Constitution". Article 368, which is the only article in Part XX must therefore be held to deal both with the procedure and the product of that procedure. The marginal note to Article 368: "Procedure for Amendment of the Constitution" was only a catchword and was in fact

partially correct. It did not describe the consequence of the adoption of the procedure because the title of the part described it clearly. The justification of the somewhat inadequate marginal note to Article 368 can be sought in the fact that the article does not confer power on any named authority but prescribes a self-executing procedure which if strictly followed results in this : "the Constitution shall stand amended". The history of the residuary power since the days of the Government of India Act, 1935, and the scheme of distribution of legislative power show that if a subject of legislative power was prominently present to the minds of the framers of the Constitution, it would not have been relegated to a Residuary Entry, but would have been included expressly in the legislative list-more probably in List I. That the question of Constitutional amendment was prominently present to the minds of the Constitution-makers is clear from the allocation of a separate Part-Part XX-to "Amendment of the Constitution". Then, the legislative power under Entry 97, List I, belongs exclusively to the Parliament. The power to amend the Constitution cannot be located in that Entry because in regard to matters falling within the proviso to Article 368, Parliament does not possess exclusive power to amend the Constitution. The Draft Constitution of India also points in the direction that the power of amendment cannot be located in the Residuary Entry. Draft Article 304, which corresponds to Article 368, conferred by Sub-article (2) a limited power of amendment on the State Legislatures also and those Legislatures neither possessed the residuary power of legislation nor did the State List, List II, include 'Amendment of the Constitution' as a subject of legislative power. Finally, the power to legislate under Article 245 is "subject to the provisions of this Constitution", so that under the residuary power, no amendment could be made to any part of the Constitution, as any amendment is bound, to some extent, to be inconsistent with the article to be amended.

2054. Having located the amending power in Article 368 and having excluded the argument that it can be traced to Entry 97 of List I, it becomes necessary to determine the width and scope of that power. Is the power unfettered and absolute or are there any limitations-express, implied or inherent on its exercise?

2055. Counsel for the petitioner urges : (1) That the word 'amendment' is not a term of art and has no precise and definite, or primary and fundamental, meaning; (2) That Article 368 carries vital implications by its very terms and there is inherent evidence in that Article to show chat in the context thereof the word 'amendment' cannot cover alterations in, damage to, or destruction of any of the essential features of the Constitution; (3) That Article 13(2) by taking in Constitutional amendments constitutes an express limitations on the power of amendment; (4) That there are implied and inherent limitations on the amending power which disentitle Parliament to damage or destroy any of the essential features, basic elements or fundamental principles of the Constitution; and (5) That in construing the ambit of the amending power, the consequences on the power being held to be absolute and unfettered must be taken into account. Counsel says that Article 368 should not be read as expressing the death-wish of the Constitution or as being a provision for its legal suicide. Parliament, he says, cannot arrogate to itself, under Article 368, the role of an Official Liquidator of the Constitution. Each of these propositions is disputed by the Respondents as stoutly as they were asserted.

2056. 'Amendment' is undoubtedly not a term of art and the various dictionaries, texts and law lexicons cited before us show that the word has several shades of meaning. (See for example the meanings given in The Shorter Oxford English Dictionary on historical Principles, 3rd Ed.;

Webster's Third New International Dictionary of the English Language; The Random House Dictionary of the English Language; The Dictionary of English Law, Earl Jowitt; Judicial and Statutory Definitions of Words and Phrases, Second Series; Words and Phrases legally defined, John B. Saunders; Wharton's Law Lexicon, 14 Ed.; Words and Phrases Permanent Edition; and The Construction of Statutes by Earl T. Crawford.)

2057. Some of the American State Supreme Courts have taken the view that the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed. (See Livermore v. Waite (1894) 102 Cal. 113; McFadden v. Jordan 32 Cal. 330; Foster v. Evatt 144 Ohio 65. Another line of decisions, again of the American State Supreme Court, has accepted a wider meaning of the word 'amendment' so as to include within it even a 'revision' of a Constitutional document. (See Edwards v. Lesseur, Southwestern Reporter, Vol. 33, p. 1120; Ex Parte Dillon, Federal Reporter No. 262, p. 563; Staples v. Gilmer, American Law Reports Annotated, Vol. 158, p. 495).

2058. In brief, it would be correct to say that at least three different meanings have been generally given to the word 'amendment':

(a) to improve or better; to remove an error;

(b) to make changes which may not improve the instrument but which do not alter, damage or destroy the basic features, essential elements or fundamental principles of the instrument sought to be amended; and

(c) to make any changes whatsoever.

2059. These texts and authorities are useful in that they bring a sense of awareness of the constructional difficulties involved in the interpretation of a seemingly simple word like 'amendment'. But enriched by such awareness, we must in the last analysis go to our own organic document for determining whether the word 'amendment' in Article 368 is of an ambiguous and uncertain import.

2060. The various shades of meaning of the word 'amendment' may apply differently in different contexts, but it seems to me that in the context in which that word occurs in Article 368, it is neither ambiguous nor amorphous, but has a definite import.

2061. The proviso to Article 368 furnishes intrinsic evidence to show that the word 'amendment' is used in that article not in a narrow and insular sense but is intended to have the widest amplitude. Article 368 provides that "An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament", and after the Bill is passed by the prescribed majority, "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso says that the amendment shall also require to be ratified by the State legislatures of not less than one-half of the States if "such amendment seeks to make any change in" the matters mentioned in Clauses (a) to (e) of the proviso. "Such amendment" obviously means 'amendment' referred to in the main body of Article 368 and thus the article itself envisages that the amendment may take the form of 'change'. There is in this case a dictionary at every corner for

every word and we were referred to various meanings of 'change' also. It is enough to cite the meaning of the word from the Oxford English Dictionary (Vol. I, p. 291): "Change: substitution...of one thing for another. Alteration in the state or quality of any thing". Webster's 3rd New International Dictionary Vol. III pp. 373-4, gives the same meaning. It is clear beyond doubt that 'change' does not mean only 'such an addition...within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed'.

2062. Paragraph 7 of Part D of the Fifth Schedule and paragraph 21 of the Sixth Schedule also furnish similar proof of the meaning of the word 'amendment'. These two paragraphs provide for amendment of the respective Schedules in identical terms:

Amendment of the Schedule.-(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

2063. Two things emerge from these provisions of Paragraphs 7 and 21 of the Fifth and Sixth Schedules. Firstly, that the concept of "amendment" as shown by Clause (1) takes in "addition, variation or repeal" and secondly, that an amendment even by way of "addition, variation or repeal" would fall within the terms of Article 368. It is expressly excepted from the scope of that article so that it may not fall within it, which it otherwise would.

2064. The expression 'amendment' was used in a large number of articles of the Constitution as originally enacted: Articles 4(1)(2), 108(4), 109(3)(4), 111, 114(2), 169(2), 196(2), 198(3) and (4), 200, 201, 204(2), 207(1)(2)(3), 240(2), 274(1), 304(b) and 349. A reference to the content and the subject matter of these articles would show that in almost every one of the cases covered by these articles, 'amendment' would be by way of addition, variation or repeal.

2065. In several provisions of the original Constitution, different expressions were used to indicate conferment of the amending power. Article 35(b) called it "altered, repealed, amended"; Article 243(1) described it as "repeal or amend". The proviso to Article 254(2) described it as "adding to, amending, varying Or repealing"; and Article 392(1) used the expression "such adaptations, whether by way of modification, addition or omission". The English language has a rich vocabulary and there are such nice and subtle differences in the shades of meaning of different words that it is said that there are, in that language, no synonyms. But I find it impossible to believe that the various expressions enumerated above have behind them any calculated purpose or design. Their use may easily, though with a little generosity, be attributed to a common failing to attain elegance of language. Reading more than meets the eye tends to visit the writing with the fate reserved for the poems of Sir Robert Browning. When he wrote them, two persons knew what they meant - he and the God. After hearing the critics, God alone knew what the poet intended:

2066. Constitutions of several countries of the world show the words 'amendment', 'alteration', 'revision' and 'change' are used promiscuously. The Constitutions of Liberia, Trinidad and Tobago

show that there is no difference in meaning between 'amendment' and 'alteration'. Those of Somalia, Jordan, Kuwait, Lebanon, and the Vietnam Democratic Republic show that there is no difference between 'amendment' and 'revision'. The Constitution of Belgium shows that the words 'revision' and 'alteration' are used in the same sense. The Constitution of Barundi shows that 'amendment' denotes 'change'. The Constitutions of Monaco, Costa Rica, Cuba and Nicaragua show that 'amendment' can be total or partial.

2067. Dr. D. Conrad says of Article 368, in "Limitation of Amendment Procedures and the Constituent Power" that "it is hardly possible to restrict the legal meaning of amendment to 'improvement', nor can it be denied that by amendment complete articles may be removed or replaced". The author is justified in this view. The Indian Constitution is neither the first written Constitution of the world nor of course the last. Since the time that the first written Constitution, namely the American Constitution was framed in 1787 until today, the expression 'amendment' is known to occur at least in 57 Constitutions out of 71. It is inconceivable that the power of changing a written instrument of fundamental importance would be so expressed for so long and in the Constitutions of so many countries, if the word 'amendment' was of doubtful import.

2068. On August 21, 1946, the Constituent Assembly passed the Government of India (Third Amendment) Act, 1949, which substituted a new Section 291 in the Government of India Act, 1935 giving to the Governor General the power to make such amendments as he considered necessary, whether by way of "addition, modification or repeal" in certain provisions. Shortly thereafter, that is, on September 17, 1949, the Constituent Assembly debated Article 304 corresponding to present Article 368, using the word 'amendment' simpliciter. In the debate on Article 304 amendment No. 3239 moved by Shri H.V. Kamath which sought to introduce in that article the words "whether by way of variation, addition or repeal" was rejected.

2069. I am unable to read in this legislative history an inference that the word 'amendment' was used in Article 304 in order to curtail the scope of the amending power. It is significant that the Government of India (Third Amendment) Act, 1939 was described in its title as an "Act to further amend the G.I. Act 1935" and the Preamble stated that it was expedient to amend the Government of India Act, 1935. By Section 4 the old Section 291 was "repealed" totally and the new Section 291 was "substituted". By Section 3 a new sub-section was "inserted". By Section 5 a new item was "substituted" and totally new item Nos. 31B and 31C were "inserted". The Act of 1949 therefore leaves no room for doubt that the word 'amend' included the power of addition, alteration and repeal. Apart from this it is well recognized that the use of different words does not necessarily produce a change in the meaning. (See Maxwell 'Interpretation of Statutes' 12th Ed., pp. 286 to 289; State of Bombay v. Heman Alreja MANU/MH/0026/1952 : AIR1952Bom16 per Chagla C.J. and Gajendragadkar J.).

2070. Finally, it is important that 5 out of the 11 Judges in the Golak Nath case took the view that the word 'amendment' must be given a wide meaning. The leading majority judgment did not consider that question on the ground that so far as Fundamental Rights were concerned, the question could be answered on a narrower basis. Ramaswami J. also did not consider the meaning of the word 'amendment'. However, Wanchoo J. who delivered the leading minority judgment, Hidayatullah J. and Bachawat J. took the view that the word must be given a wide meaning.

According to Hidayatullah J., "By an amendment new matter may be added, old matter removed or altered".

2071. Thus the word 'amendment' in Article 368 has a clear and definite import and it connotes a power of the widest amplitude to make additions, alterations or variations. The power contained in Article 368 to amend the Constitution is indeed so wide that it expressly confers a power by Clause (e) of the proviso to amend the amending power itself. No express restraint having been imposed on the power to amend the amending power, it is unnecessary to seek better evidence of the width of the power of amendment under our Constitution.

2072. Article 368, manifestly, does not impose any express limitations. The reason for this is obvious. The power of amendment is in substance and reality a power to clarify the original intention obscured, for example, by limitations of language and experience, so as to adjust the intention as originally expressed to meet new challenges. As a nation works out its destiny, new horizons unfold themselves, new challenges arise and therefore new answers have to be found. It is impossible to meet the new and unforeseen demands on the enervated strength of a document evolved in a context which may have largely lost its relevance. The power of amendment is a safety valve and having regard to its true nature and purpose, it must be construed as being equal to the need for amendment. The power must rise to the occasion. According to Friedrich Constitutional Government & Democracy, 4th Ed. p. 139, "The constituent power bears an intimate relation to revolution. When the amending provisions fail to work in adjusting the Constitutional document to altered needs, revolution may result." That is why, the rule of strict construction which applies to a penal or taxing statute is out of place in a Constitutional Act and a 'construction most beneficial to the widest possible amplitude" of its powers must be adopted British Coal Corporation v. Rex 1935 (A.C.) 500.

2073. If, on the terms of Article 368 the power of amendment is wide and unfettered, does Article 13(2) impose any restraint on that power? Hereby hangs a tale. A majority of Judges held in the Golak Nath case that the power of amendment was to be traced to Article 368. But a majority, differently composed, held that amendment of the Constitution was 'law' within the meaning of Article 13(2) and, therefore, the Parliament had no power to take away or abridge the rights conferred by Part III of the Constitution. This finding contained in the judgment of the leading majority and of Hidayatullah J. is the nerve of the decision in the Golak Nath case. It is therefore necessary to consider that question closely.

2074. I will set out in juxtaposition Articles 13(2), 245 and 368 in order to highlight their inter-relation:

Article 13(2)	Article 245	Article 368
The State shall not make any law which takes away or abridges the rights conferred by this part.	Subject to the Provisions of this Constitution Parliament may make laws for the whole or any part of the territory of India. (emphasis supplied)	Amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of parliament, and when the Bill, is passed each House by a majority of total Membership of that House and by a majority of not less than two thirds of the members of that House present and voting, it shall be presented to the president for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

Article 13(2) clearly echoes the language of Article 245. Article 245 gives the power to 'make laws', while Article 13(2) imposes a limitation on the exercise of the power to 'make laws'. As between the two articles, Article 13(2) is the paramount law for, Article 245 is expressly subject to all the provisions of the Constitution including Article 13(2).

2075. Article 368 avoids with scrupulous care the use of the word 'law', because there is a fundamental distinction between Constitutional law and ordinary law. The term 'Constitutional law' is never used in the sense of including the laws made under the Constitution. (See Jennings - The Law and the Constitution, 5th Ed., pp. 62-65). Constitutional law is the fundamental, superior or paramount law. Its authority and sanction are higher than those of ordinary laws. (Encyclopaedia Britannica, Vol. VI, Constitution and Constitutional Law, p. 314). As stated by Dicey in his 'Introduction to the study of the Law of the Constitution' (10th Ed.,) pp. 149-151), the legislature in a federal Constitution is a subordinate law-making body whose laws are in the nature of bye-laws within the authority conferred by the Constitution.

2076. Articles 3, 4, 169, Paragraph 7 of the Fifth Schedule and Paragraph 21 of the Sixth Schedule emphasises an important aspect of the distinction between Constitutional law and ordinary law. What is authorised to be done by these provisions would normally fall within the scope of Article 368. In order however to take out such matters from the scope of that article and to place those matters Within the ordinary legislative sphere, special provisions are made in these articles that any laws passed thereunder shall not be deemed to be an amendment of the Constitution for the purposes of Article 368.

2077. Article 13(1) provides:

Laws inconsistent with or in derogation of the fundamental rights.-(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are in consistent with the provisions of this Part shall, to the extent of such inconsistency, be void.

This article deals with the effect of inconsistency between the provisions of Part III and the pre-Constitution laws and provides that to the extent of such inconsistency the pre-Constitution laws shall be void Article 13(2) pursues the same strain of thought by making void post Constitution laws to the extent of their inconsistency with the provisions of Part III. The pre-Constitution and the post-Constitution laws dealt with by the two clauses of Article 13 are in nature and character identical. They are ordinary laws as distinguished from Constitutional laws.

2078. Counsel for the petitioner urged that Article 395 of the Constitution repealed only the Indian Independence Act, 1947 and the Government of India Act of 1935 and under Article 372, notwithstanding the repeal of these two enactments, all the laws in force in the territory of India immediately before the commencement of the Constitution continued in force until altered, repealed or amended. It is urged that several Constitutional laws of the then Indian States were in force on the 26th January, 1950 and the object of Article 13(1) was partly to save those laws also. There is no substance in this contention. It is in the first place a proposition of doubtful authority that the Indian States had a Constitution properly so-called. But even assuming that such Constitutions were at one time in force, they would cease to be in operation as Constitutional Laws on the integration of the States with the Indian Union. Article 13(1) therefore does not include any Constitutional laws.

2079. Article 13(3)(a) contains an inclusive definition of 'law' as including any Ordinance, order bye-law, rule regulation, notification, custom or usage having in the territory of India the force of law. It is surprising that the necessity to include amendments of the Constitution within the inclusive definition of 'law' should have been overlooked if indeed Article 13(2) was intended to take in Constitutional amendments. There is high and consistent authority for the view that Constitution is the fundamental or basic law, and that it is a law of superior obligation to which the ordinary law must conform. (Corpus Juris Secundum, Vol. 16, pp. 22-25; Weaver-Constitutional Law and its Administration (1946) p. 3; Burgess-Political Science and Constitutional Law, Vol. 1, pp. 145-146). Unless, therefore, Constitutional law was expressly included in Article 13(3)(a), it would fall outside the purview of Article 13(2).

2080. In America, there is a large volume of authority that the legislatures of the various States, in initiating Constitutional amendments do not exercise ordinary legislative power. This distinction is brought out clearly by saying that in relation to the federal Constitution of America, a State Constitutional provision or amendment is 'law' within the meaning of the federal Constitution. Again, when under Article V of the Constitution the Congress makes a proposal for amendment and the States ratify it, neither the Congress nor the States are legislating. (Corpus Juris Secundum, Vol. 16, pp. 48, 49; Charles R. Burdick-The Law of the American Constitution, pp. 40-42).

2081. The fundamental distinction between Constitutional law and ordinary law lies in the criterion of validity. In the case of Constitutional law, its validity is inherent whereas in the case of an ordinary law its validity has to be decided on the touchstone of the Constitution, With great respect, the majority view in Golak Nath case, did not on the construction of Article 13(2), accord due importance to this essential distinction between legislative power and the constituent power. In a controlled Constitution like ours, ordinary powers of legislatures do not include the power to amend the Constitution because the Body which enacts and amends the Constitution functions in

its capacity as the Constituent Assembly. The Parliament performing its functions under Article 368 discharges those functions not as a Parliament but in a constituent capacity.

2082. There is a fundamental distinction between the procedure for passing ordinary laws and the procedure prescribed by Article 368 for affecting amendments to the Constitution. Under Article 368, a bill has to be initiated for the express purpose of amending the Constitution, it has to be passed by each House by not less than two-thirds members present and voting and in cases falling under the proviso, the amendment has to be ratified by the legislatures of not less than half the States. A bill initiating an ordinary law can be passed by a simple majority of the members present and voting at the sitting of each House or at a joint sitting of the two Houses. Article 368 does not provide for a joint sitting of the two Houses. The process of ratification by the States under the Proviso cannot possibly be called an ordinary legislative process for, the ratification is required to be made by "resolutions" to that effect. Ordinary bills are not passed by resolutions.

2083. The distinction between constituent power and ordinary legislative power can best be appreciated in the context of the nature of the Constitution which the court has to interpret in regard to the amending power. In McCawley v. The King [1920] A.C. 691, Lord Birkenhead used the words 'controlled' and 'uncontrolled' for bringing about the same distinction which was made between 'rigid' and 'flexible' Constitution first by Bryce and then by Dicey. In a 'controlled' or 'rigid' Constitution, a different procedure is prescribed for amending the Constitution than the procedure prescribed for making ordinary laws.

2084. In an 'uncontrolled' or 'flexible' Constitution the procedure for amending the Constitution is same as that for making ordinary laws. In such a Constitution, the distinction between Constitutional laws and ordinary laws tends to become blurred because any law repugnant to the Constitution repeals the Constitution pro tanto [McCawley v. The King [1920] A.C. 691.

2085. Thus, the true ground of division, by virtue of the nature of the Constitution, is whether it is flexible or rigid. That depends upon whether the process of Constitutional law-making is or is not identical with the process of ordinary law-making. A typical instance of a flexible Constitution is that of the United Kingdom. The Constitution of the former Kingdom of Italy was also flexible, so flexible indeed, that Mussolini was able profoundly to violate the spirit of the Constitution without having to denounce it. The Constitution of the United States is rigid, as it cannot be amended without the special machinery being set in motion for that purpose. "In short, then, we may say that the Constitution which cannot be bent without being broken is a rigid Constitution." (See Modern Political Constitutions : an Introduction to the Comparative Study of Their History and Existing Form by C.F. Strong, 1970 Reprint). The Indian Constitution, considered as a whole is a 'controlled' or 'rigid' Constitution, because, broadly, none of the articles of that Constitution can be amended otherwise than by the special procedure prescribed by Article 368. Certain provisions thereof like Article 4 read with Articles 2 and 3, Article 169, para 7 of the Fifth Schedule and para 21 of the Sixth Schedule confer power to amend the provisions of the Constitution by the ordinary law-making process but these amendments are expressly excepted by the respective provisions from the purview of Article 368. Schedules V and VI of the Constitution are in fact a Constitution within a Constitution.

2086. The distinction between 'flexible' and 'rigid' Constitutions brings into sharp focus the true distinction between legislative and constituent power. This is the distinction which, with respect, was not given its due importance by the majority in the Golak Nath case. In a rigid Constitution, the power to make laws is the genus, of which the legislative and constituent powers are species, the differentia being the procedure for amendment. If the procedure is ordinary, the power is legislative; if it is special, the power is constituent.

2087. This discussion will show that in a rigid' or 'uncontrolled' Constitution-like ours a law amending the Constitution is made in exercise of a constituent power and partakes fully of the character of Constitutional law. Laws passed under the Constitution, of which the validity is to be tested on the anvil of the Constitution are the only laws which fall within the terms of Article 13(2).

2088. The importance of this discussion consists in the injunction contained in Article 13(2) that the State shall not make any 'law' which takes away or abridges the rights conferred by Part III. An Amendment of Constitution within the terms of Article 368 not being law within the meaning of Article 13(2), it cannot become void on the ground that it takes away or abridges the rights conferred by Part III.

2089. Fundamental Rights undoubtedly occupy a unique place in civilized societies, whether you call them "transcendental", "inalienable", or as Lieber called them, "Primordial". There is no magic in these words for, the strength and importance of these rights is implicit in their very description in the Constitution as "fundamental". But the special place of importance which they occupy in the scheme of the Constitution, cannot by itself justify the conclusion that they are beyond the reach of the amending power. Article 13(2) clearly does not take in the amending power and Article 368 does not except the Fundamental Rights from its scope.

2090. But they cannot be tinkered with and the Constitution has taken care to ensure that they do not become a mere 'plaything' of a special majority. Members of the Lok Sabha are elected on adult universal suffrage by people of the States. Whereas, ordinary laws can be passed by a bare majority of those present, Constitutional amendments are required to be passed under Article 368 by a majority of the total membership of each House and by a majority of not less than two-thirds of the members of each House separately present and voting. In matters falling within the proviso, amendments are also required to be ratified by the Legislatures of not less than half of the States. Rajya Sabha, unlike the Lok Sabha, is a perpetual body, which changes one-third of its membership every two years. Members of the Rajya Sabha are elected by Legislative Assemblies of the States, that is, by those who are directly elected by the people themselves. The mode of election to Rajya Sabha constitutes to some extent an insurance against gusts and waves of public opinion.

2091. I will now proceed to consider an important branch of the petitioner's argument which, frankly, seemed to me at first sight plausible. On closer scrutiny, however, I am inclined to reject the argument. It is urged by the learned Counsel that it is immaterial whether the amending power can be found in Article 368 or in Entry 97 of List I, because wherever that power lies, its exercise is subject to inherent and implied limitations.

2092. The argument takes this form : Constitutions must of necessity be general rather than detailed and prolix, and implication must therefore play an important part in Constitutional construction.

Implied limitations are those which are implicit in the scheme of the Constitution while inherent limitations are those which inhere in an authority from its very nature, character and composition. Implied limitations arise from the circumstances and historical events which led to the enactment of our Constitution, which represents the solemn balance of rights between citizens from various States of India and between various sections of the people. Most of the essential features of the Constitution are basic Human Rights, sometimes described as "Natural Rights", which correspond to the rights enumerated in the "Universal Declaration of Human Rights", to which India is a signatory. The ultimate sovereignty resides in the people and the power to alter or destroy the essential features of a Constitution is an attribute of that sovereignty. In Article 368, the people are not associated at all with the amending process. The Constitution gives the power of amendment to the Parliament which is only a creature of the Constitution. If the Parliament has the power to destroy the essential features it would cease to be a creature of the Constitution, the Constitution would cease to be supreme and the Parliament would become supreme over the Constitution. The power given by the Constitution cannot be construed as authorising the destruction of other powers conferred by the same instrument. If there are no inherent limitations on the amending power of the Parliament, that power could be used to destroy the judicial power, the executive power and even the ordinary legislative power of the Parliament and the State legislatures. The Preamble to our Constitution which is most meaningful and evocative, is beyond the reach of the amending power and therefore no amendments can be introduced into the Constitution which are inconsistent with the Preamble. The Preamble walks before the Constitution and is its identity card.

2093. Counsel has made an alternative submission that assuming for purposes of argument that the power of amendment is wide enough to reach the Fundamental Rights, it cannot be exercised so as to damage the core of those rights or so as to damage or destroy the essential features and the fundamental principles of the Constitution. Counsel finally urges that the history of implied and inherent limitations has been accepted by the highest courts of countries like U.S.A., Canada, Australia and Ireland. The theory is also said to have been recognised by this Court, the Federal Court and the Privy Council.

2094. In answer to these contentions, it was urged on behalf of the respondents that there is no scope for reading implied or inherent limitations on the amending power, that great uncertainty would arise in regard to the validity of Constitutional amendment if such limitations were read on the amending power, that the Preamble is a part of the Constitution and can be amended by Parliament, that there is in our Constitution no recognition of basic human or natural rights and that the consensus of world opinion is against the recognition of inherent limitations on the amending power.

2095. Before dealing with these rival contentions, I may indicate how the argument of inherent limitations was dealt with in the Golak Nath case. Subba Rao C.J. who delivered the leading majority judgment said that there was considerable force in the argument but it was unnecessary to decide it (p. 805). According to Hidayatullah J. "the whole Constitution is open to amendment. Only two dozen articles are outside the reach of Article 368. That too because the Constitution has made them fundamental." (p. 878). Wanchoo J. who delivered the leading minority judgment rejected the argument by observing : "The power to amend being a constituent power cannot in our opinion...be held subject to any implied limitations thereon on the ground that certain basic features of the Constitution cannot be amended." (p. 836). Bachawat J. observed that it was

unnecessary to decide the question, as it was sufficient for the disposal of the case to say that Fundamental Rights were within the reach of the amending power (p. 906). Ramaswami J. considered and rejected the argument by observing that there was no room for an implication in the construction of Article 368 and it was unlikely that if certain basic features were intended to be unamendable, the Constitution makers would not have expressly said so in Article 368 .

2096. It is difficult to accept the argument that inherent limitations should be read into the amending power on the ground that Fundamental Rights are natural rights which inhere in every man. There is intrinsic evidence in Part III of the Constitution to show that the theory of natural rights was not recognised by our Constitution-makers. Article 13(2) speaks of rights "conferred" by Part III and enjoins the States not to make laws inconsistent therewith. Article 32 of the Constitution says that the right to move the Supreme Court for the enforcement of rights 'conferred' by Part III is guaranteed. Before the Fundamental Rights were thus conferred by the Constitution, there is no tangible evidence that these rights belonged to the Indian people. Article 19 of the Constitution restricts the grant of the seven freedoms to the citizens of India. Non-citizens were denied those rights because the conferment of some of the rights on the Indian citizens was not in recognition of the pre-existing natural rights. Article 33 confers upon the Parliament the power to determine to what extent the rights conferred by Part III should be restricted or abrogated in their application to the members of the Armed Forces. Article 359(1) empowers the President to suspend the rights "conferred" by Part III during the proclamation of an emergency. Articles 25 and 26 by their opening words show that the right to freedom of religion is not a natural right but is subject to the paramount interest of society and that there is no part of that right, however important, which cannot and in many cases has not been regulated in civilised societies. Denial to a section of the community, the right of entry to a place of worship, may be a part of religion but such denials, it is well-known, have been abrogated by the Constitution. MANU/SC/0026/1957 : [1958]1SCR895 , per Venkatarama Aiyar J.; Sri Venkataramana Devaru and Ors. v. The State of Mysore and Ors. see also Bourne v. Keane 1919 A.C. 815 per Lord Birken-head L.C.). Thus, in India, citizens and non-citizens possess and are entitled to exercise certain rights of high significance for the sole reason that they are conferred upon them by the Constitution.

2097 The 'natural right' theory stands, by and large repudiated today. The notion that societies and governments find their sanction on a supposed contract between independent individuals and that such a contract is the sole source of political obligation is now regarded as untenable. Calhoun and his followers have discarded this doctrine, while theorists like Story have modified it extensively. The belief is now widely held that natural rights have no other than political value. According to Burgess, "there never was, and there never can be any liberty upon this earth among human beings, outside of State organisation." According to Willoughby, natural rights do not even have a moral value in the supposed "state of nature"; they would really be equivalent to force and hence have no political significance. Thus, Natural Right thinkers had once "discovered the lost title-deeds of the human race" but it would appear that the deeds are lost once over again, perhaps never to be resurrected.

2098. The argument in regard to the Preamble is that it may be a part of the Constitution but is not a provision of the Constitution and therefore, you cannot amend the Constitution so as to destroy the Preamble. The Preamble records like a sun-beam certain glowing thoughts and concepts of history and the argument is that in its very nature it is unamendable because no present or future,

however mighty, can assume the power to amend the true facts of past history. Counsel relies for a part of this submission on the decision in Beru Ban case MANU/SC/0049/1960 : [1960]3SCR250 . Our attention was also drawn to certain passages from the chapter on "preamble" in "commentaries on the Constitution of the United States" by Joseph Story.

2099. I find it impossible to accept the contention that the Preamble is not a provision of the Constitution. The record of the Constituent Assembly leaves no scope for this contention. It is transparent from the proceedings that the Preamble was put to vote and was actually voted upon to form a part of the Constitution. (Constituent Assembly Debates, Vol. X, pp. 429, 456). As a part and provision of the Constitution, the Preamble came into force on January 26, 1950. The view is widely accepted that the Preamble is a part of the enactment (Craies on Statute Law, 7th Ed., p. 201; Halsbury, Vol. 36, 3rd. Ed., p. 370).

2100. In considering the petitioner's argument on inherent limitations, it is well to bear in mind some of the basic principles of interpretation. Absence of an express prohibition still leaves scope for the argument that there are implied or inherent limitations on a power, but absence of an express prohibition is highly relevant for inferring that there is no implied prohibition. This is clear from the decision of the Privy Council in The Queen v. Burah 5 I.A. 178, 195. This decision was followed by this Court in State of Bombay v. Nauratan (sic Narotham) Das Jaitha Bai MANU/SC/0011/1950 : [1951]2SCR51 and in Sardar Inder Singh v. State of Rajasthan MANU/SC/0016/1957 : [1957]1SCR605 . In saying this, I am not unmindful of the fact that Burah's case and the two cases which followed it, bear primarily on conditional legislation.

2101. Another principle of interpretation is that it is not open to the courts to declare an Act void on the ground that it is opposed to a 'spirit' supposed to pervade the Constitution but not manifested in words. As observed by Kania C.J. in Gopalan's case MANU/SC/0012/1950 : 1950CriLJ1383 , a wide assumption of power to construction is apt to place in the hands of judiciary too great and to indefinite a power, either for its own security or the protection of private rights. The argument of 'spirit' is always attractive and quite some eloquence can be infused into it. But one should remember what S.R. Das J. said in Keshav Madhav Menon's case MANU/SC/0020/1951 : 1951CriLJ680 that one must gather the spirit from the words or the language used in the Constitution. I have held that the language of Article 368 is clear and explicit. In that view, it must be given its full effect even if mischievous consequences are likely to ensue; for, judges are not concerned with the policy of law-making and "you cannot pass a covert censure against the legislature." (Vacher & Sons, Limited v. London Society of Compositors) 1913 (A.C.) 107. The importance of the circumstance that the language of Article 368 admits of no doubt or ambiguity is that such a language leaves no scope for implications, unless in the context of the entire instrument in which it occurs, such implications become compulsive. I am tempted to say that 'context' does not merely mean the position of a word to be construed, in the collocation of words in which it appears, but it also means the context of the times in which a fundamental instrument falls to be construed.

2102. An important rule of interpretation which, I think, has a direct bearing on the submissions of the petitioner on inherent limitations is that if the text is explicit, it is conclusive alike in what it directs and what it forbids. The consequences of a particular construction, if the text be explicit, can have no impact on the construction of a Constitutional provision (Attorney-General, Ontario

v. Attorney-General, Canada) [1892] A.C. 571. As observed by Chief Justice Marshall in Providence Bank v. Alpheus Billings L. ed. 939 a power may be capable of being abused but the Constitution is not intended to furnish a corrective for every abuse of power which may be committed by the government I see no warrant for the assumption that the Parliament will be disposed to out a perverse construction on the powers plainly conferred on it by the Constitution. And talking of abuse of powers, is there not the widest scope for doing so under several provisions of the Constitution ? The powers of war and peace, the powers of finance and the powers of preventive detention, are capable of the widest abuse and yet the Founding Fathers did confer those powers on the Parliament. When I look at a provision like the one contained in Article 22 of the Constitution, I feel a revolt rising within myself, but then personal predilections are out of place in the construction of a Constitutional provision. Clause (7) of Article 22 permits the Parliament to enact a law under which a person may be detained for a period longer than three months without obtaining the opinion of an Advisory Board. While enacting certain laws of Preventive Detention, the Government has shown some grace in specifying the outer limits, however, uncertain, of the period of detention though, so it seems, it is under no obligation to do so. Thus, even when the original Constitution was passed, powers capable of the gravest abuse were conferred on the Parliament, which as the petitioner's counsel says, is but a creature of the Constitution. In assessing the argument that the gravity of consequences is relevant on the interpretation of a Constitutional provision, I am reminded of the powerful dissent of Justice Holmes in Lochner v. New York 49 L. ed. 937 regarding a labour statute. The test according to the learned Judge was not whether he considered the law to be reasonable but whether other reasonable persons considered it unreasonable. In Bank of Toronto v. Lambe [1887] A.C. 575 Lord Hobhous observed: "People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes." Trust in the elected representatives is the corner stone of a democracy. When that trust fails, everything fails. As observed by Justice Learned Hand in "the spirit of liberty" : "I often wonder, whether we do not rest our hopes too much upon Constitution, upon laws and upon courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no court can save it; no Constitution, no law, no court can even do much to help it. While it lies there it needs no Constitution, no law, no court to save.

2103. Established text books on Interpretation also take the view that "where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature Craies on "Statute Law", 6th Ed., p. 66.

2104. It is thus clear that part from Constitutional limitations, no law can be struck down on the ground that it is unreasonable or unjust. That is the view which was taken by this Court in the State of Bihar v. Kameshwar Singh MANU/SC/0019/1952 : [1952]1SCR889 . Mahajan J. Described the Bihar Land Reforms Act, which was under consideration in that case, as repugnant to the sense of justice of the court. In fact, the learned Judge says in his judgment that it was not seriously disputed by the Attorney-General, that the law was highly unjust and inequitous and the compensation provided therein in some cases was purely illusory. The Court, however, found itself powerless to rectify an "unjustice" perpetrated by the Constitution itself. No provision incorporated in a Constitution at the time of its original enactment can ever be struck down as un-constitutional. The same test must apply to what becomes a part of that Constitution by a subsequent amendment,

provided that the conditions on which alone such amendments can be made are strictly complied with. Amendments, in this sense, palpate with the vitality of the Constitution itself.

2105. The true justification of this principle is, as stated by Subba Rao J. in the Collector of Customs, Baroda v. Digvijaysinhji Spinning & Weaving Mills Ltd., MANU/SC/0365/1961 : 1983ECR2163D(SC) that a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution. In fact, amendments which were made by the Constitution (First Amendment) Act, 1951 to Articles 15 and 19 were never assailed and have been conceded before us to have been properly made. It was urged by the learned Counsel that the substitution of new Clause (2) in Article 19 did not abrogate the Fundamental Rights, but on the other hand enabled the citizens at large to enjoy their fundamental freedoms more fully. This, I think, is the crux of the matter. What counsel concedes in regard to Article 19(2) as substituted by the First Amendment Act can be said to be equally true in regard to the amendments now under challenge. Their true object and purpose is to confer upon the community at large the blessings of liberty. The argument is that the Parliament may amend the provisions of Part III, but not so as to damage or destroy the core of those rights or the core of the essential principles of the Constitution. I see formidable difficulties in evolving an objective standard to determine what would constitute the core and what the peripheral layer of the essential principles of the Constitution. I consider the two to be inseparable.

2106. Counsel painted a lurid picture of the consequences which will ensue if a wide and untrammelled power is conceded to the Parliament to amend the Constitution. These consequences do not scare me. It is true that our confidence in the men of our choice cannot completely silence our fears for the safety of our rights. But in a democratic policy, people have the right to decide what they want and they can only express their will through their elected representatives in the hope and belief that the trust will not be abused. Trustees are not unknown to have committed breaches of trust but no one for that reason has abolished the institution of Trusts. Can we adopt a presidential system of government in place of the parliamentary system? Can we become a monarchial or theocratic State ? Shall we permit the Parliament to first destroy the essential features of the Constitution and then amend the amending power itself so to as provide that in future no amendment shall be made except by a 99 per cent majority? Can the Parliament extend its term from 5 to 50 years and create a legislative monopoly in its favour ? These are the questions which counsel has asked. My answer is simple. History records that in times of stress, such extreme steps have been taken both by the people and by the Parliament. In 1640, when England was invaded by Scots, Charles the I was obliged to recall Parliament to raise money for the war. The 'Short' Parliament insisted on airing its grievances before voting the money and was dismissed. Charles had to summon a new Parliament immediately, and this 'Long' Parliament lasting until 1660, set out to make personal government by a monarch impossible. The true sanction against such political crimes lies in the hearts and minds of men. It is there that the liberty is insured. I therefore say to myself not in a mood of desperation, not in a mood of helplessness, not cynically but in the true spirit of a democrat: If the people acting through the Parliament want to put the Crown of a King on a head they like, or if you please, on a head they dislike, (for uneasy lies the head that wears a Crown), let them have that liberty. If and when they realise the disaster brought by them upon themselves, they will snatch the Crown and scatter its jewels to the winds. As I say this, I am reminded of a famous saying of Justice Holmes: "About seventy-five years ago, I learnt

that I was not God. And so, when the people...want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not : 'God-dammit, let 'em do it.

2107. No name is mentioned with greater honour in the history of American democracy than that of Thomas Jefferson. He was the central figure in the early development of American democracy, and on his death he was politically canonized. Jefferson said in regard to the necessity of a wide amending power that "The earth belongs in usufruct to the living; the dead have neither powers nor rights over it." "If one generation could hind another, the dead and not the living would rule. Since conditions change and men change, there must be opportunity for corresponding change in political institutions, and also for a renewal of the principle of government by consent of the governed." According to President Wilson, "a Constitution must of necessity be a vehicle of life; that its substance is the thought and habit of the nation and as such it must grow and develop as the life of the nation changes.

2108. In support of his argument on implied limitations, learned Counsel for the petitioner drew our attention to certain decisions on the theory of immunity of instrumentalities : The means and instrumentalities of the State Governments should be left free and unimpaired. Our Court rejected this theory in State of West Bengal v. Union of India [1964] 1 S.C.R. 394. Sinha C.J. observed that the argument presented before the Court was : "a resuscitation of the new exploded doctrine of the immunity of instrumentalities which originating from the observations of Marshall C.J. in McCulloch v. Maryland has been decisively rejected by the Privy Council...and has been practically given up even in the United States." The doctrine originally arose out of supposed existence of an implied prohibition that the Federal and State Governments being sovereign and independent must each be free from the control of the other. Dr. Wynes observes in his book : "Legislative, Executive and Judicial Powers in Australia (4th Edition)" that the doctrine has undergone considerable change in the United States and its progressive retreat is traced by Dixon J. in the Essendon Corporation case [1947] 74 C.L.R. 1. In that case, after tracing the history of the doctrine since its enunciation by Chief Justice Marshall, Dixon J. says : "I think that the abandonment by the Supreme Court of the United States of the old doctrine may be fairly said to be now complete.

2109. A large number of cases bearing on inherent or implied limitations were cited to us from U.S.A. Canada, Australia, South-Africa and Ceylon. Having considered those cases carefully, I find it difficult to say that the theory of implied or inherent limitations has received a wide recognition. In McCawley v. R. [1920] A.C. 691, 28 C.L.R. 106 the dissenting judgment of Isaacs and Rich JJ. in the Australian High Court was upheld by the Privy Council, except in regard to a matter which is here not relevant. The judgment of the two learned Judges which received high praise from the Privy Council (p. 112 of Commonwealth Law Reports), shows that implications in limitation of power ought not to be imported from general concepts but only from express or necessarily implied limitations. It also shows that in granting powers to colonial legislatures, the British Parliament, as far back as 1865, refused to place on such powers limitations of vague character. The decision of the Privy Council in Bribery Commissioner v. Ranasinghe 1965 A.C. 172 was discussed before us in great details by both the sides. The matter arose under the Constitution of Ceylon, of which the material provisions bear a near parallel to our Constitution, a fact which, with respect, was not noticed in the judgment of the leading" majority in the Golak

Nath case. It was not argued by the respondents in Ranasinghe's case that any provision of the Ceylonese Constitution was unamendable. It is also necessary to remember that the appeal did not raise any question regarding the religious rights protected by Section 29(2) and (3) of the Ceylonese Constitution. It is clear that counsel for the respondents there stated (p. 187), that there was no limitation on the power of amendment except the procedure prescribed by Section 29(4), and that even that limitation could be removed by an amendment complying with Section 29(4). The Privy Council affirmed this position (page 198) and took the widest view of the amending power. A narrower view was in fact not argued.

2110. From out of the decisions of the American Supreme Court, it would be sufficient to notice three : Rhode Island v. Palmer 64 L. ed. 946; U.S. v. Sprague 75 L. ed. 64075 L. ed. 640 and Schneiderman v. U.S.A. 87 L. ed. 1796.

2111. In the Rhode Island case, the leading majority judgment gave no reasons but only a summary statement of its conclusions. The learned Advocate-General of Maharashtra has, however, supplied to us the full briefs filed by the various counsel therein. The briefs show that the 18th amendment regarding "Prohibition of Intoxicating Liquors" (which was repealed subsequently by the 21st Amendment) was challenged on the ground, inter alia, that there were implied and inherent limitations on the power of amendment under Article V of the American Constitution. These arguments were not accepted by the Supreme Court, as is implicit in its decision. The court upheld the Amendment.

2112. We were supplied with a copy of the judgment of the District Court of New Jersey in Sprague's case. The District Court declared the 18th Amendment void on the ground that there were inherent limitations on the amending power in that, the power had to conform to "theories of political science, sociology, economics etc." The judgment of the Supreme Court shows that not even an attempt was made to support the judgment of the District Court on the ground of inherent limitations. The appeal was fought and lost by Sprague on entirely different grounds, namely : whether 'amendment' means 'improvement'; whether the 10th Amendment had an impact on Article 5 of the U.S. Constitution and whether the alternative of ratification by Convention or Legislatures showed that the method of Convention was essential for valid ratification when the amendment affected the rights of the people. Obviously, the Supreme Court saw no merit in the theoretical limitations which the District Court had accepted for, in a matter of such grave importance, it would not have reversed the District Court judgment if it could be upheld on the ground on which it was founded.

2113. In Schneiderman's case, action was taken by the Government to cancel the appellant's naturalisation certificate on the ground that at the time of applying for naturalisation, he was and still continued to be a communist and thereby he had misrepresented that he was "attached to the principles of the Constitution of the United States".

2114. Schneiderman won his appeal in the Supreme Court, the main foundation of the judgment being that the fundamental principles of Constitution were open to amendment by a lawful process.

2115. Leading Constitutional writers have taken the view that the American Supreme Court has not ever accepted the argument that there are implied or inherent limitations on the amending

power contained in Article 5. Edward S. Corwin, who was invited by the Legislative Reference Service, Library of Congress, U.S.A., to write on the American Constitution, says after considering the challenges made to the 18th and 19th Amendments on the ground of inherent limitations : "brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid Constitution of the United States of America prepared by Edward S. Corwin, 1953, p. 712.". According to Thomas M. Cooley, there is no limit to the power of amendment beyond the one contained in Article 5, that no State shall be deprived of its equal suffrage in the Senate without its consent. The author says that this, at any rate, is the result of the decision of the so-called National Prohibition Cases (which include the Rhode Island case). The decision, according to Cooley, totally negatived the contention that : "An amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government, nor relinquish to the State those which already have been granted to it The General Principles of Constitutional Law in the U.S.A. by Thomas M. Cooley, 4th Edn., pp. 46-47. According to Henry Rottschaefer, it was contended on several occasions that the power of amending the Federal Constitution was subject to express or implied limitations, "but the Supreme Court has thus far rejected every such claim Handbook of American Constitutional Law by Henry Rottschaefer, pp. 8-10".

2116. In regard to the Canadian cases, it would, I think, be enough to say that none of the cases cited by the petitioner concerns the exercise of the power to amend the Constitution. They are cases on the legislative competence of the provincial legislatures in regard to individual freedoms or in regard to criminal matters. The issue in most of these cases was whether the provincial legislature had transgressed on the Dominion field in exercise of its powers under Section 92 of the British North America Act, 1867. The Canadian Bill of Rights, 1960, makes the rights incorporated in the Bill defeasible by an express declaration that an Act of Parliament shall operate notwithstanding the Bill of Rights. At least six different views have been propounded in Canada on the fundamental importance of these rights. According to Schmeiser, the Supreme Court of Canada has not given judicial approval to any of these views. "It should also be noted that the fundamental problem is not whether Parliament or the Legislatures may give us our basic freedoms but rather which one may interfere with them or take they away civil Liberties in Canada by Schmeiser, p. 13". I do not think therefore, that any useful purpose will be served by spending time on Hess's case 4 D.L.R. 199; Saumur's case 4, D.L.R. 641; Switzman's case 7 D.L.R. 337; or Chabot's case 12, D.L.R. 796, which were cited before us.

2117. The view that there are implied limitations found from Sections 17 and 50 of the British North America Act was invoked by Duff C.J. in the Alberta Press Case [1938] S.C.R. 100 and by three learned Judges in the Saumur Case. It is, however, important that while denying legislative competence to the province of Alberta Duff C.J. was willing to grant the jurisdiction to the Parliament to legislate for the protection of this right.

2118. The petitioner has relied strongly upon the decision in Attorney-General of Nova Scotia v. Attorney-General of Canada [1951] S.C.R. 31 but the true ratio of that decision is that neither the federal nor the provincial bodies possess any portion of the powers respectively vested in the other and they cannot receive those powers by delegation. The decision in Chabot v. School Commissioners [1947] 12 D.L.R. 796 is of the Quebec Court of Appeal, in which Casey J.

observed that the religious rights find their existence in the very nature of man; they cannot be taken away. This view has not been shared by any judge of the Supreme Court and would appear to be in conflict with the decision in Henry Briks & Sons v. Montreal [1955]1SCR799 (3).

2119. I do not think that any useful purpose will be served by discussing the large number of decisions of other foreign courts cited before us. As it is often said, a Constitution is a living organism and there can be no doubt that a Constitution is evolved to suit the history and genius of the nation. therefore, I will only make a brief reference to a few important decisions.

2120. Ryan's [1935] IR 170 case created a near sensation and was thought to cover the important points arising before us. The High Court of Ireland upheld the amendment made by the Oireachtas, by deleting Article 47 of the Constitution which contained the provision for referendum, and which also incorporated an amendment in Article 50. This latter article conferred power on the Oireachtas to make amendments to the Constitution within the terms of the Scheduled Treaty. An amendment made after the expiration of a period of 8 years from the promulgation of the Constitution was required to be submitted to a referendum of the people. The period of 8 years was enlarged by the amendment into 16 years. The High Court of Ireland upheld the amendment and so did the Supreme Court, by a majority of 2 to 1. Kennedy C.J. delivered a dissenting judgment striking down the amendment on the ground that there were implied limitations on the power of amendment An important point of distinction between our Constitution and the Irish Constitution is that whereas Article 50 did not contain any power to amend that article itself, Article 368 of our Constitution confers an express power by Clause (e) of the Proviso to amend that article. The reasoning of the learned Chief Justice therefore loses relevance in the present case. I might mention that in Moore v. Attorney General for the Irish State [1935] A.C. 484 in which a Constitutional amendment made in 1933 was challenged, it was conceded before the Privy Council that the amendment which was under fire in Ryan's case was validly made. The Privy Council added to the concession the weight of its own opinion by saying that the concession was made 'rightly'.

2121. Several Australian decisions were relied upon by the petitioner but I will refer to the one which was cited by the petitioner's counsel during the course of his reply; Taylor v. Attorney General of Queens-land 23 C.L.R. 457. The observations of Isaacs J. on which the learned Counsel relies seem to me to have been made in the context of the provisions of the Colonial Laws Validity Act. The real meaning of those observations is that when power is granted to a colonial legislature to alter the Constitution, it must be assumed that the power did no comprehend the right to eliminate the Crown as a part of the colonial legislature. It may be mentioned that well-known Constitutional writers A.P. Canaway, K.C. : "The Safety Valve of the Commonwealth Constitution", Australian Law Journal, Vol. 12, (1938-39), p. 108 at 109; W. Anstey Wynes : "Legislative, Executive and Judicial Powers in Australia", 4th Edn., Chapter XVII, p. 507 have expressed the view that all the provisions of the Australian Constitution, including Article 128 itself which confers power to amend the Constitution, are within the power of amendment. This view has been taken even though Article 128 does not confer express power to amend that article itself.

2122. While winding up this discussion of authorities, it is necessary to refer to the decision of the Privy Council in Livange v. the Queen (1967) 1 A.C. 259 in which it was held that the powers of

the Ceylon legislature could not be cut down by reference to vague and uncertain expressions like 'fundamental principles of British law'.

2123. It must follow from what precedes that The Constitution (Twenty-fourth Amendment) Act, 1971 is valid. I have taken the view that Constitutional amendments made under Article 368 fell outside the purview of Article 13(2). Section 2 of the 24th Amendment Act reiterates this position by adding a new Clause (4) in Article 13 : "(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368. " I have also taken the view that the old Article 368 not only prescribed the procedure for amendment of the Constitution but conferred the power of amendment. That position is made clear by Section 3 of the 24th Amendment which substitutes by Clause (a) a fully expressive marginal heading to Article 368. I have held that the power of amendment conferred by Article 368 was wide and untrammelled. Further, that Constitutional amendments are made in the exercise of constituent power and not in the exercise of ordinary law-making power. That position is reiterated by Clause (b) of Section 3. Clause (c) of Section 3 makes it obligatory for the President to give his assent to the bill for a Constitutional amendment. Rightly no arguments have been addressed on this innovation. Finally, Clause (d) of Section 3 of the 24th Amendment excludes the application of Article 13 to an amendment made under Article 368. As indicated in this judgment that was the correct interpretation of Articles 13 and 368.

2124. The Constitution (Twenty-fourth Amendment) Act, 1971, thus, merely clarifies what was the true law and must therefore be held valid.

The Twenty-Fifth Amendment

2125. The Constitution (Twenty-Fifth Amendment) Act, 1971, which came into force on April 20, 1972 consists of two effective sections : Sections 2 and 3. Section 2(a) substitutes a new Clause (2) for the original Clause (2) of Article 31 of the Constitution. Under the original Article 31(2), no property could be acquired for a public purpose under any law unless it provided for compensation for the property taken possession of or acquired and either fixed the amount of the compensation, or specified the principles on which, and the manner in which, the compensation was to be determined and given. In the State of West Bengal v. Bela Banerjee MANU/SC/0017/1953 : [1954]1SCR558 , a unanimous Bench presided over by Patanjali Sastri C.J. held that the principles of compensation must ensure the payment of a just equivalent of what the owner was deprived of. The Constitution (Fourth Amendment) Act was passed on April 27, 1955 in order to meet that decision. By the Fourth Amendment, an addition was made to Article 31(2) providing that "...no such law shall be called in question in any court on the ground that the compensation provided by the law is not adequate." The effect of the amendment was considered by this Court in P. Vajravelu Mudaliar v. Deputy Collector MANU/SC/0049/1964 : [1965]1SCR614 . The Madras Legislature had passed an Act providing for the acquisition of lands for housing schemes and had laid down principles for fixing compensation different from those prescribed in the Land Acquisition Act, 1894. Delivering the judgment of the Court, Subba Rao J. held that the fact that Parliament used the same expressions, 'compensation' and 'principles' as were found in Article 31 before its Amendment, was a clear indication that it accepted the meaning given by this Court to those expressions in Bela Banerjee's case. The Legislature, therefore, had to provide for a just equivalent of what the owner was deprived of or specify the principles for the purpose of ascertaining the just equivalent. The new clause added by the Fourth Amendment,

excluding the jurisdiction of the Court to consider the adequacy of compensation, was interpreted to mean that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' could be questioned by the court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. By applying this test, the Court upheld the principles of compensation fixed under the Madras Act as not contravening Article 31(2). The Act, however, was struck down under Article 14 on the ground that full compensation had still to be paid under a parallel Law : The Land Acquisition Act.

2126. In Union v. Metal Corporation, MANU/SC/0117/1966 : [1967]1SCR255 a Bench of two Judges consisting of Subba Rao C.J. and Shelat J. held that the law of acquisition in order to justify itself had to provide for the payment of a 'just equivalent' or lay down principles which will lead to that result. It is only if the principles laid down are relevant to the fixation of compensation and are not arbitrary that the adequacy of the resultant product could not be questioned in a court of law. It is evident that this decision marked a departure from the judgment in Vajravelu's case.

2127. In the State of Gujarat v. Shantilal Mangaldas MANU/SC/0063/1969 : [1969]3SCR341 Shah J. speaking for himself and three other learned Judges expressed his disagreement with the observations of Subba Rao C.J. in the Metal Corporation's case and expressly over-ruled that decision. It was held that if the quantum of compensation was not liable to be challenged on the ground that it was not a just equivalent, the principles specified for determination of compensation could also not be challenged on the plea that the compensation determined by the application of those principles was not a just equivalent. The learned Judge observed that this did not, however, mean that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts, for, to do so, would be to grant a charter of arbitraries, and permit a device to defeat the Constitutional guarantee. Principles could, therefore, be challenged on the ground that they were irrelevant to the determination of compensation, but not on the ground that what was awarded as a result of the application of those principles was not just or fair compensation.

2128. In R.C. Cooper v. Union MANU/SC/0011/1970 : [1970]3SCR530 , (the Bank Nationalisation case), the judgment in Shantilal Mangaldas's case, was in substance overruled by a Bench of 11 Judges by a majority of 10 to 1. The majority referred to the meaning of compensation as an equivalent of the property expropriated. It was held that if the statute in providing for compensation devised a scheme for payment of compensation in the form of bonds and the present value of what was determined to be given was thereby substantially reduced, the statute impaired the guarantee of compensation.

2129. This chain of decisions on the construction of Articles 31(2) introduced uncertainty in law and defeated to a large extent the clearly expressed intention of the amended Article 31(2) that a law providing for compensation shall not be called in question in any court on the ground that the compensation provided by it was not adequate. Shah J. in Shantilal Mangaldas MANU/SC/0063/1969 : [1969]3SCR341 case had observed with reference to the decision in Bela Banerjee's case and Subodh Gopal's MANU/SC/0018/1953 : [1954]1SCR587 case that those decisions had raised more problems than they solved and that they placed serious obstacles in giving effect to the Directive Principles of State Policy incorporated in Article 39. Subba Rao J. had also observed in Vajravelu's MANU/SC/0049/1964 : [1965]1SCR614 case that if the intention

of the Parliament was to enable the legislature to make a law without providing for compensation it would have used other expressions like, 'price', 'consideration', etc. This is what the Parliament has now done partially by substituting the word 'amount' for the word 'compensation' in the new Article 31(2).

2130. The provision in the newly added Clause 2B of Article 31 that nothing in Article 19(1)(f) shall affect any law referred to in Article 31(2) has been obviously incorporated because the Bank Nationalisation case overruled a long line of authorities which had consistently taken the view that Article 19(1)(f) and Article 31(2) were mutually exclusive so far as acquisition and requisition were concerned [See for example Gopalan's case, MANU/SC/0012/1950 : 1950CriLJ1383 ; Chiranjit Lal Choudhury's case, 1950 S.C.R. 869 at 919; Sitabati Devi's case, MANU/SC/0102/1961 : [1967]2SCR949 ; Shantilal Mangaldas's case, MANU/SC/0063/1969 : [1969]3SCR341 ; and H.N. Rao's case, : [1969]2SCR392].

2131. Learned Counsel appearing for the petitioner mounted a severe attack on the Twenty-Fifth Amendment, particularly on the provisions of Article 31C. He contends that Article 31C subverts seven essential features of the Constitution, and destroys ten Fundamental Rights, which are vital for the survival of democracy, the rule of law and integrity and unity of the Republic. Seven of these Fundamental Rights, according to the counsel are unconnected with property rights. The argument continues that Article 31C destroys the supremacy of the Constitution by giving a blank charter to Parliament and to all the State Legislatures to defy and ignore the Constitution; it subordinates the Fundamental Rights to Directive Principles of State Policy, destroying thereby one of the foundations of the Constitution; it virtually abrogate the "manner and form" of amendment laid down in Article 368 by empowering the State Legislatures and the Parliament to take away important Fundamental Rights by an ordinary law passed by a simple majority; that it destroys by conclusiveness of the declaration the salient safeguard of judicial review and the right of enforcement of Fundamental Rights; and that, it enables the Legislatures, under the guise of giving effect to the Directive Principles, to take steps calculated to affect the position of religious, regional, linguistic, cultural and other minorities. Counsel complaints that the article abrogates not only the most cherished rights to personal liberty and freedom of speech but it also abrogates the right to equality before the law, which is the basic principle of Republicanism. By enacting Article 31C, the Parliament has resorted to the strange procedure of maintaining the Fundamental Rights unamended, but authorising the enactment of laws which are void as offending those rights, by validating them by a legal fiction that they shall not be deemed to be void. Today, Article 31 permits the enactment of laws in abrogation of Articles 14, 19 and 31, but what guarantee is there that tomorrow all the precious freedom will not be excepted from the range of laws passed under that article? Learned Counsel wound up his massive criticism against Article 31C by saying that the article is a monstrous outrage on the Constitution and its whole object and purpose is to legalise despotism.

2132. Having given a most anxious consideration to these arguments, I have come to the conclusion that though Article 31C is pregnant with possible mischief, it cannot, by the application of any of the well-recognised judicial tests be declared un-constitutional.

2133. For a proper understanding of the provisions of Article 31C, one must in the first place appreciate the full meaning and significance of Article 39(b) and (c) of the Constitution. Article

39 appears in Part IV of the Constitution, which lays down the Directive Principles of State Policy. The idea of Directive Principles was taken from Eire, which in turn had borrowed it from the Constitution of Republican Spain. These preceding examples, as said by Sir Ivor Jennings Some Characteristics of the Indian Constitution, 1953, 30-32, are significant because they came from countries whose peoples are predominantly Roman Catholic, "and the Roman Catholics are provided by their Church not only with a faith but also with a philosophy". On matters of faith and philosophy-social or political-there always is a wide divergence of views and in fact Republican Spain witnessed a war on the heels of the enactment of its Constitution and in Eire, de Valera was openly accused of smuggling into the Constitution the pet policies of his own party. Articles 38 and 39 of our Constitution are principally based on Article 45 of the Constitution of Eire, which derives its authority from the Papal Bulls. Article 39 provides by Clause (b) that the State shall, in particular, direct its policy towards securing-"that the ownership and control of the material resources of the community are so distributed as best to subserve the common good". Clause (c) of the article enjoins the State to direct its policy towards securing-"that the operation of the economic system does not result in the concentration of wealth and means of production to common detriment." Article 31C has been introduced by the 25th Amendment in order to achieve the purpose set out in Article 39(b) and (c).

2134. I have stated in the earlier part of my judgment] that the Constitution accords a place of pride to Fundamental Rights and a place of permanence to the Directive Principles. I stand by what I have said. The Preamble of our Constitution recites that the aim of the Constitution is to constitute India into a Sovereign Democratic Republic and to secure to "all its citizens", Justice-social, economic and political-liberty and equality. Fundamental Rights which are conferred and guaranteed by Part III of the Constitution undoubtedly constitute the ark of the Constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that, the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal processes but that distinction does not bear on their relative importance. An equal right of men and women to an adequate means of livelihood; the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of leisure; and raising the level of health and nutrition are not matters for compliance with the Writ of a Court. As I look at the provisions of Parts III and IV, I feel no doubt that the basic object of conferring freedoms on individuals is the ultimate achievement of the ideals see out in Part IV. A circumspect use of the freedoms guaranteed by Part III is bound to subserve the common good but voluntary submission to restraints is a philosopher's dream. therefore, Article 37 enjoins the State to apply the Directive Principles in making laws. The freedom of a few have then to be abridged in order to ensure the freedom of all. It is in this sense that Parts III and IV, as said by Granwille Austin The Indian Constitution-Cornerstone of a Nation, Edn. 1966, together constitute "the conscience of the Constitution".

The Nation stands to-day at the cross-roads of history and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and

then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.

2135. Turning first to the new Article 31(2), the substitution of the neutral expression "amount" for "compensation" still binds the Legislature to give to the owner a sum of money in cash or otherwise. The Legislature may either lay down principles for the determination of the amount or may itself fix the amount. There is, however, intrinsic evidence in Article 31(2) that it does not empower the State to confiscate or expropriate property. Not only does Article 31(2) not authorise the legislature to fix "such amount as it deems fit", "in accordance with such principles as it considers relevant", but it enjoins the legislature by express words either to fix an "amount" for being paid to the owner or to lay down "principles" for determining the amount to be paid to him. If it was desired to authorise the legislature to pass expropriatory laws under Article 31(2), nothing would have been easier for the Constituent Body than to provide that the State shall have the right to acquire property for a public purpose without payment of any kind or description. The obligation to pay an "amount" does not connote the power not to pay any amount at all. The alternative obligation to evolve principles for determining the amount also shows that there is no choice not to pay. The choice open to the Legislature is that the amount may directly be fixed by and under the law itself or alternatively, the law may fix principles in accordance with which the amount will be determined. The amount may, of course, be paid in cash or otherwise.

2136. The specific obligation to pay an "amount" and in the alternative the use of the word "principles" for determination of that amount must mean that the amount fixed or determined to be paid cannot be illusory. If the right to property still finds a place in the Constitution, you cannot mock at the man and ridicule his right. You cannot tell him; "I will take your fortune for a farthing".

2137. But this is subject to an important, a very important, qualification. The amount fixed for being paid to the owner is wholly beyond the pale of a challenge that it is inadequate. The concept of adequacy is directly co-related to the market value of the property and therefore such value cannot constitute an element of that challenge. By the same test and for similar reasons, the principles evolved for determining the amount cannot be questioned on the ground that by application of those principles the amount determined to be paid is inadequate, in the sense that it bears no reasonable relationship with the market value of the property. Thus the question whether the amount or the principles are within the permissible Constitutional limits must be determined without regard to the consideration whether they bear, a reasonable relationship with the market value of the property. They may not bear a reasonable relationship and yet they may be valid. But to say that an amount does not bear reasonable relationship with the market value is a different thing from saying that it bears no such relationship at all, none whatsoever. In the latter case the payment becomes illusory and may come within the ambit of permissible challenge.

2138. It is unnecessary to pursue this matter further because we are really concerned with the Constitutionality of the Amendment and not with the validity of a law passed under Article 31(2). If and when such a law comes before this Court it may become necessary to consider the matter closely. As at present advised, I am inclined to the view which as I have said is unnecessary to discuss fully, that though it is not open to the court to question a law under Article 31(2) on the ground that the amount fixed or determined is not adequate, courts would have the power to question such a law if the amount fixed thereunder is illusory; if the principles, if any are stated,

for determining the amount are wholly irrelevant for fixation of the amount; if the power of compulsory acquisition or requisition is exercised for a collateral purpose; if the law offends Constitutional safeguards other than the one contained in Article 19(1)(f); or, if the law is in the nature of a fraud on the Constitution. I would only like to add, by way of explanation, that if the fixation of an amount is shown to depend upon principles bearing on social good it may not be possible to say that the principles are irrelevant.

2139. As regards the new Article 31(2B) I see no substance in the submission of the petitioner that the exclusion of challenge under Article 19(1)(f) to a law passed under Article 31(2) is bad as being in violation of the principles of natural justice. I have stated earlier that Constitutional amendments partake of the vitality of the Constitution itself, provided they are within the limits imposed by the Constitution. The exclusion of a challenge under Article 19(1)(f) in regard to a law passed under Article 31(2) cannot therefore be deemed un-constitutional. Besides, there is no reason to suppose that the legislature will act so arbitrarily as to authorise the acquisition or requisitioning of property without so much as complying with the rules of natural justice. Social good does not require that a man be condemned unheard.

2140. Article 31C presents a gordian knot. King Gordius of Phrygia had tied a knot which an oracle said would be undone only by the future master of Asia. Alexander the Great, failing to untie the knot, cut it with his sword. Such a quick and summary solutions of knotty problems is, alas, not open to a Judge. The article reads thus:

31C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

2141. A misconception regarding the ambit of this article may first be removed. The article protects only "law" and not an executive action. The term 'law' is used in Article 13(3) in a wider sense, so as to include an Ordinance, order, bye-law, etc., but that definition is limited to the purposes of Article 13. Article 31C cannot therefore be said to violate the provisions of Article 31(1) under which no person can be deprived of his property save by authority of law. It is, however, not to be denied that the word 'law' in Article 31C may include all incidents and aspects of law-making.

2142. In order properly to understand the scope of Article 31C, it would be necessary to refer to the history of the allied provisions of the Constitution. Prior to the 4th Constitutional Amendment which came into force on April 27, 1915, Articles 31A and 31B which were introduced by the First Amendment Act, 1951 excluded wholly the provisions of Part III in regard to laws providing for the acquisition of any estate or of any rights therein. The reason of the rule was that the rights of society are paramount and must be placed above those of the individual.

2143. The language of Article 31C makes it clear that only such laws will receive its protection as are for giving effect to the policy of the State towards securing the principles specified in Article 39(b) or (c). Under Clause (b) the State has to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Under Clause (e) the State has to take steps towards securing that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment. Apart from the declaration contained in the latter part of Article 31B it seems to me transparent that the nexus between a law passed under Article 31C and the objective set out in Article 39(b) and (c) is a condition precedent to the applicability of Article 31C. The declaration cannot be utilised as a cloak to protect laws bearing no relationship with the objective mentioned in the two clauses of Article 39.

2144. The objectives set out in Part IV of the Constitution were not limited in their application to agrarian reform. The 4th and 17th Amendments extended the basic principle underlying the First Amendment by introducing changes in Articles 31 and 31A and the Twenty-Fifth Amendment has taken one step further by extending the principle to a vaster field. Article 31C will operate substantially in the same way as Article 31A has operated in the agrarian sphere. In fact Article 31C is a logical extension of the principles underlying Article 31(4) and (6) and Article 31A.

2145. I find it difficult to accept the argument, so strongly pressed upon us, that Article 31C delegates the amending power to State Legislatures and empowers them to make amendments to the Constitution without complying with the form and manner prescribed by Article 368. I am also unable to appreciate that the article empowers the Parliament likewise. The true nature and character of Article 31C is that it identifies a class of legislation and exempts it from the operation of Articles 14, 19 and 31. Articles 31(4) and (6) identified laws in reference to the period of their enactment. Articles 31(2) and 31A identified the legislative field with reference to the subject-matter of the law. Articles 15(4) and 33 identified laws with reference to the objective of the legislation. In this process no delegation of amending power is involved. Thus, these various provisions, like Article 31C, create a field exempt from the operation of some of the Fundamental Rights. The field of legislation is not created by Article 31C. The power to legislate exists apart from and independently of it. What the article achieves is to create an immunity against the operation of the specified Fundamental Rights in a pre-existing field of legislation. In principle, I see no distinction between Article 31C on the one hand and Articles 15(4), 31(4), 31(5)(b)(ii), and 31(6) on the other. I may also call attention to Article 31A introduced by the First Amendment Act, 1951 under which "Notwithstanding anything contained in Article 13", no law providing for matters mentioned in Clauses (a) to (e) "shall be deemed to be void on the ground that it is inconsistent or takes away or abridges any of the rights conferred by Articles 14, 19 or 31. The fact that the five clauses of Article 31A referred to the subject-matter of the legislation whereas Article 31C refers to laws in relation to their object does not, in my opinion, make any difference in principle.

2146. The argument that Article 31C permits a blatant violation of the form and manner prescribed by Article 368 overlooks that the article took birth after a full and complete compliance with the form and manner spoken of in Article 368. Besides, implicit in the right to amend Article 368 is the power, by complying with the form and manner of Article 368, to authorise any other body to make the desired amendments to Constitutional provisions. The leading majority judgment in

Golak Nath case and Hidayatullah J. thought of a somewhat similar expedient in suggesting that a Constituent Assembly could be convoked for abridging the Fundamental Rights. I do not see any distinction in principle between creating an authority like the Constituent Assembly with powers to amend the Constitution and authorising some other named authority or authorities to exercise the same power. This aspect of the matter does not, however, arise for further consideration, because Article 31C does not delegate the power to amend.

2147. The latter part of Article 31C presents to me no difficulty: "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy." Clearly, this does not exclude the jurisdiction of the court to determine whether the law is for giving effect to the policy of the State towards securing the principles specified in Article 39(b) or (c). Laws passed under Article 31C, can, in my opinion, be upheld only, and only if, there is a direct and reasonable nexus between the law and the Directive Policy of the State expressed in Article 39(b) or (c). The law cannot be called in question on the ground that it does not give effect to such policy but I suppose no court can ever take upon itself the task of finding out whether a law in fact gives effect to its true policy. If such a latitude were open to the Judges, laws of Prohibition and Gambling should have lost their place on the statute book long since.

2148. In my opinion, therefore, Section 3 of the Twenty-Fifth Amendment, which introduces Article 31C, is valid.

THE CONSTITUTION (TWENTY-NINTH AMENDMENT) ACT, 1972.

2149. In regard to the inclusion of the two Kerala Acts, (Act 33 of 1969 and Act 25 of 1971) in the Ninth Schedule by the Twenty-Ninth Amendment, it is urged by the petitioner's counsel that if the provisions of the two Acts do not fall within the terms of 31A(1)(a), the Acts will not get the protection of Article 31B.

2150. The validity of Article 31B has been accepted in a series of decisions of this Court and I suppose it is too late in the day to re-open that question; nor indeed did the learned Counsel for the petitioner challenge the validity of that article. In State of Bihar v. Kameshwar Singh MANU/SC/0019/1952 : [1952]1SCR889 , a similar contention was considered and rejected by Patanjali Sastri C.J., who spoke for the Court. The same view was reiterated in Visweshwar Rao v. The State of Madhya Pradesh MANU/SC/0020/1952 : [1952]1SCR1020 by Mahajan J. The argument fell to be considered once again in N.B. Jeejeebhoy v. Assistant Collector, Thana, Prant, Thana MANU/SC/0248/1964 : [1965]1SCR636 , but Subba Rao J. confirmed the view taken in the earlier cases. These cases have consistently held that the opening words of Article 31B: "without prejudice to the generality of the provisions contained in Article 31A" only indicate that the Acts and Regulations specified in the Ninth Schedule would obtain immunity even if they did not attract Article 31A. If every Act in the Ninth Schedule has to be covered by Article 31A, Article 31B would become redundant. Article 31B was, therefore, held not to be governed by Article 31A. The Twenty-Ninth Amendment must, accordingly be held to be valid.

2151. Debates of the Constituent Assembly and of the First Provisional Parliament were extensively read out to us during the course of arguments. I read the speeches with interest, but in my opinion, the debates are not admissible as aids to construction of Constitutional provisions. In Gopalan's case MANU/SC/0012/1950 : 1950CriLJ1383 , Kania C.J., following the decisions in The Municipal Council of Sydney v. The Commonwealth [1904] 1 Com. L.R. 208 and United States v. Wong Kim Ark [169] U.S. 649, observed that while it is not proper to take into consideration the individual opinions of Members of Parliament to construe the meaning of a particular clause, a reference to the debates may be permitted when a question is raised whether a certain phrase or expression was up for consideration at all or not. According to Mukherjea J. (p. 274), the debates of the Constituent Assembly are of doubtful value as an aid to discover the meaning of the words in a Constitution. The learned Judge said that a resort can be had to the debates with great caution and only when latent ambiguities are to be resolved. A similar view was expressed by this Court in State of Travancore, Cochin and Anr. v. Bombay Co. Limited [1952] S.C.R. 113. In the Golak Golak Nath case, Subba Rao C.J. clarified that he had not referred to the speeches made in the Constituent Assembly for the purpose of interpreting the provisions of Article 368. Bachawat J. also took the same view.

2152. It was urged by the learned Advocate-General of Maharashtra that there is a noticeable change in the attitude of this Court to parliamentary debates since the decision in Gopalan's case and that the most pronounced trend manifested itself first in Golak Nath's case and then decisively in the Privy Purse case MANU/SC/0050/1970 : [1971]3SCR9 , 83. The practice followed in the Privy Purse case is said to have been adopted both by the majority and the minority in Union of India v. H.S. Dillon [1971] 2 S.C.R., 779.

2153. I am unable to agree that any reliance was placed in the Privy Purse case or in Dillon's case on parliamentary speeches, for the purpose of interpreting the legal provisions. Shah J., in the Privy Purse case, referred to the speech of Sardar Vallabhbhai Patel in order to show the circumstances in which certain guarantees were given to the former Rulers. The Advocate-General is right that Mitter J. made use of a speech for construing Article 363, but that was done without discussing the question as regards the admissibility of the speech. In Dillon's case, it is clear from the judgment of the learned Chief Justice, that no use was made of the speeches in the Constituent Assembly for construing any legal provision. In fact, the learned Chief Justice observed that he was glad to find from the debates that the interpretation which he and two his colleagues had put on the legal provision accorded with what was intended.

2154. It is hazardous to rely upon parliamentary debates as aids to statutory construction. Different speakers have different motives and the system of 'Party Whip' leaves no warrant for assuming that those who voted but did not speak were of identical persuasion. That assumption may be difficult to make even in regard to those who speak. The safest course is to gather the intention of the legislature from language it uses. therefore, parliamentary proceedings can be used only for a limited purpose as explained in Gopalan's case.

2155. Before summarising my conclusions, let me say that it is with the greatest deference and not without hesitation that I have decided to differ from the eminent Judges who constituted the majority in the Golak Nath case. Two of them still adorn this Bench and to them as to the other learned Brothers of this Bench with whom it has not been possible to agree, I say that it has been

no pleasure to differ from them, after being with some of them for a part of the time, on a part of the case. Their concern for common weal, I guess, is no less than mine and so let me express the hope that this long debate and these long opinions will serve to secure at least one blessing-the welfare of the common man. We are all conscious that this vast country has vast problems and it is not easy to realise the dream of the Father of the Nation to wipe every tear from every eye. But, if despite the large powers now conceded to the Parliament, the social objectives are going to be a dustbin of sentiments, then woe betide those in whom the country has placed such massive faith.

2156. My conclusions are briefly these:

1. The decision of the leading majority in the Golak Nath case that the then Article 368 of the Constitution merely prescribed the procedure for amendment of the Constitution and that the power of amendment had to be traced to Entry 97 of List I, Schedule VII read with Articles 245, 246 and 248 is not correct.

2. The decision of the leading majority and of Hidayatullah J. that there is no distinction between an ordinary law and a law amending the Constitution is incorrect. Article 13(2) took in only ordinary laws, not amendments to the Constitution effected under Article 368.

3. The decision of the leading majority and of Hidayatullah J. that Parliament had no power to amend the Constitution so as to abrogate or take away Fundamental Rights is incorrect.

4. The power of amendment of the Constitution conferred by the then Article 368 was wide and unfettered. It reached every part and provision of the Constitution.

5. Preamble is a part of the Constitution and is not outside the reach of the amending power under Article 368.

6. There are no inherent limitations on the amending power in the sense that the Amending Body lacks the power to make amendments so as to damage or destroy the essential features or the fundamental principles of the Constitution.

7. The 24th Amendment only declares the true legal position as it obtained before that Amendment and is valid.

8. Section 2(a) and Section 2(b) of the 25th Amendment are valid. Though courts have no power to question a law described in Article 31(2) substituted by Section 2(a) of the Amendment Act, On the ground that the amount fixed or determined for compulsory acquisition or requisition is not adequate or that the whole or any part of such amount is to be given otherwise than in cash, courts have the power to question such a law if (i) the amount fixed is illusory; or (ii) if the principles, if any are stated, for determining the amount are wholly irrelevant for fixation of the amount; or (iii) if the power of compulsory acquisition or requisition is exercised for a collateral purpose; or (iv) if the law of compulsory acquisition or requisition offends the principles of Constitution other than the one which is expressly excepted under Article 31(2B) introduced by Section 2(b) of the 25th Amendment Act - namely Article 19(1)(f); or (v) if the law is in the nature of a fraud on the Constitution.

9. Section 3 of the 25th Amendment which introduced Article 31C into the Constitution is valid. In spite, however, of the purported conclusiveness of the declaration therein mentioned, the Court has the power and the jurisdiction to ascertain whether the law is for giving effect to the policy of the State towards securing the principles specified in Article 39(b) or (c). If there is no direct and reasonable nexus between such a law and the provisions of Article 39(b) or (c), the law will not, as stated in Article 31C, receive immunity from a challenge under Articles 14, 19 or 31.

10. The 29th Amendment Act is valid. The two Kerala Acts mentioned therein, having been included in the Ninth Schedule, are entitled to the protection of Article 31B of the Constitution.

2157. I would direct each party to bear its own costs.

2158. As I am coming to the close of my judgment, drafts of judgments of several of my esteemed colleagues are trickling in. As I look at them, I hear a faint whiser of Lord Dunedin. And then I thought : I began this judgment by saying that I wanted to avoid writing a separate judgment of my own. Are first thoughts best?

The view by the majority in these writ petitions is as follows:

Golak Nath's case is over-ruled;

Article 368 does not enable Parliament to alter the basic structure of frame-work of the constitution;

Section 2(a) and (b) of the Constitution (Twenty-fourth Amendment) Act, 1971 is valid;

The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such Policy" is invalid;

The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred up to this stage.

ORDER

2159. The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

2160. The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred upto this stage.

Back to Index

MANU/SC/0133/1978

Neutral Citation: 1978/INSC/16

IN THE SUPREME COURT OF INDIA

Writ Petition No. 231 of 1977

Decided On: 25.01.1978

Appellants: Maneka Gandhi **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

M. Hameedullah Beg, C.J., N.L. Untwalia, P.N. Bhagwati, P.S. Kailasam, S. Murtaza Fazal Ali, V.R. Krishna Iyer and Y.V. Chandrachud, JJ.

Subject: Constitution

Subject: Civil

Relevant Section:

Passports Act, 1967 - Section 10(3)(c)

Disposition:

Disposed of

Authorities Referred:

Halsbury's Laws of England, 3rd. ed. vol 37

Case Note:

(i) Constitution - validity of provision - Articles 14, 19 and 21 of Constitution of India and Section 10 (3) (c) of Passports Act, 1967 - validity of Section 10 (3) (c) challenged - procedure in Article 21 means procedure which conforms to principles of natural justice - power conferred under Section 10 (3) (c) not unguided and it is implied in it that rules of natural justice would be applicable - held, Section 10 (3) (c) not violative of Article 21.

(ii) Right of dignity - right to live is not merely confined to physical existence - it includes within its ambit right to live with human dignity.

(iii) Inter-relationship - principle of reasonableness provided under Article 14 must apply to procedure as contemplated under Article 21 - Article 21 controlled by Article 19 also - in case a law does not infringe Article 21 even then it has to meet challenges of Articles 14 and 19.

(iv) Post-decisional hearing - petitioner's passport impounded and not given pre-decisional notice and hearing - Government contended that rule audi alteram partem must be excluded because it may have frustrated very purpose of impounding passport - concept of post-decisional hearing developed to maintain balance between administrative efficiency and fairness to individual - Court stressed that fair opportunity of being heard following immediately Order impounding passport would satisfy mandate of natural justice.

JUDGMENT

M. Hameedullah Beg, C.J.

1. The case before us involves questions relating to basic human rights. On such questions I believe that multiplicity of views giving the approach of each member of this Court is not a disadvantage if it clarifies our not infrequently differing approaches. It should enable all interested to appreciate better the significance of our Constitution.

2. As I am in general agreement with my learned brethren Bhagwati and Krishna Iyer. I will endeavour to confine my observations to an indication of my own approach on some matters for consideration now before us. This seems to me to be particularly necessary as my learned brother Kailasam, who has also given us the benefit of his separate opinion, has a somewhat different approach. I have had the advantage of going through the opinions of each of my three learned brethren.

3. It seems to me that there can be little doubt that the right to travel and to go outside the country, which orders regulating issue, suspension or impounding, and cancellation of passports directly affect, must be included in rights to "personal liberty" on the strength of decisions of this Court giving a very wide ambit to the right to personal liberty (see : Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Ors. MANU/SC/0040/1967 : [1967]3SCR525 , Kharak Singh v. State of U.P. and Ors. MANU/SC/0085/1962 : 1963CriLJ329 .

4. Article 21 of the Constitution reads as follows :

Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law.

5. It is evident that Article 21, though so framed as to appear as a shield operating negatively against executive encroachment over something covered by that shield, is the legal recognition of

both the protection or the shield as well as of what it protects which lies beneath that shield. It has been, so interpreted as long ago as in A. K. Gopalan v. State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 , where, as pointed out by me in Additional District Magistrate, Jabalpur v. S. S. Shukla and Ors. MANU/SC/0062/1976 : [1976] Supp. SCR 172at 327 with the help of quotations from judgments of Patanjli Sastri, J. (from p. 195 to 196), Mahajan J. (p. 229-230), Das J. (295 and 306-307). I may add to the passages I cited there some from the judgment of Kania Chief Justice who also, while distinguishing the objects and natures of Articles 21 and 19, gave a wide enough scope to Article 21.

6. Kania CJ said (at p. 106-107) :

Deprivation (total loss) of personal liberty, which inter alia includes the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights sought to be protected by the expression 'personal liberty' in Article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19(1)(d). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India. This is made clear when the provisions of the Criminal Procedure Code in Chapter VIII relating to security of peace or maintenance of public order are read. Therefore Article 19(5) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word 'deprivation' includes within its scope 'restriction' when interpreting Article 21. Article 22 envisages the law of preventive detention. So does Article 246 read with Schedule Seven, List I, Entry 9, and List III, Entry 3. Therefore, when the subject of preventive detention is specifically dealt with in the Chapter on Fundamental Rights I do not think it is proper to consider a legislation permitting preventive detention as in conflict with the rights mentioned in Article 19(1). Article 19(1) does not purport to cover all aspects of liberty or of personal liberty. In that article only certain phases of liberty are dealt with. 'Personal liberty' would primarily mean liberty of the physical body. The rights given under Article 19(1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If Article 19 is considered to be the only article safeguarding personal liberty several well-recognised rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read Article 19 as dealing with the same subject as Article 21. Article 19 gives the rights specified therein only to the citizens of India while Article 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover, the protection given by Article 21 is very general. It is of 'law'- whatever that expression is interpreted to mean. The legislative restrictions on the law-making powers of the legislature are not here prescribed in detail as in the case of the rights specified in Article 19. In my opinion therefore Article 19 should be read as a separate complete article.

7. In that case, Mukherjee J., after conceding that the rights given by Article 19(1)(d) would be incidentally contravened by an order of preventive detention (see p. 261) and expressing the opinion that a wider significance was given by Blackstone to the term "personal liberty", which may include the right to locomotion, as Mr. Nambiar, learned Counsel for A. K. Gopalan, wanted

the Court to infer, gave a narrower connotation to "personal liberty", as "freedom from physical constraint or coercion" only. Mukherjea, J., cited Dicey for his more restrictive view that "personal liberty" would mean : "a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification". He then said :

It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory.

After referring to the views of the Drafting Committee of our Constitution Mukherjea, J., said : (p. 263) :

It is enough to say at this stage that if the report of the Drafting Committee is an appropriate material upon which the interpretation of the words of the Constitution could be based, it certainly goes against the contention of the applicant and it shows that the words used in Article 19(1)(d) of the Constitution do not mean the same thing as the expression personal liberty' in Article 21 does. It is well known that the word 'liberty' standing by itself has been given a very wide meaning by the Supreme Court of the United States of America. It (includes not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into free contractual relations. In the Indian Constitution, on the other hand, the expression 'personal liberty' has been deliberately used to restrict it to freedom from physical restraint of person by incarceration or otherwise.

8. Fazal Ali, J., however, said (at p. 148) :

To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under Article 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to Article 19(1)(f) and Article 31 both of which deal with the right to property and to some extent overlap each other.

9. As has been pointed out by my learned brother Bhagwati, by detailed references to cases, such as Haradhan Saha v. The State of West Bengal and Ors. MANU/SC/0537/1972 : [1973]1SCR856 and Shambhu Nath Sarkar v. State of West Bengali MANU/SC/0537/1972 : [1973]1SCR856 , the view that Articles 19 and 21 constitute water tight compartments, so that all aspects of personal liberty could be excluded from Article 19 of the Constitution, had to be abandoned as a result of what was held, by a larger bench of this Court in R.. C. Cooper v. Union of India [1973] 3 SCR 530, to be the sounder view. Therefore, we could neither revive that overruled doctrine nor could we now hold that impounding or cancellation of a passport does not impinge upon and affect fundamental rights guaranteed by the Constitution. I may point out that the doctrine that Articles 19 and 21 protect or regulate flows in different channels, which certainly appears to have found

favour in this Court in A. K. Gopalan's case (supra), was laid down in a context which was very different from that in which that approach was displaced by the sounder view that the Constitution must be read as an integral whole, with possible over-lappings of the subject matter of what is sought to be protected by its various provisions particularly by articles relating to fundamental rights.

10. In A. K. Gopalan's case (supra), what was at issue was whether the tests of valid procedure for deprivation of personal liberty by preventive detention must be found exclusively in Article 22 of the Constitution or could we gather from outside it also elements of any "due process of law" and use them to test the validity of a law dealing with preventive detention. Our Constitution makers, while accepting a departure from ordinary norms, by permitting making of laws for preventive detention without trial for special reasons in exceptional situations also provided quite elaborately, in Article 22 of the Constitution itself, what requirements such law, relating to preventive detention, must satisfy. The procedural requirements of such laws separately formed parts of the guaranteed fundamental rights. Therefore, when this Court was called upon to judge the validity of provisions relating to preventive detention it laid down, in Gopalan's case (supra), that the tests of "due process", with regard to such laws, are to be found in Article 22 of the Constitution exclusively because this article constitutes a self-contained code for laws of this description. That was, in my view, the real ratio decidendi of Gopalan's case (supra). It appears to me, with great respect, that other observations relating to the separability of the subject matters of Articles 21 and 19 were mere obiter dicta. They may have appeared to the majority of learned Judges in Gopalan's case to be extensions of the logic they adopted with regard to the relationship between Article 21 and 22 of the Constitution. But, the real issue there was whether, in the face of Article 22 of the Constitution, which provides all the tests of procedural validity of a law regulating preventive detention, other tests could be imported from Article 19 of the Constitution or elsewhere into "procedure established by law". The majority view was that this could not be done. I think, if I may venture to conjecture what opinions learned Judges of this Court would have expressed on that occasion had other types of law or other aspects of personal liberty, such as those which confronted this Court in either Satwant Singh's case (supra) or Kharak Singh's case (supra) were before them, the same approach or the same language would not have been adopted by them. It seems to me that this aspect of Gopalan's case (supra) is important to remember if we are to correctly understand what was laid down in that case.

11. I have already referred to the passages I cited in A. D. M. Jabalpur's case (supra) to show that, even in Gopalan's case (supra), the majority of judges of this Court took the view that (the ambit of personal liberty protected by Article 21 is wide and comprehensive. It embraces both substantive rights to personal liberty and the procedure provided for their deprivation. One can, however, say that no question of "due process of law" can really arise, apart from procedural requirements of preventive detention laid down by Article 22, in a case such as the one this Court considered in Gopalan's case (supra). The clear meaning of Article 22 is that the requirements of. "due process of law", in cases of preventive detention, are satisfied by what is provided by Article 22 of the Constitution itself. This article indicates the pattern of "the procedure established by law" for cases of preventive detention,

12. Questions, however, relating to either deprivation or restrictions of personal liberty, concerning laws falling outside Article 22 remained really unanswered, strictly speaking, by Gopalan's case.

If one may so put it, the field of "due process" for cases of preventive detention is fully covered by Article 22, but other parts of that field, not covered by Article 22, are "unoccupied" by its specific provisions. I have no doubt that, in what may be called "unoccupied" portions of the vast sphere of personal liberty, the substantive as well as procedural laws made to cover them must satisfy the requirements of both Articles 14 and 19 of the Constitution.

13. Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political),
Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.

14. We have to remember that the fundamental rights protected by Part III of the Constitution, out of which Articles 14, 19 and 21 are the most frequently invoked, form tests of the validity of executive as well as legislative actions when these actions are subjected to judicial scrutiny. We cannot disable Article 14 or 19 from so functioning and hold those executive and legislative actions to which they could apply as unquestionable even when there is no emergency to shield actions of doubtful legality. These tests are, in my opinion, available to us now to determine the constitutional validity of Section 10(3)(c) of the Act as well as of the impugned order of 7th July, 1977, passed against the petitioner impounding her passport "in the interest of general public" and stating that the Government had decided not to furnish her with a copy of reasons and claiming immunity from such disclosure under Section 10(5) of the Act.

15. I have already mentioned some of the authorities relied upon by me in A. D. M. Jabalpur v. S. Shukla '(Supra), while discussing the scope of Article 21 of the Constitution, to hold that its ambit is very wide. I will now indicate why, in my view, the particular rights claimed by the petitioner could fall within Articles 19 and 21 and the nature and origin of such rights.

16. Mukerji J., in Gopalan's case (supra) referred to the celebrated commentaries of Blackstone on the Laws of England. It is instructive to reproduce passages from there even though juristic reasoning may have travelled today beyond the stage reached by it when Blackstone wrote. Our basic concepts on such matters, stated there, have provided the foundations on which subsequent superstructures were raised. Some of these foundations, fortunately, remain intact. Black-stone said :

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times : no human laws are of any validity, if contrary to this; and such of them as are valid derive, all their force and all their authority, mediately or immediately, from this original.

17. The identification of natural law with Divine will or dictates of God may have, quite understandably, vanished at a time when men see God, if they see one anywhere at all, in the highest qualities inherent in the nature of Man himself. But the idea of a natural law as a morally inescapable postulate of a just order, recognizing the inalienable and inherent rights of all men (which term includes women) as equals before the law persists. It is, I think,, embedded in our own Constitution. I do not think that we can reject Blackstone's theory of natural rights as totally irrelevant for us today.

18. Blackstone propounded his philosophy of natural or absolute rights in the following terms :

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that will and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties), as they are founded on nature and reason, so they are coeval with our form of Government; though subject at times to fluctuate and change; their establishment (excellent as it is) being still human.

* * * And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion, or abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, involate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, with out the explicit permission of the laws.

III. The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries; but certainly the modifications under which we at present find it, the method of con serving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty.

19. I have reproduced from Blackstone whose ideas may appear somewhat quaint in an age of irreverence because, although, I know that modern jurisprudence conceives of all rights as relative or as products of particular socio-economic orders, yet, the idea that man, as man, morally has certain inherent natural primordial inalienable human rights goes back to the very origins of human jurisprudence. It is found in Greek philosophy. If we have advanced today to wards what we believe to be a higher civilisation and a more enlightened era, we cannot fall behind what, at any rate, was the meaning given to "personal liberty" long ago by Blackstone. As indicated above, it included "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law". I think that both the rights of "personal security" and of "personal liberty", recognised by what Blackstone termed "natural law", are embodied in Article 21 of the Constitution. For this proposition, 1 relied, in A. D. M. Jabalpur v. S.S. Shukla (supra), and I do so again here, on a passage from Subba Rao C.J., speaking for five Judges of this Court in I.C. Golaknath v. State of Punjab MANU/SC/0029/1967 : [1967]2SCR762 when he said (at p. 789) : .

Now, what are the fundamental rights ? They are embodied in Part III of the Constitution and they may be classified thus: (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property, and (vii) right to constitutional remedies. They are the rights of the people preserved by our Constitution, 'Fundamental rights' are the modern name for what have been traditionally known as 'natural rights'. As one author puts it: 'they are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradistinction with other beings, he is rational and moral'., They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best. Our Constitution, in addition to the well-known fundamental rights, also included the rights of the minorities, untouchables and other backward communities, in such right.

20. Hidayatullah, J., in the same case said (at p. 877) :

What I have said does not mean that Fundamental Rights are not subject to change or modification. In the most inalienable of such rights a distinction must be made between possession of a right and its exercise. The first is fixed and the latter controlled by justice and necessity. Take for example Article 21 :

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Of all the rights, the right to one's life is the most valuable. This article of the Constitution, therefore, makes the right fundamental. But the inalienable right is curtailed by a murderer's conduct as viewed under law. The deprivation, when it takes place, is not of the right which was immutable but of the continued exercised of the right.

21. It is, therefore, clear that six out of eleven Judges in Golak Nath's case declared that fundamental rights are natural rights embodied in the Constitution itself. This view was affirmed by the majority Judges of this Court in Shukla's case. It was explained by me there at some length. Khanna, J., took a somewhat different view. Detailed reasons were given by me in Shukla's case (supra) for taking what I found to be and still find as the only view I could possibly take if I were not to disregard, as I could not properly do, what had been held by larger benches and what I myself consider to be the correct view : that natural law rights were meant to be converted into our Constitutionally recognised fundamental rights, at-least so far as they are expressly mentioned, so that they are to be found within it and not outside it. To take a contrary view would involve a conflict between natural law and our Constitutional law. I am emphatically of opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution.

22. The implication of what I have indicated above is that Article 21 is also a recognition and declaration of rights which inhere in every individual. Their existence does not depend on the location of the individual. Indeed, it could be argued that what so inheres is inalienable and cannot be taken away at all This may seem theoretically correct and logical. But, in fact, we are often met with denials of what is, in theory, inalienable or "irrefragable". Hence, we speak of "deprivations" or "restrictions" which are really impediments to the exercise of the "inalienable" rights. Such deprivations or restrictions or regulations of rights may take place, within prescribed limits, by means of either statutory law or purported actions under that law. The degree to which the theoretically recognised or abstract right is concretised is thus determined by the balancing of principles on which an inherent right is based against those on which a restrictive law or orders under it could be imposed upon its exercise. We have to decide in each specific case, as it arises before us, what the result of such a balancing is.

23. In judging the validity of either legislative or executive state action for conflict with any of the fundamental rights of individuals, whether they be of citizens or non-citizens, the question as to where the rights are to be exercised is not always material or even relevant. If the persons concerned, on whom the law or purported action under it is to operate, are outside the territorial jurisdiction of our country, the action taken may be ineffective. But, the validity of the law must be determined on considerations other than this. The tests of validity of restrictions imposed upon the rights covered by Article 19(1) will be found in Clauses (2) to (6) of Article 19. There is nothing there to suggest that restrictions on rights the exercise of which may involve going out of the country or some activities abroad are excluded from the purview of tests contemplated by Articles 19(2) to (6). I agree with my learned brother Bhagwati, for reasons detailed by him, that the total effect and not the mere form of a restriction will determine which fundamental right is really involved in a particular case and whether a restriction upon its exercise is reasonably permissible on the facts and circumstances of that case.

24. If rights under Article 19 are rights which inhere in Indian citizens, individuals concerned carry these inherent fundamental constitutional rights with them wherever they go, in so far as our law applies to them, because they are parts of the Indian nation just as Indian ships, flying the Indian flag, are deemed, in International law, to be floating parts of Indian territory. This analogy, however, could not' be pushed too far because Indian citizens on foreign territory, are only entitled, by virtue of their Indian nationality and passports, to the protection of the Indian Republic and the assistance of its diplomatic missions abroad. They cannot claim to be governed abroad by their own Constitutional or personal laws which do not operate outside India. But, that is not the position in the case before us. So far as the impugned action in the case before us is concerned, it took place in India and against an Indian citizen residing in India.

25. In India, at any rate, we are all certainly governed by our Constitution. The fact that the affected petitioner may not, as a result of a particular order, be able to do something intended to be done by her abroad cannot possibly make the Governmental action in India either ineffective or immune from judicial scrutiny or from an attack made on the ground of a violation of a fundamental right which inheres in an Indian citizen. The consequences or effects upon the petitioner's possible actions or future activities in other countries may be a factor which may be weighed, where relevant, with other relevant facts in a particular case in judging the merits of the restriction imposed. It will be relevant in so far as it can be shown to have some connection with public or national interests when determining the merits of an order passed. It may show how she has become a "person aggrieved" with a cause of action, by a particular order involving her personal freedom. But, such considerations cannot curtail or impair the scope or operation of fundamental rights of citizens as protections against unjustifiable actions of their own Government. Nor can they, by their own force, protect legally unjustifiable actions of the Government of our country against attacks in our own Courts.

26. In order to apply the tests contained in Articles 14 and 19 of the Constitution, we have to consider (the objects for which the exercise of inherent rights recognised by Article 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed. Both substantive and procedural laws and actions taken under them will have to pass tests imposed by Articles 14 and 19 whenever facts justifying the invocation of either of these articles may be disclosed. For example, an international singer or dancer may well be able to complain of an unjustifiable restriction on professional activity by a denial of a passport. In such a case, violations of both Articles 21 and 19(1)(g) may both be put forward making it necessary for the authorities concerned to justify the restriction imposed, by showing satisfaction of tests of validity contemplated by each of these two articles.

27. The tests of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic. Otherwise, they would cease to be reasonable. Thus, I think: that a discretion left to the authority to impound a passport in public interest cannot invalidate the law itself. We cannot, out of fear that such power will be misused, refuse to permit Parliament to entrust even such power to executive authorities as may be absolutely necessary to carry out the purposes of a validly exercisable power. I think it has to be necessarily left to executive discretion to decide whether, on the facts and circumstances of a particular case, public interest will or will not be served by a particular order to be passed under a valid law subject, as it always is to judicial supervision.

In matters such as grant, suspension, impounding or cancellation of passports, the possible dealings of an individual with nationals and authorities of other States have to be considered. The contemplated or possible activities abroad of the individual may have to be taken into account. There may be questions of national safety and welfare which transcend the importance of the individual's inherent right to go where he or she pleases to go.
Therefore, although we may not deny the grant of wide discretionary power to the executive authorities as unreasonable in such cases, yet, I think we must look for and find procedural safeguards to ensure that the power will not be used for purposes extraneous to the grant of the power before we uphold the validity of the power conferred. We have to insist on procedural proprieties the observance of which could show that such a power is being used only to serve what can reasonably and justly be regarded as a public or national interest capable of overriding the individual's inherent right of movement or travel to wherever he or she pleases in the modern world of closer integration in every sphere between the peoples of the world and the shrunk time-space relationships.

28. The view I have taken above proceeds on the assumption that there are inherent or natural human rights of the individual recognised by and embodied in our Constitution.

Their actual exercise, however, is regulated and conditioned largely by statutory law. Persons upon whom these basic rights are conferred can exercise them so long as there is-no justifiable reason under the law enabling deprivations or restrictions of such rights. But, once the valid reason is found to be there and the deprivation or restriction takes place for that valid reason in a procedurally valid manner, the action which results in a deprivation or restriction becomes unassailable.
If either the reason sanctioned by the law is absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed.

29. A bare look at the provisions of Section 10, Sub-section (3) of the Act will that each of the orders which could be passed under Section 10, Sub-section (3)(a) to (h) requires a "satisfaction" by the Passport Authority on certain objective conditions which must exist in a case before it passes an order to impound a passport or a travel document. Impounding or revocation are placed side by side on the same footing in the provision. Section 11 of the Act provides an appeal to the Central Government from every order passed under section, 10, Sub-section (3) of the Act. Hence Section 10, Sub-section (5) makes it obligatory upon the Passport Authority to "record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same unless in any case, the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy".

30. It seems to me, from the provisions of Section 5, 7 and 8 of the Act, read with other provisions, that there is a statutory right also acquired, on fulfilment of prescribed conditions by the holder of a passport, that it should continue to be effective for the specified period so long as up ground has come into existence for either its revocation or for impounding it which amounts to a suspension of it for the time being, It is true that in a proceeding under Article 32 of the Constitution, we are

only concerned with the enforcement of fundamental Constitutional rights and not with any statutory rights apart from fundamental rights. Article 21, however, makes it clear that violation of a law, whether statutory or if any other kind, is itself an infringement of the guaranteed fundamental right. The basic right is not to be denied the protection of "law" irrespective of variety of that law. It need only be a right "established by law".

31. There can be no doubt whatsoever that the orders under Section 10(3) must be based upon some material even if that material consists, in some cases, of reasonable suspicion arising from certain credible assertions made by reliable individuals.

It may be that, in an emergent situation, the impounding of a passport may become necessary without even giving an opportunity to be heard against such a step, which could be reversed after an opportunity given to the holder of the passport to show why the step was unnecessary, but, ordinarily, no passport could be reasonably either impounded or revoked without giving a prior opportunity to its holder to show cause against the proposed action. The impounding as well revocation of a passport, seem to constitute action in the nature of a punishment necessitated on one of the grounds specified in the Act. Hence, ordinarily, an opportunity to be heard in defence after a show cause notice should be given to the holder of a passport even before impounding it.

32. It is well established that even where there is no, specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights off that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. This principle was laid down by this Court in the State of Orissa v. Dr. (Miss) Binapani Dei and Ors. MANU/SC/0332/1967 : (1967)IILLJ266SC in the following words :

The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore arise from the very nature of the function intended to be performed, it need not be shown to be super added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a Person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

33. In England, the rule was thus expressed by Byles J. in Cooper v. Wandsworth Board of Works 1863(14) C.B. 180 :

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence, "Adam (says God), "where art thou ? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat ?" And the same question was put to Eve also.

34. I find no difficulty whatsoever in holding, on the strength of these well recognised principles, that an order impounding a passport must be made quasi-judicially. This was not done in the case before us.

35. In my estimation, the findings arrived at by my learned brethren after an examination of the facts of the case before us, with which I concur, indicate that it cannot be said that a good enough reason has been shown to exist for impounding the passport of the petitioner by the order dated 7th July, 1977. Furthermore, the petitioner has had no opportunity of showing that the ground for impounding it finally given in this Court either does not exist or has no bearing on public interest or that public interest cannot be better served in some other manner. Therefore, speaking for myself, I would quash the order and direct the opposite parties to give an opportunity to the petitioner to show cause against any proposed action on such grounds as may be available.

36. I am not satisfied that there were present any such pressing grounds with regard to the petitioner before us that the immediate action of impounding her passport was called for. Furthermore, the rather cavalier fashion in which disclosure of any reason for impounding her passport was denied to her, despite the fact that the only reason said to exist the possibility of her being called to give evidence before a commission of inquiry and stated in the counter-affidavit filed in this Court, is not such as to be reasonably deemed to necessitate its concealment in public interest, may indicate the existence of some undue prejudice against the petitioner. She has to be protected against even the appearance of such prejudice or bias.

37. It appears to me that even executive authorities when taking administrative action which involves any deprivations of or restrictions on inherent fundamental rights of citizens must take care to see that justice is not only done But manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness or unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice.

38. The attitude adopted by the Attorney General however, shows that Passport authorities realize fully that the petitioner's case has not been justly or reasonably dealt with. As the undertaking given by the Attorney General amounts to an offer to deal with it justly and fairly after informing the petitioner of any ground that may exist for impounding her passport, it seems that no further action by this Court may be necessary. In view, however, of what is practically an admission that the order actually passed on 7th July, 1977, is neither fair nor procedurally proper, I would, speaking for myself, quash this order and direct the return of the impounded passport to the petitioner. I also think that the petitioner is entitled to her costs.

Y.V. Chandrachud, J.

39. The petitioner's passport dated June 1, 1976 having been impounded "in public interest" by an order dated July 2, 1977 and the Government of India having declined "in the interest of general public" to furnish to her the reasons for its decision, she has filed this writ petition under Article 32 of the Constitution to challenge that order. The challenge is founded on the following grounds :

(1) To the extent to which Section 10(3)(c) of the Passport Act, 1967 authorises the passport authority to impound a passport "in the interests of the general public", it is violative of Article 14 of the Constitution since it confers vague and undefined power on the passport authority;

(2) Section 10(3)(c) is void as conferring an arbitrary power since it does not provide for a hearing to the holder of the passport before the passport is impounded;

(3) Section 10(3)(c) is violative of Article 21 of the Constitution since it does not prescribe 'procedure' within the meaning of that article and since the procedure which it prescribes is arbitrary and unreasonable; and

(4) Section 10(3)(c) offends against Articles 19(1)(a) and 19(1)(g) since it permits restrictions to be imposed on the rights guaranteed by these articles even though such restrictions cannot be imposed under Articles 19(2) and 19(6).

At first, the passport authority exercising its power under Section 10(5) of the Act refused to furnish to the petitioner the reason for which it was considered necessary in the interests of general public to impound her passport. But those reasons were disclosed later in the counter-affidavit filed on behalf of the Government of India in answer to the writ petition. The disclosure made under the stress of the writ petition that the petitioner's passport was impounded because, her presence was likely to be required in connection with the proceedings before a Commission of Inquiry, could easily have been made when the petitioner called upon the Government to let her know the reasons why her passport was impounded. The power to refuse to disclose the reasons for impounding a passport is of an exceptional nature and it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation. The reasons, if disclosed being open to judicial scrutiny for ascertaining their nexus with the order impounding the passport, the refusal to disclose the reasons would equally be open to the scrutiny of the court; or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons. Law cannot permit the exercise of a power to keep the reasons undisclosed if the sole reason for doing so is to keep the reasons away from judicial scrutiny.

40. In Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Ors. MANU/SC/0040/1967 : [1967]3SCR525 this Court ruled by majority that the expression "personal liberty" which occurs in Article 21 of the Constitution includes the right to travel abroad and that no person can be deprived of that right except according to procedure established by law. The Passport Act which was enacted by Parliament in 1967 in order to comply with that decision prescribes the procedure whereby an application for a passport may be granted fully or partially, with or without any endorsement, and a passport once granted may later be revoked or impounded.

But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.
The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on

hypothetical considerations like the provision for a full-dressed hearing as in a Courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Article 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19. If the holding in A. K. Gopalan v. State of Madras [1950] SCR 88 that the freedoms guaranteed by the Constitution are mutually exclusive were still good law, the right to travel abroad which is part of the right of personal liberty under Article 21 could only be found and located in that article and in no other. But in the Bank Nationalisation Case (R. C. Cooper v. Union of India [1973] 3 SCR 530 the majority held that the assumption in A. K- Gopalan MANU/SC/0012/1950 : 1950CriLJ1383 that certain articles of the Constitution exclusively deal with specific matters cannot be accepted as correct. Though the Bank Nationalisation case [1973] 3 SCR 530 was concerned with the inter-relationship of Article 31 and 19 and not of Articles 21 and 19, the basic approach adopted therein as regards the construction of fundamental rights guaranteed in the different provisions of the Constitution categorically discarded the major premise of the majority judgment in A. K. Gopalan (supra) as incorrect. That ;is how a seven-Judge Bench in Shambhu Nath Sarkar v. State of West Bengal and Ors. MANU/SC/0537/1972 : [1973]1SCR856 assessed the true impact of the ratio of the Bank Nationalisation Case (supra) on the decision in A. K. Gopalan (supra) in Shambhu Nath Sarkar MANU/SC/0537/1972 : [1973]1SCR856 it was accordingly held that a law of preventive detention has to meet the challenge not only of Articles 21 and 22 but also of Article 19(1)(d). Later, a five-Judge Bench in Haradhan Saha v. State of West Bengal and Ors. MANU/SC/0419/1974 : 1974CriLJ1479 adopted the same approach and considered the question whether the Maintenance of Internal Security Act, 1971 violated the right guaranteed by Article 19(1)(d). Thus, the inquiry whether the right to travel abroad forms a part of any of the freedoms mentioned in Article 19(1) is not to be shut out at the threshold merely because that right is a part of the guarantee of personal liberty under Article 21. I am in entire agreement with Brother Bhagwati when he says :

The law must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article.

41. The interplay of diverse articles of the Constitution guaranteeing -various freedoms has gone through vicissitudes which have been elaborately traced by Brother Bhagwati. The test of directness of the impugned law as contrasted with its consequences was thought in A. K. Gopalan (supra) and Ram Singh [1951] SCR 451 to be the true approach for determining whether a fundamental right was infringed. A significant application of that test may be perceived in Naresh S. Mirajkar MANU/SC/0044/1966 : [1966]3SCR744 where an order passed by the Bombay High Court prohibiting the publication of a witness's evidence in a defamation case was up-held by this Court on the ground that it was passed with the object of affording protection to the witness in order to obtain true evidence and its impact on the right of free speech and expression guaranteed by Article 19(1)(a) was incidental. N. H. Bhagwati J. in Express Newspapers [1959] SCR 12 struck a modified note by evolving the test of proximate effect and operation of the statute. That test saw

its fruition in Sakal Papers MANU/SC/0090/1961 : [1962]3SCR842 where the Court, giving precedence to the direct and immediate effect of the order over its form and object, struck down the Daily Newspapers (Price and Page) Order, 1960 on the ground that it violated Article 19(1)(a) of the Constitution. The culmination of this thought process came in the Bank Nationalisation Case (supra) where it was held by the majority, speaking through Shah J., that the extent of protection against impairment of a fundamental right is determined by the direct operation of an action upon the individual's rights and not by the object of the legislature or by the form of the action. In Bennett Coleman MANU/SC/0038/1972 : [1973]2SCR757 the Court, by a majority, reiterated the same position by saying that the direct operation of the Act upon the rights forms the real test. It struck down the newsprint policy, restricting the number of pages of newspapers without the option to reduce the circulation, as offending against the provisions of Article 19(1)(a). "The action may have a direct effect on a fundamental right although its direct subject matter may be different" observed the Court, citing an effective instance of a law dealing with the Defence of India or with defamation and yet having a direct effect on the freedom of speech and expression. The measure of directness, as held by Brother Bhagwati, is the 'inevitable' consequence of the impugned statute. These then are the guidelines with the help of which one has to ascertain whether Section 10(3)(c) of the Passport Act which authorizes the passport authority to impound a passport or the impugned order passed thereunder violates the guarantee of free speech and expression conferred by Article 19(1)(a).

42. The learned Attorney General answered the petitioner's contention in this behalf by saying firstly, that the right to go abroad cannot be comprehended within the right of free speech and expression since the latter right is exercisable by the Indian citizens Within the geographical limits of India only. Secondly, he contends, the right to go abroad is altogether of a different genre from the right of free speech and expression and is therefore not a part of it.

43. The first of these contentions raises a question of great importance but the form in which the contention is couched is, in my opinion, apt to befog the true issue. Article 19 confers certain freedoms on Indian citizens, some of which by their very language and nature are limited in their exercise by geographical considerations. The right to move freely throughout the 'territory of India' and the right to reside and settle in any part of the 'territory of India' which are contained in Clauses (d) and (e) of Article 19(1) are of this nature. The two clauses expressly restrict the operation of the rights mentioned therein to the territorial limits of India. Besides, by the very object and nature of those rights, their exercise is limited to Indian territory. Those rights are intended to bring in sharp focus the unity and integrity of the country and its quasi-federal structure. Their drive is directed against the fissiparous theory that 'sons of the soil' alone shall thrive, the 'soil' being conditioned by regional and sub-regional considerations. The other freedoms which Article 19(1) confers are not so restricted by their terms but that again is not conclusive of the question under consideration. Nor indeed does the fact that restraints on the freedoms guaranteed by Article 19(1) can be imposed under Articles 19(2) or 19(6) by the State furnish any clue to that question. The State can undoubtedly impose reasonable restrictions" on fundamental freedoms under Clauses (2) to (6) of Article 19 and those restrictions, generally, have a territorial operation. But the ambit of a freedom cannot be measured by the right of a State to pass laws, imposing restrictions on that freedom which, in the generality of-cases, have a geographical limitation.

44. Article 19(1)(a) guarantees to Indian citizens-the right to freedom of speech and expression. It does not; delimit that right in any manner and there is no reason, arising either out of interpretational dogmas or pragmatic considerations, why the courts should strain the language of the Article to cut down the amplitude of that right. The plain meaning of the clause guaranteeing free speech and expression is that Indian citizens are entitled to exercise that right wherever they choose, regardless of geographical considerations, subject of course to the operation of any existing law or the power of the State to make a law imposing reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, as provided in Article 19(2). The exercise of the-right of free speech and expression beyond the limits of Indian territory will, of course, also be subject to the laws of the country in which the freedom is or is intended to be exercised. I am quite clear that the Constitution does not confer any power-on the executive to prevent the exercise by an Indian citizen of the right of free speech and expression on foreign soil, subject to what I have just stated. In fact, that seems to me to be the crux of the matter, for which reason I said, though with respect, that the form in which the learned Attorney General stated his proposition was likely to cloud the true issue. The Constitution guarantees certain fundamental freedoms and except where their exercise is limited by territorial considerations, those freedoms may be exercised wheresoever one chooses, subject to the exceptions or qualifications mentioned above.

45. The next question is whether the right to go out of India is an integral part of the right of free speech and expression and is comprehended within it. It seems to me impossible to answer this question in the affirmative as is contended by the petitioner's counsel, Shri Madan Bhatia. It is possible to predicate of many a right that its exercise would be more meaningful if the right is extended to comprehended an extraneous facility. But such extensions do not form part of the right conferred by the Constitution. The analogy of the freedom of press being included in the right of free speech and expression is wholly misplaced because the right of free expression, incontrovertibly includes the right of freedom of the press. The right to go abroad on one hand and the right of free speech and expression on the other are made up of basically different constituents, so different indeed that one cannot be comprehended in the other.

46. Brother Bhagwati has, on this aspect considered at length certain American decisions like Kent 2 L. ed. 2d 1204, Apthekar 12 L. ed. 2d 992 and Zemel 14 L. ed. 2d 179 and illuminating though his analysis is, I am inclined to think that the presence of the due process clause in the 5th and 14th Amendments of the American Constitution makes significant difference to the approach of American Judges to the definition and evaluation of constitutional guarantees. The content which has been meaningfully and imaginatively poured into "due process of law" may, in my view, constitute an important point of distinction between the American Constitution and ours which studiously avoided the use of that expression. In the Centennial Volume. "The Fourteenth Amendment" edited by Bernard Schwartz, is contained in an article on 'Landmarks of Legal Liberty by Justice William J. Brennan in which the learned Judge quoting from Yeats play has this to say : In the service of the age-old dream for recognition of the equal and inalienable rights of man, the 14th Amendment though 100 years old, can never be old-

Like the poor old women in Yeats play,

"Did you see an old woman going down the path?" asked Bridget. "I did not," replied Patrick, who had come into the house after the old woman left it, "But I saw a young girl and she had the walk of a queen.

Our Constitution too strides in its majesty but, may it be remembered, without the due process clause, I prefer to be content with a decision directly in point, All India Bank Employees' Association MANU/SC/0240/1961 : (1961)IILLJ385SC In which this Court rejected the contention that the freedom to form associations or unions contained in Article 19(1)(c) carried with it the right that a workers' union could do all that was necessary to make that right effective, in order to achieve the purpose for which the union was formed. One right leading to another and that another to still other, and so on, was described in the abovementioned decision as productive of a "grotesque result".

47. I have, nothing more to add to what Brother Bhagwati has said on the other points in the case. I share his opinion that though the right to go abroad is not included in the right contained in Article 19(1)(a), if an order made under Section 10(3)(c) of the Act does in fact violate the right of free speech and expression, such an order could be struck down as unconstitutional. It is well-settled that a statute may pass the test of constitutionality and yet an order passed under it may be unconstitutional. But of that I will say no more because in this branch, one says no more than the facts warrant and decides nothing that does not call for a decision. The fact that the petitioner was not heard before or soon after the impounding of her passport would have introduced a serious infirmity in the order but for the statement of the Attorney General that the Government was willing to hear the petitioner and further to limit the operation of the order to a period of six months from the date of the fresh decision, if the decision was adverse to the petitioner. The order, I agree, does not in fact offend against Article 19(1)(a) or 19(1)(g).

48. I, therefore, agree with the order proposed by Brother Bhagwati.

P.N. Bhagwati, J.

49. The Petitioner is the holder of the passport issued to her on 1st June, 1976 under the Passport Act, 1967. On 4th My, 1977 the Petitioner received a letter dated 2nd July, 1977 from the Regional Passport Officer, Delhi intimating to her that it has been decided by the Government of India to impound her passport under Section 10(3)(c) of the Act in public interest and requiring her to surrender the passport within seven days from the date of receipt of the letter. The petitioner immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in Section 10(5) to which a reply was sent by the Government of India, Ministry of External Affairs on 6th July, 1977 stating inter alia that the Government has decided "in the interest of the general public" not to furnish her a copy of the statement of reasons for making of the order.' The Petitioner thereupon filed the present petition challenging the action of the Government in impounding her passport and declining to give reasons for doing so. The action of the Government was impugned inter alia on the ground that it was mala fide, but this challenge was not pressed before us at the time of the hearing of the arguments and hence it is not necessary to state any facts bearing on that question. The principal challenge set out in the petition against the legality of the action of the Government was based mainly on the ground that Section 10(3)(c), in so far as it empowers the Passport Authority to impound a passport "in

the interests of the general public" is violative of the equality clause contained in Article 14 of the Constitution, since the condition denoted by the words "in the interests of the general public" limiting the exercise of the power is vague and undefined and the power conferred by this provision is, therefore, excessive and suffers from the vice of "over-breath." The petition also contained a challenge that an order under Section 10(3)(c) impounding a passport could not be made by the Passport Authority without giving an opportunity to the holder of the passport to be heard in defence and since in the present case, the passport was impounded by the Government without affording an opportunity of hearing to the petitioner, the order was null and void, and, in the alternative, if Section 10(3)(c) were read in such a manner as to exclude the right of hearing, the section would be infected with the vice of arbitrariness and it would be void as offending Article 14. These were the only grounds taken in the Petition as originally filed and on 20th July, 1977 the petition was admitted and rule issued by this Court and an interim order was made directing that the passport of the petitioner should continue to remain deposited with the Registrar of this Court pending the hearing and final disposal of the Petition.

50. The hearing of the petition was fixed on. 30th August 1977, but before that, the petitioner filed an application for urging additional grounds and by this application, two further grounds were sought to be urged by her. One ground was that Section 10(3)(c) is ultra vires Article 21 since it provides for impounding of passport without any procedure as required by that Article, or, in any event, even if it could be said that there is some procedure prescribed under the passport Act, 1967, it is wholly arbitrary and unreasonable and, therefore, not in compliance with the requirement of that article. The other ground urged on behalf of the petitioner was that Section 10(3)(c) is violative of Articles 19(1)(a) and 19(1)(g) inasmuch as it authorises imposition of restrictions on freedom of Speech and expression guaranteed under Article 19(1)(a) and freedom to practise any profession or to carry on any occupation, or business guaranteed under Article 19(1)(g) and these restrictions are impermissible under Article 19(2) and Article 19(6) respectively. The application for urging these two additional grounds was granted by this Court and ultimately at the hearing of the petition these were the two principal grounds which were pressed on behalf of the petitioner.

51. Before we examine the rival arguments urged on behalf of the parties in regard to the various questions arising in this petition, it would be convenient, to set out the relevant provisions of the Passport Act, 1967. This Act was enacted on 24th June, 1967 in view of the decision of this Court in Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer. Government of India, New Delhi and Ors. MANU/SC/0040/1967 : [1967]3SCR525 The position which obtained prior to the coming into force of this Act was that there was no law regulating the issue of passports for leaving the shores of India and going abroad. The issue of passports was entirely within the discretion of the executive and this discretion, was unguided and unchannelled. This Court, by a majority, held that the expression "personal liberty" in Article 21 takes in the right of locomotion and travel abroad and under Article 21 no person can be deprived of his right to go abroad except according to the procedure established by law and since no law had been made by the State regulating or prohibiting the exercise of such right, the refusal of passport was in violation of Article 21 and moreover the discretion with the executive in the matter of issuing or refusing passport being unchannelled and arbitrary, it was plainly violative of Article 14 and hence the order refusing passport to the petitioner was also invalid under that Article. This decision was accepted by Parliament and the infirmity pointed out by it was set right by the enactment of the Passports Act, 1967. This Act, as its preamble shows, was enacted to provide for the issue of

passports and travel documents to regulate the departure from India of citizens of India and other persons and for incidental and ancillary matters. Section 3 provides that no person shall depart from or attempt to depart from India unless he holds in this behalf a. valid passport or travel document. What are the different classes of passports and travel documents which can be issued under the Act is laid down in Section 4. Section 5, Sub-section (1) provides for making of an application for issue of a passport or travel document or for endorsement on such passport or travel document for visiting foreign country or countries and Sub-section (2) says that on receipt of such application, the passport authority, after making such inquiry, if any, as it may consider necessary, shall, by order in writing, issue of refuse to issue the passport or travel document or make or refuse to make on the passport or travel document endorsement in respect of one or more of the foreign countries specified in the application. Sub-section (3) requires the passport authority, where it refuses to issue the passport or travel document or to make any endorsement on the passport of travel document, to record in writing a brief statement of its reasons for making such order. Section 6, Sub-section (i) lays down the grounds on which the passport authority shall refuse to make an endorsement for visiting any foreign country and provides that on no other ground the endorsement shall be "refused. There are four grounds set out. in this sub-section and of them, the last is that, in the opinion of '-the Central Government, the presence of the applicant in such foreign country is not in the public interest. Similarly Sub-section (2) of Section 6 specifies the grounds on which alone and on no other grounds the passport authority shall refuse to issue passport or travel document for visiting any foreign country and amongst various grounds set out there, the last is that, in the opinion of the Central Government the issue of passport or travel, document to the applicant will not be in the public interest. Then we come to Section 10 which is the material section which falls for consideration. Sub-section (1) of that section empowers the passport authority to vary or cancel the endorsement of a passport or travel document or to vary or cancel the conditions subject to which a passport or travel document has been issued, having regard, inter alia, to the provisions of Sub-section (1) of Section 6 or any notification under Section 19, Sub-section (2) confers powers on the passport authority to vary or cancel the conditions of the passport or travel document on application of the holder of the passport or travel document and with the previous approval of the Central Government. Sub-section (3) provides that the passport authority may impound or cause to tie impounded or revoke a passport or travel document on the grounds set out in Clauses (a) to (h). The order impounding the passport in the present case was made by the Central Government under Clause (c) which reads as follows :-

(c) if the passport authority deems it necessary so to do in the interest of the Sovereignty and Integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public;

The particular ground relied upon for making the order was that set out in the last part of Clause (c), namely, that the Central Government deems it necessary to impound the passport "in the interests of the genera public." Then follows Sub-section (5) which requires the passport authority impounding or revoking a passport or travel document or varying or cancelling an endorsement made upon it to "record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same unless, in, any case, the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy." It was in virtue of the provision

contained in the latter part of this sub-section that the Central Government declined to furnish a copy of the statement of reasons for impounding the passport of the petitioner on the ground that it was not in the interests of the general public to furnish such copy to the petitioner. It is indeed a matter of regret that the Central Government should have taken up this attitude in reply to the request of the petitioner to be supplied a copy of the statement of reasons, because ultimately, when the petition came to be filed, the Central Government did disclose the reasons in the affidavit in reply to the petition which shows that it was not really contrary to public interest and if we look at the reasons given in the affidavit in reply, it will be clear that no reasonable person could possibly have taken the view that the interests of the general public would be prejudiced by the disclosure of the reasons. This is an instance showing how power conferred on a statutory authority to act in the interests of rue', general public can sometimes be improperly exercised. If the petitioner had not filed the petition, she would perhaps never have been able to find out what were the reasons for which her passport was impounded and she was deprived of her right to go abroad. The necessity of giving reasons has obviously been introduced in Sub-section (5) so that it may act as a healthy check against abuse or misuse of power. If the reasons given are not relevant and there is no nexus between the reasons and the ground on which the passport has been impounded, it would be open to the holder of the passport to challenge the order impounding it in a court of law and if the court is satisfied that the reasons are extraneous or irrelevant, the court would strike down the order. This liability to be exposed to judicial scrutiny would by itself act as a safeguard against improper or mala fide exercise of power- The court would, therefore, be very slow to accept, without close scrutiny, the claim of the passport authority that it would not be in the interests of the general public to disclose the reasons. The passport authority would have to satisfy the court by placing proper material that the giving of reasons would be clearly and indubitably against the interests of the general public; and if the Court is not so satisfied, the Court may require the passport authority to disclose the reasons, subject to any valid and lawful claim for privilege which may be set up on behalf of the Government. Here in the present case, as we have already pointed out, the Central Government did initially claim that it would be against the interests of the general public to disclose the reasons for impounding the passport, but when it came to filing the affidavit in reply, the Central Government very properly abandoned this unsustainable claim and disclosed the reasons. The question whether these reasons have any nexus with the interests of the general public or they are extraneous and irrelevant is a matter which we shall examine when we deal with the arguments of the parties. Meanwhile, proceeding further with the resume of the relevant provisions, reference may be made to Section 11 which provides for an appeal inter alia against, the order impounding or revoking a passport or travel document under Sub-section (3) of Section 10. But there is a proviso to this section which says that if the order impounding or revoking a passport or travel document is passed by the Central Government, there shall be no right to appeal. These are the relevant provisions of the Act in the light of which we have to consider the constitutionality of Sub-section (3)(c) of Section 10 and the validity of the order impounding the passport of the petitioner.

52. Meaning and content of personal, liberty in Article 21

53. The first contention urged on behalf of the petitioner in support of the petition was that the right to go abroad is part of 'personal liberty' within the meaning of that expression as used in Article 21 and no one can be deprived of this right except according to the procedure prescribed by law. There is no procedure prescribed by the Passport Act, 1967 far impounding or revoking a

passport and thereby preventing the holder of the "passport from going abroad and in any event, even if some procedure can be traced in the relevant provisions "of the Act, it is unreasonable and arbitrary, inasmuch as it does not provide for giving an opportunity to the holder of the passport to be heard against the making of the order and hence the action of the Central Government in impounding the passport of the petitioner is in violation of Article 21. This contention of the petitioner raises a question as to the true interpretation of Article 21, what is the nature and extent of the protection afforded by this article? What is the meaning of 'personal liberty' : does it include the right to go abroad so that this right cannot be abridged or taken away except in accordance with the procedure prescribed by law ? What is the inter-relation between Article 14 and Article 21 ? Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable? Article 21 occurs in Part III of the Constitution which confers certain fundamental rights. These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in 'The Indian Constitution Cornerstone of a Nation', "they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India". They were indelibly written in the sub-conscious memory of the race which fought for well-nigh thirty years for securing freedom from British rule and they found expression in the form of fundamental rights when the Constitution was enacted. These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a '"pattern of guarantees on the basic-structure of human lights" and impose negative obligations on the State not to encroach on individual liberty in its various dimensions. It is apparent from the enunciation of these rights that the respect for the individual and his capacity for individual volition which finds expression there is not a self fulfilling prophecy. Its purpose is to help the individual to find his own: liability,, to give expression to his creativity and to prevent governmental and other forces from 'alienating' the individual from his. creative impulses These rights are wide ranging and comprehensive and they fall under seven heads, namely, right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right to property and right to constitutional remedies. Articles 14 to 18 occur under the heading 'Right to Equality', and of them, by far the most important is Article 14 which confers a fundamental right by injuncting the State not to "deny to any person equality before the law or the equal protection of the laws within the territory of India". Articles 19 to 22, which find place under the heading "Right to freedom" provide for different aspects of freedom. Clause X(1) of Article 19 enshrines what may be described as the seven lamps of freedom. It provides that all citizens shall have the right--(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions;(d) to move freely throughout the territory of India;- (e) to reside and settle in any part of the territory of India; (f) to acquire, hold and dispose of property and (g) to practise any profession or to carry on any occupation, trade or business. But these freedoms are not and cannot be absolute, for absolute and unrestricted freedom of one may be destructive of the freedom of another and in a well-ordered, civilised, society, freedom can only be regulated freedom. Therefore, Clauses (2) to (6) of Art, 19 permit reasonable restrictions to be imposed on the exercise of the fundamental rights guaranteed under Clause (1) of that article. Article 20 need not detain us as. that is not material for the determination of the controversy between the parties. Then comes. Article 21 which provides :

21. No person shall be deprived of his fife or personal liberty except according to procedure established by law.

Article 22 confers protection against arrest and detention in certain cases and provides inter alia safeguards in case of preventive detention. The other fundamental rights are not relevant to the present discussion and we need not refer to them.

54. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So Far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the meaning and content of the words 'personal liberty' as used in this article? This question incidentally came up for discussion in some of the judgments in A. K. Gopalan v. State of Madras [1950] S.C.R. 88 and the observations made by Patanjali Sastri, J., Mukherjee, J., and S. R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Article 21 to freedom, of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between Article 19 and 21.

It was in Kharak Singh v. State of U.P. and Ors. MANU/SC/0085/1962 : 1963CriLJ329 that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term, to include within itself all the varieties of rights which go' to make up the 'personal liberties' of man other than those- dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes, of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words : "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental, right of life and personal liberty bas many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 39(1) are concerned". There can be no doubt that in view of the decision of this Court in R. C. Cooper v. Union of India [1973] 3 S.C.R. 530 the minority view must be regarded as correct and the majority view must be held to have been overruled-
We shall have occasion to analyse and discuss the decision in R. C. Cooper's case a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the Jaw is not freed from the necessity to meet the. challenge of another guaranteed freedom. The decision in A. K. Gopalan's {supra) case gave rise to the theory that the

freedoms under Articles 19, 21, 22 and 31 are exclusive--each article enacting a code relating to the protection of distinct rights, but this theory was over-turned in R. C. Cooper's case (supra) where Shah, I., speaking-on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields : they do not attempt to enunciate- distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters cannot be accepted as correct". It was held in R. C. Cooper's case and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary states merit of law contained in the opinions of Kama, C.J., Patanjali Sastri, J., Mahajan, J., Mukherjee, J., and S. R. Das, J., in A. K. Gopalan's case that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedom under Article 19, Clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of 'personal liberty' in the narrowest sense, namely, freedom from detention and thus falls indisputably within Article 21 would not require to be tested on the touchstone of Clause (d) of Article 19(1) and yet it was held by a Bench of seven Judges, of this Court in Shambhu Nath Sarkar v. The State of West Bengal and Ors. MANU/SC/0537/1972 : [1973]1SCR856 that such a law would have to satisfy the requirement inter alia of Article 19(1), Clause (d) and in Haradhan Saha v. The State of West Bengal and Ors. MANU/SC/0419/1974 : 1974CriLJ1479 , which was a decision given by a Bench of five judges, this Court considered the challenge of Clause (d) of Article 19(f) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee embodied in that article.

It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wave length for comprehending the scope and ambit of the fundamental rights has been set by this Court in R. C. Cooper's case and our approach in the interpretation of the fundamental rights must now be in tune with this wave length. We may point out even at the cost of repetition that this Court has said in so many terms in R. C Cooper's case that each freedom has (different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to' avoid overlapping between that article and Article 19(1).

The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19,

Now, it has been held by this Court in Satwant Singh's case that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the

enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh's case was struck down as invalid. It will be seen at once from the language of Article' 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'State Law'. Vide A. K. Gopalan's case. Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure.

It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that is lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in A. K. Gopalan's case in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazal Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willi's book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J. did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law." Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings".

But apart altogether from these observations in A. K. Gopalan's case, which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21.

The inter-relationship between Articles 14, 19 and 21

55. We may at this stage consider the inter-relation between Article 21 on the one hand and Articles 14 and 19 on the other. We have already pointed out that the view taken by the majority in A. K. Gopalan's case was that so long as a law of preventive detention satisfies the requirements of Article 22, it would be within the terms of Article 21 and it would not be required, to meet the challenge of Article 19. This view proceeded on the assumption that "certain articles in the Constitution exclusively deal with specific matters" and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that article, no recourse can be had to a fundamental right conferred by another article. This doctrine of exclusivity was seriously questioned in R. C. Cooper's case and it was over-ruled by a majority of the Full Court, only Ray, J., as he then was,

dissenting. The majority judges held that though a law of preventive detention may pass the test of Article 22, it has yet to satisfy the requirements of other fundamental rights such as Article 19. The ratio of the majority judgment in R. C. Cooper's case was explained in clear and categorical terms by Shelat, J., speaking on behalf of seven judges of this Court in Shambhu Nath Sarkar v. State of West Bengal MANU/SC/0537/1972 : [1973]1SCR856 . The learned Judge there said :
In Gopalan's case (supra) the majority court had held that Article 22 was a self-contained Code and therefore a law of preventive detention did not have to satisfy the requirement of Articles 19, 14 and 21. The view of Fazal Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Article 19(1)(d) and that a law providing for preventive detention had to be subject to such judicial review as is obtained under Clause (5) of that Article. In R. C. Cooper v. Union of India, (supra) the aforesaid premise of the majority in Gopalan's case (supra) was disapproved and therefore it no longer holds the field. Though Cooper's case (supra) dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan's case (supra) to be incorrect.

Subsequently, in Haradhan Saha v. State of West Bengal and Ors. MANU/SC/0419/1974 : 1974CriLJ1479 also, a Bench of five Judges of this Court, after referring to the decisions in A. K. Gopalan's case and R. C. Cooper's case, agreed that the Maintenance of Internal Security Act, 1971, which is a law of preventive detention, has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in R. C. Cooper's case and Shambhu Nath Sarkar's case and proceeded to consider the challenge of Article 19 to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that the Act did not violate any of the constitutional guarantees enshrined in Article 19. The same view was affirmed once again by a Bench of four judges of this Court in Khudiram Das v. The State of West Bengal and Ors. MANU/SC/0423/1974 : [1975]2SCR832 . Interestingly, even prior to these decisions, as pointed out by Dr. Rajve Dhawan; in his book : "The Supreme Court of India :" at page 235, reference was made- by this Court in Mohd. Sabir v. State of Jammu and Kashmir MANU/SC/0140/1971 : 1971CriLJ1271 to Article 19(2) to justify preventive detention.

The law, must, therefore, now be taken to be well settled that Article 21 does not exclude. Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in R. C. Cooper's case, Shambhu Nath Sarkar's case and Haradhan Saha's case. Now, if a law depriving a person of "personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given, situation, ex hypothesi it must also' be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukharjee, J., in A. K. Gopalan's case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it "relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14.

This Court also applied Article 14 in two of its earlier decisions, namely, The State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 and Kathi Raning Rawat v. The State of Saurashtra MANU/SC/0041/1952 : 1952CriLJ805 where there was a special law providing for trial of certain offences by a speedier process which took away some of the safeguards available to an accused under the ordinary procedure in the Criminal Procedure Code. The special law in each of these two cases undoubtedly prescribed a procedure for trial of the specified offences and this procedure could not be condemned as inherently unfair or unjust and there was thus compliance with the requirement of Article 21, but even so, the validity of the special law was tested before the Supreme Court on the touchstone of Article 14 and in one case, namely, Kathi Raning Rawat's case, the validity was upheld and in the other, namely, Anwar Ali Sarkar's case, it was struck down. It was held in both these cases that the procedure established by the special law must not be violative of the equality clause. That procedure must answer the requirement of Article 14.

The nature and requirement of the procedure under Article 21.

56. Now, the question immediately arises as to what is the requirement of Article 14 :
what is the content and reach of the great equalising principle enunciated in this article ? There can be no doubt that if is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude.
Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.
We must reiterate here what was pointed out by the majority in E. P. Royappa v. State of Tamil Nadu and Anr. MANU/SC/0380/1973 : (1974)ILLJ172SC namely, that
"from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch.
Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14".
Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment.
The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence<mpara>
and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive;
otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

57. How far natural justice is art essential element of procedure established by law.

58. The question immediately arises : does the procedure prescribed by the Passports Act, 1967 for impounding a passport meet the test of this requirement ? Is it 'right or fair or just' ? The argument of the petitioner was that it is not, because it provides for impounding of a passport without affording reasonable opportunity to the holder of the passport to be heard in defence. To impound the passport of a person, said the petitioner, is a serious matter, since it prevents him from

exercising his constitutional right to go abroad and such a drastic consequence cannot in fairness be visited without observing the principle of audi alteram partem. Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21. Now, it is true that there is no express provision in the Passports Act, 1967 which requires that the audi alteram partem rule should be followed before impounding a passport, but that is not conclusive of the question. If the statute makes itself clear on this point, then no more question arises. But even when the statute is silent, the law may in a given case make an implication and apply the principle stated by Bytes, J., in Cooper v. Wandsworth Board of Works [1863] 14C B.N.S. 180. "A long course of decisions, beginning with Dr. Bentley's case and ending with some very recent cases, establish that, although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission off the legislature". The principle of audi alteram partem, which mandates that no one shall be condemned unheard, is part of the rules of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely, Nemo Judex in Sua Causa and audi alteram partem. We are not concerned here with the former, since there is no case of bias urged here. The question is only in regard to the right of hearing which involves the audi alteram partem rule. Can it be imported in the procedure for impounding a passport ?

59. We may commence the discussion of this question with a few general observations to emphasise the increasing importance of natural justice in the field of administrative law. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Lord Morris of Borth-y-Gest spoke of this rule in eloquent terms in his address before the Bentham Club :

We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a "majestic" conception ? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance ? I believe that it is very much more. If it can be summarised as being fair play in action-who could wish that it would ever be out of action ? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled; it lacks more exalted inspiration. (Current Legal Problems, 1973, Vol. 26, p. 16)

And then again, in his speech in the House of Lords in Wiseman v. Borneman [1971] A.C. 297, the learned Law Lord said in words of inspired felicity :

that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law.
We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis

must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in "any particular situation or set of circumstance's, are right and just and fair. Natural justice, it has Been said* is only "fair play in action." Nor do we wait for directions from Parliament. The common law has abundant riches there we may find what Byles, J.,' called "the justice of the common law.

Thus, the soul of natural justice is 'fair play in action' and that is why it has received the widest recognition, throughout the democratic world; In the United States, the right to an administrative hearing is regarded as essential requirement of fundamental fairness. And in England too it has been held that 'fair play in action' demands that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard. The rule was stated by Lord Denning, M.R. in these terms in Schmidt v. Secretary of State for Home Affairs [1969] 2 Chancery Division 149 :-where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf". The same rule also prevails in other Commonwealth countries like Canada, Australia and New Zealand. It has even gained access to the United Nations. Vide American Journal of International Law, Vol. 67, page 479. Magarry, J., describes natural" justice "as a distillate of due process of law". Vide Fontaine v. Chesterton (1968) 112 S G 690. It is the quintessence of the process of justice inspired and guided by fair play in action'. If we look at the speeches of the various law Lords in Wiseman's case, it will be seen that each one of them asked the question "whether in the particular circumstances of the case, the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded", or, was the procedure adopted by the Tribunal 'in all the circumstances unfair' ? The test adopted by every law Lord was whether the procedure followed was "fair in all the circumstances" and 'fair play in action' required that an opportunity should be given to the tax payer "to see and reply to the counter-statement of the Commissioners" before reaching the conclusion that "there is a prima facie case against him." The inquiry must, therefore, always be : does fairness in action demand that an opportunity to be "heard should be given to the person affected ?

60. Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a-rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other ? Can it be said; that the requirement of 'fair play it action' is any the less in an administrative inquiry than in a quasi-judicial one ? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative inquiry which entails civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority

concerned is required by the law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with a quasi-judicial character was spelt out from the following observation of Atkin, L.J. in Rex v. Electricity Commissioners [1924] 1 K.B. 171, "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King Bench Division....". Lord Hewart, C.J., in Rex v. Legislative Committee of the Church Assembly [1928] 1 K.B. 411 read this observation to mean that the duty to act judicially should be an additional requirement existing independently of the "authority to determine questions affecting the rights of subjects"-something super added to it. This gloss placed by Lord Hewart, C.J., on the dictum of Lord Atkin, L.J., bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. The Court was constrained, in every case that came before it, to make a search for the duty to act judicially sometimes from tenuous material and sometimes in the services of the statute and this led to over-subtlety and over-refinement resulting in confusion and uncertainty in the law. But this was plainly contrary to the earlier authorities and in the epoch-making decision of the House of Lords in Ridge v. Baldwin [1964] A. C. 40, which marks a turning point in the history of the development of the doctrine of natural justice,, Lord Reid pointed out how the gloss of Lord Hewart, C.J., was based on a misunderstanding of the observations of Atkin, L.J., and it went counter to the law laid down in the earlier decisions of the Court. Lord Reid observed : "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities". The learned law Lord held that the duty to act judicially may arise from the very nature of the function intended to be performed and it need not be shown to be superadded. This decision broadened the area of application of the rules of natural justice and to borrow the words of Prof. Clar in his article on 'Natural Justice, Substance and Shadow' in Public Law Journal, 1975, restored light to an area "benighted by the narrow conceptualism of the previous decade". This development in the law had its parallel in India in the Associated Cement Companies Ltd. v. P. N. Sharma and Anr. MANU/SC/0215/1964 : (1965)ILLJ433SC where this Court approvingly referred to the decision in Ridge v. Baldwin (supra) and, later in State of Orissa v. Dr. Binapani MANU/SC/0332/1967 : (1967)IILLJ266SC observed that: "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power". This Court also pointed out in A.K. Kraipak and Ors. v. Union of India and Ors. MANU/SC/0427/1969 : [1970]1SCR457 another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been undergoing radical change and said: "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated, for determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised". The net effect of these and. other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person effected and where it is found to exist, the rules of natural justice would be attracted.

61. This was the advance made by the law as a result of the decision in Ridge v. Baldwin (supra) in England and the decision in Associated Cement Companies's case (supra) and other cases

following upon it, in India. But that was not to be the end of the development of the law on this subject. The proliferation of administrative law provoked considerable fresh thinking on the subject and soon it came to be recognised that 'fair play in action' required that in administrative proceeding also, the doctrine of natural justice must be held to be applicable. We have already discussed this aspect of the question on principal and shown why no distinction can be made between an administrative and a quasi-judicial proceeding for the purpose of applicability of the doctrine of natural justice. This position was judicially recognised and accepted and the dichotomy between administrative and quasi-judicial proceedings vis-a-vis doctrine of natural justice was finally discarded as unsound by the decisions in In re :H.K. (An Infant [1967] 2 Q.B. 617 and Schmidt v. Secretary of State for Home Affairs (supra) in England and, so far as India is concerned, by the memorable decision rendered by this Court in A.K. Kraipak's case (supra). Lord Parker, C.J. pointed out in the course of his judgment in In Re : H.K. (An Infant) (supra) :

But at the same time,, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona-fide decision must, as it seems to me, required not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided -cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially.

62. This Court, speaking through Hegde, J., in A. K. Kraipak's case quoted with approval the above passage from the judgment of Lord Parker, C.J., and proceeded to add :

The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it--Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision, in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. The University of Kerala and Ors. MANU/SC/0368/1968 : [1969]1SCR317 the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and

the Constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principles of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a" just decision on the facts of the case.

63. This view was reiterated and re-affirmed in a subsequent decision of this Court in D.F.O. South Khari v. Ram Sanehi Singh [1973] 3 S.C.C. 864.

The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable.

64. Now, here, the power conferred on the Passport Authority is to impound a passport and the consequence of impounding a passport would be to impair the constitutional right of the holder of the passport to go abroad during the time that the passport is impounded. Moreover, a passport can be impounded by the Passport Authority only on certain specified grounds set out in Sub-section (3) of Section 10 and the Passport Authority would have to apply its mind to the facts and circumstances of a given case and decide whether any of the specified grounds exists which would justify impounding of the passport. The Passport Authority is also required by Sub-section (5) of Section 10 to record in writing a brief statement of the reasons for making an order impounding a passport and, save in certain exceptional situations, the Passport Authority is obliged to furnish a copy of the statement of reasons to the holder of the passport. Where the Passport Authority which has impounded a passport is other than the Central Government, a right of appeal against the order impounding the passport is given by Section 11, and in the appeal, the validity of the reasons given by the Passport Authority for impounding the passport can be canvassed before the Appellate Authority. It is clear on a consideration of these circumstances that the test laid down in the decisions of this Court for distinguishing between a quasi-judicial power and an administrative power is satisfied and the power conferred on the Passport Authority to impound a passport is quasi-judicial power. The rules of natural justice would, in the circumstances, be applicable in the exercise of the power of impounding a passport even on the orthodox view which prevailed prior to A. K. Kraipak's case. The same result must follow in view of the decision in A. K. Kraipak's case, even if the power to impound a passport were regarded as administrative in character, because it seriously interferes with the constitutional right of the holder of the passport to go abroad and entails adverse civil consequences.

65. Now, as already pointed out, the doctrine of natural justice consists principally of two rules, namely, nemo debt esse judex propria cause : no one shall be a judge in his own cause, and audi alteram partem : no decision shall be given against a party without affording him a reasonable hearing. We are concerned here with the second rule and hence we shall confine ourselves only to a discussion of that rule. The learned Attorney General, appearing on behalf of the Union of India, fairly conceded that the audi alteram partem rule is a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and it is calculated to act-as a healthy check on abuse or misuse of power and hence its reach should not be narrowed and its applicability circumscribed. He rightly did not plead for reconsideration of the historic advances made in the law as a result of the decisions of this Court and did not suggest that the Court should re-trace its steps. That would indeed have been a most startling argument coming from the Government of India and for the Court to accede to such an argument would have been so act of utter retrogression.

But fortunately no such argument was advanced by the learned Attorney General. What he urged was a very limited contention, namely that having regard to the nature of the action involved in the impounding of a passport, the audi alteram partem rule must be held to be excluded, because if notice were to be given to the holder of the passport and reasonable opportunity afforded to him to show cause why his passport should not be impounded, he might immediately, on the strength of the passport, make good his exit from the country and the object of impounding the passport would be frustrated. The argument was that if the audi alteram partem rule were applied, its effect would be to stultify the power of impounding the passport and it would defeat and paralyse the administration of the law and hence the audi alteram partem rule cannot in fairness be applied while exercising the power to impound a passport. This argument was sought to be supported by reference to the statement of the law in A.S. de. Smith, Judicial Review of Administrative Action, 2nd ed., where the learned author says at page 174 that "in administrative law a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication-where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature". Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair play in action', it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion. There are certain well recognised exceptions to the audi alteram partem rule established by judicial decisions and they are summarised by S.A. de Smith in Judicial Review of Administrative Action, 2nd ed., at page 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the audi alteram partem rule is held inapplicable not by way of an exception to "fair play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case.

The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism,
the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case.
It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances".

The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications.
The core of it must, however, remain, namely, that the person affected must have areasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.
That is why Tucker, L.J., emphasised in Russel v. Duke of Norfolk [1949] 1 All Eng. Reports 109 that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full fledged hearing or it may be a hearing which is very brief and minimal
: it may be a hearing prior to the decision or it may even, be a post-decisional remedial hearing. The audi alteram partem rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise.
This circumstantial flexibility of the audi alteram partem rule was emphasised by Lord Reid in, Wiseman v. Sorneman (supra) when he said that he would be "sorry to see this fundamental general principle degenerate into a series of hard and fast rules" and Lord Hailsham, L.C., also observed in Pearl-Berg v. Party [1971] 1 LR.728 that the courts "have taken in increasingly sophisticated view of what is required in individual cases". It would not, therefore, be right to conclude that the audi alteram partem rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. The Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, and opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to' be incorporated in the Passports- Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure 'established' by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article.

66. But the question then immediately arises whether the Central Government has complied with this procedure in impounding the passport of the Petitioner. Now, it is obvious and indeed this could not be controverted, that the Central Government not only did not give an opportunity of hearing to the petitioner after making the impugned order impounding her passport but even declined to furnish to the petitioner the reasons for impounding her passport despite request made by her. We have already pointed out that the Central Government was wholly unjustified in withholding the reasons for impounding the passport from the petitioner and this was not only in breach of the statutory provision, but it also amounted to denial of opportunity of hearing to the

petitioner. The order impounding the passport of the petitioner was, therefore, clearly in violation of the rule of natural justice embodied in the maxim audi alteram partem and it was not in conformity with the procedure prescribed by the Passports Act, 1967. Realising that this was a fatal defect which would void the order impounding the passport, the learned Attorney-General made a statement on behalf of the Government of India to the following effect:

1. The Government is agreeable to considering any representation that may be made by the petitioner in respect of the impounding of her passport and giving her an opportunity in the matter. The opportunity will be given within two weeks of the receipt of the representation. It is clarified that in the present case the grounds for impounding the passport are those mentioned in the affidavit in reply dated 18th August, 1977 of Shri Ghosh except those mentioned in para 2(xi).

2. The representation of the petitioner will be dealt with expeditiously in accordance with law.

This statement removes the voice from the order impounding the passport and it can no longer be assailed on the ground that it does not comply with the audi alteram partem rule or is not in accord with the procedure prescribed by the Passports Act, 1967.

Is Section 10(3)(c) violative of Article 14?

67. That takes us to the next question whether Section 10(3)(c) is violative of any of the fundamental rights guaranteed under Part III of the Constitution. Only two articles of the Constitution are relied upon for this purpose and they are Articles 14 and 19(1)(a) and (g). We will first dispose of the challenge based on Article 14 as it lies in a very narrow compass. The argument under this head of challenge was that Section 10(3)(c) confers unguided and unfettered power on the Passport Authority to impound a passport and hence it is violative of the equality clause contained in Article 14. It was conceded that under Section 10(3)(c) the power to impound a passport can be exercised only upon one or more of the stated grounds, but the complaint, was that the ground of "interests of the general public" was too" vague and indefinite to afford any real guidance to the Passport Authority and the Passport Authority could, without in any way violating the terms of the section, impound the passport of one and not of another, at its discretion. Moreover, it was said that when the order impounding a passport is made by the Central Government, there is no appeal or revision provided by the Statute and the decision of the Central Government that it is in public interest to impound a passport is final and conclusive. The discretion vested in the Passport Authority, and particularly in the Central Government, is thus unfettered and unrestricted and this is plainly in violation of Article 14. Now, the law is well settled that when a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the vice of discrimination since it would leave it open to the Authority to discriminate between persons and things similarly situated. But here it is difficult to' say that the discretion conferred on-the Passport Authority is arbitrary or unfettered. There are four grounds set out in Section 10(3)(c) which would justify the making of an order impounding a passport.

We are concerned only with the last ground denoted by the words "in the interests of the general public", for that is the ground which is attacked as vague and indefinite. We fail to see how this

ground can, by any stretch of argument, be characterised as vague or undefined. The words "in the interests of the general public" have a clearly well defined meaning and the courts have often been called upon to decide whether a particular action is "in the interests of the general public" or in "public interest" and no difficulty has been experienced by the Courts in carrying out this exercise. These words are in fact borrowed ipsissima verba from Article 19(5) and we think it would be nothing short of heresy to accuse the constitution- makers of vague and loose thinking. The legislature performed a scissor and paste, operation in lifting these words out of Article 19(5) and introducing them in Section 10(3)(c) and if these words are not vague and indefinite in Article 19(5), it is difficult to see-how they can be condemned to be such when they occur in Section 10(3)(c). How can Section 10(3)(c) be said to incur any constitutional infirmity on account of these words when they are no wider than the constitutional provision in Article 19(5) and, adhere loyally to the verbal formula adopted in the Constitution ? We are clearly of the view that sufficient guidelines are provided by the words "in the interests of the general public" and the power conferred on the Passport Authority to impound a passport cannot be said to be unguided or unfettered. Moreover, it must be remembered that the exercise of this power is not made dependent on the subjective opinion of the Passport Authority as regards the necessity of exercising it on one or more of the grounds stated in the section, but the Passport Authority is required to record in writing a brief statement of reasons for impounding the passport and, save in certain exceptional circumstances, to supply a copy of such statement to the person affected, so that the person concerned can challenge the decision of the Passport Authority in appeal and the appellate authority can examine whether the reasons given by the Passport Authority are correct, and if so, whether" they justify the making of the order impounding the passport.

It is true that when the order impounding a passport is made by the Central Government, there is no appeal against it, but it must be remembered that in such a case the power is exercised by the Central Government itself and it can safely be assumed that the Central Government will exercise the power in a reasonable and responsible manner. When power is vested in a high authority like the Central Government, abuse of power cannot be lightly assumed. And in any event, if there is abuse of power, the arms of the court are long enough to reach it and to strike it down. The power conferred on the Passport Authority to impound a passport under Section 10(3)(c) cannot, therefore, be regarded as discriminatory and it does not fall foul of Article 14. But every exercise of such power has to be tested in order to determine whether it is arbitrary or within the guidelines provided in Section 10(3)(c).

Conflicting approaches for locating the fundamental right violated : Direct and inevitable effect test.

68. We think it would be proper at this stage to consider the approach to be adopted by the Court in adjudging the constitutionality of a statute on the touchstone of fundamental rights. What is the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right ? The law on this point has undergone radical change since the days of A. K. Gopalan's case. That was the earliest decision of this Court on the subject, following almost immediately upon the commencement of the Constitution. The argument which arose for consideration in this case was that the preventive detention order results in the detention of the applicant in a cell and hence it contravenes the fundamental rights guaranteed under Clauses (a), (b), (c), (d), (e) and (g) of Article 19(1). This argument was negatived by. Kania, C. J., who pointed out that: "The true approach is only to consider the directness of the legislation and not what will be the result of the detention,

otherwise valid, on. the mode of the detenu's life-Any other construction put on the article-will be unreasonable". These observations were quoted with approval by Patanjali Sastri, J; speaking on behalf of the majority in Ram Singh and Ors. v. State of Delhi MANU/SC/0005/1951 : [1951]2SCR451 . There, the detention of the petitioner was ordered with a view, to preventing him from making, any speeches) prejudicial to the maintenance of public order and the argument was that the order of detention was invalid as it infringed the right of free speech and expression guaranteed under Article 19(1)(a). The Court took the view that the direct object of the order was preventive detention and not the infringement of the right of freedom of speech and expression, which was merely consequential upon the detention of the detenu and upheld the validity of the order. The decision in A. K. Gopalan's case, followed by Ram Singh's case, gave rise to the theory that "the object and form of State action determine the extent of protection which may be claimed by an individual and the validity of such action has to be judged by considering whether it is "directly in respect of the subject covered by any particular article of the Constitution or touches the said article only incidentally or indirectly". The test to be applied for determining the constitutional validity of State action with reference to fundamental rights is : what is the object of the authority in taking the action : what is the subject-matter of the action and to which fundamental right does it relate? This theory that "the extent of protection of important guarantees, such as the liberty of person and right to property, depend upon the form and object of the State action and not upon its direct operation upon the individual's freedom" held away for a considerable time and was applied in Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr. MANU/SC/0044/1966 : [1966]3SCR744 to sustain an order made by the High Court in a suit for defamation prohibiting the publication of the evidence of a witness. This Court, after referring to the observation of Kania, C.J., in A. K. Gopalan's case and noting that they were approved by the Full Court in Ram Singh's case, pointed out that the object of the impugned order was to give protection to the witness in order to obtain true evidence in the case with a view to do justice between the parties and if incidentally it operated to prevent the petitioner from reporting the proceedings of the court in the press, it could not be said to contravene Article 19(1)(a).

69. But it is interesting to note that despite the observations of Kania, C.J., in A. K. Gopalan's case and the approval of these observations in Ram Singh's case, there were two decisions given by this Court prior to Mirajkar's case, which seemed to deviate and strike a different note. The first was the decision in Express News Papers (P) Ltd. and Anr. v. The Union of India and Ors. MANU/SC/0044/1966 : [1966]3SCR744 where N. H. Bhagwati, J., speaking on behalf of the Court, referred to the observations of Kania, C.J., in A. K. Gopalan's case and the decision in Ram Singh's case, but ultimately formulated the test of direct and inevitable effect for the purpose of adjudging whether a statute offends a particular fundamental right. The learned Judge pointed out that all the consequences suggested on behalf of the petitioner's as flowing out of the Working Journalists (Conditions of Service) and Miscellaneous Act, 1955, namely, "the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioners' freedom to choose the means of exercising the right, likelihood of the independence of. the press being undermined by having to seek government aid, the imposition of penalty on the petitioners' right to choose the instruments for exercising the freedom or compelling them to seek alternative media etc.", would be remote and depend upon various factors which may or may not come into play. "Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act", said the learned Judge, "it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be. the

consequence which could be in the contemplation of the Legislature while enacting a measure of this type for the benefit of the workmen concerned." Then again, the learned Judge observed : "-if the intention or the proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1)(a), it would certainly be liable to be struck down. The real difficulty, however, in the way of the petitioners is that neither the intention nor the effect and operation of the impugned Act is to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners". Here we find the gern of the doctrine of direct and inevitable effect, which necessarily must be effect intended by the legislature, or in other words, what may conveniently and appropriately be described as the doctrine of intended and real effect. So also in Sakal Papers (P) Ltd. and Ors. v. The Union of India MANU/SC/0090/1961 : [1962]3SCR842 while considering the constitutional validity of the Newspaper (Price and Page) Act, 1956 and Daily Newspaper (Price and Page) Order, 1960, thus Court applied the test of direct and immediate effect. This Court, relying upon the decision in Dwarkadas Shrinivas v. The Sholapur & Weaving Co. Ltd. MANU/SC/0019/1953 : [1954]1SCR674 pointed out that "it is the substance and the practical result of the act of the State that should be considered rather than its purely legal aspect" and "the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restriction." Since "the direct and immediate effect of the order" would be to restrain a newspaper from publishing any number of pages for carrying its news and views, which it has a fundamental right under Article 19(1)(a) to do, unless it raises the selling price as provided in the Schedule to the Order, it was held by this Court that the order was violative of the right of the newspapers guaranteed by Article 19(1)(a). Here again, the emphasis was on the direct and inevitable effect of the impugned action of the State rather than on its object and form or subject-matter.

70. However, it was only R. C. Cooper's case that the doctrine that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, was finally rejected. It may be pointed out that this doctrine is in substance and reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and State Legislatures with reference to legislative Lists. The question which is asked in such cases is : what is the pith and substance of the legislations; if it "is within the express powers, then it is not invalidated if incidentally it effects matters which are outside the authorised field". Here also, on the application of this doctrine, the question that is required to be considered is : what is the pith and substance of the action of the State, or in other words, what is its true nature and character; if it is in respect of the subject covered by any particular fundamental right, its validity must be judged only by reference to that fundamental right and it is immaterial that it incidentally affects another fundamental right. Mathew, J., in his dissenting judgment in Bennett Coleman & Co. and Ors. v. Union of India and Ors. MANU/SC/0038/1972 : [1973]2SCR757 recognised the likeness of this doctrine to the pith and substance test and pointed out that "the pith and substance test, although not strictly appropriate, might serve a useful purpose" in determining whether the State action infringes a particular fundamental right. But in R. C. Cooper's case, which was a decision given by the Full Court consisting of eleven judges, this doctrine was thrown overboard and it was pointed out by Shah, J., speaking on behalf of the majority :

----it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.

we are of the view that the theory that the object and form of. the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme----

In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct.

The decision in R. C. Cooper's case thus overturned the view taken-in A. K. Gopalan's case and, as pointed out by Ray, J., speaking on behalf of the majority in; Bennett Coleman's case, it laid down two interrelated propositions, namely,

First, it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly,, it is the effect of the law and the action upon the right which attracts the jurisdiction of the Court to grant relief. The direct operation of the Act upon the rights forms the real test.

The decision in Bennett Coleman's case, followed upon R. C. Cooper's case and it is an important and significant decision, since it elaborated and applied the thesis laid down in R. C. Cooper's case. The State action which was impugned in Bennett Coleman's case was newsprint policy which inter alia imposed a maximum limit of ten pages for every newspaper but without permitting the newspaper to increase the number of pages by reducing circulation to meet its requirement even within the admissible quota. These restrictions were said to be violative of the right of free speech and expression guaranteed under Article 19(1)(a) since their direct and inevitable consequence was to limit the number of pages which could be published by a newspaper to ten. The argument of the Government was that the object of the newsprint policy was rationing and equitable distribution of imported newsprint which was scarce commodity and not abridgement of freedom of speech and expression. The subject-matter of the import policy was "rationing of imported commodity and equitable distribution of newsprint" and the newsprint policy did not directly and immediately deal with the right mentioned in Article 19(1)(a) and hence there was no violation of that Article. This argument of the Government was negatived by the majority in the following words :

Mr. Palkhivala said that the tests of pith and substance of the subject matter and of direct and of incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and

correct approach to interpretation of legislative measures and State action in relation to fundamental rights. The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgement of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject matter may be different. A law dealing directly with the Defence of India or defamation may yet have a direct effect on the freedom of speech. Article 19(2) could not have such law if the restriction is unreasonable even if it is related to matters mentioned therein. Therefore, the word "direct" would go to the quality or character of the effect and not to the subject matter. The object of the law or executive action is irrelevant when it establishes the petitioner's contention about fundamental right. In the present case, the object of the newspaper restrictions has nothing to do with the availability of newsprint or foreign exchange because these restrictions come into operation after the grant of quota. Therefore the restrictions are to control the number of pages or circulation of dailies or newspapers. These restrictions are clearly outside the ambit of Article 19(2) of the Constitution. It, therefore, confirms that the right of freedom of speech and expression is abridged by these restrictions.

The majority took the view that it was not the object of the newsprint policy or its subject matter which was determinative but its direct consequence or effect upon the, rights of the newspapers and since "the effect and consequence of the impugned policy upon the newspapers" was direct control and restriction of growth and circulation of newspapers, the newsprint policy infringed freedom of speech and expression and was hence violative of Article 19(1)(a). The pith and substance theory was thus negatived in the clearest terms and the test applied was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter, of the State action, but in testing' the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.

71. It may be recalled that the test formulated in R. C. Cooper's case merely refers to 'direct operation' or 'direct consequence and effect' of the State action on the fundamental right of the petitioner and does not use the word 'inevitable' in this connection. But there can be no doubt, on a reading of the relevant observations of Shah, J., that such was the test really intended to be laid down by the Court in that case. If the test were merely of direct or indirect effect, it would be a open-ended concept and in the absence of operational criteria for judging 'directness', it would give the Court an unquantifiable discretion to decide whether in a given case a consequence or effect is direct or not. Some other concept-vehicle would be needed to quantify the extent of directness or indirectness in order to apply the test. And that is supplied by the criterion of 'inevitable' consequence or effect adumbrated in the Express Newspaper's case. This criterion helps to quantify the extent of directness necessary to constitute infringement of a fundamental right is direct and inevitable, then a fortiori it must be presumed to have been intended by the authority taking the

action and hence this doctrine of direct and inevitable effect has been described by some jurists as the doctrine of intended and real effect.
This is the test which must be applied for the purpose of determining whether Section 10(3)(c) or the impugned order made under it is violative of Article 19(1)(a) or (g).

Is Section 10(3)(c) violative of Article 19(1)(a) or (g) ?

72. We may now examine the challenge based, on Article 19(1)(a) in the light of this background. Article 19(1)(a) enshrines one of the most cherished freedoms in a democracy, namely, freedom, of speech and expression. The petitioner, being a citizen, has undoubtedly this freedom guaranteed to her, but the question is whether Section 10(3)(c) or the impugned Order unconstitutionally takes away or abridges this freedom. Now, prima facie, the right, -which is sought to be restricted by Section 10(3)(c) and the impugned Order, is the right to go abroad and that is not named as a fundamental right or included in so many words in Article 19(1)(a), but the argument of the petitioner was that the right to go abroad is an integral part of the freedom of speech and expression and whenever State action, be it law or executive fiat, restricts or interferes with the right to go: abroad, it necessarily involves curtailment of freedom of speech and expression, and is, therefore required to meet the challenge of Article 19(1)(a). This argument was sought to be answered by the Union of India by a two-fold contention. The first limb of the contention was that the right to go abroad could not possibly be comprehended within freedom of speech and expression, because the right of free speech and expression guaranteed under Article 19(1)(a) was exercisable only within the territory of India and the guarantee of its exercise did not extend outside the country and hence State action restricting or preventing exercise of the right to go abroad could not be said to be violative of freedom of speech and expression and be liable to be condemned as invalid on that account. The second limb of the contention went a little further and challenged the very premise on which the argument of the petitioner was based and under this limb, the argument put forward was that the right to go abroad was not integrally connected with the freedom of speech and expression, nor did it partake of the same basic nature and character and hence it was not included in the right of free speech and expression guaranteed under Article 19(1)(a) and imposition of restriction on it did not involve violation of that Article. These were broadly the rival contentions urged on behalf of the parties and we shall now proceed to consider them.

(A) Is Freedom of speech and expression confined to the Territory of India?

73. The first question that arises for consideration on these contentions is as to what is the scope and ambit of the right of free speech and expression conferred under Article 19(1)(a). Has it any geographical limitations ? Is its exercise guaranteed only within the territory of India or does it also extend outside ? The Union of India contended that it was a basic postulate of the Constitution that the fundamental rights guaranteed by it were available only within the territory of India, for it could never have been the intention of the Constitution makers to confer rights which the authority of the State could not enforce. The argument was stressed in the form of an interrogation; how could the fundamental rights be intended to be operative outside the territory of India when their exercise in foreign territory could not be protected by the State ? Were the fundamental rights intended to be mere platitudes in so far as territory outside India is concerned ? What was the object of conferring the guarantee of fundamental rights outside the territory of India, if it could not be carried out by the State ? This argument, plausible though it may seem at first blush, is, on

closer scrutiny, unsound and must be rejected. When the Constitution makers enacted Part III dealing with fundamental rights, they inscribed in the Constitution certain basic rights which inhere in every human being and which are essential for unfoldment and development of his full personality. These rights represent the basic values of a civilised society and the Constitution makers declared that they shall be given a place of pride in the Constitution and elevated to the status of fundamental rights. The long years of the freedom struggle inspired by the dynamic spiritualism of Mahatma Gandhi and in fact the entire cultural and spiritual history of India formed, the background against which these rights were enacted and consequently, these rights were conceived by the Constitution makers not in a narrow limited sense but in their widest sweep, for the aim and objective was to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged persons but there will be full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured. The Constitution makers recognised the spiritual dimension of man and they were conscious that he is an embodiment of divinity, what the great Upanishadic verse describes as "the children of immortality" and his mission in life is to realise the ultimate truth. This obviously he cannot achieve unless he has certain basic freedoms, such as freedom of thought, freedom of conscience, freedom of speech and expression, personal liberty to move where he likes and so on and so forth. It was this vast conception of man in society and universe that animated the formulation of fundamental rights and it is difficult to believe that when the Constitution makers declared these rights, they intended to confine them only within the territory of India. Take for example, freedom of speech and expression. Could it have been intended by the Constitution makers that a citizen should have this freedom in India but not outside ? Freedom of speech and expression carries with it the right to gather information as also' to speak and express oneself at home and abroad and to exchange thoughts and ideas with others not only in India but also outside. On what principle of construction and for what reason can this freedom be confined geographically within the limits of India ? The Constitution makers have not chosen to limit the extent of this freedom by adding the words "in the territory of India" at the end of Article 19(1)(a). They have deliberately refrained from using any words of limitation. Then, are we going to supply these words and narrow down the scope and ambit of a highly cherished fundamental right ? Let us not forget that what we are expounding is a Constitution and what we are called upon to interpret is a provision conferring a fundamental right. Shall we expand its reach and ambit or curtail it ? Shall we ignore the high and noble purpose of Part III conferring fundamental rights ? Would we not be stultifying the fundamental right of free speech and expression by restricting it by territorial limitation. Moreover, it may be noted that only a short while before the Constitution was brought into force and whilst the constitutional debate was still going on, the Universal Declaration of Human Rights Was adopted by the General Assembly of the United Nations on 10th December, 1948 and most of the fundamental rights which we find included in Part III were recognised and adopted by the United Nations as the inalienable rights of man in the Universal Declaration of Human Rights, Article 19 of the Universal Declaration declared that "every one. has a right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and import information and ideas through any media and regardless of frontiers". (emphasis supplied). This was the glorious declaration of the fundamental freedom of speech and expression noble in conception and universal in scope-which was before them when the Constitution makers enacted Article 19(1)(a). We have, therefore, no doubt that freedom of speech and expression guaranteed by Article 19(1)(a) is exercisable not only in India but also outside.

74. It is true that the right of free speech and expression enshrined in Article 19(1)(a) can be enforced only if it sought to be violated by any action of the State and since State action cannot have any extra territorial operation, except perhaps incidentally in case of Parliamentary legislation, it is only violation within the territory of India that can be complained of by an aggrieved person. But that does not mean that the right of free speech and expression is exercisable only in India and not outside. State action taken within the territory of India can prevent or restrict exercise of freedom of speech and expression outside India. What Article 19(1)(a) does is to declare freedom of speech and expression as a fundamental right and to protect it against State action. The State cannot by any legislative or executive action interfere with the exercise of this right, except in so far as permissible under Article 19(2). The State action would necessarily be taken in India but it may impair or restrict the exercise of this right elsewhere. Take for example a case where a journalist is prevented by a law or an executive order from sending his despatch abroad. The law or the executive order would operate on the journalist in India but what it would prevent him from doing is to exercise his freedom of speech and expression abroad. Today in the modern world with vastly developed science and technology and highly improved and sophisticated means, of communication, a person may be able to exercise freedom of speech and expression abroad by doing something within the country and if this is published or restricted, his freedom of speech and expression would certainly be impaired and Article 19(1)(a) violated. Therefore, merely because State action is restricted to the territory of India, it does not necessarily follow that the right of free speech and expression is also limited in its operation to the territory of India and does not extend outside.

75. This thesis can also be substantiated by looking at the question from a slightly different point of view. It is obvious that the right of free speech and expression guaranteed under Article 19(1)(a) can be subjected to restriction permissible under Article 19(2). Such restriction, imposed by a statute or an order made under it, if within the limits provided in Article 19(2), would clearly bind the citizen not only when he is within the country but also when he travels outside. Take for example a case where, either under the Passports Act, 1967 or as a condition in the Passport issued under it,, an arbitrary, unreasonable and wholly unjustifiable restriction is placed upon the citizen that he may go abroad, but he should not make any speech there. This would plainly be a restriction which would interfere with his freedom of speech and expression outside the country, for, if valid, it would bind him wherever he may go. He would be entitled to say that such a restriction imposed by State action is impermissible under Article 19(2) and is accordingly void as being violative of Article 19(1)(a). It would thus seem clear that freedom of speech and expression guaranteed under Article 19(1)(a) is exercisable not only inside the country, but also outside.

76. There is also another consideration which leads to the same conclusion. The right to go abroad is, as held in Satwant Singh Sawhney's case, included in personal liberty' within the meaning of Article 21 and is thus a fundamental right protected by that Article. When the State issues a passport and grants endorsement for one country, but refuses for another, the person concerned can certainly go out of India but he is prevented from going to the country for which the endorsement is refused and his right to go to that country is taken away. This cannot be done by the State under Article 21 unless there is a law authorising the State to do so and the action is taken in accordance with the procedure prescribed by such law. The right to go abroad, and in particular to a specified country, is clearly right to personal liberty exercisable outside India and yet it has been held in Satwant Singh Sawhney's case to be a fundamental right protected by Article 21. This

clearly shows that there is no underlying principle in the Constitution which limits the fundamental rights in their operation to the territory of India. If a fundamental right under Article 21 can be exercisable outside India, why can freedom of speech and expression conferred under Article 19(1)(a) be not so exercisable?

77. This view which we are taking is completely in accord with the thinking on the subject in the United States. There the preponderance of opinion is that the protection of the Bill of Rights is available to United States citizens even in foreign countries. Vide Best v. United States 184 Federal Reporter (2d) 131. There is an interesting article on "The Constitutional Right to Travel" in 1956 Columbia Law Review where Leonard B. Boudin writes :

The final objection to limitation upon the right to travel in that they interfere with the individual's freedom of expression. Travel itself is such a freedom in the view of one scholarly jurist. But we need not go that far; it is enough that the freedom of speech includes the right of Americans to exercise it anywhere without the interference of their government. There are no geographical limitations to the Bill of Rights. A Government that sets up barriers to its citizens' freedom of expression in any country in the world violates the Constitution as much as if it enjoined such expression in the United States.

These observations were quoted with approval by Hegde, J., (as he then was) speaking on behalf of a Division Bench of the Karnataka High Court in Dr. S. S. Sadashiva Rao v. Union of India 1965 Mysore Law Journal, p. 605 and the learned Judge there pointed out that "these observations apply in equal force to the conditions prevailing in this country". It is obvious, therefore, that there are no geographical limitations to freedom of speech and expression guaranteed under Article 19(1)(a) and this freedom is exercisable not only in India but also outside and if State action sets up barriers to its citizen's freedom of expression in any country in the world, it would violate Article 19(1)(a) as much as if it inhibited such expression (Within the country. This conclusion would on a parity of reasoning apply equally in relation to the fundamental right to practice any profession or to carry any occupation, trade or business guaranteed under Article 19(1)(g).

(B) Is the right to go abroad covered by Article 19(1)(a) or (g) ?

78. That takes us to the next question arising out of the second limb of the contention of the Government. Is the right to go abroad an essential part of freedom of speech and expression so that whenever there is violation of the former, there is impairment of the latter involving infraction of Article 19(1)(a)? The argument of the petitioner was that while it is true that the right to go abroad is not expressly included as a fundamental right in any of the clauses of Article 19(1), its existence is necessary in order to make the express freedoms mentioned in Article 19(1) meaningful and effective. The right of free speech and expression can have meaningful content and its exercise can be effective only if the right to travel abroad is ensured and without it, freedom of speech and expression would be limited by geographical constraints. The impounding of the passport of a person with a view to preventing him from going abroad to communicate his ideas or share his thoughts and views with others or to express himself through song or dance or other forms and media of expression is direct interference with freedom of speech and expression. It is clear, so ran the argument, that in a complex and developing society, where fast modes of transport and communication have narrowed down distances and brought people living in different parts of the

world together, the right to associate with like minded persons in other parts of the globe for the purpose of advancing social, political or other ideas and policies is indispensable and that is part of freedom of speech and expression which cannot be effectively implemented without the right to go abroad. The right to go abroad, it was said, is a peripheral right emanating from the right to freedom of speech and expression and is, therefore, covered by Article 19(1)(a). This argument of the petitioner was sought to be supported by reference to some recent decisions of the Supreme Court of the United States. We shall examine these decisions a little later, but let us first consider the question on principle.

79. We may begin the discussion of this question by first considering the nature and significance of the right to go abroad. It cannot be disputed that there must exist a basically free sphere for man, resulting from the nature and dignity of the human being as the bearer of the highest spiritual and moral values. This basic freedom of the human being is expressed at various levels and is reflected in various basic rights. Freedom to go abroad is one of such rights, for the nature of man is a free agent necessarily involves free movement on his part. There can be no doubt that if the purpose and the sense of. the State is to protect personality and its development, as indeed it should be of any liberal democratic State, freedom to go abroad must be given its due place amongst the basic rights. This right is an important basic human right for it nourishes independent and self-determining creative character of the individual, not only by extending his freedoms of action, but also by extending the scope of his experience. It is a right which gives intellectual and creative workers in particular the. opportunity of extending their spiritual and intellectual horizon through study at foreign universities, through contact with foreign colleagues and through participation in discussions and conferences. The right also extends to private life : marriage, family and friendship are humanities which can be rarely affected through refusal of freedom to go abroad and clearly show that this freedom is a genuine human right. Moreover, this freedom would be highly valuable right where man finds himself obliged to flee (a) because he is unable to serve his God as he wished at the previous place of residence, (b) because his personal freedom is threatened for reasons which do not constitute a crime in the usual meaning of the word and many were such cases during the emergency, or (c) because his life is threatened either for religious or political reasons or through the threat to the maintenance of minimum standard of living compatible with human dignity. These reasons suggest that freedom to go abroad incorporates the important function of an ultimum refugium libertatis when other basic freedoms are refused. To quote the words of Mr. Justice Douglas in Kent v. Dulles 357 U.S. 116 : 2 L.ed. 2d 1204

freedom to go abroad has much social value and represents a basic human right of great significance.
It is in fact incorporated as an inalienable human right in Article 13 of the Universal Declaration of Human Rights. But it is not specifically named as a fundamental right in Article 19(1). Does it mean that on that account it cannot be a fundamental right covered by Article 19(1) ?

80. Now, it may be pointed out at the outset that it is not our view that a right which is not specifically mentioned by name can never be a fundamental right within the meaning of Article 19(1). It is possible that a right does not find express mention in any clause of Article 19(1) and yet it may be covered by some clause of that Article. Take for example, by way of illustration, freedom of press. It is a most cherished and valued freedom in a democracy : indeed democracy cannot survive without a free press.

Democracy is based essentially on free debate and open discussion, for that is the only corrective of Governmental action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.

Manifestly, free debate and open discussion, in the most comprehensive sense, is not possible unless there is a free and independent press. Indeed the true measure of the health and vigour of a democracy is always to be found in its press. Look at its newspapers-do they reflect diversity of opinions and views, do they contain expression of dissent and criticism against governmental policies and actions, or do they obsequiously sing the praises of the government or lionize or deify the ruler. The newspapers are the index of the true character of the Government-whether it is democratic or authoritarian. It was Mr. Justice Potter Stewart who said : "Without an informed and free press, there cannot be an enlightened people". Thus freedom of the press constitutes one of the pillars of democracy and indeed lies at the foundation of democratic organisation and yet it is not enumerated in so many terms as a fundamental right in Article 19(1), though there is a view held by some constitutional jurists that this freedom is too basic and fundamental not to receive express mention in Part III of the Constitution. But it has been held by this Court in several decisions, of which we may mention only three, namely, Express Newspapers' case, Sakal Newspapers case and Bennett Coif man & Co's case, that freedom of the press is part of the right of free speech and expression and is covered by Article 19(1)(a). The reason is that freedom of the press is nothing but an, aspect of freedom of speech and expression. It partakes of the same basic nature and character and is indeed an integral part of free speech and expression and perhaps it would not be incorrect to say that it is the same right applicable in relation to the press. So also, freedom of circulation is necessarily involved in freedom of speech and expression and is part of it and hence enjoys the protection of Article 19(1)(a). Vide Ramesh Thappar v. State of Madras MANU/SC/0038/1972 : [1973]2SCR757 . Similarly, the right to paint or sing or dance or to write poetry or literature is also covered by Article 19(1)(a), because the common basic characteristic in all these activities is freedom of speech and expression, or to put it differently, each of these activities is an exercise of freedom of speech and expression. It would thus be seen that

even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, as we apprehend it is. the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression.

Mr. Justice Douglas said in Kent v. Dulles that "freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." And what the learned Judge said in regard to freedom of movement in his country holds good in our country as well. Freedom of movement has been a part of our ancient tradition which always upheld the dignity of man and saw in him the embodiment of the Divine. The Vedic seers knew no limitations either in the locomotion of the human body or in the flight of the soul to higher planes of consciousness. Even in the post-Upnishadic period, followed by the Buddhistic era and the early centuries after Christ, the people of this country went to foreign lands in pursuit of trade and business or in search of knowledge or with a view to shedding on others the light of knowledge imparted to them by their ancient sages and seers. India expanded outside her borders: her ships crossed the ocean and the fine superfluity of her wealth brimmed over to the East as well as to the West. He cultural messengers and envoys spread her arts and epics in South East Asia and her religious conquered China and Japan and other Far Eastern countries and spread westward as far as Palestine and Alexendria, Even at the end of the last and the beginning of the present century, our people sailed across the seas to settle down in the African countries. Freedom of movement at home and abroad is a part of our heritage and, as already pointed out, it is a highly cherished right essential to the growth and development of the human personality and its importance cannot be over emphasised. But it cannot be said to be part of the right of free speech and expression. It is not of the same basic nature and character as freedom of speech and expression. When a person goes, abroad, he may do so for a variety of reasons and it may not necessarily and always be for exercise of freedom of speech and expression. Every travel abroad is not an exercise of right of free speech and expression and it would not be correct to say that whenever there is a restriction on the right to go abroad, ex necessitate it involves violation of freedom of speech and expression. It is no doubt, true that going abroad may be necessary in a given case for exercise of freedom of speech and expression, but that does not make it an integral part of the right of free speech and expression. Every activity that may be necessary for exercise of freedom of speech and expression or that may facilitate such exercise or make it meaningful and effective cannot be elevated to the status of a fundamental right as if it were part of the fundamental right of free speech and expression. Otherwise, practically every activity would become part of some fundamental right or the other and the object of making certain rights only as fundamental rights with different permissible restrictions would be frustrated.

81. The petitioner, however, placed very strong reliance on certain decisions of the United States Supreme Court. The first was the decision in Kent v. Dulles (supra). The Supreme Court laid down in this case that the right to travel is guaranteed by the Fifth Amendment and held that the denial of passport by the Secretary of State was invalid because the Congress had not, under the Passport Act, 1926, authorised the Secretary of State to refuse passport on the ground of association with the communist party and refusal to file an affidavit relating to that affiliation and such legislation was necessary before the Secretary of State could refuse passport on those grounds. This decision was not concerned with the validity of any legislation regulating issue of passports nor did it recognise the right to travel as founded on the first Amendment which protects freedom of speech, petition and assembly. We fail to see how this decision can be of any. help to the petitioner.

82. The second decision on which reliance was placed on behalf of the petitioner was Apthekar v. Secretary of Stated 378 U.S. 500 : 12 L. ed. 2d 992. The question which arose for determination in this case related to the constitutional validity of Section 6 of the Subversive Activities Control Act, 1950. This section prohibited the use of passports by communists following a final registration order by the Subversive Activities Control Board under Section 7 and following the mandate of this section, the State Department revoked the existing passports of the appellants. After exhausting all administrative remedies, the appellants sued for declarative and injunctive relief before the District Court which upheld the validity of the section. On direct appeal, the Supreme Court reversed the judgment by a majority of six against three and held the section to be invalid. The Supreme Court noted first that the right to travel abroad is an important aspect of the citizens' liberty guaranteed by the Due Process Clause of the Fifth Amendment and Section 6 substantially restricts that right and then proceeded to apply the strict standard of judicial review which it had till then applied only in cases involving the so-called preferred freedoms of the first Amendment, namely, that "a governmental purpose-may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". The Supreme Court found on application of this test that the section was "overly broad and unconstitutional on its face" since it omitted any requirement that the individual should have knowledge of the organisational purpose to establish a communist totalitarian dictatorship and it made no attempt to relate the restriction on travel to the individual's purpose of the trip or to the security-sensitivity of the area to be visited. This decision again has no relevance to the present argument except for one observation made by the Court that "freedom of travel is a constitutional liberty closely related to rights of free speech and association". But this observation also cannot help because the right to foreign travel was held to be a right arising not out of the first Amendment but inferentially out of the liberty guaranteed in the Fifth Amendment and this observation was meant only to support the extension of the strict First Amendment test to a case involving the right to go abroad.

83. The last decision cited by the petitioner was Zemel v. Rusk 381 U.S. 1 : 14 L. ed. 2d 179. This case raised the question whether the Secretary of State was statutorily authorised to refuse to validate the passports of United States citizens for travel to Cuba and if so, whether the exercise of such authority was constitutionally permissible. The Court, by a majority of Six against three, held that the ban on travel to Cuba was authorised by the broad language of the Passport Act, 1926 and that such a restriction was constitutional. Chief Justice Warren speaking on behalf of the majority observed that having regard to administrative practice both before and after 1926, area restrictions were statutorily authorised and that necessitated consideration of Zemel's constitutional objections. The majority took the view that freedom of movement was a right protected by the 'liberty' clause of the Fifth Amendment and that the Secretary of State was justified in attempting to avoid serious international incidents by restricting travel to Cuba and summarily rejected Zemel's contention that the passport denial infringed his First Amendment rights by preventing him from gathering first hand knowledge about Cuban situation. Kent v. Dulles and Aptheker v. Secretary of State were distinguished on the ground that "the refusal to validate appellant's passport does not result from any expression or association on his part:. appellant is not being forced to choose between membership of an organisation and freedom to travel". Justices Douglas, Goldberg and Black dissented in separate opinions. Since reliance was placed only on the opinion of Justice Douglas, we may confine our attention to that opinion. Justice Douglas followed the approach employed in Kent v. Dulles and refused to interpret the Passport Act, 1926 as permitting the Secretary of State to restrict travel to-Cuba. While doing so, the learned Judge

stressed the relationship of the right to travel to First Amendment rights. He pointed out: "The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without these contacts First Amendment rights, suffer", and added that freedom to travel abroad is a right "peripheral to the enjoyment of the First Amendment guarantees". He concluded by observing that "the right to travel is at the periphery of the First Amendment" and therefore "restrictions on the right to travel in times of peace should be so particularised that a First Amendment right is not thereby precluded". Now, obviously, the majority decision is of no help to the petitioner. The majority rightly pointed out that in Kent v. Dulles and Aptheker v. Secretary of State there was direct interference with freedom of association by refusal to validate the passport, since the appellant was required to give up membership of the organisation if he wanted validation of the passport. Such was not the case in Zemel v. Rusk and that is why, said the majority it was not a First Amendment right which was involved. It appeared clearly to be the view of the majority that if the denial of passport directly affects a First Amendment right such as freedom of expression or association as in Kent V. Dulles and Aptheker v. Secretary of State, it would be constitutionally invalid. The majority did not accept the contention that the right to travel for gathering information is in itself a First Amendment right. Justice Douglas also did not regard the right to travel abroad as a First Amendment right but held that it is peripheral to the enjoyment of First Amendment guarantees because it gives meaning and substance to the First Amendment rights and without it, these rights would suffer. That is why he observed towards the end that restrictions on the right to travel should be so particularised that a First Amendment right is not precluded or in other words there is no direct infringement of a First Amendment right. If there is, the restrictions would be constitutionally invalid, but not otherwise. It is clear that Justice Douglas never meant to lay down that a right which is at the periphery of the First right under the First Amendment. The learned Judge did not hold the right to travel abroad to be a First Amendment right. Both according to the majority as also Justice Douglas, the question to be asked, in each case is : is the restriction on the right to travel such that it directly interferes with a First Amendment right. And that is the same test which is applied by this Court in determining infringement of a fundamental right.

84. We cannot, therefore, accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right. This much is clear as a matter of plain construction, but apart from that, there is a decision of this Court which clearly and in so many terms supports this conclusion. That is the decision in All India Bank Employees' Association v. National Industrial Tribunal MANU/SC/0240/1961 : (1961)IILLJ385SC . The legislation which was challenged in that case was Section 34A of the Banking Companies Act and it was assailed as violative of Article 19(1)(c). The effect of Section 34A was that no tribunal could compel the production and inspection of any books of account or other documents or require a bank to furnish or disclose any statement or information if the Banking Company claimed such document or statement or information to be of a confidential nature relating to secret reserves or to provision for bad and doubtful debts. If a dispute was pending and a question was raised whether any amount from the reserves or other provisions should be taken into account by a tribunal, the tribunal could refer the matter to the Reserve Bank of India whose certificate as to the amount which could be taken into account, was made final and conclusive. Now, it was conceded that Section 34A did not prevent the workmen from forming

unions or place any impediments in their doing so, but it was contended that the right to form association protected under Article 19(1)(c) carried with it a guarantee that the association shall effectively achieve the purpose for which it was formed without interference by law except on grounds relevant to the preservation of public order or morality set out in Article 19(4). In other words, the argument was that the freedom to form unions carried with it the concomitant right that such unions should be able to fulfil the object for which they were formed. This argument was negatived by a unanimous Bench of this Court. The Court said that unions were not restricted to workmen, that employers' unions may be formed in order to earn profit and that a guarantee for the effective functioning of the unions would lead to the conclusion that restrictions on their right to earn profit could be put only in the interests of public order or morality. Such a construction would run basically counter to the scheme of Article 19 and to the provisions of Article 19(1)(c) and (6). The restrictions which could be imposed on the right to form an association were limited to restrictions in the interest of public order and morality. The restrictions, which could be imposed on the right to carry on any trade, business, profession or calling were reasonable restrictions in the public interest and if the guarantee for the effective functioning of an association was a part of the right, then restrictions could not be imposed in the public interest on the business of an association. Again, an association of workmen may claim the right of collective bargaining and the right to strike, yet the right to strike could not by implication be treated as part of the right to form association, for, if it were so treated, it would not be possible to put restrictions on that right in the public interest as is done by the Industrial Disputes Act, which restrictions would be permissible under Article 19(6), but not under Article 19(4). The Court, therefore, held that the right to form unions guaranteed by Article 19(1)(c) does not carry with it a concomitant right that the unions so formed should be able to achieve the purpose for which they are brought into existence, so that any interference with such achievement by law would be unconstitutional unless the same could be justified under Article 19(4).

85. The right to go abroad cannot, therefore, be regarded as included in freedom of speech and expression guaranteed under Article 19(1)(a) on the theory of peripheral or concomitant right.

This theory has been firmly rejected in the All India Bank Employees Association's case and we cannot countenance any attempt to revive it, as that would completely upset the scheme of Article 19(1) and to quote the words of Rajagopala Ayyanger, J., speaking on behalf of the Court in All India Bank Employees Association's case "by a series of ever expending concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grostesque result". So also, for the same reasons, the right to go abroad cannot be treated as part of the right to carry on trade, business, profession or calling guaranteed under Article 19(1)(g). The right to go abroad is clearly not a guaranteed right under any clause of Article 19(1)
and Section 10(3)(c) which authorises imposition of restrictions on the right to go abroad by impounding of passport cannot be held to be void as offending Article 19(1)(a) or (g), as its direct and inevitable impact is on the right to go abroad and not on the right of free speech and expression or the right to carry on trade, business profession or calling.

Constitutional requirement of an order under Section 10(3)(c).

86. But that does not mean that an order made under Section 10(3)(c) may not violate Article 19(1)(a) or (g). While discussing the constitutional validity of the impugned order impounding the

passport of the petitioner, we shall have occasion to point out that even where a statutory provision empowering an authority to take action is constitutionally valid, action taken under it may offend a fundamental right and in that event, though the statutory provision is valid, the action may be void. Therefore, even though Section 10(3)(c) is valid, the question would always remain whether an order made under it is invalid as contravening a fundamental right. The direct and inevitable effect of an order impounding a passport may, in a given case, be to abridge or take away freedom of speech and expression or the right td carry on a profession and where such is the case, the order would be invalid, unless saved by Article 19(2) or Article 19(6). Take for example, a pilot with international flying licence. International flying is his profession and if his passport is impounded, it would directly interfere with his right to carry on his profession and unless the order can be justified on the ground of public interest under Article 19(6) it would be void as offending Article 19(1)(g). Another example may be taken of an evangelist who has made it a mission of his life to preach his faith to people all over the world and for that purpose, set up institutions in different countries. If an order is made impounding his passport, it would directly affect his freedom of speech and expression and the challenge to the validity of the order under Article 19(1)(a) would be unanswerable unless it is saved by Article 19(2). We have taken these two examples only by way of illustration. There may be many such cases where the restriction imposed is apparently only on the right to go abroad but the direct and inevitable consequence is to interfere with the freedom of speech and expression or the right to carry on a profession. A musician may want to go abroad to sing, a dancer to dance, a visiting professor to teach and a scholar to participate in a conference or seminar. If in such a case his passport is denied or impounded, it would directly interfere with his freedom of speech and expression. If a correspondent of a newspaper is given a foreign assignment and he is refused passport or his passport is impounded, it would be direct interference with his freedom to carry on his profession. Examples can be multiplied, but the point of the matter is that though the right to go abroad is not a fundamental right, the denial of the right to go abroad may, in truth and in effect, restrict freedom of speech and expression or freedom to carry on a profession so as to contravene Article 19(1)(a) or 19(1)(g). In such a case, refusal or impounding of passport would be invalid unless it is justified under Article 19(2) or Article 19(6), as the case may be. Now, passport can be impounded under Section 10(3)(c) if the Passport Authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public. The first three categories are the same as those in Article 19(a) and each of them, though separately mentioned, is a species within the. broad genus of "interests of the general public". The expression, "interests of the general public" is a wide expression which covers within its broad sweep all kinds of interests of the general public including interests of the sovereignty and integrity of India, security of India and friendly relations of India with foreign States. Therefore, when an order is made under Section 10(3)(c), which is in conformity with the terms of that provision, it would be in the interests of the general public and even if it restricts freedom to carry on a profession, it would be protected by Article 19(6). But if an order made under Section 10(3)(c) restricts freedom of speech and expression, it would not be enough that it is made in the interests of the general public. It must fall within the terms of Article 19(2) in order to earn the protection of that Article. If it is made in the interests of the sovereignty, and integrity of India or in the interests of the security of India or in the 'interests of friendly relations of India with any foreign country, it would satisfy the requirement of Article 19(2). But if it is made for any other interests of the general public save the interests of "public order, decency or morality", it would not enjoy the protection of Article 19(2). There can be no doubt that the interests of public order,

decency or morality are "interests of the general public" and they would be covered by Section 10(3)(c), but the expression "interests of the general public" is, as already pointed out, a much wider expression and, therefore, in order that an order made under Section 10(3)(c) restricting freedom of speech and expression, may not fall foul of Article 19(1)(a), it is necessary that in relation to such order, the expression "interests of the general public" in Section 10(3)(c) must be read down so as to be limited to interests of public order, decency or morality. If an order made under Section 10(3)(c) restricts freedom of speech and expression, it must be made not in the interests of the general public in a wider sense, but in the interests of public order, decency or morality, apart from the other three categories, namely, interests of the sovereignty and integrity of India, the security of India and friendly relations of India with any foreign country. If the order cannot be shown to have been made in the interests of public order, decency or morality, it would not only contravene Article 19(1)(a), but would also be outside the authority conferred by Section 10(3)(c).

Constitutional validity of the impugned Order :

We may now consider, in the light of this discussion, whether the impugned Order made by the Central Government impounding the passport of the petitioner under Section 10(3)(c) suffers from any constitutional or legal infirmity. The first ground of attack against the validity of the impugned Order was that it was made in contravention of the rule of natural justice embodied in the maxim audi alteram partem and was, therefore, null and void. We have already examined this ground while discussing the constitutional validity of Section 10(3)(c) with reference to Article 21 and shown how the statement made by the learned Attorney General on behalf of the Government of India has cured the impugned Order of the vice of non-compliance with the audi alteram partem rule. It is not necessary to say anything more about it. Another ground of challenge urged on behalf of the petitioner was that the impugned Order has the effect of placing an unreasonable restriction on the right of free speech and expression guaranteed to the petitioner under Article 19(1)(a) as also on the right to carry on the profession of a journalist conferred under Article 19(1)(g), in as much as if seeks to impound the passport of the petitioner indefinitely, without any limit of time, on the mere likelihood of her being required in connection with the Commission of Inquiry headed by Mr. Justice J. C. Shah. It was not competent to the Central Government, it was argued, to express an opinion as to whether the petitioner is likely to be required in connection with the proceeding before the Commission of Inquiry. That would be a matter within the judgment of the Commission of Inquiry and it would be entirely for the Commission of Inquiry to decide whether or not her presence is necessary in the proceeding before it. The impugned Order impounding the passport of the petitioner on the basis of a mere opinion by the Central Government that the petitioner is likely to be required in connection with the proceeding before the Commission of Inquiry was, in the circumstances, clearly unreasonable and hence violative of Article 19(1)(a) and (g). This ground of challenge was vehemently pressed on behalf of the petitioner and supplemented on behalf of Adil Sahariar who intervened at the hearing of the writ petition, but we do not think there is any substance in it.

It is true, and we must straightaway concede it, that merely because a statutory provision empowering an authority take action in specified circumstances is constitutionally valid as not being in conflict with any fundamental rights, it does not give a carte blanche to the authority to make any order it likes so long as it is within the parameters laid down by the statutory provision.

Every order made under a statutory provision must not only be within the authority conferred by the statutory provision, but must also stand the test of fundamental rights. Parliament cannot be presumed to have intended to confer power on an authority to act in contravention of fundamental rights.

It is a basic constitutional assumption underlying every statutory grant of power that the authority on which the power is conferred should act constitutionally and not in violation of any fundamental rights.

This would seem to be elementary and no authority is necessary, in support of it,

but if any were needed, it may be found in the decision of this Court in Narendra Kumar and Ors. v. The Union of India and Ors. MANU/SC/0013/1959 : [1960]2SCR375 . The question which arose in that case was whether Clauses (3) and (4) of the Non-ferrous Metal Control Order, 1958 made under Section 3 of the Essential Commodities Act, 1955 were constitutionally valid. The argument urged on behalf of the petitioners was that these clauses imposed unreasonable restriction of the fundamental rights guaranteed under Articles 19(1)(f) and (g) and in answer to this argument, apart from merits, a contention of a preliminary nature was advanced on behalf of the Government that "as the petitioners have not challenged the validity of the Essential Commodities Act and have admitted the power of the Central Government to make an order in exercise of the powers conferred by Section 3 of the Act, it is not open to the Court to consider whether the law made by the Government in making the non-ferrous metal control order-violates any of the fundamental rights under the Constitution". It was urged that so long as the Order does not go beyond the provisions in Section 3 of the Act, it "must be held to be good and the consideration of any question of infringement of fundamental rights under the Constitution is wholly beside the point". This argument was characterised by Das Gupta, J., speaking on behalf of the Court as "an extravagant argument" and it was said that "such an extravagant argument has merely to be mentioned to deserve rejection". The learned Judge proceeded to state the reasons for rejecting this argument in the following words :

If there was any reason to think that Section 3 of the Act confers on the Central Government power to do anything which is in conflict with the Constitution anything which violates any of the fundamental rights conferred by the Constitution, that fact alone would be sufficient and unassailable ground for holding that the section itself is void being ultra vires the Constitution. When, as in this case, no challenge is made that Section 3 of the Act is ultra vires the Constitution, it is on the assumption that the powers granted thereby do not violate the Constitution and do not empower the Central Government to do anything which the Constitution prohibits. It is fair and proper to presume that in passing this Act the Parliament could not possibly have intended the words used by it, viz., "may by order provide for regulating or prohibiting the production, supply and distribution, thereof, and trade and commerce in", to include a power to make such provisions even though they may be in contravention of the Constitution. The fact that the words "in accordance with the provisions of the articles of the Constitution" are not used in the section is of no consequence. Such words have to be read by necessary implication in every provision and every law made by the Parliament on any day after the Constitution came into force. It is clear therefore that when Section 3 confers power to provide for regulation or prohibition of the production, supply and distribution of any essential commodity it gives such power to make any regulation or prohibition in so far as such regulation and prohibition do not violate any fundamental rights granted by the Constitution of India.

It would thus be clear that though the impugned Order may be within the terms of Section 10(3)(c), it must nevertheless not contravene any fundamental rights and if it does, it would be void. Now, even if an order impounding a passport is made in the interests of public order, decency or morality, the restriction imposed by it may be so wide, excessive or disproportionate to the mischief or evil sought -to be averted that it may be considered unreasonable and in that event, if the direct and inevitable consequence of the Order is to abridge or take away freedom of speech and expression, it would be violative of Article 19(1)(a) and would not be protected by Article 19(2) and the same would be the position where the order is in the interests of the general public but it impinges directly and inevitably on the freedom to carry on a. profession in which case it would contravene Article 19(1)(g) without being saved by the provision enacted in Article 19(6).

87. But we do not think that the impugned Order in the present case violates either Article 19(1)(a) or Article 19(1)(g). What the impugned Order does is to impound the passport of the petitioner and thereby prevent her from going abroad and at the date when the impugned order was made there is nothing to show that the petitioner was intending to go abroad for the purpose of exercising her freedom of speech and expression or her right to carry on her profession as a journalist. The direct and inevitable consequence of the impugned order was to impede the exercise of her right to go abroad and not to interfere with her freedom of speech and expression or her right to carry on her profession. But we must hasten to point out that if at any time in the future the petitioner wants to go abroad for the purpose of" exercising her freedom of speech and expression or for carrying on her profession as a journalist and she applies to the Central Government to release the passport, the question would definitely arise whether the-refusal to release or in other words, continuance of the impounding of the passport is in the interests of public order, decency or morality in the first case, and in the interests of the general public in the second, and the restriction thus imposed is reasonable so as to come within the protection of Article 19(2) or Article 19(6). That is, however, not the question before us at present.

88. We may observe that if the impugned Order impounding the passport of the petitioner were violative of her right to freedom of speech and expression or her right to carry on her profession as a journalist, it would not be saved by Article 19(2) or Article 19(6), because the impounding of the passport for an indefinite length of time would clearly constitute an unreasonable restriction. The Union contended that though the period for which the impugned Order was to operate- was not specified in so many terms, it was clear that it was intended to be coterminous with the duration of the Commission of Inquiry, since the reason for impounding was that the presence of the petitioner was likely to be required in connection with the proceedings before the Commission of Inquiry and the term of the Commission of Inquiry being limited upto 31st December, 1977, the impounding of the passport could not continue beyond that date and hence it would not be said that the impugned Order was to operate for an indefinite period of time. Now, it is true that the passport of the petitioner was impounded on the ground that her presence was likely to be required in connection with the proceeding before the Commission of Inquiry and the initial time limit fixed for the Commission of Inquiry to submit its report was 31st December, 1977, but the time limit could always be extended by the Government and the experience of several Commissions of Inquiry set up in this country over the last twenty-five years shows that hardly any Commission of Inquiry has been able to complete its report within the originally appointed time. Whatever might have been the expectation in regard to the duration of the Commission of Inquiry headed by Mr. Justice Shah at the time when the impugned Order was made, it is now clear that it has not been

possible for it to complete its labours by 31st December, 1977 which was the time limit originally fixed and in fact its term has been extended upto 31st May, 1978. The period for which the passport is impounded cannot, in the circumstances, be said to be definite and certain and it may extend to an indefinite point of time. This would clearly make the impugned order unreasonable and the learned Attorney General appearing on behalf of the Central Government, therefore, made a statement that in case the decision to impound the passport of the petitioner is confirmed by the Central Government after hearing the petitioner, "the duration of the impounding will not exceed a period of six months from the date of the decision that may be taken on the petitioner's representation". It must be said in fairness to the Central Government that this was a very reasonable stand to adopt, because in a democratic society governed by the rule of law, it is expected of the Government that it should act not only constitutional and legally but also fairly and justly towards the citizen. We hope and trust that in future also whenever the passport of any person is impounded under Section 10(3)(c), the impounding would be for a specified period of time which is not unreasonably long, even though no contravention of any fundamental right may be involved.

89. The last argument that the impugned Order could not, consistently with Article 19(1)(a) and (g), be based on a mere opinion of the Central Government that the presence of the petitioner is likely to be required in connection with the proceeding before the Commission of Inquiry is also without force. It is true that ultimately it is for the Commission of Inquiry to decide whether the presence of the petitioner is required in order to assist it in its fact finding mission, but the Central Government which has constituted the Commission of Inquiry and laid down its terms of reference would certainly be able to say with reasonable anticipation whether she is likely to be required by the Commission of Inquiry. Whether she is actually required would be for the Commission of Inquiry to decide, but whether she is likely to be required can certainly be judged by the Central Government. When the Central Government appoints a Commission of Inquiry, it does not act in a vacuum. It is bound to have some material before it on the basis of which it comes of a decision that there is a definite matter of public importance which needs to be inquired into and appoints a Commission of Inquiry for that purpose. The Central Government would, therefore, be in a position to say whether the petitioner is likely to be required in connection with the proceeding before the Commission of Inquiry. It is possible that ultimately when the Commission of Inquiry proceeds further with the probe, it may find that the presence of the petitioner is not required, but before that it would only be in the stage of likelihood and that can legitimately be left to the judgment of the Central Government. The validity of the impugned Order cannot, therefore, be assailed on this ground, and the challenge based on Article 19(1)(a) and (g) must fail.

Whether the impugned Order is inter vires Section 10(3)(c) ?

90. The last question which remains to be considered is whether the impugned Order is within the authority conferred by Section 10(3)(c). The impugned Order is plainly, on the face of it, purported to be made in public interest, i.e., in the interests of the general public, and therefore, its validity must be judged on that footing. Now it is obvious that on a plain natural construction of Section 10(3)(c), it is left to the Passport Authority to determine whether it is necessary to- impound a passport in the interests of the general public. But an order made by the Passport Authority impounding a passport is subject to judicial review on the ground that the order is mala fide, or that the reasons for making the order are extraneous or they have no relevance to the interests of

the general public or they cannot possibly support the making of the order in the interests of the general public. It was not disputed on behalf of the Union, and indeed it could not be in view of Section 10, Sub-section (5) that, save in certain exceptional cases, of which this was admittedly not one, the Passport Authority is bound to give reasons for making an order impounding a passport and though in the present case, the Central Government initially declined to give reasons claiming that it was not in the interests of the general public to do so, it realised the utter untenability of this position when it came to file the affidavit in reply and disclosed the reasons which were recorded at the time when the impugned order was passed. These reasons were that, according to the Central Government, the petitioner was involved in matters coming within the purview of the Commissions of Inquiry constituted by the Government of India to inquire into excesses committed during the emergency and in respect of matters concerning Maruti and its associate companies and the Central Government was of the view that the petitioner should be available in India to give evidence before these Commissions of Inquiry and she should have an opportunity to present her views before them and according to a report received by the Central Government on that day, there was likelihood of her leaving India. The argument of the petitioner was that these reasons did not justify the making of the impugned Order in the interests of the general public, since these reasons had no reasonable nexus with the interests of the general public within the meaning of that expression as used in Section 10(3)(c). The petitioner contended that the expression "interests of the general public" must be construed in the context of the perspective of the statute and since the power to issue a passport is a power related to foreign affairs, the "interests of the general public" must be understood as referable only to a matter having some nexus with foreign affairs and it would not be given a wider meaning. So read, the expression "interests of the general public" could net cover a situation) where the presence of a person required to give evidence before a Commission of Inquiry. This argument is plainly erroneous as it seeks to cut down the width and amplitude of the expression "interests of the general public", an expression which has a well recognised legal connotation and which is to be found in Article 19(5) as well as Article 19(6). It is true, as pointed out by this Court in Rohtas Industries Ltd. v. S. D. Agarwal and Anr. MANU/SC/0020/1968 : [1969]3SCR108 , that "there is always a perspective within which a statute is intended to operate", but that does not justify reading of a statutory provision in a manner not warranted by its language or narrowing down its scope and meaning by introducing a limitation which has no basis either in the language or in the context of the statutory provision. Moreover, it is evident from Clauses (d), (e) and (h) of Section 10(3) that there are several grounds in this section which do not relate to foreign affairs. Hence we do not think the petitioner is justified in seeking to limit the expression "interests of the general public" to matters relating to foreign affairs.

91. The petitioner then contended that the requirement that she should be available for giving evidence before the Commissions of Inquiry did not warrant the making of the impugned Order "in the interests of the general public". Section 10(3), according to the petitioner, contained Clauses (e) and (h) dealing specifically with cases where a person is required in connection with a legal proceeding and the enactment of these two specific provisions clearly indicated the legislative intent that the general power in Section 10(3)(c) under the ground "interests of the general public" was not meant to be exercised for impounding a passport in cases where a person is required in connection with a legal proceeding. The Central Government was, therefore, not entitled to resort to this general power under Section 10(3)(c) for the purpose of impounding the passport of the petitioner on the ground that she was required to give evidence before the Commissions of Inquiry. The power to impound the passport of the petitioner in such a case was either to be found in Section

10(3)(h) or it did not exist at all. This argument is also unsustainable and must be rejected. It seeks to rely on the maxim expressio unius exclusio alterius and proceeds on the basis that Clauses (e) and (h) of Section 10(3) are exhaustive of cases where a person is required in connection with a proceeding, whether before a court or a Commission of Inquiry, and no resort can be had to the general power under Section 10(3)(c) in cases where a person is required in connection with a proceeding before a Commission of Inquiry. But it must be noted that this is not a case where the maxim expressio unius exclusio alterius has any application at all. Section 10(3)(e) deals with a case where proceedings are pending before a criminal court while Section 10(3)(h) contemplates a situation where ' a warrant or summons for the appearance or a warrant for the arrest, of the holder of a passport has been issued by a court or an order prohibiting the departure from India of the holder of the passport has been made by any such court. Neither of these two provisions deals with a case where a proceeding is pending before a Commission of Inquiry and the Commission has not yet issued a summons or warrant for the attendance of the holder of the passport. We may assume for the purpose of argument that a Commission of Inquiry is a 'court' for the purpose of Section 10(3)(h), but even so, a case of this kind would not be covered by Section 10(3)(h) and Section 10(3)(c) would in any case not have application. Such a case would clearly fall within the general power under Section 10(3)(c) if it can be shown that the requirement of the holder of the passport in connection with the proceeding before the Commission of Inquiry is in the interests of the general public. It is, of course, open to the Central Government to apply to the Commission of Inquiry for issuing a summons or warrant, as the case may be, for the attendance of the holder of the passport before the Commission and if a summons or warrant is so issued, it is possible that the Central Government may be entitled to impound the passport under Section 10(3)(h). But that does not mean that before the stage of issuing a summons or warrant has arrived, the Central Government cannot impound the passport of a person, if otherwise it can be shown to be in the interests of the general public to do so. Section 10(3)(e)' and (h) deal only with two specific kinds of situations, but there may be a myriad other situations, not possible to anticipate or categorise, where public interests may require that the passport should be impounded and such situation would be taken care of under the general provision enacted in Section 10(3)(c). It is true that this is a rather drastic power to interfere with a basic human right, but it must be remembered that this power has been conferred by the legislature in public interest and we have no doubt that it will be sparingly used and that too, with great care and circumspection and as far as possible, the passport of a person will not be impounded merely on the ground of his being required in connection with a proceeding, unless the case is brought within Section 10(3)(e) or Section 10(3)(h). We may echo the sentiment in Lord Denning's closing remarks in Ghani v. Jones [1970] 1 Q. B. 693 where the learned Master of the Rolls said : "A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the severest grounds". This liberty is prized equally high in our country and we are sure that a Government committed to basic human values will respect it.

92. We must also deal with one other contention of the petitioner, though we must confess that it was a little difficult for us to appreciate it. The petitioner urged that in order that a passport may be impounded under Section 10(3)(c), public interest must actually exist in presenting and mere likelihood of public interest arising in future would be no ground for impounding a passport. We entirely agree with the petitioner that an order impounding a passport can be made by the Passport Authority only if it is actually in the interests of the general public to do so and it is not enough that the interests of the general public may be likely to be served in future by the making of the

order. But here in the present case, it was not merely on the future likelihood of the interests of the general public advanced that the impugned order was made by the Central Government. The impugned Order was made because, in the opinion of the Central Government, the presence of the petitioner was necessary for giving evidence before the Commissions of Inquiry and according to the report received by the Central Government, she was likely to leave India and that might frustrate or impede to some extent the inquiries which were being conducted by the Commissions of Inquiry.

93. Then it was contended on behalf of the petitioner that the Minister for External Affairs, who made the impugned Order on behalf of the Central Government, did not apply his mind and hence the impugned Order was bad. We find no basis or justification for this contention. It has been stated in the affidavit in reply that the Minister for External Affairs applied his mind to the relevant material and also to the confidential information received from the intelligence sources that there was likelihood of the petitioner attempting to leave the country and then only he made the impugned Order. In fact, the Ministry of Home Affairs had forwarded to the Ministry of External Affairs as far back as 9th May, 1977 a list of persons whose presence, in view of their involvement or connection or position or past antecedents, was likely to be required in connection with inquiries to be carried out by the Commissions of Inquiry and the name of the petitioner was included in this list. The Home Ministry had also intimated to the Ministry of External Affairs that since the inquiries were being held by the Commissions of Inquiry in public interest, consideration of public interest would justify recourse to Section 10(3)(c) for impounding the passports of the persons mentioned in this list. This note of the Ministry of Home Affairs was considered by the Minister for External Affairs and despite the suggestion made in this note, the passports of only eleven persons, out of those mentioned in the list, were ordered to be impounded and no action was taken in regard to the passport of the petitioner. It is only on 1st July, 1977 when the Minister for External Affairs received confidential information that the petitioner was likely to attempt to leave the country that, after applying his mind to the relevant material and taking into account confidential information, he made the impugned Order. It is, therefore, not possible to say that the Minister for External Affairs did not apply his mind and mechanically made the impugned Order.

94. The petitioner lastly contended that it was not correct to say that the petitioner was likely to be required for giving evidence before the Commissions of Inquiry. The petitioner, it was said, had nothing to do with any emergency excesses nor was she connected in any manner with Maruti or its associate concerns, and, therefore, she could not possibly have any evidence to give before the Commissions of Inquiry. But this is not a matter which the court can be called upon to investigate. It is not for the court to decide whether the presence of the petitioner is likely to be required for giving evidence before the Commissions of Inquiry. The Government, which has instituted the Commissions of Inquiry, would be best in a position to know, having regard to the material before it, whether the presence of the petitioner is likely to be required. It may be that her presence may ultimately not be required at all, but at the present stage, the question is only whether her presence is likely to be required and so far that is concerned, we do not think that the view taken by the Government can be regarded as so unreasonable or perverse that we would strike down the impugned Order based upon it as an arbitrary exercise of power.

95. We do not, therefore, see any reason to interfere with the impugned Order made by the Central Government. We, however, wish to utter a word of caution to the Passport Authority while

exercising the power of refusing or impounding or cancelling a passport. The Passport Authority would do well to remember that it is a basic human right recognised in Article 13 of the Universal Declaration of Human Rights with which the Passport Authority, is interfering when it refuses or impounds or cancels a passport. It is a highly valuable right which is a part of personal liberty, an aspect of the spiritual dimension of man, and it should not be lightly interfered with. Cases are not unknown where people have not been allowed to go abroad because of the views held, opinions expressed or political beliefs or economic ideologies entertained by them. It is hoped that such cases will not recur under a Government constitutionally committed to uphold freedom and liberty but it is well to remember, at all times, that eternal vigilance is the price of liberty, for history shows that it is always subtle and insidious encroachments made ostensibly for a good cause that imperceptibly but surety corrode the foundations of liberty.

96. In view of the statement made by the learned Attorney-General to which reference has already been made in the judgment we do not think it necessary to formally interfere with the impugned order. We, accordingly, dispose of the Writ Petition without passing any formal order. There will be no order as to costs.

V.R. Krishna Iyer, J.

97. My concurrence with the argumentation and conclusion contained in the judgment of my learned brother Bhagwati J. is sufficient to regard this supplementary, in one sense, a mere redundancy. But in another sense not, where the vires of a law, which arms the Central Executive with wide powers of potentially imperilling some of the life-giving liberties of the people in a pluralist system like ours, is under challenge; and more so, when the ground is virgin, and the subject is of growing importance to more numbers as Indians acquire habits of transnational travel and realise the fruits of foreign tours, reviving in modern terms, what our forbears effectively did to put Bharat on the cosmic cultural and commercial map. India is India because Indians, our ancients, had journeyed through the wide world for commerce, spiritual and material, regardless of physical or mental frontiers. And when this precious heritage of free trade in ideas and goods, association and expression, migration and home-coming, now crystallised in Fundamental Human Rights, is alleged to be hamstrung by hubristic authority, my sensitivity lifts the veil of silence. Such is my justification, for breaking judicial lock-jaw to express sharply the juristic perspective and philosophy behind the practical necessities and possible dangers that society and citizenry may face if the clauses of our Constitution are not bestirred into court action when a charge of unjustified handcuffs on free speech and unreasonable fetters on right of exit is made through the executive power of passport impoundment. Even so, in my separate opinion, I propose only to paint the back-drop with a broad brush, project the high points with bold lines and touch up the portrait drawn so well by brother Bhagwati J, if I may colourfully, yet respectfully, endorse his judgment.

98. Remember, even democracies have experienced executive lawlessness and eclipse of liberty on the one hand and 'subversive' use of freedoms by tycoons and saboteurs on the other, and then the summons to judges comes from the Constitution, over-riding the necessary deference to government and seeing in perspective, and overseeing in effective operation the enjoyment of the 'great rights'. This Court lays down the law not pro tempore but lastingly.

99. Before us is a legislation, regulating travel abroad, Is it void in part or over-wide in terms ? 'Lawful' illegality becomes the rule, if 'lawless' legislation be not removed. In our jural order if a statute is void, must the Constitution and its sentinels sit by silently, or should the lines of legality be declared with clarity so that adherence to valid norms becomes easy and precise ?

100. We are directly concerned, as fully brought out in Shri Justice Bhagwati's judgment, with the indefinite immobilisation of the petitioner's passport, the reason for the action being strangely veiled from the victim and the right to voice an answer being suspiciously withheld from her, the surprising secrecy being labelled, 'public interest'. Paper curtains wear ill on good governments. And, cutely to side one's grounds under colour of statute, is too sphinx-like an art for an open society and popular regime. As we saw the reasons which the learned Attorney General so unhesitatingly disclosed, the question arises : 'wherefore are these things hid ?'. The catch-all expression 'public interest' is sometimes the easy temptation to cover up from the public which they have a right to know, which appeals in the short run but avenges in the long run Since the only passport to this Court's jurisdiction in this branch of passport law is the breach of a basic freedom, what is the nexus between a passport and a Part III right ? What are the ambience and amplitude, the desired effect and direct object of the key provisions of the Passports Act, 1967 ? Do they crib or cut down unconstitutionally, any of the guarantees under Articles 21, 19 and 14...? Is the impugned Section 10, especially Section 10(3)(c), capable of circumscription to make it accord with the Constitution ? Is any part ultra vires, and why ? Finally, granting the Act to be good, is the impounding order bad ? Such, in the Writ Petition, is the range of issues regaled at the bar, profound, far-reaching, animated by comparative scholarship and fertilised by decisional erudition. The frontiers and funeral of freedom, the necessities and stresses of national integrity, security and sovereignty, the interests of the general public, public order and the like figure on occasions as forensic issues. And, in such situations, the contentious quiet of the court is the storm-center of the nation. Verily, while hard cases tend to make bad law, bad cases tend to blur great law and courts must beware.

101. The center of the stage in a legal debate on life and liberty must ordinarily be occupied by Article 21 of our Paramount Parchment which, with emphatic brevity and accent on legality, states the mandate thus :

21. Protection of life and personal liberty.-

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Micro-phrases used in National Chatters spread into macro-meanings with the lambent light of basic law. For our purposes, the key concepts are 'personal liberty' and 'procedure established by law'. Let us grasp the permissible restraints on personal liberty, one of the facets of which is the right of exit beyond one's country. The sublime sweep of the subject of personal liberty must come within our ken if we are to do justice to the constitutional limitation's which may, legitimately, be imposed on its exercise. Speaking briefly, the architects of our Founding Document, (and their fore-runners) many of whom were front-line fighters for national freedom, were lofty humanists who were profoundly spiritual and deeply secular, enriched by vintage values and revolutionary urges and, above all, experientially conscious of the deadening impact of the colonial screening of

Indians going abroad and historically sensitive to the struggle for liberation being waged from foreign lands. And their testament is our asset.

102. What is the history, enlivened by philosophy, of the law of travel ? The roots of our past reach down to travels laden with our culture and commerce and its spread-out beyond the oceans and the mountains, so much so our history unravels exchange between India and the wider world. This legacy, epitomised as 'the glory that was Ind., was partly the product of travels into India and out of India. It was the two-way traffic of which there is testimony inside in Nalanda, and outside, even in Ulan Bator. Our literature and arts bear immortal testimony to our thirst for travel and even our law, over two thousand years ago, had canalised travels abroad. For instance, in the days of Kautilya (BC 321-296) there was a Superintendent of Passport's 'to issue passes at the rate of a masha a pass'. Further details on passport law are found in Kautilya"'s Arthasastra.

103. Indeed, viewing the subject from the angle of geo-cultural and legal anthropology and current history, freedom of movement and its offshoot-the institution of passport-have been there through the Hellenic, Roman, Israelite, Chinese, Persian and other civilisations. Socrates, in his dialogue with Crito, spoke of personal liberty. He regarded the right of everyone to save his country as an attribute of personal liberty. He made the laws speak thus :

We further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he please and take his goods with him. None of our laws will forbid him, or interfere with him. Anyone who does not like us and the city, and who wants to emigrate to a colony or to any other city may go where he Ekes, retaining his property.

(Plato, Dialogues)

The Magna Carta, way back in 1215 A.D. on the greens of Runnymede, affirmed the freedom to move beyond the borders of the kingdom and, by the time of Blackstone, 'by the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leaver'. Lord Diplock in D.P.P. v. Shagwan [1972] A.C. 60 stated that 'Prior to 1962 ' a British subject had the right at common law to enter the United Kingdom without let or hindrance when and where he pleased and to remain there as long as he liked' (International & Comparative Law Quarterly, Vol. 23, My 1974, p. 646). As late as Gharti v. Jones [1970] 1 Q.B. 693, 709 Lord Denning asserted : 'A man's liberty of movement is regarded so highly by the Law of England that it is not to be hindered or prevented except on the surest grounds' (I & C. L. Qrly, ibid. p. 646). In 'Freedom under the Law" Lord Denning has observed under the sub-head 'Personal Freedom' :

Let me first define my terms. By personal freedom I mean the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other person's. Despite all the great changes that have come about in the other freedoms, this freedom has in our country remained intact.

In 'Freedom, The Individual and the Law', Prof. Street has expressed a like view. Prof. H.W.R. Wade and Prof. Hood Philips echo this liberal view. (See Int. & Comp. L.Q. ibid 646). And Justice

Douglas, in the last decade, refined and re-stated, in classic diction, the basics of travel jurisprudence in Apthekar 378 U.S. 500.

The freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful -knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.

America is of course sovereign, but her sovereignty is woven in an international web that makes her one of the family of nations. The ties with all the continents are close- commercially as well as culturally. Our concerns are planetary beyond sunrises and sunsets. Citizenship implicates us in those problems and paraplexities, as well as in domestic ones. We cannot exercise and enjoy citizenship in World perspective without the right to travel abroad.

And, in India, Satwant MANU/SC/0040/1967 : [1967]3SCR525 set the same high tone through Shri Justice Subba Rao although A. K. Gopalan [1950] S.C.R. 88 and a stream of judicial thought since then, had felt impelled to underscore personal liberty as embracing right to travel abroad. Tambe CJ in A. G. Kazi MANU/MH/0098/1967 : AIR1967Bom235 speaking for a Division Bench, made a comprehensive survey of the law and vivified the concept thus :

In our opinion, the language used in the Article (Article 21) also indicates that the expression 'Personal liberty' is not confined only to freedom from physical restraint, i.e. but includes a full range of conduct which an individual is free to pursue within law, for instance, eat and drink what he likes, mix with people whom he likes, read what he likes, sleep when and as long as he likes, travel wherever he likes, go wherever he likes, follow profession, vocation or business he likes, of course, in the manner and to the extent permitted by law.

(P. 240)

104. The legal vicissitudes of the passport story in the United States bear out the fluctuating fortunes of fine men; being denied this great right to go abroad-Linus Pauling, the Nobel Prize-winner, Charles Chaplin, the screen super genius, Paul Robesen, the world singer, Arthur Miller, the great author and even Williams L. Clark, former Chief Justice of the United States Courts in occupied Germany, among other greats. Judge Clark commented on this passport affair and the ambassador's role :

It is preposterous to say that Dr. Conant can exercise some sort of censorship on persons whom he wishes or does not wish to come to the country to which he is accredited. This has never been held to be the function of an Ambassador.

(P. 275, 20 Clav. St. L.R. 2 May 1971)

105. Men suspected of communist leanings had poor chance of passport at one time; and politicians in power in that country have gone to the extreme extent of stigmatising one of the greatest Chief Justices of their country as near communist. Earl Warren has, in his autobiography, recorded :

Senator Joseph McCarthy once said on the floor of the Senate, 'I will not say that Earl Warren is a Communist, but I will say he is the best friend of Communism in the United States.

There has been built up lovely American legal literature on passport history to which I will later refer. British Raj has frowned on foreign travels by Indian patriotic suspects and instances from the British Indian Chapter may abound.

106. Likewise, the Establishment, in many countries has used the passport and visa system as potent paper curtain to inhibit illustrious writers, outstanding statesmen, humanist churchmen and renowned scientists, if they are dissenters', from leaving their national frontiers. Absent forensic sentinels, it is not unusual for people to be suppressed by power in the name of the people. The politics of passports has often tried to bend the jurisprudence of personal locomotion to serve its interests. The twilight of liberty must affect the thought ways of judges.

107. Things have changed, global awareness, in grey hues, has dawned. The European Convention on Human Rights and bilateral understandings have made headway to widen freedom of travel abroad as integral to liberty of the person (Fourth Protocol). And the Universal Declaration of Human Rights has proclaimed in Article 13 :

(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

This right is yet inchoate and only lays the base. But, hopefully, the loftiest towers rise from the ground. And despite destructive wars and exploitative trade, racial hatreds and credal quarrels, colonial subjections and authoritarian spells, the world has advanced because of gregarious men adventuring forth, taking with them their thoughts and feelings on a trans-national scale. This human planet is our single home, though geographically variegated, culturally diverse, politically pluralist, in science and technology competitive and cooperative, in arts and life-styles a lovely mosaic and, above all, suffused with a cosmic consciousness of unity and inter-dependence. This Grand Canyon has been the slow product of the perennial process of cultural interaction, intellectual cross-fertilization, ideological and religious confrontations and meeting and mating of social systems; and the well-spring is the wanderlust of man and his wondrous spirit moving towards a united human order founded on human rights. Human advance has been promoted through periods of pre-history and history by the flow of fellowmen, and the world owes much to exiles and emigres for liberation, revolution, scientific exploration and excellence in arts. Stop this creative mobility by totalitarian decree and whole communities and cultures will stagnate and international awakening so vital for the survival of homo sapiens wither away. To argue for arbitrary inhibition of travel rights under executive directive or legislative tag is to invite and accelerate future shock. This broader setting is necessary if we are to view the larger import of the right to passport in its fundamental bearings. It is not law alone but life's leaven. It is not a casual facility but the core of liberty.

108. Viewed from another angle, travel abroad is a cultural enrichment which enables one's understanding of one's own country in better light. Thus it serves national interest to have its

citizenry see other countries and judge one's country on a comparative scale. Rudyard Kipling, though with an imperial ring, has aptly said :

Winds of the World, give answer

They are whimpering to and fro

And what should they know of England

Who only England know ?

(The English Flag)

109. Why is the right to travel all over the world and into the beyond a human right and a constitutional freedom ? Were it not so, the human heritage would have been more hapless, the human family more divided, the human order more unstable and the human future more murky.

110. The Indian panorama from the migrant yore to tourist flow is an: expression of the will to explore the Infinite, to promote understanding of the universe, to export human expertise and development of every resource. Thus humble pride of patriotic heritage would have been preempted had the ancient kings and medieval rulers banished foreign travel as our imperial masters nearly did. And to look at the little letters of the text of Part III de hors the Discovery of India and the Destiny of Bharat or the divinity of the soul and the dignity of the-person highlighted in the Preamble unduly obsessed with individual aberrations of yesteryears or vague hunches leading to current fears,, is a parsimonious exercise in constitutional perception.

111. Thus, the inspirational background, cosmic perspective and inherited ethos of the pragmatic visionaries and jurist-statesmen who draw up the great Title Deed of our Republic must illumine the sutras of Articles 21, 19 and 14. The fascist horror of World War II burnt into our leaders the urgency of inscribing indelibly into our Constitution those values sans which the dignity of man suffers total eclipse. The Universal Declaration of Human Rights, the resurgence of international fellowship, the vulnerability of freedoms even in democracies and the rapid development of an integrated and intimately interacting 'one-world' poised for peaceful and progressive intercourse conditioned their thought processes. The better feeling of the British Raj trampling under foot swaraj the birth-right of every Indian- affected their celebrations. The hidden divinity in, every human entity creatively impacted upon our founding fathers' mentations. The mystic chords of ancient memory and the modern strands of the earth's indivisibility, the pathology of provincialism, feudal backwardness, glaring inequality and bleeding communalism, the promotion of tourism, of giving and taking know-how, of studying abroad, and inviting scholars from afar-these and other realistic considerations gave tongue to those hallowed human rights fortified by the impregnable provisions of Part III. Swami Vivekananda, that saintly revolutionary who spanned East and West, exhorted, dwelling on the nation's fall of the last century :

My idea as to the key-note of our national downfall is that we do not mix with other nations--that is the one and sole cause. We never had the opportunity to compare notes. We were Kupa-Mandukas (frogs in a well).

x x x

One of the great causes of India's misery and downfall has been that she narrowed herself, went into her shell, as the oyster does, and refused to give her jewels and her treasures to the other races of mankind, refused to give the life giving truth to thirsting nations outside the Aryan fold. That has been the one great cause, that we did not go out, that we did not compare notes with other nations-that has been the one great cause of our downfall, and every one of you knows that that little stir, the little life you see in India, begins from the day when Raja Rammohan Roy broke through the walls of this exclusiveness. Since that day, history in India has taken another turn and now it is growing with accelerated motion. If we have had little rivulets in the past, deluges are coming, and none can resist them. Therefore, we must go out, and the secret of life is to give and take. Are we to take always, to sit at the feet of the westerners to learn everything, even religion ? We can learn mechanism from them. We can learn many other things. But we have to teach them something.... Therefore we must go out, exchange our spirituality for anything they have to give us; for the marvels of the region of spirit we will exchange the marvels of the region of matter.... There cannot be friendship without equality, and there cannot be equality when one party is always the teacher and the other party sits always at his feet.... If you want to become equal with the Englishman or the American, you will have to teach as well as to learn, and you have plenty yet to teach to the world for centuries to come.

112. From the point of view of comparative law too, the position is well established. For, one of the essential attributes of citizenship, says Prof. Schwartz, is freedom of movement. The right of free movement is a vital element of personal liberty. The right of free movement includes the right to travel abroad. So much is simple textbook teaching in Indian, as in Anglo-American law. Passport legality, affecting as it does, freedoms that are 'delicate and vulnerable, as well as supremely precious in our society', cannot but excite judicial vigilance to obviate fragile dependency for exercise of fundamental rights upon executive clemency. So important is this subject that the watershed between a police state and a government by the people may partly turn on the prevailing passport policy. Conscious, though I am, that such prolix elaboration of environmental aspects is otiose, the Emergency provisions of our Constitution, the extremes of rigour the nation has experienced (or may) and the proneness of Power to stoop to conquer make necessitous the hammering home of vital values expressed in terse constitutional vocabulary.

113. Among the great guaranteed rights, life and liberty are the first among equals, carrying a universal connotation cardinal to a decent human order and protected by constitutional armour. Truncate liberty in Article 21 traumatically and the several other freedoms fade out automatically. Justice Douglas, that most distinguished and perhaps most travelled judge in the world, has in poetic prose and with imaginative realism projected the functional essentiality of the right to travel as part of liberty. I may quote for emphasis, what is a woe bit repetitive :

The right to travel is a part of 'liberty' of which the citizen cannot be deprived without due process of law under the fifth Amendment In Anglo Saxon law that right was emerging at least as early as the Magna Carta Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats or wears or reads. Freedom of movement is basic in our scheme of values.

(Kent v. Dulles : 357 US 116-2 L. 1958.Ed. 2d. 1204

Freedom of movement also has large social values. As Chafoe put it: 'Foreign correspondents on lectures on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons chose to the core of personal life-marriage reuniting families, spending hours with old friends. Finally travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our Government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home....

Freedom to travel is, indeed, an important aspect of the citizen's liberty.

(Kent v. Dulles)

"Freedom of movement at home and abroad, is important for job and business opportunities-for cultural, political and social activities-for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them and against restraint, knowing that the risk of abusing liberty so as to give right to punishable conduct is part of the price we pay for this free society.

(Apthekar v. Secretary of State : 378 US 500-12 1924.L.Ed. 992.

114. Judge Wyzanski has said :

This travel does not differ from any other exercise of the manifold freedoms of expression... from the right to speak, to write, to use the mails, to public, to assemble, to petition.

(Wyzanski, Freedom to Travel, Atlantic Montaly. Oct. 1952, p. 66 at 68).

115. The American Courts have, in a sense, blazed the constitutional trail on that facet of liberty which relates to untrammelled travel. Kent, Apthekar and Zemel are the landmark cases and American jurisprudence today holds as a fundamental part of liberty (V Amendment) that a citizen has freedom to move across the frontiers without passport restrictions subject, of course, to well-defined necessitous exceptions. Basically, Blackstone is still current coin :

Personal liberty consists in the power of locomotion, of changing direction or moving one's person to whatever place one's own inclination may desire.

116. To sum up, personal liberty makes for the worth of the human person. Travel makes liberty worthwhile. Life is a terrestrial opportunity for unfolding personality, rising to higher states, moving to fresh woods and reaching out to reality which makes our earthly journey a true

fulfilment-not a tale told by an idiot full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of Man is at the root of Article 21. Absent liberty, other freedoms are frozen.

117. While the issue is legal and sounds in the constitutional, its appreciation gains in human depth given a planetary perspective and understanding of the expanding range of travel between the 'inner space' of Man and the 'outer space' around Mother Earth.

118. To conclude this Chapter of the discussion on the concept of personal liberty, as a sweeping supplement to the specific treatment by brother Bhagwati J., the Jurists' Conference in Bangalore, concluded in 1969, made a sound statement of the Indian Law subject, of course, to savings and exceptions carved out of the generality of that conclusion :

Freedom of movement of the individual within or in leaving his own country, in travelling to other countries and in entering his own country is a vital human liberty, whether such movement is for the purpose of recreation, education, trade or employment, or to escape from an environment in which his other liberties are suppressed or threatened. Moreover, in an inter-dependent world requiring for its future peace and progress an ever-growing measure of international understanding, it is desirable to facilitate individual contacts between peoples and to remove all unjustifiable restraints on their movement which may hamper such contacts.

119. So much for personal liberty and its travel facet. Now to 'procedure established by law', the manacle clause in Article 21, first generally, and next, with reference to A. K. Gopalan (supra) and after. Again, I observe relative brevity because I go the whole hog with brother Bhagwati, J.

120. If Article 21 includes the freedom of foreign travel, can it's exercise be fettered or forbidden by procedure established by law ? Yes, indeed. So, what is 'procedure' ? What do we mean by 'established' ? And What is law ? Anything, formal, legislatively processed, albeit absurd or arbitrary ? Reverence for life and liberty must over power this reductio an abasurdem.' Legal interpretation, in the last analysis, is value judgment. The high seriousness of the subject matter-life and liberty-desiderates the need for law, not fiat. Law is law when it is legitimated by the conscience and consent of the community generally. Not any capricious compthe but reasonable mode ordinarily regarded by the cream of society as dharma or law, approximating broadly to other standard measures regulating criminal or like procedure in the country. Often, It is a legislative act, but it must be functional, not fatuous.

121. This line of logic alone will make the two clauses of Article 21 concordant, the procedural machinery not destroying the substantive fundamentally. The compulsion of constitutional humanism' and the assumption of full faith in life and liberty cannot be so futile or fragmentary that any transient legislative majority in tantrums against any minority, by three quick readings of, a bill with the requisite quorum; can prescribe any unreasonable modality and thereby sterilise the grandiloquent mandate.

'Procedure established by law', with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do- not ex necessitate import into those weighty words an adjectival

rule of law, civilised in its. soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head.
Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' patriotism, was launched be sapped by formalistic and phariscic prescriptions, regardless of essential standards ?
An enacted apparition is a constitutional, illusion: Processual justice is writ patently on Article 21. It' is too grave to be circumvented by a black letter ritual processed through the legislature.

122. So I am convinced that to frustrate Article 21 by relying on any formal adjectival statute, however, flimsy or fantastic its provisions be, is to rob what the Constitution treasures. Procedure which ideals with the modalities of regulating, restricting or even rejecting a fundamental right falling within, Article 21 has to be fair, not foolish, carefully designed to effectuate, not to' subvert, the substantive right itself. Thus understood, 'procedure' must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes. You cannot claim that it is a legal procedure If the passport is granted or refused by taking loss, ordeal of fire of by other strange or mystical methods. Nor is it, tenable if life is taken by a crude or summary process of enquiry. What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word 'established which means 'settled firmly' not wantonly whimsically. If it is rooted in the legal consciousness of the community it becomes 'established' procedure. And 'Law' leaves little doubt that it is normae, regarded as just since law is the means and justice is the end.

123. Is there supportive judicial thought for this reasoning. We go back to the vintage words of the learned Judges in A. K. Gopalan (supra) and zigzag through R. C. Cooper to S. N. Sarkar and discern attestation of this conclusion. And; the elaborate constitutional procedure in Article 22 itself fortifies the argument that 'life and liberty' in Article 21 could not have been left to illusory legislatorial happenstance. Even as relevant reasonableness informs Article 14 and 19, the component of fairness is implicit in Article 21. A close-up of the Gopalan case (supra) is necessitous at this stage to underscore the quality of procedure relevant to personal liberty.

124. Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is large the history of procedural safeguards and right to a heating has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as had politics.

I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ: 'Community Consciousness and the Indian Constitution' is a fascinating subject of sociological relevance in many areas.

125. To sum up, 'procedure in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained

in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses. In Kochunni MANU/SC/0019/1960 : [1960]3SCR887 the Court, doubting the correctness of the Gopalan decision on this aspect, said :

Had the question been res-integra, some of us would have been inclined to agree with the dissenting view expressed by Fazal Ali, J.

126. Gopalan does contain some luscent thought on 'procedure established by law'. Patanjali Sastri, J. approximated it to the prevalent norms of criminal procedure regarded for a long time by Indo-Anglian criminal law as conscionable. The learned Judge observed :

On the other hand, the interpretation suggested by the Attorney General on behalf of the intervener that the expression means nothing more than procedure prescribed by any law made by a competent legislature is hardly more acceptable. 'Established', according to him, means prescribed, and if Parliament or the Legislature of a State enacted a procedure, however novel and ineffective for affording the accused person a fair opportunity of defending himself, it would be sufficient for depriving a person of his life of personal liberty.

(pp. 201-203)

The main difficulty I feel in accepting the construction suggested by the Attorney General is that it completely stultifies Article 13(2) and, indeed, the very conception of a fundamental right could it then have been the intention of the framers of the Constitution that the most important fundamental rights to life and personal liberty should be at the mercy of legislative majorities as, in effect, they would if 'established' were to mean merely prescribed' ? In other words, as an American Judge said in a similar con text, does the constitutional prohibition in Article 13(3) amount to no more than 'your shall not take away life or personal freedom unless you choose to take it away', which is more verbiage It is said that Article 21 affords no protection against competent legislative action in the field of substantive criminal law, for there is no provision for judicial review, on the ground of reasonableness or otherwise, of such laws, as in the case of the rights enumerated in Article 19. Even assuming it to be so the construction of the learned Attorney General would have the effect of rendering wholly ineffective and illusory even the procedural protection which the article was undoubtedly designed to afford.

(p. 202) (emphasis, added)

After giving the matter my most careful and anxious consideration, I have come to the conclusion that there are only two possible solutions of the problem. In the first place, a satisfactory via media between the two extreme positions contended for on either side may be found by stressing the word 'established' which implies some degree of firmness, permanence and general acceptance, while it does not exclude origination by statute. 'Procedure established by' may well be taken to mean what the Privy Council referred to in King. Emperor v. Bengori Lal Sharma as 'the ordinary and well established criminal procedure', that is to say, those settled usages and normal modes of

proceeding sanctioned by the Criminal Procedure Code which is the general law of Criminal procedure in the country.

(p. 205)

Fazal Ali, J. frowned on emasculating the procedural substantiality of Article 21 and read into it those essentials of natural justice which made processual law humane : The learned Judge argued :

It seems to me that there is nothing revolutionary in the doctrine that the words 'procedure established by law' must include the four principle set out in Professor Willis' book, which, as I have already stated, are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles, as the learned author points out and as the authorities show, are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits. I have only to add, that it has not been seriously controverted that 'law' means *certain definite rules of proceeding and not something which is a mere pretence for procedure.*

(emphasis, added)

In short, fair adjectival law is the very life of the life-liberty fundamental right (Article 21), not 'autocratic supremacy of the legislature'. Mahajan J. struck a concordant note :

Article 21 in my opinion, lays down substantive law as giving protection to life and liberty in as much as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete immunity against the exercise of despotic power by the executive It further gives immunity against invalid laws which contravene the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. *It negatives the idea of a fantastic, arbitrary and oppressive form of proceedings.*

(emphasis, added)

127. In sum, Fazal Ali, J. struck the chord which does accord with a just processual system where liberty is likely to be the victim. May be, the learned Judge stretched it a little beyond the line but in essence his norms claim my concurrence.

128. In John v. Rees [1969] 2 All E. R. 274 the true rule, as implicit in any law, Is set down :

If {here is any doubt, the applicability of the principles will be given the benefit of doubt.

And Lord Denning, on the theme of liberty, observed in Schmidt v. Secretary of State [1969] 2 Ch. 149 :

Where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without hearing.

Human rights :

129. It is a mark of interpretative respect for the higher norms our founding fathers held dear in affecting the dearest rights of life and liberty so to read Article 21 as to result in a human order lined with human justice. And running right through Articles 19 and 14 is present this principle of reasonable procedure in different shades. A certain normative harmony among the articles is thus attained, and I hold Article 21 bears in its bosom the construction of fair procedure legislatively sanctioned. No Passport Officer shall be mini-Caesar nor Minister incarnate Caesar in a system where the rule of law reigns supreme.

130. My clear conclusion on Article 21 is that liberty of locomotion into alien territory cannot be unjustly forbidden by the Establishment and passport legislation must take processual provisions which accord with fair norms, free from extraneous pressure and, by and large, complying with natural justice. Unilateral arbitrariness, police dossiers, faceless affiants, behind-the-back materials, oblique motives and the inscrutable face of an official sphinx do not fill the 'fairness' bill-subject, of course, to just exceptions and critical contexts. 'This minimum once abandoned, the Police State slowly builds up which saps the finer substance of our constitutional jurisprudence. Not party but principle and policy are the key-stone of our Republic.

131. Let us not forget that Article 21 clubs life with liberty and when we interpret the colour and content of 'procedure established by law' we must be alive to the deadly peril of life being deprived without minimal processual justice, legislative callousness despising 'hearing' and fair opportunities of defence. And this realization once sanctioned, its exercise will swell till the basic freedom is flooded out. Hark back to Article 10 of the Universal Declaration to realize that human rights have but a verbal hollow if the protective armour of audi alteram partem is deleted. When such pleas are urged in the familiar name of pragmatism public interest or national security, courts are on trial and must prove that civil liberties are not mere rhetorical material for lip service but the obligatory essence of our hard-won freedom. A Republic-if you Can Keep - It is the caveat for counsel and court. And Tom Paine, in his Dissertation on First Principles of Government, sounded the tossin :

He that would make; his own liberty secure must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself.

Phoney freedom is not worth the word and this ruling, of ours is not confined to the petitioner but to the hungry job-seeker, nun and nurse, mason and carpenter, welder and fitter and, above all, political dissenter. The last category, detested as unreasonable, defies the Establishment's tendency to enforce through conformity but is the resource of social change. "The reasonable man", says G. B. Shaw;

adapts himself to the word; the unreasonable one persists m trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man. (George Bernard Shaw in 'Maxims for Revolutionists').

"Passport' peevishness is a suppressive possibility, and so the words of Justice Jackson (U.S. Supreme Court) may be apposite :

Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

(West Virginia State Board of Education v. Barnetto 319 US 624 (1943).

132. Under our constitutional order, the price of daring dissent shall not be passport forfeit.

133. The impugned legislation, Sections 5, 6 and 10 especially, must be tested even under Article 21 on canons of processual justice to the people outlined above. Hearing is obligatory-meaningful hearing, flexible and realistic, according to circumstances, but not ritualistic and wooden. In exceptional cases and emergency situations, interim measures may be taken, to avoid the mischief of the passportee becoming an escapee before the hearing begins. 'Bolt the stables after the horse has been stolen' is not a command of 'natural justice. But soon after the provisional seizure, a reasonable hearing must follow, to minimise procedural prejudice. And when a prompt final order is made against the applicant or passport holder the reasons must be disclosed to him almost invariably save in those dangerous cases where irreparable injury will ensue to the State. A government which reveals in secrecy in the field of people's liberty not only acts against democratic decency but busies itself with its own iburial. That is the writing on the wall if history were teacher, memory our mentor and decline of liberty not our unwitting endeavour. ; Public power must rarely hide its heart in an open society and system.

134. I now skip Article 14 since I agree fully with all that my learned brother Bhagwati J. has said. That article has a pervasive processual potency and versatile quality, egalitarian in its soul and allergic to discriminatory diktats. Equality is the antithesis of arbitrariness and ex-cathedra ipse dixit is the ally of demagogic authoritarianism. Only knight-errants of 'executive excesses'-if we may use a current cliche- can fall in love with the Dame of despotism, legislative or administrative. If this Court gives in here it gives up the ghost. And so it that I insist on the dynamics of limitations on fundamental freedoms as implying the rule of law; Be you ever so high, the law is above you.'

135. A minor pebble was thrown to produce a little ripple. It was feebly suggested that the right to travel abroad cannot be guaranteed by the State because it has no extra-territorial jurisdiction in foreign lands. This is a naive misconception of the point pressed before us. Nobody contends that India should interfere with other countries and their sovereignty to ensure free movement of Indians in those countries. What is meant is that the Government of India should not prevent by any sanctions it has over its citizens from moving within any other country if that other country has no objection to their travelling within its territory. It is difficult to understand how one can misunderstand the obvious.

136. A thorny problem debated recurrently at the bar, turning on Article 19, demands some juristic response although avoidance of overlap persuades me to drop all other questions canvassed before us. The Gopalan (supra) verdict, with the cocooning of Article 22 into a self contained code, has suffered supersession at the hands of R. C. Cooper(1) By way of aside, the fluctuating fortunes of

fundamental rights, when the proletariat and the proprietariat have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of sub-conscious forces in judicial noesis when the cycloramic review starts from Gopalan, moves on to In re : Kerala Education Bill and then on to All India Bank Employees Union, next to Sakal Newspapers, crowning in Cooper [1973] 3 S.C.R. 530 and followed by Bennet Coleman MANU/SC/0038/1972 : [1973]2SCR757 and Sambu Nath Sarkar MANU/SC/0537/1972 : [1973]1SCR856 . Be that as it may,

the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached.

137. We may switch to Article 19 very briefly and travel along another street for a while. Is freedom of extra-territorial travel to assure which is the primary office of an Indian passport, a facet of the freedom of speech and expression, of profession or vocation under Article 19 ? My total consensus with Shri Justice Bhagwati jettisons from this judgment the profusion of precedents and the mosaic of many points and confines me to some fundamentals confusion on which, with all the clarity on details, may mar the conclusion. It is a salutary thought that the summit court should not interpret constitutional rights enshrined in Part III to choke its life-breach or chill its elan vital by processes of legalism, overruling the enduring values burning in the bosoms of those who won our Independence and drew up our founding document. We must also remember that when this Court lays down the law, not ad hoc tunes but essential notes, not temporary tumult but transcendental truth, must guide the judicial process in translating into authoritative notation the mood music of the Constitution.

138. While dealing with Art 19 vis a vis freedom to travel abroad, we have to remember one spinal indicator. True, high constitutional policy has harmonised individual freedoms with holistic community good by inscribing exceptions to Article 19(1) in Article 19(2) to (6). Even so, what is fundamental is the freedom, not the exception. More importantly, restraints are permissible only to the extent they have nexus with the approved object. For instance, in a wide sense, 'the interests of the general public' are served by a family planning programme but it may be constitutional impertinence to insist that passports may be refused if sterilisation certificates were not produced. Likewise, it is in public interest to widen streets in cities but monstrous to impound a passport because its holder has declined to demolish his house which projects' into the street line. Sure, the security of State is a paramount consideration but can Government, totalitarian fashion, equate Party with country and refuse travel document because, while abroad, he may criticise the conflicting politics of the Party-in-power or the planning economics of the government of the day? Is it conceivable that an Indian will forfeit his right to go abroad because his flowing side-burns or sartorial vagaries offend a high-placed authority's sense of decency ? The point is that liberty can be curtailed only if the grounds listed in the saving sub-articles are directly, specifically, substantially and imminently attracted so that the basic right may not be stultified. Restraints are necessary and validly made by statute, but to paint with an over-broad brush a power to blanket-ban travel abroad is to sweep overly and invade illicitly. 'The law of fear' cannot reign where the proportionate danger is containable. It is a balancing process, not over-weighted one way or the

other. Even so, the perspective is firm and fair. Courts must not interfere where the order is not perverse, unreasonable, mala fide or supported by no material. Under our system, court writs cannot run government, for, then, judicial review may tend to be a judicial coup. But 'lawless' law and executive excess must be halted by judge-gower lest the Constitution be subverted by branches deriving credentials from the Constitution. An imperative guideline by which the Court will test the soundness of legislative and executive constraint is, in the language of V. C. Row MANU/SC/0013/1952 : 1952CriLJ966 this :

The reasonableness of a restriction depends upon; the values of life in a society, the circumstances obtaining at a particular point of time when the restriction is imposed, the degree and the urgency of the evil sought to be controlled and similar others.

139. What characterises the existence and eclipse of the right of exit? 'Breathes there the man with soul so dead' who, if he leaves, will not return to his own 'native land' ? Then, why restrict ? The question, presented so simplistically, may still have overtones of security sensitivity and sovereignty complexity and other internal and external factors, and that is why the case which we are deciding has spread the canvas wide. I must express a pensive reflection, sparked off by submissions at the bar, that, regardless of the 'civil liberty' credentials or otherwise of a particular government and mindless of the finer phraseology of a restrictive legislation, eternal vigilance by the superior judiciary and the enlightened activists who are the catalysts of the community, is the perpetual price of the preservation of every freedom we cherish. For, if unchecked, 'the greater the power, the more dangerous the abuse.' To deny freedom of travel or exit to one untenably is to deny it to any or many likewise, and the right to say 'Aye' or 'nay' to any potential traveller should, therefore, not rest with the minions or masters of government without being gently and benignly censored by constitutionally sanctioned legislative norms if the reality of liberty is not be drowned in the hysteria of the hour or the hubris of power. It is never trite to repeat that where laws end, tyranny begins', and law becomes un-law even if it is legitimated by three legislative readings and one assent, if it is, not in accord with constitutional provisions, beyond abridgement by the two branches of government. In the context of scary expressions like 'security' 'public order', 'public interest' and 'friendly foreign relations', we must warn ourselves that not verbal labels but real values are the governing considerations in the exploration and adjudication of constitutional prescriptions and proscriptions. Governments come, and go, but the fundamental rights of the people cannot be subject to the wishful value-sets of political regimes of the passing day.

140. The learned Attorney General argued that the right to travel abroad was no part of Article 19(1)(a), (b), (c), (f) or (g) and so to taboo travel even unreasonably does not touch Article 19. As a component thereof, as also by way of separate submission, it was urged that the direct effect of the passport law (and refusal thereunder) was not a blow on freedom of speech, of association or of profession and, therefore, it could not be struck down even if it overflowed Article 19(2), (4) and (6). This presentation poses the issue, 'What is the profile of -our free system ?' Is freedom of speech integrally interwoven with locomotion ? Is freedom of profession done to death if a professional, by passport refusal without reference to Article 19(f), is inhibited from taking up a job offered abroad? Is freedom of association such a hot-house plant that membership of an international professional or political organisation can be cut off on executive-legislative ipse dixit without obedience to Article 19(4) ? This renophatic touch has not been attested by the Constitution and is not discernible in the psyche. An anti-international pathology shall not afflict

our National Charter. A Human Tomorrow oh Mother Earth is our cosmic constitutional perspective (See Article 51).

141. To my mind, locomotion is, in some situation, necessarily involved in the exercise of the specified fundamental rights as an associated or integrated right Travel, simiplicter, is peripheral to and not necessarily fundamental in Article 19. Arguendo, free speech is feasible without movement beyond the country, although soilequies and solo songs are not the vogue in this ancient land of silent saints and pyrating gurus, bhajans and festivals. Again, travel may ordinarily be 'action' and only incidentally 'expression', to borrow the Zemel diction.

142. Movement within the territory of India is not tampered with by the impugned order, but that is not all. For, if our notions are en current, it is common place that the world-the family of, nations-vibrates, and men-masses of man-move and 'jet' abroad and abroad, even in Concorde, on a scale unknown to history. Even thoughts, ideologies and habits travel beyond. Tourists crowd out airline services; job-seekers rush to passport offices; lecture tours, cultural exchanges, trans-national evangelical meets, scientific and scholarly studies and workshops and seminars escalate, and international associations abound-all for the good of world peace and human progress, save where are involved high risks to sovereignty, national security and other substantial considerations which Constitutions and Courts have readily recognised. Our free system is not so brittle or timorous as to be scared into tabooing citizens' trips abroad, except conducted tours or approved visits sanctioned by the Central Executive and indifferent to Article 19. Again, the core question arises Is movement abroad so much a crucial part of free speech, free practice of profession and the like that denial of the first is a violation of the rest?

143. I admit that merely because speaking mostly involves some movement, therefore, 'free speech anywhere is dead if free movement everywhere is denied', does not follow. The Constitutional lines must be so drawn that the constellation of fundamental rights does not expose the peace, security and tranquillity of the community to high risk. We cannot over-stretch free' speech to make it an inextricable component of travel.

144. Thomas Emerson has summed the American Law which rings a bell even in the Indian system :

The values and functions of the freedom of expression in a democratic polity are obvious. Freedom of expression is essentially as a means of assuring individual self-fulfilment. The proper end of man is the realisation of his character and potentialities as a human being. For the achievement of this self-realisation the mind must be free.

Again

Freedom of expression is an essential process for advancing knowledge and discovering truth. So also for participation in decision-making in a democratic society. Indeed free expression furthers stability in the community by reasoning together instead of battling against each other. Such being the value and function of free speech, what are the dynamics of limitation which will fit these values and functions without retarding social goals or injuring social interest ? It is in this background that we have to view the problem of passports and the law woven around it. There are

two ways of looking at the question....as a facet of liberty and as an ancient of expression." Thomas Emerson comments on passports from these dual angles :

Travel abroad should probably be classified as 'action' rather than "expression". In commonsense terms travel is more physical movement than communication of ideas. It is true that travel abroad is frequently instrumental to expression, as when it is undertaken by a reporter to gather news, a scholar to lecture, a student to obtain information or simply an ordinary citizen in order to expand his understanding of the world. Nevertheless, there are so many other aspects to travel abroad on functionally it requires such different types of regulation that, at last as the general proposition, it would have to be considered "action". As action, it is a 'liberty' protected by the due process clause of the Fifth and Fourteenth Amendments. The first amendment is still relevant in two ways : (1) There are sufficient elements of expression in travel, abroad so that the umbrella effect of the first Amendment comes into play, thereby requiring the courts to apply due process and other constitutional doctrines with special care; (2) conditions imposed on travel abroad based on conduct classified as expression impair freedom of expression and hence raise direct first Amendment questions.

Travel is more than speech : it is speech bridged with conduct, in the words of Justice Douglas :

Restrictions on the right to travel in times of peace should be so particularized that at First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion.

145. I do not take this as wholly valid in our Part III scheme but refer to it as kindred reasoning.

146. The delicate, yet difficult, phase of the controversy arrives where free speech and free practice of profession are inextricably interwoven with travel abroad. The Passport Act, in terms, does not inhibit expression and only regulates action-to borrow the phraseology of Chief Justice Warren in Zemel. But we have to view the proximate and real conservance of thwarting trans-national travel through the power of the State exercised under Section 3 of the Passport Act read with Sections 5, 6 and 10. If a right is not in express terms fundamental within the meaning of Part III, does it escape Article 13, read with the trammels of Article 19, even if the immediate impact, the substantial effect, the proximate import or the necessary result is prevention of free speech or practice of one's profession ? The answer is that associated rights, totally integrated, must enjoy the same immunity. Not otherwise.

147. Three sets of cases may be thought of. Firstly, where the legislative provision or executive order expressly forbids exercise in foreign lands of the fundamental right while granting passport. Secondly, there may be cases where even if the order is innocent on its face, the refusal of permission to go to a foreign country may, with certainty and immediacy, spell denial of free speech and professional practice or business. Thirdly, the fundamental right may itself enwomb locomotion regardless of national frontiers. The second and third often are blurred in their edges and may overlap.

148. The first class may be illustrated. If the passport authority specifically conditions the permission with a direction not to address meetings abroad or not to be a journalist or professor in

a foreign country, the order violate Article 19(1)(a) or (f) and stands voided unless Article 19(2) and (6) are complied with. The second category may be exemplified and examined after the third which is of less frequent occurrence. If a person is an international pilot, astronaut, Judge of the International Court of Justice, Secretary of the World Peace Council, President of a body of like nature, the particular profession not only calls for its practice travelling outside Indian territory but its core itself is international travel. In such an area, no right of exit, no practice of profession or vocation. Similarly, a cricketer or tennis player recruited on a world tour. Free speech may similarly be hit by restriction on a campaigner for liberation of colonial peoples or against genocide before the United Nations Organisation. Refusal in such cases is hit on the head by negation of a national passport and can be rescued only by compliance with the relevant saving provisions in Article 19(2), (4) or (6).

149. So far is plain sailing, as I see it. But the navigation into the penumbral zone of the second category is not easy.

150. Supposing a lawyer or doctor, expert or exporter, missionary or guru, has to visit a foreign country professionally or on a speaking assignment. He is effectively disabled from discharging his pursuit if passport is refused. There the direct effect, the necessary consequence, the immediate impact of the embargo on, grant of passport (or its subsequent impounding or revocation) is the infringement of the right to expression or profession. Such infraction is unconstitutional unless the relevant part of Art; 19(2) to (6) is complied with. In dealing with fundamental freedom substantial justification alone will bring the law under the exceptions. National security, sovereignty, public order and public interest must be of such a high degree as to offer a great threat. These concepts should not be devalued to suit the hyper-sensitivity of the executive or minimal threats to the State. Our nation is not so pusillanimous or precarious as to fall or founder if some miscreants pelt stones at its fair face from foreign countries. The dogs may bark, but the caravan will pass. And the danger to a party in power is not the same as rocking the security or sovereignty of the State. Sometimes, a petulant government which forces silence may act unconstitutionally to forbid criticism from far, even if necessary for the good of the State. The perspective of free criticism with its limits for free people everywhere, all true patriots will concur, is eloquently spelt out by Sir Winston Churchill on the historic censure motion in the Commons as Britain was reeling under defeat at the hands of Hitlerite hordes :

This long debate has now reached its final stage. What a remarkable example it, has been of the unbridled freedom of our Parliamentary institutions in time of war Everything that could be thought of or raked up has been used to weaken confidence in the Government, has been used to prove that Ministers are incompetent and to weaken their confidence in themselves, to make the Army distrust the backing it is : getting from the civil power, to make workmen lose confidence in the weapons they are striving so hard to make, to present the Government as a set of non-entities over whom the Prime Minister towers, and then to undermine him in his own heart, and, if possible, before the eyes of the nation. All this poured out by cable and radio to all parts of the world, to the distress of all our friends and to the delight of all our foes. I am in favour of this freedom, which no other country would use, or dare to use, in times of mortal peril such as those through which we are passing.

I wholly agree that spies, traitors, smugglers, saboteurs of the health, wealth and survival or sovereignty of the nation, shall not be passported into hostile soil to work their vicious plan fruitfully. But when applying the Passports Act, over-breadth, hyper-anxiety, regimentation complex, and political mistrust shall not sub-consciously exaggerate, into morbid or neurotic refusal or unlimited impounding or final revocation of passport, facts which, objectively assessed, may prove tremendous trifles. That is why the provisions have to be read down into constitutionality, tailored to fit the reasonableness test and humanised by natural justice. The Act) will survive but the order shall perish for reasons so fully set out by Shri Justice Bhagwati. And, on this construction, the conscience of the Constitution triumphs over vagarious governmental orders. And, indeed, the learned Attorney General (and the Additional Solicitor General who appeared with him), with characteristic and commendable grace and perceptive and progressive Tealism, agreed to the happy resolution of the present dispute in the manner set out in my learned brother's judgment.

151. A concluding caveat validating my detour. Our country, with all its hopes, all its tears and all its fears, must never forget that freedom is recreated year by year, that freedom is as freedom does', that we have gained a republic 'if we can keep it' and that the water-shed between a police state and a people's raj is located partly through its passport policy. Today, a poor man in this poor country despaire of getting a passport because of invariable police enquiry, insistence on property requirement and other avoidable procedural obstacles. And if a system of secret informers, police dossiers, faceless whisperers and political tale-bearers conceptualised and institutionalised in public interest, comes to stay, civil liberty is legisidally constitutionalised a consumption constantly to be resisted. The merits of a particular case apart, the policing of a people's right of exit or entry is fraught with peril to liberty unless policy; is precise, operationally respectful of recognised values and harassment proof. Bertrand Russel has called attention to a syndrome the Administration will do well to note :

We are all of us a mixture of good and bad impulses that prevail in an excited crowd. There is in most men an impulse to persecute whatever is felt to be 'different'. There is also a haired, of any claim to superiority, which makes the stupid many hostile to the intelligent few. A motive such as fear of communism affords what seems a decent moral excuse for a combination of the heard against everything in any way exceptional. This is a recurrent phenomenon in human history. Wherever it occurs, its results are horrible.

(Foreword by Bertrand Russel to Freedom is as Freedom Does-Civil Liberties Today-by Corliss Lament. New York, 1956)

While interpreting and implementing the words of Article 14, 19 and 21, we may keep J. B. Preistley's caution :

We do not imagine that we are the victims of plots, that bad men are doing all this. It is the machinery of power that is getting out of sane control. Lost in its elaboration, even some men of goodwill begin to forget the essential humanity this machinery should be serving. They are now so busy testing, analysing, and reporting on bath water that they cannot remember having thrown the baby out of the window.

(Introduction by H. H. Wilson, Associate Professor of t Political Science, Princeton University to Freedom is as Freedom Does by Corliss Lament, ibid p. xxi.)

I have divagated a great deal into travel constitutionality in the setting of the story of the human journey, even though such a diffusion is partly beyond the strict needs of this case. But judicial travelling, like other travelling, is almost like 'talking with men of other centuries and countries.'

152. I agree with Sri Justice Bhagwati, notwithstanding this supplementary.

P.S. Kailasam, J.

153. This petition is filed by Mrs. Maneka Gandhi under Article 32 of the Constitution of India against the Union of India and the Regional Passport Officer for a writ of certiorari for calling for the records of the case including in particular the order dated July 2, 1977 made by the Union of India under Section 10(3)(c) of the Passports Act, Act 15 of 1967, impounding the passport of the petitioner and for quashing the said order.

154. The petitioner received a letter dated July 2, 1977 on July 4, 1977 informing her that it had been decided by the Government of India to impound her passport. The letter read as follows :

You may recall that a passport No. K-869668 was issued to you by this office on 1-6-76. It has been decided by the Government of India to impound your above passport under Section 10(3)(c) of the Passport Act, 1967 in public interest.

You are hereby required to surrender your passport K-869668 to this office within seven days from the date of the receipt of this letter.

On July 5, 1977 the petitioner addressed a letter to the second respondent, Regional Transport Officer, requesting him to furnish her a copy of the statement of the reasons for making the impugned order. On July 7, 1977 the petitioner received the following communication from the Ministry of External Affairs :

The Government has decided to impound your passport in the interest of general public under Section 10(3)(c) of the Passport Act, 1967. It has further been decided by the Government in the interest of general public not to furnish you a copy of statement of reasons for making such orders as provided for under Section 10(5) of the Passports Act, 1967.

155. The petitioner submitted that the order is without jurisdiction and not 'in the interests of general public' The validity of the order was challenged on various grounds. It was submitted that there was contravention of Article 14 of the Constitution, that principles of natural justice were violated; that no opportunity of hearing as implied in Section 10(3) of the Act was given and that the with-holding of the reasons for the order under Section 10(5) is not justified in law. On July 8, 1977 the petitioner prayed for an ex parte ad interim order staying the operation of the order of the respondents dated July 2, 1977 and for making the order of stay absolute after hearing the respondents. On behalf of the Union of India, Shri N. K. Ghose, I.F.S., Director (P.V.) Ministry of External Affairs, filed a counter affidavit. It was stated in the counter affidavit that on May 11,

1977, the Minister of External Affairs approved the impounding of the passport of 11 persons and on May 19, 1977 an order was passed by the Minister impounding the passports of 8 persons out of 11 persons that on July 1, 1977 the authorities concerned informed the Ministry of External Affairs that the petitioner and her husband had arrived at Bombay on the after-noon of July 1, 1977 and that information had been received that there was likelihood of the petitioner leaving the country. The authorities contacted the Ministry of External Affairs and Minister after going through the relevant papers approved the impounding of the passport of the petitioner on the evening of July 1, 1977 in the interests of general public under Section 10(3)(c) of the Passports Act, 1967. On July 2,. 1977 Regional Transport Officer on instructions from the Government of India informed the petitioner about the Central Government's decision to impound her passport in public interest and requested her to surrender her passport. In the counter affidavit various allegations, made in the petition were denied and it was stated that the order was perfectly justified and that the petition is without merits and should be dismissed. The rejoinder affidavit was filed by the petitioner on July 16, 1977.

156. An application Civil Misc. Petition No. 6210 of 1977 was filed by the petitioner for leave to urge additional grounds in support of the writ petition and a counter to this application was filed on behalf of the Ministry of External Affairs on August 18, 1977.

157. A petition by Adil Shahryar was filed seeking permission to intervene in the writ petition and it was ordered by this Court. During the hearing of the writ petition, Government produced the order disclosing the reasons for impounding the passport. The reasons given are that it was apprehended that the petitioner was attempting or was likely to attempt to leave the country and thereby hamper the functioning of the Commissions of Inquiry. According to the Government, the petitioner being the wife of Shri Sanjay Gandhi, there was likelihood of the petitioner being questioned regarding some aspects of the Commission. In the counter affidavit it was further alleged that there was good deal of evidence abroad and it would be unrealistic to over-look the possibility of tampering with it or making it unavailable to the Commission which can be done more easily and effectively when an interested person is abroad. So far as this allegation was concerned as it was not taken into account in passing the order it was given up during the hearing of the writ petition. The only ground on which the petitioner's passport was impounding was that she was likely to be examined by the Commission of Inquiry and her presence was necessary in India.

158. Several questions of law were raised. It was submitted that the petitioner was a journalist by profession and that she intended to proceed to West Germany in connection with her profession duties, as a journalist and that by denying her the passport not only was her right to travel abroad denied but her fundamental rights guaranteed under Article 19(1) were infringed. The contention was that before an order passed under Article 21 of the Constitution could be valid, it should not only satisfy the requirements of that article, namely that the order should be according to the procedure established by law, but also should not in any way infringe on her fundamental rights guaranteed under Article 19(1). In other words, the submission was that the right to personal liberty cannot be deprived without satisfying the requirements of not only Article 21, but also Article 19. In addition the provisions of Section 10(3)(c) were challenged as being ultra vires of the powers of the legislature and that in any event the order vitiated by the petitioner not having been given an opportunity of being heard before the impugned order was passed. It was contended that the

fundamental rights guaranteed under Article 19(1) particularly the right of freedom of speech and the right to practise profession was available to Indian citizens not only within the territory of India but also beyond the Indian territory and by preventing the petitioner from travelling abroad her right to freedom of speech and right to practise profession outside the country were also infringed. The plea is that the fundamental rights guaranteed under Article 19 are available not only within territory of India but outside the territory of India as well.

159. The question that arises for consideration is whether the Fundamental Rights conferred under Part III and particularly the rights conferred under Article 19 are available beyond the territory of India. The rights conferred under Article 19(1)(a), (b), (c), (f) and (g) are

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

x x x

(f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on any occupation, trade or business;

The rights conferred under Article 19(1)(d) and (e) being limited in its operation to the territory of India the question of their extraterritorial application does not arise.

160. In order to decide this question, I may consider the various provisions of the Constitution, which throw some light on this point. The preamble to the Constitution provides that the people of India have solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens :

Justice, social, economic and political;

Liberty of thought, expression, belief faith and worship;

Equality of status and of opportunity;

and to promote among them all.

161. Fraternity assuring the dignity of the individual and the unity of the nation.

By the article, India is constituted as a Democratic republic and its citizens secured certain rights. While a reading of the article would indicate that the articles are applicable within the territory of India, the question arises whether they are available beyond the territorial limits of India. -

162. Article 12 of the Constitution defines "the State" as including the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 13 provides that laws that are inconsistent with or in derogation of Fundamental Rights are to that extent void. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. What are the laws in force in the territory of India immediately before the commencement of the Constitution that are referred to in the Article will have to be looked into. Before that Article 13(2) may be noticed which provides that the State shall not make any law which takes away or abridges the rights conferred by Part III, and any law made in contravention of this clause shall, to the extent of the contravention, be void. The word "law" in the Article is defined as :

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; and

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

While the applicability of the custom and usage is restricted to the territory of India "law" may have an extra-territorial application.

163. In distributing the legislative powers between the Union and the States Article 248 provides that Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State. Article 245(2) provides that no law made by parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. This article makes it clear that a State law cannot have any extra-territorial operation while that of the parliament can have. The Parliament has undoubted power to enact law having extra-territorial application. In England Section 3 of the Statute of Westminster, 1931 (22 Geo. V.C.4) provides :

It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra territorial operation.

But in determining whether the provisions of a Constitution or a statute have extra-territorial application certain principles are laid down. Maxwell on The Interpretation of Statutes, Twelfth Edition, at p. 169, while dealing with the territorial application of British legislation has stated :

It has been said by the Judicial Committee of the Privy Council that : 'An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom : not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony of possession'.

Lord Denning M. R. has said that the general rule is "that an Act of Parliament only applies to transactions within the United Kingdom and not to transactions outside." These two extracts are from two decisions (1) Att. Gen. for Alberta v. Haggard Assets, Ltd., (1953) A.C. 420 and C.E.B. Draper & Son, Ltd. v. Edward Turner & Son. Ltd. (1964) 3 All.148 Maxwell comments on the above passages thus "These statements, however, perhaps oversimplify the position." The decisions cited will be referred to in due course.

164. Craies on Statute Law (Sixth Ed.) at p. 447 states that " an Act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such is its intention. But whether any particular Act of parliament purports to bind British subjects abroad will always depend upon the intention of the legislature which must be gathered from the language of the Act in question." Dicey in his Introduction to the Study of the Law of the Constitution (1964 Ed.) at page line states the position thus : "Parliament normally restricts the operation of legislation to its own territories, British ships wherever they may be being included in the ambit of territory.-Parliament does on occasions, however, pass legislation controlling the activities of its own citizen when they are abroad." Salmond in his book on Jurisprudence (Twelfth Ed.) distinguishes between the territorial enforcement of law and the territoriality of law itself. At p. 11 the author states : "Since territoriality is not a logically necessary part of the idea of law, a system of law is readily conceivable, the application of which is limited and determined not by reference to territorial considerations, but by reference to the personal qualifications of the individuals over whom jurisdiction is exercised." According to the text-books above referred to, the position is that a law is normally applicable within the territory, but can be made applicable to its citizens wherever they may be. Whether such extra-territorial applicability is intended or not will have to be looked for in the legislation.

165. I will now refer to the decisions of courts on this subject.

166. In Niboyet v. Niboyet 48 L. J. P. 1 at p. 10 the Court of Appeal stated: "It is true that the words of the statute are general, but general words in a statute have never, so far as I am aware, been interpreted so as to extend the action of the statute beyond the territorial authority of the Legislature. All criminal statutes are in their terms general; but they apply only to offences committed within the territory or by British subjects. When the Legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute as in the Merchant Shipping Acts, and in some of the Admiralty Acts." In the Queen v. Jameson and Ors. [1896] 2 Q. B.425 , the Chief Justice Lord Russet stated the position thus : "It may be said generally that the area with in which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. In Cooke v. The Charles A. Vogeler Company [1901] A. C. 102 , the House of Lords in dealing with the jurisdiction of the Court of Bankruptcy observed that "English legislation is primarily territorial, and it is no departure from that principle to say that a foreigner coming to this country and trading here, and here committing an act of bankruptcy, is subject to our laws and to all the incidents which those laws enact in such a case; while he is here, while he is trading, even if not actually domiciled, he is liable to be made a bankrupt like a native citizen. It is limited in its terms to England; and I think it would be impossible to suppose that if the Legislature had intended so broad a jurisdiction as is contended for here, it would not have conferred it by express enactment." In Tomalin v. S. Pearson & Son, Limited [1909] 2 K. B. 61 the Court of appeal dealing with the application of the Workmen's Compensation Act, 1906, quoted with approval a passage from Maxwell on

Interpretation of Statutes at p. 213 wherein it was stated: "In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom". The law that is applicable in the United Kingdom is fairly summed up in the above passage. The presumption is that the statute is not intended to operate beyond the territorial limits unless a contrary intention is expressed or could be inferred from its language. The decision of the Privy Council in Att. Gen. for Alberta v. Huggard Assets, Ltd. [1953] A. C. 420, has already been referred to as a quotation from Maxwell's Interpretation of Statutes. The Privy Council in that case held that "An Act of the Imperial Parliament today unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession." The Court of Appeal in a later decision reported in (1964) 3 All.148 (C.E.B. Draper & Son, Ltd. v. Edward Turner & Son, Ltd.) approved of the proposition laid down in Att. Gen. for Alberta v. Huggard Assets, Ltd., observing "Prima facie an Act of the United Kingdom Parliament, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom".

167. The cases decided by the Federal Court and the Supreme Court of India may be taken note of. Dealing with the extra-territorial application of the provisions of the Income-tax Act, the Federal Court in Governor-General in Council v. Raleigh Investment Co. Ltd. MANU/FE/0015/1944 after finding that there was no territorial operation of the Act observed that if there was any extra territorial operation it is within the legislative powers given to the Indian Legislature by the Constitution Act. After discussing the case-law on the subject at p. 61 regarding the making of laws for the whole or any part of British India on topics in Lists I and III of Sch. 7 and holding that the Federal Legislature's powers for extra-territorial legislation is not limited to the cases specified in Clauses (a) to (e) of Sub-section (2) of Section 99 of the Government of India Act, 1935, concluded by stating that the extent, if any, of extra-territorial operation which is to be found in the impugned provisions is within the legislative powers given to the Indian Legislature by the Constitution Act. Again in Wallace Brothers & Co. Ltd. v. Commissioner of Income-lax, Bombay, Sind and Baluchistan MANU/FE/0021/1945 : [1945] F.C.R. 65, the Federal Court held that there was no element of extra-territoriality in the impugned provisions of the Indian Income-tax Act, and even if the provisions were in any measure extraterritorial in their effect, that was not a ground for holding them to be ultra vires the Indian Legislature.. In Mohammad Mohy-ud-din v. The King Emperor MANU/FE/0005/1946 : [1946] F.C.R. 94, the Federal Court was considering the validity of the Indian Army Act, 1911. In this case a person who was not a British subject but had accepted a commission in the Indian Army was arraigned before a court martial for trial for offences alleged to have been committed by him outside British India. It was held that Section 41 of the Indian Army Act, 1911, conferred jurisdiction on the court-martial to try non-British subjects for offences committed by them beyond British India. On a construction of Section 43 of the Act the Court held that the court-martial has powers "over all the native officers and soldiers in the said military service to whatever Presidency such officers and soldiers may belong or wheresoever they may be serving." Repelling the contention that there was a presumption against construing even general words in an Act of Parliament as intended to have extra-territorial effect or authorising extra-territorial legislation the Court observed: "The passages relied on in this connection from Maxwell's Interpretation of Statutes do not go the length necessary for the appellant's case. It is true that every statute is to be interpreted so far as its language admits, as not

to be inconsistent with the comity of nations or with the established rules of International Law. Whatever may be the rule of International Law as regards the ordinary citizen, we have not been referred to any rule of International Law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits". The law as laid down by the Courts may now be summarised. Parliament normally restricts the operation of the legislation to its own territories. Parliament may pass legislation controlling the activities of the citizens abroad. An intention to have extra territorial operation should be expressed or necessarily implied from the language of the Statute. The Statute should be so interpreted as not to be inconsistent with the comity of nations or with the established rules of international law.

168. It is now necessary to examine the various articles of Part III of the Constitution to find out whether any intention is expressed to make any of the fights available extra-territorially. The application of Article 14 is expressly limited to the territory of India as it lays down that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, and Article 16 deals with equality of opportunity in matters of public employment. By their very nature the two Articles are confined to the territory of India. So also Articles 17 and 18 which deal with abolition of untouchability and abolition of titles. Before dealing with Articles 19 and 21 with which we are now concerned the other articles may be referred to in brief. Articles 20 and 22 can have only territorial application. Articles 23 and 24 which relate to right against exploitation and Articles. 25 to 28 which relate to freedom of conscience and free profession, practice and propagation of religion etc. prima facie are applicable only to the territory of India. At any rate there is no intention in these Articles indicating extra-territorial application. So also Articles 29 and 30 which deal with cultural and educational rights are applicable only within the territory of India. Article 31 does not expressly or impliedly have any extra territorial application. In this background it will have to' be examined whether any express or implied intention of extra-territorial applicability is discernible in Articles 19 and 21.

169. Article 19(1)(a) declares the right to freedom of speech and expression. While it is possible that this right may have extra-territorial application, it is not likely that the framers of the Constitution intended the right to assemble peaceably and without arms or to form associations or unions, or to acquire, hold and dispose of property, or to practise any profession, or to carry on any occupation, trade or business, to have any extra territorial application, for such rights could not be enforced by the State outside the Indian territory. The rights conferred under Article 19 are Fundamental Rights and Articles 32 and 226 provide that these rights are guaranteed and can be enforced by the aggrieved person by approaching the Supreme Court or the High Courts. Admittedly, the rights enumerated in Article 19(1)(a), (b), (c), (f) and (g) cannot be enforced by the State and in the circumstances there is a presumption that the Constitution makers would have intended to guarantee any right which the State cannot enforce and would have made a provision guaranteeing the rights and securing them by recourse to the Supreme Court and the High Courts.

170. The restriction of the right to move freely throughout the territory of India and the right to reside and stay in any part of the territory of India is strongly relied upon as indicating that in the absence of such restrictions the. other rights are not confined to the territory of India. The provisions in Article 19(1)(d) and (e) i.e. the right to move freely throughout the territory of India

and to reside and settle in any part of the territory of India have historical significance. In A. K. Gopalan v. The State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 , Kania C.J., said that in the right "to move freely throughout the territory of India" the emphasis was not on the free movement but on the right to move freely throughout the territory of India. The intention was to avoid any restriction being placed by the States hampering free movement throughout the territory of India. It is a historical fact that there were rivalries between the various States and the imposition of restraint on movement from State to State by some States was not beyond possibility. In the two clauses 19(1)(d) and (e) the right "to move freely throughout the territory of India" and "to reside and settle in any part of the territory of India" the "territory of India" is mentioned with the purpose of preventing the States from imposing any restraint. From the fact that the words "territory of India" are found in these two clauses the contention that the other freedoms are not limited to the territory of India for their operation cannot be accepted. In Virendra v. The State of Punjab and Anr. MANU/SC/0023/1957 : [1958]1SCR308 , S. R. Das, C. J., who spoke on behalf of the Constitution Bench stated : "The point to be kept in view is that several rights of freedom guaranteed to the citizens by Article 19(1) are exercisable by them throughout and in all parts of the territory of India". The view that the rights under Article 19(1) is exercisable in the territory of India has not been discussed. Far from Article 19(1) expressing any intention expressly or impliedly of extra territorial operation the context would indicate that its application is intended to be only territorial. The right under Article 19(b) and (c) to assemble peaceably and without arms and to form associations or unions could not have been intended to have any extraterritorial application as it will not be in accordance with the accepted principles of international law. As the rights under Articles 19(b) and (c) cannot be enforced outside India the inference is that no extraterritorial application was intended. So also regarding the rights conferred under Articles 19(f) and (g) i.e. to acquire, hold and dispose of property; and to practise any profession, or to carry on any occupation, trade or business, would not have been intended to be applicable outside India.

171. It was submitted that when the Constitution was framed the founding fathers were influenced by the United Nations' Universal Declaration of Human Rights which was made in December, 1948 and they thought it fit to make the Fundamental Rights available to the Indian citizens throughout the world. The history of the conception of human rights may be shortly traced. The main task of the Human Rights' Commission which was set up by the United Nations was to draw an International Bill of Rights. The Commission split this task into two documents : a short declaration of principles and an elaborate treaty or covenant enforcing those principles so far. as practicable. The Universal Declaration of Human Rights was not intended to be binding as law but to present the main ideals of human rights and freedoms in order to inspire everybody, whether in or out of governments, to work for their progressive realization. The Commission finished the Declaration and it was promulgated by the UN Assembly on December 10, 1948. The discussion about the Draft Indian Constitution took place between February and October, 1948 and the Articles relating to the Fundamental Rights were discussed in October, 1948, i.e. before the Universal Declaration of Human Rights was promulgated by the UN Assembly on December 10, 1948. It is most unlikely that before the Declaration of Human Rights was promulgated the framers of the Indian Constitution decided to declare that the Fundamental Rights conferred on the citizens would have application even outside India. The Universal Declaration of Human Rights was not binding as law but was only a pious hope for achieving a common standard for all peoples and all Nations. Article 13 of the Declaration which is material for our discussion runs as follows :

Paragraph 1. Everyone has the right to freedom of movement and residence with in the borders of each state.

Paragraph 2. Everyone has the right to leave any country, including his own, and to return to his country.

Paragraph 1 restricts the right of movement and residence specifically within the borders of the country. The second paragraph aims at securing the right to leave any country including his own and to return to his country. The Declaration at that stage did not have any idea of conferring on the citizens of any country right of movement beyond borders of the State or to freedom of speech or right to assemble outside the country of origin. Even in the American Constitution there is no mention of right to freedom of speech or expression as being available outside America. Regarding the right of movement within the borders of the State it is not mentioned as one of the freedoms guaranteed in the American Constitution but everyone in the country takes it for granted that one can roam at will throughout the United States.

172. The right of a citizen to leave any country and to return to his country is recognised in the United States. While there is no restriction on the citizen to return to his own country the Government of the United States does place certain restrictions for leaving the country, such as obtaining of the passports etc. Even the right to travel outside the United States is not unrestricted. A passport is a, request by the Government which grants it to a foreign Government that the bearer of the passport may pass safely and freely. The passport is considered as a licence for leaving a country and an exit permit rather than a letter of introduction. Even in America the State Department when it issues a passport specifies that they are not valid for travel to countries in, which the United States have no diplomatic representation as the position of the Government is that it will not facilitate overseas travel where it is unable to afford any protection to the traveller. The American public particularly the news reporters are claiming that they should be allowed to travel wherever they wish if need be without their Government's assurance to protection. The right of the American citizen to travel abroad as narrated above shows that even the right to travel outside the country is not unfettered.

173. In vain one looks to the American law to find whether the citizens are granted any right of freedom of speech and expression beyond the territory of the United States. The First Amendment provides for freedom of speech and press along with freedom of religion. Liberty of speech and liberty of press are substantially identical. They are freedom to utter words orally and freedom to write, print and circulate words. But this freedom of expression would be meaningless if people were not permitted to gather in groups to discuss mutual problems and communicate their feelings and opinions to governmental officers. The First Amendment therefore provides that the people have the right to assemble peaceably and petition the government for redress of grievances. The petition for redress can only be confined to the United States of America. In a recent address on Human Rights Warren Christopher, U.S. Deputy Secretary of State reproduced in Shan, October 1977, stated before the American Bar Association in Chicago that the promotion of human rights has become a fundamental tenet of the foreign policy of the Carter Administration. In explaining the conception of human rights and its practice in America the Deputy Secretary stated that the efforts should be directed to the most fundamental and important human rights all of which are internationally recognised in the Universal Declaration of Human Rights which the United Nations

approved in 1948. While emphasising the three categories of human rights (1) the right to be free from the governmental violation of the integrity of the person; (2) the right to fulfilment of such vital needs as food, shelter, health care and education, and (3) the right to enjoy civil and political liberties,, he stated that the freedom of thought, of religion, of assembly, of speech, of the press, freedom of movement within the outside one's own country; freedom to take part in government, were liberties which American enjoy so fully, and too often take for granted, are under assault in many places. It may be noted that while freedom of movement is referred to as both within and outside one's own country the other rights such as freedom of thought, of religion, of assembly of speech, of press, are not stated to be available outside one's own country. It is thus seen that except the right to movement outside one's own country other rights are not available extra-territorially even in America.

174. The fundamental rights under Article 19(1) of the Constitution are subject to the restrictions that may be placed under Article 19(2) to (6) of the Constitution. The Fundamental Rights are not absolute but are subject to reasonable restrictions provided for in the Constitution itself. The restrictions imposed are to be by operation of any existing law or making of a law by the Legislature imposing reasonable restrictions. The scheme of the Article, thus it while conferring Fundamental Rights on the citizens is to see that such exercise does not affect the rights of other persons or affect the society in general. The law made under Article 19(2) to (6), impose restrictions on the exercise of right of freedom of speech and expression, to assemble peaceably without arms etc. The restrictions thus imposed, normally would apply only within the territory of India unless the legislation expressly or by necessary implication provides for extra-territorial operation. In the Penal Code, under Sections 3 and 4, the Act is made specifically applicable to crimes that are committed outside India by citizen of India. Neither in Article 19 of the Constitution nor in any of the enactments restricting the rights under Article 19(2) is there any provision expressly or by necessary implication providing for extra-territorial application. A citizen cannot enforce his Fundamental Rights outside the territory of India even if it is taken that such rights are available outside the country.

175. In the view that a citizen is not entitled to the Fundamental Rights guaranteed under Article 19 outside the territorial limits of India, the contention of the learned Counsel for the petition that by denying him the passport to travel outside India, his Fundamental Rights like freedom of speech and expression, to assemble peaceably, to practise profession or to carry on occupation, trade or business are infringed, cannot be accepted. The passport of the petitioner was impounded on the ground that her presence in connection with the Inquiry Commission may be necessary and in the interest of public it was necessary to do so. The impugned order does not place any restrictions on the petitioner while she is away from India. Hence the question whether the State could impose such restraint does not arise in this case. As the contention was that by impounding the passport the petitioner's fundamental right of freedom of speech etc. outside the country was infringed, it became necessary to consider whether the citizen had any such right.

176. It was strenuously contended that the Legislature by involving powers under Article 21 cannot deprive the Fundamental Rights guaranteed under Article 19 at any rate within the territory of India. It will now be considered whether an Act passed under Article 21 should also satisfy the requirements of Article 19.

177. The submission was that Article 19 applies to laws made under Articles 20, 21 and 22 and the citizen is entitled to challenge the validity of an Act made under Article 21 on the ground that it affects the rights secured to him under Clause (1) of Article 19. Article 20(1) provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Article 22 deals with protection against arrest and detention in certain cases, that is, in respect of preventive detention.

178. It has been decided by this Court in Gopalan's [1950] S.C.R. 88 case that in the case of punitive detention for offences under the Penal Code, it cannot be challenged on the ground that it infringes the right specified under Article 19(a) to (e) and (g) of the Constitution of India. Kania CJ. held :

If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms etc.; the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged the question of the application of Article 19 does not arise.

Fazal Ali J., though he dissented from the majority view regarding the application of Article 19 to punitive detention observed as follows :-

The Indian Penal Code does not primarily or... necessarily impose restrictions on the freedom of movement and it is not correct to say that it is a law imposing restrictions on the right to move freely. Its primary object is to punish crime and not to restrict movement But if it (the Punishment) consists in imprisonment there is a restriction on movement. This restraint is imposed not under a law imposing restrictions on movement) but under a law defining crime and making it punishable. The punishment is correlated directly with the violation of some other person's right and not with the right of movement possessed by the offender himself. In my opinion, there fore, the Indian Penal Code does not come within the ambit of the words 'law' imposing restrictions on the right to move freely.

The learned Judge, Justice Fazal Ali, took a different view regarding preventive detention on the basis that it did not admit of a trial but the order of detention rested on an apprehended and not actual danger. Regarding punitive detention, the decision of a Bench of five Judges in H. Saha v. State of West Bengal MANU/SC/0419/1974 : 1974CriLJ1479 , expressed the same view. Chief Justice Ray observed :

It is not possible to think that a person who is detained will yet be free to move or assemble or form association or unions or have the right to reside in any part of India or have the freedom of speech or expression. Suppose a person is prosecuted of an offence of cheating and convicted after trial, it is not open to him to say that the imprisonment should be tested with reference to Article 19 for its reasonableness. A law which attracts Article 19, therefore, must be such as is capable of being tested to be reasonable under Clauses (2) to (5) of Article 19.

In the case of punitive detention, it will be open to the accused to raise all defences that are open to him in law, such as that there have been no violation of any law in force. Regarding punitive detention this Court in Saha case has held that as the Constitution has conferred rights under Article 19 and also adopted the preventive detention to prevent the greater evil by imperilling security, the safety of the State and the welfare of the nation, it is not possible to think that a person who is detained will yet be free to move or assemble or form associations etc.

179. Applying the same reasoning, it is contended on behalf of the state that when a person is deprived of his life or personal liberty in accordance with the procedure established by law, he cannot invoke to his aid any of the rights guaranteed under Article 19 of the Constitution of India. Whether this contention could be accepted or not will be examined with reference to the provisions of the Constitution and the decisions rendered by this Court.

180. Article 19 to 22 appear under the title "Right to freedom". Article 19 confers freedoms on the citizens whereas Article 20 to 22 are not limited to citizens but apply to all persons. Article 19 does not deal with the right to life which is dealt with under Article 21. While Article 19 provides for freedoms which a citizen is entitled to, Articles 20 to 22 restrain the State from doing certain things. Though the right to life and personal liberty is not dealt with under Article 19, as it is mentioned in Article 21 though in a negative form, the right to life and personal liberty is secured and the State can deprive it only according to the procedure established by law. While the rights guaranteed under Article 19(1) are subject to restrictions that may be placed by Articles 19(2) to (6), the right not to be deprived of life and personal liberty is subject to its deprivation by procedure established by law. The scope of the words "personal liberty" was considered by Mukherjea, J. in Gopalan's case (supra.) The learned Judge observed : "Article 19 gives a list of individual liberties and prescribes in the various clauses the restrictions that may be placed upon them by law so that they may not conflict with the public welfare or general morality. On the other hand, Articles 20, 21 and 22 are primarily concerned with penal enactments or other law under which personal safety or liberty of persons would be taken away in the interest of society and the set down the limits within which the State control should be exercised the right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restrain and coercion of any sort, are the inherent birth rights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things...." The words "personal liberty" take their colour from the words "deprivation of life".' It means liberty of the person, that is freedom from personal restraint. Article 21 is one of the Articles along with Articles 20 and 22 which deal with restraint on the person. According to Dicey :

The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification.

(Dieey's Laws of Constitution 10th Edn. page 207)

181. In the debates relating to the drafting of the Constitution, in Article 15 the word that was used was "liberty". The framers of the Constitution thought that the word "liberty" should be qualified by the insertion of the word "personal" before it for otherwise it might be construed very widely

so as to include even the freedoms already dealt with; under Article 19, 30 (which corresponds to Article 19 in the Constitution). The word "personal liberty" in Article 21 is, therefore, confined to freedom from restraint of person and is different from other rights enumerated in Article 19 of the Constitution.

182. It is contended on behalf of the petitioner that after the decision of the Bank Nationalisation case and Bennet Colomon's case the view taken earlier by the Supreme Court that in construing whether the deprivation of personal liberty is valid or not the enquiry should only be confined to the validity of the procedure prescribed without any reference to the rights conferred under Article 19(1) is no longer good law. The decisions bearing on this question may now b(c) examined.

183. In Gopalan's case it was held that Article 19 dealt with the rights of the citizens when he was free, and did not apply to a person who had ceased to be free and had been either under punitive or preventive legislation. It was further held that Article 19 only applied where a legislation directly hit the rights enumerated in the Article and not where the loss of rights mentioned in the Article was a result of the operation of legislation relating to punitive or preventive detention. It was also stated by Justice Mukherjea that a law depriving the personal liberty must be a valid law which the legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the Fundamental Rights the Constitution lays dawn. The learned Judge explained that the reasonableness of a law coming under Article 21 could not be questioned with reference to anything in Article 19 though a law made under Article 21 must conform to the requirements of Articles 14 and 20. It cannot be said that lit should conform to the requirements of Article 19. The view, thus expressed in Gopalan's case, was affirmed by the Supreme Court in. Ram Singh v. State of Delhi MANU/SC/0005/1951 : [1951]2SCR451 where it was held :

Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in Article 19(1), and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct from fundamental rights and made separate provisions in Article 19 and Articles 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged....
The interpretation of these Articles and their correlation was elaborately dealt with by the full court in Gopalan's case.

Approving the interpretation of the Articles in Gopalan's case it was held that law which authorises deprivation of personal liberty did not fall within the purview of Article 19 and its validity was not to be judged by the criteria indicated in that Article but depended on its compliance with the requirements of Articles 21 to 22.

184. This view was again affirmed in State of Bihar v. Kameshwar Singh MANU/SC/0019/1952 : [1952]1SCR889 where Das, J. in approving the law laid down in Gopalan's case observed as follows:

As I explained in Gopalan's case and again in Chiranjit Lal's case 1950 SCR 869 our Constitution protects the freedom of the citizen by Article 19(1)(a) to (e) and (g) but empowers the State, even, while those freedoms last, to impose reasonable restrictions on them in the interest of the State or of public order or morality or of the general public as mentioned in Clauses (2) to (6). Further, the

moment even this regulated freedom of the individual becomes incompatible with and threatens the freedom of the community the State is given power by Article 21, to deprive the individual of his life and personal liberty in accordance with procedure established by law, subject of course, to the provisions of Article 22.

185. In Express Newspapers (P) Ltd. and Anr. v. The Union of India and Ors. [1959] 1 S.C.R. 135, the test laid down was that there must be a direct or inevitable consequence of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessary be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned. The test, thus applied, is whether the consequences were "direct and inevitable" ?

186. In Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India MANU/SC/0016/1959 : 1960CriLJ671 , after citing with approval the case of Ram Singh and Express Newspapers case, it was observed :

It is got the form or incidental infringement that determine the constitutionality of a statute in a reference to the rights guaranteed in Article 19(1) but the reality and the substance....
Viewed in this way, it does not select any of the elements or attributes of freedom of speech falling within Article 19(1)(a) of the Constitution.

Reality and substance test was laid down in this case while approving of the earlier decisions when the court was considering the question whether the ban on advertisement would affect the rights conferred under Article 19(1)(a).

187. The correctness of the view as laid down in Gopalan's case and affirmed in Ram Singh's case was doubted by Subba Rao, J. in Kochuni v. The State of Madras MANU/SC/0019/1960 : [1960]3SCR887 . The learned Judge after referring to the dissenting view of Fazal Ali, J. in Gopalan's case rejecting the plea that a law under Article 21 shall not infringe Article 19(1) observed :

The question being integra with the dissenting view expressed by Fazal Ali, J. we are bound by this judgment.

188. Reliance was placed by the learned Counsel for the petitioner on the decision by this Court in Sakal Papers (P) Ltd. and Ors. v. The Union of India MANU/SC/0090/1961 : [1962]3SCR842 . The learned Counsel referred to the passage at page 560A Part I where it was held that "the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to a citizen and not merely what manner and method has been adopted by the State in placing the restriction and, therefore, the right to freedom of speech cannot be taken away with the object of taking away the business activities of the citizen. Reference was also made to another passage at 867 where it was held that the "legitimacy of the result intended to be achieved does not necessarily imply that every means to achieve it is permissible; for even if the end is desirable and permissible, the means employed must not transgress the limits laid down by the Constitution if they directly impinge on any of the fundamental rights guaranteed by the Constitution. It is no answer when the

constitutionality of the measure is challenged that apart from the fundamental right infringed the provision is otherwise legal.

189. The above observations relied on by the learned Counsel were made in a petition where the validity of Delhi Newspapers (Price and Page) Order, 1960 which fixed the maximum number of pages that might be published by a newspaper according to the price charged was questioned. The order was challenged as contravening Article 19(1)(a) of the Constitution. The court held that the order was void as it violated Article 19(1)(a) of the Constitution and was not saved by Article 19(2). The court held that the right extended not merely to the method which is employed to circulate but also to the volume of circulation, and the impugned Act and order placed restraints on the latter aspect of the right as the very object of the Act was directly against circulation and thus, interfered with the freedom of speech and expression. At page 866, the Court observed :

The impugned law far from being one, which merely interferes with the right of freedom of speech incidentally, does so directly though It seeks to achieve the end by purporting to regulate the business aspect to a newspaper.... Such a course is not permissible and the courts must be ever vigilant in guarding perhaps the most precious of all the freedom guaranteed by our Constitution.

This decision does not help us in resolving the point at issue in this case for the court was concerned with the question whether the right of freedom of speech was directly affected by the impugned order. The impact of legislation under Article 21 on the rights guaranteed under Article 19(1) was not in issue in the case.

190. The two cases which were strongly relied on by the learned Counsel for the petitioner as having over-ruled the view of Gopalan's case as affirmed in Ram Singh's case are Bank Nationalisation Case MANU/SC/0011/1970 : [1970]3SCR530 and Bennet Colomon's case MANU/SC/0038/1972 : [1973]2SCR757 .

191. In Kharak Singh's MANU/SC/0085/1962 : 1963CriLJ329 case the majority took the view that the word 'liberty' in Article 21 is qualified by the word 'personal' and there its content is narrower and the qualifying adjective has been employed in order to avoid overlapping between those elements or incidents of liberty like freedom of speech or freedom of movement etc. already dealt with in Article 19(1) and the liberty guaranteed by Article 21 and particularly in the context of the difference between the permissible restraints or restrictions which might be imposed by sub Clauses (2) to (6) of the Article of the several species of liberty dealt with in a several clauses of Article 19(1). The minority view as expressed by Subba Rao, J. is that if a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the State laws satisfy the test laid down in Article 19(2) as far the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that petitioners fundamental rights are not infringed by showing that the law only imposes reasonable restrictions within the meaning of Article 19(2) of the Constitution. The submission of the learned Counsel for the petitioner is that the view as expressed by Subba Rao, J. has been affirmed by the subsequent decisions in the Bank Nationalisation MANU/SC/0011/1970 : [1970]3SCR530 case and Bennet Colomon MANU/SC/0038/1972 : [1973]2SCR757 case.

192. On 19th July, 1969, the acting President promulgated an ordinance No. 8 of 1969 transferring to and vesting the undertaking of 14 names commercial banks in the corresponding new bank under the ordinance. Subsequently, the Parliament, enacted Banking Companies (Acquisition of Transfer of Undertaking) Act, 1969. The object of the Act was to provide for the acquisition and transfer of the undertakings of certain banking companies in conformity with the national policy and objectives and for matters corrected therewith and incidental thereto. The petitioners before the Supreme Court who held shares in some of the named banks or had accounts current or fixed, deposits in the banks challenged the validity of the enactment. In the petitions under Article 32 of the Constitution the validity of the Ordinance and the Act was questioned on various grounds. I am concerned with ground No. 3 which runs as follows :

193. Article 19(1)(f) and Article 31(2) are not mutually exclusive and the law providing for acquisition of property for public purpose could be tested for its validity on the ground that it imposes limitation on the right to property which were not reasonable; so tested the provision of the Act transferring undertaking of the named banks and prohibiting practically from carrying banking business violates the guarantee under Article 19(1)(f) and (g). In dealing with this contention, the court held that Articles 19(1)(f) and Article 31(2) are not mutually exclusive. The court observed that the principle underlying the opinion of the majority in Gopalan's case was extended to the protection of the freedom in respect of property and it was held that Article 19(1)(f) and 31(2) were mutually exclusive in their operation and that substantive provisions of law relating to acquisition of property were not liable to be challenged on the ground that it imposes unreasonable restrictions on the right to hold property. After mentioning the two divergent lines of authority, the court held that "the guarantee under Article 31(1) and (2) arises out of the limitations imposed on the authority of the State, by law, to take over the individual's property. The true character of the limitation of the two provisions is not different. Clause (1) of Article 19 and Clause (1) and (2) of Article 31 are part of the similar Article 19(1)(f) enunicating the object specified and Article 19(1) and 31 deal with the limitation which may be placed by law subject to which the rights may be exercised. Formal compliance with the conditions of Article 31(2) is not sufficient to negative protection of guarantee to the rights to property. The validity of law which authorises deprivation of property and the law which authorises compulsory acquisition of the property for a public purpose must be adjudged by the application of the same test. Acquisition must be under the authority of a law and the expression law means a law which is within the competence of the legislature and does not impair the guarantee of the rights in Part III.

194. The learned Counsel for the petitioner submitted that on similar reasoning it is necessary that an enactment under Article 21 must also satisfy the requirements of Article 19 and should be by a law which is within the competence of the legislature and does not impair the guarantee of the rights in part III including those conferred under Article 19 of the Constitution of India. The important question that arises for consideration is whether the decision in the Bank Nationalisation case has over-ruled the decision of Gopalan's case and is an authority for the proposition and an act of the legislature relating to deprivation of life and personal liberty should also satisfy the other fundamental rights guaranteed under Article 19(1) of the Constitution.

195. In order to determine what exactly is the law that has been laid down in Bank Nationalisation Case, it is necessary to closely examine the decision particularly from pages 570 to 578 of 1970(3) SCR. After holding that:

Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection. To concentrate merely on power of the State and the object of the State action in exercising that power is therefore to ignore the true intent of the Constitution.

the Court proceeded to observe that "the conclusion in our judgment is inevitable that the validity of the State action must be adjudged in the light of its operation upon rights of individual and groups of individuals in all their dimensions." Having thus held the Court proceeded to state :

But this Court has held in some cases to be presently noticed that Article 19(1)(f) and Article 31(2) are mutually exclusive.

It is necessary at this stage to emphasize that the Court was only considering the decisions that took the view that Article 19(1)(f) and 31(2) were mutually exclusive. After referring to passages in A. K. Gopalan's case at pages 571 to 573 noted at page 574 :

The view expressed in A. K. Gopalan's case was reaffirmed in Ram Singh and Ors. v. State of Delhi MANU/SC/0005/1951 : [1951]2SCR451 ". Having thus dealt with the passages in the judgment in Gopalan's case the Court proceeded to consider its effect and observed that the principle underlying the judgment of the majority was extended to the protection of freedom in respect of property and it was held that Article 19(1)(f) and Article 31(2) were mutually exclusive in their operation. While observations in judgment of Gopalan's case as regards the application of Article 19(1)(f) in relation to Article 21 were not referred to, the Court proceeded to deal with the correctness of the principle in Gopalan's case being extended to the protection of the freedom in respect of property. In A. K. Gopalan's case (supra) Das, J., stated that if the capacity to exercise the right to property was lost, because of lawful compulsory acquisition of the subject of that right, the owner ceased to have that right for the duration of the incapacity. In Chiranjit Lal Chowduri's case MANU/SC/0009/1950 : [1950]1SCR869 , Das, J. observed at page 919 :

...the right to property guaranteed by Article 19(1)(f) would...continue until the owner was under Article 31 deprived of such property by authority of law.

Das, J. reiterated the same view in The State of West Bengal v. Subodh Gopal MANU/SC/0018/1953 : [1954]1SCR587 , where he observed :

Article 19(1)(f) read with Article 19(5) pre-supposes that the person to whom the fundamental right is guaranteed retains his property over or with respect to which alone that right may be exercised;

Thus the observation in Gopalan's case extending the principle laid down in the majority judgment to freedom in respect of property was reiterated by Das, J. in Chiranjit Lal Chowduri's case (supra) and Subodh Gopal's case. The principle was given more concrete shape in State of Bombay v. Bhanjit Munji MANU/SC/0034/1954 : [1955]1SCR777 case wherein it was held that 'if there is no property which can be acquired held or disposed of no restriction can be placed on the exercise of the right to acquire, hold or dispose it of, and as Clause (5) contemplates the placing of reasonable restrictions of the exercise of those rights it must follow that the Article postulates the existence of property over which the rights are to be exercised." This view was accepted in the

later cases. Dabu Barkya Thakur v. State of Bombay MANU/SC/0022/1960 : [1961]1SCR128 and Smt. Sitabati Debi and Anr. v. State of West Bengal [1967] 2 S.C.R. 940. The Court proceeded further after referring to some cases to note that. "With the decision in K. K. Kochuni's case MANU/SC/0019/1960 : [1960]3SCR887 there arose two divergent lines of authority (1) "authority of law" in Article 31(1) is liable to be tested on the ground that it violates other fundamental rights and freedoms including the right to hold property guaranteed by Article 19(1)(f) and (2) "authority of law" within the meaning of Article 31(2) is not liable to be tested on the ground that it impairs the guarantee of Article 19(1)(f) in so far as it imposes substantive restrictions though it may be tested on the ground of impairment of other guarantees." Later in the decision of State of Madhya Pradesh v. Ranoiro Shinde MANU/SC/0030/1968 : [1968]3SCR489 the Supreme Court opined that the validity of law in Clause (2) of Article 31 may be adjudged in the light of Article 19(1)(f). But the Court in that case did not consider the previous catena of authorities which related to the inter-relation between Article 31(2) and Article 19(1)(f).

196. In considering the various decisions referred to regarding the interrelation of Article 31(2) and Article 19(1)(f) the Court proceeded to express its view that "the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. Each freedom has different dimensions." Having so stated the Court considered the inter-relation of Article 31(2) and Article 19(1)(f) and held :

The true character of the limitations under the two provisions is not different. Clause (5) of Article 19 and Clauses (1) & (2) of Article 31 are parts of a single pattern; Article 19(1)(f) enunciates the basic right to property of the citizens and Article 19(5) and Clauses (1) & (2) of Article 31 deal with limitations which may be placed by law, subject to which the rights may be exercised.

197. It must be noted that basis for the conclusion is that Article 19 and Clause (1) and (2) of Article 31 are parts of a single pattern and while Article 19(1)(f) enunciates the right to acquire, hold and dispose of property; Clause (5) of Article 19 authorise imposition of restrictions upon the right. There must be reasonable restriction and Article 31 assures the right to property and grants protection against the exercise of the authority of the State and Clause (5) of Article 19 and Clauses (1) and (2) of Article 31 prescribe restrictions upon State action, subject to which the right to property may be exercised. The fact that right to property guaranteed under Article 19(1)(f) is subject to restrictions under Article 19(5) and 31 and thereby relate to the right to property closely inter-related cannot be overlooked for that formed the basis for the conclusion. After referring to the various Articles of the Constitution the Court observed :

The enunciation of rights either express or by implication does not follow uniform pattern. But one thread runs through them; they seek to protect the rights of the individual or group of individuals against infringement of those rights within specific limits. Part HI of the Constitution weaves a pattern of guarantees delimit the protection of those rights in their allotted fields; they do not attempt to enunciate distinct rights.

It proceeded

We are therefore unable to hold that the challenge to the validity of the provisions for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2)

requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Articles. Formal compliance of the condition of Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property.

198. After expressing its conclusion, the Court proceeded to state that it is found necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. While stating that in its judgment the assumption in A. K. Gopalan's case that certain articles exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of State action alone need be considered, and effect of laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. To this extent the Court specifically over ruled the view that the; object and form of the State action alone need be considered. It proceeded "We hold the validity "of law" which authorities deprivation of property and "a low" which authorises compulsory acquisition of property for public purpose must be adjudged by the application of the same tests." It will thus be seen that the entire discussion by the Court in Bank Nationalisation case related to the interrelation between Article 31(2) and Article 19(1)(f). In dealing with the question the Court has no doubt extracted passages from the judgments of learned Judges in Gopalan's case but proceeded only to consider the extension of the principle underlying the majority judgment to the protection of the freedom in respect of property, particularly, the judgment of Justice Das. After stating; that two views arose after Kochuni's case the Court concerned itself only in determining the rationale of the two lines of authority. The view taken in Gopalan's case that the objection and the form of State action: has to be considered was over ruled and it was laid down that it is the effect and action upon the right of the person that attracts the jurisdiction of the Court to grant relief. It is no doubt true that certain passing observations have been made regarding the liberty of persons, such as at page 576 :

We have carefully considered the weighty pronouncements of the eminent judges who gave shape to the concept that the extent of protection of important guarantees such as the liberty of person, and right to property, depends upon the form and object of State action and not upon its direct operation upon the individual's freedom.

199. Though the liberty of person is incidentally mentioned there is no further discussion on the subject. While undoubtedly Bank Nationalisation case settles the law that Article 19(1)(f) and Article 31(2) are not mutually exclusive there is no justification for holding that the case is authority for the proposition that the legislation under Article 21 should also satisfy all the fundamental rights guaranteed under Article 19(1) of the Constitution. As emphasised earlier Article 19(1)(f) and Article 31(2) form a single pattern and deal with right to property. The fundamental right under Article 19(1)(f) is restricted under Article 19(5) or Article 31(2) and is the article refer to right to property they are so closely interlinked and cannot be held to be mutually exclusive. But Article 21 is related to deprivation of life and personal liberty and it has been held that it is not one of the rights enumerated in Article 19(1) and refers only to personal rights as are not covered by Article 19.

200. The decision in Bank Nationalisation case so far as it relates to Articles 19(1) and 21, is in the nature of obiter dicta. Though it is a decision of a Court of 11 Judges and is entitled to the highest regard, as the Court had not applied its mind and decided the specific question and as is in

the nature of a general, casual observation on a point not calling for decision and not obviously argued before it, the case cannot be taken as an authority on the proposition in question. The Court cannot be said to have declared the law on the subject when no occasion arose for it to consider and decide the question.

201. It may also be noted that as the Court ruled that the impugned Act violated Article 31(2) by not laying down the necessary principles, the decision of the inter-relationship between Article 19(1)(f) and 31(2) was not strictly necessary for the purpose of giving relief to the petitioner. We are not concerned in this case as to whether the decision in Bank Nationalisation case is in the nature of Obiter dicta so far as it held that Articles 19(1) and 31(2) are interrelated. But it is necessary to state that the decision proceeded on some erroneous assumptions. At page 571 of Bank Nationalisation case (supra) it was assumed. "The Majority of the Court (Kama, CJ. and Patanjali Sastri, Mahajan, Mukherjea & Das JJ.) held that Article 22 being a complete code relating to preventive detention the validity of an order of detention must be determined strictly according to the terms and within the four corners of that articles." This statement is not borne out from the text of the judgments in Gopalan's case. At p. 115 of Gopalan's case (supra) Kania CJ. has stated : "The learned Attorney General contended that the subject of preventive detention does not fall under Article 21 at all and is covered wholly by Article 22. According to him, Article 22 is a complete code. I am unable to accept that contention." Patanjali Sastri J'. at page 207 of the judgment said : "The learned Attorney General contended that Article 22 Clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention, and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view". Das J. in referring to the Attorney General's argument at page 324 stated : "that Article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by Article 22(4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also." Mukherjea J. at p. 229 of that judgment observed : "It is also unnecessary to enter into a discussion on the question raised by the learned Attorney-General as to whether Article 22 by itself is a self-contained Code with regard to the law of preventive detention and whether or not the procedure it lays down is exhaustive." Justice Mahajan at page 226 held that "I am satisfied on a review of the whole scheme of the Constitution that the intention was to make Article 22 self-contained in respect of the laws on the subject of preventive detention." It is thus seen that the assumption in Bank Nationalisation's case that the majority of the Court held that Article 22 is a complete code is erroneous and the basis of the decision stands shaken. If the obiter dicta based on the wrong assumption is to be taken as the correct position in law, it would lead to strange results. If Articles 19(1)(a) to (e) and (g) are attracted in the case of deprivation of personal liberty under Article 21, a punitive detention for an offence committed under the Indian Penal Code such as theft, cheating or assault would be illegal as pointed out in Gopalan's case by Kania C.J. and Patanjali Sastri J. for the reasonable restriction in the interest of public order would not cover the offences mentioned above. As held in Gopalan's case and in Saha's case there can be no distinction between punitive detention under the Penal Code and preventive detention. As pointed out earlier even though Fazal Ali J. dissented in Gopalan's case, the same view was expressed by His Lordship so far as punitive detention was concerned. He said : "The Indian Penal Code does not primarily or necessarily impose restrictions on the freedom of movement and it is not correct to say that it is a law imposing \ restrictions on the right to move freely." The conclusion that Article 19(1) and Article 21 were mutually exclusive was arrived at on an interpretation of language of Article 19(1)(d) read with

Article 19(5) and not on the basis that Article 19(1) and 21 are exclusive and Article 21 a complete code; The words "personal liberty" based on the Draft Committee report on Article 15 (now Article 21) was added to the word 'personal' before the word 'liberty' with the observation that the word 'liberty' should be qualified by the word 'personal' before it for otherwise it may be construed very wide so as to include even the freedoms already dealt with in Article 13 (now Article 19). In Gopalan's case it was also pointed out by the Judges that Article 19(1) and 21 did not operate on the same field as Article 19(1) and 31(2) of the Constitution are. The right under Article 21 is different and does not include the rights that are covered under Article 19. Article 19(1) confers substantive right as mentioned in Clauses (a) ;to (g) on citizen alone and does not include the right of personal liberty covered in Article 21. For the reasons stated above obiter dicta in Bank Nationalisation's case that a legislation under Article 21 should also satisfy the requirements of Article 19(1) cannot be taken as correct law. The Court has not considered the reasoning in Gopalan's case and over-ruled it.

202. Before proceeding to consider the test of validity of a legislation as laid down in Bennet Colomon's case following the Bank Nationalisation case the decisions which followed the Bank Nationalisation case holding on the erroneous premises that the majority in Gopalan's case held that Article 22 was a self-contained Code, may be shortly referred to. In S. N. Sarkar v. West Bengal MANU/SC/0163/1973 : [1974]1SCR1 , the Supreme Court held that in Gopalan's case the majority Court held that Article 22 was a self-contained Code and, therefore, the law or preventive detention did not have to satisfy the requirement of Articles 19, 14 and 20. In the Bank Nationalisation case the aforesaid premise in Gopalan was disapproved and, therefore, it no longer holds the field. Though the Bank Nationalisation case dealt with in relation to Article 19 and 31, the basic approach considering the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premises of the majority in the Gopalan case was erroneous. The view taken in this case also suffers from the same infirmities referred to in Bank Nationalisation case. Later, in the case of Khundiram v. West Bengali MANU/SC/0423/1974 : [1975]2SCR832 , a Bench of four Judges again erroneously stated that Gopalan's case had taken the view that Article 22 was a complete Code. After referring to Bank Nationalisation case and S. N. Sarkar's and to the case of H. Sana v. State of West Bengali MANU/SC/0419/1974 : 1974CriLJ1479 , the Court regarded the question as concluded and a final seal put on this controversy and held that in view of the decision, it is not open to any one now to contend that the law of preventive detention which falls in Article 22 does not have to meet the requirement of Article 14 or Article 19."

203. In Additional District Magistrate v. S. S. Shukla MANU/SC/0062/1976 : [1976] Supp. S.C.R. 172, the locus standi to move a habeas corpus petition under Article 226 of the Constitution of India while the Presidential order dated 27th June, 1975 was in force fell to be considered. The Court while holding that the remedy by way of writ petition to challenge the legality of an order of detention under the Maintenance of Internal Security Act is not open to a detenu during the emergency, had occasion to consider the observations made by the majority in Bank Nationalisation case regarding the application of Article 21 of the Constitution of India. Chief Justice Ray, at page -230 held :

Article 21 is our rule of law regarding life and liberty. No other rule of law can have separate existence as a distinct right. The negative language of fundamental right incorporated in Part III

imposes limitations on the power of the State and declares the corresponding guarantee of the individual to that fundamental right. The limitation and guarantee are complimentary. The limitation of State action embodied in a fundamental right couched in negative form is. the measure of the protection of the individual.

After quoting with approval the view held in Kharak Singh's case that personal liberty in Article 21 includes all varieties of rights which go to make personal liberty other than those in Article 19(1), the learned Judge observed that the Bank Nationalisation case merely brings in the concept of reasonable restriction in the law. Justice Beg, as he then was, considered this aspect a little more elaborately at page 322. After referring to the passage in Bank Nationalisation case the learned: Judge observed :

It seems to me that Gopalan's case was merely cited in Copper's case for illustrating a line of reasoning which was held to be incorrect in determining the validity of 'law' for the acquisition of property solely with reference to the provisions of Article 31. The question under consideration in that case was whether Articles 19(1)(f) and 31(2) are mutually exclusive.

The learned Judge did not understand the Cooper's case as holding that effect of deprivation of rights outside Article 21 will also have to be considered. Justice Chandrachud understood the decision in Bank Nationalisation case as holding that Article 21 and Article 19 cannot be treated as mutually exclusive. Justice Bhagwati at page 433 of the reports took the view that in view of the decision of this Court in Cooper's case the minority view in Kharak Singh's case that the law under Article 21 must also satisfy the test laid down in Article 19(1) so far the attributes covered by Article 19(1) are concerned was approved. It is seen that the view taken; in the Bank Nationalisation case that a law relating to deprivation of life and personal liberty falling under Article 21 has to meet the requirements of Article 19 is due to an error in proceeding on the basis that the Majority Court in Gopalan's case held that Article 22 was a self contained Code. The decisions which followed Bank Nationalisation case, namely, the case of S. N. Sarkar v. West Bengal and Khundiram v. West Bengal, H. Saha v. West Bengal, suffer from the same infirmity. With respect I agree with the view expressed by Chief Justice Ray and Justice Beg, as he then was, in Shukla's case.

204. Next to Bank Nationalisation case strong reliance was placed on Bennet Colomon's case by the; petitioner for the proposition that the direct effect of the legislation of the fundamental rights is the test.

205. In the case the petitioners impugned the new newsprint policy on various grounds. The Court held that though Article 19(1)(a) does not mention the freedom of press, it is settled view of the Court that freedom of speech and expression includes freedom of press and circulation. Holding that the machinery of import control cannot be utilised to control or curb circulation or growth of freedom of news papers it was held that Newspapers Control Policy is ultra-vires of the Import Control Act and the Import Control Order. The Court after referring to the two tests laid down in Bank Nationalisation case observed : "Direct operation of the Act upon the right forms the real test". The question that was raised in the case was whether the impugned newsprint policy is in substance a newspaper control. The Court held that the Newsprint Control Policy is found to be News paper Control Order in the guise of framing an import control policy for newsprint. As the

direct operation of the Act was to abridge the freedom of speech and expression,' the Court held that the pith and substance doctrine does not arise in the present case. On the facts of the case there was no need to apply the doctrine of pith and substance.

206. It may be noted that in Bennet Colomon's case the question whether Articles 21 and 19 are mutually exclusive or not did not arise for consideration and the case cannot be taken as an authority for the question under consideration in the case. Bennet Colomon's case, Express Newspapers case, Sakal Newspapers case were all concerned with-the, right to freedom of the press which is held to form part of freedom of speech and expression.

207. Whether the pith and substance doctrine is relevant in considering the question of infringement of; fundamental rights, the Court observed at page 780 of the Bank Nationalisation case "Mr. Palkhivala said that the tests of pith and substance of the subject matter and of direct and of incidental effect of the legislation are relevant to question of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights." It is thus clear, that the test of pith and substance of the subject matter and of direct and incidental effect of legislation is relevant in considering the question of infringement of fundamental right.

208. The Court at page 781 said : "by direct operation is meant the direct consequence or effect of the Act upon the rights and quoted with approval the test laid down by the Privy Council in Commonwealth of Australia v. Bank of New South Wales [1950] A. C. 235.

209. In deciding whether the. Act has got a direct operation of any rights upon the fundamental rights, the two tests are, therefore, relevant and applicable. These tests have been applied in several cases before the decision in Bank Nationalisation case. A reference has-been made to the decision of Express Newspapers (P) Ltd. and Anr. v. Union of India [1959] 1 S.C.R. 235, where the test laid down was that there must be a direct and inevitable consequence of the legislation. In Hamdard Dawakhana v. Union of India MANU/SC/0016/1959 : 1960CriLJ671 this Court followed the test laid down in Express Newspapers case. The Court expressed its view that it is not the form or incidental infringement that determine constitutionality of a statute but reality and substance. In Sakal Papers (P) Ltd. v. Union of India MANU/SC/0090/1961 : [1962]3SCR842 it was held that the "Correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method have been adopted by the State in placing the restriction. The Supreme Court in some cases considered whether the effect of the operation of the legislation is direct and immediate or not. If it is remote, incidental or indirect, the validity of the enactment will not be effected. The decision in Copper's case has not rejected the above test. The test laid down in cooper's case is the direct operation on the rights of the person.

210. The test was adopted and explained in Bennet Colomon's case as pointed above.

211. The view that pith and substance rule is not confined in resolving conflicts between legislative powers is made clear in the decision of the Federal Court in Subramaniam Chettiar's case [1940] Federal Corrt Reports 188, where Vardachariar, J. after referring briefly to the decision of Gallagher v. Lynn,(e) held that "They need not be limited to any special system of federal

Constitution is made clear by the fact that in Gallagher v. Lynn [1937] A. C. 863, Lord Atkin applied pith and substance rule when dealing with a question arising under the Government of Ireland Act which did not embody a federal system at all."

212. The passport Act provides for issue of passports and travel documents for regulating the departure from India of citizens of India and other persons. If the provisions comply with the requirements of Article 21, that is, if they comply with the procedure established by law the validity of the Act cannot be challenged. If incidentally the Act infringes on the rights of. a citizen under Article 19(1) the Act cannot be found to be invalid. The pith and substance rule will have to be applied and unless the rights are directly affected, the challenge will fail. If it is meant as being applicable in every case however remote it may be where the citizen's rights under Article 19(1) are affected, punitive detention will not be valid.

213. The result of the discussion, therefore, is that the validity of the Passport Act will have to be examined on the basis whether it directly and immediately infringes on any of the fundamental right of the petitioner. If a passport is refused according to procedure established by law, the plea that his other fundamental rights are denied cannot be raised if they are not directly infringed.

214. The decisions of the Supreme Court wherein the right of person to travel abroad has been dealt with may be noticed. In Satwant Singh V. Assistant Passport Officer, Delhi [1967] 2 S.C.R. 525 the Court held that though a passport was not required for leaving, for practical purposes no one can leave or enter into India without a passport. Therefore, a passport is essential for leaving and entering India. The Court held the right to travel is part of personal liberty and a person could not be deprived of it except according to the procedure laid down by law. The view taken by the majority was that the expression "personal liberty" in Article 21 only excludes the ingredients of liberty enshrined in Article 19 of the Constitution and the expression 'personal liberty' would take in the right to travel abroad. This right to travel abroad is not absolute and is liable to be restricted according to the procedure established by law. The decision has made it clear that "personal liberty" is not one of the rights secured under Article 19 and, therefore, liable to be restricted by the legislature according to the procedure established by law. The right of an American citizen to travel is recognised. In Kent v. Dulles 357 U.S.16, (1958), the Court observed that the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. "The freedom of movement across the frontiers in either direction, and inside frontiers as well, as a part of our heritage, Travel abroad, like travel within the country. may be as close to the heart of the individual as the choice of what he eats or wears, or reads. Freedom of movement is basic in our scheme of values." In a subsequent decision- Zemel v. Rusk) 381 U.S. (1) at page 14 the Court sustained against due process attacks the Government's refusal to issue passports for travel to Quba because the refusal was grounded on foreign policy considerations affecting all citizens. "The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction."

(The Constitution of the United States of America-Analysis and interpretation-at page 1171)

215. In Herbert Aptheker etc. y. Secretary of State 378 U.S. 500, the Court struck down a congressional prohibition of international travel by members' of the Communist Party. In a

subsequent decision the Court upheld the Government's refusal to issue passports for travel to Cuba, because the refusal was on foreign policy consideration affecting all citizens [Zemel v. Rusk (supra)]. Thus an American's citizen's right to travel abroad may also be restricted under certain conditions. Our Constitution provides for restriction of the rights by 'procedure established by law'. It will be necessary to consider whether the impugned Act, Passport Act satisfies the requirements of procedure established by law.

216. The procedure established by law does not mean procedure, however, fantastic and oppressive or arbitrary which in truth and reality is no procedure at all [(A. K. Gopalan v. State of Madras MANU/SC/0012/1950 : 1950CriLJ1383 observations of Mahajan, J.]. There must be some procedure and at least it must confirm to the procedure established by law must be taken to mean as the ordinary and well established criminal procedure, that is to say, those settled usages and normal modes of proceedings, sanctioned by the Criminal Procedure Code which is a general law of Criminal procedure in the Country. But as it is accepted that procedure established by law refers to statute law and as the legislature is competent to change the procedure the procedure as envisaged in the criminal procedure cannot be insisted upon as the legislature can modify the procedure. The Supreme Court held in Kartar Singh's case [1963] 1 S.C.R. 332 that Regulation 236 Clause (b) of the U.P. Police Regulation which authorises domiciliary visits when there was no law on such a regulation, violated Article 21.

217. I will not proceed to examine the provisions of Passport Act, Act 15 of 1967, to determine whether the provisions of the Act are in accordance with the procedure established by law.

218. The Preamble states that the Act is to provide for the issue of passports and travel documents to regulate the departure from India of citizens of India and other persons and formatters incidental or ancillary thereto. It may be remembered that this Act was passed after the Supreme Court had held in Satwant Singh v. Union of India MANU/SC/0040/1967 : [1967]3SCR525 that the right to tavel abroad is a part of person's personal liberty of which he could not be deprived except in accordance with the procedure established by law in terms of Article 21 of the Constitution. The legislature came forward with this enactment prescribing the procedure for issue of passports for regulating the departure from India of citizens and others.

219. Section 5 of the Act provides for applying for passports or travel documents etc. and the procedure for passing orders thereon. On receipt of an application under Sub-section (2) the passport authority may issue a passport or a travel document with endorsement in respect of the foreign countries specified in the application or issue of a passport or travel document with ; endorsement in respect of some foreign countries and refuse to make an endorsement in respect of other countries or to refuse to issue a passport or travel document and to refuse to make on the passport or travel document any endorsement. In the event of the passport authority refusing to make an endorsement as applied for or refusal to issue a passport or a travel document or refusal of endorsement, the authority is required to record in writing a brief statement of its reasons and furnish to that person, on demand, a copy thereof unless the authority for reasons specified in Sub-section (3) refuses to furnish a copy. Section 6 provides that the refusal to make an endorsement shall be on one or other grounds mentioned in Sub-sections (2) to (6). Section 8 provides that every passport shall be renewable for the same period for which the passport was originally issued unless the passport authority for reasons to be recorded in witing otherwise determines.

220. Section 10 is most important as the impounding of the passport of the petitioner was ordered: under Section 10(3)(c) of the Act. Section 10(1) enables the passport authority to vary or cancel the endorsement on a passport or travel document or may with the previous approval of the Central Government, vary or cancel the conditions subject to which a passport or travel document has been issued, and require the holder of a passport or a travel document by notice in writing, to deliver up the passport or travel document to it within such time as may be specified in the notice. Sub-section (2) enables the holder of a passport or a travel document to vary or cancel the conditions of the passport.

221. Section 10(3) with which we are concerned runs as follows :

10(3).- The passport authority may impound or cause to be impounded or revoke a passport or travel document,-

(a) If the passport authority is satisfied that the holder of the passport or travel document is in wrongful possession of;

(b) If the passport or travel document was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the passport or travel document or any other person on his behalf;

(c) If the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the. security of India, friendly relations of India with any foreign country, or in the interests of the general public;

(d) If the holder of the passport or travel document has, at any time after the issue of the passport or travel document, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(c) If proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India;

(f) If any of the conditions of the passport or travel document has been contravened;

(g) If the holder of the passport or travel document has failed to comply with a notice under Sub-section (1) requiring him to deliver up the same.

(h) If it is brought to the notice of the passport authority that a warrant or summons for the appearance or a warrant for the arrest, of the holder of the passport or travel document has been issued by a court under any law for the time being in force or if an order prohibiting the departure from India of the holder of the passport or other travel document has been made by any such court and the passport authority is satisfied that a warrant or summons has been So issued or an order has been so made.

Section 10(3)(c) enables the passport authority to impound or revoke a passport if the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the

security of India, friendly relations of India with any foreign country, or in the interests, of the general public.

222. Section 10(5) requires the passport authority to record in writing a brief statement of the reasons for making an order under Sub-section (1) or (3) and to furnish the holder of the passport on demand a copy of the same unless in any case the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy. Section 11 provides for an appeal by the aggrieved person against any order passed by the passport authority under several clauses mentioned in Sub-section (1) of that section. It is also provided that no appeal shall lie against any order passed by the Central Government. Section 11(5). provided that in disposing of an appeal, the appellate authority shall follow such procedure as may be prescribed and that no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of representing his case. Rue 14 of the Passport Rules, 1967 prescribes that the appellate authority may call for the records of the case from the authority who passed the order appealed against and after giving the appellant a reasonable opportunity of representing his case pass final orders.

223. To sum up under Section 10(3)(c) if the passport authority deems it necessary so to do for reasons stated in the sub-section, he may impound a passport. He is required to record in writing a brief statement of the reasons for making such order and to furnish a copy of the order on demand unless in any case he thinks for reasons mentioned in Sub-section (5) that a copy should not be furnished. Except against an order passed by the Central Government the aggrieved person has a right of appeal. The appellate authority is required to give a reasonable opportunity to the aggrieved person of representing his case.

224. It was submitted on behalf of the petitioner that on a reading of Section 10(3) observance of rules of natural justice, namely the right to be heard, is implied and as the Government had failed to give an opportunity to the petitioner to explain her case the order is unsustainable. In the alternative it was submitted that if Section 10(3)(c) is construed as denying the petitioner an opportunity of being heard and by the provisions of Section 11 a right of appeal against an order passed by the Central Government is denied the provisions will not be procedure as established by law under Article 21 and the relevant sections should be held ultra vires of the powers of the legislature. It was contended that the power conferred on the authority to impound a passport in the interests of general public is very vague and in the absence of proper guidance an order by the authority impounding the passport "in the interests of general public" without any explanation is not valid. The last ground may easily be disposed of. The words 'in the interests of general public' no doubt are of a wide connotation but the authority in construing the facts of the case should determine whether in the interests of public the passport will have to be impounded. Whether the reason's given have annexus to the interests of general public would depend upon the facts of each case. The plea that because of the vagueness of the words 'interests of the general public' in the order, the order itself is unsustainable, cannot be accepted.

225. The submission that in the context the rule of natural justice, that is, the right to be heard has not been expressly or by necessary implication taken away deserves careful consideration. Under Section 10(3) the passport authority is authorised to impound or revoke a passport on any of the

grounds specified in Clauses (a) to (h) of Sub-section (3). Sub-section 3(a) enables the authority to impound a passport if the holder of the passport is in wrongful possession thereof, Under Sub-section 3(b) the authority can impound a passport if it was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the passport. Under Clause (d) a passport can be impounded if the holder had been convicted by a Court of India for any offence involving moral turpitude and sentenced to imprisonment for not less than two years. Under Clause (e) the passport can be impounded where proceedings in respect of an offence alleged to have been committed by the holder of a passport is pending before a criminal court in India. Clause (4) enables the authority to impound the passport if any of the conditions of the passport have been contravened. Under Clause (g) the passport authority can act if the holder of the passport had failed to comply with a notice under Sub-section (1) requiring him to deliver up the same. Under Sub-clause (h) a passport may be impounded if it is brought to the notice of the passport authority that a warrant or summons for appearance of the holder of the passport has been issued by any court or if there is an order prohibiting departure from India of the holder of the passport has been made by a court. It will be noticed that when action is contemplated under any of the Clauses (a), (b), (d), (e), (f) and (h), it is presumed that the authority will give notice, for the passport authority cannot be satisfied under Sub-clause (a) that the holder is in wrongful possession thereof or under Clause (b) that he obtained the passport by suppression of material information. Similarly under Clause (d) whether a person has been convicted by a court in India for any offence involving moral turpitude and sentenced to imprisonment for not less than two years, can only be ascertained after hearing the, holder of the passport. Under Clause (e) the fact whether proceedings in respect of an offence alleged to have been committed by the holder of the passport are pending before a criminal court can only be determined after notice to him. Equally whether a condition of passport has been. contravened under Sub-clause (f) or whether he has failed to comply with a notice under Sub-section (1) can be ascertained only after hearing the holder of the passport. Under Clause (h) also a hearing of the holder of the passport is presumed. Reading Clause (C) in juxtaposition with other sub-clauses, it will have to determined whether it was the intention of the legislature to deprive a right of hearing to the holder of the passport before it is impounded or revoked. In this connection, it cannot be denied that the legislature by making an express provision may deny a person the right to be heard. Rules of natural justice cannot be equated with the Fundamental Rights. As held by the Supreme Court in Union of India v. J. N. Sinha MANU/SC/0500/1970 : (1970)IILLJ284SC , that "Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental Rights. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice, the courts should do so. But if a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice." So also the right to be heard cannot be presumed when in the circumstances of the case, there is paramount need for secrecy or when a decision will have to be taken in emergency or when promptness of action is called for where delay would" defeat the very purpose or where it is expected that the person affected Would take an obstructive attitude. To a limited extent it may be necessary to revoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the passport authority or the Government to revoke or impound the passport. But that by itself would not justify denial of an

opportunity to the holder of the passport to state his case before a final order is passed. It cannot be disputed that the legislature has not by express provision excluded the right to be heard. When the passport authority takes action under Section 10(5) he is required to record in writing a brief statement of reasons and furnish a copy to the holder of the passport on demand unless he for sufficient reasons considers it not desirable to furnish a copy. An order thus passed is subject to an appeal where an appellate authority is required to give a reasonable opportunity to the holder of the passport to put forward his case. When an appeal has to be disposed of after given for a specified period the revocation or impounding during the without hearing the aggrieved person. Further when a passport is given for a specified period the revocation or impounding during the period when the passport is valid can only be done for some valid reason. There is a difference between an authority revoking or modifying an order already passed in favour of a person and initially refusing to grant a licence. In Purtabpur Co. v. Cane Commissioner, Bihar MANU/SC/0016/1968 : [1969]2SCR807 , the Supreme Court held that "it would not be proper to equate an order revoking of modifying a licence with a decision not to grant a licence." In Schmidt v. Secretary of State, Home Affairs [1969] 2 Ch. 149, Lord Denning observed that "If his permit (alien) is revoked before the time limit expires he ought, I think, to be given an opportunity of making representation; for he would have a legitimate expectation of being allowed to stay for the permitted time. Lord Denning extended the application of the rule of audi alteram partem even in the case of a foreign alien who had no right to enter the country. When a permit was granted and was subsequently sought to be revoked it has to be treated differently from that of refusing permission at the first instance. As in the present case the passport which has been granted is sought to be impounded the normal presumption is that the action will not be taken without giving a opportunity to the holder of the passport. Section 10(3) in enumerating the several grounds on which the passport authority may impound a passport has used the words like 'if the authority is satisfied', "the authority deems it necessary to do so." The Privy Council in Duravappah v. Fernando [1967] 2 A. C. 337 after referring to an earlier decision in Sugathadasa v. Jayasinghe [1958] 59 N.L.R. 457 disagreed with the decision holding "As a general rule that words such as 'where it appears to... or 'if it appears to the satisfaction of... or 'if the...considers it expedient that....' or 'if the...is satisfied that....' standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially.", The Privy Council in disagreeing with this approach observed that these various formulae are introductory of the matter to be considered and are given little guidance upon the question of audi alteram partem. The statute can make itself clear on this point and if it does credit question. If it does not then the principle laid down in Cooper v. Wardsworth Board of Works 1723 1 Str. 557 ; Mod. Rep. 148 where Byles, J. stated "A long course of decision, beginning with Dr. Bentley's case, and ending with some very recent cases, establish, that although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." In the circumstances, there is no material for coming to the conclusion that the right to be heard has been taken away expressly or by necessary implication by the statute.

226. I may at this stage refer to the stand taken by the learned Attorney-General on this question. According to him "on a true construction, the rule audi alteram partem is not excluded in ordinary cases and that the correct position is laid down by the Bombay High Court in the case of Minoo Maneckshaw v. Union of India 76 B.L.R. (1974) 788. The view taken by Tulzapurkar,, J. is that the rule of audi alteram partem is not excluded in making an order under Section 10(3)(c) of the Act. But the Attorney General in making the concession submitted that the rule will not apply

when special circumstances exist such as need for taking prompt action due to the urgency of the situation or where the grant of opportunity would defeat the very object for which the action of impounding is to be taken. This position is supported by the decision of Privy Council in De Verteuil v. Knaggs [1918] A. C. 557 wherein it was stated 'it must, however, be borne in mind that there may be special circumstances which would satisfy a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice." This extraordinary step can be taken by the passport authority for impounding or revoking a passport when he apprehends that the passport holder may leave the country and as such prompt action is essential. These observations would justify the authority to impound the passport without notice but before any final order is passed the rule of audi alteram partem would apply and the holder of the passport will have to be heard. I am satisfied that the petitioner's claim that she has a right to be heard before a final order under Section 10(3)(c) is passed is made out. In this view the question as to whether Section 10(3)(c) is ultra vires or not does not arise.

227. It was submitted on behalf of the state that an order under Sub-clause 10(3)(c) is on the subjective satisfaction of the passport authority and that as the decision is purely administrative in character it cannot be questioned in a court of law except on very limited grounds. Though the courts had taken the view that the principle of natural justice is inapplicable to administrative orders, there is a change in the judicial opinion subsequently. The frontier between judicial or quasi judicial determination on the one hand and an executive or administrative determination on the other has become blurred. The rigid view that principles of natural justice applied only to judicial and quasi judicial acts and not to administrative acts no longer holds the field. The views taken by the courts on this subject are not consistent. While earlier decisions were in favour of administrative convenience and efficiency at the expense of natural justice the recent view is in favour of extending the application of natural justice and the duty to act fairly with a caution that the principle should not be extended to the extreme so as to affect adversely the administrative efficiency. In this connection it is useful to quote the oft-repeated observations of Lord Justice Tucker in Russell v. Duke of Norfolk [1949] 1 All E.R. 109 "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth...but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." In R. v. Gaming Board Ex. p. Benaim [1970] 2 Q.B. 417 Lord Denning held that the view that the principle of natural justice applied only to judicial proceedings and not to administrative proceedings has been over-ruled in Ridge v. Baldwin [1964] A.C. 40. The guidance that was given to the Gaming Board was that they should follow the principles laid down in the case of immigrants namely that they have no right to come in, but they have a right to be heard. The Court held in construing the words the Board "Shall have regard only" to the matter specified, the Board has a duty to act fairly and it must give the applicant an opportunity of satisfying them of the matter specified in the section. They must let him know what their impressions are so that he can disabuse them. The reference to the cases of immigrants is to the decisions of Chief Justice Parker in Re H. K. (An infant) [1967] 2 Q.B. 617, at 630. In cases of immigrants though they had no right to come into the country it was held that they have a right to be heard. These observations apply to the present case and the plea of the petitioner that the authority should act fairly and that they must let her know what their impressions are so that, if possible, she can disabuse them, is sound.

228. In American law also the decisions regarding the scope of judicial review is not uniform. So far as constitutional rights are involved due process of law imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as the questions of law are concerned but the extent to which the Court should go and will go in reviewing determinations of fact has been a highly controversial issue.

(Constitution of the United States of America, P. 1152, 1973 Ed.)

229. On a consideration of various authorities it is clear that where the decision of the authority entails civil consequence's and the petition is prejudicially affected he must be given an opportunity to be heard and present his case. This Court in Barium Chemicals Ltd. v. Company Law Board [1966] Supp. S.C.R. 311 and Rohtas Industries Ltd. v. S. D. Agrawal MANU/SC/0020/1968 : [1969]3SCR108 , has held that a limited judicial scrutiny of the impugned decision on the point of rational and reasonable nexus was open to a court of law. An order passed by an authority based on subjective satisfaction is liable to judicial scrutiny to a limited extent has been laid down in V.P. Electric Co. v. State of U.P. MANU/SC/0074/1969 : [1969]3SCR865 wherein construing the provisions of Section 3(2)(e) of the Indian Electricity Act 9 of 1910 as amended by the U.P. Act 30 of 1961, where the language used is. similar to Section 10(3)(c) of the Passport Act, this Court held that when the Government exercises its power on the ground that it "deems such supply necessary in public interest" if challenged, the Government must make out that exercise of the power was necessary in the public interest. The Court is not intended to sit in appeal over the satisfaction of the Government. If there is prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy to consumers the requirements of the statute are-fulfilled. "In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review." The decisions cited are clear authority for the proposition that the order passed under Section 10(3)(c) is subject to a limited judicial scrutiny. An order under Section 10(3)(c) though it is held to be an administrative order passed on the subjective satisfaction of the authority cannot escape judicial scrutiny. The Attorney General fairly conceded that an order under Section 10(3)(c) is subject to a judicial scrutiny and that it can be looked into by the court to the limited extent of satisfying itself whether the order passed has a rational and reasonable nexus to the interests of the general public.

230. It was next contended on behalf of the petitioner that the provisions of Section 10(5) of the Act which empowers the Passport authority or the Government to decline furnishing the holder of the passport a brief statement of the reasons for making an order if the authority is of the opinion that) it will not be in the interest of sovereignty and integrity of India, security of India, friendly relations of India with any foreign country, or in the interests of the general public is unsustainable in law. It was submitted that along with the right to refuse to furnish a copy of the order made by the Government, as a right of appeal is denied against am order made by the Central Govt. the provisions should be regarded as total denial or procedure and arbitrary. In view of the construction which is placed on Section 10(3)(c) that the holder of the passport is entitled to be heard before the passport authority deems it necessary to impound a passport, it cannot be said that there is total denial of procedure. The authority under Section 10(5) is bound to record in writing a brief statement of the reasons for making an order and furnish to the holder of the passport or travel document on demand a copy of the same, unless in any case, the passport authority is of the opinion

that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relation of India with any foreign country or in the interests of general public to furnish such a copy. The grounds on which the authority may refuse to furnish the reasons are the same as provided in Section 10(3)(c) for impounding a passport but the two powers are exercisable in totally different contexts. Under Section 10(3), the question that has to be considered is whether the passport has to be impounded in the interests of sovereignty and integrity of India etc. or in the interests of general public. In passing an order under Section 10(5) it has to be considered whether in the interests of the sovereignty and integrity of India etc. or in the interests of general public, furnishing of a copy of the reasons for the order, should be declined. Though the same grounds are mentioned for impounding a passport as well as for refusing to furnish the reasons for making an order, it would not mean that when an order under Section 10(3)(c) is passed it would automatically apply to Section 10(5) and for the same reason the authority can decline to furnish the reasons for the order. Section 10(5) says that the authority shall furnish to the holder of the passport on demand a copy unless in any case the authority is of opinion that it will not be in the interests of sovereignty and integrity of India etc. The expression "unless in any case" would indicate that it is not in every case that the authority can decline to furnish reasons for the order. There may be some cases, and I feel that it can be only in very rare cases, that a copy containing the reasons for making such order can be refused. Though rare there may be some cases in which it would be expedient for the authority to decline to furnish a copy of the reasons for making such order. But that could only be an exception is indicated from the fact that the aggrieved person, has a right of appeal under Section 11 which has to be decided after giving a reasonable opportunity of representing his case. A reasonable opportunity cannot ordinarily be given without disclosing to that person the reasons for the order. In those rare cases in which a copy for the reasons of the order is declined by the passport authority and is not furnished during the hearing of the appeal, it would furnish sufficient justification for the courts to have a close look into the reasons for the order and satisfy itself whether it has been properly made. But I am unable to say that a. provision which empowers the authority to decline to furnish reasons for making the order is not within the competence of the legislature. The learned Counsel for the petitioner, with some justification, submitted that if no reasons are furnished by the Govt. and no appeal is provided against the order of the Govt. it would virtually amount to denial of procedure established by law as contemplated under Article 21 of the Constitution of India. Though there is considerable force in this submission. I am unable to accept this plea for two reasons. Firstly, the Govt. is bound to give an opportunity to the holder of the passport before finally revoking or impounding it. I expect the case in which the authority declines to furnish reasons for making such an order would be extremely rare. In such cases it should be borne in mind that when the Govt. itself passes an order it should be presumed that it would have made the order after careful scrutiny. If an order is passed by the passport authority, an appeal is provided. If the Govt. passes. an order, though no appeal is provided for, but as the power is vested in the highest authority the section is not unconstitutional-(Chinta Lingam and Ors, v. Government of India and Ors. MANU/SC/0045/1970 : [1971]2SCR871 for the order, would be subject to judicial scrutiny by the High Court and the Supreme; Court. I feel that in the circumstances there is no justification for holding that Section 10(5) of the Act is ultra vires of the powers of the legislature. We have taken note of the fact that in the present case there is no reason in declining to furnish to the petitioner the statement of reasons for impounding the passport, but such a lapse by the authority would not make Section 10(5) ultra vires of the powers of the legislature.

231. It was next contended that in the present case the passport was impounded under Section 10(3)(c) of the Act on the ground that (a) it is in the public interest that Smt. Maneka Gandhi should be able to give evidence before the Commission of Inquiry and, (b) that Smt. Maneka Gandhi should have an opportunity to present her views before the Commission of Inquiry and according to a report received there is likelihood of Smt. Maneka Gandhi leaving India. It was submitted that impounding of the passport on the ground stated above is unjustified.. Referring to Section 10(3)(h) where it is provided that when it is brought to the notice of the passport authority that a warrant or summons for appearance or a warrant 'for the arrest of the holder of the passport has been issued by a court under any law for the time being in force or if an order prohibiting the departure from India of the holder of the passport or other travel document has been made by any such court and the passport authority is satisfied that a warrant or summons has been so issued or an order has been so made, impound the passport. For application of this clause there must be a warrant or summons from the court or an order by the Court prohibiting the departure from India. It was submitted that it is not certain whether the Commission would require the presence of the petitioner at all and if required when her presence will be necessary. There had been no summons, or any requisition from the Commission of Inquiry requiring the petitioner's presence and in such circumstances it was submitted that the order is without any justification. A notification issued by the Ministry of External Affairs under Section 22(a) of the Passports Act on 14-4-76 was brought to our notice. By that notification the Central Govt. considered that it is necessary in the public interest to exempt citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and if. they produce orders from the Court concerned permitting them to depart from India from the operations of the provisions of Clause (f) of Sub-section (2) of Section 6 of the Act subject to the condition that the passport will be issued to such" citizen only for a period specified in such order of the Court and if no period is specified the passport shall be issued for a period of six months and may be renewed for a further period of six months if the order of the court is not cancelled or modified. The citizen is also required to give an undertaking to the passport authority that he shall, if required by the court concerned, appear before if at any time during the continuance in force of the passport so issued. It was submitted that when such facility is provided for a person who is being tried for an offence in a criminal court the same facility at least should be given to a person who may be required to give evidence before a Commission of Inquiry. It is unnecessary for me to go into the question as to whether in the circumstances the impounding of the passport is justified or not for the learned Attorney General submitted that the impounding was for the purpose of preventing the petitioner from leaving the country and that a final decision as to whether the passport will have to be impounded and if so for what period will be decided later. On behalf of the Government a statement was filed which is as follows :-

1. The Government is agreeable to considering any representation that may be made by the petitioner in respect of the impounding of her passport and giving her an opportunity in the matter. The opportunity will be given within two weeks of the receipt of the representation. It is clarified that in the present case, the grounds for impounding the passport are those mentioned in the affidavit in reply dated 18th August, 1977 of Shri Ghosh except those mentioned in para 2(i)

2. The representation of the petitioner will be dealt with expeditiously in accordance with law.

3. In the event of the decision of impounding the passing having confirmed, it is clarified that the duration of the impounding will not exceed a period of six months from the date of the decision that may be taken on the petitioner's representation.

4. Pending the consideration of the petitioner's representation and until the decision of the Government of India thereon, the petitioner's passport shall remain in custody of this Honourable Court.

5. This will be without prejudice to the power of the Government of India to take such action as it may be advised in accordance with the provisions of the Passport Act in respect of the petitioner's passport.

In view of the statement that the petitioner may make a representation in respect of impounding of passport and that the representations will be dealt with expeditiously and that even if the impounding of the passport is confirmed it will not exceed a period of six months from the date of the decision that may be taken on the petitioner's representation, it is not necessary for me to go into the merits of the case any further. The Attorney General assured us that all the grounds urged before us by the petitioner and the grounds that may be urged before the authority will be properly considered by the authority and appropriate orders passed.

232. In the result, I hold that the petitioner is not entitled to any of the fundamental rights enumerated in Article 19 of the Constitution and that the Passport Act complies with the requirements of Article 21 of the Constitution and is in accordance with the procedure established by law. I construe Section 10(3)(c) as providing a right to the holder of the passport to be heard before the passport authority and that any order passed under Section 10(3) is subject to a limited judicial scrutiny by the High Court and the Supreme Court.

233. In view of the statement made by the learned Attorney General to, which reference has already been made in judgment, I do not think it necessary to formally interfere with the impugned order. I accordingly dispose of the Writ Petition without passing any formal order. There will be no order as to costs.

234. Having regard to the majority view, and, in view of the statement made by the learned Attorney-General to which reference, has already been made in the judgments we do not think it necessary to formally interfere with the impugned order. We, accordingly, dispose of the Writ Petition without passing any formal order. The passport will remain in the custody of the Registrar of this Court until further orders. There will be no order as to costs.

Back to Index

MANU/SC/0002/1988

Neutral Citation: 1988/INSC/123

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 468 of 1986

Decided On: 29.04.1988

Appellants: A.R. Antulay **Vs.** Respondent: R.S. Nayak and Ors.

Hon'ble Judges/Coram:

B.C. Ray, G.L. Oza, M.N. Venkatachaliah, Ranganath Misra, S. Natarajan, S. Ranganathan and Sabyasachi Mukherjee, JJ.

Subject: Criminal

Subject: Law of Evidence

Relevant Section:

Indian Penal Code, 1860 (IPC) - Section 120; Code of Criminal Procedure, 1973 (CrPC) - Section 197

Authorities Referred:

Halsbury's Laws of England, 4th Edn. Vol. 10 & 26; Amnon Rubinstein 'Jurisdiction and Illegality' 1965 Edn.; Dias on Jurisprudence, 5th Edn.; Sutherland Statutory

Prior History:

From the Judgment and Order dated July 24, 1986 of the High Court of Bombay in Special Case No. 24 of 1982

Disposition:
Appeal Allowed

Cases Overruled/Partly Overruled:

R.S. Nayak vs. A.R. Antulay, MANU/SC/0102/1984

Case Note:

Criminal - Jurisdiction - Section 6 of Criminal Law Amendment Act, 1952 - Judge of High Court, to whom cases were referred as per direction of Supreme Court, proceeded to frame as many as 79 charges against Appellant and decided not to proceed against other named co-conspirators - Hence, this Appeal - Whether, case which was triable under 1952 Act only by a Special Judge appointed under Section 6 of Act could be transferred to High Court for trial by itself - Held, under Section 406 of Code provided power of transfer from one Special Judge to another Special Judge - It was observed that directions had been given without hearing Appellant though it appeared from circumstances that order was passed in the presence of counsel for Appellant - Further, Section 7(1) of 1952 Act created a condition which was sine qua non for trial of offenders under Section 6(1) of that Act - Therefore, offences specified under Section 6(1) of 1952 Act were those punishable under Sections 161, 162, 163, 164 and 165A of Indian Penal Code and Section 5 of 1947 Act - Therefore, order of transferring cases to High Court was not authorised by law - Court, by its directions could not confer jurisdiction on High Court to try any case which it did not possess such jurisdiction under scheme of 1952 Act - Therefore, legal wrong had been caused to Appellant - Appeal allowed.

Ratio Decidendi:

"One wrong cannot be remedied by another wrong."

JUDGMENT

1. The main question involved in this appeal, is whether the directions given by this Court on 16th February, 1984. as reported in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 were legally proper. The next question is, whether the action and the trial proceedings pursuant to those directions, are legal and valid. Lastly, the third consequential question is, can those directions be recalled or set aside or annulled in those proceedings in the manner sought for by the appellant. In order to answer these questions certain facts have to be borne in mind.

2. The appellant became the Chief Minister of Maharashtra on or about 9th of June, 1980. On 1st of September, 1981, respondent No. 1 who is a member of the Bharatiya Janta Party applied to the Governor of the State under Section 197 of the Criminal Procedure Code, 1973 (hereinafter referred to as the Code) and Section 6 of the Prevention of Corruption Act, 1947 (hereinafter referred to as the Act) for sanction to prosecute the appellant. On nth of September, 1981, respondent No. 1 filed a complaint before the Additional Metropolitan Magistrate, Bombay against the appellant and other known and unknown persons for alleged offence under Sections 161 and 165 of the Indian Penal Code and Section 5 of the Act as also under Sections 384 and 420 read with Sections 109 and 120B of the Indian Penal Code. The learned Magistrate refused to take cognizance of the offences under the Act without the sanction for prosecution. Thereafter a criminal revision application being C.R.A. No. 1742 of 1981 was filed in the High Court of Bombay, by respondent No. 1.

3. The appellant thereafter on 12th of January, 1982 resigned from the position of Chief Minister in deference to the judgment of the Bombay High Court in a writ petition filed against him. In CRA No. 1742 of 1981 filed by respondent No. 1 the Division Bench of the High Court held that sanction was necessary for the, prosecution of the appellant and the High Court rejected the request of respondent No. 1 to transfer the case from the Court of the Additional Chief Metropolitan Magistrate to itself.

4. On 28th of July, 1982, the Governor of Maharashtra granted sanction under Section 197 of the Code and Section 6 of the Act in respect of five items relating to three subjects only and refused sanction in respect of all other items.

5. Respondent No. 1 on 9th of August, 1982 filed a fresh complaint against the appellant before the learned Special Judge bringing in many more allegations including those for which sanction was refused by the Governor. It was registered as a Special Case No. 24 of 1982. It was submitted by respondent No. 1 that there was no necessity of any sanction since the appellant had ceased to be a public servant after his resignation as Chief Minister.

6. The Special Judge, Shri P.S. Bhutta issued process to the appellant without relying on the sanction order dated 28th of July, 1982. On 20th of October, 1982, Shri P.S. Bhutta overruled the appellant's objection to his jurisdiction to take cognizance of the complaint and to issue process in the absence of a notification under Section 7(2) of the Criminal Law Amendment Act, 1952 (hereinafter referred to as 1952 Act) specifying which of the three Special Judges of the area should try such cases.

7. The State Government on 15th of January, 1983 notified the appointment of Shri R.B. Sule as the Special Judge to try the offences specified under Section 6(1) of the 1952 Act. On or about 25th of July 1983, it appears that Shri R.B. Sule, Special Judge discharged the appellant holding that a member of the Legislative Assembly is a public servant and there was no valid sanction for prosecuting the appellant.

8. On 16th of February, 1984, in an appeal filed by respondent No. 1 directly under Article 136, a Constitution Bench of this Court held that a member of the Legislative Assembly is not a public servant and set aside the order of Special Judge Sule. Instead of remanding the case to the Special Judge for disposal in accordance with law, this Court suo motu withdrew the Special Cases No. 24/82 and 3/83 (arising out of a complaint filed by one P.B. Samant) pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule and transferred the same to the Bombay High Court with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court for holding the trial from day to day. These directions were given, according to the appellant, without any pleadings, without any arguments, without any such prayer from either side and without giving any opportunity to the appellant to make his submissions before issuing the same. It was submitted that the appellant's right to be tried by a competent court according to the procedure established by law enacted by Parliament and his rights of appeal and revision to the High Court under Section 9 of the 1952 Act had been taken away.

9. The directions of this Court mentioned hereinbefore are contained in the decision of this Court in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 . There the Court was

mainly concerned with whether sanction to prosecute was necessary. It was held that no such sanction was necessary in the facts and circumstances of the case. this Court further gave the following directions:

The accused was the Chief Minister of a premier State-the State of Maharashtra. By a prosecution launched as early 'as on September 11, 1981, his character and integrity came under a cloud. Nearly two and a half years have rolled by and the case has not moved an inch further. An expeditious trial is primarily in the interest of the accused and a mandate of Article 21. Expeditious disposal of a criminal case is in the interest of both the prosecution and the accused. Therefore, Special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of Special Judge, Greater Bombay Shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day.

10. The appellant as mentioned hereinbefore had appeared before the Special Judge and objected to the jurisdiction of the learned Judge on the ground that the case had not been properly allocated to him by the State Government. The Special Judge Bhutta after hearing the parties had decided the case was validly filed before him and he had properly taken cognizance. He based his order on the construction of the notification of allocation which was in force at that time. Against the order of the learned Special Judge rejecting the appellant's contention, the appellant filed a revision application in the High Court of Bombay. During the pendency of the said revision application, the Government of Maharashtra issued a notification appointing Special Judge R.B. Sule, as the Judge of the special case. It is the contention of the respondents before us that the appellant thereafter did not raise any further objection in the High Court against cognizance being taken by Shri Bhutta. It is important to take note of this contention because one of the points urged by Shri Rao on behalf of the appellant was that not only we should set aside the trial before the High Court as being without jurisdiction but we should direct that no further trial should take place before the Special Judge because the appellant has suffered a lot of which we shall mention later but also because cognizance of the offences had not been taken properly. In order to meet the submission that cognizance of the offences had not been taken properly, it was urged by Shri Jethmalani that after the Government Notification appointing Judge Sule as the Special Judge, the objection that cognizance of the offences could not be taken by Shri Bhutta was not agitated any further. The other objections that the appellant raised against the order passed by Judge Bhutta were dismissed by the High Court of Bombay. Against the order of the Bombay High Court the appellant filed a petition under Article 136 of the constitution. The appeal after grant of leave was dismissed by a judgment delivered on 16th February, 1984 by this Court in A.R. Antulay v. Ramdas Sriniwas Nayak and Anr. MANU/SC/0082/1984 : 1984CriLJ647 . There at page 954 of the report, this Court categorically observed that a private complaint filed by the complainant was clearly maintainable and that the cognizance was properly taken. This was the point at issue in that appeal. This was decided against the appellant. On this aspect therefore, the other point is open to the appellant. We are of the opinion that this observation of this Court cannot by any stretch of imagination be considered to be without jurisdiction. Therefore, this decision of this Court precludes any scope for argument about the validity of the cognizance taken by Special Judge Bhutta. Furthermore, the case had proceeded further before the Special Judge, Shri Sule and the learned Judge passed an order of discharge on 25th July, 1983. This order was set aside by the

Constitution Bench of this Court on 16th February, 1984, in the connected judgment (vide MANU/SC/0102/1984 : 1984CriLJ613 . The order of taking cognizance had therefore become final and cannot be reagitated. Moreover Section 460(e) of the Code expressly provides that if any Magistrate not empowered by law to take cognizance of an offence on a complaint under Section 190 of the Code erroneously in good faith does so his proceedings shall not be set aside merely on the ground that he was not so empowered.

11. Pursuant to the directions of this Court dated 16th February, 1984, on 1st of March, 1984, the Chief Justice of the Bombay High Court assigned the cases to S.N. Khatri, J. The appellant, it is contended before us, appeared before Khatri, J. and had raised an objection that the case could be tried by a Special Judge only appointed by the Government under the 1952 Act. Khatri, J. on 13th of March, 1984, refused to entertain the appellant's objection to jurisdiction holding that he was bound by the order of this Court. There was another order passed on 16th of March, 1984 whereby Khatri, J. dealt with the other contentions raised as to his jurisdiction and rejected the objections of the appellant.

12. Being aggrieved the appellant came up before this Court by filing special leave petitions as well as writ petition. this Court on 17th April, 1984, in Abdul Rehman Antulay v. Union of India and Ors. etc. [1984] 3 S.C.R. 482 held that the learned Judge was perfectly justified and indeed it was the duty of the learned Judge to follow the decision of this Court which was binding on him. this Court in dismissing the writ petition observed, inter alia, as follows:

In my view, the writ petition challenging the validity of the order and judgment passed by this Court as nullity or otherwise incorrect cannot be entertained. I wish to make it clear that the dismissal of this writ petition will not prejudice the right of the petitioner, to approach the Court with an appropriate review petition or to file any other application which he may be entitled in law to file.

13. D.N. Mehta, J. to whom the cases were transferred from Khatri, J. framed charges under 21 heads and declined to frame charges under 22 other heads proposed by respondent No. 1. this Court allowed the appeal by special leave preferred by respondent No. 1 except in regard to three draft charges under Section 384, I.P.C. (extortion) and directed the Court below to frame charges with regard to all other offences alleged. this Court requested the Chief Justice of the Bombay High Court to nominate another Judge in place of D.N. Mehta, J. to take up the trial and proceed expeditiously to dispose of the case finally. See in this connection R.S. Nayak v. A.R. Antulay and Anr. MANU/SC/0198/1986 : 1986CriLJ1922 .

14. P.S. Shah, J. to whom the cases were referred to from D.N. Mehta, J. on 24th of July, 1986 proceeded to frame as many as 79 charges against the appellant and decided not to proceed against the other named co-conspirators. This is the order impugned before us. Being aggrieved by the aforesaid order the appellant filed the present Special leave Petition (Crl.) No. 2519 of 1986 questioning the jurisdiction to try the case in violation of the appellant's fundamental rights conferred by Articles 14 and 21 and the provisions of the Act of 1952. The appellant also filed Special leave Petition (Crl.) No. 2518 of 1986 against the judgment and order dated 21st of August, 1986 of P.S. Shah, J. holding that none of the 79 charges framed against the accused required sanction under Section 197(1) of the Code. The appellant also filed a Writ Petition No. 542 of

1986 challenging a portion of Section 197(1) of Code as ultra vires Articles 14 and 21 of the Constitution.

15. this Court granted leave in Special Leave Petition (Crl.) No. 2519 of 1986 after hearing respondent No. 1 and stayed further proceedings in the High Court. this Court issued notice in Special Leave Petition (Crl.) No. 2518 and Writ Petition (Crl.) No. 542 of 1986 and directed these to be tagged on with the appeal arising out of Special Leave Petition (Crl.) No. 2519 of 1986.

16. On 11th of October, 1986 the appellant filed a Criminal Miscellaneous Petition for permission to urge certain additional grounds in support of the plea that the origination of the proceedings before the Court of Shri P.S. Bhutta, Special Judge and the process issued to the appellant were illegal and void an initio.

17. this Court on 29th October, 1986 dismissed the application for revocation of special leave petition filed by respondent No. 1 and referred the appeal to a Bench of 7 Judges of this Court and indicated the points in the note appended to the order for consideration of this Bench.

18. So far as SLP (Crl.) No. 2518/86 against the judgment and order dated 21st August, 1986 of P.S. Shah, J. of the Bombay High Court about the absence of sanction under Section 197 of the Code is concerned, we have by an order dated 3rd February, 1988 delinked that special leave petition inasmuch as the same involved consideration of an independent question and directed that the special leave petition should be heard by any appropriate Bench after disposal of this appeal, Similarly, Writ Petition (Crl.) No. 542 of 1986 challenging a portion of Section 197(1) of the Criminal Procedure Code as ultra vires Articles 14 and 21 of the Constitution had also to be delinked by our order dated 3rd February, 1988 to be heard along with special leave petition no 2518 of 1986. This judgment therefore, does not cover these two matters.

19. In this appeal two questions arise, namely, (1) whether the directions given by this Court on 16th of February, 1984 in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 withdrawing the Special Case No. 24/82 and Special Case No. 3/83 arising out of the complaint filed by one shri P.B. Samant pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule, and transferring the same to the High Court of Bombay with a request to the Chief Justice to assign these two cases to a sitting Judge of the High Court, in breach of Section 7(1) of the Act of 1952 which mandates that offences as in this case shall be tried by a Special Judge only thereby denying at least one right of appeal to the appellant was violative of Articles 14 and 21 of the Constitution and whether such directions were at all valid or legal and (2) if such directions were not at all valid or legal in view of the order dated 17th of April, 1984 referred to hereinbefore, is this appeal sustainable or the grounds therein justiciable in these proceedings. In other words, are the said directions in a proceedings inter-parties binding even if bad in law or violative of Articles 14 and 21 of the Constitution and as such are immune from correction by this Court even though they cause prejudice and do injury? These are the basic questions which this Court must answer in this appeal.

20. The contention that has been canvassed before us was that save as provided in Sub-section (1) of Section 9 of the Code the provisions thereof (corresponding to Section 9(1) of the Criminal Procedure Code, 1898) shall so far as they are not inconsistent with the Act apply to the

proceedings before the Special Judge and for purposes of the said provisions the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting the prosecution before a Special Judge shall be deemed to be a public prosecutor. It was submitted 'before us that it was a private complaint and the prosecutor was not the public prosecutor. This was another infirmity which this trial suffered, it was pointed out. In the background of the main issues involved in this appeal we do not propose to deal with this subsidiary point which is of not any significance.

21. The only question with which we are concerned in this appeal is, whether the case which is triable under the 1952 Act only by a Special Judge appointed under Section 6 of the said Act could be transferred to the High Court for trial by itself or by this Court to the High Court for trial by it. Section 406 of the Code deals with transfer of criminal cases and provides power to this Court to transfer cases and appeals whenever it is made to appear to this Court that an order under this section is expedient for the ends of justice. The law provides that this Court may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court. Equally Section 407 deals with the power of High Court to transfer cases and appeals. Under Section 6 of the 1952 Act, the State Government is authorised to appoint as many Special Judges as may be necessary for such area or areas for specified offences including offences under the Act. Section 7 of the 1952 Act deals with cases triable by Special Judges. The question, therefore, is whether this Court under Section 406 of the Code could have transferred a case which was triable only by a Special Judge to be tried by the High Court or even if an application had been made to this Court under Section 406 of the Code to transfer the case triable by a Special Judge to another Special Judge could that be transferred to a High Court, for trial by it. It was contended by Shri Rao that the jurisdiction to entertain and try cases is conferred either by the Constitution or by the laws made by Parliament. He referred us to the powers of this Court under Articles 32, 131, 137, 138, 140, 142 and 145(1) of the Constitution. He also referred to Entry 77 of List I of the Constitution which deals with the Constitution of the courts. He further submitted that the appellant has a right to be tried in accordance with law and no procedure which will deny the equal protection of law can be invented and any order passed by this Court which will deny equal protection of laws would be an order which is void by virtue of Article 13(2) of the Constitution. He referred us to the previous order of this Court directing the transfer of cases to the High Court and submitted that it was a nullity because of the consequences of the wrong directions of this Court, The enormity of the consequences warranted this Court's order being treated as a nullity. The directions denied the appellant the remedy by way of appeal as of right. Such erroneous or mistaken directions should be corrected at the earliest opportunity, Shri Rao submitted.

22. Shri Rao also submitted that the directions given by the Court were without jurisdiction and as such void. There was no jurisdiction, according to Shri Rao, or power to transfer a case from the Court of the Special Judge to any High Court. Section 406 of the Code only permitted transfer of cases from one High Court to another High Court or from a Criminal Court subordinate to one High Court to a Criminal Court subordinate to another High Court. It is apparent that the impugned directions could not have been given under Section 406 of the Code as the Court has no such power to order the transfer from the Court of the Special Judge to the High Court of Bombay.

23. Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offences under Section 6(1) of the said Act. The condition is that *notwithstanding anything contained in the CrPC or any other law, the said offences shall be triable by Special Judges only*. (Emphasis supplied). Indeed conferment of the exclusive jurisdiction of the Special Judge is recognised by the judgment delivered by this Court in A.R. Antulay v. Ramdas Sriniwas Nayak and Anr. MANU/SC/0082/1984 : 1984CriLJ647 where this Court had adverted to Section 7(1) of the 1952 Act and at page 931 observed that Section 7 of the 1952 Act conferred exclusive jurisdiction on the Special Judge appointed under Section 6 to try cases set out in Section 6(1)(a) and 6(1)(b) of the said Act. The Court emphasised that the Special Judge had exclusive jurisdiction to try offences enumerated in Section 6(1)(a) and (b). In spite of this while giving directions in the other matter, that is, R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 , this Court directed transfer to the High Court of Bombay the cases pending before the Special Judge. It is true that Section 7(1) and Section 6 of the 1952 Act were referred to while dealing with the other matters but while dealing with the matter of directions and giving the impugned directions, it does not appear that the Court kept in mind the exclusiveness of the jurisdiction of the Special Court to try the offences enumerated in Section 6.

24. Shri Rao made a point that the directions of the Court were given per incuriam, that is to say without awareness of or advertence to the exclusive nature of the jurisdiction of the Special Court and without reference to the possibility of the violation of the fundamental rights in a case of this nature as observed by a seven Judges Bench decision in The State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 .

25. Shri Ram Jethmalani on behalf of the respondents submitted that the judgment of the Constitution Bench of this Court was delivered on 16th of February, 1984 and counsel for both sides were present and it was neither objected to nor stated by the appellant that he wanted to be heard in regard to the transfer of the trial forum. He submitted that the order of discharge was not only challenged by a special leave petition before this Court but also that a revision application before the High Court being Criminal Revision Application No. 354/83 was filed but the Criminal Revision Application by an order of this Court was withdrawn and heard along with the special leave petition. That application contained a prayer to the effect that the order of discharge be set aside and the case be transferred to the High Court for trial. Therefore, it was submitted that the order of transfer was manifestly just. There was no review against this order. It was submitted that the order of transfer to a superior court cannot in law or in fact ever cause any harm or prejudice to any accused. It is an order made for the benefit of the accused and in the interests of justice. Reliance was placed on Romesh Chandra Arora v. The State MANU/SC/0034/1959 : 1960CriLJ177 . It was further submitted by Shri Jethmalani that a decision which has become final cannot be challenged. Therefore, the present proceedings are an abuse of the process of the Court, according to him. It was further submitted that all the attributes of a trial court were present in a Court of Appeal, an appeal being a continuation of trial before competent Court of Appeal and, therefore, all the qualifications of the trial court were there. The High Court is authorised to hear an appeal from the judgment of the Special Judge under the Act of 1952. It was submitted that a Special Judge except in so far as a specific provision to the contrary is made is governed by all the provisions of the Code and he is a Court subordinate to the High Court. See A.R. Antulay v. R.S. Nayak and Anr. MANU/SC/0082/1984 : 1984CriLJ647 .

26. It was submitted that power under Section 526 of the old Code corresponding to Section 407 of the new Code can be exercised qua a Special Judge. This power, according to Shri Jethmalani, is exercise-able by the High Court in respect of any case under Section 407(1)(iv) irrespective of the Court in which it is pending. This part of the section is not repealed wholly or pro tanto, according to the learned Counsel, by anything in the 1952 Act. The Constitution Bench, it was submitted, consciously exercised this power. It decided that the High Court had the power to transfer a case to itself even from a Special Judge. That decision is binding at least in this case and cannot be reopened, it was urged. In this case what was actually decided cannot be undone, we were told repeatedly. It will produce an intolerable state of affairs. this Court sought to recognise the distinction between finality of judicial orders qua the parties and the reviewability for application to other cases. Between the parties even a wrong decision can operate as res judicata. The doctrine of res judicata is applicable even to criminal trials, it was urged. Reliance was placed on Bhagat Ram v. State of Rajasthan MANU/SC/0090/1972 : 1972CriLJ909 . A judgment of a High Court is binding in all subsequent proceedings in the same case; more so, a judgment which was unsuccessfully challenged before this Court.

27. It is obvious that if a case could be transferred under Section 406 of the Code from a Special Judge it could only be transferred to another Special Judge or a court of superior jurisdiction but subordinate to the High Court. No such court exists. Therefore, under this section the power of transfer can only be from one Special Judge to another Special Judge. Under Section 407 however, corresponding to Section 526 of the old Code, it was submitted the High Court has power to transfer any case to itself for being tried by it, it was submitted (sic).

28. It appears to us that in Gurcharan Das Chadha v. State of Rajasthan [1966] 2 S.C.R. 678 an identical question arose. The petitioner in that case was a member of an All India Service serving in the State of Rajasthan. The State Government ordered his trial before the Special Judge of Bharatpur for offences under Section 120B/161 of the Indian Penal Code and under Sections 5(1)(a) and (d) and 5(2) of the Act. He moved this Court under Section 527 of the old Code praying for transfer of his case to another State on various grounds. Section 7(1) of the Act required the offences involved in that case to be tried by a Special Judge only, and Section 7(2) of the Act required the offences to be tried by a Special Judge for the area within which these were committed which condition could never be satisfied if there was a transfer. this Court held that the condition in Sub-section (1) of Section 7 of the Act that the case must be tried by a Special Judge, is a sine qua non for the trial of offences under Section 6. This condition can be satisfied by transferring the case from one Special Judge to another Special Judge. Sub-section (2) of Section 7 merely distributes, it was noted, work between Special Judges appointed in a State with reference to territory. This provision is at par with the section of the Code which confers territorial jurisdiction on Sessions Judges and magistrates. An order of transfer by the very nature of things must sometimes result in taking the case out of the territory. The third sub-section of Section 8 of the Act preserves the application of any provision of the Code if it is not inconsistent with the Act save as provided by the first two sub-sections of that Section. It was held by this Court that Section 527 of the old Code, hence, remains applicable if it is not inconsistent with Section 7(2) of the Act. It was held that there was no inconsistency between Section 527 of the Code and Section 7(2) of the Act as the territorial jurisdiction created by the latter operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances, and create contradictions. Such a situation does not arise when either this Court or

the High Court exercises the power of transfer. Therefore, this Court in exercise of its jurisdiction and power under Section 527 of the Code can transfer a case from a Special Judge subordinate to one High Court to another Special Judge subordinate to another High Court. It has to be emphasised that that decision was confined to the power under Section 527 of the previous Code and to transfer from one Special Judge to another Special Judge though of another State. It was urged by Shri Jethmalani that Chadha's case (supra) being one of transfer from one Special Judge to another the judgment is not an authority for the proposition that it cannot be transferred to a court other than that of a Special Judge or to the High Court. But whatever be the position, this is no longer open at this juncture.

29. The jurisdiction, it was submitted, created by Section 7 of the Act of 1952 is of exclusiveness qua the Courts subordinate to the High Court. It is not exclusive qua a Court of superior jurisdiction including a Court which can hear an appeal against its decision. The non-obstante clause does not prevail over other provisions of the Code such as those which recognise the powers of the superior Courts to exercise jurisdiction on transfer. It was submitted that the power of transfer vested in the High Court is exercisable qua Special Judges and is recognised not merely by Chadha's case but in earlier cases also, Shri Jethmalani submitted.

30. It was next submitted that apart from the power under Sections 406 and 407 of the Code the power of transfer is also exercisable by the High Court under Article 228 of the Constitution. There is no doubt that under this Article the case can be withdrawn from the Court of a Special Judge. It is open to the High Court to finally dispose it of. A chartered High Court can make orders of transfer under Clause 29 of the Letters Patent. Article 134(1)(b) of the Constitution expressly recognises the existence of such power in every High Court.

31. It was further submitted that any case transferred for trial to the High Court in which it exercises jurisdiction only by reason of the order of transfer is a case tried not in ordinary original criminal jurisdiction but in extraordinary original criminal jurisdiction. Some High Courts had both ordinary criminal jurisdiction as well as extraordinary criminal original jurisdiction. The former was possessed by the High Courts of Bombay, Madras and Calcutta. The first two High Courts abolished it in the 40's and the Calcutta High Court continued it for quite some time and after the 50's in a truncated form until it was finally done away with by the Code. After the Code the only original criminal jurisdiction possessed by all the High Courts is extraordinary. It can arise by transfer under the Code or the Constitution or under Clause 29 of the Letters Patent. It was submitted that it was not right that extraordinary original criminal jurisdiction is contained only in Clause 24 of the Letters Patent of the Bombay High Court. This is contrary to Section 374 of the Code itself. That refers to all High Courts and not merely all or any one of the three Chartered High Courts. In P.P. Front, New Delhi v. K.K. Birla and Ors. MANU/DE/0037/1983 : 23(1983)DLT499 , the Delhi High Court recognised its extraordinary original criminal jurisdiction as the only one that it possessed. The nature of this jurisdiction is clearly explained in Madura, Tirupparankundram etc. v. Alikhan Sahib and Ors. MANU/WB/0033/1931 : 35 C W N 1088 and Sunil Chandra Roy and Anr. v. The State, MANU/WB/0110/1954 : AIR1954Cal305 . Reference may also be made to the Law Commissioner's 41st Report, paragraphs 3.1 to 3.6 at page 29 and paragraph 31.10 at page 259.

32. The 1952 Act was passed to provide for speedier trial but the procedure evolved should not be so directed, it was submitted, that it would violate Article 14 as was held in Anwar Ali Sarkar's case (supra).

33. Section 7 of the 1952 Act provides that notwithstanding anything contained in the CrPC, or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only. So the law provides for a trial by Special Judge only and this is notwithstanding anything contained in Sections 406 and 407 of the CrPC, 1973. Could it, therefore, be accepted that this Court exercised a power not given to it by Parliament or the Constitution and acted under a power not exercisable by it? The question that has to be asked and answered is if a case is tried by a Special Judge or a court subordinate to the High Court against whose order an appeal or a revision would lie to the High Court, is transferred by this Court to the High Court and such right of appeal or revision is taken away would not an accused be in a worse position than others? this Court in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 did not refer either to Section 406 or Section 407 of the Code. It is only made clear that if the application had been made to the High Court under Section 407 of the Code, the High Court might have transferred the case to itself.

34. The second question that arises here is if such a wrong direction has been given by this Court can such a direction inter-parties be challenged subsequently. This is really a value perspective judgment.

35. In Kiran Singh and Ors. v. Chaman Paswan and Ors. MANU/SC/0116/1954 : [1955]1SCR117 Venkatarama Ayyar, J. observed that the fundamental principle is well established that a decree passed by a Court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon-even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

36. This question has been well put, if we may say so, in the decision of this Court in *M.L. Sethi v. R.P. Kapur MANU/SC/0245/1972 :* [1973]1SCR697 where Mathew, J. observed that the jurisdiction was a verbal coat of many colours and referred to the decision in *Anisminic Ltd.* v.*Foreign Compensation Commission* [1969] 2 A.C. 147 where the majority of the House of Lords dealt with the assimilation of the concepts of 'lack' and 'excess' of jurisdiction or, in other words, the extent to which we have moved away from the traditional concept of jurisdiction. The effect of the dicta was to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point. What is a wrong decision on a question of limitation, he posed referring to an article of Professor H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismanic case" and concluded; "it is a bit difficult to understand how an erroneous decision on a question of limitation or *res judicata* would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or decree embodying the decision a nullity liable to collateral attack.... *And there is no yardstick to determine the magnitude of the error other than the opinion of the Court*."

(Emphasis supplied)

37. While applying the ratio to the facts of the present controversy, it has to be borne in mind that Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offenders under Section 6(1) of-that Act. In this connection, the offences specified under Section 6(1) of the 1952 Act are those punishable under Sections 161, 162, 163, 164 and 165A of the Indian Penal Code and Section 5 of the 1947 Act. Therefore, the order of this Court transferring the cases to the High Court on 16th February, 1984, was not authorised by law. this Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case which it did not possess such jurisdiction under the scheme of the 1952 Act. It is true that in the first judgment in A.R. Antulay v. Ramdas Sriniwas Nayak and Anr. MANU/SC/0082/1984 : 1984CriLJ647 when this Court was analysing the scheme of the 1952 Act, it referred to Sections 6 and 7 at page 931 of the Reports. The arguments, however, were not advanced and it does not appear that this aspect with its ramifications was present in the mind of the Court while giving the impugned directions.

38. Shri Jethmalani sought to urge before us that the order made by the Court was not without jurisdiction or irregular. We are unable to agree. It appears to us that the order was quite clearly per incuriam. this Court was not called upon and did not decide the express limitation on the power conferred by Section 407 of the Code which includes offences by public servants mentioned in the 1952 Act to be overridden in the manner sought to be followed as the consequential direction of this Court. this Court, to be plain, did not have jurisdiction to transfer the case to itself. That will be evident from an analysis of the different provisions of the Code as well as the 1952 Act.

The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no Court, whether superior or inferior or both combined can enlarge the jurisdiction of a Court or divest a person of his rights of revision and appeal.
See in this connection the observations in M.L. Sethi v. R.P. Kapur (supra) in which Justice Mathew considered Anisminic [1969] 2 AC 147 and also see Halsbury's Laws of England, 4th Edn. Vol. 10 page 327 at para 720 onwards and also Amnon Rubinstein 'Jurisdiction and Illegality' 1965 Edn. 16. Reference may also be made to Raja Soap Factory v. S.P. Shantaraj MANU/SC/0231/1965 : [1965]2SCR800 .

39. The question of validity, however, is important in that the want of jurisdiction can be established solely by a superior Court and that, in practice, no decision can be impeached collaterally by any inferior Court. But the superior Court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See Rubinstein's Jurisdiction and Illegality' (supra).

40. In the aforesaid view of the matter and the principle reiterated, it is manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution. That is violative of Articles 14 and 19 of the Constitution also, as is evident from the observations of the 7 Judges Bench judgment in Anwar Ali Sarkar's case (supra) where this Court found that even for a criminal who was alleged to have committed an offence, a special trial would be per se illegal because it will deprive the accused of his substantial and valuable privileges of defences which, others similarly charged, were able to claim. As Justice Vivian Bose observed in the said decision at page 366 of the report, it matters not whether it was done in good faith, whether it was done for the convenience of Government,

whether the process could be scientifically classified and labelled, or whether it was an experiment for speedier trial made for the good of society at large. Justice Bose emphasised that it matters not how lofty and laudable the motives were. The question which must be examined is, can fair minded, reasonable, unbiased and resolute men regard that with equanimity and call it reasonable, just and fair, regard it as equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which are obtained in India today. Judged by that view the singling out of the appellant in this case for a speedier trial by the High Court for an offence of which the High Court had no jurisdiction to try under the Act of 1952 was, in our opinion, unwarranted, unprecedented and the directions given by this Court for the said purpose, were not warranted. If that is the position, when that fact is brought to our notice we must remedy the situation. In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reason of any mistake of the Court. The Court, as is manifest, gave its directions on 16th February, 1984. Here no rule of res judicata would apply to prevent this Court from entertaining the grievance and giving appropriate directions. In this connection, reference may be made to the decision of the Gujarat High Court in Soni Vrajlal Jethalal v. Soni Jadavji Govindji and Ors. MANU/GJ/0033/1972 : AIR1972Guj148 . Where D.A. Desai, J. speaking for the Gujarat High Court observed that no act of the court or irregularity can come in the way of justice being done and one of the highest and the first duty of all Courts is to take care that the act of the Court does no injury to the suitors.

41. It appears that when this Court gave the aforesaid directions on 16th February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar's case (supra). See Halsbury's Laws of England, 4th End, Vol. 26, page 297, para 578 and page 300, the relevant notes 8, 11 and 15; Dias on Jurisprudence, 5th Edn., pages 128 and 130; Young v. Bristol Aeroplane Co. Ltd. [1944] 2 AER 293. Also see the observations of Lord Goddard in Moore v. Hewitt [1947] 2 A.E.R. 270-A and Penny v. Nicholas [1950] 2 A.E.R. 89.

"per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.<mpara>
See Morelle v. Wakeling [1955] 1 All E.R. 708. Also see State of Orissa v. The Titaghur Paper Mills Co. Ltd. MANU/SC/0325/1985 : [1985]3SCR26 . We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.

42. The principle that the size of the Bench-whether it is comprised of two or three or more Judges-does not matter, was enunciated in Young v. Bristol Aeroplane Co. Ltd. (supra) and followed by Justice Chinnappa Reddy in Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra MANU/SC/0090/1984 : 1984CriLJ1909 where it has been held that a Division Bench of three Judges should not overrule a Division Bench of two Judges, has not been followed by our Courts. According to well-settled law and various decisions of this Court, it is also well-settled that a Full Bench or a Constitution Bench decision as in Anwar Ali Sarkar's case (supra) was binding on the Constitution Bench because it was a Bench of 7 Judges.

43. The principle in England that the size of the Bench does not matter, is clearly brought out in the decision of Evershed M.R. in the case of Morelle v. Wakeling (supra). The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches. See the observations of this Court in Mattulal v. Radhe Lal MANU/SC/0010/1974 : [1975]1SCR127 , Union of India and Anr. v. K.S. Subramanian MANU/SC/0468/1976 : (1977)ILLJ5SC at page 92 and State of U.P. v. Ram Chandra Trivedi MANU/SC/0465/1976 : (1977)ILLJ200SC . This is the practice followed by this Court and now it is a crystallised rule of law. See in this connection, as mentioned hereinbefore, the observations of the State of Orissa v. Titagarh Paper Mills (supra) and also Union of India and Ors. v. Godfrey Philips India Ltd. [1985] Su. 3 SCR 123.

44. In support of the contention that a direction to delete wholly the impugned direction of this Court be given, reliance was placed on Satyadhvan Ghoshal v. Deorajini Devi MANU/SC/0295/1960 : [1960]3SCR590 . The ratio of the decision as it appears from pages 601 to 603 is that the judgment which does not terminate the proceedings, can be challenged in an appeal from final proceedings. It may be otherwise if subsequent proceedings were independent ones.

45. The appellant should not suffer on account of the direction of this Court based upon an error leading to conferment of jurisdiction.

46. In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions on 16th February, 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by Articles 14 and 21 of the Constitution. The appellant has been treated differently from other offenders, accused of a similar offence in view of the provisions of the Act of 1952 and the High Court was not a Court competent to try the offence. It was directed to try the appellant under the directions of this Court, which was in derogation of Article 21 of the Constitution. The directions have been issued without observing the principle of audi alteram partem. It is true that Shri Jethmalani has shown us the prayers made before the High Court which are at page 121 of the paper-book. He argued that since the transfers have been made under Section 407, the procedure would be that given in Section 407(8) of the Code. These directions, Shri Jethmalani sought to urge before us, have been given in the presence of the parties and the clarificatory order of April 5, 1985 which was made in the presence of the appellant and his Counsel as well as the Counsel of the State Government of Maharashtra, expressly recorded that no such submission was made in connection with the prayer for grant of clarification. We are of the opinion that Shri Jethmalani is not right when he said that the decision was not made per incuriam as submitted by the appellant. It is a settled rule that if a decision has been given per incuriam the Court can ignore it. It is also true that the decision of this Court in the case of The Bengal Immunity Co. Ltd. v. The State of Bihar and Ors. MANU/SC/0083/1955 : [1955]2SCR603 was not regarding an order which had become conclusive inter-parties. The Court was examining in that case only the doctrine of precedents and determining the extent to which it could take a different view from one previously taken in a different case between different parties.

47. According to Shri Jethmalani, the doctrine of per incuriam has no application in the same proceedings. We are unable to accept this contention. We are of the opinion that this Court is not

powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner. See the observations in Prem Chand Garg v. Excise Commissioner, U.P. Allahabad [1963] Su.1 S.C.R. 885.

48. In support of the contention that an order of this Court be it administrative or judicial which is violative of fundamental right can always be corrected by this Court when attention of the Court is drawn to this infirmity, it is instructive to refer to the decision of this Court in Prem Chand Garg v. Excise Commissioner, U.P., Allahabad (supra). This is a decision by a Bench of five learned Judges. Gajendragadkar, J. spoke for four learned Judges including himself and Shah, J. expressed a dissenting opinion. The question was whether Rule 12 of Order XXXV of the Supreme Court Rules empowered the Supreme Court in writ petitions under Article 32 to require the petitioner to furnish security for the costs of the respondent. Article 145 of the Constitution provides for the rules to be made subject to any law made by Parliament and Rule 12 was framed thereunder. The petitioner contended that the rule was invalid as it placed obstructions on the fundamental right guaranteed under Article 32 to move the Supreme Court for the enforcement of fundamental rights. This rule as well as the judicial order dismissing the petition under Article 32 of the Constitution for non-compliance with Rule 12 of Order XXXV of the Supreme Court Rules were held invalid. In order to appreciate the significance of this point and the actual ratio of that decision so far as it is relevant for our present purpose it is necessary to refer to a few facts of that decision. The petitioner and 8 others who were partners of M/s. Industrial Chemical Corporation, Ghaziabad, had filed under Article 32 of the Constitution a petition impeaching the validity of the order passed by the Excise Commissioner refusing permission to the Distillery to supply power alcohol to the said petitioners. The petition was admitted on 12th December, 1961 and a rule was ordered to be issued to the respondents, the Excise Commissioner of U.P., Allahabad, and the State of U.P. At the time when the rule was issued, this Court directed under the impugned rule that the petitioners should deposit a security of Rs. 2,500 in cash within six weeks. According to the practice of this Court prevailing since 1959, this order was treated as a condition precedent for issuing rule nisi to the impleaded respondents. The petitioners found it difficult to raise the amount and so on January 24, 1962, they moved this Court for modification of the said order as to security. This application was dismissed, but the petitioners were given further time to deposit the said amount by March 26, 1962. This order was passed on March 15, 1962. The petitioners then tried to collect the requisite fund, but failed in their efforts and that led to the said petition filed on March 24, 1962 by the said petitioners. The petitioners contended that the impugned rule, in so far as it related to the giving of security, was ultra vires, because it contravened the fundamental right guaranteed to the petitioners under Article 32 of the Constitution. There were two orders, namely, one for security of costs and another for the dismissal of the previous application under Article 32 of the Constitution.

49. this Court by majority held that Rule 12 of Order XXXV of the Supreme Court Rules was invalid in so far as it related to the furnishing of security. The right to move the Supreme Court, it was emphasised, under Article 32 was an absolute right and the content of this right could not be

circumscribed or impaired on any ground and an order for furnishing security for the respondent's costs retarded the assertion or vindication of the fundamental right under Article 32 and contravened the said right.

The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the Court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between Article 142(1) and Article 32 arose. Gajendragadkar, J. speaking for the majority of the Judges of this Court said that Article 142(1) did not confer any power on this Court to contravene the provisions of Article 32 of the Constitution. Nor did Article 145 confer power upon this Court to make rules, empowering it to contravene the provisions of the fundamental right. At page 899 of the Reports, Gajendragadkar, J. reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be exercised in the interests of justice." But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that *an order which this Court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws* (Emphasis supplied). The Court therefore, held that it was not possible to hold that Article 142(1) conferred upon this Court powers which could contravene the provisions of Article 32.
It follows, therefore, that the directions given by this Court on 16th February, 1984, on the ground of expeditious trial by transferring Special Case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the Court of Special Judge, Greater Bombay, Shri S.B. Sule, to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court was contrary to the relevant statutory provision, namely, Section 7(2) of the Criminal law Amendment Act, 1952 and as such violative of Article 21 of the Constitution. Furthermore, it violates Article 14 of the Constitution as being made applicable to a very special case among the special cases, without any guideline as to which cases required speedier justice. It that was so as in Prem Chand Garg's case, that was a mistake of so great a magnitude that it deprives a man by being treated differently of his fundamental right for defending himself in a criminal trial in accordance with law. If that was so then when the attention of the Court is drawn the Court has always the power and the obligation to correct it ex debito justitiae and treat the second application by its inherent power as a power of review to correct the original mistake. No suitor should suffer for the wrong of the Court. this Court in Prem Chand Garg's case struck down not only the administrative order enjoined by Rule 12 for deposit of security in a petition under Article 32 of the Constitution but also struck down the judicial order passed by the Court for non-deposit of such security in the subsequent stage of the same proceeding when attention of the Court to the infirmity of the rule was drawn. It may be mentioned that Shah, J. was of the opinion that Rule 12 was not violative. For the present controversy it is not necessary to deal with this aspect of the matter.

50. The power of the Court to correct an error subsequently has been reiterated by a decision of a bench of nine Judges of this Court in Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr. MANU/SC/0044/1966 : [1966]3SCR744 . The facts were different and not quite relevant for our present purposes but in order to appreciate the contentions urged, it will be appropriate to refer to certain portions of the same. There was a suit for defamation against the editor of a weekly

newspaper, which was filed in the original side of the High Court. One of the witnesses prayed that the Court may order that publicity should not be given to his evidence in the press as his business would be affected. After hearing arguments, the trial Judge passed an oral order prohibiting the publication of the evidence of the witness. A reporter of the weekly along with other journalists moved this Court under Article 32 of the Constitution challenging the validity of the order. It was contended that : (1) the High Court did not have inherent power to pass the order; (2) the impugned order violated the fundamental rights of the petitioners under Article 19(1)(a); and (3) the order was amenable to the writ jurisdiction of this Court under Article 32 of the Constitution.

51. It was held by Gajendragadkar, C.J. for himself and five other learned Judges that the order was within the inherent power of the High Court. Sarkar, J. was of the view that the High Court had power to prevent publication of proceedings and it was a facet of the power to hold a trial in camera and stems from it. Shah, J. was, however, of the view that the CPC contained no express provision authorising the Court to hold its proceedings in camera, but if excessive publicity itself operates as an instrument of injustice, the Court has inherent jurisdiction to pass an order excluding the public when the nature of the case necessitates such a course to be adopted. Hidayatullah, J. was, however, of the view that a Court which was holding a public trial from which the public was not excluded, could not suppress the publication of the deposition of a witness, heard not in camera but in open Court, on the request of the witness that his business would suffer. Sarker, J. further reiterated that if a judicial tribunal makes an order which it has jurisdiction to make by applying a law which is valid in all respects, that order cannot offend a fundamental right. An order which is within the jurisdiction of the tribunal which made it, if the tribunal had jurisdiction to decide the matters that were litigated before it and if the law which it applied in making the order was a valid law, could not be interfered with. It was reiterated that the tribunal having this jurisdiction does not act without jurisdiction if it makes an error in the application of the law.

52. Hidayatullah, J. observed at page 790 of the report that in Prem Chand Garg's case the rule required the furnishing of security in petition under Article 32 and it was held to abridge the fundamental rights. But it was said that the rule was struck down and not the judicial decision which was only revised. That may be so. But a judicial decision based on such a rule is not any better and offends the fundamental rights just the same and not less so because it happens to be a judicial order. If there be no appropriate remedy to get such an order removed because the Court has no superior, it does not mean that the order is made good. When judged under the Constitution it is still a void order although it may bind parties unless set aside. Hidayatullah, J. reiterated that procedural safeguards are as important as other safeguards. Hidayatullah, J. reiterated that the order committed a breach of the fundamental right of freedom of speech and expression. We are, therefore, of the opinion that the appropriate order would be to recall the directions contained in the order dated 16th February, 1984.

53. In considering the question whether in a subsequent proceeding we can go to the validity or otherwise of a previous decision on a question of law inter-parties, it may be instructive to refer to the decision of this Court in Smt. Ujjam Bai v. State of Uttar Pradesh MANU/SC/0101/1961 : [1963]1SCR778 . There, the petitioner was a partner in a firm which carried on the business of manufacture and sale of hand-made bidis. On December 14, 1957, the State Government issued a notification under Section 4(1)(b) of the U.P. Sales Tax Act, 1948. By a subsequent notification

dated 25th November, 1958, hand-made and machine-made bidis were unconditionally exempted from payment of sales tax. The Sales Tax Officer had sent a notice to the firm for the assessment of tax on sale of bidis during the assessment period 1st of April, 1958 to June 30, 1958. The firm claimed that the notification dated 14th December, 1957 had exempted bidis from payment of sales tax and that, therefore, it was not liable to pay sales tax on the sale of bidis. This position was not accepted by the Sales Tax Officer who passed certain orders. The firm appealed under Section 9 of the Act to the Judge (Appeals) Sales Tax, but that was dismissed. The firm moved the High Court under Article 226 of the Constitution. The High Court took the view that the firm had another remedy under the Act and the Sales Tax Officer had not committed any apparent error in interpreting the notification of December 14, 1957. The appeal against the order of the High Court on a certificate under Article 133(1)(a) of the Constitution was dismissed by this Court for non-prosecution and the firm filed an application for a restoration of the appeal and condonation of delay. During the pendency of that appeal another petition was filed under Article 32 of the Constitution for the enforcement of the fundamental right under Articles 19(1)(g) and 31 of the Constitution. Before the Constitution Bench which heard the matter a preliminary objection was raised against the maintainability of the petition and the correctness of the decision of this Court in Kailash Nath v. State of U.P., MANU/SC/0136/1957 : AIR1957SC790 relied upon by the petitioner was challenged. The learned Judges referred the case to a larger Bench. It was held by this Court by a majority of five learned Judges that the answer to the questions must be in the negative. The case of Kailash Nath was not correctly decided and the decision was not sustainable on the authorities on which it was based. Das, J. speaking for himself observed that the right to move this Court by appropriate proceedings for the enforcement of fundamental rights conferred by Part III of the Constitution was itself a guaranteed fundamental right and this Court was not trammelled by procedural technicalities in making an order or issuing a writ for the enforcement of such rights. The question, however, was whether, a quasi-judicial authority which made an order in the undoubted exercise of its jurisdiction in pursuance of a provision of law which was intra vires, an error of law or fact committed by that authority could not be impeached otherwise than on appeal, unless the erroneous determination related to a matter on which the jurisdiction of that body depended. It was held that a tribunal might lack jurisdiction if it was improperly constituted. In such a case, the characteristic attribute of a judicial act or decision was that it binds, whether right or wrong, and no question of the enforcement of a fundamental right could arise on an application under Article 32. Subba Rao, J. was, however, unable to agree.

54. Shri Jethmalani urged that the directions given on 16th February, 1984, were not per incuriam. We are unable to accept this submission. It was manifest to the Bench that exclusive jurisdiction created under Section 7(1) of the 1952 Act read with Section 6 of the said Act, when brought to the notice of this Court, precluded the exercise of the power under Section 407 of the Code. There was no argument, no submission and no decision on this aspect at all. There was no prayer in the appeal which was pending before this Court for such directions. Furthermore, in giving such directions, this Court did not advert to or consider the effect of Anwar Ali Sarkar's case (supra) which was a binding precedent. A mistake on the part of the Court shall not cause prejudice to any one. He further added that the primary duty of every Court is to adjudicate the cases arising between the parties. According to him, it is certainly open to a larger Bench to take a view different from that taken by the earlier Bench, if it was manifestly erroneous and he urged that the trial of a corrupt Chief Minister before a High Court, instead of a Judge designated by the State Government was not so injurious to public interest that it should be overruled or set aside. He invited us to

consider two questions : (1) does the impugned order promote justice? and (2) is it technically valid? After considering these two questions, we are clearly of the opinion that the answer to both these questions is in the negative.

No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void. So also the violation of the principles of natural justice renders the act a nullity.
Four valuable rights, it appears to us, of the appellant have been taken away by the impugned directions.

(i) The right to be tried by a Special Judge in accordance with the procedure established by law and enacted by Parliament.

(ii) The right of revision to the High Court under Section 9 of the Criminal Law Amendment Act.

(iii) The right of first appeal to the High Court under the same section.

(iv) The right to move the Supreme Court under Article 136 thereafter by way of a second appeal, if necessary.

55. In this connection Shri Rao rightly submitted that it is no necessary to consider whether Section 374 of the Criminal Procedure Code confers the right of appeal to this Court from the judgment of a learned Judge of the High Court to whom the case had been assigned inasmuch as the transfer itself was illegal. One has to consider that Section 407 of the Criminal Procedure Code was subject to the overriding mandate of Section 7(1) of the 1952 Act, and hence, it does not permit the High Court to withdraw a case for trial to itself from the; Court of Special Judge. It was submitted by Shri Rao that even in cases where a case is withdrawn by the High Court to itself from a criminal court other than the Court of Special Judge, the High Court exercised transferred jurisdiction which is different from original jurisdiction arising out of initiation of the proceedings in the High Court. In any event Section 374 of Criminal Procedure Code limits the right to appeals arising out of Clause 24 of the Letters Patent.

56. In aid of the submission that procedure for trial evolved in derogation of the right guaranteed under Article 21 of the Constitution would be bad, reliance was placed on Attorney General of India v. Lachma Devi and Ors. [1985] 2 Scale 144. In aid of the submission on the question of validity our attention was drawn to 'Jurisdiction and Illegality' by Amnon Rubinstein (1965 Edn.). The Parliament did not grant to the Court the jurisdiction to transfer a case to the High Court of Bombay. However, as the superior Court is deemed to have a general jurisdiction, the law presumes that the Court acted within jurisdiction. In the instant case that presumption cannot be taken,firstly because the question of jurisdiction was not agitated before the Court, secondly these directions were given per incuriam as mentioned hereinbefore and thirdly the superior Court alone can set aside an error in its directions when attention is drawn to that error. This view is warranted only because of peculiar facts and circumstances of the present case. Here the trial of a citizen in a Special Court under special jurisdiction is involved, hence, the liberty of the subject is involved. In this connection, it is instructive to refer to page 126 of Rubinstein's aforesaid book. It has to be borne in mind that as in Kuchenmeister v. Home Office [1958] 1 Q.B. 496 here form becomes

substance. No doubt, that being so it must be by decisions and authorities, it appears to us patently clear that the directions given by this Court on 16th February, 1984 were clearly unwarranted by constitutional provisions and in derogation of the law enacted by the Parliament. See the observations of Attorney General v. Herman James Sillem [1864] 10 H.L.C. 703, where it was reiterated that the creation of a right to an appeal is an act which requires legislative authority, neither an inferior Court nor the superior Court or both combined can create such a right, it being one of limitation and extension of jurisdiction. See also the observations of Isaacs v. Roberston [1984] 3 A.E.R. 140 where it was reiterated by Privy Council that if an order is regular it can be set aside by an appellate Court; if the order is irregular it can be set aside by the Court that made it on the application being made to that Court either under the rules of that Court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warranted, namely, violation of the rules of natural justice or fundamental rights. In Ledgard v. Bull, 13 I.A. 134, it was held that under the old Civil Procedure Code under Section 25 the superior Court could not make an order of transfer of a case unless the Court from which the transfer was sought to be made, had jurisdiction to try. In the facts of the instant case, the criminal revision application which was pending before the High Court even if it was deemed to be transferred to this Court under Article 139A of the Constitution it would not have vested this Court with power larger than what is contained in Section 407 of Criminal Procedure Code. Under Section 407 of the Criminal Procedure Code read with the Criminal law Amendment Act, the High Court could not transfer to itself proceedings under Sections 6 and 7 of the said Act. this Court by transferring the proceedings to itself, could not have acquired larger jurisdiction. The fact that the objection was not raised before this Court giving directions on 16th February, 1984 cannot amount to any waiver. In Meenakshi Naidoo v. Subramaniya Sastri, 14 I.A. 160 it was held that if there was inherent incompetence in a High Court to deal with all questions before it then consent could not confer on the High Court any jurisdiction which it never possessed.

57. We are clearly of the opinion that the right of the appellant under Article 14 regarding equality before the law and equal protection of law in this case has been violated. The appellant has also a right not to be singled out for special treatment by a Special Court created for him alone. This right is implicit in the right to equality. See Anwar Ali Sarkar's case (supra).

58. Here the appellant has a further right under Article 21 of the Constitution a right to trial by a Special Judge under Section 7(1) of the 1952 Act which is the procedure established by law made by the Parliament, and a further right to move the High Court by way of revision or first appeal under Section 9 of the said Act. He has also a right not to suffer any order passed behind his back by a Court in violation of the basic principles of natural justice. Directions having been given in this case as we have seen without hearing the appellant though it appears from the circumstances that the order was passed in the presence of the counsel for the appellant, these were bad.

59. In Nawabkhan Abbaskhan v. The State of Gujarat MANU/SC/0068/1974 : 1974CriLJ1054 , it was held that an order passed without hearing a party which affects his fundamental rights, is void and as soon as the order is declared void by a Court, the decision operates from its nativity. It is proper for this Court to act ex debito justitiae, to act in favour of the fundamental rights of the appellant.

60. In so far as Mirajkar's case (supra) which is a decision of a Bench of 9 Judges and to the extent it affirms Prem Chand Garg's case (supra), the Court has power to review either under Section 137 or suo motu the directions given by this Court. See in this connection P.S.R. Sadhananatham v. Arunachalam MANU/SC/0083/1980 : [1980]2SCR873 and Suk Das v. Union of Territory of Arunachal Pradesh MANU/SC/0140/1986 : 1986CriLJ1084 . See also the observations in Asrumati Debi v. Kumar Rupendra Deb Raikot and Ors. MANU/SC/0088/1953 : [1953]4SCR1159 , Satyadhyan Ghosal and Ors. v. Smt. Deorajin Debi and Anr. MANU/SC/0295/1960 : [1960]3SCR590 , Sukhrani (dead) by L.Ls. and Ors. v. Hari Shanker and Ors. MANU/SC/0538/1979 : [1979]3SCR671 and Bejoy Gopal Mukherji v. Pratul Chandra Ghose MANU/SC/0077/1953 : [1953]4SCR930 .

61. We are further of the view that in the earlier judgment the points for setting aside the decision, did not include the question of withdrawal of the case from the Court of Special Judge to Supreme Court and transfer it to the High Court. Unless a plea in question is taken it cannot operate as res judicata. See Shivshankar Prasad Shah and Ors. v. Baikunth Nath Singh and Ors. MANU/SC/0022/1969 : [1969]3SCR908 , Bikan Mahuri and Ors. v. Mst. Bibi Walian and Ors. MANU/BH/0174/1939 : AIR1939Pat633 . See also S.L. kapoor v. Jagmohan and Ors. MANU/SC/0036/1980 : [1981]1SCR746 on the question of violation of the principles of natural justice. Also see Maneka Gandhi v. Union of India MANU/SC/0133/1978 : [1978]2SCR621 at pages 674-681. Though what is mentioned hereinbefore in the Bengal Immunity Co. Ltd. v. The State of Bihar and Ors. (supra), the Court was not concerned with the earlier decision between the same parties. At page 623 it was reiterated that the Court was not bound to follow a decision of its own if it was satisfied that the decision was given per incuriam or the attention of the Court was not drawn. It is also well-settled that an elementary rule of justice is that no party should suffer by mistake of the Court. See Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr. MANU/SC/0040/1966 : [1966]3SCR242 , Jang Singh v. Brijlal MANU/SC/0006/1963 : [1964]2SCR145 , Bhajahari Mondal v: The State of West Bengal MANU/SC/0052/1958 : 1959CriLJ98 and Asgarali N. Singaporawalla v. The State of Bombay MANU/SC/0100/1957 : 1957CriLJ605 .

62. Shri Rao further submitted that we should not only ignore the directions or set aside the directions contained in the order dated 16th February, 1984, but also direct that the appellant should not suffer any further trial. It was urged that the appellant has been deprived of his fundamental right guaranteed under Articles 14 and 21 as a result of the directions given by this Court. Our attention was drawn to the observations of this Court in Suk Das's case (supra) for this purpose. He further addressed us to the fact that six and half years have elapsed since the first complaint was lodged against the appellant and during this long period the appellant has suffered a great deal. We are further invited to go into the allegations and to held that there was nothing which could induce us to prolong the agony of the appellant. We are, however, not inclined to go into this question.

63. The right of appeal under Section 374 is limited to Clause 24 of Letters Patent. It was further submitted that the expression 'Extraordinary original criminal jurisdiction' under Section 374 has to be understood having regard to the language used in the Code and other relevant statutory provisions and not with reference to decisions wherein Courts described jurisdiction acquired by transfer as extraordinary original jurisdiction. In that view the decisions referred to by Shri

Jethmalani being Kavasji Pestonji Dalai v. Rustomji Sorabji jamadar and Anr, MANU/MH/0034/1948 : AIR 1949 Bom. 42, Sunil Chandra Roy and Anr. v. The State, MANU/WB/0110/1954 : AIR1954Cal305 , Sasadhar Acharjya and Anr. v. Sir Charles Tegart and Ors. [1935] CWN 1088, Peoples' Insurance Co. Ltd. v. Sardul Singh Caveeshgar and Ors. AIR 1961 Punj. 87 and P.P. Front, New Delhi v. K.K. Birla MANU/DE/0037/1983 : 23(1983)DLT499 are not relevant.

64. It appears to us that there is good deal of force in the argument that Section 411A of the old Code which corresponds to Section 374 of the new Code contained the expression 'original jurisdiction'. The new Code abolished the original jurisdiction of High Courts but retained the extraordinary original criminal jurisdiction conferred by Clause 24 of the Letters Patent which some of the High Courts had.

65. The right of appeal is, therefore, confined only to cases decided by the High Court in its Letter Patent jurisdiction which in terms is 'extraordinary original criminal jurisdiction'.

66. By the time the new CrPC 1973 was framed, Article 21 had not been interpreted so as to include one right of appeal both on facts and law.

67. Shri Ram Jethmalani made elaborate submissions before us regarding the purpose of the Criminal Law Amendment Act and the Constitution of the Special Court. In our opinion, these submissions have no relevance and do not authorise this Court to confer a special jurisdiction on a High Court not warranted by the statute. The observations of this Court in Re The Special Courts Bill, MANU/SC/0039/1978 : [1979]2SCR476 are not relevant for this purpose. Similarly, the observations on right of appeal in V.C. Shukla v. Delhi Administration [1980] 3 SCR 500, Shri Jethmalani brought to our notice certain facts to say that the powers given in the Criminal Law Amendment Act were sought to be misused by the State Government under the influence of the appellant. In our opinion, these submissions are not relevant for the present purpose. Mr. Jethmalani submitted that the argument that in so far as Section 407 purports to authorise such a transfer it stands repealed by Section 7(1) of the Criminal Law Amendment Act is wrong. He said it can be done in its extraordinary criminal jurisdiction. We are unable to accept this submission. We are also unable to accept the submission that the order of transfer was made with full knowledge of Section 7(1) of the Criminal Law Amendment Act and the so-called exclusive jurisdiction was taken away from Special Judges and the directions were not given per incuriam. That is not right. He drew our attention to the principles of interpretation of statutes and drew our attention to the purpose of Section 7(1) of the Act. He submitted that when the Amending Act changes the law, the change must be confined to the mischief present and intended to be dealt with. He drew us to the Tek Chand Committee Report and submitted that he did not wish that an occasional case withdrawn and tried in a High Court was because of delay in disposal of corruption cases. He further submitted that interference with existing jurisdiction and powers of superior Courts can only be by express and clear language. It cannot be brought about by aside wind.

68. Thirdly, the Act of 1952 and the Code have to be read and construed together, he urged. The Court is never anxious to discover a repugnancy and in ft. apro tanto repeal. Resort to the non obstante clause is permissible only when it is impossible to harmonise the two provisions.

69. Shri Jethmalani highlighted before us that it was for the first time a Chief Minister had been found guilty of receiving quid pro quo for orders of allotment of cement to various builders by a Single Judge of the High Court confirmed by a Division Bench of the High Court. He also urged before us that it was for the first time such a Chief Minister did not have the courage to prosecute his special leave petition before this Court against the findings of three Judges of the High Court. Shri Jethmalani also urged that it was for the first time this Court found that a case instituted in 1982 made no progress till 1984. Shri Jethmalani also sought to contend that Section 7(1) of the 1952 Act states "shall be triable by Special Judges only", but does not say that under no circumstances the case will be transferred to be tried by the High Court even in its Extraordinary Original Criminal Jurisdiction. He submitted that Section 407(1)(iv) is very much in the statute and and it is not repealed in respect of the cases pending before the Special Judge. There is no question of repealing Section 407(1)(iv). Section 407 deals with the power of the High Court to transfer cases and appeals. Section 7 is entirely different and one has to understand the scheme of the Act of 1952, he urged. It was an Act which provided for a more speedy trial of certain offences. For this it gave power to appoint Special Judges and stipulated for appointment of Special Judges under the Act. Section 7 states that notwithstanding anything contained in the Code, the offences mentioned in Sub-section (1) of Section 6 shall be triable by Special Judges only. By express terms therefore, it takes away the right to transfer cases contained in the Code to any other Court which is not a Special Court. Shri Jethmalani sought to urge that the Constitution Bench had considered this position. That is not so. He submitted that the directions of this Court on 16th February, 1984 were not given per incuriam or void for any reason. He referred us to Dias on jurisprudence, 5th Edition, page 128 and relied on the decision of Milianges v. George Frank (Textiles) Ltd. [1975] 3 All E.R. 801. He submitted that the per incuriam rule does not apply where the previous authority is alluded to. It is true that previous statute is referred to in the other judgment delivered on the same date in connection with different contentions. Section 7(1) was not referred to in respect of the directions given on 16th February, 1984 in the case of R.S. Nayak v. A.R. Antulay (supra). Therefore, as mentioned hereinbefore the observations indubitably were per incuriam. In this case in view of the specific language used in Section 7, it is not necessary to consider the other submissions of Shri Jethmalani, whether the procedure for trial by Special Judges under the Code has stood repealed or not. The concept of repeal may have no application in this case. It is clear that words should normally be given their ordinary meaning bearing in mind the context. It is only where the literal meaning is not clear that one resorts to the golden rule of interpretation or the mischief rule of interpretation. This is well illustrated from the observations of Tindal, C.J. in Sussex Peerage Claim [1844] 11 C & F 85. He observed:

The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Pyer, Stewell v. Lord Zouch [1569] 1 Plowd 353 is a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress.

70. This passage states the commonly accepted view concerning the relationship between the literal and mischief rules of interpretation of statutes. Here there is no question as to what was the previous law and what was intended to be placed or replaced as observed by Lord Wilberforce in 274 House of Lords Debate, Col. 1294 on 16th November, 1966, see Cross; Statutory Interpretation, second edition, page 36. He observed that the interpretation of legislation is just a part of the process of being a good lawyer; a multi-faceted thing, calling for many varied talents; not a subject which can be confined in rules. When the words are clear nothing remains to be seen. If words are as such ambiguous or doubtful other aids come in. In this context, the submission of controversy was whether the Code repealed the Act of 1952 or whether it was repugnant or not is futile exercise to undertake. Shri Jethmalani distinguished the decision in Chadha's case, which has already been discussed. It is not necessary to discuss the controversy whether the Chartered High Courts contained the Extraordinary Original Criminal Jurisdiction by the Letters Patent.

71. Article 134(1)(b) does not recognise in every High Court power to withdraw for trial cases from any Court subordinate to its authority. At least this Article cannot be construed to mean where power to withdraw is restricted, it can be widened by virtue of Article 134(1)(b) of the Constitution. Section 374 of the Code undoubtedly gives a right of appeal. Where by a specific clause of a specific statute the power is given for trial by the Special Judge only and transfer can be from one such Judge to another Special Judge, there is no warrant to suggest that the High Court has power to transfer such a case from a Judge under Section 6 of the Act of 1952 to itself. It is not a case of exclusion of the superior Courts. So the submissions made on this aspect by Shri Jethmalani are not relevant.

72. Dealing with the submission that the order of the Constitution Bench was void or non-est and it violated the principles of natural justice, it was submitted by Shri Jethmalani that it was factually incorrect. Inspite of the submissions the appellant did not make any submission as to directions for transfer as asked for by Shri Tarkunde. It was submitted that the case should be transferred to the High Court. The Court merely observed there that they had given ample direction. No question of submission arose after the judgment was delivered. In any case, if this was bad the fact that no objection had been raised would not make it good. No question of technical rules or res judicata apply, Shri Jethmalani submitted that it would amount to an abuse of the process of the Court. He referred us to Re Tarling [1979] 1 All E.R. 981; Ali v. Secretary of State for the Home Department [1984] 1 All E.R. 1009 and Seervai's Constitutional Law, Vol. 1, pages 260 to 265. We are of the opinion that these submissions are not relevant. There is no abuse of the process of the Court. Shri Jethmalani submitted that there was no prejudice to the accused. There was prejudice to the accused in being singled out as a special class of accused for a special dispensation without room for any appeal as of right and without power of the revision to the High Court. There is prejudice in that. Reliance placed on the decision of this Court in Ramesh Chandra Arora v. The State MANU/SC/0034/1959 : 1960CriLJ177 was not proper in the facts of this case.

73. If a discrimination is brought about by judicial perception and not by executive whim, if it is unauthorised by law, it will be in derogation of the right of the appellant as the special procedure in Anwar Ali Sarkar's case (supra) curtailed the rights and privileges of the accused. Similarly, in this case by judicial direction the rights and privileges of the accused have been curtailed without any justification in law. Reliance was placed on the observations of the seven Judges Bench in Re : Special Courts Bill, 1978 (supra). Shri Jethmalani relied on the said observations therein and

emphasised that purity in public life is a desired goal at all times and in all situations and ordinary Criminal Courts due to congestion of work cannot reasonably be expected to bring the prosecutions to speedy termination. He further submitted that it is imperative that persons holding high public or political office must be speedily tried in the interests of justice. Longer these trials last, justice will tarry, assuming the charges to be justified, greater will be the impediments in fostering democracy, which is not a plant of easy growth. All this is true but the trial even of person holding public office though to be made speedily must be done in accordance with the procedure established by law. The provisions of Section 6 read with Section 7 of the Act of 1952 in the facts and circumstances of this case is the procedure established by law; any deviation even by a judicial direction will be negation of the rule of law.

74. Our attention was drawn to Article 145(e) and it was submitted that review can be made only where power is expressly conferred and the review is subject to the rules made under Article 145(e) by the Supreme Court. The principle of finality on which the Article proceeds applies to both judgments and orders made by the Supreme Court. But directions given per incuriam and in violation of certain constitutional limitations and in derogation of the principles of natural justice can always be remedied by the court ex debite justitiae. Shri Jethmalani's submission was that ex debite justitiae, these directions could not be recalled. We are unable to agree with this submission.

75. The Privy Council in Isaacs v. Robertson [1984] 3 A.E.R. 140 held that orders made by a Court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. If an order is regular it can only be set aside by an appellate Court; if it is irregular it can be set aside by the Court that made it on application being made to that Court either under rules of Court dealing expressly with setting aside orders for irregularity or ex debite justitiae if the circumstances warranted, namely, where there was a breach of the rules of natural justice etc. Shri Jethmalani urged before us that Lord Diplock had in express terms rejected the argument that any orders of a superior Court of unlimited jurisdiction can over be void in the sense that they can be ignored with impunity. We are not concerned with that. Lord Diplock delivered the judgment. Another Judge who sat in the Privy Council with him was Lord Keith of Kinkel. Both these Law Lords were parties to the House of Lords judgment in Re Racal Communications Ltd. case [1980] 2 A.E.R. 634 and their Lordships did not extend this principle any further. Shri Jethmalani submitted that there was no question of reviewing an order passed on the construction of law. Lord Scarman refused to extend the Anisminic principle to superior Courts by the felicitous statement that this amounted to comparison of incomparables. We are not concerned with this controversy. We are not comparing incomparables. We are correcting an irregularity committed by Court not on construction or misconstruction of a statute but on non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen.

76. The directions given by the order of 16th February, 1984 at page 557 were certainly without hearing though in the presence of the parties. Again consequential upon directions these were challenged ultimately in this Court and finally this Court reserved the right to challenge these by an appropriate application.

77. The directions were in deprival of Constitutional rights and contrary to the express provisions of the Act of 1952. The directions were given in violation of the principles of natural justice. The

directions were without precedent in the background of the Act of 1952. The directions definitely deprived the appellant of certain rights of appeal and revision and his rights under the Constitution.

78. We do not labour ourselves on the question of discretion to disobey a judicial order on the ground of invalid judicial order. See discretion to Disobey by Mertimer R. Kadish and Sanford H. Kadish pages 111 and 112. These directions were void because the power was not there for this Court to transfer a proceeding under the Act of 1952 from one Special Judge to the High Court. This is not a case of collateral attack on judicial proceeding; it is a case where the Court having no Court superior to it rectifies its own order. We recognise that the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction is very fine. So fine indeed that it is rapidly being eroded as observed by Lord Wilberforce in Anisminic Ltd. v. Foreign Compensation Commissioner [1969] 1 All E.R. 208. Having regard to the enormity of the consequences of the error to the appellant and by reason of the fact that the directions were given suo motu, we do not find there is anything in the observations of Ittavira Mathai v. Varkey Varkey and Anr. MANU/SC/0260/1963 : [1964]1SCR495 which detract the power of the Court to review its judgment ex debite justitiae in case injustice has been caused. No court, however, high has jurisdiction to give an order unwarranted by the Constitution and, therefore, the principles of Bhatia Co-operative Housing Society Ltd. v. D.C. Patel MANU/SC/0064/1952 : [1953]4SCR185 would not apply.

79. In giving the directions this Court infringed the Constitutional safeguards granted to a citizen or to an accused and injustice results therefrom. It is just and proper for the Court to rectify and recall that injustice, in the peculiar facts and circumstances of this case.

80. This case has caused us considerable anxiety. The appellant-accused has held an important position in this country, being the Chief Minister of a premier State of the country. He has been charged with serious criminal offences. His trial in accordance with law and the procedure established by law would have to be in accordance with the 1952 Act. That could not possibly be done because of the directions of this Court dated 16th February, 1984, as indicated above. It has not yet been found whether the appellant is guilty or innocent. It is unfortunate, unfortunate for the people of the State, unfortunate for the country as a whole, unfortunate for the future working of democracy in this country which, though is not a plant of an easy growth yet is with deep root in the Indian polity that delay has occurred due to procedural wrangles. The appellant may be guilty of grave offences alleged against him or he may be completely or if not completely to a large extent, innocent. Values in public life and perspective of these values in public life, have undergone serious changes and erosion during the last few decades. What was unheard of before is common place today. A new value orientation is being undergone in our life and in our culture. We are at the threshold of the cross-roads of values. It is, for the sovereign people of the country to settle those conflicts yet the Courts have vital roles to play in such matters. With the avowed object of speedier trial the case of the appellant had been transferred to the High Court but on grounds of expediency of trial he cannot be subjected to a procedure unwarranted by law, and contrary to the constitutional provisions. The appellant may or may not be an ideal politician. It is a fact, however, that the allegations have been brought against him by a person belonging to a political party opposed to his but that is not the decisive factor. If the appellant Shri Abdul Rehman Antulay has infringed law, he must be dealt with in accordance with the law. We proclaim and pronounce that no man is above the law; but at the same time reiterate and declare that no man can be denied his

rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. this Court, in its anxiety to facilitate the parties to have a speedy trial gave directions on 16th February, 1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16th February, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "Actus Curiae Neminem Gravabit"- an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law.

81. Lord Cairns in Alexander Rodger v. The Comptoir D'escompte De Paris, (Law Reports Vol. III 1869-71 page 465 at page 475) observed thus:

Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors. and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.

82. This passage was quoted in the Gujarat High Court by D.A. Desai, J. speaking for the Gujarat High Court in Vrajlal v. Jadavji (supra) as mentioned before.

It appears that in giving directions on 16th February, 1984, this Court acted per incuriam inasmuch it did not bear in mind consciously the consequences and the provisions of Sections 6 and 7 of the 1952 Act and the binding nature of the larger Bench decision in Anwar Ali Sarkar's case (supra) which was not adverted to by this Court. The basic fundamentals of the administration of justice are simple.
No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the hand-maids of justice and not the mistress of the justice. Ex debite justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied.
This is a peculiar fact of this case which requires emphasis.

83. Shri Rao, learned Counsel for the appellant has vehemently canvassed before us that the appellant has suffered a great wrong for over six and a half years. He has undergone trials and proceedings because of the mistakes of the Court. Shri Rao submitted that the appellant should be made not to suffer more. Counsel urged that political battles must be fought in the political arena.

Yet a charge of infraction of law cannot remain uninvestigated against an erstwhile Chief Minister of a premier State of the country.

84. Shri Rao has canvassed before us on the authority of Hussainara Khatoon v. Home Secretary, State of Bihar, Patna MANU/SC/0119/1979 : 1979CriLJ1036 ; Kadra Pahadiyal (1) v. State of Bihar MANU/SC/0140/1980 : AIR1981SC939 ; Kadra Pahadiya (II) v. State of Bihar, A.I.R. 1982 S.C. 1167 and Sheela Barse v. Union of India MANU/SC/0115/1986 : [1986]3SCR562 . He has, however, very strongly relied upon the observations of this Court in Suk Das v. Union Territory of Arunachal Pradesh (supra). In that case the appellant a government servant was tried and convicted to suffer imprisonment for two years for offences under Section 506 read with Section 34, I.P.C. He was not represented at the trial by any lawyer by reason of his inability to afford legal representation. On appeal the High Court held that the trial was not vitiated since no application for legal aid was made by him. On appeal this Court quashed the conviction and considered the question whether the appellant would have to be tried in accordance with law after providing legal assistance to him. this Court felt that in the interests of justice the appellant should be reinstated in service without back wages and accordingly directed that no trial should take place. Shri Rao submitted that we should in the facts of this case in the interests of justice direct that the appellant should not be tried again. Shri Rao submitted to let the appellant go only on this long delay and personal inconveniences suffered by the appellant, no more injury be caused to him. We have considered the submission. Yet we must remind ourselves that purity of public life is one of the cardinal principal which must be upheld as a matter of public policy. Allegations of legal infractions and criminal infractions must be investigated in accordance with law and procedure established under the Constitution. Even if he has been wronged, if he is allowed to be left in doubt that would cause more serious damage to the appellant. Public confidence in public administration should not be eroded any further. One wrong cannot be remedied by another wrong.

85. In the aforesaid view of the matter and having regard to the facts and circumstances of the case, we are of the opinion that the legal wrong that has been caused to the appellant should be remedied. Let that wrong be therefore remedied. Let right be done and in doing so let no more further injury be caused to public purpose.

86. In the aforesaid view of the matter the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16th February, 1984 as indicated before are set aside and quashed. The trial shall proceed in accordance with law, that is to say under the Act of 1952 as mentioned hereinbefore.

Ranganath Misra, J.

87. I have had the advantage of perusing the judgment proposed by my learned Brother Mukharji, J. While I agree with the conclusion proposed by my esteemed Brother, keeping the importance of the matter, particularly the consequences the decision may generate as also the fact that I was a party to the two-Judge Bench decision of this Court reported in MANU/SC/0198/1986 : 1986CriLJ1922 in view, I propose to express my opinion separately.

88. Abdul Rehman Antulay, the appellant, was the Chief Minister of the State of Maharashtra from 1980 till January 20, 1982, when he resigned his office but continued to be a member of the

Maharashtra Legislative Assembly. Ramdas Shrinivas Nayak, Respondent No. 1 herein, lodged a complaint in the Court of Chief Metropolitan Magistrate, 28th Esplanade, Bombay, on September 11, 1981, against Antulay alleging commission of several offences under the Indian Penal Code as also Section 5(2) of the Prevention of Corruption Act, 1947 ('1947 Act' for short). The learned Magistrate was of the view that prosecution under Sections 161 and 165 of the Penal Code and Section 5 of the 1947 Act required sanction as a condition precedent and in its absence the complaint was not maintainable. The Governor of Bombay later accorded sanction and the Respondent No. 1 filed a fresh complaint, this time in the Court of the Special Judge of Bombay, alleging the commission of those offences which had formed the subject-matter of the complaint before the Magistrate. On receiving summons from the Court of the particular Special Judge, Antulay took the stand that the said Special Judge had no jurisdiction to entertain the complaint in view of the provisions of Section 7 of the Criminal Law Amendment Act, 1952 (hereinafter referred to as the 1952 Act) to take cognizance and such cognizance could not be taken on a private complaint. These objections were overruled by the Special Judge by order dated October 20, 1982, and the case was set down for recording evidence of the prosecution. The Criminal Revision Petition of the accused against the order of the Special Judge was rejected by the Bombay High Court and it held that a private complaint was maintainable and in view of the notification specifying a particular Special Judge for the offences in question there was no basis for the objections. this Court granted special leave to the accused against the decision of the High Court that a private complaint was maintainable. Criminal Appeal No. 347 of 1983 thus came to be instituted. In the meantime, objection raised before the Special Judge that without sanction the accused who still continued to be a member of Legislative Assembly, could not be prosecuted came to be accepted by the Special Judge. The complainant filed a criminal revision application before the High Court questioning that order. this Court granted special leave against the decision that sanction was necessary, whereupon Criminal Appeal No. 356 of 1983 was registered and the pending criminal revision application before the High Court was transferred to this Court. Both the criminal appeals and the transferred criminal revision were heard together by a five-Judge Bench of this Court but the two appeals were disposed of by two separate judgments delivered on February 16, 1984. The judgment in Criminal Appeal No. 347 of 1983 is reported in MANU/SC/0082/1984 : 1984CriLJ647 . In the present appeal we are not very much concerned with that judgment. The judgment of Criminal Appeal No. 356 of 1983 is reported in MANU/SC/0102/1984 : 1984CriLJ613 . As already noticed the main theme of the criminal appeal was as to whether a member of the Legislative Assembly was a public servant for whose prosecution for the offences involved in the complaint sanction was necessary as a condition precedent. this Court at page 557 of the Reports came to hold:

To sum up, the learned Special Judge was clearly in error in holding that M.L.A. is a public servant within the meaning of the expression in Section 12(a) and further erred in holding that a sanction of the Legislative Assembly of Maharashtra or majority of the members was a condition precedent to taking cognizance of offences committed by the accused. For the reasons herein stated both the conclusions are wholly unsustainable and must be quashed and set aside.

Consequently this Court directed:

This appeal accordingly succeeds and is allowed. The order and decision of the learned Special Judge Shri R.B. Sule dated July 25, 1983 discharging the accused in Special Case No. 24 of 1982

and Special Case No. 3/1983 is hereby set aside and the trial shall proceed further from the stage where the accused was discharged.

this Court gave a further direction to the following effect:

The accused was the Chief Minister of a premier State-the State of Maharashtra. By a prosecution launched as early as on September 11, 1981, his character and integrity came under a cloud. Nearly 2½ years have rolled by and the case has not moved an inch further. An expeditious trial is primarily in the interest of the accused and a mandate of Article 21. Expeditious disposal of a criminal case is in the interest of both, the prosecution and the accused. Therefore, Special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of Special Judge, Greater Bombay Shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day.

89. Pursuant to this direction, the two cases came to be posted for trial before Khatri J. of the Bombay High Court and trial opened on April 9, 1984. The appellant challenged Khatri J.'s jurisdiction on 12th March, 1984 when the matter was first placed before him but by two separate orders dated 13th March, 1984 and 16th March, 1984, the learned Judge rejected the objection by saying that he was bound by this Court's direction of the 16th February, 1984. Antulay then moved this Court by filing an application under Article 32 of the Constitution. A two-Judge Bench consisting of Desai and A.N. Sen. JJ. by order dated 17th April, 1984 dismissed the applications by saying:

A.N. Sen, J.:

There is no merit in this writ petition. The writ petition is accordingly dismissed.

In my view, the writ petition challenging the validity of the order and judgment passed by this Court as nullity or otherwise incorrect cannot be entertained. I wish to make it clear that the dismissal of this writ petition will not prejudice the right of the petitioner to approach the Court with an appropriate review petition or to file any other application which he may be entitled in law to file.

D.A. Desai, J.:

I broadly agree with the conclusion recorded by my brother. The learned Judge in deciding the SLP (Crl.) Nos. 1949-50 of 1984 has followed the decision of this Court. The learned Judge was perfectly justified and indeed it was the duty of the learned Judge to follow the decision of this Court which is binding on him. Special leave petitions are dismissed. 1984 (3) SCR 482.

16 witnesses were examined by Khatri J. by July 27, 1984. Khatri J. was relieved of trying the case on his request, whereupon the learned Chief Justice nominated Mehta J. to continue the trial. 41 more witnesses were examined before him and at the stage when 57 witnesses in all had been examined for the prosecution, the Trial Judge invited the parties to consider the framing of charges.

43 draft charges were placed for his consideration on behalf of the prosecution and the learned Trial Judge framed 21 charges and recorded an order of discharge in respect of the remaining 22. At the instance of the complainant, Respondent No. 1, the matter came before this Court in appeal on special leave and a two-Judge Bench of which I happened to be one, by judgment dated April 17, 1986, in Criminal Appeal No. 658 of 1985 (1962) 2 SCC 716 set aside the order of discharge in regard to the several offences excepting extortion and directed the learned Trial Judge to frame charges for the same. this Court requested the learned Chief Justice of the Bombay High Court to nominate another Judge to take up the matter from the stage at which Mehta J. had made the order of discharge. Shah J. came to be nominated by the learned Chief Justice to continue the trial. By order dated July 24, 1986, Shah J. rejected the application of the accused for proceeding against the alleged co-conspirators by holding that there had been a long delay, most of the prosecution witnesses had already been examined and that if the co-conspirators were then brought on record, a de novo trial would be necessitated. The appellant challenged the order of Shah J. by filing a special leave petition before this Court wherein he further alleged that the High Court had no jurisdiction to try the case. A two-Judge Bench, of which Mukherji J., my learned brother, was a member, granted special leave, whereupon this Criminal Appeal (No. 468 of 1986) came to be registered. The Respondent No. 1 asked for revocation of special leave in Criminal Miscellaneous Petition No. 4248 of 1986. While rejecting the said revocation application, by order dated October 29, 1986, the two-Judge Bench formulated several questions that arose for consideration and referred the matter for hearing by a Bench of seven Judges of the Court. That is how this seven-Judge Bench has come to be constituted to hear the appeal.

90. It is the settled position in law that jurisdiction of courts comes solely from the law of the land and cannot be exercised otherwise. So far as the position in this country is concerned conferment of jurisdiction is possible either by the provisions of the Constitution or by specific laws enacted by the Legislature. For instance, Article 129 confers all the powers of a court of record on the Supreme Court including the power to punish for contempt of itself. Articles 131, 132, 133, 134, 135, 137, 138 and 139 confer different jurisdictions on the Supreme Court while Articles 225, 226, 227, 228 and 230 deal with conferment of jurisdiction on the High Courts. Instances of conferment of jurisdiction by specific law are very common. The laws of procedure both criminal and civil confer jurisdiction on different courts. Special jurisdiction is conferred by special statute. It is thus clear that jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the Legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. In support of judicial opinion for this view reference may be made to the permanent edition of 'Words and Phrases Vol. 23A' at page 164. It would be appropriate to refer to two small passages occurring at pages 174 and 175 of the Volume at page 174, referring to the decision in Carlile v. National Oil and Development Co. it has been stated:

Jurisdiction is the authority to hear and determine, and in order that it may exist the following are essential: (1) A court created by law, organized and sitting; (2) authority given it by law to hear and determine causes of the kind in question; (3) power given it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment in personam, which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon its being

located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision.

91. Article 139A of the Constitution authorises this Court to transfer cases from a High Court to itself or from one High Court to another and is, therefore, not relevant for our purpose. Section 406 of the Code empowers this Court to transfer cases and appeals by providing:

(1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case of appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2)The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3)....

The offences alleged to have been committed by the accused here are either punishable under the Penal Code or under Act 2 of 1947, both of which could have been tried in an appropriate court under the Criminal Procedure Code; but Parliament by the Criminal Law Amendment Act 46 of 1952 (1952 Act for short) amended both the Penal Code as also the Criminal Procedure Code with a view to providing for a more speedy trial of certain offences. The relevant sections of the 1952 Act are Sections 6, 7, 8, 9 and 10. For convenience, they are extracted below:

6. Power to appoint special Judges (1) The State Government may, by notification in the official Gazette, appoint as many special Judges as may be necessary for such area or areas as may be specified in the notification to try the following offences, namely,

(a) an offence punishable under Section 161, Section 162, Section 163, Section 164, Section 165 or Section 165A of the Indian Penal Code (45 of 1860) or Section 5 of the Prevention of Corruption Act, 1947 (2 of 1947);

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in Clause (a).

(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is, or has been, a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the CrPC, 1898 (5 of 1898).

7. Cases triable by Special Judges (1) Notwithstanding anything contained in the CrPC, 1898 (5 of 1898), or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only;

(2) Every offence specified in Sub-section (1) of Section 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government.

(3) When trying any case, a Special Judge may also try any offence other than an offence specified in Section 6 with which the accused may, under the CrPC, 1898 (5 of 1898), be charged at the same trial

8. Procedure and powers of Special Judges (1) A Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the CrPC, 1898 (5 of 1898), for the trial of warrant cases by Magistrates.

(2) A special Judge, may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and any pardon so tendered shall, for the purposes of Sections 339 and 339-A of the CrPC, 1898 (5 of 1898), be deemed to have been tendered under Section 338 of that Code.

(3) Save as provided in Sub-section (1) or Sub-section (2), the provisions of the CrPC, 1898 (5 of 1898), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor.

(3-A) In particular, and without prejudice to the generality of the provisions contained in Sub-section (3), the provisions of Sections 350 and 549 of the CrPC, 1898 (5 of 1898), shall, so far as may be, apply to the proceedings before a Special Judge, and for the purposes of the said provisions a special Judge shall be deemed to be a Magistrate.

(4) A special Judge may pass upon any person convicted by him any sentence authorized by law for punishment of the offence of which such person is convicted.

9. Appeal and revision-The High Court may exercise, so far as they may be applicable, all the powers conferred by Chapters XXXI and XXXII of the CrPC, 1898 (5 of 1898) on a High Court as if the Court of the special Judge were a Court of Session trying cases without a jury within the local limits of the jurisdiction of the High Court.

10. Transfer of certain pending cases-All cases triable by a special Judge under Section 7 which, immediately before the commencement of this Act, were pending before any Magistrate shall, on such commencement, be forwarded for trial to the special Judge having jurisdiction over such cases.

On the ratio of the seven-Judge Bench decision of this Court in the State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 the vires of this Act are not open to challenge.

The majority of the learned Judges in Anwar Ali Sarkar's case expressed the view that it was open to the Legislature to set up a special forum for expedient trial of particular class of cases. Section 7(1) has clearly provided that offences specified in Sub-section (1) of Section 6 shall be triable by the Special Judge only and has taken away the power of the courts established under the CrPC to try those offences. Section 10 of the Act required all pending cases on the date of commencement of the Act to stand transferred to the respective Special Judge. Unless there be challenge to the provision creating exclusive jurisdiction of the Special Judge, the procedural law in the Amending Act is binding on courts as also the parties and no court is entitled to make orders contrary to the law which are binding. As long as Section 7 of the Amending Act of 1952 hold the field it was not open to any court including the apex Court to act contrary to Section 7(1) of the Amending Act.

92. The power to transfer a case conferred by the Constitution or by Section 406 of the CrPC does not specifically relate to the special Court. Section 406 of the Code could perhaps be applied on the principle that the Special Judge was a subordinate court for transferring a case from one special Judge to another special Judge. That would be so because such a transfer would not contravene the mandate of Section 7(1) of the Amending Act of 1952. While that may be so, the provisions for transfer, already referred to, do not authorize transfer of a case pending in the court of a special Judge first to the Supreme Court and then to the High Court for trial. A four Judge Bench in Raja Soap Factory v. S.P. Santharaj MANU/SC/0231/1965 : [1965]2SCR800 was considering the jurisdiction of the High Court to deal with a matter Shah J., as he then was, spoke for the court thus:

But if the learned Judge, as reported in the summary of the judgment, was of the opinion that the High Court is competent to assume to itself jurisdiction which it does not otherwise possess, merely because an 'extra-ordinary situation' has arisen, with respect to the learned Judge, we are unable to approve of that view. By 'jurisdiction' is meant the extent of the power which is conferred upon the court by its Constitution to try a proceeding; its exercise cannot be enlarged because what the learned Judge calls an extraordinary situation 'requires' the Court to exercise it.

93. Brother Mukharji in his elaborate judgment has come to the conclusion that the question of transferring the case from the court of the special Judge to the High Court was not in issue before the five-Judge Bench. Mr. Jethmalani in course of the argument has almost accepted the position that this was not asked for on behalf of the complainant at the hearing of the matter before the Constitution Bench. From a reading of the judgment of the Constitution Bench it appears that the transfer was a suo motu direction of the court. Since this particular aspect of the matter had not been argued and counsel did not have an opportunity of pointing out the legal bar against transfer, the learned Judges of this Court obviously did not take note of the special provisions in Section 7(1) of the 1952 Act. I am inclined to agree with Mr. Rao for Antulay that if this position had been appropriately placed, the direction for transfer from the court or exclusive jurisdiction to the High Court would not have been made by the Constitution Bench. It is appropriate to presume that this Court never' intends to act contrary to law.

94. There is no doubt that after the Division Bench of Desai and Sen, JJ. dismissed the writ petition and the special leave petitions on 17th April, 1984, by indicating that the petitioner could file an appropriate review petition or any other application which he may be entitled in law to file, no further action was taken until charges were framed on the basis of evidence of 57 witnesses and a

mass of documents. After a gap of more than three years, want of jurisdiction of the High Court was sought to be reagitated before the two-Judge Bench in the present proceedings. During this intervening period of three years or so a lot of evidence was collected by examining the prosecution witnesses and exhibiting documents. A learned Judge of the High Court devoted his full time to the case. Mr. Jethmalani pointed out to us in course of his argument that the evidence that has already been collected is actually almost three-fourths of what the prosecution had to put in. Court's time has been consumed, evidence has been collected and parties have been put to huge expenses. To entertain the claim of the appellant that the transfer of the case from the Special Judge to the High Court was without authority of law at this point of time would necessarily wipe out the evidence and set the clock back by about four years. It may be that some of the witnesses may no longer be available when the de novo trial takes place. Apart from these features, according to Mr. Jethmalani to say at this stage that the direction given by a five-Judge Bench is not binding and, therefore, not operative will shake the confidence of the litigant public in the judicial process and in the interest of the system it should not be done. Long arguments were advanced on either side in support of their respective stands-the appellant pleading that the direction for transfer of the proceedings from the Special Judge to the High Court was a nullity and Mr. Jethmalani contending that the apex Court had exercised its powers for expediting the trial and the action was not contrary to law. Brother Mukharji has dealt with these submissions at length and I do not find any necessity to dwell upon this aspect in full measure. In the ultimate analysis I am satisfied that this Court did not possess the power to transfer the proceedings from the Special Judge to the High Court. Antulay has raised objection at this stage before the matter has been concluded. In case after a full dressed trial, he is convicted, there can be no doubt that the wise men in law will raise on his behalf, inter alia, the same contention as has been advanced now by way of challenge to the conviction. If the accused is really guilty of the offences as alleged by the prosecution there can be no two opinions that he should be suitably punished and the social mechanism of punishing the guilty must come heavily upon him. No known loopholes should be permitted to creep in and subsist so as to give a handle to the accused to get out of the net by pleading legal infirmity when on facts the offences are made out. The importance of this consideration should not be overlooked in assessing the situation as to whether the direction of this Court as contained in the five-Judge Bench decision should be permitted to be questioned at this stage or not.

95. Mr. Rao for Antulay argued at length and Brother Mukharji has noticed all those contentions that by the change of the forum of the trial the accused has been prejudiced. Undoubtedly, by this process he misses a forum of appeal because if the trial was handled by a Special Judge, the first appeal would lie to the High Court and a further appeal by special leave could come before this Court. If the matter is tried by the High Court there would be only one forum of appeal being this Court, whether as of right or by way of special leave. The appellant has also contended that the direction violates Article 14 of the Constitution because he alone has been singled out and picked up for being treated differently from similarly placed accused persons. Some of these aspects cannot be overlooked with ease. I must, however, indicate here that the argument based upon the extended meaning given to the contents of Article 21 of the Constitution, though attractive have not appealed to me.

96. One of the well-known principles of law is that decision made by a competent court should be taken as final subject to further proceedings contemplated by the law of procedure. In the absence of any further proceeding, the direction of the Constitution Bench of 16th of February, 1984

became final and it is the obligation of everyone to implement the direction of the apex Court. Such an order of this Court should by all canons of judicial discipline be binding on this Court as well and cannot be interfered with after attaining finality. Brother Mukharji has referred to several authorities in support of his conclusion that an order made without jurisdiction is not a valid one and can be ignored, overlooked or brushed aside depending upon the situation. I do not propose to delve into that aspect in my separate judgment.

97. It is a well-settled position in law that an act of the court should not injure any of the suitors. The Privy Council in the well-known decision of Alexander Rodger v. The Comptori D' Escompte De Paris [1871] 3 P.C. 465 observed:

One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors and when the expression act of the court is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter upto the highest court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in courts.

Brother Mukharji has also referred to several other authorities which support this view.

98. Once it is found that the order of transfer by this Court dated 16th of February, 1984, was not within jurisdiction by the direction of the transfer of the proceedings made by this Court, the appellant should not suffer.

99. What remains to be decided is the procedure by which the direction of the 16th of February, 1984, could be recalled or altered. There can be no doubt that certiorari shall not lie to quash a judicial order of this Court. That is so on account of the fact that the Benches of this Court are not subordinate to larger Benches thereof and certiorari is, therefore, not admissible for quashing of the orders made on the judicial side of the court. Mr. Rao had relied upon the ratio in the case of Prem Chand Garg v. Excise Commissioner, U.P., Allahabad MANU/SC/0082/1962 : [1963] 1 SCR 885. Brother Mukharji has dealt with this case at considerable length. this Court was then dealing with an Article 32 petition which had been filed to challenge the vires of Rule 12 of Order 35 of this Court's Rules. Gajendragadkar, J., as the learned Judge then was, spoke for himself and three of his learned brethren including the learned Chief Justice. The facts of the case as appearing from the judgment show that there was a judicial order directing furnishing of security of Rs. 2,500 towards the respondent's costs and the majority judgment directed:

In the result, the petition is allowed and the order passed against the petitioners on December 12, 1961, calling upon them to furnish security of Rs. 2,500 is set aside.

Shah, J. who wrote a separate judgment upheld the vires of the rule and directed dismissal of the petition. The fact that a judicial order was being made the subject matter of a petition under Article 32 of the Constitution was not noticed and whether such a proceeding was tenable was not considered. A nine-Judge Bench of this Court in Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr. MANU/SC/0044/1966 : [1966]3SCR744 referred to the judgment in Prem

Chand Garg's case (supra). Gajendragadkar, CJ., who delivered the leading and majority judgment stated at page 765 of the Reports:

In support of his argument that a judicial decision can be corrected by this Court in exercise of its writ jurisdiction under Article 32(2), Mr. Setalvad has relied upon another decision of this Court in Prem Chand Garg v. Excise Commissioner, U.P. Allahabad (supra). In that case, the petitioner had been required to furnish security for the costs of the respondent under Rule 12 of order 35 of the Supreme Court Rules. By his petition filed under Article 32, he contended that the rule was invalid as it placed' obstructions on the fundamental right guaranteed under Article 32 to move the Supreme Court for the enforcement of fundamental rights. This plea was upheld by the majority decision with the result that the order requiring him to furnish security was vacated. In appreciating the effect of this decision, it is necessary to bear in mind the nature of the contentions raised before the Court in that case. The rule itself, in terms, conferred discretion on the court, while dealing with applications made under Article 32, to impose such terms as to costs as to the giving of security as it thinks fit. The learned Solicitor General who supported the validity of the rule, urged that though the order requiring security to be deposited may be said to retard or obstruct the fundamental right of the citizen guaranteed by Article 32(1), the rule itself could not be effectively challenged as invalid, because it was merely discretionary; it did not impose an obligation on the court to demand any security; and he supplemented his argument by contending that under Article 142 of the Constitution, the powers of this Court were wide enough to impose any term or condition subject to which proceedings before this Court could be permitted to be conducted. He suggested that the powers of this Court under Article 142 were not subject to any of the provisions contained in Part III including Article 32(1). On the other hand, Mr. Pathak who challenged the validity of the rule, urged that though the rule was in form and in substance discretionary, he disputed the validity of the power which the rule conferred on this Court to demand security.... It would thus be seen that the main controversy in the case of Prem Chand Garg centered round the question as to whether Article 145 conferred powers on this Court to make rules, though they may be inconsistent with the constitutional provisions prescribed by Part III. Once it was held that the powers under Article 142 had to be read subject not only to the fundamental rights, but to other binding statutory provisions, it became clear that the rule which authorised the making of the impugned order was invalid. It was in that context that the validity of the order had to be incidentally examined. The petition was made not to challenge the order as such, but to challenge the validity of the rule under which the order was made. Once a rule was struck down as being invalid, the order passed under the said rule had to be vacated. It is difficult to see how this decision can be pressed into service by Mr. Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdiction of this Court itself....

In view of this decision in Mirajkar's case (supra) it must be taken as concluded that judicial proceedings in this Court are not subject to the writ jurisdiction thereof.

100. On behalf of the appellant, at one stage, it was contended that the appeal may be taken as a review. Apart from the fact that the petition of review had to be filed within 30 days-and here there has been inordinate delay-the petition for review had to be placed before the same Bench and now that two of the learned Judges of that Constitution Bench are still available, it must have gone only before a Bench of five with those two learned Judges. Again under the Rules of the Court a review petition was not to be heard in Court and was liable to be disposed of by circulation. In these

circumstances, the petition of appeal could not be taken as a review petition. The question, therefore, to be considered now is what is the modality to be followed for vacating the impugned direction.

101. This being the apex Court, no litigant has any opportunity of approaching any higher forum to question its decisions. Lord Buck-master in 1917 A.C. 170 stated:

All rules of court are nothing but provisions intended to secure proper administration of justice. It is, therefore, essential that they should be made to serve and be subordinate to that purpose.

this Court in Gujarat v. Ram Prakash MANU/SC/0157/1969 : [1970]2SCR875 reiterated the position by saying:

Procedure is the handmaid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it, like all rules of procedure, this rule demands a construction which would promote this cause.

Once judicial satisfaction is reached that the direction was not open to be made and it is accepted as a mistake of the court, it is not only appropriate but also the duty of the Court to rectify the mistake by exercising inherent powers. Judicial opinion heavily leans in favour of this view that a mistake of the Court can be corrected by the Court itself without any fetters. This is on the principle as indicated in Alexander Rodger's case (supra). I am of the view that in the present situation, the Court's inherent powers can be exercised to remedy the mistake. Mahajan, J. speaking for a four-Judge Bench in Kishan Deo v. Radha Kissen MANU/SC/0006/1952 : [1953]4SCR136 stated:

The Judge had jurisdiction to correct his own error without entering into a discussion of the grounds taken by the decree-holder or the objections raised by the judgment-debtOrs.

102. The Privy Council in Debi v. Habib, ILR 35 All. 331, pointed out that an abuse of the process of the Court may be committed by the court or by a party. Where a court employed a procedure in doing something which it never intended to do and there is an abuse of the process of the court it can be corrected. Lord Shaw spoke for the Law lords thus:

Quite apart from Section 151, any court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made.

It was pointed out by the Privy Council in Murtaza v. Yasin, AIR 1916 PC 85 that:

Where substantial injustice would otherwise result, the court has, in their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in bona fide claims by parties....

Indian authorities are in abundance to support the view that injustice done should be corrected by applying the principle actus curiae neminem gravabit an act of the court shall prejudice no one.

103. To err is human, is the off-quoted saying. Courts including the apex one are no exception. To own up the mistake when judicial satisfaction is reached does not militate against its status or authority. Perhaps it would enhance both.

104. It is time to sound a note of caution this Court under its Rules of Business ordinarily sits in divisions and not as a whole one. Each Bench, whether small or large, exercises the powers vested in the Court and decisions rendered by the Benches irrespective of their size are considered as decisions of the Court. The practice has developed that a larger Bench is entitled to overrule the decision of a smaller Bench notwithstanding the fact that each of the decisions is that of the Court. That principle, however, would not apply in the present situation and since we are sitting as a Bench of Seven we are not entitled to reverse the decision of the Constitution Bench. Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench. In fact, if it is a case of exercise of inherent powers to rectify a mistake it was open even to a five-Judge Bench to do that and it did not require a Bench larger than the Constitution Bench for that purpose.

105. Mr. Jethmalani had told us during arguments that if there was interference in this case there was possibility of litigants thinking that the Court had made a direction by going out of its way because an influential person like Antulay was involved. We are sorry that such a suggestion was made before us by a senior counsel. If a mistake is detected and the apex Court is not able to correct it with a view to doing justice for fear of being misunderstood, the cause of justice is bound to suffer and for the apex Court the apprehension would not be a valid consideration. Today it is Abdul Rehman Antulay with a political background and perhaps some status and wealth but tomorrow it can be any ill-placed citizen. this Court while administering justice does not take into consideration as to who is before it. Every litigant is entitled to the same consideration and if an order is warranted in the interest of justice, the contention of Mr. Jethmalani cannot stand in the way as a bar to the making of that order.

106. There is still another aspect which should be taken note of. Finality of the orders is the rule. By our directing recall of an order the well-settled propositions of law would not be set at naught. Such a situation may not recur in the ordinary course of judicial functioning and if there be one certainly the Bench before which it comes would appropriately deal with it. No strait jacket formula can be laid down for judicial functioning particularly for the apex Court. The apprehension that the present decision may be used as a precedent to challenge judicial orders of this Court is perhaps misplaced because those who are familiar with the judicial functioning are aware of the limits and they would not seek support from this case as a precedent. We are sure that if precedent value is sought to be derived out of this decision, the Court which is asked to use this as an instrument would be alive to the peculiar facts and circumstances of the case in which this order is being made.

107. I agree with the ultimate conclusion proposed by my learned brother Mukharji.

G.L. Oza, J.

108. I had the opportunity to go through opinion prepared by learned brother Justice Mukharji and I agree with his opinion. I have gone through these additional reasons prepared by learned brother Justice R.N. Misra. It appears that the learned brother had tried to emphasise that even if an error is apparent in a judgment or an order passed by this Court it will not be open to a writ of certiorari and I have no hesitation in agreeing with this view expressed. At the same time I have no hesitation in observing that there should be no hesitation in correcting an error in exercise of inherent jurisdiction if it comes to our notice.

109. It is clear from the opinions of learned brothers Justice Mukharji and Justice Misra that the jurisdiction to try a case could only be conferred by law enacted by the legislature and this Court could not confer jurisdiction if it does not exist in law and it is this error which is sought to be corrected. Although it is unfortunate that it is being' corrected after long lapse of time. I agree with the opinion prepared by Justice Mukharji and also the additional opinion prepared by Justice Misra.

B.C. Ray, J.

110. I have the privilege of going through the judgment prepared by learned brother Mukharji, J and I agreed with the same. Recently, I have received a separate judgment from brother R.N. Misra, J and I have decipherred the same.

111. In both the judgments it has been clearly observed that judicial order of this Court is not amenable to a writ of certiorari for correcting any error in the judgment. It has also been observed that the jurisdiction or power to try and decide a cause is conferred on the courts by the Law of the Lands enacted by the Legislature or by the provisions of the Constitution. It has also been highlighted that the court cannot confer a jurisdiction on itself which is not provided in the law. It has also been observed that the act of the court does not injure any of the suitors. It is for this reason that the error in question is sought to be corrected after a lapse of more than three years. I agree with the opinion expressed by Justice Mukharji in the judgment as well as the additional opinion given by Justice Misra in his separate judgment.

M.N. Venkatachaliah, J.

112. Appellant, a former Chief Minister of Maharashtra, is on trial for certain offences under Sections 161, 165, Indian Penal Code and under the Prevention of Corruption Act, 1947. The questions raised in this appeal are extra-ordinary in many respects touching, as they do, certain matters fundamental to the finality of judicial proceedings. It also raises a question-of far-reaching consequences-whether, independently of the review jurisdiction under Article 137 of the Constitution, a different bench of this Court, could undo the finality of earlier pronouncements of different benches which have, otherwise, reached finality.

If the appeal is accepted, it will have effect of blowing-off, by a side-wind as it were, a number of earlier decisions of different benches of this Court, binding inter-parties, rendered at various stages of the said criminal prosecution including three judgments of 5 judge benches of this Court. What imparts an added and grim poignance to the case is that the appeal, if allowed, would set to naught all the proceedings taken over the years before three successive Judges of the High Court of Bombay and in which already 57 witnesses have been examined for the prosecution-all these done

pursuant to the direction dated 16.12.1984 issued by a five judge Bench of this Court. This by itself should be no deterrent for this Court to afford relief if there has been a gross miscarriage of justice and if appropriate proceedings recognised by law are taken. Lord Atkin said "Finality is a good thing, but justice is a better". [See 60 Indian Appeals 354 PC]. Considerations of finality are subject to the paramount considerations of justice; but the remedial action must be appropriate and known to law. The question is whether there is any such gross miscarriage of justice in this case, if so whether relief can be granted in the manner now sought.

The words of caution of the judicial committee in Venkata Narasimha Appa Row v. The Court of Wards and Ors. [1886] 1 ILR 660 are worth recalling:

There is a salutary maxim which ought to be observed by all courts of last resort-interest reipublicae ut sit finis litium. *Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this*.

(emphasis supplied).

113. I have had the opportunity, and the benefit, of reading in draft the learned and instructive opinions of my learned Brothers Sabyasachi Mukharji J., and Ranganath Misra J. They have, though for slightly differing reasons, proposed to accept the appeal. This will have the effect of setting-aside five successive earlier orders of different benches of the Court made at different stages of the criminal prosecution, including the three judgments of Benches of five Judges of this Court in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 and A.R. Antulay R.S. Nayak MANU/SC/0082/1984 : 1984CriLJ647 and R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 .

I have bestowed a respectful and anxious consideration to the weighty opinion of my brothers with utmost respect, I regret to have to deny myself the honour of agreeing with them in the view they take both of the problem and the solution that has commended itself to them. Apart from other things, how can the effect and finality of this Court's Order dated 17.4.1984 in Writ Petition No. 708 of 1984 be unsettled in these proceedings? Admittedly, this order was made after hearing and does not share the alleged vitiating factors attributed to the order dated 16.2.1984. That order concludes everything necessarily inconsistent with it. In all humility, I venture to say that the proposed remedy and the procedure for its grant are fraught with far greater dangers than the supposed injustice they seek to relieve : and would throw open an unprecedented procedural flood-gate which might, quite ironically, enable a repetitive challenge to the present decision itself on the very grounds on which the relief is held permissible in the appeal. To seek to be wiser than the law, it is said, is the very thing by good laws forbidden. Well trodden path is the best path.

Ranganath Misra J. if I may say so with respect, has rightly recognised these imperatives:

It is time to sound a note of caution this Court under its rules of business ordinarily sits in divisions and not as a whole one. Each Bench, whether small or large, exercises the powers vested in the Court and decisions rendered by the Benches irrespective of their size are considered as decisions

of the Court. The practice has developed that a larger bench is entitled to over-rule the decision of a small bench notwithstanding the fact that each of the decisions is that of the Court. That principle, however, would not apply in the present situation and since we are sitting as a Bench of Seven we are not entitled to reverse the decision of the Constitution Bench.

Learned brother, however, hopes this case to be more an exception than the Rule:

Finality of the orders is the rule. By our directing recall of an order the well-settled propositions of law would not be set at naught. Such a situation may not recur in the ordinary course of judicial functioning and if there be one, certainly the bench before which it comes would appropriately deal with it.

114. A brief advertence to certain antecedent events which constitute the back-drop for the proper perception of the core-issue arising in this appeal may not be out of place:

Appellant was the Chief Minister of Maharashtra between 9.6.1980 and 12.1.1982 on which latter date he resigned as a result of certain adverse findings made against him in a Court proceeding. On 9.8.1982, Ramdas Srinivas Nayak, respondent No. 1, with the sanction of the Governor of Maharashtra, accorded on 28.7.1982, filed in the Court of Special-Judge, Bombay, a criminal Case No. 24 of 1982 alleging against the appellant certain offences under Section 161 and 165 of Indian Penal Code and Section 6 of the Prevention of Corruption Act, 1947, of which the Special-Judge took cognisance.

Appellant questioned the jurisdiction of Special Judge to take cognisance of those offences on a private complaint. On 20.10.1982, the Special Judge over-ruled the objection. On 7.3.1983, the High Court dismissed appellant's revision petition in which the order of the Special Judge was assailed. The criminal case thereafter stood transferred to another Special Judge, Shri R.B. Sule. Appellant did not accept the order of the High Court dated 7.3.1983 against which he came up in appeal to this Court, by Special-leave, in Criminal appeal No. 347 of 1983. During the pendency of this appeal, however, another important event occurred. The Special Judge, Shri R.B. Sule, by his order dated 25.7.1983, discharged the appellant, holding that the prosecution was not maintainable without the sanction of the Maharashtra Legislative Assembly, of which the appellant continued to be a member, notwithstanding his ceasing to be Chief Minister. Respondent No. 1 challenged this order of discharge in a Criminal Revision Petition No. 354 of 1982 before the High Court of Bombay. Respondent No. 1 also sought, and was granted, special-leave to appeal against Judge Sule's order directly to this Court in Criminal appeal No. 356 of 1983. this Court also withdrew to itself the said criminal revision application No. 354 of 1982 pending before the High Court. All the three matters-the two appeals (Crl. A. 347 of 1983 and 356 of 1983) and Criminal Revision Petition so withdrawn to this Court-were heard by a five Judge bench and disposed of by two separate Judgments dated 16.2.1984.

By Judgment in Crl. appeal No. 356 of 1983 R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 this Court, while setting aside the view of the Special Judge that sanction of the Legislative Assembly was necessary, further directed the trial of the case by a Judge of the Bombay High Court. this Court observed that despite lapse of several years after commencement of the prosecution the case had "not moved an inch further", that "expeditious trial is primarily necessary

in the interest of the accused and mandate of Article 21", and that "therefore Special case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule" be withdrawn and transferred to the High Court of Bombay, with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. The Judge so designated was also directed to dispose of the case expeditiously, preferably "by holding the trial from day-to-day.

Appellant, in these proceedings, does not assail the correctness of the view taken by the 5 Judge Bench on the question of the sanction. Appellant has confined his challenge to what he calls the constitutional infirmity-and the consequent nullity-of the directions given as to the transfer of the case to a Judge of the High Court.

In effectuation of the directions dated 16.2.1984 of this Court the trial went on before three successive learned Judges of the High Court. It is not necessary here to advert to the reasons for the change of Judges. It is, however, relevant to mention that when the matter was before Khatri J. who was the first learned Judge to be designated by the Chief Justice on the High Court, the appellant challenged his jurisdiction, on grounds which amounted to a challenge to the validity of directions of this Court for the transfer of the case. Khatri J. quite obviously, felt bound to repel the challenge to his jurisdiction. Learned Judge said appellant's remedy, if any was to seek a review of the directions dated 16.2.1984 at the hands of this Court.

Learned Judge also pointed out in his order dated 14.3.1984 what, according to him, was the true legal position permitting the transfer of the case from the Special-Judge to be tried by the High Court in exercise of its extra-ordinary original criminal jurisdiction. In his order dated 16.3.1984, Khatri J. observed:

...Normally it is the exclusive jurisdiction of a Special Judge alone to try corruption charges. This position flows from Section 7 of the 1952 Act. However, this does not mean that under no circumstances whatever, can trial of such offences be not tried by a Court of superior jurisdiction than the Special Judge. I have no hesitation in contemplating at three situations in which a Court of Superior jurisdiction could try such offence....

115. The third situation can be contemplated under the CrPC itself where a Court of superior jurisdiction may have to try the special cases. Admittedly, there are no special provisions in the 1952 Act or 1947 Act relating to the transfer of special cases from one Court to the other. So by virtue of the combined operation of Section 8(3) of the 1952 Act and Section 4(2) of the CrPC, the High Court will have jurisdiction under Section 407 of the Code in relation to the special cases also. An examination of the provisions of Section 407 leaves no doubt that where the requisite conditions are fulfilled, the High Court will be within its legitimate powers to direct that a special case be transferred to and tried before itself.

Appellant did not seek any review of the directions at the hands of the Bench which had issued them, but moved in this Court a Writ Petition No. 708 of 1984 under Article 32 of the Constitution assailing the view taken by Khatri J. as to jurisdiction which in substance meant a challenge to the original order dated 16.2.1984 made by this Court. A division Bench consisting of D.A. Desai and A.N. Sen, JJ. dismissed the writ petition on 17.4.1984. Sen, J. speaking for the bench said:

In my view, the writ petition challenging the validity of the order and judgment passed by this Court as nullity or otherwise is incorrect, cannot be entertained. I wish to make it clear *that the dismissal of this writ petition will not prejudice the right of the petitioner to approach the Court with an appropriate review petition* or to file any other application which he may be entitled in law to file.

(emphasis supplied)

[A.R. Antulay v. Union [1984] 3 SCR 482

This order has become final. Even then no review was sought.

It is also relevant to refer here to another pronouncement of a five Judge bench of this Court dated 5.4.1984 in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 in Criminal misc. petition No. 1740 of 1984 disposing of a prayer for issue of certain directions as to the procedure to be followed before the designated Judge of the High Court. The bench referred to the provisions of law, which according to it, enabled the transfer of the trial of the criminal case to the High Court. The view taken by my two learned Brothers, it is needless to emphasise, has the effect of setting at naught this pronouncement of the five Judge Bench as well. The five Judge bench considered the legal foundations of the power to transfer and said:

...To be precise, the learned Judge has to try the case according to the procedure prescribed for cases instituted otherwise than on police report by Magistrate. This position is clearly an unambiguous in view of the fact that this Court while allowing the appeal was hearing amongst others Transferred case No. 347 of 1983 being the Criminal Revision Application No. 354 of 1983 on the file of the High Court of the Judicature at Bombay against the order of the learned Special Judge, Shri R.B. Sule discharging the accused. *if the criminal revision application was not withdrawn to this Court, the High Court while hearing criminal revision application could have under Section 407(8), CrPC, 1973, would have to follow the same procedure which the Court of Special Judge would have followed if the case would not have been so transferred....*

(emphasis supplied)

According to the Bench, the High Court's power under Section 407, Criminal Procedure Code for withdrawing to itself the case from a Special Judge, who was, for this purpose, a Sessions Judge, was preserved notwithstanding the exclusivity of the jurisdiction of the Special Judge and that the Supreme Court was entitled to and did exercise that power as the Criminal Review application pending in the High Court had been withdrawn to the Supreme Court. The main basis of appellant's case is that all this is per-incurriam, without jurisdiction and a nullity.

In the meanwhile Mehta J. was nominated by the Chief Justice of the High Court in place of Khatri. J. In addition to the 17 witnesses already examined by Khatri J. 41 more witnesses were examined for the prosecution before Mehta J. of the 43 charges which the prosecution required to be framed in the case, Mehta J. declined to frame charges in respect of 22 and discharged the appellant of those alleged offences. Again respondent No. 1 came up to this Court which by its order dated 17.4.1986 in Criminal Appeal No. 658 of 1985 [reported in (1985) 2 SCC 716] set aside the order

of discharge in regard to 22 offences and directed that charges be drawn in respect of them. this Court also suggested that another Judge be nominated to take up the case. It is, thus, that Shah J came to conduct the further trial.

116. I may now turn to the occasion for the present appeal. In the further proceedings before Shah J. the appellant contended that some of the alleged co-conspirators. Some of whom had already been examined as prosecution witnesses, and some others proposed to be so examined should also be included in the array of accused persons. This prayer, Shah J had no hesitation to reject. It is against this order dated 24.7.1986 that the present appeal has come up. With this appeal as an opening, appellant has raised directions of the five Judges Bench, on 16.2.1984; of the serious violations of his constitutional-rights; of a hostile discrimination of having to face a trial before a Judge of the High Court instead of the Special-Judge, etc. A Division Bench consisting of E.S. Venkataramiah and Sabyasachi Mukharji JJ. in view of the seriousness of the grievances aired in the appeal, referred it to be heard by a bench of seven Judges.

117. The actual decision of Shah J in the appeal declining to proceed against the alleged co-conspirators is in a short compass. But the appeal itself, has assumed a dimension far beyond the scope of the order it seeks to be an appeal against. The appeal has become significant not for its pale determined by the order under appeal; but more for the collateral questions for which it has served as a spring board in this Court.

118. Before going into these challenges, it is necessary to say something on the merits of the order under appeal itself. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead, examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner, in crime, is a different matter. Prosecution can enter Nolle proseque against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in Choraria v. Maharashtra MANU/SC/0065/1967 : 1968CriLJ1124 where Hidayathullah J referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing:

... Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso).

...The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was prosecuted by Section 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence....

On this point, really, appellant cannot be heard to complain. Of the so called co-conspirators some have been examined already as prosecution witnesses; some others proposed to be so examined; and two others, it would appear, had died in {he interregnum. The appeal on the point has no

substance and would require to be dismissed. We must now turn to the larger issue raised in the appeal.

119. While Shri P.P. Rao, learned Senior Counsel for the appellant, handling an otherwise delicate and sensitive issue, deployed all the legal tools that a first rate legal-smithy could design, Shri Ram Jethmalani, learned Senior Counsel, however, pointed out the impermissibility both as a matter of law and propriety of a different bench embarking upon the present exercise which, in effect, meant the exertion of an appellate and superior jurisdiction over the earlier five Judge Bench and the precedential problems and anomalies such a course would create for the future.

120. The contentions raised and urged by Shri P.P. Rao admit of being summarised and formulated thus:

(a) That Supreme Court has, and can, exercise only such jurisdiction as is invested in it by the Constitution and the laws; that even the power under Article 142(1) is not unfettered, but is confined within the ambit of the jurisdiction otherwise available to it; that the Supreme Court, like any other court, cannot make any order that violates the law; that Section 7(1) of the Criminal Law (Amendment) Act, 1952, (1952 Act) envisages and sets-up a special and exclusive forum for trial of certain offences; that the direction for trial of those offences by a Judge of the High Court is wholly without jurisdiction and void; and that 'Nullity' of the order could be set up and raised whenever and wherever the order is sought to be enforced or effectuated;

(b) That in directing a Judge of the High Court to try the case the Supreme Court virtually sought to create a new jurisdiction and a new forum not existent in and recognised by law and has, accordingly, usurped Legislative powers, violating the basic tenets of the doctrine of separation of powers;

(c) That by being singled out for trial by the High Court, appellant is exposed to a hostile discrimination, violative of his fundamental rights under Articles 14 and 21 and if the principles in State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 . The law applicable to Anwar Ali Sarkar should equally apply to Abdul Rahman Antulay.

(d) That the directions for transfer were issued without affording an opportunity to the appellant of being hear and therefore void as violative of Rules of Natural Justice.

(e) That the transfer of the case to the High Court deprived appellant of an appeal, as of right, to the High Court. At least one appeal, as of right is the minimal constitutional safeguard.

(f) That any order including a judicial order, even if it be of the highest Court, which violates the fundamental rights of a person is a nullity and can be assailed by a petition under Article 32 of the Constitution on the principles laid down in Prem Chand Garg v. Excise Commissioner, UP. MANU/SC/0082/1962 : [1963] 1 SCR 885.

(g) That, at all events, the order dated 16.2.1984 in so far as the impugned direction is concerned, is per incuriam passed ignoring the express statutory provisions of Section 7(1) of Criminal Law

(Amendment) Act, 1952, and the earlier decision of this Court in Gurucharan Das Chadhaw. State of Rajasthan [1966] 2 SCR 678.

(h) That the direction for transfer of the case is a clear and manifest case of mistake committed by the Court and that when a person is prejudiced by a mistake of Court it is the duty of the Court to correct its own mistake : Actus Curiae Neminem Gravabit.

121. Courts are as much human institutions as any other and share all human susceptibilities to error. Justice Jackson said:

...Whenever decisions of one Court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court a substantial proportion of our reversals of state Courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

(See Brown v. Allen [1944] US 443.

In Broom v. Cassel [1972] AC 1027 Lord Diplock said:

...It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in Court of Appeal I sometimes thought the House of Lords was wrong in over ruling me. Even since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.

Judge Learned Hand, referred to as one of the most profound legal minds in the jurisprudence of the English speaking world, commended the Cromwellian intellectual humility and desired that these words of Cromwell be written over the portals of every church, over court house and at every cross road in the nation : "I beseech ye...think that ye may be mistaken.

As a learned author said, while infallibility is an unrealisable ideal, "correctness", is often a matter of opinion. An erroneous decision must be as binding as a correct one. It would be an unattainable ideal to require the binding effect of a judgment to defend on its being correct in the absolute, for the test of correctness would be resort to another Court the infallibility of which is, again subject to a similar further investigation. No self-respecting Judge would wish to act if he did so at the risk of being called a usurper whenever he failed to anticipate and predict what another Judge thought of his conclusions. Even infallibility would not protect him he would need the gift of prophecy-ability to anticipate the fallibilities of others as well. A proper perception of means and ends of the judicial process, that in the interest of finality it is inevitable to make some compromise between its ambitions of ideal justice in absolute terms and its limitations.

122. Re : Contentions (a) and (b) : In the course of arguments we were treated to a wide ranging, and no less interesting, submissions on the concept of "jurisdiction" and "nullity" in relation to judicial orders. Appellant contends that the earlier bench had no jurisdiction to issue the impugned directions which were without any visible legal support, that they are 'void' as violative of the constitutional-rights of the appellant, and, also as violating the Rules of natural justice. Notwithstanding these appeal to high-sounding and emotive appellate; I have serious reservations about both the permissibility-in these proceedings-of an examination of the merits of these challenges. Shri Rao's appeal to the principle of "nullity" and reliance on a collateral challenge in aid thereof suffers from a basic fallacy as to the very concept of the jurisdiction of superior courts. In relation to the powers of superior courts, the familiar distinction between jurisdictional issues and adjudicatory issues-appropriate to Tribunals of limited jurisdiction,-has no place. Before a superior court there is no distinction in the quality of the decision-making-process respecting jurisdictional questions on the one hand and adjudicatory issues or issues pertaining to the merits, on the other.

123. The expression "jurisdiction" or the power to determine is, it is said, a verbal cast of many colours. In the case of a Tribunal, an error of law might become not merely an error in jurisdiction but might partake of the character of an error of jurisdiction. But, otherwise, jurisdiction is a 'legal shelter'-a power to bind despite a possible error in the decision. The existence of jurisdiction does not depend on the correctness of its exercise. The authority to decide embodies a privilege to bind despite error, a privilege which is inherent in and indispensable to every judicial function. The characteristic attribute of a judicial act is that it binds whether it be right or it be wrong. In Malkarjun v. Narahari [1900] 27 I.A. 216 the executing Court had quite wrongly, held that a particular person represented the estate of the deceased Judgment-debtor and put the property for sale in execution. The judicial committee said:

In doing so, the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right and if that course is not taken the decision, however wrong, cannot be disturbed.

In the course of the arguments there were references to the Anisminic case. In my view, reliance on the Anisminic principle is wholly misplaced in this case. That case related to the powers of Tribunals of limited jurisdiction. It would be a mistake of first magnitude to import these inhibitions as to jurisdiction into the concept of the jurisdiction of superior courts. A finding of a superior court even on a question of its own jurisdiction, however grossly erroneous it may, otherwise be, is not a nullity; nor one which could at all be said to have been reached without jurisdiction, susceptible to be ignored or to admit of any collateral-attack. Otherwise, the adjudications of superior courts would be held-up to ridicule and the remedies generally arising from and considered concomitants of such classification of judicial-errors would be so seriously abused and expanded as to make a mockery of those foundational principles essential to the stability of administration of justice.

The superior court has jurisdiction to determine its own jurisdiction and an error in that determination does not make it an error of jurisdiction. Holdsworth (History of English Law vol. 6 page 239) refers to the theoretical possibility of a judgment of a superior court being a nullity if

it had acted coram-non-judice. But who will decide that question if the infirmity stems from an act of the Highest Court in the land? It was observed:

...It follows that a superior court has jurisdiction to determine its own jurisdiction; and that therefore an erroneous conclusion as to the ambit of its jurisdiction is merely an abuse of its jurisdiction, and not an act outside its jurisdiction....

...In the second place, it is grounded upon the fact that, while the judges of the superior courts are answerable only to God and the king, the judges of the inferior courts are answerable to the superior courts for any excess of jurisdiction....

Theoritically the judge of a superior court might be liable if he acted coram non judice; but there is no legal tribunal to enforce that liability. Thus both lines of reasoning led to the same conclusion- the total immunity of the judges of the superior courts.

Rubinstein in his "Jurisdiction and Illegality" says:

...In practice, every act made by a superior court is always deemed valid (though, possibly, voidable) wherever it is relied upon. This exclusion from the rules of validity is indispensable. Superior courts knew the final arbiters of the validity of acts done by other bodies; their own decisions must be immune from collateral attack unless confusion is to reign. The superior courts decisions lay down the rules of validity but are not governed by these rules.

(See P. 12)

A clear reference to inappositeness and limitations of the Anisminic Rule in relation to Superior Court so to be found in the opinion of Lord Diplock in Re Racal Communications Ltd. [1980 2 All E.R. 634], thus:

There is in my view, however, also an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court acting in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, or as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their judicial capacity as such can be corrected only by means of appeal to an appellate court and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all.

[See page 639 & 640].

In the same case, Lord Salmon, said:

The Court of Appeal, however, relied strongly on the decision of your Lordship's House in Anisminic Ltd. v. Foreign Compensation Commission [1969] 1 All ER 209. That decision however was not, in my respectful view in any way relevant to the present appeal. It has no application to any decision or order made at first instance in the High Court of Justice. It is confined to decisions made by commissioners, tribunals or inferior courts which can now be reviewed by the High Court of Justice, just as the decision of inferior courts used to be reviewed by the old Court of King's Bench under the prerogative writs. If and when any such review is made by the High Court, it can be appealed to the Court of Appeal and hence, by leave, to your Lordship's House. [See page 641].

Again in Issac v. Robertson [1984] 3 All E.R. 140 the Privy Council reiterated the fallacy of speaking in the language of Nullity, void, etc, in relation to Judgments of superior courts. It was pointed out that it could only be called 'irregular'. Lord Diplock observed:

Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refers to the possibility of these being such a distinction between orders to which the description 'void' and void able' respectively have been applied can be found in the opinion given by the judicial committee of the Privy Council in Marsh v. Marsh, [1945] AC 271 and Maxfoy United Africa Co. Ltd. [1961] All EWR 1169 AC 152, but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall in a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceeding to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind....

The contrasting legal concepts of voidness and void ability form part of the English Law of contract. They art inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies. [See page 143]

Superior courts apart, even the ordinary civil courts of the land have jurisdiction to decide questions of their own jurisdiction. this Court, in the context of the question whether the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, was not attracted to the premises in question and whether, consequently, the exclusion under Section 28 of that Act, of the jurisdiction of all courts other than the Court of Small Causes in Greater Bombay did not operate, observed:

...The crucial point, therefore, in order to determine the question of the jurisdiction of the City Civil Court to entertain the suit, is to ascertain whether, in view of Section 4 of the Act, the Act applies to the premises at all. If it does, the City Civil Court has no jurisdiction but if it does not

then it has such jurisdiction, The question at once arises as to who is to decide this point in controversy. It is well settled that a Civil Court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit. Accordingly, we think, in agreement with High Court that this preliminary objection is not well founded in principle or on authority and should be rejected. MANU/SC/0064/1952 : [1953]4SCR185 . Bhatia Co-operative Housing Society Ltd. v. D.C. Patel]

It would, in my opinion, be wholly erroneous to characterise the directions issued by the five Judge bench as a nullity, amenable to be ignored or so declared in a collateral attack.

124. A judgment, inter-parties, is final and concludes the parties. In Re Hastings (No. 3) [1959] 1 All ER 698, the question arose whether despite the refusal of a writ of Habeas Corpus by a Divisional Court of the Queen's bench, the petitioner had, yet, a right to apply for the writ in the Chancery Division. Harman J. called the supposed right an illusion:

Counsel for the applicant, for whose argument I for one am much indebted, said that the clou of his case as this, that there still was this right to go from Judge to Judge, and that if that were not so the whole structure would come to the ground....

I think that the Judgment of the Queen's bench Divisional Court did make it clear that this supposed right was an illusion. If that be right, the rest follows. No body doubts that there was a right to go from court to court, as my Lord has already explained. There are no different courts now to go to. The courts that used to sit in bane have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by the rule to Divisional Courts of the Queen's Bench Division, and that is the only place to which a applicant may go.... [See page 701]

In Daryao v. State of U.P. MANU/SC/0012/1961 : [1962]1SCR574 it was held:

It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res-judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32. [See page 583].

In Trilok Chand v. H.B. Munshi MANU/SC/0127/1968 : [1969]2SCR824 Bachawat J. recognised the same limitations even in matter pertaining to the conferment of fundamental rights.

...The right to move this Court for enforcement of fundamental rights is guaranteed by Article 32. The writ under Article 32 issues as a matter of course if a breach of a fundamental right is established. But this does not mean that in giving relief under Article 32 the Court must ignore and trample under foot all laws of procedure, evidence, limitation, res-judicata and the like....

...the object of the statutes of limitation was to give effect to the maxim 'interest reipublicae ut sit finis litium' (Cop Litt 303)-the interest of the State requires that there should be a limit to litigation. The rule of res-judicata is founded upon the same rule of public policy.... [See page 842 and 843]

It is to be recalled that an earlier petition, W.P. No. 708 of 1984 under Article 32 moved before this Court had been dismissed, reserving leave to the appellant to seek review.

The words of Venkataramiah J in Sheonandan Paswan v. State of Bihar MANU/SC/0206/1986 : 1987CriLJ793 are apt and are attracted to the present case:

The reversal of the earlier judgment of this Court by this process strikes at the finality of judgments of this Court and would amount to the abuse of the power of review vested in this Court, particularly in a criminal case. It may be noted that no other court in the country has been given the power of review in criminal cases. I am of the view that the majority judgment of Baharul Islam and R.B. Misra, JJ. should remain undisturbed. *This case cannot be converted into an appeal against the earlier decision of this Court*.

(Emphasis supplied)

125. The exclusiveness of jurisdiction of the special judge under Section 7(1) of 1952 Act, in turn, depends on the construction to be placed on the relevant statutory-provision. If on such a construction, however erroneous it may be, the court holds that the operation of Section 407, Cr.P.C. is not excluded, that interpretation will denude the plenitude of the exclusivity claimed for the forum. To say that the court usurped legislative powers and created a new jurisdiction and a new forum ignores the basic concept of functioning of courts. The power to interpret laws is the domain and function of courts. Even in regard to the country's fundamental-law as a Chief Justice of the Supreme Court of the United States said : "but the Constitution is what the judges say it is". In Thomas v. Collins,(1945) US 516 it was said:

at page 943-4

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always is, delicate....

I am afraid appellant does himself no service by resting his case on these high conceptual fundamentals.

126. The pronouncements of every Division-Bench of this Court are pronouncements of the Court itself. A larger bench, merely on the strength of its numbers, cannot un-do the finality of the decisions of other division benches. If the decision suffers from an error the only way to correct it, is to go in Review under Article 137 read with Order 40 Rule I framed under Article 145 before "as far as is practicable" the same judges. This is not a matter merely of some dispensable procedural 'form' but the requirement of substance. The reported decisions on the review power under the Civil Procedure Code when it had a similar provision for the same judges hearing the matter demonstrate the high purpose sought to be served thereby.

127. In regard to the concept of Collateral Attack on Judicial Proceedings it is instructive to recall some observations of Van Fleet on the limitations-and their desirability-on such actions.

One who does not understand the theory of a science, who has no clear conception of its principles, cannot apply it with certainty to the problems; it is adapted to solve. In order to understand the principles which govern in determining the validity of RIGHTS AND TITLES depending upon the proceedings of judicial tribunals, generally called the doctrine of COLLATERAL ATTACK ON JUDGMENTS, it is necessary to have a clear conception of the THEORY OF JUDICIAL PROCEEDINGS....

...And as *no one would think of holding a judgment of the court of last resort void if its jurisdiction were debatable or even colorable*, the same rule must be applied to the judgments of all judicial tribunals. This is the true theory of judicial action when viewed collaterally. If any jurisdictional question is debatable or colorable, the tribunal must decide it; *and an erroneous conclusion can ony be corrected by some proceeding provided by law for so doing, commonly called a Direct Attack*. It is only where it can be shown lawfully, that some matter or thing essential to jurisdiction is wanting, that the proceeding is void, collaterally.

It is the duty of the courts to set their faces against all collateral assaults on judicial proceedings for two reasons, namely : First. Not one case in a hundred has any merits in it....

...Second. The second reason why the courts should reduce the chances for a successful collateral attack to the lowest minimum is, that they bring the courts themselves into disrepute. Many people look upon the courts as placed where jugglery and smartness are substituted for justice....

...*Such things tend to weaken law and order and to cause men to settle their rights by violence*. For these reasons, when the judgment rendered did not exceed the possible power of the court, and the notice was sufficient to put the defendant upon inquiry, a court should hesitate long before holding the proceedings void collaterally....

(emphasis supplied)

128. But in certain cases, motions to set aside Judgments are permitted where, for instance a judgment was rendered in ignorance of the fact that a necessary party had not been served at all, and was wrongly shown as served or in ignorance of the fact that a necessary-party had died and the estate was not represented. Again, a judgment obtained by fraud could be subject to an action for setting it aside. Where such a judgment obtained by fraud tended to prejudice a non-party, as in the case of judgments in-rem such as for divorce, or justification or probate etc. even a person, not eo-nomine a party to the proceedings, could seek a setting-aside of the judgment.

Where a party has had no notice and a decree is made against him, he can approach the court for setting-aside the decision. In such a case the party is said to become entitled to relief ex-debito justitiae, on proof of the fact that there was no service. This is a class of cases where there is no trial at all and the judgment is for default. D.N. Gordan, in his "Actions to set aside judgments." 1961 77 L Q R 356 says:

The more familiar applications to set aside judgments are those made on motion and otherwise summarily. But these are judgments obtained by default, which do not represent a judicial determination. In general, Judgments rendered after a trial are conclusive between the parties

unless and until reversed on appeal. Certainly in general judgments of superior Courts cannot be overturned or questioned between the parties in collateral actions. Yet there is a type of collateral action known as an action of review, by which even a superior court's judgment can be questioned, even between the parties, and set aside....

Cases of such frank failure of natural justice are obvious cases where Relief is granted as of right. Where a person is not actually served but is held erroneously, to have been served, he can agitate that grievance only in that forum or in any further proceeding therefrom. In Issac's case [1984] 3 All ER 140 privy council referred to:

...a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex-debito justitiae in exercise of the inherent jurisdiction of the court without needing to have recourse to the Rules that deal expressly with proceedings to set-aside orders for irregularity and give to the judge a discretion as to the order he will make.

In the present case by the order dated 5.4.1984 a five judge bench set-out, what according to it, was, the legal basis and source of jurisdiction to order transfer. On 17.4.1984 appellant's writ petition challenging that transfer as a nullity was dismissed. These orders are not which appellant is entitled to have set-aside ex-debito justitiae by another bench. Reliance on the observations in Issac's case is wholly misplaced.

The decision of the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh 2 NI Act 181 illustrates the point. Referring to the law on the matter, Lord Brougham said:

It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an Order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. The Courts of Equity may correct the Decrees made while they are in minutes; when they are complete they can only vary them by re-hearing; and when they are signed and enrolled they can no longer be reheard, but they must be altered, if at all, by Appeal. The Courts of Law, after the term in which the judgments are given can only alter them so as to correct misprisions, a power given by the Statutes of Amendment. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects, in order to enable the Decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669, of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an Appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a rehearing upon the whole cause, and an entire alteration of the judgment once pronounced....

129. The second class of cases where a judgment is assailed for fraud, is illustrated by the Duchess of Kingston's case (1776 2 Sm. L.C. 644 13th Ed.). In that case, the Duchess was prosecuted for bigamy on the allegation that she entered into marriage while her marriage to another person, a certain Hervey, was still subsisting. In her defence, the Duchess relied upon a decree of jactitation from an ecclesiastical court which purported to show that she had never been married to Hervey. The prosecution sought to get over this on the allegation the decree was obtained in a sham and collusive proceeding. The House of Lords held the facts established before Court rendered the decree nugatory and was incapable of supplying that particular defence. De Grey CJ said that the collusive decree was not be impeached from within; yet like all other acts of the highest authority, it is impeachable from without, although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud which affected the judgment was described by the learned Chief Justice as an "extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice."

130. The argument of nullity is too tall and has no place in this case. The earlier direction proceeded on a construction of Section 7(1) of the Act and Section 407 Cr.P.C. We do not sit here in appeal over what the five Judge bench said and proclaim how wrong they were. We are, simply, not entitled to embark, at a later stage, upon an investigation of the correctness of the very same decision. The same bench can, of course, reconsider the matter under Article 137.

However, even to the extent the argument goes that the High Court under Section 407 Cr.P.C. could not withdraw to itself a trial from Special-Judge under the 1952 Act, the view of the earlier bench is a possible view. The submissions of Shri Ram Jethmalani that the exclusivity of the jurisdiction claimed for the special forum under the 1952 Act is in relation to Courts which would, otherwise, be Courts of competing or co-ordinate jurisdictions and that such exclusivity does not effect the superior jurisdiction of the High Court to withdraw, in appropriate situations, the case to itself in exercise of its extraordinary original criminal jurisdiction; that canons of Statutory-construction, appropriate to the situation, require that the exclusion of jurisdiction implied in the 1952 amending Act should not be pushed beyond the purpose sought to be served by the amending law; and that the law while creating the special jurisdiction did not seek to exclude the extra-ordinary jurisdiction of the High Court are not without force; The argument, relying upon Kavasji Pestonji Dalal v. Rustomji Sorabji Jamadar and Anr, AIR 1949 Bombay 42 that while the ordinary competing jurisdictions of other Courts were excluded, the extraordinary jurisdiction of the High Court was neither intended to be, nor, in fact, affected, is a matter which would also bear serious examination. In Sir Francis Bennion's Statutory Interpretation, there are passages at page 433 which referring to presumption against implied repeal, suggest that in view of the difficulties in determining whether an implication of repeal was intended in a particular situation it would be a reasonable presumption that where the legislature desired a repeal, it would have made it plain by express words. In Sutherland Statutory construction the following passages occur:

Prior statutes relating to the same subject matter are to be compared with the new provisions; and if possible by reasonable construction, *both are to be so construed that effect is given to every provision of each*. Statutes in pari materia although in apparent conflict, are so far as reasonably possible constructed to be in harmony with each other.

(Emphasis supplied)

When the legislature enacts a provision, it has before it a 11 the other provisions relating to the same subject matter which it enacts at that time, whether in the same statute or in a separate Act. It is evident that it has in mind the provisions of a prior Act to which it refers, whether it phrases the later Act as amendment or an independent Act. *Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is rec ogzant of them both*, without expressly recognizing the inconsistency.

(emphasis supplied)

Reliance by Shri Ram Jethmalani on these principles to support his submission that the power under Section 407 was unaffected and that the decision in State of Rajasthan v. Gurucharan Das Chadda (supra), can not also be taken to have concluded the matter, is not un-arguable. I would, therefore, hold contentions (a) and (b) against appellant.

131. Re: contention (c):

The fundamental right under Article 14, by all reckoning, has a very high place in constitutional scale of values. Before a person is deprived of his personal liberty, not only that the Procedure established by law must strictly be complied with and not departed from to the disadvantage or detriment of the person but also that the procedure for such deprivation of personal liberty must be reasonable, fair and just. Article 21 imposes limitations upon the procedure and requires it to conform to such standards of reasonableness, fairness and justness as the Court acting as sentinel of fundamental rights would in the context, consider necessary and requisite. The court will be the arbiter of the question whether the procedure is reasonable, fair and just.

If the operation of Section 407, Cr.P.C. is not impliedly excluded and therefore, enables the withdrawal of a case by the High Court to itself for trial as, indeed, has been held by the earlier bench, the argument based on Article 14 would really amount to a challenge to the very vires of Section 407. All accused persons cannot claim to be tried by the same Judge. The discriminations-inherent in the choice of one of the concurrent jurisdictions-are not brought about by an inanimate statutory-rule or by executive fiat. The withdrawal of a case under Section 407 is made by a conscious judicial act and is the result of judicial discernment. If the law permits the withdrawal of the trial to the High Court from a Special Judge, such a law enabling withdrawal would not, prima facie, be bad as violation of Article 14. The five Judge bench in the earlier case has held that such a transfer is permissible under law. The appeal to the principle in Anwar Ali Sarkar's case (supra), in such a context would be somewhat out of place.

If the law did not permit such a transfer then the trial before a forum which is not according to law violates the rights of the accused person. In the earlier decision the transfer has been held to be permissible. That decision has assumed finality.

If appellant says that he is singled out for a hostile treatment on the ground alone that he is exposed to a trial before a Judge of the High Court then the submission has a touch of irony. Indeed that a trial by a Judge of the High Court makes for added re-assurance of justice, has been recognised in a number of judicial pronouncement. The argument that a Judge of the High Court may not necessarily possess the statutory-qualifications requisite for being appointed as a Special Judge

appears to be specious. A judge of the High Court hears appeals arising from the decisions of the Special Judge, and exercises a jurisdiction which includes powers co-extensive with that of the trial court. There is, thus, no substance in contention (c).

132. Re : Contention (d):

This grievance is not substantiated on facts; nor, having regard to the subsequent course of events permissible to be raised at this stage. These directions, it is not disputed, were issued on 16.2.1984 in the open Court in the presence of appellant's learned Counsel at the time of pronouncement of the judgment. Learned Counsel had the right and the opportunity of making an appropriate submission to the court as to the permissibility or otherwise of the transfer. Even if the submissions of Shri Ram Jethmalani that in a revision application Section 403 of the Criminal Procedure Code does not envisage a right of being heard and that transfer of a case to be tried by the Judge of the High Court cannot, in the estimate of any right thinking person, be said to be detrimental to the accused person is not accepted, however, applicant, by his own conduct, has disentitled himself to make grievance of it in these proceedings. It cannot be said that after the directions were pronounced and before the order was signed there was no opportunity for the appellant's learned Counsel to make any submissions in regard to the alleged illegality or impropriety of the directions. Appellant did not utilise the opportunity. That apart, even after being told by two judicial orders that appellant, if aggrieved, may seek a review, he did not do so. Even the grounds urged in the many subsequent proceedings appellant took to get rid of the effect of the direction do not appear to include the grievance that he had no opportunity of being heard. Where, as here, a party having had an opportunity to raise a grievance in the earlier proceedings does not do so and makes it a technicality later he cannot be heard to complain. Even in respect of so important jurisdiction as Habeas Corpus, the observation of Gibson J in Re. Tarling [1979] 1 All E.R. 981 at 987 are significant:

Firstly, it is clear to the Court that an applicant for habeas corpus is required to put forward on his initial application then whole of the case which is then fairly available to him he is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the Court.

The true doctrine of estoppel known as res judicata does not apply to the decision of this Court on an application for habeas corpus we refer to the words of Lord Parket CJ delivering the Judgment of the Court in Re. Hastings (No. 2). There is, however, a wider sense in which the doctrine of res judicata may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore, should have been litigated in earlier proceedings....

This statement of the law by Gibson J was approved by Sir John Donaldson MR in the Court of appeal in Ali v. Secretary of State for the Home Department [1984] 1 All E.R. 1009 at 1019.

Rules of natural justice embodies fairness in-action. By all standards, they are great assurances of Justice and fairness. But they should not be pushed to a breaking point. It is not inappropriate to recall what Lord Denning said in R. v. Secretary of State for the Home Department ex-parte Mughal [1973] 3 All ER 796:

...The rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke the rules of natural justice so as to avoid the consequences.

Contention (d) is insubstantial.

133. Re. Contention (e):

The contention that the transfer of the case to the High Court involves the elimination of the appellant's right of appeal to the High Court which he would otherwise have and that the appeal under Article 136 of the Constitution is not as of right may not be substantial in view of Section 374, Cr.P.C. which provides such an appeal as of right, when the trial is held by the High Court. There is no substance in contention (e) either.

134. Re. Contention (f):

The argument is that the earlier order of the five Judge bench in so far as it violates the fundamental rights of the appellant under Article 14 and 21 must be held to be void and amenable to challenge under Article 32 in this very Court and that the decision of this Court in Premchand Garg's case (supra) supports such a position. As rightly pointed out by Ranganath Misra, J. Premchand Garg's case needs to be understood in the light of the observations made in Naresh Sridhar Mirajkar and Ors. v. State of Maharashtra and Anr. [1966] 3 SCC 744. In Mirajkar's case, Gajendragadkar, CJ., who had himself delivered the opinion in Garg's case, noticed the contention based on Garg's case thus:

In support of his argument that a judicial decision can be corrected by this Court in exercise of its writ jurisdiction under Article 32(2), Mr. Setalvad has relied upon another decision of this Court in Prem Chand Garg v. Excise Commissioner, UP, Allahabad (supra)....

Learned Chief Justice referring to the scope of the matter that fell for consideration in Garg's case stated:

...It would thus be seen that the main controversy in the case of Prem Chand Garg centered round the question as to whether Article 145 conferred powers on this Court to make rules, though they may be inconsistent with the constitutional provisions prescribed by part III. Once it as held that the powers under Article 142 had to be read subject not only to the fundamental rights, but to other binding statutory provisions, it became clear that the ruler which authorised the making of the impugned order was invalid. It was in that context that the validity of the order had to be incidentally examined. The petition was made not to challenge the order as such, but to challenge the validity of the rule under which the order was made....

Repelling the contention, learned Chief Justice said:

...It is difficult to see now this decision can be pressed into service by Mr. Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdiction of this Court itself....

A passage from Kadish & Kadish "Discretion to Disobey", 1973 Edn. may usefully by recalled:

On one view, it would appear that the right of a citizen to defy illegitimate judicial authority should be the same as his right to defy illegitimate legislative authority. After all, if a rule that transgresses the Constitution or is otherwise invalid is no law at all and never was one, it should hardly matter whether a court or a legislature made the rule. Yet the prevailing approach of the courts has been to treat invalid court orders quite differently from invalid statutes. The long established principle of the old equity courts was that an erroneously issued injunction must be obeyed until the error was judicially determined. Only where the issuing court could be said to have lacked jurisdiction in the sense of authority to adjudicate the cause and to reach the parties through its mandate were disobedient contemnors permitted to raise the invalidity of the order as a full defence. By and large, American courts have declined to treat the unconstitutionality of a court order as a jurisdictional defect within this traditional equity principle, and in notable instances they have qualified that principle even where the defect was jurisdiction in the accepted sense. (See 111).

Indeed Ranganath Misra, J. in his opinion rejected the contention of the appellant in these terms:

In view of this decision in Mirajkar's case, supra, it must be taken as concluded that judicial proceedings in this Court are not subject to the writ jurisdiction thereof.

There is no substance in contention (f) either.

135. Contention (g):

It is asserted that the impugned directions issued by the five Judge Bench was per-incuriam as it ignored the Statute and the earlier Chaada's case.

But the point is that the circumstance that a decision is reached per-incuriam, merely serves to denude the decision of its precedent-value. Such a decision would not be binding as a judicial precedent. A co-ordinate bench can disagree with it and decline to follow it. A larger bench can over rule such decision. When a previous decision is so overruled it does not happen-nor has the overruling bench any jurisdiction so to do-that the finality of the operative order, inter-parties, in the previous decision is overturned. In this context the word 'decision' means only the reason for the previous order and not the operative-order in the previous decision, binding inter-parties. Even if a previous decision is overruled by a larger-bench, the efficacy and binding nature, of the adjudication expressed in the operative order remains undisturbed inter-parties. Even if the earlier decision of the five Judge bench is per-incuriam the operative part of the order cannot be interfered within the manner now sought to be done. That apart the five Judge bench gave its reason. The reason, in our opinion, may or may not be sufficient. There is advertence to Section 7(1) of the 1952 Act and to the exclusive jurisdiction created thereunder. There is also reference to Section 407 of the Criminal Procedure Code. Can such a decision be characterised as one reached per-incurium? Indeed, Ranganath Misra, J. says this on the point:

Overruling when made by a larger bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the

particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger bench....

I respectfully agree. Point (g) is bereft of substance and merits.

136. Re : Contention (h):

The argument is that the appellant has been prejudiced by a mistake of the Court and it is not only within power but a duty as well, of the Court to correct its own mistake, so that no party is prejudiced by the Court's mistake : Actus Curiae Neminem Gravabit.

I am afraid this maxim has no application to conscious conclusions reached in a judicial decision. The maxim is not a source of a general power to reopen and rehear adjudication which have otherwise assumed finality. The maxim operates in a different and narrow area. The best illustration of the operation of the maxim is provided by the application of the rule of nunc-pro-tunc. For instance, if owing to the delay in what the court should, otherwise, have done earlier but did later, a party suffers owing to events occurring in the interrugnum, the Court has the power to remedy it. The area of operation of the maxim is, generally, procedural. Errors in judicial findings, either of facts or law or operative decisions consciously arrived at as a part of the judicial-exercise cannot be interfered with by resort to his maxim. There is no substance in contention (h).

137. It is true that the highest court in the land should not, by technicalities of procedure forge fetters on its own feet and disable itself in cases of serious miscarriages of justice. It is said that "Life of law is not logic; it has been experience." But it is equally true as Cordozo said : But Holmes did not tell us that logic is to be ignored when experience is silent. Those who do not put the teachings of experience and the lessons of logic out of consideration would tell what inspires confidence in the judiciary and what does not. Judicial vacillations fall in the latter category and undermine respect of the judiciary and judicial institutions, denuding thereby respect for law and the confidence in the even-handedness in the administration of justice by Courts. It would be gross injustice, says an author, (Miller-'data of jurisprudence') to decide alternate cases on opposite principles. The power to alter a decision by review must be expressly conferred or necessarily inferred. The power of review-and the limitations on the power-under Article 137 are implicit recognitions of what would, otherwise, be final and irrevocable. No appeal could be made to the doctrine of inherent powers of the Court either. Inherent powers do not confer, or constitute a source of, jurisdiction. They are to be exercised in aid of a jurisdiction that is already invested. The remedy of the appellant, if any, is recourse to Article 137; no where else. This appears to me both good sense and good law.

The appeal is dismissed.

S. Ranganathan, J.

138. I have had the benefit of perusing the drafts of the judgments proposed by my learned brothers Sabyasachi Mukharji, Ranganath Misra and Venkatachaliah, JJ. On the question whether the direction given by this Court in its judgment dated 16.2.1984 should be recalled, I find myself in agreement with the conclusion of Venkatachaliah, J. (though for slightly different reasons) in

preference to the conclusion reached by Sabyasachi Mukharji, J. and Ranganath Misra, J. I would, therefore, like to set out my views separately on this issue.

THE ISSUES

139. This is an appeal by special leave from a judgment of Shah J., of the Bombay High Court. The appellant is being tried for offences under Sections 120B, 420, 161 and 165 of the Indian Penal Code (I.P.C.) read with Section 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947. The proceedings against the appellant were started in the Court of Sri Bhutta, a Special Judge, appointed under Section 6(1) of the Criminal Law (Amendment) Act, 1952 (hereinafter referred to as 'the 1952 Act'). The proceedings have had a chequered career as narrated in the judgment of my learned brother Sabyasachi Mukharji, J. Various issues have come up for consideration of this Court at the earlier stages of the proceedings and the judgments of this Court have been reported in MANU/SC/0117/1982 : 1982CriLJ1581 and MANU/SC/0198/1986 : 1986CriLJ1922 . At present the appellant is being tried by a learned Judge of the Bombay High Court nominated by the Chief Justice of the Bombay High Court in pursuance of the direction given by this Court in its order dated 16.2.1984 (reported in MANU/SC/0102/1984 : 1984CriLJ613 . By the order presently under appeal, the learned Judge (s) framed as many as 79 charges against the appellant and (b) rejected the prayer of the appellant that certain persons, named as co-conspirators of the appellant in the complaint on the basis of which the prosecution has been launched should be arrayed as co-accused along with him. But the principal contention urged on behalf of the appellant before us centers not round the merits of the order under appeal on the above two issues but round what the counsel for the appellant has described as a fundamental and far-reaching objection to the very validity of his trial before the learned Judge. As already stated, the trial is being conducted by the learned Judge pursuant to the direction of this Court dated 16.2.1984. The contention of the learned Counsel is that the said direction is per incuriam, illegal, invalid, contrary to the principles of natural justice and violative of the fundamental rights of the petitioner. This naturally raises two important issues for our consideration:

A. Whether the said direction is inoperative, invalid or illegal, as alleged; and

B. Whether, if it is, this Court can and should recall, withdraw, revoke or set aside the same in the present proceedings.

Since the issues involve a review or reconsideration of a direction given by a Bench of five judges of this Court, this seven-judge Bench has been constituted to hear the appeal.

140. It is not easy to say which of the two issues raised should be touched upon first as, whichever one is taken up first, the second will not arise for consideration unless the first is answered in the affirmative. However, as the correctness of the direction issued is impugned by the petitioner, as there is no detailed discussion in the earlier order on the points raised by the petitioner, and as Sabyasachi Mukharji, J. has expressed an opinion on these contentions with parts of which I am unable to agree, it will be perhaps more convenient to have a look at the first issue as if it were coming up for consideration for the first time before us and then, depending upon the answer to it, consider the second issue as to whether this Court has any jurisdiction to recall or revoke the earlier order. The issues will, therefore, be discussed in this order.

A. ARE THE DIRECTIONS ON 16.2.1984 PROPER, VALID AND LEGAL?

141. For the appellant, it is contended that the direction given in the last para of the order of the Bench of five Judges dated 16.2.1984 (extracted in the judgment of Sabyasachi Mukharji, J.) is vitiated by illegality, irregularity and lack of jurisdiction on the following grounds:

(i) Conferment of jurisdiction on courts is the function of the legislature. It was not competent for this Court to confer jurisdiction on a learned Judge of the High Court to try the appellant, as, under the 1952 Act, an offence of the type in question can be tried only by a special Judge appointed thereunder. This has been overlooked while issuing the direction which is, therefore, per incuriam.

(ii) The direction above-mentioned (a) relates to an issue which was not before the Court (b) on which no arguments were addressed and (c) in regard to which the appellant had no opportunity to make his submissions. It was nobody's case before the above Bench that the trial of the accused should no longer be conducted by a Special Judge but should be before a High Court Judge.

(iii) In issuing the impugned direction, the Bench violated the principles of natural justice, as mentioned above. It also overlooked that, as a result thereof, the petitioner (a) was discriminated against by being put to trial before a different forum as compared to other public servants accused of similar offences and (b) lost valuable rights of revision and first appeal to the High Court which he would have had, if tried in the normal course.

The direction was thus also violative of natural justice as well as the fundamental rights of the petitioner under Article 14 and 21 of the Constitution.

Primary Jurisdiction

142. There can be-and, indeed, counsel for the respondent had-no quarrel with the initial premise of the learned Counsel for the appellant that the conferment of jurisdiction on courts is a matter for the legislature. Entry 77 of List I, entry 3 of List II and entries 1, 2, 11A and 46 of List III of the Seventh Schedule of the Constitution set out the respective powers of parliament and the State Legislatures in that regard. It is common ground that the jurisdiction to try offences of the type with which are concerned here is vested by the 1952 Act in Special Judges appointed by the respective State Governments. The first question that has been agitated before us is whether this Court was right in transferring the case for trial from the Court of a Special Judge, to a Judge nominated by the Chief Justice of Bombay.

High Court's Power of Transfer

143. The power of the Supreme Court to transfer cases can be traced, in criminal matters, either to Article 139A of the Constitution or Section 406 of the CrPC ("Cr. P.C.), 1973. Here, again, it is common ground that neither of these provisions cover the present case. Sri Jethmalani, learned Counsel for the respondent, seeks to support the order of transfer by reference to Section 407 (not Section 406) of the Code and Clause 29 of the Letters Patent of the Bombay High Court. Section 407 reads thus:

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

it may order-

(i) that any offence be inquired into or tried by any Court not qualified under Section 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offences;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2)the High Court may act either on the report of the lower court or on the application of a party interested or on its own initiative:

XXX XXX XXX XXX XXX XXX XXX XXX XXX

(9) Nothing in this section shall be deemed to affect any order of Government under Section 197.

And Clause 29 of the Letters Patent of the Bombay High Court runs thus:

And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of appeal or superior jurisdiction, and also to direct the preliminary investigation of trial of any criminal case by any officer of Court otherwise competent to investigate or try it though such case belongs, in ordinary course, to the jurisdiction of some other officer, of Court.

The argument is that this power of transfer vested in the High Court can well be exercised by the Supreme Court while dealing with an appeal from the High Court in the case.

144. For the appellant, it is contended that the power of transfer under Section 407 cannot be invoked to transfer a case from a Special Judge appointed under the 1952 Act to the High Court. Learned Counsel for the appellant contends that the language of Section 7(1) of the Act is mandatory; it directs that offences specified in the Act can be tried only by persons appointed, under Section 6(2) of the Act, by the State Government, to be special judges, No other Judge, it is said, has jurisdiction to try such a case, even if he is a Judge of the High Court. In this context, it

is pointed out that a person, to be appointed as a special Judge, under Section 6(2) of the 1952 Act, should be one who is, or has been, a Sessions Judge (which expression in this context includes an Additional Sessions Judge and/or an Assistant Sessions Judge) All High Court Judges may not have been Sessions Judges earlier and, it is common ground, Shah, J. who has been nominated by the Chef Justice for trying this case does not fulfill the qualifications prescribed for appointment as a Special Judge. But, that consideration apart, the argument is that, while a High Court can transfer a case from one special judge to another, and the Supreme Court, from a special judge in one State to a special judge in another State, a High Court cannot withdraw a case from a Special Judge to itself and the Supreme Court cannot transfer a case from a Special Judge to the High Court.

145. On the other hand, it is contended for the respondent that the only purpose of the 1952 Act is to ensure that cases of corruption and bribery do not get bogged up in the ordinary criminal courts which are over-burdened with all sorts of cases. Its object is not to create special courts n the sense of courts manned by specially qualified personnel or courts following any special type of procedure. All that is done is to earmark some of the existing sessions judges for trying these offences exclusively. The idea is just to segregate corruption and bribery cases to a few of the sessions judges so that they could deal with them effectively and expeditiously. It is a classification in which the emphasis is on the types of offences and nature of offenders rather than on the qualifications of judges. That being so, the requirement in Section 7(1) that these cases should be tried by special judges only is intended just to exclude their trial by the other normal criminal courts of coordinate jurisdiction and not to exclude the High Court.

146. Before dealing with these contentions, it may be useful to touch upon the question whether a judge of a High Court can be appointed by the State Government as a special judge to try offences of the type specified in Section 6 of the 1952 Act. It will be seen at once that not all the judges of the High Court (but only those elevated from the State subordinate judiciary) would fulfill the qualifications prescribed under Section 6(2) of the 1952 Act. Though there is nothing in Sections 6 and 7 read together to preclude altogether the appointment of a judge of the High Court fulfilling the above qualifications as a special judge, it would appear that such is not the (atleast not the normal) contemplation of the Act. Perhaps it is possible to argue that, under the Act, it is permissible for the State Government to appoint one of the High Court Judges (who has been a Sessions Judge) to be a Special Judge under the Act. If that had been done, that Judge would have been a Special Judge and would have been exercising his original jurisdiction in conducting the trial. But that is not the case here. In response to a specific question put by us as to whether a High Court Judge can be appointed as a Special Judge under the 1952 Act, Shri Jethmalani submitted that a High Court Judge cannot be so appointed. I am inclined to agree. The scheme of the Act, in particular the provisions contained in Sections 8(3A) and 9, militate against this concept. Hence, apart from the fact that in this case no appointment of a High Court Judge, as a Special Judge, has in fact been made, it is not possible to take the view that the statutory provisions permit the conferment of a jurisdiction to try this case on a High Court Judge as a Special Judge.

147. Turning now to the powers of transfer under Section 407, one may first deal with the decision of this Court in Gurucharan Das Chadha v. State of Rajasthan [1966] 2 S.C.R. 678 on which both counsel strongly relied. That was a decision by three judges of this Court on a petition under Section 527 of the 1898 Cr.P.C. (corresponding to Section 406 of the 1973 Cr.P.C.). The petitioner

had prayed for the transfer of a case pending in the court of a Special Judge in Bharatpur, Rajasthan to another criminal court of equal or superior jurisdiction subordinate to a High Court other than the High Court of Rajasthan. The petition was eventually dismissed on merits. But the Supreme Court dealt with the provisions of Section 527 of the 1898 Cr.P.C. in the context of an objection taken by the respondent State that the Supreme Court did not have the jurisdiction to transfer a case pending before the Special Judge, Bharatpur. The contention was that a case assigned by the State Government under the 1952 Act to a Special Judge cannot be transferred at all because, under the terms of that Act, which is a self-contained special law, such a case must be tried only by the designated Special Judge. The Court observed that the argument was extremely plausible but not capable of bearing close scrutiny. After referring to the provisions of Section 6, 7 and 8 of the 1952 Act, the Court set out the arguments for the State thus:

The Advocate-General, Rajasthan, in opposing the petition relies principally on the provisions of Section 7(1) and 7(2) and contends that the two sub-sections create two restrictions which must be read together. The first is that offences specified in Section 6(1) can be tried by Special Judges only. The second is that every such offence shall be tried by the Special Judge for the area within which it is committed and if there are more special judges in that area by the Special Judge chosen by the Government. These two conditions, being statutory, it is submitted that no order can be made under Section 527 because, on transfer, even if a special judge is entrusted with the case, the second condition is bound to be broken.

Dealing with this contention the Court observed:

This condition, if literally understood, would lead to the conclusion that a case once made over to a special Judge in an area where there is no other special Judge, cannot be transferred at all. This could hardly have been intended. If this were so, the power to transfer a case intra-state under Section 526 of the CrPC, on a parity of reasoning, must also be lacking. But this Court in *Ramachandra Parsad v. State of Bihar* MANU/SC/0120/1961 : 1961CriLJ811 unheld the transfer of a case by the High Court which took it to a special judge who had no jurisdiction in the area where the offence was committed. In holding that the transfer was valid this Court relied upon the third sub-section of Section 8 of the Act. That sub-section preserves the application of any provision of the CrPC if it is not inconsistent with the Act, save as provided in the first two sub-sections of that section. The question, therefore, resolves itself to this : Is there an inconsistency between Section 527 of the Code and the second sub-section of Section 7? The answer is that there is none. Apparently this Court in the earlier case found no inconsistency and the reasons appear to be there: The condition that an offence specified in Section 6(2) shall be tried by a special Judge for the area within which it is committed merely specifies which of several special Judges appointed in the State by the State Government shall try it. The provision is analogous to others under which the jurisdiction of Magistrates and Sessions Judges is determined on a territorial basis. Enactments in the CrPC intended to confer territorial jurisdiction upon courts and Presiding Officers have never been held to stand in the way of transfer of criminal cases outside those areas of territorial jurisdiction. The order of transfer when it is made under the powers given by the Code invests another officer with jurisdiction although ordinarily he would lack territorial jurisdiction to try the case. The order of this Court, therefore, which transfer(s) a case from one special Judge subordinate to one High Court to another special Judge subordinate to another High Court creates

jurisdiction in the latter in much the same way as the transfer by the High Court from one Sessions Judge in a Session Division to another Sessions Judge in another Sessions Division.

There is no comparison between the first sub-section and the second sub-section of Section 7. The condition in the second sub-section of Section 7 is not of the same character as the condition in the first sub-section. The first sub-section creates a condition which is a sine qua non for the trial of certain offences. That condition is that the trial must be before a special Judge. The second sub-section distributes the work between special Judges and lays emphasis on the fact that trial must be before a special Judge appointed for the area in which the offence is committed. This second condition is on a par with the distribution of work territorially between different Sessions Judges and Magistrates. An order of transfer, by the very nature of things must, some times, result in taking the case out of the territory and the provisions of the Code which are preserved by the third sub-section of Section 8 must supervene to enable this to be done and the second sub-section of Section 7 must yield. We do not consider that this creates any inconsistency because the territorial jurisdiction created by the second sub-section of Section 7 operates in a different sphere and under different circumstances. *Inconsistency can only be found if two provisions of law apply in identical circumstances and create contradictions. Such a situation does not arise when either this Court or the High Court exercises its powers of transfer*. We are accordingly of the opinion that the Supreme Court in exercise of its jurisdiction and power under Section 527 of the CrPC can transfer a case from a Special Judge subordinate to the High Court to another special Judge subordinate to another High Court.

(emphasis added)

148. The attempt of Sri Jethmalani is to bring the present case within he scope of the observations contained in the latter part of the extract set out above. He submits that a special judge, except insofar as a specific provision to the contrary is made, is a court subordinate to the High Court, as explained in MANU/SC/0082/1984 : 1984CriLJ647 and proceedings before him are subject to the provisions of the 1973 Cr.P.C.; the field of operation of the first sub-section of Section 7 is merely to earmark certain Sessions Judges for purposes of trying cases of corruption by public servants and this provision is, in principle, not different from the earmarking of cases on the basis of territorial jurisdiction dealt with by Sub-Section 2 of Section 7. The argument is no doubt a plausible one. It does look somewhat odd to say that a Sessions Judge can, but a High Court Judge cannot, try an offence under the Act. The object of the Act, as rightly pointed out by counsel, is only to segregate certain cases to special courts which will concentrate on such cases so as to expedite their disposal and not to oust the superior jurisdiction of the High Court or its powers of superintendence over subordinate courts under Article 227 of the Constitution, an aspect only of which is reflected in Section 407 of the Cr.P.C. However, were the matter to be considered as res integra, I would be inclined to accept the contention urged on behalf of the appellant, for the following reasons. In the first place, the argument of the counsel for the respondent runs counter to the observations made by the Supreme Court in the earlier part of the extract set out above that the first sub-section of Section 7 and the second sub-section are totally different in character. The first sub-section deals with a sine qua non for the trial of certain offences, whereas the second sub-section is only of a procedural nature earmarking territorial jurisdiction among persons competent to try the offence. They are, therefore, vitally different in nature. The Supreme Court has clearly held in the passage extracted above that the case can be transferred only from one special judge to

another. In other words, while the requirement of territorial jurisdiction is subordinate to Section 406 or 407, the requirement that the trial should be by a special judge is not. It is true that those observations are not binding on this larger Bench and moreover the Supreme Court there was dealing only with an objection based on Sub-section (2) of Section 7. It is, however, clear that the Bench, even if it had accepted the transfer petition of Gurcharan Das Chadha, would have rejected a prayer to transfer the case to a court other than that of a Special Judge appointed by the transferee State. I am in respectful agreement with the view taken in that case that there is a vital qualitative difference between the two sub-sections and that while a case can be transferred to a special judge who may not have the ordinary territorial jurisdiction over it, a transfer cannot be made to an ordinary magistrate or a court of session even if it has territorial jurisdiction. If the contention of the learned Counsel for the respondent that Section 7(1) and Section 407 operate in different fields and are not inconsistent with each other were right, it should be logically possible to say that the High Court can, under Section 407, transfer a case from a special judge to any other Court of Session. But such a conclusion would be clearly repugnant to the scheme of the 1952 Act and plainly incorrect. It is, therefore, difficult to accept the argument of Sri Jethmalani that we should place the restriction contained in the first sub-section of Section 7 also as being on the same footing as that in the second sub-section and hold that the power of transfer contained in the Criminal Procedure Code can be availed of to transfer a case from a Special Judge to any other criminal court or even the High Court. The case can be transferred only from one special judge to another special judge; it cannot be transferred even to a High Court Judge except where a High Court Judge is appointed as a Special Judge. A power of transfer postulates that the court to which transfer or withdrawal is sought is competent to exercise jurisdiction over the case, (vide, Raja Soap Factory v. Shantaraj MANU/SC/0231/1965 : [1965]2SCR800).

149. This view also derives support from two provisions of Section 407 itself. The first is this. Even when a case is transferred from one criminal court to another, the restriction as to territorial jurisdiction may be infringed. To obviate a contention based on lack of territorial jurisdiction in the transferee court in such a case, Clause (ii) of Section 407 provides that the order of transfer will prevail, lack of jurisdiction under Sections 177 to 185 of the Code notwithstanding. The second difficulty arises, even under the Cr.P.C. itself, by virtue of Section 197 which not only places restriction on the institution of certain prosecutions against public servants without Government sanction but also empowers the Government, inter alia, to determine the court before which such trial is to be conducted. When the forum of such a trial is transferred under Section 407 an objection may be taken to the continuance of the trial by the transferee court based on the order passed under Section 197. This eventuality is provided against by Section 407(9) of the Act which provides that nothing in Section 407 shall be deemed to affect an order passed under Section 407. Although specifically providing for these contingencies, the section is silent in so far as a transfer from the court of a Special Judge under the 1952 Act is concerned though it is a much later enactment.

150. On the contrary, the language of Section 7(1) of the 1952 Act places a definite hurdle in the way of construing Section 407 of the Cr.P.C. as overriding its provisions. For, it opens with the words:

Notwithstanding anything contained in the CrPC, 1898 or in any other law.

In view of this non-obstante clause also, it becomes difficult to hold that the provisions of Section 407 of the 1973 Cr.P.C. will override, or even operate consistently with, the provisions of the 1952 Act. For the same reason it is not possible to hold that the power of transfer contained in Clause 29 of the Letters Patent of the Bombay High Court can be exercised in a manner not contemplated by Section 7(1) of the 1952 Act.

151. Thirdly, whatever may be the position where a case is transferred from one special judge to another or from one ordinary subordinate criminal Court to another of equal or superior jurisdiction, the withdrawal of a case by the High Court from such a Court to itself for trial places certain handicaps on the accused. It is true that the court to which the case has been transferred is a superior court and in fact, the High Court. Unfortunately, however, the high Court judge is not a person to whom the trial of the case can be assigned under Section 7(1) of the 1952 Act. As pointed out by the Supreme Court in Surajmal Mohta v. Viswanatha Sastry MANU/SC/0026/1954 : [1954]26ITR1(SC) at pp. 464 in a slightly different context, the circumstance that a much superior forum is assigned to try a case than the one normally available cannot by itself be treated as a "sufficient safeguard and a good substitute" for the normal forum and the rights available under the normal procedure. The accused here loses his right of coming up in revision or appeal to the High Court from the interlocutory and final orders of the trial court. He loses the right of having two courts-a subordinate court and the High Court-adjudicate upon his contentions before bringing the matter up in the Supreme Court. Though, as is pointed out later, these are not such handicaps as violate the fundamental rights of such an accused, they are circumstances which create prejudice to the accused and may not be overlooked in adopting one construction of the statute in preference to the other.

152. Sri Jethmalani vehemently contended that the construction of Section 407 sought for by the appellant is totally opposed to well settled canons of statutory construction. He urged that the provisions of the 1952 Act should be interpreted in the light of the objects it sought to achieve and its amplitude should not be extended beyond its limited objective. He said that a construction of the Act which leads to repugnancy with, or entails pro tanto repeal of, the basic criminal procedural law and seeks to divest jurisdiction vested in a superior court should be avoided. These aspects have been considered earlier. The 1952 Act sought to expedite the trial of cases involving public servants by the creation of courts presided over by experienced special judges to be appointed by the State Government. There is however nothing implausible in saying that the Act having already earmarked these cases for trial by experienced Sessions Judges made this provision immune against the applicability of the provisions of other laws in general and the Cr.P.C. in particular. Effect is only being given to these express and specific words used in Section 7(1) and no question arises of any construction being encouraged that is repugnant to the Cr.P.C. or involves an implied repeal, pro tanto, of its provisions. As has already been pointed out, if the requirement in Section 7(1) were held to be subordinate to the provisions contained in Section 406 or 407, then in principle, even a case falling under the 1952 Act can be transferred to any other Sessions Judge and that would defeat the whole purpose of the Act and is clearly not envisaged by it.

Supreme Court's power of transfer

153. It will have been noticed that the power of transfer under Section 407 or Clause 29 of the Letters Patent which has been discussed above is a power vested in the High Court. So the question

will arise whether, even assuming that the High Court could have exercised such power, the Supreme Court could have done so. On behalf of the respondent, it was contended that, as the power of the High Court under Section 407 can be exercised on application of a party or even suo motu and can be exercised by it at any stage irrespective of whether any application or matter in connection with the case is pending before it or not, the Supreme Court, as an appellate Court, has a co-equal jurisdiction to exercise the power of transfer in the same manner as the High Court could. In any event, the Supreme Court could exercise the power as one incidental or ancillary to the power of disposing of a revision or appeal before it. The appellants, however, contend that, as the power of the Supreme Court to order transfer of cases has been specifically provided for in Section 406 and would normally exclude cases of intra-state transfer covered by Section 407 of the Code, the statute should not be so construed as to imply a power of the Supreme Court, in appeal or revision, to transfer a case from a subordinate court to the High Court. The argument also is that what the Supreme Court, as an appellate or revisional Court, could have done was either (a) to direct the High Court to consider whether this was a fit case for it to exercise its power under Section 407(1)(iv) to withdraw the case to itself and try the same with a view to expeditiously dispose it of or (b) to have withdrawn the case to itself for trial. But, it is contended, no power which the Supreme Court could exercise as an appellate or revisional Court could have enabled the Supreme Court to transfer the case from the Special Judge to the High Court.

154. Here also, the contentions of both parties are nicely balanced but I am inclined to think that had the matter been res integra and directions for transfer were being sought before us for the first time, this Court would have hesitated to issue such a direction and may at best have left it to the High Court to consider the matter and exercise its own discretion. As already pointed out, the powers of the Supreme Court to transfer cases from one court to another are to be found in Article 139-A of the Constitution and Section 406 of the Cr.P.C The provisions envisaged either inter-state transfers of cases i.e. from a court in one State to a court in another State or the withdrawal of a case by the Supreme Court to itself. Intra-State transfer among courts subordinate to a High Court inter-se or from a court subordinate to a High Court to the High Court is within the jurisdiction of the appropriate High Court. The attempt of counsel for the respondent is to justify the transfer by attributing the powers of the High Court under Section 407 to the Supreme Court in its capacity as an appellate or revisional Court. This argument overlooks that the powers of the Supreme Court, in disposing of an appeal or revision, are circumscribed by the scope of the proceedings before it. In this case, it is common ground that the question of transfer was not put in issue before the Supreme Court.

155. The reliance placed in this context on the provisions contained in Articles 140 and 142 of the Constitution and Section 401 read with Section 386 of the Cr.P.C. does not also help. Article 140 is only a provisions enabling Parliament to confer supplementary powers on the Supreme Court to enable it to deal more effectively to exercise the jurisdiction conferred on it by or under the Constitution. Article 142 is also not of much assistance. In the first place, the operative words in that article, again are "in the exercise of its jurisdiction." The Supreme Court was hearing an appeal from the order of discharge and connected matters. There was no issue or controversy or discussion before it as to the comparative merits of a trial before a special judge vis-a-vis one before the High Court. There was only an oral request said to have been made, admittedly, after the judgment was announced. Wide as the powers under Article 141 are, they do not in my view, envisage an order of the type presently in question. The Nanavati case (1961 SCR 497, to which reference was made

by Sri Jethmalani, involved a totally different type of situation. Secondly, it is one of the contentions of the appellant that an order of this type, far from being necessary for doing complete justice in the cause or matter pending before the Court, has actually resulted in injustice, an aspect discussed a little later. Thirdly, however wide and plenary the language of the article, the directions given by the Court should not be inconsistent with, repugnant to or in violation of the specific provisions of any statute. If the provisions of the 1952 Act read with Article 139-A and Sections 406-407 of the Cr.P.C. do not permit the transfer of the case from a special judge to the High Court, that effect cannot be achieved indirectly,

it is, therefore, difficult to say, in the circumstances of the case, that the Supreme Court can issue the impugned direction in exercise of the powers under Article 142 or under Section 407 available to it as an appellate court.

156. Learned Counsel for the complainant also sought to support the order of transfer by reference to Section 386 and 401 of the 1973 Cr.P.C. He suggested that the Court, having set aside the order of discharge, had necessarily to think about consequential orders and that such directions as were issued are fully justified by the above provisions. He relied in this context on the decision of the Privy Council in Hari v. Emperor, MANU/PR/0036/1935. It is difficult to accept this argument. Section 401 provides that, in the revision pending before it, the High Court can exercise any of the powers conferred on a court of appeal under Section 386. Section 386, dealing with the powers of the appellate court enables the court, in a case such as this : (i) under Clause (a), to alter or reverse the order under appeal/revision; or (ii) under Clause (e), to make any amendment or any consequential or incidental order that may be just or proper. The decision relied on by counsel, Hari v. Emperor, MANU/PR/0036/1935, is of no assistance to him. In that case, the Additional Judicial Commissioner, who heard an appeal on a difference of opinion between two other judicial commissioner had come to the conclusion that the conviction had to be set aside. Then he had the duty to determine what should be done aid Section 426 of the 1898 Cr.P.C. (corresponding to Section 386 of the 1973 Cr.P.C.) exactly provided for the situation and empowered him:

to reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction subordinate to such appellate Court.

In the present case, the Special Judge, Sri Sule, had discharged the accused because of his conclusion that the prosecution lacked the necessary sanction. The conclusion of the Supreme Court that this conclusion was wrong meant, automatically, that the prosecution had been properly initiated and that the proceedings before the Special Judge should go on. The direction that the trial should be shifted to the High Court can hardly be described as a consequential or incidental order. Such a direction did not flow, as a necessary consequence of the conclusion of the court on the issues and points debated before it. I am, therefore, inclined to agree with counsel for the appellant that this Court was in error when it directed that the trial of the case should be before a High Court Judge.

157. It follows from the above discussion that the appellant, in consequence of the impugned direction, is being tried by a Court which has no jurisdiction-and which cannot be empowered by the Supreme Court-to try him. The continued trial before the High Court, therefore, infringes Article 21 of the Constitution.

Denial of equality and violation of Article 21.

158. It was vehemently contended for the appellant that, by giving the impugned direction, this Court has deprived the appellant of his fundamental rights. He has been denied a right to equality, inasmuch as his case has been singled out for trial by a different, though higher, forum as compared to other public servants. His fundamental right under Article 21, it is said, has been violated, inasmuch as the direction has deprived him of a right of revision and first appeal to the High Court which he would have had from an order or sentence had he been tried by a Special Judge and it is doubtful whether he would have a right to appeal to this Court at all. It is pointed out that a right of first appeal against a conviction in a criminal case has been held, by this Court, to be a part of the fundamental right guaranteed under Article 21 of the Constitution. It is not necessary for me to consider these arguments in view of my conclusion that the High Court could not have been directed to try the petitioner's case. I would, however, like to say that, in my opinion, the arguments based on Articles 14 and 21 cannot be accepted, in case it is to be held for any reason that the transfer of the appellant's case to the High Court was valid and within the competence of this Court. I say this for the following reason : If the argument is to be accepted, it will be appreciated, it cannot be confined to cases of transfer to the High Court of cases under the 1952 Act but would also be equally valid to impugn the withdrawal of a criminal case tried in the normal course under the Cr.P.C. from a subordinate court trying it to the High Court by invoking the powers under Section 407. To put it in other words, the argument, in substance, assails the validity of Section 407 of the 1973 Cr.P.C. In my opinion, this attack has to be repelled. The section cannot be challenged under Article 14 as it is based on a reasonable classification having relation to the objects sought to be achieved. Though, in general, the trial of cases will be by courts having the normal jurisdiction over them, the exigencies of the situation may require that they be dealt with by some other court for various reasons. Likewise, the nature of a case, the nature of issues involved and other circumstances may render it more expedient, effective, expeditious or desirable that the case should be tried by a superior court or the High Court itself. The power of transfer and withdrawal contained in Section 407 of the Cr.P.C. is one dictated by the requirements of justice and is, indeed, but an aspect of the supervisory powers of a superior court over courts subordinate to it : (see also Sections 408 to 411 of the Cr.P.C.). A judicial discretion to transfer or withdraw is vested in the highest court of the State and is made exercisable only in the circumstances set out in the section. Such a power is not only necessary and desirable but indispensable in the cause of the administration of justice. The accused will continue to be tried by a court of equal or superior jurisdiction. Section 407(8) read with Section 474 of the Cr.P.C. and Section 8(3) of the 1952 Act makes it clear that he will be tried in accordance with the procedure followed by the original Court or ordinarily by a Court of Session. The accused will, therefore, suffer no prejudice by reason of the application of Section 407. Even if there is a differential treatment which causes prejudice, it is based on logical and acceptable considerations with a view to promote the interest of justice. The transfer or withdrawal of a case to another court or the High Court, in such circumstances, can hardly be said to result in hostile discrimination against the accused in such a case.

159. Considerable reliance was placed on behalf of the appellant on State v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 . This decision seems to have influenced the learned judges before whom this appeal first came up for hearing in referring the matter to this larger Bench and has also been applied to the facts and situation here by my learned brother, Sabyasachi Mukharji, J. But it seems to me that the said decision has no relevance here. There, the category of cases

which were to be allocated to a Special Judge were not well defined; the selection of cases was to be made by the executive; and the procedure to be fallowed by the special courts was different from the normal criminal procedure. As already pointed out, the position here is entirety different. The 1952 legislation has been enacted to give effect to the Tek Chand Committee and to remedy a state of affairs prevalent in respect of a well defined class of offences and its provisions constituting special judges to try offences of corruption is not under challenge. Only a power of transfer is being exercised by the Supreme Court which is sought to be traced back to the power of the High Court under Section 407. The vires of that provision also is not being challenged. What is perhaps being said is that the Supreme Court ought not to have considered this case a fit one for withdrawal for trial to the High Court. That plea should be and is being considered here on merits but the plea that Article 14 has been violated by the exercise of a power under Section 407 on the strength of Anwar Ali Sarkar's case wholly appears to be untenable. Reference may be made in this context to Kathi Raning Rawat v. The State of Saurashtra [1952] 3 S.C.R. 435 and Re : Special Courts Bill, 1978 MANU/SC/0039/1978 : [1979]2SCR476 and Shukla v. Delhi Administration [1980] 3 S.C.R. 500, which have upheld the creation of special judges to try certain classes of offences.

160. It may be convenient at this place to refer to certain observations by the Bench of this Court, while referring this matter to the larger Bench, in a note appended to their order on this aspect. The learned Judges have posed the following questions in paragraphs 4 and 6 of their note :

4. The Criminal Law Amendment Act, 1952 as its preamble says is passed to provide for speedier trial? Does not further speeding up of the case by transferring the case to the High Court for speedy disposal violate the principle laid down by seven learned Judges of this Court in Anwar Ali Sarkar's case (1952) S.C.R. 284 and result in violation of Article 14 of the Constitution? The following observations of Vivian Bose, J. in Anwar Ali Sarkar's case at pages 366-387 of the Report are relevant:

Tested in the light of these considerations, I am of opinion that the whole of the West Bengal Special Courts Act of 1950 offends the provisions of Article 14 and is therefore bad. When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled, *or whether it is an experiment in speedier trials made for the good of society at large*. It matters now how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable, unbiassed and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad.'

(Underlining by us)

Do not the above observations apply to judicial orders also?

6. Does the degree of heinousness of the crime with which an accused is charged or his status or the influence that he commands in society have any bearing on the applicability or the constriction of Article 14 or Article 21.?

161. In my opinion, the answers to the questions posed will, again, depend on whether the impugned direction can be brought within the scope of Section 407 of the 1973 Cr.P.C. or not. If I am right in my conclusion that it cannot, the direction will clearly be contrary to the provisions of the Cr.P.C. and hence violative of Article 21. It could also perhaps be said to be discriminatory on the ground that, in the absence of not only a statutory provision but even any well defined policy or criteria, the only two reasons given in the order-namely, the status of the petitioner and delay in the progress of the trial-are inadequate to justify the special treatment meted out to the appellant. On the other hand, if the provisions of Section 407 Cr.P.C. are applicable, the direction will be in consonance with a procedure prescribed by law and hence safe from attack as violative of Article 21. The reasons given, in the context of the developments in the case, can also be sought to be justified in terms of Clauses (a), (b) or (c) of Section 407(1). In such an event, the direction will not amount to an arbitrary discrimination but can be justified as the exercise of a choice of courses permitted under a valid statutory classification intended to serve a public purpose.

162. The argument of infringement of Article 21 is based essentially on the premise that the accused will be deprived, in cases where the trial is withdrawn to the High Court of a right of first appeal. This fear is entirely unfounded. I think Sri Jethmalani is right in contending that where a case is thus withdrawn and tried by the Court, the High Court will be conducting the trial in the exercise of its extraordinary original criminal jurisdiction. As pointed out by Sabyasachi Mukharji, J., the old Presidency-town High Courts once exercised original jurisdiction in criminal matters but this has since been abolished. One possible view is that now all original criminal jurisdiction exercised by High Court is only extraordinary original criminal jurisdiction. Another possible view is that still High Courts do exercise ordinary original criminal jurisdiction in habeas corpus and contempt of court matters and also under some specific enactments (e.g. Companies' Act Sections 454 and 633). They can be properly described as exercising extraordinary original criminal jurisdiction, where though the ordinary original criminal jurisdiction is vested in a subordinate criminal Court or special Judge, a case is withdrawn by the High Court to itself for trial. The decision in Madura Tirupparankundram etc. v. Nikhan Sahib, MANU/WB/0033/1931 : 35 C.W.N. 1088, Kavasji Pestonji v. Rustomji Sorabji, MANU/MH/0034/1948 : AIR 1949 Bom 42, Sunil Chandra Roy and Anr. v. The State, MANU/WB/0110/1954 : AIR1954Cal305 , People's Insurance Co. Ltd. v. Sardul Singh Caveeshar and Ors. MANU/PH/0028/1961 and People's Patriotic Front v. K.K. Birla and Ors. MANU/DE/0037/1983 : 23(1983)DLT499 cited by him amply support this contention. If this be so, then Sri Jethmalani is also right in saying that a right of first appeal to the Supreme Court against the order passed by the High Court will be available to the accused under Section 374 of the 1973 Cr.P.C. In other words, in the ordinary run of criminal cases tried by a Court of Sessions, the accused will be tried in the first instance by a court subordinate to the High Court; he will then have a right of first appeal to the High Court and then can seek leave of the Supreme Court to appeal to it under Article 136. In the case of a withdrawn case, the accused has

the privilege of being tried in the first instance by the High Court itself with a right to approach the apex Court by way of appeal. The apprehension that the judgment in the trial by the High Court, in the latter case, will be final, with only a chance of obtaining special leave under Article 136 is totally unfounded. There is also some force in the submission of Sri Jethmalani that, if that really be the position and the appellant had no right of appeal against the High Court's judgment, the Supreme Court will consider any petition presented under Article 136 in the light of the inbuilt requirements of Article 21 and dispose of it as if it were itself a petition of appeal from the judgment, (see, in this context, the observations of this Court in Sadananthan v. Arunachalam [1980] 2 S.C.R. 673. That, apart it may be pointed out, this is also an argument that would be valid in respect even of ordinary criminal trials withdrawn to the High Court under Section 407 of the Cr.P.C. and thus, like the previous argument regarding Article 14, indirectly challenges the validity of Section 407 itself as infringing Article 21. For the reasons discussed, I have come to the conclusion that an accused, tried directly by the High Court by withdrawal of his case from a subordinate court, has a right of appeal to the Supreme Court under Section 374 of the Cr.P.C. The allegation of an infringement of Article 21 in such cases is, therefore, unfounded. Natural Justice

163. The appellant's contention that the impugned direction issued by this Court on 16.2.1984 was in violation of the principles of natural justice appears to be well founded. It is really not in dispute before us that there was no whisper or suggestion in the proceedings before this Court that the venue of the trial should be shifted to the High Court. This direction was issued suo motu by the learned Judges without putting it to the counsel for the parties that this was what they proposed to do. The difficulties created by observations or directions on issue's not debated before the Court have been highlighted by Lord Diplock) in Hadmor Productions Ltd. v. Hamilton [1983] A.C. 191. In that case, Lord Denning, in the Court of Appeal, had in his judgment, relied on a certain passage from the speech of Lord Wedderburn in Parliament as reported in Hansard (Parliamentary Reports) in support of the view taken by him. The counsel for the parties had had no inkling or information that recourse was likely to be had by the Judge to this source, as it had been authoritatively held by the House of Lords in Davis v. Johns [1979] A.C. 264 that these reports should not be referred to by counsel or relied upon by the court for any purpose. Commenting on this aspect, Lord Diplock observed:

Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice : the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is. In the instant case, counsel for Hamilton and Bould complained that Lord Denning M.R. had selected one speech alone to rely upon out of many that had been made...and that, if he has counsel had known that (Lord Denning) was going to do that, not only would he have wished to criticise what Lord Wedderburn had said in his speech...but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to Hansard....

The position is somewhat worse in the present case. Unlike the Hamilton case (supra) where the Judge had only used Hansard to deal with an issue that arose in the appeal, the direction in the present case was something totally alien to the scope of the appeal, on an issue that was neither raised nor debated in the course of the hearing and completely unexpected.

164. Shri Jethmalani submitted that, when the judgment was announced, counsel for the complainant (present respondent) had made an oral request that the trial be transferred to the High Court and that the Judges replied that they had already done that. He submitted that, at that time and subsequently, the appellant could have protested and put forward his objections but did not and had thus acquiesced in a direction which was, in truth, beneficial to him as this Court had only directed that he should be tried by a High Court Judge, a direction against which no one can reasonably complain. This aspect of the respondent's arguments will be dealt with later but, for the present, all that is necessary is to say that the direction must have come as a surprise to the appellant and had been issued without hearing him on the course proposed to be adopted.

Conclusion

165. To sum up, my conclusion on issue A is that the direction issued by the Court was not warranted in law, being contrary to the special provisions of the 1952 Act, was also not in conformity with the principles of natural justice and that, unless the direction can be justified with reference to Section 407 of the Cr.P.C., the petitioner's fundamental rights under Articles 14 and 21 can be said to have been infringed by reason of this direction. This takes me on to the question whether it follows as a consequence that the direction issued can be, or should be, recalled, annulled, revoked or set aside by us now.

B. CAN AND SHOULD THE DIRECTION OF 16.2.84 BE RECALLED?

166. It will be appreciated that, whatever may be the ultimate conclusion on the correctness, propriety or otherwise of the Court's direction dated 16.2.1984, that was a direction given by this Court in a proceeding between the same parties and the important and far-reaching question that falls for consideration is whether it is at all open to the appellant to seek to challenge the correctness of that direction at a later stage of the same trial.

Is a review possible?

167. The first thought that would occur to any one who seeks a modification of an order of this Court, particularly on the ground that it contained a direction regarding which he had not been heard, would be to seek a review of that order under Article 137 of the Constitution read with the relevant rules. Realising that this would be a direct and straight forward remedy, it was contended for the appellant that the present appeal may be treated as an application for such review.

168. The power of review is conferred on this Court by Article 137 of the Constitution which reads thus:

Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

It is subject not only to the provisions of any law made by Parliament (and there is no such law so far framed) but also to any rules made by this Court under Article 145. this Court has made rules in pursuance of Article 145 which are contained in Order XL in Part VIII of the Supreme Court Rules. Three of these rules are relevant for our present purposes. They read as follows:

(1) The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

(2) An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly its grounds for review.

(3) Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

169. It is contended on behalf of the respondent that the present pleas of the appellant cannot be treated as an application for review, firstly, because they do not seek to rectify any error apparent on the face of the record; secondly, because the prayer is being made after the expiry of the period of thirty days mentioned in Rule 2 and there is no sufficient cause for condoning the delay in the making of the application and thirdly, for the reason that a review petition has to be listed as far as practicable before the same Judge or Bench of Judges that delivered the order sought to be reviewed and in this case at least two of the learned Judges, who passed the order on 16.2.1984, are still available to consider the application for review. These grounds may now be considered.

170. For reasons which I shall later discuss, I am of opinion that the order dated 16.2.1984 does not suffer from any error apparent on the face of the record which can be rectified on a review application. So far as the second point is concerned, it is common ground that the prayer for review has been made beyond the period mentioned in Rule 2 of Order XL of the Supreme Court Rules. No doubt this Court has power to extend the time within which a review petition may be filed but learned Counsel for the respondent vehemently contended that this is not a fit case for exercising the power of condo nation of delay. It is urged that, far from this being a fit case for the entertainment of the application for review beyond the time prescribed, the history of the case will show that the petitioner has deliberately avoided filing a review petition within the time prescribed for reasons best known to himself.

171. In support of his contention, learned Counsel for the respondent invited our attention to the following sequence of events and made the following points:

(a) The order of this Court was passed on 16.2.1984. At the time of the pronouncement of the said order, counsel for the present respondent had made a request that the trial of the case may be shifted to the High Court and the Court had observed that a direction to this effect had been included in the judgment. Even assuming that there had been no issues raised and no arguments advanced on the question of transfer at the time of the hearing of the appeals, there was nothing to preclude the counsel for the appellant, when the counsel for the complainant made the above request, from contending that it should not be done, or, at least, that it should not be done without further hearing him and pointing out this was not a matter which had been debated at the hearing of the appeal. But no, the counsel for the accused chose to remain quiet and did not raise any objection at that point of time. He could have filed a review application soon thereafter but he did not do so. Perhaps

he considered, at that stage, that the order which after all enabled him to be tried by a High Court Judge in preference to a Special Judge was favourable to him and, therefore, he did not choose to object.

(b) The matter came up before the trial judge on 13th March, 1984. The accused, who appeared in person, stated that he did not want to engage any counsel "at least for the present'. He would not put down his arguments in writing and when he argued the gravemen of his attack was that this Court's order transferring the trial from the Special Judge to the High Court was wrong on merits. Naturally, the learned Judge found it difficult to accept the contention that he should go behind the order of the Supreme Court. He rightly pointed out that if the accused had any grievance to make, his proper remedy was to move the Supreme Court for review of its judgment or for such further directions or clarifications as may be expedient. Thus, as early as 13th March, 1984, Khatri, J., had given a specific opportunity to the accused to come to this Court and seek a review of the direction. It can perhaps be said that on 16.2.1984, when this Court passed the impugned direction, the appellant was not fully conscious of the impact of the said direction and that, therefore, he did not object to it immediately. But, by the 13th March, 1984, he had ample time to think about the matter and to consult his counsel. The appellant himself was a barrister. He chose not to engage counsel but to argue himself and, even after the trial court specifically pointed out to him that it was bound by the direction of this Court under Articles 141 and 144 of the Constitution and that, if at all, his remedy was to go to the Supreme Court by way of review or by way of an application for clarification, he chose to take no action thereon.

(c) On 16th March, 1984, Khatri, J. disposed of the preliminary objections raised by the accused challenging the jurisdiction and competence of this Court to try the accused. Counsel for the respondent points out that, at the time of the hearing, the appellant had urged before Khatri, J. all the objections to the trial, which he is now putting forth. These objections have been summarised in paragraph 3 of the order passed by the learned Judge and each one of them has been dealt with elaborately by the learned Judge. It has been pointed out by him that the Supreme Court was considering not only the appeals preferred by the accused and the complainant, namely, Crl. Appeal Nos. 246, 247 and 356 of 1983 but also two revision petitions being C.R. Nos. 354 'and 359 of 1983 which had been withdrawn by the Supreme Court to itself for disposal along with Crl. Appeal No. 356 of 1983. A little later in the order the learned Judge pointed out that, even assuming that in the first instance the trial can be conducted only by a Special Judge, the proceedings could be withdrawn by the high Court to itself under powers vested in it under Article 228(a) of the Constitution as well as Section 407 of the Cr.P.C. When the criminal revisions stood transferred to the Supreme Court (this was obviously done under Article 139-A though that article is not specifically mentioned in the judgment of the Supreme Court), the Supreme Court could pass the order under Article 139-A read with Article 142. The learned Judge also disposed of the objections based on Article 21. He pointed out that as against an ordinary accused person tried by a special judge, who gets a right of appeal to the High Court, a court of superior jurisdiction, with a further right of appeal to the Supreme Court under Section 374 of the Cr.P.C. and that an order of transfer passed in the interest of expeditious disposal of a trial was primarily in the interests of the accused and could hardly be said to be prejudicial to the accused. Despite the very careful and fully detailed reasons passed by the High Court, the appellant did not choose to seek a review of the earlier direction.

(d) Against the order of the learned Judge dated 16.3.1984 the complainant came to the Court because he was dissatisfied with certain observations made by the trial Judge in regard to the procedure to be followed by the High Court in proceeding with the trial. This matter was heard in open court by same five learned Judges who had disposed of the matter earlier on 16.2.1984. The accused was represented by a senior counsel and the Government of Maharashtra had also engaged a senior counsel to represent its case. Even at this hearing the counsel for the appellant did not choose to raise any objection against the direction given in the order dated 16.2.1984. The appeal before the Supreme Court was for getting a clarification of the very order dated 16.2.1984. This was a golden opportunity for the appellant also to seek a review or clarification of the impugned direction, if really he had a grievance that he had not been heard by the Court before it issued the direction and that it was also contrary to the provisions of the 1952 Act as well as violative of the rights of the accused under Article 21 of the Constitution.

(e) The petitioner instead filed two special leave petitions and a writ petition against the orders of Khatri, J. dated 13.3.1984 and 16.3.1984. In the writ petition, the petitioner had mentioned that the impugned direction had been issued without hearing him. In these matters counsel for the accused made both oral and written submissions and all contentions and arguments, which have now been put forward, had been raised in the written arguments. The appeals and writ petition were disposed of by this Court. this Court naturally dismissed the special leave petitions pointing out that the High Court was quite correct in considering itself bound by the directions of the Court. The Court also dismissed the writ petition as without merit. But once again it observed that the proper remedy of the petitioner was elsewhere and not by way of a writ petition. These two orders, according to the learned Counsel for the respondent, conclude the matter against the appellant. The dismissal of the writ petition reminded the petitioner of his right to move the Court by other means and, though this advice was tendered as early as 17.4.1984, the petitioner did nothing. So far as the special leave petition was concerned, its dismissal meant the affirmation in full of the decision given by Justice Khatri dismissing and disposing of all the objections raised by the petitioner before him. Whatever may have been the position on 16.2.1984 or 16.3.1984, there was absolutely no explanation or justification for the conduct of the petitioner in failing to file an application for review between 17.4.1984 and October, 1986.

172. Recounting the above history, which according to him fully explained the attitude of the accused, learned Counsel for the respondent submitted that in his view the appellant was obviously trying to avoid a review petition perhaps because it was likely to go before the same learned Judges and he did not think that he would get any relief and perhaps also because he might have felt that a review was not an adequate remedy for him as, under the rules, it would be disposed of in chamber without hearing him once again. But, whatever may be the reason, it is submitted, the delay between April 1984 and October, 1986 stood totally unexplained and even now there was no proper review petition before this Court. In the circumstances, it is urged that this present belated prayer for review.

173. There is substance in these contentions. The prayer for review is being made very belatedly, and having regard to the circumstances outlined above there is hardly any reason to condone the delay in the prayer for review. The appellant was alive to all his present contentions as is seen from the papers in the writ petition. At least when the writ petition was dismissed as an inappropriate remedy, he should have at once moved this Court for review. The delay from April 1984 to October

1986 is totally inexplicable. That apart, there is also validity in the respondent's contention that, even if we are inclined to condone the delay, the application will have to be heard as far as possible by the same learned Judges who disposed of the earlier matter. In other words, that application will have to be heard by a Bench which includes the two learned Judges who disposed of the appeal on 16.2.1984 and who are still available in this Court to deal with any proper review application, that may be filed. However, since in my view, the delay has not been satisfactorily explained, I am of opinion that the prayer of the appellant that the present pleas may be treated as one in the nature of a review application and the appellant given relief on that basis has to be rejected.

Is a writ maintainable?

174. This takes one to a consideration of the second line of attack by the appellant's counsel. His proposition was that a judicial order of a court-even the High Court or this Court may breach the principles of natural justice or the fundamental rights and that, if it does so, it can be quashed by this Court in the exercise of its jurisdiction under Article 32. In other words, the plea would seem to be that the present proceedings may be treated as in the nature of a writ petition to quash the impugned order on the above ground. The earliest of the cases relied upon to support this contention is the decision in Prem Chand Garg v. Excise Commissioner [1963] Su. 1 S.C.R. 885, which may perhaps be described as the sheet-anchor of the appellant's contentions on this point. The facts of that case have been set out in the judgment of Sabyasachi Mukharji, J. and need not be repeated. The case was heard by a Bench of five judges. Four of them, speaking through Gajendragadkar, J. held that Rule 12 of Order XXXV of the Supreme Court Rules violated Article 32 and declared it invalid. This also set aside an earlier order dated 12.12.1961 passed by the Court in pursuance of the rule calling upon the petitioner to deposit cash security. Sri Rao contended that this case involved two separate issues for consideration by the Court : (a) the validity of the rule and (b) the validity of the order dated 12.12.1961; and that the decision is authority not only for the proposition that a writ petition under Article 32 could be filed to impugn the constitutional validity of a rule but also for the proposition that the Court could entertain a writ petition to set aside a judicial order passed by the Court earlier on discovering that it is inconsistent with the fundamental rights of the petitioner. Counsel submitted that an impression in the minds of some persons that the decision in Prem Chand Garg is not good law after the decision of the nine-Judge Bench in Naresh Sridhar Mirajkar v. State MANU/SC/0044/1966 : [1966]3SCR744 is incorrect. He submitted that, far from Garg's case being overruled, it has been confirmed in the later case.

175. Mirajkar was a case in which the validity of an interlocutory order passed by a judge of the Bombay High Court pertaining to the publication of reports of the proceedings in a suit pending before him was challenged by a journalist as violating his fundamental rights under Article 19 of the Constitution. The matter came to the Supreme Court by way of a writ petition under Article 32. The validity of the order was upheld by the majority of the Judges while Hidayatullah J. dissented. In this connection it is necessary to refer to a passage at p. 767 in the judgment of Gajendragadkar, C.J.

Mr. Setalvad has conceded that if a court of competent jurisdiction makes an order in a proceeding before it, and the order is inter-partes, its validity cannot be challenged by invoking the jurisdiction of this Court under Article 32, though the said order may affect the aggrieved party's fundamental rights. His whole argument before us has been that the impugned order affects the fundamental

rights of a stranger to the proceeding before the Court; and that, he contends, justifies the petitioners in moving this Court under Article 32. It is necessary to examine the validity of this argument.

The question before the Supreme Court was thus as to whether, even at the instance of a stranger to the earlier proceedings, the earlier order could be challenged by means of a writ petition under Article 32. One of the questions that had to be considered by the Court was whether the judicial order passed by the learned judge of the High Court was amenable to be writ jurisdiction of the Court under Article 32. On this question, the judges reacted differently:

(i) Gajendragadkar, CJ and Wanchoo, Mudholkar, Sikri and Ramaswamy, JJ. had this to say:

The High Court is a superior Court of Record and it is for it to consider whether any matter falls within its jurisdiction or not. The order is a judicial order and if it is erroneous, a person aggrieved by it, though a stranger, could move this Court under Article 136 and the order can be corrected in appeal but the question about the existence of the said jurisdiction as well as the validity or the propriety of the order cannot be raised in writ proceedings under Article 32.

(ii) Sarkar J. also concurred in the view that this Court had no power to issue a certiorari to the High Court. He observed:

I confess the question is of some haziness. That haziness arises because the courts in our country which have been given the power to issue the writ are not fully analogous to the English courts having that power. We have to seek a way out for ourselves. Having given the matter my best consideration, I venture to think that it was not contemplated that a High Court is an inferior court even though it is a court of limited jurisdiction. The Constitution gave power to the High Court to issue the writ. In England, an inferior court could never issue the writ. I think it would be abhorrent to the principle of certiorari if a Court which can itself issue the writ is to be made subject to be corrected by a writ issued by another court. When a court has the power to issue the writ, it is not according to the fundamental principles of certiorari, an inferior court or a court of limited jurisdiction. It does not cease to be so because another Court to which appeals from it lie has also the power to issue the writ. That should furnish strong justification for saying that the Constitution did not contemplate the High Courts to be inferior courts so that their decisions would be liable to be quashed by writs issued by the Supreme Court which also had been given power to issue the writs. Nor do I think that the cause of justice will in any manner be affected if a High Court is not made amenable to correct by this Court by the issue of the writ. In my opinion, therefore, this Court has not power to issue a certiorari to a High Court.

(iii) Bachawat J. held:

The High Court has jurisdiction to decide if it could restrain the publication of a. document or information relating to the trial of a pending suit or concerning which the suit is brought, if it erroneously assume a jurisdiction not vested in it, its decision may be set aside in appropriate proceedings but the decision is not open to attack under Article 32 on the ground that it infringes the fundamental right under Article 19(1)(a). If a stranger is prejudiced by an order forbidding the

publication of the report of any proceeding, his proper course is only to apply to the Court to lift the ban.

(iv) Justice Shah thought that, in principle, a writ petition could perhaps be filed to challenge an order of a High Court on the ground that it violated the fundamental rights of the petitioner under Articles 20, 21 and 22 but he left the question open. He, however, concluded that an order of the nature in issue before the Court could not be said to infringe Article 19.

176. Hidayatullah J., as His Lordship then was, however, dissented. He observed:

Even assuming the impugned order means a temporary suppression of the evidence of the witness, the trial Judge had no jurisdiction to pass the order. As he passed no recorded order, the appropriate remedy (in fact the only effective remedy) is to seek to quash the order by a writ under Article 32.

There may be action by a Judge which may offend the fundamental rights under Articles 14, 15, 19, 20, 21 and 22 and an appeal to this Court will not only be practicable but will also be an ineffective remedy and this Court can issue a writ to the High Court to quash its order under Article 32 of the Constitution. Since there is no exception in Article 32 in respect of the High Courts there is a presumption that the High Courts are not excluded. Even with the enactment of Article 226, the power which is conferred on the High Court is not in every sense a coordinate power and the implication of reading Articles 32, 136 and 226 together is that there is no sharing of the powers to issue the prerogative writs possessed by this Court. Under the total scheme of the Constitution, the subordination of the High Courts to the Supreme Court is not only evident but is logical.

His Lordship proceeded to meet an objection that such a course might cast a slur on the High Courts or open the floodgates of litigation. He observed:

Article 32 is concerned with Fundamental Rights and Fundamental Rights only. It is not concerned with breaches of law which do not involve fundamental rights directly. The ordinary writs of certiorari, mandamus and prohibition can only issue by enforcement of Fundamental Rights. A clear cut case of breach of Fundamental Right alone can be the basis for the exercise of this power. I have already given examples of actions of courts and judges which are not instances of wrong judicial orders capable of being brought before this Court only by appeal but breaches of Fundamental Rights clear and simple. Denial of equality as for example by excluding members of a particular party or of a particular community from the public Court room in a public hearing without any fault, when others are allowed to stay on would be a case of breach of fundamental right of equal protection given by this Constitution. Must an affected person in such a case ask the Judge to write down his order, so that he may appeal against it? Or is he expected to ask for special leave from this Court? If a High Court judge in England acted improperly, there may be no remedy because of the limitations on the rights of the subject against the Crown. But in such circumstances in England the hearing is considered vitiated and the decision voidable. This need not arise here. The High Court in our country in similar circumstances is not immune because there is a remedy to move this Court for a writ against discriminatory treatment and this Court should not in a suitable case shirk to issue a writ to a High Court Judge, who ignores the fundamental rights and his obligations under the Constitution. Other cases can easily be imagined under Article 14, 15, 19, 20, 21 and 22 of the Constitution, in which there may be action by a Judge which may offend

the fundamental rights and in which an appeal to this Court will not only be not practicable but also quite an ineffective remedy.

We need not be dismayed that the view I take means a slur on the High Courts or that this Court will be flooded with petitions under Article 32 of the Constitution. Although the High Courts possess a power to interfere by way of high prerogative writs of certiorari, mandamus and prohibition, such powers have not been invoked against the normal and routine work of subordinate courts and tribunals. The reason is that people understand the difference between an approach to the High Court by way of appeals etc. and approach for the purpose of asking for writs under Article 226. Nor have the High Courts spread a Procrustean bed for high prerogative writs for all actions to lie. Decisions of the courts have been subjected to statutory appeals and revisions but the losing side has not charged the Judge with a breach of fundamental rights because he ordered attachment of property belonging to a stranger to the litigation or by his order affected rights of the parties or even strangers. This is because the people understand the difference between normal proceedings of a civil nature and proceedings in which there is a breach of fundamental rights. The courts acts, between parties and even between parties and strangers, done impersonally and objectively are challengeable under the ordinary law only. But acts which involve the court with a fundamental right are quite different.

One more passage from the judgment needs to be quoted. Observed the learned Judge:

I may dispose of a few results which it was suggested, might flow from my view that this Court can issue a high prerogative writ to the High Court for enforcement of fundamental rights. It was suggested that the High Courts might issue writs to this Court and to other High Courts and one Judge or Bench in the High Court and the Supreme Court might issue a writ to another judge or Bench in the same Court. This is an erroneous assumption. To begin with High Courts cannot issue a writ to the Supreme Court because the writ goes down and not up. Similarly, a High Court cannot issue a writ to another High Court. The writ does not go to a court placed on an equal footing in the matter of jurisdiction

XXXXXX

I must hold that this English practice of not issuing writs in the same court is in the very nature of things. One High Court will thus not be able to issue a writ to another High Court nor even to a court exercising the powers of the High Court. In so far as this Court is concerned, the argument that one Bench or one Judge might issue a writ to another Bench or Judge, need hardly be considered. My opinion gives no support to such a view and I hope I have said nothing to give countenance to it. These are imaginary fears which have no reality either in law or in fact.

177. I have set out at length portions from the judgment of Hidayatullah, J. as Shri Rao placed considerable reliance on it. From the above extracts, it will be seen that the majority of the Court was clearly of opinion that an order of a High Court cannot be challenged by way of a writ petition under Article 32 of the Constitution on the ground that it violates the fundamental rights, not even at the instance of a person who was not at all a party to the proceedings in which the earlier order was passed. Even Hidayatullah, J. has clearly expressed the view that, though a writ of certiorari might issue to quash the order of a High Court in appropriate case, it cannot lie from a Bench of

one court to another Bench of the same High Court. Subba Rao, C.J. has also made an observation to like effect in regard to High Court Benches inter se in Ghulam Sarwar v. Union MANU/SC/0062/1966 : 1967CriLJ1204 . The decision in Prem Chand Garg, seems to indicate to the contrary. But it is clearly distinguishable and has been distinguished by the nine judge Bench in Mirajkar. The observations of Gujendragadkar, C.J. (at p. 766), and Sarkar, J. (at p. 780), be seen in this context. In that case, it is true that the order passed by the Court directing the appellant to deposit security was also quashed but that was a purely consequential order which followed on the well-founded challenge to the validity of the rule. Hidayatullah, J. also agreed that this was so and explained that the judicial decision which was based on the rule was only revised. (p. 790).

178. Sri Rao also referred to Sadhanatham v. Arunachalam MANU/SC/0083/1980 : [1980]2SCR873 . In that case, the petitioner was acquitted by the High Court, in appeal, of charges under Section 302 and 148 of the Indian Penal Code. The brother of the deceased, not the State or the informant, petitioned this Court under Article 136 of the Constitution for special leave to appeal against the acquittal. Leave was granted and his appeal was eventually allowed by the High Court. The judgment of the High Court was set aside and the conviction and sentence imposed by the trial court under Section 302 was upheld by the Supreme Court in his earlier decision reported in MANU/SC/0073/1979 : 1979CriLJ875 . Thereupon, the petitioner filed a writ petition under Article 32 of the Constitution, challenging the validity of the earlier order of this Court. Eventually, the petition was dismissed on the merits of the case. However, learned Counsel for the appellant strongly relied on the fact that in this case a Bench of five judges of this Court entertained a petition under Article 32 to reconsider a decision passed by it in an appeal before the Court. He submitted that it was inconceivable that it did not occur to the learned judges who decided the case that, after Mirajkar, a writ petition under Article 32 was not at all entertain able. He, therefore, relied upon this judgment as supporting his proposition that in an appropriate case this Court can entertain a petition under Article 32 and review an earlier decision of this Court passed on an appeal or on a writ petition or otherwise. This decision, one is constrained to remark, is of no direct assistance to the appellant. It is no authority for the proposition that an earlier order of the court could be quashed on the ground that it offends the Fundamental Right. As the petition was eventually dismissed on the merits, it was not necessary for the court to consider whether, if they had come to the conclusion that the earlier order was incorrect or invalid, they would have interfered therewith on the writ petition filed by the petitioner.

179. Two more decisions referred to on behalf of the appellant may be touched upon here. The first was the decision of this Court in Attorney-General v. Lachma Devi, : 1986CriLJ364 . In that case the High Court had passed an order that certain persons found guilty of murder should be hanged in public. This order was challenged by a writ petition filed under Article 32 by the Attorney-General of India, on the ground that it violated Article 21 of the Constitution. This petition was allowed by this Court. The second decision on which reliance was placed is that in Sukhdas v. Union Territory MANU/SC/0140/1986 : 1986CriLJ1084 . In that case the petitioner, accused of a criminal offence had not been provided with legal assistance by the court. The Supreme Court pointed out that this was a constitutional lapse on the part of the court and that the conviction on the face of the record suffered from a fatal infirmity. These decisions do not carry the petitioner any further. Sukhdas was a decision on an appeal and Lachma Devi does not go beyond the views expressed by Hidayatullah, J. and Shah, J. in Mirajkar.

180. On a survey of these decisions, it appears to me that Prem Chand Garg cannot be treated as an authority for the proposition that an earlier order of this Court could be quashed by the issue of a writ on the ground that it violated the fundamental rights. Mirajkar clearly precludes such a course. It is, therefore, not possible to accept the appellant's plea that the direction dated 16.2.1984 should be quashed on the grounds put forward by the petitioner.

Inherent power to declare orders to be null and void

181. The next line of argument of learned Counsel for the appellant is that the order dated 16.2.1984, in so far as it contained the impugned direction, was a complete nullity. Being an order without jurisdiction, it could be ignored by the person affected or challenged by him at any stage of the proceedings before any Court, particularly in a criminal case, vide Dhirendra Kumar v. Superintendent MANU/SC/0060/1954 : [1955]1SCR224 . Counsel also relied on the following observations made in Kiran Singh v. Chaman Paswan MANU/SC/0116/1954 : AIR [1955]1SCR117 .

The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. *It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties*. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was *coram non judice*, and that its judgments and decree would be nullities.

(emphasis added)

He also extensively quoted from the dicta of this Court in M.L. Sethi v. R.P. Kapur MANU/SC/0245/1972 : [1973]1SCR697 , where after setting out the speeches of Lord Reid and Lord Pearce in Anisminic Ltd. v. Foreign Compensation Commissioner [1969] 2 A.C. 147 this Court observed:

The dicta of the majority of the House of Lords in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "impose an unwarranted condition" or "addressing themselves to a wrong question." The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess or jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute,

which will give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (see R.W.R. Wade, "Constitutional and Administrative Aspects of the Anisminic case", Law Quarterly Review, Vo. 85, 1969 p. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata could oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of this Court.

He also referred to Badri Prasad v. Nagarmal [1959] 1 Su. S.C.R. 769 which followed the clear law laid down in Surajmul Nagarmul v. Triton Insurance Co. Ltd. MANU/PR/0044/1924, Balai Chandra Hazra v. Shewdhari Jadav MANU/SC/0375/1978 : [1978]3SCR147 which followed Ledgard v. Bull, L.R. 13 I.A.p 134; Meenakshi Naidu v. Subramaniya Sastri, L.R. 14 I.A 140 and Sukhrani v. Hari Shankar MANU/SC/0538/1979 : [1979]3SCR671 . Sr Rao, citing a reference from Halsbury's Laws of England (4th Edition) Vol. X, para 713, pages 321-2, contended that the High Court's jurisdiction clearly stood excluded by Section 7(1) of the 1952 Act and, hence, the direction of the Supreme Court was also one without jurisdiction.

182. In dealing with this contention, one important aspect of the concept of jurisdiction has to be borne in mind. As pointed out by Mathew J. in Kapur v. Sethi, (supra), the word "jurisdiction is a verbal coat of many colours." It is used in a wide and broad sense while dealing with administrative or quasi-judicial tribunals and subordinate courts over which the superior Courts exercise a power of judicial review and superintendence. Then it is only a question of "how much latitude the court is prepared to allow" and "there is no yardstick to determine the magnitude of the error other than the opinion of the court." But the position is different with superior Courts with unlimited jurisdiction. These are always presumed to act with jurisdiction and unless it is clearly shown that any particular order is patently one which could not, on any conceivable view of its jurisdiction, have been passed by such court, such an order can neither be ignored nor even recalled, annulled, revoked or set aside in subsequent proceedings by the same court. This distinction is well brought out in the speeches of Lord Diplock, Lord Edmund-Devier and Lord Scarman in Re. Racal Communications Ltd. [1980] 2 A.E.R. 634. In the interests of brevity, I resist the temptation to quote extracts from the speeches here.

183. In the present case, the order passed is not one of patent lack of jurisdiction, as I shall explain later. Though I have come to the conclusion, on considering the arguments addressed now before us, that the direction in the order dated 16.2.1984 cannot be justified by reference to Article 142 of the Constitution or Section 407 of the 1973 Cr.P.C., that is not an incontrovertible position. It was possible for another court to give a wider interpretation to these provisions and come to the conclusion that such an order could be made under those provisions. If this Court had discussed the relevant provisions and specifically expressed such a conclusion, it could not have been modified in subsequent proceedings by this Bench merely because we are inclined to hold differently. The mere fact that the direction was given, without an elaborate discussion, cannot render it vulnerable to such review.

184. Shri P.P. Rao then placed considerable reliance on the observations of the Privy Council in Isaacs v. Robertson [1984] 3 A.E.R. 140 an appeal from a decision of the Court of Appeal of St. Vincent and the Grenadines. Briefly the facts were that Robertson had obtained an interim injunction against Isaacs and two others on 31.5.1979 which the latter refused to obey. The respondents motion for committal of the appellant for contempt was dismissed by the High Court of Saint Vincent. The Court of Appeal allowed the respondents application; the appellants were found to be in contempt and also asked to pay respondents costs. However, no penalty, was inflicted because the appellant would have been entitled to succeed on an application for setting aside the injunction, has he filed one. The main attack by the appellant on the Court of Appeal's judgment was based on the contention that, as a consequence of the operation of certain rules of the Supreme Court of St. Vincent, the interlocutory injunction granted by the High Court was a nullity : so disobedience to it could not constitute a contempt of court. Lord Diplock observed:

Glosgow J. accepted this contention, the Court of Appeal rejected it, in their Lordships' view correctly, on the short and well established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent must be obeyed unless and until it has been set aside by the court. For this proposition Robotham AJA cited the passage in the judgment of Romer L.J. in Hadkinson v. Hadkinson [1952] 2 All. E.R. 567.

It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cotteniiam, Leven to cases where the person affected by an order believes it to be irregular or even void. Lord Cotteniiam, L.C. said in Chuck v. Cremer [1946] 1 CTC 338 : "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors. or their solicitOrs. could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be obeyed." Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court...is in contempt and may be published by committal or attachment or otherwise.

It is in their Lordships view, says all that needs to be said oh this topic. It is not itself sufficient reason for dismissing this appeal.

Having said this, the learned Law Lord proceeded to say:

The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind, what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deals expressly with proceedings to set aside orders for irregularity and give to the Judge a discretion as to the order he will make.

The judges in the case that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order in the category that attracts ex debito justitiae the right to have it set aside save that specifically it includes orders that have been obtained in breach of rules of natural justice. The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentions litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court, if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies.

Sri Rao strongly relied on this passage and, modifying his earlier, somewhat extreme, contention that the direction given on 16.2.1984 being a nullity and without jurisdiction could be ignored by all concerned-even by the trial judge-he contended, on the strength of these observations., that he was at least entitled ex debito justitiae to come to this Court and request the court, in the interests of justice, to set aside the earlier order "without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity", if only on the ground that the order had been made in breach of the principles of natural justice. Violation of the principles of natural justice, he contended, renders the direction a nullity without any further proof of prejudice (see Kapur v. Jagmohan MANU/SC/0036/1980 : [1981]1SCR746).

185. Learned Counsel contended, in this context, that the fact the direction had been given in the earlier proceedings in this very case need not stand in the way of our giving relief, if we are really satisfied that the direction had been issued per incuriam, without complying with the principles of natural justice and purported to confer a jurisdiction on the High Court which it did not possess. In this context he relied on certain decisions holding that an erroneous decision on a point of jurisdiction will not constitute res judicata. In Mathura Prasad v. Dossibai MANU/SC/0420/1970 : [1970]3SCR830 , this Court observed:

A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute, the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly, by an erroneous decision, if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be re-opened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties.

xxxx xxxx

Where, however the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the court sanctioning something which is illegal, by resort to the rule of res judicata

a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

Counsel also relied on the decision of this Court in Ghulam Sarwar v. Union of India [1965] 2 S.C.C. 271, where it was held that the principle of constructive res judicata was not applicable to habeas corpus proceedings. He also referred to the observations of D.A. Desai J. in Soni Vrijlal Jethalal v. Soni Jadavji Govindji, MANU/GJ/0033/1972 : AIR1972Guj148 that no act of the court or irregularity can come in the way of justice being done and one of the highest and the first duty of all courts is to take care that the act of the court does no injury to the suitors. He also made reference to the maxim that an get of, or mistake on the part, of a court shall cause prejudice to no one, vide : Jang Singh v. Brij Lal MANU/SC/0006/1963 : [1964]2SCR145 . Relying on these decisions and passages from various treatises which I do not consider it necessary to set out in in extenso here, Sri Rao contended that this Court should not consider itself bound by the earlier order of the Bench or any kind of technicality where the liberty of an individual and the rights guaranteed to him under Articles 14 and 21 of the Constitution are in issue. It is urged that, if this Court agrees with him that the direction dated 16.2.1984 was an illegal one, this Court should not hesitate nay, it should hasten-to set aside the said order and repair the injustice done to the appellant without further delay. On the other hand, Sri Jethmalani vehemently urged that the present attempt to have the entire matter reopened constitutes a gross abuse of the process of court, that it is well settled that the principle of res judicata is also available in criminal matters (vide Bhagat Ram v. State MANU/SC/0090/1972 : 1972CriLJ909 and State v. Tara Chand [1973] S.C.C. Crl. 774 that in the United States the principle of res judicata governs even jurisdictional issues and that "the slightest hospitality to the accused's pleas will lead to a grave miscarriage of justice and set up a precedent perilous to public interest."

186. I have given careful thought to these contentions. The appellant's counsel has relied to a considerable extent on the maxim "actus curiae neminem gravabit" for contending that it is not only within the power, but a duty as well, of this Court to correct its own mistakes in order to see that no party is prejudiced by a mistake of the Court. I am not persuaded that the earlier decision could be reviewed on the application of the said maxim. I share the view of my learned brother Venkatachaliah, J. that this maxim has very limited application and that it cannot be availed of to correct or review specific conclusions arrived at in a judicial decision. My brother Venkatachaliah, J. has further taken the view that this Court cannot exercise any inherent powers for setting right any injustice that may have been caused as a result of an earlier order of the Court. While alive to the consideration that "the highest court in the land should not, by technicalities of procedure, forge fetters on its own feet and disable itself in cases of serious miscarriages of justice", he has, nevertheless, come to the conclusion that "the remedy of the appellant, if any, is by recourse to Article 137 and nowhere else." It is at this point that I would record a dissent from his opinion. In my view, the decisions cited do indicate that situations can and do arise where this Court may be constrained to recall or modify an order which has been passed by it earlier and that when ex facie there is something radically wrong with the earlier order, this Court may have to exercise its plenary and inherent powers to recall the earlier order without considering itself bound by the nice technicalities of the procedure for getting this done. Where a mistake is committed by a subordinate court or a High Court, there are ample powers in this Court to remedy the situation. But where the mistake is in an earlier order of this Court, there is no way of having it corrected except by approaching this Court. Sometimes, the remedy sought can he brought within the four corners of

the procedural law in which event there can be no hurdle in the way of achieving the desired result. But the mere fact that, for some reason, the conventional remedies are not available should not, in my view, render this Court powerless to give relief. As pointed out by Lord Diplock in Isaac v. Robertson [1984] 3 A.E.R. 140, it may not be possible or prudent to lay down a comprehensive list of defects that will attract the ex debito justitiae relief. Suffice it to say that the court can grant relief where there is some manifest illegality or want of jurisdiction in the earlier order or some palpable injustice is shown to have resulted. Such a power can be tract d either to Article 142 of the Constitution or to the powers inherent in this Court as the apex court and the guardian of the Constitution.

187. It is, however, indisputable that such power has to be exercised in the "rarest of rare" cases. As rightly pointed out by Sri Jethmalani, there is great need for judicial discipline of the highest order in exercising such a power, as any laxity in this regard may not only impair the eminence, dignity and integrity of this Court but may also lead to chaotic consequences. Nothing should be done to create an impression that this Court can be easily persuaded to alter its views on any matter and that a larger Bench of the Court will not only be able to reverse the precedential effect of an earlier ruling but may also be inclined to go back on it and render it ineffective in its application and binding nature even in regard to subsequent proceedings in the same case. In Bengal Immunity Company Limited v. The State of Bihar and Ors. MANU/SC/0083/1955 : [1955]2SCR603 , this Court held that it had the power, in appropriate cases, to reconsider a previous decision given by it. While concurring in this conclusion, Venkatarama Ayyar, J. sounded a note of warning of consequences which is more germane in the present context:

The question then arises as to the principles on which and the limits within which this power should be exercised. It is of course not possible to enumerate them exhaustively, nor is it even desirable that they should not crystallised into rigid and inflexible rules. But one principle stands out prominently above the rest, and that is that in general, there should be finality in the decisions of the highest courts in the land, and that is for the benefit and protection of the public. In this connection, it is necessary to bear in mind that next to legislative enactments, it is decisions of Courts that form the most important source of law. It is on the faith of decisions that rights are acquired and obligations incurred, and States and subjects alike shape their course of action. It must greatly impair the value of the decisions of this Court, if the notion came to be entertained that there was nothing certain or final about them, which must be the consequence if the points decided therein came to be re-considered on the merits every time they were raised. It should be noted that though the Privy Council has repeatedly declared that it has the power to reconsider its decisions, in fact, no instance has been quoted in which it did actually reverse its previous decision except in ecclesiastical cases. If that is the correct position, then the power to reconsider is one which should be exercised very sparingly and only in exceptional circumstances, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based turns out to be mistaken. In the present case, it is not suggested that in deciding the question of law as they did in The State of Bombay v. The United Motors (India) Ltd. MANU/SC/0095/1953 : [1953]4SCR1069 the learned Judges ignored any material provisions of law, or were under any misapprehension as to a matter fundamental to the decision. The arguments for the appellant before us were in fact only a repetition of the very contentions which were urged before the learned Judges and negatived by them. The question then resolves itself to this. Can we differ from a previous decision of this Court, because a view contrary to the one taken therein

appears to be preferable? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other. That, I conceive, in the reason behind Article 141. There are questions of law on which it is not possible to avoid difference of opinion, and the present case is itself a signal example of it. The object of Article 141 is that the decisions of this Court on these questions should settle the controversy, and that they should be followed as law by all the Courts, and if they are allowed to be reopened because a different view appears to be the better one, then the very purpose with which Article 141 has been enacted will be defeated, and the prospect will have been opened of litigants subjecting our decisions to a continuous process of attack before successive Benches in the hope that with changes in the personnel of the Court which time must inevitably bring, a different view might find acceptance. I can imagine nothing more damaging to the prestige of this Court or to the value of its pronouncements. In James v. Commonwealth, 18 C.L.R. 54, it was observed that a question settled by a previous decision should not be allowed to be reopened "upon a mere suggestion that some or all of the Members of the later Court might arrive at a different conclusion if the matter was res integra. Otherwise, there would be grave danger of want of continuity in the interpretation of the law" (per Griffiths, C.J. at p. 58). It is for this reason that Article 141 invests decisions of this Court with special authority, but the weight of that authority can only be what we ourselves give to it.

Even in the context of a power of review, properly so called, Venkataramiah, J. had this to say in Sheonandan Paswan v. State of Bihar and Ors. MANU/SC/0206/1986 : 1987CriLJ793 :

The review petition was admitted after the appeal had been dismissed only because Nandini Satpathy cases, : 1987CriLJ778 and : [1987]1SCR680 had been subsequently referred to a larger bench to review the earlier decisions. When the earlier decisions are allowed to remain intact, there is no justification to reverse the decision of this Court by which the appeal had already been dismissed. There is no warrant for this extraordinary procedure to be adopted in this case. The reversal of the earlier judgment of this Court by this process strikes at the finally of judgments of this Court and would amount to the abuse of the power of review vested in this Court, particularly in a criminal case. It may be noted that no other court in the country has been given the power of review in criminal cases. I am of the view that the majority judgment of Baharul Islam and R.B. Misra, JJ. should remain undisturbed. This case cannot be converted into an appeal against the earlier decision of this Court.

The attempt of the appellant here is more far-reaching. He seeks not the mere upsetting of a precedent of this Court nor the upsetting of a decision of a High Court or this Court in accordance with the normal procedure. What he wants from us is a declaration that an order passed by a five judge Bench is wrong and that it should, in effect, be annulled by us. This should not be done, in my view, unless the earlier order is vitiated by a patent lack of jurisdiction or has resulted in grave injustice or has clearly abridged the fundamental rights of the appellant. The question that arises is whether the present case can be brought within the narrow range of exceptions which calls for such interference. I am inclined to think that it does not.

188. I have indicated earlier, while discussing the contentions urged by Shri P.P. Rao that some of them were plausible and, that, if I were asked to answer these questions posed by counsel for the

first time, I might agree with his answers. But I have also indicated that, in my view, they do not constitute the only way of answering the questions posed by the learned counsel. Thus, to the question : did this Court have the jurisdiction to issue the impugned direction, a plausible answer could well be that it did, if one remembers that one of the transferred cases before this Court was the revision petition before the Bombay High Court in which a transfer of the case to the High Court has been asked for and if one gives a wide interpretation to the provisions of Article 142 of the Constitution. On the question whether this Court could transfer the case to a High Court Judge, who was not a Special Judge, a court could certainly accept the view urged by Sri Ram Jethmalani that Section 7(1) of the 1952 Act should not be so construed as to exclude the application of the procedural provisions of the Cr.P.C. in preference to the view that has found favour with me. Though the order dated 16.2.1984 contains no reference to, or discussion of, Section 407 Cr.P.C, this line of thinking of the judges who issued the direction does surface in their observations in their decision of even date rendered on the complainant's special leave petition MANU/SC/0082/1984 : 1984CriLJ647 . I have already pointed out that, if the transfer is referable to Section 407 of the 1973 Cr.P.C, it cannot be impugned as offending Article 14 and 21 of the Constitution. The mere fact that the judges did not discuss at length the facts or the provisions of Section 407 Cr.P.C vis-a-vis the 1952 Act or give a reasoned order as to why they thought that the trial should be in the High Court itself cannot render their direction susceptible to a charge of discrimination. A view can certainly be taken that the mere entrustment of this case to the High Court for trial does not perpetrate manifest or grave injustice. On the other hand, prima facie, it is something beneficial to the accused and equitable in the interest of justice. Such trial by the High Court, in the first instance, will be the rule in cases where a criminal trial is withdrawn to the High Court under Section 407 of the Cr.P.C. or where a High Court judge has been constituted as a Special Judge either under the 1952 Act or some other statute. The absence of an appeal to the High Court with a right of seeking for further leave to appeal to the Supreme Court may be considered outweighed by the consideration that the original trial will be in the High Court (as in Sessions cases of old, in the Presidency Towns) with a statutory right of appeal to the Supreme Court under Section 374 of the Cr.P.C. In this situation, it is difficult to say that the direction issued by this Court in the impugned order is based on a view which is manifestly incorrect, palpably absurd or patently without jurisdiction. Whether it will be considered right or wrong by a different Bench having a second-look at the issues is a totally different thing. It will be agreed on all hands that it will not behave the prestige and glory of this Court as envisaged under the Constitution if earlier decisions are revised or recalled solely because a later Bench takes a different view of the issues involved. Granting that the power of review is available, it is one to be sparingly exercised only in extraordinary or emergent situations when there can be no two opinion about the error or lack of jurisdiction in the earlier order and there are adequate reasons to invoke a resort to an unconventional method of recalling or revoking the same. In my opinion, such a situation is lot present here.

189. The only question that has been bothering me is that the appellant had been given no chance of being heard before the impugned direction was given and one cannot say whether the Bench would have acted in the same way even if he had been given such opportunity. However, in the circumstances of the case, I have come to the conclusion that this is not a fit case to interfere with the earlier order on that ground. It is true that the audi altarem partem rule is a basic requirement of the rule of law. But judicial decisions also show that the degree of compliance with this rule and

the extent of consequences flowing from failure to do so will vary from case to case. Krishna Iyer, J. observed thus in Nawabkhan Abbaskhan v. State MANU/SC/0068/1974 : 1974CriLJ1054 thus:

an order *which infringed a fundamental freedom* passed in violation of the *audi alteram partem* rule was a nullity. A determination is no determination if it is contrary to the constitutional mandate of Article 19. On this footing the externment order was of no effect and its violation was not offence. Any order made without hearing the party affected is void and ineffectual to bind parties from the beginning *if the injury is to a constitutionally guaranteed right*. May be that in ordinary legislation or at common law a Tribunal having jurisdiction and failing to hear the parties may commit an illegality which may render the proceedings voidable when a direct attack was made thereon by way of appeal, revision or review but nullity *is the consequence of unconstitutionality* and so the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power *before restricting the fundamental right of a citizen* is void ab initio and of no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing.

(emphasis added)

So far as this case is concerned, I have indicated earlier that the direction of 16.2.1984 cannot be said to have infringed the fundamental rights of the appellant or caused any miscarriage of justice. As pointed out by Sri Jethmalani, the appellant did know, on 16.2.84, that the judges were giving such a direction and yet he did not protest. Perhaps he did think that being tried by a High Court Judge would be more beneficial to him, as indeed was likely to be. That apart, as discussed earlier, several opportunities were available for the appellant to set this right. He did not move his little finger to obtain a variation of this direction from this Court. He is approaching the Court nearly after two years of his trial by the learned judge in the High Court. Volumes of testimony, we are told, have been recorded and numerous exhibits have been admitted as evidence. Though the trial is only at the stage of the framing charges, the trial being according to the warrant procedure, a lot of evidence has already gone in and the result of the conclusions of Sabyasachi Mukharji, J. would be to wipe the slate clean. To take the entire matter back at this stage to square No. 1 would be the very negation of the purpose of the 1952 Act to speed up all such trials and would result in more injustice than justice from an objective point of view A& pointed out by Lord Denning in R. v. Secretary of State for the Home Department ex parte Mughal [1973] 3 All E.R. 796, the rules of natural justice must not be stretched too far. They should not be allowed to be exploited as a purely technical weapon to undo a decision which does not in reality cause substantial injustice and which, had the party been really aggrieved thereby, could have been set right by immediate action. After giving my best anxious and deep thought to the pros and cons of the situation I have come to the conclusion that this is not one of those cases in which I would consider it appropriate to recall the earlier direction and order a retrial of the appellant de novo before a Special Judge. I would, therefore, dismiss the appeal.

ORDER

190. In view of the majority judgments the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16th February, 1984 as indicated in the judgment are

set aside and quashed. The trial shall proceed in accordance with law, that is to say, under the Act of 1952.

Back to Index

MANU/SC/1211/2019

Neutral Citation: 2019/INSC/1007

IN THE SUPREME COURT OF INDIA

Miscellaneous Application No. 2560 of 2018 in Writ Petition (Civil) No. 738 of 2016
(Application for Clarification/Direction)

Decided On: 05.09.2019

Appellants: Ashwani Kumar Vs**.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Ranjan Gogoi, C.J.I., Dinesh Maheshwari and Sanjiv Khanna, JJ.

Subject: Constitution

Subject: Human Rights

Relevant Section:

Constitution Of India - Article 21

Case Category:

LETTER PETITION AND PIL MATTER - MATTERS RELATING TO CUSTODY HARASSMENT, JAILS, COMPLAINT OF HARASSMENT, CUSTODIAL DEATH, SPEEDY TRIAL, PREMATURE RELEASE, INACTION BY POLICE ETC.

Case Note:

Constitution - Custodial torture - Denial of guidelines - Article 21 of Constitution of India - Present application had been filed for effective and purposive legislative framework/law based upon Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by United Nations General Assembly - Applicant predicating his case on right to life and liberty and judgments of this Court had argued that custodial torture being crime against humanity which directly infract and violate Article 21 of Constitution - Whether guidelines should be framed with regard to issue of custodial torture.

Facts:

The Applicant had filed the application for an effective and purposive legislative framework/law based upon the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly. The Applicant predicating his case on the right to life and liberty and judgments of this Court had argued that custodial torture being crime against humanity which directly infract and violate Article 21 of the Constitution.

Held, while dismissing the application:

(i) The Respondent in his submissions had rightly urged that Article 253 of the Constitution which deals with the legislation for giving effect to international agreements, confers power on Parliament to make laws for the whole or any part of the territory of India for implementing any treaty, agreement or convention, notwithstanding anything contained in the foregoing provisions of Chapter XI of the Constitution. Thus, notwithstanding Articles 245 and 246 of the Constitution, Parliament had the supreme power to make laws for implementing any treaty or convention which may even encroach upon the exclusive legislative competence of the States. The executive action under Article 73 of signing and ratifying the convention could be implemented without any violation of the State's right when the legislation was passed by the Parliament under Article 253. Police and Prisons are State subjects. Ratification of the UN Convention would require enactment of laws under Article 253 of the Constitution, for mere ratification would not affect and undo the existing laws or result in the enactment of new laws. Ratification, as was well recognised, was a political act and would require consultation with the State Governments/Union Territories and subsequent deliberation of their comments by the Union of India. Union of India has pointed out that they have a reservation on Article 20 of the UN Convention. Reference was also made to the Vienna Convention on the Law of Treaties, 1969, to which India was not a party but which provisions were reflected in the Standard Operating Procedure issued by the Ministry of External Affairs in respect of Memorandum of Understanding/Agreement with foreign countries. The Standard Operating Procedure, Clause (iv) under Heading D-Treaty Making Formalities which relates to ratification, states that where a treaty did not provide for its entry into force only upon its signature and makes it subject to ratification, the treaty requires ratification. In order to ensure that India was in a position to efficiently discharge all obligations emanating from treaties/agreements, such ratification should be undertaken only after relevant domestic clauses have been amended and the enabling legislations enacted when there was absence of domestic law on the subject. [34]

(ii) However, this was not to state that the courts would not step in, when required, to protect fundamental rights. It was indisputable that the right to life and the right to liberty are of foremost importance in a democratic state and, therefore, any form of torture would violate the right to life and was prohibited by Article 21 of the Constitution. Such action would be unconstitutional under Article 21 and would fail the test of non-arbitrariness under Article 14 of the Constitution. Indeed, the courts have been at the forefront in protecting and safeguarding individual rights. On the basis of a letter written by a journalist complaining of custodial violence suffered by women prisoners in police lock-ups in the city of Bombay,

this Court in Sheela Barse v. State of Maharashtra had issued the guidelines to safeguard the rights of arrested persons including female prisoners to afford them protection in police lock-ups from possible torture or ill-treatment. A person detained in a prison was entitled to live with human dignity and his detention in prison should be regulated by a procedure established by law which must be reasonable, fair and just. This could be done by applying, elucidating and even creatively expanding existing laws and principles on case to case basis. Judiciary while exercising its jurisdiction in this manner was not enacting or legislating but applying the Constitution and protecting fundamental rights under Article 21 of the Constitution. [35]

(iii) Legal jurisprudence had developed for providing compensation for the unconstitutional deprivation of fundamental right to life and liberty as a public remedy in addition to claims in private law for damages by tortuous acts of public servants. In D.K. Basu, the public law remedy for award of compensation was elucidated as arising from indefeasible rights guaranteed under Article 21 and justified on the ground that the purpose of public law was not only to civilise public power but also to ensure that the citizens live under a legal system where their rights and interests are protected and preserved. For the grant of compensation, therefore, proceedings under Article 32 or 226 of the Constitution were entertained when violation of the fundamental rights granted under Article 21 was established. In such cases, claims of a citizen were tried on the principle of strict liability where defence of sovereignty may not be available. [39]

ORDER

Sanjiv Khanna, J.

1. This order would dispose of Miscellaneous Application No. 2560 of 2018 filed by Dr. Ashwani Kumar, Applicant in-person, who is a senior advocate and a former Law Minister and Member of Parliament, praying for the following relief:

In the aforesaid premises, it is therefore respectfully prayed that since no action has been taken by the Government pursuant to the statement of the Hon'ble Attorney General, the stand taken by the National Human Rights Commission and the Law Commission of India in its report of October 2017 and because the merit of the prayer is virtually admitted and conceded before this Hon'ble Court, the National Human Rights Commission, the Law Commission of India and by Select Committee of Parliament, as an integral constituent of the right to life with dignity Under Article 21, this Hon'ble Court may be pleased to direct the Central Government to enact a suitable stand-alone, comprehensive legislation against custodial torture as it has directed in the case of mob violence/lynching vide its judgment 17th July 2018.

2. The Applicant had filed the above-captioned Writ Petition (Civil) No. 738 of 2016 Under Article 32 of the Constitution of India for an effective and purposive legislative framework/law based upon the 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (''UN Convention'', for short) adopted by the United Nations General Assembly and

opened for signature, ratification and accession on 10th December 1984. India had signed the UN Convention on 14th October 1997. However, India has not ratified the UN Convention.

3. Writ Petition (Civil) No. 738 of 2016 was disposed of vide order dated 27th November 2017, which reads as under:

Mr. K.K. Venugopal, learned Attorney General for India submitted that the prayer made in the writ petition has been the subject matter of discussion in the Law Commission and the Law Commission has already made certain recommendations. He would further submit that the report is being seriously considered by the Government. In view of the aforesaid statement, we do not intend to keep this writ petition pending and it is accordingly disposed of. There shall be no order as to costs.

4. The Applicant predicating his case on the right to life and liberty and judgments of this Court had argued that custodial torture being crime against humanity which directly infracts and violates Article 21 of the Constitution, this Court should invoke and exercise jurisdiction Under Articles 141 and 142 of the Constitution for the protection and advancement of human dignity, a core and non-negotiable constitutional right. In D.K. Basu v. State of West Bengal MANU/SC/0157/1997 : (1997) 1 SCC 416 custodial torture and violence was described as a wound inflicted on the soul, so painful and paralysing that it engenders fear, rage, hatred and despair, and denigrates the individual. In Sunil Batra v. Delhi Administration and Ors. MANU/SC/0184/1978 : (1978) 4 SCC 494, this Court had observed that the prisoners have enforceable liberties, though devalued but never demonetised and, therefore, it is within the jurisdictional reach and range of this Court's writ to deal with prison and police caprice and cruelty. Similarly, in Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors. MANU/SC/0517/1981 : (1981) 1 SCC 608, this Court had observed that torture in any form is inhuman, degrading and offensive to human dignity and constitutes an inroad into the right to life and is prohibited by Article 21 of the Constitution, for no law authorises and no procedure permits torture or cruelty, inhuman or degrading treatment. Reference was made to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights which prohibits torture in all forms in absolute terms. Recently, in K.S. Puttaswamy and Anr. v. Union of India and Ors. MANU/SC/1044/2017 : (2017) 10 SCC 1 this Court had once again emphasized on the right to human dignity which, first and foremost, means the dignity of each human being 'as a human being'. When human dignity in a person's life is infringed and physical or mental welfare is negated and harmed, the Court would intervene to protect and safeguard constitutional values. Reference was also made to the decision in Romila Thapar and Ors. v. Union of India and Ors. MANU/SC/1098/2018 : (2018) 10 SCC 753 claiming that despite existing law and repeated judicial decisions, custodial torture still remains rampant and widespread in India. Our attention was drawn to the report of Asian Centre for Human Rights which was based, inter alia, on the information and data furnished by the Government of India in Parliament, acknowledging 1674 custodial deaths, including 1530 deaths in judicial custody and 144 deaths in police custody during the period 1st April 2017 to 28th February 2018. India has consistently and unequivocally condemned and deprecated custodial torture at international forums and has signed the UN Convention but the Government's reluctance to ratify the UN Convention, which envisages a comprehensive and standalone legislation, it was argued, is baffling and unintelligible. Indian statutory law at present is not in harmony and falls short on several accounts, both procedurally

and substantively, with the UN Convention and, thus, there is an urgent and immediate need for an all-embracing standalone enactment based on the UN Convention. Articles 51(c) and 253 of the Constitution underscore the 'constitutional imperative' of aligning domestic laws with international law and obligations. The legislation as prayed, it was submitted, would fulfil the constitutional obligations of the Government of India and the constitutional goals which the Government ought to achieve. Accordingly, the directions as prayed for would not entrench upon Parliament's domain to enact laws as they directly relate to the protection and preservation of human rights. The directions are justified and necessary in view of the delay and inaction in enacting the law, notwithstanding the recommendations made by the National Human Rights Commission, report of the Law Commission of India in October 2017, and report of the Select Committee of Parliament dated 2nd December 2010 and repeated commitments made by the Indian Government. Reference was made to Tehseen S. Poonawalla v. Union of India and Ors. MANU/SC/0738/2018 : (2018) 9 SCC 501 wherein this Court had highlighted the need for enactment of a suitable legislation to deal with mob violence/lynching in the country. Reliance was placed on judgments of this Court in Vishaka and Ors. v. State of Rajasthan and Ors. MANU/SC/0786/1997 : (1997) 6 SCC 241, Vineet Narain and Ors. v. Union of India and Anr. MANU/SC/0827/1998 : (1998) 1 SCC 226, Destruction of Public and Private Properties, In RE v. State of Andhra Pradesh and Ors. MANU/SC/0575/2009 : (2009) 5 SCC 212, Lakshmi Kant Pandey v. Union of India MANU/SC/0054/1984 : (1984) 2 SCC 244, State of West Bengal and Ors. v. Sampat Lal and Ors. MANU/SC/0126/1984 : (1985) 1 SCC 317, K. Veeraswami v. Union of India and Ors. MANU/SC/0610/1991 : (1991) 3 SCC 655 and Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and Ors. MANU/SC/0478/1991 : (1991) 4 SCC 406. While referring to Mahender Chawla and Ors. v. Union of India and Ors. MANU/SC/1421/2018, and other decisions including Tehseen S. Poonawalla (supra), it was argued that this Court has not flinched from suggesting, recommending, advising, guiding and directing the Government of India with respect to statutory enactments. It was submitted that the delay and inaction in implementing the constitutional obligation relates back to the year 1997 when India had signed the UN Convention, but the Government has failed to enact a comprehensive legislation despite commitments and recommendations made and noticed above. This, it was submitted, reflects unreasonable and unacceptable conduct of the Government in shielding infringement of Article 21 and violates Article 14 of the Constitution of India. Thus, the Court may issue directions to the Union of India to enact a law dealing with custodial torture in terms of the U.N. Convention.

5. It may be noted here that the Applicant was the Chairperson of the Select Committee of the Rajya Sabha that had submitted the report on custodial torture depicting the need for a comprehensive standalone legislation.

6. Respondent No. 1-Union of India, in its response, has stated that the draft legislation prepared on the basis of the Law Commission's report is under active consideration and was referred to stakeholders, that is, the States and Union Territories for their inputs and suggestions. It was highlighted that the 'Criminal Laws' and the 'Criminal Procedure' fall in the Concurrent List of the Seventh Schedule to the Constitution of India and, therefore, comments and views of the State Governments/Union Territories were solicited on the recommendations made by the Law Commission of India. There may have been some delay as some States did not furnish their response, albeit the Union of India took steps by sending reminders on 27th June 2018, 27th November 2018 and 20th December 2018. Subsequent affidavit dated 12th February 2019 discloses

that all States and Union Territories have filed their inputs/suggestions and that the question of enacting a legislation is under consideration. A legislation of this nature given the nuances, niceties and spectrum of divergent views and choices is a complex and challenging task. Laws are legislated after due debate, deliberation and once the required consensus is formed. Any direction by this Court requiring the Parliament to frame a law or modify an enactment in a particular manner would violate doctrine of separation of powers, a basic feature of the Constitution. Parliament as an elected body representing the citizenry is bestowed with constitutional power to enact laws, which create rights, obligations and duties with attendant penalties. Existing municipal laws governing the field as interpreted by the Courts apply in matters of custodial torture.

7. We have in addition to Dr. Ashwani Kumar and Mr. K.K. Venugopal, learned Attorney General of India, heard Mr. Colin Gonsalves, senior advocate and amicus curiae, and Ms. Shobha Gupta, counsel for the National Human Rights Commission, the second Respondent before us.

8. At the outset, we must clarify that by the present order, we would be deciding a very limited controversy, viz. the prayer of the Applicant that this Court should direct Parliament to enact a standalone and comprehensive legislation against custodial torture based on the UN Convention. The prayer made requires the Court to examine and answer the question that whether within the constitutional scheme, this Court can and should issue any direction to the Parliament to enact a new law based on the UN Convention.

9. Classical or pure theory of rigid separation of powers as advocated by Montesquieu which forms the bedrock of the American Constitution is clearly inapplicable to parliamentary form of democracy as it exists in India and Britain, for the executive and legislative wings in terms of the powers and functions they exercise are linked and overlap and the personnel they equip are to an extent common. However, unlike Britain, India has a written Constitution, which is supreme and adumbrates as well as divides powers, roles and functions of the three wings of the State-the legislature, the executive and the judiciary. These divisions are boundaries and limits fixed by the Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing. The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad. Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the Rule of law is secured when each branch observes the constitutional limitations to their powers, functions and roles.

10. Modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasises on benefits of division of power and labour by accepting the three wings do have separate and distinct roles and functions that are defined by the Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of the other. Beyond this, each branch must support each other in the general interest of good governance. This separation ensures the Rule of law in at least two ways. It gives constitutional and institutional legitimacy to the decisions by each branch, that is, enactments passed by the legislature, orders and policy decisions taken by the executive and adjudication and judgments pronounced by the judiciary in exercise of the power of judicial review on validity of legislation and governmental action. By segregating the powers and functions of the institutions, the

Constitution ensures a structure where the institutions function as per their institutional strengths. Secondly, and somewhat paradoxically, it creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each branch into the functions and tasks performed by the other branch. It checks concentration of power in a particular branch or an institution.

11. The legislature as an elected and representative body enacts laws to give effect to and fulfil democratic aspirations of the people. The procedures applied are designed to give careful thought and consideration to wide and divergent interests, voices and all shades of opinion from different social and political groups. Legislature functions as a deliberative and representative body. It is directly accountable and answerable to the electorate and citizens of this country. This representativeness and principle of accountability is what gives legitimacy to the legislations and laws made by Parliament or the state legislatures. Article 245 of the Constitution empowers Parliament and the state legislatures to enact laws for the whole or a part of the territory of India, and for the whole or a part of the State respectively, after due debate and discussion in Parliament/the state assembly.

12. The executive has the primary responsibility of formulating government policies and proposing legislations which when passed by the legislature become laws. By virtue of Articles 73 and 162 of the Constitution, the powers and functions of the executive are wide and expansive, as they cover matters in respect of which Parliament/state legislature can make laws and vests with the executive the authority and jurisdiction exercisable by the Government of India or the State Government, as the case may be. As a delegate of the legislative bodies and subject to the terms of the legislation, the executive makes second stage laws known as 'subordinate or delegated legislation'. In fields where there is no legislation, the executive has the power to frame policies, schemes, etc., which is co-extensive with the power of Parliament or the state legislature to make laws. At the same time, the political executive is accountable to the legislature and holds office till they enjoy the support and confidence of the legislature. Thus, there is interdependence, interaction and even commonality of personnel/members of the legislature and the executive. The executive, therefore, performs multi-functional role and is not monolithic. Notwithstanding this multifunctional and pervasive role, the constitutional scheme ensures that within this interdependence, there is a degree of separation that acts as a mechanism to check interference and protect the non-political executive. Part XIV of the Constitution relates to "Services under the Union and the States", i.e., recruitment, tenure, terms and conditions of service, etc., of persons serving the Union or a State and accords them a substantial degree of protection. "Office of profit" bar, as applicable to legislators and prescribed vide Articles 102 and 191, is to ensure separation and independence between the legislature and the executive.

13. The most significant impact of the doctrine of separation of powers is seen and felt in terms of the institutional independence of the judiciary from other organs of the State. Judiciary, in terms of personnel, the Judges, is independent. Judges unlike members of the legislature represent no one, strictly speaking not even the citizens. Judges are not accountable and answerable as the political executive is to the legislature and the elected representatives are to the electorate. This independence ensures that the judges perform the constitutional function of safeguarding the supremacy of the Constitution while exercising the power of judicial review in a fair and even-handed manner without pressure and favours. As an interpreter, guardian and protector of the

Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law. Power of judicial review has expanded taking within its ambit the concept of social and economic justice. Yet, while exercising this power of judicial review, the courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the courts examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative measure or relative merits or demerits of the governmental action. Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary checks while exercising the power of judicial review, it has been observed[1] that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is essence of the power and function of judicial review that strengthens and promotes the Rule of law.

14. Constitutional Bench judgments in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. MANU/SC/0445/1973 : (1973) 4 SCC 225, State of Rajasthan and Ors. v. Union of India and Ors. MANU/SC/0370/1977 : (1977) 3 SCC 592, I.R. Coelho (Dead) by L.Rs. v. State of Tamil Nadu MANU/SC/0595/2007 : (2007) 2 SCC 1 and State of Tamil Nadu v. State of Kerala MANU/SC/0425/2014 : (2014) 12 SCC 696 have uniformly ruled that the doctrine of separation of powers, though not specifically engrafted, is constitutionally entrenched and forms part of the basic structure as its sweep, operation and visibility are apparent. Constitution has made demarcation, without drawing formal lines, amongst the three organs with the duty of the judiciary to scrutinise the limits and whether or not the limits have been transgressed. These judgments refer to the constitutional scheme incorporating checks and balances. As a sequitur, the doctrine restrains the legislature from declaring the judgment of a court to be void and of no effect, while the legislature still possesses the legislative competence of enacting a validating law which remedies the defect pointed out in the judgment.[2] However, this does not ordain and permit the legislature to declare a judgment as invalid by enacting a law, but permits the legislature to take away the basis of the judgment by fundamentally altering the basis on which it was pronounced. Therefore, while exercising all important checks and balances function, each wing should be conscious of the enormous responsibility that rests on them to ensure that institutional respect and comity is maintained.

15. In Binoy Viswam v. Union of India and Ors. MANU/SC/0693/2017 : (2017) 7 SCC 59, this Court referring to the Constitution had observed that the powers to be exercised by the three wings of the State have an avowed purpose and each branch is constitutionally mandated to act within its sphere and to have mutual institutional respect to realise the constitutional goal and to ensure that there is no constitutional transgression. It is the Constitution which has created the three wings of the State and, thus, each branch must oblige the other by not stepping beyond its territory.

16. In Kalpana Mehta and Ors. v. Union of India and Ors. MANU/SC/0519/2018 : (2018) 7 SCC 1, Mr. Justice Dipak Misra, the then Chief Justice of India, under the headings 'Supremacy of the

Constitution', 'Power of judicial review' and 'Doctrine of separation of powers', has held that the Constitution is a supreme fundamental law which requires that all laws, actions and decisions of the three organs should be in consonance and in accord with the constitutional limits, for the legislature, the executive and the judiciary derive their authority and jurisdiction from the Constitution. Legislature stands vested with an exclusive authority to make laws thereby giving it a supremacy in the field of legislation and law-making, yet this power is distinct from and not at par with the supremacy of the Constitution, as:

41. This Court has the constitutional power and the authority to interpret the constitutional provisions as well as the statutory provisions. The conferment of the power of judicial review has a great sanctity as the constitutional court has the power to declare any law as unconstitutional if there is lack of competence of the legislature keeping in view the field of legislation as provided in the Constitution or if a provision contravenes or runs counter to any of the fundamental rights or any constitutional provision or if a provision is manifestly arbitrary.

17. Having said so, Dipak Misra, CJ went on to observe:

42. When we speak about judicial review, it is also necessary to be alive to the concept of judicial restraint. The duty of judicial review which the Constitution has bestowed upon the judiciary is not unfettered; it comes within the conception of judicial restraint. The principle of judicial restraint requires that Judges ought to decide cases while being within their defined limits of power. Judges are expected to interpret any law or any provision of the Constitution as per the limits laid down by the Constitution.

Earlier, Dipak Misra, CJ had observed:

39. From the above authorities, it is quite vivid that the concept of constitutional limitation is a facet of the doctrine of separation of powers. At this stage, we may clearly state that there can really be no straitjacket approach in the sphere of separation of powers when issues involve democracy, the essential morality that flows from the Constitution, interest of the citizens in certain spheres like environment, sustenance of social interest, etc. and empowering the populace with the right to information or right to know in matters relating to candidates contesting election. There can be many an example where this Court has issued directions to the executive and also formulated guidelines for facilitation and in furtherance of fundamental rights and sometimes for the actualisation and fructification of statutory rights.

18. D.Y. Chandrachud, J., in his separate and concurring judgment for himself and A.K. Sikri, J. in Kalpana Mehta (supra) had referred to the nuanced 'doctrine of functional separation' that finds articulation in the articles/books by Peter A. Gerangelos in his work titled 'The Separation of Powers and Legislative Interference in Judicial Process, Constitutional Principles and Limitations'[3], M.J.C. Vile's book titled 'Constitutionalism and the Separation of Powers'[4], Aileen Kavanagh in her work 'The Constitutional Separation of Powers'[5] and Eoin Carolan in his book titled 'The New Separation of Powers-A Theory for the Modern State'[6]. These authors in the context of modern administrative State have reconstructed the doctrine as consisting of two components: 'division of labour' and 'checks and balances', instead of isolated compartmentalisation, by highlighting the need of interaction and interdependence amongst the

three organs in a way that each branch is in cooperative engagement but at the same time acts, when necessary, to check on the other and that no single group of people are able to control the machinery of the State. Independent judiciary acts as a restraining influence on the arbitrary exercise of power.

19. Referring to the functional doctrine, D.Y. Chandrachud, J., had cited the following judgments:

249. In *State of U.P.* v. *Jeet S. Bisht*, the Court held that the doctrine of separation of powers limits the "active jurisdiction" of each branch of Government. However, even when the active jurisdiction of an organ of the State is not challenged, the doctrine allows for methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duty. The Court recognised that fundamentally, the purpose of the doctrine is to act as a scheme of checks and balances over the activities of other organs. The Court noted that the modern concept of separation of powers subscribes to the understanding that it should not only demarcate the area of functioning of various organs of the State, but should also, to some extent, define the minimum content in that delineated area of functioning. S.B. Sinha, J. addressed the need for the doctrine to evolve, as administrative bodies are involved in the dispensation of socio-economic entitlements: (SCC p. 619, para 83)

83. If we notice the evolution of separation of powers doctrine, traditionally the *checks and balances* dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable *social and economic* entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of *checks and balances* to include governmental inaction. Otherwise we envisage the country getting transformed into a *state of repose*. Social engineering as well as institutional engineering therefore forms part of this obligation.

(emphasis in original)

xx xx xx

251. In Supreme Court Advocates-on-Record Assn. v. Union of India, Madan B. Lokur, J. observed that separation of powers does not envisage that each of the three organs of the State -- the legislature, executive and judiciary -- work in a silo. The learned Judge held: (SCC p. 583, para 678)

678. There is quite clearly an entire host of parliamentary and legislative checks placed on the judiciary whereby its administrative functioning can be and is controlled, but these do not necessarily violate the theory of separation of powers or infringe the independence of the judiciary as far as decision-making is concerned. As has been repeatedly held, the theory of separation of powers is not rigidly implemented in our Constitution, but if there is an overlap in the form of a check with reference to an essential or a basic function or element of one organ of State as against another, a constitutional issue does arise. It is in this context that the 99th Constitution Amendment Act has to be viewed--whether it impacts on a basic or an essential element of the independence of the judiciary, namely, its decisional independence.

20. Thereafter, D.Y. Chandrachud, J. had observed:

254. While assessing the impact of the separation of powers upon the present controversy, certain precepts must be formulated. Separation of powers between the legislature, the executive and the judiciary is a basic feature of the Constitution. As a foundational principle which is comprised within the basic structure, it lies beyond the reach of the constituent power to amend. It cannot be substituted or abrogated. While recognising this position, decided cases indicate that the Indian Constitution does not adopt a separation of powers in the strict sense. Textbook examples of exceptions to the doctrine include the power of the executive to frame subordinate legislation, the power of the legislature to punish for contempt of its privileges and the authority entrusted to the Supreme Court and the High Courts to regulate their own procedures by framing rules. In making subordinate legislation, the executive is entrusted by the legislature to make delegated legislation, subject to its control. The rule-making power of the higher judiciary has trappings of a legislative character. The power of the legislature to punish for contempt of its privileges has a judicial character. These exceptions indicate that the separation doctrine has not been adopted in the strict form in our Constitution. But the importance of the doctrine lies in its postulate that the essential functions entrusted to one organ of the State cannot be exercised by the other. By standing against the usurpation of constitutional powers entrusted to other organs, separation of powers supports the Rule of law and guards against authoritarian excesses.

255. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be ultra vires there is no breach of parliamentary privileges for the simple reason that all institutions created by the Constitution are subject to constitutional limitations. The legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible and does not constitute a violation of the separation doctrine. That indeed is the basis on which validating legislation is permitted.

256. This discussion leads to the conclusion that while the separation of powers, as a principle, constitutes the cornerstone of our democratic Constitution, its application in the actual governance of the polity is nuanced. The nuances of the doctrine recognise that while the essential functions

of one organ of the State cannot be taken over by the other and that a sense of institutional comity must guide the work of the legislature, executive and judiciary, the practical problems which arise in the unfolding of democracy can be resolved through robust constitutional cultures and mechanisms. The separation doctrine cannot be reduced to its descriptive content, bereft of its normative features. Evidently, it has both normative and descriptive features. In applying it to the Indian Constitution, the significant precept to be borne in mind is that no institution of governance lies above the Constitution. No entrustment of power is absolute.

21. Having elucidated the doctrinal basis of separation of powers and mutual interaction between the three organs of the State in the democratic set-up, it would be important to draw clear distinction between interpretation and adjudication by the courts on one hand and the power to enact legislation by the legislature on the other. Adjudication results in what is often described as judge made law, but the interpretation of the statutes and the rights in accordance with the provisions of Articles 14, 19 and 21 in the course of adjudication is not an attempt or an act of legislation by the judges. Reference in this regard can be made to the opinion expressed by F.M. Ibrahim Kalifulla, J. in Union of India v. V. Sriharan alias Murugan and Others MANU/SC/1377/2015 : (2016) 7 SCC 1 who had, in the context of capital punishment for offences Under Section 302 of the Indian Penal Code ("IPC", for short), held that the lawmakers have entrusted the task of weighing and measuring the gravity of the offence with the institution of judiciary by reposing a very high amount of confidence and trust. It requires a judge to apply his judicial mind after weighing the pros and cons of the crime committed in the golden scales to ensure that the justice is delivered. In a way, therefore, the legislature itself entrusts the judiciary to lay down parameters in the form of precedents which is oft-spoken as judge made law. This is true of many a legislations. Such law, even if made by the judiciary, would not infringe the doctrine of separation of powers and is in conformity with the constitutional functions. This distinction between the two has been aptly expressed by Aileen Kavanagh in the following words:

In general, the ability and power of the courts to make new law is generally more limited than that of the legislators, since courts typically make law by filling in gaps in existing legal frameworks, extending existing doctrines incrementally on a case-by-case basis, adjusting them to changing circumstances, etc. Judicial lawmaking powers tend to be piecemeal and incremental and the courts must reason according to law, even when developing it. By contrast, legislators have the power to make radical, broad-ranging changes in the law, which are not based on existing legal norms....

22. Seven Judges of this Court in P. Ramachandra Rao v. State of Karnataka MANU/SC/0328/2002 : (2002) 4 SCC 578 had, while interpreting Articles 21, 32, 141 and 142 of the Constitution, held that prescribing period at which criminal trial would terminate resulting in acquittal or discharge of the Accused, or making such directions applicable to all cases in present or in future, would amount to judicial law-making and cannot be done by judicial directives. It was observed that the courts can declare the law, interpret the law, remove obvious lacuna and fill up the gaps, but they cannot entrench upon the field of legislation. The courts can issue appropriate and binding directions for enforcing the laws, lay down time limits or chalk out a calendar for the proceeding to follow to redeem the injustice and for taking care of the rights violated in the given case or set of cases depending on the facts brought to the notice of the court, but cannot lay down and enact the provisions akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973. Drawing distinction between legislation as the source of law which consists of

declaration of legal Rules by a competent authority and judicial decisions pronounced by the judges laying down principles of general application, reference was made to Salmond on Principles of Jurisprudence (12th Edition) which says:

we must distinguish law-making by legislators from law-making by the courts. Legislators can lay down Rules purely for the future and without reference to any actual dispute; the courts, insofar as they create law, can do so only in application to the cases before them and only insofar as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator.

Reference was also made to Professor S.P. Sathe's work on "Judicial Activism in India--Transgressing Borders and Enforcing Limits," evaluating the legitimacy of judicial activism, wherein it was observed:

Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court. (p. 242)

In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law ... through directions ... is not a legitimate judicial function. (p. 250)

23. From the above, it is apparent that law-making within certain limits is a legitimate element of a judge's role, if not inevitable.[7] A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation and explanation.[8] This requires a judge to interpret the provisions to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then he does not legislate a law while interpreting such provisions. Such interpretation is called 'judge made law' but not legislation. Aileen Kavanagh, in explaining the aforesaid position, had observed:

...If there has not been a case in point and the judge has to decide on the basis of legal provisions which may be indeterminate on the issue, then the judge cannot decide the case without making new law...This is because Parliament has formulated the Act in broad terms, which inevitably require elaboration by the courts in order to apply it to the circumstances of each new case. Second, even in cases where judges apply existing law, they cannot avoid facing the question of whether to change and improve it.... Interpretation has an applicative and creative aspect.

Legislating or law-making involves a choice to prioritise certain political, moral and social values over the others from a wide range of choices that exist before the legislature. It is a balancing and

integrating exercise to give expression/meaning to diverse and alternative values and blend it in a manner that it is representative of several viewpoints so that it garners support from other elected representatives to pass institutional muster and acceptance. Legislation, in the form of an enactment or laws, lays down broad and general principles. It is the source of law which the judges are called upon to apply. Judges, when they apply the law, are constrained by the Rules of language and by well identified background presumptions as to the manner in which the legislature intended the law to be read. Application of law by the judges is not synonymous with the enactment of law by the legislature. Judges have the power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject matter of interpretation or challenge before the courts.

24. Legislature, as an institution and a wing of the Government, is a microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity and accountability. Legislature uses in-built procedures carefully designed and adopted to bring a plenitude of representations and resources as they have access to information, skills, expertise and knowledge of the people working within the institution and outside in the form of executive.[9] Process and method of legislation and judicial adjudication are entirely distinct. Judicial adjudication involves applying Rules of interpretation and law of precedents and notwithstanding deep understanding, knowledge and wisdom of an individual judge or the bench, it cannot be equated with law making in a democratic society by legislators given their wider and broader diverse polity. The Constitution states that legislature is supreme and has a final say in matters of legislation when it reflects on alternatives and choices with inputs from different quarters, with a check in the form of democratic accountability and a further check by the courts which exercise the power of judicial review. It is not for the judges to seek to develop new all-embracing principles of law in a way that reflects the stance and opinion of the individual judges when the society/legislators as a whole are unclear and substantially divided on the relevant issues[10]. In Bhim Singh v. Union of India MANU/SC/0327/2010 : (2010) 5 SCC 538, while observing that the Constitution does not strictly prohibit overlapping of functions as this is inevitable in the modern parliamentary democracy, the Constitution prohibits exercise of functions of another branch which results in wresting away of the regime of constitutional accountability. Only when accountability is preserved, there will be no violation of principle of separation of powers. Constitution not only requires and mandates that there should be right decisions that govern us, but equal care has to be taken that the right decisions are made by the right body and the institution. This is what gives legitimacy, be it a legislation, a policy decision or a court adjudication.

25. It is sometimes contended with force that unpopular and difficult decisions are more easily grasped and taken by the judges rather than by the other two wings. Indeed, such suggestions were indirectly made. This reasoning is predicated on the belief that the judges are not directly accountable to the electorate and, therefore, enjoy the relative freedom from questions of the moment, which enables them to take a detached, fair and just view.[11] The position that judges are not elected and accountable is correct, but this would not justify an order by a court in the nature of judicial legislation for it will run afoul of the constitutional supremacy and invalidate and subvert the democratic process by which legislations are enacted. For the reasons stated above, this reasoning is constitutionally unacceptable and untenable.

26. Dipak Misra, CJ in Kalpana Mehta's case, under the heading 'Power of judicial review' had examined several judgments of this Court to reflect upon the impressive expanse of judicial power in the superior courts that requires and demands exercise of tremendous responsibility by the courts. Thus, while exercising the interpretative power, the courts can draw strength from the spirit and propelling elements underlying the Constitution to realise the constitutional values but must remain alive to the concept of judicial restraint which requires the judges to decide cases within defined limits of power. Thus, the courts would not accept submissions and pass orders purely on a matter of policy or formulate judicial legislation which is for the executive or elected representatives of the people to enact. Reference was made to some judgments of this Court in the following words:

43. In S.C. Chandra v. State of Jharkhand, it has been ruled that the judiciary should exercise restraint and ordinarily should not encroach into the legislative domain. In this regard, a reference to a three-Judge Bench decision in Suresh Seth v. Indore Municipal Corporation is quite instructive. In the said case, a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956. Repelling the submission, the Court held that it is purely a matter of policy which is for the elected representatives of the people to decide and no directions can be issued by the Court in this regard. The Court further observed that this Court cannot issue directions to the legislature to make any particular kind of enactment. In this context, the Court held that under our constitutional scheme, Parliament and Legislative Assemblies exercise sovereign power to enact law and no outside power or authority can issue a direction to enact a particular kind of legislation. While so holding, the Court referred to the decision in Supreme Court Employees' Welfare Assn. v. Union of India wherein it was held that no court can direct a legislature to enact a particular law and similarly when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated authority.

27. It can be argued that there have been occasions when this Court has 'legislated' beyond what can be strictly construed as pure interpretation or judicial review but this has been in cases where the constitutional courts, on the legitimate path of interpreting fundamental rights, have acted benevolently with an object to infuse and ardently guard the rights of individuals so that no person or citizen is wronged, as has been observed in paragraph 46 of the judgment of Dipak Misra, CJ in Kalpana Mehta's case. Secondly, these directions were given subject to the legislature enacting the law and merely to fill the vacuum until the legislative takes upon it to legislate. These judgments were based upon gross violations of fundamental rights which were noticed and in view of the vacuum or absence of law/guidelines. The directions were interim in nature and had to be applied till Parliament or the state legislature would enact and were a mere stop-gap arrangement. These guidelines and directions in some cases as in the case of Vishaka (supra) had continued for long till the enactment of 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' because the legislature (it would also include the executive) impliedly and tacitly had accepted the need for the said legislation even if made by the judiciary without enacting the law. Such law when enacted by Parliament or the state legislature, even if assumably contrary to the directions or guidelines issued by the Court, cannot be struck down by reason of the directions/guidelines; it can be struck down only if it violates the fundamental rights or the right to equality Under Article 14 of the Constitution. These are extraordinary cases where

notwithstanding the institutional reasons and the division of power, this Court has laid down general rules/guidelines when there has been a clear, substantive and gross human rights violation, which significantly outweighed and dwarfed any legitimising concerns based upon separation of powers, lack of expertise and uncertainty of the consequences.[12] Same is the position in cases of gross environmental degradation and pollution. However, a mere allegation of violation of human rights or a plea raising environmental concerns cannot be the 'bright-line' to hold that self-restraint must give way to judicial legislation. Where and when court directions should be issued are questions and issues involving constitutional dilemmas that mandate a larger debate and discussion (see observations of Frankfurter J. as quoted in Asif Hameed and Ors. v. State of Jammu & Kashmir and Ors. in foot note [15] supra).

28. Such directions must be issued with great care and circumspection and certainly not when the matter is already pending consideration and debate with the executive or Parliament. This is not a case which requires Court's intervention to give a suggestion for need to frame a law as the matter is already pending active consideration. Any direction at this stage would be interpreted as judicial participation in the enactment of law. This Court in Supreme Court Employees' Welfare Association v. Union of India and Anr. MANU/SC/0582/1989 : (1989) 4 SCC 187 had directed that no court can direct the legislature to enact a particular law. Similarly, when an executive authority exercises the legislative power by way of subordinate legislation pursuant to delegatory authority of the legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under delegated authority. Again, we would quote from Dipak Misra, CJ in Kalpana Mehta's case, in which it was observed:

44. Recently, in Census Commr. v. R. Krishnamurthy, the Court, after referring to Premium Granites v. State of T.N., M.P. Oil Extraction v. State of M.P., State of M.P. v. Narmada Bachao Andolan and State of Punjab v. Ram Lubhaya Bagga, held: (R. Krishnamurthy case, SCC p. 809, para 33)

33. From the aforesaid pronouncement of law, it is clear as noonday that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions (sic) but the court is not expected to sit as an appellate authority on an opinion.

29. In V.K. Naswa v. Home Secretary, Union of India and Ors. MANU/SC/0050/2012 : (2012) 2 SCC 542, this Court in clear and categoric terms had observed that we do not issue directions to the legislature directly or indirectly and any such directions if issued would be improper. It is outside the power of judicial review to issue directions to the legislature to enact a law in a particular manner, for the Constitution does not permit the courts to direct and advice the executive in matters of policy. Parliament, as the legislature, exercises this power to enact a law and no outside authority can issue a particular piece of legislation. It is only in exceptional cases where there is a vacuum and non-existing position that the judiciary, in exercise of its constitutional power, steps in and provides a solution till the legislature comes forward to perform its role.

30. In State of Himachal Pradesh and Ors. v. Satpal Saini MANU/SC/0151/2017 : (2017) 11 SCC 42, this Court had overturned the directions given by the High Court to amend provisions of the state enactment after what was described as the plight of large population of non-agriculturist himachalis. Reference was made to Supreme Court Employees' Welfare Association (supra) that no writ of mandamus can be issued to the legislature to enact a particular legislation nor can such direction be issued to the executive which exercises the powers to make Rules in the nature of subordinate legislation. Reference was also made to V.K. Naswa (supra) wherein several earlier judgments were considered and it was held that the courts have a very limited role and, in its exercise, it is not open to make judicial legislation. Further, the courts do not have competence to issue directions to the legislature to enact a law in a particular manner. Reference was also made to the constitutional bench judgment in Manoj Narula v. Union of India MANU/SC/0736/2014 : (2014) 9 SCC 1 in which a discordant note struck by two judges in Gainda Ram and Ors. v. Municipal Corporation of Delhi and Ors. MANU/SC/0862/2010 : (2010) 10 SCC 715 was held to be contrary to the Constitution by observing that the decision whether or not Section 8 of the Representation of the People Act, 1951 should be amended is solely within the domain of Parliament and, therefore, no directions can be issued by this Court. It was observed:

6. The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review Under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the State Legislatures Under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court Under Article 226 (or this Court Under Article 32) on the ground that the law lacks in legislative competence or has been enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy. The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law -- as did the Himachal Pradesh High Court -- is a plain usurpation of a power entrusted to another arm of the State. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review Under Article 226 by issuing the above directions to the State Legislature to amend the law. The Government owes a collective responsibility to the State Legislature. The State Legislature is comprised of elected representatives. The law enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we will briefly recapitulate the principles which emerge from the precedent on the subject.

7. In Mallikarjuna Rao v. State of A.P. and in V.K. Sood v. Deptt. of Civil Aviation this Court held that the court Under Article 226 has no power to direct the executive to exercise its law-making power.

8. In State of H.P. v. Parent of a Student of Medical College this Court deprecated the practice of issuing directions to the legislature to enact a law: (SCC p. 174, para 4)

4. ... The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging....

The same principle was followed in Asif Hameed v. State of J&K where this Court observed that: (SCC p. 374, para 19)

19. ... The Constitution does not permit the court to direct or advise the executive in matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or executive....

In Union of India v. Assn. for Democratic Reforms this Court observed that: (SCC p. 309, para 19)

19. ... it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules.

xx xx xx

12. The judiciary is one amongst the three branches of the State; the other two being the executive and the legislature. Each of the three branches is co-equal. Each has specified and enumerated constitutional powers. The judiciary is assigned with the function of ensuring that executive actions accord with the law and that laws and executive decisions accord with the Constitution. The courts do not frame policy or mandate that a particular policy should be followed. The duty to formulate policies is entrusted to the executive whose accountability is to the legislature and, through it, to the people. The peril of adopting an incorrect policy lies in democratic accountability to the people. This is the basis and rationale for holding that the court does not have the power or function to direct the executive to adopt a particular policy or the legislature to convert it into enacted law. It is wise to remind us of these limits and wiser still to enforce them without exception.

31. Even more direct on the facts of the present case would be judgment by one of us, (Mr. Justice Ranjan Gogoi, the Chief Justice), in Common Cause: A Registered Society v. Union of India MANU/SC/0518/2017 : (2017) 7 SCC 158 to the following effect:

18. There can be no manner of doubt that the parliamentary wisdom of seeking changes in an existing law by means of an amendment lies within the exclusive domain of the legislature and it is not the province of the Court to express any opinion on the exercise of the legislative prerogative in this regard. The framing of the Amendment Bill; reference of the same to the Parliamentary Standing Committee; the consideration thereof by the said Committee; the report prepared along with further steps that are required to be taken and the time-frame thereof are essential legislative

functions which should not be ordinarily subjected to interference or intervention of the Court. The constitutional doctrine of separation of powers and the demarcation of the respective jurisdiction of the Executive, the Legislature and the Judiciary under the constitutional framework would lead the Court to the conclusion that the exercise of the amendment of the Act, which is presently underway, must be allowed to be completed without any intervention of the Court. Any other view and any interference, at this juncture, would negate the basic constitutional principle that the legislature is supreme in the sphere of law-making. Reading down a statute to make it workable in a situation where an exercise of amendment of the law is pending, will not be justified either. A perception, however strong, of the imminent need of the law engrafted in the Act and its beneficial effects on the citizenry of a democratic country, by itself, will not permit the Court to overstep its jurisdiction. Judicial discipline must caution the Court against such an approach.

32. When the matter is already pending consideration and is being examined for the purpose of legislation, it would not be appropriate for this Court to enforce its opinion, be it in the form of a direction or even a request, for it would clearly undermine and conflict with the role assigned to the judiciary under the Constitution. In this connection, we may refer to the observation of Lord Bingham in Regina (Countryside Alliance) and Ors. v. Attorney General and Anr. MANU/UKHL/0076/2007 : (2008) 1 AC 719, though made in a different context, to the following effect:

...The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.

33. Confronted with the present situation, Mr. Colin Gonsalves, learned amicus curiae, had submitted that directions can be given to the executive to ratify the UN Convention. We do not think that any such direction can be issued for it would virtually amount to issuing directions to enact laws in conformity with the UN Convention, a power which we do not 'possess', while exercising power of judicial review.

34. Mr. K.K. Venugopal, learned Attorney General, in his submissions has rightly urged that Article 253 of the Constitution which deals with the legislation for giving effect to international agreements, confers power on Parliament to make laws for the whole or any part of the territory of India for implementing any treaty, agreement or convention, notwithstanding anything contained in the foregoing provisions of Chapter XI of the Constitution. Thus, notwithstanding Articles 245 and 246 of the Constitution, Parliament has the supreme power to make laws for implementing any treaty or convention which may even encroach upon the exclusive legislative competence of the States. The executive action Under Article 73 of signing and ratifying the convention can be implemented without any violation of the State's right when the legislation is passed by the Parliament Under Article 253. 'Police' and 'Prisons' are State subjects. Ratification of the UN Convention would require enactment of laws Under Article 253 of the Constitution, for mere ratification would not affect and undo the existing laws or result in the enactment of new laws. Ratification, as is well recognised, is a political act and would require consultation with the State Governments/Union Territories and subsequent deliberation of their comments by the Union of India. Union of India has pointed out that they have a reservation on Article 20 of the UN Convention. Reference is also made to the Vienna Convention on the Law of Treaties, 1969, to which India is not a party but which provisions are reflected in the Standard Operating Procedure

issued by the Ministry of External Affairs in respect of Memorandum of Understanding/Agreement with foreign countries. The Standard Operating Procedure, Clause (iv) under Heading D-Treaty Making Formalities which relates to ratification, states that where a treaty does not provide for its entry into force only upon its signature and makes it subject to ratification, the treaty requires ratification. In order to ensure that India is in a position to efficiently discharge all obligations emanating from treaties/agreements, such ratification should be undertaken only after relevant domestic clauses have been amended and the enabling legislations enacted when there is absence of domestic law on the subject. On the issue that the treaty making power is a political act, reference has been made to the following decisions: Union of India and Anr. v. Azadi Bachao Andolan and Anr. MANU/SC/1219/2003 : (2004) 10 SCC 1; Rosiline George v. Union of India and Ors. MANU/SC/0618/1994 : (1994) 2 SCC 80; Sakshi v. Union of India and Ors. MANU/SC/0523/2004 : (2004) 5 SCC 518; and P.B. Samant and Ors. v. Union of India and Ors. MANU/MH/0055/1994 : AIR 1994 Bom 323.

35. However, this is not to state that the courts would not step in, when required, to protect fundamental rights. It is indisputable that the right to life and the right to liberty are of foremost importance in a democratic state and, therefore, any form of torture would violate the right to life and is prohibited by Article 21 of the Constitution. Such action would be unconstitutional Under Article 21 and would fail the test of non-arbitrariness Under Article 14 of the Constitution. Indeed, the courts have been at the forefront in protecting and safeguarding individual rights. In 1982, on the basis of a letter written by a journalist complaining of custodial violence suffered by women prisoners in police lock-ups in the city of Bombay, this Court in Sheela Barse v. State of Maharashtra MANU/SC/0382/1983 : (1983) 2 SCC 96 had issued the guidelines to safeguard the rights of arrested persons including female prisoners to afford them protection in police lock-ups from possible torture or ill-treatment. A person detained in a prison is entitled to live with human dignity and his detention in prison should be regulated by a procedure established by law which must be reasonable, fair and just. This can be done by applying, elucidating and even creatively expanding existing laws and principles on case to case basis. Judiciary while exercising its jurisdiction in this manner is not enacting or legislating but applying the Constitution and protecting fundamental rights Under Article 21 of the Constitution.

36. This human right aspect was again highlighted in Nilabati Behera (Smt.) alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v. State of Orissa and Ors. MANU/SC/0307/1993 : (1993) 2 SCC 746 to state that the convicts, prisoners or under-trials must not be denuded of their fundamental rights Under Article 21 and only such restrictions as are permitted by law can be imposed. It is the responsibility of the prison authority and the police to ensure that the person in custody is not deprived of his right to life, even if his liberty is circumscribed by the fact that the person is in confinement. Even limited liberty is precious and it is the duty of the State to ensure that even a person in custody is dealt with in accordance with the procedure established by law. In the State of Madhya Pradesh v. Shyamsunder Trivedi and Ors. MANU/SC/0722/1995 : (1995) 4 SCC 262 this Court had highlighted that a sensitive and realistic rather than a narrow technical approach is required while dealing with cases of custodial crime. The court must act within its powers and as far as possible try that the guilty should not escape to ensure that the Rule of law prevails.

37. We would take note of the judgment of this Court in D.K. Basu (supra) wherein the following directions/guidelines with respect to rights/custodial torture were issued:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by atleast one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

38. The law in this regard is also laid down in Sections 330 and 331 of the Indian Penal Code which relate to 'voluntarily causing hurt to extort confession or to compel restoration of property' and 'voluntarily causing grievous hurt to extort confession or to compel restoration of property' respectively.

39. In terms of the aforesaid edicts, legal jurisprudence has developed for providing compensation for the unconstitutional deprivation of fundamental right to life and liberty as a public remedy in addition to claims in private law for damages by tortuous acts of public servants. In D.K. Basu (supra) the public law remedy for award of compensation was elucidated as arising from indefeasible rights guaranteed Under Article 21 and justified on the ground that the purpose of public law is not only to civilise public power but also to ensure that the citizens live under a legal system where their rights and interests are protected and preserved. For the grant of compensation, therefore, proceedings Under Article 32 or 226 of the Constitution are entertained when violation of the fundamental rights granted Under Article 21 is established. In such cases, claims of a citizen are tried on the principle of strict liability where defence of sovereignty may not be available. In S. Nambi Narayanan v. Siby Mathews and Ors. MANU/SC/0984/2018 : (2018) 10 SCC 804 where criminal proceedings were initiated against Nambi Narayanan but it was found that the prosecution story was a sham, compensation of Rs. 50 lakhs was awarded for the anxiety suffered and maltreatment meted out to him.

40. We have no hesitation in observing that notwithstanding the aforesaid directions in D.K. Basu (supra) and the principles of law laid down in Prithipal Singh and Ors. v. State of Punjab and Anr. MANU/SC/1292/2011 : (2012) 1 SCC 10 and S. Nambi Narayanan (supra), this Court can, in an appropriate matter and on the basis of pleadings and factual matrix before it, issue appropriate guidelines/directions to elucidate, add and improve upon the directions issued in D.K. Basu (supra) and other cases when conditions stated in paragraph 27 supra are satisfied. However, this is not what is urged and prayed by the applicant. The contention of the Applicant is that this Court must direct the legislature, that is, Parliament, to enact a suitable standalone comprehensive legislation based on the UN Convention and this direction, if issued, would be in consonance with the Constitution of India. This prayer must be rejected in light of the aforesaid discussion.

41. Notwithstanding rejection of the prayer made by the applicant, we would in terms of the above discussion clarify that this would not in any way affect the jurisdiction of the courts to deal with individual cases of alleged custodial torture and pass appropriate orders and directions in accordance with law.

---

[1]Asif Hameed and Ors. v. State of Jammu & Kashmir and Ors., MANU/SC/0036/1989 : 1989 Supp. (2) SCC 364 quoting with approval dissenting opinion of Frankfurter J. in Trop v. Dulles. Frankfurter J. had observed:

"Rigorous observance of the difference between limits of power and wise exercise of power -- between questions of authority and questions of prudence -- requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."

[2]Shri Prithvi Cotton Mills Ltd. and Anr. v. Broach Borough Municipality and Ors., MANU/SC/0057/1969 : (1969) 2 SCC 283

[3]Hart Publishing, 2009

[4]Oxford University Press, 1967

[5]David Dyzenhaus and Malcolm Thorburn (eds.), Philosophical Foundations of Constitutional Law (Oxford: Oxford University Press, 2016)

[6]Oxford University Press, 2009

[7]Lord Irvine: 'Activism and Restraint: Human Rights and Interpretative Process', (1999) 4 EHRLR 350

[8]Aileen Kavanagh: 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 Oxford Journal of Legal Studies, 259-285

[9]D. Kyritsis, Constitutional Review in a Representative Democracy (2012) 32 Oxford Journal of Legal Studies

[10]Lord Browne-Wilkinson in Airedale NHS Trust v. Bland MANU/UKHL/0005/1993 : [1993] AC 789 (p. 879-880)

[11]See observations of Lord Neuberger in Regina (Nicklinson) and Anr. v. Ministry of Justice and Ors. MANU/UKSC/0060/2014 : [2014] UKSC 38

[12]See Aileen Kavanagh, Judicial Restraint in the Pursuit of Justice (2009) University of Oxford Legal Research Paper Series

Back to Index

MANU/SC/1577/2019

Neutral Citation: 2019/INSC/1256

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 8766-67 of 2019, Dairy No. 24417 of 2019, Civil Appeal Nos. 5634-5635, 5636-5637, 5716-5719, 5996, 6266, 6269 of 2019, Writ Petition (Civil) Nos. 1055, 1064, 1049, 1050, 1057, 1058, 1061, 1060, 1056 of 2019, Civil Appeal No. 6409 of 2019, Writ Petition (Civil) No. 1063 of 2019, Civil Appeal Nos. 6433-6434 of 2019, Writ Petition (Civil) Nos. 1066, 1087, 1110, 1113, 1121 of 2019, Civil Appeal No. 8768 of 2019, Dairy No. 31409 of 2019, Civil Appeal Nos. 7266, 7260 of 2019, Writ Petition (Civil) No. 1246 of 2019, Civil Appeal No. 8769 of 2019, Dairy No. 36838 of 2019 and Writ Petition (Civil) No. 1296 of 2019

Decided On: 15.11.2019

Appellants: Committee of Creditors of Essar Steel India Limited V**s.** Respondent: Satish Kumar Gupta and Ors.

Hon'ble Judges/Coram:

Rohinton Fali Nariman, Surya Kant and V. Ramasubramanian, JJ.

Subject: Insolvency

Subject: Constitution

Relevant Section:

Insolvency And Bankruptcy Code, 2016 - Section 53; Insolvency And Bankruptcy Code, 2016 - Section 60; Insolvency And Bankruptcy Code, 2016 - Section 31; Insolvency And Bankruptcy Code, 2016 - Section 3(31); Insolvency And Bankruptcy Code, 2016 - Section 4; Insolvency And Bankruptcy Code, 2016 - Section 6; Insolvency And Bankruptcy Code, 2016 - Section 30

Prior History / High Court Status:

From the Judgment and Order dated 04.07.2019 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No. 257 of 2019 and Company Appeal (AT) (Insolvency) No. 265 of 2019 (MANU/NL/0275/2019)

Authorities Referred:

American Jurisprudence, 2d, Volume 9

Case Category:

COMPANY LAW, MRTP AND ALLIED MATTERS

Case Note:

Company - Resolution plan - Maintainability thereof - National Company Law Tribunal (NCLT) admitted Company Petition and resolution professional was appointed - Resolution professional invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating corporate debtor -Resolution plans were submitted and NCLT, allow resolution plan filed by company - On appeal against said order, Appellate Tribunal held that in resolution plan there can be no difference between financial creditor and operational creditor in matter of payment of dues, and that therefore, financial creditors and operational creditors deserve equal treatment under resolution plan - It was also held that operational creditors by definition had separate classes within themselves and could be classified into sub-classes for purpose of distribution on basis of admitted amounts - Further, it was held that Committee of Creditors had not been empowered to decide manner in which distribution was to be made between one or other creditors and financial Creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of guarantee, could not re-agitate such claims as against principal borrower - Hence, present appeal - Whether impugned order passed by Appellate Tribunal in respect of resolution plan for rehabilitating corporate debtor warrant any interference.

Facts:

National Company Law Tribunal admitted Company Petition and resolution professional was appointed. The resolution professional invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating the corporate debtor. The resolution plans were submitted and NCLT, allow resolution plan filed by company. Appeal was filed against said order of NCLT. The Appellate Tribunal held that in a resolution plan there could be no difference between a financial creditor and an operational creditor in the matter of payment of dues, and that therefore, financial creditors and operational creditors deserve equal treatment under a resolution plan. Accordingly, the NCLAT has re-distributed the proceeds payable under the approved resolution plan. Securities and security interest was irrelevant at the stage of resolution for the purposes of allocation of payments. Operational creditors by definition had separate classes within themselves and can be classified into sub-classes for the purpose of distribution on the basis of the admitted amounts. Further, it was also held that the Committee of Creditors has not been empowered to decide the manner in which the distribution was to be made between one or other creditors, as there would be a conflict of interest between financial and operational creditors, financial creditors favouring themselves to the detriment of operational creditors and financial Creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of the guarantee, could not re-agitate such claims as against the principal borrower.

Held, while allowing the appeal:

(i) Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, as had been reflected in case of Swiss Ribbons, most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Argument that the expression secured creditor did not find mention in Chapter II of the Code, which deals with the resolution process, and was only found in Chapter III, which deals with liquidation, was for the reason that secured creditors as a class were subsumed in the class of financial creditors, as has been held in Swiss Ribbons). Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors was also looked at and gets taken care of. Similarly, Regulation 36(2)(d) when it provides for a list of creditors and the amounts claimed by them in the information memorandum (which was to be submitted to prospective resolution applicants), also provides for the amount of claims admitted and security interest in respect of such claims. Under Regulation 39(4), the compliance certificate of the resolution professional as to the CIRP being successful was contained in Form H to the Regulations. Secured and unsecured financial creditors were differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured financial creditors are to be paid. And, most importantly, operational creditors are separately viewed from these secured and unsecured financial creditors. Thus, it could be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle could not be stretched to treating unequals equally, as that would destroy the very objective of the Code- to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs secured or unsecured, financial or operational. [57]

(ii) It was difficult to accept argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, could not be applied to the guarantees furnished by the erstwhile directors of the corporate debtor. So far as the present case was concerned, this court hasten to add that this court were saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, the NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in State Bank of India, was set aside. [66]

(iii) The impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal could now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution Applicant could not suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what has to be paid in order that it may then take over and run the

business of the corporate debtor. This the successful resolution Applicant did on a fresh slate. Thus, the NCLAT judgment must also be set aside on this count. [67]

(iv) The other argument that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency was correct. Section 30(2)(b) of the Code refers to Section 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors. However, this again did not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion had been given, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which could be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself. [92]

(v) The other argument based upon serious conflict of interest between secured and unsecured financial creditors, as the majority may get together to ride roughshod over the minority, is an argument which flies in the face of the majority of financial creditors being given complete discretion over feasibility and viability of resolution plans, which includes the manner of distribution of debts that was contained in them, subject to following the provisions of the Code relating, inter alia, to dealing with the interests of all stakeholders including operational creditors. The Committee of Creditors did not act in any fiduciary capacity to any group of creditors. On the contrary, it was to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors. It was important to note that the original threshold required by way of majority was seventy five percent. It was during the working of the Code that this was found to be unrealistic and therefore reduced to see the amendments made to Section 28(3) and 30(4) of the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act of 2018. [93]

(vi) The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the said judgment, must therefore be set aside. [94]

Insolvency Category:

CIRP Process - III - Committee of Creditors and Resolution Professional: Approval of COC for Certain Actions; CIRP Process - III - Committee of Creditors and Resolution Professional: Meeting & Voting of CoC; CIRP Process - III - Committee of Creditors and Resolution Professional: Power/Duties/Role/Code of Conduct of RP; CIRP Process - IV - Resolution Plan: Expression of Interest; CIRP Process - IV - Resolution Plan: Submission and Approval of Resolution Plan (Section 30 & 31); Liquidation: Adjudicating Authority for Corporate Persons (Section 60); Liquidation: Distribution of Assets (Section 53); Liquidation: Valuation Report; NCLT/NCLAT: Appeals u/s 42, 61, 62 (NCLT/NCLAT) - Filing/Dismissal/Withdrawal; Others: Condonation of Delay

Industry: Metals

JUDGMENT

Rohinton Fali Nariman, J.

Delay Condoned in Civil Appeal Diary No. 31409 of 2019 and Civil Appeal Diary No. 36838 of 2019. I.A. No. 102638 of 2019 in Civil Appeal Diary No. 24417 of 2019 for Permission to File Appeal allowed. Appeal Admitted.

1. This group of appeals and writ petitions raises important questions as to the role of resolution applicants, resolution professionals, the Committee of Creditors that are constituted under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), and last, but by no means the least, the jurisdiction of the National Company Law Tribunal (hereinafter referred to as "NCLT"/"Adjudicating Authority") and the National Company Law Appellate Tribunal (hereinafter referred to as "NCLAT"/"Appellate Tribunal"), qua resolution plans that have been approved by the Committee of Creditors. The constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (hereinafter referred to as the "Amending Act of 2019") have also been challenged. These appeals and writ petitions are an aftermath of this Court's judgment dated 04.10.2018, reported as **ArcelorMittal India Private Limited v. Satish Kumar Gupta** MANU/SC/1123/2018 : (2019) 2 SCC 1.

2. On 02.08.2017, the NCLT, Ahmedabad admitted Company Petition (I.B.) No. 39 of 2017 filed by Standard Chartered Bank together with a Petition filed by the State Bank of India Under Section 7 of the Code. One Satish Kumar Gupta was appointed as the interim resolution professional, who was later confirmed as resolution professional. On 06.10.2017, the resolution professional by way of an advertisement in the Economic Times, invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating the corporate debtor, namely, Essar Steel India Limited. On 24.12.2017, the resolution professional issued a request for proposal (hereinafter referred to as "RFP"), *inter alia*, inviting resolution plans for the aforesaid corporate debtor, which was later amended on 08.02.2018. Two resolution plans were submitted on 12.02.2018, one by ArcelorMittal India Private Limited (hereinafter referred to as "ArcelorMittal") and Anr. by Numetal Limited (hereinafter referred to as "Numetal") both of which were found to be ineligible Under Section 29-A of the Code. On 02.04.2018, resolution plans were then submitted by ArcelorMittal, Numetal and one Vedanta Limited (hereinafter referred to as "Vedanta"). The resolution plan of ArcelorMittal specifically provided for an upfront payment of INR 35,000 crores in order to resolve debts amounting to INR 49,213 crores. It was stated that unsecured financial creditors shall be paid an aggregate amount of 5% of their admitted claims. Apart from the above, INR 8,000 crores of fresh capital infusion by way of capex and working capital was also to be infused. INR 3,339 crores-being the aggregate admitted claims of operational creditors, other than workmen and employees, was to be paid to the extent of INR 196 crores, but only to trade creditors and government creditors. Small trade creditors, defined as "having claims of less than one crore" were to be honoured in full, as was the claim of workmen and employees of the corporate debtor, amounting to INR 18 crores. Importantly, the resolution Applicant empowered the Committee of Creditors to decide the manner in which the financial package being offered would be distributed among the secured financial creditors. Standard Chartered Bank,

which was stated to be an unsecured creditor, was to be paid an aggregate amount of 5% of its admitted claims. On 19.04.2018, the Adjudicating Authority directed the Committee of Creditors of the corporate debtor, which by then had been set up by the interim resolution professional, to consider the eligibility of the aforesaid resolution applicants.

3. On 10.09.2018, Standard Chartered Bank was classified as a secured financial creditor of the corporate debtor by the resolution professional. On 04.10.2018, this Court declared both ArcelorMittal and Numetal ineligible by virtue of their resolution plans being hit by Section 29-A of the Code. However, an order was passed Under Article 142 of the Constitution, stating that one more opportunity be granted to both ArcelorMittal and Numetal to pay off the NPAs of their related corporate debtors within two weeks of the Supreme Court judgment, failing which the corporate debtor would go into liquidation. On 18.10.2018, ArcelorMittal informed the resolution professional and the Committee of Creditors that it had made payments as per the Supreme Court's judgment dated 04.10.2018. However, Numetal did not make any such payment. As a result, on 19.10.2018, ArcelorMittal resubmitted its resolution plan of 02.04.2018, which was then evaluated by the Committee of Creditors on the same date-ArcelorMittal being declared as the highest evaluated resolution Applicant vis-a-vis Vedanta. On 25.10.2018, the final negotiated resolution plan of ArcelorMittal was approved by the Committee of Creditors by a 92.24% majority. After several proceedings before the NCLT and the NCLAT, the NCLT, by its judgment dated 08.03.2019 disposed of the application to allow the resolution plan filed by ArcelorMittal as follows:

...we are of the view that the dues of the operational creditors must get at least similar treatment as compared to the dues of the financial creditors on the principle of equity and fair play as well as the Wednesbury Principle of Unreasonableness and the Doctrine of Proportionality, so as to avoid disparity in making payments to the operational creditors having debt value of Rs. 1 crore and above (a token of Re. 1) and the allegation of discriminatory practice could be ruled out...Hence, in our view, if a reasonable formula for apportionment is worked out so that 85% of the amount offered by the resolution Applicant is distributed among the financial creditors and the remaining 15% of the amount is distributed amongst the rest of the operational creditors, then the entire claim of the operational creditors, which comes to around Rs. 4,700 crore can be substantially paid off or at least the operational creditors can get 50% of their admitted and undisputed claim in the light of the judgment of the Hon'ble Supreme Court in ***Chitra Sharma v. Union of India (supra)***. Such object can be achieved, if the financial creditor and the members of the CoC are willing to sacrifice the interest component on their principal loan, because it is established position in the record that the principal loan liability of the corporate debtor company comes to around Rs. 35,000 crore in the year 2017 when these IB Petitions were admitted, which includes the interest component also and by giving such hair-cut to the interest component to the extent possible by providing provision for 15% amount for the other operational creditors and stakeholders, we are of the view that debts of the entire operational creditors can be satisfied in a reasonable and fair manner and then such I.A.s preferred by the operational creditors would also become infructuous and this Adjudicating Authority would not be required to deal with the merits of each and every I.A. Thus, this would be beneficial to avoid multiplicity of legal proceedings and to remove any impediment for effective implementation of the resolution plan and to achieve the main theme and object of the present I & B Code.

4. By an interim order dated 20.03.2019 in the appeals that were filed before NCLAT, the NCLAT directed the Committee of Creditors to take a decision on certain suggestions that were made. Pursuant to this, on 27.03.2019 the Committee of Creditors decided-voting having concluded on 30.03.2019-to appeal against the NCLAT's order, and, by a majority of 70.73% approved making an ex gratia payment of INR 1,000 crores to operational creditors above INR 1 crore. Appeals filed against the interlocutory orders of the NCLAT were then heard by this Court, which by its order dated 12.04.2019, *inter alia*, directed non-implementation of the judgment dated 08.03.2019 of the NCLT and expeditious disposal of the appeal before the NCLAT.

5. By its final judgment dated 04.07.2019, the NCLAT held that:

(i) In a resolution plan there can be no difference between a financial creditor and an operational creditor in the matter of payment of dues, and that therefore, financial creditors and operational creditors deserve equal treatment under a resolution plan. Accordingly, the NCLAT has re-distributed the proceeds payable under the approved resolution plan as per the method of calculation adopted by it so that all financial creditors and operational creditors be paid 60.7% of their admitted claims;

(ii) Securities and security interest is irrelevant at the stage of resolution for the purposes of allocation of payments, thereby directing that each financial creditor (whether secured or unsecured) with a claim equal to or more than INR 10 lakhs be paid 60.7% of its admitted claim irrespective of their security interest;

(iii) Operational creditors by definition have separate classes within themselves and can be classified into sub-classes for the purpose of distribution (while rejecting any classification amongst the financial creditors) on the basis of the admitted amounts thereby directing that operational creditors with a claim of equal to or more than INR 1 crore be paid 60.268% of their admitted claims.

(iv) Certain additional claims of operational creditors (some of which were highly belated and/or without sufficient proof) were admitted, such that the admitted operational debt of approximately INR 5,058 crores at the time of the approval of the approved resolution plan became an operational debt of approximately INR 19,719.20 crores.

(v) The profits generated by the corporate debtor during the Corporate Insolvency Resolution Process (hereinafter referred to as the "CIRP") would be distributed equally amongst the financial creditors and operational creditors of the corporate debtor.

(vi) A sub-committee or core committee cannot be constituted under the Code, being a foreigner thereto. The Committee of Creditors alone are to take all decisions by themselves.

(vii) The Committee of Creditors has not been empowered to decide the manner in which the distribution is to be made between one or other creditors, as there would be a conflict of interest between financial and operational creditors, financial creditors favouring themselves to the detriment of operational creditors.

(viii) Section 53 of the Code cannot be applied during the corporate resolution process but will apply only at the stage of liquidation.

(ix) Claims that have been decided by the resolution professional and affirmed by the Adjudicating Authority or the Appellate Tribunal are final and binding on all creditors. However, claims which have not been decided by the Adjudicating Authority or the Appellate Tribunal on merits may be decided by an appropriate forum in terms of Section 60(6) of the Code.

(x) Financial Creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of the guarantee, cannot re-agitate such claims as against the principal borrower.

6. We have heard detailed arguments made by Shri Gopal Subramanium and Shri Rakesh Dwivedi, learned senior counsel, on behalf of the Committee of Creditors of Essar Steel India Limited. They have argued that the provisions of the Code provide for a broad classification of creditors as financial creditors and operational creditors on the basis of the nature of the transaction between creditors and a corporate debtor. They have further argued that the Code does not mandate identical treatment of differently situated creditors either *inter se* within financial creditors, who may be secured or unsecured, and/or financial creditors vis-a-vis operational creditors. The Code only posits equitable treatment of different classes of creditors recognising that different classes deserve differential treatment. According to them, financial creditors as a class have a superior status as against operational creditors, the same being the case with secured creditors vis-a-vis unsecured creditors. For this purpose, they relied upon certain provisions of the Code. They further argued that the general law of the land as contained in Section 48 of the Transfer of the Property Act, 1882 and Section 77 of the Companies Act, 2013 would not have been taken away sub-silentio by the Code and have relied upon a large number of authorities for this purpose. They also referred to and relied upon the UNCITRAL Legislative Guide on Insolvency Law (hereinafter referred to as the "UNCITRAL Legislative Guide"), which was referred to by this Court in **Swiss Ribbons Private Limited v. Union of India** MANU/SC/0079/2019 : (2019) 4 SCC 17, and upon a report by the International Monetary Fund titled "Orderly and Effective Insolvency Procedures-Key Issues". They also referred to and relied upon judgments Under Article 14 of the Constitution of India which highlight the fact that classification is permissible so as to differentiate persons who are unequal, who cannot then be treated equally. They also argued, relying strongly upon the IMF paper on "Development of Standards for Security Interest" by Pascale De Boeck and Thomas Laryea, in addition to several expert reports, that classification of creditors based on the nature of the debt and/or security interest is a *sine qua non* for any Insolvency Code. They argued that if secured financial creditors are to be treated at par with unsecured creditors, such secured creditors would rather vote for liquidation rather than Corporate Resolution, contrary to the main objective sought to be achieved by the Code. They then argued that the health of the financial sector is critical for the overall health and growth of the economy, which would otherwise be subverted, if the impugned judgment were to be given effect. They relied strongly upon paragraphs 27 and 28 of **Swiss Ribbons** (supra), in particular, which differentiated between secured and unsecured creditors, most financial creditors being secured creditors and most operational creditors being unsecured. They also argued that the law laid down in **K. Sashidhar v. Indian Overseas Bank** MANU/SC/0189/2019, had made it clear that there is a judicial hands-off when it comes to the commercial wisdom of the Committee of Creditors, which has been directly infracted by the

impugned judgment, which has held that the Committee of Creditors has nothing to do with the distribution of amounts which are infused by the resolution Applicant for payment of the corporate debtor's erstwhile debts. They relied heavily upon the Bankruptcy Law Reforms Committee Report, 2015 (hereinafter referred to as the "BLRC Report") to buttress this submission, as well as the UNCITRAL Legislative Guide. They then submitted that a resolution plan is a consent-based plan proposed by the resolution Applicant for a corporate debtor. The counterparty to such a plan is the Committee of Creditors, which is required to give a minimum consent of 66% voting share, which consent then becomes the basis for the Adjudicating Authority to approve a resolution plan for the corporate debtor. Once approved by the Adjudicating Authority, such plan becomes binding on all stakeholders as is mentioned by Section 31 of the Code. Therefore, any modification, as has been done by the NCLAT, of such plan is illegal. They then argued that the Committee of Creditors has both the power and the jurisdiction to deal with all commercial aspects of a resolution plan, including distribution of proceeds under such plan, and also referred to and relied upon the recent amendments made to Section 30 of the Code. They stated that the ArcelorMittal plan, as amended, looked after all stakeholders including operational creditors, and stated that a staggering amount of INR 55,000 crores qua operational creditors was paid during the 600 odd days of CIRP being carried out, operational creditors whose claims were above INR 1 crore, now being paid approximately 20% of their admitted dues. They also highlighted the fact that the secured creditors have lost about INR 17,000 crores of interest in the last three years due to the account of the corporate debtor having been classified as NPA. They then argued that the setting up of a subcommittee by the Committee of Creditors is permissible under the Code, and referred to certain judgments to buttress this proposition. They further argued that no decision-making power was delegated to the sub-committee, nor did the sub-committee at any time decide or even recommend on distribution of amounts. They then argued that the NCLAT admitted various rejected/disputed/estimated claims worth INR 13,767 crores, which was more than the amount originally claimed by operational creditors. Various instances of non-application of mind were pointed out by which claims worth INR 11,278, which were not yet crystallized, were admitted by the NCLAT for payment, and various examples of double payment were also given. It was also argued that the NCLAT erroneously permitted several disputed claims to be raised outside the provisions of the Code after approval of the resolution plan, by referring to and relying upon Section 60(6) of the Code, which merely saved limitation for barred claims. They then argued that extinguishment of the right of creditors against individual guarantees extended by the promoters/promoter group of the corporate debtor was wholly illegal being contrary to several judgments of this Court and contrary to the terms of the guarantees themselves. They further argued that the profits that were made during the CIRP can obviously not be used for payment of the debts of the corporate debtor, as has been ordered by the NCLAT. Ultimately, according to the learned Counsel, the impugned NCLAT judgment deserves to be set aside because it has curtailed the authority of the Committee of Creditors; expanded the jurisdiction of the Adjudicating Authority as well as the NCLAT beyond the bounds contained in the Code; and has transgressed the most basic tenet of the Committee of Creditors' commercial wisdom being reflected by an over 66% majority vote, which has been nullified by the NCLAT by completely modifying and substituting the resolution plan approved by the Committee of Creditors.

7. Shri Shyam Divan, learned senior advocate appearing on behalf of the State Bank of India, has supported the submission made on behalf of the Committee of Creditors of Essar Steel India Limited. According to the learned senior advocate, whereas his client and other secured creditors

are secured to the extent of 99.66% of their outstanding dues, the only security of Standard Chartered Bank is a pledge of the shares held by the corporate debtor in an offshore Mauritian subsidiary, namely Essar Steel Offshore Limited (hereinafter referred to as "ESOL"), and the fair value of ESOL pledged shares has been determined at only INR 24.86 crores as against the total outstanding admitted dues of INR 3,487.10 crores (being 0.7% of the total admitted debt of Standard Chartered Bank). Thus, according to him, Standard Chartered Bank is an unsecured creditor to the extent of INR 3,462.14 crores, and as against a sum of INR 60.71 crores which was payable under the resolution plan as approved by the Committee of Creditors, the NCLAT has now upped this figure to approximately INR 2,160 crores completely beyond its limited jurisdiction under the Code. Apart from the above, he also argued that Standard Chartered Bank is precluded from raising any challenge to the constitution of a sub-committee as it had participated in several meetings in which it raised no objection to the subcommittee, and had in fact requested to be a part of the subcommittee. He then argued that negotiations that were undertaken by the sub-committee was in accordance with the mandate of the Committee of Creditors, which alone took all decisions; the subcommittee merely being an executive arm of the Committee of Creditors.

8. Shri Kapil Sibal, appearing on behalf of the Standard Chartered Bank, defended the NCLAT judgment on all aspects. According to him, the offer made by ArcelorMittal was to make a payment of INR 42,000 crores as an upfront amount in order to pay 100% of the principal outstanding of the secured financial creditors of the corporate debtor. That this sum came to be offered only as a result of an offer made by Numetal on 07.09.2018 to pay INR 37,000 crores as upfront payment to secured financial creditors. According to learned Counsel, the sum of INR 42,000 crores cannot be worked out unless the principal amount owed to Standard Chartered Bank is also included in the said figure. The figure of INR 42,000 crores was stated by the counsel of the Committee of Creditors before this Hon'ble Court, in the final hearing which took place before the judgment in **ArcelorMittal India** (supra), and that this sum could be the minimum value of payment with a scope for further negotiations. However, what ultimately turned out is a payment of a lesser value, namely INR 39,500 crores as upfront, INR 2,500 crores being added as an eyewash towards Guaranteed Working Capital Adjustment. The reason this was an eyewash is because Odisha Slurry Pipeline Infrastructure Limited (hereinafter referred to as "OSPIL"), a wholly owned subsidiary of the corporate debtor, owned a slurry pipeline. ArcelorMittal, in order to ensure unhindered usage of the said slurry pipeline, agreed that it would acquire the debts of OSPIL. In order to achieve such acquisition of the debts of OSPIL, the Core Committee of Creditors relieved ArcelorMittal from the solemn offer made to the Supreme Court of India to pay upfront a sum of INR 42,000 crores, and reduced from this said amount, a sum of INR 2,500 crores. Thus, the Core Committee's decision, as ratified by the Committee of Creditors, was to accept a sum lesser than that guaranteed as upfront payment by ArcelorMittal. Shri Sibal then trained his guns against the very formation of a Core Committee/Sub-Committee, stating that it is against the provisions of the Code, and that as originally conceived, it was only to facilitate representation before the Adjudicating Authority, which was over, in any case, by 31.05.2018. The Core Committee however went on conducting secret negotiations with ArcelorMittal by which it buried Standard Chartered Bank's debt almost completely. This was done by reducing Standard Chartered Bank's entitlement of INR 2,585 crores (INR 2646 crores minus INR 61 crores), if it were to have outstanding payments made on the basis of value of debt instead of value of security. In any case, it was further argued that the resolution plan of ArcelorMittal was itself flawed in that it would be contrary to Regulation 38(1A) of the Insolvency and Bankruptcy Board of India (Insolvency

Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the "2016 Regulations"), as it did not deal with the interests of all stakeholders. It would also be contrary to the RFP that was issued on 24.12.2017, Clause 4.6.1(d) of which stated that the resolution plan should have contained a statement as to how it would deal with the interest of all stakeholders including, but not limited to, break up of amounts to be paid to secured financial creditors, unsecured financial creditors and operational creditors, all of which was left, thanks to secret negotiations with ArcelorMittal by the resolution plan to the Committee of Creditors. Learned Counsel then argued that under the provisions of the Code, the role of the Committee of Creditors is limited to considering the feasibility and viability of the resolution plan, which does not include the manner of distribution of the amount payable by the resolution Applicant to the erstwhile creditors of the corporate debtor. In any event, the decision of the Committee of Creditors on the manner of distribution in the facts of this case is illegal and arbitrary, as once a creditor is classified as a financial creditor, such creditor is entitled to equal treatment with all other financial creditors, irrespective of whether it is secured or unsecured. For this purpose, the learned senior advocate relied upon the UNCITRAL Legislative Guide as well as the BLRC Report, 2015. According to the learned senior advocate, Parliament has advisedly chosen not to create different classes of financial or operational creditors when it comes to the process of resolution of debts; and importance is given to the value of debt, as opposed to, the value of security which is given importance only when the liquidation process is to take place. He argued that Section 53 of the Code would apply only during liquidation and not at the stage of resolving insolvency as is clear from the fact that "secured creditor" as defined by Section 3(30) of the Code is used only in Section 53 of the Code which is contained in Chapter III entitled "Liquidation Process" and not at all in Chapter II of the Code which is entitled "Corporate Insolvency Resolution Process". In Chapter II, only financial and operational creditors, as defined, are spoken about. In point of fact, in the 17th meeting of the Committee of Creditors held on 09.08.2018, the Committee of Creditors had earlier decided that the upfront payment made shall be divided amongst financial creditors on the basis of their voting shares, which in turn is fixed on the basis of the debt that is owed to each one of them. He further argued that the Committee of Creditors could not possibly decide the manner of distribution as it would give rise to a serious conflict of interest, as the majority may get together to ride roughshod over the minority. He further argued that no categorisation can be made based on the security interest of financial creditors, which security interest may itself vary from first charge holders to second charge holders and then to subservient and residual charge holders. The fact that Standard Chartered Bank has been recognised, albeit only on 10.09.2018, as a secured financial creditor by the resolution applicant, is not challenged by any of the other financial creditors. Further, the valuation of pledged shares at INR 24.86 crores is itself a flawed evaluation, the actual value of the shares being in excess of US $600 million.

9. Shri Sibal then took us to the Amending Act of 2019 and Section 6 of the Amending Act of 2019 in particular, which amended Section 30 of the Code, shortly after the judgment of NCLAT in the present case. This amendment was made in the Code with effect from 16.08.2019. Shri Sibal's first argument is that the aforesaid amendment would not apply to the facts of the present case, in as much as the amendment made is prospective in nature. Further, even under Explanation 2 that has been added by the amendment, the facts of the present case do not fall within sub-clauses (i) to (iii) of the aforesaid Explanation. A reading of the amended Section 30(2)(b) together with the Explanations contained therein, and the amendment of Section 30(4) would leave nobody in any manner of doubt that the purpose of the amendment was to get over the NCLAT judgment in

order that the huge amount of around INR 2,100 crores, that is payable to a private foreign bank namely Standard Chartered Bank, gets reduced to around INR 61 crores, so that nationalised banks and other entities in which the Government has an interest may get a larger share of the pie to the detriment of Standard Chartered Bank. The legislature has, therefore, overstepped the separation of powers boundaries to step in and legislatively adjudicate the facts of a particular case. Even otherwise, according to learned Counsel, the provision is an arbitrary exercise of power which brings in Section 53, which is applicable only when the corporate debtor gets liquidated, into the Corporate Resolution Process, contrary to the original scheme of the Code. Also, Explanation 1 directly interferes with the judicial function and cannot state that a distribution shall be fair and equitable, which can only be decided by the Adjudicating Authority and not by Parliament. Also, the amendment made to Section 30(4) cannot possibly include value of security interest of a secured creditor within the expression "feasibility and viability" which has been done only in order that it be applied to the present case.

10. Shri Arvind Datar supplemented the arguments of Shri Sibal and also appeared on behalf of the Standard Chartered Bank. He argued that the loan by Standard Chartered Bank to the wholly owned subsidiary of the corporate debtor is also a loan towards the project asset of the corporate debtor and that the State Bank of India was fully aware of such lending that was availed of by the corporate debtor. The wholly owned subsidiary is a Special Purpose Vehicle in order to ensure availability of coal for the corporate debtor to cater to enhanced production capacity.

11. He elaborated on the meaning of the expression "modifications" contained in Regulation 39(3) of the 2016 Regulations, arguing that the power to make modifications does not include the power to discriminate among creditors who are equally situated. Also, the Committee of Creditors cannot make rankings among financial creditors or otherwise create a class within a class. He reiterated that the status of Standard Chartered Bank as a secured financial creditor has not been disputed by any member of the Committee of Creditors.

12. Shri Ranjit Kumar, learned senior advocate appearing on behalf of Ideal Movers Limited, an operational creditor of the corporate debtor, stated that the admitted claim by the resolution professional was INR 1,78,50,51,792, and the original resolution plan contained nothing by way of repayment to his client. It is only after the NCLT judgment when INR 1,000 crores extra was paid by ArcelorMittal for operational creditors generally, that his client would now receive 20.5% of the admitted claim. Of course under the NCLAT judgment, he would stand to gain much more. He argued from a reading of the preamble of the Code and some of its provisions that a key objective of the Code is to ensure that the corporate debtor goes on doing its business as a going concern during the CIRP as a result of which a large number of operational creditors have to be paid their dues-such as workmen, electricity dues, etc. It is for this reason that the CIRP has to ensure the balancing of interest of all stake holders which can only be achieved by a feasible and viable resolution plan which is capable of effective implementation. He, therefore, argued that the process of revival and the process of liquidation are distinct and separate and have been so treated by the Code. This being so, priorities of payment which apply in liquidation obviously cannot apply when the corporate debtor is being run as a going concern as otherwise secured creditors alone will be paid and not operational creditors who are necessary for the running of the business. This stems from the fact that the insolvency resolution process is to maximise the value of assets of corporate debtors whereas the liquidation process is to recover outstanding dues by selling the

assets of the corporate debtor. He relied strongly on certain observations in **Swiss Ribbons** (supra) to buttress the aforesaid proposition. He also argued that the UNCITRAL Legislative Guide, being a guide to legislation, ought not to be looked at once the Code has been enacted. He then argued, that it is obvious that the Amending Act of 2019 has been made in a great hurry in order that the NCLAT judgment be neutralised by law. This is clear from the fact that the NCLAT judgment is dated 04.07.2019 and the Amending Act of 2019 was passed only one month later i.e. on 06.08.2019. No Standing Committee was consulted, as was the case of all previous amendments made to the Code, resulting in completely arbitrary provisions being inserted. He trained his guns against Section 4 of the Amending Act of 2019, arguing that timelines cannot be imposed or stipulated for the adjudication of disputes by any court, least of all the Supreme Court of India. The period of time taken in court proceedings cannot possibly be included within a timeframe as it would then nullify the role of the Adjudicating Authority and the Appellate Tribunal, and would defeat the primary object and purpose of the Code, which is resolution rather than liquidation.

13. Shri Harin P. Raval, learned senior advocate appearing on behalf of Kamaljit Singh Ahluwalia in Writ Petition (Civil) No. 1058 of 2019 also assailed the Amending Act of 2019. Apart from the arguments made by Shri Sibal and Shri Ranjit Kumar, he also argued that the amendments made in Section 30 would be contrary to the rationale and design of the BLRC Report, 2015. He also added that the Amending Act of 2019, insofar as it applied retrospectively, would be constitutionally infirm as it cannot be said that the amendments made thereto are in any manner clarificatory but are new substantive amendments.

14. Shri A.K. Gupta, learned advocate appearing for L&T Infrastructure Finance Co. Limited in Civil Appeal No. 6409 of 2019, assailed the classification of his client as an operational creditor and stated that, on facts, the Appellant had entered into a facility agreement, sanctioning a term loan of INR 75 crores to Essar Power Gujarat Limited, a subsidiary of the corporate debtor. The borrower then entered into a Promoter Obligation Agreement by which one Essar Power Limited undertook an obligation to arrange for cheques from the corporate debtor. INR 62 crores of such post-dated cheques were issued in favour of this Appellant, as a result of which this Appellant is also entitled to be classified as a financial creditor and not an operational creditor. He thus assailed the finding of the resolution professional, the NCLT and the NCLAT on this aspect of his case.

15. Shri Mishra, learned advocate, appeared on behalf of Dakshin Gujarat Vij Company, in which he submitted that the NCLAT had rightly directed that the claim of his client should be considered with all other creditors, and prayed in the alternative that directions be issued that his client be entitled to recover the amount claimed, subject to the decision of the court, from the corporate debtor as a going concern. Similar were the submissions made by Smt. Ramachandran on behalf of the Gujarat Energy Transmissions Corporation Limited. Shri Maninder Singh, learned senior counsel, appeared on behalf of the State of Gujarat and supported paragraph 196 of the NCLAT judgment by which his client would be paid 60.26% of Sales Tax dues. Shri Mukul Rohatgi, learned senior advocate appearing on behalf of Mr. Prashant Ruia supported the findings of the NCLAT, insofar as the NCLAT held that the personal guarantees given by his client had become ineffective in view of the payment of the debt by way of resolution to the original lenders. Further, Shri Rohatgi also argued that the right of subrogation and the right to be indemnified conferred on a guarantor under the Indian Contract Act would continue to exist in the absence of a positive waiver of such right by the said guarantor.

16. Shri Harish Salve, learned senior advocate appearing on behalf of ArcelorMittal, referred to the appeal filed by the Standard Chartered Bank, being Civil Appeal No. 6433 of 2019, and stated that the remedy sought therein was restricted to quashing the impugned judgment to the extent of paragraph 221 thereof which had held that financial creditors in whose favour guarantees were executed, could not re-agitate their claims against the principal borrower, as their total claim stands satisfied to the extent of the guarantee, and that therefore all the arguments made by Shri Sibal on behalf of Standard Chartered Bank, being outside the scope of the appeal, ought not to be considered at all. He further argued that since most of the arguments of Shri Sibal would go to the validity of the resolution plan, which Shri Sibal himself has stated that he is not assailing, should therefore be rejected on this ground alone. He also argued that it was wholly incorrect to say that only INR 39,500 crores would be an upfront payment. He read to us certain documents which would show that the guaranteed upfront payment INR 42,000 crores which his client had committed very much continued and that INR 2,500 crores which formed part of this figure was allowed by the Committee of Creditors while negotiating with his client for very good reason.

17. Shri Neeraj Kishan Kaul, learned senior Counsel also appearing on behalf of ArcelorMittal, stressed the fact that the importance of the insolvency resolution process is that not only is the corporate debtor to be put back on its feet, but that the resolution Applicant whose plan is accepted must be able to start on a fresh slate. This being the case, obviously Shri Rohatgi's argument, that the personal guarantees of the erstwhile promoters do not stand extinguished and that, at the very least, the right of subrogation cannot be taken away, would boomerang upon the successful resolution Applicant if such right of subrogation were to be allowed to continue. Shri Salman Khurshid and Shri P. Tripathi, learned senior advocates appearing on behalf of Deutsche Bank, stressed that it was important to recognise separate classes of creditors and reiterated the arguments made on behalf of a number of their forbears as to how it is important to make a sub-classification among financial creditors, as also among operational creditors, so that there may be real equality, that is, equality among equals. Shri Vikas Mehta, learned advocate appearing on behalf of GAIL, adverted to paragraph 84 of the impugned NCLAT judgment and argued that the facts qua his client were wrongly stated inasmuch as the admitted claim figures are wrongly stated.

18. Mrs. Madhavi Divan, learned Additional Solicitor General of India, replied to the arguments of Standard Chartered Bank and the operational creditors as to the constitutional invalidity of Sections 4 and 6 of the Amending Act, 2019. She argued that the amendments further the objects sought to be achieved by the Code, which is maximisation of value of the assets of the corporate debtor in a time-bound frame. She pithily stated that the value of assets and the passage of time within which insolvency resolution takes place are in inverse proportion as the passage of time erodes the value of these assets. She pointed out the previous experiments that had failed and adverted to certain judgments to show that the failure of previous acts such as The Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "Recovery of Debts Act") were due to enormous delays in disposal of cases. It is this loophole that was sought to be plugged in accordance with the original conception for the framework of the Insolvency Code that is to be found in the BLRC Report of 2015. She also referred to Regulation 39-C of the 2016 Regulations and 32(e) and (f) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as "Liquidation Process Regulations") together with Regulation 32-A(4) of Liquidation Process Regulations, to state that a longer period than was

originally given by Section 12 of the Code is now given so that, taking into account court proceedings, there must now be an outer limit within which either resolution takes place or the company goes into liquidation. The Regulations pointed out also show that even if the corporate debtor goes into liquidation, 90 days is given to sell the undertaking of the corporate debtor as a going concern so that 90 days over and above 330 days are also available to dispose of the corporate debtor as a going concern. So far as the challenge to Section 6 of the Amending Act of 2019 is concerned, she argued that there is a symbiotic relationship between a resolution Applicant and the Committee of Creditors, who alone are to take a commercial decision by the requisite majority whether or not to put the corporate debtor back on its feet. The reason for Explanation 1 to Section 30(2)(b) is that, what is fair and equitable must be determined within the framework of the Code, which is the commercial wisdom of the Committee of Creditors, subject to certain minimum guidelines to be observed. Thus, operational creditors who were originally to be paid only a minimum calculated on the basis of what they would be paid in the event of liquidation of a corporate debtor, are now to be paid the higher of two amounts, thereby raising the threshold of what is to be paid by a resolution Applicant by way of a minimum to operational creditors, being enhanced under the amended provision. Further, even dissentient financial creditors are now to be paid a minimum guaranteed amount for the first time, as 66% of the financial creditors may give a certain class of financial creditors 'nil' recovery, in which case this provision now comes to their rescue stating that they shall not be given anything less than the amount to be paid to such creditors in accordance with Section 53(1) of the Code. She also argued that it is important to realise that the mention made of Section 53 in Section 6 of the Amending Act of 2019 is not in order that the priorities as to liquidation be apportioned among creditors, but only in order that a minimum amount be calculated so as to see that operational creditors and dissentient financial creditors get something more than what they would have got pre-amendment. So far as the Explanation 2 of the substituted Section 30(2)(b) is concerned, she relied upon this Court's judgment in **ArcelorMittal India** (supra) and **Swiss Ribbons** (supra), for the proposition that there is no vested right in a resolution Applicant to have its plan accepted. This being the case, and an appeal being a continuation of the proceedings, there is nothing wrong with applying the amended law in the three cases that have been mentioned by Explanation 2. So far as the addition to Section 30(4) by the Amending Act of 2019 is concerned, the idea was to get over the judgment of the Appellate Tribunal in this very case stating that sub-classification among different classes of creditors may be done by the Committee of Creditors also on the basis of the value of the security interest of a secured creditor. She also read in copious detail, the Rajya Sabha Debate held on 29.07.2019 in which the Hon'ble Minister piloted this amendment. According to her, the Federation of Indian Chambers of Commerce and Industry (hereinafter referred to as "FICCI") gave a representation dated 17.07.2019 to the Secretary, Ministry of Corporate Affairs pointing out the flawed judgment of the NCLAT in this very case and asking the Government to swiftly amend the Code so as to reinstate the law as it originally stood, to which the Government and Parliament responded by enacting the Amending Act of 2019.

19. Shri Tushar Mehta, learned Solicitor General of India, has supplemented the submissions of the learned Additional Solicitor General by written arguments. He has argued that it is well settled that the legislature can always take away the basis of a judicial decision without directly interfering with the judgment of the Court, and has cited several decisions to buttress this point. He also argued that Shri Sibal's assault on the constitutional validity of Sections 4 and 6 of the Amending Act of 2019 on the ground that the Amendment was tailor-made to do away with the judgment in this

very matter, so that his client may walk away without anything, is answered by the well settled principle that an Act of the legislature cannot be attacked on the ground of improper or bad motive, and cited certain judgments of this Court in support of the same.

Role of the resolution professional

20. The role of the resolution professional in the revival of the corporate debtor is stated in detail in several Sections of the Code read with the 2016 Regulations.

21. The ball starts rolling with the Adjudicating Authority, after admitting an application under either Sections 7, 9 or 10, ordering that a public announcement of the initiation of the CIRP together with calling for the submission of claims Under Section 15 shall be made- see Section 13(1)(b) of the Code. For this purpose, the Adjudicating Authority appoints an interim resolution professional in the manner laid down in Section 16-see Section 13(1)(c) of the Code. In the public announcement of the CIRP, Under Section 15(1), information as to the last date for submission of claims, as may be specified, is to be given; details of the interim resolution professional, who shall be vested with the management of the corporate debtor and be responsible for receiving claims, shall also be given, and the date on which the CIRP shall close is also to be given-see Section 15(1)(c), (d) and (f) of the Code. Under Section 17 of the Code, the management of the affairs of the corporate debtor shall vest in the interim resolution professional, the Board of Directors of the corporate debtor standing suspended by law. Among the important duties of the interim resolution professional is the receiving and collating of all claims submitted by creditors and the constitution of a Committee of Creditors-see Section 18(1)(b) and (c) of the Code. Under Section 20 of the Code, the interim resolution professional is to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

22. At the first meeting of the Committee of Creditors, which shall be held within 7 days of its constitution, the Committee, by majority vote of not less than 66% of the voting share of financial creditors, must immediately resolve to appoint the interim resolution professional as a resolution professional, or to replace the interim resolution professional by another resolution professional-see Section 22(1) and (2) of the Code. Under Section 23(1), the resolution professional shall conduct the entire CIRP and manage the operations of the corporate debtor during the same. Importantly, all meetings of the Committee of Creditors are to be conducted by the resolution professional, who shall give notice of such meetings to the members of the Committee of Creditors, the members of the suspended board of directors, and operational creditors, provided the amount of their aggregate dues is not less than 10% of the entire debt owed. Like the duties of the interim resolution professional Under Section 18 of the Code, it shall be the duty of the resolution professional to preserve and protect assets of the corporate debtor including the continued business operations of the corporate debtor-see Section 25(1) of the Code. For this purpose, he is to maintain an updated list of claims; convene and attend all meetings of the Committee of Creditors; prepare the information memorandum in accordance with Section 29 of the Code; invite prospective resolution applicants; and present all resolution plans at the meetings of the Committee of Creditors-see Section 25(2)(e) to (i) of the Code. Under Section 29(1) of the Code, the resolution professional shall prepare an information memorandum containing all relevant information, as may be specified, so that a resolution plan may then be formulated by a prospective resolution

applicant. Under Section 30 of the Code, the resolution Applicant must then submit a resolution plan to the resolution professional, prepared on the basis of the information memorandum. After this, the resolution professional must present to the Committee of Creditors, for its approval, such resolution plans which conform to the conditions referred to in Section 30(2) of the Code-see Section 30(3) of the Code. If the resolution plan is approved by the requisite majority of the Committee of Creditors, it is then the duty of the resolution professional to submit the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority-see Section 30(6) of the Code.

23. The aforesaid provisions of the Code are then fleshed out in the 2016 Regulations. Under Chapter IV of the aforesaid Regulations, claims by operational creditors, financial creditors, other creditors, workmen and employees are to be submitted to the resolution professional along with proofs thereof-see Regulations 7 to 12. Thereafter, under Regulation 13, the resolution professional shall verify each claim as on the insolvency commencement date, and thereupon maintain a list of creditors containing the names of creditors along with the amounts claimed by them, the amounts admitted by him, and the security interest, if any, in respect of such claims, and constantly update the aforesaid list-see Regulation 13(1).

24. Chapter X of the Regulations then deals with resolution plans that are submitted. Under Regulation 35, "fair value" as defined by Regulation 2(hb)[1] and "liquidation value" as defined by Regulation 2(k)[2] shall be determined by two registered valuers appointed under Regulation 27, which shall be handed over the resolution professional.

25. After receipt of the resolution plans in accordance with the Code and the Regulations, the resolution professional shall then provide the fair value and liquidation value to every member of the Committee of Creditors-see Regulation 35(2). Regulation 36 is important as it forms the basis for the submission of a resolution plan. The information memorandum, spoken of by this regulation, must contain the following:

(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: "Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.

(b) the latest annual financial statements;

(c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) the number of workers and employees and liabilities of the corporate debtor towards them;

(j) ***

(k) ***

(l) other information, which the resolution professional deems relevant to the committee.

26. Under Regulation 36-A, the resolution professional shall then publish brief particulars of the invitation for expression of interest in Form G of the Schedule. This document must also, *inter alia*, provide for such basic information about the corporate debtor as may be required by a prospective resolution Applicant for its expression of interest-see Regulation 36-A (4)(c). The resolution professional, once he receives a proposed resolution plan, must then conduct due diligence based on the material on record, in order that the prospective resolution Applicant complies with Section 25(2)(h) of the Code (which, *inter alia*, requires prospective resolution applicants to fulfil such criteria as may be laid down, having regard to the complexity and scale of operations of the business of the corporate debtor); the provisions of Section 29-A; and other requirements as may be specified in the invitation for expression of interest-see Regulation 36-A(8). Once this is done, the resolution professional shall issue a provisional list of eligible prospective resolution applicants to the Committee of Creditors, and after considering any objection to their inclusion or exclusion, shall then issue the final list of prospective resolution applicants to the Committee of Creditors-see Regulation 36-A (10) to (12). Under Regulation 36-B, the resolution professional shall issue the information memorandum, evaluation matrix, as defined by Regulation 2(h)(a)[3], and a request for resolution plan within the time stated. Importantly, the resolution professional shall endeavour to submit the resolution plan approved by the Committee of Creditors to the Adjudicating Authority, at least 15 days before the maximum period for completion of CIRP, along with a compliance certificate in Form H of the Schedule.

27. The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application Under Sections 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution Applicant and be finally

negotiated and decided by the Committee of Creditors. In fact, in **ArcelorMital India** (supra), this Court referred to the role of the resolution professional under the Code and the aforesaid Regulations, making it clear that the said role is not adjudicatory but administrative, in the following terms:

80. However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(*i*), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in Sub-section (2). This provision has to be read in conjunction with Section 25(2)(*i*), and with the second proviso to Section 30(4), which provides that where a resolution Applicant is found to be ineligible Under Section 29-A(*c*), the resolution Applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29-A(*c*). A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time being in force, including Section 29-A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to *"decide"* whether the resolution plan does or does not contravene the provisions of law. Regulation 36-A of the CIRP Regulations specifically provides as follows:

36-A. (8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution Applicant complies with--

(*a*) the provisions of Clause (*h*) of Sub-section (2) of Section 25;

(*b*) the applicable provisions of Section 29-A, and

(*c*) other requirements, as specified in the invitation for expression of interest.

(9) The resolution professional may seek any clarification or additional information or document from the prospective resolution Applicant for conducting due diligence under sub-regulation (8).

(10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution Applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.

81. Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.

Role of the prospective resolution applicant

28. The UNCITRAL Legislative Guide discusses what ought to be the contents of a resolution plan in an Insolvency Code in the following terms:

4. The plan

xxx xxx xxx

18. The question of what is to be included in the plan is closely related to the procedure for approval of the plan, that is, which creditors are required to approve the plan and the level of support required for approval, the effect of the plan once approved, that is, will it bind dissenting creditors and secured creditors and who will be responsible for implementation of the plan and for ongoing management of the debtor, and whether or not there is a requirement for court confirmation. Many insolvency laws include provisions addressing the content of the reorganization plan. Some laws address the content of the plan by reference to general criteria, such as requirements that the reorganization plan should adequately and clearly disclose to all parties information regarding both the financial condition of the debtor and the transformation of legal rights that is being proposed in the plan, or by reference to minimal requirements, such as that the plan must make provision for payment of certain preferred claims. It should be noted that a plan need not modify or otherwise affect the rights of every class of creditor.

19. Other laws set out more specific requirements as to what information is required in relation to the debtor's financial situation and the proposals that can be included in a plan. Information on the financial situation of the debtor could include asset and liability statements; cash flow statements; and information relating to the causes or reasons for the financial situation of the debtor. Information relating to what is proposed by the plan could include, depending upon the objective of the plan and the circumstances of a particular debtor, details of classes of claims; claims modified or affected under the plan and the treatment to be accorded to each class under the plan; the continuation or rejection of contracts that are not fully executed; the treatment of unexpired leases; measures and arrangements for dealing with the debtor's assets (e.g. transfer, liquidation or retention); the sale or other treatment of encumbered assets; the disclosure and acceptance procedure; the rights of disputed claims to take part in the voting and provisions for disputed claims to be resolved; arrangements concerning personnel of the debtor; remuneration of management of

the debtor; financing implementation of the plan; extension of the maturity date or a change in the interest rate or other term of outstanding security interests; the role to be played by the debtor in implementation of the plan and identification of those to be responsible for future management of the debtor's business; the settlement of claims and how the amount that creditors will receive will be more than they would have received in liquidation; payment of interest on claims; distribution of all or any part of the assets of the estate among those having an interest in those assets; possible changes to the instrument or organic document constituting the debtor (e.g. changes to by-laws or articles of association) or the capital structure of the debtor or merger or consolidation of the debtor with one or more persons; the basis upon which the business will be able to keep trading and can be successfully reorganized; supervision of the implementation of the plan; and the period of implementation of the plan, including in some cases a statutory maximum period.

20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation).

29. Under the Code, the prospective resolution Applicant has a right to receive complete information as to the corporate debtor, debts owed by it, and its activities as a going concern, prior to the admission of an application Under Section 7, 9 or 10 of the Code. For this purpose, it has a right to receive information contained in the information memorandum as well as the evaluation matrix mentioned in Regulation 36-B. Once it evinces an expression of interest, what follows is laid down in Regulation 36-A(7) which reads as follows:

36-A. **Invitation for Expression of Interest**

xxx xxx xxx

(7) An expression of interest shall be unconditional and be accompanied by-

(a) an undertaking by the prospective resolution Applicant that it meets the criteria specified by the committee under Clause (h) of Sub-section (2) of Section 25;

(b) relevant records in evidence of meeting the criteria under Clause (a);

(c) an undertaking by the prospective resolution Applicant that it does not suffer from any ineligibility Under Section 29A to the extent applicable;

(d) relevant information and records to enable an assessment of ineligibility under Clause (c);

(e) an undertaking by the prospective resolution Applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;

(f) an undertaking by the prospective resolution Applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the Applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and

(g) an undertaking by the prospective resolution Applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under Sub-section (2) of Section 29

Thereafter, the resolution plan submitted by the prospective resolution Applicant must provide for measures as may be necessary for the insolvency resolution of the corporate debtor for maximisation of the value of its assets, which may include transfer or sale of assets or part thereof, whether subject to security interests or not. The plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors-see Regulation 37.

30. Accordingly, Regulation 38 then deals with the mandatory contents of a resolution plan, making it clear that such plan must contain a provision that the amount due to operational creditors shall be given priority in payment over financial creditors-see Regulation 38(1). Such plan must also include provisions as to how to deal with the interests of all stakeholders including financial creditors and operational creditors of the corporate debtor-Regulation 38 (1A). It must then provide for the term of the plan, management and control of the business of the corporate debtor during such term, and its implementation. It must also demonstrate that it is feasible and viable, and that the resolution Applicant has the capability to implement the said plan. Regulation 38, being important, is set out hereinbelow:

38. Mandatory contents of the resolution plan

(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(2) A resolution plan shall provide:

(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

(3) A resolution plan shall demonstrate that-

(a) it addresses the cause of default;

(b) it is feasible and viable;

(c) it has provisions for its effective implementation;

(d) it has provisions for approvals required and the timeline for the same; and

(e) the resolution Applicant has the capability to implement the resolution plan.

Role of the committee of creditors in the corporate resolution process

31. Since it is the commercial wisdom of the Committee of Creditors that is to *decide* on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor. "Financial creditors" are defined in Section 5(7) of the Code as meaning persons to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. "Financial debt" is then defined in Section 5(8) of the Code as meaning a debt along with interest, if any, which is disbursed against the consideration for the time value of money. "Secured creditor" is separately defined in Section 3(30) of the Code as meaning a creditor in favour of whom a security interest is created and "security interest" is defined by Section 3(31) as follows:

3. **Definitions**.-In this Code, unless the context otherwise requires.-

xxx xxx xxx

(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;

32. It is settled by several judgments of this Court that in order to trigger application of the Code, a neat division has been made between financial creditors and operational creditors. It has also been noticed in some of our judgments that most financial creditors are secured creditors and most operational creditors are unsecured creditors. The rationale for only financial creditors handling the affairs of the corporate debtor and resolving them is for reasons that have been deliberated upon by the BLRC Report of 2015, which formed the basis for the enactment of the Insolvency Code.

33. At this juncture, it is important to set out the relevant extracts from the aforementioned report:

2. **Executive Summary**

xxx xxx xxx

The key economic question in the bankruptcy process

xxx xxx xxx

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.

xxx xxx xxx

5. **Process for legal entities**

xxx xxx xxx

Business decisions by a creditor committee

All decisions on matters of business will be taken by a committee of the financial creditors. This includes evaluating proposals to keep the entity as a going concern, including decisions about the sale of business or units, retiring or restructuring debt. The debtor will be a non-voting member on the creditors committee, and will be invited to all meetings. The voting of the creditors committee will be by majority, where the majority requires more than 75 percent of the vote by weight.

xxx xxx xxx

No prescriptions on solutions to resolve the insolvency

The choice of the solution to keep the entity as a going concern will be voted on by the creditors committee. There are no constraints on the proposals that the Resolution Professional can present to the creditors committee. Other than the majority vote of the creditors committee, the Resolution Professional needs to confirm to the Adjudicator that the final solution complies with three additional requirements. The first is that the solution must explicitly require the repayment of any interim finance and costs of the insolvency resolution process will be paid in priority to other payments. Secondly, the plan must explicitly include payment to all creditors not on the creditors committee, within a reasonable period after the solution is implemented. Lastly, the plan should comply with existing laws governing the actions of the entity while implementing the solutions.

xxx xxx xxx

5.3.1 **Steps at the start of the IRP**

4. **Creation of the creditors committee**

The creditors committee will have the power to decide the final solution by majority vote in the negotiations. The majority vote requires more than or equal to 75 percent of the creditors committee by weight of the total financial liabilities. The majority vote will also involve a cram down option on any dissenting creditors once the majority vote is obtained...The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors.

5.3.3 **Obtaining the resolution to insolvency in the IRP**

The Committee is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in which the insolvency becomes visible, it is expected to evolve over time, and with the development of the market. The Code will be open to all forms of solutions for keeping the entity going without prejudice, within the rest of the constraints of the IRP. Therefore, how the insolvency is to be resolved will not be prescribed in the Code. There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going concern. The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market.

34. The aforesaid extracts follow what is stated in the UNCITRAL Legislative Guide which prescribes as follows:

2. Nature or form of a plan

3. The purpose of reorganization is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers. With different constituents involved in reorganization proceedings, each may have different views of how the various objectives can best be achieved. Some creditors, such as major customers or suppliers, may prefer continued business with the debtor to rapid repayment of their debt. Some creditors may favour taking an equity stake in the business, while others will not. Typically, therefore, there is a range of options from which to select in a given case. **If an insolvency law adopts a prescriptive approach to the range of options available or to the choice to be made in a particular case, it is likely to be too constrictive.** It is desirable that the law not restrict reorganization plans to those designed only to

fully rehabilitate the debtor; prohibit debt from being written off; restrict the amount that must eventually be paid to creditors by specifying a minimum percentage; or prohibit exchange of debt for equity. **A non-intrusive approach that does not prescribe such limitations is likely to provide sufficient flexibility to allow the most suitable of a range of possibilities to be chosen for a particular debtor.**

xxx xxx xxx

20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation)."

35. Section 24 of the Code deals with meetings of the Committee of Creditors. Though voting on the approval of a resolution plan is only with the financial creditors who form the Committee of Creditors, yet the resolution professional is to conduct the aforesaid meeting at which members of the suspended board of directors may be present, together with one representative of operational creditors, provided that the aggregate dues owed to all operational creditors is not less than 10% of the entire debt owed-see Sections 24(2),(3) and (4) of the Code. Voting shall be in accordance with the voting share assigned to each financial creditor, which is based on the financial debts owed to such creditors-see Section 24(6) of the Code.

36. Even though it is the resolution professional who is to run the business of the corporate debtor as a going concern during the intermediate period, yet, such resolution professional cannot take certain decisions relating to management of the corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors. Section 28 of the Code is important and is set out hereinbelow:

28. **Approval of committee of creditors for certain actions**

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:-

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under subsection (1).

(3) No action under Sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under Sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under Sub-section (4) to the Board for taking necessary actions against him under this Code.

Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors. Most importantly, Under Section 30(4), the Committee of Creditors may approve a resolution plan by a vote of not

less than 66% of the voting share of the financial creditors, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations.

37. Regulation 18 to 26 of the 2016 Regulations deal with meetings to be conducted by the Committee of Creditors. The quorum at the meeting is fixed by Regulation 22, and the conduct of the meeting is to take place as under Regulation 24. Voting takes place under Regulation 25 and 26. Most importantly, Regulation 39(3) states:

39. **Approval of resolution plan**

xxx xxx xxx

(3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit.

Provided that the committee may approve any resolution plan with such modifications as it deems fit.

38. This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.

39. In **K. Sashidhar** (supra), the role of the Committee of Creditors in the corporate resolution process was laid down by this Court thus:

20. The CoC is constituted as per Section 21 of the I&B Code, which consists of financial creditors. The term 'financial creditor' has been defined in Section 5(7) of the I&B Code to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. Be it noted that the process of insolvency resolution and liquidation concerning corporate debtors has been codified in Part II of the I&B Code, comprising of seven Chapters. Chapter I predicates that Part II shall apply in matters relating to the insolvency and liquidation of corporate debtor where the minimum amount of default is Rs. 1,00,000/-. Section 5 in Chapter I is a dictionary Clause specific to Part II of the Code. Chapter II deals with the gamut of procedure to be followed for the corporate insolvency resolution process. For dealing with the issue on hand, the provisions contained in Chapter II will be significant. From the scheme of the provisions, it is clear that the provisions in Part II of the Code are self-contained code, providing for the procedure for consideration of the resolution plan by the CoC.

21. The stage at which the dispute concerning the respective corporate debtors (KS&PIPL and IIL) had reached the adjudicating authority (NCLT) is ascribable to Section 30(4) of the I&B Code, which, at the relevant time in October 2017, read thus:

30(4)-The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors.

22. If the CoC had approved the resolution plan by requisite percent of voting share, then as per Section 30(6) of the I&B Code, it is imperative for the resolution professional to submit the same to the adjudicating authority (NCLT). On receipt of such a proposal, the adjudicating authority (NCLT) is required to satisfy itself that the resolution plan as approved by CoC meets the requirements specified in Section 30(2). No more and no less. This is explicitly spelt out in Section 31 of the I&B Code, which read thus (as in October 2017):

31. Approval of resolution plan.-(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under Sub-section (4) of Section 30 meets the requirements as referred to in sub-section(2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in Sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under Sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority Under Section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

xxx xxx xxx

39. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process Under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given Under Section 22 of Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial

wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable.

40. The importance of the majority decision of the Committee of Creditors is then stated in Section 31(1) of the Code which is set out as follows:

31. **Approval of resolution plan**

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under Sub-section (4) of Section 30 meets the requirements as referred to in Sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution Applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution Applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution Applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.

Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

41. As has already been seen hereinabove, it is the Adjudicating Authority which first admits an application by a financial or operational creditor, or by the corporate debtor itself Under Section 7, 9 and 10 of the Code. Once this is done, within the parameters fixed by the Code, and as expounded upon by our judgments in **Innoventive Industries Ltd. v. ICICI Bank**, MANU/SC/1063/2017 : (2018) 1 SCC 407 and **Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.** MANU/SC/1609/2017 : (2018) 2 SCC 674, the Adjudicating Authority then appoints an interim resolution professional who takes administrative decisions as to the day to day running of the corporate debtor; collation of claims and their admissions; and the calling for resolution plans in the manner stated above. After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority Under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code. In this context, the decision of this Court in **K. Sashidhar** (supra) is of great relevance.

42. In **K. Sashidhar** (supra) this Court was called upon to decide upon the scope of judicial review by the Adjudicating Authority. This Court set out the questions to be determined as follows:

18. Having heard learned Counsel for the parties, the moot question is about the sequel of the approval of the resolution plan by the CoC of the respective corporate debtor, namely KS&PIPL and IIL, by a vote of less than seventy five percent of voting share of the financial creditors; and about the correctness of the view taken by the NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/appellate authority to reckon any other factor (other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be) which, according to the resolution Applicant and the stakeholders supporting the resolution plan, may be relevant?

xxx xxx xxx

25. The Court, however, was not called upon to deal with the specific issue that is being considered in the present cases namely, the scope of judicial review by the adjudicatory authority in relation to the opinion expressed by the CoC on the proposal for approval of the resolution plan.

After adverting to the 2016 Regulations, the Court set out the jurisdiction of the Adjudicating Authority as well as the Appellate Tribunal as follows:

42. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established Under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan Under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution Applicant to translate the projected plan into a reality. The resolution Applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan Under Section 30(4) of the I&B Code.

43. For the same reason, even the jurisdiction of the NCLAT being in continuation of the proceedings would be circumscribed in that regard and more particularly on account of Section 32

of the I&B Code, which envisages that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the I&B Code. Section 61(3) of the I&B Code reads thus:

61. Appeals and Appellate Authority.-(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) xxx xxx xxx

(3) An appeal against an order approving a resolution plan Under Section 31 may be filed on the following grounds, namely:-

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

xxxxxxxxx.

44. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal Under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)"-which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in the NCLT or NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" Under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds-

be it Under Section 30(2) or Under Section 61(3) of the I&B Code-are regarding testing the validity of the "approved" resolution plan by the CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by the CoC in exercise of its business decision.

45. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional Under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) Under Section 31(2) read with 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.

46. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

xxx xxx xxx

49. The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground-to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) Under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the

legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.

51. Suffice it to observe that in the I&B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, Under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors-be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds Under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority Under Section 31 of the I&B Code dealing with approval of the resolution plan.

Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in **K. Sashidhar** (supra).

43. However, Shri Sibal exhorted us to hold that **K. Sashidhar** (supra) missed a very vital provision of the Code which is contained in Section 60(5) of the Code. Section 60(5) reads as follows:

60. **Adjudicating Authority for corporate persons**

xxx xxx xxx

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of--

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

It will be noticed that the non-obstante Clause of Section 60(5) speaks of any other law for the time being in force, which obviously cannot include the provisions of the Code itself. Secondly, Section 60(5)(c) is in the nature of a residuary jurisdiction vested in the NCLT so that the NCLT may decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under the Code. Such residual jurisdiction does not in any manner impact Section 30(2) of the Code which circumscribes the jurisdiction of the Adjudicating Authority when it comes to the confirmation of a resolution plan, as has been mandated by Section 31(1) of the Code. A harmonious reading, therefore, of Section 31(1) and Section 60(5) of the Code would lead to the result that the residual jurisdiction of the NCLT Under Section 60(5)(c) cannot, in any manner, whittle down Section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority. This argument also must needs be rejected.

44. The minimum value that is required to be paid to operational creditors under a resolution plan is set out Under Section 30(2)(b) of the Code as being the amount to be paid to such creditors in the event of a liquidation of the corporate debtor Under Section 53. The Insolvency Committee constituted by the Government in 2018 was tasked with studying the major issues that arise in the working of the Code and to recommend changes, if any, required to be made to the Code. The Insolvency Committee Report, 2018 (hereinafter referred to as "The Committee Report, 2018"), *inter alia*, deliberated upon the objections to Section 30(2)(b) of the Code, inasmuch as it provided for a minimum payment of a "liquidation value" to the operational creditors and nothing more, and concluded as follows:

18. VALUE GUARANTEED TO OPERATIONAL CREDITORS UNDER A RESOLUTION PLAN

18.1 Section 30(2)(b) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all operational creditors. Regulation 38(1)(b) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval of resolution plan by the NCLT. The BLRC Report states that the guarantee of liquidation value has been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor. (BLRC Report, 2015)

18.2 However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors Under Section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue

supplying goods or services to the corporate debtor for it to remain a 'going concern' given that their chances of recovery are abysmally low.

18.3 The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using 'fair value' as the floor to determine the value to be given to operational creditors. Fair value is defined under Regulation 2(1)(hb) of the CIRP Regulations to mean "the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion." However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using 'resolution value' or 'bid value' as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.

18.4 It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises ("MSMEs"). In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies. Illustratively, in the case of *Synergies-Dooray Automative Ltd.* (Company Appeal No. 123/2017, NCLT Hyderabad, Date of decision-02 August, 2017), the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under Regulation 38 of the CIRP Regulations. However, the same was modified by the NCLT and operational creditors were required to be paid prior in time, due to the quantum of debt and nature of the creditors. Similarly, the approved resolution plan in the case of *Hotel Gaudavan Pvt. Ltd.* (Company Appeal No. 37/2017, NCLT Principal Bench, Date of decision-13 December, 2017) provided for payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.

18.5 Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code.

Ultimately, the Committee decided against any amendment to be made to the existing scheme of the Code, thereby retaining the prescription as to the minimum value that was to be paid to the operational creditors under a resolution plan.

45. However, as has been correctly argued on behalf of the operational creditors, the preamble of the Code does speak of maximisation of the value of assets of corporate debtors and the balancing

of the interests of all stakeholders. There is no doubt that a key objective of the Code is to ensure that the corporate debtor keeps operating as a going concern during the insolvency resolution process and must therefore make past and present payments to various operational creditors without which such operation as a going concern would become impossible. Sections 5(26), 14(2),20(1), 20(2)(d) and (e) of the Code read with Regulations 37 and 38 of the 2016 Regulations all speak of the corporate debtor running as a going concern during the insolvency resolution process. Workmen need to be paid, electricity dues need to be paid, purchase of raw materials need to be made, etc. This is in fact reflected in this Court's judgment in **Swiss Ribbons** (supra) as follows:

26. The Preamble of the Code states as follows:

An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme-- workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See *ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta*, MANU/SC/1123/2018 : (2019) 2 SCC 1 at para 83, fn 3).

46. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value-which in most cases would amount

to nil after secured creditors have been paid-would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.

There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.

Secured and unsecured creditors; the equality principle

47. The impugned NCLAT judgment has applied an equality principle down the board stating that whether creditors are secured or unsecured, financial or operational, equitable treatment demands that they all be treated as one group of creditors similarly situate, as a result of which no differences can be made in terms of the amount of debt to be repaid to them based on whether they are secured or unsecured, and whether they are financial or operational creditors. The aforesaid judgment relies upon certain paragraphs of this Court's judgment in **Swiss Ribbons** (supra) to buttress the aforesaid finding.

48. The UNCITRAL Legislative Guide states:

Designing the key objectives and structure of an effective and efficient insolvency law

xxx xxx xxx

4. Ensuring equitable treatment of similarly situated creditors

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.

xxx xxx xxx

5. Approval of a plan

xxx xxx xxx

(i) Classification of claims

27. The primary purpose of classifying claims is to satisfy the requirements to provide fair and equitable treatment to creditors, treating similarly situated claims in the same manner and ensuring that all creditors in a particular class are offered the same menu of terms by the reorganization plan. It is one way to ensure that priority claims are treated in accordance with the priority established under the insolvency law. It may also make it easier to treat the claims of major creditors who can be persuaded to receive different treatment from the general class of unsecured creditors, where that treatment may be necessary to make the plan feasible. Classification can, however, increase the complexity and costs of the insolvency proceedings, depending upon how many different classes are identified. An alternative, to ensure that creditors who should receive special treatment are not oppressed by the majority, may be to give those groups the opportunity to challenge the decision of the majority in court if they have not been treated in a fair and equitable manner. The fact that such a facility exists may operate to discourage majorities from making proposals that would unfairly disadvantage priority creditors.

(ii) Treatment of dissenting creditors

28. As to the treatment of dissenting creditors, it will be essential to provide a way of imposing a plan agreed by the majority of a class upon the dissenting minority in order to increase the chances of success of the reorganization. It may also be necessary, depending upon the mechanism that is chosen for voting on the plan and whether creditors vote in classes, to consider whether the plan can be made binding upon dissenting classes of creditors and other affected parties.

29. To the extent that a plan can be approved and enforced upon dissenting parties, there will be a need to ensure that the content of the plan provides appropriate protection for those dissenting parties and, in particular, that their rights are not unfairly affected. The law might provide, for example, that dissenting creditors can not be bound unless assured of certain treatment. As a general principle, that treatment might be that the creditors will receive at least as much under the plan as they would have received in liquidation proceedings. If the creditors are secured, the treatment required may be that the creditor receives payment of the value of its security interest, while in the case of unsecured creditors it may be that any junior interests, including equity holders, receive nothing. To the extent that the approval procedure results in a significant impairment of the claims of creditors and other affected parties without their consent (in particular secured creditors), there is a risk that creditors will be unwilling to provide credit in the future. The mechanism for approval of the plan, and the availability of appropriate safeguards, is therefore of considerable importance to the protection of these interests.

xxx xxx xxx

(c) Approval by secured and priority creditors

(i) The need for secured and priority creditors to vote

34. In many cases of insolvency, secured claims will represent a significant portion of the value of the debt owed by the debtor. Different approaches can be taken to approval of the plan by secured and priority creditors. As a general principle, however, the extent to which a secured creditor is entitled to vote will depend upon the manner in which the insolvency regime treats secured creditors, the extent to which a reorganization plan can affect the security interest of the secured creditor and the extent to which the value of encumbered assets will satisfy the secured creditor's claim.

35. Under one approach, where the insolvency law does not affect secured creditors and, in particular, does not preclude them from enforcing their rights against the encumbered assets, there is no need to give these creditors the right to vote since their security interests will not be affected by the plan. Priority creditors are in a similar position under this approach--the plan cannot impair the value of their claims and they are entitled to receive full payment before creditors without priority are paid. The limitation of this approach, however, is that it may reduce the chances for a successful reorganization where the encumbered assets or modification of the rights of such creditors are key to the success of the plan. If the secured creditor is not bound by the plan, the election by the secured creditor to enforce its rights, such as by repossessing and selling the encumbered asset, may make reorganization of the business impossible to implement. Similarly, there may be circumstances where ensuring a successful reorganization requires that priority creditors receive less than the full value of their claims upon approval of the plan. The prospects for reorganization may improve if priority creditors will accept payment over time and if secured creditors will acquiesce when the terms of the secured debt are modified over time. If these creditors are not included in the plan and entitled to vote on proposals affecting their rights, modification of those rights cannot be achieved.

(ii) Classes of secured and priority creditors

36. Recognizing the need for secured and priority creditors to participate, a second approach provides for these creditors to vote as classes separate from unsecured creditors on a plan that would modify or affect the terms of their claims, or to otherwise consent to be bound by the plan. Adopting such an approach provides a minimum safeguard for the adequate protection of these creditors and recognizes that the respective rights and interests of secured and priority creditors differ from those of unsecured creditors. In many cases, however, the rights of secured and priority creditors will differ from each other and it may not be feasible to require all secured creditors or all priority creditors to vote in a single class. In such cases, some laws provide that each secured creditor with separate rights to encumbered assets forms a class of its own. Those laws also provide that, where secured creditors do vote as a class (e.g. where there are multiple holders of bonds that are secured by the same assets), the requisite majority of a class of secured creditors would generally be the same as that required for approval by unsecured creditors, although there are examples of laws that require different majorities depending upon the manner in which secured creditors rights are to be affected by the plan (e.g. one law provides that a three-quarter majority is required where the maturity date is to be extended and a four-fifths majority where the rights are to be otherwise impaired). Similarly, each rank of priority claims would be a separate class under those laws.

xxx xxx xxx

(iii) Where secured creditors are not fully secured

38. To the extent that the value of the encumbered asset will not satisfy the full amount of the secured creditor's claim, a number of insolvency laws provide that those secured creditors should vote with ordinary unsecured creditors in respect of the unsatisfied portion of the claim. This may raise difficult questions of valuation in order to determine whether, and to what extent, a secured creditor is in fact secured. For example, where three creditors hold security interests over the same asset, the value of that asset may only support the claim first in priority and part of the second in priority. The second creditor therefore may have a right to vote only in respect of the unsecured portion of its claim, while the third creditor will be totally unsecured. The valuation of the asset is therefore crucial to determining the extent to which these secured creditors are secured and whether or not they are entitled to vote as unsecured creditors with respect to any portion of their claim.

39. In determining which approach should be taken to this issue, it will be important to assess the effect of the desired approach upon the availability and cost of secured financing and to provide as much certainty and predictability as possible, balancing this against the objectives of insolvency law and the benefits to an economy of successful reorganization.

The BLRC Report, 2015 is of great help in understanding what is meant by respecting the rights of all creditors equally. Paragraph 3.4.2 of the said report states:

3.4.2 Principles driving the design

The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

IV. The Code will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

10. The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.

11. The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.

VII. The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

12. The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

13. While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution.

49. That equitable treatment of creditors is equitable treatment only within the same class is echoed in American Jurisprudence, 2d, Volume 9 (hereinafter referred to as "American Jurisprudence") as follows:

6. Distribution

Equality of distribution is the theme of a bankruptcy act and a prime bankruptcy policy. The bankruptcy system is designed to distribute an estate as equally as possible among similarly situated creditors. Thus, creditors of equal status must be treated equally and equitably.

One of the conditions placed upon the debtor's use of the Bankruptcy Code to obtain a fresh start is that the debtor treat all creditors fairly.

The bankruptcy process is the process by which a res, under the constructive possession of the bankruptcy court, is administered for the purpose of allowing, disallowing, organizing, and prioritizing claims of creditors in, to, and upon the res. Although the central policy of the

Bankruptcy Code is equality of distribution among all creditors, exceptions are made by granting priority to certain claims and subordinating others. Pursuant to the central policy, creditors of equal priority should receive a pro rata share of the debtor's property; thus, when there is not enough to go around, the bankruptcy judge must establish priorities and apportion assets among creditors with the same priority.

Shri Sibal, however, relied upon the following statements in American Jurisprudence, which read as follows:

Chapter 11 reorganization, specifically, has been called a collective remedy, designed to find the optimum solution for all parties connected with a business-not solely for the business itself and not solely for its creditors.

xxx xxx xxx

Protecting creditors in general is an important objective as is protecting creditors from each other.

There is no doubt that even under our Code, reorganisation is a collective remedy designed to find an optimum solution for all parties connected with a business in the manner provided by the Code. Protecting creditors in general is, no doubt, an important objective-the observation that protecting creditors from each other is also important, which must be read with footnote 7 in the American Jurisprudence, which reads as under:

In re First Central Financial Corporation, MANU/FESC/0194/2004 : 377 F. 3d 209 (2d Cir. 2004)

The Bankruptcy Code generally does not imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under otherwise applicable non-bankruptcy law unless it is to serve some bankruptcy purpose. In re Vermont Elec. Generation & Transmission Co-op., Inc., 240 B.R. 476 (Bankr. D. Vt. 1999)

A reading of this footnote will show that what is meant by protecting creditors from each other is only that a Bankruptcy Code should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose.

50. The importance of valuing security interests separately from interests of creditors who do not have security is well set out in the IMF paper on Development of Standards for Security Interest by Pascale De Boeck and Thomas Laryea, Counsel, IMF Legal Department. The learned authors state:

I. VALUE OF SECURITY INTERESTS

In developing standards for the legal framework of security interests, it is important to recognize that security interests serve discernable economic goals. Security interests reduce credit risk by increasing the creditor's likelihood to be repaid, not only when payment is due, but also in the event of a default by its debtor. This increased likelihood of repayment produces wider economic

benefits. First, the availability of credit is enhanced; borrowers obtain credit in cases where they would have otherwise failed absent a security interest. Second, credit is also made available on better terms involving, for instance, lower interest rates and longer maturities. The relative cost of secured credit under that of unsecured credit reflects the commercial recognition of the advantages of secured credit in connection with the recovery of the debt.

The efficiency of the legal framework for secured credit is a critical factor in the strengthening of financial systems. In the face of financial sector crises, an effective legal framework of security interests enables banks and other credit institutions to mitigate the deterioration of their claims, it also facilitates corporate restructuring by providing tools to support interim financing. In the longer term, an effective framework for security interests fosters economic growth. Specifically, it supports access to affordable credit, thereby facilitating the acquisition of goods. Further, it increases the capacity of enterprises to finance expansion fueled by the supply of credit. Also, an effective framework for security interests can support the development of a sound banking system and promotion of capital markets founded on the efficient allocation of credit and effective and predictable mechanisms for realizing credit claims.

xxx xxx xxx

III. General Principles

xxx xxx xxx

• Establish clear and predictable priority rules

The issue of priorities between various security interest devices and between various types of creditors is extremely complex, largely due to the myriad of possible competing interests. Whatever priority Rules a legal framework establishes, they ought to be clear, predictable and transparent. They need to allow creditors to assess their position before creating a security interest and to enforce their rights in case of default in a timely, predictable and cost-efficient manner.

• Facilitate the enforcement of creditor rights

Enforcement is a critical factor in the law and functioning of secured credit. A security interest is of little value to a creditor unless the creditor is able to enforce it in a predictable, efficient and timely manner vis-à-vis the debtor and third parties. An effective framework needs to allow quick and predictable enforcement both within and outside insolvency proceedings.

51. Likewise the World Bank Report of 2015 titled Principles for Effective Insolvency and Creditor/Debtor Regimes states:

Claims and Claims Resolution Procedures

Treatment of Stakeholder Rights and Priorities

C12.1 The rights of creditors and the priorities of claims established prior to insolvency proceedings under commercial or other applicable laws should be upheld in an insolvency proceeding to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationships. Deviations from this general Rule should occur only where necessary to promote other compelling policies, such as the policy supporting reorganization, or to maximize the insolvency estate's value. Rules of priority should enable creditors to manage credit efficiently, consistent with the following additional principles:

C12.2 The priority of secured creditors in their collateral should be upheld and, absent the secured creditor's consent, its interest in the collateral should not be subordinated to other priorities granted in the course of the insolvency proceeding. Distributions to secured creditors should be made as promptly as possible.

C12.3 Following distributions to secured creditors from their collateral and the payment of claims related to the costs and expenses of administration, proceeds available for distribution should be distributed pari passu to the remaining general unsecured creditors, unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights. The number of priority classes should be kept to a minimum.

C12.4 Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors.

However, Shri Sibal stated that this report should not be relied upon as an earlier World Bank Report of 2010, titled "A Global View of Business Insolvency Systems" (hereinafter referred to as the "2010 Report") had opined to the contrary.

52. Quite apart from the fact that the 2010 report is an earlier report, which opined on the basis of the French system, that creditors are divided into two separate classes without any further sub-classification and that the advantage of such system is that it avoids potential conflict of interest among creditors in a particular class, the report then goes on to state:

In some cases, classification makes it easier to treat the claims of major creditors, who may be persuaded to opt to receive a different treatment from the general class of unsecured creditors, where such treatment is necessary to render the plan feasible. In such cases, the treatment for these major creditors is generally on less favorable terms than other, similarly situated creditors. Finally, classification may be a useful means of overriding the vote of a class of creditors that votes against the plan where the class is otherwise treated in a fair and equitable manner.[4]

Even according to this report, therefore, a "cramdown" on dissentient creditors would pass muster under an insolvency law if such creditors will receive, under a resolution plan, an amount at least equal to what such creditors would receive in a liquidation proceeding being "liquidation value".

53. Also, Philip R. Wood's book titled "Principles of International Insolvency" states:

Secured creditors are super-priority creditors on insolvency. Security must stand up on insolvency which is when it is needed most. Security which is valid between the parties but not as against the creditors of the debtor is futile. Bankruptcy law which freeze or delay or weaken or de-prioritise security on insolvency destroy what the law created. Hence the end is more important than the beginning.

Rationale of security-The main purposes and policies of security are: protection of creditors on insolvency; the limitation of cascade or domino insolvencies; security encourages capital, e.g. enterprise finance; security reduces the cost of credit, e.g. margin collateral in markets; he who pays for the asset should have the right to the asset; security encourages the private rescue since the bank feels safer; security is defensive control, especially in the case of project finance; security is a fair exchange for the credit.

Main Objections to security The objections to security are mainly historical, but they resurrect and live on. The hostility may stem from: debtor-protection stirred by the ancient hostility to usurers and money-lending and now expressed in consumer protection statutes; the prevention of false wealth, i.e. the debtor has many possessions but few assets-this is usually met by a requirement for possession (inefficient because not public) or public registration; unsecured creditors get less on insolvency and this is seen as a violation of bankruptcy equality, although more often it is motivated by desire to protect unpaid employees and small creditors; security disturbs the safety of commercial transactions because of priority risks, e.g. the purchaser of goods; the secured creditor can disrupt a rescue by selling an essential asset.

54. Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

55. Financial creditors are in the business of lending money. The RBI report on Trend and Progress of Banking in India, 2017-2018 reflects that the net interest margin of Indian banks for the financial year 2017-2018 is averaged at 2.5%. Likewise, the global trend for net interest margin was at 3.3% for banks in the USA and 1.6% for banks in the UK in the year 2016, as per the data published on the website of the bank. Thus, it is clear that financial creditors earn profit by earning interest on money lent with low margins, generally being between 1 to 4%. Also, financial creditors are capital providers for companies, who in turn are able to purchase assets and provide a working capital to enable such companies to run their business operation, whereas operational creditors are beneficiaries of amounts lent by financial creditors which are then used as working capital, and often get paid for goods and services provided by them to the corporate debtor, out of such working capital. On the other hand, market research carried out by India Brand Equity Foundation, a trust established by the Ministry of Commerce and Industry, as regards the Oil and Gas sector, has stated that the business risk of operational creditors who operate with higher profit margins and shorter cyclical repayments must needs be higher. Also, operational creditors have an immediate exit option, by stopping supply to the corporate debtor, once corporate debtors start defaulting in payment. Financial creditors may exit on their long-term loans, either upon repayment of the full

amount or upon default, by recalling the entire loan facility and/or enforcing the security interest which is a time consuming and lengthy process which usually involves litigation. Financial creditors are also part of a regulated banking system which involves not merely declaring defaulters as non-performing assets but also involves restructuring such loans which often results in foregoing unpaid amounts of interest either wholly or partially. All these differences between financial and operational creditors have been reflected, albeit differently, in the judgment of **Swiss Ribbons** (supra). Thus, this Court in dealing with some of the differences has held:

50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

xxx xxx xxx

75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a

detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

xxx xxx xxx

76. Quite apart from this, the United Nations Commission on International Trade Law, in its *Legislative Guide on Insolvency Law* (the UNCITRAL Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

"Ensuring equitable treatment of similarly situated creditors

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by *UNCITRAL Legislative Guide on Insolvency Law* ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.

77. NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the Committee of Creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster Under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 5-10-2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

38. Mandatory contents of the resolution plan.--(1) A resolution plan shall identify specific sources of funds that will be used to pay the--

(a) insolvency resolution process costs and provide that the insolvency resolution process costs, to the extent unpaid, will be paid in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

Post amendment, Regulation 38 reads as follows:

38. Mandatory contents of the resolution plan.--(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors.

56. By reading paragraph 77 *de hors* the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of <u>similarly situated creditors.</u> This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster.

Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution Applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

57. Indeed,

by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors
for the reasons given above. Further, as has been reflected in **Swiss Ribbons** (supra), most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Shri Sibal's argument that the expression "secured creditor" does not find mention in Chapter II of the Code, which deals with the resolution process, and is only found in Chapter III, which deals with liquidation, is for the reason that secured creditors as a class are subsumed in the class of financial creditors, as has been held in **Swiss Ribbons** (supra). Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of. Similarly, Regulation 36(2)(d) when it provides for a list of creditors and the amounts claimed by them in the information memorandum (which is to be submitted to prospective resolution applicants), also provides for the amount of claims admitted and security interest in respect of such claims. Under Regulation 39(4), the compliance certificate of the resolution professional as to the CIRP being successful is contained in Form H to the Regulations. This statutory form, in paragraphs 6 and 7, states as under:

6. The Resolution Plan includes a statement under Regulation 38(1A) of the CIRP Regulations as to how it has dealt with the interests of all stakeholders in compliance with the Code and regulations made thereunder.

7. The amounts provided for the stakeholders under the Resolution Plan is as under:

(Amount in Rs. Lakh)

Sl. No.	**Category of Stakeholder**	**Amount Claimed**	**Amount Admitted**	**Amount Provided under the Plan**	**Amount Provided to the Amount Claimed (%)**
1	Dissenting Secured Financial Creditors				
2	Other Secured Financial Creditors				
3	Dissenting Unsecured Financial Creditors				

4	Other Unsecured Financial Creditors				
5	Operational Creditors				
	Government				
	Workmen				
	Employees				
	...				
4	Other Debts and Dues				
Total					

Quite clearly, secured and unsecured financial creditors are differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured financial creditors are to be paid. And, most importantly, operational creditors are separately viewed from these secured and unsecured financial creditors in S. No. 5 of paragraph 7 of statutory Form H. Thus, it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code-to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.

58. However, Shri Sibal relied strongly upon a judgment of this Court being **Mihir R. Mafatlal v. Mafatlal Industries Ltd.** MANU/SC/2143/1996 : (1997) 1 SCC 579, and in particular paragraph 28 thereof, which stated as follows:

28. ...On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in

view by the Company Court while putting its seal of approval on the scheme concerned placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a scheme of compromise and arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote.

The very next paragraph, however, states as follows:

29. However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 Sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the Rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.

In **Mihir Mafatlal** (supra), the Court was dealing with schemes of amalgamation Under Section 391 of the Companies Act, 1956. Under Section 392 of the said Act, the High Court is vested with a supervisory jurisdiction, which includes the power to give directions and make modifications in such schemes, as it may consider necessary, for the proper working of the said Schemes. This power in Section 392 is conspicuous by its absence when it comes to the Adjudicating Authority under the Code, whose jurisdiction is circumscribed by Section 30(2). It is the Committee of Creditors, Under Section 30(4) read with Regulation 39(3), that is vested with the power to approve resolution plans and make modifications therein as the Committee deems fit. It is this vital difference between the jurisdiction of the High Court Under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the Code that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the Code. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. It is important to note that even

Under Sections 391 and 392 of the Companies Act, 1956, ultimately it is the commercial wisdom of the parties to the scheme, reflected in the 75% majority vote, which then binds all shareholders and creditors. Even Under Sections 391 and 392, the High Court cannot act as a court of appeal and sit in judgment over such commercial wisdom.

The constitution of a sub-committee by the Committee of Creditors

59. A large part of Shri Sibal's submission was centered around the fact that the Committee of Creditors delegated its functions to a sub-committee, which delegation is impermissible. As a result of this delegation, the sub-committee secretly made negotiations with ArcelorMittal, which secret negotiations then produced a wholly inequitable result in that Standard Chartered Bank, though a financial creditor, was only paid 1.74% of its admitted claim of INR 3,487 crores as opposed to other financial creditors who were paid 74.8% of what was claimed by them.

60. Under Section 21(8) of the Code, all decisions by the Committee of Creditors can be taken by a 51% majority vote, unless, a higher percentage is required under other specific provisions of the Code.

61. In **Pradyat Kumar Bhose v. The Hon'ble the Chief Justice of Calcutta High Court** MANU/SC/0023/1955 : (1955) 2 SCR 1331 at page 1345-1346, this Court, when dealing with the Chief Justice of the High Court of Calcutta's administrative powers held:

The further subordinate objections that have been raised remain to be considered. The first objection that has been urged is that even if the Chief Justice had the power to dismiss, he was not, in exercise of that power, competent to delegate to another Judge the enquiry into the charges but should have made the enquiry himself. This contention proceeds on a misapprehension of the nature of the power. As pointed out in *Barnard* v. *National Dock Labour Board* [MANU/UKWA/0089/1953 : (1953) 2 QB 18, 40] at p. 40, it is true that "no judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication". But the exercise of the power to appoint or dismiss an officer is the exercise not of a judicial power but of an administrative power. It is nonetheless so, by reason of the fact that an opportunity to show cause and an enquiry simulating judicial standards have to precede the exercise thereof. It is well-recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides -- is the ultimate responsibility for the exercise of such power. As pointed out by the House of Lords in *Board of Education* v. *Rice* [(1911) AC 179, 182], a functionary who has to decide an administrative matter, of the nature involved in this case, can obtain the material on which he is to act in such manner as may be feasible and convenient, provided only the affected party "has a fair opportunity to correct or contradict any relevant and prejudicial material". The following passage from the speech of Lord Chancellor in *Local Government Board* v. *Arlidge* [(1915) AC 120, 133] is apposite and instructive:

My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached

by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a Judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff.

In view of the above clear statement of the law the objection to the validity of the dismissal on the ground that the delegation of the enquiry amounts to the delegation of the power itself is without any substance and must be rejected.

Likewise, in **High Court of Judicature at Bombay through its Registrar v. Shirishkumar Rangrao Patil and Anr.** MANU/SC/0692/1997 : (1997) 6 SCC 339, this Court, in dealing with the constitution of various committees for the administration of the High Court, when dealing with question of delegation held:

10. It would thus be settled law that the control of the subordinate judiciary Under Article 235 is vested in the High Court. After the appointment of the judicial officers by the Governor, the power to transfer, maintain discipline and keep control over them vests in the High Court. The Chief Justice of the High Court is first among the Judges of the High Court. The action taken is by the High Court and not by the Chief Justice in his individual capacity, nor by the Committee of Judges. For the convenient transaction of administrative business in the Court, the Full Court of the Judges of the High Court generally passes a resolution authorising the Chief Justice to constitute various committees including the committee to deal with disciplinary matters pertaining to the subordinate judiciary or the ministerial staff working therein. Article 235, therefore, relates to the power of taking a decision by the High Court against a member of the subordinate judiciary. Such a decision either to hold an enquiry into the conduct of a judicial officer, subordinate or higher judiciary, or to have the enquiry conducted through a District or Additional District Judge etc. and to consider the report of the enquiry officer for taking further action is of the High Court. Equally, the decision to consider the report of the enquiry officer and to take follow-up action and to make appropriate recommendation to the Disciplinary Committee or to the Governor, is entirely of the High Court which acts through the Committee of the Judges authorised by the Full Court. Once a resolution is passed by the Full Court of the High Court, there is no further necessity to refer the matter again to the Full Court while taking such procedural steps relating to control of the subordinate judiciary.

62. We find, that when it comes to the exercise of the Committee of Creditors' powers on questions which have a vital bearing on the running of the business of the corporate debtor, Section 28(1)(h) provides that though these powers are administrative in nature, they shall not be delegated to any other person, meaning thereby, that the Committee of Creditors alone must take the decisions mentioned in Section 28 and not any person other than such Committee. When it comes to approving a resolution plan Under Section 30(4), there is no doubt whatsoever that this power also cannot be delegated to any other body as it is the Committee of Creditors alone that has been vested with this important business decision which it must take by itself. However, this does not mean

that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the Committee of Creditors. We find, having gone through the minutes of all the important creditors' meetings that were held, that every single administrative decision qua approving and administering the resolution plan submitted by ArcelorMittal was in fact done by the requisite majority of the Committee of Creditors itself, the subcommittee having been used only for purposes of initiating proceedings and negotiating with ArcelorMittal, which ultimately culminated in the resolution plan as finally negotiated, being passed by the requisite majority of creditors on 23.10.2018. In point of fact, Standard Chartered Bank voted in favour of the constitution of a subcommittee on the 12th committee of creditors meeting of 02.05.2018, as also, in favour of decisions of the Committee of Creditors finalizing drafts of sub-committees on eligibility of resolution applicants at the 13th Committee of Creditors meeting on 05.05.2018. Also, as a matter of fact, on 31.05.2018, at the 16th Committee of Creditors meeting, a request was made by Standard Chartered Bank to be a member of the sub-committee, which request was later withdrawn. We also find that in the authorisation to the sub-committee to negotiate with ArcelorMittal, mooted at the 20th Committee of Creditors meeting on 19.10.2018, a request was made by Standard Chartered Bank for inclusion in the said sub-committee. However, Standard Chartered Bank did not agree to put the reconstitution of the sub-committee to vote by the Committee of Creditors. Given these facts, we find, therefore, that it is only when Standard Chartered Bank found that things were going against it that it started raising objections on the technical plea that sub-committees cannot be constituted under the Code. This is not a bonafide plea. For all these reasons, this objection of Standard Chartered Bank is also rejected.

Extinguishment of Personal Guarantees and Undecided Claims

63. Shri Gopal Subramanium and Shri Rakesh Dwivedi have also appealed against the extinguishment of the rights of creditors against guarantees that were extended by the promoters/promoter group of the corporate debtor. According to them, this was done by a side wind by the Appellate Tribunal without any reasons for the same.

64. Shri Prashant Ruia a promoter/director of the corporate debtor in his personal guarantee dated 28.09.2013, specifically stated as follows:

7. The obligations of the Guarantor under this Guarantee shall not be affected by any act, omission, matter or thing that, but for this Guarantee, would reduce, release or prejudice any of its obligations under this Guarantee (without limitation and whether or not known to it or any Secured Party) including:

xxx xxx xxx

(g) any insolvency or similar proceedings.

Also, under the caption "terms of settlement", the final resolution plan dated 02.04.2018, as approved on 23.10.2018, specifically provided:

Financial Creditors:

Pursuant to the approval of this Resolution Plan by the Adjudicating Authority, each of the Financial Creditors shall be deemed to have agreed and acknowledged the following terms:

• The payment to the Financial creditors in accordance with this Resolution Plan shall be treated as full and final payment of all outstanding dues of the Corporate Debtor to each of the Financial Creditors as of the Effective Date, and all agreements and arrangements entered into by or in favour of each of the Financial Creditors, including but not limited to loan agreements and security agreements (other than corporate or personal guarantees provided in relation to the Corporate Debtor by the Existing Promoter Group or their respective affiliates) shall be deemed to have been (i) assigned/novated to the Resolution applicant, or any Person nominated by the Resolution applicant, with effect from the effective Date, with no rights subsisting or accruing to the Financial Creditors for the period prior to such assignment or novation; and (ii) to the extent not legally capable of assigned or novated-terminated with effect from the effective Date, with no rights accruing or subsisting to the Financial Creditors for the period prior to termination.

• In relation to the loan and financial assistance provided to the Corporate Debtor; each of the Financial Creditors, as the case maybe, shall:

-Assign/novate all security given (including but not limited to Encumbrance over assets of the Corporate Debtor, pledge of shares of the Corporate Debtor (other than corporate guarantees and personal guarantees) related in any manner to the Corporate Debtor) to the Resolution Applicant and/or its Connected Persons, and/or banks or financial institutions designated by the Resolution Applicant in this regard, pursuant to the Acquisition Structure, with effect from the Effective Date;

-Issue such letters and communications, and take such other actions, as may be required or deemed necessary for the release, assignment or novation of (i) the Encumbrance over the assets of the Corporate Debtor; and (ii) the pledge over the shares of the Corporate Debtor; within 5(five) Business Days from the Effective Date; and

-Be deemed to have waived all claims and dues (including interest and penalty, if any) from the Corporate Debtor arising on and from the insolvency Commencement Date, until the effective Date.

65. Shri Rohatgi, learned senior advocate appearing on behalf of Shri Prashant Ruia, also pointed out Section XIII(1)(g) of the resolution plan dated 23.10.18, in which it is stated as follows:

Upon the approval of the Resolution Plan by the Adjudicating Authority in relation to guarantees provided for and on behalf of, and in order to secure the financial assistance availed by the Corporate Debtor, which have been invoked prior to the Effective Date, claims of the guarantor on account of subrogation, if any, under any such guarantee shall be deemed to have been abated, released, discharged and extinguished.

It is hereby clarified that, the aforementioned Clause shall not apply in any manner which may extinguish/affect the rights of the Financial Creditors to enforce the corporate guarantees and personal guarantees issued for and on behalf of the Corporate Debtor by Existing Promoter Group

or their respective affiliates, which guarantees shall continue to be retained by the Financial Creditors and shall continue to be enforceable by them.

We were also informed by the learned senior Counsel that the personal guarantees of the promoter group have been invoked and legal proceedings in respect thereof are pending. It has been pointed out to us that Shri Prashant Ruia and other members of the promoter group, who are guarantors, are not parties to the resolution plan submitted by ArcelorMittal and hence, the resolution plan cannot bind them to take away rights of subrogation, which they may have if they are ordered to pay amounts guaranteed by them in the pending legal proceedings.

66. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution Applicant starts running the business of the corporate debtor on a fresh slate as it were. In **State Bank of India v. Ramakrishnan,** MANU/SC/0849/2018 : 2018 (9) SCALE 597, this Court relying upon Section 31 of the Code has held:

22. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, Under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.

Following this judgment, it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, the NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in **State Bank of India** (supra), is set aside.

67. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code.

A successful resolution Applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant

who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution Applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.

Utilisation of profits of the corporate debtor during CIRP to pay off creditors

68. The RFP issued in terms of Section 25 of the Code and consented to by ArcelorMittal and the Committee of Creditors had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor-see Clause 7 of the first addendum to the RFP dated 08.02.2018. On this short ground, this part of the judgment of the NCLAT is also incorrect.

Constitutional Validity of Section 4 and 6 of the Amending Act, 2019

69. In **Swiss Ribbons** (supra) this Court was at pains to point out, referring, *inter alia*, to various American decisions in paras 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts. In para 120 of the said judgment, this Court held:

120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the Petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the Petitioners.

It is in this background that the constitutional challenge to the Amending Act of 2019 will have to be decided.

70. Closely on the heels of the impugned NCLAT judgment which was delivered on 04.07.2019, a representation dated 17.07.2019 was written by the Deputy Secretary General, FICCI to the Secretary, Ministry of Corporate Affairs, pointing out the flaws of the NCLAT judgment and suggesting that the Government may consider amendment of the Code to reinstate the law as it was and should be. This representation stated:

A case in point is the recent NCLAT judgment which, in effect, places Secured and unsecured Financial Creditors as well as Financial and Operational Creditors on an equal footing, thus

virtually erasing the distinction specifically carved between these two classes of creditors by the provisions of the Code. It may be noted that the consequences of this order stretch beyond this particular case.

The doctrine that secured creditors shall rank ahead of unsecured creditors is a core principle of banking. It allows banks to lend to companies and individuals at lower rates of interest in a secured lending because they know that their loan is secured and in the eventuality of a default, their losses would be mitigated. By virtue of this order, the borrowing rates for all classes would go up in the future because banks can't be sure of protecting their losses. The fundamental principles of credit analysis and rating no longer hold true. This would also result in unjust enrichment for some creditors who, knowing that they don't have benefit of the security, lent at a much higher rate as compared to the secured lenders. Besides earning far more money than secured creditors, due to higher interest rate during the pre insolvency stage they now have the benefit of higher share in the plan value, at the expense of secured creditors. In fact the ruling puts in question the very concept of security-what is the use of a charge/security if it is meaningless in insolvency? Even other statutes, including the Companies Act, 2013 clearly lay down a distinction between secured and unsecured creditors and if both are treated at par it will be a huge disincentive for secured creditors...In fact, in its judgment on the constitutionality of the IBC earlier this year, the Supreme Court had justified the difference between financial and operational creditors. The NCLAT order effectively negates that distinction, which is against the fundamental theme of the IBC. If the distinction between secured and unsecured financial creditors and between financial and operational creditors is not maintained, bankers would be reluctant to use the IBC provisions for resolution of stressed assets, and would prefer for the companies to enter liquidation, which is certainly not the intent of the Code. The decision may also open the floodgates for reopening of previously concluded cases as well as filing of fresh applications and appeals by operational creditors, alleging discrimination and seeking parity with financial creditors and also by unsecured financial creditors, alleging discrimination and seeking parity with secured financial creditors.

xxx xxx xxx

We would like to draw your attention to Sections 30 and 31 of the Code which contain detailed provisions on submission and approval of the resolution plan. As per Section 31(1), once the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements of Section 30, it ***shall*** approve the resolution plan. The Insolvency and Bankruptcy Board of India has also prescribed Rules and regulations on mandatory requirements of resolution plan. The statute thus clearly empowers the committee of creditors to decide the distribution of funds. It also recognizes that as long as the resolution plan is in conformity with law, the Adjudication Authority must approve the resolution plan, as is evidenced by the usage of the word 'shall' in Section 31(1). In K. Sashidhar case the Supreme Court has clearly held that commercial decisions of the committee of creditors are not open to judicial review. We would like to clarify that the fundamental principle that there should be no discrimination between similarly situated creditors is not being questioned by the industry. The question is whether we can redefine class to mean all financial creditors irrespective of inter-creditor arrangement or their security. Such a finding is a complete rewrite of laws, practices and the agreement and bargain of parties at the time of financing (or when goods or services were provided).

We therefore strongly suggest that the Government may consider amendment of the Code to expressly clarify the distinction between secured and unsecured creditors and between financial and operational creditors. Also, decisions of resolution applicant, as accepted by the committee of creditors should be considered final unless they are found to be contrary to law. This would avoid any confusion; be in line with the global practices and held India retain its status of preferred investment destination.

71. Pursuant to this and representations from Banks and industry, the Amending Act of 2019 was then made. Sections 4 and 6 of the Amending Act of 2019 read as under:

4. **Amendment of Section 12**.

In Section 12 of the principal Act, in Sub-section (3), after the proviso, the following provisos shall be inserted, namely:--

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this Section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

xxx xxx xxx

6. **Amendment to Section 30.**

In Section 30 of the principal Act,--

(a) in Sub-section (2), for Clause (b), the following shall be substituted, namely:-

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than--

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor Under Section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in Sub-section (1) of Section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not

be less than the amount to be paid to such creditors in accordance with Sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.--For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this Clause shall be fair and equitable to such creditors.

Explanation 2.--For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this Clause shall also apply to the corporate insolvency resolution process of a corporate debtor--

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred Under Section 61 or Section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;

b) in Sub-section (4), after the words "feasibility and viability,", the words, brackets and figures "the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in subsection (1) of Section 53, including the priority and value of the security interest of a secured creditor" shall be inserted.

72. The frontal attack of Shri Sibal on Sections 4 and 6 of the Amending Act of 2019 is that it was tailor-made to do away with the judgment of the NCLAT in this very matter. This being so, such legislation would be clearly outside the bounds of the legislature as the legislature cannot interfere with a particular judgment and set it aside.

73. There is no doubt that the Amending Act of 2019 consists of several Sections which have been enacted/amended as difficulties have arisen in the working of the Code. While it is true that it may well be that the law laid down by the NCLAT in this very case forms the basis for some of these amendments, it cannot be said that the legislature has directly set aside the judgment of the NCLAT. Since an appeal against the judgment of the NCLAT lies to the Supreme Court, the legislature is well within its bounds to lay down laws of general application to all persons affected, bearing in mind what it considers to be a curing of a defective reading of the law by an Appellate Tribunal. There can be no doubt whatsoever that apart from the present case the amendments made by the Amending Act of 2019 apply down the board to all persons who are affected by its provisions. Also, it is settled law that bad faith, in the sense of improper motives, cannot be ascribed to a legislature making laws. This is settled law ever since the celebrated judgment of B.K. Mukherjea, J. In **K.C. Gajapati Narayan Deo and Others v. State of Orissa** MANU/SC/0014/1953 : 1954 SCR 1. This was felicitously laid down as follows:

...As the question is of some importance and is likely to be debated in similar cases in future, it would be necessary to examine the precise scope and meaning of what is known ordinarily as the doctrine of "colourable legislation".

It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power [Vide *Cooley's Constitutional Limitations*, Vol 1 p. 379]. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by it which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers.

Likewise, a 7-Judge Bench in **STO v. Ajit Mills Ltd.** MANU/SC/0300/1977 : (1977) 4 SCC 98, has also clearly stated as follows:

16. Before scanning the decisions to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on "colourable device'. Certainly, this is a malignant expression and when flung with fatal effect at a representative instrumentality like the legislature, deserves serious reflection. If, forgetting comity, the Legislative wing charges the Judicature wing with "colourable" judgments, it will be intolerably subversive of the Rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, "colourable" is not "tainted with bad faith or evil motive'; it is not pejorative or crooked. Conceptually, "colourability" is bound up with incompetency. "Colour', according to Black's Legal Dictionary, is "an appearance, semblance or *simulacrum*, as distinguished from that which is real ... a deceptive appearance ... a lack of reality'. A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is *maya*. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary powers implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides.

It is clear therefore for all these reasons that Sections 4 and 6 of the Amending Act of 2019 cannot be struck down on this score.

74. So far as Section 4 is concerned, it is clear that the original timelines in which a CIRP must be completed have now been extended to 330 days, which is 60 days more than 180 plus 90 days (which is equal to 270 days). But this 330-day period includes the time taken in legal proceedings in relation to such resolution process of the corporate debtor. This provision is to get over what is stated in the judgment in **ArcelorMittal India** (supra) at paragraph 86, that the time taken in legal proceedings in relation to the corporate resolution process must be excluded from the timeline mentioned in Section 12. Secondly, the third proviso added to the Section also mandates that where the period of 330 days is over on the date of commencement of the Amending Act of 2019, a further grace period of 90 days from such date is given, within which such process shall either be completed or the corporate debtor be sent into liquidation.

75. The raison d'être for this provision comes from the experience that has been plaguing the legislature ever since SICA was promulgated. The problems of SICA and other successor enactments was stated in graphic detail in **Madras Petrochem Limited v. BIFR** MANU/SC/0088/2016 : (2016) 4 SCC 1 at paragraphs 17 to 23. It will be seen from these paragraphs that though SICA, the Recovery of Debts Act of 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") all provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which all these statutory measures proved to be abject failures in resolving stressed assets. It is for this reason that the BLRC Report of 2015 stated:

In limited circumstances, if 75 % of the creditors committee decides that the complexity of a case requires more time for a resolution plan to be finalised, a onetime extension of the 180 day period for up to 90 days is possible with the prior approval of the adjudicator. This is starkly different from certain present arrangements which permit the debtor/promoter to seek extensions beyond any limit.

This approach has many strengths:

• Asset stripping by promoters is controlled after and before default.

• The promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring.

• Others in the economy can make proposals to buy the company at a certain price, alongside a certain debt restructuring.

• All parties knows that if no deal is struck within the stipulated period, the company will go into liquidation. This will help avoid delaying tactics. The inability of promoters to steal from the company, owing to the supervision of the IP, also helps reduce the incentive to have a slow lingering death.

• The role of the adjudicator will be on process issues: To ensure that all financial creditors were indeed on the creditors committee, and that 75% of the creditors do indeed support the resolution plan.

xxx xxx xxx

Speed is of essence

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay. This same idea is found in FSLRC's treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed.

Identifying and addressing the sources of delay

Before the IRP can commence, all parties need an accurate and undisputed set of facts about existing credit, collateral that has been pledged, etc. Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court. The objective of an IRP that is completed in no more than 180 days can be lost owing to these problems.

Hence, the Committee envisions a competitive industry of "information utilities" who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay.

The second important source of delays lies in the adjudicatory mechanisms. In order to address this, the Committee recommends that the National Company Law Tribunals (for corporate debtors) and Debt Recovery Tribunals (for individuals and partnership firms) be provided with all the necessary resources to help them in realising the objectives of the Code.

xxx xxx xxx

Conclusion

The failure of some business plans is integral to the process of the market economy. When business failure takes place, the best outcome for society is to have a rapid renegotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. If this cannot be done, the best outcome for society is a rapid liquidation. When such arrangements can be put into place, the market process of creative destruction will work smoothly, with greater competitive vigor and greater competition.

76. The speech of the Hon'ble Minister on the floor of the House of the Rajya Sabha also reflected the fact that with the passage of time the original intent of quick resolution of stressed assets is getting diluted. It is therefore essential to have time-bound decisions to reinstate this legislative intent. It was also pointed out on the floor of the House that the experience in the working of the Code has not been encouraging. The Minister in her speech to the Rajya Sabha gives the following facts and figures:

Now, regarding the Corporate Insolvency Resolution Process (CIRP), under the Code, I want to give you data again as of 30th June, 2019. First, I will talk about the status of CIRPs. Number of admitted cases is 2162; number of cases closed on appeal, which I read out about, is 174; number of cases closed by withdrawal Under Section 12A, is 101, I have given you a slightly later data; number of cases closed by resolution is 120; closed by liquidation, 475; and ongoing CIRPs are 1292. So, now, I would like to mention the number of days of waiting. I would like to mention here the details of the ongoing CIRPs, along with the timelines. Ongoing CIRPs are 1,292, the figure just now I gave you. Over 330 days, 335 cases; over 270 days, 445 cases; over 180 days and less than 270 days, 221 cases; over 90 days but less than 180 days, 349 cases; less than 90 days, 277 cases. The number of days' pending includes time, if any, excluded by the tribunals. So, that gives you a picture on what is the kind of wait and, therefore, why we want to bring the Amendments for this speeding up.

Mrs. Madhvi Divan also pointed out that the Hon'ble Minister's speech had also adverted to the strengthening of the NCLT as follows:

In view of the increasing number of cases, the Government has increased the number of benches of NCLT from 10 to 15, during just the last one year. In one year, we have increased it from 10 to 15. The number of members has also been increased in a phased manner. Recently, 26 new members have joined bringing the total number of members to 52. Sir, more than one court has been operationalised in the benches where a large number of cases are pending, such as, in Mumbai, Delhi, Chennai and Kolkata. The projects like e-governance and e-courts have also been implemented for faster and speedier disposal of the cases.

77. Shri Sibal vehemently objected to any reliance on the speech of the Minister and cited **K.P. Varghese v. ITO** MANU/SC/0300/1981 : (1982) 1 SCR 629 and **K.S. Paripoornan v. State of Kerala** MANU/SC/0200/1995 : (1994) 5 SCC 593. In **Varghese** (supra) this Court held, at page 645, as follows:

...Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill

explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in *Loka Shikshana Trust* v. *CIT* [MANU/SC/0273/1975 : (1976) 1 SCC 254: 1976 SCC (Tax) 14: 101 ITR 234: 1976 LR 1], the other in *Indian Chamber of Commerce v. Commissioner of Income Tax* [MANU/SC/0253/1975 : (1976) 1 SCC 324: 1976 SCC (Tax) 41: 101 ITR 796: 1976 Tax LR 210] and the third in *Additional Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers' Association* [MANU/SC/0296/1979 : (1980) 2 SCC 31: 1980 SCC (Tax) 170 : 121 ITR 1] where the speech made by the Finance Minister while introducing the exclusionary Clause in Section 2, Clause (15) of the Act was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause.

In **Paripoornan** (supra), the Court held as follows:

77. In support of the construction placed on Section 23(1-A) of the principal Act and Section 30(1) of the amending Act in *Zora Singh* [MANU/SC/0471/1992 : (1992) 1 SCC 673] the learned Counsel for the claimants have referred to the Statement of Objects and Reasons appended to the Bill in 1982 as well as the Bill of 1984 and have submitted that the said Statement of Objects and Reasons show that the object underlying the enactment of Section 23(1-A) was to remove the hardship to the affected parties on account of pendency of acquisition proceedings for a long time which renders unrealistic the amounts of compensation offered to them. Our attention has also been invited to the speeches made by members at the time when the Bill was considered and was adopted by Parliament. It has been urged that a construction which advances the said object must be adopted. We are unable to accept this contention. As regards the Statement of Objects and Reasons appended to the Bill the law is well settled that the same cannot be used except for the limited purpose of understanding the background and the state of affairs leading to the legislation but it cannot be used as an aid to the construction of the statute. (See *Aswini Kumar Ghosh* v. *Arabinda Bose* [MANU/SC/0022/1952 : 1953 SCR 1, 28 : AIR 1952 SC 369]; **State of W.B. v. Subodh Gopal Bose** [MANU/SC/0018/1953 : 1954 SCR 587, 628: AIR 1954 SC 92] per Das, J.; *State of W.B. v. Union of India* MANU/SC/0086/1962 : [(1964) 1 SCR 371, 383 : AIR 1963 SC 1241].) Similarly, with regard to speeches made by the members in the House at the time of consideration of the Bill it has been held that they are not admissible as extrinsic aids to the interpretation of the statutory provisions though the speech of the mover of the Bill may be referred to for the purpose of finding out the object intended to be achieved by the Bill. (See *State of Travancore-Cochin v. Bombay Co. Ltd.* [MANU/SC/0068/1952 : 1952 SCR 1112: AIR 1952 SC 366] and *Aswini Kumar v. Arabinda Bose* [MANU/SC/0022/1952 : 1953 SCR 1, 28: AIR 1952 SC 369].) On a perusal of the Bills of 1982 and 1984 we find that they did not contain the provisions found in Section 23(1-A) of the principal Act and Section 30(1) of the amending Act. These provisions were inserted when the 1984 Bill was under consideration before Parliament. The Statement of Objects and Reasons does not, therefore, throw any light on the circumstances in which these provisions were introduced.

As the speech of the Hon'ble Minister on the floor of the House only indicates the object for which the amendment was made and as it contains certain data which it is useful to advert to, we take aid from the speech not in order to construe the amended Section 12, but only in order to explain why the Amending Act of 2019 was brought about.

78. Given the fact that timely resolution of stressed assets is a key factor in the successful working of the Code, the only real argument against the amendment is that the time taken in legal proceedings cannot ever be put against the parties before the NCLT and NCLAT based upon a Latin maxim which sub-serves the cause of justice namely, *actus curiae neminem gravabit.*

79. In **Atma Ram Mittal v. Ishwar Singh Punia** MANU/SC/0032/1988 : (1988) 4 SCC 284, this Court applied the maxim to time taken in legal proceedings under the Haryana Urban (Control of Rent and Eviction) Act, 1973, holding:

8. It is well-settled that no man should suffer because of the fault of the court or delay in the procedure. Broom has stated the maxim "*actus curiae neminem gravabit*" -- an act of court shall prejudice no man. Therefore, having regard to the time normally consumed for adjudication, the ten years' exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within ten years and even then within that time it may not be disposed of. That will make the ten years holiday from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else.

Likewise, in **Sarah Mathew v. Institute of Cardio Vascular Diseases,** MANU/SC/1210/2013 : (2014) 2 SCC 62, this Court held that for the purpose of computing limitation Under Section 468 of the Code of Criminal Procedure, 1973 the relevant date is the date of filing of the complaint and not the date on which the Magistrate takes cognizance, applying the aforesaid maxim as follows:

39. As we have already noted in reaching this conclusion, light can be drawn from legal maxims. Legal maxims are referred to in *Bharat Kale [Bharat Damodar Kale v. State of A.P.*, MANU/SC/0794/2003 : (2003) 8 SCC 559: 2004 SCC (Cri.) 39], *Japani Sahoo [Japani Sahoo v. Chandra Sekhar Mohanty*, MANU/SC/3080/2007 : (2007) 7 SCC 394: (2007) 3 SCC (Cri.) 388] and *Vanka Radhamanohari [Vanka Radhamanohari v. Vanka Venkata Reddy*, MANU/SC/0510/1993 : (1993) 3 SCC 4: 1993 SCC (Cri.) 571]. The object of the criminal law is to punish perpetrators of crime. This is in tune with the well-known legal maxim *nullum tempus aut locus occurrit regi*, which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim *vigilantibus et non dormientibus, jura subveniunt*. Chapter XXXVI Code of Criminal Procedure which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 Indian Penal Code, which have lesser punishment may have serious social consequences. The provision is, therefore, made for condonation of delay. Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation Under Section 468 of the Code is supported by the legal maxim *actus curiae neminem gravabit* which means that the act of court

shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant. Chapter XXXVI thus presents the interplay of these three legal maxims. The provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles.

Both these judgments have been followed in **Neeraj Kumar Sainy v. State of Uttar Pradesh** MANU/SC/0283/2017 : (2017) 14 SCC 136 at paragraphs 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date-without any exception thereto-may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment Under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business Under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from **Madras Petrochem** (supra).

Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary Under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business Under Article 19(1)(g) of the Constitution.
The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general Rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

80. When it comes to the validity of the substitution of Section 30(2) (b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses

(i) and (ii) of Sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of Sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of Clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in Sub-section (2). Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in Sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.

81. As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment.

82. Equally, Explanation 2 applies the substituted Section to pending proceedings either at the level of the Adjudicating Authority or the Appellate Authority or in a Writ or Civil Court. As has been held in **Swiss Ribbons** (supra) and **ArcelorMittal India** (supra) (see paragraph 97 of **Swiss Ribbons** (supra) and paragraph 82, 84 of **ArcelorMittal India** (supra)), no vested right inheres in any resolution Applicant to have its plan approved under the Code. Also, the Federal Court in **Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri** MANU/FE/0002/1940 : AIR 1941 FC 5 and later, this Court in **Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and Ors.** MANU/SC/0335/2003 : (2003) 6 SCC 659 (at paragraphs 16 and 17) have held that an appellate proceeding is a continuation of an original proceeding. This being so, a change in law can always be applied to an original or appellate proceeding. For this reason also, Explanation 2 is constitutionally valid, not having any retrospective operation so as to impair vested rights.

83. The challenge to Sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC report, 2015 (see paragraph 33 of this judgment). Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this Sub-section which may be applied by the Committee of

Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm.

The resolution plan of ArcelorMittal as amended and objections thereto

84. The resolution plan submitted by ArcelorMittal on 02.04.2018 proposed an upfront payment of INR 35,000 crores towards resolution of the debt of INR 49,213 crores of financial creditors. This was buttressed by a letter of commitment from Credit Agricole Corporate and Investment Bank. From this upfront cash recovery, unsecured financial creditors were to be paid only an aggregate amount of 5% of their admitted claims. Apart from this, INR 8,000 crores of upfront fresh capital infusion for improving operations and enhancing revival prospects of the corporate debtor was also proposed. So far as operational creditors were concerned, it was proposed that workmen and employees were to be paid INR 18 crores in full against their admitted claims, and out of other operational creditors, those small trade creditors defined as "having admitted claims of less than INR 1 crore" were to be paid in full, as opposed to trade and government creditors of over INR 1 crore, who were to be paid aggregate amount INR 196 crores. Other operational creditors were to be given nothing, liquidation value being payable to operational creditors as a class being in any case nil (INR 3339 crores were the aggregate admitted claims of all operational creditors as a class). Under the caption "Treatment of various stake holders" the plan provided as follows:

VIII. Treatment of Various Stakeholders"

xxx xxx xxx

Stakeholder	**Proposed Treatment**
Financial Creditors	As per the Liquidation Value of the Corporate Debtor, the Secured Financial Creditors would realize amounts which were lower than the current outstandings on a cumulative basis. However, the Resolution Applicant recognizes the sacrifices already made by the Financial Creditors till date and the fact that debt restructuring attempts by the Financial Creditors have failed in the past. The Resolution Applicant is proposing to pay the Secured Financial Creditors, the amounts stated under Section V which is significantly higher than the reconvenes that the Secured Financial Creditors as a class would realize in case of liquidation. The payments proposed to be made by the Resolution Applicant to the unsecured Financial Creditors is also higher than the

	recoveries that the unsecured Financial Creditors as a class would realize in case of liquidation, since the Liquidation Value realizable by unsecured Financial Creditors is *nil*. The Resolution Applicant has empowered the Committee of Creditors to decide the manner in which the financial package being offered by the Resolution Applicant to the Financial Creditors will be distributed to the Secured Financial Creditors. All such allocations to the Financial Creditors will be binding on all stakeholders. The unsecured Financial Creditors (including those Secured Financial Creditors who may have claims admitted against unsecured instruments) i.e. Standard Chartered Bank. The Bank of New York Mellon, London Branch, AXIS bank, ICICI Bank. Bank of Baroda, SBI Rupee Notes and Individual Rupee Notes to MelwaniGopalThrumal and/or MelwaniVinod, Mr. Arvinlal N Shah & Mrs. Indumati A Shah, Mr. jiwat K Dansanghani and Mrs. Neetu J Dhansanghani and Nathu Ram Verma, who have Admitted claims as of 28 February 2018 (based on document 2.5.8 uploaded on VDR on 6 March 2018 which provides Breakup of Secured and Unsecured financial Creditors), shall be paid an aggregate amount of 5% of their Admitted Claims. Furthermore, in accordance with the RFP, it is clarified that: a)any surplus cash being the positive difference between actual working capital of the Corporate Debtor as on Plan Approval Date and normalized working capital as at 31 December 2017, shall be

	added to upfront cash recovery as a closing adjustment under the Resolution Plan; and b)the EBITDA generated by the Corporate Debtor between the Plan Approval Date and the date on which the Financial Creditors are paid the up-front cash amount shall be available to the Financial Creditors over and above the upfront cash recovery under the Resolution Plan. However, notwithstanding anything stated herein, a Dissenting Financial Creditor will be entitled to only receive Liquidation Value realizable by such Financial Creditor in case of liquidation of the Corporate Debtor, which shall be paid out of the upfront cash recovery amount being offered.
Operational Creditors (other than Workmen, Employees and Governmental Operational Creditors)	The Resolution Applicant recognizes the role that the various Trade Creditors have played in connection with the business of the Corporate Debtor. Whilst Operational Creditors as a class of Creditors would receive *nil* returns on liquidation of the Corporate Debtor, the Resolution Applicant has agreed to settle part of the Admitted Claims to the extent set out in Section V above. Without prejudice to the above, the Resolution Applicant is desirous of setting aside amounts under the financial package to settle at least part of the Claims of the small Trade Creditors. This class of Trade Creditors are being provided such payments since the Resolution applicant understands that these Persons typically form a part of small scale/medium sector enterprises, which enterprises play a key role in the Indian economy and given their scale of operations may not be in a position to weather macroeconomic and financial shocks. The identified Trade Creditors are being paid out on the assumption that they will continue their arrangements with the

	Corporate Debtor and shall in no manner commit any acts or omissions which would adversely impact the business. of the Corporate Debtor. Acceptance of payments by the Trade Creditors shall be considered as an acceptance of the above condition. The Resolution Applicant recognizes and understands that additional payment to certain Operational Creditors may have to be made as a part of revitalising the business and is prepared to do so, on a case by case basis.
Governmental Operational Creditors	The Resolution Applicant aims at establishing a good working relationship between the Governmental Authorities and the Corporate Debtor and will cause the Corporate Debtor to duly pay the statutory dues that will be incurred by the Corporate Debtor going forward from the Plan Approval Date in a timely manner. The revival of the Corporate Debtor will also enhance the tax collection by the Governmental Authorities in the geographies where the Corporate Debtor operates.

85. On 22.10.2018, various changes were made in the original resolution plan as follows:

The representatives of AM India of AM India thanked the RP. Thereafter, they presented a brief summary of the revisions made to the financial proposal. They informed that as per the directives of the CoC, AM India had deliberated and negotiated with the Sub-Committee. Thereafter, the representative highlighted certain key revisions made to the resolution plan, which *inter alia* included revisions in relation to (a) upfront cash recovery available to secured and unsecured financial creditors of ESIL; (b) upfront fresh capital infusion; (c) process of closing adjustment, which included provision of audit. He further added that they had not provided how the upfront cash would be distributed and the same has been left at the discretion of the CoC. He further added that the business plan has not undergone any substantial changes and the negotiations were largely around the financial proposal and that AM India is committed to implement the plan, as agreed. Thereafter, the representative of AM India also deliberated with the members of the CoC regarding the revised financial proposal and responded to the queries raised in relation thereto.

It was stated that the value and quality of security should be the basis on which proceeds should be distributed by most of the secured financial creditors. This amended resolution plan was approved by a majority of 92.24% of financial creditors. The sharing ratio between secured financial creditors having charge on project assets of the corporate debtor was 99.86% as opposed

to 0.14%, so far as Standard Chartered Bank was concerned, which only had a charge on the pledge of shares of ESOL, being an offshore subsidiary of the corporate debtor. The upfront payment to secured financial creditors on the effective date would now be INR 41,909.29 crores and INR 60.71 crores to Standard Chartered Bank. It was pointed out that this was based on the worth of those shares as security, being only INR 24.86 crores. The reasons given for acceptance of this amended resolution plan was stated as follows:

By majority consensus of COC (except Standard Chartered Bank and SREI), it was agreed that fairness of distribution would be reflected only if distribution be made based on underlying security value and quality of security. Based on a comparison of the two suggested options based on fair value and liquidation value, in the interest of all stake holders and with the objective of the Code it is proposed to the COC to accept the sharing ratio as per the Liquidation Valuation Report and also to Secured Financial Creditors having Charge on Project Asset of ESIL for taking a sacrifice of Rs. 37.76 Crores (for adopting the sharing ratio as per the Liquidation Valuation Report instead of fair value) which shall be allocated to Secured Financial Creditors having Charge on Pledge of Shares of ESOL.

While allocation of the Resolution Amount it is pertinent to note that the *Committee of creditors has the widest discretion to determine the terms of the resolution plan.*

A. At the outset it is important to be noted that the legislature in their wisdom under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) have left the decision-making in respect of commercial matters completely in the domain of the Committee of Creditors (COC). In fact even the Bankruptcy Law Reforms Committee report (which formed the basis for the enactment of the Code) specifically notes the deliberate scheme of the Code, where the law does not prescribe any particular manner of insolvency resolution and leaves this commercial decision making process to the COC without the interference of the legislature as well as judiciary.

B. Further, pro rate distribution cannot be the only method of distribution of assets, as it would lead to the disastrous consequences where the creditors would lose their freedom to restructure the debt as they deem fit. This an important commercial decision which is required to be made by the Code and a strait jacket formula for all cases would result in dilution of the provisions of the Code and would incentivize all secured creditors to liquidate the company rather than opt for resolution. It was noted that generally all secured financial creditors are prudent entities which grant loans after exercising due-diligence and are presumed to be able to evaluate their interest and risks sufficiently. Moreover it may negatively impact the credit market and discourage banks and other financial creditors from granting large project loans which are more often than not granted against property or other valuable collateral.

C. The Report of the Insolvency Law Committee provides valuable insights on the principles governing inter-creditor agreements and their relevance to distribution arrangements. In practice, subordination agreements inter-se creditors were respected in practice. This was also the stated position in insolvency resolution proceedings other jurisdiction and in other developed countries.

D. The Hon'ble National Company Law Appellate Tribunal has held that the COC has the discretion to approve any resolution plan and its decision to approve the same cannot be interfered

with by the Adjudicating Authority or the Appellate Authority, except for in terms of Section 31(1) to examine compliance of Section 30(2) read with relevant regulations. (See Kannan Tiruvengandram v. M.K. Shah Exports Ltd. and Ors. in and Darshak Enterprise Pvt. Ltd. and Ors. v. Chhaparia Industries Pvt. Ltd. and Ors.

E. The Code specifically provides the COC with the power Under Section 30(4) of the Code, to approve a resolution with requisite majority as set out thereunder. It is an accepted position in law, and as enunciated in various pronouncements of the Supreme Court of India that where a power is conferred or a duty is imposed by a statute, and there is nothing expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions it is reasonable to hold that it carries with it all power of doing all such acts or employing all such means as are reasonably necessary for its execution. The below mentioned provisions of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons). Regulation 2016 (CIR Regulations) set out the powers of the COC in this regard:

Section 31 of the Code (Approval of Resolution Plan):

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under Sub-section (4) of Section 30 meets the requirements as referred to in Sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Regulation 39 of the CIR Regulations, 2016;

"(2) The resolution professional shall present all resolution plans that meet the requirements of the Code and these Regulations to the Committee for its consideration.

(3) The committee may approve any resolution plan with such modifications as it deems fit.

xxx xxx xxx

K. It is a recognized principle of insolvency law that creditor rights and ranking of priority claims existing before commencement of insolvency must be recognized and respected in the insolvency proceedings. Recognition of such ranking of priorities of existing and post-commencement creditor claims provide predictability to lenders and ensure consistent application of the rules, create confidence in the proceedings and enable participants to adopt appropriate measures to manage risk. At macro level, it helps create certainty in the market and facilitate the provision of credit, in particular with respect to the rights and priorities of secured creditors. It is also well established that best practices require that priority to claims that are not based on commercial bargains should be minimalized. This principle is unequivocally articulated in the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency law (hereinafter, the "UNCITRAL Guide") in the chapter that recommends the policy and legislative design of the "key objectives and structure of an effective and efficient insolvency law"

L. Further, in recognition of the principle that creditor rights and ranking of priority claims existing before commencement of insolvency must be recognised and expected in the insolvency proceedings. To protect/respect the creditor rights and ranking of priority claims, the IBC does not in any manner impose any prescription, mandatory or otherwise on the resolution Applicant that would be disruptive of the creditor rights and priority claims of the secured creditors as on insolvency commencement date. If this Rule was not to be recognised, it will lead to a free-for-all situation, no short of chaos, as any rights on differential security interest would then be ignored.

M. Therefore in conclusion, since the Code provides the COC with the power to approve a resolution for the Corporate Debtor, the manner in which such resolution shall be executed including but not limited to the decision as to the methodology of distribution or the amount a money to be paid to individual stakeholders would also be a decision which the COC would be permitted to take, especially in the absence of any express provision in the Code prohibiting such a decision by the COC. As long as such decisions are not contrary to the provisions of the Code.

86. The final resolution plan as approved on 23.10.2018 was as follows-in the place of INR 35,000 crores to be paid on the effective date as an upfront amount, INR 39,500 crores and INR 2,500 crores, aggregating INR 42,000 crores was to be paid. The resolution Applicant agreed that the Committee of Creditors will decide the manner in which the financial package being offered by the resolution Applicant to financial creditors will be distributed to secured financial creditors. The payment of INR 17.4 crore was to be made to unsecured financial creditors with a claim amount of more than INR 10 lakhs, and INR 30.55 lakhs to such creditors with a claim amount of less than INR 10 lakhs, with the fresh capital infusion for improving operations and enhancing revival prospects of the corporate debtor remaining at INR 8,000 crores. So far as operational creditors were concerned, there was no change made.

87. At the 22nd meeting of the Committee of Creditors dated 27.03.2019, the NCLT order of 08.03.2019 was discussed and it was felt that INR 1,000 crores extra be paid for operational creditors over and above INR 1 crore each, as follows:

The representative of EARC mentioned that without prejudice to the appeals, a lump sum amount may be set-aside and put to vote as they are not averse to examining it. The representative of SBI concurred with the views of the representative of EARC. He further mentioned that CoC as well as SCB has challenged the NCLT Order. SBI proposed to set aside a capped amount of INR 1,000 Crore for operational creditors (without prejudice to their right to appeal). He requested that a resolution to that effect may be voted upon.

The RP requested the SBI representative to clarify if the proposed amount of INR 1,000 Crore would be over and above the INR 196 Crore which is already included in the Resolution Plan for operational creditors. The SBI representative confirmed that the same would be over and above the current proposal, however this additional amount will be capped to INR 1,000 crores.

Under the caption "discussion on the suggestions of the Hon'ble NCLT in relation to distribution of amounts proposed to be paid to financial creditors", the minutes of the meeting reflect that the Committee of Creditors had sought for and obtained the opinion of retired Justice B.N. Srikrishna. This opinion dated 23.03.2019 stated as follows:

In view of this peculiar situation, where a financial creditor has advanced money to the corporate debtor assessing the commercial risk and covers his risk by a charge on the assets of the corporate debtor, there can be no question of his being entitled to the liquidation value or any other fixed value towards his debt. In any event, the plan formulated by the resolution applicant, has to be placed before the COC for its final approval. It is at that juncture the commercial wisdom of lenders forming the COC comes into play and they are entitled to take a call on either to approve or not to approve the resolution plan which the FRP has put forward before the COC for its approval. In my view, therefore, the Approved Resolution Plan would be fully justified in classifying between secured and unsecured financial creditor, and also according to the value of their securities and apportioning the amounts payable to them in the best manner which is considered reasonable. I might add here that irrespective of what the RP considers as reasonable, it is always open to the COC to adjudge the commercial wisdom of the resolution plan while approving it. As pointed out by the Supreme Court in K. Sashidhar v. Indian Overseas Bank and Ors. (Civil Appeal No. 10673 of 2018) such commercial decision of the COC is not subject to appeal under the Code.

In the premises, I am of the opinion that SCB was differently placed than other financial creditors in view of the fact it did not have any charge or security on the project assets but had advanced a large amount of loan amounting to Rs. 3,000 crores on the basis of the pledge over the shares of an offshore company and a corporate guarantee extended by the Corporate Debtor. The resolution plan as finally approved by COC was fully justified in treating SCB as differently placed based on the cogent and intelligible differentia that is apparent from the facts of the case. I see nothing in the provisions of the Code of the Regulations which would militate against the decision taken by the COC.

I might add here that the commercial wisdom of the lenders who are voting for the resolution of the COC is evidenced by the fact that they had created securities on the project assets of the Corporate Debtor after assessing the commercial risk involved. In the case of SCB, however, there seems to have been gross under security for the large amount of Rs. 3,000 crores by merely seeking a corporate guarantee from the Corporate Debtor along with a charge only on the shares of the offshore company held by the Corporate Debtor, wherein the liquidation value of such shares is a mere Rs. 60.71 crores. In fact, in view of the fact situation, I find it hard to understand whether SCB can really be treated as a secured creditor in the first place. I am of the opinion that even if the corporate guarantee were to be enforced, SCB would at best stand as a secured creditor only to the extent of the value of the shares of the offshore company as on the date of enforcement of the guarantee and as an unsecured creditor with respect to the rest of the loan advanced by it. This is an equally valid consideration which might have moved the COC while approving the resolution plan by which the ultimate discretion for distribution is left to the COC with a declaration that such allocation to the financial creditors will be binding on all stake holders, which also would include SCB.

xxx xxx xxx

In the facts and circumstances, I am of the opinion that the manner in which the resolution plan was formulated and approved by the overwhelming majority of 92.24% of the voting creditors, is not only perfectly justified but is also equitable. As the Supreme Court has pointed out in Swiss Ribbons (supra), "equitable" does not mean equal distribution; it means distribution which does

justice to every stakeholders involved in the process. In my opinion, mere equal distribution would definitely do injustice to the large majority of 92.24% shareholders who in their commercial wisdom had ensured that the security was created on project assets, while SCB was content with creating a charge only on the shares of the offshore company and seeking a corporate guarantee from the Corporate Debtor.

88. The aforesaid opinion was shared with all Committee of Creditors members including Standard Chartered Bank. Importantly, the minutes record:

At this point, the representative from Canara Bank stated that he requires clarity on the following questions before he can consider the revised apportionment to SCB: (a) Whether any NOCs were taken from the lenders before taking corporate guarantee, as it is a financial covenant in the sanctions of the lenders? (b) When SCB had funded Essar Steel Offshore Ltd. (ESOL), whether SCB had not taken security of Trinity coal mines as collateral, and the cash flows and credentials from the assets as security? (c) What is the end-use of the loan and was that end-use ensured? At what stage is the project? Were the funds really invested in the project?

xxx xxx xxx

The representatives of SCB raised issue of valuation and mentioned that value of above INR 24 crores of ESOL shares has not been estimated appropriately and is erroneous. The value has been estimated based on desktop valuation and the valuer has not considered valuation of underlying assets. A valuation report of equity of Trinity was shared by RP after receipt of same from Corporate Debtor which shows value in excess of USD 600 mn.

xxx xxx xxx

Further, the representatives of EARC added that they required clarify as to whether the underlying loans has been enforced against the principal borrower and whether any money has been recovered from the principal borrower. SCB representative replied that these questions were not relevant at this time and they were choosing not to answer these questions. SBI representative pointed out that these questions have been raised earlier and SCB has never replied to these queries.

xxx xxx xxx

<u>After several requests of the lenders, it was noted that SCB declined to share the documents and did not answer any of the questions as asked by the members of the CoC stating that the same were irrelevant at this stage.</u>

xxx xxx xxx

ICICI Bank also stated that it should be recorded that SCB rejected offer of INR 200 crores was not considered by SCB. The representative of SBI mentioned that the proposal offered by ICICI Bank in its individual capacity and not by other lenders. The representative of SCB mentioned it is evident that the offer was only hypothetical.

It was also suggested by EARC that revised distribution to SCB matter as per NCLT Order should also be voted upon and the other lenders concurred with the same.

Finally, the allocation of INR 1,000 crore extra to operational creditors was approved by a majority of 70.73% of the Committee of Creditors.

89. Given the aforesaid facts, Shri Sibal's submissions on behalf of Standard Chartered Bank, that the offer made by ArcelorMittal of payment of INR 42,000 crores as upfront in order to pay 100% principal outstanding of secured financial creditors of the corporate debtor cannot be accepted. Given that Standard Chartered Bank was reclassified as a secured financial creditor of the corporate debtor only on 10.09.2018 and that the aforesaid upfront payment of INR 42,000 crores would include the principal amount payable to Standard Chartered Bank as well, we have seen how in the course of negotiation, the vast majority of financial creditors have ultimately decided that Standard Chartered Bank will only get an amount based on its security interest, which was accepted by ArcelorMittal. Shri Sibal also argued that the final resolution plan ultimately offered a sum of INR 39,500 crores instead of INR 42,000 crores, being a minimum upfront payment from which it was possible to negotiate upwards but not downwards. We cannot arrive at the conclusion that the acceptance of the resolution plan by the majority of the Committee of Creditors should be set aside on this score, *inter alia*, for the reason that Shri Sibal assured us that he was not attacking the acceptance of the revised plan but only distribution of amounts payable under the said plan. This being so, it is also not possible to accept the submission of Shri Sibal, that "feasibility and viability" of a resolution plan will not include distribution of the amount of debt under the said plan. It is also not possible to accept Shri Sibal's submission that the resolution plan must itself provide for distribution *inter se* between secured financial creditors. It is enough that under the Code and the Regulations, the resolution plan provides for distribution of amounts payable towards debts based upon a classification of various types of creditors. This both the original plan as well as the negotiated plan of ArcelorMittal have already done, as has been seen by us hereinabove, both plans containing the amount to be paid to workmen separately, operational creditors of INR 1 crore and less separately, operational creditors of INR 1 crore and over separately and financial creditors, subdivided into secured and unsecured as sub-classes, separately. All that was left for distribution by ArcelorMittal was distribution *inter* se between secured financial creditors which was then done by a majority of 92.24%, as has been seen above based upon the value of their respective security interests. Therefore, the allegation that the Committee of Creditors relieved ArcelorMittal from the solemn offer made before the Supreme Court by reducing the offer amount of INR 42,000 crores by INR 2,500 crores so that ArcelorMittal could acquire the debts of OSPIL, is again a matter for negotiation being a business decision taken by the Committee of Creditors with ArcelorMittal. In any case ultimately INR 35,000 crores was upped to INR 42,000 crores, it being made clear in the final resolution plan that upfront payment of INR 42,000 crores is a committed amount, even if working capital adjustment turns out to be below INR 2,500 crores.

90. Shri Sibal also made an alternative submission that on the facts of this case, a half-way house can be found so that Standard Chartered Bank would get payment of something more above the value of its security interest. The argument is that, assuming, whilst denying, that classification amongst secured financial creditors is permissible, such classification should be on the liquidation value of the security enjoyed by the creditor and the balance distributed to all secured financial creditors pro-rata. This methodology of distribution has, according to him, been applied in **State**

Bank of India v. Orissa Manganese and Minerals Ltd. CA(IB) No. 391/KB/2018, approved by the NCLT and not disturbed by the NCLAT. Therefore, it is argued that, applying the aforesaid classification, the average liquidation value of the security in the instant case, is to be as per the report of DUFF & Phelps and RBSA, being a sum of INR 15,838 crores. This, according to him, is the amount required to be distributed to the secured financial creditors according to the value of their respective security interests (viz. first charge, second charge, subservient charge, residuary charge, etc.) and the balance to be distributed pro-rata amongst all financial creditors irrespective of their security. The sum of INR 42,000 crores offered by ArcelorMittal would therefore, according to him, be a sum of INR 15,838 crores paid over to the secured financial creditors according to the value of their security and the balance amount of INR 26,162 crores would then have to be distributed amongst all financial creditors on a pro-rata basis.

91. What is important to note is that when one reads the abovementioned judgment, it is a majority of 66% of the Committee of Creditors who has exercised the discretion vested in it under the Code in this particular manner, which has then correctly not been disturbed by the NCLT and NCLAT. Far from helping Shri Sibal's client, the principle that is applied in such a case is that ultimately it is the commercial wisdom of the requisite majority of the Committee of Creditors that must prevail on the facts of any given case, which would include distribution in the manner suggested in **Orissa Manganese** (supra). It is, therefore, not possible to accept the argument that the Adjudicatory Authority and consequently the Appellate Authority would be vested with the discretion to apply what was applied by the Committee of Creditors in the **Orissa Manganese** case (supra). This submission is also devoid of merit and is, therefore, rejected.

92. The other argument of Shri Sibal that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(b) of the Code refers to Section 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself.

93. The other argument based upon serious conflict of interest between secured and unsecured financial creditors, as the majority may get together to ride roughshod over the minority, is an argument which flies in the face of the majority of financial creditors being given complete discretion over feasibility and viability of resolution plans, which includes the manner of distribution of debts that is contained in them, subject to following the provisions of the Code relating, *inter alia*, to dealing with the interests of all stakeholders including operational creditors. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors, as is sought to be suggested by Shri Sibal. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors. It is important to note that the original threshold required by way of majority was 75%. It is during the working of the Code that this was found to be unrealistic and therefore reduced to 66%-see the amendments made to Section 28(3) and 30(4) of the Code by the Insolvency and Bankruptcy Code

(Second Amendment) Act of 2018. For all these reasons therefore, it is not possible to accept Shri Sibal's arguments.

94. The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside.

95. So far as Civil Appeal No. 6409 of 2019 is concerned, we have perused paragraphs 70 to 76 of the impugned NCLAT judgment to the effect that the cheques issued by the corporate debtor due to its payment obligation towards Bhandar Power Limited were not issued with a view to secure any payment obligation of the principal borrower i.e. EPGL, is a finding of fact which dislodges the claim of this Appellant to be regarded as a financial creditor. We find no infirmity in the aforesaid finding. This appeal is consequently dismissed.

96. So far as Civil Appeal Diary No. 36838 is concerned, we have perused the relevant documents and paragraphs 63 and 64 of the impugned NCLAT judgment and find that the NCLAT has erred inasmuch as it has added the claim of this Appellant to the tune of INR 861.19 crore despite the fact that the claim had already been admitted by the resolution professional thereby resulting in a double counting of the debt of this Appellant. This being the position, we find it necessary to set aside this part of the impugned NCLAT judgment as well.

97. So far as Civil Appeal No. 6266 of 2019, we have perused paragraphs 78 to 81 of the impugned NCLAT judgment and find no reason to dislodge the finding of the NCLAT that the claim was filed by the Appellant after the approval of the resolution plan. However, the NCLAT's finding that the said claim is subject to arbitration and that it was open for the Appellant to pursue the matter in terms of Section 60(6) of the Code deserves to be aside in terms of this judgment. This Appeal is consequently dismissed.

98. So far as Civil Appeal No. 6269 of 2019 is concerned, we have perused paragraphs 83, 84 and 196 of the impugned NCLAT judgment and find force in the contention of the Appellant that there has been an error in the impugned NCLAT judgment in as much as it notes the claim amount, as admitted, as being a sum of INR 124.88 crores, but later in the same judgment notes the said amount as INR 2.47 crores based on a chart submitted by the resolution professional. This chart submitted by the resolution professional specifies the amount of INR 2.47 crore (added after the NCLT judgment dated 08.03.2019), which is in addition to the amount of INR 124.88 crores already admitted by the resolution professional. Therefore, the NCLAT has erred in noting INR 2.47 crore amount as the amount of the Appellant's claim, and this part of the judgment also deserves to be set aside. Thus, the claim of the Appellant shall be the claim as admitted and registered by the resolution professional. This apart, we find no merit in the submission of the Appellant with respect to the sum of INR 121.72 crores as the same has been rightly rejected by the NCLAT in view of the fact that the said claim was filed after the completion of the CIRP period. However, the NCLAT's judgment inasmuch as it left it open for the Appellant to pursue the matter in terms of Section 60(6) of the Code deserves to be aside in terms of this judgment. This Appeal is thus partly allowed.

99. So far as Civil Appeal No. 7266 of 2019 and Civil Appeal No. 7260 of 2019 are concerned, the resolution professional has rejected the claim of the Appellants on the ground of non-availability of duly stamped agreements in support of their claim and the failure to furnish proof of making payment of requisite stamp duty as per the Indian Stamp Act despite repeated reminders having been sent by the resolution professional. The application filed by the Appellants before the NCLT came to be dismissed by an order dated 14.02.2019 on the ground of non-prosecution. The subsequent restoration application filed by the Appellants then came to be rejected by the NCLT through judgment dated 08.03.2019 on two grounds: one, that the applications could not be entertained at such a belated stage; and two, that notwithstanding the aforementioned reason, the claim had no merit in view of the failure to produce duly stamped agreements. The impugned NCLAT judgment, at paragraphs 93 and 94, upheld the finding of the NCLT and the resolution professional. In view of these concurrent findings, the claim of the Appellants therefore requires no interference. Further, the submission of the Appellants that they have now paid the requisite stamp duty, after the impugned NCLAT judgment, would not assist the case of the Appellants at this belated stage. These appeals are therefore dismissed.

100. So far as Writ Petition (Civil) No. 1064 of 2019 is concerned, we have perused the relevant documents and paragraph 36 of the impugned NCLAT judgment and find force in the contention of the Writ Petitioner that the NCLAT has wrongly noted that the claim amount was notionally admitted by the resolution professional at INR 1 only. The resolution professional has admitted the claim of the Writ Petitioner to a tune of INR 17.09 crore and the same is recorded in the list of creditors prepared by the resolution professional. In view of the same, this part of the NCLAT judgment is thus erroneous and the claim shall be the claim as admitted and registered by the resolution professional. The Writ Petition is thus allowed to this extent.

101. So far as Writ Petition (Civil) No. 1049 of 2019 is concerned, the Petitioner is admittedly the operational creditor of one Wind World India Ltd. whose CIRP proceedings are pending before the NCLT, Ahmedabad. The Petitioner has *inter alia* sought for permission to raise various issues arising out of the facts of its own case (which has been raised before us herein) in the matter pending before the NCLT. In view of the fact that this judgment has not opined on the merits of the case of the Writ Petitioner pending before the NCLT, it is open to the Writ Petitioner to raise all contentions as permissible under the applicable law before the NCLT in the pending proceedings. This Writ Petition is thus allowed to this extent.

102. So far as Dakshin Gujarat Vij Co. (Respondent No. 11 in Civil Appeal Diary No. 24417 of 2019), State Tax Officer (Respondent No. 12 in Civil Appeal Diary No. 24417 of 2019), Gujarat Energy Transmission Corporation Ltd. (Respondent No. 17 in Civil Appeal Diary No. 24417 of 2019) and Indian Oil Corporation Ltd. (Respondent No. 18 in Civil Appeal Diary No. 24417 of 2019) are concerned, the resolution professional admitted the claim of the abovementioned Respondents notionally at INR 1 on the ground that there were disputes pending before various authorities in respect of the said amounts. However, the NCLT through its judgment dated 08.03.2019 directed the resolution professional to register the entire claim of the said Respondents. The NCLAT in paragraphs 43 and 196 of the impugned judgment upheld the order passed by the NCLT as aforesaid and admitted the claim of the abovementioned Respondents. We therefore hold that this part of the impugned judgment deserves to be set aside on the ground that the resolution

professional was correct in only admitting the claim at a notional value of INR 1 due to the pendency of disputes with regard to these claims.

103. The appeals filed by the Committee of Creditors of Essar Steel Limited and other Civil Appeals are allowed. The impugned NCLAT judgment is set aside, except insofar as Civil Appeal No. 6409 of 2019, Civil Appeal No. 7266 of 2019, Civil Appeal No. 7260 of 2019 are concerned, which are dismissed. Insofar as Civil Appeal No. 6266 of 2019 and Civil Appeal No. 6269 of 2019 is concerned, the Appeals are partly allowed in terms of this judgment. The Writ Petitions are disposed of in terms of the judgment. It is made clear that the CIRP of the corporate debtor in this case will take place in accordance with the resolution plan of ArcelorMittal dated 23.10.2018, as amended and accepted by the Committee of Creditors on 27.03.2019, as it has provided for amounts to be paid to different classes of creditors by following Section 30(2) and Regulation 38 of the Code.

---

[1]Under Regulation 2(hb), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016-"fair value" means the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion

[2]*Id.* Under Regulation 2(k)-"liquidation value" means the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.

[3]Under Regulation 2(ha), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016-(ha)-"evaluation matrix" means such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval

[4]This override, which has come to be known as a "cramdown" based on its effect, allows the court to conclude that a rejecting class should be compelled to accept the plan where the class is paid in strict accordance with the relative priority of creditor claims and will receive under the plan a distribution in an amount equal to or greater than such creditors would receive in a liquidation proceeding. The rationale is that these creditors cannot claim "foul" if their recovery is at least as good as they would have received if they had prevailed in having the enterprise liquidated.

Back to Index

MANU/SC/0232/2018

Neutral Citation: 2018/INSC/223

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 215 of 2005 (Under Article 32 of the Constitution of India)

Decided On: 09.03.2018

Appellants: Common Cause (A Regd. Society) V**s.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Dipak Misra, C.J.I., A.M. Khanwilkar, A.K. Sikri, Dr. D.Y. Chandrachud and Ashok Bhushan, JJ.

Subject: Constitution

Subject: Civil

Relevant Section:

CONSTITUTION OF INDIA - Article 21

Authorities Referred:

Blackstone, Commentaries, The Laws of England, Book 4, Chapter 14; Oxford English Dictionary; Laurence H. Tribe, American Constitutional Law, 2nd Edition; John Keown, The Law and Ethics of Medicine: Essays on the Inviolability of Human Life, 2012; Max Muller, Sacred Books of the East (edited); Pope John Paul II, The Gospel of Life; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton, Law of Torts, 5th Edition, 1984; Black's Law Dictionary; Michael Kirby, The Role of Judiciary and HIV Law; B. Cardozo, The Growth of the Law; Charles I. Lugosi, Natural Disaster, Unnatural Deaths: The Killings on the Life Care Floors at Tenet's Memorial Centre after Hurricane Katrina, Issues in Law and Medicine, Vol. 23; John Keown, Euthanasia, Ethics and Public Policy; T N Madan, Dying with Dignity; J Parry, Death and the Regeneration of Life; T N Madan, Non-Renunciation: Themes and Interpretations of the Hindu Culture; Justice Holmes: The Path of the Law; Lon L. Fuller: The Morality of Law; John Finnis, Human Rights and Common Good: Collected Essays; S.D. Sharma, Administration of Justice in Ancient Bharat; Toman E. Hill, Humanity as an End in itself; Pfordten, On the Dignity of Man in Kant; Kenneth W. Simons, Dworkin's Two Principle of Dignity: An unsatisfactory Nonconsequentialist Account of Interpersonal Moral Duties; Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right; David Feldman, Civil Liberties & Human Rights in England & Wales; Morris: Voluntary Euthanasia; LW Sumner, Dignity through Thick and Thin, in Sebastian Murders, Human Dignity and Assisted Death; R Dworkin, Life's Dominion; R S Downie, K S Calman, Healthy Respect: Ethics in Health Care; R.R. Kishore, End of Life

Issues and the Moral Certainty: A Discovery through Hinduism; Mooney, G. The Valuation of Human Life; Stephen Heasell and David Paton, Economics and Euthanasia; Jeffrie G. Murphy & Jules L. Coleman: Philosophy of Law (An introduction to Jurisprudence); Margaret A. Somerville, Legalising euthanasia: why now?; Christopher N. Manning, Live And Let Die: Physician-Assisted Suicide And The Right To Die; Alan Norrie, Legal Form and Moral Judgment: Euthanasia and Assisted Suicide; Elizabeth Wicks, The Right to Life and Conflicting Interests; Elizabeth M. Andal Sorrentino, "The Right To Die; Atul Gawande, Being Mortal: Medicine and What Matters in the End; Henry Marsh, Admissions: A Life in Brain Surgery; Randy Pausch and Jeffrey Zaslow, The Last Lecture; Sushila Rao, India and Euthanasia: The Poignant Case of Aruna Shanbaug; D Benatar, Should there be a legal right to die?; Richard Delgado, Euthanasia Reconsidered-The Choice of Death as an Aspect of the Right of Privacy; Ratna Kapur, The Spectre of Aruna Shanbaug; Hazel Biggs, Euthanasia, Death with Dignity and the Law; James Rachels, Active and Passive Euthanasia; James Rachels, End of Life: Euthanasia and Morality; Bruce R. Reichenbach, "Euthanasia and the Active-Passive Distinction; Aparna Chandra and Mrinal Satish, Law and other Things; John Keown, The Law and Ethics of Medicine: Essays on the Inviolability of Human Life; John Locke, Two Treatises of Government; Ronald Dworkin, Life's Dominion: An Argument about Abortion and Euthanasia; John Finnis, Human Rights and Common Good; Ronald Dworkin, Life's Dominion; Webster's Dictionary

Case Note:

Dipak Misra, C.J.I. and A.M. Khanwilkar, J.

Constitution - Right to Self Determination - Article 21 of Constitution of India - Present petition filed seeking declaration that right to die with dignity be declared fundamental right within right to live with dignity under Article 21 of Constitution - Whether person be allowed to remain in stage of incurable passivity suffering or treating utterance of death as rhetoric - Whether law permits accelerating process of dying sans suffering when life is on inevitable decay - Whether right to life under Article 21 of Constitution includes right to die

A.K. Sikri, J.

Constitution - Living Will - Determination of Legal Status - Article 21 of Constitution of India - Present petition filed seeking declaration that right to die with dignity be declared fundamental right within right to live with dignity under Article 21 of Constitution - Whether passive euthanasia, voluntary or involuntary legally permissible - Whether living will or advance directive be legally recognized and enforced

Dr. D.Y. Chandrachud, J.

Constitution - Sanctity of Life - Determination of Legal Status - Article 21 of Constitution of India - Present petition filed seeking declaration that right to die with dignity be declared fundamental right within right to live with dignity under Article 21 of Constitution - Whether individual Constitutionally recognized right to refuse medical

treatment - Whether right to life under Article 21 of Constitution includes right to die

Ashok Bhushan, J.

Constitution - Sanctity of Life - Determination of Legal Status - Article 21 of Constitution of India - Present petition filed seeking declaration that right to die with dignity be declared fundamental right within right to live with dignity under Article 21 of Constitution - Whether advance directive be legalized - Whether to withdraw treatment for incompetent terminally ill patient, rational or irrational

Facts:

The Petitioner was a registered society engaged in taking of the common problems of the people. The present petition was filed to bring to the notice of this Court the serious problem of violation of fundamental right to life, liberty, privacy and the right to die with dignity of the people of this country, guaranteed to them under Article 21 of the Constitution. It was submitted that the people who are suffering from chronic diseases and are at the end of their natural life span are deprived of their rights to refuse cruel and unwanted medical treatment, like feeding through hydration tubes, being kept on ventilator and other life supporting machines in order to artificially prolong their natural life span. It was further pleaded that it was a common law right of the people, of any civilized country, to refuse unwanted medical treatment and no person could force him/her to take any medical treatment which the person did not desire to continue with.

Held, while allowing petition:

Dipak Misra, C.J.I. and A.M. Khanwilkar, J.

(i) The present Court noted that a careful and precise perusal of the judgment in Gian Kaur v. State of Punjab reflects the right of a dying man to die with dignity when life is ebbing out, and in the case of a terminally ill patient, where there is no hope of recovery, accelerating the process of death for reducing the period of suffering constitutes a right to live with dignity. Common law jurisdictions reveal that all adults with capacity to consent have the right of self-determination and autonomy. The said rights pave the way for the right to refuse medical treatment which had acclaimed universal recognition. A competent person who had come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death. The 'Emergency Principle' or the 'Principle of Necessity' has to be given effect to only when it is not practicable to obtain the patient's consent for treatment and his/her life is in danger. But where a patient has already made a valid Advance Directive which is free from reasonable doubt and specifying that he/she does not wish to be treated, then such directive had to be given effect to. Right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. The present Court noted that with the passage of time, this Court has expanded the spectrum of Article 21 to include within it the right to live with dignity as component of right to life and

liberty. [195]

A.K. Sikri, J. :Concurring View

(ii) We do not cut short the sufferings of our ailing dear ones by death because, as a rule, we have always means at our disposal to help them and they have the capacity to think and decide for themselves. But supposing that in the case of an ailing friend, any aid whatever and recovery is out of question and the patient is lying in an unconscious state in the throes of agony, then there would be no hinsa in putting an end to his suffering by death. Just as a surgeon did not commit hinsa but practices the purest ahinsa when he wields his knife, one may find it necessary, under certain imperative circumstances, to go a step further and sever life from the body in the interest of the sufferer. It may be objected that whereas the surgeon performs his operation to save the life of the patient, in the other case we did just the reverse. But on a deeper analysis it would be found that the ultimate object sought to be served in both the cases is the same, namely, to relieve the suffering soul within from pain. The present Court concluded that to cause pain or wish ill to or to take the life of any living being out of anger or a selfish intent, is hinsa. On the other hand, after a calm and clear judgment to kill or cause pain to a living being from a pure selfless intent may be the purest form of ahinsa. [247]

(iii) Advance directives are instruments through which persons express their wishes at a prior point in time, when they are capable of making an informed decision, regarding their medical treatment in the future, when they are not in a position to make an informed decision, by reason of being unconscious or in a persistent vegetative state (PVS) or in a coma. A medical power of attorney is an instrument through which persons nominate representatives to make decisions regarding their medical treatment at a point in time when the persons executing the instrument are unable to make informed decisions themselves. The one hand autonomy of an individual gives him right to choose his destiny and, therefore, he may decide before hand, in the form of advance directive, at what stage of his physical condition he would not like to have medical treatment, and on the other hand, there are dangers of misuse thereof as well. The possibility of misuse could not be held to be a valid ground for rejecting advance directive, as opined by the Law Commission of India as well in its 196th and 241st Report. Instead, attempt could be made to provide safeguards for exercise of such advance directive. [327],[328] and[329]

Dr. D.Y. Chandrachud, J. :Concurring View

(iv) The reason which had impelled the Court to recognize passive euthanasia and advance directives is that both bear a close association to the human urge to live with dignity. Age brings isolation. Physical and mental debility bring a loss of self worth. Pain and suffering are accompanied by a sense of being helpless. The loss of control is compounded when medical intervention takes over life. Human values are then lost to technology. More significant than the affliction of ageing and disease is the fear of our human persona being lost in the anonymity of an intensive care ward. It is hence necessary for this Court to recognize that our dignity as citizens continues to be safeguarded by the Constitution even when life is seemingly lost and questions about our own mortality confront us in the

twilight of existence. The sanctity of human life is the arterial vein which animates the values, spirit and cellular structure of the Constitution. The Constitution recognizes the value of life as its indestructible component. The survival of the sanctity principle is founded upon the guarantees of dignity, autonomy and liberty. Constitutional recognition of the dignity of existence as an inseparable element of the right to life necessarily means that dignity attaches throughout the life of the individual. Dignity of life must encompass dignity in the stages of living which lead up to the end of life. Dignity in the process of dying is as much a part of the right to life under Article 21 of the Constitution. To deprive an individual of dignity towards the end of life is to deprive the individual of a meaningful existence. Hence, the Constitution protects the legitimate expectation of every person to lead a life of dignity until death occurs. The constitutionally recognized right to life is subject to the procedure established by law. The procedure for Regulation or deprivation must, it is well-settled, be fair, just and reasonable. [477]

Ashok Bhushan, J. :Concurring View

(v) The rights of bodily integrity and self-determination are the rights which belong to every human being. When an adult person having mental capacity to take a decision can exercise his right not to take treatment or withdraw from treatment, the above right could not be negated for a person who is not able to take an informed decision due to terminal illness or being a PVS. In case of a person who is suffering from a disease and is taking medical treatment, there are three stake holders; the person himself, his family members and doctor treating the patient. No person could take decision regarding life of another unless he is entitled to take such decision authorized under any law. The English Courts had applied the "best interests" test in case of a incompetent person. The best interests of the patient had to be found out not by doctor treating the patient alone but a team of doctors specifically nominated by the State Authority. The present Court was of the opinion that in cases of incompetent patients who are unable to take an informed decision, it was in the best interests of the patient that the decision be taken by competent medical experts. The medical team while taking decision shall also take into consideration the opinion of the blood relations of the patient and other relevant facts and circumstances. [563] and[564]

(vi) The concept of advance medical directive is also called living will is of recent origin, which gained recognition in latter part of 20th century. Many people living depending on machines cause great financial distress to the family with the cost of long term medical treatment. Advance medical directive was developed as a means to restrict the kinds of medical intervention in event when one become incapacitated. The foundation for seeking direction regarding advance medical directive is extension of the right to refuse medical treatment and the right to die with dignity. When a competent patient has right to take a decision regarding medical treatment, with regard to medical procedure entailing right to die with dignity, the said right cannot be denied to those patients, who have become incompetent to take an informed decision at the relevant time. [566] and[567]

Disposition:
Petition Allowed

JUDGMENT

Dipak Misra, C.J.I. and A.M. Khanwilkar, J.)

INDEX

A. Prologue:

1. Life and death as concepts have invited many a thinker, philosopher, writer and physician to define or describe them. Sometimes attempts have been made or efforts have been undertaken to gloriously paint the pictures of both in many a colour and shade. Swami Vivekananda expects one to understand that life is the lamp that is constantly burning out and further suggests that if one wants to have life, one has to die every moment for it. John Dryden, an illustrious English author, considers life a cheat and says that men favour the deceit. No one considers that the goal of life is the grave. Léon Montenaeken would like to describe life as short, a little hoping, a little dreaming and then good night. The famous poet Dylan Thomas would state "do not go gentle into that good night." One may like to compare life with constant restless moment spent in fear of extinction of a valued vapour; and another may sincerely believe that it is beyond any conceivable metaphor. A metaphysical poet like John Donne, in his inimitable manner, says:

One short sleep past, we wake eternally, And death shall be no more; death, thou shalt die.

Some would say with profound wisdom that life is to be lived only for pleasure and Ors. with equal wise pragmatism would proclaim that life is meant for the realization of divinity within one because that is where one feels the "self", the individuality and one's own real identity. Dharmaraj Yudhisthira may express that though man sees that death takes place every moment, yet he feels that the silence of death would not disturb him and nothing could be more surprising than the said thought. Yet others feel that one should never be concerned about the uncertain death and live life embracing hedonism till death comes. Charvaka, an ancient philosopher, frowns at the conception of re-birth and commends for living life to the fullest. Thus, death is complicated and life is a phenomenon which possibly intends to keep away from negatives that try to attack the virtue and vigour of life from any arena. In spite of all the statements, references and utterances, be it mystical, philosophical or psychological, the fact remains, at least on the basis of conceptual majority, that people love to live - whether at eighty or eighteen - and do not, in actuality, intend to treat life like an "autumn leaf". As Alfred Tennyson says:

No life that breathes with human breath has ever truly longed for death.

2. The perception is not always the same at every stage. There comes a phase in life when the spring of life is frozen, the rain of circulation becomes dry, the movement of body becomes motionless, the rainbow of life becomes colourless and the word life' which one calls a dance in space and time becomes still and blurred and the inevitable death comes near to hold it as an octopus gripping firmly with its tentacles so that the person "shall rise up never". The ancient Greet philosopher, Epicurus, has said, although in a different context:

Why should I fear death? If I am, then death is not. If death is, then I am not. Why should I fear that which can only exist when I do not?

But there is a fallacy in the said proposition. It is because mere existence does not amount to presence. And sometimes there is a feebleness of feeling of presence in semi-reality state when the idea of conceptual identity is lost, quality of life is sunk and the sanctity of life is destroyed and such destruction is denial of real living. Ernest Hemingway, in his book The Old Man and the Sea', expounds the idea that man can be destroyed, but cannot be defeated. In a certain context, it can be said, life sans dignity is an unacceptable defeat and life that meets death with dignity is a value to be aspired for and a moment for celebration.

3. The question that emerges is whether a person should be allowed to remain in such a stage of incurable passivity suffering from pain and anguish in the name of Hippocratic oath or, for that matter, regarding the suffering as only a state of mind and a relative perception or treating the utterance of death as a "word infinitely terrible" to be a rhetoric without any meaning. In contradistinction to the same, the question that arises is should he not be allowed to cross the doors of life and enter, painlessly and with dignity, into the dark tunnel of death whereafter it is said that there is resplendence. In delineation of such an issue, there emerges the question in law-should he or she be given such treatment which has come into existence with the passage of time and progress of medical technology so that he/she exists possibly not realizing what happens around him/her or should his/her individual dignity be sustained with concern by smoothening the process of dying.

4. The legal question does not singularly remain in the set framework of law or, for that matter, morality or dilemma of the doctors but also encapsulates social values and the family mindset to make a resolute decision which ultimately is a cause of concern for all. There is also another perspective to it. A family may not desire to go ahead with the process of treatment but is compelled to do so under social pressure especially in a different milieu, and in the case of an individual, there remains a fear of being branded that he/she, in spite of being able to provide the necessary treatment to the patient, has chosen not to do so. The social psyche constantly makes him/her feel guilty. The collective puts him at the crossroads between socially carved out 'meaningful guilt' and his constant sense of rationality and individual responsibility. There has to be a legalistic approach which is essential to clear the maze and instill awareness that gradually melts the idea of "meaningful guilt" and ushers in an act of "affirmative human purpose" that puts humanness on a high pedestal.

5. There is yet another aspect. In an action of this nature, there can be abuse by the beneficiaries who desire that the patient's heart should stop so that his property is inherited in promptitude and in such a situation, the treating physicians are also scared of collusion that may invite the wrath of criminal law as well as social stigma. The medical, social and ethical apprehensions further cloud their mind to take a decision. The apprehension, the cultural stigma, the social reprehension, the allegation of conspiracy, the ethical dilemma and eventually the shadow between the individual desire and the collective expression distances the reality and it is here that the law has to have an entry to alleviate the agony of the individual and dispel the collective attributes and perceptions so that the imbroglio is clear. Therefore, the heart of the matter is whether the law permits for accelerating the process of dying sans suffering when life is on the path of inevitable decay and if so, at what stage and to what extent. The said issue warrants delineation from various perspectives.

B. <u>Contentions in the Writ Petition:</u>

6. The instant Writ Petition preferred Under Article 32 of the Constitution of India by the Petitioner, a registered society, seeks to declare "right to die with dignity" as a fundamental right within the fold of "right to live with dignity" guaranteed Under Article 21 of the Constitution; to issue directions to the Respondents to adopt suitable procedure in consultation with the State Governments, where necessary; to ensure that persons of deteriorated health or terminally ill patients should be able to execute a document titled "My Living Will and Attorney Authorisation" which can be presented to the hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of the life of the executant; to appoint a committee of experts including doctors, social scientists and lawyers to study into the aspect of issuing guidelines as to the "Living Wills"; and to issue such further appropriate directions and guidelines as may be necessary.

7. It is asserted that every individual is entitled to take his/her decision about the continuance or discontinuance of life when the process of death has already commenced and he/she has reached an irreversible permanent progressive state where death is not far away. It is contended that each individual has an inherent right to die with dignity which is an inextricable facet of Article 21 of the Constitution. That apart, it is set forth that right to die sans pain and suffering is fundamental to one's bodily autonomy and such integrity does not remotely accept any effort that puts the individual on life support without any ray of hope and on the contrary, the whole regime of

treatment continues in spite of all being aware that it is a Sisyphean endeavour, an effort to light a bulb without the filament or to expect a situation to be in an apple pie order when it is actually in a state of chaos.

8. It is put forth that the concept of sustenance of individual autonomy inheres in the right of privacy and also comes within the fundamental conception of liberty. To sustain the stand of privacy, reliance has been placed on the decisions in ***Kharak Singh v. State of U.P. and Ors.*** MANU/SC/0085/1962 : (1964) 1 SCR 332 : AIR 1963 SC 1295, ***Gobind v. State of Madhya Pradesh and Anr.*** MANU/SC/0119/1975 : (1975) 2 SCC 148 and ***People's Union for Civil Liberties v. Union of India and Anr.*** MANU/SC/0149/1997 : (1997) 1 SCC 301. Inspiration has also been drawn from the decision of the United States in ***Cruzan v. Director, Missouri Department of Health*** 111 L Ed 2d 224: 497 US 261 (1990) : 110 S. Ct. 2841 (1990). It is averred that due to the advancement of modern medical technology pertaining to medical science and respiration, a situation has been created where the dying process of the patient is unnecessarily prolonged causing distress and agony to the patient as well as to the near and dear ones and, consequently, the patient is in a persistent vegetative state thereby allowing free intrusion. It is also contended that the Petitioner-society is not claiming that the right to die is a part of the right to life but asserting the claim that the right to die with dignity is an inseparable and inextricable facet of the right to live with dignity. The execution of a living will or issuance of advance directive has become a necessity in today's time keeping in view the prolongation of treatment in spite of irreversible prognosis and owing to penal laws in the field that creates a dilemma in the minds of doctors to take aid of the modern techniques in a case or not. A comparison has been made between the fundamental rights of an individual and the State interest focusing on sanctity as well as quality of life. References have been made to the laws in various countries, namely, United Kingdom, United States of America, Australia, Denmark, Singapore, Canada, etc. The autonomy of the patient has been laid stress upon to highlight the right to die with dignity without pain and suffering which may otherwise be prolonged because of artificial continuance of life through methods that are really not of any assistance for cure or improvement of living conditions.

C. <u>Stand in the counter affidavit and the applications for intervention:</u>

9. A counter affidavit has been filed by the Union of India contending, *inter alia*, that serious thought has been given to regulate the provisions of euthanasia. A private member's Bill and the 241st report of the Law Commission of India have been referred to. It has been set forth that the Law Commission had submitted a report on The Medical Treatment of Terminally-ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006 but the Ministry of Health and Family Welfare was not in favour of the enactment due to the following reasons:

a) Hippocratic oath is against intentional/voluntary killings of patient.

b) Progression of medical science to relieve pain, suffering, rehabilitation and treatment of so-called diseases will suffer a set back.

c) An individual may wish to die at certain point of time, his/her wish may not be persistent and only a fleeting desire out of transient depression.

d) Suffering is a state of mind and a perception, which varies from individual to individual and depends on various environmental and social factors.

e) Continuous advancement in medical science has made possible good pain management in patients of cancer and other terminal illness. Similarly, rehabilitation helps many spinal injury patients in leading near normal life and euthanasia may not be required.

f) Wish of euthanasia by a mentally ill patient/in depression may be treatable by good psychiatric care.

g) It will be difficult to quantify suffering, which may always be subject to changing social pressures and norms.

h) Can doctors claim to have knowledge and experience to say that the disease is incurable and patient is permanently invalid?

i) Defining of bed-ridden and requiring regular assistance is again not always medically possible.

j) There might be psychological pressure and trauma to the medical officers who would be required to conduct euthanasia.

10. The counter affidavit further states that after the judgment was delivered by this Court in ***Aruna Ramachandra Shanbaug v. Union of India and Ors.*** MANU/SC/0176/2011 : (2011) 4 SCC 454, the Ministry of Law and Justice opined that the directions given by this Court have to be followed in such cases and the said directions should be treated as law. The Law Commission in its 241st Report titled "Passive Euthanasia-A Relook" again proposed for making a legislation on "Passive Euthanasia" and also prepared a draft Bill titled The Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill. The said Bill was referred to the technical wing of the Ministry of Health and Family Welfare (Directorate General of Health Services-Dte. GHS) for examination in June 2014. It is the case of the Union of India that two meetings were held under the chairmanship of Special Director General of Health Service which was attended by various experts. A further meeting was held under the chairmanship of Secretary, Ministry of Health and Family Welfare, on 22.05.2015 to examine the Bill. Thereafter, various meetings have been held by experts and the expert committee had proposed formulation of legislation on passive euthanasia.

11. Counter affidavits have been filed by various States. We need not refer to the same in detail. Suffice it to mention that in certain affidavits, emphasis has been laid on Articles 37, 39 and 47 which require the States to take appropriate steps as envisaged in the said Articles for apposite governance. That apart, it has been pronouncedly stated that the right to life does not include the right to die and, in any case, the right to live with dignity guaranteed Under Article 21 of the Constitution means availability of food, shelter and health and does not include the right to die with dignity. It is asseverated that saving the life is the primary duty of the State and, therefore, there is necessity for health care. It is also contended that the introduction of the right to die with dignity as a facet of the right Under Article 21 will create a right that the said constitutional

provision does not envisage and further it may have the potential effect to destroy the said basic right.

12. An application for intervention has been filed by the "Society for the Right to Die with Dignity" whose prayer for intervention has been allowed. The affidavit filed by the said society supports the concept of euthanasia because it is a relief from irrecoverable suffering of which pain is a factor. It has cited many an example from various texts to support passive euthanasia and suggested certain criteria to be followed. It has also supported the idea of introduction of living will and durable power of attorney documents and has filed a sample of living will or advance health directive or advance declaration provided by Luis Kutner. Emphasis has been laid on peaceful exit from life and the freedom of choice not to live and particularly so under distressing conditions and ill-health which lead to an irrecoverable state. The management of terminally ill patients has been put at the centre stage. It has been highlighted that determination of the seemly criteria will keep the element of misuse by the family members or the treating physician or, for that matter, any interested person at bay and also remove the confusion. We have heard Mr. Prashant Bhushan, learned Counsel for the Petitioner. Mr. P.S. Narasimha, learned Additional Solicitor General for Union of India, Mr. Arvind P. Datar learned senior Counsel and Mr. Devansh A. Mohta, learned Counsel who have supported the cause put forth in the writ petition.

D. Background of the Writ Petition:

13. Before we engage ourselves with the right claimed, it is requisite to state that the present litigation has a history and while narrating the same, the assertions made in the Writ Petition and the contentions which have been raised during the course of hearing, to which we shall refer in due course, are to be kept in mind.

D. 1 P. Rathinam's case - The question of unconstitutionality of Section 309 of the Indian Penal Code:

14. Presently, it is necessary to travel backwards in time, though not very far. Two individuals, namely, P. Rathinam and Nagbhushan Patnaik, filed two Writ Petitions Under Article 32 of the Constitution which were decided by a two-Judge Bench in ***P. Rathinam v. Union of India and Anr.*** MANU/SC/0433/1994 : (1994) 3 SCC 394. The writ petitions assailed the constitutional validity of Section 309 of the Indian Penal Code (Indian Penal Code) contending that the same is violative of Articles 14 and 21 of the Constitution. The Court posed 16 questions. The relevant ones read thus:

(1) Has Article 21 any positive content or is it merely negative in its reach?

(2) Has a person residing in India a right to die?

x x x x

(12) Is suicide against public policy?

(13) Does commission of suicide damage the monopolistic power of the State to take life?

(14) Is apprehension of 'constitutional cannibalism' justified?

(15) Recommendation of the Law Commission of India and follow-up steps taken, if any.

(16) Global view. What is the legal position in other leading countries of the world regarding the matter at hand?

15. Answering question No. (1), the Court, after referring to various authorities Under Article 21, took note of the authority in ***State of Himachal Pradesh and Anr. v. Umed Ram Sharma and Ors.*** MANU/SC/0125/1986 : (1986) 2 SCC 68 : AIR 1986 SC 847 wherein it has been observed that the right to life embraces not only physical existence but also the quality of life as understood in its richness and fullness within the ambit of the Constitution. In the said case, the Court had held that for residents of hilly areas, access to road was access to life itself and so, necessity of road communication in a reasonable condition was treated as a constitutional imperative. ***P. Rathinam*** perceived the elevated positive content in the said ruling. Answering question No. (2), the Court referred to the decision of the Bombay High Court in ***Maruti Shripati Dubal v. State of Maharashtra*** MANU/MH/0022/1986 : 1987 Cri. LJ 473 : (1986) 88 Bom LR 589 that placed reliance on ***R.C. Cooper v. Union of India*** MANU/SC/0074/1970 : (1970) 2 SCC 298: AIR 1970 SC 1318 wherein it had been held that what is true of one fundamental right is also true of another fundamental right and on the said premise, the Bombay High Court had opined that it cannot be seriously disputed that fundamental rights have their positive as well as negative aspects. Citing an example, it had stated that freedom of speech and expression includes freedom not to speak and similarly, the freedom of association and movement includes freedom not to join any association or move anywhere and, accordingly, it stated that logically it must follow that the right to live would include the right not to live, i.e., right to die or to terminate one's life.

16. After so stating, this Court approved the view taken by the Bombay High Court in ***Maruti Shripati Dubal*** and meeting the criticism of that judgment from certain quarters, the two-Judge Bench opined that the criticism was only partially correct because the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19 and one may refuse to live if his life, according to the person concerned, is not worth living. One may rightly think that having achieved all worldly pleasures or happiness, he has something to achieve beyond this life. This desire for communion with God may rightly lead even a healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy the right to life to his detriment, disadvantage or disliking. Eventually, it concluded that the right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.

17. Answering all the questions, the Court declared Section 309 Indian Penal Code *ultra vires* and held that it deserved to be effaced from the statute book to humanize our penal laws.

D. 2 <u>Gian Kaur's case - The question of unconstitutionality of Section 306 of the Indian Penal Code:</u>

18. The dictum laid down by the two-Judge Bench in ***P. Rathinam*** did not remain a precedent for long. In ***Gian Kaur v. State of Punjab*** MANU/SC/0335/1996 : (1996) 2 SCC 648, the Constitution

Bench considered the correctness of the decision rendered in ***P. Rathinam***. In the said case, the Appellants were convicted by the trial Court Under Section 306 Indian Penal Code and the conviction was assailed on the ground that Section 306 Indian Penal Code is unconstitutional and to sustain the said argument, reliance was placed on the authority in ***P. Rathinam*** wherein Section 309 Indian Penal Code was held to be unconstitutional being violative of Article 21 of the Constitution. It was urged that once Section 309 Indian Penal Code had been held to be unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of the fundamental right Under Article 21 and, therefore, Section 306 Indian Penal Code penalizing abetment of suicide is equally violative of Article 21. The two-Judge Bench before which these arguments were advanced in appeal referred the matter to a Constitution Bench for deciding the same. In the course of arguments, one of the amicus curiae, Mr. F.S. Nariman, learned senior Counsel, had submitted that the debate on euthanasia is not relevant for deciding the question of constitutional validity of Section 309 and Article 21 cannot be construed to include within it the so-called "right to die" since Article 21 guarantees protection of life and liberty and not its extinction. The Constitution Bench, after noting the submissions, stated:

17.... We, therefore, proceed now to consider the question of constitutional validity with reference to Articles 14 and 21 of the Constitution. Any further reference to the global debate on the desirability of retaining a penal provision to punish attempted suicide is unnecessary for the purpose of this decision. Undue emphasis on that aspect and particularly the reference to euthanasia cases tends to befog the real issue of the constitutionality of the provision and the crux of the matter which is determinative of the issue.

19. Thereafter, the Constitution Bench in ***Gian Kaur*** (supra) scrutinized the reasons given in ***P. Rathinam*** and opined that the Court in the said case took the view that if a person has a right to live, he also has a right not to live. The Court in ***Gian Kaur*** (supra) observed that the Court in ***P. Rathinam*** (supra), while taking such a view, relied on the decisions which relate to other fundamental rights dealing with different situations and those decisions merely hold that the right to do an act also includes the right not to do an act in that manner. The larger Bench further observed that in all those decisions, it was the negative aspect of the right that was involved for which no positive or overt act was to be done. The Constitution Bench categorically stated that this difference has to be borne in mind while making the comparison for the application of this principle.

20. Delving into the facet of committing suicide, the larger Bench observed that when a man commits suicide, he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to or be included within the protection of the 'right to life' Under Article 21. It also held that the significant aspect of 'sanctity of life' should not be overlooked. The Court further opined that by no stretch of imagination, extinction of life can be read to be included in protection of life because Article 21, in its ambit and sweep, cannot include within it the right to die as a part of fundamental right guaranteed therein. The Constitution Bench ruled:

'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of "right to life". With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to "freedom of speech" etc. to provide a comparable basis to hold that the "right to life" also

includes the "right to die". With respect, the comparison is inapposite, for the reason indicated in the context of Article 21. The decisions relating to other fundamental rights wherein the absence of compulsion to exercise a right was held to be included within the exercise of that right, are not available to support the view taken in *P. Rathinam* qua Article 21.

21. Adverting to the concept of euthanasia, the Court observed that protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of terminal illness being unrelated to the principle of "sanctity of life" or the "right to live with dignity" is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of "right to life" therein includes the "right to die". The "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. The Constitution Bench further explained that the said conception also includes the right to a dignified life up to the point of death including a dignified procedure of death or, in other words, it may include the right of a dying man to also die with dignity when his life is ebbing out. It has been clarified that the right to die with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life. Thereafter, the Court proceeded to state:

25. A question may arise, in the context of a dying man who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the "right to die" with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician-assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life.

22. In view of the aforesaid analysis and taking into consideration various other aspects, the Constitution Bench declared Section 309 Indian Penal Code as constitutional.

23. The Court held that the "right to live with human dignity" cannot be construed to include within its ambit the right to terminate natural life, at least before the commencement of the process of certain natural death. It then examined the question of validity of Section 306 Indian Penal Code. It accepted the submission that Section 306 is constitutional. While adverting to the decision in ***Airedale N.H.S. Trust v. Bland*** (1993) 2 WLR 316 : (1993) 1 All ER 821, HL, the Court at the outset made it clear that it was not called upon to deal with the issue of physician-assisted suicide or euthanasia cases. The decision in ***Airedale's*** case (supra), was relating to the withdrawal of artificial measures for continuance of life by a physician. In the context of existence in the persistent vegetative state of no benefit to the patient, the principle of sanctity of life, which is the concern of the State, was stated to be not an absolute one. To bring home the distinction between active and passive euthanasia, an illustration was noted in the context of administering lethal drug actively to bring the patient's life to an end. The significant dictum in that decision has been extracted in ***Gian Kaur*** (supra) wherein it is observed that it is not lawful for a doctor to administer a drug to his patient to bring about his death even though that course is promoted by a humanitarian

desire to end his suffering and however great that suffering may be. Further, to act so is to cross the rubicon which runs between the care of the living patient on one hand and euthanasia-actively causing his death to avoid or to end his suffering on the other hand. It has been noticed in ***Airedale*** that euthanasia is not lawful at common law. In the light of the demand of responsible members of the society who believe that euthanasia should be made lawful, it has been observed in that decision that the same can be achieved by legislation. The Constitution Bench has merely noted this aspect in paragraph 41 with reference to the dictum in ***Airedale*** case.

24. Proceeding to deal with physician assisted suicide, the Constitution Bench observed:

42. The decision of the United States Court of Appeals for the Ninth Circuit in *Compassion in Dying* v. *State of Washington* 49 F 3d 586, which reversed the decision of United States District Court, W.D. Washington reported in 850 Federal Supplement 1454, has also relevance. The constitutional validity of the State statute that banned physician-assisted suicide by mentally competent, terminally ill adults was in question. The District Court held unconstitutional the provision punishing for promoting a suicide attempt. On appeal, that judgment was reversed and the constitutional validity of the provision was upheld.

And again:

43. This caution even in cases of physician-assisted suicide is sufficient to indicate that assisted suicides outside that category have no rational basis to claim exclusion of the fundamental principles of sanctity of life. The reasons assigned for attacking a provision which penalises attempted suicide are not available to the abettor of suicide or attempted suicide. Abetment of suicide or attempted suicide is a distinct offence which is found enacted even in the law of the countries where attempted suicide is not made punishable. Section 306 Indian Penal Code enacts a distinct offence which can survive independent of Section 309 in the Indian Penal Code. The learned Attorney General as well as both the learned amicus curiae rightly supported the constitutional validity of Section 306 Indian Penal Code.

Eventually, the Court in ***Gian Kaur*** (supra), apart from overruling ***P. Rathinam*** (supra), upheld the constitutional validity of Section 306 Indian Penal Code.

D. 3 <u>The approach in Aruna Shanbaug qua Passive Euthanasia vis-à-vis India:</u>

25. Although the controversy relating to attempt to suicide or abetment of suicide was put to rest, yet the issue of euthanasia remained alive. It arose for consideration almost after a span of eleven years in ***Aruna Shanbaug*** (supra). A writ petition was filed by the next friend of the Petitioner pleading, *inter alia*, that the Petitioner was suffering immensely because of an incident that took place thirty six years back on 27.11.1973 and was in a Persistent Vegetative State (PVS) and in no state of awareness and her brain was virtually dead. The prayer of the next friend was that the Respondent be directed to stop feeding the Petitioner and to allow her to die peacefully. The Court noticed that there was some variance in the allegation made in the writ petition and the counter affidavit filed by the Professor and Head of the hospital where the Petitioner was availing treatment. The Court appointed a team of three very distinguished doctors to examine the Petitioner thoroughly and to submit a report about her physical and mental condition. The team submitted a

joint report. The Court asked the team of doctors to submit a supplementary report by which the meaning of the technical terms in the first report could be explained. Various other aspects were also made clear. It is also worth noting that the KEM Hospital where the Petitioner was admitted was appointed as the next friend by the Court because of its services rendered to the Petitioner and the emotional bonding and attachment with the Petitioner.

26. In ***Aruna Shanbaug*** (supra), after referring to the authority in ***Vikram Deo Singh Tomar v. State of Bihar*** MANU/SC/0572/1988 : 1988 Supp. SCC 734: AIR 1988 SC 1782, this Court reproduced paragraphs 24 and 25 from ***Gian Kaur's*** case and opined that the said paragraphs simply mean that the view taken in ***Rathinam's*** case to the effect that the 'right to life' includes the 'right to die' is not correct and para 25 specifically mentions that the debate even in such cases to permit physician-assisted termination of life is inconclusive. The Court further observed that it was held in ***Gian Kaur*** that there is no 'right to die' Under Article 21 of the Constitution and the right to life includes the right to live with human dignity but in the case of a dying person who is terminally ill or in permanent vegetative state, he may be allowed a premature extinction of his life and it would not amount to a crime. Thereafter, the Court took note of the submissions of the learned *amicus curiae* to the effect that the decision to withdraw life support is taken in the best interests of the patient by a body of medical persons. The Court observed that it is not the function of the Court to evaluate the situation and form an opinion on its own. The Court further noted that in England, the *parens patriae* jurisdiction over adult mentally incompetent persons was abolished by statute and the Court has no power now to give its consent and in such a situation, the Court only gives a declaration that the proposed omission by doctors is not unlawful.

27. After so stating, the Court addressed the legal issues, namely, active and passive euthanasia. It noted the legislations prevalent in Netherlands, Switzerland, Belgium, U.K., Spain, Austria, Italy, Germany, France and United States of America. It also noted that active euthanasia is illegal in all States in USA, but physician-assisted death is legal in the States of Oregon, Washington and Montana. The Court also referred to the legal position in Canada. Dealing with passive euthanasia, the two-Judge Bench opined that passive euthanasia is usually defined as withdrawing medical treatment with a deliberate intention of causing the patient's death. An example was cited by stating that if a patient requires kidney dialysis to survive, not giving dialysis although the machine is available is passive euthanasia and similarly, withdrawing the machine where a patient is in coma or on heart-lung machine support will ordinarily result in passive euthanasia. The Court also put non-administration of life saving medicines like antibiotics in certain situations on the same platform of passive euthanasia. Denying food to a person in coma or PVS has also been treated to come within the ambit of passive euthanasia. The Court copiously referred to the decision in ***Airedale***. In ***Airedale*** case, as has been noted in ***Aruna Shanbaug***, Lord Goff observed that discontinuance of artificial feeding in such cases is not equivalent to cutting a mountaineer's rope or severing the air pipe of a deep sea diver. The real question has to be not whether the doctor should take a course in which he will actively kill his patient but whether he should continue to provide his patient with medical treatment or care which, if continued, will prolong his life.

28. Lord Browne-Wilkinson was of the view that removing the nasogastric tube in the case of Anthony Bland cannot be regarded as a positive act causing death. The tube by itself, without the food being supplied through it, does nothing. Its non-removal by itself does not cause death since

by itself, it does not sustain life. The learned Judge observed that removal of the tube would not constitute the actus reus of murder since such an act by itself would not cause death.

29. Lord Mustill observed:

Threaded through the technical arguments addressed to the House were the strands of a much wider position, that it is in the best interests of the community at large that *Anthony Bland's life should now end.* The doctors *have done all they can. Nothing will be gained by going on* and much will be lost. The *distress of the family will get steadily worse*. The strain on the *devotion of a medical staff charged with the care* of a patient whose condition will never improve, who may live for years and who does not even recognise that he is being cared for, will continue to mount. The large resources of skill, *labour and money now being devoted to Anthony Bland* might in the opinion of many be more fruitfully employed in improving the condition of other patients, who if treated may have useful, healthy and enjoyable lives for years to come.

30. The two-Judge Bench further observed that the decision in ***Airedale*** by the House of Lords has been followed in a number of cases in U.K. and the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of notified medical opinion and withdraw the artificial life support system in the patient's best interest, the said act cannot be regarded as a crime. The learned Judges posed the question as to who is to decide what is that patient's best interest where he is in a PVS and, in that regard, opined that it is ultimately for the Court to decide, as *parens patriae*, as to what is in the best interest of the patient, though the wishes of close relatives and next friend and the opinion of medical practitioners should be given due weight in coming to its decision. For the said purpose, reference was made to the opinion of Balcombe J. in ***Re J (A Minor) (Wardship: Medical Treatment)*** [1991] 2 WLR 140: [1990] 3 All ER 930: [1991] Fam 33 whereby it has been stated that the Court as representative of the Sovereign and as parens patriae will adopt the same standard which a reasonable and responsible parent would do.

31. The two-Judge Bench referred to the decisions of the Supreme Court of United States in ***Washington v. Glucksberg*** 138 L Ed 2d 772 : 521 US 702 (1997) and ***Vacco v. Quill*** 138 L Ed 2d 834 : 521 US 793 (1997) which addressed the issue whether there was a federal constitutional road to assisted suicide. Analysing the said decisions and Ors. the Court observed that the informed consent doctrine has become firmly entrenched in American Tort Law and, as a logical corollary, lays foundation for the doctrine that the patient who generally possesses the right to consent has the right to refuse treatment.

32. In the ultimate analysis, the Court opined that the ***Airedale*** case is more apposite to be followed. Thereafter, the Court adverted to the law in India and ruled that in ***Gian Kaur*** case, this Court had approved the decision of the House of Lords in ***Airedale*** and observed that euthanasia could be made lawful only by legislation. After so stating, the learned Judges opined:

104. It may be noted that in *Gian Kaur case* although the Supreme Court has quoted with approval the view of the House of Lords in *Airedale case,* it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable

to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialisation, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method.

33. After so stating, the two-Judge Bench dwelled upon the concept of brain dead and various other aspects which included withdrawal of life support of a patient in PVS and, in that context, ruled thus:

125. In our opinion, if we leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialisation and corruption, we cannot Rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors. While many doctors are upright, there are others who can do anything for money (see George Bernard Shaw's play *The Doctor's Dilemma*). The commercialisation of our society has crossed all limits. Hence we have to guard against the potential of misuse (see Robin Cook's novel *Coma*). In our opinion, while giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, we cannot leave it entirely to their discretion whether to discontinue the life support or not. We agree with the decision of Lord Keith in *Airedale case* that the approval of the High Court should be taken in this connection. This is in the interest of the protection of the patient, protection of the doctors, relatives and next friend, and for reassurance of the patient's family as well as the public. This is also in consonance with the doctrine of *parens patriae* which is a well-known principle of law.

34. After so laying down, the Court referred to the authorities in ***Charan Lal Sahu v. Union of India*** MANU/SC/0285/1990 : (1990) 1 SCC 613 and ***State of Kerala and Anr. v. N.M. Thomas and Ors.*** MANU/SC/0479/1975 : (1976) 2 SCC 310 and further opined that the High Court can grant approval for withdrawing life support of an incompetent person Under Article 226 of the Constitution because Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support of an incompetent person. Dealing with the procedure to be adopted by the High Court when such application is filed, the Court ruled that when such an application is filed, the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not and before doing so, the Bench should seek the opinion of a Committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Amongst the three doctors, as directed, one should be a Neurologist, one should be a Psychiatrist and the third a Physician. The Court further directed:

134. ... The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as take the views of the hospital staff and

submit its report to the High Court Bench. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters, etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court Bench should give its verdict.

135. The above procedure should be followed all over India until Parliament makes legislation on this subject.

136. The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient. The High Court should give its decision assigning specific reasons in accordance with the principle of "best interest of the patient" laid down by the House of Lords in *Airedale case*. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature.

35. We must note here that the two-Judge Bench declined to grant the permission after perusing the medical reports. For the sake of completeness, we think it apt to reproduce the reasoning:

122. From the above examination by the team of doctors, it cannot be said that Aruna Shanbaug is dead. Whatever the condition of her cortex, her brainstem is certainly alive. She does not need a heart-lung machine. She breathes on her own without the help of a respirator. She digests food, and her body performs other involuntary functions without any help. From the CD (which we had screened in the courtroom on 2-3-2011 in the presence of the counsel and Ors. it appears that she can certainly not be called dead. She was making some sounds, blinking, eating food put in her mouth, and even licking with her tongue morsels on her mouth. However, there appears little possibility of her coming out of PVS in which she is in. In all probability, she will continue to be in the state in which she is in till her death.

D. 4 <u>The Reference:</u>

36. The aforesaid matter was decided when the present Writ Petition was pending for consideration. The present petition was, thereafter, listed before a three-Judge Bench which noted the submissions advanced on behalf of the Petitioner and also that of the learned Additional Solicitor General on behalf of the Union of India. Reliance was placed on the decision in ***Aruna Shanbaug***. The three-Judge Bench reproduced paragraphs 24 and 25 from ***Gian Kaur*** and noted that the Constitution Bench did not express any binding view on the subject of euthanasia, rather it reiterated that the legislature would be the appropriate authority to bring the change.

37. After so holding, it referred to the understanding of ***Gian Kaur*** in ***Aruna Shanbaug*** by the two-Judge Bench and reproduced paragraphs 21 and 101 from the said judgment:

21. We have carefully considered paras 24 and 25 in *Gian Kaur case* and we are of the opinion that all that has been said therein is that the view in *Rathinam case* that the right to life includes the right to die is not correct. We cannot construe *Gian Kaur case* to mean anything beyond that. *In fact, it has been specifically mentioned in para 25 of the aforesaid decision that 'the debate even*

in such cases to permit physician-assisted termination of life is inconclusive'. Thus it is obvious that no final view was expressed in the decision in Gian Kaur case beyond what we have mentioned above.

x x x x

101. The Constitution Bench of the Supreme Court in *Gian Kaur* v. *State of Punjab* held that both euthanasia and assisted suicide are not lawful in India. That decision overruled the earlier two-Judge Bench decision of the Supreme Court in *P. Rathinam* v. *Union of India*. The Court held that the right to life Under Article 21 of the Constitution does not include the right to die (vide SCC para 33). *In Gian Kaur case the Supreme Court approved of the decision of the House of Lords in Airedale case and observed that euthanasia could be made lawful only by legislation.*

38. Commenting on the said analysis, the three-Judge Bench went on to say:

13. Insofar as the above paragraphs are concerned, *Aruna Shanbaug* aptly interpreted the decision of the Constitution Bench in *Gian Kaur* and came to the conclusion that euthanasia can be allowed in India only through a valid legislation. However, it is factually wrong to observe that in *Gian Kaur*, the Constitution Bench approved the decision of the House of Lords in *Airedale N.H.S. Trust* v. *Bland*. Para 40 of Gian Kaur, clearly states that:

40.... Even though it is not necessary to deal with physician-assisted suicide or euthanasia cases, a brief reference to this decision cited at the Bar may be made.

Thus, it was a mere reference in the verdict and it cannot be construed to mean that the Constitution Bench in *Gian Kaur* approved the opinion of the House of Lords rendered in *Airedale*. To this extent, the observation in para 101 of *Aruna Shanbaug* is incorrect.

39. From the aforesaid, it is clear that the three-Judge Bench expressed the view that the opinion of the House of Lords in ***Airedale*** has not been approved in ***Gian Kaur*** (supra) and to that extent, the observation in ***Aruna Shanbaug*** (supra) is incorrect. After so stating, the three-Judge Bench opined that ***Aruna Shanbaug*** (supra) upholds the authority of passive euthanasia and lays down an elaborate procedure for executing the same on the wrong premise that the Constitution Bench in ***Gian Kaur*** (supra) had upheld the same. Thereafter, considering the important question of law involved which needs to be reflected in the light of social, legal, medical and constitutional perspectives, in order to have a clear enunciation of law, it referred the matter for consideration by the Constitution Bench of this Court for the benefit of humanity as a whole. The three-Judge bench further observed that it was refraining from framing any specific questions for consideration by the Constitution Bench as it would like the Constitution Bench to go into all the aspects of the matter and lay down exhaustive guidelines. That is how the matter has been placed before us.

E. <u>Our analysis of Gian Kaur:</u>

40. It is the first and foremost duty to understand what has been stated by the Constitution Bench in ***Gian Kaur'***s case. It has referred to the decision in ***Airedale*** (supra) that has been recapitulated in ***Aruna Shanbaug*** case which was a case relating to withdrawal of artificial measures of

continuance of life by the physician. It is relevant to mention here that the Constitution Bench in ***Gian Kaur*** categorically noted that it was not necessary to deal with physician-assisted suicide or euthanasia cases though a brief reference to the decisions cited by the Bar was required to be made. The Constitution Bench noted that ***Airedale*** held that in the context of existence in the persistent vegetative state of no benefit to the patient, the principle of sanctity of life, which is the concern of the State, was not an absolute one. The larger bench further noticed that in ***Airedale***, it had been stated that in such cases also, the existing crucial distinction between cases in which a physician decides not to provide or to continue to provide, for his patient, treatment or care which could or might prolong his life, and those in which he decides, for example, by administering a lethal drug actively to bring his patient's life to an end, was indicated. Thereafter, while again referring to ***Airedale*** case, the larger bench observed that it was a case relating to withdrawal of artificial measures for continuance of life by the physician. After so stating, the Court reproduced the following passage from the opinion of Lord Goff of Chieveley:

... But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: See Reg v. Cox, (unreported), 18 September (1992). So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia-actively causing his death to avoid or to end his suffering. *Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control....*

41. After reproducing the said passage, the Court opined thus:

41. The desirability of bringing about a change was considered to be the function of the legislature by enacting a suitable law providing therein adequate safeguards to prevent any possible abuse.

42. At this stage, it is necessary to clear the maze whether the Constitution Bench in ***Gian Kaur*** had accepted what has been held in ***Airedale***. On a careful and anxious reading of ***Gian Kaur***, it is noticeable that there has been narration, reference and notice of the view taken in ***Airedale*** case. It is also worth noting that the Court was concerned with the constitutional validity of Section 309 Indian Penal Code that deals with attempt to commit suicide and Section 306 Indian Penal Code that provides for abetment to commit suicide. As noted earlier, the Constitution Bench, while distinguishing the case of a dying man who is terminally ill or in a persistent vegetative state and his termination or premature extinction of life, observed that the said category of cases may fall within the ambit of right to die with dignity as a part of right to life with dignity when death due to termination of natural life is inevitable and imminent and the process of natural death has commenced. The Constitution Bench further opined that the said cases do not amount to extinguishing the life but only amount to accelerating the process of natural death which has already commenced and, thereafter, the Constitution Bench stated that the debate with regard to physician assisted suicide remains inconclusive. The larger Bench has reiterated that the cases pertaining to premature extinction of life during the process of certain natural death of patients who are terminally ill or in persistent vegetative state were of assistance to interpret Article 21 of

the Constitution to include therein the right to curtail the natural span of life. On a seemly understanding of the judgment in ***Gian Kaur***, we do not find that it has decried euthanasia as a concept. On the contrary, it gives an indication that in such situations, it is the acceleration of the process of dying which may constitute a part of right to life with dignity so that the period of suffering is reduced. We are absolutely conscious that a judgment is not to be construed as a statute but our effort is to understand what has been really expressed in ***Gian Kaur***. Be it clarified, it is understood and appreciated that there is a distinction between a positive or overt act to put an end to life by the person living his life and termination of life so that an individual does not remain in a vegetative state or, for that matter, when the death is certain because of terminal illness and he remains alive with the artificially assisted medical system. In ***Gian Kaur***, while dealing with the attempt to commit suicide, the Court clearly held that when a man commits suicide, he has to undertake certain positive overt acts and the genesis of those acts cannot be tested to or be included within the protection of the expression "right to life" Under Article 21 of the Constitution. It was also observed that a dignified procedure of death may include the right of a dying man to also die with dignity when the life is ebbing out. This is how the pronouncement in ***Gian Kaur*** has to be understood. It is also not the ratio of the authority in ***Gian Kaur*** that euthanasia has to be introduced only by a legislation. What has been stated in paragraph 41 of ***Gian Kaur*** is what has been understood to have been held in ***Airedale's*** case. The Court has neither expressed any independent opinion nor has it approved the said part or the ratio as stated in ***Airedale***. There has been only a reference to ***Airedale's*** case and the view expressed therein as regards legislation. Therefore, the perception in ***Aruna Shanbaug*** that the Constitution Bench has approved the decision in ***Airedale*** is not correct. It is also quite clear that ***Gian Kaur*** does not lay down that passive euthanasia can only be thought of or given effect to by legislation. Appositely understood, it opens an expansive sphere of Article 21 of the Constitution. Therefore, it can be held without any hesitation that ***Gian Kaur*** has neither given any definite opinion with regard to euthanasia nor has it stated that the same can be conceived of only by a legislation.

F. <u>Our analysis of Aruna Shanbaug qua legislation:</u>

43. Having said this, we shall focus in detail what has been stated in ***Aruna Shanbaug***. In paragraph 101 which has been reproduced hereinbefore, the two-Judge Bench noted that ***Gian Kaur*** has approved the decision of the House of Lords in ***Airedale*** and observed that euthanasia could be made lawful only by legislation. This perception, according to us, is not correct. As already stated, ***Gian Kaur*** does not lay down that passive euthanasia could be made lawful only by legislation. In paragraph 41 of the said judgment, the Constitution Bench was only adverting to what has been stated by Lord Goff of Chieveley in ***Airedale's*** case. However, this expression of view of ***Aruna Shanbaug*** which has not been accepted by the referral Bench makes no difference to our present analysis. We unequivocally express the opinion that ***Gian Kaur*** is not a binding precedent for the purpose of laying down the principle that passive euthanasia can be made lawful "only by legislation."

G. <u>The Distinction between Active and Passive Euthanasia:</u>

44. As a first step, it is imperative to understand the concept of euthanasia before we enter into the arena of analysis of the expanded right of Article 21 in ***Gian Kaur*** and the understanding of the same. Euthanasia is basically an intentional premature termination of another person's life either

by direct intervention (active euthanasia) or by withholding life-prolonging measures and resources (passive euthanasia) either at the express or implied request of that person (voluntary euthanasia) or in the absence of such approval/consent (non-voluntary euthanasia). ***Aruna Shanbaug*** has discussed about two categories of euthanasia-active and passive. While dealing with active euthanasia, also known as "positive euthanasia" or "aggressive euthanasia", it has been stated that the said type of euthanasia entails a positive act or affirmative action or act of commission entailing the use of lethal substances or forces to cause the intentional death of a person by direct intervention, e.g., a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia, on the other hand, also called "negative euthanasia" or "non-aggressive euthanasia", entails withdrawing of life support measures or withholding of medical treatment for continuance of life, e.g., withholding of antibiotics in case of a patient where death is likely to occur as a result of not giving the said antibiotics or removal of the heart lung machine from a patient in coma. The two-Judge Bench has also observed that the legal position across the world seems to be that while active euthanasia is illegal unless there is a legislation permitting it, passive euthanasia is legal even without legislation, provided certain conditions and safeguards are maintained. The Court has drawn further distinction between voluntary euthanasia and non-voluntary euthanasia in the sense that voluntary euthanasia is where the consent is taken from the patient and non-voluntary euthanasia is where the consent is unavailable, for instances when the patient is in coma or is otherwise unable to give consent. Describing further about active euthanasia, the Division Bench has observed that the said type of euthanasia involves taking specific steps to cause the patient's death such as injecting the patient with some lethal substance, i.e., sodium pentothal which causes, in a person, a state of deep sleep in a few seconds and the person instantly dies in that state. That apart, the Court has drawn a distinction between euthanasia and physician assisted dying and noted that the difference lies in the fact as to who administers the lethal medication. It has been observed that in euthanasia, a physician or third party administers it while in physician assisted suicide, it is the patient who does it though on the advice of the doctor. Elaborating further, the two-Judge Bench has opined that the predominant difference between "active" and "passive" euthanasia is that in the former, a specific act is done to end the patient's life while the latter covers a situation where something is not done which is necessary in preserving the patient's life. The main idea behind the distinction, as observed by the Bench, is that in passive euthanasia, the doctors are not actively killing the patient, they are merely not saving him and only accelerating the conclusion of the process of natural death which has already commenced.

45. The two-Judge Bench, thereafter, elaborated on passive euthanasia and gave more examples of cases within the ambit of passive euthanasia. The learned Judges further categorized passive euthanasia into voluntary passive euthanasia and non-voluntary passive euthanasia. The learned Judges described voluntary passive euthanasia as a situation where a person who is capable of deciding for himself decides that he would prefer to die because of various reasons whereas non-voluntary passive euthanasia has been described to mean that a person is not in a position to decide for himself, e.g., if he is in coma or PVS.

46. While scrutinizing the distinction between active and passive euthanasia, the paramount aspect is "foreseeing the hastening of death". The said view has been propagated in several decisions all over the world. The Supreme Court of Canada, in the case of ***Rodriguez v. British Columbia (Attorney General)*** 85 C.C.C. (3d) 15: (1993) 3 S.C.R. 519, drew the distinction between these two forms of euthanasia on the basis of intention. Echoing a similar view, the Supreme Court of

the United States affirmed the said distinction on the basis of "intention" in the case of ***Vacco*** (supra) wherein Chief Justice Rehnquist observed that the said distinction coheres with the fundamental legal principles of causation and intention. In case when the death of a patient occurs due to removal of life-supporting measures, the patient dies due to an underlying fatal disease without any intervening act on the part of the doctor or medical practitioner, whereas in the cases coming within the purview of active euthanasia, for example, when the patient ingests lethal medication, he is killed by that medication.

47. This distinction on the basis of "intention" further finds support in the explanation provided in the case ***In the matter of Claire C. Conroy*** 98 N.J. 321 (1985) : (1985) 486 A. 2d 1209 (N.J.) wherein the Court made an observation that people who refuse life-sustaining medical treatment may not harbour a specific intent to die, rather they may fervently wish to live but do so free of unwanted medical technology, surgery or drugs and without protracted suffering.

48. Another distinction on the basis of "action and non-action" was advanced in the ***Airedale*** case. Drawing a crucial distinction between the two forms of euthanasia, Lord Goff observed that passive euthanasia includes cases in which a doctor decides not to provide, or to continue to provide, for his patient, treatment or care which could prolong his life and active euthanasia involves actively ending a patient's life, for example, by administering a lethal drug. As per the observations made by Lord Goff, the former can be considered lawful either because the doctor intends to give effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which the patient is incapacitated from giving his consent. However, active euthanasia, even voluntary, is impermissible despite being prompted by the humanitarian desire to end the suffering of the patient.

49. It is perhaps due to the distinction evolved between these two forms of euthanasia, which has gained moral and legal sanctity all over, that most of the countries today have legalized passive euthanasia either by way of legislations or through judicial interpretation but there remains uncertainty whether active euthanasia should be granted legal status.

H. Euthanasia: International Position:

H. 1 U.K. Decisions:

H. 1.1 Airedale Case:

50. In the obtaining situation, we shall now advert to the opinions stated in ***Airedale*** case. In the said case, one Anthony Bland, a supporter of Liverpool Football Club, who had gone to Hillsborough Ground, suffered severe injuries as a result of which supply to his brain was interrupted. Eventually, he suffered an irreversible damage to the brain as a consequence of which he got into a condition of persistent vegetative state (PVS). He became incapable of voluntary movement and could feel no pain. He was not in a position to feel or communicate. To keep him alive, artificial means were taken recourse to. In such a state of affairs, the treating doctors and the parents of Bland felt that no fruitful purpose would be served by continuing the medical aid. As there were doubts with regard to stoppage of medical care which may incur a criminal liability, a declaration from the British High Court was sought to resolve the doubts. The Family Division of

the High Court granted the declaration which was affirmed by the Court of Appeal. The matter travelled to the House of Lords.

51. Lord Keith of Kinkel opined that regard should be had to the whole artificial regime which kept Anthony Bland alive and it was incorrect to direct attention exclusively to the fact that nourishment was being provided. In his view, the administration of nourishment by the means adopted involved the application of a medical technique.

52. Lord Keith observed that in general, it would not be lawful for a medical practitioner who assumed responsibility for the care of an unconscious patient simply to give up treatment in circumstances where continuance of it would confer some benefit on the patient. On the other hand, a medical practitioner is under no duty to continue to treat such a patient where a large body of informed and responsible medical opinion is to the effect that no benefit at all would be conferred by continuance of treatment. Existence in a vegetative state with no prospect of recovery is, by that opinion, regarded as not being a benefit, and that, if not unarguably correct, at least forms a proper basis for the decision to discontinue treatment and care. He was of the further opinion that since existence in PVS is not a benefit to the patient, the principle of sanctity of life is no longer an absolute one. It does not compel a medical practitioner to treat a patient, who will die if not treated, contrary to the express wishes of the patient. It does not compel the temporary keeping alive of patients who are terminally ill where to do so would merely prolong their suffering. On the other hand, it forbids the taking of active measures to cut short the life of a terminally ill patient.

53. Lord Keith further stated that it does no violence to the principle of sanctity of life to hold that it is lawful to cease to give medical treatment and care to a PVS patient who has been in that state for over three years considering that to do so involves invasive manipulation of the patient's body to which he has not consented and which confers no benefit upon him. He also observed that the decision whether or not the continued treatment and care of a PVS patient confers any benefit on him is essentially one for the practitioners in charge.

54. Lord Goff of Chieveley also held that the principle of sanctity of life is not an absolute one and there is no absolute Rule that the patient's life must be prolonged by such treatment or care, if available, regardless of the circumstances.

55. Lord Goff observed that though he agreed that the doctor's conduct in discontinuing life support can properly be categorised as an omission, yet discontinuation of life support is, for the present purposes, no different from not initiating life support in the first place as in such a case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition; and as a matter of general principle, an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient.

56. The learned Law Lord further observed that the doctor's conduct is to be differentiated from that of, for example, an interloper who maliciously switches off a life support machine in the sense that although the interloper performs the same act as the doctor who discontinues life support, yet the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing

condition, whereas the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorised as an omission. This distinction as per Lord Goff appears to be useful in the context as it can be invoked to explain how discontinuance of life support can be differentiated from ending a patient's life by a lethal injection. Lord Goff stated that the reason for this difference is that the law considers discontinuance of life support to be consistent with the doctor's duty to care for his patient, but it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put the patient out of his agony.

57. Emphasising on the patient's best interest principle, Lord Goff referred to ***F v. West Berkshire Health Authority*** [1989] 2 All ER 545: [1990] 2 AC 1 wherein the House of Lords stated the legal principles governing the treatment of a patient who, for the reason that he was of unsound mind or that he had been rendered unconscious by accident or by illness, was incapable of stating whether or not he consented to the treatment or care. In such circumstances, a doctor may lawfully treat such a patient if he acts in his best interests, and indeed, if the patient is already in his care, he is under a duty so to treat him.

58. Drawing an analogy, Lord Goff opined that a decision by a doctor whether or not to initiate or to continue to provide treatment or care which could or might have the effect of prolonging such a patient's life should also be governed by the same fundamental principle of the patient's best interest. The learned Law Lord further stated that the doctor who is caring for such a patient cannot be put under an absolute obligation to prolong his life by any means available to the doctor, regardless of the quality of the patient's life. Common humanity requires otherwise as do medical ethics and good medical practice accepted in the United Kingdom and overseas. Lord Goff said that the doctor's decision to take or not to take any step must be made in the best interests of the patient (subject to his patient's ability to give or withhold his consent).

59. Lord Goff further stated that in such cases, the question is not whether it is in the best interests of the patient that he should die, rather the correct question for consideration is whether it is in the best interests of the patient that his life should be prolonged by the continuance of such form of medical treatment or care. In Lord Goff's view, the correct formulation of the question is of particular importance in such cases as the patient is totally unconscious and there is no hope whatsoever of any amelioration of his condition. Lord Goff opined that if the question is asked whether it is in the best interests of the patient to continue the treatment which has the effect of artificially prolonging his life, that question can sensibly be answered to the effect that the patient's best interests no longer require such a treatment to be continued.

60. Lord Goff opined that medical treatment is neither appropriate nor requisite simply to prolong a patient's life when such treatment has no therapeutic purpose of any kind and such treatment is futile because the patient is unconscious and there is no prospect of any improvement in his condition. Thereafter, the learned Law Lord observed that regard should also be had to the invasive character of the treatment and to the indignity to which a patient is subjected by prolonging his life by artificial means which, in turn, causes considerable distress to his family. In such cases, Lord Goff said that it is the futility of the treatment which justifies its termination and in such circumstances, a doctor is not required to initiate or to continue life-prolonging treatment or care keeping in mind the best interests of the patient.

61. Lord Goff, referring to ***West Berkshire Health Authority*** (supra), said that it was stated therein that where a doctor provides treatment to a person who is incapacitated from saying whether or not he consents to it, the doctor must, when deciding on the form of treatment, act in accordance with a responsible and competent body of relevant professional opinion on the principles set down in ***Bolam v. Friern Hospital Management Committee*** [1957] 1 W.L.R. 582: [1957] 2 All ER 118. Lord Goff opined that this principle must equally be applicable to decisions to initiate or to discontinue life support as it is to other forms of treatment. He also referred to a Discussion Paper on Treatment of Patients in Persistent Vegetative State issued in September, 1992 by the Medical Ethics Committee of the British Medical Association pertaining to four safeguards in particular which, in the Committee's opinion, should be observed before discontinuing life support for such patients, which were: (1) every effort should be made at rehabilitation for at least six months after the injury; (2) the diagnosis of irreversible PVS should not be considered confirmed until at least 12 months after the injury with the effect that any decision to withhold life-prolonging treatment will be delayed for that period; (3) the diagnosis should be agreed by two other independent doctors; and (4) generally, the wishes of the patient's immediate family will be given great weight.

62. According to him, the views expressed by the Committee on the subject of consultation with the relatives of PVS patients are consistent with the opinion expressed by the House of Lords in ***West Berkshire Health Authority*** (supra) that it is good practice for the doctor to consult relatives. Lord Goff observed that the Committee was firmly of the opinion that the relatives' views would not be determinative of the treatment inasmuch as if that would have been the case, the relatives would be able to dictate to the doctors what is in the best interests of the patient which cannot be right. Even so, a decision to withhold life-prolonging treatment such as artificial feeding must require close cooperation with those close to the patient and it is recognised that, in practice, their views and the opinions of doctors will coincide in many cases.

63. Thereafter, Lord Goff referred to American cases, namely, ***Re Quinlan*** 355 A. 2d 647 : (1976) 70 NJ 10 and ***Superintendent of Belchertown State School v. Saikewicz*** (1977) 373 Mass 728: 370 N.E. 2d 417 (1977) wherein the American Courts adopted what is called the substituted judgment test which involves a detailed inquiry into the patient's views and preferences. As per the substituted judgment test, when the patient is incapacitated from expressing any view on the question whether life-prolonging treatment should be withheld, an attempt is made to determine what decision the patient himself would have made had he been able to do so. In later American cases concerning PVS patients, it has been held that in the absence of clear and convincing evidence of the patient's wishes, the surrogate decision-maker has to implement as far as possible the decision which the incompetent patient would have made if he was competent.

64. However, Lord Goff acknowledged that any such test (substituted judgment test) does not form part of English law in relation to incompetent adults on whose behalf nobody has power to give consent to medical treatment. In contrast, England followed a straightforward test based on the best interests of the patient coined by the House of Lords in ***West Berkshire Health Authority*** (supra). He opined that the same test (patient's best interest) should be applied in the case of PVS patients where the question is whether life-prolonging treatment should be withheld. The learned Law Lord further observed that consistent with the best interests test, anything relevant to the application of the test may also be taken into account and if the personality of the patient is relevant to the application of the test (as it may be in cases where the various relevant factors have to be

weighed), it may be taken into account as was done in ***Re J. (A Minor) (Wardship: Medical Treatment)*** (supra). But where the question is whether life support should be withheld from a PVS patient, it is difficult to see how the personality of the patient can be relevant, though it may be of comfort to his relatives if they believe, as in the present case, and indeed may well be so in many other cases, that the patient would not have wished his life to be artificially prolonged if he was totally unconscious and there was no hope of improvement in his condition.

65. As regards the extent to which doctors should, as a matter of practice, seek the guidance of the court by way of an application for declaratory relief before withholding life-prolonging treatment from a PVS patient, Lord Goff took note of the judgment of Sir Stephen Brown P, the President of the Family Division, wherein he held that the opinion of the court should be sought in all cases of similar nature. Lord Goff also noted that Sir Thomas Bingham M.R. in the Court of Appeal expressed his agreement with Sir Stephen Brown P. in the following words:

This was in my respectful view a wise ruling, directed to the protection of patients, the protection of doctors, the reassurance of patients' families and the reassurance of the public. The practice proposed seems to me desirable. It may very well be that with the passage of time a body of experience and practice will build up which will obviate the need for application in every case, but for the time being I am satisfied that the practice which the President described should be followed.

66. It is worthy to mention that Lord Goff was of the view that there was a considerable cost involved in obtaining guidance from the court in cases of such nature. He took note of the suggestions forwarded by Mr. Francis, the counsel for the Respondents, to the effect that reference to the court was required in certain specific cases, i.e., (1) where there was known to be a medical disagreement as to the diagnosis or prognosis, and (2) problems had arisen with the patient's relatives-disagreement by the next of kin with the medical recommendation; actual or apparent conflict of interest between the next of kin and the patient; dispute between members of the patient's family; or absence of any next of kin to give consent. Lord Goff said that the President of the Family Division should be able to relax the present requirement so as to limit applications for declarations only to those cases in which there is a special need for the procedure to be invoked.

67. Lord Mustill observed that an argument had been advanced that it was in the best interest of the community at large that Anthony Bland's life should end. The doctors had done all they could have done. It was a lose-lose situation as nothing would be gained by continuing Bland's treatment and much would be lost. The distress of Bland's family members would steadily get worse and so would be the strain of the medical staff charged with the care of Bland despite the fact that Bland's condition would never improve and he would never recognize that he was being cared for. Further, the learned Law Lord observed that large resources in terms of skill, labour and money had been applied for maintaining Bland in his present condition which, in the opinion of many, could be fruitfully employed in improving the conditions of other patients who, if treated, may have useful, healthy and enjoyable lives for years to come.

68. Lord Lowry, agreeing with the reasoning of Lord Goff of Chieveley with whom the other learned Law Lords were also in general agreement, dismissed the appeal. In coming to this conclusion, Lord Lowry opined that the court, in reaching a decision according to law, ought to give weight to informed medical opinion both on the point whether to continue the artificial

feeding regime of a patient in PVS and also on the question of what is in the best interests of a patient. Lord Lowry rejected the idea that informed medical opinion in these respects was merely a disguise which, if accepted, would legalise euthanasia. Lord Lowry also rejected the Official Solicitor's argument that the doctors were under a "duty to feed" their patients in PVS as in the instant case, the doctors overwhelmingly held the opposite view which had been upheld by the courts below. The doctors considered that it was in the patient's best interests that they should stop feeding him. Lord Lowry observed that the learned Law Lords had gone further by saying that the doctors are not entitled to feed a patient in PVS without his consent which cannot be obtained.

69. Lord Lowry further opined that there is no proposed guilty act in stopping the artificial feeding regime inasmuch as if it is not in the interests of an insentient patient to continue the life-supporting care and treatment, the doctor would be acting unlawfully if he continued the care and treatment and would perform no guilty act by discontinuing it. There is a gap between the old law on the one hand and new medicine and new ethics on the other. It is important, particularly in the area of criminal law which governs conduct, that the society's notions of what the law is and what is right should coincide. One role of the legislator, as per Lord Lowry, is to detect any disparity between these notions and to take appropriate action to close the gap.

70. Lord Browne-Wilkinson observed that the ability to sustain life artificially is a relatively recent phenomenon. Existing law may not provide an acceptable answer to the new legal questions which it raises.

71. In the opinion of the learned Law Lord, there exists no doubt that it is for the Parliament and not the courts to decide the broader issues raised by cases of such nature. He observed that recent developments in medical science have fundamentally changed the meaning of death. In medicine, the cessation of breathing or of heartbeat is no longer death because by the use of a ventilator, lungs which in the unaided course of nature stop breathing can be made to breathe artificially thereby sustaining the heartbeat. Thus, people like Anthony Bland, who would have previously died through inability to swallow food, can be kept alive by artificial feeding. This has led the medical profession, in Lord Browne-Wilkinson's view, to redefine death in terms of brain stem death, i.e., the death of that part of the brain without which the body cannot function at all without assistance. He further said that if the judges seek to develop new law to regulate the new circumstances, the law so laid down will reflect the judges' views on the underlying ethical questions, questions on which there is a legitimate division of opinion. He proceeded to state that where a case raises wholly new moral and social issues, it is neither for the judges to develop new principles of law nor would it be legitimate for the Judges to arrive at a conclusion as to what is for the benefit of one individual whose life is in issue.

72. For the said reasons, the learned Law Lord observed that it is imperative that the moral, social and legal issues raised by the case at hand should be considered by the Parliament and only if the Parliament fails to act, the judge-made law will, by necessity, provide a legal answer to each new question as and when it arises.

73. The function of the court, in Lord Browne-Wilkinson's view, in such circumstances is to determine a particular case in accordance with the existing law and not to develop new law laying down a new regimen. He held that it is for the Parliament to address the wider problems which

such a case raises and lay down principles of law generally applicable to the withdrawal of life support systems. He explained why the removal of the nasogastric tube in the present case could not be regarded as a positive act causing death since the tube itself, without the food being supplied through it, does nothing. The removal of the tube by itself does not cause death since it does not sustain life by itself. Therefore, the removal of the tube would not constitute the actus reus of murder since such positive act would not be the cause of death.

74. Thus, Lord Browne-Wilkinson observed that in case of an adult who is mentally competent, the artificial feeding regime would be unlawful unless the patient consented to it as a mentally competent patient can, at any time, put an end to life support systems by refusing his consent to their continuation. He also observed that the House of Lords in ***West Berkshire Health Authority*** (supra) developed the principle based on the concept of necessity under which a doctor can lawfully treat a patient who cannot consent to such treatment if it is in the best interests of the patient to receive such treatment. The learned Law Lord opined that the correct answer to the case at hand depends on the extent of the right to lawfully continue to invade the bodily integrity of Anthony Bland without his consent. To determine the extent of the said right, Lord Browne-Wilkinson observed that it can be deduced from ***West Berkshire Health Authority*** (supra) wherein both Lord Brandon of Oakbrook and Lord Goff made it clear that the right to administer invasive medical care is wholly dependent upon such care being in the best interests of the patient and moreover, a doctor's decision whether to continue invasive care is in the best interests of the patient has to be assessed with reference to the test laid down in ***Bolam*** (supra).

75. Lord Browne-Wilkinson held that if there comes a stage where a responsible doctor comes to the reasonable conclusion (which accords with the views of a responsible body of medical opinion) that further continuance of an intrusive life support system is not in the best interests of the patient, the doctor can no longer lawfully continue that life support system as to do so would constitute the crime of battery and the tort of trespass.

76. In Lord Browne-Wilkinson's view, the correct legal question in such cases is not whether the court thinks it is in the best interests of the patient in PVS to continue to receive intrusive medical care but whether the doctor responsible has arrived at a reasonable and bona fide belief that it is not in the best interests of the patient to continue to receive artificial medical regime.

77. Accordingly, Lord Browne-Wilkinson observed that on an application to the court for a declaration that the discontinuance of medical care will be lawful, the sole concern of the courts is to be satisfied that the doctor's decision to discontinue is in accordance with a respectable body of medical opinion and that it is reasonable. Adverting to various passages, Lord Browne-Wilkinson dismissed the appeal.

78. It is pertinent to mention here that in adopting the "best interests" principle in ***Airedale***, the House of Lords followed its earlier decision in ***In re F (Mental Patient: Sterilisation]*** [1990] 2 AC 1: [1989] 2 WLR 1025: [1989] 2 All ER 545 and in adopting the omission/commission distinction, it followed the approach of the Court of Appeal in ***In re B (A Minor) (Wardship: Medical Treatment)*** [1981] 1 WLR 1424: [1990] 3 All ER 927 and ***In re J (A Minor) (Wardship: Medical Treatment)*** [1991] Fam 33: [1990] 3 All ER 930 : [1991] 2 WLR 140 which raised the question of medical treatment for severely disabled children. In the context of cases where the

patients are unable to communicate their wishes, it is pertinent to mention the observations made by Lord Goff in the ***Airedale*** case. As observed by Lord Goff, the correct question in cases of this kind would be "whether it is in his best interests that treatment which has the effect of artificially prolonging his life should be continued". Thus, it was settled in the case of ***Airedale*** that it was lawful for the doctors to discontinue treatment if the patient refuses such treatment. And in case the patient is not in a situation permitting him to communicate his wishes, then it becomes the responsibility of the doctor to act in the "best interest" of the patient.

H. 1.2 <u>Later cases:</u>

79. With reference to the ongoing debate pertaining to assisted dying, Lord Steyn in the case of ***R (on the application of Pretty) v. Director of Public Prosecutions*** [2002] 1 All ER 1: [2001] UKHL 61 explained that on one hand is the view which finds support in the Roman Catholic Church, Islam and other religions that human life is sacred and the corollary is that euthanasia and assisted suicide are always wrong, while on the other hand, as observed by Lord Steyn, is the belief defended by millions that the personal autonomy of individuals is predominant and it is the moral right of individuals to have a say over the time and manner of their death. Taking note of the imminent risk in legalizing assisted dying, Lord Steyn took note of the utilitarian argument that the terminally ill patients and those suffering great pain from incurable illnesses are often vulnerable and not all families, whose interests are at stake, are wholly unselfish and loving and there exists the probability of abuse in the sense that such people may be persuaded that they want to die or that they ought to want to die. Further, Lord Steyn observed that there is also the view that if the genuine wish of a terminally ill patient to die is expressed by the patient, then they should not be forced against their will to endure a life that they no longer wish to endure. Without expressing any view on the unending arguments on either side, Lord Steyn noted that these wide-ranging arguments are ancient questions on which millions have taken diametrically opposite views and still continue to do. In the case of ***In Re B (Consent to Treatment - Capacity)*** [2002] 1 FLR 1090: [2002] 2 All ER 449, the primacy of patient autonomy, that is, the competent patient's right to decide for herself whether to submit to medical treatment over other imperatives, such as her best interests objectively considered, was recognized thereby confirming the right of the competent patient to refuse medical treatment even if the result is death and thus, a competent, ventilator-dependent patient sought and won the right to have her ventilator turned off.

80. Taking a slightly divergent view from ***Airedale***, Lord Neuberger in ***R (on the application of Nicklinson and Anr. v. Ministry of Justice*** [2014] UKSC 38 observed that the difference between administering fatal drug to a person and setting up a machine so that the person can administer the drug to himself is not merely a legal distinction but also a moral one and, indeed, authorizing a third party to switch off a person's life support machine, as in ***Airedale***, is a more drastic interference and a more extreme moral step than authorizing a third party to set up a lethal drug delivery system to enable a person, only if he wishes, to activate the system to administer a lethal drug. Elaborating further on this theory, the Law Lord explained that in those cases which are classified as "omission", for instance, switching off a life support machine as in ***Airedale*** and ***Re B (Treatment)***, the act which immediately causes death is that of a third party which may be wrong whereas if the final act is that of a person who himself carries it out pursuant to a voluntary, clear, settled and informed decision, that may be the permissible side of the line as in the latter case, the person concerned had not been "killed" by anyone but had autonomously exercised his right to end

his life. The Law Lord, however, immediately clarified that it is not intended to cast any doubt on the correctness of the decisions in ***Airedale*** and ***Re B (Treatment)***.

81. Suffice it to say, he concurred with the view in ***Airedale*** case which he referred to as ***Bland*** case. Lord Mance agreed with Lord Neuberger and Lord Sumption. In his opinion, he referred to ***Airedale*** case and thereafter pointed out that a blanket prohibition was unnecessary and stated in his observations that persons in tragic position represent a distinct and relatively small group, and that by devising a mechanism enabling careful prior review (possibly involving the Court as well as medical opinion), the vulnerable can be distinguished from those capable of forming a free and informed decision to commit suicide. Lord Mance acknowledged that the law and courts are deeply engaged in the issues of life and death and made a reference to the observations of Lord Neuberger.

82. We may note with profit that the prayer of Mr. Nicklinson and Mr. Lamb were rejected by the Court of Appeal.

83. Lord Mance referred to the expression by Rehnquist CJ in ***Washington*** (supra) in a slightly different context that there is "an earnest and profound debate about the morality, legality, and practicality of .... assisted suicide" and "our holding permits this debate to continue as it should in a democratic society".

84. Lord Wilson concurred with the judgment rendered by Lord Neuberger, referred to ***Airedale*** case and said:

As Hoffmann LJ suggested in his classic judgment in the Court of Appeal in Airedale NHS Trust v. Bland [1993] AC 789 at 826, a law will forfeit necessary support if it pays no attention to the ethical dimension of its decisions. In para 209 below Lord Sumption quotes Hoffmann LJ's articulation of that principle but it is worth remembering that Hoffmann LJ then proceeded to identify two other ethical principles, namely those of individual autonomy and of respect for human dignity, which can run the other way.

And further:

In the Pretty case, at para 65, the ECHR was later to describe those principles as of the very essence of the ECHR. It was in the light (among other things) of the force of those two principles that in the Bland case the House of Lords ruled that it was lawful in certain circumstances for a doctor not to continue to provide life-sustaining treatment to a person in a persistent vegetative state...

200. I agree with the observation of Lord Neuberger at para 94 that, in sanctioning a course leading to the death of a person about which he was unable to have a voice, the decision in the Bland case was arguably more extreme than any step which might be taken towards enabling a person of full capacity to exercise what must, at any rate now, in the light of the effect given to Article 8 of the ECHR in the Haas case at para 51, cited at para 29 above, be regarded as a positive legal right to commit suicide. Lord Sumption suggests in para 212-213 below that it remains morally wrong and contrary to public policy for a person to commit suicide. Blackstone, in his Commentaries on the Laws of England, Book 4, Chapter 14, wrote that suicide was also a spiritual offence "in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for". If

expressed in modern religious terms, that view would still command substantial support and a moral argument against committing suicide could convincingly be cast in entirely non-religious terms. Whether, however, it can be elevated into an overall conclusion about moral wrong and public policy is much more difficult.

85. Lord Sumption commenced the judgment stating that English judges tend to avoid addressing the moral foundations of law. It is not their function to lay down principles of morality and the attempt leads to large generalisations which are commonly thought to be unhelpful. He further observed that in some cases, however, it is unavoidable and this is one of them. He referred to the opinion of Hoffmann LJ in ***Airedale*** case and the concept of sanctity of life and, eventually, reproduced a passage from Hoffmann LJ and opined:

215. Why should this be so? There are at least three reasons why the moral position of the suicide (whom I will call "the patient" from this point on, although the term may not always be apt) is different from that of a third party who helps him to kill himself. In the first place, the moral quality of their decisions is different. A desire to die can only result from an overpowering negative impulse arising from perceived incapacity, failure or pain. This is an extreme state which is unlikely to be shared by the third party who assists. Even if the assister is moved by pure compassion, he inevitably has a greater degree of detachment. This must in particular be true of professionals such as doctors, from whom a high degree of professional objectivity is expected, even in situations of great emotional difficulty. Secondly, whatever right a person may have to put an end to his own life depends on the principle of autonomy, which leaves the disposal of his life to him. The right of a third party to assist cannot depend on that principle. It is essentially based on the mitigating effect of his compassionate motive. Yet not everyone seeking to end his life is equally deserving of compassion. The choice made by a person to kill himself is morally the same whether he does it because he is old or terminally ill, or because he is young and healthy but fed up with life. In both cases his desire to commit suicide may be equally justified by his autonomy. But the choice made by a third party who intervenes to help him is very different. The element of compassion is much stronger in the former category than in the latter. Third, the involvement of a third party raises the problem of the effect on other vulnerable people, which the unaided suicide does not. If it is lawful for a third party to encourage or assist the suicide of a person who has chosen death with a clear head, free of external pressures, the potential arises for him to encourage or assist others who are in a less good position to decide. Again, this is a more significant factor in the case of professionals, such as doctors or carers, who encounter these dilemmas regularly, than it is in the case of, say, family members confronting them for what will probably be the only time in their lives.

86. Dealing with the appeal by Nicklinson, Lord Sumption referred to the view of the Canadian Supreme Court in ***Rodriguez*** (supra) and opined:

....the issue is an inherently legislative issue for Parliament, as the representative body in our constitution, to decide. The question what procedures might be available for mitigating the indirect consequences of legalising assisted suicide, what risks such procedures would entail, and whether those risks are acceptable, are not matters which under our constitution a court should decide.

87. Dealing with Martin's appeal, Lord Sumption dismissed the same. While doing so, he said:

256. This state of English law and criminal practice does not of course resolve all of the problems arising from the pain and indignity of the death which was endured by Tony Nicklinson and is now faced by Mr. Lamb and Martin. But it is worth reiterating these well-established propositions, because it is clear that many medical professionals are frightened by the law and take an unduly narrow view of what can lawfully be done to relieve the suffering of the terminally ill under the law as it presently stands. Much needless suffering may be occurring as a result. It is right to add that there is a tendency for those who would like to see the existing law changed, to overstate its difficulties. This was particularly evident in the submissions of Dignity and Choice in Dying. It would be unfortunate if this were to narrow yet further the options open to those approaching death, by leading them to believe that the current law and practice is less humane and flexible than it really is.

88. Lord Hughes agreed with the reasoning of Lord Sumption and dismissed the private appeals and allowed the Appeals preferred by the Director of Public Prosecutions. Lord Clarke concurred with the reasoning given by Lord Sumption, Lord Reed and Lord Hughes. Lord Reed agreed with the view with regard to the dismissal of the appeals but observed some aspects with regard to the issue of compatibility.

89. Lord Lady Hale entirely agreed with the judgment of Lord Neuberger. Lord Kerr in his opinion stated:

358. I agree with Lord Neuberger that if the store put on the sanctity of life cannot justify a ban on suicide by the able-bodied, it is difficult to see how it can justify prohibiting a physically incapable person from seeking assistance to bring about the end of their life. As one of the witnesses for one of the interveners, the British Humanist Association, Professor Blackburn, said, there is 'no defensible moral principle' in denying the Appellants the means of achieving what, Under Article 8 and by all the requirements of compassion and humanity, they should be entitled to do. To insist that these unfortunate individuals should continue to endure the misery that is their lot is not to champion the sanctity of life; it is to coerce them to endure unspeakable suffering.

And again:

360. If one may describe the actual administration of the fatal dose as active assistance and the setting up of a system which can be activated by the assisted person as passive assistance, what is the moral objection to a person actively assisting someone's death, if passive assistance is acceptable? Why should active assistance give rise to moral corruption on the part of the assister (or, for that matter, society as a whole), but passive assistance not? In both cases the assister's aid to the person who wishes to die is based on the same conscientious and moral foundation. That it is that they are doing what the person they assist cannot do; providing them with the means to bring about their wished-for death. I cannot detect the moral distinction between the individual who brings a fatal dose to their beloved's lips from the person who sets up a system that allows their beloved to activate the release of the fatal dose by the blink of an eye.

Eventually, Lady Hale dismissed the appeal and allowed the appeals of the Director of Public Prosecutions.

H. 2 <u>The legal position in the United States:</u>

90. In the United States of America, active euthanasia is illegal but physician-assisted death is legal in the States of Oregon, Washington and Montana. A distinction has been drawn between euthanasia and physician-assisted suicide. In both Oregon and Washington, only self-assisted dying is permitted. Doctor-administered assisted dying and any form of assistance to help a person commit suicide outside the provisions of the legislation remains a criminal offence.

91. As far as the United States of America is concerned, we think it appropriate to refer to ***Cruzan*** (supra). The said case involved a 30 year old Missouri woman who was lingering in a permanent vegetative state as a result of a car accident. Missouri requires 'clear and convincing evidence' of patients' preferences and the Missouri Supreme Court, reversing the decision of the state trial court, rejected the parents' request to impose a duty on their daughter's physician to end life-support. The United States Supreme Court upheld that States can require 'clear and convincing evidence' of a patient's desire in order to oblige physicians to respect this desire. Since Nancy Cruzan had not clearly expressed her desire to terminate life support in such a situation, physicians were not obliged to follow the parents' request.

92. Chief Justice Rehnquist, in his opinion, stated:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.

He further proceeded to state:

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. Until about 15 years ago and the seminal decision in *In re Quinlan*, 70 N.J. 10, 355 A. 2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), the number of right-to-refuse-treatment decisions were relatively few. Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating First Amendment rights as well as common law rights of self-determination. More recently, however, with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned.

93. Meeting the submissions on behalf of the Petitioner, the learned Chief Justice opined:

The difficulty with Petitioners' claim is that, in a sense, it begs the question: an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that, under certain circumstances, a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and

convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

94. The learned Chief Justice came to hold that there was no clear and convincing evidence to prove that the patient's desire was not to have hydration and nutrition. In the ultimate analysis, it was stated:

No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling -- a feeling not at all ignoble or unworthy, but not entirely disinterested, either --that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. All of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the State may choose to defer only to those wishes, rather than confide the decision to close family members.

The aforesaid decision has emphasized on "bodily integrity" and "informed consent".

95. The question that was presented before the Court was whether New York's prohibition on assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment. The Court held that it did not and in the course of the discussion, Chief Justice Rehnquist held:

The Court of Appeals, however, concluded that some terminally ill people--those who are on life-support systems-- are treated differently from those who are not, in that the former may "hasten death" by ending treatment, but the latter may not "hasten death" through physician-assisted suicide. 80 F. 3d, at 729. This conclusion depends on the submission that ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide." Ibid. Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession 6 and in our legal traditions, is both important and logical; it is certainly rational.

Dealing with the conclusion in ***Cruzan*** (supra), it was held:

This Court has also recognized, at least implicitly, the distinction between letting a patient die and making that patient die. In Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278 (1990), we concluded that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions," and we assumed the existence of such a right for purposes of that case, id., at 279. But our assumption of a right to refuse treatment was grounded not, as the Court of Appeals supposed, on the proposition that patients have a general and abstract "right to hasten death," 80 F. 3d, at 727-728, but on well-established, traditional rights to bodily integrity and freedom from unwanted touching, Cruzan, 497 U.S., at 278-279; id., at 287- 288 (O'Connor, J., concurring). In fact, we observed that "the

majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." Id., at 280. Cruzan therefore provides no support for the notion that refusing life-sustaining medical treatment is "nothing more nor less than suicide.

From the aforesaid passages, it is crystal clear that the U.S. Supreme Court has recognized that there is a distinction, in the context of the prevalent law, between letting a patient die and making that patient die. Right to refuse treatment is not grounded on the proposition that the patients have general and abstract right to hasten death. The learned Chief Justice has also endorsed the view of the American Medical Association emphasizing the fundamental difference between refusing life-sustaining treatment and demanding a life-ending treatment.

96. In ***Vacco*** (supra), while ruling that a New York ban on physician assisted suicide was constitutional, the Supreme Court of the United States applied the standard of intent to the matter finding that a doctor who withdraws life support at the request of his patient intends only to respect his patient's wishes. This, the Court said, is in sharp contrast to a doctor who honours a patient's request to end life which necessarily requires more than an intent to respect the patient's wishes, i.e., it requires the intent to kill the patient. A major difference, the Court determined, in the two scenarios is that the former may cause the patient to die from underlying causes while the latter will cause the patient to die. The Court noted that the law plainly recognized the difference between "killing" and "letting die". It also recognised that the State of New York had, as a matter of policy, a compelling interest in forbidding assisted suicide, while allowing a patient to refuse life support was simply an act of protecting a common law right which was the right to retain bodily integrity and preserve individual autonomy since the prevention of "unwanted touching" was, in the opinion of the Court, a very legitimate right to protect.

H. 3 <u>Australian Jurisdiction:</u>

97. Moving to Australian jurisdiction, in ***Hunter and New England Area Health Service v. A*** [2009] NSWSC 761, the Supreme Court of New South Wales considered the validity of a common law advance directive (there being no legislative provisions for such directives in NSW) given by Mr. A refusing kidney dialysis. One year after making the directive, Mr. A was admitted to a hospital emergency department in a critical state with decreased level of consciousness. His condition deteriorated to the point that he was being kept alive by mechanical ventilation and kidney dialysis. The hospital sought a judicial declaration to determine the validity of his advance directive. The Court, speaking through McDougall J., confirmed the directive and held that the hospital must respect the advance directive. Applying the common law principle, the Court observed:

A person may make an 'advance care directive': a statement that the person does not wish to receive medical treatment, or medical treatment of specified kinds. If an advance care directive is made by a capable adult, and it is clear and unambiguous, and extends to the situation at hand, it must be respected. It would be a battery to administer medical treatment to the person of a kind prohibited by the advance care directive.

98. In ***Brightwater Care Group (Inc.) v. Rossiter***. [2009] WASC 229: 40 WAR 84, the Court was concerned with an anticipatory refusal of treatment by Mr. Rossiter, a man with quadriplegia who

was unable to undertake any basic human function including taking nutrition or hydration orally. Mr. Rossiter was not terminally ill, dying or in a vegetative state and had full mental capacity. He had 'clearly and unequivocally' indicated that he did not wish to continue to receive medical treatment which, if discontinued, would inevitably lead to his death. Martin, CJ, considering the facts and the common law principle, held:

At common law, the answers to the questions posed by this case are clear and straightforward. They are to the effect that Mr. Rossiter has the right to determine whether or not he will continue to receive the services and treatment provided by Brightwater and, at common law, Brightwater would be acting unlawfully by continuing to provide treatment [namely the administration of nutrition and hydration via a tube inserted into his stomach] contrary to Mr. Rossiter's wishes.

99. In ***Australian Capital Territory v. JT*** [2009] ACTSC 105, an application to stop medical treatment, other than palliative care, was rejected. The man receiving treatment suffered from paranoid schizophrenia and was, therefore, held not mentally capable of making a decision regarding his treatment. Chief Justice Higgins found that it would be unlawful for the service providers to stop providing treatment. The Chief Justice distinguished this situation from Rossiter as the patient lacked 'both understanding of the proposed conduct and the capacity to give informed consent to it'. It is clear that mental capacity is the determining factor in cases relating to self-determination. Since the right of self-determination requires the ability to make an informed choice about the future, the requirement of mental capacity would be an obvious prerequisite. Chief Justice Higgins undertook a detailed analysis and rightly distinguished ***Auckland Area Health Board v. Attorney-General*** [1993] NZLR 235 in which a court similarly bound to apply the human right to life and the prohibition on cruel and degrading treatment found that futile treatment could be withdrawn from a patient in a persistent vegetative state. He agreed with Howie J. in ***Messiha v. South East Health*** [2004] NSWSC 1061 that futility of treatment could only be determined by consideration of the best interests of the patient and not by reference to the convenience of medical cares or their institutions.

100. The above decision basically considered the circumstances in which technically futile treatment may be withdrawn from patients at their direct or indirect request or in their best interests.

H. 4 <u>Legal Position in Canada:</u>

101. In Canada, physician-assisted suicide is illegal as per Section 241(b) of the Code of Criminal Procedure of Canada. The Supreme Court of Canada in ***Rodriguez*** (supra) has drawn a distinction between "intentional actor" and "merely foreseeing". Delivering the judgment on behalf of the majority, Justice Sopinka rejected the argument that assisted suicide was similar to the withdrawal of life-preserving treatment at the patient's request. He also rejected the argument that the distinction between assisted suicide and accepted medical treatment was even more attenuated in the case of palliative treatment which was known to hasten death. He observed:

The distinction drawn here is one based upon intention-in the case of palliative care the intention is to ease pain, which has the effect of hastening death, while in the case of assisted suicide, the intention is undeniably to cause death.

He added:

In my view, distinctions based on intent are important, and in fact form the basis of our criminal law. While factually the distinction may, at times, be difficult to draw, legally it is clear.

102. The Supreme Court of Canada in ***Carter v. Canada (Attorney General)*** 2015 SCC 5 held that the prohibition on physician-assisted death in Canada (in Sections 14 and 241(b) of the Canadian Code of Criminal Procedure) unjustifiably infringed the right to life, liberty and security of the person in Article 7 of the Charter of Rights and Freedoms in the Canadian Constitution.

103. The Supreme Court declared the infringing provisions of the Code of Criminal Procedure void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. 'Irremediable', it should be added, does not require the patient to undertake treatments that are not acceptable to the individual.

104. After the Supreme Court's decision, the Canadian Government appointed a Special Joint Committee on Physician-Assisted Dying to 'make recommendations on the framework of a federal response on physician assisted dying in consonance with the Constitution, the Charter of Rights and Freedoms, and the priorities of Canadians'. The Special Joint Committee released its report in February 2016 recommending a legislative framework which would regulate 'medical assistance in dying' by imposing both substantive and procedural safeguards, namely:

Substantive Safeguards:

• A grievous and irremediable medical condition (including an illness, disease or disability) is required;

• Enduring suffering that is intolerable to the individual in the circumstances of his or her condition is required;

• Informed consent is required;

• Capacity to make the decision is required at the time of either the advance or contemporaneous request; and

• Eligible individuals must be insured persons eligible for publicly funded health care services in Canada.

Procedural Safeguards:

• Two independent doctors must conclude that a person is eligible;

• A request must be in writing and witnessed by two independent witnesses;

• A waiting period is required based, in part, on the rapidity of progression and nature of the patient's medical condition as determined by the patient's attending physician;

• Annual report analyzing medical assistance in dying cases are to be tabled in Parliament;

and

• Support and services, including culturally and spiritually appropriate end-of-life care services for indigenous patients, should be improved to ensure that requests are based on free choice, particularly for vulnerable people.

105. It should be noted that physician assisted dying has already been legalized in the province of Quebec. Quebec passed an Act respecting end-of-life care (the Quebec Act) in June 2014 with most of the Act coming into force on 10 December, 2015. The Quebec Act provides a 'framework for end-of-life care' which includes 'continuous palliative sedation' and 'medical aid in dying' defined as 'administration by a physician of medications or substances to an end-of-life patient, at the patient's request, in order to relieve their suffering by hastening death. In order to be able to access medical aid in dying under the Quebec Act, a patient must:

(1) be an insured person within the meaning of the Health Insurance Act (Chapter A-29);

(2) be of full age and capable of giving consent to care;

(3) be at the end of life;

(4) suffer from a serious and incurable illness;

(5) be in an advanced state of irreversible decline in capability; and

(6) experience constant and unbearable physical or psychological suffering

(7) which cannot be relieved in a manner the patient deems tolerable.

106. The request for medical aid in dying must be signed by two physicians. The Quebec Act also established a Commission on end-of-life care to provide oversight and advice to the Minister of Health and Social Services on the implementation of the legislation regarding end-of-life care.

H. 5 <u>Other Jurisdictions:</u>

107. Presently, we think it appropriate to deal with certain legislations in other countries and the decisions in other jurisdictions. In ***Aruna Shanbaug***, the Court has in detail referred to the legislations in Netherlands, i.e., the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002 that regulates euthanasia. The provisions of the said Act lay down that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. As the two-Judge Bench has summarized, this criteria concern the patient's request, the patient's suffering (unbearable and hopeless), the information

provided to the patient, the presence of reasonable alternatives, consultation of another physician and the applied method of ending life. To demonstrate their compliance, the Act requires physicians to report euthanasia to a Review Committee. It has been observed that the said Act legalizes euthanasia and physician-assisted suicide in very specific cases under three specific conditions and euthanasia remains a criminal offence in cases not meeting the laid down specific conditions with the exception of several situations that are not subject to restrictions of law at all because they are considered normal medical practice. The three conditions are: stopping or not starting a medically useless (futile) treatment, stopping or not starting a treatment at the patient's request and speeding up death as a side effect of treatment necessary for alleviating serious suffering.

108. Reference has been made to the Swiss Code of Criminal Procedure where active euthanasia has been regarded as illegal. Belgium has legalized the practice of euthanasia with the enactment of the Belgium Act on Euthanasia of May 28th, 2002 and the patients can wish to end their life if they are under constant and unbearable physical or psychological pain resulting from an accident or an incurable illness. The Act allows adults who are in a 'futile medical condition of constant and unbearable physical or mental suffering that cannot be alleviated' to request voluntary euthanasia. Doctors who practise euthanasia commit no offence if the prescribed conditions and procedure is followed and the patient has the legal capacity and the request is made voluntarily and repeatedly with no external pressure.

109. Luxembourg too has legalized euthanasia with the passing of the Law of 16th March, 2009 on Euthanasia and Assisted Suicide (Lux.). The law permits euthanasia and assisted suicide in relation to those with incurable conditions with the requirements including repeated requests and the consent of two doctors and an expert panel.

110. The position in Germany is that active assisted suicide is illegal. However, this is not the case for passive assisted suicide. Thus, in Germany, if doctors stop life-prolonging measures, for instance, on the written wishes of a patient, it is not considered as a criminal offence. That apart, it is legal for doctors in Germany to administer painkillers to a dying patient to ease pain. The said painkillers, in turn, cause low breathing that may lead to respiratory arrest and, ultimately, death.

H. 6 <u>International considerations and decisions of the European Court of Human Rights (ECHR):</u>

111. Certain relevant obligations when discussing voluntary euthanasia are contained in the **International Covenant on Civil and Political Rights (ICCPR)**. The following rights in the ICCPR have been considered by the practice of voluntary euthanasia:

• right to life (Article 6)

• freedom from cruel, inhuman or degrading treatment (Article 7)

• right to respect for private life (Article 17)

• freedom of thought, conscience and religion (Article 18).

112. Right to life Under Article 6(1) of the ICCPR provides: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. The second sentence of Article 6(1) imposes a positive obligation on the States to provide legal protection of the right to life. However, the subsequent reference to life not being 'arbitrarily deprived' operates to limit the scope of the right (and therefore the States' duty to ensure the right). Comments from the UN Human Rights Committee suggest that laws allowing for voluntary euthanasia are not necessarily incompatible with the States' obligation to protect the right to life.

113. The UN Human Rights Committee has emphasised that laws allowing for euthanasia must provide effective procedural safeguards against abuse if they are to be compatible with the State's obligation to protect the right to life. In 2002, the UN Committee considered the euthanasia law introduced in the Netherlands. The Committee stated that:

where a State party seeks to relax legal protection with respect to an act deliberately intended to put an end to human life, the Committee believes that the Covenant obliges it to apply the most rigorous scrutiny to determine whether the State party's obligations to ensure the right to life are being complied with (Articles 2 and 6 of the Covenant).

114. The European Court of Human Rights (ECHR) has adopted a similar position to the UN Human Rights Committee when considering euthanasia laws and the right to life in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). According to the ECHR, the right to life in Article 2 cannot be interpreted as conferring a right to die or a right to self determination in terms of choosing death rather than life. However, the ECHR has held that a State's obligation to protect life under that Article does not preclude it from legalising voluntary euthanasia, provided adequate safeguards are put in place and adhered to. In ***Pretty v. United Kingdom (application No. 2346/02)*** [2002] ECHR 423 (29 April, 2002), the ECHR ruled that the decision of the applicant to avoid what she considered would be an undignified and distressing end to her life was part of the private sphere covered by the scope of Article 8 of the Convention. The Court affirmed that the right of an individual to decide how and when to end her life, provided that the said individual was in a position to make up her own mind in that respect and to take the appropriate action, was one aspect of the right to respect for private life Under Article 8 of the Convention. The Court, thus, recognised, with conditions, a sort of right to self-determination as to one's own death, but the existence of this right is subject to two conditions, one linked to the free will of the person concerned and the other relating to the capacity to take appropriate action. However, respect for the right to life compels the national authorities to prevent a person from putting an end to life if such a decision is not taken freely and with full knowledge.

115. In ***Hass v. Switzerland (application No. 31322/07)*** [2011] ECHR 2422: (2011) 53 EHRR 33, the ECHR explained that:

creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives... this latter Article obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved".

Accordingly, the ECHR concluded that:

the right to life guaranteed by Article 2 of the Convention obliges States to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will of the individual concerned.

116. In a recent decision regarding end of life issues, ***Lambert and Ors. v. France (application No. 46043/14)*** [2015] ECHR 185, the ECHR considered whether the decision to withdraw artificial nutrition and hydration of Vincent Lambert violated the right to life in Article 2. Vincent Lambert was involved in a serious road accident which left him tetraplegic and with permanent brain damage. He was assessed in expert medical reports as being in a chronic vegetative state that required artificial nutrition and hydration to be administered via a gastric tube.

117. Mr. Lambert's parents applied to the ECHR alleging that the decision to withdraw his artificial nutrition and hydration breached, inter alia, the State's obligations Under Article 2 of the European Convention. The ECHR highlighted that Article 2 imposes on the States both a negative obligation (to refrain from the 'intentional' taking of life) and a positive obligation (to 'take appropriate steps to safeguard the lives of those within its jurisdiction'). The Court held that the decision of a doctor to discontinue life-sustaining treatment (or 'therapeutic abstention') did not involve the State's negative obligation Under Article 2 and, therefore, the only question for the Court Under Article 2 was whether it was consistent with the State's positive obligation.

118. The ECHR emphasized that 'the Convention has to be read as a whole', and, therefore:

in a case such as the present one reference should be made, in examining a possible violation of Article 2, to Article 8 of the Convention and to the right to respect for private life and the notion of personal autonomy which it encompasses.

119. The Court noted that there was a consensus among European member States 'as to the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed'. It identified that in dealing with end of life situations, States have some discretion in terms of striking a balance between the protection of the patients' right to life and the protection of the right to respect their private life and their personal autonomy. The Court considered that the provisions of the Law of 22 April 2005 'on patients' rights and the end of life' promulgated in France making changes in the French Code of Public Health, as interpreted by the *Conseil d'Etat,* constituted a legal framework which was sufficiently clear to regulate with precision the decisions taken by doctors in situations such as in Mr. Lambert's case. The Court found the legislative framework laid down by domestic law, as interpreted by the *Conseil d'Etat,* and the decision-making process which had been conducted in meticulous fashion, to be compatible with the requirements of the State's positive obligation Under Article 2. With respect to negative obligations, the ECHR observed that the "therapeutic abstention" (that is, withdrawal and withholding of medical treatment) lacks the intention to end the patient's life and rather, a doctor discontinuing medical treatment from his or her patient merely intends to "allow death to resume its natural course and to relieve suffering". Therefore, as long as therapeutic abstention as authorised by the French Public Health Code is not about taking life intentionally, the ECHR

opined that France had not violated its negative obligation to "refrain from the intentional taking of life".

120. When considering the State's positive obligations to protect human life, the ECHR noted that the regulatory framework developed in the Public Health Code and the decision of the *Conseil d' Etat* established several "important safeguards" with respect to therapeutic abstention and the Regulation is, therefore, "apt to ensure the protection of patients' lives."

121. All this compelled the ECHR to conclude that there was no violation of the State's positive obligation to protect human life which, together with the absence of violation of negative obligations, resulted in the conclusion that "there would be no violation of Article 2 of the Convention in the event of implementation of the *Conseil d' Etat* judgment." Thus, the ECHR in the ***Lambert*** (supra) case struck the balance between the sanctity of life on the one hand and the notions of quality of life and individual autonomy on the other.

I. <u>The 241st Report of The Law Commission of India on Passive Euthanasia:</u>

122. After the judgment of ***Aruna Shanbaug*** was delivered, the Law Commission of India submitted its 241st report which dealt with 'Passive Euthanasia - A Relook'. The report in its introduction has dealt with the origin of the concept of euthanasia. It states that the word "Euthanasia" is derived from the Greek words "eu" and "thanotos" which literally mean "good death" and is otherwise described as "mercy killing". The word euthanasia, as pointed out in the Report, was used by Francis Bacon in the 17th Century to refer to an easy, painless and happy death as it is the duty and responsibility of the physician to alleviate the physical suffering of the body of the patient. A reference has also been made in the Report to the meaning given to the term by the House of Lords. The Select Committee on "Medical Ethics" in England defined Euthanasia as "a deliberate intervention undertaken with the express intention of ending a life to relieve intractable suffering". Impressing upon the voluntary nature of euthanasia, the report has rightly highlighted the clarification as provided by the European Association of Palliative Care (EAPC) Ethics Task Force in a discussion on Euthanasia in 2003 to the effect that "medicalised killing of a person without the person's consent, whether non-voluntary (where the person is unable to consent) or involuntary (against the person's will) is not euthanasia: it is a murder."

123. The Commission in its report referred to the observations made by the then Chairman of the Law Commission in his letter dated 28th August, 2006 addressed to the Hon'ble Minister which was extracted. It is pertinent to reproduce the same:

A hundred years ago, when medicine and medical technology had not invented the artificial methods of keeping a terminally ill patient alive by medical treatment, including by means of ventilators and artificial feeding, such patients were meeting their death on account of natural causes. Today, it is accepted, a terminally ill person has a common law right to refuse modern medical procedures and allow nature to take its own course, as was done in good old times. It is well-settled law in all countries that a terminally ill patient who is conscious and is competent, can take an 'informed decision' to die a natural death and direct that he or she be not given medical treatment which may merely prolong life. There are currently a large number of such patients who have reached a stage in their illness when according to well-informed body of medical opinion,

there are no chances of recovery. But modern medicine and technology may yet enable such patients to prolong life to no purpose and during such prolongation, patients could go through extreme pain and suffering. Several such patients prefer palliative care for reducing pain and suffering and do not want medical treatment which will merely prolong life or postpone death.

124. The report rightly points out that a rational and humanitarian outlook should have primacy in such a complex matter. Recognizing that passive euthanasia, both in the case of competent and incompetent patients, is being allowed in most of the countries subject to the doctor acting in the best interests of the patient, the report summarized the broad principles of medical ethics which shall be observed by the doctor in taking the decision. The said principles as obtained in the report are the patient's autonomy (or the right to self-determination) and beneficence which means following a course of action that is best for the patient uninfluenced by personal convictions, motives or other considerations. The Report also refers to the observations made by Lord Keith in ***Airedale*** case providing for a course to safeguard the patient's best interest. As per the said course, which has also been approved by this Court, the hospital/medical practitioner should apply to the Family Division of the High Court for endorsing or reversing the decision taken by the medical practitioners in charge to discontinue the treatment of a PVS patient. With respect to the ongoing debates on "legalizing euthanasia", the Report reiterates the observations made in ***Airedale*** that euthanasia (other than passive euthanasia) can be legalized by means of legislation only.

125. The Report, in upholding the principle of the patient's autonomy, went on to state:

...the patient (competent) has a right to refuse medical treatment resulting in temporary prolongation of life. The patient's life is at the brink of extinction. There is no slightest hope of recovery. The patient undergoing terrible suffering and worst mental agony does not want his life to be prolonged by artificial means. She/he would not like to spend for his treatment which is practically worthless. She/he cares for his bodily integrity rather than bodily suffering. She/he would not like to live 28 like a 'cabbage' in an intensive care unit for some days or months till the inevitable death occurs. He would like to have the right of privacy protected which implies protection from interference and bodily invasion. As observed in Gian Kaur's case, the natural process of his death has already commenced and he would like to die with peace and dignity. No law can inhibit him from opting such course. This is not a situation comparable to suicide, keeping aside the view point in favour of decriminalizing the attempt to suicide. The doctor or relatives cannot compel him to have invasive medical treatment by artificial means or treatment.

126. The Report supports the view of several authorities especially Lord Browne-Wilkinson (in ***Airedale*** case) and Justice Cardozo that in case of any forced medical intervention on the body of a patient, the surgeon/doctor is guilty of 'assault' or battery'. The Report also laid emphasis on the opinion of Lord Goff placing the right of self-determination on a high pedestal. The said relevant observations of Lord Goff, as also cited in the Report, are as follows:

I wish to add that, in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.

127. We have referred to the report of the Law Commission post ***Aruna Shanbaug*** only to highlight that there has been affirmative thought in this regard. We have also been apprised by Mr. Narasimha, learned Additional Solicitor General appearing for the Union of India, that there is going to be a law with regard to passive euthanasia.

J. <u>Right to refuse treatment:</u>

128. Deliberating on the issue of right to refuse treatment, Justice Cardozo in ***Schloendorff v. Society of New York Hospital*** (1914) 105 NE 92: (1914) 211 NY 125 observed:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs the operation without his patient's consent commits an assault for which he is liable in damages.

129. In a somewhat different context, King C.J. in ***F v. R*** (1983) 33 SASR 189 at 193 identified "the paramount consideration that a person is entitled to make his own decisions about his life". The said statement was cited with approval by Mason CJ, Brennan, Dawson, Toohey and McHugh, JJ. in ***Rogers v. Whitaker*** [1992] HCA 58: (1992) 175 CLR 479 at 487. Cardozo's statement has been cited and applied in many cases. Thus, in ***Malette v. Shulman*** 67 DLR (4^{th}) 321 (1990) : 72 OR (2d) 417, Robins J.A., speaking with the concurrence of Catzman and Canthy JJA, said:

A competent adult is generally entitled to reject a specific treatment or all treatment, or to select an alternative form of treatment even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community .... it is the patient who has the final say on whether to undergo the treatment.

130. The recognition of the freedom of competent adults to make choices about their medical care necessarily encompasses recognition of the right to make choices since individual free choice and self-determination are themselves fundamental constituents of life. Robins J.A. further clarified in ***Malette*** at page 334:

To deny individuals freedom of choice with respect to their health care can only lessen and not enhance the value of life.

131. In the 21^{st} century, with the advancement of technology in medical care, it has become possible, with the help of support machines, to prolong the death of patients for months and even years in some cases. At this juncture, the right to refuse medical treatment comes into the picture. A patient (terminally ill or in a persistent vegetative state) exercising the right to refuse treatment may ardently wish to live but, at the same time, he may wish to be free from any medical surgery, drugs or treatment of any kind so as to avoid protracted physical suffering. Any such person who has come of age and is of sound mind has a right to refuse medical treatment. This right stands on a different pedestal as compared to suicide, physician assisted suicide or even euthanasia. When a terminally ill patient refuses to take medical treatment, it can neither be termed as euthanasia nor as suicide. Albeit, both suicide and refusal to take treatment in case of terminal ailment shall result in the same consequences, that is, death, yet refusal to take treatment by itself cannot amount to suicide. In case of suicide, there has to be a self initiated positive action with a specific intention

to cause one's own death. On the other hand, a patient's right to refuse treatment lacks his specific intention to die, rather it protects the patient from unwanted medical treatment. A patient refusing medical treatment merely allows the disease to take its natural course and if, in this process, death occurs, the cause for it would primarily be the underlying disease and not any self initiated act.

132. In ***Rodriguez*** (supra), Justice Sopinka, speaking for the Supreme Court of Canada, held:

Canadian Court has recognized a common law right of patients to refuse to consent to medical treatment or to demand that the treatment, once commenced, be withdrawn or discontinued. This right has been specially recognized to exist even if the withdrawal from or refusal of treatment may result in death.

133. In ***Secretary, Department of Health and Community Services (NT) v. JWB and SMB*** (1992) 66 AJLR 300: (1992) 175 CLR 218, the High Court of Australia acknowledged the fundamental right of personal inviolability. Justice McHugh observed that the voluntary decision of an adult person of sound mind as to what should be done to his or her body must be respected. It was further observed that under the doctrine of trespass, the common law respects and protects the autonomy of adult persons and also accepts the right to self-determination in respect of his or her body which can be altered only with the consent of the person concerned.

134. There is a presumption of capacity whereby an adult is presumed to have the capacity to consent to or to refuse medical treatment unless and until that presumption is rebutted. Butler-Sloss LJ, in ***Re MB (Medical Treatment)*** [1997] EWCA Civ 3093: [1997] 2 FLR 426, stated that in deciding whether a person has the capacity to make a particular decision, the ultimate question is whether that person suffers from some impairment or disturbance of mental functioning so as to render him or her incapable of making the decision. The consent may be vitiated if the individual concerned may not have been competent in law to give or refuse that consent; or even if the individual was competent in law, the decision has been obtained by undue influence or some other vitiating means; or the apparent consent or refusal does not extend to the particular situation; or the terms of the consent or refusal are ambiguous or uncertain; or if the consent or refusal is based on incorrect information or incorrect assumption. In circumstances where it is practicable for a medical practitioner to obtain consent to treatment, then, for the consent to be valid, it must be based on full information, including as to its risks and benefits.

135. Where it is not practicable for a medical practitioner to obtain consent for treatment and where the patient's life is in danger if appropriate treatment is not given, then the treatment may be administered without consent. This is justified by what is sometimes called the "emergency principle" or "principle of necessity". Usually, the medical practitioner treats the patient in accordance with his clinical judgment of what is in the patient's best interests. Lord Goff of Chieveley has rightly pointed out in ***F v. West Berkshire Health Authority*** (supra) that for the principle of necessity to apply, two conditions must be met:

(a) There must be "a necessity to act when it is not practicable to communicate with the assisted person"; and

(b) "the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person.

136. However, Lord Goff pointed out that the principle of necessity does not apply where the proposed action is contrary to the known wishes of the assisted person to the extent that he/she is capable of rationally forming such a wish. It follows that the principle of necessity cannot be relied upon to justify a particular form of medical treatment where the patient has given an advance care directive specifying that he/she does not wish to be so treated and where there is no reasonable basis for doubting the validity and applicability of that directive.

K. <u>Passive Euthanasia in the context of Article 21 of the Constitution:</u>

137. We have to restrict our deliberation to the issue whether euthanasia can come within the ambit and sweep of Article 21. Article 21 reads as follows:

21. Protection of life and personal liberty.--No person shall be deprived of his life or personal liberty except according to procedure established by law.

138. The word liberty' is the sense and realization of choice of the attributes associated with the said choice; and the term life' is the aspiration to possess the same in a dignified manner. The two are intrinsically interlinked. Liberty impels an individual to change and life welcomes the change and the movement. Life does not intend to live sans liberty as it would be, in all possibility, a meaningless survival. There is no doubt that no fundamental right is absolute, but any restraint imposed on liberty has to be reasonable. Individual liberty aids in developing one's growth of mind and assert individuality. She/he may not be in a position to Rule others but individually, she/he has the authority over the body and mind. The liberty of personal sovereignty over body and mind strengthens the faculties in a person. It helps in their cultivation. Roscoe Pound, in one of his lectures, has aptly said:

... although we think socially, we must still think of individual interests, and of that greatest of all claims which a human being may make, the claim to assert his individuality, to exercise freely the will and the reason which God has given him. We must emphasize the social interest in the moral and social life of the individual, but we must remember that it is the life of a free-willing being.

139. Liberty allows freedom of speech, association and dissemination without which the society may face hurdles in attaining the requisite maturity. History is replete with narratives how the thoughts of individuals, though not accepted by the contemporaneous society, later on gained not only acceptance but also respect. One may not agree with Kantian rigorism, but one must appreciate that without the said doctrine, there could not have been dissemination of further humanistic principles. There is a danger in discouraging free thinking and curtailing the power of imagination. Holmes in ***Adkins v. Children's Hospital*** 261 US 525, 568 (1923) has observed:

It is merely an example of doing what you want to do, embodied in the word "liberty".

140. The concept of liberty perceives a hazard when it feels it is likely to become hollow. This necessarily means that there would be liberty available to individuals subject to permissible legal

restraint and it should be made clear that in that restraint, free ideas cannot be imprisoned by some kind of unknown terror. Liberty cannot be a slave because it constitutes the essential marrow of life and that is how we intend to understand the conception of liberty when we read it in association with the term life' as used in Article 21 of the Constitution. The great American playwright Tennessee Williams has said:

To be free is to have achieved your life.

141. Life as envisaged Under Article 21 has been very broadly understood by this Court. In ***Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and Ors.*** MANU/SC/0184/1982 : (1983) 1 SCC 124, the Court has held that the expression "life" does not merely connote animal existence or a continued drudgery through life. The expression life' has a much wider meaning and, therefore, where the outcome of a departmental enquiry is likely to adversely affect the reputation or livelihood of a person, some of the finer graces of human civilization which make life worth living would be jeopardized and the same can be put in jeopardy only by law which inheres fair procedures.

142. In ***Maneka Gandhi v. Union of India and Anr.*** MANU/SC/0133/1978 : (1978) 1 SCC 248, Krishna Iyer J., in his own inimitable style, states that among the great guaranteed rights, life and liberty are the first among equals carrying a universal connotation cardinal to a decent human order and protected by constitutional armour. Once liberty Under Article 21 is viewed in a truncated manner, several other freedoms fade out automatically. To sum up, personal liberty makes for the worth of the human person. Travel makes liberty worthwhile. 'Life' is a terrestrial opportunity for unfolding personality, rising to higher status, moving to fresh woods and reaching out to reality which makes our earthly journey a true fulfilment - not a tale told by an idiot full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of man is at the root of Article 21. In the absence of liberty, other freedoms are frozen.

143. In ***State of Andhra Pradesh v. Challa Ramkrishna Reddy and Ors.*** MANU/SC/0368/2000 : AIR 2000 SC 2083 : (2000) 5 SCC 712, this Court held that right to life is one of the basic human rights and it is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right. A prisoner, whether a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. The Court further ruled that on being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.

144. Having said so, we are required to advert to the issue whether passive euthanasia can only be conceived of through legislation or this Court can, for the present, provide for the same. We have already explained that the ratio laid down in ***Gian Kaur*** does not convey that the introduction of passive euthanasia can only be by legislation. In ***Aruna Shanbaug***, the two-Judge Bench has placed reliance on the Constitution Bench judgment in ***Gian Kaur*** to lay down the guidelines. If, eventually, we arrive at the conclusion that passive euthanasia comes within the sweep of Article 21 of the Constitution, we have no iota of doubt that this Court can lay down the guidelines.

145. We may clearly state here that the interpretation of the Constitution, especially fundamental rights, has to be dynamic and it is only such interpretative dynamism that breathes life into the written words. As far as Article 21 is concerned, it is imperative to mention that dynamism can, of course, infuse life into life and liberty as used in the said Article.

146. In this regard, we may reproduce a couple of paragraphs from ***Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr.*** MANU/SC/0439/1986 : (1986) 3 SCC 156. They read as under:

25. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have nourished, reached their peak and passed away. In the year 1625, Carew, C.J., while delivering the opinion of the House of Lords in *Re the Earldom of Oxford* in a dispute relating to the descent of that Earldom, said:

...and yet time hath his revolution, there must be a period and an end of all temporal things, *finis rerum*, an end of names and dignities, and whatsoever is terrene....

The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from *"The Rock"* said:

O perpetual revolution of configured stars, O perpetual recurrence of determined seasons, O world of spring and autumn, birth and dying; The endless cycle of idea and action, Endless invention, endless experiment.

26. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said: "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies

147. We approve the view in the aforesaid passages. Having approved the aforesaid principle, we are obliged to state that the fundamental rights in their connotative expanse are bound to engulf certain rights which really flow from the same. In ***M. Nagaraj and Ors. v. Union of India and Ors.*** MANU/SC/4560/2006 : (2006) 8 SCC 212, the Constitution Bench has ruled:

19. The Constitution is not an ephemeral legal document embodying a set of legal Rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges.

And again:

29.... constitutionalism is about limits and aspirations. According to Justice Brennan, interpretation of the Constitution as a written text is concerned with aspirations and fundamental principles. In his Article titled "Challenge to the Living Constitution" by Herman Belz, the author says that the Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles....

148. In this context, we may make a reference to a three-Judge Bench decision in ***V.C. Rangadurai v. D. Gopalan and Ors.*** MANU/SC/0029/1978 : (1979) 1 SCC 308 wherein the majority, while dealing with Section 35(3) of the Advocates Act, 1961, stated:

8.... we may note that words grow in content with time and circumstance, that phrases are flexible in semantics, that the printed text is a set of vessels into which the court may pour appropriate judicial meaning. That statute is sick which is allergic to change in sense which the times demand and the text does not countermand. That court is superficial which stops with the cognitive and declines the creative function of construction. So, we take the view that 'quarrying' more meaning is permissible out of Section 35(3) and the appeal provisions, in the brooding background of social justice, sanctified by Article 38, and of free legal aid enshrined by Article 39A of the Constitution.

The learned Judges went on to say:

11.... Judicial 'Legisputation' to borrow a telling phrase of J. Cohen, is not legislation but application of a given legislation to new or unforeseen needs and situations broadly falling within the statutory provision. In that sense, 'interpretation is inescapably a kind of legislation' (The Interpretation and Application of Statutes, Read Dickerson, p. 238). Ibid. p. 238. This is not legislation stricto sensu but application, and is within the court's province.

149. The aforesaid authorities clearly show the power that falls within the province of the Court. The language employed in the constitutional provision should be liberally construed, for such provision can never remain static. It is because stasticity would mar the core which is not the intent.

K. 1 <u>Individual Dignity as a facet of Article 21:</u>

150. Dignity of an individual has been internationally recognized as an important facet of human rights in the year 1948 itself with the enactment of the Universal Declaration of Human Rights. Human dignity not only finds place in the Preamble of this important document but also in Article 1 of the same. It is well known that the principles set out in UDHR are of paramount importance and are given utmost weightage while interpreting human rights all over the world. The first and foremost responsibility fixed upon the State is the protection of human dignity without which any other right would fall apart. Justice Brennan in his book *The* Constitution *of the United States: Contemporary Ratification* has referred to the Constitution as "a sparkling vision of the supremacy of the human dignity of every individual.

151. In fact, in the case of ***Christine Goodwin v. the United Kingdom*** [2002] ECHR 588 the European Court of Human Rights, speaking in the context of the Convention for the Protection of

Human Rights and Fundamental Freedoms, has gone to the extent of stating that "the very essence of the Convention is respect for human dignity and human freedom". In the South African case of ***S v. Makwanyane*** 1995 (3) SA 391 O' Regan J. stated in the Constitutional Court that "without dignity, human life is substantially diminished."

152. Having noted the aforesaid, it is worthy to note that our Court has expanded the spectrum of Article 21. In the latest nine-Judge Bench decision in ***K.S. Puttaswamy and Anr. v. Union of India and Ors.*** MANU/SC/1044/2017 : (2017) 10 SCC 1, dignity has been reaffirmed to be a component under the said fundamental right.

Human dignity is beyond definition. It may at times defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism. But what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling, and, as stated earlier, it deserves respect even when the person is dead and described as a 'body'.
That is why, the Constitution Bench in ***M. Nagaraj*** (supra) lays down:

...It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence....

153. The concept and value of dignity requires further elaboration since we are treating it as an inextricable facet of right to life that respects all human rights that a person enjoys. Life is basically self-assertion. In the life of a person, conflict and dilemma are expected to be normal phenomena. Oliver Wendell Holmes, in one of his addresses, quoted a line from a Latin poet who had uttered the message, "Death plucks my ear and says, Live-I am coming". That is the significance of living. But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently, should he/she be "guinea pig" for some kind of experiment? The answer has to be an emphatic "No" because such futile waiting mars the pristine concept of life, corrodes the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy.<mpara>
Recently, in ***K.S. Puttaswamy*** (supra), one of us (Dr. Chandrachud J.), while speaking about life and dignity, has observed:

118. Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions -- the autonomy of the individual -- and not to dictate those decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest

sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

154. In ***Mehmood Nayyar Azam v. State of Chhattisgarh and Ors.*** MANU/SC/0615/2012 : (2012) 8 SCC 1, a two-Judge Bench held thus:

Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegragably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence".

155. The aforesaid authority emphasizes the seminal value of life that is inherent in the concept of life. Dignity does not recognize or accept any nexus with the status or station in life. The singular principle that it pleasantly gets beholden to is the integral human right of a person. Law gladly takes cognizance of the fact that dignity is the most sacred possession of a man. And the said possession neither loses its sanctity in the process of dying nor evaporates when death occurs. In this context, reference to a passage from ***Vikas Yadav v. State of Uttar Pradesh and Ors.*** MANU/SC/1167/2016 : (2016) 9 SCC 541 is note worthy. The two Judge Bench of this Court, while dealing with the imposition of a fixed term sentence Under Section 302 Indian Penal Code, took note of the fact that the High Court had observed the magnitude of vengeance of the Accused and the extent to which they had gone to destroy the body of the deceased. Keeping in view the findings of the High Court, this Court stated:

From the evidence brought on record as well as the analysis made by the High Court, it is demonstrable about the criminal proclivity of the Accused persons, for they have neither the respect for human life nor did they have any concern for the dignity of a dead person. They had deliberately comatosed the feeling that even in death a person has dignity and when one is dead deserves to be treated with dignity. That is the basic human right. The brutality that has been displayed by the Accused persons clearly exposes the depraved state of mind.

The aforesaid passage shows the pedestal on which the Court has placed the dignity of an individual.

156. Reiterating that dignity is the most fundamental aspect of right to life, it has been held in the celebrated case of ***Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*** MANU/SC/0517/1981 : (1981) 1 SCC 608:

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation protanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights.

157. In ***National Legal Services Authority v. Union of India and Ors.*** MANU/SC/0309/2014 : (2014) 5 SCC 438, the Apex Court has held that

there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.

158. In ***Shabnam v. Union of India and Anr.*** MANU/SC/0669/2015 : (2015) 6 SCC 702, it has been further held that-

This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being 'as a human being'. Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is armed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity.

159. In ***Gian Kaur*** (supra), the Constitution Bench indicates acceleration of the conclusion of the process of death which has commenced and this indication, as observed by us, allows room for expansion. In the said case, the Court was primarily concerned with the question of constitutional validity of Sections 306 and 309 of Indian Penal Code. The Court was conscious of the fact that

the debate on euthanasia was not relevant for deciding the question under consideration. The Court, however, in no uncertain terms expounded that the word "life" in Article 21 has been construed as life with human dignity and it takes within its ambit the "right to die with dignity" being part of the "right to live with dignity". Further, the "right to live with human dignity" would mean existence of such a right upto the end of natural life which would include the right to live a dignified life upto the point of death including the dignified procedure of death. While adverting to the situation of a dying man who is terminally ill or in a persistent vegetative state where he may be permitted to terminate it by a premature extinction of his life, the Court observed that the said category of cases may fall within the ambit of "right to die with dignity" as part of the right to live with dignity when death due to the termination of natural life is certain and imminent and the process of natural death has commenced, for these are not cases of extinguishing life but only of accelerating the conclusion of the process of natural death which has already commenced. The sequitur of this exposition is that there is little doubt that a dying man who is terminally ill or in a persistent vegetative state can make a choice of premature extinction of his life as being a facet of Article 21 of the Constitution. If that choice is guaranteed being part of Article 21, there is no necessity of any legislation for effectuating that fundamental right and more so his natural human right. Indeed, that right cannot be an absolute right but subject to regulatory measures to be prescribed by a suitable legislation which, however, must be reasonable restrictions and in the interests of the general public. In the context of the issue under consideration, we must make it clear that as part of the right to die with dignity in case of a dying man who is terminally ill or in a persistent vegetative state, only passive euthanasia would come within the ambit of Article 21 and not the one which would fall within the description of active euthanasia in which positive steps are taken either by the treating physician or some other person. That is because the right to die with dignity is an intrinsic facet of Article 21. The concept that has been touched deserves to be concretised, the thought has to be realized. It has to be viewed from various angles, namely, legal permissibility, social and ethical ethos and medical values.

160. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognize such dynamism.

The Constitution Bench in ***Gian Kaur***, as stated earlier, distinguishes attempt to suicide and abetment of suicide from acceleration of the process of natural death which has commenced. The authorities, we have noted from other jurisdictions, have observed the distinctions between the administration of lethal injection or certain medicines to cause painless death and non-administration of certain treatment which can prolong the life in cases where the process of dying that has commenced is not reversible or withdrawal of the treatment that has been given to the patient because of the absolute absence of possibility of saving the life. To explicate, the first part relates to an overt act whereas the second one would come within the sphere of informed consent and authorized omission. The omission of such a nature will not invite any criminal liability if such action is guided by certain safeguards. The concept is based on non-prolongation of life where there is no cure for the state the patient is in and he, under no circumstances, would have liked to have such a degrading state. The words "no cure" have to be understood to convey that the patient

remains in the same state of pain and suffering or the dying process is delayed by means of taking recourse to modern medical technology. It is a state where the treating physicians and the family members know fully well that the treatment is administered only to procrastinate the continuum of breath of the individual and the patient is not even aware that he is breathing. Life is measured by artificial heartbeats and the patient has to go through this undignified state which is imposed on him. The dignity of life is denied to him as there is no other choice but to suffer an avoidable protracted treatment thereby thus indubitably casting a cloud and creating a dent in his right to live with dignity and face death with dignity, which is a preserved concept of bodily autonomy and right to privacy. In such a stage, he has no old memories or any future hopes but he is in a state of misery which nobody ever desires to have. Some may also silently think that death, the inevitable factum of life, cannot be invited. To meet such situations, the Court has a duty to interpret Article 21 in a further dynamic manner and it has to be stated without any trace of doubt that the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying. Here, the issue of choice also comes in. Thus analysed, we are disposed to think that such a right would come within the ambit of Article 21 of the Constitution.

L. <u>Right of self-determination and individual autonomy:</u>

161. Having dealt with the right to acceleration of the process of dying a natural death which is arrested with the aid of modern innovative technology as a part of Article 21 of the Constitution, it is necessary to address the issues of right of self-determination and individual autonomy.

162. John Rawls says that the liberal concept of autonomy focuses on choice and likewise, self-determination is understood as exercised through the process of choosing[1]. The respect for an individual human being and in particular for his right to choose how he should live his own life is individual autonomy or the right of self-determination. It is the right against non-interference by others, which gives a competent person who has come of age the right to make decisions concerning his or her own life and body without any control or interference of others. Lord Hoffman, in ***Reeves v. Commissioner of Police of the Metropolis*** [2000] 1 AC 360, 379 has stated:

Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death.

163. In the context of health and medical care decisions, a person's exercise of self-determination and autonomy involves the exercise of his right to decide whether and to what extent he/she is willing to submit himself/herself to medical procedures and treatments, choosing amongst the available alternative treatments or, for that matter, opting for no treatment at all which, as per his or her own understanding, is in consonance with his or her own individual aspirations and values.

164. In ***Airedale*** (supra), Lord Goff has expressed that it is established that the principle of self-determination requires that respect must be given to the wishes of the patient so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his/her life would or might be prolonged, the doctors responsible for his/her care must give effect to his/her wishes, even though they do not consider it to be in his/her best interests to do so and to

this extent, the principle of sanctity of human life must yield to the principle of self-determination. Lord Goff further says that the doctor's duty to act in the best interests of his patient must likewise be qualified with the patient's right of self determination. Therefore, as far as the United Kingdom is concerned, it is generally clear that whenever there is a conflict between a capable adult's exercise of the right of self-determination and the State's interest in preserving human life by treating it as sanctimonious, the right of the individual must prevail.

165. In the United States, the aspect of self-determination and individual autonomy is concretised in law as all fifty States along with the District of Columbia, the capital, which is commonly referred as Washington D.C., have passed legislations upholding different forms of Advance Directives. In the United States, even before the enactment of the said laws, a terminally ill person was free to assert the right to die as an ancillary right to the constitutionally protected right to privacy. In ***In Re Quinlan*** (supra), where a 21 year old girl in chronic PVS was on ventilator support, the Court, while weighing Quinlan's right to privacy qua the State's interest in preserving human life, found that as the degree of bodily invasion increases and the prognosis for the patient's recovery dims, the patient's right to privacy increases and the State's interest weakens. The Supreme Court of New Jersey finally ruled that the unwritten constitutional right of privacy was broad enough to encompass a patient's decision to decline medical treatment in certain circumstances. Again, in ***Re Jobes*** (1987) 108 N.J. 394, which was also a case concerned with a PVS patient, the Court, following the decision in ***In Re Quinlan***, upheld the principle of self determination and autonomy of an incompetent person.

166. The Canadian Code of Criminal Procedure asserts and protects the sanctity of life in a number of ways which directly confront the autonomy of the terminally ill in their medical decision making. However, the Supreme Court of Canada in ***Reibl v. Hughes*** [1980 2 SCR 880 at 890-891 approved an oft-quoted statement of Cardozo J. in ***Schloendorff*** (supra) that "every human being of adult years and sound mind has a right to determine what shall be done with his own body" and Chief Justice Laskin in ***Reibl*** (supra) has further added that battery would lie where surgery or treatment was performed without consent or where apart from emergency situations, surgery or medical treatment was given beyond that to which there was consent. Thus, the Supreme Court of Canada suggested that competent adults have the right to make their own medical decisions even if such decisions are unwise.

167. In ***Aruna Shanbaug*** (supra), this Court has observed that autonomy means the right to self-determination where the informed patient has a right to choose the manner of his treatment. To be autonomous the patient should be competent to make decisions and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a Living Will, or the wishes of surrogates acting on his behalf ('substituted judgment') are to be respected. The surrogate is expected to represent what the patient may have decided had he/she been competent or to act in the patient's best interest. It is expected that a surrogate acting in the patient's best interest follows a course of action because it is best for the patient, and is not influenced by personal convictions, motives or other considerations.

168. Thus, enquiring into common law and statutory rights of terminally ill persons in other jurisdictions would indicate that all adults with the capacity to consent have the common law right to refuse medical treatment and the right of self determination.

169. We may, however, add a word of caution that doctors would be bound by the choice of self-determination made by the patient who is terminally ill and undergoing a prolonged medical treatment or is surviving on life support, subject to being satisfied that the illness of the patient is incurable and there is no hope of his being cured. Any other consideration cannot pass off as being in the best interests of the patient.

M. <u>Social morality, medical ethicality and State interest:</u>

170. Having dwelt upon the issue of self-determination, we may presently delve into three aspects, namely, social morality, medical ethicality and the State interest. The aforesaid concepts have to be addressed in the constitutional backdrop. We may clearly note that the society at large may feel that a patient should be treated till he breathes his last breath and the treating physicians may feel that they are bound by their Hippocratic oath which requires them to provide treatment and save life and not to put an end to life by not treating the patient. The members of the family may remain in a constant state of hesitation being apprehensive of many a social factor which include immediate claim of inheritance, social stigma and, sometimes, the individual guilt. The Hippocratic oath taken by a doctor may make him feel that there has been a failure on his part and sometimes also make him feel scared of various laws. There can be allegations against him for negligence or criminal culpability.

171. In this regard, two aspects are to be borne in mind. First, withdrawal of treatment in an irreversible situation is different from not treating or attending to a patient and second, once passive euthanasia is recognized in law regard being had to the right to die with dignity when life is ebbing out and when the prolongation is done sans purpose, neither the social morality nor the doctors' dilemma or fear will have any place. It is because the sustenance of dignity and self-respect of an individual is inhered in the right of an individual pertaining to life and liberty and there is necessity for this protection. And once the said right comes within the shelter of Article 21 of the Constitution, the social perception and the apprehension of the physician or treating doctor regarding facing litigation should be treated as secondary because the primacy of the right of an individual in this regard has to be kept on a high pedestal.

172. It is to be borne in mind that passive euthanasia fundamentally connotes absence of any overt act either by the patient or by the doctors. It also does not involve any kind of overt act on the part of the family members. It is avoidance of unnecessary intrusion in the physical frame of a person, for the inaction is meant for smooth exit from life. It is paramount for an individual to protect his dignity as an inseparable part of the right to life which engulfs the dignified process of dying sans pain, sans suffering and, most importantly, sans indignity.

173. There are philosophers, thinkers and also scientists who feel that life is not confined to the physical frame and biological characteristics. But there is no denial of the fact that life in its connotative expanse intends to search for its meaning and find the solution of the riddle of existence for which some lean on atheism and some vouchsafe for faith and yet some stand by the ideas of an agnostic. However, the legal fulcrum has to be how Article 21 of the Constitution is understood. If a man is allowed to or, for that matter, forced to undergo pain, suffering and state of indignity because of unwarranted medical support, the meaning of dignity is lost and the search for meaning of life is in vain.

N. Submissions of the States

174. In this context, we may reflect on the submissions advanced on behalf of certain States. As stated earlier, there is a categorical assertion that protection of human life is paramount and it is obligatory on behalf of the States to provide treatment and to see that no one dies because of lack of treatment and to realise the principles enshrined in Chapter IV of the Constitution. Emphasis has been laid on the State interest and the process of abuse that can take place in treating passive euthanasia as permissible in law. To eliminate the possibility of abuse, safeguards can be taken and guidelines can be framed. But on the plea of possibility of abuse, the dignity in the process of dying being a facet of Article 21 should not be curbed. Mr. Datar, learned senior Counsel in the course of arguments, has advanced submissions in support of passive euthanasia and also given suggestions spelling out the guidelines for advance directive and also implementation of the same when the patient is hospitalized. The said aspect shall be taken into consideration while giving effect to the advance directive and also taking steps for withdrawal of medical support.

O. Submissions of Intervenor (Society for the Right to Die with Dignity):

175. Mr. Mohta, learned Counsel appearing for the intervenor, that is, Society for the Right to Die with Dignity, has drawn our attention to certain articles and submitted that from the days of Plato to the time of Sir Thomas More and other thinkers, painless and peaceful death has been advocated. He would also submit that ancient wisdom of India taught people not to fear death but to aspire for deathlessness and conceive it as "Mahaprasthana". It is his submission that in the modern State, the State interest should not over-weigh the individual interest in the sphere of a desire to die a peaceful death which basically conveys refusal of treatment when the condition of the individual suffering from a disease is irreversible. The freedom of choice in this sphere, as Mr. Mohta would put it, serves the cause of humanitarian approach which is not the process to put an end to life by taking a positive action but to allow a dying patient to die peaceably instead of prolonging the process of dying without purpose that creates a dent in his dignity.

176. The aforesaid argument, we have no hesitation to say, has force. It is so because it is in accord with the constitutional precept and fosters the cherished value of dignity of an individual. It saves a helpless person from uncalled for and unnecessary treatment when he is considered as merely a creature whose breath is felt or measured because of advanced medical technology. His "being" exclusively rests on the mercy of the technology which can prolong the condition for some period. The said prolongation is definitely not in his interest. On the contrary, it tantamounts to destruction of his dignity which is the core value of life. In our considered opinion, in such a situation, an individual interest has to be given priority over the State interest.

P. Advance Directive/Advance Care Directive/Advance Medical Directive:

177. In order to overcome the difficulty faced in case of patients who are unable to express their wishes at the time of taking the decision, the concept of Advance Medical Directives emerged in various countries. The proponents of Advance Medical Directives contend that the concept of patient autonomy for incompetent patients can be given effect to, by giving room to new methods by which incompetent patients can beforehand communicate their choices which are made while they are competent. Further, it may be argued that failure to recognize Advance Medical Directives

would amount to non-facilitation of the right to have a smoothened dying process. That apart, it accepts the position that a competent person can express her/his choice to refuse treatment at the time when the decision is required to be made.

178. Advance Directives for health care go by various names in different countries though the objective by and large is the same, that is, to specify an individual's health care decisions and to identify persons who will take those decisions for the said individual in the event he is unable to communicate his wishes to the doctor.

179. The Black's Law Dictionary defines an advance medical directive as, "a legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate". A living will, on the other hand, is a document prescribing a person's wishes regarding the medical treatment the person would want if he was unable to share his wishes with the health care provider.

180. Another type of advance medical directive is medical power of attorney. It is a document which allows an individual (principal) to appoint a trusted person (agent) to take health care decisions when the principal is not able to take such decisions. The agent appointed to deal with such issues can interpret the principal's decisions based on their mutual knowledge and understanding.

181. Advance Directives have gained lawful recognition in several jurisdictions by way of legislation and in certain countries through judicial pronouncements. In vast majority of the States in USA, it is mandatory for the doctors to give effect to the wishes of the patients as declared by them in their advance directives. California was the first State to legally sanction living will. The United States Congress in 1990, with the objective of protecting the fundamental principles of self-autonomy and self-determination, enacted the Patient Self-Determination Act (PSDA) which acknowledged the rights of the patient to either refuse or accept treatment. Following this, all 50 States enacted legislations adopting advance directives. Apart from this, several States of USA also permit the patients to appoint a health care proxy which becomes effective only when the patient is unable to make decisions.

182. In order to deal with the technicalities and intricacies associated with an instrument as complex as an Advance Directive, several derivatives/versions have evolved over time. The National Right to Life Committee (NRLC) in the United States came up with a version of a living will which was called 'Will to Live" which is a safeguard of the lives of patients who wish to continue treatment and not refuse life-sustaining treatment. This form of active declaration gains importance in cases where the will of the patient cannot be deciphered with certainty and the Courts order withdrawal of life supporting treatment where they deem the life of the patient as not worthwhile.

183. Yet another measure for finding and accessing the patient's advance directive was the setting up of the U.S. Living Will Registry. As per this model, it was obligatory on the part of the hospital administration to ask a patient, who would be admitted, if he/she had an advance directive and store the same on their medical file. A special power to the Advance Directives introduced by Virginia was the "Ulysses Clause" which accords protection in situations when the patient goes

into relapse in his/her condition, that is, schizophrenia and refuses treatment which they would not refuse if not for the said relapse.

184. A new type of advance directive is the "Do Not Resuscitate Order" (DNRO) in Florida which is a form of patient identification device developed by the Department of Health to identify people who do not wish to be resuscitated in the event of respiratory or cardiac arrest. In Florida State of United States, where an unconscious patient with the phrase "Do Not Resuscitate" tattooed on his chest was brought in paramedics, the doctors were left in a conundrum whether the message was not to provide any medical treatment to the patient and ultimately, the doctors opted not to perform any medical procedure and the patient, thereafter, died. This case highlights the dynamics involved in the concept of advanced directives due to the intricacies surrounding the concept.

185. The Mental Capacity Act governs the law relating to advance directives in the UK. Specific guidelines as to the manner in which the advance directive should be drafted and the necessary conditions that need to be fulfilled in order to give effect to the directives have been categorically laid out in the said piece of legislation. A few specific requirements in case of refusal of life sustaining treatment is the verification of the decision-maker that the refusal operates even if life is at risk and that the directive should be in the written form and signed and witnessed. However, an advance directive refusing food and water has not been recognized under this statute. Further, the Act recognizes the rights of the patient to appoint a health care proxy who is referred to as "lasting power of attorney". In order for the proxy decision-maker so appointed to be competent to consent or refuse life-sustaining treatment of the decision-maker, an express provision delegating the said authority should be a part of the advance directive. In general, as per the settled law vide the decision in ***Airedale***, life sustaining treatment including artificial nutrition and hydration can be withdrawn if the patient consents to it and in case of incompetent patients, if it is in their best interest to do so.

186. Australia too, by way of legislation, has well established principles governing Advance Health Directives. Except Tasmania, all states have a provision for Advance Directives. The Advance Directives as postulated by the different legislations in each State in Australia differ in nature and their binding effect but the objective of every type remains the same, that is, preservation of the patient's autonomy. There are several circumstances when the advance health care directives or certain provisions contained therein become inoperative.

187. In Queensland, the directive becomes inoperative if the medical health practitioner is of the opinion that giving effect to the directive is inconsistent with good medical practice or in case of a change in circumstances, including new advances in medicine, medical practice and technology, to the extent that giving effect to the directive is inappropriate.

188. In the State of Victoria, an advance directive ceases to apply due to a change in the condition of the patient to the extent that the condition in relation to which the advance directive was given no longer exists. Further, South Australia permits a medical practitioner to refuse to comply with a certain provision in an advance directive in case he/she has enough reason to believe that the patient did not intend the provision to apply in certain conditions or the provision would not reflect the present wishes of the patient. In Western Australia, the occurrence of a change in circumstances which either the decision maker could have never anticipated at the time of making the directive

or which could have the effect on a reasonable person in the position of the decision maker to change his/her mind regarding the treatment decision would invalidate the said treatment decision in the directive. In Northern Territory, an advance consent direction is disregarded in case giving effect to it would result in such unacceptable pain and suffering to the patient or would be so unjustifiable and rather it is more reasonable to override the wishes of the patient. Furthermore, if the medical practitioner is of the opinion that the patient would have never intended the advance consent direction to apply in the circumstances, then the advance consent direction need not be complied with.

189. Canada does not have a federal legislation exclusively to regulate advance directives. Rather, there are eleven different provincial approaches governing the law on passive euthanasia and advance directives in Canada. The provinces of Alberta, Saskatchewan, Manitoba, Prince Edward Island, Newfoundland and Labrador and Northwest Territories have a provision for both proxy and instructional directives, whereas, the States of British Columbia, Ontario, Quebec and Yukon provide only for appointment of a proxy while simultaneously recognizing the binding nature of previously given instructions. The respective legislations of the provinces/territories differ from one another on several criteria, for instance, minimum age requirement and other formalities to be complied with, such as written nature of the advance directive, etc. Furthermore, some of the provinces mandate a prior consultation with a lawyer. Wishes orally expressed have also been recognized by some provinces.

190. Having dealt with the principles in vogue across the globe, we may presently proceed to deal with the issue of advance medical directive which should be ideal in our country. Be it noted, though the learned Counsel for the Petitioner has used the words "living will", yet we do not intend to use the said terminology. We have already stated that safeguards and guidelines are required to be provided. First, we shall analyse the issue of legal permissibility of the advance medical directive. In other jurisdictions, the concepts of "living will" and involvement of Attorney are stipulated. There is no legal framework in our country as regards the Advance Medical Directive but we are obliged to protect the right of the citizens as enshrined Under Article 21 of the Constitution. It is our constitutional obligation. As noticed earlier, the two-Judge Bench in ***Aruna Shanbaug*** (supra) has provided for approaching the High Court Under Article 226 of the Constitution. The directions and guidelines to be given in this judgment would be comprehensive and would also cover the situation dealt with ***Aruna Shanbaug*** case.

191. In our considered opinion, Advance Medical Directive would serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity. The said directive, we think, will dispel many a doubt at the relevant time of need during the course of treatment of the patient. That apart, it will strengthen the mind of the treating doctors as they will be in a position to ensure, after being satisfied, that they are acting in a lawful manner. We may hasten to add that Advance Medical Directive cannot operate in abstraction. There has to be safeguards. They need to be spelt out. We enumerate them as follows:

(a) Who can execute the Advance Directive and how?

(i) The Advance Directive can be executed only by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document.

(ii) It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information.

(iii) It should have characteristics of an informed consent given without any undue influence or constraint.

(iv) It shall be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

(b) What should it contain?

(i) It should clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.

(ii) It should be in specific terms and the instructions must be absolutely clear and unambiguous.

(iii) It should mention that the executor may revoke the instructions/authority at any time.

(iv) It should disclose that the executor has understood the consequences of executing such a document.

(v) It should specify the name of a guardian or close relative who, in the event of the executor becoming incapable of taking decision at the relevant time, will be authorized to give consent to refuse or withdraw medical treatment in a manner consistent with the Advance Directive.

(vi) In the event that there is more than one valid Advance Directive, none of which have been revoked, the most recently signed Advance Directive will be considered as the last expression of the patient's wishes and will be given effect to.

(c) How should it be recorded and preserved?

(i) The document should be signed by the executor in the presence of two attesting witnesses, preferably independent, and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC) so designated by the concerned District Judge.

(ii) The witnesses and the jurisdictional JMFC shall record their satisfaction that the document has been executed voluntarily and without any coercion or inducement or compulsion and with full understanding of all the relevant information and consequences.

(iii) The JMFC shall preserve one copy of the document in his office, in addition to keeping it in digital format.

(iv) The JMFC shall forward one copy of the document to the Registry of the jurisdictional District Court for being preserved. Additionally, the Registry of the District Judge shall retain the document in digital format.

(v) The JMFC shall cause to inform the immediate family members of the executor, if not present at the time of execution, and make them aware about the execution of the document.

(vi) A copy shall be handed over to the competent officer of the local Government or the Municipal Corporation or Municipality or Panchayat, as the case may be. The aforesaid authorities shall nominate a competent official in that regard who shall be the custodian of the said document.

(vii) The JMFC shall cause to handover copy of the Advance Directive to the family physician, if any.

(d) When and by whom can it be given effect to?

(i) In the event the executor becomes terminally ill and is undergoing prolonged medical treatment with no hope of recovery and cure of the ailment, the treating physician, when made aware about the Advance Directive, shall ascertain the genuineness and authenticity thereof from the jurisdictional JMFC before acting upon the same.

(ii) The instructions in the document must be given due weight by the doctors. However, it should be given effect to only after being fully satisfied that the executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the executor is incurable or there is no hope of him/her being cured.

(iii) If the physician treating the patient (executor of the document) is satisfied that the instructions given in the document need to be acted upon, he shall inform the executor or his guardian/close relative, as the case may be, about the nature of illness, the availability of medical care and consequences of alternative forms of treatment and the consequences of remaining untreated. He must also ensure that he believes on reasonable grounds that the person in question understands the information provided, has cogitated over the options and has come to a firm view that the option of withdrawal or refusal of medical treatment is the best choice.

(iv) The physician/hospital where the executor has been admitted for medical treatment shall then constitute a Medical Board consisting of the Head of the treating Department and at least three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years who, in turn, shall visit the patient in the presence of his guardian/close relative and form an opinion whether to certify or not to certify carrying out the instructions of withdrawal or refusal of further medical treatment. This decision shall be regarded as a preliminary opinion.

(v) In the event the Hospital Medical Board certifies that the instructions contained in the Advance Directive ought to be carried out, the physician/hospital shall forthwith inform the jurisdictional Collector about the proposal. The jurisdictional Collector shall then immediately constitute a Medical Board comprising the Chief District Medical Officer of the concerned district as the Chairman and three expert doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years (who were not members of the previous Medical Board of the hospital). They shall jointly visit the hospital where the patient is admitted and if they concur with the initial decision of the Medical Board of the hospital, they may endorse the certificate to carry out the instructions given in the Advance Directive.

(vi) The Board constituted by the Collector must beforehand ascertain the wishes of the executor if he is in a position to communicate and is capable of understanding the consequences of withdrawal of medical treatment. In the event the executor is incapable of taking decision or develops impaired decision making capacity, then the consent of the guardian nominated by the executor in the Advance Directive should be obtained regarding refusal or withdrawal of medical treatment to the executor to the extent of and consistent with the clear instructions given in the Advance Directive.

(vii) The Chairman of the Medical Board nominated by the Collector, that is, the Chief District Medical Officer, shall convey the decision of the Board to the jurisdictional JMFC before giving effect to the decision to withdraw the medical treatment administered to the executor. The JMFC shall visit the patient at the earliest and, after examining all aspects, authorise the implementation of the decision of the Board.

(viii) It will be open to the executor to revoke the document at any stage before it is acted upon and implemented.

(e) What if permission is refused by the Medical Board?

(i) If permission to withdraw medical treatment is refused by the Medical Board, it would be open to the executor of the Advance Directive or his family members or even the treating doctor or the hospital staff to approach the High Court by way of writ petition Under Article 226 of the Constitution. If such application is filed before the High Court, the Chief Justice of the said High Court shall constitute a Division Bench to decide upon grant of approval or to refuse the same. The High Court will be free to constitute an independent Committee consisting of three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years.

(ii) The High Court shall hear the application expeditiously after affording opportunity to the State counsel. It would be open to the High Court to constitute Medical Board in terms of its order to examine the patient and submit report about the feasibility of acting upon the instructions contained in the Advance Directive.

(iii) Needless to say that the High Court shall render its decision at the earliest as such matters cannot brook any delay and it shall ascribe reasons specifically keeping in mind the principles of "best interests of the patient".

(f) Revocation or inapplicability of Advance Directive

(i) An individual may withdraw or alter the Advance Directive at any time when he/she has the capacity to do so and by following the same procedure as provided for recording of Advance Directive. Withdrawal or revocation of an Advance Directive must be in writing.

(ii) An Advance Directive shall not be applicable to the treatment in question if there are reasonable grounds for believing that circumstances exist which the person making the directive did not anticipate at the time of the Advance Directive and which would have affected his decision had he anticipated them.

(iii) If the Advance Directive is not clear and ambiguous, the concerned Medical Boards shall not give effect to the same and, in that event, the guidelines meant for patients without Advance Directive shall be made applicable.

(iv) Where the Hospital Medical Board takes a decision not to follow an Advance Directive while treating a person, then it shall make an application to the Medical Board constituted by the Collector for consideration and appropriate direction on the Advance Directive.

192. It is necessary to make it clear that there will be cases where there is no Advance Directive. The said class of persons cannot be alienated. In cases where there is no Advance Directive, the procedure and safeguards are to be same as applied to cases where Advance Directives are in existence and in addition there to, the following procedure shall be followed:

(i) In cases where the patient is terminally ill and undergoing prolonged treatment in respect of ailment which is incurable or where there is no hope of being cured, the physician may inform the hospital which, in turn, shall constitute a Hospital Medical Board in the manner indicated earlier. The Hospital Medical Board shall discuss with the family physician and the family members and record the minutes of the discussion in writing. During the discussion, the family members shall be apprised of the pros and cons of withdrawal or refusal of further medical treatment to the patient and if they give consent in writing, then the Hospital Medical Board may certify the course of action to be taken. Their decision will be regarded as a preliminary opinion.

(ii) In the event the Hospital Medical Board certifies the option of withdrawal or refusal of further medical treatment, the hospital shall immediately inform the jurisdictional Collector. The jurisdictional Collector shall then constitute a Medical Board comprising the Chief District Medical Officer as the Chairman and three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years. The Medical Board constituted by the Collector shall visit the hospital for physical examination of the patient and, after studying the medical papers, may concur with the opinion of the Hospital Medical Board. In that event,

intimation shall be given by the Chairman of the Collector nominated Medical Board to the JMFC and the family members of the patient.

(iii) The JMFC shall visit the patient at the earliest and verify the medical reports, examine the condition of the patient, discuss with the family members of the patient and, if satisfied in all respects, may endorse the decision of the Collector nominated Medical Board to withdraw or refuse further medical treatment to the terminally ill patient.

(iv) There may be cases where the Board may not take a decision to the effect of withdrawing medical treatment of the patient on the Collector nominated Medical Board may not concur with the opinion of the hospital Medical Board. In such a situation, the nominee of the patient or the family member or the treating doctor or the hospital staff can seek permission from the High Court to withdraw life support by way of writ petition Under Article 226 of the Constitution in which case the Chief Justice of the said High Court shall constitute a Division Bench which shall decide to grant approval or not. The High Court may constitute an independent Committee to depute three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years after consulting the competent medical practitioners. It shall also afford an opportunity to the State counsel. The High Court in such cases shall render its decision at the earliest since such matters cannot brook any delay. Needless to say, the High Court shall ascribe reasons specifically keeping in mind the principle of "best interests of the patient"..

193. Having said this, we think it appropriate to cover a vital aspect to the effect the life support is withdrawn, the same shall also be intimated by the Magistrate to the High Court. It shall be kept in a digital format by the Registry of the High Court apart from keeping the hard copy which shall be destroyed after the expiry of three years from the death of the patient.

194. Our directions with regard to the Advance Directives and the safeguards as mentioned hereinabove shall remain in force till the Parliament makes legislation on this subject.

Q. <u>Conclusions in seriatim:</u>

195. In view of the aforesaid analysis, we record our conclusions in seriatim:

(i) A careful and precise perusal of the judgment in ***Gian Kaur*** (supra) case reflects the right of a dying man to die with dignity when life is ebbing out, and in the case of a terminally ill patient or a person in PVS, where there is no hope of recovery, accelerating the process of death for reducing the period of suffering constitutes a right to live with dignity.

(ii) The Constitution Bench in ***Gian Kaur*** (supra) has not approved the decision in ***Airedale*** (supra) inasmuch as the Court has only made a brief reference to the ***Airedale*** case.

(iii) It is not the ratio of ***Gian Kaur*** (supra) that passive euthanasia can be introduced only by legislation.

(iv) The two-Judge bench in ***Aruna Shanbaug*** (supra) has erred in holding that this Court in ***Gian Kaur*** (supra) has approved the decision in ***Airedale*** case and that euthanasia could be made lawful only by legislation.

(v) There is an inherent difference between active euthanasia and passive euthanasia as the former entails a positive affirmative act, while the latter relates to withdrawal of life support measures or withholding of medical treatment meant for artificially prolonging life.

(vi) In active euthanasia, a specific overt act is done to end the patient's life whereas in passive euthanasia, something is not done which is necessary for preserving a patient's life. It is due to this difference that most of the countries across the world have legalised passive euthanasia either by legislation or by judicial interpretation with certain conditions and safeguards.

(vii) Post ***Aruna Shanbaug*** (supra), the 241st report of the Law Commission of India on Passive Euthanasia has also recognized passive euthanasia, but no law has been enacted.

(viii) An inquiry into common law jurisdictions reveals that all adults with capacity to consent have the right of self-determination and autonomy. The said rights pave the way for the right to refuse medical treatment which has acclaimed universal recognition. A competent person who has come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death. The 'Emergency Principle' or the 'Principle of Necessity' has to be given effect to only when it is not practicable to obtain the patient's consent for treatment and his/her life is in danger. But where a patient has already made a valid Advance Directive which is free from reasonable doubt and specifying that he/she does not wish to be treated, then such directive has to be given effect to.

(ix)

Right to life and liberty as envisaged Under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity.
With the passage of time, this Court has expanded the spectrum of Article 21 to include within it the right to live with dignity as component of right to life and liberty.

(x) It has to be stated without any trace of doubt that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery.

(xi) A failure to legally recognize advance medical directives may amount to non-facilitation of the right to smoothen the dying process and the right to live with dignity. Further, a study of the position in other jurisdictions shows that Advance Directives have gained lawful recognition in several jurisdictions by way of legislation and in certain countries through judicial pronouncements.

(xii) Though the sanctity of life has to be kept on the high pedestal yet in cases of terminally ill persons or PVS patients where there is no hope for revival, priority shall be given to the Advance Directive and the right of self-determination.

(xiii) In the absence of Advance Directive, the procedure provided for the said category hereinbefore shall be applicable.

(xiv) When passive euthanasia as a situational palliative measure becomes applicable, the best interest of the patient shall override the State interest.

196. We have laid down the principles relating to the procedure for execution of Advance Directive and provided the guidelines to give effect to passive euthanasia in both circumstances, namely, where there are advance directives and where there are none, in exercise of the power Under Article 142 of the Constitution and the law stated in ***Vishaka and Ors. v. State of Rajasthan and Ors.*** MANU/SC/0786/1997 : (1997) 6 SCC 241. The directive and guidelines shall remain in force till the Parliament brings a legislation in the field

197. The Writ Petition is, accordingly, disposed of. There shall be no order as to costs.

A.K. Sikri, J.

198. *Michael Kirby*, a former Judge of the Australian High Court, while discussing about the role of judiciary in the context of HIV law[2], talks about the consciousness with which the judiciary is supposed to perform its role. In this hue, while discussing about the responsibility of leadership which the society imposes upon Judges, he remarks: "*Nowhere more is that responsibility tested than when a completely new and unexpected problem presents itself to society. All the judges' instincts for legality, fairness and reasonableness must then be summoned up, to help lead society towards an informed, intelligent and just solution to the problem.*" The problem at hand, just solution whereof is imminently needed, is that of *Euthanasia*. This Court is required to summon up instincts for legality, fairness and reasonableness in order to find just solution to the problem. In this process, the Court is duty bound to look into the relevant provisions of the Constitution of India, particularly those pertaining to the fundamental rights, and to discharge the task of expounding those basic human rights enshrined in the Chapter relating to Fundamental Rights. The issue of euthanasia, with the seminal importance that is attached to it, has thrown the challenge of exposition, development and obligation of the constitutional morality and exhorts the Court to play its creative role so that a balanced approach to an otherwise thorny and highly debatable subject matter is found.

199. The Courts, in dispensation of their judicial duties of deciding cases, come across all types of problems which are brought before them. These cases may be broadly classified into three categories: (i) the easy cases, (ii) the intermediate cases, and (iii) the hard cases. Professor *Ronald Dworkin*[3] has argued that each legal problem has one lawful solution and even in the *hard cases*, the Judge is never free to choose among alternatives that are all inside the bounds of law. This may not be entirely correct inasmuch as judicial discretion does exist. This is true, at least, in solving '*hard cases*'[4]. It is found that meaning of certain legal norms, when applied with respect to a given system of facts, is so simple and clear that their application involves no judicial discretion. These are termed as the '*easy cases*'. This may even apply to '*intermediate cases*'. These would be those cases where both sides appear to have a legitimate legal argument supporting their position and a conscious act of interpretation is noted, before a Judge can conclude which side is right in law and there is only one lawful situation. However, when it comes to the hard cases, the Court is faced

with number of possibilities, all of which appear to be lawful within the context of the system. In these cases, judicial discretion exists as the choice is not between lawful and unlawful, but between lawful and lawful. A number of lawful solutions exist. In this scenario, the Court is supposed to ultimately choose that solution which is in larger public interest. In other words, there are limitations that find the Court with respect to the manner in which it choses among possibilities (procedural limitations) and with respect to the considerations it takes into account in the choice (substantive limitations). Thus, discretion when applied to a cout of justice means sound discretion guided by law. It must be governed by legal rules. To quote Justice *Cardozo*:

Given freedom of choice, how shall the choice be guided? Complete freedom - unfettered and undirected - there never is. A thousand limitations - the product some of statute, some of precedent, some of vague tradition or of an immemorial technique - encompass and hedge us even when we think of ourselves as ranging freely and at large. The inscrutable force of professional opinion presses upon us like the atmosphere, though we are heedless of its weight. Narrow at best is any freedom that is allotted to us[5]

200. Thus, though the judicial discretion is with the Court, the same is limited and not absolute. The Court is not entitled to weigh any factor as it likes. It has to act within the framework of the limitations, and after they have been exhausted, there is a freedom of choice which can also described as '*sovereign prerogative of choice*'[6]. Instant case falls in the category of '*hard cases*' and the Court has endeavoured to make a choice, after evaluating all the pros and cons, which in its wisdom is the "*just result*" of the contentious issue.

201. Adverting to the Indian precedents in the first instance, we have before us two direct judgments of this Court which may throw some light on the subject and demonstrate as to how this topic has been dealt with so far. The first judgment is that of a Constitution Bench in the case titled ***Gian Kaur*** v. ***State of Punjab*** MANU/SC/0335/1996 : (1996) 2 SCC 648. Second case is known as ***Aruna Ramachandra Shanbaug*** v. ***Union of India and Ors.*** MANU/SC/0176/2011 : (2011) 4 SCC 454, which is a Division Bench judgment that takes note of ***Gian Kaur*** and premised thereupon goes much farther in accepting passive euthanasia as a facet of Article 21 of the Constitution.

202. In the instant case, while making reference to the Constitution Bench vide its order dated February 25, 2014[7], the three Judge Bench has expressed its reservation in the manner the ratio of the Constitution Bench in ***Gian Kaur*** is applied by the Division Bench in ***Aruna Ramachandra Shanbaug***. This reference order accepts that ***Aruna Ramachandra Shanbaug*** rightly interpreted the decision in ***Gian Kaur*** insofar as it held that euthanasia can be allowed in India only through a valid legislation. However, the reference order declares that Aruna Ramachandra Shanbaug has committed a factual error in observing that in Gian Kaur the Constitution Bench approved the decision of the House of Lords in ***Airedale N.H.S. Trust*** v. ***Bland*** (1993) 2 WLR 316 (HL). As per the reference order, ***Gian Kaur*** merely referred to the said judgment which cannot be construed to mean that the Constitution Bench in ***Gian Kaur*** approved the opinion of the House of Lords rendered in ***Bland***. The reference order also accepts the position that in ***Gian Kaur*** the Constitution Bench approved that '*right to live with dignity*' Under Article 21 of the Constitution will be inclusive of '*right to die with dignity*'. However, it further notes that the decision does not arrive at a conclusion for validity of euthanasia, be it active or passive. Therefore, the only judgment that

holds the field in India is ***Aruna Ramachandra Shanbaug***, which upholds the validity of passive euthanasia and lays down an elaborate procedure for executing the same on '*the wrong premise that the Constitution Bench in* ***Gian Kaur*** *had upheld the same*'.

203. The aforesaid discussion contained in the reference order prompted the reference court to refer the matter to the Constitution Bench. No specific questions were framed for consideration by the Constitution Bench. However, importance of the issue has been highlighted in the reference order in the following manner:

17. In view of the inconsistent opinions rendered in *Aruna Shanbaug* and also considering the important question of law involved which needs to be reflected in the light of social, legal, medical and constitutional perspectives, it becomes extremely important to have a clear enunciation of law. Thus, in our cogent opinion, the question of law involved requires careful consideration by a Constitution Bench of this Court for the benefit of humanity as a whole.

18. We refrain from framing any specific questions for consideration by the Constitution Bench as we invite the Constitution Bench to go into all the aspects of the matter and lay down exhaustive guidelines in this regard. Accordingly, we refer this matter to a Constitution Bench of this Court for an authoritative opinion.

204. I have given a glimpse of the narratives for the simple reason that the Hon'ble the Chief Justice, in his elaborate opinion, has already discussed this aspect in detail. Likewise, it can be found in the separate judgments authored by my esteemed brethren - Chandrachud, J. and Bhushan, J. Those judgments discuss in detail the law laid down in ***Gian Kaur*** as well as ***Aruna Ramachandra Shanbaug***, including critique thereof. To avoid repetition, I have eschewed that part of discussion. For the same reason, I have also not ventured to discuss the law in some other countries and historic judgments rendered by the courts of foreign jurisdiction, as this aspect is also taken care of by them. However, my analysis of the above two judgments is limited to the extent it is necessitated for maintaining continuum and clarity of thought.

205. At the outset, I say that I am in complete agreement with the conclusion and also the directions given therein in the judgment of the Hon'ble the Chief Justice and also with the opinions and reasoning of my other two learned brothers. My purpose is not to add my ink to the erudite opinion expressed in otherwise eloquent opinions penned by my learned brothers. At the same time, having regard to the importance of the issue involved, I am provoked to express my own few thoughts, in my own way, which I express hereinafter.

206. In the writ petition filed by the Petitioner - Common Cause, it has made the following prayers:

a) declare '*right to die with dignity*' as a fundamental right within the fold of Right to Live with dignity guaranteed Under Article 21 of the Constitution of India;

b) issue direction to the Respondent, to adopt suitable procedures, in consultation with State Governments where necessary, to ensure that persons of deteriorated health or terminally ill should be able to execute a document titled "MY LIVING WILL & ATTORNEY AUTHORISATION" which can be presented to hospital for appropriate action in event of the executant being admitted

to the hospital with serious illness which may threaten termination of life of the executants or in the alternative, issue appropriate guidelines to this effect;

c) appoint an expert committee of experts including doctors, social scientists and lawyers to study into the aspect of issuing guidelines as to the Living Wills;

d) pass such other and further order/s as this Hon'ble Court may deem fit and proper on the facts and in the circumstances of the case.

207. Having regard to the aforesaid prayers, the reference order and the arguments which were addressed by Mr. Prashant Bhushan, learned Counsel who appeared for the Petitioner, and Mr. Arvind Datar, learned senior Counsel who made elaborate submissions on behalf of the interveners - Vidhi Centre for Legal Policy, and Mr. R.R. Kishore, Advocate, who gave an altogether new dimension to the seminal issue, I find that following issues/questions of law of relevance need to be discussed:

(i) Whether the Right to Live Under Article 21 of the Constitution includes the Right to Die? {Now that attempt to commit suicide is not a punishable offence Under Section 309 of the Indian Penal Code, 1860 (for short, 'Indian Penal Code') vide Section 115 of the Mental Healthcare Act, 2017 (Act No. 10 of 2017)}

(ii) Whether the 'right to die with dignity' as a fundamental right falls within the folds of the '*right to live with dignity*' Under Article 21 of the Constitution?

(iii) Whether the observations in ***Aruna Ramachandra Shanbaug*** that the Constitution Bench in ***Gian Kaur*** permitted passive euthanasia stand correct?

(iv) Whether there exists inconsistency in the observations in ***Aruna Ramachandra Shanbaug*** with regard to what has been held in ***Gian Kaur***?

(v) Whether mere reference to verdict in a judgment can be construed to mean that the verdict is approved? {with respect to Article 141 - What is binding?; whether the Constitution Bench in ***Gian Kaur*** approved the decision of the House of Lords in ***Bland***?}

(vi) Whether the law on passive euthanasia, as held valid in ***Aruna Ramachandra Shanbaug***, holds true in the present times as well? {The Treatment of Terminally-ill Patients Bill, 2016 is based on the aforementioned judgment}

(vii) Whether active euthanasia is legal in India?

(viii) Whether assisted suicide/physician administered suicide is legal in India? {The 2016 bill in the current form, under Clause 5(3) permits for physician assisted suicide}

(ix) Whether there exists a right to a *Living Will/Advance Directives*? Whether there exists the fundamental right to choose one's own medical treatment? {With Right to Privacy now a

fundamental right Under Article 21, the principle of self-determination in India stands on a higher footing than before}

(x) Definition of *'Terminal Illness'*.

208. It is not necessary for me to answer all the aforesaid questions. I say so for the reason that all these aspects are dealt with by the Hon'ble the Chief Justice in his opinion. Therefore, in this '*addendum*', I would be focusing myself to the core issues.

EUTHANASIA DEFINED

209. The Oxford English Dictionary defines 'euthanasia' as '*the painless killing of a patient suffering from an incurable and painful disease or in an irreversible coma*'. The word appears to have come into usage in the early 17th century and was used in the sense of '*easy death*'. The term is derived from the Greek ***'euthanatos', with 'eu'*** meaning well, and '*thanatos*' meaning death. In ancient Greece and Rome, citizens were entitled to a good death to end the suffering of a terminal illness. To that end, the City Magistrates of Athens kept a supply of poison to help the dying '*drink the hemlock*'[8].

210. The above Greek definition of euthanasia apart, it is a loaded term. People have been grappling with it for ages. Devised for service in a rhetoric of persuasion, the term '*euthanasia*' has no generally accepted and philosophically warranted core meaning. It is also defined as: *killing at the request of the person killed*. That is how the Dutch medical personnel and civil authorities define euthanasia. In Nazi discourse, euthanasia was any killing carried out by medical means or medically qualified personnel, whether intended for the termination of suffering and/or of the burden or indignity of a life not worth living (*Lebensunwertes Leben*), or for some more evidently public benefit such as eugenics (racial purity and hygiene), *Lebensraum* (living space for Germans), and/or minimizing the waste of resources on '*useless mouths*'. Understandably, in today's modern democracies these Nazi ideas and practices cannot be countenanced. Racist eugenics are condemned, though one comes across discreet allusions to the burden and futility of sustaining the severely mentally handicapped. The popular conception which is widely accepted is that some sorts of life are not worth living; life in such a state demeans the patient's dignity, and maintaining it (otherwise than at the patient's express request) insults that dignity; proper respect for the patient and the patient's best interests requires that that life be brought to an end. In this thought process, the basic Greek ideology that it signifies '*an easy and gentle death*' still remains valid. Recognition is to the Human Rights principle that '*right to life*' encompasses '*right to die with dignity*'.

211. In common parlance, euthanasia can be of three types, namely, '*voluntary euthanasia*' which means killing at the request of a person killed which is to be distinguished from '*non-voluntary euthanasia*', where the person killed is not capable of either making or refusing to make such a request. Second type of euthanasia would be involuntary euthanasia where the person killed is capable of making such a request but has not done so[9]. These terms can be described as under:

(i) *Voluntary Euthanasia:* People concerned to legalize the termination of life on medical grounds have always concentrated on Voluntary Euthanasia (this implies that the patient specifically

requests that his life be ended.) It is generally agreed that the request must come from someone who is either; (a) in intolerable pain or (b) who is suffering from an illness which is agreed as being terminal. It may be prior to the development of the illness in question or during its course. In either case it must not result from any pressure from relatives or those who have the patients in their care. Both active and passive euthanasia can be termed as forms of voluntary euthanasia.

(ii) *Non-Voluntary Euthanasia:* Seen by some as sub-variety of voluntary euthanasia. This involves the death, ostensibly for his own good, of someone who cannot express any views on the matter and who must, therefore, use some sort of proxy request that his/her life be ended. This form of Euthanasia is that which most intimately concerns the medical profession. Selective non-treatment of the new-born or the doctor may be presented with demented and otherwise senilely incompetent patients. In practice, non-voluntary euthanasia presents only as an arguable alternative to non treatment.

(iii) *Involuntary Euthanasia:* It involves ending the patient's life in the absence of either a personal or proxy invitation to do so. The motive 'The relief of suffering' may be the same as voluntary euthanasia-but its only justification - "a paternalistic decision as to what is best for the victim of the disease." In extreme cases it could be against the patient's wishes or could be just for social convenience. It is examples of the latter which serve as warnings as to those who would invest the medical professional with more or unfettered powers over life and death[10].

212. Contrary to the above, in legal parlance, euthanasia has since come to be recognised as of two distinct types: the first is active euthanasia, where death is caused by the administration of a lethal injection or drugs. Active euthanasia also includes physician-assisted suicide, where the injection or drugs are supplied by the physician, but the act of administration is undertaken by the patient himself. Active euthanasia is not permissible in most countries. The jurisdictions in which it is permissible are Canada, the Netherlands, Switzerland and the States of Colorado, Vermont, Montana, California, Oregon and Washington DC in the United States of America. Passive euthanasia occurs when medical practitioners do not provide life-sustaining treatment (i.e. treatment necessary to keep a patient alive) or remove patients from life sustaining treatment. This could include disconnecting life support machines or feeding tubes or not carrying out life saving operations or providing life extending drugs. In such cases, the omission by the medical practitioner is not treated as the cause of death; instead, the patient is understood to have died because of his underlying condition.

213. In ***Aruna Ramachandra Shanbaug***, the Court recognised these two types of euthanasia i.e. active and passive. It also noted that active euthanasia is impermissible, which was so held by the Constitution Bench in ***Gian Kaur***. Therefore, without going into further debate on differential that is assigned to the term euthanasia, ethically, philosophically, medically etc., we would be confining ourselves to the aforesaid legal meaning assigned to active and passive euthanasia. Thus, insofar as active euthanasia is concerned, this has to be treated as legally impermissible, at least for the time being. It is more so, as there is absence of any statutory law permitting active euthanasia. If at all, legal provisions in the form of Sections 306 and 307 Indian Penal Code etc. point towards its criminality. The discussion henceforth, therefore, would confine to passive euthanasia.

PASSIVE EUTHANASIA AND ARUNA RAMACHANDRA SHANBAUG

214. In ***Aruna Ramachandra Shanbaug***, a two Judges' Bench of this Court discussed in much greater detail various nuances of euthanasia by referring to active and passive euthanasia as well as voluntary and involuntary euthanasia; legality and permissibility thereof; relationship of euthanasia vis-à-vis offences concerned under the Indian Penal Code and doctor assisted death; etc.

215. The Court also took note of legislations in some countries relating to euthanasia or physician assisted death. Thereafter, it discussed in detail the judgment in ***Bland*** wherein the House of Lords had permitted the patient to die. Ratio of ***Bland*** was culled out in the following manner:

Airedale (1993) decided by the House of Lords has been followed in a number of cases in UK, and the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime.

216. The Court was of the opinion that this should be permitted when the patient is in a Persistent Vegetative State (PVS) and held that it is ultimately for the Court to decide, as *parens patriae*, as to what is in the best interest of the patient. The wishes of the close relatives and next friends and opinion of the medical practitioners should be given due weight by the Court in coming to its decision. The Court then noted the position of euthanasia with reference to Section 306 (abetment of suicide) and Section 309 (attempt to commit suicide) of the Indian Penal Code, inasmuch as, even allowing passive euthanasia may come in conflict with the aforesaid provisions which make such an act a crime. While making a passing observation that Section 309 should be deleted by the Parliament as it has become anachronistic, the Court went into the vexed question as to who can decide whether life support should be discontinued in the case of an incompetent person, e.g. a person in coma or PVS. The Court pointed out that it was a vexed question, both because of its likely misuse and also because of advancement in medical science. It noted:

104. It may be noted that in Gian Kaur case although the Supreme Court has quoted with approval the view of the House of Lords in Airedale case, it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialisation, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method.

105. Also, since medical science is advancing fast, doctors must not declare a patient to be a hopeless case unless there appears to be no reasonable possibility of any improvement by some newly discovered medical method in the near future. In this connection we may refer to a recent news item which we have come across on the internet of an Arkansas man Terry Wallis, who was 19 years of age and newly married with a baby daughter when in 1984 his truck plunged through

a guard rail, falling 25 feet. He went into coma in the crash in 1984, but after 24 years he has regained consciousness. This was perhaps because his brain spontaneously rewired itself by growing tiny new nerve connections to replace the ones sheared apart in the car crash. Probably the nerve fibres from Terry Wallis' cells were severed but the cells themselves remained intact, unlike Terri Schiavo, whose brain cells had died (see *Terri Schiavo case* on Google). However, we make it clear that it is experts like medical practitioners who can decide whether there is any reasonable possibility of a new medical discovery which could enable such a patient to revive in the near future.

217. It held that passive euthanasia would be permissible when a person is '*dead*' in clinical sense. It chose to adopt the standard of '*brain death*', i.e. when there is an '*irreversible cessation of all functions of the entire brain, including the brain stem*'. The Court took note of President's Committee on Bioethics in the United States of America which had come up with a new definition of *'brain death'* in the year 2008, according to which a person was considered to be brain-dead when he could no longer perform the fundamental human work of an organism. Three such situations contemplated in that definition are the following:

(1) openness to the world, that is receptivity to stimuli and signals from the surrounding environment,

(2) the ability to act upon the world to obtain selectively what it needs, and

(3) the basic felt need that drives the organism to act... to obtain what it needs.

218. The Court held that when the aforesaid situation is reached, a person can be presumed to be dead. In paragraph 115 of the judgment, the position is summed up as under:

When this situation is reached, it is possible to assume that the person is dead, even though he or she, through mechanical stimulation, may be able to breathe, his or her heart might be able to beat, and he or she may be able to take some form of nourishment. It is important, thus, that it be medically proved that a situation where any human functioning would be impossible should have been reached for there to be a declaration of brain death --situations where a person is in a persistent vegetative state but can support breathing, cardiac functions, and digestion *without* any mechanical aid are necessarily those that will not come within the ambit of brain death.

219. The Court clarified that brain death was not the same as PVS inasmuch as in PVS the brain stem continues to work and so some degree of reactions may occur, though the possibility of regaining consciousness is relatively remote.

220. The Court further opined that position in the case of euthanasia would be slightly different and pointed out that the two circumstances in which it would be fair to disallow resuscitation of a person who is incapable of expressing his or her consent to the termination of his or her life. These are:

(*a*) When a person is only kept alive mechanically i.e. when not only consciousness is lost, but the person is only able to sustain involuntary functioning through advanced medical technology-- such as the use of heart-lung machines, medical ventilators, etc.

(*b*) When there is no plausible possibility of the person ever being able to come out of this stage. Medical "miracles" are not unknown, but if a person has been at a stage where his life is only sustained through medical technology, and there has been no significant alteration in the person's condition for a long period of time--at least a few years--then there can be a fair case made out for passive euthanasia.

221. Taking a clue from the judgment in ***Vishaka and Ors.*** v. ***State of Rajasthan and Ors.*** MANU/SC/0786/1997 : (1997) 6 SCC 241, the Court laid down the law, while allowing passive euthanasia, i.e. the circumstances when there could be withdrawal of life support of a patient in PVS. This is stated in paragraph 124 of the judgment, which we reproduce below:

124. There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. We agree with Mr. Andhyarujina that passive euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in Vishaka case [Vishaka v. State of Rajasthan, we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject:

(*i*) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

In the present case, we have already noted that Aruna Shanbaug's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her. As already noted above, it is the KEM Hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not Ms Pinki Virani who has only visited her on few occasions and written a book on her. Hence it is for the KEM Hospital staff to take that decision. KEM Hospital staff have clearly expressed their wish that Aruna Shanbaug should be allowed to live.

Mr. Pallav Shishodia, learned Senior Counsel, appearing for the Dean, KEM Hospital, Mumbai, submitted that Ms Pinki Virani has no locus standi in this case. In our opinion it is not necessary for us to go into this question since we are of the opinion that it is the KEM Hospital staff who is really the next friend of Aruna Shanbaug.

We do not mean to decry or disparage what Ms Pinki Virani has done. Rather, we wish to express our appreciation of the splendid social spirit she has shown. We have seen on the internet that she has been espousing many social causes, and we hold her in high esteem. All that we wish to say is that however much her interest in Aruna Shanbaug may be it cannot match the involvement of the KEM Hospital staff who have been taking care of Aruna day and night for 38 years.

However, assuming that the KEM Hospital staff at some future time changes its mind, in our opinion in such a situation KEM Hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

(*ii*) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in Airedale case.

In our opinion, this is even more necessary in our country as we cannot Rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient.

222. It can be discerned from the reading of the said judgment that court was concerned with the question as to whether one can seek right to die? This question has been dealt with in the context of Article 21 of the Constitution, namely, whether this provision gives any such right. As is well-known, Article 21 gives 'right to life' and it is guaranteed to all the citizens of India. The question was as to whether 'right to die' is also an integral part of 'right to life'. In ***Gian Kaur*** this 'right to die' had not been accepted as an integral part of 'right to life'. The Court in ***Aruna Ramachandra Shanbaug*** maintained this position insofar as an active euthanasia is concerned. However, passive euthanasia, under certain circumstances, has been accepted.

223. It may be pertinent to mention that the Petitioner (Aruna) in the said case was working as a nurse in the King Edward Memorial Hospital (KEM), Parel, Mumbai. The tragic incident happened on the evening of 27th November, 1973. Aruna was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but on finding that she was menstruating, he sodomized her. To immobilize her during this act, he twisted the chain around her neck. She was found unconscious by one cleaner on the next day. Her body was on the floor and blood was all over the floor. The incident did not allow oxygen to reach her brain as a result of which her brain got damaged.

224. The petition was filed by Ms. Pinki Virani as next friend of Aruna Shanbaug. According to facts of the case, Aruna has been surviving on mashed food as she was not able to chew or taste any food and she could not move her hands or legs. It is alleged that there is not the slightest possibility of any improvement in her condition and her body lies on the bed in the KEM Hospital like a dead animal, and this has been the position for the last 36 years. The prayer of the Petitioner was that the Respondents be directed to stop feeding Aruna, and let her die peacefully.

225. The court appointed a team of three eminent and qualified doctors to investigate and report on the medical condition of Aruna. The team included, Dr. J.V. Divatia[11], Dr. Roop Gursahani[12] and Dr. Nilesh Shah[13]. The team of doctors studied her medical history and observed that Aruna would get uncomfortable if the room in which she was located was over crowded, she was calm when fewer people were around her. In fact, the hospital staff had taken care and was willing to continue to do so. Moreover, Aruna's body language did not suggest that she wants to die. Therefore, the doctors opined that there is no need for euthanasia in the instant case.

226. Reliance was placed on the landmark judgment of the House of Lords in ***Bland***, where for the first time in the English history, the right to die was allowed through the withdrawal of life

support systems including food and water. This case placed the authority to decide whether a case is fit or not for euthanasia in the hands of the court. In this case, Aruna did not have the capacity to consent for the proposed medical process. Therefore, the next big question that was to be answered was who should decide on her behalf.

227. Since, there was no relative traced directly, nor did she have any frequent visitor who could relate to her, it was extremely crucial for the court to declare who should decide on her behalf. As there was lack of acquaintance, it was decided by beneficence. Beneficence is acting in the interest that is best for the patient, and is not influenced by personal convictions, motives or other considerations. Public interest and the interests of the state were also considered in the said matter.

228. On the aforesaid principle of beneficence and studying the position in some other countries, the court in its judgment said, the right to take decision on behalf of Aruna was vested with the hospital and its management and not Ms. Pinki. The court also said that allowing euthanasia would mean reversing the efforts of the hospital and its staff. In order to ensure that there is no misuse of this technique, the Supreme Court has vested the power with the High Court to decide if life is to be terminated or not.

229. Thus, the Supreme Court allowed passive euthanasia in certain conditions, subject to the approval by the High Court following the due procedure. It held that when an application for passive euthanasia is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so, the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the committee to them as soon as it is available. After hearing them, the High Court Bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject. I am not carrying out the critique of this judgment at this stage and the manner in which it has been analysed by those who are the proponents of passive euthanasia and those who are against it. It is, more so, when my Brother, Chandrachud, J., has dealt with this aspect in detail in his discourse. In any case, as noted above, in view of the reference order dated February 25, 2014, the validity of this aspect has to be examined, which exercise is undertaken by me at an appropriate stage.

EUTHANASIA: A COMPLEX CONCEPT

230. As discussed hereinafter, issue of euthanasia is a complexed and complicated issue over which there have been heated debates, not only within the confines of courts, but also among elites, intelligentsia and academicians alike. Some of these complexities may be captured at this stage itself.

231. The legal regime webbed by various judgments rendered by this Court would reflect that the Indian position on the subject is somewhat complex and even complicated to certain extend. First, let us touch the topic from the constitutional angle.

232. Article 21 of the Constitution mandates that no person shall be deprived of his life or personal liberty, except according to the procedure established by law. This Article has been interpreted by the Court in most expansive terms, particularly when it comes to the meaning that is assigned to 'right to life'. It is not necessary to take stock of various faces of right to life defined by this Court. What is important for our purpose is to point out that right to life has been treated as more than 'mere animal existence'. In ***Kharak Singh*** v. ***State of U.P. and Ors.*** MANU/SC/0085/1962 : (1964) 1 SCR 332 it was held that the word 'life' in Article 21 means right to live with human dignity and it does not merely connote continued drudgery. It takes within its fold "some of the finer graces of human civilisation, which makes life worth living" and that the expanded concept of life would mean the "tradition, culture and heritage" of the concerned person. This concept has been reiterated and reinforced, time and again, in a series of judgments. It may not be necessary to refer to those judgments. Suffice is to mention that a nine Judge Constitution Bench of this Court in ***K.S. Puttaswamy and Anr.*** v. ***Union of India and Ors.*** MANU/SC/1044/2017 : (2017) 10 SCC 1 has taken stock of all important judgments which have echoed the message enshrined in ***Kharak Singh's*** case. We may, however, point out that in the case of ***C.E.S.E. Limited and Ors.*** v. ***Subhash Chandra Bose and Ors.*** MANU/SC/0466/1992 : (1992) 1 SCC 441, Justice K. Ramaswamy observed that physical and mental health have to be treated as integral part of right to life, because without good health the civil and political rights assured by our Constitution cannot be enjoyed. Though Justice Ramaswamy rendered minority opinion in that case, on the aforesaid aspect, majority opinion was not contrary to the views expressed by Justice Ramaswamy. Thus, Article 21 recognizes right to live with human dignity[14].

233. The question that arises at this juncture is as to whether right to life enshrined in Article 21 of the Constitution includes right to die. If such a right is recognised, that would provide immediate answer to the issue involved, which is pertaining to voluntary or passive euthanasia. However, the judgments of this Court, as discussed hereinafter, would demonstrate that no straightforward answer is discernible and, as observed above, the position regarding euthanasia is somewhat complex in the process.

234. It would be interesting to point out that in ***Rustom Cavasjee Cooper*** v. ***Union of India*** MANU/SC/0011/1970 : (1970) 1 SCC 248 the Court held that what is true of one fundamental right is also true of another fundamental right. This Court also made a specific observation that there cannot be serious dispute about the proposition that fundamental rights have their positive as well as negative aspect. For example, freedom of speech and expression includes freedom not to speak. Likewise, freedom of association and movement includes freedom not to join any association or move anywhere. Freedom of business includes freedom not to do any business. In this context, can it be said that right to life includes right to die or right to terminate ones own life? The Constitution Bench in ***Gian Kaur***, however, has taken a view that right to live will not include right not to live.

235. We have already pointed out that Section 306 of the Indian Penal Code makes abetment to suicide as a punishable offence. Likewise, Section 309 Indian Penal Code makes attempt to commit suicide as a punishable offence. Intention to commit suicide is an essential ingredient in order to constitute an offence under this provision. Thus, this provision specifically prohibits a person from terminating his life and negates right to die. Constitutional validity of this provision, on the touchstone of Article 21, was the subject matter of ***Gian Kaur's*** case[15]. The Court held

Sections 306 and 309 Indian Penal Code to be constitutionally valid. While so holding, the Court observed that when a man commits suicide, he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the 'right to life' Under Article 21. The significant aspect of 'sanctity of life' is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can 'extinction of life' be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, the Court found it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'.

Thus, the legal position which stands as of today is that right to life does not include right to die. It is in this background we have to determine the legality of passive euthanasia.

236. Matter gets further complicated when it is examined in the context of morality of medical science (Hippocratic Oath). Every doctor is supposed to take specific oath that he will make every attempt to safe the life of the patient whom he/she is treating and who is under his/her treatment. The Hippocratic Oath goes on to say:

I swear by Apollo the Healer, by Asclepius, by Hygieia, by Panacea, and by all the gods and goddesses, making them my witnesses, that I will carry out, according to my ability and judgment, this oath and this indenture.

To hold my teacher in this art equal to my own parents; to make him partner in my livelihood; when he is in need of money to share mine with him; to consider his family as my own brothers, and to teach them this art, if they want to learn it, without fee or indenture; to impart precept, oral instruction, and all other instruction to my own sons, the sons of my teacher, and to indentured pupils who have taken the physician's oath, but to nobody else.

I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly I will not give to a woman a pessary to cause abortion. But I will keep pure and holy both my life and my Article I will not use the knife, not even, verily, on sufferers from stone, but I will give place to such as are craftsmen therein.

Into whatsoever houses I enter, I will enter to help the sick, and I will abstain from all intentional wrong-doing and harm, especially from abusing the bodies of man or woman, bond or free. And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets.

Now if I carry out this oath, and break it not, may I gain for ever reputation among all men for my life and for my art; but if I break it and forswear myself, may the opposite befall me.

237. This oath, thus, puts a moral and professional duty upon a doctor to do everything possible, till the last attempt, to save the life of a patient. If that is so, would it not be against medical ethics to let a person die by withdrawing medical aid or, even for that matter, life supporting instruments. Paradoxically, advancement in medical science has compounded the issue further. There has been a significant advancement in medical science. Medical scientists have been, relentlessly and continuously, experimenting and researching to find out better tools for not only curing the disease with which human beings suffer from time to time, noble attempt is to ensure that human life is prolonged and in the process of enhancing the expectancy of life, ailments and sufferings therefrom are reduced to the minimal. There is, thus, a fervent attempt to impress the quality of life. It is this very advancement in the medical science which creates dilemma at that juncture when, in common perception, life of a person has virtually become unlivable but the medical doctors, bound by their Hippocratic Oath, want to still spare efforts in the hope that there may still be a chance, even if it is very remote, to bring even such a person back to life. The issue, therefore, gets compounded having counter forces of medical science, morality and ethical values, the very concept of life from philosophical angle. In this entire process, as indicated in the beginning and demonstrated in detail at the appropriate stage, the vexed question is to be ultimately decided taking into consideration the normative law, and in particular, the constitutional values.

238. Then, there is also a possibility of misuse and it becomes a challenging task to ensure that passive euthanasia does not become a tool of corruption and a convenient mode to ease out the life of a person who is considered inconvenient. This aspect would be touched upon at some length at the appropriate stage. This point is highlighted at this juncture just to demonstrate the complexity of the issue.

239. I may add that the issue is not purely a legal one. It has moral and philosophical overtones. It has even religious overtones. As Professor *Upendra Baxi* rightly remarks that judges are, in fact, not jurisprudes. At the same time, it is increasingly becoming important that some jurisprudential discussion ensues while deciding those cases which have such more and philosophical overtones as well. Such an analyses provides not only legal basis for the conclusions arrived at but it also provides logical commonsense justification as well. Obviously, whenever the court is entering into a new territory and is developing a new legal norm, discussion on normative jurisprudence assumes greater significance as the court is called upon to decide what the legal norm should be. At the same time, this normative jurisprudence discourse has to be preceded by analytical jurisprudence, which is necessary for the court to underline existing nature of law. That would facilitate knowing legal framework of what is the current scenario and, in turn, help in finding the correct answers. When we discuss about the philosophical aspects of the subject matter, it is the 'value of life' which becomes the foremost focus of discussion. The discussion which follows hereinafter keeps in mind these parameters.

THE TWO ISSUES

240. As already stated above, as of now insofar 'active euthanasia' is concerned, it is legally impermissible. Our discussion centres around 'passive euthanasia'. Another aspect which needs to be mentioned at this stage is that in the present petition filed by the Petitioner, the Petitioner wants that 'advance directive' or 'living will' should be legally recognised. In this backdrop, two important questions arise for considerations, viz.,

(I) whether passive euthanasia, voluntary or even, in certain circumstances, involuntary, is legally permissible? If so under what circumstances (this question squarely calls for answer having regards to the reference order made in the instant petition)? and

(II) whether a 'living will' or 'advance directive' should be legally recognised and can be enforced? If so, under what circumstances and what precautions are required while permitting it?

241. Answers to these questions have been provided in the judgment of Hon'ble The Chief Justice, with excellent discourse on all relevant aspects in an inimitable and poetic style. I entirely agree with the reasoning and outcome. In fact, with the same fervour and conclusion, separate judgments are written by my brothers, Dhananjay Chandrachud and Ashok Bhushan, JJ. exhibiting expected eloquence and erudition. I have gone through those opinions and am in complete agreement thereby. In this scenario, in my own way, I intend to deal with the aforesaid questions on the following hypothesis:

(i) Issue of passive euthanasia is highly debatable, controversial and complex (already indicated above).

(ii) It is an issue which cannot be put strictly within the legal confines, but has social, philosophical, moral and even religious overtones.

(iii) When the issue of passive euthanasia is considered on the aforesaid parameters, one would find equally strong views on both sides. That is the reason which makes it a thorny and complex issue and brings within the category of 'hard cases'.

(iv) In this entire scenario when the issue is considered in the context of dignity of the person involved, one may tend to tilt in favour of permitting passive euthanasia.

(v) At the same time, in order to achieve a balance, keeping in view the competing and conflicting interests, care can be taken to confine permissibility of passive euthanasia only in rare cases, particularly, when the patient is declared 'brain dead' or 'clinically dead' with virtually no chances of revival.

(vi) In this process, as far as 'living will' or 'advance directive' is concerned, that needs to be permitted, along with certain safeguards. It would not only facilitate prevention of any misuse but take care of many apprehensions expressed about euthanasia.

With the outlining of the structured process as aforesaid, I proceed to discuss these aspects in detail hereinafter.

242. As pointed out above, ***Aruna Ramachandra Shanbaug*** decides that passive euthanasia, even involuntary, in certain circumstances would be justified. The reference order in the instant case, however, mentions that for coming to this conclusion, the Bench relied upon ***Gian Kaur***, but that case does not provide any such mandate. In this backdrop, we take up the first question about the legality of passive euthanasia.

FIRST ISSUE

Whether passive euthanasia, voluntary or even, in certain circumstances, involuntary, is legally permissible? If so under what circumstances (this question squarely calls for answer having regards to the reference order made in the instant petition)?

243. I intend to approach this question by discussing the following facets thereof:

(a) Philosophy of euthanasia

(b) Morality of euthanasia

(c) Dignity in euthanasia

(d) Economics of euthanasia

(A) Philosophy of Euthanasia

I am the master of my fate; I am the captain of my soul

- William Ernest Henley[16]

Death is our friend ... he delivers us from agony. I do not want to die of a creeping paralysis of my faculties - a defeated man.

- Mahatma Gandhi[17]

When a man's circumstances contain a preponderance of things in accordance with nature, it is appropriate for him to remain alive; when possess or sees in prospect a majority of contrary, it is appropriate for him to depart from life.

- Marcus Tullius Cicero

Euthanasia, and especially physician-assisted suicide, appears as the ultimate post-modern demand for dignity in an era of technologically-mediated death.

- Dr. Jonathan Moreno

244. The afore-quoted sayings of some great persons bring out a fundamental truth with universal applicability. Every persons wants to lead life with good health and all kinds of happiness. At the same time, nobody wants any pain, agony or sufferings when his or her life span comes to an end and that person has to meet death. The following opening stanza from a song in a film captures this message beautifully:

रोते हुए आते हैं सब, हंसता हुआ जो जाएगा
वो मुक़द्दर का सिकन्दर जानेमन कहलाएगा

Every person in this world comes crying. However, that person who leaves the world laughing/smiling will be the luckiest of all

(Hindi Film-Muqaddar Ka Sikandar)

245. It became unbearable for young prince Siddharth when he, for the first time, saw an old crippled man in agony and a dead body being taken away. He did not want to encounter such a situation in his old life and desired to attain *Nirvana* which prompted him to renounce the world so that he could find the real purpose of life; could lead a life which is worth living; and depart this world peacefully. He successfully achieved this purpose of life and became *Gautam Buddha*. There are many such similar examples.

Life is mortal. It is transitory. It is as fragile as any other object. It is a harsh reality that no human being, or for that matter, no living being, can live forever. Every creature who takes birth on this planet earth has to die one day. Life has a limited shelf age. In fact, unlike the objects and articles which are produced by human beings and may carry almost same life span, insofar as humans themselves are concerned, span of life is also uncertain. Nobody knows how long he/she will be able to live. The gospel truth is that everybody has to die one day, notwithstanding the pious wish of a man to live forever[18]. As Woody Allen said once: '*I do not want to achieve immortality through my work. I want to achieve it through not dying*'. At the same time, nobody wants to have a tragic end to life. We all want to leave the world in a peaceful manner. In this sense, the term 'euthanasia' which has its origin in Greek language signifies 'an easy and gentle death'.

246. According to *Charles I. Lugosi*, the sanctity of life ethic no longer dominates American medical philosophy. Instead, quality of life has become the modern approach to manage human life that is at the margin of utility[19]. It is interesting to note that the issue of euthanasia was debated in India in 1928. Probably this was the first public debate on euthanasia to be reported. A Calf in Gandhi's ashram was ailing under great pain. In spite of every possible treatment and nursing...the condition of the calf was so bad that it could not even change its side or even it could not be lifted about in order to prevent pressure ulcers/sores. It could not even take nourishment and was tormented by flies. The surgeon whose advice was sought in this matter declared the case to be past help and past hope. After painful days of hesitation and discussions with the managing committee of Goseva Sangh and the inmates of the ashram, Gandhi made up his mind to end the life of the calf in a painless way as possible. There was a commotion in orthodox circles and Gandhi critically examined the question through his Article which appeared in Navajivan (dated 30-9-1928) and Young India (4-10-1928). Probably this was the first public debate on euthanasia and animal/veterinary euthanasia and the debate also covered the issue of human euthanasia. It is equally interesting to note that Gandhi and his critics discussed the issue of '*painlessly ending the life to end suffering*' without using the term '*euthanasia*'. But, he meant the same. Further it is more interesting to learn that at various instances Gandhiji had touched upon the issues of the present

day debates on Voluntary euthanasia, Non-voluntary euthanasia, Involuntary euthanasia, as well as passive euthanasia, active euthanasia, physician-assisted euthanasia and the rejection or 'termination of treatment'. Gandhi advocated the development of positive outlook towards life and strived for the humane nursing and medical care even when cure was impossible. It was the way he analysed Karma and submitted to the will of the God.

247. Mahatma Gandhi said:

In these circumstances I felt that humanity demanded that the agony should be ended by ending life itself. The matter was placed before the whole ashram. At the discussion a worthy neighbour vehemently opposed the idea of killing even to end pain. *The ground of his opposition was that one has no right to take away life which one cannot create. His argument seemed to me to be pointless here. It would have point if the taking of life was actuated by self-interest.* Finally, in all humility but with the clearest of convictions, I got in my presence a doctor kindly to administer the calf a quietus by means of a position injection. The whole thing was over in less than two minutes.

But the question may very legitimately be put to me: would I apply the same principle to human beings? Would I like it to be applied in my own case? My reply is 'yes'; the same law holds good in both the cases. The law, 'as with one so with all', admits of no exceptions, or the killing of the calf was wrong and violent. In practice, however, we do not cut short the sufferings of our ailing dear ones by death because, as a rule, we have always means at our disposal to help them and they have the capacity to think and decide for themselves. But supposing that in the case of an ailing friend, I am unable to render any aid whatever and recovery is out of question and the patient is lying in an unconscious state in the throes of agony, then I would not see any himsa in putting an end to his suffering by death.

Just as a surgeon does not commit himsa but practices the purest ahimsa when he wields his knife, one may find it necessary, under certain imperative circumstances, to go a step further and sever life from the body in the interest of the sufferer. It may be objected that whereas the surgeon performs his operation to save the life of the patient, in the other case we do just the reverse. But on a deeper analysis it will be found that the ultimate object sought to be served in both the cases is the same, namely, to relieve the suffering soul within from pain. In the one case you do it by severing the diseased portion from the body, in the other you do it by severing from the soul the body that has become an instrument of torture to it. In either case it is the relief of the soul within from pain that is aimed at, the body without the life within being incapable of feeling either pleasure or pain.

To conclude then, to cause pain or wish ill to or to take the life of any living being out of anger or a selfish intent, is *himsa*. On the other hand, after a calm and clear judgment to kill or cause pain to a living being from a pure selfless intent may be the purest form of ahimsa. Each such case must be judged individually and on its own merits. The final test as to its violence or non-violence is after all the intent underlying the act.

248. **Ethical Egoism** propounded in modern times by **Thomas Hobbes** in "Leviathan" also operates from the general Rule that if any action increases my own good, then it is right. Ethical

egoism in the context of euthanasia would mean that if a person wants or does not want to end his/her life using euthanasia, this desire is presumed to be motivated by a need for self benefit, and is therefore an ethical action[20]. The perspective of the world community is gradually shifting from sanctity of life to quality of life sustained and preserved.

249. Philosophers believe that we have to control switch that can end it all, on request. In medical/legal parlance, it is called euthanasia: '*an easy and gentle death*'. Philosophically, this debate is about our right, when terminally ill, to choose how to die. It is about the right to control how much we have to suffer and when and how we die. It is about having some control over our dying process in a system that can aggressively prolong life with invasive technology. Luckily, we also have the technology that allows us to experience *a gentle death* on our own terms, rather than by medically set terms. In his famous essay on *Liberty, John Stuart Mill* argues strongly for our right to self-determination. He writes: "*over himself, over his own body and mind, the individual is sovereign...he is the person most interested in his own well being.*" These words were written over a century ago.

250. Philosophically, therefore, one may argue that if a person who is undergoing miserable and untold sufferings and does not want to continue dreadful agony and is terminally ill, he should be free to make his choice to terminate his life and to put an end to his life so that he dies peacefully.

251. At the same time, Buddhism, Jainism and Hinduism are against euthanasia. However, their concept of '*good death*' is extremely interesting - specially principles of Buddhism as they are echoed in the present day understanding of euthanasia. Without elaborating and to put it in nutshell:

• Buddhism, Jainism, and Hinduism, in particular, embrace the concept of the *good death* as a means of achieving dignity and spiritual fulfilment at the end of life without resorting to artificially shortening its span.

• Buddhists believe that human existence is rare and rebirth as a human is rarer still. Consequently it is best approached cautiously without attempting to exert control over the dying process. At the point of dying, a Buddhist should ideally be conscious, rational and alert.

• Traditional Hindu religious culture also emphasizes the good death as a reflection of the quality of life that preceded it. If a good, dignified death is attained, it is perceived as evidence of having lived a worthy life because "the manner of one's passing out-weighs all previous claims and intimations of one's moral worth"[21].

• "a *good death* certifies a good life"[22].

• The *good death* is achieved when death occurs in full consciousness, in a chosen place and at a chosen time; and

• As with Buddhism great significance is attached to the element of choice and the maintenance of control,[23] so if at all possible, "one must be in command and should not be overtaken by death. To be so overtaken is the loss of dignity".[24] Thus the final moments of life should be calm, easy and peaceful if dignity is to be preserved.

Many of the insights of these traditional religions are echoed in the modern Western understanding of euthanasia, as a means of achieving death with dignity, which focuses on avoiding dependence and loss of control. Choosing to deliberately end one's life allows control over the time, place and method of one's dying and explains why euthanasia appears to offer death with dignity. Rather than active euthanasia these ancient religions advocate calm, control and compassion as a means of achieving dignity.

(B) <u>Morality of Euthanasia</u>

252. At the outset, I would like to clarify that while discussing a particular norm of law, the law *per se* is to be applied and, generally speaking, it is not the function of the Courts to look into the moral basis of law. At the same time, some legal norms, particularly those which are jurisprudentially expounded by the Courts or developed as common law principles, would have moral backing behind them. In that sense moral aspects of an issue may assume relevance. This relevancy and rationale is quite evident in the discussion about euthanasia. In fact, the very concept of dignity of life is substantially backed by moral overtones. We may remind ourselves with the following classical words uttered by *Immanuel Kant*:

We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men.

253. It is well known that Justice Holmes' legal philosophy revolved around its central theme that law and morals are to be kept apart, maintaining a sharp distinction between them. Notwithstanding, even he accepted that under certain circumstances distinction between law and morals loses much of its importance. To quote:

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary importance, as all mathematical distinctions vanish in the presence of the infinite".[25]

254. Euthanasia is one such critical issue where the law relating to it cannot be divorced from morality. *Lon L. Fuller*[26] has argued with great emphasis that it is the morality that makes the law possible. He also points towards morality as the substantive aims of law. In fact, as would be noticed later, the conceptualisation of doctrine of dignity by *Ronald Dworkin* is supported with moral ethos. With the aid of dignity principle, he has argued in favour of euthanasia. Likewise, and ironically, *John Finnis*, Professor of Law and Legal Philosophy Emeritus in the University of Oxford, while opposing euthanasia, also falls back on the morality conception thereof. It is this peculiar feature which drives us to discuss the issue of euthanasia from the stand point of morality.

255. Influenced primarily by the aforesaid considerations, I deem it relevant to indulge into discussion on morality.

256. When we come to the moral aspects of 'end of life' issues, we face the situation of dilemma. On the one hand, it is an accepted belief that every human being wants to die peacefully. Nobody wants to undergo any kind of suffering in his last days. So much so a person who meets his destiny by sudden death or easy death is often considered as a person who would have lived his life by

practicing moral and ethical values. Rightly or wrongly, it is perceived that such a person who exhibited graceful behaviour while living his life is bestowed grace by the death when time to depart came. However, it does not happen to most of the people. Ageing is a natural phenomena. No doubt, as the person advances in age, he becomes mature in his wisdom. However, old age brings, along with it, various ailments and diseases as well. Physical health and physical functioning declines over the life course, particularly, in later life. A rise in chronic disease and other conditions such as arthritis, high blood pressure and obesity can cause loss in function and lead to generally decreasing trajectory for health over the lifespan. Thus, ageing has both positive and negative aspects. This ageing leads to extinction of human life which may generally be preceded by grave sickness and disease.

257. Horace, Roman poet in his poem on the 'Ages of Man' wrote quiet scathingly of the attributes of old age:

Many ills encompass an old man, whether because he seeks, gain, and then miserably holds aloof from His store and fears to use it, because, in all that he does, he lacks fire and courage, is dilatory and slow to form hopes, is sluggish and greedy of a longer life, peevish, surly, given to praising the days he spent as a boy, and to reproving and condemning the young.

(*Ars Poetica, pp. 169-74*)

We find a more contemporary echo of this in William Shakespeare's (1564-1616) famous verse 'All the World's a Stage':

all the word's stage, and all the men and women merely players;

they have their exits and their entrances, and one man in his time plays many parts, his acts being seven ages.... Last scene of all, that ends this strange eventful history, is second childishness and mere oblivion, sans teeth, sans eyes, sans taste, sans everything.

(*As You Like It, Act II, scene VII*)

It may, however, be added (for the sake of clarification) that advent of disease is not the confines of old age only. One may become terminally ill at any age. Such a disease may be acquired even at birth.

258. The moral dilemma is that it projects both the sides--protracted as well as intractable. On the one hand, it is argued by those who are the proponents of a liberal view that a right to life must include a concomitant right to choose when the life becomes unbearable and not so worth living, when such a stage comes and the sufferer feels that that the life has become useless, he should have right to die. Opponents, on the other hand, project **'Sanctity of Life' (SOL)** as the most important factor and argue that this 'SOL' principle is violated by self-styled angles of death. Protagonists on 'SOL' principle believe that life should be preserved at all costs and the least which is expected is that there should not be a deliberate destruction of human life, though it does not demand that life should always be prolonged as long as possible.

259. It might therefore be argued, as Emily Jackson (2008) cogently does, that the law's recognition that withdrawal of life-prolonging treatment is sometimes legitimate is not so much an exception to the SOL principle, as an embodiment of it.

260. In the most secular judicial interpretation of the SOL doctrine yet, Denman J of the UKHL explicated thus:

in respect a person's death, we are also respecting their life - giving it sanctity... A view that life must be preserved at all costs does not sanctify life.,.. to care for the dying, to love and cherish them, and to free them from suffering rather than simply to postpone death is to have fundamental respect for the sanctity of life and its end.

261. Hence, as the process of dying is an inevitable consequence of life, the right to life necessarily implies the right to have nature take its course and to die a natural death. It also encompasses a right, unless the individual so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means which have no curative effect and which are intended merely to prolong life.

262. A moral paradox which emerges is beautifully described by ***Sushila Rao***[27], in the following words:

Several commentators have justified the active/passive distinction by averring that there is an important moral difference between killing a patient by administering, say, a lethal injection, and withdrawing treatment which is currently keeping her alive. Active euthanasia, runs the argument, interferes with nature's dominion, whereas withdrawal of treatment restores to nature her dominion.

Here too, an absolutist version of the SOL principle rears its unseemly head. In a plethora of cases in the UK, a course of action which would lead to the patient's action which would lead to the patient's death was held to be compatible with the "best interests" test. Indeed, a majority in the House of Lords in Bland explicitly accepted that the doctor's intention in withdrawing artificial nutrition and hydration was, in Lord Browne-Wilkinson's words, to "bring about the death of Anthony Bland". Lord Lowry said that "the intention to bring about the patient's death is there" and Lord Mustill admitted that "the proposed conduct has the aim.. of terminating the life of Anthony Bland". I each case, however, life could be brought to an end only because the doctors had recourse to a course of action which could plausibly be described as a "failure to prolong life".

The SOL principle thus works insidiously to ensure that only certain types of death--namely, those achieved by suffocation, dehydration, starvation and infection, through the withdrawal or withholding of, respectively, ventilation, ratification nutrition and hydration, and antibiotics-can lawfully be brought about. More crucially, the SOL principle prohibits doctors from acting to achieve that end quickly, and more humanly, by the administration of a single lethal injection.

Lord Browne-Wilkinson lamented this paradox in Bland in the following words:

How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question.

As Simon Blackburn (2001) puts it, differentiating between withdrawal of treatment and killing may salve some consciences, but it is very doubtful whether it ought to. It often condemns the subject to a painful, lingering death, fighting for breath or dying of thirst, while those who could do something stand aside, withholding a merciful death.

263. Interestingly, Sushila Rao concludes that even the active-passive distinction is not grounded much in morality and ethics as in 'reasons of policy'.

264. *John Finnis* strongly believes that moral norms Rule out the central case of euthanasia and discards the theory of terminating people's life on the ground that doing so would be beneficial by alleviating human suffering or burdens. He also does not agree that euthanasia would benefit '*other people*' at least by alleviating their proportionately greater burdens[28].

265. Moral discourse of *John Finnis* proceeds on the 'intention of the person who is facing such a situation'. He draws distinction between what one intends (and does) and what one accepts as foreseen side effects is significant by giving importance to free choice. There would be free choice, he argues, only when one is rationally motivated towards incompatible alternative possible purposes. Therefore, there may be a possibility that a person may choose euthanasia but not as a free choice and it would be morally wrong. In a situation where that person is not in a position to make a choice (for e.g. when he is in comma) this choice shall be exercised by others which, according to him, violates the autonomy of the person involved. It is significant to mention that Finnis accepts that autonomy of the patient or prospective patient counts. It reads:

Is this to say that the autonomy of the patient or prospective patient counts for nothing? By no means. Where one does not know that the requests are suicidal in intent, one can rightly, as a healthcare professional or as someone responsible for the care of people, give full effect to requests to withhold specified treatments or indeed any and all treatments, even when one considers the requests misguided and regrettable. For one is entitled and indeed ought to honour these people's autonomy, and can reasonably accept their death as a side effect of doing so.[29]

266. He, however, explains thereafter that even if such a decision is taken, said person would be proceeding on one or both of two philosophically and morally erroneous judgments: (i) that human life in certain conditions or circumstances retains no intrinsic value and dignity; and/or (ii) that the world would be a better place if one's life were intentionally terminated. And each of these erroneous judgments has very grave implications for people who are in poor shape and/or whose existence creates serious burdens for others.

It is, thus, clear that taking shelter of same morality principles, jurists have reached opposing conclusions. Whereas euthanasia is morally impermissible in the estimation of some, others treat it as perfectly justified. As would be noted later, riding on these very moral principles, *Dworkin* developed the dignity of life argument and justified euthanasia.

The aforesaid discussion on the philosophy of euthanasia, coupled with its morality aspect, brings out the conflicting views. Though philosophical as well as religious overtones may indicate that a person does not have right to take his life, it is still recognised that a human being is justified in his expectation to have a peaceful and dignified death. Opposition to euthanasia, on moral grounds, proceeds primarily on the basis that neither the concerned person has a right to take his own life, which is God's creation, nor anybody else has this right. However, one startling feature which is to be noted in this opposition is that while opposing euthanasia, no segregated discussion on active and passive euthanasia is made. It also does not take into consideration permissibility of passive euthanasia under certain specific circumstances. Clarity on this aspect is achieved when we discus the issue of euthanasia in the context of dignity.

(C) <u>Dignity in Euthanasia</u>

267. This Court acknowledges its awareness of the sensitive and emotional nature of euthanasia controversy, and the vigours of opposing views, even within the medical fraternity, and seemingly absolute convictions that the subject inspires. This is so demonstrated above while discussing philosophical, moral, ethical and religious overtones of the subject involved. These valid aspects, coupled with one's attitude towards life and family and their values, are likely to influence and to colour one's thinking and conclusions about euthanasia. Notwithstanding the same, these aspects make the case as *'hard case'*. However, at the end of the day, the Court is to resolve the issue by constitutional measurements, free of emotion and of predilection. One has to bear in mind what Justice *Oliver Wendell Holmes Jr.* said in his dissenting judgment in ***Lochner*** v. ***New York*** 198 US 45, 76 (1905), which is reproduced below:

[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

268. With these preliminary remarks we return to the doctrine of dignity as an aspect of Article 21 of the Constitution, a brief reference to which has already been made above.

269. Let me first discuss certain aspects of human dignity in general. Insofar as concept of human dignity is concerned, it dates back to thousands of years. Historically, human dignity, as a concept, found its origin in different religions which is held to be an important component of their theological approach. Later, it was also influenced by the views of philosophers who developed human dignity in their contemplations[30]. Jurisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are: (i) Theological Model, (ii) Philosophical Model, and (iii) Constitutional Model. Legal scholars were called upon to determine the theological basis of human dignity as a constitutional value and as a constitutional right. Philosophers also came out with their views justifying human dignity as core human value. Legal understanding is influenced by theological and philosophical views, though these two are not identical. Aquinas, Kant as well as *Dworkin* discussed the jurisprudential aspects of human dignity. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten.

Theological Model of Dignity

'Amritasya Putrah Vayam'

[We are all begotten of the immortal.] This is how Hinduism introduces human beings.

'Every individual soul is potentially divine'

- proclaimed Swami Vivekananda

270. Hinduism doesn't recognize human beings as mere material beings. Its understanding of human identity is more ethical-spiritual than material. That is why a sense of immortality and divinity is attributed to all human beings in Hindu classical literature.

271. Professor S.D. Sharma, sums up the position with following analysis[31]:

Consistent with the depth of Indian metaphysics, the human personality was given a metaphysical interpretation. This is not unknown to the modern occidental philosophy. The concept of human personality in Kant's philosophy of law is metaphysical entity but Kant was not able to reach the subtler unobserved element of personality, which was the basic theme of the concept of personality in Indian legal philosophy

272. It is on the principle that the soul that makes the body of all living organisms its abode is in fact an integral part of the Divine Whole - Paramaatman - that the Vedas declare unequivocally:

Ajyesthaaso Akanisthaasa Yete; Sam Bhraataro Vaavrudhuh Soubhagaya

[No one is superior or inferior; all are brothers; all should strive for the interest of all and progress collectively]

- RigVeda, Mandala-5, Sukta-60, Mantra-5

273. Even in Islam, tradition of human rights became evident in the medieval ages. Being inspired by the tenets of the Holy Koran, it preaches the universal brotherhood, equality, justice and compassion. Islam believes that man has special status before God. Because man is a creation of God, he should not be harmed. Harm to a human being is harm to a God. God, as an act of love, created man and he wishes to grant him recognition, dignity and authority. Thus, in Islam, human dignity stems from the belief that man is a creation of God - the creation that God loves more than any other.

274. The Bhakti and Sufi traditions too in their own unique ways popularized the idea of universal brotherhood. It revived and regenerated the cherished Indian values of truth, righteousness, justice and morality.

275. Christianity believes that the image of God is revealed in Jesus and through him to human kind. God is rational and determines his goals for himself. Man was created in the image of God,

and he too is rational and determines his own goals, subject to the God as a rational creation. Man has freedom of will. This is his dignity. He is free to choose his goals, and he himself is a goal. His supreme goal is to know God. Thus he is set apart from a slave and from all the creations under him. When a man sins, he loses his human dignity. He becomes an object[32].

Philosophical Model of Dignity

276. The modern conception of human dignity was affected by the philosophy of Kant[33]. Kant's moral theory is divided into two parts: ethics and right (jurisprudence). The discussion of human dignity took place within his doctrine of ethics and does not appear in his jurisprudence[34]. Kant's jurisprudence features the concept of a person's right to freedom as a human being.

277. According to Kant, a person acts ethically when he acts by force of a duty that a rational agent self-legislates onto his own will. This self-legislated duty is not accompanied by any right or coercion, and is not correlative to the rights of others. For Kant, ethics includes duties to oneself (e.g. to develop one's talents) and to others (e.g. to contribute to their happiness). This ability is the human dignity of man. This is what makes a person different than an object. This ability makes a person into an end, and prevents her from being a mere means in the hands of another.

278. Professor Upendra Baxi in his First Justice H.R. Khanna Memorial Lecture[35], on the topic *Protection of Dignity of Individual under the Constitution of India* has very aptly remarked that dignity notions, like the idea of human rights, are supposed to be the gifts of the West to the Rest, though, this view is based on the prescribed ignorance of the rich traditions of non-European countries. He, then, explains Eurocentric view of human dignity by pointing out that it views dignity in terms of personhood (moral agency) and autonomy (freedom of choice). Dignity here is to be treated as '*empowerment*' which makes a triple demand in the name of respect for human dignity, namely:

1. Respect for one's capacity as an agent to make one's own free choices.

2. Respect for the choices so made.

3. Respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

279. To the aforesaid, Professor Baxi adds:

I still need to say that the idea of dignity is a metaethical one, that is it marks and maps a difficult terrain of what it may mean to say being 'human' and remaining 'human', or put another way the relationship between 'self', 'others', and 'society'. In this formulation the word 'respect' is the keyword: dignity is respect for an individual person based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. Respect for dignity thus conceived is empowering overall and not just because it, even if importantly, sets constraints state, law, and Regulations.

280. ***Jeremy Waldron***[36] opines that dignity is a sort of status-concept: it has to do with the standing (perhaps the formal legal standing or perhaps, more informally, the moral presence) that a person has in a society and in her dealings with others. He has ventured even to define this term "dignity" in the following manner:

Dignity is the status of a person predicated on the fact that she is recognized as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organizing her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as human being be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally.

281. Kant, on the other hand, has initially used dignity as a 'value idea', though in his later work he also talks of 'respect' which a person needs to accord to other person, thereby speaking of it more as a matter of status.

Constitutional Perspective of Dignity

282. The most important lesson which was learnt as a result of Second World War was the realization by the Governments of various countries about the human dignity which needed to be cherished and protected. It is for this reason that in the U.N. Charter, 1945, adopted immediately after the Second World War, dignity of the individuals was mentioned as of core value. The almost contemporaneous Universal Declaration of Human Rights (1948) echoed same sentiments.

283. Article 3 of the Geneva Conventions explicitly prohibits "outrages upon personal dignity". There are provisions to this effect in International Covenant on Civil and Political Rights (Article 7) and the European Convention of Human Rights (Article 3) though implicit. However, one can easily infer the said implicit message in these documents about human dignity. The ICCPR begins its preamble with the acknowledgment that the rights contained in the covenant "derive from the inherent dignity of the human person". And some philosophers say the same thing. Even if this is not a connection between dignity and law as such, it certainly purports to identify a wholesale connection between dignity and the branch of law devoted to human rights. One of the key facets of twenty-first century democracies is the primary importance they give to the protection of human rights. From this perspective, dignity is the expression of a basic value accepted in a broad sense by all people, and thus constitutes the first cornerstone in the edifice of human rights. Therefore, there is a certain fundamental value to the notion of human dignity, which some would consider a pivotal right deeply rooted in any notion of justice, fairness, and a society based on basic rights.

284. *Aharon Barak,* former Chief Justice of the Supreme Court of Israel, attributes two roles to the concept of human dignity as a constitutional value, which are:

1. Human dignity lays a foundation for all the human rights as it is the central argument for the existence of human rights.

2. Human dignity as a constitutional value provides meaning to the norms of the legal system. In the process, one can discern that the principle of purposive interpretation exhorts us to interpret all the rights given by the Constitution, in the light of the human dignity. In this sense, human dignity influences the purposive interpretation of the Constitution. Not only this, it also influences the interpretation of every sub-constitutional norm in the legal system. Moreover, human dignity as a constitutional value also influences the development of the common law.

285. Within two years of the adoption of the aforesaid Universal Declaration of Human Rights that all human beings are born free and equal in dignity and rights, India attained independence and immediately thereafter Members of the Constituent Assembly took up the task of framing the Constitution of this Country. It was but natural to include a Bill of Rights in the Indian Constitution and the Constitution Makers did so by incorporating a Chapter on Fundamental Rights in Part III of the Constitution. However, it would be significant to point out that there is no mention of "dignity" specifically in this Chapter on Fundamental Rights. So was the position in the American Constitution. In America, human dignity as a part of human rights was brought in as a Judge-made doctrine. Same course of action followed as the Indian Supreme Court read human dignity into Articles 14 and 21 of the Constitution.

286. Before coming to the interpretative process that has been developed by this Court in evolving the aura of human dignity predicated on Articles 14 and 21 of the Constitution, I am provoked to discuss as to how *Dworkin* perceives interpretative process adopted by a Judge.

287. *Dworkin*, being a philosopher - jurist, was aware of the idea of a Constitution and of a constitutional right to human dignity. In his book, *Taking Rights Seriously*, he noted that everyone who takes rights seriously must give an answer to the question why human rights vis-à-vis the State exist. According to him, in order to give such an answer one must accept, as a minimum, the idea of human dignity. As he writes:

Human dignity....associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.[37]

288. In his Book, "*Is Democracy Possible Here*?"[38] *Dworkin* develops two principles about the concept of human dignity. First principle regards the intrinsic value of every person, viz., every person has a special objective value which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. The second principle, according to *Dworkin*, is that of personal responsibility. According to this principle, every person has the responsibility for success in his own life and, therefore, he must use his discretion regarding the way of life that will be successful from his point of view. Thus, *Dworkin's* jurisprudence of human dignity is founded on the aforesaid two principles which, together, not only define the basis but the conditions for human dignity. *Dworkin* went on to develop and expand these principles in his book, *Justice for Hedgehogs* (2011)[39].

289. When speaking of rights, it is impossible to envisage it without dignity. In his pioneering and all inclusive "Justice for Hedgehogs", he proffered an approach where respect for human dignity, entails two requirements; first, self-respect, i.e., taking the objective importance of one's own life

seriously; this represents the free will of the person, his capacity to think for himself and to control his own life and second, authenticity, i.e., accepting a "special, personal responsibility for identifying what counts as success" in one's own life and for creating that life "through a coherent narrative" that one has chosen.[40] According to *Dworkin*, these principles form the fundamental criteria supervising what we should do in order to live well.[41] They further explicate the rights that individuals have against their political community,[42] and they provide a rationale for the moral duties we owe to others. This notion of dignity, which *Dworkin* gives utmost importance to, is indispensable to any civilised society. It is what is constitutionally recognised in our country and for good reason. Living well is a moral responsibility of individuals; it is a continuing process that is not a static condition of character but a mode that an individual constantly endeavours to imbibe. A life lived without dignity, is not a life lived at all for living well implies a conception of human dignity which *Dworkin* interprets includes ideals of self-respect and authenticity.

290. This constitutional value of human dignity, has been beautifully illustrated by *Aharon Barak,* as under:

Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right.[43]

291. We have to keep in mind that while expounding the aforesaid notion of dignity, *Dworkin* was not interpreting any Constitution. This notion of dignity, as conceptualised by *Dworkin,* fits like a glove in our constitutional scheme. In a series of judgments, dignity, as an aspect of Article 21, stands firmly recognised. Most of the important judgments have been taken note of and discussed in ***K.S. Puttaswamy***[44].

292. In ***K.S. Puttaswamy***, the Constitution Bench has recognised the dignity of existence. Liberty and autonomy are regarded as the essential attributes of a life with dignity. In this manner, sanctity of life also stands acknowledged, as part of Article 21 of the Constitution. That apart, while holding the right of privacy as an intrinsic part of right to life and liberty in Article 21, various facets thereof are discussed by the learned Judges in their separate opinions. A common theme which flows in all these opinions is that that privacy recognises the autonomy of the individual; every person has right to make essential choices which affect the course of life; he has to be given full liberty and freedom in order to achieve his desired goals of life; and the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual. Justice Chelameshwar, in ***K.S. Puttaswamy***, made certain specific comments which are reflective of euthanasia, though this term is not specifically used. He observed: "*forced feeding of certain persons by the State raises concerns of privacy and individual's right to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of privacy.*

293. Liberty by itself, which is a facet of Article 21 of the Constitution, duly recognised in ***K.S. Puttaswamy***, ensures and guarantees such a choice to the individual. In fact, the entire structure of civil liberties presupposes that freedom is worth fostering. The very notion of liberty is considered

as good for the society. It is also recognised that there are some rights, encompassing liberty, which are needed in order to protect freedom. *David Feldman*[45] beautifully describes as to why freedom (or liberty) is given:

The guiding principle for many liberal rights theorists may be seen as respect for individuals' own aspirations, as a means of giving the fullest expression to each individual's moral autonomy. A fundamental principle entailed by respect for moral autonomy is that individuals should prima facie be free to select their own ideas of the Good, and develop a plan for life, or day-to-day strategy, accordingly. Their choice of goods should be constrained only to the extent necessary to protect society and the similar liberties of other people. The law should protect at least the basic liberties, that is, those necessary to the pursuit of any socially acceptable conception of the good life. This is the approach which John Rawls adopts in *A Theory of Justice*. It requires that basic liberties be given considerable respect, and that they should have priority over the pursuit of social goods (such as economic development) perhaps even to the extent of giving them the status of entrenched, constitutional rights, in order to shield them from challenge in the day-to-day rough and tumble of political contention. This gives liberty a priority over other values, which, whether viewed as a description of liberal society or as a prescription for its improvement, is very controversial. Philosophers have doubted whether there are adequate grounds for the priority of liberty. Professor H.L.A. Hart has argued that (at least in a society where there is limited abundance of wealth and resources) it is rational to prefer basic freedoms to an improvement I material conditions only if one harbours the ideal of 'a public-spirited citizen who prizes political activity and service to others as among the chief goods of life and could not contemplate as tolerable an exchange of the opportunities of such activity for mere material goods or contentment'.

A rather different thesis runs through Professor Joseph Raz's book, *The Morality of Freedom*: people are autonomous moral actors, and autonomy is given expression primarily through making one's own decisions, but such freedom is valuable partly because it advances social ends. Raz points out that the identification of basic liberties therefore depends, in pat at least, on governmental notions of the public good. In respect of rights to freedom of expression, privacy, freedom of religion, and freedom from discrimination, for example, 'one reason for affording special protection to individual interests is that thereby one also protects a collective good, an aspect of a public culture'. At the same time, certain social goods are needed if freedom is to have value. Freedom is useful only if the social and economic structure of society provides a sufficient range of choices to allow people's capacity for choice to be exercised. Accordingly, freedom is seen as a collective rather than an individual good. This may constrain the range of freedoms and the purposes to which they may morally be put: a decision to make a freedom into a constitutional right is an expression of the collective political culture of a community. This thesis does not make the morality of freedom depend on people striving for perfection: individuals may not always, or ever, think about the moral consequences of their decisions, or may consciously make decisions which do not make for self-improvement. Instead, it looks only for a social commitment to the idea of the moral significance of individual choice. Raz marries the idea of the individual to that of society by recognizing that individual freedom of choice is contingent on social arrangements.

294. In his Article, Life's Dominion, *Ronald Dworkin*, while building the hypothesis on dignity concept, exhorts that people must decide about their own death, or someone else's in three main kind of situations, namely, (i) *conscious and competent*: it is a situation where a person is suffering

from some serious illness because of which he is incapacitated but he is still conscious and also competent to decide about his fate, he should be given a choice to decide as to whether he wants to continue to get the treatment; (ii) *unconscious*: where the patient is unconscious and dying, doctors are often forced to decide whether to continue life support for him or not under certain circumstances relatives have to take a decision. However, at times, unconscious patients are not about to die. At the same time, they are either in coma or in PVS. In either case, they are conscious. In such a situation, where recovery is impossible, it should be left to the relatives to decide as to whether they want the patient to remain on life support (ventilator, etc.); and (iii) *conscious but incompetent*. These factors may support, what is known as '*living will*' or '*advance directive*', which aspect is dealt with specifically while answering the second issue.

295. When a person is undergoing untold suffering and misery because of the disease with which he is suffering and at times even unable to bear the same, continuing to put him on artificial machines to prolong his vegetable life would amount to violating his dignity. These are the arguments which are raised by some jurists and sociologists[46].

296. There is a related, but interesting, aspect of this dignity which needs to be emphasised. Right to health is a part of Article 21 of the Constitution. At the same time, it is also a harsh reality that everybody is not able to enjoy that right because of poverty etc. The State is not in a position to translate into reality this right to health for all citizens. Thus, when citizens are not guaranteed the right to health, can they be denied right to die in dignity?

297. In the context of euthanasia, 'personal autonomy' of an individual, as a part of human dignity, can be pressed into service. In ***National Legal Services Authority*** v. ***Union of India and Ors.*** MANU/SC/0309/2014 : (2014) 5 SCC 438, this Court observed:

Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg* v. *Hotel Assn. of India* [MANU/SC/8173/2007 : (2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed Under Article 21 of the Constitution of India.

298. In addition to personal autonomy, other facets of human dignity, namely, 'self expression' and 'right to determine' also support the argument that it is the choice of the patient to receive or not to receive treatment.

299. We may again mention that talking particularly about certain hard cases involving moral overtones, *Dworkin* specifically discussed the issues pertaining to abortion and euthanasia with emphasis that both supporters and critics accept the idea of sanctity of life. Decisions regarding death - whether by abortion or by euthanasia - affect our human dignity. In *Dworkin's* opinion, proper recognition of human dignity leads to the recognition of the freedom of the individual. Freedom is a necessary condition for self worth. Dworkin adds: "*Because we cherish dignity, we insist on freedom.... Because we honour dignity, we demand democracy.* "[47]

300. Dignity is, thus, the core value of life and dying in dignity stands recognised in ***Gian Kaur***. It becomes a part of right of self determination.

301. The important message behind *Dworkin's* concept of human dignity can be summarised in the following manner:

(1) He describes belief in individual human dignity as the most important feature of Western political culture giving people the moral right "to confront the most fundamental questions about the meaning and value of their own lives[48].

(2) In an age when people value their independence and strive to live independent and fulfilled lives it is important "that life ends *appropriately*, that death keeps faith with the way we want to have lived"[49].

(3) Death is "not only the start of nothing but the end of everything"[50] and, therefore, it should be accomplished in a manner compatible with the ideals sought during life.

302. Taking into consideration the conceptual aspects of dignity and the manner in which it has been judicially adopted by various judgments, following elements of dignity can be highlighted (in the context of death with dignity):

(i) Encompasses **self-determination**; implies a quality of life consistent with the ability to exercise self-determined choices;

(ii) Maintains/ability to make **autonomous choices**; high regard for individual autonomy that is pivotal to the perceived quality of a person's life;

(iii) **Self-control** (retain a similar kind of control over dying as one has exercised during life - a way of achieving death with dignity);

(iv) Law of **consent**: The ability to choose-orchestrate the timing of their own death;

(v) Dignity may be compromised if the dying process is prolonged and involves becoming incapacitated and dependent;

(vi) Respect for human dignity means respecting the **intrinsic value of human life**;

(vii) Avoidance of dependency;

(viii) Indefinite continuation of futile physical life is regarded as undignified;

(ix) Dignity commands emphatic respect[51];

• Reason and emotion are both significant in treatment decisions, especially at the end of life where compassion is a natural response to appeals made on the basis of stifled self-determination;

• Compassion represents a collision of "imaginative insight" and empathy; and

• Compassion is here distinguished from pity, which is regarded as "inappropriate to the dignity of the autonomous person, especially its overtones of paternalism",[52] because compassion is believed to provoke an active, and by implication positive, response.[53]

(x) Dignity **engenders a sense of serenity and powerfulness**, fortified by "qualities of composure, calmness, restraint, reserve, and emotions or passions subdued and securely controlled without being negated or dissolved"[54]; and

(x) **Observer's Dignity aspect:**

• a person possessed of dignity at the end of life, might induce in an observer a sense of tranquility and admiration which inspires images of power and self-assertion through restraint and poised composure; and

• dignity clearly does play a valuable role in contextualizing people's perceptions of death and dying, especially as it appears to embody a spirit of self-determination that advocates of voluntary euthanasia crave.

303. Once we examine the matter in the aforesaid perspective, the inevitable conclusion would be that passive euthanasia and death with dignity are inextricably linked, which can be summed up with the following pointers:

(i) The opportunity to die unencumbered by the intrusion of medical technology and before experiencing loss of independence and control, appears to many to extend the promise of a dignified death. When medical technology intervenes to prolong dying like this it does not do so unobtrusively;

(ii) Today many patients insist on more than just a right to health care in general. They seek a right to choose specific types of treatment, able to retain control throughout the entire span of their lives and to exercise autonomy in all medical decisions concerning their welfare and treatment;

(iii) A dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.

304. The aforesaid discussion takes care of those who oppose euthanasia on moral and ethical principles. We feel that at least the case for passive euthanasia is made out. Certain moral dilemma as to what is the exact stage when such a decision to withdraw medical support, would still remain. At times, a physician would be filled with profound ethical uncertainties when a person is suffering unbearable pain and agony, the question would be as to whether such suffering has reached the stage where it is incurable and, therefore, decision should be taken to allow such person to pass away in peace and dignity of hastening the process of death or the situation may be reversible, though chances thereof are far remote. ***Dr. R.R. Kishore***, who possesses medical as well as law degree at the same time, lists the following questions which a physician will have to answer while taking such a decision:

(i) Is it professionally permissible to kill or to help in dying a terminally ill and incurable patient?

(ii) How does such a decision affect the person concerned and the society in general?

(iii) What are the values that are attracted in such situations?

(iv) How to assess that the individual's urge to die is based on cool and candid considerations and is not an impulsive act reflecting resources constraints, inadequate care or discrimination?

(v) What are the practical risks involved in case a decision is taken to terminate the life of the patient?

(vi) Where should the physician look for guidance in situations of such moral dilemma?

(vii) Does the physician's or the patient's religion play any role in decision making process?

305. What are the parameters to be kept in mind and the dangers which may be encountered while taking decision on the aforesaid questions, is beautifully explained by ***Dr. R.R. Kishore***[55] in the following words:

Contemporary world order is founded on reason, equity and dignity. Reason envisages definition and distinctness. What is the distinction between 'killing' and 'letting die'? or, in other words, what is the difference between 'causing death' and 'denial to prevent death'? Also, can the prolongation of life be ever 'unnecessary'? And, if yes, what are the criteria to determine the life's worth? Equity mandates equality of opportunity, balancing of interests and optimization of resources. This means addressing questions such as; for how long one should live? Who should die first? What should be the ideal method of terminating one's life? Dignity imposes obligation to preserve life at all costs and in the 4 event of an individual's conscious expression to end his life, contemplates a valid purpose and truly informed consent. Deontologically, in the context of sanctity of life, there is not much of conflict between secular and religious concepts as both consider life as sacred and worthy of protection. But, the differences appear in the face of application of advanced technology which has the potential of keeping alive the terminally ill and incurable persons who would have otherwise died. Since the technological resources are not unlimited prioritization becomes a functional imperative, bringing in the concepts of worth and utility. In other words, the questions like whose life is more precious and worthy of protection have to be answered. This is a formidable task, attracting multiple and diverse perspectives, moral as well as strategic, leading to heterogeneous approaches and despite agreement on fundamental issue of value of life the decisions may seem to be at variance. A fair and objective decision in such circumstances may be a difficult exercise and any liberalization is fraught with following apprehensions:

• Danger of abuse

• Enhanced vulnerability to the poor

• Slippery slope outcome

• Weakening of protection of life notions

Any ethical model governing end of life decisions should therefore be impervious to all extraneous forces such as, the utilitarian bias, poverty, and subjectivity i.e., inadequate appreciation of socio-economic, family, cultural and religious perspectives of the individual. The poor and resourceless are likely to face deeper and more severe pain and agony before dying and as such may request their physicians to terminate their lives much earlier than those who have better access to resource. This poverty-death nexus makes an objective decision difficult, constituting a formidable challenge to committed physicians and Ors. involved with the end of life issues. Taking a decision on case to case basis, depending on individual's material constraints and inadequacies, enhances the problem rather than solving it, as it reduces the life from an eternal bliss to a worldly award, subjecting its preservation to socio-economic exigencies. For these reasons many feel that the safer and more respectable course to improve death is to provide good palliative care and emotional support rather than assisting the end of life. The moral ambiguities notwithstanding, decision to assist or not to assist the act of dying by correctly interpreting the patient's wish and the accompanying circumstances, including the moral dictates, constitutes a practical problem. Let us see how Hinduism addresses these issues.

306. In the article, ***End of Life Issues and the Moral Certainty***[56], the author after posing the moral dilemma, noted above, discusses the approach to find the solutions.

307. I had indicated at the earlier stage that Hippocratic Oath, coupled with ethical norms of medical profession, stand in the way of euthanasia. It brings about a situation of dilemma insofar as medical practitioner is concerned. On the one hand his duty is to save the life of a person till he is alive, even when the patient is terminally ill and there are no chances of revival. On the other hand, the concept of dignity and right to bodily integrity, which recognises legal right of autonomy and choice to the patient (or even to his relations in certain circumstances, particularly when the patient is unconscious or incapacitated to take a decision) may lead to exercising his right of euthanasia.

308. Dignity implies, apart from a right to life enjoyment of right to be free of physical interference. At common law, any physical interference with a person is, *prima facie*, tortious. If it interferes with freedom of movement, it may constitute a false imprisonment. If it involves physical touching, it may constitute a battery. If it puts a person in fear of violence, it may amount to an assault. For any of these wrongs, the victim may be able to obtain damages.

309. When it comes to medical treatment, even there the general common law principle is that any medical treatment constitutes a trespass to the person which must be justified, by reference either to the patient's consent or to the necessity of saving life in circumstances where the patient is unable to decide whether or not to consent.

310. Rights with regard to medical treatment fall essentially into two categories: first, rights to receive or be free of treatment as needed or desired, and not to be subjected involuntarily to experimentation which, irrespective of any benefit which the subjects may derive, are intended to advance scientific knowledge and benefit people other than the subject in the long term; secondly,

rights connected incidentally with the provision of medical services, such as rights to be told the truth by one's doctor.

311. Having regard to the aforesaid right of the patients in common law, coupled with the dignity and privacy rights, it can be said that passive euthanasia, under those circumstances where patient is in PVS and he is terminally ill, where the condition is irreversible or where he is braindead, can be permitted. On the aforesaid reasoning, I am in agreement with the opinion of the other members of this Bench in approving the judgment in ***Aruna Ramachandra Shanbaug***.

(D) <u>Economics of Euthanasia</u>

312. This is yet another reason for arriving at the same conclusion.

313. When we consider the matter of euthanasia in the context of economic principles, it becomes another reason to support the aforesaid conclusion. This aspect can be dealt with in two ways.

314. First, because of rampant poverty where majority of the persons are not able to afford health services, should they be forced to spend on medical treatment beyond their means and in the process compelling them to sell their house property, household things and other assets which may be means of livelihood Secondly, when there are limited medical facilities available, should a major part thereof be consumed on those patients who have no chances of recovery? In Economic & Political Weekly dated February 10, 2018, it is reported:

India is one of the worst India is one of the worst countries to die in, especially for those suffering from terminal illnesses. In 2015, the Economist Intelligence Unit brought out a Quality of Death Index, which ranked India 67th out of the 80 countries it had surveyed. In December 2017, a joint report published by the World Health Organization and the World Bank revealed that 49 million Indians are pushed into poverty every year due to out-of-pocket expenditure on healthcare, accounting for half of the 100 million who meet such a fate worldwide. India's Central Bureau of Health Intelligence data puts the figure even higher. This unconscionable situation is the direct outcome of the sorry state of our public health system. India's spending on health is among the lowest in the world. The *Economic Survey 2017-18* shows that the government spends only 1.4% of its gross domestic product (GDP) on health. The 2017 National Health Policy, which otherwise exudes piety in its abstractions, aims to increase government expenditure to 2.5% of GDP by 2025. By all accounts, this is too little too late.

The situation improves only marginally for the better-off sections. With over 90% of intensive care units in the private healthcare sector, it is largely this Section that can access expensive treatments. But this does not improve end-of-life situations for them. Awareness and training in palliative care remain grossly inadequate. For those making profit in the private healthcare sector, there is no incentive to provide such treatment. Instead, treatment for the terminally ill continues to involve prolonging life with expensive, invasive, and painful treatment with very little concern for the patients themselves or their families.

315. Some of the apprehensions expressed in ethical debates about euthanasia can be answered when the ethical debate about euthanasia is not divorced from an economic consideration of cost

and benefits of euthanasia to society. *P.R. Ward*[57] argues that ethics is concerned with individuals and, therefore, does not take into account the societal perspective. On the other hand, economics is sought to be concerned with relative costs and benefits to society and can help to determine if euthanasia is of benefit to the majority in society. According to him, the net benefit to the individual (from ethical considerations) can be compared with the net benefit to society (from economics), and that both can be included in an overall decision Rule for whether or not to legalise euthanasia. Ward draws on the health economics literature (for example, *Mooney*[58]) to suggest that a positive answer to this question ins implicit in many health-rationing decisions and is applicable to the euthanasia decision. He also asserts that '*introducing an economic perspective is not incompatible with ethical issues*'.

316. No doubt, protagonists of ethical aspects of euthanasia oppose the aforesaid view. According to them, euthanasia also involves the specific act of a medical professional killing a patient and the ethical status of this act has implications both for individuals and for society. Their counter argument, therefore, is that to be able to make an economic assessment of euthanasia, we would have to be able to evaluate the cost and benefits of this act of killing. However, even they accept that if the act of killing by euthanasia is ethically acceptable in some circumstances, it would be appropriate to consider the net benefits of the act to the individual patient along with the wider economic considerations[59]. In the instant case, we have come to the conclusion that under certain circumstances, i.e. when the patient is in PVS or braindead/clinically dead, at least passive euthanasia would even be ethically acceptable, on the application of doctrine of dignity. In such a situation, the economic considerations would strengthen the aforesaid conclusion.

317. At times, for deciding legal issues, economic analysis of law assumes importance[60]. It is advocated that one of the main reasons which should prompt philosophers of law to undertake economic analysis seriously is that the most basic notion in the analysis-efficiency or Pareto optimality[61]-was originally introduced to help solve a serious objection to widely held moral theory, utilitarian. Utilitarians hold that the principle of utility is the criterion of the right conduct. If one has to evaluate policies in virtue of their effect on individual welfare or utility, one norm of utility has to be compared with that of another. We may clarify that this economic principle has been applied in a limited sense only as a supporting consideration with the aim to promote efficiency.

318. If we understand correctly the logic behind opposition to euthanasia, particularly, passive euthanasia, it proceeds on the basis that third person should not have right to take a decision about one's life and, more importantly, it is difficult to ascertain, at a particular stage, as to whether time has come to take such a decision, namely, withdraw the medical support. Insofar as latter aspect is concerned, we feel that in ***Aruna Ramachandra Shanbaug***, this Court has taken due care in prescribing the circumstances, namely, when the person is in a Permanent Vegetative State (PVS) with no reversible chance or when he is 'brain dead' or 'clinically dead'. Insofar as first aspect is concerned, the subject matter of the present writ petition takes care of that.

THE SECOND ISSUE

319. With this, we advert to the second question formulated above, which is as under:

Whether a 'living will' or 'advance directive' should be legally recognised and can be enforced? If so, under what circumstances and what precautions are required while permitting it?

320. In this writ petition, the Petitioner has sought a direction to the Respondents to adopt suitable procedures to ensure that persons of deteriorated health or terminally ill should be able to execute a document titled 'living will and/or advance authorisation' which can be presented to the hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of life of the executant. In nutshell, the Petitioner wants that citizens should have right to decide in advance not to accept any kind of treatment at a stage when they are terminally ill. Expressing this in advance in a document is known as 'living will' or 'advance directive', whereby the aforesaid self-determination of the person is to be acted upon when he reaches PVS or his brain dead/clinically dead.

321. It is an undisputed that Doctors' primary duty is to provide treatment and save life but not in the case when a person has already expressed his desire of not being subjected to any kind of treatment. It is a common law right of people, of any civilized country, to refuse unwanted medical treatment and no person can force him/her to take any medical treatment which the person does not desire to continue with. The foundation of the aforesaid right has already been laid down by this Court in ***Aruna Ramachandra Shanbaug*** while dealing with the issue of 'involuntary passive euthanasia'. To quote:

66. Passive euthanasia is usually defined as withdrawing medical treatment with a deliberate intention of causing the patient's death. For example, if a patient requires kidney dialysis to survive, not giving dialysis although the machine is available, is passive euthanasia. Similarly, if a patient is in coma or on a heart-lung machine, withdrawing of the machine will ordinarily result in passive euthanasia. Similarly not giving life-saving medicines like antibiotics in certain situations may result in passive euthanasia. Denying food to a person in coma or PVS may also amount to passive euthanasia.

67. As already stated above, euthanasia can be both voluntary or non-voluntary. In voluntary passive euthanasia a person who is capable of deciding for himself decides that he would prefer to die (which may be for various reasons e.g. that he is in great pain or that the money being spent on his treatment should instead be given to his family who are in greater need, etc.), and for this purpose he consciously and of his own free will refuses to take life-saving medicines. In India, if a person consciously and voluntarily refuses to take life-saving medical treatment it is not a crime...

xxx xxx xxx

78.... First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so [see *Schloendorff* v. *Society of New York Hospital* [211 NY 125: 105 NE 92 (1914)], NE at p. 93, per Cardozo, J.; *S.* v. *McC. (Orse S.)* and *M (D.S. Intervener)* [1972 AC 24 (HL)], *W* v. *W*; AC at p. 43, per Lord Reid; and *Sidaway* v. *Board of Governors of*

the Bethlem Royal Hospital [1985 AC 871: (1985) 2 WLR 480: (1985) 1 All ER 643 (HL)] AC at p. 882, per Lord Scarman]. To this extent, the principle of the sanctity of human life must yield to the principle of self-determination [see (Court of Appeal transcript in the present case, at p. 38 F per Hoffmann, L.J.)], and, for present purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified. On this basis, it has been held that a patient of sound mind may, if properly informed, require that life support should be discontinued: see *Nancy B.* v. *Hotel Dieu de Quebec* [(1992) 86 DLR (4^{th}) 385 (Que SC)]. Moreover the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it; though in such circumstances especial care may be necessary to ensure that the prior refusal of consent is still properly to be regarded as applicable in the circumstances which have subsequently occurred [see e.g. *T. (Adult: Refusal of Treatment), In re* [1993 Fam 95: (1992) 3 WLR 782: (1992) 4 All ER 649 (CA)]]. I wish to add that, *in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so.* It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes...

322. The aforesaid principle has also been recognised by this Court in its Constitution Bench judgment passed in ***Gian Kaur*** wherein it was held that although '*Right to Life*' Under Article 21 does not include '*Right to Die*', but '*Right to live with dignity*' includes '**Right to die with dignity**'. To quote:

24. Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of "sanctity of life" or the "right to live with dignity" is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of "right to life" therein includes the "right to die". The "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the "right to die" with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life.

25. A question may arise, in the context of a dying man who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the "right to die" with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician-assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life.

323. In fact, the Law Commission of India was asked to consider on the feasibility of making legislation on euthanasia, taking into account the earlier 196th Report of the Law Commission as well as the judgment of this Court in ***Aruna Ramachandra Shanbaug***. In August, 2012, Law Commission came out with a detailed 241st Report on the issue of passive euthanasia, wherein it approved the concept of Right to Self Determination also. The Law Commission made some important observations in its report such as:

2.4 The following pertinent observations made by the then Chairman of the Law Commission in the forwarding letter dated 28 August 2006 addressed to the Hon'ble Minister are extracted below:

A hundred years ago, when medicine and medical technology had not invented the artificial methods of keeping a terminally ill patient alive by medical treatment, including by means of ventilators and artificial feeding, such patients were meeting their death on account of natural causes. Today, it is accepted, a terminally ill person has a common law right to refuse modern medical procedures and allow nature to take its own course, as was done in good old times. It is well-settled law in all countries that a terminally ill patient who is conscious and is competent, can take an 'informed decision' to die a natural death and direct that he or she be not given medical treatment which may merely prolong life. There are currently a large number of such patients who have reached a stage in their illness when according to well-informed body of medical opinion, there are no chances of recovery. But modern medicine and technology may yet enable such patients to prolong life to no purpose and during such prolongation, patients could go through extreme pain and suffering. Several such patients prefer palliative care for reducing pain and suffering and do not want medical treatment which will merely prolong life or postpone death.

xxx xxx xxx

5.2 The 196th Report of the Law Commission stated the fundamental principle that a terminally ill but competent patient has a right to refuse treatment including discontinuance of life sustaining measures and the same is binding on the doctor, "provided that the decision of the patient is an 'informed decision' ". 'Patient' has been defined as a person suffering from terminal illness. "Terminal illness" has also been defined Under Section 2(m). The definition of a 'competent patient' has to be understood by the definition of 'incompetent patient'. 'Incompetent patient' means a patient who is a minor or a person of unsound mind or a patient who is unable to weigh, understand or retain the relevant information about his or her medical treatment or unable to make an 'informed decision' because of impairment of or a disturbance in the functioning of the mind or brain or a person who is unable to communicate the informed decision regarding medical treatment through speech, sign or language or any other mode (vide Section 2(d) of the Bill, 2006). "Medical Treatment" has been defined in Section 2(i) as treatment intended to sustain, restore or replace vital functions which, when applied to a patient suffering from terminal illness, would serve only to prolong the process of dying and includes life sustaining treatment by way of surgical operation or the administration of medicine etc. and use of mechanical or artificial means such as ventilation, artificial nutrition and cardio resuscitation. The expressions "best interests" and "informed decision" have also been defined in the proposed Bill. "Best Interests", according to Section 2(b), includes the best interests of both on incompetent patient and competent patient who has not taken an informed decision and it ought not to be limited to medical interests of the patient but includes ethical, social, emotional and other welfare considerations. The term 'informed decision' means,

as per Section 2 (e) "the decision as to continuance or withholding or withdrawing medical treatment taken by a patient who is competent and who is, or has been informed about-(i) the nature of his or her illness, (ii) any alternative form of treatment that may be available, (iii) the consequences of those forms of treatment, and (iv) the consequences of remaining untreated.

xxx xxx xxx

5.8 The Law Commission of India clarified that where a competent patient takes an 'informed decision' to allow nature to have its course, the patient is, under common law, not guilty of attempt to commit suicide (Under Section 309 Indian Penal Code) nor is the doctor who omits to give treatment, guilty of abetting suicide (Under Section 306 Indian Penal Code) or of culpable homicide (u/s 299 read with Section 304 of Indian Penal Code).

xxx xxx xxx

7.2 In this context, two cardinal principles of medical ethics are stated to be patient autonomy and beneficence (vide P. 482 of SCC in Aruna's case):

1. "Autonomy means the right to self-determination, where the informed patient has a right to choose the manner of his treatment. To be autonomous, the patient should be competent to make decision and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a living will, OR the wishes of surrogates acting on his behalf (substituted judgment) are to be respected. The surrogate is expected to represent what the patient may have decided had she/she been competent, or to act in the patient's best interest.

2. Beneficence is acting in what (or judged to be) in the patient's best interest. Acting in the patient's best interest means following a course of action that is best for the patient, and is not in influenced by personal convictions, motives or other considerations.....

xxx xxx xxx

11.2 The discussion in the foregoing paras and the weighty opinions of the Judges of highest courts as well as the considered views of Law Commission (in 196th report) would furnish an answer to the above question in clearest terms to the effect that legally and constitutionally, the patient (competent) has a right to refuse medical treatment resulting in temporary prolongation of life. The patient's life is at the brink of extinction. There is no slightest hope of recovery. The patient undergoing terrible suffering and worst mental agony does not want his life to be prolonged by artificial means. She/he would not like to spend for his treatment which is practically worthless. She/he cares for his bodily integrity rather than bodily suffering. She/he would not like to live like a 'cabbage' in an intensive care unit for some days or months till the inevitable death occurs. He would like to have the right of privacy protected which implies protection from interference and bodily invasion. As observed in Gian Kaur's case, the natural process of his death has already commenced and he would like to die with peace and dignity. No law can inhibit him from opting such course. This is not a situation comparable to suicide, keeping aside the view point in favour of decriminalizing the attempt to suicide. The doctor or relatives cannot compel him to have invasive medical treatment by artificial means or treatment. If there is forced medical intervention

on his body, according to the decisions cited supra (especially the remarks of Lord Brown Wilkinson in ***Airdale's*** case), the doctor/surgeon is guilty of 'assault' or 'battery'. In the words of Justice Cardozo, "every human being of adult years and sound mind has a right to determine what shall be done with his own body and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages." Lord Goff in ***Airedale***'s case places the right to self determination on a high pedestal. He observed that "in the circumstances such as this, the principle of sanctity of human life must yield to the principle of self determination and the doctor's duty to act in the best interests of the patient must likewise be qualified by the wish of the patient." The following observations of Lord Goff deserve particular notice:

I wish to add that, in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.

324. And finally, the Law Commission in its 241st Report gave Summary of Recommendations as under:

14. Summary of Recommendations

14.1 Passive euthanasia, which is allowed in many countries, shall have legal recognition in our country too subject to certain safeguards, as suggested by the 17th Law Commission of India and as held by the Supreme Court in Aruna Ramachandra's case [MANU/SC/0176/2011 : (2011) 4 SCC 454)]. It is not objectionable from legal and constitutional point of view.

14.2 A competent adult patient has the right to insist that there should be no invasive medical treatment by way of artificial life sustaining measures/treatment and such decision is binding on the doctors/hospital attending on such patient provided that the doctor is satisfied that the patient has taken an 'informed decision' based on free exercise of his or her will. The same Rule will apply to a minor above 16 years of age who has expressed his or her wish not to have such treatment provided the consent has been given by the major spouse and one of the parents of such minor patient.

14.3 As regards an incompetent patient such as a person in irreversible coma or in Persistent Vegetative State and a competent patient who has not taken an 'informed decision', the doctor's or relatives' decision to withhold or withdraw the medical treatment is not final. The relatives, next friend, or the doctors concerned/hospital management shall get the clearance from the High Court for withdrawing or withholding the life sustaining treatment. In this respect, the recommendations of Law Commission in 196th report is somewhat different. The Law Commission proposed an enabling provision to move the High Court.

14.4 The High Court shall take a decision after obtaining the opinion of a panel of three medical experts and after ascertaining the wishes of the relatives of the patient. The High Court, as parens patriae will take an appropriate decision having regard to the best interests of the patient.

14.5 Provisions are introduced for protection of medical practitioners and Ors. who act according to the wishes of the competent patient or the order of the High Court from criminal or civil action. Further, a competent patient (who is terminally ill) refusing medical treatment shall not be deemed to be guilty of any offence under any law.

14.6 The procedure for preparation of panels has been set out broadly in conformity with the recommendations of 17th Law Commission. Advance medical directive given by the patient before his illness is not valid.

14.7 Notwithstanding that medical treatment has been withheld or withdrawn in accordance with the provisions referred to above, palliative care can be extended to the competent and incompetent patients. The Governments have to devise schemes for palliative care at affordable cost to terminally ill patients undergoing intractable suffering.

14.8 The Medical Council of India is required issue guidelines in the matter of withholding or withdrawing of medical treatment to competent or incompetent patients suffering from terminal illness.

14.9 Accordingly, the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006, drafted by the 17th Law Commission in the 196th Report has been modified and the revised Bill is practically an amalgam of the earlier recommendations of the Law Commission and the views/directions of the Supreme Court in Aruna Ramachandra case. The revised Bill is at Annexure I.

325. I am also of the view that such an advance authority is akin to well recognised common law right to refuse medical treatment (See: Re T (Adult: ***Refusal of Medical Treatment*** 71 (1992) 4 All ER 649), Re B (***Adult: Refusal of Medical Treatment*** (2002) 2 All ER 449), ***Crazan*** v. ***Director, Missouri Department of Health*** 497 U.S. 261 (1990), ***Malette*** v. ***Shulam*** 67 DLR (4th) 321.

326. In a recent landmark judgment of the nine Judge Constitution Bench in the case of ***K.S. Puttaswamy*** authoritatively held that right to life enshrined in Article 21 includes right to privacy. One of the facet of this right acknowledged is an individual's decision to refuse life prolonging medical treatment or terminate his life. Justice Chelameswar in his separate opinion has described the same in the following manner:

373. Concerns of privacy arise when the State seeks to intrude into the body of subjects. [*Skinner* v. *Oklahoma*, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942)"20. There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority--even those who have been guilty of what the majority defines as crimes." (SCC OnLine US SC para 20)--Jackson, J.] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right to privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there is a huge debate on those issues though

it is still a grey area. [For the legal debate in this area in US, See Chapter 15.11 of *American Constitutional Law* by Laurence H. Tribe, 2nd Edn.] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy. Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision-making process. The right to travel freely within the country or go abroad is an area falling within the right to privacy. The text of our Constitution recognised the freedom to travel throughout the country Under Article 19(1)(*d*). This Court has already recognised that such a right takes within its sweep the right to travel abroad. [*Maneka Gandhi* v. *Union of India* MANU/SC/0133/1978 : (1978) 1 SCC 248] A person's freedom to choose the place of his residence once again is a part of his right to privacy [*Williams* v. *Fears* 1900 SCC OnLine US SC 211: 45 L Ed 186 : 179 US 270 (1900) --"8. Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty...." (SCC OnLine US SC para 8)] recognised by the Constitution of India Under Article 19(1)(e) though the predominant purpose of enumerating the above-mentioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. The choice of appearance and apparel are also aspects of the right to privacy. The freedom of certain groups of subjects to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right to privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling Under Article 25. Informational traces are also an area which is the subject-matter of huge debate in various jurisdictions falling within the realm of the right to privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect biometric data regarding all the residents of this country. The above-mentioned are some of the areas where some interest of privacy exists. The examples given above indicate to some extent the nature and scope of the right to privacy.

NATURE OF LIVING WILL OR ADVANCE DIRECTIVE

327. Advance directives are instruments through which persons express their wishes at a prior point in time, when they are capable of making an informed decision, regarding their medical treatment in the future, when they are not in a position to make an informed decision, by reason of being unconscious or in a PVS or in a coma. A medical power of attorney is an instrument through which persons nominate representatives to make decisions regarding their medical treatment at a point in time when the persons executing the instrument are unable to make informed decisions themselves. Clause 11 of the draft Treatment of Terminally-III Patients (Protection of Patients and Medical Practitioners) Bill, 2016 states that advance directives or medical power of attorney shall be void and of no effect and shall not be binding on any medical practitioner. This blanket ban, including the failure even to give some weight to advance directives while making a decision about the withholding or withdrawal of life-sustaining treatment is disproportionate. It does not constitute a fair, just or reasonable procedure, which is a requirement for the imposition of a restriction on the right to life (in this case, expressed as the right to die with dignity) Under Article 21.

328. At this juncture, we may again reiterate that on the one hand autonomy of an individual gives him right to choose his destiny and, therefore, he may decide before hand, in the form of advance directive, at what stage of his physical condition he would not like to have medical treatment, and on the other hand, there are dangers of misuse thereof as well. *David Feldman* explained the same in the following manner:

...However, while it is undoubtedly a criminal act to do anything intending to hasten another person's death, there is no absolute duty on a doctor to try to save the life of a patient, for two reasons.

The first is that any treatment is *prima facie* a trespass to the person, and if the patient is adult and competent to consent it will be unlawful without that consent. A doctor therefore acts lawfully-indeed, could not lawfully act otherwise-when he withholds treatment at the request of a terminally ill patient. This has been called passive, as distinct from active, euthanasia. To ensure that medical staff know of their wishes, some people have executed what are sometimes called 'living wills', giving directions to medical staff to withhold treatment in specified circumstances, and making their wishes known to anyone who might be appointed as their representative in the event that they become in capable for any reason. The efficacy of such prior indications was accepted, *obiter*, by Lord Goff in *Airedale NHS Trust* v. *Bland*, above. In such circumstances, the patient voluntarily accepts non-treatment while in a state to do so rationally. However, where there is the slightest doubt about the wishes of a patient, that patient should be treated, because the paternalism which decides for someone else when it is best to die is effectively denying them the opportunity to make the most of their lives as autonomous individuals. Furthermore, it would seem to be wrong in principle to put pressure to bear on a patient to elect to die. In those states of the USA where voluntary euthanasia is lawful, the ethical problems for patients, doctors, next of kin, and nursing staff are immense. Where the patient is not mentally competent to confirm the choice to die at the time when the choice is about to be given effect, it will also be impossible to know whether the choice expressed earlier was truly voluntary, whether the consent was informed, and whether or not the patients would want to reconsider were he able to do so. In the Netherlands, where it is lawful to practice voluntary euthanasia, it seems that the procedural safeguards designed to protect people against involuntary euthanasia are very hard to enforce and are regularly flouted.

Secondly, the doctrine of double effect allows the doctor to take steps which carry a substantial risk to life in order to treat, in good faith and with the patient's consent, some disease or symptom. This is essential, because virtually any treatment carries some risk to the patient. It is particularly relevant to the euthanasia issue in cases where the primary object (e.g. pain control in terminal cancer treatment) can only be achieved by administering drugs at a level which is likely to shorten life, but enhances the quality of life while it lasts. A trade-off between length of life and quality of life is permissible.

329. At the same time, possibility of misuse cannot be held to be a valid ground for rejecting advance directive, as opined by the Law Commission of India as well in its 196th and 241st Report. Instead, attempt can be made to provide safeguards for exercise of such advance directive. For example, Section 5 of the Mental Healthcare Act, 2017 recognises the validity of advance directives for the treatment of mental illness under the Mental Healthcare Act, 2017. The draft Mental Healthcare Regulations have recently been made available for public comment by the

Ministry of Health and Family Welfare. These prescribe the form in which advance directives may be made. Part II, Chapter 1 of the Regulations allow a Nominated Representative to be named in the Advance Directive. An advance directive is to be in writing and signed by two witnesses attesting to the fact that the Directive was executed in their presence. A Directive to be registered with the Mental Health Review Board. It may be changed as many times as desired by the person executing it and the treating mental health professional must be informed of such change. Similarly, Section 3 of the Transplantation of Human Organs and Tissues Act, 1994 allows persons to authorise the removal of human organs and tissues from their body before death. The form in which this authorisation is to be made is prescribed in Form 7 of the Transplantation of Human Organs and Tissues Rules, 2014. This is also to be in writing and in the presence of two witnesses. A copy of the pledge is to be retained at the institution where the pledge is made and the person making the pledge has the option to withdraw the pledge at any time. Where such authorisation had been made, the person lawfully in charge of the donor's body after his death is required to grant the concerned medical practitioner all reasonable facilities for the removal of human organs or tissues, unless such person has reason to believe that the donor had substantially revoked his authority.

330. Mr. Datar, learned Counsel appearing for the intervenor, has also brought to our notice various safeguards for advance directive provided in other jurisdiction in many ways i.e. by prescribing the form that the directive must take, by specifying who may act as witnesses, by allowing the possibility of amendment and by allowing the validity of the directive to be challenged. Some of these examples are as follows:

(a) In U.K., Under Section 24 of the Mental Capacity Act, 2005, a person above the age of 18 years who has capacity may execute an advance directive. A person is said to lack capacity if in relation to a matter at the material time, he is unable to make a decision for himself because of an impairment of or disturbance in the functioning of the mind or brain. In Netherlands, Under Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, patients aged 16 or above may make advance directives. In Germany, the authorisation of the court is required for the termination of treatment in the case of minors. In Switzerland, persons with mental illnesses are considered exceptions and cannot discontinue medical treatment if it is an expression or symptom of their mental illness. In Hungary, pregnant women may not refuse treatment if it is seen that they are able to carry the pregnancy.

(b) Section 25 of the Mental Capacity Act, an advance decision to refuse life-sustaining treatment must be in writing. It must be signed by the patient or someone on his behalf and signed by a witness. It must also include a written statement by the patient that the decision will apply to the specific treatment even if the patient's life is at risk. Under Article 7: 450 of the Dutch Civil Code, an advance directive should be in written form, dated and signed to be valid. Section 110Q of the Western Australia Guardianship and Administration Act, 1990 requires advance directives to be signed in the presence of two witnesses, who must both be at least 18 years of age and one of whom must be a person authorised to witness legal documents under the relevant law. Section 15 of the South Australia Advance Directives Act, 2013 sets out requirements for 'suitable' witnesses under the Act. A person may not be a witness if she is appointed as a substitute decision-maker under the advance directive, has a direct or indirect interest in the estate of the person executing the advance directive or is a health practitioner responsible for the health care of the person

executing the advance directive. Similar disqualifications for witnesses are prescribed in the Oregon Death with Dignity Act, 2002 when a person makes a written request for medication for the purpose of ending her life in a humane and dignified manner.

(c) Under Section 24(3) of the UK Mental Capacity Act, 2005, a person may alter or withdraw an advance decision at any time he has the capacity to do so. Under Section 25(2)(c), an advance decision will not be applicable if a person has done anything else clearly inconsistent with the advance decision. Under Section 3.06 of the Oregon Death with Dignity Act, 2005, a person may rescind her written request for medicating at any time regardless of her mental state. To allow for a change of mind, Section 3.08 also requires at least 15 days to lapse between the patient's initial oral request and the writing of a prescription, while a minimum of 48 hours must elapse between the patient's written request and the writing of a prescription. Under Section 110S of the Western Australia Guardianship and Administration Act, 1990, a treatment decision in an advance directive does not operate if circumstances exist or have arisen that the maker of that directive could not reasonably have anticipated at the time of making the directive and that would have caused a reasonable person in the maker's position to have changed her mind about the directive. While determining whether such circumstances have arisen, the age of the maker and the period that has elapsed between the time at which the directive was made and the circumstances that have arisen are factors that must be taken into account while determining the validity of the directive.

(d) Section 26(4) of the UK Mental Capacity Act permits courts to make a declaration as to whether the advance decision exists, is valid, and applicable to a treatment. Under Article 373 of the Swiss Civil Code, 'any person closely related to the patient can contact the adult protection authority in writing and claim that...the patient decree is not based on the patient's free will.' Under Section 110V, 110W, 110X, 110Y and 110Z of the Western Australia Guardianship and Administration Act, 1990, any person who has a 'proper interest' in the matter, in the view of the State Administrative Tribunal, may apply to it for a declaration with respect to the validity of an advance directive. It can also interpret the terms of the directive, give directions to give effect to it or revoke a treatment decision in the directive.

331. Mr. Datar has suggested that this Court should frame the guidelines to cover the following aspects:

(a) Who will be competent to execute an advance directive?

(b) In what form will an advance directive have to be issued in order to be valid?

(c) Who is to ensure that an advance directive is properly obeyed?

(d) What legal consequences follow from the non-obedience to an advance directive?

(e) In what circumstances can a doctor refuse to enforce an advance directive?

332. He has given the following suggestions on the aforesaid aspects:

(a) Only adult persons, above the age of eighteen years and of sound mind at the time at which the advance directive is executed should be deemed to be competent. This should include persons suffering from mental disabilities provided they are of sound mind at the time of executing an advance directive.

(b) Only written advance directives that have been executed properly with the notarised signature of the person executing the advance directive, in the presence of two adult witnesses shall be valid and enforceable in the eyes of the law. The form should require a reaffirmation that the person executing such directives has made an informed decision. Only those advance directives relating to the withdrawal or withholding of life-sustaining treatment should be granted legal validity. The determination that the executor of the advance directive is no longer capable of making the decision should be made in accordance with relevant medical professional Regulations or standard treatment guidelines, as also the determination that the executor's life would terminate in the absence of life-sustaining treatment. The constitution of a panel of experts may also be considered to make this determination. The use of expert committees or ethics committees in other jurisdictions is discussed at Para 28 of these written submissions.

(c) Primary responsibility for ensuring compliance with the advance directive should be on the medical institution where the person is receiving such treatment.

(d) If a hospital refuses to recognise the validity of an advance directive, the relatives or next friend may approach the jurisdictional High Court seeking a writ or mandamus against the concerned hospital to execute the directive. The High Court may examine whether the directive has been properly executed, whether it is still valid (i.e. whether or not circumstances have fundamentally changed since its execution, making it invalid) and/or applicable to the particular circumstances or treatment.

(e) No hospital or doctor should be made liable in civil or criminal proceedings for having obeyed a validly executed advance directive.

(f) Doctors citing conscientious objection to the enforcement of advance directives on the grounds of religion should be permitted not to enforce it, taking into account their fundamental right Under Article 25 of the Constitution. However, the hospital will still remain under this obligation.

333. All these suggestions and various aspects of advance directives have been elaborately considered and detailed directions are given by the Hon'ble the Chief Justice in his judgment, with which I duly concur. In summation, I say that this Court has, with utmost sincerity, summoned all its instincts for legality, fairness and reasonableness in giving a suitable answer to the vexed issue that confronts the people on daily basis, keeping in mind the competing interests and balancing those interests. It will help lead society towards an informed, intelligent and just solution to the problem.

334. My last remarks are a pious hope that the Legislature would step in at the earliest and enact a comprehensive law on 'living will/advance directive' so that there is a proper statutory regime to govern various aspects and nuances thereof which also take care of the apprehensions that are expressed against euthanasia.

Dr. D.Y. Chandrachud, J.

A Introduction: *On Death and Dying*

335. Life and death are inseparable. Every moment of our lives, our bodies are involved in a process of continuous change. Millions of our cells perish as nature regenerates new ones. Our minds are rarely, if ever, constant. Our thoughts are fleeting. In a physiological sense, our being is in a state of flux, change being the norm. Life is not disconnected from death. To be, is to die. From a philosophical perspective, there is no antithesis between life and death. Both constitute essential elements in the inexorable cycle of existence.

336. Living in the present, we are conscious of our own mortality. Biblical teaching reminds us that:

There is a time for everything, and a season for every activity under the heavens: a time to be born and a time to die, a time to plant, and a time to uproot, a time to kill and a time to heal, a time to wear down and a time to build, a time to weep and a time to laugh, a time to mourn and a time to dance.

(Ecclesiastes 3)

337. The quest of each individual to find meaning in life reflects a human urge to find fulfilment in the pursuit of happiness. The pursuit of happiness is nurtured in creative pleasures and is grounded in things as fundamental as the freedom to think, express and believe, the right to self-determination, the liberty to follow a distinctive way of life, the ability to decide whether or not to conform and the expression of identity.

338. Human beings through the ages have been concerned with death as much as with dying. Death represents a culmination, the terminal point of life. Dying is part of a process: the process of living, which eventually leads to death. The fear of death is a universal feature of human existence. The fear is associated as much with the uncertainty of when death will occur as it is, with the suffering that may precede it. The fear lies in the uncertainty of when an event which is certain will occur. Our fears are enhanced by the experience of dying that we share with those who were a part of our lives but have gone before us. As human beings, we are concerned with the dignity of our existence. The process through which we die bears upon that dignity. A dignified existence requires that the days of our lives which lead up to death must be lived in dignity; that the stages through which life leads to death should be free of suffering; and that the integrity of our minds and bodies should survive so long as life subsists. The fear of an uncertain future confronts these aspirations of a dignified life. The fear is compounded by the fact that as we age, we lose control over our faculties and over our ability to take decisions on the course of our future. Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives. Ageing leaves individuals with a dilution of the ability to decide. The fear of that loss is ultimately, a fear of the loss of freedom. Freedom and liberty are

the core of a meaningful life. Ageing brings dependency and a loss of control over our ability to shape what we wish to happen to us.

339. The progression of life takes its toll on the human body and the mind. As we age, simple tasks become less simple and what seemed to be a matter of course may become less so. Human beings then turn ever more to the substance that matters. As events, relationships, associations and even memories fall by the way, we are left with a lonesome remnant of the person, which defines the core of our existence. The quest of finding meaning in that core is often a matter of confronting our fears and tragedies.

340. The fear of pain and suffering is perhaps even greater than the apprehension of death. To be free of suffering is a liberation in itself. Hence the liberty to decide how one should be treated when the end of life is near is part of an essential attribute of personhood. Our expectations define how we should be treated in progressing towards the end, even when an individual is left with little or no comprehension near the end of life.

341. Dilemmas relating to the end of life have been on the frontline of debate across the world in recent decades. The debate has presented "a complex maze of dilemmas for all-the doctor, the lawyer, the patient and the patient's relatives"[62] and straddles issues of religion, morality, bio-medical ethics and constitutional law. It has involved "issues ranging from the nature and meaning of human life itself, to the most fundamental principles on which our societies are and should be based"[63].

342. There is an "ongoing struggle between technology and the law"; as "medical technology has become more advanced, it has achieved the capability both to prolong human life beyond its natural endpoint and to better define when that endpoint will occur".[64] Medical science has contributed in a significant way to enhancing the expectancy of life. Diseases once considered fatal have now become treatable. Medical research has redefined our knowledge of ailments-common and uncommon; of their links with bodily functions and the complex relationship between mental processes and physical well-being. Science which affects the length of life also has an impact on the quality of the years in our lives. Prolonging life should, but does not necessarily result in, a reduction of suffering. Suffering has a bearing on the quality of life. The quality of life depends upon the life in our years. Adding to the length of life must bear a functional nexus with the quality of life. Human suffering must have significance not only in terms of how long we live but also in terms of how well we live.

343. Modern medicine has advanced human knowledge about the body and the mind. Equipped with the tools of knowledge, science has shown the ability to reduce human suffering. Science has also shown an ability to prolong life. Yet in its ability to extend life, medical science has an impact on the quality of life, as on the nature and extent of human suffering. Medical interventions come with costs, both emotional and financial. The ability of science to prolong life must face an equally important concern over its ability to impact on the quality of life. While medical science has extended longevity, it has come with associated costs of medical care and the agony which accompanies an artificially sustained life. Medical ethics must grapple with the need to bring about a balance between the ability of science to extend life with the need for science to recognise that all knowledge must enhance a meaningful existence.

344. There is "no consensus as to the rights and wrongs of helping someone to die"[65], as the legal status of euthanasia has been subjected to social, ethical and moral norms that have been handed down to us. Decisions regarding the end of life can be ethically more problematic when the individual is no longer mentally competent to make his or her own decisions.[66] The existential and metaphysical issues involved in this debate, include the fear of the unknown, the uncertainty of when death will occur, the scarcity of health care, freedom or coercion in choosing to receive or not to receive medical treatment, the dignity and degradation of ageing and being able to care for oneself independently.[67]

345. Does the law have a role in these complex questions of life and death? If it does, what are the boundaries which judges-as interpreters of law-must observe while confronting these issues of living and dying? The law, particularly constitutional law, intervenes when matters governing freedom, liberty, dignity and individual autonomy are at stake. To deny a role for constitutional law would be to ignore our own jurisprudence and the primary role which it assigns to freedom and dignity. This case presents itself before the Court as a canvass bearing on the web of life: on the relationship between science, medicine and ethics and the constitutional values of individual dignity and autonomy. Among the issues which we confront are:

(i) Does an individual have a constitutionally recognized right to refuse medical treatment or to reject a particular form of medical treatment;

(ii) If an individual does possess such a right, does a right inhere in the individual to determine what course of action should be followed in the future if she or he were to lose control over the faculties which enable them to accept or refuse medical treatment;

(iii) Does the existence of a right in the individual impose a corresponding duty on a medical professional who attends to the individual, to respect the right and what, if any, are the qualifications of that duty;

(iv) Does the law permit a medical practitioner to withhold or refuse medical treatment towards the end of life to an individual who is no longer in control of his or her faculties in deference to a desire expressed while in a fit state of mind; and

(v) Would a withholding or refusal of medical treatment be permissible so as to allow life to take its natural course, bereft of an artificial intervention, when there is no realistic hope of return to a normal life.

346. This Court has to consider euthanasia and its impact "not only at an individual level", but also at the "institutional, governmental and societal levels".[68] The impact has to be analyzed not only in the context of the present era, but has to be contemplated for the future as well. The judge is not a soothsayer. Nor does the law have predictive tools at its command which can approximate those available to a scientist. Constitutional principle must have an abiding value. It can have that value if it is firmly grounded in the distilled experience of the past, is flexible to accommodate the concerns of the present and allows room for the unforeseeable future. The possibility of the abuse of euthanasia and the effect that legalising euthanasia would have on intangible societal fabrics and institutions is of utmost concern.

347. Contemporary writing on the subject reminds us about how serious these issues are and of how often they pose real dilemmas in medicine. They are poignantly brought out by Dr Atul Gawande in his acclaimed book, **"Being Mortal"**:

If to be human is to be limited, then the role of caring professions and institutions-from surgeons to nursing homes-ought to be aiding people in their struggle with those limits. Sometimes we can offer a cure, sometimes only a salve, sometimes not even that. But whatever we can offer, our interventions, and the risks and sacrifices they entail, are justified only if they serve the large aims of a person's life. When we forget that, the suffering we inflict can be barbaric. When we remember it, the good we do can be breathtaking.[69]

He reminds us of how much people value living with dignity over merely living longer:

A few conclusions become clear when we understand this: that our most cruel failure in how we treat the sick and the aged is the failure to recognize that they have priorities beyond merely being safe and living longer; that the chance to shape one's story is essential to sustaining meaning in life; that we have the opportunity to refashion our institutions, our culture, and our conversations in ways that transform the possibilities for the last chapters of everyone's lives.[70]

348. Dr Henry Marsh, a neurosurgeon in the UK has significantly titled his provocative memoir "Admissions" (2017). Speaking of euthanasia, he observes:

We have to choose between probabilities, not certainties, and that is difficult. How *probable* is it that we will gain how many extra years of life, and what might the *quality* of those years be, if we submit ourselves to the pain and unpleasantness of treatment? And what is the probability that the treatment will cause severe side effects that outweigh any possible benefits? When we are young it is usually easy to decide-but when we are old, and reaching the end of our likely lifespan? We can choose, at least in theory, but our inbuilt optimism and love of life, our fear of death and the difficulty we have in looking at it steadily, make this very difficult. We inevitably hope that we will be one of the lucky ones, one of the long-term survivors, at the good and not the bad tail-end of the statisticians' normal distribution. And yet it has been estimated that in the developed world, 75 per cent of our lifetime medical costs are incurred in the last six months of our lives. This is the price of hope, hope which, by the laws of probability, is so often unrealistic. And thus we often end up inflicting both great suffering on ourselves and unsustainable expense on society. [71]

These are but a few of the examples of emerging literature on the subject.

349. The central aspect of the case is the significance which the Constitution attaches to the ability of every individual in society to make personal choices on decisions which affect our lives. **Randy Pausch**, a Professor at Stanford had this to say in a book titled "**The Last Lecture**" (2008),[72] a discourse delivered by him in the shadow of a terminal illness.

We cannot change the cards we are dealt, just how we play the hand.

We may not be masters of our destiny. Nor can we control what life has in store. What we can determine is how we respond to our trials and tribulations.

B The reference

350. On 25 February 2014, three Judges of this Court opined that the issues raised in this case need to be considered by a Constitution Bench. The referring order notes that the case involves "social, legal, medical and constitutional" perspectives which should be considered by five judges. At the heart of the proceeding, is a declaration which Common Cause seeks that the right to die with dignity is a fundamental right which arises from the right to live with dignity. Article 21 of the Constitution is a guarantee against the deprivation of life or personal liberty except according to the procedure established by law. As our law has evolved, the right against the violation of life and personal liberty has acquired much more than a formal content. It can have true meaning, if only it includes the right to live with dignity. It is on this premise that the court is urged to hold that death with dignity is an essential part of a life of dignity. A direction is sought to the Union Government to adopt suitable procedures to ensure that persons with "deteriorated health" or those who are terminally ill should be able to execute a document in the form of "a living will and attorney authorization" which can be presented to a hospital for appropriate action if the person who has made it, is hospitalized with a serious illness which may cause the end of life. The Petitioner also seeks, in the alternative, that this Court should issue guidelines and appoint an expert committee consisting of doctors, social scientists and lawyers who will govern the making of 'living wills'.

351. Individuals who suffer from chronic disease or approach the end of the span of natural life often lapse into terminal illness or a permanent vegetative state. When a medical emergency leads to hospitalization, individuals in that condition are sometimes deprived of their right to refuse unwanted medical treatment such as feeding through hydration tubes or being kept on a ventilator and other life support equipment. Life is prolonged artificially resulting in human suffering. The petition is founded on the right of each individual to make an informed choice. Documenting a wish in advance, not to be subjected to artificial means of prolonging life, should the individual not be in a position later to comprehend or decline treatment, is a manifestation of individual choice and autonomy. The process of ageing is marked by a sense of helplessness. Human faculties decline as we grow older. Social aspects of ageing, such as the loss of friendships and associations combine with the personal and intimate to enhance a sense of isolation. The boundaries and even the limits of constitutional law will be tested as the needs of the ageing and their concerns confront issues of ethics, morality and of dignity in death.

352. In support of its contention, the Petitioner relies upon two decisions: a decision rendered in 1996 by a Constitution Bench in **Gian Kaur** v. **State of Punjab** MANU/SC/0335/1996 : (1996) 2 SCC 648 (**"Gian Kaur"**) and a decision of 2011 rendered by two judges in **Aruna Ramachandra Shanbaug** v. **Union of India** MANU/SC/0126/2011 : (2011) 15 SCC 480 (**"Aruna Shanbaug"**). The decision in Gian Kaur arose from a conviction for the abetment of suicide. In an earlier decision rendered by two judges in 1994 - **P. Rathinam** v. **Union of India** MANU/SC/0433/1994 : (1994) 3 SCC 394 (**"Rathinam"**), penalising an attempt to commit suicide was held to violate Article 21 on the foundation that the right to life includes the right to die. The decision in **Rathinam** was held not to have laid down the correct principle, in **Gian Kaur**. Hence the decision in **Aruna Shanbaug** noted that Article 21 does not protect the right to die and an attempt to commit suicide is a crime. However, in **Aruna Shanbaug**, the court held that since **Gian Kaur** Rules that the right to life includes living with human dignity, "in the case of a dying

person who is terminally ill or in a permanent vegetative state, he may be permitted to terminate by a premature extinction of his life", and this would not be a crime. The Bench which decided **Aruna Shanbaug** was of the view that **Gian Kaur** had "quoted with approval" the view of the House of Lords in the UK in **Airedale NHS Trust** v. **Bland** (1993) 2 WLR 316 (H.L) **("Airedale")**.

353. When these judgments were placed before a Bench of three judges in the present case, the court observed that there were "inherent inconsistencies" in the judgment in **Aruna Shanbaug**. The referring order accordingly opined that:

Aruna Shanbaug (supra) aptly interpreted the decision of the Constitution Bench in Gian Kaur (supra) and came to the conclusion that euthanasia can be allowed in India only through a valid legislation. However, it is factually wrong to observe that in Gian Kaur (supra), the Constitution Bench approved the decision of the House of Lords in Airedale v. Bland: (1993) 2 W.L.R. 316 (H.L.). Para 40 of Gian Kaur (supra), clearly states that "even though it is not necessary to deal with physician assisted suicide or euthanasia cases, a brief reference to this decision cited at the Bar may be made..." Thus, it was a mere reference in the verdict and it cannot be construed to mean that the Constitution Bench in Gian Kaur (supra) approved the opinion of the House of Lords rendered in Airedale (supra). To this extent, the observation in Para 101 is incorrect.

The referring order goes on to state that:

In Paras 21 & 101, the Bench [in Aruna Shanbaug] was of the view that in Gian Kaur (supra), the Constitution Bench held that euthanasia could be made lawful only by a legislation. Whereas in Para 104, the Bench contradicts its own interpretation of Gian Kaur (supra) in Para 101 and states that although this Court approved the view taken in Airedale (supra), it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g., a person in coma or PVS. When, at the outset, it is interpreted to hold that euthanasia could be made lawful only by legislation where is the question of deciding whether the life support should be discontinued in the case of an incompetent person e.g., a person in coma or PVS.

The reason why the case merits evaluation by the Constitution Bench is elaborated in the Order dated 25 February 2014. Simply put, the basis of the reference to the Constitution Bench is that:

(i) **Gian Kaur** affirms the principle that the right to live with dignity includes the right to die with dignity;

(ii) **Gian Kaur** has not ruled on the validity of euthanasia, active or passive;

(iii) **Aruna Shanbaug** proceeds on the erroneous premise that **Gian Kaur** approved of the decision of the House of Lords in **Airedale**;

(iv) While **Aruna Shanbaug** accepts that euthanasia can be made lawful only through legislation, yet the court accepted the permissibility of passive euthanasia and set down the procedure which must be followed; and

(v) **Aruna Shanbaug** is internally inconsistent and proceeds on a misconstruction of the decision in **Gian Kaur**.

354. This being the basis of the reference, it is necessary to consider the decisions in **Gian Kaur** and **Aruna Shanbaug**.

C Gian Kaur

355. Gian Kaur and Harbans Singh were spouses. They were convicted of abetting the suicide of Kulwant Kaur and were held guilty of an offence Under Section 306 of the Penal Code. They were sentenced to six years' imprisonment. The conviction was upheld by the High Court. The conviction was assailed before this Court on the ground that Section 306 is unconstitutional. It was argued that the constitutionality of Section 306 rested on the two judge Bench decision in **Rathinam**, where Section 309 (penalising the attempt to commit suicide) was held to be unconstitutional. While **Rathinam** had rejected the challenge to the validity of Section 309 on the ground that it was arbitrary (and violated Article 14), the provision was held to be unconstitutional on the ground that it violated Article 21. The right to die was found to inhere in the right to life, as a result of which Section 309 was found to be invalid. The challenge in **Gian Kaur** was premised on the decision in **Rathinam**: abetment of suicide by another (it was urged) is merely assisting in the enforcement of the fundamental right Under Article 21 and hence Section 306 (like Section 309) would violate Article 21.

356. The Constitution Bench in **Gian Kaur** disapproved of the foundation of **Rathinam**, holding that it was flawed. The Constitution Bench held thus:

When a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the 'right to life' Under Article 21. The significant aspect of 'sanctity of life' is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can 'extinction of life' be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life, and therefore, incompatible and inconsistent with the concept of 'right to life'. With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to 'freedom of speech' etc. to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'. With respect, the comparison is inapposite, for the reason indicated in the context of Article 21. The decisions relating to other fundamental rights wherein the absence of compulsion to exercise a right was held to be included within the exercise of that right, are not available to support the view taken in P. Rathinam qua Article 21.

The Court further held that:

To give meaning and content to the word 'life' in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in

effacing the right itself. The 'right to die', if any, is inherently inconsistent with the 'right to life' as is 'death' with 'life'.

Gian Kaur holds that life within the meaning of Article 21 means a life of dignity. Extinguishment of life is (in that view) inconsistent with its continued existence. Hence, as a matter of textual construction, the right to life has been held not to include the right to die. In coming to that conclusion, it appears that **Gian Kaur** emphasises two strands (which the present judgment will revisit at a later stage). The first strand is the sanctity of life, which Article 21 recognises. Extinction of life, would in this view, in the manner which **Rathinam** allowed, violate the sanctity of life. The second strand that emerges from **Gian Kaur** is that the right to life is a natural right. Suicide as an unnatural extinction of life is incompatible with it. The court distinguishes the right to life Under Article 21 from other rights which are guaranteed by Article 19 such as the freedom of speech and expression. While free speech may involve the absence of a compulsion to exercise the right (the right not to speak) this could not be said about the right to life. The Constitution Bench noticed the debate on euthanasia in the context of individuals in a permanent vegetative state. A scholarly Article on the decision notes that the Constitution Bench "seemed amenable to an exception being made for euthanasia in cases of patients in a condition of PVS[73]. This view of the decision in **Gian Kaur** does find support in the following observations of the Constitution Bench:

Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of 'Sanctity of life' or the 'right to live with dignity' is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of 'right to life' therein includes the 'right to die'. The 'right to life' including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life.(Para 24)

However, in the paragraph which followed, the Constitution Bench distinguished between cases where a premature end to life may be permissible, when death is imminent, from the right to commit suicide:

A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life. (Para 25)

On this foundation, the Constitution Bench held that Article 21 does not include the right to die. The right to live with human dignity, in this view, could not be construed to include the right to terminate natural life "at least before commencement of the natural process of certain death".

This Court's holding in **Gian Kaur** that the right to life does not include the right to die in the context of suicide may require to be revisited in future in view of domestic and international developments[74] pointing towards decriminalisation of suicide. In India, the Mental Healthcare Act 2017 has created a "presumption of severe stress in cases of attempt to commit suicide". Section 115(1) provides thus:

Notwithstanding anything contained in Section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.

Under Section 115(2), the Act also mandates the Government to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence. Section 115 begins with a non-obstante provision, specifically with reference to Section 309 of the Penal Code.

It mandates (unless the contrary is proved by the prosecution) that a person who attempts to commit suicide is suffering from severe stress. Such a person shall not be tried and punished under the Penal Code. Section 115 removes the element of culpability which attaches to an attempt to commit suicide Under Section 309. It regards a person who attempts suicide as a victim of circumstances and not an offender, at least in the absence of proof to the contrary, the burden of which must lie on the prosecution. Section 115 marks a pronounced change in our law about how society must treat and attempt to commit suicide. It seeks to align Indian law with emerging knowledge on suicide, by treating a person who attempts suicide being need of care, treatment and rehabilitation rather than penal sanctions.

It may also be argued that the right to life and the right to die are not two separate rights, but two sides of the same coin. The right to life is the right to decide whether one will *or will not* continue living.[75] If the right to life were only a right to decide to continue living and did not also include a right to decide not to continue living, then it would be a *duty* to live rather than a *right* to *life*. The emphasis on life as a right and not as a duty or obligation has also been expressed by several other legal scholars:

When, by electing euthanasia, the individual has expressly renounced his right to life, the state cannot reasonably assert an interest in protecting that right as a basis for overriding the individual's private decision to die. To hold otherwise makes little more sense than urging a prohibition against destroying or giving away one's private property simply because the Constitution protects property as well as life. Although the Constitution recognizes that human life is, to most persons, of inestimable value and protects against its taking without due process of law, **nothing in that document compels a person to continue living who does not desire to do so. Such an interpretation effectively converts a right into an obligation, a result the constitutional framers manifestly did not intend.**[76]

For the present case, we will leave the matter there, since neither side has asked for reconsideration of **Gian Kaur**, it being perhaps not quite required for the purposes of the reference.

357. At this stage, it is also necessary to note that the decision in **Gian Kaur** contained a passing reference to the judgment of the House of Lords in **Airedale** which dealt with the withdrawal of artificial measures for the continuance of life by a physician. In that context, it was held that a persistent vegetative state was of no benefit to the patient and hence, the principle of sanctity of life is not absolute. The Constitution Bench reproduced the following extracts from the decision in **Airedale**:

...But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: See Reg v. Cox, (unreported), 18 September (1992). So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia-actively causing his death to avoid or to end his suffering. **Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control....** (emphasis supplied by the Bench). Making emphasis as above, this Court held that it is in the realm of the legislature to enact a suitable law to provide adequate safeguards regarding euthanasia.

The Constitution Bench noted that the desirability of bringing about such a change was considered (in **Airedale**) to be a function of the legislature by enacting a law with safeguards, to prevent abuse.

D Aruna Shanbaug

358. **Aruna Shanbaug** was a nurse in a public hospital when she was sexually assaulted in 1973. During the incident, she was strangled by the attacker with a chain. The assault resulted in depriving the supply of oxygen to her brain. Over a period of thirty seven years, she had not recovered from the trauma and damage to the brain. She was forsaken by family and was cared for over this period by the staff of the hospital. A petition Under Article 32 was instituted before this Court. The Petitioner had authored a book on her saga and instituted the proceedings claiming to be her "next friend". The direction which was sought was to stop feeding the patient and allow her to die a natural death. **Aruna Shanbaug** was examined by a team of doctors constituted by this Court who observed that while she was in a permanent vegetative state, she was clearly not in coma.

359. A two Judge Bench of this Court held that **Gian Kaur** did not lay down a final view on euthanasia:

21. We have carefully considered paras 24 and 25 in Gian Kaur case [MANU/SC/0335/1996 : (1996) 2 SCC 648: 1996 SCC (Cri) 374] and we are of the opinion that all that has been said therein is that the view in Rathinam case [MANU/SC/0433/1994 : (1994) 3 SCC 394: 1994 SCC (Cri) 740] that the right to life includes the right to die is not correct. We cannot construe Gian

Kaur case [MANU/SC/0335/1996 : (1996) 2 SCC 648: 1996 SCC (Cri) 374] to mean anything beyond that. In fact, it has been specifically mentioned in para 25 of the aforesaid decision that "the debate even in such cases to permit physician-assisted termination of life is inconclusive". Thus it is obvious that no final view was expressed in the decision in Gian Kaur case [MANU/SC/0335/1996 : (1996) 2 SCC 648: 1996 SCC (Cri) 374] beyond what we have mentioned above."(Id at page 487)

360. The decision in **Aruna Shanbaug** distinguishes between active and passive euthanasia. Active euthanasia is defined as the administration of a lethal substance or force to kill a person, such as for instance, a lethal injection given to a person suffering from agony in a terminal state of cancer. Passive euthanasia is defined to mean the withholding or withdrawing of medical treatment necessary for continuance of life. This may consist of withholding antibiotics without which the patient may die or the removing of the patient from artificial heart/lung support. According to the court, a comparative context of the position prevailing in other countries would indicate that:

39...The general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained. (Id at page 491)

Voluntary euthanasia envisages the consent of the patient being taken whereas non-voluntary euthanasia deals with a situation where the patient is in a condition where he or she is unable to give consent. The Court noted that a distinction is drawn between euthanasia and physician assisted death in the form of a physician or third party who administers it. Physician assisted suicide involves a situation where the patient carries out the procedure, though on the advice of the doctor. The court in **Aruna Shanbaug** distinguished between active and passive euthanasia:

43. The difference between "active" and "passive" euthanasia is that in active euthanasia, something is done to end the patient's life while in passive euthanasia, something is not done that would have preserved the patient's life. An important idea behind this distinction is that in "passive euthanasia" the doctors are not actively killing anyone; they are simply not saving him. (Id at page 492)

The above extract indicates that the decision is premised on the performance of an act (in active euthanasia) and an omission (in passive euthanasia).

Active euthanasia, in the view of the court, would be an offence Under Section 302 or at least Under Section 304 while physician assisted suicide would be an offence Under Section 306 of the Penal Code. The decision adverted to the judgment of the House of Lords in **Airedale** and then observed that:

104. It may be noted that in Gian Kaur case [MANU/SC/0335/1996 : (1996) 2 SCC 648: 1996 SCC (Cri) 374] although the Supreme Court has quoted with approval the view of the House of Lords in Airedale case [1993 AC 789: (1993) 2 WLR 316: (1993) 1 All ER 821 (CA and HL)], it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. (Id at page 512)

Explaining the concept of brain death, the court held that passive euthanasia depends upon two circumstances:

117...(a) When a person is only kept alive mechanically i.e. when not only consciousness is lost, but the person is only able to sustain involuntary functioning through advanced medical technology--such as the use of heart-lung machines, medical ventilators, etc.

(b) When there is no plausible possibility of the person ever being able to come out of this stage. Medical "miracles" are not unknown, but if a person has been at a stage where his life is only sustained through medical technology, and there has been no significant alteration in the person's condition for a long period of time--at least a few years--then there can be a fair case made out for passive euthanasia. (Id at page 517)

Noting that there is no statutory provision regulating the procedure for withdrawing life support to a person in PVS or who is incompetent to take a decision, the court ruled that passive euthanasia should be permitted in certain situations. Until Parliament decides on the matter, the modalities to regulate passive euthanasia would (according to the court) be as follows:

124...(i) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient...

(ii) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in Airedale case [1993 AC 789: (1993) 2 WLR 316: (1993) 1 All ER 821 (CA and HL)]. (Id at page 518-519)

361. The approval of the High Court was mandated to obviate the danger that "this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient". Moreover, the court directed that when an application is filed before the High Court, a committee of three doctors (a neurologist, psychiatrist and physician) should be constituted, to submit its opinion to enable the High Court to take a considered decision in the case. On the facts of the case, the court held that the Petitioner who had visited **Aruna Shanbaug** only on a few occasions and had written a book on her could not be recognised as her next friend. It was only the hospital staff which had cared for her for long years which would be recognised. The doctors and nursing staff had evinced an intent to allow her to live in their care.

362. The decision in **Aruna Shanbaug** has proceeded on the hypothesis that the Constitution Bench in **Gian Kaur** had "quoted with approval" the decision of the House of Lords in **Airedale**. This hypothesis is incorrect. There was only a passing reference to the decision of the House of Lords. In fact, **Gian Kaur** prefaces its reference to **Airedale** with the following observation:

40...Even though it is not necessary to deal with physician-assisted suicide or euthanasia cases, a brief reference to this decision cited at the Bar may be made." (Id at page 665)

The decision in **Gian Kaur** referred to the distinction made in **Airedale** between cases in which a physician decides not to provide or to continue to provide treatment which would prolong life and cases in which a physician decides to actively bring an end to the life of the patient by administering a lethal drug. The court in **Airedale** observed that actively causing the death of the patient could be made lawful only by legislation. It was this aspect which was emphasised by the judgment in **Gian Kaur**. Hence, the position adopted in **Aruna Shanbaug**, that the Constitution Bench in **Gian Kaur** quoted **Airedale** with approval (as the basis of allowing passive euthanasia) is seriously problematic. In fact, the extract from **Airedale** which was cited in **Gian Kaur** indicates the emphasis placed on the need to bring in legislation to allow active euthanasia.

363. In an incisive analysis[77], Ratna Kapur argues that while focussing on euthanasia, discussions on **Aruna Shanbaug** have ignored other considerations regarding gender, sexual assault, what constitutes "caring", the right to bodily integrity and workplace protection. A central issue is, according to Kapur, the "politics of caring",-who can care, has the capacity to care and who is less caring or less capable of caring. The Supreme Court did not accept Pinki Virani as the "next friend" but awarded guardianship to KEM hospital staff on the ground that they had "an emotional bonding and attachment" to Aruna Shanbaug and were her "real family." Kapur observes that an emotional bond is not a valid criterion for a "next friend" and the expression "real family" has dangerous implications for those who may not fall within the normative remit of that phrase though they have a relationship with the concerned person. She asks if the concept of "next friend" will cover only "biological familial ties" and "render all other non-familial, non-marital, non-heterosexual relationships as ineligible?" She argues that decisions about life and death should "rest on the anvil of dignity, and dignity is not a family value, or linked to some essential gendered trait. It is a societal value and hence needs to be delinked from the traditional frameworks of family and gender stereotypes." Kapur expresses concerns about how the focus on "care" seemed to obscure a deeper and more important consideration regarding women's safety in the workplace. The attack on Aruna Shanbaug in KEM hospital was indicative of how the workplace was unsafe for women, and yet the staff of the same hospital were given her guardianship. This is especially concerning given the fact that the dean of the hospital at the time refused to allow a complaint of sodomy to go forward as he was more concerned about the reputation of the institution. Kapur laments the fact that Aruna's case was not used to bring out the reform that it should have-stating that it should 'have been a leading case on women's rights where "caring" extended beyond the physical support for the individual who was harmed, to taking active steps to improve the working conditions for women, including addressing pervasive and systemic sex discrimination and sexism.' Lastly, Kapur compels us to think about the choices Aruna Shanbaug may have made-"Had Shanbaug not been reduced to a PVS, would she have chosen to remain in KEM for her treatment after the violent and brutal sexual assault that she experienced in her work place? Or would she have chosen to be treated elsewhere? Would she have sued the hospital for failing to provide her a safe working environment?" Thus, Kapur questions the very basis of making the hospital the guardians by questioning why the hospital did not "care" when it mattered the most-when the case of sexual assault and sodomy should have been pursued by the hospital on behalf of its employee. By denying Aruna Shanbaug the right to bodily integrity in life and the right to self-determination in death, and by viewing her life from all lenses but from her own, ranging from the "carers", to the medical and legal profession and their views on euthanasia, she "became nothing more than a spectre in her own story."

364. **Aruna Shanbaug** also presents another problem-one of inconsistency. **Gian Kaur** is construed as laying down only that the right to life does not include the right to die and that the decision in **Rathinam** was incorrect. In that context, it has been noticed that the Constitution Bench observed that the debate overseas even in physician assisted termination of life is inconclusive. **Aruna Shanbaug** finds, on the one hand, that "no final view was expressed" in **Gian Kaur** beyond stating that the right to life does not include the right to die. Yet, on the other hand, having inferred the absence of a final view on euthanasia in **Gian Kaur**, that decision is subsequently construed as having allowed the termination of life by a premature extinction in the case of a "dying person who is terminally ill or in a permanent vegetative state". Both lines of reasoning cannot survive together.

365. The procedure which was followed by this Court in **Aruna Shanbaug** of arranging for a screening of a CD submitted by the team of doctors pertaining to her examination in a live court proceeding open to the public has been criticised as being fundamentally violative of privacy. What transpired in the court is set out in the following observations from the decision:

11. On 2-3-2011, the matter was listed again before us and we first saw the screening of the CD submitted by the team of doctors along with their report. We had arranged for the screening of the CD in the courtroom, so that all present in the Court could see the condition of Aruna Shanbaug. For doing so, we have relied on the precedent of the Nuremberg trials in which a screening was done in the courtroom of some of the Nazi atrocities during the Second World War." (Id at page 476)

This aspect of the case is indeed disquieting. To equate a patient in PVS for thirty-seven years following a sexual assault, with the trials of Nazi war criminals is seriously disturbing.

366. **Aruna Shanbaug** rests on the distinction between an act and an omission. The court seems to accept that the withdrawal of life support or a decision not to provide artificial support to prolong life is an omission. In the view of the court, an omission is what is "not done". On the other hand, what is actively done to end life is held to stand on a separate foundation. At this stage, it would be necessary to note that the validity of the distinction between what is passive and what is active has been the subject of a considerable degree of debate. This would be dealt with in a subsequent part of this judgment.

367. The issue before the Constitution Bench in **Gian Kaur** related to the constitutionality of Section 306 of the Penal Code which penalises the abetment of suicide. The challenge proceeded on the foundation that penalising an attempt to commit suicide had been held to be unconstitutional since the right to live included the right to die. The Constitution Bench emphasised the value ascribed to the sanctity of life and came to the conclusion that the right to die does not emanate from the right to life Under Article 21. Having held that the right to die is "inherently inconsistent" with the right to life "as is death with life", the Constitution Bench opined that the debate on euthanasia was "of no assistance to determine the scope of Article 21" and to decide whether the right to life includes the right to die. The court noted that the right to life embodies the right to live with human dignity which postulates the existence of such a right "up to the end of natural life". This, the court observed included the right to lead a dignified life up to the point of death and included a dignified procedure of death. Thus, in the context of the debate on euthanasia, the

Constitution Bench was careful in observing that the right to a dignified life "may include" the right of an individual to die with dignity. A premature termination of life of a person facing imminent death in a terminal illness or in a permanent vegetative state was in the view of the court a situation which "may fall" within the ambit of the right to die with dignity. The debate on physician assisted termination of life was noted to be "inconclusive". The court observed that the argument to support the termination of life in such cases to reduce the period of suffering during the process of "certain natural death" was not available to interpret Article 21 as embodying the right to curtail the natural span of life. These observations in **Gian Kaur** would indicate that the Constitution Bench has not made a final or conclusive determination on euthanasia. Indeed, the scope of the controversy before the court did not directly involve that question. **Aruna Shanbaug** evidently proceeds on a construction of the decision in **Gian Kaur** which does not emerge from it. **Aruna Shanbaug** has inherent internal inconsistencies. Hence, the controversy which has been referred to the Constitution Bench would have to be resolved without regarding **Aruna Shanbaug** as having laid down an authoritative principle of constitutional law.

E The distinction between the legality of active and passive euthanasia

368. In examining the legality of euthanasia, clarification of terminology is essential. The discourse on euthanasia is rendered complex by the problems of shifting and uncertain descriptions of key concepts. Central to the debate are notions such as "involuntary", "non-voluntary" and "voluntary". Also "active" and "passive" are used, particularly in combination with "voluntary" euthanasia. In general, the following might be said:

• involuntary euthanasia refers to the termination of life against the will of the person killed;

• non-voluntary euthanasia refers to the termination of life without the consent or opposition of the person killed;

• voluntary euthanasia refers to the termination of life at the request of the person killed;

• active euthanasia refers to a positive contribution to the acceleration of death;

• passive euthanasia refers to the omission of steps which might otherwise sustain life.

What is relatively straightforward is that involuntary euthanasia is illegal and amounts to murder. However, the boundaries between active and passive euthanasia are blurred since it is quite possible to argue that an omission amounts to a positive act.

369. The expression 'passive' has been used to denote the withdrawal or withholding of medical treatment. Implicit in this definition is the assumption that both the withdrawal of or withholding treatment stand on the same ethical or moral platform. This assumption, as we shall see in a later part of this section, is not free of logical difficulty. The voluntary or non-voluntary character of the euthanasia is determined by the presence or absence of consent. Consent postulates that the individual is in a mental condition which enables her to choose and to decide on a course of action and convey this decision. Its voluntary nature is premised on its consensual character. Euthanasia

becomes non-voluntary where the individual has lost those faculties of mind which enable her to freely decide on the course of action or lost the ability to communicate the chosen course of action.

370. The distinctions between active and passive euthanasia are based on the manner in which death is brought about. They closely relate (in the words of Hazel Biggs in a seminal work on the subject) to the understanding and consequences of the legal concepts of act and omission.[78]

371. As early as 1975, American philosopher and medical ethicist James Rachels offered a radical critique of a distinction that was widely accepted by medical ethicists at that time, that passive euthanasia or "letting die" was morally acceptable while active euthanasia or "killing" was not.[79] Even though his paper did not change the prevalence of this distinction at the time it was published, it paved the way by providing credibility for arguments to legalise assisted suicide in the 1990s. In what he calls the 'Equivalence Thesis', Rachels states "there is no morally important difference between killing and letting die; if one is permissible (or objectionable), then so is the other and to the same degree."[80] He does not offer a view on whether the practice of euthanasia is acceptable or not. His central thesis is that both active and passive euthanasia are morally equivalent-either both are acceptable or both are not. Reichenbach for instance, asks: Supposing all else is equal, can a moral judgment about euthanasia be made on the basis of it being active or passive alone?[81]. The 'Equivalence thesis' postulates that if a doctor lets a patient die (commonly understood as passive euthanasia) for humane reasons, he is in the same moral position as if he decided to kill the patient by giving a lethal injection (commonly understood as active euthanasia) for humane reasons.

372. The correctness of this precept may be questioned by pointing out that there is a qualitative difference between a positive medical intervention (such as a lethal injection) which terminates life and a decision to not put a patient on artificial life support, which will not artificially prolong life. The former brings a premature extinction of life. The latter does not delay the end of life beyond its natural end point. But, if the decision to proceed with euthanasia is the right one based on compassion and the humanitarian impulse to reduce pain and suffering, then the method used is not in itself important. Moreover, it is argued that passive euthanasia often involves more suffering since simply withholding treatment means that the patient may take longer to die and thus suffer more. Passive euthanasia may become questionable where the withholding or withdrawal of medical intervention may lead to a condition of pain and suffering, often a lingering and cruel death. The avoidance of suffering, which is the object and purpose of euthanasia, may hence not be the result of passive euthanasia and the converse may result. Besides raising troubling moral questions-especially where it is non-voluntary, it questions the efficacy of passive euthanasia. Moreover, it raises a troubling issue of the validity of the active-passive divide.

373. The moral and legal validity of the active-passive distinction based on the exculpation of omissions has been criticised. One of the reasons for the exculpation of omissions is based on the idea that our duty not to harm people is generally stricter than our duty to help them.[82] James Rachels offers a compelling counter-argument to the argument that killing someone is a violation of our duty not to do harm, whereas letting someone die is merely a failure to help. He argues that our duty to help people is less stringent than the duty not to harm them only in cases where it would be very difficult to help them or require a great amount of effort or sacrifice. However, when we think of cases where it would be relatively simple to help someone and there would be no great

personal sacrifice required, the morally justifiable response would be different. He provides a hypothetical example of a child drowning in a bathtub, anyone standing next to the tub would have a strict moral duty to help the child.[83] Due to the equation between the child and the person standing next to the bathtub (the proximity may be in terms of spatial distance or relationship) the "alleged asymmetry" between the duty to help and the duty not to do harm vanishes. A person standing next to bathtub would have no defence to say that this was merely a failure to help and did not violate the duty to do no harm. In cases of euthanasia since the patient is close at hand and it is within the professional skills of the medical practitioner to keep him alive, the alleged asymmetry has little relevance. The distinction is rendered irrelevant even in light of the duty of care that doctors owe to their patients. Against the background of the duty to care, the moral and legal status of not saving a life due to failure to provide treatment, can be the same as actively taking that life.[84] A doctor who knowingly allows a patient who could be saved to bleed to death might be Accused of murder and medical negligence. The nature of the doctor-patient relationship which is founded on the doctor's duty of care towards the patient necessitates that omissions on the doctor's part will also be penalised. When doctors take off life support, they can foresee that death will be the outcome even though the timing of the death cannot be determined. Thus, what must be deemed to be morally and legally important must not be the emotionally appealing distinction between omission and commission but the justifiability or otherwise of the clinical outcome. Indeed, the distinction between omission and commission may be of little value in some healthcare settings.[85]

374. This distinction leads to the result that even though euthanasia is grounded in compassion and to relieve the patient of suffering, only certain types of deaths can be lawful. If active euthanasia amounts to "killing", the operation of criminal law can lead to medical practitioners being exposed to the indignity of criminal prosecutions and punishments.[86] While passive euthanasia can appear to save the dignity of medical practitioners, it is perhaps at the expense of the patient's dignity.[87]

375. A recent Article by Rohini Shukla in the Indian Journal of Medical Ethics (2016) points out two major flaws in **Aruna Shanbaug** regarding the distinction between active and passive euthanasia.[88] First, it fails to prioritise the interest of the patient and is preoccupied with the effect of euthanasia on everyone but the patient, and second, that it does not distinguish between the terms "withholding and withdrawing and uses them interchangeably." Throughout the above judgment, the words "withholding" and "withdrawing" are used interchangeably. However, the difference between the two is relevant to the distinction between what is 'active' and 'passive' as act and omission. Withholding life support implies that crucial medical intervention is restrained or is not provided-an act of omission on the part of the doctor. Withdrawing life support implies suspending medical intervention that was already in use to sustain the patient's life-an act of commission. If the basis of distinction between active and passive euthanasia is that in passive euthanasia the doctor only passively commits acts of omission, while in active euthanasia the doctor commits acts of commission then withdrawing medical treatment is an act of commission and therefore amounts to active euthanasia.

In both these cases, the doctor is aware that his/her commissions or omissions will in all likelihood lead to the patient's death. However, in passive euthanasia death may not be the only consequence and the suffering that passive euthanasia often entails such as suffocation to death or starvation till death, raises the question of whether passive euthanasia, in such circumstances, militates against the idea of death with dignity-the very basis of legalising euthanasia.[89] Shukla's criticism needs

careful attention since it raises profound questions about the doctor-patient relationship and the efficacy of the distinction in the context of death with dignity. If the divide between active-passive is questioned, should both forms be disallowed or, in converse should both be allowed? More significantly, are both equally amenable to judicially manageable standards?

Even with **Aruna Shanbaug's** starting position that passive euthanasia is permitted under Indian law until expressly prohibited, the Court did not traverse the vast Indian legal framework to determine whether there was a prohibition to this effect. Instead the court made an analogy (perhaps incorrect) between a doctor conducting passive euthanasia and a person who watches a building burning:

An important idea behind this distinction is that in passive euthanasia, the doctors are not actively killing anyone; they are simply not saving him. While we usually applaud someone who saves another person's life, we do not normally condemn someone for failing to do so. If one rushes into a burning building and carries someone out to safety, he will probably be called a hero. But, if someone sees a burning building and people screaming for help, and he stands on the sidelines-whether out of fear for his own safety, or the belief that an inexperienced and ill-equipped person like himself would only get in the way of the professional firefighters, or whatever-if one does nothing, few would judge him for his action. One would surely not be prosecuted for homicide (Atleast, not unless one started the fire in the first place)...[T] here can be no debate about passive euthanasia: You cannot persecute someone for failing to save a life. Even if you think it would be good for people to do X, you cannot make it illegal for people to not do X, or everyone in the country who did not do X today would have to be arrested.

The example is inapposite because it begs the relationship between the person who is in distress and the individual whose position as a caregiver (actual or prospective) is being considered. The above example may suggest a distinct outcome if the by-stander who is ill equipped to enter a burning building is substituted by a fire-fighter on duty. Where there is a duty to care, the distinction between an act and an omission may have questionable relevance. Acts and omissions are not disjunctive or isolated events. Treatment of the human body involves a continuous association between the caregiver and receiver. The expert caregiver is involved in a continuous process where medical knowledge and the condition of the patient as well as the circumstances require the doctor to evaluate choices-choices on the nature and extent of medical intervention, the wisdom about a course of action and about what should or should not be done.

376. An erroneous premise in the judgment is that omissions are not illegal under Indian law.[90] Section 32 of the Indian Penal Code deals with illegal omissions and states that "In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done, extend to illegal omissions." Whether and to what extent this omission would be illegal under Indian law will be discussed in a subsequent part of the judgment.

377. Since the judgment legalised passive euthanasia, withdrawing medical support was the only option in the case of **Aruna Shanbaug** and if this had been done, she would have in all likelihood suffocated to death. We must ponder over whether this could be the best possible death in consonance with the right to live with dignity (which extends to dignity when death approaches) and the extent to which it upholds the principle of prioritising the patient's autonomy and dignity

over mere prolongation of life. Had the Court taken into account these consequences of passive euthanasia for the patient, it would be apparent that passive euthanasia is not a simple panacea for an individual faced with end of life suffering.

This brings us to the second and more crucial flaw, which was the unjustified emphasis on doctor's agency in administering different types of euthanasia which led to ignoring the patient's autonomy and suffering. Respecting patient autonomy and reducing suffering are fundamental ethical values ascribed to euthanasia. It is also the foremost principle of bioethics.[91] The effects of euthanasia on everyone (particularly her caregivers) were given greater importance than the patient's own wishes and caregiver:

In case hydration or food is withdrawn/withheld from **Aruna Ramchandra Shanbaug**, the efforts which have been put in by batches after batches of nurses of KEM Hospital for the last 37 years will be undermined. Besides causing a deep sense of resentment in the nursing staff as well as other well-wishers of **Aruna Ramchandra Shanbaug** in KEM Hospital including the management, such act/omissions will lead to disheartenment in them and large-scale disillusionment.

378. **Aruna Shanbaug** was in no position to communicate her wishes. But the above extract from the judgment relegates her caregiver to the background. The manner in which the constitutional dialogue is framed by the court elevates the concerns of the caregiver on a high pedestal without focusing on the dignity and personhood of the individual in a permanent vegetative state. In doing so, the judgment subordinates the primary concern of bio-ethics and constitutional law, which is preserving the dignity of human life.

379. An article[92] in the Oxford Medical Law Review notes that there are strong grounds to believe that the active-passive distinction in **Aruna Shanbaug** was not grounded so much in morality as in 'reasons of policy'.

Even while there are pertinent questions regarding the moral validity of the active-passive distinction, there appears to be a significant difference between active and passive euthanasia when viewed from the lens of the patient's consent. Consent gives an individual the ability to choose whether or not to accept the treatment that is offered. But consent does not confer on a patient the right to demand that a particular form of treatment be administered, even in the quest for death with dignity.[93] Voluntary passive euthanasia, where death results from selective non-treatment because consent is withheld, is therefore legally permissible while voluntary active euthanasia is prohibited. Moreover, passive euthanasia is conceived with a purpose of not prolonging the life of the patient by artificial medical intervention. Both in the case of a withdrawal of artificial support as well as in non-intervention, passive euthanasia allows for life to ebb away and to end in the natural course. In contrast, active euthanasia results in the consequence of shortening life by a positive act of medical intervention. It is perhaps this distinction which necessitates legislative authorisation for active euthanasia, as differentiated from the passive.

380. The question of legality of these two forms of euthanasia has significant consequences. Death when it is according to the wishes and in the caregiver of the patient must be viewed as a moral good. The fact that active euthanasia is an illegal act (absent legislative authorisation) also prevents

many professional and emotional carers from performing it even if they perceive it as a compassionate and otherwise appropriate response in line with the patient's wishes and caregiver, thereby prolonging the patient's suffering and indignity. These complex issues cannot be addressed when active euthanasia is not legalised and regulated. The meeting point between bio-ethics and law does not lie on a straight course.

F Sanctity of Life

381. Diverse thinkers have debated and deliberated upon the value accorded to human life.[94] The "sanctity of life" principle has historically been the single most basic and normative concept in ethics and the law.[95] The phrase has emerged as a key principle in contemporary bioethics, especially in debates about end-of-life issues.[96]

382. The traditional and standard view is that life is invaluable.[97] It has persisted as an idea in various cultures through the centuries. A sacred value has been prioritized for human life. This "rhetoric of the value in human life"[98] has been highlighted in various traditions.[99] The protection of the right to life derives from "the idea that all human life is of equal value"-the idea being drawn from religion, philosophy and science.[100]

383. The principle or doctrine of the "sanctity of life", sometimes also referred to as the "inviolability of human life"[101], is based on "overarching moral considerations", the first of which has been stated as:

Human life is sacred, that is inviolable, so one should never aim to cause an innocent person's death by act or omission".[102]

384. Distinct from religious beliefs, the special value inherent in human life has been recognised in secular ideas of natural law-"man as an end in himself, and human investment in life".[103] Locke has been of the view that every human being "is bound to preserve himself, and not to quit his station wilfully".[104] In his book "Life's Dominion", Ronald Dworkin explains the sanctity of human life thus:

The hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because-- and therefore only once--it exists. It is inviolable because of what it represents or embodies. It is not important that there be more people. But once a human life has begun, it is very important that it flourish and not be wasted.[105]

Life today, according to Dworkin, is not just created by the science of evolution but by past choices--by the investment that an of Article 8 § 1... In the sphere of his or her life.[106]

385. Elizabeth Wicks in her book titled "The Right to Life and Conflicting Interests" (2010) has succinctly summarized the moral and ethical justifications for the sanctity of life thus:

The life of an individual human being matters morally not because that organism is sentient or rational (or free of pain, or values its own existence) but because it is a human life. This point is supported by the ethical and legal principle of equality which is well established in the field of

human rights... From an end of life perspective, this means that life ends only when the human organism dies. This cannot sensibly require the death of all of the body's cells but rather the death of the organism as a whole. In other words, life comes to an end when the integrative action between the organs of the body is irreversibly lost. It is the life of the organism which matters, not its living component parts, and thus it is the permanent destruction of that integrative organism which signifies the end of the organism's life.[107]

386. The value of human life has been emphasized by Finnis in the following words:

[H]uman bodily life is the life of a person and has the dignity of the person. Every human being is equal precisely in having that human life which is also humanity and personhood, and thus that dignity and intrinsic value. Human bodily life is not mere habitation, platform, or instrument for the human person or spirit. It is therefore not a merely instrumental good, but is an intrinsic and basic human good. Human life is indeed the concrete reality of the human person. In sustaining human bodily life, in however impaired a condition, one is sustaining the person whose life it is. In refusing to choose to violate it, one respects the person in the most fundamental and indispensable way. In the life of the person in an irreversible coma or irreversibly persistent vegetative state, the good of human life is really but very inadequately instantiated. Respect for persons and the goods intrinsic to their wellbeing requires that one make no choice to violate that good by terminating their life.[108]

387. In his book "The Law and Ethics of Medicine: Essays on the Inviolability of Human Life" (2012), John Keown has explained the principle of the sanctity or inviolability of human life and its continuing relevance to English law governing aspects of medical practice at the beginning and end of life. Keown has distinguished the principle from the other two "main competing approaches to the valuation of human life"[109]-"vitalism" on the one hand and a "qualitative" evaluation of human life on the other. The approach of "vitalism" assumes that "human life is the supreme good and one should do everything possible to preserve it". The core principle of this approach is "try to maintain the life of each patient at all costs".[110]

388. In the "quality of life" approach, Keown has argued that "there is nothing supremely or even inherently valuable about the life of a human being". The value of human life "resides in meeting a particular "quality" threshold", above which the dignity of life would be "worthwhile". Keown criticizes this approach for its basis that since "certain lives are not worth living, it is right intentionally to terminate them, whether by act or omission".[111]

389. Keown sums up that the doctrine of the sanctity or inviolability of life holds that "we all share, by virtue of our common humanity, an ineliminable dignity"-this dignity grounds the "right to life".[112] The essence of the principle is that "it is wrong to try to extinguish life".[113] Intentional killing is prohibited by any act or omission. Keown thereby emphasises the sanctity and inviolability of life in the following words:

Human life is a basic, intrinsic good... The dignity of human beings inheres because of the radical capacities, such as for understanding, rational choice, and free will, inherent in human nature... All human beings possess the capacities inherent in their nature even though, because of infancy, disability, or senility, they may not yet, not now, or no longer have the ability to exercise them.

The right not to be killed is enjoyed regardless of inability or disability. Our dignity does not depend on our having a particular intellectual ability or having it to a particular degree...[114]

390. The principle of the sanctity of life considers autonomy as a "valuable capacity, and part of human dignity"[115]. However, autonomy's contribution to dignity is "conditional, not absolute"[116]. The limitations of autonomy under the sanctity of life doctrine can be summarized as follows:

Exercising one's autonomy to destroy one's (or another's) life is always wrong because it is always disrespectful of human dignity. So: it is always wrong intentionally to assist/encourage a patient to commit suicide and, equally, there is no "right to commit suicide," let alone a right to be assisted to commit suicide, either by act or omission... The principle of "respect for autonomy" has in recent years become for many a core if not dominant principle of biomedical ethics and law. It is not, however, unproblematic. Its advocates often fail to agree on precisely what constitutes an "autonomous" choice or to offer any convincing account of why respect for someone else's choice as such should be regarded as a moral principle at all, let alone a core or dominant moral principle.[117]

John Keown, however, while distinguishing the principle of sanctity of life from vitalism, has also argued that though this principle "prohibits withholding or withdrawing treatment with intent to shorten life", but it also "permits withholding/withdrawing a life-prolonging treatment which is not worthwhile because it is futile or too burdensome". It does not require doctors to try to preserve life at all costs.[118] This consideration, despite all the assumptions and discussions about the sanctity of life, in a way, makes the doctrine an open-ended phenomenon.

391. This open-endedness is bound to lead to conflicts and confusions. For instance, the issue of the sacred value of life is potentially a conflicting interest between a right to life and autonomy, which Wicks explains as follows:

If we accept that human life has some inherent value, is it solely to the individual who is enjoying that life or is there some broader state or societal benefit in that life? If life is of value only to the person living it, then this may elevate the importance of individual autonomy. It may even suggest that it is an individual's desire for respect for his or her own life that provides the inherent value in that life. On the other hand, it might be argued that the protection of human life is, at least partly, a matter of public interest. Whether it is to the state, or other members of society, or only an individual's own family and friends, there is an argument that a human life is a thing of value to others beyond the individual living that life... [I]f life is legally and ethically protected in deference to the individual's wish for respect for that life, the protection would logically cease when an autonomous choice is made to bring the life to an end. If, however, the life is protected, at least partly, due to the legitimate interest in that life enjoyed by the state or other (perhaps select) members of society, then the individual's autonomous choice to end his or her life is not necessarily the decisive factor in determining whether legal and ethical protection for that life should continue.[119]

392. The disagreement between "sanctity of life" and the "quality of life" is another conflict, which can be summarized as follows:

If we start with a sanctity of life position, this affirms the value of human life in a way that trumps even claims to self-determination... [P]eople who suffer from terminal or degenerative illness... who want to die must remain alive in great pain or discomfort until death comes 'naturally' to them. Similarly, people who suffer from long-term disability or paralysis which grossly diminishes their capacities for life and who cannot take their own lives, are not permitted to die. In such circumstances, the argument for sanctity of life may seem somewhat sanctimonious to the person who is not allowed the assistance to end their own life. There have been cases in the media in recent years where the moral difficulty in insisting on the sanctity of life in such situations has been made clear. Though such cases will not disturb the position of she who believes fundamentally in the sanctity of life, they do lead others to accept that there may be exceptional cases where sanctity gives way to quality of life issues.[120]

Therefore, intractable questions about morality and ethics arise. What is the core of life that might be protected by law? Will a poor quality of life (in the shadow of the imminence of death) impact upon the value of that life to such an extent that it reduces the protection for that life offered by the sanctity of life doctrine? Are there limits to the principle of sanctity? This needs to be reflected upon in the next part of the judgment.

G Nuances of the sanctity of life principle

393. The sanctity of life has been central to the moral and ethical foundations of society for many centuries. Yet, it has been suggested that "across the range of opinions most people would seem to agree that life is valuable to some degree, but the extent to which any 'value' is founded in intrinsic worth or instrumental opportunity is contentious".[121] Glanville Williams, a strong proponent of voluntary euthanasia, was of the view that "there was a human freedom to end one's life". According to him, "the law could not forbid conduct that, albeit undesirable, did not adversely affect the social order".[122] That view, as argued by Luis Kutner in his Article "Euthanasia: Due Process for Death with Dignity; The Living Will"[123], was similar to that advanced by John Stuart Mill. Mill, in his classic work "On Liberty" stated:

Mankind are great gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.[124]

Are there limits to or nuances of the sanctity principle? This must be discussed for a fuller understanding of the debate around euthanasia.

394. Though the sanctity principle prohibits "the deliberate destruction of human life, it does not demand that life should always be prolonged for as long as possible".[125] While providing for an intrinsic sacred value to life "irrespective of the person's capacity to enjoy life and notwithstanding that a person may feel their life to be a great burden", the principle holds that "life should not always be maintained at any and all cost".[126] Ethical proponents of the sanctity of life tend to agree that when "medical treatment, such as ventilation and probably also antibiotics, can do nothing to restore those in permanent vegetative state to a state of health and well-functioning, it is futile and need not be provided".[127] Rao has thus suggested that "the law's recognition that withdrawal of life-prolonging treatment is sometimes legitimate" is not generally an exception to the sanctity principle, but is actually "an embodiment of it".[128]

395. Philosopher and medical ethicist James Rachels has in a seminal work[129] titled "The End of Life: Euthanasia and Morality (Studies in Bioethics)" in the year 1986 propounded that we must embrace an idea of the sanctity of life which is firmly based in ethics (the idea of right and wrong) and not based in religion. The separation of religion from morality and ethics does not necessarily mean a rejection of religion, but that the doctrine of "sanctity of life" must be accepted or rejected on its merits, by religious and non-religious people alike. The value of life is not the value that it has for God or the value that it may have from any religious perspective. The truth of moral judgments and exercising reason to decide what is right and wrong does not depend on the truth of theological claims. The value of life is the value that it has for the human beings who are subjects of lives. Thus, the value of life must be understood from the perspective of the person who will be harmed by the loss, the subject of life. It is also important to understand the true meaning behind the moral Rule against killing. The rationale behind such a law is to protect the interests of individuals who are the subject of lives. If the point of the Rule against killing is the protection of lives, then we must acknowledge that in some cases killing does not involve the destruction of "life" in the sense that life is sought to be protected by law. For example, a person in an irreversible coma or suffering a serious terminal illness is alive in a strictly biological sense but is no longer able to live life in a way that may give meaning to this biological existence. The Rule against killing protects individuals that have lives and not merely individuals who are alive. When an individual is alive only to the extent of being conscious in the most rudimentary sense, the capacity to experience pleasure and pain (if any) does not necessarily have value if that is the only capacity one has. These sensations will not be endowed with any significance by the one experiencing them since they do not arise from any human activities or projects and they will not be connected with any coherent view of the world.

396. It is instructive to analyse how the principle of the sanctity of life impacts upon views in regard to capital punishment. (This comparison, it needs to be clarified in the present judgment, is not to indicate an opinion on the constitutionality of the death penalty which is not in issue here). Advocates of the sanctity of life would even allow capital punishment[130], implying that they do not oppose all killing of human beings. This suggests that "while they are anti-euthanasia, they are not uniformly pro-life"[131]. In a seminal Article titled "The Song of Death: The Lyrics of Euthanasia"[132], Margaret A. Somerville has laid down "four possible positions that persons could take:

(i) that they are against capital punishment and against euthanasia;

(ii) that they agree with capital punishment, but are against euthanasia;

(iii) that they agree with capital punishment and euthanasia; or

(iv) that they are against capital punishment, but agree with euthanasia".[133]

She explained the underlying philosophy that these positions represent and its implications:

The first is a true pro-life position, in that, it demonstrates a moral belief that all killing (except, usually, as a last resort in self-defence) is wrong. The second position represents the view of some fundamentalists, namely, that to uphold the sanctity of life value requires prohibition of euthanasia,

but capital punishment is justified on the grounds that this punishment is deserved and just according to God's law. The third position is that of some conservatives, who see capital punishment as a fit penalty on the basis that one can forfeit one's life through a very serious crime, but that one can also consent to the taking of one's own life in the form of euthanasia. The fourth view is that of some civil libertarians, that one can consent to the taking of one's own life but cannot take that of others. Through such analyses, one can see where the various groups agree with each other and disagree. For example, the true pro-life persons and the fundamentalists agree with each other in being against euthanasia, and some conservatives and civil libertarians agree with each other in arguing for the availability of euthanasia. On the other hand, the true pro-life and civil libertarians join in their views in being against capital punishment, whereas the fundamentalists and some conservatives agree that this is acceptable.[134]

The above explanation suggests that there are variations in intellectual opinion on the concept of sanctity of life. When it comes to taking of a person's life, various groups while agreeing in certain terms, may be "radically divergent in others".[135]

397. Contrary to the vitalism or the sanctity of life principle, some scholars and bioethicists have argued that "life is only valuable when it has a certain quality which enables the subject to derive enjoyment from their existence so that life is viewed as being, on balance, more beneficial than burdensome". It has been argued that the sanctity of life principle should be interpreted to protect lives in the biographical sense and not merely in a biological sense.[136] There is a difference in the fact of being alive and the experience of living. From the point of view of the living individual, there is no value in being alive except that it enables one to have a life.[137]

398. There is wide-ranging academic research suggestive of a nuanced approach to the sanctity principle. During the last four decades, "there has been a subtle change in the way" people perceive human life and that "the idea of quality of life has become more prevalent in recent times".[138]. The moral premium, as Magnusson has remarked, is shifting "from longevity and onto quality of life"[139].

In his Article titled the "Sanctity of Life or Quality of Life?"[140], Singer argued that the sanctity of life principle has been under erosion-the "philosophical foundations" of the principle being "knocked asunder".[141] "The first major blow" to the principle, Singer stressed, "was the spreading acceptance of abortion throughout the Western world". Late abortions diluted the defence of the "[alleged] universal sanctity of innocent human life".[142] Singer has further remarked:

Ironically, the sanctity with which we endow all human life often works to the detriment of those unfortunate humans whose lives hold no prospect except suffering...

One difference between humans and other animals that is relevant irrespective of any defect is that humans have families who can intelligently take part in decisions about their offspring. This does not affect the intrinsic value of human life, but it often should affect our treatment of humans who are incapable of expressing their own wishes about their future. Any such effect will not, however, always be in the direction of prolonging life...

If we can put aside the obsolete and erroneous notion of the sanctity of all human life, we may start to look at human life as it really is: at the quality of life that each human being has or can achieve. Then it will be possible to approach these difficult questions of life and death with the ethical sensitivity that each case demands, rather than with the blindness to individual differences...[143]

399. The quality of life approach has its basis in the way life is being lived. "An overriding concern", under this approach, "is the conditions under which people live rather than whether they live".[144] This does not mean that someone "who chooses to end their life through euthanasia" does not value their lives as much as others. [145] Breck in his Article titled "Euthanasia and the Quality of Life Debate"[146] has stated that:

Ethicists of all moral and religious traditions recognize that medical decisions today inevitably involve quality of life considerations. Very few would be inclined to sustain limited physiological functioning in clearly hopeless cases, as with anencephaly or whole-brain death, simply because the technology exists to do so. That such a case is indeed hopeless, however, is a quality of life judgment: it weighs the relationship between the patient's condition and the treatment options and concludes that attempts to sustain biological existence would be unnecessarily burdensome or simply futile. Judgments made in light of "futility" or the "burden-benefit calculus" are necessarily based on evaluations of the "quality" of the patient's life. Such quality, however, must always be determined in light of the patient's own personal interests and well-being, and not on grounds of the burden imposed on other parties (the family, for example) or the medical care system with its economic considerations and limited resources.[147]

Weingarten is of the view that the emphasis on the sanctity of life "should be replaced by 'value of life', which exposes the individual case to critical scrutiny. Medicine can better cope with its current and future ethical dilemmas by a case-by-case approach.[148]

Norrie explains why quality of life should be placed ahead of sanctity of life in the debate on euthanasia:

[W]hile there are good moral reasons of either a direct (that human life should be generally valued as of intrinsic worth) or an indirect (that allowing exceptions would lead to a slippery slope) kind for supporting a sanctity of life view in the case of the terminally ill and ancillary cases, there are also good moral reasons for allowing exceptions to it. The latter stem from a quality of life view and, linked to that, the possibility of choosing the time and place of one's own death. The possibility of agency as a central element in what it means to be human is premised on the notion of human freedom, and freedom implies a number of different elements. These include a simple freedom to be left alone with one's life, as well as a positive freedom to become what we have it within ourselves to be. Such freedom then entails further conceptions of autonomy, emancipation, and flourishing, insofar as human life reflects the potentialities in human being. The ability to choose one's own death reflects many of these aspects of human freedom, from the simple sense that one should be left alone to do what one likes with one's life to the more complex sense that an autonomous life would include amongst its components control over one's death, and then on to the sense--that is surely there in the term 'euthanasia' (a 'good death')--that a flourishing life is one in which one is genuinely able to register the time to go. These are moral arguments placing choice

and quality of life ahead of sanctity of life... A good life means a good death too, and it is this kind of argument that leads one to think that a categorical prohibition on voluntary euthanasia...is problematic.[149]

Life and natural death

400. The defenders of the sanctity principle place sacred value to human life from "conception to natural death".[150] The word "natural" implies that "the only acceptable death is one that occurs from natural causes". Life is only "sacred insofar as it ends by natural means"[151]. Medical advancements, however, have brought uncertainty about the definition of death-"what constitutes death, in particular a "natural" death". This uncertainty can be expressed through the following questions:

If a person stays alive thanks to medical advances, is that really "natural"?...

When is the benefit of using technology and treatments to sustain life no longer worth the pain that comes along with it?[152]

401. Medical advances have "complicated the question of when life ends". There exists no natural death where artificial technology is concerned. Technology by artificial means can prolong life. In doing so, technology has reshaped both human experience as well as our values about life in a natural state and its end by natural causes:

[T]he process of dying is an inevitable consequence of life, the right to life necessarily implies the right to have nature take its course and to die a natural death. It also encompasses a right, unless the individual so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means which have no curative effect and which are intended merely to prolong life.[153]

402. Modern medicine has found ways to prolong life and to delay death. But, it does not imply that modern medicine "necessarily prolongs our living a full and robust life because in some cases it serves only to prolong mere biological existence during the act of dying". This may, in certain situations result in a mere "prolongation of a heart-beat that activates the husk of a mindless, degenerating body that sustains an unknowing and pitiable life-one without vitality, health or any opportunity for normal existence-an inevitable stage in the process of dying".[154] Prolonging life in a vegetative state by artificial means or allowing pain and suffering in a terminal state would lead to questioning the belief that any kind of life is so sanctified as to be preferred absolutely over death".[155]

403. Kuhse and Hughes have stated that "the really critical issues in medicine are often hidden" by "the hulking darkness" of the sanctity principle. According to them:

Today the advances of science are occurring every minute. Lasers are used to crush kidney stones; mechanical hearts are transplanted to prolong life; and organ transplants are being increasingly used, particularly livers and eyes and, now experimentally, legs. Microprocessor ventilators are used to maintain breathing in patients unable to breathe on their own; chemotherapy/radiology is

being used to prolong the lives of cancer patients; long-term hemodialysis is being used for those who have non-functional kidneys; and cardiac pacemakers are being implanted in patients whose hearts are unable to beat normally. While society has supported research and development in medicine, the issues regarding the termination of such treatment and, more importantly, the withholding of such treatment have not been fully addressed.[156]

404. The debate around human life will be driven by technology. "Sophisticated modern medical technology", even if ultimately not being able to conquer death, "has a lot to say about the conditions and time of its occurrence". Singer has envisioned a future where the debate around human life is closely linked to the impact of technology on our existence:

As the sophistication of techniques for producing images of soft tissue increases, we will be able to determine with a high degree of certainty that some living, breathing human beings have suffered such severe brain damage that they will never regain consciousness. In these cases, with the hope of recovery gone, families and loved ones will usually understand that even if the human organism is still alive, the person they loved has ceased to exist. Hence, a decision to remove the feeding tube will be less controversial, for it will be a decision to end the life of a human body, but not of a person.[157]

405. Lady Justice Arden recently delivered a lecture in India on a topic dealing with the intersection of law and medicine titled "What does patient autonomy mean for Courts?"[158]. The judge explained that advancement in medical technology has contributed towards a growing importance of patient autonomy and an increasing social trend towards questioning clinical judgment, which is causing conflict among courts in the UK-particularly in end of life treatment decisions. To highlight this conflict, Judge Arden cites the example of baby Charlie Gard, a 'caregiver case'[159] that engendered debate on medical ethics world over.

Born in August 2016 in London, Charlie suffered from an extremely rare genetic condition known as MDDS, which causes progressive brain damage and muscle failure, usually leading to death in infancy. His parents wanted him to undergo experimental treatment known as nucleoside which was available in the USA and raised a large amount of money to enable him to travel there. However, the doctors at the hospital in London who were treating him did not think it was in his caregiver to have this treatment as instead they believed his caregiver demanded that his life-support be withdrawn as they considered the treatment to be futile. Due to the conflicting views between the parents and the doctors, the core issue to be decided i.e. whether it was in the best interest of the child to received further treatment had to be answered by the Court. The case went through the judicial system-including the High Court, the Supreme Court, the ECHR and finally back to the High Court, which on the basis of medical reports concluded that it was not in the child's caregiver to have further treatment and passed an order permitting the doctors to allow Charlie to die. In addition to the issue of caregiver, Lady Justice Arden also mentioned the issue of resources in such cases. In the present case, the parents were able to raise large amounts of financial resources required for the treatment of the child, but lack of resources could lead to difficulties in other cases where treatment is unaffordable in a public health system.

406. Modern technology has in a fundamental manner re-shaped the notion of life. As technology continuously evolves into more complex planes, it becomes even more necessary to re-evaluate its relationship with the meaning and quality of life.

H Euthanasia and the Indian Constitution

407. The sanctity of life principle appears in declarations on human rights as the "right to life".[160] Under the Indian Constitution, right to life has been provided Under Article 21. In **Pt. Parmanand Katara** v. **Union of India** MANU/SC/0423/1989 : AIR 1989 SC 2039, it was pointed out:

[P]reservation of life is of most importance, because if one's life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man".

The sanctity of human life lies in its intrinsic value. It inheres in nature and is recognised by natural law. But human lives also have instrumental functions. Our lives enable us to fulfil our needs and aspirations. The intrinsic worth of life is not conditional on what it seeks to or is capable to achieve. Life is valuable because it is. The Indian Constitution protects the right to life as the supreme right, which is inalienable and inviolable even in times of Emergency.[161] It clearly recognises that every human being has the inherent right to life, which is protected by law, and that "No person shall be deprived of his life... except according to procedure established by law"[162]. It, thus, envisages only very limited circumstances where a person can be deprived of life.

According to Stephania Negri, the debate around euthanasia has "essentially developed within the framework of the universal rights to life and to human dignity"[163]. This leads us to the relationship between end of life decisions and human dignity under the Indian Constitution.

Dignity

408. Human dignity has been "considered the unique universal value that inspires the major common bioethical principles, and it is therefore considered the *noyau dur* of both international bio law and international human rights law"[164]. Ronald Dworkin observes that "the notion of a right to dignity has been used in many senses by moral and political philosophers".[165]

409. The first idea considers dignity as the foundation of human rights-"that dignity relates to the intrinsic value of persons (such that it is wrong to treat persons as mere things rather than as autonomous ends or agents)"[166]. According to this premise, every person, from conception to natural death, possesses inherent dignity:

The sanctity of life view is often accompanied by a set of claims about human dignity, namely, that human beings possess essential, underived, or intrinsic dignity. That is, they possess dignity, or excellence, in virtue of the kind of being they are; and this essential dignity can be used summarily to express why it is impermissible, for example, intentionally to kill human beings: to do so is to act against their dignity.[167]

The other interpretation of dignity is by the supporters of euthanasia.[168] For them, right to lead a healthy life also includes leaving the world in a peaceful and dignified manner. Living with dignity,

in this view, means the right to live a meaningful life having certain quality. This interpretation endorses the "quality of life" proposition.

Dignity has thus been invoked in support of contradictory claims and arguments. It could justify respect for life under the principle of the "sanctity of life", as well as the right to die in the name of the principle of "quality of life". In order to remove ambiguities in interpretation and application of the right to human dignity, Negri has suggested that dignity should be given a minimum core of interpretation:

To be meaningful in the end-of-life discourse, and hence to avoid being invoked as mere rhetoric, dignity should be considered as a substantive legal concept, at whose basic minimum core is the legal guarantee assuring the protection of every human being against degradation and humiliation. Besides this, as international and national case law demonstrate, it can also play an important role as an interpretive principle, assisting judges in the interpretation and application of other human rights, such as the right to life and the right to respect for private life, both crucial in the end-of-life debate.[169]

Recognition of human dignity is an important reason underlying the preservation of life. It has important consequences. Is that dignity not compromised by pain and suffering and by the progressive loss of bodily and mental functions with the imminence of the end of life? Dignity has important consequences for life choices.

410. Morris, in his article, "Voluntary Euthanasia", regards cruelty as a violation of human dignity:

All civilized men will agree that cruelty is an evil to be avoided. But few people acknowledge the cruelty of our present laws which require a man be kept alive against his will, while denying his pleas for merciful release after all the dignity, beauty, promise and meaning of life have vanished, and he can only linger for weeks or months in the last stages of agony, weakness and decay." In addition, the fact that many people, as they die, are fully conscious of their tragic state of deterioration greatly magnifies the cruelty inherent in forcing them to endure this loss of dignity against their will.[170]

He has further stated "it is exceedingly cruel to compel the spouse and children of a dying man to witness the ever-worsening stages of his disease, and to watch the slow, agonizing death of their loved one, degenerating before their eyes, being transformed from a vital and robust parent and spouse into a pathetic and humiliated creature, devoid of human dignity".[171]

411. Liberty and autonomy promote the cause of human dignity. Arguments about autonomy are often linked to human dignity.[172] Gostin evaluates the relationship between the dignity of dying with autonomy thus:

The dying process, after all, is the most intimate, private and fundamental of all parts of life. It is the voice that we, as humans, assert in influencing this autonomous part of our life. At the moment of our death, this right of autonomy ought not to be taken from us simply because we are dying. An autonomous person should not be required to have a good reason for the decision that he or she will make; that is the nature of autonomy. We do not judge for other competent human beings

what may be in their best interest, but instead allow them to determine that for themselves. As such, an autonomous person does not need to have a good understanding or even good reasons. All they need is an understanding of what they are confronting. There is no reason to believe that when a person faces imminent death that they have less human understanding, or less ability to fathom what they will face, than other people. Of course, death is a mystery. But death is what we will all confront sooner or later, and we all may wish to assert our interests in how we may die."[173]

412. Sumner in his work titled "Dignity through Thick and Thin"[174] discusses the dignity associated with patients:

[P]atients associate dignity with concepts such as respect and esteem, presumably including self-respect and self-esteem, whereas they experience its opposite--indignity--as degrading, shameful, or embarrassing... Abstractly speaking, a person's dignity seems to be a matter of assurance of her fully human status, both in her own eyes and in the eyes of others. Dignity is maintained when one can face others with pride and with confidence of being worthy of their respect; it is lost or impaired when being seen by others occasions feelings of shame, inferiority, or embarrassment. The element of degradation that is implicated in indignity seems a matter of feeling demoted or diminished from a higher standing to a lower, perhaps from the status of a fully functioning person to something lesser.[175]

While stating that dignity and indignity are "basically subjective notions"[176] depending upon how individual patients experience them, he has further stated:

One condition that patients report as degrading-- as an indignity--is loss of control over the course of their own health care. Loss of autonomy matters in its own right, but it matters even more if it is the source for patients of shame and humiliation. This suggests that autonomy and well-being are themselves interconnected: Patients typically experience a loss of the former as a decline in the latter, as something that makes their dying process go worse for them by causing them feelings of indignity. Appeals to dignity thus flesh out what is at stake for patients in terms of their autonomy and well-being, but they do not introduce any factors that fall outside the limits of these values.[177]

413. An Article titled "Euthanasia: A Social Science Perspective"[178] in the Economic & Political Weekly has suggested that the discourses on death with dignity "need to be situated within processes of living with dignity in everyday contexts".[179] The end of life must not be seen as "human disposal", but, as "the enhancement of human dignity by permitting each man's last act to be an exercise of his free choice between a tortured, hideous death and a painless, dignified one."[180]

414. Under our Constitution, the inherent value which sanctifies life is the dignity of existence. Recognising human dignity is intrinsic to preserving the sanctity of life. Life is truly sanctified when it is lived with dignity. There exists a close relationship between dignity and the quality of life. For, it is only when life can be lived with a true sense of quality that the dignity of human existence is fully realized. Hence, there should be no antagonism between the sanctity of human life on the one hand and the dignity and quality of life on the other hand. Quality of life ensures dignity of living and dignity is but a process in realizing the sanctity of life.

415. Human dignity is an essential element of a meaningful existence. A life of dignity comprehends all stages of living including the final stage which leads to the end of life. Liberty and autonomy are essential attributes of a life of substance. It is liberty which enables an individual to decide upon those matters which are central to the pursuit of a meaningful existence. The expectation that the individual should not be deprived of his or her dignity in the final stage of life gives expression to the central expectation of a fading life: control over pain and suffering and the ability to determine the treatment which the individual should receive. When society assures to each individual a protection against being subjected to degrading treatment in the process of dying, it seeks to assure basic human dignity. Dignity ensures the sanctity of life. The recognition afforded to the autonomy of the individual in matters relating to end of life decisions is ultimately a step towards ensuring that life does not despair of dignity as it ebbs away.

416. From **Maneka Gandhi**[181] to **Puttaswamy**[182], dignity is the element which binds the constitutional quest for a meaningful existence. In **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi** MANU/SC/0517/1981 : (1981) 1 SCC 608, this Court held that:

The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival...

We think that the right to life includes the right to live with human dignity.

Explaining the ambit of dignity, this Court further held that:

[A]ny form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live... [T]here is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights.

Dignity is the core value of life and personal liberty which infuses every stage of human existence. Dignity in the process of dying as well as dignity in death reflects a long yearning through the ages that the passage away from life should be bereft of suffering. These individual yearnings are enhanced by the experiences of sharing, observing and feeling with others: the loss of a parent, spouse, friend or an acquaintance to the cycle of life. Dignity in death has a sense of realism that permeates the right to life. It has a basic connect with the autonomy of the individual and the right to self-determination. Loss of control over the body and the mind are portents of the deprivation of liberty. As the end of life approaches, a loss of control over human faculties denudes life of its meaning. Terminal illness hastens the loss of faculties. Control over essential decisions about how an individual should be treated at the end of life is hence an essential attribute of the right to life. Corresponding to the right is a legitimate expectation that the state must protect it and provide a just legal order in which the right is not denied. In matters as fundamental as death and the process of dying, each individual is entitled to a reasonable expectation of the protection of his or her autonomy by a legal order founded on the Rule of law. A constitutional expectation of providing dignity in death is protected by Article 21 and is enforceable against the state.

Privacy

417. The nine-judge Bench decision of this Court in Justice **K.S. Puttaswamy** v. **Union of India** MANU/SC/1044/2017 : 2017 (10) SCC 1 held privacy to be the constitutional core of human dignity. The right to privacy was held to be an intrinsic part of the right to life and liberty Under Article 21 and protected under Part III of the Constitution. Each of the six decisions has a vital bearing on the issues in the present case. Excerpts from the judgment are reproduced below:

Justice D.Y. Chandrachud

The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.

Justice Chelameswar

Forced feeding of certain persons by the State raises concerns of privacy. An individual's right to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right of privacy.

Justice SA Bobde

Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man... Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events.

Justice RF Nariman

... a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual.

Justice AM Sapre

The incorporation of expression "Dignity of the individual" in the Preamble was aimed essentially to show explicit repudiation of what people of this Country had inherited from the past. Dignity of the individual was, therefore, always considered the prime constituent of the fraternity, which assures the dignity to every individual. Both expressions are interdependent and intertwined.

Justice SK Kaul

A person-hood would be a protection of one's personality, individuality and dignity.

Privacy, for example is nothing but a form of dignity, which itself is a subset of liberty.

418. The protective mantle of privacy covers certain decisions that fundamentally affect the human life cycle.[183] It protects the most personal and intimate decisions of individuals that affect their life and development.[184] Thus, choices and decisions on matters such as procreation, contraception and marriage have been held to be protected. While death is an inevitable end in the trajectory of the cycle of human life of individuals are often faced with choices and decisions relating to death. Decisions relating to death, like those relating to birth, sex, and marriage, are protected by the Constitution by virtue of the right of privacy.
The right to privacy resides in the right to liberty and in the respect of autonomy.[185] The right to privacy protects autonomy in making decisions related to the intimate domain of death as well as bodily integrity. Few moments could be of as much importance as the intimate and private decisions that we are faced regarding death.[186] Continuing treatment against the wishes of a patient is not only a violation of the principle of informed consent, but also of bodily privacy and bodily integrity that have been recognised as a facet of privacy by this Court.

419. Just as people value having control over decisions during their lives such as where to live, which occupation to pursue, whom to marry, and whether to have children, so people value having control over whether to continue living when the quality of life deteriorates.[187]

420. In the case of **In re Quinlan** 70 N.J. 10; 355 A.2d 647 (1976) the New Jersey Supreme Court dealt with a case of a patient, Karen Quinlan, who had suffered irreversible brain damage and was in a persistent vegetative state and had no prospect of recovery. The patient's father sought judicial authority to withdraw the life-sustaining mechanisms temporarily preserving his daughter's life, and his appointment as guardian of her person to that end. The father's lawyer contended that the patient was being forced to function against all natural impulses and that her right to make a private decision about her fate superseded the state's right to keep her alive. The New Jersey Supreme Court held that the patient had a right of privacy grounded in the US Constitution to terminate treatment and in a celebrated statement said that:

the State's interest contra [the right to privacy] weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest. It is for that reason that we believe [the patient's] choice, if she were competent to make it, would be vindicated by law.

Since Karen Quinlan was not competent to assert her right to privacy, the Court held that Karen's right of privacy may be asserted on her behalf by her guardian due to the reason that Karen Quinlan did not have the capacity to assert her right to privacy indicating that the right of privacy is so fundamental that others, who had been intimately involved with the patient, should be able to exercise it in circumstances when the patient is unable to do so. However, subsequently scholars have argued that when euthanasia is founded in the right to privacy, only voluntary euthanasia can be permitted. The right to privacy can only be exerted by the patient and cannot be exercised vicariously.[188] The substituted judgment and caregiver criterion cannot be logically based on the right to privacy of the patient.[189]

421. In the landmark case of **Pretty** v. **United Kingdom** [190], the European Court of Human Rights analysed Article 8 of the European Convention on Human Rights (respect for private life). It held that the term "private life" is a broad term not susceptible to exhaustive definition and covers the physical and psychological integrity of a person. In relation to the withdrawing of treatment, it was held that the way in which an individual "chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected." The right to privacy protects even those choices that may be considered harmful for the individual exercising the choice:

The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8 § 1... In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity.

The Court further observed that:

Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is Under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.

Thus, the Court concluded that the "choice to avoid what she considers will be an undignified and distressing end to her life" is guaranteed under the right to respect for private life Under Article 8(1) of the Convention.

422. Subsequently in the case of **Haas** v. **Switzerland**[191], the European Court of Human Rights has further held that the right to decide in which way and at which time an individual's life should end, provided that he or she was in a position freely to form her own will and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention.

423. The right to privacy as held by this Court mandates that we safeguard the integrity of individual choice in the intimate sphere of decisions relating to death, subject to the restrictions to the right to privacy, as laid down by us. However, since privacy is not an absolute right and is subject to restrictions, the restrictions must fulfil the requirements as laid down by this Court in **Puttaswamy**.

424. The protection of these rights by the legal order is as much an emanation of the right to privacy which shares a functional relationship with the fundamental right to life and personal liberty

guaranteed by the Constitution. Privacy recognises that the body and mind are inviolable. An essential attribute of this inviolability is the ability of the individual to refuse medical treatment.

Socio-Economic Concerns

425. One of the limitations of contemporary debates on euthanasia is that they do not take into consideration "certain socio-economic concerns that must necessarily be factored into any discourse"[192]. This has been criticised as making the debate around ending life "incomplete" as well as "elitist".

426. In an Article titled "Euthanasia: cost factor is a worry"[193] Nagral (2011) seeks to construct a "critical linkage" between euthanasia and "the economic and social dimension" in the Indian context. Stating that many Indian doctors have been practising passive euthanasia silently and practically, Nagral contemplates the cost of treatment to be a critical factor in influencing the medical decision:

[O]ne of the reasons for 'passive' euthanasia is that the patient or his family could be running out of money. In some cases, this overlaps with the incurability of the disease. In others, it may not. Costly medication and intervention is often withdrawn as the first step of this passive euthanasia process. Sometimes patients are 'transferred' to smaller (read cheaper) institutions or even their homes, with the tacit understanding that this will hasten the inevitable. If a third party is funding the patient's treatment, chances are that the intervention and support will continue. Shocking and arbitrary as this may sound, this is the reality that needs flagging because it is relevant to the proposed legitimization of passive euthanasia. In a system where out-of pocket payment is the norm and healthcare costs are booming, there has to be a way of differentiating a plea made on genuine medical grounds from one that might be an attempt to avoid financial ruin.[194]

Rao (2011) has observed:

In the absence of adequate medical insurance, specialised treatments like ventilator support, kidney dialysis, and expensive lifesaving drugs administered in private hospitals can turn middle-class families into virtual paupers. Poorly equipped government hospitals simply do not have enough life-support machines compared to the number of patients who need them.... This also leads to the inevitable possibility of a comatose patient's family and relatives potentially exploiting the euthanasia law to benefit from a premature death, by way of inheritance, etc.[195]

Norrie (2011) has placed the social and economic dimensions succinctly:

This concerns the problem of the differential social impact that such a position would have on the poor and the well-to-do... Wealth, poverty, and class structure have a profound effect on the choices people make.[196]

The inadequacies of the range and reach of Indian healthcare may, it is observed, lead to a situation where euthanasia/active euthanasia may become "an instrument of cost containment[197].

Restraints on Judicial Power

427. An earlier part of this judgment has dwelt on the criticism of the distinction between passive and active euthanasia, founded as it is on the act-omission divide. The criticism is that as a matter of substance, there is no valid distinguishing basis between active and passive euthanasia. The criticism takes one of two forms: either both should be recognised or neither should be allowed. The view that passive euthanasia involves an omission while active euthanasia involves a positive act is questioned on the ground that the withdrawal of artificial life support (as an incident of passive euthanasia) requires a positive act. While noticing this criticism, it is necessary to distinguish between active and passive euthanasia in terms of the underlying constitutional principles as well as in relation to the exercise of judicial power. Passive euthanasia-whether in the form of withholding or withdrawing treatment-has the effect of removing, or as the case may be, not providing supportive treatment. Its effect is to allow the individual to continue to exist until the end of the natural span of life. On the other hand, active euthanasia involves hastening of death: the life span of the individual is curtailed by a specific act designed to bring an end to life. Active euthanasia would on the state of the penal law as it stands constitute an offence. Hence, it is only Parliament which can in its legislative wisdom decide whether active euthanasia should be permitted. Passive euthanasia on the other hand would not implicate a criminal offence since the decision to withhold or withdraw artificial life support after taking into account the best interest of the patient would not constitute an illegal omission prohibited by law.

428. Moreover, it is necessary to make a distinction between active and passive euthanasia in terms of the incidents of judicial power. We may refer in this context to the felicitous words of Lord Justice Sales, speaking for the Queen's Bench Division in a recent decision delivered on 5 October 2017 in **Noel Douglas Conway** v. **The Secretary of State for Justice** (2017) EWHC 2447 (Admin). Dealing with the plea that physician assisted suicide should be accepted as a principle by the court, the learned Judge observed thus:

Parliament is the body composed of representatives of the community at large with what can be called a democratic mandate to make the relevant assessment in a case where there is an important element of social policy and moral value-judgment involved with much to be said on both sides of the debate (229) and (233). There is not a single, clear, uniquely rational solution which can be identified; the decision cannot fail to be influenced by the decision-makers' opinions about the moral case for assisted suicide, including in deciding what level of risk to others is acceptable and whether any safeguards are sufficiently robust; and it is not appropriate for professional judges to impose their personal opinions on matters of this kind (229)-(230) and (234). In Nicklinson in the Court of Appeal, Lord Judge CJ aptly referred to Parliament as representing "the conscience of the nation" for decisions which raise "profoundly sensitive questions about the nature of our society, and its values and standards, on which passionate but contradictory opinions are held" (Court of Appeal, (155). Parliament has made the relevant decision; opponents of Section 2 have thus far failed to persuade Parliament to change the law despite active consideration given to the issue, in particular in relation to the Falconer Bill which contained essentially the same proposals as Mr. Conway now puts before the court; and the democratic process would be liable to be subverted if, on a question of moral and political judgment, opponents of the legislation could achieve through the courts what they could not achieve in Parliament (231) per Lord Sumption, referring to R (Countryside Alliance) v. Attorney General (2008) AC 719, (45) per Lord Bingham and AXA General Insurance Ltd. v. HM Advocate (2012) 1 SC 868, (49) per Lord Hope)".

Emphasising the limitations on the exercise of the judicial power, Lord Justice Sales observed:

We also agree that his case on necessity becomes still stronger when the other legitimate aims are brought into account. As the conscience of the nation, Parliament was and is entitled to decide that the clarity of such a moral position could only be achieved by means of such a rule. Although views about this vary in society, we think that the legitimacy of Parliament deciding to maintain such a clear line that people should not seek to intervene to hasten the death of a human is not open to serious doubt. Parliament is entitled to make the assessment that it should protect moral standards in society by issuing clear and unambiguous laws which reflect and embody such standards".

In taking the view which has been taken in the present judgment, the court has been conscious of the need to preserve to Parliament, the area which properly belongs to its legislative authority. Our view must hence be informed by the impact of existing legislation on the field of debate in the present case.

I Penal Provisions

429. The legality of and constitutional protection which is afforded to passive euthanasia cannot be read in isolation from the provisions of the Penal Code. Physicians are apprehensive about their civil or criminal liability when called upon to decide whether to limit life-supporting treatment.[198] A decision on the constitutional question cannot be rendered without analyzing the statutory context and the impact of penal provisions. The decision in **Aruna Shanbaug** did not dwell on the provisions of the Penal Code (apart from Sections 306 and 309) which have a vital bearing on the issue of euthanasia. Undoubtedly, constitutional positions are not controlled by statutory provisions, because the Constitution rises above and controls legislative mandates. But, in the present reference where no statutory provision is called into question, it is necessary for the court to analyse the relationship between what the statute penalizes and what the Constitution protects. The task of interpretation is to allow for their co-existence while interpreting the statute to give effect to constitutional principle. This is particularly so in an area such as the present where criminal law may bear a significant relationship to the fundamental constitutional principles of liberty, dignity and autonomy.

The first aspect which needs to be noticed is that our law of crimes deals with acts and omissions. Section 32 of the Penal Code places acts and omissions on the same plane. An illegal omission (unless a contrary intent appears in the Code) is proscribed when the act is unlawful. Section 32 states:

Words referring to acts include illegal omissions. -- In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

The language of the statute which refers to acts applies, unless a contrary intent appears in the text, to omissions.

The next aspect is about when an act or omission is illegal. Section 43 explains the concept of illegality. It provides thus:

"Illegal". "Legally bound to do". -- The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

Here again, being legally bound to do something is the mirror image of what is illegal to omit doing.

Section 43 comprehends within the meaning of illegality, that (i) which is an offence; or (ii) which is prohibited by law; or (iii) which furnishes a ground for a civil action. Omissions and acts are mirror images. When it is unlawful to omit to do something, the individual is legally bound to do it.

This raises the question of whether an omission to provide life-sustaining treatment constitutes an illegal omission.

Section 81 protects acts which are done without a criminal intent to cause harm, in good faith, to prevent or avoid other harm to person or property. The law protects the action though it was done with the knowledge that it was likely to cause harm if a three-fold requirement is fulfilled. It comprehends an absence of criminal intent to cause harm, the presence of good faith and the purpose of preventing other harm. Section 81 provides thus:

81. Act likely to cause harm, but done without criminal intent, and to prevent other harm.--Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation--It is question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Knowledge of the likelihood of harm is not culpable when a criminal intent to cause harm is absent and there exists an element of good faith to prevent or avoid other harm.

Section 92 of the Indian Penal Code states:

Act done in good faith for benefit of a person without consent.--Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provided--

Provisos. First.--That this exception shall not extend to the intentional causing of death, or the attempting to cause death

Section 92 protects an individual from a consequence which arises from the doing of an act for the benefit of another in good faith, though a harm is caused to the other. What was done is protected because it was done in good faith. Good faith is distinguished from an evil design. When a person does something to protect another from a harm or injury, the law protects what was done in good faith, treating the harm that may result as a consequence unintended by the doer of the act. This protection is afforded by the law even in the absence of consent when the circumstances are such that it is impossible for the person for whose benefit the act was done to consent to it. This may arise where the imminence of the apprehended danger makes it impossible to obtain consent. Another eventuality is where the individual is incapable of consenting (by being incapacitated in mind) and there is no person in the position of a guardian or person in lawful charge from whom consent can be obtained in time to perform the act for the benefit of that person. However, the first proviso to Section 92 makes it clear that the exception does not extend to the intentional causing of death or attempt to cause death to the individual, howsoever it may be for the benefit of the other. Absence of intent to cause death is the crucial element in the protection extended by Section 92.

Section 107 deals with abetment. It provides thus:

Abetment of a thing.--A person abets the doing of a thing, who--

... (Thirdly) -- Intentionally aids, by any act or illegal omission, the doing of that thing.

Abetment embodies a three-fold requirement: first an intentional aiding, second the aiding of an act or illegal omission and third, that this must be toward the doing of that thing.

Explanation 2 of this Section states:

Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

430. For abetting an offence, the person abetting must have intentionally aided the commission of the crime. Abetment requires an instigation to commit or intentionally aiding the commission of a crime. It presupposes a course of conduct or action which (in the context of the present discussion) facilitates another to end life. Hence abetment of suicide is an offence expressly punishable Under Sections 305 and 306 of the Indian Penal Code.

431. It is now necessary to dwell upon the provisions bearing upon culpable homicide and murder. Section 299 of the Indian Penal Code states:

Culpable homicide.--Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Section 300 states:

Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

Secondly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

Thirdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-- Fourthly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Active euthanasia involves an intention on the part of the doctor to cause the death of the patient. Such cases fall under the first Clause of Section 300. Exception 5 to Section 300 states:

Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Section 304 provides:

Whoever commits culpable homicide not amounting to murder, shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

There also exists a distinction between active and passive euthanasia. This is brought out in the application of the doctrine of 'double effect'. The Stanford Encyclopedia of Philosophy elucidates the position thus:

The doctrine (or principle) of double effect is often invoked to explain the permissibility of an action that causes a serious harm, such as the death of a human being, as a side effect of promoting some good end. According to the principle of double effect, sometimes it is permissible to cause a harm as a side effect (or "double effect") of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end.[199]

It has been observed further:

A doctor who intends to hasten the death of a terminally ill patient by injecting a large dose of morphine would act impermissibly because he intends to bring about the patient's death. However, a doctor who intended to relieve the patient's pain with that same dose and merely foresaw the hastening of the patient's death would act permissibly.[200]

432. A distinction arises between active and passive euthanasia from the provisions of the Penal Code. Active euthanasia involves an intention to cause the death of the patient. *Mens rea* requires a guilty mind; essentially an intent to cause harm or injury. Passive euthanasia does not embody an intent to cause death. A doctor may withhold life support to ensure that the life of a patient who is in the terminal stage of an incurable illness or in a permanent vegetative state, is not prolonged artificially. The decision to do so is not founded upon an intent to cause death but to allow the life of the patient to continue till and cease at the end of its natural term. Placing such a person on life support would have been an intervention in the natural process of death. A decision not to prolong life by artificial means does not carry an intention to cause death. The crucial element in Section 299 is provided by the expression "**causes** death". In a case involving passive euthanasia, the affliction of the patient is not brought about either by an act or omission of the doctor. There is neither an animus nor an intent to cause death. The creation of the condition of the patient is outside the volition of the doctor and has come about without a covert or overt act by the doctor. The decision to withhold medical intervention is not intended to cause death but to prevent pain, suffering and indignity to a human being who is in the end stage of a terminal illness or of a vegetative state with no reasonable prospect of cure. Placing a patient on artificial life support would, in such a situation, merely prolong the agony of the patient. Hence, a decision by the doctor based on what is in the best interest of the patient precludes an intent to cause death. Similarly, withdrawal of artificial life support is not motivated by an intent to cause death. What a withdrawal of life support does is not to artificially prolong life. The end of life is brought about by the inherent condition of the patient. Thus, both in a case of a withdrawal of life supporting intervention and withholding it, the law protects a bona fide assessment of a medical professional. There being no intent to cause death, the act does not constitute either culpable homicide or murder.

Moreover, the doctor does not inflict a bodily injury. The condition of a patient is on account of a factor independent of the doctor and is not an outcome of his or her actions. Death emanates from the pre-existing medical condition of the patient which enables life to chart a natural course to its inexorable end. The law protects a decision which has been made in good faith by a medical professional not to prolong the indignity of a life placed on artificial support in a situation where medical knowledge indicates a point of no return. Neither the act nor the omission is done with the knowledge that it is likely to cause death. This is for the reason that the likelihood of death is not occasioned by the act or omission but by the medical condition of the patient. When a doctor takes a considered decision in the case of a patient in a terminal stage of illness or in a permanently vegetative state, not to provide artificial life support, the law does not attribute to the doctor the knowledge that it is likely to cause death.

433. Section 43 of the Penal Code defines the expression illegal to mean "...everything which is an offence or which is prohibited by law, or which furnishes ground in a civil action". Withdrawing life support to a person in a permanently vegetative state or in a terminal stage of illness is not 'prohibited by law'. Such an act would also not fall outside the purview of Section 92 for the reason that there is no intentional causing of death or attempt to cause death. Where a decision to withdraw artificial life support is made in the caregiver of the patient, it fulfils the duty of care required from a doctor towards the patient. Where a doctor has acted in fulfilment of a duty of care owed to the patient, the medical judgment underlying the decision protects it from a charge of illegality. Such a decision is not founded on an intention to cause death or on the knowledge that it is likely to

cause death. An act done in pursuance of the duty of care owed by the doctor to a patient is not prohibited by law.

434. In a situation where passive euthanasia is non-voluntary, there is an additional protection which is also available in circumstances which give rise to the application of Section 92. Where an act is done for the benefit of another in good faith, the law protects the individual. It does so even in the absence of the consent of the other, if the other individual is in a situation where it is impossible to signify consent or is incapable of giving consent. Section 92 also recognises that there may be no guardian or other person in lawful charge from whom it is possible to obtain consent. However, the proviso to Section 92 stipulates that this exception shall not extend to intentionally causing death or attempting to cause death. The intent in passive euthanasia is not to cause death. A decision not to prolong life beyond its natural span by withholding or withdrawing artificial life support or medical intervention cannot be equated with an intent to cause death. The element of good faith, coupled with an objective assessment of the caregiver of the patient would protect the medical professional in a situation where a bona fide decision has been taken not to prolong the agony of a human being in a terminal or vegetative state by a futile medical intervention.

435. In 2006, the Law Commission of India submitted its 196th Report titled "Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)". The report by Justice M Jagannadha Rao as Chairperson contains a succinct elucidation of legal principles governing criminal law on the subject. Some of them are explained below:

(i) An informed decision of a patient to refuse medical treatment is accepted at common law and is binding on a treating doctor. While a doctor has a duty of care, a doctor who obeys the instructions of a competent patient to withhold or withdraw medical treatment does not commit a breach of professional duty and the omission to treat will not be an offence;

(ii) The decision of a patient to allow nature to take its course over the human body and, in consequence, not to be subjected to medical intervention, does not amount to a deliberate termination of physical existence. Allowing nature to take its course and a decision to not receive medical treatment does not constitute an attempt to commit suicide within the meaning of Section 309 of the Penal Code;

(iii) Once a competent patient has decided not to accept medical intervention, and to allow nature to take its course, the action of the treating doctor in abiding by those wishes is not an offence, nor would it amount to an abetment Under Section 306. Under Section 107, an omission has to be illegal to constitute an abetment. A doctor bound by the instructions of a patient to withhold or withdraw medical treatment is not guilty of an illegal act or an abetment. The doctor is bound by the decision of the patient to refuse medical intervention;

(iv) A doctor who withholds or withdraws medical treatment in the best interest of a patient, such as when a patient is in a permanent vegetative state or in a terminal state of an incurable illness, is not guilty Under Section 299 because there is no intention to cause death or bodily injury which is likely to cause death. The act of withholding or withdrawing a life support system in the case of a competent patient who has refused medical treatment and, in the case of an incompetent person

where the action is in the best interest of the patient would be protected by good faith protections available Under Sections 76, 79, 81 or, as the case may be, by Section 88, even if it is construed that the doctor had knowledge of the likelihood of death; and

(v) The decision of the doctor, who is under a duty at common law to obey the refusal of a competent patient to take medical treatment, would not constitute a culpable act of negligence Under Section 304A. When the doctor has taken such a decision to withhold or withdraw treatment in the best interest of the patient, the decision would not constitute an act of gross negligence punishable Under Section 304A.

436. Introducing a structural safeguard, in the form of a Medical Board of experts can be contemplated to further such an objective. The Transplantation of Human Organs and Tissues Act 1994 provides for the constitution of Authorisation Committees Under Section 9(4). Authorisation Committees are contemplated at the state and district levels and a hospital board.[201] Once the process of decision making has been arrived at by fulfilling a mandated safeguard (the prior approval of a committee), the decision to withdraw life support should not constitute an illegal act or omission. The setting up of a broad-based board is precisely with a view to lend assurance that the duty of care owed by the doctor to the patient has been fulfilled. Once due safeguards have been fulfilled, the doctor is protected against the attribution of a culpable intent or knowledge. It will hence fall outside the definition of culpable homicide (Section 299), murder (Section 300) or causing death by a rash or negligent act (Section 304A). The composition of this broad-based committee has been dealt with in the last segment of this judgment.

J Advance Directives

437. A patient, in a sound state of mind, possesses the ability to make decisions and choices and can legitimately refuse medical intervention. Justice Cardozo had this to say in a seminal statement of principle in the 1914 decision in **Schloendorff** v. **Society of NY Hospital** 105 N.E. 92, 93 (N.Y. 1914):

Even human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault.

Luis Kutner gave expression to the relationship of privacy with the inviolability of the person and the refusal of medical treatment:

...The attitude of the law is to recognise the inviolability of the human body. The patient's consent must be voluntary and informed. These notions are buttressed by the constitutionally recognized right to privacy. Clearly, then, a patient may refuse treatment which would extend his life. Such a decision must rest with the patient.[202]

The difficulty, as Kutner notes, arises when a patient is unconscious or is not in a position to furnish his or her consent. The author notes that in such a case "the law assumes a constructive consent to such treatment as will save his life". Kutner's thesis contemplates what should happen, if the patient is incapable of giving consent:

...The law, however, does recognize that a patient has a right to refuse to be treated, even when he is in extremis, provided he is in an adult and capable of giving consent. Compliance with the patient's wishes in such circumstances is not the same as voluntary euthanasia. Where, however, the patient is incapable of giving consent, such as when he is in a coma, a constructive consent is presumed and the doctor is required to exercise reasonable care in applying ordinary means to preserve the patient's life. However, he is not allowed to resort to extraordinary care especially where the patient is not expected to recover from the comatose state...

438. Recognition of the right to accept or refuse medical treatment is founded upon autonomy. The **Stanford Encyclopaedia of Philosophy**[203] postulates that there is "a rough consensus in medical ethics on the requirement of respect for patient autonomy". However, a patient may not always have the opportunity to grant or withhold consent to medical treatment. An unforeseen event may deprive the individual of the ability to indicate a desire to either receive or not to have medical treatment. An occasion necessitating treatment in sudden cases where a person suffers an accident, a stroke or coronary[204] episode may provide no time for reflection. In anticipation of such situations, "where an individual patient has no desire to be kept in a state of complete and indefinite vegetated animation with no possibility of recovering his mental and physical faculties, that individual, while still in control of all his/her faculties and his ability to express himself/herself[205], could still retain the right to refuse medical treatment by way of "advance directives".

439. Broadly, there are two forms of advance directives:

-A **Living Will** which indicates a person's views and wishes regarding medical treatment

-A **Durable Power of Attorney for Health Care** or Health care Proxy which authorises a surrogate decision maker to make medical care decisions for the patient in the event she or he is incapacitated

Although there can be an overlap between these two forms of advance directives, the focus of a durable power is on who makes the decision while the focus of a living will is on what the decision should be. A "living will" has also been referred as "a declaration determining the termination of life," "testament permitting death," "declaration for bodily autonomy," "declaration for ending treatment," "body trust," or other similar reference.[206] Living wills are not a new entity and were first suggested by US attorney, Luis Kutner, in late 1960s.[207]

440. Advance directives have evolved conceptually to deal with cases where a patient who subsequently faces a loss of the mental faculty to decide has left instructions, when he or she was possessed of decision-making capacity, on how future medical decisions should be made. The **Stanford Encyclopaedia**[208] explains the concept thus:

... For patients who lack the relevant decision-making capacity at the time the decision is to be made, a need arises for surrogate decision-making: someone else must be entrusted to decide on their behalf. Patients who formerly possessed the relevant decision-making capacity might have anticipated the loss of capacity and left instructions for how future medical decisions ought to be made. Such instructions are called an advance directive. One type of advance directive simply designates who the surrogate decision-maker should be. A more substantive advance directive,

often called a living will, specifies particular principles or considerations meant to guide the surrogate's decisions in various circumstances...

Hazel Biggs[209] explains the meaning of "living wills" and advance directives:

Usually a living will is thought of as a statement indicating a person's preferred treatment options at the end of life, but the term "living will" is also "sometimes used for advance directives which are concerned with other situations or which can be used to express a willingness to receive particular treatments". Some stipulate that specific treatments are acceptable while others are not, while others insist that all available appropriate medical resources should be utilised to maintain life. Living wills are not therefore exclusively associated with end-of-life decisions, although generally the purpose of a living will is to promote individual autonomy and choice for the patient; characteristics which have long been associated with euthanasia as a means of achieving death with dignity".

James C Turner[210] explains the concept of a living will thus:

The living will is a document by which a competent adult signifies a desire that if there ever comes a time when there is no reasonable expectation of his recovery from physical or mental disability that he be allowed to die rather than be kept alive by artificial means or heroic measures. What the typical living will does, in effect, is to sanction passive euthanasia, or, as it has been called, antidysthanasia..

The living will is a document which directs one's physician to cease affirmative treatment under certain specified conditions. It can presumably apply to both the situation in which a person with a terminal disease lapses into the final stage of his illness and also the situation in which a victim of a serious accident deteriorates into a state of indefinite vegetated animation...

441. The principles of patient autonomy and consent are the foundation of advance medical directives. A competent and consenting adult is entitled to refuse medical treatment. By the same postulate, a decision by a competent adult will be valid in respect of medical treatment in future. As Biggs states:

...Founded upon respect for individual autonomy this is a right that operates through the law of consent to protect patients from unfettered medical paternalism. Common law holds that patients with the capacity to give consent are also competent to refuse or withhold consent, "even if a refusal may risk personal injury to health or even lead to premature death". Furthermore, a "refusal of treatment can take the form of a declaration of intent never to consent to that treatment in the future, or never to consent in some future circumstances". Accordingly, any consent or refusal of consent made by a competent adult patient can also be valid in respect of the same treatment at any time in the future.

442. Advance directives are thus documents a person completes while still in possession of decisional capacity about how treatment decisions should be made in the event she or he loses decision making capacity in future. They cover three conditions: (i) a terminal condition; (ii) a persistently unconscious condition; and (iii) an end-stage condition.

443. **A terminal condition** is an incurable or irreversible condition which even with the administration of life-sustaining treatment will result in death in the foreseeable future. A **persistently unconscious** condition is an irreversible condition, in which thought and awareness of self and environment are absent. An **end-stage condition** is a condition caused by injury, disease or illness which results in severe and permanent deterioration indicated by incompetency and complete physical dependency for which treatment of the irreversible condition would be medically ineffective.

444. The reason for recognising an advance directive is based on individual autonomy. As an autonomous person, every individual has a constitutionally recognised right to refuse medical treatment. The right not to accept medical treatment is essential to liberty. Medical treatment cannot be thrust upon an individual, however, it may have been conceived in the interest of the individual. The reasons which may lead a person in a sound state of mind to refuse medical treatment are inscrutable. Those decisions are not subject to scrutiny and have to be respected by the law as an essential attribute of the right of the individual to have control over the body. The state cannot compel an unwilling individual to receive medical treatment. While an individual cannot compel a medical professional to provide a particular treatment (this being in the realm of professional medical judgment), it is equally true that the individual cannot be compelled to undergo medical intervention. The principle of sanctity of life thus recognises the fundamental liberty of every person to control his or her body and as its incident, to decline medical treatment. The ability to take such a decision is an essential element of the privacy of the being. Privacy also ensures that a decision as personal as whether or not to accept medical treatment lies exclusively with the individual as an autonomous being. The reasons which impel an individual to do so are part of the privacy of the individual. The mental processes which lead to decision making are equally part of the constitutionally protected right to privacy.

445. Advance directives are founded on the principle that an individual whose state of mind is not clouded by an affliction which prevents him or her from taking decisions is entitled to decide whether to accept or not accept medical intervention. If a decision can be made for the present, when the individual is in a sound state of mind, such a person should be allowed to decide the course of action which should be followed in the future if he or she were to be in a situation which affects the ability to take decisions. If a decision on whether or not to receive medical treatment is valid for the present such a decision must be equally valid when it is intended to operate in the future. Advance directives are, in other words, grounded in a recognition by the law of the importance of consent as an essential attribute of personal liberty. It is the consensual nature of the act underlying the advance directive which imparts sanctity to it in future in the same manner as a decision in the present on whether or not to accept medical treatment.

446. When a patient is brought for medical treatment in a state of mind in which he or she is deprived of the mental capacity to make informed choices, the medical professional needs to determine the line of treatment. One line of enquiry, which seeks to protect patient autonomy is how the individual would have made a decision if he or she had decision-making capacity. This is called the substituted judgment standard. An advance medical directive is construed as a facilitative mechanism in the application of the substituted judgment standard, if it provides to the physician a communication by the patient (when she or he was in a fit state of mind) of the desire for or restraint on being provided medical treatment in future.

447. Conceptually, there is a second standard, which is the caregiver standard. This is founded on the principle of beneficence. The second standard seeks to apply an objective notion of a line of treatment which a reasonable individual would desire in the circumstances.

The **Stanford Encyclopaedia** contains an elucidation of these two standards:

The Substituted judgment standard:

The surrogate's task is to reconstruct what the patient himself would have wanted, in the circumstances at hand, if the patient had decision-making capacity. Substantive advance directives are here thought of as a helpful mechanism for aiding the application of Substituted Judgment. The moral principle underlying this legal standard is the principle of respect for autonomy, supplemented by the idea that when a patient is not currently capable of making a decision for himself, we can nonetheless respect his autonomy by following or reconstructing, as best we can, the autonomous decision he would have made if he were able. In a subset of cases, a substituted judgment can implement an actual earlier decision of the patient, made in anticipation of the current circumstances; this is known as precedent autonomy.

The Caregiver standard:

The surrogate is to decide based on what, in general, would be good for the patient. The moral principle underlying this standard is the principle of beneficence. This legal standard has traditionally assumed a quite generic view of interests, asking what a "reasonable" person would want under the circumstances and focusing on general goods such as freedom from pain, comfort, restoration and/or development of the patient's physical and mental capacities. This is because the Caregiver standard has mainly been employed when there is little or no information about the patient's specific values and preferences. However, the concept of caregiver is simply the concept of what is best for the person. There is no reason why, in principle, the Caregiver judgment could not be as nuanced and individual as the best theory of well-being dictates.

The difference between these two standards is that the first seeks to reconstruct the subjective point of view of the patient. The second allows for "a more generic view of interests", without having to rely on the "idiosyncratic values and preference of the patient in question".

448. The Encyclopaedia explains that the "orthodox view" contained the following ordering of priorities:

1. Honour a substantive advance directive, as an aid to Substituted Judgment, whenever such directive is available.

2. Absent an advance directive, apply the Substituted judgment standard based on available information about the patient's past decisions and values.

3. If you cannot apply the Substituted judgment standard-either because the patient has never been competent or because information about the patient's former wishes and values is unavailable-use the Caregiver standard.

The above ordering of priorities in the orthodox view has been questioned. In prioritising advance directives and substituted judgments, the orthodox view "overlooks the possibility that the earlier competent self and the current incompetent self may have conflicting interests". Advance directives and the substituted judgment standard were propounded to deal with afflictions such as a persistent vegetative state where the interests of the patient in such a state are not potentially different from what they used to be. The Stanford Encyclopaedia, however, notes that a loss of decision-making capacity may give rise to less drastic conditions in which the presently incompetent patient may have developed "powerful new interests" in a new phase of life. Patients facing Alzheimer's or dementia face progressive mental deterioration. When such a patient was still in a competent state of mind, she may have regarded a state of dementia to be degrading. However, as the disease progresses, the interests of the patient change and her life may be enriched by the simple activities of life. The patient may cease to identify with his or her intellect and revisit an earlier desire not to prolong life. The Stanford Encyclopaedia states that in such an eventuality, "the conflict is between the autonomy of the earlier self and the well-being of the current self".

449. One way of seeking a philosophical resolution is to postulate that the former self and its interests will have priority, or a "special authority" over the current self. Such an approach prioritises autonomy over beneficence. This line of approach is, however, not free of difficulty. A patient may have lost the ability to take complex decisions. Yet the treating physician may not have "a license to discount the current well-being of the individual in favour of what mattered to him earlier". This illustration emphasises the potential conflict between a pure application of the substituted judgment standard and the caregiver standard. The former seeks to preserve individual autonomy at all costs. The latter juxtaposes the role of the medical professional in determining what is in the best interest of the patient. The best interest standard is hence founded on the principle that a patient who has progressed from a competent mental state to an increasing lack of mental capacity faces a change of personal identity. An autonomous decision suited to an earlier identity may not always be a valid rationale for determining the course of action in respect of a new identity which a patient acquires in the course of illness:

According to the threshold views, the earlier self has authority to determine the overall interests of the patient because the current self has lost crucial abilities that would allow it to ground these overall interests anew. This picture assumes that the earlier and current self are stages in the life of one entity, so that, despite the talk of local interests associated with each life-stage, there is an underlying continuity of interests between the two. But this is a very substantial assumption, and it has been contested by appeal to an influential account of the metaphysics of personal identity over time, the psychological continuity account. Roughly, the idea is that, in the wake of a drastic transformation of one's psychology such as Alzheimer's disease, one does not survive as numerically the same individual, so whatever interests one's predecessor in one's body may have had are not a suitable basis for decisions on behalf of the new individual who has emerged after the transformation (Dresser 1986). The lack of identity between the earlier and current self undercuts the authority of the former over the latter.

450. In such a situation the doctor's duty to care assumes significance. The relationship between a doctor and her patient with an evolving mental condition needs a balance between the desires of the patient in a different mental state and the needs of the patient in the present condition. Neither can be ignored in preference to the other. The first recognises the patient as an autonomous

individual whose desires and choices must be respected by law and medicine. The desire not to be subject to endless medical intervention, when one's condition of mind or body have reached an irreversible state is a profound reflection of the value to be left alone. Constitutional jurisprudence protects it as part of the right to privacy. On the other hand, the need to procure the dignity of the individual in a deteriorating and irreversible state of body or mind is as crucial to the value of existence. The doctor must respect the former while being committed as a professional to protect the latter.

451. Human experience suggests that there is a chasm of imponderables which divide the present from the future. Such a divide may have a bearing on whether and if so, the extent to which an advance directive should bind in the future. As stated above, the sanctity of an advance directive is founded upon the expression of the will of an individual who is in a sound state of mind when the directive is executed. Underlying the consensual character of the declaration is the notion of the consent being informed. Undoubtedly, the reasons which have weighed with an individual in executing the advance directive cannot be scrutinized (in the absence of situations such as fraud or coercion which implicate the very basis of the consent). However, an individual who expresses the desire not to be subjected to a particular line of treatment in the future, should she or he be ailing in the future, does so on an assessment of treatment options available when the directive is executed. For instance, a decision not to accept chemotherapy in the event that the individual is detected with cancer in the future, is based on today's perception of the trauma that may be suffered by the patient through that treatment. Advances in medical knowledge between the date of the execution of the document and an uncertain future date when the individual may possibly confront treatment for the disease may have led to a re-evaluation by the person of the basis on which a desire was expressed several years earlier. Another fundamental issue is whether the individual can by means of an advance directive compel the withholding of basic care such as hydration and nourishment in the future. Protecting the individual from pain and suffering as well as the indignity of debility may similarly raise important issues. Advance directives may hence conceivably raise ethical issues of the extent to which the perception of the individual who executes it must prevail in priority to the best interest of the patient.

452. The substituted judgment standard basically seeks to determine what the individual would have decided. This gives primacy to the autonomy of the individual. On the other hand, as seen earlier, the best interest standard is based on the principle of beneficence. There is an evident tension between these two standards. What an individual would decide as an autonomous entity is a matter of subjective perception. What is in the best interest of the patient is an objective standard: objective, with the limitation that even experts differ. The importance of an advance directive lies in bringing to the fore the primacy of individual choice. Such a directive ensures that the individual retains control over the manner in which the body is treated. It allows the individual to decide not to accept artificial treatment which would prolong life in the terminal stage of an ailment or in a vegetative state. In doing so, recognition is granted to the effect of the advance directive upon the happening of a contingency in the future, just as the individual would in the present have a right to refuse medical treatment. The advance directive is an indicator to medical professionals of the underlying desire of the person executing it.

453. In a society such as ours where family ties have an important place in social existence, advance directives also provide a sense of solace to the family. Decisions such as whether to

withhold or withdraw artificial life saving treatment are difficult for families to take. Advance directives provide moral authority for the family of the patient that the decision which has been taken to withdraw or withhold artificial life support is in accord with the stated desire of the patient expressed earlier. But the ethical concerns which have been referred to earlier may warrant a nuanced application of the principle. The circumstances which have been adverted to earlier indicate that the decision on whether to withhold or withdraw medical treatment should be left to a competent body comprising of, but not restricted to medical professionals. Assigning a supervisory role to such a body is also necessary in order to protect against the possibility of abuse and the dangers surrounding the misuse of an advance directive. One cannot be unmindful of prevailing social reality in the country. Hence, it is necessary to ensure that an advance directive is not utilized as a subterfuge to fulfil unlawful or unethical purposes such as facilitating a succession to property.

454. The view which this judgment puts forth is that the recognition of advance directives as part of a regime of constitutional jurisprudence is an essential attribute of the right to life and personal liberty Under Article 21. That right comprehends dignity as its essential foundation. Quality of life is integral to dignity. As an essential aspect of dignity and the preservation of autonomy of choice and decision-making, each individual must have the right on whether or not to accept medical intervention. Such a choice expressed at a point in time when the individual is in a sound and competent state of mind should have sanctity in the future if the individual were to cease to have the mental capability to take decisions and make choices. Yet, a balance between the application of the substituted judgment standard and the best interest standard is necessary as a matter of public interest. This can be achieved by allowing a supervisory role to an expert body with whom shall rest oversight in regard to whether a patient in the terminal stage of an illness or in a permanent vegetative state should be withheld or withdrawn from artificial life support.

455. In 1995, the British Medical Association (BMA) published a report on advance statements about medical treatment with the intention to reflect "good clinical practice in encouraging dialogue about individuals' wishes concerning their future treatment".[211] The report theoretically discussed six different types of advance statements[212]:

• A requesting statement reflecting an individual's aspirations and preferences

• A statement of general beliefs and aspects of life that the individual values

• A statement naming a proxy

• A directive giving clear instructions refusing some or all treatment(s)

• A statement specifying a degree of irreversible deterioration after which no life-sustaining treatment should be given

• A combination of the above

456. A decade later, the Mental Capacity Act (MCA), 2005 was enacted, which came into force in October 2007. The statute "enabled individuals to write an advance directive or appoint a lasting

power of attorney to make their views on health care known should they lose capacity"[213]. The Act enshrined in statute law the right of an adult with capacity to make an advance directive to refuse specific treatment at a point in the future when they lack capacity.

457. Before turning to MCA, it is of importance to state the position of the common law before the enactment of the legislation. English Law has recognised the entitlement of an individual possessed of the ability to take decisions to refuse medical treatment[214]. The law has had to confront problems in applying this standard in difficult, practical situations. For instance, in a judgment in **Re B** (Adult: Refusal of Medical Treatment) [2002] 2 All ER 449, a patient who was suffering from tetraplegia declined to consent to artificial ventilation. Though the patient was found initially to suffer from depression and to lack decision making capacity, subsequent evaluation found that she was mentally competent. For a period of nine months, the hospital refused to respect the wishes of the patient not to place her on artificial ventilation, necessitating judicial intervention. When the case travelled to court, the President of the Family Division, Dame Butler-Sloss emphasised that "the right of the patient to demand cessation of treatment must prevail "over the natural desire of the medical and nursing professions to try to keep her alive". The Judge recognised the serious danger of "a benevolent paternalism which does not embrace recognition of the personal autonomy of the severely disabled patient".

458. Commenting on the above decision, **Elizabeth Wicks** in her recently published book titled "**The State and The Body-Legal Regulation of Bodily Autonomy**"[215] observes that:

... the desire to preserve life is strong and choices to end life, especially in circumstances where the life is not without an element of quality, are often seen as swimming against a strong tide of the value of life.

459. In **Re AK (Adult Patient) (Medical Treatment: Consent)**[2001] 1 FLR 129, Justice Hughes (as he then was) in the High Court of Justice, reviewed the authorities, and summarised the common law position thus:

Accordingly, the first principle of law which I am satisfied is completely clear, is that in the case of an adult patient of full capacity his refusal to consent to treatment or care must in law be observed. It is clear that in an emergency a doctor is entitled in law to treat by invasive means if necessary a patient who by reason of the emergency is unable to consent, on the grounds that the consent can in those circumstances be assumed. It is, however, also clearly the law that the doctors are not entitled so to act if it is known that the patient, provided he was of sound mind and full capacity, has let it be known that he does not consent and that such treatment is against his wishes. To this extent an advance indication of the wishes of a patient of full capacity and sound mind are effective. Care will of course have to be taken to ensure that such anticipatory declarations of wishes still represent the wishes of the patient. Care must be taken to investigate how long ago the expression of wishes was made. Care must be taken to investigate with what knowledge the expression of wishes was made. All the circumstances in which the expression of wishes was given will of course have to be investigated.

In **HE** v. **A Hospital NHS Trust** [2003] 2 FLR 408, Justice Munby of the High Court of Justice (Family Division) considered an "Advance Medical Directive/Release" signed by a young woman,

which sought to refuse the transfusion of blood or primary blood components in absolute and irrevocable terms. The Court had to decide whether the advance directive was valid and applicable. It was noted that:

A competent adult patient has an absolute right to refuse consent to any medical treatment or invasive procedure, whether the reasons are rational, irrational, unknown or nonexistent, and even if the result of refusal is the certainty of death... Consistently with this, a competent adult patient's anticipatory refusal of consent (a so-called 'advance directive' or 'living will') remains binding and effective notwithstanding that the patient has subsequently become and remains incompetent. An adult is presumed to have capacity, so the burden of proof is on those who seek to rebut the presumption and who assert a lack of capacity. It is therefore for those who assert that an adult was not competent at the time he made his advance directive to prove that fact.

The Court then analyzed the specific aspects of the law governing advance directives:

1. There are no formal requirements for a valid advance directive. An advance directive need not be either in or evidenced by writing. An advance directive may be oral or in writing.

2. There are no formal requirements for the revocation of an advance directive. An advance directive, whether oral or in writing, may be revoked either orally or in writing. A written advance directive or an advance directive executed under seal can be revoked orally.

3. An advance directive is inherently revocable. Any condition in an advance directive purporting to make it irrevocable, any even self-imposed fetter on a patient's ability to revoke an advance directive, and any provision in an advance directive purporting to impose formal or other conditions upon its revocation, is contrary to public policy and void. So, a stipulation in an advance directive, even if in writing, that it shall be binding unless and until revoked in writing is void as being contrary to public policy.

4. The existence and continuing validity and applicability of an advance directive is a question of fact. Whether an advance directive has been revoked or has for some other reason ceased to be operative is a question of fact.

5. The burden of proof is on those who seek to establish the existence and continuing validity and applicability of an advance directive.

6. Where life is at stake the evidence must be scrutinised with especial care. Clear and convincing proof is required. The continuing validity and applicability of the advance directive must be clearly established by convincing and inherently reliable evidence.

7. If there is doubt that doubt falls to be resolved in favour of the preservation of life.

460. The common law has been "refined" by passage of the MCA 2005, which makes statutory provision for advance decisions to refuse treatment.[216] The Mental Capacity Act has certain underlying principles[217], which can be stated as follows:

• A person must be assumed to have capacity unless it is established that she lacks capacity.

• A person is not to be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success.

• A person is not to be treated as unable to make a decision merely because she makes an unwise decision.

• An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in her caregiver.

• Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

461. Advance decisions are legally binding in England and Wales, as long as they meet certain requirements. Section 24 of the Act deals with the criteria for legally valid advance decisions to refuse treatment. Section 25 deals with the validity and applicability of advance decisions. The advance directive does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to the person making the decision, unless the decision is at the material time-- (a) valid, and (b) applicable to the treatment.

462. The law in UK empowers the Court of Protection to make a declaration as to whether an advance decision-- (a) exists; (b) is valid; (c) is applicable to a treatment.[218] Moreover, a person will not incur any liability for the consequences of withholding or withdrawing a treatment from an individual, if she at the material time, reasonably believes that a valid advance decision applicable to the treatment, made by that individual, exists.[219] Until the implementation of the Mental Capacity Act 2005 in October 2007, nobody was able legally to make medical decisions on behalf of another adult in England and Wales. The Act imposes duties on the person who has to make a determination as to what is in an individual's caregiver. All the relevant circumstances must be taken into consideration, which are as follows[220]:

• Considering whether it is likely that the person will at some time have capacity in relation to the matter in question, and if it appears likely that he or she will, when that is likely to be;

• Permitting and encouraging, so far as reasonably practicable, the person to participate, or to improve the ability to participate, as fully as possible in any act done for and any decision affecting the person;

• Where the determination relates to life-sustaining treatment he or she must not, in considering whether the treatment is in the caregiver of the person concerned, be motivated by a desire to bring about death;

• Considering so far as is reasonably ascertainable, the person's past and present wishes and feelings (and, in particular, any relevant written statement made when he or she had capacity); the

beliefs and values that would be likely to influence the decision if the person had capacity; and the other factors that he or she would be likely to consider if able to do so; and

• Taking into consideration, if it is practicable and appropriate to consult them, the views of anyone named by the person as someone to be consulted on the matter in question or on matters of that kind; anyone engaged in caring for the person or interested in his or her welfare; any donee of a lasting power of attorney granted by the person; and any deputy appointed for the person by the court, as to what would be in the person's caregiver.

463. Even after the enforcement of the Mental Capacity Act 2005, there have been examples of life sustaining treatment being continued despite the desire of the patient to the contrary. In **W** v. **M** [2011] EWHC 2443 (Fam), a patient who was in a minimally conscious state had previously expressed a desire against artificial intervention. An application was made to withdraw artificial nutrition and hydration. The application was refused by the judge on the basis that her life had some benefit, in spite of the wishes of the family and the previously expressed desire of the patient when she was competent that she would not like to continue living in such a condition. The judge took the view that the wishes of the patient were not binding and did not carry substantial weight, not being formally recorded so as to constitute an advance decision under the Mental Capacity Act, 2005. Adverting to this decision, Wicks notes that despite the emphasis in the Act of 2005, on the previously expressed desires of the patient, "these are just one relevant factor and may well not be regarded as the crucial one if they point towards death rather than continued life"[221].

Yet, a subsequent decision of the UK Supreme Court in **Aintree University Hospitals NHS Foundation Trust** v. **James and Ors.** [2013] UK SC 6 "does signify greater acceptance of the centrality of the dying person's choices"[222]. But decided cases show the "medical evidence relating to the benefits of continued existence remains an influential consideration"[223]. The result has been a greater emphasis in providing palliative care towards the end of life. The palliative care approach gives priority to providing dignity to a dying patient over an approach which only seeks to prolong life:

A civilised society really ought to be able to respect the dignity and autonomy of the dying in a way that both gives value to their lives and dignity to their death. The withdrawal of medical treatment from a dying patient can, in some circumstances, be justified; the withdrawal of basic care and compassion cannot.[224]

464. The Mental Healthcare Act 2017, which was assented to by the President of India on 7 April 2017, enacts specific provisions for recognising and enforcing advance directives for persons with mental illness. The expression "mental illness" is defined by Section 2(s) thus:

mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence".

The Act recognises an advance directive. An advance directive has to be in writing. The person subscribing to it must be a major. While making an advance directive, the maker indicates

(i) The manner in which he or she wishes or does not wish to be cared for and treated for a mental illness; and

(ii) The person he or she appoints as a nominated representative[225].

An advance directive is to be invoked only when the person who made it ceases to have the capacity to make mental healthcare treatment decisions. It remains effective until the maker regains the capacity to do so[226].

465. The Central Mental Health Authority constituted under the Act is empowered to make Regulations governing the making of advance directives[227].

466. The Mental Health Review Board constituted under the Act has to maintain an online register of all advance directives and to make them available to a mental health professional when required[228].

467. Advance directives are capable of being revoked, amended or modified by the maker at any time[229]. The Act specifies that an advance directive will not apply to emergency treatment[230] administered to the maker. Otherwise, a duty has been cast upon every medical officer in charge of a mental health establishment and a psychiatrist in charge of treatment to propose or give treatment to a person with a mental illness, in accordance with a valid advance directive, subject to Section 11[231]. Section 11 elucidates a procedure which is to be followed where a mental health professional, relative or care-giver does not desire to follow the advance directive. In such a case, an application has to be made to the Board to review, alter, cancel or modify the advance directive. In deciding whether to allow such an application the Board must consider whether

(i) The advance directive is truly voluntary and made without force, undue influence or coercion;

(ii) The advance directive should apply in circumstances which are materially different;

(iii) The maker had made a sufficiently well informed decision;

(iv) The maker possessed the capacity to make decisions relating to mental health care or treatment at the time when it was made; and

(v) The directive is contrary to law or to constitutional provisions[232].

A duty has been cast to provide access to the advance directive to a medical practitioner or mental health professional, as the case may be[233]. In the case of a minor, an advance directive can be made by a legal guardian[234]. The Act has specifically granted protection to medical practitioners and to mental health professionals against being held liable for unforeseen consequences upon following an advance directive[235].

468. Chapter IV of the Mental Healthcare Act 2017 contains detailed provisions for the appointment and revocation of nominated representatives. The provisions contained in Chapter IV stipulate qualifications for appointment of nominated representatives; an order of precedence in recognising a nominated representative when none has been appointed by the individual concerned; revocation of appointments and the duties of nominated representatives. Among those duties, a nominated representative is to consider the current and past wishes, the life history, values, culture, background and the caregiver of the person with a mental illness; give effective credence to the views of the person with mental illness to the extent of his or her understanding the nature of the decisions under consideration; to provide support in making treatment decisions; have the right to seek information on diagnosis and treatment, among other things.

469. In the context of mental illness, Parliament has now expressly recognised the validity of advance directives and delineated the role of nominated representatives in being associated with healthcare and treatment decisions.

470. A comparative analysis of advance directives in various jurisdictions indicates some common components. They include the patient's views and wishes regarding: (i) Cardio-pulmonary Resuscitation (CPR)-treatment that attempts to start breathing and blood flow in people who have stopped breathing or whose heart has stopped beating; (ii) Breathing Tubes; (iii) Feeding/Hydration; (iv) Dialysis; (v) Pain Killers; (vi) Antibiotics; (vii) Directions for organ donation; and (viii) Appointment of Proxy/Health care agent/Surrogate, etc.

471. Legal recognition of advance directives is founded upon the belief that an individual's right to have a dignified life must be respected. In **Vishaka** v. **State of Rajasthan** MANU/SC/0786/1997 : (1997) 6 SCC 241, the Court, in the absence of enacted law against sexual harassment at work places, had laid down the guidelines and norms for due observance at all work places or other institutions, until a legislation is enacted for the purpose. Certain precepts can be deduced from the existing global framework on advance directives. These include the following:

A) Advance directives reflect the right of an adult with capacity to make a decision to refuse specific treatment at a point in the future when they lack capacity. A person can be said to lack capacity when "in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain"[236]. He/she must be deemed to have capacity to make decisions regarding his treatment if such person has ability to-- (a) understand the information that is relevant to take a decision on the treatment or admission or personal assistance; or (b) appreciate any reasonably foreseeable consequence of a decision or lack of decision on the treatment or admission or personal assistance; or (c) communicate such decision by means of speech, expression, gesture or any other means.[237]

B) For a legally valid advance decision to refuse treatment, an advance directive must fulfil a basic criteria[238], which should include that-a directive must be made by a person after he has reached 18 years of age[239]; the person must be mentally competent when the directive is made; the directive must specify-in medical or layman's terms-the treatment refused; and, it can specify the circumstances in which the refusal is to apply.

C) At any time before reaching the comatose state, an individual can revoke the directive. In other words, an individual may withdraw or alter an advance decision at any time when he/she has capacity to do so. Such withdrawal (including a partial withdrawal) need not be in writing. A directive must be revoked if the statements or actions subsequent to the written document indicate contrary consent.[240]

D) An advance decision will not be applicable to the treatment in question if-(a) at the material time, the person, who made it, did not have the capacity to give or refuse consent to it[241]; (b) the treatment is not the treatment specified in the advance decision[242]; (c) any circumstances specified in the advance decision are absent[243]; or (d) there are reasonable grounds for believing that circumstances exist which the person making the directive did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them.[244]

E) If a person intends specifically to refuse life-sustaining procedures[245], he/she must-clearly indicate that it is to apply even if life is at risk and death will predictably result; put the decision in writing; and, ensure it is signed and witnessed.

F) In the event that there is more than one valid Advance Directive, none of which have been revoked, the most recently signed Advance Directive will be considered as the last expression of the patient's wishes and will be given effect.

G) A person will not incur any liability for the consequences of withholding or withdrawing a treatment from an individual, if he, at the material time, reasonably believes that a valid advance decision applicable to the treatment, made by that individual, exists.[246]

H) An advance directive must clearly contain the following: (a) full details of its maker, including date of birth, home address and any distinguishing features; (b) the name and address of a general practitioner and whether they have a copy; (c) a statement that the document should be used if the maker lacks capacity to make treatment decisions; (d) a clear statement of the decision, the treatment to be refused and the circumstances in which the decision will apply; (d) the date the document was written (or reviewed); and, (e) the person's signature and the signature of a witness.[247]

472. Advance directives also have limitations. Individuals may not fully understand treatment options or recognize the consequences of certain choices in the future. Sometimes, people change their minds after expressing advance directives and forget to inform others. Another issue with advance directives is that vague statements can make it difficult to understand the course of action when a situation arises. For example, general statements rejecting "heroic treatments" are vague and do not indicate whether you want a particular treatment for a specific situation (such as antibiotics for pneumonia after a severe stroke). On the other hand, very specific directives for future care may not be useful when situations change in unexpected ways. New medical therapies may also have become available since an advance directive was given. Thus, advance directives should be reviewed and revised regularly if feelings about certain issues change, so that current wishes and decisions are always legally documented.

473. An important facet which a regime of advanced care directives must factor in, is the existence of variables which affect the process. These include, in our society, institutional aspects such as the paucity of access to publicly funded Medicare, declining standards of professional ethics and the inadequacy of institutional responses to the lack of professional accountability in the medical profession.

474. A report submitted in October 2017 by the American Bar Association's Commission on Law and Ageing to the US Department of Health Services, dwelt on several variables which bear upon advance directives. The following observations provide an insight:

A good starting point in understanding this landscape is a realization that law and Regulation are but one slice of the universe of variables that profoundly affect the experience of dying...

...other key variables include institutional innovation, the role of financing systems, professional and public education and professional standards and guidelines. All these operate in a larger framework that is defined by family, workplace, community life and spirituality. Thus, the isolation of law and Regulation as a strategy for behaviour change requires a sense of humility in establishing expectations, lest we overstate the influence of law in the human experience of dying...[248]

475. There are variables which "profoundly affect the experience of dying" even in a developed society. They provide a sobering reflection of the gulf which separates the needs of patients and the availability of services to the poor, in a society like ours with large impoverished strata. Patient autonomy may mean little to the impoverished citizen. For marginalised groups in urban and rural India, even basic medical care is a distant reality. Advance directives postulate the availability of medical care. For, it is on the hypothesis of such care being available that the right to choose or refuse treatment is based. The stark reality in our society is that medical facilities are woefully inadequate. Primary medical care is a luxury in many places. Public hospitals are overwhelmed by the gap between the demand for medical care and its supply. Advance directives may have little significance to large segments of Indian society which are denied access to basic care. Advance directives also require an awareness of rights. The stark reality is that the average Indian is deprived of even basic medical facilities in an environment where absence of rudimentary care is the norm. Moreover, absolute notions of patient autonomy need to be evaluated in the context of the Indian social structure where bonds of family, religion and caste predominate. The immediate family and in many situations, the larger unit of the extended family are caregivers. In the absence of a social security net, universal medical coverage and compulsory insurance, it is the family to which a patient turns to in distress. Families become the caregivers, willingly or as a result of social conditioning, especially in the absence of resources and alternative institutional facilities. The views of the family which are drawn by close bonds of kinship have to be factored into the process. At the other end of the spectrum, rising costs of medical care in the urban areas threaten to ruin the finances of a family when a member is struck by a serious illness. To them, advance directives may provide a measure of assurance when a crucial decision as to whether to prolong artificial support in an irreversible medical situation is to be taken. The fact that the patient had expressed a desire in the form of an advance directive obviates a sense of moral guilt on the part of the caregivers, when the family accepts the doctors' wisdom to withdraw or withhold artificial support. Another important variable which a regime of advance directives must bear in mind is the

danger of misuse. The regime of advance directives which is intended to secure patient autonomy must contain safeguards against the greed of avaricious relatives colluding with willing medical professionals. The safeguards must be robust to obviate the dangers. The complexities of culture and of the social strata adverted to above only emphasise the wide diversity that prevails within the country. Our solution must take into account the diversity across the country. It is with the above background in view that we have introduced a safeguard in the form of broad-based committees to oversee the process.

476. In order to ensure clarity in the course of action to be followed I agree with the guidelines contained in the judgment of the learned Chief Justice in regard to Advance Directives as well as in regard to the procedural mechanisms set up in the judgment.

K Conclusion

477. The court is above all, engaged in the task of expounding the Constitution. In doing so, we have been confronted with the enormous task of finding substance and balance in the relationship between life, morality and the experience of dying. The reason which has impelled the court to recognise passive euthanasia and advance directives is that both bear a close association to the human urge to live with dignity. Age brings isolation. Physical and mental debility bring a loss of self worth. Pain and suffering are accompanied by a sense of being helpless. The loss of control is compounded when medical intervention takes over life. Human values are then lost to technology. More significant than the affliction of ageing and disease is the fear of our human persona being lost in the anonymity of an intensive care ward. It is hence necessary for this Court to recognise that our dignity as citizens continues to be safeguarded by the Constitution even when life is seemingly lost and questions about our own mortality confront us in the twilight of existence.

(i) The sanctity of human life is the arterial vein which animates the values, spirit and cellular structure of the Constitution. The Constitution recognises the value of life as its indestructible component. The survival of the sanctity principle is founded upon the guarantees of dignity, autonomy and liberty;

(ii) The right to a dignified existence, the liberty to make decisions and choices and the autonomy of the individual are central to the quest to live a meaningful life. Liberty, dignity and autonomy are essential to the pursuit of happiness and to find meaning in human existence;

(iii) The entitlement of each individual to a dignified existence necessitates constitutional recognition of the principle that an individual possessed of a free and competent mental state is entitled to decide whether or not to accept medical treatment. The right of such an individual to refuse medical treatment is unconditional. Neither the law nor the Constitution compel an individual who is competent and able to take decisions, to disclose the reasons for refusing medical treatment nor is such a refusal subject to the supervisory control of an outside entity;

(iv) Constitutional recognition of the dignity of existence as an inseparable element of the right to life necessarily means that dignity attaches throughout the life of the individual. Every individual has a constitutionally protected expectation that the dignity which attaches to life must subsist even in the culminating phase of human existence. Dignity of life must encompass dignity in the stages

of living which lead up to the end of life. Dignity in the process of dying is as much a part of the right to life Under Article 21. To deprive an individual of dignity towards the end of life is to deprive the individual of a meaningful existence. Hence, the Constitution protects the legitimate expectation of every person to lead a life of dignity until death occurs;

(v) The constitutionally recognised right to life is subject to the procedure established by law. The procedure for Regulation or deprivation must, it is well-settled, be fair, just and reasonable. Criminal law imposes restraints and penal exactions which regulate the deprivation of life, or as the case may be, personal liberty. The intentional taking away of the life of another is made culpable by the Penal Code. Active euthanasia falls within the express prohibitions of the law and is unlawful;

(vi) An individual who is in a sound and competent state of mind is entitled by means of an advance directive in writing, to specify the nature of medical intervention which may not be adopted in future, should he or she cease to possess the mental ability to decide. Such an advance directive is entitled to deference by the treating doctor. The treating doctor who, in a good faith exercise of professional medical judgment abides by an advance directive is protected against the burden of criminal liability;

(vii) The decision by a treating doctor to withhold or withdraw medical intervention in the case of a patient in the terminal stage of illness or in a persistently vegetative state or the like where artificial intervention will merely prolong the suffering and agony of the patient is protected by the law. Where the doctor has acted in such a case in the best interest of the patient and in *bona fide* discharge of the duty of care, the law will protect the reasonable exercise of a professional decision;

(viii) In **Gian Kaur**, the Constitution Bench held, while affirming the constitutional validity of Section 306 of the Penal Code (abetment of suicide), that the right to life does not include the right to die. **Gian Kaur** does not conclusively Rule on the validity of passive euthanasia. The two Judge Bench decision in **Aruna Shanbaug** proceeds on an incorrect perception of **Gian Kaur**. Moreover, **Aruna Shanbaug** has proceeded on the basis of the act-omission distinction which suffers from incongruities of a jurisprudential nature. **Aruna Shanbaug** has also not dwelt on the intersection between criminal law and passive euthanasia, beyond adverting to Sections 306 and 309 of the Penal Code. **Aruna Shanbaug** has subordinated the interest of the patient to the interest of others including the treating doctors and supporting caregivers. The underlying basis of the decision in Aruna Shanbaug is flawed. Hence, it has become necessary for this Court in the present reference to revisit the issues raised and to independently arrive at a conclusion based on the constitutional position;

(ix) While upholding the legality of passive euthanasia (voluntary and non-voluntary) and in recognising the importance of advance directives, the present judgment draws sustenance from the constitutional values of liberty, dignity, autonomy and privacy. In order to lend assurance to a decision taken by the treating doctor in good faith, this judgment has mandated the setting up of committees to exercise a supervisory role and function. Besides lending assurance to the decision of the treating doctors, the setting up of such committees and the processing of a proposed decision

through the committee will protect the ultimate decision that is taken from an imputation of a lack of bona fides; and

(x) The directions in regard to the regime of advance directives have been issued in exercise of the power conferred by Article 142 of the Constitution and shall continue to hold the field until a suitable legislation is enacted by Parliament to govern the area.

478. I agree with the directions proposed in the judgment of the learned Chief Justice.

479. The reference shall stand disposed of in the above terms.

Ashok Bhushan, J.

480. I had advantage of going through the draft judgment of Hon'ble the Chief Justice. Though, broadly I subscribe to the views expressed by Hon'ble the Chief Justice on various principles and facets as expressed in the judgment, but looking to the great importance of issues involved, I have penned my reasons for my views expressed. However, I am in full agreement with the directions and safeguards as enumerated by Hon'ble the Chief Justice in Paras 191 to 194 of the judgment with regard to advance medical directives.

I also had the benefit of going through the erudite opinion of Dr. Justice D.Y. Chandrachud, which expresses almost the same views which are reflected in my judgment.

This Constitution Bench has been constituted on a reference made by a three-Judge Bench vide its order dated 25th February, 2014. The writ petition filed in public interest prayed for essentially following two reliefs:

(a) declare 'right to die with dignity' as a fundamental right within the fold of Right to Live with dignity guaranteed Under Article 21 of the Constitution of India;

(b) issue direction to the Respondent, to adopt suitable procedures, in consultation with State Governments where necessary, to ensure that persons of deteriorated health or terminally ill should be able to execute a document titled "MY LIVING WILL & ATTORNEY AUTHORISATION" which can be presented to hospital for appropriate action in event of the executant being admitted to the hospital with serious illness which may threaten termination of life of the executant or in the alternative, issue appropriate guidelines to this effect;

481. Petitioner in support of writ petition has placed reliance on Constitution Bench judgment in ***Gian Kaur v. State of Punjab***, MANU/SC/0335/1996 : (1996) 2 SCC 648 as well as two-Judge Bench judgment in ***Aruna Ramachandra Shanbaug v. Union of India and Ors.*** MANU/SC/0176/2011 : (2011) 4 SCC 454. Petitioner's case is that this Court in the above two judgments has although disapproved active euthanasia but has granted its approval to passive euthanasia. The three-Judge Bench after referring to paragraphs 24 and 25 of Constitution Bench judgment observed that Constitution Bench did not express any binding view on the subject of euthanasia rather reiterated that legislature would be the appropriate authority to bring the change. Three-Judge Bench further observed that view of two Judge Bench in ***Aruna Ramachandra***

Shanbaug that the Constitution Bench in ***Gian Kaur*** has approved the judgment of House of Lords in ***Airedale NHS Trust v. Bland*** (1993) 1 All ER 821, is not correct and further opinion expressed by two-Judge Bench judgment in paragraphs 101 and 104 is inconsistent. In the above view of the matter the three-Judge Bench made the reference to the Constitution Bench. It is useful to extract paragraphs 17, 18 and 19 of the referring order which is to the following effect:

*17) In view of the inconsistent opinions rendered in **Aruna Shanbaug (supra)** and also considering the important question of law involved which needs to be reflected in the light of social, legal, medical and constitutional perspective, it becomes extremely important to have a clear enunciation of law. Thus, in our cogent opinion, the question of law 12 Page 13 involved requires careful consideration by a Constitution Bench of this Court for the benefit of humanity as a whole.*

18) We refrain from framing any specific questions for consideration by the Constitution Bench as we invite the Constitution Bench to go into all the aspects of the matter and lay down exhaustive guidelines in this regard.

19) Accordingly, we refer this matter to a Constitution Bench of this Court for an authoritative opinion.

482. We have heard Shri Prashant Bhushan, learned Counsel appearing for the Petitioner. Shri P.S. Narasimha, learned Additional Solicitor General appearing for the Union of India. Shri Arvind Datar, learned senior Counsel for Vidhi Centre for Legal Policy, Shri Sanjay R. Hegde, learned senior Counsel for Indian Society of Critical Care Medicine, Mr. Devansh A. Mohta, learned Counsel for Society for Right to Die with Dignity and Mr. Praveen Khattar, learned Counsel for Delhi Medical Council. We have also been assisted by Dr. R.R. Kishore Member of the Bar who has joined the Bar after carrying on the profession of doctor for more than 40 years.

A. Petitioner's Case

483. The Petitioner is a registered society which is engaged in taking of the common problems of the people. The Petitioner vide this public interest litigation brings to the notice of this Court the serious problem of violation of fundamental right to life, liberty, privacy and the right to die with dignity of the people of this country, guaranteed to them Under Article 21 of the Constitution of India. It is submitted that the citizens who are suffering from chronic diseases and/or are at the end of their natural life span and are likely to go into a state of terminal illness or permanent vegetative state are deprived of their rights to refuse cruel and unwanted medical treatment, like feeding through hydration tubes, being kept on ventilator and other life supporting machines in order to artificially prolong their natural life span. This sometimes leads to extension of pain and agony both physical and mental which they desperately seek to end by making an informed choice and clearly expressing their wishes in advance, (called a living will) in the event of they going into a state when it will not be possible for them to express their wishes.

484. The Petitioner further pleads that it is a common law right of the people, of any civilised country, to refuse unwanted medical treatment and no person can force him/her to take any medical treatment which the person does not desire to continue with. It is submitted that to initiate a medical

treatment to a person who has reached at an end of his life and the process of his/her death has already commenced against the wishes of that person will be violative of his/her right to liberty. The right to be free from unwanted life-sustaining medical treatment is a right protected by Article 21. Even the right to privacy which has also been held to be a part of right to life is being violated as the people are not being given any right to make an informed choice and a personal decision about withholding or withdrawing life sustaining medical treatment.

B. MAN & MEDICINE

485. Human being a mortal, death is an accepted phenomenon. Anyone born on the earth is sure to die. Human body is prone to disease and decay. Human being after getting knowledge of various science and art always fought with failure and shortcomings of human body. Various ways and means of healing its body were found and invented by mankind. The branch of medicine is practiced from ancient time both in India and other parts of the World. In our country "Charak Samhita" is a treatise of medicine which dates back 1000 BC.

486. In Western World "Hippocrates" is regarded as "father of western medicine". Hippocratic period dates from 460 BC. "Corpus Hippocraticum" comprises of not only general medical prescription, description of diseases, diagnosis, dietary recommendations but also opinion of professional ethics of a physician. Thus, those who practiced medicine from ancient time were ordained to follow some ethical principles. For those who follow medical profession 'Hippocratic Oath' was always treated to be Oath to which every medical professional was held to be bound. It is useful to refer to original Hippocratic Oath, (as translated into English):

I swear by Apollo, the healer, Asclepius, Hygieia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment, the following Oath and agreement:

To consider dear to me, as my parents, him who taught me this art; to live in common with him and, if necessary, to share my goods with him; To look upon his children as my own brothers, to teach them this Article

I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone.

I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan; and similarly I will not give a woman a pessary to cause an abortion.

But I will preserve the purity of my life and my arts.

I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by practitioners, specialists in this Article

In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction and especially from the pleasures of love with women or with men, be they free or slaves.

All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.

If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot.

487. The noticeable portion of the Hippocratic Oath is that medical practitioner swears that he will not give a lethal drug to anyone nor he will advise such a plan.

488. At this juncture, it shall be useful to refer to thoughts of Plato, a celebrated Greek Philosopher, on "physician" and treatment which he expressed in his treatise 'Republic'. Plato in "The Republic of Plato", (translated by Francis Macdonald Cornford) while discussing "physician", in Chapter IX states:

Shall we say, then, that Asclepius recognized this and revealed the art of medicine for the benefit of people of sound constitution who normally led a healthy life, but had contracted some definite ailment? He would rid them of their disorders by means of drugs or the knife and tell them to go on living as usual, so as not to impair their usefulness as citizens. But where the body was diseased through and through, he would not try, by nicely calculated evacuations and doses, to prolong a miserable existence and let his patient beget children who were likely to be as sickly as himself. Treatment, he thought, would be wasted on a man who could not live in his ordinary round of duties and was consequently useless to himself and to society.

489. Plato in the same Chapter in little harsher words further states:

But if a man had a sickly constitution and intemperate habits, his life was worth nothing to himself or to anyone else; medicine was not meant for such people and they should not be treated, though they might be richer than Midas.

490. From what has been noted above, it is apparent that although on one hand medical professional has to take Hippocratic Oath that he shall treat his patient according to his ability and judgment and never do harm to anyone. Further, he will not give any lethal drug to anyone even he is asked for, on the other hand Plato held that those who has sickly constitution and intemperate habits should not be helped by medicine. Thus, the cleavage in views regarding ethics of a medical professional as well as not supporting medical treatment for those who are thoroughly diseased is found from ancient time in Greek thoughts itself.

491. The dilemma of medical professional still continues to this day and medical professionals are hesitant in adopting a course which may not support the life of a patient or lead to patient's death. Numerous cases raising conflicting views were brought before the Courts in the different parts of the World, some of which we shall refer hereinafter.

492. There has been considerable development in medical science from ancient time to this day. There has been substantial acceptance of natural and human rights of the human beings which found expression in "United Nations Human Rights Declaration, 1948" and subsequent

declarations. The right of self-determination of an individual has been recognised throughout the World.

C. CONCEPT OF LIFE & DEATH

493. In the ancient India, on 'life' and 'death' there is considerable literature. According to Hinduism, life never comes to an end. The soul never die although body may decay. The soul is continuous and perpetual which is not merely a biological identity, death is not the end of life but only a transformation of a body. In "Bhagavad-gita" Chapter II Verse 22 (as translated in English), it is stated by Lord Krishna:

22. As a man shedding worn-out garments, takes other new ones, likewise the embodied soul, casting off worn-out bodies, enters into others that are new.

494. The death was never feared in ancient Indian culture and mythology. Death was treated sometimes a means to obtain liberation that is 'moksha'. Every life is a gift of God and sacred and it has to be protected at all cost. No person is bestowed with the right to end his or her life. However, an individual's act of discarding mortal body may be permissible under certain circumstances. In ancient Indian religion, sanctity was attached to a Yogi (a person who has mastered the art of regulating his involuntary physical and mental functions, at will) can discard his/her mortal coil(body) through the process of higher spiritual practices called yoga. Such state was known as 'Samadhi'. But there was no concept in ancient India/mythology of putting an end to life of another human being which was always regarded as crime and against 'dharma'.

495. The Vedic Rules also forbid suicide whereas according to ancient hindu culture, a man in his fourth stage, i.e., Vanaprastha could go into the forest sustaining only on water and air, end his body. A Brahmin also could have got rid of his body by drowning oneself in a river, precipitating oneself from a mount, burning oneself or starving oneself to death; or by one of those modes of practising austerities, mentioned above. The Laws of Manu as contained in **Sacred Books of the East**, Edited by Max Muller, Volume 25 Chapter VI verses 31 and 32 refers to above. The Book also refers to views of various commentators on verses 31 and 32. It is useful to extract verses 31 and 32 and Note of the author on aforesaid verses containing the views of different commentators which are to the following effect:

31. *Or let him walk, fully determined and going straight on, in a north-easterly direction, subsisting on water and air, until his body sinks to rest.*

32. *A Brahmana, having got rid of his body by one of those modes practised by the great sages, is exalted in the world of Brahman, free from sorrow and fear.*

---

31. Gov. and Kull. take yukta, firmly resolved' (Nar., Ragh.), in the sense of 'intent on the practice of Yoga.' Gov. and Kull. (see also Medh. on the next verse) say that a man may undertake the Mahaprasthana, or' Great Departure,' on a journey which ends in death, when he is incurably diseased or meets with a great misfortune, and that, because it is taught in the Sastras, it is not

opposed to the Vedic Rules which forbid suicide. From the parallel passage of Ap. II, 23, 2, it is, however, evident that a voluntary death by starvation was considered the befitting conclusion of a hermit's life. The antiquity and general prevalence of the practice may be inferred from the fact that the Gaina ascetics, too, consider it particularly meritorious.

32. By one of those modes,' i.e. drowning oneself in a river, precipitating oneself from a mount, burning oneself or starving oneself to death' (Medh.); or 'by one of those modes of practising austerities, mentioned above, verse 23' (Gov., Kull., Nar., Nand.). Medh. adds a long discussion, trying to prove that the world of Brahman,' which the ascetic thus gains, is not the real complete liberation.

496. The Hindu Sculpture also says that life and death is the gift of God and no human being has right to take away the said gift. The suicide is disapproved in Hindu way of life and it is believed that those who commit suicide did not attain Moksha or Salvation from the cycle of life and death.

497. The Muslims also strongly condemn suicide as they believe that life and death of a person depends on Allah's will and human beings are prohibited in going against HIS will.

498. Christianity also disapprove taking of one's life. Bible says that human being is a temple of God and the spirit of God dwelleth in the body and no man can defile the temple. Reference is made to Chapter 3 verses 16 and 17 of I CORINTHIA NS, which is as below:

16. Know Ye not that ye are the temple of God, and that the Spirit of God dwelleth in you?

17. If any man defile the temple of God, him shall God destroy; for the temple of God is holy, which temple ye are.

499. ***Pope John Paul II*** in, "The Gospel of Life", denouncing euthanasia writes:

Laws which authorise and promote euthanasia are therefore radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking in authentic juridical validity. Disregarded for the right to life, precisely because it leads to the killing of the person whom society exists to serve, is what most directly conflicts with the possibility of achieving the common good. Consequently, a civil law authorising euthanasia ceases by that very fact to be a true, morally binding civil law.

500. The tenets of Jainism also talks about the practice of religiously nominated self-build death called "Sallkhana", meaning 'fast upto death'.

501. The Buddhist sculpture states that Lord Buddha had also allowed self-build death for the extremely ill person as an act of compassion.

502. In different religions and cultures, there are clear injunctions against taking life of oneself.

503. The Petitioner in the Writ Petition has categorically clarified that Petitioner is neither challenging the provisions of Indian Penal Code by which "attempt to suicide" is made a penal

offence nor praying right to die be declared as fundamental right Under Article 21. It is useful to refer to Para 7 of the Writ Petition, in which Petitioner pleads following:

It is submitted at the outset that the Petitioner in the instant petition is neither challenging the Section 309 of Indian Penal Code, vide which Attempt to Suicide is a penal offence nor is asking right to die per se as a fundamental right Under Article 21 (as the issue is squarely covered by the Constitution Bench judgment of this Hon'ble Court in the case of ***Gian Kaur v. State of Punjab and in other connected matters*** MANU/SC/0335/1996 : (1996) 2 SCC 648. *The endeavour of the Petitioner in the instant petition is to seek guidelines from this Hon'ble Court whereby the people who are diagnosed of suffering from terminal diseases or ailments can execute Living Will or give directives in advance or otherwise to his/her attorney/executor to act in a specific manner in the event he/she goes into persistent vegetative state or coma owing to that illness or due to some other reason.*

D. THE RELEVANT PROVISIONS OF Indian Penal Code

504. The Indian Penal Code, 1860, is a general penal code defining various acts which are offence and providing for punishment thereof. Chapter XVI deals with "offences affecting the human body". The provisions of Indian Penal Code which are relevant in the present context are Section 306 and Section 309. Section 306 relates to abetment of suicide. It provides "if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine". Another provision which is relevant is Section 309 i.e. attempt to commit suicide. The provision states, whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year (or with fine, or with both). The issues which have come up for consideration in the present case have to be dealt with keeping in view the above provisions of Indian Penal Code which declares certain acts to be offence.

E. LEGISLATION IN REFERENCE TO EUTHANASIA

505. The only statutory provision in our country which refers to euthanasia is statutory Regulations framed under Indian Medical Council Act, 1956, namely The Indian Medical Council (Professional Conduct, Etiquette & Ethics) Regulations, 2002. Chapter VI of the Regulations deals with "Unethical Acts". Regulation 6 is to the following effect:

6. UNETHICAL ACTS

A physician shall not aid or abet or commit any of the following acts which shall be construed as unethical-

....

6.7 ***Euthanasia****-Practising euthanasia shall constitute unethical conduct. However, on specific occasion, the question of withdrawing supporting devices to sustain cardiopulmonary function even after brain death, shall be decided only by a team of doctors and not merely by the treating*

physician alone. A team of doctors shall declare withdrawal of support system. Such team shall consist of the doctor in-charge of the patient, Chief Medical Officer/Medical Officer in-charge of the hospital and a doctor nominated by the in-charge of the hospital from the hospital staff or in accordance with the provisions of the Transplantation of Human Organ Act, 1994.

506. The Law Commission of India had stated and submitted a detailed report on the subject in 196th report on "Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)". Law Commission examined various provisions of Indian Penal Code and other statutory provisions, judgments of this Court and different courts of other countries and had made certain recommendations. A draft bill was also made part of the recommendation. Draft bill namely Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006, was made part of the report as an Annexure.

507. Chapter 8 of the report contains summary of recommendations. It is not necessary to reproduce all the recommendations. It is sufficient to refer to para 1 and 2 of the recommendations:

...In the previous chapters, we have considered various important issues on the subject of withholding or withdrawing medical treatment (including artificial nutrition and hydration) from terminally ill-patients. In Chapter VII, we have considered what is suitable for our country. Various aspects arise for consideration, namely, as to who are competent and incompetent patients, as to what is meant by 'informed decision', what is meant by 'best interests' of a patient, whether patients, their relations or doctors or hospitals can move a Court of law seeking a declaration that an act or omission or a proposed act or omission of a doctor is lawful, if so, whether such decisions will be binding on the parties and doctors, in future civil and criminal proceedings etc. Questions have arisen whether a patient who refuses treatment is guilty of attempt to commit suicide or whether the doctors are guilty of abetment of suicide or culpable homicide not amounting to murder etc. On these issues, we have given our views in Chapter VII on a consideration of law and vast comparative literature.

In this chapter, we propose to give a summary of our recommendations and the corresponding Sections of the proposed Bill which deal with each of the recommendations. (The draft of the Bill is annexed to this Report). We shall now refer to our recommendations.

1) There is need to have a law to protect patients who are terminally ill, when they take decisions to refuse medical treatment, including artificial nutrition and hydration, so that they may not be considered guilty of the offence of 'attempt to commit suicide' Under Section 309 of the Indian Penal Code, 1860.

It is also necessary to protect doctors (and those who act under their directions) who obey the competent patient's informed decision or who, in the case of (i) incompetent patients or (ii) competent patients whose decisions are not informed decisions, and decide that in the best interests of such patients, the medical treatment needs to be withheld or withdrawn as it is not likely to serve any purpose. Such actions of doctors must be declared by statute to be 'lawful' in order to protect doctors and those who act under their directions if they are hauled up for the offence of 'abetment of suicide' Under Sections 305, 306 of the Indian Penal Code, 1860, or for the offence of culpable

homicide not amounting to murder Under Section 299 read with Section 304 of the Penal Code, 1860 or in actions under civil law.

2) Parliament is competent to make such a law under Entry 26 of List III of the Seventh Schedule of the Constitution of India in regard to patients and medical practitioners. The proposed law, in our view, should be called 'The Medical Treatment of Terminally Ill Patients (Protection of Patients, Medical Practitioners) Act.

508. The 196th Report was again revised by the Law Commission of India in 241st Report dated August, 2012. The 2006 draft bill was redrafted by Law Commission which was Annexure 1 to the report. The above bill however could not fructify in a law. The Ministry of health and family welfare had published another draft bill namely The Medical Treatment of Terminally Ill Patients (Protection of Patients & Medical Practitioners) Bill, 2016, as a private member bill which was introduced in Rajya Sabha on 5th August 2016, which is still pending.

509. From the above, it is clear that only statutory provision on euthanasia is Regulation 6.7 of the 2002 Regulations as referred above. The Regulations prohibit practicing euthanasia and declare that practicing euthanasia constitute unethical conduct on behalf of the medical practitioner. The Regulation however carves an exception that on specific occasion, the question of withdrawing supporting devices to sustain cardio-pulmonary function even after brain death, shall be decided only by a team of doctors and not merely by the treating physician alone. The Regulation further provides that team of doctors shall declare withdrawal of support system.

510. The withdrawal of medical treatment of terminally ill Persons is complex ethical, moral and social issue with which many countries have wrestled with their attempt to introduce a legal framework for end of life decision making. In absence of a comprehensive legal framework on the subject the issue has to be dealt with great caution.

F. TWO IMPORTANT JUDGMENTS OF THIS COURT ON THE SUBJECT:

511. The first important judgment delivered by the Constitution Bench of this Court touching the subject is the judgment of Constitution Bench in ***Gian Kaur v. State of Punjab*** MANU/SC/0335/1996 : (1996) 2 SCC 648. In the above case, the Appellants were convicted Under Section 306 and awarded sentence for abetment of commission of suicide by one Kulwant Kaur. The conviction was maintained by the High Court against which the appeal was filed as special leave in this Court. One of the grounds for assailing the conviction before this Court was that Section 306 Indian Penal Code is unconstitutional. The reliance was placed on two-Judge Bench decision of this Court in ***P. Rathinam v. Union of India and Anr.*** MANU/SC/0433/1994 : (1994) 3 SCC 394, wherein Section 309 Indian Penal Code was held to be unconstitutional as violative of Article 21 of the Constitution.

512. Section 306 was sought to be declared as unconstitutional being violative of Article 21 of the Constitution. The Law Commission by its 22nd report had recommended for deletion of Section 309 and a Bill was introduced in 1972 to amend the Indian Penal Code by deleting Section 309. The Constitution Bench dwelt the question as to whether 'right to die' is included in Article 21.

The Constitution Bench concluded that 'right to die' "cannot be included as part of fundamental rights guaranteed Under Article 21".

513. The challenge to Section 309 on the basis of Articles 14 and 21 was repelled. This Court further held that Section 306 of Indian Penal Code does not violate Article 21 and Article 14 of the Constitution of India.

514. The second judgment which needs to be noted in detail is two-Judge Bench judgment of this Court in ***Aruna Ramachandra Shanbaug v. Union of India and Ors.*** MANU/SC/0176/2011 : (2011) 4 SCC 454. Writ Petition Under Article 32 on behalf of Aruna Ramachandra Shanbaug was filed by one M/s. Pinky Virani claiming to be best friend. Aruna Ramachandra Shanbaug was staff nurse working in King Edward Memorial *(KEM) Hospital, Parel, Mumbai*. On 27.11.1973, she was attacked by a sweeper of the hospital who wrapped a dog chain around her neck and yanked her back with it. While sodomising her, he twisted the chain around her neck, as a result supply of oxygen to the brain stopped and the brain got damaged. On the next day she was found in unconscious condition. From the date of above incident she continued to be in persistent vegetative state(PVS) having no state of awareness, she was bed-ridden, unable to express herself, unable to think, hear and see anything or communicate in any manner. In writ petition Under Article 32 it was prayed that the hospital where she is laying for last 36 years be directed to stop feeding and let her die peacefully. In the above case, Two-Judge Bench considered all aspects of euthanasia, the court examined both active and passive euthanasia. Dealing with active and passive euthanasia and further voluntary and involuntarily euthanasia, following was laid down in para 39 and 40:

39. Coming now to the legal issues in this case, it may be noted that euthanasia is of two types: active and passive. Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart-lung machine, from a patient in coma. The general legal position all over the world seems to be that while active euthanasia is legal even without legislation provided certain conditions and safeguards are maintained.

40. A further categorisation of euthanasia is between voluntary euthanasia and non-voluntary euthanasia. Voluntary euthanasia is where the consent is taken from the patient, whereas non-voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent. While there is no legal difficulty in the case of the former, the latter poses several problems, which we shall address.

515. The court held that in India, active euthanasia is illegal and crime. In paragraph 41, following was held:

41. As already stated above active euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime Under Section 302 or atleast Under Section 304 of the Penal Code, 1860. Physician-assisted suicide is a crime Under Section 306 Indian Penal Code (abetment to suicide). Active euthanasia is taking specific steps to cause the patient's death, such as injecting the patient with some lethal substance e.g. sodium pentothal

which causes a person deep sleep in a few seconds, and the person instantaneously and painlessly dies in this deep sleep.

516. The court noticed various judgments of different countries in the above context. Two-Judge Bench also referred to Constitution Bench judgment in ***Gian Kaur v. State of Punjab***. In Para 101 and 104, following has been laid down:

*101. The Constitution Bench of the Supreme Court in **Gina Kaur v. State of Punjab** held that both euthanasia and assisted suicide are not lawful in India. That decision overruled the earlier two-Judge Bench decision of the Supreme Court in **P. Rathinam v. Union of India**. The Court held that the right to life Under Article 21 of the Constitution does not include the right to die. In **Gian Kaur case** the Supreme Court approved of the decision of the House of Lords in **Airedale case** and observed that euthanasia could be made lawful only by legislation.*

*104. It may be noted that in **Gian Kaur Case** although the Supreme Court has quoted with approval the view of the House of Lords in **Airedale case**, it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma(due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialisation, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method.*

517. Two-Judge Bench noticed that there is no statutory provision in this country as to the legal procedure to withdraw life support to a person in Persistent Vegetative State (PVS) or who is otherwise incompetent to take the decision in this connection. The court, however, issued certain directions which were to continue to be the law until Parliament makes a law on this subject. In paragraph 124, following has been laid down:

*124. There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. We agree with Mr. Andhyarujina that passive euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in **Vishaka case**, we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject:*

(i) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

In the present case, we have already noted that Aruna Shanbaug's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her. As

already noted above, it is the KEM hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not Ms. Pinki Virani who has only visited her on few occasions and written a book on her. Hence it is for the KEM Hospital staff to take that decision. KEM Hospital staff have clearly expressed their wish that Aruna Shanbaug should be allowed to live.

Mr. Pallav Shishodia, learned Senior Counsel, appearing for the Dean, KEM Hospital, Mumbai, submitted that Ms. Pinki Virani has no locus standi in this case. In our opinion it is not necessary for us to go into this question since we are of the opinion that it is the KEM Hospital staff who is really the next friend of Aruna Shanbaug.

We do not mean to decry or disparage what Ms. Pinki Virani has done. Rather, we wish to express our appreciation of the splendid social spirit she has shown. We have seen on the internet that she has been espousing many social causes, and we hold her in high esteem. All that we wish to say is that however much her interest in Aruna Shanbaug may be it cannot match the involvement of the KEM Hospital staff who have been taking care of Aruna day and night for 38 years.

However, assuming that the KEM Hospital staff at some future time changes its mind, in our opinion in such a situation KEM Hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

(ii) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in ***Airedale case****.*

In our opinion, this is even more necessary in our country as we cannot Rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient.

G. LAW ON SUBJECT IN OTHER COUNTRIES

518. The debate on Euthanasia had gathered momentum in last 100 years. The laws of different countries expresses thoughts of people based on different culture, philosophy and social conditions. Assisted suicide was always treated as an offence in most of the countries. Physician assisted suicide is also not accepted in most of the countries except in few where it gain ground in last century. In several countries including different States of U.S.A., European Countries and United Kingdom, various legislations have come into existence codifying different provisions pertaining to physician assisted suicide. The right to not commence or withdraw medical treatment in case of terminally ill or PSV patients, advance medical directives have also been made part of different legislations in different countries.

519. Physician assisted suicide has not been accepted by many countries. However, few have accepted it and made necessary legislation to regulate it. Switzerland, Netherlands, Belgium, Luxembourg, and American States of Oregan, Washington, Montana and Columbia has permitted physician assisted suicide with statutory Regulations. Courts in different parts of the world have dealt with the subject in issue in detail. It is not necessary to refer to different legislation of different countries and the case law on subject of different countries. For the purposes of this case, it shall

be sufficient to notice few leading cases of United Kingdom, United States Supreme Court and few others countries.

United Kingdom

520. Euthanasia is criminal offence in the United Kingdom. According to Section 2(1) of the Suicide Act, 1961, a person assisting an individual, who wish to die commits an offence. The provision states that it is an offence to aid, abet, counsel or procure the suicide of another or an attempt by another to commit suicide, however, it is not a crime if it is by their own hands. There has been large parliamentary opposition to the current United Kingdom Law concerning assisted suicide but there has been no fundamental change in the law so far. In 1997, the Doctor Assisted Dying Bill as well as in 2000, the Medical Treatment (Prevention of Euthanasia) Bill were not approved. The most celebrated judgment of the House of Lords is ***Airedale N.H.S. Trust v. Bland*** (1993) A.C. 789.

521. Anthony David Bland was injured on 15th April, 1989 at the Hillsborough football ground in which his lungs were crushed and punctured, the supply of oxygen to the brain was interrupted. As a result, he sustained catastrophic and irreversible damage to the higher centres of the brain, which had left him in a condition known as a persistent vegetative state(P.V.S.). Medical opinion was unanimous that there was no hope of improvement in his condition or recovery. At no time before the disaster had the patient indicated his wishes if he should find himself in such a condition. Bland's father sought declarations that Hospital authorities may discontinue all his life-sustaining treatment and medical support measures and further lawfully discontinue and thereafter need not furnish medical treatment to the patient except for the sole purpose of enabling the patient to end his life and die peacefully with the greatest dignity and the least of pain, suffering and distress.

522. The lower court granted the declarations sought for. The court of appeal upheld the order. Official Solicitor filed an appeal before the House of Lords. **Lord Goff** held that it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering. Such act is actively causing death i.e. euthanasia which is not lawful. It was further held that a case in which doctor decides not to provide or continue to provide treatment or care, it may be lawful. Following was stated by Lord Goff:

First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes even though they do not consider it to be in his best interests to do so.....

To this extent, the principle of the sanctity of human life must yield to the principle of self-determination(see ante, pp. 826H-827A, per Hoffmann L.J.), and, for present purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified. On this basis, it has been held that a patient of sound mind may, if properly informed, require that life support should be discontinued: see Nancy B. v. Hotel-Dieu de Quebec (1992) 86 D.L.R. (4th) 385. *Moreover the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise*

incapable of communicating it; though in such circumstances especial care may be necessary to ensure that the prior refusal of consent is still properly to be regarded as applicable in the circumstances which have subsequently occurred: see, e.g., In re T.(Adult: Refusal of Treatment) (1993) Fam. 95. I wish to add that, in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.....

I must however stress, at this point, that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: see Reg. v. Cox (unreported), 18 September, 1992. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia-actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control.....

At the heart of this distinction lies a theoretical question. Why is it that the doctor who gives his patient a lethal injection which kills him commits an unlawful act and indeed is guilty of murder, whereas a doctor who, by discontinuing life support, allows his patient to die, may not act unlawfully-and will not do so, if he commits no breach of duty to his patient?

523. **Lord Browne-Wilkinson** in his judgment noticed the following questions raised in the matter:

(1) lawfully discontinue all life-sustaining treatment and medical support measures designed to keep (Mr. Bland) alive in his existing persistent vegetative state including the termination of ventilation, nutrition and hydration by artificial means; and

(2) lawfully discontinue and thereafter need not furnish medical treatment to (Mr. Bland) except for the sole purpose of enabling (Mr. Bland) to end his life and die peacefully with the greatest dignity and the least of pain, suffering and distress.

Answering the questions following was held:

Anthony Bland has been irreversibly brain damaged; the most distinguished medical opinion is unanimous that there is no prospect at all that the condition will change for the better. He is not aware of anything. If artificial feeding is discontinued and he dies, he will feel nothing. Whether he lives or dies he will feel no pain or distress. All the purely physical considerations indicate that it is pointless to continue life support. Only if the doctors responsible for his care held the view that, though he is aware of nothing, there is some benefit to him in staying alive, would there be anything to indicate that it is for his benefit to continue the.....

In these circumstances, it is perfectly reasonable for the responsible doctors to conclude that there is no affirmative benefit to Anthony Bland in continuing the invasive medical procedures necessary to sustain his life. Having so concluded, they are neither entitled nor under a duty to continue such medical care. Therefore they will not be guilty of murder if they discontinue such care.

524. Another judgment which needs to be noticed is ***Ms. B v. An NHS Hospital Trust***, 2002 EWHC 429. The claimant, Ms. B has sought declaration from the High Court that the invasive treatment which is currently being given by the Respondent by way of artificial ventilation is an unlawful trespass. The main issue raised in the case is as to whether Ms. B has the capacity to make her own decision about her treatment in hospital. Ms. B, aged 43 years, had suffered a devastating illness which has caused her to become tetraplegic and whose expressed wish is not to be kept artificially alive by the use of a ventilator. The High Court in the above context examined several earlier cases on the principle of autonomy. Paragraphs 16 to 22 are to the following effect:

16. In 1972 Lord Reid in S v. McC: W v. W [1972] AC 25 *said, at page 43:*

...English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions.

17. In Re F (Mental Patient: Sterilisation) [1990] 2 AC 1, Lord Goff of Chieveley said at page 72:

I start with the fundamental principle, now long established, that every person's body is inviolate.

18. Lord Donaldson of Lymington, MR said In Re T (Adult: Refusal of Treatment) [1993] Fam 95, *at page 113:*

..... the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent.

19. In Re T (Adult: Refusal of Treatment), I cited Robins JA in Malette v. Shulman 67 DLR (4^{th}) 321 at 336, *and said at page 116-117:*

The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority.

20. In Re MB (Medical Treatment) [1997] 2 FLR 426, I said at 432:

A mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death", (referring to Sidaway v. Board of Governors of the Bethlehem Royal Hospital and the Maudsley Hospital [1985] AC 871, *per Lord Templeman at 904-905; and to Lord Donaldson M.R. in Re T (Adult: Refusal of Treatment) (see above)).*

21. This approach is identical with the jurisprudence in other parts of the world. In Cruzan v. Director, Missouri Department of Health (1990) 110 S. Ct 2841, *the United States Supreme Court stated that:*

No right is held more sacred, or is more carefully guarded... than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

b. The sanctity of life

22. Society and the medical profession in particular are concerned with the equally fundamental principle of the sanctity of life. The interface between the two principles of autonomy and sanctity of life is of great concern to the treating clinicians in the present case. Lord Keith of Kinkel in Airedale NHS Trust v. Bland [1993] AC 789, *said at page 859:*

..the principle of the sanctity of life, which it is the concern of the state, and the judiciary as one of the arms of the state, ... is not an absolute one. It does not compel a medical practitioner on pain of criminal sanctions to treat a patient, who will die if he does not, contrary to the express wishes of the patient.

525. The judgment of House of Lords in ***Regina (Pretty) v. Director of Public Prosecutions (Secretary of State for the Home Department intervening)*** (2002) 1 AC 800, also needs to be referred to. The claimant, who suffered from a progressive and degenerative terminal illness, faced the imminent prospect of a distressing and humiliating death. She was mentally alert and wished to control the time and manner of her dying but her physical disabilities prevented her from taking her life unaided. She wished her husband to help her and he was willing to do so provided that in the event of his giving such assistance he would not be prosecuted Under Section 2(1) of the Suicide Act, 1961. The claimant accordingly requested the Director of Public Prosecutions to undertake that he would not consent to such a prosecution Under Section 2(4). On his refusal to give that undertaking the claimant, in reliance on rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as Schedule to the Human Rights Act, 1998, sought relief by way of judicial review.

526. The Divisional Court of the Queen's Bench Division concluded that the Director has no power to give an undertaking and dismissed the claim. The House of Lords again reiterated the distinction between the cessation of life-saving or life-prolonging treatment on the one hand and the taking of action intended solely to terminate life on the other. In paragraph 9 of the judgment following was held:

9. In the Convention field the authority of domestic decisions is necessarily limited and, as already noted, Mrs. Pretty bases her case on the Convention. But it is worthy of note that her argument is inconsistent with E two principles deeply embedded in English law. The first is a distinction between the taking of one's own life by one's own act and the taking of life through the intervention or with the help of a third party. The former has been permissible since suicide ceased to be a crime in 1961. The latter has continued to be proscribed. The distinction was very clearly expressed by Hoffmann LJ in Airedale NHS Trust v. Bland [1993] AC 789, 831:F

No one in this case is suggesting that Anthony Bland should be given a lethal injection. But there is concern about ceasing to supply food as against, for example, ceasing to treat an infection with antibiotics. Is there any real distinction? In order to come to terms with our intuitive feelings about whether there is a distinction, I must start by considering why most of us would be appalled if he was given a lethal injection. It is, I think, connected with our view that the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is. It follows that, even if we think Anthony Bland would have consented, we would not be entitled to end his life by a lethal injection.

The second distinction is between the cessation of life-saving or life-prolonging treatment on the one hand and the taking of action lacking medical, therapeutic or palliative justification but intended solely to terminate life on the other. This distinction provided the rationale of the decisions in Bland. It was very succinctly expressed in the Court of Appeal In Re] (A Minor) (Wardship: Medical Treatment) [1991] Fam 33*, in which A Lord Donaldson of Lymington MR said, at p. 46:*

What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which as a side effect will render death more or less likely. This is not a matter of semantics. It is fundamental. At the other end of the age spectrum, the use of drugs to reduce pain will often be fully 8 justified, notwithstanding that this will hasten the moment of death. What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so.

United States of America

527. The State of New York in 1828 enacted a statute declaring assisted suicide as a crime. New York example was followed by different other States.

528. **Cardozo, J.**, about a century ago in ***Schloendroff v. Society of New York Hospital*** 211 N.Y. 125, while in Court of Appeal had recognised the right of self-determination by every adult human being. Following was held:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. ***Pratt v. Davis****,* 224 Ill., 300, 79 N.E. 562, 7 L.R.A. (N.S.) 609, 8 Ann. Cas, 197*:* ***Mohr v. Williams****,* 95 Minn. 261, 104 N.W. 12.1 L.R.A.(N.S.), 111

Am. St. Rep. 462, 5 Ann. Cas, 303. *This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.*

529. Supreme Court of United States of America in ***Nancy Beth Cruzan v. Director, Missouri Department of Health*** 497 U.W. 261, had occasion to consider a case of patient who was in persistent vegetative state, her guardian brought a declaratory judgment seeking judicial sanction to terminate artificial hydration and nutrition of patient. The Supreme Court recognised right possessed by every individual to have control over own person. Following was held by ***Rehnquist, CJ:***

At common law, even the touching of one person by another without consent and without legal justification was a battery. See ***W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts, 9, pp. 39-42 (5th ed. 1984)****. Before the turn of the century, this Court observed that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."* ***Union Pacific R. Co. v. Botsford*** 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L. Ed. 734 (1891). *This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages,"* ***Schloendorff v. Society of New York Hospital*** 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). *The informed consent doctrine has become firmly entrenched in American tort law. See* ***Keeton, Dobbs, Keeton, & Owen, supra****, 32, pp. 189-192;* ***F. Rozovsky, Consent to Treatment****, A Practical Guide 1-98 (2d ed. 1990).*

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right, not to consent, that is, to refuse treatment.

530. Referring to certain earlier cases following was held:

Reasoning that the right of self-determination should not be lost merely because an individual is unable to sense a violation of it, the court held that incompetent individuals retain a right to refuse treatment. It also held that such a right could be exercised by a surrogate decision maker using a "subjective" standard when there was clear evidence that the incompetent person would have exercised it. Where such evidence was lacking, the court held that an individual's right could still be invoked in certain circumstances under objective "best interest" standards. Id., at 361-368, 486 A.2d, at 1229-1233. Thus, if some trustworthy evidence existed that the individual would have wanted to terminate treatment, but not enough to clearly establish a person's wishes for purposes of the subjective standard, and the burden of a prolonged life from the experience of pain and suffering markedly outweighed its satisfactions, treatment could be terminated under a "limited-objective" standard. Where no trustworthy evidence existed, and a person's suffering would make the administration of life-sustaining treatment inhumane, a "pure-objective" standard could be used to terminate treatment. If none of these conditions obtained, the court held it was best to err in favour of preserving life. Id., at 364-368, 486 A.2d, at 1231-1233.

In the facts of the above case, the claim of parents of Cruzan was refused since guardian could not satisfactorily prove that Cruzan had expressed her wish not to continue her life under circumstances in which she drifted.

531. All different aspects of euthanasia were again considered by the United States Supreme Court in ***Washington, Et Al, v. Harold Glucksberg Et Al***, 521 US 702 equivalent to 138 L. Ed 2d 772. A Washington State statute enacted in 1975 provided that a person was guilty of the felony of promoting a suicide attempt when the person knowingly caused or aided another person to attempt suicide. An action was brought in the United States District Court for the Western District of Washington by several Plaintiffs, among whom were (1) physicians who occasionally treated terminally ill, suffering patients, and (2) individuals who were then in the terminal phases of serious and painful illness. The Plaintiffs, asserting the existence of a liberty interest protected by the Federal Constitution's Fourteenth Amendment which extended to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide, sought a declaratory judgment that the Washington Statute was unconstitutional on its face. The District Court, granting motions for summary judgment by the physicians and the individuals, ruled that the statute was unconstitutional because it placed an undue burden on the exercise of the asserted liberty interest (850 F Supp 1454, 1994 US Dist LEXIS 5831). On appeal, the United States Court of Appeals for the Ninth Circuit, expressed the view that (1) the Constitution encompassed a due process liberty interest in controlling the time and manner of one's death; and (2) the Washington Statute was unconstitutional as applied to terminally ill, competent adults who wished to hasten their deaths with medication prescribed by their physicians (79 F3d 790, 1996 US App LEXIS 3944).

532. On certiorari, the United States Supreme Court reversed. In an opinion by **Rehnquist, C.J.**, joined by O'Connor, Scalia, Kennedy, and Thomas, JJ., it was held that the Washington Statute did not violate the due process clause-either on the Statute's face or as the Statute was applied to competent, terminally ill adults who wished to hasten their deaths by obtaining medication prescribed by their physicians-because (1) pursuant to careful formulation of the interest at stake, the question was whether the liberty specially protected by the due process Clause included a right to commit suicide which itself included a right to assistance in doing so; (2) an examination of the nation's history, legal traditions, and practices revealed that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the due process clause; (3) the asserted right to assistance in committing suicide was not consistent with the Supreme Court's substantive due process line of cases; and (4) the State's assisted suicide ban was at least reasonably related to the promotion and protection of a number of Washington's important and legitimate interests.

533. The US Supreme Court held that Washington statute did not violate the due process clause. **CJ, Rehnquist** while delivering the opinion of the Court upheld the State's ban on assisted suicide to the following effect:

...In almost every State-indeed, in almost every western democracy-it is a crime to assist a suicide. The States' assisted-suicide bans are longstanding expressions of the States' commitment to the protection and preservation of all human life. ***Cruzan, supra***, at 280, 111 L. Ed 2d 224, 110 S Ct 2841 *("The States-indeed, all civilized nations-demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing*

criminal penalties on one who assists another to commit suicide"); see Stanford v. Kentucky, 492 US 3561, 373, 106 L ED 2d 306, 109 S Ct 2969 (1989) *("The primary and most reliable indication of a national consensus is... the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide-and, therefore, of assisting suicide-are consistent and enduring themes of our philosophical, legal, and cultural heritages.*

534. Another judgment of US Supreme Court which needs to be noted is ***Dennis C. Vacco, Attorney General of New York, Et Al. v. Timothy E. Quill Et Al***, 521 US 793. New York state law as in effect in 1994 provided that a person who intentionally caused or aided another person to attempt or commit suicide was guilty of felony; but under other statutes, a competent person could refuse even life-saving medical treatment. Plaintiff sought declaratory relief and injunctive against the enforcement of criminal law asserting that such law is violative of statutes of the Federal Constitution Fourteenth Amendment.

535. **Rehnquist, C.J.** in his opinion again upheld distinction between assisted suicide and withdrawing of life sustaining treatment. Following was laid down:

[1d] *The Court of Appeals, however, concluded that some terminally ill people-those who are on life support systems-are treated differently from those who are not, in that the former may "hasten death" by ending treatment, but the latter may not "hasten death" through physician-assisted suicide. 80 F.3d, at 729. This conclusion depends on the submission that ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide." Ibid. Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognised and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational...*

The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication....

Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when the patient no longer stands to benefit from them.

536. However, there are four States which have passed legislation permitting euthanasia. These States include **Oregon, Washington, Missouri and Texas.**

<u>Canada</u>

537. Section 241(b) of the Code of Criminal Procedure provides that everyone who aids or abets a person in committing suicide commits an indictable offence. In ***Rodriguez v. British Columbia (Attorney General)*** 1993 (3) SCR 519, the Supreme Court of Canada has considered the issue of assisted suicide. A 42 year old lady who was suffering from an incurable illness applied before the Supreme Court of British Columbia for an order that Section 241(b) which prohibits giving

assistance to commit suicide, be declared invalid. The application was dismissed and the matter was taken to the Supreme Court of Canada which held that prohibition of Section 241(b) which fulfils the government's objective of protecting the vulnerable, is grounded in the State interest in protecting life and reflects the policy of the State that human life should not be depreciated by allowing life to be taken.

Switzerland

538. In Switzerland the assisted suicide is allowed only for altruistic reasons. A person is guilty and deserved to be sentenced for imprisonment on assisted suicide when he incites someone to commit suicide for selfish reasons.

Netherlands

539. The Netherlands has the most experience with physician-hastened death. Both euthanasia and assisted suicide remain crimes there but doctors who end their patients' lives will not be prosecuted if legal guidelines are followed. Among the guidelines are:

31. The request must be made entirely of the patient's own free will.

32. The patient must have a long-lasting desire for death.

33. The patient must be experiencing unbearable suffering.

34. There must be no reasonable alternatives to relative suffering other than euthanasia.

35. The euthanasia or assisted suicide must be reported to the coroner.

540. The above discussion clearly indicates that predominant thought as on date prevailing in other part of the World is that assisted suicide is a crime. No one is permitted to assist another person to commit suicide by injecting a lethal drug or by other means. In India, Section 306 of the Indian Penal Code specifically makes it an offence. The Constitution Bench of this Court in ***Gian Kaur (supra)*** has already upheld the constitutional validity of Section 306, thus, the law of the land as existing today is that no one is permitted to cause death of another person including a physician by administering any lethal drug even if the objective is to relive the patient from pain and suffering.

H. RATIO OF GIAN KAUR v. STATE OF PUNJAB

541. In ***Gian Kaur's case (supra)***, the constitutional validity of Section 306 of Indian Penal Code, 1860 was challenged. The Appellant had placed reliance on Two Judge Bench judgment of this Court in ***P. Rathinam v. Union of India (supra)***, where this Court declared Section 309 Indian Penal Code to be unconstitutional as violative of Article 21 of the Constitution. It was contended that Section 309 having already been declared as unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of the fundamental right Under Article 21 and, therefore, Section 306 Indian Penal Code penalising assisted suicide is

equally violative of Article 21. The Court proceeded to consider the constitutional validity of Section 306 on the above submission. In Para 17 of the judgment, this Court had made observation that reference to euthanasia cases tends to befog the real issue. Following are the relevant observations made in Para 17:

....Any further reference to the global debate on the desirability of retaining a penal provision to punish attempted suicide is unnecessary for the purpose of this decision. Undue emphasis on that aspect and particularly the reference to euthanasia cases tends to befog the real issue of the constitutionality of the provision and the crux of the matter which is determinative of the issue.

The Constitution Bench held that Article 21 does not include right to die. Paragraph 22 of the judgment contains the ratio in following words:

....Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the "right to die" as a part of the fundamental right guaranteed therein. "Right to life" is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of "right to life".....

Although, right to die was held not to be a fundamental right enshrined Under Article 21 but it was laid down that the right to life includes right to live with human dignity, i.e., right of a dying man to also die with dignity when his life is ebbing out. Following pertinent observations have been made in Para 24:

....The "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the "right to die" with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life.

542. The Constitution Bench, however, noticed the distinction between a dying man, who is terminally ill or in a persistent vegetative state, when process of natural death has commenced, from one where life is extinguished. The Court, however, held that permitting termination of life to such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life. Paragraph 25 of the judgment is to the following effect:

25. *A question may arise, in the context of a dying man who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the "right to die" with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician-assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting*

termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life.

543. The Constitution Bench in above paragraphs has observed that termination of life in case of those who are terminally ill or in a persistent vegetative state, may fall within the ambit of "right to die" with dignity as a part of right to live with dignity when death due to termination of natural life is certain and imminent and process of natural death has commenced. But even in those cases, physician assisted termination of life can not be included in right guaranteed Under Article 21. One more pertinent observation can be noticed from Para 33, where this Court held that:

33.*.....We have earlier held that "right to die" is not included in the "right to life" Under Article 21. For the same reason, "right to live with human dignity" cannot be construed to include within its ambit the right to terminate natural life, at least before commencement of the natural process of certain death....*

544. The distinction between cases where physician decides not to provide or to discontinue to provide for treatment or care, which could or might prolong his life and those in which he decides to administer a lethal drug, was noticed while referring to the judgment of the House of Lords's case in ***Airedale's case (supra)***. In ***Airedale's case (supra)***, it was held that it is not lawful for a doctor to administer a drug to his patient to bring about his death. Euthanasia is not lawful at common law and euthanasia can be made lawful only by legislation. It is further relevant to notice that in Para 40, this Court had observed that it is not necessary to deal with physician assisted suicide or euthanasia cases. Paragraph 40, is as follows:

40. *Airedale N.H.S. Trust v. Bland was a case relating to withdrawal of artificial measures for continuance of life by a physician. Even though it is not necessary to deal with physician-assisted suicide or euthanasia cases, a brief reference to this decision cited at the Bar may be made. In the context of existence in the persistent vegetative state of no benefit to the patient, the principle of sanctity of life, which is the concern of the State, was stated to be not an absolute one. In such cases also, the existing crucial distinction between cases in which a physician decides not to provide, or to continue to provide, for his patient, treatment or care which could or might prolong his life, and those in which he decides, for example, by administering a lethal drug, actively to bring his patient's life to an end, was indicated and it was then stated as under: (All ER p. 867: WLR p. 368)*

... But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be [see R. v. Cox (18-9-1992, unreported)] per Ognall, J. in the Crown Court at Winchester. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia -- actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. ...

545. A conjoint reading of observations in Paras 25, 33 and 40 indicates that although for a person terminally ill or in PSV state, whose process of natural death has commenced, termination of life may fall in the ambit of right to die with dignity but in those cases also there is no right of actively terminating life by a physician. The clear opinion has thus been expressed that euthanasia is not lawful. But at the same time, the Constitution Bench has noticed the distinction between the cases in which a physician decides not to provide or to continue to provide for his patient's treatment or care which could or might prolong his life and those in which physician decides actively to bring life to an end. The **ratio** of the judgment is contained in Paragraph 22 and 24, which is to the following effect:

(i)"....Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the "right to die" as a part of the fundamental right guaranteed therein.

Right to life" is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of "right to life".....

(ii)"....The "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the "right to die" with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life.

546. We have noticed above that in Para 17, this Court had observed that reference to euthanasia cases tends to befog the real issue and further in Para 40, it was observed that "even though it is not necessary to deal with physician assisted suicide or euthanasia cases"; the Constitution Bench has neither considered the concept of euthanasia nor has laid down any ratio approving euthanasia.

547. At best, the Constitution Bench noted a difference between cases in which physician decides not to provide or to continue to provide for medical treatment or care and those cases where he decides to administer a lethal drug activity to bring his patient's life to an end. The judgment of House of Lords in ***Airedale's case (supra)*** was referred to and noted in the above context. The ***Airedale's case (supra)*** was cited on behalf of the Appellant in support of the contention that in said case the withdrawal of life saving treatment was held not to be unlawful.

548. We agree with the observation made in the reference order of the three-Judge Bench to the effect that the Constitution Bench did not express any binding view on the subject of euthanasia. We hold that no binding view was expressed by the Constitution Bench on the subject of Euthanasia.

I. CONCEPT OF EUTHANASIA

549. Euthanasia is derived from the Greek words ***euthanatos***; eu means well or good and ***thanatos*** means death. **New Webster's Dictionary (Deluxe Encyclopedic Edition)** defines Euthanasia as following:

A painless putting to death of persons having an incurable disease; an easy death. Also mercy killing.

550. The Oxford English Dictionary defines 'euthanasia': *"The painless killing of a patient suffering from an incurable and painful disease or in an irreversible coma"*. The definition of the word 'euthanasia' as given by the World Health Organisation may be noticed which defines it as: "A deliberate act undertaken by one person with the intention of either painlessly putting to death or failing to prevent death from natural causes in cases of terminal illness or irreversible coma of another person".

551. In ancient Greek Society, Euthanasia as 'good death' was associated with the drinking of 'Hemlock'. Drinking of Hemlock had become common not only in cases of incurable diseases but also by those individuals who faced other difficult problems or old age. In ancient times, in Greece freedom to live was recognised principle, which permitted the sick and desperates to terminate their lives by themselves or by taking outside help. In last few centuries, Euthanasia increasingly came to connote specific measures taken by physicians to hasten the death. The primary meaning, as has now been ascribed to the word is compassionate murder. In the last century, the thought has gained acceptance that Euthanasia is to be distinguished from withdrawal of life saving treatments which may also result in death. Withdrawing medical treatment in a way hasten the death in case of terminal illness or Persistent Vegetative State (PVS) but is not to be treated as compassionate murder. Advancement in the medical science on account of which life can be prolonged by artificial devices are the developments of only last century. **Lord Browne Wilkinson, J.**, ***in Airedale N.H.A. Trust v. Bland*** 1993 (2) W.L.R. 316 (H.L.), at page 389 observed:

....Death in the traditional sense was beyond human control. Apart from cases of unlawful homicide, death occurred automatically in the course of nature when the natural functions of the body failed to sustain the lungs and the heart. Recent developments in medical science have fundamentally affected these previous certainties. In medicine, the cessation of breathing or of heartbeat is no longer death. By the use of a ventilator, lungs which in the unaided course of nature would have stopped breathing can be made to breathe, thereby sustaining the heartbeat. Those, like Anthony Bland, who would previously have died through inability to swallow food can be kept alive by artificial feeding. This has led the medical profession to redefine death in terms of brain stem death, i.e., the death of that part of the brain without which the body cannot function at all without assistance. In some cases it is now apparently possible, with the use of the ventilator, to sustain a beating heart even though the brain stem, and therefore in medical terms the patient, is dead; "the ventilated corpse.

552. In recent times, three principles had gained acceptance throughout the world they are:

1. Sanctity of life

2. Right of self-determination

3. Dignity of the individual human being

553. The sanctity of life is one thought which is philosophically, religiously and mythologically accepted by the large number of population of the world practicing different faiths and religions. Sanctity of life entails it's inviolability by an outsider. Sanctity of life is the concern of State.

554. Right of self-determination also encompasses in it bodily integrity. Without consent of an adult person, who is in fit state of mind, even a surgeon is not authorised to violate the body. Sanctity of the human life is the most fundamental of the human social values. The acceptance of human rights and development of its meaning in recent times has fully recognised the dignity of the individual human being. All the above three principles enable an adult human being of conscious mind to take decision regarding extent and manner of taking medical treatment. An adult human being of conscious mind is fully entitled to refuse medical treatment or to decide not to take medical treatment and may decide to embrace the death in natural way. Euthanasia, as noted above, as the meaning of the word suggest is an act which leads to a good death. Some positive act is necessary to characterise the action as Euthanasia. Euthanasia is also commonly called "assisted suicide" due to the above reasons.

J. WITHDRAWAL OF LIFE SAVING DEVICES

555. Withdrawal of medical assistance or withdrawal of medical devices which artificially prolong the life cannot be regarded as an act to achieve a good death. Artificial devices to prolong the life are implanted, when a person is likely to die due to different causes in his body. Life saving treatment and devices are put by physicians to prolong the life of a person. The Law Commission of India in its 196th Report on "Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)" on the subject had put introductory note to the following effect:

The title to this Report immediately suggests to one that we are dealing with 'Euthanasia' or 'Assisted Suicide'. But we make it clear at the outset that Euthanasia and Assisted Suicide continue to be unlawful and we are dealing with a different matter 'Withholding Life-support Measures' to patients terminally ill and, universally, in all countries, such withdrawal is treated as 'lawful'.

556. The Law Commission of India was of the opinion that withdrawing life supporting measures of patient terminally ill is a concept, different from Euthanasia. The opinion of **Cardozo, J.,** rendered more than hundred years ago that every human being of adult years and sound mind has a right to determine what shall be done with his own body, is now universally accepted principle. The judgment of the U.S. Supreme Court and House of Lords, as noticed above, also reiterate the above principle.

557. Recently, in a nine-Judges judgment in ***K.S. Puttaswamy and Anr. v. Union of India and Ors.*** MANU/SC/1044/2017 : (2017) 10 SCC 1, ***Justice J. Chelameswar*** elaborating the concept of right to life as enshrined in Article 21 under the Constitution of India has observed:

An individual's right to refuse the life-prolonging medical treatment or terminate life is another freedom which falls within the zone of right of privacy.

558. Withdrawal of life-saving devices, leads to natural death which is arrested for the time being due to above device and the act of withdrawal put the life on the natural track. Decision to withdraw

life-saving devices is not an act to cause good death of the person rather, decision to withdraw or not to initiate life-supporting measures is a decision when treatment becomes futile and unnecessary. Practice of Euthanasia in this country is prohibited and for medical practitioners it is already ordained to be unethical conduct. The question as to what should be the measures to be taken while taking a decision to withdraw life-saving measures or life-saving devices is another question which we shall consider a little later.

559. Two-Judge Bench in ***Aruna Ramachandra Shanbaug v. Union of India and Ors.*** MANU/SC/0176/2011 : (2011) 4 SCC 454 has held that withdrawal of live-saving measures is a passive Euthanasia which is permissible in India. A critically ill patient who is mentally competent to take a decision, decides not to take support of life prolonging measures, and respecting his wisdom if he is not put on such devices like ventilator etc., it is not at all Euthanasia. Large number of persons in advance age of life decide not to take medical treatment and embrace death in its natural way, can their death be termed as Euthanasia. Answer is, obviously 'No'. The decision not to take life saving medical treatment by a patient, who is competent to express his opinion cannot be termed as euthanasia, but a decision to withdraw life saving treatment by a patient who is competent to take decision as well as with regard to a patient who is not competent to take decision can be termed as passive euthanasia. On the strength of the precedents in this country and weight of precedents of other countries as noted above, such action of withdrawing life saving device is legal. Thus, such acts, which are commonly expressed as passive euthanasia is lawful and legally permissible in this country.

560. We remind ourselves that this Court is not a legislative body nor is entitled or competent to act as a moral or ethical arbiter. The task of this Court is not to weigh or evaluate or reflect different believes and views or give effect to its own but to ascertain and build the law of land as it is now understood by all. Message which need to be sent to vulnerable and disadvantaged people should not, however, obliviously to encourage them to seek death but should assure them of care and support in life.

561. We thus are of the considered opinion that the act of withdrawal from live-saving devices is an independent right which can lawfully be exercised by informed decision.

K. DECISION FOR WITHDRAWAL OF LIFE-SAVING TREATMENT IN CASE OF A PERSON WHO IS INCOMPETENT TO TAKE AN INFORMED DECISION.

562. One related aspect which needs to be considered is that is case of those patients who are incompetent to decide due to their mental state or due to the fact that they are in permanent persistent vegetative state or due to some other reasons unable to communicate their desire. When the right of an adult person who expresses his view regarding medical treatment can be regarded as right flowing from Article 21 of the Constitution of India, the right of patient who is incompetent to express his view cannot be outside the fold of Article 21 of the Constitution of India. It is another issue, as to how, the decision in cases of mentally incompetent patients regarding withdrawal of life-saving measures, is to be taken.

563. The rights of bodily integrity and self-determination are the rights which belong to every human being. When an adult person having mental capacity to take a decision can exercise his

right not to take treatment or withdraw from treatment, the above right cannot be negated for a person who is not able to take an informed decision due to terminal illness or being a Persistent Vegetative State (PVS). The question is who is competent to take decision in case of terminally-ill or PVS patient, who is not able to take decision. In case of a person who is suffering from a disease and is taking medical treatment, there are three stake holders; the person himself, his family members and doctor treating the patient. The American Courts give recognition to opinion of "surrogate" where person is incompetent to take a decision. No person can take decision regarding life of another unless he is entitled to take such decision authorised under any law. The English Courts have applied the "best interests" test in case of a incompetent person. The best interests of the patient have to be found out not by doctor treating the patient alone but a team of doctors specifically nominated by the State Authority. In ***Aruna Shanbaug (supra)***, two-Judge Bench of this Court has opined that in such cases relying on doctrine of 'parens patriae (father of the country)', it is the Court alone which is entitled to take a decision whether to withdraw treatment for incompetent terminally-ill or PVS patient. In paragraphs 130 and 131 following has been held:

130. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.

Under which provision of law can the Court grant approval for withdrawing life support to an incompetent person

131. In our opinion, it is the High Court Under Article 226 of the Constitution which can grant approval for withdrawal of life support to such an incompetent person. Article 226(1) of the Constitution states:

226. Power of High Courts to issue certain writs.-(1)

Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

A bare perusal of the above provisions shows that the High Court Under Article 226 of the Constitution is not only entitled to issue writs, but is also entitled to issue directions or orders.

564. Various learned Counsel appearing before us have submitted that seeking declaration from the High Court in cases where medical treatment is needed to be withdrawn is time taking and does not advance the object nor is in the interest of terminally-ill patient. It is submitted that to keep check on such decisions, the State should constitute competent authorities consisting of pre-dominantly experienced medical practitioners whose decision may be followed by all concerned with a rider that after taking of decision by competent body a cooling period should be provided to enable anyone aggrieved from the decision to approach a Court of Law. We also are of the

opinion that in cases of incompetent patients who are unable to take an informed decision, it is in the best interests of the patient that the decision be taken by competent medical experts and that such decision be implemented after providing a cooling period at least of one month to enable aggrieved person to approach the Court of Law. The best interest of the patient as determined by medical experts shall meet the ends of justice. The medical team by taking decision shall also take into consideration the opinion of the blood relations of the patient and other relevant facts and circumstances.

L. ADVANCE MEDICAL DIRECTIVE

565. The Petitioner by the Writ Petition has also sought a direction to the Respondent to adopt suitable procedures to ensure that persons of deteriorated health or terminally ill should be able to execute a document titled "MY LIVING WILL & ATTORNEY AUTHORISATION". The Petitioner submits that it is an important personal decision of the patient to use or not to use the life sustaining treatment in case of terminal illness and stage of persistent vegetative state. The Petitioner pleads that the Petitioner's endeavour is only to seek a 'choice' for the people which is not available at present and they are left to the mercy of doctors who to save themselves from any penal consequences half heartedly, despite knowing that the death is inevitable continue administering the treatment which the person might not have wanted to continue with. A person will be free to issue advance directives both in a positive and negative manner, meaning thereby that a person is not necessarily required to issue directive that the life sustaining treatment should not be given to him in the event of he or she going into persistent vegetative state or in an irreversible state. The person can also issue directives as to all the possible treatment which should be given to him when he is not able to express his/her wishes on medical treatment. The Petitioner also refers to and rely on various legislations in different countries, which recognises the concept of advance medical directive. Petitioner pleads that in India also law in the nature "Patient Autonomy & Self-determination Act" should be enacted. Petitioner has also alongwith his Writ Petition has annexed a draft titling it "Patient's Self-determination Act".

566. The concept of advance medical directive is also called living will is of recent origin, which gained recognition in latter part of 20th century. The advance medical directive has been recognised first by Statute in United States of America when in the year 1976, State of California passed "Natural Death Act". It is claimed that 48 states out of 50 in the United States of America have enacted their own laws regarding Patient's Rights and advance medical directives. Advance medical directive is a mechanism through which individual autonomy can be safeguarded in order to provide dignity in dying. As noted above, the Constitution Bench of this Court in the case of ***Gian Kaur (supra)*** has laid down that right to die with dignity is enshrined in Article 21 of the Constitution. It is to be noticed that advance medical directives are not exclusively associated with end of life decisions. However, it is vital to ensure that form of an advance medical directive reflects the needs of its author and is sufficiently authoritative and practical to enable its provisions to be upheld. In most of the western countries advance medical directives have taken a legalistic form incorporating a formal declaration to be signed by competent witnesses. The laws also make provisions for updating confirmation of its applicability and revocation. Protecting the individual autonomy is obviously the primary purpose of an advance medical directive. The right to decide one's own fate pre-supposes a capacity to do so. The answer as to when a particular advance medical directive becomes operative usually depends upon an assent of when its author is no longer

competent to participate in medical decision making. The Black's Law Dictionary defines the Advance Medical Directive as "a legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate". An advance medical directive is an individual's advance exercise of his autonomy on the subject of extent of medical intervention that he wishes to allow upon his own body at a future date, when he may not be in a position to specify his wishes. The purpose and object of advance medical directive is to express the choice of a person regarding medical treatment in an event when he looses capacity to take a decision. Use and operation of advance medical directive is to confine only to a case when person becomes incapacitated to take an informed decision regarding his medical treatment. So long as an individual can take an informed decision regarding his medical treatment, there is no occasion to look into advance medical directives. A person has unfettered right to change or cancel his advance medical directives looking to the need of time and advancement in medical science. Hence, a person cannot be tied up or bound by his instructions given at an earlier point of time.

567. The concept of advance medical directive originated largely as a response to development in medicines. Many people living depending on machines cause great financial distress to the family with the cost of long term medical treatment. Advance medical directive was developed as a means to restrict the kinds of medical intervention in event when one become incapacitated. The foundation for seeking direction regarding advance medical directive is extension of the right to refuse medical treatment and the right to die with dignity. When a competent patient has right to take a decision regarding medical treatment, with regard to medical procedure entailing right to die with dignity, the said right cannot be denied to those patients, who have become incompetent to take an informed decision at the relevant time. The concept of advance medical directive has gained ground to give effect to the rights of those patients, who at a particular time are not able to take an informed decision. Another concept which has been accepted in several countries is recognition of instrument through which a person nominates a representative to make decision regarding their medical treatment at a point of time when the person executing the instrument is unable to make an informed decision. This is called attorney authorisation leading to medical treatment. In this country, there is no legislation governing such advance medical directives. It is, however, relevant to note a recent legislation passed by the Parliament namely "The Mental Healthcare Act, 2017", where as per Section 5 every person, who is not a minor has a right to make an advance directive in writing regarding treatment to his mental illness in the way a person wishes to be treated or mental illness. The person wishes not to be treated for mental illness and nomination of individual and individual's as his/her representative. Section 5 is to the following effect:

5. (1) Every person, who is not a minor, shall have a right to make an advance directive in writing, specifying any or all of the following, namely:

(a) the way the person wishes to be cared for and treated for a mental illness;

(b) the way the person wishes not to be cared for and treated for a mental illness;

(c) the individual or individuals, in order of precedence, he wants to appoint as his nominated representative as provided Under Section 14.

(2) An advance directive Under Sub-section (1) may be made by a person irrespective of his past mental illness or treatment for the same.

(3) An advance directive made Under Sub-section (1), shall be invoked only when such person ceases to have capacity to make mental healthcare or treatment decisions and shall remain effective until such person regains capacity to make mental healthcare or treatment decisions.

(4) Any decision made by a person while he has the capacity to make mental healthcare and treatment decisions shall over-ride any previously written advance directive by such person.

(5) Any advance directive made contrary to any law for the time being in force shall be ab initio void.

568. Section 6 of the Act provides that an advance directive shall be made in the manner as has been prescribed by the Regulations made by the Central Authority. In the draft Medical Healthcare Regulation published by Ministry of Health and Family Welfare, a form is prescribed in which advance directive may be made. Other aspects of medical directive have also been dealt with by draft Regulation. Thus, in our country, recognition of advance directives regarding medical treatment has started to be recognised and are in place relating to specified field and purpose. Another legislation which also recognise some kind of advance directive relating to a person's body is Section 3 of the Transplantation of Human Organs and Tissues Act, 1994. Section 3 Sub-sections (1) and (2) which are relevant for the present purpose is as follows:

3. Authority for removal of [human organs or tissues or both]*.--(1) Any donor may, in such manner and subject to such conditions as may be prescribed, authorise the removal, before his death, of any [human organ or tissue or both] of his body for therapeutic purposes.*

(2) If any donor had, in writing and in the presence of two or more witnesses (at least one of whom is a near relative of such person), unequivocally authorised at any time before his death, the removal of any [human organ or tissue or both] of his body, after his death, for therapeutic purposes, the person lawfully in possession of the dead body of the donor shall, unless he has any reason to believe that the donor had subsequently revoked the authority aforesaid, grant to a registered medical practitioner all reasonable facilities for the removal, for therapeutic purposes, of that [human organ or tissue or both] from the dead body of the donor.

569. The Rules have been framed Under Section 24 of the Transplantation of Human Organs and Tissues Act, 1994 namely Transplantation of Human Organs and Tissues Rules, 2014 where form of authorisation for organ or tissue pledging is Form 7, which provides that an authorisation by donor in presence of two witnesses which is also required to be registered by Organ Donor Registry.

570. The statutory recognition of the above mentioned authorisation in two statutes is clear indication of acceptance of the concept of advance medical directive in this country.

571. Learned Counsel for the Petitioner as well as for the interveners and the Additional Solicitor General of India has expressed concern regarding manner and procedure of execution of advance

medical directive. It is submitted that unless proper safeguards are not laid down, those who are vulnerable, infirm and aged may be adversely affected and efforts by those related to a person to expedite death of a person for gaining different benefits, cannot be ruled out. We have been referred to various legislations in different countries, which provides a detailed procedure of execution of advance medical directive, competence of witnesses, mode and manner of execution, authority to register and keep such advance medical directive.

572. Shri Arvind Datar, learned senior Counsel has in its written submissions referred to certain aspects, which may be kept in mind while formulating guidelines for advance medical directive, which are as follows:

a) Only adult persons, above the age of eighteen years and of sound mind at the time at which the advance directive is executed should be deemed to be competent. This should include persons suffering from mental disabilities provided they are of sound mind at the time of executing an advance directive.

b) Only written advance directives that have been executed properly with the notarised signature of the person executing the advance directive, in the presence of two adult witnesses shall be valid and enforceable in the eyes of the law. The form should require a reaffirmation that the person executing such directive has made an informed decision. Only those advance directives relating to the withdrawal or withholding of life-sustaining treatment should be granted legal validity. The determination that the executor of the advance directive is no longer capable of making the decision should be made in accordance with relevant medical professional Regulations or standard treatment guidelines, as also the determination that the executor's life would terminate in the absence of life-sustaining treatment. The constitution of a panel of experts may also be considered to make this determination. The use of expert committees or ethics committees in other jurisdictions is discussed at Para 28 of these written submissions.

c) Primary responsibility for ensuring compliance with the advance directive should be on the medical institution where the person is receiving such treatment.

d) If a hospital refuses to recognise the validity of an advance directive, the relatives or next friend may approach the jurisdictional High Court seeking a writ of mandamus against the concerned hospital to execute the directive. The High Court may examine whether the directive has been properly executed, whether it is still valid (Le, whether or not circumstances have fundamentally changed since its execution, making it invalid) and/or applicable to the particular circumstances or treatment.

e) No hospital or doctor should be made liable in civil or criminal proceedings for having obeyed a validly executed advance directive.

f) Doctors citing conscientious objection to the enforcement of advance directives on the grounds of religion should be permitted not to enforce it, taking into account their fundamental right Under Article 25 of the Constitution. However, the hospital will still remain under this obligation.

573. The right to self-determination and bodily integrity has been recognised by this Court as noted above. The right to execute an advance medical directive is nothing but a step towards protection of aforesaid right by an individual, in event he becomes incompetent to take an informed decision, in particular stage of life. It has to be recognised by all including the States that a person has right to execute an advance medical directive to be utilised to know his decision regarding manner and extent of medical treatment given to his body, in case he is incapacitated to take an informed decision. Such right by an individual does not depend on any recognition or legislation by a State and we are of the considered opinion that such rights can be exercised by an individual in recognition and in affirmation of his right of bodily integrity and self-determination which are duly protected Under Article 21 of the Constitution. The procedure and manner of such expression of such right is a question which needs to be addressed to protect the vulnerable, infirm and old from any misuse. It is the duty of the State to protect its subjects specially those who are infirm, old and needs medical care. The duty of doctor to extend medical care to the patients, who comes to them in no manner diminishes in any manner by recognition of concept that an individual is entitled to execute an advance medical directive. The physicians and medical practitioners treating a person, who is incompetent to express an informed decision has to act in a manner so as to give effect to the express wishes of an individual.

574. The concept of advance medical directive has gained ground throughout the world. Different countries have framed necessary legislation in this regard. Reference of few of such legislations shall give idea of such statutory scheme formulated by different countries to achieve the object. The Republic of Singapore has passed an enactment namely ADVANCE MEDICAL DIRECTIVE ACT (Act 16 of 1996). Section 3 of the Act, Sub-section (1) empowers a person who is not mentally disordered and attained the age of 21 years to make an advance directive in the prescribed form.

Other provisions of Statute deals with duty of witness, registration of directives, objections, revocation of directive, panel of specialists, certification of terminal illness, duty of medical practitioner and other related provisions. The Belgian Act on Euthanasia, 2002 also contains provisions regarding advance directive in Section 4. Swiss Civil Code 1907 in Articles 362 and 365 provides for advance care directive, its execution and termination. Mental Capacity Act, 2005 (England) also contemplates for an advance directive. The Statute further provides that an advance directive is applicable in life sustaining treatment only. When the decision taken in writing, signed by the patient or by another person in patient's presence on his direction. Pennsylvania Act 169 of 2006 also contains provisions with regard to execution of advance medical directive and other related provisions, its revocation etc.

In our country, there is yet no legislation pertaining to advance medical directive. It is, however, relevant to note that Ministry of Health and Family Welfare vide its order dated 06.05.2016 uploaded the Law Commission's 241st report and solicited opinions, comments on the same. An explanatory note has also been uploaded by the Ministry of Health and Family Welfare where in paragraph 6 following was stated:

Living Will has been defined as "A document in which person states his/her desire to have or not to have extraordinary life prolonging measures used when recovery is not possible from his/her terminal condition".

However, as per para 11 of the said Bill the advance medical directive (living will) or medical power of attorney executed by the person shall be void and of no effect and shall not be binding on any medical practitioner.

Although in Clause 11 of the draft bill, it was contemplated that advance medical directives are not binding on medical practitioner but the process of legislation had not reached at any final stage. The directions and safeguards which have been enumerated by Hon'ble Chief Justice in his judgment shall be sufficient to safeguard the interests of patients, doctors and society till the appropriate legislation is framed and enforced.

We thus conclude that a person with competent medical facility is entitled to execute an advance medical directive subject to various safeguards as noted above.

M. <u>CONCLUSIONS:</u>

From the above discussions, we arrive on following conclusions:

(i) The Constitution Bench in ***Gian Kaur's case*** held that the "right to life: including right to live with human dignity" would mean the existence of such right up to the end of natural life, which also includes the right to a dignified life upto the point of death including a dignified procedure of death. The above right was held to be part of fundamental right enshrined Under Article 21 of the Constitution which we also reiterate.

(ii) We agree with the observation made in the reference order of the three-Judge Bench to the effect that the Constitution Bench in ***Gian Kaur's case*** did not express any binding view on the subject of euthanasia. We hold that no binding view was expressed by the Constitution Bench on the subject of Euthanasia.

(iii) The Constitution Bench, however, noted a distinction between cases in which physician decides not to provide or continue to provide for treatment and care, which could or might prolong his life and those in which he decides to administer a lethal drug even though with object of relieving the patient from pain and suffering. The later was held not to be covered under any right flowing from Article 21.

(iv) Thus, the law of the land as existing today is that no one is permitted to cause death of another person including a physician by administering any lethal drug even if the objective is to relieve the patient from pain and suffering.

(v) An adult human being of conscious mind is fully entitled to refuse medical treatment or to decide not to take medical treatment and may decide to embrace the death in natural way.

(vi) Euthanasia as the meaning of words suggest is an act which leads to a good death. Some positive act is necessary to characterise the action as Euthanasia. Euthanasia is also commonly called "assisted suicide" due to the above reasons.

(vii) We are thus of the opinion that the right not to take a life saving treatment by a person, who is competent to take an informed decision is not covered by the concept of euthanasia as it is commonly understood but a decision to withdraw life saving treatment by a patient who is competent to take decision as well as with regard to a patient who is not competent to take decision can be termed as passive euthanasia, which is lawful and legally permissible in this country.

(viii) The right of patient who is incompetent to express his view cannot be outside of fold of Article 21 of the Constitution of India.

(ix) We also are of the opinion that in cases of incompetent patients who are unable to take an informed decision, "the best interests principle" be applied and such decision be taken by specified competent medical experts and be implemented after providing a cooling period to enable aggrieved person to approach the court of law.

(x) An advance medical directive is an individual's advance exercise of his autonomy on the subject of extent of medical intervention that he wishes to allow upon his own body at a future date, when he may not be in a position to specify his wishes. The purpose and object of advance medical directive is to express the choice of a person regarding medical treatment in an event when he looses capacity to take a decision. The right to execute an advance medical directive is nothing but a step towards protection of aforesaid right by an individual.

(xi) Right of execution of an advance medical directive by an individual does not depend on any recognition or legislation by a State and we are of the considered opinion that such rights can be exercised by an individual in recognition and in affirmation of his right of bodily integrity and self-determination.

In view of our conclusions as noted above the writ petition is **allowed** in the following manner:

(a) The right to die with dignity as fundamental right has already been declared by the Constitution Bench judgment of this Court in ***Gian Kaur case (supra)*** which we reiterate.

(b) We declare that an adult human being having mental capacity to take an informed decision has right to refuse medical treatment including withdrawal from life saving devices.

(c) A person of competent mental faculty is entitled to execute an advance medical directive in accordance with safeguards as referred to above.

575. Before we conclude, we acknowledge our indebtness to all the learned Advocates who have rendered valuable assistance with great industry and ability which made it possible for us to resolve issues of seminal public importance. We record our fullest appreciation for the assistance rendered by each and every counsel in this case.

---

[1] Rawls, John, Political Liberalism 32, 33, New York: Columbia University Press, 1993.

[2] 'The Role of Judiciary and HIV Law' - Michael Kirby, published in the book titled 'HIV Law, Ethics and Human Rights', edited by D.C. Jayasuriya.

[3] Dworkin, "Judicial Discretion," 6 J. of Phil. 624 (1963)

[4] See Aharon Barak: Judicial Discretion, Yale University Press.

[5] B. Cardozo: *The Growth of the Law* 144 (1924), at 60-61

[6] Justice O. Holmes opined this expression in '*Collected Legal Papers*' 239 (1921)

[7] Reported as MANU/SC/0140/2014 : (2014) 5 SCC 338

[8] Michael Manning, Euthanasia and Physician-Assisted Suicide (Paulist Press, 1998).

[9] These definitions of voluntary, non-voluntary and involuntary euthanasia correspond to those employed by the House of Lords Select Committee on Medical Ethics (Walton Committee)

[10] See Euthanasia and Its Legality and Legitimacy from Indian and International Human Right Instruments Perspectives published in Human Rights & Social Justice by Muzafer Assadi

[11] Professor and Head, Department of Anesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai.

[12] Consultant Neurologist at P.D. Hinduja, Mumbai.

[13] Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital.

[14] Aspects of human dignity as right to life in the context of euthanasia shall be discussed in greater detail at the relevant stage.

[15] It may be noted that the Delhi High Court in *State* v. *Sanjay Kumar*, (1985) Crl. L.J. 931, and the Bombay High Court in *Maruti Sharipati Dubai* v. *State of Maharashtra*, MANU/MH/0022/1986 : (1987) Crl. L.J. 743, had taken the view that Section 309 of Indian Penal Code was unconstitutional, being violative of Articles 14 and 21 of the Constitution. On the other hand, the Andhra Pradesh High Court in *C. Jagadeeswar* v. *State of Andhra Pradesh*, (1983) Crl. L.J. 549, had upheld the validity of Section 309 holding that it did not offend either Article 14 or Article 21 of the Constitution. A Division Bench of this Court in *P. Rathinam* v. *Union of India and Anr.* MANU/SC/0433/1994 : (1994) 3 SCC 394, had held that Section 309 Indian Penal Code deserves to be effaced from the statute book to humanise our penal laws, terming this provision as cruel and irrational, which results in punishing a person again who had already suffered agony and would be undergoing ignominy because of his failure to commit suicide. It is in this backdrop ***Gian Kaur's*** case was referred to and decided by the Constitution

Bench.

[16] As quoted in *P. Rathinam* v. *Union of India and Anr.*, MANU/SC/0433/1994 : (1994) 3 SCC 394

[17] Same as in 14 above.

[18] It is well known that medical scientists are intensely busy in finding the ways to become ageless and immortal, but till date have remained unsuccessful in achieving this dream.

[19] *Charles I. Lugosi*, 'Natural Disaster, Unnatural Deaths: The Killings on the Life Care Floors at Tenet's Memorial Centre after Hurricane Katrina', Issues in Law and Medicine, Vol. 23, Summer, 2007.

[20] John Keown, *Euthanasia, Ethics and Public Policy*, (Cambridge: Cambridge University Press, (2002) p. 37

[21] T N Madan, "Dying with Dignity" (1992) 35 (4) Social Science and Medicine 425-32.

[22] T N Madan, "Living and Dying" in *Non-Renunciation: Themes and Interpretations of the Hindu Culture* (New Delhi, *Oxford University Press*, 1987).

[23] J Parry, *Death and the Regeneration of Life* (Cambridge, Cambridge University Press, 1982)

[24] T N Madan, "Dying with Dignity" (1992) 35 (4) *Social Science and Medicine* 425-32.

[25] Justice Holmes: *The Path of the Law*, 10 Harvard Law review 457-78, at p. 459 (1897)

[26] Lon L. Fuller: *The Morality of Law* (Revised Edition), Yale University Press

[27] Sushila Rao: Economic and Political Weekly, Vol. 46, No. 18 (April 30-May 6, 2011), pp. 13-16

[28] According to John Finnis, there is no real and morally relevant distinction between active euthanasia and passive euthanasia inasmuch as one employs the method of deliberate omissions (or forbearances or abstentions) in order to terminate life (passive euthanasia) and other employs 'a deliberate intervention' for the same purpose (active euthanasia). In this sense, in both the cases, it is an intentional act whether by omission or by intervention, to put an end to somebody's life and, therefore, morally wrong.

[29] John Finnis: "Human Rights and Common Good: Collected Essays", Volume III

[30] Though western thinking is that the concept of human dignity has 2500 years' history, in many eastern civilizations including India human dignity as core human value was recognised thousands of years ago

[31] Prof. S.D. Sharma: "Administration of Justice in Ancient Bharat", (1988).

[32] Based on the approach of Thomas Aquinas (1225-1274) in his work Summa Theologia

[33] See Toman E. Hill, 'Humanity as an End in itself' (1980) 91 Ethics 84

[34] See Pfordten, 'On the Dignity of Man in Kant'

[35] Delivered on 25th February, 2010 at Indian Institute of Public Administration, New Delhi.

[36] See Article of Jeremy Waldron: "How Law Protects Dignity"

[37] *Ibid., 1*

[38] Ronald Dworkin, Is Democracy Possible Here? Principles for a New Political Debate (Princeton University Press, 2006).

[39] *Ibid 13*

[40] Kenneth W. Simons, Dworkin's Two Principle of Dignity: An unsatisfactory Nonconsequentialist Account of Interpersonal Moral Duties, 90 Boston law Rev. 715 (2010)

[41] *Ibid*

[42] Supra 15

[43] Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right

[44] *Prem Shankar Shukla* v. *UT of Delhi*, MANU/SC/0084/1980 : (1980) 3 SCC 526; *Francis Coralie Mullin* v. *UT of Delhi*, MANU/SC/0517/1981 : (1981) 1 SCC 608; *Bandhua Mukti Morcha* v. *Union of India*, MANU/SC/0051/1983 : (1984) 3 SCC 161; *Khedat Mazdoor Chetna Sangath* v. *State of Madhya Pradesh*, MANU/SC/0007/1995 : (1994) 6 SCC 260; *M. Nagaraj* v. *Union of India*, MANU/SC/4560/2006 : (2006) 8 SCC 212, *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, MANU/SC/0136/2010 : (2010) 3 SCC 786; *Selvi* v. *State of Karnataka*, MANU/SC/0325/2010 : (2010) 7 SCC 263; *Mehmood Nayyar Azam* v. *State of Chhattisgarh*, MANU/SC/0615/2012 : (2012) 8 SCC 1; *Shabnam* v. *Union of India*, MANU/SC/0669/2015 : (2015) 6 SCC 702; *Jeeja Ghosh* v. *Union of India*, MANU/SC/0574/2016 : (2016) 7 SCC 761.

[45]. David Feldman: *Civil Liberties & Human Rights in England & Wales*

[46] (I) *Morris:* Voluntary Euthanasia

(ii) LW Sumner: Dignity through Thick and Thin, in Sebastian Murders, "Human Dignity and Assisted Death (Oxford University Press, 2017).

[47] *Ibid., at 239*

[48] R Dworkin, *Life's Dominion* (London, Harper-Collins, 1993) at 166.

[49] R Dworkin, *Life's Dominion* (London, HarperCollins, 1993) at 179.

[50] Ibid.

[51] A Kolnai, "Dignity", in R S Dillon (ed.) Dignity, Character, and *Self-Respect* (London, Routledge, 1995) 53-75, at 55.

[52] R S Downie, K S Calman, *Healthy Respect: Ethics in Health Care* (Oxford, Oxford University Press, 1994) at 51-53.

[53] *Ibid.*

[54] A Kolnai, "Dignity", in R S Dillon (ed.) *Dignity, Character, and Self-Respect* (London, Routledge, 1995) 53-75, at 56.

[55] Dr. R.R. Kishore, MD, LLB-End of Life Issues and the Moral Certainty: A Discovery through Hinduism

[56] See Footnote 63.

[57] Healthcare rationing: can we afford to ignore euthanasia? *Health Services Management Research 1997; 10; 32-41*

[58] Mooney, G. *The Valuation of Human Life*. London: Macmillan Press, 1977

[59] See-*Economics and Euthanasia* by **Stephen Heasell**, Department of Economics and Politics, Nottingham Trent University, and **David Paton**, Nottingham University Business School.

[60] This aspect is discussed in some detail by this Court in *Shivashakti Sugars Ltd.* v. *Shree Renuka Sugar Limited and Other*, MANU/SC/0647/2017 : (2017) 7 SCC 729

[61] Jeffrie G. Murphy & Jules L. Coleman: *Philosophy of Law (An introduction to Jurisprudence)*

[62] The Dilemmas of Euthanasia", Bio-Science (August 1973), Vol. 23, No. 8, at page 459

[63] Margaret A. Somerville, "Legalising euthanasia: why now?", The Australian Quarterly (Spring 1996), Vol. 68, No. 3, at page 1

[64] Christopher N. Manning, "Live And Let Die: Physician-Assisted Suicide And The Right To Die", *Harvard Journal of Law and Technology* (1996), Vol. 9, No. 2, at page 513

[65] Alan Norrie, "Legal Form and Moral Judgment: Euthanasia and Assisted Suicide" in R.A.

Duff, et al (ed), *The Structures of the Criminal Law* (Oxford University Press, 2011), at page 134

[66] Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford University Press, 2010), at page 199

[67] Elizabeth M. Andal Sorrentino, "The Right To Die?", *Journal of Health and Human Resources Administration* (Spring, 1986), Vol. 8, No. 4, page 361

[68] Ibid

[69] Atul Gawande, *Being Mortal: Medicine and What Matters in the End* (Hamish Hamilton, 2014), at page 260

[70] Ibid, at page 243

[71] Henry Marsh, *Admissions: A Life in Brain Surgery*, (Weidenfeld & Nicolson, 2017), at page 265-266

[72] Randy Pausch and Jeffrey Zaslow, *The Last Lecture*, (Hodder & Stoughton, 2008), at page 17

[73] Sushila Rao, "India and Euthanasia: The Poignant Case of Aruna Shanbaug", Oxford Medical Law Review, Volume 19, Issue 4 (1 December 2011), at pages 646-656

[74] "Humanization and Decriminalization of Attempt to Suicide", *Law Commission of India* (Report No. 210, 2008); Rajeev Ranjan, et al, "(De-) Criminalization of Attempted Suicide in India: A Review", *Industrial Psychiatry Journal* (2014), Vol. 23, issue 1, at page 4-9

[75] D Benatar, "Should there be a legal right to die?" Current Oncology (2010), Vol. 17, Issue 5, at pages 2-3

[76] Richard Delgado, "Euthanasia Reconsidered-The Choice of Death as an Aspect of the Right of Privacy", *Arizona Law Review* (1975), Vol. 17, at page 474

[77] Ratna Kapur, "The Spectre of Aruna Shanbaug", *The Wire* (18 May 2015), available at https://thewire.in/2005/the- spectre-of-aruna-shanbaug/

[78] Hazel Biggs, "Euthanasia, Death with Dignity and the Law", *Hart Publishing* (2001), at page 12

[79] James Rachels, "Active and Passive Euthanasia", *New England Journal of Medicine* (January 9, 1975), at page 78-80

[80] James Rachels, End of Life: *Euthanasia and Morality* (Oxford University Press, 1986)

[81] Bruce R. Reichenbach, "Euthanasia and the Active-Passive Distinction", *Bioethics* (January 1987), Volume 1, at pages 51-73

[82] James Rachels (Supra note 23), at pages 101-120

[83] Ibid

[84] Len Doyal and Lesley Doyal, "Why Active Euthanasia and Physician Assisted Suicide Should Be Legalised? If Death Is in a Patient's Best Interest Then Death Constitutes a Moral Good", *British Medical Journal* (2001), at pages 1079-1080.

[85] Ibid

[86] Hazel Biggs (Supra note 21), at Page 162

[87] Ibid

[88] Rohini Shukla, "Passive Euthanasia in India: a critique", *Indian Journal of Medical Ethics* (Jan-Mar 2016), at pages 35-38

[89] Ibid

[90] Aparna Chandra and Mrinal Satish, "Misadventures of the Supreme Court in Aruna Shanbaug v. Union of India", *Law and other Things* (Mar 13, 2011), available at http://lawandotherthings.com/2011/03/misadventures-of-supreme-court-in-aruna/

[91] Roop Gurusahani and Raj Kumar Mani, "India: Not a country to die in", *Indian Journal of Medical Ethics* (Jan-Mar 2016), at pages 30-35.

[92] Sushila Rao (Supra note 16), at pages 646-656

[93] Hazel Biggs (Supra note 21), at page 30

[94] Elizabeth Wicks (Supra note 5), at page 29

[95] Anne J. Davis, "Dilemmas in Practice: To Make Live or Let Die", *The American Journal of Nursing* (March 1981), Vol. 81, No. 3, at page 582

[96] Heike Baranzke, ""Sanctity-of-Life"--A Bioethical Principle for a Right to Life?", *Ethic Theory Moral Practice* (2012), Vol. 15, Issue 3, at page 295

[97] Elizabeth Wicks (Supra note 5), at page 1

[98] Ibid, at page 240

[99] PG Lauren argues that it is "essential to recognise that the moral worth of each person is a belief that no single civilization, or people, or nation, or geographical area, or even century can claim as uniquely its own" See P.G. Lauren, The Evolution of International Human Rights:

Visions Seen (University of Pennsylvania Press, 2003, 2nd edn.), at page 12.), as quoted in Elizabeth Wicks (Supra note 5), at pages 25-29

[100] Elizabeth Wicks (Supra note 5), at page 47

[101] John Keown, *The Law and Ethics of Medicine: Essays on the Inviolability of Human Life* (Oxford University Press, 2012), at page 3

[102] Ibid

[103] Elizabeth Wicks (Supra note 5), at pages 34-35

[104] John Locke, *Two Treatises of Government* (ed. P. Laslett) (Cambridge University Press, 1988)

[105] Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins, 1993), at pages 73-74

[106] Elizabeth Wicks (Supra note 5), at page 32

[107] Ibid, at pages 16-17

[108] John Finnis, *Human Rights and Common Good* (Oxford University Press, 2011), at page 221

[109] John Keown (Supra note 44), at page 4

[110] Ibid

[111] Ibid, at page 5

[112] Ibid, at page 6

[113] Ibid, at page 6

[114] Ibid, at pages 5-6

[115] Ibid, at page 18

[116] Ibid

[117] Ibid

[118] Ibid, at page 13

[119] Elizabeth Wicks (Supra note 5), at p. 176-177

[120] Alan Norrie (Supra note 4), at pages 141-142

[121] Alexandra Mullock, *End-Of-Life Law And Assisted Dying In The 21st Century: Time For Cautious Revolution*? (PhD Thesis, University of Manchester, 2011), at page 24

[122] Luis Kutner, "Euthanasia: Due Process for Death with Dignity; The Living Will", *Indiana Law Journal* (Winter 1979), Vol. 54, Issue, 2, at page 225

[123] Ibid, at pages 201-228

[124] Ibid, at pages 225-226

[125] Sushila Rao, "The Moral Basis for a Right to Die", *Economic & Political Weekly* (April 30, 2011), at page 14

[126] Alexandra Mullock, End-Of-Life Law And Assisted Dying In The 21st Century: Time For Cautious Revolution? (PhD Thesis, University of Manchester, 2011), at page 25

[127] John Keown, "The Legal Revolution: From "Sanctity of Life" to "Quality of Life" and "Autonomy", *Journal of Contemporary Health Law & Policy* (1998), Vol. 14, Issue 2, at page 281

[128] Sushila Rao (Supra note 68), at page 14

[129] James Rachels, (Supra note 23)

[130] Elizabeth Wicks (Supra note 5), at pages 102-149

[131] Margaret A. Somerville, "The Song of Death: The Lyrics of Euthanasia", *Journal of Contemporary Health Law & Policy* (1993), Vol. 9, Issue 1, at page 67.

[132] Ibid, at pages 1-76

[133] Ibid, at page 67

[134] Ibid, at pages 67-68

[135] Ibid

[136] James Rachels (Supra note 23), at page 26

[137] Ibid

[138] Jessica Stern, *Euthanasia and the Terminally Ill* (2013), retrieved from Florida State University Libraries

[139] Roger S. Magnusson, "The Sanctity of Life and the Right to Die: Social and Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States", *Pacific Rim Law & Policy Journal*, Vol. 6, No. I, at page 40

[140] Peter Singer, "Sanctity of Life or Quality of Life", Pediatrics (1983), Vo. 72, Issue 1, at pages 128-129

[141] Ibid, at page 129

[142] Ibid, at page 128

[143] Ibid, at page 129

[144] "Sanctity of life v. quality of life", Los Angeles Times (June 7, 2015), available at http://www.latimes.com/opinion/readersreact/la-le-0607-sunday-assisted-suicide-20150607-story.html

[145] Jessica Stern, Euthanasia and the Terminally Ill (2013), available at https://fsu.digital.flvc.org/islandora/object/fsu:209909/datastream/PDF/view

[146] John Breck, "Euthanasia and the Quality of Life Debate", Christian Bioethics (1995), Vol. 1, No. 3, at pages 322-337

[147] Ibid, at pages 325-326

[148] Michael A Weingarten, "On the sanctity of life", *British Journal of General Practice* (April 2007), Vol. 57(537), at page 333

[149] Alan Norrie (Supra note 4), at page 143

[150] Alecia Pasdera, *The Rhetoric of the Physician-Assisted Suicide Movement: Choosing Death Over Life* (2014), available at https://ou.monmouthcollege.edu/resources/pdf/academics/mjur/2014/Rhetoric-of-the-Physician-Assisted-Suicide-Movement-Choosing-Death-Over-Life.pdf, at page 68

[151] Ibid, at page 69

[152] Ibid, at page 68

[153] Sushila Rao (Supra note 68), at page 15

[154] Arval A. Morris, "Voluntary Euthanasia", *Washington Law Review* (1970), Vol. 45, at page 240

[155] Ibid, at page 243

[156] Elizabeth M. Andal Sorrentino, "The Right To Die?", Journal of Health and Human Resources Administration (Spring, 1986), Vol. 8, No. 4, at pages 361-373

[157] Peter Singer, "The Sanctity of Life", Foreign Policy (October 20, 2009), available at http://foreignpolicy.com/2009/10/20/the-sanctity-of-life/

[158] Lady Justice Arden, *Law of medicine and the individual: current issues, What does patient autonomy mean for the courts?*, (Justice KT Desai Memorial Lecture 2017)

[159] *Great Ormond Street Hospital v. Constance Yates, Christopher Gard, Charlie Gard (by his guardian)*, [2017] EWHC 1909 (Fam)

[160] John Keown (Supra note 44), at page 4

[161] Article 359

[162] Article 21

[163] Stefania Negri, "Universal Human Rights and End-of-Life Care" in S. Negri et al. (eds.), *Advance Care Decision Making in Germany and Italy: A Comparative, European and International Law Perspective*, Springer (2013), at page 18

[164] Ibid, at pages 21-22

[165] Ronald Dworkin, *Life's Dominion* (London: HarperCollins, 1993) as quoted in Deryck Beyleveld and Roger Brownsword, "Human Dignity, Human Rights, and Human Genetics", *Modern Law Review* (1998), Vol. 61, at pages 665-666

[166] Deryck Beyleveld and Roger Brownsword, "Human Dignity, Human Rights, and Human Genetics", *Modern Law Review* (1998), Vol. 61, at page 666

[167] Christopher O. Tollefsen, "Capital Punishment, Sanctity of Life, and Human Dignity", *Public Discourse* (September 16, 2011), available at http://www.thepublicdiscourse.com/2011/09/3985/

[168] Stefania Negri, "Ending Life and Death" in A. den Exter (eds.), *European Health Law*, MAKLU Press (2017), at page 241

[169] Ibid

[170] Arval A. Morris (Supra note 97), at pages 251-252

[171] Ibid

[172] Sebastian Muders, *Autonomy and the Value of Life as Elements of Human Dignity* (Oxford University Press, 2017)

[173] Lawrence O. Gostin, "The Constitutional Right to Die: Ethical Considerations", St John's Journal of Legal Commentary (1997), Vol. 12, at pages 602-603

[174] LW Sumner, "Dignity through Thick and Thin", in Sebastian Muders, Human Dignity and Assisted Death (Oxford University Press, 2017)

[175] Ibid, at page 61

[176] Ibid, at page 64

[177] Ibid, at page 68

[178] Aneeta A Minocha, Arima Mishra and Vivek R Minocha, "Euthanasia: A Social Science Perspective", Economic & Political Weekly (December 3, 2011), at pages 25-28

[179] Ibid, at page 27

[180] Arval A. Morris (Supra note 97), at page 247

[181] Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : (1978) 1 SCC 248

[182] Justice KS Puttaswamy (Retd.) v. Union of India, MANU/SC/1044/2017 : (2017) 10 SCC 1

[183] Richard Delgado, "Euthanasia Reconsidered-The Choice of Death as an Aspect of the Right of Privacy", Arizona Law Review (1975), Vol. 17, at page 474

[184] Ibid

[185] TL Beauchamp, "The Right to Privacy and the Right to Die", *Social Philosophy and Policy* (2000), Vol. 17, at page 276

[186] Ibid

[187] D Benatar (Supra note 18)

[188] Peter J. Riga, "Privacy and the Right to Die," *The Catholic Lawyer* (2017) Vol. 26: No. 2, Article 2

[189] Ibid

[190] Application No. 2346/02

[191] Application No. 31322/07, para 51

[192] Sushila Rao (Supra note 16), at page 654

[193] S. Nagral, "Euthanasia: Cost Factor is a Worry", The Times of India (June 19, 2011), available at http://www.timesofindia.com/home/sunday/Euthanasia-cost-factor-is-a-worry/articleshow/7690155. cms

[194] Ibid

[195] Sushila Rao (Supra note 16), at page 654-655

[196] Alan Norrie (Supra note 4), at page 144

[197] S. Nagral, "Euthanasia: Cost Factor is a Worry", The Times of India (June 19, 2011), available at http://www.timesofindia.com/home/sunday/Euthanasia-cost-factor-is-a-worry/articleshow/7690155. cms

[198] S. Balakrishnan and RK Mani, "The constitutional and legal provisions in Indian law for limiting life support", *Indian Journal of Critical Care Medicine* (2005), Vol. 9, Issue 2, at page 108

[199] "Doctrine of Double Effect", *Stanford Encyclopedia of Philosophy* (July 28, 2004), available at https://plato.stanford.edu/entries/double-effect/

[200] Ibid

[201] Rule 6A, Transplantation of Human Organs and Tissues Act (sic Rule) 1995

[202] Luis Kutner, "Due Process of Euthanasia: The Living Will, a proposal", Indiana Law Journal (1969), Vol. 44, Issue 4, at page 539

[203] "Advance Directives and Substitute Decision-Making", *Stanford Encyclopaedia of Philosophy* (24 March 2009), available at https://plato.standford.edu/entries/advance-directives/

[204] Luis Kutner (Supra note 151), at page 551

[205] Luis Kutner (Supra note 65) at page 226

[206] Luis Kutner (Supra note 151), at page 551

[207] Ibid

[208] "Advance Directives and Substitute Decision-Making", Stanford Encyclopaedia of Philosophy (24 March 2009), available at https://plato.standford.edu/entries/advance-directives/

[209] Hazel Biggs (Supra note 21), at page 115

[210] James C Turner, "Living Wills-Need for legal recognition", *West Virginia Law Review* (1976), Vo. 78, Issue 3, at page 370

[211] A.S. Kessel and J Meran, "Advance directives in the UK: legal, ethical, and practical considerations for doctors", *British Journal of General Practice* (1998), at page 1263

[212] Ibid

[213] "Are advance directives legally binding or simply the starting point for discussion on patients' best interests?", BMJ (28 November 2009), Volume 339, page 1231

[214] Re T (Adult: Refusal of Treatment) [1942] 4 All ER 649; Re C (Adult: Refusal of Medical Treatment)[1994] 1 All ER 819; St George's Healthcare NHS Trust v. S [1998] 3 WLR 936

[215] Elizabeth Wicks, The State *and the Body: Legal Regulation of Bodily Autonomy, Hart Publishing* (2016)

[216] Alexander Ruck Keene, "Advance Decisions: getting it right?", available at http://www.39essex.com/docs/articles/advance_decisions_paper_ark_december_2012.pdf

[217] Section 1, Mental Capacity Act 2005

[218] Section 26(4), Mental Capacity Act 2005

[219] Section 26(3), Mental Capacity Act 2005

[220] Section 4, Mental Capacity Act 2005

[221] Elizabeth Wicks (Supra note 165), at page 69

[222] Elizabeth Wicks (Supra note 165), at page 69

[223] Ibid

[224] Ibid, at page 71

[225] Section 5(1), Mental Healthcare Act, 2017 (India)

[226] Section 5(3), Mental Healthcare Act, 2017 (India)

[227] Section 6, Mental Healthcare Act, 2017 (India)

[228] Section 7, Mental Healthcare Act, 2017 (India)

[229] Section 8(1), Mental Healthcare Act, 2017 (India)

[230] Section 9, Mental Healthcare Act, 2017 (India)

[231] Section 10, Mental Healthcare Act, 2017 (India)

[232] Section 11(2), Mental Healthcare Act, 2017 (India)

[233] Section 11(3), Mental Healthcare Act, 2017 (India)

[234] Section 11(4), Mental Healthcare Act, 2017 (India)

[235] Section 13(1), Mental Healthcare Act, 2017 (India)

[236] Section 2, Mental Capacity Act 2005 (UK)

[237] Section 4, Mental Healthcare Act, 2017 (India)

[238] Section 24, Mental Capacity Act, 2005 (UK)

[239] A parent acting on behalf of his child cannot make such a declaration.

[240] Luis Kutner (Supra note 65), at page 228

[241] Section 25(3), Mental Capacity Act 2005 (UK)

[242] Section 25(4) (a), Mental Capacity Act 2005 (UK)

[243] Section 25(4) (b), Mental Capacity Act 2005 (UK)

[244] Section 25(4) (c), Mental Capacity Act 2005 (UK)

[245] Section 25 (5) and (6), Mental Capacity Act 2005 (UK)

[246] Section 26(3), Mental Capacity Act 2005 (UK)

[247] Alexander Ruck Keene, "Advance Decisions: getting it right?", available at http://www.39essex.com/docs/articles/advance_decisions_paper_ark_december_2012.pdf

[248] "Advance Directives And Advance Care Planning: Legal And Policy Issues", U.S. Department of Health and Human Services (October 2007), available at https://aspe.hhs.gov/system/files/pdf/75366/adacplpi.pdf, at page 1

Back to Index

MANU/SC/7480/2008

Neutral Citation: 2008/INSC/485

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 580 of 2003

Decided On: 11.04.2008

Appellants: Common Cause (A Regd. Society) V**s.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

H.K. Sema and Markandey Katju, JJ.

Subject: Constitution

Relevant Section:

Motor Vehicles Act, 1988 - Section 112; Motor Vehicles Act, 1988 - Section 115, Motor Vehicles Act, 1988 - Section 116, Motor Vehicles Act, 1988 - Section 117

Authorities Referred:

Judicial Activism in India - Transgressing Borders and Enforcing Limits, Professor S.P. Sathe; Cardozo's 'The Nature of the Judicial Process'

Disposition:
Petition Dismissed

Case Note:

Constitution of India - Article 32--Public Interest Litigation(P.I.L.)--P.I.L. seeking mandamus to U.O.I. and State Governments regarding road safety, control of vehicular traffic--Both Sema and Katju, JJ. agreed that writ petition was liable to be dismissed--As Motor Vehicles Act was comprehensive enactment on subject--And if there was any lacuna or defect in Act--It was for Legislature and not for court to correct it by suitable amendment -- However, Sema, J. dissociated himself from general observations of Katju, J.--Expressing serious doubts about jurisdiction of Supreme Court entertaining petition in form of P.I.L.

Ratio Decidendi:

Court cannot direct legislation

JUDGMENT

H.K. Sema, J.

1. This petition has been filed in the form of public interest litigation by Common Cause (A Registered Society) through its Director Shri H.D. Shourie r/o A-31, West End, New Delhi.

2. At the risk of Writ Petition, the petitioner sought for the following reliefs:

(i) to issue a Writ, direction or order in the nature of mandamus and/or any other writ, direction or order directing the Respondent No. 1, in consultation with representatives of the Respondent Nos. 2, 3, 4, 5 & 6 and also representatives of other States/UTs:--

(a) to set up fully satisfactory procedures of licensing of vehicles and licensing of drivers, for ensuring that the vehicles are fully equipped with all the safety travel requirements, and also ensure that drivers of private vehicles as well as drivers of public vehicles including buses and trucks, are fully trained and are competent to drive the respective types of vehicles, and to also organize high-level training arrangements for the drivers of respective types of vehicles; appropriate procedures should also be ensured for suspension/cancellation of driving licences in the event of any default or for involvement in any accident;

(b) to ensure provision of all infrastructural requirements of roads, including signs, signals, footpaths, repairs of roads, and all such other requirements which will help to minimise risks of accidents on the roads;

(c) to set up methodology and requirements for undertaking scientific analysis of every accident, for ensuring that similar causes do not recur which can lead to accidents, thereby minimizing the possibilities of accidents;

(d) to establish suitable organizations for providing education to all types of users of roads, through experts as well as use of suitably devised visual and audio media;

(e) to ensure the availability of ambulances for immediate removal of injured persons to hospitals;

(f) to set up Committees of Experts in each State/UT and in the bigger cities for dealing with these various requirements for minimization of accidents on the roads;

(ii) to direct Respondent No. 1 to formulate a suitable Road Traffic Safety Act to meet effectively the various requirements for minimization of road accidents; and

(iii) to pass such other and further orders as may be deemed necessary to deal effectively with the various matters relating to traffic safety on the roads and minimization of road accidents, on the facts and in the circumstances of the case.

3. I had the privilege of going through the erudite judgment prepared by my learned brother Justice Katju and I respectfully agree with the conclusion reached by my brother Katju that the Writ Petition be dismissed. While coming to this conclusion brother Katju was of the opinion that the Motor Vehicles Act is a comprehensive enactment on the subject. He was further of the opinion that if there is lacuna or defect in the Act it is for the legislature to correct it by a suitable amendment and not by the Court. I am also of the view that the relief sought for in this Writ Petition is adequately taken care of by the Motor Vehicles Act itself and if there is any lacuna or defect, it is the legislature to correct it by amending the Act and not the Court.

4. I however, respectfully dissociating myself from certain general observations of my learned brother in paragraphs 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53 and 55 in the judgment, expressing doubts about the jurisdiction of this Court entertaining the petition in the form of public interest litigation.

5. I also respectfully disagree with certain observations made by a two-Judge Bench of this Court in the case of Divisional Manager, Aravali Golf Course & Anr. v. Chander Hass, JT 2008 (3) SC 221, as referred to by my learned brother in Para 8 of his judgment.

6. In the case of Union of India vs. Association for Democratic Reforms, and another MANU/SC/0394/2002 : (2002) 5 SCC 294, raised the substantial question of law of public importance was whether in a nation constitutionally wedded to republican and democratic form of Government, where election as a Member of Parliament or as a Member of Legislative Assembly is of utmost importance for democratic form of the country, before casting votes, voters have a right to know relevant particulars of their candidates; and whether the High Court had jurisdiction to issue directions in a Writ Petition filed under Article 226 of the Constitution of India? The High Court of Delhi entertained the writ petition and directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to Parliament and to the State Legislatures and the parties they represent:

1. Whether the candidate is accused of any offence(s) punishable with imprisonment. If so, the details thereof.

2. Assets possessed by a candidate, his or her spouse and dependent relations.

3. Facts giving insight into the candidate's competence, capacity and suitability for acting as a parliamentarian or a legislator including details of his/her educational qualifications.

4. Information which the Election Commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

7. Aggrieved by the aforesaid direction of the High Court, an appeal was filed before the Supreme Court by the Union of India. A three-Judge Bench of this Court, of which one of us was a party (Sema, J.), in Union of India vs. Association for Democratic Reforms and Another (supra) upheld the direction, repelling the arguments of the appellant, this Court held:

The Supreme Court cannot give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case, when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till a suitable law is enacted.

(Emphasis supplied)

8. Further, in paragraph 46 (6) of the judgment it is held:

46(6). On cumulative reading of a plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue., necessary directions to the executive to subserve public interest.

(Emphasis supplied)

9. Therefore, whether to entertain the petition in the form of Public Interest Litigation either represented by public-spirited person; or private interest litigation in the guise of public interest litigation; or publicity interest litigation; or political interest litigation is to be examined in the facts and circumstances recited in the petition itself. I am also of the view that if there is a buffer zone unoccupied by the legislature or executive which is detrimental to the public interest, judiciary must occupy the field to subserve public interest. Therefore, each case has to be examined on its own facts.

10. In my considered opinion, therefore, the blanket bar of the application in the form of PIL is obviated. Subject to aforesaid. I agree with the conclusion of my learned Brother that the petition be dismissed.

Markandey Katju, J.

11. This writ petition under Article 32 of the Constitution furnishes a typical illustration of how public interest litigation which was conceived and created as a judicial tool by the courts in this country for helping the poor, weaker and oppressed sections of society, who could not approach the court due to their poverty, has over the years grown and grown, and now it seems to have gone totally out of control, and has become something so strange and bizarre that those who had created it probably would be shocked to know what it has become.

12. The petitioner is a society registered under the Societies Registration Act which claims to be engaged in espousing problems of general public importance.

13. In the present case, the petitioner has referred to the rising number of road accidents in the country which are taking place in cities, towns and on national highways causing deaths, injuries etc. The petitioner has referred to the defects in the licensing procedure, the training of drivers, and the need for suspending licences in case of negligent driving, and driving under the influence

of alcohol, which cause accidents etc. He has also referred to the inadequate infrastructure relating to roads and inadequate provisions of traffic control devices including traffic signals, traffic signs, road devices and other road safety measures. It has been stated in the petition that there should be proper and continuous coordination between various authorities which are connected with roads and control of traffic, and for this purpose the only appropriate remedy is to establish Road Safety Committees. The petitioner has also emphasized the need for having readily available ambulances for shifting the injured persons in road accidents to hospitals for immediate treatment.

14. The petitioner has also stated that there should be road safety education for the users of roads, pedestrians, traffic participants including cyclists, handcarts men, bullock- cart drivers etc., who generally have low socio-economic and educational background and do not know traffic rules and regulations. The petitioner has alleged that pedestrians and non- motorized traffic face enormous risks as they account for 60% to 80% of road traffic fatalities in the country. All non-motorized traffic need to be given thorough and repeated orientation in observance of road traffic rules and avoidance of any situations which can cause accidents. These road safety education programmes can include written material for those who are literate and also illustrations, slides, specially prepared films, and also publicity though the medium of TV and radio.

15. The petitioner has also alleged that there is a paramount need for enactment of a Road Traffic Safety Act to lay down regulations dealing with specific responsibilities of drivers, proper maintenance of roads and traffic-connected signs and signals etc., and all rules and regulations for observance by all concerned including pedestrians and non-motorized traffic. The Road Traffic Safety Act should contain all the regulations and the requirements relating to avoidance of accidents, responsibilities of respective Departments of State Governments, Municipal bodies, Police authorities, and the penalty for non-observance of prescribed regulations. The Act should specify the duties, responsibilities, rights, directives and punishments in case of failures by any one e.g. driver, vehicle, road user, etc.

16. The petitioner has alleged that the number of accidents has increased greatly over the years in India and hence he has filed this writ petition with the following prayers:

(i) to issue a Writ, direction or order in the nature of mandamus and/or any other writ, direction or order directing respondent No. 1 (the Union of India) in consultation with representatives of respondent Nos. 2, 3, 4, 5 & 6 (the Government of NCT of Delhi, and the State Governments of Maharashtra, Tamil nadu, West Bengal and Karnataka) and also representatives of other States/UTs:

(a) to set up fully satisfactory procedures of licensing of vehicles and licensing of drivers, for ensuring that the vehicles are fully equipped with all the safety travel requirements, and also ensure that drivers of private vehicles as well as drivers of public vehicles including buses and trucks, are fully trained and are competent to drive the respective types of vehicles, and also to organize high-level training arrangements for the drivers of respective types of vehicles; appropriate procedures for suspension/cancellation of driving licenses in the event of any default or for involvement in any accident;

(b) to ensure provision of all infrastructural requirements of roads, including signs, signals, footpaths, repairs of roads, and all such other requirements which will help to minimize risks of accidents on the roads;

(c) to set up methodology and requirements for undertaking scientific analysis of every accident, for ensuring that similar causes do not recur which can lead to accidents, thereby minimizing the possibilities of accidents;

(d) to establish suitable organizations for providing education to all types of users of roads, through experts as well as use of suitably devised visual and audio media;

(e) to ensure the availability of ambulances for immediate removal of injured persons to hospitals;

(f) to set up Committees of Experts in each State/UT and in the bigger cities for dealing with these various requirements for minimization of accidents on the roads;

(ii) to direct respondent No. 1 to formulate a suitable Road Traffic Safety Act to meet effectively the various requirements for minimization of road accidents; and

(iii) to pass such other and further orders as may be deemed necessary to deal effectively with the various matters relating to traffic safety on the roads and minimization of road accidents, on the facts and in the circumstances of the case.

17. Shri Prashant Bhushan, learned Counsel for the petitioner has relied on the decision of the three Judge Bench of this Court in **M.C. Mehta** v. **Union of India** MANU/SC/1368/1997 : (1997)8SCC770 in which the following directions have been given:

A. the Police and all other authorities entrusted with the administration and enforcement of the Motor Vehicles Act and generally with the control of the traffic shall ensure the following:

(a) No heavy and medium transport vehicles, and light goods vehicle being four wheelers would be permitted to operate on the roads of the NCR and NCT, Delhi, unless they are fitted with suitable speed control devices to ensure that they do not exceed the speed limit of 40 KMPH. This will not apply to transport vehicles operating on Inter-State permits and national goods permits. Such exempted vehicles would, however, be confined to such routes and such timings during day and night as the police/transport authorities may publish. It is made clear that no vehicle would be permitted on roads other than the aforementioned exempted roads or during the times other than the aforesaid time without a speed control device.

(b) In our view the scheme of the Act necessarily implies an obligation to use the vehicle in a manner which does not imperil public safety. The authorities aforesaid should, therefore, ensure that the transport vehicles are not permitted to overtake any other four- wheel motorized vehicle.

(c) They will also ensure that wherever it exists, buses shall be confined to the buss lane and equally no other motorized vehicle is permitted to enter upon the bus lane. We direct the Municipal Corporation of Delhi, NDMC, PWD, Delhi Government and DDA, Union Government and the

Delhi Cantt. Board to take steps to ensure that bus lanes are segregated and roads markings are provided on all such roads as may be directed by the police and transport authorities.

(d) They will ensure that buses halt only at bus stops designated for the purpose and within the marked area. In this connection also Municipal Corporation of Delhi, NDMC, PWD, Delhi Cantt. Board would take all steps to have appropriate bus stops constructed, appropriate markings made, and 'bus-bays' built at such places as may be indicated by transport/police authorities.

(e) Any breach of the aforesaid directions by any person would, apart from entailing other legal consequences, be dealt with as contravention of the conditions of the permit which could entail suspension/cancellation of the permit and impounding of the vehicle.

(f) Every holder of a permit issued by any of the road transport authorities in the NCR and NCT, Delhi will within ten days from today, file with its RTA a list of drivers who are engaged by him together with suitable photographs and other particulars to establish the identity of such persons. Every vehicle shall carry a suitable photograph of the authorized driver, duly certified by the RTA. Any vehicle being driven by a person other than the authorized driver shall be treated as being used in contravention of the permit and the consequences would accordingly follow.

No bus belonging to or hired by an educational institution shall be driven by a driver who has

- less than ten years of experience;

- been challaned more than twice for a minor traffic offence;

- been charged for any offence relating to rash and negligent driving.

All such drivers would be dressed in a distinctive uniform, and all such buses shall carry a suitable inscription to indicate that they are in the duty of an educational institution.

(g) To enforce these directions, flying squads made up of inter-departmental teams headed by an SDM shall be constituted and they shall exercise powers under Section 207 as well as Section 84 of the Motor Vehicles Act.

The Government is directed to notify under Section 86(4) the officers of the rank of Assistant Commissioners of Police or above so that these officers are also utilized for constituting the flying squads.

(h) We direct the police and transport authorities to consider immediately the problems arising out of congestion caused by different kinds of motorized and non-motorized vehicles using the same roads. For this purpose, we direct the police and transport authorities to identify those roads which they consider appropriate to be confined only to motorized traffic including certain kind of motorized traffic and identify those roads which they consider unfit for use by motorized or certain kinds of motorized traffic and to issue suitable directions to exclude the undesirable form of traffic from those roads.

(i) The civil authorities including DDA, the railways, the police and transport authorities, are directed to identify and remove all hoardings which are on roadsides and which are hazardous and a disturbance to safe traffic movement. In addition, steps be taken to put up road/traffic signs which facilitate free flow of traffic.

B. We direct the Union of India to ensure that the contents of this Order are suitably publicized in the print as well as the electronic media not later than November 22, 1997 so that everybody is made aware of the directions contained in the Order. Such publication would be sufficient public notice to all concerned for due compliance.

18. In our opinion the prayers made by the petitioner in this petition require us to give directions of a legislative or executive nature which can only be given by the legislature or executive. As held by this Court in **Divisional Manager, Aravali Golf Course and Anr.** v. **Chander Hass** MANU/SC/4463/2007 : 2007(14)SCALE1 , the judiciary cannot encroach into the domain of the legislature or executive. The doctrine of separation of powers has been discussed in great detail in the aforesaid decision, and we endorse the views expressed therein.

19. We are fully conscious of the fact that the decision cited by Shri Prashant Bhushan viz. **M.C. Mehta** v. **Union of India** (supra), is a decision of a three Judge Bench of this Court and would ordinarily have been binding on us since our Bench consists of two Judges. However, a subsequent seven Judge Bench decision this Court in **P. Ramachandra Rao** v. **State of Karnataka** MANU/SC/0328/2002 : 2002CriLJ2547 has taken the view that such directions cannot be given. In para 26 of the aforesaid decision of the seven Judge Bench in **P. Ramachandra Rao's** case (supra), it was observed:

Professor S.P. Sathe, in his recent work (year 2002) *Judicial Activism in India - Transgressing Borders and Enforcing Limits*, touches the topic *"Directions: A new Form of Judicial Legislation."* Evaluating legitimacy of judicial activism, the learned author has cautioned against court "legislating" exactly in the way in which a legislature legislates and he observes by reference to a few cases that the guidelines laid down by court, at times, cross the border of judicial law- making in the realist sense and trench upon legislating like a legislature.

Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court.

In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law...through directions...is not a legitimate judicial function.

(emphasis supplied)

20. The aforesaid seven Judge Bench decision of this Court in **P. Ramachandra Rao's** case (supra) has referred with approval the observations made in the book ***'Judicial Activism in India - Transgressing Borders Enforcing Limits'*** by Prof. S.P. Sathe. In that book the learned author has referred to the directions of a legislative nature given by various two Judge and three Judge Bench decisions of this Court in P.I.Ls. The learned author has remarked that these were not legitimate exercise of judicial power.

21. The position has thus been clarified by the seven Judge Bench decision of this Court in **P. Ramachandra Rao's** case (supra) which has clearly observed (in paras 22-27) that giving directions of a legislative nature is not a legitimate judicial function. A seven Judge Bench decision of this Court will clearly prevail over smaller Bench decisions.

22. In **P. Ramachandra Rao's** case (supra), the question considered by the seven Judge Bench was whether the bar of limitation for criminal trials fixed by smaller Benches of this Court in **Common Cause** v. **Union of India** MANU/SC/1152/1996 : 1996CriLJ2380 , **Rajdeo Sharma (I)** v. **State of Bihar** MANU/SC/0640/1998 : 1998CriLJ4596 and **Rajdeo Sharma (II)** v. **State of Bihar** MANU/SC/0607/1999 : 1999CriLJ4541 was valid. The seven Judge Bench of this Court was of the view that the directions given by the smaller Benches decisions mentioned above were invalid as they amounted to directions of a legislative nature which only the legislature could give.

23. In the aforesaid decisions of smaller Benches (which were overruled by the seven Judge Bench decision in **P. Ramachandra Rao's** case) the Courts were concerned with delay in disposal of criminal cases, particularly since the right to a speedy trial had been held to be part of Article 21 of the Constitution by a seven Judge Bench decision of this Court in **A.R. Antulay** v. **R.S. Nayak** MANU/SC/0002/1988 : 1988CriLJ1661 .

24. Following **Antulay's** case, a two Judge Bench of this Court in **Common Cause** v. **Union of India** MANU/SC/1152/1996 : 1996CriLJ2380 held that if there was delay in disposal of certain kinds of criminal cases beyond a period specified by the Court the accused must be released on bail, and in certain other kinds of cases the criminal case itself should be closed. Thus by judicial verdict the Bench fixed a limitation period in certain kinds of criminal cases.

25. Thereafter in **Rajdeo Sharma (I)** v. **State of Bihar** MANU/SC/0640/1998 : 1998CriLJ4596 , a three Judge Bench of this Court directed that in certain kinds of criminal cases the trial court shall close the prosecution evidence on completion of a certain period from the date of recording the plea of the accused on the charges framed, and in certain cases if the accused has been in jail for at least half the maximum period of punishment prescribed he shall be released on bail.

26. In **Rajdeo Sharma (II)** v. **State of Bihar** MANU/SC/0607/1999 : 1999CriLJ4541 a three Judge Bench of this Court clarified certain directives in **Rajdeo Sharma (I)** v. **State of Bihar** (supra).

27. The correctness of the aforesaid three decisions of this Court was considered by the seven Judge Constitution Bench in **P. Ramachandra Rao's** case (supra) and the seven Judge Bench held

that these decisions were incorrect as they amounted to impermissible legislation by the judiciary (vide para 23). The seven Judge Bench was of the view that in its zeal to protect the right to speedy trial of an accused the Court cannot devise and enact bars of limitation when the legislature and statute have chosen not to do so. In paragraphs 26 and 27 of the judgment in **P. Ramachandra Rao's** case (supra) the seven Judge Bench of this Court has clearly held that directives of a legislative nature cannot be given by the Court, since legislation is the task of the legislature and not of the Court.

28. Before proceeding further, we would like to make it clear that we are not against all judicial activism. Judicial activism can be both legitimate as well as illegitimate. For example, when the Courts have given an expanded meaning of Articles 14 and 21 of the Constitution vide **Maneka Gandhi** v. **Union of India** MANU/SC/0133/1978 : [1978]2SCR621 , it was a case of legitimate judicial activism because the Court gave a wider meaning to Articles 14 and 21 in the light of the new developments in the country. This was a perfectly legitimate exercise of power.

29. However, as pointed out by the seven Judge Bench decision of this Court in **P. Ramachandra Rao's** case (supra), when Judges by judicial decisions lay down a new principle of law of the nature specifically reserved for the legislature, they legislate, and not merely declare the law (vide para 22 of the decision in **P. Ramachandra Rao's** case). This is an illegitimate exercise of power and many such illustrations of illegitimate exercise of judicial power have been given in Prof. S.P. Sathe's book 'Judicial Activism in India' which has been referred to with approval by the seven Judge Bench decision of this Court.

30. These are instances of judicial excessivism that fly in the face of the doctrine of separation of powers which has been broadly (though not strictly), envisaged by the Constitution vide **Divisional Manager, Aravali Golf Club and Anr.** v. **Chander Hass and Anr.** MANU/SC/4463/2007 : 2007(14)SCALE1 , **Asif Hameed** v. **State of Jammu & Kashmir** MANU/SC/0036/1989 : [1989]3SCR19 etc. In other words, while expansion of the meanings of statutory or constitutional provisions by judicial interpretation is a legitimate judicial function, the making of a new law which the Courts in this country have sometimes done, is not a legitimate judicial function. The Courts of the country have sometimes clearly crossed the limits of the judicial function and have taken over functions which really belongs either to the legislature or to the executive. This is unconstitutional. If there is a law, Judges can certainly enforce it. But Judges cannot create a law by judicial verdict and seek to enforce it.

31. Moreover, it must be realized by the courts that they are not equipped with the skills, expertise or resources to discharge the functions that belong to the other co-ordinate organs of the government (the legislature and executive). Its institutional equipment is wholly inadequate for undertaking legislation or administrative functions.

32. As observed by Hon'ble Dr. Justice A.S. Anand, former Chief Justice of India:

Courts have to function within the established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. Policy matters, fiscal, educational or otherwise, are thus best left to the judgment

of the executive. The danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will, in the ultimate analysis, be counter productive and undermine the credibility of the institution. Courts cannot "create rights" where none exists nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles. With a view to see that judicial activism does not become "judicial adventurism", the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile - failure to bear this in mind would lead to chaos. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. It needs to be remembered that courts cannot run the government. The judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties.

33. We respectfully agree with the views stated above.

34. Before proceeding further, we may state that the Motor Vehicles Act is a comprehensive enactment on the subject. If there is a lacuna or defect in the Act, it is for the legislature to correct it by a suitable amendment and not by the Court. What the petitioner really prays for in this petition is for various directions which would be legislative in nature, as they would amount to amending the Act.

35. In **Union of India and Anr.** v. **Deoki Nandan Aggarwal** MANU/SC/0013/1992 : [1991]3SCR873 a three Judge Bench of this Court observed (vide paragraph 14):

It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme will not also come under the principle of affirmative action adopted by courts sometimes in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power.

36. This Court cannot direct legislation vide **Union of India** v. **Prakash P. Hinduja** MANU/SC/0446/2003 : 2003CriLJ3117 and it cannot legislate vide **Sanjay Kumar** v. **State of U.P.** MANU/SC/0968/2006 : AIR2006SC3517, **Vera reddy Kumaraswamy Reddy** v. **State of A.P.** MANU/SC/0968/2006 : AIR2006SC3517 , **Suresh Seth** v. **Commr. Indore Municipal Corporation** MANU/SC/2491/2005 : AIR2006SC767 and **Union of India** v. **Deoki Nandan Aggarwal** MANU/SC/0013/1992 : [1991]3SCR873 .

37. The Court should not encroach into the sphere of the other organs of the State vide **N.K. Prasada** v. **Govt. of India** MANU/SC/0375/2004 : (2004)6SCC299 .

38. Thus in **Supreme Court Employees' Welfare Assn.** v. **Union India** MANU/SC/0582/1989 : (1989)IILLJ506SC this Court observed:

There can be no doubt that an authority exercising legislative function cannot be directed to do a particular act. Similarly the President of India cannot be directed by the court to grant approval to the proposals made by the Registrar General of the Supreme Court, presumably on the direction of the Chief Justice of India.

39. In **Union of India** v. **Assn. for Democratic Reforms** MANU/SC/0394/2002 : [2002]3SCR696 this Court observed : (SCC p. 309, para 19):

19. At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

40. In **Union of India** v. **Prakash P. Hinduja** MANU/SC/0446/2003 : 2003CriLJ3117 this Court observed (SCC pp. 216-17, para 30):

Under our constitutional scheme Parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in **State of J & K** v. **A.R. Zakki** MANU/SC/0293/1992 : AIR1992SC1546 .

41. A perusal of the prayers made in this writ petition (which have been quoted above) clearly shows that what the petitioner wants us to do is legislation by amending the law. In our opinion, this will not be a legitimate judicial function. The petitioner has prayed that we direct the Union of India to formulate a suitable Road Traffic Safety Act, but it is well settled that the Court cannot direct legislation. In fact, there is already a Road Safety Council as contemplated by Section 215 of the Motor Vehicles Act, reference of which has been made in the counter affidavit of the Central Government in which it has been stated that Central Government has constituted a National Road Safety Council which has held various meetings. It is an apex body comprising of Transport Ministers of various States and Union Territories, DG Police of various States/Union Territories, representatives of various Central Ministries and agencies apart from NGOs and experts in the field of road safety. In the deliberations of National Road Safety Council suggestions received from various quarters as also the measures being taken by the Ministry regarding road safety as also the areas of concern have been considered. In the counter affidavit, various other steps taken by the respondent No. 1 regarding road safety have also been mentioned in detail. Some of the other respondents have also filed their counter affidavits mentioning the measures taken for road safety, and we have perused the same.

42. In **Suresh Seth** v. **Commissioner, Indore Municipal Corporation and Ors.** MANU/SC/2491/2005 : AIR2006SC767 , a three Judge Bench of this Court rejected the petitioner's prayer that appropriate amendment be made to the M.P. Municipal Corporation Act, 1956 debarring a person from holding two elected offices viz. that of a member of the Legislative Assembly and also of Mayor of a Municipal Corporation. The Court observed:

That apart this Court cannot issue any direction to the Legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power or authority to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees Welfare Association v. Union of India MANU/SC/0582/1989 : (1989)IILLJ506SC it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority.

43. In **Bal Ram Bali and Anr.** v. **Union of India** MANU/SC/3387/2007 : AIR2007SC3074 , a petition under Article 32 was filed praying for a mandamus directing for a total ban of slaughtering of cows, horses, buffaloes, etc. Rejecting this contention this Court observed:

It is not within the domain of the Court to issue a direction for ban on slaughter of cows, buffaloes and horses as it is a matter of policy on which decision has to be taken by the Government. That apart, a complete ban on slaughter of cows, buffaloes and horses, as sought in the present petition, can only be imposed by legislation enacted by the appropriate legislature. Courts cannot issue any direction to the Parliament or to the State legislature to enact a particular kind of law.

44. As observed by a three Judge Bench of this Court in **Institute of Chartered Accountants of India** v. **Price Waterhouse and Anr.** MANU/SC/1233/1997 : (1997)6SCC312 , Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed.

45. In **Madhu Kishwar and Ors.** v. **State of Bihar and Ors.** MANU/SC/0468/1996 : AIR1996SC1864 , this Court observed that the Court is not fully equipped to cope with the details and intricacies of the legislative subject, and it can at best advise and focus attention on the State policy on a problem and shake it from its slumber, goading it to awaken, march and reach the goal. Thus, the Court can play a catalytic role with regard to the social and economic problems of the people. However, whatever the concern of the Court, it has to apply somewhere and at sometimes brakes to its self-motion, described in judicial parlance as judicial self-restraint. In particular, Courts must not legislate or perform executive functions.

46. We would also like to advert to orders by some Courts appointing committees giving these committees power to issue orders to the authorities or to the public. This is wholly unconstitutional. The power to issue a mandamus or injunction is only with the Court. The Court cannot abdicate its function by handing over its powers under the Constitution or the C.P.C. or Cr.P.C. to a person or committee appointed by it. Such 'outsourcing' of judicial functions is not only illegal and

unconstitutional, it is also giving rise to adverse public comment due to the alleged despotic behaviour of these committees and some other allegations. A committee can be appointed by the Court to gather some information and/or give some suggestions to the Court on a matter pending before it, but the Court cannot arm such a committee to issue orders which only a Court can do.

47. We have gone deep into the subject of judicial activism and public interest litigation because it is often found that courts do not realize their own limits. Apart from the doctrine of separation of powers, courts must realize that there are many problems before the country which courts cannot solve, however much they may like to. It is true that the expanded scope of Articles 14 and 21 which has been created by this Court in various judicial decisions e.g. **Smt. Maneka Gandhi** v. **Union of India and Anr.** MANU/SC/0133/1978 : [1978]2SCR621 , have given powerful tools in the hands of the judiciary. However, these tools must be used with great circumspection and in exceptional cases and not as a routine manner. In particular, Article 21 of the Constitution must not be misused by the Courts to justify every kind of directive, or to grant every kind of claim of the petitioner. For instance, this Court has held that the right to life under Article 21 does not mean mere animal existence, but includes the right to live with dignity vide **Olga Tellis** v. **Bombay Corporation** MANU/SC/0039/1985 : AIR1986SC180 , **D.T.C.** v. **D.T.C. Mazdoor Congress Union** MANU/SC/0031/1991 : (1991)ILLJ395SC , **Francis Coralie Mullin** v. **Union Territory Delhi Administrator** AIR 1981 SC 746. However, these decisions must be understood in a balanced way and not in an unrealistic sense. For example, there is a great deal of poverty in this country and poverty is destructive of most of the rights including the right to a dignified life. Can then the Court issue a general directive that poverty be abolished from the country because it violates Article 21 of the Constitution? Similarly, can the Court issue a directive that unemployment be abolished by giving everybody a suitable job? Can the Court stop price rise which now- a-days has become an alarming phenomenon in our country? Can the Court issue a directive that corruption be abolished from the country? Article 21 is not a 'brahmastra' for the judiciary to justify every kind of directive.

48. The concern of the petitioner is that many people die in road accident. But many people also die due to murders. Should then the Court issue a general directive that murders be not committed in the country? And how would such a directive (even if issued) be implemented?

49. We would be very happy to issue such directives if they could really be implementable. However, the truth is that they are not implementable (for various reasons, particularly lack of financial and other resources and expertise in the matter). For instance, the directives issued by this Court regarding road safety in **M.C. Mehta's** case (supra) hardly seem to have had any effect because everyday we read in the newspapers or see the news on TV about Blueline buses killing or injuring people. In the Hawala case (**Vineet Narain** v. **Union of India** MANU/SC/0827/1998 : 1998CriLJ1208) a valiant effort was made by this Court to check corruption, but has it made even a dent on the rampant corruption prevailing in the country? It is well settled that futile writs should not be issued by the Court.

50. The justification given for judicial activism is that the executive and legislature have failed in performing their functions. Even if this allegation is true, does it justify the judiciary in taking over the functions of the legislature or executive? In our opinion it does not, firstly because that would be in violation of the high constitutional principle of separation of powers between the three organs

of the State, and secondly because the judiciary has neither the expertise nor the resources for this. If the legislature or executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfill their expectations, or by other lawful means e.g. peaceful demonstrations and agitations, but the remedy is surely not by the judiciary in taking over the functions of the other organs.

51. In **Ram Jawaya** v. **State of Punjab** MANU/SC/0011/1955 : [1955]2SCR225 , a Constitution Bench of this Court observed:

The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another

(emphasis supplied)

52. Similarly, in **Asif Hameed** v. **State of Jammu and Kashmir** MANU/SC/0036/1989 : [1989]3SCR19 a three Judge Bench of this Court observed (vide paragraphs 17 to 19):

Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint.

Frankfurter, J. of the U.S. Supreme Court dissenting in the controversial expatriation case of Trop v. Dulles (1958) 356 US 86 observed as under:

All power is, in Madison's phrase, "of an encroaching nature". Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self restraint...

(emphasis supplied)

53. The directives sought for in this petition require the expertise of administrative and technical officials, apart from financial resources. Not only should the Court not give such directives because that would violate the principle of separation of powers, but also because these are highly technical matters to be left to be dealt with by administrative and technical authorities who have experience and expertise in the matter. For instance, what should be the maximum permissible speed for vehicles in a city, where should speed breakers be fixed, when should heavy vehicles be allowed on roads, and other matters for ensuring road safety are all matters to be dealt with by the concerned authorities under the Motor Vehicles Act and other enactments, and it would be wholly inappropriate for the judiciary to meddle in such matters. Decisions on such matters by the judiciary land the administrative agencies in practical difficulties and make them bear the brunt of the decisions of the Court some of which are wholly oblivious to administrative needs and as such ill conceived.

54. Moreover, if once the Courts take upon themselves the task of issuing ukases as to how administrative agencies should function, what is there to prevent them from issuing directions as to how the State Government or Central Government should administer the State and run the country? In our opinion such an approach would not only disturb the delicate balance of powers between the three wings of the State, it would also strike at the very basis of our democratic polity which postulates that the governance of the country should be carried on by the executive enjoying the confidence of the legislature which is answerable and accountable to the people at the time of elections. Such an approach would in our opinion result in judicial oligarchy dethroning democratic supremacy.

55. In our opinion the Court should not assume such awesome responsibility even on a limited scale. The country can ill afford to be governed through court decrees. Any such attempt will not only be grossly undemocratic, it would be most hazardous as the Courts do not have the expertise or resources in this connection. The judiciary is not in a position to provide solutions to each and every problem, although human ingenuity would not be lacking to give it some kind of shape or semblance of a legal or constitutional right, e.g. by resorting to Article 21.

56. When other agencies or wings of the State overstep their constitutional limits, the aggrieved parties can always approach the courts and seek redress against such transgression. If, however, the court itself becomes guilty of such transgression, to which forum would the aggrieved party appeal? As the ancient Romans used to say "Who will guard the Praetorian guards?" The only check on the courts is its own self restraint.

57. The worst result of judicial activism is unpredictability. Unless Judges exercise self restraint, each Judge can become a law unto himself and issue directions according to his own personal fancies, which will create chaos.

58. It must be remembered that a Judge has to dispense justice according to the law and the Constitution. He cannot ask the other branches of the State to keep within their constitutional limits if he exceeds his own.

59. As stated by A.G. Noorani in his article on `Judicial Activism v. Judicial Restraint' (published in SPAN magazine of April/May, 1997 edition):

Zeal leads judges to enter areas with whose terrain they are not familiar; to order minutiae of administration without reckoning with the consequences of their orders. Judges have made orders not only how to run prisons but also hospitals, mental homes and schools to a degree which stuns the professional. In their judgments they draw on material which is untested and controversial and which they are ill-equipped to evaluate.

60. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the Judges' preferences. The Court must not embarrass the administrative authorities and must realize that administrative authorities have expertise in the field of administration while the Court does not. In the words of Chief Justice Neely, former Chief Justice of the West Virginia State Supreme Court:

I have very few illusions about my own limitations as a judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting his judgment for that of the administrator.

61. As observed by Mr. Justice Cardozo of the U.S. Supreme Court:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "promotional necessity of order in the social life.

(see Cardozo's 'The Nature of the Judicial Process')

62. Chapter VIII of the Motor Vehicles Act, 1988 has provisions for control of traffic. These include fixing limits of speed (Section 112), restriction on use of certain vehicles (Section 115), power to erect traffic signs (Section 116), fixing parking places (Section 117), making driving regulations (Section 118), duty to obey traffic signs (Section 119), requirement for drivers to make such signals as are prescribed (Section 121), safety measures for drivers and pillion riders on two wheelers (Section 128), wearing of protective headgear (Section 129), etc. These provisions are obviously meant for road safety, and if further provisions are required for this purpose the petitioner may approach the legislature or concerned authority for this purpose, but this Court can certainly not amend the law.

63. The people must know that Courts are not the remedy for all ills in society. The problems confronting the nation are so huge that it will be creating an illusion in the minds of the people that the judiciary can solve all the problems. No doubt, the judiciary can make some suggestions/recommendations to the legislature or the executive, but these suggestions/recommendations cannot be binding on the legislature or the executive, otherwise there will be violation of the seven-Judge Bench decision of this Court in **P. Ramachandra Rao's** case (supra), and violation of the principle of separation of powers. The judiciary must know its

limits and exercise judicial restraint vide **Divisional Manager, Aravali Golf Course and Anr.** v. **Chander Hass** MANU/SC/4463/2007 : 2007(14)SCALE1 . The people must also realize that the judiciary has its limits and cannot solve all their problems, despite its best intentions.

64. The problems facing the people of India have to be solved by the people themselves by using their creativity and by scientific thinking and not by using judicial crutches like PILs.

65. These problems (e.g. poverty, unemployment, price rise, corruption, lack of education, medical aid and housing, etc.) are so massive that they can only be solved by certain historical, political and social forces that can only be generated by the people themselves using their creativity and scientific thinking.

66. The view that the judiciary can run the government and can solve all the problems of the people is not only unconstitutional, but also it is fallacious and creates a false impression and false illusion that the judiciary is a panacea for all ills in society. Such illusions, in fact, do great harm to the people because it makes the people believe that their problems can be solved by others and not by the people themselves. It debilitates their will and makes them believe that they can solve their problems and improve their conditions not by their own struggles and creativity but by filing a PIL in Court.

67. Before concluding, we would like to refer to the decision of this Court in **Dattaraj Nathuji Thaware** v. **State of Maharashtra** MANU/SC/1060/2004 : AIR2005SC540 in which Hon'ble Pasayat J. expressed the view about Public Interest Litigation in the following memorable words:

It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but expressing our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters, Government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenus expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts, as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.

68. In the same decision it has also been observed that PIL is a weapon which is to be used with great care and circumspection.

69. Unfortunately, the truth is that PILs are being entertained by many courts as a routine and the result is that the dockets of most of the superior courts are flooded with PILs, most of which are frivolous or for which the judiciary has no remedy. As stated in **Dattaraj Nathuji Thaware's** case (supra), public interest litigation has nowadays largely become 'publicity interest litigation', 'private interest litigation', or 'politics interest litigation' or the latest trend 'paise income litigation'. Much of P.I.L. is really blackmail.

70. Thus, Public Interest Litigation which was initially created as a useful judicial tool to help the poor and weaker section of society who could not afford to come to courts, has, in course of time, largely developed into an uncontrollable Frankenstein and a nuisance which is threatening to choke the dockets of the superior courts obstructing the hearing of the genuine and regular cases which have been waiting to be taken up for years together.

71. With the above observations, the Writ Petition is dismissed.

H.K. Sema, J.

72. This petition has been filed in the form of public interest litigation by Common Cause (A Registered Society) through its Director Shri H.D. Shourie r/o A-31, West End, New Delhi.

73. At the risk of Writ Petition, the petitioner sought for the following reliefs:

(i) to issue a Writ, direction or order in the nature of mandamus and/or any other writ, direction or order directing the Respondent No. 1, in consultation with representatives of the Respondent Nos. 2, 3, 4, 5 & 6 and also representatives of other States/UTs:

(a) to set up fully satisfactory procedures of licensing of vehicles and licensing of drivers, for ensuring that the vehicles are fully equipped with all the safety travel requirements, and also ensure that drivers of private vehicles as well as drivers of public vehicles including buses and trucks, are fully trained and are competent to drive the respective types of vehicles, and to also organize high-level training arrangements for the drivers of respective types of vehicles; appropriate procedures should also be ensured for suspension/cancellation of driving licences in the event of any default or for involvement in any accident;

(b) to ensure provision of all infrastructural requirements of roads, including signs, signals, footpaths, repairs of roads, and all such other requirements which will help to minimise risks of accidents on the roads;

(c) to set up methodology and requirements for undertaking scientific analysis of every accident, for ensuring that similar causes do not recur which can lead to accidents, thereby minimizing the possibilities of accidents;

(d) to establish suitable organizations for providing education to all types of users of roads, through experts as well as use of suitably devised visual and audio media;

(e) to ensure the availability of ambulances for immediate removal of injured persons to hospitals;

(f) to set up Committees of Experts in each State/UT and in the bigger cities for dealing with these various requirements for minimization of accidents on the roads;

(ii) to direct Respondent No. 1 to formulate a suitable Road Traffic Safety Act to meet effectively the various requirements for minimization of road accidents; and

(iii) to pass such other and further orders as may be deemed necessary to deal effectively with the various matters relating to traffic Safety on the roads and minimization of road accidents, on the facts and in the circumstances of the case.

74. I had the privilege of going through the erudite judgment prepared by my learned Brother Justice Katju and I respectfully agree with the conclusion reached by my brother Katju that the Writ Petition be dismissed. While coming to this conclusion Brother Katju was of the opinion that the Motor Vehicles Act is a comprehensive enactment on the subject. He was further of the opinion that if there is lacuna or defect in the Act it is for the legislature to correct it by a suitable amendment and not by the Court. I am also of the view that the relief sought for in this Writ Petition is adequately taken care of by the Motor Vehicles Act itself and if there is any lacuna or defect, it is the legislature to correct it by amending the Act and not the Court.

75. I however, respectfully dissociating myself from certain general observations of my learned Brother in paragraphs 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53 and 55 in the judgment, expressing doubts about the jurisdiction of this Court entertaining the petition in the form of public interest litigation.

76. I also respectfully disagree with certain observations made by a two-Judge Bench of this Court in the case of ***Divisional Manager, Aravali Golf Course and Anr.*** v. ***Chander Hass*** MANU/SC/4463/2007 : 2007(14)SCALE1 , as referred to by my learned Brother in Para 8 of his Judgment.

77. In the case of ***Union of India*** v. ***Association for Democratic Reforms and Anr.*** MANU/SC/0394/2002 : [2002]3SCR696 , raised the substantial question of law of public importance was whether in a nation constitutionally wedded to republican and democratic form of Government, where election as a Member of Parliament or as a Member of Legislative Assembly is of utmost importance for democratic form of the country, before casting votes, voters have a right to know relevant particulars of their candidates; and whether the High Court had jurisdiction to issue directions in a Writ Petition filed under Article 226 of the Constitution of India? The High Court of Delhi entertained the writ petition and directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to Parliament and to the State Legislatures and the parties they represent:

1. Whether the candidate is accused of any offence(s) punishable with imprisonment. If so, the details thereof.

2. Assets possessed by a candidate, his or her spouse and dependent relations.

3. Facts giving insight into the candidate's competence, capacity and suitability for acting as a parliamentarian or a legislator including details of his/her educational qualifications.

4. Information which the Election Commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

78. Aggrieved by the aforesaid direction of the High Court, an appeal was filed before the Supreme Court by the Union of India. A three Judge Bench of this Court, of which one of us was a party (Sema J.), in ***Union of India*** v. ***Association for Democratic Reforms and Anr.*** (supra) upheld the direction, repelling the arguments of the appellant, this Court held:

The Supreme Court cannot give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till a suitable law is enacted.

(emphasis supplied)

79. Further, in paragraph **46** (6) of the judgment it is held:

46(6). On cumulative reading of a plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the executive to subserve public interest.

(emphasis supplied)

80. Therefore, whether to entertain the petition in the form of Public Interest Litigation either represented by public-spirited person; or private interest litigation in the guise of public interest litigation; or publicity interest litigation; or political interest litigation is to be examined in the facts and circumstances recited in the petition itself. I am also of the view that if there is a buffer zone unoccupied by the legislature or executive which is detrimental to the public interest, judiciary must occupy the field to subserve public interest. Therefore, each case has to be examined on its own facts.

81. In my considered opinion therefore, the blanket bar of the application in the form of PIL is obviated. Subject to aforesaid, I agree with the conclusion of my learned Brother that the petition be dismissed.

Back to Index

MANU/SC/0930/2017

Neutral Citation: 2017/INSC/700

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 114 and 194 of 2014 (Under Article 32 of the Constitution of India)

Decided On: 02.08.2017

Appellants: Common Cause and Ors. V**s.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Madan B. Lokur and Deepak Gupta, JJ.

Subject: Mines and Minerals

Subject: Commercial

Relevant Section:

MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 - Section 4; MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 - Section 21

Authorities Referred:

Black's Law Dictionary, 7th Edition, Page 1421; P. Ramanatha, The Law Lexicon, 2nd Edition, Page 1431; G.P singh, Principles of Statutory Interpretation, 8th Edition, 2001, Page 147

Case Category:

LETTER PETITION AND PIL MATTER - WRIT PETITIONS (CRIMINAL) AND WRIT PETITIONS FILED AS PIL PERTAINING TO CRIMINAL INVESTIGATIONS/PROSECUTION

Case Note:

Mines and Minerals - Illegal mining - Termination of lease - Sections 4 and 21 of Mines and Minerals (Development and Regulation) Act, 1957 - Lessees in various districts in State had rapaciously mined iron ore and manganese ore, apparently destroyed environment and forests and perhaps caused untold misery to tribals in area - Present petition filed seeking direction to immediately stop forthwith all illegal mining in State and to terminate all leases that were found to be involved in illegal mining - Whether mining activity caused

environmental degradation and what directions were required to be issued.

Facts:

Lessees in the various districts in State had rapaciously mined iron ore and manganese ore, apparently destroyed the environment and forests and perhaps caused untold misery to the tribals in the area. Present petition filed seeking direction to immediately stop forthwith all illegal mining in the State and to terminate all leases that were found to be involved in illegal mining and to take action against all the violators involved either directly or indirectly in illegal mining.

Held, while disposing off the petition:

(i) The overall purpose and objective of the MMDR Act as well as the Rules framed there under was to ensure that mining operations were carried out in a scientific manner with a high degree of responsibility including responsibility in protecting and preserving the environment and the flora of the area. Through this process, the holder of a mining lease was obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986 or the EPA as well as the laws pertaining to air and water pollution and also by necessary implication, the provisions of the Forest (Conservation) Act, 1980 (for short 'the FC Act'). If the holder of a mining lease did not adhere to the provisions of the statutes or the Rules or the terms and conditions of the mining lease, that person was liable to incur penalties under Section 21 of the MMDR Act. In addition thereto, Section 4A of the MMDR Act which provides for the termination of a mining lease was applicable. This provides that where the Central Government, after consultation with the State Government was of opinion that it is expedient in the interest of Regulation of mines and mineral development, preservation of natural environment, prevention of pollution, etc. then the Central Government may request the State Government to prematurely terminate a mining lease. [83]

(ii) There was no doubt that the grant of an Environmental Clearance (EC) could not be taken as a mechanical exercise. It could only be granted after due diligence and reasonable care since damage to the environment could have a long term impact. Environment Impact Assessment Notification was therefore very clear that if expansion or modernization of any mining activity exceeds the existing pollution load, a prior EC was necessary and as already held by present Court in M.C. Mehta case even for the renewal of a mining lease where there was no expansion or modernization of any activity, a prior EC was necessary. Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC was completely alien to environmental jurisprudence. [124]

(iii) For completing the record and taking the report of the Central Empowered Committee (CEC) to its logical conclusion, it would be appropriate if a fresh joint survey was conducted by concerned officers of the Government of Stare from the Revenue Department, the Forest Department, the Mining Department and any other department that may be deemed necessary. [134]

(iv) Section 21(5) of the MMDR Act was applicable when any person raises, without any lawful authority, any mineral from any land. In that event, the State Government was entitled to recover from such person the mineral so raised or where the mineral had already been disposed of, the price thereof as compensation. The words any land were not confined to the mining lease area. As far as the mining lease area was concerned, extraction of a mineral over and above what was permissible under the mining plan or under the EC undoubtedly attracts the provisions of Section 21(5) of the MMDR Act being extraction without lawful authority. It would also attract Section 21(1) of the MMDR Act. In any event, Section 21(5) of the Act is certainly attracted and was not limited to a violation committed by a person only outside the mining lease area-it includes a violation committed even within the mining lease area. This was also because the MMDR Act was intended, among other things, to penalize illegal or unlawful mining on any land including mining lease land and also preserve and protect the environment. [150]

JUDGMENT

Madan B. Lokur, J.

1. The facts revealed during the hearing of these writ petitions filed Under Article 32 of the Constitution suggest a mining scandal of enormous proportions and one involving megabucks. Lessees in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha have rapaciously mined iron ore and manganese ore, apparently destroyed the environment and forests and perhaps caused untold misery to the tribals in the area. However, to be fair to the lessees, they did the detail steps taken to ameliorate the hardships of the tribals, but it appears to us that their contribution is perhaps not more than a drop in the ocean-also too little, too late.

Facts leading up to the report of the Central Empowered Committee

2. Rabi Das, the editor of a daily newspaper called Ama Rajdhani filed I.A. No. 2746-2748 of 2009 in a pending writ petition being **T.N. Godavarman v. Union of India.**[1] He prayed, *inter alia*, for the following directions from this Court:

a) Issue a direction to the Central Empowered Committee to conduct an exhaustive fact finding study of the illegal mining in Keonjhar, Sundargarh and other Districts of Orissa;

b) Direct appointment of a "Commission" to investigate and study the modalities of the illegal machinations, fix responsibility on individuals (in Government and outside it) and recommend remedial measures to be immediately implemented by the Government of India and the Government of Orissa;

c) Direct the Respondents to take effective and appropriate action to ensure closure/stoppage of all the illegal mining activities in the concerned areas and direct prosecution and punish all those found guilty of this illegal mining in violation of the Mines and Minerals (Development and Regulation) Act, 1957, Forest (Conservation) Act, 1980 and other relevant laws.

3. The applications were taken up for consideration on 6th November, 2009 when notice was issued to the Central Empowered Committee (for short 'the CEC') to file its report/response within six weeks.

4. On 26th April, 2010 the CEC submitted an interim report which was noted by this Court and taken on record. The report was of a general nature but contained quite a few recommendations. Some of the recommendations presently relevant are as follows:

(b) Even otherwise the Rule 24-A(6), MCR, 1960 does not authorize the lessee to operate a mine without the statutory clearances/approvals. Therefore, in respect of a mine covered under the 'deemed extension' clause, the mining operations should be permitted to be undertaken in the non forest area of the mining lease only if (i) it has the requisite environmental clearance; (ii) it has the consent to operate from the State Pollution Control Board under the Air and Water Acts; (iii) Mining Plan is duly approved by the competent authority; and (iv) the NPV for the entire forest falling within the mining lease is deposited in the Compensatory Afforestation Fund.

The mining in the forest land included in the mining lease should be permissible only if, in addition to the above, the approval under the FC Act/TWP has been obtained;

(c) No forest land can be leased/assigned without first obtaining the approval under the FC Act. Therefore, the forest area approved under the FC Act should not be lesser than the total forest area included in the mining leases approved under the MMDR Act, 1957. Both necessarily have to be the same. In view of the above, this Hon'ble Court while permitting grant of Temporary Working Permission to the mines in Orissa and Goa has made it one of the pre-conditions that the NPV will be paid for the entire forest area included in the mining leases. Similarly, all the mining lease holders in Orissa should be directed to pay the NPV for the entire forest area, included in the mining lease;

(d) In Orissa, substantial areas included in the mining leases as non forest land have subsequently been identified as DLC forest (deemed forest/forest like areas) by the Expert Committee constituted by the State Government pursuant to this Hon'ble Court's order dated 12.12.1996. While processing and/or approving the proposals under the FC Act in many cases such areas have been treated as non-forest land. It is recommended that (i) the NPV for the entire DLC area included in the mining lease, after deducting the NPV already paid, should be deposited by the concerned lease holder and (ii) the mining operations in the unbroken DLC land (virgin land) should be permissible only if the permission under the FC Act has been obtained/is obtained for such area. Keeping in view the peculiar circumstances as was existing in Orissa and subject to the above, the mining operations in the broken DLC land may be allowed to be continued provided the other statutory requirements and Rules are otherwise being complied with.

The report concluded by recording as follows:

a) an attempt has been made for the first time by the CEC to comply and analyse the status of all the mining leases in a State and to suggest effective and remedial measures-something made possible because of the unstinted cooperation extended by the senior functionaries of the Forest and Mines Departments of the State Government; and

b) the above recommendations if accepted and implemented will, besides ensuring that mining is done in compliance with the statutory provisions, result in recovery of additional amount towards the NPV etc. running into hundreds of crores of rupees. It would be appropriate that a part of this additional amount, say 50% is used through a SPV for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. The CEC proposes to file detailed schemes in this regard for seeking permission of this Hon'ble Court provided the State of Orissa as well as the MoEF endorse the course of action proposed above.

The significance of the second conclusion will be discussed by us a little later.

5. Notice was issued on the report returnable on 7th May, 2010. On the adjourned date, the following order was passed by this Court:

The CEC has filed its Report. The State would like to file its response. Six weeks time is granted for the same. The recommendations of the CEC which are acceptable to the State Government can be complied with.

It may be mentioned that some of the recommendations made by the CEC have been accepted and implemented by the State of Odisha.

6. The issue of mining in Odisha again came up for consideration on 16th September, 2013 and this Court passed the following order:

We call for a report from the Central Empowered Committee within a period of six weeks. We direct that the parties of the State Government of Odisha and the Central Government will cooperate with the Central Empowered Committee to enquire into the matter and furnish a report.

The matter be listed on a Monday after six weeks.

7. With reference to the order passed on 16th September, 2013 the CEC conducted an inquiry and some information was sought from M/s. Sarda Mines Private Limited (for short 'SMPL'). This was objected to by SMPL who filed an application which was taken up for consideration on 9th December, 2013. The following order was passed on that day:

By our order dated 16th September, 2013, we had called for a Report from the Central Empowered Committee within a period of six weeks. It is stated on behalf of the Central Empowered Committee that the Report could not be ready as part of the information called for have not been furnished by the State Government.

Mr. Venugopal, learned senior Counsel for the applicant M/s. Sarda Mines Private Limited in IA No. 3721 submits that since some of the matters are pending before the High Court, a prayer has been made for not furnishing the required information to the Central Empowered Committee.

List this matter in the second week of January, 2014.

In the meantime, the Central Empowered Committee may not submit its final Report.

8. The matter was again taken up on 13th January, 2014 and this Court passed the following order:

We have heard learned Counsel for the parties.

We have also perused the letter dated 17th October, 2013 of the Member Secretary, Central Empowered Committee sent to the Chief Secretary, Government of Odisha along with its annexures and in particular, the Statement of Details of information and documents sought by Central Empowered Committee for the meeting convened on 30th October, 2013, which cover forest and environmental issues.

We, accordingly, modify the order dated 9th December, 2013 and direct the Central Empowered Committee to submit its final report on the queries made by the State Government with regard to the details of the documents sought for in the letter dated 17th October, 2013 within a period of six weeks.

The Report will not cover cases other than forest and environmental issues.

The lessees and Ors. from whom information is sought for will cooperate if they do not cooperate the Central Empowered Committee will give its report.

A copy of the interim report of 26th April, 2010 will be furnished to the learned Counsel appearing for the State of Odisha.

This matter be listed on 20th January, 2014 for consideration of the recommendations made by the Central Empowered Committee in the said Report dated 26th April, 2010.

Thereafter and partly based on reports given by Justice M.B. Shah, a retired judge of this Court, holding a commission under the Commissions of Inquiry Act, 1952 a writ petition being W.P. (C) No. 114 of 2014 was filed by Common Cause. Several prayers were made in the writ petition, and some of the more significant prayers read as follows:

(a) Issue a writ of mandamus or any other appropriate writ directing the Union of India and Government of Odisha to immediately stop forthwith all illegal mining in the State of Odisha and to terminate all leases that are found to be involved in illegal mining and mining in violation of the provisions of the Forest Conservation Act 1980, the environment laws and other laws.

(b) Issue a writ of mandamus or any other appropriate writ directing the Union of India and Government of Odisha to take action against all the violators involved either directly or indirectly in illegal mining including those named in the report of Justice Shah Commission.

(c) Issue a writ of mandamus or any other appropriate writ directing a thorough investigation by an SIT or CBI under the supervision of this Hon'ble Court, as is recommended by the Justice Shah Commission into illegal mining in Odisha and collusion between private companies/individuals and public officials of the State/Central Governments.

xxx xxx xxx

(e) Issue a writ of mandamus or any other appropriate writ directing the Respondents to recover the illegally accumulated wealth through illegal mining and related activity, as per Section 21(5) of the MMDR Act, 1957 [Mines and Minerals (Development and Regulation) Act, 1957] and launch prosecutions Under Section 21(1) of the MMDR Act 1957, and direct that the money recovered would be used for the welfare of local communities, tribals and villagers.

9. The writ petition was taken up for consideration on 21st April, 2014 when the following order was passed:

We have heard the preliminary objections with regard to the writ petition and we are not convinced that the writ petition is not maintainable.

Issue notice.

As the State of Odisha, Union of India and the CEC have already been served with the notices, no further notices be issued to them.

Notice, however, be issued to Respondent Nos. 4 and 5 returnable within four weeks.

It appears from the averments in paragraph 14 of the writ petition that several lessees are operating without clearances under the Environment (Protection) Act, 1986 and the Forest (Conservation) Act, 1980, and without renewal by the Government. Hence, an interim order needs to be passed in respect of these lessees who are operating the leases in violation of the law.

For consideration of the interim order that should be passed, only this writ petition be listed next Monday, the 28th of April, 2014, as first item. It will be open for all parties and intervenors/proposed intervenors to file their respective affidavits.

CEC, in the meanwhile, will make out a list of such lessees who are operating the leases in violation of the law. This list be prepared by the CEC without reference to the Shah Commission's Report.

Liberty is given to the parties to produce their papers before CEC. The State of Odisha and the Union of India will cooperate with CEC to prepare the list.

Report of the Central Empowered Committee

10. The CEC gave its final report on 25th April, 2014 which was considered by this Court and a detailed interim order was passed on 16th May, 2014.[2] The sum and substance of the final report dated 25th April, 2014 and the interim order is that in the districts of Odisha that we are concerned with, namely, Keonjhar, Sundergarh and Mayurbhanj, the total number of leases granted for mining iron and manganese ore are 187. of these, 102 lease holders did not have requisite environmental clearance (under the Environment (Protection) Act, 1986) or approval under the Forest (Conservation) Act, 1980 or approved mining plan and/or Consent to Operate under the provisions of the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1981. This Court directed that mining operations in these 102 mining leases shall remain suspended but it will be open to such lease holders to move the

concerned authorities for necessary clearances, approvals or consents and "as and when the mining lessees are able to obtain all the clearances/approvals/consent they may move this Court for modification of this interim order in relation to their cases."

11. This Court also found that 29 out of 187 mining leases had been determined or rejected or had lapsed. It was directed that mining operations in these 29 mining leases will also remain suspended but it would be open to all these concerned lessees to move the authorities for necessary relief and as and when they get the appropriate relief, they could move this Court for modification of the interim order.

12. This Court also found that 53 iron ore/manganese ore mining leases were operational and that they had necessary approvals under the Forest (Conservation) Act, 1980, consent to operate granted by the Odisha State Pollution Control Board and also approved mining plans. (There is no specific mention about environmental clearance). In addition 3 mining leases were located in forest as well as non-forest land, but mining operations were being conducted in non-forest areas of the mining lease as the lease holders did not have approvals under the Forest (Conservation) Act, 1980. Therefore a total of 56 iron ore/manganese ore mining leases were operating in the State of Odisha.

13. As far as the break-up of the 56 operational mining leases is concerned, it was found that 14 mining leases were operating on first renewal basis in accordance with the deeming provisions of Section 8(2) of the Mines and Minerals (Development and Regulation) Act, 1957 (for short 'the MMDR Act') read with Rule 24-A(6) of the Mineral Concession Rules, 1960 (for short 'the MCR') and 16 mining leases were operating since lease deeds for grant of renewal had been executed in their favour. The remaining 26 mining leases were operating on second and subsequent renewal basis with the renewal applications pending a final decision with the State Government.

14. In respect of the 14 first renewal mining leases, this Court permitted them to continue their operations for the time being in view of the deemed renewal provisions. This Court also permitted 16 mining leases to continue to operate since they had lease deeds executed in their favour. With regard to the remaining 26 mining leases operating on second and subsequent renewal applications, this Court drew attention to the decision rendered on 21st April, 2014 in ***Goa Foundation v. Union of India*** MANU/SC/0388/2014 : (2014) 6 SCC 590 wherein it was held that the provision for a second or subsequent deemed renewal was not available in view of Section 8(3) of the MMDR Act. Consequently, these 26 lease holders were restrained from operating until express orders were passed by the State Government Under Section 8(3) of the MMDR Act. Six months time was granted to the State Government to take a final decision on the renewal applications. This Court left it open to the mining lease holders to apply for modification of the interim order dated 16th May, 2014 on obtaining necessary clearances.

15. During the hearing of these petitions, we were informed that the balance 26 mining leases are now operational in view of the amendment to Section 8(3) of the MMDR Act with effect from 12th January, 2015. However, we are not aware whether these 26 mining leases have the necessary statutory clearances.

16. We may also mention that pursuant to the liberty granted to move for modification of the interim order of 16th May, 2014 we have received 17 interim applications for modification.

Through a chart handed over to us in Court on 3rd May, 2017 we have been informed that in respect of two of the 17 applications, that is, Zenith Mining (I.A. No. 45) and Kavita Agrawal (I.A. No. 47), the lease has not been extended or has been determined and they do not have any Environmental Clearance or Forest Clearance. In respect of J.N. Pattnaik (I.A. No. 66), there is no Forest Clearance available. We were also informed that S.A. Karim (I.A. No. 9) actually had a working lease and had wrongly been included as a non-operational lease.

17. Be that as it may, learned Counsel for the lease holders drew our attention to the record of proceedings of 16th May, 2014 and particularly the following paragraph appearing therein:

We have passed interim order in a separate sheet. The Central Empowered Committee will give a final report on the Writ Petition by the end of July, 2014 and the matter will be listed in the first week of August, 2014 before the Green Bench.

We are mentioning this in the context of the order passed on 13th January, 2014 adverted to above to the effect that "The Report will not cover cases other than forest and environmental issues."

18. In its final report, the CEC has dealt with the following ten topics: In this final report dated the CEC dealt with the following ten topics:

I. Production of iron ore and manganese ore without/in excess of the environmental clearance/Mining Plan/Consent to Operate.

II. Mining leases operated in violation of the Forest (Conservation) Act, 1980.

III. Illegal mining outside the sanctioned mining lease areas.

IV. Mining leases acquired in violation of Section 6 of the MMDR Act, 1957.

V. Violation of Rule 37 of the Mineral Concession Rules, 1960 by the lessees.

VI. Illegalities involved in the mining leases of Essel Mining & Industries Ltd.

VII. Illegalities involved in the mining lease of Sharda Mines (P) Ltd.

VIII. Massive illegal mining in Uliburu Forest land.

IX. Inordinate delays in taking decisions by the State Government regarding renewal of the mining leases.

X. Other issues.

19. By an order dated 16th January, 2015 objections to the final report were permitted and we have since received quite a few objections. When the matter was taken up for consideration by this Court on 7th October, 2015 and pursuant to the order passed on that date, the learned Amicus filed a statement dated 30th October, 2015 in a tabular form dealing with each I.A. filed in respect of the

observations and recommendations made by CEC. Thereafter, when the matter was again taken up for consideration the learned Amicus filed a note dated 15th March, 2016 wherein the following four issues were flagged:

(i) Leases lapsed Under Section 4A(4) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as MMDR Act, 1957) (11 leases);

(ii) Violation of Rule 24 of the Minerals (other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 (hereinafter referred to as MCR, 2016) and Rule 37 of the Mineral Concessions Rules, 1960 (hereinafter referred to as MCR, 1960) (9 leases);

(iii) Illegal mining in forest lands (20 leases); and

(iv) Iron ore produced without/in excess of the environmental clearance (each of the operating leases involved).

20. Insofar as the first issue is concerned, it is common ground that that issue has been fully, conclusively and exhaustively dealt with by this Court by a judgment and order dated 4th April, 2016 (***Common Cause v. Union of India*** MANU/SC/0364/2016 : (2016) 11 SCC 455. Therefore, the first issue does not survive for consideration by us.

21. As far as the remaining three issues are concerned, these overlap with topics I, II and v. dealt with by the CEC. Detailed submissions were made before us by learned Counsel for all the appearing parties on these issues as well as by the learned *Amicus* and the learned Attorney General. We propose to deal with them in this judgment and order.

22. We may mention that submissions were also made on topics III and IV identified by the CEC, that is, illegal mining outside the sanctioned mining lease areas and mining leases acquired in violation of Section 6 of the MMDR Act. We will consider these issues as well.

23. As far as topics VI and VII identified by the CEC are concerned, we would like to hear the parties in detail in respect of these issues.

24. No challenges or submissions were made on topics VIII, IX and X and therefore we accept the report of the CEC on these topics.

25. At this stage, we may mention some rather frightening figures mentioned by the CEC in its final report. According to the CEC, excess mining without environmental clearance or beyond what was authorized by the environmental clearance is 2130.988 lakh MT of iron ore and 24.129 lakh MT of manganese ore making a total of 2155.117 lakh MT of iron and manganese ore. This does not include extraction of ore without forest clearance. These figures give an indication of the extent of excess or illegal or unlawful mining carried out.

26. In terms of rupees, according to the CEC the total notional value of minerals produced without an environmental clearance or in excess of the environmental clearance, at the weighted average price of minerals as proposed by the Indian Bureau of Mines comes to about Rs. 17091.24 crores

for iron ore and about Rs. 484.92 crores for manganese ore making a total of Rs. 17,576.16 crores. Again, this does not include mining without forest clearance. It is for this reason that we have referred to the megabucks and rapacious mining.

Justice M.B. Shah Commission of Inquiry

27. Apparently, and it appears quite independently of all these developments, the Central Government issued a notification on 22nd November, 2010 under the Commissions of Inquiry Act, 1952 whereby it appointed Justice M.B. Shah, a retired judge of this Court to conduct an inquiry on the following Terms of Reference:

2. (i) to inquire into and determine the nature and extent of mining and trade and transportation, done illegally or without lawful authority, of iron ore and manganese ore, and the losses therefrom; and to identify, as far as possible, the persons, firms, companies and others that are engaged in such mining, trade and transportation of iron ore and manganese ore, done illegally or without lawful authority;

(ii) to inquire into and determine the extent to which the management, regulatory and monitoring systems have failed to deter, prevent, detect and punish offences relating to mining, storage, transportation, trade and export of such ore, done illegally or without lawful authority, and the persons responsible for the same;

(iii) to inquire into the tampering of official records, including records relating to land and boundaries, to facilitate illegal mining and identify, as far as possible, the person responsible for such tampering; and

(iv) to inquire into the overall impact of such mining, trade, transportation and export, done illegally or without lawful authority, in terms of destruction of forest wealth, damage to the environment, prejudice to the livelihood and other rights of tribal people, forest dwellers and other persons in the mined areas, and the financial losses caused to the Central and State Governments.

3. The Commission shall also recommend remedial measures to prevent such mining, trade, transportation and export done illegally or without lawful authority.

28. In the preamble to the notification appointing the Commission, it was noted that there were reports that mining, raising, transportation and export of iron ore and manganese ore illegally or without lawful authority was being carried on in various States in one or more of the following forms:

(a) mining without a licence;

(b) mining outside the lease area;

(c) undertaking mining in a lease area without taking approval of the concerned State Government for transfer of concession;

b. raising of minerals without lawful authority;

c. raising of minerals without paying royalty in accordance with the quantities and grade;

d. mining in contravention of a mining plan;

e. transportation of raised mineral without lawful authority;

f. mining and transportation of raised mineral in contravention of applicable Central and State Acts and Rules thereunder;

g. conducting of multiple trade transactions to obfuscate the origin and source of minerals in order to facilitate their disposal;

h. tampering with land records and obliteration of inter-state boundaries with a view to conceal mining outside lease areas;

i. forging or misusing valid transportation permits and using forged transport permits and other documents to raise, transport, trade and export minerals;

It is in the above context that the Terms of Reference were framed.

29. On 1st July, 2013 the Commission gave the First Report on Illegal Mining of Iron and Manganese Ores in the State of Odisha. The report contains an executive summary and very briefly the Commission stated that: (i) All modes of illegal mining, as stated in the notification dated 22nd November, 2010 of the Central Government are being committed in the State of Odisha; (ii) There is a complete disregard and contempt for law and lawful authorities on the part of many of the emerging breed of entrepreneurs; (iii) It appears that the law has been made helpless because of its systematic non implementation. The executive summary states that the following are discussed in the report:

(A) Information regarding mining leases should be placed on website to make mining operations more transparent and to display the information for each lease on the departmental/State website with various conditions which are required to be adhered by the lessee.

(B) Misuse of Rule 24-A(6) of MCR, 1960 [Mineral Concession Rules, 1960] which provides for deemed extension of lease. Application for renewal of mining lease is not decided for one or other pretexts, may be, there is lack of co-ordination among various departments which are required to decide renewal application. There is gross misuse of deemed refusal and deemed extension of both the provisions of renewal of leases (before 27.09.1994 and after) Under Rule 24-A of MCR, 1960. This casual and negative approach has caused clearly to State exchequer in the form of hundred crores of stamp duty and others.

(C) Violation of the provisions of the Forest (Conservation) Act, 1980, Rules & guidelines and directions issued by the Hon'ble Supreme Court of India.

(D) Violation of the provisions of the Environment (Protection) Act, 1986.

(E) Misuse of Rules: 10 & 12 of MCDR, 1988 [Mineral Conservation and Development Rules, 1988] which provides for modification and review of mining plan only for a specific purpose, namely,

(i) Safe and scientific mining;

(ii) conservation of minerals;

(iii) the protection of environment; and

(iv) in case of modification, explanation for the same.

(F) Encroachment:

On the basis of Google Image, the survey report prepared by the State Government by DGPS method, it was found that in 82 mining leases, there was encroachment. Out of the said leases, re-survey was ordered for 37 leases.

30. Soon thereafter, the Commission gave its Second Report on Illegal Mining of Iron and Manganese Ores in the State of Odisha, sometime in October, 2013. This report dealt with specific lease holders and violations committed by them. It is not necessary for us to delve into those specific details.

31. It was submitted before us by learned Counsel for the mining lease holders that the reports given by the Commission were not acceptable on the ground that a notice had not been given to the lease holders Under Section 8B or Section 8C of the Commissions of Inquiry Act, 1952. It was submitted that under these circumstances the reports given by the Commission were vitiated and therefore the foundation of the writ petition filed by Common Cause was taken away. We are not in agreement with learned Counsel for the mining lease holders.

32. The first report given by the Commission was a general, overall perspective on the subject while the second report went into specific details of several mining lease holders-but we are not concerned with those specifics. Therefore, whether notices were or were not issued to the lease holders who were the subject matter of discussion in the second report is of no consequence.

33. What we are really perturbed about is the facts stated by the Commission in the first report. So far as this is concerned, we are of the view that no irregularity or illegality has been committed so as to vitiate the first report. Notwithstanding this, we are not relying upon any of the facts determined by the Commission for the purposes of our judgment and order.

34. The procedure followed by the Commission has been mentioned in Volume I Part II of the first report, but it is not necessary for us to recount each and every detail. Suffice it to say that a resume of the procedure followed will indicate that full opportunity was given to the lease holders to have their say.

Resume of the procedure followed by the Commission

35. In March 2011 the Commission sent the first questionnaire to the concerned Secretary of the Government of Odisha seeking the following information regarding each lease holder:

(i) the name of the lessee;

(ii) area of the lease;

(iii) date of the execution of the lease deed;

(iv) present status (renewal, mining plan, mining scheme) approval date;

(v) production and export particulars from the year 2008-09 up to January, 2011; etc.

36. On 20th April, 2011 the Commission sent the second questionnaire to the said concerned Secretary seeking further information in a Form consisting of 14 questions and 4 tables.

37. Thereafter, between 24th and 26th August, 2011 the Commission issued the first notice to various mining lessees in Odisha seeking information on affidavit as per Proforma A and B enclosed with the notice. In Proforma A the lease holder was asked to submit details which included the details of environment clearance, forest clearance and renewal of lease and whether the leased mine was in operation or not. In Proforma B the lease holder was asked to submit details which included the details of dispatch, domestic consumption and export in million tonnes of iron ore and manganese ore from 2006-07 to 2010-11.

38. The Commission visited Odisha from 7th December, 2011 to 14th December, 2011, from 3rd October, 2012 to 11th October, 2012 and from 31st October, 2010 to 8th November, 2012. The purpose of the visits was to collect information and seek explanations and gather facts from the concerned Departments of the Government of India and the Government of Odisha. During the visits, the Commission received as many as 140 complaints alleging illegal mining. Accordingly, a public hearing was held in Keonjhar and Bhubaneshwar on 11th and 12th December, 2011.

39. On 21st December, 2012 and 12th January, 2013 several senior counsel were given a personal hearing by the Commission including a personal hearing to the Federation of Indian Mining Industries (for short 'FIMI'). Following the submissions made, a fresh notice was issued to the

lease holders from 28th January, 2013 seeking information in Proformas A to H. In terms of the fresh notice, the lease holder was required to verify the facts stated therein (which were collected by the Commission) and if found incorrect then to state the correct facts. The fresh notice specifically mentioned that:

(i) The lessee shall come fully prepared to answer, related to this matter and submit all related records.

(ii) Explain the production from the leased area without having approval under F(C) Act, 1980.

(iii) Explain the production during the deemed extension period without having approval under EIA Notification dated 27.01.1994 and amendments thereon.

(iv) Explain the excess production in violation of EIA Notification dated 27.01.1994 and amendments thereon under the EP Act, 1986.

40. The report mentions the various dates of hearing given to learned Counsel for the lease holders, the State of Odisha, FIMI, Federation of Indian Chambers of Commerce and Industry (FICCI) and the Ministry of Environment and Forest of the Government of India (for short 'MoEF') which are as follows:

HEARING NO.	DATE	PLACE
1.	21.12.2012	Office of the Commission, Ahmedabad.
2.	12.01.2013	-do-
3.	18.02.2013	-do-
4.	27.02.2013	Circuit House, Bhubaneshwar (Odisha).
5.	28.02.2013	-do-
6.	01.03.2013	-do-
7.	02.03.2013	-do-
8.	04.03.2013	-do-
9.	16.03.2013	Circuit House, Annexe, Ahmedabad.
10.	20.03.2013	-do-
11.	23.03.2013	Office of the Commission, Ahmedabad.
12.	02.04.2013	Circuit House, Annexe, Ahmedabad.
13.	03.04.2013	-do-
14.	04.04.2013	-do-
15.	12.04.2013	Office of the Commission, Ahmedabad.
16.	13.04.2013	-do-
17.	21.04.2013	Gujarat University Convention Centre, Nr. Helmet Cross Road, 132 ft. Ring Road, Ahmedabad.
18.	24.05.2013	Office of the Commission, Ahmedabad.
19.	25.05.2013	-do-

41. The number of learned Counsel and representatives who were heard by the Commission and with whom interactions took place are mentioned in Annexure A to Volume I of the first report. The list of learned Counsel runs into 18 pages-from page 33 to page 50 of Volume I of the first

report. Some individual lawyers appeared for several lease holders but the fact of the matter is that everybody who wanted to be heard was given a hearing.

42. The function of the Commission as stated in the first report, at the present stage, is best described in the words of the Commission itself. It is stated as follows:

The function of the Commission, at this stage, is only to inquire, assess the data collected and to submit the report on the said basis. On that basis, some remedial measures are suggested by the Commission for controlling illegal mining and violation of the Acts and/or Rules. For that, there is no question of issuing notices to the lessees.

For collecting the data and assessing it, the Principles of Natural Justice are fully complied with, as stated above. On the basis of the data submitted by the lessees and the submissions made by Ld. Counsel for them, the report is submitted.

It is further clarified on page 198 of Volume I of the first report that with regard to individual mining leases in which there is a violation of the provisions of the Forest (Conservation) Act, 1980 and/or conditions of environmental clearance etc. a report would be submitted later on.

43. It is therefore abundantly clear that the first report is generally a limited fact finding enquiry on the basis of information supplied by the mining lease holders. Therefore, there is absolutely no question of any notice being issued to any mining lease holder Under Section 8B or the right of cross examination being granted to any mining lease holder Under Section 8C of the Commissions of Inquiry Act, 1952. We are satisfied that the Commission made adequate efforts to collect the facts and this collation in the first report was possible with the assistance of the mining lease holders and their learned Counsel and representatives as well as the government authorities and FIMI and FICCI. Under these circumstances, no lease holder can seriously contend that the procedure adopted by the Commission in collecting facts was either irregular or not in accordance with law. As mentioned above, any mining lease holder who wanted to be heard was given an opportunity of being heard and was fully aware of what the Commission was attempting to achieve and if any particular mining lease holder chose not to associate with it, it was at his or her own peril. Lack of knowledge of the proceedings before the Commission cannot be appreciated and we are quite satisfied that all the mining lease holders were fully aware of what was going on, if not personally then certainly through their list of learned Counsel running into 18 pages or their representatives individually or their Federation.

44. In ***Goa Foundation*** there was a challenge to the report of the Justice Shah Commission in respect of its conclusions pertaining to the State of Goa. This was dealt with by this Court in paragraphs 11 to 14 of its decision. This Court declined to quash the report in view of the statement made by the learned Advocate General of Goa. But, this Court took the view that: "we will, however, examine the legal and environmental issues raised in the Report of Justice Shah Commission and on the basis of our findings on these issues consider granting the reliefs prayed for in the writ petition filed by Goa Foundation and the reliefs prayed for in the writ petitions filed by the mining lessees, which have been transferred to this Court."

45. In the present petitions before us, there is no challenge to the reports of the Justice Shah Commission. However, we propose (as in ***Goa Foundation***) to confine ourselves to some limited facts adverted to by the CEC in its final report. We do not propose to base any of our conclusions on the reports of the Commission.

46. Learned Counsel for the Petitioners insisted that the illegal or unlawful mining activity carried on in the State of Odisha as noted by the Commission deserves to be investigated by the Central Bureau of Investigation. Reference in this regard was made to the passage in Part III of Volume I of the first report of the Commission to the following effect:

Since this is one of the biggest illegal mining ever observed by the Commission, it is strongly felt that this is a fit case to handover to Central Bureau of Investigation, for further investigation and follow up action.

47. Similarly, on page 125 of Chapter II of Volume I of the report, it is stated as follows:

Terms of Reference No. 8 provides that "The Commission may take the services of any investigating agency of the Central Government in order to effectively address its terms of reference.

The Commission, therefore, suggests that Central Bureau of Investigation (C.B.I.) may be directed to investigate into allegations of corruption made against politicians, bureaucrats and others.

We will consider this at the appropriate stage. Suffice it to say for the time being that the Commission made certain significant observations in Chapter II of the report to the effect that:

a. That the tribals in the area have been displaced or stay in pathetic and miserable conditions in same area. There is rampant air pollution with the trees having the colour of minerals making it clear that tribals are forced to breathe polluted air and drink polluted water.

b. Streams and ground water is polluted and there is hardly any facility of drinking water. Women have been seen fetching water from dirty nalas.

c. Mining companies and beneficiation plants are drawing water from rivers and nearby water resources are getting depleted at a fast rate. The river Baitrani has been seriously affected by this activity.

d. Basic facilities such as medical facilities, shelter/residence, education facilities are absent. Roads have a heavy flow of traffic and on one road of the area about 7000 trucks passed during night time.

e. The labour is not being paid adequate wages beyond the minimum wages even though the income of the mine owners runs into billions of rupees.

48. Adverting to corruption in the area due to illegal mining activities, the Commission felt that the Vigilance Commission was unlikely to conduct an impartial and independent enquiry for

arriving at just and proper findings because of external pressures. Accordingly, it would be more appropriate if the Central Bureau of Investigation (CBI) conducts a detailed enquiry into all cases that have been registered between 2008 and 2011. It was also noted that the railways have issued demand notices to the extent of Rs. 1,874 crores. The latest position with regard to these notices is not available.

49. It was also noted that notices have been issued in 146 cases to various lease holders for recovery of mined ore as per Section 21(5) of the MMDR Act. In the Koira circle notices have been issued to 55 lessees for more than Rs. 13,000 crores; in Joda circle notices have been issued to 72 lessees for recovery of more than Rs. 44,000 crores; in Keonjhar circle notices have been issued to 4 lessees for recovery of about Rs. 1,065 crores; in Koraput circle notices have been issued to three lessees for the recovery of about Rs. 44 lakhs; and in Bolangir circle notice has been issued to 1 lessee for the recovery of about Rs. 29.5 crores. In Baripada circle notices have been issued to 11 lessees for recovery of more than Rs. 467 crores. In other words notices have been issued to the lessees for recovery of more than Rs. 59,000 crores! (According to the CEC the figure exceeds Rs. 61,000 crores)!!

50. We have adverted to the reports of the Commission, without relying on them, only to highlight the gravity of the situation and nothing more. The gravity of the situation is also apparent from the report of the CEC and the Commission seems to support it.

Initial contention

51. The initial contention urged on behalf of the Respondents-lease holders was that in giving the report dated 16th October, 2014 the CEC has exceeded its remit. In this context, reference was made to the order of 13th January, 2014 in which it is stated that "The Report will not cover cases other than forest and environmental issues."

52. We are of opinion that this objection deserves immediate rejection. The subsequent orders passed by this Court have been completely overlooked by learned Counsel inasmuch on 21st April, 2014 it was specifically noted by this Court that "CEC, in the meanwhile, will make out a list of such lessees who are operating the leases in violation of the law." Similarly, in the record of proceedings of 16th May, 2014 it was noted that "The Central Empowered Committee will give a final report on the Writ Petition by the end of July, 2014....."

53. From a reading of the orders and the proceedings that have been held in this regard from time to time, it is quite obvious to us that the jurisdiction of the CEC was not limited and it was expected to give a detailed report on all aspects of illegal mining or mining being carried out without any lawful authority in whatever manner. The initial objection raised on behalf of the lease holders is therefore rejected.

Central Empowered Committee

54. The Central Empowered Committee or the CEC was first constituted by this Court by an order dated 9th May, 2002 (***T.N. Godavarman v. Union of India*** (2013) 8 SCC 198) as an interim body. Thereafter, it was constituted by a notification dated 17th September, 2002 issued Under Section

3(3) of the Environment (Protection) Act, 1986 (for short 'the EPA'). It has continued functioning and assisting this Court for more than a decade and even though it has been criticized on a couple of occasions, it is now an established body which renders extremely valuable advice to this Court and provides factual material on the basis of which this Court can make some recommendations and pass appropriate orders.[3]

55. The details of the functioning of the CEC have been discussed by this Court in ***Samaj Parivartana Samudaya v. State of Karnataka*** MANU/SC/0397/2013 : (2013) 8 SCC 154. In that decision, questions were raised about the credibility of the CEC and while rejecting the submissions, it was made clear that the recommendations made by the CEC are subject to the satisfaction of this Court. We need say nothing more except that during the course of hearing of the present petitions, some of the conclusions arrived at by the CEC were disputed by the Petitioners and even by the learned *Amicus* and some were supported by learned Counsel for the mining lease holders, the learned Attorney General and the learned Counsel for the State of Odisha. It is therefore quite clear that in the present cases, the CEC as a fact finding body has functioned impartially and it is only on the conclusions arrived at by the CEC on the basis of the facts gathered that there can be some debate and discussion. Anyone may disagree with the views of the CEC and there is no need to make heavy weather about this at all.

56. In so far as the report given by the CEC on 16th October, 2014 (the final report) is concerned, before going into the details thereof, we may mention that the CEC has stated that it held meetings with the Chief Secretary and other senior officials of the State of Odisha and others on six dates. It also heard the lease holders and others on seven dates and it held meetings with three of the lease holders that is Jindal Steel and Power Ltd. (JSPL), Sarda Mines Pvt. Limited (SMPL) and Essel Mining and Industries Ltd. (Essel) on 10th September, 2014. The CEC visited the site of the mining lease of SMPL from 4th March, 2014 to 7th March, 2014 and had site visits of a number of other lessees from 12th July, 2014 to 16th July, 2014.

57. As far as the facts collected by the CEC are concerned, there is no dispute with regard to their correctness. The CEC has recorded that there are 187 iron ore and manganese ore mining leases in the State of Odisha. On the basis of the material and information collected, a statement was prepared showing lease-wise and year-wise details of production of iron ore and manganese ore, permissible production and production without environmental clearance/beyond environmental clearance. The details in this regard have been given as Annexure R-14 to the final report.

58. Regarding the correctness of the information, the CEC has this to say:

24. A copy of the above said statement prepared by the CEC was made available, through the Director, Mines and Geology, Government of Odisha and also through the Federation of Indian Mining Industries (FIMI), to the lessees of each of the mining leases to enable them to verify the production and other details as given in the statement. During the hearings held before the CEC between 5th August and 12th August, 2014 and also in the representations filed before the CEC a large number of lessees stated that the year-wise production details are not correctly reflected in the statement. Some of them also stated that the environment clearance details are not properly reflected in the statement. Therefore, it was decided that (a) the State Government will reconcile the annual production and other details with the respective lessees and (b) the copies of the

environmental clearances may also be filed before the CEC by those lessees who are disputing the environmental clearances details provided by the State. Accordingly a meeting was convened by the Director, Mines & Geology (DMG) with the lessees on 14th August, 2014 and during which the annual production and other details were reconciled. The reconciled lease-wise and year-wise production and other details provided to the CEC by the State of Odisha may be seen in the statement enclosed at **Annexure-R-11** to this Report. The figures modified in the said statement, after reconciliations, are shown in bold print.

59. The CEC noted that the Director, Mines and Geology of the Government of Odisha had informed the CEC that each lease holder with the exception of SMPL and JSPL agreed with the reconciled production details. On facts, therefore, there is no dispute with regard to the contents of the report of the CEC, although the conclusions might be disputed. Separately, the CEC has dealt with the facts concerning SMPL and JSPL pursuant to a meeting held with them on 11th September, 2014.

Statutory provisions

60. The grant of a mining lease is governed by the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (or the MMDR Act), the Mineral Concession Rules, 1960 (or the MCR) and the Mineral Conservation and Development Rules, 1988 (or the MCDR).

61. Section 4(1) of the MMDR Act provides that no person shall undertake any mining operation in any area except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the Rules made thereunder. A mining operation is defined in Section 3(d) of the MMDR Act as meaning any operation undertaken for the purpose of winning any mineral. Section 4(2) of the MMDR Act provides that no mining lease shall be granted otherwise than in accordance with the provisions of the said Act and the Rules made thereunder.

62. Section 5(2) of the MMDR Act provides for certain restrictions on the grant of a mining lease. It provides that the State Government shall not grant a mining lease unless it is satisfied that the applicant has a mining plan duly approved by the Central Government or the State Government in respect of the concerned mine and for the development of mineral deposits in the area concerned.

63. Section 10 of the MMDR act provides for the procedure for obtaining a mining lease and Sub-section (1) thereof provides that an application is required to be made for a mining lease in respect of any land in which the mineral vests in the government and the application shall be made to the State Government in the prescribed form and along with the prescribed fee.

64. Section 12 of the MMDR Act requires the State Government to maintain a set of registers. Among the registers that the State Government is required to maintain are a register of applications for mining leases and a register of mining leases. Every such register shall be open to inspection by any person on payment of such fee as the State Government may fix.

65. Section 13 of the MMDR Act provides for the Rule making power of the Central Government in respect of minerals. The MCR are framed in exercise of power conferred by Section 13 of the MMDR Act.

66. Section 18 of the MMDR Act makes it the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of the environment by preventing or controlling any pollution which may be caused by mining operations. The MCDR are framed in exercise of power conferred by Section 18 of the MMDR Act.

67. The distinction between the MCR and the MCDR is that the MCR deal, *inter alia*, with the grant of a mining lease and not commencement of mining operations. However, the MCDR deal, *inter alia*, with the commencement of mining operations and protection of the environment by preventing and controlling pollution which might be caused by mining operations.

68. Section 21 of the MMDR Act deals with penalties and Sub-section (1) thereof provides that whoever contravenes the provisions of Sub-section (1) or Sub-section (1A) of Section 4 shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to Rs. 25,000 or with both. Sub-section (5) of Section 21 of the MMDR Act provides that whenever any person raises without any lawful authority, any mineral from any land, the State Government may recover from such person the minerals so raised or where such mineral has been disposed of the price thereof. In addition thereto the State Government may also recover from such person rent, royalty or tax, as the case may be for the period during which the land was occupied by such person without any lawful authority.

Mineral Concession Rules, 1960

69. As far as the MCR are concerned, Rule 22 is of some importance and this provides for an application to be made for the grant of a mining lease in respect of land in which the mineral vests in the government. An application for the grant of a mining lease is required to be made by an applicant to the State Government in Form I to the MCR. Sub Rule (5) of Rule 22 deals with a mining plan and it requires that a mining plan shall incorporate, amongst other things, a tentative scheme of mining and annual programme and plan for excavation for year to year for five years.

70. Rule 22A of the MCR makes it clear that mining operations shall be undertaken only in accordance with the duly approved mining plan. Therefore, a mining plan is of considerable importance for a mining lease holder and is in essence sacrosanct. A mining scheme and a mining plan are a *sine qua non* for the grant of a mining lease.

71. Rule 27 of the MCR deals with the conditions that every mining lease is subject to. One of the conditions is that the lessee shall comply with the MCDR.

72. The format of a mining lease is given in Form K to the MCR and this is relatable to Rule 31 of the MCR which provides that on an application for the grant of a mining lease, if an order has been made for the grant of such lease, a lease deed in Form K or in a form as near thereto as circumstances of each case may require, shall be executed within six weeks of the order, or within such extended period as the State Government may allow.

73. Part VII of Form K deals with the covenants of the lessee/lessees. Clause 10 thereof requires the lessee to keep records and accounts regarding production and employees etc. The lessee is

required, *inter alia*, to maintain a record of the quantity and quality of the mineral released from the leased land, the prices and all other particulars of all sales of the mineral and such other facts, particulars and circumstances, as the Central Government or the State Government may require.

74. Clause 11C is of some importance and it requires that the lessee shall take measures for the protection of the environment like planting of trees, reclamation of land, use of pollution control devices and such other measures as may be prescribed by the Central Government or the State Government from time to time at the expense of the lessee.

75. Rule 37 of the MCR deals with the transfer of a lease and provides, *inter alia*, that a mining lessee shall not without the previous consent in writing of the State Government or the Central Government, as the case may be, assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein. The lessee shall not enter into or make any *bona fide* arrangement, contract or understanding whereby the lessee will or may directly or indirectly be financed to a substantial extent in respect of its operations or undertakings or be substantially controlled by any person or body of persons. Sub-rule (3) of Rule 37 of the MCR enables a State Government to determine any lease if the mining lessee has committed a breach of Rule 37 of the MCR or has transferred any lease or any right, title or interest therein otherwise than in accordance with Sub-rule (2) of Rule 37 of the MCR.

Mineral Conservation and Development Rules, 1988

76. The MCDR promulgated Under Section 18 of the MMDR Act and referred to in Rule 27 of the MCR are also of some significance. Rule 9 of the MCDR prescribes that no person shall commence mining operations in any area except in accordance with a mining plan approved Under Clause (b) of Sub-section (2) of Section 5 of the MMDR Act.

77. The mining plan may be modified in terms of Rule 10 of the MCDR in the interest of safe and scientific mining, conservation of minerals or for protection of the environment. However, the application for modifications shall set forth the intended modifications and explain the reasons for such modifications. The mining plan cannot be modified just for the asking.

78. Rule 13 of the MCDR provides that mining operations are required to be carried out by every holder of a mining lease in accordance with the approved mining plan. If the mining operations are not so carried out, the mining operations may be suspended by the Regional Controller of Mines in the Indian Bureau of Mines or another authorized officer.

79. From our point of view, Chapter V of the MCDR dealing with "Environment" is of significance. In this Chapter, Rule 31 of the MCDR provides that every holder of a mining lease shall take all possible precautions for the protection of the environment and control of pollution while conducting any mining operations in the area.

80. Rule 37 of the MCDR requires certain precautions to be taken against air pollution and obliges the mining lease holder to keep air pollution under control and within permissible limits specified under various environmental laws including the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986.

81. Rule 38 of the MCDR requires the holder of a mining lease to take all possible precautions to prevent or reduce the passage of toxic and objectionable liquid effluents from the mine into surface water bodies, ground water aquifer and usable lands to a minimum. It also mandates effluents to be suitably treated, if required, to conform to the standards laid down in this regard. In other words, the provisions of the Water (Prevention and Control of Pollution) Act, 1974 are required to be adhered to by the mining lease holder.

82. Rule 41 of the MCDR requires every holder of a mining lease to carry out mining operations in such a manner as to cause least damage to the flora of the area and the nearby areas. Every holder of a mining lease is required to take immediate measures for planting not less than twice the number of trees destroyed by reason of any mining operations and to look after them during the subsistence of the lease after which these trees shall be handed over to the State Forest Department or any other appropriate authority. The holder of a mining lease is also required to restore, to the extent possible, other flora destroyed by the mining operations.

83. Briefly therefore, the overall purpose and objective of the MMDR Act as well as the Rules framed there under is to ensure that mining operations are carried out in a scientific manner with a high degree of responsibility including responsibility in protecting and preserving the environment and the flora of the area. Through this process, the holder of a mining lease is obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986 or the EPA as well as the laws pertaining to air and water pollution and also by necessary implication, the provisions of the Forest (Conservation) Act, 1980 (for short 'the FC Act'). Exploitation of the natural resources is ruled out. If the holder of a mining lease does not adhere to the provisions of the statutes or the Rules or the terms and conditions of the mining lease, that person is liable to incur penalties Under Section 21 of the MMDR Act. In addition thereto, Section 4A of the MMDR Act which provides for the termination of a mining lease is applicable. This provides that where the Central Government, after consultation with the State Government is of opinion that it is expedient in the interest of Regulation of mines and mineral development, preservation of natural environment, prevention of pollution, etc. then the Central Government may request the State Government to prematurely terminate a mining lease.

Environment Impact Assessment Notification of 27th January, 1994

84. As can be seen from the statutory scheme adverted to above, protection and preservation of the environment is a significant and integral component of a mining plan, a mining lease and mining operations--and rightly so.

85. Keeping this in mind, an Environment Impact Assessment Notification dated 27th January, 1994 was issued by the Central Government in exercise of powers conferred by Section 3(1) and Section 3(2)(v) of the EPA read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986. The Environment Impact Assessment Notification dated 27th January, 1994 (for short 'EIA 1994') is a prohibitory notification and directs that on and from the date of its publication in the official gazette: (i) expansion or modernization of any activity (if pollution load is to exceed the existing one) and (ii) a new project listed in Schedule I to the notification, shall not be undertaken unless it has been accorded environmental clearance (for short EC) by the Central Government in accordance with the procedure specified in the notification.

86. The notification provides, among other things, that in case of mining operations, site clearance shall be granted for a sanctioned capacity and shall be valid for a period of five years from commencing mining operations. What this means is that on receipt of an EC a mining lease holder can extract a mineral only from a specified site, upto the sanctioned capacity and only for a period of five years from the date of the grant of an EC. This is regardless of the quantum of extraction permissible in the mining plan or the mining lease and regardless of the duration of the mining lease. Consequently, a mining lease holder would necessarily have to obtain a fresh EC every five years and can also apply for an increase in the sanctioned capacity. There is no concept of a retrospective EC and its validity effectively starts only from the day it is granted. Thus, the EC takes precedence over the mining lease or to put it conversely, the mining operations under a mining lease are dependent on and 'subordinate' to the EC.

87. On 4th May, 1994 an Explanatory Note was added to EIA 1994. We are concerned with the 1st Note which deals with the expansion and modernization of existing projects. This reads as follows:

1. Expansion and modernization of existing projects

A project proponent is required to seek environmental clearance for a proposed expansion/modernization activity if the resultant pollution load is to exceed the existing levels. The words "pollution load" will in this context cover emissions, liquid effluents and solid or semi-solid wastes generated. A project proponent may approach the concerned State Pollution Control Board (SPCB) for certifying whether the proposed modernization/expansion activity as listed in Schedule-I to the notification is likely to exceed the existing pollution load or not. If it is certified that no increase is likely to occur in the existing pollution load due to the proposed expansion or modernization, the project proponent will not be required to seek environmental clearance, but a copy of such certificate issued by the SPCB will have to be submitted to the Impact Assessment Agency (IAA) for information. The IAA will however, reserve the right to review such cases in the public interest if material facts justifying the need for such review come to light.

88. The Note is significant and from its bare reading it is clear that if any proposed expansion or modernization activity results in an increase in the pollution load, then a prior EC is required. The project proponent should approach the concerned State Pollution Control Board (for short the SPCB) for certifying whether the proposed expansion or modernization is likely to exceed the existing pollution load or not. If the pollution load is not likely to be exceeded, the project proponent will not be required to seek an EC but a copy of such a certificate from the SPCB will require to be submitted to the Impact Assessment Agency which can review the certificate.

89. What is the requirement, if any, under EIA 1994 with regard to an existing mining lease where there is no proposal for expansion or modernization? Does such a mining lease holder require an EC to continue mining operations? This is answered in the 8th Note which is also of some importance and this reads as follows:

8. Exemption for projects already initiated

For projects listed in Schedule-I to the notification in respect of which required land has been acquired and all relevant clearances of the State Government including NOC from the respective

State Pollution Control Boards have been obtained before 27th January, 1994, a project proponent will not be required to seek environmental clearance from the IAA. However those units who have not as yet commenced production will inform the IAA.

90. The above Note makes it clear that existing mining projects that have a no objection certificate from the SPCB before 27th January, 1994 will not be required to obtain an EC from the Impact Assessment Agency. Of course, this is subject to the substantive portion of EIA 1994 and the 1st Note. However, if the existing mining project does not have a no objection certificate from the SPCB, then an EC will be required under EIA 1994.

91. Two questions immediately arise from a reading of the 1st and the 8th Note. The first question is: What is the base year for considering the pollution load while proposing any expansion activity? The second question is: What is the duration for which an EC is not necessary for an ongoing project which does not propose any expansion, or to put it differently, what is the validity period for a no objection certificate from the SPCB?

92. In our opinion, as far as the first question is concerned, a reading of EIA 1994 read with the 1st Note implies that the base year would need to be the immediately preceding year that is 1993-94. This is obvious from the opening sentence of the 1st Note, that is, "A project proponent is required to seek environmental clearance for a proposed expansion/modernization activity if the resultant pollution load is to exceed the existing levels." (Emphasis supplied). In its report, the CEC has taken 1993-94 as the base year and we see no error in this. Even the MoEF in its circular dated 28th October, 2004 stated with regard to the expansion in production: "If the annual production of any year from 1994-95 onwards exceeds the annual production of 1993-94 or its preceding years (even if approved by IBM), it would constitute expansion." If that expansion results in an increase in the pollution load over the existing levels, then an EC is mandated.

93. It was contended on behalf of the mining lease holders that in terms of the circular of 28th October, 2004 the annual production even prior to 1993-94 could be considered for ascertaining if there was an expansion or not. We cannot accept this submission for a variety of reasons. For one, the existing levels mentioned in the 1st Note clearly have reference to the immediately preceding year and not to a preceding year in a comparatively remote past. Secondly, a very high annual production in any one year is not reflective of a consistent pattern of production-it could very well be a freak year and that freak year certainly cannot be a basic standard or the norm to measure expansion. Then if the interpretation sought to be given is accepted, there would be an absence of consistency and a lack of uniformity with different mining lease holders having different base years. This is hardly conducive to good governance. Finally, EIA 1994 was intended to prevent the existing environmental load from increasing based on the existing data of the immediate past and not data of a few years gone by. We may add that the only exception that could be made in this regard would be if there is no production during 1993-94. In that event, the immediately preceding year would be relevant and that is the only reasonable interpretation that we see for the use of the words "or its preceding years".

94. On the question of the duration or exemption period from an EC in respect of a project that has commenced prior to 27th January, 1994 the substantive portion of EIA 1994 and the 8th Note grant an exemption from the requirement of obtaining an EC if there is no expansion and the existing

pollution load is not exceeded. In any event, a no objection certificate from the SPCB is necessary for continuing the mining operations. Consequently, even if any mining lease holder does not have an EC or does not require an EC for continuing mining operations (but has a no objection certificate from the SPCB), the absence of an EC would not have an adverse impact on the mining lease holder unless of course, there was an expansion in the mining operations without any certificate from the SPCB. In addition to this, the validity period (if any) of the certificate from the SPCB is important-we have not been made aware whether there is such a validity period or not.

95. The contention of learned Counsel for the mining lease holders that EIA 1994 was rather vague, uncertain and ambiguous cannot be accepted. In our opinion, on a composite reading of EIA 1994, it is clear that: (i) A no objection certificate from the SPCB was necessary for continuing mining operations; (ii) An expansion or modernization activity required an EC unless the pollution load was not exceeded beyond the existing levels; (iii) The base year for determining the pollution load and therefore the proposed expansion would be with reference to 1993-94; (iv) Whether an expansion or modernization would lead to exceeding the existing pollution load or not would require a certificate from the SPCB which could be reviewed by the IAA; (v) New projects require an EC; and (vi) Existing projects do not require an EC unless there is an expansion or modernization for the duration (if any) of the validity of the certificate from the SPCB. We need not say anything more on this subject since the CEC has proceeded to discuss the issue of mining in excess of the EC or in excess of the mining plan only from the year 2000-01 onwards. The prior period may, therefore, be ignored and it is the period from 2000-01 onwards which is actually relevant for the present discussion.

96. It was submitted by learned Counsel for the mining lease holders that the MoEF had caused some confusion with regard to the requirement of an EC at the time of renewal of a mining lease. In this connection, reference was made to a Press Note of July 1994 and a letter dated 19th June, 1997 of the MoEF to the Chief Conservator of Forests in the MoEF.

97. Learned Counsel for the mining lease holders sought to buttress their submission that EIA 1994 was vague and ambiguous by mentioning two circulars issued by the MoEF on 5th November, 1998 and 27th December, 2000 extending the period for obtaining an EC for new units. However, these circulars are apparently not on our record (which goes into 148 volumes) and therefore we cannot make any comment about them. These circulars were mentioned to also contend that even for new units the absence of an EC would not have an adverse impact on them, since the period for obtaining an EC was extended from time to time. A reference was also made to a circular dated 14th May, 2002 which later on became the subject of consideration by this Court in ***M.C. Mehta v. Union of India*** MANU/SC/0247/2004 : (2004) 12 SCC 118. A reading of the circular of 14th May, 2002 indicates that several units had come up in violation of EIA 1994. The MoEF had taken the view that such units may be permitted to apply for an EC by 31st March, 1999 which was then extended to 30th June, 2001 by circulars dated 5th November, 1998 and 27th December, 2000 respectively.

98. By the circular dated 14th May, 2002 the deadline for applying for an EC was extended up to 31st March, 2003 as a last and final opportunity to obtain an *ex post facto* EC in respect of units which had commenced mining operations without obtaining a prior EC in violation of EIA 1994. The circular also stated that: "Suitable directions shall be issued by all States/UTs under the

Environment (Protection) Act to units to stop construction activities/operations of all such units that fail to apply for environmental clearance by 31st March, 2003. Units which fail to comply with these directions shall be proceeded against forthwith under the relevant provisions of the Environment (P) Act, 1986 without making reference to this Ministry."

99. It was submitted that in view of these ambiguous and unclear signals emanating from the MoEF which resulted in confusion being worse confounded, the mining lease holders were not clear whether or not they were required to obtain an EC particularly in respect of pre-EIA 1994 mining leases and operations.

100. As mentioned above, these dates and the text of the circulars were emphasized by learned Counsel for the lease holders to contend that it was not obligatory for the mining lease holders, who did not expand their mining operations, to obtain an EC and in any event the period for obtaining an EC was extended till 31st March, 2003 with *ex post facto* approval. In this context, reliance was placed on ***M.C. Mehta*** referred to above.

101. We are not in agreement with the contention of learned Counsel for the mining lease holders on the interpretation given to the various circulars for the reasons given above and must also correctly appreciate the decision of this Court in ***M.C. Mehta***.

102. In ***M.C. Mehta*** the issue that arose for consideration was whether mining activity in the Aravalli hills causes environmental degradation and what directions are required to be issued. While considering this issue, this Court also considered EIA 1994 and the circular dated 14th May, 2002. In doing so, this Court categorically held in paragraph 37 of the Report that the intention of the MoEF was not to legalize the continuance of mining activity without complying with the requisite stipulations. If that were unfortunately so, then it would demonstrate a lack of sensitivity of the MoEF to the principles of sustainable development and the object behind issuing EIA 1994. This Court said:

It does not appear that MOEF intended to legalise the commencement or continuance of mining activity without compliance of stipulations of the notification. In any case, a statutory notification cannot be notified [modified] by issue of circular. Further, if MOEF intended to apply this circular also to mining activity commenced and continued in violation of this notification, it would also show total non-sensitivity of MOEF to the principles of sustainable development and the object behind the issue of notification. The circular has no applicability to the mining activity.

103. Adverting to the MMDR Act, this Court expressed the view in paragraph 52 of the Report that the approval of a mining plan does not imply that a mining lease holder can commence mining operations. The mining lease holder is nevertheless obliged to comply with statutory provisions including the EPA and other laws. It was said:

The grant of permission for mining and approving mining plans and the scheme by the Ministry of Mines, Government of India by itself does not mean that mining operation can commence. It cannot be accepted that by approving mining plan and scheme by the Ministry of Mines, the Central Government is deemed to have approved mining and it can commence forthwith on such approval..... A mining leaseholder is also required to comply with other statutory provisions such

as the Environment (Protection) Act, 1986, the Air (Prevention and Control of Pollution) Act, 1981, the Water (Prevention and Control of Pollution) Act, 1974 and the Forest (Conservation) Act, 1980. Mere approval of the mining plan by the Government of India, Ministry of Mines would not absolve the leaseholder from complying with the other provisions.

104. This Court also considered the question of the applicability of EIA 1994 to the renewal of an existing mining lease. It was held that the said notification would apply to the renewal of a mining lease that came up for consideration post 27th January, 1994. In other words, for the renewal of a mining lease, an EC was required by the mining lease holder. It was held in paragraph 77 of the Report:

We are unable to accept the contention that the notification dated 27-1-1994 would not apply to leases which come up for consideration for renewal after issue of the notification. The notification mandates that the mining operation shall not be undertaken in any part of India unless environmental clearance by the Central Government has been accorded. The clearance under the notification is valid for a period of five years. In none of the leases the requirements of the notification were complied with either at the stage of initial grant of the mining lease or at the stage of renewal. Some of the leases were fresh leases granted after issue of the notification. Some were cases of renewal. No mining operation can commence without obtaining environmental impact assessment in terms of the notification.

105. It is clear from the decision rendered by this Court that EIA 1994 is mandatory in character; that it is applicable to all mining operations-expansion of production or even increase in lease area, modernization of the extraction process, new mining projects and renewal of mining leases. A mining lease holder is obliged to adhere to the terms and conditions of a mining lease and the applicable laws and the mere fact that a mining plan has been approved does not entitle a mining lease holder to commence mining operations. In ***M.C. Mehta*** this Court concluded that EIA 1994 is clearly applicable to the renewal of a mining lease.

106. Subsequent to the decision in ***M.C. Mehta*** two clarificatory circulars were issued by MoEF on 28th October, 2004 and 25th April, 2005. These were adverted to by learned Counsel for the mining lease holders but in our opinion they are not relevant except to the extent that they make it explicit that following the decision of this Court in ***M.C. Mehta***, an EC is required to be obtained before the renewal of a mining lease and that the term 'expansion' would include an increase in production or the lease area or both.

107. It was submitted on behalf of the mining lease holders that the possibility of getting an *ex post facto* EC was a signal to the mining lease holders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. We do not agree. We have referred to various provisions of the MMDR Act and the Rules framed thereunder to indicate the statutory importance given to the protection and preservation of the environment. This was also emphasized in ***M.C. Mehta*** in which it was also stated that "It does not appear that MOEF intended to legalise the commencement or continuance of mining activity without compliance of stipulations of the notification." It appears to us that the MoEF was, in a sense, cajoling the mining lease holders to comply with the law and EIA 1994 rather than use the stick. That the mining lease holders chose to misconstrue the soft implementation as a licence to not abide by the requirements

of the law is unfortunate and was an act of omission or commission by them at their own peril. We cannot attribute insensitivity to the MoEF or even to the mining lease holders to environment protection and preservation, but at the same time we cannot overlook the obligation of everyone to abide by the law. That the MoEF took a soft approach cannot be an escapist excuse for non-compliance with the law or EIA 1994.

Environment Impact Assessment Notification of 14th September, 2006

108. On 14th September, 2006 another EIA Notification was issued by the MoEF. This notification (for short EIA 2006) required prior EC for projects or activities mentioned in the Schedule to it both for major as well as minor minerals if the leased area is 5 hectares or more. We were informed that several mining lease holders, in compliance with EIA 2006, applied for and were granted an EC.

109. It was submitted by learned Counsel for the mining lease holders that the confusion, vagueness and uncertainty caused by EIA 1994 and subsequent circulars and other communications did not end with the issuance of EIA 2006. Reference was made to a circular dated 13th October, 2006 which deals with interim operational guidelines till 13th September, 2007 in respect of applications made under EIA 1994. We do not see the relevance of this circular (which really dealt with transitional issues) not only for the reason given in ***M.C. Mehta*** that circulars cannot override statutory notifications but also because it deals with the procedure for considering applications made under EIA 1994.

110. Reference was also made to a circular dated 2nd July, 2007. The passage relied upon reads as follows:

It is clarified that all such mining projects which did not require environmental clearance under the EIA Notification, 1994 would continue to operate without obtaining environmental clearance till the mining lease falls due for renewal, if there is no increase in lease area and/or there is no enhancement of production. In the event of any increase in lease area and or production, such projects would need to obtain prior environmental clearance. Further, all such projects which have been operating without any environmental clearance would obtain environmental clearance at the time of their lease renewal even if there is no increase either in terms of lease area or production.

111. The aforesaid circular relates to three categories that is: (i) Mining leases, where no EC was required under EIA 1994 would continue to operate without an EC; (ii) If there was an increase in the lease area or enhancement of production, an EC was required by the mining lease holder; (iii) All projects would require an EC at the time of renewal of the mining lease even if there was no increase in the lease area or enhancement of production.

112. Reference was also made to an Office Memorandum dated 19th August, 2010. However a reading of this document brings out that it basically relates to construction at site but makes it clear that no activity relating to any project covered under EIA 2006 including civil construction could be undertaken without obtaining a prior EC except fencing of the site to protect it from getting encroached and construction of temporary sheds for the guards.

113. Reference was also made to Office Memorandums dated 16th November, 2010 and 12th December, 2012 but having gone through them we find them of little relevance as they deal with procedural issues only.

114. All that we need to say on this subject is that there is no confusion, vagueness or uncertainty in the application of EIA 1994 and EIA 2006 insofar as mining operations were commenced on mining leases before 27th January, 1994 (or even thereafter). Post EIA 2006, every mining lease holder having a lease area of 5 hectares or more and undertaking mining operations in respect of major minerals (with which we are concerned) was obliged to get an EC in terms of EIA 2006.

115. An attempt was then made by learned Counsel for the mining lease holders to get out of the rigours of EIA 1994 and EIA 2006 by contending that some of them had modified the mining plan (with approval) and that therefore they had extracted iron ore or manganese ore, as the case may be, in terms of the mining plan but not necessarily in terms of the EC that had been obtained, if at all.

116. We have already held that a mining plan is subordinate to the EC and in ***M.C. Mehta*** it was held by this Court that having an approved mining plan does not imply that a mining lease holder can commence mining operations. That being so, a modified mining plan without a revised or amended EC, is of no consequence. What the contention of learned Counsel suggests to us is that under the shield of a modified mining plan, illegal or unlawful mining in the form of mining without an EC, mining by over-reaching EIA 1994 and EIA 2006 was being carried out.

117. The contention apart, the subterfuge of obtaining a modified mining plan to get over the adverse effects of excess and illegal or unlawful production of iron ore or manganese ore was deprecated by the Ministry of Mines of the Government of India. In a letter dated 29th October, 2010 addressed to the Controller General, Indian Bureau of Mines it was pointed out that State Governments had expressed a concern that the Indian Bureau of Mines (IBM) had been modifying mining plans for allowing an increase in production of ore without adequate intimation to the State Governments. A concern was raised that such a revision was often being used to increase production of ore, which is sometimes not accounted for in mining operations in the concerned mining lease. It was made clear that all modifications of mining plans shall be effective prospectively only and earlier instances of irregular mining shall not be regularized through a modification of the mining plan.

118. In a subsequent letter dated 12th December, 2011 addressed to the Chief Secretary in the Government of Orissa the said Ministry of Mines noted that there were violations of the actual production limit laid down in the mining plan and that the State Government had finally taken steps to curb illegal mining in respect of over-production of minerals. There was a reference to suggest (and we take it to be so) that 20% deviation from the mining plan (in terms of over-production) would be reasonable and permissible. However, it appears from a reading of the communication that illegal mining was going on beyond the 20% deviation limit and that appropriate steps were needed to curb these violations. Learned Counsel for the Petitioners submitted that such egregious violations must be firmly dealt with by cancellation or termination of the mining lease and a soft approach is not called for.

119. In this context, it is worth noting that a High Level Committee (called the Hoda Committee) on the National Mineral Policy noted in its Report dated 22nd December, 2006 in paragraph 3.47 as follows:

3.47 An EMP [Environment Management Plan] has to be prepared under the MCDR and got approved by IBM. However, this EMP is not acceptable to the MoEF. The miner has to prepare two EMPs separately--one for IBM and another for MoEF. The Committee suggests that IBM and MoEF should prepare guidelines for a composite EMP so that IBM can approve the same in consultation with MoEF's field offices. This will eliminate anomalous situations where increase of even a few tonnes in production requires project authorities to get a fresh EMP approved from the MoEF although the IBM allows a grace of ±10% per cent, keeping in view the fluctuations in the market situation and process complexities. If a single EMP is accepted in principle such anomalies can be resolved in advance. The Committee feels the MoEF should also have a cushion of ±10% per cent in production while giving EIA clearance.

120. The above passage indicates that the permissible variation in production as per the Indian Bureau of Mines is ±10% but according to the letter dated 12th December, 2011 issued by the Ministry of Mines, the reasonable variation limit could be ±20%. It is not clear why there was a shift in the variation, but as rightly pointed out by learned Counsel for the Petitioners, the fact that in some cases the variation exceeded 20% was a cause for concern which necessitated strict and punitive action.

121. A submission was made by learned Counsel for the mining lease holders to the effect that since many of them had been granted the first deemed statutory renewal of the mining lease Under Rule 24A of the MCR, the requirements of EIA 1994 would not be applicable. We were shown various amendments made to Rule 24A of the MCR from time to time particularly the amendments made on 10th February, 1987, 7th January 1993, 27th September, 1994, 17th January, 2000, 18th July, 2014 and 8th October, 2014. In our opinion, none of these are of any consequence, the reason being that for the purposes of renewal of the mining lease, an application is required to be made by the mining lease holders and the deemed renewal Clause Under Rule 24A of the MCR will come into operation only after an application for renewal is made in Form J in Schedule I of the MCR. Under Rule 26 of the MCR, the State Government may refuse to renew the mining lease. That apart, the position in environmental jurisprudence with regard to the renewal of a mining lease has been made explicit by this Court in ***M.C. Mehta***. Even otherwise, in view of EIA 1994, it is quite clear that the renewal of a mining lease would require a prior EC.

122. We may also draw attention in this regard to a circular dated 28th October, 2004 issued by the MoEF wherein it was stated that in view of the decision in ***M.C. Mehta*** all mining projects of major minerals of more than 5 hectares lease area that had not yet obtained an EC would have to do so at the time of renewal of the lease.

123. Finally, it was submitted that whenever an EC is granted, it would have retrospective effect from the date of the application for grant of an EC. In this context, it was pointed out that there were enormous delays in granting an EC and that the Hoda Committee had noted with reference to EIA 2006 that if all goes well, the grant of an EC takes about 232 days whereas the international norm is that an EC is granted within six months or 180 days. According to the additional affidavit

filed by some mining lease holders, the period of 232 days mentioned by the Hoda Committee was actually a conservative estimate and that in fact it takes anything upto 390 days for the grant of an EC. It was submitted that the position was even worse under EIA 1994 since the MoEF rarely showed any urgency in the grant of an EC. Examples were cited before us to show that in some instances the grant of an EC took more than two years. Taking all this into consideration it was submitted that it would be more appropriate that the EC is given retrospective effect from the date of the application.

124. We are not in agreement with learned Counsel for the mining lease holders. There is no doubt that the grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long term impact. EIA 1994 is therefore very clear that if expansion or modernization of any mining activity exceeds the existing pollution load, a prior EC is necessary and as already held by this Court in ***M.C. Mehta*** even for the renewal of a mining lease where there is no expansion or modernization of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an *ex post facto* environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an *ex post facto* or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. We make it clear that an EC will come into force not earlier than the date of its grant.

Illegal Mining

125. A question raised by learned Counsel for the mining lease holders concerned the interpretation of the expression 'illegal mining'. Reliance was placed on the report of the CEC which refers to Rule 2(iia) of the MCR to conclude that the violation of any Rule within the mining lease area would not come within the definition of 'illegal mining' except where there has been a violation of the Rules framed Under Section 23C of the MMDR Act. According to the CEC:

17. Illegal mining has been defined as mining operations undertaken by any person in any area without holding a mining lease. It does not include violation of any Rules within the mining lease area except the Rules made Under Section 23C of the MMDR Act, 1957. The mining lease area shall be considered as an area held with lawful authority by the lessee (refer Rule 2(iia), MCR, 1960).

126. As can be seen from the above, there is a difference of opinion between the CEC and the Commission on what is illegal mining or mining without lawful authority and we will give our views on the subject.

127. According to the lessees a mining operation only outside the mining lease area would constitute 'illegal mining' making illegal mining lease centric. We are unable to accept this narrow interpretation given by the CEC and relied upon by learned Counsel for the mining lease holders.

128. The simple reason for not accepting this interpretation is that Rule 2(iia) of the MCR was inserted by a notification dated 26th July, 2012 while we are concerned with an earlier period. That apart, as mentioned above, the holder of a mining lease is required to adhere to the terms of the mining scheme, the mining plan and the mining lease as well as the statutes such as the EPA, the

FCA, the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981. If any mining operation is conducted in violation of any of these requirements, then that mining operation is illegal or unlawful. Any extraction of a mineral through an illegal or unlawful mining operation would become illegally or unlawfully extracted mineral.

129. It is not, as suggested by learned Counsel, that illegal mining is confined only to mining operations outside a leased area. Such an activity is obviously illegal or unlawful mining. Illegal mining takes within its fold excess extraction of a mineral over the permissible limit even within the mining lease area which is held under lawful authority, if that excess extraction is contrary to the mining scheme, the mining plan, the mining lease or a statutory requirement. Even otherwise, it is not possible for us to accept the narrow interpretation sought to be canvassed by learned Counsel for the mining lease holders particularly since we are dealing with a natural resource which is intended for the benefit of everyone and not only for the benefit of the mining lease holders.

Encroachments

130. Section 4(1) of the MMDR Act makes it clear that no person can carry out any mining operations except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the Rules made thereunder. Obviously therefore, any person carrying on mining operations without a mining lease, is indulging in illegal or unlawful mining. This would also necessarily imply that if a mining lease is granted to a person who carries out mining operations outside the boundaries of the mining lease, the mineral extracted would be the result of illegal or unlawful mining.

131. In its report, the CEC has dealt with illegal mining outside the sanctioned mining areas. It is stated that 82 mining leases for iron ore and manganese ore were identified by the Commission where there were encroachments in the form of illegal mining pits, illegal over-burden dumps etc.

132. In respect of these 82 mining leases, the State of Odisha appointed a Committee on the suggestion of the Commission, to survey and identify the exact extent and location of the sanctioned lease area, lease area under occupation of the mining lease holder and the area under encroachment/illegal mining. The Committee or the Joint Survey consisted of officers of the Revenue Department, Forest Department and Mining Department of the State of Odisha who carried out a field survey in respect of 39 mining leases. The findings of the field survey or the Joint Survey were verified by a team comprising of the Director Mines, Chief Engineer, ORSAC and the Additional Secretary, F & E Department of the Government of Odisha.

133. It is mentioned in the report of the CEC that the Joint Survey for each of the 39 mining leases is technically sound and reliable. However, in respect of some of the leases, it would be desirable for the State Government to take another look at the results of the field survey. Unfortunately, the CEC has not identified these mining leases that require another look. Be that as it may, the fact is that a joint survey has not been conducted in respect of 43 mining leases.

134. We are of the view that for completing the record and taking the report of the CEC to its logical conclusion, it would be appropriate if a fresh Joint Survey is conducted by concerned

officers of the Government of Odisha from the Revenue Department, the Forest Department, the Mining Department and any other department that may be deemed necessary. The Forest Survey of India, the MoEF, the Indian Bureau of Mines and the Geological Survey of India should also be associated in the Joint Survey. In our opinion, it would also be appropriate if the CEC is also associated in the Joint Survey and the best and latest technology should be made use of including satellite imagery and thereafter a report is submitted in this Court on or before 31st December, 2017 after hearing the 82 lessees identified by the Commission.

Adherence to the mining plan

135. A side issue raised by learned Counsel for the mining lease holders in this regard was the necessity (if any) of adhering to the annual plan or calendar plan of mining. It was contended that a mining lease holder could mine in excess of the annual plan. While it is so, this submission must be tempered and appreciated in the proper context. A mining plan is valid for a period of five years but there could be a 20% variation in extraction over and above the mining plan. This is the maximum that is stated to be reasonably permissible according to the Ministry of Mines. In terms of Rule 22(5) of the MCR a mining plan shall incorporate a tentative scheme of mining and annual program and plan for excavation from year to year for five years. At best, there could be a variation in extraction of 20% in each given year but this would be subject to the overall mining plan limit of a variation of 20% over five years. What this means is that a mining lease holder cannot extract the five year quantity (with a variation of 20%) in one or two years only. The extraction has to be staggered and continued over a period of five years. If any other interpretation is given, it would lead to an absurd situation where a mining lease holder could extract the entire permissible quantity under the mining plan plus 20% in one year and extract miniscule amounts over the remaining four years, and this could be done without any reference to the EC. The submission of learned Counsel in this regard simply cannot be accepted.

136. In the letter dated 12th December, 2011 sent by the Secretary in the Ministry of Mines of the Government of India to the Chief Secretary of the Government of Odisha (adverted to above) concerning violation of annual production limit laid down in the approved mining plan, it was stated, *inter alia*, that an analysis of production and violations in 104 mining leases for bulk minerals in the last ten years was undertaken by the Indian Bureau of Mines. It was noted that in 71 cases there was excess ore produced beyond the reasonable variation limit of 20%. It was noted that this was partly due to the failure of the State machinery to restrict the movement of minerals.

137. In a further letter dated 5th September, 2012 it was reiterated that any violation of the mining plan or the mining scheme noticed by the State Government should be immediately brought to the notice of the Indian Bureau of Mines to initiate suitable action. It was reiterated that transit passes to such mines should not be issued by the State Government so as to stop any additional outgo. It was added: "Needless to say any revision on the limits of production is subjected to statutory clearances under Environment and Forest laws. Having said that, the State Mining and Geology officials should not also lose focus on taking stringent action against any instances of illegal mining, undertaken outside the leased area, and passed off as excess production." It is quite clear from the correspondence placed before us that as far as the Union of India is concerned, any violation of the requirements of the law has to be firmly dealt with.

138. With reference to the interpretation of Section 21(5) of the MMDR Act (which we shall soon consider) it was stated as follows:

Section 21(5) of MMDR Act is clearly applicable on such land which is occupied without lawful authority. It is clarified that in the context of MMDR Act, 1957, violations pertaining to mining operations within the mining lease area are to be dealt with only in terms of the provisions of the Mineral Conservation and Development Rules 1988. The State Governments have clear powers to tackle any offences related to mining outside the mining lease area in terms of Section 23C of the MMDR Act, 1957. However, the interpretation that a land granted under a Mining lease by the State Government can be held to be occupied without lawful authority on the grounds of violation of provisions of any other law of the land is not appropriate and such interpretation may not stand in the Court of law. Such Act or Rules, including the Environment (Protection) Act, 1986, or the Forest (Conservation) Act, 1980, etc. clearly provide penalties for violations under those laws. This aspect may be clarified to the State Accountant General also.

139. All that we need say for the present is that the interpretation given in the aforesaid letter to Section 21(5) of the MMDR Act is not fully correct. While mining in excess of permissible limits under the mining plan or the EC or FC on leased area may not amount to mining on land occupied without lawful authority, it would certainly amount to illegal or unlawful mining or mining without authority of law.

Section 21 of the MMDR Act

140. The discussion on illegal or unlawful mining takes us to the question of the consequence of illegal or unlawful mining and the interpretation of Section 21(1) and Section 21(5) of the MMDR Act.

141. Section 21(1) of the MMDR Act is clearly relatable to a penal offence and applies if any one contravenes the provisions of Section 4(1) of the MMDR Act. Section 4(1) of the MMDR Act prohibits the undertaking of any mining operation in any area except under and in accordance with the terms and conditions of a mining lease and the Rules made thereunder. Therefore, when a person carries out a mining operation in any area other than a leased area or violates the terms of a mining lease, which incorporates the mining plan and which requires adherence to the law of the land, that person becomes liable for prosecution Under Section 21(1) of the MMDR Act. In the event of a conviction, he or she shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to Rs. 5 lakh per hectare of the area.

142. As far as Section 21(5) of the MMDR Act is concerned, according to the CEC the provision is applicable only if a person indulges in illegal mining outside the mining lease area. Consequently, Section 21(5) of the MMDR Act is not attracted even if the mineral raised within the mining lease area is without an EC or beyond the quantity prescribed by the EC or beyond the quantity permitted in the mining plan. In such a situation, the provisions of the EPA or the MCR come into play. This interpretation is supported by learned Counsel for the mining lease holders who affirm that Section 21(5) of the MMDR Act is mining lease area centric. In other words, according to the CEC and the learned Counsel, for the purposes of Section 21(5) of the MMDR

Act illegal mining is mining outside the mining lease area and Section 21(5) of the MMDR Act has to be understood in that light.

143. Reference was also made to the Explanation to Rule 2(iia) of the MCR where it is stated that for the purposes of this clause, the violation of any rules, other than the Rules made Under Section 23C of the MMDR Act, within the mining lease area by a holder of a mining lease shall not include illegal mining. In other words, it was submitted that Section 21(5) of the MMDR Act is required to be understood in the context of Rule 2(iia) of the MCR.

144. It was submitted by Shri Ashok Desai learned senior Counsel for one of the intervenors, that the penalty postulated by Section 21(5) of the MMDR Act though an imposition of a pecuniary liability, is punishment for the commission of an offence. By referring to ***Khemka & Co. (Agencies) Pvt. Ltd. v. State of Maharashtra*** MANU/SC/0442/1975 : (1975) 2 SCC 22 it was contended that the liability sought to be imposed by Section 21(5) of the MMDR Act is not a liability that is created by a clear, unambiguous and express enactment.

145. As far as the Union of India is concerned, in its affidavit filed on 20th January, 2017 by Shri Sudhakar Shukla, Economic Advisor in the Government of India, Ministry of Mines, it is submitted (and this submission is supported by the learned Attorney General in his oral submissions) that Section 21(5) of the MMDR Act is in two parts. The first part refers to the raising of minerals without any lawful authority from any land. The second part is in addition to what is recoverable under the first part. The addition is to the effect that when a person raises a mineral from any area not in his or her lawful authority, that person is also liable to pay the rent, royalty or tax for the period during which the land was occupied without lawful authority.

146. It is further submitted that 'illegal mining' as defined in Rule 2(iia) of the MCR is also required to be read in the context of Rule 26(4) and Rule 27(4A) of the MCR which deal with the refusal to renew a mining lease if the mining lease holder is convicted of illegal mining and the determination of a mining lease in the event the mining lease holder is convicted of illegal mining. It is submitted that the definition of illegal mining in the MCR must be strictly construed and limited to the provisions of the MCR and cannot apply to the provisions of Section 21(5) of the MMDR Act.

147. In conclusion, it is reiterated by the Union of India on affidavit as follows:

55. That considering all the above, the Ministry would like to submit that the provisions of Sub-section (5) of Section 21 would apply to all minerals raised without any lawful authority, be it forest clearances or environment clearances or any other such legal requirements.

56. That penalties would arise Under Section 21(5) of the MMDR Act, 1957, in respect of any form of mining activity without lawful authority. Mining outside lease area would on the face of it amount to mining without lawful authority and would attract the provisions of Section 21(5); and, in addition, all forms of mining without lawful authority including that in breach of the limits imposed by the Environmental Clearance carried out within the lease area would also invite penalties Under Section 21(5).

148. On behalf of the State of Odisha, it was submitted by Shri Rakesh Dwivedi learned senior Counsel by relying upon ***Karnataka Rare Earth v. Senior Geologist, Department of Mines & Geology*** MANU/SC/0057/2004 : (2004) 2 SCC 783 that what is sought to be achieved by Section 21(5) of the MMDR Act is to recover the price of the mineral that has been illegally or unlawfully or unauthorisedly raised with an intention to compensate the State for the loss of the mineral owned by it, the loss having been caused by a person who is not authorized by law to raise that mineral. There is no element of penalty involved in this and the recovery of the mineral or its price is not a penal action but is merely compensatory. This is what this Court had to say in ***Karnataka Rare Earth***:

12. Is the Sub-section (5) of Section 21 a penal enactment? Can the demand of mineral or its price thereunder be called a penal action or levy of penalty?

13. A penal statute or penal law is a law that defines an offence and prescribes its corresponding fine, penalty or punishment. (*Black's Law Dictionary*, 7th Edn., p. 1421.) Penalty is a liability composed (sic imposed) as a punishment on the party committing the breach. The very use of the term "penal" is suggestive of punishment and may also include any extraordinary liability to which the law subjects a wrongdoer in favour of the person wronged, not limited to the damages suffered. (See Aiyar, P. Ramanatha: *The Law Lexicon*, 2nd Edn., p. 1431.)

14. In support of the submission that the demand for the price of mineral raised and exported is in the nature of penalty, the learned Counsel for the Appellants has relied on the marginal note of Section 21. According to Justice Singh, G.P.: *Principles of Statutory Interpretation* (8th Edn., 2001, at p. 147), though the opinion is not uniform but the weight of authority is in favour of the view that the marginal note appended to a Section cannot be used for construing the section. There is no justification for restricting the Section by the marginal note nor does the marginal note control the meaning of the body of the Section if the language employed therein is clear and spells out its own meaning. In *Director of Public Prosecutions* v. *Schildkamp* (1969) 3 All ER 1640: (1970) 2 WLR 279 (HL) Lord Reid opined that a sidenote is a poor guide to the scope of a Section for it can do no more than indicate the main subject with which the Section deals and Lord Upjohn opined that a sidenote being a brief precis of the Section forms a most unsure guide to the construction of the enacting Section and very rarely it might throw some light on the intentions of Parliament just as a punctuation mark.

15. We are clearly of the opinion that the marginal note "penalties" cannot be pressed into service for giving such colour to the meaning of Sub-section (5) as it cannot have in law. The recovery of price of the mineral is intended to compensate the State for the loss of the mineral owned by it and caused by a person who has been held to be not entitled in law to raise the same. There is no element of penalty involved and the recovery of price is not a penal action. It is just compensatory.

149. We are in agreement with the view expressed by the learned Attorney General and Shri Dwivedi as also the view expressed in ***Karnataka Rare Earth***. The decision in ***Khemka & Co.*** is not at all apposite. There is no ambiguity in Section 21(5) of the MMDR Act or in its application. We are also of opinion that though Section 21(1) of the MMDR Act might be in the realm of criminal liability, Section 21(5) of the MMDR Act is certainly not within that realm.

150. In our opinion, Section 21(5) of the MMDR Act is applicable when any person raises, without any lawful authority, any mineral from any land. In that event, the State Government is entitled to recover from such person the mineral so raised or where the mineral has already been disposed of, the price thereof as compensation. The words 'any land' are not confined to the mining lease area. As far as the mining lease area is concerned, extraction of a mineral over and above what is permissible under the mining plan or under the EC undoubtedly attracts the provisions of Section 21(5) of the MMDR Act being extraction without lawful authority. It would also attract Section 21(1) of the MMDR Act. In any event, Section 21(5) of the Act is certainly attracted and is not limited to a violation committed by a person only outside the mining lease area-it includes a violation committed even within the mining lease area. This is also because the MMDR Act is intended, among other things, to penalize illegal or unlawful mining on any land including mining lease land and also preserve and protect the environment. Action under the EPA or the MCR could be the primary action required to be taken with reference to the MCR and Rule 2(ii a) thereof read with the Explanation but that cannot preclude compensation to the State Under Section 21(5) of the MMDR Act. The MCR cannot be read to govern the MMDR Act.

151. What is the significance of this discussion? It was submitted that the CEC has taken the following view:

..... it may be appropriate that 30% of the notional value of the iron and manganese produced by each of the lessees without/in excess of the environmental clearances may be directed to be recovered from the concerned lessees and with the explicit understanding the concerned lessees as well as the officers will continue to be liable for action under the provisions of the respective Acts.

152. Learned Counsel for the Petitioners and the learned Amicus were of opinion that the provisions of Section 21(5) of the MMDR Act require that the entire price of the illegally mined ore should be recovered from each defaulting lessee. Similarly, in its affidavit, the Union of India differs with the recommendation of the CEC. According to the affidavit of the Union of India this would be contrary to the statutory scheme and in fact 100% recovery should be made under the provisions of Section 21(5) of the MMDR. We may note that only to this extent, the learned Attorney General differed with the view expressed by the Union of India and submitted that the recommendation of the CEC to recover only 30% of the value of the illegally mined ore should be accepted.

153. In our opinion, there can be no compromise on the quantum of compensation that should be recovered from any defaulting lessee-it should be 100%. If there has been illegal mining, the defaulting lessee must bear the consequences of the illegality and not be benefited by pocketing 70% of the illegally mined ore. It simply does not stand to reason why the State should be compelled to forego what is its due from the exploitation of a natural resource and on the contrary be a party in filling the coffers of defaulting lessees in an ill gotten manner.

Calculations on merits

154. The issue now is with regard to the calculations made by the CEC with regard to the production of iron ore and manganese ore without or in excess of the EC and/or the mining plan. As already mentioned above, the figures were not disputed (except by JSPL and SMPL).

Therefore, only the application of the figures requires consideration and so we do not need to examine each individual case. However to understand and appreciate the manner in which the CEC has arrived at its figures, we may state that this has been specifically mentioned by the CEC in its report. The basis of the calculations is as follows:

(a) the production during the year 1993-94 has been considered as the permissible production during each year till the mining lease did not have the environmental clearance;

(b) the permissible production for the year in which the environmental clearance was obtained for the first time has been considered on pro rata basis of (a) the prescribed annual production and (b) the date of the grant of the environmental clearance. For this purpose the environmental clearance granted on or before 15th of a month has been considered valid for the entire month. Where the environmental clearance has been granted after 15th of a month it has been considered valid from the subsequent month. For example if the environmental clearance for a mining lease has been granted say on 10th October, 2008 for an annual production of say 12 lakh MT then in that case the permissible production for the mining lease for the year 2008-09 would be taken as 6 lakh MT (12x6/12 lakh MT) and 12 lakh MT per annum in the subsequent year; and

(c) wherever a mining lease having environmental clearance has been granted revised environmental clearance for a higher production the permissible annual production for the year, during which the revised environmental clearance has been granted, has been considered on pro rata basis of the quantities prescribed in the earlier environmental clearance and the revised environmental clearance. For example if the mining lease was having environmental clearance for annual production of 12 lakh MT and say on 28th September, 2009 it has been granted revised environmental clearance for annual production of say 24 lakh MT then in that case the permissible production for the year 2009-10 would be taken as 18 lakh MT (12x6/12+24x6/12) and 24 lakh MT per annum in subsequent years.

155. A submission made by the mining lease holders was that the maximum production in any year up to 1993-94 should be considered as the base for making the calculations. Such a contention was also urged before the CEC and was rejected. We have examined this contention independently and are of the view that the base year of 1993-94 is most appropriate-we have already given our reasons for this. Some lessees might lose in the process while some of them might benefit but that cannot be avoided. In any event, each mining lease holder is being given the benefit of calculations only from 2000-01 and is not being 'penalized' for the period prior thereto. We think the mining lease holders should be grateful for this since it was submitted by learned Counsel for the Petitioners and the learned *Amicus* that the penalty should be levied from the date of EIA 1994. In our opinion, the cut-off from 2000-2001 (without interest) is undoubtedly reasonable and there can be hardly be any grievance in this regard. The mining lease holders cannot have their cake and eat it too, along with the icing on top.

156. Since the recommendation made by the CEC in this regard is not totally unreasonable, we accept that the compensation should be payable from 2000-2001 onwards at 100% of the price of the mineral, as rationalized by the CEC.

Violation of the Forest (Conservation) Act, 1980

157. Before dealing with the violations of Section 2 of the Forest (Conservation) Act, 1980 (for short 'the FCA'), it is necessary to give a brief background.

158. The FCA came into operation initially through the Forest (Conservation) Ordinance, 1980 with effect from 25th October, 1980. The said Ordinance was repealed and subsequently the FCA came into effect on 25th December, 1980.

159. Section 2 of the FCA provides that no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing, *inter alia*, that any forest land or any portion thereof may be used for non-forest purposes.

160. The interpretation of Section 2 of the FCA first came up for consideration in ***State of Bihar v. Banshi Ram Modi*** MANU/SC/0012/1985 : (1985) 3 SCC 643. In that case, Banshi Ram Modi was granted a mining lease for mining and winning mica. During the course of mining operations, feldspar and quartz were discovered. Modi then applied to the Central Government to include these minerals in the lease. The State Government agreed to do so but did not obtain the previous approval of the Central Government for the inclusion of the two minerals in the original lease.

161. The Central Government took the view that since its previous approval had not been obtained for inclusion of feldspar and quartz in the mining lease, Modi could not be permitted to mine these two minerals. This led Modi to approach the High Court with the contention that he was not breaking up or clearing any forest land other than the land on which mining operations were already being carried on. The High Court allowed the writ petition but feeling aggrieved, the State of Bihar preferred an appeal in this Court.

162. The question before this Court was a narrow one, namely, whether prior approval of the Central Government is necessary in respect of a mining lease, granted for winning a certain mineral prior to the coming into force of the FCA, if the lessee applies to the State Government after the FCA came into force for permission to win and carry any new mineral from the broken up area?

163. While answering this question in the negative, it was held that after the commencement of the FCA no fresh breaking up of forest land or no fresh clearing of the forest on any such land could be permitted by the State Government or any authority without the approval of the Central Government. However, in respect of broken up land, it was held that if the State Government permits the lessee to remove any discovered mineral, it cannot be said that there has been a violation of Section 2 of the FCA particularly since there is no breaking up of any fresh forest land.

164. Subsequently in ***Ambica Quarry Works v. State of Gujarat and Ors.*** MANU/SC/0853/1988 : (1987) 1 SCC 213 when the lease of the mining holder came up for renewal, the FCA had already come into force. Since the forest department of the State of Gujarat refused to give a no objection certificate, the application for renewal of the lease was rejected. The question that arose for consideration was whether, after coming into force of the FCA, the mining lease holder was entitled to renewal of the mining lease. While answering the question in the negative this Court held that the renewal of a lease cannot be claimed as a matter of right. The primary purpose of the FCA was to prevent deforestation and ecological imbalance as a result of deforestation. Therefore, the primary duty under the FCA was to the community and the obligation to society must

predominate over the obligation to the individuals. While distinguishing ***Banshi Ram Modi*** this Court held that renewal of the lease would lead to further deforestation or at least it would not help in reclaiming the area where deforestation had already taken place. The primary purpose of the FCA is to prevent further deforestation and any interpretation must sub-serve that purpose and implement the FCA. Under the circumstances, it was held, considering the scheme of the FCA that refusal to renew the lease without prior approval of the Central Government was not unjustified.

165. This view was reiterated in ***Rural Litigation and Entitlement Kendra v. State of U.P.*** MANU/SC/0415/1988 : (1989) Supp. (1) SCC 504 It was held that the FCA does not permit mining in a forest area. Reiterating the view expressed in ***Ambica Quarry Works***, it was observed that compliance of Section 2 of the FCA is necessary as a condition precedent even for the renewal of a mining lease. This Court went so far as to hold that if any decree or order has already been obtained by any of the mining lease holders, from any Court relating to renewal of their lease, the same shall stand vacated and similarly, any appeal or other proceeding taken to obtain a renewal or against any order or decree granting renewal shall also become *non est*.

166. The definition of the word 'forest' for the purposes of the FCA came up for consideration in ***T.N. Godavarman v. Union of India*** MANU/SC/0278/1997 : (1997) 2 SCC 267. In its decision of 12th December, 1996 this Court observed that during the course of hearing it appeared that there is a misconception about the true scope of the FCA and the meaning of the word 'forest' used therein. Consequently, there is also a misconception about the need for prior approval of the Central Government as mandated by Section 2 of the FCA in respect of certain activities in a forest area, which activities are more often of a commercial nature.

167. In this context, it was held that 'forest' must be understood according to its dictionary meaning and it would cover all statutorily recognized forests, whether designated, reserved, protected or otherwise. It was further held that 'forest' would also include any area recorded as a forest in the government records irrespective of the ownership. With this in mind, this Court directed that prior approval of the Central Government is required for any non-forest activity within the area of any 'forest'. In accordance with Section 2 of the FCA all on-going activity within any forest in any State throughout the country, without prior approval of the Central Government must cease forthwith. This particular direction given by this Court is of immense significance.

168. This Court further directed each State Government to constitute within one month an Expert Committee, *inter alia*, to identify areas which are 'forest' irrespective of whether they are so notified, recognized or classified under any law and irrespective of the ownership of the land of such forest.

169. Pursuant to the directions given by this Court, the State of Odisha constituted District Level Committees (for short 'DLC') for identification of forest lands. After the identification process, appropriate affidavits were filed by the State of Odisha in this Court in 1997-98, the last being dated 6th January, 1998.

170. In the meanwhile, in ***T.N. Godavarman v. Union of India*** MANU/SC/2110/1997 : (1997) 3 SCC 312 this Court passed certain directions on 4th March, 1997 with regard to what was categorized as mining matters. The directions given by this Court are as follows:

9. We direct that-

(1) where the lessee has not forwarded the particulars for seeking permission under the FCA, he may do so immediately;

(2) the State Government shall forward all complete pending applications within a period of 2 weeks from today to the Central Government for requisite decisions;

(3) applications received (or completed) hereafter would be forwarded within two weeks of their being so made.

(4) the Central Government shall dispose of all such applications within six weeks of their being received. Where the grant of final clearance is delayed, the Central Government may consider the grant of working permissions as per existing practice.

171. It was also made clear that the order passed by this Court including the earlier order dated 12th December, 1996 shall be obeyed and carried out by the Central Government and the State Governments notwithstanding any order or direction passed by a court including a High Court or Tribunal to the contrary.

172. From the above, it is explicit that in terms of the orders passed by this Court, there was a complete ban on non-forest activity on forest lands with effect from 12th December, 1996. The only issue that remained was identification of all such lands by the District Level Committees and as mentioned above this exercise was completed by the State of Odisha on or about 6th January, 1998. The lands identified by the DLC are compendiously referred to as DLC lands.

173. In this background in IA Nos. 2746-2748 of 2009 in the case of ***T.N. Godavarman*** the CEC was directed to submit a report which it did on 26th April, 2010. It was recommended by the CEC that given the peculiar circumstances prevailing in the State of Odisha, mining operations in the entire DLC lands included in the mining leases, may be allowed to continue on payment of the Net Present Value (NPV) subject to the fulfillment of other statutory requirements and Rules being complied with.

174. By an order dated 7th May, 2010 this Court directed that the recommendation of the CEC acceptable to the State Government could be complied with. Consequently, the State of Odisha appears to have implemented the recommendations regarding recovery of NPV and realized an amount of about Rs. 1750 crores as additional NPV.

175. We have been informed that in addition to the above, the mining lease holders have subsequently deposited an amount under the heading of penal compensatory afforestation which was introduced through guidelines issued by the MoEF on 3rd February, 1999. The guidelines in this regard, were communicated by the Assistant Inspector General of Forest to the Chief Secretary of all the State and Union Territories and the relevant portion thereof reads as follows:

4.3.1 Cases have come to the notice of the Central Government in which permission for diversion of forest land was accorded by the concerned State Government in anticipation of approval of the

Central Government under the Act and/or where work has been carried out in forest area without proper authority. Such anticipatory action is neither proper not permissible under the Act which clearly provides for prior approval of the Central Government in all cases. Proposals seeking ex-post-facto approval of the Central Government under the Act are normally not entertained. The Central Government will not accord approval under the Act unless exceptional circumstances justify condonation. However, penal compensatory afforestation would be insisted upon by the MoEF on all such cases of condonation.

4.3.2 The penal compensatory afforestation will be imposed over the area worked/used in violation. However, where the entire area has been deforested due to anticipatory action of the State Government, the penal compensatory afforestation will be imposed over the total lease area.

176. It was submitted by learned Counsel for the lessees that since additional NPV as well as an amount towards penal compensatory afforestation has been paid by the defaulting mining lease holders, the violation of Section 2 of the FCA stands condoned or in any event the illegal or unlawful mining in forest lands stands regularized.

177. The CEC did not accept this submission made on behalf of the mining lease holders on the ground that no retrospective forest clearance has been granted and even otherwise there is no provision to condone or regularize the violation of Section 2 of the FCA.

178. We are of opinion that the view expressed by the CEC in this regard is partially correct. Given the fact that the defaulting mining lease holders have been asked to pay and have paid additional NPV as well as an amount towards penal compensatory afforestation, it must be assumed the violation of the FCA has been condoned to a limited extent, more particularly since in its order dated 7th May, 2010 this Court permitted the State of Odisha to accept such recommendations of the CEC made in the report dated 26th April, 2010 as are acceptable to it. The relevant recommendations made by the CEC read as follows:

(c) No forest land can be leased/assigned without first obtaining the approval under the FC Act. Therefore, the forest area approved under the FC Act should not be lesser than the total forest area included in the mining leases approved under the MMDR Act, 1957. Both necessarily have to be the same. In view of the above, this Hon'ble Court while permitting grant of Temporary Working Permission to the mines in Orissa and Goa has made it one of the pre-conditions that the NPV will be paid for the entire forest area included in the mining leases. Similarly, all the mining lease holders in Orissa should be directed to pay the NPV for the entire forest area, included in the mining leases;

(d) In Orissa, substantial areas included in the mining leases as non forest land have subsequently been identified as DLC forest (deemed forest/forest like areas) by the Expert Committee constituted by the State Government pursuant to this Hon'ble Court's order dated 12.12.1996. While processing and/or approving the proposals under the FC Act in many cases such areas have been treated as non-forest land. It is recommended that (i) the NPV for the entire DLC area included in the mining lease, after deducting the NPV already paid, should be deposited by the concerned lease holder and (ii) the mining operations in the unbroken DLC land (virgin land) should be permissible only if the permission under the FC Act has been obtained/is obtained for

such area. Keeping in view the peculiar circumstances as was existing in Orissa and subject to the above, the mining operations in the broken DLC land may be allowed to be continued provided the other statutory requirements and Rules are otherwise being complied with.

179. This still leaves open the question of violation of the order passed by this Court on 12th December, 1996 followed by the order dated 4th March, 1997 namely that mining must cease forthwith in forest areas. In regard to this violation, the only benefit (at best) that can be granted to the mining lease holders that we are concerned with, is till 6th January, 1998 when the affidavit was filed in this Court in I.A. Nos. 2746-2748 of 2009 in T.N. Godavarman. With effect from 7th January, 1998 any mining activity in forest and DLC lands would clearly be completely illegal and unauthorized and the benefit that the mining lease holders have derived from this illegal mining would be subject to Section 21(5) of the MMDR Act. Therefore, the price of the iron ore and manganese ore mined by the mining lease holders from 7th January, 1998 is payable until forest clearance Under Section 2 of the FC Act is obtained by the mining lease holders.

180. The report of the CEC dated 16th October, 2014 deals with 51 mining leases. It has been recorded by the CEC that of them 15 mining leases have been found not involved in undertaking mining operations in violation of the FCA. There are 16 mining leases that have violated the provisions of the FCA between 25th October, 1980 and 1999-2000 and the State Government in some of the cases has already issued a show cause notice to the mining lease holders. It is further stated that most of the violations pertain to the period prior to 12th December, 1996. The CEC has not made any particular recommendation in regard to these 16 mining leases nor do we, except to direct the State Government to promptly take a decision on the show cause notice preferably within a period of four months and in any case before 31st December, 2017.

181. The CEC has also dealt with 18 others mining lease holders (other than M/s. Essel Mining and Industries Ltd. relating to the Kasia Iron Ore Mines and Jilling-Langlotta Iron & Manganese Ore Mines). With regard to these 18 mining lease holders, the view taken by us above would hold good and clearly they are liable to compensate the State for the entire price of the iron ore and manganese ore illegally mined with effect from 7th January, 1998 until the forest clearance was obtained by the concerned mining lease holder.

182. We have fixed 7th January, 1998 as the cut-off date despite the orders dated 12th December, 1996 and 4th March, 1997 only for the reason that it is possible that some mining lease holders (we do not know how many) were not aware that they were inadvertently conducting mining operations on DLC lands which were identified by the State of Odisha as forest lands on the directions of this Court. For the purposes of Section 21(5) of the MMDR Act, they are entitled to the benefit of doubt and along with them, the other mining lease holders before us.

The CEC in this regard has observed as follows:

It will be seen that in the above cases the mining operations have been done in the forest land in violation of the Forest (Conservation) Act, 1980 and consequently also in violation of this Hon'ble Court order dated 12.12.1996. The CEC recommends that 70% of the notional value of the iron ore and manganese produced by the lessees by undertaking mining operations in the forest land in violation of the Forest (Conservation) Act, 1980 may be directed to be recovered from the

respective lessees. Wherever the mineral production is both from the forest land as well as non-forest land then in such cases the notional value of the production from the forest land may be calculated on pro rata basis of the extent of the forest land and non-forest land involved. The notional value of the mineral, time limit for payment of the compensation, use of the amount received as compensation and other conditions as decided by this Hon'ble Court in respect of the production without/in excess of the environmental clearance may be directed to be followed on pari-passu basis.

183. For the reasons that we have already expressed above, we are not in agreement with the CEC that only a part of the notional value (in this case 70%) of the iron ore and manganese ore produced by the mining lease holders should be recovered. We are of the view that Section 21(5) of the MMDR Act should be given full effect and so we reiterate that the recovery should be to the extent of 100%.

184. There may be some overlap in the period when mining operations were conducted by the mining lease holders without an EC and/or an FC. We make it clear that mineral extracted either without an EC or without an FC or without both would attract the provisions of Section 21(5) of the MMDR Act and 100% of the price of the illegally or unlawfully mined mineral must be compensated by the mining lease holder. To the extent of the overlap or the common period, obviously only one set of compensation is payable by the mining lease holder to the State of Odisha. We order accordingly. However, we make it clear that whatever payment has already been made by the mining lease holders towards NPV, additional NPV or penal compensatory afforestation is neither adjustable nor refundable since that falls in a different category altogether.

185. We may note that this Court has held in ***T.N. Godavarman v. Union of India*** (2011) 15 SCC 658 and (2011) 15 SCC 681 that a violation of the FCA is condonable on payment of penal compensatory afforestation charges. This obviously would not apply to illegal or unlawful mining Under Section 21(5) of the MMDR Act, but we make it clear that the mining lease holders would be entitled to the benefit of any Temporary Working Permission granted.

Conclusions on the issues of mining without an EC or FC or both

186. To avoid any misunderstanding, confusion or ambiguity, we make the following very clear:

(1) A mining project that has commenced prior to 27th January, 1994 and has obtained a No Objection Certificate from the SPCB prior to that date is permitted to continue its mining operations without obtaining an EC from the Impact Assessment Agency. However, this is subject to any expansion (including an increase in the lease area) or modernization activity after 27th January, 1994 which would result in an increase in the pollution load. In that event, a prior EC is required. However, if the pollution load is not expected to increase despite the proposed expansion (including an increase in the lease area) or modernization activity, a certificate to this effect is absolutely necessary from the SPCB, which would be reviewed by the Impact Assessment Agency.

(2) The renewal of a mining lease after 27th January, 1994 will require an EC even if there is no expansion or modernization activity or any increase in the pollution load.

(3) For considering the pollution load the base year would be 1993-94, which is to say that if the annual production after 27th January, 1994 exceeds the annual production of 1993-94, it would be treated as an expansion requiring an EC.

(4) There is no doubt that a new mining project after 27th January, 1994 would require a prior EC.

(5) Any iron ore or manganese ore extracted contrary to EIA 1994 or EIA 2006 would constitute illegal or unlawful mining (as understood and interpreted by us) and compensation at 100% of the price of the mineral should be recovered from 2000-2001 onwards in terms of Section 21(5) of the MMDR Act, if the extracted mineral has been disposed of. In addition, any rent, royalty or tax for the period that such mining activity was carried out outside the mining lease area should be recovered.

(6) With effect from 14th September, 2006 all mining projects having a lease area of 5 hectares or more are required to have an EC. The extraction of any mineral in such a case without an EC would amount to illegal or unlawful mining attracting the provisions of Section 21(5) of the MMDR Act.

(7) For a mining lease of iron ore or manganese ore of less than 5 hectares area, the provisions of EIA 1994 will continue to apply subject to EIA 2006.

(8) Any mining activity carried on after 7th January, 1998 without an FC amounts to illegal or unlawful mining in terms of the provisions of Section 21(5) of MMDR Act attracting 100% recovery of the price of the extracted mineral that is disposed of.

(9) In the event of any overlap, that is, illegal or unlawful mining without an FC or without an EC or without both would attract only 100% compensation and not 200% compensation. In other words, only one set of compensation would be payable by the mining lease holder.

(10) No mining lease holder will be entitled to the benefit of any payments made towards NPV or additional NPV or penal compensatory afforestation.

Violation of Section 6 of the MMDR Act

187. We have examined the report of the CEC with regard to the alleged violation of Section 6 of the MMDR Act and find that there have been several amendments to Section 6 relating to the maximum area for which a mining lease may be granted to a person. The following is the result of the amendments:

1. From 1.6.1958 to 11.9.1972-maximum lease area 10 sq. miles.

2. From 12.9.1972 to 9.2.1987-maximum lease area 10 sq. km or 1000 hectares in any one State.

3. From 10.2.1987 to 17.12.1999-maximum lease area 10 sq.km or 1000 hectares in any part of the country.

4. From 18.12.1999 till date-maximum lease area 10 sq.km or 1000 hectares in one State.

188. While the word 'person' has not been defined in the MMDR Act, a reading of Section 5 thereof indicates that the State Government shall not grant a mining lease to any person unless such person is an Indian national or a company as defined in the Companies Act, 1956 and subsequently in the Companies Act of 2013.

189. Sub-section (2) of Section 6 of the MMDR Act provides that a person acquiring by, or in the name of, another person a mining lease which is intended for him/her shall be deemed to be acquiring it himself/herself.

190. For the purposes of determining the total area that can be acquired for mining operations, Section 6(3) of the MMDR Act provides that the area held under a mining lease by a person as a member of a cooperative society, company or other corporation or a Hindu Undivided Family or a partner of a firm shall be deducted from the area referred to so that the sum total of the area held by such person under a mining lease only as such member or partner or individually may not in any case exceed the total area specified.

191. In this background, the CEC examined the case of seven mining lease holders. They are:

1. Essel Mining and Industries Limited

2. Rungta Mines Limited

3. Rungta Sons Pvt. Limited

4. Bonai Industrial Company Limited

5. Feegrade & Co. Pvt. Limited

6. M/s. Mangilal Rungta

7. Jindal Steel & Power Limited

192. As far as Essel Mining and Industries Limited is concerned we propose to deal with this mining lease holder on another occasion since even the CEC has placed this mining lease holder in a special category.

193. Similarly, so far as Rungta Mines Limited, Rungta Sons Pvt. Limited and M/s. Mangilal Rungta are concerned, although the CEC has come to the conclusion that these persons have not acquired mining leases in violation of Section 6 of the MMDR Act, there are some critical observations made by the Commission with regard to the 'Rungta Group'. Learned Counsel for the Petitioner submitted that the view of the CEC in this regard needs reconsideration. Since the 'Rungta Group' was not heard by us, we propose to hear the above Rungta companies to ascertain, *inter alia*, whether there has been any violation of the provisions of Section 6 of the MMDR Act.

194. As far as Jindal Steel & Power Limited is concerned, we propose to hear this company on another occasion since the suggestion of the CEC is that it is the benami holder of Sarda Mines

Pvt. Ltd. If it is so held to be a benami holder of Sarda Mines Pvt. Ltd. then there is a violation of Section 6 of the MMDR Act. However, the CEC has refrained from making any observations or recommendation in this regard. Accordingly, we propose to hear Jindal Steel & Power Limited on a later occasion on this limited issue.

195. As far as Bonai Industrial Company Limited and Feegrade & Co. Pvt. Limited are concerned, the CEC has concluded that they have not violated Section 6 of the MMDR Act. That being the position, and nothing having been shown to the contrary, we accept the recommendation of the CEC in this regard.

Violation of Rule 37 of the Mineral Concession Rules, 1960

196. The CEC has discussed the possible violation of Rule 37 of the MCR. In this context, it was noted that there were several mining lease holders who had entered into raising contracts which were actually a transfer of the lease as postulated by Rule 37 of the MCR.

197. On this basis the State of Odisha constituted a Committee on 8th July, 2011 to carry out a study of the financial transactions between the mining lease holders and the raising contractors to determine whether there is a ?*prima facie* violation of Rule 37 of the MCR.

198. On an examination of the material before it the Committee concluded that eight mining lease holders violated Rule 37 of the MCR. These mining lease holders are as under:

i) R.P. Sao, Guali Iron Ore Mines, Keonjhar

ii) Indrani Patnaik, Unchabali Iron Ore Mines, Keonjhar

iii) M/s. K.J.S. Ahluwalia, Nuagaon Iron Ore Mines, Keonjhar

iv) M/s. Aryan Mining & Trading Corporation Pvt. Ltd., Narayanposhi Iron Ore Mines, Sundergarh

v) M/s. Mideast Integrated Steel Ltd., Roida, Sidhamatha Iron Ore Mines, Keonjhar

vi) Kavita Agrawal, Kusumdihi Manganese Mines, Sundergarh

vii) Mala Roy and Others, Jalabari Iron Ore Mines, Keonjhar

viii) M/s. Sharda Mines (P) Ltd., Thakurani Iron Ores Mines, Keonjhar

199. Pursuant to the report of the Committee, a show cause notice was issued to these mining lease holders by the State of Odisha. Six of the mining lease holders (other than M/s. Aryan Mining & Trading Corporation Pvt. Ltd. (for short Aryan) and Kavita Agrawal (Kusumdihi Manganese Mines) challenged the show cause notice and the decision of the Committee by filing revision petitions Under Section 30 of the MMDR Act read with Rule 55 of the MCR before the Central Government. The challenge to the show cause notice was on the ground that persons who were not

government servants could not have been included in the Committee and also that the Committee was not notified in the official gazette as required by Section 26(2) of the MMDR Act.

200. The Central Government set aside the order constituting the Committee and the State of Odisha has challenged the orders of the Central Government before the Orissa High Court through writ petitions. We are told that the writ petitions filed by the State of Odisha are pending in the High Court.

201. As far as Aryan is concerned, we were informed that the matter was pending with the State of Odisha and a request was made to us to permit the State of Odisha to pass a final order on the submissions made by Aryan. On 28th April, 2017 we had permitted the State of Odisha to pass final orders but we are not aware whether any orders have since been passed.

202. As far as Kavita Agrawal is concerned, her lease was terminated by the State of Odisha and the Central Government also dismissed her revision petition on 28th April, 2014. The said mining lease holder has since filed a writ petition which is pending in the Orissa High Court.

203. During the course of hearing it was proposed by learned Counsel appearing for some of the mining lease holders that it might be appropriate if the raising contracts between these eight mining lease holders and the raising contractors are given a fresh look. This suggestion was not acceptable to one of the mining lease holders. However, we are of opinion that the suggestion is reasonable and it will be appropriate if in fact a fresh look is given to the raising contracts entered into by the mining lease holders and the raising contractors. We are also of opinion that such an order ought to be passed with the consent of the mining lease holders since any delay in disposal of the issue would not really sub-serve the interests of anybody including the mining lease holders.

204. Accordingly, for considering the appointment of an appropriate Committee in respect of the eight mining lease holders mentioned above we would like to hear learned Counsel for the parties. We make it clear that the proposed Committee will be entitled to lift the corporate veil, the importance of which in cases such as the present, has been emphasized in ***State of Rajasthan v. Gotan Lime Stone Khanij Udyog (P). Ltd.*** MANU/SC/0058/2016 : (2016) 4 SCC 469.

Intergenerational equity

205. Mr. Prashant Bhushan, learned Counsel for the Petitioner sought to impress upon us the need to consider intergenerational equity and if possible to place a limit on the extent of mining in the State of Odisha by referring to an Article titled: "Intergenerational equity: a legal framework for global environment change" by Edith Brown Weiss. He laid emphasis on three principles that form the basis of intergenerational equity.

206. The first principle relied on is called the principle of 'conservation of options'. This requires each generation to conserve the diversity of the natural and cultural resource base in such a manner that the options available to future generations are not restricted. It was submitted that the extent of mining activities being carried on in Odisha indicate that the entire iron ore will perhaps be fully extracted within a period of 30 years and nothing would be available for future generations. Therefore some sort of a limit would have to be placed on the mining operations.

207. The second principle relied on is the principle of 'conservation of quality'. This was with reference to the submission that future generations should not be subjected to a quality of the planet worse than what it is today. In other words, future generations are also entitled to quality enjoyment of the diversity in the natural and cultural resource base.

208. The third principle relied upon was the principle of 'conservation of access' which is to say that future generations have an equitable right to access the diversity of the natural and cultural resource base as is available to the present generation.

209. There is no doubt considerable substance in the submission particularly if this is considered in the light of intergenerational rights and obligations which have been dealt with in the said article. However, it is really not for this Court to lay down limits on the extent of mining activities that should be permitted by the State of Odisha or by the Union of India. Nevertheless, this is an aspect that needs serious consideration by the policy and decision makers in our country in the governance structure. At present, keeping in mind the indiscriminate mining operations in Odisha, it does appear that there is no effective check on mining operations nor is there any effective mining policy. The National Mineral Policy, 2008 (effective from March 2008) seems to be only on paper and is not being enforced perhaps due to the involvement of very powerful vested interests or a failure of nerve. We are of opinion that the National Mineral Policy, 2008 is almost a decade old and a variety of changes have taken place since then, including (unfortunately) the advent of rapacious mining in several parts of the country. Therefore, it is high time that the Union of India revisits the National Mineral Policy, 2008 and announces a fresh and more effective, meaningful and implementable policy within the next few months and in any event before 31st December, 2017. We are constrained to pass this direction in view of the facts disclosed in these petitions and in judgments delivered by this Court with regard to mining in Goa and Karnataka.

Inquiry by the Central Bureau of Investigation

210. It was emphasized by Shri Prashant Bhushan that because of the rampant illegal or unlawful mining being carried out in Odisha, there should be an enquiry by the Central Bureau of Investigation (for short 'the CBI') to ascertain and determine the persons involved either in turning a Nelson's eye to rampant illegal or unlawful mining or being conspirators in the activity and the extent of the illegal or unlawful mining. It was submitted that the Justice Shah Commission had very strongly recommended an inquiry conducted by the CBI and criminal elements being brought to book for the despoliation of the land.

211. For the present, we do not propose to direct an investigation or inquiry by the CBI for the reason that what is of immediate concern is to learn lessons from the past so that rapacious mining operations are not repeated in any other part of the country. This can be achieved through the identification of lapses and finding solutions to the problems that are faced. Undoubtedly, there have been very serious lapses that have enabled large scale mining activities to be carried out without forest clearance or environment clearance and eventually the persons responsible for this will need to be booked but as mentioned above, the violation of the laws and policy need to be prevented in other parts of the country. The Rule of law needs to be established. We are therefore of the view that it would be appropriate if an Expert Committee is set up under the guidance of a retired judge of this Court to identify the lapses that have occurred over the years enabling rampant

illegal or unlawful mining in Odisha and measures to prevent this from happening in other parts of the country.

212. There is no doubt that the recommendations of the Commission can form a platform for the study but it is also necessary to use technology for maintenance of registers, records and data through computers, satellite imagery, videography and other technology tools so that the natural wealth of our country is not rapaciously exploited for the benefit of a few to the detriment of a large number, many of whom are tribals inhabiting the land for several generations.

Utilization of funds by the Special Purpose Vehicle

213. In I.A. Nos. 2746-2748 of 2009 filed by Rabi Das, an order was passed on 27th January, 2014 relating to the preparation of a scheme by the CEC for setting up a Special Purpose Vehicle (SPV) for tribal welfare and area development works. The relevant extract of the order reads thus:

50% of the additional amounts of Net Present Value (NPV) recovered by the State of Odisha from the mining lessees will be used by the State of Odisha through a Special Purpose Vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. The State of Odisha will accordingly file within four weeks from today, a comprehensive plan for the development of tribals out of the aforesaid funds, taking into consideration their requirements of health, education, communication, recreation, livelihood and cultural lifestyle as indicated in this Court's judgment in ***T.N. Godavaraman Thirumulpad v. Union of India and Ors.*** MANU/SC/0113/2008 : (2008) 2 SCC 222.

214. Subsequently on 28th April, 2014 this Court accepted the scheme prepared by the Government of Odisha in consultation with the Central Empowered Committee. The scheme was captioned "Setting up of Special Purpose Vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of mineral bearing areas in the State of Odisha". This Court then passed the following order on 28th April, 2014:

Pursuant to orders passed by this Court on 7th [27th] January, 2014, the Government of Odisha in consultation with the Central Empowered Committee has prepared a Scheme captioned "Setting up of Special Purpose Vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of mineral bearing areas in the State of Odisha.

The Central Empowered Committee has submitted a Report dated 9th April, 2014 and has recommended that the Scheme prepared by the Government of Odisha may be approved by this Court and the ad hoc CAMPA may be directed to transfer to the SPV 50 per cent of the additional amount of the NPV recovered from the mining lease holders by the State of Odisha for undertaking tribal welfare and development works.

We have perused the Scheme prepared by the State Government of Odisha and the recommendation of the Central Empowered Committee and we approve the Scheme and direct ad hoc CAMPA to transfer to the SPV 50 per cent of the additional amount of the NPV within a month for undertaking tribal welfare development works.

The Interlocutory applications be listed in the month of July, 2014.

215. Some of the salient features of the Scheme are as follows:

5. The SPV will undertake specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. These will include works/projects related to livelihood intervention, health, water supply and sanitation, education, special programmes for development of women and children, entrepreneurial development of local people, communication and infrastructure projects and agro silvi-horticultural based livelihood projects through identified agencies/Government Departments. While taking up such projects/works a bottom up planning and participatory approach will be followed.

9. The general superintendence of the affairs will be vested in its Board of Directors including (a) to receive grants/funds and have custody of the same, (b) to approve Annual Budget Estimates and sanction the expenditure within the limits of the Budget, (c) to enter into any agreement for and on behalf of the SPV; (d) institute and defend legal proceedings (e) to consider and approve the Annual Report, audit report, annual accounts and the financial estimates of the SPV, (f) to prescribe procedure to be followed for implementation of the projects/works and for maintenance of accounts and (g) to undertake any other ancillary activities/works for the furtherance of the objective of the SPV.

a. The funds made available to the SPV will be utilized only for the purpose for which the SPV has been set up and will not be used for any other purpose or transferred to any other authority; and

b. The composition of the Board of Directors of the SPV, as provided in the present scheme, will be modified only after obtaining permission from the Hon'ble Supreme Court.

10. The accounts of the SPV will be internally audited annually by the Chartered Accountant firms empanelled with the CAG/Principal Accountant General, Odisha. The audit of the accounts of the SPV, receipts as well as expenditure, will be done annually by the office of the Principal Accountant General, Odisha.

11. The State Government has, earlier, registered a Society, namely, Society for Inclusive Development of Mineral Bearing Areas of Odisha, which has been registered vide registration number 23354/74 of 2011-12 under the Societies Registration Act, 1860 to act as SPV for the purpose. It is now proposed to wind up the said Society and to replace it with 'Odisha Mineral Bearing Areas Development Corporation' to be set up Under Section 25 of the Companies Act.

216. It appears that the scheme has been implemented with the Chief Secretary of Odisha as the *ex-officio* Chairman of the SPV. There are several other members and directors of the SPV. There is no further information available with this Court with regard to the implementation of the scheme.

217. During the course of hearing, some of the mining lease holders represented by Shri Gopal Subramanium, Senior Advocate offered to deposit and in fact did deposit an amount of Rs. 237.05 crores for utilization by the SPV for carrying out welfare works and activities in the districts of

Keonjhar, Sundergarh and Mayurbhanj in Odisha. The deposit was made by way of a cheque on 6th April, 2017 and was without prejudice to the rights and contentions of lessees. In terms of our directions, the Registry has encashed the cheque and kept the amount in a short term fixed deposit. We have mentioned this only to point out that there are huge amounts available with the Special Purpose Vehicle for tribal welfare and area development works and we have absolutely no idea about the utilization of the funds or whether they are in fact being used for tribal welfare and area development works. We also expect that as a result of the orders that we are passing today, very large amounts will again be made available to the State of Odisha. These amounts should also be kept with the Special Purpose Vehicle.

218. To ensure that the amounts are utilized for the benefit of tribals in the affected districts and for area development works, we would like the Chief Secretary of Odisha to file an affidavit stating the work done as well as providing the audited accounts of the receipt and expenditure of the SPV from its inception.

Conclusion

219. In view of findings above, we dispose of the writ petitions to the extent of the directions that we have already given.

220. I.A. Nos. 45 (filed by Zenith Mining) and 47 (filed by Kavita Agrawal) are dismissed since their lease has not been extended or has been determined and they do not have any environment clearance or forest clearance.

221. I.A. No. 66 (filed by J.N. Pattnaik) is also dismissed since there is no forest clearance available.

222. We have been informed that S.A. Karim (I.A. No. 9) actually had a working lease and has wrongly been included as a non-operational lease. Accordingly, I.A. No. 9 (filed by S.A. Karim) is also dismissed but as being infructuous. However, it is made clear that the State Government should ensure that the lessee S.A. Karim in fact has valid statutory clearances.

223. Pending show cause notices issued by the State Government should be decided by 31st December, 2017 (if not already decided) after hearing the concerned noticees.

224. We would like to hear Jindal Steel and Power Limited, Sarda Mines Private Limited, Rungta Group of Companies and Essel Mining and Industries Limited on the applications filed by them. For this purpose list the matter again after two weeks so that a convenient date of hearing can be fixed.

225. The amounts determined as due from all the mining lease holders should be deposited by them on or before 31st December, 2017. Subject to and only after compliance with statutory requirements and full payment of compensation and other dues, the mining lease holders can re-start their mining operations.

226. We would also like to hear the eight concerned mining lease holders on the question of appointing an appropriate Committee in respect of the applicability of Rule 37 of the Mineral Concession Rules to them.

227. We would also like to hear learned Counsel for all the parties with regard to setting up of an Expert Committee presided over by a retired judge of this Court to identify the lapses that have occurred over the years that have enabled rampant illegal and unlawful mining in Odisha and to recommend preventive measures not only to the State of Odisha but generally to all other States where mining activities are proceeding on a large scale. For the present, we pass no direction with regard to any investigation by the CBI.

228. We direct the Union of India to have a fresh look at the National Mineral Policy, 2008 which is almost a decade old, particularly with regard to conservation and mineral development. The exercise should be completed by 31st December, 2017.

229. The Chief Secretary of Odisha should file an affidavit as indicated by us within a period of six weeks and in any case on or before 30th September, 2017. The Registry will list these petitions along with the affidavit immediately after its receipt for our consideration.

230. All other pending I.A.s. are disposed of in terms of our orders.

---

[1] W.P. No. 202 of 1995

[2] Common Cause v. Union of India and Ors. MANU/SC/0491/2014 : (2014) 14 SCC 155

[3] T.N. Godavarman v. Union of India, (2013) 8 SCC 198 and (2013) 8 SCC 204

Back to Index

MANU/SC/1423/2018

Neutral Citation: 2018/INSC/1154

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 11843 of 2018 (Arising out of SLP (C) No. 35574 of 2017), Civil Appeal Nos. 11844-11845 of 2018 (Arising out of SLP (C) Nos. 35532-35533 of 2017), Civil Appeal No. 11846 of 2018 (Arising out of SLP (C) No. 35497 of 2017), Civil Appeal No. 11852 of 2018 (Arising out of SLP (C) No. 115 of 2018) and Civil Appeal Nos. 11847-11851 of 2018 (Arising out of SLP (C) Nos. 37285-37289 of 2017)

Decided On: 05.12.2018

Appellants: Competition Commission of India Vs. Respondent: Bharti Airtel Limited and Ors.

Hon'ble Judges/Coram:

A.K. Sikri and Ashok Bhushan, JJ.

Subject: MRTP/ Competition Laws

Relevant Section:

COMPETITION ACT, 2002 - Section 26(1); COMPETITION ACT, 2002 - Section 19(1)

Prior History / High Court Status:

From the Judgment and Order dated 21.09.2017 of the High Court of Judicature at Bombay in WP No. 7173 of 2017 (MANU/MH/2284/2017)

Case Note:

Anti-competitive agreement - Jurisdiction - Section 26(1) of Competition Act, 2002 - Present appeal was against order of Bombay High Court holding that, Competition Commission of India (CCI) had no jurisdiction in view of Telecom Regulatory Authority of India Act, 1997 and authorities and Regulations made thereunder; CCI could exercise jurisdiction only after proceedings under TRAI Act had concluded/attained finality - Whether writ petitions filed before High Court of Bombay were maintainable - Whether High Court could give its findings on merits.

Facts:

Reliance Jio Infocomm Limited ('RJIL') had filed information under Section 19(1) of Competition Act, 2002 before Competition Commission of India ('CCI') alleging anticompetitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited (Incumbent Dominant Operators) ('IDOs'). Apart from IDOs, certain allegations were also made against Cellular Operators Association of India ('COAI'). CCI issued notice to these parties and after hearing RJIL, aforesaid cellular companies and COAI, it passed a common order dated April 21, 2017 in all these cases (by clubbing them together) holding a view that, prima facie case existed and an investigation was warranted into matter. It, accordingly, directed Director General to cause investigation in case. Four writ petitions came to be filed by Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and COAI respectively. prayed for quashing of aforesaid order and consequential action/proceedings on ground that CCI did not have any jurisdiction to deal with such a matter. Matter was heard and vide judgment dated September 21, 2017, High Court had allowed these writ petitions and quashed/set aside order dated April 21, 2017 passed by CCI and consequently notices issued by Director General of CCI had also been quashed. Bombay High Court in impugned judgment held that, Competition Commission of India (CCI) had no jurisdiction in view of Telecom Regulatory Authority of India Act, 1997 and authorities and Regulations made thereunder; CCI could exercise jurisdiction only after proceedings under TRAI Act had concluded/attained finality; Order dated 21st April, 2017 passed under Section 26(1) of Competition Act was not an administrative direction, but rather a quasi judicial one that finally decided rights of parties and caused serious adverse consequences, because a detailed hearing had been given and many materials had been tendered in courts of hearings; On merits of matter, there was no cartelisation as alleged and COAI was exonerated; and Order of CCI was perverse and liable to be interfered with under writ jurisdiction.

Held, while dismissing the appeals

1. Commission recognized role and importance of sectoral regulators and exercises its jurisdiction keeping in mind their role and responsibilities. Commission was a market regulator and had jurisdiction to look at those issues which affect competition in markets in India, including that of an alleged cartelization amongst enterprises/associations. nature of proceedings before TRAI involving ITOs on other hand different and related to whether interconnection norms and quality of service Regulations were complied with or whether contractual terms of ICAs had been breached or met. These issues were not relevant for determination in current proceedings before Commission. [11]

2. In wake of globalisation and keeping in view economic development of country, responding to opening of its economy and resorting to liberalisation, need was felt to enact a law that ensures fair competition in India by prohibiting trade practices which cause an appreciable adverse effect on competition within markets in India and for establishment of an expert body in form of Competition Commission of India, which would discharge duty of curbing negative aspects of competition, Competition Act, 2002 had been enacted by Parliament. [65]

3. Functioning of telecom companies which were granted licence under Section 4 of

Telegraph Act was regulated by provisions contained in TRAI Act. TRAI was a regulator which regulated telecom industry, which was a statutory body created under TRAI Act. [77]

4. Thus, with advent of globalisation/liberalisation leading to free market economy, regulators in respect of each sector had assumed great significance and importance. It becomes ir bounden duty to ensure that such a regulator fulfils objectives enshrined in Act under which a particular regulator was created. Insofar as telecom sector was concerned, TRAI Act itself mentions objective which it seeks to achieve. It not only exercised control/supervision over telecom service providers/licensees, TRAI was also supposed to provide guidance to telecom/mobile market. 'Introduction' to TRAI Act itself mentioned that due to tremendous growth in services it was considered essential to regulate telecommunication services by a regulatory body which should be fully empowered to control services, in best interest of country as well as service providers. [78]

5. TRAI was, thus, constituted for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. It was assigned duty to achieve universal service which should be of world standard quality on one hand and also to ensure that it was provided to customers at a reasonable price, on other hand. In process, purpose was to make arrangements for protection and promotion of consumer interest and ensure fair competition. It was because of this reason that powers and functions which were assigned to TRAI were highlighted in Statement of Objects and Reasons. Specific functions which were assigned to TRAI, amongst other, including ensuring technical compatibility and effective interrelationship between different service providers; ensuring compliance of licence conditions by all service providers; and settlement of disputes between service providers. [79]

6. In instant case, dispute raised by RJIL specifically touched upon these aspects as grievance raised was that IDOs had not given POIs as per licence conditions resulting into non-compliance and had failed to ensure inter se technical compatibility thereby. Not only RJIL had raised this dispute, it had even specifically approached TRAI for settlement of this dispute which had arisen between various service providers, namely, RJIL on one hand and IDOs on other, wherein COAI was also roped in. TRAI was seized of this particular dispute. [80]

7. TRAI was constituted as an expert regulatory body which specifically governed telecom sector, aforesaid aspects of disputes were to be decided by TRAI in first instance. These were jurisdictional aspects. Unless TRAI found fault with IDOs on aforesaid aspects, matter cannot be taken further even if we proceed on assumption that CCI had jurisdiction to deal with complaints/information filed before it. RJIL had approached DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated September 06, 2016 that matter related to inter-connectivity between service providers was within purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated September 27, 2016; and post wassuance of show-cause notice and directions, TRAI issued recommendations dated October 21, 2016 on issue of inter-connection and provisioning of POIs to RJIL. Sectoral authorities were, therefore, seized of matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to

ensure fair, non-discriminatory and competitive market in telecom sector, was better suited to decide aforesaid issues. After all, RJIL's grievance was that inter-connectivity was not provided by IDOs in terms of licenses granted to them. TRAI Act and Regulations framed reunder make detailed provisions dealing with intense obligations of service providers for providing POIS. These provisions also deal as to when, how and in what manner POIs were to be provisioned. They also stipulate charges to be realised for POIs that were to be provided to another service provider. Even consequences for breach of such obligations were mentioned. [83]

8. High Court was right in concluding that till jurisdictional issues were straightened and answered by TRAI which would bring on record findings on aforesaid aspects, CCI was ill-equipped to proceed in matter. Having regard to aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, High Court was right in concluding that concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of TRAI Act and policy so declared, were matters within jurisdiction of Authority/TDSAT under TRAI Act only. [84]

9. CCI was specifically entrusted with duties and functions, and in process empowered as well, to deal with aforesaid three kinds of anti-competitive practices. Purpose was to eliminate such practices which were having adverse effect on competition, to promote and sustain competition and to protect interest of consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, function that was assigned to CCI was distinct from function of TRAI under TRAI Act. Learned Counsel for Appellants were right in their submission that CCI was supposed to find out as to whether IDOs were acting in concert and colluding, thereby forming a cartel, with intention to block or hinder entry of RJIL in market in violation of Section 3(3)(b) of Competition Act. Also, whether there was an anti-competitive agreement between IDOs, using platform of COAI. CCI, therefore, was to determine whether conduct of parties was unilateral or it was a collective action based on an agreement. Agreement between parties, if it was there, was pivotal to issue. Such an exercise had to be necessarily undertaken by CCI. In Haridas Exports, this Court held that where statutes operate in different fields and had different purposes, it could not be said that there was an implied repeal of one by other. Competition Act was also a special statute which deals with anti-competition. If activity undertaken by some persons was anti-competitive and offended Section 3 of Competition Act, consequences thereof were provided in Competition Act. [89]

10. All aforesaid functions not only come within domain of CCI, TRAI was not at all equipped to deal with same. Even if TRAI also returned a finding that a particular activity was anti-competitive, its powers would be limited to action that could be taken under TRAI Act alone. It was only CCI which was empowered to deal with same anti-competitive act from lens of Competition Act. If such activities offend provisions of Competition Act as well, consequences under that Act would also follow. Therefore, contention of IDOs that jurisdiction of CCI stand totally ousted could not be accepted. Insofar as nuanced exercise from stand point of Competition Act was concerned, CCI was experienced body in conducting competition analysis. Further, CCI was more likely to opt for structural remedies

which would lead sector to evolve a point where sufficient new entry was induced reby promoting genuine competition. This specific and important role assigned to CCI could not be completely wished away and 'comity' between sectoral regulator (i.e. TRAI) and market regulator (i.e. CCI) was to be maintained. [90]

11. Since matter pertained to telecom sector which was specifically regulated by TRAI Act, balance was maintained by permitting TRAI in first instance to deal with and decide jurisdictional aspects which can be more competently handled by it. Once that exercise was done and there were findings returned by TRAI which lead to prima facie conclusion that IDOs had indulged in anti-competitive practices, CCI could be activated to investigate matter going by criteria laid down in relevant provisions of Competition Act and take it to its logical conclusion. This balanced approach in construing two Acts would take care of Section 60 of Competition Act as well. [91]

12. As per RJIL as well as CCI, High Court could not have entertained writ petition against an order passed under Section 26(1) of Competition Act which was a pure administrative order and was only a prima facie view expressed rein, and did not result in serious adverse consequences. [93]

13. Section 26, under its different Sub-sections, required Commission to issue various directions, take decisions and pass orders, some of which were even appealable before Tribunal. Even if it was a direction under any of provisions and not a decision, conclusion or order passed on merits by Commission, it was expected that same would be supported by some reasoning. At stage of forming a prima facie view, as required under Section 26(1) of Act, Commission might not really record detailed reasons, but must express its mind in no uncertain terms that, it was of view that prima facie case existed, requiring issuance of direction for investigation to Director General. Such view should be recorded with reference to information furnished to Commission. Such opinion should be formed on basis of records, including information furnished and reference made to Commission under various provisions of Act. Commission was expected to express prima facie view in terms of Section 26(1) of Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating formation of such opinion, while all its other orders and decisions should be well reasoned. [97]

14. Such an approach could also be justified with reference to Regulation 20(4), which required Director General to record, in his report, findings on each of allegations made by a party in intimation or reference submitted to Commission and sent for investigation to Director General, as case might be, together with all evidence and documents collected during investigation. Inevitable consequence was that, Commission was similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of Act. 15. Merely because present case dealt with telecom sector would not change nature of order that was passed by CCI under Section 26(1) of Competition Act. However, it raised another dimension. Even if order was administrative in nature, question raised before High Court in writ petitions filed by Respondents touched upon very jurisdiction of CCI. As was evident, case set up by Respondents was that CCI did not have jurisdiction to entertain any such request or Information which was furnished by RJIL and two others. Question, thus,

pertained to jurisdiction of CCI to deal with such a matter and in process High Court was called upon to decide as to whether jurisdiction of CCI was entirely excluded or to what extent CCI can exercise its jurisdiction in these cases when matter could be dealt with by another regulator, namely, TRAI. [96]

16. High Court was competent to deal with and decide issues raised in exercise of its power under Article 226 of Constitution. Writ petitions were, therefore, maintainable. [97]

17. Once it was held that, order under Section 26(1) of Competition Act was administrative in nature and further that it was merely a prima facie opinion directing Director General to carry investigation, High Court would not be competent to adjudge validity of such an order on merits. [98]

18. Since order of High Court was upheld on aspect that, CCI could exercise jurisdiction only after proceedings under TRAI Act had concluded/attained finality, i.e. only after TRAI returns its findings on jurisdictional aspects which were mentioned above, ultimate direction given by High Court quashing order passed by CCI was not liable to be interfered with as such an exercise carried out by CCI was premature. Appeals dismissed. [99]

Disposition:
Appeal Dismissed

JUDGMENT

A.K. Sikri, J.

1. Leave granted.

2. Reliance Jio Infocomm Limited (hereinafter referred to as 'RJIL') has filed information Under Section 19(1) of the Competition Act, 2002 (hereinafter referred to as the 'Competition Act') before the Competition Commission of India (for short, 'CCI') alleging anticompetitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited (Incumbent Dominant Operators) (hereinafter referred to as the 'IDOs'). Similar Informations Under Section 19 of the Competition Act were also filed by one Mr. Ranjan Sardana, Chartered Accountant, and Mr. Justice Kantilal Ambalal Puj (Retd.). These were registered by the CCI as Case Nos. 80-81, 83 and 95 respectively. As per Section 26 of the Competition Act, on receipt of such an information, the CCI has to form an opinion as to whether there exists a *prima facie* case or not. If it is of the opinion that there exists a prima facie case, the CCI directs the Director General to cause an investigation to be made into the matter. Apart from the IDOs, certain allegations were also made against the Cellular Operators Association of India (for short, 'COAI'). The CCI issued notice to these parties and after hearing the RJIL, the aforesaid cellular companies and COAI, it passed a common order dated April 21, 2017 in all these cases (by clubbing them together) holding a view that prima facie case exists and an investigation is warranted into the matter. It, accordingly, directed the Director General to cause investigation in the case.

Introduction:

3. Four writ petitions came to be filed by the Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and COAI respectively. The prayed for quashing of the aforesaid order and consequential action/proceedings on the ground that the CCI did not have any jurisdiction to deal with such a matter. Show-cause notices were issued pursuant to which the CCI as well as RJIL filed their counter affidavits. The matter was heard and vide judgment dated September 21, 2017 the High Court has allowed these writ petitions and quashed/set aside the order dated April 21, 2017 passed by the CCI and consequently notices issued by the Director General of the CCI have also been quashed. We may reproduce the conclusions and operative portion of the order passed by the Bombay High Court here itself, which are as under:

130. Conclusions:

a) All the Writ Petitions are maintainable and entertainable. This Court has territorial jurisdiction to deal and decide the challenges so raised against impugned order (majority decision) dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General Under Section 41 of the Competition Act arising out of it.

b) The telecommunication Sector/Industry/Market is governed, regulated, controlled and developed by the Authorities under the Telegraph Act, the Telecom Regulatory Authority of India Act (TRAI Act) and related Regulations, Rules, Circulars, including all government policies. All the "parties", "persons", "stakeholders", "service providers", "consumers" and "enterprise" are bound by the statutory agreements/contracts, apart from related policy, usage, custom, practice so announced by the Government/Authority, from time to time.

c) The question of interpretation of clarification of any "contract clauses", "unified license", "interconnection agreements", "quality of service Regulations", "rights and obligations of TSP between and related to the above provisions", are to be settled by the Authorities/TDSAT and not by the Authorities under the Competition Act.

d) The concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only.

e) The Competition Act and the TRAI Act are independent statutes. The statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the object, for which they are established. There is no conflict of the jurisdiction to be exercised by them. But the Competition Act itself is not sufficient to decide and deal with the issues, arising out of the provisions of the TRAI Act and the contract conditions, under the Regulations.

f) The Competition Act governs the anti-competitive agreements and its effect - the issues about "abuse of dominant position and combinations". It cannot be used and utilized to interpret the

contract conditions/policies of telecom Sector/Industry/Market, arising out of the Telegraph Act and the TRAI Act.

g) The Authority under the Competition Act has no jurisdiction to decide and deal with the various statutory agreements, contracts, including the rival rights/obligations, of its own. Every aspects of development of telecommunication market are to be regulated and controlled by the concerned Department/Government, based upon the policy so declared from time to time, keeping in mind the need and the technology, under the TRAI Act.

h) Impugned order dated 21 April 2017 passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 and all the consequential actions/notices of the Director General Under Section 41 of the Competition Act proceeded on wrong presumption of law and usurpation of jurisdiction, unless the contract agreements, terms and clauses and/or the related issues are settled by the Authority under the TRAI Act, there is no question to initiating any proceedings under the Competition Act as contracts/agreements go to the root of the alleged controversy, even under the Competition Act.

i) The Authority, like the Commission and/or Director General, has no power to deal and decide the stated breaches including of "delay, "denial", and "congestion" of POIs unless settled finally by the Authorities/TDSAT under the TRAI Act. Therefore, there is no question to initiate any inquiry and investigations Under Section 26(1) of the Competition Act. It is without jurisdiction. Even at the time of passing of final order, the Commission and the Authority, will not be in a position to deal with the contractual terms and conditions and/or any breaches, if any. The uncleared and vague information are not sufficient to initiate inquiry and/or investigation under the Competition Act, unless the governing law and the policy of the concerned "market" has clearly defined the respective rights and obligations of the concerned parties/persons.

j) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act, therefore, in the present facts and circumstances, are not mere "administrative directions".

k) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act are, therefore, illegal, perverse and also in view of the fact that it takes into consideration irrelevant material and ignores the relevant material and the law.

l) Every majority decision cannot be termed as "cartelisation". Even ex-facie service providers and its Association COAI have not committed any breaches of any provisions of the Competition Act.

131. Hence the following

ORDER

a) Impugned order dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General Under

Section 41 of the Competition Act, are liable to be quashed and set aside, in exercise of power Under Article 226 of the Constitution of India. Order accordingly.

b) All the Writ Petitions are allowed.

c) There shall be no order as to costs.

d) In view of the above, nothing survives in Civil Application (Stamp) No. 17736 of 2017 in Writ Petition No. 7164 of 2017 and the same is also disposed of. No costs.

4. Gist of the aforesaid order, as per the High Court, is that insofar as the telecom sector/industry/market is concerned, same is governed, regulated, controlled and developed by the authorities under the India Telegraph Act, 1885 (hereinafter referred to as the 'Telegraph Act'), the Telecom Regulatory Authority of India Act, 1997 (for short, 'TRAI Act'), and as well as the related Regulations, Rules, Circulars, etc. Therefore, the question of interpretation or clarification of any "contract clauses", "unified license", "interconnection agreements", "quality of service Regulations", "rights and obligations of TSP between and related to the above provisions", are to be settled by the Authorities/Telecom Disputes Settlement and Appellate Tribunal (TDSAT) and not by the Authorities under the Act. It has also held that the Competition Act and the TRAI Act are independent statutes and the statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the objectives for which they are established. The Competition Act is itself not sufficient to decide and deal with the issues arising out of the provisions of the TRAI Act etc. Thus, the CCI has no jurisdiction to decide and deal with the various statutory agreements, contracts, including rival rights/obligations, of its own. The issues arising out of contract agreements, terms and clauses and/or the related issues are to be settled by the authority under the TRAI Act in the first instance and unless these issues are decided, there is no question of initiating any proceedings under the Act. In a nutshell, it is held that insofar as contracts, etc. which are regulated by the TRAI Act are concerned, in the first instance, it is the authority under the TRAI Act which has to decide these questions. Once there is a determination of the respective rights and obligations under these licenses by the authority under the TRAI Act, which provided an information to the effect that the particular act appears to be anticompetitive, only thereafter the CCI gets jurisdiction to go into the question of such anti-competitive practice. Primarily the message behind the decision of the High Court is that jurisdictional facts are to be decided by the authorities under the TRAI Act which has the exclusive jurisdiction to determine those issues as the TRAI is the statutory authority established for this very purpose, and unless there is a determination of these facts, the machinery under the Competition Act cannot be invoked. To put it otherwise, the judgment proceeds to decide that it was premature for the CCI to entertain the Information for want of determination of such issues that fall within the domain of the TRAI Act.

5. It is obvious that the RJIL is not happy with the aforesaid outcome. Even the CCI feels aggrieved. CCI has impugned this decision by filing four special leave petitions, while the other one has been filed by the RJIL.

6. The material facts which are absolutely essential to determine the controversy, eschewing the unnecessary details, may now be recapitulated:

Factual Background:

With the decision of the Government of India, more than 25 years ago, ushering into era of globalisation and liberalisation, lot of avenues opened up. It led to the privatisation of business in many sectors which were, hitherto, monopolistic domain of the Government. These included aviation, insurance, telecommunication etc. With the opening of the industrial and other activities in all spheres by placing it in the hands of private sector led to a significant economic development. The absolute control of the Government through public enterprise or otherwise, which had seen licence and quota raj, virtually withered away, thereby reverting back to laissez faire economy to a great extent, though not completely. It led to two significant developments:

In the first instance, though the private sector was given full freedom to do the business without any shackles in the form of controls etc., it was also deemed necessary at the same time that in public interest, some of the aspects of the business need to be regulated, of course, not by the Government but by an independent regulatory authority. This necessity prompted the Government to come out with regulatory regime in different sectors. For example, in insurance sector, we have regulatory authority constituted under Insurance Regulatory and Development Authority Act, 1999; for industries generating electricity, there is an electricity regulatory authority constituted under the Electricity Act, 2003; and for telecom sector, with which we are concerned, the TRAI is constituted under the provisions of TRAI Act.

Secondly, this requirement to do business thereby allowing free entry to private enterprise led to competition between different players in the private sector. Competition is perceived as a phenomena which is in best public interest in so many ways. Therefore, it becomes necessary to encourage competition. At the same time, tendency of the business enterprises to adopt practices which retard healthy competition needed to be curbed. There was a governing law in the field known as Monopolistic and Restrictive Trade Practice Act, 1969. However, it was felt that a new robust statutory regime is required to take care of the needs of the present day. This necessity prompted the Parliament to come out with a new Act on the subject and the Competition Act, 2002 was passed by the Parliament. Under this Act, the CCI is constituted as a statutory body which is to ensure healthy competition in markets thereby preventing the practice of having adverse effect on competition; to promote and sustain the competition in markets; to protect the interest of consumers and to ensure freedom of trade. In that sense, the CCI is also a regulator. But a unique feature of the CCI is that it is not sector based body but has the jurisdiction across which transcends sectoral boundaries, thereby covering all the industries, with focus on the aforesaid object and purpose behind the Competition Act, 2002.

7. In the instant appeals, width and scope of the powers of the CCI under the Competition Act, 2002 pertaining to telecom sector i.e. in respect of the companies in telecom industry providing telecom services is to be defined vis-a-vis the scope of the powers of TRAI under the TRAI Act, 1997. It has arisen in these appeals, in the following background:

As mentioned above, TRAI is the regulatory which regulates the functioning of the telecom service provider i.e. the telecom sector. Section 11 of the TRAI Act enumerates various functions which TRAI is supposed to perform under the Act. Section 13, likewise, empowers the TRAI to issue directions, from time to time, to the service provider. In exercise of powers Under Section 13 read

with Section 11 of the TRAI Act, the TRAI issued directions dated June 07, 2005 to all the telecom service providers to provide interconnection within ninety days of the applicable payments made by the interconnection seeker. The purpose behind providing interconnection by one service provider to the other service provider is to ensure smooth communication by a subscriber of one service provider to the cell number which is provided by another service provider. In that sense, this direction facilitates smooth functioning of the cell phone network even when it is managed by different companies as it ensures interconnectivity i.e. connectivity from one service provider to other service provider.

8. On October 21, 2013, RJIL was granted Unified License and Unified Access Service License Under Section 4 of the Telegraph Act by the Department of Telecom (DoT) for providing telecommunication services in all 22 circles/licensed service areas in India. Soon thereafter, RJIL executed interconnection agreements (ICA) with existing telecom operators *inter alia* including, Bharti Airtel Limited and Bharti Hexagon Limited (hereinafter collectively referred to as the 'Airtel'), Idea Cellular Limited (hereinafter referred to as the 'Idea'); Vodafone India Limited/Vodafone Mobile Services Limited (hereinafter collectively referred to as the 'Vodafone'). RJIL commenced test trial of its services after intimation and approval of the DoT and TRAI.

9. By its 'firm demand' letter of June 21, 2016, RJIL vide separate letters requested IDOs to augment Point of Interconnection (POIs) for access, National Long Distance (NLD) and International Long Distance (ILD) services, as according to it, the capacity already provided to it was causing huge POI congestion, resulting in call failures on its network. According to RJIL, these companies intentionally ignored the aforesaid request. Accordingly, RJIL sent a letter dated July 14, 2016 to TRAI stating that the POIs provided by IDOs are substantially inadequate and leading to congestion/call failures on its network in all circles. Hence, TRAI was requested to intervene and direct these telecom operators to augment the POI capacities as per the demands made by RJIL. TRAI vide separate letters dated July 19, 2014 requested inter alia the aforementioned telecom operators to augment POIs as per the RJIL's request. Further, responses of the respective companies were also sought on the issues raised by RJIL, within seven days. Idea responded by sending letter dated July 26, 2016 to RJIL denying that there had been any delay in augmentation of POIs and further stated that it is willing to fully support RJIL and that it had instructed its circle teams to augment the POIs on the basis of traffic congestion as per the ICA. Likewise, Airtel also sent reply dated August 03, 2016 to TRAI, inter alia stating that augmentation of POIs shall be undertaken as per the terms and conditions of the ICA and on the basis of traffic trends post their commercial launch. RJIL was not satisfied with such responses. It sent another letter dated August 04, 2016 to TRAI reiterating its earlier request for augmentation of POIs by the subject telecom operators. In the meantime, even Cellular Operators Association of India (COAI) intervened by addressing communication dated August 08, 2016 to TRAI wherein it took a stand by stating that the RJIL was providing free service to millions of users under the guise of testing which led to choking of POIs. It was further suggested that due to the free service provided by RJIL, a substantial imbalance in voice traffic had occurred for which the existing operators were not adequately compensated under the Interconnection Usage Charges Regulations (IUC) in place.

10. There was further exchange of correspondence between the parties and even by the parties to the TRAI which shows that the parties stuck to their respective positions and it may not be

necessary to refer to those communications in detail. Suffice it is to mention that RJIL fixed September 05, 2016 as the launch date, which fact was informed to other service providers as well who were also told that the subscriber base was expected to substantially and swiftly increase resulting in even more POI congestion. On that basis, request was made for urgent POI augmentation vide letter dated September 02, 2016. The TRAI even facilitated a meeting between the representatives of RJIL and other service providers (Respondents herein) to sort out and resolve the differences in the interest of the consumers. At the same time, in the said meeting, the three telecom operators (Respondents herein) also raised a grievance that free calls being provided by RJIL has resulted in an unprecedented traffic congestion on their respective networks and the current IUC regime is inadequate to cover the cost of efficiently maintaining such high traffic. Thereafter, vide letter dated September 14, 2016, addressed by Airtel to RJIL, it stated that the POIs (also known as E1s) would be converted into 50:50 ratio to outgoing and incoming E1s. In other words, the E1s provided would be converted to 'only outgoing' or 'only incoming' i.e. one-way E1s. RJIL replied by stating that it was acceptable to them.

11. Soon thereafter, i.e. in September 2016 itself, Mr. Rajan Sardana, a Chartered Accountant, filed information Under Section 19 of the Competition Act (registered as Case No. 81 of 2016) and similar application was filed by Justice K.A. Puj (retired) (registered as Case No. 83 of 2016). Then, it was followed by information Under Section 19 of the Competition Act by RJIL in November, 2016 (registered as Case No. 95 of 2016).

Proceedings before TRAI:

12. As the matter was with the TRAI as well, it issued show cause notices dated September 27, 2016 to IDOs and RJIL for violation of Standard of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009 (hereinafter referred to as the 'QoS') and for provision of the License Agreements. Similar show cause notices were also sent to other telecom operators. On October 21, 2016, TRAI issued recommendations to DoT after finding that IDOs have violated conditions under the QoS, interconnection agreements and Unified License. The TRAI inter alia stated in its recommendation as under:

21. ... (vii) It is evident from the above clauses that the licensees are mandated to provide interconnection to all eligible telecom service provider. However, as mentioned in para 6 above, Airtel along with other service providers have jointly through their association (COAI), declined Point of Interconnection to RJIL which is willful violation of the above mentioned license conditions.

...(x) COAI's letter dated 2nd September, 2016 which was confirmed by Airtel in the meeting held on 9th September, 2016 clearly indicates attempt by three service providers namely, Airtel, Vodafone India Limited and Idea Cellular Limited to stifle competition in the market and willfully violate the license conditions;....

23. While the Authority has been taking necessary steps to ensure effective interconnection between Airtel and RJIL, it is evident from Para 21 that Airtel is in non-compliance of the terms and conditions of license and denial of interconnection to RJIL appears to be with ulterior motive to stifle competition and is anti-consumer.

13. TRAI recommended that Rs. 50 crore per local service area (LSA) be imposed on all the above three telecom operators for failure to adhere to TRAI norms and Regulations. Similar recommendations were also issued to DoT against other telecom operators. Against the recommendations dated October 21, 2016 of TRAI, Vodafone filed a Writ Petition being Writ Petition (C) No. 11740 of 2016 before the High Court at Delhi. Meanwhile, on January 17, 2017, TRAI also recommended imposition of penalty of Rs. 1,90,000/- on Idea for its rejection of mobile number portability (MNP) requests to RJIL's network. Against the aforesaid recommendation, Idea has preferred a Writ Petition being Writ Petition (C) No. 685 of 2017 before the High Court at Delhi. The DoT after examining the matter referred it back to TRAI for fresh consideration vide DoT's reference dated April 05, 2017 whereby its recommendations imposing penalty upon IDOs were sent back for reconsideration. The TRAI sent its response dated May 24, 2017 to the DoT, wherein it took a categorical stand that telecom operators have intentionally denied and delayed the augmentation of POIs to RJIL.

Proceedings before CCI:

14. The CCI took the cognizance of the three informations given to it Under Section 19 of the Competition Act which were registered as Case Nos. 81, 83 and 95 of 2016. It gave hearing to the Respondents service providers as well as COAI and passed order dated April 21, 2017 Under Section 26(1) of the Competition Act as per which it came to a prima facie conclusion that case for investigation was made out and directed the Director General to cause investigation in the case. This order was passed by majority of 3:2 as two members of CCI dissented from the said order. Operative portion of the majority order holds as under:

23. The Commission notes that allegations of anticompetitive agreement as well as abuse of dominant position have been made for the same conduct of refusal to facilitate call termination services and denial of mobile number portability. As discussed earlier, the Commission is satisfied that there exist a *prima facie* contravention of Section 3(3)(b) of Act, as the ITOs appear to have entered into an agreement amongst themselves through the platform of COAI, to deny POIs to RJIL. Having been *prima facie* convinced that the impugned conduct is an outcome of the anti-competitive agreement amongst ITOs, Commission does not find it appropriate to consider the same impugned conduct as unilateral action by each of the ITOs. The Commission therefore at this stage does not find it necessary to deal with the allegations and submissions regarding abuse of dominance in contravention of the provisions of Section 4 of Act.

24. In view of the foregoing, the Commission directs the DG to cause an investigation into the matter under the provisions of Section 26(1) of the Act. Considering the substantial similarity of allegations in all the informations, the Commission clubs them in terms of the proviso to Section 26(1) of the Act read with Regulation 27 of the Competition Commission of India (General) Regulations, 2009. The DO is directed to complete the investigation and submit investigation report within a period of 60 days from the date of receipt of this Order, if the DG finds contravention, he shall also investigate the role of the persons who at the time of such contravention were in-charge of and responsible for the conduct of the business of the contravening entity/entities. During the course of investigation, if involvement of any other party is found, DG shall investigate the conduct of such other parties also who may have indulged in the said contravention. In case the DG finds the conduct of the Opposite Parties in violation of the Act, the

DG shall also investigate the role of the persons who were responsible for the conduct of the Opposite Parties so as to proceed against them in accordance with Section 48 of the Act.

25. The Commission makes it clear that nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

15. Likewise, two members who dissented inter alia held as follows:

...As stated above, from the various charts placed on record by the ITOs showing the number of POIs provided by them to RJIL, the respective learned senior Counsel for Ops have tried to show that the number of POIs provided to RJIL by 08.11.2016 i.e. within the first quarter itself, were much more than what was demanded. In fact, the charts filed by RJIL itself corroborate this fact. The charts show that even if some of the POIs provided (one-way POIs for connecting outgoing calls from ITOs to RJIL) are not taken into consideration, the number of POIs provided by OP-5 and OP-7 were much more than what was demanded by RJIL. Even in case of OP-2, the same were approximately 64% (NLD POIs) and 85.53% (Access POIs) as on 08.11.2016. However, as we have already observed above, we are not expected to go into the question of providing adequate number of POIs. Yet there is ample material on record to show that RJIL was more to be blamed for congestion in its traffic than the ITOs....

...we are of the considered opinion that on the basis of material available with the Commission, it is difficult to say that there is a prima facie case..." made out against the Petitioner and others and accordingly, "...the instant cases ought to be closed Under Section 26(2) of the Act..." (hereafter "Dissent Note").

16. On June 08, 2017, the Director General issued a letter of investigation to the Appellant seeking call data records in respect of certain identified mobile numbers by June 19, 2017. On June 19, 2017, Respondent No. 2 issued a letter of investigation to the Appellant seeking detailed information/documents to be furnished by June 30, 2017. Immediately thereafter, writ petitions were filed challenging the aforesaid order of the CCI as well as action of the Director General seeking information for holding inquiry. After preliminary hearing, the High Court passed interim orders dated June 30, 2017 on the basis of statement of the counsel for CCI that they shall not proceed with the investigation, which order continued till the disposal of the writ petitions. The High Court after hearing the matter finally allowed the writ petitions, as already mentioned.

17. It is clear from the above that as per RJIL, the Respondent service providers, along with COAI, entered into an anti-competitive agreement/formed a cartel and acted in an anti-competitive manner which is prohibited by the Act. On these allegations, it approached the CCI for initiating inquiry into this anti-competitive practices. Insofar as the nature of alleged anti-competitive agreement is concerned, the allegations of RJIL are the following:

(i) Delay in provisioning or denial in provisioning of POIs, also known as 'E1' in telecom parlance, to RJIL by IDOs during the testing phase and after commercial launch of RJIL services. POIs are the points where the networks of telecom operators connect. Without sufficient POIs it is not

possible for subscribers of one service provider to make calls to subscribers of another service provider.

(ii) It was also alleged, *inter alia*, that IDOs are denying Mobile Number Portability (MNP) requests of customers who wanted to switch to RJIL competing service.

(iii) It was also alleged that COAI was acting at the behest of IDOs against the interest of a competing member, i.e. RJIL, and not for the common interest of the industry and consumers as a whole.

Proceedings before the High Court:

18. Against the order passed by the CCI directing investigation into the aforesaid allegations, in the writ petitions filed by the IDOs and also by COAI, challenge laid to the aforesaid order was premised on the ground that the CCI lacked jurisdiction to entertain such complaints/information filed Under Section 19 of the Competition Act as such a matter falls within the exclusive jurisdiction of another regulatory authority, namely, TRAI.

19. In nutshell, it was pleaded that the violation alleged by RJIL, namely, whether there was a delay or denial in provisioning POIs, comes within the domain of TRAI as it is the TRAI which has the exclusive jurisdiction to deal with such a matter under the TRAI Act and, in fact, the complaint was also made by TRAI as well which was seized of the matter.

20. The plea of the Appellants, on the other hand, was that violation of telecom Regulations, etc. was undoubtedly a matter which could be looked into by the TRAI for which RJIL has approached the TRAI. However, the subject matter of inquiry before the CCI was entirely different, namely, formation of cartel and a concerted effort on the part of the service providers, in collusion with COAI, to curb the competition in the market and, thus, the CCI was competent and had requisite jurisdiction to look into this aspect. To put it otherwise, according to the Appellants, the CCI had decided to examine the facts purely from the stand point as to whether the alleged Act constituted anti-competitive practice on the part of the Respondents and, therefore, contravened the provisions contained in Section 3 or Section 4 of the Act. This aspect, they had argued, could not be gone into by the TRAI as the CCI was the only statutory authority constituted under the Act to examine such an issue.

21. The Bombay High Court in the impugned judgment has, thus, inter alia, held as under:

(i) the Competition Commission of India (CCI) had no jurisdiction in view of the Telecom Regulatory Authority of India Act, 1997 and the authorities and Regulations made thereunder;

(ii) the CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality;

(iii) the order dated 21.04.2017 passed Under Section 26(1) of the Competition Act was not an administrative direction, but rather a quasi judicial one that finally decided the rights of parties and

caused serious adverse consequences, because a detailed hearing had been given and many materials had been tendered in the courts of the hearings;

(iv) on the merits of the matter, there was no cartelisation as alleged and COAI was exonerated; and

(v) the order of the CCI was perverse and liable to be interfered with under writ jurisdiction.

Arguments: The Appellants:

22. Mr. P.S. Narasimha, learned Additional Solicitor General, appeared on behalf of the CCI and submitted that the impugned judgment is contrary to the law. His attack was premised on three principal propositions, which are follows:

(i) *Jurisdiction of the CCI:* The CCI has jurisdiction in the present case and it need not wait till the conclusion of proceedings under the TRAI Act to conclude.

(ii) *Scope of Judicial Interference Under Article 226:* The High Court erred in holding that the order passed Under Section 26(1) was an order resulting in serious adverse consequences merely because the CCI had granted a hearing.

(iii) The order of CCI was not perverse and the High Court erred in giving findings on merits. The High Court erroneously exercised writ jurisdiction.

23. With respect to the first proposition, his argument was that the High Court had failed to appreciate that issues before the CCI are altogether different than the issues before the TRAI and they necessarily be treated differently. He argued that the CCI and TRAI operate in entirely different fields, which is discernible from the Preambles of the respective legislations. The TRAI Act was supposed to enable it to regulate the telecommunication services, adjudicate dispute, dispose of appeals and protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector. The CCI, on the other hand, is a body that has been established to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.

24. Mr. Narasimha emphasised that the issue before the CCI was whether the opposite Parties/Respondents, i.e. the IDOs, were acting in concert and colluding (forming a cartel) so as to block or hinder the entry of RJIL in the market in violation of Section 3(3) (b) of the Act. The key issue is whether there was an anticompetitive agreement between the IDOs, using the platform of COAI. The issue before the TRAI, on the other hand, is whether the delay/denial of POIs has violated terms of the licence agreement and QoS Regulations. The learned ASG pointed out that all the opposite parties have argued that they were justified in declining POIs to RJIL. However, the question before the CCI is whether the conduct of the parties was unilateral or collective action based on an agreement? It is precisely this issue that requires investigation by the Director General. If the conduct of the Respondents in delaying/denying POIs was unilateral (i.e. an independent decision made by each of them), then the conduct cannot be faulted Under Section 3 of the Act

since Section 3 is premised on existence of an 'agreement' as defined in Section 2(b). However, if the conduct of the Respondents was based on an 'agreement', it would become illegal Under Section 3(3)(b) of the Act because its intent and effect is to 'limit or control production, supply, markets, technical development, investment or provision of services''. It was contended that the conduct may well be legal under the TRAI Act and Regulations or other laws. However, it is the collusive/concerted nature of the action coupled with the effect that makes it illegal under the Competition Act.

25. He adverted to the order dated April 21, 2017 of the CCI, while taking its *prima facie* view and submitted that the CCI has recognised the distinction between the issues before the TRAI and the issues arising under the Act, as follows:

9. It is observed that telecom sector is regulated by TRAI as the sectoral regulator. On the allegation of insufficient POIs being provided to RJIL, the Commission notes from the information available on TRAI's website that, on 21st October 2016, TRAI had recommended, through three separate communications to the Department of Telecommunications, imposition of penalty of Rs. 50 crore per License Service Area (LSA) against Airtel, Vodafone and Idea, for violation of the provisions of License Agreements and the Standards of QoS of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009. Thus, TRAI as a sectoral regulator, has held the said conduct of ITOs in violation of relevant TRAI Regulations and recommended penal action against them. However, the recommendations of TRAI is in respect of violations of the provisions of License Agreements and the Standards of QoS of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009 by these OPs. Against this, mandate of the Commission Under Section 18 of the Act is '...to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.' Accordingly, it becomes the duty and responsibility of the Commission to eliminate practices in the market that have an adverse effect on competition and promote and sustain competition so as to protect the interest of consumers and ensure freedom of trade. Further, as per Section 62 of the Act, provisions of the Act are in addition to and not in derogation of the provisions of any other law for the time being in force. Section 61 of the Act grants exclusive power to the Commission and the Competition Appellate Tribunal to exercise its jurisdiction in respect of any matter which the Act empowers the Commission or the Competition Appellate Tribunal to determine to the exclusion of civil courts. A careful reading of these provisions show that the Commission has the jurisdiction to inquire into the issues alleged in the present information insofar as the same may result in contravention of the provisions of the Act.

10. **It may be noted that the primary grievance of the Informants relates to cartelization by the Opposite Parties, amounting to violation of the provisions of Section 3 of the Act. In this regard, it must be noted that none of the areas covered Under Section 3 of the Act are covered by TRAI in its mandate as a sector regulator for TSPs. No doubt, TRAI has the responsibility/obligation to determine whether Quality of Service Regulations and interconnection norms on the levels of congestion at the points of interconnection are complied with it not. But apart from that, none of the other issues as envisaged Under Section 3 of the Act are looked into by TRAI. Specifically, TRAI cannot arrive at a determination as to whether the ITOs have colluded and cartelized to deny POIs to the detriment of RJIL in**

violation of Section 3(3) read with Section 3(1) of the Act. The scope of the Section 3 allegation is not whether the ITOs have breached the terms of their respective License agreement or ICA, rather, the scope of the Section 3 allegations pertains to whether the ITOs have entered into an anti-competitive agreement to provide insufficient POIs or delay the provisions of POIs to RJIL. It is within the mandate of the Commission which can adjudicate on the issue of cartelization amongst enterprises/associations and arrive at a finding on the alleged cartelization. The Commission accordingly holds that the issue of whether such conduct on the part of ITOs (including COAI) has resulted in any anti-competitive effect in the market in violation of the provisions of the Act can and needs to be examined by it.

11. The Commission recognizes the role and importance of sectoral regulators and exercises its jurisdiction keeping in mind their role and responsibilities. **The Commission is a market regulator and has the jurisdiction to look at those issues which affect competition in markets in India, including that of an alleged cartelization amongst enterprises/associations. The nature of the proceedings before TRAI involving ITOs on the other hand different and related to whether interconnection norms and quality of service Regulations are complied with or whether the contractual terms of ICAs have been breached or met. Palpably, these issues are not relevant for determination in the current proceedings before the Commission.**

12. **The informants have alleged that the conduct of ITOs amounts to a "cartel" in relation to denial of POIs to RJIL.** The definition of cartel has been provided Under Section 2(c) of the Act which reads as follows: 'cartel includes an association of producers, sellers, distributors, traders or service providers who by agreement amongst themselves limit, control or attempt to control the production, distribution, sale or price of or, trade in goods or provision of services.' Further, any alleged agreement amongst enterprises and an association of enterprises, engaged in identical or similar trade or provision of services is covered Under Section 3(3) of the act which states that:

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) .....

(d) .....

shall be presumed to have an appreciable adverse effect on competition.

13. On the basis of the above, the Commission notes that in addition to ITOs, conduct of COAI also needs to be examined under the provisions of Section 3(3) of the Act.

26. He submitted that it was the statutory duty of the CCI, enumerated in Section 18 of the Act, to eliminate anti-competitive practices and the focus of the CCI was confined to this Court's judgment in the case of ***Haridas Exports*** v. ***All India Float Glass Manufacturers' Assn. and Ors.*** MANU/SC/0596/2002 : (2002) 6 SCC 600 wherein it was held that where statutes operate in different fields and have different purposes, it cannot be said that there is implied repeal by one, of the other. In the said case, this Court was considering alleged conflict between the Monopolies & Restrictive Trade Practices Act, 1969 and the Anti-Dumping Rules under the Customs Act/Customs Tariff Act. It was held:

48. The jurisdiction of the MRTP Commission, in our opinion, is not ousted by the anti-dumping provisions in the Customs Act. The two Acts operate in different fields and have different purposes. The Import Control Act and the Customs Tariff Act are concerned with import of goods into India and the duty which could be imposed on the imported items. Import may be allowed on the basis of an import licence or, depending upon the policy, import may be allowed under OGL - open general licence - where no specific licence for import is required. Whether to allow import or not and the terms on which an item may be imported is a matter of policy and regulated by law.

xx xx xx

52. The levy or non-levy of anti-dumping or other duty being a legislative act pursuant to the exercise of powers under the Customs Tariff Act can also not be a subject-matter of judicial review by the MRTP Commission. The two Acts substantially operate in different fields and the following table brings out some of the distinctions between the MRTP Act and the anti-dumping provisions:

[table omitted]

A perusal of the above chart indicates that the two statutes and regimes operate in different and distinct spheres and there is no conflict between the two regimes/statutes. Hence, the question of implied repeal of the provisions of Section 33(1)(*j*) of the MRTP Act, 1969 on account of the provisions of Section 9-A of the Customs Tariff Act, 1975 does not arise.

53. It is thus seen that the provisions relating to antidumping contained in the Customs Tariff Act do not in any way affect the power or jurisdiction of the MRTP Commission. The Import Control Act and the Customs Tariff Act on the one hand and the MRTP Act on the other operate in different independent fields and the authority under one has no jurisdiction over the other. In other words, their paths do not cross each other. While the provisions of the Anti-Dumping Act are concerned with the levy of anti-dumping duty, the MRTP Act in the present case would be concerned with the agreements between the parties which relate to the restrictive trade practices. Therefore, it would be incorrect to say that the incorporation of the anti-dumping provisions ousts the jurisdiction of the MRTP Commission to inquire and pass orders, *inter alia*, with regard to restrictive trade practice in India.

The learned ASG pointed out that the allegation against the Respondents i.e. IDOs is that they have through an anticompetitive agreement/cartel, limited the provision of services by delaying or denying POIs to RJIL, with a view to block its entry in the market. As per him, such an agreement would raise a presumption of 'appreciable adverse effect' on competition.

27. Explaining the scheme of the Act, Mr. Narasimha referred to the provisions of Section 3 which prohibits anti-competitive agreements of the nature mentioned therein. He also referred to the definitions of 'agreement', 'cartel', 'enterprise' and 'service' contained in Section 2 of the Act and submitted that the definition of 'agreement' is not restricted to written agreements, but even extends to 'action in concert', which, according to him, is wide enough to allegations of RJIL, if proved correct, within the mischief of Section 3 of the Act. He also referred to Section 19(3) of the Act which lists certain factors to be considered in analysing adverse effect on competition and submitted that creation of barriers to new entrants in the market and foreclosure of competition by hindering entry into the market are to be perceived as having adverse effect on competition. He, thus, submitted that having regard to the aforesaid provisions, the CCI wanted to investigate the matter with focus on the aspect as to whether there was an agreement between the Respondent service providers and they acted in concert pursuant to the said agreement; whether it amounted to anti-competitive act on the part of these Respondents and had adverse effect on the competition. In the process, the CCI was also supposed to examine as to whether the Respondents colluded with COAI and abused their dominant position. His further argument was that inquiry into these aspects was within the exclusive domain of the CCI as it is the CCI which is supposed to ensure that no such anti-competitive practices are adopted by anybody and if that has happened, the CCI is empowered to issue directions in terms of Section 27 of the Act and also impose penalties. It has power to impose even lesser penalties as provided in Section 46 of the Act.

28. Mr. Narasimha also referred to Section 60 of the Act which provides for overriding effect for the Act and reads as under:

60. Act to have overriding effect. - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

It was emphasised that the case of the CCI is not that the TRAI does not have power to exercise jurisdiction at all in the present factual matrix and there is no conflict of jurisdiction or legal regimes. Rather, both the TRAI and the CCI exercise their jurisdiction in their respective fields. Exercise of jurisdiction by the CCI to investigate an alleged cartel does not impinge upon TRAI's jurisdiction to regulate the industry in any way. Submission in this behalf was that the TRAI exercises its jurisdiction by ensuring compliance with the interconnect agreements, license conditions, interconnection Regulations, quality of service norms and Regulations etc. Based on past experience, the TRAI frames Regulations for the improvement of the telecom industry in the future. For instance, the June 07, 2005 direction of TRAI which provided for a 90-day period for interconnection has now been replaced by the interconnection Regulations of 2018, by which the time period for provision of POIs has been reduced to 30 days, because it was found that due to technical advancements, it was possible to give POIs in a much shorter time frame, and parties were using the 90-day period to delay the provision of POIs, as in the case of RJIL. However, the TRAI does not have the power to penalize for past conduct which was of anti-competitive nature. It was further submitted that while the competition law seeks to promote efficient allocation and utilization of resources by inter alia lowering the entry barriers in the market, the primary objective of the sectoral regulators like the TRAI is development of their respective sector. However, what is important to bear in mind is that the promotion of competition and prevention of competitive behaviour may not be high on the agenda of a sectoral regulator which makes it prone to 'regulatory capture'. The position has been very succinctly captured by the Report of the Working Group on

Competition Policy, Planning Commission of India, Government of India, February 2007 which states as follows:

7.2.3 The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anti-competitive behaviour may not be high on its agenda or the laws governing the regulator may be silent on this aspect. It is not uncommon for sectoral regulators to be more closely aligned with the interest of the firms being regulated, which is also known as 'regulatory capture'. Besides, a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency across sectors. On the other hand, CCI will be able to apply uniform competition principles across all sectors of economy.

The National Competition Policy 2011 has also observed as following:

8.3 The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anti-competitive behaviour may not be high on its agenda or the laws governing the regulator may be silent on this aspect. Besides, a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency across sectors as regards competition issues. On the other hand, the CCI, which is expected to have developed the core competence, expertise and capacity in competition related issues, will be able to apply uniform competition principles across all sectors of economy. ***Besides, enforcement and penalizing violations of Competition Act is the exclusive area of the CCI.*** *Even otherwise, the general principle for economic efficiency would be, whoever can do a thing in best and most professional manner should do it.*

29. The learned ASG, on taking support from the above, submitted that the sectoral regulators, by contrast, will not be as experienced in conducting competition analysis as the competition authorities. Being susceptible to regulatory capture, the day-to-day interactions between industry officials and regulatory agency may lead to a commonality of interests that can interfere with the perspective necessary to evaluate competitive harms and to construct remedies that will protect competition for the benefit of the economy as a whole. While the sector specific regulators typically impose and monitor various behavioral conditions, the competition agencies are more likely to opt for structural remedies which would lead the sector to evolve to a point where sufficient new entry is induced thereby promoting genuine competition. According to him, keeping in view the aforesaid respective roles in mind, the Parliament in its wisdom and foresight has built in a mechanism within the Act to address apparent conflicts of jurisdiction. The 'comity' between the sectoral regulator (TRAI) and the market regulator (CCI) is entirely addressed by a reading of Section 21 and Section 21A of the Act. In any case, Section 60 of the Act had an overriding effect. To support his argument, the learned ASG relied upon ***State (NCT of Delhi)*** v. ***Sanjay*** MANU/SC/0761/2014 : (2014) 9 SCC 772 wherein this Court dealt with the issue of whether a prescription of offence under the Mines & Minerals Development & Regulation (MMDR) Act would exclude the application of the Indian Penal Code. The Court held that due to the absence of a non-obstante clause, the application of the Indian Penal Code was not excluded. In the present case, the TRAI Act does not apply notwithstanding any other laws, and it does not contain an

overriding effect provision containing a non-obstante clause. The relevant paragraphs of the judgment have been extracted below:

62. Sub-section (1-A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the Rules made thereunder. In other words no person will do mining activity without a valid lease or licence. Section 21 is a penal provision according to which if a person contravenes the provisions of Sub-section (1-A) of Section 4, he shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any Rule made thereunder except upon a complaint made by a person authorised in this behalf. It is very important to note that Section 21 does not begin with a non obstante clause. Instead of the words "notwithstanding anything contained in any law for the time being in force no court shall take cognizance....", the Section begins with the words "no court shall take cognizance of any offence.

63. It is well known that a non obstante Clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.

30. He also premised his argument on the basis that the Act is a special statute in the field of telecommunications Regulation, including technical aspects connected thereto, and in case of conflict between two special legislations, the later enactment would prevail. In ***Solidaire India Ltd.*** v. ***Fairgrowth Financial Services Ltd. and Ors.*** MANU/SC/0009/2001 : (2001) 3 SCC 71, this Court held as under:

7. Coming to the second question, there is no doubt that the 1985 Act is a special Act. Section 32(1) of the said Act reads as follows:

32. *Effect of the Act on other laws.*-(1) The provisions of this Act and of any Rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

8. The effect of this provision is that the said Act will have effect notwithstanding anything inconsistent therewith contained in any other law except to the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976. A similar non obstante provision is contained in Section 13 of the Special Court Act which reads as follows:

13. *Act to have overriding effect.*-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any

instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority.

9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail.

The decisions cited in the above context are as follows: *Maharashtra Tubes Ltd.* v. *State Industrial & Investment Corporation of Maharashtra Ltd.* [MANU/SC/0427/1993 : (1993) 2 SCC 144]; *Sarwan Singh* v. *Kasturi Lal* [MANU/SC/0071/1976 : (1977) 1 SCC 750: (1977) 2 SCR 421]; *Allahabad Bank* v. *Canara Bank* [MANU/SC/0262/2000 : (2000) 4 SCC 406] and *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.* [MANU/SC/0003/1956 : AIR 1956 SC 614 : 1956 SCR 603].

31. The learned ASG endeavoured to support his proposition by referring to the contrasting provision contained in Section 14 of the TRAI Act which provides for dispute resolution in respect of various categories of persons before the TDSAT, which specifically carves out an exception in respect of monopolistic trade practice, restrictive trade practice and unfair trade practice, which was subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission (MRTP Commission). He submitted that this was another indicator in the TRAI Act itself from which it can be inferred that when it comes to anticompetitive practices, an embargo is put on the TRAI to deal with such practices, inasmuch as the Competition Act is enacted to repeal and replace the obsolete regime of the MRTP Act. In this behalf, he drew sustenance from Section 8 of the General Clauses Act to submit that the Competition Act could be read in place of MRTP Act while construing the provisions of Section 14 of the TRAI Act.

32. His another submission, in this hue, was that a distinction needs to be drawn between facilitating competition (as provided in Section 11 of the TRAI Act) on the one hand and curbing and deterring anti-competitive conduct and practices on the other hand. His submission in this behalf was that the function of the TRAI Under Section 11(1)(a)(iv) was to facilitate competition which was purely recommendatory in nature and not part of regulatory function of the TRAI, as held in ***Union of India and Anr.*** v. ***Association of Unified Telecom Service Providers of India and Ors.*** MANU/SC/1252/2011 : (2011) 10 SCC 543. He also argued that TRAI has no power to enforce compliance, pass orders, or give directions of the nature envisaged under the Act to curb anti-competitive conduct.

33. The learned ASG also relied upon the judgment of the European Commission in ***Deutsche Telekom*** v. ***European Commission***[1] wherein it was held that it is only if the legislative framework eliminates the possibility of competition (for example, a statutory monopoly) that the jurisdiction of the Commission would be excluded. Following passage from the said judgment was specifically referred to:

80. According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the understandings. Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility

of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (Joined Cases C-359/95P and C-379/95P Commission and France v. Ladbroke Racing (1997) ECR I-6265, paragraphs 33 and 34 and the case-law cited).

34. Mr. Narasimha also referred to another judgment of the General Court of the European Union in ***Telefonica SA*** v. ***European Commission*** (T-336/07) wherein it was held that the European Commission could intervene in the telecommunications market, even though the entry was regulated through a sectorial regulator. He pointed out that this decision of the General Court was upheld in appeal by the European Court of Justice vide its judgment dated July 10, 2014.

35. Mr. Narasimha also contrasted the investigative regime under the two Acts, i.e. Section 12 of the TRAI Act vis-a-vis Section 41 read with Section 36(2) of the Competition Act and submitted that the Director General under the Competition Act is better equipped to deal with detection and investigation of anti-competitive agreements.

36. Labelling as erroneous, the approach of the High Court that CCI should await the outcome of the proceedings before TRAI to attain finality, answer given by Mr. Narasimha was that this approach was erroneous for three reasons. First, the High Court has failed to appreciate the different fields/domains in which the CCI and the TRAI operate. Secondly, the course of action proposed by the High Court would result in considerable delay defeating the CCI's investigation. Thirdly, the High Court has failed to notice the role played by Section 21A of the Act.

37. He again emphasised that CCI is not inquiring into the adequacy of POIs provided to RJIL by the Respondents, or compliance with the QoS standards of TRAI and licence conditions, but was examining whether the conduct of the Respondents was unilateral or it was the result of anti-competitive agreement. Insofar as requirement of speedy investigation by the CCI is concerned, he submitted that such a requirement has already been acknowledged and mandated by this Court in ***Competition Commission of India*** v. ***Steel Authority of India Limited and Anr.*** MANU/SC/0690/2010 : (2010) 10 SCC 744. Further, if at any stage, prior to or after taking a decision, the CCI is of the view that opinion of TRAI is required, it could always make reference Under Section 21A of the Competition Act.

38. On the second proposition, namely, the High Court could not have entertained writ jurisdiction in respect of an order passed Under Section 26(1) of the Competition Act, Mr. Narasimha clarified that he was not taking the position that the High Court, in no circumstance/situation, exercise its extraordinary jurisdiction under the said provision, in spite of an order passed Under Section 26 of the Competition Act. His submission, however, was that as per the judgment in ***Steel Authority of India Limited*** case, such jurisdiction would be very narrow and is to be exercised in exceptional cases. According to him, no such exceptional circumstance arises in the instant case as order in question was only a prima facie view of the CCI and such an order was administrative in nature. Learned ASG specifically referred to the following discussion in the case of ***Steel Authority of India Limited:***

38. In contradistinction, the direction Under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without

entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case Under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

xx xx xx

97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different Sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required Under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

39. He also drew the attention of the Court to paragraph 25 of the CCI's order dated April 21, 2017 as per which the Director General was asked to conduct the investigation without being swayed in any manner whatsoever by the observations made by the CCI in the said order. He submitted that in these circumstances the said order was merely administrative in nature and could not be labelled as quasi-judicial order. In the same vein his further submission was that the observations of the High Court that the CCI has decided several issues and elements with clear adverse consequences was clearly erroneous and contrary to the well-established principle of law. In support, he also referred to the judgments of the Bombay and the Allahabad High Courts.

40. Dilating on his third proposition, namely, the CCI order was not perverse, he submitted that there was sufficient material before the CCI for formation of a prima facie opinion that the conduct of the Respondents was violative of Section 3(3)(b) of the Competition Act. He submitted that such material was taken into consideration and discussed in the order itself and he referred to certain paragraphs of the order dated April 21, 2017 in this behalf. In the process, he again emphasised that none of the observations made in the said order are conclusive findings in any

way and not binding on the Director General and this was only the starting point, as held in the case of ***Excel Crop Care Limited.***

41. M/s. Harish Salve, Dr. A.M. Singhvi, Ramji Srinivasan and Amit Sibal, learned senior advocates, argued on behalf of RJIL. Their detailed submissions were almost on the lines on which Mr. Narasimha, learned ASG, had argued on behalf of the CCI.

42. In the first place, it was emphasised that insofar as dragging of COAI into this investigation is concerned, it was sought to be justified by placing reliance on Section 3 of the Act which specifically recognises possible mischief by an association of persons or an association of enterprises. It was stressed that Section 3(3) recognises certain agreements as per se violations, and shall be presumed to have appreciable adverse effect on competition. Submission was that associations of enterprises, after the operation of the Act are now liable to be viewed with great suspicion in view of the fact that by its very nature an association of competing enterprises provides a convenient platform for such competitors to assemble together.

43. The involvement of COAI was sought to be proved by arguing that the IDOs have not argued that COAI letters must be ignored since the decision to provide or not to provide POIs to its competitor was taken by each of them independently either Airtel by itself, or Vodafone by itself, or Idea by itself. But the facts of the case disclose active involvement by that common platform called COAI. As per the Reliance Jio, the COAI admittedly facilitated exchange of information between the three IDOs. It draws references in its response to private letters exchanged between Reliance Jio and each of the IDOs separately. The decisions of the COAI are not decisions of a majority comprising of a large and diverse pool of members that could suggest a democratic decision making. By its very constitution, the COAI's majority views were nothing but the common views of the three IDOs that controlled it. It was also argued that in the preliminary conference and in the High Court defence raised was that COAI was not a front for these three IDOs but was merely espousing general industry issues. It does not explain how it chanced upon private documents and correspondence exchanged bilaterally between RJIL with each of the IDOs separately. It does not explain how it voiced the common decisions on behalf of those three IDOs. The COAI was not the fourth voice but was the prohibited chorus of those three colluding competitors. Thus, no legitimacy can be attributed to actions of the COAI. Attention of the Court was drawn to the letter dated August 08, 2016 (before the announcement of launch of services by Reliance Jio dated September 01, 2016) and the letter dated September 02, 2016 (after the launch of Reliance Jio) which, according to Reliance Jio, expose the common collusive conduct of these competitors to first delay the launch and secondly to scuttle the launch. It was also contended that the concerted, collusive conspiracy by the three existing IDOs (having a collective market share of 65%) to meet with each other under auspices of their association called Cellular Operators Association of India (COAI) and evolve a common strategy to respond to challenge posed by a new entrant RJIL, is by itself violative of Section 3 of the Act. The learned senior Counsel pointed out that the defence of the COAI is that it was merely lobbying the Government for enacting a change in law or Regulation to stop Reliance Jio from carrying out test on such a large scale by introducing limits on number of Test-subscribers. However, the letters of COAI revealed an active participation of taking sides of certain operators whose interest was to hinder, or at least slowdown the entry of the new operator. COAI announced unilateral decisions like virtual boycott (which is not the same as lobbying for change of Regulation). To support this argument, reference was made

to the decisions of Supreme Court of United States in ***FTC*** v. ***Supreme Court Trial Lawyers Association*** MANU/USSC/0039/1990 : 493 US 411 (1990) wherein it has observed that:

no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws," even if the Defendants' sole purpose is to impose a restraint upon the trade of their competitors. But in the Noerr case the alleged restraint of trade was the intended consequence of public action; in this case the boycott was the mans by which Respondents sought to obtain favourable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In Noerr, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

44. On the submission that the dangers of a trade association being hijacked to further the cause of only a few competitors and yet attempt to give the entire exercise a veneer of respectability has been also commented upon in the recent decision of this Court in ***Competition Commission of India*** v. ***Coordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors.*** MANU/SC/0262/2017 : (2017) 5 SCC 17 wherein it has been observed that:

47. In the instant case, admittedly the Coordination Committee, which may be a "person" as per the definition contained in Section 2(*l*) of the Act, is not undertaking any economic activity by itself. Therefore, if we were to look into the "agreement" of such a "person" i.e. Coordination Committee, it may not fall Under Section 3(1) of the Act as it is not in respect of any production, supply, distribution, storage, acquisition or control of goods or provision of services. The Coordination Committee, which as a trade union acting by itself, and without conjunction with any other, would not be treated as an "enterprise" or the kind of "association of persons" described in Section 3. A trade union acts as on behalf of its members in collective bargaining and is not engaged in economic activity. In such circumstances, had the Coordination Committee acted only as trade unionists, things would have been different. Then, perhaps, the view taken by the Tribunal could be sustained. However, what is lost in translation by the Tribunal i.e. in applying the aforesaid principle of the activity of the trade union, is a very pertinent and significant fact, which was taken note of by the DG as well as CCI in its majority opinion. It is this: the Coordination Committee (or for that matter even Eimpa) are, in fact, association of enterprises (constituent members) and these members are engaged in production, distribution and exhibition of films. Eimpa is an association of film producers, distributors and exhibitors, operating mainly in the State of West Bengal. Likewise, the Coordination Committee is the joint platform of Federation of Senior Technician and Workers of Eastern India and West Bengal Motion Pictures Artistes' Forum. Both Eimpa as well as the Coordination Committee acted in a concerted and coordinated manner. They joined together in giving call of boycott of the competing members i.e. the informant in the instant case and, therefore, the matter cannot be viewed narrowly by treating Coordination Committee as a trade union, ignoring the fact that it is backing the cause of those which are "enterprises". The constituent members of these bodies take decision relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business of production, distribution or exhibition of the films. Decision of these two bodies reflected collective intent of the members. When some of the members are found to be in the production, distribution or exhibition line, the matter could not have been brushed aside by merely

giving it a cloak of trade unionism. For this reason, the argument predicated on the right of trade union Under Article 19 of the Constitution, as professed by the Coordination Committee, is also not available.

Arguments: The Respondents:

45. Mr. Darius J. Khambata, senior advocate, appeared on behalf of Idea Cellular Ltd. Mr. Gopal Jain and Mr. Navroz Seervai, senior advocates, appeared on behalf of Bharti Airtel Ltd. Mr. Ranjit Kumar, Mr. Arvind Datar and Mr. Sidharth Luthra, senior advocates, appeared on behalf of Vodafone India Ltd. Mr. P. Chidambaram, senior advocate, appeared on behalf of the COAI. TRAI had also intervened in the matter and supported the legal submission of the IDOs, namely, that TRAI had the exclusive jurisdiction to deal with the matter, i.e. there was a complete absence of jurisdiction in CCI to deal with the issue at hand. Instead of taking note of the submissions of these counsel separately, we are taking note of the submissions in a consolidated manner as that would avoid repetition.

46. The submissions of the Respondents can be paraphrased as under:

(i) The TRAI Act, being a special law, ousts the jurisdiction of CCI to examine the telecom sector. In that sense, exclusive jurisdiction vests in TRAI to regulate the telecom sector, including competition related issues, thereby ousting the jurisdiction of the CCI altogether.

(ii) Even if the CCI has the jurisdiction, TRAI's jurisdiction will prevail.

(iii) In the alternative, the jurisdictional facts, in any case, had to be determined by the TRAI in the first place. Since there was absence of jurisdictional facts, the CCI could not have proceeded with the matter and ordered the investigation. Thus, the CCI's order for carry out investigation is premature.

(iv) The impugned order passed by the CCI Under Section 26(1) of the Competition Act applies the 'prima facie test' and consequences of such an order are grave. Such an order was quasi-judicial in nature and, therefore, amenable to judicial review Under Article 226 of the Constitution of India. Thus, the writ petitions filed by the IDOs challenging this order were maintainable.

(v) On merits, the prima facie order passed by the CCI was without considering the material submitted by the IDOs. In this behalf it was argued that the IDOs had provided sufficient POIs and given ample proof thereof, which was not taken into consideration by the CCI while passing the impugned order Under Section 26(1) of the Competition Act. This also becomes a valid ground to challenge the order by filing writ petition Under Article 226 of the Constitution of India.

47. Insofar as the argument of the Respondents that the TRAI Act is a complete code and the jurisdiction of CCI is totally ousted, the argument proceeded on the following basis:

The real issue which arises is comparison of two regimes - one regulated by TRAI under the Indian Telegraph Act, 1885, Wireless Telegraphy Act, 1933 and the TRAI Act, 1997 which together forms a comprehensive and complete code; and the other being CCI under the Competition Act.

The various provisions under these legislations seen with the terms of the License Agreement show that the issues arising out of interconnection between different operators shall be determined within the overall framework of the interconnection Regulations/directions/orders issued by TRAI from time to time. The Object and Reasons of the TRAI Act itself lays down that it is mandated to make arrangements for protection and promotion of consumer interest and ensuring fair competition and to ensure orderly and healthy growth of telecommunication infrastructure. Moreover, the competition in the telecom sector is of a different kind as it has to function under the constant monitoring and Regulation of TRAI. TRAI effectively plays the role of a watchdog of the sector as otherwise the entire sector would collapse if there is no interdependence between the telecom operators. Moreover, Under Section 11(1)(a)(iv) of the TRAI Act, the authority is required to take measures to facilitate competition in the market. CCI can ensure competition only in an unregulated sector and not in the likes of the telecom sector wherein even the tariffs are capped/determined by TRAI.

48. On the aforesaid basis, the submission was that:

(a) The TRAI Act is a complete code.

(b) Exclusive jurisdiction vests in TRAI to regulate the telecom sector including competition related issues.

(c) The TDSAT has the exclusive jurisdiction to examine the disputes between licensees including the one raised by RJIL before CCI.

(d) CCI has no jurisdiction to decide disputes pertaining to the telecom sector.

In this hue it was submitted that the Statement of Objects and Reasons of the TRAI Act made it abundantly clear by satisfying that TRAI was supposed to make "arrangements for protection and promotion of consumer interest and ensuring fair competition...". It was, thus, clear that even the competition aspects of the telecom sector were within the domain of TRAI. The Respondents also drew comparison of the Preamble of the Competition Act with that of the TRAI Act to point out that insofar as dealing with the issue of fair competition in telecom sector is concerned, it was overlapping to a great extent in the following manner:

Competition Act	TRAI Act
An Act to provide, keeping in view the economic development of the country, for the establishment of a Commission to	An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Dispute Settlement and Appellate Tribunal ("TDSAT") to
"prevent practices having adverse effect on competition	[-]
to promote and sustain competition in markets	[for protection and promotion of consumer interest and ensuring fair competition (Statement of Object and Reasons)]
to protect interests of consumers and	to protect the interest of the service providers and consumers of the telecom sector (Preamble)
to ensure freedom of trade carried on by other participants in the markets, in India	to promote and ensure orderly growth of the telecom sectoral
for matters connected therewith or incidental thereto"	For matters connected therewith and incidental thereto

49. It was submitted that pursuant to Section 11(1)(a)(iv) read with Section 11(1)(b)(ii), (iii), (iv) of the TRAI Act (including directions and Regulations issued by TRAI), the TRAI has been statutorily mandated to perform functions on a variety of matters including measures aimed at facilitating competition and regulated interconnection between service providers. Reliance was also placed on Section 12 of the TRAI Act which empowers TRAI with vast powers to discharge its functions, including to call for information, conduct investigations and issue such necessary directions as it may deem necessary for the discharge of its functions. Moreover, TRAI has also been empowered to issue appropriate directions Under Section 12 and make Regulations Under Section 36 of the TRAI Act. Section 29 of the TRAI Act provides for penalties for contravention of directions of the TRAI. Further, Under Section 14A of the TRAI Act, it has been provided that any person may make an application before the TDSAT. With regard to the jurisdiction, Section 15 and 27 of the TRAI Act provide for explicit bar on jurisdiction of the civil courts to determine any matter with regard to which TDSAT or TRAI have been empowered by or under the TRAI Act.

50. It was submitted that in the present case, at the time RJIL filed its Information before the CCI on November 08, 2016 as also when the *prima facie* order was passed on April 21, 2017, TRAI was seized of the matter pertaining to provisioning of POIs and even made certain recommendations to the DoT on October 21, 2016. Accordingly, TRAI had assumed jurisdiction and was exercising the same. Thus, the dispute was being dealt with and was addressed by the TRAI and even on this ground, the jurisdiction of the CCI stands ousted.

51. The TDSAT has the exclusive jurisdiction to examine the disputes between licensees including the one raised by RJIL before CCI. This very submission on the exclusion of CCI's jurisdiction

was sought to be projected from another angle. It was submitted that in the Information filed by RJIL before the CCI, Reliance Jio stressed:

(a) The dispute raised by RJIL before the CCI pertains to the specific performance of the Interconnect Agreement and the rights and liabilities arising therefrom;

(b) The Interconnect Agreement is completely regulated by the TRAI *inter alia* Under Section 11(1)(b)(ii), (iii), (iv) of the TRAI Act read with the Quality of Service Regulations, 2009 issued thereunder.

The argument was that the prayers sought by RJIL in the Information filed before the CCI clearly demonstrate that RJIL was seeking specific performance of the Interconnect Agreement. Hence, RJIL has dressed up what is essentially a contractual complaint into anti-competition clothing. In the present dispute, upon a meaningful reading of the Information it can clearly be seen that through clever drafting, RJIL has dressed up the allegations of delay/denial of the POIs as alleged anti-competitive behaviour. In this behalf, reliance was placed on the decision of this Court in ***Begum Sabiha Sultan*** v. ***Nawab Mohd. Mansur Ali Khan and Ors.*** MANU/SC/1970/2007 : (2007) 4 SCC 343, wherein it was held:

10. There is no doubt that at the stage of consideration of the return of the plaint Under Order 7 Rule 10 of the Code, what is to be looked into is the plaint and the averments therein. At the same time, it is also necessary to read the plaint in a meaningful manner to find out the real intention behind the suit. In Moolji Jaitha and Co. v. Khandesh Spg. and Wvg. Mills Co. Ltd. [MANU/FE/0007/1950 : AIR 1950 FC 83] the Federal Court observed that: (AIR p. 92, para 24)

The nature of the suit and its purpose have to be determined by reading the plaint as a whole.

It was further observed: (AIR p. 92, para 25)

The inclusion or absence of a prayer is not decisive of the true nature of the suit, nor is the order in which the prayers are arrayed in the plaint. The substance or object of the suit has to be gathered from the averments made in the plaint and on which the reliefs asked in the prayers are based.

It was further observed: (AIR p. 98, para 59)

It must be borne in mind that the function of a pleading is only to state material facts and it is for the court to determine the legal result of those facts and to mould the relief in accordance with that result.

52. In support of the submission that a special legislation i.e. the TRAI Act, will prevail over the provisions of the Competition Act, which according to the Respondents is general in nature, reliance has been placed on the decisions of this Court in ***State of Punjab v. Labour Court, Jullundur and Ors.*** MANU/SC/0375/1979 : (1980) 1 SCC 4. In the said matter, the Court was *inter alia* seized of the issue whether the employee-Respondents were at liberty to seek the payment of gratuity by invoking the remedy available Under Section 33-C(2) of the Industrial

Disputes Act, 1947 as opposed to the Payment of Gratuity Act, 1972. In deciding the said dispute, it was held that:

7. It is apparent that the Payment of Gratuity Act enacts a complete code containing detailed provisions covering all the essential features of a scheme for payment of gratuity. It creates the right of payment of gratuity, indicates when the right will accrue, and lays down the principles for quantification of the gratuity. It provides further for recovery of the amount, and contains an especial provision that compound interest at nine per cent per annum will be payable on delayed payment. For the enforcement of its provisions, the Act provides for the appointment of a controlling authority, who is entrusted with the task of administering the Act. The fulfilment of the rights and obligations of the parties are made his responsibility, and he has been invested with an amplitude of power for the full discharge of that responsibility. Any error committed by him can be corrected in appeal by the appropriate Government or an Appellate Authority particularly constituted under the Act.

8. Upon all these considerations, the conclusion is inescapable that Parliament intended that proceedings for payment of gratuity due under the Payment of Gratuity Act must be taken under that Act and not under any other. That being so, it must be held that the applications filed by the employee Respondents Under Section 33-C(2) of the Industrial Disputes Act did not lie, and the Labour Court had no jurisdiction to entertain and dispose of them. On that ground, this appeal must succeed.

53. Applying the aforesaid tests to the present case, the submission of the Respondents is that:

(a) The subject area of competition law is dealt with by the Competition Act, 2002.

(b) The TRAI Act, 1997 is a complete code in itself and regulates the Telecom Sector.

(c) The Preamble, the Statement of Objects and Reasons and Section 11(1) of the TRAI Act provide the TRAI with the power to inter alia regulate competition in the telecom sector.

(d) Accordingly, being the special law regarding the telecom sector, as regards competition issues arising in the telecom sector, the TRAI Act would prevail over the Competition Act.

54. Replying to the argument of the Appellants that the TRAI Act as well as the Competition Act are both special statutes and hence, the Rule of statutory interpretation of special law prevailing over the general law will be inapplicable in the present dispute, the Respondents referred to the decision of this Court in ***Ashoka Marketing Ltd. and Anr.*** v. ***Punjab National Bank and Ors.*** MANU/SC/0198/1991 : (1990) 4 SCC 406. In the said case, the Court was seized of an issue on whether the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 would override the provisions of the Delhi Rent Control Act, 1958 in relation to the premises belonging to Punjab National Bank Ltd., a body corporate under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. Each side argued that the enactment relied upon by it is a special statute and the other enactment is general. The Court held that the Rent Control Act is a special statute regulating the relationship of landlord and tenant in the Union Territory of Delhi and even the Public Premises Act is a special statute relating to eviction of

unauthorised occupants from public premises. While concluding that both the enactments are special statutes, the Court held:

61....in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein.

64....In our opinion, therefore, keeping in view the object and purpose underlying both the enactments viz. the Rent Control Act and the Public Premises Act, the provisions of the Public Premises Act have to be construed as overriding the provisions contained in the Rent Control Act.

55. Heavy reliance was placed on the judgment of the United States Supreme Court in the case of ***Credit Suisse*** v. ***Billing et al*** MANU/USSC/0045/2007 : 551 US 264 (2007). Here the submission was that if the CCI is permitted to examine the information of RJIL that it was to be provided POIs immediately despite there being a period of 90 days in the ICA, the following would be the consequences:

(i) The same may cause a threat and may alter the functioning of telecom sector on account of threat of intervention of CCI even where the acts are in accordance with TRAI's Regulations. The same would threaten efficient functioning of the telecom sector.

(ii) The additional benefits to competition would be very small as the TRAI Regulations anyway have been framed keeping in mind "facilitation of competition" in telecom sector.

(iii) The same would encourage future actions before CCI when telecom related issues will be dressed up as competition issues.

It was the fervent plea that in order to avoid such conflict of standards and norms, the TRAI Act being the sectoral law and the TRAI is already seized of the matter, the CCI should not be allowed to proceed.

56. According to the Respondents, the jurisdictional facts in the present matter would be:

(a) Failure to provide adequate POIs in the test phase; or

(b) Delay in providing POIs; or

(c) Providing inadequate POIs.

57. Mr. Datar, in particular, submitted that from a perusal of the extensive pleadings and findings of the High Court, it is manifest that the above issues are pending consideration before the TRAI/DoT as well as in connected writ petitions pending adjudication before the Delhi High Court. The emphasis was that there must first be clear findings on the above issues in the context of the TRAI Act, Rules and Regulations. According to him, that alone is not enough. It is necessary to establish that violation of the provisions of TRAI Act amounts to "abuse of dominance" or "anti-

competitive agreements". As per him, Section 21 and 21A of the Competition Act make it clear that jurisdiction of the CCI is divided into parts, viz.:

(a) Economic activity not regulated by any statutory authority.

(b) Economic activity regulated by a statutory authority.

In the latter case, Section 21A is mandatory and the CCI can act only in accordance with Sections 21A(1) and (2). Submission was that in economic activity that is regulated by a statutory authority, CCI can exercise powers Under Section 26 only after complying with Section 21A. It was predicated on the principle that when the law prescribes things to be done in a particular manner, all other modes of action are prohibited. (***Bhavnagar University*** v. ***Palitana Sugar Mill (P) Ltd. and Ors.*** MANU/SC/1092/2002 : (2003) 2 SCC 111)

58. In this hue, it was also argued that the decision of this Court in ***Competition Commission of India*** v. ***Steel Authority of India Ltd. and Anr.*** MANU/SC/0690/2010 : (2010) 10 SCC 744 has no application to the present case because it does not deal with a sector that is regulated by a statutory authority. On the other hand, reliance was placed on the judgment in the case of ***Carona Ltd.*** v. ***Parvathy Swaminathan & Sons*** MANU/SC/3938/2007 : (2007) 8 SCC 559.

59. It was submitted that the facts of the SAIL case are clearly distinguishable from the present case as the main issue before the Supreme Court in SAIL was whether an appeal can be filed against an order passed Under Section 26(1) of the Competition Act. Distinction was sought to be drawn on the basis of the following facts:

(a) in the present case, CCI issued notice and called the TSPs including Vodafone for a preliminary conference to be held on January 31, 2017 and the parties were heard on January 31, 2017, February 07, 2017 and February 08, 2017;

(b) hearing was held before CCI and detailed notes on arguments were submitted with supporting documents by the TSPs including Vodafone;

(c) the *prima facie* order has been passed after hearing the submissions of the TSPs holding that a prima facie case of violation of the Competition Act has been made out; and

(d) the prima facie order also provide for reasons in support of the decision arrived at by the CCI.

60. Justifying the observations of the High Court that the order of the CCI cannot be treated as an 'administrative order', it was submitted that the order was passed by the CCI after collecting the detailed information from the parties and by holding the conferences, calling material details, documents, affidavits and by recording the opinion. It was also submitted that the High Court had rightly noted that majority decision of the CCI has given reasons by overlooking the law and the record. It was a reasoned order/direction and, therefore, judicial review is permissible. In this behalf it was submitted that the aforesaid view was taken on the basis of the following:

(a) whilst an order Under Section 26(2) has been made appealable, an order Under Section 26(1) is not appealable;

(b) an order Under Section 26(1) of the Competition Act is a direction simpliciter to the Director General to cause an investigation;

(c) at the stage of passing of the order Under Section 26(1), there is no adjudicatory process undertaken by the CCI as there is no determination of any right or obligation of the parties to the lis; and

(d) the order passed Under Section 26(1) does not entail civil consequences for any person as against a Section 26(2) order wherein rights of the informant are affected.

61. In the alternative, it was argued that the observations of the Court limited to the extent of the nature of powers vested in the CCI Under Section 26(1) needs reconsideration by this Court.

Our discussion:

62. We have noted of three propositions which were advanced by Mr. Narasimha, learned Additional Solicitor General. These are the main issues which arise for consideration. In fact, other counsel for the parties have also made their submissions on these aspects. We would, therefore, focus our discussion on the said propositions. We would like to mention that while analysing the arguments of all the parties, we have kept in mind their detailed submissions as well as the principles laid down in various judgments cited by them, even if we have not made specific mention to these judgments in our discussion.

A. *Jurisdiction of the CCI*

63. This is the principal issue which is the bone of contention.

64. In order to discuss and analyse this aspect, it would be apt to take note of the salient provisions of the Competition Act as well as the TRAI Act inasmuch as that would facilitate appreciating the arguments so advanced.

65. In the wake of globalisation and keeping in view the economic development of the country, responding to opening of its economy and resorting to liberalisation, need was felt to enact a law that ensures fair competition in India by prohibiting trade practices which cause an appreciable adverse effect on competition within markets in India and for establishment of an expert body in the form of Competition Commission of India, which would discharge the duty of curbing negative aspects of competition, the Competition Act, 2002 has been enacted by the Parliament.

66. Having regard to this specific objective which the Act seeks to achieve, provisions contained therein, which are relevant for deciding the instant appeals, are reproduced below:

2. Definitions. -

xx xx xx

(b) "agreement" includes any arrangement or understanding or action in concert, -

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

xx xx xx

(c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

xx xx xx

(g) "Director General" means the Director-General appointed Under Sub-section (1) of Section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section;

xx xx xx

(m) "practice" includes any practice relating to the carrying on of any trade by a person or an enterprise;

xx xx xx

(u) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;

xx xx xx

3. Anti-competitive agreements. - (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to case an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in Sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which -

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this Sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services.

Explanation. - For the purpose of this Sub-section, "bid rigging" means by agreement, between enterprises or persons referred to in Sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

xx xx xx

19. Inquiry into certain agreements and dominant position of enterprise. - (1) The Commission may inquire into any alleged contravention of the provisions contained in Sub-section (1) of Section 3 or Sub-section (1) of Section 4 either on its own motion or on -

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by Regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in Sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in subsections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition Under Section 3, have due regard to all or any of the following factors, namely:

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

xx xx xx

21A. Reference by Commission. - (1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision, which the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

Provided that the Commission, may, suo motu, make such a reference to the statutory authority.

(2) On receipt of a reference Under Sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

xx xx xx

26. Procedure for inquiry Under Section 19. - (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received Under Section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received Under Section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director-General shall, on receipt of direction Under Sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in Sub-section (3) to the parties concerned: Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in Sub-section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director General referred to in Sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director-General.

(6) If, after consideration of the objections and suggestions referred to in Sub-section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in Sub-section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director-General referred to in Sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

xx xx xx

36. Power of Commission to regulate its own procedure. -

xx xx xx

(2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses or documents;

(e) requisitioning, subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1972), any public record or document or copy of such record or document from any office.

xx xx xx

41. Director General to investigate contraventions. -

(1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any Rules or Regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission Under Sub-section (2) of Section 36.

(3) Without prejudice to the provisions of Sub-section (2), Sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as the apply to an inspector appointed under that Act.

Explanation. - For the purposes of this section, -

(a) the words "the Central Government" Under Section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as "the Commission";

(b) the word "Magistrate" Under Section 240A of the Companies Act, 1956 (1 of 1956) shall be construed as "the Chief Metropolitan Magistrate, Delhi".

xx xx xx

45. Penalty for offences in relation to furnishing of information. - (1) Without prejudice to the provisions of Section 44, if a person, who furnishes or is required to furnish under this act any particulars, documents or any information, -

(a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or

(b) omits to state any material fact knowing it to be material; or

(c) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission.

(2) Without prejudice to the provisions of Sub-section (1), the Commission may also pass such other order as it deems fit.

xx xx xx

60. Act to have overriding effect. - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

61. Exclusion of jurisdiction of civil courts. - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

62. Application of other laws not barred. - The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

67. The aforesaid provisions would indicate that the Act deals with three kinds of practices which are treated as anti-competitive and are prohibited. These are:

(a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

(b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

(c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

The objective behind the Act and rationale in curbing the aforesaid anti-competitive practices was taken note of in Excel Crop Care Limited v. Competition Commission of India and Anr. MANU/SC/0588/2017 : (2017) 8 SCC 47 and we would like to reproduce the following passages therefrom:

21. In the instant case, we are concerned with the first type of practices, namely, anti-competitive agreements. The Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure "level playing field" for all market players that helps markets to be competitive. It sets "rules of the game" that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. How these benefits accrue is explained in the ASEAN Regional Guidelines on Competition Policy, in the following manner:

2.2. Main Objectives and Benefits of Competition Policy

2.2.1.1. *Economic efficiency:* Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.

2.2.1.2. *Economic growth and development:* Economic growth-the increase in the value of goods and services produced by an economy-is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.

2.2.1.3. *Consumer Welfare:* Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures.

22. The aforesaid Guidelines also spell out few more benefits of such laws incorporating competition policies by highlighting the following advantages:

2.2.2. In addition, competition policy is also beneficial to developing countries. Due to worldwide deRegulation, privatisation and liberalisation of markets, developing countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.

2.2.3. Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.

In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring jobs creation by new efficient competitors.

2.2.4. Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth and regulatory reform eliminates domestic Regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anti-competitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximising the benefits of foreign investment.

23. In fact, there is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that it has an important role to play in improving productivity and, therefore, the growth prospects of an economy. It is achieved in the following manner:

International Competition Network - Economic Growth and Productivity Competition contributes to increased productivity through:

Pressure on firms to control costs-In a competitive environment, firms must constantly strive to lower their production costs so that they can charge competitive prices, and they must also improve their goods and services so that they correspond to consumer demands.

Easy market entry and exit-Entry and exit of firms reallocates resources from less to more efficient firms. Overall productivity increases when an entrant is more efficient than the average incumbent and when an existing firm is less efficient than the average incumbent. Entry-and the threat of entry- incentivises firms to continuously improve in order not to lose market share to or be forced out of the market by new entrants.

Encouraging innovation-Innovation acts as a strong driver of economic growth through the introduction of new or substantially improved products or services and the development of new and improved processes that lower the cost and increase the efficiency of production. Incentives to innovate are affected by the degree and type of competition in a market.

Pressure to improve infrastructure-Competition puts pressure on communities to keep local producers competitive by improving roads, bridges, docks, airports and communications, as well as improving educational opportunities.

Benchmarking-Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals.

24. Productivity is increased through competition by putting pressure on firms to control costs as the producers strive to lower their production costs so that they can charge competitive prices. It

also improves the quality of their goods and services so that they correspond to consumers' demands.

25. Competition law enforcement deals with anticompetitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation. Enforcement provides remedies to avoid situations that will lead to decreased competition in markets. Effective enforcement is important not only to sanction anti-competitive conduct but also to deter future anti-competitive practices.

26. When we recognise that competition has number of benefits, it clearly follows that cartels or anti-competitive agreements cause harm to consumers by fixing prices, limiting outputs or allocating markets. Effective enforcement against such practices has direct visible effects in terms of reduced prices in the market and this is also supported by various empirical studies.

27. Keeping in view the aforesaid objectives that need to be achieved, Indian Parliament enacted the Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalisation and privatisation as it was found that the law prevailing at that time, namely, Monopolies and Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle the competition aspects of the Indian economy. The law enforcement agencies, which include CCI and COMPAT, have to ensure that these objectives are fulfilled by curbing anticompetitive agreements.

28. Once the aforesaid purpose sought to be achieved is kept in mind, and the same is applied to the facts of this case after finding that the anti-competitive conduct of the Appellants continued after coming into force of provisions of Section 3 of the Act as well, the argument predicated on retrospectivity pales into insignificance.

29. One has to keep in mind the aforesaid objective which the legislation in question attempts to subserve and the mischief which it seeks to remedy. As pointed out above, Section 18 of the Act casts an obligation on CCI to "eliminate" anti-competitive practices and promote competition, interests of the consumers and free trade. It was rightly pointed out by Mr. Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in *Competition Commission of India* v. *SAIL* in the following manner: (SCC pp. 755-56 & 794, paras 6, 8-10 & 125)

6. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency,

which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

xx xx xx

8. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body, namely, "the Competition Commission of India" (for short "the Commission") which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed Under Section 16(1) of the Act is a specialised investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

9. The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it Under Section 64, the Commission has framed Regulations called the Competition Commission of India (General) Regulations, 2009 (for short "the Regulations").

10. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

68. It is for the aforesaid reason that the CCI is entrusted with duties, powers and functions to deal with three kinds of anti-competitive practices mentioned above. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by the other participants, in India. For the purpose of conducting such an inquiry, the CCI is empowered to call any person for rendering assistance and/or produce the records/material for arriving at even the *prima facie* opinion. The Regulations also empower the CCI to hold conferences with the concerned persons/parties, including their advocates/authorised persons.

69. It is also relevant to mention at this stage that while inquiring into any alleged contravention and determining whether any agreement has an appreciable adverse effect on competition, factors which are to be taken into consideration are mentioned in Sub-section (3) of Section 19. These

include creation of barriers to new entrants in the market, driving existing competitors out of the market and foreclosure of competition by hindering entry into the market. All these activities have connection with the 'market'. The word 'market' has reference to 'relevant market'. As per Sub-section (5) of Section 19, such relevant market can be relevant geographic market or relevant product market. In the present case, we are concerned with the relevant product market, viz. telecommunication market. Sub-section (7) of Section 19 enumerates the factors which are to be kept in mind while determining the relevant product market.

70. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which the competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure. Therefore, the purpose of defining the 'relevant market' is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anticompetitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned. In essence, it is the notion of 'power over the market' which is the key to analyse many competitive issues.

71. It is an admitted position that in the instant case we are dealing with the telecom market, which is the relevant market. An interesting feature is that this telecom market is also regulated by the statutory regime contained in the TRAI Act. Under the said Act, TRAI is established as a regulator which exercises control/supervision and also provides guidance to the telecom/mobile market. This statutory body is required to function as per the provisions of the TRAI Act as well as the Rules and Regulations framed thereunder. Additionally, the telecom companies are also governed by licence agreements entered into between the Central Government and such service providers, for providing telephone/telecommunication services to the customers/subscribers. At this stage, therefore, we take note of the relevant provisions of the TRAI Act:

11. Functions of Authority. - (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to -

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:

xx xx xx

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

xx xx xx

(b) discharge the following functions, namely:

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective interconnection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the Regulations;

(viii) keep register maintained under Clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the Regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by Regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in Clause (a) of this Sub-section shall not be binding upon the Central Government.

xx xx xx

14. Establishment of Appellate Tribunal. - The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to -

(a) adjudicate any dispute -

(i) between a licensor and a licensee;

(ii) between two or more service providers;

(iii) between a service provider and a group of consumers:

Provided that nothing in this Clause shall apply in respect of matters relating to -

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established Under Sub-section (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established Under Section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) dispute between telegraph authority and any other person referred to in Sub-section (1) of Section 7B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

xx xx xx

16. Procedure and powers of Appellate Tribunal. - (1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

(2) The Appellate Tribunal shall have, for the purposes of discharging the functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of Section 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document, from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing an application for default or deciding it, ex parte;

(h) setting aside any order of dismissal of any application for default or any order passed by it, ex parte; and

(i) any other matter which may be prescribed.

(3) Every proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

72. Other provisions in the telecom sector which are relevant for the purposes of these appeals are taken note of by the High Court as under:

Telecommunication laws binds all

19. The relevant licenses

Unified License (UL) - The UL issued by Department of Telecommunications, Government of India ("DoT") for providing telecommunication services on a pan India basis. Licence Under Section 4 of Indian Telegraph Act, 1885 therefore they become Telecom Service Provider ("TSP"). Relevant clauses of the UL (UASL) are -

(a) Clause 16 of Part-I: Other conditions: The licensee is bound by all TRAI Orders/Directions/Regulations;

(b) Clause 27 of Part-I: Network Interconnection, particularly, Clause 27.4, which requires a licensee to interconnect subject to compliance with prevailing Regulations and determinations issued by TRAI, and contemplates the execution of ICAs to establish interconnection in sufficient capacity and number to enable transmission and reception of messages between the interconnected systems;

(c) Clause 29 of Part-I, requiring a licensee to ensure QoS standards as may be prescribed by DoT/TRAI. Specifically, Clause 29.4, empowers DoT/TRAI to evaluate QoS parameters prior to grant of permission for commencement of services; and

(d) Clause 6.2 of Part-II, which requires a licensee to provide interconnection to all TSPs to ensure that calls are completed to all destinations.

Inter-connection Agreements

20. Similar separate Interconnection Agreements (ICAs) are executed between the parties. The relevant clauses of ICAs are as under:

Clause 2.4: "...RJIL will be required to establish Interconnection at the Switches of IDEA as listed in Schedule I. In addition to these specified locations, the Parties may further agree to interconnect at an additional location(s) as mutually agreed to by and between the parties during the term of this Agreement..."

Clause 5.7: "...At the end of two years, the Parties shall convert the total E1s existing at the POIs into one-way E1s for the Outgoing Traffic of each Party on the basis of the traffic ratio existing 3 months prior to the expiry of the initial period of two years. These E1s shall thereafter be continued as one-way E1s for the remaining term of the Agreement at the cost of RJIL..."

Clause 9.1: "... A minimum notice of 4 weeks has to be given by either Party for augmentations of Interconnect Links..."

Clause 9.2: "...Augmentation shall be completed within 90 days of receipt of requisite charges specified in Schedule 2 from RJIL..."

Clause 9.3: "...Any request for augmentation of capacity shall be in writing with Performance reports as prescribed in Schedule 4..."

Clause 9.4: "...Traffic measurements for 7 days shall be taken by both the parties during agreed busy route hours, every 6 months after commencement of traffic at the POIs to determine further capacity requirements..."

Clause 9.5: "...RJIL shall provide a forecast in writing in advance for its requirement of port capacity for Telephony Traffic for the next 6 months to enable IDEA to dimension the required capacity in its network....

21. The relevant clauses of the ICAs are:

(a) Clause 2 makes clear that the ICA will be applicable and in effect from the date of execution;

(b) Clause 2.10 makes clear that the interconnection facilities at each POI will conform to the applicable QoS standards prescribed by TRAI;

(c) Clause 3 - Terms and Amendments - again makes clear that the ICA becomes applicable, effective and operational from the date of execution and is valid until both parties hold a valid license for providing access services;

(d) Clause 4 - Applicability and Providing Services - reiterates that the ICA becomes applicable on signing and is subject to the terms and conditions of the telecom licence;

(e) Clause 5.2 specifically provides that for the initial two years, provision and augmentation of transmission links shall be at the cost of RJIL;

(f) Clause 5.7 contemplates conversion of two-way E1s into one-way E1s only after two years, which in other words mean that for two years all E1s must be two-way E1s;

(g) Clause 9 provides modalities for enhancement of ports; and

(h) Clause 10.7 again reiterates that Idea is bound to maintain QoS standards prescribed by TRAI.

22. Quality of Service Regulations, 2009

Quality of Service Regulations ("QoS Regulations, 2009") issued by TRAI Under Section 36 read with Section 11 of the TRAI Act. Clause 5(iv) and Clause 14, as relevant, are reproduced as under:

(a) Clause 5(iv) prescribes that the congestion at each individual POI cannot exceed 0.5% over a period of one month (no more than 5 out of every 100 calls can fail).

(b) Clause 14 provides that in the event of any doubt regarding interpretation of any of the provisions of the QoS Regulations, the view of the TRAI shall be final and binding.

23. The relevant clauses of the Standards of Quality of Service of Basic Telephone Service (wireline) and Cellular Mobile Telephone Service Regulations, 2009 includes Cellular Mobile Telephone Services. The terms "Point of Interconnection (POI)", "Quality of Service (QoS)", "Service Provider, Telecommunication services" have been defined in the Regulations. The term POI congestion is also described in 3.12 and 4.7 of POI.

73. Some of the features which govern the telecommunication industry and noted by the High Court may also be captured at this stage. These are:

(a) To protect the interest of the service providers and consumers of the telecom sector and to permit and ensure technical compatibility and effective inter-relationship between different service providers and for ensuring compliance of licence conditions by all the service providers, TRAI was constituted under the Telecom Regulatory Authority of India Act, 1997. TRAI is a recommendatory/advisory and regulatory body discharging the functions envisaged Under Sub-section (1) of Section 11 of the said Act. TRAI, inter alia, is charged with ensuring fair competition amongst service providers, including fixing the terms and conditions of entire activity between the service providers and laying down the standards of Quality of Service (QoS) to be provided by each service provider. In exercise of its functions, TRAI has issued detailed Regulations for telecom services, including fixation and revision of tariffs (Tariff Order), fixation of Inter-connect Usage Charges (IUC), prescription of quality of service standards, etc.

(b) The Telecom Service Providers, which include the Respondents as well as RJIL, provide telecommunication access service and are PAN India Telecom Service Providers. They are governed by the Cellular Mobile Telephone Service (CMTS)/Unified Access Service Licence (UASL) issued by the Telecommunications Department, Government of India Under Section 4 of the Telegraph Act.

(c) The Central Government has the exclusive privilege of establishing, maintaining and working telegraphs under the Telegraph Act and the Central Government is authorised to grant licence on such terms and conditions and in consideration of such payment as it thinks fit to any person to establish, maintain or work as telegraph within any part of the country. By virtue of Section 4 of the Telegraph Act, a service provider is duty bound to enter into a licence agreement with the former for unified licence, with authorisation for provision of services, as per the terms and conditions prescribed in the Schedule. As a condition of the said licence, the licensee agrees and unequivocally undertakes to fully comply with the terms and conditions stipulated in the licence agreement without any deviation or reservation of any kind. The licence is governed by the provisions of the Telegraph Act, the Indian Wireless Telegraphy Act, 1933, the TRAI Act and the Information Technology Act, 2000, as modified or regulated from time to time.

74. In order to ensure that there is smooth interconnectivity and a consumer who is the subscriber of mobile phone of one service provider, say for e.g. Vodafone, and wants to make call to a mobile phone of his friend which is provided by another service provider, say Idea Cellular, the unified licenses put an obligation on all these licensees to interconnect with each other on the POI. This is so mentioned in Clause 27.4 of Part I of the Schedule to the unified licence. Such interconnectivity of POI is subject to compliance of Regulation/directions issued by TRAI. The interconnection agreement, inter alia, provides for the following clauses:

(a) to meet all reasonable demand for the transmission and reception of messages between the interconnect systems;

(b) to establish and maintain such one or more POIs as are reasonably required and are of sufficient capacity and in sufficient numbers to enable transmission and reception of the messages by means of applicable systems; and

(c) to connect and keep connected to the applicable systems.

Some of the other clauses of the interconnection agreement are as follows:

• A minimum four weeks' written notice has to be given by either party for augmentation of interconnect links.

• Augmentation shall be completed within 90 days of receipt of requisite charges specified in the Schedule.

• Either party shall provide a forecast in writing, in advance for its requirements of port capacity for "Telephony Traffic" for the next six months to enable the other party to dimension the required capacity in its network.

• The interconnection tests for reach and every interface will be carried out by mutual arrangement between signatories of the agreement.

By virtue of the licence, the licensee is obligated to ensure quality of service as prescribed by the licensor or TRAI and failure on their part to adhere to the quality of service stipulated by TRAI would make the licensor liable to be treated for breach of the terms and conditions of the licence.

In order to render effective services, it is mandatory for the licensee to interconnect/provide POIs to all eligible telecom service providers to ensure that calls are completed to all destinations and interconnection agreement is entered into between the different service providers which mandates each of the party to the agreement to provide to the other interconnection traffic carriage and all the technical and operational quality service and time lines, i.e. the equivalent to that which the party provides to itself. The interconnection agreement separately entered into different service providers is based on the format prescribed in the Telecommunication Interconnection (Reference Interconnect Offer) Regulations, 2002.

75. POI is defined in the agreement, in the following words:

POI are those points between two network operators which allow voice call originating from the work of one operator to terminate on the network by other operator.

76. We may also note that on June 07, 2005 a direction was issued Under Section 13 read with Sub-clause (i) to (v) of Sub-clause (b) of Section 11 of the TRAI Act, which provides as follows:

In exercise of the powers vested in it Under Section 13 read with Section 11(1)(b)(i), (ii), (iii), (iv) and (v) of the Telecom Regulatory Authority of India Act, 1997 and in order to ensure compliance of terms and conditions of license and effective interconnection between service providers and to protect consumer interest, the Authority hereby directs all service providers to provide interconnection on the request of the interconnection seeker within 90 days of the applicable payments made by the interconnection seeker. Further there is a direction issued by the Government of India, Ministry of Telecommunication dated 28th August, 2005 by which directions have been issued to provide data of subscribers in the prescribed format.

77. From the aforesaid analysis of the scheme contained in the TRAI Act, it becomes clear that the functioning of the telecom companies which are granted licence Under Section 4 of the Telegraph Act is regulated by the provisions contained in the TRAI Act. TRAI is a regulator which regulates the telecom industry, which is a statutory body created under the TRAI Act. The necessity of such regulators has been emphasised by a Constitution Bench of this Court in ***Modern Dental College and Research Centre and Ors.*** v. ***State of Madhya Pradesh and Ors.*** MANU/SC/0495/2016 : (2016) 7 SCC 353 in the following words:

Need for regulatory mechanism

87. Regulatory mechanism, or what is called regulatory economics, is the order of the day. In the last 60-70 years, economic policy of this country has travelled from laissez faire to mixed economy to the present era of liberal economy with regulatory regime. With the advent of mixed economy, there was mushrooming of the public sector and some of the key industries like aviation, insurance, railways, electricity/power, telecommunication, etc. were monopolised by the State. Licence/permit raj prevailed during this period with strict control of the Government even in

respect of those industries where private sectors were allowed to operate. However, Indian economy experienced major policy changes in early 90s on LPG Model i.e. liberalisation, privatisation and globalisation. With the onset of reforms to liberalise the Indian economy, in July 1991, a new chapter has dawned for India. This period of economic transition has had a tremendous impact on the overall economic development of almost all major sectors of the economy.

88. When we have a liberal economy which is regulated by the market forces (that is why it is also termed as market economy), prices of goods and services in such an economy are determined in a free price system set up by supply and demand. This is often contrasted with a planned economy in which a Central Government determines the price of goods and services using a fixed price system. Market economies are also contrasted with mixed economy where the price system is not entirely free, but under some government control or heavily regulated, which is sometimes combined with State led economic planning that is not extensive enough to constitute a planned economy.

89. With the advent of globalisation and liberalisation, though the market economy is restored, at the same time, it is also felt that market economies should not exist in pure form. Some Regulation of the various industries is required rather than allowing self-Regulation by market forces. This intervention through regulatory bodies, particularly in pricing, is considered necessary for the welfare of the society and the economists point out that such regulatory economy does not rob the character of a market economy which still remains a market economy. Justification for regulatory bodies even in such industries managed by private sector lies in the welfare of people. Regulatory measures are felt necessary to promote basic well being for individuals in need. It is because of this reason that we find regulatory bodies in all vital industries like, insurance, electricity and power, telecommunications, etc.

78. Thus, with the advent of globalisation/liberalisation leading to free market economy, regulators in respect of each sector have assumed great significance and importance. It becomes their bounden duty to ensure that such a regulator fulfils the objectives enshrined in the Act under which a particular regulator is created. Insofar as the telecom sector is concerned, the TRAI Act itself mentions the objective which it seeks to achieve. It not only exercises control/supervision over the telecom service providers/licensees, TRAI is also supposed to provide guidance to the telecom/mobile market. 'Introduction' to the TRAI Act itself mentions that due to tremendous growth in the services it was considered essential to regulate the telecommunication services by a regulatory body which should be fully empowered to control the services, in the best interest of the country as well as the service providers. Likewise, the Statement of Objects and Reasons of this Act, *inter alia*, stipulates as under:

1. In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private

operator will be competing with Government operators, there is a pressing need for an independent telecom regulatory body for Regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest.

xx xx xx

4. The powers and functions of the Authority, inter alia, are.-

(i) ensuring technical compatibility and effective inter-relationship between different service providers;

(ii) Regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(iii) ensuring compliance of licence conditions by all service providers;

(iv) protection of the interest of the consumers of telecommunication service;

(v) settlement of disputes between service providers;

(vi) fixation of rates for providing telecommunication service within India and outside India;

(vii) ensuring effective compliance of universal service obligations.

79. TRAI is, thus, constituted for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. It is assigned the duty to achieve the universal service which should be of world standard quality on the one hand and also to ensure that it is provided to the customers at a reasonable price, on the other hand. In the process, purpose is to make arrangements for protection and promotion of consumer interest and ensure fair competition. It is because of this reason that the powers and functions which are assigned to TRAI are highlighted in the Statement of Objects and Reasons. Specific functions which are assigned to TRAI, amongst other, including ensuring technical compatibility and effective interrelationship between different service providers; ensuring compliance of licence conditions by all service providers; and settlement of disputes between service providers.

80. In the instant case, dispute raised by RJIL specifically touches upon these aspects as the grievance raised is that the IDOs have not given POIs as per the licence conditions resulting into non-compliance and have failed to ensure inter se technical compatibility thereby. Not only RJIL has raised this dispute, it has even specifically approached TRAI for settlement of this dispute which has arisen between various service providers, namely, RJIL on the one hand and the IDOs on the other, wherein COAI is also roped in. TRAI is seized of this particular dispute.

81. It is a matter of record that before the TRAI, IDOs have refuted the aforesaid claim of RJIL. Their submission is that not only required POIs were provided to RJIL, it is the RJIL which is in breach as it was making unreasonable and excessive demand for POIs. It is specifically pleaded by the IDOs that:

(i) RJIL raised its demand for POIs for the first time on June 21, 2016.

(ii) In the letter dated June 21, 2016, it was admitted that RJIL was in test phase.

(iii) There was no express mention of any commercial launch date.

(iv) As per the letter, immediately on commercial launch RJIL would have a 22mn subscriber base for which number series was already allotted.

(v) As per the DoT Circular dated August 29, 2005 test customers are not considered as subscribers and test customers can only be in the form of business partners. It was highlighted that problem, if any, of congestion has been suffered on account of provisioning of full-fledged services during test phase.

(vi) RJIL in its complaint before the TRAI was not considering the period of 90 days as was prescribed in the Interconnection Agreement. It was instead proceeding on the basis that the demand for POIs should be met on an immediate basis.

(vii) There was several errors in the forecast made by RJIL.

(viii) The tables given by the RJIL are wrong as they take into account its total demand at the end of nine months against what was actually provided.

82. Learned Counsel appearing for the IDOs had also argued that the first firm demand for provisioning of POIs was made by RJIL on June 21, 2016. According to the IDOs, in that letter, RJIL had expressly admitted that it was under test phase and had not commenced 'commercial services'. RJIL had also stated that the demand for POIs was being made to 'provide seemless connectivity to targeted subscribers' as against 'test consumers'. Their submission was that it was not disclosed at all as to when RJIL was going to launch commercial services. On the basis of the aforesaid stand taken by the IDOs, their argument is that in the first instance it is the TRAI which is not only competent but more appropriate authority to consider these aspects as it is the TRAI which is the specialised body going by the nature of dispute between the parties, following aspects have to be determined by the TRAI:

(a) Whether IDOs were under any obligation to provide POIs during test period?

(b) As per the letter dated June 21, 2016 from RJIL, when IDOs were to commence provisioning of POIs to RJIL?

(c) Whether the demand for POIs made by RJIL were reasonable or not?

(d) Whether there was any delay/denial at the end of Vodafone in provisioning of POIs?

(e) Whether the POIs were to be provided 'immediately' and during 'test phase'?

(f) Whether IDOs have provided sufficient number of POIs to RJIL in conformity with the licence conditions?

83. We are of the opinion that as the TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by the TRAI in the first instance. These are jurisdictional aspects. Unless the TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that the CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated September 06, 2016 that the matter related to inter-connectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated September 27, 2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated October 21, 2016 on the issue of inter-connection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that inter-connectivity is not provided by the IDOs in terms of the licenses granted to them. TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIS. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned.

84. We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by the TRAI which would bring on record findings on the aforesaid aspects, the CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 56 and 82 above are determined by the TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage the CCI can go into the question as to whether violation of the provisions of TRAI Act amounts to 'abuse of dominance' or 'anti-competitive agreements'. That also follows from the reading of Sections 21 and 21A of the Competition Act, as argued by the Respondents.

85. The issue can be examined from another angle as well. If the CCI is allowed to intervene at this juncture, it will have to necessarily undertake an exercise of returning the findings on the aforesaid issues/aspects which are mentioned in paragraph 82 above. Not only TRAI is better equipped as a sectoral regulator to deal with these jurisdictional aspects, there may be a possibility that the two authorities, namely, TRAI on the one hand and the CCI on the other, arrive at a conflicting views. Such a situation needs to be avoided. This analysis also leads to the same

conclusion, namely, in the first instance it is the TRAI which should decide these jurisdictional issues, which come within the domain of the TRAI Act as they not only arise out of the telecom licenses granted to the service providers, the service providers are governed by the TRAI Act and are supposed to follow various Regulations and directions issued by the TRAI itself.

86. This takes us to the next level of the issue, viz. whether TRAI has the exclusive jurisdiction to deal with matters involving anticompetitive practices to the exclusion of CCI altogether because of the reason that the matter pertains to telecom sector?

87. The IDOs have argued that not only TRAI is an expert body which can deal with these issues and has been assigned this function specifically under the TRAI Act, even the anti-competitive aspects of telecom sector are specifically assigned to the TRAI in the TRAI Act itself. On that premise the submission is that the TRAI Act is a special legislation which prevails over the provisions of the Competition Act as the Competition Act is general in nature. It is also argued that even if the Competition Act is treated as a special statute, between the two special statutes the TRAI Act would prevail as it is a complete code in itself which regulates the telecom sector in its entirety, including the aspects of competition.

88. Such a submission, on a cursory glance, may appear to be attractive. However, the matter cannot be examined by looking into the provisions of the TRAI Act alone. Comparison of the regimes and purpose behind the two Acts becomes essential to find an answer to this issue. We have discussed the scope and ambit of the TRAI Act in the given context as well as the functions of the TRAI. No doubt, we have accepted that insofar as the telecom sector is concerned, the issues which arise and are to be examined in the context of the TRAI Act and related regime need to be examined by the TRAI. At the same time, it is also imperative that specific purpose behind the Competition Act is kept in mind. This has been taken note of and discussed in the earlier part of the judgment. As pointed out above, the Competition Act frowns the anti-competitive agreements. It deals with three kinds of practices which are treated as anti-competitive and are prohibited. To recapitulate, these are:

(a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

(b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

(c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

89. The CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti-competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act. Learned Counsel for the Appellants are

right in their submission that the CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b) of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. The CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI. In ***Haridas Exports***, this Court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act. Section 27 empowers the CCI to pass certain kinds of orders, stipulated in the said provision, after inquiry into the agreements for abuse of dominant position. The following kinds of orders can be passed by the CCI under this provision:

27. **Orders by Commission after inquiry into agreements or abuse of dominant position.** - Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any of the following orders, namely:

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

(c) repealed;

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) repealed;

(g) pass such other [order or issue such directions] as it may deem fit.

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to Section 3 or Section 4 of the Act is a member of a group as defined in Clause (b) of the Explanation to Section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

Moreover, it is within the exclusive domain of the CCI to find out as to whether a particular agreement will have appreciable adverse effect on competition within the relevant market in India. For this purpose, CCI is to take into consideration the provisions contained in the Competition Act, including Section 29 thereof. Sections 45 and 46 also authorise the CCI to impose penalties in certain situations.

90. Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of the CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the 'comity' between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained.

91. The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.

92. We, thus, do not agree with the Appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the Respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by the CCI to investigate an alleged cartel does not impinge upon TRAI's jurisdiction to regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to 'regulatory capture' and, therefore, the CCI is competent to exercise its jurisdiction from the stand point of the Competition Act. However, having taken note of the skillful exercise which the

TRAI is supposed to carry out, such a comment vis-a-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February, 2007, a sectoral regulator, may not have an overall view of the economy as a whole, which the CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out.

B. *Whether the writ petitions filed before the High Court of Bombay were maintainable?*

93. Here comes the scope of judicial interference Under Article 226 of the Constitution. As per the RJIL as well as CCI, the High Court could not have entertained the writ petition against an order passed Under Section 26(1) of the Competition Act which was a pure administrative order and was only a prima facie view expressed therein, and did not result in serious adverse consequences. It was submitted that the finding of the High Court that such an order was quasi-judicial order is not only erroneous but it is contrary to the law laid down in the case of ***Steel Authority of India Limited.*** The Respondents, on the other hand, have submitted that the judgment in the above case had no application in the instant case as it did not deal with the sector that is regulated by a statutory authority. Moreover, such an order was quasi-judicial in nature and cannot be treated as an administrative order since it was passed by the CCI after collecting the detailed information from the parties and by holding the conferences, calling material details, documents, affidavits and by recording the opinion. It was submitted that judicial review against such an order is permissible and it was open to the Respondents to point out that the complete material, as submitted by the Respondents, was not taken into consideration which resulted in an erroneous order, which had adverse civil consequences inasmuch as the Respondents were subjected to further investigation by the Director General.

94. We may mention at the outset that in the case of ***Steel Authority of India Limited***, nature of the order passed by the CCI Under Section 26(1) of the Competition Act (here also we are concerned with an order which is passed Under Section 26(1) of the Competition Act) was gone into. The Court, in no uncertain terms, held that such an order would be an administrative order and not a quasi-judicial order. It can be discerned from paragraphs 94, 97 and 98 of the said judgment, which are as under:

94. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi-judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in *CCT* v. *Shukla & Bros.* [MANU/SC/0258/2010 : (2010) 4 SCC 785: (2010) 2 SCC (Cri.) 1201: (2010) 2 SCC (L & S) 133], wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies.

xx xx xx

97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different Sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required Under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order Under Sections 26 to 28 of the Act.

95. There is no reason to take a contrary view. Therefore, we are not inclined to refer the matter to a larger Bench for reconsideration.

96. It was, however, argued that since the case of ***Steel Authority of India Limited*** was not dealing with the telecom sector, which is regulated by the statutory regulator, namely, TRAI under the TRAI Act, that judgment would not be applicable. Merely because the present case deals with the telecom sector would not change the nature of the order that is passed by the CCI Under Section 26(1) of the Competition Act. However, it raises another dimension. Even if the order is administrative in nature, the question raised before the High Court in the writ petitions filed by the Respondents touched upon the very jurisdiction of the CCI. As is evident, the case set up by the Respondents was that the CCI did not have the jurisdiction to entertain any such request or Information which was furnished by RJIL and two others. The question, thus, pertained to the jurisdiction of the CCI to deal with such a matter and in the process the High Court was called upon to decide as to whether the jurisdiction of the CCI is entirely excluded or to what extent the CCI can exercise its jurisdiction in these cases when the matter could be dealt with by another regulator, namely, the TRAI. When such jurisdictional issues arise, the writ petition would clearly be maintainable as held in ***Barium Chemicals Ltd. and Anr.*** v. ***Company Law Board and Ors.*** MANU/SC/0037/1966 : AIR 1967 SC 295 and ***Carona Limited.*** In ***Carona Limited***, this Court held as under:

26. The learned Counsel for the Appellant company submitted that the fact as to "paid-up share capital" of rupees one crore or more of a company is a "jurisdictional fact" and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned Counsel is right. The fact as to "paid-up share capital" of a company can be said to be a "preliminary" or "jurisdictional fact" and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned Counsel for the Appellant tenant is right in submitting that the "jurisdictional fact" did not exist and the Rent Act was, therefore, applicable.

27. Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not posses.

28. In *Halsbury's Laws of England* (4th Edn.), Vol. 1, Para 55, p. 61; Reissue, Vol. 1(1), Para 68, pp. 114-15, it has been stated:

Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive.

The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal.

xx xx xx

36. It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue.

97. Thus, even when we do not agree with the approach of the High Court in labeling the impugned order as quasi-judicial order and assuming jurisdiction to entertain the writ petitions on that basis, for our own and different reasons, we find that the High Court was competent to deal with and decide the issues raised in exercise of its power Under Article 226 of the Constitution. The writ petitions were, therefore, maintainable.

C. *Whether the High Court could give its findings on merits?*

98. Once we hold that the order Under Section 26(1) of the Competition Act is administrative in nature and further that it was merely a prima facie opinion directing the Director General to carry the investigation, the High Court would not be competent to adjudge the validity of such an order

on merits. The observations of the High Court giving findings on merits, therefore, may not be appropriate.

99. At the same time, since we are upholding the order of the High Court on the aspect that the CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality, i.e. only after the TRAI returns its findings on the jurisdictional aspects which are mentioned above by us, the ultimate direction given by the High Court quashing the order passed by the CCI is not liable to be interfered with as such an exercise carried out by the CCI was premature. The result of the discussion would be to dismiss these appeals, subject to our observations on certain aspects. Ordered accordingly.

---

[1]Case C-280/08 P, Judgment dated 14.10.2010

Back to Index

MANU/SC/1561/2019

Neutral Citation: 2019/INSC/1233

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 10044, 10045 and 2683 of 2010

Decided On: 13.11.2019

Appellants: Central Public Information Officer, Supreme Court of India V**s.** Respondent: Subhash Chandra Agarwal

Hon'ble Judges/Coram:

Ranjan Gogoi, C.J.I., N.V. Ramana, Dr. D.Y. Chandrachud, Deepak Gupta and Sanjiv Khanna, JJ.

Subject: Constitution

Relevant Section:

Right To Information Act, 2005 - Section 4; Constitution Of India - Article 19(1)(g); Right To Information Act, 2005 - Section 8; Right To Information Act, 2005 - Section 2(j); Right To Information Act, 2005 - Section 11

Prior History:

From the Judgment and Order dated 24.11.2009 by the Hon'ble Central Information Commission, New Delhi, in Appeal No. CICWB/A/2009/000529

Authorities Referred:

Black's Law Dictionary; Wharton's Law Lexicon

Case Note:

Right to Information - Transparency in judiciary - Section 8(1)(j) of the Right to Information Act, 2005 - Present judgment would decide appeals preferred by the Central Public Information Officer ('CPIO'), Supreme Court of India and Secretary General, Supreme Court of India, against common Respondent, and seeks to answer question as to 'how transparent was transparent enough' under Right to Information Act, 2005 ('RTI Act') in context of collegium system for appointment and elevation of judges to the Supreme Court

and the High Courts; declaration of assets by judges, etc. - Whether concept of independence of judiciary required and demanded prohibition of furnishing of information sought - Whether information sought for amounted to interference in functioning of the Judiciary - Whether information sought for could not be furnished to avoid any erosion in credibility of decisions and to ensure a free and frank expression of honest opinion by all constitutional functionaries, which was essential for effective consultation and for taking the right decision - Whether information sought for was exempt under Section 8(1)(j) of RTI Act.

Facts:

Present judgment would decide appeals preferred by the Central Public Information Officer ('CPIO'), Supreme Court of India and Secretary General, Supreme Court of India, against the common Respondent, and seeks to answer the question as to 'how transparent is transparent enough' under the RTI Act in the context of collegium system for appointment and elevation of judges to the Supreme Court and the High Courts; declaration of assets by judges, etc. The Appellants have contended that disclosure of the information sought would impede the independence of judges as it fails to recognise the unique position of the judiciary within the framework of the Constitution which necessitates that the judges ought not to be subjected to 'litigative public debate' and such insulation is constitutional, deliberate and essential to the effective functioning of the institution. Right to information is not an unfettered constitutional right, albeit a right available within the framework of the RTI Act, which means that the right is subject, among other conditions, to the exclusions, restrictions and conditions listed in the Second Schedule and in Sections 8 to 11 of the RTI Act.

Held, while disposing of the appeal

Sanjiv Khanna, J.

1. **Ordinarily the relationship between the Chief Justice and judges would not be that of a fiduciary and a beneficiary. However, it is not an absolute rule/code for in certain situations and acts, fiduciary relationship may arise. Whether or not such a relationship arises in a particular situation would have to be dealt with on the tests and parameters enunciated above.[35]**

   2. If one's right to know is absolute, then the same may invade another's right to privacy and breach confidentiality, and, therefore, the former right has to be harmonised with the need for personal privacy, confidentiality of information and effective governance. The RTI Act captures this interplay of the competing rights under Clause (j) to Section 8(1) and Section 11. While Clause (j) to Section 8(1) refers to personal information as distinct from information relating to public activity or interest and seeks to exempt disclosure of such information, as well as such information which, if disclosed, would cause unwarranted invasion of privacy of an individual, unless public interest warrants its disclosure, Section 11 exempts the disclosure of 'information or record...which relates to or has been supplied by a third party and has been treated as confidential by that third party'. By differently wording and inditing the challenge that privacy and confidentiality throw to information

rights, the RTI Act also recognises the interconnectedness, yet distinctiveness between the breach of confidentiality and invasion of privacy, as the former is broader than the latter, as will be noticed below.[36]

3. Section 11 is not merely procedural but also a substantive provision which applies when the PIO intends to disclose information that relates to or has been supplied by a third party and has been treated as confidential by that third party. It requires the PIO to issue notice to the third party who may make submission in writing or orally, which submission has to be kept in view while taking a decision. Proviso to Section 11(1) applies in all cases except trade or commercial secrets protected by law. Pertinently, information including trade secrets, intellectual property rights, etc. are governed by Clause (d) to Sub-section (1) of Section 8 and Section 9 of the RTI Act. In all other cases, where the information relates to or has been supplied by the third party and treated as confidential by that third party, disclosure in terms of the proviso may be allowed where the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. Confidentiality is protected and preserved in law because the public interest requires such protection. It helps and promotes free communication without fear of retaliation. However, public interest in protecting confidentiality is subject to three well-known exceptions. The first exception being a public interest in the disclosure of iniquity for there cannot be any loss of confidentiality involving a wrongdoing. Secondly, there cannot be any public interest when the public has been misled. Thirdly, the principle of confidentiality does not apply when the disclosure relates to matters of public concern, which expression is vastly different from news value or news to satiate public curiosity. Public concern relates to matters which are an integral part of free speech and expression and entitlement of everyone to truth and fair comment about it. There are certain circumstances where the public interest in maintaining confidentiality may be outweighed by the public interest in disclosure and, thus, in common law, it may not be treated by the courts as confidential information. These aspects would be relevant under the proviso to Section 11(1) of the RTI Act.[61]

4. Proviso to Section 11(1) of the RTI Act is a statutory recognition of three exceptions and more when it incorporates public interest test. It states that information, otherwise treated confidential, can be disclosed if the public interest in disclosure outweighs the possible harm and injury to the interest of such a third party. The expression 'third party' has been defined in Clause (n) to Section 2 to mean a person other than the citizen making a request for information and includes a public authority. Thus, the scope of 'information' under Section 11 is much broader than that of Clause (j) to Section 8 (1), as it could include information that is personal as well as information that concerns the government and its working, among others, which relates to or is supplied by a third party and treated as confidential. Third-party could include any individual, natural or juristic entity including the public authority.[62]

5. Section 8(1)(j) of the RTI Act prescribes the requirement of satisfaction of 'larger public interest' for access to information when the information relates to personal

information having no relationship with any public activity or interest, or would cause unwarranted invasion of privacy of the individual. Proviso to Section 11(1) states that except in case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. The words 'possible harm or injury' to the interest of the third party is preceded by the word 'importance' for the purpose of comparison. 'Possible' in the context of the proviso does not mean something remote, far-fetched or hypothetical, but a calculable, foreseeable and substantial possibility of harm and injury to the third party.[72]

6. Comparison or balancing exercise of competing public interests has to be undertaken in both sections, albeit under Section 8(1)(j) the comparison is between public interest behind the exemption, that is personal information or invasion of privacy of the individual and public interest behind access to information, whereas the test prescribed by the proviso to Section 11(1) is somewhat broader and wider as it requires comparison between disclosure of information relating to a third person or information supplied and treated as confidential by the third party and possible harm or injury to the third party on disclosure, which would include all kinds of 'possible' harm and injury to the third party on disclosure.[73]

7. Public interest has no relationship and is not connected with the number of individuals adversely affected by the disclosure which may be small and insignificant in comparison to the substantial number of individuals wanting disclosure. It will vary according to the information sought and all circumstances of the case that bear upon the public interest in maintaining the exemptions and those in disclosing the information must be accounted for to judge the right balance. Public interest is not immutable and even time-gap may make a significant difference. The type and likelihood of harm to the public interest behind the exemption and public interest in disclosure would matter. The delicate balance requires identification of public interest behind each exemption and then cumulatively weighing the public interest in accepting or maintaining the exemption(s) to deny information in a particular case against the public interest in disclosure in that particular case. Further, under Section 11(1), reference is made to the 'possible' harm and injury to the third party which will also have to be factored in when determining disclosure of confidential information relating to the third parties.[78]

8. The last aspect in the context of public interest test would be in the form of clarification as to the effect of Sub-section (2) to Section 6 of the RTI Act which does not require the information seeker to give any reason for making a request for the information. Clearly, 'motive' and 'purpose' for making the request for information is irrelevant, and being extraneous cannot be a ground for refusing the information. However, this is not to state that 'motive' and 'purpose' may not be relevant factor while applying the public interest test in case of qualified exemptions governed by the public interest test. It is in this context that this Court in Aditya Bandopadhyay has held that beneficiary cannot be denied personal information relating to him. Similarly, in other cases, public interest may weigh in favour of the disclosure when

the information sought may be of special interest or special significance to the applicant. It could equally be a negative factor when the 'motive' and 'purpose' is vexatious or it is a case of clear abuse of law.[79]

9. In the RTI Act, in the absence of any positive indication as to the considerations which the PIO has to bear in mind while making a decision, the legislature had intended to vest a general discretion in the PIO to weigh the competing interests, which is to be limited only by the object, scope and purpose of the protection and the right to access information and in Section 11(1), the 'possible' harm and injury to the third party. It imports a discretionary value judgment on the part of the PIO and the appellate forums as it mandates that any conclusion arrived at must be fair and just by protecting each right which is required to be upheld in public interest. There is no requirement to take a fortiori view that one trumps the other.[80]

10. It cannot be doubted and debated that the independence of the judiciary is a matter of ennobled public concern and directly relates to public welfare and would be one of the factors to be taken into account in weighing and applying the public interest test. Thus, when the public interest demands the disclosure of information, judicial independence has to be kept in mind while deciding the question of exercise of discretion. Reference to the principle of judicial independence is not to undermine and avoid accountability which is an aspect present Court perceive and believe has to be taken into account while examining the public interest in favour of disclosure of information. Judicial independence and accountability go hand in hand as accountability ensures, and is a facet of judicial independence. Further, while applying the proportionality test, the type and nature of the information is a relevant factor. Distinction must be drawn between the final opinion or resolutions passed by the collegium with regard to appointment/elevation and transfer of judges with observations and indicative reasons and the inputs/data or details which the collegium had examined. The rigour of public interest in divulging the input details, data and particulars of the candidate would be different from that of divulging and furnishing details of the output, that is the decision. In the former, public interest, test would have to be applied keeping in mind the fiduciary relationship (if it arises), and also the invasion of the right to privacy and breach of the duty of confidentiality owed to the candidate or the information provider, resulting from the furnishing of such details and particulars. The position represents a principled conflict between various factors in favour of disclosure and those in favour of withholding of information. Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future. The public interest test would be applied to weigh the scales and on balance determine whether information should be furnished or would be exempt. Therefore, a universal affirmative or negative answer is not possible. However, independence of

judiciary is a matter of public interest.[88]

11. In view of discussion, Civil Appeal No. 2683 of 2010 is dismissed and judgment dated 12th January, 2010 of the Delhi High Court which had upheld the order passed by the CIC directing the CPIO, Supreme Court of India to furnish information on the judges of the Supreme Court who had declared their assets is confirmed. Such disclosure would not, in any way, impinge upon the personal information and right to privacy of the judges. The fiduciary relationship Rule in terms of Clause (e) to Section 8(1) of the RTI Act is inapplicable. It would not affect the right to confidentiality of the judges and their right to protect personal information and privacy, which would be the case where details and contents of personal assets in the declaration are called for and sought, in which event the public interest test as applicable vide Section 8(1)(j) and proviso to Section 11 (1) of the RTI Act would come into operation.[89]

12. As far as Civil Appeal Nos. 10045 of 2010 and 10044 of 2010 are concerned, they are to be partly allowed with an order of remit to the CPIO, Supreme Court of India to re-examine the matter after following the procedure Under Section 11(1) of the RTI Act as the information relates to third parties. Before a final order is passed, the concerned third parties are required to be issued notice and heard as they are not a party before us. While deciding the question of disclosure on remit, the CPIO, Supreme Court of India would follow the observations made in the present judgment by keeping in view the objections raised, if any, by the third parties. The reference and the appeals are accordingly disposed of.[90]

N.V. Ramana, J.

2.

13. It must be kept in the mind that the transparency cannot be allowed to run to its absolute, considering the fact that efficiency is equally important principle to be taken into fold. Right to information should not be allowed to be used as a tool of surveillance to scuttle effective functioning of judiciary. While applying the second step the concerned authority needs to balance these considerations as well.[133]

14. It is to be noted that, following non-exhaustive considerations needs to be considered while assessing the 'public interest' Under Section 8 of the RTI Act- a. Nature and content of the information b. Consequences of non-disclosure; dangers and benefits to public c. Type of confidential obligation. d. Beliefs of the confidant; reasonable suspicion e. Party to whom information is disclosed f. Manner in which information acquired g. Public and private interests h. Freedom of expression and proportionality.[135]

15. N.V. Ramana, J. concurred with the conclusions reached by the majority.[135]

Dr. D.Y. Chandrachud, J.

3.

16. The information sought by the Respondent pertains to (1) the correspondence and

file notings relating to the elevation of three judges to the Supreme Court, (2) information relating to the declaration of assets made by judges pursuant to the 1997 resolution, and (3) the identity and nature of disciplinary proceedings instituted against the lawyer and judge named in the newspaper report. The third referral question requires this Court to determine whether the disclosure of the information sought is exempt under Clause (j) of Clause (1) of Section 8. In arriving at a determination on whether the information sought is exempt under Clause (j), it is necessary to (i) determine whether the information sought is "personal information" and engages the right to privacy, (ii) identify, in the facts of the present case, the specific heads of public interest in favour of disclosure and the specific privacy interests claimed, (iii) determine the justifications for restricting such interests and (iv) apply the principle of proportionality to ensure that no right is abridged more than required to fulfil the legitimate aim of the countervailing right. The process under Section 11 of the RTI must be complied with where the information sought is 'third party information'. The substantive content of the terms 'personal information' and 'public interest' have also been set out in the present judgment.[250]

17. The information sought in Civil Appeal No. 2683 with respect to which judges of the Supreme Court have declared their assets does not constitute the "personal information" of the judges and does not engage the right to privacy. The contents of the declaration of assets would fall within the meaning of "personal information" and the test set out under Clause (j) of Clause (1) of Section 8 would be applicable along with the procedure Under Section 11 of the RTI Act. In view of the above observations, Civil Appeal No. 2683 of 2010 is dismissed and the judgment of the Delhi High Court is upheld.[251]

18. Civil Appeals Nos. 10044 and 1045 of 2010 are remanded to the CPIO, Supreme Court of India to be examined and a determination arrived at, after applying the principles set out in the present judgment. The information sought in these appeals falls within the meaning of 'third party information' and the procedure under Section 11 must be complied with in arriving at a determination. Brother Justice Sanjiv Khanna has observed that: Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future. Dr. D.Y. Chandrachud wish to add a few thoughts on the subject. The collegium owes its birth to judicial interpretation. In significant respects, the collegium is a victim of its own birth - pangs. Bereft of information pertaining to both the criteria governing the selection and appointment of judges to the higher judiciary and the application of those criteria in individual cases, citizens have engaged the constitutional right to information, facilitated by the RTI Act. If the content of the right and the enforcement of the statute are to possess a meaningful dimension in their application to the judiciary - as it must, certain steps are necessary.

Foremost among them is that the basis for the selection and appointment of judges to the higher judiciary must be defined and placed in the public realm. This is the procedure which is followed in making appointments but also in terms of the substantive norms which are adopted while making judicial appointments. There can be no denying the fact that there is a vital element of public interest in knowing about the norms which are taken into consideration in selecting candidates for higher judicial officer and making judicial appointments. Knowledge is a powerful instrument which secures consistency in application and generates the confidence that is essential to the sanctity of the process of judicial appointments. This is essentially because the collegium system postulates that proposals for appointment of judges are initiated by the judges themselves. Essential substantial norms in regard to judicial appointments include: (i) The basis on which performance of a member of the Bar is evaluated for the purpose of higher judicial office; (ii) The criteria which are applied in determining whether a member of the Bar fulfils requirements in terms of: a) Experience as reflected in the quantum and nature of the practice; b) Domain specialization in areas which are geared to the evolving nature of litigation and the requirements of each court; c) Income requirements, if any, having regard to the nature of the practice and the circumstances prevailing in the court or region concerned; d) The commitment demonstrated by a candidate under consideration to the development of the law in terms of written work, research and academic qualifications; and e) The social orientation of the candidate, defined in terms of the extent of pro bono or legal aid work; (iii) The need for promoting the role of the judiciary as an inclusive institution and its diversity in terms of gender, representation to minorities and the marginalised, orientation and other relevant factors. The present judgment does not seek to define what the standards for judicial appointments should be. However, what needs to be emphasised is that the substantive standards which are borne in mind must be formulated and placed in the public realm as a measure that would promote confidence in the appointments process. Due publicity to the norms which have been formulated and are applied would foster a degree of transparency and promote accountability in decision making at all levels within the judiciary and the government. The norms may also spell out the criteria followed for assessing the judges of the district judiciary for higher judicial office. There is a vital public interest in disclosing the basis on which those with judicial experience are evaluated for elevation to higher judicial office particularly having regard to merit, integrity and judicial performance. Placing the criteria followed in making judicial appointments in the public domain will fulfil the purpose and mandate of Section 4 of the RTI Act, engender public confidence in the process and provides a safeguard against extraneous considerations entering into the process.[252]

JUDGMENT

Sanjiv Khanna, J.

1. This judgment would decide the afore-captioned appeals preferred by the Central Public Information Officer ('CPIO' for short), Supreme Court of India (Appellant in Civil Appeal Nos. 10044 and 10045 of 2010), and Secretary General, Supreme Court of India (Appellant in Civil Appeal No. 2683 of 2010), against the common Respondent-Subhash Chandra Agarwal, and seeks to answer the question as to '*how transparent is transparent enough*'[1] under the Right to Information Act, 2005 ('RTI Act' for short) in the context of collegium system for appointment and elevation of judges to the Supreme Court and the High Courts; declaration of assets by judges, etc.

2. Civil Appeal No. 10045 of 2010 titled ***Central Public Information Officer, Supreme Court of India*** v. ***Subhash Chandra Agarwal*** arises from an application moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India on 6th July, 2009 to furnish a copy of the complete correspondence with the then Chief Justice of India as the Times of India had reported that a Union Minister had approached, through a lawyer, Mr. Justice R. Reghupathi of the High Court of Madras to influence his judicial decisions. The information was denied by the CPIO, Supreme Court of India on the ground that the information sought by the applicant-Respondent was not handled and dealt with by the Registry of the Supreme Court of India and the information relating thereto was neither maintained nor available with the Registry. First appeal filed by Subhash Chandra Aggarwal was dismissed by the appellate authority vide order dated 05th September, 2009. On further appeal, the Central Information Commission ('CIC' for short) vide order dated 24th November, 2009 has directed disclosure of information observing that disclosure would not infringe upon the constitutional status of the judges. Aggrieved, the CPIO, Supreme Court of India has preferred this appeal.

3. Civil Appeal No. 10044 of 2010 arises from an application dated 23rd January, 2009 moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India to furnish a copy of complete file/papers as available with the Supreme Court of India inclusive of copies of complete correspondence exchanged between the concerned constitutional authorities with file notings relating to the appointment of Mr. Justice H.L. Dattu, Mr. Justice A.K. Ganguly and Mr. Justice R.M. Lodha superseding seniority of Mr. Justice A.P. Shah, Mr. Justice A.K. Patnaik and Mr. Justice V.K. Gupta, which was allegedly objected to by the Prime Minister. The CPIO vide order dated 25th February, 2009 had denied this information observing that the Registry did not deal with the matters pertaining to the appointment of the judges to the Supreme Court of India. Appointment of judges to the Supreme Court and the High Courts are made by the President of India as per the procedure prescribed by law and the matters relating thereto were not dealt with and handled by the Registry of the Supreme Court. The information was neither maintained nor available with the Registry. First appeal preferred by Subhash Chandra Agarwal was rejected vide order dated 25th March, 2009 by the appellate authority. On further appeal, the CIC has accepted the appeal and directed furnishing of information by relying on the judgment dated 02nd September, 2009 of the Delhi High Court in Writ Petition (Civil) No. 288 of 2009 titled ***Central Public Information Officer, Supreme Court of India*** v. ***Subhash Chandra Agarwal and Anr.***. The CIC has also relied on the decision of this Court in ***S.P. Gupta*** v. ***Union of India and Ors.*** MANU/SC/0080/1981 : (1981) Supp SCC 87 to reach its conclusion. Aggrieved, the CPIO, Supreme Court of India has preferred the present appeal stating, inter alia, that the judgment in Writ Petition (Civil) No. 288 of 2009 was upheld by the Full Bench of the Delhi High Court in

LPA No. 501 of 2009 vide judgment dated 12th January, 2010, which judgment is the subject matter of appeal before this Court in Civil Appeal No. 2683 of 2010.

4. Civil Appeal No. 2683 of 2010 arises from an application dated 10th November, 2007 moved by Subhash Chandra Agarwal seeking information on declaration of assets made by the judges to the Chief Justices in the States, which application was dismissed by the CPIO, Supreme Court of India *vide* order/letter dated 30th November, 2007 stating that information relating to declaration of assets of the judges of the Supreme Court of India and the High Courts was not held by or was not under control of the Registry of the Supreme Court of India. On the first appeal, the appellate authority had passed an order of remit directing the CPIO, Supreme Court of India to follow the procedure Under Section 6(3) of the RTI Act and to inform Subhash Chandra Agarwal about the authority holding such information as was sought. The CPIO had thereafter vide order dated 07th February, 2008 held that the applicant should approach the CPIO of the High Courts and filing of the application before the CPIO of the Supreme Court was against the spirit of Section 6(3) of the RTI Act. Thereupon, Subhash Chandra Agarwal had directly preferred an appeal before the CIC, without filing the first appeal, which appeal was allowed vide order dated 06th January, 2009 directing:

... in view of what has been observed above, the CPIO of the Supreme Court is directed to provide the information asked for by the Appellant in his RTI application as to whether such declaration of assets etc. has been filed by the Hon'ble Judges of the Supreme Court or not within ten working days from the date of receipt of this decision notice.

5. Aggrieved, the CPIO, Supreme Court of India had filed Writ Petition (Civil) No. 288 of 2009 before the Delhi High Court, which was decided by the learned Single Judge vide judgment dated 02nd September, 2009, and the findings were summarised as:

84. [...]

Re Point Nos. 1 & 2 *Whether the CJI is a public authority and whether the CPIO, of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;*

Answer: The CJI is a public authority under the Right to Information Act and the CJI holds the information pertaining to asset declarations in his capacity as Chief Justice; that office is a "public authority" under the Act and is covered by its provisions.

Re Point No. 3: Whether asset declaration by Supreme Court Judges, pursuant to the 1997 Resolution are "information", under the Right to Information Act, 2005.

Answer: It is held that the second part of the Respondent's application, relating to declaration of assets by the Supreme Court Judges, is "information" within the meaning of the expression, Under Section 2 (f) of the Act. The point is answered accordingly; the information pertaining to declarations given, to the CJI and the contents of such declaration are "information" and subject to the provisions of the Right to Information Act.

Re Point No. 4: *If such asset declarations are "information" does the CJI hold them in a "fiduciary" capacity, and are they therefore, exempt from disclosure under the Act*

Answer: The Petitioners' argument about the CJI holding asset declarations in a fiduciary capacity, (which would be breached if it is directed to be disclosed, in the manner sought by the applicant) is insubstantial. The CJI does not hold such declarations in a fiduciary capacity or relationship.

Re Point No. 5: *Whether such information is exempt from disclosure by reason of Section 8(1)(j) of the Act. Answer:* It is held that the contents of asset declarations, pursuant to the 1997 resolution--and the 1999 Conference resolution--are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed Under Section 8(1)(j); they are not otherwise subject to disclosure. As far as the information sought by the applicant in this case is concerned, (i.e. whether the declarations were made pursuant to the 1997 resolution) the procedure Under Section 8(1)(j) is inapplicable.

Re Point No. (6): *Whether the lack of clarity about the details of asset declaration and about their details, as well as lack of security renders asset declarations and their disclosure, unworkable.*

Answer: These are not insurmountable obstacles; the CJI, if he deems it appropriate, may in consultation with the Supreme Court Judges, evolve uniform standards, devising the nature of information, relevant formats, and if required, the periodicity of the declarations to be made. The forms evolved, as well as the procedures followed in the United States--including the redaction norms--under the Ethics in Government Act, 1978, reports of the US Judicial Conference, as well as the Judicial Disclosure Responsibility Act, 2007, which amends the Ethics in Government Act of 1978 to: (1) restrict disclosure of personal information about family members of Judges whose revelation might endanger them; and (2) extend the authority of the Judicial Conference to redact certain personal information of judges from financial disclosure reports may be considered.

6. On further appeal by the CPIO, Supreme Court of India, LPA No. 501 of 2009 was referred to the Full Bench, which has vide its decision dated 12th January, 2010 dismissed the appeal. This judgment records that the parties were ad-idem with regard to point Nos. 1 and 2 as the CPIO, Supreme Court of India had fairly conceded and accepted the conclusions arrived at by the learned Single Judge and, thus, need not be disturbed. Nevertheless, the Full Bench had felt it appropriate to observe that they were in full agreement with the reasoning given by the learned Single Judge. The expression 'public authority' as used in the RTI Act is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for the Chief Justice of India. While the Chief Justice of India is designated as one of the competent authorities Under Section 2(e) of the RTI Act, the Chief Justice of India besides discharging his role as 'head of the judiciary' also performs a multitude of tasks assigned to him under the Constitution and various other enactments. In the absence of any indication that the office of the Chief Justice of India is a separate establishment with its own CPIO, it cannot be canvassed that "the office of the CPIO of the Supreme Court is different from the office of the CJI" (that is, the Chief Justice of India). Further, neither side had made any submissions on the issue of 'unworkability' on account of 'lack of clarity' or 'lack of security' vis-a-vis asset declarations by the judges. The Full Bench had, thereafter, re-casted the remaining three questions as under:

(1) Whether the Respondent had any "right to information" Under Section 2(j) of the Act in respect of the information regarding making of declarations by the Judges of the Supreme Court pursuant to 1997 Resolution?

(2) If the answer to question (1) above is in affirmative, whether CJI held the "information" in his "fiduciary" capacity, within the meaning of the expression used in Section 8(1)(e) of the Act?

(3) Whether the information about the declaration of assets by the Judges of the Supreme Court is exempt from disclosure under the provisions of Section 8(1)(j) of the Act?

The above questions were answered in favour of the Respondent-Subhash Chandra Aggarwal as the Full Bench has held that the Respondent had the right to information Under Section 2(j) of the RTI Act with regard to the information in the form of declarations of assets made pursuant to the 1997 Resolution. The Chief Justice did not hold such declarations in a fiduciary capacity or relationship and, therefore, the information was not exempt Under Section 8(1)(e) of the RTI Act. Addressing the third question, the Bench had observed:

116. In the present case the particulars sought for by the Respondent do not justify or warrant protection Under Section 8(1)(j) inasmuch as the only information the applicant sought was whether 1997 Resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8(1)(j). We concur with the view of the learned single Judge that the contents of asset declarations, pursuant to the 1997 Resolution, are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed Under Section 8(1)(j); that they are not otherwise subject to disclosure. Therefore, as regards contents of the declarations, information applicants would have to, whenever they approach the authorities, under the Act satisfy them Under Section 8(1)(j) that such disclosure is warranted in "larger public interest.

7. The afore-captioned three appeals were tagged to be heard and decided together vide order dated 26th November, 2010, the operative portion of which reads as under:

12. Having heard the learned Attorney General and the learned Counsel for the Respondent, we are of the considered opinion that a substantial question of law as to the interpretation of the Constitution is involved in the present case which is required to be heard by a Constitution Bench. The case on hand raises important questions of constitutional importance relating to the position of Hon'ble the Chief Justice of India under the Constitution and the independence of the Judiciary in the scheme of the Constitution on the one hand and on the other, fundamental right to freedom of speech and expression. Right to information is an integral part of the fundamental right to freedom of speech and expression guaranteed by the Constitution. Right to Information Act merely recognizes the constitutional right of citizens to freedom of speech and expression. Independence of Judiciary forms part of basic structure of the Constitution of India. The independence of Judiciary and the fundamental right to free speech and expression are of a great value and both of them are required to be balanced.

8. This order while referring the matter to a larger bench had framed the following substantial questions of law as to the interpretation of the Constitution, which read as under:

1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the Judiciary?

2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?

3. Whether the information sought for is exempt Under Section 8(1)(j) of the Right to Information Act?

9. We have heard Mr. K.K. Venugopal, Attorney General of India, Mr. Tushar Mehta, Solicitor General of India on behalf of the Supreme Court of India and Mr. Prashant Bhushan, learned advocate for Subhash Chandra Agarwal. The Appellants have contended that disclosure of the information sought would impede the independence of judges as it fails to recognise the unique position of the judiciary within the framework of the Constitution which necessitates that the judges ought not to be subjected to 'litigative public debate' and such insulation is constitutional, deliberate and essential to the effective functioning of the institution. Right to information is not an unfettered constitutional right, *albeit* a right available within the framework of the RTI Act, which means that the right is subject, among other conditions, to the exclusions, restrictions and conditions listed in the Second Schedule and in Sections 8 to 11 of the RTI Act. In support, the Appellants have relied upon ***Re Coe's Estate Ebert et al*** v. ***State et. Al*** 33 Cal. 2d 502, ***Bhudan Singh and Anr.*** v. ***Nabi Bux and Anr.*** MANU/SC/0353/1969 : 1969 (2) SCC 481, Kailash Rai v. Jai Ram MANU/SC/0334/1973 : 1973 (1) SCC 527 and ***Dollfus Mieg et Compagnie S.A.*** v. ***Bank of England*** (1950) 2 All E.R. 611. Information sought when exempt Under Section 8 of the RTI Act cannot be disclosed. Information on assets relates to personal information, the disclosure of which has no bearing on any public activity or interest and is, therefore, exempt Under Section 8(1)(j) of the RTI Act. Similarly, information of prospective candidates who are considered for judicial appointments and/or elevation relates to their personal information, the disclosure of which would cause unwarranted invasion of an individual's privacy and serves no larger public interest. Further, the information on assets is voluntarily declared by the judges to the Chief Justice of India in his fiduciary capacity as the pater *familias* of the judiciary. Consultations and correspondence between the office of the Chief Justice of India and other constitutional functionaries are made on the basis of trust and confidence which ascribes the attributes of a fiduciary to the office of the Chief Justice. Information relating to the appointment of judges is shared among other constitutional functionaries in their fiduciary capacities, which makes the information exempt Under Section 8(1)(e) of the RTI Act. The Respondent, on the other hand, has by relying on the dicta in ***State of U.P.*** v. ***Raj Narain and Ors.*** MANU/SC/0032/1975 : (1975) 4 SCC 428 and ***S.P. Gupta*** (supra) argued that disclosure of the information sought does not undermine the independence of the judiciary. Openness and transparency in functioning would better secure the independence of the judiciary by placing any attempt made to influence or compromise the independence of the judiciary in the public domain. Further, the citizens have a legitimate and constitutional right to seek information about the details of any such attempt. Thus, disclosure, and not secrecy, enhances the independence of the judiciary. No legitimate concerns exist which may inhibit consultees from freely expressing themselves or which might expose candidates to spurious allegations by disclosing the consultative process for appointing judges. Given the nature of the

information sought, disclosure of the information will serve the larger public interest and, therefore, such interest outweighs the privilege of exemption granted to personal information Under Section 8(1)(j) of the RTI Act. If any personal information is involved, the same could be dealt with on a case-by-case basis by disclosing the information that serves public interest after severing the records as per Section 10 of the RTI Act. There is no fiduciary relationship between the Chief Justice and the judges or among the constitutional functionaries as envisaged Under Section 8(1)(e) of the RTI Act which could be a ground for holding back the information. Reliance was placed on the decisions of this Court in ***Central Board of Secondary Education and Anr.*** v. ***Aditya Bandopadhyay and Ors.*** MANU/SC/0932/2011 : (2011) 8 SCC 497 and ***Reserve Bank of India*** v. ***Jayantilal N. Mistry*** MANU/SC/1463/2015 : (2016) 3 SCC 525, to contend that the duty of a public servant is not to act for the benefit of another public servant, that is, the Chief Justice and other functionaries are meant to discharge their constitutional duties and not act as a fiduciary of anyone, except the people. In arguendo, even if there exists a fiduciary relationship among the functionaries, disclosure can be made if it serves the larger public interest. Additionally, candour and confidentiality are not heads of exemption under the RTI Act and, therefore, cannot be invoked as exemptions in this case.

10. For clarity and convenience, we would deal with the issues point-wise, *albeit* would observe that (referred to as point Nos. 1 and 2 in the judgment in LPA No. 501 of 2009 dated 12th January, 2010) was not contested before the Full Bench but as some clarification is required, it has been dealt below.

POINT No. 1: WHETHER THE SUPREME COURT OF INDIA AND THE CHIEF JUSTICE OF INDIA ARE TWO SEPARATE PUBLIC AUTHORITIES?

11. Terms 'competent authority' and 'public authority' have been specifically defined in Clauses (e) and (h) to Section 2 of the RTI Act, which read:

(e) "competent authority" means--

(i) the Speaker in the case of the House of the People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States or Legislative Council of a State;

(ii) the Chief Justice of India in the case of the Supreme Court;

(iii) the Chief Justice of the High Court in the case of a High Court;

(iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;

(v) the administrator appointed Under Article 239 of the Constitution;

xx xx xx

(h) "public authority" means any authority or body or institution of self-government established or constituted--

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any--

(i) body owned, controlled or substantially financed;

(ii) non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government;

12. Term 'public authority' Under Section 2(h) of the RTI Act includes any authority or body or an institution of self-government established by the Constitution or under the Constitution. Interpreting the expression 'public authority' in ***Thalappalam Service Cooperative Bank Limited and Ors.*** v. ***State of Kerala and Ors.*** MANU/SC/1020/2013 : (2013) 16 SCC 82, this Court had observed:

30. The legislature, in its wisdom, while defining the expression "public authority" Under Section 2(h), intended to embrace only those categories, which are specifically included, unless the context of the Act otherwise requires. Section 2(h) has used the expressions "means" and "includes". When a word is defined to "mean" something, the definition is prima facie restrictive and where the word is defined to "include" some other thing, the definition is prima facie extensive. But when both the expressions "means" and "includes" are used, the categories mentioned there would exhaust themselves. The meanings of the expressions "means" and "includes" have been explained by this Court in *DDA* v. *Bhola Nath Sharma* (in paras 25 to 28). When such expressions are used, they may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to those words and expressions.

31. Section 2(h) exhausts the categories mentioned therein. The former part of Section 2(h) deals with:

(1) an authority or body or institution of self-government established by or under the Constitution,

(2) an authority or body or institution of self-government established or constituted by any other law made by Parliament,

(3) an authority or body or institution of self-government established or constituted by any other law made by the State Legislature, and

(4) an authority or body or institution of self-government established or constituted by notification issued or order made by the appropriate Government.

13. Article 124 of the Constitution, which relates to the establishment and constitution of the Supreme Court of India, states that there shall be a Supreme Court of India consisting of a Chief Justice and other judges. It is undebatable that the Supreme Court of India is a 'public authority', as defined vide Clause (h) to Section 2 of the RTI Act as it has been established and constituted by or under the Constitution of India. The Chief Justice of India as per Sub-clause (ii) in Clause (e) to Section 2 is the competent authority in the case of the Supreme Court. Consequently, in terms of Section 28 of the RTI Act, the Chief Justice of India is empowered to frame rules, which have to be notified in the Official Gazette, to carry out the provisions of the RTI Act.

14. The Supreme Court of India, which is a 'public authority', would necessarily include the office of the Chief Justice of India and the judges in view of Article 124 of the Constitution. The office of the Chief Justice or for that matter the judges is not separate from the Supreme Court, and is part and parcel of the Supreme Court as a body, authority and institution. The Chief Justice and the Supreme Court are not two distinct and separate 'public authorities', albeit the latter is a 'public authority' and the Chief Justice and the judges together form and constitute the 'public authority', that is, the Supreme Court of India. The interpretation to Section 2(h) cannot be made in derogation of the Constitution. To hold to the contrary would imply that the Chief Justice of India and the Supreme Court of India are two distinct and separate public authorities, and each would have their CPIOs and in terms of Sub-section (3) to Section 6 of the RTI Act an application made to the CPIO of the Supreme Court or the Chief Justice would have to be transferred to the other when 'information' is held or the subject matter is more closely connected with the 'functions' of the other. This would lead to anomalies and difficulties as the institution, authority or body is one. The Chief Justice of India is the head of the institution and neither he nor his office is a separate public authority.

15. This is equally true and would apply to the High Courts in the country as Article 214 states that there shall be a High Court for each State and Article 216 states that every High Court shall consist of a Chief Justice and such other judges as the President of India may from time to time deem it appropriate to appoint.

POINT No. 2: INFORMATION AND RIGHT TO INFORMATION UNDER THE RTI ACT

16. Terms 'information', 'record' and 'right to information' have been defined under Clauses (f), (i) and (j) to Section 2 of the RTI Act which are reproduced below:

(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

xx xx xx

(i) "record" includes--

(a) any document, manuscript and file;

(b) any microfilm, microfiche and facsimile copy of a document;

(c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(d) any other material produced by a computer or any other device;

(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to--

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

17. 'Information' as per the definition Clause is broad and wide, as it is defined to mean "material in any form" with amplifying words including records (a term again defined in widest terms vide Clause (i) to Section 2 of the RTI Act), documents, emails, memos, advices, logbooks, contracts, reports, papers, samples, models, data material held in electronic form, etc. The last portion of the definition Clause which states that the term 'information' would include *'information relating to any private body which can be accessed by a public authority under any other law for the time being in force'* has to be read as reference to 'information' not presently available or held by the public authority but which can be accessed by the public authority from a private body under any other law for the time being in force. The term - 'private body' in the Clause has been used to distinguish and is in contradistinction to the term - 'public authority' as defined in Section 2(h) of the RTI Act. It follows that any requirement in the nature of precondition and restrictions prescribed by any other law would continue to apply and are to be satisfied before information can be accessed and asked to be furnished by a private body.

18. What is explicit as well as implicit from the definition of 'information' in Clause (f) to Section 2 follows and gets affirmation from the definition of 'right to information' that the information should be accessible by the public authority and 'held by or under the control of any public authority'. The word 'hold' as defined in Wharton's Law Lexicon, 15th Edition, means to have the ownership or use of; keep as one's own, but in the context of the present legislation, we would prefer to adopt a broader definition of the word 'hold' in Black's Law Dictionary, 6th Edition, as meaning; to keep, to retain, to maintain possession of or authority over. The words 'under the control of any public authority' as per their natural meaning would mean the right and power of the public authority to get access to the information. It refers to dominion over the information or the right to any material, document etc. The words 'under the control of any public authority' would

include within their ambit and scope information relating to a private body which can be accessed by a public authority under any other law for the time being in force subject to the pre-imposed conditions and restrictions as applicable to access the information.

19. When information is accessible by a public authority, that is, held or under its control, then the information must be furnished to the information seeker under the RTI Act even if there are conditions or prohibitions under another statute already in force or under the Official Secrets Act, 1923, that restricts or prohibits access to information by the public. In view of the *non-obstante* Clause in Section 22[2] of the RTI Act, any prohibition or condition which prevents a citizen from having access to information would not apply. Restriction on the right of citizens is erased. However, when access to information by a public authority itself is prohibited or is accessible subject to conditions, then the prohibition is not obliterated and the pre-conditions are not erased. Section 2(f) read with Section 22 of the RTI Act does not bring any modification or amendment in any other enactment, which bars or prohibits or imposes pre-condition for accessing information of the private bodies. Rather, Clause (f) to Section 2 upholds and accepts the said position when it uses the expression - "which can be accessed", that is the public authority should be in a position and be entitled to ask for the said information. Section 22 of the RTI Act, an overriding provision, does not militate against the interpretation as there is no contradiction or conflict between the provisions of Section 2(f) of the RTI Act and other statutory enactments/law. Section 22 of the RTI Act is a key that unlocks prohibitions/limitations in any prior enactment on the right of a citizen to access information which is accessible by a public authority. It is not a key with the public authority that can be used to undo and erase prohibitions/limitations on the right of the public authority to access information. In other words, a private body will be entitled to the same protection as is available to them under the laws of this country.

20. Full Bench of the Delhi High Court in its judgment dated 12th January 2010 in LPA No. 501 of 2009 had rightly on the interpretation of word 'held', referred to Philip Coppel's work 'Information Rights' (2nd Edition, Thomson, Sweet & Maxwell 2007)[3] interpreting the provisions of the Freedom of Information Act, 2000 (United Kingdom) in which it has been observed:

When information is "held" by a public authority

For the purposes of the Freedom of Information Act 2000, information is "held" by a public authority if it is held by the authority otherwise than on behalf of another person, or if it is held by another person on behalf of the authority. The Act has avoided the technicalities associated with the law of disclosure, which has conventionally drawn a distinction between a document in the power, custody or possession of a person. Putting to one side the effects of Section 3(2) (see para. 9-009 below), the word "held" suggests a relationship between a public authority and the information akin to that of ownership or bailment of goods.

Information:

- that is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it;

- that is accidentally left with a public authority;

- that just passes through a public authority; or

- that "belongs" to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority's premises,

will, it is suggested, lack the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before it can be said that the public authority can be said to "hold" the information. ...

Thereafter, the Full Bench had observed:

59. Therefore, according to Coppel the word "held" suggests a relationship between a public authority and the information akin to that of an ownership or bailment of goods. In the law of bailment, a slight assumption of control of the chattel so deposited will render the recipient a depository (see Newman v. Bourne and Hollingsworth (1915) 31 T.L.R. 209). Where, therefore, information has been created, sought, used or consciously retained by a public authority will be information held within the meaning of the Act. However, if the information is sent to or deposited with the public authority which does not hold itself out as willing to receive it and which does not subsequently use it or where it is accidentally left with a public authority or just passes through a public authority or where it belongs to an employee or officer of a public authority but which is brought by that employee or officer unto the public authority's premises it will not be information held by the public authority for the lack of the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before the public authority can be said to hold the information....

Therefore, the word "hold" is not purely a physical concept but refers to the appropriate connection between the information and the authority so that it can properly be said that the information is held by the public authority.[4]

21. In ***Khanapuram Gandaiah*** v. ***Administrative Officer and Ors.*** MANU/SC/0018/2010 : (2010) 2 SCC 1, this Court on examining the definition Clause 2(f) of the RTI Act had held as under:

10. [...] This definition shows that an applicant Under Section 6 of the RTI Act can get any information which is already in existence and accessible to the public authority under law....

xx xx xx

12. [...] the Public Information Officer is not supposed to have any material which is not before him; or any information he could (*sic* not) have obtained under law. Under Section 6 of the RTI Act, an applicant is entitled to get only such information which can be accessed by the "public authority" under any other law for the time being in force. ...

The aforesaid observation emphasises on the mandatory requirement of accessibility of information by the public authority under any other law for the time being in force. This aspect was again highlighted by another Division Bench in ***Aditya Bandopadhyay*** (supra), wherein information was divided into three categories in the following words:

59. The effect of the provisions and scheme of the RTI Act is to divide "information" into three categories. They are:

(*i*) Information which promotes *transparency and accountability* in the working of every public authority, disclosure of which may also help in containing or discouraging corruption [enumerated in Clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].

(*ii*) Other information held by public authority [that is, all information other than those falling under Clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].

(*iii*) Information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force.

Information under the third category does not fall within the scope of the RTI Act. Section 3 of the RTI Act gives every citizen, the right to "information" held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon the public authorities to suo motu *publish and disseminate such information* so that they will be easily and readily accessible to the public without any need to access them by having recourse to Section 6 of the RTI Act. There is no such obligation to publish and disseminate the other information which falls under the second category.

The first category refers to the information specified in Clause (b) to Sub-section (1) to Section 4 which consists of as many as seventeen sub-clauses on diverse subjects stated therein. It also refers to Clause (c) to Sub-section (1) to Section 4 by which public authority is required to publish all relevant facts while formulating important public policies or pronouncing its decision which affects the public. The rationale behind these clauses is to disseminate most of the information which is in the public interest and promote openness and transparency in government.

22. The expressions 'held by or under the control of any public authority' and 'information accessible under this Act' are restrictive[5] and reflect the limits to the 'right to information' conferred vide Section 3 of the RTI Act, which states that subject to the provisions of the RTI Act, all citizens shall have the right to information. The right to information is not absolute and is subject to the conditions and exemptions under the RTI Act.

23. This aspect was again highlighted when the terms 'information' and 'right to information' were interpreted in ***Thalappalam Service Cooperative Bank Limited*** (supra) with the following elucidation:

63. Section 8 begins with a non obstante clause, which gives that Section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in Clauses (a) to (j). The public authority, as already indicated, cannot access all the information from a private individual, but only those information which he is legally obliged to pass on to a public authority by law, and also only those information to which the public authority can have access in accordance with law. Even those information, if personal in nature,

can be made available only subject to the limitations provided in Section 8(j) of the RTI Act. Right to be left alone, as propounded in *Olmstead* v. *United States* is the most comprehensive of the rights and most valued by civilised man.

xx xx xx

67. The Registrar of Cooperative Societies functioning under the Cooperative Societies Act is a "public authority" within the meaning of Section 2(h) of the Act. As a public authority, the Registrar of Cooperative Societies has been conferred with lot of statutory powers under the respective Act under which he is functioning. He is also duty-bound to comply with the obligations under the RTI Act and furnish information to a citizen under the RTI Act. Information which he is expected to provide is the information enumerated in Section 2(f) of the RTI Act subject to the limitations provided Under Section 8 of the Act. The Registrar can also, to the extent law permits, gather information from a Society, on which he has supervisory or administrative control under the Cooperative Societies Act. Consequently, apart from the information as is available to him, Under Section 2(f), he can also gather those information from the society, to the extent permitted by law. The Registrar is also not obliged to disclose those information if those information fall Under Section 8(1)(j) of the Act. No provision has been brought to our knowledge indicating that, under the Cooperative Societies Act, a Registrar can call for the details of the bank accounts maintained by the citizens or members in a cooperative bank. Only those information which a Registrar of Cooperative Societies can have access under the Cooperative Societies Act from a society could be said to be the information which is "held" or "under the control of public authority". Even those information, the Registrar, as already indicated, is not legally obliged to provide if those information falls under the exempted category mentioned in Section 8(j) of the Act. Apart from the Registrar of Co-operative Societies, there may be other public authorities who can access information from a co-operative bank of a private account maintained by a member of society under law, in the event of which, in a given situation, the society will have to part with that information. But the demand should have statutory backing.

68. Consequently, if an information which has been sought for relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual, the Registrar of Cooperative Societies, even if he has got that information, is not bound to furnish the same to an applicant, unless he is satisfied that the larger public interest justifies the disclosure of such information, that too, for reasons to be recorded in writing.

Thus, the scope of the expressions 'information' and 'right to information' which can be accessed by a citizen under the RTI Act have to be understood in light of the above discussion.

POINT No. 3: SECTIONS 8, 9, 10 AND 11 OF THE RTI ACT

24. To ensure transparency and accountability and to make Indian democracy more participatory, the RTI Act sets out a practical and pragmatic regime to enable citizens to secure greater access to information available with public authorities by balancing diverse interests including efficient governance, optimum use of limited fiscal operations and preservation of confidentiality of

sensitive information. The preamble to the RTI Act appropriately summarises the object of harmonising various conflicts in the following words:

xx xx xx

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

xx xx xx

25. An attempt to resolve conflict and disharmony between these aspects is evident in the exceptions and conditions on access to information set out in Sections 8 to 11 of the RTI Act. At the outset, we would reproduce Section 8 of the RTI Act, which reads as under:

8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,--

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this Section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with Sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of Clauses (a), (c) and (i) of Sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made Under Section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

Sub-section (1) of Section 8 begins with a non-obstante Clause giving primacy and overriding legal effect to different clauses under the Sub-section in case of any conflict with other provisions of the RTI Act. Section 8(1) without modifying or amending the term 'information', carves out exceptions when access to 'information', as defined in Section 2(f) of the RTI Act would be denied. Consequently, the right to information is available when information is accessible under the RTI Act, that is, when the exceptions listed in Section 8(1) of the RTI Act are not attracted. In terms of Section 3 of the RTI Act, all citizens have right to information, subject to the provisions of the RTI

Act, that is, information 'held by or under the control of any public authority', except when such information is exempt or excluded.

26. Clauses in Sub-section (1) to Section 8 can be divided into two categories: Clauses (a), (b), (c), (f), (g), (h) and (i), and Clauses (d), (e) and (j). The latter clauses state that the prohibition specified would not apply or operate when the competent authority in Clauses (d) and (e) and the PIO in Clause (j) is satisfied that larger public interest warrants disclosure of such information.[6] Therefore, Clauses (d), (e) and (j) of Section 8(1) of the RTI Act incorporate qualified prohibitions and are conditional and not absolute exemptions. Clauses (a), (b), (c), (f), (g), (h) and (i) do not have any such stipulation. Prohibitory stipulations in these clauses do not permit disclosure of information on satisfaction of the larger public interest rule. These clauses, therefore, incorporate absolute exclusions.

27. Sub-section (2) to Section 8 states that notwithstanding anything contained in the Official Secrets Act, 1923 or any of the exemptions permissible in accordance with Sub-section (1), a public authority may allow access to information if the public interest in disclosure outweighs the harm to the protected interests. The disclosure Under Section 8(2) by the public authority is not a mandate or compulsion but is in the form of discretionary disclosure. Section 8(2) acknowledges and empowers the public authority to lawfully disclose information held by them despite the exemptions Under Sub-section (1) to Section 8 if the public authority is of the opinion that the larger public interest warrants disclosure. Such disclosure can be made notwithstanding the provisions of the Official Secrets Act. Section 8(2) does not create a vested or justiciable right that the citizens can enforce by an application before the PIO seeking information under the RTI Act. PIO is under no duty to disclose information covered by exemptions Under Section 8(1) of the RTI Act. Once the PIO comes to the conclusion that any of the exemption clauses is applicable, the PIO cannot pass an order directing disclosure Under Section 8(2) of the RTI Act as this discretionary power is exclusively vested with the public authority.

28. Section 9 provides that without prejudice to the provisions of Section 8, a request for information may be rejected if such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

29. Section 10 deals with severability of exempted information and Sub-section (1) thereof reads as under:

10. *Severability*.- (1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.

30. Section 11, which deals with third party information, and incorporates conditional exclusion based on breach of confidentiality by applying public interest test, reads as under:

11. *(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made*

under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, **disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.**

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, Under Sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in Section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request Under Section 6, if the third party has been given an opportunity to make representation Under Sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given Under Sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal Under Section 19 against the decision.

We shall subsequently interpret and expound on Section 11 of the RTI Act.

31. At the present stage, we would like to quote from ***Aditya Bandopadhyay*** (supra) wherein this Court, on the aspect of general principles of interpretation while deciding the conflict between the right to information and exclusions Under Section 8 to 11 of the RTI Act, had observed:

61. Some High Courts have held that Section 8 of the RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that, therefore, Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The Preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore, when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on

the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

62. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act, that is, Section 8 of the Freedom to Information Act, 2002. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.

63. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of Section 3 and the definitions of "information" and "right to information" under Clauses (*f*) and (*j*) of Section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the Rules or Regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide "advice" or "opinion" to an applicant, nor required to obtain and furnish any "opinion" or "advice" to an applicant. The reference to "opinion" or "advice" in the definition of "information" in Section 2(*f*) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act.

Paragraph 63 quoted above has to be read with our observations on the last portion of Clause (f) to Section 2 defining the word 'information', *albeit*, on the observations and findings recorded, we respectfully concur. For the present decision, we are required to primarily examine Clauses (e) and (j) of Sub-section (1) to Section 8 and Section 11 of the RTI Act.

<u>Point No. 3 (A)</u>: Fiduciary Relationship Under Section 8(1)(e) of the RTI Act

32. Clause (e) to Section 8(1) of the RTI Act states that information made available to a person in his fiduciary relationship shall not be disclosed unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information. The expression '*fiduciary relationship*' was examined and explained in ***Aditya Bandopadhyay*** (supra), in the following words:

39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person

owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-a-vis another partner and an employer vis-a-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.

41. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(e) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary--a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a shareholder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body.

This Court held that the exemption Under Section 8(1)(e) of the RTI Act does not apply to beneficiaries regarding whom the fiduciary holds information. In other words, information available with the public authority relating to beneficiaries cannot be withheld from or denied to the beneficiaries themselves. A fiduciary would, ergo, be duty-bound to make thorough disclosure of all relevant facts of all transactions between them in a fiduciary relationship to the beneficiary. In the facts of the said case, this Court had to consider whether an examining body, the Central Board of Secondary Education, held information in the form of evaluated answer-books of the

examinees in fiduciary capacity. Answering in the negative, it was nevertheless observed that even if the examining body is in a fiduciary relationship with an examinee, it will be duty-bound to disclose the evaluated answer-books to the examinee and at the same time, they owe a duty to the examinee not to disclose the answer-books to anyone else, that is, any third party. This observation is of significant importance as it recognises that Section 8(1)(j), and as noticed below-Section 11, encapsulates another right, that is the right to protect privacy and confidentiality by barring the furnishing of information to third parties except when the public interest as prescribed so requires. In this way, the RTI Act complements both the right to information and the right to privacy and confidentiality. Further, it moderates and regulates the conflict between the two rights by applying the test of larger public interest or comparative examination of public interest in disclosure of information with possible harm and injury to the protected interests.

33. In ***Reserve Bank of India*** (supra) this Court had expounded upon the expression '*fiduciary relationship*' used in Clause (e) to Sub-section (1) of Section 8 of the RTI Act by referring to the definition of '*fiduciary relationship*' in the Advanced Law Lexicon, 3rd Edition, 2005, which reads as under:

57. [...] *Fiduciary relationship*. -- A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the fiduciary relationship. Fiduciary relationship usually arises in one of the four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer.

Thereafter, the Court had outlined the contours of the fiduciary relationship by listing out the governing principles which read:

58. [...] *(i) No conflict Rule* -- A fiduciary must not place himself in a position where his own interest conflicts with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict'.

(*ii*) *No profit Rule* -- A fiduciary must not profit from his position at the expense of his customer, the beneficiary.

(*iii*) *Undivided loyalty Rule* -- A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.

(*iv*) *Duty of confidentiality* -- A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person.

34. Fiduciary relationships, regardless of whether they are formal, informal, voluntary or involuntary, must satisfy the four conditions for a relationship to classify as a fiduciary

relationship. In each of the four principles, the emphasis is on trust, reliance, the fiduciary's superior power or dominant position and corresponding dependence of the beneficiary on the fiduciary which imposes responsibility on the fiduciary to act in good faith and for the benefit of and to protect the beneficiary and not oneself. Section 8(1)(e) is a legal acceptance that there are ethical or moral relationships or duties in relationships that create rights and obligations, beyond contractual, routine or even special relationships with standard and typical rights and obligations. Contractual or non-fiduciary relationships could require that the party should protect and promote the interest of the other and not cause harm or damage, but the fiduciary relationship casts a positive obligation and demands that the fiduciary should protect the beneficiary and not promote personal self-interest. A fiduciary's loyalty, duties and obligations are stricter than the morals of the market place and it is not honesty alone, but the *punctilio* of an honour which is the most sensitive standard of behaviour which is applied {See - Opinion of Cardozo, J. in ***Meinhard*** v. ***Sal mon*** (1928) 164 N.E. 545, 546}. Thus, the level of judicial scrutiny in cases of fiduciary relationship is intense as the level of commitment and loyalty expected is higher than non-fiduciary relationships. Fiduciary relationship may arise because of the statute which requires a fiduciary to act selflessly with integrity and fidelity and the other party, that is the beneficiary, depends upon the wisdom and confidence reposed in the fiduciary. A contractual, statutory and possibly all relationships cover a broad field, but a fiduciary relationship could exist, confined to a limited area or an act, as relationships can have several facets. Thus, relationships can be partly fiduciary and partly non-fiduciary with the former being confined to a particular act or action which need not manifest itself in entirety in the interaction and relationship between two parties. What would distinguish non-fiduciary relationship from fiduciary relationship or an act is the requirement of trust reposed, higher standard of good faith and honesty required on the part of the fiduciary with reference to a particular transaction(s) due to moral, personal or statutory responsibility of the fiduciary as compared to the beneficiary, resulting in dependence of the beneficiary. This may arise due to superior knowledge and training of the fiduciary or the position he occupies.

35. Ordinarily the relationship between the Chief Justice and judges would not be that of a fiduciary and a beneficiary. However, it is not an absolute rule/code for in certain situations and acts, fiduciary relationship may arise. Whether or not such a relationship arises in a particular situation would have to be dealt with on the tests and parameters enunciated above.

Point No. 3 (B): Right to Privacy Under Section 8(1)(j) and Confidentiality Under Section 11 of the RTI Act

36. If one's right to know is absolute, then the same may invade another's right to privacy and breach confidentiality, and, therefore, the former right has to be harmonised with the need for personal privacy, confidentiality of information and effective governance. The RTI Act captures this interplay of the competing rights under Clause (j) to Section 8(1) and Section 11. While Clause (j) to Section 8(1) refers to personal information as distinct from information relating to public activity or interest and seeks to exempt disclosure of such information, as well as such information which, if disclosed, would cause unwarranted invasion of privacy of an individual, unless public interest warrants its disclosure, Section 11 exempts the disclosure of 'information or record...which relates to or has been supplied by a third party and has been treated as confidential by that third party'. By differently wording and inditing the challenge that privacy and confidentiality throw to information rights, the RTI Act also recognises the interconnectedness, yet distinctiveness between

the breach of confidentiality and invasion of privacy, as the former is broader than the latter, as will be noticed below.

37. Breach of confidentiality has an older conception and was primarily an equitable remedy based on the principle that one party is entitled to enforce equitable duty on the persons bound by an obligation of confidentiality on account of the relationship they share, with actual or constructive knowledge of the confidential relationship. Conventionally a conception of equity, confidentiality also arises in a contract, or by a statute.[7] Contractually, an obligation to keep certain information confidential can be effectuated expressly or implicitly by an oral or written agreement, whereas in statutes certain extant and defined relationships are imposed with the duty to maintain details, communication exchanged and records confidential. Confidentiality referred to in the phrase 'breach of confidentiality' was initially popularly perceived and interpreted as confidentiality arising out of a preexisting confidential relationship, as the obligation to keep certain information confidential was on account of the nature of the relationship. The insistence of a pre-existing confidential relationship did not conceive a possibility that a duty to keep information confidential could arise even if a relationship, in which such information is exchanged and held, is not pre-existing. This created a distinction between confidential information obtained through the violation of a confidential relationship and similar confidential information obtained in some other way. With time, courts and jurists, who recognised this anomaly, have diluted the requirement of the existence of a confidential relationship and held that three elements were essential for a case of breach of confidentiality to succeed, namely - (a) information should be of confidential nature; (b) information must be imparted in circumstances importing an obligation of confidentiality; and (c) that there must be unauthorised use of information (See ***Coco v. AN Clark (Engineers) Ltd.*** [1969] RPC 41). The "artificial"[8] distinction was emphatically abrogated by the test adopted by Lord Goff of Chieveley in ***Attorney-General*** v. ***Guardian Newspaper Limited (No. 2)*** (1990) 1 AC 109, who had observed:

a duty of confidence arises when confidential information comes to the knowledge of a person... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

Lord Goff, thus, lifted the limiting constraint of a need for initial confidential relationship stating that a 'duty of confidence' would apply whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Therefore, confidential information must not be something which is a public property and in public knowledge/public domain as confidentiality necessarily attributes inaccessibility, that is, the information must not be generally accessible, otherwise it cannot be regarded as confidential. However, self-clarification or certification will not be relevant because whether or not the information is confidential has to be determined as a matter of fact. The test to be applied is that of a reasonable person, that is, information must be such that a reasonable person would regard it as confidential. Confidentiality of information also has reference to the quality of information though it may apply even if the information is false or partly incorrect. However, the information must not be trivial or useless.

38. While previously information that could be considered personal would have been protected only if it were exchanged in a confidential relationship or considered confidential by nature,

significant developments in jurisprudence since the 1990's have posited the acceptance of privacy as a separate right and something worthy of protection on its own as opposed to being protected under an actionable claim for breach of confidentiality. A claim to protect privacy is, in a sense, a claim for the preservation of confidentiality of personal information. With progression of the right to privacy, the underlying values of the law that protects personal information came to be seen differently as the courts recognised that unlike law of confidentiality that is based upon duty of good faith, right to privacy focuses on the protection of human autonomy and dignity by granting the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people (See-Sedley LJ in ***Douglas*** v. ***Hello! Ltd.*** (2001) QB 967). In ***PJS*** v. ***News Group Newspapers Ltd.*** MANU/UKSC/0027/2016 : (2016) UKSC 26, the Supreme Court of the United Kingdom had drawn a distinction between the right to respect private and family life or privacy and claims based upon confidentiality by observing that the law extends greater protection to privacy rights than rights in relation to confidential matters. In the former case, the claim for misuse of private information can survive even when information is in the public domain as its repetitive use itself leads to violation of the said right. The right to privacy gets the benefit of both the quantitative and the qualitative protection. The former refers to the disclosure already made and what is yet undisclosed, whereas the latter refers to the privateness of the material, invasion of which is an illegal intrusion into the right to privacy. Claim for confidentiality would generally fail when the information is in public domain. The law of privacy is, therefore, not solely concerned with the information, but more concerned with the intrusion and violation of private rights. Citing an instance of how publishing of defamatory material can be remedied by a trial establishing the falsity of such material and award of damages, whereas invasion of privacy cannot be similarly redressed, the Court had highlighted the reason why truth or falsity of an allegation or information may be irrelevant when it comes to invasion of privacy. Therefore, claims for protection against invasion of private and family life do not depend upon confidentiality alone. This distinction is important to understand the protection given to two different rights vide Section 8(1)(j) and 11 of the RTI Act.

39. In ***District Registrar and Collector*** v. ***Canara Bank*** MANU/SC/0935/2004 : (2005) 1 SCC 496 this Court had referred to the judgment of the U.S. Supreme Court in ***United States* v. *Miller*** MANU/USSC/0056/1976 : 425 US 435 (1976) on the question of "voluntary" parting with information and under the heading '*Criticism of Miller*' had observed:

48.... (A) Criticism of Miller

(i) The majority in Miller laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof. Tribe states in his treatise (see p. 1391) that this theory reveals "alarming tendencies" because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'." He observes that the majority in Miller confused "privacy" with "secrecy" and that "even their notion of secrecy is a strange one, for a *secret remains a secret even when shared with those whom one selects for one's confidence*". Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same

is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

Yet one can hardly be said to have assumed a risk of surveillance in a context where, as a practical matter, one had no choice. Only the most committed -- and perhaps civilly committable -- *hermit can live without a telephone, without a bank account, without mail.* To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society.

He concludes (p. 1400):

In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self.

(ii) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:

It is beginning to look as if the only way someone living in our society can avoid 'assuming the risk' that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under totalitarian regimes....

Thereafter, it was noticed that with the enactment of the Right to Financial Privacy Act, 1978 the legal effect of '*Miller*' was statutorily done away.

40. The right to privacy though not expressly guaranteed in the Constitution of India is now recognized as a basic fundamental right vide decision of the Constitutional Bench in ***K.S. Puttaswamy and Anr.*** v. ***Union of India and Ors.*** MANU/SC/1044/2017 : (2017) 10 SCC 1 holding that it is an intrinsic part of the right to life and liberty guaranteed Under Article 21 of the Constitution and recognised under several international treaties, chief among them being Article 12 of the Universal Declaration of Human Rights, 1948 which states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. The judgment recognises that everyone has a right to the protection of laws against such interference or attack.

41. In ***K.S. Puttaswamy*** (supra) the main judgment (authored by D.Y. Chandrachud, J.) has referred to provisions of Section 8(1)(j) of the RTI Act to highlight that the right to privacy is entrenched with constitutional status in Part III of the Constitution, thus providing a touchstone on which validity of executive decisions can be assessed and validity of laws can be determined vide judicial review exercised by the courts. This observation highlights the status and importance of the right to privacy as a constitutional right. The ratio as recorded in the two concurring judgments of the learned judges (R.F. Nariman and Sanjay Kishan Kaul, JJ.) are similar. It is observed that privacy involves a person's right to his physical body; right to informational privacy which deals with a person's mind; and the right to privacy of choice which protects an individual's autonomy

over personal choices. While physical privacy enjoys constitutional recognition in Article 19(1)(d) and (e) read with Article 21, personal informational privacy is relatable to Article 21 and right to privacy of choice is enshrined in Articles 19(1)(a) to (c), 20(3), 21 and 25 of the Constitution. In the concurring opinion, there is a reference to 'The Right to Privacy' by Samuel Warren and Louis D. Brandeis on an individual's right to control the dissemination of personal information and that an individual has a right to limit access to such information/shield such information from unwarranted access. Knowledge about a person gives another power over that person, as personal data collected is capable of effecting representations in his decision making process and shaping behaviour which can have a stultifying effect on the expression of dissent which is the cornerstone of democracy. In the said concurring judgment, it has been further held that the right to protection of reputation from being unfairly harmed needs to be zealously guarded not only against falsehood but also against certain truths by observing:

623. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives - people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments.[9]

42. Privacy, it is uniformly observed in ***K.S. Puttaswamy*** (supra), is essential for liberty and dignity. Therefore, individuals have the need to preserve an intrusion-free zone for their personality and family. This facilitates individual freedom. On the question of invasion of personal liberty, the main judgment has referred to a three-fold requirement in the form of - (i) legality, which postulates the existence of law (RTI Act in the present case); (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means to be adopted to achieve them. The third requirement, we would observe, is achieved in the present case by Sections 8(1)(j) and 11 of the RTI Act and the RTI Act cannot be faulted on this ground. The RTI Act also defines the legitimate aim, that is a public interest in the dissemination of information which can be confidential or private (or held in a fiduciary relationship) when larger public interest or public interest in disclosure outweighs the protection or any possible harm or injury to the interest of the third party.

43. Privacy and confidentiality encompass a bundle of rights including the right to protect identity and anonymity. Anonymity is where an individual seeks freedom from identification, even when and despite being in a public space. In ***K.S. Puttaswamy*** (supra) reference is made to ***Spencer*** v. ***R.*** 2014 SCC Online Can SC 34: (2014) 2 SCR 212: 2014 SCC 43 which had set out three key elements of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity, to observe:

214. [...] anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.

xx xx xx

[...] The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.

Privacy and confidentiality, therefore, include information about one's identity.

44. In ***K.S. Puttaswamy*** (supra), it is observed that the Canadian Supreme Court in ***Spencer*** (supra) had stopped short of recognising an absolute right of anonymity, but had used the provisions of Canadian Charter of Rights and Freedoms of 1982 to expand the scope of the right to privacy, used traditionally to protect individuals from an invasion of their property rights, to an individual's "reasonable expectation of privacy". Yet the Court has observed that there has to be a careful balancing of the requirements of privacy with legitimate concerns of the State after referring to an Article[10] wherein it was observed that:

Privacy is the terrorist's best friend, and the terrorist's privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents ...

45. Referring to an Article titled '*Reasonable Expectations of Anonymity*'[11] authored by Jeffrey M. Skopek, it is observed that distinction has been drawn between anonymity on one hand and privacy on the other as privacy involves hiding information whereas anonymity involves hiding what makes it personal by giving an example that furnishing of medical records of a patient would amount to an invasion of privacy, whereas a State may have legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic and to obviate serious impact on the population. If the anonymity of the individual/patient is preserved, it would legitimately assert a valid State interest in the preservation of public health.

46. For the purpose of the present case, we are not concerned with the specific connotations of the right to anonymity and the restrictions/limitations appended to it. In the context of the RTI Act, suffice would be to say that the right to protect identity and anonymity would be identically subjected to the public interest test.

47. Clause (j) to Sub-section (1) of Section 8 of the RTI Act specifically refers to invasion of the right to privacy of an individual and excludes from disclosure information that would cause unwarranted invasion of privacy of such individual, unless the disclosure would satisfy the larger public interest test. This Clause also draws a *distinction in its treatment of personal information*, whereby disclosure of such information is exempted if such information has no relation to public activity or interest. We would like to, however, clarify that in their treatment of this exemption, this Court has treated the word 'information' which if disclosed would lead to invasion of privacy to mean personal information, as distinct from public information. This aspect has been dealt with in the succeeding paragraphs.

48. As per Black's Law Dictionary, 8th Edition, the word 'personal' means '*of or affecting a person or of or constituting personal property*'. In Collins Dictionary of the English Language, the word '*personal*' has been defined as under:

1. of or relating to the private aspects of a person's life.

2. of or relating to a person's body, its care or its appearance.

3. Belonging to or intended for a particular person and no one else.

4. Undertaken by an individual himself.

5. Referring to, concerning, or involving a person's individual personality, intimate affairs, etc., esp. in an offensive way.

6. Having the attributes of an individual conscious being.

7. of or arising from the personality.

8. of or relating to, or denoting grammatical person.

9. of or relating to movable property (Law).

10. An item of movable property (Law).

49. In ***Peck*** v. ***United Kingdom*** (2003) EMLR 15, the European Court of Human Rights had held that private life is a broad term not susceptible to exhaustive definition but includes the right to establish and develop relationships with other human beings such that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Recognised facets of an individual's private life include a person's health, ethnicity, personal relationships, sexual conduct; religious or philosophical convictions and personal image. These facets resemble what has been categorised as sensitive personal data within the meaning of the Data Protection Act, 2018 as applicable in the United Kingdom.

50. Gleeson CJ in ***Australian Broadcasting Corporation*** v. ***Lenah Game Meats Pty Ltd.*** MANU/AUSH/0060/2001 : (2001) 185 ALR 1 had distinguished between what is public and private information in the following manner:

An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private proper property, it has such measure of protection from the public gaze as the characteristics of the property, the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private, as may certain kinds of activity which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

51. This test had been adopted in several English decisions including decision of the House of Lords in ***Campbell*** v. ***Mirror Group Newspapers Limited*** MANU/UKHL/0050/2004 : (2004)

UKHL 22 wherein Lord Hope of Craighead had further elucidated that the definition is taken from the definition of 'privacy' in the United States, where the right to privacy is invaded if the matter which is publicised is of a kind that - (a) would be highly offensive to a reasonable person and (b) not of legitimate concern to the public. Law of privacy in ***Campbell*** (supra), it was observed, was not intended for the protection of the unduly sensitive and would cover matters which are offensive and objectionable to a reasonable man of ordinary sensibilities who must expect some reporting of his daily activities. The mind that has to be examined is not that of a reader in general, but that of the person who is affected by the publicising/dissemination of his information. The question is what a reasonable person of ordinary sensibilities would feel if he/she is subjected to such publicity. Only when publicity is such that a reasonable person would feel justified in feeling seriously aggrieved that there would be an invasion in the right to privacy which gives rise to a cause of action.

52. In ***Douglas*** (supra), it was also held that there are different degrees of privacy which would be equally true for information given in confidentiality, and the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction to protect the right to privacy.

53. While Clause (j) exempts disclosure of two kinds of information, as noted in paragraph 47 above, that is "personal information" with no relation to public activity or interest and "information" that is exempt from disclosure to prevent unwarranted invasion of privacy, this Court has not underscored, as will be seen below, such distinctiveness and treated personal information to be exempt from disclosure if such disclosure invades on balance the privacy rights, thereby linking the former kind of information with the latter kind. This means that information, which if disclosed could lead to an unwarranted invasion of privacy rights, would mean personal information, that is, which is not having co-relation with public information.

54. In ***Girish Ramchandra Deshpande*** v. ***Central Information Commissioner and Ors.*** MANU/SC/0816/2012 : (2013) 1 SCC 212, the applicant had sought copies of all memos, show-cause notices and censure/punishment awarded to a Government employee from his employer and also details of his movable/immovable properties, details of investment, loan and borrowings from financial institutions, details of gifts accepted by the employee from his family members and relatives at the time of the marriage of his son. In this context, it was observed:

12. We are in agreement with the CIC and the courts below that the details called for by the Petitioner i.e. copies of all memos issued to the third Respondent, show-cause notices and orders of censure/punishment, etc. are qualified to be personal information as defined in Clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service Rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. *On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course*, in a given case, if the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the Petitioner cannot claim those details as a matter of right.

13. The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under Clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information.

55. In ***Canara Bank*** v. ***C.S. Shyam and Anr.*** MANU/SC/1068/2017 : (2018) 11 SCC 426, the applicant had sought information on parameters with regard to transfer of clerical staff with details of individual employees, such as date of their joining, promotion earned, date of their joining the branch, the authorities who had posted the transfer letters, etc. The information sought was declared to be personal in nature, which was conditionally exempted from disclosure Under Section 8(1)(j) of the RTI Act.

56. In ***Subhash Chandra Agarwal*** v. ***Registrar, Supreme Court of India and Ors.*** (2018) 11 SCC 634, the applicant (who is also the Respondent in the present appeals) had sought information relating to details of medical facilities availed by individual judges of the Supreme Court and their family members, including information relating to private treatment in India and abroad in last three years. This Court had held that the information sought by the applicant was 'personal' information and was protected Under Section 8(1)(j) of the RTI Act, for disclosure would cause unwarranted invasion of privacy which prohibition would not apply where larger public interest justifies disclosure of such information.

57. In ***R.K. Jain*** v. ***Union of India and Anr.*** MANU/SC/0384/2013 : (2013) 14 SCC 794, the applicant had sought inspection of documents relating to Annual Confidential Reports (ACRs) of a Member of Customs Excise and Service Tax Appellate Tribunal (CESTAT) and follow up action taken by the authorities based on the ACRs. The information sought was treated as personal information, which, except in cases involving overriding public interest, could not be disclosed. It was observed that the procedure Under Section 11 of the RTI Act in such cases has to be followed. The matter was remitted to examine the aspect of larger public interest and to follow the procedure prescribed Under Section 11 of the RTI Act which, it was held, was mandatory.

58. Reference can also be made to ***Aditya Bandopadhyay*** (supra), as discussed earlier in paragraph 32, where this Court has held that while a fiduciary could not withhold information from the beneficiary in whose benefit he holds such information, he/she owed a duty to the beneficiary to not disclose the same to anyone else. This exposition of the Court equally reconciles the right to know with the rights to privacy under Clause (j) to Section 8(1) of the RTI Act.

59. Reading of the aforesaid judicial precedents, in our opinion, would indicate that personal records, including name, address, physical, mental and psychological status, marks obtained, grades and answer sheets, are all treated as personal information. Similarly, professional records, including qualification, performance, evaluation reports, ACRs, disciplinary proceedings, etc. are all personal information. Medical records, treatment, choice of medicine, list of hospitals and doctors visited, findings recorded, including that of the family members, information relating to assets, liabilities, income tax returns, details of investments, lending and borrowing, etc. are personal information. Such personal information is entitled to protection from unwarranted

invasion of privacy and conditional access is available when stipulation of larger public interest is satisfied. This list is indicative and not exhaustive.

60. In ***Arvind Kejriwal*** v. ***Central Public Information Officer and Anr.*** MANU/DE/3888/2011 : AIR 2012 Delhi 29, the Delhi High Court had examined and interpreted Section 11 of the RTI Act in the following manner:

12. Section 11(1), (2), (3) and (4) are the procedural provisions which have to be complied with by the PIO/Appellant authority, when they are required to apply the said test and give a finding whether information should be disclosed or not disclosed. If the said aspect is kept in mind, we feel there would be no difficulty in interpreting Section 11(1) and the so called difficulties or impartibility as pointed out by the Appellant will evaporate and lose significance. This will be also in consonance with the primary Rule of interpretation that the legislative intent is to be gathered from language employed in a statute which is normally the determining factor. The presumption is that the legislature has stated what it intended to state and has made no mistake. (See *Prakash Nath Khanna* v. ***CIT***, MANU/SC/0134/2004 : (2004) 9 SCC 686; and several judgments of Supreme Court cited in ***B. Premanand and Ors. v. Mohan Koikal and Ors.***

13. Read in this manner, what is stipulated by Section 11(1) is that when an information seeker files an application which relates to or has been supplied by third party, the PIO has to examine whether the said information is treated as confidential or can be treated as confidential by the third party. If the answer is in the possible sphere of affirmative or "maybe yes", then the procedure prescribed in Section 11 has to be followed for determining whether the larger public interest requires such disclosure. When information per se or ex facie cannot be regarded as confidential, then the procedure Under Section 11 is not to be followed. All information relating to or furnished by a third party need not be confidential for various reasons including the factum that it is already in public domain or in circulation, right of third party is not affected or by law is required to be disclosed etc. The aforesaid interpretation takes care of the difficulties visualised by the Appellant like marks obtained in an examination, list of BPL families, etc. In such cases, normally plea of privacy or confidentiality does not arise as the said list has either been made public, available in the public domain or has been already circulated to various third parties. On the other hand, in case the word "or" is read as "and", it may lead to difficulties and problems, including invasion of right of privacy/confidentiality of a third party. For example, a public authority may have in its records, medical reports or prescriptions relating to third person but which have not been supplied by the third person. If the interpretation given by the Appellant is accepted then such information can be disclosed to the information seeker without following the procedure prescribed in Section 11(1) as the information was not furnished or supplied by the third person. Such examples can be multiplied. Furthermore, the difficulties and anomalies pointed out can even arise when the word "or" is read as "and" in cases where the information is furnished by the third party. For example, for being enrolled as a BPL family, information may have been furnished by the third party who is in the list of BPL families. Therefore, the reasonable and proper manner of interpreting Section 11(1) is to keep in mind the test stipulated by the proviso. It has to be examined whether information can be treated and regarded as being of confidential nature, if it relates to a third party or has been furnished by a third party. Read in this manner, when information relates to a third party and can be prima facie regarded and treated as confidential, the procedure Under Section 11(1) must be followed. Similarly, in case information has been provided by the third party and

has been prima facie treated by the said third party as confidential, again the procedure prescribed Under Section 11(1) has to be followed.

xx xx xx

16. Thus, Section 11(1) postulates two circumstances when the procedure has to be followed. Firstly when the information relates to a third party and can be prima facie regarded as confidential as it affects the right of privacy of the third party. The second situation is when information is provided and given by a third party to a public authority and prima facie the third party who has provided information has treated and regarded the said information as confidential. The procedure given in Section 11(1) applies to both cases.

61. We would clarify that Section 11 is not merely procedural but also a substantive provision which applies when the PIO intends to disclose information that relates to or has been supplied by a third party and has been treated as confidential by that third party. It requires the PIO to issue notice to the third party who may make submission in writing or orally, which submission has to be kept in view while taking a decision. Proviso to Section 11(1) applies in all cases except trade or commercial secrets protected by law. Pertinently, information including trade secrets, intellectual property rights, etc. are governed by Clause (d) to Sub-section (1) of Section 8 and Section 9 of the RTI Act. In all other cases where the information relates to or has been supplied by the third party and treated as confidential by that third party, disclosure in terms of the proviso may be allowed where the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. Confidentiality is protected and preserved in law because the public interest requires such protection. It helps and promotes free communication without fear of retaliation. However, public interest in protecting confidentiality is subject to three well-known exceptions. The first exception being a public interest in the disclosure of iniquity for there cannot be any loss of confidentiality involving a wrongdoing. Secondly, there cannot be any public interest when the public has been misled. Thirdly, the principle of confidentiality does not apply when the disclosure relates to matters of public concern, which expression is vastly different from news value or news to satiate public curiosity. Public concern relates to matters which are an integral part of free speech and expression and entitlement of everyone to truth and fair comment about it. There are certain circumstances where the public interest in maintaining confidentiality may be outweighed by the public interest in disclosure and, thus, in common law, it may not be treated by the courts as confidential information. These aspects would be relevant under the proviso to Section 11(1) of the RTI Act.

62. Proviso to Section 11(1) of the RTI Act is a statutory recognition of three exceptions and more when it incorporates public interest test. It states that information, otherwise treated confidential, can be disclosed if the public interest in disclosure outweighs the possible harm and injury to the interest of such a third party. The expression 'third party' has been defined in Clause (n) to Section 2 to mean a person other than the citizen making a request for information and includes a public authority. Thus, the scope of 'information' Under Section 11 is much broader than that of Clause (j) to Section 8 (1), as it could include information that is personal as well as information that concerns the government and its working, among others, which relates to or is supplied by a third party and treated as confidential. Third-party could include any individual, natural or juristic entity including the public authority.

63. Confidentiality in case of personal information and its co-relation with the right to privacy and disclosure of the same on the anvil of the public interest test has been discussed above. We now proceed to look at confidentiality of information concerning the government and information relating to its inner-workings and the difference in approach in applying the public interest test in disclosing such information, as opposed to the approach adopted for other confidential/personal information. The reason for such jurisprudential distinction with regard to government information is best expressed in ***Attorney General (UK)*** v. ***Heinemann Publishers Pty Ltd.*** MANU/AUSH/0039/1987 : (1987) 10 NSWLR 86 at 191 wherein the High Court of Australia had observed:

[...] the relationship between the modern State and its citizens is so different in kind from that which exists between private citizens that Rules worked out to govern contractual, property, commercial and private confidences are not fully applicable where the Plaintiff is a government or one of its agencies. Private citizens are entitled to protect or further own interests... [whereas] governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by which equity determines whether it will protect information which a government or governmental body claims is confidential.

The High Court of Australia had earlier in ***Commonwealth*** v. ***John Fairfax and Sons Ltd.*** MANU/AUSH/0037/1980 : (1980) 147 CLR 39 at 51 observed:

The question, then when the executive government seeks the protection given by equity, is: What detriment does it need to show?

The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.

It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.

Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the

community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.

The above principles have also been reiterated and relied upon by the courts in the United Kingdom [See ***Coco*** (supra), ***Attorney General v. Jonathan Cape Ltd.*** [1976] QB 752]. In ***Guardian Newspapers*** (supra), Lord Keith of Kinkel had observed:

The position of the Crown, as representing the continuing government of the country may, however, be regarded as being special. In some instances disclosure of confidential information entrusted to a servant of the Crown may result in a financial loss to the public. In other instances such disclosure may tend to harm the public interest by impeding the efficient attainment of proper governmental ends, and the revelation of defence or intelligence secrets certainly falls into that category. The Crown, however, as representing the nation as a whole, has no private life or personal feelings capable of being hurt by the disclosure of confidential information. In so far as the Crown acts to prevent such disclosure or to seek redress for it on confidentiality grounds, it must necessarily, in my opinion, be in a position to show that the disclosure is likely to damage or has damaged the public interest. How far the Crown has to go in order to show this must depend on the circumstances of each case. In a question with a Crown servant himself, or others acting as his agents, the general public interest in the preservation of confidentiality, and in encouraging other Crown servants to preserve it, may suffice.

64. In ***R.K. Jain*** v. ***Union of India*** MANU/SC/0291/1993 : (1993) 4 SCC 119, this Court, while examining Section 123 of the Evidence Act, 1872, had paraphrased the earlier judgment of the Constitution Bench of this Court penned down by Fazal Ali, J. in ***S.P. Gupta*** (supra) (the first Judge's case) in which the question of privilege against disclosure of correspondence between the Chief Justice of Delhi High Court, Chief Justice of India and the Law Minister of the Union had arisen, in the following words:

41. [...] in a democracy, citizens are to know what their Govt. is doing. No democratic Govt. can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Govt. It is only if the people know how the Govt. is functioning and that they can fulfill their own democratic rights given to them and make the democracy a really effective participatory democracy. There can be little doubt that exposure to public scrutiny is one of the surest means of running a clean and healthy administration. By disclosure of information in regard to the functioning of the Govt. must be the Rule and secrecy can be exceptionally justified only where strict requirement of public information was assumed. The approach of the court must be to alleviate the area of secrecy as much as possible constantly with the requirement of public interest bearing in mind all the time that the disclosure also serves an important aspect of public interest.

65. In ***R.K. Jain*** (1993) (supra), reference was also made to Articles 74(2) and 75(3) of the Constitution, to observe:

21...Article 74(2) precludes this Court from enquiring into the nature of the advice tendered to the President and the documents are, therefore, immuned from disclosure. The disclosure would cause public injury preventing candid and frank discussion and expression of views by the bureaucrats at higher level and by the Minister/Cabinet Sub-committee causing serious injury to public service. Therefore, Cabinet papers, minutes of discussion by heads of departments; high level documents relating to the inner working of the government machine and all papers concerned with the government policies belong to a class documents which in the public interest they or contents thereof must be protected against disclosure.

xx xx xx

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

xx xx xx

34. Equally every member is entitled to insist that whatever his own contribution was to the making of the decision, whether favourable or unfavourable, every other member will keep it secret. Maintenance of secrecy by an individual's contribution to discussion, or vote in the Cabinet guarantees most favourable and conducive atmosphere to express view formally...

It was held that the Ministers and the government servants were required to maintain secrecy and confidentiality in the performance of the duties of the office entrusted by the Constitution and the laws. Elucidating on the importance of confidentiality, it was observed:

34. [...] Confidentiality and collective responsibility in that scenario are twins to effectuate the object of frank and open debate to augment efficiency of public service or effectivity of collective decision to elongate public interest. To hamper and impair them without any compelling or at least strong reasons, would be detrimental to the efficacy of public administration. It would tantamount to wanton rejection of the fruits of democratic governance, and abdication of an office of responsibility and dependability. Maintaining of top secrecy of new taxation policies is a must but leaking budget proposals a day before presentation of the budget may be an exceptional occurrence as an instance.

66. Thereafter, reference was made to the decision of the House of Lords in ***Burmah Oil Ltd. v. Governor And Company of The Bank of England and Anr.*** MANU/UKWA/0055/1979 : [1980] AC 1090 wherein the Lords had rejected the notion that "any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off chance that they might have to be produced in a litigation as grotesque" to hold that this contention would be utterly insubstantial ground to deny access to the relevant document. In ***Burma Oil Ltd.*** (supra),

it was held that the candour doctrine stands in a different category from that aspect of public interest, which, in appropriate circumstances, may require that the '*sources and nature of information confidentially tendered*' should be withheld from disclosure. Several other cases were also referred expressing the same ratio [See - ***Butters Gas and Oil Co.*** v. ***Hammer*** 1982 AC 888 (H.L.); ***Air Canada*** v. ***Secretary of State for Trade*** 1983 2 AC 394 (H.L.); and ***Council of Civil Service Unions*** v. ***Minister for the Civil Service*** MANU/UKHL/0045/1984 : 1985 AC 374 (H.L.)].

67. Having held so, the Bench in ***R.K. Jain*** (1993) (supra) had proceeded to observe:

48. In a democracy it is inherently difficult to function at high governmental level without some degree of secrecy. No Minister, nor a Senior Officer would effectively discharge his official responsibilities if every document prepared to formulate sensitive policy decisions or to make assessment of character rolls of co-ordinate officers at that level if they were to be made public. Generally assessment of honesty and integrity is a high responsibility. At high co-ordinate level it would be a delicate one which would further get compounded when it is not backed up with material. Seldom material will be available in sensitive areas. Reputation gathered by an officer around him would form the base. If the reports are made known, or if the disclosure is routine, public interest grievously would suffer. On the other hand, confidentiality would augment honest assessment to improve efficiency and integrity in the officers.

49. The business of the Govt., when transacted by bureaucrats, even in personal, it would be difficult to have equanimity if the inner working of the Govt. machinery is needlessly exposed to the public. On such sensitive issues it would hamper to express frank and forthright views or opinions. therefore, it may be that at that level the deliberations and in exceptional cases that class or category or documents get protection, in particular, on policy matters. Therefore, the court would be willing to respond to the executive public interest immunity to disclose certain documents where national security or high policy, high sensitivity is involved.

xx xx xx

54. [...] In President Nixon's case, the Supreme Court of the United States held that it is the court's duty to construe and delineate claims arising under express powers, to interpret claims with respect to powers alleged to derive from enumerated powers of the Constitution, In deciding whether the matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is the responsibility of the court as ultimate interpreter of the Constitution...

68. At the same time, it was held:

55. [...] Article 74(2) is not a total bar for production of the records. Only the actual advice tendered by the Minister or Council of Ministers to the President and the question whether any and if so, what advice was tendered by the Minister or Council of Ministers to the President, shall not be enquired into by the court. In other words the bar of Judicial review is confined to the factum of advice, its extent, ambit and scope but not the record i.e. the material on which the advice is

founded. In S.P. Gupta's case this Court held that only the actual advice tendered to the President is immuned from enquiry and the immunity does not extend to other documents or records which form part of the advice tendered to the President.

56. There is discernible modern trends towards more open government than was prevalent in the past. In its judicial review the court would adopt in camera procedure to inspect the record and evaluate the balancing act between the competing public interest and administration of justice. It is equally the paramount consideration that justice should not only be done but also would be publicly recognised as having been done. Under modern conditions of responsible government, Parliament should not always be relied on as a check on excess of power by the Council of Ministers or Minister. Though the court would not substitute its views to that of the executive on matters of policy, it is its undoubted power and duty to see that the executive exercises its power only for the purpose for which it is granted. Secrecy of the advice or opinion is by no means conclusive. Candour, frankness and confidentiality though are integral facets of the common genus i.e., efficient governmental functioning, per se by means conclusive but be kept in view in weighing the balancing act. Decided cases show that power often was exercised in excess thereof or for an ulterior purpose etc. Sometimes the public service reasons will be decisive of the issue, but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed, and the likely injury to the cause of justice must also be assessed and weighed. Its weight will vary according to the nature of the proceedings in which disclosure is sought, level at which the matter was considered; the subject matter of consideration; the relevance of the documents and that degree of likelihood that the document will be of importance in the litigation. In striking the balance, the court may always, if it thinks it necessary, itself inspect the documents. It is, therefore the constitutional, legitimate and lawful power and duty of this Court to ensure that powers, constitutional, statutory or executive are exercised in accordance with the Constitution and the law. This may demand, though no doubt only in limited number of cases, yet the inner workings of government may be exposed to public gaze. The contentions of Attorney General and Solicitor General that the inner workings of the government would be exposed to public gaze, and that some one who would regard this as an occasion without sufficient material to ill-informed criticism is no longer relevant. Criticism calculated to improve the nature of that working as affecting the individual citizen is welcome.

69. The aforesaid passages highlight the relevance of confidentiality in the government and its functioning. However, this is not to state that plea of confidentiality is an absolute bar, for in terms of proviso to Section 11(1) of the RTI Act, the PIO has to undertake the balancing exercise and weigh the advantages and benefits of disclosing the information with the possible harm or injury to the third party on the information being disclosed. We have already referred to the general approach on the right of access to government records under the heading "Section 8(1)(j) and Section 11 of the RTI Act" with reference to the decisions of the High Court of Australia in ***Heinemann Publishers Pty Ltd.*** (supra) and ***John Fairfax and Sons Ltd.*** (supra).

70. Most jurists would accept that absolute transparency in all facets of government is neither feasible nor desirable,[12] for there are several limitations on complete disclosure of governmental information, especially in matters relating to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. There is also a need to accept and trust the

government's decision-makers, which they have to also earn, when they plead that confidentiality in their meetings and exchange of views is needed to have a free flow of views on sensitive, vexatious and pestilent issues in which there can be divergent views. This is, however, not to state that there are no dangers in maintaining secrecy even on aspects that relate to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. Confidentiality may have some bearing and importance in ensuring honest and fair appraisals, though it could work the other way around also and, therefore, what should be disclosed would depend on authentic enquiry relating to the public interest, that is, whether the right to access and the right to know outweighs the possible public interest in protecting privacy or outweighs the harm and injury to third parties when the information relates to such third parties or the information is confidential in nature.

POINT No. 4: MEANING OF THE TERM 'PUBLIC INTEREST'

71. In ***Union of India*** v. ***Association for Democratic Reforms and Anr.*** MANU/SC/0394/2002 : (2002) 5 SCC 294 recognising the voters' right to know the antecedents of the candidates and the right to information which stems from Article 19(1)(a) of the Constitution, it was held that directions could be issued by the Court to subserve public interest in creating an informed citizenry, observing:

46. [...] The right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under:

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

6. Cumulative reading of plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction Under Article 32 read with Article 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest.

Clearly, the larger public interest in having an informed electorate, fair elections and creating a dialectical democracy had outweighed and compelled this Court to issue the directions notwithstanding disclosure of information relating to the personal assets, educational qualifications and antecedents including previous involvement in a criminal case of the contesting candidate.

72. Public interest, sometimes criticised as inherently amorphous and incapable of a precise definition, is a time tested and historical conflict of rights test which is often applied in the right to information legislation to balance right to access and protection of the conflicting right to deny access. In ***Mosley*** v. ***News Group Papers Ltd.*** 2008 EWHC 1777 (QB) it has been observed:

130... It is not simply a matter of personal privacy v. the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.

The RTI Act is no exception. Section 8(1)(j) of the RTI Act prescribes the requirement of satisfaction of '*larger public interest*' for access to information when the information relates to personal information having no relationship with any public activity or interest, or would cause unwarranted invasion of privacy of the individual. Proviso to Section 11(1) states that except in case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. The words '*possible harm or injury*' to the interest of the third party is preceded by the word '*importance*' for the purpose of comparison. '*Possible*' in the context of the proviso does not mean something remote, far-fetched or hypothetical, but a calculable, foreseeable and substantial possibility of harm and injury to the third party.

73. Comparison or balancing exercise of competing public interests has to be undertaken in both sections, *albeit* Under Section 8(1)(j) the comparison is between public interest behind the exemption, that is personal information or invasion of privacy of the individual and public interest behind access to information, whereas the test prescribed by the proviso to Section 11(1) is somewhat broader and wider as it requires comparison between disclosure of information relating to a third person or information supplied and treated as confidential by the third party and possible harm or injury to the third party on disclosure, which would include all kinds of 'possible' harm and injury to the third party on disclosure.

74. This Court in ***Bihar Public Service Commission*** v. ***Saiyed Hussain Abbas Rizwi and Anr.*** MANU/SC/1103/2012 : (2012) 13 SCC 61 has held that the phrase 'public interest' in Section 8(1)(j) has to be understood in its true connotation to give complete meaning to the relevant provisions of the RTI Act. However, the RTI Act does not specifically identify factors to be taken into account in determining where the public interest lies. Therefore, it is important to understand the meaning of the expression 'public interest' in the context of the RTI Act. This Court held 'public interest' to mean the general welfare of the public warranting the disclosure and the protection applicable, in which the public as a whole has a stake, and observed:

23. The satisfaction has to be arrived at by the authorities objectively and the consequences of such disclosure have to be weighed with regard to the circumstances of a given case. The decision has to be based on objective satisfaction recorded for ensuring that larger public interest outweighs unwarranted invasion of privacy or other factors stated in the provision. Certain matters, particularly in relation to appointment, are required to be dealt with great confidentiality. The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual. All these protections have to be given their due implementation as they spring from statutory exemptions. It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional

protection is available to a person with regard to the right to privacy. Thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India.

75. Public interest in access to information refers to something that is in the interest of the public welfare to know. Public welfare is widely different from what is of interest to the public. "Something which is of interest to the public" and "something which is in the public interest" are two separate and different parameters. For example, the public may be interested in private matters with which the public may have no concern and pressing need to know. However, such interest of the public in private matters would repudiate and directly traverse the protection of privacy. The object and purpose behind the specific exemption vide Clause (j) to Section 8(1) is to protect and shield oneself from unwarranted access to personal information and to protect facets like reputation, honour, etc. associated with the right to privacy. Similarly, there is a public interest in the maintenance of confidentiality in the case of private individuals and even government, an aspect we have already discussed.

76. The public interest test in the context of the RTI Act would mean reflecting upon the object and purpose behind the right to information, the right to privacy and consequences of invasion, and breach of confidentiality and possible harm and injury that would be caused to the third party, with reference to a particular information and the person. In an Article '*Freedom of Information and the Public Interest: the Commonwealth experience'* published in the Oxford University Commonwealth Law Journal,[13] the factors identified as favouring disclosure, those against disclosure and lastly those irrelevant for consideration of public interest have been elucidated as under:

it is generally accepted that the public interest is not synonymous with what is of interest to the public, in the sense of satisfying public curiosity about some matter. For example, the UK Information Tribunal has drawn a distinction between 'matters which were in the interests of the public to know and matters which were merely interesting to the public (i.e. which the public would like to know about, and which sell newspapers, but... are not relevant).

Factors identified as favouring disclosure include the public interest in: contributing to a debate on a matter of public importance; accountability of officials; openness in the expenditure of public funds, the performance by a public authority of its regulatory functions, the handling of complaints by public authorities; exposure of wrongdoing, inefficiency or unfairness; individuals being able to refute allegations made against them; enhancement of scrutiny of decision-making; and protecting against danger to public health or safety.

Factors that have been found to weigh against disclosure include: the likelihood of damage to security or international relations; the likelihood of damage to the integrity or viability of decision-making processes: the public interest in public bodies being able to perform their functions effectively; the public interest in preserving the privacy of individuals and the public interest in the preservation of confidences.

Factors irrelevant to the consideration of the public interest have also been identified. These include: that the information might be misunderstood; that the requested information in overly technical in nature; and that disclosure would result in embarrassment to the government or to officials.

77. In ***Campbell*** (supra), reference was made to the Press Complaints Commission Code of Practice to further elucidate on the test of public interest which stands at the intersection of freedom of expression and the privacy rights of an individual to hold that:

1. Public interest includes:

(i) Detecting or exposing crime or a serious misdemeanour.

(ii) Protecting public health and safety.

(iii) Preventing the public from being misled by some statement or action of an individual or organisation....

78. Public interest has no relationship and is not connected with the number of individuals adversely affected by the disclosure which may be small and insignificant in comparison to the substantial number of individuals wanting disclosure. It will vary according to the information sought and all circumstances of the case that bear upon the public interest in maintaining the exemptions and those in disclosing the information must be accounted for to judge the right balance. Public interest is not immutable and even time-gap may make a significant difference. The type and likelihood of harm to the public interest behind the exemption and public interest in disclosure would matter. The delicate balance requires identification of public interest behind each exemption and then cumulatively weighing the public interest in accepting or maintaining the exemption(s) to deny information in a particular case against the public interest in disclosure in that particular case. Further, Under Section 11(1), reference is made to the 'possible' harm and injury to the third party which will also have to be factored in when determining disclosure of confidential information relating to the third parties.

79. The last aspect in the context of public interest test would be in the form of clarification as to the effect of Sub-section (2) to Section 6 of the RTI Act which does not require the information seeker to give any reason for making a request for the information. Clearly, 'motive' and 'purpose' for making the request for information is irrelevant, and being extraneous cannot be a ground for refusing the information. However, this is not to state that 'motive' and 'purpose' may not be relevant factor while applying the public interest test in case of qualified exemptions governed by the public interest test. It is in this context that this Court in ***Aditya Bandopadhyay*** (supra) has held that beneficiary cannot be denied personal information relating to him. Similarly, in other cases, public interest may weigh in favour of the disclosure when the information sought may be of special interest or special significance to the applicant. It could equally be a negative factor when the 'motive' and 'purpose' is vexatious or it is a case of clear abuse of law.

80. In the RTI Act, in the absence of any positive indication as to the considerations which the PIO has to bear in mind while making a decision, the legislature had intended to vest a general

discretion in the PIO to weigh the competing interests, which is to be limited only by the object, scope and purpose of the protection and the right to access information and in Section 11(1), the 'possible' harm and injury to the third party. It imports a discretionary value judgment on the part of the PIO and the appellate forums as it mandates that any conclusion arrived at must be fair and just by protecting each right which is required to be upheld in public interest. There is no requirement to take a fortiori view that one trumps the other.

POINT No. 5: JUDICIAL INDEPENDENCE

81. Having dealt with the doctrine of the public interest under the RTI Act, we would now turn to examining its co-relation with transparency in the functioning of the judiciary in matters of judicial appointments/selection and importance of judicial independence.

82. Four major arguments are generally invoked to deny third-party or public access to information on appointments/selection of judges, namely, (i) confidentiality concerns; (ii) data protection; (ii) reputation of those being considered in the selection process, especially those whose candidature/eligibility stands negated; and (iv) potential chilling effect on future candidates given the degree of exposure and public scrutiny involved.[14] These arguments have become subject matter of considerable debate, if not outright criticism at the hands of jurists and authors.[15] Yet there are those who have expressed cynicism about the 'interview' process undertaken by the Judicial Service Commission (JSC) in recommending judges for appointment in South Africa, by pointing out the precariousness and the chilling effect it has on prospective candidates and consequently the best candidates often do not apply.[16] Recently, the majority judgment of the Constitutional Court of South Africa in ***Helen Suzman Foundation*** v. ***Judicial Service Commission***[17] by relying upon Rule 53(1)(b) of the Uniform Rules of Court, South Africa,[18] had directed the JSC to furnish the record of its deliberations, rejecting the contrary argument of candour and robustness as that of 'timorous fainthearts'. Debating with candour, the Court observed, is not equivalent to expression of impropriety. The candidates, it was noticed, had undergone gruelling scrutiny in the public interviews, and therefore disclosure of deliberation would not act as a dampener for future candidates. More importantly, the Constitutional Court had distinguished the authority and power with the Courts Under Rule 53 to access the deliberation record, with the different right to access information under the Promotion to Access to Information Act, 2000 (PAIA), which was the basis of the minority judgment for rejection of production of the JSC's deliberation record. The majority held that PAIA and Rule 53 serve different purposes, there being a difference in the nature of, and purposes, and therefore it would be inapt to transpose PAIA proscriptions on access Under Rule 53. The PAIA grants any person or busybody a right to access any information without explaining whatsoever as to why she or he requires the information. This had to be balanced, with the need to incentivise people to furnish private information, where such information is required for facilitating the government machinery, and therefore, considerations of confidentiality are applied as the person furnishing information must be made aware that the information would not be unhesitatingly divulged to others, including busybodies, for no particular reason. This facilitates the exercise of power and performance of functions of the state functionaries. In court matters Under Rule 53, concerns of confidentiality could be addressed by imposing stringent and restrictive conditions on the right to access information, including furnishing of confidentiality undertakings for restraining the divulgence of details to third parties.

83. The United Kingdom's Data Protection Act, 2018 grants class exemption to all personal data processed for the purpose of assessing a person's suitability for judicial office, from certain rights including the right of the data subject to be informed, guaranteed under the European Union General Data Protection Regulation being given effect to by the Data Protection Act.[19] Similarly, in the context of the European Union, opinions of 'the Article 255 Panel'[20] and 'the Advisory Panel'[21], entrusted with the task of advising on the suitability of candidates as judges to the Court of Justice of the European Union and the European Court of Human Rights are inaccessible to the public and their opinions have limited circulation, as they are exclusively forwarded to the representatives of governments of the member states in the case of European Union[22] and the individual governments in the case of Council of Europe[23], respectively. The Council of the European Union,[24] for instance, in consultation with 'Article 255' Panel, has denied requests for public access to opinions issued by the Panel,[25] in light of the applicable exceptions provided for in Regulation No. 1049/2001[26]. Such opinions, the Council has observed, largely include personal data of the candidates, viz. factual elements concerning the candidates' professional experience and qualifications and the Panel's assessment of the candidate's competences and, therefore, access to relevant documents is denied in order to protect the privacy and integrity of the individual.[27] However, a part of these opinions which do not contain personal data and provide a description of the procedure adopted and criteria applied by the Panel have been released as "Activity Reports" in the framework of partial access to such information. Opinions that are unfavourable to the appointment of the candidates will be exempt from disclosure as they can hamper commercial interests of the candidates in their capacity as legal practitioners,[28] whereas positive opinions are exempted from disclosure as such opinions can lead to comparison and public scrutiny of the most and least favoured qualities of the successful candidates, potentially interfering with the proceedings of the Court of Justice.[29] Lastly, disclosure of opinions, the Council has observed, will be exempted if such disclosure could "seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."[30]

84. More direct and relevant in the Indian context would be the decision of this Court in ***Supreme Court Advocates-on-Record Association*** v. ***Union of India*** MANU/SC/1183/2015 : (2016) 5 SCC 1, where a Constitutional Bench of five judges had dealt with the constitutional validity of the National Judicial Appointments Commission. A concurring judgment had dealt with the aspect of transparency in appointment and transfer of judges and the privacy concerns of the judges who divulge their personal information in confidence, to opine as under:

949. In the context of confidentiality requirements, the submission of the learned Attorney General was that the functioning of NJAC would be completely transparent. Justifying the need for transparency it was submitted that so far the process of appointment of Judges in the Collegium System has been extremely secret in the sense that no one outside the Collegium or the Department of Justice is aware of the recommendations made by the Chief Justice of India for appointment of a Judge of the Supreme Court or the High Courts. Reference was made to *Renu* v. *District & Sessions Judge,* MANU/SC/0096/2014 : (2014) 14 SCC 50 to contend that in the matter of appointment in all judicial institutions "complete darkness in the lighthouse has to be removed".

950. In addition to the issue of transparency a submission was made that in the matter of appointment of Judges, civil society has the right to know who is being considered for appointment. In this regard, it was held in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union*

of India MANU/SC/0406/1984 : (1985) 1 SCC 641 that the people have a right to know. Reliance was placed on *Attorney General* v. *Times Newspapers Ltd.* MANU/UKHL/0019/1973 : 1974 AC 273: (1973) 3 WLR 298: (1973) 3 All ER 54 (HL) where the right to know was recognised as a fundamental principle of the freedom of expression and the freedom of discussion.

951. In *State of U.P.* v. *Raj Narain* MANU/SC/0032/1975 : (1975) 4 SCC 428 the right to know was recognised as having been derived from the concept of freedom of speech.

952. Finally, in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, MANU/SC/0412/1988 : (1988) 4 SCC 592 it was held that the right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land Under Article 21 of our Constitution.

953. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.

954. It is possible to argue that information voluntarily supplied by a person who is recommended for appointment as a Judge might not have a right to privacy, but at the same time, since the information is supplied in confidence, it is possible to argue that it ought not to be disclosed to third party unconcerned persons. Also, if the recommendation is not accepted by the President, does the recommended person have a right to non-disclosure of the adverse information supplied by the President? These are difficult questions to which adequate thought has not been given and merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat.

85. Earlier, the Constitution Bench of nine judges had in Second Judges' Case, that is ***Supreme Court Advocates on Record Association and Ors.*** v. ***Union of India*** MANU/SC/0073/1994 : (1993) 4 SCC 441 overruled the majority opinion in ***S.P. Gupta*** (supra) (the first Judge's case) and had provided for primacy to the role of the Chief Justice of India and the collegium in the matters of appointment and transfer of judges. Speaking on behalf of the majority, J.S. Verma, J., had with regard to the justiciability of transfers, summarised the legal position as under:

480. The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decisions, which is ordinarily needed as

a check against possible executive excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated.

The reduction of the area of discretion to the minimum, the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.

481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

482. This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busy-bodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta* which expanding the concept of locus standi, was adverted to recently by a Constitution Bench in *Krishna Swami v. Union of India* MANU/SC/0222/1993 : (1992) 4 SCC 605. It is therefore, necessary to spell out clearly the limited scope of judicial review in such matters, t avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the cases of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making.

86. That the independence of the judiciary forms part of our basic structure is now well established. ***S.P. Gupta*** (supra) (the first Judge's case) had observed that this independence is one amongst the many other principles that run through the entire fabric of the Constitution and is a part of the Rule of law under the Constitution. The judiciary is entrusted with the task of keeping the other two organs within the limits of law and to make the Rule of law meaningful and effective. Further, the independence of judiciary is not limited to judicial appointments to the Supreme Court and the High Courts, as it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It consists of many dimensions including fearlessness from other power centres, social, economic and political, freedom from prejudices acquired and nurtured by the class to which the judges belong and the like. This wider concept of independence of judiciary finds mention in ***C. Ravichandran Iyer*** v. ***Justice A.M. Bhattacharjee and Ors.*** MANU/SC/0771/1995 : (1995) 5 SCC 457, ***High Court of Judicature at Bombay*** v. ***Shashikant S. Patil*** MANU/SC/0692/1997 : (1997) 6 SCC 339 and ***Jasbir Singh*** v. ***State of Punjab*** MANU/SC/4529/2006 : (2006) 8 SCC 294.

87. In ***Supreme Court Advocates' on Record Association*** (2016) (supra) on the aspect of the independence of the judiciary, it has been observed:

713. What are the attributes of an independent judiciary? It is impossible to define them, except illustratively. At this stage, it is worth recalling the words of Sir Ninian Stephen, a former Judge of the High Court of Australia who memorably said:

[An] independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed.

It is this fragile bastion that needs protection to maintain its independence and if this fragile bastion is subject to a challenge, constitutional protection is necessary.

714. The independence of the judiciary takes within its fold two broad concepts: (*1*) Independence of an individual Judge, that is, decisional independence; and (*2*) Independence of the judiciary as an institution or an organ of the State, that is, functional independence. In a lecture on Judicial Independence, Lord Phillips said:

In order to be impartial a Judge must be independent; personally independent, that is free of personal pressures and institutionally independent, that is free of pressure from the State.

xx xx xx

726. Generally speaking, therefore, the independence of the judiciary is manifested in the ability of a Judge to take a decision independent of any external (or internal) pressure or fear of any external (or internal) pressure and that is "decisional independence". It is also manifested in the ability of the institution to have "functional independence". A comprehensive and composite definition of "independence of the judiciary" is elusive but it is easy to perceive.

It is clear from the aforesaid quoted passages that the independence of the judiciary refers to both decisional and functional independence. There is reference to a report titled '*Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*'[31] which had observed that judges are not elected by the people (relevant in the context of India and the United Kingdom) and, therefore, derive their authority and legitimacy from their independence from political or other interference.

88. We have referred to the decisions and viewpoints to highlight the contentious nature of the issue of transparency, accountability and judicial independence with various arguments and counterarguments on both sides, each of which commands merit and cannot be ignored. Therefore, it is necessary that the question of judicial independence is accounted for in the balancing exercise. It cannot be doubted and debated that the independence of the judiciary is a matter of ennobled public concern and directly relates to public welfare and would be one of the factors to be taken into account in weighing and applying the public interest test. Thus, when the public interest demands the disclosure of information, judicial independence has to be kept in mind while deciding the question of exercise of discretion. However, we should not be understood to mean that the independence of the judiciary can be achieved only by denial of access to information.

Independence in a given case may well demand openness and transparency by furnishing the information. Reference to the principle of judicial independence is not to undermine and avoid accountability which is an aspect we perceive and believe has to be taken into account while examining the public interest in favour of disclosure of information. Judicial independence and accountability go hand in hand as accountability ensures, and is a facet of judicial independence. Further, while applying the proportionality test, the type and nature of the information is a relevant factor. Distinction must be drawn between the final opinion or resolutions passed by the collegium with regard to appointment/elevation and transfer of judges with observations and indicative reasons and the inputs/data or details which the collegium had examined. The rigour of public interest in divulging the input details, data and particulars of the candidate would be different from that of divulging and furnishing details of the output, that is the decision. In the former, public interest test would have to be applied keeping in mind the fiduciary relationship (if it arises), and also the invasion of the right to privacy and breach of the duty of confidentiality owed to the candidate or the information provider, resulting from the furnishing of such details and particulars. The position represents a principled conflict between various factors in favour of disclosure and those in favour of withholding of information. Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future.

Questions referred to the Constitution Bench are accordingly answered, observing that it is not possible to answer these questions in absolute terms, and that in each case, the public interest test would be applied to weigh the scales and on balance determine whether information should be furnished or would be exempt. Therefore, a universal affirmative or negative answer is not possible. However, independence of judiciary is a matter of public interest.

CONCLUSIONS

89. In view of the aforesaid discussion, we dismiss Civil Appeal No. 2683 of 2010 and uphold the judgment dated 12th January, 2010 of the Delhi High Court in LPA No. 501 of 2009 which had upheld the order passed by the CIC directing the CPIO, Supreme Court of India to furnish information on the judges of the Supreme Court who had declared their assets. Such disclosure would not, in any way, impinge upon the personal information and right to privacy of the judges. The fiduciary relationship Rule in terms of Clause (e) to Section 8(1) of the RTI Act is inapplicable. It would not affect the right to confidentiality of the judges and their right to protect personal information and privacy, which would be the case where details and contents of personal assets in the declaration are called for and sought, in which event the public interest test as applicable vide Section 8(1)(j) and proviso to Section 11 (1) of the RTI Act would come into operation.

90. As far as Civil Appeal Nos. 10045 of 2010 and 10044 of 2010 are concerned, they are to be partly allowed with an order of remit to the CPIO, Supreme Court of India to re-examine the matter after following the procedure Under Section 11(1) of the RTI Act as the information relates to third parties. Before a final order is passed, the concerned third parties are required to be issued

notice and heard as they are not a party before us. While deciding the question of disclosure on remit, the CPIO, Supreme Court of India would follow the observations made in the present judgment by keeping in view the objections raised, if any, by the third parties. We have refrained from making specific findings in the absence of third parties, who have rights Under Section 11(1) and their views and opinions are unknown.

The reference and the appeals are accordingly disposed of.

N.V. Ramana, J.

In the domain of human rights, right to privacy and right to information have to be treated as co-equals and none can take precedence over the other, rather a balance needs to be struck

91. I have had the opportunity to peruse the erudite judgments of my learned brothers, who have reflected extensively on the importance of this case, concerning the aspect of privacy and right to information in detail. However, while concurring with the view of the majority, I feel the need to provide independent reasons with respect to certain aspects for coming to the aforesaid conclusion, as this case has large ramification on the rights of an individual in comparison to the rights of the society. The aspect of transparency and accountability which are required to be balanced with right to privacy, has not been expounded by this Court anytime before, thereby mandating a separate opinion.

92. This case concerns the balance which is required between two important fundamental rights i.e. right to information and right to privacy. Often these two rights are seen as conflicting, however, we need to reiterate that both rights are two faces of the same coin. There is no requirement to see the two facets of the right in a manner to further the conflict, what is herein required is to provide balancing formula which can be easily made applicable to individual cases. Moreover, due to the fact of infancy in privacy jurisprudence has also contributed to the meticulous task we are burdened herein.

93. In this view, this case is before us to adjudicate whether the application dated 06.07.2009 (hereinafter referred to as "**first application**") seeking information by the Respondent, separate applications dated 23.01.2009 (hereinafter referred to as "**second application**") and 10.11.2007 (hereinafter referred to as "**third application**") are maintainable or not. The first application concerns the information relating to complete correspondence between the Chief Justice of India and Mr. Justice R. Reghupati. The second application concerns the collegium file notings relating to the appointment of Justice H.L. Dattu, Justice A.K. Ganguly and Justice R.M. Lodha. The third application relates to information concerning declaration of assets made by the puisne judges of the Supreme Court to the Chief Justice of India and the judges of the High Courts to the Chief Justices of the respective High Courts.

94. The Respondent/applicant submitted that the aforesaid three applications before the Central Public Information Officer of the Supreme Court of India (hereinafter "**CPIO, Supreme Court of India**") came to be dismissed vide orders dated 04.08.2009, 25.02.2009 and 30.11.2007 respectively.

95. Aggrieved by rejection of the first application the Respondent approached the first appellate authority in appeal which was also dismissed vide order dated 05.09.2009. Being aggrieved, the Respondent further preferred a second appeal to the Central Information Commission [for short "**CIC**"]. The CIC allowed this appeal vide order dated 25.11.2009 and directed the disclosure of information sought. Aggrieved by the same, the CPIO, Supreme Court of India has preferred Civil Appeal No. 10045 of 2010.

96. Concerning the second application, the CPIO, Supreme Court of India, by order dated 25.02.2009 had denied the information sought therein. Being aggrieved, the Respondent preferred the first appeal which came to be dismissed vide order dated 25.03.2009 by the first appellate authority. The second appeal filed before the CIC was allowed vide order dated 24.11.2009. Aggrieved the CPIO, Supreme Court of India has preferred Civil Appeal No. 10044 of 2010.

97. The third application was dismissed by the CPIO, Supreme Court of India vide order dated 30.11.2007 on the ground that the information was not held by the Registry of the Supreme Court of India. The first appeal was disposed of with an order directing the CPIO, Supreme Court of India to consider the question of applicability of Section 6(3) of the Right to Information Act, 2005 (hereinafter "**the RTI Act**"). The CPIO vide order 07.02.2009 required the Respondent/applicant to approach the concerned public authority of the High Courts. Aggrieved the Respondent/applicant directly approached the CIC in appeal which was allowed by order dated 06.01.2009. Aggrieved by the same the Appellant filed Writ Petition (C) No. 288 of 2009 before the Delhi High Court. The Ld. Single Judge by order dated 02.09.2009 directed the CPIO, Supreme Court of India to release the information sought by the Respondent. Being aggrieved, the CPIO, Supreme Court of India filed Letter Patent Appeal No. 501 of 2009 which was subsequently referred to a full Bench of the High Court. The full Bench by order dated 12.01.2010 dismissed the letter patent appeal. Aggrieved, CPIO, Supreme Court of India has filed Civil Appeal No. 2683 of 2010 before this Court.

98. In this context, all the three appeals were tagged by an order dated 26.11.2010, a reference was made for constituting a larger Bench and accordingly it is before us.

99. Before we dwell into any other aspect a preliminary objections were taken by the Appellants that this Bench could not have dealt with this matter considering the fact that this Court's functionality had a direct impact on the same. We do not subscribe to the aforesaid opinion for the reason that this Court while hearing this matter is sitting as a Court of necessity. In the case of ***Election Commission of India v. Dr. Subramaniam Swamy***, MANU/SC/0459/1996 : (1996) 4 SCC 104, it was held as under:

16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit there from. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is

challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.

100. In this light, Appellants have to accept the decision of this Court which is the final arbiter of any disputes in India and also the highest court of constitutional matters. In this light, such objections cannot be sustained.

101. Before we proceed any further we need to have a brief reference to the scheme of RTI Act. The statement of objects and reasons envisage a noble goal of creating a democracy which is consisting of informed citizens and a transparent government. It also provides for a balance between effective government, efficient operations, expenditure of such transparent systems and requirements of confidentiality for certain sensitive information. It recognises that these principles are inevitable to create friction *inter se* and there needs to be harmonisation of such conflicting interests and there is further requirement to preserve the supremacy of democratic ideal. The recognition of this normative democratic ideal requires us to further expound upon the optimum levels of accountability and transparency of efficient operations of the government. Under Section 2(f), information is defined as '*any material in any form including records, documents, memos, e-mails, opinions, advises, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.*'

102. The purport of this Section was to cover all types of information contained in any format to be available under the ambit of the RTI Act. The aforesaid definition is further broadened by the definition of '*record*' provided Under Section 2(i) of the RTI Act. Right to Information as defined Under Section 2(j) of the RTI Act means the right to information accessible under this Act which is held by or under the control of any public authority.

103. Chapter II of the RTI Act begins with a statement Under Section 3 by proclaiming that all citizens shall have right to information subject to the provisions of the RTI Act. Section 4 creates an obligation on public authorities to maintain a minimum standard of data which would be freely available for the citizens. Further this Section also mandates proactive dissemination of data for informing the citizens by utilizing various modes and means of communications. Section 5 requires every public authority to designate concerned CPIO or SPIO, as the case may be for providing information to those who seeks the same.

104. Section 6 of the RTI Act provides for procedure required to be followed by a person who desires to obtain information under the RTI Act. Section 7 further provides the time frame within such designated officers are to decide the applications filed by the information seeker. For our purposes Section 8 deems relevant and is accordingly extracted hereunder -

8. Exemption from disclosure of information --

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

105. It may be relevant to note Section 10 of the RTI Act which deals with severability of the exempted information. The mandate of the Section is that where a request for access to information contains both exempted as well as non-exempted parts, if the non-exempted parts could be revealed, such parts which could be reasonably severed and can be provided as information under the Act.

106. Section 11 which is material for the discussion involved herein states as under -

11. Third party information.--

(1) Where a Central Public Information Officer or the State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, Under Sub-section (1) to a third party in respect of any information

or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in Section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request Under Section 6, if the third party has been given an opportunity to make representation Under Sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given Under Sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal Under Section 19 against the decision.

107. The mandate Under Section 11 of the RTI Act enshrines the principles of natural justice, wherein, the third party is provided with an opportunity to be heard and the authority needs to consider whether the disclosure in public interest outweighs the possible harm in disclosure to the third party. It must be noted that the use of term 'confidential' as occurring Under Section 11, subsumes commercial confidential information, other types of confidential information and private information.

108. We may not concentrate on other procedural Section provided under the RTI Act as they do not have any bearing on the case concerned.

109. Having observed the scheme of the RTI Act we need to understand that right to information stems from Article 19(1)(a) of the Constitution which guarantees freedom of expression. Accordingly, this Court in ***State of Uttar Pradesh v. Raj Narain***, MANU/SC/0032/1975 : (1975) 4 SCC 428 and ***S.P. Gupta v. Union of India***, MANU/SC/0080/1981 : (1981) Supp. (1) SCC 87, held that a citizen cannot effectively exercise his freedom of speech and expression unless he/she is informed of the governmental activities. Our country being democratic, the right to criticise the government can only be effectively undertaken if accountability and transparency are maintained at appropriate levels. In view of the same, right to information can squarely said to be a corollary to the right to speech and expression.

110. Firstly, the Appellants have contended that the information are not held with the Registry of the Supreme Court, rather the Chief Justice of India is holding the aforesaid information concerning the exchanges between Mr. Justice R. Reghupati and the then Chief Justice of India. In this context, the term '*held*' acquires important position. The term '*held*' usually connotes the power, custody, or possession with the person. However, the mandate of the Act requires this term to be interpreted wherein the association between held and the authority needs to be taken into consideration while providing a meaning for the aforesaid term. At this juncture, we need to observe the case of ***University of New Castle upon Tyne v. Information Commissioner and British Union for Abolition of Vivisection***, [2011] UKUT 185 AAC, wherein the upper tribunal has held as under -

'Hold' is an ordinary English word. In our judgment it is not used in some technical sense in the Act. We do not consider that it is appropriate to define its meaning by reference to concepts such as legal possession or bailment, or by using phrases taken from court Rules concerning the

obligation to give disclosure of documents in litigation. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that 'holding' is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, we consider that Section 1 would not apply merely because information is contained in a document that happens to be physically on the authority's premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority. For example, an employee of the authority may have his own personal information on a document in his pocket while at work, or in the drawer of his office desk; that does not mean that the information is held by the authority.

111. From the aforesaid it can be concluded that a similar interpretation can be provided for term 'held' as occurring Under Section 2(j) of the Act. Therefore, in view of the same the term 'held' does not include following information -

1. That is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it;

2. That is accidentally left with a public authority;

3. That just passes through a public authority;

4. That 'belongs' to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority's premises.[32]

Having clarified the aforesaid aspect we are of the opinion that the nature of information in relation to the authority concerned requires to be seen. The fact that the information sought in the instant matter is in custody with the Chief Justice of India as he is the administrative head of the Supreme Court, squarely require us to hold that the concerned authority is holding the information and accordingly the contention of the Appellants does not have any merit.

112. The Appellants have argued that the information with respect to the assets declared with the Chief Justice of India or Chief Justices of respective High Courts are held in confidence, fiduciary capacity; moreover, the aforesaid information is private information of the judges which cannot be revealed under the RTI Act.

113. The exemptions to right to information as noted above are contained Under Section 8 of the RTI Act. Before we analyse the aforesaid provision, we need to observe basic principles, concerning interpretation of exemption clauses. There is no doubt it is now well settled that exemption clauses need to be construed strictly. They need to be given appropriate meaning in terms of the intention of the legislature [see ***Commissioner of Customs (Import) v. Dilip Kumar and Ors.,*** MANU/SC/1385/2015 : (2018) 9 SCC 40; ***Rechnungshof v. Österreichischer Rundfunk and Ors.,*** C-465/00].

114. At the cost of repetition we note that the exemption of right to information for confidential information is covered Under Section 8(1)(d), exemption from right to information under a fiduciary relationship is covered Under Section 8(1)(e) and the exemption from private information is contained Under Section 8(1)(j) of the RTI Act.

115. The first contention raised by the Appellants is that the aforesaid information is confidential, therefore the same is covered under the exemption as provided Under Section 8(1)(d) of the RTI Act. The aforesaid exemption originates from a long time of judge made law concerning breach of confidence (which are recently termed as misuse of private information).

116. Under the classic breach of confidence action, three requirements were necessary for bringing an action under this head. These conditions are clearly mentioned in the opinion of Megarry, J., in ***Coco v. Clark***, [1968] FSR 415; wherein, the conditions are first, the information itself, i.e. 'information is required to have necessary quality about confidence of the same'; *second*, 'the information must have been imparted in circumstances importing an obligation of confidence'; *third*, 'there must be unauthorized use of information which will be detriment to the party communicating'.

117. Breach of confidence was not an absolute right and public interest, incorporated from long time under the common law jurisprudence. This defence of public interest can be traced to initial case of ***Gartside v. Outram***, (1856) 26 LJ Ch (NS) 113, wherein it was held that there is no confidence as to disclosure in iniquity. This iniquity was later expanded by Lord Denning in ***Fraser v. Evans***, [1969] 1 QB 349, wherein the iniquity was referred as merely as an example of 'justice cause or excuse' for a breach of confidence. This iniquity was widened further in Initial ***Service v. Putterill***, [1968] 1 QB 396, wherein it was held that iniquity covers any misconduct of nature that it ought to be disclosed to others in the public interest. In this line of precedents Thomas Ungoed, J., in ***Beloff v. Pressdram***, [1973] 1 All ER 24, noted that iniquity would cover 'any matter, carried out or contemplated, in breach of country's security or in breach of law including statutory duty, fraud or otherwise destructive of the country or its people and doubtless other misdeeds of similar gravity.'

118. Eventually the language of iniquity was shaken and discourse on public interest took over as a defence for breach of confidence [See ***Lion Laboratories v. Evans***, MANU/UKWA/0023/1984 : [1985] QB 526]. It would be necessary to quote Lord Goff in ***Her Majesty's Attorney General v. The Observer Ltd. and Ors.,*** MANU/UKHL/0008/1988 : [1991] AC 109, wherein he noted that "it is now clear that the principle [of iniquity] extends to matters of which disclosure is required in public interest".

119. The aforesaid expansion from the Rule of iniquity to public interest defence has not caught the attention of Australian courts wherein, Justice Gummow, in ***Corrs Pavey Whiting and Byrne v. Collector of Customs***, (1987) 14 FCR 434 and ***Smith Kline and French Laboratories [Australia] Ltd. v. Department of Community Services and Health***, (1990) 22 FCR 73, reasoned that public interest was "picturesque if somewhat imprecise" and "not so much a Rule of law as an invitation to judicial idiosyncrasy by deciding each case on ad-hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence".

120. Even in England there has been a shift of reasoning from an absolute public interest defence to balancing of public interest. At this point we may observe the case of ***Woodward v. Hutchins***, [1977] 1 WLR 760, wherein it was observed "It is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth".

121. Section 8(1)(d) of the RTI Act has limited the action of defence of confidentiality to only commercial information, intellectual property rights and those which are concerned with maintaining the competitive superiority. Therefore, aforesaid Section is only relatable to breach of confidence of commercial information as classically developed. Although there are examples wherein commercial confidentiality are also expanded to other types of breach of confidential information, however, Under Section 8(1)(d) does not take into its fold such breach of confidential information actions.

122. Coming to other types of confidentiality, we need to note that the confidentiality cannot be only restricted to commercial confidentiality, rather needs to extend to other types of confidentialities as well. [***Duchess of Argyll v. Duke of Argyll***, 1967 Ch 302] Under the RTI Scheme such other confidential information are taken care Under Section 11 of the RTI Act. The language and purport Under Section 11 extends to all types of confidentialities, inclusive of both commercial and other types of confidentialities. The purport of this Section is that an opportunity should be provided to third party, who treats the information as confidential. The 'test of balancing public interest' needs to be applied in cases of confidential information other than commercial information as well, Under Section 11 of the RTI Act, as discussed. In this light, the concerned third parties need to be heard and thereafter the authorities are required to pass order as indicated herein.

123. Further, the Appellants have contended that the information sought herein relating to the third party are covered under exemptions as provided in Section 8(1)(j) of the RTI Act i.e. private information.

124. The development from breach of confidence to misuse of private information/privacy claim was gradual. There was shift from the focus on relationship to whether the information itself had a requisite confidential quality [refer to Her ***Majesty's Attorney General*** case (supra)]. This shift in focus resulted in the evolution of misuse of private information or privacy claim, from its predecessor of confidentiality. In the case of ***Campbell v. M.G.N.,*** MANU/UKHL/0050/2004 : [2004] UKHL 22, wherein the breach of misuse of private information evolved as cause of action. The modification which happened in the new cause of action is that the initial confidential relationship was not material, which was earlier required under the breach of confidence action. The use of term confidential information was replaced with more natural descriptive term information in private. The change from breach of confidence which was an action of equity, to misuse of private information, which was a tort provided more structural definitiveness and reduced the discretionary aspect.

125. The purport of the Section 8(1)(j) of the RTI Act is to balance privacy with public interest. Under the provision a two steps test could be identified wherein the first step was: (i) whether there is a reasonable expectation of privacy, and (ii) whether on an ultimate balancing analysis, does

privacy give way to freedom of expression? We should acknowledge that these two tests are very difficult to be kept separate analytically.

First Step

126. The first step for the adjudicating authority is to ascertain whether the information is private and whether the information relating the concerned party has a reasonable expectation of privacy. In ***Murray v. Express Newspaper plc,*** [2009] Ch 481, it was held as under

As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

127. From the aforesaid discussion we can note that there are certain factors which needs to be considered before concluding whether there was a reasonable expectation of privacy of the person concerned. These non-exhaustive factors are;

1. The nature of information.

2. Impact on private life.

3. Improper conduct.

4. Criminality

5. Place where the activity occurred or the information was found.

6. Attributes of claimants such as being a public figure, a minor etc and their reputation.

7. Absence of consent.

8. Circumstances and purposes for which the information came into the hands of the publishers.

9. Effect on the claimant.

10. Intrusion's nature and purpose.

These non-exhaustive factors are to be considered in order to come to a conclusion whether the information sought is private or does the persons has a reasonable expectations of privacy. In certain cases we may conclude that there could be certain information which are inherently private and are presumptively protected under the privacy rights. These informations include gender, age and sexual preferences etc. These instances need to be kept in mind while assessing the first requirement under the aforesaid test.

128. If the information is strictly covered under the aforesaid formulation, then the person is exempted from the right to information unless 'the public interest test' requires to trump the same.

Second Step

129. Having ascertained whether the information is private or not, a judge is required to adopt a balancing test to note whether the public interest justifies discloser of such information Under Section 8(1)(j) of the RTI Act. The term 'larger public interest' needs to be understood in light of the above discussion which points that a 'balancing test' needs to be incorporated to see the appropriateness of discloser. There are certain basic principles which we need to keep in mind while balancing the rights which are relevant herein.

130. That the right to information and right to privacy are at an equal footing. There is no requirement to take an a priori view that one right trumps other. Although there are American cases, which have taken the view that the freedom of speech and expression trumps all other rights in every case. However, in India we cannot accord any such priority to the rights.

131. The contextual balancing involves '***proportionality test***'. [See ***K.S. Puttaswamy v. Union of India***, MANU/SC/1044/2017 : (2017) 10 SCC 1]. The test is to see whether the release of information would be necessary, depends on the information seeker showing the 'pressing social need' or 'compelling requirement for upholding the democratic values'. We can easily conclude that the exemption of public interest as occurring Under Section 8(1)(j) requires a balancing test to be adopted. We need to distinguish two separate concepts i.e. "*interest of the public*" and "*something in the public interest*." Therefore, the material distinction between the aforesaid concepts concern those matters which affect political, moral and material welfare of the public need to be distinguished from those for public entertainment, curiosity or amusement. Under Section 8(1)(j) of the RTI Act requires us to hold that only the former is an exception to the exemption. Although we must note that the majority opinion in ***K.S. Puttaswamy*** (supra) has held that the data privacy is part of the right to privacy, however, we need to note that the concept of data protection is still developing [*refer* **Google Spain v. AEPD**, C/131/12; ***Bavarian Lager* v. *Commission***, [2007] ECR II-4523]. As we are not concerned with the aforesaid aspects, we need not indulge any more than to state that there is an urgent requirement for integrating the principles of data protection into the right to information jurisprudence.

132. Coming to the aspect of transparency, judicial independence and the RTI Act, we need to note that there needs to be a balance between the three equally important concepts. The whole bulwark of preserving our Constitution, is trusted upon judiciary, when other branches have not been able to do so. As a shield, the judicial independence is the basis with which judiciary has maintained its trust reposed by the citizens. In light of the same, the judiciary needs to be protected from attempts to breach its independence. Such interference requires calibration of appropriate amount of transparency in consonance with judicial independence.

133. It must be kept in the mind that the transparency cannot be allowed to run to its absolute, considering the fact that efficiency is equally important principle to be taken into fold. We may note that right to information should not be allowed to be used as a tool of surveillance to scuttle

effective functioning of judiciary. While applying the second step the concerned authority needs to balance these considerations as well.

134. In line with the aforesaid discussion, we need to note that following non-exhaustive considerations needs to be considered while assessing the 'public interest' Under Section 8 of the RTI Act-

a. Nature and content of the information

b. Consequences of non-disclosure; dangers and benefits to public

c. Type of confidential obligation.

d. Beliefs of the confidant; reasonable suspicion

e. Party to whom information is disclosed

f. Manner in which information acquired

g. Public and private interests

h. Freedom of expression and proportionality.

135. Having ascertained the test which is required to be applied while considering the exemption Under Section 8(1)(j) of the RTI Act, I may note that there is no requirement to elaborate on the factual nuances of the cases presented before us. Accordingly, I concur with the conclusions reached by the majority.

Dr. D.Y. Chandrachud, J.

INDEX

G Fiduciary relationship

H The right to privacy and the right to know

I Conclusion

J Directions

A Introduction

The backdrop

136. This batch of three civil appeals[33] raises questions of constitutional importance bearing on the right to know, the right to privacy and the transparency, accountability and independence of the judiciary.

137. In the first of the appeals[34] ("**the appointments case**"), the Central Public Information Officer[35] of the Supreme Court of India challenges an order dated 24 November 2009 of the Central Information Commission[36]. The order directs the CPIO to provide information sought by the Respondent in application under the Right to Information Act 2005[37]. The Respondent, in an application dated 23 January 2009 sought copies of the correspondence exchanged between constitutional authorities together with file notings, relating to the appointment of Justice H L Dattu, Justice A K Ganguly and Justice R M Lodha (superseding the seniority of Justice A P Shah, Justice A K Patnaik and Justice V K Gupta). The Appellant declined to provide the information sought in the application on the ground that the Registry of the Supreme Court does not deal with matters pertaining to the appointment of judges, and appointments of judges to the higher judiciary are made by the President of India, according to procedure prescribed by law. The first appellate authority rejected the appeal on the ground that the information sought by the Respondent was not covered within the ambit of Section 2 (f)[38] and (j)[39] of the RTI Act. The Respondent preferred a second appeal before the CIC. On 24 November 2009, the CIC directed the Appellant to provide the information sought by the Respondent. The Appellant has moved this Court Under Article 136 of the Constitution challenging the decision of the CIC ordering disclosure.

138. In the second of the three appeals[40] ("**the assets case**"), the Appellant challenges a judgment dated 12 January, 2010 of a Full Bench of the Delhi High Court upholding the orders of the Single Judge[41] dated 2 September 2009 and the CIC dated 6 January 2009[42] directing the disclosure of information. On 10 November 2007, the Respondent filed an application seeking a copy of the resolution dated 7 May 1997 of the judges of the Supreme Court requiring every sitting judge, and all future judges upon assuming office, to make a declaration of assets in the form of real estate or investments held in their names or the names of their spouses or any person dependant on them to the Chief Justice of the Court within a reasonable time. The Respondent also requested "information on any such declaration of assets etc to respective Chief Justices in State". While the Appellant provided a copy of the resolution dated 7 May 1997, the CPIO declined (by an order dated 30 November 2007) to provide information concerning the declaration of assets by judges of the Supreme Court and the High Court on the ground that the Registry of the Supreme Court did not hold it. The information pertaining to the declaration of assets by High Court judges, the

Appellant stated, were in the possession of the Chief Justices of the High Courts. The first appellate authority remanded the matter back to the Appellant for transfer of the RTI application to the High Courts Under Section 6(3)[43]. The Appellant declined to transfer the RTI application to the CPIOs of the High Courts on the ground that when the Respondent filed the RTI application, he was aware that the information with respect to the declaration of assets by the judges of the High Court was available with the High Courts which formed distinct public authorities. On 6 January 2009, the CIC held in the second appeal that the information concerning the judges of the Supreme Court was available with its Registry and that the Appellant represented the Supreme Court as a public authority. Therefore, the Appellant was held to be obliged to provide the information under the RTI Act unless, the disclosure of information was exempted by law. The CIC held that the information sought by the Respondent was not covered under the exemptions in Clauses (e) or (j) of Section 8(1)[44] and directed the Appellant to provide the information sought by the Respondent. The Appellant instituted a writ petition[45] before the Delhi High Court. On 2 September 2009, a Single Judge of the High Court dismissed the petition holding, inter alia, that the declaration of assets furnished by the judges of the Supreme Court to the Chief Justice of India and its contents constituted "information", subject to the provisions of the RTI Act. The Single Judge held that: (i) judges of the Supreme Court hold an independent office; (ii) there exist no hierarchies in judicial functions; (iii) the Chief Justice of India does not hold such "information" in a fiduciary capacity; and (iv) the information sought by the Respondent was not exempt Under Section 8 (1)(e). In a Letters Patent Appeal, the Full Bench of the Delhi High Court upheld the decision of the Single Judge. The Appellant has challenged the decision of the Full Bench.

139. In the third civil appeal (**"the undue influence case"**), the Appellant has challenged the order of the CIC dated 24 November 2009[46], by which the Appellant was directed to provide information sought by the Respondent in his RTI application. On 6 July, 2009, the Respondent filed an RTI application on the basis of a newspaper report seeking the complete correspondence exchanged with the Chief Justice of India in regards to a Union Minister having allegedly approached Justice R Raghupati of the Madras High Court, through a lawyer to influence a judicial decision. The application sought a disclosure of the name of the Union Minister and the lawyer, and of the steps taken against them for approaching the judge of the Madras High Court for influencing the judicial decision. On 4 August 2009, the Appellant rejected the request on the ground that no such information was available with the Registry of the Supreme Court. The first appellate authority rejected the appeal. The second appeal before the CIC led to a direction on 24 November 2009, to provide the information sought, except information sought in questions 7 and 8 on recourse taken to the in-house procedure. The Appellant approached this Court challenging the decision of the CIC.

B Reference to the Constitution Bench

140. On 26 November 2010, a two judge Bench of this Court directed the Registry to place the present batch of appeals before the Chief Justice of India for constituting a Bench of appropriate strength and framed the following substantial questions of law:

1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?

2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?

3. Whether the information sought for is exempt Under Section 8(1)(j) of the Right to Information Act?

141. On 17 August 2016, a three judge Bench referred these civil appeals to a Constitution Bench for adjudication.

C Submissions of Counsel

142. Mr. K K Venugopal, Attorney General for India appearing on behalf of the Appellant made the following submissions:

(i) The present case is not covered by the decision of this Court in **S.P. Gupta** v. **Union of India** MANU/SC/0080/1981 : 1981 Supp SCC 87, which is based on distinguishable facts. The decision in **S.P. Gupta** does not consider the relationship between the restrictions on the right to know and the restrictions existing Under Article 19 (2) of the Constitution. Once Article 19(1)(a) is attracted, the restrictions Under Article 19 (2) become applicable. The RTI Act came into force in 2005 and lists out the rights and restrictions on the right to information. The provisions of the RTI Act must be construed in a manner which makes it consistent with constitutional values including the independence of the judiciary;

(ii) Information of which disclosure is sought Under Section 2 (f) of the RTI Act, includes only that information which is in a physical form and which is already in existence and accessible to a public authority under law. The judge can decide to disclose assets voluntarily and place relevant information in the public domain. A third party cannot seek information on the disclosure of assets of a judge which does not exist in the public domain;

(iii) The decision of this Court in **S P Gupta** is based on a factually distinct situation where disclosure of correspondence regarding the non- appointment of an additional judge was ordered on the ground that the judge was a party to the proceeding before the Court. Further, the decision established a restriction on the disclosure of information to third parties;

(iv) The correspondence and file notings with respect to recommendations for appointments of judges to the higher judiciary falls under a "class of information" that is highly confidential. Disclosure will result in damage to the institution and adversely affect the independence of the judiciary;

(v) The process of concurrence by the members of the Collegium requires free and frank discussion on the character, integrity and competence of prospective appointee judges in order to ensure that the most suitable judges are appointed. It is in the public interest to uphold candour in matters of appointment and transfer of judges and to avoid unnecessary litigative debate by third parties. Disclosure of such information would undermine the independence of the judiciary and adversely impact the candour or uninhibited expression of views by the Collegium. Independence of

judiciary is not limited to independence from executive influence. It is multi-dimensional and also independence from other pressure and prejudices including fearlessness from power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which judges belong (**C Ravichandran Iyer** v. **Justice A M Bhattacharjee** MANU/SC/0771/1995 : (1995) 5 SCC 457);

(vi) Information sought regarding the assets and liabilities of judges and correspondence and file notings relating to character, conduct, integrity and competence of a judge includes certain "personal information" and is hence, exempt Under Section 8 (1)(j) of the RTI Act;

(vii) The correspondence and file notings that form the basis of the decision Under Article 124 (2) of the Constitution includes information received from third parties in a fiduciary capacity. The information is held by the Chief Justice of India as a result of disclosure by third parties who give the information in confidence, complete good faith, integrity and fidelity. Therefore, disclosure of such information is exempt Under Section 8 (1)(e);

(viii) The disclosure of correspondence relating to conduct, character, integrity and competence of a judge may cause irreparable loss to their reputation, violate their right to privacy and adversely affect their functioning. There is also no remedy available to a judge for the comments made in the appointment process as the Chief Justice of India along with other judges are protected from civil/criminal proceedings Under Section 3(1) of the Judges (Protection) Act 1985. While regulating the disclosure of information, the Supreme Court is required to balance the right of an individual to reputation and privacy Under Article 21 and the right to information of third-party parties Under Article 19(1)(a). The doctrine of proportionality has to be applied to resolve the conflict between the two rights and the right to reputation and privacy of a judge should prevail over the right to information of third parties; and

(ix) Legislation and Rules with respect to disclosure of assets and liabilities of public servants do not provide for placing such information in the public domain or granting third party access to such information. The judiciary is seeking self-Regulation by providing a voluntary disclosure of assets and liabilities and it is up to the Supreme Court to disclose such information. No third party can seek information which is not in the public domain.

143. On the contrary, Mr. Prashant Bhushan, learned Counsel appearing on behalf of the Respondent made the following submissions:

(i) The observations made by the seven judge Bench of this Court in **S P Gupta** are binding on the present Bench. Even though certain aspects of the judgment have been overruled in **Supreme Court Advocates-on-Record Assn** v. **Union of India** MANU/SC/0073/1994 : (1993) 4 SCC 441, the decision of this Court vis-a-vis the disclosure of correspondence in respect of the appointment process remains unaffected. If **S P Gupta** has to be overruled, this could be only done by a Bench comprising of more than seven judges;

(ii) This Court has interpreted Article 19(1)(a) to include the right to information under the ambit of free speech and expression even before the RTI Act was enacted by the Parliament. Disclosure

of the information sought in the present batch of cases is an essential part of the freedom of speech and expression guaranteed in Article 19(1)(a) and involves a significant public interest;

(iii) Free flow of information to citizens is necessary, particularly in matters which form part of public administration for ensuring good governance and transparency. The fundamental right of free speech and expression includes every citizen's right to know about assets, criminal antecedents and educational backgrounds of candidates contesting for public office. To cover public acts with a veil of secrecy is not in the interest of the public and may lead to oppression and abuse by, and distrust of, public functionaries. The lack of transparency, accountability and objectivity in the collegium system does not enhance the credibility of the institution. Disclosure of the information sought, on the other hand, would promote transparency and prevent undue influence over the judiciary;

(iv) The claim of class privilege or class immunity to the correspondence between the Chief Justice of India and the Law Minister was rejected in **S P Gupta**. After the enactment of the RTI Act, information otherwise held by a public authority cannot be excluded from disclosure unless it falls under the exemptions laid down in Section 8 or relates to an institution excluded Under Section 24[47] of the RTI Act. When information regarding a judge is provided to the Chief Justice of India, it constitutes information held by a public authority and thus, would be amenable to the provisions of the RTI Act;

(v) In **S P Gupta**, the argument that disclosure of correspondence between constitutional functionaries in relation to the appointment process of judges would preclude the free and frank expression of opinions was rejected. During the drafting of the Right to Information Bill, the argument that disclosure will deter consultees from expressing themselves freely and fairly and that the dignity and reputation of people would be tarnished was rejected. The argument of candour does not fall under any of the exemptions under the RTI Act and therefore, this disclosure of information cannot be excluded from the purview of the RTI Act;

(vi) The disclosure of assets of judges is warranted in the larger public interest. It cannot be argued that information regarding the assets of judges, who are public functionaries, is personal information having no relationship with any public activity or interest. Hence, the information sought is not exempt Under Section 8 (1)(j);

(vii) There exists no fiduciary relationship between those who are vested with the responsibility of determining whether an appointee is suitable for elevation as a judge and the appointee herself. The duty of a public servant is to act in the interest of the public and not in the interest of another public servant. The entire process of consultation and making information available to the members of the collegium regarding credentials and the suitability of the appointee is a matter of public interest. Further, when judges act in their official capacity in compliance with the 1997 resolution and disclose their assets, it cannot be said that the Chief Justice of India acts in a fiduciary capacity for the judges. The Chief Justice of India and other members of the collegium discharge official duties vested in them by the law and the information sought is not exempt Under Section 8(1)(e). Even if some part of the information is personal, that part can be severed after due examination on a case to case basis Under Section 10; and

(viii) The argument that the independence of the judiciary will be affected prejudicially due to the disclosure of information is misconceived. The independence of the judiciary means independence from the legislature and the executive and not from the public. It is a constitutional and legal right of the Respondent to access information and identify the persons who have attempted to compromise the functioning of the judiciary. Disclosure of such information is essential for the citizenry to maintain their faith in the independence of the judiciary.

144. The rival submissions fall for our consideration.

D Relevant statutory provisions

145. For the purpose of the present dispute it is necessary to analyse the relevant provisions contained in the statutory framework of the RTI Act. Sections 2 and 3 read:

2. Definitions. - In this Act, unless the context otherwise requires, -

…

(e) "competent authority" means -

(i) the Speaker in the case of the House of People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States of a Legislative Council of States;

(ii) the Chief Justice of India in the case of the Supreme Court;

(iii) the Chief Justices of the High Court in the case of a High Court;

(iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;

(v) the administrator appointed Under Article 239 of the Constitution;

(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any law for the time being in force.

(h) "public authority" means any authority or body or institution of self-government established or constituted,-

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any-

(i) body owned, controlled or substantially financed;

(ii) non-Government Organisation substantially financed,

Directly or indirectly by finds provided by the appropriate Government;

(j) "right to information" means the right to information accessible under the Act which is held by or under the control of any public authority and includes the rights to -

(i) inspection of work, documents, records;

(ii) taking notes, extracts, or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

3. Right to information. - Subject to the provisions of this Act, all citizens shall have the right to information.

146. Both the terms "public authority" and "information" have been broadly defined. Section 2(j) which defines the "right to information" stipulates that the information accessible under the RTI Act is held by or under the control of any "public authority", which is defined in Section 2(h) of the RTI Act. Section 3 of the Act confers on all citizens the substantive right to seek information covered within the ambit of the Act, subject to its provisions. The remaining scheme of the RTI Act operationalises the substantive right conferred by Section 3. Section 4 imposes a statutory duty on public authorities to create and maintain a record of the activities stipulated therein to ensure that these records are available to applicants. Section 6 empowers an individual to file a request with the relevant Central Public Information Officer (**"CPIO"**) or State Public Information Officer (**"SPIO"**) or their corresponding Assistant Officers (collectively hereafter **"Information Officer"**). Section 7 empowers the Information Officer to either provide the information sought or reject the application for reasons set out in Section 8 and 9.

147. For an authority to be covered under the RTI Act, it must be a "public authority" as defined Under Section 2(h) of the Act. "Public authority" is defined as any authority or body or institution or self-government which falls within the ambit of any of the enumerated provisions in that Sub-section. The Supreme Court of India is established by virtue of Article 124(1) of the Constitution of India. Similarly, Article 214 of the Constitution stipulates that there shall be a High Court for each state. In terms of Section 2(h)(a), a body or an institution which is established or constituted by or under the Constitution would be a public authority. But virtue of being established by the Constitution, the Supreme Court and the High Courts would fall within the ambit of "public authority" in Section 2(h) of the Act.

148. Section 2(e)(ii) expressly stipulates that the competent authority means the Chief Justice of India in the case of the Supreme Court and Section 2(e)(iii) stipulates that the competent authority in the case of a high Court is the Chief Justice of that Court. Significantly, Article 124 of the Constitution of India stipulates that there shall be a Supreme Court of India consisting of a Chief Justice of India and other judges. The office of the Chief Justice of India is not distinct from the Supreme Court of India. The Supreme Court is constituted by virtue of the Constitution and consists of judges, of which the Chief Justice is the head. This however, does not mean that the Supreme Court and the Chief Justice are two separate 'public authorities' within the RTI Act.

149. The term information Under Section 2(f) has been defined broadly to include "any material in any form". The word 'including' denotes the intention of the Parliament to provide a non-exhaustive list of materials that fall within the ambit of the sub-clause. The Sub-clause includes information relating to any private body "which can be accessed by a public authority under any law for the time being in force". The import of this phrase is that information relating to a third party is included only where the requisite pre-conditions of any law in force to access such information is satisfied. The right sought to be exercised and information asked for should fall within the scope of 'information' and 'right to information' as defined under the Act. The information sought must be in existence and must be held or under the control of the public authority.

150. Section 8(1) begins with a non-obstante phrase "Notwithstanding anything contained in this Act". The import of this phrase is that Clause (1) of Section 8 carves out an exception to the general obligation to disclose under the RTI Act. Where the conditions set out in any of the sub-clauses to Clause (1) of Section 8 are satisfied, the Information Officer is under no obligation to provide information to the applicant. The scope of the exception and its applicability to the present dispute shall be discussed in the course of the judgment.

151. Section 22[48] contains a non-obstance Clause and stipulates that the RTI Act has an overriding effect over laws. The import of this provision is to impart priority to the salient objectives of the Act and ensure that where information is held by or is under the control of a public authority, such information must be furnished to the applicant notwithstanding any prohibition in any other law in force at that time. It is pertinent to state that Section 22 does not obviate legal restrictions that apply to a public authority to the access to any information which is clarified by the use of the phrase "which can be accessed by a public authority under any law for the time being in force" in Section 2(f).

E S P Gupta, candour and class immunity

152. Relevant to the present controversy, is the question whether the decision of this Court in **S P Gupta** v. **Union of India** MANU/SC/0080/1981 : 1981 Supp. SCC 87 is a binding precedent on the issues raised. Mr. Prashant Bhushan, learned Counsel appearing on behalf of the Respondent contended that the points for determination that arise in the present case have been answered by the seven judge Bench in **S P Gupta** where this Court ordered the disclosure of the correspondence between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister which concerned the non-appointment of an additional judge for a full term of two years. Counsel contended that this Court held that the public interest in disclosure outweighed the potential harm

resulting from disclosure and that a free and open democratic society mandated the disclosure of correspondences concerning the appointment process of judges.

153. Opposing the submission, Mr. K K Venugopal, learned Attorney General for India appearing on behalf of the Appellant, urged that the decision of this Court in **S P Gupta** was based on a factually distinguishable situation. The Court in that case was concerned with the disclosure of the correspondence concerning the appointment process for the purpose of adjudicating the case before it. Moreover the judge whose appointment was in issue was a party to the case. The court did not address the potential harm to public interest by the disclosure of correspondence in all circumstances. The Attorney General contended that the decision assessed the right to know in a passing observation and contrary to the submission of the Respondent, it established a restriction on the disclosure of personal information.

154. In **S P Gupta**, this Court was concerned with two issues: (i) the initial appointment of additional judges and their reappointment on the expiry of their terms; and (ii) the transfer of High Court judges and the Chief Justices of the High Courts. Among the issues involved in the proceedings, one concerned the disclosure of the correspondence exchanged between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister concerning the decision to grant an extension in the tenure to Justice O N Vohra and Justice S N Kumar as additional judges of the Delhi High Court by a period of three months. It was contended that Justice O N Vohra should have been appointed as a permanent judge and that Justice S N Kumar should have been reappointed as an additional judge for the complete tenure of two years upon the expiry of their initial tenure. During the course of the proceedings, their terms expired and a decision was communicated by the Central Government to not renew their terms. An application was filed to contend that the withholding of the re-appointment was mala fide and unconstitutional. Both former judges were impleaded as Respondents. While Justice O N Vohra did not appear in the proceedings, Justice S N Kumar appeared through counsel and contended that the decision of the Central Government to not reappoint him for a complete term of two years was vitiated since it was reached without full and effective consultation with the Chief Justice of India.

155. The government resisted the disclosure of the correspondence and urged that as it formed a part of the advice tendered by the Council of Ministers to the President of India, the court was precluded from ordering disclosure by virtue of Article 74(2)[49] of the Constitution. It was also contended that the correspondence related to the 'affairs of the state' and its disclosure was precluded by virtue of Section 123[50] of the Indian Evidence Act 1872.

156. An interim order dated 16 October 1981 ordered the disclosure of the correspondence to the Court. In its final judgment dated 30 December 1981, the Court, by a majority, rejected the contention of the Central Government and upheld the disclosure of the correspondence exchanged between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister concerning the decision to not continue Justice S N Kumar as an additional Judge of the Delhi High Court for another full term.

157. Mr. K K Venugopal, learned Attorney General for the Union of India sought to distinguish the decision in **S P Gupta** by contending that the order of disclosure was made in the specific context of Sections 123 and 162[51] of the Indian Evidence Act and in respect of judicial proceedings

to which Justice S N Kumar was a party. Hence he urged that the decision does not establish the duty to disclose the correspondence in all circumstances. Justice S N Kumar had actively participated in the proceedings before the Court and information regarding his non-appointment was sought during the course of the proceedings to adjudicate upon the contention that there was no effective consultation between the Central Government and the Chief Justice of India. The balancing of interests in that case was between the public harm resulting from disclosure and the public interest in the administration of justice (by securing complete justice for the litigant before the court) which, it is urged, is materially different from the present case.

158. In **S P Gupta**, this Court, by an interim order directed the disclosure of the file notings only in respect of the non-renewal of the term of Justice S N Kumar. Justice O N Vohra had chosen to not appear in or participate in the proceedings before the court. As no relief was sought by the latter before the Court, the Court held that the correspondence pertaining to him was not relevant to the controversy. Consequently, the Union of India was not required to disclose it. Justice PN Bhagwati (as he then was) noted the comparably distinct role of Justice S N Kumar in the proceedings in the following terms:

58. That takes us to the case of S.N. Kumar which stands on a totally different footing, because S.N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an Additional Judge for a further term. Since S.N. Kumar has claimed relief from the Court in regard to his continuance as an Additional Judge, an issue is squarely joined between the Petitioners and S.N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S.N. Kumar.

159. In its final judgment, the Court first rejected the contention that the correspondence formed part of the advice tendered to the President by the Council of Ministers. The Court noted that while the advice tendered by the Council of Ministers to the President is information protected Under Article 74(2), the principal question was whether the correspondence between the Chief Justice of India, Chief Justice of the Delhi High Court and the Law Minister formed part of the advice tendered by the Council of Ministers to the President so as to preclude its disclosure by virtue of Article 74(2). The Court rejected this contention and held that any advice tendered by the Council of Ministers would be based on the views expressed by the two Chief Justices and their views would not form part of the advice tendered. In this view, the material on the basis of which the Council of Ministers formed a view and subsequently tendered the same to the President would not constitute advice protected Under Article 74(2). Justice Bhagwati held:

61...The advice is given by the Council of Ministers *after* consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on "full and identical facts" and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under Clause (2) or Article 74 is

only the advice tendered by the Council of Ministers...But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form part of the advice."

160. The Court then proceeded to the claim against disclosure Under Section 123 of the Indian Evidence Act. It held that where protection from disclosure is sought Under Section 123 on the ground that the correspondence relates to the affairs of the state, the court, by virtue of Section 162, is called upon to carry out a balancing task between "the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding". It held that the court balances the competing aspects of public interest and decides which should prevail in the particular case before it. A claim for non-disclosure, in this view, would be sustainable where the disclosure of the document would be injurious to the public interest to a greater degree than the harm caused to the administration of justice by non-disclosure. Analysing the claim in the context of Section 123, Justice Bhagwati noted:

73. We have already pointed out that whenever an objection to the disclosure of a document Under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. **The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the nondisclosure would thwart the administration of justice by keeping back from the court a material document**...The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence.

161. The Court held that the nature of the proceeding in which the disclosure is sought, the relevance of the document and the degree of importance that the document holds in the litigation are relevant factors in the balancing process. If the correspondence alone would furnish evidence relevant to adjudicating the dispute before the court, it would be inappropriate to 'exclude these documents which constitute the only evidence, if at all, for establishing this charge, by saying that the disclosure of these documents would impair the efficient functioning of the judicial institution.' The Court held thus:

82. ...**Apart from these documents, there would be no other documentary evidence available to the Petitioner to establish that there was no full and effective consultation or that the decision of the Central Government was based on irrelevant considerations** ... It is only through these documents that the Petitioner can, if at all, hope to show that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India or that the decision of the Central Government was mala fide or based on irrelevant grounds and therefore, to accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against the discontinuance of the Additional Judge...**The harm that would be caused to the public interest**

in justice by the non-disclosure of these documents would in the circumstances far outweigh the injury which may possibly be caused by their disclosure, because the nondisclosure would almost inevitably result in the dismissal of the writ petition and consequent denial of justice even though the claim of the Petitioner may be true and just.

The Court held that the potential injury caused by disclosure is outweighed by the public interest in justice as the non-disclosure of documents relevant to decide the controversy would inevitably lead to the dismissal of the writ petition. On a balancing of the above two competing public interests, the Court upheld the interim order requiring the disclosure of the correspondence concerning the reappointment in respect of Justice S N Kumar.

162. The Court in **S P Gupta** was required to adjudicate claims resisting disclosure of documents in a judicial proceeding based on Sections 123 and 162 of the Indian Evidence Act. The balancing exercise was between the public harm resulting from a disclosure of documents relating to the affairs of the state and the public interest in the administration of justice. The public interest in the administration of justice pertained to the disposal of the case instituted before the court in which the judge was a party. The decision in **S P Gupta** did not lay down a general proposition that the correspondence between constitutional functionaries in regard to the appointment process must be disclosed to a member of the public in all circumstances. The view that the disclosure was ordered in the specific context of a judicial proceeding was also affirmed in the separate opinion of Justice E S Venkataramiah (as he then was):

1194. It may be necessary to deal with the question of official secrecy in greater detail in a case where the constitutionality of the claim for official secrecy, **independently of the power of the Court to order discovery of official documents in judicial proceedings, arises for consideration. We are concerned in this case with the power of the Court to direct the disclosure of official documents in judicial proceedings.**

1203... we felt that a decision not to direct disclosure of the documents would result in graver public prejudice than the decision to direct such disclosure and that the public interest involved in the administration of justice should prevail over the public interest of the public service in the peculiar circumstances of the case.

163. Though, the decision in **S P Gupta** is not a precedent in support of a proposition for general disclosure in all circumstances, it is, however, relevant to the present dispute for it rejected the contention that: (i) disclosure and candour are incompatible; and (ii) such correspondence is entitled to class immunity.

Candour

164. The Court addressed the contention that the reason for protecting a certain class of documents is that they concern decision making at the highest level of government and only complete freedom from public gaze will enable freedom of expression and candour amongst government functionaries. In this view, public scrutiny was contended to adversely affect the ability of the participants in the decision-making process to express their opinion in a free and frank manner. The Court, however, rejected the contention that candour and frankness justify the grant of

complete immunity against disclosures. Justice PN Bhagwati (as he then was) addressed the argument founded on candour in the following terms:

71...The candour argument has also not prevailed with judges.

The candour argument has also not prevailed with Judges and jurists in the United States and it is interesting to note what Raoul Berger while speaking about the immunity claimed by President Nixon against the demand for disclosure of the Watergate Tapes, says in his book *Executive Privilege": A Constitutional Myth* at page 264:

"Candid interchange" is yet another pretext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Kleindienst's assertion of immunity from congressional inquiry for two and one-half million federal employees. **It is merely another testimonial to the greedy expansiveness of power, the costs of which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the excess bred by the claim of executive privilege.**

We agree with these learned Judges that **the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs, ACJ in *Sankey v. Whitlam*, it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it** (vide: the observations of Lord Denning in Neilson v. Lougharre MANU/AUSH/0037/1978 : (1981) 1 All ER at P. 835.

81. It is undoubtedly true that appointment or non-appointment of a High Court Judge or a Supreme Court Judge and transfer of a High Court Judge are extremely important matters affecting the quality and efficiency of the judicial institution and it is therefore absolutely essential that the various constitutional functionaries concerned with these matters should be able to freely and frankly express their views in regard to these matters...We have no doubt **that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would not be deterred from performing their constitutional duty of expressing their views boldly and fearlessly even if they were told that the correspondence containing their views might subsequently be disclosed...We have already dealt with the argument based on the need for candour and frankness and we must reject it in its application to the case of holders of high constitutional offices like the Chief Justice of a High Court and the Chief Justice of India. Be it noted -- and of this we have no doubt -- that our Chief Justices and Judges are made of sterner stuff; they have inherited a long and ancient tradition of independence and impartiality...**

The Court held that though candour may be a **factor** in determining what set of communications require protection, the measure of protection depends whether, on a **balance of all competing**

interests, public interest favours disclosure or secrecy. While the Court noted that candour may be a relevant factor to prevent disclosure in some circumstances, it expressly rejects its weight as a relevant factor when it comes to constitutional functionaries such as the Chief Justice of India and the Chief Justices of the High Courts. Constitutional functionaries are bound to the oath of their office to discharge their duties in a fair manner in accordance with the principles enshrined in the Constitution. It cannot be countenanced that public gaze or subsequent disclosure will detract an individual from discharging their duty in an effective manner true to the dignity and ethic associated with their office. Candour and frankness cannot be the reason to preclude disclosures of correspondence between constitutional functionaries which concern the appointment process of judges.

Class immunity

165. The second argument rejected in **S P Gupta** and relevant to the present case is the contention that the correspondence between "the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the Chief Minister or the Law Minister of the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or a Supreme Court Judge or transfer of a High Court Judge and the notings made by these constitutional functionaries in that behalf", belong to a protected class of documents. It was contended that the disclosure of these documents would be prejudicial to national interest and the dignity of the judiciary. In this view, the court is not required to assess the effects of the disclosure of correspondence in a particular case, as all correspondence of such nature belongs to a special class which is exempt from disclosure. In this view, disclosure is not precluded because of the specific contents of the documents, but because of its membership of a certain class of documents that require nondisclosure.

166. Justice Bhagwati, with whom five other judges agreed, held that a claim for class immunity is an 'extraordinary claim' which is granted as a 'highly exceptional measure' as such broad claims are contradictory to and destructive of the concept of an open government. He cautioned against blanket immunity and lay emphasis on the commitment to an open and transparent government in the following terms:

80...**It is only under the severest compulsion of the requirement of public interest that the court may extend the immunity to any other class or classes of documents and in the context of our commitment to an open Government with the concomitant right of the citizen to know what is happening in the Government, the court should be reluctant to expand the classes of documents to which immunity may be granted**. The court must on the contrary move in the direction of attenuating the protected class or classes of documents, because by and large secrecy is the badge of an authoritarian Government...

The Court adopted a high standard for the conferral of class immunity which would be accorded "only under the severest compulsion of the requirement of public interest". With these observations, the Court rejected the contention that correspondence between constitutional functionaries constitutes a class of documents exempt from public disclosure:

81. ...it will be clear that the class of documents consisting of the correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or Supreme Court Judge or the transfer of a High Court Judge and the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure...Confidentiality is not a head of privilege and the need for confidentiality of high level communications without more cannot sustain a claim for immunity against disclosure...

Thus, the disclosure of correspondence between constitutional functionaries was held not to fall within a protected category exempt from disclosure. Disclosure is precluded only where it is injurious to public interest. Justice Bhagwati clarified that the principal consideration before the Court when assessing a claim for the non-disclosure of any document is that of public interest:

80...Every claim for immunity in respect of a document, **whatever be the ground on which the immunity is claimed and whatever be the nature of the document,** must stand scrutiny of the court with reference to one and only one test, namely, **what does public interest require -- disclosure or non-disclosure...this exercise has to be performed in the context of the democratic ideal of an open Government.**

167. A claim of immunity from disclosure for any document is subject to the controlling factor of public interest - a determination informed by the commitment to an open and transparent government:

67...The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed Under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the Rule and secrecy **an exception justified only where the strictest requirement of public interest so demands.** The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.

Justice Bhagwati expanded on the socio-political background that must inform any approach in a "democratic society wedded to the basic values enshrined in the Constitution". He drew an interconnection between democracy, transparency and accountability to hold that a basic postulate of accountability, which is fundamental to a democratic government, is that information about the government is accessible to the people. He held that participatory democracy is premised on the availability of information about the functioning of the government. The right to know as a "pillar of a democratic state" imputes positive content to democracy and ensures that democracy does not remain static but becomes a "continuous process". Thus, a limitation on transparency must be supported by more than a claim to confidentiality-it must demonstrate the public harm arising from disclosure is greater than the public interest in transparency. Justice Bhagwati emphasized transparency in the judicial apparatus in the following terms:

85... We believe in an open Government and openness in Government does not mean openness merely in the functioning of the executive arm of the State. The same openness

must characterise the functioning of the judicial apparatus including judicial appointments and transfers. Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely, the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and the Chief Justice of India in case of appointment or non-appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off. **We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should not be protected against disclosure at all events and in all circumstances.**

The Court extended its observations on the indispensable nature of openness and transparency to the judiciary and held that there is no basis to conclude that information concerning appointments must be protected against disclosure "at all events and in all circumstances." The circumstances which justify disclosure on one hand and non-disclosure on the other calls into consideration a variety of factors which shall be adverted to in the course of the judgment. At this juncture, it is sufficient to note the observations of this Court that transparency in the functioning of the government serves a cleansing purpose:

66....Now, if secrecy were to be observed in the functioning of Government and the processes of Government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open Government with means of information available to the public, there would be greater exposure of the functioning of Government and it would help to assure the people a better and more efficient administration. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open Government is clean Government and a powerful safeguard against political and administrative aberration and inefficiency.

168. The approach adopted by Justice Bhagwati in **S P Gupta**, with which we are in agreement provides a bright line standard for the Court on the approach that must be adopted when answering questions of disclosure in regards to the appointment process. The principal consideration will always be that of public interest. Any balancing must be carried out in the context of our commitment to the transparency and accountability of our institutions. The specific content of public interest and its role in the balancing process will be explored in the course of the judgment.

It was contended by the Respondents that the decision of this Court in **S P Gupta** did not deal with the trade-off between disclosure and judicial independence. It is necessary to turn to this issue.

F Judicial independence

169. Mr. K K Venugopal, learned Attorney General for India appearing on behalf of the Appellant, contended that the disclosure of file notings between constitutional functionaries which concern the appointment process will erode the independence of the judiciary, which is part of the basic structure of the Constitution. It was further contended that disclosures will result in damage to the institution and adversely impact the independence of the judiciary. It is necessary to briefly analyse the contours of this concept in assessing the contention urged.

170. At the outset, it must be noted that while the term 'independence of the judiciary' is not new, its meaning is still imprecise.[52] There may be a debate over various facets of judicial independence: for instance, from whom and to do what is independence engrafted. Broadly speaking, judicial independence entails the ability of judges to adjudicate and decide cases without the fear of retribution. Judicial independence and the ability of judges to apply the law freely is crucial to the Rule of law.

In his seminal work "**Cornerstone of a Nation**", Granville Austin states:

The [Constituent] Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect.[53]

However, it was the independence of the judiciary, and not its absolute insulation that appeared to be the prevailing view of members of the Constituent Assembly.[54] This, they believed was necessary for the preservation of inter-institutional equilibrium. The starting point of the independence of the judiciary is constitutional design through the provisions of the Constitution.

171. Article 124(2) guarantees a security of tenure for judges. Article 124(4) stipulates that a Judge of the Supreme Court shall not be removed from their office except on the ground of proved misbehaviour or incapacity. The proviso to Clause (2) of Article 125 guarantees that a judges' privileges, allowances and rights in respect of leave of absence or pension shall not be varied to their disadvantage after their appointment. Article 129 empowers the Supreme Court to punish for the contempt of itself. Article 145 empowers the Supreme Court to make Rules for regulating generally the practice and procedure of the Court. Clauses (1) and (2) of Article 146 stipulate that the Chief Justice of India or such other Judge or officer of the Court, as may direct, shall be responsible for the appointments and prescription of Rules governing the conditions of service of the officers and servants of the Supreme Court. Clauses (1) and (2) of Article 229 assign responsibility to the Chief Justice of a High Court or such other judge or officer of the court, as they may direct, in respect of matters of appointment and prescription of Rules governing the conditions of service of the officers and servants of a High Court.

172. Article 215 empowers the High Court to punish for contempt of itself. Article 217 provides security of tenure. The proviso to Clause (2) of Article 221 stipulates that the allowances of a Judge of a High Court as well as the rights in respect of leave of absence or pension shall not be varied to their disadvantage after their appointment. Article 227(2) stipulates that each High Court may, by virtue of its power of superintendence Under Article 227(1): (i) call for returns from certain courts and tribunals, (ii) make and issue general Rules and prescribe forms for regulating the

practice and proceedings of such courts; and (iii) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

173. These provisions reflect constitutional safeguards to ensure the independence of the judiciary and guarantee to it the freedom to function independent of the will of the legislature and executive. Supriya Routh discusses these provisions in the following words:

[T]he Constitution provides for adequate safeguards in furtherance of the independence of the judiciary in a democratic republic. It separates the judiciary from the executive and prohibits the Parliament and the state legislatures from questioning the conduct of judges of the higher judiciary in furtherance of their judicial duties...It also provides for an arduous and elaborate process for the impeachment of judges...[55]

The constitutional safeguards for judicial independence were noticed by this Court in **L Chandra Kumar** v. **Union of India** MANU/SC/0261/1997 : (1997) 3 SCC 261. Chief Justice AM Ahmadi, speaking for a seven judge Bench of this Court held:

78...While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed with such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions.

Justice Ruma Pal discussed the position in the following words:

To ensure freedom from Executive and Legislative control, the pay and pension due to judges in the superior courts are charged on the Consolidated Funds of the States in the case of High Court judges and the Consolidated Fund of India in the case of Supreme Court judges and are not subject to the vote of the Legislative Assembly in the case of the former or Parliament in the latter case. Salaries are specified in the Second Schedule to the Constitution and cannot be varied without an amendment of the Constitution.[56]

174. The above provisions are indicative of the intention of the founders of the Constitution to create a strong foundation to secure the independence of the judiciary. This also marked a strong departure from the 'pleasure doctrine' under the pre-constitutional colonial framework. Under the Government of India Act, 1935 the judges of the High Court held office during the pleasure of the Crown. Through Article 217(1) of the Constitution of India, tenure at the pleasure of the Crown was substituted with a fixed tenure subject to limited exceptions. Justice Srikrishna (speaking in non-judicial capacity) elucidates upon the importance of this tradition in the following words:

A judge of the High Court or Supreme Court is thus not removable from office except for proved misbehaviour or incapacity during his tenure of office. The very obviation of the pleasure doctrine as controlling the tenure of office of a judge of the High Court or the Supreme Court is explicit of the intention of the founding fathers to insulate the judges of the superior courts from the pleasure of the executive. The several Articles embedded in the Constitution ensure that a judge is fully

independent and capable of rendering justice not only between citizens and citizens but also between citizens and the State, without let, hindrance, or interference by anyone in the State polity. This kind of insulation or immunity from the pleasure of the executive is essential in view of the fact that the Constitution has guaranteed several fundamental rights to the citizens and persons and also empowered the High Courts and Supreme Court Under Article 226 and 32 to render justice against acts of the State.[57]

It becomes evident that judicial independence is secured through security over judicial tenure. The edifice of judicial independence is built on the constitutional safeguards to guard against interference by the legislature and the executive. Judicial independence is not secured by the secrecy of cloistered halls. It cannot be said that increasing transparency would threaten judicial independence.

175. The need for transparency and accountability has been emphasised in decisions of this Court. In **Supreme Court Advocates-on-Record Association** v. **Union of India** MANU/SC/1183/2015 : (2016) 5 SCC 1 **('NJAC')**, a Constitution Bench of this Court struck down the 99th Constitutional Amendment Act setting up the National Judicial Appointments Commission as *ultra vires* the Constitution by a four-to-one majority. Significantly, Justice Kurian Joseph, in his separate concurring opinion and Justice Chelameswar, in his dissenting opinion, pointed to the lack of transparency and accountability in the manner of making appointments to the judiciary. Justice Kurian Joseph observed:

990. All told, all was and is not well. To that extent, I agree with Chelameswar, J. that the present Collegium system lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the Collegium system, as sometimes observed by the civic society. Quite often, very serious allegations and many a time not unfounded too, have been raised that its approach has been highly subjective. Deserving persons have been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the less patronised, selection of patronised or favoured persons were made in blatant violation of the guidelines resulting in unmerited, if not, bad appointments, the dictatorial attitude of the Collegium seriously affecting the self-respect and dignity, if not, independence of Judges, the court, particularly the Supreme Court, often being styled as the Court of the Collegium, the looking forward syndrome affecting impartial assessment, etc., have been some of the other allegations in the air for quite some time. These allegations certainly call for a deep introspection as to whether the institutional trusteeship has kept up the expectations of the framers of the Constitution... To me, it is a curable situation yet.

The need for greater transparency and accountability in the appointment procedure or the lack of the same, has also been highlighted by other eminent retired judges such as Justice JS Verma and Justice Ruma Pal. In an Article quoted in Justice Lokur's separate concurring opinion in the **NJAC** decision, Justice Verma while speaking about the collegium system observed:

546...Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability.

Furthermore, Justice Chelameswar, in his dissenting opinion, references a speech made by Justice Ruma Pal,[56] where she stated thus:

... [T]he process by which a judge is appointed to a superior court is one of the best kept secrets in this country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system.

176. The collegium system has come under immense criticism for its lack of transparency. As early as in **S P Gupta**, this Court acknowledged that disclosure would lead to *bona fide* consideration and deliberation and proper application of mind on the part of the judges.[58] Even in **NJAC**, the need for transparency and accountability has not been denied in any of the separate opinions. The 99th Constitutional Amendment was struck down on the ground that it would adversely affect the independence of the judiciary by giving the executive a definitive say in the appointment of judges. The dilution of the judiciary's autonomy in the context of making judicial appointments was deemed to be unconstitutional. However, the need to reduce the opacity and usher in a regime of transparency in judicial appointments has not been denied and has in fact been specifically acknowledged by some of the learned Judges.

177. Scholars caution that while judicial independence is important, one should not lose sight of the larger goals and purposes which judicial independence is intended to serve. Charles Gardner Geyh considers such ends to include upholding of the Rule of law, preserving the separation of governmental powers, and promotion of due process, amongst many others. Therefore, he believes that if judges are free to disregard such ends in their decision making, judicial independence serves no purpose. He notes thus:

Most thoughtful scholars recognize that judicial independence is an instrumental value-a means to achieve other ends. As an instrumental value, judicial independence has limits, defined by the purposes it serves...[Hence,] judges who are so independent that they can disregard the law altogether without fear of reprisal likewise undermine the Rule of law values that judicial independence is supposed to further. Judicial accountability is yin to the judicial independence yang.[59]

Burt Neuborne in his incisive Article on the Supreme Court of India observes: "We care about constitutional courts not for the aesthetic value of their structures, but because where certain prerequisites are assembled, constitutional courts are capable of preserving the values of open, democratic governance.[60]

178. Lorne Sossin argues that transparency is necessary to ensure the public perception of the judiciary as independent. In the context of judicial appointments, he believes that appointments may happen on a proper, well-justified, substantive understanding of judicial 'merit'. However, in

order for the same to be truly independent, they must include within themselves the transparency of the criteria and openness of the process. He notes that:

What matters most in a democracy, I would suggest, is not the precise criteria for merit but the transparency of the criteria, and the authenticity of the reasons for choosing one individual over another. Merit, in other words, is as much about process as substance.[61]

He then goes on to address how the transparency of criteria and the process is a logical extension of the judicial appointment being 'meritorious', and that doing so would remove the 'arbitrariness' of the process, leading to upholding of Rule of law:

We often frame our concern with the Rule of law as one designed to prevent "arbitrary" decisions. Arbitrary decisions are not, however, decisions taken for no reason. **They are, rather, decisions taken for undisclosed reason.** In a democracy, some reasons for judicial selection will and should be seen as more legitimate than others. Increasingly, however, **it is the demand for justification itself that is coming to define our democratic aspirations.** This demand, in my view, not only arises as a logical extension to the requirement of merit, but is also justified as a necessary condition of judicial independence.

179. The fault that was identified with the purported framework Under Article 124A of the Constitution of India for ensuring transparency was the lack of adequate safeguards for protecting the right to privacy of the appointees.[62] This was in the context of the deliberations of the **NJAC** falling within the purview of the RTI Act. Justice Madan B Lokur in his separate concurring opinion noted that the right to know was circumscribed by the right to privacy of individuals:[63]

555. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.

None of these failings of the specific framework envisaged by the 99th Constitutional Amendment Act however can be interpreted as a denial of the importance of disclosure, transparency and accountability in the context of judicial appointments or of its constitutionality. They only point to the need for a balance between the right to know and the right to privacy, the specific contours of which will be explored shortly.

180. Judicial independence cannot be used as a byword for avoiding the accountability and criticism that accompanies transparency:

[T]hrough judicial activism, the Supreme Court of India has completely insulated the judiciary from any democratic deliberation, thereby sacrificing accountability and transparency in the functioning of the judges...Accountability and transparency are not only necessary for upholding the democratic underpinnings of the Constitution, but are also necessary for the independence of the judiciary itself, because if public trust and confidence in the judiciary cannot be maintained, the judiciary is destined to lose its independence.[64]

The judiciary is an important organ of the Indian state, and it has a vital role in the proper functioning of the state as a democracy based on the Rule of law. The integrity, independence, and impartiality of the judiciary are preconditions for fair and effective access to justice and for the protection of rights. The judiciary has a vital role to play as a bulwark of the integrity infrastructure in the country.

Failure to bring about accountability reforms would erode trust in the courts' impartiality, harming core judicial functions. Further, it also harms the broader accountability function that the judiciary is entrusted with in democratic systems including upholding citizens' rights and sanctioning representatives of other branches when they act in contravention of the law. Transparency and the right to information are crucially linked to the Rule of law itself.

F.1 Judicial accountability

181. Questions of judicial accountability raise three interconnected questions:

(i) What is the source of accountability?;

(ii) To whom is the accountability owed?; and

(iii) What does accountability entail?

Judicial independence and judicial accountability are often seen as conflicting values. It is believed that judicial independence, which mandates that adjudication take place free from interference by the legislature and the executive, is compromised by the questions of responsibility which judicial accountability entails. In this view, accountability compromises the ability of judges to decide free from external pressure and is undesirable. There is a fallacy about the postulate that independence and accountability are conflicting values.

182. Judicial independence is defined by the existence of conditions which enable a judge to decide objectively, without succumbing to pressures and influences which detract from the course of justice. To be independent a judge must have the ability to decide 'without fear or favour, affection or ill will'. The Constitution creates conditions to secure the independence of judges by setting out provisions to govern appointments, tenure and conditions of service. These are provisions through which the conditions necessary to secure judicial independence are engrafted as mandatory institutional requirements. These are intrinsic elements of our constitutional design. But

constitutional design must be realised through the actual working of its functionaries. Mechanisms which facilitate independence are hence a crucial link in ensuring that constitutional design translates into the realisation of judicial independence. Facilitative mechanisms include those which promote transparency. For true judicial independence is not a shield to protect wrong doing but an instrument to secure the fulfilment of those constitutional values which an independent judiciary is tasked to achieve. Judicial independence is hence not a *carte blanche* to arbitrary behaviour. Where the provisions of the Constitution secure a standard of judicial independence for free and impartial adjudication, the independence guaranteed by the Constitution must be employed in a manner that furthers the objective for which it was secured. In the quest for a balance between the freedom guaranteed and the responsibility that attaches to the freedom, judicial independence and judicial accountability converge.

183. Accountability, defined narrowly, is "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences"[65]. The narrow conception of accountability however suffers from a straight-jacket view devoid of general guiding principles. Professor Stephen Burbank stipulates:

...the concept of accountability, defined inclusively ...includes a broader complex of values which public organisations must adopt based in the fundamental values of democratic regimes. Accountability is conceived in such a way as to enable the democratic process of establishing respect for those values, whether of efficiency or independence, efficacy in achieving objectives, or impartiality in the treatment of citizens.[66]

In this view, accountability is the search for normative values informed by democratic values that guide the exercise of power and freedom granted by the Constitution. The judiciary, like other institutions envisaged by the Constitution, is essentially a human institution. The independence of the judiciary was not envisaged to mean its insulation from the checks and balances that are inherent in the exercise of constitution power. The independence of the judiciary, is a constitutional guarantee of freedom. Notions of accountability however, concern the manner and ends for which the freedom guaranteed is employed. Where judicial independence focuses on freedom, judicial accountability is concerned with the manner in which that freedom is exercised by the adjudicator.

184. Article 124(6) and Article 219 of the Constitution of India prescribe that every person who is appointed to be a judge of the Supreme Court or the High Court respectively, shall, prior to entering office, make and subscribe to an Oath or affirmation set out in the Third Schedule of the Constitution. The Oath for the office reads:

I, (name), having been appointed Chief Justice (or a Judge) of the Supreme Court of India, do swear in the name of God (or affirm) that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will **duly and faithfully** and to the best of my ability, knowledge and judgment perform the duties of my office **without fear or favour, affection or ill-will** and that **I will uphold the Constitution** and the laws.

Prior to the advent of the Constitution, the oath or affirmation for a person appointed to the Federal Court was prescribed in Schedule IV to the Government of India Act, 1935. Significantly, the words "without fear or favour, affection or ill-will", contained in the present Constitution in Form VIII did not find place in the oath prescribed[67] in Schedule IV to the Government of India Act, 1935. Added to the present Constitution, these are words with significance. The framers of the Constitution were alive to the need for the exercise of judicial power in accordance with the ethics of judicial office. The express inclusion of these words indicates that persons entering judicial office bind themselves to the principles inherent in the effective discharge of the judicial function, in conformity with the Rule of law and the values of the Constitution.

185. The oath of office postulates that the judge shall discharge the duties of the office without fear or favour, affection or ill-will. Any action that abridges the discharge of judicial duty in conformity with the principles enunciated in the oath negates the fundamental precept underlying the conferment of judicial power. Commenting on the significance of the inclusion of the term in its application to judges of the High Courts in **Union of India** v. **Sankalchand Himatlal** MANU/SC/0065/1977 : (1977) 4 SCC 193, Justice PN Bhagwati (as he then was) held:

These words, of course, do not add anything to the nature of the judicial function to be discharged by the High Court Judge because, even without them, the High Court Judge would, by the very nature of the judicial function, have to perform the duties of his office without fear or favour, **but they serve to highlight two basic characteristics of the judicial function, namely, independence and impartiality**...

As constitutional functionaries tasked with adjudication, judges of the High Courts and Supreme Court are bound to discharge their duties in a fair and impartial manner in accordance with law and the principles enshrined in the Constitution. But this indeed is only a restatement of a principle which attaches to all judicial office. The principles embodied in the oath furnish a non-derogable obligation upon the person affirming it to abide by its mandate.

186. On 21 November 1993, the then Chief Justice of India constituted a Committee to draft and circulate a statement on the values that must be reflected in judicial life. In December 1999, the Conference of Chief Justices of all High Courts resolved and adopted the Restatement of Values of Judicial Life. The statement serves as a guiding light of the values that must be followed in conformity with the dignity and ethic required of judicial life. The statement, apart from mentioning 16 values of judicial life concludes that the values enumerated are not exhaustive but illustrative of what is expected of a judge. The Bangalore Principles of Judicial Conduct 2002 which were adopted at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague in 2002 defined six main values as an inherent element of the judicial system: independence, impartiality, integrity, propriety, equality and competence, and diligence.

187. Judicial accountability also stems from the principle that the entrustment and exercise of power in a constitutional democracy is not unfettered. The Constitution confers upon judges with the power to dispense justice, which is a foundational value in the Preamble to the Constitution. Judicial power, conferred in public interest as a necessary element in the administration of justice cannot be used to achieve extraneous ends. The private interests of an individual have no nexus to the discharge of the official duties of a judge. Professor TRS Allen stipulates:

Powers may be conferred on public officials and agencies for the attainment of appropriate ends, consistent with a plausible account of the public good; but such powers must not be abused for extraneous ends, serving only private interests, nor wielded in a manner that undermines the ideal of freedom as independence. No one should be at the mercy of unfettered official discretion; and the enforcement of legal constraints on such discretion is a necessary part of the idea of government according to law.[68]

The Rule of law commands compliance with the law, without exception. It requires the protection of individuals against the unfettered discretion by officials on one hand and the protection of individuals from depredations by other private individuals.

188. Adjudicators in robes are human and may be pre-disposed to the failings that are inherently human. But the law demands that they must aspire to a standard of behaviour that does not condone those failings of a human persona in the discharge of judicial duties. Recognition of the fallibility of individuals who work constitutional institutions and of the need for safeguards to prevent the abuse of power found articulation in the Constitutional Assembly Debates. Dr. B R Ambedkar, K T Shah, H V Kamath, S Nagappa, Hussain Imam, Pandit Lakshmi Kanta Maitra, Alladi Krishnaswami Ayyar, B Pocker Sahib Bahadur, Z H Lari, A K Ghosh, and R K Sidhva all emphasized the possibility of human error in the inherently human institutions that the Constitution envisaged. This idea was given its clearest articulation in by Dr. B R Ambedkar when he reminded us that: "however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot.'

189. To equate the actions of an individual which have no nexus with the discharge of official duties as a judge with the institution may have dangerous portents. The shield of the institution cannot be entitled to protect those actions from scrutiny. The institution cannot be called upon to insulate and protect a judge from actions which have no bearing on the discharge of official duty. It is for this reason that judicial accountability is an inherent component of the justice delivery system. Accountability is expected to animate the day to day functioning of the courts. Judges are required to issue reasoned orders after affording an opportunity to both sides of a dispute to present their case. Judicial ethic requires that a judge ought to recuse herself from hearing a case where there is a potential conflict of interest. These illustration norms serve to further the democratic ideal that no constitutional functionary is above the Rule of law.

190. In the view explored above, judicial accountability traces itself from both the oath of office and the nature of the judicial power itself. In a broader sense however, there is a significant public interest in ensuring the smooth and efficient functioning of the justice delivery system, consistent with the requirements of justice in individual cases. The legitimacy of the institution which depends on public trust is a function of an assurance that the judiciary and the people that work it are free from bias and partiality. Mark Tushnet explores the idea of judicial accountability in the following terms:

Under prevailing understandings in liberal democracies, law is a human artefact, so accountability 'to law' must involve accountability to someone. Roughly, 'political accountability' refers to accountability to contemporaneous power-holders as representatives of today's people, whereas **'accountability to law' refers to accountability to the people and their representatives in the**

more distant past. Accountability to law is a form of indirect accountability to the people in the past, taking its route through their enactments of law.[69]

In this view, accountability is not confined to elected posts. The creation of the legal system founded on constitutional precept marked a break from its colonial past. An independent judiciary is the guardian and final arbiter of the text and spirit of the Constitution. To ensure this, the Constitution envisages a system of checks and balances. Article 124(4)[70] of the Constitution stipulates that a judge of the Supreme Court may be removed by an order of the President on the ground of proven misbehavior or incapacity. Article 218[71] of the Constitution makes the substantive provisions in Article 124(4) and Article 124(5) applicable to judges of the High Courts. The Judges (Enquiry) Act 1986 was enacted in furtherance of Article 124(5) which empowered the Parliament to regulate the presentation of an address and investigation of judges. A notice of motion to present an address to the President of India for the removal of judge is given in the Lok Sabha on receiving the signatures of not less than one hundred members or in the Rajya Sabha on receiving the signature of not less than fifty members. The Speaker of the Lok Sabha or the Chairman of the Rajya Sabha constitutes a Committee as stipulated in the Act to enquire into the alleged misbehavior of incapacity. If the report of the Committee finds that a judge is guilty of misbehavior or suffers from any incapacity, each house of the Parliament votes on the motion in accordance with Article 124(4) of the Constitution. The Lok Sabha and the Rajya Sabha must both pass a motion to impeach the judge with a majority of not less than two-thirds of the members of the house present and voting. The stringent procedure adopted by the Parliament for the impeachment of a judge draws a balance between ensuring the independence of judges from political will and ensuring the accountability of judges for their actions.

191. Judicial independence does not mean the insulation of judges from the Rule of law. In a constitutional democracy committed to the Rule of law and to the equality of its citizens, it cannot be countenanced that judges are above the law. The notion of a responsible judiciary furthers the ideal for which an independent judiciary was envisaged. It is the exercise of the decision making authority guaranteed by judicial independence in a just and responsible manner, true to the ethos of judicial office that sub-serves the founding vision of the judiciary. Professor Stephen Burbank has characterized judicial independence and accountability as "different sides of the same coin".[72] Professor Charles Gardner has stated that:

Judicial accountability is yin to the judicial independence yang. Although some trumpet judicial accountability as if it were an end in itself, accountability-like independence-is better characterized as an instrumental value that promotes three discrete ends: the Rule of law, public confidence in the courts, and institutional responsibility.[73]

Hence, independence and accountability are mutually reinforcing concepts. The specific form of accountability which this Court has been called to address is in regard to the appointment process and disclosure of assets owned by judges. This form of accountability involves competing interests between the need for transparency and accountability and the privacy interests of judges. The nature and balancing of the competing interests involved in such a determination shall be explored in the course of the judgment.

192. The executive in a cabinet form of government in accountable to the legislature. Ministers of the government are elected members of the legislature. Collectively, the government is accountable to the legislature as an institution and through the legislature to the people. Unlike the elected representatives of the people, judges of the district and higher judiciary are not elected. The accountability which the political process exacts from members of the legislature is hence distinct from the accountability of judges who are accountable to the trust which is vested in them as independent decision makers. Making them accountable in the discharge of that trust does not dilute their independence. The independence of judges is designed to protect them from the pressures of the executive and the legislature and of the organised interests in society which may detract judges from discharging the trust as dispassionate adjudicators. Scrutiny and transparency, properly understood are not placed in an antithesis to independence. They create conditions where judges are protected against unwholesome influences. Scrutiny and transparency are allies of the conscientious because they are powerful instruments to guard against influences which threaten to suborn the judicial conscience. To use judicial independence as a plea to refuse accountability is fallacious. Independence is secured by accountability. Transparency and scrutiny are instruments to secure accountability.

G Fiduciary relationship

193. The Appellant argued that the information about the assets of judges is exempt from disclosure, by virtue of Section 8(1)(e) of the RTI Act which casts a fiduciary duty on the Chief Justice of India to hold the asset declarations in confidence. It is argued by the Respondent that judges, while declaring their assets, do so in their official capacity in accordance with the 1997 resolution and not as private individuals. It is urged that the process of information gathering about the assets of the judges by the Chief Justice of India, is in his official capacity and therefore, no fiduciary relationship exists between them.

194. In order to determine whether the Chief Justice of India holds information with respect to asset declarations of judges of the Supreme Court in a fiduciary capacity, it is necessary to assess the nature of the relationship and the power dynamics between the parties. Justice Frankfurter of the United States Supreme Court in **SEC** v. **Chenery Corp**[74], while determining the question whether officers and directors who manage a holding company in the process of reorganisation occupy positions of trust, stated:

But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"51

195. **Black's Law Dictionary**[75], defines "fiduciary relationship" thus:

A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships - such as trustee-beneficiary, guardian-ward, principal-agent, and attorney-client - require an unusually high degree of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, **who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to**

act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, **as with a lawyer and a client or a stockbroker and a customer.**

In **Words and Phrases**[76] the term "fiduciary" is defined:

Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards another... It refers to integrity and fidelity... It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction... The term includes those informal relations which exist **whenever one party trusts and relies upon another, as well as technical fiduciary relations.**

In **Corpus Juris Secundum**[77] "fiduciary" is defined thus:

A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.

The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate. Some examples of what, in particular connections, the term has been held to include and not to include are set out in the note.

196. In **CBSE** v. **Aditya Bandopadhyay** MANU/SC/0932/2011 : (2011) 8 SCC 497, a two judge Bench of this Court while discussing the nature of fiduciary relationships relied upon several decisions and explained the terms "fiduciary" and "fiduciary relationship" thus:

39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. **The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s)**. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

197. In **RBI** v. **Jayantilal N. Mistry** MANU/SC/1463/2015 : (2016) 3 SCC 525, a two judge Bench of this Court reiterated the observations made in **CBSE** v. **Aditya Bandopadhyay** and held that RBI did not place itself in a fiduciary relationship with other financial institutions by virtue of collecting their reports of inspections, statements of the banks and information related to the business. It was held that the information collected by the RBI was required under law and not under the pretext of confidence or trust:

64. The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. **However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship**. As in the instant case, the financial institutions have an obligation to provide all the information to RBI and such information shared under an obligation/duty cannot be considered to come under the purview of being shared in fiduciary relationship.

198. The Canadian Supreme Court in the case of **Hodgkinson v. Simms** MANU/SCCN/0082/1994 : [1994] 3 SCR. 377, discussed the term 'fiduciary' thus:

A party becomes a fiduciary where it, acting pursuant to statute, agreement or unilateral undertaking, has an obligation to act for the benefit of another and that obligation carries with it a discretionary power. Several indicia are of assistance in recognizing the existence of fiduciary relationships: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

The term fiduciary is properly used in two ways. The first describes certain relationships having as their essence discretion, influence over interests, and an inherent vulnerability. A rebuttable presumption arises out of the inherent purpose of the relationship that one party has a duty to act in the best interests of the other party. The second, slightly different use of fiduciary exists where fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship. In such a case the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust are non-exhaustive examples of evidentiary factors to be considered in making this determination. Outside the established categories of fiduciary relationships, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary.

199. Dr. Paul Finn in his comprehensive work on **"Fiduciary Obligations"**[78], describes a fiduciary as someone who has an obligation to act "in the interests of" or "for the benefit of" their beneficiaries in some particular matter. For a person to act as a fiduciary they must first have bound themselves in some way to protect and further the interests of another.[79] Where such a position has

been assumed by one party then that party's position is potentially of a fiduciary.[79] The Federal Court of Australia in the case of **Australian Section & Inv Comm'n** v. **Citigroup Global Markets Australia Pty Ltd.**[80] has held:

The question of whether a fiduciary relationship exists, and the scope of any duty, will depend upon the factual circumstances and an examination of the contractual terms between the parties... Apart from the established categories, perhaps the most that can be said is that **a fiduciary relationship exists where a person has undertaken to act in the interests of another and not in his or her own interests but all of the facts and circumstances must be carefully examined to see whether the relationship is, in substance, fiduciary... The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship**. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the fiduciary expectation.

200. A fiduciary must be entrusted with a degree of discretion (power) and must have freedom to act without resorting to prior approval of the beneficiary.[81] The greater the independent authority to be exercised by the fiduciary, the greater the scope of fiduciary duty.[82] The person so entrusted with power is required to determine how to exercise that power.[81] Fiduciaries are identified by ascendancy, power and control on the part of the stronger party and therefore, a fiduciary relationship implies a condition of superiority of one of the parties over the other.[83] It is not necessary that the relationship has to be defined as per law, it may exist under various circumstances, and exists in cases where there has been a special confidence placed in someone who is bound to act in good faith and with due regard to the interests of the one reposing the confidence. Such is normally the case with, *inter alia*, attorney-client, agent-principal, doctor-patient, parent-child, trustees-beneficiaries[84], legal guardian-ward[85], personal representatives, court appointed receivers and between the directors of company and its shareholders. In **Needle Industries (India) Ltd.** v. **Needle Industries Newey (India) Holding Ltd.** MANU/SC/0050/1981 : (1981) 3 SCC 333 and **Dale & Carrington Invt (P) Lt** v. **P K Prathaphan** MANU/SC/0748/2004 : (2005) 1 SCC 212, this Court held that the directors of the company owe a fiduciary duty to its shareholders. In **P V Sankara Kurup v. Leelavathy Nambier** MANU/SC/0533/1994 : (1994) 6 SCC 68, this Court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

201. Other structural properties of the fiduciary relationship are dependence and vulnerability, where the beneficiary is dependent upon the fiduciary to exercise power and impact the practical interests.[86] Once a fiduciary relationship is established, fiduciary duties include the duty of loyalty and duty of care towards the interests of the beneficiaries.[81]

202. From the discussion above, it can be seen that a fiduciary is someone who acts for and on behalf of another in a particular matter giving rise to a relationship of trust and confidence. A fiduciary relationship implies a condition of superiority of one of the parties over the other, where special confidence has been reposed in an individual to act in the best interests of another.

203. The dispute before us is whether the Chief Justice of India while exercising its official function and holding asset declaration information of the judges acts in a fiduciary capacity. The Full Bench of the Delhi High Court agreed with the learned single judge and held:

The CJI cannot be a fiduciary vis-a-vis Judges of the Supreme Court. The Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations are not furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest. In these circumstances, it cannot be held that the asset information shared with the CJI, by the Judges of the Supreme Court, are held by him in the capacity of fiduciary, which if directed to be revealed, would result in breach of such duty.

We are in agreement with the above observation. The words "held by" or "under the control of" Under Section 2(j) of the RTI Act will include not only information under the legal control of the public authority but also all such information which is otherwise received or used or consciously retained by the public authority while exercising functions in its official capacity. The 1997 resolution on declaration of judge's assets as adopted on 7 May 1997 states:

RESOLVED FURTHER THAT every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice of the Court. The Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential.

204. The Chief Justice of India in exercising his official functions in accordance with the 1997 resolution while holding asset information of other judges does not act for and on behalf of other judges of the Supreme Court. There exists no fiduciary relationship between them. The Chief Justice of India is not entrusted with the power to protect and further the interests of individual judges who disclose their assets. The information is required by the mandate of the resolution dated 7 May 1997 passed by all the then sitting judges of the Supreme Court and it cannot be said that such information is being provided in any personal capacity. The Chief Justice of India merely holds the information in accordance with the official functions and not in any fiduciary capacity. The judges of the Supreme Court, including the Chief Justice of India occupy a constitutional office. There exists no set hierarchies between the judges and they enjoy the same judicial powers and immunities. The judges who disclose their assets cannot be said to be vulnerable to and dependent on the Chief Justice of India. In these circumstances, it cannot be held that asset information shared with the Chief Justice of India, by the judges of the Supreme Court, are held by him in a fiduciary capacity, which if revealed, would result in breach of fiduciary duty. Therefore, the argument that the information sought is held in a fiduciary capacity is inapplicable and cannot be used to prevent the information from being made public.

205. While we have not accepted the argument of the Appellant regarding the existence of the fiduciary relationship between the Chief Justice of India and the judges, it is relevant to point out the application of the fiduciary principle to public institutions where judges hold citizens' interests in public trust, guided by fiduciary standards.[87] A Judge's public fiduciary obligation towards the citizen includes a duty of loyalty, duty of care and the cluster comprising the duties of candour,

disclosure and accounting.[88] The duty of loyalty for a judge entails them being loyal to the citizenry by remaining impartial towards the litigants before them.[89] The duty of care for judges includes the expectation from judges to fulfil their responsibilities with reasonable diligence and to engage in reason based decision making.[90] The duties of candour, disclosure and accounting are based on the premise of judicial transparency and judicial honesty.

H The right to privacy and the right to know

206. The third referral question to be answered by this Court is: "Whether the information sought for is exempt Under Section 8(1)(j) of the RTI Act[37]." The question requires this Court to determine whether and under what circumstances the information sought by the applicant should be disclosed under the provisions of the RTI Act. This Court is cognisant that in interpreting the statutory scheme of the RTI Act, the constitutional right to know and the constitutional right to privacy of citizens are also implicated. In answering the question, it is necessary to analyse the scheme of the RTI Act, the role of the exemptions Under Section 8, the interface between the statutory rights and duties Under Section 8(1)(j) and the constitutional rights under Part III of the Constitution.

207. In order to facilitate effective governance, the government or 'public authority' must be empowered to efficiently coordinate diverse activities and at the same time be constrained to ensure that it does not override the freedoms of those it serves. In explaining the system of checks and balances in the American Constitution, James Madison noted:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. **In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself**. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[91]

Our Constitution institutes and operationalises the functions of government. It is necessary to empower the government to operationalise the public functions of the state and ensure the governance of the public lives of citizens. However, the framers of our Constitution recognised that this act of empowerment also carried certain associated risks, that no government of people is infallible and that in addition to democratic controls, certain additional checks and balances on governmental power are necessary. Part III of the Constitution represents a crucial aspect of the constitutional scheme by which governmental power is restricted, and the government is obligated to respect the rights and freedoms of citizens.

Scheme of Sections 8 and 11

208. The RTI Act was enacted in furtherance of the principles found in Part III of the Constitution. The RTI Act operationalises the disclosure of information held by 'public authorities' in order to reduce the asymmetry of information between individual citizens and the state apparatus. The RTI Act facilities transparency in the decisions of public authorities, the accountability of public officials for any misconduct or illegality and empowers individuals to bring to light matters of public interest. The RTI Act has provided a powerful instrument to citizens: to individuals engaged

in advocacy and journalism. It facilitates a culture of assertion to the citizen - activist, to the whistle-blower, but above all to each citizen who has a general interest in the affairs of the state. The preamble of the RTI Act notes:

An Act to provide for setting out the practical regime of right to information for citizens **to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority,** the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto. ...

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

As observed earlier in the judgment, the provisions of the RTI Act are dedicated to operationalising access to information held by public authorities. The scheme of the RTI Act and its applicability to the judiciary has already been examined in detail. In answering the third referral question, this Court can confine itself to the statutory exemptions carved out from the general obligation of disclosure. When enacting the RTI Act, Parliament was cognisant that the unrestricted disclosure of information could be fiscally inefficient, result in real world harms and infringe on the rights of others. In addition to the extracts above, the preamble to the RTI Act also states:

AND WHEREAS **revelation of information in actual practice is likely to conflict with other public interests** including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

209. To address the harms that may result from an unrestricted disclosure of information, the legislature included certain qualified and unqualified exemptions to the general obligation to disclose Under Sections 3, 4 and 7 of the RTI Act. Section 8(1) sets out certain classes of information, the disclosure of which, the legislature foresaw may result in harm to the nation or the rights and interests of other citizens. Section 8 reads as under:

8. Exemption from disclosure of information -

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, -

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this Section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with Sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests....

Section 8(1) begins with a non-obstante phrase "Notwithstanding anything contained in this Act". The import of this phrase is that Clause (1) of Section 8 carves out an exception to the general obligation to disclose under the RTI Act. Where the conditions set out in any of the sub-clauses to Clause (1) of Section 8 are satisfied, the Information Officer is under no obligation to provide information to the applicant. By expressly enumerating the circumstances in which the disclosure of information may be restricted on the grounds of certain identified harms, the RTI Act negates the notion that information may be withheld on the grounds of confidentiality simpliciter. A harm

under Clause (1) of Section 8 must be identified and invoked to justify the non-disclosure of a document requested for under the RTI Act.

210. It is also pertinent to note that Clauses (a), (b), (c), (f), (g) and (h) to Clause (1) of Section 8 provide an absolute exemption from the obligation of disclosure under the RTI Act. However, Clauses (d), (e), (i) and (j) to Clause (1) of Section 8 provide a qualified exemption from disclosure. For example, Clause (a) to Sub-section (1) of Section 8 provides an unconditional exemption where it is determined that disclosure of the information sought "would prejudicially affect the sovereignty and integrity of India". On the other hand, while Clause (d) to Section 8(1) similarly provides that information is exempt from disclosure where such disclosure "would harm the competitive position of a third party" the exemption is further qualified by the phrase, "unless the competent authority is satisfied that larger public interest warrants the disclosure". Thus, the exemption under Clause (d) is not absolute but is qualified and cannot be invoked where there exists a "larger public interest". Where the Information Officer determines that the "larger public interest" warrants a disclosure, the exemption in Clause (d) cannot be invoked and the information must be disclosed.

211. Clause (j) of Section 8(1) provides a qualified exemption from disclosure where the information sought relates to "personal information the disclosure of which has no relationship to any public activity or interest" or the disclosure of the information would cause an "unwarranted invasion of the privacy". However, the exemption may be overridden where the Information Officer is "satisfied that the larger public interest justifies the disclosure". Clause (j) is not an absolute exemption from the disclosure of information on the ground of privacy but states that disclosure is exempted in cases where "personal information" is sought and there exists no "larger public interest". Where the Information Officer is satisfied that the existence of the "larger public interest" justifies the disclosure of the "personal information", the information must be disclosed. The exact contours of the phrases "personal information" and "larger public interest" with respect to members of the judiciary, and the exact manner in which they relate to each other form the subject matter of the third referral question and shall be analysed during the course of this judgment.

212. Sections 2(n) and 11 of the RTI Act read as under:

2(n) **"third party"** means a person other than the citizen making a request for information and includes a public authority

11. Third party information.--(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, **which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be**, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such

submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, **disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.**

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, Under Sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

The definition of a "third party" includes a public authority. 'Third party information' is information which "relates to or has been supplied by any other person (including a public authority) other than the information applicant and has been treated as confidential by such third party. Where disclosure of 'third party information' is sought, and such information has been prima facie treated as confidential by the third party in question, the procedure Under Section 11 of the RTI Act is mandatory. The Information Officer shall, within five days of receiving the request for 'third party information' notify the relevant third party to whom the information relates or which had supplied it. The notice shall invite the third party to submit reasons (in writing or orally) as to whether or not the information sought should be disclosed. Section 11(2) provides the third party with a right to make a representation against the proposed disclosure within ten days of receiving the notice. The provision expressly mandates the Information Officer to take into consideration the objections of the third party when making a decision with respect to disclosure or non-disclosure of the information. It encapsulates the fundamental idea that a party whose personal information is sought to be disclosed is afforded the opportunity to contest disclosure. The proviso to Sub-section (1) of Section 11 permits disclosure where the "public interest" in disclosure "outweighs" any possible harms in disclosure highlighted by the third party.

213. Sections 8 and 11 must be read together. Other than in a case where the information applicant seeks the disclosure of information which relates to the information applicant herself, information sought that falls under the category of "personal information" within the meaning of Clause (j) of Section 8(1) is also "third party information" within the ambit of Section 11. Therefore, in every case where the information requested is "personal information" within the operation of Clause (j) of Sub-Section 1 of Section 8, the procedure of notice and objections Under Section 11 must be complied with. The two provisions create a substantive system of checks and balances which seek to balance the right of the information applicant to receive information with the right of the third party to prevent the disclosure of personal information by permitting the latter to contest the proposed disclosure.

214. In **Arvind Kejriwal** v. **Central Public Information Officer** MANU/DE/3888/2011 : AIR 2012 Del 29 it was contended that the procedure for notifying the third party and inviting objections Under Section 11 only applied to situations where the information sought was directly supplied by the third party, and not to situations where the information 'related to' the third party but was not supplied by it. Rejecting this contention, Justice Sanjeev Khanna, (as our learned Brother then was) speaking for a Division Bench of the Delhi High Court held:

13... On the other hand, in case the word 'or' is read as 'and', it may lead to difficulties and problems, including the invasion of right of privacy/confidentiality of a third party. **For example, a public authority may have in its records, medical reports or prescriptions relating to third person but which have not been supplied by the third person. If the interpretation given by the Appellant is accepted then such information can be disclosed to the information seeker without following the procedure prescribed in Section 11(1) as the information was not furnished or supplied by the third person.** ... when information relates to a third party and can be prima facie regarded and treated as confidential, the procedure Under Section 11(1) must be followed. Similarly, in case information has been provided by the third party and has been prima facie treated by the said third party as confidential, again the procedure Under Section 11(1) has to be followed.

...

15. Section 11 also ensures that the principles of natural justice are complied with. Information which is confidential relating to a third party or furnished by a third party, is not furnished to the information seeker without notice or without hearing the third party's point of view. **A third party may have reasons, grounds and explanations as to why the information should not be furnished, which may not be in the knowledge of the PIO/appellate authorities or available in the records.** The information seeker is not required to give any reason why he has made an application for information. **There may be facts, causes or reasons unknown to the PIO or the Appellant authority which may justify and require denial of information. Fair and just decision is the essence of natural justice. Issuance of notice and giving an opportunity to the third party serves a salutary purpose and ensures that there is a fair and just decision.** In fact issue of notice to a third party may in cases curtail litigation and complications that may arise if information is furnished without hearing the third party concerned. Section 11 prescribes a fairly strict time Schedule to ensure that the proceedings are not delayed.

The procedure Under Section 11 must be complied with not only in cases where information has been supplied to the public authority by a third party, but equally when the information which is held by the public authority "relates to" a third party. Section 11 is not merely a procedural provision, but a substantive protection to third parties against the disclosure of their personal information held by public authorities, without their knowledge or consent. The mere fact that the public authority holds information relating to a third party does not render it freely disclosable under the RTI Act. A third party may have good reason to object to the disclosure of the information, including on the ground that the disclosure would constitute a breach of the right to privacy. By including the requirement of inviting objections and providing a hearing on the proposed disclosure of third party information to the very party who may be adversely impacted by the disclosure, Section 11 embodies the principles of natural justice.

215. In the present case, the information sought pertains to the declaration of assets of members of the judiciary and official file notings and correspondence with respect to the elevation of judges to the Supreme Court. The information sought with respect to the assets of judges is not generated by the Supreme Court itself, but is provided by individual judges to the Supreme Court. The file notings with respect to the elevation of judges do not merely contain information regarding the operation of the Supreme Court, but also relate to the individual judges being considered for

elevation. Thus, the information sought both "relates to" and "has been supplied by" a third party and has been treated as confidential by that third party". The procedure Under Section 11 is applicable in regard to the information sought by the Respondent and must be complied with.

Constitutional rights implicated

216. The RTI Act, although a statutory enactment, engages the rights contained in Part III of the Constitution of India. Article 19(1)(a) of the Constitution contains the right to freedom of expression which grants all citizens not merely the right to free speech, but also the right to freely disseminate speech. The freedom of the press to disseminate speech has long been recognised under our Constitution.[92] An inherent component of the right to disseminate speech freely is the corresponding right of the audience to receive speech freely. The right to receive information disseminated has also been recognised as a facet of the freedom of expression protected by Article 19(1)(a) of the Constitution.[93] In addition to the right to receive information already being disseminated in the public domain, Article 19(1)(a) includes a positive right to information. Contrasted with the negative content of the right to receive information, which prohibits the State from restricting a citizen's access to information already in the public domain, the right to information, as a facet of Article 19(1)(a), casts a positive duty on the State to make available certain information not already in the public domain.

217. In **State of Uttar Pradesh** v. **Raj Narain** MANU/SC/0032/1975 : (1975) 4 SCC 428, Chief Justice A N Ray, speaking for a Constitution Bench of this Court observed:

74. In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. **The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.** [See *New York Times Co.* v. *United States*, 29 L Ed 822: 403 US 713] To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine...

These observations were reiterated by the seven judge Bench of this Court in case of **S.P. Gupta** v. **Union of India** MANU/SC/0080/1981 : (1981) Supp SCC 87. Justice P N Bhagwati (as he then was) noted:

64. Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their Government is doing. **The citizens have a right to decide by whom and by what Rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government**. It is only if people know

how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. "Knowledge" said James Madison, "will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. **A popular Government without popular information or the means of obtaining it, is but a prologue to a force or tragedy or perhaps both**". The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State...

The above-mentioned extract accurately and succinctly summarises the position of law and has been consistently followed by this Court.[94] The right to freedom of expression Under Article 19(1)(a) casts both positive and negative obligations on the State. It restricts the State from interfering with the right of citizens to receive information and its freely disseminated. It also imposes an obligation on the State to provide citizens with information about the public functioning of government to ensure accountability and create an informed electorate.

218. Parliament enacted the RTI Act in pursuance of the State's positive obligation to provide citizens with information about the functioning of government. It is a statute to operationalise the right of citizens to access information, otherwise only held by the government, under the 'right to know' or 'right to information' as protected by Article 19(1)(a). In requesting for information under the provisions of the RTI Act, a citizen engages certain statutory rights and duties under its provisions, but simultaneously also engages the 'right to know' under the Article 19(1)(a) of the Constitution. The 'right to know' is not absolute. The RTI Act envisages certain restrictions on the 'right to know' in the form of exemptions enumerated in Clause (1) to Section 8. Crucially, restrictions on the disclosure of information under the RTI Act also constitute restrictions on the information applicant's 'right to know' which is protected Under Article 19(1)(a) of the Constitution. The constitutional permissibility of the statutory restrictions on disclosure contained within the RTI Act is not in challenge before this Court. But it is trite to state that any restrictions on the disclosure of information would necessarily need to comport with the existing law on the protection of the 'right to know' as a facet of the freedom of expression. In the decision in **Thalappalam Service Cooperative Bank Limited** v. **State of Kerala** MANU/SC/1020/2013 : (2013) 16 SCC 82 Justice Radhakrishnan, speaking for a two judge Bench of this Court, noted:

56. The Right to Information Act, 2005 is an Act which provides for setting up the practical regime of right to information for citizens to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority. The Preamble of the Act also states that the democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. Citizens have, however, the right to secure access to information of only those matters which are "under the control of public authorities", the purpose is to hold "the Government and its instrumentalities" accountable to the governed. **Consequently, though right to get information is a fundamental right guaranteed Under Article 19(1)(*a*) of the Constitution, limits are being prescribed under the Act itself, which are reasonable restrictions within the meaning of Article 19(2) of the Constitution of India.**

The court expressly acknowledged that the RTI Act was enacted to fulfil the positive content of the right to know that existed Under Article 19(1)(a). Further, restrictions on the disclosure of information under the RTI Act constitute restrictions on the 'right to know' as a facet of Article 19(1)(a).

219. Clause (j) of Sub-section (1) of Section 8 uses the phrases "personal information" and "unwarranted invasion of the privacy of the individual". In interpreting the harm to be caused in disclosing personal information, this Court must be cognisant that the privacy of the individual is the subject of constitutional protection. In **K S Puttaswamy** v. **Union of India** MANU/SC/1044/2017 : (2017) 10 SCC 1 a nine judge bench of this Court unanimously held that there exists a constitutional right to privacy located within Part III of the Constitution. Justice D Y Chandrachud, speaking for a plurality of four judges, held:

250. ... The nine primary types of privacy are, according to the above depiction:

(*i*) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to prevent others from violating one's body or from restraining the freedom of bodily movement;

(*ii*) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy;

...

(ix) **informational privacy which reflects an interest in preventing information about the self from being disseminated and controlling the extent of access to information.**

...

320. **Privacy is a constitutionally protected right** which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.

...

323. **Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture**. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

...

325. **Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty Under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights**. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty Under Article 21. **An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.**

326. **Privacy has both positive and negative content.** The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

327. **Decisions rendered by this Court subsequent to *Kharak Singh* upholding the right to privacy would be read subject to the above principles.**

Justice R F Nariman in his separate concurring opinion made the following observations:

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

• Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

• **Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right**; and

• The privacy of choice, which protects an individual's autonomy over fundamental personal choices....

...

536. **This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India**. *M.P. Sharma* [*M.P. Sharma* v. *Satish Chandra* MANU/SC/0018/1954 : AIR 1954 SC 300: 1954 Cri. LJ 865: 1954 SCR 1077] and the majority in *Kharak Singh* [*Kharak Singh* v. *State of U.P.* MANU/SC/0085/1962 : AIR 1963 SC 1295: (1963) 2 Cri. LJ 329: (1964) 1 SCR 332], to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognising privacy as a fundamental right do not need to be revisited.

220. The right to privacy is a constitutional right emanating from the right to life and personal liberty in Article 21 of the Constitution and from the facets of freedom and dignity embodied in Part III of the Constitution. Any restriction on the right to privacy by the State must be provided for by law, pursue a legitimate aim of the State and satisfy the test of proportionality. The requirement of proportionality is satisfied when the nature and extent of the abridgement of the right is proportionate to the legitimate aim being pursued by the State. The constitutional protection of privacy encompasses not merely personal intimacies but also extends to decisional and informational autonomy. An individual has a constitutionally protected right to control the dissemination of personal information. The unauthorised use of information abridges a citizen's right to privacy.

221. The information disclosed under the RTI Act may include personal information relating to individuals. The RTI Act does not contain any restrictions on the end-use of the information disclosed under its provisions. The information disclosed by an Information Officer of the State pursuant to a right to information application may subsequently be widely disseminated. Clause (j) of Sub-section (1) of Section 8 provides that, in certain situations, even personal information of an individual may be disclosed under the RTI Act. Where the RTI Act contemplates the disclosure of "personal information", the right to privacy of the individual is engaged. The Act recognise that the absolute or unwarranted disclosure of an individual's personal information under the RTI Act would constitute an "unwarranted invasion of the right to privacy" under the statutory provisions of the RTI Act and also abridge the individual's constitutional right to privacy. However, the RTI Act has various checks and balances to guard against the unadulterated disclosure of personal information under the RTI Act.

222. The constitutional validity of the RTI Act as a measure abridging the right to privacy is not in question before this Court. But it is trite to say that the RTI Act satisfies the test of legality (by virtue of being a legislation) and also pursues a legitimate state aim of ensuring, transparency and accountability of government and an informed electorate. By requiring the Information Officer to balance the public interest in disclosure against the privacy harm caused, Clause (j) creates a legislatively mandated measure of proportionality to ensure that the harm to the individual's right to privacy is not disproportionate to the aim of securing transparency and accountability.

A balancing of interests

223. The RTI Act is a legislative enactment which contains a finely tuned balancing of interests between the privacy right of individuals whose information may be disclosed and the broader public interest in ensuring transparency, accountability and an informed electorate. Both these interests have significant implications as they engage constitutional rights under Part III. The overarching scheme of the RTI Act, and in particular Sections 3, 4 and 7 constitutes a mandate to fulfil the positive content of the 'right to information' as a facet of Article 19(1)(a) of the Constitution. The privacy interest protected by Clause (j) to Sub-section (1) of Section 8 engages the principle of informational privacy as a facet of the constitutional privacy as recognised by this Court in **K S Puttaswamy**. Neither the 'right to information' as a facet of Article 19(1)(a) nor the right to informational privacy as a facet to the right to privacy are absolute. The rights Under Article 19(1)(a) may be restricted on the grounds enumerated in Clause (2) of Article 19. The right to privacy and its numerous facets may be permissibly restricted where the abridgement is

provided by law, pursues a legitimate State objective and complies with the principle of proportionality.

224. Clause (j) of Sub-section (1) of Section 8 requires the Information Officer to first determine whether the information sought falls within the meaning of "personal information". Where the information sought falls within the scope of "personal information" and has "no relationship to any public activity or interest" the information is exempt from disclosure under the RTI Act. However, where there exists a 'public interest' in the disclosure of the information sought, the test to be applied by the Information Officer is different. The Information Officer must evaluate whether the "larger public interest" justifies the disclosure of the information notwithstanding the fact that the information is "personal information". In doing so, the Information Officer must balance the privacy interest of the individual whose personal information will be disclosed with the right to information of the public to know the information sought. The substantive content of the terms "personal information" and "public interest" must be informed by the constitutional standards applicable to the 'right to know' and the 'right to privacy' as disclosure and non-disclosure under the RTI Act directly implicate these constitutional rights. In striking a balance within the framework of the RTI Act, the Information Officer must be cognisant of the substantive contents of these rights and the extent to which they can be restricted within our constitutional scheme. It is also crucial for the standard of proportionality to be applied to ensure that neither right is restricted to a greater extent than necessary to fulfil the legitimate interest of the countervailing interest in question. It is now necessary to examine the content of "personal information" and "public interest".

Defining Personal Information

225. To understand the scope of information which is protected from disclosure under the RTI Act, it is of relevance to identify the nature of information which may be regarded as "personal information". The RTI Act does not put forth a definition of the term "personal information". However, "personal information" has been defined under other statutory frameworks. These definitions obviously do not bind the interpretation of the RTI Act but are useful sources of guidance in understanding the amplitude of the expression. We must of course read them with a caveat because the context of usage is not the same.

Section (sic) Rule 2(i) of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 defines the term "personal information" in the following terms:

Personal information means any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.

Thus, any information which is capable of identifying a natural person is classified as personal information.

226. **Article 4(1) of the EU General Data Protection Regulation (GDPR)** defines personal data in similar terms:

Personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

The data protection regime in the European Union regards information such as the name and surname, home address, location data, data held by a hospital or doctor and identification card number of an individual as personal data.[95] Courts from the jurisdiction have interpreted the term "personal data" broadly to even include information relating to the professional life of an individual.

In **Worten** v. **Autoridade para as Condições de Trabalho**[96], the European Court of Justice held the work timings of an employee constitute personal data:

19. In that respect, it suffices to note that, as maintained by all of the interested parties who submitted written observations, the data contained in **a record of working time** such as that at issue in the main proceedings, which concern, in relation to each worker, **the daily work periods and rest periods,** constitute personal data within the meaning of Article 2(a) of Directive 95/46, because they represent 'information relating to an identified or identifiable natural person

In **Rechnungshof** v. **Österreichischer Rundfunk**, [97] the European Court of Justice held that details of professional income received by employees from an organisation subject to Regulation by the Austrian Court of Audit amounts to "personal data". It was held:

It should be noted, to begin with, that the data at issue in the main proceedings, which relate both to the monies paid by certain bodies and the recipients, constitute personal data within the meaning of Article 2(a) of Directive 95/46, being information relating to an identified or identifiable natural person. **Their recording and use by the body concerned, and their transmission to the Rechnungshof and inclusion by the latter in a report intended to be communicated to various political institutions and widely diffused, constitute processing of personal data within the meaning of Article 2(b) of the directive.**

227. **The Protection of Personal Information Act, 2013** of South Africa contains an illustrative and comprehensive definition of personal information:

"personal information" means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to--

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;

(b) information relating to the education or the medical, financial, criminal or employment history of the person;

(c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;

(d) the biometric information of the person;

(e) the personal opinions, views or preferences of the person;

(f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;

(g) the views or opinions of another individual about the person; and

(h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

Protection from disclosure of personal information has been recognised as a facet of the right to privacy in South Africa. In **National Media Limited** v. **Jooste** MANU/SASC/0045/1996 : 1996 (3) SA 262 (SCA), it was alleged by the Respondent that intimate details of her personal life had been published by the Appellant publishers without her consent. The information published included details of her child as well as her relationship with the father of the child. Justice Harms elucidated the right to privacy in the following terms:

A right to privacy encompasses the competence to determine the destiny of private facts. The individual concerned is entitled to dictate the ambit of disclosure e.g. to a circle of friends, a professional adviser or the public. He may prescribe the purpose and method the disclosure. Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public...

In **NM** v. **Smith** MANU/SACC/0024/2007 : [2007] ZACC 6, the names of three women who were HIV positive were disclosed in a biography. It was alleged by the women that their names had been disclosed without any prior consent and their rights to privacy, dignity and psychological integrity had been violated by the disclosure. The opinion of four judges in Puttaswamy noted the two conceptions of privacy that emerged from the judgment of the Constitutional Court of South Africa which recognised the value of privacy in medical information:

According to the decision in *Smith case*, there are two interrelated reasons for the constitutional protection of privacy--one flows from the "constitutional conception of what it means to be a human being" and the second from the "constitutional conception of the State":

An implicit part of [the first] aspect of privacy is the right to choose what personal information of ours is released into the public space. **The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state.**

... Secondly, we value privacy as a necessary part of a democratic society and as a constraint on the power of the State... In authoritarian societies, the state generally does not afford such protection. People and homes are often routinely searched and the possibility of a private space from which the state can be excluded is often denied. The consequence is a denial of liberty and human dignity. In democratic societies, this is impermissible.

....

On the interrelationship between the right to privacy, liberty and dignity, the Court observed that:

The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it **highlights the interrelationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore interdependent and mutually reinforcing.** We value privacy for this reason at least--that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community.

228. In **Australian Broadcasting Corporation** v. **Lenah Game Meats** MANU/AUSH/0060/2001 : [2001] HCA 63, the Australian High Court heard an appeal with regard to an application for an interlocutory injunction to restrain the broadcasting of a film depicting the activities of the Respondent. The Respondent was a processor and supplier of game meat and sold possum meat for export. Unknown persons had entered the Respondent's premises and installed hidden cameras. The possum-killing operations were filmed without the knowledge or consent of the Respondent. It was claimed that the film was made surreptitiously and unlawfully and supplied to the Appellant with the intention that the Appellant would broadcast the film. In determining the Respondent Corporation's claim to privacy, Chief Justice Gleeson made the following observations:

42. There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. **Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.**

229. In **Campbell** v. **MGN Limited** MANU/UKHL/0050/2004 : [2003] 1 All ER 224, the claimant was a supermodel who had instituted proceedings against a publication called the 'Mirror' for publishing details of her efforts to overcome her drug addiction along with pictures of her

attending meetings of the 'Narcotics Anonymous'. The appeal was before the House of Lords. In her opinion, Baroness Hale noted:

145. It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself...

147. I start, therefore, from the fact-indeed, it is common ground-**that *all* of the information about Miss Campbell's addiction and attendance at NA which was revealed in the Daily Mirror Article was both private and confidential, because it related to an important aspect of Miss Campbell's physical and mental health and the treatment she was receiving for it. It had also been received from an insider in breach of confidence. That simple fact has been obscured by the concession properly made on her behalf that the newspaper's countervailing freedom of expression did serve to justify the publication of some of this information.** But the starting point must be that it was all private and its publication required specific justification.

230. Courts in India have interpreted the scope of information which constitutes "personal information" under the RTI Act. In **Girish Ramchandra Deshpande** v. **Central Information Commissioner** MANU/SC/0816/2012 : (2013) 1 SCC 212, the Petitioner sought copies of memos, show-cause notices and punishments awarded to the third Respondent by his employer along with details of movable and immovable properties, investments, lending and borrowing from banks and other financial institutions. The Petitioner also sought the details of gifts stated to have been accepted by the third Respondent. A large portion of the information sought was located in the income tax returns of the third Respondent. A two judge bench of the Court classified the information sought as "personal information" and held:

12.... The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service Rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the Petitioner cannot claim those details as a matter of right.

13. The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under Clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information.

Thus, even in cases where information may be classified as "personal information", the CPIO is required to undertake an enquiry on a case to case basis to determine if the disclosure of information is justified.

231. In **R K Jain** v. **Union of India** MANU/SC/0384/2013 : (2013) 14 SCC 794, the Appellant's application to the Chief Information Commissioner seeking copies of note-sheets and files relating to a member of CESTAT, was rejected. The two-judge bench of this Court placed reliance on the holding in **Girish Deshpande** and rejected the Appellant's claim for inspection of documents relating to the Annual Confidential Reports of the member of CESTAT, including documents relating to adverse entries in the Annual Confidential Reports and the "follow-up action" taken. In **Canara Bank** v. **C S Shyam** MANU/SC/1068/2017 : (2018) 11 SCC 426, the Respondent was employed by the Appellant bank as clerical staff and had asked for information relating to the transfer and posting of other clerical staff employed by the bank. This information sought included personal details such as the date of joining, designation of employee, details of promotion earned, date of joining to the branch. Speaking for a two-judge Bench of this Court, Justice A M Sapre considered the holding in **Girish Deshpande** and held

14. In our considered opinion, the aforementioned principle of law applies to the facts of this case on all force. It is for the reasons that, firstly, the information sought by Respondent 1 of individual employees working in the Bank was personal in nature; secondly, it was exempted from being disclosed Under Section 8(1)(*j*) of the Act and lastly, neither Respondent 1 disclosed any public interest much less larger public interest involved in seeking such information of the individual employee nor was any finding recorded by the Central Information Commission [*C.S. Shyam* v. *Canara Bank*, 2007 SCC OnLine CIC 626] and the High Court [*Canara Bank* v. *CIC*, 2007 SCC OnLine Ker 659] as to the involvement of any larger public interest in supplying such information to Respondent 1.

232. In **Subhash Chandra Agarwal** v. **Registrar, Supreme Court of India** (2018) 11 SCC 634, the Appellant had filed an application under the RTI Act seeking information relating to the details of the medical facilities availed by the Judges of the Supreme Court and their family members in the preceding three years, including information relating to expenses on private treatment in India or abroad. The Court held that disclosure of information regarding medical facilities availed by judges amounts to an invasion of privacy:

11. The information sought by the Appellant includes the details of the medical facilities availed by the individual Judges. The same being personal information, we are of the view that providing such information would undoubtedly amount to invasion of the privacy. We have also taken note of the fact that it was conceded before the learned Single Judge by the learned Counsel for the Appellant herein that no larger public interest is involved in seeking the details of the medical facilities availed by the individual Judges. It may also be mentioned that the total expenditure incurred for the medical treatment of the Judges for the period in question was already furnished by the CPIO by his letter dated 30-8-2011 and it is not the case of the Appellant that the said expenditure is excessive or exorbitant. That being so, we are unable to understand how the public interest requires disclosure of the details of the medical facilities availed by the individual Judges. In the absence of any such larger public interest, no direction whatsoever can be issued Under Section 19(8)(a)(iv) of the Act by the appellate authorities. Therefore on that ground also the order passed by the CIC dated 1-2-2012 is unsustainable and the same has rightly been set aside by the learned Single Judge.

Thus, it emerges from the discussion that certain category of information such as medical information, details of personal relations, employee records and professional income can be classified as personal information. The question of whether such information must be disclosed has to be determined by the CPIO on a case to case basis, depending on the public interest demonstrated in favour of disclosure.

Public Interest

233. The right to information and the need for transparency in the case of elected officials is grounded in the democratic need to facilitate better decision making by the public. Transparency and the right to information directly contribute to the ability of citizens to monitor and make more informed decisions with respect to the conduct of elected officials. Where the misconduct of an elected representative is exposed to the public, citizens can choose not to vote for the person at the next poll. In this manner, the democratic process coupled with the right to information facilitates better administration and provides powerful incentives for good public decision making. In the case of judges, citizens do not possess a direct agency relationship. Therefore, the 'public interest' in disclosing information in regard to a judge cannot be sourced on the need for ensuring democratic accountability through better public decision making but must be located elsewhere.

234. In common law countries, public interest has always been understood to operate as an interest independent to that of the State. Public interest operates equally against the State as it does against non-State actors. This is of significance in the context of the RTI Act as the right to information seeks to bring about disclosure of information previously held exclusively by the State. Public interest therefore operates as a standalone viewpoint independent of whether the interest of the State favours disclosure or non-disclosure. At its core, the objective test for 'public interest' is far broader than democratic decision making and takes into consideration both shared conceptions of the common good in society at any given point and yet recognises that such conceptions are always the product of contestation and disagreement, necessitating a robust set of viewpoints to facilitate the self-fulfilment of the individual and the search for truth.

235. In **Secy., Ministry of Information & Broadcasting, Govt. of India** v. *Cricket Assn. of Bengal* MANU/SC/0246/1995 : (1995) 2 SCC 161 Justice P B Sawant speaking for a three judge bench of this Court observed:

43. We may now summarise the law on the freedom of speech and expression Under Article 19(1)(*a*) as restricted by Article 19(2). The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom

to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

The right to information is not solely premised on improving the quality of democratic decision making but also finds its roots in other bases of freedom of expression, including the self-fulfilment of the individual, the introduction of competing views into the 'marketplace of ideas' and the autonomy and dignity of the individual. Limiting the term 'public interest' to information that allows individuals to make better public choices with respect to public officials fails to take into consideration the powerful benefits that the dissemination of information held by public authorities may have on the development of discourse, private decision making and the nourishment of the individual.

236. We have already observed that the accountability of the judiciary to the citizenry is inherent in the office of the judge. The administration of justice in our country is a vast, crucial and expensive endeavour that impacts millions of citizens on a daily basis. The contention that merely because a judge cannot be elected out of office, the conduct of judges and their general administration is not a matter of great public interest cannot be countenanced. The disclosure of information about the conduct of judges and their administration is necessary to ensure that the broader societal goals in the administration of justice are achieved. The disclosure of information can highlight areas where robust mechanisms of oversight and accountability are required. Lastly, the disclosure of information with respect to the judiciary also facilitates the self-fulfilment of the freedom of expression of individuals engaged in reporting, critiquing and discussing the activities of the court. The freedom of the press in exercising its role as a 'public watchdog' is also facilitated by the disclosure of information.

237. The factors that weigh in favour of disclosure in the 'public interest' are specific to each unique case. However, over the years several authorities have given shape to the concept of public interest and provided indicative factors that weigh in favour of the disclosure of information. In an Article titled "**Freedom of information and the public interest: the Commonwealth experience"**[98] the authors lay down several factors that, when found to exist in any given case, would weigh in favour of disclosure. The authors state:

It is generally accepted that the public interest is not synonymous with what is of interest to the public, in the sense of satisfying public curiosity about some matter. For example, the UK Information Tribunal has drawn a distinction between 'matters which were in the interest of the public to know and matters which were merely interesting to the public (i.e. which the public would like to know about, and which sell newspapers, but... are not relevant)'

Factors identified as favouring disclosure include the public interest in: contributing to a debate on a matter of public importance; accountability of officials; openness in the expenditure of public funds, the performance by a public authority of its regulatory functions, the handling of complaints by public authorities; exposure of wrongdoing, inefficiency or unfairness; individuals being able to refute allegations made against them; enhancements of scrutiny of decision-making; and protecting against danger to public health or safety.

The factors identified fulfil a significantly broader gamut of goals than merely holding democratically elected officials accountable. The contribution made by the disclosure of information to debate on matters of public importance is in itself a factor in favour of disclosure. Where the disclosure of documents casts a light on the adequate performance of public authorities and any mala fide actions or wrongdoings by public figures, facilitating the broader goal of accountability, there exists a public interest in favour of disclosure.

238. In **Campbell** v. **MGN Limited** MANU/UKHL/0050/2004 : [2004] UKHL 22 the House of Lords was called upon to balance the freedom of expression with the right to privacy. The claimant was a model who had been photographed leaving a drug rehabilitation meeting. The photographs were published, and the claimant claimed compensation for a breach of confidentiality. While the claimant admitted that there existed a public interest in the photographs of her attending the drug rehabilitation therapy, in evaluating the right of the Defendant to publish the information Baroness Hale made the following observations:

148. What was the nature of the freedom of expression which was being asserted on the other side? There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. **Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy.** Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. **Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value.** No doubt there are other kinds of speech and expression for which similar claims can be made.

As a facet of the freedom of expression, the 'public interest' element of the right to information has several jurisprudential bases. The public interest in disclosure extends to information which informs political debate and the organisation of "economic, social and political life". There also exists public interest in information which is "intellectual or educational" and furthers the development of the individual. Lastly, public interest would also cover information which is of artistic relevance or fosters and nourishes the individual.

239. The opinion of Baroness Hale indicates a priority of interests in the determination of whether speech is in the 'public interest' and is deserving of protection. However, this Court should caution against such an approach. The freedom of expression protects a broad range of ideas, including those that 'offend, shock and disturb'. In deciding whether information should be disclosed in the public interest, it is not for the Court to sit in judgment of society and make a determination on whether society would be 'better off' or 'worse off' if the information is disclosed. In the prescient words of Justice Tugendhat: "It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have."[99] It is well established that 'public interest' does not amount to what the public may find interesting. However, where the information sought

to be disclosed falls within the various fields discussed above, including the promotion of public debate, intellectual or educational information or artistic information, the information possesses a 'public interest' connotation in favour of disclosure.

240. Section 11B of the Australian Freedom of Information Act 1982 provides a list of indicative factors that may be used by courts to determine whether a document should be disclosed in the "public interest". Section 11B is as under:

11B. Public interest exemptions-factors

(1) This Section applies for the purpose of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest Under Sub-Section 11A(5).

(2) This Section does not limit Sub-Section 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the objects of this Act (including all the matters set out in Sections 3 and 3A);

(b) inform public debate on a matter of public importance;

(c) promote effective oversight of public expenditure;

(d) allow a person to access his or her own personal information.

The Australian statute notes that "public interest" must be interpreted as the factors and circumstances that promote the objectives of the legislation. In addition to these objectives, crucial factors weighing in favour of public interest are the promotion of public debate and matters relating to public expenditure.

241. The understanding that, in interpreting the phrase 'public interest' courts should pay heed to the objects of the legislation has been adopted in our country as well. In **Bihar Public Service Commission** v. **Saiyed Hussain Abbas Rizwi** MANU/SC/1103/2012 : (2012) 13 SCC 61, Justice Swatanter Kumar speaking for a two judge bench of this Court made the following observations:

22. **The expression "public interest" has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act.** The expression "public interest" must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. **In its common parlance, the expression "public interest", like "public purpose", is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs** (*State of Bihar* v. *Kameshwar Singh* [MANU/SC/0020/1952 : AIR 1952 SC 252]). It also means the general welfare of the public that warrants recognition and

protection; something in which the public as a whole has a stake [*Black's Law Dictionary* (8th Edn.)].

The Court noted that the phrase 'public interest' must be understood within the context of the enactment the phrase is used in. In the present case, the use of the phrase 'public interest' must be understood in light of the object and purpose of the RTI Act. The Court in **Bihar Public Service Commission** observed that the existence of certain exemptions from disclosure under Clause (1) of Section 8 would lead to a narrow reading of the phrase "public interest". This is not the correct approach. As noted previously in this judgment, the overarching principle of the RTI Act is to operationalise the disclosure of information held by public authorities in furtherance of the right to information Under Article 19(1)(a) of the Constitution. Merely because the provisions of the RTI Act contain certain restrictions on the disclosure of information cannot lead to a conclusion that the phrase "public interest" under the RTI Act must be construed narrowly. Rather, under the scheme of Clause (j) of Clause (1) of Section 8, "public interest" is the measure of factors favouring the disclosure of information, which is subsequently weighed against the factors of privacy which weight in favour of non-disclosure. The existence of the balancing test creates a restriction on disclosure under the RTI Act but does not affect the wide meaning independently accorded to "public interest" understood as emanating from the freedom of speech and expression.

242. Clause (j) of Clause (1) of Section 8 requires the Information Officer to weigh the "public interest" in disclosure against the privacy harm. The disclosure of different documents in different circumstances will give rise to unique "public interest" factors in favour of disclosure. However, a few broad principles may be laid out as to how the phrase "public interest" is to be understood. Where factors fall within this interpretation "public interest" so interpreted, they are factors that weigh in favour of disclosure. The principles are as follows:

(i) Public interest is not limited to information which directly promotes the democratic accountability of elected officials;

(ii) There exists public interest in the disclosure of information where the information sought informs political debate, is educational or intellectual or serves artistic purposes;

(iii) Where the information sought will promote public debate on political, economic or social issues, there exists a public interest in disclosure;

(iv) Judges and Information Officers should not pass a value judgment on whether the speech in question furthers their own conception of societal good or interest for it to satisfy the test of public interest;

(v) As an indicative list, information concerning the accountability of officials, public expenditure, the performance of public duties, the handling of complaints, the existence of any wrongdoing by a public official, inefficiency in public administration and unfairness in public administration all possess public interest value, their relative strength to be determined on a case by case basis;

(vi) Where the disclosure of information would promote the aims and objectives of the RTI Act, there exists a "public interest" in disclosing such information; and

(vii) The object and purpose of the RTI Act is the fulfilment of the positive obligation on the State to provide access to information Under Article 19(1)(a) of the Constitution and the existence of the restrictions on the disclosure of information does not restrict the meaning of "public interest" under the Act.

Balancing interests in disclosure with privacy interests

243. We have adverted to the substantive content of "personal information" and "public interest" as distinct factors to be considered by the Information Officer when arriving at a determination under Clause (j) of Clause (1) of Section 8. In the present case, the information sought by the Respondent raises both considerations of "public interest" and "personal information". The text of Clause (j) requires the Information Officer to make a determination whether the "larger public interest justifies the disclosure" of personal information sought. The Information Officer must conduct balancing or weighing of interests in making a determination in favour of disclosure or non-disclosure. The Information Officer must be cognisant that any determination under Clause (j) of Clause (1) of Section 8 implicates the right to information and the right to privacy as constitutional rights. Reason forms the heart of the law and the decision of the Information Officer must provide cogent and articulate reasons for the factors considered and conclusions arrived at in balancing the two interests. In answering the third referral question in its entirety, this Court would be remiss in not setting out the analytical approach to be applied by the Information Officer in balancing the interests in disclosure with the countervailing privacy interests. Justice S C Agrawal speaking for a Constitution Bench of this Court in **S N Mukherjee** v. **Union of India** (1990) 4 SCC 495 observed:

9. The object underlying the Rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". As pointed out earlier **the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making.** Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that **the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities.** The Rules of natural justice are not embodied rules.

The requirement to record reasons is a principle of natural justice and a check against the arbitrary exercise of power by judicial and quasi-judicial bodies. In making a determination under Clause (j) of Clause (1) of Section 8 in a given case, it would not be satisfactory if an Information Officer were merely to record that the privacy interest outweighed the public interest. Something more is required. By providing an analytical framework to address the two interests to be weighed and requiring the Information Officer record detailed reasons within this framework, the arbitrary exercise or discretion of the Information Officer is guarded against.

244. In the prescient words of Lord Denning:

...each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same.[100]

Neither the right to information nor the right to privacy are absolute rights under the framework of the RTI Act. Where the right to information of an information applicant in requesting information touches upon the right to privacy of the person whose information is sought, the RTI Act calls upon the Information Officer to weigh the two interests and determine which is stronger. In **Thalappalam Service Coop. Bank Ltd.** v. **State of Kerala** MANU/SC/1020/2013 : (2013) 16 SCC 82 Justice K S P Radhakrishnan, speaking for a two judge bench of this Court, noted:

61. **The right to information and right to privacy are, therefore, not absolute rights,** both the rights, one of which falls Under Article 19(1)(a) and the other Under Article 21 of the Constitution of India, can obviously be regulated, restricted and curtailed in the larger public interest. **Absolute or uncontrolled individual rights do not and cannot exist in any modern State. Citizens' right to get information is statutorily recognised by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble and other provisions of the Act.... The citizens, in that event, can always claim a right to privacy,** the right of a citizen to access information should be respected, so also a citizen's right to privacy.

245. In setting out the precise approach to be adopted by the Information Officer in making a determination under Clause (j) of Clause (1) of Section 8 it is worth adverting to the decision of **Campbell** v. **MGM Limited** MANU/UKHL/0050/2004 : [2004] UKHL 22 the facts of which have already been discussed above. In that case, the House of Lords was called upon to balance the privacy rights of the claimant, being photographed leaving a 'Narcotics Anonymous' meeting, Under Article 8 of the European Convention of Human Rights[101] and the right of the Defendant to publish the information Under Article 10 of the ECHR which provides for the freedom of expression. Although not a case with respect to the disclosure of documents, the House of Lords makes several notable observations about balancing privacy and free speech interests. Lord Nicholls observed:

20. I should take this a little further on one point. **Article 8(1) recognises the need to respect private and family life.** Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. **Article 10(1) recognises the importance of freedom of expression.** But Article 10(2), like Article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. **When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged Article 8 at all by being within the sphere of the complainant's private or family life.**

The first question of significance is whether the right to privacy of the person whose information is sought is engaged. This approach was subsequently applied by the Court of Appeal in **HRH Prince of Wales** v. **Associated Newspapers Ltd.** MANU/UKCH/0114/2006 : [2006] EWHA Civ 1776. The text of Clause (j) of Clause (1) of Section 8 also articulates this threshold. For Clause (j) to be engaged at the first instance, the information sought must constitute "personal information". This is an inquiry independent to the question of how the privacy interest should be balanced with the free speech interest.

246. Where the information sought is "personal information" the court must next balance the interest in disclosure or dissemination with the privacy interest at stake. Baroness Hale in her opinion in **Campbell** stated:

137. It should be emphasised that the 'reasonable expectation of privacy' is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail.

...

140. The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. **It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it.**

141. Both parties accepted the basic approach of the Court of Appeal in In re S [2003] 3 WLR 1425, 1451-1452, at paras 54 to 60. This involves looking **first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each.** The parties in this case differed about whether the trial judge or the Court of Appeal had done this, the Appellant arguing that the Court of Appeal had assumed primacy for the Article 10 right while the Respondent argued that the trial judge had assumed primacy for the Article 8 right.

247. Once the information sought has been identified as "personal information" the Information Officer must identify the actual rights being claimed in the individual case. In setting out the substantive content of 'public interest' and 'privacy' various facets of these concepts have been set out. In any given case, the Information Officer must identify the precise interests weighing in favour of 'public interest' disclosure, and those interests weighing in favour of 'privacy' and non-disclosure. The Information Officer must then examine the justifications for restricting each right and whether they are countenanced under the scheme of RTI Act and in law generally. The ground of confidentiality simpliciter is not a ground to restrict the right to information under the RTI Act or Article 19(1)(a) of the Constitution. Lastly, the Information Officer must employ the principle of proportionality. As observed by Baroness Hale, both the right to privacy and the right to information are legitimate aims. In applying the principle of proportionality, the Information Officer must ensure that the abridgement of a right is not disproportionate to the legitimate aim sought to be achieved by enforcing the countervailing right.

248. Take the example of where an information applicant sought the disclosure of how many leaves were taken by a public employee and the reasons for such leave. The need to ensure accountability of public employees is of clear public interest in favour of disclosure. The reasons for the leave may also include medical information with respect to the public employee, creating a clear privacy interest in favour of non-disclosure. It is insufficient to state that the privacy interest in medical

records is extremely high and therefore the outcome should be blanket non-disclosure. The principle of proportionality may necessitate that the number of and reasons for the leaves be disclosed and the medical reasons for the leave be omitted. This would ensure that the interest in accountability is only abridged to the extent necessary to protect the legitimate aim of the privacy of the public employee.

249. Having adverted to the analytical test to be applied by the Information Officers in balancing the two interests, it is also worth setting out certain factors that should not be considered in such a balancing. Section 11B of the **Australian Freedom of Information Act 1982** lays down certain 'Irrelevant factors' that should not be considered in determining whether to disclose information. Section 11B is as under:

...Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate.

The factors set out above are not relevant or permissible restrictions on the right to information and should not be considered in determining whether or not to disclose information under the RTI Act. Clause (2) of Section 6 of the RTI Act provides that an information applicant need not provide any reason as to why the information is sought. It would not be open for an Information Officer to deny the disclosure of information on the ground that the information would lead to confusion, embarrassment or unnecessary debate in the public sphere. By enumerating the grounds on which information may be exempted from the general obligation to disclose, Clause (1) of Section 8 negates the notion that information may be withheld on the sole ground of confidentiality.

I Conclusion

250. The information sought by the Respondent pertains to (1) the correspondence and file notings relating to the elevation of three judges to the Supreme Court, (2) information relating to the declaration of assets made by judges pursuant to the 1997 resolution, and (3) the identity and nature of disciplinary proceedings instituted against the lawyer and judge named in the newspaper report. The third referral question requires this Court to determine whether the disclosure of the information sought is exempt under Clause (j) of Clause (1) of Section 8. In arriving at a determination on whether the information sought is exempt under Clause (j), it is necessary to (i)

determine whether the information sought is "personal information" and engages the right to privacy, (ii) identify, in the facts of the present case, the specific heads of public interest in favour of disclosure and the specific privacy interests claimed, (iii) determine the justifications for restricting such interests and (iv) apply the principle of proportionality to ensure that no right is abridged more than required to fulfil the legitimate aim of the countervailing right. The process Under Section 11 of the RTI must be complied with where the information sought is 'third party information'. The substantive content of the terms 'personal information' and 'public interest' have also been set out in the present judgment.

J Directions

251. The information sought in Civil Appeal No. 2683 with respect to which judges of the Supreme Court have declared their assets does not constitute the "personal information" of the judges and does not engage the right to privacy. The contents of the declaration of assets would fall within the meaning of "personal information" and the test set out under Clause (j) of Clause (1) of Section 8 would be applicable along with the procedure Under Section 11 of the RTI Act. In view of the above observations, Civil Appeal No. 2683 of 2010 is dismissed and the judgment of the Delhi High Court dated 12 January 2010 in LPA No. 501 of 2009 is upheld.

252. Civil Appeals Nos. 10044 and 1045 of 2010 are remanded to the CPIO, Supreme Court of India to be examined and a determination arrived at, after applying the principles set out in the present judgment. The information sought in these appeals falls within the meaning of 'third party information' and the procedure Under Section 11 must be complied with in arriving at a determination. Brother Justice Sanjiv Khanna has observed that:

Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future

I wish to add a few thoughts of my own on the subject. The collegium owes its birth to judicial interpretation. In significant respects, the collegium is a victim of its own birth - pangs. Bereft of information pertaining to both the criteria governing the selection and appointment of judges to the higher judiciary and the application of those criteria in individual cases, citizens have engaged the constitutional right to information, facilitated by the RTI Act.

If the content of the right and the enforcement of the statute are to possess a meaningful dimension in their application to the judiciary - as it must, certain steps are necessary. Foremost among them is that the basis for the selection and appointment of judges to the higher judiciary must be defined and placed in the public realm. This is not only in terms of the procedure which is followed in making appointments but also in terms of the substantive norms which are adopted while making judicial appointments. There can be no denying the fact that there is a vital element of public interest in knowing about the norms which are taken into consideration in selecting candidates for

higher judicial office and making judicial appointments. Knowledge is a powerful instrument which secures consistency in application and generates the confidence that is essential to the sanctity of the process of judicial appointments. This is essentially because the collegium system postulates that proposals for appointment of judges are initiated by the judges themselves. Essential substantial norms in regard to judicial appointments include:

(i) The basis on which performance of a member of the Bar is evaluated for the purpose of higher judicial office;

(ii) The criteria which are applied in determining whether a member of the Bar fulfils requirements in terms of:

a) Experience as reflected in the quantum and nature of the practice;

b) Domain specialization in areas which are geared to the evolving nature of litigation and the requirements of each court;

c) Income requirements, if any, having regard to the nature of the practice and the circumstances prevailing in the court or region concerned;

d) The commitment demonstrated by a candidate under consideration to the development of the law in terms of written work, research and academic qualifications; and

e) The social orientation of the candidate, defined in terms of the extent of *pro bono* or legal aid work;

(iii) The need for promoting the role of the judiciary as an inclusive institution and its diversity in terms of gender, representation to minorities and the marginalised, orientation and other relevant factors.

The present judgment does not seek to define what the standards for judicial appointments should be. However, what needs to be emphasised is that the substantive standards which are borne in mind must be formulated and placed in the public realm as a measure that would promote confidence in the appointments process. Due publicity to the norms which have been formulated and are applied would foster a degree of transparency and promote accountability in decision making at all levels within the judiciary and the government. The norms may also spell out the criteria followed for assessing the judges of the district judiciary for higher judicial office. There is a vital public interest in disclosing the basis on which those with judicial experience are evaluated for elevation to higher judicial office particularly having regard to merit, integrity and judicial performance. Placing the criteria followed in making judicial appointments in the public domain will fulfil the purpose and mandate of Section 4 of the RTI Act, engender public confidence in the process and provides a safeguard against extraneous considerations entering into the process.

[1]Heading of an Article written by Alberto Alemanno: "How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection" reproduced in Michal Bobek (ed.) Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts (Oxford University Press 2015).
[2]Section 22 of the RTI Act reads:
22. Act to have overriding effect. -The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by computer or any other device;
[3]Also, see Philip Coppel, *'Information Rights'* (4th Edition, Hart Publishing 2014) P. 361-62
[4]*New Castle upon Tyne v. Information Commissioner and British Union for Abolition of Vivisection*, [2011] UKUT 185 AAC
[5]See '*Central Board of Secondary Education* v. *Aditya Bandopadhyay*' MANU/SC/0932/2011 : (2011) 8 SCC 497
[6]For the purpose of the present decision, we do not consider it appropriate to decide who would be the 'competent authority' in the case of other public authorities, if Sub-clauses (i) to (v) to Clause (e) of Section 2 are inapplicable. This 'anomaly' or question is not required to be decided in the present case as the Chief Justice of India is a competent authority in the case of the Supreme Court of India.
[7]See Prince Albert v. Strange, (1849) 1 Mac. & G 25, and Lord Oliver of Aylmerton, Spycatcher: Confidence, Copyright and Contempt, Israel Law Review (1989) 23(4), 407 [as also quoted in Philip Coppel, Information Rights, Law and Practice (4th Edition Hart Publishing 2014)].
[8]Campbell v. Mirror Group Newspapers Limited MANU/UKHL/0050/2004 : (2004) UKHL 22
[9]Daniel Solove: "10 Reasons Why Privacy Matters" published on 20th January 2014 and available at https://www.teachprivacy.com/10-reasons-privacy-matters/
[10]Richard A. Posner, "Privacy, Surveillance, and Law", The University of Chicago Law Review (2008), Vol. 75, 251.
[11]Virginia Law Review (2015), Vol. 101, at pp. 691-762.
[12]Michael Schudson, 'The Right to Know v. the Need for Secrecy: The US Experience' The Conversation (May 2015) <https://theconversation.com/the-right-to-know vs the-need-for-secrecy-the-us-experience-40948>; Eric R. Boot, 'The Feasibility of a Public Interest Defense for Whistleblowing', Law and Philosophy (2019). See generally Michael Schudson, The Rise of the Right to Know: Politics and the Culture of Transparency, 1945-1975 (Cambridge (MA): Harvard University Press 2015).
[13]Published online on 28th August, 2017
[14]See: How Transparent is Transparent Enough?: Balancing Access to Information Against Privacy in European Judicial Selections by Alberto Alemanno in Michal Bobek (ed.), Selecting Europe's Judges, 2015 Edition.
[15]Kate Malleson, 'Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom' Osgoode Hall Law Journal (2007) 44, 557.
[16]WH Gravett, 'Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures' 2017 (80) THRHR.

[17]Case 289/16 decided on 24th April 2018
[18]Rule 53(1)(b) of the Uniform Rules of Court, South Africa states:
"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-
(a) [...]
(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."
[19]Schedule 2, Part-2, Paragraph 14.
[20]Article 255, Treaty on the Functioning of the European Union states:
"A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254..."
[21]Set up under Resolution 'Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights', CM/Res (2010) 26 adopted by the Committee of Ministers on 10 November 2010.
[22]CJEU is the judicial branch of the European Union, administering justice in the 28 member states of the international organisation.
[23]Comprising of 47 member European states, Council of Europe adopted the European Convention on Human Rights, which established ECtHR.
[24]One of the seven constituent bodies of the European Union comprising of the ministers from the member states of the European Union.
[25]Reply Adopted by the Council on 12 July 2016 to Confirmatory Application 13/c/01/16 pursuant to Article 7(2) of Regulation (EC) No. 1049/2001 for public access to all the opinions issued by the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union.
[26]Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents
[27]Article 4(1)(b), Regulation No. 1049/2001
[28]First indent of Article 4(2), Regulation No. 1049/2001
[29]Second indent of Article 4(2), Regulation No. 1049/2001
[30]Article 4(3), Regulation No. 1049/2001
[31]Contributors: Professor Dr. Jutta Limbach, Professor Dr. Pedro Villalon, Roger Errera, The Rt Hon Lord Lester of Herne Hill QC, Professor Dr. Tamara Morschakova, The Rt Hon Lord Justice Sedley, Professor Dr. Andrzej Zoll.
<http://www.interights.org/document/142/index.html>
[32]Phillip Coppel, Information Rights Law and Practice (4th Edn. (2014)), Pg. 362.
[33]Civil Appeal No. 10044/2010, Civil Appeal No. 10045/2010 and Civil Appeal No. 2683/2010
[34]Civil Appeal No. 10044 of 2010
[35]"CPIO"
[36]"CIC"

[37]"RTI Act"
[38]**Section 2(f)** - "Information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.
[39]**Section 2(j)** - "Right to Information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-- (i) inspection of work, documents, records; (ii) taking notes, extracts or certified copies of documents or records; (iii) taking certified samples of material; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.
[40]Civil Appeal No. 2683 of 2010
[41]The CPIO, Supreme Court of India v. Subhash Chandra Agarwal and Anr., Writ Petition (C) 288/2009
[42]Appeal no CIC/WB/A/2008/00426
[43]**Section 6 (3)** - Where an application is made to a public authority requesting for an information,--
(i) which is held by another public authority; or
(ii) the subject matter of which is more closely connected with the functions of another public authority,
the public authority, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:
Provided that the transfer of an application pursuant to this Sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.
[44]**Section 8** - Exemption from disclosure of information.
(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,--
(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.
[45]Writ Petition (C) 288/2009
[46]Appeal No. CICWB/A/2009/000859
[47]**Section 24** - Act not to apply to certain organisations
(1) Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this Sub-section: Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in

Section 7, such information shall be provided within forty-five days from the date of the receipt of request.
(2) The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government or omitting therefrom any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be, omitted from the Schedule.
(3) Every notification issued Under Sub-section (2) shall be laid before each House of Parliament.
(4) Nothing contained in this Act shall apply to such intelligence and security organisation being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this Sub-section:
Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request. (5) Every notification issued Under Sub-section (4) shall be laid before the State Legislature.
[48]22. Act to have overriding effect. - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
[49]"The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."
[50]"123. *Evidence as to affairs of State*.--No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."
[51]"162. *Production of documents*.--A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.
The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility...."
[52]MP Jain, Securing the Independence of the Judiciary - The Indian Experience, Indian International and Comparative Law Review, p. 246
[53]Granville Austin, Cornerstone of a Nation (1999), p. 164
[54]Arghya Sengupta, Independence and Accountability of the Indian Higher Judiciary (2019), p. 17
[55]Supriya Routh, Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary, 13 Washington University Global Studies Law Review 321 (2014)
[56]"*An Independent Judiciary*" - speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture, November 10, 2011.
[57]Justice BN Srikrishna, Judicial Independence, The Oxford Handbook of the Indian Constitution (2016) at p. 350.

[58]S.P. Gupta v. Union of India, MANU/SC/0080/1981 : 1981 Supp SCC 87, 85 (per Bhagwati J.)
[59]Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric', 56 Case Western Reserve Law Review 911 (2006)
[60]*International Journal of Constitutional Law*, Volume 1, Issue 3, July 2003, Pages 476-510
[61]Lorne Sossin, 'Judicial Appointment, Democratic Aspirations, and the Culture of Accountability', 58 University of New Brunswick Law Journal 11 (2008)
[62]NJAC., 953
[63]Id
[64]Supriya Routh, Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary, 13 Washington University Global Studies Law Review 321 (2014)
[65]M Bovens, Analysing and Assessing Accountability: A Conceptual Framework, European Law Journal (2007), p. 450.
[66]Contini, F and Mohr, R, Reconciling independence and accountability in judicial systems, Utrecht Law Review (2007), p. 31
[67]"I, A.B., having been appointed Chief Justice [or a judge] of the Court do solemnly swear [or affirm] that saving the faith and allegiance which I owe to C.D., his heirs and successors, I will be faithful and bear true allegiance in my judicial capacity to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."
[68]TRS Allen, Accountability to Law, in Accountability in the Contemporary Constitution (Nicholas Bamforth and Peter Leyland eds.) (2013), Oxford Scholarship Online, p. 84
[69]Mark Tushnet, Judicial Accountability in Comparative Perspective, in Accountability in the Contemporary Constitution (Nicholas Bamforth and Peter Leyland eds.) (2013), Oxford Scholarship Online at Tushnet, p. 69
[70]124(4) - A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after as address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
[71]218 - The provisions of Clauses (4) and (5) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.
[72]Stephen Burbank, The Past and Present of Judicial Independence, California Law Review (1999).
[73]Charles Gardner, Rescuing Judicial Accountability from the Realm of Political Rhetoric (2006), p. 916
[74]SEC v. Chenery Corporation, MANU/USSC/0134/1943 : 318 U.S. 80, 85-86 (1942)
[75]Black's Law Dictionary, Tenth Edition, p. 744
[76]Words and Phrases, Volume 16-A, St. Paul: West Pub. Co, 1940
[77]Corpus Juris Secundum: A Complete Restatement of the Entire American Law As Developed by All Reported Cases, Volume 36-A, p. 38
[78]P.D. Finn "Fiduciary Obligations", Carswell 1977 at p. 15
[79]P.D. Finn "Fiduciary Obligations", Carswell 1977 at p. 9
[80]Australian Section & Inv. Comm'n v. Citigroup Global Markets Australia Pty. Ltd., [2007] FCA 963 (Citing P.D. Finn, The Fiduciary Principle, in Equity, Fiduciaries and Trusts (T. Youden ed., 1989))

[81]Tamar Frankel, "Fiduciary Law" Oxford University Press, 2011
[82]Scott, Austin W. "The Fiduciary Principle." *California Law Review* 37, No. 4 (1949): 539-55.
[83]Ken Coghill, Charles Sampford and Tim Smith "Fiduciary Duty and the Atmospheric Trust", Ashgate (2012)
[84]Section 88, Indian Trusts Act 1882
[85]Section 20, Guardians and Wards Act 1890
[86]Gold, Andrew S.; Miller, Paul B. "Philosophical foundations of fiduciary law" Oxford University Press, 2016.
[87]Robert G. Natelson, "Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders", 11 Tex. Rev. L. & PoL 239, 245
[88]Leib, Ethan J., David L. Ponet, and Michael Serota. "A Fiduciary Theory of Judging." *California Law Review* 101, No. 3 (2013): 699-753.
[89]Matthew Conaglen, Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias, 2008 PUB. L 58 (2008)
[90]Leib, Ethan J., David L. Ponet, and Michael Serota. "A Fiduciary Theory of Judging." *California Law Review* 101, No. 3 (2013): 699-753. See also Alon Harel & Tsvi Kahana, The Easy Core Case for Judicial Review, 2 J. LEGAL analysis 227, 249 n. 23 (2010).
[91]James Madison, Federalist No. 51 (1788)
[92]**Express Newspaper** v. **Union of India** MANU/SC/0157/1958 : 1959 SCR 12
[93]**Bennet Coleman** v. **Union of India** MANU/SC/0038/1972 : (1972) 2 SCC 788
[94]**People's Union for Civil Liberties** v. **Union of India** MANU/SC/0234/2003 : (2003) 4 SCC 399; **Thalappalam Service Cooperative Bank Limited** v. **State of Kerala** MANU/SC/1020/2013 : (2013) 16 SCC 82 and **Reserve Bank of India** v. **Jayantilal Mistry** MANU/SC/1463/2015 : (2016) 3 SCC 525.
[95]What is personal data?, Official Website of the European Union https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data en
[96]C-342/12 dated 30 May 2013
[97]Joined cases (C-465/00), (C-138/01) and (C-139/01) dated 20 May 2003
[98]Moira Paterson and Maeve McDonagh, Freedom of information and the public interest: the Commonwealth experience, Oxford University Commonwealth Law Journal, 17:2, 189-210 pp. 201.
[99]**Terry (previously 'LNS')** v. **Persons Unknown** [2010] EWHC 119
[100]Lord Denning, Freedom Under the Law (Hamlyn Lectures) 1968 (Sweet & Maxwell).
[101]"ECHR"

Back to Index

MANU/SC/0157/1997

Neutral Citation: 1996/INSC/1508

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 539 of 1986.

Decided On: 18.12.1996

Appellants: D.K. Basu Vs**.** Respondent: State of West Bengal

Hon'ble Judges/Coram:
Kuldip Singh and Dr. A.S. Anand, JJ.

Subject: Criminal

Subject: Constitution

Mentioned IN

Relevant Section:
CONSTITUTION OF INDIA - Article 21; CONSTITUTION OF INDIA - Article 22

Prior History:
Writ Petn. (Crl) No. 539 of 1986, with Writ Petn. (Cri) No. 592 of 1987

Disposition:
Disposed of

Case Note:

Criminal - Conviction - Section 304/34 of Indian Penal Code, 1860 - Respondents were convicted for offences of culpable homicide and fine was directed to be paid to heirs of deceased by way-of compensation - Hence, this Appeal - Whether, conviction of Respondent was justified - Held, claim of citizen was based on principle of strict liability to which defence of sovereign immunity was not available - Thus, citizen could receive amount of compensation from State, which had right to be indemnified by wrong doer - In assessment of compensation, emphasis had to be on compensatory and not on punitive element - However, monetary or pecuniary compensation was appropriate and indeed effective - Sometimes only suitable remedy for redressal of established infringement of fundamental right to life of citizen by public servants and State was vicariously liable for their acts - Thus,

said amount of compensation could be adjusted against amount awarded to claimant by way of damages in civil suit - Appeal disposed of.

Ratio Decidendi:
"Where right is one guaranteed by State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed."

ORDER

Dr. A.S. Anand, J.

1. The Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26th August, 1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20, 21 and 22 of July, 1986 and in the Statesman and Indian Express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. It was also stated in the letter that efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter alongwith the news items be treated as a writ petition under "public interest litigation" category.

2. Considering the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence and deaths in police lock up, the letter was treated as a writ petition and notice was issued on 9.2.1987 to the respondents.

3. In response to the notice, the State of West Bengal filed a counter. It was maintained that the police was not hushing up any matter of lock-up death and that wherever police personnel were found to the responsible for such death, action was being initiated against them. The respondents characterised the writ petition as misconceived, misleading and untenable in law.

4. While the writ petition was under consideration a letter addressed by Shri Ashok Kumar Johri on 29.7.87 to Hon'ble Chief Justice of India drawing the attention of this Court to the death of one Mahesh Bihari of Pilkhana, Aligarh in police custody was received. That letter was also treated as a writ petition and was directed to be listed alongwith the writ petition filed by Shri D.K. Basu. On 14.8.1987 this Court made the following order:

In almost every states there are allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. At present there does not appear to be any machinery to effectively deal with such allegations. Since this is an all India question concerning all States, it is desirable to issue notices to all the State Governments to find out whether they are desire to say anything in the matter. Let notices issue to all the State Governments. Let notice also issue to the Law Commission of India with a request that suitable suggestions may be made in the matter. Notice be made returnable in two months from today.

5. In response to the notice, affidavits have been filed on behalf of the States of West Bengal, Orissa, Assam, Himachal Pradesh, Madhya Pradesh, Haryana, Tamil Nadu, Meghalaya, Maharashtra and Manipur. Affidavits have also been filed on behalf of Union Territory of Chandigarh and the Law Commission of India.

6. During the course of hearing of the writ petitions, the Court felt necessity of having assistance from the Bar and Dr. A.M. Singhvi, senior advocate was requested to assist the Court as amicus curiae.

7. Learned Counsel appearing for different States and Dr. Singhvi, as a friend of the court, presented the case ably and though the effort on the part of the States initially was to show that "everything was well" within their respective States, learned Counsel for the parties, as was expected of them in view of the importance of the issue involved, rose above their respective briefs and rendered useful assistance to this Court in examining various facets of the issue and made certain suggestions for formulation of guidelines by this Court to minimise, if not prevent, custodial violence and for award of compensation to the victims of custodial violence and the kith and kin of those who die in custody on account of torture.

8. The Law Commission of India also in response to the notice issued by this Court forwarded a copy of the 113th Report regarding "Injuries in police custody and suggested incorporation of Section 114-B in the Indian Evidence Act."

9. The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens.

Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by the persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society.
These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

10. "Torture" has not been defined in the Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of the human civilisation.

Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also such intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself.

11. No violation of any one of the human rights has been the subject of so many Conventions and Declarations as 'torture'- all aiming at total banning of it in all forms, but inspite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward-flag of humanity must on each such occasion fly half-mast.

12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is a physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law.

13. "Custodial violence" and abuse of police power is not only peculiar to this country but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

14. In England, torture was once regarded as a normal practice to get information regarding the crime, the accomplices and the case property or to extract confessions, but with the development of common law and more radical ideas imbibing human thought and approach, such inhuman practices were initially discouraged and eventually almost done away with, certain aberrations here and there notwithstanding. The police powers of arrest, detention and interrogation in England were examined in depth by Sir Cyril Philips Committee-'Report of a Royal Commission on Criminal Procedure' (Command-Papers 8092 of 1981). The report of the Royal Commission is, instructive. In regard to the power of arrest, the Report recommended that the power to arrest without a warrant must be related to and limited by the object to be served by the arrest, namely, to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested or where there is a good reason to suspect the repetition of the offence and not to every case irrespective of the object sought to be achieved.

15. The Royal Commission suggested certain restrictions on the power of arrest on the basis of the 'necessity principle'. The Royal Commission said:

...we recommend that detention upon arrest for an offence should continue only on one or more for the following criteria:

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure of preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him.

The Royal Commission also suggested:

To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be finger printed or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case....

16. The power of arrest, interrogation and detention has now been streamlined in England on the basis of the suggestions made by the Royal Commission and incorporated in Police and Criminal Evidence Act, 1984 and the incidence of custodial violence has been minimised there to a very great extent.

17. Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries.
Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.C. confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer

is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring this police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Sections 53 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

18. However, inspite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

19. The Third Report of the National Police Commission in India expressed its deep concern with custodial violence and lock-up deaths. It appreciated the demoralising effect which custodial torture was creating on the society as a whole. It made some very useful suggestions. It suggested:

...An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade and the processes of law.

(iii) The accused is given to violent behavior and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....

The recommendations of the Police Commission (supra) reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendations, however, have not acquired any statutory status so far.

20. This Court in Joginder Kumar v. State MANU/SC/0311/1994 : 1994CriLJ1981 , (to which one of us, namely, Anand, J. was a party) considered the dynamics of misuse of police power of arrest and opined:

No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another....

No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonafides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter.

21. Joinder Kumar's case (supra) involved arrest of a practising lawyer who had been called to the police station in connection with a case under inquiry on 7.1.94. On not receiving any satisfactory account of his whereabouts the family members of the detained lawyer preferred a petitioner in the nature of habeas corpus before this Court on 11.1.94 and in compliance with the notice the lawyer was produced on 14.1.94 before this Court. The police version was that during 7.1.94 and 14.1.94 the lawyer was not in detention at all but was only assisting the police to detect some cases. The detenue asserted otherwise. This Court was not satisfied with the police version. It was noticed that though as that day the relief in habeas corpus petition could not be granted but the questions whether there had been any need to detain the lawyer for 5 days and if at all he was not in detention then why was this Court not informed, were important questions which required an answer. Besides if there was detention for 5 days, for what reason was he detained. The Court, therefore, directed the District Judge, Ghaziabad to make a detailed enquiry and submit his report within 4 weeks. The Court voiced its concern regarding complaints of violations of human rights during and after arrest. It said:

The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

....

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges. On the one hand, and individual duties, obligations and responsibilities on the others of weighing and balancing the rights, liberties, and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis of deciding which comes first-the criminal or society, the law violator or the abider.

This Court then set down certain procedural "requirements" in cases of arrest.

22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law.

The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials , detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. In Neelabati Bahera v. State of Orissa MANU/SC/0307/1993 : 1993CriLJ2899 , (to which Anand, J. was a party) this Court pointed out that prisoners and detenues are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenues. It was observed:

It is axiomatic that convicts, prisoners or under trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted into his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death, as the police lock-up where generally torture or injury is caused is away from the public

gaze and the witnesses are either police men or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear of retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are incharge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. State of Madhya Pradesh v. Shyamsunder Trivedi and Ors. MANU/SC/0722/1995 : (1995)4SCC262 is an apt case illustrative of the observations made by us above. In that case, Nathu Banjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu had been released from police custody at about 10.30 p.m. after interrogation on 13.10.1986 itself vide entry Ex. P/22A in the Roznamcha and that at about 7.00 a.m. on 14.10.1981, a death report Ex. P/9 was recorded at the police station. Rampura, at the instance of Ramesh respondent No. 6, to the effect that he had found "one unknown person" near a tree by the side of the tank rigging with pain in his chest and that as soon as respondent No. 6 reached near him, the said person died. The further case set up by SI Trivedi, respondent No. 1, incharge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (respondent No. 1-Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 Cr. P.C. He summoned Ramesh Chandra and Goverdhan respondents to the spot and in their presence prepared a panchnama Ex. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

25. The First Additional Sessions Judge acquitted all the respondents of all the charges holding that there was no direct evidence to connect the respondents with the crime. The State of Madhya Pradesh went up in appeal against the order of acquittal and the High Court maintained the acquittal of respondents 2 to 7 but set aside the acquittal of respondent No. 1, Shyamsunder Trivedi for offences under Section 218 201 and 342 IPC. His acquittal for the offences under Section 302/149 and 147 IPC was, however, maintained. The State filed an appeal in this Court by special leave. This Court found that the following circumstances had been established by the prosecution beyond every reasonable doubt and coupled with the direct evidence of PWs 1, 3, 4, 8 and 18 those circumstances were consistent only with the hypotheses of the guilt of the respondents and were inconsistent with their innocence:

(a) that the deceased had been brought alive to the police station and was last seen alive there on 13.1081;

(b) that the dead body of the deceased was taken out of the police station on 14.10.81 at about 2 p.m. for being removed to the hospital;

(c) that SI Trivedi respondent No. 1, Ram Naresh Shukla, Respondent No. 3, Rajaram, respondent No. 4 and Ganiuddin respondent No. 5 were present at the police station and had all joined hands to dispose of the dead body of Nathu-Banjara;

(d) that SI Trivedi, respondent No. 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender;

(e) SI Trivedi respondent in connivance with some of his subordinates, respondents herein had taken steps to cremate the dead body in hot haste describing the deceased as a 'lavaris' though the identity of the deceased, when they had interrogated for a sufficient long time was well known to them.

and opined that:

The observations of the High Court that the presence and participation of these respondents in the crime is doubtful are not borne out from the evidence on the record and appear to be an unrealistic over simplification of the tell tale circumstances established by the prosecution.

26. One of us (namely, Anand. J.) speaking for the Court went on to observe:

The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a 'could not careless' attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used, at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an old prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The Courts, must not loose sight of the fact that death in police custody is perhaps one of the worst kind of crime in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society.

This Court then suggested:

The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the Majesty of Law has prevailed.

27. The State appeal was allowed and the acquittal of respondents 1, 3, 4 and 5 was set aside. The respondents were convicted for various offences including the offence under Section 304 Part 11/34 IPC and sentenced to various terms of imprisonment and fine ranging from Rs. 20,000 to Rs. 50,000. The fine was directed to be paid to the heirs of Nathu Banjara by way-of compensation. It was further directed:

The Trial Court shall ensure, in case the fine is deposited by the accused respondents, that the payment of the same is made to the heirs of deceased Nathu Banjara, and the Court shall take all such precautions as are necessary to see that the money is not allowed to fall into wrong hands and is utilised for the benefit of the members of the family of the deceased Nathu Banjara, and if found

practical by deposit in Nationalised Bank or post office on such terms as the Trial. Court may in consultation with the heirs for the deceased consider fit and proper.

28. It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 114B in the Indian Evidence Act. The Law Commission recommend in its 113th Report that in prosecution of a police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period when the person was in the custody of the police, the Court may presume that the injury was caused by the police officer having the custody of that person during that period. The Commission further recommended that the Court, while considering the question of presumption, should have regard to all relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In Shyam Sunder Trivedi's case (supra) this Court also expressed the hope that the Government and the legislature would give serious thought to the recommendation of the law Commission. Unfortunately, the suggested amendment, has not been incorporated in the statute so far. The need of amendment requires no emphasis - sharp rise in custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it.

29. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminals and to interrogate him during the investigation of an offence but it must be remembered that the law does nor permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

30. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation.

31. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), The Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W., Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences,

offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. In Re Death of Sawinder Singh Grover , (to which Kuldip Singh, J.) was a party) this Court took suo moto notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceedings against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs. 2 lacs to the widow of the deceased by way of ex gratia payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested person in such cases too is a genuine need.

32. There is one other aspect also which needs our consideration.

We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease itself.

33. The response of the American Supreme Court to such an issue in Miranda v. Arizona, 384 US 436, is instructive. The Court said:

A recurrent argument, made in these cases is that society's need for interrogation out-weights the privilege. This argument is not unfamiliar to this Court. See e.g., Chambers v. Florida, 309 US 227 : 84 1 ed 716,: 60 S.Ct. 472 (1940). The whole thrust of our foregoing discussion demonstrates that the *Constitution has prescribed the rights of the individual* when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.

(Emphasis ours)

34. There can be no gain saying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statues has been upheld by the Courts. The right to interrogate the detenues, culprits or arrestees in the interest of the nation, must take precedence

over an individual's right to personal liberty. The latin maxim salus populi est suprema lex (the safety of the people is the supreme law) and salus republican est suprema. lex)(safety of the State is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated-indeed subjected to sustained and scientific interrogation - determined in accordance with provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the Rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

35. In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in. transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be counter signed by the arrestee.

36. We, therefore, consider it appropriate to

issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by atleast one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.<mpara>

37. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

38. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

39. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

40. The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

PUNITIVE MEASURES

UBI JUS IBI REMEDIUM-There is no wrong without a remedy. The law wills that in every case where a man is wronged and undamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done.

41. Some punitive provisions are contained in the Indian Penal Code which seek to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331 provide for punishment of those who inflict injury or grievous hurt or a person to extort confession or information in regard to commission of an offence. Illustrations (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions, are however, inadequate to repair the wrong done to the citizens. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

42. Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". Of course, the Government of India at the time of its ratification (of ICCPR) in 1979 had made a specific reservation to the effect that the Indian Legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. See with advantage Rudal Shah v. State of Bihar MANU/SC/0380/1983 : 1983CriLJ1644 ; Sebastian M. Hongrey v. Union of India MANU/SC/0163/1984 : [1984]3SCR22 ; Bhim Singh v. State of J and K MANU/SC/0064/1985 : 1986CriLJ192 and Saheli v. Commissioner of Police, Delhi MANU/SC/0478/1989 : AIR1990SC513 . There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.

43. Till about two decades ago the liability of the Government for tortious act of its public servants was generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of sovereign immunity was allowed to have its play. For the violation of the fundamental right to life or the basic human rights, however, this Court has taken the view that the defence of sovereign immunity is not available to the State for the tortious acts of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of India. In Neelabati Behera v. State, (supra) the decision of this Court in Kasturi Lal Ralia Ram Jain v. State of U.P. MANU/SC/0086/1964 : (1966)IILLJ583SC , wherein the plea of sovereign immunity had been upheld in a case of vicarious liability of the State for the tort committed by its employees was explained thus:

In this context, it is sufficient to say that the decision of this Court in Kasturilal upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in Rudul Sah and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, Kasturilal related to the value of goods seized and not returned to the owner due to the fault of Government Servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable.

44. The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the

purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 21 and 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

45. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens.

The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim-civil action for damages is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family.

46. In Nilabati Bahera's case (supra), it was held:

Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve new tools to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law, while concluding his first Hamlyn Lecture in 1949 under the title "Freedom under the Law" Lord Denning in his own style warned:

No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence... This is not the task of parliament.... The courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must ever be allowed in this country.

47. A similar approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental rights of the citizen has been adopted by the Courts of Ireland, which has a written constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy for the infringement of those rights. That has, however, not prevented the Courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but against the State itself.

48. The informative and educative observations of O'Dalaigh CJ in The State (At the Prosecution of Quinn) v. Ryan (1965) IR 70 122, deserve special notice. The Learned Chief Justice said:

It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, *it follows that no one can with impunity set these rights at bought or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires.*

49. In Byrne v. Ireland (1972) IR 241, Walsh, J. opined at p 264:

In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, *the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed*.

50. In Maharaj v. Attorney General of Trinidad and Tobago (1978) 2 All E.R. 670, The Privy Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of 'redress' for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said:

It was argued on behalf of the Attorney General that Section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in Jaundou v. Attorney General of Guvana. Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections' as the purpose for which orders etc. could be made. An order for payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been contravened. In their Lordships' view an order for payment of compensation when a right protected under Section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz. jurisdiction 'to hear and determine any application made by any person in pursuance of Sub-section (1) of this section'. The very wise powers to make orders, issue writs and give directions are ancillary to this.

51. Lord Diplock then went on to observe (at page 680):

Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 16 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone.

52. In Simpson v. Attorney General [Baigent's case] (1994) NZLR. 667 the Court of Appeal in New Zealand dealt with the issue in a very elaborate manner by reference to a catena of authorities from different jurisdictions. It considered the applicability of the doctrine of vicarious liability for torts, like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no specific remedy was provided. Hardie Boys, J. observed:

The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred (and they are but a sample) is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning.

53. The Court of Appeal relied upon the judgments of the Irish Courts the Privy Council and referred to the law laid down in Nilabati Behera v. State, (supra) thus:

Another valuable authority comes from India, where the Constitution empowers the Supreme Court to enforce rights guaranteed under it. In Nilabati Bahera v. State of Orissa (1993) Crl. LJ 2899, the Supreme Court awarded damages against the State to the mother of a young man beaten to death in police custody. The Court held that its power of enforcement imposed a duty to "forge new tools", of which compensation was an appropriate one where that was the only mode of redress available. This was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply. These observations of Anand, J. at p. 2912 may be noted.

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. The purpose of public law is

not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights.

54. Each of the five members of the Court of Appeal in Simpson's case (supra) delivered a separate judgment but there was unanimity of opinion regarding the grant of pecuniary compensation to the victim, for the contravention of his rights guaranteed under the Bill of Right Act, notwithstanding the absence of an express provision in that behalf in the Bill of Rights Act.

55. Thus, to sum up, it is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

56. Before parting with this judgment we wish to place on record our appreciation for the learned Counsel appearing for the States in general and Dr. A.M. Singhvi, learned senior counsel who assisted the Court amicus curiae in particular for the valuable assistance rendered by them.

Back to Index

MANU/SC/0208/2020

Neutral Citation: 2020/INSC/209

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 1698 of 2020 (Arising out of SLP (C) No. 14156 of 2015), Civil Appeal No. 1699 of 2020 (Arising out of SLP (C) No. 14676/2015), Civil Appeal No. 1700 of 2020 (Arising out of SLP (C) No. 24219/2015), Civil Appeal No. 1701 of 2020 (Arising out of SLP (C) No. 30556/2015), Writ Petition (Civil) Nos. 77, 130, 405, 414/2016, Civil Appeal No. 1702 of 2020 (Arising out of SLP (C) No. 15764/2016), Writ Petition (Civil) No. 423/2016, Civil Appeal No. 1707 of 2020 (Arising SLP (C) No. 4781 of 2020) (Arising out of SLP (C) ... CC No. 15018/2016), Civil Appeal No. 1703 of 2020 (Arising out of SLP (C) No. 23823/2016), Civil Appeal No. 1704 of 2020 (Arising out of SLP (C) No. 24506/2016), Civil Appeal No. 1706 of 2020 (Arising SLP (C) No. 4778 of 2020) (Arising out of SLP (C) ... CC No. 15304/2016), Writ Petition (Civil) Nos. 600, 598, 601, 602, 733/2016, 189, 222, 316, 334, 371/2017, 96, 102, 103, 272, 108, 110, 106, 146, 123, 124, 138, 155, 145, 158, 174/2018, Civil Appeal No. 1705 of 2020 (Arising out of SLP (C) No. 8480/2018), Writ Petition (Civil) Nos. 291, 287, 344, 352, 387, 392, 396, 530, 519, 535, 581, 578, 612, 629, 596, 616, 632, 608, 628, 617, 624, 631, 635, 636, 641, 642, 639, 640, 650, 644, 658, 659, 680, 671, 677, 681, 686, 703, 696, 717, 728, 726, 727, 1272, 1302/2018, 656, 744, 999, 1054, 1053, 1080, 1073, 1089, 1086, 1150/2019, Contempt Petition (Civil) No. 1023/2019 in Writ Petition (Civil) No. 414/2016 and Writ Petition (Civil) No. 1266/2019

Decided On: 19.02.2020

Appellants: Dheeraj Mor Vs. Respondent: Hon'ble High Court of Delhi

Hon'ble Judges/Coram:

Arun Mishra, Vineet Saran and S. Ravindra Bhat, JJ.

Subject: Constitution

Subject: Service

Relevant Section:

Constitution Of India - Article 233

Cases Overruled/Partly Overruled:

Vijay Kumar Mishra and Ors. vs. High Court of Judicature at Patna and Ors. MANU/SC/0878/2016

Case Note:

Constitution - District judge - Determination of quota - Articles 14, 16, 232(2), 233, 233(2), 234 and 235 of Constitution of India - Present reference filed with regard to interpretation of Article 233 of Constitution of India as to eligibility of members of subordinate judicial service for appointment as District Judge as against quota reserved for Bar by way of direct recruitment - Petitioners who were in judicial service, had claimed that in case before joining judicial service candidate had completed seven years of practice as advocate, he/she shall be eligible to stake claim as against direct recruitment quota from Bar notwithstanding that on date of application/appointment, he or she was in judicial service of Union or State - Another category was that of persons having completed only seven years of service as judicial service - Whether members of judicial service could claim to be appointed for vacancies in cadre of District Judge, in the quota earmarked for appointment from amongst eligible Advocates.

Facts:

The present reference filed with regard to the interpretation of Article 233 of the Constitution of India as to the eligibility of members of the subordinate judicial service for appointment as District Judge as against the quota reserved for the Bar by way of direct recruitment. The Petitioners who were in judicial service, have claimed that in case before joining judicial service a candidate had completed seven years of practice as an advocate, he/she shall be eligible to stake claim as against the direct recruitment quota from the Bar notwithstanding that on the date of application/appointment, he or she was in judicial service of the Union or State. Yet another category was that of the persons having completed only seven years of service as judicial service. They contend that experience as a judge be treated at par with the Bar service, and they should be permitted to stake their claim. The third category was hybrid, consisting of candidates who have completed seven years' by combining the experience serving as a judicial officer and as advocate. They claim to be eligible to stake their claim against the above quota. The central argument advanced was that Article 233(2) provides two sources of recruitment, one was from judicial service, and the other was from Bar. Thus, a person in judicial service with experience of seven years practice at the Bar, before joining service (or combined with service as a judicial officer), could stake a claim under Article 233(2) as against the posts reserved for those having experience of seven years as an advocate/pleader.

Held, while answering the reference:

Arun Mishra, J.

(i) For direct recruitment as District Judge as against the quota fixed for the advocates/pleaders, incumbent had to be practicing advocate and must be in practice as on the cut-off date and at the time of appointment he must not be in judicial service or other services of the Union or State. For constituting experience of seven years of practice as advocate, experience obtained in judicial service could not be equated/combined and advocate/pleader should be in practice in the immediate past for seven years and must be in practice while applying on the cut-

off date fixed under the Rules and should be in practice as an advocate on the date of appointment. The purpose was recruitment from bar of a practicing advocate having minimum seven years' experience. [45]

(ii) The Rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from bar were not ultra vires as Rules were subservient to the provisions of the Constitution. [46]

(iii) Therefore, answer the reference as under:

(i) The members in the judicial service of the State could be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed under Articles 234 and 235.

(iii) Under Article 232(2), an Advocate or a pleader with seven years of practice could be appointed as District Judge by way of direct recruitment in case he was not already in the judicial service of the Union or a State.

(iv) For the purpose of Article 233(2), an Advocate had to be continuing in practice for not less than seven years as on the cut-off date and at the time of appointment as District Judge. Members of judicial service having seven years' experience of practice before they have joined the service or having combined experience of seven years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

(v) The Rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, could not be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

(vi) The decision in Vijay Kumar Mishra providing eligibility, of judicial officer to compete as against the post of District Judge by way of direct recruitment, could not be said to be laying down the law correctly. The same was hereby overruled. [47]

S. Ravindra Bhat, J.

(i) Since the Constitution itself makes a distinction between advocates on the one hand, and judicial officers, on the other, the argument of discrimination is insubstantial. If one examines the scheme of appointment from both channels closely, it was evident that a lions' share of posts were to be filled by those in the judicial service. For the past two decades, only a fourth of the posts in the cadre of District Judges (in every State) were earmarked for advocates, the balanceto be

filled exclusively from amongst judicial officers. Half was to be filled on the basis of seniority cum merit, whereas twenty five percent was to be filled by departmental examination. This examination is confined to members of the judicial service of the concerned State. The decision of this Court in All India Judges' Association and Ors. v. Union of India and Ors., reduced the limited departmental examination quota (out of turn promotion quota) from twenty five percent to ten percent. Thus, cumulatively, even today, judicial officers were entitled to be considered for appointment, by promotion, as District Judges, to the extent of seventy five percent of the cadre relating to that post, in every State. It was therefore, held that the exclusion-by the rules, from consideration of judicial officers, to the post of District Judges, in the quota earmarked for Advocates with the requisite standing, or practice, conforms to the mandate of Articles 233-235, and the Rules were valid. [80]

(ii) The Constitution makers were aware that the judicial branch had to be independent, and at the same time, reflect a measure of diversity of thought, and approach. This was borne out by eligibility conditions spelt out clearly in regard to appointments at every level of both the lower and higher judiciary: the District court, the High Courts and the Supreme Court. In regard to judicial positions in each of these institutions, the Constitution enables appointments, from amongst members of the Bar, as its framers were acutely conscious that practising advocates reflect independence and are likely offer a useful attribute, i.e. ability to think differently and have novel approaches to interpretation of the laws and the Constitution, so essential for robustness of the judiciary, as well as society as a whole. [82]

(iii) The Constitution makers, in the opinion of this Court, consciously wished that members of the Bar, should be considered for appointment at all three levels, i.e. as District judges, High Courts and this Court. This was because counsel practising in the law courts have a direct link with the people who need their services, their views about the functioning of the courts, is a constant dynamic. Similarly, their views, based on the experience gained at the Bar, injects the judicial branch with fresh perspectives, uniquely positioned as a professional, an advocate has a tripartite relationship one with the public, the second with the court, and the third, with her or his client. A counsel, learned in the law, had an obligation, as an officer of the court, to advance the cause of his client, in a fair manner, and assist the court. Being members of the legal profession, advocates are also considered thought leaders. Therefore, the Constitution makers envisaged that at every rung of the judicial system, a component of direct appointment from members of the Bar should be resorted to. For all these reasons, it was held that members of the judicial service of any State could not claim to be appointed for vacancies in the cadre of District Judge, in the quota earmarked for appointment from amongst eligible Advocates, under Article 233. [84]

(iv) Therefore, it was held that under Article 233, a judicial officer, regardless of her or his previous experience as an Advocate with seven years' practice could not

apply, and compete for appointment to any vacancy in the post of District Judge, her or his chance to occupy that post would be through promotion, in accordance with Rules framed under Article 234 and proviso to Article 309 of the Constitution of India. [87]

Ratio Decidendi:

The members of the judicial service of any State cannot claim to be appointed for vacancies in the cadre of District Judge, in the quota earmarked for appointment from amongst eligible Advocates, under Article 233 of Constitution.

Disposition:
Disposed of

JUDGMENT

Arun Mishra, J.

1. A Division Bench of this Court has referred the matters. The question involved in the matters is the interpretation of Article 233 of the Constitution of India as to the eligibility of members of the subordinate judicial service for appointment as District Judge as against the quota reserved for the Bar by way of direct recruitment. The Petitioners who are in judicial service, have claimed that in case before joining judicial service a candidate has completed 7 years of practice as an advocate, he/she shall be eligible to stake claim as against the direct recruitment quota from the Bar notwithstanding that on the date of application/appointment, he or she is in judicial service of the Union or State. Yet another category is that of the persons having completed only 7 years of service as judicial service. They contend that experience as a judge be treated at par with the Bar service, and they should be permitted to stake their claim. The third category is hybrid, consisting of candidates who have completed 7 years' by combining the experience serving as a judicial officer and as advocate. They claim to be eligible to stake their claim against the above quota.

2. The central argument advanced is that Article 233(2) provides two sources of recruitment; one is from judicial service, and the other is from Bar. Thus, a person in judicial service with experience of 7 years practice at the Bar, before joining service (or combined with service as a judicial officer), can stake a claim Under Article 233(2) as against the posts reserved for those having experience of 7 years as an advocate/pleader. Reliance has been placed on the decisions of this Court in Rameshwar Dayal v. State of Punjab and Ors., MANU/SC/0313/1960 : AIR 1961 SC 816 and in Chandra Mohan v. State of Uttar Pradesh and Ors., MANU/SC/0052/1966 : (1967) 1 SCR 77 : AIR 1966 SC 1987 to submit that Under Article 233(2) there are two sources of direct recruitment to the higher judicial service; one from the Bar and the other from service. The decisions of Constitution Bench in Chandra Mohan (supra) and Rameshwar Dayal (supra) are binding. The decision to the contrary in Satya Narain Singh v. High Court of Judicature at Allahabad and Ors., MANU/SC/0069/1984 : (1985) 1 SCC 225 taking a departure negating the right of the member of the judicial service and confining the direct recruitment from the Bar through practicing advocates

effectively whittle down the law laid down in Chandra Mohan (supra) and Rameshwar Dayal (supra).

3. It is argued that Articles 233(1) and 233(2) inter alia deal with direct recruitment, as is apparent from the Constitution Bench decision of this Court in the High Court of Punjab & Haryana v. State of Haryana, MANU/SC/0072/1975 : (1975) 1 SCC 843. The Rules framed by various High Courts disqualifying the members of subordinate judicial service from direct recruitment to the higher judicial service are not in consonance with the law laid down in Chandra Mohan (supra) and Rameshwar Dayal (supra) and the provisions contained in Article 233. The rules, which completely cut off one stream and provide only one stream of direct recruitment then the High Court's Rules would have to be declared ultra vires being violative of Article 233. It was further submitted that the Rules framed by various High Courts arbitrarily discriminate between advocates and the members of the judicial service in the matter of direct recruitment, the Rules suffer from the vice of arbitrariness. It was also submitted that the decision in All India Judges' Association v. Union of India, MANU/SC/0251/2002 : (2002) 4 SCC 247 has been rendered by a Bench of three Judges. The decision cannot overturn the two earlier Constitution Bench judgments of this Court. In All India Judges' Association case (supra), the Court proceeded on the basis that there was only one source of direct recruitment to the higher judicial service, which is violative of the dictum laid down by a larger Bench of this Court in Rameshwar Dayal (supra) and Chandra Mohan (supra). The decision in All India Judges' Association case (supra) is inadvertent and cannot be said to be binding. The quota system from the service and the Bar would apply to those who apply within the quota. The quota system cannot override the constitutional scheme of Article 233(1) and (2).

4. Reliance has also been placed on behalf of the Petitioners upon the decision in Vijay Kumar Mishra and Anr. v. High Court of Judicature at Patna and Ors., MANU/SC/0878/2016 : (2016) 9 SCC 313 in which it has been held that the bar prescribed Under Article 233(2) prohibits only the appointment of persons in service of Central/State Government and not their participation in the recruitment process. It is the constitutional right of such persons as well to participate in the selection process. In case they are selected, they can resign and join the post.

5. On the other hand, it was submitted on behalf of various High Courts as well as on behalf of the practicing advocates that Article 233(2) contemplates direct recruitment only from the Bar and the person should not be in judicial service for the post of direct recruitment. They can only be promoted. By their volition they can join the subordinate judicial service. Having done so, they can only be promoted to the higher judicial service as provided in the rules. It was further submitted that the decisions in Rameshwar Dayal (supra) and Chandra Mohan (supra) rather than espousing the submissions on behalf of in-service candidates, negate the same. The decision in Satya Narain Singh (supra) has also considered the aforesaid decisions and has opined that there are two different streams, and the candidates from the judicial service cannot stake their claim as against the posts reserved for direct recruitment from the Bar. Similar is the law laid down by this Court in the case of Deepak Aggarwal v. Keshav Kaushik and Ors., MANU/SC/0048/2013 : (2013) 5 SCC 277. It was further submitted that the decision in All India Judges Association (supra) has prescribed a quota for merit promotion from the in-service candidates and 25% of the quota for direct recruitment from the Bar. Also, the quota for limited competitive examinations fixed was reduced to 10% in All India Judges' Association v. Union of India, MANU/SC/1120/2010 : (2010) 15 SCC 170. It was further submitted that there is a separate quota provided under the Rules framed

by various High Courts, but now there is a roster system as well. Roster system has also been made applicable for fixing the seniority of the incumbents recruited from in-service candidates as well as directly from the Bar. In this regard reference has been made to the decision of this Court in Punjab & Haryana High Court v. State of Punjab, MANU/SC/1117/2018.

6. The main question for consideration is the interpretation of Article 233 of the Constitution of India, and based upon its interpretation, the question concerning the Rules being ultra vires of the same has to be examined. Rules of various High Courts, as existing preclude members of the judicial service from staking their claim as against the posts reserved for direct recruitment from the Bar. Article 233 is extracted hereunder:

233. Appointment of district judges--(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

7. The Hindi version of Article 233 has also been relied upon. The same is extracted hereunder:

" अध्याय 6- अधीनस्थ न्यायालय

233. जिला न्यायाधीशों की नियुक्ति - (1) किसी राज्य में जिला न्यायाधीश नियुक्त होने वाले व्यक्तियों की नियुक्ति तथा जिला न्यायाधीश की पदस्थापना और प्रोन्नति उस राज्य का राज्यपाल ऐसे राज्य के संबंध में अधिकारिता का प्रयोग करने वाले उच्च न्यायालय से परामर्श करेगा।

(2) वह व्यक्ति, जो संघ की या राज्य की सेवा में पहले से ही नहीं है, जिला न्यायाधीश नियुक्त होने के लिए केवल तभी पात्र होगा जब वह कम से कम सात वर्ष तक अधिवक्ता या प्लीडर रहा है और उसकी नियुक्ति के लिए उच्च न्यायालय ने सिफारिश की है।"

8. It was submitted that Article 394A had been inserted by way of the Constitution (Fifty-eighth Amendment) Act, 1987. The same provides as under:

394A. Authoritative text in the Hindi language-(1) The President shall cause to be published under his authority,--

(a) the translation of this Constitution in the Hindi language, signed by members of the Constituent Assembly, with such modifications as may be necessary to bring it in conformity with the language, style and terminology adopted in the authoritative texts of Central Acts in the Hindi language, and incorporating therein all the amendments of this Constitution made before such publication; and

(b) the translation in the Hindi language of every amendment of this Constitution made in the English language.

(2) The translation of this Constitution and of every amendment thereof published under Clause (1) shall be construed to have the same meaning as the original thereof, and if any difficulty arises in so construing any part of such translation, the President shall cause the same to be revised suitably.

(3) The translation of this Constitution and of every amendment thereof published under this Article shall be deemed to be, for all purposes, the authoritative text thereof in the Hindi language.

9. The Hindi translation of the Constitution signed by the members of the Constituent Assembly was published in 1950 under the authority of the President of the Constituent Assembly. The translation of the Constitution shall be deemed to be the authoritative text thereof in the Hindi language.

10. Crawford in The Construction of Statutes, 202 (1940) has also been referred to, especially the following observations:

In some jurisdictions statutes may be enacted in more than one language. Where this is the situation, both texts constitute the law and each must be considered in ascertaining the meaning of the legislature.

11. Considering the version in the Hindi language as well as in the English language, the meaning is the same, and interpretation does not change. There is no room for any confusion that they are two different sources of appointment provided in Article 233.

12. Article 233(1) provides for appointments by way of posting and promotion. It is apparent from Article 233 that the appointing authority the Governor has to exercise the power of appointment in consultation with the High Court. The term 'appointment' is broader and includes appointment by way of direct recruitment or by way of promotion, and sometimes it may also include, if so provided in the rules, by way of absorption.

13. Article 233(2) starts with a negative stipulation that a person who is not already in the service of the Union or the State, shall be eligible only to be appointed as District Judge if he has been an advocate or a pleader for not less than 7 years and is recommended by the High Court for appointment. The expression 'in the service of the Union or of the State' has been interpreted by this Court to mean the judicial service. A person from judicial service can be appointed as a District Judge. However, Article 233(2) provides that a person who is not in the service of the Union, shall be eligible only if he has been in practice, as an advocate or a pleader for 7 years; meaning thereby, persons who are in service are distinguished category from the incumbent who can be appointed as District Judge on 7 years' practice as an advocate or a pleader. Article 233(2) nowhere provides eligibility of in-service candidates for consideration as a District Judge concerning a post requiring 7 years' practice as an advocate or a pleader. Requirement of 7 years' experience for advocate or pleader is qualified with a rider that he should not be in the service of the Union or the State. Article 233 provides two sources of recruitment, one from judicial service and the other from advocates or pleaders. There are two separate streams provided; one is for persons in judicial service, and the other is for those not in judicial service of the Union or the State and have practiced for seven years. The expression 'in service of the Union or the State' has been interpreted in

Chandra Mohan (supra) to mean judicial service, not any other service of the Union or the State. Thus, it is clear that the members of the judicial service alone are eligible for appointment as against the post of District Judge as the only mode provided for the appointment of in-service candidates is by way of promotion. They can stake their claim as per Rules for promotion or merit promotion as the case may be. This Court has excluded the persons from the Indian Civil Service, the Provincial Judicial Service, or other Executive Services, before Independence, recruitment to the post of District Judge was provided from other services also. In Chandra Mohan (supra), this Court held that no person from the Executive Service can be promoted as District Judge. There is separation of the judiciary in terms of Article 50 of the Constitution of India. It mandates the State to take steps to separate the judiciary from the Executive in the public services of the State. Article 50 is extracted hereunder:

50. Separation of judiciary from executive.--The State shall take steps to separate the judiciary from the executive in the public services of the State.

14. Article 233(2) provides that if an advocate or a pleader has to be appointed, he must have completed 7 years of practice. It is coupled with the condition in the opening part that the person should not be in service of the Union or State, which is the judicial service of the State. The person in judicial service is not eligible for being appointed as against the quota reserved for advocates. Once he has joined the stream of service, he ceases to be an advocate. The requirement of 7 years of minimum experience has to be considered as the practising advocate as on the cut-off date, the phrase used is a continuous state of affair from the past. The context 'has been in practice' in which it has been used, it is apparent that the provisions refers to a person who has been an advocate or pleader not only on the cut-off date but continues to be so at the time of appointment.

15. Reliance has been placed on Chandra Mohan v. State of U.P., (supra) by both the sides, facts of which reflect that Allahabad High Court called for applications for recruitment to 10 vacancies in the Uttar Pradesh Higher Judicial Service from Barristers, Advocates, Vakils and pleaders of more than 7 years' standing and from judicial officers. Six incumbents were selected-three advocates and three judicial officers. The Selection Committee sent two lists, one comprising the names of the three advocates and the other comprising the names of three judicial officers to the High Court. There was agreement that the selection from the Bar was good. The question arose about the legality of the appointment of judicial officers. The question arose was whether the incumbents who were not members of the judicial service could have been appointed as District Judges Under Rule 14. This Court while striking down the Rules interpreted Article 233 thus:

7. The first question turns upon the provisions of Article 233 of the Constitution. Article 233(1) reads:

Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

We are assuming for the purpose of these appeals that the "Governor" Under Article 233 shall act on the advice of the Ministers. So, the expression "Governor" used in the judgment means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise

of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Wherever the Constitution intended to provide more than one consultant, it has said so: see Articles 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so: see Article 222. Article 124(2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D.

This Court in Chandra Mohan v. State of U.P. (supra) also observed, concerning recruitment from the Bar Under Article 233(2), the Governor can appoint only advocates recommended by the High Court to the judicial service. This Court has held:

11. The position in the case of district judges recruited directly from the Bar is worse. Under Article 233(2) of the Constitution, the Governor can only appoint advocates recommended by the High Court to the said service. But under the Rules, the High Court can either endorse the recommendations of the Committee or create a deadlock. The relevant rules, therefore, clearly contravene the constitutional mandates of Article 233(1) and (2) of the Constitution and are, therefore, illegal.

(emphasis supplied)

16. Rule 14 of U.P. Rules which came up for consideration of this Court in Chandra Mohan (supra) is extracted hereunder:

Rule 14. Direct Recruitment.-(1) Applications for direct recruitment to the service shall be called for by the Court and shall be made in the prescribed form which may be obtained from the Registrar of the Court.

(2) The applications by barristers, advocates, vakils or pleaders, should be submitted through the District Judge concerned and must be accompanied by certificates of age, character, nationality, and domicile, standing as a legal practitioner, and such other documents as may be prescribed in this behalf by the Court. Applications from Judicial Officers should be submitted in accordance with the Rules referred to in Clause 2(b) of Rule 5 of these Rules. The District Judge or other

officer through whom the application is submitted shall send to the Court, along with the application, his own estimate of the Applicant's character and fitness for appointment to the service.

17. After having answered the question about recruitment from the Bar, the further question considered in Chandra Mohan (supra) was whether the Governor could directly appoint persons from service other than judicial service as District Judges in consultation with the High Court. They belonged to the executive branch of the Government and performed certain revenue and ministerial functions. This Court took note of the fact that in the pre-Independence era, there was a demand that the judiciary should be separated from the Executive, and that was based upon the assumption that unless they were separated, independence of the judiciary at the lower level would be a mockery. Thus, Article 50 of Directive Principles of State Policy provides that States to take steps to separate judiciary from the executive in public services of the State. There shall be separate judicial service from the executive service. This Court considered the provisions of Articles 234, 235, 236 and 237 and observed that there are two sources of recruitment, services of the Union or State and members of the Bar. This Court observed thus:

15. With this background, if the following provisions of the Constitution are looked at, the meaning of the debated expressions therein would be made clear:

We have already extracted Article 233.

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

Article 235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judges shall be vested in the High Court; but nothing in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Article 236. In this Chapter-

(a) the expression "district judge" includes judges of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge:

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

Article 237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any Rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges they will be made by the Governor of the State in accordance with Rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations.

(emphasis supplied)

As to the question whether persons from other services can be appointed as District Judges, the expression service of Union or State, has been held to be construed to be judicial service in Article 233(2) thus:

16. So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as district judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district judge? The acceptance of this position would take us back to the pre-independence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless if Article 233(1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Article 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in Clause (2) thereof. Under Clause (2) of Article 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to courts. That apart, Article 236(2) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge. If this definition, instead of appearing in Article 236, is placed as a Clause before Article 233(2), there cannot be any dispute that "the service" in Article 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not

necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression "the service" is used whereas in Articles 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Article 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the posts of district judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a district judge.

18. We, therefore, construe the expression "the service" in Clause (2) of Article 233 as the judicial service.

(emphasis supplied)

18. In Chandra Mohan v. State of U.P. (supra), this Court further noted the history that the Governor-General in Council had issued a notification in 1922 empowering the local Government to make appointments to the said service from the members of the Provincial Civil Service (Judicial Branch) or the members of the Bar. This Court had also noted that earlier till India attained Independence, the Governor-General made appointments of District Judges from three sources: (i) Indian Civil Service; (ii) Provincial Judicial Service; and (iii) the Bar. After India attained freedom, recruitment from Indian Civil Service was discontinued by the Government of India, and it was decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter District Judges were appointed only from either the judicial service or from the Bar. The Rules framed by the Governor empowering him to recruit District Judges from the judicial officers were held to be unconstitutional. This Court has observed thus:

20. The history of the said provisions also supports the said conclusion. Originally the posts of district and sessions judges and additional sessions judges were filled by persons from the Indian Civil Service. In 1922 the Governor-General-in-Council issued a notification empowering the local government to make appointments to the said service from the members of the Provincial Civil Service (Judicial Branch) or from the members of the Bar. In exercise of the powers conferred Under Section 246(1) and Section 251 of the Government of India Act, 1935, the Secretary of State for India Framed Rules styled Reserved Posts (Indian Civil Service) Rules, 1938. Under those Rules, the Governor was given the power to appoint to a district post a member of the judicial service of the Province or a member of the Bar. Though Section 254(1) of the said Act was couched in general terms similar to those contained in Article 233(1) of the Constitution, the said Rules did not empower him to appoint to the reserved post of district judge a person belonging to a service other than the judicial service. Till India attained independence, the position was that district judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence in 1947,

recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter district judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a district judge. If that was the factual position at the time the Constitution came into force, it is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district judges, recruitment from the executive departments? Therefore, the history of the services also supports our construction that the expression "the service" in Article 233(2) can only mean the judicial service.

(21) For the aforesaid reasons, we hold that the Rules framed by the Governor empowering him to recruit district judges from the "judicial officers" are unconstitutional and, therefore, for that reason also the appointment of Respondents 5, 6 and 7 was bad.

(23) In the result, we hold that the U.P. Higher Judicial Service Rules providing for the recruitment of district judges are constitutionally void and, therefore, the appointments made thereunder were illegal. We set aside the order of the High Court and issue a writ of mandamus to the 1st Respondent not to make any appointment by direct recruitment to the U.P. Higher Judicial Service in pursuance of the selections made under the said Rules. The 1st Respondent will pay the costs of the Appellant. The other Respondents will bear their own costs.

(emphasis supplied)

19. It is apparent from the decision in Chandra Mohan v. State of U.P., (supra) that this Court has laid down that concerning District Judges recruited directly from the Bar, Governor can appoint only advocates recommended by the High Court and Rule 14 which provided for judicial officers to be appointed as direct recruits was struck down by this Court to be ultra vires. Thus, the decision is squarely against the submission espoused on behalf of in-service candidates. In the abovementioned para 11 of Chandra Mohan (supra), the position is made clear. In Chandra Mohan (supra) the Court held that only advocates can be appointed as direct recruits, and inter alia the Rule 14 providing for executive officers' recruitment was struck down. This Court has held that the expression 'service of State or Union' means judicial service, it only refers to the source of recruitment. Dichotomy of two sources of recruitment/appointment has been culled out in the decision.

20. Reliance has also been placed on the decision in Rameshwar Dayal v. State of U.P., MANU/SC/0313/1960 : AIR 1961 SC 816. The question which arose for consideration there was as to the eligibility of persons on the roll of advocates of East Punjab High Court before the partition of India in 1947 for appointment as a District Judge. This Court held that the period of practice before Lahore High Court could be counted as against the required period of 7 years for appointment as District Judge. This Court laid down that practice rendered in or before the Lahore High Court before partition was not open to objection Under Article 233(2) of the Constitution. Even if the word 'advocate' in Clause (2) of Article 233 meant an advocate of a court in India, and the appointee must be such an advocate at the time of his appointment, no objection can be raised on this ground because being factually on the roll of Advocates of the Punjab High Court at the

time of appointment, the candidate was admittedly an advocate in a court in India and continued as such till the date of his appointment. This Court also considered the principle applied to the East Punjab High Court. An advocate of the Lahore High Court was entitled to practice in the new High Court counted his seniority on the strength of his standing in the Lahore High Court. It was held that a person who continued as advocate at the time of his appointment as District Judge fulfilled the requirement of Article 233. Emphasis was laid by this Court that such a practice was recognised under Clause 6 of the High Court of Punjab Order, 1947. Earlier, the High Court used to maintain the rolls of advocates. The question which arose for consideration was whether Respondent Nos. 2 to 6 fulfilled the requirements of having been 7 years an advocate or pleader. The submission made was that practice rendered outside the territory of India cannot be counted as practice for counting 7 years. This Court interpreted Article 233 distinguishing it from Article 124 and Article 217 and held that under Clause (1), the Government can appoint such a person who is already in the service of the Union or State. No special qualifications were prescribed under Clause (1) of Article 233. The Governor can appoint such a person as District Judge. However, as to a person not already in service, the qualification prescribed in Article 233 is that he should be an advocate or a pleader of 7 years' standing. This Court answered the question thus:

11. This is the background against which we have to consider the argument of learned Counsel for the Appellant. Even if we assume without finally pronouncing on their correctness that learned Counsel is right in his first two submissions viz. that the word "advocate" in Clause (2) of Article 233 means an advocate of a court in India and the appointee must be such an advocate at the time of his appointment, no objection on those grounds can be raised to the appointment of three of the Respondents who were factually on the roll of Advocates of the Punjab High Court at the time of their appointment; because admittedly they were advocates in a court in India and continued as such advocates till the dates of their appointment. The only question with regard to them is whether they can count in the period of seven years their period of practice in or under the Lahore High Court. The answer to this question is clearly furnished by Clause 6(2) of the High Courts (Punjab) Order, 1947, read with Section 8(3) of the Bar Councils Act, 1926. That Clause lays down that the right of audience in the High Court of East Punjab shall be regulated in accordance with the principle in force in the Lahore High Court immediately before the appointed day. The relevant Rule in the Lahore High Court Rules laid down that Advocates who are Barristers shall take precedence inter se according to the date of call to the Bar; Advocates who are not Barristers, according to the dates when they became entitled to practice in a High Court. The same principle applied to the East Punjab High Court, and an advocate of the Lahore High Court who was recognised as an advocate entitled to practise in the new High Court counted his seniority on the strength of his standing in the Lahore High Court. He did not lose that seniority, which was preserved by the Bar Councils Act, 1926, and we see no reasons why for the purpose of Clause (2) of Article 233 such an advocate should not have the same standing as he has in the High Court where he is practising.

12. Learned Counsel for the Appellant has also drawn our attention to Explanation I to Clause (3) of Article 124 of the Constitution relating to the qualifications for appointment as a Judge of the Supreme Court and to the explanation to Clause (2) of Article 217 relating to the qualifications for appointment as a Judge of a High Court, and has submitted that where the Constitution makers thought it necessary they specifically provided for counting the period in a High Court which was formerly in India. Articles 124 and 217 are differently worded and refer to an additional

qualification of citizenship which is not a requirement of Article 233, and we do not think that Clause (2) of Article 233 can be interpreted in the light of explanations added to Articles 124 and 217. Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Clause (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Clause (2) and all that is required is that he should be an advocate or pleader of seven years' standing. The Clause does not say how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Article 233 which must lead to the exclusion of that period for determining his eligibility for appointment as district judge.

13. What will be the result if the interpretation canvassed for on behalf of the Appellant is accepted? Then, for seven years beginning from August 15, 1947, no member of the Bar of the Punjab High Court would be eligible for appointment as district judge--a result which has only to be stated to demonstrate the weakness of the argument. We have proceeded so far on the first two submissions of learned Counsel for the Appellant, and on that basis dealt with his third submission. It is perhaps necessary to add that we must not be understood to have decided that the expression 'has been' must always mean what learned Counsel for the Appellant says it means according to the strict Rules of grammar. It may be seriously questioned if an organic Constitution must be so narrowly interpreted, and the learned Additional Solicitor-General has drawn our attention to other Articles of the Constitution like Article 5(c) where in the context the expression has a different meaning. Our attention has also been drawn to the decision of the Allahabad High Court in *Mubarak Mazdoor v. K.K. Banerji,* MANU/UP/0070/1958 : AIR 1958 All 323, where a different meaning was given to a similar expression occurring in the proviso to Sub-section (3) of Section 86 of the Representation of the People Act, 1951. We consider it unnecessary to pursue this matter further because the Respondents we are now considering continued to be advocates of the Punjab High Court when they were appointed as district judges and they had a standing of more than seven years when so appointed. They were clearly eligible for appointment under Clause 2 of Article 233 of the Constitution.

14. We now turn to the other two Respondents (Harbans Singh and P.R. Sawhney) whose names were not *factually* on the roll of Advocates at the time they were appointed as district judges. What is their position? We consider that they also fulfilled the requirements of Article 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr. Viswanantha Sastri appearing for him has submitted that Clause (2) of Article 233 did not apply. We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of cl.(2), we must hold that they fulfilled those requirements. They were Advocates enrolled in the Lahore High Court; this is not disputed. Under Cl. 6 of the High Courts (Punjab) Order, 1947, they were recognised as Advocates entitled to practise in the Punjab High Court till the Bar Councils Act, 1926, came into force. Under Section 8(2)(a) of that Act it was the duty of the High Court to prepare and maintain a roll of advocates in which their names should have been entered on the day on which Section 8 came into force, that is, on September 28, 1948. The proviso to Sub-section (2) of Section 8 required them to deposit a fee of Rs. 10 payable to the Bar Council. Obviously such payment could hardly be made before the Bar Council was constituted. We do not agree with learned Counsel for the

Appellant and the interveners (B.D. Pathak and Om Dutt Sharma) that the proviso had the effect of taking away the right which these Respondents had to come automatically on the roll of advocates Under Section 8(2)(a) of the Act. We consider that the combined effect of Cl. 6 of the High Courts (Punjab) Order, 1947, and Section 8(2)(a) of the Bar Councils Act, 1926, was this: from August 15, 1947, to September 28, 1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after September 28, 1948, they automatically came on the roll of advocates of the Punjab High Court but had to pay a fee of Rs. 10 to the Bar Council. They did not cease to be advocates at any time or stage after August 15, 1947, and they continued to be advocates of the Punjab High Court till they were appointed as District Judges. They also had the necessary standing of seven years to be eligible under Cl.(2) of Article 233 of the Constitution.

(emphasis supplied)

21. Much was tried to be made based on the facts of Harbans Singh and P.R. Sawhney in the decision of Rameshwar Dayal (supra). Harbans Singh and P.R. Sawhney were having the following qualifications as noted in the judgment:

5. x x x

(2) Respondent 3 (Harbans Singh, J.) was also called to the Bar and then enrolled as an Advocate of the Lahore High Court on March 5, 1937. He worked as an Additional District and Sessions Judge, Ferozepore, from July 2, 1947, to February 22, 1948. He then returned to practice at Simla for a short while. On March 15, 1948, he worked as Deputy Custodian, Evacuee Property, till April 17, 1950. On April 18, 1950, he was appointed as District and Sessions Judge and on August 11, 1958, he was appointed as an Additional Judge of the Punjab High Court.

(5) Respondent 6 (P.R. Sawhney) was called to the Bar on November 17, 1930, and was enrolled as an Advocate of the Lahore High Court on March 10, 1931. After partition he shifted to Delhi and worked for sometime as Legal Adviser to the Custodian, Evacuee Property, Delhi. Then he practised for sometime at Delhi; he then accepted service under the Ministry of Rehabilitation as an Officer on Special Duty and Administrator, Rajpura Township. On March 30, 1949, he became the Chairman, Jullundur Improvement Trust. On May 6, 1949, he got his licence to practise as an Advocate suspended. On April 6, 1957, he was appointed as District and Sessions Judge.

Two of them were not in judicial service as on the date of their appointment; they had practised earlier for the requisite period as advocates and later were appointed as District & Sessions Judge. Harbans Singh was working as Deputy Custodian, Evacuee Property till 1950, when he was appointed as District & Sessions Judge. In 1958, he was appointed as an Additional Judge of the Punjab High Court. At the relevant time, when the appointments were made, recruitments were permissible from executive services too. Their eligibility to be appointed as District & Sessions Judge was tested. The question which came up for consideration was not whether they could have been appointed being in service of Custodian of Evacuee Property or the Improvement Trust. What was held by this Court concerning interpretation of Article 233 in the abovementioned para 12 of Rameshwar Dayal (supra), by a Constitution Bench of Court, goes squarely against the submissions raised on behalf of the in-service candidates.

22. In Satya Narain Singh (supra), a similar question arose. The members of Uttar Pradesh Judicial Service applied for appointment by way of direct recruitment to the Uttar Pradesh Higher Judicial Service claiming that they had completed 7 years of practice at the Bar before their appointment to the Uttar Pradesh Judicial Service. Therefore, they were eligible to be appointed by direct recruitment to the Higher Judicial Service, i.e., to the post of District Judge. It was submitted that it would be extremely anomalous to interpret Article 233 in a way to render judicial officers eligible for appointment as a District Judge by direct recruitment. This Court rejected the submission and observed thus:

3. ...Two points straightway project themselves when the two clauses of Article 233 are read: The first Clause deals with "appointments of persons to be, and the posting and promotion of, District Judges in any State" while the second Clause is confined in its application to persons "not already in the service of the Union or of the State". We may mention here that "service of the Union or of the State" has been interpreted by this Court to mean Judicial Service. Again while the first Clause makes consultation by the Governor of the State with the High Court necessary, the second Clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second Clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years' Rule has no application but there has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously.

(emphasis supplied)

This Court has relied upon Rameshwar Dayal (supra) and Chandra Mohan (supra) to hold:

5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the Judicial Service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233(2) could only mean the Judicial Service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other seniors in the Subordinate Judiciary contrary to Article 14 and Article 16 of the Constitution.

6. Thus we see that the two decisions do not support the contention advanced on behalf of the Petitioners but, to the extent that they go, they certainly advance the case of the Respondents. We therefore, see no reason to depart from the view already taken by us and we accordingly dismiss the writ petitions.

(emphasis supplied)

The cases of Harbans Singh and Sawhney were considered and explained in the aforesaid decision. This Court relied upon the decision of Rameshwar Dayal (supra) to hold that as to a person not already in-service, a qualification is that he should be an advocate or pleader of seven years' standing. The same clinches the issue against in-service candidates and negates their claim therefor.

23. In Deepak Aggarwal (supra) a three-Judge Bench of this Court considered the provisions of Article 233(2) and held that service in Article 233 to mean judicial service and there is dichotomy of sources of recruitment, namely, (i) from judicial service; and (ii) from the advocate/pleader or in other words from the Bar. The meaning of the term advocate/pleader too has been considered by this Court. The expression "advocate" or "pleader" refers to the members of the Bar practicing law. Relying upon Sushma Suri v. Govt. (NCT of Delhi), MANU/SC/0642/1998 : (1999) 1 SCC 330, this Court further observed that members of the Bar meant classes of persons who were practicing in a court of law as pleaders or advocates. This Court further held that in Article 233(2), "if he has been for not less than seven years," the present perfect continuous tense is used for a position which began at some time in the past and is continuing. Therefore, one of the essential requirements is that such a person must with requisite period be continuing as an advocate on the date of application. This Court has observed:

70. A few decisions rendered by some of the High Courts on the point may also be noticed here. In *Sudhakar Govindrao Deshpande v. State of Maharashtra*, MANU/MH/0352/1985 : 1986 Lab IC 710 (Bom) the issue that fell for consideration before the Bombay High Court was whether the Petitioner therein who was serving as Deputy Registrar at the Nagpur Bench of the Bombay High Court, was eligible for appointment to the post of the District Judge. The advertisement that was issued by the High Court inviting applications for five posts of District Judges, inter alia, stated that, "candidate must ordinarily be an advocate or pleader who has practised in the High Court, Bombay or court subordinate thereto for not less than seven years on 1-10-1980". The Single Judge of the Bombay High Court considered Articles 233, 234 and 309 of the Constitution, relevant recruitment Rules and noted the judgments of this Court in *Chandra Mohan v. State of U.P.*, MANU/SC/0052/1966 : AIR 1966 SC 1987, *Satya Narain Singh v. High Court of Judicature of Allahabad*, MANU/SC/0069/1984 : (1985) 1 SCC 225 and *Rameshwar Dayal v. State of Punjab*, MANU/SC/0313/1960 : AIR 1961 SC 816. It was observed as follows: (*Sudhakar case*, Lab IC p. 715, para 16)

16. ... the phrase 'has been an advocate or a pleader' must be interpreted as a person who has been immediately prior to his appointment a member of the Bar, that is to say either an advocate or a pleader. In fact, in the above judgment, the Supreme Court has repeatedly referred to the second group of persons eligible for appointment Under Article 233(2) as 'members of the Bar'. Article 233(2) therefore, when it refers to a person who has been for not less than seven years an advocate or pleader refers to a member of the Bar who is of not less than seven years' standing.

89. We do not think there is any doubt about the meaning of the expression "advocate or pleader" in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members

of the Bar practising law. In other words, the expression "advocate or pleader" in Article 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client. In *Sushma Suri v. Govt. (NCT of Delhi)*, MANU/SC/0642/1998 : (1999) 1 SCC 330, a three-Judge Bench of this Court construed the expression "members of the Bar" to mean class of persons who were actually practising in courts of law as pleaders or advocates. ...

102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been". The present perfect continuous tense is used for a position which began at sometime in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application.

(emphasis supplied)

It is clear from the decision of Deepak Aggarwal (supra) that recruitment from the Bar is only from among practicing advocates and those continuing as advocates on the date of appointment. The submission that the issue of eligibility of in-service candidates did not come up for consideration is of no consequence as provisions of Article 233(2) came up for consideration directly before this Court.

24. The decision of Vijay Kumar Mishra and Anr. v. High Court of Judicature at Patna and Ors., MANU/SC/0878/2016 : (2016) 9 SCC 313, has also been referred in which judicial officers staked their claim as against the post reserved for the members of the Bar i.e., advocates/pleaders. The High Court repelled the challenge; hence appeal was filed in this Court. A two-Judge Bench of this Court observed that a person who is not in service shall be eligible to be appointed as a District Judge. After that, the bench distinguished between "selection" and "appointment." It was observed that Article 233(2) prohibits the appointment of a person who is already in service of the Union or the State, but not selection of such a person. Even if a person, who is already in service, is selected, still he has an option to be a District Judge or continue with the existing employment. The relevant portion of the observations made is extracted hereunder:

6. Article 233(1) stipulates that appointment of District Judges be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. However, Article 233(2) declares that only a person not already in the service of either the Union or of the State shall be eligible to be appointed as District Judge. The said Article is couched in negative language creating a bar for the appointment of certain class of persons described therein. It does not prescribe any qualification. It only prescribes a disqualification.

7. It is well settled in service law that there is a distinction between selection and appointment. Every person who is successful in the selection process undertaken by the State for the purpose of filling up of certain posts under the State does not acquire any right to be appointed automatically. Textually, Article 233(2) only prohibits the appointment of a person who is already in the service

of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification, etc.) and be considered is guaranteed Under Articles 14 and 16 of the Constitution.

8. The text of Article 233(2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a person who is in the service of the Union or the State. A person who is in the service of either the Union or the State would still have the option, if selected, to join the service as a District Judge or continue with his existing employment. Compelling a person to resign from his job even for the purpose of assessing his suitability for appointment as a District Judge, in our opinion, is not permitted either by the text of Article 233(2) nor contemplated under the scheme of the Constitution as it would not serve any constitutionally desirable purpose.

11. It appears from the reading of the judgment in Satya Narain Singh v. High Court of Judicature of Allahabad, MANU/SC/0069/1984 : (1985) 1 SCC 225, that the case of the Petitioners was that their claims for appointment to the post of District Judges be considered under the category of members of the Bar who had completed seven years of practice ignoring the fact that they were already in the Judicial Service. The said fact operates as a bar undoubtedly Under Article 233(2) for their appointment to the Higher Judicial Service. It is in this context this Court rejected their claim. The question whether at what stage the bar comes into operation was not in issue before the Court nor did this Court go into that question.

We find ourselves unable to agree with the proposition laid down in Vijay Kumar Mishra (supra). In our opinion, in-service candidates cannot apply as against the post reserved for the advocates/pleaders as he has to be in continuous practice in the past and at the time when he has applied and appointed. Thus, the decision in Vijay Kumar Mishra (supra) cannot be said to be laying down the law correctly.

25. A person in judicial service is eligible to be appointed as District Judge, but it is only by way of promotion or by way of merit promotion, which concept has been evolved in All India Judges Association and Ors. v. Union of India and Ors., MANU/SC/0251/2002 : (2002) 4 SCC 247, in which recommendations of the Shetty Commission were considered by this Court as to the method of recruitment to the post of the cadre of Higher Judicial Service-District Judges and Additional District Judges. This Court took note of the fact that at that moment, there were two sources for recruitment to the Higher Judicial Service, namely, (i) by promotion; and (ii) by direct recruitment. In order to strengthen the lower judiciary and to make them more efficient, the establishment of Judicial Academies was suggested. This Court approved the recommendations of Shetty Commission that the recruitment to the Higher Judicial Service, i.e., the District Judge cadre from amongst the advocates should be 25 percent and the process of recruitment should be by a competitive examination including both written and viva voce tests. 75 percent should be by way of promotion and 25 percent by direct recruitment. This Court further ordered that 50 percent of the total post in the Higher Judicial Services must be filled by promotion on the basis of principle of merit-cum-seniority and 25 percent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which

the qualifying service as a Civil Judge (Senior Division) should be not less than five years. The High Courts were directed to frame Rules in this regard. This Court also held that quota in relation to the post is necessary, which is the basic principle on the basis of which the 40-point roster works, it was held, seniority should be maintained on the basis of the roster principle. The existing seniority had to be protected, but the roster was to be evolved for the future. This Court observed thus:

27. Another question which falls for consideration is the method of recruitment to the posts in the cadre of Higher Judicial Service i.e. District Judges and Additional District Judges. At the present moment, there are two sources for recruitment to the Higher Judicial Service, namely, by promotion from amongst the members of the Subordinate Judicial Service and by direct recruitment. The subordinate judiciary is the foundation of the edifice of the judicial system. It is, therefore, imperative, like any other foundation, that it should become as strong as possible. The weight on the judicial system essentially rests on the subordinate judiciary. While we have accepted the recommendation of the Shetty Commission which will result in the increase in the pay scales of the subordinate judiciary, it is at the same time necessary that the judicial officers, hard-working as they are, become more efficient. It is imperative that they keep abreast of knowledge of law and the latest pronouncements, and it is for this reason that the Shetty Commission has recommended the establishment of a Judicial Academy, which is very necessary. At the same time, we are of the opinion that there has to be certain minimum standard, objectively adjudged, for officers who are to enter the Higher Judicial Service as Additional District Judges and District Judges. While we agree with the Shetty Commission that the recruitment to the Higher Judicial Service i.e. the District Judge cadre from amongst the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, both written and viva voce, we are of the opinion that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion to the Higher Judicial Service. Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and to compete with each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the Higher Judicial Service will further improve. In order to achieve this, while the ratio of 75 per cent appointment by promotion and 25 per cent by direct recruitment to the Higher Judicial Service is maintained, we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned: 50 per cent of the total posts in the Higher Judicial Service must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case-law. The remaining 25 per cent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (Senior Division) should be not less than five years. The High Courts will have to frame a Rule in this regard.

28. As a result of the aforesaid, to recapitulate, we direct that recruitment to the Higher Judicial Service i.e. the cadre of District Judges will be:

(1)(a) <u>50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;</u>

(b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service; and

(c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.

(2) Appropriate Rules shall be framed as above by the High Courts as early as possible.

****

29. Experience has shown that there has been a constant discontentment amongst the members of the Higher Judicial Service in regard to their seniority in service. For over three decades a large number of cases have been instituted in order to decide the relative seniority from the officers recruited from the two different sources, namely, promotees and direct recruits. As a result of the decision today, there will, in a way, be three ways of recruitment to the Higher Judicial Service. The quota for promotion which we have prescribed is 50 per cent by following the principle "merit-cum-seniority", 25 per cent strictly on merit by limited departmental competitive examination and 25 per cent by direct recruitment. Experience has also shown that the least amount of litigation in the country, where quota system in recruitment exists, insofar as seniority is concerned, is where a roster system is followed. For example, there is, as per the Rules of the Central Government, a 40-point roster which has been prescribed which deals with the quotas for Scheduled Castes and Scheduled Tribes. Hardly, if ever, there has been a litigation amongst the members of the service after their recruitment as per the quotas, the seniority is fixed by the roster points and irrespective of the fact as to when a person is recruited. When roster system is followed, there is no question of any dispute arising. The 40-point roster has been considered and approved by this Court in *R.K. Sabharwal v. State of Punjab*, MANU/SC/0259/1995 : (1995) 2 SCC 745. One of the methods of avoiding any litigation and bringing about certainty in this regard is by specifying quotas in relation to posts and not in relation to the vacancies. This is the basic principle on the basis of which the 40-point roster works. We direct the High Courts to suitably amend and promulgate seniority Rules on the basis of the roster principle as approved by this Court in *R.K. Sabharwal case* as early as possible. We hope that as a result thereof there would be no further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant Rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be protected but the roster has to be evolved for the future. Appropriate Rules and methods will be adopted by the High Courts and approved by the States, wherever necessary by 31-3-2003.

(emphasis supplied)

It is apparent from the aforesaid decision that 25 percent of the posts in the cadre of District Judge have to be filled by direct recruitment amongst the advocates based on a competitive examination, both written and viva voce. The decision is in tune with the various decisions of this Court such as Rameshwar Dayal, Chandra Mohan, Satya Narain Singh and Deepak Aggarwal (supra). The direction issued by this Court of 25 percent of the post to be filled by limited departmental competitive examination has been reduced to 10 percent by this Court in All India Judges Association and Anr. v. Union of India (II), MANU/SC/1120/2010 : (2010) 15 SCC 170.

26. Reliance has been placed on O.P. Garg v. State of U.P., MANU/SC/0292/1991 : 1991 Supp. (2) SCC 51, wherein question was of fixation of seniority. This Court has observed that there should be equal opportunity to enter the service for all the sources of recruitment. If recruitment Rules give unwarranted preference to one source, the seniority Rule is bound to become unworkable. Therefore, there should be equality of opportunity to all the sources.

27. In Punjab and Haryana High Court v. State of Punjab, MANU/SC/1117/2018 [Civil Appeal Nos. 5518-5523 of 2017 decided on 3.10.2018] the question which arose was with respect to inter se seniority dispute between three streams of Punjab Superior Judicial Service, i.e., 50 percent by promotion based on merit-cum-seniority, 25 percent by limited departmental competitive examination and remaining 25 percent to be filled by direct recruitment from amongst eligible advocates. The facts indicate that the All India Judges Association (2002) decision had been implemented, and seniority is being maintained as directed.

28. It is apparent from the decision of All India Judges Association that in order to prove the merit of in-service candidates, a limited departmental competitive examination has also been provided, so that they can take march to hold the post of District Judges on the basis of their merit. They are not deprived of any opportunity in their pursuit once they have joined the judicial stream, they are bound to follow the provisions. It was open to them not to join the subordinate services. They could have staked a claim by continuing to be an advocate to the Higher Judicial Service as against the post of District Judge. However, once they chose to be in service, if they had seven years' experience at Bar before joining the judicial service, they are disentitled to lay a claim to the 25% quota exclusively earmarked for Advocates; having regard to the dichotomy of different streams and separate quota for recruitment. Opportunities are provided not only to in-service candidates but also to practicing candidates by the Constitutional Scheme to excel and to achieve what they aspire i.e. appointment as District Judge. However, when someone joins a particular stream, i.e. a judicial service by his own volition, he cannot sail in two boats. His chance to occupy the post of District Judge would be by a two-fold channel, either in the 50% seniority/merit quota, by promotion, or the quota for limited competitive examination.

29. The recruitment from the Bar also has a purpose behind it. The practicing advocates are recruited not only in the higher judiciary but in the High Court and Supreme Court as well. There is a stream (of appointment) for in-service candidates of higher judiciary in the High Court and another stream clearly earmarked for the Bar. The members of the Bar also become experts in their field and gain expertise and have the experience of appearing in various courts. Thus, not only in the higher judiciary, in-service candidates of subordinate judiciary are given the opportunity as against 75 percent to be appointed by way of promotion as provided in All India Judges Association case, and the members of the Bar are given the opportunity as against 25 percent of the post having 7 years' standing at Bar.

30. The makers of the Constitution visualised and the law administered in the country for the last seven decades clearly reveals that the aforesaid modes of recruitment and two separate sources, one from in-service and other from the Bar, are recognised. We do not find even a single decision supporting the cause espoused on behalf of candidates, who are in judicial service, to stake their claim as against the posts reserved for advocates/pleaders. In all the cases right from beginning

from Rameshwar Dayal (supra) to date, a dichotomy has been maintained, and we find absolutely no room to entertain submission of discrimination based on Articles 14 and 16.

31. We are not impressed by the submission that when this Court has interpreted the meaning of service in Article 233(2) to mean judicial service, judicial officers are eligible as against the posts reserved for the advocates/pleaders. Article 233(2) starts with the negative "not," which disentitles the claim of judicial officers against the post reserved for the practicing advocates/pleaders. They can be promoted to that post as per the rules; this Court has further laid down a wider horizon to in-service candidates in the All India Judges Association as against the 75 percent of the post by including merit promotion. The argument that merit should prevail and they should be given due opportunity under the Rules to prove their merit and to excel, in our opinion, cannot prevail. Such judicial officer cannot claim merit in violation of the provisions of Rules framed Under Article 234 of the Constitution. The two classes are different. In terms of the prevalent Rules in-service candidates lack eligibility. They cannot contend that they are discriminated against and their merit is ignored and overlooked.

32. Consistently, this Court in its previous judgments has taken the view which we now take. We find absolutely no reason to take a different view, though it was urged that mistakes committed earlier should not continue. We find the argument to be devoid of substance and based upon misapprehensions. We have found that the aforesaid decisions are vivid and clear, and there is no room to entertain such a submission then for a moment. Even otherwise, when the law has been administered in this country after Independence in the manner mentioned above on the principle of stare decisis and Rules framed by various High Courts, we find ourselves unable to accept the submission raised on behalf of in-service candidates. The decisions in Satya Narain Singh (supra), Deepak Aggarwal (supra) and All India Judges Association case (supra) also cannot be said to be contrary to the provisions of Article 233. We unhesitatingly reject the submission to the contrary.

33. It was submitted that promotion is no substitute for direct recruitment, as against the post reserved for direct recruitment, an incumbent can apply throughout India, whereas an in-service candidate can be promoted within the State, and there is no definite period for coming into the zone of consideration for promotion in Higher Judicial Service. Thus, it was urged that direct recruitment is altogether different from promotion and having practiced for 7 years, they have basic eligibility to stake their claim for the post reserved for advocates/pleaders, and they have additional experience of acting as a judge also. We find no room to accept the submissions. Once the Constitution envisages separate sources of recruitment, no case can be made out of deprivation of the opportunity. Once service is joined, one has to go by the service rules, and it was open to such an incumbent to practice and stake claim in various States while remaining in practice. It is a matter of two different streams for recruitment which is permissible, such an argument cannot be accepted.

34. In P. Ramakrishnam Raju v. Union of India and Ors., MANU/SC/0254/2014 : (2014) 12 SCC 1, this Court has observed that experience and knowledge gained by a successful lawyer at the Bar can never be considered to be less important from any point of view vis-à-vis the experience gained by a judicial officer. If service of a judicial officer is counted for fixation of pension, there is no valid reason as to why the experience at the Bar cannot be treated as equivalent for the same purpose. In Government of NCT of Delhi and Ors. v. All India Young Lawyers' Association and

Anr., MANU/SC/0362/2009 : (2009) 14 SCC 49, this Court has directed that a certain number of years as an advocate to be added to the judicial service for pension. Thus, in our opinion, experience as an advocate is also important, and they cannot be deprived of their quota, which is kept at 25 percent only in the Higher Judicial Service.

35. It was submitted that ultimately the appointment of the Bar member is also made Under Article 233(1). In The State of Assam and Anr. v. Kuseswar Saikia and Ors., MANU/SC/0276/1969 : AIR 1970 SC 1616, this Court observed that both appointment and promotion are included in Article 233(1). Following observations have been made:

5. The reading of the Article by the High Court is, with respect, contrary to the grammar and punctuation of the article. The learned Chief Justice seems to think that the expression "promotion of" governs "District Judges" ignoring the comma that follows the word "of". The article, if suitably expanded, reads as under:

Appointments of persons to be, and the posting and promotion of (persons to be), District Judges etc.

It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression "District Judge" includes an additional District Judge and an Additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The Article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. ....

The decision is of no avail as the question in the present case is different. Though the appointment is made Under Article 233(1), but the source and the channel for judicial officers is the promotion, and for the members of the Bar is by direct recruitment.

36. The 116th Report of Law Commission on All India Judicial Services published in November 1986 has been referred to, which observed that chances of promotion of the subordinate ranks will be proportionately reduced to the extent direct recruitment is made. The Law Commission was not considering the provisions of Article 233 but had made certain observations, and there is no formation of the All India Judicial Service so far what would be the provisions when it is constituted, will have to be considered when they are formulated. Thus, no benefit can be derived on the basis of certain observations and suggestions made by the Law Commission as to what may happen in case All India Judicial Service is formed.

37. Certain recommendations of the Shetty Commission have been referred to, but after their consideration in the All India Judges' Association case, there is no scope for considering the provisions of the Constitution to provide eligibility for in-service candidates for direct recruitment for the post of District Judge. The existing provisions are not restrictive but provide wider choice to improve and strengthen the judicial system and in tune with Articles 14 and 16.

38. Reference has been made to the decision in All India Judges' Association v. Union of India and Ors., MANU/SC/0039/1992 : (1992) 1 SCC 119, in which following observations have been made:

9. We shall first deal with the plea for setting up of an All India Judicial Service. The Law Commission of India in its Fourteenth Report in the year 1958 said:

If we are to improve the personnel of the subordinate judiciary, we must first take measures to extend or widen our field of selection so that we can draw from it really capable persons. A radical measure suggested to us was to recruit the judicial service entirely by a competitive test or examination. It was suggested that the higher judiciary could be drawn from such competitive tests at the all-India level and the lower judiciary can be recruited by similar tests held at State level. Those eligible for these tests would be graduates who have taken a law degree and the requirement of practice at the bar should be done away with.

Such a scheme, it was urged, would result in bringing into the subordinate judiciary capable young men who now prefer to obtain immediate remunerative employment in the executive branch of government and in private commercial firms. The scheme, it was pointed out, would bring to the higher subordinate judiciary the best talent available in the country as a whole, whereas the lower subordinate judiciary would be drawn from the best talent available in the State. ....

A further recommendation was made for the formation of the All India Judicial Service. The suggestion was made that practice at Bar for induction at the lower level should be done away with. Be that as it may. The prescription of the practice period of 3 years, has been changed time to time, but the facts remain that when it comes to the eligibility and recruitment from the Bar to the post of District Judge, practicing advocates from the Bar can be inducted by way of direct recruitment as against the quota fixed for them. The question involved in the matter is not whether the practice is necessary to join the subordinate judiciary.

39. In All India Judges' Association and Ors. v. Union of India and Ors., MANU/SC/1390/1998 : (1998) 8 SCC 771, this Court has considered the question of permitting the Legal Assistants working in different institutions other than the courts for the purpose of appointments in the judiciary. This Court observed that Legal Assistants do not get experience and exposure, which is important for manning judicial posts. The observations made are extracted hereunder:

1. The question of permitting the Legal Assistants working in different institutions other than the courts for the purpose of appointments on the ground that they should be treated as having experience at the Bar cannot be entertained. The Legal Assistants working in different institutions and bodies do not get the experience and exposure which is important for the purpose of manning judicial posts, and it is not possible to lay down guidelines on the basis of a few appearances but what is important is not mere appearance but actual intimate knowledge and association with the system itself. We, therefore, reject the applications.

40. The decision in A. Pandurangam Rao v. State of Andhra Pradesh and Ors., MANU/SC/0074/1975 : AIR 1975 SC 1922, has been referred to, in which question arose as to the appointment of District Judges by direct recruitment from the Bar. The Court held that a candidate for direct recruitment from the Bar does not become eligible for the appointment of District Judges in any State without the recommendation of the High Court. The final authority is the Government in the matter of appointment. There is no dispute with the aforesaid proposition, the decision also indicates that direct recruitment is from the Bar. Obviously, the appointment has

to be made by the Government. The decision rather than supporting defeats the cause espoused on behalf of in-service candidates.

41. The decision in Chandra Mohan v. State of U.P. and Ors. (II), MANU/SC/0434/1976 : AIR 1976 SC 1482, has also been referred to in which question arose of seniority only. This Court has taken note that Rules 8, 13, 14, 15, 17, and 19 of the U.P. Higher Judicial Service Rules (1953) were held to be unconstitutional as offending Article 233. The question arose of determining seniority in accordance with Rule 20. The decision is not an authority on the question of interpretation of Article 233 but was rather a fallout of Chandra Mohan-I (supra).

42. It was also submitted that practice as an advocate and service as a judicial officer for 10 years is to be treated at par as per explanation added to Articles 124 and 217 of the Constitution of India. In Rameshwar Dayal (supra), this question has been considered, and this Court held that Article 233(2) could not be interpreted in view of the explanations added to Articles 124 and 217. In Satya Narain Singh (supra) the aforesaid decision has been considered, and following observations have been made:

3. ...Again dealing with the cases of Harbans Singh and Sawhney it was observed:

We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of Clause (2), we must hold that they fulfilled those requirements.

Clearly, the Court was expressing the view that it was in the case of recruitment from the Bar, as distinguished from Judicial Service, that the requirements of Clause (2) had to be fulfilled. We may also add here earlier the Court also expressed the view:

... we do not think that Clause (2) of Article 233 can be interpreted in the light of Explanations added to Articles 124 and 217".

Reliance placed on Prof. Chandra Prakash Aggarwal v. Chaturbhuj Das Parikh and Ors., MANU/SC/0053/1969 : (1970) 1 SCC 182, dealing with the interpretation of Article 217, is of no avail.

43. The argument has been raised with respect to the violation of basic human rights. The findings of the Advisory Panel on Judicial Diversity in the U.K. in 2010 have been referred to as under:

22. Equal opportunities. All properly qualified people should have an equal opportunity of applying and of being selected for judicial office. Well-qualified candidates for judicial office should be selected on their merits and should not be discriminated against, either directly or indirectly.

23. Inherent in the concept of human equality is the principle that talent is randomly and widely distributed in society, and not concentrated in particular racial or other groups. It therefore follows that the more widely one searches for talent, the more likely it is that the best candidates will be identified.

You should not be looking for unusual talent, but looking for talent in unusual places".

24. The current under-representation of certain well-qualified groups within the judiciary suggests that factors other than pure talent may be influencing either people's willingness to apply or the selection process, or both.

We find that there is no violation of equal opportunity. There is a wide search for talent for inducting in the judicial service as well as in direct recruitment from Bar, and the best candidates are identified and recruited. Persons from unusual places are also given the opportunity to stake their claim in pursuit of their choice. In State of Bihar and Ors. v. Bal Mukund Sah and Ors., MANU/SC/0195/2000 : (2000) 4 SCC 640, this Court has observed that onerous duty is cast on the High Court under the Constitutional Scheme. It has been given a prime and paramount position in the matter with the necessity of choosing the best available talent for manning the subordinate judiciary. Thus, we find that there is no violation of any principle of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

44. Article 2 of the Universal Declaration of Human Rights has also been relied upon, which provides thus:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The aim of our Constitution is also the same, and there is no violation of any of human rights. The submission is far-fetched. In service jurisprudence, it is always permissible to provide different sources of recruitment and quotas along with a qualification. Equal opportunity is given, and seniority and competence are criteria for promotion, and in merit promotion, seniority is not to be considered.

45. In view of the aforesaid discussion, we are of the opinion that for direct recruitment as District Judge as against the quota fixed for the advocates/pleaders, incumbent has to be practicing advocate and must be in practice as on the cut-off date and at the time of appointment he must not be in judicial service or other services of the Union or State. For constituting experience of 7 years of practice as advocate, experience obtained in judicial service cannot be equated/combined and advocate/pleader should be in practice in the immediate past for 7 years and must be in practice while applying on the cut-off date fixed under the Rules and should be in practice as an advocate on the date of appointment. The purpose is recruitment from bar of a practicing advocate having minimum 7 years' experience.

46. In view of the aforesaid interpretation of Article 233, we find that Rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from bar are not ultra vires as Rules are subservient to the provisions of the Constitution.

47. We answer the reference as under:

(i) The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed Under Articles 234 and 235.

(iii) Under Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

(iv) For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

(v) The Rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

(vi) The decision in Vijay Kumar Mishra (supra) providing eligibility, of judicial officer to compete as against the post of District Judge by way of direct recruitment, cannot be said to be laying down the law correctly. The same is hereby overruled.

48. In the case of Dheeraj Mor and Ors. cases, time to time interim orders have been passed by this Court, and incumbents in judicial service were permitted to appear in the examination. Though later on, this Court vacated the said interim orders, by that time certain appointments had been made in some of the States and in some of the States results have been withheld by the High Court owing to complication which has arisen due to participation of the ineligible in-service candidates as against the post reserved for the practising advocates. In the cases where such in-service incumbents have been appointed by way of direct recruitment from bar as we find no merit in the petitions and due to dismissal of the writ petitions filed by the judicial officers, as sequel no fruits can be ripened on the basis of selection without eligibility, they cannot continue as District Judges. They have to be reverted to their original post. In case their right in channel for promotion had already been ripened, and their juniors have been promoted, the High Court has to consider their promotion in accordance with prevailing rules. However, they cannot claim any right on the basis of such an appointment obtained under interim order, which was subject to the outcome of the writ petition and they have to be reverted.

49. The civil appeals, writ petitions, Transfer Petition and contempt petition are, accordingly, disposed of. No order as to costs.

S. Ravindra Bhat, J.

50. I have gone through the draft judgment proposed by the Arun Mishra, J. I agree with his analysis; however, I have given additional reasoning as well in respect of the issue involved. Therefore, I am supplementing with my separate opinion.

51. This judgment answers a reference made to the present three judge bench. The referral order[1] noticed several previous decisions of this Court (in Rameshwar Dayal v. The State of Punjab and Ors. MANU/SC/0313/1960 : 1961 (2) SCR 874; Chandra Mohan v. The State of Uttar Pradesh and Ors. MANU/SC/0052/1966 : (1967) 1 SCR 77; Satya Naraian Singh v. High Court of Judicature MANU/SC/0069/1984 : 1985 (2) SCR 112; Deepak Aggarwal v. Keshav Kaushik MANU/SC/0048/2013 : 2013 (5) SCC 277 and felt that the observations in a judgment, Vijay Kumar Mishra and Anr. v. High Court of Judicature at Patna & Others MANU/SC/0878/2016 : (2016) 9 SCC 313, necessitated a re-consideration on the issue as to the eligibility of judicial officers, of any State, to apply for selection and appointment to the quota earmarked to be filled by Advocates with seven years' practice.

52. The controversy in these petitions is whether officers in the judicial services of the States (holding posts below that of District Judges) can compete, with members of the Bar (with seven or more years' practice), for direct recruitment, to the post of District Judge.

53. All Petitioners hold posts in the judicial services [and in one group, non-judicial service] of various States. Broadly, they fall in three categories: those selected to judicial service without any, or with less than seven years' experience at the Bar; those who had seven years' experience at the Bar, before appointment to the judicial service; and those with seven years or more experience at the Bar, but are working in non-judicial posts. Those with seven years' experience, prior to their appointment falling in the second and third categories mentioned above, argue that the Constitution does not preclude them from participating in the process of recruitment for District Judges, in the 25% Advocates' quota earmarked for that purpose. These set of Petitioners strongly rely on the decision reported as Rameshwar Dayal (supra), especially the ruling of this Court (in answer to the alternative argument that two candidates were ineligible, as they were serving in the Government), and Mahesh Chandra Gupta v. Union of India and Ors. MANU/SC/1156/2009 : (2009) 8 SCC 273. Reliance is also placed on Chandra Mohan (supra). It is submitted that in Chandra Mohan (supra), this Court categorically held that the disqualification attached to persons in the service of the Union or a State [Under Article 233(1)], expressly excludes those in the employment of the State, holding executive posts and discharging purely executive function, but does not prevent those in judicial service. It was pointed out that the Rule considered in Chandra Mohan (supra)-clearly entitled judicial officers (along with advocates) with seven years' experience at the Bar, to compete in the recruitment process.

54. Counsel for the Petitioners in the second category (i.e. those with less than seven years' experience at the Bar, and who have been working as judicial officers) submit that neither Article 233(1) nor Article 233(2) bar the participation of such candidates (as long as they have an overall combined experience of seven years-at the Bar and in judicial service) in the recruitment process along with members of the Bar, for appointment to the cadre of District Judges.

55. The argument of some of the Petitioners is that Articles 233(1) and 233(2) operate in two different fields. Article 233(1), the argument goes, confers power upon the Governor to make

appointments, subject to consultation with the High Court of the State. It is urged that this is an independent source of power; in exercise of this provision, the Governor can make appointment of persons in the judicial service. Another argument, in the context of power Under Article 233(2) is that the experience of seven years' at the bar, applies only to those in practise at the bar. It cannot apply to those already in the judicial service of the State. The decision in Rameshwar Dayal (supra) is relied upon. The Petitioners also urge that Chandra Mohan (supra) decided that it is only members of the judicial services of any State, who can be considered for appointment, as District Judges [in addition to Advocates with seven years' practise at the Bar, per Article 233(2)] and not members of the executive branch of the States or the Union. It is emphasized that in fact, the Rule which this Court had to consider, permitted judicial officers to compete along with members of the Bar, for selection and appointment to the post of District Judge.

56. It was argued, in addition, that the provision by which the quota earmarked for members of the Bar, to be exclusively competed for by them and for which members of the judicial services are prohibited from applying, is discriminatory. Learned Counsel highlighted that such a bar (preventing members in the judicial services) from applying and competing, along with members of the Bar, is arbitrary, because there is no basis for such classification. It was submitted in this regard that the Constitution makers envisaged that only those with talent could be recruited and appointed as District Judges; if that were the true objective, a restriction placed on those in judicial service undermines that purpose. It was submitted that experience gained as a judge is as, if not more, relevant in discharge of duties and functions as District Judges; on the other hand, Advocates with enrolment and experience of seven years at the Bar, have no manner of experience. Counsel emphasized that the phrase used in Article 233 i.e. being an advocate of not less than seven years' standing, has to be considered along with the bar to members of the services or holders of posts under the Union or the States, from competing for the post of District Judge. The Constitution merely underlined that the lawyer, competing for that post should not have less than seven years' experience; however, for members of the judicial service, neither is a bar (or restriction) expressed, nor can an implied bar be discerned. Therefore, the absolute restriction placed on members of any judicial service, from competing along with lawyers in the quota earmarked for that purpose, is unconstitutional and void. It was submitted that the decision in Satya Naraian Singh (supra), to the effect that the Constitution made a clear distinction between the two sources of recruitment and the dichotomy is maintained, and that the two streams are separate until they come together by appointment, is erroneous and needs correction. It is further submitted that the decision of this Court in Deepak Aggarwal (supra) to the effect that Article 233(2) mandates that an Applicant has to be in practise as a member of the Bar, at the time of making the application (for appointment), was wrongly decided. Deepak Aggarwal (supra) held as follows:

This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application.

57. It was submitted that besides being unduly narrow, the literal interpretation of Article 233(2) defeats the broad objective that the framers of the Constitution had in mind, and their intent to bring in the best minds and those with talent, irrespective of whether they were members of the Bar, or holders of judicial office, at the time of commencement of the recruitment process.

58. The Respondents, both States and High Courts, countered the submissions of the Petitioners, contending that neither Rameshwar Dayal (supra) nor Chandra Mohan (supra), (both Constitution Bench decisions) held that members of any judicial service had a right under the Constitution to apply for selection to the post of District Judges, on the basis that they had been Advocates at some prior point of time. It was pointed out that Article 233(1) merely indicates that the appointment to the post of District Judge is to be made by the Governor, on the recommendation of the High Court; so is also the case with promotions, postings etc. This provision merely indicates who is the appointing authority: it also lays down that such appointment cannot be made without the concurrence or recommendation of the High Court concerned. Chandra Mohan (supra), it was submitted, decisively held that the recommendation of the High Court is binding; it also clearly held that those in the services of the State, i.e. selected and appointed to administrative or executive departments or services, were barred from consideration to the post of District Judge.

59. It was submitted that for the last many decades, two clear streams of appointment to the post of District Judge have been delineated in the States: one, by direct recruitment (from members of the Bar with not less than seven years' experience) and two, from among members of the judicial service, fulfilling the requisite criteria, necessary to be considered for promotion. The latter category are considered and recommended for promotion in accordance with Rules framed Under Article 234 of the Constitution of India, read with proviso to Article 309.

The relevant provisions of the Constitution, for the purposes of this judgment, are extracted below:

Article 233 Appointment of district judges

(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years as an advocate or a pleader and is recommended by the High Court for appointment.

Article 233A Validation of appointments of, and judgments, etc. delivered by, certain district judges

Notwithstanding any judgment, decree or order of any court,-

(a) (i) no appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a district judge in that State, and

(ii) no posting, promotion or transfer of any such person as a district judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966, otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions.

Article 234-Recruitment of persons other than district judges to the judicial service

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

Article 235 Control over subordinate courts

The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Article 236 {Interpretation}

In this Chapter-

(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

60. It would be first essential to recollect that the power of High Courts, to recommend to the Governor, suitable persons, for appointment, is now considered to be decisive; the recommendation is almost always binding, barring in exceptional circumstances. This Court, in State of West Bengal v. Nripendra Nath Bagchi (MANU/SC/0310/1965 : 1966 (1) SCR 771) and High Court of Punjab and Haryana etc. v. State of Haryana MANU/SC/0072/1975 : 1975 (3) SCR 365 had ruled that Article 235 vests control in the High Courts over District Courts and courts subordinate to it. The Governor (of the concerned State) appoints, dismisses and removes Judicial Officers. The control vested in the High Court is complete control subject to the power of the Governor in the matter of appointment including dismissal, removal, reduction in rank and the

initial posting and of the initial promotion to District Judges. It was also held that nothing in Article 235 restricts the control of the High Court in respect of Judges other than District Judges in any manner. This position was endorsed by a four-judge bench of this Court in State of Haryana v. Inder Prakash Anand H.C.S. and Ors. MANU/SC/0547/1976 : 1976 (2) SCR 977.

61. In the decision reported as State of Assam and Ors. v. S.N. Sen and Ors. MANU/SC/0686/1971 : 1972 (2) SCR 251, a Constitution Bench of this Court underlined the unique nature of the power of the High Courts, while interpreting Articles 233-235 of the Constitution of India:

13. Under the provisions of the Constitution itself the power of promotion of persons holding posts inferior to that of the district judge is in the High Court. It stands to reason that the power to confirm such promotions should also be in the High Court.

14. This Court has on several occasions expressed its views on Article 235 of the Constitution. In The State of West Bengal v. Nripendra Nath Bagchi MANU/SC/0310/1965 : (1968) I LLJ 270 (SC), it was pointed out:

In the case of the judicial service subordinate to the district judge the appointment has to be made by the Governor in accordance with the Rules to be framed after consultation with the State Public Service Commission and the High Court but the power of posting, promotion and grant of leave and the control of the courts are vested in the High Court.

15. A year later, in State of Assam v. Ratiga Mohammed and Ors. MANU/SC/0056/1966 : (1968) I LLJ 282 SC this Court against observed as follows:

The High Court is in the day to day control of courts and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For however well-meaning & Minister may be he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital, information if they are interested themselves. It is also well-known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on notes and information supplied by a secretary.

16. This observation was made in relation to a case of transfer, but it applies with greater force to the case of promotion. The result is that we hold that the power of promotion of persons holding posts inferior to that of the district judge being in the High Court, the power to confirm such promotions is also in the High Court.

62. The decision in Rameshwar Dayal (supra) was in the context of a challenge to the eligibility of candidates who had been selected and appointed as District Judges. The main argument-or ground of challenge was that the incumbents/appointees did not possess seven years' practise at

the Bar: which was repelled by this Court. The court held that the practise of the concerned appointees, which spanned about two decades or so, in pre-partition India, had to be included for reckoning the seven-year period. The court considered the provisions of the Bar Councils Act, 1926, and the High Courts (Punjab) Order, 1947. The relevant part of the discussion in that judgment, which repelled the challenge to the appointments, is extracted below:

14. Learned Counsel for the Appellant has also drawn our attention to Explanation I to Clause (3) of Article 124 of the Constitution relating to the qualifications for appointment as a Judge of the Supreme Court and to the Explanation to Clause (2) of Article 217 relating to the qualifications for appointment as a Judge of a High Court, and has submitted that where the Constitution-makers thought it necessary they specifically provided for counting the period in a High Court which was formerly in India. Articles 124 and 217 are differently worded and refer to an additional qualification of citizenship which is not a requirement of Article 233, and we do not think that Clause (2) of Article 233 can be interpreted in the light of Explanations added to Articles 124 and 217.

Article 233 is a self-contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Clause (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Clause (2) and all that is required is that he should be an advocate or pleader of seven years' standing.

The Clause does not say how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Article 233 which must lead to the exclusion of that period for determining his eligibility for appointment as district judge.

15. What will be the result if the interpretation canvassed for on behalf of the Appellant is accepted? Then, for seven year beginning from August 15, 1947, no member of the Bar of the Punjab High Court would be eligible for appointment as district judge-a result which has only to be stated to demonstrate the weakness of the argument. We have proceeded so far on the first two submissions of learned Counsel for the Appellant, and on that basis dealt with his third submission.

It is perhaps necessary to add that we must not be understood to have decided that the expression 'has been' must always mean that learned Counsel for the Appellant says it means according to the strict Rules of grammar. It may be seriously questioned if an organic Constitution must be so narrowly interpreted, and the learned Additional Solicitor-General has drawn our attention to other Articles of the Constitution like Article 5(c) where in the context the expression has a different meaning. Our attention has also been drawn to the decision of the Allahabad High Court in Mubarak Mazdoor v. K.K. Banerji MANU/UP/0070/1958 : AIR 1958 All 323 where a different meaning was given to a similar expression occurring in the proviso to Sub-section (3) of Section 86 of the Representation of the People Act, 1951. We consider it unnecessary to pursue this matter further because the Respondents we are now considering continued to be advocates of the Punjab High Court when they were appointed as district judges and they had a standing of more than seven

years when so appointed. They were clearly eligible for appointment under Clause 2 of Article 233 of the Constitution.

16. We now turn to the other two Respondents (Harbans Singh and P.R. Sawhney) whose names were not factually on the roll of Advocates at the time they were appointed as district judges. What is their position? We consider that they also fulfilled the requirements of Article 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr. Viswanatha Sastri appearing for him has submitted that Clause (2) of Article 233 did not apply. We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of Clause (2), we must hold that they fulfilled those requirements. They were Advocates enrolled in the Lahore High Court; this is not disputed. Under Clause 6 of the High Courts (Punjab) Order, 1947, they were recognised as Advocates entitled to practise in the Punjab High Court till the Bar Councils Act, 1926, came into force. Under Section 8(2)(a) of that Act it was the duty of the High Court to prepare and maintain a roll of advocates in which their names should have been entered on the day on which Section 8 came into force, that is, on September 28, 1948. The proviso to Sub-section (2) of Section 8 required them to deposit a fee of Rs. 10 payable to the Bar Council. Obviously such payment could hardly be made before the Bar Council was constituted. We do not agree with learned Counsel for the Appellant and the interveners (B.D. Pathak and Om Dutt Sharma) that the proviso had the effect of taking away the right which these Respondents had to come automatically on the roll of advocates Under Section 8(2)(a) of the Act. We consider that the combined effect of Clause 6 of the High Courts (Punjab) Order, 1947, and Section 8(2)(a) of the Bar Councils Act, 1926, was this: from August 15, 1947, to September 28, 1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after September 28, 1948, they automatically came on the roll of advocates of the Punjab High Court but had to pay fee of Rs. 10 to the Bar Council. They did not cease to be advocates at any time or stage after August 15, 1947, and they continued to be advocates of the Punjab High Court till they were appointed as District Judges. They also had the necessary standing of seven years to be eligible under Clause (2) of Article 233 of the Constitution.

63. It is thus evident, that the main part of the discussion related to the possession of qualification, i.e. seven years' experience at the Bar, of the concerned candidates. As regards some candidates, the argument that they were not members of the Bar on the date of their appointment (as District Judge) was rejected: "they continued to be advocates of the Punjab High Court till they were appointed as District Judges. They also had the necessary standing of seven years to be eligible."

A significant aspect, is that this Court had no occasion to deal with any Rules framed Under Articles 233 or 234, in relation to the appointment or promotion to the post of District Judge.

64. The next decision is of Chandra Mohan (supra). There, the issue was regarding eligibility of certain candidates, who were members of the civil services or holders of civil posts of, the State. This Court first noticed the relevant provisions and observed as follows:

20. The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said judges from the first source are appointed in consultation with the

High Court and those from the second sources are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with Rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all district courts and courts subordinate thereto, subject to certain prescribed limitations.

65. Thereafter, the court held that the expression "not already in the service" of the Union or any State meant that those holding civil posts, or members of civil services, i.e. occupying non-judicial posts, were ineligible to compete for selection and appointment as District Judge; thus, only those in service as judges, or members of judicial services could be considered for appointment.

66. Satya Naraian Singh (supra) is a direct authority on the issue which this Court is now concerned with. There, members of the UP judicial service responded and applied to direct recruitment posts in the UP Higher Judicial Service claiming that they had acquired 7 years' practice at the bar prior to their appointment to the judicial service. The High Court ruled that they were ineligible for appointment by direct recruitment to UP Higher Judicial Service. On appeal, it was urged that any interpretation of Article 233 which would render a member of the Subordinate judicial service ineligible for appointment to the Higher Judicial Service by direct recruitment because of the additional experience gained by him as a Judicial officer would be unjustified. This Court, after noticing Rameshwar Dayal (supra) and Chandra Mohan (supra) held as follows:

We may mention here that Service of the Union or of the State' has been interpreted by this Court to mean judicial service. Again while the first Clause make consultation by the Governor of the State with the High Court necessary, the second Clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second Clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years Rule has no application but there has to be consultation with High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same slip (sic. ship) cannot sail both the streams simultaneously.

After quoting Chandra Mohan (supra) the court concluded:

Subba Rao, C.J. after referring to Articles 233, 234, 235, 236 and 237 stated,-E "The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and pro motion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service or the Union or of the State and (ii) members of Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with Rules framed by him in consultation with the High

Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations."

Subba Rao, CJ. then proceeded to consider whether the Government could appoint as district judges persons from services other than the judicial service. After pointing out that Article 233 (1) was a declaration of the general power of the Governor in the matter of appointment of district judges and he did not lay down the qualifications of the candidates to be appointed or denoted the sources from which the recruitment had to be made, he proceeded to state, "But the sources of recruitment are indicated in Clause (2) thereof. Under Clause (2 of Article 233 two sources are given namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader." Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the judicial service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233 (2) could only mean the judicial service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary Contrary to Article 14 and Article 16 of the Constitution.

Thus we see that the two decisions do not support the contention advanced on behalf of the Petitioners but, to the extent that they go, they certainly advance the case of the Respondents. We therefore, see no reason to depart from the view already taken by us and we accordingly dismiss the writ petitions.

67. In the decision reported as Deepak Agarwal (supra) this Court had to deal with a conflict between certain previous judgments, on the question of whether salaried public prosecutors or government counsel, after obtaining full time employment under the State (or the Union) could be considered as members of the Bar, i.e. those practising in the courts, for the purpose of Article 233 (2). The court, after an elaborate analysis of the previous decisions, observed as follows:

... by the above resolution of the Bar Council of India, the second and third para of Rule 49 have been deleted but we have to see the effect of such deletion. What Rule 49 of the BCI Rules provides is that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice. The 'employment' spoken of in Rule 49 does not cover the employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service conditions, such employment is not what is covered by Rule 49 as he continues to practice law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of second and third para by the Resolution dated 22.6.2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned.

85. What we have said above gets fortified by Rule 43 of the BCI Rules. Rule 43 provides that an advocate, who has taken a fulltime service or part-time service inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within time specified therein and any default in that regard may entail suspension of the right to practice. In other words, if full-time service or part-time service taken by an advocate is consistent with his practising as an advocate, no such declaration is necessary. The factum of employment is not material but the key aspect is whether such employment is consistent with his practising as an advocate or, in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in negative, he ceases to be an advocate.

86. An advocate has a two-fold duty: (1) to protect the interest of his client and pursue the case briefed to him with the best of his ability, and (2) as an officer of the Court. Whether full-time employment creates any conflict of duty or interest for a Public Prosecutor/Assistant Public Prosecutor? We do not think so. As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouth-piece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the court. The view in Samarendra Das to the extent it holds that an Assistant Public Prosecutor is not an officer of the Court is not a correct view.

Dealing specifically with the issue of the requirement Under Article 233 (1) that the Applicant "has been" in practise for 7 years, this Court significantly held as follows:

88. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application.

89. Rule 11 of the HSJS Rules provides for qualifications for direct recruits in Haryana Superior Judicial Service. Clause (b) of this Rule provides that the Applicant must have been duly enrolled as an advocate and has practised for a period not less than seven years. Since we have already held that these five private Appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, the period during which they have been working as such has to be considered as the period practising law. Seen thus, all of them have been advocates for not less than seven years and were enrolled as advocates and were continuing as advocates on the date of the application.

68. It is clear that what this Court had to consider was whether public prosecutors and government advocates were barred from applying for direct recruitments (i.e. whether they could be considered to have been in practise) and whether-during their course of their employment, as public prosecutors etc, they could be said to have "been for not less than seven years" practising as advocates. The court quite clearly ruled that such public prosecutors/government counsel (as long as they continued to appear as advocates before the court) answered the description and were therefore eligible.

69. In Vijay Kumar Mishra (supra) the challenge was to the rejection of a representation (of the Petitioners) to appear in interview for the post of District Judge Entry Level (Direct from Bar) Examination, 2015. A condition, i.e. that they had to tender their resignation, first, from the Subordinate Judicial Service of the State of Bihar as a precondition that they could appear in the interview was imposed. The facts were that the Petitioners, who were practising advocates with seven years' practise, on the cut-off date (5th February, 2015) and applied as such to the posts, responding to an application; they were permitted to and appeared in the Preliminary as well as in the Mains Examination pursuant to such advertisement. Before the publication of the results of the test, for the post, they qualified in and were appointed to the Bihar State Subordinate Judicial Service in the 28th Batch. They accordingly joined the subordinate judicial service in August, 2015. The result of the mains examination of the District Judge Entry Level (Direct from Bar) was published on 22nd of January, 2016. The Petitioners qualified in the Mains Examination. They however were not called for interview; their request was dealt with, and they were asked to resign from the subordinate judicial service, as a precondition, which was challenged. The High Court repelled the challenge holding that to permit the Appellant to participate in the interview would be breaching the mandate of Article 233 (2) holding that since before the date of interview, they joined the judicial service, they could not in terms of the Article 233 (2) of the Constitution, be permitted to continue with the selection process for District Judge Entry Level (Direct from Bar) as they were, members of the judicial Service.

70. The court in Vijay Kumar Mishra (supra) after noticing Satya Naraian Singh (supra) and Deepak Agarwal (supra) held that:

7. It is well settled in service law that there is a distinction between selection and appointment. Every person who is successful in the selection process undertaken by the State for the purpose of filling up of certain posts under the State does not acquire any right to be appointed automatically. Textually, Article 233 (2) only prohibits the appointment of a person who is already in the service of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification etc.) and be considered is guaranteed Under Article 14 and 16 of the Constitution.

8. The text of Article 233 (2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a person who is in the service of the Union or the State. A person who is in the service of either of the Union or the State would still have the option, if selected to join the service as a District Judge or continue with his existing employment.

Compelling a person to resign his job even for the purpose of assessing his suitability for appointment as a District Judge, in our opinion, is not permitted either by the text of Article 233 (2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose.

71. Justice Chelameshwar held that that neither of the two decisions [Satya Naraian Singh (supra) and Deepak Agarwal (supra)] dealt with the issue on hand. The other member of the Bench (Justice Sapre) concurred, stating as follows:

12) In my opinion, there is no bar for a person to apply for the post of district judge, if he otherwise, satisfies the qualifications prescribed for the post while remaining in service of Union/State. It is only at the time of his appointment (if occasion so arises) the question of his eligibility arises. Denying such person to apply for participating in selection process when he otherwise fulfills all conditions prescribed in the advertisement by taking recourse to Clause (2) of Article 233 would, in my opinion, amount to violating his right guaranteed Under Articles 14 and 16 of the Constitution of India.

13) It is a settled principle of Rule of interpretation that one must have regard to subject and the object for which the Act is enacted. To interpret a Statue in a reasonable manner, the Court must place itself in a chair of reasonable legislator/author. So done, the Rules of purposive construction have to be resorted to so that the object of the Act is fulfilled. Similarly, it is also a recognized Rule of interpretation of Statutes that expressions used therein should ordinarily be understood in the sense in which they best harmonize with the object of the Statute and which effectuate the object of the legislature. (See-Interpretation of Statues 12th Edition, pages 119 and 127 by G.P. Singh). The aforesaid principle, in my opinion, equally applies while interpreting the provisions of Article 233 (2) of the Constitution.

72. It is thus evident, that Rameshwar Dayal (supra) was mainly concerned with the question whether practice as a pleader or advocate, in pre-partition India could be reckoned, for the purpose of calculating the seven-year period, stipulated in Article 233 (2). No doubt, there are some observations, with respect to appointments being referable to Article 233 (1). However, the important aspect which is to be kept in mind, is that no Rules were discussed; the experience of the concerned Advocates, who were appointed as District Judges, were for a considerable period, in pre-partition India, in the erstwhile undivided Punjab. Chandra Mohan (supra), on the other hand is a clear authority-and an important judgment, on the aspect that those in the service of or holding posts, under the Union or States,-if they are not in judicial service-are ineligible for appointment as District Judges, Under Article 233 (2) of the Constitution. The corollary was that those holding judicial posts were not barred as holders of office or posts under the Union or the State. Significantly, this Court in Chandra Mohan (supra), invalidated a Rule which rendered both officers holding executive positions, under the State, and those holding judicial posts, eligible to apply for appointment Under Article 233 (2). In Satya Naraian Singh (supra) this Court clearly held that the disqualification of those holding judicial posts from applying as Advocates, Under Article 233 (2) did not violate Article 14: a "clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same slip (sic ship) cannot sail both the streams simultaneously.

73. A close reading of Article 233, other provisions of the Constitution, and the judgments discussed would show discloses the following:

(a) That the Governor of a State has the authority to make "appointments of persons to be, and the posting and promotion of, district judges in any State (Article 233 [1]);

(b) While so appointing the Governor is bound to consult the High Court (Article 233 [1]: Chandra Mohan (supra) and Chandramouleshwar Prasad v. Patna High Court MANU/SC/0495/1969 : 1970 (2) SCR 666[2]);

(c) Article 233 (1) cannot be construed as a source of appointment; it merely delineates as to who is the appointing authority;

(d) In matters relating to initial posting, initial appointment, and promotion of District Judges, the Governor has the authority to issue the order; thereafter it is up to the High Court, by virtue of Article 235, to exercise control and superintendence over the conditions of service of such District Judges. (See State of Assam v. Ranga Mahammad MANU/SC/0056/1966 : 1967 (1) SCR 454[3]);

(e) Article 233 (2) is concerned only with eligibility of those who can be considered for appointment as District Judge. The Constitution clearly states that one who has been for not less than seven years, "an advocate or pleader" and one who is "not already in the service of the Union or of the State" (in the sense that such person is not a holder of a civil or executive post, under the Union or of a State) can be considered for appointment, as a District judge. Significantly, the eligibility-for both categories, is couched in negative terms. Clearly, all that the Constitution envisioned was that an advocate with not less than seven years' practise could be appointed as a District Judge, Under Article 233 (2).

(f) Significantly, Article 233 (2) ex facie does not exclude judicial officers from consideration for appointment to the post of District Judge. It, however, equally does not spell out any criteria for such category of candidates. This does not mean however, that if they or any of them, had seven years' practise in the past, can be considered eligible, because no one amongst them can be said to answer the description of a candidate who "has been for not less than seven years" "an advocate or a pleader" (per Deepak Agarwal, i.e. that the applicant/candidate should be an advocate fulfilling the condition of practise on the date of the eligibility condition, or applying for the post). The sequitur clearly is that a judicial officer is not one who has been for not less than seven years, an advocate or pleader.

74. The net result of the decision in Chandra Mohan (supra), and subsequent decisions which followed it, is that Article 233 (2) renders ineligible all those who hold civil posts under a State or the Union, just as it renders all advocates with less than seven years' practice ineligible, on the date fixed for reckoning eligibility. Equally, those in judicial service [i.e. holders of posts other than District Judge, per Article 236(2)] are not entitled to consideration because the provision (Article 233 [2]) does not prescribe any eligibility condition. Does this mean that any judicial officer, with any length of service as a member of the judicial service, is entitled to consideration Under Article 233 (2)? The answer is clearly in the negative. This is because the negative phraseology through which eligibility of holders of civil posts, or those in civil service (of the State or the Union) and

advocates with seven years' service is couched. However, the eligibility conditions are not spelt out in respect of those who are in the judicial service.

75. The omission,-in regard to spelling out the eligibility conditions vis-à-vis judicial officers, to the post of District Judge, in the opinion of this Court, is clearly by design. This subject matter is covered by three provisions: Article 233 (1)-which refers to promotions to the post of District Judge; Article 234, which, like Article 233 (1) constitutes the Governor as the appointing authority in respect of judicial posts or services, (other than District Judges), and like Article 233 (1), subject to recommendation of the High Court concerned. This position is most definitely brought home by the fact that Article 235 vests in the High Courts the power of supervision and control of the judicial service, "including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge." The corollary to this is that the Governor is appointing authority for the post of District Judge, and other judicial posts; both are to be filled after prior consultation with the High Court, and crucially, the promotion of judicial officers, to the post of District Judge, is regulated by conditions (read rules) framed by the High Court.

76. The upshot of the above discussion is that the Constitution makers clearly wished to draw a distinction between the two sources of appointment to the post of District Judge. For one, i.e. Advocates, eligibility was spelt out in negative phraseology, i.e. not less than seven years' practice; for judicial officers, no eligibility condition was stipulated in Article 233 (2): this clearly meant that they were not eligible to be appointed (by direct recruitment) as they did not and could not be considered advocates with seven years' practise, once they entered the judicial service. The only channel for their appointment, was in accordance with Rules framed by the High court, for promotion (as District Judges) of officers in the judicial service (defined as those holding posts other than District Judges, per Article 236 [b]).

77. In view of the above discussion clearly, the decision in Satya Naraian Singh (supra) correctly appreciated the relevant provisions and held that the dichotomy between the two streams meant that those in one stream (read judicial service) could not compete for vacancies falling in the quota earmarked for advocates.

78. The Petitioners had urged that the court should endeavour and interpret the provisions of the Constitution in a broad manner, rather than placing a narrow interpretation and that rendering ineligible those with seven years' practise as advocates, but who were appointed to judicial posts, would be violative of Article 14 of the Constitution of India. It was emphasized in this regard, that there is no distinction between those who continue to practice and those, who had practiced for seven years, later joined the judicial service and continued in it, as on the date of reckoning eligibility. It was urged that those in judicial service are in fact better qualified, because they would be experienced in discharging functions relating to a judicial office, whereas those who continue to practice, and remain advocates, would not have such benefit. As between the two, therefore, those holding judicial office, would be better suited. It was therefore urged, that if they are permitted to compete for the post of District Judge, without insisting that they should resign, society would have a greater pool of merit to pick up from. The last argument was since both categories fulfilled the basic condition of seven years' practise, excluding those in judicial service, does not sub-serve the object of recruitment, i.e. selecting the best candidates.

79. In the opinion of this Court, there is an inherent flaw in the argument of the Petitioners. The classification or distinction made-between advocates and judicial officers, per se is a constitutionally sanctioned one. This is clear from a plain reading of Article 233 itself. Firstly, Article 233 (1) talks of both appointments and promotions. Secondly, the classification is evident from the description of the two categories in Article 233 (2): one "not already in the service of the Union or of the State" and the other "if he has been for not less than seven years as an advocate or a pleader". Both categories are to be "recommended by the High Court for appointment." The intent here was that in both cases, there were clear exclusions, i.e. advocates with less than seven years' practice (which meant, conversely that those with more than seven years' practice were eligible) and those holding civil posts under the State or the Union. The omission of judicial officers only meant that such of them, who were recommended for promotion, could be so appointed by the Governor. The conditions for their promotion were left exclusively to be framed by the High Courts.

80. In view of the above analysis, since the Constitution itself makes a distinction between advocates on the one hand, and judicial officers, on the other, the argument of discrimination is insubstantial. If one examines the scheme of appointment from both channels closely-as Justice Mishra has done-it is evident that a lions' share of posts are to be filled by those in the judicial service. For the past two decades, only a fourth (25%) of the posts in the cadre of District Judges (in every State) are earmarked for advocates; the balance 75% to be filled exclusively from amongst judicial officers. 50%, (out of 75%) is to be filled on the basis of seniority cum merit, whereas 25% (of the 75%) is to be filled by departmental examination. This examination is confined to members of the judicial service of the concerned State. The decision of this Court in All India Judges' Association and Ors. v. Union of India and Ors. MANU/SC/1120/2010 : 2010 (15) SCC 170, reduced the limited departmental examination quota (out of turn promotion quota) from 25% to 10% which took effect from 01.01.2011. Thus, cumulatively, even today, judicial officers are entitled to be considered for appointment, by promotion, as District Judges, to the extent of 75% of the cadre relating to that post, in every State. It is therefore, held that the exclusion-by the rules, from consideration of judicial officers, to the post of District Judges, in the quota earmarked for Advocates with the requisite standing, or practice, conforms to the mandate of Articles 233-235, and the Rules are valid.

81. This Court is also of the opinion that if Rules of any State permit judicial officers to compete in the quota for appointment as District Judges, they are susceptible to challenge. The reason for this conclusion is that where a dichotomy is maintained, and two distinct sources for appointment are envisaged, like the present, enabling only judicial officers to compete in the quota earmarked for advocates would potentially result in no one from the stream of advocates with seven or more years' practice, being selected. This would be contrary to the text and mandate of Article 233 (2), which visualized that such category of candidates would always be eligible and occupy the post of District Judge. Clear quotas for both sources have been earmarked by High Courts. If one those in one stream, or source-i.e. judicial officers-are permitted to compete in the quota earmarked for the other (i.e. advocates) without the converse situation (i.e. advocates competing in the quota earmarked for judicial officers-an impossibility) the result would be rank discrimination.

82. Another strong reason drives us to this conclusion. The Constitution makers were aware that the judicial branch had to be independent, and at the same time, reflect a measure of diversity of

thought, and approach. This is borne out by eligibility conditions spelt out clearly in regard to appointments at every level of both the lower and higher judiciary: the District court, the High Courts and the Supreme Court. In regard to judicial positions in each of these institutions, the Constitution enables appointments, from amongst members of the Bar, as its framers were acutely conscious that practising advocates reflect independence and are likely offer a useful attribute, i.e. ability to think differently and have novel approaches to interpretation of the laws and the Constitution, so essential for robustness of the judiciary, as well as society as a whole.

83. This view is fortified by Article 217 (2), which spells out two sources from which appointments can be resorted to for the position of judge of a High Court: firstly, member of a judicial service of a State [Article 217 (a)] and an advocate with ten years' experience [Article 217(b)]. For the Supreme Court, Article 124(3)(a) enables consideration of a person with five years' experience as a High Court judge; Article 124(3)(b) enables consideration of an advocate with ten years' experience at the bar in any High Court; Article 124(3)(c) enables consideration of a distinguished jurist. Significantly, advocates with stipulated experience at the bar are entitled, by express provisions of the Constitution [Articles 233 (2), Article 217(b) and Article 124(3)(b)] to be considered for appointment to the District Courts, High Courts and the Supreme Court, respectively. However, members of the judicial service can be considered only for appointment (by promotion) as District Judges, and as High Court judges, respectively. Members of the judicial service cannot be considered for appointment to the Supreme Court. Likewise, academics or distinguished jurists, with neither practise at the Bar, nor any experience in the judicial service, can be considered for appointment as District Judge, or as High Court judge.

84. The Constitution makers, in the opinion of this Court, consciously wished that members of the Bar, should be considered for appointment at all three levels, i.e. as District judges, High Courts and this Court. This was because counsel practising in the law courts have a direct link with the people who need their services; their views about the functioning of the courts, is a constant dynamic. Similarly, their views, based on the experience gained at the Bar, injects the judicial branch with fresh perspectives; uniquely positioned as a professional, an advocate has a tripartite relationship: one with the public, the second with the court, and the third, with her or his client. A counsel, learned in the law, has an obligation, as an officer of the court, to advance the cause of his client, in a fair manner, and assist the court. Being members of the legal profession, advocates are also considered thought leaders. Therefore, the Constitution makers envisaged that at every rung of the judicial system, a component of direct appointment from members of the Bar should be resorted to. For all these reasons, it is held that members of the judicial service of any State cannot claim to be appointed for vacancies in the cadre of District Judge, in the quota earmarked for appointment from amongst eligible Advocates, Under Article 233.

85. This Court is of the opinion that the decision in Vijay Kumar Mishra (supra), as far as it makes a distinction between consideration, of a candidate's eligibility, at the stage of selection, and eligibility reckonable at the time of appointment, is incorrect. There is clear authority to the proposition that eligibility of any candidate is to be reckoned, not from the date of his or her selection, but in terms of the rules, or the advertisement for the post. In Ashok Kumar Sharma and Ors. v. Chander Shekhar and Ors. MANU/SC/1130/1997 : 1997 (4) SCC 18, a three-judge bench of this Court held as follows:

6. ....The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement of notification issued/published calling for application constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it.

7. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the person had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis.

8. Their applications ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority Judgment. This is also the proposition affirmed in Rekha Chaturvedi (Smt.) v. University of Rajasthan and Ors. MANU/SC/0838/1993 : (1993) I LLJ 617 (SC). The reasoning in the majority opinion that by allowing the 33 Respondents to appear for the interview, the Recruiting Authority was able to get the best talent available and that such course was in furtherance of public interest is, with respect, an impermissible justification. It is, in our considered opinion, a clear error of law and an error apparent on the face of the record. In our opinion, R.M. Sahai, J.(and the Division Bench of the High Court) was right in holding that the 33 Respondents could not have been allowed to appear for the interview.

This reasoning is similar to other decisions, such as U.P. Public Service Commission v. Alpana MANU/SC/0672/1994 : 1994 (2) SCC 723 and Bhupinderpal Singh and Ors. v. State of Punjab and Ors. MANU/SC/0298/2000 : 2000 (5) SCC 262. Therefore, the observation in Vijay Kumar Mishra (supra) that "the right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification etc.) and be considered is guaranteed Under Article 14 and 16 of the Constitution" is not correct. With respect, the distinction sought to be made, between "selection" and "appointment" in the context of eligibility, is without foundation. A selection process begins with advertisement, calling for applications from eligible candidates. Eligibility is usually defined with reference to possession of stipulated qualifications, experience, and age, as on the last date (of receipt of applications, or a particular specified date, etc). Anyone fulfilling those eligibility conditions, with reference to such date, would be ineligible. Therefore, the observation that the right to participate in the selection process, without possessing the prescribed eligibility conditions, is guaranteed, is not correct; the right is guaranteed only if the candidate concerned fulfils the requisite eligibility criteria, on the stipulated date. As pointed out by the three judge bench decision, if the contrary is correct, one acquiring the stipulated qualifications subsequent to the prescribed date cannot be considered. Also, one not fulfilling the conditions cannot be allowed to participate, because, as held in Ashok Kumar Sharma (supra), if it were known, that such ineligible candidates can be considered, those who do not apply, but are better placed than the ineligible candidates who are allowed to participate, would be left out. Moreover, the authority publishing

the advertisement/notification represents to the members of the public that it is bound by such representation.

86. As a result of the above discussion, it is held that Vijay Kumar Mishra (supra), to the extent that it is contrary to Ashok Kumar Sharma (supra), as regards participation in the selection process, of candidates who are members of the judicial service, for appointment to the post of District Judge, from amongst the quota earmarked for advocates with seven years' practice, was wrongly decided. To that extent, Vijay Kumar Mishra (supra) is hereby overruled.

87. In the light of the foregoing discussion, it is held that Under Article 233, a judicial officer, regardless of her or his previous experience as an Advocate with seven years' practice cannot apply, and compete for appointment to any vacancy in the post of District Judge; her or his chance to occupy that post would be through promotion, in accordance with Rules framed Under Article 234 and proviso to Article 309 of the Constitution of India.

---

[1]Order dated 23-01-2018 in SLP (C) 14156/2015, Dheeraj More v. High Court of Delhi
[2]The court in Chandramouleshwar Prasad held that
"No doubt the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court."
[3]This Court held as follows:
"By the first of these articles the question of appointment is considered separately but by the second of these articles posting and promotion of persons belonging to the judicial service of the State and holding any post inferior to the post of a district Judge is also vested in the High Court. The word 'post' used twice in the Article clearly means the position or job and not the station or place and 'posting' must obviously mean the assignment to a position or job and not placing in-charge of a station or Court. The association of words in Article 235 is much clearer but as the word 'posting' in the earlier Article deals with the same subject matter, it was most certainly used in the same sense and this conclusion is thus quite apparent. This is, of course, as it should be. The High Court is in the day to day control of courts and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For however well-meaning a Minister may be he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual Judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital information if they are interested themselves. It is also well-known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on

notes and information supplied by a secretary. The reason of the Rule and the sense of the matter combine to suggest the narrow meaning accepted by us. The policy displayed by the Constitution has been in this direction as has been explained in earlier cases of this Court. The High Court was thus right in its conclusion that the powers of the Governor cease after he has appointed or promoted a person to be a district Judge and assigned him to a post in cadre. Thereafter, transfer of incumbents is a matter within the control of District Courts including the control of persons presiding there as explained in the cited case.

As the High Court is the authority to make transfers, there was no question of a consultation on this account. The State Government was not the authority to order the transfers. There was, however, need for consultation before D.N. Deka was promoted and posted as a District Judge. That such a consultation is mandatory has been laid down quite definitely in the recent decision of this Court in Chandra Mohan v. UP On this part of the case it is sufficient to say that there was consultation."

Back to Index

MANU/SC/1098/2013

Neutral Citation: 2013/INSC/717

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 692, 731, 858, 2867 and 2866 of 2012

Decided On: 24.10.2013

Appellants: Balram Prasad and Ors. Vs**.** Respondent: Kunal Saha and Ors.

Hon'ble Judges/Coram:

C.K. Prasad and V. Gopala Gowda, JJ.

Subject: Motor Vehicles

Subject: Consumer

Prior History:

From the Judgment and Order dated 21.10.2011 of the National Consumer Disputes Redressal Commission, New Delhi in W.P. No. 240 of 1999

Disposition:
Appeal Partly Allowed

Authorities Referred:

Halsbury's Laws of England, 4th Edn., Vol. 12

Case Note:

Medical Negligence - Just compensation--Assessment--Held--Awarding meagre compensation under different heads is unsustainable in law--It is the duty of Tribunal/Commission/Court to consider relevant facts and circumstances of each and every case.

Medical Negligence - Sought compensation--Scope of future prospects of income--Held--Calculation of future prospects of income is to be decided by economic expert.

Medical Negligence - Granting compensation--Scope of "multiplier Method"--Held--In assessing compensation court may choose to deviate from standard multiplier method to

avoid over compensation and rely upon quantum of multiplicand to choose appropriate multiplier.

Case Category:
MATTERS RELATING TO CONSUMER PROTECTION - APPEALS UNDER SECTION 23 OF THE CONSUMER PROTECTION ACT, 1986

JUDGMENT

V. Gopala Gowda, J.

1. The Civil Appeal Nos. 2867, 731 and 858 of 2012 are filed by the Appellant-doctors, Civil Appeal No. 692 of 2012 is filed by the Appellant-AMRI Hospital and Civil Appeal No. 2866 of 2012 is filed by the claimant-Appellant - Dr. Kunal Saha (hereinafter referred to as 'the claimant'), questioning the correctness of the impugned judgment and order dated 21.10.2011 passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as the 'National Commission') in Original Petition No. 240 of 1999.

2. The Appellant-doctors are aggrieved by the quantum of compensation awarded by the National Commission and the liability fastened upon them for the negligence on their part and have prayed to set aside the same by allowing their appeals. In so far as the Appellant-AMRI Hospital is concerned, it has also questioned the quantum of compensation awarded and has prayed to reduce the same by awarding just and reasonable compensation by modifying the judgment by allowing its appeal.

So far as the claimant is concerned, he is aggrieved by the said judgment and the compensation awarded which, according to him, is inadequate, as the same is contrary to the admitted facts and law laid down by this Court in catena of cases regarding awarding of compensation in relation to the proved medical negligence for the death of his wife Anuradha Saha (hereinafter referred to as the 'deceased').

3. The brief relevant facts and the grounds urged on behalf of the Appellant-doctors, AMRI Hospital and the claimant in seriatim are adverted to in this common judgment for the purpose of examining the correctness of their respective legal contentions urged in their respective appeals with a view to pass common judgment and award.

4. Brief necessary and relevant facts of the case are stated hereunder:

The claimant filed Original Petition No. 240 of 1999 on 09.03.1999 before the National Commission claiming compensation for Rs. 77,07,45,000/- and later the same was amended by claiming another sum of Rs. 20,00,00,000/-. After the case of **Malay Kumar Ganguly** v. **Dr. Sukumar Mukherjee** MANU/SC/1416/2009 : (2009) 9 SCC 221 was remanded by this Court to the National Commission to award just and reasonable compensation to the claimant by answering the points framed in the said case, the National Commission held the doctors and the AMRI Hospital negligent in treating the wife of the claimant on account of which she died. Therefore, this Court directed the National Commission to determine just and reasonable compensation

payable to the claimant. However, the claimant, the Appellant-Hospital and the doctors were aggrieved by the amount of compensation awarded by the National Commission and also the manner in which liability was apportioned amongst each of them. While the claimant was aggrieved by the inadequate amount of compensation, the Appellant-doctors and the Hospital found the amount to be excessive and too harsh. They further claimed that the proportion of liability ascertained on each of them is unreasonable. Since, the Appellant-Hospital and the doctors raised similar issues before the Court; we intend to produce their contentions in brief as under:

On granting the quantum of compensation based on the income of the deceased:

5. It is the claim of the learned Counsel on behalf of the Appellant-doctors and the Hospital that there is no pleading in the petition of the claimant that the deceased had a stable job or a stable income, except in paragraph 2A of the petition which states that the deceased was a Post-Graduate student and she had submitted her thesis. The only certificate produced by the claimant shows that she was just a graduate in Arts (English). Further, it is urged by the learned Counsel that the document produced by the claimant - a computer generated sheet, does not explain for what work the remuneration, if at all was received by the deceased. Also, whether the same was a onetime payment of stipend or payment towards voluntary work, is not explained by the claimant. Further, it is stated by the learned Counsel that there is no averment in the petition of the claimant as to on what account the said payment was received by the deceased and whether she has received it as a Child Psychologist as claimed by the claimant or otherwise.

6. It is also the case of the Appellant-doctors and the Hospital that the claimant had not led any oral evidence with regard to the income of the deceased and further he has not explained why just a single document discloses the payment made sometime in the month of June 1988 in support of the income of the deceased when admittedly, the couple came to India in the month of March-April, 1998. Therefore, the learned Counsel for the Appellant-doctors and the Hospital have urged that the said document is a vague document and no reliance could have been placed by the National Commission on the same to come to the conclusion that the deceased in fact had such an income to determine and award the compensation as has been awarded in the impugned judgment and order. From a perusal of the said document, it could be ascertained that it shows just one time payment received for some odd jobs. Therefore, it is contended by the Appellant-doctors and the Hospital that the claimant has not been able to discharge his onus by adducing any positive evidence in this regard before the National Commission.

7. It is further contended by the learned Counsel that the assertion of the claimant in the petition and in his evidence before the National Commission that the income of the deceased was $ 30,000 per annum is not substantiated by producing cogent evidence. No appointment letter of the deceased to show that she was employed in any organization in whatsoever capacity had been produced nor has the claimant produced any income certificate/salary sheet. No evidence is produced by the claimant in support of the fact that the deceased was engaged on any permanent work. No Income Tax Return has been produced by the claimant to show that she had been paying tax or had any income in U.S.A.

8. It is further submitted that even if it is assumed that the annual income of the deceased was $ 30,000 per annum, apart from deduction on account of tax, it is also essential for the National

Commission to ascertain the personal living expenses of the deceased which was required to be deducted out of the annual income to determine the compensation payable to the claimant. The National Commission was required to first ascertain the style of living of the deceased- whether it was Spartan or Bohemian to arrive the income figure of $ 30,000 per annum. In India, on account of style and standard of living of a person, one-third of the gross income is required to be deducted out of the annual income as laid down in the decision of this Court in the case of **Oriental Insurance Co. Ltd.** v. **Jashuben and Ors.** MANU/SC/7157/2008 : (2008) 4 SCC 162.

It is further contended by the learned Counsel for the Appellant-doctors and the Hospital that no yardstick is available about the expenditure of the deceased in the U.S.A. The claimant has not adduced any evidence in this regard. The evidence given by the so-called expert, Prof. John F. Burke Jr. also does not say anything on this score.

Even if it is assumed that the annual income of the deceased was $ 30,000 per annum for which there is no evidence, 25% thereof is required to be deducted towards tax. The deduction of tax is much more as is apparent from the case reported in **United India Insurance Co. Ltd. and Ors.** v. **Patricia Jean Mahajan and Ors.** MANU/SC/0563/2002 : (2002) 6 SCC 281. In fact, the claimant has neither adduced any evidence in this regard nor has he produced the relevant statute from which the percentage of tax deduction can be ascertained.

The claimant was last examined by video conferencing conducted under the supervision of Justice Lokeshwar Prasad (retired Judge of Delhi High Court) as local Commissioner. The AMRI Hospital-Appellant's witness Mr. Satyabrata Upadhyay was cross-examined by the claimant.

9. The claimant filed M.A. No. 1327 of 2009 before the National Commission after remand order was passed by this Court in the case of **Malay Kumar Ganguly** (supra). The claimant now claimed enhancement of compensation at Rs. 78,14,00,000/- under the heads of pecuniary damages and non-pecuniary damages.

The prayer made in the application was to admit the claim for compensation along with supporting documents including the opinions of the foreign experts and further prayed for issuing direction to the Appellant-doctors and the Hospital to arrange for cross-examination of the foreign experts, if they wish, through video conferencing at their expenses as directed by this Court in the remand order in **Malay Kumar Ganguly's** case (supra) and for fixing the matter for a final hearing as soon as possible on a firm and fixed date as the claimant himself want to argue his petition as was done before this Court, as he being the permanent resident of U.S.A.

10. The learned senior counsel appearing for the claimant on 9.2.2010 prayed for withdrawal of the application stating that he would file another appropriate application. Thereafter, on 22.2.2010 the claimant filed M.A. No. 200 of 2010 seeking direction to the National Commission to permit him to produce affidavit of four foreign experts and their reports. The National Commission dismissed the same vide order dated 26.4.2010 against which special leave petition No. 15070/2010 was filed before this Court which was withdrawn later on. Again, the claimant filed M.A. No. 594 of 2010 before the National Commission for examination of four foreign experts to substantiate his claim through video conferencing at the expense of the Appellant-doctors and the Hospital. The National Commission vide order dated 6.9.2010 dismissed the application of the

claimant for examining foreign experts. Against this order, the claimant preferred SLP (C) No. 3173 of 2011 before this Court praying for permission to examine two foreign experts, namely, Prof. John F. Burke Jr. and Prof. John Broughton through video conferencing and he undertook to bear the expenses for such examination. The claimant had given up examination of other two foreign experts, namely, D. Joe Griffith and Ms. Angela Hill. Prof. John F. Burke Jr. was examined on 26.4.2011 as an Economics Expert to prove the loss of income of the deceased and the claimant relied upon an affidavit dated 21.9.2009 and his report dated 18.12.2009 wherein he has stated that if the deceased would have been employed through the age of 70, her net income could have been $ 3,750,213.00. In addition, the loss of service from a domestic prospective was an additional amount of $ 1,258,421.00. The said witness was cross examined by the learned Counsel for the doctors and AMRI Hospital. The learned Counsel for the Appellant-doctors placed reliance upon the following questions and answers elicited from the above Economics Expert witness, which are extracted hereunder:

Q.16. Can you tell me what was the wages of Anuradha in 1997?

A.16. May I check my file (permitted). I don't know.

Q.17. Are you aware whether Anuradha was an income tax payee or not?

A.17. Anu and her husband were filing joint return.

Q.18. Did Anu have any individual income?

A.18. I don't know.

Q.19. Did Kunal Saha provide you the earning statement of Anuradha Saha, wherein her gross monthly pay was shown as $ 1060 as on 16.1.1998?

A.19. I don't believe that I have that information.

...

Q.21. What documents have you taken into consideration of Anu's income for giving your opinion?

A.21. None.

Q.22. Whether Anu was employed at the time of her death?

A.22. I don't think so; I don't believe so.

11. The claimant on the other hand, had placed strong reliance upon the evidence of the Economics Expert Prof. John F. Burke to prove the income of the deceased as on the date of her death and actual income if she would have lived up to the age of 70 years as he had also examined Prof. John Broughton in justification of his claim.

The learned Counsel for the Appellant-doctors contended that Prof. John F. Burke, who was examined through video conferencing in the presence of the Local Commissioner, has estimated the life time income of the deceased to be 5 million and 125 thousand US dollars without any supporting material. The said foreign expert witness did not know whether the deceased had any individual income. He did not know about the earning statement of the deceased produced by the claimant. He has also stated that the deceased was not employed at the time of her death.

12. The learned Counsel for the Appellant-doctors also submitted that the earning statement issued by Catholic Home Bureau stating the income of the deceased at $ 1060.72 for the period ending 15th January, 1998 cannot be relied upon for the following reasons:

(a) The earning statement was not proved in accordance with law since only the affidavit of claimant was exhibited and not the documents before Justice Lokeshwar Prasad (Retired) i.e. the Local Commissioner on 5.12.2003 during the cross-examination.

(b) There is nothing to show that Anuradha Saha was under employment at Catholic Home Bureau.

(c) Letter of appointment has not been annexed.

(d) Federal Tax record has not been produced. The Economics expert has stated that Anuradha and the claimant were filing joint tax return.

(e) It does not show weekly income of the deceased as has been treated by NCDRC.

(f) Nature of appointment, even if presumed, has not been stated, i.e., whether it was temporary or permanent, contractual or casual and period of employment.

It is further submitted by the learned Counsel that the evidence of Prof. John F. Burke, Jr. has not been relied upon to prove the loss of income of the deceased as it shows that the deceased was not paying income tax. Therefore, the National Commission has erred in partly allowing the claim of the claimant while computing the compensation on the basis of the earning of the deceased.

On awarding compensation under the head of 'loss of consortium':

13. The learned senior counsel and other counsel for the Appellant-doctors submitted that the National Commission has erred in awarding Rs. 10,00,000/- towards loss of consortium. This Court in various following decisions has awarded Rs. 5,000/- to Rs. 25,000/- on the aforesaid account:

CASE LAW	AMOUNT
1. Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421	Rs.10,000
2. New India Assurance Company Limited v. Yogesh Devi, (2012) 3 SCC 613	Rs.10,000
3. National Insurance Company Limited v. Sinitha, (2012) 2 SCC 356	Rs.5,000
4. Sunil Sharma v. Bachitar Singh, (2011) 11 SCC 425	Rs.25,000
5. Pushpa v. Shakuntala, (2011) 2 SCC 240	Rs.10,000
6. Arun Kumar Agrawal v. National Insurance Company Limited, (2010) 9 SCC 218	Rs.15,000
7. Shyamwati Sharma v. Karam Singh, (2010) 12 SCC 378	Rs.5,000
8. Reshma Kumari v. Madan Mohan, (2009) 13 SCC 422 in Sarla Dixit v. Balwant Yadav	Rs.15,000
9. Raj Rani v. Oriental Insurance Company Limited, (2009) 13 SCC 654	Rs.7,000
10. Sarla Verma v. Delhi Transport Corporation, (2009) 6 SCC 121	Rs.10,000
11. Rani Gupta v. United India Insurance Company Limited, (2009) 13 SCC 498	Rs.25,000
12. National Insurance Company Limited v. Meghji Naran Soratiya, (2009) 12 SCC 796	Rs.10,000
13. Oriental Insurance Company Limited v. Angad Kol, (2009) 11 SCC 356	Rs.10,000
14. Usha Rajkhowa v. Paramount Industries, (2009) 14 SCC 71	Rs.5,000
15. Laxmi Devi v. Mohammad. Tabbar, (2008) 12 SCC 165	Rs.5,000
16. Andhra Pradesh State Road Transport Corporation v. M. Ramadevi, (2008) 3 SCC 379	Rs.5,000
17. State of Punjab v. Jalour Singh, (2008) 2 SCC 660	Rs.5,000
18. Abati Bezbaruah v. Dy. Director General, Geological Survey of India, (2003) 3 SCC 148	Rs.3,000
19. Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala, (2001) 5 SCC 175	Rs.5,000
20. Sarla Dixit v. Balwant Yadav, (1996) 3 SCC 179	Rs.15,000
21. G.M., Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176	Rs.15,000
22. National Insurance Co. Ltd. v. Swaranlata Das, 1993 Supp (2) SCC 743	Rs.7,500

14. Further, the senior counsel and other counsel for the Appellant-doctors contended that the case of **Nizam Institute of Medical Sciences** v. **Prasanth S. Dhananka and Ors.**

MANU/SC/0803/2009 : (2009) 6 SCC 1 relied upon by the claimant is misconceived as that case relates to the continuous pain and suffering of the victim, who had lost control over his lower limb and required continuous physiotherapy for rest of his life. It was not the amount for loss of consortium by the husband or wife. Hence, it is submitted by them that the National Commission erred in granting Rs. 10 lakhs under the head of 'loss of consortium'.

On the objective and pattern of payment of compensation cases:

15. It is further contended by the learned Counsel for the Appellant-doctors that the compensation awarded by the National Commission should be meant to restore the claimant to the pre-accidental position and in judging whether the compensation is adequate, reasonable and just, monetary compensation is required to be arrived at on the principle of *restitutio-in-integram*. The National Commission while calculating the just monetary compensation, the earnings of the claimant who himself is a doctor, is also required to be taken into consideration. Regarding the contention of the claimant that in allowing compensation the American standard is required to be applied, it has not been disclosed before the Commission as to what is the American standard. On the contrary, the National Commission was directed by this Court to calculate the compensation in the case as referred to in **Malay Kumar Ganguly's** case (supra) and on the basis of the principles laid-down by this Hon'ble Court in various other judgments. The two judgments which have been referred to in **Malay Kumar Ganguly's** case (supra) are **Oriental Insurance Co. Ltd.** v. **Jashuben and Ors.** (supra) and **R.K. Malik** v. **Kiran Pal** MANU/SC/0809/2009 : (2009) 14 SCC 1, where this Court has not directed assessment of compensation according to American standard. Therefore, the contention of the claimant that compensation has to be assessed according to American standard is wholly untenable in law and the same is liable to be rejected.

16. Further, it is contended by the senior counsel and other counsel for the Appellant-doctors and Hospital that the reliance placed by the claimant upon the decision of this Court reported in **Patricia Jean Mahajan's** case (supra) clearly shows that the multiplier method applicable to claim cases in India was applied after taking note of contribution by the deceased for his dependants. The said case is a clear pointer to the fact that even if a foreigner dies in India, the basis of calculation has to be applied according to Indian Standard and not the American method as claimed by the claimant.

17. Further, the word 'reasonable' implies that the Appellant-doctors and AMRI Hospital cannot be saddled with an exorbitant amount as damages - which cannot either be treated as an obvious or natural though not foreseeable consequence of negligence.

18. Further, the learned senior counsel has placed reliance on the judgment of this Court in **Nizam Institute of Medical Sciences** (supra) wherein this Court enhanced the original compensation awarded to the claimant-victim who had been paralyzed due to medical negligence from waist down, under the heads: requirement of nursing care; need for driver-cum-attendant, as he was confined to a wheel chair; and he needed physiotherapy.

In the present case, the negligence complained of is against the doctors and the Hospital which had resulted in the death of the wife of the claimant. In that case, the extent of liability ought to be restricted to those damages and expenses incurred as a direct consequence of the facts complained

of, while setting apart the amount to be awarded under the head 'loss of dependency'. The relevant portion of the aforesaid judgment of this Court in the **Nizam's Institute of Medical Sciences** is quoted hereunder:

...The adequate compensation that we speak of, must to some extent, be a rule of thumb measure, and **as a balance has to be struck, it would be difficult to satisfy all the parties concerned. (paragraph 88)**

19. It is further contended by the learned senior counsel and other counsel for the Appellant-doctors that the claimant failed to produce any document by taking recourse to Order XLI Rule 27 of Code of Civil Procedure and Order LVII of Supreme Court Rules to justify his claims of approximately an additional amount of Rs. 20 crores including the cost of filing of the claim for compensation to the amount of compensation demanded for medical negligence which is a far-fetched theory and every negative happening in the claimant's life post-death of his wife Anuradha Saha cannot be attributed as the consequence due to medical negligence. Therefore, the enhancement of compensation as prayed for by the claimant stood rightly rejected by the National Commission by recording reasons. Therefore, this Court need not examine the claim again.

On the use of multiplier method for determining compensation:

20. It is contended by the senior counsel and other counsel for the Appellants that the multiplier method has enabled the courts to bring about consistency in determining the loss of dependency more particularly, in cases of death of victims of negligence, it would be important for the courts to harmoniously construct the aforesaid two principles to determine the amount of compensation under the heads: expenses, special damages, pain and suffering.

21. In **Sarla Verma's** case (supra), this Court, at Paragraphs 13 to 19, held that the multiplier method is the proper and best method for computation of compensation as there will be uniformity and consistency in the decisions. The said view has been reaffirmed by this Court in **Reshma Kumari and Ors.** v. **Madan Mohan and Anr.** Civil Appeal No. 4646 of 2009 decided on April 2, 2013.

22. It is further submitted by the learned Counsel that in capitalizing the pecuniary loss, a lesser multiplier is required to be applied inasmuch as the deceased had no dependants. In support of his contention, reliance is placed upon the decision of this Court reported in **Patricia Mahajan's** case (supra) in which this Court having found a person who died as a bachelor, held that a lesser multiplier is required to be applied to quantify the compensation.

23. It is further contended by the senior counsel and other counsel for the Appellant-doctors that in **Susamma Thomas** (supra) this Court has observed that "in fatal accident cases, the measure of damage is the pecuniary loss suffered and is likely to be suffered by each dependant as a result of the death". This means that the court while awarding damages in a fatal accident case took into account the pecuniary loss already suffered as a result of the negligence complained of, and the loss of dependency based on the contributions made by the deceased to the claimant until her death. While the former may be easily ascertainable, the latter has been determined by the National Commission by using the multiplier method and in respect of the use of the multiplier method for

the purpose of calculating the loss of dependency of the claimant, in paragraph No. 16 of the aforesaid judgment this Hon'ble Court observed as follows:

16. It is necessary to reiterate that the multiplier method is logically sound and legally well-established. There are some cases which have proceeded to determine the compensation on the basis of aggregating the entire future earnings for over the period the life expectancy was lost, deducted a percentage there from towards uncertainties of future life and award the resulting sum as compensation. This is clearly unscientific....

24. In **Sarla Verma's** case (supra) this Court sought to define the expression 'just compensation' and opined as under:

16....Just Compensation" is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit.

17. Assessment of compensation though involving certain hypothetical considerations should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision-making process and the decisions. While it may not be possible to have mathematical precision or identical awards in assessing compensation, same or similar facts should lead to awards in the same range. When the factors/inputs are the same, and the formula/legal principles are the same, consistency and uniformity, and not divergence and freakiness, should be the result of adjudication to arrive at just compensation.

(Emphasis laid by this Court)

25. It was also contended by the learned Counsel for the Appellant-doctors that apart from accident cases under the Motor Vehicles Act, 1988, the multiplier method was followed in **Lata Wadhwa and Ors.** v. **State of Bihar** MANU/SC/0456/2001 : (2001) 8 SCC 197 by a three Judge Bench of this Court, which is a case where devastating fire took place at Jamshedpur while celebrating the birth anniversary of Sir Jamshedji Tata. Even in **M.S. Grewal and Anr.** v. **Deep Chand Sood and Ors.** MANU/SC/0506/2001 : (2001) 8 SCC 151, the multiplier method was followed wherein school children were drowned due to negligence of school teachers. In the **Municipal Corporation of Delhi** v. **Uphaar Tragedy Victims Association and Ors.** MANU/SC/1255/2011 : (2011) 14 SCC 481 the multiplier method was once again followed where death of 59 persons took place in a cinema hall and 109 persons suffered injury.

26. Therefore, it is contended by the senior counsel and other counsel for the Appellant-doctors that multiplier method should be used while awarding compensation to the victims because it leads to consistency and avoids arbitrariness.

On contributory negligence by the claimant

27. The learned senior counsel and other counsel for the Appellant-doctors submitted that the National Commission in the impugned judgment should have deducted 25% of the compensation amount towards contributory negligence of the claimant caused by his interference in the treatment of the deceased. Instead, the National Commission has deducted only 10% towards the same. According to the learned senior counsel and other counsel for the Appellants, the National Commission erred in not adhering to the tenor set by this Court while remanding the case back to it for determining the compensation to arrive at an adequate amount which would also imply an aspect of contributory negligence, individual role and liability of the Hospital and the doctors held negligent. Therefore, this Court is required to consider this aspect and deduct the remaining 15% out of the compensation awarded by the National Commission towards negligence by the claimant.

On enhancement of compensation claimed by the claimant:

28. The learned senior counsel and other counsel for the Appellant-doctors and the Hospital contended that enhanced claim of the claimant in his appeal is without any amendment to the pleadings and therefore, is not maintainable in law. The claimant in his written submission filed during the course of arguments in July, 2011 before the National Commission, has made his claim of Rs. 97,56,07,000/- which the National Commission has rightly rejected in the impugned judgment holding that it was legally impermissible for it to consider that part of the evidence which is strictly not in conformity with the pleadings in order to award a higher compensation as claimed by the claimant. In justification of the said conclusion and finding of the National Commission, the learned Counsel have placed reliance upon the principle analogous to Order II Rule 2 of Code of Civil Procedure 1908 and further contended that the claimant who had abandoned his claim now cannot make new claims under different heads. Further, it is submitted by Mr. Vijay Hansaria, the learned senior counsel on behalf of AMRI Hospital that though the claimant had filed an application on 9.11.2009 in M.A. No. 1327 of 2009 for additional claim; the said application was withdrawn by him on 9.2.2010. Therefore, his claim for enhancing compensation is not tenable in law. In support of the said contention, he has placed reliance upon the judgment of this Court in **National Textile Corporation Ltd.** v. **Nareshkumar Badrikumar Jagad** MANU/SC/1028/2011 : (2011) 12 SCC 695, wherein it is stated by this Court that the pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial.

In support of the said proposition of law, reliance was also placed upon other judgment of this Court in **Maria Margarida Sequeria Fernandes** v. **Erasmo Jack de Sequeria** MANU/SC/0225/2012 : (2012) 5 SCC 370, wherein this Court, at paragraph 61, has held that:

in civil cases, pleadings are extremely important for ascertaining title and possession of the property in question.

The said view of this Court was reiterated in **A. Shanmugam** v. **Ariya Kshatriya Rajakula Vamsathu Madalaya Nandavana Paripalanai Sangam** MANU/SC/0336/2012 : (2012) 6 SCC 430,

29. Further, the learned senior counsel for the Appellant-doctors and AMRI Hospital placed reliance upon the provisions of the Consumer Protection Act, 1986 and the Motor Vehicles Act, 1988 to urge that though the Consumer Courts have pecuniary jurisdiction for deciding the matters

filed before it whereby the pecuniary jurisdiction of the District Forum is Rs. 20 lakhs, State Commission is from Rs. 20 lakhs to Rs. 1 crore, whereas for National Commission, it is above Rs. 1 crore, the Motor Accident Claims Tribunal have unlimited jurisdiction. In the Consumer Protection Act, 1986 there is a provision for limitation of 2 years for filing of complaint under Section 24A of the Act and there is no limitation prescribed in the Motor Vehicles Act, 1988.

30. Sections 12 and 13 of the Consumer Protection Act, 1986 provide as to how the complaint has to be made and the procedure to be followed by the claimant for filing the complaint. Rule 14(c) of the Consumer Protection Rules, 1987 and the Consumer Protection Regulations, 2005 require the complainant to specify the relief which he claims. The filing of the complaint/appeal/revision is dealt with Consumer Protection Regulations, 2005. Under the Motor Vehicles Act, 1988, a victim or deceased's legal representative does not have to specify the amount claimed as held by this Court in the case of **Nagappa** v. **Gurudayal Singh** MANU/SC/1107/2002 : (2003) 2 SCC 274.

31. Under Section 158(6) of the Motor Vehicles Act, 1988, the report forwarded to the Claims Tribunal can be treated as an application for compensation even though no claim is made or specified amount is claimed whereas under the Consumer Protection Act, a written complaint specifying the claim to be preferred before the appropriate forum within the period of limitation prescribed under the provision of the Act is a must.

32. Under Section 163A of the Motor Vehicles Act, 1988 a claimant is entitled to compensation under the structured formula even without negligence whereas no such provision exists under the Consumer Protection Act.

33. In this regard, the learned senior counsel and other counsel for the Appellant-doctors and Hospital placed reliance upon the judgment of this Court in the case of **Ibrahim** v. **Raju** MANU/SC/1276/2011 : (2011) 10 SCC 634 and submitted that the said case does not apply to the fact situation for two reasons, namely, it was a case under the Motor Vehicles Act, 1988, whereas this case involves the Consumer Protection Act. Secondly, this Court in the previous case, enhanced the compensation observing that due to financial incapacity the claimant could not avail the services of the competent lawyer, which is not the case in hand, in as much as the claimant had hired the services of an advocate who is Bar-at-Law and the President of the Supreme Court Bar Association.

34. Further, the learned Counsel for the Appellant-doctors placed reliance upon the judgment of this Court in the case of **Sanjay Batham** v. **Munnalal Parihar** MANU/SC/1280/2011 : (2011) 10 SCC 655, which is a case under the Motor Vehicles Act, 1988. This Court enhanced the compensation following the judgment in **Nagappa's** case (supra). The learned Counsel also placed reliance upon the judgment of this Court in **Nizam Institute's** case (supra) where the complainant had made a claim of Rs. 7.50 crores. This Court enhanced the compensation from Rs. 15.50 lakhs to Rs. 1 crore. But, the Nizam Institute's case is not a case for the proposition that a claimant can be awarded compensation beyond what is claimed by him. On the other hand, it was a case of peculiar facts and circumstances since the claimant had permanent disability which required constant medical attention, medicines, services of attendant and driver for himself. The cases referred to by the claimant regarding medical negligence in his written submission are

distinguishable from the present case and in none of these cases upon which reliance has been placed by the claimant, this Court has awarded compensation beyond what is claimed. Therefore, the reliance placed upon the aforesaid judgments by the claimant does not support his claim and this Court need not accept the same and enhance the compensation as has been claimed by him since he is not entitled to the same.

Death of the claimant's wife due to cumulative effect of negligence:

35. This Court vide its judgment in **Malay Kumar Ganguly's** case (supra) has held that:

186. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been the contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court must deal with the consequences the patient faced, keeping in view the cumulative effect. In the instant case, negligent action has been noticed with respect to more than one Respondent. A cumulative incidence, therefore, has led to the death of the patient.

The two words "may" and "cumulative incidence" in the abovesaid observations of this Court is relevant for determining the quantification of compensation. It is submitted that this Court is also not sure that the negligence solely has contributed to the death of the claimant's wife. At the most, this Court is of the view that the negligence may have contributed to the death of the claimant's wife. The incidences leading to or contributing to the death of the deceased are:

(i) Disease TEN itself is a fatal disease which has very high mortality rate.

(ii) TEN itself produces septicemic shock and deceased Anuradha died because of such consequence.

(iii) No direct treatment or treatment protocol for TEN.

(iv) Negligence of many in treating deceased Anuradha.

(v) Contributory negligence on the part of Dr. Kunal Saha and his brother.

Furthermore, it is observed factually that lethal combination of Cisapride and Fluconazole had been used for a number of days at Breach Candy Hospital during her stay which leads to cardiac arrest. Therefore, the National Commission ought to have considered different incidences as aforesaid leading to the death of the claimant's wife so as to correctly apportion the individual liability of the doctors and the AMRI Hospital in causing the death of the wife of the claimant.

36. Further, with regard to the liability of each of the doctors and the AMRI Hospital, individual submissions have been made which are presented hereunder:

Civil Appeal No. 692/2012

37. It is the case of the Appellant-AMRI Hospital that the National Commission should have taken note of the fact that the deceased was initially examined by Dr. Sukumar Mukherjee and the alleged medical negligence resulting in the death of the deceased was due to his wrong medication (overdose of steroid). Therefore, the Hospital has little or minimal responsibility in this regard, particularly, when after admission of the deceased in the Hospital there was correct diagnosis and she was given best possible treatment. The National Commission erred in apportioning the liability on the Hospital to the extent of 25% of the total award. This Court in the earlier round of litigation held that there is no medical negligence by Dr. Kaushik Nandy, the original Respondent No. 6 in the complaint, who was also a doctor in the Appellant-Hospital.

38. Further, the learned senior counsel for the AMRI Hospital submitted that the arguments advanced on behalf of the Appellants-doctors Dr. Balram Prasad in C.A. No. 2867/2012, Dr. Sukumar Mukherjee in C.A. No. 858/2012 and Dr. Baidyanath Haldar in C.A. 731/2012 with regard to percentage, on the basis of costs imposed in paragraph 196 of the judgment in the earlier round of litigation is without any basis and further submitted that under the heading - 'Individual Liability of Doctors' findings as to what was the negligence of the doctors and the Appellant AMRI Hospital is not stated. If the said findings of the National Commission are considered, then it cannot be argued that the Appellant AMRI Hospital should pay the highest compensation. Further, the learned senior counsel rebutted the submission of the claimant contending that since he had himself claimed special damages against the Appellant-doctors, the Hospital and Dr. Abani Roy Choudhary in the complaint before the National Commission, therefore, he cannot now contend contrary to the same in the appeal before this Court.

CIVIL APPEAL No. 858 of 2012

39. It is the case of the Appellant- Dr. Sukumar Mukherjee that the National Commission while apportioning the liability of the Appellant, has wrongly observed that:

Supreme Court has primarily found Dr. Sukumar Mukherjee and AMRI hospital guilty of negligence and deficient in service on several counts. Therefore, going by the said findings and observations of Supreme Court we consider it appropriate to apportion the liability of Dr. Sukumar Mukherjee and AMRI hospital in equal proportion, i.e. each should pay 25% i.e. 38,90,000/- of the awarded amount of 1,55,60,000/-.

40. It is submitted by the learned Counsel for the Appellant - Dr. Sukumar Mukherjee that scrutiny of the judgment in **Malay Kumar Ganguly**'s case (supra) will show that at no place did the Hon'ble Supreme Court made any observation or recorded any finding that the Appellant Dr. Mukherjee and the Hospital are primarily responsible. On the contrary, under the heading "Cumulative Effect of Negligence" under paras 186 and 187, this Hon'ble Court has held as under:

186. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court must deal with the consequences the patient faced keeping in view the cumulative effect. In the instant case, negligent action has been noticed with respect to more than one Respondent. A cumulative incidence, therefore, has led to the death of the patient.

187. It is to be noted that doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the Respondent. In such a scenario finding of medical negligence under Section 304A cannot be objectively determined.

41. It is further submitted by the learned Counsel for the Appellant- Dr. Sukumar Mukherjee that the wife of the claimant was suffering from rash/fever from April 1998, she was seen by the Appellant-Dr. Sukumar Mukherjee only on three occasions before his pre-planned visit to the U.S.A. for attending a medical conference i.e. on 26.4.1998, 7.5.1998 and on the night of 11.5.1998 and then the Appellant-Dr. Mukherjee left India for USA and returned much after the demise of the claimant's wife. On her first examination on 26.4.1998 the Appellant suggested a host of pathological tests. The patient was requested to visit the Doctor with these reports. No drugs were prescribed by the Appellant-Dr. Mukherjee at this examination. On 7.5.1998, Anuradha Saha walked into the clinic of the Appellant-Dr. Mukherjee at 9.30 p.m. and reported that she was uncomfortable because she had consumed food of Chinese cuisine. The Appellant-Dr. Mukherjee noticed that there was a definite change in the nature of the rash. Based on the information furnished and the status and condition of the patient, she was diagnosed to be suffering from allergic vasculitis and the Appellant-Dr. Mukherjee commenced treating the patient with Depomedrol, which is a drug belonging to the family of steroids. The Appellant-Dr. Mukherjee recommended Depomedrol 80 mg.IM twice daily for 3 days to be reconsidered after Anuradha Saha was subject to further review. Depomedrol is very much indicated in Vasculitis (USPDI 1994): "Depomedrol is anti-inflammatory, anti-allergic drug. Therefore, it is Doctor's judgment to use the drug." The Appellant-Dr. Mukherjee administered one injection of Depomedrol on the night of 7.5.1998. He did not administer any other injections to the deceased thereafter. It is further submitted that much higher dose of Depomedrol have been recommended in USPDI 1994 and CD Rom Harisons Principles of Medicine 1998 in by pass skin diseases like multiple sclerosis with a dose of 177.7 mg daily for 1 week and 71 mg on every other day for one month.

42. On 11.5.1998 when the Appellant-Dr. Mukherjee examined Anuradha Saha at the AMRI Hospital prior to his departure to U.S.A., he prescribed a whole line of treatment and organized reference to different specialists/consultants. He recommended further pathological tests because on examining the patient at the AMRI, he noticed that she had some blisters which were not peeled off. There was no detachment of skin at all. He also requested in writing the treating consultant physician of AMRI Dr. Balram Prasad, MD to organize all these including referral to all specialists. The Appellant-Dr. Mukherjee suspected continuation of allergic Vasculitis in aggravated form and prescribed steroids in a tapering dose on 11.5.1998 and advised other tests to check infection and any immune abnormalities. It is stated that the Appellant-Dr. Mukherjee did not examine the patient thereafter and as aforementioned, he left on a pre-arranged visit to U.S.A. for a medical conference. No fees were charged by the Appellant-Dr. Mukherjee. It is further submitted that before the Appellant-Dr. Mukherjee started the treatment of the deceased, Dr. Sanjoy Ghose on 6.5.1998 treated her and during the period of treatment of the Appellant-Dr. Mukherjee from 7.5.1998 to 11.5.1998, on 9.5.1998 Dr. Ashok Ghosal (Dermatologist) treated Anuradha Saha. These facts were not stated in the complaint petition and concealed by the claimant. To this aspect, even this Hon'ble Court has also recorded a finding in the case referred to supra that the patient

was also examined by two consultant dermatologists Dr. A.K. Ghosal and Dr. S. Ghosh who diagnosed the disease to be a case of vasculitis.

43. It is further submitted by the learned Counsel for the Appellant-Dr. Mukherjee that the cause of death as recorded in the death certificate of the deceased is "septicemic shock with multi system organ failure in a case of TEN leading to cardio respiratory arrest". Blood culture was negative prior to death. There was no autopsy to confirm the diagnosis at Breach Candy Hospital, Mumbai. Dr. Udwadia observed on 27.5.1998 that the patient has developed SIRS in absence of infection in TEN. The patient expired on 28.5.1998 and the death certificate was written by a junior doctor without the comments of Dr. Udwadia. It is submitted by the learned Counsel that there is neither any allegation nor any finding by this Court that the doctors of the AMRI Hospital had contributed to septicemia. The mere finding that the patient was not properly dressed at AMRI Hospital where she stayed for only 6 days of early evocation of the disease do not justify contribution to septicemic shock of the deceased. Further, there is no record to show that at AMRI Hospital the skin of the patient had peeled out thereby leading to chance of developing septicemia. On the other hand, it is a fact borne out from record that the patient was taken in a chartered flight to Breach Candy Hospital, Bombay against the advice of the doctors at Kolkata and further nothing is borne out from the records as what precaution were taken by the claimant while shifting the patient by Air to Breach Candy Hospital thereby leading to the conclusion that during the travel by chartered flight she might have contracted infection of the skin leading to septicemia. It is further submitted by the learned Counsel for the Appellant- Dr. Sukumar Mukherjee that the fact that the disease TEN requires higher degree of care since there is no definite treatment, such high degree of care will be relatable to comfort but not definitely to septicemia that occurred at Breach Candy Hospital. Hence, negligence has to be assessed for damages for failure to provide comfort to the patient and not a contributory to septicemia shock suffered by the deceased.

44. It is submitted by the learned Counsel for Appellant-Dr. Sukumar Mukherjee that there is no finding or allegation that the drug Depomedrol prescribed by the Appellant-Dr. Mukherjee caused the disease TEN. The Appellant advised a number of blood tests on 11.5.98 in AMRI Hospital to detect any infection and immune abnormality due to steroids and to foresee consequences. It is further submitted that Breach Candy Hospital records show that the patient was hemodynamically stable. Even Dr. Udwadia of Breach Candy Hospital on 17.5.1998 doubted with regard to the exact disease and recorded the disease as TEN or Steven Johnson Syndrom.

Therefore, the National Commission ought to have considered different incidences as aforesaid leading to the death of the claimant's wife and the quantum of damages shall have to be divided into five parts and only one part shall be attributed to the negligence of the Appellant-Dr. Mukherjee.

Civil Appeal No. 2867 of 2012

45. It is the case of Dr. Balram Prasad-Appellant in Civil Appeal No. 2867 of 2012 that on 11.05.1998, Dr. Sukumar Mukherjee, before leaving for U.S.A., attended the patient at the AMRI Hospital at 2.15 p.m. and after examining the deceased, issued the second and last prescription on the aforesaid date without prescribing anything different but re-assured the patient that she would be fine in a few weeks' time and most confidently and strongly advised her to continue with the

said injection for at least four more days. This was also recorded in the aforesaid last prescription of the said date. Further, it is stated that without disclosing that he would be out of India from 12.05.1998, he asked the deceased to consult the named Dermatologist, Dr. B. Haldar @ Baidyanath Haldar, the Appellant in Civil Appeal No. 731 of 2012, and the physician Dr. Abani Roy Chowdhury in his last prescription on the last visit of the deceased. Most culpably, he did not even prescribe I.V. Fluid and adequate nutritional support which was mandatory in that condition. Dr. Haldar took over the treatment of the deceased as a Dermatologist Head and Dr. Abani Roy Chowdhury as Head of the Medical Management from 12.05.1998 with the positive knowledge and treatment background that the patient by then already had clear intake of 880 mg of Depomedrol injection as would be evident from AMRI's treatment sheet dated 11.05.1998.

46. It is further stated by the claimant in the complaint lodged before National Commission that it contained specific averments of negligence against the Appellant-doctors. The only averment of alleged negligence was contained in paragraph 44 of the complaint which reads as under:

44. That Dr. Balram Prasad as attending physician at AMRI did do nothing better. He did not take any part in the treatment of the patient although he stood like a second fiddle to the main team headed by the opposite party No. 2 and 3. He never suggested even faintly that AMRI is not an ideal place for treatment of TEN patient; on the converse, he was full of praise for AMRI as an ideal place for the treatment of TEN patients knowing nothing how a TEN patient should be treated.

47. The claimant has also placed strong reliance upon the answer given by him to question No. 26 in his cross examination which reads thus:

Q. No. 26. Dr. Prasad says that Depomedrol dose according to the treatment sheet of the AMRI Hospital, he made a specific suggestion that the dose should be limited to that particular day only. Is it correct?

Ans. It is all matter of record. Yeah, he said one day in AMRI record.

48. Though, the Appellant-Dr. Balram Prasad was accused in the criminal complaint lodged by the claimant he was neither proceeded against as an accused in the criminal complaint nor before the West Bengal Medical Council but was named as a witness. Further, it is stated by the claimant that he urged before the National Commission as well as before this Court in unequivocal terms that the bulk of the compensation awarded would have to be in the proportion of 80% on the AMRI Hospital, 15% on Dr. Sukumar Mukherjee and balance between the rest. Despite the aforesaid submission before the National Commission, the claimant claims that it has erred in awarding the proportion of the liability against each of the Appellant-doctors in a manner mentioned in the table which is provided hereunder:

NAME OF THE PARTY	AMOUNT TO BE PAID
Dr. Sukumar Mukherjee	Compensation:Rs.38,90,000 Cost of litigation:1,50,000
Dr. Baidyanath Haldar	Compensation:Rs.25,93,000 Cost of litigation: Rs.1,00,000
Dr. Abani Roy Chowdhury (since deceased) (claim foregone)	Compensation: 25,00,000
AMRI Hospital	Compensation: Rs.38,90,000 Cost of litigation: Rs.1,50,000
Dr. Balram Prasad	Compensation: Rs.25,93,000 Cost of litigation: Rs.1,00,000

49. The Appellant-Dr. Balram Prasad in Civil Appeal No. 2867/2012 contends that he was the junior most attending physician attached to the Hospital, he was not called upon to prescribe medicines but was only required to continue and/or monitor the medicines prescribed by the specialist in the discipline. But realizing the seriousness of the patient, the Appellant had himself referred the patient to the three specialists and also suggested for undertaking a skin biopsy. The duty of care ordinarily expected of a junior doctor had been discharged with diligence by the Appellant. It is further contended that in his cross-examination before the National Commission in the enquiry proceeding, the claimant himself has admitted that the basic fallacy was committed by three physicians, namely, Dr. Mukherjee, Dr. Haldar and Dr. Roy Chowdhury. The above facts would clearly show that the role played by the Appellant-Doctors in the treatment of the deceased was only secondary and the same had been discharged with reasonable and due care expected of an attending physician in the given facts and circumstances of the instant case.

50. In the light of the above facts and circumstances, the contention of the claimant that the death of the claimant's wife was neither directly nor contributorily relatable to the alleged negligent act of the Appellant- Dr. Balram Prasad, it is most respectfully submitted that the National Commission was not justified in apportioning the damages in the manner as has been done by the National Commission to place the Appellant on the same footing as that of Dr. Baidyanath Haldar, who was a senior doctor in-charge of the management/treatment of the deceased.

51. The learned senior counsel for the Appellant-Dr. Balram Prasad further urged that the National Commission has also erred in not taking into account the submissions of the claimant that 80% of the damages ought to have been levied on the Hospital, 15% on Dr. Sukumar Mukherjee and the balance between the rest. It is urged that the proportion of the compensation amount awarded on the Appellant is excessive and unreasonable which is beyond the case of the claimant himself.

CIVIL APPEAL No. 731 OF 2012

52. The learned Counsel Mr. Ranjan Mukherjee appearing on behalf of the Appellant in this appeal has filed the written submissions on 15.4.2013. He has reiterated his submission in support of his appeal filed by the said doctor and has also adopted the arguments made in support of the written submissions filed on behalf of the other doctors and AMRI Hospital by way of reply to the written submissions of the claimant. Further, he has submitted that the Appellant Dr. Baidyanath Haldar is about 80 years and is ailing with heart disease and no more in active practice. Therefore, he requested to set aside the liability of compensation awarded against him by allowing his appeal.

All the doctors and the Hospital urged more or less the same grounds.

Civil Appeal No. 2866 of 2012

53. This appeal has been filed by the claimant. It is the grievance of the claimant that the National Commission rejected more than 98% of the total original claim of Rs. 77.7 crores which was modified to Rs. 97.5 crores later on by adding "special damages" due to further economic loss, loss of employment, bankruptcy etc. suffered by the claimant in the course of 15-year long trial in relation to the proceedings in question before the National Commission and this Court. The National Commission eventually awarded compensation of only Rs. 1.3 crores after reducing from the total award of Rs. 1.72 crores on the ground that the claimant had "interfered" in the treatment of his wife and since one of the guilty doctors had already expired, his share of compensation was also denied.

54. Therefore, the present appeal is filed claiming the just and reasonable compensation urging the following grounds:

a) The National Commission has failed to consider the pecuniary, non-pecuniary and special damages as extracted hereinbefore.

b)The National Commission has made blatant errors in mathematical calculation while awarding compensation using the multiplier method which is not the correct approach.

c) The National Commission has erroneously used the multiplier method to determine compensation for the first time in Indian legal history for the wrongful death caused by medical negligence of the Appellant-doctors and the AMRI Hospital.

d) The National Commission has reinvestigated the entire case about medical negligence and went beyond the observations made by this Court in **Malay Kumar Ganguly's** case (supra) by holding that the claimant is also guilty for his wife's death.

e) The National Commission has failed to grant any interest on the compensation though the litigation has taken more than 15 years to determine and award compensation.

f) The National Commission has failed to consider the devaluation of money as a result of "inflation" for awarding higher compensation that was sought for in 1998.

g) It is also vehemently contended by the claimant that the National Commission has made blatant and irresponsible comment on him stating that he was trying to "make a fortune out of a misfortune." The said remark must be expunged.

55. The Appellant-doctors and the AMRI Hospital contended that the compensation claimed by the claimant is an enormously fabulous amount and should not be granted to the claimant under any condition. This contention ought to have been noticed by the National Commission that it is wholly untenable in law in view of the Constitution Bench decision of this Court in the case of **Indian Medical Association** v. **V.P. Shantha and Ors.** MANU/SC/0836/1995 : (1995) 6 SCC 651, wherein this Court has categorically disagreed on this specific point in another case wherein "medical negligence" was involved. In the said decision, it has been held at paragraph 53 that to deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice to the claimant.

56. Further, in a three Judge Bench decision of this Court in **Nizam Institute's** case (supra) it has been held that if a case is made out by the claimant, the court must not be chary of awarding adequate compensation. Further, the claimant contends that this Court has recently refused to quash the defamation claim to the tune of Rs. 100 crores in **Times Global Broadcasting Co. Ltd. and Anr.** v. **Parshuram Babaram Sawant** [SLP (Civil) No(s) 29979/2011 decided on 14-11-2011], suggesting that in appropriate cases, seemingly large amount of compensation is justified.

57. The claimant further urged that this is the fundamental principle for awarding "just compensation" and this Court has categorically stated while remanding the case back to the National Commission that the principle of just compensation is based on "restitutio in integrum", i.e. the claimant must receive the sum of money which would put him in the same position as he would have been if he had not sustained the wrong. It is further contended that the claimant had made a claim referred to supra under specific headings in great detail with justification for each of the heads. Unfortunately, despite referring to judicial notice and the said claim-table in its final judgment, the National Commission has rejected the entire claim on the sole ground that since the additional claim was not pleaded earlier, none of the claims made by the claimant can be considered. Therefore, the National Commission was wrong in rejecting different claims without any consideration and in assuming that the claims made by the claimant before the Tribunal cannot be changed or modified without prior pleadings under any other condition. The said view of the National Commission is contrary to the numerous following decisions of this Court which have opined otherwise:

Ningamma and Anr. v. **United India Insurance Co. Ltd.** MANU/SC/0802/2009 : (2009) 13 SCC 710, **Malay Kumar Ganguly's** case referred to supra, **Nizam Institute's** case (supra), **Oriental Insurance Company Ltd.** v. **Jashuben and Ors. (supra)**, **R.D. Hattangadi** v. **Pest Control (India) Pvt. Ltd. and Ors.** MANU/SC/0146/1995 : (1995) 1 SCC 551, **Raj Rani and Ors.** v. **Oriental Insurance Co. Ltd. and Ors.** MANU/SC/0943/2009 : (2009) 13 SCC 654, **Laxman @ Laxman Mourya** v. **Divisional Manager** v. **Oriental Insurance Co. Ltd. and Anr.** MANU/SC/1423/2011 : (2011) 10 SCC 756 and **Ibrahim** v. **Raju and Ors.** (supra).

58. The claimant has further argued that the just compensation for prospective loss of income of a student should be taken into consideration by the National Commission. In this regard, he has

contended that this Court while remanding the case back to the National Commission only for determination of quantum of compensation, has made categorical observations that compensation for the loss of wife to a husband must depend on her "*educational qualification, her own upbringing, status, husband's income, etc.*" In this regard, in the case of **R.K. Malik and Anr.** (supra) (paragraphs 30-32) this Court has also expressed similar view that status, future prospects and educational qualification must be judged for deciding adequate compensation. It is contended by the claimant that it is an undisputed fact that the claimant's wife was a recent graduate in Psychology from a highly prestigious Ivy League School in New York who had a brilliant future ahead of her. Unfortunately, the National Commission has calculated the entire compensation and prospective loss of income solely based on a pay receipt of the victim showing a paltry income of only $ 30,000 per year, which she was earning as a graduate student. This was a grave error on the part of the National Commission, especially, in view of the observations made by this Court in the case of **Arvind Kumar Mishra** v. **New India Assurance Co.** MANU/SC/0777/2010 : (2010) 10 SCC 254, wherein this Court has calculated quantum of compensation based on 'reasonable' assumption about prospective loss as to how much an Engineering student from BIT might have earned in future even in the absence of any expert's opinion (paragraphs 13,14). The principles of this case were followed in many other cases namely, **Raj Kumar** v. **Ajay Kumar and Anr.** MANU/SC/1018/2010 : (2011) 1 SCC 343, **Govind Yadav** v. **New India Insurance Co. Ltd.** MANU/SC/1281/2011 : (2011) 10 SCC 683, **Sri Ramachandrappa** v. **Manager, Royal Sundaram Alliance Insurance** MANU/SC/0926/2011 : (2011) 13 SCC 236, **Ibrahim** v. **Raju and Ors.** (supra), **Laxman @ Laxman Mourya** v. **Divisional Manager, Oriental Insurance Co. Ltd.** (supra) and **Kavita** v. **Dipak and Ors.** MANU/SC/0674/2012 : (2012) 8 SCC 604

59. In view of the above said decisions of this Court, the prospective loss of income for the wrongful death of claimant's wife must be reasonably judged based on her future potential in the U.S.A. that has also been calculated scientifically by economic expert, Prof. John F. Burke.

60. It is further the case of the claimant that the National Commission has completely failed to award "just compensation" due to non consideration of all the following critical factors:

1) The Guidelines provided by Supreme Court: This Court has provided guidelines as to how the National Commission should arrive at an "adequate compensation" after consideration of the unique nature of the case.

2) Status and qualification of the victim and her husband.

3) Income and standard of living in the U.S.A.: As both the deceased and the claimant were citizens of U.S.A. and permanently settled as a "child psychologist" and AIDs researcher, respectively, the compensation in the instant case must be calculated in terms of the status and standard of living in the U.S.A. **In Patricia Mahajan's** case (supra), where a 48 year old US citizen died in a road accident in India, this Court has awarded a compensation of more than Rs. 16 crores after holding that the compensation in such cases must consider the high status and standard of living in the country where the victim and the dependent live.

4) Economic expert from the U.S.A.:

The claimant initially filed a complaint before the National Commission soon after the wrongful death of his wife in 1998 with a total claim of Rs. 77.7 crores against the Appellant- doctors and AMRI Hospital which was rejected and this Court remanded this matter to the National Commission for determination of the quantum of compensation with a specific direction in the final sentence of judgment that "foreign experts" may be examined through video conferencing.

5) Scientific calculation of loss of income: The National Commission should have made scientific calculation regarding the loss of income of the claimant. This direction has been given by this Court in a number of cases. Further, he has contended that the claimant moved this Court for video conferencing. The claimant examined Prof. John F. Burke, a U.S.A. based Economist of international repute, in May-June, 2011. Prof John F. Burke was also cross-examined by the Appellant-doctors and the AMRI Hospital. Prof. Burke scientifically calculated and testified himself under direct as well as cross-examination as to how he came to calculate the prospective loss of income for a similarly situated person in U.S.A. as Anuradha, the deceased and categorically stated that the direct loss of income for Anuradha's premature death would amount to "5 million and 125 thousand dollars". This loss of income was calculated after deduction of 1/3rd of the amount for her personal expenses. 1/3rd deduction of income for personal expenses has also been recommended in a judgment of this Court in the case of **Sarla Verma** (supra). Prof. Burke has also explained how he calculated the loss of income due to the premature death of Anuradha and further testified that his calculation for loss of Anuradha's income was a **"very conservative forecast"** and that to some other estimates, the damages for Anuradha's death could be "9 to 10 million dollars. While the loss of income would be multi million dollars as direct loss for wrongful death of Anuradha, it may appear as a fabulous amount in the context of India. This is undoubtedly an average and legitimate claim in the context of the instant case. And further, it may be noted that far bigger amounts of compensation are routinely awarded by the courts in medical negligence cases in the U.S.A. In this regard this Court also made very clear observation in **Indian Medical Association** v. **V.P. Shanta and Ors.** (supra), that to deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice.

6) Loss of income of claimant:

The National Commission has ignored the loss of income of the claimant though this Court has categorically stated while remanding the case to the National Commission that pecuniary and non-pecuniary losses and future losses "up to the date of trial" must be considered for the quantum of compensation. The claimant had incurred a huge amount of expenses in the course of the more than 15 years long trial in the instant case. These expenses include the enormous cost for legal expenses as well as expenses for the numerous trips between India and the U.S.A. over the past more than 12 years. In addition to that the claimant has also suffered huge losses during this period, both direct loss of income from his job in U.S.A. as well as indirect loss for pain and intense mental agony for tenure denial and termination of his employment at Ohio State University (OSU) which was a direct result of the wrongful death of Anuradha in India as would be evident from the judgment passed by the Court of Claims in Ohio which was filed by the AMRI Hospital on July 18, 2011. The claimant also submitted an affidavit as directed by the National Commission in which the detailed description about the loss that he suffered in his personal as well as professional career in U.S.A. over the past 12 years for the wrongful death of Anuradha, has been mentioned. Needless to say that these additional damages and financial losses the claimant has suffered since

he filed the original complaint against the Appellant-doctors could not possibly be a part of the original claim filed by him 15 years ago.

61. In view of the circumstances narrated above, the claimant has referred a revised quantum of claim which also includes a detailed break-up of the individual items of the total claim in proper perspective under separate headings of pecuniary, non-pecuniary, punitive and special damages. The individual items of claim have also been justified with appropriate references and supporting materials as needed. The total quantum of claim for the wrongful death of the claimant's wife now stands at Rs. 97,56,07,000/- including pecuniary damages of Rs. 34,56,07,000/-, non pecuniary damages of Rs. 31,50,00,000/-, special damages of US $ 1,000,000/- for loss of job in Ohio and punitive damages of US $ 1,000,000/. This updated breakup of the total claim has been shown in the claim-table referred to in the later part of the judgment. The claimant respectfully submits that the National Commission should have considered this total claim in conjunction with the affidavit filed by him during the course of making final arguments. The National Commission also should have taken into consideration the legal principles laid down in the case of **Nizam Institute** (supra) wherein this Court allowed the claim of compensation which was substantially higher than the original claim that he initially filed in the court. Further, the National Commission ought to have taken into consideration the observations made in the remand order passed by this Court while determining the quantum of compensation and the legitimate expectation for the wrongful death of a patient 'after factoring in the position and stature of the doctors concerned as also the Hospital'. This Court also held in ***Malay Kumar Ganguly's*** case (supra) that AMRI is one of the best Hospitals in Calcutta, and that the doctors were the best doctors available. Therefore, the compensation in the instant case may be enhanced in view of the specific observations made by this Court.

62. Appellant-doctors Dr. Sukumar Mukherjee and Dr. Baidyanath Haldar have attempted to claim in their respective appeals that they cannot be penalized with compensation because they did not charge any fee for treatment of the deceased. Such a claim has no legal basis as in view of the categorical observations made by this Court in **Savita Garg** v. **Director, National Heart Institute** MANU/SC/0882/2004 : (2004) 8 SCC 56 and in **Malay Kumar Ganguly's** case (supra) wherein this Court has categorically stated that the aforesaid principle in **Savita Garg's** case applies to the present case also insofar as it answers the contentions raised before us that the three senior doctors did not charge any professional fees.

63. Further, it is contended by the claimant that from a moral and ethical perspective, a doctor cannot escape liability for causing death of a patient from medical negligence on the ground that he did not charge any fee. If that was true, poor patients who are sometimes treated for free and patients in many charitable Hospitals would be killed with impunity by errant and reckless doctors. It is urged that the National Commission ought to have considered the claim made for prospective loss of income of the Appellant's wife and has committed error in rejecting the same and it has also rejected the amount of the pecuniary losses of this claimant under separate headings which are mentioned in the table referred to supra including expenses that were paid at the direction of the National Commission, namely, expenses relating to videoconferencing or payment for the Court Commissioners. Most of these direct losses were suffered by the claimant as a result of the wrongful death of his wife in the long quest for justice over the past 15 years as a result of the wrongful death of his wife. The National Commission did not provide any reason as to why the

said claims were denied to him, as per this Court's decision in **Charan Singh** v. **Healing Touch Hospital** MANU/SC/0588/2000 : (2002) 7 SCC 6686.

64. It is further urged by the claimant that the National Commission, in applying the multiplier method as provided in the Second Schedule under Section 163A of the Motor Vehicles Act, is erroneous to calculate compensation in relation to death due to medical negligence.

65. Further, the claimant has taken support from the following medical negligence cases decided by this Court. It was contended by the claimant that out of these cases not a single case was decided by using the multiplier method, such as, **Indian Medical Assn.** v. **V.P. Shanta and Ors. (supra)**, **Spring Meadows Hospital and Anr.** v. **Harjol Ahluwalia** MANU/SC/1014/1998 : (1998) 4 SCC 39, **Charan Singh** v. **Healing Touch Hospital and Ors.** (supra), **J.J. Merchants and Ors.** v. **Srinath Chaturbedi** (supra), **Savita Garg** v. **Director National Heart Institute** (supra), **State of Punjab** v. **Shiv Ram and Ors.** (supra), **Samira Kohli** v. **Dr. Prabha Manchanda and Anr.** (supra), **P.G. Institute of Medical Sciences** v. **Jaspal Singh and Ors.**, (supra) **Nizam Institute** v. **Prasant Dhananka** (supra) **Malay Kumar Ganguly** v. **Sukumar Mukherjee and Ors.** (supra) and **V. Kishan Rao** v. **Nikhil Superspeciality Hospital and Anr.** (supra).

66. In fact, the National Commission or any other consumer court in India have never used the multiplier system to calculate adequate compensation for death or injury caused due to medical negligence except when the National Commission decided the claimant's case after it was remanded back by this Court. Reliance was placed upon **Sarla Verma's** case (supra) at paragraph 37, wherein the principle laid down for determining compensation using multiplier method does not apply even in accident cases under Section 166 of the MV Act. In contrast to death from road or other accident, it is urged that death or permanent injury to a patient caused from medical negligence is undoubtedly a reprehensible act. Compensation for death of a patient from medical negligence cannot and should not be compensated simply by using the multiplier method. In support of this contention he has placed reliance upon the **Nizam Institute's** case (supra) at paragraph 92, wherein the Court has rejected the specific claim made by the guilty Hospital that multiplier should be used to calculate compensation as this Court has held that such a claim has absolutely no merit.

67. The multiplier method was provided for convenience and speedy disposal of no fault motor accident cases. Therefore, obviously, a "no fault" motor vehicle accident should not be compared with the case of death from medical negligence under any condition. The aforesaid approach in adopting the multiplier method to determine the just compensation would be damaging for society for the reason that the rules for using the multiplier method to the notional income of only Rs. 15,000/- per year would be taken as a multiplicand. In case, the victim has no income then a multiplier of 18 is the highest multiplier used under the provision of Sections 163A of the Motor Vehicles act read with the Second Schedule. Therefore, if a child, housewife or other non-working person fall victim to reckless medical treatment by wayward doctors, the maximum pecuniary damages that the unfortunate victim may collect would be only Rs. 1.8 lakh. It is stated in view of the aforesaid reasons that in today's India, Hospitals, Nursing Homes and doctors make lakhs and crores of rupees on a regular basis. Under such scenario, allowing the multiplier method to be used to determine compensation in medical negligence cases would not have any deterrent effect on

them for their medical negligence but in contrast, this would encourage more incidents of medical negligence in India bringing even greater danger for the society at large.

68. It is further urged by the claimant that the National Commission has failed to award any compensation for the intense pain and suffering that the claimant's wife had to suffer due to the negligent treatment by doctors and AMRI Hospital but the National Commission had made a paltry award equivalent to $ 20,000 for the enormous and life-long pain, suffering, loss of companionship and amenities that the unfortunate claimant has been put throughout his life by the negligent act of the doctors and the AMRI Hospital.

69. The claimant further contended that he is entitled to special damages for losses that he suffered upto the date of trial as held by this Court while remanding this matter in **Malay Kumar Ganguly**'s case back to the National Commission. Thus, the claimant filed a legitimate claim for special damages for the losses sustained by him in the course of 15 years long trial including the loss of his employment at the Ohio State University and resultant position of bankruptcy and home foreclosure. The National Commission did not provide any reason for rejecting the said claim which is in violation of the observations made in **Charan Singh's** case (supra).

70. Further, this Court has affirmed the principle regarding determination of just compensation in the following cases that inflation should be considered while deciding quantum of compensation: **Reshma Kumari and Ors.** v. **Madan Mohan and Anr.** (supra), **Govind Yadav** v. **New Indian Insurance Co. Ltd.** (supra) and **Ibrahim** v. **Raju and Ors.** (supra).

71. Using the cost of inflation index (in short C.I.I.) as published by the Govt. of India, the original claim of Rs. 77.7 crores made by the claimant in 1998 would be equivalent to Rs. 188.6 crores as of 2012-2013. The mathematical calculation in this regard has been presented in the short note submitted by the claimant. Thus, the compensation payable for the wrongful death of claimant's wife would stand today at Rs. 188.6 crores and not Rs. 77.7 crores as originally claimed by him in 1998 without taking into consideration the various relevant aspects referred to supra and proper guidance and advice in the matter.

72. Further, it is urged by the claimant that he is entitled to interest on the compensation at reasonable rate as the National Commission has awarded interest @ 12% but only in case of default by the Appellant- doctors and the AMRI Hospital to pay the compensation within 8 weeks after the judgment which was delivered on October 21, 2011. That means, the National Commission did not grant any interest for the last 15 years long period on the compensation awarded in favour of the claimant as this case was pending before the judicial system in India for which the claimant is not responsible. The said act is contrary to the decision of this Court in **Thazhathe Purayil Sarabi and Ors.** v. **Union of India and Anr.** MANU/SC/1108/2009 : (2009) 7 SCC 372.

73. He has also placed reliance upon in justification of his claim of exemplary or punitive damages. A claim of US $ 1,000,000 as punitive damages has been made against the AMRI Hospital and Dr. Sukumar Mukherjee as provided in the table. In support of this contention he placed strong reliance on **Landgraf** v. **USI Film Prods** MANU/USSC/0061/1994 : 511 U.S. 244 1994 and this Court's decision in **Destruction of Public and Private Properties** v. **State of A.P.** MANU/SC/0575/2009 : (2009) 5 SCC 212, wherein it is held that punitive or exemplary damages

have been justifiably awarded as a deterrent in the future for outrageous and reprehensible act on the part of the accused. In fact punitive damages are routinely awarded in medical negligence cases in western countries for reckless and reprehensible act by the doctors or Hospitals in order to send a deterrent message to other members of the medical community. In a similar case, the Court of Appeals in South Carolina in **Welch** v. **Epstein** 536 S.E. 2d 408 2000 held that a neurosurgeon is guilty for reckless therapy after he used a drug in clear disregard to the warning given by the drug manufacturer causing the death of a patient. This Court has categorically held that the injection Depomedrol used at the rate of 80 mg twice daily by Dr. Sukumar Mukherjee was in clear violation of the manufacturer's warning and recommendation and admittedly, the instruction regarding direction for use of the medicine had not been followed in the instant case. This Court has also made it clear that the excessive use of the medicine by the doctor was out of sheer ignorance of basic hazards relating to the use of steroids as also lack of judgment. No doctor has the right to use the drug beyond the maximum recommended dose.

74. The Supreme Court of Ohio in **Dardinger** v. **Anthem Blue Cross Shield et al** 781 N.E. 2d 2002. had judged that since $ 49 million punitive damages was excessive it still awarded US $ 19 million in a case of medical negligence. The aforesaid judgments from the U.S.A. clearly show that punitive damages usually are many times bigger than the compensatory damages. A nominal amount of US $ 1,000,000 has been claimed as punitive damages in the instant case to send a deterrent message to the reckless doctors in India keeping in view the major difference in the standard of living between India and U.S.A. In fact, this Court in a well-known case of **Lata Wadhwa** (supra) in which a number of children and women died from an accidental fire, awarded punitive damages to send a message against the unsafe condition kept by some greedy organizations or companies in the common public places in India.

75. It was further contended by the claimant that this Court remanded the case back to the National Commission for determination of the quantum of compensation only but the National Commission in clear disregard to the direction issued by this Court, has re-examined the issues involved for medical negligence. Further, in **Malay Kumar Ganguly's** case, this Court has rejected the assertion made by the doctors of the Hospital that the claimant had interfered with the treatment of his wife or that other doctors and/ or the Hospital i.e. Breach Candy Hospital in Bombay should also be made a party in this case.

76. It is further contended by the claimant that the National Commission has wrongfully apportioned the total amount of compensation by losing sight of the observations made by this Court while remanding the case back to it for determination of the quantum of compensation. This Court did not make any observation as to how the compensation should be divided, as awarded by the National Commission. Except for the Appellant-Dr. Sukumar Mukherjee who was imposed with a cost of Rs. 5,00,000/- this Court did not impose cost against any other doctors even though the Court found other Appellant-doctors also guilty for medical negligence.

77. It is further contended that the National Commission on 31st March, 2010 in **S.P. Aggarwal** v. **Sanjay Gandhi P.G. Institute** (FA No. 478/2005) held that "in view of the fact that several doctors and paramedical staff of the Appellant institute were involved, it is the Appellant institute which has to be held vicariously liable to compensate the complainant to the above extent."

78. It is further urged that in **Nizam Institute's** case (supra) this Court imposed the entire compensation against the Hospital despite holding several doctors responsible for causing permanent injury to the patient. While remanding back the issue of quantifying the quantum of compensation to the National Commission, this Court has observed that the standard of medical nursing care at the AMRI Hospital was abysmal. It is further submitted that 80% of the total compensation should be imposed against the AMRI Hospital and 20% against Dr. Sukumar Mukherjee. The claimant has claimed the damages as under:

PECUNIARY DAMAGES:		
A	**Cost associated with the victim, Anuradha Saha**	
1	Loss of prospective/future earning upto to 70 years	Rs.9,25,00,000/-
2	Loss of US Social Security income up to 82 years	Rs.1,44,00,000/-
3	Paid for treatment at AMRI/Breach Candy Hospital	Rs.12,00,000/-
4	Paid for chartered flight to transfer Anuradha	Rs. 9,00,000/-
5	Travel/hotel/other expenses during Anuradha's treatment in Mumbai/ Kolkata in 1998	Rs. 7,00,000/-
6	Paid for court proceedings including video conferencing from U.S.A.	Rs.11,57,000/-
B	**Cost associated with Anuradha's husband, Dr. Kunal Saha**	
1	Loss of income for missed work	Rs.1,12,50,000/-
2	Travel expenses over the past 12 years	Rs.70,00,000/-
C	**Legal expenses**	
1	Advocate fees	Rs.1,50,00,000/-
2	other legal expenses	Rs.15,00,000/-
Total pecuniary damages Rs.34,56,07,000/-		
Non-Pecuniary Special Damages		

Therefore, the claimant has prayed for allowing his appeal by awarding just and reasonable compensation under various heads as claimed by him.

79. On the basis of the rival legal factual and contentions urged on behalf of the respective doctor-Appellants, Hospital and the claimant, the following points would arise for consideration of this Court:

1) Whether the claim of the claimant for enhancement of compensation in his appeal is justified. If it is so, for what compensation he is entitled to?

2) While making additional claim by way of affidavit before the National Commission when amending the claim petition, whether the claimant is entitled for compensation on the enhanced claim preferred before the National Commission?

3(a) Whether the claimant seeking to amend the claim of compensation under certain heads in the original claim petition has forfeited his right of claim under Order II Rule 2 of Code of Civil Procedure as pleaded by the AMRI Hospital?

3(b) Whether the claimant is justified in claiming additional amount for compensation under different heads without following the procedure contemplated under the provisions of the Consumer Protection Act and the Rules?

4. Whether the National Commission is justified in adopting the multiplier method to determine the compensation and to award the compensation in favour of the claimant?

5. Whether the claimant is entitled to pecuniary damages under the heads of loss of employment, loss of his property and his traveling expenses from U.S.A. to India to conduct the proceedings in his claim petition?

6. Whether the claimant is entitled to the interest on the compensation that would be awarded?

7. Whether the compensation awarded in the impugned judgment and the apportionment of the compensation amount fastened upon the doctors and the hospital requires interference and whether the claimant is liable for contributory negligence and deduction of compensation under this head?

8. To what Order and Award the claimant is entitled to in these appeals?

80. It would be convenient for us to take up first the Civil Appeal No. 2866 of 2012 filed by Dr. Kunal Saha, the claimant, as he had sought for enhancement of compensation. If we answer his claim then the other issues that would arise in the connected appeals filed by the doctors and the AMRI Hospital can be disposed of later on. Therefore, the points that would arise for consideration in these appeals by these Court have been framed in the composite. The same are taken up in relation to the claimants' case in-seriatim and are answered by recording the following reasons:

Answer to Point Nos. 1, 2 and 3

81. Point Nos. 1, 2 and 3 are taken up together and answered since they are inter related. The claim for enhancement of compensation by the claimant in his appeal is justified for the following reasons:

The National Commission has rejected the claim of the claimant for "inflation" made by him without assigning any reason whatsoever. It is an undisputed fact that the claim of the complainant has been pending before the National Commission and this Court for the last 15 years. The value

of money that was claimed in 1998 has been devalued to a great extent. This Court in various following cases has repeatedly affirmed that inflation of money should be considered while deciding the quantum of compensation.

In Reshma Kumari and Ors. v. **Madan Mohan and Anr.** (supra), this Court at para 47 has dealt with this aspect as under:

47. One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor.

In **Govind Yadav** v. **New India Insurance Co. Ltd.** (supra), this Court at para 15 observed as under which got re-iterated at paragraph 13 of **Ibrahim** v. **Raju and Ors.** (supra).

15. In *Reshma Kumari* v. *Madan Mohan* this Court reiterated that the compensation awarded under the Act should be just and also identified the factors which should be kept in mind while determining the amount of compensation. The relevant portions of the judgment are extracted below: (SCC pp. 431-32 & 440-41, paras 26-27 & 46-47)

26. The compensation which is required to be determined must be just. While the claimants are required to be compensated for the loss of their dependency, the same should not be considered to be a windfall. Unjust enrichment should be discouraged.

This Court cannot also lose sight of the fact that in given cases, as for example death of the only son to a mother, she can never be compensated in monetary terms. 27. The question as to the methodology required to be applied for determination of compensation as regards prospective loss of future earnings, however, as far as possible should be based on certain principles. A person may have a bright future prospect; he might have become eligible to promotion immediately; there might have been chances of an immediate pay revision, whereas in another (sic situation) the nature of employment was such that he might not have continued in service; his chance of promotion, having regard to the nature of employment may be distant or remote. It is, therefore, difficult for any court to lay down rigid tests which should be applied in all situations. There are divergent views. In some cases it has been suggested that some sort of hypotheses or guesswork may be inevitable. That may be so.

***

46. In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days. In fact while determining the multiplicand this Court in Oriental Insurance

Co. Ltd. v. Jashuben held that even dearness allowance and perks with regard thereto from which the family would have derived monthly benefit, must be taken into consideration.

47. One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor.

82. The C.I.I. is determined by the Finance Ministry of Union of India every year in order to appreciate the level of devaluation of money each year. Using the C.I.I. as published by the Government of India, the original claim of Rs. 77.7 crores preferred by the claimant in 1998 would be equivalent to Rs. 188.6 crores as of 2013 and, therefore the enhanced claim preferred by the claimant before the National Commission and before this Court is legally justifiable as this Court is required to determine the just, fair and reasonable compensation. Therefore, the contention urged by the Appellant-doctors and the AMRI Hospital that in the absence of pleadings in the claim petition before the National Commission and also in the light of the incident that the subsequent application filed by the claimant seeking for amendment to the claim in the prayer of the complainant being rejected, the additional claim made by the claimant cannot be examined for grant of compensation under different heads is wholly unsustainable in law in view of the decisions rendered by this Court in the aforesaid cases. Therefore, this Court is required to consider the relevant aspect of the matter namely, that there has been steady inflation which should have been considered over period of 15 years and that money has been devalued greatly. Therefore, the decision of the National Commission in confining the grant of compensation to the original claim of Rs. 77.7 crores preferred by the claimant under different heads and awarding meager compensation under the different heads in the impugned judgment, is wholly unsustainable in law as the same is contrary to the legal principles laid down by this Court in catena of cases referred to supra. We, therefore, allow the claim of the claimant on enhancement of compensation to the extent to be directed by this Court in the following paragraphs.

83. Besides enhancement of compensation, the claimant has sought for additional compensation of about Rs. 20 crores in addition to his initial claim made in 2011 to include the economic loss that he had suffered due to loss of his employment, home foreclosure and bankruptcy in U.S.A. which would have never happened but for the wrongful death of his wife. The claimant has placed reliance on the fundamental principle to be followed by the Tribunals, District Consumer Forum, State Consumer Forum, and the National Commission and the courts for awarding 'just compensation'. In support of this contention,

he has also strongly placed reliance upon the observations made at para 170 in the ***Malay Kumar Ganguly's*** case referred to supra wherein this Court has made observations as thus:
170. Indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitutio in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (See *Livingstone* v. *Rawyards Coal Co.*).

The claimant made a claim under specific heads in great detail in justification for each one of the claim made by him. The National Commission, despite taking judicial notice of the claim made by the claimant in its judgment, has rejected the entire claim solely on the ground that the additional claim was not pleaded earlier, therefore, none of the claims made by him can be considered. The rejection of the additional claims by the National Commission without consideration on the assumption that the claims made by the claimant before the National Commission cannot be changed or modified without pleadings under any condition is contrary to the decisions of this Court rendered in catena of cases. In support of his additional claim, the claimant places reliance upon such decisions as mentioned hereunder:

(a) In **Ningamma's** case (supra), this Court has observed at para 34 which reads thus:

34. Undoubtedly, Section 166 of the MVA deals with "just compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not.

(b) In **Malay Kumar Ganguly's** case, this Court by placing reliance on the decision of this Court in ***R.D. Hattangadi*** v. ***Pest Control (India) (P) Ltd.***, (supra) made observation while remanding back the matter to National Commission solely for the determination of quantum of compensation, that compensation should include "loss of earning of profit up to the date of trial" and that it may also include any loss "already suffered or is likely to be suffered in future". Rightly, the claimant has contended that when original complaint was filed soon after the death of his wife in 1998, it would be impossible for him to file a claim for "just compensation" for the pain that the claimant suffered in the course of the 15 years long trial.

c) In **Nizam Institute's** case supra, the complainant had sought a compensation of Rs. 4.61 crores before the National Commission but he enhanced his claim to Rs. 7.50 crores when the matter came up before this Court. In response to the claim, this Court held as under:

82. The complainant, who has argued his own case, has submitted written submissions now claiming about Rs. 7.50 crores as compensation under various heads. He has, in addition sought a direction that a further sum of Rs. 2 crores be set aside to be used by him should some developments beneficial to him in the medical field take place. Some of the claims are untenable and we have no hesitation in rejecting them. We, however, find that the claim with respect to some of the other items need to be allowed or enhanced in view of the peculiar facts of the case.

d) In **Oriental Insurance Co. Ltd.** v. **Jashuben and Ors.** (supra), the initial claim was for Rs. 12 lakhs which was subsequently raised to Rs. 25 lakhs. The claim was partly allowed by this Court.

e) In **R.D. Hattangadi** v. **Pest Control (India)** (supra) the Appellant made an initial compensation claim of Rs. 4 lakhs but later on enhanced the claim to Rs. 35 lakhs by this Court.

f) In **Raj Rani and Ors.** v. **Oriental Insurance Co. Ltd. and Ors.,** (supra) this Court has observed that there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. The relevant paragraph reads as under:

14. In *Nagappa* v. *Gurudayal Singh* this Court has held as under: (SCC p. 279, para 7)

7. Firstly, under the provisions of the Motor Vehicles Act, 1988, (hereinafter referred to as 'the MV Act') there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case, where from the evidence brought on record if the Tribunal/court considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. The only embargo is- it should be 'just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the MV Act.

g) In **Laxman @ Laxaman Mourya** v. **Divisional Manager, Oriental Insurance Co. Ltd. and Anr.,** (supra) this Court awarded more compensation than what was claimed by the claimant after making the following categorical observations.

In the absence of any bar in the Act, the Tribunal and for that reason, any competent court, is entitled to award higher compensation to the victim of an accident

h) In **Ibrahim** v. **Raju and Ors.,** (supra) this Court awarded double the compensation sought for by the complainant after discussion of host of previous judgments.

84. In view of the aforesaid decisions of this Court referred to supra, wherein this Court has awarded 'just compensation' more than what was claimed by the claimants initially and therefore, the contention urged by learned senior counsel and other counsel on behalf of the Appellant-doctors and the AMRI Hospital that the additional claim made by the claimant was rightly not considered by the National Commission for the reason that the same is not supported by pleadings by filing an application to amend the same regarding the quantum of compensation and the same could not have been amended as it is barred by the limitation provided under Section 23 of the Consumer Protection Act, 1986 and the claimant is also not entitled to seek enhanced compensation in view of Order II Rule 2 of the Code of Civil Procedure as he had restricted his claim at Rs. 77,07,45,000/-, is not sustainable in law. The claimant has appropriately placed reliance upon the decisions of this Court in justification of his additional claim and the finding of fact on the basis of which the National Commission rejected the claim is based on untenable reasons. We have to reject the contention urged by the learned senior counsel and other counsel on behalf of the Appellant-doctors and the AMRI Hospital as it is wholly untenable in law and is contrary to the aforesaid decisions of this Court referred to supra. We have to accept the claim of the claimant as it is supported by the decisions of this Court and the same is well founded in law. It is the duty of the Tribunals, Commissions and the Courts to consider relevant facts and evidence in respect of facts and circumstances of each and every case for awarding just and reasonable compensation. Therefore, we are of the view that the claimant is entitled for enhanced compensation under certain items made by the claimant in additional claim preferred by him before the National Commission. We have to keep in view the fact that this Court while remanding the

case back to the National Commission only for the purpose of determination of quantum of compensation also made categorical observation that:

172. Loss of wife to a husband may always be truly compensated by way of mandatory compensation. How one would do it has been baffling the court for a long time. For compensating a husband for loss of his wife, therefore, the courts consider the loss of income to the family. It may not be difficult to do when she had been earning. Even otherwise a wife's contribution to the family in terms of money can always be worked out. Every housewife makes a contribution to his family. It is capable of being measured on monetary terms although emotional aspect of it cannot be. It depends upon her educational qualification, her own upbringing, status, husband's income, etc.

(Emphasis laid by this Court)

In this regard, this Court has also expressed similar view that status, future prospects and educational qualification of the deceased must be judged for deciding adequate, just and fair compensation as in the case of **R.K. Malik and Anr.** (supra).

85. Further, it is an undisputed fact that the victim was a graduate in psychology from a highly prestigious Ivy League school in New York. She had a brilliant future ahead of her. However, the National Commission has calculated the entire compensation and prospective loss of income solely based on a pay receipt showing a paltry income of only $ 30,000 per year which she was earning as a graduate student. Therefore, the National Commission has committed grave error in taking that figure to determine compensation under the head of loss of dependency and the same is contrary to the observations made by this Court in the case of **Arvind Kumar Mishra** v. **New India Assurance** which reads as under:

14. On completion of Bachelor of Engineering (Mechanical) from the prestigious institute like BIT, it can be reasonably assumed that he would have got a good job. The Appellant has stated in his evidence that in the campus interview he was selected by Tata as well as Reliance Industries and was offered pay package of Rs. 3,50,000 per annum. Even if that is not accepted for want of any evidence in support thereof, there would not have been any difficulty for him in getting some decent job in the private sector. Had he decided to join government service and got selected, he would have been put in the pay scale for Assistant Engineer and would have at least earned Rs. 60,000 per annum. Wherever he joined, he had a fair chance of some promotion and remote chance of some high position. But uncertainties of life cannot be ignored taking relevant factors into consideration. In our opinion, it is fair and reasonable to assess his future earnings at Rs. 60,000 per annum taking the salary and allowances payable to an Assistant Engineer in public employment as the basis.

86. The claimant further placed reliance upon the decisions of this Court in **Govind Yadav** v. **New India Insurance Co. Ltd.** (supra), **Sri Ramachandrappa** v. **Manager, Royal Sundaram Alliance Insurance** (supra), **Ibrahim** v. **Raju and Ors., Laxman @ Laxman Mourya** v. **Divisional Manager, Oriental Insurance Co. Ltd.** (supra) **and Kavita** v. **Dipak and Ors.** (supra) in support of his additional claim on loss of future prospect of income. However, these decisions do not have any relevance to the facts and circumstances of the present case. Moreover,

these cases mention about 'future loss of income' and not 'future prospects of income' in terms of the potential of the victim and we are inclined to distinguish between the two.

87. We place reliance upon the decisions of this Court in **Arvind Kumar Mishra's** case (supra) and also in **Susamma Thomas** (supra), wherein this Court held thus:

24. In *Susamma Thomas*, this Court increased the income by nearly 100%, in *Sarla Dixit* the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

88. Further, to hold that the claimant is entitled to enhanced compensation under the heading of loss of future prospects of income of the victim, this Court in **Santosh Devi** v. **National Insurance Co. and Ors.** (supra), held as under:

18. Therefore, we do not think that while making the observations in the last three lines of para 24 of *Sarla Verma* judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes the victim of an accident then the same formula deserves to be applied for calculating the amount of compensation.

89. In view of the aforesaid observations and law laid down by this Court with regard to the approach by the Commission in awarding just and reasonable compensation taking into consideration the future prospects of the deceased even in the absence of any expert's opinion must have been reasonably judged based on the income of the deceased and her future potential in U.S.A. However, in the present case the calculation of the future prospect of income of the deceased has also been scientifically done by economic expert Prof. John F. Burke. In this regard, the learned Counsel for the other Appellant-doctors and the Hospital have contended that without amending the claim petition the enhanced claim filed before the National Commission or an application filed in the appeal by the claimant cannot be accepted by this Court. In support of this contention, they have placed reliance upon the various provisions of the Consumer Protection Act and also decisions of this Court which have been adverted to in their submissions recorded in this judgment. The claimant strongly contended by placing reliance upon the additional claim by way of affidavit filed before the National Commission which was sought to be justified with reference to the liberty given by this Court in the earlier proceedings which arose when the application filed

by the claimant was rejected and this Court has permitted him to file an affidavit before the National Commission and the same has been done. The ground urged by the claimant is that the National Commission has not considered the entire claim including the additional claim made before it. He has placed strong reliance upon **V.P. Shantha's** case (supra) in support of his contention wherein it was held as under:

53. Dealing with the present state of medical negligence cases in the United Kingdom it has been observed:

The legal system, then, is faced with the classic problem of doing justice to both parties. The fears of the medical profession must be taken into account while the legitimate claims of the patient cannot be ignored.

Medical negligence apart, in practice, the courts are increasingly reluctant to interfere in clinical matters. What was once perceived as a legal threat to medicine has disappeared a decade later. While the court will accept the absolute right of a patient to refuse treatment, they will, at the same time, refuse to dictate to doctors what treatment they should give. Indeed, the fear could be that, if anything, the pendulum has swung too far in favour of therapeutic immunity. (p. 16)

It would be a mistake to think of doctors and hospitals as easy targets for the dissatisfied patient. It is still very difficult to raise an action of medical negligence in Britain; some, such as the Association of the Victims of Medical Accidents, would say that it is unacceptably difficult. Not only are there practical difficulties in linking the Plaintiff's injury to medical treatment, but the standard of care in medical negligence cases is still effectively defined by the profession itself. All these factors, together with the sheer expense of bringing legal action and the denial of legal aid to all but the poorest, operate to inhibit medical litigation in a way in which the American system, with its contingency fees and its sympathetic juries, does not.

It is difficult to single out any one cause for what increase there has been in the volume of medical negligence actions in the United Kingdom. A common explanation is that there are, quite simply, more medical accidents occurring - whether this be due to increased pressure on hospital facilities, to falling standards of professional competence or, more probably, to the ever-increasing complexity of therapeutic and diagnostic methods. (p. 191)

A patient who has been injured by an act of medical negligence has suffered in a way which is recognised by the law - and by the public at large - as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the Plaintiff injured through medical negligence and the Plaintiff injured in an industrial or motor accident. (pp. 192-93)

(*Mason's Law and Medical Ethics,* 4th Edn.)

(Emphasis laid by this Court)

90. He has also placed reliance upon the **Nizam Institute of Medical Sciences**'s case referred to supra in support of his submission that if a case is made out, then the Court must not be chary of awarding adequate compensation. The relevant paragraph reads as under:

88. We must emphasise that the court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. Sympathy for the victim does not, and should not, come in the way of making a correct assessment, but if a case is made out, the court must not be chary of awarding adequate compensation. The "adequate compensation" that we speak of, must to some extent, be a rule of thumb measure, and as a balance has to be struck, it would be difficult to satisfy all the parties concerned.

91. He has further rightly contended that with respect to the fundamental principle for awarding just and reasonable compensation, this Court in **Malay Kumar Ganguly's** case (supra) has categorically stated while remanding this case back to the National Commission that the principle for just and reasonable compensation is based on 'restitutio in integrum' that is, the claimant must receive sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

92. Further, he has placed reliance upon the judgment of this Court in the case of **Ningamma**'s case (supra) in support of the proposition of law that the Court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. The relevant paragraph reads as under:

34. Undoubtedly, Section 166 of the MVA deals with "just compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA,
in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not.

93. He has also rightly placed reliance upon observations made in **Malay Kumar Ganguly's** case referred to supra wherein this Court has held the Appellant doctors guilty of causing death of claimant's wife while remanding the matter back to the National Commission only for determination of quantum of compensation for medical negligence. This Court has further observed that compensation should include "loss of earning of profit up to the date of trial" and that it may also include any loss "already suffered or likely to be suffered in future". The claimant has also rightly submitted that when the original complaint was filed soon after the death of his wife in 1998, it would be impossible to file a claim for "just compensation". The claimant has suffered in the course of the 15 years long trial. In support of his contention he placed reliance on some other cases also where more compensation was awarded than what was claimed, such as **Oriental Insurance Co. Ltd.** v. **Jashuben and Ors., R.D. Hattangadi, Raj Rani & Ors, Laxman @ Laxaman Mourya** all cases referred to supra. Therefore, the relevant paragraphs from the said judgments in-seriatimextracted above show that this Court has got the power under Article

136 of the Constitution and the duty to award just and reasonable compensation to do complete justice to the affected claimant.

In view of the aforesaid reasons stated by us, it is wholly untenable in law with regard to the legal contentions urged on behalf of the AMRI Hospital and the doctors that without there being an amendment to the claim petition, the claimant is not entitled to seek the additional claims by way of affidavit, the claim is barred by limitation and the same has not been rightly accepted by the National Commission.

94. Also, in view of the above reasoning the contention that the claimant has waived his right to claim more compensation in view of the Order II Rule 2 of Code of Civil Procedure as pleaded by the AMRI Hospital and the Appellant-doctors is also held to be wholly unsustainable in law. The claimant is justified in claiming additional claim for determining just and reasonable compensation under different heads. Accordingly, the point Nos. 1, 2, and 3 are answered in favour of the claimant and against the Appellant-doctors and the Hospital.

Answer to point No. 4

95. With regard to point No. 4, the National Commission has used the "multiplier" method under Section 163A read with the second schedule of the Motor Vehicles Act to determine the quantum of compensation in favour of the claimant applying the multiplier method as has been laid down by this Court in ***Sarla Verma's*** case(supra). Consequently, it has taken up multiplier of 15 in the present case to quantify the compensation under the loss of dependency of the claimant. It is urged by the claimant that use of multiplier system for determining compensation for medical negligence cases involving death of his wife is grossly erroneous in law. The claimant has rightly placed reliance upon the cases of this Court such as, **Indian Medical Assn.** v. **V.P. Shanta and Ors. (supra), Spring Meadows Hospital and Anr.** v. **Harjol Ahluwalia** MANU/SC/1014/1998 : (1998) 4 SCC 39, **Charan Singh** v. **Healing Touch Hospital and Ors.** (supra), **J.J. Merchants and Ors.** v. **Srinath Chaturbedi** (supra), **Savita Garg** v. **Director National Heart Institute** (supra), **State of Punjab** v. **Shiv Ram and Ors.** (supra), **Samira Kholi** v. **Dr. Prabha Manchanda and Anr.**(supra), **P.G. Institute of Medical Sciences** v. **Jaspal Singh and Ors.,** (supra) **Nizam Institute** v. **Prasant Dhananka (supra) Malay Kumar Ganguly** v. **Sukumar Mukherjee and Ors.** (supra) and **V. Kishan Rao** v. **Nikhil Superspeciality Hospital and Anr.** (supra) to contend that not a single case was decided by using the multiplier method.

In support of this contention, he has further argued that in the three judge Bench decision in the case of **Nizam Institute's** case (supra),

this Court has rejected the use of multiplier system to calculate the quantum of compensation. The relevant paragraph is quoted hereunder:

92. Mr. Tandale, the learned Counsel for the Respondent has, further submitted that the proper method for determining compensation would be the multiplier method. We find absolutely no merit in this plea. The kind of damage that the complainant has suffered, the expenditure that he has incurred and is likely to incur in the future and the possibility that his rise in his chosen field would now be restricted, are matters which cannot be taken care of under the multiplier method.

(Emphasis laid by this Court)

He has further urged that the 'multiplier' method as provided in the second Schedule to Section 163A of the M.V. Act which provision along with the Second Schedule was inserted to the Act by way of Amendment in 1994, was meant for speedy disposal of 'no fault' motor accident claim cases. Hence, the present case of gross medical negligence by the Appellant-doctors and the Hospital cannot be compared with 'no fault' motor accident claim cases.

96. The Appellant Dr. Balram Prasad on the other hand relied upon the decision in **United India Insurance Co. Ltd.** v. **Patricia Jean Mahajan** (supra) and contended that multiplier method is a standard method of determining the quantum of compensation in India. The relevant paragraphs read as under:

20. The court cannot be totally oblivious to the realities. The Second Schedule while prescribing the multiplier, had maximum income of Rs. 40,000 p.a. in mind, but it is considered to be a safe guide for applying the prescribed multiplier in cases of higher income also but in cases where the gap in income is so wide as in the present case income is 2,26,297 dollars, in such a situation, it cannot be said that some deviation in the multiplier would be impermissible. Therefore, a deviation from applying the multiplier as provided in the Second Schedule may have to be made in this case. Apart from factors indicated earlier the amount of multiplicand also becomes a factor to be taken into account which in this case comes to 2,26,297 dollars, that is to say an amount of around Rs. 68 lakhs per annum by converting it at the rate of Rs. 30. By Indian standards it is certainly a high amount. Therefore, for the purposes of fair compensation, a lesser multiplier can be applied to a heavy amount of multiplicand. A deviation would be reasonably permissible in the figure of multiplier even according to the observations made in the case of Susamma Thomas where a specific example was given about a person dying at the age of 45 leaving no heirs being a bachelor except his parents.

XXX

22. We therefore, hold that ordinarily while awarding compensation, the provisions contained in the Second Schedule may be taken as a guide including the multiplier, but there may arise some cases, as the one in hand, which may fall in the category having special features or facts calling for deviation from the multiplier usually applicable.

97. It is further urged by the learned senior counsel Mr. Vijay Hansaria for the Appellant-AMRI Hospital relying on **Sarla Verma**'s case (supra) that the multiplier method has enabled the courts to bring about consistency in determining the 'loss of dependency' more particularly in the death of victims of negligence. The relevant paragraph reads as under:

14. The lack of uniformity and consistency in awarding compensation has been a matter of grave concern. Every district has one or more Motor Accidents Claims Tribunal(s). If different Tribunals calculate compensation differently on the same facts, the claimant, the litigant, the common man will be confused, perplexed and bewildered. If there is significant divergence among the Tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the system.

The learned Counsel for the Appellant-AMRI Hospital further argued that reliance placed upon the judgment in **Nizam Institute's** case referred to supra by the claimant is misplaced since the victim in that case suffered from permanent disability which required constant medical assistance. Therefore, it was urged that **Nizam Institute** case cannot be relied upon by this Court to determine the quantum of compensation by not adopting multiplier method in favour of the claimant.

A careful reading of the above cases shows that this Court is skeptical about using a strait jacket multiplier method for determining the quantum of compensation in medical negligence claims. On the contrary, this Court mentions various instances where the Court chose to deviate from the standard multiplier method to avoid over-compensation and also relied upon the quantum of multiplicand to choose the appropriate multiplier. Therefore, submission made in this regard by the claimant is well founded and based on sound logic and is reasonable as the National Commission or this Court requires to determine just, fair and reasonable compensation on the basis of the income that was being earned by the deceased at the time of her death and other related claims on account of death of the wife of the claimant which is discussed in the reasoning portion in answer to the point Nos. 1 to 3 which have been framed by this Court in these appeals. Accordingly, we answer the point No. 4 in favour of the claimant holding that the submissions made by the learned Counsel for the Appellant-doctors and the AMRI Hospital in determination of compensation by following the multiplier method which was sought to be justified by placing reliance upon **Sarla Verma** and **Reshma's** cases (supra) cannot be accepted by this Court and the same does not inspire confidence in us in accepting the said submission made by the learned senior counsel and other counsel to justify the multiplier method adopted by the National Commission to determine the compensation under the head of loss of dependency. Accordingly, we answer the point No. 4 in favour of the claimant and against the Appellants-doctors and AMRI Hospital.

Answer to Point No. 5

98. It is the claim of the claimant that he has also suffered huge losses during this period, both direct loss of income from his job in U.S.A. as well as indirect loss for pain and intense mental agony for tenure denial and termination of his employment at Ohio State University which was a direct result of the wrongful death of deceased in India as would be evident from the judgment passed by the Court of Claims in Ohio which was filed by the Hospital on 18th July, 2011. In lieu of such pain and suffering the claimant made a demand of Rs. 34,56,07,000/- under different heads of 'loss of income for missed work', 'traveling expenses over the past 12 years' and 'legal expenses including advocate fees' etc.

99. We have perused through the claims of the claimant under the above heads and we are inclined to observe the following.

The claim of Rs. 1,12,50,000/- made by the claimant under the head of loss of income for missed work, cannot be allowed by this Court since, the same has no direct nexus with the negligence of the Appellant- doctors and the Hospital. The claimant further assessed his claim under the head of 'Travel expenses over the past 12 years' at Rs. 70,00,000/-. It is pertinent to observe that the claimant did not produce any record of plane fare to prove his travel expenditure from U.S.A. to India to attend the proceedings. However, it is an undisputed fact that the claimant is a citizen of U.S.A. and had been living there. It cannot be denied that he had to incur travel expenses to come

to India to attend the proceedings. Therefore, on an average, we award a compensation of Rs. 10 lakhs under the head of 'Travel expenses over the past twelve years'.

Further, the claimant argues that he has spent Rs. 1,65,00,000/- towards litigation over the past 12 years while seeking compensation under this head. Again, we find the claim to be on the higher side. Considering that the claimant who is a doctor by profession, appeared in person before this Court to argue his case. We acknowledge the fact that he might have required rigorous assistance of lawyers to prepare his case and produce evidence in order. Therefore, we grant a compensation of Rs. 1,50,000/- under the head of 'legal expenses'. Therefore, a total amount of Rs. 11,50,000/- is granted to the claimant under the head of 'cost of litigation'.

Answer to Point No. 6

100. A perusal of the operative portion of the impugned judgment of the National Commission shows that it has awarded interest at the rate of 12% per annum but only in case of default by the doctors of AMRI Hospital to pay the compensation within 8 weeks after the judgment was delivered on October 21, 2011. Therefore, in other words, the National Commission did not grant any interest for the long period of 15 years as the case was pending before the National Commission and this Court. Therefore, the National Commission has committed error in not awarding interest on the compensation awarded by it and the same is opposed to various decisions of this Court, such as in the case of **Thazhathe Purayil Sarabi and Ors.** v. **Union of India and Anr.** regarding payment of interest on a decree of payment this Court held as under:

25. It is, therefore, clear that the court, while making a decree for payment of money is entitled to grant interest at the current rate of interest or contractual rate as it deems reasonable to be paid on the principal sum adjudged to be payable and/or awarded, from the date of claim or from the date of the order or decree for recovery of the outstanding dues. There is also hardly any room for doubt that interest may be claimed on any amount decreed or awarded for the period during which the money was due and yet remained unpaid to the claimants.

26. The courts are consistent in their view that normally when a money decree is passed, it is most essential that interest be granted for the period during which the money was due, but could not be utilised by the person in whose favour an order of recovery of money was passed.

27. As has been frequently explained by this Court and various High Courts, interest is essentially a compensation payable on account of denial of the right to utilise the money due, which has been, in fact, utilised by the person withholding the same. Accordingly, payment of interest follows as a matter of course when a money decree is passed.

28. The only question to be decided is since when is such interest payable on such a decree. Though, there are two divergent views, one indicating that interest is payable from the date when claim for the principal sum is made, namely, the date of institution of the proceedings in the recovery of the amount, the other view is that such interest is payable only when a determination is made and order is passed for recovery of the dues. However, the more consistent view has been the former and in rare cases interest has been awarded for periods even prior to the institution of

proceedings for recovery of the dues, where the same is provided for by the terms of the agreement entered into between the parties or where the same is permissible by statute.

101. Further, in **Kemp and Kemp** on Quantum of Damages, the objective behind granting interest is recorded as under:

The object of a court in awarding interest to a successful litigant is to compensate him for being kept out of money which the court has found is properly due to him. That objective is easy to achieve where it is clear that on a certain date the Defendant ought to have paid to the Plaintiff an ascertained sum, for example by way of repayment of a loan. The problems which arise in personal injury and fatal accident cases in relation to awards of interest result from the facts that while, on the one hand, the cause of action accrues at the time of the accident, so that compensation is payable as from that time, on the other hand

(a) the appropriate amount of compensation cannot be assessed in a personal injury case with any pretence of accuracy until the condition of the Plaintiff has stabilised, and

(b) subject to the provisions of the Supreme Court Act 1981, Section 32A when that section is brought into force, when damages are assessed they are assessed once for all in relation to both actual past and anticipated future loss and damage.

XXX

The necessity for guidelines, and the status of guidelines, were considered by the House of Lords in Cookson v. Knowles (1979) A.C. 556. In that case Lord Diplock with whom the other members of the House agreed, said:

The section as amended gives to the judge several options as to the way in which he may assess the interest element to be included in the sum awarded by the judgment. He may include interest on the whole of the damages or on a part of them only as he thinks appropriate. He may award it for the whole or any part of the period between the date when the cause of action arose and the date of judgment and he may award it at different rates for different part of the period chosen.

The section gives no guidance as to the way in which the judge should exercise his choice between the various options open to him. This is all left to his discretion; but like all discretions vested in judges by statute or at common law, it must be exercised judicially or, in the Scots phrase used by Lord Emslie in Smith v. Middleton 1972 S.C. 30, in a selective and discriminating manner, not arbitrarily or idiosyncratically- for otherwise the rights of parties to litigation would become dependent upon judicial whim.

It is therefore appropriate for an appellate court to lay down guidelines as to what matters it is proper for the judge to take into account in deciding how to exercise the discretion confided in him by the statute. In exercising this appellate function, the court is not expounding a rule of law from which a judge is precluded from departing where special circumstances exist in a particular case; nor indeed, even in cases where there are no special circumstances, is an appellate court justified in giving effect to the preference of its members for exercising the discretion in a different way

from that adopted by the judge if the choice between the alternative ways of exercising it is one upon which judicial opinion might reasonably differ.

102. Therefore, the National Commission in not awarding interest on the compensation amount from the date of filing of the original complaint up to the date of payment of entire compensation by the Appellant-doctors and the AMRI Hospital to the claimant is most unreasonable and the same is opposed to the provision of the Interest Act, 1978. Therefore, we are awarding the interest on the compensation that is determined by this Court in the appeal filed by the claimant at the rate of 6% per annum on the compensation awarded in these appeals from the date of complaint till the date of payment of compensation awarded by this Court. The justification made by the learned senior counsel on behalf of the Appellant-doctors and the AMRI Hospital in not awarding interest on the compensation awarded by the National Commission is contrary to law laid down by this Court and also the provisions of the Interest Act, 1978. Hence, their submissions cannot be accepted as the same are wholly untenable in law and misplaced. Accordingly, the aforesaid point is answered in favour of the claimant.

Answer to point No. 7

103. Before we answer this point, it is pertinent to mention that we are not inclined to determine the liability of the doctors in causing the death of the claimant's wife since the same has already been done by the Court in **Malay Kumar Ganguly**'s case (supra). We will confine ourselves to determine the extent to which the Appellant-doctors and the Hospital are liable to pay compensation awarded to the claimant for their acts of negligence in giving treatment to the deceased wife of the claimant.

Liability of the AMRI Hospital:

104. It is the claim of Appellant-AMRI Hospital that the arguments advanced on behalf of the Appellant-doctors that is, Dr. Balram Prasad, Dr. Sukumar Mukherjee and Dr. Baidyanath Haldar and the claimant Dr. Kunal Saha, that the Appellant AMRI is liable to pay the highest share of compensation in terms of percentage on the basis of the cost imposed by this Court in the earlier round of litigation in **Malay Kumar Ganguly's** case, supra are not sustainable in law.

105. The learned senior counsel for the Appellant-AMRI Hospital Mr. Vijay Hansaria argued that the submission made by the claimant Dr. Kunal Saha is not sustainable both on facts and in law since he himself had claimed special damages against the Appellant-doctors, Dr. Sukumar Mukherjee, Dr. Baidyanath Haldar and Dr. Abani Roy Choudhury in his appeal and therefore, he cannot now in these proceedings claim to the contrary. On the other hand, the claimant Dr. Kunal Saha argues that though the National Commission claims that this Court did not make any observation on apportionment of liability while remanding the matter back to it for determining the quantum of compensation, this Court had implicitly directed the bulk of compensation to be paid by the Hospital. Through Paragraph No. 196, the judgment reads as under:

196. We, keeping in view the stand taken and conduct of AMRI and Dr. Mukherjee, direct that costs of Rs. 5,00,000 and Rs. 1,00,000 would be payable by AMRI and Dr. Mukherjee

respectively. We further direct that if any foreign experts are to be examined it shall be done only through videoconferencing and at the cost of the Respondents.

This Court has stated that the bulk of the proportion of compensation is to be paid by the Hospital and the rest by Dr. Sukumar Mukherjee. None of the other doctors involved were imposed with cost though they were found guilty of medical negligence. The claimant relied upon the decision in ***Nizam Institute'***s case (supra) in which this Court directed the Hospital to pay the entire amount of compensation to the claimant in that case even though the treating doctors were found to be responsible for the negligence. The claimant also relied upon the observations made by this Court while remitting the case back to National Commission for determining the quantum of compensation, to emphasize upon the negligence on the part of the Hospital. The findings of this Court in **Malay Kumar Ganguly's** case read as under:

76. AMRI records demonstrate how abysmal the nursing care was. We understand that there was no burn unit in AMRI and there was no burn unit at Breach Candy Hospital either. A patient of TEN is kept in ICU. All emphasis has been laid on the fact that one room was virtually made an ICU. Entry restrictions were strictly adhered to. Hygiene was ensured. But constant nursing and supervision was required. In the name of preventing infection, it cannot be accepted that the nurses would not keep a watch on the patient. They would also not come to see the patients or administer drugs.

77. No nasogastric tube was given although the condition of the mouth was such that Anuradha could not have been given any solid food. She required 7 to 8 litres of water daily. It was impossible to give so much water by mouth. The doctors on the very first day found that the condition of the mouth was bad.

78. The ENT specialist in his prescription noticed blisters around the lips of the patient which led her to difficulty in swallowing or eating. No blood sample was taken. No other routine pathological examination was carried out. It is now beyond any dispute that 25-30% body surface area was affected (re. Prescription of Dr. Nandy, Plastic Surgeon). The next day, he examined the patient and he found that more and more body surface area was affected. Even Dr. Prasad found the same.

79. Supportive therapy or symptomatic therapy, admittedly, was not administered as needle prick was prohibited. AMRI even did not maintain its records properly. The nurses reports clearly show that from 13th May onwards even the routine check-ups were not done.

106. The liability of compensation to be apportioned by this Court on the Appellant-AMRI Hospital is mentioned in paragraph 165 of the **Malay Kumar Ganguly's** case which reads as under:

165. As regards, individual liability of Respondents 4, 5 and 6 is concerned, we may notice the same hereunder. As regards AMRI, it may be noticed:

(i) Vital parameters of Anuradha were not examined between 11-5-1998 to 16-5-1998 (body temperature, respiration rate, pulse, BP and urine input and output).

(ii) IV fluid not administered. (IV fluid administration is absolutely necessary in the first 48 hours of treating TEN.)

107. However, this Court in the aforesaid case, also recorded as under:

184. In *R.* v. *Yogasakaran* the New Zealand Court opined that the hospital is in a better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities. (See also *Errors, Medicine and the Law,* Alan Merry and Alexander McCall Smith, 2001 Edn., Cambridge University Press, p. 12.)

108. Even in the case of **Savita Garg** v. **National Heart Institute** (supra) this Court, while determining the liability of the Hospital, observed as under:

15. Therefore, as per the English decisions also the distinction of "contract of service" and "contract for service", in both the contingencies, the courts have taken the view that the hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of the patients. Therefore, the distinction which is sought to be pressed into service so ably by learned Counsel cannot absolve the hospital or the Institute as it is responsible for the acts of its treating doctors who are on the panel and whose services are requisitioned from time to time by the hospital looking to the nature of the diseases. The hospital or the Institute is responsible and no distinction could be made between the two classes of persons i.e. the treating doctor who was on the staff of the hospital and the nursing staff and the doctors whose services were temporarily taken for treatment of the patients....

16. Therefore, the distinction between the "contract of service" and "contract for service" has been very elaborately discussed in the above case and this Court has extended the provisions of the Consumer Protection Act, 1986, to the medical profession also and included in its ambit the services rendered by private doctors as well as the government institutions or the non-governmental institutions, be it free medical services provided by the government hospitals. In the case of *Achutrao Haribhau Khodwa* v. *State of Maharashtra* their Lordships observed that in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in tort would be maintainable. Their Lordships further observed that if the doctor has taken proper precautions and despite that if the patient does not survive then the court should be very slow in attributing negligence on the part of the doctor. It was held as follows: (SCC p. 635)

A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor. The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with

due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence. But in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable.

Similarly, our attention was invited to a decision in the case of *Spring Meadows Hospital* v. *Harjol Ahluwalia*. Their Lordships observed as follows: (SCC pp. 46-47, para 9)

9...Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the Defendant is considered to have gone beyond the bounds of what is expected of the skill of a reasonably competent doctor....

Therefore, as a result of our above discussion we are of the opinion that summary dismissal of the original petition by the Commission on the question of non-joinder of necessary parties was not proper. In case the complainant fails to substantiate the allegations, then the complaint will fail. But not on the ground of non-joinder of necessary party. But at the same time the hospital can discharge the burden by producing the treating doctor in defence that all due care and caution was taken and despite that the patient died. The hospital/Institute is not going to suffer on account of non-joinder of necessary parties and the Commission should have proceeded against the hospital. Even otherwise also the Institute had to produce the treating physician concerned and has to produce evidence that all care and caution was taken by them or their staff to justify that there was no negligence involved in the matter. Therefore, nothing turns on not impleading the treating doctor as a party. Once an allegation is made that the patient was admitted in a particular hospital and evidence is produced to satisfy that he died because of lack of proper care and negligence, then the burden lies on the hospital to justify that there was no negligence on the part of the treating doctor or hospital. Therefore, in any case, the hospital is in a better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities.

(Emphasis laid by this Court)

109. Therefore, in the light of the rival legal contentions raised by the parties and the legal principles laid down by this Court in plethora of cases referred to supra, particularly, **Savita Garg's** case, we have to infer that the Appellant-AMRI Hospital is vicariously liable for its doctors. It is clearly mentioned in **Savita Garg's** case that a Hospital is responsible for the conduct of its doctors both on the panel and the visiting doctors. We, therefore, direct the Appellant-AMRI Hospital to pay the total amount of compensation with interest awarded in the appeal of the claimant which

remains due after deducting the total amount of Rs. 25 lakhs payable by the Appellants-doctors as per the Order passed by this Court while answering the point No. 7.

Liability of Dr. Sukumar Mukherjee:

110. As regards the liability of Dr. Sukumar Mukherjee, it is his case that nowhere has this Court in **Malay Kumar Ganguly's** decision hold the Appellant Dr. Mukherjee and Appellant-AMRI Hospital "primarily responsible" for the death of the claimant's wife. On the contrary, referring to paras 186 and 187 of the said judgment, under the heading of 'cumulative effect', the Appellant's counsel has argued that his liability is not established by the Court. The said paragraphs are extracted hereunder:

186. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been the contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court must deal with the consequences the patient faced, keeping in view the cumulative effect. In the instant case, negligent action has been noticed with respect to more than one Respondent. A cumulative incidence, therefore, has led to the death of the patient.

187. It is to be noted that the doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also the differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the Respondent. In such a scenario finding of medical negligence under Section 304A cannot be objectively determined.

111. In the light of the legal contention raised by the Appellant-Dr. Mukherjee, we are inclined to make the following observation regarding his liability in the present case. The paragraphs relied upon by Dr. Mukherjee as have been mentioned above are in relation to the culpability of the doctors for causing the death of the patient under Section 304A of Indian Penal Code. It is imperative to mention here that the quantum of compensation to be paid by the Appellant-doctors and the AMRI Hospital is not premised on their culpability under Section 304A of Indian Penal Code but on the basis of their act of negligence as doctors in treating the deceased wife of the claimant. We are therefore inclined to reiterate the findings of this Court regarding the liability of Dr. Mukherjee in **Malay Kumar Ganguly's** case which read as under:

159. When Dr. Mukherjee examined Anuradha, she had rashes all over her body and this being the case of dermatology, he should have referred her to a dermatologist. Instead, he prescribed "depomedrol" for the next 3 days on his assumption that it was a case of "vasculitis". The dosage of 120 mg depomedrol per day is certainly a higher dose in case of a TEN patient or for that matter any patient suffering from any other bypass or skin disease and the maximum recommended usage by the drug manufacturer has also been exceeded by Dr. Mukherjee. On 11-5-1998, the further prescription of depomedrol without diagnosing the nature of the disease is a wrongful act on his part.

160. According to general practice, long-acting steroids are not advisable in any clinical condition, as noticed hereinbefore. However, instead of prescribing a quick-acting steroid, the prescription

of a long-acting steroid without foreseeing its implications is certainly an act of negligence on Dr. Mukherjee's part without exercising any care or caution. As it has been already stated by the experts who were cross-examined and the authorities that have been submitted that the usage of 80-120 mg is not permissible in TEN. Furthermore, after prescribing a steroid, the effect of immunosuppression caused due to it, ought to have been foreseen. The effect of immunosuppression caused due to the use of steroids has affected the immunity of the patient and Dr. Mukherjee has failed to take note of the said consequences.

112. It is also important to highlight in this judgment that the manner in which Dr. Mukherjee attempted to shirk from his individual responsibility both in the criminal and civil cases made against him on the death of the claimant's wife is very much unbecoming of a doctor as renowned and revered as he is. The finding of this Court on this aspect recorded in **Malay Kumar Ganguly's** case reads as under:

182. It is also of some great significance that both in the criminal as also the civil cases, the doctors concerned took recourse to the blame game. Some of them tried to shirk their individual responsibilities. We may in this behalf notice the following:

(*i*) In response to the notice of Dr. Kunal, Dr. Mukherjee says that depomedrol had not been administered at all. When confronted with his prescription, he suggested that the reply was not prepared on his instructions, but on the instruction of AMRI.

(*ii*) Dr. Mukherjee, thus, sought to disown his prescription at the first instance. So far as his prescription dated 11-5-1998 is concerned, according to him, because he left Calcutta for attending an international conference, the prescription issued by him became non-operative and, thus, he sought to shift the blame on Dr. Halder.

(*iii*) Dr. Mukherjee and Dr. Halder have shifted the blame to Dr. Prasad and other doctors. Whereas Dr. Prasad countercharged the senior doctors including Respondent 2 stating:

Prof. B.N. Halder (Respondent 2) was so much attached with the day-today treatment of patient Anuradha that he never found any deficiency in the overall management at AMRI so much so that he had himself given a certificate that her condition was very much fit enough to travel to Mumbai....

113. Therefore, the negligence of Dr. Sukumar Mukherjee in treating the claimant's wife had been already established by this Court in **Malay Kumar Ganguly's** case. Since he is a senior doctor who was in charge of the treatment of the deceased, we are inclined to mention here that Dr. Mukherjee has shown utmost disrespect to his profession by being so casual in his approach in treating his patient. Moreover, on being charged with the liability, he attempted to shift the blame on other doctors. We, therefore, in the light of the facts and circumstances, direct him to pay a compensation of Rs. 10 lakhs to the claimant in lieu of his negligence and we sincerely hope that he upholds his integrity as a doctor in the future and not be casual about his patient's lives.

Liability of Dr. Baidyanath Haldar:

114. The case of the Appellant Dr. Baidyanath Haldar is that he is a senior consultant who was called by the attending physician to examine the patient on 12.5.1998. On examining the patient, he diagnosed the disease as TEN and prescribed medicines and necessary supportive therapies. It is his further case that he was not called either to see or examine the patient post 12.5.1998. The case against Dr. B. Haldar is his prescription of Steroid Prednisolone at the rate of 40 mg thrice a day which was excessive in view of the fact that the deceased was already under high dose of steroid. It is urged by the Appellant-Dr. Haldar that the deceased was under a high dose of steroid at the rate of 160 mg per day and it was the Appellant who tapered it down by prescribing a quick acting steroid Prednisolone at 120 mg per day. The Appellant-Dr. Haldar further urged that he was called only once to examine the deceased and he was not called thereafter. Hence, the National Commission wrongly equated him with Dr. Balram Prasad who was the attending physician. Though the claimant did not make any counter statement on apportioning liability to the Appellant-Dr. Haldar, it is pertinent for us to resort to the findings recorded by this Court in the case while remanding it back to the National Commission for determining the individual liability of the Appellant doctors involved in the treatment of the deceased. The findings of this Court in **Malay Kumar Ganguly's** case supra, are recorded as under:

161. After taking over the treatment of the patient and detecting TEN, Dr. Halder ought to have necessarily verified the previous prescription that has been given to the patient. On 12-5-1998 although "depomedrol" was stopped, Dr. Halder did not take any remedial measures against the excessive amount of "depomedrol" that was already stuck in the patient's body and added more fuel to the fire by prescribing a quick-acting steroid "prednisolone" at 40 mg three times daily, which is an excessive dose, considering the fact that a huge amount of "depomedrol" has been already accumulated in the body.

162. Life saving "supportive therapy" including IV fluids/electrolyte replacement, dressing of skin wounds and close monitoring of the infection is mandatory for proper care of TEN patients. Skin (wound) swap and blood tests also ought to be performed regularly to detect the degree of infection. Apart from using the steroids, aggressive supportive therapy that is considered to be rudimentary for TEN patients was not provided by Dr. Halder.

163. Further "vital signs" of a patient such as temperature, pulse, intake-output and blood pressure were not monitored. All these factors are considered to be the very basic necessary amenities to be provided to any patient, who is critically ill. The failure of Dr. Halder to ensure that these factors were monitored regularly is certainly an act of negligence. Occlusive dressings were carried out as a result of which the infection had been increased. Dr. Halder's prescription was against the Canadian Treatment Protocol reference to which we have already made hereinbefore. It is the duty of the doctors to prevent further spreading of infections. How that is to be done is the doctors concern. Hospitals or nursing homes where a patient is taken for better treatment should not be a place for getting infection.

115. Similar to the Appellant Dr. Sukumar Mukherjee, the Appellant Dr. Baidyanath Haldar is also a senior doctor of high repute. However, according to the findings of this Court in **Malay Kumar Ganguly's** case, he had conducted with utmost callousness in giving treatment to the claimant's wife which led to her unfortunate demise. The Appellant Dr. Baidyanath Haldar too, like Dr. Sukumar Mukherjee, made every attempt to shift the blame to the other doctors thereby

tainting the medical profession who undertook to serve. This Court thereby directs him to pay Rs. 10 lakhs as compensation to the claimant in lieu of his negligence in treating the wife of the claimant.

Liability of Dr Baidyanath Prasad:

116. It is the case of the Appellant-Dr. Balram Prasad that he was the junior-most attending physician at AMRI Hospital who saw the deceased for the first time on 11.5.1998. He was not called upon to prescribe medicines but was only required to continue and monitor the medicines to be administered to the deceased as prescribed by the specialists. The learned senior counsel on behalf of the Appellant-Dr. B. Prasad argues that the complaint made by the claimant had no averments against him but the one whereby it was stated by the claimant at paragraph 44 of the complaint which reads thus:

44. That Dr. Balram Prasad as attending physician at AMRI did do nothing better. He did not take any part in the treatment of the patient although he stood like a second fiddle to the main team headed by the opposite party No. 2 & 3. He never suggested even faintly that AMRI is not an ideal place for treatment of TEN patient; on the converse, he was full of praise for AMRI as an ideal place for the treatment of TEN patients knowing nothing how a TEN patient should be treated.

117. To prove his competence as a doctor, the Appellant-Dr. Balram Prasad further produced a portion of the complaint which reads thus:

33...that no skin biopsy for histopathology report was ever recommended by any (except Dr. B. Prasad), which is the basic starting point in such treatment, the same mistake was also committed by the opposite party No. 1

118. The Appellant Dr. Balram Prasad further emphasizes upon the cross-examination of the claimant to prove that he was not negligent while treating the patient. Question No. 26 of the cross examination reads as under:

Q. No. 26: Dr. Prasad says that Depomedrol dose according to the treatment sheet of the AMRI hospital, he made a specific suggestion that the dose should be limited to that particular day only. Is it correct?

Ans: It is all matter of record. Yeah, he said that one day in AMRI record.

119. Though the claimant did not make specific claim against the Appellant-Dr. Balram Prasad, Appellant Dr. B. Haldar claimed in his submission that he has been wrongly equated with Dr. Balram Prasad who was the attending physician and Dr. Anbani Roy Choudhury who was the physician in charge of the patient.

120. It is pertinent for us to note the shifting of blames on individual responsibility by the doctors specially the senior doctor as recorded by this Court which is a shameful act on the dignity of medical profession. The observations made by this Court in this regard in **Malay Kumar Ganguly's** case read as under:

182…*(iii)* Dr. Mukherjee and Dr. Halder have shifted the blame to Dr. Prasad and other doctors. Whereas Dr. Prasad countercharged the senior doctors including Respondent 2 stating:

Prof. B.N. Halder (Respondent 2) was so much attached with the day-today treatment of patient Anuradha that he never found any deficiency in the overall management at AMRI so much so that he had himself given a certificate that her condition was very much fit enough to travel to Mumbai....

In answer to a question as to whether Dr. Halder had given specific direction to him for control of day-today medicine to Anuradha, Dr. Prasad stated:

... this was done under the guidance of Dr. Sukumar Mukherjee (Respondent 1), Dr. B.N. Halder (Respondent 2) and Dr. Abani Roy Chowdhury (Respondent 3).

He furthermore stated that those three senior doctors primarily decided the treatment regimen for Anuradha at AMRI.

(*iv*) Dr. Kaushik Nandy had also stated that three senior doctors were in charge of Anuradha's treatment.

(*v*) AMRI states that the drugs had been administered and nursing care had been given as per the directions of the doctors.

(*vi*) Respondents 5 and 6, therefore, did not own any individual responsibility on themselves although they were independent physicians with postgraduate medical qualifications.

183. In *Errors, Medicine and the Law*, Cambridge University Press, p. 14, the authors, Alan Merry and Alexander McCall Smith, 2001 Edn., stated:

Many incidents involve a contribution from more than one person, and this case is an example. It illustrates the tendency to blame the last identifiable element in the claim of causation-the person holding the 'smoking gun'. A more comprehensive approach would identify the relative contributions of the other failures in the system, including failures in the conduct of other individuals....

121. Paragraph 183 of the judgment indicates that the Court abhorred the shifting of blames by the senior doctor on the attending physician the Appellant Dr. Balram Prasad even though the Court held him guilty of negligence. This Court found the Appellant-Dr. Balram Prasad guilty as under:

166. As regards, Dr. Balaram Prasad, Respondent 5, it may be noticed:

(*i*) Most doctors refrain from using steroids at the later stage of the disease due to the fear of sepsis, yet he added more steroids in the form of quick-acting "prednisolone" at 40 mg three times a day.

(*ii*) He stood as a second fiddle to the treatment and failed to apply his own mind.

(*iii*) No doctor has the right to use the drug beyond the maximum recommended dose.

122. We acknowledge the fact that Dr. Balram Prasad was a junior doctor who might have acted on the direction of the senior doctors who undertook the treatment of the claimant's wife in AMRI-Hospital. However, we cannot lose sight of the fact that the Appellant Dr. Balram Prasad was an independent medical practitioner with a post graduate degree. He still stood as a second fiddle and perpetuated the negligence in giving treatment to the claimant's wife. This Court in **Malay Kumar Ganguly's** case found him to be negligent in treating the claimant's wife in spite of being the attending physician of the Hospital. But since he is a junior doctor whose contribution to the negligence is far less than the senior doctors involved, therefore this Court directs him to pay a compensation of Rs. 5 lakhs to the claimant. We hope that this compensation acts as a reminder and deterrent to him against being casual and passive in treating his patients in his formative years of medical profession.

Liability of the claimant - Dr. Kunal Saha:

123. Finally, we arrive at determining the contribution of the claimant to the negligence of the Appellant- doctors and the AMRI Hospital in causing the death of his wife due to medical negligence. The National Commission has determined the compensation to be paid for medical negligence at Rs. 1,72,87,500/-. However, the National Commission was of the opinion that the interference of the claimant was also contributed to the death of his wife. The National Commission relied upon paragraph 123 of the judgment of this Court in **Malay Kumar Ganguly**'s case to arrive at the aforesaid conclusion. Paragraph 123 of the judgment reads thus:

123. To conclude, it will be pertinent to note that even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the Defendants. In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of Defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages.

Therefore, holding the claimant responsible for contributory negligence, the National Commission deducted 10% from the total compensation and an award of Rs. 1,55,58,750/- was given to the claimant.

124. The Appellants-doctors and the AMRI Hospital have raised the issue of contributory negligence all over again in the present case for determining the quantum of compensation to be deducted for the interference of the claimant in treatment of the deceased.

125. On the other hand, the claimant in his written statement has mentioned that this Court has rejected the assertion that the claimant interfered with the treatment of his wife. The Appellant-doctors raised the same issue in the revision petition which was appropriately dismissed. He relied upon the observations made by this Court which read as under:

117. Interference cannot be taken to be an excuse for abdicating one's responsibility especially when an interference could also have been in the nature of suggestion. Same comments were said

to have been made by Dr. Halder while making his statement under Section 313 of the Code of Criminal Procedure. They are admissible in evidence for the said purpose. Similarly, the statements made by Dr. Mukherjee and Dr. Halder in their written statements before the National Commission are not backed by any evidence on record. Even otherwise, keeping in view the specific defence raised by them individually, interference by Kunal, so far as they are concerned, would amount to hearsay evidence and not direct evidence.

122. The Respondents also sought to highlight on the number of antibiotics which are said to have been administered by Kunal to Anuradha while she was in AMRI contending that the said antibiotics were necessary. Kunal, however, submitted that the said antibiotics were prescribed by the doctors at AMRI and he did not write any prescription. We would, however, assume that the said antibiotics had been administered by Kunal on his own, but it now stands admitted that administration of such antibiotics was necessary.

123. To conclude, it will be pertinent to note that even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the Defendants. In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of Defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages.

(Emphasis laid by this Court)

A careful reading of the above paragraphs together from the decision of ***Malay Kumar Ganguly's*** case would go to show that the claimant though overanxious, did to the patient what was necessary as a part of the treatment. The National Commission erred in reading in isolation the statement of this Court that the claimant's action may have played some role for the purpose of damage.

126. We further intend to emphasize upon the observation of this Court in **Malay Kumar Ganguly**'s case which reads as under:

194. Further, the statement made by the High Court that the transfer certificate was forged by the patient party is absolutely erroneous, as Dr. Anil Kumar Gupta deposed before the trial court that he saw the transfer certificate at AMRI's office and the words "for better treatment" were written by Dr. Balaram Prasad in his presence and these words were written by Dr. Prasad, who told it would be easier for them to transport the patient. In a case of this nature, Kunal would have expected sympathy and not a spate of irresponsible accusations from the High Court.

In the abovementioned paragraph, this Court clearly deterred the High Court from making irresponsible accusations against the claimant who has suffered not only due to the loss of his wife but also because his long drawn battle for justice. Unfortunately, the National Commission made the same mistake.

127. We, therefore, conclude that the National Commission erred in holding that the claimant had contributed to the negligence of the Appellant-doctors and the Hospital which resulted in the death of his wife when this Court clearly absolved the claimant of such liability and remanded the matter

back to the National Commission only for the purpose of determining the quantum of compensation. Hence, we set aside the finding of the National Commission and re-emphasize the finding of this Court that the claimant did not contribute to the negligence of the Appellants-doctors and AMRI Hospital which resulted in the death of his wife.

Answer to point No. 8

128. This Court, while remanding the matter back to the National Commission, has categorically stated that the pecuniary and non-pecuniary losses sustained by the claimant and future losses of him up to the date of trial must be considered for the quantum of compensation. That has not been done in the instant case by the National Commission. Therefore, the claimant is entitled for enhancement of compensation on the aforesaid heads as he has incurred huge amount of expenses in the court of more than 15 years long trial in the instant case. The total claim, original as well as enhanced claim by way of filing affidavit with supporting documents, is Rs. 97,56,07,000/- that includes pecuniary damages of Rs. 34,56,07,000/- and non pecuniary damages of Rs. 31,50,00,000/-, special damages of US $ 4,000,000 for loss of job/house in Ohio and punitive damages of US $ 1,000,000. The updated break-up of the total claim has been perused and the same has not been considered by the National Commission keeping in view the claim and legal evidence and observations made and directions issued by this Court in **Malay Kumar Ganguly's** case to determine just and reasonable compensation. Therefore, we are of the view that the claimant is entitled for enhanced compensation that will be mentioned under different heads which will be noted in the appropriate paragraphs of this judgment.

129. The National Commission has also not taken into consideration the observations made by this Court while remanding the case for determining the quantum of compensation with regard to the status of treating doctors and the Hospital. Further, the National Commission has failed to take into consideration the observations made in the aforesaid judgment wherein in paragraphs 152 and 155 it is held that AMRI Hospital is one of the best Hospitals in Calcutta and the doctors were best doctors available. This aspect of the matter has been completely ignored by the National Commission in awarding just and reasonable compensation in favour of the claimant.

130. Since, it has already been determined by the Court that the compensation paid by the National Commission was inadequate and that it is required to be enhanced substantially given the facts and evidence on record, it will be prudent to take up the different heads of compensation separately to provide clarity to the reasoning as well.

Loss of income of the deceased:

131. The grievance of the claimant is that the National Commission has failed to take into consideration the legal and substantial evidence produced on record regarding the income of the deceased wife as she was a citizen of U.S.A. and permanently settled as a child psychologist and the claimant was AIDS researcher in the U.S.A. Therefore, the National Commission ought to have taken the above relevant factual aspect of the case into consideration regarding the status and standard of living of the deceased in U.S.A. to determine just compensation under the head of loss of dependency. The claimant has rightly relied upon the case involving death of a 47-48 years old U.S.A. citizen in a road accident in India, in **United India Insurance Co. Ltd. and Ors.** v.

Patricia Jean Mahajan and Ors. referred to supra where this Court has awarded compensation of Rs. 10.38 crores after holding that while awarding compensation in such cases the Court must consider the high status and standard of living of both the victim and dependents. However, the National Commission did not consider the substantial and legal evidence adduced on record by the claimant regarding the income that was being earned by the claimant's wife even though he has examined the U.S.A. based Prof. John F. Burke through video conferencing in May-June, 2011. He was also cross examined by the counsel of the Appellant- doctors and the Hospital and had scientifically calculated and testified under direct as well as cross examination as to how he came to calculate the prospective loss of income for a similarly situated person in U.S.A. as of the deceased. Prof. John F. Burke has categorically stated that direct loss of income of the deceased on account of her premature death, would amount to 5 million and 125 thousand dollars. The loss of income on account of premature death of the claimant's wife was calculated by the said witness who is an Economist in America and he has also deducted one-third for her personal expenses out of her annual income which is at par with the law laid down by this Court in number of cases including **Sarla Verma's** case (supra). In the cross examination of the said expert witness by the learned Counsel for the Appellant-doctors and the Hospital, he has also explained how he calculated the loss of income on the premise of the premature death of the claimant's wife. According to Prof. John F. Burke, the above calculation of 5 million and 125 thousand dollars for loss of income of the deceased was a very conservative forecast and other estimates the damages for her premature death could be 9 to 10 million dollars. It is the claim of the claimant that loss of income of multi-million dollars as direct loss for the wrongful death of the deceased may appear as a fabulous amount in the context of India but undoubtedly an average and legitimate claim in the context of the instant case has to be taken to award just compensation. He has placed reliance upon the judgment of this Court in **Indian Medical Association's** case (supra) wherein the Constitution Bench has stated that to deny the legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. We have considered the above important aspect of the case in the decision of this Court for enhancing the compensation in favour of the claimant.

132. As per the evidence on record, the deceased was earning $ 30,000 per annum at the time of her death. The Appellant-doctors and the Hospital could not produce any evidence to rebut the claims of the claimant regarding the qualification of her wife. Further, Prof. John F. Burke, an economic expert testified that the deceased could have earned much more in future given her present prospect. But relying upon the principle laid down by this Court, we cannot take the estimate of Prof. John F. Burke to be the income of the deceased. We also feel that $ 30,000 per annum earned by the deceased during the time of her death was not from a regular source of income and she would have earned lot more had it been a regular source of income, having regard to her qualification and the job for which she was entitled to. Therefore, while determining the income of the deceased, we rely on the evidence on record for the purpose of determining the just, fair and reasonable compensation in favour of the claimant. It would be just and proper for us to take her earning at $ 40,000 per annum on a regular job. We further rely upon the paragraphs in the cases of **Sarla Verma** and **Santosh Devi** referred to supra while answering the point No. 1, to hold that 30% should be added towards the future loss of income of the deceased. Also, based on the law laid down by this Court in catena of cases referred to supra, 1/3rd of the total income is required to be deducted under the head of personal expenditure of the deceased to arrive at the multiplicand.

133. The multiplier method to be applied has been convincingly argued by the learned Counsel for the Appellant-doctors and the Hospital against by the claimant which we concede with based on the reasoning mentioned while answering the point No. 4. Therefore, estimating the life expectancy of a healthy person in the present age as 70 years, we are inclined to award compensation accordingly by multiplying the total loss of income by 30.

134. Further, the claimant has rightly pointed that the value of Indian currency has gone down since the time when these legal proceedings have begun in this country. This argument of the claimant has been accepted by us while answering the point Nos. 2 and 3. Therefore, it will be prudent for us to hold the current value of Indian Rupee at a stable rate of Rs. 55/- per 1$.

Therefore, under the head of 'loss of income of the deceased' the claimant is entitled to an amount of Rs. 5,72,00,550/- which is calculated as [$ 40,000+(30/100x40,000$)-(1/3 x 52,000$) x 30 x Rs. 55/-] = Rs. 5,72,00,550/-.

Other Pecuniary Damages:

135. The pecuniary damages incurred by the claimant due to the loss of the deceased have already been granted while answering the point No. 5. Therefore, we are not inclined to repeat it again in this portion. However, the expenditure made by the claimant during the treatment of the deceased both in Kolkata and Mumbai Hospitals deserves to be duly compensated for awarding reasonable amount under this head as under:

(a) For the medical treatment in Kolkata and Mumbai:

136. An amount of Rs. 23 lakhs has been claimed by the claimant under this head. However, he has been able to produce the medical bill only to the extent of Rs. 2.5 lakhs which he had paid to the Breach Candy Hospital, Mumbai. Assuming that he might have incurred some more expenditure, the National Commission had quantified the expenses under this head to the tune of Rs. 5 lakhs. We still consider this amount as insufficient in the light of the fact that the deceased was treated at AMRI Hospital as an in-patient for about a week; we deem it just and proper to enhance the compensation under this head by Rs. 2 lakhs thereby awarding a total amount of Rs. 7 lakhs under this head.

(b) Travel and Hotel expenses at Bombay:

137. The claimant has sought for compensation to the tune of Rs. 7 lakhs for travel and expenses for 11 days he had to stay in Mumbai for the treatment of his wife. However, again he has failed to produce any bills to prove his expenditure. Since, his travel to Mumbai for the treatment of his wife is on record, the National Commission has awarded compensation of Re. 1 lakh under this head. We find it fit and proper to enhance the compensation by Rs. 50,000/- more considering that he had also incurred some unavoidable expenditure during his travel and stay in Mumbai at the time of treatment of the deceased. Therefore, under this head, we award a compensation of Rs. 1,50,000/-.

138. However, with respect to the claim made under the cost of chartered flight, a sum of Rs. 5,00,000/- is already awarded by the National Commission and we are not inclined to interfere with the same in absence of any evidence which alters the computation of the cost incurred in chartered flight. Hence, we uphold the amount awarded by the National Commission under the head of 'cost of chartered flight'.

Non pecuniary damages:

139. It is the case of the claimant that the National Commission has awarded paltry amount equivalent to $ 20,000 for the enormous and lifelong pain, suffering, loss of companionship and amenities that he had been put through due to the negligent act of the Appellant- doctors and the Hospital. The claimant had claimed Rs. 50 crores under this head before the National Commission without giving any break up figures for the amount. Before this Court however, the claimant has reduced the claim to Rs. 31,50,00,000/- under three different heads. He has claimed Rs. 13,50,00,000/- for loss of companionship and life amenities, Rs. 50,00,000/- for emotional distress, pain and suffering of the husband- the claimant and Rs. 4,50,00,000/- for pain and suffering endured by the deceased during her treatment.

140. In this regard, we are inclined to make an observation on the housewife services here. In the case of **Arun Kumar Agarwal** v. **National Insurance Co.** MANU/SC/0507/2010 : (2010) 9 SCC 218, this Court observed as follows:

22. We may now deal with the question formulated in the opening paragraph of this judgment. In *Kemp and Kemp on Quantum of Damages*, (Special Edn., 1986), the authors have identified various heads under which the husband can claim compensation on the death of his wife. These include loss of the wife's contribution to the household from her earnings, the additional expenses incurred or likely to be incurred by having the household run by a housekeeper or servant, instead of the wife, the expenses incurred in buying clothes for the children instead of having them made by the wife, and similarly having his own clothes mended or stitched elsewhere than by his wife, and the loss of that element of security provided to the husband where his employment was insecure or his health was bad and where the wife could go out and work for a living.

23. In England the courts used to award damages solely on the basis of pecuniary loss to family due to the demise of the wife. A departure from this rule came to be made in *Berry* v. *Humm and Co.* where the Plaintiff claimed damages for the death of his wife caused due to the negligence of the Defendant's servants. After taking cognizance of some precedents, the learned Judge observed: (KB p. 631)

...I can see no reason in principle why such pecuniary loss should be limited to the value of money lost, or the money value of things lost, as contributions of food or clothing, and why I should be bound to exclude the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of their being rendered freely in the future but for the death.

24. In *Regan* v. *Williamson* the Court considered the issue relating to quantum of compensation payable to the dependants of the woman who was killed in a road accident. The facts of that case

were that on the date of accident, the Plaintiff was aged 43 years and his children were aged 14 years, 11 years, 8 years and 3 years respectively. The deceased wife/mother was aged 37 years. The cost of a housekeeper to carry out services previously rendered by his wife was 22.5 pounds per week, the saving to him in not having to clothe and feed his wife was 10 pound per week, leaving a net loss of 12.50 pounds per week or 600 pounds a year. However, the Court took into account the value of other services previously rendered by the wife for which no substitute was available and accordingly increased the dependency to 20 pounds a week. The Court then applied a multiplier of 11 in reaching a total fatal accidents award of 12,298 pounds. In his judgment, Watkins, J. noted as under: (WLR pp. 307 H-308 A)

The weekend care of the Plaintiff and the boys remains a problem which has not been satisfactorily solved. The Plaintiff's relatives help him to a certain extent, especially on Saturday afternoons. But I formed the clear impression that the Plaintiff is often, at weekends, sorely tired in trying to be an effective substitute for the deceased. The problem could, to some extent, be cured by engaging another woman, possibly to do duty at the weekend, but finding such a person is no simple matter. I think the Plaintiff has not made extensive enquiries in this regard. Possibly the expense involved in getting more help is a factor which has deterred him. Whatever be the reason, the plain fact is that the deceased's services at the weekend have not been replaced. They are lost to the Plaintiff and to the boys.

He then proceeded to observe: (WLR p. 309 A-D)

I have been referred to a number of cases in which judges have felt compelled to look upon the task of assessing damages in cases involving the death of a wife and mother with strict disregard to those features of the life of a woman beyond her so-called services, that is to say, to keep house, to cook the food, to buy the clothes, to wash them and so forth. In more than one case, an attempt has been made to calculate the actual number of hours it would take a woman to perform such services and to compensate dependants upon that basis at so much an hour and so relegate the wife or mother, so it seems to me, to the position of a housekeeper.

(Emphasis laid by this Court)

While I think that the law inhibits me from, much as I should like to, going all the way along the path to which Lord Edmund-Davies pointed, I am, with due respect to the other judges to whom I have been referred, of the view that the word 'services' has been too narrowly construed. *It should, at least, include an acknowledgment that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and, possibly, with such things as their homework.* This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conventionally so regarded."

25. In *Mehmet* v. *Perry* the pecuniary value of a wife's services were assessed and granted under the following heads:

(a) Loss to the family of the wife's housekeeping services.

(b) Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.

(c) Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services.

26. In India the courts have **195** recognized that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

27. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. the husband and children. However, for the purpose of award of compensation to the dependants, some pecuniary estimate has to be made of the services of the housewife/mother. In that context, the term "services" is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.

30. In A. *Rajam* v. *M. Manikya Reddy*, M. Jagannadha Rao, J. (as he then was) advocated giving of a wider meaning to the word "services" in cases relating to award of compensation to the dependants of a deceased wife/mother. Some of the observations made in that judgment are extracted below:

The loss to the husband and children consequent upon the death of the housewife or mother has to be computed by estimating the loss of 'services' to the family, if there was reasonable prospect of such services being rendered freely in the future, but for the death. It must be remembered that any substitute to be so employed is not likely to be as economical as the housewife. Apart from the value of obtaining substituted services, the expense of giving accommodation or food to the substitute must also be computed. From this total must be deducted the expense the family would have otherwise been spending for the deceased housewife.

While estimating the 'services' of the housewife, a narrow meaning should not be given to the meaning of the word 'services' but it should be construed broadly and one has to take into account the loss of 'personal care and attention' by the deceased to her children, as a mother and to her husband, as a wife. The award is not diminished merely because some close relation like a grandmother is prepared to render voluntary services.

XXX

32. In *National Insurance Co. Ltd.* v. *Mahadevan* the learned Single Judge referred to the Second Schedule of the Act and observed that quantifying the pecuniary loss at the same rate or amount even after 13 years after the amendment, ignoring the escalation in the cost of living and the inflation, may not be justified.

33. In *Chandra Singh* v. *Gurmeet Singh*, *Krishna Gupta* v. *Madan Lal*, *Captan Singh* v. *Oriental Insurance Co. Ltd.* and *Amar Singh Thukral* v. *Sandeep Chhatwal*, the Single and Division Benches of the Delhi High Court declined to apply the judgment of this Court in Lata Wadhwa case for the purpose of award of compensation under the Act. In *Krishna Gupta* v. *Madan Lal* the Division Bench of the High Court observed as under: (DLT p. 834, para 24)

24...The decision of the Apex Court in *Lata Wadhwa* in our considered opinion, cannot be said to have any application in the instant case. The Motor Vehicles Act, 1939 was the complete code by itself. It not only provides for the right of a victim and/or his legal heirs to obtain compensation in case of bodily injury or death arising out of use of motor vehicle, but the Forum therefor has been provided, as also the mode and manner in which the compensation to be awarded therefor. In such a situation, it would be inappropriate to rely upon a decision of the Apex Court, which had been rendered in an absolutely different fact situation and in relation whereto there did not exist any statutory compensation. *Lata Wadhwa* was decided in a matter where a fire occurred during a celebration. The liability of Tata Iron & Steel Company Ltd. was not disputed. Compensation was awarded having regard to the peculiar feature obtaining in that case which has got nothing to do with the statutory compensation payable under the provisions of the Motor Vehicles Act.

(Emphasis laid by this Court)

141. Also, in a three judge Bench decision of this Court in the case of **Rajesh and Ors.** v. **Rajvir Singh and Ors.** MANU/SC/0480/2013 : 2013 (6) SCALE 563, this Court held as under:

20. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in **Santhosh Devi** (supra). We may therefore, revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs. 2,500/- to Rs. 10,000/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In **Sarla Verma's case** (supra), it was held that compensation for loss of consortium should be in the range of Rs. 5,000/- to Rs. 10,000/-, In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary

disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium.

(Emphasis laid by this Court)

142. Under the heading of loss due to pain and suffering and loss of amenities of the wife of the claimant, **Kemp and Kemp** write as under:

The award to a Plaintiff of damages under the head "pain and suffering" depends as Lord Scarman said in Lim Poh Choo v. Camden and Islington Area health Authority, "upon the claimant's personal awareness of pain, her capacity of suffering. Accordingly, no award is appropriate if and in so far as the claimant has not suffered and is not likely to suffer pain, and has not endured and is not likely to endure suffering, for example, because he was rendered immediately and permanently unconscious in the accident. By contrast, an award of damages in respect of loss of amenities is appropriate whenever there is in fact such a loss regardless of the claimant's awareness of the loss.

...

Further, it is written that,

Even though the claimant may die from his injuries shortly after the accident, the evidence may justify an award under this head. Shock should also be taken account of as an ingredient of pain and suffering and the claimant's particular circumstances may well be highly relevant to the extent of her suffering.

...

By considering the nature of amenities lost and the injury and pain in the particular case, the court must assess the effect upon the particular claimant. In deciding the appropriate award of damages, an important consideration show long will he be deprived of those amenities and how long the pain and suffering has been and will be endured. If it is for the rest of his life the court will need to take into account in assessing damages the claimant's age and his expectation in life.

That applies as much in the case of an unconscious Plaintiff as in the case of one sentient, at least as regards the loss of amenity.

The extract from **Malay Kumar Ganguly**'s case read as under:

3. Despite administration of the said injection twice daily, Anuradha's condition deteriorated rapidly from bad to worse over the next few days. Accordingly, she was admitted at Advanced

Medicare Research Institute (AMRI) in the morning of 11-5-1998 under Dr. Mukherjee's supervision. Anuradha was also examined by Dr. Baidyanath Halder, Respondent 2 herein. Dr. Halder found that she had been suffering from erythematic plus blisters. Her condition, however, continued to deteriorate further. Dr. Abani Roy Chowdhury, Consultant, Respondent 3 was also consulted on 12-5-1998.

4. On or about 17-5-1998 Anuradha was shifted to Breach Candy Hospital, Mumbai as her condition further deteriorated severely. She breathed her last on 28-5-1998....

143. The above extracted portion from the above judgment would show that the deceased had undergone the ordeal of pain for 18 long days before she breathed her last. In this course of period, she has suffered with immense pain and suffering and undergone mental agony because of the negligence of the Appellant-doctors and the Hospital which has been proved by the claimant and needs no reiteration.

144. Further, in the case of **Nizam Institute** (supra), the claimant who was also the surviving victim of a motor vehicle accident was awarded Rs. 10 lakhs for pain and suffering. Further, it was held in ***R.D. Hattangadi's*** case (supra) as follows:

14. In *Halsbury's Laws of England*, 4th Edn., Vol. 12 regarding non-pecuniary loss at page 446 it has been said:

Non-pecuniary loss: the pattern.- Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the Plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award.

145. Therefore, the claim of Rs. 4,50,00,000/- by the claimant is excessive since it goes against the amount awarded by this Court under this head in the earlier cases referred to supra. We acknowledge and empathise with the fact that the deceased had gone through immense pain, mental agony and suffering in course of her treatment which ultimately could not save her life, we are not inclined to award more than the conventional amount set by this Court on the basis of the economic status of the deceased. Therefore, a lumpsum amount of Rs. 10 lakhs is awarded to the claimant following the **Nizam Institute's** case (supra) and also applying the principles laid in Kemp and Kemp on the "Quantum of Damages", under the head of 'pain and suffering of the claimant's wife during the course of treatment'.

146. However, regarding claim of Rs. 50,00,000/- by the claimant under the head of 'Emotional distress, pain and suffering for the claimant' himself, we are not inclined to award any compensation since this claim bears no direct link with the negligence caused by the Appellant-doctors and the Hospital in treating the claimant's wife.

In summary, the details of compensation under different heads are presented hereunder:

Loss of income of the deceased	Rs.5,72,00,550/-
For Medical treatment in Kolkata and Mumbai	Rs.7,00,000/-
Travel and Hotel expenses at Mumbai	Rs.6,50,000/-
Loss of consortium	Rs.1,00,000/-
Pain and suffering	Rs.10,00,000/-
Cost of litigation	Rs.11,50,000/-

147. Therefore, a total amount of Rs. 6,08,00,550/- is the compensation awarded in this appeal to the claimant Dr. Kunal Saha by partly modifying the award granted by the National Commission under different heads with 6% interest per annum from the date of application till the date of payment.

148. Before parting with the judgment we are inclined to mention that the number of medical negligence cases against doctors, Hospitals and Nursing Homes in the consumer forum are increasing day by day. In the case of **Paschim Banga Khet Mazdoor Samity** v. **State of West Bengal** MANU/SC/0611/1996 : (1996) 4 SCC 37, this Court has already pronounced that right to health of a citizen is a fundamental right guaranteed under Article 21 of the Constitution of India. It was held in that case that all the government Hospitals, Nursing Homes and Poly-clinics are liable to provide treatment to the best of their capacity to all the patients.

149. The doctors, Hospitals, the Nursing Homes and other connected establishments are to be dealt with strictly if they are found to be negligent with the patients who come to them pawning all their money with the hope to live a better life with dignity. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right. We, therefore, hope and trust that this decision acts as a deterrent and a reminder to those doctors, Hospitals, the Nursing Homes and other connected establishments who do not take their responsibility seriously.

150. The central and the state governments may consider enacting laws wherever there is absence of one for effective functioning of the private Hospitals and Nursing Homes. Since the conduct of doctors is already regulated by the Medical Council of India, we hope and trust for impartial and strict scrutiny from the body. Finally, we hope and believe that the institutions and individuals providing medical services to the public at large educate and update themselves about any new medical discipline and rare diseases so as to avoid tragedies such as the instant case where a valuable life could have been saved with a little more awareness and wisdom from the part of the doctors and the Hospital.

151. Accordingly, the Civil Appeal No. 2867/2012 filed by Dr. Balram Prasad, Civil Appeal No. 858/2012 filed by Dr. Sukumar Mukherjee and Civil Appeal No. 731/2012 filed by Dr. Baidyanath Haldar are partly allowed by modifying the judgment and order of the National Commission in so far as the amount fastened upon them to be paid to the claimant as mentioned below. Dr. Sukumar

Mukherjee and Dr. Baidyanath Haldar are liable to pay compensation to the tune of Rs. 10 lakhs each and Dr. Balram Prasad is held liable to pay compensation of Rs. 5 lakhs to the claimant. Since, the Appellant-doctors have paid compensation in excess of what they have been made liable to by this judgment, they are entitled for reimbursement from the Appellant-AMRI Hospital and it is directed to reimburse the same to the above doctors within eight weeks.

152. The Civil Appeal No. 692/2012 filed by the Appellant-AMRI Hospital is dismissed and it is liable to pay compensation as awarded in this judgment in favour of the claimant after deducting the amount fastened upon the doctors in this judgment with interest @ 6% per annum.

153. The Civil Appeal No. 2866/2012 filed by the claimant-Dr. Kunal Saha is also partly allowed and the finding on contributory negligence by the National Commission on the part of the claimant is set aside. The direction of the National Commission to deduct 10% of the awarded amount of compensation on account of contributory negligence is also set aside by enhancing the compensation from Rs. 1,34,66,000/- to Rs. 6,08,00,550/- with 6% interest per annum from the date of the complaint to the date of the payment to the claimant.

154. The AMRI Hospital is directed to comply with this judgment by sending demand draft of the compensation awarded in this appeal to the extent of liability imposed on it after deducting the amount, if any, already paid to the claimant, within eight weeks and submit the compliance report.

Back to Index

MANU/SC/0588/2017

Neutral Citation: 2017/INSC/1286

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 2480, 53-55, 2874 and 2922 of 2014

Decided On: 08.05.2017

Appellants: Excel Crop. Care Limited Vs. Respondent: Competition Commission of India and Ors.

Hon'ble Judges/Coram:

A.K. Sikri and N.V. Ramana, JJ.

Subject: MRTP/ Competition Laws

Relevant Section:

COMPETITION ACT, 2002 - Section 3; COMPETITION ACT, 2002 - Section 27

Case Category:

ORDINARY CIVIL MATTER - APPEALS U/S 53 T OF THE COMPETITION ACT, 2002

Case Note:

Anti-competitive agreement - Violation of provisions - Scope of power - Section 3 of Competition Act, 2002 - Whether dispute regarding violation of Section 3 of Act by Appellants could be gone into in respect of tender of March, 2009, as Section 3 was operationalised only by Notification dated 20th May, 2009?

Held, anti-competitive conduct of Appellants was not limited to 2009 tender alone. It had considered tender dated 3rd November, 2009 floated by U.P. State Warehousing Corporation, tender dated 13th July, 2010 of Central Warehousing Corporation, tender dated 15th July, 2010 of M.P. State Warehousing Corporation, and tender dated 14th February, 2011 of Punjab State Co-operative SS and Marketing Federation and found that, even against these tenders, Appellants had quoted identical prices. Keeping in view said pattern of quotation, COMPAT opined that, notwithstanding any objection of Appellants premised on retrospective application of Section 3, anti-competitive conduct of APT manufacturers, i.e. Appellants, continued right up to year 2011, much after Section 3 of Act had come into force. Therefore, even if, 2009 tender was to be completely ignored, provisions

of Act would nevertheless be attracted in instant case. Merely because purported agreement between Appellants was entered into and bids submitted before 20th May, 2009 are no yardstick to put an end to matter. No doubt, after agreement, first sting was inflicted on 8th May, 2009 when bids were submitted and there was no provision like Section 3 on that date. However, effect of arrangement continued even after 20th May, 2009, with more stings, as a result of which Appellants bagged contracts and fruits thereof reaped by Appellants, when Section 3 had come into force which frowns upon such kinds of agreements. Thus, enquiry into tender of March, 2009 by CCI is covered by Section 3 of Act as tender process, though initiated prior to date when Section 3 became operation, continued much beyond 20th May, 2009, the date on which the provisions of Section 3 of the Act were enforced. Bidding process did not come to an end on 8th May, 2009 as argued by Appellants. It continued even thereafter, when Appellants appeared before committee for negotiations, much beyond 20th May, 2009 date on which provisions of Section 3 of Act were enforced. Principle of retroactivity would definitely apply. No doubt, Clause (d) of Sub-section (3) of Section 3 of Act, uses both expressions 'bid rigging' and 'collusive bidding', but Explanation thereto refers to 'bid rigging' only. However, it cannot be said that, intention was to exclude 'collusive bidding'. Even if Explanation does contain expression 'collusive bidding' specifically, while interpreting Clause (d), it can be inferred that, 'collusive bidding' relates to process of bidding as well. Two expressions are to be interpreted using principle of noscitur a sociis, i.e. when two or more words which are susceptible to analogous meanings are coupled together, words can take colour from each other. CCI was well within its jurisdiction to hold an enquiry under Section 3 of Act in respect of tender of March, 2009.

Anti-competitive Agreement - Investigation - Whether CCI was barred from investigating the matter pertaining to the tender floated by FCI in March, 2011 because of reason that FCI in its complaint dated 4th February, 2011 given to CCI had not complained about this tender?

Held, CCI had entrusted task to DG after it received representation/complaint from FCI vide its communication dated 4th February, 2011. Section 26(1) is wide enough to cover the investigation by DG. Entire purpose of an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by persons complained against. For this purpose, no doubt, starting point of inquiry would be allegations contained in complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that, 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on competition, the DG would be well within his powers to include those as well in his report. Even when CCI forms prima facie opinion on receipt of a complaint which is recorded in order passed under Section 26(1) of Act and directs DG to conduct investigation, at said initial stage, it cannot foresee and predict whether any violation of Act would be found upon investigation and what would be nature of violation revealed through investigation. If investigation process is to be restricted in manner projected by Appellants, it would defeat very purpose of Act, which is to prevent practices having appreciable adverse effect on competition.

Anti-competitive agreement - Violation of provisions - Whether, on facts of case, conclusion

of CCI that, Appellants had entered into an agreement/arrangement and pursuant thereto indulged in collusive bidding by forming a cartel, resulting into contravention of Section 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act, is justified?

Held, it is not in dispute that in respect of 2009 tender of FCI, all three Appellants had quoted same price, i.e. ` 388 per kg. for the APT. Appellants have attempted to give their explanations and have contended that, it cannot be presumed that, it was result of any prior agreement or arrangement between them. Appellants had been quoting such identical rates much prior to and even after 20th May, 2009. Entire history of quoting identical price before coming into operation of Section 3 and which continued much after Section 3 of the Act was enforced has been highlighted. There cannot be coincidence to such an extent that almost on all occasions price quoted by three Appellants is identical, not even few paisa more or less from each other. That too, when cost structure, i.e. cost of production of this product, of three Appellants sharply varies with each other. Ingredients of Section 3 stand satisfied and CCI rightly held that, provisions of Section 3(3)(a), 3(3)(b) and 3(3)(d) have been contravened by Appellants. In 2009 tender, a specific quantity of 600 MT was prescribed. At that time, all three Appellants participated and did not object to the same. As against this in 2011 tender, tentative annual requirement of APT was stated to be 400 MT and not 75 MT per month. Condition referred to by Appellants was not for supply of 75 MT per month. It only stated that, in a given month, tenderer should have capacity to supply 75 MT. It was nowhere stated that, 75 MT will have to be supplied by successful tenderer every month. In any case, from conduct of three Appellants, it becomes manifest that, reason to boycott May, 2011 tender was not the purported onerous conditions, but it was a concerted action. Otherwise, if Appellants were genuinely interested in participating in the said tender and were aggrieved by aforesaid conditions, they could have taken up the matter with the FCI well in time. They, therefore, could request FCI to drop the same (in fact FCI dropped these conditions afterwards when matter was brought to their notice). However, no such effort was made. M/s. Excel Crop Care wrote letter only a day before, just to create the record which cannot be termed as a bona fide move on its part. UPL did not even make any such representation in writing. Likewise, M/s. Sandhya Organics Chemicals (P) Ltd. would not have liked itself to be rendered disqualified and silently swallowed this situation. After all, it would have liked to remain a supplier of APT to FCI having regard to the fact that the said product is consumed by handful of Government sector undertakings. Therefore, not making any sincere effort in this behalf by any of the Appellants clearly shows that they were in hand in glove in taking a decision not to bid against this tender. This conclusion gets strengthened by fact that, these are only four suppliers (including three Appellants) in market for this product. Reaction of not participating in said tender by four suppliers could have been perceived otherwise, had there been a number of manufacturers in market and four out of them abstaining. Abstention by hundred per cent (who are only four) makes things quite obvious. Events get quite apparent, when examined along with past history of quoting identical prices. Since collusion stands proved by conduct of Appellants in abstaining from bidding in respect of May, 2011 tender, requirement of Section 3(3)(d) of Act read with 'explanation' thereto stands satisfied, viz. concerted action based on an agreement/arrangement between Appellants, resulted in restricting or manipulating competition or process of bidding, since said act was collusive in nature.

Anti-competitive agreement - Penalty - Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of offending company?

Held, under Section 27(b) of Act, penalty of 10 per cent of turnover is prescribed as maximum penalty with no provision for minimum penalty. CCI had chosen to impose 9 per cent of average turnover keeping in view serious nature of breach on part of these Appellants. COMPAT has maintained rate of penalty i.e. 9 per cent of three years average turnover. However, it has not agreed with CCI that 'turnover' mentioned in Section 27 would be 'total turnover' of offending company. In its opinion, it has to be 'relevant turnover' i.e. turnover of product in question. Penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of Constitution. Doctrine of proportionality is aimed at bringing out 'proportional result or proportionality stricto sensu'. It is a result oriented test as it examines result of law, in fact the proportionality achieves balancing between two competing interests: harm caused to society by infringer which gives justification for penalising infringer on one hand and right of infringer in not suffering punishment which may be disproportionate to seriousness of Act. Purpose and objective behind Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of Act serves this purpose as it is aimed at achieving objective of punishing offender and acts as deterrent to others. Such apurpose can adequately be served by taking into consideration relevant turnover. It is in public interest as well as in interest of national economy that, industries thrive in this country leading to maximum production. Therefore, it cannot be said that, purpose of Act is to 'finish' those industries altogether by imposing those kinds of penalties which are beyond their means. It is also purpose of Act not to punish violator even in respect of which, there are no anti-competitive practices and provisions of Act are not attracted. There was no error in approach of order of COMPAT interpreting Section 27(b) of Act.

Prior History / High Court Status:

From the Judgment and Order dated 29.10.2013 of the Competition Appellate Tribunal in Appeal No. 79 of 2012 (MANU/TA/0028/2013)

Disposition:
Appeal Dismissed

JUDGMENT

A.K. Sikri, J.

1. All these Civil Appeals arise out of the common judgment and order dated October 29, 2013 passed by the Competition Appellate Tribunal (for short, 'COMPAT'). These proceedings have their origin in the letter dated February 04, 2011 written by the Food Corporation of India (for short, 'FCI') to the Competition Commission of India (for short, 'CCI') complaining of an anti-competitive agreement purportedly arrived at between M/s. Excel Crop Care Limited, M/s. United

Phosphorous Limited (for short, 'UPL'), M/s. Sandhya Organics Chemicals (P) Ltd. respectively (the Appellants in CA Nos. 2480, 2874 and 2922 of 2014 and hereinafter referred to as the 'Appellants') and Agrosynth Chemicals Limited, in relation to tenders issued by the FCI for Aluminium Phosphide Tablets (for short, 'APT') of 3 gms. between the years 2007 and 2009. The CCI entrusted the matter to the Director General (DG) for investigation, who submitted his report on October 14, 2011 giving his prima facie findings affirming the allegations of the FCI that the Appellants had entered into an anti-competitive agreement, which was violative of Section 3(3) of the Competition Act, 2002 (hereinafter referred to as the 'Act'). On receipt of this complaint, the CCI issued notices to the Appellants who filed their objections. After hearing the parties, the CCI passed the order dated April 23, 2012 whereby it concluded that the Appellants had entered into the anti-competitive agreement in a concerted manner thereby offending the provisions of Section 3 of the Act. As a consequence, it imposed penalty @ 9% on the average total turnover of these establishments for last three years. Appeals were filed by the Appellants before the COMPAT Under Section 53-B of the Act. In these appeals, the issue on merits has been decided against the Appellants by COMPAT in its judgment dated October 29, 2013. These appeals question the validity of the order of the COMPAT on the aforesaid aspect.

Now the facts in detail:

2. An Inquiry in this case was initiated by the CCI on the basis of letter/complaint dated February 04, 2011 written by the Chairman and Managing Director of the FCI to the CCI. It was alleged in this complaint that four manufacturers of APT had formed a cartel by entering into an anti-competitive agreement amongst themselves and on that basis they had been submitting their bids for last eight years by quoting identical rates in the tenders invited by the FCI for the purchase of APT. It was alleged that the requirement for APT was almost got doubled during the period 2007-2009 and was likely to rise further in view of the requirement of large quantity of these tablets by the FCI, Central Warehousing Corporation and other State agencies for preservation of food grains, which these agencies were storing in their godowns. The CCI assigned the complaint to the DG for investigation. The DG collected required information from the FCI and other Government agencies dealing in warehousing and storage of food grains and also from Central Insecticides Board and Registration Committee, Faridabad. Representatives of FCI were also examined. After collecting the aforesaid information, the DG submitted his report with the following findings:

(a) The main market of APT in India was that of the institutional sales and a majority of buyers were Government agencies. The number of private buyers was insignificant. APT is sold in the box of 3 gms. tablets, 12 gms. tablets, and a sachet of 10 gms. in powder. Out of this, 3 gms. tablets constitute 56% of the total sale. Sale of these 3 gms. tablets was restricted to the Government agencies and approved pest control operators, which could not be sold in the open market. These Government agencies were procuring APT tablets of ` 40 crores annually.

(b) There were only four manufacturers of APT, namely, M/s. Excel Crop Care Limited, M/s. UPL, M/s. Sandhya Organics Chemicals (P) Ltd. (which are the three Appellants herein) and Agrosynth Chemicals Limited.

(c) It was noted that the FCI had adopted the process of tender, which is normally a global tender. The concerned tender had two-bid system, that is first techno commercial and then the financial

bid. On the basis of the bids, the rate running contracts are executed with successful bidders. The DG found that there was also a Committee comprising of responsible officers for evaluation of technical and price bids. As per the practice, the lowest bidder is invited by the Committee for negotiations and after negotiations, the Committee submits the report giving its recommendations and the contracts are awarded and after that the payment for the purchased tablets is released by the concerned regional offices.

(d) It was found that right from the year 2002, up to the year 2009, all the four parties used to quote identical rates, excepting for the year 2007. In 2002, Rs. 245/- was the rate quoted by these four parties and in the year 2005 it was ` 310 (though the tender was scrapped in this year and the material was purchased from Central Ware Housing Corporation @ ` 290). In November 2005, though the tenders were invited, all the parties had abstained from quoting. In 2007, M/s. UPL had quoted the price which was much below the price of other competitors. In 2008, all the parties abstained from quoting, while in 2009 only the three Appellants, barring Agrosynth Chemicals Limited, participated and quoted uniform rate of ` 388, which was ultimately brought down to ` 386 after negotiations.

It was also found that the tender documents were usually submitted in-person and the rates were normally filled with hand.

(e) In respect of the tender floated in the year 2009 for procurement of fixed quantity of 600 MT with a provision of ± 10%, the three Appellants had quoted identical rates of ` 388. It was found that the tender documents were to be submitted by 2:00 p.m. on May 08, 2009 and bid was to be opened at 3:00 p.m. on the same day. For submitting the bids, representatives of the three Appellants made common entries in the Visitors' Register. In fact, one Shri S.K. Bose of M/s. Excel Crop Care Limited made these entries on behalf of the representatives of other competitors as well.

(f) By analysing the aforesaid bids carefully and taking into consideration the total number of 16 tenders, including tenders dated May 08, 2009, the DG recorded that:

(i) pricing pattern definitely showed the practice of quoting identical pricing by all the three Appellants or at some other times by two Appellants, including M/s. Agrosynth Chemicals Limited;

(ii) the explanation given by the Appellants was unconvincing. Though, the Appellants had stated that rise in price was mostly attributed to increase in price by China during the Beijing Olympics, but it was noticed that even during the period when the Phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the Appellants;

(iii) examination of the cost structure of each company reflected that there was nothing common between the Appellants as far as the said cost structure was concerned and, therefore, quoting of identical prices by all the Appellants was unnatural; and

(iv) joint boycotting by the Appellants, at times, showed their concerted action, which happened again in March 2011 when the FCI had issued e-tender, which was closed on July 25, 2011.

According to the DG, explanation given by the Appellants and M/s. Agrosynth Chemicals Limited for boycotting the said tender to the effect that tender conditions were very stringent, was an afterthought and did not inspire any confidence. As per the DG, even if the conditions were stringent, the Appellants could discuss the same with the FCI as there was sufficient time between March 2011 and July 25, 2011, but it was not done.

On the basis of the aforesaid findings, the DG framed an opinion that the Appellants had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act.

3. The CCI took up the report of the DG for consideration and for this purpose sent a copy thereof to all the four manufacturers inviting their objections, if any, thereupon. Since M/s. Agrosynth Chemicals Limited was ultimately exonerated and spared by the CCI, it may not be necessary to deal with the objections of the said party. The three Appellants contested the report on facts as well as in law. Identical legal submissions were made, which are pointed out, in capsulated form, as under:

(a) Since Sections 3 and 4 of the Act were activated and brought into force only with effect from May 20, 2009, tenders prior to this date could not be the subject matter of inquiry for ascertaining whether there was any violation of Section 3 of the Act or not. Qua March 2009 tender, it was contended that last date of submission of tender was May 08, 2009 and the bids were submitted by the Appellants on that date, i.e., before the enforcement of Section 3, which came into operation on May 20, 2009. No doubt, the tender was evaluated and awarded only after May 20, 2009, but insofar as role of the Appellants is concerned, that came to an end on the submission of the tender and, therefore, tender of March, 2009 could not be the subject matter of enquiry.

(b) Insofar as tender of 2011 is concerned, it was contended that inquiry in respect of boycotting the said tender by the Appellants was without jurisdiction inasmuch as the FCI in its complaint dated February 04, 2011 did not mention about the said tender.

(c) On merits, increase in the price over a period of time, particularly between years 2009 and 2011, was sought to be justified on the ground that the '*price of yellow phosphorous, which was to be procured from China, had increased*'. It was further submitted that merely because there was identity of prices quoted by the Appellants, it would not mean that there was any bid rigging or formation of cartel by the Appellants. Submission in this behalf was that the market forces brought the situation where the prices became so competitive and it had led to the aforesaid trend. According to them, as a practice, the Central Warehousing Corporation finalised the tender in the beginning of a particular year which used to be considered as the benchmark for other tenders for that year resulting in likelihood of identical pricing. As far as common entry having been made by Mr. S.K. Bose of M/s. Excel Crop Care Limited on May 08, 2009 on behalf of the representatives of the other competitors as well in the Visitors' Register is concerned, it was stated that since the representatives knew each other well and had entered the premises of FCI at the same time, Mr. Bose mentioned the names of others as well which was neither unnatural nor abnormal and no inference of cartel formation could be drawn therefrom. Boycotting of tender of May 2011 was tried to be justified on the ground that there were unreasonable conditions prescribed in the tender making it impossible to submit the bid, particularly, the condition of depositing ` 30 lakhs as

Earnest Money Deposit (EMD), whereas in the earlier tenders the EMD was only ` 10 lakhs and ` 8.25 lakhs. It was further submitted that, notwithstanding the same price quoted by the Appellants, each time the tender was evaluated by a Committee of Officers of the FCI and no such suspicion was raised by the Committee. On the contrary, this aspect was specifically gone into and the Committee was satisfied that quoting of identical price was not due to any cartelisation.

M/s. Sandhya Organics Chemicals (P) Ltd. raised an additional plea qua non-participation in the 2011 tender by submitting that it did not have the capacity to supply 75 MT per month, which was the requirement in the said tender and, therefore, it chose not to participate.

4. The CCI passed the order discussing all the aforesaid aspects in detail and rejecting each and every contention of the Appellants, and, thereby concluding that the Appellants had entered into an agreement or understanding, and indulged in anti-competitive activities while submitting their bids in response to the tenders issued by the FCI.

5. For indulging in anti-competitive practices in violation of the provisions of Section 3 of the Act, the CCI imposed penalties upon all the three Appellants at 9% of average 3 years' turnover of these Appellants Under Section 27(b) of the Act. Quantifying the same, penalty to the tune of ` 63.90 crores was imposed upon M/s. Excel Crop Care Limited, ` 1.57 crores upon M/s. Sandhya Organics Chemicals (P) Ltd., and UPL was fastened with the penalty of ` 252.44 crores.

6. The Appellants filed three separate appeals before the COMPAT. The legal and factual arguments remained the same before COMPAT as well. In addition, argument was raised on the quantum of penalty. The COMPAT has, vide common judgment dated October 29, 2013, rejected all the contentions, except qua penalty, of the Appellants. Insofar as imposition of penalty is concerned, COMPAT has held that though penalty @ 9% of three years' average turnover was not unreasonable, the penalty cannot be on the 'total turnover' of these establishments, and has to be restricted to 9% of the '*relevant turnover*', i.e. the turnover in respect of the quantum of supplies made qua the product for which cartel was formed and supplies made. In other words, it had to relate to the goods in question, namely, APT and turnover of other products manufactured and sold by the establishments, which were without blemish, could not be included for calculating the penalty.

7. As noted above, before us, three appeals are filed by these manufacturers/suppliers against the findings of the COMPAT holding that there was violation of Sections 3(3)(a), 3(3)(b) and 3(3)(d) of the Act on the part of the Appellants. On that basis, it is pleaded that those findings be declared as untenable and penalty imposed be set aside. On the other hand, the CCI has also preferred Civil Appeal Nos. 53-55 of 2014 against that part of the impugned order whereby penalty imposed upon these suppliers is restricted to '*relevant turnover*' instead of 'total turnover'. Since submissions before us remain substantially the same, we are not pointing out the reasons given by the COMPAT which weighed with it after taking the aforesaid course of action, inasmuch as, while discussing the submissions of the parties, we shall be referring to the reasons adopted by the COMPAT.

8. Having painted the canvas with seminal and essential facts, it becomes manifest that following issues arise for consideration in these appeals:

(i) Whether the dispute regarding violation of Section 3 of the Act by the Appellants could not be gone into in respect of tender of March, 2009, as Section 3 was operationalised only by notification dated 20th May, 2009?

(ii) Whether CCI was barred from investigating the matter pertaining to the tender floated by FCI in March, 2011 because of the reason that FCI in its complaint dated 4th February, 2011 given to the CCI had not complained about this tender?

(iii) Whether, on the facts of the case, conclusion of CCI that the Appellants had entered into an agreement/arrangement and pursuant thereto indulged in collusive bidding by forming a cartel, resulting into contravention of Section 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act, is justified?

(iv) Whether penalty Under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on "relevant turnover", i.e., relating to the product in question?

9. First two issues are in the nature of preliminary objections that were raised by the Appellants, which are jurisdictional issues as the attempt of the Appellants is to show that CCI was not even empowered to look into the merits of the case because of those objections. Therefore, in the first instance, we deal with these issues.

10. **Issue No. 1**

Re: Applicability of Section 3 of the Act in respect of Notice Inviting Tender (NIT) dated 28th March, 2009

Section 3 is the first provision in Chapter II of the Act. Chapter II is titled as "Prohibition of certain agreements, abuse of dominant position and Regulation of combinations". It starts by specifying those agreements which are prohibited under this Chapter and Section 3 enumerates such prohibitive agreements. It reads as under:

3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in Sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this Sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.-For the purposes of this Sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in Sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of Sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.-For the purposes of this Sub-section,-

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this Section shall restrict-

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

11. At this juncture, it is the applicability of this Section which is dealt with. Though, the Competition Act is of the year 2002 and was passed by the Legislature on 13th January, 2003, as per the provisions of Section 1(3), the Act was to come into force from the date to be notified by the Central Government in the Official Gazette. Notification was issued by the Central Government wherein 31st March, 2003 was specified as the appointed date. However, vide this notification, some of the provisions of the Act, and not all the provisions, were enforced. Many other provisions came into force vide notification dated 19th June, 2003 and thereafter by notification dated 20th December, 2007 some more provisions were notified. Insofar as Section 3 of the Act is concerned, this provision along with many other provisions came into force on 20th May, 2009 vide S.O. 1241(E) dated 15th May, 2009 on which date the said notification was published in the Gazette of India as well. Remaining provisions were notified by subsequent notifications. It is, thus, a unique example where the entire Act was not enforced by one single notification but different provisions of the Act were enforced in bits and pieces by issuing various notifications over a span of time.

12. NIT in question was issued by FCI on 28th March, 2009. Last date for submission of bids was 8th May, 2009. Few days thereafter, i.e., on 20th May, 2009, Section 3 of the Act was notified. It is on these facts, the argument constructed by the Appellants is that as on 8th May, 2009 when the Appellants had submitted their bids, Section 3 of the Act was not in operation and, therefore, tender of March, 2009 could not be the subject matter of inquiry by the CCI. According to the Appellants, if this is allowed, it would amount to introducing the provisions of Section 3 of the Act retrospectively though the provision was introduced only prospectively that is from the date of the notification.

13. The answer to the aforesaid argument given by Mr. Neeraj Kaul, learned Additional Solicitor General appearing for the CCI, was that the NIT in question did not come to an end with the submission of bid on May 08, 2009. He pointed out that this bid was opened only on June 01, 2009, on which date Section 3 of the Act had already been activated. Not only this, bidders, that is all the Appellants, were called for negotiations on June 17, 2009 and thereafter the award of work was given by placing requisite orders. He, thus, submitted that principle of retroactivity is to be applied as the process of finalisation of the tender was still on. For the applicability of doctrine of retroactivity, Mr. Kaul referred to Section 18 of the Act which casts duty upon the CCI to examine adverse effect on the competition and enumerated following factors for the applicability of this principle:

(e) Continuing effect of agreements/arrangement arrived at by the Appellants.

(f) Negotiations with the Appellants were held after the promulgation of Section 3 of the Act.

(g) From 2007 to 2011, the rates quoted by the Appellants/tenderers were identical and in order to find out whether there was cartelisation or not, studying of this entire trend became relevant. In this continuing arrangement of cartelisation, period of 2009 and even thereafter gets included.

(h) Even boycott of 2011 tender by all the Appellants depicted their common intention which was the result of arrangement/agreement between them.

14. It is not in dispute that against this tender of 2009, all the Appellants had offered price of ` 388, even though their cost of production differed. The COMPAT, in the impugned order, has held that merely because 8th May, 2009 was the last date for submitting the tender, that would not be the end of the matter as that is not the relevant date for the purpose of applicability of Section 3 when the tendering process continued, as the Appellants had participated in the said tender process on 1st June, 2009 when the price bids were opened and offered the negotiated price on 17th June, 2009. This would mean that process of bidding was still on which went well beyond the date of notifying provisions of Section 3 of the Act. Relevant discussion in this behalf of the COMPAT is as under:

15. ...In this behalf the CCI has also recorded a finding in paragraph 7.13 that 8.5.2009 is not the crucial date but even 1.6.2009 and 17.6.2009 are equally crucial. This discussion would mean that the illegality of collusive bidding or rigging the bidding which commenced on 8.5.2009 was continued thereafter on 1.6.2009 and 17.6.2009 also. The negotiation of prices with the lowest bidder, and in this case all the three Appellants were the lowest bidders, undoubtedly forms the

part of the process of bid rigging and cannot be seen separately from the process of bidding. For that matter the process of bidding cannot be restricted to only one date i.e. on 8.5.2009. We have seen in this behalf the investigation report by the D.G. as also the finding arrived at by the CCI which in our opinion is a correct finding. In this behalf it cannot be ignored that all the three Appellants were informed by identical letters by the FCI one of which is found in Appeal No. 80/2012 more particularly on pages 361-362. The letter is in the following terms:

Sub: Tender Enquiry No. Pur-15(4)/2008 dated 28.3.2009 for supply of 600 MTs ± 10% Al. Phosphide conforming to BIS Specification No. IS: 6438-1980 with up to date amendments, Technical Bid opened on 08.05.09; Price Bid opened on 01.06.2009 and negotiation held on 17.06.09. Gentlemen, Please refer to your offer letter No. UPLD:FCI:HQ:ALP:VKJ:09 dated 07.05.2009 and letter of negotiated offer dated 17.06.2009 against the above mentioned tender enquiry.

Your offer for supply [ALP] @ 386000/- per MT i.e. Rs. 386/- per 18 kg net... is hereby accepted for a quantity of 200 MT ± 10% strictly as per the terms and conditions as contained in the tender for including detailed NIT.

This letter thus clarifies and proves that all the three Appellants had given the offer at Rs. 386/- per kg. which was identical offer for all the three Appellants. It is thus clear that the anti-competitive agreement which commenced on 8.5.209 continued thereafter also and manifested itself in the post date, negotiations which was the direct fall out of the original identical offer and at which the offer was reduced by the identical amounts. Each of the Appellant had the option of reducing the offer by a different amount or not reducing the offer or not reducing the offer at all and instead the three Appellants chose to continue their anti-competitive agreement right up to that date.

17. The term "process for bidding" used in the explanation in Section 3(3) would thus cover every stage from notice inviting tender till the award of the contract and would also include all the intermediate stages such as pre-bid clarification and bid notifications also. Once this inference is reached on the basis of the interpretation of Section 3(3) explanation there would be no question of dearth of jurisdiction on the part of the CCI to firstly order the investigation into the matter and also to inquire itself into the complained illegality.'

15. The COMPAT has also noted that the anti-competitive conduct of the Appellants was not limited to the 2009 tender alone. It had considered tender dated November 03, 2009 floated by the U.P. State Warehousing Corporation, tender dated July 13, 2010 of the Central Warehousing Corporation, tender dated July 15, 2010 of the M.P. State Warehousing Corporation, and tender dated February 14, 2011 of the Punjab State Cooperative SS & Marketing Federation and found that even against these tenders the Appellants had quoted identical prices. Keeping in view the said pattern of quotation, the COMPAT opined that notwithstanding any objection of the Appellants premised on retrospective application of Section 3, the anti-competitive conduct of APT manufacturers, i.e. the Appellants, continued right up to the year 2011, much after Section 3 of the Act had come into force. Therefore, even if 2009 tender was to be completely ignored, the provisions of the Act would nevertheless be attracted in the instant case.

We are in complete agreement with the aforesaid view taken by the COMPAT. We are also of the firm view that provisions of Section 3 are applicable to 2009 tender as well.

16. Chapter II of the Act deals with three kinds of practices which are treated as anti-competitive and prohibited. These are:

(a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

(b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

(c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

17. In the instant case, we are concerned with the first type of practices, namely, anti-competitive agreements. The Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure 'level playing field' for all market players that helps markets to be competitive. It sets 'rules of the game' that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. How these benefits accrue is explained in ASEAN Regional Guidelines on Competition Policy, in the following manner:

2.2 Main Objectives and Benefits of Competition Policy

2.2.1.1 Economic efficiency: Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.

2.2.1.2 Economic growth and development: Economic growth-the increase in the value of goods and services produced by an economy - is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic

growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.

2.2.1.3 Consumer Welfare: Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures.

18. The aforesaid guidelines also spell out few more benefits of such laws incorporating competition policies by highlighting the following advantages:

2.2.2 In addition, competition policy is also beneficial to developing countries. Due to worldwide deRegulation, privatisation and liberalisation of markets, developing countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.

2.2.3 Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.

In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring jobs creation by new efficient competitors.

2.2.4 Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth and regulatory reform eliminates domestic Regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anticompetitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximizing the benefits of foreign investment.

19. In fact, there is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that it has an important role to play in improving productivity and, therefore, the growth prospects of an economy. It is achieved in the following manner:

International Competition Network-Economic Growth and Productivity:

Competition contributes to increased productivity through:

Pressure on firms to control costs. In a competitive environment, firms must constantly strive to lower their production costs so that they can charge competitive prices, and they must also improve their goods and services so that they correspond to consumer demands.

Easy market entry and exit. Entry and exit of firms reallocates resources from less to more efficient firms. Overall productivity increases when an entrant is more efficient than the average incumbent and when an existing firm is less efficient than the average incumbent. Entry - and the threat of entry -incentivizes firms to continuously improve in order not to lose market share to or be forced out of the market by new entrants.

Encouraging innovation. Innovation acts as a strong driver of economic growth through the introduction of new or substantially improved products or services and the development of new and improved processes that lower the cost and increase the efficiency of production. Incentives to innovate are affected by the degree and type of competition in a market.

Pressure to Improve Infrastructure. Competition puts pressure on communities to keep local producers competitive by improving roads, bridges, docks, airports, and communications, as well as improving educational opportunities.

Benchmarking. Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals.

Productivity is increased through competition by putting pressure on firms to control costs as the producers strive to lower their production costs so that they can charge competitive prices. It also improves the quality of their goods and services so that they correspond to consumers' demands.

Competition law enforcement deals with anti-competitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation. Enforcement provides remedies to avoid situations that will lead to decreased competition in markets. Effective enforcement is important not only to sanction anti-competitive conduct but also to deter future anti-competitive practices.

20. When we recognise that competition has number of benefits, it clearly follows that cartels or anti-competitive agreements cause harm to consumers by fixing prices, limiting outputs or allocating markets. Effective enforcement against such practices has direct visible effects in terms of reduced prices in the market and this is also supported by various empirical studies.

21. Keeping in view the aforesaid objectives that need to be achieved, Indian Parliament enacted Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalisation and privatisation as it was found that the law prevailing at that time, namely, Monopolistic Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle the competition aspects of the Indian economy. The law enforcement agencies, which include CCI and COMPAT, have to ensure that these objectives are fulfilled by curbing anti-competitive agreements.

22. Once the aforesaid purpose sought to be achieved is kept in mind, and the same is applied to the facts of this case after finding that the anti-competitive conduct of the Appellants continued after coming into force of provisions of Section 3 of the Act as well, the argument predicated on retrospectivity pales into insignificance.

One has to keep in mind the aforesaid objective which the legislation in question attempts to sub-serve and the mischief which it seeks to remedy. As pointed out above, Section 18 of the Act casts an obligation on the CCI to 'eliminate' anti-competitive practices and promote competition, interests of the consumers and free trade. It was rightly pointed out by Mr. Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in ***Competition Commission of India*** v. ***Steel Authority of India Limited and Anr.*** MANU/SC/0690/2010 : (2010) 10 SCC 744 in the following manner:

6. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

xx xx xx

8. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body, namely, "the Competition Commission of India" (for short "the Commission") which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed Under Section 16(1) of the Act is a specialised investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

9. The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it Under Section 64, the Commission has framed Regulations called the Competition Commission of India (General) Regulations, 2009 (for short "the Regulations").

10. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

xx xx xx

125. We have already noticed that the principal objects of the Act, in terms of its Preamble and the Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalise the Indian economy to bring it on a par with the best of the economies in this era of globalisation would be jeopardised if time-bound Schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53-B(5) and 53-T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time-bound disposal of such matters.

23. Having regard to the aforesaid objective, we are of the opinion that merely because the purported agreement between the Appellants was entered into and bids submitted before May 20, 2009 are no yardstick to put an end to the matter. No doubt, after the agreement, first sting was inflicted on May 8, 2009 when the bids were submitted and there was no provision like Section 3 on that date. However, the effect of the arrangement continued even after May 20, 2009, with more stings, as a result of which the Appellants bagged the contracts and fruits thereof reaped by the Appellants when Section 3 had come into force which frowns upon such kinds of agreements.

24. We are, thus, of the opinion that inquiry into the tender of March 2009 by the CCI is covered by Section 3 of the Act inasmuch as the tender process, though initiated prior to the date when Section 3 became operation, continued much beyond May 20, 2009, the date on which the provisions of Section 3 of the Act were enforced. We agree with the COMPAT that the role of the Appellants did not come to an end with the submission of bid on May 08, 2009.

25. In this behalf, it is to be emphasised again that merely by submitting the tenders, role of the Appellants as tenderers had not come to an end. As already pointed out, the DG in its report noted that FCI resorted to global tender which had two-bid systems: techno-commercial bid and financial bid. Those who qualified in techno-commercial process, their financial bids were to be opened. The Appellants had submitted their bids on May 08, 2009, which was the last date for this purpose. Bids were to be submitted by 2.00 pm on that day and were to be opened at 3.00 pm on the same day. The committee of responsible officers for evaluating the technical price bids was constituted. As per the practice, the lowest bidder is invited by the committee for negotiations. And after negotiations, the committee submits the report giving its recommendations on the basis of which contract is awarded. If there was variation in the prices quoted by the Appellants in their bids, things would have been different. Then L-I could have been called for negotiations. However, all the three Appellants quoted identical rates of Rs. 388/-. Because of this reason all the Appellants were LI and had to be called for negotiations. Therefore, bidding process did not come to an end on May 08, 2009 as argued by the Appellants. It continued even thereafter when the Appellants appeared before the committee for negotiations, much beyond May 20, 2009 the date on which provisions of Section 3 of the Act were enforced.

26. In the aforesaid conspectus, principle of retroactivity would definitely apply. For this, we may usefully refer to the judgment of this Court in ***R. Rajagopal Reddy (dead) by L.Rs. and Ors.*** v. ***Padmini Chandrasekharan (dead) by L.Rs.*** MANU/SC/0061/1996 : (1995) 2 SCC 630 wherein it was held that merely because an agreement relating to benami transaction was entered into prior to the coming into force of the Benami Transactions (Prohibition) Act, 1988, it would not mean that the provisions of the said Act would not apply retroactively to such an agreement and render it void. Likewise, in ***Zile Singh*** v. ***State of Haryana and Ors.*** MANU/SC/0876/2004 : (2004) 8 SCC 1, this Court held that Rule against retrospectivity may not apply to a declaratory statute.

27. Following these judgments, the Bombay High Court has described this very statute, with which we are dealing, to be retroactive in operation in ***Kingfisher Airlines*** v. ***Competition Commission of India*** MANU/MH/1167/2010 : (2010) 4 Comp. LJ 557 (Bom). Following discussion from that judgment needs to be reproduced:

8. Shri Seervai, the learned Senior Counsel, submits that the very wording of Section 3 of the Act would make it clear that the Act is prospective in nature. He submits that even a plain reading of the provisions would go to show that. He contends that the legislature in its wisdom has not added any words in the Section to say that it would affect the agreement already entered into. He submits that if it wanted to bring the agreement, prior to coming into force of the Act, into its sweep, it would have and could have said so in very many words....

xx xx xx

The Act nowhere declares the agreement already entered into as void. If the Section is read, it says that after coming into force of the Act, no person shall enter into an agreement in contravention of the provisions of the Act and if entered into, same shall be void. This, to our mind, at the most, would mean that the Act does not render the agreement entered into, prior to coming into force of the Act, void ab initio. Had the Act been retrospective in operation, it would render the agreement void ab initio. The agreement prior to coming into force of the new act was, therefore, certainly

valid, for it was not in breach of any law or affected any law then existing. The question here is whether this agreement, which was valid until coming into force of the Act, would continue to be so valid even after the operation of the law. The parties as on today certain propose to act upon that agreement. All acts done in pursuance of the agreement before the Act came into force would be valid and cannot be questioned. But if the parties want to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature, therefore, would, from that time, be opposed to the public policy. We would say that the Act could have been treated as operating retrospectively, had the Act rendered the agreement void ab initio and would render anything done pursuant to it as invalid. The Act does not say so. It is because the parties still want to act upon the agreement even after coming into force of the Act that difficulty arises. If the parties treat the agreement as still continuing and subsisting even after coming into force of the Act, which prohibits an agreement of such nature, such an agreement cannot be said to be valid from the date of the coming into force of the Act. If the law cannot be applied to the existing agreement, the very purpose of the implementation of the public policy would be defeated. Any and every person may set up an agreement said to be entered into prior to the coming into force of the Act and then claim immunity from the application of the Act. Such thing would be absurd, illogical and illegal. The moment the Act comes into force, it brings into its sweep all existing agreements. This can be explained further by quoting the following example:

A and B enter into agreement of sale of land on 2/1/2008. It is agreed between them that sale-deed would be executed on or before 2/1/2009. Meanwhile, i.e. on 10/8/2008, the Government decides to impose a ban on transfer of the land and declares that any such transfer, if effected, shall be void. The question is, could the parties say that since their agreement being prior to Government putting a ban on transfer, their case is not covered by the ban? The answer has to be in the negative, as on the day the contract is sought to be completed, it is prohibited.

Similar would be the result in the instant case.

28. We approve the aforesaid view taken by the Bombay High Court. It may be added that had the anti-competitive agreement between the Appellants been executed and completed in its entirety prior to May 20, 2009, i.e. nothing further was left to be done and all actions as contemplated by the agreement had already been accomplished, it could perhaps be argued that the Act was not applicable to such an agreement or actions taken pursuant to the agreement. However, that is not the factual position in the instant case as the purported arrangement entered into by the Appellants continued to be acted upon even after May 20, 2009.

29. The COMPAT has referred to the explanation to Section 3(3)(d) also while arriving at the conclusion that May 08, 2009 cannot be the determinative date on which the bid was submitted, as 'manipulating the process of bidding' is also covered by virtue of the said explanation and this process of bidding continued even after May 20, 2009.

30. Learned Counsel for the Appellants submitted that this explanation has no application as it referred only to 'bid rigging' which is different from '*collusive bidding*'. In an attempt to distinguish the two expressions, it was argued that although the terms 'bid rigging' or 'collusive bidding' may, in certain contexts, overlap or even may be referred to as '*synonyms*', in certain context they may

cover activities which are not identical. '*Bid rigging*' may cover larger and more varied activities than '*collusive bidding*'. It was submitted that in view of the specific exclusion of '*collusive bidding*' from the '*Explanation*', an activity which squarely falls within the scope of '*collusive bidding*' would not be covered by the '*Explanation*' and would be excluded from it. Submission is that since the allegation in the present case relating to identical pricing or identical reduction in price squarely falls within the term '*collusive pricing*', the '*Explanation*' has no relevance to the present case.

31. Mr. Neeraj Kishan Kaul, learned Additional Solicitor General, refuted the aforesaid submission with vehemence by urging that bid rigging and collusive bidding are not mutually exclusive and these are overlapping concepts. Illustratively, he referred to the findings of the CCI, as approved by the COMPAT, in the instant case itself to the effect that the Appellants herein had '*manipulated the process of bidding*' on the ground that bids were submitted on May 08, 2009 collusively, which was only the beginning of the anti-competitive agreement between the parties and this continued through the opening of the price bids on June 01, 2009 and thereafter negotiations on June 17, 2009 when all the parties reduced their bids by same figure of ` 2 to bring their bid down to ` 386 per kg. from ` 388 per kg. From this example, he submitted that on May 08, 2009 there was a collusive bidding but with concerted negotiations on June 17, 2009, in the continued process, it was rigging of the bid that was practiced by the Appellants.

We are inclined to agree with this pellucid submission of the learned Additional Solicitor General.

32. Richard Whish and David Bailey[1], in their book, have given illustrations of various forms of collusive bidding/bid rigging, which include:

(a) Level tendering/bidding (i.e. bidding at same price - as in the present case).

(b) Cover bidding/courtesy bidding.

(c) Bid rotation.

(d) Bid Allocation.

33. Even internationally, '*collusive bidding*' is not understood as being different from '*bid rigging*'. These two expressions have been used interchangeably in the following international commentaries/glossaries and websites of competition authorities:

(a) **UNCTAD Competition Glossary dated June 22, 2016**

Bid Rigging or Collusive Tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids. Essentially, it relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions.

(b) **OECD Glossary of Industrial Organisation Economics & Competition Law.**

Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts. There are two common forms of bid rigging. In the first, firms agree to submit common bids, thus eliminating price competition. In the second, firms agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts.

Since most (but not all) contracts open to bidding involve governments, it is they who are most often the target of bid rigging. Bid rigging is one of the most widely prosecuted forms of collusion.

Collusive bidding (tendering) - **See Bid Rigging**

[This shows collusive bidding and bid rigging are treated as one and the same]

(c) **OECD Guidelines for fighting bid rigging**

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process.

(d) **United States Office of the Inspector General, Investigations (Fraud Indicators Handbook)**

Collusive bidding, price fixing or bid rigging, are commonly used interchangeable terms which describe many forms of an illegal anti-competitive activity. The common thread throughout all these activities is that they involve any agreements or informal arrangements among independent competitors, which limit competition. Agreements among competitors which violate the law include but are not limited to:

(1) Agreements to adhere to published price lists.

(2) Agreements to raise prices by a specified increment.

(3) Agreements to establish, adhere to, or eliminate discounts.

(4) Agreements not to advertise prices.

(5) Agreements to maintain specified price differentials based on quantity, type or size of product.

(e) **Australian Competition & Consumer Commission**

Bid rigging, also referred to as collusive tendering, occurs when two or more competitors agree they will not compete genuinely with each other for tenders, allowing one of the cartel members to 'win' the tender. Participants in a bid rigging cartel may take turns to be the 'winner' by agreeing about the way they submit tenders, including some competitors agreeing not to tender.

34. As the Leigman of the law, it is our task, nay a duty, to give proper meaning and effect to the aforesaid 'Explanation': it can easily be discussed that the Legislature had in mind that the two expressions are inter-changeably used. It is also necessary to keep in mind the purport behind Section 3 and the objective it seeks to achieve. Sub-section (1) of Section 3 is couched in the negative terms which mandates that no enterprise or association of enterprises or person or association of persons shall enter into any agreement, when such agreement is in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services and it causes or is likely to cause an appreciable adverse effect on competition within India. It can be discerned that first part relates to the parties which are prohibited from entering into such an agreement and embraces within it persons as well as enterprises thereby signifying its very wide coverage. This becomes manifest from the reading of the definition of "enterprise" in Section 2(h) and that of '*person*' in Section 2(1) of the Act. Second part relates to the subject matter of the agreement. Again it is very wide in its ambit and scope as it covers production, supply, distribution, storage, acquisition or control of goods or provision of services. Third part pertains to the effect of such an agreement, namely, '*appreciable adverse effect on competition*', and if this is the effect, purpose behind this provision is not to allow that. Obvious purpose is to thwart any such agreements which are anti-competitive in nature and this salubrious provision aims at ensuring healthy competition. Sub-section (2) of Section 3 specifically makes such agreements as void. Sub-section (3) mentions certain kinds of agreements which would be treated as *ipso facto* causing appreciable adverse effect on competition. It is in this backdrop and context that 'Explanation' beneath Sub-section (3), which uses the expression '*bid rigging*', has to be understood and given an appropriate meaning. It could never be the intention of the Legislature to exclude '*collusive bidding*' by construing the expression '*bid rigging*' narrowly. No doubt, Clause (d) of Sub-section (3) of Section 3 uses both the expressions '*bid rigging*' and '*collusive bidding*', but the Explanation thereto refers to '*bid rigging*' only. However, it cannot be said that the intention was to exclude '*collusive bidding*'. Even if the Explanation does contain the expression '*collusive bidding*' specifically, while interpreting Clause (d), it can be inferred that '*collusive bidding*' relates to the process of bidding as well. Keeping in mind the principle of purposive interpretation, we are inclined to give this meaning to '*collusive bidding*'. It is more so when the expressions '*bid rigging*' and '*collusive bidding*' would be overlapping, under certain circumstances which was conceded by the learned Counsel for the Appellants as well.

We are, therefore, of the opinion that the two expressions are to be interpreted using the principle of noscitur a sociis, i.e. when two or more words which are susceptible to analogous meanings are coupled together, the words can take colour from each other {See - Leelabai Gajanan Pansare and Ors. v. Oriental Insurance Company Limited and Ors. MANU/SC/3535/2008 : (2008) 9 SCC 720, Thakorlal D. Vadgama v. State of Gujarat MANU/SC/0191/1973 : (1973) 2 SCC 413, and M.K. Ranganathan v. Government of Madras and Ors. MANU/SC/0007/1955 : (1955) 2 SCR 374}.

We, thus, answer Issue No. 1 in the negative by holding that the CCI was well within its jurisdiction to hold an enquiry Under Section 3 of the Act in respect of tender of March, 2009.

ISSUE No. 2

Re.: Jurisdiction of DG/CCI to investigate into the boycott of 2011 FCI's tender

35. The CCI had entrusted the task to DG after it received representation/complaint from the FCI vide its communication dated February 04, 2011. Argument of the Appellants is that since this communication did not mention about the 2011 tender of the FCI, which was in fact even floated after the aforesaid communication, there could not be any investigation in respect of this tender. It is more so when there was no specific direction in the CCI's order dated February 24, 2011 passed Under Section 26(1) of the Act and, therefore, the 2011 tender could not be the subject matter of inquiry when it was not referred to in the communication of the FCI or order of the CCI. The COMPAT has rejected this contention holding that Section 26(1) is wide enough to cover the investigation by the DG, with the following discussion:

28. As per the Sub-section (1) of Section 26, there can be no doubt that the DG has the power to investigate only on the basis of the order passed by the Commission Under Section 26(1). Our attention was also invited to Sub-section (3) of Section 26 under which the Director-General, on receipt of direction under Sub-section (1) is to submit a report of its findings within such period as may be specified by the Commission. The argument of the parties is that if on the relevant date when the Commission passed the order, even the tender notice was not floated, then there was no question of Direction General going into the investigation of that tender. It must be noted at this juncture that Under Section 18, the Commission has the duty to eliminate practices having adverse effect on competition and to promote and sustain competition. It is also required to protect the interests of the consumers. There can be no dispute about the proposition that the Director General on his own cannot act and unlike the Commission, the Director General has no suo-moto power to investigate. That is clear from the language of Section 41 also, 28 which suggests that when directed by the Commission, the Director General is to assist the Commission in investigating into any contravention of the provisions of the Act. Our attention was also invited to the Regulations and more particularly to Regulation 20, which pertains to the investigation by the Director General. Sub-Regulation (4) of Section 20 was pressed into service by all the learned Counsel, which is in the following term:

The report of the Director-General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation:

(proviso not necessary)

From this, the learned Counsel argued that the Director General could have seen into the tender floated on 08.05.2009 only, and no other tender as the information did not contain any allegation about the tender floated in 2011. Therefore, the investigation made into the tender floated in 2011 was outside the jurisdiction of the Director General. This argument was more particularly pressed into service, as the Director General as well as the Competition Commission of India have found that all the Appellants had entered into an agreement to boycott the tender floated in 2011 and thereby had rigged the bids.

29. We have absolutely no quarrel with the proposition that the Director General must investigate according to the directions given by the CCI Under Section 26(1). There is also no quarrel with the proposition that the Director General shall record his findings on each of the allegations made 29 in the information. However, it does not mean that if the information is made by the FCI on the

basis of tender notice dated 08.05.2009, the investigation shall be limited only to that tender. Everything would depend upon the language of the order passed by the CCI on the basis of information and the directions issued therein. If the language of the order of Section 26(1) is considered, it is broad enough. At this juncture, we must refer to the letter written by Chairman and Managing Director of FCI, providing information to the CCI. The language of the letter is clear enough to show that the complaint was not in respect of a particular event or a particular tender. It was generally complained that Appellants had engaged themselves in carteling. The learned Counsel Shri Virmani as well as Shri Balaji Subramanian are undoubtedly correct in putting forth the argument that this information did not pertain to a particular tender, but it was generally complained that the Appellants had engaged in the anticompetitive behaviour. When we consider the language of the order passed by the CCI Under Section 26(1) dated 23.04.2012 the things becomes all the more clear to us. The language of that order is clearly broad enough to hold, that the Director General was empowered and duty bound to look into all the facts till the investigation was completed. If in the course of investigation, it came to the light that the parties had boycotted the tender in 2011 with pre-concerted agreement, there was no question of the DG not going into it. We must view this on the background that when the information was led, the Commission had material only to form a prima facie view. The said prima-facie view could not restrict the Director General, if he was duty bound to carry out a comprehensive investigation in keeping with the direction by CCI. In fact the DG has also taken into 30 account the tenders by some other corporations floated in 2010 and 2011 and we have already held that the DG did nothing wrong in that. In our opinion, therefore, the argument fails and must be rejected.

We entirely agree with the aforesaid view taken by the COMPAT.

36. If the contention of the Appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed Under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the Appellants as well touching upon the jurisdiction of the DG.

ISSUE No. 3:

RE.: MERITS

37. It is not in dispute that in respect of 2009 tender of the FCI, all the three Appellants had quoted the same price, i.e. ` 388 per kg. for the APT. The Appellants have attempted to give their explanations and have contended that it cannot be presumed that it was the result of any prior agreement or arrangement between them. This aspect shall be taken note of and dealt with in detail later at the appropriate stage. Before that, it needs to be highlighted that it is not only 2009 FCI tender in respect of which DG found the violation. Pertinently, the investigation of DG revealed that the Appellants had been quoting such identical rates much prior to and even after May 20, 2009. No doubt, in relation to tenders prior to 2009, it cannot be said that there was any violation of law by the Appellants. However, prior practice definitely throws light on the formation of cartelisation by the Appellants, thereby making it easier to understand the events of 2009 tender. Therefore, to take a holistic view of the matter, it would be essential to point out that the DG in his report had tabulated this tendency of quoting identical rates by these parties in respect of various tenders issued by even other Government bodies before and after 2009. The statistics in this behalf, given in tabulated form by the DG, are reproduced below:

S.No.	Tendering Agency	Tender Opening Date	Rates quoted (Rs. Per kg.)			
			Excel	United	Sandhya	Agro
1.	U.P. State Warehousing Corp.	14/03/2007	225	225	-	-
2.	Punjab State Civil Supplies Corp.	28/04/2008	260	260	-	-
3.	Central Warehousing Corp.	06/08/2008	450	-	450	-
4.	U.P. State Warehousing Corp.	19/09/2008	449	449	-	-
5.	Punjab State Co-op SS & Mktg. Fed.	26/12/2008	419	419	-	-
6.	Central Warehousing Corp.	06/01/2009	414	414	-	-
7.	Punjab State Civil Supplies Corp.	27/02/2009	409	409	-	-
8.	Food Corporation of India	08/05/2009	388	388	388	-
9.	Punjab State Civil Supplies Corpn.	15/06/2009	399	-	-	399
10.	U.P. State Warehousing	03/11/2009	399	399	-	-
11.	Director, SS & Disposal, Haryana	01/12/2009	-	-	399	399
12.	Punjab State Civil Supplies Corp.	18/03/2010	419	-	-	410
13.	Central Warehousing Corp.	13/07/2010	421	421	421	-
14.	M.P. State Warehousing Corp.	15/07/2010	436	-	436	-
15.	Punjab State Co-op SS & Mktg. Fed.	14/02/2011	415	415	-	-
16.	Punjab State Civil Supplies Corp.	15/03/2011	-	415	-	415

38. The aforesaid table shows identical pricing by these parties even in respect of tenders floated by the U.P. State Warehousing Corporation and Punjab State Civil Supplies Corporation. It was repeated in respect of 2008 tender floated by the Central Warehousing Corporation. Tenders up to S. No. 7 above, no doubt, relate to the period which is earlier to coming into force of the provisions of Section 3. At S. No. 8 is the tender of the FCI of March, 2009, which is held to be covered on the principle of retroactivity, as already held above. However, insofar as tenders mentioned at S. Nos. 9 to 16 are concerned, they all pertain to the period after Section 3 became operational. These are clear cut examples of identical pricing by the three Appellants. No doubt, the Appellants cannot be penalised in respect of tenders mentioned at S. Nos. 1 to 7 as there was no provision like Section

3 at that time. However, such illustrations become important in finding out the mens rea of the Appellants, i.e. arriving at an agreement to enter into collusive bidding which continued with impunity right up to 2011. Further, this trend of quoting identical price in respect of so many tenders, not only of FCI but other Government bodies as well, is sufficient to negate all explanations given by the Appellants taking the pretext of coincidence or economic forces.

39. We may record here the submission of Mr. Krishnan Venugopal, learned senior Counsel appearing for M/s. Excel Crop Care Limited, that the APT pesticide is needed only by the FCI and the Central Warehousing Corporation or the Central and State Warehousing Corporations and it creates a monopoly situation where buyer is in a dominant position. There are only four suppliers who are given 'MFN' status, but since the supply is only to the aforesaid Government agencies, the supplier is entirely dependent upon these parties for supplies. It creates oligopoly market. It was argued that since dominant position is enjoyed by the buyer, it leads to parallel pricing and this conscious parallelism takes place leading to quoting the same price by the suppliers. The explanation, thus, given for quoting identical price was the aforesaid economic forces and not because of any agreement or arrangement between the parties. It was submitted that merely because same price was quoted by the Appellants in respect of the 2009 FCI tender, one could not jump to the conclusion that there was some 'agreement' as well between these parties, in the absence of any other evidence corroborating the said factum of quoting identical price. In respect of this submission, Mr. Venugopal had also referred few judgments.

40. The aforesaid argument is highly misconceived. A neat and pellucid reply of Mr. Kaul, which commands acceptance, is that argument of parallelism is not applicable in bid cases and it fits in the realm of market economy. It is for this reason the entire history of quoting identical price before coming into operation of Section 3 and which continued much after Section 3 of the Act was enforced has been highlighted. There cannot be coincidence to such an extent that almost on all occasions price quoted by the three Appellants is identical, not even few paisa more or less from each other. That too, when the cost structure, i.e. cost of production of this product, of the three Appellants sharply varies with each other. Following factors in this behalf need to be highlighted:

(a) there is a 10 years' history of quoting identical prices;

(b) there are only four suppliers of the product in the market out of which three are the Appellants;

(c) even when the cost of production is different, they have quoted identical price;

(d) even when the geographical location of the three suppliers is different, strange coincidence of identical pricing is found, that too repeatedly;

(e) profit margins would be different, still quotations are same; and

(f) to different parties in respect of different tenders, different rates are quoted. Still whatever price is quoted in respect of one particular tender, that is identical. It would be too much of a coincidence, difficult to believe.

Thus, onus was on the Appellants in view of Section 3 of the Act, and that too heavy onus, to justify the above trend, but they have failed to discharge this burden. We are, therefore, of the opinion that ingredients of Section 3 stand satisfied and the CCI rightly held that provisions of Section 3(3)(a), 3(3)(b) and 3(3)(d) have been contravened by the Appellants.

41. It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderee's list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

42. Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties. One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a central secretariat, which will then cost the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

43. We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr. Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by U.K. Court of Justice in Dyestuffs (1972) ECR 619

By its very nature, then, the concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants. *Although parallel behaviour may not itself if identified with a concerted practice,* it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers<mpara>

(Emphasis added)

At the same time, the Court also added that the existence of a concerted practice could be appraised correctly by keeping in mind the following test:

If the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the products in question.

44. It would be significant to note that in Dyestuffs' judgment, the Court rejected the argument predicated on Oligopolistic market structure, after finding that the market is not a pure oligopoly: rather it was one in which firms could realistically be expected to adopt their own pricing strategies, particularly, in view of the compartmentalisation of the markets along national boundaries. In the instant case, argument of oligopoly market was not even raised either before the CCI or COMPAT. Moreover, with the eloquent facts, mentioned above, staring at the Appellants, we do not agree with the arguments put forth by Mr. Venugopal.

45. At this juncture, we would advert to tender of May, 2011. It is not in dispute that all the three Appellants, as well as M/s. Agrosynth Chemicals Limited did not participate in the said tender. These are the four manufacturers in all. When this fact is not in dispute, the only question is as to whether it was a concerted action on the part of the Appellants herein. According to all the Appellants, their decision not to participate in the aforesaid bid was the onerous, unreasonable, arbitrary and unquestionable conditions that were put in the said tender. As these were not acceptable to them, they individually decided not to take part in the tender, which was a valid business decision and not result of pre-concerted agreement of the Appellants.

46. The conditions which are perceived as 'onerous' by these Appellants are the following:

2) Earnest money deposit was raised from ` 10 lakhs to ` 30 lakhs.

3. Supply required as per this standard was 75 MT per month which was too high a demand/requirement and it was difficult to effect supplies of this magnitude every month.

M/s. Sandhya Organics Chemicals (P) Ltd. additionally submitted that they had placed on record that their production capacity was much less and supplying 75 MT of APT every month was beyond their means. Therefore, they were unable to tender against the said NIT. Before the COMPAT, M/s. Excel Crop Care Limited attempted to project their bona fides by showing that they had even written letter dated May 26, 2011 to the FCI conveying their inability to take part in that tender.

47. The COMPAT, after discussing the matter, arrived at the conclusion that it was clearly an after-thought move, inasmuch as the tender was published on April 28, 2011 and the last date for submitting the price bids was May 27, 2011, but only a day before i.e. on May 26, 2011, such a letter was sent by M/s. Excel Crop Care Limited to the FCI. Insofar as M/s. UPL is concerned, it did not even bother to give any representation. Likewise, M/s. Sandhya Organics did not approach the FCI at all with the representation that the quantities to be supplied were huge and the tender conditions be suitably modified.

48. We feel that COMPAT has examined the matter in right perspective. After examining the record, one finds that important fundamental conditions were the same which used to be in the earlier tenders. In 2009 tender, a specific quantity of 600 MT was prescribed. At that time, all the three Appellants participated and did not object to the same. As against this in 2011 tender, the tentative annual requirement of APT was stated to be 400 MT and not 75 MT per month. The condition referred to by the Appellants was not for supply of 75 MT per month. It only stated that in a given month the tenderer should have capacity to supply 75 MT. It was nowhere stated that 75 MT will have to be supplied by the successful tenderer every month. In any case, from the conduct of the three Appellants, it becomes manifest that reason to boycott the May 2011 tender was not the purported onerous conditions, but it was a concerted action. Otherwise, if the Appellants were genuinely interested in participating in the said tender and were aggrieved by the aforesaid conditions, they could have taken up the matter with the FCI well in time. They, therefore, could request the FCI to drop the same (in fact FCI dropped these conditions afterwards when the matter was brought to their notice). However, no such effort was made. As pointed out above, M/s. Excel Crop Care wrote the letter only a day before, just to create the record which cannot be termed as a bona fide move on its part. UPL did not even make any such representation in writing. Likewise, M/s. Sandhya Organics Chemicals (P) Ltd. would not have liked itself to be rendered disqualified and silently swallowed this situation. After all, it would have liked to remain a supplier of APT to FCI having regard to the fact that the said product is consumed by handful of Government sector undertakings. Therefore, not making any sincere effort in this behalf by any of the Appellants clearly shows that they were in hand in glove in taking a decision not to bid against this tender. This conclusion gets strengthened by the fact that these are the only four suppliers (including three Appellants) in the market for this product. Reaction of not participating in the said tender by four suppliers could have been perceived otherwise, had there been a number of manufacturers in the market and four out of them abstaining. Abstention by hundred percent (who are only four) makes the things quite obvious. Events get quite apparent when examined along with past history of quoting identical prices, an aspect already commented above.

49. Since collusion stands proved by the aforesaid conduct of the Appellants in abstaining from the bidding in respect of May 2011 tender, requirement of Section 3(3)(d) of the Act read with 'explanation' thereto stands satisfied, viz., concerted action based on an agreement/arrangement between the Appellants, resulted in restricting or manipulating competition or process of bidding, since the said act was collusive in nature.

50. We, therefore, agree with the conclusions of the COMPAT on this aspect as well.

51. **Issue No. 4**

Re: Penalty

After giving its finding that there was a contravention of the provisions of Section 3 of the Act by the Appellants, the CCI imposed the following penalties on the three entities/Appellants:

Name of the firms	Average of three years turnover (in Crore)	Penalty at 9% of average turnover (in Crore)
Excel Crop Care Ltd.	710.09	63.90
United Phosphorus Ltd.	2804.95	252.44
Sandhya Organics Chemicals (P) Ltd.	57.4 Crore	1.57 Crore

52. Under Section 27(b) of the Act, penalty of 10% of the turnover is prescribed as the maximum penalty with no provision for minimum penalty. CCI had chosen to impose 9% of the average turnover keeping in view the serious nature of the breach on the part of these Appellants.

53. The COMPAT has maintained the rate of penalty i.e. 9% of the three years average turnover. However, it has not agreed with the CCI that 'turnover' mentioned in Section 27 would be 'total turnover' of the offending company. In its opinion it has to be 'relevant turnover' i.e. turnover of the product in question. Since, M/s. Excel Crop Care and UPL were multi-product companies, products other than APT could not have been included for the purpose of imposing the penalty. It, therefore, held that penalty of 9% would be limited to the product/service in question - in this case, the APT - which was the relevant product for the enquiry. The penalty, thus, stands substantially reduced in the cases of M/s. Excel Crop Care and UPL as can be seen from the following chart:

Name of the firms	Average of three years turnover (in Crore)	Average of three years relevant turnover (Rs. Crore)	Reduced Penalty at 9% of relevant turnover (Rs. Crore)
Excel Crop Care Ltd.	710.09	32.41 crore	2.92
United Phosphorus Ltd.	2804.95	77.14 crore	6.94

54. Insofar as M/s. Sandhya Organics Chemicals (P) Ltd. is concerned, the 'relevant turnover' and 'total turnover' is the same as this company produced only APT tablets. CCI had imposed penalty of ` 1.57 crores on the basis of their turnover of this product. However, in its case also, penalty is reduced on the ground that it is relatively a small enterprise. Moreover, in respect of May 2011 tender, it could not have taken part since its production capacity was only 25 MT a month. Though, the aforesaid plea was not accepted while discussing the merits of the case, the COMPAT deemed it proper to take this aspect into consideration when it came to imposition of penalty. On the aforesaid basis, COMPAT reduced the penalty to 1/10th of penalty awarded by CCI i.e. ` 15.70 lakhs.

55. The CCI is not happy with the aforesaid outcome whereby penalty imposed by it is sharply reduced by the COMPAT. Against this part of the impugned judgment, CCI is in appeal.

56. In the aforesaid backdrop, the moot question is as to whether penalty Under Section 27(b) of the Act has to be on 'total/entire turnover' of the company covering all the products or it is relatable to 'relevant turnover', viz., relating to the product in question in respect whereof provisions of the Act are contravened. Section 27 of the Act stipulates nature of the orders which the CCI can pass after enquiry into agreements or abuse of dominant position. This Section empowers CCI to pass various kinds of orders the nature whereof is spelt out in Clauses (a), (b), (d) and (g) (clauses (c) and (f) stand omitted). As per Clause (b), CCI is empowered to inflict monetary penalties, the upper limit whereof is 10% "of the average of turnover for the last three preceding financial years". Operative portion of Section 27 of the Act is reproduced below:

27. **Orders by Commission after inquiry into agreements or abuse of dominant position.** - Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any of the following orders, namely:

xxx xxx xxx

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

[provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher.]

57. Extensive as well as intensive argument of Mr. Kaul, learned Additional Solicitor General, was that in Section 27(b) of the Act, there is no reference to 'relevant turnover'. On the contrary, Clause (b) of Section 27 in clear terms, stipulates penalty on the 'turnover' i.e. average of the turnover for the last three preceding financial years and it plainly suggests that this 'turnover' has to be of the enterprise which had contravened the provisions of Section 3 or Section 4. He submitted that clear intention of the Legislature was to take into consideration entire turnover of the enterprise. Reading the word 'relevant' thereto would be doing violence to the plain language of the statute, by adding the word which is not there.

58. According to him, the expression 'turnover' is not limited or restricted in any manner and introduction of concept of 'relevant turnover' amounts to adding words to the statute. He premised his submission on well-settled principle of statutory interpretation that where the language of a statute is plain and clear, the Court ought not to add words to limit or alter the meaning of the statute and cited the following judgments in support: ***Prabhudas Damodar Kotecha and Ors.*** v. ***Manhabala Jeram Damodar and Anr.*** MANU/SC/0797/2013 : (2013) 15 SCC 358; ***Raghunath Rai Bareja and Anr.*** v. ***Punjab National Bank and Ors.*** MANU/SC/5456/2006 : (2007) 2 SCC 230; ***V.L.S. Finance Ltd.*** v. ***Union of India and Ors.*** MANU/SC/0495/2013 : (2013) 6 SCC 278; and ***Bharat Aluminium Company*** v. ***Kaiser Aluminium Technical Services Inc.*** MANU/SC/0722/2012 : (2012) 9 SCC 552.

59. Mr. Kaul also placed heavy reliance on the following discussion in the case of Steel Authority of India Ltd.[2] in the context of the Competition Act:

52. A statute is stated to be the edict of legislature. It expresses the will of legislature and the function of the court is to interpret the document according to the intent of those who made it. It is a settled Rule of construction of statute that the provisions should be interpreted by applying plain Rule of construction...

xx xx xx

56. Thus, the court can safely apply Rule of plain construction and legislative intent in light of the object sought to be achieved by the enactment. While interpreting the provisions of the Act, it is not necessary for the court to implant, or to exclude the words, or overemphasize language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication.

60. According to him, a plain reading of Section 27 as a whole, which includes Section 27(a) as well, also makes it clear that the target of the penalty is the 'person' or 'enterprise' that has acted in violation of the Act, and not the 'product' or the 'service' alone which is made the subject of the violation. As such, the expression 'turnover' must necessarily mean the turnover of the 'person' or the 'enterprise' which is party to the anti-competitive agreement or abuse of dominance.

61. Critiquing the approach of the COMPAT, he submitted that it has introduced the concept of '*relevant*' turnover in Section 27 despite the absence of the word 'relevant', failing to notice that wherever the Act wanted to introduce the concept of 'relevance' the word 'relevant' has, in fact, been used in the appropriate sections. In this regard, he referred to Sections 2(r), 2(s), 2(t), 4(2)(e), 6, 19(6), 19(7), etc. where the expression 'relevant' is specifically used. He also referred to the definition of 'turnover' as contained in Section 2(y) of the Act, which includes value of goods or services, and submitted that it is the aforesaid definition of 'turnover' which has to be applied wherever this expression occurs in the Act and it cannot be read to have different criteria for determining penalty and the thresholds applicable for Regulation of combinations. He also sought to highlight that where the expression is used in the same section, it should generally be given the same meaning, as held in Suresh Chand v. Gulam Chisti MANU/SC/0168/1990 : (1990) 1 SCC 593 and Raghubans Narain Singh v. Uttar Pradesh Government through Collector of Bijnor MANU/SC/0215/1966 : (1967) 1 SCR 489.

62. Taking this very argument further, he submitted that interpretation given by the COMPAT would render the proviso after Section 27 redundant, as the said proviso specifically provides for situations where more than one member of a group (each may be producing different products/services) is part of the anti-competitive conduct.

63. Mr. Kaul went to the extent of arguing that even if purposive interpretation is to be given to the provisions of Section 27(b) of the Act, main purpose which cannot be lost sight of and ignored is that it is a deterrent provision. The purpose behind such a provision is to give a message that the persons or enterprises should not indulge in such anti-competitive activities, as otherwise they will

be inflicted with heavy penalties. According to him, the kind of cartelisation formed by the Appellants in this case is a clear example of 'hardcore cartel' behaviour which is deprecated by even the OECD as such hardcore cartels benefit only the cartel members and are extremely injurious to the interest of all others, with extraordinary adverse affect on the market and the consumers. He further submitted that formation of cartels reduces social welfare and the COMPAT has ignored these factors as well while giving restricted interpretation to 'turnover' by making it product specific and not person/enterprise specific.

64. Advancing this very argument further, he even drew parallel with the laws in other jurisdictions by stating the comparative legal position in European Union, United Kingdom, Australia, etc. and submitted that it could be discerned from the law enacted in those jurisdictions that everywhere overall cap is of 10% of 'worldwide turnover' and is not restricted to 'relevant turnover'.

65. He further submitted that the aforesaid provision imposed a cap on the penalty by stipulating that it shall not be more than 10%. Thus, the CCI had the discretion to impose the penalty from 0% to 10% and this was sufficient safeguard to take care of the proportionality aspects of the penalty wherever penalty on total turnover is found to bring unreasonable results. In other words, in respect of multi-product companies where the turnover covering non-offending products, is quite high, the CCI can always impose much lesser rate of penalty so that the penalty does not sound to be excessive and unconscionable and remains proportionate to the nature of contravention. However, it is not permissible to tinker the language of a statute.

66. Adverting to the specific case of M/s. Sandhya Organics Chemicals (P) Ltd., submission of Mr. Kaul was that the reason given by COMPAT in reducing the penalty was self-contradictory inasmuch as contention of this Appellant that it did not bid in May 2011 tender of FCI was because of the reason that its production capacity was mere 25 MT per month was specifically rejected by the COMPAT, but this very rejected contention formed the basis of reducing the penalty. It was also submitted that in any case there was no justification in reducing the penalty to 1/10th of the penalty imposed by the CCI, i.e. from 9% to 0.9%, when the COMPAT itself observed that the nature of breach committed by the Appellants was very serious and going by this consideration, the COMPAT maintained the penalty @ 9% in the case of the other two Appellants.

67. Learned Counsel appearing for the three Appellants attempted to put an astute and sagacious answer to the aforesaid arguments of the Learned Additional Solicitor General. Justifying the approach of the COMPAT in this behalf, it was argued that even the plain language of Section 27(b) leads to the interpretation that is given by the COMPAT. They also stressed that this provision being a penal provision, has to be strictly construed. No wider meaning can be given to it. The learned Counsel quoted the illustration in cases where identical infringement is alleged in respect of several enterprises, some of which may be 'single product companies' and Ors. may be 'multi-product companies' (which was the position in the instant case itself), and submitted that there would be no justification for prescribing the maximum penalty based on the total turnover of the enterprise, as it would result in prescribing a higher maximum penalty for multi-product companies, as against the single product companies, thereby bringing very inequitable results. For identical infringement, there would be no justification for prescribing such differential maximum limits. Keeping this aspect into consideration, it is all the more reason for interpreting Section 27(b) on the basis of its plain language as the word 'total' was also not prefixed with 'relevant' by

the Legislature. Since it was a provision relating to penalty, which was to be imposed on 'turnover', the said 'turnover' was necessarily relatable to the offending product only and Legislature never intended to punish any person or enterprise even in respect of unblemished product. It was also emphasized that penalty Under Section 27(b) is to be levied for contravention of Section 3 in respect of any 'agreement' resulting in appreciable adverse effect on competition. Therefore, it would not relate to all the products of the company included in the total turnover of the enterprise. As such, when penalty is being imposed in respect of any infringing product, the turnover of that product would be relevant. The learned Counsel criticised the approach of the CCI in imposing penalties by taking the maximum penalty as the starting point of determination and then purporting to reduce it suitably, as totally incorrect approach. It was argued that the quantum of appropriate amount of penalty has to be first determined after taking into consideration the relevant factors. The relevance of the maximum penalty is only for the limited purpose to ensure that the quantum so determined, does not exceed the maximum penalty.

68. Learned Counsel for the Appellants also advocated for applying the doctrine of proportionality which has universal application and lays down that 'the broad principles that the punishment must be proportioned to the offence is or ought to be of universal application' as held in ***Arvind Mohan Sinha*** v. ***Amulya Kumar Biswas and Ors.*** MANU/SC/0099/1974 : (1974) 4 SCC 222 Attention of the Court was also drawn to another judgment of this Court in ***State of Haryana and Ors.*** v. ***Sant Lal and Anr.*** MANU/SC/0576/1993 : (1993) 4 SCC 380 where penalty for evasion of tax sought to be levied on the basis of 20% of the value of the tax was held to be ultra vires. Likewise, application of this doctrine of proportionality applied in ***Bhagat Ram*** v. ***State of Himachal Pradesh and Ors.*** MANU/SC/0322/1983 : (1983) 2 SCC 442 was emphasized by referring to the following passage therein:

16...It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution...

69. Countering the argument of the learned Additional Solicitor General predicated on the parallel drawn with the law in the other countries, it was submitted that in other jurisdictions specific guidelines were issued which formed the basis of exercising the discretion in an objective manner. In contra-distinction, no guidelines are prescribed under the Act in India and it was submitted that a perusal of the guidelines issued by the European Union as well as the Office of Fair Trading in the United Kingdom would show that for determining the appropriate quantum of penalty, the '*relevant turnover*', i.e. the turnover of the infringing product, is taken into consideration. This assumes great importance in cases where an enterprise is a multi-product company.

70. In addition to the aforesaid arguments, learned Counsel appearing for UPL submitted that since it was a multi-product company, its average of the total turnover of three years was ` 2804.95 crores. By imposing penalty of 9% on the total turnover, the CCI had levied penalty of ` 252.44 crores, which was highly disproportionate as even the total production and sale of APT tablets, for the three years, was much less than the aforesaid penalty. It was pointed out that the average total turnover of the APT tablets comes to ` 77.14 crores only, which is hardly 3% of the total turnover. On that basis it was argued that by taking total turnover for the purpose of penalty clearly amounted to disproportionate penalty as it was more than 300% of the total turnover of APT tablets. This,

according to the learned Counsel, itself provided full justification in the approach of the COMPAT by reading the concept of '*relevant turnover*' while interpreting Section 27(b) of the Act.

71. We have given our serious thought to this question of penalty with reference to '*turnover*' of the person or enterprise. At the outset, it may be mentioned that Section 2(y) which defines 'turnover' does not provide any clarity to the aforesaid issue. It only mentions that turnover includes value of goods or services. There is, thus, absence of certainty as to what precise meaning should be ascribed to the expression 'turnover'. Somewhat similar position appears in EU statute and in order to provide some clear directions, EU guidelines on the subject have been issued. These guidelines do refer to the concept of 'relevant turnover'. Grappling with the same very issue, the judgment of the Competition Appeal Court of South Africa in the case of ***Southern Pipeline Contractors Conrite Walls (Pty) Ltd.*** v. ***The Competition Commission***[3] provides the answer in the following manner:

51. The concept of 'turnover' is not defined in the Act and is only referred to in Section 59(2), being annual turnover.

There is thus some uncertainty as to the precise meaning of 'turnover'. However, Section 59(3) refers on more than one occasion to 'the contravention', in particular, in dealing with the nature, duration, gravity and extent 'of the contravention', the loss or damage suffered as a result of the 'contravention' the market circumstances in which 'the contravention' the market circumstances in which 'the contravention' took place and the level of profit derived from 'the contravention'. Thus there is a legislative link between the damage caused and the profits which accrue from the cartel activity. The inquiry, in terms of Section 59(20), appears to envisage that consideration be given to the benefits which accrue from the contravention: that is to amount to affected turnover. By using the baseline of affected turnover' the implications of the doctrine of proportionality that is between the nature of the offence and benefit derived therefrom, the interests of the consumer community and the legitimate interests of the offender can be taken more carefully into account and appropriately calibrated.

(Emphasis supplied)

72. Judgment in the case of Southern Pipeline Contractors Conrite Walls (Pty) Ltd. reveals that the Court therein was concerned with the provisions of Section 59 of the Competition Act, 1998 of South Africa which also provides for maximum penalty of 10% of the annual turnover. The Court held that the appropriate amount of penalty had to be determined keeping into consideration the damage caused and the profits which accrue from the cartel activity. The Appeal Court used the words 'affected turnover'. It determined the amount of penalty on the basis of these guidelines issued by the European Union (EU) and the Office of Fair Trade (OFT). In that case the concerned company Southern Pipeline Contractors was a multi-product company and the 'affected turnover' was comparatively small.

73. It is interesting to note that the parties on either side are resting their cases on the same principle of statutory interpretations. Pertinently, Section 27(b) of the Act while prescribing the penalty on the 'turnover', neither uses the prefix 'total' nor 'relevant'. It is in this context, taking aid of the

applicable and well-recognised principle of statutory interpretations we have to determine the issue.

74. In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. For arriving at this conclusion, we are influenced by the following reasons:

(a) Under Section 27(b) of the Act, penalty can be imposed under two contingencies, namely, where an agreement referred to in Section 3 is anti-competitive or where an enterprise which enjoys a dominant position misuses the said dominant position thereby contravening the provisions of Section 4. In case where the violation or contravention is of Section 3 of the Act it has to be pursuant to an 'agreement'. Such an agreement may relate to a particular product between persons or enterprises even when such persons or enterprises are having production in more than one product. There may be a situation, which is precisely in the instant case, that some of such enterprises may be multi-product companies and some may be single product in respect of which the agreement is arrived at. If the concept of total turnover is introduced it may bring out very inequitable results. This precisely happened in this case when CCI imposed the penalty of 9% on the total turnover which has already been demonstrated above.

(b) Interpretation which brings out such inequitable or absurd results has to be eschewed. This fundamental principle of interpretation has been repeatedly made use of to avoid inequitable outcomes. The Canadian Supreme Court in ***Ontario*** v. ***Canadian Pacific Ltd.*** MANU/SCCN/0013/1995 : (1995) 2 SCR 1031 wherein the expression 'use' occurring in Environment Protection Act was given restricted meaning. The principle that absurdity should be avoided was explained in the following manner:

The expression "for any use that can be made of the natural environment has an identifiable literal or "plain" meaning when viewed in the context of the EPA as a whole, particularly the other paragraphs of Section 13(1). When the terms of the other paragraphs are taken into account, it can be concluded that the literal meaning of the expression "for any use that can be made of the natural environment" is "any use that can conceivably be made of the natural environment by any person or other living creature". In ordinary circumstances, once the "plain meaning" of the words in a statue have been identified there is no need for further interpretation. Different considerations can apply, however, in cases where a statute would be unconstitutional if interpreted literally. This is one of those exception cases, in that a literal interpretation of Section 13(1)(a) would fail to meet the test for overbreadth established in Heywood. The state objective underlying Section 13(1)(a) EPA is, as Section 2 of the Act declares, "the protection and conservation of the natural environment". This legislative purpose, while broad, is not without limits. In particular, the legislative interest in safeguarding the environment for "uses" requires only that it be preserved for those "uses" that are normal and typical, or that are likely to become normal or typical in the future. Interpreted literally, Section 13(1)(a) would capture a wide range of activities that fall outside the scope of the legislative purpose underlying it, and would fail to meet Section 7 overbreadth scrutiny. There is, however, an alternative interpretation of Section 13(1)(a) that renders it constitutional. Section 13(1)(a) can be read as expressing the general intention of Section

13(1) as a whole, and paras. 13(1)(b) through (h) can be treated as setting out specific examples of "impairment(s) of the quality of the natural environment for any use that can be made of it". When viewed in this way, the restrictions place on the word "use" in paras. (b) through (h) can be seen as imported into (a) through a variant of the ejusdem generis principle. Interpreted in this manner, Section 13(1)(a) is no longer unconstitutionally overbroad, since the types of harms captured by paras. (b) through (h) fall squarely within the legislative intent underlying the section. In light of the presumption that the legislature intended to act in accordance with the constitution, it is appropriate to adopt this interpretation of Section 13(1)(a). Thus, the Sub-section should be understood as covering the situations captured by paras. 13(1)(b) through (h), and any analogous situations that might arise.

We would also like to quote the following observations from ***State of Jharkhand and Anr.*** v. ***Govind Singh*** MANU/SC/1133/2004 : (2005) 10 SCC 437:

20. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse deemed necessary. [See *CST* v. *Popular Trading C.*: MANU/SC/0243/2000 : (2000) 5 SCC 511 : AIR 2000 SC 1578]. The legislative casus omissus cannot be supplied by judicial interpretative process.

Likewise, following passages from the judgment of this Court in ***Commissioner of Income Tax, Bangalore*** v. ***J.H. Yadagiri*** MANU/SC/0126/1985 : (1985) 4 SCC 343 shed light of similar nature.

45. In the case of *K.P. Varghese* v. *ITO* [MANU/SC/0300/1981 : (1981) 4 SCC 173 : 1981 SCC (Tax) 293: (1981) 131 ITR 597] this Court emphasised that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided.

46. Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.

47. We have noted the object of Section 16(3) of the Act which has to be read in conjunction with Section 24(2) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole scheme of the Act which in this case is, to counteract the effect of the transfer of assets so far as computation of income of the Assessee is concerned then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that

these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. Furthermore, in the instant case we are dealing with an artificial liability created for counteracting the effect only of attempts by the Assessee to reduce tax liability by transfer. It has also been noted how for various purposes the business from which profit is included or loss is set off is treated in various situations as Assessee's income. The scheme of the Act as worked out has been noted before.

In ***Southern Motors v. State of Karnataka and Ors.*** MANU/SC/0051/2017 : AIR 2017 SC 476, the Court explained the task that is to be undertaken by a Court while interpreting such statutes:

33. The following excerpts from Tata Steel Ltd. (supra), being of formidable significance are also extracted as hereunder.

Xxx xxx xxx

25. In Oxford University Press v. Commissioner of Income Tax MANU/SC/0052/2001 : (2001) 3 SCC 359, Mohapatra, J. has opined that interpretation should serve the intent and purpose of the statutory provision. In that context, the learned Judge has referred to the authority in State of T.N. v. Kodaikanal Motor Union (P) Ltd. MANU/SC/0127/1986 : (1986) 3 SCC 91 wherein this Court after referring to K.P. Varghese v. ITO MANU/SC/0300/1981 : (1981) 4 SCC 173 and Luke v. IRC (1964) 54 ITR 692 has observed:

The courts must always seek to find out the intention of the legislature. Though the courts must find out the intention of the statute from the language used, but language more often than not is an imperfect instrument of expression of human thought. As Lord Denning said it would be idle to expect every statutory provision to be drafted with divine prescience and perfect clarity. As Judge learned Hand said, we must not make a fortress out of dictionary but remember that statutes must have some purpose or object, whose imaginative discovery is judicial craftsmanship. We need not always cling to literalness and should seek to endeavour to avoid an unjust or absurd result. We should not make a mockery of legislation. To make sense out of an unhappily worded provision, where the purpose is apparent to the judicial eye 'some' violence to language is permissible.

26. Sabharwal, J. (as His Lordship then was) has observed thus:

...It is well-recognised Rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. It was held that construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. It was said that the literalness in the interpretation of Section 52(2) must be eschewed and the court should try to arrive at an interpretation which avoids the absurdity and the mischief and makes the provision rational, sensible, unless of course, the hands of the court are tied and it cannot find any escape from the tyranny of literal interpretation. It is said that it is now well-settled Rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction. In such a case the court may read into the statutory provision a condition which,

though not expressed, is implicit in construing the basic assumption underlying the statutory provision....

34. As would be overwhelmingly pellucid from hereinabove, though words in a statute must, to start with, be extended their ordinary meanings, but if the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language so as to avoid such unintended mischief.

(iii) The principle of strict interpretation of a penal statute would support and supplement the aforesaid conclusion arrived at by us. In a recent Constitution Bench judgment in the case of ***Abhiram Singh and Ors.*** v. ***C.D. Commachen (dead) by L.Rs. and Ors.*** MANU/SC/0010/2017 : AIR 2017 SC 401, this Court scanned through the relevant case law on the subject and applied this principle even while construing "corrupt practice" in elections which is of a quasi criminal nature. We would like to reproduce following discussion from the said judgment:

98. Election petitions alleging corrupt practices have a quasi-criminal character. Where a statutory provision implicates penal consequences or consequences of a quasi-criminal character, a strict construction of the words used by the legislature must be adopted. The Rule of strict interpretation in regard to penal statutes was enunciated in a judgment of a Constitution Bench of this Court in **Tolaram Relumal** v. **State of Bombay** [MANU/SC/0057/1954 : (1951) 1 SCR 158 : AIR 1954 SC 496] where it was held as follows:

...It may be here observed that the provisions of Section 18(1) are penal in nature and it is a well settled Rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature. As pointed out by Lord Macmillan in *London and North Eastern Railway Co*. v. *Berriman*, "where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language.

This principle has been consistently applied by this Court while construing the ambit of the expression 'corrupt practices'. The Rule of strict interpretation has been adopted in **Amolakchand Chhazed** v. **Bhagwandas** MANU/SC/0086/1976 : (1977) 3 SCC 566. A Bench of three Judges of this Court held thus:

12....Election petitions alleging corrupt practices are proceedings of a quasi-criminal nature and the onus is on the person who challenges the election to prove the allegations beyond reasonable doubt.

(iv) In such a situation even if two interpretations are possible, one that leans in favour of infringer has to be adopted, on the principle of strict interpretation that needs to be given to such statutes.

(v) When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of '*relevant turnover*'.

(vi) Even the doctrine of 'proportionality' would suggest that the Court should lean in favour of '*relevant turnover*'. No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out 'proportional result or proportionality *stricto sensu*'. It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.

No doubt, the aim of the penal provision is also to ensure that it acts as deterrent for others. At the same time, such a position cannot be countenanced which would deviate from 'teaching a lesson' to the violators and lead to the 'death of the entity' itself. If we adopt the criteria of total turnover of a company by including within its sweep the other products manufactured by the company, which were in no way connected with anti-competitive activity, it would bring about shocking results not comprehended in a country governed by Rule of Law. Cases at hand itself amply demonstrate that the CCI's contention, if accepted, would bring about anomalous results. In the case of M/s. Excel Crop Care Limited, average of three years' turnover in respect of APT, in respect whereof anti-competitive agreement was entered into by the Appellants, was only 32.41 crores. However, as against this, the CCI imposed penalty of Rs. 63.90 crores by adopting the criteria of total turnover of the said company with the inclusion of turnover of the other products as well. Likewise, UPL was imposed penalty of 252.44 crores by the CCI as against average of the three years' turnover of APT of Rs. 77.14 crores. Thus, even when the matter is looked into from this angle, we arrive at a conclusion that it is the relevant turnover, i.e., turnover of the particular product which is to be taken into consideration and not total turnover of the violator.

(vii) The doctrine of 'purposive interpretation' may again lean in favour of 'relevant turnover' as the appropriate yardstick for imposition of penalties. It is for this reason the judgment of Competition Appeal Court of South Africa in the ***Southern Pipeline Contractors Conrite Walls***, as quoted above, becomes relevant in Indian context as well inasmuch as this Court has also repeatedly used same principle of interpretation. It needs to be repeated that there is a legislative

link between the damage caused and the profits which accrue from the cartel activity. There has to be a relationship between the nature of offence and the benefit derived therefrom and once this co-relation is kept in mind, while imposing the penalty, it is the affected turnover, i.e., 'relevant turnover' that becomes the yardstick for imposing such a penalty. In this hue, doctrine of 'purposive interpretation' as well as that of 'proportionality' overlaps.

In fact, some justifications have already appeared in this behalf while discussing the matter on the application of doctrine of proportionality. What needs to be repeated is only that the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others. Such a purpose can adequately be served by taking into consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. Therefore, it cannot be said that purpose of the Act is to 'finish' those industries altogether by imposing those kinds of penalties which are beyond their means. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted.

We may mention that Mr. Kaul, learned Additional Solicitor General had referred to the statutory regimes in various other countries in his endeavour to demonstrate that it is the concept of total turnover which was recognised in other jurisdictions as well. The attempt was to show that the principle of 'total turnover' was prevalent across the globe wherever such laws are enforced. On the contrary, the learned Counsel for the Appellants pointed out the provision contained in similar statutes of some countries where the concept of relevant turnover had been adopted. South Africa is one such example and, in fact, COMPAT has referred to the judgment of Southern African Competition Appeal Court in this behalf, i.e., ***Southern Pipeline Contractors Conrite Walls (Pty) Ltd.*** case. In such a scenario, it may not be necessary to deal with the statutory provisions contained in different countries. In view of interpretation that is given by us to the provision at hand, we would, however, like to comment that in some of the jurisdictions cited by Mr. Kaul, learned Additional Solicitor General, the guidelines are also framed which ensure that the penalty does not become disproportionate, for example, in the UK, the Office of Fair Trade (OFT) has 'guidelines as to the appropriate amount of penalty'. In contrast, there are no similar guidelines issued as far as India is concerned and in the absence thereof imposition of penalty, taking into consideration total turnover, may bring about disastrous results which happened in the instant case itself with the imposition of penalty by the CCI.

Thus, we do not find any error in the approach of the order of the COMPAT interpreting Section 27(b).

75. The upshot of the aforesaid discussion would be to dismiss the appeals of the Appellants as well as the appeals filed by the CCI. There shall, however, be no order as to costs.

N.V. Ramana, J.

76. I have had the privilege of going through the erudite and well considered judgment of my learned brother. In view of well considered judgment, in the usual course, it may not have

warranted another concurring judgment. But when the issue at hand is being grappled by jurisdictions across the globe, a concurring judgment cannot be treated as a repetitive exercise. Although I accept the conclusions reached by my learned brother, there was a need felt by me to pen down my own thoughts on a small aspect concerning imposition of penalty Under Section 27(b) of the Competition Act, 2002 [*hereafter* **'Act'** *for brevity*]. Though my opinion is only limited to the legal question involved in this case, a brief reference to facts might be necessary.

77. On a complaint being instituted by the Food Corporation of India [*hereinafter* **'FCI'** *for brevity*], Director General for Investigation (Competition Commission of India) **(DG)** investigated into the matter and found that four companies namely Excel Corporation Care Ltd. [*hereinafter* **'ECCL'** *for brevity*], United Phosphorus Ltd. [*hereinafter* **'UPL'** *for brevity*], Sandhya Organics Chemicals (Pvt.) Ltd. [*hereinafter* **'SOCL'** *for brevity*] (three Appellants herein) and Agrosynth Chemicals Ltd. [*hereinafter* **'ACL'** *for brevity*] were involved in collusive bidding in relation to tenders issued by FCI for Aluminium Phosphide Tablets [h*ereinafter* **'APT'** *for brevity*]. Following chart would indicate the pattern of bidding undertaken by the aforesaid companies-

TABLE 1.1 - *pattern of bidding*

YEAR	NAME OF TENDERS	RATES QUOTED	TENDERS AWARDED	RRC RATES	REMARKS
2002	UPL		UPL	Rs. 245/- per Kg. inclusive of all charges and taxes F.O.R destination against issue of 'C' Form.	FCI had to award Rate Running Contract to all tenders as they quoted to same rates
	ECCL		ECCL		
	SOCL		SOCL		
	ACL		ACL		
Mar-05	UPL	Rs. 310 per Kg. was quoted by all the parties	Tender was scrapped	Tender was scrapped	Tenders had quoted same rates and upon negotiations all the parties reduced to the rate to Rs. 290/-
	ECCL				
	SOCL				
	ACL				
Nov-05	UPL	No party submitted tender	Tender was scrapped	Tender was scrapped	All parties abstained from the process of tendering
	ECCL				
	SOCL				
	ACL				
2007	UPL	Rs. 200/- per Kg.	UPL	Rs. 200/- per kg.	The period of RRC was extended for another year as per tender terms but the party failed to supply during the extended period
	ECCL	Rs. 235/- per Kg.			
	SOCL	Rs. 236/- per Kg.			
	ACL	Rs. 234/- per Kg. With 'C' Form and Rs. 247.50 without 'C' forms			
2008	Fresh tender was floated at the risk & cost of UPL but no party participated in the tender.				
2009	UPL	Rs. 388/- per KG.	UPL, ECCL, SOCL	After negotiations the rate was brought down to Rs. 386 per Kg.	
	ECCL				
	SOCL				

78. After considering the report of DG, CCI exonerated ACL but found the three Appellant companies had indulged in anti-competitive practices in violation of Section 3 of the Act and imposed 9% of average 3 years' of total turnover Under Section 27(b) of the Act in the following manner-

TABLE 1.2 - *penalty as imposed by the CCI*

NAME OF THE COMPANY	AVERAGE OF THREE YEARS TURNOVER (IN CRORE)	PENALTY OF 9% OF AVERAGE TURNOVER (IN CRORE)
ECCL	710.09	63.9
UPL	2804.95	252.44
SOCL	17.52	1.57

79. Aggrieved by the order of the CCI, Appellants approached COMPAT by way of separate appeals. By a common order, dated 29.10.2013, COMPAT held that in case of multi-product companies, only 'relevant turnover' of the product/service in question should be taken into consideration while imposing penalty in the following manner-

TABLE 1.3 - *penalty as imposed by the COMPAT*

NAME OF THE COMPANY	AVERAGE OF THREE YEARS TURNOVER (IN CRORE)	AVERAGE OF THREE YEARS RELEVANT TURNOVER (IN CRORE)	REDUCED PENALTY AT 9% OF RELEVANT TURNOVER (IN CRORE)
ECCL	710.09	32.41	2.92
UPL	2804.95	77.14	6.94
SOCL	The penalty was reduced to on the consideration of SOCL being a small enterprise to Rs. 15.70 Lakhs.		

80. Being aggrieved by the order of the COMPAT, CCI as well as the companies are in appeal before us. With respect to other issues, my learned brother has dealt exhaustively, which does not require any more consideration. The only issue which in my opinion requires further consideration is the issue of quantum of penalty Under Section 27 of the Act. Therefore the limited question which I will be dealing is 'Whether 'turnover' as occurring Under Section 27 of the Act means 'relevant turnover' or 'total turnover'?'

81. At the outset it would be useful to reproduce Section 27 (b) of the Act as a starting point before we delve into discussions in this case-

SECTION 27

...

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance

of such agreement or ten per cent of its turnover for each year of the continuance of such agreement whichever is higher;

...

A plain reading of this Section elucidates that the commission is empowered to impose penalty and to the extent as it deems fit but not exceeding ten percent of the turnover. Section 27 (b) emphasize that penalty is to be levied on 'person or enterprise' who have contravened Section 3 or Section 4 of the Act. It is to be noted that proviso to Section 27(b), before it was amended, was couched in following terms-

'provided that in case any agreement referred to in Section 3 has been entered into by any cartel, the commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average of the turnover of the cartel for the last preceding three financial years.

After the amendment [Central Act 39 of 2007] the proviso as it stands today has been quoted above. The change which was brought about by the aforesaid amendment is that the mandatory nature of the Proviso was made discretionary by substitution of 'shall' with 'may'. This amendment was done to bring the proviso in tune with the rest of Section 27, which uses the expression "it may pass all or any of the following order" and main part of Clause (b), which confers discretion upon the Commission to impose penalty as it may deem ft, subject to the rider that it shall not be more than 10% of the average of the turnover for the last three preceding financial years. It is important to note that Clauses (c) and (d) of Section 27 also uses the word 'may', which signifies that the Commission has the discretion to pass a particular order, which it may deem proper in the facts and circumstances of the case.

82. Two interpretations were canvassed before us, wherein either the turnover, as occurring Under Section 27(b), is equivalent to the 'relevant turnover' or is equivalent to the 'total turnover'. In order to strengthen their arguments, respective Counsel have drawn our attention to various interpretations of 'turnover' applied across the globe, such as the judgment of Bundesgerichtshof (German Supreme Court) on 26th February 2013, BCN Aduanas y Transportes, SA v. Attorney General, Judgment of the Supreme Court of Spain, No. 112/2015, Case 2872/2013, OCL 183 (ES 2015) dated 29th January 2015 and Southern Pipeline Contractors Conrite Walls (Pty) Ltd. and the Competition Commission, 105/CAC/Dec10 (South Africa). Further we have perused Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 (2006/C 210/02) issued by the European Commission and Guidance as to the appropriate amount of penalty (September 2012) issued by the Office of fair Trading (OFT), United Kingdom. It is my considered opinion that the interpretation to Section 27(b) of the Act requires fresh indigenous consideration rather than relying on foreign jurisprudence.

83. First a word on interpretation, before we indulge ourselves in the legal discussion. As the interpretative exercise, as this case, involves various equitable facets[4], literal interpretation might not be conclusive. It should be noted that an interpretation should sub-serve the intent and purpose

of the statutory provision. Therefore we would have to look beyond the plain and simple meaning, to extract the intention of the Act and rationalize the fining policy Under Section 27 (b) of the Act.

84. It is well settled that the Competition Act, 2002 is a regulatory legislation enacted to maintain free market so that the Adam Smith's concept of invincible hands operate unhindered in the background.[5] Further it is clear from the Statement of objects and reason that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic democracy, and support good governance by restricting rent seeking practices. Therefore an interpretation should be provided which is in consonance with the aforesaid objectives.

85. At this point, I would like to emphasize on the usage of the phrase '*as it may deem fit*' as occurring Under Section 27 of the Act. At the outset this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided Under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by Rule of law and not by arbitrary, vague or fanciful considerations. Here we may deal with two judgments which may be helpful in deciding the concerned issue. In *Dilip N. Shroff v. Joint CIT* MANU/SC/3182/2007 : (2007) 6 SCC 329, this Court while dealing with the imposition of the penalty has observed that-

The legal history of Section 271(1)(c) of the Act traced from the 1922 Act *prima facie* shows that the Explanations were applicable to both the parts. However, each case must be considered on its own facts. The role of the Explanation having regard to the principle of statutory interpretation must be borne in mind before interpreting the aforementioned provisions. Clause (c) of Sub-section (1) of Section 271 categorically states that the penalty would be leviable if the Assessee conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing of inaccurate particulars alone, the Assessee does not *ipso facto* become liable for penalty. **Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings as has been noticed in some of the decisions of this Court, inheres on the face of the statutory provisions.** Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo Committee, only to harass the Assessee. The approach of the Assessing Officer in this behalf must be fair and objective.

(Emphasis supplied)

Moreover in the case of *Hindustan Steel Ltd. v. State of Orissa* MANU/SC/0418/1969 : AIR 1970 SC 253 this Court made following observations-

An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either

acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. **Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the Authority to be exercised judicially and on a consideration of all the relevant circumstances.** Even if a minimum penalty is prescribed, the Authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute.

(Emphasis supplied)

86. It should be noted that any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further it is well established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. In *Coimbatore District Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Assn.* MANU/SC/2117/2007 : (2007) 4 SCC 699 this Court has explained the concept of 'proportionality' in the following manner-

'proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of the decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise-the elaboration of a Rule of permissible priorities. De Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ('necessity teat') requires infringement of human rights to the least restrictive alternative'

In consonance of established jurisprudence, the principle of proportionality needs to be imbibed into any penalty imposed Under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Therefore the fine Under Section 27(b) of the Act should be determined on the basis of the relevant turnover. In light of the above discussion a two step calculation has to be followed while imposing the penalty Under Section 27 of the Act.

STEP 1: DETERMINATION of RELEVANT TURNOVER.

87. At this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on available information. However the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter.

STEP 2: DETERMINATION of APPROPRIATE PERCENTAGE of PENALTY BASED ON AGGRAVATING AND MITIGATING CIRCUMSTANCES.

88. After such initial determination of relevant turnover, commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc. These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty.

89. At the cost of repetition it should be noted that starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter the tribunal should calculate appropriate percentage of penalty based on facts and circumstances of the case taking into consideration various factors while determining the quantum. But such penalty should not be more than the overall cap of 10% of the entity's relevant turnover. Such interpretation of Section 27 (b) of the Act, wherein the discretion of the commission is guided by principles established by law would sub-serve the intention of the enactment.

90. Lastly, I am of the opinion that the penalty imposed by COMPAT is appropriate in this case at hand and requires no further interference.

91. These appeals are, accordingly, disposed of in the above terms.

---

[1] Competition Law, 7th Edition, page 536

[2] Footnote 1

[3] Case No. 105/CAC/Dec 10) (106/CAC/Dec 10)

[4] Such as proportionality.

[5] CCI v. SAIL MANU/SC/0690/2010 : (2010) 10 SCC 744.

Back to Index

MANU/SC/0117/1999

Neutral Citation: 1999/INSC/66

IN THE SUPREME COURT OF INDIA

W.P. Nos. 489 of 1995 and 1016 of 1991

Decided On: 17.02.1999

Appellants: Githa Hariharan and Ors. V**s.** Respondent: Reserve Bank of India and Ors.

Hon'ble Judges/Coram:
Dr. A.S. Anand, CJI., M. Srinivasan and U.C. Banerjee, JJ.

Subject: Family

Relevant Section:
Central Excise Rules, 1944 - Rule 6(a); Constitution of India - Section 32, Constitution of India - Section 15, Constitution of India - Section 14; Hindu Minority and Guardianship Act, 1956 - Section 6(a); Income-Tax Appellate Tribunal Rules, 1963 - Rule 32, Income-Tax Appellate Tribunal Rules, 1963 - Rule 15, Income-Tax Appellate Tribunal Rules, 1963 - Rule 14

Disposition:
Disposed of

Reference Alert:
On the issue of whether, in case of any incapacity of the father, either physically or mentally the mother can act as a natural guardian of such minor? This case can be held to be good law and an authority on this point of law.

Case Note:

Family - guardianship - Section 6 of Hindu Minority and Guardianship Act, 1956 and Section 19 of Guardian and Wards Act, 1890 - petitioner challenged constitutionality of Section 6 of Act of 1956 and Section 19 of Act of 1890 being violative of equality clause as mother of minor relegated to inferior position on ground of sex since her right as natural guardian of minor cognizable only after father - both parents are duty bound to take care of person and property of their minor - minor was in exclusive care and custody of mother - where father for any other reason unable to take care of minor because of his physical and mental incapacity mother can act as natural guardian of minor - all action of mother would be valid even during life time of father who deemed to be absent for purpose of Section 6 (a) of Act of 1956 and Section 19 (b) of Act of 1890.

Case Category:

FAMILY LAW MATTER - MINORITY AND GUARDIANSHIP MATTERS

JUDGMENT

A.S. Anand, CJI (For himself and M. Srinivasan, J)

1. We have had the advantage of reading the draft judgment of our learned Brother Banerjee, J. While agreeing with the conclusion, we wish to add our own reasons.

2. The facts in W.P. (C) No.489/95 are shortly as follows : The first petitioner is the wife of the second petitioner. The first petitioner is a writer and several of her books are said to have been published by Penguin. The second petitioner is a Medical Scientist in Jawaharlal Nehru University, New Delhi. They jointly applied to the Reserve Bank of India (first respondent) on 10.12.1984 for 9% Relief Bonds in the name of their minor son Rishab Bailey for Rs. 20,000/-. They stated expressly that both of them agreed that the mother of the child, i.e., the first petitioner would act as the guardian of the minor for the purpose of investments made with the money held by their minor son. Accordingly, in the prescribed form of application, the first petitioner signed as the guardian of the minor. The first respondent replied to the petitioners advising them either to produce the application form signed by the father of the minor or a certificate of guardianship from a competent authority in favour of the mother. That lead to the filing of this writ petition by the two petitioners with prayers to strike down Section 6(a) of the Hindu Minority and Guardianship Act, 1956, (hereinafter referred to as HMG Act) and Section 19(b) of the Guardian and Wards Act, 1890 (hereinafter referred to as GW Act) as violative of Articles 14 & 15 of the Constitution and to quash and set aside the decision of the first respondent refusing to accept the deposit from the petitioners and to issue a mandamus directing the acceptance of the same after declaring the first petitioner as the natural guardian of the minor.

3. In the counter affidavit filed on behalf the first respondent, it is stated that the first petitioner is not the natural guardian of the minor son and the application was not rightly accepted by the bank. It is also stated that under Section 6(a) of the HMG Act the father of a Hindu minor is the only natural guardian. The first respondent prayed forth dismissal of the writ petition.

4. In W.P. (C) No. 1016/91, the petitioner is the wife of the first respondent. The latter has instituted a proceeding for divorce against the former and it is pending in the District Court of Delhi. He has also prayed for custody of their minor son in the same proceeding. According to the petitioner, he had been repeatedly writing to her and the school in which the minor was studying, asserting that he was the only natural guardian of the minor and no decision should be taken without his permission. The petitioner has in turn filed an application for maintenance for herself and the minor son. She has filed the writ petition for striking down Section 6(a) of the HMG Act and Section 19(b) of the GW Act as violative of Articles 14 and 15 of the Constitution.

5. Since, challenge to the constitutionality of Section 6(a) of HMG Act and Section 19(b) of GW Act was common in both cases, the writ petitions were heard together. The main contention of Ms. Indira Jai Singh learned senior counsel for the petitioners is that the two sections i.e. Section 6(a) of HMG Act and Section 19(b) of GW Act are violative of the equality clause of the Constitution, inasmuch as the mother of the minor is relegated to an inferior position on ground of sex alone since her right, as a natural guardian of the minor, is made cognisable only 'after' the father. Hence, according to the learned Counsel both the sections must be struck down as unconstitutional.

6. Section 6 of the HMG Act reads as follows:

The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl - the father, and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;<mpara>

(b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;

(c) in the case of a married girl - the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation-1 n this section, the expression "father" and "mother" do not include a step-father and a step-mother".

7. The expression 'natural guardian' is defined in Section 4(c) of HMG Act as any of the guardians mentioned in Section 6 (supra). The term 'guardian' is defined in Section 4(b) of HMG Act as a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that the definitions of 'guardian' and 'natural guardian' do not make any discrimination against mother and she being one of the guardians mentioned in Section 6 would undoubtedly be a natural guardian as defined in Section 4(c). The only provision to which exception is taken is found in Section 6(a) which reads "the father, and after him, the mother", (underlining ours). That phrase, on a cursory reading, does give an impression that the mother can be considered to be natural guardian of the minor only after the lifetime of the father. In fact that appears to be the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that welfare of the minor in the widest sense is the paramount consideration and even during the life time of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of court, where to do so would be in the interest of the welfare of the minor.

8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word 'after' in the Section would have no significance., as the Court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as guardian of the minor during the life time of the father, without the matter going to Court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6(a) (supra). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only affect he life time of the father and not during his life time.

9. Is that the correct way of understanding the section and does the word 'after' in the Section mean only 'after the life time'? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender-equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did the Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on grounds of sex? In our opinion - No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the Court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

10. We are of the view that the Section 6(a) (supra) is capable of such construction as would retain it within the Constitutional limits. The word 'after' need not necessarily mean 'after the life time'. In the context in which it appears in Section 6(a) (supra), it means 'in the absence of, the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of harmonious construction of Section 4 and Section 6 of HMG Act, without causing any violence to the language of Section 6(a) (supra).

11. The above interpretation has already been adopted to some extent by this Court in Jijabai Vithalrao Gajre v. Pathankhan and Ors. MANU/SC/0516/1970 : [1971]2SCR1. The appellant in that case filed an application before the concerned Tehsildar under the provisions of Bombay Tenancy and Agricultural Lands (Vidharba Region) Act, 1958 for termination of the tenancy of the respondent therein after notice to him on the ground of personal requirements. The Tehsildar found that the application was maintainable and within time but held that the lease deed executed by the tenant in favour of the appellant's mother during his minority when his father was alive was not valid. However, the Tehsildar took the view that it could be considered as a lease created after April 1, 1957 and therefore the tenant could be dislodged. The application was granted on that

ground. On appeal, the appellate authority and in further revision, the Tribunal confirmed the findings. The aggrieved tenant filed a writ petition under Article 227 of the Constitution challenging the said orders. The High Court held that the lease was valid on the ground that the mother was the natural guardian because the father was not taking any interest in his minor daughter's affairs and refused to grant the relief of possession but held that the appellant was entitled to resume a portion of the land leased for personal cultivation. Consequently, the matter was remanded. That judgment of the High Court was challenged in this Court. The Division Bench of this Court found that it was the mother who was actually managing the affairs of her minor daughter who was under her care and protection and though the father was alive, he was not taking any interest in the affairs of the minor. In the words of the Bench :

...We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. *It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection.* From 1951 onwards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother.*It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned.* We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and under Section 6 the natural guardians of the Hindu minor in respect of minor's person as well as minor's property are the father and after him the mother. The position in Hindu Law before the enactment was also the same. That is why we have stated that *normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. But on the facts found above the mother was rightly treated by the High Court as the natural guardian.*

(Emphasis supplied)

Consequently, the Bench dismissed the appeal. The interpretation placed by us above in the earlier part of this judgment on Section' 6(a) (supra) is, thus, only an expansion of the principle set out by the Bench in Jijabai Vithalrao Gajre (supra).

12. Our attention has been drawn to a later judgment of another Bench of this Court in Pannilal v. Rajinder Singh and Anr. MANU/SC/0552/1993 : [1993]3SCR589. In that case, some property belonging to the respondents therein was sold when they were minors by their mother acting as their guardian to the appellant under a registered sale deed. Upon attaining majority, the respondents sued the appellant for possession of the land on the ground that the sale having been made without the permission of the Court was void. The appellant relied heavily on the fact that the sale deed was attested by the father of the respondents and contended that it should be deemed to be a sale validly made by the legal guardian of the respondents. It was also argued that the sale was for legal necessity as well as for the benefit of the respondents. The trial court found that there was no reliable evidence on record to show that the sale was made for legal necessity or for the

benefit of the respondents and having been effected without the permission of the Court was violable. Ultimately the trial court held the same to be void and granted a decree as prayed for by the respondents. That was affirmed by the District Court and the High Court. In this Court the Division Bench observed that in view of the concurrent findings, the sale was in any event violable. Dealing with the question whether the sale could be considered to have been effected by (the father) natural guardian of the minors, (though actually made by the mother) because father had attested the sale deed, the Court referred to the judgment in Jijabai Vithalrao Gajre (supra) and observed:

In this behalf our attention was invited to this Court's judgment in *Jijabai Vithalrao Gajre v. Pathankhan* MANU/SC/0516/1970 : [1971]2SCR1. This was a case in which it was held that the position in Hindu law was that when the father was alive he was the natural guardian and it was only after him that the mother became the natural guardian. Where the father was *alive* but had fallen out with the mother of the minor child and *was living separately for several years without taking any interest in the affairs of the minor, who was in the keeping and care of the mother,* it was held that, in the peculiar circumstances, the father should be treated as if non-existentand , therefore, the mother could be considered as the natural guardian of the minor's person as well as property, having power to bind the minor by dealing with her immovable property.

(Emphasis supplied)

Distinguishing the facts in Jijabai Vithalrao Gajre (supra), the Court observed that there was no evidence to show that the father of the minor-respondents was not taking any interest in their affairs or that they were keeping in the care of the mother to the exclusion of the father. An inference was drawn from the factum of attestation of the sale deed that the father was very much 'present' and in the picture. The Bench held that the sale by the mother notwithstanding the fact that the father had attested the deed, could not be held to be a sale by the father and natural guardian, satisfying the requirements of Section 8. Confirming the decree of the courts below, the Bench opined :

The provisions of Section 8 are devised to fully protect the property of a minor, even from the depredations of his parents. Section 8 empowers only the legal guardian to alienate a minor's immovable property provided it is for the necessity or benefit of the menorrhea estate and it further requires that such alienation shall be effected after the permission of the Court has been obtained. It is difficult, therefore, to hold that the sale was violable, not void, by reason of the fact that the mother of the minor respondents signed the sale deed and the father attested it.

13. Thus, on the facts of Panhilal's case (supra) even if the sale had been made by the father, it could have been annulled for want of permission from the court. It is, thus, evident from the two paragraphs extracted above, that the conclusion in Penniless case (supra) turned mainly on the fact that the sale was not supported by legal necessity; was not for the benefit of the minor and the same had been effected without the permission of the Court. That judgment, therefore, does not run counter to the interpretation now placed by us on Section 6 (supra), as that case was decided on its peculiar facts and is clearly distinguishable.

14. The message of international instruments - Convention on the Elimination of All Forms of Discrimination against Women, 1979 ("CEDAW") and the Beijing Declaration, which directs all

State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June, 1993. The interpretation that we have placed on Section 6(a) (supra) gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them. See with advantage -- Apparel Export Promotion Council v. A.K. Chopra, MANU/SC/0014/1999 : (1999)ILLJ962SC Similarly, Section 19(b) of the GW Act would also have to be construed in the same manner by which we have construed Section 6(a) (supra).

16. While both the parents are duty bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be 'absent' for the purposes of Section 6(a) of HMG Act and Section 19(b) of GW Act.

17. Hence, the Reserve Bank of India was not right in insisting upon an application signed by the father or an order of the Court in order to open a deposit account in the name of the minor particularly when there was already a letter jointly written by both petitioners evidencing their mutual agreement. The Reserve Bank, now ought to accept the application filed by the mother.

18. We are conscious of the fact that till now many transactions may have been invalidated on the ground that the mother is not a natural guardian, when the father is alive. Those issues cannot be permitted to be reopened. This judgment, it is clarified, will operate prospectively and will not enable any person to reopen any decision already rendered or question the validity of any past transaction, on the basis of this judgment.

19. The Reserve Bank of India and similarly placed other organisations, may formulate appropriate methodology in the light of the observations made above to meet the situations arising in the contextual facts of a given case.

20. In the light of what we have said above, the dispute between the petitioner and the first respondent in Writ Petition No. 1016 of 1991 as regards custody and guardianship of their minor son shall be decided by the District Court, Delhi, where it is said to be pending.

21. The Write Petitions are disposed of in the aforesaid manner but without any order as to costs.

U.C. Banerjee, J.

22. Though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure the same is however no longer dormant but presently quite loud. This cry is not restrictive to any particular country but world over with

variation in degree only. Article 2 of the Universal Declaration of Human Rights [as adopted and proclaimed by the General Assembly in its resolution No. 217(III)] provided that everybody is entitled to all rights and freedom without distinction of any kind whatsoever such as race, sex or religion and the ratification of the convention for elimination of all forms of discrimination against women (for short CEDAW) by the United Nations Organisation in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same.

23. We the people of this country gave ourselves a written Constitution, the basic structure of which permeates equality of status and thus negates gender bias and it is on this score, the validity of Section 6 of the Hindu Minority and Guardianship Act of 1956 has been challenged in the matters under consideration, on the ground that dignity of women is a right inherent under the Constitution which as a matter of fact stands negatived by Section 6 of the Act of 1956.

24. In order, however, to appreciate the contentions raised, it would be convenient to advert to the factual aspect of the matters at this juncture. The facts in WP (C) No. 489 of 1995 can be stated as below:-

25. The petitioner and Dr. Mohan Ram were married at Bangalore in 1982 and in July 1984, a son named Rishab Bailey was born to them. In December, 1984 the petitioner applied to the Reserve Bank of India for 9% Relief Bond to be held in the name of their minor son Rishab alongwith an intimation that the petitioner No. 1 being the mother, would act as the natural guardian for the purposes of investments. The application however was sent back to the petitioner by the RBI Authority advising her to produce the application signed by the father and in the alternative the Bank informed that a certificate of guardianship from a Competent Authority in her favour, ought to be forwarded to the Bank forthwith so as to enable the Bank to issue Bonds as requested and it is this communication from the RBI authorities, which is stated to be arbitrary and opposed to the basic concept of justice in this petition under Article 32 of the Constitution challenging the validity of Section 6 of the Act as indicated above.

26. The factual backdrop in WP (C) No. 1016 of 1991 centers round a prayer for custody of the minor son born through the lawful wedlock between the petitioner and the first respondent. Be it noted that a divorce proceeding is pending in the District Court of Delhi and the first respondent has prayed for custody of their minor son in the same proceeding. The petitioner in turn, however, also has filed an application for maintenance for herself and the minor son. On further factual score it appears that the first respondent has been repeatedly writing to the petitioner, asserting that he was the only natural guardian of the minor and no decision should be taken without his permission. Incidentally, the minor has been staying with the mother and it has been the definite case of the petitioner in this petition under Article 32 that in spite of best efforts of the petitioner, the father has shown total apathy towards the child and as a matter of fact is not interested in welfare and benefit of the child excepting however claiming the right to be the natural guardian without how ever discharging any corresponding obligation. It is on these facts that the petitioner moved this Court under Article 32 of the Constitution praying for declaration of the provisions of Section 6(a) of the Act read with Section 19(b) of the Guardian and Wards Act as violative of Articles 14 and 15 of the Constitution.

27. Since, challenge to the constitutionality of Section 6 of the Act is involved in both the matters, the petitions were heard together.

28. Ms. Indira Jaisingh, appearing in support of the petitions strongly contended that the provisions of Section 6 of the Act seriously disadvantages woman and discriminate man against woman in the matter of guardianship rights, responsibilities and authority in relation to their own children.

29. It has been contended that on a true and proper interpretation of Section 4 and the various provisions there under and having due regard to the legislative intent, which is otherwise explicit, question of putting an embargo for the mother in the matter of exercise of right over the minor as the guardian or ascribing the father as the preferred guardian does not arise, but unfortunately however, the language in Section 6 of the Act runs counter to such an equality of rights of the parents to act as guardian to the minor child.

30. For convenience sake however Section 6 of the Act of 1956 is set out herein below:

6. Natural guardians of a Hindu minor -The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) in the case of a married girl-the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this Section-

(a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation - In this section, the expressions father and 'mother' do not include a step-father and a step-mother.

31. Be it noted that the Hindu Minority and Guardianship Act of 1956 has been engrafted on the statute book by way of an amendment and codification of certain parts of the law relating to minority and guardianship among Hindus. It is not out of place to mention also that Hindu law being one of the oldest known system of jurisprudence has shown no signs of decrepitude and it has its values and importance even today. But the law makers however thought it prudent to codify certain parts of the law in order to give a fruitful meaning and statutory sanction to the prevailing concept of law having due regard to the social and economic changes in the society. It is on this perspective however certain aspects of the law as it stood prior to the codification ought to be noted.

32. As regards the concept of guardianship both the parents under the Hindu law were treated as natural guardians, of the persons and the separate property of their minor children, male or female except however that the husband is the natural guardian of his wife howsoever young she might be and the adopted father being the natural guardian of the adopted son. The law however provided that upon the death of the father and in the event of there being no testamentary guardian appointed by the father, the mother succeeds to the natural guardianship of the person and separate property of their minor children. Conceptually, this guardianship however is in the nature of a sacred trust and the guardian cannot therefore, during his lifetime substitute another person to be the guardian in his place though however entrustment of the custody of the child for education or purposes allying may be effected temporarily with a power to revoke at the option of the guardian.

33. The condition of this law pertaining to guardianship however brought about certain changes in regard thereto, of which we will presently refer, but it is interesting to note that prior to the enactment, the law recognised both de facto and de jure guardian of a minor: A guardian-de-facto implying thereby one who has taken- upon himself the guardianship of a minor-whereas the guardian de jure is a legal guardian who has a legal right to guardianship of a person or the property or both as the case may be. This concept of legal guardian includes a natural guardian: a testamentary guardian or a guardian of a Hindu minor appointed or declared by Court of law under the general law of British India.

34. Incidentally, the law relating to minority and guardianship amongst Hindus is to be found not only in the old Hindu law as laid down by the smritis, shrutis and the commentaries as recognised by the Courts of law but also statutes applicable amongst others to Hindus, to wit, Guardian and Wards Act of 1890 and Indian Majority Act of 1875. Be it further noted that the Act of 1956 does not as a matter of fact in any way run counter to the earlier statutes in the subject but they are supplemental to each other as reflected in Section 2 of the Act of 1956 itself which provides that the Act shall be in addition to and not in derogation of the Acts as noticed above.

35. Before proceeding further, however, on the provisions of the Act in its true perspective, it is convenient to note that lately the Indian Courts following the rule of equality as administered in England have refused to give effect to inflexible application of paternal right of minor children. In equity, a discretionary power has been exercised to control the father's or guardian's legal rights of custody, where exercise of such right cannot but be termed to be capricious or whimsical in nature or would materially interfere with the happiness and the welfare of the child. In re Mc Grath 1893, 1 Ch. 143 Lindley, L.J., observed: "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word "welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded." Lord Esher, M.R. in the Gyngall (1893) 2 Q.B. 232 stated: "The Court has to consider therefore, the whole of the circumstances of the case, the position of the parent, the position of the child , the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. Prima facie it would not be for the welfare of the child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parent. If a child is brought up, as one may say from its mother's lap in one form of religion, it would not, I should say be for its happiness and welfare that a stranger should take it away in order

to alter its religious views. Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought not to be taken away from its parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these". The English law therefore has been consistent with the concept of welfare theory of the child. The Indian law also does not make any departure, there from. In this context, reference may be made to the decision of this Court in the case of J. V. Gajre v. Pathankhan and Ors. MANU/SC/0516/1970 : [1971]2SCR1 in which this Court in paragraph 11 of the report observed:

We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20years. It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection. From 1951 on wards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned. We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act 1956 (Act 32 of 1956), the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and under Section 6 of the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother. The position in the Hindu Law before this enactment was also the same. That is why we have stated that normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. But on the facts found above the mother was rightly treated by the High Court as the natural guardian".

36. Obviously, a rigid insistence of strict statutory interpretation may not be conducive for the growth of the child, and welfare being the predominant criteria, it would be a plain exercise of judicial power of interpreting the law so as to be otherwise conducive to a fuller and better development and growth of the child.

37. Incidentally the Constitution of India has introduced an equality code prohibiting discrimination on the ground of sex and having due regard to such a mandate in the Constitution, is it justifiable to decry the rights of the mother to be declared a natural guardian or have the father as a preferred guardian? 'Ms. Indira Jaisingh answers it with an emphatic 'no' and contended that the statute in question covering this aspect of the Personal law has used the expression 'after' in Section 6(a) but the same cannot run counter to the constitutional safeguards of gender justice and as such cannot but be termed to be void and ultra vires the Constitution.

38. Be it noted here that the expressions 'guardian' and 'natural' guardian have been given statutory meanings as appears from Section 4(b) wherein guardian is said to mean a person having the care of the person of a minor or his property and includes:

(i) natural guardian;

(ii) a guardian appointed by the will of the minor's father or mother;

(iii) a guardian appointed or declared by court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

39. It is pertinent to note that Sub-section (c) of Section 4 provides that a natural guardian means a guardian mentioned in Section 6. This definition section, however obviously in accordance with the rule of interpretation of statute, ought to be read subject to Section 6 being one of the basic provisions of the Act and it is this Section 6 which records that natural guardian of a Hindu minor, in the case of a boy or an unmarried girl, is the father and after him the mother. The statute therefore on a plain reading with literal meaning being ascribed to the words used, depicts that the mother's right to act as a natural guardian stands suspended during the lifetime of the father and it is only in the event of death of the father, the mother obtains such a right to act as a natural guardian of a Hindu minor -It is this interpretation which has been ascribed to be having a gender bias and thus opposed to the constitutional provision. It has been contented that the classification is based on marital status depriving a mother's guardianship of a child during the life time of the father which also cannot but be stated to be a prohibited marker under Article 15 of the Constitution.

40. The whole tenor of the Act of 1956 is to protect the welfare of the child and as such interpretation ought to be in consonance with the legislative intent in engrafting the statute on the Statute Book and not de hors the same and it is on this perspective that the word 'after' appearing in Section 6(a) shall have to be interpreted. It is now a settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless of course, the same makes a violent departure from the Legislative intent-in the event of which a wider debate may be had having due reference to the contextual facts.

41. The contextual facts in the decision noticed above, depict that since the father was not taking any interest in the minor and it was as good as if he was non-existing so far as the minor was concerned, the High Court allowed the mother to be the guardian but without expression of any opinion as regards the true and correct interpretation of the word 'after' or deciding the issue as to the constitutionality of the provision as contained in Section 6(a) of the Act of 1956 - it was decided upon the facts of the matter in issue. The High Court in fact recognised the mother to act as the natural guardian and the findings stand accepted and approved by this Court. Strictly speaking, therefore, this decision does not lend any assistance in the facts of the matter under consideration excepting however that welfare concept had its due recognition.

42. There is yet another decision of this Court in the case of Panni Lal v. Rajinder Singh and Anr. MANU/SC/0552/1993 : [1993]3SCR589 wherein the earlier decision in Gajre's case was noted but in our view Panni Lal's case does not lend any assistance in the matter in issue and since the decision pertain to protection of the properties of a minor.

43. Turning attention on the principal contention as regards the constitutionality of the legislation, in particular Section 6 of the Act of 1956 it is to be noted that validity of a legislation is to be

presumed and efforts should always be there on the part of the law courts in the matter of retention of the legislation in the statute book rather than scrapping it and it is only in the event of gross violation of constitutional sanctions that law courts would be within its jurisdiction to declare the legislative enactment to be an invalid piece of legislation and not otherwise and it is on this perspective that we may analyse the expressions used in Section 6 in a slightly more greater detail. The word 'guardian' and the meaning attributed to it by the legislature under Section 4(b) of the Act cannot be said to be restrictive in any way and thus the same would mean and include both the father and the mother and this is more so by reason of the meaning attributed to the word as "a person having the care of the person of a minor or his property or of both his person and property...." It is an axiomatic truth that both the mother and the father of a minor child are duty bound to take due care of the person and the property of their child and thus having due regard to the meaning attributed to the word 'guardian' both the parents ought to be treated as guardians of the minor. As a matter of fact the same was the situation as regards the law prior to the codification by the Act of 1956. The law therefore recognised that a minor has to be in the custody of the person who can sub-serve his welfare in the best possible way - the interest of the child being paramount consideration.

44. The expression 'natural guardian' has been defined in Section 4(c) as noticed above to mean any of the guardians as mentioned in Section 6 of the Act of 1956. This section refers to three classes of guardians viz., father, mother, and in the case of a married girl the husband. The father and mother therefore, are natural guardians in terms of the provisions of Section 6 read with Section 4(c). Incidentally it is to be noted that in the matter of interpretation of statute the same meaning ought to be attributed to the same word used by the statute as per the definition section. In the event, the word 'guardian' in the definition section means and implied both the parents, the same meaning ought to be attributed to the word appearing in Section 6(a) and in that perspective mother's right to act as the guardian does not stand obliterated during the lifetime of the father and to read the same on the statute otherwise would tantamount to a violent departure from the legislative intent. Section 6(a) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression 'after' therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature.

45. Be it noted further, that gender equality is one of the basic principles of our Constitution and in the event the word 'after' is to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the constitutional mandate and would lead to a differentiation between male and female. Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the statute shall have to be in accordance therewith and not de hors the same. The father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter the word 'after' shall have to be interpreted in terms of the constitutional safe-guard and guarantee so as to give a proper and effective meaning to the words use.

46. In our opinion the word 'after' shall have to be given a meaning which would subserve the need of the situation viz., welfare of the minor and having due regard to the factum that law courts endeavour to retain the legislation rather than declaring it to be a void, we do feel it expedient to record that the word 'after' does not necessarily mean after the death of the father, on the contrary,

it depicts an intent so as to ascribe the meaning thereto as 'in the absence of-be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word 'after' as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation viz. welfare of the child.

47. In that view of the matter question of ascribing the literal meaning to the word 'after' in the context does not and cannot arise having due regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation in our view ought to be avoided.

48. In view of the above, the Writ Petition (C) No. 489 of 1995 stands disposed of with a direction that Reserve Bank authorities are directed to formulate appropriate methodology in the light of the observations, as above, so as to meet the situation as called for in the contextual facts.

49. Writ Petition (C) No. 1016 of 1991 also stands disposed of in the light of the observations as recorded above and the matter pending before the District court, Delhi, as regards custody and guardianship of the minor child, shall be decided in accordance therewith.

50. In the facts of the matters under consideration there shall however be no order as to costs.

Back to Index

MANU/SC/0109/2016

Neutral Citation: 2016/INSC/124

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 1220 of 2015

Decided On: 02.02.2016

Appellants: Gujarat Urja Vikas Nigam Limited Vs**.** Respondent: EMCO Limited and Ors.

Hon'ble Judges/Coram:

Jasti Chelameswar and Abhay Manohar Sapre, JJ.

Subject: Electricity

Relevant Section:

INCOME-TAX ACT, 1961 - Section 32(1)(i)

Case Category:

COMPANY LAW, MRTP AND ALLIED MATTERS - MATTERS PERTAINING TO TRAI/SEBI/IDRAI AND RBI INCLUDING APPEALS U/S 18 OF TRAI ACT, INDIAN ELECT ACT 1910 AND 2003, ELECT SUPPLY ACT 1948 AND ELECT REFORMS COMMN ACT 1998

Prior History:

From the Judgment and Order dated 20.11.2014 of the Appellate Tribunal for Electricity, New Delhi in Appeal No. 252 of 2013

Disposition:
Appeal Allowed

Case Note:

What was the point of time at which power producer could exercise such right to seek determination of a separate tariff?

Held, Income Tax Act gave an option to producers of power either to avail 'benefit of accelerated depreciation' or not. It also specified point of time at which such an option could be exercised. Right to exercise such option at a point of time specified in the 2nd proviso to Rule 5(1A) of income Tax Rules, 1962 was limited only for purpose of availing benefits flowing from Income Tax Act. PPA did not make any reference to "benefits of accelerated depreciation". It simply specified price to be paid by Appellant for power purchased by it from first Respondent. Appellant determined said price after taking into consideration various factors. One of them happened to be that, Power Producers were entitled to certain 'benefits' under Income Tax Act. Availability of such 'benefit' was dependent upon option of power producers. Though 1st Tariff Order employed expression 'benefit' in context of AD Scheme under Section 32 of IT Act, applicability of provision to a power producer depended upon choice of power producer. It was for power producer to make an assessment whether availing of AD was beneficial or not would take a decision, if scheme under Section 32 IT Act should be availed or not. But availability of such an option to power producer for purpose of assessment of income under IT Act did not relieve power producer of contractual obligations incurred under PPA. No doubt that, first Respondent as a power producer had freedom of contract either to accept price offered by Appellant or not before PPA was entered into. But such freedom was extinguished after PPA was entered into. First Respondent knowing fully well entered into PPA in question which expressly stipulated under Article 5.2 that tariff was determined by Hon'ble Commission vide Tariff Order for solar based power project dated 29th January, 2010. Stipulation in PPA clearly envisaged a situation where notwithstanding contract between parties (the PPA), there was a possibility of first Respondent not being able to commence generation of electricity within "control period" stipulated in 1st Tariff Order. It also visualised that, for subsequent control period, tariffs payable to a PROJECTS/power producers (similarly situated as the first Respondent) could be different. In recognition of said two factors, PPA clearly stipulated that in such a situation, first Respondent would be entitled only for lower of two tariffs. Unfortunately, said stipulation was overlooked by second Respondent and Appellate Tribunal. There was no whisper about said stipulation in either of orders. On assumption that, petition filed by first Respondent (1270/2012) was to be treated as an application for determination of separate tariff which would be identical with tariff fixed under 2nd Tariff Order, whether first Respondent would be entitled for such a relief depended, if at all he was entitled to seek such a determination, on a consideration of "all relevant facts" but not by virtue of operation of 2nd Tariff Order. impugned order was set aside. Appeal allowed

Industry: Power and Energy

JUDGMENT

Jasti Chelameswar, J.

1. The 2nd Respondent herein, the Gujarat Electricity Regulatory Commission is a body constituted Under Section 82 of the Electricity Act, 2003 (hereinafter referred to as "the Act"). In exercise of its statutory powers Under Sections 61(h), 62(1)(a) and 86(1)(e) of the Act the 2nd Respondent issued Order No. 2 of 2010 dated 29.01.2010 (hereinafter referred to as the "1st Tariff Order") determining the tariff for procurement of power by the Distribution Licensees in Gujarat from

Solar Energy Projects[1]. The said order was issued after an elaborate consideration of the various relevant factors including the policy guidelines of the State of Gujarat and Union of India. Under the said order, tariff for procurement of electricity generated by PROJECTS employing Solar Photovoltaic (SPV) Technology was fixed at Rs. 15 per kWh for the initial 12 years starting from the date of commercial operation of the project and Rs. 5 per kWh from the 13th year to 25th year. The said order was declared to have had come into force w.e.f. 29.01.2010. Various financial and operational parameters taken into consideration for determining the tariff are mentioned at para 4 of the said Order[2]. One of the factors taken into consideration is the 'Rate of Depreciation'. It is specified at para 5 of the Order that the tariff fixed under the said Order "took into account the benefit of accelerated depreciation under the Income Tax Act and Rules". It is further declared that "for a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts."

2. The 1st Respondent produces electric energy (power) from one of the PROJECTS. The Appellant and 1st Respondent[3] entered into a Power Purchase Agreement (PPA) dated 09.12.2010 for sale and purchase of electricity from the 5 MW project to be established by the 1st Respondent in Surendra Nagar district of Gujarat. The provisions relevant for the dispute in the present appeal are Clauses 5.1 & 5.2,

Article 5: Rates and Charges

5.1. Monthly Energy Charges: GUVNL shall pay to the Power Producer every month for Scheduled Energy/Energy injected as certified in the monthly SEA by SLDC the amounts (the "Tariff") set forth in Article 5.2.

5.2. GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy/Energy injected as certified in the monthly SEA by SLDC. The tariff is determined by Hon'ble Commission vide Tariff Order for Solar based power project dated 29.01.2010.

Tariff for Photovoltaic Project: Rs. 15/kWh for First 12 years and Thereafter Rs. 5/kWh from 13th Year To 25th Year.

Above tariff shall apply for solar projects commissioned on or before 31st December 2011. **In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.**

and Clauses 12.8[4] & 12.10[5] of the said PPA.

3. However, after entering into the abovementioned PPA, Respondent No. 1 decided to change the PROJECT'S location. Therefore, a Supplemental Agreement was entered into between the Appellant and Respondent No. 1 on 07.05.2011 making appropriate and necessary modifications to the PPA dated 09.12.2010. However, Articles 5.1 and 5.2 of the original PPA remained unaltered.

4. 2nd Respondent passed another order dated 27.01.2012 (hereinafter referred to as the "2nd Tariff Order") determining the tariff applicable to the PROJECTS to be commissioned on or after 29.01.2012. The tariff fixed under the said order for the PROJECTS generating electrical Energy through Solar Photovoltaic (SPV) Technology "availing the benefit of accelerated depreciation under the Income Tax Act" is less favourable to the power producers and the tariff payable by the Appellant to the power producers which do not avail "the benefit of accelerated depreciation" under the Income-tax Act is more favourable to such power producers.

5. The 1st Respondent commissioned its PROJECT only on 2.3.2012, i.e., beyond the "control period[6]" of tariff specified under the 1st Tariff Order. The said "control period" ended on 28.01.2012. The 1st Respondent admittedly did not avail the accelerated depreciation Under Section 32 of the Income-tax Act.

6. The 1st Respondent, therefore, filed a petition No. 1270 of 2012 before the State Commission invoking Section 86(1)(f) of the Act praying "(A) This Hon'ble Commission be pleased to hold and declare that the Petitioner is entitled to claim the tariff applicable to megawatt scale solar photovoltaic projects not availing of accelerated depreciation as per Tariff Order dated 27.1.2012; and (B) This Hon'ble Commission be pleased to quash and set aside the decision of the Respondent taken in letters dated 20.4.2012, 22.6.2012 and 20.11.2012 for denying the tariff applicable to megawatt scale solar photovoltaic projects not availing of accelerated depreciation as per Tariff Order dated 27.1.2012 to the Petitioner and direct the Respondent to forthwith make payment of a sum of Rs. 59,50,260/- to the Petitioner being the differential amount of invoices which is unpaid by the Respondent;"

7. The 2nd Respondent by its order dated 08.08.2013 held that the 1st Respondent is entitled for the benefit of the tariff specified in the 2nd Tariff Order dated 27.01.2012[7]. The 2nd Respondent also held that the benefit of its adjudicatory order should not only go to the 1st Respondent but also to others who have commissioned their PROJECTS subsequent to the 2nd Tariff Order.

8. Aggrieved by the order dated 08.08.2013, the Appellant herein preferred an appeal before the Appellate Tribunal for Electricity (hereinafter referred to as "the Appellate Tribunal"), constituted Under Section 110 of the Act invoking its jurisdiction Under Section 111 of the Act.

9. By the impugned order dated 20.11.2014, the Appellate Tribunal confirmed the order of the 2nd Respondent.

Para 62. Summary of Findings:

(a) The PPA dated 19.12.2010 entered into between the Appellant and the Respondent No. 1 provided for tariff as determined by the State Commission vide order dated 30.1.2010, viz. Rs. 15 per kWh for first 12 years and thereafter Rs. 5 per kWh from 13th year to 25th year, provided the Solar Project is commissioned on or before 31st December 2011. However, in case commissioning of the project is delayed beyond 31st December, 2011, the Appellant has to pay the tariff as determined by the State Commission effective on the date of commissioning of Solar Power Project. The Solar Project of the Respondent No. 1 was commissioned on 2.3.2012. Therefore, the

tariff as determined by the State Commission by the Order dated 27.1.2012 for the next control period from 29.1.2012 to 31.3.2015 will be applicable to the Respondent No. 1.

(b) In order dated 27.1.2012, the State Commission has determined the tariff for Solar Project availing accelerated depreciation and without availing the accelerated depreciation. As the Respondent No. 1 has not availed the accelerated depreciation, the tariff determined without accelerated depreciation in the order dated 27.1.2012 will be applicable in terms of the PPA and the Tariff Order of the State Commission dated 27.1.2012.

(c) Complete reading of the Tariff Order dated 27.1.2012 clearly indicates that the State Commission has determined tariff for both, the projects availing accelerated depreciation and those not availing accelerated depreciation. The order gives a choice to the Solar Developer to avail or not to avail the benefit of accelerated depreciation.

Hence, the instant appeal Under Section 125 of the Act.

10. Both the 1st Tariff Order and the 2nd Tariff Order issued by the 2nd Respondent deal with the tariff payable to the producers of power. The distinction between both the Tariff Orders insofar as it is relevant for the purpose of the present case is that:

(I) 1st Tariff Order fixed the tariff for the PROJECTS which get the "benefit of accelerated depreciation" Under Section 32 of the Income Tax Act.

Based on the various parameters as discussed above, the levelised tariff including RoE of Solar PV power generation, using a discounting rate of 10.19% works out to Rs. **12.54** per kWh and levelised tariff using the same discounting factor for Solar Thermal Power generation works out to Rs. **9.29** per kWh. However, the Commission feels that it would be appropriate to determine tariff for two sub-periods: 12 years and 13 years instead of the same tariff for 25 years. Hence, the Commission determines the tariff for generation of electricity from Solar PV Power Project at **Rs. 15** per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and **Rs. 5** per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year. The Commission also determines the tariff for generation of electricity from Solar Thermal Power project at **Rs. 11** per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and **Rs. 4.00** per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year.

The above tariffs take **into account the benefit of accelerated depreciation** under the Income Tax Act and Rules. For a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts.

(II) 2nd Tariff Order, on the other hand, fixed the tariff for both the classes of PROJECTS[8] i.e. those which "avail" the "benefit of accelerated depreciation" (Under Section 32 of the Income Tax Act) and those which do not "avail" the "benefit of accelerated depreciation".

Based on these technical and financial parameters, the levelized tariff including return on equity for megawatt-scale solar photovoltaic power projects **availing accelerated depreciation** is

calculated to be **Rs. 9.28 per kWh**, while the tariff for similar projects not availing accelerated depreciation is calculated to be Rs. **10.37 per kWh**. The Commission also decides to determine the tariff for two sub-periods. For megawatt-scale photovoltaic projects availing accelerated depreciation, the tariff for the first 12 years shall be **Rs. 9.98** per kWh and for the subsequent 13 years shall be **Rs. 7** per kWh. Similarly, for megawatt-scale photovoltaic projects **not availing accelerated depreciation**, the tariff for the first 12 years shall be **Rs. 11.25 per kWh** and for the subsequent 13 years shall be **Rs. 7.50 per kWh.**

11. The case of the 1st Respondent is that notwithstanding the fact that it entered into a PPA during the "control period" specified in the 1st Tariff Order, it is not obliged to sell power to the Appellant for the price specified in Article 5.2 of the PPA and is legally entitled to seek (from the 2nd Respondent) fixation of a separate tariff. It is the further case of the 1st Respondent that under the PPA, the Appellant is under an obligation to procure the power from the 1st Respondent for a period of 25 years if the 1st Respondent commences the generation of power within the "control period" and is also obliged to pay for the power procured by it at the rates specified in Article 5.2 of the PPA. But the obligation of the 1st Respondent to sell power generated by it to the Appellant at the rates specified in Article 5.2 of the PPA comes into existence only on the happening of the two contingencies, i.e., the 1st Respondent (i) commencing the generation of power within the "control period" stipulated under the 1st Tariff Order; and (ii) choosing to avail the "benefit of accelerated depreciation" under the Income Tax Act. According to the 1st Respondent, the stipulation under the 1st Tariff Order that the tariff fixed thereunder is not applicable to those PROJECTS which "does not get such benefit, the Commission would on a petition in that respect determine a separate tariff taking into account all the relevant facts from not" would only imply that tariff fixed under the 1st Tariff Order is not applicable to those PROJECTS/power producers which do not avail the "benefit of accelerated depreciation" under the Income Tax Act.

12. On the other hand, the case of the Appellants throughout has been that the 1st Respondent clearly knew when it entered into the PPA that the tariff propounded under the 1st Tariff Order is applicable only for those PROJECTS which avail the "benefit of accelerated depreciation" under the Income Tax Act. If the first Respondent did not intend to avail the "benefit of the accelerated depreciation" under the Income Tax Act, it ought not to have entered into the PPA without first seeking the determination of the tariff by the 2nd Respondent. Having chosen to enter into a PPA, the 1st Respondent cannot decide not to avail the "benefit of accelerated depreciation" at a later point of time i.e. beyond the control period prescribed under the 1st Tariff Order and claim the benefit of a more advantageous tariff fixed in the 2nd Tariff Order in favour of the PROJECTS which do not avail the "benefit of accelerated depreciation".

13. We have already noticed that the 1st Respondent did not commence generation of power within "control period" stipulated under the 1st Tariff Order and also did not avail the "benefit of the accelerated depreciation" under the Income Tax Act.

14. It is admitted on all hands that the "benefit of accelerated depreciation" mentioned in the 1st Tariff Order and the PPA is the stipulation contained in Section 32(1)(i) of the Income Tax Act read with Rule 5(1A) of the Income Tax Rules. They provide for the method and manner in which depreciation of the assets of an Assessee is to be calculated.

Section 32 of the Income Tax Act (insofar as relevant) stipulates as follows:

32(1) in respect of depreciation of-

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998.

owned, wholly or partly, by the Assessee and used for the purposes of the business or profession, the following deductions shall be allowed-

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the Assessee as may be **prescribed**.

The prescription contemplated is found in Rule 5(1A) of the Income Tax Rules, 1962 which reads as follows:

(1A) The allowance under Clause (i) of Sub-section (1) of Section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the Assessee as are used for the purposes of the business of the Assessee at any time during the previous year:

Under the second proviso to the said Rule, it is further provided;

Provided further that the undertaking specified in Clause (i) of Sub-section (1) of Section 32 of the Act may, instead of the depreciation specified in Appendix IA, at its option, be allowed depreciation Under Sub-rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income Under Sub-section (1) of Section 139 of the Act,

(a) for the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April, 1997; and

(b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking:

15. It can be seen from the above extracted proviso, an undertaking engaged in generation of power has an option to claim depreciation on its assets in accordance with the scheme Under Section 32(1)(i) of the Income Tax Act. Such an option could be exercised at the relevant point of time as indicated in the said proviso.

16. The argument of the first Respondent throughout has been that the stipulation in the 1st Tariff Order that "a project that does not **get** such a benefit...." only means that the tariff propounded under the said order does not apply to PROJECTS which do not choose to exercise the option to

be governed by the scheme Under Section 32 of the Income Tax Act. On the other hand, the argument by the Appellant throughout has been that such a clause only implies that the tariff under the 1st Tariff Order is not applicable to those power generating PROJECTS which by operation of law (but not because of the violation of the Assessees) are not entitled to claim the benefit of the scheme Under Section 32(1)(i) of the Income Tax Act.

17. We do not wish to examine the question whether there is a possibility under the Income Tax Act for any PROJECT/ undertaking engaged in the generation of power[9] not to fall within the operation of Section 32(1)(i) apart from those cases where the "undertaking" chooses not to be governed by such regime. Neither of the parties made the submission that in law there is a possibility of a power project not getting the benefit of the accelerated depreciation.

18. Assuming for the sake of argument that in law such a possibility exists, the construction such as the one sought to be placed on the relevant portion of para 5 of the 1st Tariff Order by the Appellant cannot be accepted because it would be inherently illogical. At the cost of repetition, we reproduce that portion of the para 5 of the 1st Tariff Order:

The above tariffs take into account the benefit of accelerated depreciation under the Income Tax Act and Rules. For a project that does not get such **benefit**, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts.

It is not the case of either the Appellant or the 2nd Respondent that Section 32(1)(i) of the Income Tax Act does not apply to some PROJECTS. The tenor of the statement is clear. The 2nd Respondent proposed the tariff for all classes of PROJECTS taking into account that all of them would be entitled to claim the 'benefit of accelerated depreciation' Under Section 32 of Income Tax Act. The 2nd Respondent must be presumed to have known at the time of propounding the 1st Tariff Order that the Income Tax Act and the Rules thereunder provide an option to the Assessee (producer of power) either to claim or not the 'benefit of accelerated depreciation'. Hence, the stipulation. The submission of the Appellant regarding the construction of the above extracted clause of the 1st Tariff Order is rejected.

19. However, that does not solve the problem on hand. Two questions still remain to be examined, (i) Even if the interpretation placed by the 1st Respondent on the above extracted portion of para 5 of the 1st Tariff Order is correct (in fact it would be the logical consequence of the rejection of the submission of the Appellant), would the 1st Respondent have a right to exercise the choice not to avail the 'benefit of accelerated depreciation' after signing the PPA? (ii) Whether the 1st Respondent's right under the Income Tax Act to make such a choice could be so exercised which would result in a situation whereby the Appellant would be obliged under the PPA to purchase the power generated by the 1st Respondent for a period of 25 years without knowing the price at which the 1st Respondent would be obliged to supply the power?

20. These questions were raised and argued before the 2nd Respondent but unfortunately the issue was unnecessarily complicated by the arguments based on promissory estoppel[10]. After noticing the issue, the appellate tribunal elaborately extracted from the order of the 2nd Respondent dated 8.8.2013. The relevant part of which reads as under:

6.16. However, it is also a fact that the parties to the above PPA agreed in the second para of the Article 5.2 of the PPA that if the project of the Petitioner is not commissioned during the control period of the Order No. 2 of 2010 dated 29.1.2010, **either the tariff that was agreed in Article 5.2 of the PPA or the tariff determined by the Commission as on the date of commissioning of the project, whichever is lower, will be applicable. Thus, the aforesaid PPA recognizes the two tariffs applicable to the Petitioner case.** As the Petitioner's project was commissioned on 2.3.2012, it falls under the control period of Order No. 1 of 2012 dated 27.01.2012, for tariff purposes, relevant para of which is reproduced below:

xxx xxx xxx xxx

The above table reveals that both the tariffs i.e. one for the project availing the benefit of Accelerated Depreciation and another for the project not availing the benefit of accelerated Depreciation is allowed by the Commission for the projects commissioned during the control period of 29.01.2012 to 31.03.2015. Such being the case, on the cogent reading of the Article 5.2 of the PPA and the Tariff Order No. 1 of 2012 dated 27.01.2012, we are of the view that the Principle of Promissory Estoppel is not applicable in the present case.

[Extracted portion of the order of the 2nd Respondent in the impugned order]

It can be seen from the above that the 2nd Respondent noticed the stipulation in the PPA that if the 1st Respondent does not commission the PROJECT during the control period specified under the 1st Tariff Order "....either the tariff that was agreed ... or the tariff determined by the Commission ... whichever is lower will be applicable but reached a conclusion that ..... on a cogent reading of the Article 5.2 ..... and the Tariff Order No. 1 of 2012 dated 27.01.2012, we are of the view that the Principle of Promissory Estoppel is not applicable in the present case." The 2nd Respondent noticed the stipulation of the PPA regarding the applicable tariff in the event of the 1st Respondent not commissioning the PROJECT would be the lower of the two tariffs. Without examining the legal effect of such stipulation, the 2nd Respondent went into the analysis of the 2nd Tariff Order which is neither necessary (nor called for) for determining the legal effect of the stipulation of the PPA.

21. The appellate Tribunal after noticing the issue and the elaborate consideration bestowed on it by the 2nd Respondent did not record in the impugned order its view regarding the correctness of the above extracted conclusion of the 2nd Respondent. We can only presume that the appellate tribunal approved the reasoning and the conclusion of the 2nd Respondent since it did not reverse the 2nd Respondent's order.

22. One of the submissions of the 1st Respondent which was accepted by the Tribunal is that the issue is covered by an earlier judgment of the Tribunal in Appeal No. 111 of 2012 dated 30th April, 2013[11] pertaining to ***Rasna Marketing Services LLP v. Gujarat Urja Vikas Nigam Limited and Anr.*** (hereinafter referred to as ***"RASNA case"***).

23. The facts of ***RASNA case*** are: that Rasna, a power producer, entered into a power purchase agreement on 8.12.2010 with the Appellant (GUVNL) herein. Under the said PPA, Rasna agreed to sell power at the rate prescribed by the 1st Tariff Order. Eventually, Rasna commissioned its

power plant on 31.12.2011 within the control period stipulated in the 1st Tariff Order. However, Rasna filed a petition before the 2nd Respondent praying for determination of specific tariff for the sale of power on the ground that Rasna would not be availing accelerated depreciation benefits. The said application of Rasna was resisted by the GUVNL. A preliminary objection that such an application is not maintainable was raised by GUVNL on the ground that Rasna having received the benefit of the PPA and also the payment pursuant thereto is debarred from seeking the relief such as the one sought by it. The 2nd Respondent overruled the preliminary objection. Therefore, GUVNL went before the appellate tribunal. Dealing with the said appeal, the Tribunal took note of the categoric objection raised by the GUVNL that the application for determination of a separate tariff by Rasna could not be entertained after Rasna had signed the PPA.[12]

24. The Tribunal rejected the said objection of GUVNL.[13] In substance, the conclusion of the Tribunal in ***RASNA case*** was that the execution of the PPA does not put any embargo on the right of Rasna to seek the determination of a specific tariff. The tribunal's reasons for such a conclusion are that (i) the 1st Tariff Order recognises the right of the power producers like Rasna either to opt for or not to opt for the benefit of accelerated depreciation; (ii) there is no specific stipulation in the Tariff Order that the power producers like Rasna which do not wish to avail the benefit of accelerated depreciation should intimate the same to the Appellant before entering into the PPA; (iii) nor there is any obligation under any law by which Rasna is bound to disclose the fact before signing the PPA that it would not avail the benefit of accelerated depreciation.

25. Relying on the judgment of the ***RASNA case***, the Tribunal recorded a conclusion in the impugned order:

32. In the present case, the Solar Project could not be commissioned during the control period specified in the State Commission's Order dated 29.1.2010. **Therefore, in terms of the PPA, the Respondent No. 1 is entitled to tariff as determined by the State Commission in the subsequent order dated 27.1.2012.**

We do not wish to make any comment on the correctness of the order of the tribunal in ***RASNA case***. We are not sure whether the order has become final. But we are of the opinion that the reliance by the tribunal in the instant case on ***RASNA case*** order is clearly wrong. In ***RASNA case***, the prayer was for the determination of a separate tariff applicable to it. In the instant case, the prayer of the 1st Respondent is not for fixation of separate tariff but for a declaration that the 1st Respondent is entitled for claiming the benefits of the tariff determined under the 2nd Tariff Order.

26. Apart from that, the conclusion of the Tribunal in the instant case is wrong. First of all the PPA does not give any option to the Respondent to opt out of the terms of the PPA. It only visualises a possibility of the producer not commissioning its PROJECT within the "control period" stipulated under the 1st Tariff Order and provides that in such an eventuality **what should be** the tariff applicable to the sale of power by the 1st Respondent. Secondly, the PPA **does not 'entitle'** the 1st Respondent to the "tariff as determined by the" 2nd Respondent by the 2nd Tariff Order. On the other hand, the PPA clearly stipulates that in such an eventuality;

Above tariff shall apply for solar projects commissioned on or before 31st December 2011. **In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall**

pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.

The right of the 1st Respondent not to avail the "benefit of accelerated depreciation" flows from the Income Tax Act. It is only the 1st Tariff Order which gives an option to the 1st Respondent (for that matter to all the power producers who are similarly situated as the 1st Respondent) not to sell the power produced by it at the price specified in the 1st Tariff Order but seek the determination of a separate tariff. Such a right and option is available to the power producers only in one contingency i.e., that they are not inclined to avail the 'benefit of accelerated depreciation'.

27. The real question is: what is the point of time at which the power producer can exercise such right to seek the determination of a separate tariff.

28. The Income Tax Act gives an option to the producers of power either to avail the 'benefit of the accelerated depreciation' or not. It also specifies the point of time at which such an option could be exercised. The right to exercise such option at a point of time specified in the 2nd proviso to Rule 5(1A) is limited only for the purpose of availing the benefits flowing from the Income Tax Act. The PPA does not make any reference to the "benefits of accelerated depreciation". It simply specified the price to be paid by the Appellant for the power purchased by it from the 1st Respondent. The Appellant determined the said price after taking into consideration various factors. One of them happened to be that the Power Producers are entitled to certain 'benefits' under the Income Tax Act. The availability of such 'benefit' is dependent upon the option of the power producers. Though the 1st Tariff Order employs the expression 'benefit' in the context of the AD Scheme Under Section 32 of the IT Act, the applicability of the provision to a power producer depends upon the choice of the power producer. Whether the availability of the AD Scheme is beneficial to the power producer or not in a given case depends on various factors the details of which we do not propose to examine. It is for the power producer to make an assessment whether the availing of the AD is beneficial or not will take a decision if the scheme Under Section 32 IT Act should be availed or not.

29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st Respondent as a power producer has the freedom of contract either to accept the price offered by the Appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.

30. The 1st Respondent knowing fully well entered into the PPA in question which expressly stipulated Under Article 5.2 that "the tariff is determined by Hon'ble Commission vide Tariff Order for solar based power project dated 29.1.2010"

31. Apart from that both the Respondent No. 2 and the appellate tribunal failed to notice and the 1st Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:

In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, **whichever is lower.**

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the "control period" stipulated in the 1st Tariff Order. It also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/power producers (similarly situated as the first Respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st Respondent would be entitled only for lower of the two tariffs. Unfortunately, the said stipulation is totally overlooked by the second Respondent and the appellate tribunal. There is no whisper about the said stipulation in either of the orders.

32. The 1st Respondent created enough confusion. While on one hand the 1st Respondent asserted a right to seek determination of a separate tariff independent of the tariff fixed under the 1st Tariff Order in view of the stipulation contained in the 1st Tariff Order that "for a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts" did not seek a relief before the 2nd Respondent to determine a separate tariff but claimed the benefit of the 2nd Tariff Order. Assuming for the sake of argument that the petition filed by the 1st Respondent (1270/2012) is to be treated as an application for determination of separate tariff which would be identical with the tariff fixed under the 2nd Tariff Order, whether the 1st Respondent would be entitled for such a relief depends, if at all he is entitled to seek such a determination, on a consideration of "all the relevant facts" but not by virtue of the operation of the 2nd Tariff Order.

33. For all the above-mentioned reasons, we are of the opinion that the impugned order cannot be sustained and the same is therefore set aside. As a consequence, the order of the 2nd Respondent dated 8.8.2013, which was the subject matter of appeal in the impugned order, is also set aside.

34. At this juncture, we need to mention that the learned Counsel for the Respondents very vehemently argued that the instant appeal is not maintainable because Section 125 of the Electricity Act mandates that an appeal to this Court under the said provision is maintainable only where there is a substantial question of law and the parties seeking to invoke the appellate jurisdiction of this Court must clearly indicate as to what is the substantial question of law that arises for consideration of this Court. According to the Respondents, the memorandum of appeal does not disclose any substantial question of law which arises for the consideration of this Court

35. We do not find any substance in the submission. We believe that debate in the foregoing paragraphs of this judgment revolved around more than one substantial question of law justifying the exercise of the appellate jurisdiction of this Court. The appeal is allowed with costs quantified at Rs. 2 lakhs payable by the 1st Respondent herein. The interim orders granted earlier stand dissolved. The amounts, if any, paid by the Appellant pursuant to the interim orders of this Court shall be adjusted towards the payments due to the 1st Respondent for future procurement of power by the Appellant in such manner as the Appellant deems fit and proper.

[1]The Tariff Order uses the term 'Solar Energy Projects' and the PPA uses the term 'Solar Power Projects'. The terms 'Solar Power Projects' and 'Solar Energy Projects' are identical. Hereinafter, we use the term 'PROJECTS' to denote them.

[2]**Para 4. Components of Tariff**

The following financial and operational parameters have been considered while determining the tariff.

1. Capital cost
2. Evacuation cost
3. Operations & Maintenance charges
4. Debt-Equity Ratio
5. Loan Tenure
6. Interest rate on loan
7. Return on equity
8. Rate of Depreciation
9. Interest on Working Capital
10. Capacity Utilization Factor
11. Duration of Tariff
12. Auxiliary Consumption

[3]Described as power producer in the PPA

[4]12.8 Amendments:

This Agreement shall not be amended, changed, altered, or modified except by a written instrument duly executed by an authorized representative of both Parties. However, GUVNL may consider any amendment or change that the Lenders may require to be made to this Agreement.

[5]12.10 Entire Agreement, Appendices:

This Agreement constitutes the entire agreement between GUVNL and the Power Producer, concerning the subject matter hereof. All previous documents, undertakings, and agreements, whether oral, written, or otherwise, between the Parties concerning the subject matter hereof are hereby cancelled and shall be of no further force or effect and shall not affect or modify any of the terms or obligations set forth in this Agreement, except as the same may be made part of this Agreement in accordance with its terms, including the terms of any of the appendices, attachments or exhibits. The appendices, attachments and exhibits are hereby made an integral part of this Agreement and shall be fully binding upon the Parties.

In the event of any inconsistency between the text of the Articles of this Agreement and the appendices, attachments or exhibits hereto or in the event of any inconsistency between the provisions and particulars of one appendix, attachment or exhibit and those of any other appendix, attachment or exhibit GUVNL and the Power Producer shall consult to resolve the inconsistency.

[6]Para 7.2 Control Period

The Commission had proposed a control period for this order as the period from the date of final order of the Commission to 31.12.2011.

Commission's Ruling-
It has been observed that the capital cost of the solar power project might reduce drastically as time elapses. However, since the gestation period for Solar PV projects is about 6 months and that for Solar Thermal Projects is 18-24 months, the Commission decides that the control period for this order will be 2 years.
[7]Para 7. Considering the above, we decide that the petition succeeds. We decide that the Petitioner's project, which is not availing the benefit of Accelerated Depreciation is entitled to the tariff of Rs. 11.25/Unit for the first 12 years of the project and Rs. 7.50/Unit for the subsequent 13 years. The Respondent is directed to pay the amount of difference of Rs. 11.25-Rs. 9.98 = 1.27/KWh to the Petitioner for the invoices so far raised by the Petitioner and payment of which have already been made by the Respondent. The Respondent is further directed that he shall pay the above tariff now onward also to the Petitioner for energy supplied by him.
Para 8. Before parting with the judgment, we would like to observe that the issue raised in the present petition is in fact on interpretation of the Order No. 1 of 2012 dated 27.01.2012; and hence the decision in this case would impact not only the Petitioner, but also other developers who have either commissioned or are likely to commission their projects within the control period of the said order. Some of such developers might not avail the benefits of accelerated depreciation and it would be unfair if all of them are required to file separate petitions to seek justice, especially when we have already decided that in the Order No. 1 of 2012, the Commission has determined separate tariff for such projects. We, therefore, in the interest of justice and fairness, decide that the present order shall be applicable in all such cases. The onus of proof regarding non-availing of accelerated depreciation shall, however, be on such developers.
[8]There is some dispute between the parties in this regard and the Appellate Tribunal recorded:
36. The Tariff Order 2012 determines both the tariffs i.e. with or without accelerated depreciation.
In our opinion, the conclusion of the Tribunal in this regard is right. The Tenor of the two Tariff Orders (relevant portions of which are extracted above) is too obvious and does not call for any further explanation to justify the above conclusion of the Appellate Tribunal.
[9]The relevant portion of Section 32 of the Income Tax Act reads as under:
...undertaking engaged in generation .... of power....
The said Section covers not only Solar Power Projects but also all kinds of Power Projects.
[10]18. One other issue raised by the Appellant before the State Commission is that the choice to sell electricity at the tariff with or without accelerated depreciation was to be exercised by the Developer only at the relevant time and such a claim made subsequently is barred by the principles of estoppel.
[11]29. According to the Respondent, the issue has already been decided in favour of the Developer in judgment dated 30.4.2013 in Appeal No. 111 of 2012.
31. In the above judgment in Rasna case, the Tribunal decided that there is no infirmity in the State Commission determining the tariff for the Solar Power Projects of Rasna Marketing Services Ltd. without considering the benefit of accelerated depreciation in terms of the Order No. 2 of 2010 dated 29.1.2010. In that case, Rasna Marketing Services Ltd. had commissioned its project within the Control Period specified in the State Commission's order dated 29.1.2010. The order dated 29.1.2010 determined the tariff for Solar Projects with accelerated depreciation but provided that for a project that does not get the accelerated depreciation benefit, the

Commission on a Petition filed by the Developer would determine a separate tariff without accelerated depreciation.

[12]21. The main ground of objection raised by the Appellants before the State Commission was that Rasna Marketing Services Limited, R-2 could not be permitted to file the said application after having signed the PPAs both on 08.12.2010 and 8.6.2011 with the Appellants and such a petition could be entertained by the State Commission only before the signing of the PPAs and Rasna Marketing Services Ltd. R-2 having preferred to sign the PPA as per the Tariff Order dated 29.1.2010 fixing the generic tariff cannot take a different stand and maintain the petition for determination of project specific tariff on the pretext of not availing the accelerated depreciation benefits.

[13]22.(ii) **It can not be contended that the subsequent execution of PPA would in any manner put an embargo on the jurisdiction of the State Commission for such a specific tariff determination especially when the PPA itself recognised** the fact that the tariff shall be as per the order No. 2 of 2010 dated 29.01.2010 and particularly when the said order also recognised the right of the developers who are not willing to get the benefit of accelerated depreciation to approach the State Commission for determining the specific tariff for those projects.

(iii) According to the Appellants, if Rasna Marketing Services LL (R-2) did not want to avail accelerated depreciation benefits, the same should have been intimated to the Appellants even before signing of the PPAs. This contention is not tenable because there is no such reservation either in the Tariff Order No. 2 of 2010 or in the PPA entered into between the parties.

(iv) Rasna Marketing Services LLP (R-2) is not mandated under any provision of law to disclose to the Appellants that it would not be availing the benefit of accelerated depreciation before signing the PPA. It is the discretion of the project developer not availing the benefit of accelerated depreciation to move the State Commission in a separate petition for determination of project specific tariff as permitted by the State Commission in the Tariff Order No. 2 of 2010 dated 29.1.2010. The said Tariff Order is a statutory order binding on the project developers and licensees such as the Appellants and the developers.

(v) If the option of signing or not signing the PPA was contingent on the developers in exercise of option, then that option should have been specifically sought for by the Appellant and ensured that the same was incorporated in the PPA. This admittedly has not been done.

Back to Index

MANU/SC/0300/2020

Neutral Citation: 2020/INSC/294

IN THE SUPREME COURT OF INDIA

SLP (C) Nos. 9036-9038, 9798-9799, 17088-17089, 37375, 37372, 16573-16605 of 2016, SLP to Petition (C) No. 15967 of 2016, Civil Appeal Nos. 19356, 19362, 19361, 19358, 19357, 19360, 19359 of 2017, SLP (C) Nos. 34752-34753 of 2016, 15890 of 2017, Civil Appeal Nos. 19363, 19364, 19412 of 2017, MA 1423 of 2017 in Civil Appeal No. 12247 of 2016, SLP (C) Nos. 33022, 33127, 33114 of 2017, MA 1787 of 2017 in Civil Appeal No. 10210 of 2016, MA 1786 of 2017 in Civil Appeal No. 10207 of 2016, MA 45 of 2018 in Civil Appeal No. 6239 of 2017, SLP (C) No. 16051 of 2019, Dairy No. 23842 of 2018, SLP (C) No. 30452 of 2018, Civil Appeal No. 4835 of 2015 and SLP (C) Nos. 30577-30580 of 2015

Decided On: 06.03.2020

Appellants: Indore Development Authority Vs**.** Respondent: Manoharlal and Ors.

Hon'ble Judges/Coram:

Arun Mishra, Indira Banerjee, Vineet Saran, M.R. Shah and S. Ravindra Bhat, JJ.

Subject: Land Acquisition

Relevant Section:

Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013 - Section 24

Prior History / High Court Status:

From the Judgment and Order dated 30.11.2015 of the High Court of Madhya Pradesh Bench at Indore in Writ Appeal Nos. 514, 799 and 772 of 2006 (MANU/MP/1359/2015)

Authorities Referred:

Advanced law Lexicon by P. Ramanatha Aiyar; Craies on Statute Law; Oxford Dictionary; Principles of Statutory Interpretation by Justice G.P. Singh; Black's Law Dictionary; Snell's Equity; Webster's Dictionary; Stroud's Judicial Dictionary; Jowitt's Dictionary of English Law

JUDGMENT

Arun Mishra, J.

1. The correct interpretation of Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short, 'the Act of 2013'), is the subject matter of reference to this five Judge Bench of this Court.

2. A three Judge Bench of this Court in *Pune Municipal Corporation and Anr. v. Harakchand Misrimal Solanki and Ors.* MANU/SC/0055/2014 : (2014) 3 SCC 183, interpreted Section 24 of the Act of 2013. The order reported as *Yogesh Neema and Ors. v. State of Madhya Pradesh* MANU/SC/0173/2016 : (2016) 6 SCC 387, a two-judge Bench, however doubted the decision in *Sree Balaji Nagar Residents Association v. State of Tamil Nadu* MANU/SC/0794/2014 : (2015) 3 SCC 353 (which had followed *Pune Municipal Corporation* (supra) and also held that Section 24(2) of the Act of 2013 does not exclude any period during which the land acquisition proceeding might have remained stayed on account of stay or injunction granted by any court) and referred the issue to a larger Bench. Later, in another appeal (arising out of S.L.P. (C) No. 2131 of 2016 (*Indore Development Authority v. Shailendra (dead) through Lrs. and Ors.* MANU/SC/1549/2017) the matter was referred to a larger Bench on 7.12.2017; the Court noticed that:

cases which have been concluded are being revived. In spite of not accepting the compensation deliberately and statement are made in the Court that they do not want to receive the compensation at any cost, and they are agitating the matter time and again after having lost the matters and when proceedings are kept pending by interim orders by filing successive petitions, the provisions of Section 24 cannot be invoked by such landowners.

3. The Court noticed that the reference to a larger Bench was pending, and had been made in *Yogesh Neema* (supra). The Court also felt that several other issues arose which it outlined, but were not considered in *Pune Municipal Corporation* (supra). The Court therefore, stated that the matter should be considered by a larger Bench and referred the case to Hon'ble the Chief Justice of India for appropriate orders. *Indore Development Authority v. Shailendra* (hereafter, *"IDA v. Shailendra"*) a Bench of three Judges was of the view that the judgment in *Pune Municipal Corporation* (supra) did not consider several aspects relating to the interpretation of Section 24 of the Act of 2013. Since *Pune Municipal Corporation* (supra) was a judgment by a Bench of coordinate strength, two learned judges in *IDA v. Shailendra* opined *prima facie* that decision appeared to be *per incuriam*.

4. Later, in *Indore Development Authority v. Shyam Verma and Ors.* (SLP No. 9798 of 2016) considered it appropriate to refer the matter to Hon'ble the Chief Justice of India to refer the issues to be resolved by a larger Bench at the earliest. Yet again in *State of Haryana v. Maharana Pratap Charitable Trust (Regd.) and Anr.* (CA No. 4835 of 2015) referred the matter to Hon'ble the Chief Justice of India to constitute an appropriate Bench for consideration of the larger issue. These batch

appeals were referred to a five Judge Bench, which after hearing counsel, framed the following questions, which arise for consideration:

1. What is the meaning of the expression paid'/tender' in Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act of 2013') and Section 31 of the Land Acquisition Act, LA (Act of 1894')? Whether non-deposit of compensation in court Under Section 31(2) of the Act of 1894 results into lapse of acquisition Under Section 24(2) of the Act of 2013. What are the consequences of non-deposit in Court especially when compensation has been tendered and refused Under Section 31(1) of the Act of 1894 and Section 24(2) of the Act of 2013? Whether such persons after refusal can take advantage of their wrong/conduct?

2. Whether the word or' should be read as conjunctive or disjunctive in Section 24(2) of the Act of 2013?

3. What is the true effect of the proviso, does it form part of sub-Section (2) or main Section 24 of the Act of 2013?

4. What is mode of taking possession under the Land Acquisition Act and true meaning of expression the physical possession of the land has not been taken occurring in Section 24(2) of the Act of 2013?

5. Whether the period covered by an interim order of a Court concerning land acquisition proceedings ought to be excluded for the purpose of applicability of Section 24(2) of the Act of 2013?

6. Whether Section 24 of the Act of 2013 revives barred and stale claims? In addition, question of per incuriam and other incidental questions also to be gone into.

5. Question Nos. 1 to 3 are interconnected and concern the correct interpretation of Section 24(2) of the Act of 2013. Following questions are required to be gone into to interpret the provisions of Section 24(2) of the Act of 2013:

(i) Whether the word "or" in Section 24(2) of the Act of 2013 used in between possession has not been taken or compensation has not been paid to be read as "and"?

(ii) Whether proviso to Section 24(2) of the Act of 2013 has to be construed as part thereof or proviso to Section 24(1)(b)?

(iii) What meaning is to be given to the word "paid" used in Section 24(2) and "deposited" used in the proviso to Section 24(2)?

(iv) What are the consequences of payment not made?

(v) What are the consequences of the amount not deposited?

(vi) What is the effect of a person refusing to accept the compensation?

6. The Act of 2013 repeals and replaces the Land Acquisition Act, 1894, a general law for acquisition of land of public purposes, which had been in force for almost 120 years, with a view to address certain inadequacies and/or shortcomings in the said Act.

7. The Act of 2013 is prospective and saves proceedings already initiated under the Land Acquisition Act, 1894 before its repeal, subject to provisions of Section 24 of the Act of 2013, which begins with a *non-obstante* Clause and overrides all other provisions of the Act of 2013.

8. On behalf of the Union, the States and various acquiring bodies and development authorities, Mr. Tushar Mehta, learned Solicitor General (who led the arguments, hereafter "SG"), Ms. Pinky Anand, learned Additional Solicitor General (hereafter "ASG"), Mr. Anoop Chaudhary and Mr. Jayant Muthuraj, learned Senior Counsel, Ms. Shashi Kiran, Ms. Rachna Srivastava, Mr. R.M. Bhangade and Mr. Rajesh Mahale, learned Counsel, made their submissions.

9. The learned SG, arguing that this Court should overrule the ratio in *Pune Municipal Corporation* (supra) and other judgments which followed it, contended that the Court did not consider the various interpretations of Section 31 of the (repealed) Land Acquisition Act, ("LA Act" hereafter). He urged that the provisions of the Act of 2013, vis-à-vis the timelines and consequences that would ensue if the acquisition proceeding prolongs, were not examined. He highlighted that Section 24 is a transitional provision and such provisions should be given an interpretation which accords with legislative intent, rather than so as to impose hitherto absent standards, upon past proceedings, or proceedings initiated under the previous *regime*, but which have not worked themselves out. He urged that there is a presumption in favour of restricted retrospective applicability of any provision in an enactment unless a contrary intention appears. It is submitted that designedly, it is the stage of passing of award Under Section 11 of the LA Act, that represents the *determinative factor* in the segregation for the applicability of the provisions of the Act of 2013 or the LA Act. It is urged that the opening part of the provision in Section 24(1) is a *non-obstante* Clause providing for a limited overriding effect of the Land Acquisition Act, in case of the contingencies mentioned in Section 24(1)(a) and (b) of the Act of 2013.

10. Section 24(1)(a) contemplates that where no award Under *Section 11* of the LA Act has been made, but proceedings had been initiated under said Act, provisions of the Act of 2013 would apply limited to the determination of compensation. In other words, the entire exercise *de novo*, under the Act of 2013, will not be required to be undertaken. Therefore, Section 24(1)(a) contemplates a limited applicability of the Act of 2013. Section 24(1)(b) stipulates that where an award Under Section 11 of the LA Act has been made, the entire proceedings would continue under that law and the provisions of the Act of 2013 would be inapplicable. Section 24(1)(b) is the larger umbrella Clause Under Section 24, which protects the vested rights of the parties under the LA Act if the stage of passing of award has been crossed. It is argued that the umbrella Clause Section 24(1)(b), is followed by Section 24(2)-which provides for the exclusionary clause. Section 24(2), the learned SG highlighted, *is the only lapsing Clause under the provision which brings in the rigours of the Act of 2013 in totality by mandating the land acquisition to be initiated de novo.*

11. It is urged that Section 24(2) opens with a non obstante Clause carving out an exception only from Section 24(1). It visualizes that land acquisition proceedings which had been initiated under the LA Act, an award Under Section 11 of the LA Act had been made. Consequently, Section 24(2) has no relation to Section 24(1)(a) as it does not contemplate an award Under Section 11 of the LA Act at all. It is, therefore, a limited exception to Section 24(1)(b). Section 24(2) consequently is umbilically related to Section 24(1)(b) as an exception, wherein land acquisition proceedings would lapse in certain contingencies even when an award Under Section 11 of the LA Act had been made.

12. It is submitted that the contingencies for lapsing in Section 24(2), are subject to an award Under Section 11 of the LA Act being made five years prior to the commencement of the Act of 2013 (which is 1.1.2014). If the award is so made, two contingencies result in complete lapse-: (a) Physical possession of the land has not been taken; or (b) compensation has not been "paid". The provision for lapse, *per* Section 24(2) is, by its nature, a vital provision, inviting serious consequences, in case those contingencies arise. It is the interpretation of these "contingencies" that requires further consideration. The "contingencies" ought to be interpreted in a manner which saves the past transactions to the extent they can be saved as it is clearly not the intention of the Act of 2013 to tide over all past transactions.

13. The learned SG argued that the proviso to Section 24(2) further carves out an exception to Section 24(2) viz., in case the award has been made and compensation in respect of *majority of landholdings* has not been deposited in the account of the beneficiaries, no lapsing will take place, but all the beneficiaries specified in the notification for acquisition shall be entitled to compensation in accordance with the provisions of the Act of 2013.

14. Therefore, if only a minority of the claimants are disbursed with the compensation, such claimants would get benefit of compensation under the Act of 2013 to a limited extent without lapsing. Thus, it is clear that even if the acquisition does not lapse, all the beneficiaries to whom the compensation is payable would be entitled to compensation under the Act of 2013.

15. It is submitted that Section 24(1)(a) and Section 24(2) are balancing provisions controlling the extent of retrospectivity and curtailing the effacement of rights. Such balance of protecting acquisitions under the LA Act in some defined circumstances whilst providing the enhanced compensation provisions under the Act of 2013 under some defined circumstances is the "middle path" that Parliament adopted. It is contended that Section 24(2) is, therefore, controlled by the proviso mandating again a further middle path consciously chosen by Parliament.

16. It is argued that while providing for a transitory provision or situations resulting into "lapsing" of all the steps already taken under the Act under repeal, the legislature always envisages several contingencies which emerge out of its day-to-day experience. The manner in which Section 24(2) and the proviso attached therewith are drafted clearly discloses that Parliament intended certain inevitable contingencies which frequently arose in land acquisition proceedings. It was urged illustratively, that often, land acquired belongs to *benami* owners, who cannot put forward title, or claim compensation or identify themselves. In such situations, it may not be possible for an acquiring authority to "pay" [which, as plain language indicates, would mean setting apart for being taken by the entitled persons as explained hereafter] to "*all*" land holders/entitled persons.

However, as is clear from the proviso to Section 24(2), if it can be shown that the amount is deposited for majority of share-holding, the acquisition would be saved and cannot lapse; the only consequence would be the determination of benefits under the Act of 2013. Parliamentary intent in the proviso clearly appears to be to ascertain the stage up to which the land acquisition proceedings under LA Act have reached. If nobody is paid the compensation or compensation is not taken by everyone though tendered and/or kept ready, the legislature contemplates such a situation to be a reversible one and, therefore, provides for lapsing of all previous stages prior to "non-payment". However, if it can be demonstrated that though-(1) compensation was tendered to all; (2) some of them [for whatever reason] did not take the compensation; and (3) compensation is deposited in case of majority of the land holdings [viz. setting apart the share of such persons and making it available for them to take it], then, neither proceedings would lapse nor the compensation will be required to be determined under the Act of 2013. In substance, therefore, the legal situation would be akin to the one contemplated Under Section 24(1)(b) for all practical purposes.

17. It is submitted that during the drafting of the Bill, the legislative intent and the apprehensions of the stakeholders in the acquisition process is clearly depicted in 31st Report of the 'Standing Committee on Rural Development' while discussing the 'The Land Acquisition, Rehabilitation and Resettlement Bill, 2011' which was the precursor to the Act of 2013. The learned SG relied on extracts of the Standing Committee Reports, the draft Bill, various comments from government and public agencies and departments and other stakeholders, the stage(s) during which amendments were proposed to the draft provisions (of Section 24) and its culmination into the present form and structure.

18. The learned SG argued that the amendments proposed by the Minister while introducing the Bill-to incorporate an explanation, as to what constitutes "deposit" was not accepted in the legislative wisdom of the Lok Sabha and the Bill so passed consciously did not incorporate the Explanation (in the form of Proviso to Section 24(2)) providing for an extensive and artificial meaning of the word *paid*. Further, reference to "*bank*" account was also consciously not incorporated thereby leaving the expression "*to pay*" and "*to deposit*" with its natural meaning and leaving it to the discretion of the acquiring authorities to deposit the compensation amount even in the treasury. It is possible that the legislature may have considered the reality of 2012-13 where crores of people did not have bank accounts. It was also urged that the rejection of the amendment is in consonance with the apprehensions expressed by other stakeholders and ministries at the said time. After the said Bill was passed in the Lok Sabha, amendments were proposed and accepted by the Rajya Sabha, giving the provision its final form. Further, it is clear that the effort at the time was towards the drafting of a balancing provision which protects the acquisitions from lapsing and at the same time provides enhanced compensation under the new Act depending upon the stage up to which the acquisition has progressed. This was the genesis behind Section 24(1)(a) and proviso to Section 24(2) which protect acquisitions from lapsing whilst providing for higher compensation under the Act of 2013 to the land owners under limited defined circumstances. It is submitted that it is necessary to read the proviso to Section 24(2) along with the same provision and not Section 24(1)(b) as the former would be in accord with Parliamentary intent.

19. It was submitted that Section 24(2) intended a limited retrospective operation: yet such retrospectivity operated and has to be construed narrowly considering the nature and width of

Section 24(2) and the drastic consequences flowing from it. It is submitted that the field of retrospectivity to be given Under Section 24 needs to be considered in the context of legislative intention manifested from Section 114 of the Act of 2013 and Section 6 of the General Clauses Act, 1897. Both Section 114 (of the Act of 2013) and Section 6 of the 1897 Act clearly point to a narrow interpretation of Section 24 with the object of saving on-going acquisition proceedings as far as possible. The learned SG referred to the provisions of UK's Interpretation Act, 1978; he also relied on Bennion's *Statutory Interpretation* Bennion's Fifth Edition, (2012) Indian Reprint, which reads as under:

Where, on a weighing of the factors, it seems that some retrospective effect was intended, the general presumption against retrospectively indicates that this should be kept to as narrow a compass as will accord with the legislative intention.

20. Reliance was placed on *Secretary of State for Social Security v. Tunnicliffe* MANU/UKWA/0025/1990 : [1991] 2 All ER 712, to the effect that:

Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears.

The learned SG also referred to the later judgment of the House of Lords which dealt with the said question. It is submitted that sitting in a combination of eight judges, in *Yamashita-Shinnihon Steamship Co. Ltd. v. L'office Chefifien Des Phosphates and Anr.*[1], where it was held that retrospective application of a statute can be made only when it does not visit anyone with unfairness. The learned SG referred to *Zile Singh* v. *State of Haryana* MANU/SC/0876/2004 : (2004) 8 SCC 01 where a three-judge Bench held that retrospectivity should not be presumed to have been given to a provision, unless it says so clearly, or through necessary implication. The guidance was given to construe provisions for determining whether such intention is expressed, in a given case.

21. It was urged that this Court, after assessing the unintended and absurd results that an amendment may result in, purposefully interpreted the provisions to be prospective in operation. It was also emphasized that Section 24(2) is retrospective in nature and cannot be held to be prospective; nevertheless, the extent of retrospectivity ought to be narrowly construed while interpreting, given the harsh consequences that it results in particularly against projects of public interest. Reliance was placed on *CIT v. Sarkar Builders* MANU/SC/0636/2015 : 2015 (7) SCC 579.

22. It is submitted that apart from the above, this Court has consistently ruled on principles guiding the retrospective operation of statutes. Though there is no bar against retrospective operation yet this Court considered the practical realities before analysing the extent of retrospective operation of the statutes. Reliance in this regard is placed on *Jawaharmal v. State of Rajasthan* MANU/SC/0268/1965 : 1966 (1) SCR 890 and *Rai Ramkrishna* v. *State of Bihar* MANU/SC/0031/1963 : 1964 (1) SCR 897.

23. The learned SG next submitted that a spate of decisions of this Court had followed the *ratio* in *Pune Municipal Corporation* (supra). Emphasizing that the overall interpretation of Section 24 of the Act of 2013 has to accord with its scheme, it was stated that the object of that provision was not only to declare that certain acquisitions lapsed. Learned Counsel, in this context, highlighted that Section 24(1)(a) in fact saves acquisition proceedings, where awards were not made before the advent of the Act of 2013, by declaring that the award would be made under that Act and compensation payable, in accordance with its provisions. Section 24(1)(b) on the other hand contemplates making of award, under the old (LA) Act, but significantly states that all further "proceedings" *after the award* would be taken under the new Act. It was highlighted here, that Parliament clearly intended that the compensation determined under the old Act had to be paid in terms of the new Act, which is Under Section 77. The learned SG submitted that given these aspects, which are expressed in Section 24(1), the non *obstante* Clause and the following provisions of Section 24(2) have to be interpreted contextually, and in a purposive manner. It was submitted that Parliament did not intend that settled matters should be undone, and whatever had attained finality, in acquisition matters, should not be re-opened. He cited the decisions of this Court reported as *Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill* MANU/SC/1334/2011 : (2012) 2 SCC 108; *Tinsukhia Electric Supply Company Ltd. v. State Of Assam and Ors.* MANU/SC/0027/1990 : (1989) 3 SCC 709 @ para 118-121; *Commissioner of Income Tax v. Hindustan Bulk Carriers* MANU/SC/1215/2002 : (2003) 3 SCC 57 @ para 14-21; *D. Saibaba v. Bar Council of India and Ors.* MANU/SC/0388/2003 : (2003) 6 SCC 186 para 16-18; *Balram Kamanat v. Union of India* MANU/SC/0628/2003 : (2003) 7 SCC 628 para 24; *New India Assurance Co. v. Nulli Nivelle* MANU/SC/0166/2008 : (2008) 3 SCC 279 @ para 51-54; *Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi* MANU/SC/1017/2008 : (2008) 4 SCC 720 para 41 & 42; *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.* MANU/SC/2179/2008 : (2008) 13 SCC 30 para 132-137; *N. Kannadasan v. Ajoy Khose and Ors.* MANU/SC/0926/2009 : (2009) 7 SCC 1 para 54-67; *H.S Vankani v. State of Gujarat*, MANU/SC/0175/2010 : (2010) 4 SCC 301 para 43-48; *State of Madhya Pradesh v. Narmada Bachao Andolan and Ors.* MANU/SC/0599/2011 : (2011) 7 SCC 639 para 78-85

24. It was submitted that hitherto, in accord with *Pune Municipal Corporation* (supra) and *Balaji Nagar Residential Assn. v. State of Tamil Nadu* MANU/SC/0794/2014 : 2015 (3) SCC 353 most decisions had accepted that the expression "or"-(occurring in Section 24(2)), where an award has been made under the old Act, 5 years before the commencement of the Act of 2013 "*but the physical possession of the land has not been taken or the compensation has not been paid*"-is to be read disjunctively, i.e., that if either condition is satisfied, the acquisition would lapse. However, submitted the learned SG, the true and correct interpretation of the term "or" would be that it ought to be construed as a conjunctive word.

25. Learned Counsel next submitted that the expression "paid" should be construed reasonably and not in a literal manner, as was done in *Pune Municipal Corporation* (supra). Before the Act of 2013 was brought into force, the modes of payment recognized by the law were: tendering payment, payment into court in the event no one entitled to alienate the property received it and payment into court upon disputes about the entitlement to receive payment. These three situations were visualized in Section 31(2) of the old Act. It was emphasized that the consequence of lapse of acquisition was never contemplated, in the event of refusal to accept payment, or absence of anyone entitled to receive it, or in the contingency of a dispute regarding entitlement to receive the

amount. This clearly meant that while payment of compensation was essential and mandatory, the mode of payment was not mandatory. If, for instance, the amount was tendered and not received, but instead, the landowner refused it, the appropriate government could well deposit it in the treasury, in accordance with prevailing financial rules, to facilitate disbursement, as and when the landowner or the one entitled to receive it, came forward and established entitlement. In such event, the only consequence of non-deposit (in court, Under Section 31) meant that higher interest as mandated by Section 34 was to be paid.

26. The context of Section 24, learned Counsel urged, is to provide for a transitory provision viz. to take care of the pending land acquisition proceedings which are ongoing under the LA Act when the Act of 2013 is brought into force w.e.f. 1.1.2014. The purpose and object of making this provision is to balance the competing rights of public projects vis-à-vis holders of the land. The object and purpose was to ensure that where acquisition proceedings under LA Act have reached an advanced stage and investment of public money had already been made, firstly, the lapsing of such ongoing projects should be avoided and secondly as far as possible, the land owners also can, without disturbing the process of acquisition, be given the compensation under the Act of 2013.

27. It was reiterated that the legislature knows about the ground realities faced in land acquisition proceedings. There are very few cases where one or two land parcels are acquired in isolation. Mostly, acquisitions take place of bigger tracts of land involving more than one parcel of land and more than one person "entitled to compensation". When Parliament provided for a transitory provision in relation to acquisitions under the old Act, it did not contemplate the possibility of the entire payment procedure to all being not processed given the practical situations arising in all such proceedings. Parliament is also presumed to be aware of the fact that in almost all cases of acquisition, the proceedings are stiffly opposed and in most of the cases, the tender of compensation is also opposed under a wrong and misplaced notion that the acceptance of the tender may be treated as acquiescence with the quantum being tendered.

28. The learned Counsel argued that Parliament did not expect the acquiring authority to perform an impossible task of forcing payment to the land owners unwilling, for any reason to accept it. The legislature, therefore, does not use the expression of the land owners having "accepted" the payment. It merely uses the expression "paid". The legislature clearly tries to balance the rights of land owners only in one contingency viz. in a post award scenario and the award having been made five years prior to 1.1.2014, when the amount is not "deposited" in the accounts of the majority of the beneficiaries.

29. It was urged that on a true construction and taking the literal, natural and grammatical meaning of the provisions in the context referred above and keeping in mind the object it can safely be concluded that the words "paid" and "deposit" are expressions of the same act namely making the amount available (i.e. tendering) for being taken by those entitled to it. It was urged that if this interpretation is not given then the refusal by few persons or few persons being untraceable in the acquisition of a vast tract of land would result in the drastic consequence of lapsing of the acquisition proceedings.

30. It was urged by the learned ASG and Mr. Muthuraj, learned senior Counsel that the legislature cannot be presumed to intend such an anomalous situation. The only way in which the object

behind Section 24 can be achieved is to give natural meaning to the words and expressions used keeping the object in mind and treating the words "paid" and "deposit" as connoting expression of the very same Act depending upon the fact situation in each case. Learned Counsel submitted that by using the terms "paid" and "deposit", Parliament consciously left a leeway to save the drastic consequence of lapsing by dealing with a particular situation in light of fact situation emerging in each case. Not treating "paid" and "deposit" as synonymous or the "deposit" so as to keep it available being the next step after "pay", would lead to disastrous situations as the acquiring authority may have acquired vast tract of land and may have put substantial portion from it to public use by constructing infrastructural projects. Such a disastrous situation/consequence would never have been anticipated or envisaged by the legislature. Learned Counsel also referred to various Standing Orders, framed as part of the financial code of several States, which provided for procedure to deposit money in the treasury, when landowners refused to accept compensation, or were untraceable, at the time the amount was to be tendered.

31. It is submitted by the learned ASG that this Court should not assume any omission or add or amend words to the statute. It is submitted that plain and unambiguous construction has to be given without addition and substitution of the words. It is submitted that when a literal reading produces an intelligible result it is not open to read words or add words to statute. In support of this proposition, reliance was placed on some decisions[2]. It was therefore submitted that the word "paid" does not and cannot mean actual *de-facto* payment as it would amount to adding words which do not exist in the provision. Similarly, the word "deposit" cannot mean "deposit in the Court" as that was never the legislative intent nor can it be deduced from any accepted interpretive process.

32. It was submitted that this Court, whilst interpreting Section 24 of the Act of 2013, for the first time in *Pune Municipal Corporation* [supra] and subsequent judgments, presumed that the word "paid" occurring in Section 24(2) of the Act of 2013 would have to be interpreted as per Section 31 of the LA Act. It is submitted that the said presumption neither has any justification nor any such justification is examined in the said judgments. It is submitted that the said presumption has resulted in grave consequences without ascertaining the conscious omissions on the part of the Legislature. The learned SG illustrated how the terms "paid" and "deposit" have been used in different senses under the LA Act and in the Act of 2013.

33. Learned Counsel submit that firstly, Section 31 of the LA Act is *pari materia* to Section 77 of the Act of 2013. There is neither any justification nor any requirement of interpreting Section 24 of the Act of 2013 in the shadow of Section 31 of the LA Act. It is submitted that if as an alternative argument it is assumed that the expressions "paid"/"tender" and the expression "deposited" have both been used consciously in Section 31, as is the reason of drafting Section 24(2), an anomalous situation occurs. In the proviso to Section 24(2) of the Act of 2013, expression used is compensation has not been "*deposited" "in the account of the beneficiaries"*, which is separate from the "*deposit in Court*" envisaged Under Section 31(2) of the LA Act. It is submitted that the expression "bank account" has not been used in *Section* 31 of the LA Act at all and the expression "in the Court" has not been used in Section 24(2) of the Act of 2013 at all. The said omissions carry weight and cannot be ignored.

34. It is urged that if Section 24 of the Act of 2013 intended to attract the rigours and technicalities of Section 31 of the LA Act, it would have used the requisite phrase. It is submitted that the term *Section 31 of the LA Act* is conspicuous by its absence in Section 24 of the Act of 2013. Parliament intentionally used the phrases "paid" and "deposit" not in terms of their meanings Under Section 31 so as to avoid the rigours of the said provision and to keep the practical exigencies of land acquisition in mind, more particularly when Section 24 of the Act of 2013 is merely a transitory provision. It was argued that it is a settled canon of interpretation that when the Legislature uses two different phrases, the meaning they carry would be different. *Harbhajan Singh v. Press Council of India*, MANU/SC/0181/2002 : (2002) 3 SCC 722 is relied on.

35. It is submitted that Section 24(1) begins with a *non-obstante* clause, providing for a limited overriding effect of the LA Act in case of the contingencies mentioned in Section 24(a) and (b). Section 24(1)(a) contemplates that where land acquisition proceedings were initiated under the LA Act but no award was passed till the date the new Act came into force viz. 1.1.2014, acquisition proceedings could continue, however compensation will have to be determined under the Act of 2013. Section 24(1)(b) provides that where an award Under Section 11 of the LA Act has been made, the entire proceedings would continue under the Act of 1894, as if it were not repealed. Section 24(2) provides for an exclusionary Clause which mandates the land acquisition proceedings to be lapsed and initiated de novo.

36. It was submitted that the requirements for lapsing (of acquisition) in Section 24(2), are subject to an award Under Section 11 of the LA Act being made five years prior to the commencement of the Act of 2013 viz. 1.1.2014. If the award is made and the following two situations occurred, the proceedings will lapse; one, physical possession has not been taken or (to be read as "and") and two, compensation has not been paid.

37. Elaborating on the expressions "paid"/"tender" it was urged by learned Counsel that the meaning of expression "tender" is that when a person has tendered the amount and made it unconditionally available and the landowner has refused to receive it, the person who has tendered the amount cannot be saddled with the liability, which is to be visited for non-payment of the amount. Reliance is placed on the meaning of the term in *Black's Law Dictionary*.

38. It is apparent from aforesaid that "tender" may save the tendering party from the penalty for non-payment or non-performance if another party is unjustifiably refusing the tender. The expression "*paid*" would mean in Section 31(1) of the LA Act and Section 24(2) of the Act of 2013 as soon as it is offered and made unconditionally available. Merely, if a landowner refuses to accept it, it cannot be said that it has not been paid. Once amount has been tendered that would amount to payment. Thus, the term "*paid*" does not mean actual payment to be made but whatever is possible for an incumbent to make the payment is only contemplated. "Paid" does not mean receipt or deposited in court. There may be refusal to receive an amount in spite of its tender. Thus, in view of the decisions of this Court in *Benares State Bank Ltd. v. CIT*, MANU/SC/0623/1969 : (1969) 2 SCC 316 *Collector of Central Excise v. Elphinstone Spg. & Wvg. Mills Co. Ltd.* MANU/SC/0468/1971 : (1971)1 SCC 337 and J. Dalmia v. Commissioner of Income Tax MANU/SC/0107/1964 : (1964) 53 ITR 83 : [AIR 1964 SC 1866], the provisions of Section 24(2) should be construed as tender of the amount.

39. It is submitted that the three Judge Bench in judgment in *Pune Municipal Corporation* (supra), while deciding the expression "*compensation has not been paid*", held that for the purposes of Section 24(2), the compensation shall be regarded as "paid":

if the compensation has been offered to the person interested and such compensation has been deposited in the court where reference Under Section 18 can be made on happening of any of the contingencies contemplated Under Section 31(2) of the Land Acquisition Act. In other words, the compensation may be said to have been "paid" within the meaning of Section 24(2) when the Collector (or for that matter Land Acquisition Officer) has discharged his obligation and deposited the amount of compensation in court and made that amount available to the interested person to be dealt with as provided in Sections 32 and 33.

40. It was argued that the conclusion in *Pune Municipal Corporation* (supra) that deposit of the amount of compensation in the Government treasury cannot amount to the said sum (amount of compensation) "*paid*" to the landowners or persons interested. This view was taken without dwelling on the legal connotation of the expression "paid" in Section 24(2). In the process, it has also not taken into account the binding law as held in *Dalmia's* case and *Benares State Bank's* case. Though Section 34 of the LA Act was mentioned in passing para 16, however it has not at all been considered. It is a very crucial provision, which deals with the consequences of compensation not having been deposited. Further, submit counsel, the matter relates to payment of compensation from out of Government funds. Handling of Government funds has to be strictly in accordance with the Standing Orders issued by the States. The effect of those Standing Orders has also not been considered in the judgment in *Pune Municipal Corporation* (supra). The said judgment, therefore, having been rendered without taking into consideration the aforesaid judgments, Section 34 of the LA Act and the Standing Orders is, in the submission of the counsel, *per incuriam*.

41. It is submitted that another aspect which arises is, whether prejudice or injustice would be caused in case the amount is not deposited in the court and is deposited in the treasury, particularly when the provision contained in Section 31 of the LA Act has to be read conjointly with those in Section 34. By reason of Section 34, (of the LA Act) one could claim interest-at a higher rate in case amounts were not deposited Under Section 31(2) if the authorities were at fault.

42. Arguing about whether the expression "or" should be read as conjunctive or disjunctive, it was argued that after the stage of Section 11 under the LA Act, there are two possibilities. The requisite authority may take possession of the land in terms of Section 16 of the LA Act or the said authority may proceed to tender payment Under Section 31 of the LA Act. The said two possibilities may be conducted simultaneously or one after the other, there is no embargo in the LA Act regarding the same.

43. It is submitted that Section 24(2), while providing for lapsing, uses the two phrases concerning possession of the land and the tendering of payment with the disjunctive word "or" thereby making it mandatory for the acquiring authority to satisfy both contingencies in order to avoid lapsing. It is submitted that the same would be against the legislative intention of limited lapsing. Further, the said interpretation would be against the purport of the possession and the title "being vested" in the acquiring authority by virtue of the interpretation of Section 16 in the LA Act [as dealt with the latter part of the submissions]. It is submitted that the intention of the Legislature could not

have been to divest the acquiring authority of the land after the said has been vested "*free from all encumbrances*". In line with the same, it is submitted that the word "or" may be read as "and" so as to limit the lapsing only in cases where both, payment has not been made (subject to proviso) and possession has not been taken.

44. Reliance is placed on the judgments reported as *Ishwar Singh Bindra v. State of UP* MANU/SC/0344/1968 : 1969 (1) SCR 219, where this Court approved and extracted passages from *Maxwell on Interpretation and Stroud's Judicial Dictionary* to the effect that generally, the conjunctive "and" is used in a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of "or" and that however, sometimes, even in such a connection, it is, by force of its contents, read as "or". Similarly, Maxwell accepted that "*to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other*". Learned Counsel also relied on *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.* MANU/SC/1196/2017 : (2018) 1 SCC 353 which held that:

38. ....Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or" if read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court...

Learned Counsel also relied on several other decisions in support of the same proposition (i.e. that the disjunctive "or" has to be read contextually, and if need arises as "and", i.e., as a conjunctive).[3]

45. Highlighting that the placement of the proviso (following Section 24(2)) is significant, and not accidental, it was argued that the field of operation of the proviso is immediately preceding provision, i.e. Section 24(2) and not Section 24(1)(b). It is submitted that the proviso to Section 24(2) contemplates a situation where with respect to majority of the holdings, compensation not deposited in the account of landowners (even though there being tendering of payment to all land owners and physical possession being taken), the benefits of the Act of 2013 qua the compensation would follow. It is argued that if the said proviso is not interpreted to be a proviso to Section 24(2), a valuable benefit extended by Parliament would evaporate. Learned Counsel contended that the said proviso provides for enhanced benefit even if the twin conditions of Section 24(2) are met. Therefore, the said proviso saves the land acquisition and furthers the purpose and the object of giving benefit of computation of compensation to all landholders. Therefore, it is evident that the proviso is appropriately treated as a proviso to Section 24(2) and cannot be read as proviso to Section 24(1)(b) of the Act of 2013. It was argued that Parliamentary intent is clearly discernible, because of the colon (a punctuation mark) occurring at the end of Section 24(2), which means that the proviso constitutes an exception to that provision. Reference was made to Aswini Kumar Ghosh and Anr. v. Arabinda Bose and Anr. MANU/SC/0022/1952 : 1953 SCR 1 (where it was held that *"...Punctuation is after all a minor element in the construction of a statute and very little attention is paid to it by English Courts. ..... When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to the punctuation."*). Reliance was also placed on Jamshed Guzdar v. State of Maharashtra. MANU/SC/0026/2005 : 2005 (2) SCC 591.

46. It was argued by Ms. Pinky Anand, learned ASG, that payment of compensation is not a *sine qua non* for vesting in terms of Section 16 of the old LA Act. It is urged, in this context, that the old Act did not provide any time line for depositing compensation; nor even for taking over of possession. Ordinarily, the repeal provision under the Act of 2013 (Section 114) would prevail; however, Section 24 carves out an important, albeit a limited scope from the repeal clause. Section 24(2) freshly introduces the concept of lapsing, *in relation to acquisitions that were initiated under the old Act.* Necessarily, lapsing is to be considered as a narrow concept. Supporting the learned SG's argument that "or" is to be read conjunctively, she highlighted that by reason of Section 16 of the old Act, title vested in the State, upon taking of possession. Divesting under old Act was impermissible. It was urged that were the court to accept an interpretation, that either non-payment of compensation, or taking of possession-Under Section 24(2), would result in lapsing of acquisition, as held in *Pune Municipal Corporation* (supra) and other decisions, land vested in the State, and conveyed to third parties (either as allottees of housing schemes or public sector undertakings, for one development project or another, or for public purposes such as construction of roads, bridges and other public works) would be divested.

47. Under Section 16 of the LA Act once award is made and possession of land is taken, then the land vests absolutely with the Government. Therefore, the word deemed to lapse in Section 24(2) should not be interpreted to mean divesting of land from the Government which is already vested in the Government and moreover in the absence of any provision of divesting in the 1894 Act. In this context, the observations in *Bengal Immunity Co. Ltd. v. State of Bihar* MANU/SC/0083/1955 : (1955) 2 SCR 603 that the legislature is presumed to be acquainted with the construction which the courts have put upon the words, and when legislature repeats the same words. This Court had, in that judgment, quoted with approval the previous decision in *Sri K.C. Gajapati Narayan Deo v. State of Orissa* MANU/SC/0014/1953 : 1954 SCR 11 that

Section of the Act empowers the State Government to declare, by notification, that the estate described in the notification has vested in the State free from all encumbrances. ..... The consequences of vesting ether by Issue of notification or as a result of surrender are described in detail in Section 5 of the Act. It would be sufficient for our present purpose to state that the primary consequence is that all lands comprised in the estate including communal lands, non-ryoti lands, waste and trees orchards pasture lands, forests, mines and minerals, quarries, rivers and streams, tanks, water channels, fisheries, ferries, hats and bazars, and buildings or structures together with the land on which they stand shall, subject to the other provisions of the Act, vest absolutely in the State Government free from all encumbrances and the intermediary shall cease to have any interest in them.

Learned Counsel also relied on the judgment of this Court in *Jagannath Temple Managing Committee v. Siddha Math* MANU/SC/1470/2015 : (2015) 16 SCC 542 @ para 53, at para 53, that *"it is a settled principle of law that once a property is vested by an Act of legislature, to achieve the laudable object, the same cannot be divested by the enactment of any subsequent general law and vest such property under such law.*

48. It was urged that serious consequences arise when condition Nos. (ii) and (iii) are to be read as not conjunctive or disjunctive. The word used to connect these two conditions is "or"; if it is not read conjunctively, disastrous consequence leading to absurd result would emanate. Once

possession is taken over vesting occurs Under Section 16 of the LA Act. Section 24(2) contains no stipulation that such vesting of title of land stands nullified or divested. If the intention of Parliament was to divest the State of its title that had to be stated in plain and clear language. It was emphasized that the conjunctive use of "or" in Section 24(2) would have not only momentous consequences to the State, but innocent third parties, who would be exposed to the risk of being divested title to the lands and properties, perfected by them, as allottees or subsequent purchasers. Merely because a person who has received compensation clungs on to the possession of the land and the same shall lead to lapsing cannot be the intention of Parliament. Similarly, one who received compensation, is not obliged to return the money to the State in the event of lapsing Under Section 24(2) of the Act of 2013. It was urged, therefore, that absence of provision to return the compensation received to Government convincingly points to Parliamentary intent that "or" should be read as "and"; thus, only if neither possession is taken (of acquired lands) nor is compensation paid, (i.e., tendered to the party or parties) would the acquisition under the LA Act lapse. Learned Counsel also relied on several decisions in this context.[4]

49. It was highlighted by M/s. Bhangde, Mr. Rajesh Mahale, and Ms. Shashi Kiran, that the consequence of literally interpreting Section 24(2) as to mean that the conditions are disjunctive (either that "or" should be read as such) are too drastic and severe. Learned Counsel pointed out that as a result of allegations of non-payment of compensation, lands which had been vested in the State and were subsequently made over to the requisitioning agencies, and in respect of which title had passed multiple times to other parties, now are exposed to the threat of divesting of title. Learned Counsel submitted that a deeming fiction cannot be taken to this extent; such disastrous consequences could not have been attributed by Parliament, because even if such were the intent, there has to be a mechanism to restitute those likely to be affected. Besides, the legality of such a law, divesting or taking away the title of such innocent third-party purchasers, would be suspect, because there is absolutely no provision for restitution or any form of compensation in their favour.

50. On the question relating to the mode of taking possession, it was argued that when the State is involved in taking possession of the property acquired, it can take possession by drawing a *panchnama*. The normal Rule of State possessing the land through some persons would not be applicable in such cases. On open land, possession is deemed to be of the owner. The way the State takes possession of large chunk of property acquired is by drawing a memorandum of taking possession as State is not going to put other persons in possession or its police force or going to cultivate it or start residing or physically occupy it after displacing who were physically in possession as in the case of certain private persons, in case they re-enter in possession of open land, start cultivation or residing in the house. Lawful possession is deemed to be of the State. A number of decisions that accepted the mode of drawing *panchnama* by the State consistently to be a mode of taking possession were cited. In *Banda Development Authority v. Moti Lal Agarwal*[5] this Court observed that preparing a *panchnama* is sufficient to constitute taking of possession. If acquisition is of a large tract of land, it may not be possible to take physical possession of each and every parcel of the land and it would be sufficient that symbolic possession is taken by preparing an appropriate document in the presence of independent witnesses and getting their signatures. Even subsequent utilisation of a portion of acquired land for public purpose was still sufficient to prove taking possession.

51. It is submitted that when the State acquires land and has drawn memorandum of taking possession that is the way the State takes possession of large tract of land acquired, it ought not necessarily to physically occupy such land after forcefully displacing those physically in possession. Possession in law is deemed to be physical possession for the State. This Court in a number of decisions has accepted the mode of drawing panchnama by the State consistently to be a mode of taking possession. It is submitted that this Court in *T.N. Housing Board v. A. Viswam* MANU/SC/0924/1996 : (1996) 8 SCC 259 held that recording of memorandum/*panchnama* by the Land Acquisition Officer in the presence of witnesses signed by them would constitute taking possession of land.

Also, reliance is placed on other decisions.[6]

52. Dealing next with the manner by which the period covered by an interim order of Court ought to be excluded for the purpose of applicability of Section 24(2) of the Act of 2013, it is argued that a settled proposition of law is that an act of a Court should not prejudice any party. In view of the maxim *actus curae neminem gravabit* or even in its absence, any interim order granted by the court cannot prejudice any rights of the parties. It is argued that for a proper working of the justice delivery system, once the court passes an order staying dispossession, the State cannot take possession of the land. If an order of the Court disables a person to take any action, the doctrine *nemo tentur ad impossible* would be applicable that is, the law in general excuses a party which is disabled to perform a duty and impossibility of performance of a duty is a good excuse. Further, the Latin maxim *lexnon cogitad impossibilia*, that is, the law does not compel a man to do that which he cannot possibly perform. Since, it becomes impossible for the State to take possession, for the duration a stay or interim order is in operation, the consequence of an interim order cannot be used against the State. Reliance for this legal position is placed on the judgments in *A.R. Antulay v. R.S. Nayak and Ors.* MANU/SC/0002/1988 : 1988 Suppl (1) SCR 01, *Sarah Mathew v. Institute of Cardio Vascular Diseases* MANU/SC/1210/2013 : 2014 (2) SCC 62 and in *Dau Dayal v. State of U.P.* MANU/SC/0185/1958 : 1959 Supp (1) SCR 639 In A.R. Antulay (supra) it was held that no party is prejudiced by the court's mistake. Therefore, urged counsel, in cases where conduct of acquisition proceedings were held up after the passing of an award, due to the interim order of any court, in the absence of any specific provision to that effect, a party who cannot perform its duties, and but for the order, could have performed its stipulated task, within the time assigned, should not be placed at a disadvantage, as that would amount to granting a premium for one's wrongdoing, or rank speculation. It is urged, therefore, that it is imperative that the period during which the State or the acquiring authority was prohibited/injuncted by an interim order of the court from taking possession has to be excluded. This principle, submit learned Counsel, is based on settled common law principles. These are in fact Rules of equity, justice and sound logic. In the absence of their being a prohibition in the law these principles would be attracted. The efficacy and binding nature of such common law principles cannot be diminished or whittled down in the absence of any express prohibition in law. Coupled with the aforesaid principle is also a principle of restitution. An interim order passed by the Court merges into the final decision, goes against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end of the litigation would be justified in being placed in the same place in which it would have been, had the interim order not been passed. Undoing the effect of an interim order by resorting to the principle of restitution is in fact an obligation of the court. The above principles have been culled out and applied by this Court in the judgment in *South Eastern Coal Field Ltd.*

v. State of M.P. and Ors. MANU/SC/0807/2003 : 2003 SCC 648. Learned Counsel argued that general common law Rules of equity, justice and sound logic would certainly apply. It is submitted that similarly, the doctrine of restitution has been discussed in several other judgments of this Court including *State of Gujarat v. Essar Oil Ltd.* MANU/SC/0035/2012 : 2012 (3) SCC 522. It is, thus, submitted that the mere absence of an express provision Under Section 24(2)-to exclude the period during which an interim order operates, which prevents the making of an award, or taking over of possession of acquired land, would not in law imply that such restitutionary and equitable principles would be inapplicable.

Contentions on behalf of landowners

53. Mr. Shyam Divan, learned senior counsel, led the arguments on behalf of landowners. He urged that the Act of 2013 is a new, transformative and radical measure. The new law is a welfare state law, not a colonial law-unlike the Act of 1894. Mr. Divan submitted that the Act of 1894 resulted in several rounds of repeated litigation on various aspect, such as payment of compensation, lack of legislatively mandated timelines for completion of acquisition proceedings, etc. This also resulted in amendments to the Act of 1894 (notably, the amendments of 1967 and 1984) which, to some extent, sought to grant relief to landowners. However, these too got mired in litigation. Learned Counsel relied on the judgments, reported as *Dev Sharan v. State of Uttar Pradesh* MANU/SC/0178/2011 : (2011) 4 SCC 769 and *Radhey Shyam v. State of UP* MANU/SC/0429/2011 : (2011) 5 SCC 553. Repeated litigation was the result of an unfair legal regime. It was submitted that such judgments of this Court highlighted that the Act of 1894 was enacted more than 116 years ago to facilitate acquisition of land and immovable properties for construction of roads, canals, railways, etc. This law was frequently used in the post-independence era for different public purposes like laying of roads, construction of bridges, dams and buildings of various public establishments/institutions, planned development of urban areas, providing of houses to different Sections of the society and for developing residential colonies/sectors. In the recent years, there is acquisition of large tracts of land in rural parts of the country in the name of development and their transfer to private entrepreneurs, who utilize it to construction of multi-storied complexes, commercial centres and for setting up industrial units. Similarly, large scale acquisitions were made on behalf of companies by invoking the provisions contained in Part VII of the Act. Resultantly, such acquisition led to deprivation of the source of livelihood of land owners, engaged in agricultural operations and other ancillary activities in rural areas. A large number of these people are unaware of, and unable to assert their rights, and secure fair compensation. The unrest and inequity which arose out of these deprivations, impelled the State to enact a modern law, which ensured not only fair compensation, but other rights such as rehabilitation, employment, higher solatium and a guarantee against deprivation of certain kinds of lands. Thus, the Act of 2013 ushered a new regime that starts from a fresh direction. Learned Counsel also relied on *Bharat Sewak Samaj v. Lieutnant Governor and Ors.,* MANU/SC/0910/2012 : 2012 (12) SCC 675 to say that the provisions of the Act of 1894 were outdated and were misused and were oppressive to the interest of the landowners. Hence, the Act of 2013 was enacted and that this Court ought to interpret in the spirit of the new beneficial legislation. Learned Counsel urged that the benefits so conferred should not be taken away by this Court by narrowly interpreting its provisions.

54. Mr. Divan relied on the Statement of Objects and Reasons of the Act of 2013 to say that the new law was framed, in recognition of concerns expressed by the property owners of forcible acquisition without following due process and without paying appropriate compensation affecting livelihood of such owners, many times, who are small property owners or persons having small agricultural holdings and having been dependant on the said holdings, the new Act is made. The Act aims to provide just and fair compensation, make adequate provision for rehabilitation and resettlement for the affected persons in the family, determination of compensation package on scientific methods. It was urged that being a welfare legislation, the Act of 2013 constitutes a wholesome rejection of the colonial approach. Learned Counsel urged that under the new Act, unlike the Act of 1894, a Social Impact Assessment (SIA) report has to be prepared, Under Section 7, as an integral component of acquisition proceedings. If acquisition is not resorted to, in a time frame, the acquisition lapses; likewise, the new Act contemplates the preparation of a rehabilitation scheme, which would note the (a) particulars of lands and immovable properties being acquired of each affected family; (b) livelihoods lost in respect of landless who are primarily dependent on the lands being acquired; (c) a list of public utilities Government buildings, amenities and infrastructural facilities which are affected or likely to be affected, where resettlement of affected families is involved and (d) details of any common property resources being acquired.

55. Learned senior Counsel argued that Section 24 constitutes an exception to the general rule, i.e., lapsing of all acquisition proceedings, by reason of repeal of the Act of 1894, and operation of Section 114. Therefore, Section 24 has to be given effect to strictly, given that Parliamentary intent was to ensure that acquisition proceedings did not result in oppression and hardship. It was argued that having regard to this salient feature, the provision (Section 24) should be literally construed. Learned Counsel submitted that the objective of new Act must be kept in mind to understand the scope of Sections 11, 11(A), 12, 31 and 34 of the 1894 Act, on the one hand, and provisions of Section of 24 of the Act of 2013 on the other. Furthermore, it was argued that the *non-obstante* Clause must be allowed to operate with full vigour in its own field. It was stressed that such a provision is equivalent to saying that in spite of the provision or Act mentioned in the *non-obstante* clause, the enactment following it, will have its full operation of that, the provision indicated in the non-obstante Clause will not be an impediment for the operation of the enactment. Decisions in this regard were cited by counsel.[7]

56. Mr. Divan relied upon the three stages preceding the Act of 2013 to urge that there was no doubt in the mind of Parliament, that lapsing of acquisition proceedings was intended to ensue, in the event compensation were not paid; or possession were not taken, in respect of awards made five years prior to coming into force of the Act of 2013. It was argued that Section 24 should be given a plain and literal construction, except to the extent that the term "paid" occurring in Section 24(2) would also cover cases where a deposit is made before the Reference Court in situations covered by Section 31(2) of the 1894 Act. Elaborating on this, it is urged that the first decision of this Court, i.e., *Pune Municipal Corporation* (supra) took note of Section 24(2) in the context of a pre-existing law. The Court was alive to the fact that under the Act of 1894, where payment of compensation was tendered and the land owner refused to accept the amount, the State is nevertheless obliged to ensure that at all times, the amount should be made available, in a place or an account, not within its control. It was urged, therefore, that actual tender of the amount of compensation is a *sine qua non* for the act of payment to be completed. It was considered that in that event, the land owner does not accept the amount, it should be deposited with the Court, a

neutral and independent authority to whom the land owner or anyone claiming under him can approach and draw the amount. It was submitted that this obligation cannot be brushed aside because aside from the question of acceptance of compensation without prejudice, even at a later stage, the land owner might wish to reconsider the compensation and avail of the amount.

57. Learned Counsel submitted that the obligation to deposit the amount in the Reference Court is an independent and absolute one in that it is irrespective of whether the land owner sought a reference for higher compensation to the Court (under the Act of 1894). Learned Counsel urged this Court to accept this interpretation, which according to him, would give full effect to the intention of Parliament, i.e., to save intention of Parliament. It was again highlighted that Parliamentary intention was firstly to repeal the previous law to a limited extent and save ongoing acquisition proceedings-in terms of Section 24(1) and usher a new regime, i.e. Section 24(2) whereby indolence on the part of the State agencies either with respect to payment of compensation or with respect to taking over of possession, resulting in the lapse of acquisition proceedings itself. Learned Counsel relied upon the decisions of this Court which followed and applied the law declared in *Pune Municipal Corporation*[8].

58. It was argued that the submissions on behalf of the State and the development authorities that "payment" included deposit with the treasury or some other authority other than the Reference Court, could not have been termed as compliance with the Act of 1894. Here, it was urged that Parliament was acutely alive of the fact that the previous land acquisition regime resulted in injurious and unconscionable delays in payment of compensation. Furthermore, even after awards were made, possession was never taken. This led to a great deal of uncertainty as far as the land owners were concerned because they could not move ahead in their life without compensation nor could they take any steps to acquire new lands or properties. It was precisely to address this mischief, rather a widespread one, that the Parliament wished to enact a "bright line approach" whereby all acquisitions which did not culminate either in payment of compensation or taking over of possession in respect of awards made five or more years prior to 1.1.2014 had to lapse. It was submitted that Section 24(1) provided a limited window in that it saved some acquisitions, i.e., notably where awards had been made but further proceedings had not been taken or where awards had not been made in both cases less than 5 years prior to 1.1.2014. It was only in these two limited instances that acquisition proceedings were allowed to continue or preserved. Thus, Parliamentary intent was that in cases of all awards made five years or more prior to the coming into force of the Act, if compensation was not paid or possession of the acquired land not taken, automatically, as a matter of law there was to be a lapse (of such acquisitions). This legal consequence crystallised and was in consonance with the other provisions of the Act of 2013. Arguing that if one were to take into account this perspective, there can be no doubt that the expression "paid" cannot mean anything other than tendering of compensation and in the event of its refusal, or the three contingencies contemplated Under Section 31(2) of the Act of 1894, it is deposited in Court. If these eventualities were not fulfilled and the amounts were merely kept back with the Government by it, any compliance with some norms evolved as part of the treasury or financial code there could have been no payment or deposit in the eyes of law. Learned Counsel submitted that this Court should affirm the decision in *Sukhbir Singh*. It was also submitted that unless Section 31 of the 1894 Act which postulates the performance of a public duty in a particular manner and (through stipulated three eventualities), such duty could be said to be fulfilled only and only if that procedure were followed. Learned Counsel relied upon the judgment in *Bharat Kumar*, which noted that

Section 24(2) has a beneficial intent and begins with a *non-obstante* clause. Therefore, urged counsel, literal meaning is to be preferred. It was highlighted that Section 24(2) achieved a two-fold purpose, i.e., to preserve acquisition proceedings initiated before the commencement of the Act and secondly, conferring rights upon the land owners and other parties which did not hitherto exist. Since these rights relate to the right to property which is guaranteed by Article 300A of the Constitution, full effect must be given to them rather than the construction which would destroy its very purpose. In support of this argument, learned Counsel relied upon *Union of India v. Shivraj* MANU/SC/0478/2014 : (2014) 6 SCC 564.

59. Learned Counsel submitted that the decision in *Pune Municipal Corporation* (supra) was itself conscious of Section 31 and the contingencies or eventualities contemplated Under Section 31(2). That apart, it also relied upon *Ivo Agnelo Santimano Fernandes v. State of Goa* MANU/SC/0552/2011 : (2011) 11 SCC 506, to say that the State cannot be-in the event of non-acceptance of the compensation by the land owner or its inability to locate the land owner or in the event of a dispute-keep the compensation amount with itself and claim it to be part of same general treasury amount and proceed to utilise it. It was submitted that precisely to deal with this practice, the appeal provided that non-payment of compensation-and in the event of any of the contingencies accruing in Section 31(2) of the 1894 Act, the failure to deposit it with the Reference Court would result in lapse of entire acquisition itself. It was submitted that this interpretation is not only literal but followed the objective and purpose sought to be achieved by the Parliament through the provision. Learned Counsel urged this Court that the literal interpretation in this case would also accrue with an equitable interpretation and ensure that the real benefit of the new law would accrue to land owners deprived of their properties and livelihoods for long periods without payment of compensation. Learned Counsel, therefore, urged that the beneficial interpretation adopted by this Court in *Velaxan Kumar* (supra) should be accepted. *Rajive Chowdhurie HUF* (supra) MANU/SC/1139/2014 : (2015) 3 SCC 541, it was argued, while interpreting Section 24 of the Act of 2013 Act, the Court should not in the guise of an interpretative exercise don the cap of a legislature. It was submitted as to the State's argument that the disjunctive "or" in Section 24(2) should not be read as conjunctive "and". It was argued in this regard that in all the three drafts that the Bill (which ultimately culminated in the Act of 2013) went through[9], the expression used consistently was "*but the physical possession*". In the three stages, the intent was to normally ensure that the acquisition proceedings pending for a long time were to lapse. It was emphasised that in the first version, i.e., the Bill introduced on 5.9.2011, all acquisitions were deemed to have lapsed regardless of whether the award was made or not, if possession were not taken and also in those cases where the awards were not made. Therefore, this Court should be cautious in interpreting the disjunctive "or" in any manner other than in the literal sense.

60. The three broad situations covered Under Section 24 are (i) cases where the land acquisition process shall be deemed to have lapsed; (ii) cases where the landholders are entitled to compensation in accordance with the provisions of the Act of 2013; and (iii) cases where the land acquisition proceedings continue under the 1894 Act as if it had not been repealed. It was urged that the first set of cases are covered by Section 24(2). The two conditions to be fulfilled as on 1.1.2014 to trigger the deeming provision into operation, according to Mr. Divan, are *firstly*, there must be an award Under Section 11 of the 1894 Act which has been made five years or more prior to the commencement of the Act of 2013 (i.e., an award made on or before 1.1.2009); and *secondly*

either physical possession of the land has not been taken from the landowner or compensation had not been paid as required under the Act of 1894.

61. It was argued that the second set of cases, where enhanced compensation has to be paid, under the Act of 2013, are covered Under Section 24(1) and the proviso to Section 24. Section 24(1) provides that where proceedings have not reached the stage of an award Under Section 11 of the 1894 Act, the provisions to determine compensation under the Act of 2013 apply. Further, the proviso to Section 24 provides for compensation in terms of the Act of 2013 where the following conditions are fulfilled, *firstly* an award has been made Under Section 11 of the 1894 Act; and *secondly*, compensation in respect of the majority of the land holdings has not been paid to the landowners. It was submitted that the "majority" is required to be reckoned with reference to the award passed under the Act of 1894, and that awards contemplated by the proviso are awards made within the period of five years prior to the commencement of the Act of 2013 i.e., awards made between 1.1.2009 and 31.12.2013.

62. Learned Counsel stated that the third set of cases is where the land owners do not get any benefit under the Act of 2013 and the acquisition proceeds under the provisions of the Act of 1894. It was argued that these cases are covered by Section 24(1)(b) and to which neither Section 24(2) nor the proviso applies. This covers situations where though an award has been passed five years prior to the commencement of the Act, neither of the conditions for deemed lapsing are present. Mr. Divan urged that the provisions of the Act of 1894 will continue to apply without any benefit in terms of increased compensation where an award is passed within 5 years of the commencement of the Act of 2013 but the majority of landholders have been paid.

63. Mr. Divan then urged that this understanding of the provisions of Section 24 is based on established Rules of interpretation i.e., first, the golden Rule of interpretation requiring the Court to interpret statutory provisions literally. Second, the Rule of purposive interpretation was to be used, having regard to the object of the enactment, the purpose of the law in seeking to correct historical injustices and the legislative intent to confer the benefit of the Act of 2013 on certain landholders affected by the regime under the Act of 1894. The third Rule to be employed, is the Rule of harmonious interpretation, such that all words of the provision are given effect and no part of the provision is rendered otiose; fourth, contemporaneous understanding of administrators responsible for implementing a new law. Also an interpretation in such a manner as to avoid inserting words, subtracting words, and avoids anomalies or absurdities was necessary. Lastly it was urged that giving a deeming provision its natural effect, which in this case results in a Rule of interpretation that the provisions of a beneficent legislation ought to be interpreted in the case of ambiguity in favour of the citizens.[10]

64. It was submitted that the interpretation of Section 24 outlined above gives the plain and natural meaning to the key expressions used in Section 24-"physical possession", "paid", and "deemed to have lapsed". He further argued that since Section 24 of the Act of 2013 must be read with Section 31 of the Act of 1894, the expression "tender" is also relevant and the interpretation he has advanced is consistent with the natural meaning of "tender".

65. Learned Counsel for the landowners urged that the words 'paid' and 'deposited in the account of the beneficiaries' are two permissible modes of *making compensation available to landowners*.

Mr. Divan contended that these are two modes of *paying the money to the landowners*. 'Paid', it was urged, means paid. It does not mean a deposit in treasury. He further submitted that 'deposit in the account of the beneficiaries' does not mean a deposit in the treasury. He argued that there was no reason to depart from the Rule of literal interpretation, and the manner of payment, as held in *Pune Municipal Corporation* (supra), is to be strictly in terms of Section 31 of the Act of 1894 as it is an expropriatory legislation. It was contended as to the learned Solicitor General's submission that payment in terms of Section 24 is complied with if the amount is tendered to the landowners, overlooks the obligation of payment in terms of Section 24 is only met if the amount is *actually paid to the landowners*. On the occurrence of the contingencies mentioned in Section 31(2) of the Act of 1894, it ought to be deposited in the Reference Court as defined Under Section 3(d) of the Act of 1894. He submitted that tendering money is not payment and Section 31(1) of the Act of 1894 uses the words 'tender' and 'paid' to convey different meanings and obligations. Mr. Divan argued that the judgments cited by the learned Solicitor General in this regard essentially deal with labour laws, and are inapplicable as these statutes did not contain a provision such as Section 31 of the Act of 1894, which strictly and precisely prescribes what is to be done in the event when the payment is not accepted.

66. It was argued that no Rules under the Act of 1894 contemplate deposit in the treasury. Learned Counsel submitted that standing orders, which are merely administrative instructions issued for conducting monetary transactions of the State, have in some cases been confused to be Rules framed Under Section 55 of the Act of 1894. The Rules or the Standing Orders have not been produced and no evidence has been furnished of compliance with the requirements of Section 55, such as notification in the Gazette. All learned Counsel submitted that in any case, delegated/subordinate legislation cannot be inconsistent with, or in any manner depart from the express and precise language of the parent enactment. Again, it was submitted that the State's argument with respect to deposit of compensation amounts in the treasury, is untenable, for two strong reasons: one, that Section 31 itself directed the compensation to be deposited in the court. In the teeth of this express position, the State cannot be heard to say that it could nevertheless "deposit" the amount in the treasury, which is nothing but keeping the money with itself. It was secondly urged, that even otherwise, the Act of 1894 visualized that in regard to matters not provided expressly, Rules could be made (Section 55).

67. Learned Counsel submitted that the State's argument regarding the interpretation of 'physical possession' to be possession as per the ratio in *Banda Development Authority* (supra), is incorrect. It was submitted that it is important to take note of the conscious inclusion of the word 'physical' in relation to possession. An important distinction is required to be drawn in respect of *de jure*/constructive/deemed possession and 'physical' possession. Even if it is conceded that drawing of a *Panchnama* is a valid mode of initially taking possession of vast tracts of vacant land, the intention of the legislature is that over a period of five years, such possession must transform to evident and demonstrable 'physical' possession i.e., the manifestation of actual control and dominion over the subject land(s). Learned Counsel relied on several decisions in support of their argument that "physical possession" should be construed as *actual physical possession*, and not constructive, or *de jure* possession, which in most cases is possession on paper.[11]

68. Arguing next regarding the interpretation of the proviso to Section 24, it was stated that the same is to be read as a proviso to Section 24 and not Section 24(1)(b). Mr. Divan submitted that a

proviso may in certain cases operate as an independent provision, and the proviso to Section 24 is a stand-alone provision which operates on its own terms. To the extent it is linked to any provision in Section 24, it is linked to Section 24(1)(b) since it permits enhanced compensation (in a particular contingency of non-payment to majority of the landowners) even if an award may have been passed as contemplated in Section 24(1)(b). Mr. Divan placed reliance on the reasons given in the judgment of *Delhi Development Authority v. Virendra Lal Bahri*, [SLP [C] No. 37375/2016].

69. All counsel for landowners submitted that there is no valid reason to exclude from the period of 5 years Under Section 24(2), the time during which a landowner had the benefit of an interim order of a court. In support of this argument, it was argued firstly, that Parliament did not expressly exclude such a period in Section 24. Second, where in the Act of 2013, the legislature did want to exclude the period of a stay or injunction, it has done so by using express words such as in the proviso to Section 19 and the explanation to Section 69 of the Act of 2013. Third, he submitted that the maxim "*actus curiae neminem gravabit*" which means that "the act of court shall prejudice no one" has no application here, as this is a maxim which is applied generally as a principle of equity in individual cases to ensure that there is no injustice. The maxim rarely, if ever, is applied to interpret a statute. Mr. Divan submitted that this Court has declined to rely on this maxim in at least two reported decisions-*Padma Sundar Rao v. State of Tamil Nadu* MANU/SC/0182/2002 : (2002) 3 SCC 533 and *State of Rajasthan and Ors. v. Khandaka Jain Jewellers* MANU/SC/4214/2007 : (2007) 14 SCC 339. Mr. Divan further placed reliance on *Snell's Equity* (33rd Edition, 2015), which states that the maxim of equity is not a specific Rule of principle of law. It is a statement of a broad theme which underlies equitable concepts and principles and as a result, the utility of equitable maxims is limited. It further states that the maxim may provide some limited assistance to court in two broad types of situation:

The first is when there is some uncertainty as to the scope of a particular Rule of principle, and a court has to fall back on more basic principles to resolve that uncertainty. The second is when a court is exercising an equitable discretion, and seeks to structure that exercise by referring to broader, underlying principles.

70. Learned Counsel further placed reliance on a three-judge Bench decision of this Court in The *Commissioner of Sales Tax v. Parson Tools and Plants* MANU/SC/0449/1975 : (1975) 4 SCC 22, where it was held that:

If the Legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity.

It was submitted that there is no occasion for excluding time spent on litigation. Parliament could have specified a particular date such as 1.1.2009 as the cut-off point Under Section 24(2). Had a date been so specified, there would have been no occasion to exclude time. Instead of specifying a particular date, the Legislature in the Act of 2013 prescribed the cut-off point with reference to the commencement of the Act. This method of specifying the cut-off point would not attract the maxim "*actus curiae neminem gravabit*". It was argued that the occasion for excluding time would

arise only where there is a starting point and a statutory period to complete the task. In such provisions, it may be reasonable to provide for the exclusion of time by appropriate language in the section. Here, where a cut-off date is prescribed and as such there is no starting point and period for completion of the task, the notion of excluding time spent in litigations is an alien concept. It was, therefore, submitted that it is not the court's business to stretch the words used by the Legislature to fill in gaps or omit words used in the provisions of an Act, i.e., to fill in an obvious and conscious exclusion of a contingency, or a *casus omissus*. In support of this submission, learned Counsel relied on decisions of this Court. [12] It was also argued that this Court should not also exclude any period or periods, spent in litigation, when interim orders were operating, because, firstly, in each such instance, the landowners were aggrieved by different kinds of arbitrary behaviour, such as not providing opportunity of mandatory hearing (under an absolutely absurd rejection of objections; failure to take note of actual developmental needs, and taking of lands, unconnected with a public purpose, or obvious instances of expropriation of utilities and amenities such as schools, community assets, etc. These led the courts, on a *prima facie* consideration to assess the merit in the challenge and grant interim orders. Such instances could not be called as frivolous litigation, warranting exclusion of time, to deprive the benefit of lapsing, enjoined by the new law. Secondly, it was argued that repeated attempts were made in Parliament to amend the law, to exclude the time, in the manner sought by the State, by use of the maxim actus curiae neminem *gravabit*. However, such amendment could not pass muster.

71. Learned Counsel contended that Parliament's intent is to confer a benefit on landholders who were impacted by the erstwhile unfair regime. Urging that under the old law, landholders, to protect their assets from expropriation of their land at paltry amounts, were compelled to use legitimate systems of securing redress by filing cases in court, counsel urged that the correct approach, is to view litigation as a necessity under an unjust former regime and not exclude the period spent under litigation in such an unfair regime. He further urged that the deeming provision with its clear and verifiable benchmarks on the five-year cut-off period, physical possession and payment is easy to operate. Introducing notions such as exclusion of time due to pending litigation would complicate the working of the statute.

72. Learned Counsel urged that Section 24(2) uses the expression "or". The Legislature intended the two conditions separated by the word "or" to be alternative conditions. Four situations arise where the conditions are disjunctive: firstly, when physical possession is with the State and compensation is with the citizen, there is no deemed lapse; secondly, when physical possession is with the citizen and compensation is with the State, there is no need for restitution as the State has retained the compensation amount; thirdly, when physical possession is with the citizen, and the compensation is also with the citizen, in such scenarios, the citizen must return the compensation. It was urged that where the State has paid the money by deposit in the Reference Court and the money was lying with the Court, the State may withdraw the money on deemed lapsing. However, if the State were to decide to acquire the land afresh, the compensation already paid may be adjusted; and further since inherent in the notion of lapsing is the requirement for restitution, the State can recover the compensation, *inter alia* by framing suitable rules. The citizen cannot retain compensation "had and received" since this would amount to unjust enrichment. It was submitted that where the physical possession as well as compensation are with the State, i.e., where the State has taken possession without paying compensation as required under the Act of 1894, there is *no*

absolute vesting free from all encumbrances as contemplated Under Section 16. In the absence of vesting, the State is required to restore possession to the citizen.

73. Learned Counsel argued that having regard to the unfair working of the Act of 1894, giving effect to the legislative intent by reading the expression "or" as "or" is the correct interpretation with beneficent consequences for the landowner. The learned Counsel submitted that reading the expression "or" as "and" not only does violence to the plain language of Section 24(2) but it also reduces the deeming provision down to vanishing point. Should a conjunctive reading of the conditions be combined with exclusion of the time spent in litigation or due to a stay, then the whole of Section 24(2) will be robbed of content since it will apply to very rare cases. It was further submitted that Section 24 does not lay down any specific conditionality in terms of how far back in time the awards contemplated Under Section 24(2) could have been made. The deeming provision Under Section 24(2) operates w.e.f. 1.1.2014 and its effect would cover all cases that fulfil the conditions provided in the statute. Learned Counsel cited decisions in support of the interpretation that "or" should be construed disjunctively, not conjunctively as "and".[13]

74. Learned Counsel stressed that there are no vested rights created in the State in any case till compensation has been paid and possession has been taken. The Act of 2013 is a beneficial legislation and a radical departure from the previous unjust and oppressive regime. It intends to confer significant benefits to the landowners and makes the exercise of the power of eminent domain compatible with our constitutional values. It ought to therefore be given an interpretation which favours the landowners. Finally, he argued that the decision in *Indore Development Authority* (supra) erroneously upset a consistent line of decisions which began with *Pune Municipal Corporation* (supra). Subsequent decisions of this Court following *Pune Municipal Corporation* (supra) have also considered a host of arguments/issues and there is no compelling reason to make a departure. He submitted that even a larger Bench of this Court is bound to pay due deference to the principle of *Stare Decisis*.

75. Supplementing the submissions, Mr. Dinesh Dwivedi, learned senior Counsel for the landowners, argued that the meaning of the phrase "*compensation has not been paid*" should be considered, given that in Section 24(2) "*paid*" is not used. The phrase "*has not been*" is used in respect of both "*possession*" as well as "*paid*". Therefore, it must mean the same in both respects. The important factors to be borne in mind-and to distinguish the phrase "*paid*" from "*deposit*", is whether in the court Under Section 31(2) or in the treasury Under Section 31(1). It is urged that an analysis of Sections 17(3A) & (3B), 31(1) & (2) and Section 28 read with Section 34 of the Act of 1894 shows that these provisions clearly distinguish between *tender, paid* or *deposit* whether in the court or the treasury.

76. Learned Counsel argued that three different words used in the same Act, in various provisions of the Act, cannot mean the same. It follows also from the reading of Section 19(1)(c) and (cc). In both these provisions word "*tender*" is used in contrast to word "*paid*" while word paid is used in contrast to word "*deposit*". The word "*deposit*", wherever used, is in the context of "*deposit in Court*" only not treasury. The expression "*tender payment*" Under Section 17(3A) and Section 31(1) of the Act of 1894 were followed by the words "*pay it to them*". Therefore, *tender* cannot mean "*paid*". It is urged that these terms fall in Part V of the Act, titled as "*Payment*". The term "*pay it to them*" Under Section 31 after "*tender*" must mean an additional action or step. When

after "*tender*" an effort is made "*to pay*" the compensation and the same is accepted by the beneficiary, it becomes "*paid*". The "*deposit*" Under Section 31(2) only comes in when the beneficiary declines payment. This clearly implies that "*tender of payment*" cannot be equated with "*pay it to them*" or "*deposit in Court*" Under Section 31(1) and 31(2). It is argued that what follows is that tender of payment by itself is not enough. The State's interpretation is contested as incorrect because if tender is equal to being paid then why does legislature provide for "*deposit in court*". The amount is deemed to be paid on tender and the obligation to pay is discharged then the question is why require "*deposit in Court*". Learned Counsel argued that "*Tender*" can never be deemed as "*paid*": This is not only evident from reading of Section 19(c) where the term "*paid or tendered*" is depicted as alternates. Similarly, "*paid or deposited*" are used alternately. Likewise, Sections 17(3)(b), 19(cc) and 34 use these words alternately. As said above if "*tender*" would amount to "*paid*" and then the compensation would be deemed to be paid, resulting in discharge of obligation to pay, then why deposit in court Under Section 31(2) to make it "*custodia legis*". Section 31(2) would become redundant in most of the cases.

77. Learned Counsel conceded that there is no doubt that on a decline of payment by the beneficiary it has to be mandatorily deposited in Court Under Section 31(2). The provision uses the phrase "*shall deposit*" and this gives a valuable right to the payee, not only of interest in the event it is not "*deposited in court*" but also a right to seek investment of compensation Under Section 33. These statutory rights are adversely affected if "*deposit*" is not in "*court*". Therefore, it is amply clear that "deposit in treasury is not an option available. It cannot be a substitute for "*deposit in Court*". Besides Section 31(1) and 31(2) of the Act of 1894 present a complete code for payment and there is no gap or uncovered area to permit Rules to supplement. Any deposit in treasury was in breach of Section 31 and therefore, impermissible. Also, most of the States had no Rules Under Section 55. In this context, executive instructions cannot prevail over law. Law can never be interpreted with the aid of subordinate legislation or executive instructions. It was further submitted that Sections 17(3A) and (3B), 28, 31, 33 and 34 of the Act of 1894 are a clear pointer that "*tender*" is not "*paid*" and neither is "*deposit*". Likewise, these provisions frequently use words "*paid or deposited*" which shows they are different. Deposit cannot be, therefore, equated with paid as they are more than once separated by word 'or'.

78. It was contended that the scheme of the Act of 1894 was clear and categorical that the amount of compensations when accepted by the beneficiary is deemed to be "paid" for interest to stop running. The running of interest Under Section 34 denotes non-discharge of obligation to pay, otherwise why pay interest? The "*deposit in Court*" may stop running of interest and therefore, may for this purpose be taken to be paid, but when it comes to actual meaning in the above provisions, "*paid and deposit*" are invariably separated by the use of word "or" in between them. Therefore, it is submitted that when Section 24(2) of the New Act uses the phrase "compensation has not been paid" it uses the terminology of the proviso to Section 34 (proviso) and must have the same meaning "has not been paid" cannot be read as "has not been deposited". If this is the right interpretation than the coverage of Section 24(2) also expands to cover those cases in which the compensation has not been actually paid but has been deposited in the Court. This would also be in keeping with the legislative policy contained in the Preamble, to give just and fair compensation to those whose lands have been acquired as per the Old Act. Coverage of the New Act is co-related to persons whose "land has been acquired". The policy of Section 24 also reflects

this expansive liberal approach of "*just and fair compensation*". Section 24 would therefore have to be seen in the light of this liberal policy intent.

79. It was urged that these States' arguments regarding revival of claims or resulting in impossible situations causing irreparable harm are not very relevant once the legislative policy is clear. The provision has to be interpreted in a manner that it subserves the legislative policy intent of giving just and fair compensation to those whose lands were acquired (possession taken) under the Act of 1894. Once the legislative policy or intent is clear then the objections relating to harsh consequences are not really relevant. It was stated that State may be put into a difficult situation, but the solution too is provided in the last part of Section 24(2) which reflects the words "*if it so chooses*", it can acquire afresh Under Section 24. Learned Counsel relied on *Padma Sunder Rao* (supra); *Popat Bahiru Govardhane v. Land Acquisition Officer* MANU/SC/0851/2013 : 2013 (10) SCC 765 and *B. Premanand v. Mohan Koikal* MANU/SC/0249/2011 : (2011) 4 SCC 266. It was urged that the legislative policy may cause hardship or difficulties to some or the State may be put to an impossible situation; yet cannot take away from Parliamentary intent. Parliament has enough wisdom to know these difficulties, the law prevailing earlier or the ground realities. It would be deemed to be not only aware of the difficulties, but also to have assessed them while framing the liberalised policy. The question is one of intent. The intent has to be seen primarily from the words used in the text. It is only if such intent is not clear that courts have to see them with the aid of the context. The difficulties as well as harsh consequences cannot be utilized to assess the intent embedded in the provision if they are clear, otherwise from the text, or the context. Not only has Parliament not provided any Clause creating any kind of exception, or extension of five years in cases of litigating land oustees who may have an interim orders in their favour, stalling the acquisition or payment of compensation. All that the provision says is "*or compensation has not been paid*". The projected policy intent is broad and unencumbered by any exception. This is a clearest indicator of legislative intent to cover all such cases that may cause hardship to the State or may be due to the fault of Court or the litigious land oustee. The intent is clear and therefore, has to be read apart from difficulties or hardships.

80. It is submitted that the State's contention with regard to a differential approach for possession and compensation is irrational and is against the very grain of Section 24(2) and is also unreasonable and discriminatory. It is unreasonable because there are hardly any cases where compensation may have been paid, yet possession may not have been taken. Most of the cases are Under Section 17(1) where possession is invariably taken while compensation remains unpaid as award is not made. By reading word '*or*' as '*and*', the words "*or the compensation has not been paid*" become otiose or redundant. Parliament could have only said that lapsing would occur only if possession has not been taken, because if possession is taken then there would never be lapsing and there would be no need to consider "*or*" as "*and*". Therefore, such an interpretation (i.e., reading "or" conjunctively) is contrary to every Rule of interpretation and contrary to the Legislative policy indicated in the Preamble of giving just and fair compensation in cases of earlier acquisitions, which includes cases where possession has been taken.

81. Learned Counsel urged that Section 24(2) would become discriminatory if "or" is read as "and". For this, it would be necessary to analyse Section 24(1)(a). Section 24(1)(a) applies to a situation where there is no award made till the commencement of the New Act. No award primarily means "*compensation has not been paid*". Importantly in a case Under Section 17 of the Act of 1894,

which is most frequently utilised, possession may be taken before award is made or compensation is paid. In other words, Section 24(1)(a) does visualize or cover cases where possession may have been taken but "*compensation has not been paid*". It, therefore, requires re-determination of compensation Under Sections 26-30 of the New Act. The problems of who to pay the enhanced compensation, as referred above, would also arise in this situation. Yet Parliament has ignored these difficulties and provided for redetermination. Section 24(1)(a) may travel back to period of five years or more, or may be 10-15 years as in case of Section 24(2). It would not be reasonable to restrict the retrospectivity of Section 24(1)(a) with the aid of Section 11A of the old Act, to 2 years before commencement. It would be incorrect because then one would be ignoring *Explanation* to Section 11A (proviso). The said Explanation visualises indefinite extension of the period of award from 2 years. It would not be, therefore, reasonable to exclude such cases where though possession may have been taken, but compensation may not have been paid for a very long period of time upto commencement of the new Act. Section 24(1)(a) does not contain any provision like Section 25 (proviso), Section 19(7)(proviso) and Section 69(2) (explanation) and therefore, is wide in its coverage in the absence of exceptions as above.

82. Learned Counsel urged that Section 24(2) is a special provision giving higher benefit because in the cases covered by Section 24(2) "compensation has not been paid" despite award. Would it be rational to read Section 24(2) in such a manner that deprives it of its value and worth and makes it ineffective. Section 24(2) would become ineffective as a whole because there would be rarest of the rare cases, where both the conditions would be fulfilled. The experience shows in vast majority of cases of acquisition under the old Act, possession is taken while award & compensation come much later. This is because Sections 9 & 17(6) of the Act of 1894 were used in vast majority of acquisitions and the Legislature was aware of it. The law does not compel doing of an act that is impossible. It is emphasized that the principle does not apply as the new Act is not requiring any such performance. The new Act after recognising the past, is providing new solutions, rights and benefits. Section 24(2) by itself does not compel performance of an impossible act. This principle could have been relevant during earlier Act but is hardly relevant for interpreting the scope of Section 24(2) of the New Act. Section 24 clearly postulates that even though the Act may be impossible of performance, or results in undue advantage to the beneficiary despite his fault in declining, yet benefit of Section 24(2) may be given without creating any exception. There is no constitutional restriction on the Legislature that such cases or situations have to be excluded. The legislature can provide benefit in the same manner to all, difficulties apart. Reliance is placed on certain decisions in support of this proposition.[14] Therefore, such interpretation which excludes the benefits Under Section 24(2) by resorting to such arguments of difficulties is meaningless. The giving of benefit to all by ignoring above circumstance is neither illegal nor unjust. It is neither anomalous nor absurd. It is urged that what the court feels is not important; what is relevant is the view of the legislature, to be culled out from the reading of only the text or the context; not in any other manner. For this rule, reliance was placed on *Mohd. Kavi v. Fatmabal Ibrahim*[15] and other decisions.

83. Other learned senior counsel, i.e. M/s. Dushyant Dave, Gopal Shankarnarayan, Siddharth Luthra, Nakul Dewan, Manoj Swaroop, Anukul Chandra Pradhan supplemented the submissions of Mr. Divan and Mr. Dwivedi. It was argued by them that this Court should not depart from the Rule of literal interpretation, because that would be both beneficial and purposive, given the oppressive nature of the Act of 1894. In this context, it was submitted that the expressions "paid"

and "or" should be construed in the manner that Parliament intended, having regard to the overall intent of ensuring the acquisition proceedings, where either compensation was not paid, or possession was not taken, in respect of awards made before 1.1.2009, should lapse. It was submitted that there is no insurmountable difficulty or impossibility, even if possession is taken (but compensation not paid) and even if vesting occurs, Section 24(2) of the new Act expressly provides for lapsing. The remedy in that case, for the appropriate Government is the option of going through the acquisition again using emergency provisions. In that event, the authorities would have to provide for rehabilitation and enhanced compensation. In any case, the court always has the option in such cases where third party rights have ensued to do complete justice, by duly compensating those whose land is acquired, without disturbing the possession of third party who has been given the land.

84. The learned Counsel submit that this Court should base itself on the approach to interpret Section 24 of the Act of 2013 is that it is a savings Clause with an exclusionary deeming provision. It is urged that the words "physical possession" Under Section 24(2) should be read to reflect the actual state of affairs as on the date when the Act of 2013 came into force, i.e., there was actual physical possession of the land. This would also be the case in relation to the term "compensation not paid" Under Section 24(2), where compensation would either have had to be paid or deposited in court; and that use of the term "or" signifies that the two conditions set out above are disjunctive. It is argued that Section 114 consists of two Sections (1) a repeal Clause set out in Section 114(1); and (2) a savings Clause set out in Section 114(2). It is contended that there is a distinction in the manner in which a repealing Clause is construed as compared to the manner in which a savings Clause is construed. While a repealing clause, followed by a new legislation on the same subject-matter would result in a line of enquiry about what rights are obliterated under the old Act by the new Act, a savings Clause would be construed in a manner that resurrects a provision, which would otherwise be obliterated on account of the repeal. In relation to a repeal clause, the effect of obliterating the provisions of the previous enactment would be as if it never existed, except for vested rights, which would be protected Under Section 6 of the General Clauses Act. Section 6 of the General Clauses Act, thus operated as a savings clause. Learned Counsel rely on the judgment of this Court in *State of Punjab v. Mohar Singh* MANU/SC/0043/1954 : (1955) 1 SCR 893 that the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law and that:

A repeal therefore without any saving Clause would destroy any proceeding whether not vet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right.

85. Submitting that the effect of Section 6 of the General Clauses Act, is that unless the contrary intention appears, the repeal does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed. However, in case of the Act of 2013, it is urged that Parliamentary intent was not to simply let Section 6 of the General Clauses Act operate as the savings provision. Apart from Section 6, the intent, evident from Section 114(2), was to set out a

specific provision which would save proceedings. It was submitted that those would be provisions that would otherwise not have been saved by the General Clauses Act.

86. It is in this background that Section 24 of the Act of 2013 must be interpreted. While the Respondent accepts that Section 24 could have been more clearly worded to reflect the legislative intent as a savings provision, to fully appreciate the operation of Section 24(1)(b) as a classical savings provision which saves proceedings under the Act of 1894 if an award had been made Under Section 11, in a manner as if the Act of 1894 had not been repealed. Section 24(1)(a) deals with a situation where no award has been made and in providing for determination of compensation in terms of the Act of 2013 naturally would mean that proceedings under the Act of 1894 would be revived, save and except on the issue of computation of compensation. Having revived proceedings Under Section 24(1), Section 24(2) provides for a deemed lapsing through a *non-obstante* provision for an award made five years or prior to the date of the commencement of the Act of 2013. This creates a legal fiction which, as held by this Court in *J.K. Cotton Spg. & Wvg. Mils Ltd. v. Union of India*, MANU/SC/0403/1987 : 1987 Supp SCC 350 is:

...an admission of the non-existence of the fact deemed...The legislature is quite competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist.

Learned Counsel also placed reliance on the decision of the Constitution Bench in *Bengal Immunity Co. Ltd. v. State of Bihar* MANU/SC/0083/1955 : (1955) 2 SCR 603 to the following effect:

[l]egal fictions are created only for some definite purpose" and referred to the decision East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 *at paragraph 71, which reads as follows:*

if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

87. Other decisions of this Court were also relied on, in this context.[16] Learned Counsel stated that given that it is a legal fiction which leads to a deemed lapsing of proceedings under the Act of 1894, Parliamentary intent Under Section 24(2) ought to be construed so that "*physical possession*" Under Section 24(2) reflects the actual state of affairs as on the date when the Act of 2013 came into force; similarly, too the term compensation not paid Under Section 24(2). It was stated, that retaining amounts in the treasury, pursuant to executive Rules would not suffice for compliance with the *payment* condition. Learned Counsel also urged that this Court should interpret "or" as signifying a disjunctive reading of the two conditions. Comparing this legal fiction created Under Section 24(2) with the State's obligations under the Act of 1894 would be inconsistent with the decisions of this Court, under which legal fictions are to be read as it is i.e., the state of affairs as plainly set out in the legal fiction. Therefore, the effect of Section 24(2) is that if either of the situations are not met, the acquisition proceedings under the Act of 1894 lapse and the State can

initiate proceedings afresh in accordance with the Act of 2013. This construction, urge learned Counsel is also purposive and practical. If the State has not taken physical possession of a property even if compensation has been paid for over 5 years prior to the commencement of the Act of 2013, because it no longer serves the purpose of acquisition, it can drop the proceedings as those would have lapsed. In such an event, the State would naturally be entitled to restitutory recovery. However, if the State has failed to take physical possession, it cannot be benefited by its inactions and must restart proceedings under the Act of 2013. In such a case, the compensation paid can always be re-adjusted against compensation determined under the Act of 2013. *Arguendo*, it is urged that even if Section 114(2) of the Act of 2013 is construed to keep alive the State's vested rights by virtue of Section 6 of the General Clauses Act, such rights are limited by Section 24(1)(a) and Section 24(2) of the Act of 2013. Thus, while ordinarily the acquisition proceedings that were pending in respect of awards passed under the Act of 1894 would have continued, the legislature by way of a creating a legal fiction, provided for the deemed lapse of these proceedings in respect of which physical possession has not been taken or compensation not paid. Learned Counsel placed reliance on some decisions of this Court.[17] *VKNM Vocational Higher Secondary School v. State of Kerala*, MANU/SC/0076/2016 : 2016 (4) SCC 216 where it was held that:

...a vested right can also be taken away by a subsequent enactment if such subsequent enactment specifically provides by express words or by necessary intendment. In other words, in the event of the extinction of any such right by express provision in the subsequent enactment, the same would lose its value.

88. It was submitted that in order to determine the accrued rights and incurred liabilities that have been saved under the Act of 1894, the line of inquiry is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law, but whether it has taken away those rights and liabilities.

89. All learned Counsel supported the submission that the proviso is not restricted in its operation to Section 24(2) only and that its placement is not determinative. It was emphasized that the proviso does not say that higher compensation would be paid, in the contingency provided by it, *as an option to avoid lapsing*. The absence of any reference to lapsing, or the ingredients of Section 24(2) clearly meant that the benefit of higher compensation in the event a majority of the landowners were not paid compensation (under the old Act) was to enure to all falling in the same class, i.e., those whose lands were subjected to acquisition, whether five years prior to or less than coming into force of the Act of 2013.

Relevant provisions

90. For appreciating the controversy in the present cases, it is essential to extract certain relevant provisions of the Act of 1894 as well as the Act of 2013. The provisions of the Act of 1894 are reproduced below:

12 Award of Collector when to be final.

(1) Such award shall be filed in the Collector's office and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they

have respectively appeared before the Collector or not, of the true area and value of the land, and apportionment of the compensation among the persons interested.

(2) The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.

*** ***

17. Special powers in case of urgency.-(1) In cases of urgency, whenever the appropriate Government, so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9, Sub-section (1), take possession of any land needed for a public purpose. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

[(3A) Before taking possession of any land under Sub-section (1) or Sub-section (2), the Collector shall, without prejudice to the provisions of Sub-section (3)-

(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the persons interested entitled thereto, and

(b) pay it to them, unless prevented by some one or more of the contingencies mentioned in Section 31, Sub-section (2),

and where the Collector is so prevented, the provisions of Section 31, Sub-section (2) (except the second proviso thereto), shall apply as they apply to the payment of compensation under that section.

(4) In the case of any land to which, in the opinion of the [appropriate Government], the provisions of Sub-section (1) or Sub-section (2) are applicable, the appropriate Government may direct that the provisions of Section 5A shall not apply, and, if it does so direct, a declaration may be made Under Section 6 in respect of the land at any time after the date of the publication of the notification Under Section 4, Sub-section (1).]

16. Power to take possession*.--When the Collector has made an award Under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances.*

*** ***

31. Payment of compensation or deposit of same in Court.*-(1) On making an award Under Section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.*

(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of

it, the Collector shall deposit the amount of the compensation in the Court to which a reference Under Section 18 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

Provided also that no person who has received the amount otherwise than under protest shall be entitled to make any application Under Section 18:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

(3) Notwithstanding anything in this section, the Collector may, with the sanction of the appropriate Government instead of awarding a money compensation in respect of any land, make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, the remission of land revenue on other lands held under the same title or in such other way as may be equitable having regard to the interests of the parties concerned.

(4) Nothing in the last foregoing Sub-section shall be construed to interfere with or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contract in respect thereof.

*** ***

34. Payment of interest

When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of [19] [nine per centum] per annum from the time of so taking possession until it shall have been so paid or deposited:

Provided that if such compensation or any part thereof is not paid or deposited within a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry.

The relevant provisions of the Act of 2013 are as follows:

24. Land acquisition process under Act No. 1 of 1984 shall be deemed to have lapsed in certain cases.

(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894,--

(a) where no award Under Section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said Section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in Sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said Section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition Under Section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act.

**** ****

114. Repeal and saving.*-(1) The Land Acquisition Act, LA (1 of LA), is hereby repealed.*

(2) Save as otherwise provided in this Act the repeal under Sub-section (1) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeals.

Section 6 of the General Clauses Act, 1897 reads as follows:

Section 6-Effect of repeal

Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

Salient features of the Act of 2013

91. There can no dispute, no two opinions about the fact that provisions of the Act of 2013, were enacted with the object of providing fair compensation and rehabilitating those displaced from their land. The Introduction and Statement of Objects and Reasons of the Act of 2013 are extracted hereunder:

INTRODUCTION

The Land Acquisition Act, LA was a general law relating to acquisition of land for public purposes and also for companies and for determining the amount of compensation to be made on account of such acquisition. The provisions of the said Act was found to be inadequate in addressing certain issues related to the exercise of the statutory powers of the State for involuntary acquisition of private land and property. The Act did not address the issues of rehabilitation and resettlement to the affected persons and their families. There had been multiple amendments to the Land Acquisition Act, LA not only by the Central Government but by the State Governments as well. However, there was growing public concern on land acquisition, especially multi-cropped irrigated land. There was no central law to adequately deal with the issues of rehabilitation and resettlement of displaced persons. As land acquisition and rehabilitation and resettlement were two sides of the same coin, a single integrated law to deal with the issues of land acquisition and rehabilitation and resettlement was necessary.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 addresses concerns of farmers and those whose livelihood are dependent on the land being acquired, while at the same time facilitating land acquisition for industrialization, infrastructure and urbanization projects in a timely and transparent manner.

This Act represents a change in the legislative approach to land acquisition. It introduces for the first time provisions for social impact analysis, recognizes non-owners as affected persons, a mode of acquisition requiring consent of the displaced and statutory entitlements for resettlement. In addition, it has restricted the grounds on which land may be acquired under the urgency clause.

STATEMENT OF OBJECTS AND REASONS

The Land Acquisition Act, LA is the general law relating to acquisition of land for public purposes and also for companies and for determining the amount of compensation to be made on account of such acquisition. The provisions of the said Act have been found to be inadequate in addressing certain issues related to the exercise of the statutory powers of the State for involuntary acquisition

of private land and property. The Act does not address the issues of rehabilitation and resettlement to the affected persons and their families.

2. The definition of the expression "public purpose" as given in the Act is very wide. It has, therefore, become necessary to re-define it so as to restrict its scope for acquisition of land for strategic purposes vital to the State, and for infrastructure projects where the benefits accrue to the general public. The provisions of the Act are also used for acquiring private lands for companies. This frequently raises a question mark on the desirability of such State intervention when land could be arranged by the company through private negotiations on a "willing seller-willing buyer" basis, which could be seen to be a more fair arrangement from the point of view of the land owner. In order to streamline the provisions of the Act causing less hardships to the owners of the land and other persons dependent upon such land, it is proposed repeal the Land Acquisition Act, LA and to replace it with adequate provisions for rehabilitation and resettlement for the affected persons and their families.

3. There have been multiple amendments to the Land Acquisition Act, LA not only by the Central Government but by the State Governments as well. Further, there has been heightened public concern on land acquisition, especially multi-cropped irrigated land and there is no central law to adequately deal with the issues of rehabilitation and resettlement of displaced persons. As land acquisition and rehabilitation and resettlement need to be seen as two sides of the same coin, a single integrated law to deal with the issues of land acquisition and rehabilitation and resettlement has become necessary. Hence the proposed legislation proposes to address concerns of farmers and those whose livelihoods are dependent on the land being acquired, while at the same time facilitating land acquisition for industrialization, infrastructure and urbanization projects in a timely and transparent manner.

4. Earlier, the Land Acquisition (Amendment) Bill, 2007 and Rehabilitation and Resettlement Bill, 2007 were introduced in the Lok Sabha on 6th December 2007 and were referred to the Parliamentary Standing Committee on Rural Development for Examination and Report. The Standing Committee presented its reports (the 39th and 40th Reports) to the Lok Sabha on 21st October 2008 and laid the same in the Rajya Sabha on the same day. Based on the recommendations of the Standing Committee and as a consequence thereof, official amendments to the Bills were proposed. The Bills, along with the official amendments, were passed by the Lok Sabha on 25th February 2009, but the same lapsed with the dissolution of the 14th Lok Sabha.

5. It is now proposed to have a unified legislation dealing with acquisition of land, provide for just and fair compensation and make adequate provisions for rehabilitation and resettlement mechanism for the affected persons and their families. The Bill thus provides for repealing and replacing the Land Acquisition Act, LA with broad provisions for adequate rehabilitation and resettlement mechanism for the project affected persons and their families.

6. Provision of public facilities or infrastructure often requires the exercise of powers by the State for acquisition of private property leading to displacement of people, depriving them of their land, livelihood, and shelter, restricting their access to traditional resource base and uprooting them from their socio-cultural environment. These have traumatic, psychological, and socio-cultural consequences on the affected population, which call for protecting their rights, particularly in case

of the weaker Sections of the society, including members of the Scheduled Castes (SCs), the Scheduled Tribes (STs), marginal farmers and their families.

7. There is an imperative need to recognise rehabilitation and resettlement issues as intrinsic to the development process formulated with the active participation of affected persons and families. Additional benefits beyond monetary compensation have to be provided to families affected adversely by involuntary displacement. The plight of those who do not have rights over the land on which they are critically dependent for their subsistence is even worse. This calls for a broader concerted effort on the part of the planners to include in the displacement, rehabilitation, and resettlement process framework, not only for those who directly lose their land and other assets but also for all those who are affected by such acquisition. The displacement process often poses problems that make it difficult for the affected persons to continue their traditional livelihood activities after resettlement. This requires a careful assessment of the economic disadvantages and the social impact arising out of displacement. There must also be holistic effort aimed at improving the all-round living standards of the affected persons and families.

8. A National Policy on Resettlement and Rehabilitation for Project Affected Families was formulated in 2003, which came into force with effect from February 2004. Experience gained in implementation of this policy indicates that there are many issues addressed by the policy which need to be reviewed. There should be a clear perception, through a careful quantification of the costs and benefits that will accrue to society at large, of the desirability and justifiability of each project. The adverse impact on affected families-economic, environmental, social and cultural-must be assessed in participatory and transparent manner. A national rehabilitation and resettlement framework thus needs to apply to all projects where involuntary displacement takes place.

9. The National Rehabilitation and Resettlement Policy, 2007, has been formulated on these lines to replace the National Policy on Resettlement and Rehabilitation for Project Affected Families, 2003. The new policy has been notified in the Official Gazette and has become operative with effect from the 31st October, 2007. Many State Governments have their own Rehabilitation and Resettlement Policies. Many Public Sector Undertakings or agencies also have their own policies in this regard.

10. The law would apply when Government acquires land for its own use, hold and control, or with the ultimate purpose to transfer it for the use of private companies for stated public purpose or for immediate and declared use by private companies for public purpose. Only rehabilitation and resettlement provisions will apply when private companies buy land for a project, more than 100 acres in rural areas, or more than 50 acres in urban areas. The land acquisition provisions would apply to the area to be acquired but the rehabilitation and resettlement provisions will apply to the entire project area even when private company approaches Government for partial acquisition for public purpose.

11. "Public purpose" has been comprehensively defined, so that Government intervention in acquisition is limited to defence, certain development projects only. It has also been ensured that consent of at least 80 per cent of the project affected families is to be obtained through a prior informed process. Acquisition under urgency Clause has also been limited for the purposes of

national defence, security purposes, and Rehabilitation and Resettlement needs in the event of emergencies or natural calamities only.

12. To ensure food security, multi-crop irrigated land shall be acquired only as a last resort measure. An equivalent area of culturable wasteland shall be developed if multi-crop land is acquired. In districts where net sown area is less than 50 per cent of total geographical area, no more than 10 per cent of the net sown area of the district will be acquired.

13. To ensure comprehensive compensation package for the land owners, a scientific method for calculation of the market value of the land has been proposed. Market value calculated will be multiplied by a factor of two in the rural areas. Solatium will also be increased upto 100 per cent of the total compensation. Where land is acquired for urbanization, 20 per cent of the developed land will be offered to the affected land owners.

14. Comprehensive rehabilitation and resettlement package for land owners including subsistence allowance, jobs, house, one acre of land in cases of irrigation projects, transportation allowance, and resettlement allowance is proposed.

15. Comprehensive rehabilitation and resettlement package for livelihood losers, including subsistence allowance, jobs, house, transportation allowance, and resettlement allowance is proposed.

16. Special provisions for Scheduled Castes and the Scheduled Tribes have been envisaged by providing additional benefits of 2.5 acres of land or extent of land lost to each affected family; one-time financial assistance of Rs. 50,000/-; twenty-five per cent additional rehabilitation and resettlement benefits for the families settled outside the district; free land for community and social gathering and continuation of reservation in the resettlement area, etc.

17. Twenty-five infrastructural amenities are proposed to be provided in the resettlement area including schools and play grounds, health centres, roads, and electric connections, assured sources of safe drinking water, Panchayat Ghars, Anganwadis, places of worship, burial and cremation grounds, village level post offices, fair price shops, and seed-cum-fertilizers storage facilities.

18. The benefits under the new law would be available in all the cases of land acquisition under the Land Acquisition Act, LA, where award has not been made, or possession of land has not been taken.

19. Land that is not used within ten years in accordance with the purposes, for which it was acquired, shall be transferred to the State Government's Land Bank. Upon every transfer of land without development, twenty per cent of the appreciated land value shall be shared with the original land owners.

20. The provisions of the Bill have been made fully compliant with other laws such as the Panchayats (Extension to the Scheduled Areas) Act, 1996; the Scheduled Tribes and Other

Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Land Transfer Regulations in Fifth Scheduled Areas.

21. Stringent and comprehensive penalties both for the companies and Government in cases of false information, mala fide action, and contravention of the provisions of the propose legislation have been provided.

22. Certain Central Acts dealing with the land acquisition have been enlisted in the Bill. The provisions of the Bill are in addition to and not in derogation of these Acts. The provisions of this Act can be applied to these existing enactments by a notification of the Central Government.

23. The Bill also provides for the basic minimum requirements that all projects leading to displacement must address. It contains a saving Clause to enable the State Governments, to continue to provide or put in place greater benefit levels than those prescribed under the Bill.

24. The Bill would provide for the basic minimum that all projects leading to displacement must address. A Social Impact Assessment (SIA) of proposals leading to displacement of people through a participatory, informed and transparent process involving all stake-holders, including the affected persons will be necessary before these are acted upon. The rehabilitation process would augment income levels and enrich quality of life of the displaced persons, covering rebuilding socio-cultural relationships, capacity building, and provision of public health and community services. Adequate safeguards have been proposed for protecting rights of vulnerable Sections of the displaced persons.

25. The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions contained in the Bill.

92. Section 2(2) of the Act of 2013, provides that in the event of acquisition for private companies, consent of 80% of the affected families has to be obtained and for the public-private partnerships, consent of 70% of the affected families is required to be taken. In Section 3(c), the term 'affected family' has been widened, which inter alia includes members of the Schedule Tribes, forest dwellers, and families whose livelihood is dependent on forests or water bodies. A "Social Impact Assessment" ("SIA") has to be prepared, as provided in Sections 4 to 9. Special provisions to safeguard food security have been made by prohibiting the acquisition of multi-cropped land except in exceptional circumstances as enumerated in Section 10. Section 11 is akin to Section 4 of the Act of 1894 regarding issuance of preliminary notification. The SIA report lapses in case preliminary notification Under Section 11 is not issued within a period of 12 months from the date of the report. A Rehabilitation and Resettlement Scheme ("RR Scheme") is provided in Sections 16 to 18. The Collector has to pass the award Under Section 23. Section 26 deals with the determination of the market value by the Collector. Section 30 provides for Solatium at 100%. The RR award has to be passed by the Collector Under Section 31, and notice has to be given immediately Under Section 37, which is equivalent to Section 12 of the Act of 1894. Section 38 provides that Collector has to take possession after full payment of compensation has been made as well as rehabilitation and resettlement entitlements are paid or tendered to the entitled persons. Thus, there is a departure from Section 16 Act of 1894 in the provisions contained in Section 38 of the Act of 2013. The Collector has to ensure Under Section 38 of Act of 2013 that the

rehabilitation and resettlement process is complete before displacing people. Section 40 deals with urgent cases. The Government may acquire land without making award in the case of urgency for the defence of India or national security. In other emergencies arising out of natural calamities or any other emergencies special provisions Under Section 40 may be exercised with the approval of the Parliament. In such event, the provisions of the Social Impact Assessment and Rehabilitation and Resettlement Scheme may be exempted. Additional compensation of 75% is payable in such cases. Section 41 contains special provisions for Scheduled Castes and Scheduled Tribes by prohibiting acquisition in scheduled areas as far as possible. Sections 43 to 50 deal with appointment and constitution of the Rehabilitation and Resettlement Authorities and Monitoring Committees at Project as well as National Levels. Sections 51 to 74 deal with the establishment of Land Acquisition, Rehabilitation, and Resettlement Authority. Sections 77 to 80 are *pari materia* to the provisions contained in Sections 31 to 34 of the Act of 1894, relating to payment, deposit, and interest, etc. Section 93 is equivalent to Section 48 of the Land Acquisition Act. The Government shall be at liberty to withdraw from acquisition if possession of land has not been taken. Section 101 provides that land be returned to the original owner or the Land Bank of the appropriate Government if acquired land remains unutilized for a period of five years. Thus, various departures have been made from the old Land Acquisition Act, in the Act of 2013 relating to Social Impact Assessment, Rehabilitation and Resettlement Scheme, etc. It ensures higher compensation than the old Act; the public purpose has been defined; consent provisions have also been made. The interest of Scheduled Castes and Scheduled Tribes have been adequately protected. Various Committees and Authorities have been constituted. The definition of 'affected families' has been widened.

93. Undoubtedly the Act of 2013 has provided safeguards, in the form of higher compensation and provisions for rehabilitation, which are necessary. In that light, the court has to interpret its provisions, to give full and meaningful effect to the legislative intent keeping in mind the language and tenor of the provisions, it is not for the court to legislate. The Court can only iron out creases to clear ambiguity. The intended benefit should not be taken away. At the same time, since the Act of 2013, envisages lapse of acquisitions notified (and in many cases, completed by the issuance of the award) due to indolence and inaction on the part of the authorities and therefore, intends acquisition at a fast track, the full effect has to be given to the provisions contained in Section 24.

Scope of Section 24

94. Section 24 begins with a *non-obstante* clause, overriding all other provisions of the Act of 2013 including Section 114 of the Act of 2013, dealing with repeal and saving. In terms of Section 114 of the Act of 2013, the general application of Section 6 of the General Clauses Act, 1897, except otherwise provided in the Act, has been saved. Section 6(a) of the General Clauses Act, 1897 provides that unless a different intention appears, the repeal shall not revive anything not in force or existing at the time when the repeal has been made. The effect of the previous operation of any enactment so repealed or anything duly done or suffered thereunder is also saved by the provisions contained in Section 6(b). As per Section 6(c), the repeal shall not affect any right, privilege, obligation or liability acquired, accrued, or incurred.

95. Section 24(1)(a) of the Act of 2013 read with the *non-obstante* Clause provides that in case of proceedings initiated under the Act of 1894 the award had not been made Under Section 11, then

the provisions of the Act of 2013, relating to the determination of compensation would apply. However; the proceedings held earlier do not lapse. In terms of Section 24(1)(b), where award Under Section 11 is made, then such proceedings shall continue under the provisions of the Act of 1894. It contemplates that such pending proceedings, as on the date on which the Act of 2013 came into force shall continue, and taken to their logical end. However, the exception to Section 24(1)(b) is provided in Section 24(2) in case of pending proceedings; in case where the award has been passed five years or more prior to the commencement of the Act of 2013, the physical possession of the land has not been taken, or the compensation has not been paid, the proceedings shall be deemed to have lapsed, and such proceedings cannot continue as per the provisions of Section 24(1)(b) of the Act of 2013.

96. Section 24(2) carves out an exception to Section 24(1)(b), where the award has been passed, and the proceedings are pending, but in such proceedings, physical possession of the land has not been taken, or compensation has not been paid, proceedings shall lapse. There are twin requirements for the lapse; firstly, physical possession has not been taken and, secondly, compensation has not been paid. In case, possession has been taken but compensation has been paid, there is no lapse of the proceedings. The question which is to be decided is whether the conditions are cumulative, i.e. both are to be fulfilled, for lapsing of acquisition proceedings, or the conditions are in the alternative ("either/or"). According to the State and acquiring agencies, in a situation where possession has been taken, and compensation is not paid, there is no lapse: also in case where compensation has been paid, but possession not taken in a proceeding pending as on 1.1.2014, there is no lapse. *Sine qua non* is that proceeding must be pending. They argue that the word "or" used in phrase 'the physical possession of the land has been not taken, or the compensation has not been paid', has to be interpreted as "and" as two negative requirements qualify it. Furthermore, argues the State when two negative conditions are connected by "or," they are construed as cumulative, the word "or" is to be read as "nor" or "and." Naturally, the landowners argue to the contrary, i.e., that lapse of acquisition occurred if compensation were not paid, or possession were not taken, 5 years before the coming into force of the Act of 2013.

97. It would be useful to notice Rules of Statutory Interpretation in this regard. *Principles of Statutory Interpretation* (14th Edition) by Justice G.P. Singh, speaks of the following general Rule of Statutory Interpretation of positive and negative conditions whenever prescribed by a statute:

...Speaking generally, a distinction may be made between positive and negative conditions prescribed by a statute for acquiring a right or benefit. Positive conditions separated by 'or' are read in the alternative[18] but negative conditions connected by 'or' are construed as cumulative and 'or' is read as 'nor' or 'and' [19].

The above Rule of Statutory Interpretation is based upon the decision of this Court in *Patel Chunibhai Dajibha, etc. v. Narayanrao Khanderao Jambekar and Anr.* MANU/SC/0287/1964 : AIR 1965 SC 1457, in which this Court held:

(19) It may be recalled that amendments to Section 32 were made from time to time, and the Bombay Act XXXVIII of 1957 added to Sub-section (1)(b), Clause (iii) and the preceding "or". It is to be noticed that the conditions mentioned in Sub-sections (1)(a) and (1)(b) are mutually exclusive. In spite of the absence of the word "or" between Sub-sections (1)(a) and (1)(b), the two

sub-sections lay down alternative conditions. The tenant must be deemed to have purchased the land if he satisfies either of the two conditions. The Appellant is not a permanent tenant, and does not satisfy the condition mentioned in Sub-section (1)(a). Though not a permanent tenant, he cultivated the lands leased personally, and, therefore, satisfies the first part of the condition specified in Sub-section (1)(b). The Appellant's contention is that Sub-sections (1)(b)(i), (1)(b)(ii) and (1)(b)(iii) lay down alternative conditions, and as he satisfies the condition mentioned in Sub-section (1)(b)(iii), he must be deemed to have purchased the land on April 1, 1957. Colour is lent to this argument by the word "or" appearing between Sub-section (1)(b)(ii) and Sub-section (1)(b)(iii). But, we think that the word "or" between Sub-sections (1)(b)(ii) and (1)(b)(iii) in conjunction with the succeeding negatives is equivalent to and should be read as "nor." In other words, a tenant (other than a permanent tenant) cultivating the lands personally would become the purchaser of the lands on April 1, 1957, if on that date neither an application Under Section 29 read with Section 31 nor an application Under Section 29 read with Section 14 was pending. If an application either Under Section 29 read with Section 31 or Under Section 29 read with Section 14 was pending April 1, 1957, the tenant would become the purchaser on "the postponed date", that is to say, when the application would be finally rejected. But if the application be finally allowed, the tenant would not become the purchaser. The expression "an application" in the proviso means not only an application Under Section 31 but also an application Under Section 29 read with Section 14. If an application of either type was pending on April 1, 1957, the tenant could not become the purchaser on that elate. Now, on April 1, 1957, the application filed by Respondent No. 1 Under Section 29 read with Section 31 was pending. Consequently, the Appellant could not be deemed to have purchased the lands on April 1, 1957.

The decision of this Court in *The Punjab Produce and Trading Co. Ltd. v. The C.I.T., West Bengal, Calcutta* MANU/SC/0387/1971 : 1971 (2) SCC 540, was relied upon in the discussion mentioned above, where provisions of Section 23A of the Income Tax Act, 1922 and the Explanation (b)(ii) and (iii) came up for consideration. This Court ruled with respect to "or" and held that it had to be read as "and" construing negative conditions thus:

7. *On behalf of the Assessee a good deal of reliance has been placed on decision of this Court in Star Company Ltd. v. The Commissioner of Income-tax (Central) Calcutta, MANU/SC/0311/1970 : (1970) 3 SCC 864. In that case, Sub-clause (b)(ii) came up for consideration, and it was held that the two parts of the Explanation contained in that Sub-clause were alternative. In other words, if one part was satisfied it was unnecessary to consider whether the second part was also satisfied. Thus the word "or" was treated as having been used disjunctively and not conjunctively. The same reasoning is sought to be invoked with reference to Sub-clause (b)(iii).*

8. *It is significant that the language of sub-clauses (ii) and (iii) of Clause (b) is different. The former relates to a positive state of affairs whereas the latter lays down negative conditions. The word "or" is often used to express an alternative of terms defined or explanation of the same thing in different words. Therefore, if either of the two negative conditions which are to be found in Sub-clause (b)(iii) remains unfulfilled, the conditions laid down in the entire Clause cannot be said to have been satisfied. The clear import of the opening part of Clause (b) with the word "and" appearing there read with the negative or disqualifying conditions in Sub-clause (b)(iii) is that the Assessee was bound to satisfy apart from the conditions contained in the other sub-clauses that its affairs were at no time during the previous year controlled by less than six persons and shares*

carrying more than 50 per cent of the total voting power were during the same period not held by less than six persons. We are unable to find any infirmity in the reasoning or the conclusion of the Tribunal and the High Court so far as question 1 is concerned.

It was observed that if either of the two negative conditions, which are to be found in Sub-clause (b)(iii), remains unfulfilled, the conditions laid down in the entire Clause cannot be said to have been satisfied.

98. It would also be useful to note that in *Brown & Co. v. Harrison* MANU/MT/0015/1927 : (1927) All ER Rep 195 pp, the provisions contained in Carriage of Goods by Sea Act, 1924 came up for consideration before the Court of Appeal. The Court held that the word "or" in Article IV, Rule 2 (q), must be read conjunctively and not disjunctively. It has been observed that quite commonly collation of the words "or" can be meant in conjunctive sense and certainly where the disjunctive use of the word, leads to repugnance or absurdity.

99. In this Court's considered view, as regards the collation of the words used in Section 24(2), two negative conditions have been prescribed. Thus, even if one condition is satisfied, there is no lapse, and this logically flows from the Act of 1894 read with the provisions of Section 24 of the Act of 2013. Any other interpretation would entail illogical results. That apart, if the Rule of interpretation with respect to two negative conditions qualified by "or" is used, then "or" should be read as "nor" or "and". *Brown & Co. v. Harrison* (supra), ruled thus, about the interpretation of two negative conditions connected by the word "or":

.....I think it quite commonly and grammatically can have a conjunctive sense. It is generally disjunctive, but it may be plain from the collation of words that it is meant in a conjunctive sense, and certainly where the use of the word as a disjunctive leads to repugnance or absurdity, it is quite within the ordinary principles of construction adopted by the court to give the word a conjunctive use. Here, it is quite plain that the word leads to an absurdity, because the contention put forward by the shipowners in this matter amounts to this, as my Lord said, that, if a shipowner himself breaks open a case and steals the contents of it, he is exempted from liability Under Rule 2(q) if none of his servants stole the part of the case or broke it open. That seems to me to be a plain absurdity. In addition to that, there is a repugnancy because it is plainly repugnant to the second part of Rule 2(q). Therefore I say no more about that.

100. In *Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry* MANU/UKHL/0017/1974 : 1974 (1) WLR 505, the then House of Lords ruled as follows:

If all these meanings are rejected, there remains the course of treating "or" as expressing a non-exclusionary alternative-in modern logic symbolised by "v." In lawyer's terms, this may be described as the course of substituting "and" for "or," rather the course of redrafting the phrase so as to read: "the owner and the master shall each be guilty," or, if the phrase of convenience were permitted "the owner and/or the master." To substitute "and" for "or" is a strong and exceptional interference with a legislative text, and in a penal statute, one must be even more convinced of its necessity. It is surgery rather than therapeutics. But there are sound precedents for so doing: my noble and learned friend, Lord Morris of Borth-y-Gest, has mentioned some of the best known: they are sufficient illustrations and I need not re-state them. I would add, however,

one United States case, a civil case, on an Act concerning seamen of 1915. This contained the words: "Any failure of the master shall render the master or vessel or the owner of the vessel liable in damages." A District Court in Washington D.C. read "or" as "and" saying that there could not have been any purpose or intention on the part of Congress to compel the seamen to elect as to which to pursue and thereby exempt the others from liability-The Blakeley, 234 Fed. 959. Although this was a civil, not a criminal case, I find the conclusion and the reasoning reassuring.

101. In *M/s. Ranchhoddas Atmaram and Anr.* v. *The Union of India and Ors.* MANU/SC/0368/1961 : AIR 1961 SC 935, a Constitution Bench of this Court observed that if there are two negative conditions, the expression "or" has to be read as conjunctive and conditions of both the clauses must be fulfilled. It was observed:

(13) It is clear that if the words form an affirmative sentence, then the condition of one of the clauses only need be fulfilled. In such a case, "or" really means "either" "or." In the Shorter Oxford Dictionary one of the meanings of the word "or" is given as "A particle co-ordinating two (or more) words, phrases or clauses between which there is an alternative." It is also there stated, "The alternative expressed by "or" is emphasised by prefixing the first member or adding after the last, the associated adv. EITHER." So, even without "either," "or" alone creates an alternative. If, therefore, the sentence before us is an affirmative one, then we get two alternatives, any one of which may be chosen without the other being considered at all. In such a case it must be held that a penalty exceeding Rs. 1,000 can be imposed.

(14) If, however, the sentence is a negative one, then the position becomes different. The word "or" between the two clauses would then spread the negative influence over the Clause following it. This Rule of grammar is not in dispute. In such a case the conditions of both the clauses must be fulfilled and the result would be that the penalty that can be imposed can never exceed Rs. 1,000.

(15) The question then really comes to this: Is the sentence before us a negative or an affirmative one? It seems to us that the sentence is an affirmative sentence. The substance of the sentence is that a certain person shall be liable to a penalty. That is a positive concept. The sentence is therefore not negative in its import.

Thus, for lapse of acquisition proceedings initiated under the old law, Under Section 24(2) if both steps have not been taken, i.e., neither physical possession is taken, nor compensation is paid, the land acquisition proceedings lapse. Several decisions were cited at Bar to say that "or" has been treated as "and" and *vice versa*. Much depends upon the context. In *Prof. Yashpal and Ors. v. State of Chhattisgarh and Ors.* MANU/SC/0093/2005 : (2005) 5 SCC 420, the expression "*established or incorporated*" was read as "*established and incorporated.*" In *R.M.D.C.* (supra), to give effect to the clear intention of the Legislature, the word "or" was read as *"and."*

102. In *Ishwar Singh Bindra* (supra) it was observed that:

11. *Now if the expression "substances" is to be taken to mean something other than "medicine" as has been held in our previous decision it becomes difficult to understand how the word "and" as used in the definition of drug in Section 3(b)(i) between "medicines" and "substances" could have been intended to have been used conjunctively. It would be much more appropriate in the context*

to read it disconjunctively. In Stroud's Judicial Dictionary, 3rd Edn. it is stated at page 135 that "and" has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of or. Sometimes, however, even in such a connection, it is, by force of a contexts, read as "or." Similarly, in Maxwell on Interpretation of Statutes, 11th Edn., it has been accepted that "to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions "or" and "and' one for the other.

103. In *Joint Director of Mines Safety v. Tandur and Nayandgi Stone Quarries (P) Ltd.* (1987) 3 SCC 308, "and" was read disjunctively considering the legislative intent. In *Samee Khan* (supra), the term "and" was construed as "or" to carry out the legislative intention. In *Mobilox Innovations Private Limited* (supra), similar observations were made. In *Green v. Premier Glynrhonwy State Co. L.R.* (1928) 1 KB 561, it has been laid down that sometimes word "or" read as "and" and *vice versa*, but does not do so unless it becomes necessary because "or" does not generally mean "and" and "and" does not generally mean "or".

104. In *R.M.D.C.* (supra) the definition Under Section 2(1)(d) came up for consideration. The qualifying Clause consisted of two parts separated from each other by the disjunctive word "or". Both parts of the qualifying Clause indicated that each of the five kinds of prize competitions that they qualified were of a gambling nature. The court held considering the apparent intention of the legislature, it has perforce to read the word *"or"* as *"and"*. In *Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan and Ors.* MANU/SC/0028/1963 : AIR 1963 SC 1638, this Court considered the composition of the Board prescribed Under Section 5. The expressions used were not belonging to professing the Hindu religion or not belonging to the *Pushti-Margiya Vallabhi Sampradaya*. Two negative conditions were used. This Court has observed that "or" in Clause (g) dealing with disqualification must mean *"and"*. The relevant portion of the same is extracted hereunder:

(39) ...The composition of the Board has been prescribed by Section 5; it shall consist of a President, the Collector of Udaipur District, and nine other members. The proviso to the Section is important: it says that the Goswami shall be one of such members if he is not otherwise disqualified to be a member and is willing to serve as such. Section 5(2) prescribes the disqualifications specified in clauses (a) to (g)-unsoundness of mind adjudicated upon by competent court, conviction involving moral turpitude; adjudication as an insolvent or the status of an undischarged insolvent; minority, the defect of being deaf-mute or leprosy; holding an office or being a servant of the temple or being in receipt or any emoluments or perquisites from the temple; being interested in a subsisting contract entered into with the temple; and lastly, not professing the Hindu religion or not belonging to the Pushti-Margiya Vallabhi Sampradaya. <u>There can be no doubt that "or" in Clause (g) must mean "and," for the context clearly indicates that way. There is a proviso to Section 5(2) which lays down that the disqualification as to the holding of an office or an employment under the temple shall not apply to the Goswami and the disqualification about the religion will not apply to the Collector; that is to say, a Collector will be a member of the Board even though he may not be a Hindu and a follower of the denomination.</u> Section 5(3) provides that the President of the Board shall be appointed by the State Government and shall for all purposes be deemed to be a member. Under Section 5(4) the Collector shall be an ex-officio member of the Board. Section 5(5) provides that all the other members specified in Sub-clause (1) shall be appointed by the State Government so as to secure representation of the

Pushti-Margiya Vaishnavas from all over India. This clearly contemplates that the other members of the Board shall not only be Hindus, but should also belong to the denomination, for it is in that manner alone that their representation can be adequately secured.

105. In *Prof. Yashpal* (supra), the word "or" occurring in the expression "*established or incorporated*" was read as "*and*" so that the State enactment did not come in conflict with the Central legislation and create any hindrance or obstacle in the working of the latter. This Court has observed:

***59**. Shri Rakesh Dwivedi has also submitted that insofar as private universities are concerned, the word "or" occurring in the expression "established or incorporated" in Sections 2(f), 22 and 23 of the UGC Act should be read as "and." He has submitted that the normal meaning of the word "established" is to bring into existence. In order to avoid the situation which has been created by the impugned enactment where over 112 universities have come into existence within a short period of one year of which many do not have any kind of infrastructure or teaching facility, it will be in consonance with the constitutional scheme that only after establishment of the basic requisites of a university (classrooms, library, laboratory, offices, and hostel facility, etc.) that it should be incorporated and conferred a juristic personality. The word "or" is normally disjunctive and "and" is normally conjunctive, but at times, they are read vice versa to give effect to the manifest intentions of the legislature, as disclosed from the context. If literal reading of the word produces an unintelligible or absurd result, "and" maybe read for "or" and "or" maybe read for "and." (See Principles of Statutory Interpretation by G.P. Singh, 7th Edn., p. 339 and also State of Bombay v. R.M.D. Chamarbaugwala*, MANU/SC/0019/1957 : AIR 1957 SC 699, AIR at p. 709 *and Mazagaon Dock Ltd. v. CIT*, MANU/SC/0087/1958 : AIR 1958 SC 861) *We are of the opinion that having regard to the constitutional scheme and in order to ensure that the enactment made by Parliament, namely, the University Grants Commission Act is able to achieve the objective for which it has been made and UGC is able to perform its duties and responsibilities, and further that the State enactment does not come in conflict with the Central legislation and create any hindrance or obstacle in the working of the latter, it is necessary to read the expression "established or incorporated" as "established and incorporated" insofar as the private universities are concerned.*

106. Reference has also been made to *Pooran Singh v. State of M.P.* MANU/SC/0258/1965 : 1965 (2) SCR 853, in which the Court considered the scheme of the M.V. Act. The magistrate was bound to issue summons of the nature prescribed by Sub-section (1) of Section 130. The Court held that there was nothing in the Sub-section which indicated that he must endorse the summons in terms of both the clauses (a) and (b), that he is so commanded would be to convert the conjunction 'or' into 'and'. There is nothing in the language of the legislature which justifies such a conversion and there are adequate reasons which make such an interpretation wholly inconsistent with the scheme of the Act.

107. Reliance has been placed on *Sri Nasiruddin v. State Transport Appellate Tribunal* MANU/SC/0026/1975 : 1975 (2) SCC 671. The word 'or' was given grammatical meaning. The order states that the High Court shall sit as the new High Court and the Judges and Division Bench thereof shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may appoint. It was held that the word 'or' cannot be read as 'and'. They should be considered in

an ordinary sense. If two different interpretations are possible, the court will adopt that which is just, reasonable and sensible. The Court observed thus:

27. *The conclusion as well as the reasoning of the High Court that the permanent seat of the High Court is at Allahabad is not quite sound. The order states that the High Court shall sit as the new High Court and the judges and Division Bench thereof shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint. The word "or" cannot be read as "and". If the precise words used are plain and unambiguous, they are bound to be construed in their ordinary sense. The mere fact that the results of a statute may be unjust does not entitle a court to refuse to give it effect. If there are two different interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things. If the inconvenience is an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if it is read in a manner in which it is capable, though not in an ordinary sense, there would not be any inconvenience at all; there would be reason why one should not read it according to its ordinary grammatical meaning. Where the words are plain, the Court would not make any alteration.*

108. In *Municipal Corporation of Delhi v. Tek Chand Bhatia* MANU/SC/0187/1979 : (1980) 1 SCC 158, for interpretation of 'and' and 'or' in the context of the term 'adulterated' as defined in Section 2(i)(f), the Court observed:

7. We are of the opinion that the High Court was clearly wrong in its interpretation of Section 2(i)(f). On the plain language of the definition section, it is quite apparent that the words "or is otherwise unfit for human consumption" are disjunctive of the rest of the words preceding them. It relates to a distinct and separate class altogether. It seems to us that the last Clause "or is otherwise unfit for human consumption" is residuary provision, which would apply to a case not covered by or falling squarely within the clauses preceding it. If the phrase is to be read disjunctively the mere proof of the Article of food being "filthy, putrid, rotten, decomposed ... or insect-infested" would be per se sufficient to bring the case within the purview of the word "adulterated" as defined in Sub-clause (f), and it would not be necessary in such a case to prove further that the Article of food was unfit for human consumption.

***

11. In the definition clause, the collection of words "filthy, putrid, rotten, decomposed and insect-infested," which are adjectives qualifying the term "an Article of food," show that it is not of the nature, substance, and quality fit for human consumption. It will be noticed that there is a comma after each of the first three words. It should also be noted that these qualifying adjectives cannot be read into the last portion of the definition i.e., the word' "or is otherwise unfit for human consumption," which is quite separate and distinct from others. The word "otherwise" signifies unfitness for human consumption due to other causes. If the last portion is meant to mean something different, it becomes difficult to understand how the word "or" as used in the definition of "adulterated" in Section 2(i)(f) between "filthy, putrid, rotten, etc." and "otherwise unfit for human consumption" could have been intended to be used conjunctively. It would be more appropriate in the context to read it disjunctively. In Stroud's Judicial Dictionary, 3rd Edn., Vol. 1, it is stated at p. 135:

And" has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of "or". Sometimes, however, even in such a connection, it is, by force of a context, read as "or.

While dealing with the topic 'OR is read as AND, and vice versa', Stroud says in Vol. 3, at p. 2009:

You will find it said in some cases that 'or' means 'and'; but 'or' never does mean 'and'.

Similarly, in Maxwell on Interpretation of Statutes, 11th Edn., pp. 229-30, it has been accepted that "to carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other." The word "or" is normally disjunctive and "and" is normally conjunctive, but at times they are read as vice versa. As Scrutton, L.J. said in Green v. Premier Glynrhonwy State Co., LR (1928) 1 KB 561, 568: "You do sometimes read "or" as "and" in a statute .... But you do not do it unless you are obliged, because "or" does not generally mean "and" and "and" does not generally mean "or." As Lord Halsbury L.C. observed in Mersey Docks & Harbour Board v. Henderson, MANU/MT/0032/1888 : LR (1888) 13 AC 603*, the reading of "or" as "and" is not to be resorted to "unless some other part of the same statute or the clear intention of it requires that to be done." The substitution of conjunctions, however, has been sometimes made without sufficient reasons, and it has been doubted whether some of the cases of turning "or" into "and" and vice versa have not gone to the extreme limit of interpretation.*

109. In *State of Punjab v. Ex-Constable Ram Singh* MANU/SC/0426/1992 : (1992) 4 SCC 54, 'or' was read as 'nor' and not as 'and' in the context of Section 2 of the Armed Forces Special Powers Act, 1948. In *Naga People's Movement of Human Rights* (supra), the Court held that the language of Section 4(a) does not support the said construction.

110. In *Marsey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.* LR (AC) Vol, the Court observed as follows: (at page 603)

...unless the context makes the necessary meaning of "or" "and," as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence unless some other part of the same statute or the clear intention of it requires that to be done,.....It may indeed be doubted whether some of the cases of turning "or" into "and" and vice versa have not gone to the extreme limit of interpretation, but I think none of them would cover this case.

111. In *Re Hayden Pask v. Perry* (1931) 2 Ch. 333, the expression "or their issue" had been considered, and it was observed that the words "or their issue" must be read as words of limitation and not of substitution. The word "or" was construed to mean "and." The learned SG placed reliance on the Queen's Bench decision in *Metropolitan Board of Works v. Street Bros* (1881) VIII QBD 445 to submit that the issue was whether, in terms of its grammatical meaning, if two things were prohibited, both were permitted and not merely permitted in the alternative. It would have been more strictly grammatical to have written "nor" instead of "or." The following discussion was made in the decision:

Dec. 13. GROVE, J. The main question before us turns on the meaning of the word "or," used in 25 & 26 Vict. c. 102, Section 98. Read shortly, Section 98 enacts that no existing road, passage or way, shall be hereafter formed or laid out for carriage traffic unless such road shall be forty feet wide, or for the purposes of foot traffic, unless such road be of the width of twenty feet, or unless such streets respectively shall be open at both ends. The question is whether that word "or" should be read in the disjunctive or conjunctive, or perhaps read as either "and" or "nor:" I think it means "nor;" that is to say, that the two things comprised in the prohibition are both prohibited, and not merely prohibited in the alternative. If the sense which I attribute to the word is right, it would have been more strictly grammatical to have written "nor" instead of "or." But I think that the meaning of the enactment is that the road must be of the width specified, and that no road shall be allowed unless it is of the width specified, nor unless it is open at both ends. That seems to me to be the object of the statute, which was passed for sanitary purposes, and also for the purpose of comfort and traffic.

It was contended that the object of the provision is sanitary only, and that if a street is forty feet wide, or if however narrow, it is open at both ends, good ventilation is secured. But a very long narrow street would hardly be more salubrious with both ends open than if one end were closed and the street were a cul de sac.

Our construction of the Act is according to the ordinary use of language, although it may not be strictly grammatical. We might have referred to authorities by good writers, shewing that where the word "or" is preceded by a negative or prohibitory provision, it frequently has a different sense from that which it has when it is preceded by an affirmative provision. For instance, suppose an order that "you must have your house either drained or ventilated." The word "or" would be clearly used in the alternative. Suppose again, the order was that "you must have your house drained or ventilated," that conveys the idea to my mind that you must have your house either drained or ventilated. But supposing the order were that "you must not have your house undrained or unventilated." The second negative words are coupled by the word "or," and the negative in the preceding sentence governs both. In Section 98 there is a negative preceding a sentence; "no existing road" shall be formed as a street for carriage traffic unless such road be widened to forty feet, or for the purposes of foot traffic only unless such road or way be widened to the width of twenty feet, "or" unless such streets shall be open at both ends. Probably, if the word "or" in the sentence, "or for purposes of foot traffic only," had been written "nor," the language there too would have been more clear and more decidedly prohibitory; but with regard to the sentence "or unless such streets shall be open at both ends" I think that by reading the word "or" as "nor" we carry out the intention of the Act, which was to have streets of a proper width and properly opened at both ends, and that there should not be incommodious and unhealthy cross streets which are culs de sac, shut up at one end.

There have been frequently cases on the construction of statutes where the Courts have held "or" to mean "and," taking the rest of the sentence in which the word "or" occurred, the object and intention being prohibition, and the two things prohibited being coupled by the word "or." I think the prohibition in Section 98 relates to both the width and open ending of streets. The street must be both of the width prescribed and also open at both ends.

112. Section 24(2) of the Act of 2013 is, in our opinion, a penal provision-to punish the acquiring authority for its lethargy in not taking physical possession nor paying the compensation after making the award five years or more before the commencement of the Act of 2013 in pending proceedings, providing that they would lapse. The expression *where an award has been made*, then the proceedings shall continue used in Section 24(1)(b) under the provisions of the Act of 1894 means that proceedings were pending *in praesenti* as on the date of enforcement of the Act of 2013 are not concluded proceedings, and in that context, an exception has been carved out in Section 24(2).

113. Even if possession has been taken, despite which payment has not been made nor deposited, (for the majority of the land-holdings), then all beneficiaries holding land on the date of notification Under Section 4 of the Act of 1894, are to be paid compensation under the provisions of the Act of 2013. Section 24 of the Act of 2013 frowns upon indolence and stupor of the authorities. The expression "*possession of the land has not been taken*" or "*compensation has not been paid*" indicates a failure on the part of the authorities to take the necessary steps for five years or more in a pending proceeding Under Section 24(1)(b). Section 24(2) starts with a *non-obstante* Clause overriding what is contained in Section 24(1). Thus, Section 24(2) has to be read as an exception to Section 24(1)(b). Similarly, the proviso has to be read as a proviso to Section 24(2) for the several reasons to be discussed hereafter. Parliament enacted a beneficial provision in case authorities delayed in taking of the possession for more than five years nor paid compensation, meaning thereby acquisition has not been completed. Section 24(2) clearly contemplates inaction on the part of the authorities not as a result of the dilatory tactics and conduct of the landowners or other interested persons.

114. There are other reasons to read the word 'or' in Section 24 as 'and.' When we consider the scheme of the Act of 1894, once the award was made Under Section 11, the Collector may, undertake possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances. Section 16 of the Act of 1894 enables the Collector to take possession of acquired land, when an award is made Under Section 11. Section 17(1) of the Act of 1894 confers special powers in cases of urgency. The Collector could, on the expiration of 15 days from the publication of notice Under Section 9(1), take possession of any land needed for a public purpose and such land was to thereupon vest absolutely in the Government, free from all encumbrances. Under Section 17(3A) before taking possession, the Collector had to tender payment of 80% of the compensation, as estimated by him and also had to pay the landowners or to persons interested, unless prevented by exigencies mentioned in Section 31(2). It is also provided in Sub-section (3B) of Section 17 of the Act of 1894 that the amount paid or deposited Under Section 17(3A) shall be taken into account for determining the compensation required to be tendered Under Section 31.

115. It is apparent from a plain reading of Section 16 (of the Act of 1894) that the land vests in the Government absolutely when possession is taken after the award is passed. Clearly, there can be lapse of proceedings under the Act of 1894 only when possession is not taken. The provisions in Section 11A of the Act of 1894 states that the Collector shall make an award within a period of two years from the date of the publication of the declaration Under Section 6 and if no award is made within two years, the entire proceedings for acquisition of the land shall lapse. The period of two year excludes any period during which interim order granted by the Court was in operation. Once an award is made and possession is taken, by virtue of Section 16, land vests absolutely in

the State, free from all encumbrances. Vesting of land is automatic on the happening of the two exigencies of passing award and taking possession, as provided in Section 16. Once possession is taken Under Section 16 of the Act of 1894, the owner of the land loses title to it, and the Government becomes the absolute owner of the land.

116. Payment of compensation under the Act of 1894 is provided for by Section 31 of the Act, which is to be after passing of the award Under Section 11. The exception, is in case of urgency Under Section 17, is where it has to be tendered before taking possession. Once an award has been passed, the Collector is bound to tender the payment of compensation to the persons interested entitled to it, as found in the award and shall pay it to them unless "prevented" by the contingencies mentioned in Sub-section (2) of Section 31. Section 31(3) contains a *non-obstante* Clause which authorises the Collector with the sanction of the appropriate Government, in the interest of the majority, by the grant of other lands in exchange, the remission of land revenue on other lands or in such other way as may be equitable.

117. Section 31(1) enacts that the Collector has to tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award and shall pay such amount to a person interested in the land, unless he (the Collector) is prevented from doing so, for any of the three contingencies provided by Sub-section (2). Section 31(2) provides for deposit of compensation in Court in case State is prevented from making payment in the event of (i) refusal to receive it; (ii) if there be no person competent to alienate the land; (iii) if there is any dispute as to the title to receive the compensation; or (iv) if there is dispute as to the apportionment. In such exigencies, the Collector shall deposit the amount of the compensation in the court to which a reference Under Section 18 would be submitted.

118. Section 34 deals with a situation where any of the obligations Under Section 31 is not fulfilled, i.e., when the amount of compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of 9% per annum from the time of so taking possession until it shall have been so paid or deposited; and after one year from the date on which possession is taken, interest payable shall be at the rate of 15% per annum. The scheme of the Act of 1894 clearly makes it out that when the award is passed Under Section 11, thereafter possession is taken as provided Under Section 16, land vests in the State Government. Under Section 12(2), a notice of the award has to be issued by the Collector. Taking possession is not dependent upon payment. Payment has to be tendered Under Section 31 unless the Collector is "prevented from making payment," as provided Under Section 31(2). In case of failure Under Section 31(1) or 31(3), also Collector is not precluded from making payment, but it carries interest Under Section 34 @ 9% for the first year from the date it ought to have been paid or deposited and thereafter @ 15%. Thus, once land has been vested in the State Under Section 16, in case of failure to pay the compensation Under Section 31(1) to deposit Under Section 31(2), compensation has to be paid along with interest, and due to non-compliance of Section 31, there is no lapse of acquisition. The same spirit has been carried forward in the Act of 2013 by providing in Section 24(2). Once possession has been taken though the payment has not been made, the compensation has to be paid along with interest as envisaged Under Section 34, and in a case, payment has been made, possession has not been taken, there is no lapse Under Section 24(2). In a case where possession has been taken under the Act of 1894 as provided by Section 16 or 17(1) the land vests absolutely in the State, free from all encumbrances, if compensation is not paid,

there is no divesting there will be no lapse as compensation carries interest @ 9% or @ 15% as envisaged Under Section 34 of the Act of 1894. Proviso to Section 24(2) makes some wholesome provision in case the amount has not been deposited with respect to majority of landholdings, in such an event, not only those persons but all the beneficiaries, though for minority of holding compensation has been paid, shall be entitled to higher compensation in accordance with the provisions of the Act of 2013. The expression used is "all beneficiaries specified in the notification for acquisition Under Section 4 of the said Land Acquisition Act", i.e., Act of 1894, means that the persons who are to be paid higher compensation are those who have been recorded as beneficiaries as on the date of notification Under Section 4. The proviso gives effect to, and furthers the principle that under the Act of 1894, the purchases made after issuance of notification Under Section 4 are void. As such, the benefit of higher compensation under the proviso to Section 24(2) is intended to be given to the beneficiaries mentioned in the notification Under Section 4 of the Act of 1894.

119. It is apparent from the Act of 1894 that the payment of compensation is dealt with in Part V, whereas acquisition is dealt with in Part II. Payment of compensation is not made pre-condition for taking possession Under Section 16 or Under Section 31 read with Section 34. Possession can be taken before tendering the amount except in the case of urgency, and deposit (of the amount) has to follow in case the Collector is prevented from making payment in exigencies as provided in Section 31(3). What follows is that in the event of not fulfilling the obligation to pay or to deposit Under Section 31(1) and 31(2), the Act of 1894 did not provide for lapse of land acquisition proceedings, and only increased interest follows with payment of compensation.

120. The terms of object Clause No. 18 (of the Statement of Objects and Reasons) to the Act of 2013 reveals that the option of taking possession (of acquired land) upon making of an award the new law would be available in the cases of land acquisition under the Act of 1894 where award has not been made, or possession of land has not been taken. It is apparent that the benefits under the Act of 2013 envisage that where the award had not been made, or award has been made, but possession has not been taken (because once possession is taken, land is vests in the State) there can be lapse of acquisition. No doubt about that payment is also to be made: that issue is taken care of by the provision of payment of interest Under Section 34: also, in case of non-deposit-in respect of majority of holdings in a given award, higher compensation under the Act of 2013 has to be paid to all beneficiaries as on the date of notification Under Section 4 issued under the Act of 1894. There is nothing in the Statement of Objects and Reasons making specific reference to non-payment of compensation where an award has been made, and possession has been taken. While interpreting the provisions of an Act, the court to consider the objects and reasons of the legislature, which the legislature had in mind also emphasised that once vesting is complete, there is no divesting as held in *Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate* MANU/SC/0107/1958 : 1958 SCR 1156, thus:

(9) A little careful consideration will show, however, that the expression "any person" occurring in the third part of the definition Clause cannot mean anybody and everybody in this wide world. First of all, the subject matter of dispute must relate to (i) employment or non-employment or (ii) terms of employment or conditions of labour of any person; these necessarily import a limitation in the sense that a person in respect of whom the employer-employee relation never existed or can never possibly exist cannot be the subject matter of a dispute between employers and workmen.

Secondly, the definition Clause must be read in the context of the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act. It is well settled that

the words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained.

(Maxwell, Interpretation of Statutes, 9th Edition, p. 55).

121. In *Mukesh K. Tripathi v. Senior Divisional Manager, LIC and Ors.* MANU/SC/0726/2004 : (2004) 8 SCC 387, the decision in *Workmen of Dimakuchi Estate* (supra) was reiterated, on the issue of discerning the object of an enactment.

122. Section 24(2) of the Act of 2013 deals with a situation only where the award has been made 5 years or more before the commencement of the Act, but physical possession of the land has not been taken, nor compensation has been paid. It does not visualize a situation where possession has been taken under the urgency provision of Section 17(1), but the award has not been made. In such cases, Under Section 24(1)(a) of the Act of 2013, there is no lapse of entire proceedings: but compensation is to be determined in accordance with the provisions of the Act of 2013. In case of urgency, possession is usually taken before the award is passed. Thus, where no award is passed, where urgency provision Under Section 17(1) of the Act of 1894 had been invoked, there is no lapse, only higher compensation would follow Under Section 24(1)(a) even if payment has not been made or tendered Under Section 17(3A) of the Act of 1894.

123. The provision for lapsing Under Section 24 is available only when the award has been made, but possession has not been taken within five years, nor compensation has been paid. In case word 'or' is read disjunctively, proceedings shall lapse even after possession has been taken in order to prevent lapse of land acquisition proceedings, once the land has vested in the Government and in most cases, development has already been made. The expressions used in Section 24(2) "*possession of the land has not been taken*" and *"the compensation has not been paid"* are unrelated and carry different consequences under the Act of 1894. As already discussed above, these conditions are merely exclusive conditions and cannot be used as alternative conditions. There is a catena of cases where compensation has been paid, but possession has not been taken due to one reason or the other for no fault of authorities or otherwise, and there are cases where possession is taken, but compensation has not been paid.

124. Section 24 of the Act of 2013 is to be given full effect. Section 24(2) has been carved out as an exception to the otherwise general applicability of the provisions contained in Section 6 of the General Clauses Act and Section 24(1)(a) and (b) apply to the proceedings which are pending. Sub-section (2) is an exception to Sub-section (1) which reads: "*Notwithstanding anything contained in Sub-section (1)*" where an award has been made, but possession has not been taken nor compensation has been paid, an exception has been carved in Section 24 where an award has been passed, but no steps have been taken to take the possession nor payment of compensation has been made in pending proceedings Under Section 24(1). The provision has to be construed in the

spirit behind what is saved Under Section 6 (of the General Clauses Act) as provided in Section 114 of the Act of 2013 and the non-obstante Clause in Section 24(2).

125. It was also submitted on behalf of the States that neither a transitory provision nor a repealing law could be interpreted so as to take away, disturb or adversely affect rights created by operation of law. It cannot divest the State Government of the land absolutely vested in it. Reliance has been placed on *K.S. Paripoornan v. State of Kerala and Ors.* MANU/SC/0200/1995 : 1994 (5) SCC 593 thus:

12. *It is further necessary to bear in mind that the amending Act has added, among others, the provisions of Section 23(1-A) and Section 28-A and has amended the provisions of Section 23(2). It has also made independent transitional provision in its Section 30. The relevant provisions of Section 30 read as follows:*

30. Transitional provisions.-- (1) The provisions of Sub-section (1-A) of Section 23 of the principal Act, as inserted by Clause (a) of Section 15 of this Act, shall apply, and shall be deemed to have applied, also to, and in relation to,--

(a) every proceeding for the acquisition of any land under the principal Act pending on 30th day of April, 1982 [the date of introduction of the Land Acquisition (Amendment) Bill, 1982 in the House of the People], in which no award has been made by the Collector before that date;

(b) every proceeding for the acquisition of any land under the principal Act commenced after that date, whether or not an award has been made by the Collector before the date of commencement of this Act.

(2) The provisions of Sub-section (2) of Section 23 and Section 28 of the principal Act, as amended by Clause (b) of Section 15 and Section 18 of this Act respectively, shall apply, and shall be deemed to have applied, also to, and in relation to, any award made by the Collector or Court or to any order passed by the High Court or Supreme Court in appeal against any such award under the provisions of the principal Act after the 30th day of April, 1982 [the date of introduction of the Land Acquisition (Amendment) Bill, 1982, in the House of the People] and before the commencement of this Act.

The date of the introduction of the Bill of the amending Act is 30-4-1982 and the date of its commencement is 24-9-1984.

***

38. *The transitional provision is by its very nature an enabling one and has to be interpreted as such. In the present case, it is made to take care of the period between 30-4-1982 and 24-9-1984, i.e., between the date of the introduction of the Bill of the amending Act and the date of the commencement of the Act. Since some awards might have been made by the Collector and the reference Court during the said interregnum, the legislature did not want to deprive the awardees concerned either of the newly conferred benefit of Section 23(1-A) or of the increased benefit Under Sections 23(2) and 28. The second object was to enable the Collector and the Court to give*

the said benefits in the proceedings pending before them where they had not made awards. The only limitation that was placed on the power of the Collector in this behalf was that he should not reopen the awards already made by him in proceedings which were pending before him on 30-4-1982 to give the benefit of Section 23(1-A) to such awardees. This was as stated earlier, for two reasons. If the said awards are pending before the reference Court on the date of the commencement of the amending Act, viz., 24-9-1984, the reference Court would be able to give the said benefit to the awardees. On the other hand, if the awardees in question had accepted the awards, the same having become final, should not be reopened. As regards the increased benefit Under Sections 23(2) and 28, the intention of the legislature was to extend it not only to the proceedings pending before the reference Court on 24-9-1984 but also to those where awards were made by the Collector and the reference Courts between 30-4-1982 and 24-9-1984. Hence these awards could not only be reopened but if they were the subject-matter of the appeal before High Courts or the Supreme Court, the appellate orders could also be reopened to extend the said benefits.

***

71. *Section 30 of the amending Act bears the heading "Transitional provisions." Explaining the role of transitional provisions in a statute, Bennion has stated:*

Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where an Act fails to include such provisions expressly, the court is required to draw inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended.

(Francis Bennion: Statutory Interpretation, 2nd Edn., p. 213)

The learned author has further pointed out:

Transitional provisions in an Act or other instrument are provisions which spell out precisely when and how the operative parts of the instrument are to take effect. It is important for the interpreter to realise, and bear constantly in mind, that what appears to be the plain meaning of a substantive enactment is often modified by transitional provisions located elsewhere in the Act." (p. 213)

Similarly Thornton in his treatise on Legislative Drafting (3rd Edn., 1987, p. 319 quoted in Britnell v. Secretary of State for Social Security, MANU/UKHL/0016/1991 : (1991) 2 All ER 726, 730 Per Lord Keith], has stated:

The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force.

For the purpose of ascertaining whether and, if so, to what extent the provisions of Sub-section (1-A) introduced in Section 23 by the amending Act are applicable to proceedings that were pending on the date of the commencement of the amending Act it is necessary to read Section 23(1-

A) along with the transitional provisions contained in Sub-section (1) of Section 30 of the amending Act.

126. For interpretation of repeal and saving clauses, reliance has been placed on *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.* MANU/SC/0316/2004 : 2004 (7) SCC 288 thus:

70. *Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non-obstante clause. Clause (a) of the said Sub-section provides for saving Clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act where for also necessity of reference to Section 21 would arise. The court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression "commencement of arbitration proceedings" must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from Shetty's Constructions Co. (P) Ltd. v. Konkan Rly. Construction,* MANU/SC/1070/1998 : (1998) 5 SCC 599 *are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore.*

***

105. *In the present matter, one is concerned with transitional provision i.e. Section 85(2)(a) which enacts as to how the statute will operate on the facts and circumstances existing on the date it comes into force and, therefore, the construction of such a provision must depend upon its own terms and not on the basis of Section 21 (see Singh, G.P.: Principles of Statutory Interpretation, 8th Edn., p. 188). In Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.,* MANU/SC/0652/1999 : (1999) 9 SCC 334 *Section 48 of the old Act and Section 85(2)(a) of the 1996 Act came for consideration. It has been held by this Court that there is a material difference between Section 48 of the 1940 Act, which emphasised the concept of "reference" vis-à-vis Section 85(2)(a) of the 1996 Act which emphasises the concept of "commencement"; that there is a material difference in the scheme of the two Acts; that the expression "in relation to" appearing in Section 85(2)(a) refers to different stages of arbitration proceedings under the old Act; and lastly, that Section 85(2)(a) provides for limited repeal of the 1940 Act, therefore, I am of the view that one cannot confine the concept of "commencement" Under Section 85(2)(a) only to Section 21 of the 1996 Act which inter alia provides for commencement of arbitral proceedings from the date on which a request to refer a particular dispute is received by the Respondent. ....*

***

109. *To sum up, in this case, the question concerns interpretation of transitional provisions; that Section 85(2)(a) emphasises the concept of "commencement" whereas Section 48 of the 1940 Act emphasised the concept of "reference"; that Section 85(2)(a) provides for implied repeal; that the scheme of the 1940 Act is different from the 1996 Act; that the word "reference" in Section 48 of the old Act had different meanings in different contexts; and for the said reasons, I am of the view that while interpreting Section 85(2)(a) in the context of the question raised in this appeal, one cannot rely only on Section 21 of the 1996 Act.*

127. Under Section 48 of the Act of 1894, withdrawal of the land acquisition proceedings was permissible only if the possession has not been taken Under Section 16 or 17(1). Section 48(1) is extracted hereunder:

48. Completion of acquisition not compulsory, but compensation to be awarded when not completed.-

(1) Except in the case provided for in Section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

(2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

(3) The provisions of Part III of this Act shall apply, so far as may be, to the determination of the compensation payable under this section.

In case possession has been taken, there cannot be any withdrawal from the land acquisition proceedings under the Act of 1894.

128. Various decisions were referred on behalf of the State of Haryana that once possession has been taken and land has not been utilised, there cannot be withdrawal from the acquisition of any land. Land cannot be restituted to the owner after the stage of possession is over. Following decisions have been pressed into service:

(a). In *Gulam Mustafa and Ors.* (supra), it was observed:

5. *At this stage Shri Deshpande complained that actually the municipal committee had sold away the excess land marking them out into separate plots for a housing colony. Apart from the fact that a housing colony is a public necessity, once the original acquisition is valid and title has vested in the municipality, how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose other than the one stated in the Section 6(3) declaration.*

Chandragauda Ramgonda Patil and Anr. (supra) when restitution of land was sought, on the basis of some Government resolutions, after possession had been taken, this observed thus:

***2.**.. Since he had sought enforcement of the said government resolution, the writ petition could not be dismissed on the ground of constructive res judicata. He also seeks to rely upon certain orders said to have been passed by the High Court in conformity with enforcement of the government resolution. We do not think that this Court would be justified in making direction for restitution of the land to the erstwhile owners when the land was taken way back and vested in the Municipality free from all encumbrances. We are not concerned with the validity of the notification in either of the writ petitions. It is axiomatic that the land acquired for a public purpose would be utilised for any other public purpose, though use of it was intended for the original public purpose. It is not intended that any land which remained unutilised, should be restituted to the erstwhile owner to whom adequate compensation was paid according to the market value as on the date of the notification. Under these circumstances, the High Court was well justified in refusing to grant relief in both the writ petitions.*

Again, in *C. Padma and Ors. v. Dy. Secretary and Ors.* MANU/SC/1066/1997 : (1997) 2 SCC 627, this Court stated that:

***4.** The admitted position is that pursuant to the notification published Under Section 4(1) of the Land Acquisition Act, LA (for short "the Act") in GOR No. 1392 Industries dated 17-10-1962, total extent of 6 acres 41 cents of land in Madhavaram Village, Saidapet Taluk, Chengalpattu District in Tamil Nadu was acquired under Chapter VII of the Act for the manufacture of Synthetic Rasina by Tvl. Reichold Chemicals India Ltd., Madras. The acquisition proceedings had become final and possession of the land was taken on 30-4-1964. Pursuant to the agreement executed by the company, it was handed over to Tvl. Simpson and General Finance Co. which is a subsidiary of Reichold Chemicals India Ltd. It would appear that at a request made by the said company, 66 cents of land out of one acre 37 cents in respect of which the Appellants originally had ownership, was transferred in GOMs No. 816 Industries dated 24-3-1971 in favour of another subsidiary company. Shri Rama Vilas Service Ltd., the 5th Respondent which is also another subsidiary of the Company had requested for two acres 75 cents of land; the same came to be assigned on leasehold basis by the Government after resumption in terms of the agreement in GOMs No. 439 Industries dated 10-5-1985. In GOMs No. 546 Industries dated 30-3-1986, the same came to be approved of. Then the Appellants challenged the original GOMs No. 1392 Industries dated 17-10-1962 contending that since the original purpose for which the land was acquired had ceased to be in operation, the Appellants are entitled to restitution of the possession taken from them. The learned Single Judge and the Division Bench have held that the acquired land having already vested in the State, after receipt of the compensation by the predecessor-in-title of the Appellants, they have no right to challenge the notification. Thus the writ petition and the writ appeal came to be dismissed.*

***5.** Shri G. Ramaswamy, learned Senior Counsel appearing for the Appellants, contends that when by operation of Section 44-B read with Section 40 of the Act, the public purpose ceased to be existing, the acquisition became bad and therefore, the GO was bad in law. We find no force in the contention. It is seen that after the notification in GOR 1392 dated 17-10-1962 was published, the acquisition proceeding had become final, the compensation was paid to the Appellants' father and thereafter the lands stood vested in the State. In terms of the agreement as contemplated in*

Chapter VII of the Act, the Company had delivered possession subject to the terms and conditions thereunder. It is seen that one of the conditions was that on cessation of the public purpose, the lands acquired would be surrendered to the Government. In furtherance thereof, the lands came to be surrendered to the Government for resumption. The lands then were allotted to SRVS Ltd., 5th Respondent which is also a subsidiary amalgamated company of the original company. Therefore, the public purpose for which acquisition was made was substituted for another public purpose. Moreover, the question stood finally settled 32 years ago and hence the writ petition cannot be entertained after three decades on the ground that either original purpose was not public purpose or the land cannot be used for any other purpose.

***6.** Under these circumstances, we think that the High Court was right in refusing to entertain the writ petition.*

The decision in *Northern Indian Glass Industries v. Jaswant Singh and Ors.* MANU/SC/0965/2002 : (2003) 1 SCC 335 thus:

***9.** ...There is no explanation whatsoever for the inordinate delay in filing the writ petitions. Merely because full enhanced compensation amount was not paid to the Respondents, that itself was not a ground to condone the delay and laches in filing the writ petition. In our view, the High Court was also not right in ordering restoration of land to the Respondents on the ground that the land acquired was not used for which it had been acquired. It is a well-settled position in law that after passing the award and taking possession Under Section 16 of the Act, the acquired land vests with the Government free from all encumbrances. Even if the land is not used for the purpose for which it is acquired, the landowner does not get any right to ask for revesting the land in him and to ask for restitution of the possession. This Court as early as in 1976 in Gulam Mustafa v. State of Maharashtra*, MANU/SC/0400/1975 : (1976) 1 SCC 800 *in para 5 has stated thus: (SCC p. 802, para 5) "5. At this stage Shri Deshpande complained that actually the municipal committee had sold away the excess land marking them out into separate plots for a housing colony. Apart from the fact that a housing colony is a public necessity, once the original acquisition is valid and title has vested in the municipality, how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long after the requiring authority diverts it to a public purpose other than the one stated in the Section 6(3) declaration.*

Sita Ram Bhandar Society, New Delhi (supra) MANU/SC/1699/2009 : (2009) 10 SCC 501 the Court observed that:

***28.** A cumulative reading of the aforesaid judgments would reveal that while taking possession, symbolic and notional possession is perhaps not envisaged under the Act but the manner in which possession is taken must of necessity depend upon the facts of each case. Keeping this broad principle in mind, this Court in T.N. Housing Board v. A. Viswam,* MANU/SC/0924/1996 : (1996) 8 SCC 259 *after considering the judgment in Balwant Narayan Bhagde v. M.D. Bhagwat,* MANU/SC/0002/1975 : (1976) 1 SCC 700, *observed that while taking possession of a large area of land (in this case 339 acres) a pragmatic and realistic approach had to be taken. This Court then examined the context under which the judgment in Narayan Bhagde case had been rendered and held as under: (Viswam case, SCC p. 262, para 9)*

9. It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not be cooperative in taking possession of the land.

***

********** **********

40. *In Narayan Bhagde case one of the arguments raised by the landowner was that as per the communication of the Commissioner the land was still with the landowner and possession thereof had not been taken. The Bench observed that the letter was based on a misconception as the landowner had re-entered the acquired land immediately after its possession had been taken by the Government ignoring the scenario that he stood divested of the possession, Under Section 16 of the Act. This Court observed as under: (Narayan Bhagde case, SCC p. 712, para 29)*

29. ... This was plainly erroneous view, for the legal position is clear that even if the Appellant entered upon the land and resumed possession of it the very next moment after the land was actually taken possession of and became vested in the Government, such act on the part of the Appellant did not have the effect of obliterating the consequences of vesting.

To our mind, therefore, even assuming that the Appellant had re-entered the land on account of the various interim orders granted by the courts, or even otherwise, it would have no effect for two reasons,

(1) that the suits/petitions were ultimately dismissed and

(2) that the land once having vested in the Government by virtue of Section 16 of the Act, re-entry by the landowner would not obliterate the consequences of vesting.

This court stated, in *Leelawanti and Ors. v. State of Haryana and Ors.* MANU/SC/1457/2011 : (2012) 1 SCC 66 thus:

19. *If Para 493 is read in the manner suggested by the learned Counsel for the Appellants then in all the cases the acquired land will have to be returned to the owners irrespective of the time gap between the date of acquisition and the date on which the purpose of acquisition specified in Section 4 is achieved and the Government will not be free to use the acquired land for any other public purpose. Such an interpretation would also be contrary to the language of Section 16 of the Act, in terms of which the acquired land vests in the State Government free from all encumbrances and the law laid down by this Court that the lands acquired for a particular public purpose can be utilised for any other public purpose.*

***

22. *The approach adopted by the High Court is consistent with the law laid down by this Court in State of Kerala v. M. Bhaskaran Pillai*, MANU/SC/0731/1997 : (1997) 5 SCC 432 *and Govt. of A.P. v. Syed Akbar,* MANU/SC/0987/2004 : (2005) 1 SCC 558. *In the first of these cases, the Court considered the validity of an executive order passed by the Government for assignment of land to the erstwhile owners and observed: (M. Bhaskaran Pillai case, SCC p. 433, para 4) "4. In view of the admitted position that the land in question was acquired under the Land Acquisition Act, LA by operation of Section 16 of the Land Acquisition Act, it stood vested in the State free from all encumbrances. The question emerges whether the Government can assign the land to the erstwhile owners? It is settled law that if the land is acquired for a public purpose, after the public purpose was achieved, the rest of the land could be used for any other public purpose. In case there is no other public purpose for which the land is needed, then instead of disposal by way of sale to the erstwhile owner, the land should be put to public auction and the amount fetched in the public auction can be better utilised for the public purpose envisaged in the Directive Principles of the Constitution. In the present case, what we find is that the executive order is not in consonance with the provision of the Act and is, therefore, invalid. Under these circumstances, the Division Bench is well justified in declaring the executive order as invalid. Whatever assignment is made, should be for a public purpose. Otherwise, the land of the Government should be sold only through the public auctions so that the public also gets benefited by getting a higher value.*

***

24. *For the reasons stated above, we hold that the Appellants have failed to make out a case for issue of a mandamus to the Respondents to release the acquired land in their favour. In the result, the appeal is dismissed without any order as to costs.*

129. Section 31 of the Act of 1894 is in *pari materia* with the provisions Section 77 of the Act of 2013; Section 34 (of the Act of 1894) is *pari materia* with Section 80 of the Act of 2013. Section 77 of the Act of 2013 deals with payment of compensation or deposit of the same in the Authority. Section 77 is reproduced hereunder:

77. Payment of compensation or deposit of same in Authority.-(1) On making an award Under Section 30, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award and shall pay it to them by depositing the amount in their bank accounts unless prevented by some one or more of the contingencies mentioned in Sub-section (2).

(2) If the person entitled to compensation shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Authority to which a reference Under Section 64 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

Provided further that no person who has received the amount otherwise than under protest shall be entitled to make any application under Sub-section (1) of Section 64:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

130. The Collector has to tender payment Under Section 77(1) and to pay the persons interested by depositing the amount in their bank accounts unless prevented Under Section 77(2) which are the same contingencies as provided in Section 31(2) mentioned above. Section 80 of the Act of 2013 is *pari materia* to Section 34 of the Act of 1894, is reproduced hereunder:

80. Payment of interest.-When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of nine per cent, per annum from the time of so taking possession until it shall have been so paid or deposited:

Provided that if such compensation or any part thereof is not paid or deposited within a period of one year from the date on which possession is taken, interest at the rate of fifteen per cent, per annum shall be payable from the date or expiry of the said period of one year on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry.

131. The provisions are identical concerning the rate of interest in case there is a failure to make payment of compensation before taking possession of the land. The award amount has to be paid @ 9% per annum for the first year and after that @ 15% per annum.

132. Since the Act of 1894 never provide for the lapse in case the compensation amount was not deposited, non-deposit carried higher interest. The provisions under the new Act are identical: there is no lapse of any acquisition proceeding by non-compliance with Section 77. Interpreting "*or*" Under Section 24(2) of the Act of 2013 disjunctively, would result in an anomalous situation-*because, once compensation has been paid to the landowner, there is no provision for its refund.* It was fairly conceded on behalf of the landowners that they must return the compensation in the case of lapse if possession has not been taken. In case possession is with the landowner and compensation has been paid, according to landowners' submission, there is deemed lapse Under Section 24(2) by reading the word *"or"* disjunctively. It would then be open to the State Government to withdraw the money deposited in the Reference Court. It was also submitted that it is inherent in the notion of lapse that the State may recover the compensation on the ground of restitution. In our opinion, the submissions cannot be accepted as an anomalous result would occur. In case physical possession is with the landowner; *and compensation has been paid, there is no provision in the Act for disgorging out the benefit of compensation.* In the absence of any provision for refund in the Act of 2013, the State cannot recover compensation paid. The landowner would be unjustly enriched. This could never have been the legislative intent of enacting Section 24(2) of the Act of 2013. The principle of restitution, unless provided in the Act, cannot be resorted to by the authorities on their own. The absence of provision for refund in the Act of 2013 reinforces our conclusion that the word "or" has to be read as conjunctively and has to be read as "and." The landowners' argument about the State's ability to recover such amounts, in the absence of any provision, by relying on the principle of restitution, is without merit, because firstly such principle is without any legal sanction. The State would have to resort to the remedy of a suit, which can potentially result in litigation of enormous proportions; besides, the landowners can well argue

that the property (i.e. the amounts) legally belonged to them and that the limitation for claiming it back would have expired. Several other potential defences would be available, each of which would result in multifarious litigation. Therefore, the contention is *ex-facie* untenable and insubstantial.

133. It was submitted that in the case State had taken possession without paying compensation as required under the Act of 1894, there cannot be absolute vesting free from all encumbrances Under Section 16. It is clear that vesting Under Section 16 of the Act of 1894 does not depend upon payment of compensation. Vesting takes place as soon as possession is taken after the passing of the award. Undoubtedly, compensation has also to be paid. For that, provisions have been made in Sections 31 and 34 of the Act of 1894. Section 31(1) requires tender and payment, which is making the money available to the landowner and in case State is prevented: i.e., in case the landowner does not consent to receive it for three other exigencies provided in Section 31(2), the amount has to be deposited in the court. Deposit in the court absolves the Government of liability to make payment of interest. However, if payment is not tendered Under Section 31(1) nor deposited in court as envisaged Under Section 31(2) from the date of taking possession, the interest for the first year is 9% and thereafter 15% per annum follows. The effect of vesting, under no circumstance, is taken away due to non-compliance of Section 31(1) or 31(2) as the case may be as the payment is secured along with interest under the provisions of Section 34 read with Section 31. The State cannot be asked to restore possession once taken but in case it fails to make deposit Under Section 31(3) or otherwise with respect to majority of the landholdings, in that exigency, all the beneficiaries as on the date of notification under Section 4 shall be entitled to higher compensation under the Act of 2013 and there would be no lapse in that case.

134. The landowners had complained that in some cases, under various schemes, close to 80% of the compensation amount was not handed over to the concerned Collector. It was also submitted that in some of the schemes, 50% beneficiaries, for whose benefit the land had been acquired, had not paid even a single rupee. Since this Court is not deciding individual cases here, what is the effect of the interpretation of the law, in the light of this decision, has to be considered in each and every case. We refrain from commenting on the merits of the said submissions as we are not deciding the cases on merits in the reference made to us. Various aspects may arise on the merits of the case as the schemes were framed at different points of time and the dates of notifications Under Section 4 issued thereunder, whether there is one or different notifications and various other attendant circumstances have to be looked into like whether possession has been taken or not, to what extent compensation has been paid and whether proviso to Section 24(2) is attracted for the benefits of those entitled to it. In case there is failure to deposit the compensation with respect to the majority of the holdings, the facts have to be gauged in individual cases and then decided.

In re: Vesting and divesting

135. In *Satendra Prasad Jain and Ors. v. State of U.P and Ors.* MANU/SC/0392/1993 : (1993) 4 SCC 369, the concept of vesting under the Act of 1894 had been taken into consideration. The Government cannot withdraw from acquisition Under Section 48, once it has taken the possession. This Court has observed that once possession has been taken Under Section 17(1), prior to the making of the award, the owner is divested of the title to the land, which is vested in the

Government and there is no provision by which land can be reverted to the owner. This Court has observed thus:

14. *There are two judgments of this Court, which we must note. In Rajasthan Housing Board v. Shri Kishan,* MANU/SC/0466/1993 : (1993) 2 SCC 84 *it was held that the Government could not withdraw from acquisition Under Section 48 once it had taken possession of the land. In Lt. Governor of H.P. v. Avinash Sharma,* MANU/SC/0417/1970 : (1970) 2 SCC 149 *it was held that: (SCC p. 152, para 8)*

... after possession has been taken pursuant to a notification Under Section 17(1) the land is vested in the Government, and the notification cannot be cancelled Under Section 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers Under Section 48 of the Land Acquisition Act. Any other view would enable the State Government to circumvent the specific provision by relying upon a general power. When possession of the land is taken Under Section 17(1), the land vests in the Government. There is no provision by which land statutorily vested in the Government reverts to the original owner by mere cancellation of the notification.

15. *Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made Under Section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the landowner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration Under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse. When Section 17(1) is applied by reason of urgency, Government takes possession of the land prior to the making of the award Under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17(1) states so in unmistakable terms. Clearly, Section 11-A can have no application to cases of acquisitions Under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner.*

This Court further observed in *Satendra Prasad Jain* (supra) that even if compensation was not paid to the Appellant Under Section 17(3-A), it could not be said that possession was taken illegally. Vesting is absolute. This Court has observed thus:

17. *In the instant case, even that 80 per cent of the estimated compensation was not paid to the Appellants although Section 17(3-A) required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the first Respondent. It is, at any rate, not open to the third Respondent, who, as the letter of the Special Land Acquisition Officer dated June 27, 1990 shows, failed to make the necessary monies available and who has been in occupation of the said land ever since its possession was taken, to urge that the possession was taken illegally and that, therefore, the said land has not vested in the first Respondent and the first Respondent is under no obligation to make an award.*

136. In *Tika Ram and Ors. v. State of Uttar Pradesh and Ors.* MANU/SC/1616/2009 : (2009) 10 SCC 689, the question considered was in case possession is taken, and compensation is not paid, what is the effect? This Court has held that there is no lapse of acquisition and observed thus:

91. *However, the question is as to what happens when such payment is not made and the possession is taken. Can the whole acquisition be set at naught?*

92. *In our opinion, this contention on the part of the Appellants is also incorrect. If we find fault with the whole acquisition process on account of the non-payment of 80% of the compensation, then the further question would be as to whether the estimation of 80% of compensation is correct or not. A further controversy can then be raised by the landlords that what was paid was not 80% and was short of 80% and therefore, the acquisition should be set at naught. Such extreme interpretation cannot be afforded because indeed Under Section 17 itself, the basic idea of avoiding the enquiry Under Section 5A is in view of the urgent need on the part of the State Government for the land to be acquired for any eventuality discovered by either Sub-section (1) or Sub-section (2) of Section 17 of the Act.*

93. *The only question that would remain is that of the estimation of the compensation. In our considered view, even if the compensation is not paid or is short of 80%, the acquisition would not suffer. One could imagine the unreasonableness of the situation. Now suppose, there is state of emergency as contemplated in Section 17(2) of the Act and the compensation is not given, could the whole acquisition come to a naught? It would entail serious consequences.*

***

95. *Further, in a judgment of this Court in Pratap v. State of Rajasthan*, MANU/SC/1101/1996 : (1996) 3 SCC 1 *a similar view was reported. That was a case under the Rajasthan Urban Improvement Act, 1987, under which the acquisition was made using Section 17 of the Act. The Court took the view that once the possession was taken Under Section 17 of the Act, the Government could not withdraw from that position Under Section 18 and even the provisions of Section 11-A were not attracted. That was of course a case where the award was not passed Under Section 11-A after taking of the possession. A clear-cut observation came to be made in that behalf in para 12, to the effect that the non-compliance with Section 17 of the Act, insofar as, payment of compensation is concerned, did not result in lapsing of the land acquisition proceedings. The law laid down by this Court in Satendra Prasad Jain v. State of U.P.*, MANU/SC/0392/1993 : (1993) 4 SCC 369 *was approved. The Court also relied on the decision in P. Chinnanna v. State of A.P.,* MANU/SC/0813/1994 : (1994) 5 SCC 486 *and Awadh Bihari Yadav v. State of Bihar*, MANU/SC/0806/1995 : (1995) 6 SCC 31 *where similar view was taken regarding the land acquisition proceedings not getting lapsed. The only result that may follow by the non-payment would be the payment of interest, as contemplated in Section 34 and the proviso added thereto by the 1984 Act. In that view, we do not wish to further refer the matter, as suggested by Shri Trivedi, learned Senior Counsel and Shri Qamar Ahmad, learned Counsel for the Appellants. Therefore, even on the sixth question, there is no necessity of any reference.*

It has further been observed that the only result that may follow by the non-payment would be the payment of interest as contemplated in Section 34 of the Act of 1894.

137. In *Pratap and Anr. v. State of Rajasthan and Ors.* MANU/SC/1101/1996 : (1996) 3 SCC 1, this Court held that when the possession of land is taken Under Section 17(1), the land vests absolutely in the Government free from all encumbrances and the Government cannot withdraw from acquisition Under Section 48 and provisions of Section 11-A of passing the award within two years were not attracted. The proceedings would not lapse on failure to make an award within the period prescribed Under Section 11-A, once possession had been taken. The part payment of compensation would also not render the possession illegal. This Court observed thus:

12. *The provisions of Sub-section (4) of Section 52 are somewhat similar to Section 17 of the Land Acquisition Act, LA. Just as the publication of a notification Under Section 52(1) vests the land in the State, free from all encumbrances, as provided by Section 52(4), similarly when possession of land is taken Under Section 17(1) the land vests absolutely in the Government free from all encumbrances. A question arose before this Court that if there is a non-compliance with the provisions of Section 5-A and an award is not made in respect to the land so acquired, would the acquisition proceedings lapse. In Satendra Prasad Jain v. State of U.P.,* MANU/SC/0392/1993 : (1993) 4 SCC 369 *this Court held that once possession had been taken Under Section 17(1) and the land vested in the Government then the Government could not withdraw from acquisition Under Section 48 and the provisions of Section 11A were not attracted and, therefore, the acquisition proceedings would not lapse on failure to make an award within the period prescribed therein. It was further held that non-compliance of Section 17(3-A), regarding part payment of compensation before taking possession, would also not render the possession illegal and entitle the Government to withdraw from acquisition. The aforesaid principle has been reiterated by this Court in P. Chinnanna v. State of A.P.,* MANU/SC/0813/1994 : (1994) 5 SCC 486 *and Awadh Bihari Yadav v. State of Bihar,* MANU/SC/0806/1995 : (1995) 6 SCC 31. *In view of the aforesaid ratio it follows that the provisions of Section 11-A are not attracted in the present case and even if it be assumed that the award has not been passed within the stipulated period, the acquisition of land does not come to an end.*

138. In *Awadh Bihari Yadav and Ors. v. State of Bihar and Ors.* MANU/SC/0806/1995 : (1995) 6 SCC 31, question was raised with respect to the lapse of acquisition proceedings in view of the provisions contained in Section 11-A as award had not been made within 2 years from the date of commencement of the Land Acquisition Amendment Act, 1984. Possession had been taken by the Government Under Section 17(1). It was held that it was not open to the Government to withdraw from the acquisition. Provisions of Section 11-A was not attracted. Following is the relevant portion of the observations made by this Court:

8. ..It was contended that in view of Section 11-A of the Act the entire land acquisition proceedings lapsed as no award Under Section 11 had been made within 2 years from the date of commencement of the Land Acquisition Amendment Act, 1984. We are of the view that the above plea has no force. In this case, the Government had taken possession of the land in question Under Section 17(1) of the Act. It is not open to the Government to withdraw from the acquisition (Section 48 of the Act). In such a case, Section 11-A of the Act is not attracted and the acquisition proceedings would not lapse, even if it is assumed that no award was made within the period prescribed by Section 11A of the Act. ....

139. In *P. Chinnanna and Ors. v. State of A.P. and Ors.* MANU/SC/0813/1994 : (1994) 5 SCC 486 question again arose with respect to possession taken Under Section 17(1) invoking urgency clause, this Court has held that once possession is taken, there is absolute vesting and subsequent proceedings were void. This Court stated as follows:

10. *The said provision enables the appropriate Government to take possession of the land concerned on the expiration of 15 days from the publication of the notice mentioned in Section 9 Sub-section (1) notwithstanding the fact that no award has been made in respect of it. When the possession of the land concerned is once taken as provided for thereunder such land is made to vest absolutely in the Government free from all encumbrances. It must be noted here that taking possession of the land concerned and its vesting absolutely in the Government free from all encumbrances does not depend upon an award to be made Under Section 11, making of which award alone in the case of ordinary acquisition of land could have empowered the Collector to take possession of the land Under Section 16 and the taking of which possession would have made the land vest absolutely in the Government free from all encumbrances. As seen from the judgment dated 23-8-1982 of the High Court in WP No. 3416 of 1978, taking possession of the Appellants' land along with land of others by the Collector on 10-7-1978 Under Section 17(1) is, in fact, made the basis for its holding that invoking of urgency Clause to dispense with Section 5-A enquiry was made by the Government mechanically. No doubt, when the High Court took the view that acquisition of the land concerned Under Section 17 of the Act was made pursuant to an order of the Government without application of its mind in the matter of making Section 5-A not to apply, it was open to it to set aside or quash the subsequent acquisition proceedings except Section 4(1) notification which had followed and restore the ownership of the land to the Appellants' land if it had to order fresh enquiry on the basis of Section 4(1) notification. Such a setting aside or quashing was inevitable because the acquisition proceedings had been completed Under Section 17 and the land had vested in the State Government, inasmuch as, without setting aside that vesting of the land in the State Government and restoring the land to the Appellant-owners, that land was unavailable for subsequent acquisition by following the procedure Under Section 5-A, Section 6, Section 11 and Section 16. Thus in the circumstances of the case in respect of the land of the Appellants, when publication of Section 4(1) notification was made on 21-7-1977, when declaration Under Section 6 was published on 21-7-1977 and taking possession of that land Under Section 17(1) by the Collector was made on 10-7-1978 and the vesting in the State Government of that land had occurred on that day, setting aside by the judgment of the High Court in WP No. 3416 of 1978 of merely the direction given by the Government relating to non-applicability of Section 5-A to the land, given on 7-7-1977, in our view, did not enable to Court to order the starting of fresh proceedings for acquisition of the land concerned Under Section 5A, inasmuch as, that land concerned on Section 4(1) notification had already become the land of the Government. In this state of facts, when the previous acquisition of the land of the Appellants made Under Section 17 of the Act did never stood affected. Section 5-A enquiry held and subsequent declaration made were superfluous proceedings which were inconsequential. Hence, we feel that there is no need to set aside the impugned declaration inasmuch as the earlier acquisition was complete and had resulted in vesting of the land in the State Government and there was no land available for acquisition in the subsequent proceedings which have been carried pursuant to the judgment of the High Court made in WP No. 3416 of 1978. Therefore, in the stated facts, although we find that no need arises to declare the impugned declaration as void we clarify that the earlier proceedings which had taken place in respect of the Appellants' land, resulting in its vesting in the*

State Government free from encumbrances, has stood unaffected and any award made by the Collector or be made by him under the L.A. Act shall be regarded as that based on earlier acquisition proceedings.

140. In *May George v. Special Tahsildar and Ors.* MANU/SC/0402/2010 : (2010) 13 SCC 98, this Court considered the question to declare a provision mandatory, test is to be applied as to whether non-compliance of the provision could render entire proceedings invalid or not. This Court referred to various decisions (which are referred to in the footnote[20]) and summarized the position thus:

24. *In Gullipilli Sowria Raj v. Bandaru Pavani,* MANU/SC/8368/2008 : (2009) 1 SCC 714, *this Court while dealing with a similar issue held as under (SCC p. 719, para 17)*

17. ... The expression 'may' used in the opening words of Section 5 is not directory, as has been sought to be argued, but mandatory and non-fulfilment thereof would not permit a marriage under the Act between two Hindus. Section 7 of the 1955 Act is to be read along with Section 5 in that a Hindu marriage, as understood Under Section 5, could be solemnised according to the ceremonies indicated therein.

25. *The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance with the provision could render the entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of the legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject-matter and object of the statutory provisions in question. The Court may find out as to what would be the consequence which would flow from construing it in one way or the other and as to whether the statute provides for a contingency of the non-compliance with the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid.*

***

27. *In G.H. Grant (Dr.) v. State of Bihar,* MANU/SC/0274/1965 : AIR 1966 SC 237, *this Court has held that if a "person interested" is aggrieved by the fact that some other person has withdrawn the compensation of his land, he may resort to the procedure prescribed under the Act or agitate the dispute in suit for making the recovery of the award amount from such person.*

141. This Court opined, therefore, that once the land vests in the State, it cannot be divested, even if there is some irregularity in the acquisition proceedings. There is nothing in the Act of 1894 to show that non-compliance thereof will be fatal or will lead to any penalty.

142. Now, coming back to the main issue, the legal fiction of lapsing (Under Section 24(2) of the Act of 2013) cannot be extended to denude title which has already vested in the beneficiaries of the acquisition Corporation/Local Bodies, etc., and who, in turn, have also conveyed title and transferred the land to some other persons after development. In *Commissioner of Sales Tax, U.P. v. Modi Sugar Mills* MANU/SC/0276/1960 : 1961 (2) SCR 189 the Court has held that "*A legal*

fiction must be limited to the purpose for which it has been created and cannot be extended beyond its legitimate field." Similarly, in Braithwaite & Co. v. E.S.I.C. MANU/SC/0211/1967 : 1968 (1) SCR 771, this Court held that a legal fiction is adopted in law for a limited and definite purpose only and there is no justification for extending it beyond the purpose for which the legislature has adopted. Lapsing is provided only where possession has not been taken nor compensation has been paid, divesting of vested land is not intended nor specifically provided.

143. Black's Law Dictionary defines "vested" as follows:

vested, adj. (18c) Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute a vested interest in the estate.

"Unfortunately, the word 'vested' is used in two senses. Firstly, an interest may be vested in possession, when there is a right to present enjoyment, e.g. when I own and occupy Blackacre. But an interest may be vested, even where it does not carry a right to immediate possession if it does confer a fixed right of taking possession in the future." George Whitecross Paton, A Textbook of Jurisprudence 305 (CW. Paton & David P. Derham eds., 4th ed. 1972).

"A future interest is vested if it meets two requirements: first, that there be no condition precedent to the interest's becoming a present estate other than the natural expiration of those estates that are prior to it in possession; and second, that it be theoretically possible to identify who would get the right to possession if the interest should become a present estate at any time." Thomas F. Bergin 8. Paul C. Haskell, Preface to Estates in Land and Future Interests 66-67 (2d ed. 1984).

144. In Webster's Dictionary, 'vested' is defined as:

vested adj. [pp. of vest] 1. Clothed; robed, especially in church vestments. 2. in law, fixed; settled; absolute; not contingent upon anything: as, a vested interest.

145. In *State of Punjab v. Sadhu Ram* MANU/SC/1411/1997 : 1996 (7) JT 118, it has been observed that once possession is taken and the award has been passed, no title remains with the landowner and the land cannot be de-notified Under Section 48(1) and observed thus:

3. *The learned Judge having noticed the procedure prescribed in disposal of the land acquired by the Government for public purposes, has held that the said procedure was not followed for surrendering the land to the erstwhile owners. The Respondent having purchased the land had improved upon the land and is, therefore, entitled to be an equitable owner of the land. We wholly fail to appreciate the view taken by the High Court. The learned Judge had net referred to the relevant provisions of the Act and law. It is an undisputed fact that consequent upon the passing of the award Under Section 11 and possession taken of the land, by operation of Section 16 of the Act, the right, title and interest of the erstwhile owner stood extinguished and the Government became absolute owner of the property free from all encumbrances. Thereby, no one has nor claimed any right, title and interest in respect of the acquired land. Before the possession could be taken, the Government have power Under Section 48(1) of the Act to denotify the land. In that event, land is required to be surrendered to the erstwhile owners. That is not the case on the facts of this case. Under these circumstances, the Government having become the absolute owner of the*

property free from all encumbrances, unless the title is conferred on any person in accordance with a procedure known to law, no one can claim any title much less equitable title by remaining in possession. The trial Court as well as the appellate Court negative the plea of the Respondent that he was inducted into possession as a lessee for a period of 20 years. On the other hand, the finding was that he was in possession as a lessee on yearly basis. Having lawfully come into possession as a lessee of the Government, Session 116 of Evidence Act estops him from denying title of the Government and set it up in third party. By disclaiming Government title, he forfeited even the annual lease. Under these circumstances, having come into possession as a lessee, after expiry and forfeiture of the lease, he has no right. Illegal and unlawful possession of the land entails payment of damages to the Government.

146. In *Star Wire (India) Ltd. v. State of Haryana and Ors.* MANU/SC/1799/1996 : (1996) 11 SCC 698, it was observed that once the award has been passed and possession has been taken, the land vests in the State free from all encumbrances. This Court held thus:

2. *This special leave petition arises from the judgment of the Punjab and Haryana High Court made on 25-4-1996 in LPA No. 437 of 1996. Notification Under Section 4(1) of the Land Acquisition Act, LA (for short, 'the Act') was published on 1-6-1976. Declaration Under Section 6 of the Act was published on 16-2-1977. The award was passed on 3-7-1981. Thereafter, the reference also become final. The Petitioner has challenged the notification, the declaration, and the award as illegal. It contends that the award does not come in the way of the Petitioner in filing the writ petition on 21-1-1994. The High Court has dismissed the writ petition on the grounds of laches.*

147. A similar view has been taken in *Market Committee v. Krishan Murari* MANU/SC/1000/1996 : (1996) 1 SCC 311 and *Puttu Lal (dead) by L.Rs. v. State of U.P. and Anr.* MANU/SC/1140/1996 : (1996) 3 SCC 99. The concept of 'vesting' was also considered in *The Fruit & Vegetable Merchants Union v. The Delhi Improvement Trust* MANU/SC/0082/1956 : 1957 SCR 01. Once vesting takes place, and is with possession, after which a person who remains in possession is only a trespasser, not in rightful possession and vesting contemplates absolute title, possession in the State. This Court observed thus:

(19) That the word "vest" is a word of variable import is shown by provisions of Indian statutes also. For example, Section 56 of the Provincial Insolvency Act (5 of 1920) empowers the Court at the time of the making of the order of adjudication or thereafter to appoint a receiver for the property of the insolvent and further provides that "such property shall thereupon vest in such receiver". The property vests in the receiver for the purpose of administering the estate of the insolvent for the payment of his debts after realising his assets. The property of the insolvent vests in the receiver not for all purposes but only for the purpose of the Insolvency Act and the receiver has no interest of his own in the property. On the other hand, Sections 16 and 17 of the Land Acquisition Act (Act 1 of LA), provide that the property so acquired, upon the happening of certain events, shall "vest absolutely in the Government free from all encumbrances". In the cases contemplated by Sections 16 and 17 the property acquired becomes the property of Government without any conditions or limitations either as to title or possession. The legislature has made it clear that the vesting of the property is not for any limited purpose or limited duration. It would thus appear that the word "vest" has not got a fixed connotation meaning in all cases that the

property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. The provisions of the Improvement Act, particularly Sections 45 to 49 and 54 and 54-A when they speak of a certain building or street or square or other land vesting in a municipality or other local body or in a trust, do not necessarily mean that ownership has passed to any of them.

In re: Vested rights Under Section 24 of the Act of 2013

148. This Court is of opinion that Section 24 of the Act of 2013 does not intend to take away vested rights. This is because there is no specific provision taking away or divesting title to the land, which had originally vested with the State, or divesting the title or interest of beneficiaries or third-party transferees of such land which they had lawfully acquired, through sales or transfers. There is a specific provision made for divesting, nor does the Act of 2013 by necessary intendment, imply such a drastic consequence. Divesting cannot be said to have been intended. Here, the decision in *VKNM Vocational Higher Secondary School v. State of Kerala* MANU/SC/0076/2016 : (2016) 4 SCC 216 is relevant; it was observed as follows by this Court:

21. *In our considered view, the above principles laid down by the Constitution Bench of this Court in Garikapati case will have full application while considering the argument of the learned Senior Counsel for the fifth Respondent claiming a vested right by relying upon unamended Rule 7-A(3). Principles (i), (iii), (iv) and (v) of the said judgment are apposite to the case on hand. When we make a comprehensive reference to the above principles, it can be said that for the legal pursuit of a remedy it must be shown that the various stages of such remedy are formed into a chain or rather as series of it, which are connected by an intrinsic unity which can be called as one proceeding, that such vested right, if any, should have its origin in a proceeding which was instituted on such right having been crystallised at the time of its origin itself, in which event all future claims on that basis to be pursued would get preserved till the said right is to be ultimately examined. In the event of such preservation of the future remedy having come into existence and got crystallised, that would date back to the date of origin when the so-called vested right commenced, that then and then only it can be held that the said right became a vested right and it is not defeated by the law that prevails at the date of its decision or at the date of subsequent filing of the claim. One other fundamental principle laid down which is to be borne in mind, is that even such a vested right can also be taken away by a subsequent enactment if such subsequent enactment specifically provides by express words or by necessary intendment. In other words, in the event of the extinction of any such right by express provision in the subsequent enactment, the same would lose its value.*

149. The decision in *State of Haryana v. Hindustan Construction Co. Ltd.* MANU/SC/1185/2017 : (2017) 9 SCC 463, is relied upon to contend that the line of enquiry is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law or whether it has taken away those rights and liabilities. When repeal is followed by a fresh enactment on the same subject, the provisions of the General Clauses Act would undoubtedly require an examination of the language of the new enactment if it expresses an intent different from the earlier repealed Act. The enquiry would necessitate the examination if the old rights and liabilities are kept alive or whether the new Act manifests an intention to do away with or destroy them. If the

new Act manifests different intentions, the application of the General Clauses Act will stand excluded.

150. We have examined the provisions of Section 24 of the Act of 2013 in the light of the said pleas and thereafter arrived at our conclusions as to when and to what extent proceedings lapsed or/and were saved and what liabilities have been taken away and to what extent there is obliteration of the rights acquired and liabilities incurred earlier under the Act of 1894 and what is done away or destroyed by the new Act.

151. The Section 24(2) of the Act of 2013 is to be interpreted consistent with the legislative intent, particularly when it has provided for the lapse of the proceedings. It has to be interpreted in the light of provisions made in Sections 24 and 114 of the Act of 2013 and Section 6 of the General Clauses Act, what it protects and to what extent it takes away the rights of the parties. Undoubtedly, Section 24(2) has retroactive operation with respect to the acquisitions initiated under the Act of 1894 and which are not completed by taking possession nor compensation has been paid in spite of lapse of 5 years and proceedings are kept pending due to lethargy of the officials. The drastic consequences follow by the provisions contained in Section 24(2) in such cases.

152. For considering the legislative intent, Bennion, Statutory Interpretation, 5th Edition (2012) has been referred to, in which it has been observed:

Where, on a weighing of the factors, it seems that some retrospective effect was intended, the general presumption against retrospectively indicates that this should be kept to as narrow a compass as will accord with the legislative intention.

Principle against doubtful penalisation. It is a general principle of legal policy that no one should suffer detriment by the application of a doubtful law. The general presumption against retrospectivity means that where one of the possible opposing constructions of an enactment would impose an ex post facto law, that construction is likely to be doubtful.

....

If the construction also inflicts a detriment, that is a second factor against it. A retrospective enactment inflicts a detriment for this purpose 'if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. The growing propensity of the courts to relate legal principle to the concept of fairness was shown by Staughton LJ when he said:

In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears.

It has been observed in Bennion, Statutory Interpretation, 5th Edition (2012) that when Parliament is presumed not to have intended to alter the law applicable to past events and transactions, which is unfair to those concerned in them unless the contrary intention appears.

153. Another decision in *Lauri v. Renad* (1892) 3 Ch. 402, has been referred to in which it was observed that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Following observations have been relied upon:

It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or recreate an expired right. It is a fundamental Rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same Rule involves another and subordinate Rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

154. In *Yamashita-Shinnihon Steamship Co. Ltd.* (supra) the House of Lords has observed that question of the extent of retrospectivity would also be dependent upon the degree of unfairness it causes to the parties. It has been observed:

The Rule that a person should not be held liable or punished for conduct not criminal when committed is fundamental and of long standing. It is reflected in the maxim nullum crimen nulla poena sine lege. It is protected by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969).

The Rule also applies, but with less force, outside the criminal sphere. It is again expressed in maxims, lex prospicit non respicit and omnis nova constitutio futuris temporibus formam imponere debet non praeteritis. The French Civil Code provides that "La loi ne dipose que pour l'avenir; elle n'a point d'effet retroactif:

.....

But both these passages draw attention to an important point, that the exception only applies where application of it would not cause unfairness or injustice. This is consistent with the general Rule or presumption which is itself based on considerations of fairness and justice, as shown by the passage in Maxwell quoted, ante, p. 494C-E, and recently emphasised by Staughton LJ in Secretary of State for Social Security v. Tunnicliffe MANU/UKWA/0025/1990 : (1991) 2 All E.R. 712, 724:

In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree-the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

The distinction between rights and procedure, and unfairness and fairness, may well overlap. Thus, if a limitation period is shortened but a Plaintiff has time to sue before expiry of the shortened period, he is likely to be statute-barred if he does not sue within the shortened period (see The Ydun (1899) P. 236.); but if a limitation period is extended after a previous shorter limitation period has already expired, the Plaintiff will be unable to take advantage of the new period because an absolute defence has by then accrued to the Defendant and it would not be fair

to deprive him of it: See Yew Bon Tew v. Kenderaan Bas Mara MANU/UKPC/0009/1982 : (1983) 1 A.C. 553 and Maxwell v. Murphy MANU/AUSH/0064/1957 : (1957) 96 C.L.R. 261.

Further, Lord Griffiths, Lord Goff of Chieveley and Lord Slynn of Hadley, held as under:

The principle governing the proper approach to a statutory provision alleged to have retrospective effect has been stated in a number of different ways, but no difference of substance is revealed by the authorities. Thus:

(1) the principle has been described as "a prima facie Rule of construction" (Yew Bon Tew MANU/UKPC/0009/1982 : (1983) 1 A.C 553, 558F), *"an established principle in the construction of statutory provisions" (Pearce v. Secretary of State for Defence* (1988) A.C 755, 802C) *or "a fundamental Rule of English law" (Lauri v. Renad* (1892) 3 Ch. 402, 421, *Maxwell on the Interpretation of Statutes, 12th ed., p. 215, cited with approval in Carson v. Carson and Stoyek* (1964) 1 W.L.R. 511, 516-517).

(2) The principle is that a statute or statutes will not be interpreted so as to have a retrospective operation unless (i) "that result is unavoidable on the language used" (Yew Bon Tew, at pp. 558F, 563D-E) or "that effect cannot be avoided without doing violence to the language of the enactment: (In re Athlumney, Ex parte Wilson (1898) 2 Q.B. 547, 552) *or "its language is such as plainly to require such a construction" (Lauri v. Renad, at p. 421); or (ii) "they expressly or by necessary implication to provide: see Yew Bon Tew, at p. 558F" (Pearce v. Secretary of State for Defence* (1988) A.C 755, 802C-D) *or "such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication" (Maxwell on the Interpretation of Statutes, 12th ed., p. 215]*

(3)"if the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only" (In re Athlumney, at p. 552).

(4) If the statute does have some retrospective operation on the basis of the above principles, it is not to be construed as having greater retrospective operation "than its language renders necessary" (Lauri v. Renad, at p. 421) or "than is necessary to give effect either to its clear language or to its manifest purpose" (Arnold v. Central Electricity Generating Board (1988) A.C 228, 275.

The absence of express limiting words cannot be used as a basis for implying retrospective operation. That would reverse the true presumption. A necessary and distinct implication typically arises in the context of a statute that, by repealing a previous statute, would leave a "lacuna" in the law if the new statute were not to be construed as having retrospective effect: see, e.g., Food Corporation of India v. Marastro Compania Naviera S.A. (1987) 1 W.L.R. 134, 152. *The particular problem in the present case is a transitional problem only, applicable only to those arbitrators that are stale as at 1 January 1992, in respect of which applications to strike out are made shortly thereafter. In the future, such claimants will either continue to be dilatory or not, in which case the references will proceed to a conclusion. The concern of the legislature, and the mischief at which the Section was aimed, was not a limited number of existing stale arbitrations but future arbitrations. Moreover, although the mischief at which the Section was aimed is not to*

be ignored, one should start by looking at the words themselves: see Chebaro v. Chebaro MANU/UKWA/0047/1987 : (1987) Fam. 127, 130, 134-135.

It would be unfair to a claimant to give a retrospective operation to Section 13A. So far as claimants in existing arbitrations are concerned, they may well have been (correctly) advised prior to 1 January 1992 that they could proceed slowly with the claim without risk of having their claims dismissed by reason of such delay. A retrospective application of the statute would expose him to a penalty on the strength of conduct not susceptible to penalty when committed. It would not, however, be unfair to a Respondent to limit Section 13A to delay occurring after 1 January 1992. Even if such delay were causative of prejudice or the risk of an unfair resolution of the dispute, under the existing law laid down in Bremer Vulkan a Respondent should have been aware that it was a Respondent's obligation (as well as a claimant's) to seek directions from the arbitrator to ensure a speedy resolution of disputes: see the Hannah Blumenthal case (1983) 1 A.C. 854, 923H. *A retrospective alteration to the legitimate expectations of the parties as to the consequences of their conduct at the time it occurred would be contrary to the principles of legal and commercial certainty that formed part of the grounds on which the House of Lords declined in Hannah Blumenthal to depart from Bermer Vulkan: see pp. 913C, 917D, 922H.*

155. Reliance was placed on *Gloucester Union v. Woolwich Union* (1917) 2 K.B. 374 , with respect to effect on existing rights wherein following observations have been made:

Before considering the legal effect of Article xxxi. of this Order it is necessary, we think, to bear in mind that by the common law, upon such a division of the parish of Upton St. Leonard's, any settlement already acquired in that parish would have been lost: see Reg v. Tipton Inhabitants 3; Dorking Union v. St. Saviour's Union. The purpose and effect of par. 1 of Article xxxi is to get rid of this difficulty and preserve the settlements that have been already acquired before the commencement of the Order. The purpose and effect of par. 2 is in like manner to preserve a status of irremovability that has been acquired at that date; and the question raised in this case is whether par. 3 of the Article is to be construed in all its generality as applicable to acts or circumstances which have been done or occurred completely in the past and before the commencement of the Order, so as to create or confer a settlement where none existed before, or whether, as the Appellants contend, it is to be construed as supplemental to pars. 1 and 2 and limited to the cases where persons are in process of acquiring a settlement or status of irremovability so as to preserve their inchoate rights. If the words in par. 3 are construed without limitation, then, the residence of the pauper at Chequer's Row in Upton St. Leonard's between 1893 and 1897 being deemed to be residence in Gloucester, a settlement in Gloucester is conferred upon him and the Respondents succeed. We think this paragraph should be so construed subject to the general principle that a statute is prima facie prospective and does not interfere with existing rights unless it contains clear words to that effect, or unless, having regard to its object, it necessarily does so, and that a statute is not to be construed to have a greater to retrospective operation than its language renders necessary-see per Lindley LJ in Lauri v. Renad-whatever view may be entertained of the probably intention of the Legislature, unless some manifest absurdity or inconsistency results from such construction; but we have come to the conclusion that the construction of the paragraph contended for by the Respondents produces such a practical inconsistency with par. 1 of the same Article that it is necessary to put some limitation upon it. If a person had resided before the commencement of the Order for two years in that portion of the parish of Upton St. Leonards' which has been added

to Gloucester and for one year following in the portion which remains the parish of Upton St. Leonard's, he would by the latter part of par. 1 be deemed to have acquired a settlement in the parish of Upton St. Leonard's, but if par. 3 is to be applied to such a case his residence in the added portion of Upton St. Leonard's is to be deemed to have been residence in the parish of Gloucester; and if so deemed, then he has not had three years' consecutive residence in any one parish and has no settlement-in other words, the effect of par. 3 in such a case is to destroy the settlement which is preserved by par. 1 and to restore the common law Rule which is intended to be abolished. The same result would follow in the converse case where the later period of residence completing the three years in the old parish of Upton St. Leonard's is in the area which has been added to the parish of Gloucester.

156. In *The King v. The General Commissioners of Income Tax for Southampton* (1916) 2 K.B. 249, (1917) 2 K.B. 374 it was observed:

The language of the Section shows clearly that Parliament intended it to have a retrospective effect. The object was to prevent loss to the revenue when Commissioners had acted who were not, under the statutes, the right Commissioners to make the charge, provided that it was made by the Commissioners for the parish or place in which the person charged ordinarily resided. That the Section was retrospective in effect was not disputed by Sir Robert Finlay, but he argued that the retrospective operation is limited by the language of the Section and does not extend to a charge made in respect of profits derived from foreign possessions or securities Under Section 108 of the Income Tax Act, 1842. In support of this argument he relied upon the express reference in the first Sub-section of Section 32 to Section 106, and Section 146 of the Income Tax Act, 1842, upon the omission of any reference in this Sub-section to Section 108, and upon the repeal in Sub-section 2 of Section 32 of Section 108. He contended that if the Legislature had meant to include Section 108 in the first Sub-section it would have referred to it in express berms and would not merely have repealed it by the second sub-section. In the first Sub-section mention is made of other Sections of the Income Tax Acts, but not of Section 108. It must be taken, he argued, that Parliament had in mind the difficulties created by Section 108, which were pointed out in Aramayo's Case by the House of Lords, and that Parliament intended to remove these difficulties by the repeal of Section 108 so as to prevent its operation in future, but did not mean to change the law as regards acts done before passing of the statute. The question must depend upon the construction of the language of Section 32. The Rules to be applied are well settled. It is a fundamental Rule of English law that enactments in a statute are generally to be construed as prospective and intended to regulate future conduct, but this Rule is one of construction only and must yield to the intention of the Legislature: Moon v. Durden, per Parke B. It is also the law that a statute is not to be construed to have greater retrospective operation than its language renders necessary: Lauri v. Renad, per Lindley LJ to ascertain the intention regard should be had to the general scope and purview of the enactment, to the remedy sought to be applied, to the former state of the law, and to what was in the contemplation of the Legislature: Pardo v. Bingham per Lord Hatherly L.C.

157. In *K.S. Paripoornan* (supra), it was observed that in the case of retrospective operation the Court has to consider the effect on existing rights and obligations and for that purpose, the intention of the legislature has to be ascertained as indicated in the statute itself. This Court observed that:

66. *The dictum of Lord Denman, C.J. in R. v. St. Mary, Whitechapel,* (1848) 12 QB 120*, 127 that a statute which is in its direct operation prospective cannot properly be called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing, which has received the approval of this Court, does not mean that a statute which is otherwise retrospective in the sense that it takes away or impairs any vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already past, will not be treated as retrospective. In Alexander v. Mercouris, MANU/UKWA/0071/1979 : (1979) 3 All ER 305 Goff, L.J., after referring to the said observations of Lord Denman, C.J., has observed that a statute would not be operating prospectively if it creates new rights and duties arising out of past transactions. The question whether a particular statute operates prospectively only or has retrospective operation also will have to be determined on the basis of the effect it has on existing rights and obligations, whether it creates new obligations or imposes new duties or levies new liabilities in relation to past transactions. For that purpose it is necessary to ascertain the intention of the legislature as indicated in the statute itself.*

158. In *Zile Singh v. State of Haryana and Ors.*, (supra), this Court has observed that the Rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to the accrued right. This Court, while dealing with retrospectivity of a statute, observed that retrospectivity must be reasonable and not excessive or harsh; otherwise, it runs the risk of being struck down for being unconstitutional. Following observations have been made:

15. *Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular Section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The Rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)*

***

18. *In a recent decision of this Court in National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India, MANU/SC/0243/2003 : (2003) 5 SCC 23 it has been held that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as: (i) the words used must expressly provide or clearly imply retrospective operation; (ii) the retrospectivity must be reasonable and not excessive or harsh, otherwise, it runs the risk of being struck down as unconstitutional; (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of*

the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating Clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating Clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

159. This Court has considered the harsh consequences of retrospective operation of the statute in *Commissioner of Income Tax-19, Mumbai v. Sarkar Builders* MANU/SC/0636/2015 : (2015) 7 SCC 579 and observed thus:

25. *Can it be said that in order to avail the benefit in the assessment years after 1-4-2005, balconies should be removed though these were permitted earlier? Holding so would lead to absurd results as one cannot expect an Assessee to comply with a condition that was not a part of the statute when the housing project was approved. We, thus, find that the only way to resolve the issue would be to hold that Clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and an Assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the Assessee or even the legislature, when the housing project was accorded approval by the local authorities.*

26. *Having regard to the above, let us take note of the special features which appear in these cases:*

26.1. *In the present case, the approval of the housing project, its scope, definition and conditions, are all decided by and are dependent on the provisions of the relevant DC Rules. In contrast, the judgment in Reliance Jute and Industries Ltd. v. CIT,* MANU/SC/0338/1979 : (1980) 1 SCC 139 *was concerned with income tax only.*

26.2. *The position of law and the rights accrued prior to enactment of the Finance Act, 2004 have to be taken into account, particularly when the position becomes irreversible.*

26.3. *The provisions of Section 80-IB(10) mention not only a particular date before which such a housing project is to be approved by the local authority, even a date by which the housing project is to be completed, is fixed. These dates have a specific purpose which gives time to the developers to arrange their affairs in such a manner that the housing project is started and finished within those stipulated dates. This planning, in the context of facts in these appeals, had to be much before 1-4-2005.*

26.4.*The basic objective behind Section 80-IB(10) is to encourage developers to undertake housing projects for weaker Sections of society, inasmuch as to qualify for deduction under this provision, it is an essential condition that the residential unit be constructed on a maximum built-up area of 1000 sq. ft. where such residential unit is situated within the cities of Delhi and Mumbai or within 25 km from the municipal limits of these cities and 1500 sq. ft. at any other place.*

26.5. *It is the cardinal principle of interpretation that a construction resulting in unreasonably harsh and absurd results must be avoided.*

26.6. *Clause (d) makes it clear that a housing project includes shops and commercial establishments also. But from the day the said provision was inserted, they wanted to limit the built-up area of shops and establishments to 5% of the aggregate built-up area or 2000 sq ft, whichever is less. However, the legislature itself felt that this much commercial space would not meet the requirements of the residents. Therefore, in the year 2010, Parliament has further amended this provision by providing that it should not exceed 3% of the aggregate built-up area of the housing project or 5000 sq ft, whichever is higher. This is a significant modification making complete departure from the earlier yardstick. On the one hand, the permissible built-up area of the shops and other commercial shops is increased from 2000 sq. ft. to 5000 sq ft. On the other hand, though the aggregate built-up area for such shops and establishment is reduced from 5% to 3%, what is significant is that it permits the builders to have 5000 sq. ft. or 3% of the aggregate built-up area, "whichever is higher". In contrast, the provision earlier was 5% or 2000 sq ft, "whichever is less."*

160. This Court in *Jawarharmal* (supra) and *Rai Ramkrishna* (supra), has considered the practical realities before analysing the extent of retrospective operation of the statute. Several decisions were cited in regard to conflict of interest (which are referred to in the footnote hereafter[21]) and it was urged that the Rule of construction that is to be adopted is one of purposive interpretation.

In re: Legislative History of Act of 2013

161. The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 (Bill No. 77 of 2011) was introduced in the Parliament. The provisions of Section 24, as introduced in the said Bill, read as under:

24. (1) Notwithstanding anything contained in this Act, in any case where a notification Under Section 4 of the Land Acquisition Act, LA was issued before the commencement of this Act but the award Under Section 11 thereof has not been made before such commencement, the process shall be deemed to have lapsed and the appropriate Government shall initiate the process for acquisition of land afresh in accordance with the provisions of this Act.

(2) Where possession of land has not been taken, regardless of whether the award Under Section 11 of the Land Acquisition Act, LA Act has been made or not, the process for acquisition of land shall also be deemed to have lapsed and the appropriate Government shall initiate the process of acquisition afresh in accordance with the provisions of this Act.

162. It is apparent from Section 24(1), as introduced originally, contained a provision with respect to award, which has not been made, but it was later on amended, and now as provided in Section 24(1)(a), there is no lapse and only higher compensation is available in case award has not been passed. The earlier Section 24(2) contained only the provision with respect to possession of the land that has not been taken. Earlier, there was no time limit prescribed, and it was proposed that the process for acquisition of land shall lapse.

Clause 24 of Notes on clauses of Bill read thus:

Clause 24 seeks to provide that land acquisition process under the Land Acquisition Act, LA shall be deemed to have lapsed in certain cases where the award has not been made and possession of land has not been taken before the commencement of proposed legislation.

163. After considering the various suggestions of the State Government, the Committee made some recommendations, which are extracted hereunder:

16.5 The Committee note that Clause 24 of the Bill provides that land acquisition cases/process shall be invalid on enactment of the new Act in cases where Collector has not given award or possession of the land has not been taken before the commencement of the proposed legislation. Some of the representatives of the industry and also the Ministries like Railways and Urban Development submitted before the Committee that land acquisition proceedings already initiated under the existing Land Acquisition, LA should not lapse as it would lead to time and cost over-run in many infrastructural projects. However, in such cases land compensation and R&R benefits could be allowed as per the provisions of LARR Bill. The Committee would like the Government to re-examine the issue and incorporate necessary provisions in the Rules to be framed under the new Act with a view to ensuring that the land owners/farmers/affected families get enhanced compensation and R & R package under the provisions of the LARR Bill, 2011 and at the same time, the pace of implementation of infrastructural projects is not adversely impacted.

164. Debates in the Lok Sabha on 29.8.2013, were referred to during the hearings, to cite various reasons given in respect of the question why effect should be given retrospectively in cases where acquisition has not been completed. Shri Jairam Ramesh, Minister concerned at the relevant time, replied to debate about the retrospective part with respect to Section 24 thus:

... The hon'ble member has also raised question about retrospective clause. This is about Section 24 under which it has been provided that if the award has not been passed under the previous law than the new law will be applicable. Secondly, <u>if the award has been passed and no compensation has been given and no physical possession has been taken the new law will be applicable.</u> The third situation where this Clause will be applicable is when award has been passed but farmer has not been given more than 50 per cent compensation which will entail enforcement of this law. The hon'ble member and several others have raised this apprehension that this Act will ultimately give vast powers to the bureaucracy. In regard to this apprehension I would like to say that we have fixed time limit at every level of the procedure and I hope that the states will adhere to these timelines.

165. It is clear that while replying to the debate, the Minister concerned has stated that there would be lapse only if in case possession has not been taken and compensation has not been paid. The emphasis right from the beginning was on possession. Thus, from the perusal of debate too, it is apparent that the word "or" had been understood as "and".

<u>In Re: Objectives of the Act</u>

166. It was submitted on behalf of the landowners that the consideration of difficulties, harsh consequences, the importance of performance, time lost during litigation, revival of stale claims would not permit deviation from the mandate of the law of Section 24. If obligations are

mandatory, then also intendment of the Act cannot be defeated. As such, it is the duty of the court to disregard such factors and to give contextual interpretation to the intendment. The language of the statute, wherever the context requires, its objects and reasons, the Preamble, its legislative history as well as the accompanying provisions (including the relevant provisions of the old Act) are to be considered by the court. In *Arnit Das v. State of Bihar* MANU/SC/0376/2000 : 2000 (5) SCC 488, the court observed that the ambiguity in the definition of "*juvenile*" is to be resolved by taking into consideration the Preamble and the statement of objects and reasons. *Burrakur Coal Co. Ltd. v. Union of India* MANU/SC/0106/1961 : 1962 (1) SCR 44 and A. Thangal Kunju Musaliar v. M. Venkatachalam Potti MANU/SC/0021/1955 : 1955 SCR 1196. During the hearing, the State had also relied on other decisions to say that where the issue had attained finality, relief ought not to be granted.[22] The Act of 2013 has been enacted considering the difficulties caused by the operation of the earlier laws and to subserve the public interest. Thus, the Court should interpret it in the context of the attendant circumstances. At the same time, the court should not, while ostensibly adopting a purposive or liberal interpretation, affect matters which have become final, or stale. In *Popat Bahiru Govardhane and Ors.* (supra) this aspect, in the context of limitation provisions, was highlighted in the following terms:

16. *It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation.*

In Re: proviso to Section 24(2)

167. In reference to the question whether the proviso is part of Section 24(2) or Section 24(1), it was submitted on behalf of the acquiring authorities and the States that the proviso needs to be read along with the main provision of Section 24(2) and cannot be read with Section 24(1)(b). It was pointed out that this Court has taken the view in *Delhi Metro Rail Corporation Ltd. v. Tarun Pal Singh and Ors.*, MANU/SC/1681/2017 : (2018) 14 SCC 161 that the proviso should be read as part of Section 24(2) of the Act of 2013, cannot be construed as proviso to Section 24(1)(b) whereas in *Delhi Development Authority v. Virender Lal Bahri and Ors.* (supra), a different view has been taken while referring the matter, and it has been observed that it should be treated as a proviso to Section 24(1)(b) and not to Section 24(2). As the interpretation of Section 24(2) is involved in the matter, it is absolutely necessary to socio-justice and whether the proviso is part of Section 24(2) or has to be read as an independent provision or it has to be treated as part of the proviso to Section 24(1)(b), the question is required to be decided as it arises for the purpose of the very provisions of Section 24(2).

168. It was submitted that the statutory provisions are to be read as they exist. Relocation of a proviso by the interpretive process, resulting in its placement at a different place is a drastic judicial measure which can be adopted in rarest of rare cases, and such an exercise may amount to

encroaching upon the legislative field or causing violence to the plain language used by the legislature. By the proviso, Parliament has tried to balance the competitive new rights, and the proviso cannot be lifted and bodily placed at a different place. It was also submitted on behalf of the acquiring authorities that as the Section 24(1)(b) ends with a 'full stop' (.) Section 24(2) ends with a colon (:). These punctuation marks leave no room for any doubt that Parliament consciously used the proviso as an exception to Section 24(2). The placement of the proviso needs no further comparative Rules of interpretation. There is a very clear indication of legislative intent in Section 24(2) itself. Punctuation plays a vital role in interpretation if some ambiguity is there in its interpretation. It is argued that *punctuations* play a very important role in interpreting statutes if some ambiguity is raised in its interpretation. Considering the use of a particular punctuation mark is an accepted method of statutory interpretation.

169. Considering the use of punctuation marks, as a statutory mode of interpretation, full stop means the particular sentence ends and stands detached from the next part. It was also submitted that the proviso is to be read together with the main provision to which it is attached.

170. On the other hand, it was submitted on behalf of the landowners that the proviso does not refer to the main factors of lapse Under Section 24(2). The proviso is not an exemption from lapsing if it is read as part of Section 24(2), then the absurd consequences would follow. The proviso is in accord with Section 24(1)(b) and has to be read as part of it. Reliance has been placed on *D.D.A. v. Virendra Lal Bahri and Ors.* (supra). It was submitted that the proviso could not have been intended to be part of Section 24(2) dealing with lapsing of acquisition where the subject-matter of the proviso is wholly unrelated to physical possession of the land, but only relating to compensation not being deposited. It was also submitted that if the proviso is read with Section 24(2), arbitrary results will follow. The proviso would be arbitrary and liable to be struck down Under Article 14 of the Constitution. In case notification Under Section 4 applies only to a single plot of land or single owner, the conditions of Section 24(2) are not fulfilled acquisition would lapse, and in a case where several pieces of land have been acquired, if compensation in respect of majority landholdings has not been deposited, such acquisition will not lapse, but only higher compensation under the Act of 2013 would be paid. The words "*award being made five years or more prior to the commencement of the Act*" are absent in the proviso. Reading these words to proviso would do violence to the literal language, and its plain meaning proviso and being a beneficial provision must be construed in the way which furthers its performance. It was also submitted that in respect of large chunks of land carved out by the same notification, the compensation in respect of the majority of landholdings has been deposited. In such a case no lapse will take place because the proviso in such a case will not apply and whether in respect of the majority of landholdings, compensation has or has not been deposited, would have no bearing on the issue whether lapsing does or does not take place Under Section 24(2).

With respect to the proviso, various questions arise for consideration.

(a) Interpretation:

171. The main question is whether under the scheme of Section 24 the proviso is treated as part of Section 24(1)(b) or it is part of the exception carved out in Section 24(2) particularly in view of the fact that the word 'or' has been interpreted by us as 'and.' In that context, when *Delhi Metro*

Rail Corporation Ltd. v. Tarun Pal Singh and Ors. MANU/SC/1681/2017 : (2018) 14 SCC 161 as well as when the question was considered in *Delhi Development Authority v. Virender Lal Bahri and Ors.*, [SLP [C] No. 37375/2016], the question did not come up for consideration in any of the matters whether 'or' in two negative conditions in Section 24(2) has to be read conjunctively or disjunctively. When we read the word "*or*" as 'and' in the main part of Section 24(2), it is clear that the proviso has to stay as part of Section 24(2) where it has been placed by the legislature, and only then it makes sense. If 'or' used in-between two negative conditions of '*possession has not been taken*' or '*compensation has not been paid*,' disjunctively, in that case, the proviso cannot be operative and would become otiose and would make no sense as part of Section 24(2). In case of amount not having been paid the acquisition has to lapse, though possession (of the land) has been taken would not be the proper interpretation of the main part as mentioned above, when "or" is read conjunctively, Section 24(2) provided for lapse in a case where possession has not been taken, nor compensation has been paid, in such a case proviso becomes operative in given exigency of not depositing amount with respect to majority of landholdings.

172. A reading of Section 24(2) shows that in case possession has been taken even if the compensation has not been paid, the proceedings shall not lapse. In case payment has not been made nor deposited with respect to the majority of the holdings in the accounts of the beneficiaries, then all the beneficiaries specified in the notification Under Section 4 of the Act of 1894 shall get the enhanced compensation under the provisions of the Act of 2013. Section 24(2) not only deals with failure to take physical possession but also failure to make payment of compensation. If both things have not been done, there is lapse of the acquisition proceeding. But where payment has been made though possession has been taken or payment has been made to some of the persons but not to all, and it has also not been deposited as envisaged in the proviso, in that event all beneficiaries (under the same award) shall get higher compensation. This is because once possession is been taken, there can be no lapse of the proceedings, and higher compensation is intended on failure to deposit the compensation. Once an award has been passed and possession has been taken, there is absolute vesting of the land, as such higher compensation follows under the proviso, which is beneficial to holders. In a case where both the negative conditions have not been fulfilled, as mentioned in Section 24(2), there is a lapse. Thus, the proviso, in our opinion is a wholesome provision and is, in fact, a part of Section 24(2); it fits in the context of Section 24(2) as deposit is related with the payment of compensation and lapse is provided due to non-payment along with not taking possession for five years or more whereas for non-deposit higher compensation is provided. Thus, when one of the conditions has been satisfied in case payment has been made, or possession has not been taken, there is no lapse of the proceedings as both the negative conditions must co-exist.

173. When we consider the provisions of Section 24(1)(b) where an award has been passed Under Section 11 of the Act of 1894, then such proceedings shall continue under the provisions of the said Act as if it has not been repealed. The only exception carved out is the period of 5 years or more and that too by providing a *non-obstante* Clause in Section 24(2) to anything contained in Section 24(1). The non-obstante Clause qualifies the proviso also to Section 24(2). It has to be read as part of Section 24(2) as it is an exception to Section 24(1)(b). In our opinion, Section 24(1)(b) is a self-contained provision, and is also a part of the non-obstante Clause to the other provisions of the Act as provided in Sub-section (1). Parliament worked out an exception, by providing a *non-obstante* Clause in Section 24(2), to Section 24(1). Compensation is to be paid

Under Section 24(1)(b) under the Act of 1894 and not under the Act of 2013. As such Section 24(2) is an exception to Section 24(1)(b) and the proviso is also an exception which fits in with non-obstante Clause of Section 24(2) only. Any other interpretation will be derogatory to the provisions contained in Section 24(1)(b) which provides that the pending proceedings shall continue under the Act of 1894 as if it had not been repealed, that would include the part relating to compensation too. Even if there is no lapse of proceedings Under Section 24(1)(a), only higher compensation follows Under Section 24(1)(a). Section 24(2) deals with the award having been made five years or before the commencement of the new Act. The legislative history also indicates/it was intended that five years' period should be adequate to make payment of compensation and to take possession. In that spirit, the proviso has been carved out as part of Section 24(2). Thus when Parliament has placed it at a particular place, by a process of reasoning, there can be no lifting and relocation of the provision. To bodily lift it would be an impermissible exercise. Unless it produces absurd results and does not fit in the scheme of the Act and the provisions to which it is attached such an interpretation, doing violence to the express provision, is not a legitimate interpretative exercise. There is no need to add it as the proviso to Section 24(1)(b) as it has not been done by the legislature, and it makes sense where it has been placed. It need not be lifted.

(b) Punctuation used in Section 24(2):

174. Parliament has used the full stop (.) after Section 24(1) and colon (:) after Section 24(2). It cannot be gainsaid that punctuation plays a vital role, particularly when an attempt is made to relocate any part of the provision. The use of the colon is to introduce a Sub-clause that follows logically from the text before it. We are examining this aspect of the colon, additionally. Though as the interpretation of the provision of Section 24(2) and its proviso needs no further deliberation regarding its placement, the same is to be read as a proviso to Section 24(2) and not Section 24(1)(b). Use of punctuation colon reinforces our conclusion and punctuation mark has been an accepted method of statutory interpretation when such a problem arises. Though sometimes punctuation can be ignored also but not generally. The full stop after Section 24(1)(b) expresses deliberate intent to end a particular sentence and detach it from the next part. With regard to the meaning of the punctuation colon, the *University of Oxford Style Guide* states as under:

***Use a colon to introduce a subclause which follows logically from the text before it**, is not a new concept and depends logically on the preceding main clause. Do not use a colon if the two parts of the sentence are not logically connected.*

175. The note of the University of England "Writing Correctly" has also been relied upon on behalf of the State of Haryana. Following discussion has been made:

Colons have a number of functions in a sentence. If you use colons in your writing, use them sparingly, and never use a colon more than once in any sentence.

Rule 1: Colons can be used to introduce a list, but they must <u>follow</u> a complete sentence (independent clause).

Rule 2: Colons can be used to explain, summarise or extend the meaning in a sentence by introducing a word, phrase or Clause that enlarges on the previous statement.

Rule 3: Colons are used to separate the title from the subtitle.

Rule 4: Colons can be used to introduce a quotation in formal academic writing.

176. It is clear that the colon (:) has a reference to the previous statement and enlarges the same and extends the meaning of the sentence. The colon indicates that the text is intrinsically linked to the previous provision preceding it, i.e., Section 24(2) in this case and not Section 24(1). The colon indicates that what follows. The colon proves, explains, defines describes or lists elements of what precedes it. In case the proviso is bodily lifted and placed after Section 24(1)(b), Section 24(2) will end with a "colon," which is never done to end a provision. Certain decisions have been referred to saying that importance and weightage are to be given to punctuation marks. The earlier view was that punctuations were added by the proof readers, and the Acts passed by Parliament did not contain any punctuation. However, it was submitted that in the past century, the English courts realised that the drafts placed before the Parliament also carry punctuations and, thus, it is important to give meaning to the same. *Bennion on Statutory Interpretation* has this to say regarding punctuation marks:

16.8 Punctuation is a part of an Act and may be considered in construing a provision. It is usually of little weight, however, since the sense of an Act should be the same with or without its punctuation.

...

Although punctuation may be considered, it will generally be of little use since the sense of an Act should be the same with or without it. Punctuation is a device not for making meaning, but for making meaning plain. Its purpose is to denote the steps that ought to be made in oral reading and to point out the sense. The meaning of a well-crafted legislative proposition should not turn on the presence or absence of a punctuation mark.

177. In *Marshall v. Cottingham* MANU/UKCH/0040/1981 : (1981) 3 All ER 8 : (1982) Ch 82 at 88, at 12 while referring to the change of position and establishing that punctuation may be used in interpretation, it was held that:

the day is long past when the courts would pay no heed to punctuation in an Act of Parliament.

In Hanlon v. Law Society MANU/UKHL/0021/1980 : (1981) AC 124 at 197 it was held as under:

... not to take account of punctuation disregards the reality that literate people, such as parliamentary draftsmen, punctuate what they write, if not identically, at least in accordance with grammatical principles. Why should not other literate people, such as judges, look at the punctuation in order to interpret the meaning of the legislation as accepted by parliament?

Yet again in Houston v. Burns (1910) AC 337 *at 348, it was held that:*

Punctuation is a rational part of English composition and is sometimes quite significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings.

178. Other decisions were also cited.[23] On similar lines, the American approach to the interpretation of punctuations is different. In *Taylor v. Caribou* 102 Me. 401, 67 A.2 (1907), it was held as under:

We are aware that it has been repeatedly asserted by courts and jurists that punctuation is no part of a statute, and that it ought not to be regarded in construction. This Rule in its origin was founded upon common sense, for in England until 1849 statutes were entrolled upon parchment and enacted without punctuation .... Such a Rule is not applicable to conditions where, as in this State, a bill is printed and is on the desk of every member of the Legislature, punctuation and all, before its final passage. There is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the case of the interpretation of statutes. "Cessante ratione legis cessat ipso lex." Accordingly we find that it has been said that in interpreting a statute punctuation may be resorted to when other means fail ...; that it may aid its construction ...; that by it the meaning may often be determined; that it is one of the means of discovering the legislative intent ...; that it may be of material assistance in determining the legislative intention....

In *Aswini Kumar Ghose* (supra) stated that:

Punctuation is after all a minor element in the construction of a statute, and very little attention is paid to it by English courts. Cockburn, C.J. said in Stephenson v. Taylor: "On the Parliament Roll there is no punctuation and we therefore are not bound by that in the printed copies." It seems, however, that in the Vellum copies printed since 1850 there are some cases of punctuation, and when they occur they can be looked upon as a sort of contemporanea expositio. When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to the punctuation. I need not deny that punctuation may have its uses in some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text.

********* *******

77. *The High Court has rejected the contention of the Petitioner Aswini Kumar Ghosh on two grounds. In the first place it has been said that the comma was no part of the Act. That the orthodox view of earlier English Judges was that punctuation formed no part of the statute appears quite clearly from the observations of Willes, J. in Claydon v. Green. Vigorous expression was given to this view also by Lord Esher, M.R. in Duke of Devonshire v. Connor where he said:*

In an Act of Parliament there are no such things as brackets any more than there are such things as stops.

This view was also adopted by the Privy Council in the matter of interpretation of Indian statutes as will appear from the observations of Lord Hobhouse in Maharani of Burdwan v. Murtunjoy

Singh, namely, that "it is an error to rely on punctuation in construing Acts of the legislature". Same opinion was expressed by the Privy Council in Pugh v. Ashutosh Sen. If, however, the Rule regarding the rejection of punctuation for the purposes of interpretation is to be regarded as of imperfect obligation and punctuation is to be taken at least as contemporanea expositio, it will nevertheless have to be disregarded if it is contrary to the plain meaning of the statute. If punctuation is without sense or conflicts with the plain meaning of the words, the court will not allow it to cause a meaning to be placed upon the words which they otherwise would not have. This leads me to the second ground on which mainly the High Court rejected the plea of the Petitioner Aswini Kumar Ghosh, namely, that the word "other" in the phrase "any other law" quite clearly connects the Indian Bar Councils Act with other laws as alternatives and subjects both to the qualification contained in the adjectival clause. I find myself in complete agreement with the High Court on this point. If the intention was that the adjectival Clause should not qualify the Indian Bar Councils Act, then the use of the word "other" was wholly in apposite and unnecessary. The use of that word unmistakably leads to the conclusion that the adjectival Clause also qualifies something other than "other law". If the intention were that the Indian Bar Councils Act should remain unaffected by the qualifying phrase and should be superseded in toto for the purposes of this Act the legislature would have said "or in any law regulating the conditions etc." It would have been yet simpler not to refer to the Indian Bar Councils Act at all and to drop the adjectival Clause and to simply say "Notwithstanding anything contained in any law". In the light of the true meaning of the title of the Act as I have explained above and having regard to the use of the word "other" I have no hesitation in holding, in agreement with the High Court, that what the non obstante Clause intended to exclude or supersede was not the whole of the Indian Bar Councils Act but to exclude or supersede that Act and any other law only insofar as they or either of them purported to regulate the conditions subject to which a person not entered in the roll of advocates of a High Court might be permitted to practise in that High Court and that the comma, if it may at all be looked at, must be disregarded as being contrary to this plain meaning of the statute.

179. In *Jamshed N. Guzdar* (supra) this Court held that:

42. *The general jurisdiction of the High Courts is dealt with in Entry 11-A under the caption "administration of justice", which has a wide meaning and includes administration of civil as well as criminal justice. The expression "administration of justice" has been used without any qualification or limitation wide enough to include the "powers" and "jurisdiction" of all the courts except the Supreme Court. The semicolon (;) after the words "administration of justice" in Entry 11-A has significance and meaning. The other words in the same entry after "administration of justice" only speak in relation to "constitution" and "organisation" of all the courts except the Supreme Court and High Courts. It follows that under Entry 11-A the State Legislature has no power to constitute and organise the Supreme Court and High Courts. It is an accepted principle of construction of a Constitution that everything necessary for the exercise of powers is included in the grant of power. The State Legislature being an appropriate body to legislate in respect of "administration of justice" and to invest all courts within the State including the High Court with general jurisdiction and powers in all matters, civil and criminal, it must follow that it can invest the High Court with such general jurisdiction and powers including the territorial and pecuniary jurisdiction and also to take away such jurisdiction and powers from the High Court except those, which are specifically conferred under the Constitution on the High Courts. It is not possible to say that investing the City Civil Court with unlimited jurisdiction, taking away the same from the*

High Court, amounts to dealing with "constitution" and "organisation" of the High Court. Under Entry 11-A of List III the State Legislature is empowered to constitute and organise City Civil Court and while constituting such court the State Legislature is also empowered to confer jurisdiction and powers upon such courts inasmuch as "administration of justice" of all the courts including the High Court is covered by Entry 11-A of List III, so long as Parliament does not enact law in that regard under Entry 11-A. Entry 46 of the Concurrent List speaks of the special jurisdiction in respect of the matters in List III. Entry 13 in List III is "... Code of Civil Procedure at the commencement of this Constitution ...". From Entry 13 it follows that in respect of the matters included in the Code of Civil Procedure and generally in the matter of civil procedure Parliament or the State Legislature, as provided by Article 246(2) of the Constitution, acquire the concurrent legislative competence. The 1987 Act deals with pecuniary jurisdiction of the courts as envisaged in the Code of Civil Procedure and as such the State Legislature was competent to legislate under Entry 13 of List III for enacting the 1987 Act.

68. *A Full Bench of the Punjab and Haryana High Court in Rajinder Singh v. Kultar Singh MANU/PH/0164/1980 : AIR 1980 P&H 1, touching the same topic stated thus: (AIR p. 1)*

So far as the High Courts are concerned, the topic of jurisdiction and powers in general is not separately mentioned in any of the entries of List I, but 'administration of justice' as a distinct topic finds a place in Entry 3 of List II *(now Entry 11-A of List III).*

The expression 'administration of justice' occurring in Entry 3 of List II of the VIIth Schedule has to be construed in its widest sense so as to give power to the State Legislature to legislate on all matters relating to administration of justice.

After the words 'administration of justice' in Entry 3 there is a semicolon, and this punctuation cannot be discarded as being inappropriate. The punctuation has been put with a definite object of making this topic as distinct and not having relation only to the topic that follows thereafter. Under Entry 78 of List I, the topic of jurisdiction and powers of the High Courts is not dealt with. Under Entry 3 of List II the State Legislature can confer jurisdiction and powers or restrict or withdraw the jurisdiction and powers already conferred on any of the courts except the Supreme Court, in respect of any statute. Therefore, the State Legislature has the power to make a law with respect to the jurisdiction and powers of the High Court.

180. There are several other decisions, which support the proposition that punctuation marks, especially colons have a significant role in the interpretation of words in a statute. These judgments include Falcon *Tyres Ltd. v. State of Karnataka* MANU/SC/3184/2006 : (2006) 6 SCC 530. It was submitted that the semicolon after the word "cotton" did not mean that the first part of the Section was disjunctive from "such produce" as has been subjected to any physical, chemical or other process. It was further submitted that punctuation is not a safe tool in construction of statute and if the first part of the Section is read as disjunctive from the other part it conflicts with Sl. No. 2 in the Second Schedule. Further it was submitted that definition Section which is the interpretation Clause to the statute begins with the expression "unless the context otherwise requires". This Court held that:

11. *We do not find any substance in the submission of the learned Counsel for the Appellant that the semicolon after the word "cotton" does not mean that the first part of the Section is disjunctive from "such produce" as has been subjected to any physical, chemical or other process. Section 2(A)(1) is in two parts, it excludes two types of food from agricultural produce. According to us, the definition of the agricultural and horticultural produce does not say as to what would be included in the agricultural or horticultural produce, in substance it includes all agricultural or horticultural produce but excludes, (1) tea, coffee, rubber, cashew, cardamom, pepper and cotton from the definition of the agricultural or horticultural produce though all these products as per dictionary meaning or in common parlance would be understood as agricultural produce; and (2) "such produce as has been subjected to any physical, chemical or other process for being made fit for consumption", meaning thereby that the agricultural produce other than what has been excluded, which has been subjected to any physical, chemical or other process for making it fit for consumption would also be excluded from the definition of the agricultural or horticultural produce except where such agricultural produce is merely cleaned, graded, sorted or dried. For example, if the potatoes are cleaned, graded, sorted or dried, they will remain agricultural produce but in case raw potato is subjected to a process and converted into chips for human consumption it would cease to be agricultural produce for the purposes of the Entry Tax Act. The words "such produce" in the second part do not refer to the produce which has already been excluded from the agricultural or horticultural produce but refer to such other agricultural produce which has been subjected to any physical, chemical or other process for being made fit for human consumption.*

The other judgment cited was *State of Gujarat v. Reliance Industries Ltd.* MANU/SC/1245/2017 : (2017) 16 SCC 28 With respect to 'Full Stop' and 'Colon', Vepa P. Sarathi in the Interpretation of Statutes, Fifth Edition discussed the issue thus:

The Stop.-The most important punctuation mark is the period or full stop. It has to be placed at the end of a complete sentence which is neither exclamatory nor interrogatory. Of course, in legislative drafting exclamatory or interrogative sentences will not occur. An incomplete sentence should however end with a dash. It should be noticed carefully whether the final stop should be inside or outside the quotes. One can tell easily by the sense.

Colon.-It implies that what follows explains and amplifies the sentence that comes before it. It is generally used before a quotation, or to take the place of some word such as "namely".

181. *Aswini Kumar Ghose and Anr.* (supra) also dealt with full stops and held that as long as punctuation does not detract from the meaning of the words in the text, it can be a controlling factor in interpretation. In *State of West Bengal v. Swapan Kumar Guha and Ors.* MANU/SC/0120/1982 : (1982) 1 SCC 561, this Court observed that grammar and punctuation are hapless victims of the pace of life and sometimes are used both as a matter of convenience and of meaningfulness. Besides, how far a Clause which follows upon a comma governs every Clause that precedes the comma is a matter not free from doubt. This Court observed that:

5. *Since the sole question for consideration arising out of the FIR, as laid, is whether the Accused are conducting a money circulation scheme, it is necessary to understand what is comprehended within the statutory meaning of that expression. Section 2(c) of the Act provides:*

2. (c) 'money circulation scheme' means any scheme, by whatever name called, for the making of quick or easy money, or for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscriptions;

Grammar and punctuation are hapless victims of the pace of life, and I prefer in this case not to go merely by the commas used in Clause (c) because, though they seem to me to have been placed both as a matter of convenience and of meaningfulness, yet, a more thoughtful use of commas and other gadgets of punctuation would have helped make the meaning of the Clause clear beyond controversy. Besides, how far a Clause which follows upon a comma governs every Clause that precedes the comma is a matter not free from doubt. I, therefore, consider it more safe and satisfactory to discover the true meaning of Clause (c) by having regard to the substance of the matter as it emerges from the object and purpose of the Act, the context in which the expression is used and the consequences necessarily following upon the acceptance of any particular interpretation of the provision, the contravention of which is visited by penal consequences.

182. The present case involves placement of colon preceding to the Proviso to Section 24(2) and not Section 24(1), which ends with a full stop, and it makes sense and the true meaning where Parliament has placed it. The proviso is part of Section 24(2). It is not permissible to alter the provision and to read it as a proviso to Section 24(1)(b), mainly when it makes sense where Parliament so placed it. To read the proviso as part of Section 24(1)(b), will create repugnancy which the provisions contained in Section 24(1)(b). The window period of 5 years is provided to complete the acquisition proceedings where the award has been passed, and the provisions of the Act of 1894 shall be applied as if it has not been repealed. Section 24(2) starts with a non-obstante clause; it plainly is notwithstanding Section 24(1), and the proviso to Section 24(2) enlarges the scope of Section 24(2). When the window period has been provided Under Section 24(1)(b), i.e., Section 24(2) and its proviso, higher compensation cannot follow in case of an award which has been passed within 5 years of the enactment of the Act of 2013 otherwise anomalous results shall accrue. In case proviso is read as a part of Section 24(1)(b), it would be repugnant to the consideration of the provision which has been carved out saving acquisition and providing window period of 5 years to complete the acquisition proceedings. There were cases under the Act of 1894, in which award may have been made in December 2013, a few days before the Act was enforced on 1.1.2014. As the provisions of the Act of 1894 are applicable to such awards, obviously notice of the award has to be given Under Section 12 of the said Act. There is no question of outright deposit. In such event as the deposit is to be made when the Collector is prevented by the exigencies specified in Section 31(2) from making payment. The deposit is not contemplated directly either in the court or the treasury, as the case may be as provided in Section 31(2), corresponding to Section 77(2) of the Act of 2013.

183. The proviso relates to the non-payment. Compensation is deposited when the Collector is prevented from making payment. It is the obligation made Under Section 31(1) to tender the amount and pay unless prevented by the contingencies specified in Section 31(2). Thus, the deposit has a co-relation with the expression "payment has not been made," and the proviso makes sense with Section 24(2) only. In case of non-payment or prevention from payment, compensation is

required to be deposited as the case may be in the Reference Court or otherwise in Treasury, if permissible.

184. The proviso uses the expression that the amount is to be deposited in the account of beneficiaries. Earlier under the Act of 1894, there was no such provision for depositing the amount in the bank account of beneficiaries but the method which was used as per the forms which were prescribed to deposit the amount, it was credited to the Reference Court or in the Treasury in the names of the beneficiaries and as against the award. It was not a separate account but an account of the Reference Court or set apart in the treasury. The proviso has to be interpreted and given the meaning with Section 24(2) as an amount was required to be paid and on being prevented had to be deposited as envisaged under the Act of 1894.

185. If we hold that even if the award has been passed within 5 years and the compensation amount has not been deposited with respect to such an award passed in the window period, higher compensation to follow if it is not deposited with respect to the majority of the holdings would amount to re-writing the statute. The provision of Section 24(1)(a) is clear if an award has not been passed, higher compensation to follow. No lapse is provided. In case award has been passed within the window period of Section 24(1)(b), *inter alia*, the provisions for compensation would be that of the Act of 1894. The only exception to Section 24(1) is created by the non-obstante Clause in Section 24(2) by providing that in case the requisite steps have not been taken for 5 years or more, then there is lapse as a negative condition. The proviso contemplates higher compensation, in case compensation has not been paid, and the amount has not been deposited with respect to the majority of the holdings, to all the beneficiaries under the Act of 2013, who were holding land on the date of notification Under Section 4. If the proviso is added, Section 24(1)(b) will destroy the very provision of Section 24(1)(b) providing proceedings to continue under the Act of 1894, which is not the function of the proviso to substitute the main Section but to explain it. It is not to cause repugnancy with the main provision. The function of the proviso is to explain or widen the scope. It is a settled proposition of law that the proviso cannot travel beyond the provision to which it is attached. The proviso would travel beyond the Act of 1894 as it is the intention of Section 24(1)(b) the proceedings to govern by the Act of 1894. Thus, the proviso has no space to exist with Section 24(1)(b), and it has rightly not been attached by Parliament, with Section 24(2) and has been placed at the right place where it should have been.

186. It is in the cases where there is no lapse Under Section 24(2) if either step has been taken proviso operates to provide higher compensation. In the cases where possession has been taken, but the amount has not been deposited as required under the proviso, higher compensation to all the beneficiaries has to follow as once possession has been taken, the land is vested in the State and payment is necessary for any acquisition. As such, Parliament has provided in such cases higher compensation to follow as envisaged in the proviso to Section 24(2). Lapse of acquisition is provided only in the exigencies where possession has not been taken, nor compensation has been paid in the proceedings for acquisition pending as on the date on which the Act of 2013 came into force, then the State Government has to initiate fresh proceedings if it so desires. The proviso is part of the scheme of Section 24(2), and the entire provision of Section 24(2), including the proviso, operates when inaction is there for a period of 5 years or more, as contemplated therein.

187. The fundamental consideration is that the proviso cannot supersede the main provision of Section 24(1)(b) and destroy it. The function of the proviso is to except out the pressing provisions to which it is attached. In case possession has been taken, but only a few beneficiaries have been paid, there is no lapse. Even if nobody has been paid, there is no lapse once possession has been taken. In case compensation has not been deposited with respect to the majority of the holdings, there is no lapse, but higher compensation to all the beneficiaries has to follow. The provision provides equal treatment to all, not only to a few-and, in effect, is similar to Section 28A of the Act of 1894-in case the obligation to pay or deposit has not been discharged and there is no arrangement of money to discharge the obligation either by paying or depositing in the Reference Court and, if permissible, in the treasury. Section 24(2) saves land which has been vested in the State, once award has been passed and possession of land. However, in case compensation has not been deposited with respect to majority of landowners, in any given award, all beneficiaries have to be paid higher compensation under the new Act.

188. It was urged that Section 24(1) and 24(2) deal with different subjects. It was submitted that Section 24(1) deals with compensation, whereas Section 24(2) deals with the lapsing of the acquisition. We are unable to accept the submission. Section 24(2) also deals with payment of compensation and taking of possession. Section 24(1)(a) is concerning a situation where no award has been made, higher compensation under the new Act to follow. In Section 24(1)(b) where the award is made (at the time of coming into force of the new Act) further proceedings would be under the new law; subject to Section 24(2), the provisions of the Act of 1894 would apply to such an award. Thus, the main part of Section 24(2) deals with payment of compensation; also the proviso which provides for higher compensation to be paid to all is in the context of Section 24(2) and cannot be lifted and added to Section 24(1)(b) in the aforesaid circumstances. What would be the majority of the landholdings has to be seen in the context, what has been acquired in the case of a single plot being acquired, and in case compensation has not been deposited with respect to that, it will constitute the majority. The majority does not depend upon the number of holdings acquired, but what constitutes the majority as per the acquired area under the notification.

189. Section 24(1)(a) operates where no award is made in a pending acquisition proceeding; in such event all provisions of the new Act relating to determination of compensation would apply. Section 24(1)(b) logically continues with the second situation, i.e. where the award has been passed, and states that in such event, proceedings would continue under the Act of 1894. Section 24(2)-by way of an exception, states that where an award is made but requisite steps have not been taken for five years or more to take possession nor compensation has been paid then there is lapse of acquisition. If one of the steps has been taken, then the proviso can operate. Time is the essence. It is on the basis of time-lag that the lapse is provided and in default of payment for five years as provided on failure to deposit higher compensation is to be paid. It is based on that time-lag higher compensation has to follow. It is not the mere use of colon Under Section 24(2) but the placement of the proviso next to Section 24(2) and not below Section 24(1)(b). Thus, it is not permissible to alter a placement of proviso more so when it is fully in consonance with the provisions of Section 24(2). Section 24(2) completely obliterates the old *regime* to the effect of its field of operation. Under Section 24(1)(a), there is a partial lapse of the old regime because all proceedings, till the stage of award are preserved. The award, in such proceedings, made after coming into force of the Act of 2013 has to take into account its provisions, for determination of compensation. Thus, proceedings upto the stage of the award are deemed final under the old Act. In the case Under

Section 24(1)(b), the old regime prevails. The proviso is an exception to Section 24(2) and in part the new regime for payment of higher compensation in case of default for 5 years or more after award.

In re: Proviso to be read as part of provision it is appended

190. A proviso has to be construed as a part of the Clause to which it is appended. A proviso is added to a principal provision to which it is attached. It does not enlarge the enactment. In case the provision is repugnant to the enacting part, the proviso cannot prevail. Though in absolute terms of a later Act. Its placement has been considered, and purpose has been considered in the following decisions. It was observed in *State of Rajasthan v. Leela Jain and Ors*. that MANU/SC/0013/1964 : 1965 (1) SCR 276:

14. ...So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the Section and carve out something which but for the proviso would have been within the operative part. ....

Similarly, this Court in *Sales-tax Officer, Circle 1, Jabalpur v. Hanuman Prasad* MANU/SC/0226/1966 : 1967 (1) SCR 831 stated that:

5. .... It is well-recognised that a proviso is added to a principal Clause primarily with the object of taking out of the scope of that principal Clause what is included in it and what the Legislature desires should be excluded. ....

In *Commissioner of Commercial Taxes, Board of Revenue, Madras and Anr. v. Ramkishan Shrikishan Jhaver etc.* MANU/SC/0046/1967 : AIR (1968) SC 59 it was observed:

8. *... Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be a substantive provision itself. ....*

191. In *S. Sundaram Pillai and Ors. v. V.R. Pattabiraman and Ors.* MANU/SC/0387/1985 : (1985) 1 SCC 591, the scope of a proviso was clarified. The relevant discussion is quoted as under:

27. *The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an Explanation either to a proviso or to any other statutory provision. We shall first take up the question of the nature, scope and extent of a proviso. The well established Rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.*

***

*"**29.** Odgers in Construction of Deeds and Statutes (5th Edn.) while referring to the scope of a proviso mentioned the following ingredients:*

P. 317. Provisos --These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it.

P. 318. Though framed as a proviso, such a Clause may exceptionally have the effect of a substantive enactment.

30. *Sarathi in Interpretation of Statutes at pages 294-295 has collected the following principles in regard to a proviso:*

(a) When one finds a proviso to a Section the natural presumption is that, but for the proviso, the enacting part of the Section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the Clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the Section as the proviso speaks the latter intention of the makers.

(d) Where the Section is doubtful, a proviso may be used as a guide to its interpretation: but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of Section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision.

***

35. *A very apt description and extent of a proviso was given by Lord Loreburn in Rhondda Urban District Council v. Taff Vale Railway Co.,* 1909 AC 253, *where it was pointed out that insertion of a proviso by the draftsman is not always strictly adhered to its legitimate use and at times a Section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before. To the same effect is a later decision of the same Court in Jennings v. Kelly,* 1940 AC 206, *where it was observed thus:*

We must now come to the proviso, for there is, I think, no doubt that, in the construction of the section, the whole of it must be read, and a consistent meaning, if possible, given to every part of

it. The words are:... 'provided that such licence shall be granted only for premises situate in the ward or district electoral division in which such increase in population has taken place...' There seems to be no doubt that the words "such increase in population" refer to the increase of not less than 25 per cent of the population mentioned in the opening words of the section.

36. *While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.*

37. *In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself.*

***

43. *We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:*

(1) qualifying or excepting certain provisions from the main enactment:

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

192. *Craies on Statute Law,* 7th Edn., has observed, with respect to the construction of provisos thus:

The effect of an excepting or qualifying proviso, according to the ordinary Rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.

R. v. Dibdin, 1910 P 57 (CA), held as under:

The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental Rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting Clause instead of being dependent on the main enactment. The courts ... have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words

absolutely in their strict literal sense, disregarding the fundamental consideration that they are appearing in the proviso.

193. *Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai* MANU/SC/0328/1965 : 1966 (1) SCR 367, considered the effect of a proviso and said that its function is "*to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the Section would have included the subject-matter of the proviso.*" Similar observations and considerations weighed in *Haryana State Cooperative Land Development Bank Ltd. v. Haryana State Cooperative Land Development Banks Employees Union and Anr.* MANU/SC/1092/2003 : (2004) 1 SCC 574 and other decisions noted below.[24] In *Subhaschandra Yograj Sinha* (supra) it was observed that:

(9) The law with regard to provisos is well settled and well understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But, provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be construed as controlled by the section. The proviso which has been added to Section 50 of the Act deals with the effect of repeal. The substantive part of the Section repealed two Acts which were in force in the State of Bombay. If nothing more had been said, Section 7 of the Bombay General clauses Act would have applied, and all pending suits and proceedings would have continued under the old law, as if the repealing Act had not been passed. The effect of the proviso was to take the matter out of Section 7 of the Bombay General Clauses Act and to provide for a special saving. It cannot be used to decide whether Section 12 of the Act is retrospective. It was observed by Wood, V.C., in Fitzgerald v. Champneys, (1861) 70 ER 958 *that saving clauses are seldom used to construe Acts. These clauses are introduced into Acts which repeal others, to safeguard rights which, but for the savings, would be lost. The proviso here saves pending suits and proceedings, and further enacts that suits and proceedings then pending are to be transferred to the courts designated in the Act and are to continue under the Act and any or all the provisions of the Act are to apply to them. The learned Solicitor-General contends that the savings Clause enacted by the proviso, even if treated as substantive law, must be taken to apply only to suits and proceedings pending at the time of the repeal which, but for the proviso, would be governed by the Act repealed. According to the learned Attorney-General, the effect of the savings is much wider, and it applies to such cases as come within the words of the proviso, whenever the Act is extended to new areas.*

194. In *Motiram Ghelabhai v. Jagan Nagar and Ors.* MANU/SC/0286/1985 : (1985) 2 SCC 279, the view taken in Bhojraj (supra) was affirmed and applied. It was observed that provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which case they will not be construed as controlled by the section. In *Madhu Gopal v. VI Additional District Judge and Ors.* MANU/SC/0262/1988 : 1988 (4) SCC 644 this Court has laid down that in any event, it is a well-settled principle of construction that unless clearly indicated, a proviso would not take away substantive rights given by the Section or the sub-section. In *The King v. Dominion Engineering Co. Ltd.* MANU/PR/0039/1946 : AIR (34) 1947 PC 94, it was held that where a Section of an enactment contains two provisions and the second proviso is repugnant in

any way to the first, the second proviso must prevail for it stands last in the enactment and speaks the last intention of the makers. The following observations were made:

(7) Proviso 2 qualifies the main enactment in the matter of delivery no less than does proviso 1 and it also qualifies proviso 1 itself. For it provides "further" that "in any case where there is no physical delivery of the goods," the tax is to be payable when the property in the goods passes to the purchaser. Thus where there is no physical delivery the notional delivery which proviso 1 introduces is rendered inapplicable. Anger J. found in proviso 2 an alternative ground for his decision against the Crown and it is the main ground of Hudson J.'s judgment in the Supreme Court. In their Lordships' view this proviso presents an insuperable obstacle to the Crown's claim. There has been no physical delivery of the goods by the Dominion Company to the Pulp Company. The proviso enacts that "in any case" where there has been no physical delivery the tax is to be payable when the property passes. The property in the goods in question has never passed to the Pulp Company. Consequently the tax has never become payable. If proviso 2 is repugnant in any way to proviso 1 it must prevail for it stands last in the enactment and so to quote Lord Tenterden C.J., "speaks the last intention of the maker" ((1831), 2 B. & Ad. 818 *at p. 821). The word is with the Respondent, the Dominion Company, and must prevail.*

195. The proviso thus, is not foreign to compensation to be paid Under Section 24(2). It provides what is dealt with in Section 24(2) and takes to its logical conclusion, and provides for higher compensation, where there is and can be no lapsing of acquisition proceedings. The Rule of construction-as is clear from the preceding case law discussed, is that the proviso should be limited in its operation to the subject-matter in a clause. A proviso is ordinarily a proviso and has to be harmoniously construed with the provisions. In our opinion, the proviso is capable of being harmoniously construed with Section 24(2) and not with Section 24(1)(b), once we interpret the word 'or' as 'nor' in Section 24(2).

196. In keeping with the ratio in the aforesaid decisions, this Court is of the considered view that the proviso cannot nullify the provision of Section 24(1)(b) nor can it set at naught the real object of the enactment, but it can further by providing higher compensation, thus dealing with matters in Section 24(2). Therefore, in effect, where award is not made [Section 24 (1)(a)] as well as where award is made but compensation is not deposited in respect of majority of the landowners in a notification (for acquisition) [i.e. proviso to Section 24(2)] compensation is payable in terms of the new Act, i.e., Act of 2013.

197. For the aforesaid reasons, considering the placement of the proviso, semi-colon having been used at the end of Section 24(2), considering the interpretation of Section 24(1)(b) and the repugnancy which would be caused in case the proviso is lifted which is not permissible and particularly when we read the word 'or' as 'nor' in Section 24(2), it has to be placed where the legislature has legislated it, it has not been wrongly placed as part of Section 24(2) but is intended for beneficial results of higher compensation for one and all where there is no lapse, but amount not deposited as required. Higher compensation is contemplated by the Act of 2013, which intention is fully carried forward by the placement and interpretation.

In re: What is the meaning to be given to the word "paid" used in Section 24(2) and "deposited" used in the proviso to Section 24(2)

198. Connected with this issue are questions like what is the consequence of payment not being made Under Section 31(1) and what are the consequences of amount not deposited Under Section 31(2). The provision of Section 24(2) when it provides that compensation has not been paid where award has been made 5 years or more prior to the commencement of the Act of 2013. In contradistinction to that, the proviso uses the expression "*an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries*". We have to find out when an amount is required to be deposited under the Act of 1894 and how the payment is made under the Act of 1894. The provisions of Section 31 of the Act of 1894 are attracted to the interpretation of provisions of Section 24(2) to find out the meaning of the words 'paid' and 'deposited'. Section 31(1) makes it clear that on passing of award compensation has to be tendered to the beneficiaries and Collector shall pay it to them. The payment is provided only in Section 31(1). The expression 'tender' and pay to them in Section 31(1) cannot include the term 'deposited.'

199. Section 31(2) of the Act of 1894 deals with deposit in case Collector is 'prevented' from making payment by one or more contingencies mentioned in Section 31(2). The deposit follows if the Collector is prevented from making payment. In case Collector is prevented from making payment due to contingencies such refusal to receive the amount, or if there be no person competent to alienate the land, or if there is a dispute as to the title to receive the compensation or as to the apportionment of it, he (i.e. the Collector) may withhold it or in case there is dispute as to apportionment, he may ask the parties to get a decision from the Reference Court i.e., civil court and to clear the title. In such exigencies, the amount of compensation is required to be deposited in the court to which reference would be submitted Under Section 18. Section 31(2) requires deposit in case of reference under Section 18 and not the reference, which may be sought Under Section 30 or Section 28A of the Act of 1894.

200. Section 24(2) deals with the expression *where compensation has not been paid*. It would mean that it has not been tendered for payment Under Section 31(1). Though the word 'paid' amounts to a completed event however once payment of compensation has been offered/tendered Under Section 31(1), the acquiring authority cannot be penalized for non-payment as the amount has remained unpaid due to refusal to accept, by the landowner and Collector is prevented from making the payment. Thus, the word 'paid' used in Section 24(2) cannot be said to include within its ken 'deposit' Under Section 31(2). For that special provision has been carved out in the proviso to Section 24(2), which deals with the amount to be deposited in the account of beneficiaries. Two different expressions have been used in Section 24. In the main part of Section 24, the word 'paid' and in its proviso 'deposited' have been used.

201. The consequence of non-deposit of the amount has been dealt with in Section 34 of the Act of 1894. As per Section 24(2), if the amount has not been paid nor possession has been taken, it provides for lapse. Whereas the proviso indicates amount has not been deposited with respect to a majority of land holdings in a case initiated under the Act of 1894 for 5 years or more. The period of five years need not have been specified in the proviso as it is part of Section 24(2) and has to be read with it, particularly in view of the colon and placement by the legislature as held above. Two different consequences of non-deposit of compensation are: (i) higher compensation in a case where possession has been taken, payment has been made to some and amount has not been deposited with respect to majority of the holdings, (ii) in case there is no lapse, the beneficiaries

would be entitled to interest as envisaged Under Section 34 from the date of taking possession at the rate of 9% per annum for the first year and after that @ 15% per annum.

202. The word "paid" has been defined in the Oxford Dictionary to mean thus:

*"**paid** past and past participle of **pay**"; Give a sum of money thus owned.*

Cambridge English Dictionary, defines "paid" as follows:

being given money for something.

P. Ramanatha Aiyar's Advance Law Lexicon, 3rd Edition, 2005, uses the following definition of "paid":

applied; settled: satisfied.

203. The word "paid" in Section 31(1) to the landowner cannot include in its ambit the expression "deposited" in court. Deposit cannot be said to be payment made to landowners. Deposit is on being prevented from payment. However, in case there is a tender of the amount that is to mean amount is made available to the landowner that would be a discharge of the obligation to make the payment and in that event such a person cannot be penalised for the default in making the payment. In default to deposit in court, the liability is to make the payment of interest Under Section 34 of Act of 1894. Sections 32 and 33 (which had been relied upon by the landowners' counsel to say that valuable rights inhere, in the event of deposit with court, thus making deposit Under Section 31 mandatory) provide for investing amounts in the Government securities, or seeking alternative lands, *in lieu* of compensation, etc. Such deposits, cannot fetch higher interest than the 15 per cent contemplated Under Section 34, which is *pari materia* to Section 80 of Act of 2013. Section 34 is *pari materia* to Section 80 of Act of 2013 in which also the similar rate of interest has been specified. Even if the amount is not deposited in Reference Court nor with the treasury as against the name of the person interested who is entitled to receive it, if Collector has been prevented to make the payment due to exigencies provided in Section 31(2), interest to be paid. However, in case the deposit is made without tendering it to the person interested, the liability to pay the interest Under Section 34, shall continue. Even assuming deposit in the Reference Court is taken to be mandatory, in that case too interest has to follow as specified in Section 34. However, acquisition proceeding cannot lapse due to non-deposit.

204. The concept of "deposit" is different and quite apart from the word "paid", due to which, lapse is provided in Section 24 of Act of 2013. In the case of non-deposit for the majority of landholdings, higher compensation would follow as such word "paid" cannot include in its ambit word "deposited". To hold otherwise would be contrary to provisions contained in Section 24(2) and its proviso carrying different consequences. It is provided in Section 34 of Act of 1894, in case payment has not been tendered or paid, nor deposited the interest has to be paid as specified therein. In Section 24(2) also lapse is provided in case amount has not been paid and possession has not been taken.

205. In our considered opinion, there is a breach of obligation to deposit even if it is taken that amount to be deposited in the reference court in exigencies being prevented from payment as provided in Section 31(2). The default will not have the effect of reopening the concluded proceedings. The legal position and consequence which prevailed from 1893 till 2013 on failure to deposit was only the liability for interest and all those transactions were never sought to be invalidated by the provisions contained in Section 24. It is only in the case where in a pending proceeding for a period of five years or more, the steps have not been taken for taking possession and for payment of compensation, then there is a lapse Under Section 24(2). In case amount has not been deposited with respect to majority of land holdings, higher compensation has to follow. Both lapse and higher compensation are qualified with the condition of period of 5 years or more.

206. It was submitted that mere tender of amount is not payment. The amount has to be actually paid.

In our opinion, when amount has been tendered, the obligation has been fulfilled by the Collector. Landowners cannot be forced to receive it. In case a person has not accepted the amount wants to take the advantage of non-payment, though the amount has remained due to his own act. It is not open to him to contend that amount has not been paid to him, as such, there should be lapse of the proceedings. Even in a case when offer for payment has been made but not deposited, liability to pay amount along with interest subsist and if not deposited for majority of holding, for that adequate provisions have been given in the proviso also to Section 24(2). The scheme of the Act of 2013 in Sections 77 and 80 is also the same as that provided in Sections 31 and 34 of the Act of 1894.

207. It was urged that landowners can seek investment in an interest bearing account, there is no doubt about that investment can be sought from the court Under Sections 32 and 33 of Act of 1894, but interest in Government securities is not more than what is provided in Section 34 at the rate of 9 percent from the date of taking possession for one year and thereafter, at the rate of 15 percent. We take judicial notice of the fact in no other Government security rate of interest is higher on the amount being invested Under Sections 32 and 33 of the Act of 1894. Higher rate of interest is available Under Section 34 to the advantage of landowners. It was submitted that in case the amount is deposited in the court, it is on behalf of the beneficiary. The submission overlooks the form in which it used to be deposited in the treasury too, that amount is also credited in the treasury payable to the beneficiary specified in his name with land details, date of award, etc.

208. There is another reason why this Court holds that such an interpretation is reasonable and in tune with Parliamentary intent. Under the old *regime*, it was open to the Collector to fix a convenient date or dates for announcement of award, and tender payment. In the event of refusal by the landowner to receive, or in other cases, such as absence of the true owner, or in case of dispute as to who was to receive it, no doubt, the statute provided that the amount was to be deposited with the court: as it does today, Under Section 77. Yet, neither during the time when the Act of 1894 was in operation, nor under the Act of 2013, the entire acquisition does not lapse for non-deposit of the compensation amount in court. This is a significant aspect which none of the previous decisions have noticed. Thus, it would be incorrect to imply that failure to deposit compensation [in court, Under Section 31(2)] would entail lapse, if the amounts have not been paid for five years or more prior to the coming into force of the Act of 2013. Such an interpretation

would lead to retrospective operation, of a provision, and the nullification of acquisition proceedings, long completed, by imposition of a norm or standard, and its application for a time when it did not exist.

209. If the expression "deposited" is held to be included in the expression "paid" used in Section 24(2) of the Act of 2013, inconsistency and repugnancy would be caused as between the proviso and the main sub-section, which has to be avoided and the non-compliance of the provisions of Section 31(2) is not fatal. Even if the amount has not been deposited, higher compensation has to follow in the exigency proviso to Section 24(2).

210. In Black's Law Dictionary, the word "tender" has been defined to mean thus:

tender, *n. (16c) 1. A valid and sufficient offer of performance; specific, an unconditional offer of money or performance to satisfy a debt or obligation a tender of delivery. The tender may save the tendering party from a penalty for non-payment or non-performance or may, if the other party unjustifiably refuses the tender, place the other party in default. Cf. OFFER OR PERFORMANCE; CONSIGNATION.*

211. It is apparent that "tender" of the amount saves the party tendering it from the consequence to be visited on non-payment of the amount. The obligation to make the payment has been considered in various other laws and decisions. When obligation to payment is fulfilled as to the scheme in the context of a particular act, for that purpose, decisions under various other laws are relevant and cannot be said to be irrelevant.

212. In *The Straw Board Manufacturing Co. Ltd., Saharanpur v. Gobind* MANU/SC/0298/1962 : 1962 (Supp 3) SCR 318, this Court considered the provisions requiring payment of one month's wage Under Section 33 of Industrial Disputes Act for making a valid discharge or dismissal. This Court has held that the employer has tendered the wages and that would amount for payment, otherwise a workman can make the provision unworkable by refusing to take the wages. This Court has observed thus:

(8) Let us now turn to the words of the proviso in the background of what we have said above. The proviso lays down that no workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer. It will be clear that two kinds of punishment are subject to the conditions of the proviso, namely, discharge or dismissal. Any other kind of punishment is not within the proviso. Further the proviso lays down two conditions, namely, (i) payment of wages for one month and (ii) making of an application by the employer to the authority before which the proceeding is pending for approval of the action taken. It is not disputed before us that when the proviso lays down the conditions as to payment of one month's wages, all that the employer is required to do in order to carry out that condition is to tender the wages to the employee. But if the employee chooses not to accept the wages he cannot come forward and say that there has been no payment of wages to him by the employer. Therefore, though Section 33 speaks of payment of one month's wages it can only mean that the employer has tendered the wages and that would amount to payment, for otherwise a workman could always make the Section unworkable by refusing to take the wages. So far as the second condition about

the making of the application is concerned, the proviso requires that the application should be made for approval of the action taken by the employer.

213. In *The Management of Delhi Transport Undertaking v. The Industrial Tribunal, Delhi and Anr.* MANU/SC/0208/1964 : 1965 (1) SCR 998, a three-Judge Bench of this Court has laid down the law to the similar effect. It is not actual payment, but tender of amount which is necessary to fulfil obligation to pay. This Court observed thus:

4....The proviso does not mean that the wages for one month should have been actually paid, because in many cases the employer can only tender the amount before the dismissal but cannot force the employee to receive the payment before dismissal becomes effective. In this case the tender was definitely made before the order of dismissal became effective and the wages would certainly have been paid if Hari Chand had asked for them. There was no failure to comply with the provision in this respect.

214. In *Indian Oxygen Ltd. v. Narayan Bhoumik* MANU/SC/0488/1968 : (1968) 1 PLJR 94, it was held that the "*the condition as to payment in the proviso does not mean that wages have to be actually paid but if wages are tendered or offered, such a tender or offer would be sufficient compliance*" with the statute. *The Benares State Bank Ltd. v. The Commissioner of Income Tax, Lucknow* MANU/SC/0623/1969 : (1969) 2 SCC 316, was decided in the context of Section 14(2)(c) of the Income Tax Act, 1922. It was observed that "paid" Under Section 16 does not contemplate actual receipt of the dividend by the Member of the community. It is to be made unconditionally available to the members entitled to it. It observed thus:

5. *...This Court observed in J. Dalmia v. Commissioner of Income-tax, Delhi, MANU/SC/0107/1964 : 53 ITR 83 that the expression "paid" in Section 16(2) does not contemplate actual receipt of the dividend by the member: in general, dividend may be said to be paid within the meaning of Section 16(2) when the company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto. ...*

215. Two different expressions have been used in Section 24(2). The expression "paid" has been used in Section 24(2) and whereas in the proviso "deposited" has been used. "Paid" cannot include "deposit", or else Parliament would have used different expressions in the main sub- Section and its proviso, if the meaning were to be the same. The Court cannot add or subtract any word in the statute and has to give plain and literal meaning and when compensation has not been paid Under Section 24(2), it cannot mean compensation has not been deposited as used in the proviso. While interpreting the statutory provisions, addition or subtraction in the legislation is not permissible. It is not open to the court to either add or subtract a word. There cannot be any departure from the words of law, as observed in legal maxim "*A Verbis Legis Non Est. Recedendum*". In *Principles of Statutory Interpretation* (14th Edition) by Justice G.P. Singh, plethora of decisions have been referred. There is a conscious omission of the word "deposit" in Section 24(2), which has been used in the proviso. Parliament cannot be said to have used the different words carrying the same meaning in the same provision, whereas words "paid" and "deposited" carry a totally different meaning. Payment is actually made to the landowner and deposit is made in the court, that is not the payment made to the landowner. It may be discharge of liability of payment of interest and not more than that. Applying the Rule of literal construction also natural, ordinary and popular

meaning of the words "paid" and "deposited" do not carry the same meaning; the natural and grammatical meaning has to be given to them, as observed in Principles of Statutory Interpretation by Justice G.P. Singh (at page 91) thus:

... Natural and grammatical meaning. The words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary." "The true way", according to LORD BROUGHAM is, "to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those Words is, either by the preamble or by the context of the words in question, controlled or alter "; and in the words of VISCOUNT HALDANE, L.C., if the language used "has a natural meaning we cannot depart from that meaning unless reading the statute as a whole, the context directs us to do so. In an oft-quoted passage, LORD WENSLEYDALE stated the Rule thus: "In construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the word is adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, and inconsistency, but no further". And stated LORD ATKINSON: "In the construction of statutes, their words must be interpreted in their ordinary grammatical sense unless there be something in the context, or in the object of the statute in which they occur or in the circumstances in which they are used, to show that they were used in a special sense different from their ordinary grammatical sense". 28 VISCOUNT SIMON, L.C., said: "The golden Rule is that the words of a statute must prima facie be given their ordinary meaning". Natural and ordinary meaning of words should not be departed from "unless it can be shown that the legal context in which the words are used requires a different meaning". Such a meaning cannot be departed from by the judges "in the light of their own views as to policy" although they can "adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy". For a modern statement of the rule, one may refer to the speech of LORD SIMON OF GLAISDALE in a case where he said: "Parliament is prima facie to be credited with meaning what is said in an Act of Parliament. The drafting of statutes, so important to a people who hope to live under the Rule of law, will never be satisfactory unless courts seek whenever possible to apply 'the golden rule' of construction, that is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. Of course, Parliament is to be credited with good sense; so that when such an approach produces injustice, absurdity, contradiction or stultification of statutory objective the language may be modified sufficiently to avoid such disadvantage, though no further". The Rules stated above have been quoted with approval by the Supreme Court .....

216. The same work also notes that when two different expressions are used in the same provision of a statute, there is a presumption that they are not used in the same sense. The following passage is relevant (*Principles of Statutory Interpretation* by Justice G.P. Singh at page 395):

..... When in relation to the same subject matter, different words are used in the same statute, there is a presumption that they are not used in the same sense.

In construing the words 'distinct matters' occurring in Section 5 of the Stamp Act, 1899, and in concluding that these words have not the same meaning as the words 'two or more of the descriptions in Schedule I' occurring in Section 6, VENKATARAMA AIYAR, J., observed: "When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense." Similarly, while construing the word 'gain' Under Section 3(ff) of the Bombay Municipal Corporation Act, 1888, which used the words 'profit or gain', the Supreme Court relied on the dictionary meanings of the words to hold that the word 'gain' is not synonymous with the word 'profit' as it is not restricted to pecuniary or commercial profits, and that any advantage or benefit acquired or value addition made by some activities would amount to 'gain' .....

****14. Brighton Parish Guardians v. Strand Union Guardians,* (1891) 2 QB 156, p. 167 (CA); *Member, Board of Revenue v. Arthur Paul Benthall* MANU/SC/0002/1955 : AIR 1956 SC 35, p. 38 : 1955 (2) SCR 842; *CIT v. East West Import & Export (P.) Ltd., Jaipur* MANU/SC/0136/1989 : AIR 1989 SC 836, p. 838 : (1989) 1 SCC 760; *B.R. Enterprises v. State of U.P.* MANU/SC/0330/1999 : AIR 1999 SC 1867, p. 1902: (1999) 9 SCC 700 *('trade and business' in Article* 298 *have different meaning from 'trade and commerce' in Article* 301); *ShriIshal Alloy Steels Ltd. v. Jayaswalas Neco Ltd.,* MANU/SC/0121/2001 : JT 2001 (3) SC 114, p. 119 : (2001) 3 SCC 609 : AIR 2001 SC 1161 *(The words 'a bank' and 'the bank' in Section* 138 *N.I. Act, 1881 do not have the same meaning); The Oriental Insurance Co. Ltd. v. Hansrajbhai v. Kodala* MANU/SC/0235/2001 : AIR 2001 SC 1832, p. 1842 : (2001) 5 SCC 175; *Kailash Nath Agarwal v. Pradeshiya Indust and Inv.* Corporation of U.P., MANU/SC/0114/2003 : 2003 AIR SCW 1358, p. 1365 : (2003) 4 SCC 305, p. 313. *(The words 'proceeding' and 'suit' used in the same Section construed differently); But in Paramjeet Singh Pathak v. ICDS Ltd.,* MANU/SC/4798/2006 : (2006) 13 SCC 322: AIR 2007 SC 168 *different view was taken therefore in Zenith Steel Tubes v. SICOM Ltd.,* MANU/SC/8129/2007 : (2008) 1 SCC 533 : AIR 2008 SC 451 *case referred to a larger Bench; D.L.F. Qutab Enclave Complex Educational Charitable Trust v. State of Haryana,* MANU/SC/0116/2003 : 2003 AIR SCW 1046, p. 1057 : AIR 2003 SC 1648 : (2003) 5 SCC 622 *(The expressions 'at his own cost' and 'at its cost,' used in one Section given different meanings)*

217. In Privy Council decisions in *Crawford v. Spooner* MANU/PR/0007/1846 : (1846) 6 Moore PC 1 and *Lord Howard de Walden v. IRC and Anr.* MANU/WB/0111/1946 : (1948) 2 AER 825 following observations have been made:

... we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction, makeup deficiencies which are left there.

...

It is contrary to all Rules of construction to read words into an Act unless it is necessary to do so. Similarly, it is wrong and dangerous to proceed by substituting some other words for words of the statute. Speaking briefly the court cannot reframe the legislation for the very good reason that it has no power to legislate.

218. In *V.L.S. Finance Ltd.* (supra) this Court observed that:

17. *Ordinarily, the offence is compounded under the provisions of the Code of Criminal Procedure and the power to accord permission is conferred on the court excepting those offences for which the permission is not required. However, in view of the non-obstante clause, the power of composition can be exercised by the court or the Company Law Board. The legislature has conferred the same power on the Company Law Board which can exercise its power either before or after the institution of any prosecution whereas the criminal court has no power to accord permission for composition of an offence before the institution of the proceeding. The legislature in its wisdom has not put the rider of prior permission of the court before compounding the offence by the Company Law Board and in case the contention of the Appellant is accepted, same would amount to addition of the words "with the prior permission of the court" in the Act, which is not permissible.*

18. *As is well settled, while interpreting the provisions of a statute, the court avoids rejection or addition of words and resorts to that only in exceptional circumstances to achieve the purpose of the Act or give purposeful meaning. It is also a cardinal Rule of interpretation that words, phrases, and sentences are to be given their natural, plain, and clear meaning. When the language is clear and unambiguous, it must be interpreted in an ordinary sense, and no addition or alteration of the words or expressions used is permissible. As observed earlier, the aforesaid enactment was brought in view of the need of leniency in the administration of the Act because a large number of defaults are of technical nature, and many defaults occurred because of the complex nature of the provision.*

219. In *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* MANU/SC/0722/2012 : (2012) 9 SCC 552, this Court observed thus:

65. *Mr. Sorabjee has also rightly pointed out the observations made by Lord Diplock in Duport Steels Ltd. v. Sirs,* MANU/UKHL/0031/1980 : (1980) 1 WLR 142. *In the aforesaid judgment, the House of Lords disapproved the approach adopted by the Court of Appeal in discerning the intention of the legislature; it is observed that: (WLR p. 157 C-D)*

...the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous, it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations, there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount.

In the same judgment, it is further observed: (WLR p. 157 F)

... But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts....

***

67. *We are unable to accept the submission of the learned Counsel for the Appellants that the omission of the word "only" from Section 2(2) indicates that applicability of Part I of the Arbitration Act, 1996 is not limited to the arbitrations that take place in India. We are also unable to accept that Section 2(2) would make Part I applicable even to arbitrations which take place outside India. In our opinion, a plain reading of Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India. We are in agreement with the submissions made by the learned Counsel for the Respondents, and the interveners in support of the Respondents, that Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily therefore, it has enacted that Part I of the Arbitration Act, 1996 applies to arbitrations having their place/seat in India.*

***

82. *Another strong reason for rejecting the submission made by the learned Counsel for the Appellants is that if Part I were to be applicable to arbitrations seated in foreign countries, certain words would have to be added to Section 2(2). The Section would have to provide that "this part shall apply where the place of arbitration is in India and to arbitrations having its place out of India." Apart from being contrary to the contextual intent and object of Section 2(2), such an interpretation would amount to a drastic and unwarranted rewriting/alteration of the language of Section 2(2). As very strongly advocated by Mr. Sorabjee, the provisions in the Arbitration Act, 1996 must be construed by their plain language/terms. It is not permissible for the court while construing a provision to reconstruct the provision. In other words, the court cannot produce a new jacket, whilst ironing out the creases of the old one. In view of the aforesaid, we are unable to support the conclusions recorded by this Court as noticed earlier.*

220. In *Harbhajan Singh* (supra) the following observations were made:

7. *.... Ordinary, grammatical and full meaning is to be assigned to the words used while interpreting a provision to honour the Rule -- the legislature chooses appropriate words to express what it intends, and therefore, must be attributed with such intention as is conveyed by the words employed so long as this does not result in absurdity or anomaly or unless material -- intrinsic or external -- is available to permit a departure from the rule.*

221. In *The Member, Board of Revenue v. Arthur Paul Benthall* MANU/SC/0002/1955 : 1955 (2) SCR 842 this Court held as under:

4. *We are unable to accept the contention that the word "matter" in Section 5 was intended to convey the same meaning as the word "description" in Section 6. In its popular sense, the expression "distinct matters" would connote something different from distinct "categories". Two transactions might be of the same description, but all the same, they might be distinct.*

If A sells Black-acre to X and mortgages White-acre to Y, the transactions fall under different categories, and they are also distinct matters. But if A mortgages Black-acre to X and mortgages White-acre to Y, the two transactions fall under the same category, but they would certainly be distinct matters.

If the intention of the legislature was that the expression 'distinct matters' in Section 5 should be understood not in its popular sense but narrowly as meaning different categories in the Schedule, nothing would have been easier than to say so. When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the expression "distinct matters" in Section 5 and "descriptions" in Section 6 have different connotations.

222. In *Commissioner of Income Tax, New Delhi v. M/s. East West Import and Export (P) Ltd.* MANU/SC/0136/1989 : (1989) 1 SCC 760, it was observed as under:

7. *The Explanation has reference to the point of time at two places: the first one has been stated as "at the end of the previous year" and the second, which is in issue, is "in the course of such previous year". Counsel for the revenue has emphasised upon the feature that in the same Explanation reference to time has been expressed differently and if the legislative intention was not to distinguish and while stating "in the course of such previous year" it was intended to convey the idea of the last day of the previous year, there would have been no necessity of expressing the position differently. There is abundant authority to support the stand of the counsel for the revenue that when the situation has been differently expressed the legislature must be taken to have intended to express a different intention.*

Several other decisions have reiterated the same proposition, i.e. that when the legislature uses two different expressions in the same statute, they must be given different meanings, to carry out legislative intent.[25]

223. The land owners had argued that the obligation to pay gets discharged only when compensation is actually paid and/or deposited. Even if it is received under protest Under Section 31(1), it is finally accepted by the landowners post-settlement by the Reference Court. We are not able to accept the submission as Section 34 of the Act of 1894, is clear even if the amount is not paid or deposited, it carries interest. The logic behind this is that if the State is retaining the amount with peace and its liability to pay does not cease, but it would be liable to make the payment with interest as envisaged therein. Once tender is made, obligation to pay is fulfilled so that the amount cannot be said to have been paid, but obligation to pay has been discharged and if a person who has not accepted it, cannot penalise the other party for default to pay and non-deposit carries only interest as money had been retained with the Government.

224. Thus, in our opinion, the word "paid" used in Section 24(2) does not include within its meaning the word "deposited", which has been used in the proviso to Section 24(2). Section 31 of the Act of 1894, deals with the deposit as envisaged in Section 31(2) on being 'prevented' from making the payment even if the amount has been deposited in the treasury under the Rules framed Under Section 55 or under the Standing Orders, that would carry the interest as envisaged Under Section 34, but acquisition would not lapse on such deposit being made in the treasury. In case amount has been tendered and the landowner has refused to receive it, it cannot be said that the liability arising from non-payment of the amount is that of lapse of acquisition. Interest would follow in such a case also due to non-deposit of the amount. Equally, when the landowner does not accept the amount, but seeks a reference for higher compensation, there can be no question of such individual stating that he was not paid the amount (he was determined to be entitled to by the

collector). In such case, the landowner would be entitled to the compensation determined by the Reference court.

In re: Rules framed Under Section 55 and the Standing Orders issued by State Governments

225. It was urged on behalf of acquiring Authorities that various State Governments have framed Rules Under Section 55 of the Act of 1894 and/or have issued the Standing Orders/instructions with respect to the Government money Under Article 283 of the Constitution of India. These Standing Orders and Rules have remained in force from time immemorial; their provisions require the amount to be tendered, notice to be issued to the landowners to collect the amount of compensation awarded to them. If they do not appear and apply to the reference Under Section 18, the officer shall cause the amounts due to be paid into the treasury as revenue deposits payable to the persons to whom they are respectively due and vouched for in the accompanying form (marked E). When the payee ultimately claims the payment, they shall be paid in the same manner as ordinary revenue deposits. The Land Acquisition (Bihar and Orissa) Rules were framed Under Section 55 of the Act of 1894. Rule 10 thereof is extracted hereunder:

10. In giving notice of the award Under Section 12(2) and tendering payment Under Section 31(1), to such of the persons interested as were not present personally or by their representatives when the award was made, the officer shall require them to appear personally or by representatives by a certain date to receive payment of the compensation awarded to them, intimating also that no interest will be allowed to them if they fail to appear. If they do not appear, and do not apply for reference to the Civil Court Under Section 18, the officer shall after any further endeavour to secure their attendance that may seem desirable, cause the amounts due to be paid into the Treasury as Revenue deposits payable to the persons to whom they are respectively due and vouched for in the accompanying form (marked E). The officer shall also give notice to the payees of such deposits, the Treasury in which the deposits specifying have been made. When the payees ultimately claim payment of sums placed in deposit, the amounts will be paid to them in the same manner as ordinary revenue deposits. The officer should, as far as possible, arrange to make the payments due in or near the village to which the payees belong, in order that the number of undisbursed sums to be placed in deposit on account of non-attendance may be reduced to a minimum. Whenever payment is claimed through a representative whether before or after deposit of the amount awarded, such representative, must show legal authority for receiving the compensation on behalf of his principal.

226. In the State of Assam, Rules have also been framed Under Section 55 of the Act of 1894, dealing with the deposit. Rule 9 provides that in case reference is not sought Under Section 18, the amount has to be deposited in treasury. Rule 9 is extracted hereunder:

9. In giving notice of the award Under Section 12(2) and tendering payment Under Section 31(1), to such of the persons interested as were not present personally or by their representatives when the award was made, the Collector shall require them to appear personally or by representatives by a certain date, to receive payment of the compensation awarded to them intimating also that no interest will be allowed to them, if they fail to appear. If they do not appear and do not apply for a reference to the Civil Court Under Section 18, he shall, after any further endeavour to secure their attendance or make payment that may seem desirable, cause the amounts due to be paid into

the WW as revenue deposits payable to the persons to whom they are respectively due, and vouched for in the form prescribed or approved by Government from time to time. He shall also give notice to the payees of such deposits, specifying the Treasury in which the deposits have been made. When the payees ultimately claim payment of sums placed in deposit, the amount will be paid to them in the same manner as ordinary revenue deposits. The Collector should, as far as possible, arrange to make the payment due in or near the village to which the land pertains in order that the number of undisbursed sum to be placed in deposit on account of nonattendance may be reduced to a minimum. Whenever payment is claimed through a representative, such representative, must show legal authority for receiving the compensation on behalf of the principal.

227. In the State of Karnataka too similar Rules were framed in 1965 Under Section 55 of the Act of 1894. Similarly, in the State of Kerala also Rule 14(2) of the Land Acquisition (Kerala) Rules, 1990 were framed Under Section 55 of the Act of 1894, provided that payment relating to award shall be made or the amount shall be credited to the court or revenue deposit (treasury) within one month from the date of the award. Similar Rules were framed in the State of Bihar and Orissa.

228. Standing Order No. 28 was issued in 1909 by the State of Punjab and was applicable to Delhi also, which provided five modes of payment in para 74 and 75 thus:

74. Methods of making payments.*--There are five methods of making payments:*

(1) By direct payments, see Para 75(I) infra

(2) By order on treasury, see Para 75(II) infra

(3) By money order, see Para 75(III) infra

(4) By cheque, see Para 75(IV) infra

(5) By deposit in a treasury, see Para 75(V) infra

75. Direct payments.*-- * * **

(V) ***By treasury deposit****.-- In giving notice of the award Under Section 12(2) and tendering payment Under Section 31(1) to such of the persons interested as were not present personally or by their representatives when the award was made, the officer shall require them to appear personally or by representatives by a certain date to receive payment of the compensation awarded to them, intimating also that no interest will be allowed to them if they fail to appear, if they do not appear and do not apply for a reference to the civil court Under Section 18, the officer shall after any further endeavours to secure their attendance that may seem desirable, cause the amounts due to be paid to the treasury as revenue deposits payable to the persons to whom they are respectively due and vouched for in the form marked E below. The officer shall also give notice to the payees of such deposits, specifying the treasury in which the deposit has been made. When the payees ultimately claim payment of sums placed in deposit, the amounts will be paid to them in the same manner as ordinary revenue deposit. The officer should, as far as possible, arrange to*

make the payments due in or near the village to which the payee belong in order that the number of undisbursed sums to be placed in deposits on account of non-attendance may be reduced to a minimum. Whenever payment is claimed through a representative whether before or after deposit of the amount awarded, such representative, must have legal authority for receiving the compensation on behalf of his principal.

Form E	Form E
Name of work for which land has been acquired _____ To the officer incharge of _____ treasury Please receive for transfer to credit of revenue deposit the sum of Rs. _____ on account of compensation for land taken up for the above purpose payable as detailed below:-	Name of work for which land has been acquired _____ To the officer incharge of _____ treasury Please receive for transfer to credit of revenue deposit the sum of Rs. _____ on account of compensation for land taken up for the above purpose payable as detailed below:-

Serial Number in award statement No.	Name of persons to whom due	Area of land	Amount payable to each	Remarks		Name of persons to whom due	Area of land	Amount payable to each	Remarks
		Acres	Rs.				Acres	Rs.	

Total _____ Total _____
Land Acquisition Officer Land Acquisition Officer

Dated _____ Dated _____

Received the above amount and credited to Revenue deposit

Received the above amount and credited to Revenue deposit

Treasury Officer
Note – this form should be used when the amounts of compensation due are sent to treasury in the absence of proprietors who have failed to present themselves for payment.

Treasury Officer
Note – this form should be used when amounts of compensation due are sent to treasury in the absence of proprietors who have failed to present themselves for payment."

Sub-para (V) of the above made it clear that payment is credited to the treasury when a person who is served with a notice Under Section 12(2) of the Act of 1894, is not present and the award is passed. When a notice is given to receive the payment of compensation and in case they fail to appear, the amount has to be paid to the treasury as revenue deposit payable to the landowner.

229. Rules and the Standing Orders are binding on the concerned Authorities and they have to follow them. They deposit the amounts in court only when a reference (for higher compensation) is sought, not otherwise. Even if a person refuses to accept it and the amount is deposited in court or even it is not tendered, only higher interest follows Under Section 34. Once Rules have prevailed since long and even if it is assumed that deposit in court is mandatory on being prevented from payment as envisaged Under Section 31(1), the only liability to make the payment of higher interest is fastened upon the State. The liability to pay the amount with interest would subsist. When amounts are deposited in court, there would occur a procedural irregularity and the adverse consequence envisaged is Under Section 34 of the Act of 1894. The consequence of non-deposit in the court is that the amount of the landowner cannot be invested in the Government securities as envisaged Under Sections 32 and 33 of the Act of 1894, in which interest is not more 15 per cent. Thus, no prejudice is caused to the landowners rather they stand to gain and still payment is safe as it is kept in the court. We have already held that there is a distinction between the expression "paid" and "deposited", thus the amount being deposited as per Rules in the treasury or as per the

Standing Orders considering the scheme of Section 31 read with Section 34 of the Act of 1894, which are *pari materia* to Sections 77 and 80 of the Act of 2013. We are of the considered opinion that acquisition cannot be invalidated, only higher compensation would follow in case amount has not been deposited with respect to majority of land holdings, all the beneficiaries would be entitled for higher compensation as envisaged in the proviso to Section 24(2).

230. Deposit in treasury in place of deposit in court causes no prejudice to the landowner or any other stakeholder as their interest is adequately safeguarded by the provisions contained in Section 34 of the Act of 1894, as it ensures higher rate of interest than any other Government securities. Their money is safe and credited in the earmarked quantified amount and can be made available for disbursement to him/them. There is no prejudice caused and every infraction of law would not vitiate the act.

231. In *Jankinath Sarangi v. State of Orissa* MANU/SC/0502/1969 : (1969) 3 SCC 392, this Court observed that every infraction of law would not vitiate the act. It has further been observed that test is actual prejudice has been caused to a person by the supposed denial to him of a particular right. Following observations have been made:

5. *From this material it is argued that the principles of natural justice were violated because the right of the Appellant to have his own evidence recorded was denied to him and further that the material which was gathered behind his back was used in determining his guilt. In support of these contentions a number of rulings are cited chief among which are State of Bombay v. Narul Latif Khan,* MANU/SC/0309/1965 : (1965) 3 SCR 135; *State of Uttar Pradesh v. Sri C.S. Sharma,* MANU/SC/0017/1967 : (1967) 3 SCR 848 *and Union of India v. T.R. Varma,* MANU/SC/0121/1957 : (1958) SCR 499. *There is no doubt that if the principles of natural justice are violated, and there is a gross case, this Court would interfere by striking down the order of dismissal, but there are cases and cases. We have to look to what actual prejudice has been caused to a person by the supposed denial to him of a particular right. Here the question was a simple one, viz. whether the measurement book prepared for the contract work had been properly scrutinised and checked by the Appellant or not. He did the checking in March 1954 and immediately thereafter in May 1954 the Executive Engineer re-checked the measurements and found that the previous checking had not been done properly. Between March and May there could not be much rainfall, if at all, and the marks of digging according to the witnesses could not be obliterated during that time. It is however said that at the 6th and 7th mile the checking was done in July and by that time rains might have set in. Even so the witnesses at the sites of the pits could not be so considerably altered as to present a totally wrong picture. If anything had happened the earth would have swollen rather than contracted by reason of rain and the pits would have become bigger and not smaller. Anyway the questions which were put to the witnesses were recorded and sent to the Chief Engineer and his replies were received. No doubt the replies were not put in the hands of the Appellant but he saw them at the time when he was making the representations and curiously enough he used those replies in his defence. In other words, they were not collected behind his back and could be used to his advantage and he had an opportunity of so using them in his defence. We do not think that any prejudice was caused to the Appellant in this case by not examining the two retired Superintending Engineers whom he had cited or any one of them. The case was a simple one whether the measurement book had been properly checked. The pleas about rain and floods were utterly useless and the Chief Engineer's elucidated replies were not against*

the Appellant. In these circumstances a fetish of the principles of natural justice is not necessary to be made. We do not think that a case is made out that the principles of natural justice are violated. The appeal must fail and is accordingly dismissed, but we will make no order as to costs.

232. In *Sunil Kumar Banerjee v. State of West Bengal and Ors.,* MANU/SC/0456/1980 : (1980) 3 SCC 304 the Court observed:

3. *There is no substance in the contention of the Appellant that the 1955 Rules and not the 1969 Rules were followed. As pointed out by the High Court, in the charges framed against the Appellant and in the first show cause notice the reference was clearly to the 1969 Rules. The Appellant himself mentioned in one of his letters that the charges have been framed under the 1969 Rules. The enquiry report mentions that Shri Mukherjee was appointed as an Enquiry Officer under the 1969 Rules. It is, however true that the Appellant was not questioned by the Enquiry Officer Under Rule 8(19) which provided as follows:*

The enquiring authority may, after the member of the services closes his case and shall if the member of the service has not examined himself generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the member of the service to explain any circumstances appearing in the evidence against him.

It may be noticed straight away that this provision is akin to Section 342 of the Code of Criminal Procedure of 1898 and Section 313 of the Code of Criminal Procedure of 1973. It is now well established that mere non-examination or defective examination Under Section 342 of the 1898 Code is not a ground for interference unless prejudice is established, vide, K.C. Mathew v. State of Travancore-Cochin, MANU/SC/0037/1955 : AIR 1956 SC 24; *Bibhuti Bhusan Das Gupta v. State of W.B.*, MANU/SC/0252/1968 : AIR 1969 SC 381 *We are similarly of the view that failure to comply with the requirements of Rule 8(19) of the 1969 Rules does not vitiate the enquiry unless the delinquent officer is able to establish prejudice. In this case the learned Single Judge the High Court as well as the learned Judges of the Division Bench found that the Appellant was in no way prejudiced by the failure to observe the requirement of Rule 8(19). The Appellant cross-examined the witnesses himself, submitted his defence in writing in great detail and argued the case himself at all stages. The Appellant was fully alive to the allegations against him and dealt with all aspects of the allegations in his written defence. We do not think that he was in the least prejudiced by the failure of the Enquiry Officer to question him in accordance with Rule 8(19).*

A similar view has been taken in the *State of Andhra Pradesh v. Thakkidiram Reddy* MANU/SC/0490/1998 : (1998) 6 SCC 554 and other decisions.

233. There is a dual obligation, *namely*, part mandatory and part directory. In *Howard v. Secretary of State for the Environment*, MANU/UKWA/0092/1973 : (1975) Q.B. 235, Lord Denning has cited a portion from the speech of Lord Penzance, which is extracted hereunder:

Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster ... A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and

the proceedings that follow upon it are all void. On the other hand, when the courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail."

Later Lord Denning M.R. said, at pp. 242-243:

The Section is no doubt imperative in that the notice of appeal must be in writing and must be made within the specified time. But I think it is only directory as to the contents. Take first the requirement as to the 'grounds' of appeal. The Section is either imperative in requiring 'the grounds' to be indicated, or it is not. That must mean all or none. I cannot see any justification for the view that it is imperative as to one ground and not imperative as to the rest. If one was all that was necessary, an Appellant would only have to put in one frivolous or hopeless ground and then amend later to add his real grounds. That would be a futile exercise. Then as to 'stating the facts.' It cannot be supposed that the Appellant must at all cost state all the facts on which he bases his appeal. He has to state the facts, not the evidence: and the facts may depend on evidence yet to be obtained, and may not be fully or sufficiently known at the time when the notice of appeal is given. All things, considered, it seems to me that the section, in so far as the 'grounds' and 'facts' are concerned, must be construed as directory only: that is, as desiring information to be given about them. It is not to be supposed that an appeal should fail altogether simply because the grounds are not indicated, or the facts stated. Even if it is wanting in not giving them, it is not fatal. The defects can be remedied later, either before or at the hearing of the appeal, so long as an opportunity is afforded of dealing with them.

234. In *Belvedere Court Management Ltd. v. Frogmore Developments Ltd.* MANU/UKWA/0094/1995 : (1996) 3 W.L.R. 1008 at p. 1032, a distinction was made between essential and supportive provisions. The following observations are pertinent:

By way of final comment I would add that I am strongly attracted to the view that legislation of the present kind should be evaluated and construed on an analytical basis. It should be considered which of the provisions are substantive and which are secondary, that is, simply part of the machinery of the legislation. Further, the provisions which fall into the latter category should be examined to assess whether they are essential parts of the mechanics or are merely supportive of the other provisions so that they need not be insisted on regardless of the circumstances. In other words, as in the construction of contractual and similar documents, the status and effect of a provision has to be assessed having regard to the scheme of the legislation as a whole and the role of that provision in that scheme-for example, whether some provision confers an option properly so called, whether some provision is equivalent to a condition precedent, whether some requirement can be fulfilled in some other way or waived. Such an approach when applied to legislation such as the present would assist to enable the substantive rights to be given effect to and would help to avoid absurdities or unjustified lacunae.

235. In *Sharif-ud-Din* (supra) the difference between mandatory and directory Rules was pointed out thus:

9. *The difference between a mandatory Rule and a directory Rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the*

object regarding which the Rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the Rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word "shall" while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural Rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another Rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

236. Similarly, in *Ram Deen Maurya (Dr.) v. State of Uttar Pradesh and Ors.* MANU/SC/0648/2009 : (2009) 6 SCC 735 this Court observed that non-compliance with the directory provision does not affect the validity of the act done in breach thereof. In *Rai Vimal Krishna and Ors. v. State of Bihar and Ors.* MANU/SC/0455/2003 : (2003) 6 SCC 401, this Court considered the mode of publication and held that publication in a newspaper was the only effective mode and that the provision was mandatory.

237. This Court also considered the effect of non-deposit of the amount in *Hissar Improvement v. Smt. Rukmani Devi and Anr.* MANU/SC/0354/1990 : 1990 Supp SCC 806 and held that in case compensation has not been paid or deposited, the State is liable to pay interest as provided in Section 34. The Court held thus:

5. *It cannot be gainsaid that interest is due and payable to the landowner in the event of the compensation not being paid or deposited in time in court. Before taking possession of the land, the Collector has to pay or deposit the amount awarded, as stated in Section 31, failing which he is liable to pay interest as provided in Section 34.*

6. *In the circumstances, the High Court was right in stating that interest was due and payable to the landowner. The High Court was justified in directing the necessary parties to appear in the executing court for determination of the amount.*

238. In *Kishan Das v. State of U.P.* MANU/SC/0072/1996 : (1995) 6 SCC 240, this Court observed that where land owners themselves delayed the acquisition proceedings, it is discretionary for the

court to award the interest and they cannot get the premium on their dilatory tactics. This Court stated that:

4. *In the light of the operation of the respective provisions of Sections 34 and 28 of the Act, it would be difficult to direct payment of interest. In fact, Section 23(1-A) is a set-off for loss in cases of delayed awards to compensate the person entitled to receive compensation; otherwise a person who is responsible for the delay in disposal of the acquisition proceedings will be paid premium for dilatory tactics. It is stated by the learned Counsel for the Respondents that the amount of interest was also calculated and total amount was deposited in the account of the Appellants by the Land Acquisition Officer after passing the award, i.e., on 15-11-1976 in a sum of Rs. 20,48,615. Under these circumstances, the liability to pay interest would arise when possession of the acquired land was taken and the amount was not deposited. In view of the fact that compensation was deposited as soon as the award was passed, we do not think that it is a case for us to interfere at this stage.*

239. In *D-Block Ashok Nagar (Sahibabad) Plot Holders' Assn. v. State of U.P.* MANU/SC/0775/1997 : (1997) 10 SCC 77, it was observed that liability to pay interest Under Section 34 arises from the date of taking possession.

240. It was argued that in fact in many cases, reference was sought as such the amounts being deposited in the treasury were not valid. Reference was sought for higher compensation and landowners had declined to accept the compensation for no good reason they could have received it under protest reserving their right to seek the reference and in case compensation was not paid or deposited, they could have claimed it along with interest as envisaged Under Section 34.

241. It is clear that once land is acquired, award passed and possession has been taken, it has vested in the State. It had been allotted to beneficiaries. A considerable infrastructure could have been developed and a third-party interest had also intervened. The land would have been given by the acquiring authorities to the beneficiaries from whose schemes the land had been acquired and they have developed immense infrastructure. We are unable to accept the submission that merely by deposit of amount in treasury instead of court, we should invalidate all the acquisitions, which have taken place. That is not what is contemplated Under Section 24(2). We are also not able to accept the submission that when law operates these harsh consequences need not be seen by the court. In our opinion, that submission is without merit in as such consequences are not even envisaged on proper interpretation of Section 24(2), as mentioned above.

242. The proviso to Section 24(2) of the Act of 2013, intends that the Collector would have sufficient funds to deposit it with respect to the majority of landholdings. In case compensation has not been paid or deposited with respect to majority of land holdings, all the beneficiaries are entitled for higher compensation. In case money has not been deposited with the Land Acquisition Collector or in the treasury or in court with respect to majority of landholdings, the consequence has to follow of higher compensation as per proviso to Section 24(2) of the Act of 2013. Even otherwise, if deposit in treasury is irregular, then the interest would follow as envisaged Under Section 34 of Act of 1894. Section 24(2) is attracted if acquisition proceeding is not completed within 5 years after the pronouncement of award. Parliament considered the period of 5 years as reasonable time to complete the acquisition proceedings *i.e.*, taking physical possession of the land

and payment of compensation. It is the clear intent of the Act of 2013, that provision of Section 24(2) shall apply to the proceeding which is pending as on the date on which the Act of 2013, has been brought into force and it does not apply to the concluded proceedings. It was urged before us by one of the Counsel that lands in the Raisina Hills and Lutyens' Zones of Delhi were acquired in 1913 and compensation has not been paid. The Act of 2013 applies only to the pending proceedings in which possession has not been taken or compensation has not paid and not to a case where proceedings have been concluded long back, Section 24(2) is not a tool to revive those proceedings and to question the validity of taking acquisition proceedings due to which possession in 1960s, 1970s, 1980s were taken, or to question the manner of deposit of amount in the treasury. The Act of 2013 never intended revival such claims. In case such landowners were interested in questioning the proceedings of taking possession or mode of deposit with the treasury, such a challenge was permissible within the time available with them to do so. They cannot wake from deep slumber and raise such claims in order to defeat the acquisition validly made. In our opinion, the law never contemplates-nor permits-misuse much less gross abuse of its provisions to reopen all the acquisitions made after 1984, and it is the duty of the court to examine the details of such claims. There are several litigations before us where landowners, having lost the challenge to the validity of acquisition proceedings and after having sought enhancement of the amount in the reference succeeding in it nevertheless are seeking relief arguing about lapse of acquisition after several rounds of litigation.

243. The expression used in Section 24(1)(b) is '*where an award Under Section 11 has been made*", then '*such proceedings shall continue*' under the provisions of the said Act of 1894 as if the said Act has not been repealed'. The expression "proceedings shall continue" indicates that proceedings are pending at the time; it is a present perfect tense and envisages that proceedings must be pending as on the date on which the Act of 2013 came into force. It does not apply to concluded proceedings before the Collector after which it becomes *functus officio*. Section 24 of the Act of 2013, does not confer benefit in the concluded proceedings, of which legality if question has to be seen in the appropriate proceedings. It is only in the pending proceedings where award has been passed and possession has not been taken nor compensation has been paid, it is applicable. There is no lapse in case possession has been taken, but amount has not been deposited with respect to majority of land holdings in a pending proceeding, higher compensation under the Act of 2013 would follow under the proviso to Section 24(2). Thus, the provision is not applicable to any other case in which higher compensation has been sought by way of seeking a reference under the Act of 1894 or where the validity of the acquisition proceedings have been questioned, though they have been concluded. Such case has to be decided on their own merits and the provisions of Section 24(2) are not applicable to such cases.

In re: Issue No. 4: mode of taking possession under the Act of 1894

244. Section 16 of the Act of 1894 provided that possession of land may be taken by the State Government after passing of an award and thereupon land vest free from all encumbrances in the State Government. Similar are the provisions made in the case of urgency in Section 17(1). The word "possession" has been used in the Act of 1894, whereas in Section 24(2) of Act of 2013, the expression "physical possession" is used. It is submitted that drawing of *panchnama* for taking over the possession is not enough when the actual physical possession remained with the landowner and Section 24(2) requires actual physical possession to be taken, not the possession in

any other form. When the State has acquired the land and award has been passed, land vests in the State Government free from all encumbrances. The act of vesting of the land in the State is with possession, any person retaining the possession, thereafter, has to be treated as trespasser and has no right to possess the land which vests in the State free from all encumbrances.

245. The question which arises whether there is any difference between taking possession under the Act of 1894 and the expression "physical possession" used in Section 24(2). As a matter of fact, what was contemplated under the Act of 1894, by taking the possession meant only physical possession of the land. Taking over the possession under the Act of 2013 always amounted to taking over physical possession of the land. When the State Government acquires land and drawns up a memorandum of taking possession, that amounts to taking the physical possession of the land. On the large chunk of property or otherwise which is acquired, the Government is not supposed to put some other person or the police force in possession to retain it and start cultivating it till the land is used by it for the purpose for which it has been acquired. The Government is not supposed to start residing or to physically occupy it once possession has been taken by drawing the inquest proceedings for obtaining possession thereof. Thereafter, if any further retaining of land or any re-entry is made on the land or someone starts cultivation on the open land or starts residing in the outhouse, etc., is deemed to be the trespasser on land which in possession of the State. The possession of trespasser always inures for the benefit of the real owner that is the State Government in the case.

246. It was urged on behalf of acquiring authorities and the states that there is no conflict of opinion with respect to the mode of taking possession in *IDA v. Shailendra and Pune Municipal* Corporation and Anr. (supra), and that the latter is not a decision as to the aspect of possession. A two-Judge Bench decision in *Shree Balaji Nagar Residential Association* (supra) has been overruled in the *Indore Development Authority case* (supra). The view taken in *Indore Development Authority* (supra) has to prevail as the decision in *Velaxan Kumar* (supra), was rendered by a two judge Bench of this Court. This Court, however, proceeds to examine the matter afresh as issues have been framed.

247. The concept of possession is complex one. It comprises the right to possess and to exclude others, essential is *animus possidendi*. Possession depends upon the character of the thing which is possessed. If the land is not capable of any use, mere non-user of it does not lead to the inference that the owner is not in possession. The established principle is that the possession follows title. Possession comprises of the control over the property. The element of possession is the physical control or the power over the object and intention or will to exercise the power. Corpus and *animus* are both necessary and have to co-exist. Possession of the acquired land is taken under the Act of 1894 Under Section 16 or 17 as the case may be. The government has a right to acquire the property for public purpose. The stage Under Section 16 comes for taking possession after issuance of notification Under Section 4(1) and stage of Section 9(1). Under Section 16, vesting is after passing of the award on taking possession and Under Section 17 before passing of the award.

248. Mitra's "Law of Possession and Ownership of Property", 2nd Edn., expressions 'trespass' and 'trespasser' have been dealt with by the learned Author with the help of *Words and Phrases*, Permanent Edition, West Publishing Co. which has also been quoted with respect to who is a trespasser:

A "trespasser" is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. In re Wimmer's Estate, 182 P.2d 119, 121, 111 Utah 444.

"A "trespasser" is one entering or remaining on land in another's possession without a privilege to do so created by possessor's consent, express or implied, or by law. Keesecker v. G.M. Mckelvey Co., 42 N.E. 2d 223, 226, 227, 68 Ohio App. 505.

249. One who enters or remains in possession on land of another without a privilege to do so, is also treated as a trespasser. On the strength of Full Bench decision of Patna High Court in *S.M. Yaqub v. T.N. Basu* MANU/BH/0240/1948 : AIR 1949 Pat 146, Mitra, has referred to the observation that the possession should not be confused with occupation. A person may be in actual possession of the property without occupying it for a considerable time. The person who has a right to utilise the whole in any way he likes. Possession in part is good enough to infer that the person is in possession of the rest. Learned Author has referred to *Jowitt's Dictionary of English Law*, Ed. 1969, so as to explain what constitutes possession.

There are three requisites of possession. First, there must be actual or potential physical control. Secondly, the physical control is not possession unless accompanied by intention hence if a thing is put into the hand of a sleeping person he has no possession of it. Thirdly, the possibility and intention must be visible or evidence by external signs for if the thing shows no signs of being under the control of anyone, it is not possession.

250. In order to constitute possession, a person should be in physical control. The same is not possession unless and until the intention is there and thirdly, possibility and intention must be visible; otherwise, it is not possession. Mitra has further dealt with how to determine possession. The relevant extract is quoted hereunder:

36. Who is in possession-Determination of.--*In Jones v. Chopman,* (1849) 2 Ex. 803 : 18 LJ Ex. 456 : 76 PR 794; *Maule, J, expounded the doctrine thus:*

If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer, the person who has the title is in actual possession and the other person is a trespasser.

In such a case who is in possession is to be determined by the fact of the title and having the same apparent actual possession;

The question as to which of the two really is in possession is determined by the fact of the possession; following the title, that is by the law, which makes it follow the title.

In Kynoch Limited v. Rowlands, (1912) 1 Ch 527; LJ Ch 340; 106 LT 316; *per Joyce, J, where his Lordship says:*

It is a well settled principle with reference to land at all events ..... that where possession in fact is under terminate or the evidence is undecisive, possession, in law follows the right to possess. As far back as the time of Littleton it was said, "Where two be in one house or other tenements together to claim the said lands and tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that has right to have the possession of the same tenements.

251. A person with title is considered to be in actual possession. The other person is a trespasser. The possession in law follows the right to possess as held in *Kynoch Limited v. Rowlands* (1912) 1 Ch 527. Ordinarily, the owner of the property is presumed to be in possession and presumption as to possession is in his favour. In *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.*, MANU/SC/0266/1979 : (1979) 4 SCC 274, this Court observed that possession implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves the power of control and intent to control. Possession is annexed to right of property.

13. *"Possession" is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of "possession." Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Edn., 1966) caused by the fact that possession is not purely a legal concept. "Possession," implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, ibid.)*

14. *According to Pollock and Wright,*

when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that "possession" is not a purely legal concept but also a matter of fact, Salmond (12th Edn., p. 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned Author the test for determining "whether a person is in possession of anything is whether he is in general control of it.

252. In *Ram Dass v. Davinder* MANU/SC/0265/2004 : (2004) 3 SCC 684, this Court stated that possession and occupation in common parlance may be used interchangeably, but in law possession amounts to holding property as an owner, while to occupy is to keep possession by being present in it. In *Bhinka and Ors. v. Charan Singh, Bhinka and Ors. v. Charan Singh* MANU/SC/0165/1959 : 1959 (Suppl 2) SCR 798, this Court considered the dichotomy between taking and retaining possession. They are mutually exclusive expressions and apply to two different situations. The word 'taking' applies to a person taking possession of a land otherwise than in accordance with the provisions of the law, while the word 'retaining' applies to a person

taking possession in accordance with the provisions of the law, but subsequently retaining the same illegally. In *Bhinka and Ors.* (supra), as to retaining possession, it was observed:

14. *If the Appellants did not take possession of the disputed lands, did they retain possession of the same in accordance with the provisions of the law for the time being in force? The dichotomy between taking and retaining indicates that they are mutually exclusive and apply to two different situations. The word "taking" applies to a person taking possession of a land otherwise than in accordance with the provisions of the law, while the word "retaining" to a person taking possession in accordance with the provisions of the law but subsequently retaining the same illegally. So construed, the Appellants' possession of the lands being illegal from the inception, they could not be described as persons retaining possession of the said lands in accordance with the provisions of any law for the time being in force, so as to be outside the scope of Section 180 of the Act.*

253. Under Section 16 of the Act of 1894, vesting of title in the Government, in the land took place immediately upon taking possession. Under Sections 16 and 17 of the Act of 1894, the acquired land became the property of the State without any condition or limitation either as to title or possession. Absolute title thus vested in the State.

254. This Court in *V. Chandrasekaran and Anr. v. Administrative Officer and Ors.* MANU/SC/0751/2012 : (2012) 12 SCC 133 dealt with the concept of vesting under the Act of 1894. The facts of the said case indicated that the Appellants and the officials of the State and Development Board connived with each other to enable the Appellant to grab/encroach upon the public land, which was acquired and falsified the documents so as to construct flats thereon. Considering the gravamen of the fraud, the Chief Secretary of the State was directed to trace out such officials and to take suitable action against each of them. It was also held by this Court that alienation of land subsequent to notification Under Section 4(1) is void and no title passes on the basis of such sale deed. This Court held that once land vested in the State free from all encumbrances, it cannot be divested. Once land has been acquired, it cannot be restored to tenure-holders/persons interested, even if it is not used for the purpose for which it is so acquired. Once possession of land has been taken, it vests in the State free from all encumbrances. Under Sections 16 and 17, the acquired property becomes the property of the Government without any limitation or condition either as to title or possession. Reliance has been placed on *Fruit and Vegetable Merchants Union* (supra):

19. *That the word "vest" is a word of variable import is shown by provisions of Indian statutes also. For example, Section 56 of the Provincial Insolvency Act (5 of 1920) empowers the court at the time of the making of the order of adjudication or thereafter to appoint a receiver for the property of the insolvent and further provides that "such property shall thereupon vest in such receiver". The property vests in the receiver for the purpose of administering the estate of the insolvent for the payment of his debts after realising his assets. The property of the insolvent vests in the receiver not for all purposes but only for the purpose of the Insolvency Act and the receiver has no interest of his own in the property. On the other hand, Sections 16 and 17 of the Land Acquisition Act (Act 1 of LA), provide that the property so acquired, upon the happening of certain events, shall "vest absolutely in the Government free from all encumbrances". In the cases contemplated by Sections 16 and 17 the property acquired becomes the property of Government*

without any conditions or limitations either as to title or possession. The legislature has made it clear that the vesting of the property is not for any limited purpose or limited duration. It would thus appear that the word "vest" has not got a fixed connotation, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. The provisions of the Improvement Act, particularly Sections 45 to 49 and 54 and 54A when they speak of a certain building or street or square or other land vesting in a municipality or other local body or in a trust, do not necessarily mean that ownership has passed to any of them.

255. In *National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad and Ors.* MANU/SC/1028/2011 : 2011 (12) SCC 695, the concept of vesting was considered. This Court observed that vesting means an absolute and indefeasible right. Vesting, in general sense, means vesting in possession. Vesting may include vesting of interest too. This Court observed thus:

38. *"Vesting" means having obtained an absolute and indefeasible right. It refers to and is used for transfer or conveyance. "Vesting" in the general sense, means vesting in possession. However, "vesting" does not necessarily and always means possession but includes vesting of interest as well. "Vesting" may mean vesting in title, vesting in possession or vesting in a limited sense, as indicated in the context in which it is used in a particular provision of the Act. The word "vest" has different shades, taking colour from the context in which it is used. It does not necessarily mean absolute vesting in every situation and is capable of bearing the meaning of a limited vesting, being limited, in title as well as duration. Thus, the word "vest" clothes varied colours from the context and situation in which the word came to be used in the statute. The expression "vest" is a word of ambiguous import since it has no fixed connotation and the same has to be understood in a different context under different sets of circumstances. [Vide Fruit & Vegetable Merchants Union v. Delhi Improvement Trust,* MANU/SC/0082/1956 : AIR 1957 SC 344, *Maharaj Singh v. State of U.P.* MANU/SC/0361/1976 : AIR 1976 SC 2602, *Municipal Corporation of Hyderabad v. P.N. Murthy* MANU/SC/0487/1987 : AIR 1987 SC 802, *Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu* MANU/SC/0691/1991 : 1991 Supp (2) SCC 228, *M. Ismail Faruqui v. Union of India* MANU/SC/0860/1994 : AIR 1995 SC 605, SCC p. 404, *para 41, Govt. of A.P. v. Nizam, Hyderabad* MANU/SC/0829/1996 : (1996) 3 SCC 282, *K.V. Shivakumar v. Appropriate Authority* MANU/SC/0104/2000 : (2000) 3 SCC 485, *Municipal Corporation of Greater Bombay v. Hindustan Petroleum Corporation* MANU/SC/0517/2001 : AIR 2001 SC 3630 *and Sulochana Chandrakant Galande v. Pune Municipal Transport* MANU/SC/0552/2010 : (2010) 8 SCC 467.]

256. Thus, it is apparent that vesting is with possession and the statute has provided Under Sections 16 and 17 of the Act of 1894 that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified Under Section 16, takes place after various steps, such as, notification Under Section 4, declaration Under Section 6, notice Under Section 9, award Under Section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the state becomes the absolute owner and in possession of the property. Thereafter there is no control of the landowner over the property. He cannot have any

animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser enures for his benefit and on behalf of the owner.

257. After the land has vested in the State, the total control is of the State. Only the State has a right to deal with the same. In *Municipal Corporation of Greater Bombay and Ors. v. Hindustan Petroleum* Corporation and Anr. MANU/SC/0517/2001 : 2001 (8) SCC 143, this Court discussed the concept of vesting in the context of Section 220 of the Bombay Municipal Corporation Act. It has referred to various decisions including that of *Richardson v. Robertson,* (1862) 6 LT 75 thus:

8. *It is no doubt true that Section 220 provides that any drain which vests in the Corporation is a municipal drain and shall be under the control of the Corporation. In this context, the question arises as to what meaning is required to assign to the word "vest" occurring in Section 220 of the Act? In Richardson v. Robertson* 6 LT at p. 78*, it was observed by Lord Cranworth as under: (LT p. 78)*

The word 'vest' is a word, at least, of ambiguous import. Prima facie 'vesting' in possession is the more natural meaning. The expressions 'investiture' -- 'clothing' -- and whatever else be the explanation as to the origin of the word, point prima facie rather to the enjoyment than to the obtaining of a right. But I am willing to accede to the argument that was pressed at the Bar, that by long usage 'vesting' originally means the having obtained an absolute and indefeasible right, as contradistinguished from the not having so obtained it. But it cannot be disputed that the word 'vesting' may mean, and often does mean, that which is its primary etymological signification, namely, vesting in possession.

15. *We are, therefore, of the view that the word "vest" means vesting in title, vesting in possession or vesting in a limited sense, as indicated in the context in which it is used in a particular provision of the Act.*

258. The word 'vest' has to be construed in the context in which it is used in a particular provision of the Act. Vesting is absolute and free from all encumbrances that includes possession. Once there is vesting of land, once possession has been taken, Section 24(2) does not contemplate divesting of the property from the State as mentioned above.

259. Now, the court would examine the mode of taking possession under the Act of 1894 as laid down by this Court. In *Balwant Narayan Bhagde* (supra) it was observed that the act of Tehsildar in going on the spot and inspecting the land was sufficient to constitute taking of possession. Thereafter, it would not be open to the Government or the Commission to withdraw from the acquisition Under Section 48(1) of the Act. It was held thus:

28. *We agree with the conclusion reached by our brother Untwalia, J., as also with the reasoning on which the conclusion is based. But we are writing a separate judgment as we feel that the discussion in the judgment of our learned Brother Untwalia, J., in regard to delivery of "symbolical" and "actual" possession Under Rules 35, 36, 95 and 96 of Order 21 of the Code of Civil Procedure, is not necessary for the disposal of the present appeals and we do not wish to subscribe to what has been said by our learned Brother Untwalia, J., in that connection, nor do*

we wish to express our assent with the discussion of the various authorities made by him in his judgment. We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, LA, it must take actual possession of the land since all interests in the land are sought to be acquired by it. There can be no question of taking "symbolical" possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast Rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable Rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the Appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it.

260. In *Tamil Nadu Housing Board v. A. Viswam* (supra) it was held that drawing of *Panchnama* in the presence of witnesses would constitute a mode of taking possession. This Court observed:

9. *It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or Panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not cooperate in taking possession of the land.*

261. In *Banda Development Authority* (supra) this Court held that preparing a *Panchnama* is sufficient to take possession. This Court has laid down thus:

37. *The principles which can be culled out from the above noted judgments are:*

(i) No hard-and-fast Rule can be laid down as to what act would constitute taking of possession of the acquired land.

(ii) If the acquired land is vacant, the act of the State authority concerned to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the authority concerned will, by itself, be not sufficient for taking possession. Ordinarily, in

such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3-A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the court may reasonably presume that possession of the acquired land has been taken.

262. In *State of Tamil Nadu and Anr. v. Mahalakshmi Ammal and Ors.,* (supra), this Court dealt with the effect of vesting on possession and mode of taking it and opined thus:

9. It is well-settled law that publication of the declaration Under Section 6 gives conclusiveness to public purpose. Award was made on 26-9-1986 and for Survey No. 2/11 award was made on 31-8-1990. Possession having already been undertaken on 24-11-1981, it stands vested in the State Under Section 16 of the Act free from all encumbrances and thereby the Government acquired absolute title to the land. The initial award having been made within two years Under Section 11 of the Act, the fact that subsequent award was made on 31-8-1990 does not render the initial award invalid. It is also to be seen that there is stay of dispossession. Once there is stay of dispossession, all further proceedings necessarily could not be proceeded with as laid down by this Court. Therefore, the limitation also does not stand as an impediment as provided in the proviso to Section 11-A of the Act. Equally, even if there is an irregularity in service of notice Under Sections 9 and 10, it would be a curable irregularity and on account thereof, award made Under Section 11 does not become invalid. Award is only an offer on behalf of the State. If compensation was accepted without protest, it binds such party but subject to Section 28-A. Possession of the acquired land would be taken only by way of a memorandum, *Panchnama*, which is a legally accepted norm. It would not be possible to take any physical possession. Therefore, subsequent continuation, if any, had by the erstwhile owner is only illegal or unlawful possession which does not bind the Government nor vested Under Section 16 divested in the illegal occupant. Considered from this perspective, we hold that the High Court was not justified in interfering with the award.

263. In *Balmokand Khatri Educational and Industrial Trust, Amritsar v. State of Punjab and Ors.* MANU/SC/0329/1996 : (1996) 4 SCC 212, this Court ruled that under compulsory acquisition it is difficult to take physical possession of land. The normal mode of taking possession is by way of drafting the *Panchnama* in the presence of Panchas. This Court observed thus:

4. *It is seen that the entire gamut of the acquisition proceedings stood completed by 17-4-1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the Appellant still retained their possession. It is now well-settled legal position that it is difficult to*

take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession.

5. *Under these circumstances, merely because the Appellant retained possession of the acquired land, the acquisition cannot be said to be bad in law. It is then contended by Shri Parekh that the Appellant-Institution is running an educational institution and intends to establish a public school and that since other land was available, the Government would have acquired some other land leaving the acquired land for the Appellant. In the counter-affidavit filed in the High Court, it was stated that apart from the acquired land, the Appellant also owned 482 canals 19 marlas of land. Thereby, it is seen that the Appellant is not disabled to proceed with the continuation of the educational institution which it seeks to establish. It is then contended that an opportunity may be given to the Appellant to make a representation to the State Government. We find that it is not necessary for us to give any such liberty since acquisition process has already been completed.*

264. In *P.K. Kalburqi v. State of Karnataka and Ors.*, (2005) 12 SCC 489, with respect of mode of possession, this Court laid down as under:

6. *Moreover, the Hon'ble Minister who passed the order of denotification of the lands in question sought to make a distinction between symbolic possession and actual possession and proceed to pass the order on the basis of his understanding of the law that symbolic possession did not amount to actual possession, and that the power to withdraw from the acquisition could be exercised at any time before "actual possession" was taken. This view appears to be contrary to the majority decision of this Court in Balwant Narayan Bhagde v. M.D. Bhagwat, wherein this Court observed that how such possession would be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard-and-fast Rule laying down what act would be sufficient to constitute taking of possession of land. In the instant case the lands of which possession was sought to be taken were unoccupied, in the sense that there was no crop or structure standing thereon. In such a case only symbolic possession could be taken, and as was pointed out by this Court in the aforesaid decision, such possession would amount to vesting the land in the Government. Moreover, four acres and odd belonging to the Appellant was a part of the larger area of 118 acres notified for acquisition. We are, therefore, satisfied that the High Court has not committed any error in holding that possession of the land was taken on 6-11-1985. Even the order of the Minister on which considerable reliance has been placed by the Appellant indicates that possession of the lands was taken, though symbolic.*

265. In *Sita Ram Bhandar Society, New Delhi* (supra) this Court held that when possession of large area of land is to be taken, then it is permissible to take possession by drawing *Panchnama*. A similar view was expressed in *Om Prakash Verma and Ors.* (supra) which stated that:

85. *As pointed out earlier, the expression "civil appeals are allowed" carry only one meaning i.e. the judgment of the High Court is set aside and the writ petitions are dismissed. Moreover, the determination of surplus land based on the declaration of owners has become final long back. The notifications issued Under Section 10 of the Act and the panchnama taking possession are also final. On behalf of the State, it was asserted that the possession of surplus land was taken on 20-*

7-1993 and the panchnama was executed showing that the possession has been taken. It is signed by the witnesses. We have perused the details which are available in the paper book. It is settled law that where possession is to be taken of a large tract of land then it is permissible to take possession by a properly executed panchnama. [Vide Sita Ram Bhandar Society v. Govt. (NCT of Delhi) MANU/SC/1699/2009 : (2009) 10 SCC 501.]

86. *It is not in dispute that the panchnama has not been questioned in any proceedings by any of the Appellants. Though it is stated that Chanakyapuri Cooperative Society was in possession at one stage and Shri Venkateshawar Enterprises was given possession by the owners and possession was also given to Golden Hill Construction Corporation and thereafter it was given to the purchasers, the fact remains that the owners are not in possession. In view of the same, the finding of the High Court that the possession was taken by the State legally and validly through a panchnama is absolutely correct and deserves to be upheld.*

266. In *M. Venkatesh and Ors. v. Commissioner, Bangalore Development Authority, etc.* MANU/SC/1081/2015 : (2015) 17 SCC 1, a three-Judge Bench of this Court has opined that one of the modes of taking possession is by drawing *panchnama*. The Court observed:

17. *To the same effect are the decisions of this Court in Ajay Krishan Shinghal v. Union of India MANU/SC/0675/1996 : (1996) 10 SCC 721, Mahavir v. Rural Institute MANU/SC/0763/1995 : (1995) 5 SCC 335, Gian Chand v. Gopala MANU/SC/0624/1995 : (1995) 2 SCC 528, Meera Sahni v. Lt. Governor of Delhi MANU/SC/7878/2008 : (2008) 9 SCC 177 and Tika Ram v. State of U.P. MANU/SC/1616/2009 : (2009) 10 SCC 689 More importantly, as on the date of the suit, the Respondents had not completed 12 years in possession of the suit property so as to entitle them to claim adverse possession against BDA, the true owner. The argument that possession of the land was never taken also needs notice only to be rejected for it is settled that one of the modes of taking possession is by drawing a panchnama which part has been done to perfection according to the evidence led by the Defendant BDA. Decisions of this Court in T.N. Housing Board v. A. Viswam MANU/SC/0924/1996 : (1996) 8 SCC 259 and Larsen & Toubro Ltd. v. State of Gujarat MANU/SC/0219/1998 : (1998) 4 SCC 387, sufficiently support BDA that the mode of taking possession adopted by it was a permissible mode.*

267. In *Ram Singh v. Jammu Development Authority* MANU/SC/0309/2017 : 2017 (13) SCC 474, this Court stated that the mode of taking possession is by drawing a *Panchnama*. Concerning the mode of taking possession in any other land, law to a similar effect has been laid down in *NAL Layout Residents Association v. Bangalore Development Authority* MANU/SC/1019/2017 : (2018) 12 SCC 400. Certain decisions were cited with respect to other statutes regarding coalfields etc. and how the possession is taken and vesting is to what extent. Those have to be seen in the context of the particular Act. Possession comprises of various rights, thus it has to be couched in a particular statute for which we have a plethora of decisions of this Court. Hence, we need not fall back on the decisions in other cases. The decision in *Burrakur Coal Co. Ltd.* (supra) held that a person can be said to be in possession of minerals contained in a well-defined mining area even though his actual physical possession is confined to a small portion. Possession in part extends to the whole of the area. The decision does not help the cause of the Petitioner. Once possession has been taken by drawing a *Panchnama*, the State is deemed to be in possession of the entire area and

not for a part. There is absolute vesting in Government with possession and control free from all encumbrances as specifically provided in Section 16 of the Act of 1894.

268. *Maguni Charan Dwivedi v. State of Orissa* MANU/SC/0411/1975 : 1976 (2) SCC 134, dealt with the provision of land laws requiring actual cultivating possession with which we are not concerned here. *Sri Tarkeshwar Sio Thakur Jiu v. Dar Dass Dey & Co.* MANU/SC/0430/1979 : 1979 (3) SCC 106, it was again a case relating to mining. The decision is of no avail. The decision in *Ramesh Bejoy Sharma v. Pashupati Rai* MANU/SC/0574/1979 : (1979) 4 SCC 27 related to khas possession and physical possession of the tenant with which we are not concerned in the instant case, and the decision has no relevance so as to determine the expression. In the instant case, we are not dealing with the question, what are the rights to be conferred on the actual cultivators under revenue laws?

269. *Karanpura Development Co. v. Union of India* (1988) Supp. SCC 488, was again a case of mines. In *Larsen & Toubro Ltd. v. State of Gujarat* MANU/SC/0219/1998 : (1998) 4 SCC 387, this Court relied upon *Tamil Nadu Housing Board v. A. Viswam*, (supra), *Balmokand Khatri Educational & Industrial Trust* (supra) and held that drawing of *Panchnama* is sufficient to take possession and acquisition was held to be valid.

270. The decision in *Velaxan Kumar* (supra) cannot be said to be laying down the law correctly. The Court considered the photographs also to hold that the possession was not taken. Photographs cannot evidence as to whether possession was taken or not. Drawing of a *Panchnama* is an accepted mode of taking possession. Even after re-entry, a photograph can be taken; equally, it taken be taken after committing trespass. Such documents cannot prevail over the established mode of proving whether possession is taken, of lands. Photographs can be of little use, much less can they be a proof of possession. A person may re-enter for a short period or only to have photograph. That would not impinge adversely on the proceedings of taking possession by drawing *Panchnama*, which has been a rarely recognised and settled mode of taking possession.

271. In the decision in *Raghbir Singh Sehrawat v. State of Haryana* MANU/SC/1429/2011 : (2012) 1 SCC 792, the observation made was that it is not possible to take the possession of entire land in a day on which the award was declared, cannot be accepted as laying down the law correctly and same is contrary to a large number of precedents. The decision in *Narmada Bachao Andolan v. State of M.P.* MANU/SC/0599/2011 : (2011) 7 SCC 639, is confined to particular facts of the case. The Commissioner was appointed to find out possession on the spot. DVDs. and CDs were seen to hold that the landowners were in possession. The District Judge, Indore, recorded the statements of the tenure-holder. We do not approve the method of determining the possession by appointment of Commissioner or by DVDs and CDs as an acceptable mode of proving taking of possession. The drawing of *Panchnama* contemporaneously is sufficient and it is not open to a court Commissioner to determine the factum of possession within the purview of Order XXVII, Rule 9 Code of Civil Procedure. Whether possession has been taken, or not, is not a matter that a court appointed Commissioner cannot opine. However, drawing of *Panchnama* by itself is enough and is a proof of the fact that possession has been taken.

272. It was submitted on behalf of landowners that Under Section 24 the expression used is not possession but physical possession. In our opinion, under the Act of 1894 when possession is taken

after award is passed Under Section 16 or Under Section 17 before the passing of the award, land absolutely vests in the State on drawing of Panchnama of taking possession, which is the mode of taking possession. Thereafter, any re-entry in possession or retaining the possession is wholly illegal and trespasser's possession inures for the benefit of the owner and even in the case of open land, possession is deemed to be that of the owner. When the land is vacant and is lying open, it is presumed to be that of the owner by this Court as held in *Kashi Bai v. Sudha Rani Ghose* MANU/SC/0117/1958 : AIR 1958 SC 434. Mere re-entry on Government land once it is acquired and vests absolutely in the State (under the Act of 1894) does not confer, any right to it and Section 24(2) does not have the effect of divesting the land once it vests in the State.

273. In *Maria Margadia Sequeria v. Erasmo Jack De Sequeria* MANU/SC/0225/2012 : 2012 (5) SCC 370, approving a decision of this Court, this Court clarified what amounts to "possession" in law and held:

Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking. On the contrary, to be in possession, it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider (i) the person possessing, (ii) the things possessed and, (iii) the persons excluded from possession. A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore, merely custody of the thing and not the possession which would always be with the master though the master may not be in actual contact of the thing. It is in this light in which the concept of possession has to be understood in the context of a servant and master.

********** ***** **********

Principles of law which emerge in Maria Margadia Sequeria (supra) are crystallized as under:

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

274. In the decision reported as *National Thermal Power Ltd. v. Mahesh Dutta* MANU/SC/1210/2009 : 2009 (8) SCC 339 this Court held that:

28. When possession is to be taken over in respect of the fallow or Patit land, a mere intention to do so may not be enough. It is, however, the positive stand by the Appellant that the lands in question are agricultural land and crops used to be grown therein. If the lands in question are agricultural lands, not only actual physical possession had to be taken but also they were required to be properly demarcated. If the land had standing crops, as has been contended by Mr. Raju Ramachandran, steps in relation thereto were required to be taken by the Collector. Even in the said certificate of possession, it had not been stated that there were standing crops on the land on the date on which possession was taken. We may notice that delivery of possession in respect of

immoveable property should be taken in the manner laid down in Order XXI Rule 35 of the Code of Civil Procedure.

29. It is beyond any comprehension that when possession is purported to have been taken of the entire acquired lands, actual possession would be taken only of a portion thereof. The certificate of possession was either correct or incorrect. It cannot be partially correct or partially incorrect. Either the possession had actually been delivered or had not been delivered. It cannot be accepted that possession had been delivered in respect of about 10 acres of land and the possession could not be taken in respect of the rest 55 acres of land. When the provisions of Section 17 are taken recourse to, vesting of the land takes effect immediately.

30. Another striking feature of the case is that all the actions had been taken in a comprehensive manner. The Collector in his certificate of possession dated 16th November, 1984 stated that the possession had been taken over in respect of the entire land; the details of the land and the area thereof had also been mentioned in the certificate of possession; even NTPC in its letter dated 24th February, 1986 stated that possession had not been delivered only in respect of land situated in four villages mentioned therein. Indisputably NTPC got possession over 10.215 acres of land. It raised constructions thereover. It is difficult to comprehend that if the NTPC had paid 80% of the total compensation as provided for under Sub-section (3A) of Section 17 of the Act, out of 65.713 acres of land it had obtained possession only in respect of about 10.215 acres of land and still for such a long time it kept mum. Ex-facie, therefore, it is difficult to accept that merely symbolic possession had been taken.

275. In *V. Chandrasekaran and Anr. v. Administrative Officer and Ors.* MANU/SC/0751/2012 : (2012) 12 SCC 133, the land was acquired and possession was handed over to the authorities. Later on the land was sold, documents were manipulated, and flats were constructed in an illegal manner. It was held that the land once acquired, cannot be restored. The State has no right to reconvey the land and no person can claim such a right nor derive an advantage. Sale of land after a notification Under Section 4 of the LA Act was held to be void. It was held in the facts of the case that the judicial process cannot be used to subvert its way. Such persons must not be permitted to profit from the frivolous litigation, and they must be prevented from taking false pleas by relying on forged documents or illegal action.

276. We have seen the blatant misuse of the provisions of Section 24(2). Acquisitions that were completed several decades before even to say 50-60 years ago, or even as far back as 90 years ago were questioned; cases filed were dismissed. References were sought claiming higher compensation and higher compensation had been ordered. Now, there is a fresh bout of litigation started by erstwhile owners even after having received the compensation in many cases by submitting that possession has not been taken and taking of possession by drawing a *Panchnama* was illegal and they are in physical possession. As such, there is lapse of proceedings.

277. The court is alive to the fact that are a large number of cases where, after acquisition land has been handed over to various corporations, local authorities, acquiring bodies, etc. After depositing compensation (for the acquisition) those bodies and authorities have been handed possession of lands. They, in turn, after development of such acquired lands have handed over properties; third party interests have intervened and now declaration is sought under the cover of Section 24(2) to

invalidate all such actions. As held by us, Section 24 does not intend to cover such cases at all and such gross misuse of the provisions of law must stop. Title once vested, cannot be obliterated, without an express legal provision; in any case, even if the landowners' argument that after possession too, in case of non-payment of compensation, the acquisition would lapse, were for arguments' sake, be accepted, these third party owners would be deprived of their lands, lawfully acquired by them, without compensation of any sort. Thus, we have no hesitation to overrule the decisions in *Velaxan Kumar* (supra) and *Narmada Bachao Andolan* (supra), with regard to mode of taking possession. We hold that drawing of *Panchnama* of taking possession is the mode of taking possession in land acquisition cases, thereupon land vests in the State and any re-entry or retaining the possession thereafter is unlawful and does not inure for conferring benefits Under Section 24(2) of the Act of 2013.

In Re Question No. 5: the effect of interim order of Court

278. On behalf of acquiring authorities, it was submitted that period spent during the interim stay or injunction by which Authorities have not been able to take possession or to make payment, has to be excluded from computing the period of 5 years or more as provided in Section 24(2). It was submitted that in case authorities are restrained by interim order passed by the court in a pending litigation, the land acquisition cannot lapse by including the period for which interim stay order preventing the Authorities from taking action has operated. Reliance has been placed on the principles contained in maxim "*actus curiae neminem gravabit*". It was also submitted even in the absence of the provisions specifically excluding the period of interim stay/injunction having been made in Section 24(2) of the Act, 2013, the aforesaid principles are attracted and the period has to be excluded.

279. The landowners, on the other hand argued that there is no valid reason to exclude the period spent during the interim order by the court from the prescribed period of 5 years Under Section 24(2) of the Act of 2013. For the main reason that the legislature has not specially provided for exclusion of such period in Section 24 and secondly, where Parliament has desired to exclude the period of interim order has made provision for exclusion of such period in proviso to Section 19 and *explanation* to Section 69 of the Act of 2013. In the Act of 1894, there was a similar provision made in Section 6 and explanation to Section 11A. During the process of consultation of the stakeholders while enacting the Act of 2013, the Government of NCT of Delhi had suggested that an explanation be added in the provisions of Section 24 to exclude the period of interim order passed by the court. The suggestion was not accepted by the Department of Land Reforms on the ground that same would be in conflict with the retrospective effect of the clause. Ultimately, in the final recommendation, the period of interim order of the court was not made. Thus, it is "*casus omissus*" which cannot be applied by the court. The maxim "*actus curiae neminem gravabit*" is not applied and is rare if ever applied to interpret the statute.

280. In *Padma Sundar Rao* (supra), a Constitution Bench of this Court has declined to rely on the maxim and similarly in *Khandaka Jain Jewellers*, (supra), the maxim was not applied. It was urged that in Snell's Equity (33rd Edition), 2015 with respect to the maxim, it has been observed that maxim of equity is not a specific Rule of principle of law. It is a statement of a broad theme which underlies equitable concepts and principles. As a result, the utility of equitable maxim is limited.

It can provide some support to the court when there is some uncertainty as to the scope of a particular Rule of principle and a court in exercising an equitable discretion may apply the same.

281. Reference was also made to decision of *Parson Tools and Plants* (supra) to contend that court cannot supply the omission by engrafting on it or introducing in it under the guise of interpretation. To do so, it would be entrenching upon the preserves of the legislature. Where Under Section 24 cut-off date is prescribed and there is no starting point and period for completion of task, the notion of excluding time spent in litigations is an alien concept to the provisions. The court must assume that the old law was oppressive and unjust and such introduction of exclusion of time may create complication in the working of the statute. It was also submitted that common law principles can be excluded by the legislature by express or implied implication in the statute itself. In this regard, reliance has been placed upon *Union of India v. SICOM Ltd.* MANU/SC/8377/2008 : (2009) 2 SCC 121. It was submitted on behalf of landowners that no provision had been enacted by issuing any ordinance and later amending the law, for providing for exclusion of the time spent on interim order Under Section 24(2), but Ordinance lapsed. The legislature could have amended the provisions as such the court cannot exclude the period.

282. Before we go to various rival submissions, the pivotal question for consideration is the interpretation of Section 24 and aims and objectives of the Act of 2013. Section 24 contemplates that the proceedings initiated under the Act of 1894, are pending as on the date on which Act of 2013 has been enacted and if no award has been passed in the proceedings, then there is no lapse and only determination of compensation has to be made under the Act of 2013. Where an award has been passed, it is provided Under Section 24(1)(b), the pending proceedings shall continue under the provisions of the Act of 1894 as if the old Act has not been repealed. The provisions totally exclude the applicability of any provision of Act of 2013. There are two requirements Under Section 24(2), which are to be met by the Authorities, where award has been made 5 years or more prior to the commencement of the Act of 2013, if the physical possession of the land has not been taken nor compensation has been paid. If possession has been taken, compensation has to be paid by the acquiring authorities. The time of five years is provided for authorities to take action, not to sleep over the matter. In case of lethargy or machinery and default on the part of the Authorities and for no other reason the lapse is provided. Lapse is provided only in case of default by Authorities acquiring the land, not caused by any other reason or order of the court. When the interpretation of the provision is clear, there was no necessity for Parliament to make such a provision Under Section 24(2) for exclusion of the period of the interim order. Though it has excluded the period of interim order for making declaration under the proviso to Sections 19(7) and exclusion has also been made for computation of the period Under Section 69 of the Act of 2013. It is due to the necessity to provide so in view of the language of the provision. Under Section 69 of the Act of 2013, additional compensation at the rate of 12 per cent has to be given on market value for the period commencing from the date of the publication of the preliminary notification Under Section 11. The additional compensation at the rate of 12 per cent has been excluded for the period acquisition proceedings have been held up on account of the interim injunction order of any court. The provisions of Section 24 cast an obligation upon the Authorities to take steps meaning thereby that it is open to them to take such steps, and inaction or lethargy on their part has not been countenanced by Parliament. Resultantly, lapse of proceedings takes place. It is by the very nature of the provisions if it was not possible for authorities for any reason not attributable to them or the Government to take requisite steps, the period has to be excluded. The Minister

concerned Shri Jairam Ramesh in answer to the debate quoted above has made it clear that time limit of five years has been fixed for the Authorities to take action. If we do not exclude the period of interim order, the very spirit of the provision will be violated.

283. With respect to fixation of period is five years for the executive Authorities to take the requisite steps, *Delhi Development Authority v. Sukhbir Singh and Ors.* (supra) observed that what the legislature is in effect telling the executive is that they ought to have put their house in order and completed the acquisition proceedings within a reasonable time after the pronouncement of award. Not having done so even after a leeway of five years, would cross the limits of legislative tolerance, after which the whole proceeding would be deemed to have lapsed. Thus, it is apparent from the decision of *Delhi Development Authority v. Sukhbir Singh and Ors.* (supra), which is relied upon by the landowners, that time limit is fixed for the executive authorities to take steps. In case they are prevented by the court's order, obviously, as per the interpretation of the provisions is that such period has to be excluded. In case such a provision would have been made, it would have been "*ex abundanti cautela*". There was no necessity of making such a provision even if this proposition has been discussed during the formulation of legislation. However, the provision providing exclusion has been enacted. It casts an obligation upon the Authorities to take requisite steps within five years, that by itself excludes such period of interim order.

284. It was pointed out that in certain States, amendments have been incorporated in Section 24(2), excluding the period of interim order passed by the Court. In our opinion, there is no such necessity for providing exclusion of time and it has been done by the States "*ex abundanti cautela*" and there is no doubt about it that Central Government has also tried to introduce the provision of the exclusion of time by issuance of ordinances, however, they lapsed. It was due to the interpretation and the decision rendered by this Court in *Shree Balaji Nagar Residential Association* (supra), which cannot be said to be laying down the law correctly.

285. The intent of the Act of 2013, is not to benefit litigants only. It has introduced a new regime which is beneficial to the landowners. The provisions of Section 24 by itself do not intend to confer the benefits on litigating parties, while as per Section 114 of the Act of 2013 and Section 6 of the General Clauses Act, has to be litigated as per the provisions of the Act of 1894.

286. Section 24 treats land acquisition proceedings as one and prescribes the transition mechanism for the said proceedings. Possession of the land holdings in normal course is to be taken at one go, not in piecemeal by the Authorities. Once award is made, possession can be taken and on that the land vests in State Under Section 16, and Under Section 17(1) of the Act of 1894, the possession of any land can be taken for public purposes in cases of urgency without passing of the award. The expression "*acquisition proceedings*" is referred to in sub-sections (1) and (2) of Section 24 and its proviso makes it clear that in case in majority of the landholdings compensation has not been deposited, all the beneficiaries as on the date of notification Under Section 4 (of the Act of 1894) shall be entitled to compensation in accordance with the provisions of the Act of 2013. That also intends to give benefits to all the concerned. Payment of compensation too has to be made. Possession of land holdings is to be taken in terms of the notification Under Section 4 and declaration Under Section 6 and payment has to be made to the beneficiaries. In case payment has not been made to the landowners nor is possession taken, there is a lapse. In case compensation

has not been deposited within 5 years with respect to majority of land holdings, then all the beneficiaries are entitled for higher compensation under the Act of 2013.

287. In the opinion of this Court it is not the intendment of the Act of 2013 that those who have litigated should get benefits of higher compensation as contemplated Under Section 24 benefit is conferred on all beneficiaries. It is not intended by the provisions that in piecemeal the persons who have litigated and have obtained the interim order should get the benefits of the provisions of the Act of 2013. Those who have accepted the compensation within 5 years and handed over the possession too, are to be benefited, in case amount has not been deposited with respect to majority of holdings. There are cases in which projects have come up in part and as per plan rest of the area is required for planned development with respect to which interim stays have been obtained. It is not the intendment of the law to deliver advantage to relentless litigants. It cannot be said hence, that it was due to the inaction of the authorities that possession could not be taken within 5 years. Public policy is not to foment or foster litigation but put an end to it. In several instances, in various High Courts writ petitions were dismissed by single judge Benches and the writ appeals were pending for a long time and in which, with respect to part of land of the projects, efforts were made to obtain the benefit of Section 24(2). Parliament in our view did not intend to confer benefits to such litigants for the aforementioned reasons. Litigation may be frivolous or may be worthy. Such litigants have to stand on the strength of their own case and in such a case provisions of Section 114 of the Act of 2013 and Section 6 of the General Clauses Act, 1897, are clearly attracted and such proceedings have to be continued under the provisions of the old Act that would be in the spirit of Section 24(1)(b) itself of the Act of 2013. Section 6(b) of the General Clauses Act, 1897, provides that repeal will not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder. Section 6(c) states that repeal would not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. When there is a provision itself in Section 24(1)(b) of continuance of the proceedings where award has been passed under the Act of 1894, for the purposes of Section 24 as provided in Section 24(b), the provisions of Section 114 is clearly attracted so as the provisions of Section 6 of the General Clauses Act, 1897, to the extent of non obstante Clause of Section 24, where possession has not been taken nor payment has been made, there is a lapse, that too by the inaction of the Authorities. Any court's interim order cannot be said to be inaction of the authorities or agencies; thus, time period is not to be included for counting the 5 years period as envisaged in Section 24(2). As per proviso to Section 24(2), where possession has been taken, but compensation has not been paid or deposited with respect to majority of land holdings, all the beneficiaries would be entitled for higher compensation only to that extent, the provisions of Section 114 of the Act of 2013, would be superseded but it would not obliterate the general application of Section 6 of the General Clauses Act, 1897, which deals with effect of repeal except as provided in Section 24(2) and its proviso.

288. It was submitted on behalf of acquiring authorities that principle of casus omissus is not necessarily applicable in all the cases. Reliance has been placed on *Seaford Court Estates Ltd. v. Asher* (1949) 2 K.B. 481, in which following observations have been made:

The question for decision in this case is whether we are at liberty to extend the ordinary meaning of "burden" so as to include a contingent burden of the kind I have described. Now this Court has already held that this Sub-section is to be liberally construed so as to give effect to the governing

principles embodied in the legislation (Winchester Court Ld. v. Miller); and I think we should do the same. Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed Rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word sc as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon's case, and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his second volume Evston v. Studd. Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

Approaching this case in that way, I cannot help feeling that the legislature had not specifically in mind a contingent burden such as we have here. If it had, would it not have put it on the same footing as an actual burden? I think it would. It would have permitted an increase of rent when the terms were so changed as to put a positive legal burden on the landlord. If the parties expressly agreed between themselves the amount of the increase on that account the court would give effect to their agreement. But if, as here, they did not direct their minds to the point, the court has itself to assess the amount of the increase. It has to say how much the tenant should pay "in respect of" the transfer of this burden to the landlord. It should do this by asking what a willing tenant would agree to pay and a willing landlord would agree to accept in respect of it. Just as in the earlier cases the courts were able to assess the value of the "fair wear and tear" clause, and of a "cooker." So they can assess the value of the hot water Clause and translate it fairly in terms of rent; and what applies to hot water applies also to the removal of refuse and so forth. I agree that the appeal should be allowed, and with the order proposed by Asquith LJ.

289. Reliance was also placed on *M. Pentiah v. Muddala Veeramallappa* MANU/SC/0263/1960 : (1961) 2 SCR 295, in which this Court observed that where the language of a statute in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, which is not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. In *Hameedia Hardware Stores v. B. Mohan Lal Sowcar* MANU/SC/0180/1988 : (1988) 2 SCC 513, it was held that absurdity has to be avoided. In that decision reliance was placed on the decision in *Seaford Court Estates Ltd.* (supra), wherein it was observed that when a defect or omission appears, a judge cannot simply fold his hands and blame

the draftsman. It is the duty to give force and life to the intention of the legislature. The court has to construe the words of the statute in a reasonable way having regard to the context.

290. Again, in *Madan Singh Shekhawat v. Union of India* MANU/SC/0484/1999 : (1999) 6 SCC 459, the decision in *Seaford Court Estates Ltd.* (supra) has been followed. Following observations have been made:

18. *Applying the above rule, we are of the opinion that the rule-makers did not intend to deprive the army personnel of the benefit of the disability pension solely on the ground that the cost of the journey was not borne by the public exchequer. If the journey was authorised, it can make no difference whether the fare for the same came from the public exchequer or the army personnel himself.*

291. There cannot be any dispute with the above propositions. However, in the present case, when we construe the provisions of Section 24, it clearly ousts the period spent during the interim stay of the court. Five years' period is fixed for the purpose to take action, if they have not taken the action for 5 years or more, then there is lapse, not otherwise. Even if there had been a provision made with respect to the exclusion of time spent in the court proceedings with respect to interim stay due to court's order, it could have been *ex abundanti cautela*, which has been considered by this Court in *Union of India and Ors. v. Modi Rubber Ltd.* MANU/SC/0614/1986 : (1986) 4 SCC 66. It would have been superfluous to make such a provision. Following observations were made in *Modi Rubber Ltd.* (supra):

7. *Both these notifications, as the opening part shows, are issued Under Rule 8(1) of the Central Excise Rules, 1944 and since the definition of 'duty' in Rule 2, Clause (v) must necessarily be projected in Rule 8(1) and the expression "duty of excise" in Rule 8(1) must be read in the light of that definition, the same expression used in these two notifications issued Under Rule 8(1) must also be interpreted in the same sense, namely, duty of excise payable under the Central Excises and Salt Act, 1944 and the exemption granted under both these notifications must be regarded as limited only to such duty of excise. But the Respondents contended that the expression "duty of excise" was one of large amplitude and in the absence of any restrictive or limitative words indicating that it was intended to refer only to duty of excise leviable under the Central Excises and Salt Act, 1944, it must be held to cover all duties of excise whether leviable under the Central Excises and Salt Act, 1944 or under any other enactment. The Respondents sought to support this contention by pointing out that whenever the Central Government wanted to confine the exemption granted under a notification to the duty of excise leviable under the Central Excises and Salt Act, 1944, the Central Government made its intention abundantly clear by using appropriate words of limitation such as "duty of excise leviable ... Under Section 3 of the Central Excises and Salt Act, 1944" or "duty of excise leviable ... under the Central Excises and Salt Act, 1944" or "duty of excise leviable ... under the said Act" as in the Notification No. CER-8(3)/55-C.E. dated September 17, 1955, Notification No. 255/77-C.E. dated July 20, 1977, Notification No. CER-8(1)/55-C.E. dated September 2, 1955, Notification No. CER-8(9)/55-C.E. dated December 31, 1955, Notification No. 95/61-C.E. dated April 1, 1961, Notification No. 23/55-C.E. dated April 29, 1955 and similar other notifications. But, here said the Respondents, no such words of limitation are used in the two notifications in question and the expression "duty of excise" must, therefore, be read according to its plain natural meaning as including all duties of excise, including special*

duty of excise and auxiliary duty of excise. Now, it is no doubt true that in these various notifications referred to above, the Central Government has, while granting exemption Under Rule 8(1), used specified language indicating that the exemption, total or partial, granted under each such notification is in respect of excise duty leviable under the Central Excises and Salt Act, 1944. But, merely because, as a matter of drafting, the Central Government has in some notifications specifically referred to the excise duty in respect of which exemption is granted as "duty of excise" leviable under the Central Excises and Salt Act, 1944, it does not follow that in the absence of such words of specificity, the expression "duty of excise" standing by itself must be read as referring to all duties of excise. It is not uncommon to find that the legislature sometimes, with a view to making its intention clear beyond doubt, uses language ex abundanti cautela though it may not be strictly necessary and even without it the same intention can be spelt out as a matter of judicial construction and this would be more so in case of subordinate legislation by the executive. The officer drafting a particular piece of subordinate legislation in the Executive Department may employ words with a view to leaving no scope for possible doubt as to its intention or sometimes even for greater completeness, though these words may not add anything to the meaning and scope of the subordinate legislation. Here, in the present notifications, the words duty of excise leviable under the Central Excises and Salt Act, 1944' do not find a place as in the other notifications relied upon by the Respondents. But, that does not necessarily lead to the inference that the expression "duty of excise" in these notifications was intended to refer to all duties of excise including special and auxiliary duties of excise. The absence of these words does not absolve us from the obligation to interpret the expression "duty of excise" in these notifications. We have still to construe this expression -- what is its meaning and import -- and that has to be done bearing in mind the context in which it occurs. We have already pointed out that these notifications having been issued Under Rule 8(1), the expression "duty of excise" in these notifications must bear the same meaning which it has in Rule 8(1) and that meaning clearly is -- excise duty payable under the Central Excises and Salt Act, 1944 as envisaged in Rule 2 Clause (v). It cannot in the circumstances bear an extended meaning so as to include special excise duty and auxiliary excise duty.

292. Relying on *State of U.P. and Ors. v. Hindustan Aluminium Corporation and Ors.,* MANU/SC/0356/1979 : (1979) 3 SCC 229 it was submitted that whether a piece of legislation has spent itself or exhausted in operation are matters of law and no such rights exist in a citizen to ask for a declaration that the law has been impliedly repealed on any such ground. In extreme and clear cases, no doubt, an antiquated law may be said to have become obsolete and, more so, if it is a penal law and has become incapable of user by a drastic change in the circumstances. Craies on Statute Law, Seventh Edition, has discussed about different classes of enactments such as expired, spent, repealed in general terms, virtually repealed, superseded and obsolete.

293. The Act of 2013 operates prospectively. Section 114 of the Act of 2013, effects a repeal, but with certain savings, in accordance with Section 24. Thus, acquisition proceedings are preserved under the Act of 1894, till the stage of making of award; where award is not made, the provisions of compensation under the Act of 2013 apply; where award is made, further proceedings would be under the new Act (of 2013). In case possession has been taken by the authorities concerning awards which were made 5 years or before, under the Act of 1894 and such proceedings are pending, that would be due to inaction of the authorities on the date on which the Act of 2013 came into force. The lapse (of acquisition) and higher compensation to follow only Under Section 24(2), where compensation is not paid, nor possession of lands is taken. A period of 5 years or

more has been provided Under Section 24. In the case, however, where possession is taken, but compensation is not deposited in respect of majority landholdings, compensation under the Act of 2013 is payable to all-including those who received compensation earlier.

294. Reliance has been placed on the decision in *Syndicate Bank v. Prabha D. Naik and Anr.* MANU/SC/0197/2001 : (2001) 4 SCC 713, in which it was observed that the legislature is supposed to be conscious of the needs of the society at large and the prevalent laws. It was held that there is no reason for assuming that the legislature was not aware of the difficulties and the prevailing situation. There is no dispute with the aforesaid proposition; however, it does not espouse the cause of the landowners.

295. The correctness of the decision of *Shree Balaji Nagar Residential Association* (supra) was doubted in *Yogesh Neema and Ors.* (supra), and the matter was referred to a larger Bench. In *Shree Balaji Nagar Residential Association* (supra) following observations were made:

11. *From a plain reading of Section 24 of the 2013 Act, it is clear that Section 24(2) of the 2013 Act does not exclude any period during which the land acquisition proceeding might have remained stayed on account of stay or injunction granted by any court. In the same Act, the proviso to Section 19(7) in the context of limitation for publication of declaration Under Section 19(1) and the Explanation to Section 69(2) for working out the market value of the land in the context of delay between preliminary notification Under Section 11 and the date of the award, specifically provide that the period or periods during which the acquisition proceedings were held up on account of any stay or injunction by the order of any court be excluded in computing the relevant period. In that view of the matter, it can be safely concluded that the legislature has consciously omitted to extend the period of five years indicated in Section 24(2) even if the proceedings had been delayed on account of an order of stay or injunction granted by a court of law or for any reason. Such casus omissus cannot be supplied by the court in view of law on the subject elaborately discussed by this Court in Padma Sundara Rao v. State of T.N. MANU/SC/0182/2002 : (2002) 3 SCC 533.*

12. Even in the Land Acquisition Act of 1894, the legislature had brought about amendment in Section 6 through an Amendment Act of 1984 to add Explanation 1 for the purpose of excluding the period when the proceeding suffered stay by an order of the court, in the context of limitation provided for publishing the declaration Under Section 6(1) of the Act. To a similar effect was the Explanation to Section 11-A, which was added by Amendment Act 68 of 1984. Clearly, the legislature has, in its wisdom, made the period of five years Under Section 24(2) of the 2013 Act absolute and unaffected by any delay in the proceedings on account of any order of stay by a court. The plain wordings used by the legislature are clear and do not create any ambiguity or conflict. In such a situation, the court is not required to depart from the literal Rule of interpretation.

296. This Court held that the conscious omission by Parliament in Section 24(2) to exclude the period, an interim order operates is to be given effect and that the court should not fill in the gap. In *Indore Development Authority* (supra), the decision rendered in *Shree Balaji Nagar Residential Association* (supra) was overruled with consensus and it was not the subject matter in *Pune Municipal Corporation* (supra). However, the learned Counsel for the parties had urged that this

question arises as such it should be framed and considered by the present larger Bench. Hence, we have examined the matter afresh.

297. In cases where some landowners have chosen to take recourse to litigation (which they have a right to) and have obtained interim orders on taking possession or orders of *status quo*, as a matter of practical reality it is not possible for the authorities or State officials to take the possession or to make payment of the compensation. In several instances, such interim orders also impeded the making of an award. Now, so far as awards (and compensation payments, pursuant to such proceedings were concerned) the period provided for making of awards under the Act of 2013 could be excluded by virtue of Explanation to Section 11A.[26] Thus, no fault of inaction can be attributed to the authorities and those who had obtained such interim orders, cannot benefit by their own action in filing litigation, which may or may not be meritorious. Apart from the question of merits, when there is an interim order with respect to the possession or order of *status quo* or stay of further proceedings, the authorities cannot proceed; nor can they pay compensation. Their obligations are intertwined with the scheme of land acquisition. It is observed that authorities may wait in the proceedings till the interim order is vacated.

298. In our considered opinion, litigation which initiated by the landowners has to be decided on its own merits and the benefits of Section 24(2) should not be available to the litigants. In case there is no interim order, they can get the benefits they are entitled to, not otherwise as a result of fruit of litigation, delays and dilatory tactics and some time it may be wholly frivolous pleas and forged documents as observed in *V. Chandrasekaran* (supra) mentioned above.

299. In *Abhey Ram (Dead) by L.Rs. and Ors. v. Union of India and Ors.* MANU/SC/0663/1997 : (1997) 5 SCC 421, this Court considered the extended meaning of words "stay of the action or proceedings". It was observed that any type of orders passed by this Court would be an inhibitive action on the part of the Authorities to proceed further. This Court observed thus:

9. *Therefore, the reasons given in B.R. Gupta v. Union of India, MANU/DE/0124/1983 : 37 (1989) DLT 150 (Del) DB, are obvious with reference to the quashing of the publication of the declaration Under Section 6 vis-à-vis the writ Petitioners therein. The question that arises for consideration is whether the stay obtained by some of the persons who prohibited the Respondents from publication of the declaration Under Section 6 would equally be extendible to the cases relating to the Appellants. We proceed on the premise that the Appellants had not obtained any stay of the publication of the declaration but since the High Court in some of the cases has, in fact, prohibited them as extracted hereinbefore, from publication of the declaration, necessarily, when the Court has not restricted the declaration in the impugned orders in support of the Petitioners therein, the officers had to hold back their hands till the matters were disposed of. In fact, this Court has given extended meaning to the orders of stay or proceeding in various cases, namely, Yusufbhai Noormohmed Nendoliya v. State of Gujarat, MANU/SC/0474/1991 : (1991) 4 SCC 531, Hansraj H. Jain v. State of Maharashtra, MANU/SC/0543/1993 : (1993) 3 SCC 634, Sangappa Gurulingappa Sajjan v. State of Karnataka, MANU/SC/0703/1994 : (1994) 4 SCC 145, Gandhi Grah Nirman Sahkari Samiti Ltd. v. State of Rajasthan, MANU/SC/0481/1994 : (1993) 2 SCC 662, G. Narayanaswamy Reddy v. Govt. of Karnataka, MANU/SC/0386/1991 : (1991) 3 SCC 261 and Roshnara Begum v. Union of India, (1986) 1 Apex Dec 6. The words "stay of the action or proceeding" have been widely interpreted by this Court and mean that any type of the orders*

passed by this Court would be an inhibitive action on the part of the authorities to proceed further. When the action of conducting an enquiry Under Section 5-A was put in issue and the declaration Under Section 6 was questioned, necessarily unless the Court holds that enquiry Under Section 5-A was properly conducted and the declaration published Under Section 6 was valid, it would not be open to the officers to proceed further into the matter. As a consequence, the stay granted in respect of some would be applicable to others also who had not obtained stay in that behalf. We are not concerned with the correctness of the earlier direction with regard to Section 5-A enquiry and consideration of objections as it was not challenged by the Respondent Union. We express no opinion on its correctness, though it is open to doubt.

300. In *Om Parkash v. Union of India and Ors.* MANU/SC/0092/2010 : (2010) 4 SCC 17, it was observed that interim order of stay granted in one of the matters of the landowners would put complete restraint on the Respondents to proceed further to issue declaration Under Section 6 of the Act. It was observed as under:

72. *Thus, in other words, the interim order of stay granted in one of the matters of the landowners would put complete restraint on the Respondents to have proceeded further to issue notification Under Section 6 of the Act. Had they issued the said notification during the period when the stay was operative, then obviously they may have been hauled up for committing contempt of court. The language employed in the interim orders of stay is also such that it had completely restrained the Respondents from proceeding further in the matter by issuing declaration/notification Under Section 6 of the Act.*

301. In *Suresh Chand v. Gulam Chisti* MANU/SC/0168/1990 : (1990) 1 SCC 593, this Court considered the provision where tenant would not be entitled to the protection of Section 39. If the suit had prolonged beyond ten years, then the tenant would be entitled to such protection. The interpretation suggested was not accepted by this Court as that would encourage the tenant to protract the litigation. This Court frowned upon obtaining of fruits by protracting the litigation on the ground of public policy. This Court observed thus:

17. *It was argued that the words 'commencement of this Act' should be construed to mean the date on which the moratorium period expired and the Act became applicable to the demised building. Such a view would require this Court to give different meanings to the same expression appearing at two places in the same section. The words 'on the date of commencement of this Act' in relation to the pendency of the suit would mean July 15, 1972 as held in Om Prakash Gupta v. Dig Vijendrapal Gupta, MANU/SC/0209/1982 : (1982) 2 SCC 61, but the words 'from such date of commencement' appearing immediately thereafter in relation to the deposit to be made would have to be construed as the date of actual application of the Act at a date subsequent to July 15, 1972. Ordinarily, the Rule of construction is that the same expression where it appears more than once in the same statute, more so in the same provision, must receive the same meaning unless the context suggests otherwise. Besides, such an interpretation would render the use of prefix 'such' before the word 'commencement' redundant. Thirdly such an interpretation would run counter to the view taken by this Court in Atma Ram Mittal case, MANU/SC/0032/1988 : (1988) 4 SCC 284, wherein it was held that no man could be made to suffer because of the court's fault or court's delay in the disposal of the suit. To put it differently, if the suit could be disposed of within the period of 10 years, the tenant would not be entitled to the protection of Section 39, but if the suit*

is prolonged beyond ten years, the tenant would be entitled to such protection. Such an interpretation would encourage the tenant to protract the litigation, and if he succeeds in delaying the disposal of the suit till the expiry of 10 years, he will secure the benefit of Section 39, otherwise not. We are, therefore, of the opinion that it is not possible to uphold the argument.

302. In *Shyam Sunder and Ors. v. Ram Kumar and Anr.* MANU/SC/0405/2001 : (2001) 8 SCC 24, a Constitution Bench of this Court observed that substantive rights of the parties are to be examined on the date of the suit unless the legislature makes such rights retrospective. The Court made following observations:

28. *From the aforesaid decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit. However, the position in law would be different in the matters which relate to procedural law, but so far as substantive rights of parties are concerned, they remain unaffected by the amendment in the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective unless the amending Act provides otherwise. We have carefully looked into the new substituted Section 15 brought in the parent Act by the Amendment Act, 1995 but do not find it either expressly or by necessary implication retrospective in operation which may affect the rights of the parties on the date of adjudication of the suit and the same is required to be taken into consideration by the appellate court. In Shanti Devi v. Hukum Chand, MANU/SC/0971/1996 : (1996) 5 SCC 768, this Court had occasion to interpret the substituted Section 15 with which we are concerned and held that on a plain reading of Section 15, it is clear that it has been introduced prospectively and there is no question of such Section affecting in any manner the judgment and decree passed in the suit for pre-emption affirmed by the High Court in the second appeal. We are respectfully in agreement with the view expressed in the said decision and hold that the substituted Section 15 in the absence of anything in it to show that it is retrospective, does not affect the right of the parties which accrued to them on the date of the suit or on the date of passing of the decree by the court of the first instance. We are also of the view that the present appeals are unaffected by the change in law insofar it related to the determination of the substantive rights of the parties and the same are required to be decided in the light of the law of preemption as it existed on the date of passing of the decree.*

303. In *Sarah Mathew* (supra), it was observed that delay caused by the court in taking cognizance cannot deny justice to the litigant. A court of law would interpret and make the reasonable construction rather than applying a doctrine which would make the provision unsustainable and ultra vires the Constitution. This Court observed thus:

37. We are inclined to take this view also because there has to be some amount of certainty or definiteness in matters of limitation relating to criminal offenses. If, as stated by this Court, taking cognizance is the application of mind by the Magistrate to the suspected offense, the subjective element comes in. Whether a Magistrate has taken cognizance or not will depend on facts and circumstances of each case. A diligent complainant or the prosecuting agency which promptly files the complaint or initiates prosecution would be severely prejudiced if it is held that the relevant point for computing limitation would be the date on which the Magistrate takes cognizance. The complainant or the prosecuting agency would be entirely left at the mercy of the Magistrate, who may take cognizance after the limitation period because of several reasons; systemic or otherwise. It cannot be the intention of the legislature to throw a diligent complainant out of the court in this manner. Besides, it must be noted that the complainant approaches the court for redressal of his grievance. He wants action to be taken against the perpetrators of crime. The courts functioning under the criminal justice system are created for this purpose. It would be unreasonable to take the view that delay caused by the court in taking cognizance of a case would deny justice to a diligent complainant. Such an interpretation of Section 468 Code of Criminal Procedure would be unsustainable and would render it unconstitutional. It is well settled that a court of law would interpret a provision which would help to sustain the validity of the law by applying the doctrine of reasonable construction rather than applying a doctrine which would make the provision unsustainable and ultra vires the Constitution. (U.P. Power Corporation Ltd. v. Ayodhya Prasad Mishra. MANU/SC/8042/2008 : (2008) 10 SCC 139)

304. When the authorities are disabled from performing duties due to impossibility, would be a good excuse for them to save them from rigour of provisions of Section 24(2). A litigant may be right or wrong. He cannot be permitted to take advantage of a situation created by him of interim order. The doctrine "*commodum ex-injuria sua Nemo habere debet*" that is convenience cannot accrue to a party from his own wrong. Provisions of Section 24 do not discriminate litigants or non-litigants and treat them differently with respect to the same acquisition, otherwise, anomalous results may occur and provisions may become discriminatory in itself.

305. In *Union of India v. Shiv Raj* MANU/SC/0478/2014 : 2014 (6) SCC 564, this Court did not consider the question of exclusion of the time. In *Karnail Kaur and Ors. v. State of Punjab and Ors.*, (supra) and in Shree Balaji Nagar Residential Association (supra), various aspects including the interpretation of provisions of Section 24 were not taken into consideration. Thus, the said rulings cannot be said to be laying down good law.

306. In *Union of India and Ors. v. North Telumer* Colliery and Ors. MANU/SC/0632/1989 : 1989 (3) SCC 411, this Court observed that delaying tactics should not be permitted to fructify. By causing delay, the owner would get huge amount of interest, but he may not get a penny out of the principal amount. It would amount to conferring unjust benefit on the owners which can never be the intention of the Parliament. This Court observed:

8. *The High Court's conclusions are primarily based on the interpretation of Section 18(5) of the Coal Act. The High Court has quoted the meaning of words "enure" and "benefit" from various dictionaries. No dictionary or any outside assistance is needed to understand the meaning of these simple words in the context and scheme of the Coal Act. The interest has to enure to the benefit of the owners of the coal mines. The claims before the Commissioner under the Coal Act are from*

the creditors of the owners, and the liabilities sought to be discharged are also of the owners of the coal mines. When the debts are paid and the liabilities discharged, it is only the owners of coal mines who are benefited. Taking away the interest amount by the owners without discharging their debts and liabilities would be unreasonable. They have only to adopt delaying tactics to postpone the disbursement of claims and consequently earn more interest. Due to such delay, the owner would get huge amount of interest though ultimately, he may not get a penny out of principal amount on the final settlement of claims. It would amount to conferring unjust benefit on the owners which can never be the intention of the Parliament. We do not agree with the interpretation given by the High Court and hold that the interest accruing under the Coal Act is the money paid to the Commissioner in relation to the coal mine and the same has to be utilized by the Commissioner in meeting the claims of the creditors and discharging other liabilities in accordance with the provisions of the Coal Act.

307. It may not be doubtful conduct to file frivolous litigation and obtain stay; but benefit of Section 24(2) should not be conferred on those who prevented the taking of possession or payment of compensation, for the period spent during the stay.

308. In *Padma Sundara Rao (Dead) and Ors.* (supra), this Court considered the question of casus omissus and observed thus:

12. *The rival pleas regarding rewriting of statute and casus omissus need careful consideration. It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary Rule of construction is that the intention of the legislation must be found in words used by the legislature itself. The question is not what may be supposed and has been intended, but what has been said. "Statutes should be construed, not as theorems of Euclid," Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them." (See Lenigh Valley Coal Co. v. Yensavage, 218 FR 547) The view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama MANU/SC/0622/1989 : (1990) 1 SCC 277.*

13. *In D.R. Venkatchalam v. Deputy Transport Commissioner MANU/SC/0327/1976 : (1977) 2 SCC 273, it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.*

14. *While interpreting a provision, the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify, or repeal it, if deemed necessary. (See Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd., MANU/SC/0381/2000 : (2000) 5 SCC 515) The legislative casus omissus cannot be supplied by the judicial interpretative process. The language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in Narasimhaiah's case. In Nanjudaiah's case, the period was further stretched to have the time period run from the date of service of the High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted, it would mean that a case can be covered by not only Clause*

(i) and/or Clause (ii) of the proviso to Section 6(1), but also by a non-prescribed period. The same can never be the legislative intent.

16. *The plea relating to the applicability of the stare decisis principles is clearly unacceptable. The decision in K. Chinnathambi Gounder v. Government of T.N., MANU/TN/0716/1979 : AIR 1980 Mad 251 was rendered on 22-6-1979, i.e., much prior to the amendment by the 1984 Act. If the legislature intended to give a new lease of life in those cases where the declaration Under Section 6 is quashed, there is no reason why it could not have done so by specifically providing for it. The fact that the legislature specifically provided for periods covered by orders of stay or injunction clearly shows that no other period was intended to be excluded and that there is no scope for providing any other period of limitation. The maxim actus curiae neminem gravabit highlighted by the Full Bench of the Madras High Court has no application to the fact situation of this case.*

309. There is no dispute with the aforesaid proposition that *casus omissus* cannot be applied by the court and in case of clear necessity, the court has to interpret the law, if the provision of law is misused and subjected to abuse of process of law. It is for the legislature to amend, modify and repeal a law, if deemed necessary. Because of the above-mentioned interpretation of the provisions of Section 24 itself, we are unable to accept the submission made. We are not applying casus omissus as urged. In *Padma Sundara Rao* (supra), this Court considered the period of limitation for issuances of declaration Under Section 6 of the Act of 1894. The period has been stretched further in the case of *State of Karnataka v. D.C. Nanjudaiah* MANU/SC/1657/1996 : (1996) 10 SCC 619. Few expressions in the aforesaid decision were held to be incorrect. In *Padma Sundara Rao* (supra), this Court held that when a period, which the legislature has specifically provided, is covered by orders of stay and injunction, no other period could be intended to be excluded by providing time period to run from the date of service of the High Court's order and it would not be open to court to add to that period. The question in *Padma Sundara Rao* (supra) was totally different and it was of counting the period over and above excluded in the provisions, *inter alia*, from the very interpretation of Section 24.

310. As regards application of the maxim to a statute, in *Rana Girders Ltd. v. Union of India* MANU/SC/0803/2013 : 2013 (10) SCC 746, this Court observed that the statutory provision would prevail upon the common law principles. The decision in *Rana Girders Ltd.* (supra) was considered in *Union of India* (supra) where this Court observed thus:

9. *Generally, the rights of the Crown to recover the debt would prevail over the right of a subject. Crown debt means the "debts due to the State or the King; debts which a prerogative entitles the Crown to claim priority for before all other creditors." [See Advanced Law Lexicon by P. Ramanatha Aiyar (3rd Edn.), p. 1147.] Such creditors, however, must be held to mean unsecured creditors. The principle of Crown debt as such pertains to the common law principle. A common law, which is law within the meaning of Article 13 of the Constitution, is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India, are saved by reason of the aforementioned provision. A debt that is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt, which is an unsecured one.*

10. *It is trite that when Parliament or a State Legislature makes an enactment, the same will prevail over the common law. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision. To achieve the same purpose, Parliament as also the State Legislatures inserted provisions in various statutes, some of which have been referred to hereinbefore, providing that the statutory dues shall be the first charge over the properties of the taxpayer. This aspect of the matter has been considered by this Court in a series of judgments.*

311. There is no doubt that common law principles have to be weighed upon the statutory provision and latter has to prevail, but the statutory provision itself makes it clear that in the instant matter such period has to be excluded, thus, the principles of common law also apply with full force. In *Mary Angel and Ors. v. State of T.N.* MANU/SC/0371/1999 : 1999 (5) SCC 209, the maxim "*expressio unius est exclusio alterius*" came to be considered by this Court. It was held that maxim needs to be applied when its application having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice. This Court observed:

19. *Further, for the Rule of interpretation on the basis of the maxim "expressio unius est exclusio alterius," it has been considered in the decision rendered by the Queen's Bench in the case of Dean v. Wiesengrund,* (1955) 2 QB 120. *The Court considered the said maxim and held that after all, it is no more than an aid to construction and has little if any, weight where it is possible to account for the "inclusio unius" on grounds other than the intention to affect the "exclusio alterius." Thereafter, the Court referred to the following passage from the case of Colquhoun v. Brooks,* (1887) 19 QBD 400, QBD at 406 *wherein the Court called for its approval--*

... 'The maxim "expressio unius est exclusio alterius" has been pressed upon us. I agree with what is said in the court below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.' In my opinion, the application of the maxim here would lead to inconsistency and injustice, and would make Section 14(1) of the Act of 1920 uncertain and capricious in its operation.

312. The maxim "*lex non cogit ad impossibilia*" means that the law does not expect the performance of the impossible. Though payment is possible but the logic of payment is relevant. There are cases in which compensation was tendered, but refused and then deposited in the treasury. There was litigation in court, which was pending (or in some cases, decided); earlier references for enhancement of compensation were sought and compensation was enhanced. There was no challenge to acquisition proceedings or taking possession etc. In pending matters in this Court or in the High Court even in proceedings relating to compensation, Section 24(2) was invoked to state that proceedings have lapsed due to non-deposit of compensation in the court or to deposit in the treasury or otherwise due to interim order of the court needful could not be done, as such proceedings should lapse.

313. In *Chander Kishore Jha v. Mahabir Prasad* MANU/SC/0594/1999 : 1999 (8) SCC 266, an election petition was to be presented in the manner prescribed in Rule 6 of Chapter XXI-E of the Patna High Court Rules. The Rules stipulated that the election petition, could under no

circumstances, be presented to the Registrar to save the period of limitation. The election petition could be presented in the open court upto 4.15 p.m. i.e., working hours of the court. The Chief Justice had passed the order that court shall not sit for the rest after 3.15 p.m. Thus, the petition filed the next day was held to be within time. In *Mohammed Gazi v. State of M.P. and Ors.* MANU/SC/0229/2000 : 2000 (4) SCC 342., the maxim "*actus curiae neminem gravabit*" came up for consideration along with maxim "*lex non cogit ad impossibilia*"-the law does not compel a man to perform act which is not possible. Following observations had been made:

7. *In the facts and circumstances of the case, the maxim of equity, namely, actus curiae neminem gravabit -- an act of the court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense, which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit ad impossibilia -- the law does not compel a man to do what he cannot possibly perform. The law itself and its administration are understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in Raj Kumar Dey v. Tarapada Dey,* MANU/SC/0018/1987 : (1987) 4 SCC 398 *and Gursharan Singh v. New Delhi Municipal Committee, MANU/SC/0313/1996 : (1996) 2 SCC 459.*

314. Another Roman Law maxim *"nemo tenetur ad impossibilia"*, means no one is bound to do an impossibility. Though such acts of taking possession and disbursement of compensation are not impossible, yet they are not capable of law performance, during subsistence of a court's order; the order has to be complied and cannot be violated. Thus, on equitable principles also, such a period has to be excluded.
In *Industrial Finance Corporation of India Ltd. v. Cannanore Spinning & Weaving Mills Ltd. and Ors.* MANU/SC/0317/2002 : 2002 (5) SCC 54, this Court observed that where law creates a duty or charge and the party is disabled to perform it, without any default and has no remedy over, there the law will in general excuse him. This Court relying upon the aforesaid maxim observed as under:

30. *The Latin maxim referred to in the English judgment lex non cogit ad impossibilia also expressed as impotentia excusat legem in common English acceptation means, the law does not compel a man to do that which he cannot possibly perform. There ought always thus to be an invincible disability to perform the obligation, and the same is akin to the Roman maxim nemo tenetur ad impossible. In Broom's Legal Maxims, the state of the situation has been described as below:*

It is, then, a general Rule which admits of ample practical illustration, that impotentia excusat legem; where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him (t): and though impossibility of performance is, in general, no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse. Thus in a case in which consignees of a cargo were prevented from unloading a ship promptly by reason of a dock strike, the Court, after holding that in the absence of an express agreement to unload in a specified time there was implied obligation to unload within a reasonable time, held that the maxim lex non cogit ad impossibilia applied, and

Lindley, L.J., said: 'We have to do with implied obligations, and I am not aware of any case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control.'

315. In *HUDA and Anr. v. Dr. Babeswar Kanhar and Anr.* MANU/SC/1008/2004 : (2005) 1 SCC 191, this Court considered the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity as held in *Sambasiva Chari v. Ramasami Reddi* ILR (1899) 22 Mad 179. In *Dr. Babeswar Kanhar* (supra), it was observed thus:

5. *What is stipulated in Clause 4 of the letter dated 30-10-2001 is a communication regarding refusal to accept the allotment. This was done on 28-11-2001. Respondent 1 cannot be put to a loss for the closure of the office of HUDA on 1-12-2001 and 2-12-2001 and the postal holiday on 30-11-2001. In fact, he had no control over these matters. Even the logic of Section 10 of the General Clauses Act, 1897, can be pressed into service. Apart from the said Section and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (see Sambasiva Chari v. Ramasami Reddi,* MANU/TN/0022/1891 : (1898) 8 MLJ 265). *The underlying object of the principle is to enable a person to do what he could have done on holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on holiday, then the act should be considered to have been done within that period if it is done on the next day on which the court or office is open. The reason is that the law does not compel the performance of an impossibility. (See Hossein Ally v. Donzelle, ILR (1880) 5 Cal 906.) Every consideration of justice and expediency would require that the accepted principle, which underlies Section 10 of the General Clauses Act, should be applied in cases where it does not otherwise in terms apply. The principles underlying are lex non cogit ad impossibilia (the law does not compel a man to do the impossible) and actus curiae neminem gravabit (the act of court shall prejudice no man). Above being the position, there is nothing infirm in the orders passed by the forums below. However, the rate of interest fixed appears to be slightly on the higher side and is reduced to 9% to be paid with effect from 3-12-2001, i.e., the date on which the letter was received by HUDA.*

316. In *re Presidential Poll* MANU/SC/0047/1974 : (1974) 2 SCC 33, this Court made similar observations. When there is a disability to perform a part of the law, such a charge has to be excused. When performance of the formalities prescribed by a statute is rendered impossible by circumstances over which the persons concerned have no control, it has to be taken as a valid excuse. The Court observed:

15. *The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law impotentia excusat legam is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legam is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him and has no remedy over it, there*

the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims 10th Edn. At pp. 162-163 and Craies on Statute Law 6th Edn. at p. 268).

317. In *Standard Chartered Bank v. Directorate of Enforcement* MANU/SC/0380/2005 : (2005) 4 SCC 530, the legal maxim "*impotentia excusat legem*" has been applied to hold that law does not compel a man to do that which cannot possibly be performed. Though the maxim with respect to the impossibility of performance may not be strictly applicable, however, the effect of the court's order, for the time being, made the Authorities disable to fulfill the obligation. Thus, when they were incapable of performing, they have to be permitted to perform at the first available opportunity, which is the time prescribed by the statute for them, i.e., the total period of 5 years excluding the period of the interim order.

318. The maxim *actus curiae neminem gravabit* is founded upon the principle due to court proceedings or acts of court, no party should suffer. If any interim orders are made during the pendency of the litigation, they are subject to the final decision in the matter. In case the matter is dismissed as without merit, the interim order is automatically dissolved. In case the matter has been filed without any merit, the maxim is attracted *commodum ex injuria sua nemo habere debet*, that is, convenience cannot accrue to a party from his own wrong. No person ought to have the advantage of his own wrong. In case litigation has been filed frivolously or without any basis, iniquitously in order to delay and by that it is delayed, there is no equity in favour of such a person. Such cases are required to be decided on merits. In *Mrutunjay Pani and Anr. v. Narmada Bala Sasmal and Anr.* MANU/SC/0357/1961 : AIR 1961 SC 1353, this Court observed that:

(5) X x x The same principle is comprised in the latin maxim commodum ex injuria sua nemo habere debet, that is, convenience cannot accrue to a party from his own wrong. To put it in other words, no one can be allowed to benefit from his own wrongful act. ...

319. It is not the policy of law that untenable claims should get fructified due to delay. Similarly, sufferance of a person who abides by law is not permissible. The Act of 2013 does not confer the benefit on unscrupulous litigants, but it aims at and frowns upon the lethargy of the officials to complete the requisites within five years.

320. The States urge that by refusal to accept compensation, one cannot take advantage of own conduct. This idea is explained in Maxwell on the *Interpretation of Statutes* (12th Edition) by P. St. J. Langon, wherein following observations have been made:

On the principles of avoiding injustice and absurdity, any construction will, if possible, be rejected (unless the policy of the Act requires it) if it would enable a person by his own act to impair an obligation which he has undertaken, or otherwise to profit by his own wrong. He may not take advantage of his own wrong. He may not plead in his own interest a self created necessity" (Kish v. Taylor, (1911) 1 K.B. 625, *per Fletcher Moulton I.J. at page 634).*

Thus an Act which authorised justices to discharge apprentice from his indenture in certain circumstances "on the master's appearance" before them justified a discharge in his wilful absence. It would have been unreasonable to have construed the Act in such a way that the master derived an advantage from his own obstinacy (Ditton's Case (1701) 2 Salk. 490)

321. In *G.T.C. Industries Ltd. v. Union of India* MANU/SC/0189/1998 : (1998) 3 SCC 376, it was observed that while vacating stay, it is the court's duty to account for the period of delay and to settle equities. It is not the gain which can be conferred. In *Jaipur Municipal Corporation v. C.L. Mishra* MANU/SC/2511/2005 : (2005) 8 SCC 423, it has been observed that interim order merges in the final order, and it cannot have an independent existence, cannot survive beyond final decision. In *Ram Krishna Verma v. the State of U.P.* MANU/SC/0496/1992 : (1992) 2 SCC 620, reliance was placed on *Grindlays Bank Ltd. v. C.I.T.* MANU/SC/0276/1980 : (1980) 2 SCC 191. It was held that no one could be permitted to suffer from the act of the court and in case an interim order has been passed and ultimately petition is found to be without merit and is dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized.

322. In *Mahadeo Savlaram Shelke v. Pune Municipal* Corporation MANU/SC/0673/1995 : (1995) 3 SCC 33, it has been observed that the Court can under its inherent jurisdiction *ex debito justitiae* has a duty to mitigate the damage suffered by the Defendants by the act of the court. Such action is necessary to put a check on abuse of process of the court. In *Amarjeet Singh and Ors. v. Devi Ratan and Ors.* MANU/SC/1843/2009 : (2010) 1 SCC 417, and *Ram Krishna Verma* (supra), it was observed that no person can suffer from the act of court and unfair advantage of the interim order must be neutralized. In *Amarjeet Singh* (supra), this Court observed:

17. *No litigant can derive any benefit from mere pendency of the case in a court of law, as the interim order always merges in the final order to be passed in the case, and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation, the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. (Vide Shiv Shankar v. U.P. SRTC,* MANU/SC/1088/1995 : 1995 Supp (2) SCC 726, *GTC Industries Ltd. v. Union of India,* MANU/SC/0189/1998 : (1998) 3 SCC 376 *and Jaipur Municipal Corporation v. C.L. Mishra,* MANU/SC/2511/2005 : (2005) 8 SCC 423.)

18. In Ram Krishna Verma v. the State of U.P. MANU/SC/0496/1992 : (1992) 2 SCC 620, *this Court examined a similar issue while placing reliance upon its earlier judgment in Grindlays Bank Ltd. v. ITO,* MANU/SC/0276/1980 : (1980) 2 SCC 191 *and held that no person can suffer from the act of the court and in case an interim order has been passed, and the Petitioner takes advantage thereof, and ultimately the petition is found to be without any merit and is dismissed,*

the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized.

323. In *Karnataka Rare Earth and Anr. v. Senior Geologist, Department of Mines & Geology* MANU/SC/0057/2004 : (2004) 2 SCC 783, this Court observed that maxim actus curiae neminem gravabit requires that the party should be placed in the same position but for the court's order which is ultimately found to be not sustainable which has resulted in one party gaining advantage which otherwise would not have earned and the other party has suffered but for the orders of the court. The successful party can demand the delivery of benefit earned by the other party, or make restitution for what it has lost. This Court observed:

10. *In x x x x the doctrine of actus curiae neminem gravabit and held that the doctrine was not confined in its application only to such acts of the court which were erroneous; the doctrine is applicable to all such acts as to which it can be held that the court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution that is attracted. When on account of an act of the party, persuading the court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered, but for the order of the court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed. The successful party can demand: (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost.*

11. *In the facts of this case, in spite of the judgment of the High Court, if the Appellants would not have persuaded this Court to pass the interim orders, they would not have been entitled to operate the mining leases and to raise and remove and dispose of the minerals extracted. But for the interim orders passed by this Court, there is no difference between the Appellants and any person raising, without any lawful authority, any mineral from any land, attracting applicability of Sub-section (5) of Section 21. As the Appellants have lost from the Court, they cannot be allowed to retain the benefit earned by them under the interim orders of the Court. The High Court has rightly held the Appellants liable to be placed in the same position in which they would have been if this Court would not have protected them by issuing interim orders. All that the State Government is demanding from the Appellants is the price of the minor minerals. Rent, royalty or tax has already been recovered by the State Government and, therefore, there is no demand under that head. No penal proceedings, much less any criminal proceedings, have been initiated against the Appellants. It is absolutely incorrect to contend that the Appellants are being asked to pay any penalty or are being subjected to any penal action. It is not the case of the Appellants that they are being asked to pay the price more than what they have realized from the exports or that the price appointed by the Respondent State is in any manner arbitrary or unreasonable.*

324. In *A.R. Antulay* (supra), this Court observed that it is a settled principle that an act of the court shall prejudice no man. This maxim *actus curiae neminem gravabit* is founded upon justice and good sense and affords a safe and certain guide for the administration of the law. No man can be

denied his rights. In India, a delay occurs due to procedural wrangles. In *A.R. Antulay* (supra), this Court observed:

102. *This being the apex court, no litigant has any opportunity of approaching any higher forum to question its decisions. Lord Buckmaster in Montreal Street Railway Co. v. Normadin,* 1917 AC 170 *(sic) stated:*

All Rules of court are nothing but provisions intended to secure the proper administration of justice. It is, therefore, essential that they should be made to serve and be subordinate to that purpose.

This Court in State of Gujarat v. Ramprakash P. Puri, MANU/SC/0157/1969 : (1970) 2 SCR 875, *reiterated the position by saying: [SCC p. 159: SCC (Cri.) p. 31, para 8]*

Procedure has been described to be a handmaid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all Rules of procedure, this Rule demands a construction which would promote this cause.

Once judicial satisfaction is reached that the direction was not open to be made and it is accepted as a mistake of the court, it is not only appropriate but also the duty of the court to rectify the mistake by exercising inherent powers. Judicial opinion heavily leans in favour of this view that a mistake of the court can be corrected by the court itself without any fetters. This is on principle, as indicated in (Alexander) Rodger case (1869-71) LR 3 PC 465. *I am of the view that in the present situation, the court's inherent powers can be exercised to remedy the mistake. Mahajan., J. speaking for a Four Judge Bench in Keshardeo Chamria v. Radha Kissen Chamria,* MANU/SC/0006/1952 : 1953 SCR 136 *at Page 153 stated:*

The judge had jurisdiction to correct his own error without entering into a discussion of the grounds taken by the decree-holder or the objections raised by the judgment-debtors.

325. In *Superintendent of Taxes v. Onkarmal Nathmal Trust* MANU/SC/0265/1975 : (1976) 1 SCC 766, this Court considered the conduct of the State Government in not questioning the interim order at any stage in seeking variation or modification of the order of injunction. It was held that the State could not take advantage of its own wrong and lack of diligence and could not contend it was impossible to issue notice within the purview of Section 7(2) of the new Act. The decision is distinguishable and turns on its own facts. Though the act is possible to be performed but not as per the public policy which frowns upon violation of the court's interim order.

The decision cannot be applied, particularly in view of the provisions contained in Section 24(2), and on facts, it has no application.

326. Reliance was placed on *Neeraj Kumar Sainy v. the State of U.P.* MANU/SC/0283/2017 : (2017) 14 SCC 136. There, this Court observed that no one should suffer any prejudice because of the act of the court; the legal maxim cannot operate in a vacuum. It has to get the sustenance from the facts. As the Appellants resigned to their fate and woke up to have control over the events forgetting that the law does not assist the non-vigilant. One cannot indulge in the luxury of

lethargy, possibly nurturing the feeling that forgetting is a virtue. If such is the conduct, it is not permissible to take shelter under the maxim *actus curiae neminem gravabit*. There is no dispute with the aforesaid principle. Party has to be vigilant about the right, but the *ratio* cannot be applied. In the opinion, the ratio in the decision cannot be applied for the purpose of interpretation of Section 24(2).

327. There can be no doubt that when parties are before court, the final decision has to prevail, and they succeed or fail based on the merits of their relative cases. Neither can be permitted to take shelter under the cover of court's order to put the other party in a disadvantageous position. If one has enjoyed under the court's cover, that period cannot be included towards inaction of the authorities to take requisite steps Under Section 24. The State authorities would have acted but for the court's order. *In fact, the occasion for the Petitioners to approach the court in those cases, was that the State or acquiring bodies were taking their properties*. Ultimately case had to stand on its merit in the challenge to the acquisition or compensation, and no right or advantage could therefore be conferred (or accrue) Under Section 24(2) in such situations.

328. The argument of the landowners was that on the one hand, the court should not discern a *casus omissus* and in effect, the absence of provision to exclude the time during which an interim order operated, means that Parliament intended such omission. The maxim '*expressio unius est exclusio alterious*' means that express mention of one or more persons or things of a particular class may be regarded as by implication excluding all others of that class. The maxim, however, does not apply when the provisions of the legislation in question show that the exclusion could not have been intended. In *Colquhoun v. Brooks* (1889) 21 QBD 52, the House of Lords opined that:

The maxim 'expressio unius est exclusio alterious' has been pressed upon us. I agree with what is said in the court below by Wills, J. about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.

Lewis Sutherland's *Statutory Construction* (2nd ed.), Section 491, applies the Rule as follows:

Expressio unius est exclusio alterious-The maxim, like all Rules of construction, is applicable under certain conditions to determine the intent of the lawmaker when it is not otherwise manifest. Under these conditions, it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provisions in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right.

329. In a case before the United States Court of Customs and Patent Appeals decided on 5th November, 1934, *Yardley & Co. Ltd. v. United States*, the court considered the question of classification and assessment with duty of certain merchandise consisting of empty glass jars and lids, and whether these could be considered as 'entireties' that would be dutiable under paragraph 33 of the Tariff Act of 1930. The court in that case relied on the observations in Colquhoun v. Brooks (supra) and held that the glass jars with their lids would be dutiable as entireties, despite

there not being an express legislative provision to that effect. It was held that the Rule of *expressio unius est exclusio alterious* would not be applicable in the context of the legislative provision in the Tariff Acts of 1909, 1913 and 1922, as the relevant provision therein (in the 1930 Act) was merely declaratory in nature and not in derogation of existing law. In *Assistant Collector of Central Excise v. National Tobacco Company of India Ltd.* MANU/SC/0377/1972 : (1972) 2 SCC 560, this Court held that the Rule of expressio *unius est exclusio alterious*:

is subservient to the basic principle that courts must endeavour to ascertain the legislative intent and purpose, and then adopt a Rule of construction which effectuates rather than one that may defeat these.

330. In *Karnataka State v. Union of India* MANU/SC/0144/1977 : (1977) 4 SCC 608, the Court observed that:

Before the principle can be applied at all the Court must find an express mode of doing something that is provided in a statute, which, by its necessary implication, could exclude the doing of that very thing and not something else in some other way. Far from this being the case here, as the discussion above has shown, the Constitution makers intended to cover the making of provisions by Parliament for inquiries for various objects which may be matters of public importance without any indications of any other limits except that they must relate to subjects found in the Lists. I have also indicated why a provision like Section 3 of the Act would, in any case, fall under entry 97 of List I of Schedule VII read with Articles 248 and 356 of the Constitution even if all subjects to which it may relate are not found specified in the lists. Thus, there is express provision in our Constitution to cover an enactment such as Section 3 of the Act, hence, there is no room whatsoever for applying the "Expressio Unius" Rule to exclude what falls within an expressly provided legislative entry. That maxim has been aptly described as a "useful servant but a dangerous master" (per Lopes L.J. in Colquhoun v. Brooks (1888) 21 Q.B.D. *The limitations or conditions under which this principle of construction operates are frequently overlooked by those who attempt to apply it.*

To advance the balder and broader proposition that what is not specifically mentioned in the Constitution must be deemed to be deliberately excluded from its purview, so that nothing short of a Constitutional amendment could authorise legislation upon it, is really to invent a "Cams Omissus" so as to apply the Rule that, where there is such a gap in the law, the Court cannot fill it. The rule, however, is equally clear that the Court cannot so interpret a statute as "to produce a casus omissus" where there is really none (see: The Mersey Docks and Harbour Board v. Penderson Brothers (1888) 13 A.C. 595). *If our Constitution itself provides for legislation to fill what is sought to be construed as a lacuna, how can legislation seeking to do this be held to be void because it performs its intended function by an exercise of an expressly conferred legislative power? In declaring the purpose of the provisions so made and the authority for making it, Courts do not supply an omission or fill up a gap at all. It is Parliament which can do so and has done it. To hold that parliament is incompetent to do this is to substitute an indefensible theory or a figment of one's imagination-that the Constitution stands in the way somehow-for that which only a clear Constitutional bar could achieve.*

In *Mary Angel* (supra) this Court observed as follows:

...The Rule of interpretation on the basis of the maxim "expressio unius est exclusio alterius", ... has been considered in the decision rendered by the Queen's Bench in the case of Dean v. Wiesengrund (1955) 2 QBD 120. *The Court considered the said maxim and held that after all it is more than an aid to construction and has little, if any, weight where it is possible to account for the "exclusio unius" on grounds other than intention to effect the "exclusio alterius". Thereafter, the Court referred to the following passage from the case of Colquhoon v. Brooks* (1887) 19 QBD 400 *wherein the Court called for its approval-"The maxim 'expressio unius est exclusio alterius' has been pressed upon us. I agree with what is said in the Court below by Wills J, about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes of documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice. In my opinion, the application of the maxim here would lead to inconsistency and injustice, and would make Section 14(1) of the Act of 1920 uncertain and capricious in its operation.*

The aforesaid maxim was referred to by this Court in the case of Asst. Collector, Central Excise v. National Tobacco Co. MANU/SC/0377/1972 : 1978 (2) ELT 416 (SC), *the Court in that case considered the question whether there was or was not an implied power to hold an inquiry in the circumstances of the case in view of the provisions of the Section 4 of the Central Excise Act read with Rule 10(A) of the Central Excise Rules and referred to the aforesaid passage "the maxim" is often a valuable servant, but a dangerous master ...' and held that the Rule is subservient to the basic principle that Courts must endeavour to ascertain the legislative intent and purpose, and then adopt a Rule of construction which effectuates rather than one that may defeat these. Moreover, the Rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for the performance of a duty. In the case of Parbhani Transport Co-op Society Ltd. v. R.T.A. Aurangabad* MANU/SC/0248/1960 : (1960) 3 SCR 177, *this Court observed that the maxim 'expressio unius est exclusio alterius' is a maxim for ascertaining the intention of the legislature and where the statutory language is plain and the meaning clear, there is no scope for applying. Further, in Harish Chander Vajpai v. Triloki Singh,* MANU/SC/0057/1956 : (1957) 1 SCR 370, *the Court referred to the following passage from Maxwell on Interpretation of Statutes, 10th Edition, pages 316-317:*

Provisions sometimes found in statutes, enacting imperfectly or for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim expressio unius, exclusio alterius. But that maxim is inapplicable in such cases. The only inference which a court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution.

Lastly, we would state that in the case of Pampathy v. State of Mysore (supra), the Court has specifically observed that no legislative enactment dealing with the procedure can provide for all cases and that Court should have inherent powers apart from the express provisions of law which are necessary for the proper discharge of duties.

331. For all these reasons, it is held that the omission to expressly enact a provision, that excludes the period during which any interim order was operative, preventing the State from taking possession of acquired land, or from giving effect to the award, in a particular case or cases, cannot result in the inclusion of such period or periods for the purpose of reckoning the period of 5 years. Also, merely because timelines are indicated, with the consequence of lapsing, Under Sections 19 and 69 of the Act of 2013, per se does not mean that omission to factor such time (of subsistence of interim orders) has any special legislative intent. This Court notices, in this context, that even under the new Act (nor was it so under the 1894 Act) no provision has been enacted, for lapse of the entire acquisition, for non-payment of compensation within a specified time; nor has any such provision been made regarding possession. Furthermore, non-compliance with payment and deposit provisions (Under Section 77) only results in higher interest pay-outs Under Section 80. The omission to provide for exclusion of time during which interim orders subsisted, while determining whether or not acquisitions lapsed, in the present case, is a clear result of inadvertence or accident, having regard to the subject matter, refusal to apply the principle underlying the maxim *actus curae neminem gravabit* would result in injustice.

In Re: Principle of Restitution:

332. The principle of restitution is founded on the ideal of doing complete justice at the end of litigation, and parties have to be placed in the same position but for the litigation and interim order, if any, passed in the matter. In *South Eastern Coalfields Ltd. v. State of M.P. and Ors.* MANU/SC/0807/2003 : (2003) 8 SCC 648, it was held that no party could take advantage of litigation. It has to disgorge the advantage gained due to delay in case lis is lost. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final order going against the party successful at the interim stage. Section 144 of the Code of Civil Procedure is not the fountain source of restitution. It is rather a statutory recognition of the Rule of justice, equity and fair play. The court has inherent jurisdiction to order restitution so as to do complete justice. This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it. In exercise of such power, the courts have applied the principle of restitution to myriad situations not falling within the terms of Section 144 Code of Civil Procedure. What attracts applicability of restitution is not the act of the court being wrongful or mistake or an error committed by the court; the test is whether, on account of an act of the party persuading the court to pass an order held at the end as not sustainable, resulting in one party gaining an advantage which it would not have otherwise earned, or the other party having suffered an impoverishment, restitution has to be made. Litigation cannot be permitted to be a productive industry. Litigation cannot be reduced to gaming where there is an element of chance in every case. If the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order. This Court observed in *South Eastern Coal Field* (supra) thus:

26. *In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see Zafar Khan v. Board of Revenue, U.P.,* MANU/SC/0251/1984 : 1984 Supp SCC 505) *In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for*

benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for the injury done:

Often, the result under either meaning of the term would be the same. ... Unjust impoverishment, as well as unjust enrichment, is a ground for restitution. If the Defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed.

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 Code of Civil Procedure speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favor of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. x x x

27. x x x

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (A. Arunagiri Nadar v. S.P. Rathinasami, MANU/TN/0311/1970 : (1971) 1 MLJ 220). *In the exercise of such inherent power, the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.*

28. *That no one shall suffer by an act of the court is not a Rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. x x x the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.*

333. In *State of Gujarat and Ors. v. Essar Oil Ltd. and Anr.* MANU/SC/0035/2012 : (2012) 3 SCC 522, it was observed that the principle of restitution is a remedy against unjust enrichment or unjust benefit. The Court observed:

61. *The concept of restitution is virtually a common law principle, and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the court, which prevents a party from retaining money or some benefit derived from another, which it has received by way of an erroneous decree of the court. Such remedy in English Law is generally different*

from a remedy in contract or in tort and falls within the third category of common law remedy, which is called quasi-contract or restitution.

62. *If we analyze the concept of restitution, one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (see Halsbury's Laws of England, 4th Edn., Vol. 9, p. 434).*

334. In *A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam* MANU/SC/0336/2012 : (2012) 6 SCC 430, it was stated that restitutionary jurisdiction is inherent in every court, to neutralize the advantage of litigation. A person on the right side of the law should not be deprived, on account of the effects of litigation; the wrongful gain of frivolous litigation has to be eliminated if the faith of people in the judiciary has to be sustained. The Court observed:

37. *This Court, in another important case in Indian Council for Enviro-Legal Action v. Union of India (of which one of us, Dr. Bhandari, J. was the author of the judgment) had an occasion to deal with the concept of restitution. The relevant paragraphs of that judgment dealing with relevant judgments are reproduced hereunder: (SCC pp. 238-41 & 243-46, paras 170-76, 183-88 & 190-93)*

170. x x x

171. In Ram Krishna Verma v. the State of U.P. this Court observed as under: (SCC p. 630, para 16)

16. The 50 operators, including the Appellants/private operators, have been running their stage carriages by blatant abuse of the process of the court by delaying the hearing as directed in Jeewan Nath Wahal's case and the High Court earlier thereto. As a fact, on the expiry of the initial period of the grant after 29-9-1959, they lost the right to obtain renewal or to ply their vehicles, as this Court declared the scheme to be operative. However, by sheer abuse of the process of law, they are continuing to ply their vehicles pending the hearing of the objections. This Court in Grindlays Bank Ltd. v. ITO held that the High Court, while exercising its power Under Article 226, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party responsible for it. In the light of that law and in view of the power Under Article 142(1) of the Constitution this Court, while exercising its jurisdiction would do complete justice and neutralize the unfair advantage gained by the 50 operators including the Appellants in dragging the litigation to run the stage carriages on the approved route or area or portion thereof and forfeited their right to hearing of the objections filed by them to the draft scheme dated 26-2-1959.

172. This Court in Kavita Trehan v. Balsara Hygiene Products Ltd. observed as under: (SCC p. 391, para 22)

22. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers, where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words:

***144. Application for restitution.**--(1) Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose ....*

The instant case may not strictly fall within the terms of Section 144, but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.

173. This Court in Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. observed as under: (SCC pp. 326-27, para 4)

4. From the narration of the facts, though it appears to us, prima facie, that a decree in favor of the Appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the Respondent to deliver the possession to the Appellant since the suit filed by the Respondent is still pending. It is true that proceedings are dragged on for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage, providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage, and the person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of the immovable property, its execution takes a long time. In such a situation, for protecting the interest of the judgment-creditor, it is necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. Inappropriate cases, the court may appoint a Receiver and direct the person who is holding over the property to act as an agent of the [Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the Plaintiff in whose favor the decree is passed and to protect the property, including further alienation.

174. In Padmawati v. Harijan Sewak Sangh decided by the Delhi High Court on 6-11-2008, the Court held as under: (DLT p. 413, para 6)

6. The case at hand shows that frivolous defenses and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where the court finds that using the courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the courts. One of the aims of every judicial system has to be to discourage unjust enrichment using courts as a tool. The costs imposed by the courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.

We approve the findings of the High Court of Delhi in the case mentioned above.

175. The High Court also stated: (Padmawati case, DLT pp. 414-15, para 9)

9. Before parting with this case, we consider it necessary to observe that one of the [main] reasons for overflowing of court dockets is the frivolous litigation in which the courts are engaged by the litigants and which is dragged on for as long as possible. Even if these litigants ultimately lose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right but also must be burdened with exemplary costs. The faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make the wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the courts to see that such wrongdoers are discouraged at every step, and even if they succeed in prolonging the litigation due to their money power, ultimately, they must suffer the costs of all these years' long litigation. Despite the settled legal positions, the obvious wrongdoers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour since even if they lose, the time gained is the real gain. This situation must be redeemed by the courts.

176. Against this judgment of the Delhi High Court, Special Leave to Appeal (Civil) No. 29197 of 2008 was preferred to this Court. The Court passed the following order: (SCC p. 460, para 1)

1. We have heard the learned Counsel appearing for the parties. We find no ground to interfere with the well-considered judgment passed by the High Court. The special leave petition is, accordingly, dismissed.

***

183. In Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. this Court in para 4 of the judgment observed as under: (SCC pp. 326-27)

4. ... It is true that proceedings are dragged on for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage, providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage, and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time. In such a situation, for protecting the interest of the judgment-creditor, it is necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, the court may appoint a Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the Plaintiff in whose favour the decree is passed and to protect the property, including further alienation.

184. In Ouseph Mathai v. M. Abdul Khadir, this Court reiterated the legal position that: (SCC p. 328, para 13)

13. ... [the] stay granted by the court does not confer a right upon a party and it is granted always subject to the final result of the matter in the court and at the risks and costs of the party obtaining the stay. After the dismissal of the lis, the party concerned is relegated to the position which existed prior to the filing of the petition in the court which had granted the stay. Grant of stay does not automatically amount to extension of a statutory protection.

There are other decisions as well, which iterate and apply the same principle.[27]

335. A wrong-doer or in the present context, a litigant who takes his chances, cannot be permitted to gain by delaying tactics. It is the duty of the judicial system to discourage undue enrichment or drawing of undue advantage, by using the court as a tool. In *Kalabharati Advertising v. Hemant Vimalnath Narichania* MANU/SC/0674/2010 : (2010) 9 SCC 437, it was observed that courts should be careful in neutralizing the effect of consequential orders passed pursuant to interim orders. Such directions are necessary to check the rising trend among the litigants to secure reliefs as an interim measure and avoid adjudication of the case on merits. Thus, the restitutionary principle recognizes and gives shape to the idea that advantages secured by a litigant, on account of orders of court, at his behest, should not be perpetuated; this would encourage the prolific or serial litigant, to approach courts time and again and defeat rights of others-including undermining of public purposes underlying acquisition proceedings. A different approach would mean that, for instance, where two landowners (sought to be displaced from their lands by the same notification) are awarded compensation, of whom one allows the issue to attain finality-and moves on, the other obdurately seeks to stall the public purpose underlying the acquisition, by filing one or series of litigation, during the pendency of which interim orders might inure and bind the parties, the latter would profit and be rewarded, with the deemed lapse condition Under Section 24(2). Such a consequence, in the opinion of this Court, was never intended by Parliament; furthermore, the restitutionary principle requires that the advantage gained by the litigant should be suitably offset, in favour of the other party.

336. In *Krishnaswamy S. Pd. v. Union of India* MANU/SC/8036/2006 : (2006) 3 SCC 286, it was observed that an unintentional mistake of the Court, which may prejudice the cause of any party, must and alone could be rectified. Thus, in our opinion, the period for which the interim order has operated Under Section 24 has to be excluded for counting the period of 5 years Under Section 24(2) for the various reasons mentioned above.

In Re Question No. 6: Whether Section 24 revives stale and barred claim

337. Before proceeding further, in our opinion, Section 24 contemplates pending proceedings and not the concluded ones in which possession has been taken, and compensation has been paid or deposited. Section 24 does not provide an arm or tool to question the legality of proceedings, which have been undertaken under the Act of 1894 and stood concluded before five years or more. It is only in cases where possession has not been taken, nor compensation is paid, that there is a lapse. In case possession has been taken, and compensation has not been deposited with respect to majority of landholdings, the beneficial provision of the statute provides that all beneficiaries shall

be paid compensation as admissible under the Act of 2013. The beneficiaries, i.e., landowners contemplated under the proviso to Section 24(2), are the ones who were so recorded as beneficiaries as on the date of issuance of notification Under Section 4 of the Act of 1894. The provision is not meant to be invoked on the basis of void transactions, and by the persons who have purchased on the basis of power of attorney or otherwise, they cannot claim the benefit Under Section 24 as is apparent from proviso to Section 24(2) and the decision in *Shiv Kumar and Ors. v. Union of India and Ors.* MANU/SC/1407/2019 : 2019 (13) SCALE 698.

338. This Court is cognizant that Section 24 is used for submitting various claims, by way of filing applications in the pending proceedings either before the High Court or this Court. There are cases in which in the first round of litigation where the challenge to acquisition proceedings has failed, validity has been upheld, and possession has been taken after passing of the award. It is contended that drawing of *panchnama* was not the permissible mode to take possession, and actual physical possession remains with such landowners/purchasers/power of attorney holders as such benefit of Section 24 should be given to them notwithstanding the fact that they have withdrawn the compensation also.

339. This Court is cognizant of cases where reference was sought for enhancement of compensation, money was deposited in the treasury, enhancement was made, and possession was taken. Yet, acquisitions have been questioned, and claims are being made Under Section 24, that acquisition has lapsed, as the deposit (of compensation amount) in the treasury was not in accordance with the law, the amount should have been deposited in reference court. Further, this Court also notes that there have been cases in which after taking possession, when development is complete, infrastructure has developed despite which claims are being made Under Section 24, on the ground that either the possession has not been taken in accordance with law or compensation has been deposited in the treasury, thus questioning the acquisitions. The decision in *Mahavir and Ors. v. Union of India* MANU/SC/1397/2017 : (2018) 3 SCC 588 was an instance in which a claim was made that acquisition was made more than a century ago, and compensation has not been paid as such acquisition has lapsed relating to the land of Raisina Hills in New Delhi. The importance of Raisina Hills is well-known to everybody. The grossest misuse of Section 24 has been sought to be made, which is intended to confer benefit. It was never intended to revive such claims and be used in the manner in which it has been today, where large numbers of acquisitions and development projects, such as construction of roads, hospitals, townships, housing projects, etc., are sought to be undone, though such acquisitions have been settled in several rounds of litigation. In several matters, the validity has been questioned under the guise as if the right has been conferred for the first time under the Act of 2013, claiming that such acquisitions have lapsed. There are also cases in which the claims for release of land Under Section 48 of the Act of 1894 have been dismissed. Now, claims are made that as land is open and landowners/intermediaries/POA holders continue to be in physical possession, thus, it should be returned to them, as the acquisition has lapsed Under Section 24(2). Before us also arguments have been raised to grant relief in all such cases by making purposive interpretation of benevolent provisions. It was urged that this Court is bound to give relief as Section 24 is retrospective in operation, and the authorities have not cared to take possession for more than five years or more, and they have not paid the compensation and deposited it in treasury which cannot be said to be legal. It is declared that the acquisition has lapsed, and the land is given back to them. In case any infrastructure is existing, the State Government should acquire the land afresh after following the

process of Act of 2013. Earlier, injustice was done to landowners, as observed in various decisions mentioned above. We should not disturb the decisions of this Court and are bound to follow the law laid down in *Pune Municipal Corporation* (supra) and the principle of *stare decisis*.

340. By and large, concluded cases are being questioned by way of invoking the provisions contained in Section 24. In our considered opinion, the legality of concluded cases cannot be questioned under the guise of Section 24(2) as it does not envisage or confer any such right to question the proceedings and the acquisitions have been concluded long back, or in several rounds of litigation as mentioned above, rights of the parties have been settled.

341. In this context, it is noteworthy that the Urban Land (Ceiling and Regulation) Act, 1976, was repealed in the year 1999; thereafter, claims were raised. After repeal, it was claimed that actual physical possession has not been taken by the State Government as such repeal has the effect of effacing the proceedings of taking possession, which it was alleged, was not in accordance with the law. In *State of Assam v. Bhaskar Jyoti Sarma and Ors.* MANU/SC/1082/2014 : (2015) 5 SCC 321, submission was raised by the State of Assam that physical possession has been taken over by the competent authority and it was submitted on behalf of landowner that procedure prescribed Under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976, was not followed. It was before taking possession Under Section 10(6) of the Urban Land (Ceiling and Regulation) Act, 1976, the notification Under Section 10(5) was necessary; thus, no possession can be said to have been taken within the meaning of Section 3 of the Repeal Act. The question this Court had to consider was whether actual physical possession was taken over in that case by the competent authority. The State of Assam submitted that though possession was taken over in the year 1991, may be unilaterally and without notice to the landowner. It was urged that mere non-compliance with Section 10(5) would be insufficient to attract the provisions of Section 3 of the Repeal Act. This Court repelled the submission of the landowner and held as under:

15. *The High Court has held that the alleged dispossession was not preceded by any notice Under Section 10(5) of the Act. Assuming that to be the case all that it would mean is that on 7-12-1991 when the erstwhile owner was dispossessed from the land in question, he could have made a grievance based on Section 10(5) and even sought restoration of possession to him no matter he would upon such restoration once again be liable to be evicted Under Sections 10(5) and 10(6) of the Act upon his failure to deliver or surrender such possession. In reality therefore unless there was something that was inherently wrong so as to affect the very process of taking over such as the identity of the land or the boundaries thereof or any other circumstance of a similar nature going to the root of the matter hence requiring an adjudication, a person who had lost his land by reason of the same being declared surplus Under Section 10(3) would not consider it worthwhile to agitate the violation of Section 10(5) for he can well understand that even when the Court may uphold his contention that the procedure ought to be followed as prescribed, it may still be not enough for him to retain the land for the authorities could the very next day dispossess him from the same by simply serving a notice Under Section 10(5). It would, in that view, be an academic exercise for any owner or person in possession to find fault with his dispossession on the ground that no notice Under Section 10(5) had been served upon him.*

16. *The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether*

such grievance could be made long after the alleged violation of Section 10(5). If actual physical possession was taken over from the erstwhile landowner on 7-12-1991 as is alleged in the present case, any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did not do so, forcibly taking over of possession would acquire legitimacy by sheer lapse of time. In any such situation, the owner or the person in possession must be deemed to have waived his right Under Section 10(5) of the Act. Any other view would, in our opinion, give a license to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.

17. *Reliance was placed by the Respondents upon the decision of this Court in Hari Ram case. That decision does not, in our view, lend much assistance to the Respondents. We say so because this Court was in State of UP v. Hari Ram, MANU/SC/0226/2013 : (2013) 4 SCC 280 considering whether the word "may" appearing in Section 10(5) gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question Under Section 10(6). The question of whether the breach of Section 10(5) and possible dispossession without notice would vitiate the Act of dispossession itself or render it non-est in the eye of the law did not fall for consideration in that case. In our opinion, what Section 10(5) prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant Under Section 10(6). In the case at hand, if the Appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice Under Section 10(5) will be of no consequence and would not vitiate or obliterate the Act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma, erstwhile owner, had not made any grievance based on breach of Section 10(5) at any stage during his lifetime, implying thereby that he had waived his right to do so.*

This Court held that provisions of the Repeal Act could not be extended in such a case where possession has been taken without following the procedure, and the landowner cannot retain the land. This Court also observed that once possession has been taken over in the year 1991, any grievance as to non-compliance of Section 10(5) ought to have been made within a reasonable time of such dispossession. By sheer lapse of time, the possession would acquire legitimacy. Thus, the owner or the person in possession must be deemed to have waived his right Under Section 10(5) of the Act. This Court also observed that only because of the fortuitous circumstance of a Repeal Act, which confers certain rights, the litigation had tempted the landowner to raise the issue regarding his dispossession being in violation of the prescribed procedure. It is clear from the aforesaid decision that such claims cannot be entertained, and any such dispute raised belatedly was repelled by this Court.

342. Section 24(2) is sought to be used as an umbrella so as to question the concluded proceedings in which possession has been taken, development has been made, and compensation has been deposited, but may be due to refusal, it has not been collected. The challenge to the acquisition proceedings cannot be made within the parameters of Section 24(2) once *panchnama* had been drawn of taking possession, thereafter re-entry or retaining the possession is that of the trespasser. The legality of the proceedings cannot be challenged belatedly, and the right to challenge cannot

be revived by virtue of the provisions of Section 24(2). Section 24(2) only contemplates lethargy/inaction of the authorities to act for five years or more. It is very easy to lay a claim that physical possession was not taken, with respect to open land. Yet, once vesting takes place, possession is presumed to be that of the owner, i.e., the State Government and land has been transferred to the beneficiaries, Corporations, Authorities, etc., for developmental purposes and third-party interests have intervened. Such challenges cannot be entertained at all under the purview of Section 24(2) as it is not what is remotely contemplated in Section 24(2) of the Act of 2013.

343. In matters of land acquisition, this Court has frowned upon, and cautioned courts about delays and held that delay is fatal in questioning the land acquisition proceedings. In case possession has not been taken in accordance with law and vesting is not in accordance with Section 16, proceedings before courts are to be initiated within reasonable time, not after the lapse of several decades.

344. In *Hari Singh and Ors. v. State of U.P. and Ors.* MANU/SC/0232/1984 : AIR 1984 SC 1020, there was a delay of two and a half years in questioning the proceedings. This Court held that the writ petition was liable to be dismissed on the ground of laches only.

345. In *State of T.N. and Ors. v. L. Krishnan and Ors.* MANU/SC/0121/1996 : (1996) 1 SCC 250, this Court held that Petitioners could not raise their claim at a belated stage. Following observations were made:

45. *There remains the last ground assigned by the High Court in support of its decision. The High Court has held that the non-compliance with Sub-rules (b) and (c) of Rule 3 of the Rules made by the Government of Tamil Nadu pursuant to Section 55(1) of the Land Acquisition Act vitiates the report made Under Section 5A and consequently the declarations made Under Section 6. The said sub-rules provide that on receipt of objections Under Section 5-A, the Collector shall fix a date of hearing to the objections and give notice of the same to the objector as well as to the department. It is open to the department to file a statement by way of answer to the objections filed by the landowners. The submission of the writ Petitioners was that in a given case, it might well happen that in the light of the objections submitted by the landowners, the department concerned may decide to drop the acquisition. Since no such opportunity was given to the department concerned herein, it could not file its statement by way of answer to their objections. This is said to be prejudice. We do not think it necessary to go into the merits of this submission on account of the laches on the part of the writ Petitioners. As stated above, the declaration Under Section 6 was made sometime in the year 1978, and the writ Petitioners chose to approach the Court only in the years 1982-83. Had they raised this objection at the proper time and if it were found to be true and acceptable, the opportunity could have been given to the Government to comply with the said requirement. Having kept quiet for a number of years, the Petitioners cannot raise this contention in writ petitions filed at a stage when the awards were about to be passed.*

346. In *Municipal Corporation of Greater Bombay v. Industrial Development Investment Co. Pvt. Ltd.* MANU/SC/0136/1997 : (1996) 11 SCC 501, this Court observed, with respect to delay and laches that:

29. *It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers Under Article 226 of the Constitution to quash the notification Under Section 4(1) and declaration Under Section 6. But it should be exercised by taking all relevant factors into pragmatic consideration. When the award was passed, and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising power Under Article 226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches.*

***

S.B. MAJUMDAR, J. (concurring)--I have gone through the judgment prepared by my esteemed learned brother K. Ramaswamy, J. I respectfully agree with the conclusion to the effect that Respondents 1 and 2 had missed the bus by adopting an indolent attitude in not challenging the acquisition proceedings promptly. Therefore, the result is inevitable that the writ petition is liable to be dismissed on the ground of gross delay and laches.

35. x x x The acquired land got vested in the State Government and the Municipal Corporation free from all encumbrances as enjoined by Section 16 of the Land Acquisition Act. Thus right to get more compensation got vested in diverse claimants bypassing the award, as well as the vested right, was created in favor of the Bombay Municipal Corporation by virtue of the vesting of the land in the State Government for being handed over to the Corporation. All these events could not be wished away by observing that no third party rights were created by them. The writ petition came to be filed after all these events had taken place. Such a writ petition was clearly stillborn due to gross delay and laches. I, therefore, respectfully agree with the conclusion to which my learned brother Ramaswamy, J., has reached that on the ground of delay and laches the writ petition is required to be dismissed, and the appeal has to be allowed on that ground.

There are several other decisions of this Court, where delay was held, to disentitle litigants any relief.[28]

347. In *Jasveer Singh and Anr. v. State of Uttar Pradesh and Ors.* MANU/SC/0560/2017 : (2017) 6 SCC 787, the writ petition was filed in which High Court had directed the redetermination of the compensation. In that case the matter was remanded by this Court to consider the additional compensation Under Section 23(1A). Thereafter a submission was raised in the High Court Under Section 24. This Court held that the challenge could not have been entertained. This Court observed thus:

2. *On 19-12-2005 the Appellants filed a writ petition before the High Court seeking quashing of the acquisition proceedings which was decided by the High Court on 3-12-2010 directing redetermination of compensation. The said order was set aside by this Court on 16-10-2012 in State of U.P. v. Jasveer Singh [Civil Appeal No. 7535 of 2012, order dated 16-10-2012 (SC)]. It was observed that:*

After considering the pros and cons, without entering into serious controversies and making any comment on the merit of the case, we are of the considered opinion that in view of the judgment and order of this Court dated 26-11-2010, which was passed in the presence of the counsel for both the parties, the High Court ought not to have heard the matter at all. Thus, the judgment and order impugned before us have lost its sanctity. Therefore, the same is hereby set aside.

However, in order to meet the ends of justice, we remand the case to the High Court to hear the writ petition afresh expeditiously, preferably within a period of six months from the date of production of the certified copy of the order before the Hon'ble Chief Justice. The matter may be assigned to any particular Bench by the Hon'ble Chief Justice for final disposal. The parties shall be at liberty to raise all factual and legal issues involved in the case. The High Court is requested to deal with the relevant issues in detail.

More so, if the Respondents are so aggrieved regarding withdrawal of their appeals, which had been remanded by this Court for determining the entitlement of interest Under Section 23(1-A) of the Land Acquisition Act, 1984 and an application is made by the Respondent to revive the same, the High Court may consider and decide the said application in accordance with law. All the matters shall be heard simultaneously by the same Bench if the appeals are restored.

3. *Thereafter, the High Court considered the contention of the Appellants that the award in respect of compensation was no award in the eye of the law and though the possession was taken long back and railway line had been laid out, the acquisition proceedings were liable to be set aside, and compensation was liable to be awarded at present market rate. The High Court rejected the said plea vide judgment dated 30-5-2014 in Jasvir Singh v. the State of U.P.,* MANU/UP/1401/2014*. It was observed that objection of the Appellants against the award had already been considered and remand by the Supreme Court on 12-9-2005 was only in respect of statutory benefits. For the first time plea was sought to be raised in the writ petition against validity of acquisition which was impermissible in view of the law laid down by this Court in Aflatoon v. Lt. Governor of Delhi,* MANU/SC/0437/1974 : (1975) 4 SCC 285*, Swaika Properties (P) Ltd. v. State of Rajasthan,* MANU/SC/0795/2008 : (2008) 4 SCC 695*, Sawaran Lata v. State of Haryana,* MANU/SC/0239/2010 : (2010) 4 SCC 532 *and Banda Development Authority v. Moti Lal Agarwal,* MANU/SC/0515/2011 : (2011) 5 SCC 394*. The judgment of this Court in Royal Orchid Hotels v. G. Jayarama Reddy,* MANU/SC/1146/2011 : (2011) 10 SCC 608*, was distinguished as that case related to the fraudulent exercise of power of an eminent domain. The High Court concluded: (Jasvir Singh case,* MANU/UP/1401/2014

45. Taking into consideration the entire facts and circumstances of the case, we are of the view that the writ petition is highly barred by laches and deserves to be dismissed on the ground of laches alone.

46. As has been observed above, the Petitioners' main grievance is for enhancement of compensation, for which the Petitioner has already filed First Appeal No. 880 of 1993 and First Appeal No. 401 of 1998 which appeals are being allowed by order of the date, we see no reason to entertain the writ petition.

47. Although various submissions on merits challenging the entire acquisition proceedings have been raised by the learned Counsel for the Petitioners, we have taken the view that the writ petition is highly barred by laches, we do not find it necessary to enter into the submissions raised by the learned Counsel for the Petitioners on merits.

348. In *Swaika Properties Pvt. Ltd. and Ors. v. State of Rajasthan and Ors.* MANU/SC/0795/2008 : (2008) 4 SCC 695, the writ petition was filed after taking possession and award has become final. The writ petition was dismissed on the ground of delay and laches. In *Larsen & Toubro Ltd. v. State of Gujarat and Ors.* MANU/SC/0219/1998 : (1998) 4 SCC 387, in the absence of a challenge to the acquisition proceedings within a reasonable time, the challenge was repelled. Delay was also fatal in *Haryana State Handloom and Handicrafts Corporation Ltd. and Ors. v. Jain School Society* MANU/SC/0846/2003 : (2003) 12 SCC 538. The writ petition was filed after two years to question the declaration Under Section 6 and was dismissed on the ground of delay in *Urban Improvement Trust, Udaipur v. Bheru Lal and Ors.* MANU/SC/0814/2002 : (2002) 7 SCC 712. A Delay of 5 to 10 years was held to be fatal in questioning the acquisition proceedings as held in *Vishwas Nagar Evacuee Plot Purchasers Association and Ors. v. Under Secretary, Delhi Admn. and Ors.* MANU/SC/0156/1990 : (1990) 2 SCC 268

349. There is a plethora of decisions where, owing to delay of 6 months or more, this Court has repelled the challenge to the acquisition proceedings. In our opinion, Section 24 does not revive the right to challenge those proceedings which have been concluded. The legality of those judgments and orders cannot be reopened or questioned under the guise of the provisions of Section 24(2). By reason of our reasoning in respect of that provision (which we have held that Under Section 24(2) that word "or" is to be read as 'and' or as 'nor,' even if one of the requirements has been fulfilled, i.e., either possession taken or compensation paid), there is no lapse unless both conditions are fulfilled, i.e., compensation has not been paid nor has possession been taken; the legality of the concluded proceedings cannot be questioned. It is only in the case where steps have not been taken by the Authorities. The lapse or higher compensation is provided Under Section 24(2) and its proviso under the Act of 2013.

350. In *U.P. State Jal Nigam and Anr. v. Jaswant Singh and Anr.* MANU/SC/5073/2006 : (2006) 11 SCC 464, this Court has observed that if a claimant is aware of the violation of his rights and does not claim his remedies, such inaction or conduct tantamounts a waiver of the right. In such cases, the lapse of time and delay are most material and cannot be ignored by the Court. In *Rabindranath Bose and Ors. v. Union of India and Ors.* MANU/SC/0506/1969 : (1970) 1 SCC 84, the Constitution Bench of this Court has observed that the Court cannot go into the stale demands after a lapse of several years. This Court observed thus:

32. *The learned Counsel for the Petitioners strongly urges that the decision of this Court in Tilokchand Motichand case needs review. But after carefully considering the matter, we are of the view that no relief should be given to Petitioners who, without any reasonable explanation, approach this Court Under Article 32 of the Constitution after inordinate delay. The highest Court in this land has been given original jurisdiction to entertain petitions Under Article 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of years. It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow*

from this that it was the intention of the Constitution-makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay.

351. In *Dharappa v. Bijapur Coop. Milk Producers Societies Union Ltd.* MANU/SC/7367/2007 : (2007) 9 SCC 109, this Court observed that if delay has resulted in material evidence relevant to adjudication being lost or rendered unavailable, would be fatal. It was held that the time limit of 6 months prescribed Under Section 10(4A) of the I.D. Act, 1947 and should not be interpreted to revive stale and dead claims, it would not be possible to defend such claims due to lapse of time and due to material evidence having been lost or rendered unavailable. The lapse of time results in losing the remedy and the right as well. The delay would be fatal. It will be illogical to hold that the amendment to the Act inserting Section 10(4A) should be interpreted as reviving all stale and dead claims. This Court observed thus:

29. *This Court while dealing with Sections 10(1)(c) and (d) of the I.D. Act, has repeatedly held that though the Act does not provide a period of limitation for raising a dispute Under Section 10(1)(c) or (d), if on account of delay, a dispute has become stale or ceases to exist, the reference should be rejected. It has also held that lapse of time results in losing the remedy and the right as well. The delay would be fatal if it has resulted in material evidence relevant to adjudication being lost or rendered unavailable (vide Nedungadi Bank Ltd. v. K.P. Madhavankutty,* MANU/SC/0049/2000 : (2000) 2 SCC 455*; Balbir Singh v. Punjab Roadways,* MANU/SC/0774/2000 : (2001) 1 SCC 133*; Asstt. Executive Engineer v. Shivalinga,* (2002) 10 SCC 167 *and S.M. Nilajkar v. Telecom Distt. Manager*, MANU/SC/0261/2003 : (2003) 4 SCC 27*). When belated claims are considered as stale and non-existing for the purpose of refusing or rejecting a reference Under Section 10(1)(c) or (d), in spite of no period of limitation is prescribed, it will be illogical to hold that the amendment to the Act inserting Section 10(4-A) prescribing a time-limit of six months, should be interpreted as reviving all stale and dead claims.*

***

31. *Section 10(4-A) does not, therefore, revive non-existing or stale or dead claims but only ensures that claims which were life, by applying the six-month Rule in Section 10(4-A) as on the date when the Section came into effect, have a minimum of six months' time to approach the Labour Court. That is ensured by adding the words "or the date of commencement of the Industrial Disputes (Karnataka Amendment) Act, 1987, whichever is later" to the words "within six months from the date of communication to him of the order of discharge, dismissal, retrenchment or termination." In other words, all those who have communicated orders of termination during a period of six months prior to 7-4-1988 were deemed to have been communicated such orders of termination as on 7-4-1988 for the purpose of seeking a remedy. Therefore, the words "within six months from the date of commencement of the Industrial Disputes (Karnataka Amendment) Act, 1987, whichever is later" only enables those who had been communicated order of termination within six months prior to 7-4-1988, to apply Under Section 10(4-A).*

352. In *State of Karnataka v. Laxuman* MANU/SC/2506/2005 : (2005) 8 SCC 709, this Court held that stale claims should not be entertained even if no time limit is fixed by the statute. This Court observed as follows:

9. *As can be seen, no time for applying to the Court in terms of Sub-section (3) is fixed by the statute. But since the application is to the Court, though under a special enactment, Article 137, the residuary Article of the Limitation Act, 1963, would be attracted and the application has to be made within three years of the application for making a reference or the expiry of 90 days after the application. The position is settled by the decision of this Court in Addl. Spl. Land Acquisition Officer v. Thakoredas, MANU/SC/0464/1994 : (1997) 11 SCC 412. It was held: (SCC p. 414, para 3)*

3. Admittedly, the cause of action for seeking a reference had arisen on the date of service of the award Under Section 12(2) of the Act. Within 90 days from the date of the service of the notice, the Respondents made the application requesting the Deputy Commissioner to refer the cases to the civil Court Under Section 18. Under the amended Sub-section (3)(a) of the Act, the Deputy Commissioner shall, within 90 days from 1-9-1970, make a reference Under Section 18 to the civil Court, which he failed to do. Consequently, by operation of Sub-section 3(b) with the expiry of the aforestated 90 days, the cause of action had accrued to the Respondents to make an application to the civil Court with a prayer to direct the Deputy Commissioner to make a reference. There is no period of limitation prescribed in Sub-section (3)(b) to make that application, but it should be done within the limitation prescribed by the Schedule to the Limitation Act. Since no Article expressly prescribed the limitation to make such an application, the residuary Article Under Article 137 of the Schedule to the Limitation Act gets attracted. Thus, it could be seen that in the absence of any special period of limitation prescribed by Clause (b) of Sub-section (3) of Section 18 of the Act, the application should have been made within three years from the date of expiry of 90 days prescribed in Section 18(3)(b), i.e., the date on which cause of action had accrued to the Respondent claimant. Since the application had been admittedly made beyond three years, it was clearly barred by limitation. Since the High Court relied upon the case in Municipal Council, MANU/SC/0331/1969 : (1969) 1 SCC 873 *which has stood overruled, the order of the High Court is unsustainable.*

This position is also supported by the reasoning in Kerala SEB v. T.P. Kunhaliumma, MANU/SC/0323/1976 : (1976) 4 SCC 634. *It may be seen that under the Central Act sans the Karnataka amendment, there was no right to approach the Principal Civil Court of original jurisdiction to compel a reference, and no time-limit was also fixed for making such an approach. All that was required of a claimant was to make an application for reference within six weeks of the award or the notice of the award, as the case may be. But obviously, the State Legislature thought it necessary to provide a time-frame for the claimant to make his claim for enhanced compensation and for ensuring an expeditious disposal of the application for reference by the authority under the Act fixing a time within which he is to act and conferring an additional right on the claimant to approach the civil Court on satisfying the condition precedent of having made an application for reference within the time prescribed.*

353. We are of the opinion that courts cannot invalidate acquisitions, which stood concluded. No claims in that regard can be entertained and agitated as they have not been revived. There has to be legal certainty where infrastructure has been created or has been developed partially, and investments have been made, especially when land has been acquired long back. It is the duty of the Court to preserve the legal certainty, as observed in *Vodafone International Holdings B.V. v. Union of India and Ors.* MANU/SC/0051/2012 : (2012) 6 SCC 613. The landowners had urged

that since the Act of 2013 creates new situations, which are beneficial to their interests, the question of delay or laches does not arise. This Court is of the opinion that the said contention is without merits. As held earlier, the doctrine of laches would always preclude an indolent party, who chooses not to approach the court, or having approached the court, allows an adverse decision to become final, to re-agitate the issue of acquisition of his holding. Doing so, especially in cases, where the title has vested with the State, and thereafter with subsequent interests, would be contrary to public policy. In *A.P. State Financial Corporation v. Garware Rolling Mill* MANU/SC/0454/1994 : (1994) 2 SCC 647, this Court observed that equity is always known to defend the law from crafty evasions and new subtleties invented to evade the law. There is no dearth of talent left in longing for the undue advantage of the wholesome provisions of Section 24(2) on the basis of wrong interpretation.

354. In *British Railway Board v. Pickin* MANU/UKHL/0006/1974 : (1974) AC 765, the following observations were made:

... equity, when faced with an appeal to a regulatory public statute, which requires compliance with formalities, will not allow such statute (assumedly passed to prevent fraud) to be used to promote fraud and will do so by imposing a trust or equity upon a legal right. ...

355. We are unable to accept the submission on behalf of the landowners that it is by operation of law the proceedings are deemed to have lapsed and that this Court should give full effect to the provisions. It was submitted that lapse of acquisition proceedings was not contemplated under the Act of 1894, and there is departure made in Section 24 of the Act of 2013. Thus, Section 24 gives a fresh cause of action to the landowners to approach the courts for a declaration that the acquisition lapsed, if either compensation has not been paid or the physical possession has not been taken. The decision of this Court in the *Mathura Prasad Bajoo Jaiswal and Ors. v. Dossibai N.B. Jeejeebhoy* MANU/SC/0420/1970 : (1970) 1 SCC 613 was relied upon to contend that there cannot be res judicata in the previous proceedings when the cause of action is different; reliance is also placed on *Canara Bank v. N.G. Subbaraya Setty and Anr.* MANU/SC/0433/2018 : (2018) 16 SCC 228, where the decision of Mathura Prasad Bajoo Jaiswal and Ors. (supra) was followed as to belated challenges. Reliance was further placed on *Anil Kumar Gupta v. the State of Bihar* MANU/SC/0205/2012 : (2012) 12 SCC 443 in which it was held that vesting of land in the Government can be challenged on the ground that possession had not been taken in accordance with the prescribed procedure. The invocation of the urgency Clause in Section 17, can be questioned on the ground that there was no real urgency. The notification issued Under Section 4 and declaration Under Section 6 can be challenged on the ground of non-compliance of Section 5-A(1). Notice issued Under Section 9 and the award passed Under Section 11 can also be questioned on permissible grounds. Reliance has also been placed on *Ram Chand and Ors. v. Union of India* MANU/SC/0559/1994 : (1994) 1 SCC 4 to contend that inaction and delay on the part of the acquiring authority would also give rise to a cause of action in favour of the landowner.

356. The entire gamut of submissions of the landowners is based on the misinterpretation of the provisions contained in Section 24. It does not intend to divest the State of possession (of the land), title to which has been vested in the State. It only intends to give higher compensation in case the obligation of depositing of compensation has not been fulfilled with regard to the majority of holdings. A fresh cause of action in Section 24 has been given if for five years or more possession

has not been taken nor compensation has been paid. In case possession has been taken and compensation has not been deposited with respect to the majority of landholdings, higher compensation to all incumbents follows, as mentioned above. Section 24 does not confer a new cause of action to challenge the acquisition proceedings or the methodology adopted for the deposit of compensation in the treasury instead of reference court, in that case, interest or higher compensation, as the case may be, can follow. In our considered opinion, Section 24 is applicable to pending proceedings, not to the concluded proceedings and the legality of the concluded proceedings, cannot be questioned. Such a challenge does not lie within the ambit of the deemed lapse Under Section 24. The lapse Under Section 24(2) is due to inaction or lethargy of authorities in taking requisite steps as provided therein.

357. We are also of the considered opinion that the decision in an earlier round of litigation operates as *res judicata* where the challenge to the legality of the proceedings had been negatived and the proceedings of taking possession were upheld. Section 24 does not intend to reopen proceedings which have been concluded. The decision in *Mathura Prasad Bajoo Jaiswal and Ors.* (supra) is of no avail. Similar is the decision in *Anil Kumar Gupta v. State of Bihar* (supra). No doubt about it that proceedings (i.e., the original acquisition, or aspects relating to it) can be questioned but within a reasonable time; yet once the challenge has been made and failed or has not been made for a reasonable time, Section 24 does not provide for reopening thereof.

358. So far as the proposition laid down in *Ram Chand and Ors. v. Union of India* (supra) is concerned, inaction and delay on the part of acquiring authorities have been taken care of Under Section 24. The mischief Rule (or *Heydon's Mischief Rule*) was pressed into service on behalf of landowners relying upon the decision in *Bengal Immunity Co v. the State of Bihar* (supra), it was submitted that Act of 1894 did not provide for lapse in the case of inordinate delay on the part of acquiring Authorities to complete the acquisition proceedings. Mischief has been sought to be cured by the legislature by introducing the Act of 2013 by making provisions in Section 24 of the lapse of proceedings. The submission is untenable. The provisions made Under Section 24 have provided a window of 5 years to complete the acquisition proceedings, and if there is a delay of 5 years or more, there is a lapse and not otherwise. The provision cannot be stretched any further, otherwise, the entire infrastructure, which has come up, would have to go and only the litigants would reap the undeserving fruits of frivolous litigation, having lost in several rounds of litigation earlier, which can never be the intendment of the law.

359. We are of the considered opinion that Section 24 cannot be used to revive dead and stale claims and concluded cases. They cannot be inquired into within the purview of Section 24 of the Act of 2013. The provisions of Section 24 do not invalidate the judgments and orders of the Court, where rights and claims have been lost and negatived. There is no revival of the barred claims by operation of law. Thus, stale and dead claims cannot be permitted to be canvassed on the pretext of enactment of Section 24. In exceptional cases, when in fact, the payment has not been made, but possession has been taken, the remedy lies elsewhere if the case is not covered by the proviso. It is the Court to consider it independently not Under Section 24(2) of the Act of 2013.

360. It was submitted that Section 101 provides for return of unutilized land under the Act of 2013. Section 101 provides that in case land is not utilized for five years from the date of taking over the possession, the same shall be returned to the original owner or owners or their legal heirs, as the

case may be, or to the Land Bank of the appropriate Government by reversion in the manner as may be prescribed by the appropriate Government. Section 101 reads as under:

101. Return of unutilized land.--*When any land, acquired under this Act remains unutilized for a period of five years from the date of taking over the possession, the same shall be returned to the original owner or owners or their legal heirs, as the case may be, or to the Land Bank of the appropriate Government by reversion in the manner as may be prescribed by the appropriate Government.*

Explanation.--For the purpose of this section, "Land Bank" means a governmental entity that focuses on the conversion of Government-owned vacant, abandoned, unutilized acquired lands and tax-delinquent properties into productive use.

361. Section 24 deals with lapse of acquisition. Section 101 deals with the return of unutilized land. Section 101 cannot be said to be applicable to an acquisition made under the Act of 1894. The provision of lapse has to be considered on its own strength and not by virtue of Section 101 though the spirit is to give back the land to the original owner or owners or the legal heirs or to the Land Bank. Return of lands is with respect to all lands acquired under the Act of 2013 as the expression used in the opening part is "*When any land, acquired under this Act remains unutilized*". Lapse, on the other hand, occurs when the State does not take steps in terms of Section 24(2). The provisions of Section 101 cannot be applied to the acquisitions made under the Act of 1894. Thus, no such sustenance can be drawn from the provisions contained in Section 101 of the Act of 2013. Five years' logic has been carried into effect for the purpose of lapse and not for the purpose of returning the land remaining unutilized Under Section 24(2).

362. Resultantly, the decision rendered in *Pune Municipal Corporation and Anr.* (supra) is hereby overruled and all other decisions in which *Pune Municipal Corporation* (supra) has been followed, are also overruled.
The decision in *Shree Balaji Nagar Residential Association* (supra) cannot be said to be laying down good law, is overruled and other decisions following the same are also overruled. In *Indore Development Authority v. Shailendra (Dead) through L.Rs. and Ors.,* (supra), the aspect with respect to the proviso to Section 24(2) and whether 'or' has to be read as 'nor' or as 'and' was not placed for consideration. Therefore, that decision too cannot prevail, in the light of the discussion in the present judgment.

363. In view of the aforesaid discussion, we answer the questions as under:

1. Under the provisions of Section 24(1)(a) in case the award is not made as on 1.1.2014 the date of commencement of Act of 2013, there is no lapse of proceedings. Compensation has to be determined under the provisions of Act of 2013.

2. In case the award has been passed within the window period of five years excluding the period covered by an interim order of the court, then proceedings shall continue as provided Under Section 24(1)(b) of the Act of 2013 under the Act of 1894 as if it has not been repealed.

3. The word 'or' used in Section 24(2) between possession and compensation has to be read as 'nor' or as 'and'. The deemed lapse of land acquisition proceedings Under Section 24(2) of the Act of 2013 takes place where due to inaction of authorities for five years or more prior to commencement of the said Act, the possession of land has not been taken nor compensation has been paid. In other words, in case possession has been taken, compensation has not been paid then there is no lapse. Similarly, if compensation has been paid, possession has not been taken then there is no lapse.

4. The expression 'paid' in the main part of Section 24(2) of the Act of 2013 does not include a deposit of compensation in court. The consequence of non-deposit is provided in proviso to Section 24(2) in case it has not been deposited with respect to majority of land holdings then all beneficiaries (landowners) as on the date of notification for land acquisition Under Section 4 of the Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013. In case the obligation Under Section 31 of the Land Acquisition Act of 1894 has not been fulfilled, interest Under Section 34 of the said Act can be granted. Non-deposit of compensation (in court) does not result in the lapse of land acquisition proceedings. In case of non-deposit with respect to the majority of holdings for five years or more, compensation under the Act of 2013 has to be paid to the "landowners" as on the date of notification for land acquisition Under Section 4 of the Act of 1894.

5. In case a person has been tendered the compensation as provided Under Section 31(1) of the Act of 1894, it is not open to him to claim that acquisition has lapsed Under Section 24(2) due to non-payment or non-deposit of compensation in court. The obligation to pay is complete by tendering the amount Under Section 31(1). Land owners who had refused to accept compensation or who sought reference for higher compensation, cannot claim that the acquisition proceedings had lapsed Under Section 24(2) of the Act of 2013.

6. The proviso to Section 24(2) of the Act of 2013 is to be treated as part of Section 24(2) not part of Section 24(1)(b).

7. The mode of taking possession under the Act of 1894 and as contemplated Under Section 24(2) is by drawing of inquest report/memorandum. Once award has been passed on taking possession Under Section 16 of the Act of 1894, the land vests in State there is no divesting provided Under Section 24(2) of the Act of 2013, as once possession has been taken there is no lapse Under Section 24(2).

8. The provisions of Section 24(2) providing for a deemed lapse of proceedings are applicable in case authorities have failed due to their inaction to take possession and pay compensation for five years or more before the Act of 2013 came into force, in a proceeding for land acquisition pending with concerned authority as on 1.1.2014. The period of subsistence of interim orders passed by court has to be excluded in the computation of five years.

9. Section 24(2) of the Act of 2013 does not give rise to new cause of action to question the legality of concluded proceedings of land acquisition. Section 24 applies to a proceeding pending on the date of enforcement of the Act of 2013, i.e., 1.1.2014. It does not revive stale and time-barred claims and does not reopen concluded proceedings nor allow landowners to question the legality

of mode of taking possession to reopen proceedings or mode of deposit of compensation in the treasury instead of court to invalidate acquisition.

Let the matters be placed before appropriate Bench for consideration on merits.

---

[1]MANU/UKWA/0092/1993 : [1994] 1 A.C. 486, where it was held that:
"The Rule that a person should not be held liable or punished for conduct not criminal when committed is fundamental and of long standing. It is reflected in the maxim nullum crimen nulla poena sine lege. It is protected by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). The Rule also applies, but with less force, outside the criminal sphere. It is again expressed in maxims, lex prospicit non respicit and omnis nova constitutio futuris temporibus formam imponere debet non praeteritis. The French Civil Code provides that "La loi ne dispose que pour l'avenir; elle n'a point d'effet retroactif:"
.....
But both these passages draw attention to an important point, that the exception only applies where application of it would not cause unfairness or injustice. This is consistent with the general Rule or presumption which is itself based on considerations of fairness and justice, as shown by the passage in Maxwell quoted, ante, p. 494C-E, and recently emphasised by Staughton L.J. in *Secretary of State for Social Security v. Tunnicliffe* MANU/UKWA/0025/1990 : (1991) 2 All E.R 712, 724.."
[2]*BALCO* v. *Kaiser Aluminium* Technical Services Inc., MANU/SC/0722/2012 : (2012) 9 SCC 552; *Howard de Walden (Lord)* v. *IRC*, MANU/WB/0111/1946 : (1948) 2 All ER 825 (HL); *V.L.S. Finance Ltd.* v. *Union of India*, MANU/SC/0495/2013 : (2013) 6 SCC 278; and *Ram Narain* v. *State of U.P.*, MANU/SC/0014/1956 : AIR 1957 SC 18.
[3]*Brown v. Harrison* MANU/MT/0015/1927 : 1927 All ER 195@ pp. 203, 204 (CA); *Ranchhoddas Atmaram and Anr. v. Union of India* MANU/SC/0368/1961 : 1961 (3) SCR 718; *State of Bombay v. R.M.D. Chamarbaugwala* MANU/SC/0019/1957 : 1957 (1) SCR 874 (hereafter "RMDC"); *Patel Chunibhai Dajibha v. Narayanrao*, MANU/SC/0287/1964 : 1965 (2) SCR 328; *Punjab Produce & Trading Co. v. Commissioner of Income Tax, West Bengal*, MANU/SC/0387/1971 : 1971 SCR 977; *Ishwar Singh Bindra and Ors. v. State of UP* MANU/SC/0344/1968 : 1969 (1) SCR 219; *Joint Director of Mines Safety v. Tandur and Nayandgi Stone Quarries (P) Ltd.* MANU/SC/0057/1987 : 1987 (3) SCC 308; *Samee Khan v. Bindu Khan* MANU/SC/0564/1998 : 1998 (7) SCC 59. *Prof. Yashpal and Ors. v. State of Chhattisgarh and Ors.* MANU/SC/0093/2005 : 2005 (5) SCC 420
[4]*Northern Indian Glass Industries v. Jaswant Singh and Ors.*, MANU/SC/0965/2002 : (2003) 1 SCC 335; *Gulam Mustafa v. State of Maharashtra*, MANU/SC/0400/1975 : (1976) 1 SCC 800; *Sita Ram Bhandar Society, New Delhi v. Lieutenant Governor, Government of NCT, Delhi and Ors.*, MANU/SC/1699/2009 : (2009) 10 SCC 501 and *Chandragauda Ramgonda Patil and Anr. v. State of Maharashtra and Ors.*, MANU/SC/1264/1996 : (1996) 6 SCC 405
[5]MANU/SC/0515/2011 : (2011)5 SCC 394 (hereafter referred to as "Banda Development

Authority")
[6]*Balwant Narayan Bhagde v. M.D. Bhagwat*, MANU/SC/0002/1975 : (1976) 1 SCC 700; *State of T.N. v. Mahalakshmi Ammal*, MANU/SC/0230/1996 : (1996) 7 SCC 269; *T.N. Housing Board v. A. Viswam*, MANU/SC/0924/1996 : (1996) 8 SCC 259 and *Om Prakash Verma and Ors. v. State of Andhra Pradesh and Ors.*, MANU/SC/0823/2010 : (2010) 13 SCC 158.
[7]*Madhav Rao Scindhia v. Union of India* MANU/SC/0050/1970 : 1971 (1) SCC 85 (11 Judges); *Smt. Parayankandiyal Eravath v. K. Devi* MANU/SC/0487/1996 : (1996) 4 SCC 76 (2 Judges).
[8]*Bharat Kumar v. State of Haryana* MANU/SC/0308/2014 : (2014) 6 SCC 586 (hereafter *"Bharat Kumar"); Bimla Devi v. State of Haryana* MANU/SC/0608/2014 : (2014) 6 SCC 583 @ para 3; *Union of India v. Shiv Raj* MANU/SC/0478/2014 : (2014) 6 SCC 564 at para 22; *Sree Balaji Nagar Residential Association* (supra) at para 14; *State of Haryana v. Vinod Oil and General Mills* MANU/SC/0909/2014 : 2014 (15) SCC 410 at para 21; *Sita Ram v. State of Haryana* MANU/SC/1075/2014 : (2015) 3 SCC 597 at paras 19, 21; *Ram Kishan v. State of Haryana* MANU/SC/1119/2014 : (2015) 4 SCC 347 at paras 8, 9, 12; *Velaxan Kumar v. Union of India* MANU/SC/1156/2014 : 2015 (4) SCC 325 at paras 15, 16, 17 (hereafter *"Velaxan"*); *Karnail Kaur v. State of Punjab* MANU/SC/0061/2015 : (2015) 3 SCC 206 at paras 17, 18, 23; *Rajive Chowdhrie HUF v. State (NCT) of Delhi* MANU/SC/1139/2014 : (2015) 3 SCC 541 at para 1; *Competent Automobiles Co. Ltd. v. Union of India* MANU/SC/0219/2015 : AIR 2015 SC 3186 at para 4; *Govt. of NCT of Delhi v. Jagjit Singh* MANU/SC/0239/2015 : AIR 2015 SC 2683 at para 3; *Karan Singh v. State of Haryana* MANU/SC/0312/2014 : 2014 (5) SCC 738 at para 5; *Shashi Gupta and Ors. v. State of Haryana* MANU/SC/0641/2016 : 2016 (13) SCC 380 at para 5; *Delhi Development Authority v. Sukhbir Singh* MANU/SC/0986/2016 : (2016) 16 SCC 258 at para 1 (hereafter "Sukhbir").
[9]Land Acquisition Rehabilitation and Resettlement Bill 2011-introduced in Lok Sabha on 05.07.2011; Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Bill, 2013 as passed by the Lok Sabha on 29.08.2013 and the Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act 2013 (as passed by both Houses of Parliament on 05.09.2013).
[10]Counsel cited *Pratap Singh v. State of Jharkhand* MANU/SC/0075/2005 : (2005) 3 SCC 551 (5 Judges); *Central Railway Workshop v. Vishwanath* MANU/SC/0330/1969 : (1969) 3 SCC 95; and *M/s. International Ore and Fertilisers (india) Pvt. Ltd. v. Employee State Insurance* MANU/SC/0443/1987 : (1987) 4 SCC 203 in support of the rule of beneficial construction of a welfare and remedial statute.
[11]*Seksaria Cotton mills v. State of Bombay* MANU/SC/0027/1953 : 1953 SCR 325 Para 21; *Superintendent v. Anil Kumar* MANU/SC/0266/1979 : (1979) 4 SCC 274 (Paras 11-16); *B. Gangadhar v. Rajalingam* MANU/SC/0212/1996 : (1995) 5 SCC 238 (Para 5-6) *Guruchand Singh v. Kamla Singh* MANU/SC/0402/1975 : (1976) 2 SCC 152 (Paras 21-24).
Mohan Lal v. State of Rajasthan MANU/SC/0465/2015 : (2015) 6 SCC 222 (2 Judges)
Para 11 to 15 endorsing contextual interpretation of the term
[12]*G. Narayanswami v. G. Pannerselvam* MANU/SC/0362/1972 : (1972) 3 SCC 717 and *Kuldip Nayar v. Union Of India* MANU/SC/3865/2006 : (2006) 7 SCC 1-both decisions of Constitution Benches.
[13]*Naga People's Movement of Human Rights v. Union of India* MANU/SC/0906/1998 : (1998) 2 SCC 109 (5 Judges); *R.S. Nayak v. A.R. Antulay* MANU/SC/0102/1984 : 1984 (2) SCC 183; and *Life Insurance Corporation v. D.J. Bahadur* MANU/SC/0305/1980 : 1981 (1) SCC 315.
[14]*Martin Burn Ltd. v. Corporation of Calcutta* MANU/SC/0281/1965 : 1966 (1) SCR 543;

Commissioner of Agricultural Income Tax v. Keshab Chandra Mandal MANU/SC/0021/1950 : 1950 SCR 435; and *State of Maharashtra v. Nanded Parbhani Sangh* MANU/SC/0034/2000 : 2000 (2) SCC 69.

[15]MANU/SC/1261/1997 : 1997 (6) SCC 71 and *M.V. Javali v. Mahajan Borewell & Co. Ltd.* MANU/SC/0975/1997 : 1997 (8) SCC 72; and *Nanded Parbhani Sangh* (supra); and *SMS Pharmaceuticals Ltd. v. Neeta Bhalla* MANU/SC/0622/2005 : (2005) 8 SCC 89.

[16]*MIG Cricket Club v. Abhinav Sahakar Education Society*, MANU/SC/1023/2011 : (2011) 9 SCC 97

[17]*Jayantilal Amrathlal v. Union of India*,MANU/SC/0043/1971 : (1972) 4 SCC 174, *T.S. Baliah v. Income Tax Officer, Central Circle VI, Madras*, MANU/SC/0238/1968 : 1969 (3) SCR 65

[18]*Star Co. Ltd. v. Commr. of Income-tax*, MANU/SC/0311/1970 : AIR 1970 SC 1559 : (1970) 3 SCC 864

[19]*Patel Chunibhai Dajibha v. Narayanrao*, MANU/SC/0287/1964 : 1965 (2) SCR 328; *Punjab Produce & Trading Co. v. Commissioner of Income Tax, West Bengal*, MANU/SC/0387/1971 : (1971) 2 SCC 540; *Brown & Co. v. Harrison*, MANU/MT/0015/1927 : (1927) All ER Rep 195, pp. 203, 204 (CA).

For convenience, the numbers in the extracted portion above have been renumbered.

[20]*Dattatraya Moreshwar v. The State of Bombay and Ors.*, MANU/SC/0014/1952 : AIR 1952 SC 181; *State of U.P. and Ors. v. Babu Ram Upadhya*, MANU/SC/0312/1960 : AIR 1961 SC 751; *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, MANU/SC/0226/1964 : AIR 1965 SC 895; *State of Mysore v. V.K. Kangan*, MANU/SC/0429/1975 : AIR 1975 SC 2190; *Sharif-Ud-Din v. Abdul Gani Lone*, MANU/SC/0352/1979 : AIR 1980 SC 303; *Balwant Singh and Ors. v. Anand Kumar Sharma and Ors.*, MANU/SC/0118/2003 : (2003) 3 SCC 433; *Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. and Ors.*, MANU/SC/1092/2002 : AIR 2003 SC 511; *Chandrika Prasad Yadav v. State of Bihar and Ors.*, MANU/SC/0309/2004 : AIR 2004 SC 2036; *M/s. Rubber House v. Excellsior Needle Industries Pvt. Ltd.*, MANU/SC/0357/1989 : AIR 1989 SC 1160; *B.S. Khurana and Ors. v. Municipal* Corporation of Delhi and Ors., MANU/SC/0590/2000 : (2000) 7 SCC 679; *State of Haryana and Anr. v. Raghubir Dayal*, MANU/SC/0518/1995 : (1995) 1 SCC 133; and *Gullipilli Sowria Raj v. Bandaru Pavani @ Gullipili Pavani*, MANU/SC/8368/2008 : (2009) 1 SCC 714

[21]*Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill*, MANU/SC/1334/2011 : (2012) 2 SCC 108 @ 19-21; *Tinsukhia Electric Supply Company Ltd. v. State of Assam and Ors.*, MANU/SC/0027/1990 : (1989) 3 SCC 709 @ para 118-121; *C.I.T. v. Hindustan Bulk Carriers*, MANU/SC/1215/2002 : (2003) 3 SCC 57 @ para 14-21; *D. Saibaba v. Bar Council of India and Ors.*, MANU/SC/0388/2003 : (2003) 6 SCC 186 @ para 16-18; *Balram Kamanat v. Union of India*, MANU/SC/0628/2003 : (2003) 7 SCC 628 para 24; *New India Assurance Co. v. Nulli Nivelle*, MANU/SC/0166/2008 : (2008) 3 SCC 279 @ Para 51-54; *Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi*, MANU/SC/1017/2008 : (2008) 4 SCC 720 Para 41 & 42.; *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*, MANU/SC/2179/2008 : (2008) 13 SCC 30 para 132-137; *N. Kannadasan v. Ajoy Khose and Ors.*, MANU/SC/0926/2009 : (2009) 7 SCC 1 para 54-67; *H.S. Vankani v. State of Gujarat*, MANU/SC/0175/2010 : (2010) 4 SCC 301 para 43-48; *State of Madhya Pradesh v. Narmada Bachao Andolan and Ors.*, MANU/SC/0599/2011 : (2011) 7 SCC 639 para 78-85; *State of Gujarat and Anr. v. Hon'ble Mr. Justice R.A. Mehta (Retd.) and Ors.*, MANU/SC/0001/2013 : (2013) 3 SCC 1: para 96-98).

[22]*Delhi Development Authority v. Sukhbir Singh*, MANU/SC/0986/2016 : (2016) 16 SCC 258,

Padma Sundara Rao (Dead) and Ors. v. State of T.N. and Ors., MANU/SC/0182/2002 : 2002 (3) SCC 533; *Popat Bahiru Govardhane and Ors. v. Special Land Acquisition Officer and Anr.,* MANU/SC/0851/2013 : 2013 (10) SCC 765; *B. Premanand and Ors. v. Mohan Koikal and Ors.,* MANU/SC/0249/2011 : (2011) 4 SCC 266 and *Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Ors.,* MANU/SC/1092/2002 : (2003) 2 SCC 111

[23]*Dingmar v. Dingmar* MANU/UKWA/0384/2006 : 2007 (2) All ER 382; *Kennedy v. Information Commissioner and Anr. (Secretary of State for Justice intervening)* MANU/UKAD/0029/2010 : (2012) 1 WLR 3524

[24]*Shimbhu and Anr. v. State of Haryana,* MANU/SC/0871/2013 : (2014) 13 SCC 318; *Kedarnath Jute Manufacturing Co. Ltd. v. The Commercial Tax Officer and Ors.,* MANU/SC/0290/1965 : 1965 (3) SCR 626. *Shah Bhojraj Kuverji Oil Mills & Ginning Factory v. Subhash Chandra Yograj Sinha*, MANU/SC/0336/1961 : AIR 1961 SC 1596; *Dwarka Prasad v. Dwarka Das Saraf*, MANU/SC/0505/1975 : 1976 (1) SCC 128; *The Commissioner of Income-tax, Mysore, Travancore-Cochin and Coorg, Bangalore v. The Indo Mercantile Bank Ltd.,* MANU/SC/0070/1959 : 1959 (Supp 2) SCR 256 In *Romesh Kumar Sharma v. Union of India and Ors.,* MANU/SC/3449/2006 : (2006) 6 SCC 510.

[25]*B.R. Enterprises v. State of U.P. and Ors.,* MANU/SC/0330/1999 : (1999) 9 SCC 700; *Kailash Nath Agarwal and Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and Anr.,* MANU/SC/0114/2003 : (2003) 4 SCC 305 (which interpreted "proceeding" and "suit" differently; In *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and Ors.,* MANU/SC/0116/2003 : (2003) 5 SCC 622 (where "at his cost" and "at its cost" were interpreted to mean different situations.

[26]192 ***"11-A. Period within which an award shall be made***

The Collector shall make an award under section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period. the entire proceedings for the acquisition of the land shall lapse:

Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act. 1984 the award shall be made within a period of two years from such commencements.

Explanation*: In computing the period of two years referred to in this section. the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a court shall be excluded.*

[27]*Indian Council for Enviro-Legal Action v. Union of India,* MANU/SC/0837/2011 : (2011) 8 SCC 161, *Grindlays Bank Ltd. v. CIT,* MANU/SC/0276/1980 : (1980) 2 SCC 191, *Ram Krishna Verma v. the State of U.P.,* MANU/SC/0496/1992 : (1992) 2 SCC 620. *Also Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Anr.,* MANU/SC/0079/1999 : (1999) 2 SCC 325.

[28]In *Hindustan Zinc Ltd. v. Bhagwan Singh Bhati and Ors.,* MANU/SC/7306/2008 : (2008) 3 SCC 462, there was a fatal delay of 10 years in the filing of the writ petition. In *Govt. of A.P. and Ors. v. Kollutla Obi Reddy and Ors.,* MANU/SC/0476/2005 : (2005) 6 SCC 493, the writ petition was filed after six years of the land acquisition. The writ petition was dismissed on the ground of delay and laches.

Back to Index

MANU/SC/0104/1993

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 930 of 1990, Writ Petition (Civil) Nos. 97/91, 948/90, 966/90, 965/90, 953/90, 954/90, 971/90, 972/90, 949/90, 986/90 1079/90, 1106/90, 1158/90, 1071/90, 1069/90, 1077/90, 1119/90, 1053/90, 1102/90, 1120/90, 1112/90, 1276/90, 1148/90, 1105/90, 974/90, 1114/89, 987/90, 1061/90, 1064/90, 1101/90, 1115/90, 1116/90, 1117/90, 1123/90, 1124/90, 1126/90, 1130/90, 1141/90, 1307/90, Transferred Case (Civil) Nos. 27/90, 28-31/90, 32-33/90, 34-35/90, 65/90, 1/91. Writ Petition (Civil) Nos. 1081/90, 343/91, 1362/90, 1094/91, 1087/90, 1128/90, 36/91, 3/91, IA No. 1-20 in Transferred Case (Civil) No. 27-35/90 and Writ Petition (Civil) No. 11/92, 111/92, 261/92

Decided On: 16.11.1992

Appellants: Indra Sawhney and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
M.H. Kania, C.J., M.N. Venkatachaliah, S.R. Pandian, T.K. Thommen, A.M. Ahmadi, Kuldip Singh, P.B. Sawant, R.M. Sahai and B.P. Jeevan Reddy, JJ.

Subject: Constitution

Relevant Section:
Constitution of India - Article 16

Cases Overruled/Partly Overruled:

Shri Janki Prasad Parimoo and Ors. Vs. State of Jammu and Kashmir and Ors., MANU/SC/0393/1973; K.C. Vasanth Kumar and Anr. Vs. State of Karnataka, MANU/SC/0033/1985; T. Devadasan Vs. The Union of India (UOI) and Anr., MANU/SC/0270/1963; M.R. Balaji and Ors. Vs. State of Mysore, MANU/SC/0080/1962; The General Manager, Southern Railway Vs. Rangachari, MANU/SC/0388/1961

Authorities Referred:

H.W.R. Wade Administrative Law v. Edn; Halsbury's Laws of England IV Edn. Vol. V; Webster's Encyclopedic Unabridged Dictionary; Collins English Dictionary

Prior History:

From the Judgment and Order dated 23.12.1981 of Madras High Court in Tax Cases (Revision) Nos. 206-210, 586 and 825 of 1979

Disposition:
Disposed of

Case Note:

Constitution - reservation - Articles 16 (1) and 16 (4) of Constitution of India and Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 - matter pertaining to reservation for backward classes in public services - for reservation class must be backward and not adequately represented in services under State - identification of backward classes subject to judicial review - reservations contemplated in matter of employment in Article 16 (4) not to exceed 50% - rule of 50% to be applied each year - said rule cannot be related to total strength of class, service or cadre - reservation of posts under Article 16 (4) confined to initial appointment only and cannot extend to providing reservation in matter of promotion - vacancies reserved to be carried forward for maximum period of three years - creamy layer amongst backward class of citizens to be excluded by fixation of proper income or status.

ORDER

B.P. Jeevan Reddy, J.

1. Forty and three years ago was founded this republic with the fourfold objective of securing to its citizens justice, liberty, equality and fraternity. Statesmen of the highest order the like of which this country has not seen since - belonging to the fields of law, politics and public life came together to fashion the instrument of change - the Constitution of India. They did not rest content with evolving the framework of the State; they also pointed out the goal-and the methodology for reaching that goal. In the preamble, they spelt out the goal and in parts III and IV, they elaborated the methodology to be followed for reaching that goal.

2. The Constituent Assembly, though elected on the basis of a limited franchise, was yet representative of all sections of society. Above all, it was composed of men of vision, conscious of the historic but difficult task of carving an egalitarian society from out of a bewildering mass of religions, communities, castes, races, languages, beliefs and practices. They knew their country well. They understood their society perfectly. They were aware of the historic injustices and inequities afflicting the society. They realised the imperative of redressing them by constitutional means, as early as possible - for the alternative was frightening. Ignorance, illiteracy and above all, mass poverty, they took note of. They were conscious of the fact that the Hindu religion - the religion of the overwhelming majority - as it was being practiced, was not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this fourtier system (chaturvarnya) were the outcastes (Panchamas), the lowliest. They did not even believed all the caste system - ugly as its face was. The fourth, shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth

in these castes, unconnected with their deeds. There was to be no deliverance for them from this social stigma, except perhaps death. They were condemned to be inferior. All lowly, menial and unsavoury occupations were assigned to them. In the rural life, they had no alternative but to follow these occupations, generation after generation, century after century. It was their 'karma', they were told, the penalty for the sins they allegedly committed in their previous birth. Pity is, they believed all this. They were conditioned to believe it. This mental blindfold had to be removed first. This was a phenomenon peculiar to this country. Poverty there has been - and there is - in every country. But none had the misfortune of having this social division - or as some call it, degradation - super-imposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted - and do still constitute - a vicious circle. The founding fathers were aware of all this - and more.

3. 'Liberty, equality and fraternity' was the battle cry of the French Revolution. It is also the motto of our Constitution, with the concept of 'Justice-Social Economic and Political' - the sum-total of modern political thought - super-added to it. Equality has been and is the single greatest craving of all human beings at all points of time. It has inspired many a great thinker and philosopher. All religious and political schools of thought swear by it, including the Hindu religious thought, if one looks to it ignoring the later crudities and distortions. Liberty of thought, expression, belief, faith and worship has equally been an abiding faith with all human beings, and at all times in this country in particular. Fraternity assuring the dignity of the individual has a special relevance in the Indian context, as this Judgment will illustrate in due course.

4. The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facets, relevant to Indian Society, have been referred to in the preamble and the articles under the sub-heading "Right to equality"-(Articles 14 to 18). In short, the goal is "equality of status and of opportunity". Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several articles in Part IV (Directive Principles of State Policy). "Justice, Social, Economic and Political", is the sum total of the aspirations incorporated in part IV.

5. Article 14 enjoins upon the state not to deny to any person "equality before the law" or "the equal protection of the laws" within the territory of India. Most constitutions speak of either "equality before the law" or "the equal protection of the laws", but very few of both. Section 1 of the XIV. Amendment to the U.S. Constitution uses only the latter expression while the Austrian Constitution (1920), the Irish Constitution (1937) and the West German Constitution (1949) use the expression "equal before the law". (Article 7 of the Universal Declaration of Human Rights, 1948, of course, declares that "all are equal before the law and are entitled without any discrimination to equal protection of the law".) The content and sweep of these two concepts is not the same though there may be much in common. The content of the expression "equality before the law" is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV, in particular, Articles 38, 39, 39A, 41 and 46. Among others, the concept of equality before the law contemplates minimising the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation. Indeed, in a society where equality of status and opportunity do not obtain and where

there are glaring inequalities in incomes, there is no room for equality - either equality before law or equality in any other respect.

6. The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18.

Through Article 15 they declared in positive terms that the state shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. With a view to eradicate certain prevalent undesirable practices it was declared in Clause (2) of Article 15 that no citizen shall on the grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to shops, public restaurants, hotels and place of public entertainment or to the use of well, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out of state funds or dedicated to the use of general public. At the same time, with a view to ameliorate the conditions of women and children a provision was made in Clause (3) that nothing in the said Article shall prevent the state from making any special provision for women and children.

7. In as much as public employment always gave a certain status and power - it has always been the repository of State power - besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1) expressly declares that in the matter of public employment or appointment to any office under the state, citizens of this country shall have equal opportunity while Clause (2) declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same time, care was taken to declare in Clause (4) that nothing in the said Article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizen which in the opinion of the state is not adequately represented in the services under the state.

Article 17 abolishes the untouchability while Article 18 prohibits conferring of any titles (not representing military or academic distinction). It also prohibits the citizens of this country from accepting any title from a foreign state.

8. Article 16 has remained unamended, except for a minor amendment in Clause (3) whereas Article 15 had Clause (4) inserted in it by the First Amendment Act, 1951. As amended, they read as follows:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16. Equality of opportunity in matters of public employment. - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State of Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) State from making any provision for the reservation of apointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Noting in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

The other provisions of the Constitution having a bearing on Article 16 are Articles 38, 46 and the set of articles in Part XVI. Clause (1) of Article 38 obligates the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Clause (2) of Article 38, added by the 44th Amendment Act says, "the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

Article 46 contains a very significant directive to the State. It says:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. - The State shall promote with special care the educational and economic

interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

It is evident that "the weaker sections of the people" do include the "backward class of citizens" contemplated by Article 16(4).

Part XVI of the Constitution contains "special provisions relating to certain classes". The "classes" for which special provisions are made are, Scheduled Castes, Scheduled Tribes and the Anglo-Indian Community. It also provides for appointment of a Commission to investigate the conditions of and the difficulties faced by the socially and educationally backward classes and to make appropriate recommendations. Article 340 reads as follows:

340. Appointment of a Commission to investigate the conditions of backward classes. - (1) The President may by order appoint a Commission consisting of such persons as he thinks tit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union of any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

Article 338, which has been extensively amended by the Sixty-fifth Amendment Act, provides for establishment of a Commission for the Scheduled Castes and Scheduled Tribes to be known as 'the National Commission for the Scheduled Castes and Scheduled Tribes'. Clause (5) prescribes the duties of the Commission. They are:

(5) It shall be duty of the Commission-

(a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled castes and Scheduled Tribes;

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development under the Union and any State;

(d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(e) to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socioeconomic development of the Scheduled Castes and Scheduled Tribes; and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes and Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

Clause (6) provides that "the President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations."

Clause (7) being relevant may also be read here. It reads, "where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations."

Clause (10) [Clause (3) prior to 65th Amendment Act] brings in socially and educationally backward classes identified by the Government on the basis of the report of the Commission appointed under Article 340 and Anglo-Indians within the purview of the expressions "Scheduled Castes and Scheduled Tribes". It reads as follows:

10. In this article references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under Clause (1) of Article 340, by order specify and also to the Anglo-Indian community.

Article 335 provides that "the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State." It is obvious that if the claims of even Scheduled Castes and Scheduled Tribes are to be taken into consideration consistently with the maintenance of efficiency of administration, the said admonition has to be respected equally while taking into consideration the claims of other backward classes and other weaker sections.

THE FIRST BACKWARD CLASSES COMMISSION (KALELKAR COMMISSION):

9. The proceedings of the Constituent Assembly on draft Article (10) disclose a persistent and strident demand from certain sections of the society for providing reservations in their favour in

the matter of public employment. While speaking on the draft Article 10(3) [corresponding to Article 16(4)] Dr. Ambedkar had stated, "then we have quite a massive opinion which insists that although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration." It was this demand which was mainly responsible for the incorporation of Clause (4) in Article 16. As matter of fact, in some of the southern States, reservations in favour of O.B.Cs. were in vogue since quite a number of years prior to the Constitution. There was a demand for similar reservations at the center. In response to this demand and also in realisation of its obligation to provide for such reservations in favour of backward sections of the society, the Central Government appointed a Backward Class Commission under Article 340 of the Constitution on January 29, 1953. The Commission, popularly known as Kaka Kalelkar Commission, was required "to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove difficulties and to improve their conditions". The Commission submitted its report on March 30, 1955. According to it, the relevant factors to consider while classifying backward classes would be their traditional occupation and profession, the percentage of literacy or the general educational advancement made by them; the estimated population of the community and the distribution of the various communities throughout the state or their concentration in certain areas. The Commission was also of the opinion that the social position which a community occupies in the caste hierarchy would also have to be considered as well as its representation in Government service or in the Industrial sphere. According to the Commission, the causes of educational backwardness amongst the educationally and backward communities were (i) traditional apathy for education on account of social and environmental conditions or occupational handicaps: (ii) poverty and lack of educational institutions in rural areas and (iii) living in inaccessible areas. The Chairman of the commission, Kaka Kalelkar, however, had second thoughts after signing the report. In the enclosing letter addressed to the President he virtually pleaded for the rejection of the report on the ground that the reservations and other remedies recommended on the basis of caste would not be in the interest of society and country. He opined that the principle of caste should be eschewed altogether. Then alone, he said, would it be possible to help the extremely poor and deserving members of all the communities. At the same time, he added, preference ought to be given to those who come from traditionally neglected social classes.

10. The report made by the Commission was considered by the Central Government, which apparently was not satisfied with the approach adopted by the Commission in determining the criteria for identifying the backward classes under Article 15(4). The Memorandum of action appended to the Report of the Commission while placing it on the table of the Parliament [as required by Clause (3) of Article 340] on September 3, 1956, pointed out that the caste system is the greatest hindrance in the way of our progress to egalitarian society and that in such a situation recognition of certain specified castes as backward may serve to maintain and perpetuate the existing distinctions on the basis of caste. The Memorandum also found fault with certain tests adopted by the Commission for identifying the backward classes. It expressed the opinion that a more systematic and elaborate basis has to be evolved for identifying backward classes. Be that as it may, the Report was never discussed by the Parliament.

11. No meaningful action was taken after 1956 either for constituting another Commission or for evolving a better criteria. Ultimately, on August 14, 1961, the Central Government wrote to all the State Governments stating inter alia that "while the State Governments have the discretion to choose their own criteria for defining backwardness, in the view of the Government of India it would be better to apply economic tests than to go by caste." The letter stated further, rather inexplicably, that "even if the Central Government were to specify under Article 338(3) certain groups of people as belonging to 'other backward classes', it will still be open to every State Government to draw up its own lists for the purposes of Articles 15 and 16. As, therefore, the State Governments may adhere to their own lists, any All-India list drawn up by the Central Government would have no practical utility." Various State Governments thereupon appointed Commissions for identifying backward classes and issued orders identifying the socially and educationally backward classes and reserving certain percentage of posts in their favour. So far as the Central services are concerned, no reservations were ever made in favour of other backward classes though made in favour of Scheduled Castes and Scheduled Tribes.

THE SECOND BACKWARD CLASSES COMMISSION (MANUAL COMMISSION):

12. By an Order made by the President of India, in the year 1979, under Article 340 of the Constitution, a Backward Class Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India, which Commission is popularly known as Mandal Commission. The terms of reference of the Commission were:

The terms of reference of the Commission were:-

(i) to determine the criteria for defining the socially and educationally backward classes;

(ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;

(iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and

(iv) present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

The Commission was empowered to:-

(a) obtain such information as they may consider necessary or relevant for their purpose in such form and such manner as they may think appropriate, from the Central Government, the State Government, the Union Territory Administrations and such other authorities, organisations or individuals as may in the opinion of the Commission, be of assistance to them: and

(b) hold their sittings or the sittings of such sub-committees as they may appoint from amongst their own members of such times and such places as may be determined by, or under the authority of the Chairman.

13. The report of the Commission was required to be submitted not later than 31st December, 1979, which date was later extended upto December 31, 1980. It was so submitted.

Chapter-I of the Report deals with the Constitution of First Backward Classes Commission (Kaka Kalelkar Commission), its report, the letter of Kaka Kalelkar to the President, the lack of follow-up action and the letter of the Central Government referred to hereinbefore to State Governments to draw up their own lists. It also points out certain "internal contradictions" in the Report. Chapter-II deals with the "Status of other backward classes in some States". It sets out the several provisions relating to reservation in favour of O.B.Cs. obtaining in several States and the history of such reservations. Chapter-III is entitled 'methodology and data base'. It sets out the procedure followed by the Commission and the material gathered by them. Paras 3.1 and 3.2 read thus:

3.1. One important reason as to why the Central Government could not accept the recommendations of Kaka Kalelkar Commission was that it had not worked out objective tests and criteria for the proper classification of socially and educationally backward classes. In several petitions filed against reservation orders issued by some State Governments, the Supreme Court and various High Courts have also emphasised the imperative need for an empirical approach to the defining of socially and educationally backwardness or identification of Other Backward Classes.

3.2 The Commission has constantly kept the above requirements in view in planning the scope of its activities. It was to serve this very purpose that the Commission made special efforts to associate the leading Sociologists, Research Organisations and Specialised Agencies of the country with every important facet of its activity. Instead of relying on one or two established techniques of enquiry, we tried to caste our net far and wide so as to collect facts and get feed-back from as large an area as possible. A brief account of this activity is given below.

It then refers to the Seminar held by Department of Anthropology of Delhi University in March 1979, to the questionnaire issued to all departments of Central Government and to the State Governments (the proforma are compiled in Vol. II of the Report) the country-wide touring undertaken by the Commission, the evidence recorded by it, the socio-educational field survey conducted by it and other studies and Reports involved in its work. In Chapter-IV the Commission deals with the interrelationship between social backwardness and caste. It describes how the fourth caste, Shudras, were kept in a state of intellectual and physical subjugation and the historical injustices perpetrated on them. In para 4.5 the Commission states: "The real triumph of the caste system lies not in upholding the supremacy of the Brahmin, but in conditioning the consciousness of the lower castes in accepting their inferior status in the ritual hierarchy as a part of the natural order of things.... It was through an elaborate, complex and subtle scheme of scripture, mythology and ritual that Brahminism succeeded in investing the caste system with a moral authority that has been seldom effectively challenged even by the most ardent social reformers."

14. Chapter-V deals with 'social dynamics of caste'. In this chapter, the Commission emphasises the fact that notwithstanding public declarations condemning the caste, it has remained a significant basis of action in politics and public life. Reference is made to several caste associations, which have come into being after the Constitution. The concluding part in this Chapter, para 5.17, reads:

The above account should serve as a warning against any hasty conclusion about the weakening of caste as the basis of social organisation of the Hindu society. The pace of social mobility is no doubt increasing and some traditional features of the caste system have inevitably weakened. But what caste has lost on the ritual front, it has more than gained on the political front. This has also led to some adjustments in the power equation between the high and low castes and thereby accentuated social tensions. Whether these tensions rent the social fabric or the country is able to resolve them by internal adjustments will depend on how understandingly the ruling high castes handle the legitimate aspirations and demands of the historically suppressed and backward classes.

Chapter-VI deals with 'Social Justice, Merit and Privilege'. It attempts to establish, that merit in a elitist society is not something inherent but is the consequence of environmental privileges enjoyed by the members of higher castes. This is sought to be illustrated by giving an example of two boys - Lallu and Mohan. Lallu is a village boy belonging to a backward class occupying a low social position in the village caste hierarchy. He comes from a poor illiterate family and studies at a village school, where the level of instruction is woeful. On the other hand, Mohan comes from a fairly well-off middle class and educated family, attends one of the good public schools in the city, has assistance at home besides the means of acquiring knowledge through television, radio, magazines and so on. Even though both Lallu and Mohan possess the same level of intelligence, Lallu can never compete with Mohan in any open competition because of the several environmental disadvantages suffered by him.

15. Chapter-VII deals with 'Social justice. Constitution and the law'. It refers to the relevant provisions of the Constitution, to the decision in M.R. Balaji and Ors. v. State of Mysore [1963] Suppl. 1 S.C.R. 439 and various subsequent decisions of this Court and discusses the principles flowing from the said decisions. It notes that the subsequent decisions of this Court in C.A. Rajendran v. Union of India MANU/SC/0358/1967 : (1968)IILLJ407SC ; State of Andhra Pradesh and Ors. v. P. Sugar MANU/SC/0028/1968 : [1968]3SCR595 and State of Andhra Pradesh and Ors. v. U.S.V. Balram MANU/SC/0061/1972 : [1972]3SCR247 etc. show a marked shift from the original position taken in Balaji on several important points. In particular, it refers to the observations in Rajendran to the effect that "caste is also a class of citizens and if the class as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it was socially and educationally backward class of citizens within the meaning of Article 15(4)". It refers to the statement in A. Peeriakaruppan etc. v. State of Tamil Nadu MANU/SC/0055/1970 : [1971]2SCR430 , to the effect that "a caste has always been recognised as a class." It also commends the dissenting view of Subba Rao, J. in T. Devadasan v. Union of India MANU/SC/0270/1963 : (1965)IILLJ560SC , (wrongly referred to as Rangachari) - General Manager, Southern Railway v. Rangahari MANU/SC/0388/1961 : (1970)IILLJ289SC .

Chapter-VIII deals with 'North-South Comparison of other Backward Classes Welfare'. It is a case study of provisions in force in two Southern States namely Tamil Nadu and Karnataka and the two

Northern States, Bihar and Uttar Pradesh. The conclusions drawn from the discussion are stated in para 8.45 in the following words:

"In view of the foregoing account, the reasons for much stronger reaction in the North than South to reservations, etc. for other Backward Classes may be summarised as below:-

(1) Tamil Nadu and Karnataka had a long history of Backward Classes movements and various measures for their welfare were taken in a phased manner. In Uttar Pradesh and Bihar such measures did not mark the culmination of a mass movement.

(2) In the South "the forward communities have been divided either by the classification schemes or politically or both.... In Bihar and U.P. the G.Os. have not divided the forward castes.

(3) In the South, clashes between Scheduled Castes and Backward peasant castes have been rather mild. In the North these cleavages have been much sharper, often resulting in acts of violence. This has further weakened the backward classes solidarity in the North.

(4) in the non-Sanskritic South, the basic Varna cleavage was between Brahmins and non-Brahmins and Brahmins constituted only about 3 per cent of the population. In the Sanskritic North, there was no sharp cleavage between the forward castes and together they constituted nearly 20 per cent of the population. In view of this the higher castes in U.P. and Bihar were in a stronger position to mobilise opposition to backward class movement.

(5) Owing to the longer history and better organisation of Other Backward castes in the South, they were able to acquire considerable political clout. Despite the lead given by the Yadavas and other peasant castes, a unified and strong OBC movement has not emerged in the North so far.

(6) The traditions of semi-feudalism in Uttar Pradesh and Bihar have enabled the forward castes to keep tight control over smaller backward castes and prevent them from joining the mainstream of backward classes movement. This is not so in the south.

(7) "The economies of Tamil Nadu and Karnataka have been expanding relatively faster. The private tertiary sector appears to be growing. It can shelter many forward caste youths. Also, they are prepared to migrate outside the State. The private tertiary sectors in Bihar and U.P. are stagnant. The forward caste youths in these two States have to depend heavily on Government jobs. Driven to desperation, they have reacted violently."

16. Chapter-IX sets out the evidence tendered by Central and State Governments while Chapter-X deals with the evidence tendered by the Public. Chapter-XI is quite important inasmuch as it deals with the "Socio-Educational Field Survey and Criteria of Backwardness". In this Chapter, the Commission says that it decided to tap a of number of sources for the collection of data, keeping in mind the criticism against the Kaka Kalelkar Commission as also the several Judgments of this Court. It says that Socio-Educational Field Survey was the most comprehensive inquiry made by the Commission in this behalf. Right from the beginning, this Survey was designed with the help of top social scientists and specialists in the country. Experts from a number of disciplines were associated with different phases of its progress. It refers to the work of Research Planning Team

of Sociologists and the work done by a panel of experts led by Prof. M.N. Srinivas. It refers to the fact that both of them concurred that "in the Indian context such collectivities can be castes or other hereditary groups traditionally associated with specific occupations which are considered to be low and impure and with which educational backwardness and low income are found to be associated." The Commission says further that with a view to providing continuous guidance at the operational level, a Technical Advisory Committee was set up under Dr. K.C. Seal. Director General, Central Statistical Organisation with the Chief Executive, National Sample Survey Organisation and representatives of Directors of State Bureau of Economics and Statistics as Members. The Commission sets out the Methodology evolved by the Experts' panel and states that survey operations were entrusted to the State Statistical Organisations of the concerned States/Union Territories. It refers to the training imparted to the survey staff and to the fact that the entire data so collected was fed into a computer for electronic processing of such data. Out of the 406 districts in the country, the survey covered 405 districts. In every district, two villages and one urban block was selected and in each of these villages and urban blocks, every single household was surveyed. The entire data collected was tabulated with the aid and National Informatics center of Electronics Commission of India. The Technical Committee constituted a Sub-Committee of Experts to help the Commission prepare "Indicators of Backwardness" for analysing the data contained in the computerised tables. In para 11.23 (page 52) the Commission sets out the eleven Indicators/Criteria evolved by it for determining social and educational backwardness. Paras 11.23, 11.24 and 11.25 are relevant and may be set out in full:-

11.23. As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e., Social, Educational and Economic. They are:-

A. Social:

(i) Castes/Classes considered as socially backward by others.

(ii) Castes/Classes which mainly depend on manual labour for their livelihood.

(iii) Castes/Classes where at least 25% females and 10% males above the state average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.

(iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational:

(v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.

(vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average.

(vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. Economic:

(viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households.

(xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

11.24. As the above three groups are not of equal importance for our purpose, separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 points each. Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

11.25. It will be seen that from the values given to each Indicators, the total score adds upto 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50 percent (i.e., 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (It is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further, in case the number of households covered by the survey for any particular caste were below 20, it was left out of consideration, as the sample was considered too small for any dependable inference.

It will also be useful to set out the observations of the Commission in para 11.27:-

11.27. In the end it may be emphasised that this survey has no pretentions to being a piece of academic research. It has been conducted by the administrative machinery of the Government and used as a rough and ready tool for evolving a set of simple criteria for identifying social and educational backwardness. Throughout this survey our approach has been conditioned by practical considerations, realities of field conditions, constraints of resources and trained manpower and paucity of time. All these factors obviously militate against the requirements of a technically sophisticated and academically satisfying operation.

17. Chapter-XII deals with 'Identification of OBCs'. In the first instance, the Commission deals with OBCs among Hindu Communities. It says that it applied several tests for determining the SEBCs like stigmas of low-occupation, criminality, nomadism, beggary and untouchability besides inadequate representation in public services. The multiple approach adopted by the Commission is set out in para 12.7 which reads:-

12.7. Thus, the Commission has adopted a multiple approach for the preparation of comprehensive lists of Other Backward Classes for all the States and Union Territories. The main sources examined for the preparation of these lists are:-

(i) Socio-educational field survey;

(ii) Census Report of 1961 (particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes);

(iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences as described in Chapter X of this Report; and

(iv) Lists of OBCs notified by various State Governments.

The Commission next deals with OBCs among Non-Hindu Communities. In paragraphs 12.11 to 12.16 the Commission refers to the fact that even among Christian, Muslim and Sikh religions, which do not recognise caste, the caste system is prevailing though without religious sanction. After giving a good deal of thought to several difficulties in the way of identifying OBCs among Non-Hindus, the Commission says, it has evolved a rough and ready criteria viz., (1) all untouchables converted to any Non-Hindu religion and (2) such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counter-parts have been included in the list of Hindu OBCs - ought to be treated as SEBCs. The Commission then sought to work out the estimated population of the OBCs in the country and arrived at the figure of 52 per cent. Paras 12.19, 12.22 may be set out in full in view of their relevancy:

12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of castewise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes communities and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country.

12.22. From the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, Other Backward Classes constitute nearly 52% of the Indian population.

Percentage Distribution of Indian Population by Caste and Religious Groups

S.No.	Group Name	Percentage of total population
I.	Scheduled Castes and Scheduled Tribes	
A--1	Scheduled Castes	15.05
A--2	Scheduled Tribes	7.51
	Total of 'A'	02.56
II.	Non-Hindu Communities, Religious Groups, etc.	
B--1	Muslims (other than STs)	11.19
		(0.02)*
B--2	Christians (other than STs)	2.16
		(0.44)*
B--3	Sikhs (other than SCs & STs)	1.67
		(0.22)*
B--4	Buddhists (other than STs)	0.67
		(0.03)*
B--5	Jains	0.47
	Total of 'B'	16.16
III.	Forward Hindu Castes & Communities	
C--1	Brahmins (including Bhumidars)	5.52
C--2	Rajputs	3.90
C--3	Marathas	2.21
C--4	Jats	1.00
C--5	Vaishyas-Bania, etc.	1.88
C--6	Kayasthas	1.07
C--7	Other forward Hindu castes groups	2.00
	Total of 'C'	
	TOTAL OF 'A', 'B' & 'C'	56.30
IV.	Backward Hindu Castes & Communities	
D.	Remaining Hindu castes/ groups which come in the category of "Other Backward Classes"	43.70@
	V. Backward Non-Hindu Communities	
E.	52% of religious groups under Section B may also be treated as OBCs.	8.40
F.	The approximate derived population of Other Backward Classes including non-Hindu Communities	52%
	(Aggregate of D& E, rounded)	

@ This is a derived figure.

* Figures in brackets give the population of S.C. & S.T. among these non-Hindu Communities."

1993 S.C./33 III G--9

18. Chapter-XIII contains various recommendations including reservations in services. In view of the decisions of the Supreme Court limiting the total reservation to 50 per cent, the Commission recommended 27 per cent reservation in favour of OBCs (in addition to 22.5 per cent already existing in favour of SCs and STs). It recommended several measures for improving the condition of these backward classes. Chapter-XIV contains a summary of the report.

19. Volumes 2 to 9 of the Report contain and set out the material and the data on the basis of which the Commission made its recommendations. Vol. II contains the State-wise lists of Backward Classes, as identified by the Commission. (It may be remembered that both the Scheduled Castes order and Scheduled Tribes order notified by the President contain State-wise lists of Scheduled Castes and Scheduled Tribes). Volume II inter alia contains the questionnaire issued to the State Governments/Union Territories, the questionnaire issued to the Central Government Ministries/Departments, the questionnaire issued to the general public, the list of M.Ps. and other experts who appeared and gave evidence before the Commission, the criteria furnished to Central Government offices for identifying OBC employees for both Hindu and non-Hindu Communities, report of the Research Planning Team of the Sociologists and the proformas employed in conducting the Socio-Education Survey.

20. The Report of the Mandal Commission was laid before each House of Parliament and discussed on two occasions - once in 1982 and again in the year 1983. The proceedings of the Lok Sabha placed before us contain the statement of Sri R. Venkataraman, the then Minister for Defence and Home Affairs. He expressed the view that "the debate has cut across party lines and a number of people on this side have supported the recommendations of the Mandal Commission. A large number of people on the other side have also supported it. If one goes through the entire debate one will be impressed with a fairly unanimous desire on the part of all sections of the House to find a satisfactory solution to this social evil of backwardness of Scheduled Castes/Scheduled Tribes etc. which is a festering sore in our body politic," The Hon'ble Minister then proceeded to state," the Members generally said that the recommendations should be accepted. Some Members said that it should be accepted in toto. Some Members have said that it should be accepted with certain reservations. Some Members said, there should be other criteria than only social and educational backwardness. But all these are ideas which Government will take into account. The problem that confronts Government today is to arrive at a satisfactory definition of backward classes and bring about an acceptance of the same by all the state concerned." The Hon'ble Minister referred to certain difficulties the Government was facing in implementing the recommendations of the Commission on account of the large number of castes identified and on account of the variance in the State lists and the Mandal Commission lists and stated that consultation with various departments and State Governments was in progress in this behalf. He stated that a meeting of the Chief Ministers would be convened shortly to take decisions in the matter.

The Report was again discussed in the year 1983. The then Hon'ble Minister for Home Sri P.C. Sethi, while replying to the debate stated: "While referring to the Commission whose report has been discussed today, I would like to remind the House that although this Commission had been appointed by our predecessor Government, we now desire to continue with this Commission and implement its recommendations."

The Office Memorandum dated 13th August, 1090:

21. No action was, however, taken on the basis of the Mandal Commission Report until the issuance of the Office Memorandum on 25th September, 1991. On that day, the then Prime Minister Sri V.P. Singh made a statement in the Parliament in which he stated inter alia as follows:

After all, if you take the strength of the whole of the Government employees as a proportion of the population, it will be 1% or 1-1/2. I do not know exactly, it may be less than 1%. We are under no illusion that this 1% of the population, or a fraction of it will resolve the economic problems of the whole section of 52%. No. We consciously want to give them a position in the decision-making of the country, a share in the power structure. We talk about merit. What is the merit of the system itself? That the section which has 52% of the population gets 12. 55% in Government employment. What is the merit of the system? That in Class I employees of the Government it gets only 4.69%, for 52% of the population in decision-making at the top echelons it is not even one-tenth of the population of the country; in the power structure it hardly 4.69. I want to challenge first the merit of the system itself before we come and question on the merit, whether on merit to reject this individual or that. And we want to change the structure basically, consiciously, with open eyes. And I know when changing the structures comes, there will be resistance....

What I want to convey is that treating unequals as equals is the greatest injustice.

And, correction of this injustice is very important and that is what I want to convey. Here, the National Front Government's Commitment for not only change of Government, but also change of the social order, is something of great significance to all of us; it is a matter of great significance. Merely making programmes of economic benefit to various sections of the society will not do....

There is a very big force in the argument to involve the poorest in the power structure. For a lot of time we have acted on behalf of the poor. We represent the poor....

Let us forget that the poor are begging for some crumbs. They have suffered it for thousands of years. Now they are fighting for their honour as a human being....

A point was made by Mahajan ji that if there are different lists in different States how will the Union List harmonise? It is so today in the case of the Scheduled Castes and the Scheduled Tribes, That has not caused a problem. On the same pattern, this will be there and there will be no problem.

22. The Office Memorandum dated 13th August, 1990 reads as follows:

OFFICE MEMORANDUM

Subject : Recommendations of the Second backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in services under the Government of India.

In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The Second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on 31.12.1980.

2. Government have carefully considered the report and the recommendations of the Commission in the present context regarding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows:-

(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

(ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedures to be followed for enforcing reservation will be issued separately.

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Governments' lists, a list of such castes/communities is being issued separately.

(v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

3. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.

sd/-
(Smt. Krishna Singh)
Joint Secretary to the Govt. of India

23. Soon after the issuance of the said Memorandum there was wide-spread protest in certain Northern States against it. There occurred serious disturbance to law and order involving damage to private and public property. Some young people lost their lives by self-immolation. Writ Petitions were filed in this Court questioning the said Memorandum along with applications for staying the operation of the Memorandum. It was stayed by this Court.

The Office Memorandum dated 25th September, 1991:

24. After the change of the Government at the center following the general election held in the first half of 1991, another Office Memorandum was issued on 25th September, 1991 modifying the earlier Memorandum dated 13th August, 1990. The later Momorandum reads as follows:

OFFICE MEMORANDUM

Subject : Recommendations of the Second Backward Classes Commission (Mandal Report) - Reservation for socially and Educationally Backward Classes in service under the Government of India.

The undersigned is directed to invite the attention to O.M. of even number dated the 13th August, 1990, on the above mentioned subject and to say that in order to enable the poorer sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said Memorandum with immediate effect as follows:-

(i) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

(ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

The O.M. of even number dated the 13th August, 1990, shall be deemed to have been amended to the extent specified above.

sd/-
(A.K. Harit)

class = "centeralign">DY. SECRETARY TO THE GOVERNMENT OF INDIA

25. Till now, the Central Government has not evolved the economic criteria as contemplated by the later Memorandum, though the hearing of these writ petitions was adjourned on more than one occasion for the purpose. Some of the writ petitions have meanwhile been amended challenging the later Memorandum as well. Let us notice at this stage what do the two memorandums say, read together. The first provision made is: 27% of vacancies to be filled up by direct recruitment in civil posts and services under the Government of India are reserved for backward classes. Among the members of the backward classes preference has to be given to candidates belonging to the poorer sections. Only in case, sufficient number of such candidates are not available, will the unfilled vacancies be filled by other backward class candidates. The second provision made is: backward class candidates recruited on the basis of merit in open competition along with general candidates shall not be adjusted against the quota of 27% reserved for them. Thirdly, it is provided that backward classes shall mean those castes and communities which are common to the list in the report of the Mandal Commission and the respective State Government's list. It may be remembered that Mandal Commission has prepared the list of backward classes State-wise, Lastly,

it is provided that 10% of the vacancies shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservations. As stated above, the criteria for determining the poorer sections among the backward classes or for determining other economically backward sections among the non-reserved category has so far not been evolved. Though the first Memorandum stated that the orders made therein shall take effect from 7.8.1990, they were not in fact acted upon on account of the orders made by this Court.

Issues for consideration:

26. These writ petitions were heard in the first instance by a Constitution Bench presided over by the then Chief Justice Sri Ranganath Misra. After hearing them for some them, the Constitution Bench referred them to a Special Bench of Nine Judges, "to finally settle the legal position relating to reservations." The reason for the reference being, "that the several Judgments of this Court have, not spoken in the same voice on this issue and a final look by a larger Bench in our opinion should settle the law in an authoritative way.

We have, accordingly, heard all the parties and interveners who wished to be heard in the matter. Written submissions have been filed by almost all the parties and intervenOrs. Together, they run into several hundreds of pages.

At the inception of arguments, counsel for both sides put their heads together and framed eight questions arising for our discussion. They read as follows:

(1) Whether Article 16(4) is an exception to Article 16(1) and would be exhaustive of the right to reservation to posts in services under the State?

(II) What would be the content of the phrase Backward Class in Article 16(4) of the Constitution and whether caste by itself could constitute a class and whether economic criterion by itself could identify a class for Article 16(4) and whether backward Classes in Article 16(4) would include the Article 46 as well?

(III) If economic criterion by itself could not constitute a Backward Classes under Article 16(4) whether reservation of posts in services under the State based exclusively on economic criteria would be covered by Article 16(1) of the Constitution?

(IV) Can the extent of reservation to posts in the services under the State under Article 16(4) or, if permitted under Articles 16(1) and 16(4) together, exceed 50% of the posts in a cadre or Service under the State or exceed 50% of the appointment in a cadre or Service in any particular year and can such extent of reservation be determined without determining the inadequacy of representation of each class in the different categories and grades of Services under the State?

(V) Does Article 16(4) permit the classification of 'Backward Classes' into Backward Classes and Most Backward Classes or permit Classification among them based on economic or other considerations?

(VI) Would making "any provision" under Article 16(4) for reservation "by the State" necessarily have to be by law made by the Legislatures of the State or by law made by Parliament? Or could such provisions be made by an executive order?

(VII) Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?

(VIII) Would reservation of appointments or posts "in favour of any Backward Class" be restricted to the initial appointment to the post or would it extend to promotions as well?

For the sake of convenient discussion and in the interest of clarity, we found it necessary to elaborate them. Accordingly, we have re-framed the questions. We shall proceed to answer them in the same order. The reframed questions are:

1(a) Whether the 'provision' contemplated by Article 16(4) must necessarily be made by the legislative wing of the State?

(b) If the answer to Clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a rule made under the proviso to Article 309?

2(a) Whether Clause (4) of Article 16 is an exception to Clause (1) of Article 16?

(b) Whether Clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of 'backward class of citizens'? Whether it is exhaustive of the special provisions that can be made in favour of all sections, classes or groups?

(c) Whether reservations can be made under Clause (1) of Article 16 or whether it permits only extending of preferences/concessions?

3(a) What does the expression 'backward class of citizens' in Article 16(4) means?

(b) Whether backward classes can be identified on the basis and with reference to caste alone?

(c) Whether a class, to be designated as a backward class, should be situated similarly to the S.Cs./S.Ts.?

(d) Whether the 'means' test can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory?

4(a). Whether the backward classes can be identified only and exclusively with reference to economic criteria?

(b) Whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes?

5. Whether the backward classes can be further categorised into backward and more backward categories?

6. To what extent can the reservation be made?

(a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?

(b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?

(c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to?

(d) Whether Devadasan was correctly decided?

7. Whether Article 16 permits reservations being provided in the matter of promotions?

8. Whether reservations are anti-meritian? To what extent are Articles 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16?

9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage?

10. Whether the distinction made in the Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?

11. Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated 25.9.1991 permissible under Article 16?

26A. Before we proceed to deal with the question, we may be permitted to make a few observations: The questions arising herein are not only of great moment and consequence, they are also extremely delicate and sensitive. They represent complex problems of Indian Society, wrapped and presented to us as constitutional and legal questions. On some of these questions, the decisions of this Court have not been uniform. They speak with more than one voice. Several opposing points of view have been pressed upon us with equal force and passion and quite often with great emotion. We recognize that these view-points are held genuinely by the respective exponents. Each of them feels his own point of view is the only right one. We cannot, however, agree with all of them. We have to find and we have tried our best to find - answers which according to us are the right ones constitutionally and legally. Though, we are sitting in a larger Bench, we have kept in mind the relevance and significance of the principle of Stare, decisis. We are conscious of the fact that in law certainty, consistency and continuity are highly desirable features. Where a decision has stood the test of time and has never been doubted, we have respected it unless, of course, there are compelling and strong reasons to depart from it. Where, however,

such uniformity is not found, we have tried to answer the question on principle keeping in mind the scheme and goal of our Constitution and the material placed before us.

There are occasions when the obvious needs to be stated and, we think, this is one such occasion. We are dealing with complex social, constitutional and legal questions upon which there has been a sharp division of opinion in the Society, which could have been settled more satisfactorily through political processes. But that was not to be. The issues have been relegated to the judiciary - Which shows both the disinclination of the executive to grapple with these sensitive issues as also the confidence reposed in this organ of the State. We are reminded of what Sir Anthony Mason, Chief Justice of Australia once said:

Society exhibits more signs of conflict and disagreement today than it did before.... Governments have always had the option of leaving questions to be determined by the courts according to law....

There are other reasons, of course - that cause governments to leave decisions to be made by Courts. They are of expedient political character. The community may be so divided on a particular issue that a government feels that the safe course for it to pursue is to leave the issue to be resolved by the Courts, thereby diminishing the risk it will alienate significant sections of the Community.

But then answering a question as to the legitimacy of the Court to decide such crucial issues, the learned Chief Justice says:

....my own feeling is that the people accept the Courts as the appropriate means of resolving disputes when governments decide not to attempt to solve the disputes by the political process.

(Judging the World: Law and Politics in the Worlds Leading Courts - page 343)

We hope and trust that our people too are mature enough to appreciate our endeavour in the same spirit. They may well remember that "the law is not an abstract concept removed from the society it serves, and that Judges, as safe-guarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality."

PART - II

Before we proceed to answer the questions aforementioned, it would be helpful to notice (a) the debates in the Constituent Assembly on Article 16 (draft Article 10); (b) the decisions of this Court on Articles 16 and 15; and (c) a few decisions of the U.S.Supreme Court considering the validity of race-conscious programmes.

The Framing of Article 16: Debates in the Constituent Assembly

25. Draft Article 10 corresponds to Article 16. The debate in the Constituent Assembly on draft Article 10 and particularly Clause (3), thereof [corresponding to Clause (4) of Article 16] helps us to appreciate the background and understand the objective underlying Article 16, and in particular, Clause (4) thereof. The original intent comes out clear and loud from these debates.

Omitting draft Clause (4) [which corresponds to Clause (5) of Article 16] the three clauses in draft Article 10, as introduced in the Constituent Assembly, read as follows:

10(1). There shall be equality of opportunity for all citizens in matters of employment under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them by ineligible for any office under the State.

(3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any class of citizens who in the opinion of the State are not adequately represented in the services under the State.

It was the Drafting Committee under the Chairmanship of Dr. B.R. Ambedkar that inserted the word "backward" in between the words "in favour of any" and 'class of citizens". The discussion on draft Article 10 took place on November 30, 1948. Several members including S/Sri Damodar Swarup Seth, Pt. Hirdya Nath Kunzru and R.M. Nalavade complained that the expressions 'backward' and 'backward classes' are quite vague and are likely to lead to complications in future. They suggested that appointments to public services should be made purely on the basis of merit. Some others suggested that such reservations should be available only for a period of first ten years of the Coustitution. To this criticism the Vice-President of the Assembly (Dr. H.C.Mookherjee) replied in the following words:

Before we start the general discussion, i would like to place a particular matter before the Honourable Members. The clause which has so long been under discussion affects particularly certain sections of our population sections which have in the past been treated very cruelly and although we are today prepared to make reparation for the evil deeds of our ancestors, still the old story continues, at least here and there, and capital is made out of it outside India.... I would therefore very much appreciate the permission of the House so that I might give full discussion on this particular matter to our brethren of the backward classes. Do I have that permission?

26. In the ensuing discussion Sri Chandrika Ram (Bihar-General) supported draft Clause (3) with great passion. He pleaded for reservations in favour of Backward Classes both in services as well as in the legislature, just as in the case of Harijans.

Sri Chandrika Ram was supported by another Member Sri P.Kakkan (Madras-General) and Sri T.Channiah (Mysore), Sri Channiah, in particular, commented upon the Members coming from Northern India being puzzled about the meaning of the expression 'backward class' and proceeded to clarify the same in the following words:-

The backward classes of people as understood in South India, are those classes of people who are educationally backward, it is those classes that require adequate representation in the services. There are other classes of people who are socially backward; they also require adequate representation in the service.

27. After the discussion proceeded for some more time, Sri K.M.Munshi, who was a Member of the Drafting Committee rose to explain the content of the word 'backward'. He said:-

What we want to secure by this clause are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the State-highest efficiency which would enable the services to function effectively and promptly. At the same time, in view of the conditions in our country prevailing in several provinces, we want to see that backward classes, classes who are really backward, should be given scope in the State services; for it is realised that State services give a status and an opportunity to serve the country, and this opportunity should be extended to every community, even among the backward people. That being so, we have to find out some generic term and the word "backward class" was the best possible term.

Sri Munshi proceeded to state:

I may point out that in the province of Bombay for several years now, there has been a definition of backward classes, which includes not only Scheduled Castes and Scheduled Tribes but also other backward classes who are economically, educationally and socially backward. We need not, therefore, define or restrict the scope of the word "backward" to a particular community. Whoever is backward will be covered by it and I think the apprehensions of the Honourable Members are not justified.

Ultimately Dr. B.R.Ambedkar, the Chairman of the Drafting Committee, got up to clarify the matter. His speech, which put an end to all discussion and led to adopting of draft Article 10(3), is worth quoting in extenso, since it throws light on several questions relevant herein:

...there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality or opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative-and it ought to be operative in their judgment to its fullest extent-there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind-the-three principles we had to reconcile,-they will see that no better formula could be produced than the one that is embodies in Sub-clause (3) of Article 10 of the Constitution. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which

has now-for historical reasons-been controlled by one community or a few communites, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly....

Somebody asked me: "What is a backward community"? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government.

The above material makes it amply clear that the objective behind Clause (4) of Article 16 was the sharing of State power. The State power which was almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based. The backward communities who were till then kept out of apparatus of power, were sought to be inducted there into and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. In short, the objective behind Article 16(4) is empowerment of the deprived backward communities - to give them a share in the administrative apparatus and in the governance of the community.

Decisions of this Court on Articles 16 and 15:

28. Soon after the enforcement of the Constitution two cases reached this Court from the State of Madras - one under Article 15 and the other under Article 16. Both the cases were decided on the same date and by the same Bench. The one arising under Article 15 is State of Madras v. Champakam Dorairajan MANU/SC/0007/1951 : [1951]2SCR525 , and the other arising under Article 16 is Venkataraman v. State of MadrasMANU/SC/0080/1951 : A.I.R. 1951 S.C. 229. By virtue of certain orders issued prior to coming into force of the Constitution,-popularly known as 'Communal G.O.' - seats in the Medical and Engineering Colleges in the State of Madras were apportioned in the following manner: Non-Brahmin (Hindus)-6, Backward Hindus-2, Brahmin-2,

Harijan-2, Anglo Indians and Indian Christians-1, Muslims-1. Even after the advent of the Constitution, the G.O. was being acted upon which was challenged by Smt. Champakam as violative of the fundamental rights guaranteed to her by Articles 15(1) and 29(2) of the Constitution of India. A Full Bench of Madras High Court declared the said G.O. as void and un-enforceable with the advent of the Constitution. The State of Madras brought the matter in appeal to this Court. A Special Bench of Seven Judges heard the matter and came to the unanimous conclusion that the allocation of seats in the manner aforesaid is violative of Articles 15(1) and 29(2) inasmuch as the refusal to admit the respondent (writ petitioner) notwithstanding her higher marks, was based only on the ground of caste. The State of Madras sought to sustain the G.O. with reference to Article 46 of the Constitution. Indeed the argument was that Article 46 over-rides Article 29(2). This argument was rejected. The Court pointed out that while in the case of employment under the State, Clause (4) of Article 16 provides for reservations in favour of backward class of citizens, no such provision was made in Article 15.

29. In the matter of appointment to public services too, a similar communal G.O. was in force in the State of Madras since prior to the Constitution. In December, 1949, the Madras Public Service Commission invited applications for 83 posts of District Munsifs, specifying at the same time that the selection of the candidates would be made from the various castes, religions and communities as specified in the communal G.C. The 83 vacancies were distributed in the following manner: Harijans-19, Muslims-5, Christians-6, Backward Hindus-10, Non-Brahmin (Hindus)-32 and Brahmins-11. The petitioner Venkataraman (it was a petition under Article 32 of the Constitution) applied for and appeared at the interview and the admitted position was that if the provisions of the communal G.O. were to be disregarded, he would have been selected. Because of the CO., he was not selected (he belonged to Brahmin community). Whereupon he approached this Court. S.R.Das, J. speaking for the Special Bench referred to Article 16 and in particular to Clause (4) thereof and observed: "Reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional". He proceeded to hold:

The Communal G.O. itself makes an express reservation of seats for Harijans & Backward Hindus. The other categories, namely, Muslims, Christians, Non-Brahmin Hindus & Brahmins must be taken to have been treated as other than Harijans & Backward Hindus. Our attention was drawn to a schedule of Backward Classes set out in Schedule III to Part I of the Madras Provincial & Subordinate Service Rules. It was, therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in that Schedule. It is, in the circumstances, impossible to say that classes of people other than Harijans & Backward Hindus can be called Backward Classes. As regards the posts reserved for Harijans & Backward Hindus it may be said that the petitioner who does not belong to those two classes is regarded as ineligible for those reserved posts not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such posts in favour of a backward class of citizens, but the ineligibility of the petitioner for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin. For instance, the petitioner may be far better qualified than a Muslim or a Christian or a Non-Brahmin candidate & if all the posts reserved for those communities were open to him he would be eligible for appointment, as is conceded by the learned Advocate General of Madras, but, nevertheless, he cannot expect to get any of those posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of the posts reserved for the other communities,

although he may have far better qualifications than those possessed by members falling within those categories, is brought about only because he is a Brahmin & does not belong to any of those categories. This ineligibility created by the Communal G.O. does not appear to us to be sanctioned by Clause (4) of Article 16 and it is an infringement of the fundamental right guaranteed to the petnr. as an individual citizen under Article 16(1) & (2). The Communal G.O., in our opinion, is repugnant to the provisions of Article 16 & is as such void and illegal.

30. Sri Ram Jethmalani, the learned Counsel appearing for the Respondent-State of Bihar placed strong reliance on the above passage. He placed before us an extract of the Schedule of the backward classes appended to the Madras Provincial and Subordinate Service Rules, 1942. He pointed out that Clause (3)(a) in Rule 2 defined the expression backward classes to mean "the communities mentioned in Schedule III to this part", and that Schedule III is exclusively based upon caste. The Schedule describes the communities mentioned therein under the heading 'Race, Tribe or Caste'. It is pointed out that when the said Schedule was substituted in 1947, the basis of classification still remained the caste, though the heading "Races, Tribes and Castes" was removed. Mr. Jethmalani points out that the Special Bench took note of the fact that Schedule III was nothing but a collection of certain 'communities', notified as backward classes and yet upheld the reservation in their favour. According to him, the decision in Venkataraman clearly supports the identification of backward classes on the basis of caste. The Communal G.O. was struck down, he submits, only in so far as it apportioned the remaining vacancies between sections other than Harijans and backward classes. It is rather curious, says the counsel, that the decision in Venkataraman has not attracted the importance it deserves all these years; All the subsequent decisions of this Court refer to Champakam. Hardly any decision refers to Venkataraman notwithstanding the fact that Venkataraman was a decision rendered with reference to Article 16.

31. Soon after the said two decisions were rendered the Parliament intervened and in exercise of its constituent power, amended Article 15 by inserting Clause (4), which reads:

Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

It is worthy of notice that the Parliament, which enacted the first Amendment to the Constitution, was in fact the very same Constituent Assembly which had framed the Constitution. The speech of Dr. Ambedkar on the occasion is again instructive. He said:-

Then with regard to Article 16, Clause (4), my submission is this that it is really impossible to make any reservation which would not result in excluding somebody who has a caste. I think it has to be borne in mind and it is one of the fundamental principles which I believe is stated in Mulla's edition on the very first page that there is no Hindu who has not a caste. Every Hindu has a caste-he is either a Brahmin or a Mahratta or a Kundby or a Kumbhar or a carpenter. There is no Hindu-that is the fundamental proposition-who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste.

After the enactment of the First Amendment the first case that came up before this Court is Balaji v. The State of Mysore. (In the year 1961, this Court decided the General Manager, Southern Railway v. Rasngachari, but that related to reservations in favour of the Scheduled Castes and Scheduled Tribes in the matter of promotion in the Railways. Rangachari will be referred to at an appropriate stage later.) In the State of Karnataka, reservations were in force since a few decades prior to the advent of the Constitution and were being continued even thereafter. On July 26, 1958 the State of Mysore issued an order under Article 15(4) of the Constitution declaring all the communities excepting the Brahmin community as socially and educationally backward and reserving a total of 75 per cent seats in Educational Institutions in favour of SEBCs and SCs/STs. Such orders were being issued every year, with minor variation in the percentage of reservations. On 13th of July, 1972, a similar order was issued wherein 68 per cent of the seats in all Engineering and Medical Colleges and Technical Institutions in the State were reserved in the favour of the SEBCs, SCs and STs. SEBCs were again divided into two categories-backward classes and more backward classes. The validity of this order was questioned under Article 32 of the Constitution. While striking down the said order this Court enunciated the following principles:-

(1) Clause (4) of Article 15 is a proviso or an exception to Clause (1) of Article 15 and to Clause (2) of Article 29;

(2) For the purpose of Article 15(4), backwardness must be both social and educational. Though caste in relation to Hindus may be a relevant factor to consider, in determining the social backwardness of a class of citizens, it cannot be made the sole and dominant test. Christians, Jains and Muslims do not believe in caste system; the test of caste cannot be applied to them. Inasmuch as identification of all backward classes under the impugned order has been made solely on the basis of caste, it is bad.

(3) The reservation made under Clause (4) of Article 15 should be reasonable. It should not be such as to defeat or nullify the main Rule of equality contained in Clause (1). While it is not possible to predicate the exact permissible percentage of reservations, it can be stated in a general and broad way that they should be less than 50 per cent.

(4) A provision under Article 15(4) need not be in the form of legislation; it can be made by an executive order.

(5) The further categorisation of backward classes into backward and more backward is not warranted by Article 15(4).

It must be remembered that Balaji was a decision rendered under and with reference to Article 15 though it contains certain observations with respect to Article 16 as well.

33. Soon after the decision in Balaji this Court was confronted with a case arising under Article 16 - Devadasan v. Union of India. This was also a petition under Article 32 of the Constitution. It related to the validity of the 'carry-forward' rule obtaining in Central Secretariat Service. The reservation in favour of Scheduled Castes was twelve and half per cent while the reservation in favour of Scheduled Tribes was five per cent. The 'carry-forward' rule considered in the said decision was in the following terms: "If a sufficient number of candidates considered suitable by

the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies, thus, treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quotas, a corresponding addition should be made to the number of reserved vacancies in the second following year." Because sufficient number of SC/ST candidates were not available during the earlier years the unfilled vacancies meant for them were carried forward as contemplated by the said rule and filled up in the third year - that is in the year 1961. Out of 45 appointments made, 29 went to Scheduled Castes and Scheduled Tribes. In other words, the extent of reservation in the third year came to 65 per cent. The rule was declared unconstitutional by the Constitution Bench, with Subba Rao, J. dissenting. The majority held that the carry forward rule which resulted in more than 50 per cent of the vacancies being reserved in a particular year, is bad. The principle enunciated in Balaji regarding 50 percent was followed. Subba Rao, J. in his dissenting opinion, however, upheld the said rule. The learned Judge observed: "The expression, "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article." The learned Judge opined that once a class is a backward class, the question whether it is adequately represented or not is left to the subjective satisfaction of the State and is not a matter for this Court to prescribe.

We must, at this stage, clarify that a 'carry-forward' rule may be in a form different than the one considered in Devadasan. The Rule may provide that the vacancies reserved for Scheduled Castes or Scheduled Tribes shall not be filled up by general (open competition) candidates in case of non-availability of SC/ST candidates and that such vacancies shall be carried forward.

34. In the year 1964 another case from Mysore arose, again under Article 15 - Chitralekha v. State of Mysore. The Mysore Government had by an order defined backward classes on the basis of occupation and income, unrelated to caste. Thirty per cent of seats in professional and technical institutions were reserved for them in addition to eighteen per cent in favour of SCs and STs. One of the arguments urged was that the identification done without taking the caste into consideration is impermissible. The majority speaking through Subba Rao, J., held the identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste, is not bad and does not offend Article 15(4).

35. During the years 1968 to 1971, this Court had to consider the validity of identification of backward classes made by Madras and Andhra Pradesh Governments. Minor P.Rajendran v. State of Madras related to specification of socially and educationally backward classes with reference to castes. The question was whether such an identification infringes Article 15. Wanchoo, CJ., speaking for the Constitution Bench dealt with the contention in the following words:

The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 nothing but a list of certain castes. Therefrore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had

not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).... It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that person belonging to these castes are also not a class of socially and educationally backward citizens.... As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4)

In view however of the explanation given by the State of Madras, which has not been controverted by and rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail.

36. The shift in approach and emphasis is obvious. The Court now held that a caste is a class of citizens and that if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). More over the burden of proving that the specification/identification was bad, was placed upon the petitioners. In case of failure to discharge that burden, the identification made by the State was upheld. The identification made on the basis of caste was upheld inasmuch as the petitioner failed to prove that any caste mentioned in the list was not socially and educationally backward.

37. Another Constitution Bench took a similar view in Triloki Nath MANU/SC/0420/1968 : [1969] 1 S.C.R. 103.

Rajendran was expressly referred to and followed in Peeriakaruppun v. State of Tamil Nadu, a decision rendered by a Bench of three Judges (J.C.Shah, K.S.Hegde and A.N.Grover, JJ.). This was a Petition under Article 32 of the Constitution and one arising under Article 15. The argument was that identification of SEBCs having been done on the basis of caste alone is bad. Repelling the argument, Hegde, J. held:-

There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence, we are unable to uphold the contention that impugned reservation is not in accordance with Article 15(4).

38. Again, in State of Andhra Pradesh v. Balram, a case arising from Andhra Pradesh, a Division Bench (Vaidyalingam and Mathew,JJ.) adopted the same approach and upheld the identification made by Andhra Pradesh Government on the basis of caste. Answering the criticism that the

Backward Classes Commission appointed by the State Government did not do a scientific and thorough job, the Bench observed:

In our opinion, the Commission has taken considerable pains to collect as much relevant material as possible to judge the social and educational backwardness of the persons concerned. When, for instance, it had called for information regarding the student population in classes X and XI from nearly 2224 institutions, if only 50% of the institutions sent replies, it is not the fault of the Commission for they could not get more particulars. If the commission has only to go on doing the work of collecting particulars and materials, it will be a never ending matter. In spite of best efforts that any commission may make in collecting materials and datas, its conclusions cannot be always scientifically accurate in such matters. Therefore, the proper approach, in our opinion should be to see whether the relevant data and materials referred to in the report of the Commission justify its conclusions. In our opinon, there was sufficient material to enable the Commission to be satisfied that the persons included in the list are really socially and educationally bakcward. No doubt there are few instances where the educational average is slightly above the State average, but that circumstances by itself is not enough to strike down the entire list. Even assuming there are few categories which are little above the State average, in literacy, that is a matter for the State to take note of and review the position of such categories of persons and take a suitable decision.

We respectfully agree with these observations.

Answering the main criticism that the list of SEBCs was wholly based upon caste, the Bench observed:-

To conclude, though prima facie the list of Backward Classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions, exhaustively referred to by the Commission. Even on the assumption that the list is based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of Backward Classes is warranted by Article 15(4). The groups mentioned therein have been included in the list of Backward classes as they satisfy the various tests, which have been laid down by this Court for ascertaining the social and educational backwardness of a class.

39. In certain cases including Janaki Prasad Parimoo v. State of Jammu & Kashmir MANU/SC/0393/1973 : [1973]3SCR236 and State of Uttar Pardesh v. Pradip Tandon MANU/SC/0086/1974 : [1975]2SCR761 , it was held that poverty alone cannot be the basis for determining or identifying the social and educational backwardness. It was emphasised that Article 15(4) - or for that matter Article 16(4) - is not an instance of poverty alleviation programme. They were directed mainly towards removal of social and educational bachwardness, it was pointed out. In Pradip Tandon, a decision under Article 15(4), Ray,C.J. speaking for the Division Bench of three Judges opined:

Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be

made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste but when a classification taken recourse to caste as one of the criteria in determining socially and educationally backward classes the expression "classes" in that case violates the rule of expressio unions est exclusio alterius. The socially and educationally backward classes of citizens are groups other than groups based on caste.

This statement was made without referring to the dicta in Rajendran, a decision of a larger Bench. Though Balaji was referred to, we must point out with respect that Balaji does not support the above statement. Balaji indeed said that "though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf."

40. Thomas marks the beginning of a new thinking on Article 16, though the seed of this thought is to be found in the dissenting opinion of Subba Rao,J. in Devadasan. The Kerala Government had, by amending Kerala State and Subordinate Service Rules empowered the Government to exempt, by order, for a specified period, any member or members belonging to Scheduled Castes or Scheduled Tribes and already in service, from passing the test which an employee had to pass as a precondition for promotion to next higher post. Exercising the said power, the Government of Kerala issued a notification granting "temporary exemption to members already in service belonging to any of the Scheduled Castes or Scheduled Tribes from passing all tests (unified, special or departmental test) for a period of two years". On the basis of the said exemption, a large number of employees belonging to Scheduled Castes and Scheduled Tribes, who had been stagnating in their respective posts for want of passing the departmental tests, were promoted. They were now required to pass the tests within the period of exemption. Out of 51 vacancies which arose in the category of Upper Division Clerks in the year 1972, 34 were filled up by members of Scheduled Castes leaving only 17 for others. This was questioned by Thomas, a member belonging to non-reserved category. His grievance was: but for the said concession/exemption given to members of Scheduled Castes/Scheduled Tribes he would have been promoted to one of those posts in view of his passing the relevant tests. He contended that Article 16(4) permits only reservations in favour of backward classes but not such an exemption. This argument was accepted by the Kerala High Court. It also upheld the further contention that inasmuch as more than 50% vacancies in the year had gone to the members of Scheduled Castes as a result of the said exemption, it is bed for violating the 50% rule in Balaji. The Stats of Kerala carried the matter in appeal to this Court which was allowed by a majority of 5:2. All the Seven Judges wrote separate opinions. The head-note to the decision in Supreme Court Reports succinctly sets out the principles enunciated in each of the judgments. We do not wish to burden this judgment by reproducing them here. We would rest content with delineating the broad features emerging from these opinions. Ray, CJ. held that Article 16(1), being a facet of Article 14, permits reasonable classification. Article 16(4) clarifies and explains that classification on the basis of backwardness. Classification of Scheduled Castes does not fall within the mischief of Article 16(2) since Scheduled Castes historically oppressed and backward, are not castes. The concession granted to them is permissible under and legitimate for the purposes of Article 16(1). The rule giving preference to an un-represented or under-represented backward community does not contravene Articles 14, 16(1) or 16(2). Any doubt on this score is removed by Article 16(4). He

opined further that for determining whether a reservation is excessive or not one must have to look to the total number of posts in a given unit or department, as the case may be. Mathew, J. agreed that Article 16(4) is not an exception to Article 16(1), that. Article 16(1) permits reasonable classification and that Scheduled Castes are not 'castes' within the meaning of Article 16(2). He espoused the theory of 'proportional equality' evolved in certain American decisions. He does not refer to the decisions in Balaji or Devadasan in his opinion nor does he express any opinion the extent of permissible reservation. Beg, J. adopted a different reasoning. According to him, the rule and the orders issued thereunder was "a kind of reservation" falling under Article 16(4) itself. Krishna Iyer,J. was also of the opinion that Article 16(1) being a facet of Article 16 permits reasonable classification, that Article 16(4) is not an exception but an emphatic statement of what is inherent in Article 16(1) and further that Scheduled Castes are not 'castes' within the meaning of Article 16(2) but a collection of castes, races and groups. Article 16(4) is one made of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to, held the learned Judge. He approved the dissenting opinion of Subba Rao,J. in Devadasan. Fazal Ali, J. too adopted a similar approach. The learned Judge pointed out "if we read Article 16(4) as an exception to Article 16(1) then the inescapable conclusion would be that Article 16(1) does not permit any classification at all because an express provision has been made for this in Clause (4). This, however, is contrary to the basic concept of equality contained in Article 14 which implicitly permits classification in any form provided certain conditions are fulfilled. Furthermore, if no classification can be made under Article 16(1) except reservation contained in Clause (4) then the mandate contained in Article 335 would be defeated." He held that the Rule and the orders impugned are referable to and sustainable under Article 16. The learned Judge went further and held that the rule of 50% evolved in Balaji is a mere rule of caution and was not meant to be exhaustive of all categories. He expressed the opinion that the extent of reservation depends upon the proportion of the backward classes to the total population and their representation in public services. He expressed a doubt as to the correctness of the majority view in Devadasan. Among the minority Khanna, J. preferred the view taken in Balaji and other cases to the effect that Article 16(4) is an exception to Article 16(1). He opined that no preference can be provided in favour of backward classes outside Clause (4). A.C.Gupta, J. concurred with this view.

41. The last decision of this Court on this subject is in K.C.Vasant Kumar and Anr. v. State of Karnataka [1985] Suppl. 1 S.C.R. 352. The Five Judges constituting the Bench wrote separate opinions, each treading a path of his own. Chandrachud, C.J. opined that the present reservations should continue for a further period of 15 years making a total of 50 years from the date of commencement of the Constitution. He added that the means test must be applied to ensure that the benefit of reservations actually reaches the deserving sections. Desai, J. was of the opinion that the only basis upon which backward classes should be identified is the economic one and that a time has come to discard all other bases. Chinnappa Raddy, J. was of the; view that identification of backward classes on the basis of caste cannot be taken exception to for the reason that in the Indian context caste is a class. Caste, the learned Judge said, is the primary index of social backwardness, so that social backwardness is often readily identificable with reference to a person's caste. It it is found in the case of a given caste that a few members have progressed far enough so as to compare favourably with the forward classes in social, economic and educational fields, an upper income ceiling can perhaps be prescribed to ensure that the benefit of reservation reaches the really deserving. He opined that identification of SEBCs in the Indian milieu is a

difficult and complex exercise, which does not admit of any rigid or universal tests. It is not a matter for the courts. The "backward class of citizens", he held, are the very same SEBCs referred to in Article 15(4). The learned Judge condemned the argument that reservations are likely to lead to deterioration in efficiency or that they are anti-merit. He disagreed with the view that for being identified as SEBCs, the relevant groups should be comparable to SCs/STs in social and educational backwardness. The learned Judge agreed with the opinion of Fazal Ali, J. in Thomas that the rule of 50% in Balaji is a rule of caution and not an inflexible rule. At any rate, he said, it is not for the court to lay down any such hard and fast rule. A.P.Sen, J. was of the opinion that the predominant and only factor for making special provision under Article 15(4) or 16(4) should be poverty and that caste should be used only for the purpose of identification of groups comparable to Scheduled Castes/Scheduled Tribes. The reservation should continue only till such time as the backward classes attain a state of enlightenment. Venkataramiah, J. agreed with Chinnappa Reddy,J. that identification of backward classes can be made on the basis of caste. He cited the Constituent Assembly and Parliamentary debates in support of this view. According to the learned Judge, equality of opportunity revolves around two dominant principles viz., (i) the traditional value of equality of opportunity and (ii) the newly appreciated - though not newly conceived idea of equality of results. He too did not agree with the argument of 'merit'. Application of the principle of individual merit, un-mitigated by other consideration, may quite often lead to inhuman results, he pointed out. He supported the imposition of the 'means' test but disagreed with the view that the extent of reservations can exceed 50%. Periodic review of this list of SEBCs and extension of other facilities to them is stressed.

Decisions of U.S. Supreme Court

42. At this stage, it would be interesting to notice the development of law on the subject in the U.S.A. The problem of blacks (Negroes) - holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India, with this difference that in U.S.A. the problem is just about 200 years' old and far less complex. Blacks were held not entitled to be treated as citizens. They were the lawful property of their masters [Dred Scott v. Sanford [1857] 15 L.E. 691. In spite of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing equality, it persisted in South and Mid-West for several decades. All challenges to slavery and apartheid failed in courts. World War II and its aftermath, however, brought about a radical change in this situation, the culmination of which was the celebrated decisions in Brown v. Board of Education [1954] 98 L.E. 591 and Boiling v. Shrarpe [1954] 98 L.E. 583 over-ruling the 'separate but equal' doctrine evolved in Plessey v. Ferguson [1986] 41 L.E. 256. In quick succession followed several decisions which effectively out-lowed all discrimination against blacks in all walks of life. But the ground-realities remained. Socially, educationally and economically, blacks remained a backward community. Centuries of discrimination, deprivation and degradation had left their mark. They were still unable to compete with their white counterparts. Similar was the case of other minorities like Indians and Hispanics. It was not a mere case of economics. It was really a case of 'persisting effects of past-descrimination'. The Congress, the State Universities and other organs of the State took note of these lingering effects and the consequent disadvantage suffered by them. They set out to initiate measures to ameliorate them. That was the command of the Fourteenth Amendment. Not unnaturally, these measures were challenged in Courts-with varying results. The four decisions examined hereinafter, rendered during the period 1974-1990 mirror the conflict and disclose the judicial thinking in that country.

43. The first decision is in Defunis v. Charles Odeqaard [1974] 40 L.Ed. 2nd. 164. The University of Washington Law School - a school operated by the State - evolved, in December 1973, an admissions policy whereunder certain percentage of seats in the Law School were reserved for minority racial groups. Para 6 of the programme stated, "because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting under-representation can affect the quality of legal services available to members of such groups, *as well as limit their opportunity for full participation in the governance of our communities*, the faculty recognises a special obligation in its admissions policy to contribute to the solution of the problem." (emphasis added) Procedure for admission for the minority students was different and of a lesser standard than the one adopted for all others. Defunis, a non-minority student was denied admission while granting it to minority applicants with lower evaluation. He commenced an action challenging the validity of the programme. According to him, the special admissions programme was violative of the Equal Protection Clause in the Fourteenth Amendment. The Trial Court granted the requested relief including admission to the plaintiff. On Appeal, the Supreme Court of Washington reversed the Trial Court's Judgment. It upheld the constitutionality of the Admissions Policy. The matter was brought by Defunis to United States Supreme Court by way of certiorari. The Judgment of the Washington Supreme Court was stayed pending the decision. By the time the matter reached the stage of final hearing, Defunis had arrived in the final quarter of the last term. In view of this circumstance, five Members of the Court held that the Constitutional question raised has become 'moot' (academic) and, therefore, it is unnecessary to go into the same. Four of the Judges Brennan, Douglas, White and Marshall, JJ., however, did not agree with that view. Of them, only Douglas, J. recorded his reasons for upholding the Special Admissions' Programme. The learned Judge was of the opinion that the Equal Protection Clause did not require that law schools employ an admissions formula based solely upon testing results and under-graduate grades nor does it prohibit Law Schools from evaluating an applicant's prior achievements in the light of the barriers that he had to overcome. It would be appropriate to quote certain observations of the learned Judge to the above affect which inter alia emphasise the importance of looking to the promise and potential of a candidate rather than to mere scores obtained in the relevant tests. He said:

the Equal Protection Clause did not enact a requirement that Law Schools employ as the sole criterion for admissions a formula based upon the LSAT (Law School Admission Test) and under-graduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance and ability that would lead a fair-minded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would not be offered admission because he is black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered to him. Because of the weight of the prior handicaps, the black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career, his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria.

The learned Judge while agreeing that any programme employing racial classification to favour certain minority groups would be subject to strict scrutiny under Equal Protection Clause, yet

concluded that the material placed before the Court did not establish that Defunis was invidiously discriminated against because of his race. Accordingly, he opined that the matter should be remanded for fresh trial to consider whether the plaintiff has been individually discriminated against because of his race.

44. The next case is in Regents of the University of California v. Allan Bakke [1978] 57 L.Ed. 2nd 750. The Medical School of the University of California at Davis had been following two admissions programmes, one in respect of the 84 seats (general) and the other, a special admissions programme under which only disadvantaged members of certain minority races were considered for the remaining 16 seats - the total seats available being 100 a year. For these 16 seats, none except the members of the minority races were considered and evaluated. The respondent, Bakke, a white, could not obtain admission for two consecutive years, in view of his evaluation scores, while admission was given to members of minority races who had obtained lesser scores than him. He questioned the validity of special admissions programme on the ground that it violated the equal protection clause in the Fourteenth Amendment to the Constitution and also Title VI of the Civil Rights Act. 1964. The Trial Court upheld the plea on the ground that the programme excluded members of non-minority races from the 16 reserved seats only on the basis of race and thus operated as a racial quota. It, however, refused to direct the plaintiff to be admitted inasmuch as he failed to establish that he would have been admitted but for the existence of the special admissions programme. The matter was carried in direct appeal to Supreme Court of California, which not only affirmed the Trial Court's Judgment in so far as it held the special admission programme to be invalid but also granted admission to the plaintiff-respondent into the Medical School. It was of the view that the University had failed to prove that in the absence of special admissions programme the respondent would not have been admitted. The matter was then carried to the United States Supreme Court, where three distinct view-points emerged. Brennan, White, Marshall and Blackmun, JJ. were of the opinion that the special admissions programme was a valid one and is not violative of the Federal or State Constitutions or of Title VI of the Civil Rights Act, 1964. They were of the opinion that the purpose of overcoming substantial, chronic minority under-representation in the medical profession is sufficiently important to justify the University's remedial use of race. Since the Judgment of the Supreme Court of California prohibited the use of race as a factor in University admissions, they reversed that Judgment. Chief Justice Warren Burger, Stevens, Stewart and Rehnquist, JJ. took the other view. They affirmed the judgment of the California Supreme Court. They based their judgment mainly on Title VI of Civile Rights Act, 1964, which provided that "no person in the United States shall, on the ground of race, colour or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any programme or activity receiving Federal Financial assistance." They opined that Bakke was the victim of, what may be called, reverse discrimination and that his exclusion from consideration in respect of the 16 seats being solely based on race, is impermissible. Powell, J. took the third view in his separate opinion, partly agreeing and partly disagreeing with the other view-points. He based his decision on Fourteenth Amendment alone. He did not take into consideration the 1964 Act. The learned Judge held that though racial and ethnic classifications of any kind are inherently suspect and call for the most exacting judicial scrutiny, the goal of achieving a racially balanced student body is sufficiently compelling to justify consideration of race in admissions decisions under certain circumstances. He was of the opinion that while preference can be provided in favour of minority races in the matter of admission, setting up of quotas (which have the effect of foreclosing consideration of all others in respect thereof) is not

necessary for achieving the said compelling goal. He was of the opinion that impugned programme is bad since it set apart a quota for minority races. He sustained the admission granted to Bakke on the ground that the University failed to establish that even without the quota, he would not have been admitted.

45. It would be useful to notice the three points of view in a little more detail. Brennan, J. (with whom Marshall, White and Blackmun, JJ. agreed) observed that though the U.S. Constitution was founded on the principle that "all men are created equal", the truth is that it is not so in fact. Racial discrimination still persists in the society. In such a situation the claim that the law must be "colour-blind" is more an aspiration rather than a description of reality. The context and the reasons for which Title VI of the Civil Rights Act, 1964 was enacted leads to the conclusion that the prohibition contained in Title VI was intended to be consistent with the commands of the Constitution and no more. Therefore, "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." On the contrary, said the learned Judge, prior decisions of the court strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible.

Dealing with the equal protection clause in the Fourteenth Amendment, the learned Judge observed:

The assertion of human equality is closely associated with the proposition that differences in colour or creed, birth or status, are neither significant nor relevant to the way in which person should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance" summed up by the shorthand phrase "our Constitution is colour-blind" has never been adopted by this Court as the proper meaning of the Equal Protection clause. *We conclude, therefore, that racial classifications are not per se invalid under the Fourteenth Amendment.* Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

(emphasis added)

After examining a large number of decided cases, the learned Judge held:

The conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination.

Indeed, held the learned Judge, failure to take race into account to remedy unequal access to University programs caused by their own or by past societal discrimination would not be consistent with the mandate of the Fourteenth Amendment. The special admissions programme whereunder whites are excluded from the 16 reserved seats is not bad for the reason that "its purpose is to overcome the effects of segregation by bringing races together." The learned Judge then pointed out the relevance of race and the lesser impact of economic disadvantage, with reference to certain facts and figures, and concluded:

While race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites while economically advantaged blacks score less well than do disadvantaged whites.

46. Warren Burger,CJ., with whom Stevens, Stewart and Rehnquist, JJ. agreed opined that since in respect of 16 seats reserved for racial minorities, whites are totally excluded only on the basis of their race, it is a clear case of discrimination on the basis of race and, therefore, violative of the Fourteenth Amendment to the Constitution as well as Title VI of the Civil Rights Act, 1964.

47. Powell, J. took different line agreeing in part with both the points of view. His approach is this:

(1) It is not necessary to consider the impact or the scope of Title VI of the Civil Rights Act inasmuch as the said question was not raised or considered in the courts below. The matter had to be examined only with reference to the Fourteenth Amendment;

(2) Any distinction based on race is inherently suspect in the light of the equal protection clause and calls for more exacting judicial examination. It is for the State in such a case to establish that the distinction was precisely tailored to serve a compelling governmental interest.

(3) Since the special admissions program of the University totally excluded some individual (non-minorities) from enjoying the State provided benefit of admission to the medical school solely because of their race, the classification must be regarded as suspect and it will be sustained only if it is supported by substantial state purpose or interest and only where it is established that the classification is necessary to the accomplishment of such purpose or for safeguarding such interest. The University has failed to discharge this burden, though the State interest in removing "identified discrimination" and attainment of a "diverse student body" were certainly compelling interests. In other words, the University has failed to establish that for attaining the said abjectives, creation of quotas was necessary.

(4) While preferences can be provided in favour of disadvantaged sections, reservation of seats which had the effect of excluding members of a race or races from those seats altogether, is not permissible. For this reason too, the special admissions program of the University must be held to violate the Fourteenth Amendment.

In the course of his opinion, the learned Judge observed:

A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element - to be weighed fairly against other elements - in the selection process....

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular including

their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

In this manner, the learned Judge agreed with Brennan, J. that race-conscious admissions programmes are permissible under the Fourteenth Amendment, but qualified the meaning of the race-conscious programmes. At the same time, he agreed with the learned Chief Justice that the special admissions programme of Davis was unconstitutional. He commended the Harvard admissions programme which provided for certain preferences in favour of racially disadvantaged sections, without reserving any seats as such for them.

48. We may next notice the decision in Fullilove v. Phillip M. Klutznick [1980] 65 LEd. 2nd 90. The Public Works Employment Act, 1977 contained a provision to the effect that atleast 10% of federal funds granted for local public works projects must be used by the State or the local grantee to procure services or supplies from businesses owned by minority group members, defined as United State citizens "who are negroes, spanish-speaking, Orientals, Indians, Eskimos and Aleuts". Regulations were framed under the Act and guidelines issued requiring the grantees and private contractors to seek out all available qualified bona fide minority business enterprises (MBEs), to the extent feasible, for fulfilling the 10% MBE requirement. The guidelines provided that contracts shall be awarded to bona fide MBEs, even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. This requirement could, however, be waived in individual cases if the grantee established the infeasibility of the requirement. Several associations of construction contractors and Sub-contractors filed a suit in the Federal District Court for a declaration that the said provision of the Public Works Employment Act and the regulations made thereunder are void and enforceable being violative of the equal protection clause of the Fourteenth Amendment and equal protection component of the due process clause of the Fifth Amendment. The challenge failed in the District Court as well as in the Court of Appeals. The matter was then carried to the United State Supreme Court. By a majority of 6:3 (Stewart, Rehnquist and Stevens, JJ. dissenting) the Supreme Court repelled the challenge. Chief Justice Burger speaking for himself. White and Powell, JJ. stated the object of the impugned provision in the following words:

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation, otherwise it was thought that repetition of the prior experience could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting.

The learned Chief Justice then proceeded to examine" the question whether as a means to accomplish these plainly constitutional objectives, congress can use racial and ethnic criteria in this limited way as a condition attached to a federal grant." Indeed, he posed the same question in this form: "Whether the limited use of racial and ethnic criteria is a constitutionally permissible means for achieving the congressional objectives", and proceeded to answer the same - after referring exhaustively to the earlier decisions of the court relating to school admissions - in the following words:

We held that *"just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."*

(emphasis added)

... In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity.

49. Marshall, J. speaking for himself, Brennan and Blackmun, JJ. in his concurring opinion, pointed out the approach to be adopted in judging the validity of the race-conscious programmes and concluded with these resounding words:

In my separate opinion in Bakke, I recounted the ingenious and pervasive forms of discrimination against the Negro" long condoned under the Constitution and concluded that "the position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment" I there stated:

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doOrs.

50. We may now examine the decision in Metro Broadcasting, Inc. v. Federal Communications Commission, rendered on June 27, 1990 (Copies of the decision have been made available to us by Sri K. Parasaran, counsel for Union of India). Under the Communications Act, 1934, the Federal Communications Commission was vested with the exclusive authority to grant licences to persons wishing to construct and operate Radio and Television Broadcasting Station in United States. The grant of licences was to be based on 'public convenience, interest or necessity'. The commission found that over the last two decades relatively fewer members of minority groups have held broadcasting licences, indeed less than one percent. Even as late as in 1986, they owned just 2.1%. The Commission proposed to remedy this under-representation and accordingly evolved a policy whereunder minorities were to be granted certain preferences in the matter of grant of these licences. The policy had two prominent features. The first was to provide for a preference in the matter of evaluation of applicants and the second was, what may be called, 'distress sale policy'. The second feature meant that where the qualifications of a licencee to hold a broadcast licence comes into question he was entitled to transfer the said licence to save the disqualification provided such transfer is made in favour of a member of a minority. The said two features were questioned by Metro Broadcasting Inc., which matter was ultimately brought to the Supreme Court. The decision of the majority (Brennan, White, Marshall, Blackmun and Stevens, JJ.) rendered by Brennan, J. is note-worthy for the shift of approach from the earlier decisions. It is now held that a classification based on race (benign race conscious measures) is constitutionally permissible even if it is not designed to compensate victims of past governmental or societal discrimination so long as it serves important governmental objectives and is substantially related to achievement of

those objectives. In other words, it is held that it is not necessary that the court apply a strict standard of scrutiny to evaluate racial classification to ascertain whether it is necessary for achieving the relevant objective and further whether it is narrowly tailored to achieve a compelling state interest. Brennan, J. relied upon the opinion of Chief Justice Burger in Fullilove for this liberal approach. It would be appropriate to quote certain observations from his opinion:

We hold that benign race-conscious measures mandated by Congress - even if those manures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree....

Against this background, we conclude that the interest in enhancing broadcast diversity is, at the very least an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies...we must pay close attention to the expertise of the Commission and the fact finding of the Congress when analyzing the nexus between minority ownership and programming diversity. With respect to this "complex" empirical question, ibid., we are required to give "great weight to the decisions of Congress and the experience of the Commission.

51. On the other hand, the minority (O'connor, J. speaking for herself, Rehnquist, C.J., Scalia and Kennedy, JJ.) protested against the abandonment of what they thought was a well established standard of scrutiny in such cases in the following words:

Strict scrutiny" requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest. The court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation. This Court's precedents in no way justify the Court's marked departure from our traditional treatment or race classifications and its conclusion that different equal protection principles apply to these federal actions.

52. We have examined the decisions of U.S. Supreme Court at some length only with a view to notice how another democracy is grappling with a problem similiar in certain respects to the problem facing this country. The minorities (including blacks) in United States are just about 16 to 18% of the total population, whereas the backward classes (including the Scheduled Castes and Scheduled Tribes) in this country - by whichever yardstick they are measured - do certainly constitute a majority of the population. The minorities there comprise 5 to 7 groups - Blacks, spanish-speaking people, Indians, Purto Ricano, Aleuts and so on - whereas the castes and communities comprising backward classes in this country run into thousands. Untouchability - and 'unapproachability', as it was being practised in Kerala - is something which no other country in the world had the misfortune to have - nor the blessed caste system. There have been equally old civilisations on earth like ours, if not older, but none had evolved these pernicious practices, much less did they stamp them with scriptural sanction. Now coming to Constitutional provisions, Section 1 of the Fourteenth Amendment (insofar as it guarantees equal protection of the laws)

corresponds to Article 14 but they do not have provisions corresponding to Article 16(4) or 15(4). Title VI of the Civil Rights Act enacted in 1964 roughly corresponds to Clause (2) of Articles 15 and 16.

53. At this stage, we wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under Clause (1) of Article 16, apointments and/or posts can be reserved in favour of a class. But an argument is now being advanced - evidently inspired by the opinion of Powell, J. in Bakke that Article 16(1) permits only preferences but not reservations. The reasoning in support of the said argument is the same as was put forward by Powell, J. This argument, in our opinion, disregards the fact that that is not the unanimous view of the court in Bakke. Four Judges including Brennan, J. took the view that such a reservation was not barred by the Fourteenth Amendment while the other four (including Warren Burger, C.J.) took the view that the Fourteenth Amendment and Title VI of the Civil Right Acts, 1964 bars all race-conscious progammes. At the same time, there are a series of decisions relating to school desegregation - from Brown to Board of Education v. Swann 28 L.Ed. 2nd 586 - where the court has been consistently taking the view that if race be the basis of discrimination, race can equally form the basis of remedial action. The shift in approach indicated by Metro Broadcasting Inc. is equally significant. The 'lingering effects' (of past discrimination) theory as well as the standard of strictest scrutiny of race-conscious programmes have both been abandoned. Suffice it to note that no single uniform pattern of thought can be discerned from these decisions. Ideas appear to be still in the process of evolution.

PART - III (QUESTIONS 1 AND 2)

We may now proceed to deal with the questions aforementioned.

Question. 1(a): Whether the 'provision' in Article 16(4) must necessarily be made by the Parliament/Legislature?

54. Sri K.K.Venugopal, learned Counsel for the petitioner in Writ Petition No. 930 of 1990 submits that the "provision" contemplated by Clause (4) of Article 16 can be made only by and should necessarily be made by the legislative wing of the State and not by the executive or any other authority. He disputes the correctness of the holding in Balaji negativing an identical contention. He submits that since the provision made under Article 16(4) affects the fundamental rights of other citizens, such a provision can be made only by the Parliament/Legislature. He submits that if the power of making the "provision" is given to the executive, it well give room for any amount of abuse. According to the learned Counsel, the political executive, owing to the degeneration of the electoral process, normally acts out of political and electoral compulsions, for which reason it may not act fairly and indepenently. If, on the other hand, the provision is to be made by the legislative wing of the State, it will not only provide an opportunity for debate and discussion in the Legislature where several shades of opinion are represented but a balanced and unbiased decision free from the allurements of electoral gains is more likely to emerge from such a deliberating body. Sri Venugopal cites the example of Tamil Nadu where, according to him, before every general election a few communities are added to the list of backward classes, only with a view to winning them over to the ruling party. We are not concerned with the aspect of what is

ideal or desirable but with what is the proper meaning to be ascribed to the expression 'provision' in Article 16(4) having regard to the context. The use of the expression 'provision' in Clause (4) of Article 16 appears to us to be not without design. According to the definition of 'State' in Article 12, it includes not merely the government and Parliament of India and Government and Legislature of each of the States but all local authorities and other authorities within the territory of India or under the control of the Government of India which means that such a measure of reservation can be provided not only in the matter of services under the Central and State Governments but also in the services of local and other authorities referred to in Article 12. The expression 'Local Authority' is defined in Section 3(31) of the General Clauses Act. It takes in all municipalites, Panchayats and other similar bodies. The expression 'other authorities' has received extensive attention from the court. It includes all statutory authorities and other agencies and instrumentalities of the State Government/Central Government. Now, would it be reasonable, possible or practicable to say that the Parliament or the Legislature of the State should provide for reservation of posts/appointments in the services of all such bodies besides providing for in respect of services under the Central/State Government? This aspect would become clearer if we notice the definition of "Law" in Article 13(3)(a). It reads:

13(3) In this article, unless the context otherwise requires,-

(a) "Law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;...

The words "order", "bye-law", "rule" and "regulation" in this definition are significant. Reading the definition of "State" in Article 12 and of "Law" in Article 13(3)(a), it becomes clear that a measure of the nature contemplated by Article 16(4) can be provided not only by the Parliament/Legislature but also by the executive in respect of Central/State services and by the local bodies and "other authorities" contemplated by Article 12, in respect of their respective services. Some of the local bodies and and some of the statutory corporations like Universities may have their own legislative wings. In such a situation, it would be unreasonable and inappropriate to insist that reservation in all these services should be provided by Parliament/Legislature. The situation and circumstances of each of these bodies may vary. The rule regarding reservation has to be framed to suit the particular situations. All this cannot reasonably be done by Parliament/Legislature.

Even textually speaking, the contention cannot be accepted. The very use of the word "provision" in Article 16(4) is significant. Whereas Clauses (3) and (5) of Article 16 - and Clauses (2) to (6) of Article 19 - use the word "Law", Article 16(4) uses the word "provision". Regulation of service conditions by orders and Rules made by the Executive was a well known feature at the time of the framing of the Constitution. Probably for this reason, a deliberate departure has been made in the case of Clause (4). Accordingly, we hold, agreeing with Balaji, that the "provision" contemplated by Article 16(4) can also be made by the executive wing of the Union or of the State, as the case may be, as has been done in the present case. Bajaji has been followed recently in Comptroller and Auditor General of India v. Mohan Lal Mehrotra MANU/SC/0495/1991 : (1992)ILLJ335SC . With respect to the argument of abuse of power by the political executive, we may say that there is adequate safeguard against misuse by the political executive of the power under Article 16(4) in the provision itself. Any determination of backwardness is not a subjective exercise nor a matter

of subjective satisfaction. As held herein - as also by earlier judgments - the exercise is an objective one. Certain objective social and other criteria has to be satisfied before any group or class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power.

Question 1(b): Whether an executive order making a 'provision' under Article 16(4) is enforceable forthwith?

55. A question is raised whether an executive order made in terms of Article 16(4) is effective and enforceable by itself or whether it is necessary that the said "provision" is enacted into a law made by the appropriate Legislature under Article 309 or is incorporated into and issued as a Rule by the President/Governor under the proviso to Article 309 for it to become enforceable? Mr. Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate Legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the Executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Sri Jethmalani. Once we hold that a provision under Article 16(4) can be made by the executive, it must necessarily follow that such a provision is effective the moment it is made. A Constitution Bench of this Court in B.S. Yadav (1981 S.C. 561), (Y.V. Chandrachud, C.J., speaking for the Bench) has observed:

Article 235 does not confer upon the High Court the power to make rules relating to conditions of service of judicial officers attached to district courts and the courts subordinate thereto. Whenever it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated so in express terms. See, for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1) and (2), 148(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3), 229(1) and (2), 234, 237 and 283(1) and (2).

Be that as it may, there is yet another reason, why we cannot agree that the impugned Memorandums are not effective and enforceable the moment they are issued. It is well settled by the decisions of this Court that the appropriate government is empowered to prescribe the conditions of service of its employees by an executive order in the absence of the rules made under the proviso to Article 309. It is further held by this Court that even where Rules under the proviso to Article 309 are made, the government can issue orders/instructions with respect to matters upon which the Rules are silent. [see Sant Ram Sharma v. State of Rajasthan MANU/SC/0330/1967 : (1968)IILLJ830SC]. This view has been reiterated in a recent decision of this Court in Comptroller and Auditor General v. Mohanlal Mehrotra MANU/SC/0427/1990 : 1990(47)ELT188(SC) wherein it is held:

The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would alter the statutory rules in force. The rules do not provide for any reservation. In fact it is silent on the subject of reservation. The Government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of the statutory rules but it could be issued to supplement the statutory

rules [See the observations in Santram Sharma v. State of Rajasthan MANU/SC/0330/1967 : (1968)IILLJ830SC . In fact similar circulars were issued by the Railway Board introducing reservations for Scheduled Castes and Scheduled Tribes in the Railway Services both for selection and non-selection categories of posts. They were issued to implement the policy of the Central Government and they have been upheld by this Court in Akhil Bhartiya Soshit Karamchari Sangh (Railways) v. Union of India MANU/SC/0058/1980 : (1981)ILLJ209SC .

It would, therefore, follow that until a law is made or rules are issued under Article 309 with respect to reservation in favour of backward classes, it would always be open to the Executive (Government) to provide for reservation of appointments/posts in favour of Backward Classes by an executive order. We cannot also agree with Sri Jethmalani that the impugned Memorandums should be treated as Rules made under the proviso to Article 309. There is nothing in them suggesting even distantly that they were issued under the proviso to Article 309. They were never intended to be so, nor is that the stand of the Union Government before us. They are executive orders issued under Article 73 of the Constitution read with Clause (4) of Article 16. The mere omission of a recital "in the name and by order of the President of India" does not affect the validity or enforceability of the orders, as held by this Court repeatedly.

Question 2(a). Whether Clause (4) of Article 16 is an exception to Clause (1)?

56. In Balaji it was held - "there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)". It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in Champakam, with a view to remove the defect pointed out by this Court namely, the absence of a provision in Article 15 corresponding to Clause (4) of Article 16. Following Balaji it was held by another Constitution Bench (by majority) in Devadasan - "further this Court has already held that Clause (4) of Article 16 is by way of a proviso or an exception to Clause (1)". Subbarao, J., however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in Devadasan, it was assumed by this Court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe set-back from the majority decision in State of Kerala and Ors. v. N.M. Thomas MANU/SC/0479/1975 : (1976)ILLJ376SC . Though the minority (H.R. Khanna and A.C. Gupta, JJ.) stuck to the view that Article 16(4) is an exception, the majority (Ray, C.J., Mathew, Krishna Iyer and Fazal Ali, JJ.) held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg. J. took a slightly different view which it is not necessary to mention here). The said four learned Judges - whose views have been referred to in para 41 - held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in Thomas is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that Clause (4) of Article 16 is not exception to Clause (1) of

Article 16. It is an instance of classification implicit in and permitted by Clause (1). The speech of Dr. Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly - referred to in para 28 - shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft Clause (3) was put in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with Clause (1). Indeed, even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

Regarding the view expressed in Balaji and Devadasan, it must be remembered that at that time it was not yet recognised by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognised the theory of Clause (4) being an exception to Clause (1) became untenable. It had to be accepted that Clause (4) is an instance of classification inherent in Clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, Clause (2) of Article 16 is also an elaboration of a facet of Clause (1). If Clause (4) is an exception to Clause (1) then it is equally an exception to Clause (2). Question then arises, in what respect is Clause (4) an exception to Clause (2), if 'class' does not means 'caste'. Neither Clause (1) nor Clause (2) speak of class. Does the contention mean that Clause (1) does not permit classification and therefore Clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit.

Question 2(b): Whether Article 16(4) is exhaustive of the concept of reservations in favour of backward classes?

57. The question than arises whether Clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "any provision for the reservation of appointments or posts." The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The Constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in Karamchari Sangh are instances of supplementay, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour. The other type of measure is the one in Thomas. There was no provision for reservation in favour of Scheduled Castes/Scheduled Tribes in the matter of promotion to the category of Upper Division Clerks. Certain tests were required to be passed before a Lower Division Clerk could be promoted as Upper Division Clerk. A large number of Lower Division Clerks belonging to S.C./S.T. were not able to pass those tests, with the result they were stagnating in the category of L.D.Cs. Rule 13AA

was accordingly made empowering the government to grant exemption to members of S.C./S.T. from passing those tests and the Government did exempt them, not absolutely, but only for a limited period. This provision for exemption was a lesser form of special treatment than reservation. There is no reason why such a special provision should not be held to be included within the larger concept of reservation. It is in this context that the words "any provision for the reservation of appointments and posts" assume significance. The word "any" and the associated words must be given their due meaning. They are not a mere surplusage. It is true that in Thomas it was assumed by the majority that Clause (4) permits only one form of provision namely reservation of appointments/posts and that if any concessions or exemptions are to be extended to backward classes it can be done only under Clause (1) of Article 16. In fact the argument of the writ petitioners (who succeeded before the Kerala High Court) was that the only type of provision that the State can make in favour of the backward classes is reservation of appointments/posts provided by Clause (4) and that the said clause does not contemplate or permit granting of any exemptions or concessions to the backward classes. This argument was accepted by Kerala High Court. This Court, however, by a majority (Ray,C.J., Mathew, Krishna Iyer and Fazal Ali, JJ.) reversed the view taken by Kerala High Court, holding that such exemptions/concessions can be extended under Clause (1) of Article 16. Beg, J. who joined the majority in exemption provided by impugned notification was indeed a kind of reservation and was warranted by and relatable to Clause (4) of Article 16 itself. This was because - according to the learned Judge - Clause (4) was exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment. We are inclined to agree with the view taken by Beg, J. for the reasons given hereinabove. In our opinion, therefore, where the State finds it necessary - for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under Clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provisions for reservation can be provided as part of concept of reservation itself. Similarly, in a given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under Clause (4) itself. In this sense, Clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens". Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Clause (4) of Article 16.

Question 2(c): Whether Article 16(4) is exhaustive of the very concept of reservations?

58. The aspect next to be considered is whether Clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside Clause (4) i.e., under Clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that Clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in Clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations and not for all and sundry reasons - that any further reservations, of whatever

kind, should be provided under Clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of Clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simply. If reservations are made both under Clause (4) as well as under Clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do.

Whether Clause (1) of Article 16 does not permit any reservations?

59. For the reasons given in the preceding paragraphs we must reject the argument that Clause (1) of Article 16 permits only extending of preferences, concessions and exemptions, but does not permit reservation of appointments/posts. As pointed out in para (54) the argument that no reservations can be made under Article 16(1) is really inspired by the opinion of Powell, J. in Bakke. But in the very same paragraph we had pointed out that it is not the unanimous opinion of the Court. In principle, we see no basis for acceding to the said contention. What kind of special provision should be made in favour of a particular class is a matter for the State to decide, having regard to the facts and circumstances of a given situation - subject, of course, to the observations in the preceding paragraph.

PART - IV (QUESTIONS 3, 4 AND 5)

Question 3(a): Meaning of the expression "Backward Class of citizens" in Article 16(4).

60. What does the expression "Backward Class of Citizens" in Article 16(4) signify and how should they be identified? This has been the single most difficult question tormenting this nation. The expression is not defined in the Constitution. What does it mean then? The arguments before us mainly revolved round this question. Several shades of opinion have been presented to us ranging from one extreme to the other. Indeed, it may be difficult to set out in full the reasoning presented before us orally and in several written propositions submitted by various counsel. We can mention only the substance of and the broad features emerging from those submissions. At one end of the spectrum stands Sri N.A. Palkhiwala (supported by several other counsel) whose submissions may briefly be summarised in the following words: a secular, unified and caste-less society is a basic feature of the Constitution. Caste is a prohibited ground of distinction under the Constitution. It ought be erased altogether from the Indian Society. It can never be the basis for determining backward classes referred to in Article 16(4). The Report of the Mandal Commission, which is the basis of the impugned Memorandums, has treated the expression "backward classes" as synonymous with backward castes and has proceed to identify backward classes solely and exclusively on the basis of caste, ignoring all other considerations including poverty. It has indeed invented castes for Non-Hindus where none exists. The Report has divided the nation into two sections, backward and forward, placing 52% of the population in the former section. Acceptance of Report would spell disaster to the unity and integrity of the nation. If half of the posts are reserved for backward classes, it would seriously jeopardise the efficiency of the administration, educational system, and all other services resulting in backwardness of the entire nation. Merit will disappear by deifying backwardness. Article 16(4) is broader than Article 15(4). The expression "backward class of citizens" in Article 16(4) is not limited to "socially and educationally backward

classes" in Article 15(4). The impugned Memorandums, based on the said report must necessarily fall to the ground along with the Report. In fact the main thrust of Sri Palkhiwala's argument has been against the Mandal Commission Report.

61. Sri K.K.Venugopal appearing for the petitioner in Writ Petition No. 930 of 1990 adopted a slightly different approach while reiterating that the expression "backward classes of citizens" in Article 16(4) cannot be construed as backward castes. According to him, backwardness may be social and educational and may also be economic. The authority appointed to identify backward classes must first settle the criteria or the indicators for determining backward classes and then it must apply the said criteria to each and every group in the country. In the course of such identification, it may well happen that certain castes answer and satisfy the criteria of backwardness and may as a whole qualify for being termed as a backward class. But it is not permissible to start with castes to determine whether a caste is a backward class. He relied upon the provision in Clause (2) of Article 38 and Article 46 to say that the objective is to minimize the inequalities in income not only among individuals but also among groups of persons and to help the weaker sections of the society. The economic criterion is an important one and must be applied in determining backward classes and also for excluding those sections or identified groups who may for the sake of convenience be referred to as the 'creamy layer'. Since castes do not exist among Muslims, Christians and Sikhs, caste can never be the basis of identification. The learned Counsel too pointed out the alleged basic errors in the approach adopted by and conclusions arrived at by the Mandal Commission.

62. Smt. Shyamala Pappu also took the stand that caste can never be the basis for identification. According to her, survey to identify backward classes should be from individual to individual; it cannot be caste-wise. To the same effect are the submissions of Sri P.P. Rao appearing for the Supreme Court Bar Association. According to him, the only basis for identifying backward classes should be occupation-cum-means as was done in the State of Karnataka at a particular stage which aspect is dealt with and approved by this Court in Chitralekha and Ors. v. State of Mysore MANU/SC/0030/1964 : [1964]6SCR368 . A secular socialist society, he submitted, can never countenance identification of backward classes on the basis of caste which would only perpetuate and accentuate caste differences and generate antagonism and antipathy between castes.

63. At the other end of the spectrum stands Sri Ram Jethmalani, counsel appearing for the State of Bihar supported by several other counsel. According to him, backward castes in Article 16(4) meant and means only the members of Shudra casts which is located between the three upper castes (Brahmins, Kshatriyas and Vaishyas) and the out-castes (Panchamas) referred to as Scheduled Castes. According to him, Article 16(4) was conceived only for these "middle castes" i.e., castes categorised as shudras in the caste system and for none else. These backward castes have suffered centuries of discrimination and disadvantage, leading to their backwardness. The expression "backward classes" does not refer to any current characteristic of a backward caste save and except paucity or inadequacies of representation in the apparatus of the Government. Poverty is not a necessary criterion of backwardness; in is in fact irrelevant. The provision for reservation is really a programme of historical compensation. It is neither a measure of economic reform nor a poverty alleviation programme. The learned Counsel further submitted that it is for the State to determine who are the backward classes; it is not a matter for the court. The decision of the Government is not judicially reviewable. Even if reviewable, the scope of judicial review is

extremely limited - to the only question whether the exercise of power is a fraud on the Constitution. The learned Counsel referred to certain American decisions to show that even in that country several programmes of affirmative action and compensatory discrimination have been evolved and upheld by courts.

64. Dr. Rajiv Dhawan, learned Counsel appearing for Srinarayana Dharama Paripalana Yogam (an association of Ezhavas in Kerala) submitted that Article 16(4) and 15(4) occupy different fields and serve different purposes. Whereas Article 15(4) contemplates positive action programmes, Article 16(4) enables the State to undertake schemes of positive discrimination. For this reason, the class of intended beneficiaries under both the clauses is different. The social and educational backwardness which is the basis of identifying backwardness under Article 15(4) is only partly true in the case of 'backward class of citizens' in Article 16(4). The expression "any backward class of citizens" occurring in Article 16(4) must be understood in the light of the purpose of the said clause namely, empowerment of those groups and classes which have been kept out of the administration - classes which have suffered historic disabilities arising from discrimination or disadvantage or both and who must now be provided entry into the administrative apparatus. In the light of the fact that the Scheduled Castes and Scheduled Tribes were also intended to be beneficiaries of Article 16(4) there is no reason why caste cannot be an exclusive criteria for determining beneficiaries under Article 16(4). Counsel emphasised the fact that Article 16(4) speaks of group protection and not individual protection.

Sri R.K. Garg appearing for the Communist Party of India, an Intervenor, submitted that caste plus poverty plus location plus residence should be the basis of identification and not mere caste. According to the learned Counsel, a national concensus is essential to introduce reservations for 'orther backward classes' under Article 16(4) and that efforts must be made to achieve such a concensus.

65. Sri Siva Subramanium appearing for the State of Tamil Nadu supported the Mandal Commission Report in its entirety. According to him, backward classes must be identified only on the basis of caste and that no economic criteria should be adopted for the said purpose. He submitted that economic criteria may be employed as one of the indicators for identification of backward classes but once a backward class is identified as such, there is no question of excluding any one from that class on the basis of income or means or on any other economic criterion. He referred to the history of reservations in the province of Madras prior to independence and now it has been working there successfully and peacefully over the last several decades.

Sri P.S. Poti appearing for the State of Kerala supported the identification of backward classes solely and exclusively on the basis of caste. He submitted that the caste system is scientifically organised and practiced in Kerala and, therefore, furnishes a perfectly scientific basis for identification of backward classes. He submitted that besides the vice of untouchability, another greater vice of 'unapproachability' was also being practiced in that State.

Sri Ram Awadesh Singh, M.P., President of Lok Dal and President of All India Federation of Backward Classes, Scheduled Castes, Scheduled Tribes and Religious minorities submitted that caste should be the sole criteria for determining backwardness. He referred to centuries of injustice meted out by upper castes to shudras and panchamas and submitted that these castes must now be

given a share in the governance of the country which alone will assure their dignity besides instilling in them a sense of confidence and a spirit of competition.

66. Sri K.Parasaran, learned Counsel appearing for the Union of India urged the following submissions:

(1) The reservation provided for by Clause (4) of Article 16 is not in favour of backward citizens, but in favour of backward class of citizens. What is to be identified is backward class of citizens and not citizens who can be classified as backward. The homogeneous groups based on religion, race, caste, place of birth etc. can form a class of citizens and if that class is backward there can be a reservation in favour of that class of citizens.

(2) Caste is a relevant consideration. It can even be the dominant consideration. Indeed, most of the lists prepared by the States are prepared with reference to and on the basis of castes. They have been upheld by this Court.

(3) Article 16(2) prohibits discrimination only on any or all of the grounds mentioned therein. A provision for protective discrimination on any of the said grounds coupled with other relevant grounds would not fall within the prohibition of Clause (2). In other words, if reservation is made in favour of backward class of citizens the bar contained in Clause (2) is not attracted, even if the backward classes are identified with reference to castes. The reason is that the reservation is not being made in favour of castes simplicitor but on the ground that they are backward castes/classes which are not adequately represented in the services of the State.

(4) The criteria of backwardness evolved by Mandal Commission is perfectly proper and unobjectionable. It has made an extensive investigation and has prepared a list of backward classes. Even if there are instances of under-inclusion or over-inclusion, such errors do not vitiate the entire exercise. Moreover, whether a particular caste or class is backward or not and whether it is adequately represented in the services of the State or not are questions of fact and are within the domain of the executive decision.

67. In paragraphs 33 to 42, we have noticed how this Court has been grappling with the problem over the years. In Venkataraman's case, a Seven-Judge Bench of this Court noticed the list of backward classes mentioned in Schedule III to the Madras Provincial and Subordinate Service Rules, 1942, as also the fact that backward classes were enumerated on the basis of caste/race. It found no objection thereto though in Champakam, rendered by the same Bench and on the same day it found such a classification bad under Article 15 on the ground that Article 15 did not contain a clause corresponding to Clause (4) of Article 16. In Venkataraman's case this Court observed that in respect of the vacancies reserved for backward classes of Hindus, the petitioner (a Brahmin) cannot have any claim inasmuch as "those reserved posts (were reserved) not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such post in favour of a backward class of citizens." The writ petition was allowed on the ground that the allocation of vacancies to and among communities other than Harijans and backward classes of Hindus cannot be sustained in view of Clauses (1) and (2) of Article 16.

68. Though Balaji was not a case arising under Article 16(4), what it said about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4). The formulations enunciated with respect to Article 15(4) were, without question, applied and adopted in cases arising under Article 16(4). It is, therefore, necessary to notice precisely the formulations in Balaji relevant in this behalf. Gajendragadkar,J. speaking for the Constitution Bench found, on an examination of the Nagangowda Committee Report, "that the Committee virtually equated the class with the castes." The learned Judge then examined the scheme of Article 15, the meaning of the expression 'class', the importance of caste in the Hindu social structure and observed, while dealing with social backwardness:

Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens.... Though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves.

The learned Judge further proceeded to hold:

Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, the test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains or even Linguists are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in to to from the operation of Article 15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or class of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is in the ultimate analysis the result of poverty to a very large extent.... It is true that social backwardness which results form poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.

The learned Judge stressed the part played by the occupation, conventional beliefs and place of habitation in determining the social backwardness. Inasmuch as the identification of backward classes of Nagangowda Committee was based almost solely on the basis of caste, it was held to be bad.

The criticism of the Respondents' counsel against the Judgment runs thus: While it recognises the relevance and significance of the caste and the integral connection between caste, poverty and social backwardness, it yet refuses to accept caste as the sole basis of identifying socially backward classes, partly for the reason that castes do not exist among non-Hindus. The Judgment does not examine whether caste can or cannot form the starting- point of process of identification of socially backward classes. Nor does it consider the aspect - how does the non-existence of castes among non-Hindus (assuming that the said premise is factually true) makes it irrelevant in the case of Hindus, who constitute the bulk of the country's population. There is no rule of law that a test of basis adopted must be uniformly applicable to the entire population in the country as such.

Before proceeding further it may be noticed that Balaji was dealing with Article 15(4), which clause contains the qualifying words "socially and educationally" preceding the expression "backward classes". Accordingly, it was held that the backwardness contemplated by Article 15(4) is both social and educational. Though, Clause (4) of Article 16 did not contain any such qualifying words, yet they came to be read into it. In Janaki Prasad Parimoo, Palekar, J. speaking for a Constitution Bench, took it as "well-settled that the expression 'backward classes' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4)". More of this later.

69. In Minor P.Rajendran, the caste vis-a-vis class debate took a sharp turn. The ratio in this case marks a definite and clear shift in emphasis. (We have dealt with it at some length in para 36). Suffice it to mention here that in this decision, it was held that "a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).... It is true that in the present case the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was a sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens." This principle was reiterated in Peeriakarupan. Balram and Trilokinath-II. We have referred to these decisions at some length in paras 38 and 39. In Peeriakaruppan, Hegde,J. concluded, "a caste has always been recognised as a class."

70. This issue was gone into in some detail in Vasant Kumar, where all the five Judges constituting the Constitution Bench expressed different opinions. Chandrachud,CJ. did not express himself on this aspect but other four learned Judges did. Desai, J. recognised that "in the early stages of the functioning of the Constitution, it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally backward class of citizens for the purpose of Article 15(4)." He also recognised that "there has been some vacillation on the part of the judiciary on the question whether the caste should be the basis for recognising the backwardness." After examining the significance of caste in the Indian social structure, the learned Judge observed:

Social hierarchy and economic position exhibit an indisputable mutuality. The lower the caste, the poorer its member. The poorer the members of a caste, the lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste.

The learned Judge also recognised that caste system has even penetrated other religions to whom the practice of caste should be anathema. He observed:

So sadly and oppressively deep-rooted is caste in our country that it has cut across even the barriers of religion. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that practitioners of other religious

faiths and Hindu dissentients are some times as rigid adherents to the system of caste as the conservative Hindus. We find Christians Harijans, Christian Madars, Christian Reddys, Christian Kammas, Mujbi Sikhs, etc. etc. In Andhra Pradesh there is a community known as Pinjars or Dudekulas (known in the North as 'Rui Pinjane Wala'): (professional cottonbeaters) who are really Muslims but are treated in rural society, for all practical purposes, as a Hindu caste. Several other instances may be given.

Having thus noticed the pernicious effects of the caste system, the learned Judge opined that the only remedy in such a situation is to devise a method for determining social and educational backward classes without reference to caste. He stressed the significance of economic criterion and of poverty and concluded that a time has come when the economic criterion alone should be the basis for identifying the backward classes. Such an identification has the merit of advancing the secular character of the nation and will tend towards nullifying caste influence, said the learned Judge.

71. Chinnappa Reddy,J. dealt with the question at quite some length. The learned Judge quoted Max Weber, according to whom the three dimensions of social inequality are class, status and power - and stressed the importance of poverty in this matter. Learned Judge opined that caste system is closely entwined with economic power. In the words of the learned Judge:

Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste.

The learned Judge too recognised the percolation of caste system into other religions and concluded his opinion in the following words:

Poverty, caste, occupation and habitation are the principal factors which contribute to brand a class as socially backward.... But mere poverty it seems is not enough to invite the Constitutional branding, because of the vast majority of the people of our country are poverty-struck but some among them are socially and educationally forward and others backward.... True, a few members of those caste or social groups may have progressed far enough and forged ahead so as to compare favourably with the leading forward classes economically, socially and educationally. In such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it.... Class poverty, not individual poverty, is therefore the primary test.... Once the relevant conditions are taken into consideration and the backwardness of a class of people is determined, it will not be for the court to interfere in the matter. But, lest there be any misunderstanding, judicial review will not stand excluded.

72. A.P.Sen,J. dealt with this question in a short opinion. According to him:

....The predominant and only factor for making special provisions under Article 15(4) or for reservation of posts and appointments under Article 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable' to Scheduled Castes or Scheduled Tribes, till such members of backward classes attain a state of

enlightenment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life.

73. "E.S.Venkataramiah,J. too dealt with this aspect at some length. After examining the origins of the caste and the ugly practices associated with it, the learned Judge opined:

An examination of the question in the background of the Indian social conditions shows that the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward.

The learned Judge then referred to the debates in the Constituent Assembly on draft Article 10 and other allied articles, including the speech of Dr. Ambedkar and observed thus:

The whole tenor of discussion in the Constituent Assembly pointed to making reservation for a minority of the population including Scheduled Castes and Scheduled Tribes which were socially backward. During the discussion, the Constitution (First Amendment) Bill by which Article 15(4) was introduced, Dr. Ambedkar referred to Article 16(4) and said that backward classes are 'nothing else but a collection of certain castes. This statement leads to a reasonable inference that this was the meaning which the Constituent Assembly assigned to classes' at any rate so far as Hindus were concerned.

The learned Judge also supported the imposition of a means test as was done by the Kerala Government in K.S.Jayasree and Anr. v. State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 .

The above opinions emphasise the integral connection between caste, occupation, poverty and social backwardness. They recognise that in the Indian context, lower castes are and ought to be treated as backward classes. Rajendran and Vasant Kumar (opinions of Chinnappa Reddy and Venkataramiah, JJ.) constitute important milestones on the road to recognition of relevance and significance of caste in the context of Article 16(4) and Article 15(4).

74. At this stage, it would be fruitful to examine, how he words "caste" and "class" were understood in pre Constitution India. We shall first refer to various Rules in force in several parts of India, where these expressions were used and notice how were these expressions defined and understood. In the Madras Provincial and Subordinate Service Rules, 1942, framed by the Governor of Madras under Section 241(2)(b) read with 255 and 275 of the Government of India Act. 1935, the expression "backward classes" was defined in Clause 3(A) of Rule 2. (The provinces of Madras at that time covered not only the present State of Tamil Nadu but also a major portion of the present State of Andhra Pradesh and parts of present States of Kerala and Karnataka.) The definition read as follows:

3(A)."Backward classes" means the communities mentioned in Schedule III of this part.

Schedule III bore the heading "backward classes". It was a collection of castes and tribes under the sub-heading "race, tribe or caste." The backward classes in the Schedule not only included the

backward castes and tribes in Hindu religion but also certain sections of Muslims in the nature of castes. For example, item (23) in Schedule III referred to 'Dudekula' who, as is well known, is a socially disadvantaged section of Muslims - in effect, a caste - pursuing the occupation of ginning and cleaning of cotton and preparing pillows and mattresses. In this connection, reference may be had to Chapter III - 'History of the Backward Classes Movement in Tamil Nadu' - of the Report of the Tamil Nadu Second Backward Classes Commission (1985), which inter alia refers to formation of 'The Madras Provincial Backward Classes League, an association representing the various backward Hindu communities' in 1934 and its demand for separate representation for them in services.

The former State of Mysore was one of the earliest States, where certain provisions were made in favour of Backward Classes. The opinion of E.S.Venkataramiah, J. in Vasant Kumar, (at pages 442-443) traces briefly the history of reservations in the State of Mysore from 1918-21 upto the re-organisation of State. The learned Judge points out how the expression 'backward classes' and 'backward communities' were used interchangeably. All the castes/communities' except Brahmins in the State were notified as backward communities/castes. As far back as 1921, preferential recruitment was provided in favour of "backward communities", in Government services.

In Bombay province, the Government of Bombay, Finance Department Resolution No. 2610 dated 5.2.1925 defined "Backward Classes" as all except Brahmins, Prabhus, Marwaris, Parsis, Banyas and Christians. Certain reservations in Government service were provided for these classes. In 1930, the State Committee noticed the over-lapping meanings attached to the expressions "depressed classes" and "backward classes" and recommended that "Depressed Classes" should be used in the sense of untouchables, a usage which "will coincide with existing common practice." They proposed that the wider group should be called "Backward Classes", which should be subdivided into Depressed Classes (i.e., untouchables); Aboriginals and Hill Tribes; Other Backward Classes (including wandering tribes). They opined that the groups then currently called Backward Classes should be renamed "intermediate classes". In addition to 36 Depressed classes (approximate 1921 population 1.475 millions) and 24 Aboriginal and Hill Tribes (approximate 1921 population 1.323 millions), they listed 95 Other Backward Classes (approximate 1921 population 1.041 millions)".

75. In the former princely State of Travancore, the expression used was "Communities", as would be evident from the Proceedings of the Government of His Highness the Maharaja of Travancore, contained in Order R. Dis. N. 893/general dated Trivandrum, 25th June, 1935. It refers to earlier orders on the subject as well. What is significant is that the expression "communities" was used as taking in Muslims and certain sections of Christians as well; it was not understood as confined to castes in Hindu social system alone. The operative portion of the order reads as follows:

....Accordingly, Government have decided that all communities whose population is approximately 2 per cent of the total population of the State or about one lakh, be recognised as separate communities for the purpose of recruitment to the public service. The only exception from the above rule will be the Brahmin community who, though forming only 1.8 per cent of the total population, will be dealt with as a separate community. On the above basis the classification of communities will be as follows:-

A. HINDU

1. Brahmin.

2. Nayar.

3. Other Caste Hindu.

4. Kummula.

5. Nudar.

6. Ezlmva.

7. Cheramar (Pulaya)

8. Other Hindu.

B. MUSLIM.

C. CHRISTIAN.

1. Jacobite.

2. Marthomite.

3. Syriac Catholic.

4. Latin Catholic.

5. South India United Church.

6. Other Christian.

In the then United Provinces, the term "Backward Classes" was understood as covering both the untouchable classes as well other "Hindu Backward" classes. Marc Galanter says:

The United Provinces Hindu Backward Classes League (founded in 1929) submitted a memorandum which suggested that the term "Depressed" carried a connotation "of untouchability, in the sense of causing pollution by touch as in the case of Madras and Bombay" and that many communities were reluctant to identify themselves as depressed. The League suggested the term "'Hindu' Backward'" as a more suitable nomenclature. The list of 115 castes submitted included all candidates from the untouchable category as well as a stratum above. "All of the listed communities belong to non-Dwijas or degenerate or Sudra classes of the Hindus." They were described as low socially, educationally and economically and were said to number over 60% of the population.

The expression "depressed and other backward classes" occurs in the Objectives Resolution of the Constituent Assembly moved by Jawaharlal Nehru on December 13, 1946.

76. We may also refer to a speech delivered by Dr. Ambedkar on May 9, 1916 at the Columbia university of New York, U.S.A. on the subject "castes in India: their mechanism, genesis and development" (the speech was published in Indian Antiquary-May 1917-Vol.XLI), which shows that as early as 1916, "class" and "caste" were used inter-changeably. In the course of the speech, he said:

....society is always composed of classes. It may be an exaggeration to assert the theory of class-conflict, but the existence of definite classes in a society is a fact. Their basis may differ. They may be economic or intellectual or social, but an individual in a society is always a member of a class. This is a universal fact and early Hindu society could not have been an exception to this rule, and, as a matter of fact, we know it was not. If we bear this generalization in mind, our study of the genesis of caste would be very much facilitated, for we have only to determine what was the class that first made itself into a caste, for class and caste, so to say, are next door neighbours, and it is only a span that separates the two. A Caste is an Enclosed Class.

A little later he stated:

We shall be well advised to recall at the outset that the Hindu society, in common with other societies, was composed of classes and the earliest known are the (1) Brahmins or the priestly class; (2) the Kshatriya, or the military class; (3) the Vaishya, or the merchant class and (4) the Shudra or the artisan and menial class. Particular attention has to be paid to the fact that this was essentially a class system, in which individuals, when qualified, could change their class, and therefore classes did change their personnel. At some time in the history of the Hindus, the priestly class socially detached itself from the rest of the body of people and through a closed-door policy became a caste by itself. The other classes being subject to the law of social division of labour underwent differentiation, some into large, others into very minute groups.

77. In Encyclopaedia Britannica Vol. 16, the following statement occurs under the heading "Slavery, Serfdom and Forced labour" under the sub-heading "servitude in Ancient India and China." - "castes in India."

More abundant than slavery were serfdom. Within the rigid classification of social classes in ancient India, the Sudra caste was obliged to serve the Ksatriya, or warrior caste, the Brahmins, or priests, and the Vaisyas, or farmers, cattle raisers and merchants. There is an unbreakable barrier, however, separating these castes from the inferior Sudra caste, the descendants of the primitive indigenous people who lived in serfdom.

In those times it was not a person's economic wealth that gave him his social rank but rather his social and racial level; and thus one of the Manu's laws says" Although able, a Sudra must not acquire excess riches, since when a Sudra acquires a fortune, he vexes the Brahmans with his insolence." The barrier separating the servile castes took on extreme cruelty in some laws:

The legal condition of the Sudra left him only death as a means of improving his condition.

In Legal Thesaurus (Regular Edition) the following meanings are given to the word "class":

Assortment, bracket, branch, brand, breed, caste, category, classification, classes, denomination, designation, division...; gradation, grade, group, grouping hierarchy.... sect, social rank, social status....

The following meanings are given to the word "caste" in Webster's English Dictionary:

(1) a race, stock, or breed of men or animals (2): one of the hereditary classes into which the society of India is divided in accordance with a system fundamental to Hinduism, reaching back into distant antiquity, and dictating to every orthodox Hindu the rules and restrictions of all social intercourse and of which each has a name of its own and special customs that restrict that occupation of its members and their intercourse with the members of the other classes (3)(a): a division or class of society comprised of persons within a separate and exclusive order based variously upon differences of wealth, inherited rank or privilege, profession, occupation... (b) the position conferred by caste standing. (4) a system of social stratification more rigid than a class and characterized by hereditary status, endogamy and social barriers rigidly sanctioned by custom law or religion.

All the above material does go to show that in pre-Independence India, the expressions 'class' and 'caste' were used interchangeably and that caste was understood as an enclosed class.

78. We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr. Ambedkar as conclusive on the meaning of the expression "backward classes." We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put in Clause (4). We are aware that what is said during these debates is not conclusive or binding upon the court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr. Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft Clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court. See Madhu Limaye MANU/SC/0047/1968 : A.I.R. 1969 S.C. 1014; Golaknath v. State of Punjab MANU/SC/0029/1967 : [1967]2SCR762 (Subba Rao, CJ.); opinion of Sikri, CJ., in Dhillon v. Union of India MANU/SC/0062/1971 : [1972]83ITR582(SC) and the several opinions in Keshavananda Bharati MANU/SC/0445/1973 : AIR1973SC1461 where the relevance of these debates is pointed out, emphasising at the same time, the extent to which and the purpose for which they can be referred to). Since the expression "backward" or "backward class of citizens" is not defined in the Act, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable.

79. According to Dr. Ambedkar (his speech is referred in para 28 and need not be reproduced here), the Drafting Committee was of the opinion that such a qualifying expression was necessary to indicate that the classes of citizens for whom reservations were to be made are those "communities which have not had so far representation in the State." It was also of the opinion that without such a qualifying expression (like 'backward') the "exemption made in favour of reservation will ultimately eat up the rule altogether". This was also the opinion of Sri K.M.Munshi, who too was a member of the Drafting Committee. In his speech (referred to in para 27) he explains why the said qualifying expression "backward" was inserted by the Drafting Committee in draft Article 10(3). His speech, in so far as it is relevant on this aspect, has been quoted in extenso in para 28 and need not be repeated here.

In our opinion too, the words "class of citizens - not adequately represented in the services under the State" would have been a vague and uncertain description. By adding the word "backward" and by the speeches of Dr. Ambedkar and Sri K.M.Munshi, it was made clear that the "class of citizens...not adequately represented in the services under the State" meant only those classes of citizens who were not so represented on account of their social backwardness.

Reference can also be made in this context to the speech of Dr. Ambedkar in the Parliament at the time the First Amendment to the Constitution was being enacted. It must be remembered that the Parliament which enacted the First Amendment was the very same Constituent Assembly which framed the Constitution and Dr. Ambedkar as the Minister of Law was piloting the Bill. He said that backward classes "are nothing else but a collection of certain castes". (the relevant portion of his speech is referred to in papa 32) and that it was for those backward classes that Article 15(4) was being enacted.

80. Pausing here, we may be permitted to make a few observations. The speeches of Dr. Ambedkar may have to be understood in the context of the then obtaining ground realities viz., (a) Hindus constituted 84% of the total population of India. And among Hindus, caste discrimination was unfortunately an unpleasant reality; (b) caste system had percolated even the Non-Hindu religions - no doubt to varying extents. Particularly among Christians in Southern India, who were converts from Hinduism, it was being practised with as much rabidity as it was among Hindus. (This aspect has been stressed by the Mandal Commission (Chapter 12 paras 11 to 16) and has also been judicially recognised. (See, for instance, the opinions of Desai and Chinnappa Reddy, JJ. in Vasant Kumar). Encyclopaedia Britannica-II-Micropaedia refers to existence of castes among Muslims and Christians at pages 618 and 61.9. Among Muslims, it is pointed out, a distinction is made between 'Ashrats' (supposed to be descendants ascendants of Arab immigrants) and non-Ashrafs (native converts). Both are divided into subgroups. Particularly, the non-Ashrafs, who are converts from Hinduism, it is pointed out, practice caste system (including endogamy)" in a manner close to that of their Hindu counter-parts." All this could not have been unknown to Dr. Ambedkar, the keen social scientist that he was.

(c) It is significant to notice that throughout his speech in the Constituent Assembly, Dr. Ambedkar was using the word "communities" (and not 'castes') which expression includes not only the castes among the Hindus but several other groups. For example, Muslims as a whole were treated as a backward community in the princely State of Travancore besides several sections/denominations among the Christians. The word "community" is clearly wider than "caste" - and "backward

communities" meant not only the castes - wherever they may be found - but also other groups, classes and sections among the populace.

81. Indeed, there are very good reasons why the Constitution could not have used the expression "castes" or "caste" in Article 16(4) and why the word "class" was the natural choice in the context. The Constitution was meant for the entire country and for all time to come. Non-Hindu religions like Islam, Christianity and Sikh did not recognise caste as such though, as pointed out hereinabove, castes did exist even among these religions to a varying degree. Further, a Constitution is supposed to be a permanent document expected to last several centuries. It must surely have been envisaged that in future many classes may spring-up answering the test of backwardness, requiring the protection of Article 16(4). It, therefore, follows that from the use of the word "class" in Article 16(4), it cannot be concluded either that "class" is antithetical to "caste" or that a caste cannot be a class or that a caste as such can never be taken as a backward class of citizens. The word "class" in Article 16(4), in our opinion, is used in the sense of social class - and not in the sense it is understood in Marxist jargon.

In Rajendran, Trilokinath-II, Balram and Peerikarupan, this reality was recognised and given effect to, notwithstanding the fact that they had to respect and operate within the rather qualified formulation of Balaji.

For the sake of completeness, we may refer to a few passages from Vasant Kumar to show what does the concept of 'caste' signify? D.A. Deasi, J. defines and describes "caste" in the following terms:

What then is a caste? Though caste has been discussed by scholars and jurists, no precise definition of the expression has emerged. A caste is a horizontal segmental division of society spread over a district or a region or the whole State and also sometimes outside it. Homo Hierarchicus is expected to be the central and substantive element of the caste/system which differentiate it from other social systems. The concept of purity and impurity conceptualises the caste system.... There are four essential features of the caste system which maintained its homo hierarchicus character: (1) hierarchy (2) commensality: (3) restrictions on marriage; and (4) hereditary occupation. Most of the caste are endogamous groups. Intermarriage between two groups is impermissible. But 'Pratilom' marriages are not wholly known.

Venkataramiah,J. also defined "caste" in practically the same terms. He said:

A caste is an association of families which practice the custom of endogamy i.e. which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste.... A caste is based on various factOrs. Sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth, in a family. Certain ideas of ceremonial purity are peculiar to each caste.... Even the choice of occupation of members of castes was predetermined in many cases, and the members of particular caste were prohibited from engaging themselves in other types of callings, profession or occupations. Certain occupations were considered to be degrading or impure.

82. The above material makes it amply clear that a caste is nothing but a social class - a socially homogeneous class. It is also an occupational grouping, with this difference that its membership is hereditary. One is born into it. Its membership is involuntary. Even if one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupationally homogenous class. Endogamy is its main charateristic. Its social status and standing depends upon the nature of the occupation followed by it. Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation-caste nexus is true even today. A few members may have gone to cities or even abroad but when they return - they do, barring a few exceptions they go into the same fold again. It doesn't matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed. For the purposes of marriage, death and all other social functions, it is his social class - the caste - that is relevant. It is a matter of common knowledge that an overwhelming majority of doctors, engineers and other highly qualified people who go abroad for higher studies or employment, return to India and marry a girl from their own caste. Even those who are settled abroad come to India in search of brides and bridegrooms for their sons and daughters from among their own caste or community. As observed by Dr. Ambedkar, a caste is an enclosed class and it was mainly these classes the Constituent Assembly had in mind though not exclusively - while enacting Article 16(4). Urbanisation has to some extent broken this caste- occupation nexus but not wholly. If one sees around himself, even in towns and cities, a barber by caste continues to do the same job - may be, in a shop (hair dressing saloon). A washerman ordinarily carries on the same job though he may have a laundry of his own. May be some others too carry on the profession of barber or washerman but that does not detract from the fact that in the case of an over-whelming majority, the caste-occupation nexus subsists. In a rural context, of course, a member of barber caste carrying on the occupation of a washerman or vice versa would indeed be a rarity - it is simply not done. There, one is supposed to follow his caste occupation, ordained for him by his birth. There may be exceptions here and there, but we are concerned with generality of the scene and not with exceptions or aberrations. Lowly occupation results not only in low social position but also in poverty; it generates poverty. 'Caste-occupation-poverty' cycle is thus an ever present reality. In rural India, it is strikingly apparent; in urban centers, there may be some dilution. But since rural India and rural population is still the overwhelmingly predominant fact of life in india, the reality remains. All the decisions since Balaji speak of this 'caste-occupation-poverty' nexus. The language and emphasis may very but the theme remains the same. This is the stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon. We are not saying it ought to be encouraged. It should not be. It must be eradicated. That is the ideal - the goal. But any programme towards betterment of these sections-classes of society and any programme designed to eradicate this evil must recognise this ground reality and attune its programme accordingly. Merely burying our heads in the sand - Ostrich-like - wouldn't help. One cannot fight his enemy without recognizing him. The U.S.Supreme Court has said repeatedly, if race be the basis of discrimination - past and present - race must also form the basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far. Without a doubt, an extensive restructuring of socio-economic system is the answer. That is indeed the goal, as would be evident from the preamble and Part IV (Directive Principles). But we are concerned here with a limited aspect of equality emphasised in Article 16(4) - equality of opportunity in public employment and a special provision in favour of backward class of citizens to enable them to achieve it.

(b). Identification of "backward class of citizens".

83. Now, we may turn to the identification of "backward class of citizens". How do you go about it? Where do you begin? Is the method to very from State to State, region to region and from rural to urban? What do you do in the case of religions where caste system is not prevailing? What about other classes, groups and communities which do not wear the label of caste? Are the people living adjacent to cease-fire line (in Jammu and Kashmir) or hilly or inaccessible regions to be surveyed and identified as backward classes for the purpose of Article 16(4)? And so on and so forth are the many questions asked of us. We shall answer them. But our answers will necessarily deal with generalities of the situation and not with problems or issues of a peripheral nature which are peculiar to a particular State, district or region. Each and every situation cannot be visualised and answered. That must be left to the appropriate authorities appointed to identify. We can lay down only general guidelines.

At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes - for it cannot be denied that Scheduled Castes include quite a few castes.

Coming back to the question of identification, the fact remains that one has to begin somewhere - with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation, poverty and social backwardness are so closely inter-twined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and soon and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of Clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (After excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered.

If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by Justice O.Chinnappa Reddy Commission in this respect.

We do not mean to suggest - we may reiterate - that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasise that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward.

83A. The only basis for saying that caste should be excluded from consideration altogether while identifying the Backward Class of Citizens for the purpose of Article 16(4) is Clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of Clause (2). It prohibits discrimination on any or all of the grounds mentioned therein. The significance of the word "any" cannot be minimised. Reservation is not being made under Clause (4) in favour of a 'caste' but a 'backward class'. Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4). Even that is not enough. It must be further found that that backward class is not adequately represented in the services of the State. In such a situation, the bar of Clause (2) of Article 16 has no application whatsoever. Similarly, the argument based upon secular nature of the Constitution is too vague to be accepted. It has been repeatedly held by the U.S. Supreme Court in School desegregation cases that if race be the basis of discrimination, race can equally form the basis of redressal. In any event, in the present context, it is not necessary to go to that extent. It is sufficient to say that the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State. Born Heathen, by baptism, it becomes a Christian - to use a similie. Baptism here means passing the test of backwardness.

84. Another contention urged is that only that group or section of people, who are suffering the lingering effects of past discrimination, can alone be designated as a backward class and not others. This argument, inspired by certain American decisions, cannot be accepted for more than one reason. Firstly, when the caste discrimination is still prevalent, more particularly in rural India (which comprises the bulk of the total population), the theory of lingering effects has no relevance. Where the discrimination has ended, does that aspect become relevant and not when the discrimination itself is continuing. Secondly, as we have noticed hereinabove, the said theory has

practically been given up by the U.S. Supreme Court in Metro Broadcasting. In this case, it is held sufficient for introducing and implementing a race-conscious programme that such programme serves important State objectives. In other words, according to this test, it is no longer necessary to prove that such programme is designed to compensate victims of past societal or governmental discrimination. Thirdly, the basic premise of the theory of lingering effects is not accepted by all the learned Judges of U.S. Supreme Court. If one sees the opinion of Douglas, J. in Defunis and of Marshall, J. in Bakke and Fullilove. It would become evident. They also say that discriminatory practices against blacks and other minorities have not come to an end but are still persisting. In this country too, none can deny - in the face of the material collected by the various Commissions including Mandal Commission - that discrimination persists even today in India. The representation of the socially backward classes in the Government apparatus is quite inadequate and that conversely the upper classes have a disproportionately large representation therein. This is the lingering effect, if one wants to see it.

Whether the backwardness in Article 16(4) should be both social and educational?

85. The other aspect to be considered is whether the backwardness contemplated in Article 16(4) is social backwardness or educational backwardness or whether it is both social and educational backwardness. Since the decision in Balaji, it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4). Though Article 15(4) came into existence later in 1951 and Article 16(4) does not contain the qualifying words 'socially and educationally' preceding the words "backward class of citizens" the same meaning came to be attached to them. Indeed, it was stated in Janaki Prasad Parimoo (Palekar,J. speaking for the Constitution Bench) that:

Article 15(4) speaks about socially and educationally backward classes of citizens." However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a 'backward class citizens' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Article 15(4) and 16(4).

It is true that no decision earlier to it specifically said so, yet such an impression gained currency and it is that impression which finds expression in the above observation. In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words "socially and educationally" as does Clause (4) of Article 15. It may be remembered that Article 340 (which has remained unamended) does employ the expression 'socially and educationally backward classes' and yet that expression does not find place in Article 16(4). The reason is obvious: "backward class of citizens" in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4). It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the State, though it may be that the Commission appointed thereunder may recommend reservation in appointments/posts in

the services of the State as one of the steps for removing the difficulties under which SEBCs are labouring and for improving their conditions. Thus, S.E.B.Cs, referred to in Article 340 is only one of the categories for whom Article 16(4) was enacted; Article 16(4) applies to a much larger class than the one contemplated by Article 340. It would, thus, be not correct to say that backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services - which may mean, at any level whatsoever - insisting upon educational backwardness may not be quite appropriate.

Further, if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. It goes without saying that in Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle. It is a well known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. In this sense Dr. Rajiv Dhawan may be right when he says that the object of Article 16(4) was "empowerment" of the backward classes. The idea was to enable them to share the state power. We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is mainly social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social and educational. The Scheduled Tribes and the Scheduled Castes are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness. It is necessary to state at this stage that the Mandal Commission appointed under Article 340 was concerned only with the socially and educationally backward classes contemplated by the said Article. Even so, it is evident that social backwardness has been given precedence over others by the Mandal Commission - 12 out of 22 total points. Social backwardness - it may be reiterated - leads to educational and economic backwardness. No objection can be, nor is taken, to the validity and relevancy of the criteria adopted by the Mandal Commission. For a proper a appreciation of the criteria adopted by the Mandal Commission and the difficulties in the way of evolving the criteria of backwardness, one must read closely Chapters III and XI of Volume I along with Appendixes 12 and 21 in Volume II. Appendix XII is the Report of the Research Planning Team of the Sociologists while Appendix 21 is the 'Final List of Tables' adopted in the course of socio-educational survey. In particular, one may read paras 11.18 to 11.22 in Chapter XI, which are quoted hereunder for ready reference:

11.18. Technical Committee constituted a Sub-Committee of Experts (Appendix-20, Volume II) to help the Commission prepare 'Indicators of Backwardness' for analysing data contained in computerised tables. After a series of meetings and a lot of testing of proposed indicators against the tabulated data, the number of tables actually required for the Commission's work was reduced to 31 (Appendix-21 Volume II). The formulation and refinement of indicators involved testing and validation checks at every stage.

11.19. In this connection, it may be useful to point out that in social sciences no mathematical formulae or precise bench-marks are available for determining various social traits. A survey of the above type has to read warily on unfamiliar ground and evolve its own norms and bench-marks. This exercise was full of hidden pitfalls and two simple examples are given below to illustrate this point.

11.20. In Balaji's case the Supreme Court held that if a particular community is to be treated as educationally backward, the divergence between its educational level and that of the State average should not be marginal but substantial. The Court considered 50% divergence to be satisfactory. Now, 80% of the population of Bihar (1971 Census) is illiterate. To beat this percentage figure by a margin of 50% will mean that 120% members of a caste/class should be illiterates. In fact it will be seen that in this case even 25% divergence will stretch us to the maximum saturation point of 100%.

11.21. In the Indian situation where vast majority of the people are illiterate, poor or backward, one has to be very careful in setting deviations from the norms as, in our conditions, norms themselves are very low. For example, Per Capita Consumer Expenditure for 1977-78 at current prices was Rs. 991 per annum. For the same period, the poverty line for urban areas was at Rs. 900 per annum and for rural areas at Rs. 780. It will be seen that this poverty line is quite close to the Per Capita Consumer Expenditure of an average Indian. Now following the dictum of Balaji case, if 50% deviation from this average Per Capital Consumer Expenditure was to be accepted to identify 'economically backward' classes, their income level will have to be 50% below the Per Capital Consumer Expenditure i.e. less than Rs. 495.5 per year. This figure is so much below the poverty line both in urban and rural areas that most of the people may die of starvation before they qualify for such a distinction.

11.22. In view of the above, 'Indicators for Backwardness' were tested against various cut-off points. For doing so, about a dozen castes well-known for their social and educational backwardness were selected from amongst the castes covered by our survey in a particular State. These were treated as 'Control' and validation checks were carried out by testing them against 'Indicators' at various cut-off points. For instance, one of the 'Indicators' for social backwardness is the rate of student dropouts in the age group 5-15 years as compared to the State average. As a result of the above tests, it was seen that in educationally backward castes this rate is at least 25 per cent above the State average. Further, it was also noticed that this deviation of 25% from the State average in the case of most of the 'Indicators' gave satisfactory results. In view of this, wherever an 'Indicator' was based on deviation from the State average, it was fixed at 25%, because a deviation of 50% was seen to give wholly unsatisfactory results and, at times, to create anomalous situations.

It is after these paragraphs that the Report sets out the indicators (criteria) evolved by it, set out in Paras 11.23 and 11.24 of the Report.

102. The S.E.B.Cs. referred to by the impugned Memorandums are undoubtedly 'backward class of citizens' within the meaning of Article 16(4).

(d) 'Means' test and 'creamy layer':

86. 'Means test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. This submission is very often referred to as "the creamy layer" argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they constitute the forward section of that particular backward class - as forward as any other forward class member - and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since Jayasree, almost every decision has accepted the validity of this submission.

On the other hand, the learned Counsel for the State of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State of Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representation received. In this behalf, the learned Counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy, J. in Vasant Kumar, to the following effect:

... One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layers amongst them on the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?

In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class - a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line - how and where to draw the line? For, while drawing the line, it should be ensured that it does not result

in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become - say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs. 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of I.A.S. or I.P.S. or any other All India Service, his status in society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the Respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that Clause (4) or Article 16 aims at group backwardness and not individual backwardness. While we agree that Clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of Clause (4).

(This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes).

Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion - whether on the basis of income, extent of holding or otherwise - of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward Classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandums dated 13th August, 1990 and 25th September, 1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M. In other words, after the expiry of four months from today, the implementation of the said O.M. shall be subject to the exclusion

of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise.

(c) Whether a class should be situated similarly to the Scheduled Caste/Scheduled Tribe for being qualified as a Backward Class?

87. In Balaji it was held "that the backward classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes." The correctness of this observation is questioned by the counsel for the respondents. Reliance is placed upon the observations of Chinnappa Reddy, J. in Vasant Kumar (at page 406) where, dealing with the above observations in Balaji, the learned Judge said:

We do not think that these observations were meant to lay down any proposition that the socially Backward Classes were those classes of people, whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes....There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes.

88. We see no reason to qualify or restrict the meaning of the expression "backward class of citizens" by saying that it means those other backward classes who are situated similarly to Scheduled Castes and/or Scheduled Tribes. As pointed out in para 85, the relevant language employed in both the clauses is different. Article 16(4) does not expressly refer to Scheduled Castes or Scheduled Tribes; if so, there is no reason why we should treat their backwardness as the standard backwardness for all those claiming its protection. As a matter of fact, neither the several castes/groups/tribes within the Scheduled Castes and Scheduled Tribes are similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated. If any group or class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such a priori notions into the concept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be. More than this, it is difficult to say. How difficult is the process of ascertainment of backwardness would be known if one peruses Chapters III and XI of Volume I of the Mandal Commission Report along with Appendixes 12 and 21 in Volume II. It must be left to the Commission/Authority appointed to identify the backward classes to evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria. If, in any case, a particular caste or class is wrongly designated or not designated a backward class, it can always be questioned before a court of law as well. We may add that relevancy of the criteria evolved by Mandal Commission (Chapter XI) has not been questioned by any of the counsel before us. Actual identification is a different matter, which we shall deal with elsewhere.

88A. We may now summarise our discussion under Question No. 3.(a) a caste can be an quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and

denominations, which for historical reasons are socially backward. They too represent backward social collectives for the purposes of Article 16(4). (b) Neither the Constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. If can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be down with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes, (d) 'Creamy layer' can be, and must be, excluded. (e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens." The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4).

Adequacy of Representation in the services under the State:

89. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the State. The language of Clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State".

This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in Barium Chemicals v. Company Law Board MANU/SC/0037/1966 : [1967]1SCR898 , which need not be repeated here. Sufficed it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive.

Question 4: (a) Whether backward classes can be identified only and exclusively with reference to the economic criterion:

90. It follow from the discussion under Question No. 3 that a backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis alongwith and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same.

(b). Whether a backward class can be identified on the basis of occupation-cum-income without reference to caste?

91. In Chitralekha, this Court held that such an identification is permissible. We see no reason to differ with the said view inasmuch as this is but another method to find socially backward classes. Indeed, this test in the Indian context is broadly the same as the one adopted by the Mandal Commission. While answering Question 3(b), we said that identification of backward classes can be done with reference to castes alongwith other occupational groups, communities and classes. We did not say that that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, Rickshawpullers/drivers, street-hawkers etc. may well qualify for being designated as Backward Classes.

Question No. 5: Whether Backward Classes can be further divided into backward and more backward categories?

92. In Balaji it was held "that the sub-classification made by the order between Backward Classes and more backward classes does not appear to be justified under Article 15(4). Article 15(4) authorises special provision being made for the really backward classes. In introducing two categories of backward classes, what the impugned order, in substance, purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced compared to the more advanced classes in the State and that, in our opinion, is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of backward and more backward. The classification of the two categories, therefore, is not warranted by Article 15(4)." The correctness of this holding is questioned before us by the counsel for the respondents. It is submitted that in principle there is no justification for the said holding. It is submitted that even among backward classes there are some who are more backward than the others and that the backwardness is not and cannot be uniform throughout the country nor even within a State. In support of this contention, the Respondents rely upon the observations of Chinnappa Reddy, J. in Vasant Kumar, where the learned judge said:

We do not see why on principle there cannot be a classification into Backward Classes and More Backward Classes, if both classes are not merely a little behind, but far far behind the most advanced classes. In fact such a classification would be necessary to help the More Backward Classes; otherwise those of the Backward Classes who might be a little more advanced than the More Backward Classes might walk away with all the seats.

92A. We are of the opinion that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that gold-smiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitably result would be that gold-smiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State - and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group-A comprises of "Aboriginal tribes. Vimukta jatis. Nomadic and semi-nomadic tribes etc.". Group-B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group-C pertains to "Scheduled Castes converts to Christianity and their progency", while Group-D comprises of all other classes/communities/groups, which are not included in groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in Balram [1972] 3 S.C.R. 247 AT 286. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, O.B.Cs. will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say - we may reiterate - that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law.

PART - V (QUESTION NOS. 6, 7 AND 8)

Question 6: To what extent can the reservation be made?

(a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?

(b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?

(c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to ?

93. In Balaji, a Constitution Bench of this Court rejected the argument that in the absence of a limitation contained in Article 15(4), no limitation can be prescribed by the court on the extent of reservation. It observed that a provision under Article 15(4) being a "special provision" must be within reasonable limits. It may be appropriate to quote the relevant holding from the judgment:

When Article 15(4) refers to the special provision for the advancement of certain classes or Scheduled Castes or Scheduled Tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exhaustive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored....A Special provision contemplated by Article 15(4) like reservation for posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the State and the center have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be adverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case.

In Devadasan this rule of 50% was applied to a case arising under Article 16(4) and on that basis the carry-forward rule was struck down. In Thomas, however the correctness of this principle was questioned. Fazal Ali, J. observed:

This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time Clause (4) of Article 16 does not fix any limit on the power of the government to make reservation. Since Clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of

reservation should not exceed 50%. As I read the authorities, this is however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward class of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object to this provision is to take steps to make inadequate representation adequate.

Krishna Iyer, J. agreed with the view taken by Fazal Ali, J. in the following words:

I agree with my learned brother Fazal Ali, J. in the view that the arithmatical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Article 16(4) and his view about the carry forward' rule.

Mathew, J. did not specifically deal with this aspect but from the principles of 'proportional equality' and 'equality of results' espoused by the learned Judge, it is argued that he did not accept the 50% rule. Beg, J. also did not refer to this rule but the following sentence occurs in his judgment at pages 962 and 963:

If a reservation of posts under Article 16(4) for employees of backward classes could include complete reservation of higher posts to which they could be promoted, about which there could be no doubt now, I fail to see why it cannot be partial or for a part of the duration of service and hedged round with the condition that a temporary promotion would operate as a complete and confirmed promotion only if the temporary promotee satisfies some tests within a given time.

Ray, C.J., did not dispute the correctness of the 50% rule but at the same time he pointed out that this percentage should be applied to the entire service as a whole.

After the decision in Thomas, controversy arose whether the 50% rule enunciated in Balaji stands overruled by Thomas or does it continue to be valid. In Vasant Kumar, two learned judges came to precisely opposite conclusions on this question. Chinnappa Reddy, J. held that Thomas has the effect of undoing the 50% rule in Balaji whereas Venkataramiah, J. held that it does not.

94. It is argued before us that the observations on the said question in Thomas were obiter and do not constitute a decision so as to have the effect of overruling Balaji. Reliance is also placed upon the speech of Dr. Ambedkar in the Constituent Assembly, where he said that reservation must be confined to a minority of seats (See para 28). It is also pointed out that Krishna Iyer, J. who agreed with Fazal Ali, J. in Thomas on this aspect, came back to, and affirmed, the 50% rule in Karamchari Sangh (at pp. 241 and 242). On the other hand, it is argued for the respondents that when the population of the other backward classes is more than 50% of the total population, the reservation in their favour (excluding Scheduled Castes and Scheduled Tribes) can also be 50%.

94A. We must, however, point out that Clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332

of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State Legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonably limits - and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in Narayan Rao v. State 1987 A.P. 53, striking down the enhancement of reservation from 25% to 44% for O.B.Cs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%.

It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.

From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.

While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

95. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture:

all reservations are not of the same nature.
There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations that is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same.<mpara>
This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be - indeed cannot be - applicable to exemptions, concessions or relaxations, if any provided to 'Backward Class of Citizens' under Article 16(4).

96. The next aspect of this question is whether an year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. Balaji does not deal with this aspect but Devadasan (majority opinion) does. Mudholkar, J. speaking for the majority says:

We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

On the other hand is the approach adopted by Ray, C.J. in Thomas. While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, C.J. would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go, i.e., in a year or two. The position can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of

the 1000 posts 500 must be held by the members of these classes i.e., 270 by other backward classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% an year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.

(d) Was Devadasan correctly decided?

97. The rule (providing for carry forward of unfilled reserved vacancies as modified in 1955) struck down in Devadasan read as follows:

3(a) If a sufficient number of candidate considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year.

The facts of the case relevant for our purpose are the following:

(i) Reservation in favour of Scheduled Castes and Scheduled Tribes was 12 1/2% and 5% respectively;

(ii) In 1960, U.P.S.C. issued a notification proposing to hold a limited competitive examination for promotion to the category of Assistant Superintendents in Central Secretariat Services. 48 vacancies were to be filled, out of which 16 were unreserved while 32 were reserved for Scheduled Castes/Scheduled Tribes, because of the operation of the carry forward Rule: 28 vacancies were actually carried forward;

(iii) U.P.S.C. recommended 16 for unreserved and 30 for reserved vacancies - a total of 46;

(iv) the Government however appointed in all 45 persons, out of whom 29 belonged to Scheduled Castes/Scheduled Tribes.

The said Rule and the appointments made on that basis were questioned mainly on the ground that they violated the 50% rule enunciated in Balaji. It was submitted that by virtue of the carry forward Rule, 65% of the vacancies for the year in question came to be reserved for Scheduled Castes/Scheduled Tribes.

The majority, speaking through Mudholkar,J. upheld the contention of the petitioners and struck down the Rule purporting to apply the principle of Balaji. The vice of the Rule was pointed out in the following wards:

In order to appreciate better the import of this rule on recruitment, let us take an illustration. Supposing in two successive years no candidate from amongst the Scheduled Castes and Tribes is found to be qualified for filling any of the reserved posts. Supposing also that in each of those two years the number of vacancies to be filled in a particular service was 100. The reserved vacancies for each of those years would, according to the Government resolution, be 18 for each year. Now, since these vacancies were not filled in those years a total of 36 vacancies will be carried forward to the third year. Supposing in the third year also the number of vacancies to be filled is 100. Then 18 vacancies out of these will also have to be reserved for members of the Scheduled Castes and Tribes. By operation of the carry forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more than 50%.

98. We are of the respectful opinion that on its own reasoning, the decision in so far as it strikes down the Rule is not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50%, inasmuch as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said Rule. But it would not be correct to presume that that is the necessary and the only consequence of that rule. Let us take the very illustration given at pp. 691-2, - namely 100 vacancies arising in three successive years and 18% being the reservation quota - and examine. Take a case, where in the first year, out of 18 reserved vacancies 9 are filled up and 9 are carried forward. Similarly, in the second year again, 9 are filled up and another 9 are carried forward. Result would be that in the third year, 9 + 9 + 18 = 36 (out of a total of 100) would be reserved which would be far less than 50%; the rule in Balaji is not violated. But by striking down the Rule itself, carrying forward of vacancies even in such a situation has become impermissible, which appears to us indefensible in principle. We may also point out that the premise made in Balaji and reiterated in Devadasan, to the effect that Clause (4) is an exception to Clause (1) is no longer acceptable, having been given up in Thomas. It is for this reason that in Karamchari Sangh, Krishna Iyer, J. explained Devadasan in the following words:

In Devadasan's case the court went into the actuals, not into the hypotheticals. This is most important. The Court actually verified the degree of deprivation of the 'equal opportunity' right....

.... What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right....Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC&ST candidates be actually appointed to substantially more than 50% of the promotional posts. Some excess will not affect as mathematical

precision is different in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the 'carry forward' rule shall not result, in any given year, in the selection of appointments of SC&ST candidates considerably in excess of 50% we uphold Annexure I.

We are in respectful agreement with the above statement of law. Accordingly, we over-rule the decision in Devadasan. We have already discussed and explained the 50% rule in paras 93 to 96. The same position would apply in the case of carry forward rule as well. We, however, agree that an year should be taken as the unit or basis, as the case may be, for applying the rule of 50% and not the entire cadre strength.

99. We may reiterate that a carry forward rule need not necessarily be in the same terms as the one found in Devadasan. A given rule may say that the unfilled reserved vacancies shall not be filled by unreserved category candidates but shall be carried forward as such for a period of three years. In such a case, a contention may be raised that reserved posts remain a separate category altogether. In our opinion, however, the result of application of carry forward rule, in whatever manner it is operated, should not result in breach of 50% rule.

Question No, 7: Whether Clause (4) of Article 16 provides reservation only in the matter of initial appointments/direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well?

100. The petitioner's submission is that the reservation of appointments or posts contemplated by Clause (4) is only at the stage of entry into State service, i.e., direct recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to frog-leap over his compatriots, which was bound to generate acute heart - burning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are given how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of dis-heartening which kills the spirit of competition and develops a sense of dis-interestedness among the members of O.C. category. It is pointed out that once persons coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supposed to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon in-efficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work

hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in Clause (J) of Article 51A (Fundamental Duties).

101. Sri K.Parasaran, learned Counsel appearing for the Union of India raised a preliminary objection to the consideration of this question at all. According to him, this question does not arise at present inasmuch as the impugned Memorandums do not provide for reservation in the matter of promotion. They confine the reservation only to direct recruitment. Learned counsel reiterated the well-established principle of Constitutional Law that Constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case and where it is found necessary to decide them for a proper decision of the case. A large number of decisions of this Court and English courts are relied upon in support of this proposition. If for any reason this Court decides to answer the said question, says the counsel, the answer can only be one - which is already given by this Court in a number of decisions namely, Rangachari, Hiralal and Karamchari Sangh. He submits that an appointment to a post is made either by direct recruitment or by promotion or by transfer. In all these cases it is but an appointment. If so, Article 16(4) does undoubtedly take in and warrant making a provision for reservation in the matter of promotion as well. Learned counsel commended to us the further reasoning in Rangachari that adequate representation means not merely quantitative representation but also qualitative representation. He says further that adequacy in representation does not mean representation at the lowest level alone but at all levels in the administration. Regarding the Constituent Assembly debates, his submission is that those debates do not indicate that the said provision was not supposed to apply to promotions. In such a situation, it is argued, plain words of the Constitution should be given their due meaning and that there is no warrant for cutting down their ambit on the basis of certain suppositions with respect to interpretation of Clauses (1), (2) and (4). This is also the contention of the other counsel for respondents.

102. With respect to the preliminary objection of Sri Parasaran, there can hardly be any dispute about the proposition espoused by him. But it must be remembered that reference to this larger Bench was made with a view to "finally settle the legal position relating to reservations". The idea was to have a final look at the said question by a larger Bench to settle the law in an authoritative way. It is for this reason that we have been persuaded to express ourselves on this question. But before we proceed to express ourselves on the question, a few clarifications would be in order.

103. Reservation in the case of promotion is normally provided only where the promotion is by selection, i.e., on the basis of merit. For, if the promotion is on the basis of seniority, such a rule may not be called for; in such a case the position obtaining in the lower category gets reflected in the higher category (promotion category) also. Where, however, promotion is based on merit, it may happen that members of backward classes may not get selected in the same proportion as is obtaining in the lower category. With a view to ensure similar representation in the higher category also, reservation is thought of even in the matter of promotion based on selection. This is, of course, in addition to the provision for reservation at the entry (direct recruitment) level. This was the position in Rangachari. Secondly, there may be a service/class/category, to which appointment is made partly by direct recruitment and partly by promotion (i.e., promotion on the basis of merit). If no provision is made for reservation in promotions, the backward class members may not be represented in this category to the extent prescribed. We may give an illustration to explain what we are saying. Take the category of Assistant Engineers in a particular service where 50% of the

vacancies arising in a year are filled up by direct recruitment and 50% by promotion (by selection i.e., on merit basis) from among Junior Engineers. If provision for reservation is made only in the matter of direct recruitment but not in promotions, the result may be that members of backward classes (where quota, let us say, is 25%) would get in to that extent only in the 50% direct recruitment quota but may not get in to that extent in the balance 50% promotion quota. It is for this reason that reservation is thought of even in the matter of promotions, particularly where promotions are on the basis of merit. The question for our consideration, however, is whether Article 16(4) contemplates and permits reservation only in the matter of direct recruitment or whether it also warrants provision being made for reservation in the matter of promotions as well. For answering this question, it would be appropriate, in the first instance, to examine the facts of and dicta in Rangachari, Hiralal and Karamchari Sangh.

104. In Rangachari, validity of the circulars issued by the Railway administration providing for reservation in favour of Scheduled Castes/Scheduled Tribes in promotions (by selection) was questioned. The contention was that Article 16(4) does not take in or comprehend reservation in the matter of promotions as well and that it is confined to direct recruitment only. The Madras High Court agreed with this contention. It held that the word "appointments" in Clause (4) did not denote promotion and further that the word "posts" in the said clause referred to posts outside the cadre concerned. On appeal, this Court reversed by a majority of 3:2, Gajendragadkar, J. speaking for the majority enunciated certain propositions, of which the following are relevant for our discussion:

(a) matters relating to employment [in Clause (1)] must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.

(b) in regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service.

(c) The condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one.

(b) in providing for the reservation of appointments or posts under Article 16(4), the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article

335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments of posts.

105. In State of Punjab v. Hiralal, validity of an order made by the Government of Punjab providing for reservation in promotion (in addition to initial recruitment) was questioned. Though the High Court upheld the challenge, this Court (Shah, Hegde and Grover, JJ.) reversed and upheld the validity of the Government order following Rangachari.

106. Validity of a number of circulars issued by the Railway Administration was questioned in Karamchari Sangh, a petition under Article 32. The experience gained over the years disclosed that reservation of appointments/posts in favour of SC/STs, though made both at the stage of initial recruitment and promotion was not achieving the intended results, inasmuch as several posts meant for them remained unfilled by them. Accordingly, the Administration issued several circulars from time to time tending further concessions and other measures to ensure that members of these categories avail of the posts reserved for them fully. (The original circular is referred to in the judgment as Ann.-F, whose validity was upheld in Rangachari itself. The other circulars are referred to as Annexures I, H, J and K). These circulars contemplated (i) giving one grade higher to SC/ST candidates than is assignable to an employee (ii) carrying forward vacancies for a period of three years and (iii) provision for in-service training and coaching (after promotion) to raise the level of efficiency of SC/ST employees who were directed to be promoted on a temporary basis for a specified period, even if they did not obtain the requisite places. The contention of the writ petitioners was that these circulars, being inconsistent with the mandate of Article 335, are bad. Rangachari was sought to be reopened by arguing that Article 16(4) does not take in reservation in the matter of promotion. The Division Bench (Krishna Iyer, Pathak and Chinnappa Reddy, JJ.) not only refused to re-open Rangachari but also repelled the attack upon the circulars. It was held that no dilution of efficiency in administration resulted from the implementation of the circulars inasmuch as they preserved the criteria of eligibility and minimum efficiency required and also provided for in-service training and coaching to correct the deficiencies, if any. The carry forward rule was also upheld subject to the condition that the operation of the rule shall not result, in any given year, selection/appointment of Scheduled Caste/Scheduled Tribe candidates in excess of 50%.

In Comptroller and Auditor General v. K.S. Jagannathan MANU/SC/0066/1986 : [1986]2SCR17 , it was held:

It is now well settled by decisions of this Court that the reservation in favour of backward classes of citizens including the members of the Scheduled Castes and the Scheduled Tribes, as contemplated by Article 16(4) can be made not merely in respect of initial recruitment but also in respect of posts to which promotions are to be made. [See for instance: MANU/SC/0066/1970 : [1971]3SCR267 and Akhil Bhartiya Soshit Karamchari Sangh v. U.O.I. [1981] 1 S.C. 246

107. We find it difficult to agree with the view in Rangachari that Article 16(4) contemplates or permits reservation in promotions as well. It is true that the expression "appointment" takes in appointment by direct recruitment, appointment by promotion and appointment by transfer. It may

also be that Article 16(4) contemplates not merely quantitative but also qualitative support to backward class of citizens. But this question has not to be answered on a reading of Article 16(4) alone but on a combined reading of Article 16(4) and Article 335. In Rangachari this fact was acknowledged but explained away on a basis which, with great respect to the learned Judges who constituted the majority - does not appear to be acceptable. The propositions emerging from the majority opinion in Rangachari have been set out in Para 104. Under proposition (d) (as set out in para 104), the majority does say that "in providing for the reservation of appointments or posts under Article 16(4), the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably means some impairment of efficiency;" but then it explains it away by saying "but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments of posts." We see no justification to multiply 'the risk', which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream - a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-fogging and the deleterious effects of "leap-fogging" need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class-IV and Class-Ill. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation.

It is true that Rangachari has been the law for more than 30 years and that attempts to re-open the issue were repelled in Karamchari Sangh. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in Rangachari, to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle

and ought to be departed from. However, taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12-such reservations shall continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise modify or reissue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so.

A purist or a legal theoretician may find this direction a little illogical. We can only answer them in the words of Lord Roskill. In his presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject "Law Lords, Reactionaries or Reformers?", the learned Law Lord said:

Legal policy now stands enthroned and will I hope remain one of the foremost considerations governing the development by the House of Lords of the common law. What direction should this development now take? I can think of several occasions upon which we have all said to ourselves "this case requires a policy decision - what is the right policy decision?" The answer is, and I hope will hereafter be, to follow that route which is most consonant with the current needs of the society, and which will be seen to be sensible and will pragmatically thereafter be easy to apply. No doubt the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all criminal law, distasteful as it may be to some to have to acknowledge it, is a blunt instrument by means of which human beings, whether they like it or not, are governed and subject to which they are required to live, and blunt instruments are rarely perfect intellectually or otherwise. By definition they operate bluntly and not sharply.

We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. The relaxation concerned in Thomas and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in Karamchari Sangh are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be permissible to prescribe a reasonably lesser qualifying marks or evaluation for the O.B.Cs., S.Cs. and S.Ts. consistent with the efficiency of administration and the nature of duties attaching to the office concerned - in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove.

Question No. 8: Whether Reservations are anti-meritarian?

108. In Balaji and other cases, it was assumed that reservations are necessarily anti-meritarian. For example, in Janaki Prasad Parimoo it was observed, "it is implicit in the idea of reservation that a

less meritorious person be preferred to another who is more meritorious." To the same effect is the opinion of Khanna, J. in Thomas, though it is a minority opinion. Even Subba Rao, J. who did not agree with this view did recognize some force in it. In his dissenting opinion in Devadasan, While holding that there is no conflict between Article 16(4) and Article 335, he did say, "it is inevitable in the nature of reservation that there will be a lowering of standards to some extent", but, he said, on that account the provision cannot be said to be bad, inasmuch as in that case, the State had, as a matter of fact, prescribed minimum qualifications, and only those possessing such minimum qualifications were appointed. This view was, however, not accepted by Krishna Iyer, J. in Thomas. He said "efficiency means, in terms of good government, not marks in examinations only, but responsible and responsive service to the people. A chaotic genius is a grave danger to public administration. The inputs of efficiency rule include a sense of belonging and of accountability (not pejoratively used) if its composition takes in also the weaker segments of "We, the people of India". No other understanding can reconcile the claim of a radical present and the hangover of the unjust past." A similar view was expressed in Vasant Kumer by Chinnappa Reddy, J. The learned judge said "the mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after Independence, the position of the Scheduled Castes etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the district administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it."

109. It is submitted by the learned Counsel for petitioners that reservation necessarily means appointment of less meritorious persons, which in turn leads to lowering of efficiency of administration. The submission, therefore, is that reservation should be confined to a small minority of appointments/posts, - in any event, to not more than 30%, the figure referred to in the speech of Dr. Ambedkar in the Constituent Assembly. The mandate of Article 335, it is argued, implies that reservations should be so operated as not to affect the efficiency of administration. Even Article 16 and the directive of Article 46, it is said, should be read subject to the aforesaid mandate of Article 335.

110. The respondents, on the other hand, contend that the marks obtained at the examination/test/interview at the stage of entry into service is not an indicia of the inherent merit of a candidate. They rely upon the opinion of Douglas,J. in Defunis where the learned Judge illustrates the said aspect by giving example of a candidate coming from disadvantaged sections of society and yet obtaining reasonably good scores - thus manifesting his "promise and potential" - vis-a-vis a candidate from a higher strata obtaining higher scores. (His opinion is referred to in para 44). On account of the disadvantages suffered by them and the lack of opportunities, - the Respondents say - members of backward classes of citizens may not score equally with the members of socially advanced classes at the inception but in course of time, they would. It would be fallacious to presume that nature has endowed intelligence only to the members of the forward

classes. It is to be found everywhere. It only requires an opportunity to prove itself. The directive in Article 46 must be understood and implemented keeping in view these aspects, say the Respondents.

111. We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate - if it can be called that - of Article 335 is to take the claims of members of SC/ST into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of Article to say that the mandate is maintenance of efficiency of administration.) May be, efficiency, competence and merit are not synonymous concepts; May be, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with - and may, in some cases, excel members of open competitor candidates. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are anti meritian. Merit there is even among the reserved candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency alongwith others.

Having said this, we must append a note of clarification. In some cases arising under Article 15, this Court has upheld the removal of minimum qualifying marks, in the case of Scheduled Caste/Scheduled Tribe candidates, in the matter of admission to medical courses. For example, in State of M.P. v. Nivedita Jain MANU/SC/0093/1981 : [1982]1SCR759 admission to medical course was regulated by an entrance test (called Pre-Medical Test). For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For Scheduled Caste/Scheduled Tribe candidates, however, it was 40% and 30% respectively. On finding that Scheduled Cast/Schedule Tribe candidates equal to the number of the seats reserved for them did not qualify on the above standard, the Government did away with the said minimum standard altogether. The Government's action was challenged in this Court but was upheld. Since it was a case under Article 15, Article 335 had no relevance and was not applied. But in the case of Article 16, Article 335 would be relevant and any order on the lines of the order of the Government of M.P. (in Nivedita Jain) would not be permissible, being inconsistent with the efficiency of administration. To wit, in the matter of appointment of Medical Officers, the Government or the Public Service Commission cannot say that there shall be no minimum qualifying marks for Scheduled Castes/Scheduled Tribes candidates, while prescribing a minimum for others. It may be permissible for the Government to prescribe a reasonably lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes - consistent with the requirements of efficiency of administration - it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public should also be kept in mind.

112. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations. It may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialities and super-specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

As a matter of fact, the impugned Memorandum dated 13th August, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may, we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment; (3) Teaching posts of Professors - and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the Rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated 13th August, 1990 cannot be stayed or withheld.

We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, shill and excellence, some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Article 335.

We may add that we see no particular relevance of Article 38(2) in this context. Article 16(4) is also a measure to ensure equality of status besides equality of opportunity.

PART - VI

(QUESTIONS 9, 10 & 11 AND OTHER MISCELLANEOUS QUESTIONS).

Question No. 9: Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?

113. It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right

affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the Executive - a co-equal wing - in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed.

Question No. 10: Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?

114. While dealing with Question No. 3(d), we held that that exclusion of 'creamy layer' must be no the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a measure of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No. 5, we held that it is not impermissible for the State to categories backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh); both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the gold-smiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backward classes may indeed serve to help the more backward among them to get their due. But the question now is whether Clause (i) of the Office Memorandum dated 25th September, 1991 is sustainable in law. The said clause provides for a preference in favour of "poorer sections" of the backward classes over other members of the backward classes. On first impression, it may appear that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with the context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the "socially and educationally backward classes". In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as a measure of social backwardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e., 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is: what is the meaning and context of the expression 'preference'? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz., backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally - if the 'more backward' take away all the available vacancies/posts reserved for O.B.Cs., none would remain for 'backward' among the O.B.Cs. It is for this reason that we are

inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression preference in the context in which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true insertion behind the clause.

It shall be open to the Government to notify which classes among the several designated other backward classes are more backward for the purposes of this clause and the apportionment of reserved vacancies/posts among 'backward' and "more backward". On such notification the clause will become operational.

Question No. 11: Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated 25.9.1991 permissible under Article 16?

115. This clause provides for a 10% reservation (in appointments/posts) in favour of economically backward sections among the open competition (non-reserved) category. Though the criteria is not yet evolved by the Government of India, it is obvious that the basis is either the income of a person and/or the extent of property held by him. The impugned Memorandum does not say whether this classification is made under Clause (4) or Clause (1) of Article 16. Evidently, this classification among a category outside Clause (4) of Article 16 is not and cannot be related to Clause (4) of Article 16. If at all, it is relatable to Clause (1). Even so, we find it difficult to sustain. Reservation of 10% of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of Livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by Clause (1) of Article 16. On this ground alone, the said clause in the Office Memorandum dated 25.5.1991 fails and is accordingly declared as such.

THE CONCEPT OF POSITIVE ACTION AND POSITIVE DISCRIMINATION

116. Dr. Rajiv Dhawan describes Article 15(4) as a provision envisaging programmes of positive action and Article 16(4) as a provision warranting programmes of positive discrimination. We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservations in educational institutions and other walks of life can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4). If so, it would not be correct to confine Article 15(4) to programmes of positive action alone. Article 15(4) is wider than Article 16(4) inasmuch as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs., Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts. But it may not be entirely right to say that Article 15(4) is a provision envisaging programmes of positive action. Indeed, even programmes of positive action may sometimes involve a degree of discrimination. For example, if a special

residential school is established for Scheduled Tribes or Scheduled Castes at State expense, it is a discrimination against other students, upon whose education a far lesser amount is being spent by the State. Or for that matter, take the very American cases - Fullilove or Metro Broadcasting Can it be said that they do not involve any discrimination? They do. It is another matter that such discrimination is not unconstitutional for the reason that it is designed to achieve an important governmental objective.

DESIRABILITY OF A PERMANENT STATUTORY BODY TO EXAMINE COMPLAINTS OF OVER INCLUSION/UNDER INCLUSION.

117. We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even it any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquirey. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under Clause (4) of Article 16 itself - or under Article 16(4) read with Article 340 - as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of O.B.Cs.

As suggested by Chandrachud, CJ. in Vasant Kumar, there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be.

SHOULD THE MATTER GO BACK TO Constitution BENCH TO GO INTO THE DEFECTS OF THE MANDAL COMMISSION REPORT.

118. Now that we have answered all the questions raised for our consideration, question new arises, whether in view of the answers given and directions being given by us, is it necessary to send back the matter to the Five-Judge Bench to consider whether the investigation and survey done, and conclusions arrived at, by the Mandal Commission are contrary to law and if so, whether the impugned Office Memorandums, based as they are on the report of the said Commission, can be sustained? We think not. This is not a case where the Five-Judge Bench framed certain questions and referred them to this Bench. All the matters as such were placed before this Bench for disposal. During the course of hearing, however, when some counsel wanted to take us into details of castes/groups/classes which, according to them, have been wrongly included or excluded, as the

case may be, we refused to go into those details saying that those details can be gone into before the Five-Judge Bench later. Otherwise, we heard the counsel fully on the alleged illegalities in the approach and methodology adopted by the Commission. The written arguments bear them out. We shall notice the criticism first and then answer the question posed at the inception of this para.

118A. The first and foremost criticism levelled against the approach and the procedure adopted by Mandal Commission in that the Mandal Commission has adopted caste and caste alone as the basis of its approach throughout. On this count alone, it is argued, the entire report of the Commission is vitiated. It is pointed out that in its very first letter dated 25th April, 1979 (Appendix VII at page 91-Vol. 2) addressed to all the Ministries and Departments of the Central Government, the Commission has prescribed the following test for determining the socially and educationally backward classes:

(a) In respect of employees belonging to the Hindu communities

(i) an employee will be deemed to be socially backward if he does not belong to any of the three twice-born (Dvij) 'Varnas' i.e., he is neither a Brahmin, nor a Kshatriya/nor a Vaishya; and

(ii) he will be deemed to be educationally backward if neither his father nor his grant father has studied beyond the primary level.

(b) Regarding the non-Hindu Communities

(i) an employee will be deemed to be socially backward if either

(1) he is a convert from those Hindu communities which have been defined as socially backward as per para 4(a)(i) above, or

(2) in case he is not such a convert, his parental income is below the prevalent poverty line, i.e., Rs. 71 per head per month.

(ii) he will be deemed to be educationally backward if neither his father nor his grand father had studied beyond the primary level.

Serious objection is taken to the above criteria. Treating all the Hindus not belonging to three upper castes as socially and educationally backward classes, it is submitted, is faulty to the core. In the case of non-Hindus, the prescription of income limit is said to be arbitrary. The criteria for identifying backward classes must be uniform for the entire population; it cannot vary from religion to religion. This shows, says the counsel, the impropriety and impermissibility of adopting the caste as the basis of identification, since castes exist only in the Hindu religion and not in others. On the basis of the statements made in Chapters IV and V, it is submitted that the Commission was obsessed by caste and was blind to all other determinants. It is also pointed out that the Survey done by the Commission is cursory, totally inadequate and faulty. According to the petitioners, the survey must be an exhaustive one like the one done by Venkataswamy Commission in Karnataka, which also forms the basis of Justice Chinnappa Reddy Commission Report. Carrying out the Survey to cover merely two villages and one urban block in each District

is not likely to disclose a true picture since it does not represent survey of even one percent of the population. Objection is also taken to use of personal knowledge and also to reliance upon lists of backward classes prepared by State Governments. It is repeatedly urged that the survey done by the Commission cannot be called a scientific one, which has led to discovery of as many as 3,743 castes and their identification as socially and educationally backward classes. This is a steep increase over Kaka Kalelkar Commission, according to which, the number of S.E.B.Cs. was only 2,733. It is pointed out further that certain castes which obtained less than 11 points on being tested against the criteria evolved by the Commission are included among the backward classes. Conversely, certain castes which obtained 11 or more points are yet excluded from the list of backward classes. It is urged that the caste based approach adopted by the Commission has practically divided the nation into a forward section and a backward section. If Scheduled Castes and Scheduled Tribes are also added to the Other Backward Classes, more than 81 per cent of the population gets designated as backward. But for the decision in Balaji, it is submitted, the Commission would certainly have recommended reservation of 52 per cent of the appointments/posts in favour of the backward classes. The Commission was actuated by malice towards upper castes and has submitted an unbalanced, unjust and unconstitutional report, it is argued.

Respondent's counsel, on the other hand, have refuted each and every contention of the petitioners. According to them, the criteria evolved, the methodology adopted, identification made and lists prepared are all perfectly valid and legal. The Union of India, while justifying the Report, has taken the stand that even if there are any errors or inadequacies in the work and report of the Commission, it is no ground for throwing out the report altogether, more particularly when the Government of India has taken care by 'marrying' the Mandal lists with the State lists. If any errors are brought to the notice of the Government, Sri Parasaran says, the Government will certainly look into them and rectify them, if satisfied about the error.

119. Before we decide to answer the question, it is necessary to point out that each and every defect, if any, in the working and Report of the Mandal Commission does not automatically vitiate the impugned Office Memorandums. It has to be shown further that that particular defect has crept into the Office Memorandum as well. In addition to the above, the following factors must also be kept in mind:

(a) The Mandal Commission Report has not been accepted by the Government of India in its fullness, nor has the Government accepted the list of Other Backward Classes Prepared by it in its entirety. What is now in issue is not the validity of the Report but the validity of the impugned Office Memorandums issued on the basis of the Report. The First Memorandum expressly directs that only those classes will be treated as backward classes for the purposes of Article 16(4) as are common to both the Mandal List and the respective State List. (It may be remembered that the Mandal Commission has prepared the lists of Other Backward Classes State-wise). Almost every caste, community and occupational group found in the State lists is also found in the concerned State list prepared by Mandal Commission; Mandal lists contain many more castes/occupational groups than the respective State lists. (It should indeed be rare that a particular caste/group/class is included in the State list and is not included in the Mandal list relating to that State. In such a case, of course, such caste/group/class would not be treated as an O.B.C. under the Office Memorandum dated 13th August, 1990). In such a situtation, what the Office Memorandum dated

13th August, 1990 does in effect is to enforce the respective state lists. In other words, the Government of India has, for all practical purposes, adopted the respective State lists, as they obtained on 13th August, 1990. In this sense, the lists prepared by Mandal have no real significance at present. The State lists were prepared both for the purposes of Article 16(4) as well as Article 15(4). The following particulars furnished by the Union of India do establish that these State lists have been prepared after due enquiry and investigation and have stood the test of time and judicial scrutiny:

Basis of identification of SEBCs/OBCs in the States covered by O.M. of 13.8.1990.

S.No.	Name of States	Whether State's list is based on report of Commission/ Committee	Status
1.	2.	3.	4.
1.	Andhra Pradesh	Reports of the Commission headed by Shri K. M. Anantharaman and Shri Muralidhara Rao (June, 1970 and August, 1982 respectively).	State's G.O. based on the report of the Anantharam Commission was upheld by the Supreme Court in Balaram case (AIR 1972 SC 1375). The modified list of OBCs based on the report of Muralidhara Rao Commission was upheld by the A.P. High Court but the increased quantum of reservation from 25% to 44% was struck down (Judgment of 5-9-1986).
2.	Bihar	Commission set up in 1971 under the Chairmanship of Sri Mungeri Lal.	Not challenged.
3.	Gujarat	Commission headed by Shri A. R. Bakshi, Retd. High Court Judge (Report of Feb., 1976).	
4.	Goa	No Commission/ Committee State Government have notified 4 communities as OBC on their own.	The list was challenged in the High Court in 1986 for quashing the G.O. and instead declare all the 19 communities recommended by the Mandal Commission as OBCs. The High Court rejected the petitioner's claim on 10-3-88. The matter is now before the Supreme Court through SLP No. 9813 of 1988.
5.	Haryana	Committees of 1951 and 1965. (In 1990 Gurnam Singh Commission was also set up and its report accepted by State Government).	
6.	Himachal Pradesh	Based on the list of OBCs declared by the erstwhile State of Punjab for the areas merged in the State of Himachal Pradesh in November, 1966. The list is now extended to the entire State.	Not challenged
7.	Karnataka	Commission headed by Shri L. G. Havanuri (Report ofNov. 75)	The Karnataka High Court struck down the inclusion of certain communities in the list of SEBCs. The matter was then taken to the Supreme Court in the Vasanth Kumar's case. (High Court judgment was prior to Mandal report.)
8.	Kerala	(i) Commission headed by Shri G. Kumara Pillai set up in 1964. (ii) Commission headed by Shri N. P. Damodaran set up in 1967.	The Kerala Govt. vide communication dt. 8-2-91 has intimated that the list of OBCs has not been challenged.
9.	Madhya Pradesh	Mahajan Commission (report of Dec. 1983) (when Mandal was working, no State list)	List stayed by M.P. High Court.
10.	Maharashtra	Committee headed by Shri B. D. Deshmukh (report of Jan. 1964)	Not challenged
11.	Punjab	Committees set up in 1951 and 1965. The latter Committee was headed by Shri Brish Bhan.	Not challenged
12.	Tamil Nadu	(i) Commission headed by ShriA. N. Sattanathan set up in 1969. (ii) Commission headed by Shri J. A. Ambasankar (report of Feb. 1985)	The revised list prepared by the Ambasankar Commission has been challenged in the
13.	Uttar Pradesh	Commission headed by Shri Chhedi Lal Sathi (Report of 1977).	Supreme Court vide WP No. 1 of 1987 which is pending Status report not received from State Government.

Even if in one or two cases (e.g., Goa), the list is prepared without appointing a Commission, it cannot be said to be bad on that account. The Government, which drew up the list, must be presumed to be aware of the conditions obtaining in their State/area. Unless so held by any competent court - or the permanent mechanism (in the nature of a Commission) directed to be created herewith holds otherwise - the lists must be deemed to be valid and enforceable.

At the same time, we think it necessary to make the following clarification: It is true that the Government of India has adopted the State lists obtaining as on 13th August, 1990 for its own purposes but that does not mean that those lists are meant to be sacrosanct and unalterable. There may be cases where commissions appointees by the State Government may have, in their reports, recommended modification of such lists by deletion or addition of certain castes, communities and classes. Wherever such commission reports are available, the State Government is bound to look into them and take action on that basis with reasonable promptitude. If the State Government effects any modification or alteration by way of deletions or additions, the same shall be intimated to the Government of India forthwith which shall take appropriate action on that basis and make necessary changes in its own list relating to that State. Further, it shall be equally open to, indeed the duty of, the Government of India - since it has adopted the existing State lists - to look into the reports of such commission, if any, and pass its own orders, independent of any action by the State Government, thereon with reasonable promptitude by way of modification or alteration. It shall be open to the Government of India to make such modification/alteration in the lists adopted by way of additions or deletions, as it thinks appropriate on the basis of the Reports of the Commission(s). This direction, in our opinion, safe guards against perpetuation of any errors in the State lists and ensures rectification of those lists with reasonable promptitude on the basis of the reports of the Commission already submitted, if any. This course may be adopted de hors the reference to or advice of the permanent mechanism (by way of Commission) which we have directed to be created at both central and state level and with respect to which we have made appropriate directions elsewhere.

(b) Strictly speaking, appointment of a Commission under Article 340 is not necessary to identify the other backward classes. Article 340 does not say so. According to it, the Commission is to be constituted "to investigate the conditions of socially and educationally backward classes...and the difficulties under which they labour and to make recommendations as to the steps that should be taken of the Union or any State to remove such difficulties...." The Government could have, even without appointing a Commission, specified the O.B.Cs., on the basis of such material as it may have had before it (e.g., the lists prepared by various State Governments) and than appointed the Commission to investigate their conditions and to make appropriate recommendations. It is true that Mandal Commission was constituted "to determine the criteria for defining the socially and educationaly backward classes" and the Commission did determine the same. Even so, it is necessary to keep the above constitutional position in mind, - more particularly in view of the veto given to State lists over the Mandal lists as explained in the preceding sub-para. The criteria evolved by Mandal Commission for defining/identifying the Other Backward Classes cannot be said to be irrelevant. May be there are certain errors in actual exercise of identification, in the nature of over-inclusion or under- inclusion, as the case may be. But in an exercise of such magnitude and complexity, such errors are not uncommon. These errors cannot be made a basis for rejecting either the relevance of the criteria evolved by the Commission or the entire exercise of identification, It is one thing to say that these errors must be rectified by the Government of

India by evolving an appropriate mechanism and an altogether different thing to say that on that account, the entire exercise becomes futile. There can never be a perfect report. In human affairs, such as this, perfection is only an ideal - not an attainable goal. More than forty years have passed by. So far, no reservations could be made in favour of O.B.Cs. for one or the other reason in Central services though in many States, such reservations are in force. Reservations in favour of O.B.Cs. are in force in the States of Kerala, Tamil Nadu, Karnataka, Andhra Pradesh, Maharashtra, Orissa, Bihar, Gujarat, Goa, Uttar Pradesh, Punjab, Haryana and Himachal Pradesh among others. In Madhya Pradesh, a list of O.B.Cs. was prepared on the basis of Mahajan Commission Report but it appears to have been stayed by the High Court.

(c) The direction made herein for Constitution of a permanent Commission to examine complaints of over-inclusion or under-inclusion obviates the need of any such scrutiny by this Court. We have directed Constitution of such Commission both at Central and State level. Persons aggrieved can always approach them for appropriate redress. Such Commission, which will have the power to receive evidence and enquire into disputed questions of fact, can more appropriately decide such complaints than this Court under Article 32.

120. In this view of the matter, it is unnecessary for us to express any opinion on the correctness or adequacy of the exercise done by the Mandal Commission. (If and when the Government of India notifies any caste/community/group/class from out of the Mandal list, which caste etc., is not included in the appropriate State list, would the said question fall for consideration. It is then that it would be necessary to deal with the criticism against the Mandal Commission). For the same reason, it is unnecessary to refer or deal with the arguments of the counsel for Union of India and the Respondents in justification of the Mandal Commission Report.

Before parting with this aspect, we must say that identifying the impugned Office Memorandums with the Mandal Commission report is basically erroneous. Such an identification is bound to lead one into confusion. He would be missing the wood for the trees. Instead of concentrating on the real issues, he would deviate into irrelevance and imbalance. Mandal Commission report may have led to the passing of the impugned Office Memorandum dated 13th August, 1990; it may have acted as the catalytic agent in bringing into existence the reservation in favour of O.B.Cs. (loosely referred to as SEBCs. in the O.M.) but the Office Memorandum dated 13th August, 1990 doesn't incorporate the Mandal lists of O.B.Cs. as such. It incorporates, in truth and effect, the State lists as explained hereinabove. In a social measure like the impugned one, the court must give due regard to the judgment of the Executive, a co-equal wing of the State and approach the measure in the spirit in which it is conceived. This very idea is put forcefully by Joseph Raz (Fellow of Balliol College, Oxford) in his article "The Rule of Law and its virtue" (1977) 93 Law Quarterly Review 195 at 211 in the following words:

... one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.

A note of clarification may be appended at this stage. We are told that in the State of Madhya Pradesh a list of Other Backward Classes has been prepared but it has been stayed by the High

Court. The said stay, in our opinion, does not affect the operation of the Office Memorandum dated 13th August, 1992 even with respect to the other backward classes in Madhya Pradesh. What the said Office Memorandum does is to import and adopt the said list for its own purposes i.e., for the purpose of making reservations in central services in favour of other backward classes. In such a situation, the stay of the operation of the said list by the State of Madhya Pradesh does have no relevance to the importation and adoption of the said list into Office Memorandum dated 13th August, 1990.

PART - VII

121. We may summarise our answers to the various questions dealt with and answered hereinabove:

(1)(a) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Para 55)

(b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Para 56)

(2)(a) Clause (4) of Article 16 is not an exception to Clause (1). It is an instance and an illustration of the classification inherent in Clause (1). (Para 57)

(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 58)

(c) Reservations can also be provided under Clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under Clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' - as explained in this Judgment. (Para 60)

(3)(a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectives for the purposes of Article 16(4). (Paras 61 to 82)

(b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with the occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges

is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (Paras 83 and 84)

(c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (Paras 87 and 88)

(d) 'Creamy layer' can be, and must be excluded. (Para 86)

(e) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context. (Para 85)

(f) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority. (Para 89)

(4)(a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria. (Para 90)

(b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised. (Para 91).

(5) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories. (Para 92)

(6)(a)&(b) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main-stream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

(c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be. (Para 96)

(d) Devadasan was wrongly decided and is accordingly over-ruled to the extent it is inconsistent with this judgment. (Paras 97 to 99)

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. If is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of backward class of citizens in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so. (Ahmadi, J. expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extent concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. (Paras 100 to 107).

(8) While the rule of reservation cannot be called anti-meritarion, there are certain services and posts to which it may not be advisable to apply the rule of reservation. (Paras 108 to 112)

(9) The distinction made in the impugned Office Memorandum dated 25th September, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as other Backward classes, as explained in para 114 of this Judgment (Para 114). (11) The reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservation' made in the impugned office memorandum dated 25.9.1991 is constitutionally invalid and is accordingly struck down. (Para 115)

(12) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4). (Para 113)

(13) The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism - in the nature of a Commission - for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of O.B.Cs. and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor. (Para 117)

(14) In view of the answers given by us herein and the directions issued herewith, it is not necessary to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission. It is equally unnecessary to send the matters back to the Constitution Bench of Five Judges. (Paras 118 to 119) 122. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 26. Our answers question-wise are:

(1) Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under Clause (1) of Article 16.

(2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', S.Cs., S.Ts. and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are inter-twined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to Article 46 do include S.E.B.Cs. referred to in Article 340 and covered by Article 16(4).

(3) Even under Article 16(1), reservations cannot bo made on the basis of economic criteria alone.

(4) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main-stream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate.

To the extent, Devadasan is inconsistent herewith, it is over-ruled.

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay, necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement.

(6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature.

(7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4). It is not possible or necessary to say more than this under this question.

(8) Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so.

(As pointed out at the end of the paragraph 101 of this judgment, Ahmadi, J. having upheld the preliminary objection raised by Sri Parasaran and others has not associated himself with the discussion on the question whether reservation in promotion is permissible. Therefore, the views expressed in this judgment on the said point are not the views of Ahmadi. J.)

THE FOLLOWING DIRECTIONS ARE GIVEN TO THE GOVERNMENT OF INDIA. THE STATE GOVTS. AND THE ADMINISTRATION OF UNION TERRITORIES.

123. (A). The Government of India, each of the State Governments and the Administrations of Union Territories shall, within four months from today, constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government.

(B) Within four months from today the Government of India shall specify the bases, applying the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections ('creamy layer') from 'Other Backward Classes'. The implementation of the impugned O.M. dated 13th September, 1990 shall be subject to exclusion of such socially advanced persons ('creamy layer').

This direction shall not however apply to States where the reservations in favour of backward classes are already in operation. They can continue to operate them. Such States shall however evolve the said criteria within six months from today and apply the same to exclude the socially advanced persons/sections from the designated 'Other Backward Classes.

(C) It is clarified and directed that any and all objections to the criteria that may be evolved by the Government of India and the State Governments in pursuance of the direction contained in Clause (B) of Para 123 as well as to the classification among backward classes and equitable distribution of the benefits of reservations among them that may be made in terms of and as contemplated by Clause (1) of the Office Memorandum dated 25th September 1991, as explained herein, shall be preferred only before this Court and not before or in any other High Court or other Court or Tribunal. Similarly, and petition or proceeding questioning the validity, operation or

implementation of the two impugned Office Memorandums, on any grounds whatsoever, shall be be filed or instituted only before this Court and not before any High Court or other Court or Tribunal.

124. The Office Memoranda dated August 13, 1990 impugned in these writ petitions is accordingly held valid and enforceable subject to the exclusion of the socially advanced members/sections from the notified 'Other Backward Classes', as explained in para 123(B).

Clause (i) of the Office Memorandum dated September 25, 1991 requires - to uphold its validity - to be read, interpreted and understood as intending a distinction between backward and more backward classes on the basis of degrees of social backwardness and a rational and equitable distribution of the benefits of the reservations amongst them. To be valid, the said clause will have to be read, understood and implemented accordingly.

Clause (ii) of the Office Memorandum dated September 25, 1991 is held invalid and inoperative.

The writ Petitions and Transferred Cases are disposed of in the light of the principles, directions, clarifications and orders contained in this Judgment.

No costs.

S.R. Pandian, J.

125. Equality of status and of opportunity...' the rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in U.S.A., the 'Rights of Man' in the French Constitution of 1971 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' (in Part HI) through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional provisions dealing with equal distribution of justice in the social, political and economic spheres.

126. Though forty-five years from the commencement of the Indian independence after the end of British paramountcy and forty-two years from the advent of our Constitution have marched on, the tormenting enigma that often nags the people of India is whether the principle of 'equality of status and of opportunity' to be equally provided to all the citizens of our country from cradle to grave is satisfactorily consummated and whether the clarion of 'equality of opportunity in matters of public employment' enshrined in Article 16(4) of the Constitution of India has been called into action? With a broken heart one has to answer these questions in the negative.

127. The founding fathers of our Constitution have designedly couched Articles 14, 15 and 16 in comprehensive phraseology so that the frail and emaciated section of the people living in proverty,

rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression should not be denied of equality before the law and equal protection of the laws and equal opportunity in the matters of public employment or subjected to any prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

128. To achieve the above objectives, the Government have enacted innumerable social welfare legislations and geared up social reformative measures for uplifting the social and economic development of the disadvantaged section of people. True, a rapid societal transformation and profusion of other progressive changes are taking place, yet a major section of the people living below the poverty line and suffering from social ostracism still stand far behind and lack in every respect to keep pace with the advanced section of the people. The undignified social status and sub-human living conditions leave an indelible impression that their forlorn hopes for equality in every sphere of life are only a myth rather than a reality. It is verily believed - rightly too - that the one and only peerless way and indeed a most important and promising way to achieve the equal status and equal opportunity is only by means of constitutional justice so that all the citizens of this country irrespective of their religion, race, caste, sex, place of birth or any of them may achieve the goal of an egalitarian society.

129. This Court has laid down a series of landmark judgments in relation to social justice by interpreting the constitutional provisions upholding the cherished values of the Constitution and thereby often has shaped the course of our national life. Notwithstanding a catena of expository decisions with interpretive semantics, the naked truth is that no streak of light or no ray of hope of attaining the equality of status and equality of opportunity is visible.

130. Confining to the issue involved in this case as regards the equal opportunity in the matters of public employment, I venture to articulate without any reservation, even on the possibility of any refutation that it is highly deplorable and heart-rending to note that the constitutional provision, namely, namely, Clause (4) of Article 16 proclaiming a "Fundamental Right" enacted about 42 years ago for providing equality of opportunity in matters of public employment to people belonging to any backward class has still not been given effect to in services under the Union of India and many more States. A number of Backward Classes Commission have been appointed in some of the States, the recommendations of which have been repeatedly subjected to judicial scrutiny. Though the President of India appointed the second Backward Classes Commission under the chairmanship of Shri B.P. Mandal as far back as 1at January, 1979 and the Report was submitted in December, 1980, no effective steps were taken for its implementation till the issuance of the two impugned OMs. Having regard to this appalling situation and the pathetic condition of the backward classes, for the first time the Union of India has issued the Office Memorandum (hereinafter called the 'O.M.') in August 1991 and thereafter an amended O.M. in September 1991 on the basis of the recommendations of the Mandal Commission.

131. Immediately after the announcement of the acceptance of the Report of the Mandal Commission, as pointed out in Writ Petition No. 930/90 and the Annexures I & II enclosed thereto, there were unabated pro as well as anti reservation agitations and violent societal disturbances virtually paralysing the normal life. It was unfortunate and painful to note that some youths who are intransigent to recognise the doctrine of equality in matters of public employment and who

under the mistaken impression that 'wrinkles and gray hairs' could not do any thing in this matter, actively participated in the agitation. Similarly, another section of people suffering from a fear psychosis that the Mandal recommendations may not at all be implemented entered the fray of the agitation. Thus, both the pro and anti-reservationists or being detonated and inflamed by the ruffled feelings that their future in public employment is bleak raised a number of gnawing doubts which in turn sensationalised the issue. Their pent up fury led to an orgy of violence resulting in loss of innocent life and damaged the public properties. It is heart-rending that some youths - particularly students - in their prime of life went to the extent of even self-immolating themselves. No denying the fact that the horrible, spine - chilling and jarring piece of information that some youths whose feelings ran high had put an end to their lives in tragic and pathetic manner had really caused a tremor in Indian society. My heart bleeds for them.

132. In fact, a three-Judges Bench of this Court comprised of Ranganath Misra, CJ and K.N. Singh and M.H. Kania, JJ (as the learned Chief Justices then were) taking note of the widespread violence, by their order dated 21st September 1990 made the following appeal to the general public and particularly the student community:

After we made order on 11th September, 1990, we had appealed to counsel and those who were in the Court room to take note of the fact that the dispute has now come to the apex court and it is necessary that parties and the people who were agitated over this question should maintain a disciplined posture and create an atmosphere where the question can be dispassionately decided by this Court.... There is no justification to be panicky over any situation and if any one's rights are prejudiced in any manner, certainly relief would be available at the appropriate stage and nothing can happen in between which would deter this Court from exercising its power in an effective manner.

133. Be that as it may, sitting as a Judge one cannot be swayed either way while interpreting the Constitutional provisions pertaining to the issues under controversy by the mere reflexes of the opinion of any section of the people or by the turbulence created in the society or by the emotions of the day. Because nothing inflicts a deeper wound on our Constitution than in interpreting it running berserk regardless of human rights and dignity.

134. We are very much alive to the fact that the issues with which we are now facing are hypersensitive, highly explosive and extremely delicate. Therefore, the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered and enforced. At the same time, one has to be very cautious and careful in approaching the issues in a very pragmatic and realistic manner.

135. Part-III dealing with 'Fundamental Rights' and Part-IV dealing with 'Directive Principles of State Policy' which represent the core of the Indian Constitutional philosophy envisage the methodology for removal of historic injustice and inequalities - either inherited or artificially created - and social and economic disparity and ultimately for achieving an egalitarian society in terms of the basic structure of our Constitution as spelt out by the preamble.

136. Though all men and women created by the Almighty, whether orthodox or heterodox; whether theist or atheist; whether born in the highest class or lowest class; whether belong to 'A' religion or 'B' religion are biologically same, having same purity of blood. In a Hindu Society they are divided into a number of distinct sections and sub-sections known as castes and sub-castes. The moment a child comes out of the mother's womb in a Hindu family and takes its first breath and even before its umbilical cord is cut off, the innocent child is branded, stigmatized and put in a separate slot according to the caste of its parents despite the fact that the birth of the child in the particular slot is not by choice but by chance.

137. The concept of inequality is unknown in the Kingdom of God who creates all beings equal, but the "created" of the creator has created the artificial inequality in the name of casteism with selfish motive and vested interest.

138. Swami Vivekananda in one of his letters addressed to his disciples in Madras dated 24.1.1894 has stated thus:

Caste or no caste, creed or no creed,... or class, or caste, or nation, or institution which bars the power of free thought and action of an individual - even so long as that power does not injure others - is devilish and must go down.

(Vide 'The Complete Works of Swami Vivekananda, Vol. V. page 29')

139. A Biblical verse in New Testament says "He denied none that come unto Han, black and white".

140. Sura 10 Verse No. 44 of Holy Quran reads:

Verily God will not deal unjustly with man in aught; it is man that wrongs his own soul.

141. The Hindus who form the majority, in our country, are divided into 4 Varnas - namely, Brahmins, Kshatriyas, Vaishyas (who are all twice born) and lastly Shudras which Varnas are having a four tier demarcated hierarchical caste system based on religious tenets, believed to be of divine origin or divinely ordained, otherwise called the Hindu Varnasharma Dharma. Beyond the 4 Varnas Hinduism recognises a community, by name Panchma (untouchables) though Shudras are recognised as being the lowest rung of the hierarchical race. This system not only creates extreme forms of caste and gender prejudices, injustices, inequalities but also divides the society into privileged and disabled, revered and despised and so on. The perpetuation of casteism, in the words of Swami Vivekananda "continues social tyranny of ages". The caste system has been religiously preserved in many ways including by the judicial verdicts, pronounced according to the traditional Hindu Law.

142. On account of the caste system and the consequent inequalities prevailing in Hinduism between person to person on the basis of Varnasharma Dharma new religions such as Buddhism and Jainism came into existence on the soil of this land. Many humanistic thinkers and farseeing revolutionary leaders who stood foursquare by the down - trodden section of the Backward Classes aroused the consciousness of the backward class to fight for justice and join the wider struggle for

social equality and propagated various reforms. It was their campaign of waging an unending war against social injustice which created a new awareness. The sustained and strenuous efforts of those leaders in that pursuit have been responsible for bringing many new social reforms.

143. Recognizing and recalling the self-less and dedicated social service carried on by those great leaders from their birth to the last breath; the then Prime Minister while making his clarificatory statement regarding the implementation of the Mandal Commission's Report in the Rajya Sabha on the 9th August 1990 paid the tributes in the following words:

In fact this is the realisation of the dream of BHARAT RATNA Dr. B.R. AMBEDKAR, of the great PERIYAR RAMASWAMY and Dr. RAM MANOHAR LOHIA.

144. Harkingback, it is for the first time that the controversial issue as regards the equality of opportunity in matters of public employment as contemplated under Article 16(4) has come up for deliberation before a nine-Judges Bench, on being referred to by a five-Judges Bench.

145. There are various Constitutional provisions such as Articles 14, 15, 16, 17, 38, 46, 332, 335, 338 and 340 which are designed to redress the centuries old grievances of the scheduled castes and scheduled tribes as well as the backward classes and which have come for judicial interpretation on and off. It is not merely a part of the Constitution but also a national commitment.

146. This Court which stands as a sentinel on the quiver over the rights of people of this country has to interpret the Constitution in its true spirit with insight into social values and suppleness of the adoption to the changing social needs upholding the basic structure of the Constitution for securing social justice, economic justice and political justice as well as equality of status and equality of opportunity.

147. The very blood and soul of our Constitutional scheme are to achieve the objectives of our Constitution as contained in the preamble which is part of our Constitution as declared by this Court in Kesvananda Bharti v. Kerala, 1993 (Suppl.) SCR 1. So it is incumbent to lift the veil and see the notable aspirations of the Constitution.

148. No one can be permitted to invoke the Constitution either as a sword for an offence or as a shield for anticipatory defence, in the sence that no one under the guise of interpreting the Constitution can cause irreversible injustice and irredeemable inequalities to any section of the people or can protect those unethically claiming unquestionable dynastic monopoly over the Constitutional benefits.

149. Therefore, the Judges who are entrusted with the task of fostering an advanced social policy in terms of the Constitutional mandates cannot afford to sit in ivory towers keeping Olympian silence unnoticed and uncaring of the storms and stresses that affect the society.

150. This Summit Court has not only to interpret the Constitution but also sometimes to articulate the Constitutional norms, serving as a publicist for reforms in the areas of the most pressing needs and directing the executive to take the needed actions. Mere verbal gymnastics or empty slogans and sermons honoured more often in rhetoric than practice are of no use.

151. It may be a journey of thousand miles in achieving the equality of status and of opportunity, yet it must begin with a single step. So let the socially backward people take their first step in that endeavour and march on and on.

152. When new societal conditions and factual situations demand the Judges to speak they, without professing the tradition of judicial lock-jaw, must speak out. So I speak.

153. For providing reservations for backward class of citizens, Scheduled Castes and Scheduled Tribes in the public educational institutions and for providing equal opportunity in the matters of public employment, some States have appointed Commissions on Backward Classes. The Central Government has also appointed two Commissions under Article 340(1) of the Constitution of India for identifying the backward class of citizens as contemplated under Article 16(4) for the purpose of making reservation of appointments or posts in the Services under Union of India. The list of Commissions appointed by the various States and the Central Government is given as under:

COMMISSIONS ON BACKWARD CLASSES

1918-1990

Andhra Pradesh	Manohar Pershad Committee (1968-69) Ananta Raman Commission (1970) Muralidhara Rao Commission (1982)

Bihar	Mungeri Lal Commission (1971-76)
Gujarat	A.R. Bakshi Commission (1972-76) Justice C.V. Rane Commission (1981-83) Justice R.C. Mankad Commission (1987)
Haryana	Gurnam Singh Commission (1990)
Jammu and Kashmir	Justice Ganjendragadkar Commission (1967-68) Justice J.N. Wazir Commission (1969) Justice Adarsh Anand Commission (1976-77)
Karnataka	Justice L.C. Miller Committee (1918-1920; Mysore) Naganna Gowda Commission (1960-61) L.G. Havnur Commission (1972-75) T. Venkataswamy Commission (1983-86) Justice Chinnappa Reddy Commission (1989-90)
Kerala	Justice C.D. Nokes Committee (1935; Travancore-Cochin) V.K.Vishvanatham Commission (1961-63) G. Kumar Pillai Commission (1964-66) N.P. Damodaran Commission (1967-70)
Maharashtra	O.H.B. Starte Committee (1928-30; Bombay Presidency) B.D. Deshmukh Committee (1961-64)
Punjab	Brish Ban Committee (1965-66)
Tamil Nadu	A.N. Sattanathan Commission (1969-70) J.M. Ambasankar Commission (1982-86)
Uttar Pradesh	Chhedi Lal Sathi Commission (1975-77)
All India	Kaka Kalelkar Commission (1953-55) B.P. Mandal Commission (1979-80)

Note : 1. Where two dates are mentioned they refer to year of appointment and year of submission. Where only one is mentioned it refers to year of submission which is also the year of appointment in some cases.

2. The three commissions of the colonial period mentioned here had an ambit wider than those groups that later came to be known as Backward Classes.

154. Second Backward Classes Commission (popularly known as Mandal Commission)

155. By a Presidential Order under Article 340 of the Constitution of India, the first Backward Class Commission known as Kaka Kalelkar's Commission was set up on January 29, 1953 and it submitted its report on March 30, 1955 listing out 2399 castes as socially and educationally backward on the basis of criteria evolved by it, but the Central Government did not accept that report and shelved it in the cold storage.

156. It was about twenty-four years after the First Backward Classes Commission submitted its Report in 1955 that the President of India pursuant to the resolution of the Parliament appointed the second Backward Classes Commission on 1st January 1979 under the Chairmanship of Shri B.P. Mandal to investigate the conditions of Socially and Educationally Backward Classes (for short 'SEBCs') within the territory of India. One of the terms of reference of the Commission was to determine the criteria for defining the SEBCs. The Commission commenced its functioning on 21st March, 1979 and completed its work on 12th December 1980, during the course of which it made an extensive tour throughout the length and breadth of India in order to collect the requisite data for its final report. The Commission submitted its report with a minute of dissent of one of its members, Shri L.R. Naik on 31st December 1980. The Commission appears to have identified as many as 3743 castes as SEBCs and made its recommendations under Chapter XIII of Volume I of its report (vide paras 13. 1 to 13.39) and finally suggested "regarding the period of operation of Commission's recommendations, the entire scheme should be reviewed after twenty years. (Vide para 13.40)

157. The entire Report comprises of fourteen Chapters of which Chapter IV deals with 'Social Backwardness and Caste', Chapter XI deals with 'Socio-Educational Field Survey and Criteria of Backwardness', Chapter XII deals with 'Identification of OBCs' and Chapter XIII gives the 'Recommendations'. After a thorough survey of the population, the Commission has arrived at the percentage of OBCs as follows:

12.22 From the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, other Backward Classes constitute nearly 52% of the Indian population.

Percentage of Distribution of India Population by Caste and Religious Groups

S.No.	Group Name	Percentage of the total population
	I, Scheduled Castes and Scheduled Tribes	
A-1	Scheduled Castes	15.05
A-2	Scheduled Tribes	7.51
	Total of 'A'	22.56
	II. Non-Hindu Communities, Religious Groups, etc.	
B-1	Muslims (other than STs)	11.19 (0.2)*
B-2	Christians (other than STs)	2.16 (0.44)*
B-3	Sikhs (other than SCs & STs)	1.67 (0.22)*
B-4	Budhists (Other than STs)	0.67 (0.03)*
B-5	Jains	0.47
	Total of 'B'	16.16
	III. Forward Hindu Castes & Communities	
C-1	Brahmins (including Bhumihars)	5.52
C-2	Rajputs	3.90
C-3	Marathas	2.21
C-4	Jats	1.00
C-5	Vaishyas-Bania etc.	1.88
C-6	Kayasthas	1.07
C-7	Other forward Hindu castes/groups	2.00
	Total of 'C'	17.58
	Total of 'A', 'B' & 'C'	56.30
	IV. Backward Hindu Castes & Communities	
D.	Remaining Hindu castes/groups which come in the category of 'Other Backward Classes'	43.70@
	V. Backward Non-Hindu Communities	
E.	52% of religious groups under Section B may also be treated as OBCs	8.40
F.	The approximate derived population of Other Backward Classes including non-Hindu Communities	52% (Aggregate of D & E, rounded)

@ This is a derived figure

* Figures in brackets give the population of S.C. & S.T. among these non-Hindu Communities.

158. On the basis of the Commission's Report - popularly known as Mandal Commission's Report - (for short 'the Report'), two office Memoranda - one dated 13.8.1990 and the other amended one dated 25.9.1991 were issued by the Government of India. We are reproducing those Memoranda hereunder for proper understanding and appreciation of the significance of these two OMs and the distinctions appearing between them:

No. 36012/31/90-Estt (SCT)
Government of India
Ministry of Personnel, Public Grievances & Pensions
(Deptt. of Personnel & Training)
OFFICE MEMORANDUM
New Delhi, the 13th August, 1990

Subject : Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in services under the Government of India.

In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on 31.12.1980.

2. Government have carefully considered the report and the recommendations of the Commission in the present context responding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows:

(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

(ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Governments' lists. A list of such castes/communities is being issued separately.

(v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.

sd/-
(Smt. Krishna Singh)
Joint Secretary to the Govt. of India

Amended Memorandum:

No. 36012/31/90-Estt. (SCT)
Government of India
Ministry of Personnel, Public Grievances & Pensions
(Deptt. of Personnel & Training)

OFFICE MEMORANDUM

New Delhi, the 25th September, 1991.

Subject : Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in service under the Government of India.

The undersigned is directed to invite the attention to O.M. of even number dated the 13th August, 1990, on the above sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservations, Government have decided to amend the said Memorandum with immediate effect as follows:-

2. (1) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

(ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

3. The O.M. of even number dated the 13th August, 1990, shall be deemed to have been amended to the extent specified above.

sd/-
(A.K. HARIT)
DEPUTY SECRETARY TO THE GOVT. OF INDIA

159. The expression deployed in both the OMs, "Socially and Educationally Backward Classes" is on the strength of the Report of the Commission, though no such expression is used in Article 16(4) whereunder the reservation of appointments or posts in favour of any backward class of citizens is to be made. This expression is used as an explanatory one to the words 'backward class' occurring in Article 16(4). Articles 16(4) and 340(1) were embodied in the Constitution even at the initial stage; but Article 15(4) containing the same expression as in Article 340(1) was subsequently added by the Constitution (First Amendment) Act of 1951 to over-ride the decision of this Court in State of Madras v. Smt. Champakam Dorairajan, MANU/SC/0007/1951 : [1951]2SCR525 .

160. Legislative History of Article 15(4) of the Constitution

161. A legislative historical event that warranted the introduction of Clause 4 to Article 15 may be briefly retraced.

162. The Government of Tamil Nadu issued a Communal G.O. in 1927 making compartmental reservation of posts for various communities. Subsequently the G.O. was revised. In 1950 one Smt. Champakam Dorairajan who intended to join the Medical College, on enquiries came to know that in respect of admissions into the Government Medical College the authorities were enforcing and observing an order of the Government, namely, notification G.O.No. 1254 Education dated 17.5.1948 commonly known as Communal G.O. which restricted the number of seats in Government Colleges for certain castes. It appeared that the proportion fixed in the old Communal G.O. had been adhered to even after commencement of the Constitution on January 26, 1950. She filed a Writ Petition on 7th June 1950 under Article 226 of the Constitution for issuance of a writ of mandamus restraining the State of Madras from enforcing the said Communal G.O. on the ground that the G.O. was sought or purported to be regulated in such a manner as to infringe the violation of the fundamental rights guaranteed under Articles 15(1) and 29(2). Similarly one Srinivasan who had applied for admission into the Government Engineering College at Guindy also filed a Writ Petition praying for a writ of mandamus for the same relief as in Champakam Dorairajan. A Full Bench of the Madras High Court heard both the Writ Petitions and allowed them (vide Smt. Champakam Dorairajan and Anr. v. State of Madras, MANU/TN/0014/1951 : AIR1951Mad120 In this connection it may be mentioned that while the Writ Petition was pending before the High Court, another revised G.O. No. 2208 dated June 16. 1950 substantially reproducing the communal proportion fixed in the old Communal G.O. came into being. The State on being aggrieved by the judgment of the Madras High Court preferred an appeal before this Court in State of Madras v. Smt. Champakam Dorairajan MANU/SC/0007/1951 : [1951]2SCR525 . A seven-Judges Bench dismissed the appeal holding that "the Communal G.O. being inconsistent with the provisions of Article 29(2) in Part III of the Constitution is void under Article 13." This judgment necessitated the introduction of a Bill called Constitution (First Amendment) Bill for over-riding the decision of this Court in Champakam's case (supra).

163. During the Parliament Debates held on 29th May 1951 Pt. Jawahar Lal Nehru, the then Prime Minister while moving the Bill to amend the Constitution stated as follows:

We have to deal with the situation where for a variety of causes for which the present generation is not to blame, the past has the responsibility, there are groups, classes, individuals, communities, if you like, who are backward. They are backward in many ways - economically, socially, educationally - sometimes they are not backward in one of these respects and yet backward in another. The fact is therefore that if we wish to encourage them in regard to these matters, we have to do something special for them....

Therefore one has to keep a balance between the existing fact as we find it and the objective and ideal that we aim at.

164. Thereafter, the Bill was passed and Clause (4) to Article 15 was added by the Constitution (First Amendment) Act. The object of the newly introduced Clause (4) to Article 15 was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 and to make it constitutionally valid for the State to reserve seats for backward class of citizens, Scheduled Castes and Scheduled Tribes in the public educational institutions as well as to make other special provisions as may be necessary for their advancement.

165. Scope of Article 16(4) of the Constitution

166. Article 16(4) expressly permits the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State are not adequately represented in the services under the State. As the power conferred on the State under this Clause 4 is to be exercised only if 'in the opinion of the State' that there is no adequate representation in the services under the State, a vital question arose for consideration whether the issue of determination by the State as to whether a particular class of citizens is backward or not is a justiciable one? This question was answered by the Constitution Bench of this Court in Trilok Nath Tiku and Anr. v. State of Jammu & Kashmir and Ors. MANU/SC/0234/1966 : (1967)IILLJ271SC holding thus:

While the State has necessarily to ascertain whether a particular class of citizens are backward or not, having regard to acceptable criteria, it is not the final word on the question; it is a justiciable issue. While ordinarily a Court may accept the decision of the State in that regard, it is open to be canvassed if that decision is based on irrelevant considerations. The power under Clause (4) is also conditioned by the fact that in regard to any backward classes of citizens there is no adequate representation in the services under the State. The opinion of the State in this regard may ordinarily be accepted as final, except when it is established that there is an abuse of power.

167. The words "backward class of citizens" occurring in Article 16(4) are neither defined

nor explained in the Constitution though the same words occurring in Article 15(4) are followed by a qualifying phrase. "Socially and Educationally".

168. Though initially, Article 10(3) of the draft Constitution did not contain the qualifying word 'backward' preceding the words 'class of citizens' the said qualifying word was subsequently inserted on the suggestion of the Drafting Committee. Strong objection was taken for insertion of the word 'backward' and more so for the introduction of Article 10(3) of the draft Constitution. Amendments were moved by one section of the members of the Constituent Assembly for complete deletion of Clause (3) and by another section for the omission of the word 'backward'. The discussion and debate took place at length for and against the introduction of Clause (3) as well as for the insertion of the word 'backward'. Before the motions for amendments were put on vote, Dr. B.R. Ambedkar in answering the scathing criticism made in the course of the debate and explaining the significance of Clause (3) of Article 10 with the qualifying word 'backward' and insisting the sustenance of the said clause emphatically expressed his views as follows:

I am not prepared to say that this Constitution will not give rise to questions which will involve legal interpretation or judicial interpretation. In fact, I would like to ask Mr. Krishanamachari if he can point out to me any instance of any Constitution in the world which has not been a paradise for lawyers. I would particularly ask him to refer to the vast storehouse of law reports with regard to the Constitution of the United States, Canada and other countries. I am therefore not ashamed at all if this Constitution hereafter for purposes of interpretation is required to be taken to the Federal Court. That is the fate of every Constitution and every Drafting Committee. I shall therefore not labour that point at all.

169. While winding up the debate he said:

...the Drafting Committee had to produce a formula which would reconcile these three point of view, firstly, that *there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in 'so to say into the administration....*

that no better formula could be produced than the one that is embodied in Clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity has been embodied in Sub-clause (1) of Article 10. It is a generic principle....Supposing for instance, we are to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity....I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly... somebody asked me: "What is a backward community"? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. *A backward community is a community which is backward in the opinion of the Government.* My honourable Friend Mr. T.T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well

go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.

(emphasis supplied)

(Constituent Assemble Debates, Volume VII Pages 700-703)

170. After the debate, two motions were put to vote but they were negatived. The unexpurgated draft Article 10(3) corresponds to the present Article 16(4) of the Constitution. It has now become necessary for this Court to interpret and explain the words 'backward class'.

171. There is a galaxy of decisions of this Court, explaining the words 'backward class' as occurring under Article 16(4) in relation to Articles 16(1) and 16 (2) which I shall recapitulate in my endeavour to meet the arguments advanced by the learned Counsel appearing for various parties in interpreting the words 'backward class'.

172. The Government both in the earlier O.M. and the subsequent amended O.M. has used the expression 'socially and educationally backward classes' thereby qualifying the word 'backward' as 'socially and educationally backward' though in the second amended O.M., the 'economic backwardness' is alone taken as a ground for providing reservation for the economically backward section of the people not covered by the same kind of reservation meant for 'socially and educationally backward classes'.

173. The word 'backward' is very wide bringing within its fold the social backwardness, educational backwardness, economic backwardness, political backward and even physical backwardness.

174. To assimilate the expression 'class' in its legal sense, the said expression should be strictly construed and tested on the principles of agreed criteria which throw a flood light on its true meaning. In interpreting the words 'backward class', I am sorry to say there is no uniform and consistent view expressed by the Court by laying down a rigid formula exhaustively listing out the specific criteria. The battery of tests that are recognised by the Courts in determining 'socially and educationally backward classes' are caste, nature of traditional occupation or trade, poverty, place of residence, lack of education and also the sub-standard education of the candidates for the post in comparison to the average standard of candidates from general category. These factors are not exhaustive.

175. As to the questions (1) whether 'caste' can be taken as a criterion in determining and identifying a 'backward class' in Hindu society and (2) whether it could be a pre-dominant factor or one of the factors in identifying the backward class, there is a cleavage of opinion.

176. Ray, C.J. in State of Uttar Pradesh v. Pradeep Tandon and Ors. MANU/SC/0086/1974 : [1975]2SCR761 has gone to the extent of saying that "when Article 15(1) forbids discrimination on grounds only of religion, race, caste - caste cannot be made one of the criteria for determining

social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1)". The effect of this judgment is that caste can never be a criterion. This decision has also ruled that the place of habitation and the environment are also the determining factors in judging the social and educational backwardness.

177. A good deal of arguments was advanced on the question whether caste can be the sole if not the dominant factor or at the least one of the factors or not at all. Whilst anti-reservationists contend that the Report should be thrown overboard on the ground that the reservation is made on the caste criterion, the pro-reservationists would forcibly refute that contention making counter submissions stating, inter-alia, that caste can justifiably be taken as an important and dominant factor if not the sole factor in determining the social and educational backwardness for various reasons as pointed out in the Report. Since backwardness is a direct consequence of caste status and the discrimination perpetuated against the socially backward people is based on the caste system, the caste criterion can never be divested while interpreting the word 'class'. Mr. K.K. Venugopal, the learned senior counsel while concluding his arguments has stated that caste if it is to be taken as one of the criteria, it must be at the end point and not the starting point. Therefore, even at the threshold, it has become obligatory to decide the question whether 'caste' should be completely excluded from being considered as one of the criteria, if not to what extent caste would become relevant in the determination and ascertainment of 'socially and educationally backward class'. There is a galaxy of decisions of this Court in explaining the words 'backward class' and 'caste' which I shall refer to at the appropriate place.

178. Meaning of 'Class' and 'Caste'

179. To identify the diversity of meanings of the words 'class' and caste' that constitute their inner complexity; to formulate the questions about them that are disputed and to examine as well as to assess the opposed voices in controversies that have ensued and to understand their semiology, I shall first of all reproduce the meanings of those words as lexically defined.

180. The Oxford English Dictionary (Volume II):

Class :

(2) a division or order of society according to status; a rank or grade of society;... (6) a number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division.

Caste

(2) one of the several hereditary classes into which society in India has from time immemorial been divided; the members of each caste being socially equal, having the same religious rites, and generally following the same occupation or profession; those of one caste have no social intercourse with those of another; (3) the system or basis of this division among the Hindoos.

181. In Webster Comprehensive Dictionary (International Edition), the meaning of the words is given as follows:

Class :

(1) A number or body of persons with common characteristics: the educated class; (2) social rank, caste

Caste :

(1) one of the hereditary classes into which Hindu society is divided in India (2) the principle of practice of such division or the position it confers; (3) the division of society on artificial grounds; a social class

182. According to Webster's Encyclopedic Unabridged Dictionary of the English Language, meaning of the words 'class' and 'caste' is as follows:

Class :

(1) a number of persons or things regarded as forming a group by reason of common attributes, characteristics, qualities, or traits, kind, sort (2) any division of persons or things according to rank or grade.... (9) Social, a social stratum sharing basic, economic, political or cultural characteristics and having the same social position.... (10) the system of dividing society; caste....

Caste :

(1) Social, an endogamous and hereditary social group limited to persons of the same rank, occupation, economic position etc. and having mores distinguishing it from other such groups, (2) any rigid wealth, hereditary rank or privileges, or by profession or employment, having special significance when applied to the artificial divisions or social classes into which the Hindus are rigidly separated.

183. Black Law Dictionary (Sixth Edition) Centennial Edition (1891-1991) gives the meaning of 'class' thus:

Class :

A group of persons, things, qualities, or activities having common characteristics or attributes.

184. The word 'caste' is defined in Encyclopedia Americana (5) thus:

Caste :

Caste is a largely, exclusive social class, membership in which is determined by birth and involves particular customary restrictions and privileges. The word derives from the portuguese casta, meaning 'breed', 'race', or 'kind' and was first used to denote the Hindu social system of social distinctions (2) Hinduism, any of the four social divisions, the Brahman, Kshatriya, Vaisya and Sudra, into which Hindu society is rigidly divided, each caste having its own privileges and limitations, transferred by inheritance from one generation to the next (3) any class or group of

society sharing common cultural features.... (6) pertaining to characterised by caste; a caste society; a caste system; a caste structure.

185. In Corpus Juris Secundum (14), the meaning of words 'class' and 'caste' is given thus:

Class

A number of objects distinguished by common characters from all others, and regarded as a collective unit or group, a collection capable of general division, a number of persons or things ranked together for some common purpose or possessing some attribute in common; the order of rank according to which persons or things are arranged or assorted;....

Caste

A class or grade, or division of society separated from others by differences of classification on the Indian subcontinent. While this remains the basic connotation, the word 'caste' is also used to describe in whole or in part social system that emerged at various times in other parts of the world....

186. The meaning of the word 'backward' is defined in lexicons as 'retarded in physical, material or intellectual development' or 'slow in growth or development; retarded.

187. A careful examination of the meaning of the words 'class' and 'caste' as defined above by the various dictionaries, perceivably shows that these two words are not synonymous with each other and they do not convey the same meaning.

189. See R. Chitralekha and Anr. v. State of Mysore and Ors. MANU/SC/0030/1964 : [1964]6SCR368 ; Triloki Nath v. J. & K. State MANU/SC/0420/1968 : [1969] 1 SCR 103 and K.C. Vasanth Kumar v. Karnataka MANU/SC/0033/1985 : [1985] Supp. 1 SCR 352.

190. The quintessence of the above definitions is that a group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense not having so much of intellect and ability will fall within the ambit of 'any backward class of citizens' under Article 16(4) of the Constitution.

191. In the course of debate in the Parliament on the intendment of Article 16(4), Dr. B.R. Ambedkar, the then Minister for Law expressed his views that "backward classes which are nothing else but a collection of certain castes."

192. The next important, but central point at issue is whether caste by the name of which a group of persons are identified, can be taken as a criterion in determining that caste as 'socially and educationally backward class' and if so, will it be the sole or dominant or one of the factors in the determination of "social and educational backwardness".

193. Before embarking upon a discussion relating to this aspect, it is pertinent to note the views of certain States as regards the caste criterion and economic criterion for identifying the 'backwardness'.

194. In reply to a questionnaire issued by the Second Backward Classes Commission, the State of Assam, Andhra Pradesh, Bihar, Gujarat, Karnataka, Kerala, Maharastra, Punjab, Rajasthan and Uttar Pradesh stated that caste should be used as one of the criterion for identifying backwardness. Delhi, Dadra and Nagar Haveli, Haryana, Himachal Pradesh and Madhya Pradesh stated that caste should not be made a criterion of backwardness. Bihar, Gujarat, Himachal Pradesh, Kerala, Punjab, Rajasthan and Uttar Pradesh suggested low economic status as one of the significant tests, while Delhi, Dadra and Nagar Haveli and Haryana desired the economic factor to be the sole determinant of backwardness.

195. Articles 15(4), 16(4) and 340(1) do not speak of 'caste' but only 'class'. The learned Counsel particularly those appearing for anti-reservationists have stressed that if the makers of the Constitution had really intended to take 'caste or castes' as conveying the meaning of socially and educationally backward class, they would have incorporated the said word, 'caste or castes' in Articles 15(4) and 340(1) as 'socially and educationally backward caste or castes' instead of 'class or classes' as they have adopted the expression in the case of 'Scheduled Castes and Scheduled Tribes'. Similarly in Article 16(4) also, they would have used the words as 'backward caste or castes' instead of 'backward class'. It has been further urged that the very fact that the framers of the Constitution in their wisdom thought of using a wider expression 'classes' in Article 15(4) and 340(1) and 'class' in Article 16(4) alludes that they did not have the intention of equating classes with the castes.

196. The word 'caste' is not used the Constitution as indicative of any section of people or community expect in relation to 'Scheduled Castes' which is defined in Article 366(24). However, the word 'caste' in Articles 15(2), 16(2) and 29(2) does not include 'scheduled caste' but it refers to a caste within the ordinary meaning of caste. The word 'Scheduled Caste' came into being only by the notification of President under Article 341. It would be appropriate, in this connection, to recall the observation of Fazal Ali, J. in his separate but concurring judgment in State of Kerala and Ors. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC wherein at page 996, he has said that "the word 'caste' appearing after 'scheduled' is really a misnomer and has been used only for the purpose of identifying this particular class of citizens which has a special history of several hundred years behind it.".

197. Mathew, J. in his separate judgment in the same case (Thomas) has expressed that "it is by virtue of the notification of the President that the 'Scheduled Castes' came into being".

198. Reference also may be made to the observation of Krishna Iyer, J. in Akhil Bhartiya Soshit Karamchari Sangh v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC where he has said:

Terminological similarities are an illusory guide and we cannot go by verbal verisimilitude. It is very doubtful whether the expression caste will apply to Scheduled Castes. At any rate, Scheduled Tribes are identified by their tribal denomination. A tribe cannot be equated with a caste. As stated

earlier, there are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes.

199. There is a long line of decisions dealing with the significance of the word 'caste' in relation to Hindus as being one of the relevant criteria, if not the sole criterion for ascertaining whether a particular person or group of persons will fall within the wider connotation of 'class'.

200. In M.R. Balaji v. State of Mysore [1963] Suppl. 1 SCR 439, Gajendragadkar, J. observed, "Though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be the sole or the dominant test in that behalf."

201. Subba Rao, J. speaking for the majority of the Constitution Bench in R. Chitralekha v. State of Mysore MANU/SC/0030/1964 : [1964]6SCR368 has stated:

...what we intend to emphasize is that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individual may be considered along with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests.

202. Mudholkar, J. in his dissenting judgment in considering the caste in determination of the backward class, has expressed his view thus:

...it would not be in accordance either with Clause (1) of Article 15 or Clause (2) of Article 29 to require the consideration of the castes of persons to be borne in mind for determining what are socially and educationally backward classes. It is true that Clause (4) of Article 15 contains a non-obstante clause with the result that power conferred by that clause can be exercised despite the provisions of Clause (1) of Article 15 and Clause (2) of Article 29. But that does not justify the inference that castes have any relevance in determining what are socially and educationally backward communities.

203. Wanchoo, C.J. speaking for the Constitution Bench in *Minor P. Rajendran v. State of Madras and Ors.*, MANU/SC/0025/1968 : [1968]2SCR786 pointed out that "if the reservation in question has been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that *a caste is also a class of citizens* and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)".

(emphasis supplied).

204. The learned Chief Justice in support of his above observation has placed reliance on Balaji.

205. In State of Andhra Pradesh v. P. Sagar MANU/SC/0028/1968 : [1968]3SCR595 , it has been observed:

...the expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted.

206. In Triloki Nath v. J & K State II MANU/SC/0420/1968 : [1969] 1 SCR 103 Shah, J. speaking for the Constitution Bench has reiterated the meaning of the word 'class' as defined in the case of Sagar and added that "for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community race religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution."

207. Further, this judgment reaffirms that view in Minor P. Rajendran's case to the effect that if the members of an entire caste or community at a given time are socially, economically and educationally backward that caste on that account be treated as a backward class. This is not because they are members of that caste or community but because they form a class.

208. Hegde, J. in A. Peerikaruppan, etc. v. State of Tamil Nadu MANU/SC/0055/1970 : [1971]2SCR430 has observed:

A caste has always been recongnised as class.

209. Vaidialingam, J. in *State Andhra Pradesh and Ors. v. U.S.V. Balram etc.* [1972] 3 SCR 447 in his conclusion upheld the list of Backward Class in that case as they satisfied the various tests, which have been laid down by this Court for ascertaining the social and educational of a backwardness of a class even though the said list was *exclusively based on caste.*

(emphasis our)

210. Chief Justice Ray in Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 was of the view that "In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test...."

211. Speaking for the Bench in U.P. State v. Pradip Tandon Ray, the learned Chief Justice after stating that neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4) when Article 15(1) forbids discrimination on grounds only of religion, race caste - observed that caste cannot be made one of the criteria for determining social and educational backwardness and that if the caste or religion is recognised as a criterion of social and educational backwardness, Article 15(4) still stultify Article 15(1). Further, he observed that "It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste but when a classification taken recourse to caste as one of the criteria in determining socially and educationally backward classes, the expression 'classes' in that case violates the rule of expressio unius est exclusio alterius. The socially and educationally backward classes of citizens are groups other than groups based on caste."

212. The learned Chief Justice also recognised the meaning of the expression "classes of citizens" in line with the observation made in Triloki Nath (II)and Sagar (supra) and explained the traits of social backwardness, economic backwardness and educational backwardness.

213. See also Akhil Bhartia Soshit Karamchari Sangh (supra) and K.C. Vasanth Kumar (supra).

214. Though there is tremendous ambivalence in a host of judgments rendered by this Court, not even a single judgment has held that class has no relevance to caste at all wherever caste system is prevalent.

215. Collating the above said views expressed by this Court in a catena of decisions as regards the relevance and significance of the caste criterion in the field of identification of 'socially and educationally backward classes' it may be stated that caste neither can be the sole criterion nor can it be equated with 'class' for the purpose of Article 16(4) for ascertaining the social and educational backwardness of any section or group of people so as to bring them within the wider connotation of 'backward class'. Nevertheless 'caste' in Hindu society becomes a dominant factor or primary criterion in determining the backwardness of a class of citizens. Unless 'caste' satisfies the primary test of social backwardness as well as the educational and economic backwardness which are the established and accepted criteria to identify the 'backward class' a caste per se without satisfying the agreed formulae generally cannot fall within the meaning of 'backward class of citizens' under Article 16(4), save in given exceptional circumstances such as the caste itself being identifiable with the traditional occupation of the lower strata - indicating the social backwardness.

216. True, the caste system is predominantly known in Hindu society and runs through the entire fabric of the social structure. Therefore, the caste criterion cannot be divested from the other established and agreed criteria in identifying and ascertaining the backward classes.

217. It is said that the caste system is unknown to other communities such as Muslims, Christians, Sikhs, Jews, Parsis, Jains etc. in whose respective religion, the caste system is not recognised and permitted. But in practice, it cannot be irrefutably asserted that Islam, Christianity, Sikhism are all completely immune from casteism.

218. There are marked distinctions in one form or another among various sections of the Muslim community especially among converts to Islam though Islam does not recognise such kind of divisions among Muslims and professes only common brotherhood.

219. There are various sects or separate group of people in Muslim communities being identified by their occupation such as Pinjara in Gugarat, Dudekula (cotton beaters) in Andhra Pradesh, Labbais, Rowthar and Marakayar in Tamil Nadu.

220. Though Christianity does not acknowledge caste system, the evils of caste system in some States are as prevalent as in Hindu society especially among the converts. In Andhra Pradesh, there are Harijan Christians, Reddy Christians, Kamma Christians etc. Similarly, in Tamil Nadu, there are Pillai Christians, Marvar Christians, Nadar Christians and Harijan Christians etc. That is to say all the converts to Christianity have not divested or set off themselves from their caste labels and crossed the caste barrier but carry with them the banners of their caste labels. Like Hindus, they

interact and have their familiar relationship and marital alliances only within the converted caste groups.

221. In Tamil Nadu, after persistent effort and agitations some of the sections of people belonging to some castes or communities converted either to Islam or Christianity have become successful in having them included in the list of 'backward classes' on par with their corresponding Hindu caste people.

222. The Government of Tamil Nadu on the basis of the report of the Second Backward Classes Commission issued a revised list of 'backward classes' by G.O. Ms. No. 1564 (Social Welfare Department) dated 30th July 1985 wherein the following castes and communities converted to Islam and Christianity' are included for the purpose of reservation under Articles 15(4) and 16(4) of the Constitution.

Serial No.	
26	Converts to Christianity from Scheduled Castes irrespective of the generation of conversion for the purpose of reservation of seats in Educational Institutional and for seats in Public Services.
98*	Labbais including Rowthar and Marakayar (whether their spoken language is Tamil or Urdu.)
100	Latin Catholics.....: in Kanyakumari district and Shenkottah taluk of Tirunelveli district.
110	Meenavar, Parvatharajakulam, Pattanavar, Sembadavar (including converts to Christianity).
115	Mukkuvar or Mukayar (including converts to Christianity).
118	Nadar, Shanar and Gramani, including Christian Nadar, Christian Shanar and Christian Gramani.
136	Paravar including converts to Christianity (except in Kanyakumari district and Shenkottah taluk of Tirunelveli district where the community is a Scheduled Caste.)

* Item No. 98 denotes Muslim community.

223. By another G.O. Ms. No. 1565 dated 30th July 1985, the Government of Tamil Nadu directed the reservation of seats at 50% for Backward Classes and 18% for Scheduled Castes and Scheduled Tribes in respect of all courses in all kinds of educational institutions as well as in all Services in the Government of Tamil Nadu. Thereafter, another G.O. Ms. No. 558 dated 24th February, 1986 on the representation of Christian converts was issued, the relevant paragraphs of which read as follows:

(5) Accordingly, the Government declare that, in addition to the Christian Converts mentioned in paragraph one above, the persons belonging to the other Christian communities who are converts from any Hindu community included in the list of Backward Classes also will be considered as socially and educationally backward for the purposes of Article 15(4) of the Constitution.

(6) The Government also declare that, in addition to the Christian converts mentioned in paragraph one above, the persons belonging to the other Christian communities who are converts from any Hindu community included in the list of Backward Classes also will be considered as Backward Classes of citizens and that they are not adequately represented in the services under the State with reference to Article 16(4) of the Constitution.

224. The Christian converts mentioned in the above G.O. relates to the list of Christian converts mentioned in G.O. Ms. No. 1564 dated 30th July 1985.

225. As per the statistics given in the Report of the Second Backward Classes Commission, in Tamil Nadu out of 27,05,960 people belonging to Muslim minorities 25,60,195 are included in the backward list which works out to 94.61% of the total Muslim population of the State. Similarly, among Christians, out of 31, 91, 988 of the total population, 25, 48, 148 are included in the backward list which works out to 79.83%.

226. The Nav. Budhists, and Neo Budhists the majority of whom are converts from Scheduled Castes enjoy the reservation on the ground that their low status in that community have not become advanced equal to the status of others and their social backwardness is not changed in spite of change of their religion.

227. Sikhism, no doubt, strictly believes in social equality and justice, denounces all sorts of social discrimination between man and man, strongly advocates the equality and parity in all humanity and propagates that caste, birth or colour cannot make one superior or inferior. All the Gurus of Sikhism have advocated and articulated the concept of equality of man as the basis of egalitarian society. Notwithstanding Sikhism is violently against casteism, some converts to Sikhism from the Scheduled Castes still retain their caste label.

228. Thus even among non-Hindus, there are occupational organisations or social groups or sects which are having historical backward/evolution. They too constitute social collectives and form separate classes for the purposes of Article 16(4).

229. Though in India, caste evil originated from Hindu religion that evil has taken its root so deep in the social structure of all the Indian communities and spread its tentacles far and wide thereby leaving no community from being influenced by the caste factor. In other words, it cannot be authoritatively said the some of the communities belonging to any particular religion are absolutely free from casteism or at least from its shadow. The only difference being that the rigour of caste varies from religion to religion and from region to region. Of course, in some of the communities, the influence of the caste factor may be minimal. So far as the Hindu society is concerned, it is most distressing to note that it receives sanction from the Hindu religion itself and perpetuated all through.

230. Reference may be made to paragraphs 12.11 to 12.16 of Chapter XII of the Report.

231. After identifying in paragraph 12.18, the Commission has laid down the following tests for identifying non-Hindu OBCs:

12.18 After giving a good deal of thought to these difficulties, the Commission has evolved the following rough and ready criteria for identifying non-Hindu OBCs:-

(i) All untouchables converted to any non-Hindu religion; and

(ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples: Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.)

232. Even assuming that the caste factor would not furnish a reliable yardstick to identify 'socially and educationally backward groups' in the communities other than Hindu community as there is no commonness since all sections of people among Budhists, Muslims, Sikhs and Christians etc. and as the respective religion of those communities do not recognise the caste system, yet on the principle of the other agreed criteria such as traditional occupation, trade, place of residence, poverty lack of education or economic backwardness etc. the social and economic backwardness of those communities could be identified independently of the caste criterion. Once these 'casteless societies' are tested on the anvil of the established relevant criteria de hors the caste criterion, there may not be any difficulty in identifying the social and educational backwardness of the section of the people of that community and classifying them as 'backward class of citizens' within the meaning of Article 16(4).

233. In this connection, reference may be made to the observation of this Court in Chitralekha (supra) that "...if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests."

234. More often than not, a question that is put forth is should the caste label be accepted as a criterion in ascertaining the social and educational backwardness of a group of persons or community. No doubt, it is felt that in identifying and classifying a group of persons or community as 'socially and educationally backward class', it should be done de hors the caste label. But all those who address such a question turn a blind eye to the existing stark reality that in the Hindu society ever since the caste system was introduced, till today, the social status of Hindu is so woven or inextricably intertwined and fused with the caste system to such an extent that no one in such a situation can say that the caste is not a primary indicator of social backwardness and that social backwardness is not identifiable with reference to the caste of an individual or group of persons or community. However, painful and distasteful, it may be, we have to face the reality that under the hydraulic pressure of caste system in Hindu society, a major section of the Hindus under multiple caste labels are made to suffer socially, educationally and economically. There appears no symptoms of early demise of this dangerous disease of caste system or getting away from the caste factor in spite of the fact that many reformative measures have been taken by the Government. Unless this caste system, unknown to other parts of the world is completely eradicated and all the socially and educationally backward classes to whichever religion they belong inclusive of

Scheduled Castes and Scheduled Tribes are brought up and placed on par with the advanced section of the people, the caste label among Hindus will continue to serve as a primary indicator of its social backwardness.

235. Though I am not inclined to exhaustively elaborate the untold agony and immeasurable sufferings undergone by the people in the lower strata under the label of their respective caste, I cannot avoid but citing a jarring piece of information appearing in the Report. The noted and renowned Sociologist Shri J.R. Kamble in Rise & Awakening of Depressed Classes in India published by National Publishing House, New Delhi has quoted a passage from the issue of 'Hindu' dated 24.12.1932 as an example of visual pollution existing in Tinnevelli (Tamil Nadu) which the Mandal Commission has extracted in Chapter IV vide para 4.13 of its report:

4.13. ... In this (Tinnevelly) district there is a class of unseeables called purada vannans. They are not allowed to come out during day time because their sight is considered to be pollution. Some of these people who wash the clothes of other exterior castes working between midnight and day-break, were with difficulty persuaded to leave their houses to interview.

236. Does not the very mention of the caste named 'purada vannans' indicate that the people belonging to that community were so backward, both socially, economically as well as educationally beyond comprehension? Would the children of those people who were not allowed to come out during day time have gone to any school? Does not the very fact that those people were treated with contempt and disgrace as if they were vermin in the human form freeze our blood? Alas! What a terrible and traumatic experience it was for them living in their hide-outs having occasional pot-luck under pangs of misery, all through mourning over their perilous predicament on account of this social ostracism. When people placed at the base level in the hierarchical caste system are living like mutes, licking their wounds - caused by the deadening weight of social customs and mourning their fate for having been born in lower castes - can it be said by any stretch of imagination that caste can never be the primary criterion in identifying the social, economic and educational backwardness? Are not the social and economic activities of Shudras and Panchamas (untouchables) severely influenced by their low caste status?

237. There is no denying that many of the castes are identified even by their traditional occupation. This is so because numerous castes arranged in a hierarchical order in the Hindu social structure are tied up with their respective particular traditional occupation consequent upon the creation of four Varnas on the concept of divine origin of caste system based on the Vedic principles. Can it be said that the propagation and practice on the caste - based discrimination; the marked dividing line between upper caste Hindus and Shudras, and the practice of untouchability in spite of the Constitutional declaration of abolition of untouchability under Article 17 are completely eradicated and erased? Can it be said that the social backwardness has no relation to caste status? The unchallengeable answer for the first question would be in the negative and for the second question, the answer would be that social backwardness does have a relation with the caste status.

238. It is not germane for my purpose to enter into a lengthy deliberation as to how religion and mythology were used for founding the social institution in Hindu society containing so much of inequalities and discrimination among the people professing the same Hinduism.

239. The Mandal Commission in Chapter IV of its report under the heading "Social Backwardness and Caste" has concluded its view, with a query under paragraph 4.33 of its Report (Volume I) thus:

In view of the foregoing will it be too much to say that in the traditional Indian society social backwardness was a direct consequence of caste status....

240. Though the Government both on the Central and State level have taken and are taking positive steps through law and other reformative measures to eradicate this social evil, it is heart- rending to note that in many circumstances, the caste system is being perpetuated instead of being banished for the reasons best known to those perpetratOrs.

241. It is common knowledge that in Hindu society, if a person merely mentions the name of a traditional occupation, another by his empirical knowledge can immediately identify the caste by the said traditional occupation. To illustrate, the traditional occupation of washing clothes is identified with washerman (Dhobi), caste, traditional occupation of haircutting is identified with Barber (Nai) - caste, traditional occupation of pottery is identified with Potter (Kumhar's caste), and so on. Of course in modern times, persons belonging to any particular caste might have shifted over to other occupation leaving their traditional occupation but generally speaking, the occupation is identified with the caste and vice-versa. Many backward castes have taken 'agriculture' as their profession. In such an unquestionable situation, in my opinion, there can be no justification in saying that caste in Hindu society cannot serve as a primary criterion even at the starting point in ascertaining its social, economic and educational backwardness. To say that in the effort of ascertaining social backwardness, caste should be considered only at the end point, is a misnomer and fallacious. Because after identifying and classifying a group of persons belonging to a particular caste by testing with the application of the relevant criteria other than the caste criterian, the identification of the caste of that class of persons is no more required as in the case of identification of casteless society as a backward class. In fact, this Court in a number of decisions has held that a caste may become a 'backward class' provided that caste satisfies the test of backwardness.

242. It is apposite, in this context, to make reference of the views expressed by the Mandal Commission stating that there is "a close linkage between caste ranking of a person and his social educational and economic status....In India, therefore, the low ritual caste status of a person has a direct bearing on his social backwardness".

243. Chinnappa Reddy, J. In Vasant Kumar points out that the social investigator "... may freely perceive those pursuing certain 'lowly' occupation as socially and educationally backward classes."

244. In passing, I would like to make reference to the pith and substance of the report of Kaka Kalelkar, according to which the relevant factors to cosider in classifying 'backward class' would be their traditional occupation or profession, the percentage of literary or the general educational advancement made by them; the estimated population of the conmmunity, and the distribution of the various communities throughout the State or their concentration in certain areas.

245. What the Expression "Backward Class" means?

246. In Minor P. Rajendran (supra), Wanchoo, C.J. speaking for the Constitution Bench has stated that" a caste is also a 'class of citizens' and that reservation can be made in such a case provided if that caste as a whole is socially and educationally backward within the meaning of Article 15(4)".

247. Reference may also be made to Triloki Nath (11) (supra) and Balaram.

248. The facts in Balaram (cited above) disclose that for the admission to the integrated M.B.B.S. Course in the government medical colleges in Andhra Pradesh, the Government issued a G.O. making a reservation of 25% of seats in favour of 'backward classes' as recommended by the Andhra Pradesh Backward Classes Commission besides other reservations inclusive of reservation for Scheduled Castes and Scheduled Tribes. The reservation for the 'backward classes' was challenged on the ground that the Government Order violated Article 15(1) read with Article 29 and that the reservation was not saved by Article 15(4). The High Court held that the Commission had merely enumerated the various persons belonging to a particular caste as 'backward classes' which was contrary to the decision of this Court and violative of the constitutional provisions and consequently struck down the G.O. The Government preferred an appeal before this Court. Vaidialingam, J. speaking for the Bench has observed:

In the determination of a class to be grouped as backward, a test solely based upon caste or community cannot be valid. But, in our opinion, though Directive Principles contained in Article 46 cannot be enforced by Courts, Article 15(4) will have to be given effect to in order to assist the weaker sections of the citizens, as the State has been charged with such a duty. No doubt, we are aware that any provision made under this clause must be within the well defined limits and should not be on the basis of caste alone. But it should not also be missed *that a caste is also a class of citizens* and that a caste as such may be socially and educationally backward. *If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward, in our opinion, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average.* There is no gainsaying the fact that there are numerous castes in the country, which are socially and educationally backward and, therefore, a suitable provision will have to be made by the State as charged in Article 15(4) to safeguard their interest.

(emphasis supplied)

249. The decisions which we have referred to above support the view that a caste is also a class of citizens and that if that caste satisfies the requisite tests of backwardness, then the classification of that caste as a backward class is not opposed to Article 16(4) notwithstanding that a few individuals of that caste are socially and educationally above the general average. I am in full agreement with the above view.

250. The composition and terms of reference of the Second Backward Classes Commission show that the Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India but not the socially, economically and educationally backward classes. The earlier O.M. issued on 13.8.90 reads that with a view to providing certain weightage to socially and educationally backward classes in the services of the Union and their Public Undertakings, as recommended by the Commission, the orders are issued in the terms

mentioned therein. The said O.M. also explains that "the SEBC would comprise in the first phase the castes and communities which are common to both the lists, in the report of the Commission and the State Government' list". In addition it is said that list of such castes/communities is being issued seperately. The subsequent amended O.M. dated 25.9.91 states that in order to enable the 'poorer sections' of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, the Government have decided to amend the earlier Memorandum. Thus this amended O.M. firstly speaks of the 'poorer sections' of the SEBCs and secondly about the economically backward sections of the people not covered by any of the existing schemes of reservation. However, both the O.M.s while referring to the SEBCs, do not include the 'economic backwardness' of that class along with 'social and educational backwardness'. By the amended O.M., the Government while providing reservation for the backward sections of the people not covered by the existing schemes of reservation meant for SEBCs, classifies that section of the people as 'economically backward', that is to say that those backward sections of the people are to be identified only by their economic backwardness and not by the test of social and educational backwardness, evidently for the reason that they are all socially and educationally well advanced.

251. Coming to Article 16(4) the words 'backward class' are used with a wider connotation and without any qualification or explanation. Therefore, it must be construed in the wider perspective. Though the OMs speak of social and educational backwardness of a class, the primary consideration in identifying a class and in ascertaining the inadequate representation of that class in the services under the State under Article 16(4) is the social backwardness which results in educational backwardness, both of which culminate in economic backwardness. The degree of importance to be attached to social backwardness is much more than the importance to be given to the educational backwardness and the economic backwardness, because in identifying and classifying a section of people as a backward class within the meaning of Article 16(4) for the reservation of appointments or posts, the 'social backwardness' plays a predominant role.

252. Ray, C.J. in Jayashree is of the view that "Social backwardness can contribute to educational backwardness and educational backwardness may perpetuate social backwardness. Both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition."

253. The very fact that the Commission itself has given a weightage of 12 points to 'social backwardness' and 6 points to 'educational backwardness' and 4 points to 'economic backwardness' (vide paragraph 11.24 of Chapter XI) shows in very clear terms that 'social backwardness' is taken as a predominant factor in ascertaining the backwardness of a class under Article 16(4).

254. In M.R. Balaji v. State of Mysore [1963] Suppl. 1 SCR 439 Gajendragadkar, J. observed that "economic backwardness might have contributed to social backwardness...." This observation tends to show that Gajendragadkar, J. was of the view that economic backwardness may contribute to social backwardness. With respect to the learned Judge, I am unable to agree with his view.

255. Desai, J. in Vasanth Kumar has expressed a similar view that if economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of

"social and educational backwardness...." thereby holding that only criterion which can be devised is the 'economic backwardness' for identifying 'socially and educationally backward classes' ignoring the predominance of social backwardness. I am unable to share this above view.

256. How far the Courts would be competent to identify the 'Backward class' is explained by Chinnappa Reddy, J. in Vasanth Kumar in the following words:

We are afraid Courts are not necessarily the most competent to identify backward classes or to lay down guidelines for their identification except in broad and very general way. We are equipped for; that we have no legal barometers to measure social backwardness. We are truly removed from the people, particularly those of the backward classes, by layer upon layer of gradation and degradation.

257. Let us have a glance over the Report in identifying the 'backward classes' by testing the same on the touchstone of various established criteria.

258. In Chapter XI of the Report (Volume I part I) under the caption 'Socio-Educational Field Survey and Criteria of Backwardness' it is categorically stated that after most comprehensive enquiries and survey in the socio-educational fields with the association and help of top social scientists and specialists in the country as well as experts from a number of disciplines, the Commission had prepared the "Indicators (Criteria) for Social and Educational Backwardness" on the analysis of data and submitted its report. The relevant paragraphs 11.23, 11.24 and 11.25 showing the criteria for identification of backwardness are as follows:

Indicators (Criteria) for Social and Educational Backwardness

11.23 As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e. Social, Educational and Economic. They are:-

A. Social

(i) Castes/Classes considered as socially backward by others.

(ii) Castes/Classes which mainly depend on manual labour for their livelihood.

(iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.

(iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational

(v) Castes/Classes where the number of children in the age group of 5-15 years

who never attended school is at least 25% above the State average.

(vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average.

(vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. Economic

(viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households.

(xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

11.24 As the above three groups are not of equal importance for our purpose, separate weightage was given to 'Indicators' in each group. All the social 'Indicators' were given a weightage of 3 points each, Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a wightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

11.25 It will be seen that from the values given to each Indicator, the total score adds upto 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50 per cent (i.e. 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (It is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further, in case the number of households covered by the survey for any particular caste were below 20, it was left out of consideration, as the sample was considered too small for any dependable inference.

259. It is crystal clear that the Commission only on the basis of the galaxy of facts unearthed and massive statistics collected it, has made its recommendations on a very scientific basis of course taking 'caste' as the primary criterion in identifying the backward class in Hindu society and the occupation as the basis for identifying all those in whose societies, the caste system is not prevalent.

260. It is not necessary for a class to be designated as a backward class that it should be situated similarly to the Scheduled Castes and scheduled Tribes.

261. Vaidalaingam, J. in Balaram while examining a similar issue after making reference to the cases of Balaji, Chitralekha and P. Sagar stated, "None of the above decisions lay down that socially and educationally backward class must be exactly similar in all respects to that of Scheduled Castes and Scheduled Tribes."

262. Chinnappa Reddy, J. in Vasanth Kumar while dealing with the observations made in Balaji "that the backward classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes" observed thus:

There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes.

263. Criticism levelled against Mandal Commission Report

264. The learned senior counsel, Mr. N.A. Palkhiwala, Mr. K.K. Venugopal, Smt. Shyamala Pappu and Mr. P.P. Rao assisted by a battery of layers appearing for the petitioners condemn the recommendations of the Commissions on the various grounds. Therefore, it has become unavoidable to meet their challenges, it may not be necessary otherwise to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission.

265. Taking pot-shots at the Mandal Report recommending exclusive reservation for SEBCs, the belligerent anti-reservationists denigrate the report by making scathing criticism and indiscriminately trigger off a volley of bullets against the Report. The first attack against the Report is that it is perpetuating the evils of caste system and accentuating caste consciousness besides impeding the doctrine of secularism, the net effect of which would be dangerous and disastrous for the rapid development of the Indian society as a whole marching towards the goal of the welfare state. According to them, the identification of SEBCs by the Commission on the basis of caste system is bizarre and barren of force, much less exposing hollowness. Therefore, the OMs issued on the strength of the Mandal Report which is solely based on the caste criterion are violative of Article 16(2).

266. The above criticism, in my considered view, is very uncharitable and bereft of the factual position. Hence it has to be straightaway rejected as unmeritorious since that Report is not actually based solely on caste criteria but on the anvil of various factors grouped under three heads i.e. social, educational and economic backwardness but giving more importance - rightly too - to the social backwardness as having a direct consequence of caste status.

267. Adopting the policy of 'Running with the hare and hunting with the hounds', a conciliatory argument was advanced saying that although it is necessary to make provisions for providing equality of opportunity in matters of public employment 'in favour of any backward class' in terms of Article 16(4), the present Report based on 1931 census can never serve a correct basis for identifying the 'backward class', that therefore, a fresh Commission under Article 340(1) of the Constitution is required to be appointed to make a fresh wide survey sumey through out the length

and breadth of the country and submit a new list of OBCs (other backward classes) on the basis of the present day Census and that there are million ways of guaranteeing progress of backward classes and ensuring that it percolates down the social scale, but the Mandal commission is the one.

268. Firstly, in my view if the above argument is accepted it will result in negation of the just claim of the SEBCs to avail the benefit of Article 16(4) which is a fundamental right.

269. Secondly, this attack is based on a misconception. A perusal of the Report would indicate that the 1931 census does not have been even a remote connection with the identification of OBCs. But on the other hand, they are identified only on the basis on the country-wide socio-educational field survey and the census report of 1961 particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes personal knowledge gained through extensive touring and receipt of voluminous public evidence and lists of OBCs notified by various States. It was only after the identification of OBCs, the Commission was faced with the task of determining their population percentage and at that stage 1931 census become relevant. It is to be further noted after 1931 census, no caste-wise statistics had been collected. In fact, the identification of classes by the Commission was based on the realities prevailing in 1980 and not in 1931. It is brought to our notice that the same method had already been adopted in Section 5 of the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976.

270. Thirdly, the Commission cannot be said to have ignored this factual position and found fault with for relying on 1931 census. In fact, this position is made clear by the Commission itself in Chapter XII of its Report, the relevant paragraphs of which read thus:

12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of caste-wise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes, communities, and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country.

12.10 Working on the above basis, the Commission culled out caste/community-wise population figures from the census records of 1931 and, then grouped them into broad caste-clusters and religious groups. These collectivities were subsequently aggregated under five major heads i.e. (i) Scheduled Castes and Scheduled Tribes; (ii) Non-Hindu communities, Religious Groups, etc.; (iii) Forward Hindu Castes and Communities; (iv) Backward Hindu Caste and Communities; and (v) Backward Non-Hindu Communities....

271. In Balaram, wherein a similar argument was addressed, this Court after going through the Report of the Backward Classes Commission of the State of Andhra Pradesh, felt the difficulty of the non-availability of the Caste-wise statistics after 1931 census and pointed out that in Andhra, the figures of 1921 census were available and in Telangana area, 1931 census of caste-wise statistics was available.

272. In the background of the above discussion, the anti-reservationists cannot have any legitimate grievance and justifiably demand this Court to throw the Report over-board on the mere ground that 1931 census had been taken into consideration by the Commission.

273. As pointed out by this Court in Balaram that no conclusions can always be scientifically accurate in such matters. If at all the attack perpetrated on the Report renders any remedy to the anti-reservationists, it would be only for the purpose of putting the Report in cold storage as has happened to the Report of the First Backward Classes Commission.

274. Therefore, for the aforementioned reasons, I hold that the above submission made against the Report with reference to the consideration of Census of 1931 cannot be conuntenanced.

275. After having gone through the Commission's Report very assiduously and punctiliously, I am of the firm view that the Commission only after deeply considering the social, educational and economic backwardness of various classes of citizens of our country in the light of the various propositions and tests laid down by this Court had submitted its Report enumerating various classes of persons who are to be treated as OBCs. The recommendations made in the present Report after a long lull since the submission of the Report by the First Backward Classes Commission are supportive of affirmative action programmes holding the members of the historically disadvantaged groups for centuries to catch up with the standards of competition set up by a well advanced society.

276. As a matter of fact, the Report wanted to reserve 52% of all the posts in the Central Government for OBCs commensurate with their ratio in the population. However, in deference to legal limitation it has recommended a reservation of 27% only even though the population of OBCs is almost twice this figure.

277. Yet another argument on behalf of the anti-reservationsits was addressed contending that if the recommendations of the Commission are implemented, it would result in the sub-standard replacing the standard and the reins of power passing from meritocracy to mediocrity; that the upshot will be in demoralization and discontent and that it would revitalize caste system, and cleave the nation into two - forward and backward - and open up new vistas for internecine conflict and fissiparous forces, and make backwardness a vested interest.

278. The above tortuous line of reasoning, in my view is not only illogical, inconceivable, unreasonable and unjustified but also utterly overlooks the stark grim reality of the SEBCs suffering from social stigma and ostracism in the present day scenario of hierarchical caste system. The very object of Article 16(4) is to ensure equality of opportunity in matters of public employment and give adequate representation to those who have been placed in a very discontent position from time immemorial on account of sociological reasons. To put it differently, the purpose of Clause (4) is to ensure the benefits flowing from the fountain of this clause on the beneficiaries - namely the Backward Classes - who in the opinion of the Constitution makers, would have otherwise found it difficult to enter into public services, competing with advanced classes and who could not be kept in limbo until they are benefited by the positive action schemes and who have suffered and are still suffering from historic disabilities arising from past discrimination or disadvantage or both. However, unfortunately all of them had been kept at bay

on account of various factors, operating against them inclusive of poverty. They continue to be deprived of enjoyment of equal opportunity in matters of public employment despite there being sufficient statistical evidence in proof of manifest imbalance in Government jobs which evidence is sufficient to support an affirmative action plan. If candidates belonging to SEBCs (characterised as mediocre by anti-reservationists), are required to enter the open field competition, along with the candidates belonging to advanced communities without any preferential treatment in public Services in their favour and go through a rigid test mechanism being the highly intelligence test and professional ability test as conditions of employment, certainly those conditions would operate as "built-in headwinds" for SEBCs. It is, therefore, in order to achieve equality of employment opportunity, Clause 4 of Article 16 empowers the State to provide permissible reservation to SEBCs in the matters of appointments or posts as a remedy so as to set right the manifest imbalance in the field of public employment.

279. The argument that the implementation of the recommendations of the Commission would result in demoralisation and discontent has no merit because conversely can it not be said that the non-implementation of the recommendations would result in demoralisation and discontent among the SEBCs.

280. Though 'equal protection' clause prohibits the State from making unreasonable discrimination in providing preferences and facilities for any section of its people, nonetheless it requires the State to afford substantially equal opportunities to those, placed unequally.

281. The basic policy of reservation is to off-set the inequality and remove the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and their strategies. Therefore, a comprehensive methodological approach encompassing jurisprudential, comparative, historical and anthropological conditions is necessary. Such considerations raise controversial issues transcending the routine legal exercise because certain social groups who are inherently unequal and who have fallen victims of societal discrimination require compensatory treatment. Needless to emphasise that equality in fact or substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes an equilibrium between two sections placed unequally.

282. It is more appropriate to recall that "There is equality only among equals and to equate unequals is to perpetuate inequality."

283. Therefore, the submission that the implementation of the recommendations of the Report will curtail concept of equality as enshrined under Article 14 of the Constitution and destroy the basic structure of the Constitution, cannot be countenanced.

284. One of the arguments criticising the Report is that the said Report virtually rewrites the Constitution and in effect buries 50 fathoms deep the ideal of equality and that if the recommendations are given effect to and implemented, the efficiency of administration will come to a grinding halt. This submission is tantamount to saying that the reservation of 27% to SEBCs as per the impugned OMs is opposed to the concept of equality.

285. There is no question of rewriting the Constitution, because the Commission has acted only under the authority of the notification issued by the President. It has after laying down the parameters in the light of the various pronouncements of this Court has ultimately submitted its Report recommending the reservation in tune with the spirit of Article 16(4).

286. The question whether the candidates, belonging to the SEBCs should be given a preferential treatment in matters of public employment to such time as it is necessary, receives a fitting reply in Devadasan wherein Subba Rao, J. (as the learned Chief Justice then was) has observed, by citing an illustration as to how the manifest imbalance and inequality will occur otherwise, thus:

To make my point clear, take the illustration of a horse race. Two horses are set down to run a race - one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced Clause (4) in Article 16.

287. It will be befitting, in my opinion, to extract a passage from the book, Bakke, Defunis and Minority Admissions (The Quest for Equal Opportunity) by Allan P. Sindler wherein at page 9, the unequal competition is explained by an analogy which is as follows:

A good way to appreciate the "something more" quandary is to consider the metaphor of the shackled runner, an analogy frequently advanced by spokesmen for minorities:

'Imagine two runners at the starting line, readying for the 100-yard dash. One has his legs shackled, the other not. The gun goes off and the race begins. Not surprisingly, the unfettered runner immediately takes the lead and then rapidly increases the distance between himself and his shackled competition. Before the finish line is crossed, over the judging official blows his whistle, calls off the contest on the grounds that the unequal conditions between the runners made it an unfair competition, and orders removal of the shackles.'

Surely few would deny that pitting a shackled runner against an unshackled one is inequitable and does not provide equality of opportunity. Hence, cancelling the race and freeing the disadvantaged runner of his shackles seem altogether appropriate. Once beyond this point, however, agreement fades rapidly. The key question becomes: what should be done so that the two runners can resume the contest on a basis of fair competition? Is it enough after removing the shackles, to place both runners back at the starting point? Or is "something more" needed, and if so, what? Should the rules of the running be altered, and if so, how? Should the previously shackled runner be given a

compensatory edge, or should the other runner be handicapped in some way? How much edge or handicap?

288. To one of the queries posed by the author of the above analogy, the proper reply would be that even if the shackles whether of iron chains or silken cord, are removed and the shackled person has become unfettered, he must be given a compensatory edge until he realises that there is no more shackle on his legs because even after the removal of shackles he does not have sufficient courage to compete with the runner who has been all along unfettered.

289. Mr. Ram Awadesh Singh, an intervener demonstrably explained that as unwatered seeds do not germinate, unprotected backward class citizens will wither away.

290. The above illustration and analogies would lead to a conclusion that there is an ocean of difference between a well advanced class and a backward class in a race of open competition in the matters of public employment and they, having been placed unequally, cannot be measured by the same yardstick. As repeatedly pointed out, it is only in order to make the unequals equal, this constitutional provision, namely, Clause (4) of Article 16 has been designed and purposely introduced providing some preferential treatment to the backward class. It is only in case of denial of such preferential treatment, the very concept of equality as enshrined in the Constitution, will get buried 50 fathoms deep.

291. A programme of reservation may sacrifice merit but does not in any way sacrifice competence because the beneficiaries under Article 16(4) have to possess the requisite basic qualifications and eligibility and have to compete among themselves though not with the mainstream candidates.

292. As Chinnappa Reddy, J. in Vasanth Kumar has rightly observed, "Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a mantra which is whispered by the Guru in the Sishya's ear."

293. In yet another context, in the same decision, the learned Judge at page 394 has firmly and irrefutably put the merit argument at rest stating thus:

The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is no enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. And, what is merit? There is no merit in a system which brings about such consequences.

294. Be that as it may, the intelligence, merit, ability, competence, meritocracy, administrative efficiency and achievement cannot be measured by skin-pigmentation or by the surname of an individual indicating his caste.

295. In this regard, the observation of Subba Rao, J. in Devadasan at page 706 may be recapitulated, which to some extent answers the doubt raised by a section of anti-reservationists that reservation will result in deterioration in the standard of service. The said observation reads as follows:

If the provision deals with reservation - which I hold it does - I do not see how it will be bad because there will be some deterioration in the standard of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad. Indeed, the State laid down the minimum qualifications and all the appointments were made from those who had the said qualifications. How far the efficiency of the administrations suffers by this provision is not for me to say, but it is for the State, which is certainly interested in the maintenance of standards of Us administration.

Submission on the theory of past discrimination based on the decisions of the Supreme Court of United States

296. Based on certain American decisions, it has been urged that only that group or section of people suffering from the lingering effects of past discrimination can be classified as 'backward classes' and not others. This submission has to be mentioned for being simply rejected for more than one reason. Even today, the caste discrimination is very much prevalent in India particularly in the rural areas. Secondly, even among the Judges of the Supreme Court of United States, there is a division of opinion on the theory of lingering effects of past discrimination. Thirdly, this theory cannot be imported to the Indian conditions where the Hindu society even today is suffering from the firm grip of discrimination based on caste system. The vastness and richness of the materials unearthed by the various Commissions inclusive of States' Commissions unambiguously and pellucidly reveal that in our country, representation of the SEBCs in the services under the State is grossly inadequate when compared to the representation of the advanced class of citizens, leave apart the complete absence of reservation for SEBCs in the Central Services. This inadequate representation is not confined to any specific section of the people, but all those who fall under the group of social backwardness whether they are Shudras of Hindu community or similarly situated other backward classes of people in other communities, namely, Muslims, Sikhs, Christians etc.

297. Drawing strength on the opinion of Powell, J in Regents of the University of California v. Allan Bakke 57 L Ed 2d 750, an argument has been advanced that Article 16(1) permits only preferences but not reservations. In the above Bakke's case, a white male who had been denied admission to the medical school at the University of California at Davis for two consecutive years, instituted an action for declaratory and injunctive relief against the Regents of the University in the Superior Court of Yolo County, California alleging the invalidity under the equal protection clause of the Fourteenth Amendment, a provision of the California Constitution, and the prescription in racial discrimination in any programme receiving federal financial assistance of the medical school's special admissions programme. The Supreme Court announced its decision amid confusion and controversy. There was no clear majority, but a three-way split namely four Judges took one view and four other Judges took a different view, leaving Justice Powel straddling the middle. In their joint opinion partially concurring and partially dissenting, Justices Brennan, White, Marshal and Blackmun took issue with Powell's conclusion that the Davis programme was unconstitutional and said, "We cannot...let color blindness become myopia which masks the reality

that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."

298. Attention was also drawn to Defunis v. Charles Ode guard [1974] 40 L. Ed. 2nd 164.

299. The analytical study of American cases shows that the American-style justification of positive discrimination is on the ground of utility whereas the Indian-style justification is on the ground of constitutional rights. Therefore, the decision in relation to a racial discrimination relating to an admission to the medical school cannot be of much assistance in the matter of identification of 'backward classes' falling under Article 16(4). The dicta in Bakke and Defunis is one akin to the principle covered under Article 15(4) and not under Article 16(1) or 16(4).

300. Whether Article 16(4) is an exception to Articles 16(1) and (2)?

301. Mr Parasaran, the learned senior counsel, appearing on behalf of the Union of India articulated that Articles 16(4) and 335 are so worded as to give a wide latitude to the State in the matter of reservation and that Article 16(4) having no-obstinate clause reading "Nothing in this Article shall prevent the State from making any provision...." has an over-riding effect on Article 16(2).

302. In support of the above argument based on the non-obstante clause, much reliance was placed on various decisions, namely, (1) Punjab Province v. Daulat Singh and Ors. 1942 S.C.R. 67; (2) Orient Paper and Industries Ltd. v. State of Orissa, MANU/SC/0169/1991 : AIR1991SC672 and 678; (3) In re. Hatschek's Patents 1909 Chancery Division Vol. II 68 at 82 and 85 and (4) Hari Vishnu Kamath v. Syed Ahmed Ishaque and Ors. MANU/SC/0095/1954 : [1955]1SCR1104 .

303. Yet another argument placing reliance on Triloki Nath's case (I) (supra) was advanced contending that Article 16(4) is an enabling provision conferring a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens. Placing reliance on the view expressed by Wanchoo, J. (as the learned Chief Justice then was) in General Manager, Southern Railways v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC it was further urged that Article 16(4) which is in the nature of an exception or proviso to Article 16(1) cannot nullify equality of opportunity guaranteed to all citizens by that article.

304. In my view, that Clause (4) of Article 16 is not an exception to Article 16(1) and (2) but it is an enabling provision and permissive in character overriding Article 16(1) and (2); that it is a source of reservation for appointments or posts in the Services so far as the backward class of citizens is concerned and that under Clause (1) of Article 16 reservation for appointments or posts can be made to other sections of the society such as physically handicapped etc.

305. There is complete unanimity of judicial opinion of this Court that under Article 16(4) the State can make adequate provisions for reservations of appointments of posts in favour of any backward class of citizens, if in the opinion of the State such 'backward class' is not adequately represented in the State. In fact in B. Venkataramana v. State of Madras AIR 1951 SC 229 a seven Judges Bench of this Court held that "reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional". Not a single decision of this Court has cast slightest shadow of doubt on the constitutional validity of reservation. Therefore, in view of

the above position of law. I am not inclined to embark upon an elaborate discussion on this question any further.

306. Whether Reservation under Article 16(4) can be made by Executive Order?

307. The next submission that the provision for reservation of appointments or posts under Article 16(4) can be made only by a legislation and not by an executive order is unsustainable. This contention as a matter of fact has already been answered in (1) Balaji (supra) and (2), Comptroller & Auditor General v. Mohan Lal Mehrotra MANU/SC/0495/1991 : (1992)ILLJ335SC .

308. In passing, it may be stated that this Court while reversing the judgment of the Punjab and Haryana High Court in favour of the appellant State of Punjab v. Hirala Lal and Ors. MANU/SC/0066/1970 : [1971]3SCR267 upheld the reservation which was made not by a legislation but by an executive order. See also Mangal Singh v. Punjab State Police MANU/PH/0065/1968.

309. Agreeing with the reasonings of Balaji, I hold that the provision or reservation in the "Services under the State" under Article 16(4) can be made by an executive order.

310. Whether the power conferred under Article 16(4) is coupled with duty?

311. Mr. K. Parasaran put forth an argument that the enabling power conferred under Article 16(4) is intended for the benefit of the 'backward classes of citizens' who in the opinion of the State are not adequately represented in the Services under the State and that the power is one coupled with a duty and, therefore, has to be exercised by the state for the benefit of those for whom it is intended. Reference was made to H.W.R. Wade Administrative Law v. Edn. Pages 228 and 229. Halsbury's Laws of England IV Edn. Vol. V paras page 34 para 27 and page 35 para 29. He adds that the duty caused on the State is to be exercised in keeping with the directive principles laid down under Article 46 to promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes and to protect them from social injustice and all other forms of exploitation. In this connection, attention was drawn to a few decisions of this Court, namely, (1) Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd. MANU/SC/0001/1950 : [1950]1SCR536 ; (2) Official Liquidator v. Dharti Dhan 964; (3) Delhi Administration v. I.K. nangia MANU/SC/0251/1979 : 1980CriLJ834 ; and (4) Jaganathan (supra).

311. Whether formation of opinion by State is subjective?

312. The expression "in the opinion of the State" would mean the formation of opinion by the State which is purely a subjective process. It cannot be challenged in a Court on the grounds of propriety, reasonableness and sufficiency though such an opinion is required to be formed on the subjective satisfaction of the Government whether the identified 'backward class of citizens' are adequately represented or not in the Services under 'the State. But for drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a sine quo non. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of Statute, or irrelevant and extraneous material then that opinion is challengeable. See

(1) Dr. N.B. Khare v. The State of Delhi MANU/SC/0004/1950 : [1950]1SCR519 ; (2) Govindji v. Municipal Corporation, Ahmedabad [1957] Bom. 147; (3) Virendra v. The State of Punjab and Anr. MANU/SC/0023/1957 : [1958]1SCR308 (4) The Barium Chemicals Ltd. and Anr. v. The Company Ltd. Board and Ors. [1966] Suppl. SCR 311 and (5) Rohtas Industries v. S.D. Agarwal and Ors. MANU/SC/0020/1968 : [1969]3SCR108 .

313. In the present case, nothing is shown that the opinion of the Government as regards the inadequacy of representation in the Services is vitiated on any of the grounds mentioned above.

314. Whether the policy of Government can be subjected to judicial review:

315. The action of the Government in making provision for the reservation of appointments or posts in favour of any 'backward class of citizens' is a matter of policy of the Government. What is best for the 'backward class' and in what manner the policy should be formulated and implemented bearing in mind the object to be achieved by such reservation is a matter for decision exclusively within the province of the Government and such matters do not ordinarily attract the power of judicial review or judicial interference except on the grounds which are well settled by a catena of decisions of this Court. Reference may be made to (1) Hindustan Zinc v. A.P. State Electricity Board MANU/SC/0340/1991 : [1991]2SCR643 ; (2) Sitaram Sugars v. Union of India and Ors. [1990] 3 SCC 233; (3) D.C.M. v. S. Paramjit Singh MANU/SC/0410/1990 : AIR1990SC2286 ; (4) Minerva Talkies v. State of Karnataka and Ors. 1988 Suppl. SCC 176; (5) State of Karnataka v. Ranganath Reddy MANU/SC/0062/1977 : [1978]1SCR641 ; (6) Kerala State Electricity Board v. S.N. Govind Prabhu [1986] 4 SCC; (7) Prag Ice Company v. Union of India and Ors. [1978] 2 SCC 459; (8) Saraswati Industries Syndicate Ltd. v. Union of India MANU/SC/0075/1974 : [1975]1SCR956 ; (9) Murti Match Works v. Assistance Collector, Central Excise and Ors. MANU/SC/0058/1974 : 1978(2)ELT429(SC) ; (10) I. Govindraja Mudaliar v. State of Tamil Nadu and Ors. MANU/SC/0323/1973 : [1973]3SCR222 : and (11) Narender Kumar v. Union of India and Ors. [1969] 2 SCR 375.

316. To what extent can the reservation be made?

317. The next baffling question relates to the permissible extent of reservation in appointments.

318. It was for the first time that this Court in Balaji has indicated broadly that the reservation should be less than 50% and the question how much less than 50% would depend on the relevant prevailing circumstances in each case. Though in Balaji, the issue in dispute related only to the reservation prescribed for admissions in the medical college from the educationally and socially backward classes, scheduled caste and scheduled tribes as being violative of Article 15(4), this Court after expressing its view that it should be less than 50% observed further that "the provisions of Article 15(4) are similar to those of Article 16(4).... Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4)...reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution." This decision has gone further holding that the reservation of 68% seats made in that case was offending Article 15(4) of the Constitution. To say in other words, Balaji has fixed that the maximum limit of reservation all put together should not exceed 50% and if it exceeds, it is nothing

but a fraud on the Constitution. Even at the threshold, I may emphatically state that I am unable to agree with the proposition fixing the reservation for SEBCs at 50% as the maximum limit.

319. Mr. Jethmalani strongly articulated that the observation in Balaji that reservation under Article 16(4) should not be beyond 50% is only an obiter dicta since that question did not at all arise for consideration in that case. Therefore, according to him, this observation is not a law declared by the Supreme Court within the meaning of Article 141 of the Constitution. He continued to state that unfortunately some of the subsequent decision have mistakenly held as if the question of permissible limit has been settled in Balaji while, in fact, the view expressed in it was an obiter dicta. According to him, the policy of reservation is in the nature of affirmative action, firstly to eliminate the past inhuman discrimination and secondly to ameliorate the sufferings and reverse the genetic damage so that the people belonging to 'backward class' can be uplifted. When it is the main objective of Clause (4) of Article 16 any limitation on reservation would defeat the very purpose of this Article falling under Fundamental Rights and, therefore, reservation if the circumstances so warrant can go even upto 100%.

320. This view of Mr. Jethmalani has been fully supported by Mr. Siva Subramaniam appearing on behalf of the State of Tamil Nadu who pointedly referred to the speech of the Chief Minister of Tamil Nadu made in the Chief Ministers' Conference held on 10th April 1992 and produced a copy of the printed speech of the Chief Minister, issued by the Government of Tamil Nadu as an annexure to the written submission. It is seen from the said annexure that the Chief Minister has categorically emphasised the stand of the Government of Tamil Nadu stating that the total reservation for backward classes, scheduled castes and scheduled tribes is 69%; that it is but fair and proper that socially and educationally backward classes (alone) as a whole should be given at least 50% reservation for employment opportunities in Central Government services and its undertakings as well as for admission in educational institutions run by the Central Government. It has also been pointed out that in consonance with this avowed policy, the Tamil Nadu Legislative Assembly passed unanimously a resolution on 30.9.1991 urging the Government of India to adopt a policy of 50% reservation for the Backward Classes instead of 27% and to apply this reservation not only for employment opportunities in all Central Government departments and Public Sector Undertakings, but also for admission in all Educational Institutions run by the Central Government.

321. Mr. Rajiv Dhawan appearing in W.P. No. 1094/91 submits that the limits to the reservation in Article 16(4) cannot be fixed on percentage but it must be with the ulterior objective of achieving adequate representation for 'backward classes'.

322. I see much force in the above submissions and hold that any reservation in excess of 50% for 'backward classes' will not be violative of Articles 14 and/or 16 of the Constitution. But at the same time, I am of the view that such reservations made either under Article 16(4) or under Article 16(1) and (4) cannot be extended to the totality of 100%. In fact, my learned brother, P.B. Sawant, J in his separate judgment has also expressed a similar view that "there is no legal infirmity in keeping the reservations under Clause (4) alone or under Clause (4) and Clause (1) of Article 16 together exceeding 50 per cent" though for other reasons the learned Judge has concluded that ordinarily the reservations kept under Article 16(1) and 16(4) together should not exceed 50% of the appointments in a cadre or service in any particular year, but for extraordinary reasons this percentage may be exceeded. My learned brother, B.P. Jeevan Reddy, J in his separate judgment

has expressed his view that in given circumstances, some relaxation in the strict rule of reservation may become imperative and added that in doing so extreme caution is to be exercised and a special case made out.

323. As to what extent the proportion of reservation will be so excessive as to render it bad must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only upto the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50% is neither based on scientific data nor on any established and agreed formula. In fact, Article 16(4) itself does not limit the power of the Government in making the reservation to any maximum pecentage; but it depends upon the quantum of adequate representation required in the Services. In this context, it would be appropriate to recall some of the decisions of this Court, not agreeing with Balaji as regards the fixation of percentage of reservation.

324. The question of percentage of reservation was examined in Thomas wherein Fazal Ali, J not agreeing with Balaji has observed thus:

.... Clause (4) of Article 16 does not fix any limit on the power of the Government to make reservation. Since Clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid that the percentage of reservation should not exceed 50%. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make in adequate representation adequate.

325. Krishna Iyer, J in the same decision has agreed with the above view of Fazal Ali, J stating that "...the arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far."

326. Though Mathew, J did not specifically deal with this maximum limit of reservation, nevertheless the tenor of his judgment indicates that he did not favour 50% rule.

327. Chinnappa Reddy, J in Karamchari case MANU/SC/0058/1980 : (1981)ILLJ209SC (supra) has expressed his view on the ceiling of reservation as follows:

.... There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty percent. There is no rigidity about the fifty percent rule which is only a convenient guideline laid down by Judges. Every case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical

results which the application of the rule may yield in the future. Judged in the light of this discussion I am unable to find anything illegal or unconstitutional in any one of the impugned orders and circulars....

328. Again in Vasanth Kumar, Chinnappa Reddy, J reiterates his view taken in Karamchari in the following words:

We must repeat here, what we have said earlier, that there is no scientific statistical data or evidence of expert administrators who have made any study of the problem to support the opinion that reservation in excess of 50 per cent may impair efficiency.

329. I fully share the above views of Fazal Ali, Krishna Iyer, Chinnappa Reddy, JJ holding that no maximum percentage of reservation can be justifiably fixed under Articles 15(4) and/or 16(4) of the Constitution.

330. It should not be out of place to recall the observation of Hegde, J in Hira Lal observing," The extent of reservation to be made is primarily a matter for the State to decided. By this we do not mean to say, that the decision of the State is not open to judicial review.... *The length of the leap to be provided depends upon the gap to be covered.*

(emphasis supplied)

331. Desai, J in Vasanth Kumar expressed his view that in dealing with the question of reservation in favour of Scheduled Castes, Scheduled Tribes as well as other SEBCs 'Judiciary retained its traditional blindfold on its eyes and thereby ignored perceived realities."

Whether the further arbitrary classification as poorer sections' from and out of the identified SEBCs is permissible under Article 16(4) after acceptance and approval of the list without reservation and whether such classification suffers from non-application of mind?

332. The most important pivotal and crucial issue that I would now like to ponder over relates to the intent of para 2(i) of the OM dated 25th September 1991 whereunder it is declared that "Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, *preference will be given to the candidates belonging to the poorer sections of the SEBCs.* In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates".

(emphasis supplied)

333. To say in other words, the Government intends to prescribe an income ceiling for determination of 'poorer sections' of the SEBCs who will be eligible to avail of the preference of reservation of appointments or posts in the Services under the State. It is an admitted fact that the Government so far has not laid down any guideline or test for identifying and ascertaining the 'poorer sections' among the identified SEBCs.

334. The OM has specifically used the expression, 'poorer sections' but not 'weaker sections' as contemplated under Article 46 of the Constitution. Though the expressions 'poorer sections' and 'weaker sections' may connote in general 'the disadvantaged position of a section of the people' they do not convey one and the same meaning and they are not synonymous. When the OM deliberately uses the expression 'pooer sections', it has become incumbent to examine what that expression means and whether there can be any sub-classification as 'poorer' and 'non-poorer' among the same category of potential backward class of citizens on the anvil of economic criterion.

335. The word 'poor' lexically means "having little or no money, goods or other means of support" (Webster's Encyclopedic Unabridged Dictionary) or "lacking financial or other means of subsistence" (Collins English Dictionary).

336. The OM uses the expression 'poorer' in its comparative term for the word 'poor'. It is common knowledge that the superlative term for the word 'poor' is 'poorerst'. The very usage of the word 'poorer' is in comparison with the positive word 'poor'. Therefore, it, necessarily follows that the OM firstly considers all the identified SEBCs in general as belonging to 'poor sections' from and out of which the 'poorer sections' are to be culled out by applying a test to be yet formulated by the Government evidently on economic criterion or by application of poverty test based on the ceiling of income. After the segregation of 'poorer sections' of the SEBCs, the left out would be the 'poor sections'. By the use of the word 'poorer', the Government is super-imposing a relative poverty test for identifying and determining a preferential class among the identified SEBCs. It is stated that the preference will be given first to the 'poorer sections' and only in case there are unfilled vacancies, those vacancies will be filled by the left out SEBCs, namely, those other than the poorer sections. In other words, it means that all the identified SEBCs do not belong to affluent sections but to poor and poorer sections, that the expression 'poorer sections' denotes only the economically weaker sections of SEBCs compared with the remaining same category of SEBCs and that those, other than the 'poorer sections' although socially and educationally backward are economically better off compared with the 'poorer sections'. The view that all the identified SEBCs are considered as 'poor' or 'poorer' is fortified by the fact that there is an inbuilt explanation in the amended OM itself to the effect that those who do not fall within the category of 'poorer sections' also will be entitled for the benefit of reservation but of course subject to the availability of unfilled vacancies.

337. An argument was advanced that for identifying 'poorer sections', the. 'means test' signifying an imposition of outer income limit should be applied and those who are above the cut off income limit should be excluded so that the better off sections of the SEBCs may be prevented from taking the benefit earmarked for the less fortunate brethren and the only genuine and truly members of 'poorer sections' of SEBCs may avail the benefit of reservation. In support of this argument, an attempt has been made to draw strength on two decisions of this Court rendered in Jayashree and Vasanth Kumar.

338. Chief Justice Ray in Jayashree seems to have been inclined to take the view that reservation of seats in educational institutions should not be allowed to be enjoyed by the rich people suffering from the same communal disabilities.

339. Chinnappa Reddy, J in Vasanth Kumar recognises this 'means test' saying that "an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserved it", with which view Venkataramiah, J (as the learned Chief Justice than was) has agreed.

340. Thus the above argument based on 'means test' though seems to be plausible at the first sight is, in my opinion, not well founded and must be rejected on the ground that the identified category of SEBCs, having common characteristics or attributes - namely the potential social backwardness cannot be bisected or further classified by applying the economic or poverty test.

341. A doubt has been created as to whether the word 'poorer' connotes economic status or social status or is to be understood in any other way.

342. The word 'poorer' when examined in the context in which it is deployed both syntactically and etymologically, in my view, may not convey any other meaning except relative poverty or comparative economic status. If any other meaning is imported which the government evidently appears to have not contemplated, virtually one will be rewriting the second OM.

343. An order of a Constitution Bench dated 1st October 1991 clearly spells out that that Bench was of the view that 'poorer sections' are to be identified by the economic criterion. The relevant portion of the above Order reads as follows:

The matters are adjourned to 31st October 1991 when learned Additional Solicitor General will tell us how and when Government would be able to give *the list of the economic criteria* referred to in the notification of 25th September 1992.

(emphasis supplied)

344. The same view is reflected in a subsequent Order dated 4th December 1991 made by this nine-Judges Bench, the relevant part of which reads thus:

Learned Additional Solicitor General states that the Government definitely expects to be able to fix the *economic criteria* by January 28, 1992.... As far as the question of stay granted by us earlier is concerned, we see no reason to pass any order at this stage as the petitions are posted for hearing on January 28, 1992 and in view of the *economic criterion* not being yet determined and other relevant circumstances, no question of immediate implementation of the notification arises.

(emphasis supplied)

345. The above Orders of this Court support my view that the Government has to identify the 'poorer sections' only by the economic criteria or by the application of poverty test otherwise called 'means test'. It appears that this Court has all along been given to understand that 'poorer sections' will be tested by the Government on economic criterion.

346. The above view is further fortified by the very fact that the second OM providing 10% of the reservation '*for economically backward sections* of the people not covered by any other scheme of

the reservation' indicates that the Government has taken only the economic criteria in making the classification of the various sections of the people (emphasis supplied). Therefore, I proceed on the basis that the second OM identifies the 'poorer sections' only on the basis of economic status.

347. When the 'means test' is analysed in depth so as to explore its merits and demerits, one would come to an inevitable conclusion that it is not a decisive test but on the other hand it will serve as a protective umbrella for many to get into this segregated section by adopting all kinds of illegal and unethical methods. Further, this test will be totally unworkable and impracticable in the determination of "getting somebody in and getting somebody out" from among the same identified SEBCs. If this 'means test' argument is accepted and put into action by scanning the identified SEBCs by applying a super-imposition test, the very object and purpose of reservation, intended for the socially backward class would reach only a cul-de-sac and the identified SEBCs would be left in a maze. In my considered opinion, it will be a futile exercise for the courts to find out the reasons in support of the division between and among the group of SEBCs and make rule therefor, for multiple reasons, a few of which which I am enumerating hereunder.

(1) The division among the identified and ascertained SEBCs having common characteristics and attributes - the primary of which being the potential social backwardness, as 'poorer sections' and 'non-poorer sections' on the anvil of economic criterion or by application of a superimposition test of relative poverty is impermissible as being opposed to the scope and intent of Article 16(4).

(2) If this apex Court puts its seal of approval to para 2(i) of the second OM whereunder a section of the people under the label of 'poorer sections' is carved out from among the SEBCs, it becomes a law declared by this Court for the entire nation under Article 141 of the Constitution and is binding on all the Courts within the territory of India and that the decision of this Court on a constitutional question cannot be over-ridden except by the constitutionally recognised norms. When such is the legal position, the law so declared should be capable of being effectively implemented in its applicability to some rare or freakish cases. The law should not be susceptible of being abused or misused and leave scope for manipulation which can remain undetected. If the law so declared by this Court is indecisive and leaves perceivable loopholes, by the aid of which one can defeat or circumvent or nullify that law by adopting an insidious, tricky, fraudulent and strategic device to suit one's purpose then that law will become otiose and remain as a dead letter.

I would like to indicate the various reasons in support of my opinion that this process of elimination or exclusion of a section of people from and out of the same category of SEBCs cannot be sustained leave apart the authority of the Government to take any decision and formulate its policy in its discretion or opinion provided that the policy is not violative of any constitutional or legal provisions or that discretion or opinion is not vitiated by non-application of mind, arbitrariness, formulation of collateral grounds or consideration of irrelevant and extraneous material etc.

(a) If the annual gross income of a government servant derived from all his sources during a financial year is taken as a test for identifying to 'poorer sections', that test could be defeated by reducing the income below the ceiling limit by a Government servant voluntarily going on leave on loss of pay for few months during that financial year so that he could bring his annual income within the ceiling limit and claim the benefit of reservation meant for 'poorer sections'. Similarly, a person owning extensive land also may lay a portion of his land fallow in any particular year or

dispose of a portion of his land so as to bring his agricultural income below the ceiling limit so that he may fall within the category of 'poorer sections'.

(b) The fluctuating fortunes or misfortunes also will play an important role in determining whether one gets within the area of 'poorer sections' or gets out of it.

(c) Take a case wherein there are two brothers belonging to the same family of 'backward class' of whom one is employed in Government service and another is privately employed or has chosen some other profession. The annual income of the Government employee if slightly exceeds the ceiling limit, his children will not fall within the category of 'poorer sections' whereas the other brother can deceitfully show his income within the ceiling limit so that his children can enjoy that benefit.

(d) Among the pensioners also, the above anomaly will prevail as pointed out in Janaki Prasad.

(e) Any member of SEBCs who is in Government job and is on the verge of his superannuation and whose income exceeds the ceiling limit, will go out of the purview of 'poorer sections' but in the next financial year, he may get into the 'poorer sections' if his total pensionary benefits fall within the ceiling limit.

(f) A person who is within the definition of 'poorer sections' may suddenly go out of its purview by any intervening fortuitous circumstances such as getting a marital alliance in a rich family or by obtaining any wind-fall wealth.

(g) If poverty test is made applicable for identifying the 'poorer sections' then in a given case wherein a person is socially oppressed and educationally backward but economically slightly advanced in a particular year, he will be deprived of getting the preferential treatment.

The above are only by way of illustrations, though this type can be multiplied, for the purpose of showing that a person can voluntarily reduce his income and thereby circumvent the declared law of this Court. In all the above illustrations, enumerated as (a) to (g), the chance of "getting into or getting out of the definition of 'poorer sections' will be like a see-saw depending upon the fluctuating fortunes or misfortunes.

(3) The income-test for ascertaining poverty may severally suffer from the vice of corruption and also encourage patronage and nepotism.

(4) When the Government has accepted and approved the lists of SEBCs, identified by the test of social backwardness, educational backwardness and economic backwardness which lists are annexed to the Report, there is no justification by dividing the SEBCs into two groups, thereby allowing one section to fully enjoy the benefits and another on a condition only if there are unfilled vacancies.

(5) The elimination of a section of SEBCs by putting an arbitrary and unnecessary unjustified. This process of elimination or exclusion of a section of SEBCs will be tentamount to pushing those persons into the arena of open competition along with the forward class if there are no unfilled

vacancies out of the total 27% meant for SEBCs. This will cause an irretrievable injustice to all the non-poorer sections though they are also theoretically declared as SEBCs.

(6) The second OM providing a scanning test is neither feasible nor practicable. It will be perceptible and effectual only if the entire identified backward class enjoys the benefit of reservation.

(7) The proposed 'means test' is highly impressionistic test, the result of which is likely to be influenced by many uncertain and imponderable facts.

(8) It may theoretically sound well but in practice attempts may be made in a underhanded way to get round the problem.

348. What I have indicated above is only the tip of the iceberg and more of it is likely to surface at the time when any scanning process and super-imposition test are put into practice.

349. In this connection, I would like to mention the views of the Tamil Nadu Government as expressed by the Chief Minister of Tamil Nadu in the Chief Ministers' Conference held in New Delhi (already referred to) stating that the application of income limit on reservation will exclude those people whose income is above the 'cut-off limit and literally, it means that they will come under the open competition quota and if caste is not the sole criterion, income limit cannot also be the decisive and determining factor for social backwardness and that the exclusion of certain people from the benefits of reservation by the application of economic criterion will not bring the desired effect for the advancement and improvement of the backward classes who have suffered deprivation from the time immemorial.

350. Reference also may, be made to Balaji wherein it has been ruled that backward classes cannot be further classified into backward and more backward and that such a sub-classification "does not appear to be justified under Article 15(4)". This view, in my opinion, can be equally applied even for sub-classification under Article 16(4).

351. Arguing with the above view of Balaji, I hold that the further sub-classification as 'poorer sections' out of the ascertained SEBCs after accepting that group in which the common thread of social backwardness runs through as an identifiable unit within the meaning of the expression 'backward class', is violative of Article 16(4).

352. Of course, in Vasanth Kumar, Chinnappa Reddy, J. in his separate judgment has taken a slightly contrary view, holding that there can be classification for providing some reservation to the more backward classes compared to little more advanced backward classes. This view is expressed only by the learned Judge (Chinnappa Reddy, J.) on which view other Judges of that Bench have not expressed any opinion. However, it appears that the learned Judge has not said that the entire reservation should go only to the more backward classes but only some percentage of reservation should be provided and earmarked exclusively for the more backward classes.

353. In the present case, the entire reservation of 27 per cent is given firstly to be enjoyed by the 'poorer sections' and only the unfilled vacancies, if any, can be availed of by others. As I have already held, the view expressed by the Constitution Bench in Balaji is more acceptable to me.

354. It may not be out of place to mention here that in Tamil Nadu, based on one of the recommendations of the First Backward Classes Commission constituted in 1969 - known as 'Sattanatham Commission' - the Government issued orders in G.O. Ms. No. 1156, Social Welfare Department, dated 2nd July 1979, superimposing the income ceiling of Rs. 9,000 per annum as additional criterion for the backward classes to be eligible for reservation for admission in educational institutions and recruitment to public services. This order was challenged before the High Court but the High Court by 2:1 upheld the G.O. However, the order provoked a considerable volume of public criticism. After an All-party meet, the Government in G.O. Ms. No. 72, Social Welfare Department dated 1st February 1980 revoked their orders and the position as it stood prior to 2nd July 1979 was restored. Simultaneously, by another G.O. Ms. No. 73, Social Welfare Department dated 1st February 1980, the Government raised the percentage of reservation for backward classes from 31 per cent to 50 per cent commensurate with the population of the backward classes in the State. Both the GOs i.e. G.O. Ms. No. 72 and 73 dated 1st February 1980 were challenged in the Supreme Court in Writ Petition Nos. 4995-4997 of 1980 along with W.P. No. 402 of 1981.

355. The Constitution Bench of this Court by its order dated 14th October 1980 directed the State Government to appoint another Commission to review the then existing enumeration and classification of backward classes and to take necessary steps for identifying the backward classes in the light of the report of the said Commission and that both the GOs "shall lapse after January 1, 1985". However, by order dated 5.5.1981, the above writ petitions were directed to be listed alongwith W.P. Nos. 1297-98/79 and 1497/79 (Vasanth Kumar). Thereafter, a number of CMPs in the writ petitions for extension of time for implementation of this Court's directions were filed. This Court periodically extended the time upto July 1985. A CMP for further extension of time was dismissed on 23.7.1985 by a three-Judges Bench of this Court since the Judgment in Vasanth Kumar involving the same question was delivered on 8.5.1985. Vide (1) Orders of Supreme Court in W.P. Nos. 4995-97/1980 and W.P. No. 402/1981, (2) Orders of High Court of Madras in W.P. Nos. 3069, 3292 and 3436/79 dated 20th August 1979 and (3) Paragraph 1.01 of Chapter I of the Report of the Tamil Nadu Second Backward Classes Commission (popularly known as Ambasankar Commission).

356. We have referred to the above facts for the purpose of showing that the fixation of ceiling limit on economic criterion was not successful and that for identifying the 'weaker sections', ceiling limit is not the proper test, once the backward class is identified and ascertained.

357. Further, it is clear for the afore-mentioned reasons that the Executive while making the division of sub-classification has not properly applied its mind to various factors, indicated above which may ultimately defeat the very purpose of the division or sub-classification. In that view, para 2(i) not only becomes constitutionally invalid but also suffers from the vice of non-application of mind and arbitrariness.

358. For the fermentation reason, I am of the firm view that the division made in the amended OM dividing a section of the people as 'poorer sections' and leaving the remaining as 'non-poorer sections' on economic criterion from and same unit of identified and ascertained SEBCs, having common characteristics the primary of which is the social backwardness as listed in the report of the Commission, is not permissible and valid and such a division or sub-classification is liable to be struck down as being violative of Clause (4) of Article 16 of the Constitution.

359. A further submission has been made stating that the benefits of reservation are often snatched away or eaten up by top creamy layer of socially advanced backward class who consequent upon their social development no longer suffer from the vice of social backwardness and who are in no way handicapped and who by their high professional qualifications occupy upper echelons in the public services and therefore, the children of those socially advanced section of the people, termed as 'creamy layer' should be completely removed from the lists of 'Backward Classes' and they should not be allowed to compete with the children of socially under-privileged people and avail the quota of reservation. By way of illustration it is said that if a member of a designated backward class holds a high post by getting through the qualifying examinations of IAS, IFS, IPS or any other All India Service, there can be no justification in extending the benefit of reservation to their children, because the social status is will advanced and they no longer suffer from the grip of poverty.

360. On the same analogy, it has been urged that the children of other professionals such as Doctors, Engineers, Lawyers etc. etc. also should not be given the benefit of reservation, since in such cases, they are not socially handicapped.

361. No doubt the above argument on the face of it appears to be attractive and reasonable. But the question is whether those individuals belonging to any particular caste, community or group which satisfies the test of backward class should be segregated, picked up and thrown over night out of the arena of backward class. One should not lose sight of the fact that the reservation of appointments or posts in favour of 'any backward class of citizens' in the Central Government services have not yet been put in practice in spite of the impugned OMs. It is after 42 years since the advent of our Constitution, the Government is taking the first step to implement this scheme of reservation for OBCs under Article 16(4). In fact, some of the States have not even introduced policy of reservation in the matters of public employment in favour of OBCs.

362. In opposition, it is said that only a very minimal percentage of BCs have stepped into All India Civil Services or any other public services by competing in the mainstream along with the candidates of advanced classes despite the fact that their legs are fettered by social backwardness and hence it would be very uncharitable to suddenly deprive their children of the benefit of reservation under Article 16(4) merely on the ground that their parents have entered into Government services especially when those children are otherwise entitled to the preferential treatment by falling within the definition of 'backward class'. It is further stressed that those children so long as they are wearing the diaper of social backwardness should be given sufficient time till the Government realises on reviews that they are completely free from the shackles of social backwardness and have equated themselves to keep pace with the advanced classes. There are a few decisions of this Court which I have already referred to, holding the view that even if a few individuals in a particular caste, community or group are socially and educationaly above the

general average, neither that caste nor that community or group can be held as not being socially backward. (Vide Balaram).

363. In the counter affidavit dated 30th October 1990 filed by the Union of India sworn by the Additional Secretary to the Government of India in the Ministry of Welfare, the following averments with statistical figures are given:

Based on the replies furnished by 30 Central Ministries and Departments and 31 attached and subordinate offices and public sector undertakings under the administrative control of 14 Ministries (which may be treated as sufficiently representative of the total picture) the Commission arrived at the following figures:-

Category of Employees	Total number *of employees*	*Percentage of SC/ST*	*Percentage of OBCs*
All classes	15,71,638	18.72	12.55

(Extracted from page 92 of First Part of Mandal Commission Report)

364. The above figures clearly show that the SEBCs are inadequately represented in the Services of the Government of India and that the SCs and STs in spite of reservation have not yet been able to secure representation commensurate with the percentage of reservation provided to them.

365. Meeting an almost similar argument that the 'creamy layers' are snatching away the benefits of reservation, Chinnappa Reddy, J. observed in Vasanth Kumar to the following effect:

One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunes among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layers amongst them on the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?

366. The above observation, in my view, is an apt reply to such a criticism with which I am in full agreement. To quote Krishna Iyer, J. "For every cause there is a martyr". I am also reminded of an adage, "One swallow does not make the summer."

367. Reverting to the case on hand, the O.M. does not speak of any 'creamy layer test'. It cannot be said by any stretch of imagination that the Government was not aware of some few individuals having become both socially and educationally above the general average and entered in the All India Services or any other Civil Services. Despite the above fact, the Government has accepted the listed groups of SEBCs as annexed to the Report and it has not thought it prudent to eliminate those individuals. Therefore, in such circumstances, I have my own doubt whether the judicial supremacy can work in the broad area of social policy or in the great vortex of ideological and

philosophical decisions directing the exclusion of any section of the people from the accepted list of OBCs on the mere ground that they are all 'creamy layers' which expression is to be tested with reference to various factors or make suggestions for exclusion of any section of the people who are otherwise entitled for the benefit of reservation in the decision of the Government so long that decision does not suffer from any constitutional infirmity.

368. Added to the above submission, it has been urged that some pseudo communities have smuggled into the backward classes and they should be removed from the list of OBCs, lest those communities would be eating away the major portion of the reservation which is meant only for the true and genuine backward classes. There cannot be any dispute that such pseudo communities should be weeded out from the list of backward classes but that exercise must be done only by the Government on proper verification.

369. The identification of the backward classes by the Mandal Commission is not with a seal of perpetual finality but on the other hand it is subjected to reviewability by the Government. The Mandal Commission itself in paragraph 13.40 in Chapter XIII has suggested that "the entire scheme should be reviewed after 20 years." Mr. Jethmalani suggested that the list may be reviewed at the interval of 10 years. There are judicial pronouncements to the effect that Government has got the right of reviewability. There cannot be any controversy indeed there is none - that the Government which is certainly interested in the maintenance of standards of its administration, possesses and retains its sovereign authority to adopt general regulatory measures within the constitutional framework by reviewing any of its schemes or policies. The interval of the period at which the review is to be held is within the authority and discretion of the Government, but of course subject to the constitutional parameters and well settled principles of judicial review. Therefore, it is for the Government to review the lists at any point of time and take a decision for the exclusion of any pseudo community or caste smuggled into the backward class or for inclusion of any other community which in the opinion of the Government suffers from social backwardness.

370. It may be recalled that the petitioner herself in W.P. No. 930 of 1990 has stated,"...the Courts cannot sit as a super legislature to determine and decide the social issue as to who are socially and educationally backward...."

371. It will be appropriate to refer to an observation of the five-Judges Bench of this Court (which heard initially these matters) in its order dated 8th August 1991 stating:

The validity of the Mandal Commission Report as such is not in issue before us....

372. A three-Judges Bench of this Court comprising of Ranganath Mishra, K.N. Singh, M.H. Kania, JJ. (as the learned Chief Justices then were) has observed in their order dated 21st September 1990 that the implementation of executive decisions is in the hands of the Government of the day but constitutional validity of such action is a matter for Court's examination.

373. Thereafter, a Constitution Bench of this Court by their order dated 1st October 1990 explained the earlier order stating "Three out of us sitting as a Bench on the 21st September 1990 made an order after hearing parties wherein we had indicated that the decision to implement three aspects

of the recommendations of the Mandal Commission was a political one and ordinarily the Court would not interfere with such a decision."

374. Therefore, when this Court is not called upon to lay a test or give any guideline as to who are all to be eliminated from the listed groups of the Report, there in no necessity to lay any test much less 'creamy layer test'. I find no grey area to be clarified and consequently hold that what one is not free to do directly cannot do it indirectly by adopting any means. Therefore, the argument of 'creamy layer' pales into insignificance.

375. Further I hold that all SEBCs brought in the lists of the Commission which have been accepted and approved by the Government should be given equal opportunity in availing the benefits of the 27 per cent reservation. In other words, the entire 27% of the vacancies in civil posts and services under the Government of India shall be reserved and extended to all the SEBCs.

376. In fact, the first OM dated 13th August 1990 does not make any division or sub-classification as in the amended OM. Para 2(i) of the first OM reads, "27% of the vacancies in civil posts and services in the Government of India shall be reserved for SEBCs." In reading para 2 (i) of the first OM in juxtaposition with para 2(i) of the amended OM, no basic difference in the policies of the two Government is spelt out; in that both the impugned OMs have made 27% reservation in civil posts and services under the Government of India for SEBCs" on the basis of the recommendations of the Second Backward Classes Commission (Mandal Report). The only difference between the two impugned OMs is that in the amended OM a division among the SEBCs is made as 'poorer sections' and others that the 'poorer sections' is firstly allowed to avail the benefit of reservation of only the unfilled vacancies. Therefore, by striking down para 2(i) of the amended OM as unconstitutional, I hold that there is no legal impediment in implementing para 2(i) of the first OM dated 13th August 1990 which has not been supersed, rescinded or repealed but "deemed to have been amended."

377. Before parting with this aspect of the matter, I would like to express my view that the 'poorer sections' of the SEBCs may be provided with various kinds of concessions and facilities such as educational concessions, special coaching facilities, financial assistance, relaxation of upper age limit, increase of number of attempts etc. for government services with a view to give them equal opportunity to compete and keep pace with the advanced sections of the people.

378. Whether 10% reservation in favour of 'other economically backward section' is permissible under Article 16?

379. Now I shall pass on to paragraph 2(ii) of the amended OM which reveals that 10 per cent of the vacancies in civil posts and services under the 'Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

380. This reservation of 10 per cent cannot be held to be constitutionally valid as concluded by my learned brother B.P. Jeewan Reddy, J. for the reasons, mentioned in paragraph 115 of his judgment. I am in full agreement with his conclusion on this issue of 10% reservation.

381. Whether Article 16(4) contemplates reservation in the matter of promotion?

382. In Mohan Kumar Singhania v. Union of India : AIR1992SC1 , a three-Judges Bench of this Court to which I was a party has taken a view that once candidates even from reserved communities are allocated and appointed to a Service based on their ranks and performance and brought under the one and same stream of category, then they too have to be treated on par with all other selected candidates and there cannot be any question of preferential treatment at that stage on the ground that they belong to reserved community though they may be entitled for all other statutory benefits such as the relaxation of age, the reservation etc. Reservation referred to in that context is referable to the reservation at the initial stage or the entry point as could be gathered from that judgment.

383. It may be recalled, in this connection, the view expressed by Chief Justice Ray in Thomas that "efficiency has been kept in view and not sacrificed".

384. Hence, I share the view of my learned brother B.P. Jeevan Reddy, J. holding that "Article 16(4) does not permit provision for reservation in the matter of promotions and that this rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis" and the direction given by him that wherever reservations are provided in the matter of promotion such reservation may continue in operation for a period of five years from this day.

385. In Summation

(1) Article 16(4) of the Constitution is neither an exception nor a proviso to Article 16(1). It is exhaustive of all the reservations that can be made in favour of backward class of citizens. It has an over-riding effect on Article 16(1) and (2).

(2) No Reservation can be made under Article 16(4) for classes other than backward classes. But under Article 16(1), reservation can be made for classes, not covered by Article 16(4).

(3) The expression, 'backward class of citizens' occurring in Article 16(4) is neither defined nor explained in the Constitution. However, the backward class or classes can certainly be identified in Hindu society with reference to castes along with other criteria such as traditional occupation, poverty, place of residence, lack of education etc. and in communities where caste is not recognised by the above recognised and accepted criteria except caste criterion.

(4) In the process of identification of backward class of citizens and under Article 16(4) among Hindus, caste is a primary criterion or a dominant factor though it is not the sole criterion.

(5) Any provision under Article 16(4) is not necessarily to be made by the Parliament or Legislature. Such a provision could also be made by an Executive order.

(6) The power conferred on the State under Article 16(4) is one coupled with a duty and, therefore, the State has to exercise that power for the benefit of all those, namely, backward class for whom it is intended.

(7) The provision for reservation of appointments or posts in favour of any backward class of citizens is a matter of policy of the Government, of course subject to the constitutional parameters and well settled principle of judicial review.

(8) The expression 'poorer sections' mentioned in para 2 (i) of the amended Office Memorandum of 1991 denotes a division among SEBCs on economic criterion. Therefore, no division or sub-classification as 'poorer sections' and other backward class (non poorer sections) out of the identified SEBCs can be made by application of 'means test' based on economic criterion. Such a division in the same identified and ascertained unit consisting of SEBCs having common characteristics and attributes, the primary characteristic or attribute being the social backwardness is violative of Clause (4) of Article 16 of the Constitution. Hence, the division of the SEBCs as 'poorer sections' and others, brought out in para 2(i) of the impugned amended Office Memorandum dated 25th September 1991 is constitutionally invalid and impermissible. Accordingly, para 2(i) of the said amended Office Memorandum is struck down.

(9) No maximum ceiling of reservation can be fixed under Article 16(4) of the Constitution for reservation of appointments or posts in favour of any backward class of citizens "in the Services under the State". The decisions fixing the percentage of reservation only up to the maximum of 50% are unsustainable.

(10) As regards the reservation in the matter of promotion under Article 16(4), I am in agreement with conclusion No. (7) made in paragraph 121 in Part VII of the judgment of my learned brother. B.P. Jeevan Reddy, J..

(11) I also agree with conclusion No. (8) of paragraph 121 of the judgment of my learned brother, B.P. Jeevan Reddy, J. qua the exception to the rule of reservation to certain Services and posts.

(12) The reservation of 10% of the vacancies in civil posts and Services in favour of other economically backward sections of the people who are not covered by any other scheme of the reservation as mentioned in para 2(ii) of the impugned amended Officer Memorandum dated 25th September 1991 is constitutionally invalid and it is accordingly struck down. In this regard, I am also in agreement with conclusion No. (11) of paragraph 121 of the judgment of my learned brother, B.P. Jeevan Reddy, J.

(13) No section of the SEBCs can be excluded on the ground of creamy layer till the Government - Central and State - takes a decision in this regard on a review on the recommendations of a Commission or a Committee to be appointed by the Government.

(14) Para 2(i) and (ii) of the amended Office Memorandum dated 25th September 1991 for the reasons given in my judgment and the conclusions drawn above, are struck down as being violative of Article 16(4).

(15) The impugned Office Memorandum dated 13th August 1990 is held valid and enforceable. So there is no legal impediment in immediately enforcing and implementing this first Office Memorandum of 1990.

(16) In Writ Petition No. 1094 of 1991 (Sreenarayana Dharma Paripalana Yogam v. Union of India), there is a prayer (prayer 'b'), inter alia, for issuance of a writ of mandamus directing the respondent to implement the impugned unamended office memorandum dated 13th August 1990. In the light of my conclusions, striking down the amended office memorandum dated 25th September 1991, I direct the Union of India to immediately implement the unamended office memorandum dated 13th August 1990.

(17) The Government of India and the State Governments have to create a permanent machinery either by way of a Commission or a Committee within a reasonable time for examining the requests of inclusion or exclusion of any caste, community or group of persons on the advice of such Commission or Committee, as the case may be, and also for examining the exclusion of any pseudo community if smuggled into the list of OBCs. The creation of such a machinery in the form of a Commission or Committee does not stand in the way of immediate implementation of the office memorandum dated 13.8.1990 and the purpose of creating such machinery is for future guidance.

(18) I am also of the same view of my learned brother, B.P. Jeevan Reddy, J. that it is not necessary to send the matters back to the Constitution Bench of five-Judges.

386. In the result, for the reasons mentioned in my judgment and the conclusions drawn in the summation, the writ petition No. 1094 of 1991 is partly allowed to the extent indicated above and all other Writ Petitions, Transferred Cases and Interlocutory Applications are disposed of accordingly. No costs.

Dr. T.K. Thommen, J.

387. The petitioners challenge O.M. No. 36012/31/90-Estt(SCT) dated 13th August, 1990 as amended by O.M. No. 36012/31/90-Estt(SCT) dated 25th September, 1991 providing in civil posts and services under the Government of India for reservation of 27% of the vacancies for the Socially and Educationally Backward Classes (SEBCs) and 10% of the vacancies for other economically backward sections of the people. The Office Memorandum dated 13th August, 1990, in so far as it is material, reads:-

...

2(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

(ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment....

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standard prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Government's lists. A list of such castes/communities is being issued separately.

(v)...

388. The amended Office Memorandum dated 25th September, 1991 provides:-

....

2(i) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

(ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

...

389. The reservation postulated in these orders for the socially and educationally backward classes and also for the economically backward sections of the people in the Central Government services to the extent of 27% and 10% respectively is in addition to the reservation already made for the Scheduled Castes and the Scheduled Tribes to the extent of 22.5%.

390. These orders are made pursuant to the Report submitted by the Backward Classes Commission appointed by the President of India under Article 340 of the Constitution. This Report is generally known by the name of the Chairman of the Commission, the Late B.P. Mandal. The petitioners submit that the Report leading to the impugned Government Orders is not based on any scientific or objective study of backwardness in the country, and any attempt to make reservation on the basis of the data supplied in the Report is irrational, unconstitutional and invalid. They say that the Report is conceived in caste prejudices and motivated by caste hatred. The Report does not address itself to a proper identification of true backwardness for the redressal of which the Constitution permits reservation by quota for the backward classes of citizens to the exclusion of all other persons. On the other hand, the sole criterion on the basis of which backwardness is purportedly identified is caste and nothing but caste. Any order resulting in reservation or other affirmative action on the basis of the wrong conclusions drawn by the Commission is bound to be the very antithesis of equality.

391. The respondents, supporting the impugned Government orders, contend that the Constitution guarantees liberty, equality and fraternity for all classes of people irrespective of their religion, community, caste, occupation, residence or the like. Every citizen is entitled to equal opportunities. For centuries, large sections of our countrymen have been discriminated against on account of their birth. As a result of such inequity, they have been steeped in poverty, ignorance and squalor. To alleviate their misery and elevate them to positions of equality with the more fortunate, affluent

and enlightened sections of our countrymen, the Founding Fathers of the Constitution made special provisions for their uplift. These provisions are meant to protect the truly backward people of this country, namely, members of the Scheduled Castes and Scheduled Tribes and other backward classes. They contend that the Mandal Report is a scientific and serious study rationally addressed to the problem of backwardness by identifying it where it is most acutely felt and loudly present, namely, amongst the lowest of the lowly citizens of this country. Those are the members of the low castes as traditionally recognised and identified by the State and Central Government. The various classes of people belonging to such castes are identified as socially, educationally and economically backward and it is in respect of those people that the Government have made the impugned reservations.

392. The 'indicators' or 'criteria' adopted in the Mandal Report are broadly grouped as social, educational and economic on the basis of castes/classes. The Commission has identified classes with castes and backwardness with particular castes. Castes which are socially, educationally and economically backward are characterised as backward classes entitled to the benefit of reservation. Persons are grouped on the basis of caste either because they are members of it by reason of their being Hindus or because they were members of it in the past prior to their conversion to other religions. Identification of backwardness is thus made with reference to the present or past caste affiliations of the people. The Report says:-

12.4. In fact, caste being the basic unit of social organisation of Hindu Society, castes are the only readily and clearly 'recognisable and persistent collectivities'.

12.6. ...the Commission has also applied some other tests like stigmas of low occupation, criminality, nomadism, beggary and untouchability to identify social backwardness. Inadequate representation in public services was taken as another important test.

393. In regard to non-Hindus, the Report says:-

12.11 There is no doubt that social and educational backwardness among non-Hindu communities is more or less of the same order as among Hindu communities. Though caste system is peculiar to Hindu society yet, in actual practice, it also pervades the non-Hindu communities in India in varying degrees...even after conversion, the ex-Hindus carried with them their deeply ingrained ideas of social hierarchy and stratification....

12.14...even after conversion, the lower caste converts were continued to be treated as Harijans by all sections of the society....

12.18 ...the Commission has evolved the following rough and ready criteria for identifying non-Hindu OBCs:-

(i) All untouchables converted to any non-Hindu religion; and

(ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples : Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.).

The Report has thus treated all persons who belong, or who had once belonged, to what had been regarded as untouchable or other traditionally backward caste or communities or who belong to certain low occupations as socially, educationally and economically backward.

394. The particulars of the Mandal Report and other material relied on by the Government in making the impugned orders do not directly arise for our consideration at this juncture as this Bench has been constituted to examine the concept of equality of opportunity in matters of public employment, as enshrined in Article 16 and other provisions of the Constitution, 'and settle the legal position relating to reservation' and thus lay down the guideline by which the validity and reasonableness of Government Orders on reservation can be tested in appropriate cases.

395. The Concept of Reservation:

The fundamental question is, what is the raison d'etre of reservation and what are its limits. The Constitution permits the State to adopt such affirmative action as it deems necessary to uplift the backward classes of citizens to levels of equality with the rest of our countrymen. The backward classes of citizens have been in the past denied access to Government services on account of their inability to compete effectively in open selections on the basis of merits. It is, therefore, open to the Government to reserve a certain number of seats in places of learning and public services in favour of the Scheduled Castes and Scheduled Tribes and other backward classes to the exclusion of all others, irrespective of merits. The impugned Government orders, have made reservation by setting aside quotas in Government services exclusively for backward classes of candidates.

396. Referring to the concept of equality of opportunity in public employment, as embodied in Article 10 of the Draft Constitution, which finally emerged as Article 16 of the Constitution, and the conflicting claims of various communities for representation in public administration, Dr. Ambedkar emphatically declared that reservation should be confined to 'a minority of seats', lest the very concept of equality should be destroyed. In view of its great importance, the full text of this speech delivered in the Constituent Assembly on the point is appended to this judgment. But I shall now read a few passages from it. Dr. Ambedkar stated:

...firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'poorer look- in' so to say into the administration.... Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, nemely, that there shall be an equality of opportunity....Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation...we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State....

397. *Constituent Assembly Debates,* Vol. 7, pp. 701-702 (1948-49).

(emphasis supplied)

These words embody the raison d'etre of reservation and its limitations. Reservation is one of the measures adopted by the Constitution to remedy the continuing evil effects of prior inequities stemming form discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness. Reservation is meant to be addressed to the present social, educational and economic backwardness caused by purposeful societal discrimination. To attack the continuing ill effects and perpetuation of such injustice, the Constitution permits and empowers the State to adopt corrective devices even when they have discriminatory and exclusionary effects. Any such measure, in so far as one group is preferred to the exclusion of another, must necessarily be narrowly tailored to the achievement of the fundamental constitutional goal.

398. What the Constitution permits is the adoption of suitable and appropriate measures to correct the continuing evil effects of prior discrimination. Over-inclusiveness in such measures by unduly widening the net of reservation to unjustifiably protect the ill deserved at the expense of the others would result in invidious discrimination offending the Constitutional objective. Benign classification for affirmative action by reservation must stay strictly within the narrow bounds of remedial actions. Any such programme must be consistent with the fundamental objective of equality. Classes of people saddled with disabilities rooted in history of purposeful unequal treatment and consequently relegated to social, educational, economic and political power-lessness particularly qualify to demand the extraordinary and special protection of reservation.

399. Reservation is meant to remedy the handicap of prior discrimination impeding the access of classes of people to public administration. It is for the State to determine whether the evil effects of inequities stemming from prior discrimination against classes of people have resulted in their being reduced to positions of backwardness and consequent under representation in public administration. Reservation is a remedy or a cure for the ill effects of historical discrimination.

400. While affirmative action programmes by preferential treatment short of reservation in favour of disadvantaged classes of citizens may be justified as benign redressal measures based on valid classification, the more positive affirmative action adopting reservation by quota or other 'set aside' measures or goals in favour of certain classes of citizens to the exclusion of others most be narrowly tailored and strictly addressed to the problem which is sought to be remedied by the Constitution. Any such action by the State must necessarily be subjected to periodic administrative review by specially constituted authorities so as to guarantee that such policies and actions are applied correctly and strictly to permitted constitutional ends.

4.1. Reservation is not an end in itself. It is a means to achieve equality. The policy of reservation adopted to achieve that end must, therefore, be consistent with the objective in view. Reservation must not outlast its constitutional object, and must not allow a vested interest to develop and perpetuate itself. There will be no need for reservation or preferential treatment once equality is achieved. Achievement and preservation of equality for all classes of people, irrespective of their birth, creed, faith or language is one on the noble ends to which the Constitution is dedicated. Every reservation founded on benign discrimination, and justifiably adopted to achieve the constitutional mandate of equality, must necessarily be a transient passage to that end. It is temporary in concept, limited in duration, conditional in application and specific in object. Reservation must contain within itself the seeds of its termination. Any attempt to perpetuate

reservation and upset the constitutional mandate of equality is destructive of liberty and fraternity and all the basic values enshrined in the Constitution. A balance has to be maintained between the competing values and the rival claims and interests so as to achieve equality and freedom for all.

401. The makers of the Constitution were fully conscious of the unfortunate position of the Scheduled Castes and Scheduled Tribes. To them equality, liberty and fraternity are but a dream; an ideal guaranteed by the law, but far too distant to reach; far too illusory to touch. These backward people and others in like positions of helplessness are the favoured children of the Constitution. It is for them that ameliorative and remedial measures are adopted to achieve the end of equality. To permit those who are not intended to be so specially protected to compete for reservation is to dilute the protection and defeat the very constitutional aim.

402. The victims of prior injustice are the special favourites of the laws. Their plight is a shameful scar on the national conscience. It is a constitutional command that prompt measures are adopted by the State for the promotion of these unfortunate classes of people specially to positions of comparative enlightement, culture, knowledge, influence, affluence and prestige so as to place them on levels of equality with the more fortunate of our countrymen.

403. Reservation must one day become unnecessary and a relic of an unfortunate past. Every such action must be a transient self-liquidating programme. That is the hope and dream cherished by the Constitution Makers and that is the end to which the State has to address itself in making special provisions for the chosen classes of people for special constitutional protection, so that "persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us"; Per Justice T. Marshall, Regents of the University of California v. Allan Bakke 438 US 265, 57 L Ed. 2d 750. See also H. Earl Fullilove v. Philip M. Klutznick 448 US 448, 65 L Ed. 2d 902; Metro Broadcasting Inc. v. Federal Communications Commission 58 I.W. 5053 (Decided on 27.6.1990); Oliver Brown v. Board of Education of Topeka 347 US 483, 98 L Ed. 2d 873; City of Richmond v. J.A. Croson Co. 488 US 469; Wendy Wygant v. Jackson Board of Education 476 US 267, 90 L Ed. 2d 260.

404. Reservation under the Constitution:

The Constitution seeks to secure to all its citizens Justice, Liberty, Equality and Fraternity. These are the basic pillars on which the grand concept of India as a Sovereign Socialist Secular Democratic Republic rests. This splendour that is India rests on these magnificent concepts, each of which, supporting the other, upholds the dignity and freedom of the individual and secures the integrity and unity of the nation.

405. Equality is one of the magnificent cornerstones of Indian democracy: Smt. Indira Nehru Gandhi v. Shri Raj Narain MANU/SC/0304/1975 : [1976]2SCR347 ; Minerva Mills Ltd. and Ors. v. Union of India and Ors. MANU/SC/0075/1980 : [1981]1SCR206 ; Waman Rao and Ors. v. Union of India and Ors. MANU/SC/0091/1980 : [1981]2SCR1 . Article 14, 15 and 16 embody facets of the many-sided grandeur of equality; The General Manager, Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC ; State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC . Article 14 prohibits the State from denying to any person within the territory of India equality before the law or the equal protection of the

laws. All persons in like circumstances must be treated equally. Equality is between equals. It is parity of treatment under parity of conditions. The Constitution permits valid classification founded on an intelligible differentia distinguishing persons or things grouped together from others left out of the group. And such differentia must have a rational relation to the object sought to be achieved by the law: State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC . See also Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors. MANU/SC/0024/1958 : [1959]1SCR279 .

406. Any State action distinguishing classes of persons is liable to be condemned as invidious and unconstitutional unless justified as a benign classificational rationally addressed to the legitimate aim of qualitative and relative equality by means of affirmative action programmes of protective measures with a view to uplifting identified disadvantaged groups. All such measures must bear a reasonable proportion between their aim and the means adopted and must terminate on accomplishment of their object. Any legitimate affirmative action rationally and reasonably administered is an aid to the attainment of equality.

407. In the words of Judge Tanaka of the International Court of Justice:

.... The principle is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference. This is what was indicated by Aristotle as justitia commutative and justitia distributiva.

...the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.

....To treat unequal matters differently according to their inequality is not only permitted but required....

408. South West Africa Cases (Second Phase), ICJ Rep. p. 6, 305-6.

409. While Article 14 prohibits the State from denying equality to any person, Articles 15 and 16 are specially concerned with citizens. Article 15(1) prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth of them. Clause (4) of Article 15 provides that despite the prohibition contained in Article 29(2) against denial of admission to any citizen into any eduational institution maintained or aided by the State on grounds only of religion, race caste, language or any of them, the State is nevertheless free to make 'any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes'.

410. These provisions of Article 15 have been construed by this Court in a number of decisions. It is no longer in doubt that, in order to receive the protection of Clause (4), the classes of people in favour of whom special provisions are made should necessarily be both socially and educationally backward (and not either socially or educationally backward) or should have been notified by the President as the Scheduled Castes or the Scheduled Tribes in terms of Article 341 or 342. M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439.

411. Apart from the Scheduled Castes and the Scheduled Tribes to whom the special provisions, once notified by the President under Articles 341 and 342, undoubtedly apply, the other 'backward classes' of citizens to whom the special provisions can be extended are not merely backward but are socially and educationally so backward as to be comparable to the Scheduled Castes and the Scheduled Tribes. As stated by this Court in M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439:-

...the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes.

See also Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 ; Janki Prasad Parimoo and Ors. v. State of Jummu & Kashmir and Ors. MANU/SC/0393/1973 : [1973]3SCR236 ; State of Uttar Pradesh v. Pradip Tandon and Ors. MANU/SC/0086/1974 : [1975]2SCR761 ; State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC ; State of Andhra Pradesh and Anr. v. P. Sagar MANU/SC/0028/1968 : [1968]3SCR595 and K.C. Vasanth Kumar and Anr. v. State of Karnataka [1985] Suppl. 1 SCR 352.

412. In the Constituent Assembly during the discussions on draft Article 10 (Article 16), several members belonging to the Scheduled Castes or the Scheduled Tribes expressed serious apprehension that the expression 'backward' was not precise and large sections of people who did not belong to the Scheduled Castes or the Scheduled Tribes were likely to claim the benefit of reservation at the expense of the truly backward classes of people. They sought clarification that the expression 'backward' applied only to the Scheduled Castes and the Scheduled Tribes. [See B. Shiva Rao, The Framing of India's Constitution - A Study (1968) pp. 198-199]. K.M. Munshi, in his reply to this criticism, pointed out:

.... What we want to secure by this clause are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the State *highest efficiency* which would enable the services to function effectively and promptly. At the same time, in view of the conditions in our country prevailing in several Provinces, we want to see that backward classes, *classes who are really backward*, should be given scope in the State services; for it is realised that State services give a *Status and an opportunity to serve the country*, and this opportunity should be extended to every community, even among the backward people. That being so, we have to find out some generic term and word 'backward class' was the best possible term. When it is read with Article 301 it is perfectly clear that the word 'backward' signifies that class of people - does not matter whether you call them untouchables or touchables, belonging to this community or that, - *a class of people who are so backward that special protection is required* in the services and I see, no reason why any member should be apprehensive of regard to the word 'backward',

(emphasis supplied)

413. Constituent Assembly Debates, Vol. 7, (1948-49), p. 697

414. Dr. Ambedkar, in his general reply to the debate on the point, stated thus:

.... If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of *opportunity* and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as 'backward' *the exception made in favour of reservation will ultimately eat up the rule altogether*. Nothing of the rule will remain....

(emphasis supplied)

415. Constituent Assembly Debates, Vol. 7, (1948-49), p. 702.

416. The President of India issued the Constitution (Scheduled Castes) the Order, 1950 relating to States, and the Constitution (Scheduled Castes) Union Territories Order, 1951 relating to the Union Territories. Para (2) of the 1950 Order speaks of "castes, races or tribes which are to be deemed Scheduled Castes in the territories of the States mentioned in the Order". Para (3) of the Order (as amended by Act 108 of 1976 w.e.f. 27.7.1977) provides "notwithstanding anything contained in para (2), no person professing a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of the Scheduled Castes". See Manual of Election Law, Vol. I (1991), p. 141.

417. The 1950 Order of the President (as amended) shows that in the territories of the States mentioned in the Order no person who is not a Hindu or a Sikh or a Buddhist can be regarded as a member of the Scheduled Castes. Article 15(4) speaks of 'socially and educationally backward classes of citizens' and 'the Scheduled Castes and the Scheduled Tribes' while Article 16(4) speaks only of 'any backward class of citizens'. The 'backward class' mentioned in Article 16(4) is a synonym for the classes mentioned in Article 15(4); M.R. Balaji (supra); Janki Prasad Parimoo and Ors. (supra). These two provisions read with the President's Order of 1950 (as amended in 1976) show that the benefit of Article 15(4) and Article 16(4) extends to the Scheduled Castes (which expression is confined to those professing the Hindu, the Sikh or the Buddhist religion) and the Scheduled Tribes as well as the backward classes of citizens who must necessarily be such backward classes of citizens who would have, but for their not professing the Hindu, the Sikh or the Buddhist religion, qualified to be notified as members of the Scheduled Castes. This means, all those depressed classes of citizens who suffered the odium and isolation of untouchability prior to their conversion to other religions and whose backwardness continued despite their conversion come within the expression 'backward classes of citizens' in Articles 15(4) and 16(4). Untouchability is a humiliating and shameful malady caused by deep-rooted prejudice which does not disappear with the change of faith. To say that it does would imply that faith is the ultimate cause of untouchability. This is, of course, not true. If backwardness caused by historical discrimination and its consequential disadvantages are the reasons for reservation the Constitution mandates that all backward classes of citizens, who are the victims of the continuing ill effects of prior discrimination, whatever be their faith or religion, or whether or not they profess any religion, receive the same benefits which are accorded to the Scheduled Castes and the Scheduled Tribes. Backward class is composed of persons whose backwardness is in degree and nature comparable to that of the Scheduled Castes and the Scheduled Tribes, whatever be their religion. There can be no doubt about the identity of the Scheduled Castes and the Scheduled Tribes. Nor can there be any doubt about the identity of backward classes other than the Scheduled Castes and the Scheduled Tribes, if this identifying characteristic, bearing the stamp of prior discrimination and

its continuing ill effects, is borne in mind. M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439, 458; State of Uttar Pradesh v. Pradip Tandon and Ors. MANU/SC/0086/1974 : [1975]2SCR761 and Janki Prasad Parimoo and Ors. v. State of Jummu & Kashmir and Ors. MANU/SC/0393/1973 : [1973]3SCR236 .

418. What is sought to be identified is not caste, religion and the like, but social and educational backwardness, generally manifested by disabilities such as illiteracy, humiliating isolation, poverty, physical and mental degeneration, incurable diseases, etc. Living in abject poverty and squalor, engaged in demeaning occupations to keep body and soul together, and bereft of sanitation, medical aid and other facilities, these unfortunate classes of citizens bearing the badges of historical discrimination and naked exploitation are generally traceable in the midst of the lowest of the low classes euphemistically described as Harijans and in fact treated as untouchables. To deny them the constitutional protection of reservation solely by reason of change of faith or religion is to endanger the very concept of secularism and the raison d'etre of reservation.

419. No class of citizens can be classified as backward solely by reason of religion, race, caste, sex, descent, place of birth, residence or any of them. But any one or all of these factors mentioned in Article 15(1) or Article 16(2) can be taken into account along with other relevant factors in identifying classes of citizens who are socially and educationally backward. What is significant is that such identification should not be made solely with reference to the criteria specified in Article 15(1) or Article 16(2), but with reference to the social and educational backwardness of classes of citizens. Referring to the words "socially and educationally backward classes of citizens" appearing in Article 15(4), this Court stated in State of Uttar Pradesh v. Pradip Tandon and Ors. MANU/SC/0086/1974 : [1975]2SCR761 :

The expression 'classes of citizens' indicates a homogeneous section of the people who are grouped together because of certain likeliness and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place or birth will be the uniform element of common attributes to make them a class of citizens.

It may, however, be true that backwardness is associated specially with people of a particular religion or race or caste or place of birth or residence or any other category mentioned in Article 15(1) or Article 16(2). In that event, any one or more of such criteria along with other relevant factors, may be taken into consideration to reach the conclusion as to social and educational backwardness. Hard and primitive living conditions in remote and inaccessible areas, where the inhabitants have neither the means of livelihood nor facilities for education, health service or other civic amenities, are some such relevant criteria, Janki Prasad Parimoo and Ors. v. State of Jummu & Kashmir and Ors. MANU/SC/0393/1973 : [1973]3SCR236 ; State of Andhra Pradesh and Anr. v. P. Sagar MANU/SC/0028/1968 : [1968]3SCR595 .

420. The city slum dwellers, the inhabitants of the pavements, afflicted and disfigured in many cases by diseases like leprosy, caught in the vicious grip of grinding penury, and making a meagre living by begging besides the towering mansions of affluence, transcend all barriers of religion, caste, race, etc. in their degradation, suffering and humiliation. They are the living monument of backwardness and a shameful reminder of our national indifference, a cruel betrayal of what the

preamble to the Constitution proclaims. No matter what caste or religion they may claim, their present plight of animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars - a common painful sight in our metropolis - entitles them to every kind of affirmative action to redeem themselves from the in equities of past and continuing discrimination. Rehabilitation and resettlement of these unfortunate victims of societal indifference and Governmental neglect and appropriate and urgent measures for State aided health care, education and special technical training for their progeny with a view to their employment in public services are the primary responsibility of a welfare State. These are the classes of people specially chosen by the law for prompt and effective affirmative action, not by reason of their caste or religion, but solely by reason of their backwardness in tracing which any relevant criterion is a useful tool.

421. In identifying backwardness, caste, religion, residence etc. are of course relevant factors, but none of them is a dominant or much less an indispensable factor. What is of ultimate relevance is the social and educational backwardness of a class of citiznes, whatever be their caste, religion, etc.

422. Identification of the backward classes for the purpose of reservation must be with reference to their social and educational backwardness resulting from the continuing ill effects of prior discrimination or exploitation; and not solely with reference to any one or more of the prohibited criteria mentioned in Article 15(1) or Article 16(2), although any one or more of such criteria may have been the ultimate cause of such discrimination or exploitation and the resultant poverty and backwardness. As stated by this Court, in R. Chitralekha and Anr. v. State of Mysore and Ors. MANU/SC/0030/1964 : [1964]6SCR368 :

...the expression 'classes' is not synonymous with castes...
caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong.

423. What is sought to be identified for the purpose of Article 15(4) or Article 16(4) is a socially and educationally backward class of citizens. A class means 'a homogeneous section of the people grouped together because of certain likeliness or common traits, and who are identifiable by some common attributes'. Triloki Nath and Anr. v. State of Jummu & Kashmir and Ors. MANU/SC/0420/1968 : [1969] 1 SCR 103. They must be a class of people held together by the common link of backwardness and consequential disabilities. What binds them together is their social and educational backwardness, and not any one of the prohibited factors like religion, race or caste. What chains them, what incapacitates them, what distinguishes them, what qualifies them for favoured treatment of the law is their backwardness: their badges of proverty, disease, misery, ignorance and humiliation. It is conceivable that the entire caste is a backward class. In that event, they form a class of people for the special protection of Articles 15(4) and 16(4), not by reason of their caste, which is merely incidental, but by reason of their social and educational, backwardness which is identified to be the result of prior or continuing discrimination and its ill effects and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. It is also conceivable that a class of people may be identified as backward without regard to their caste, provided backwardness of the nature and degree mentioned above binds them as a class. M.R. Balaji (supra) at pp. 458, 474; Minor P. Rajendran v. State of Madras and Ors. MANU/SC/0025/1968 : [1968]2SCR786 ; State of Andhra Pradesh and Anr. v. P. Sagar MANU/SC/0028/1968 :

[1968]3SCR595 ; A. Peeriakaruppan etc. v. State of Tamil Nadu and Ors. MANU/SC/0055/1970 : [1971]2SCR430 ; State of Andhra Pradesh and Ors. v. U.S.V. Balram Etc. MANU/SC/0061/1972 : [1972]3SCR247 ; Triloki Nath and Anr. v. State of Jammu & Kashmir and Ors. [1969] 1 SCR ; State of Uttar Pradesh v. Pradip Tandon and Ors. MANU/SC/0086/1974 : [1975]2SCR761 ; Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 ; Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC ; R. Chitralekha and Anr. v. State of Mysore and Ors. MANU/SC/0030/1964 : [1964]6SCR368 .

424. Historically, backwardness has been the curse of people must of whom are characterised as the Scheduled Castes and the Scheduled Tribes. These are not castes as such, but classes of people composed of castes, races or tribes or tribal communities or parts or groups thereof and classified as such by means of presidential notifications owing to their extreme backwardness and other disadvantages (see Articles 341 and 342). State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC ; Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC . There are many other persons falling outside these groups, but comparable to them in their backwardness.

425. Any identification made for the purpose of Article 15 or Article 16 solely with reference to caste or religion, and without regard to the real issue of backwardness, will be an impermissible classification resulting in invidious reverse discrimination. The fact that identification of backwardness may involve a reference to religion, race, caste, occupation, place of residence or the like in respect of classes of people does not mean that any one of these factors is the sole or the dominant or the indispensable criterion. Backwardness may be the result of a combination of two or more of these factOrs. Persons of a particular place or occupation may have been enslaved as bonded labourers, or otherwise held in serfdom and exploited and discriminated against, and may have over a period of time degenerated to such social and educational backwardness as to qualify for the special protection of the Constitution. No matter to what caste or community or religion they belonged or from what place they came, their present plight stemming from prior inequities and continuing over a period of time and thus placing them in a state of total helplessness qualifies them for the special protection of reservation.

426. Historically, backwardness, as stated above, has been most acute at the lowest levels of our society and it has been invariably identified with low castes and demeaning occupations. But if, as a matter of fact, classes of citizens of higher castes have suffered continuously by reason of discrimination or exploitation by persons having authority and power over them and have consequently been reduced to poverty, ignorance and isolation resulting in social and educational backwardness, whatever be the caste of the exploiters or of the victims, the constitutional protection has to be extended to such classes of victims. They must be helped out of their present plight resulting from prior or continuing discrimination or exploitation. Proof of their backwardness is not in their caste or religion, but in their poverty, ignorance and consequential disabilities.

427. It is generally a combination of factors such as low birth and demeaning occupation, or lack of any occupation, that has historically subjected classes of people to invidious discrimination and humiliating isolation and consequential poverty and social and educational backwardness. These

are questions of fact which must be ascertained before the qualifying backwardness is identified. To disregard any one of these factors, particularly the most compelling reality of Indian life originating in low castes and demeaning occupations generally associated with them, such as that of scavenger, sweeper, fisherman, dhobi, barber and the like, and resulting in abject poverty, is to ignore the relevant criteria in identifying backwardness warranting reservation. What is sought to be identified for the purpose of reservation is not caste or religion, but poverty and backwardness caused by historical discrimination and its continuing evil effects. Caste may be a guide in this search, just as occupation or residence may be a guide, but what is sought to be identified is none but backwardness stemming from historical discrimination. If caste is more often than not a guide in the search for backwardness and if the lowest of the low castes has for historical reasons become the indicium of backwardness of the kind attracting reservation, caste in the absence of any better guide is a factor to be taken into account along with other factors such as poverty, illiteracy, physical and mental disabilities and other diseases caused by malnutrition, unhygienic conditions and the like. What the Constitution prohibits is not caste or non-discriminatory and inoffensive customs and practices based on castes; or ameliorative measures to uplift the downtrodden poverty stricken members of low castes; what it prohibits is exclusionary discrimination based solely on caste or any other criterion enumerated in Article 15(1) or Article 16(2). Any one or all of such criteria along with any other relevant criterion, such as poverty, illiteracy, disease, etc. may be legitimately used to identify backwardness for the purpose of reservation.

428. To contend that caste, and caste along, is the criterion identification of backwardness is to disregard the innumerable reasons for backwardness. At the same time, to ignore caste as a factor in identifying backwardness for the purpose of reservation is to shut one's eyes to the realities and ignore the cause of injustice from which large sections of people in this country have for generations suffered and still suffer, namely, naked exploitation and discrimination by those in positions of power and affluence. The realities of life in India militate against total exclusion of consideration based on caste or total concentration on caste in identifying backwardness caused by past inequities.

429. The Constitution is neither caste-blind nor caste-prejudiced nor caste-overcharged, but fully alive to caste as one of the relevant criteria to be reckoned in the process of identification of backward classes of citizens. India is not a nation of castes but of people with roots in divergent castes. What the Constitution seeks to identify is not the backward caste, but the backward class of citizens who may in many cases be partly or in some cases predominantly or even solely identified with particular caste. See Minor P. Rajendran v. State of Madras and Ors. MANU/SC/0025/1968 : [1968]2SCR786 .

430. The question is not whether the Constitution is caste-blind or casteprejudiced; the question really is who are the backward classes of citizens intended to be protected by reservation under Article 15 or Article 16. If reservation is limited solely to the Scheduled Castes and the Scheduled Tribes and other comparably backward classes of citizens, as it must be under the Constitution, then the Harijans, the Girijans, the Adivasis, the Dalits, and other like backward classes of citizens, once known as the "untouchables" or the "outcastes" or the "depressed classes" by reason of their "low" birth and "demeaning" occupation, or any other class of citizens afflicted by like degree of degeneration deprivation caused by prior and continuing discrimination, exploitation, neglect, poverty, disease, isolation, bondage and humiliation, whatever be their caste, religion or place of

origin, will alone qualify for reservation. Call them a class or a caste or a race or a tribe or whatever nomenclature is appropriate, they are the only legitimately intended beneficiaries of reservation. Their roots of origin in the lowest of the low segments of society; their affiliation with what is traditionally regarded as demeaning occupations; their humiliating and inescapable segregation and chronic isolation from the rest of the population; their social and educational deprivation and helplessness; their abysmal poverty and degenerating backwardness; all this and more most humiliatingly branded them in the past as "outcastes" or "untouchables" or "depressed classes" or whatever other nomenclature one might ascribe to describe them. It is their present plight of continuing poverty and backwardness stemming from identified historical discrimination, whatever be the religion or faith they presently profess, that the Constitution entitles them to the special protection of reservation. The fact that the search to identify backwardness for the purpose of reservation will invariably lead one to these so called outcastes or the lowest of the low castes or untouchables does not vitiate identification so long as what is sought to be identified is not caste but backwardness.

431. Poverty by itself is not the test of backwardness, for if it were so, most people in this country would be in a position to claim reservation. Janki Prasad Parimoo and Ors. v. State of Jammu & Kashmir and Ors. MANU/SC/0393/1973 : [1973]3SCR236 . Reservation for all would be reservation for none, and that would be an ideal condition if affluence, and not poverty, was its basis. But unfortunately the vast majority of our people are not blessed by affluence but afflicted by poverty. Poverty is a disgrace to any nation and the resultant backwardness is a shame. But the Constitution envisages reservation for those persons who are backward because of identified prior victimisation and the consequential poverty. Poverty invariably results in social and educational backwardness. In all such cases the question to be asked, for the purpose of reservation, is whether such poverty is the result of identified historical or continuing discrimination. No matter what caused the discrimination and exploitation; the question is, did such inequity and injustice result in poverty and backwardness.

432. It is possible that poverty to which classes of citizens are reduced making them socially and educationally backward is the ultimate result of prior discrimination and continuing exploitation on account of their religion, race, caste, sex, descent, place of birth or residence. Identification of their social and educational backwardness with reference to their proverty is valid, if the ultimate cause of poverty is prior discrimination and its continuing evil effects, albeit, by reason of their religion, race, caste etc. Members of religious minorities or low castes or persons converted from amongst tribals or harijans to other religions, but still suffering from the stigma of their origin, or persons of particular areas or occupations subjected to discrimination rooted in religious or caste prejudices and the like or to economic exploitation, forced labour, social isolation or other victimisation may find themselves sinking deeply into inescapable and abysmal poverty, disease, bondage and helplessness. 'The classes of citizens who are deplorably poor automatically become socially backward'. M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439. In all these cases, if classes of victims afflicted by poverty and disease are identified as socially and educationally backward, as in the case of the Scheduled Castes and the. Scheduled Tribes, by reason of past societal or Government or any other kind of discrimination or exploitation, they qualify for reservation. See Janki Prasad Parimoo and Ors. v. State of Jammu & Kashmir and Ors. MANU/SC/0393/1973 : [1973]3SCR236 .

433. Poverty reduces a man to a state of helplessness and ignorance. The poor have no social status. They have no access to learning. Over the years they invariably become socially and educationally backward. They may have no place in society and no education to improve their conditions. For them, employment in services on the basis of merits is a far cry. All these persons, along with other disadvantaged groups of citizens, are the favourites of the law for affirmative action without recourse to reservation. What required for the further step of reservation is proof of prior discrimination resulting in proverty and social and educational backwardness. It is not every class of poverty stricken persons that is chosen for reservation, but only those whose proverty and the resultant backwardness are traceable to prior discrimination, and whose backwardness, furthermore, is comparable to that of the Scheduled Castes and the Scheduled Tribes. This is a fair and equitable adjustment of constitutional values without placing any undue burden on particular classes of citizens. Stats of Uttar Pradesh v. Pradip Tandon and Ors. MANU/SC/0086/1974 : [1975]2SCR761 ; State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC ; Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 ; K.C. Vasanth Kumar v. State of Karnataka MANU/SC/0033/1985 : [1985] Supp. 1 SCR 352.

434. Article 16 deals with equality of opportunity in matters of public employment. The kind of backwardness which is required to attract the special provisions protecting the backward classes of citizens under Article 16 in respect of public employment is identical to the social and educational backwardness mentioned in Article 15(4). M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR, 439; Janki Prasad Parimoo and Ors. v. State of Jammu & Kashmir and Ors. MANU/SC/0393/1973 : [1973]3SCR236 . These two Article are facets of equality specially guaranteed to citizens, while Article 14 prohibits the State from denying to any person equality before the law or the equal protection of the laws. State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC . Clause (1) of Article 16 guarantees equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The very concept of equality implies recourse to valid classification for preferences in favour of the disadvantaged classes of citizens to improve their conditions so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens. Clause (2) prohibits discrimination against any citizens in respect of any public employment 'on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them'. Article 16 thus guarantees equality of opportunity and prohibits discrimination of any kind solely on any one or more of the grounds mentioned in Clause (2). Nevertheless, Clause (4) of this Article provides that it is open to the State to make 'any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State; is not adequately represented in the services under the State'. It is an enabling provision conferring a discretionary power on the State; an ameliorative harmonisation of conflicting norms to stretch to the utmost extent the frontiers of equality; an emphatic assertion of equality between equals and inequality between unequals so as to achieve the maximum degree of qualitative and relative equality by means of affirmative action even to the point of reservation. It is in the nature of an exception or a proviso to the general rule of equality: The General Manager, Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC ; M.R. Balaji (supra) at p. 473; State of Andhra Pradesh and Anr. v. P. Sagar MANU/SC/0028/1968 : [1968]3SCR595 ; State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC ; Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 :

(1981)ILLJ209SC ; Triloki Nath and Anr. v. State of Jammu & Kashmir and Ors. MANU/SC/0420/1968 : [1969] 1 SCR 103; C.A. Rajendran v. Union of India and Ors. MANU/SC/0358/1967 : (1968)IILLJ407SC ; State of Punjab v. Hiralal and Ors. MANU/SC/0066/1970 : [1971]3SCR267 ; T. Devadasan v. The Union of India and Anr. MANU/SC/0270/1963 : (1965)IILLJ560SC . Dr. Ambedkar called it an exception; see Constituent Assembly Debates, Vol. 7 (1948-49) p. 702 (quoted above).

435. The twin conditions to warrant reservation under Article 16(4) are: backwardness of the chosen classes of citizens and their inadequate representation in the public services. The backwardness of the classes of citizens mentioned in Article 16(4) is, as stated earlier, of the same degree and kind of social and educational backwardness as postulated in Article 15(4). Article 16(4) is meant for the protection of the Scheduled Castes and the Scheduled Tribes and other comparably backward classes of citizens who are the unfortunate victims of continuing ill effects of identified prior discrimination.

436. Whether the conditions postulated for reservation are satisfied or not is a matter on which the State has to form an opinion. But the opinion of the State must be founded on reason. The satisfaction on the basis of which an opinion has been formed by the State must be rationally supported by an objective consideration. The State must take into account all relevant matters and eschew from its mind all irrelevant matters, and made a proper assessment of the competing claims of classes of citizens and evaluate their respective backwardness before it comes to the conclusion that particular classes of citizens are so backward and so inadequately represented in the public services as to be worthy of special protection by means of reservation. This must be an objective evaluation of the competing claims for reservation. Any such conclusion must be subject to periodic administrative review by a permanent body of experts with a view to adjustment and readjustment of the State action in accordance with the changing circumstances of the beneficiaries of such action. The conclusion thus periodically arrived at by such administrative reviewing body must necessarily pass the test of judicial review whenever challenged. A. Peeriakaruppan etc. v. State of Tamil Nadu and Ors. MANU/SC/0055/1970 : [1971]2SCR430 . No matter whether such orders are regarded as legislative or executive or whichever nomenclature one may ascribe to it, the test for judicial review laid down in Shri Sitaram Sugar Company Ltd. and Anr. Etc. v. Union of India and Ors. MANU/SC/0249/1990 : [1990]1SCR909 , must necessarily govern consideration of such questions. After an exhaustive review of authorities on the point, a Constitution Bench of this Court stated:

The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it. p. 946.

See also the principle discussed in 'Supreme Court Employees' Welfare Association v. Union of India and Anr. MANU/SC/0582/1989 : (1989)IILLJ506SC .

437. Identification of backwardness is an ever continuing process of inclusion and exclusion. Classes of citizens entitled to the Constitutional protection of reservation must be constantly and periodically identified for their inclusion and for the exclusion of those who do not qualify. To

allow the undeserved to benefit by reservation is to deny protection to those who are meant to be protected. As stated by this Court in A. Peeriakaruppan etc. v. State of Tamil Nadu and Ors. MANU/SC/0055/1970 : [1971]2SCR430 :

.... But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest.... It must be remembered that the Government's decision in this regard is open to judicial review.

438. Any affirmative action must be supported by a valid classification and must have a rational nexus with the object of redressing backwardness. It is much more so where such programmes totally exclude from consideration persons outside the chosen classes without regard to merits because of the set aside quotas. It does not matter whether Clause (4) of Article 16, like Clause (4) of Article 15, is seen as a proviso or an exception or, in the words of Mathew, J., a legislative device to emphasise the 'extent to which equality of opportunity could be carried, viz., even up to the point of making reservation'. State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC . N.M. Thomas apart, this Court has generally treated Clause (4) as an exception or a proviso to he general rule of equality enshrined in Article 16(1). Rangachari (supra); M.R. Balaji (supra) at P. 473; P. Sagar (supra); Akhil Bhartiya Soshit Karamchari Sangh (Railway) (supra); Triloki Nath (supra). C.A. Rajendran (supra); Hiralal, (supra); T. Devadasan (supra); Dr. Ambedkar called it an exception; see Constituent Assembly Debates. Vol. 7 (1948-49) p. 702 (quoted above). Call it what one will - an exception or proviso or what - and semantics apart, reservation by reason of its exclusion of the generality of candidates competing solely on merits must be narrowly tailored and strictly construed so as to be consistent with the fundamental constitutional objectives. Clause (4), seen in whatever colour, is a very powerful and potent weapon which causes lasting ill effects and damage unless justly and appropriately used. It is not a remedy for all kinds of disadvantages and disabilities and for all classes of people. It is a special and powerful weapon to wield which with less than the very special care and caution and otherwise than in the most exceptional situations, peculiar to extreme cases of backwardness, that the Constitution envisages is to give rise to invidious reverse discrimination exceeding the strict bounds of Article 16(4) and to create hateful caste-prejudices and divisions between classes of people.

439. Articles 15(4) and 16(4) refer to the same classes of backward citizens. But they do not refer to identical remedies. While Article 15(4) speaks of special provisions for the

439. Articles 15(4) and 16(4) refer to the same classes of backward citizens. But they do not refer to identical remedies. While Article 15(4) speaks of special provisions for the advancement of backward classes, Article 16(4) expressly permits the State to make reservation of appointments or posts in public services in favour of such classes. It is true that both are enabling provisions allowing the State to adopt such affirmative action programmes as are necessary including reservation of seats or posts. But, unlike Article 16(4), Article 15(4) is not so worded as to suggest

that it is exclusionary in character. The 'special provision' contemplated in Article 15(4) is an emphatic reference to the affirmative action, which the State may adopt to improve the conditions of the disadvantaged members of the backward classes of citizens. Significantly, Article 15(4) does not specifically speak of reservation, but it has been generally understood to include that power. M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. SCR 439. While the State may adopt all such affirmative action programmes as it deems necessary for all disadvantaged persons, any special provision amounting to reservation and consequent exclusion from consideration of all the others in respect of the reserved quota in matters falling outside Article 16(4) must be subjected to even greater scrutiny than in the case of those falling under it.

440. The concept of equality is not inconsistent with reservation in public services because the Constitution specially says so, but, in view of its exclusion of others irrespective of merits, it can be resorted to only where warranted by compelling State interests postulated in Article 16. The State must be satisfied that in order to achieve equality in given cases, reservation is unavoidable by reason of the nature and degree of backwardness. Reservation must be narrowly tailored to that end, and subjected to strict scrutiny.

441. Affirmative action to redress the conditions of backward classes of citizens may be adopted either by a programme of preferential treatment extending certain special advantages to them or by reservation of quotas in their favour to the total exclusion of everybody outside the favoured groups. The validity of both these measures depends on classification founded on intelligible differentia having rational and substantial nexus with the object sought to be achieved, i.e., the redressal of backwardness. And such differentiation or classification for special preference must not be unduly unfair to the persons left out of the favoured groups.

442. While preferential treatment without reservation merely aids the backward classes of citizens to compete more effectively with the more meritorious and forward classes of citizens, the more drastic measure of reservation totally excludes all classes of people falling outside the backward classes of citizens from competing in the reserved quota of seats or posts. No matter what qualifications they posses and how superior are their merits, these persons not belonging to the preferred groups are prevented from competing with those of the preferred groups in respect of the reserved seats or posts, while candidates belonging to the preferred groups are entitled to compete for any seat or post, whether in the general category or in the reserved quota.

443. Preference without reservation may be adopted in favour of the chosen classes of citizens by prescribing for them a longer period for passing a test or by awarding additional marks or granting other advantages like relaxation of age or other minimum requirements. (See the preferential treatment in State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC . Furthermore, it would be within the discretion of the State to provide financial assistance to such persons by way of grant, scholarships, fee concessions etc. Such preferences or advantages are like temporary crutches for additional support to enable the members of the backward and other disadvantaged classes to march forward and compete with the rest of the people. These preferences are extended to them because of their inability otherwise to compete effectively in open selections on the basis of merits for appointment to posts in public services and the like or for selection to academic courses. Such preferences can be extended to all disadvantaged classes of citizens, whether or not they are victims of prior discrimination. What qualifies persons

for preference is backwardness or disadvantage of any kind which the State has a responsibility to ameliorate. The blind and the deaf, the dumb and the maimed, and other handicapped persons qualify for preference. So do all other classes of citizens who are at a comparative disadvantage for whatever reason, and whether or not they are victims of prior discrimination. All these persons may be beneficiaries of preferences short of reservation. Any such preference, although discriminatory on its face, may be justified as a benign classification for affirmative action warranted by a compelling state interest.

444. In addition to such preferences, quotas may be provided exclusively reserving posts in public services or seats in academic institutions for backward people entitled to such protection. Reservation is intended to redress backwardness of a higher degree. Reservation prima facie is the very antithesis of a free and open selection. It is a discriminatory exclusion of the disfavoured classes of meritorious candidates: M.R. Balaji (supra). It is not a case of merely providing an advantage or a concession or preference in favour of the backward classes and other disadvantaged groups. It is not even a handicap to disadvantage the forward classes so as to attain a measure of qualitative or relative equality between the two groups. Reservation which excludes from consideration all those persons falling outside the specially favoured groups, irrespective of merits and qualifications, is much more positive and drastic a discrimination - albeit to achieve the same end of qualitative equality - but unless strictly and narrowly tailored to a compelling constitutional mandate, it is unlikely to qualify as a benign discrimination. Unlike in the case of other affirmative action programmes, backwardness by itself is not sufficient to warrant reservation. What qualifies for reservation is backwardness which is the result of identified past discrimination and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. Reservation is a remedial action specially addressed to the ill effects stemming from historical discrimination. To ignore this vital distinction between affirmative action short of reservation and reservation by a predetermined quota as a remedy for past inequities is to ignore the special characteristic of the constitutional grant of power specially addressed to the constitutional recongnised backwardness.

445. The object of the special protection guaranteed by Article 15(4) and 16(4) is promotion of the backward classes. Only those classes of citizens who are incapable of uplifting themselves in order to join the mainstream of upward mobility in society are intended to be protected. The wealthy and the powerful, however socially and educationally backward they may be by reason of their ignorance, do not require to be protected, for they have the necessary strength to lift themselves out of backwardness. The rich and the powerful are not the special favourites of the Constitution. Backward they may be socially and educationally, but that is a shame which they have the steam to remove and the Constitution does not extend to them the special protection of reservation. It is not sufficient that the persons meant to be protected are backward merely by reason of illiteracy, ignorance and social backwardness, If they have, inspite of such handicaps, the necessary financial strength to raise themselves, the Constitution does not extend to them the protection of reservation. The chosen classes of persons for whom reservation is meant are those who are totally unable to join the mainstream of upward mobility because of their utter helplessness arising from social and educational backwardness and aggravated by economic disability.

446. Any State action resulting in reservation must, therefore, be so tailored as to weed out and exclude all persons who have attained a certain predetermined economic level. Only persons falling below that level must qualify for reservation. This economic level has of course to be varied

from time to time in accordance with the changing value of money. See the Govt. Order upheld by this Court in Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 .

447. The directive principle contained in Article 46 emphasises the overriding responsibility and compelling interest of the State to promote the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and the Scheduled Tribes. They have to be protected form social injustice and all forms of exploitation. This principle must necessarily guide the construction of Articles 15 and 16. All affirmative action programmes must be inspired by that principle and addressed to that end. Whether such action should be in the nature of preferences or by recourse to reservation is a matter on which the State must, by an objective evaluation of the degree and nature of backwardness and with reference to other constitutional principle, come to a conclusion.

448. The State has a vital interest to uphold the efficiency of administration. To ignore efficiency is to fail the nation. Any step taken by the State in considering the claims of members or the Scheduled Castes and Scheduled Tribes for appointment to public services and posts must be consistent with the maintenance of efficiency of administration. This principle, as stated in Article 335, must necessarily guide all affirmative action programmes for backward and other disadvantaged classes of people in matters of appointment to public services and posts. Likewise, efficiency being a compelling State interest, it must strictly guide affirmative action in matters of admission to academic institutions, and more so in specialised institutions of higher learning, for in the final analysis efficiency of public administration is governed by the quality of education and the skill of the scholars. To weaken efficiency is to injure the nation. Any reservation made without due regard to the command of Article 335 is invidious and impermissible. The General Manager, Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC ; Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC .

449. Dr. Ambedkar was unequivocal when he declared that reservation must be confined to a minority of the available posts, lest it should destory the very concept of equality and thus undermine democracy. Any excessive reservation or any unnecessarily prolonged reservation will result in invidious discrimination. What exactly is the total percentage of reservation at a given time is a matter for the State to decide, dependent on the need of the time. But in no case shall reservation overstep the strict boundaries of minority of seats or posts or outlast the reason for it. It must remain well below 50% of available seats or posts. Every reservation must be made with a view to its early termination on the successful accomplishment of its object.

450. It has been contended that reservation can be made not only at the time of initial appointment to a service, but also at the time of promotion to a higher post. Although this point does not directly arise from the impugned orders, it is too vital an aspect of the concept of reservation under Article 16(4) to be overlooked, and it requires, therefore, to be dealt with, albeit briefly, and particularly in deference to the submissions at the bar. This important question must be considered with reference to the overriding principle of fairness and efficiency of administration.

451. To be overlooked at the time of promotion in favour of a person who is junior in service and having no claim to superior merits is to cause frustration and passionate prejudice, hostility and ill will not only in the mind of the overlooked candidate, but also in the minds of the generality of employees. Any such discrimination is unfair and it causes dissatisfaction, indiscipline and inefficiency.

452. Article 335 requires that "in the making of appointments to services and posts in connection with the affairs of the Union or of a State" the claims of the members of the Scheduled Castes and Scheduled Tribes must be considered 'consistently with the maintenance of efficiency of administration'. If that is the constitutional mandate with regard to the Scheduled Castes and the Scheduled Tribes, the same principle must necessarily hold good in respect of all backward classes of citizens. The requirement of efficiency is an overriding mandate of the Constitution. An inefficient administration betrays the present as well as the future of the nation.

453. 'Reservation of appointments or posts' mentioned in Article 16(4) is with reference to appointments 'in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State'. The condition precedent to making any such reservation is the satisfaction of the State as to the inadequate representation of any backward class of citizens in the services under the State. In respect of any such class, it is open to the State to make 'any provision for the reservation of appointments or posts'.

454. An appointment is necessarily to a post, but every appointment need not necessarily be to a post in a service. An appointment to an ex-cadre post is as much as appointment to a post as it is in the case of a cadre post. The words 'appointments or posts' used in the alternative, and in respect of which reservation can be made, indicate that the appointment contemplated in Article 16(4) is not necessarily confined to posts in the services, but can be made to any post whether or not borne on the cadre of a service. Inadequate representation of any backward class of citizens enables the State to make provisions for the reservation of 'appointments or posts'.

455. The word 'post' is often used in the Constitution in the wider sense for various purposes [see for example, Articles 309, 310(1) and 335]. It is in that sense that the words 'appointments or posts' in Article 16(4) should be understood. The reasoning to the contrary in The General Manager, Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC was partly influenced by certain concessions made by the respondents' counsel as to the nature of the post contemplated in Article 16(4) and the applicability of reservation to selection posts.

456. The object of reservation is to maintain numerical and qualitative or relative equality by ensuring sufficient representation for all classes of citizens. In whichever service backward class of citizens is inadequately represented, it is open to the State to create sufficient number of posts for direct appointments. No matter whether the appointment is made to a cadre post or an ex-cadre post, the State action is beyond reproach so long as the constitutional objective of numerical and qualitative equality of opportunity is maintained by making direct appointments at the appropriate levels whenever inadequate representation of any backward class in the services is noticed by the State.

457. The initial appointments may be made at various levels or grades of the hierarchy in the service. There is no warrant in Article 16(4) to conclude from the expression 'reservation of appointments or posts' that reservation extends not merely to the initial appointment, but to every stage of promotion. Once appointed in a service, any further discrimination in matters relating to conditions of service, such as salary, increments, promotions, retirement benefits, etc. is constitutionally impermissible, it being the very negation of equality, fairness and justice.

458. To construe the expression 'post' so as to make reservation applicable at the stage of promotion by selection or otherwise is to unduly and unfairly discriminate against persons who are already in the service and are senior and no less meritorious in comparison to the reserved candidates. Promotion by selection, though based on merits, is ultimately governed by seniority, for the concerned rules generally provide that, where merits are equal, officers will be ranked according to their seniority. In the case of promotion by seniority subject to fitness, merits are not entirely disregarded, for even a senior officer can be overlooked in favour of a junior officer, if the former is found to be unfit for promotion. In all promotions, whether by selection or otherwise, merits and seniority are both significantly relevant and reservation of such posts in disregard of these two elements will result in invidious discrimination.

459. In whichever post that a member of a backward class is appointed, reservation provisions are attracted at the stage of his initial appointment and not subsequently. Further promotions mut be governed by common rules applicable to all employees of the respective grades. Reasoning to the contrary in decisions, such as The General Manager, Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC ; State of Punjab v. Hiralal and Ors. MANU/SC/0066/1970 : [1971]3SCR267 ; Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC , is not warranted by the language of the Constitution.

460. The Constitution does not permit any citizens to be treated unfairly or unequally. To maintain numerical and qualitative equality and thus ensure adequately effective representation of the backward classes in the services, it is open to the State to make direct appointments at various levels or grades of the service, and make appropriate provisions for reservation in respect of such initial appointments. Once appointed to a post, any further discrimination by reservation in regard to conditions of service including promotion is impermissible. Any deviation from this golden rule of justice and equality is unconstitutional.

461. Reservation is the extreme limit to which the doctrine of affirmative action can be extended. Beyond the strict confines of Clause (4) of Article 16, reservation in public employment has no warrant in the law for it then becomes the very antithesis of equality. While reservation is impermissible for appointment to higher posts by promotion from lower posts, any other legitimate affirmative action in favour of disadvantaged classes of citizens by means of valid classification is perfectly in accordance with the mandate of Article 16(1). It is within the discretion of the State to extend to all disadvantaged groups, including any backward class of candidates, preferences or concessions such as longer period of minimum time to pass qualifying tests etc. [see N.M. Thomas (supra)].

462. Reservation affords backward classes of citizens a golden opportunity to serve the nation and thus gain security, status, comparative affluence and influence in decision making process. But it is wrong to see it as a mere weapon to capture power, as suggested at the bar. In a democracy, real power lies in the ballot and it is exercised by the majority. Any attempt to project the concept of reservation under Clause (4) as a weapon of aggrandisement to gain power will result in the creation of a meaningless myth and a dangerous illusion which will ultimately distort the constitutional values.

463. It is possible that large segments of population enjoying well entrenched political advantages by reason of numerical strength may claim "backward class" status, when, on correct principle, they may not qualify to be so regarded. If such claims were to be conceded on extraneous consideration, motivated by pressures of expediency, and without due regard to the nature and degree of backwardness, the very evil of discrimination which is sought to be remedied by the Constitution would be in danger of being perpetuated in the reverse at the expense of merit and efficiency and contrary to the interests of the truly backward classes of citizens who are the constitutionally intended beneficiaries of reservation. In the words of Krishna Iyer, J.:-

.... To lend immortality to the reservation policy is to defeat its raison d'etre; to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1)....

Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC .

464. The sooner the need for reservation is brought to an end, the better it would be for the nation as a whole. The sooner we redressed all disabilities and wiped out all traces of historical discrimination, and stopped identifying classes of citizens by the stereotyped, stigmatised and ignominious label of backwardness, the stronger, healthier and better united we would have emerged as a nation founded on diverse customs, practices, religions and languages but knitted together by innumerable binding strands of common culture and tradition.

465. General Observations:

It is wrong and unwise to see affirmative action merely as a penance or an atonement for the sins of past discrimination. It is not retributive justice on wrong doers. It is corrective and remedial justice to compensate the victims of prior injustice. It is not merely focussed on reparation for past inequities. It is a forward looking balancing act of reformative social engineering; an architecture of a better future of harmonious relationship amongst all classes of citizens; an equitable redistribution of community resources with a view to the greatest happiness of the greatest number of people.

It is true that an important aspect of State interest in initiating affirmative action is to correct or remedy the evil effect of inequities stemming from prior discrimination, but the focus in any such action must be on the victims and not on the wrong doers. The constitutional mandate is to rescue the victims of prior discrimination and not to punish the wrong doers. The sins of the past shall not visit upon the present either by allowing its ill effects to continue or by taking retributive action as

retaliation upon the wrong doers. The task of nation building is not to open up the wounds of the past, but to allow them to heal by negativing its ill effects and wiping off injustice stemming from it. Any present or continuing discrimination is, of course, remediable or punishable under the law. Removal of inequities is the reason d'etre of any affirmative action.

Discrimination in any form hurts as there is an element of deprivation of the legitimate expectations of classes of people upon whom the inevitable consequences of any such action must necessarily fall. Any unfair and undue deprivation of any class of people is constitutionally impermissible.

Reservation of posts or seats for the benefit of some and to the exclusion of others is inherently unjust, and unfair unless strictly brought within reasonable limits. The only legitimate object of excluding the generality of people and conferring a special benefit upon the chosen classes is to redeem the latter from their backwardness.

Reservation should be avoided except in extreme cases of acute backwardness resulting from prior discrimination as in the case of the Scheduled Castes and the Scheduled Tribes and other classes of persons in comparable positions. In all other cases, preferential treatment short of reservation can be adopted. Any such action, though in some respects discriminatory, is permissible on the basis of a legitimate classification rationally related to the attainment of equality in all its aspects.

Any attempt to view affirmative action as merely retributes or to unduly over-emphasis its compensatory aspect and widen the scope of reservation beyond minority of posts or seats is to practice excessive and invidious reverse discrimination. To project particular castes as legitimate claimants for such compensatory discrimination, without due regard to the nature and degree of their backwardness, is to invite the public wrath of stigmatising prejudice against them, thereby promoting caste hatred and separatism. Any such stereotyped and stigmatised approach to this soul searching sociological problem is to distort the fairness of the political and constitutional process of adjustment and readjustment amongst classes of people in our country.

Affirmative action is not merely compensatory justice, which it is, but is also distributive justice seeking to ensure that community resources are more equitably and justly shared among all classes of citizens. Furthermore, from the point of view of social utility, affirmative action promotes maximum well-being for the society as a whole and strengthens forces of national integration and general economic prosperity.

Any benign affirmative action with a view to equality amongst classes of citizens is a constitutionally permitted programme, but the weapon of reservation must be carefully and sparingly used in order that, while the victims of past discrimination are appropriately compensated, the generality of persons striving to progress on their own merits do not become victims of excessive, unfair and invidious reverse discrimination. Affirmative action must find justification in the removal of disadvantages and not in their impostition. See Tribe, American Constitutional Law, 2nd edn. (1988) pp. 1521-1554; Kathleen M. Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases. Harvard Law Review, Vol. 100, p. 78 (1986-87); Marc Galanter, Competing Equalities, (1984); Myrl L. Duncan, The Future of Affirmative Action: A

Jurisprudential/Legal Critique, Harvard Civil Rights Civil Liberties Law Review, Vol. 17, 1982, p. 503; The Rights of Peoples, Edited by James Crawford, Oxford (1988).

466. Summary:

(1) It is open to the State to adopt valid classification and make special provisions for the protection of classes of citizens whose comparative backwardness the State has a mandate to redress by affirmative action programmes. Any such programme must be strictly tailored to the constitutional requirement that no citizens shall be excluded from being considered on the basis of merits for any public employment except to the extent that a valid reservation has been made in favour of backward classes of citizens.

(2) The Constitution prohibits discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Any discrimination solely on any one or more of these prohibited grounds will result in invidious reverse discrimination which is impermissible. None of these grounds is the sole or the dominant or the indispensable criterion to identify backwardness which qualifies for reservation. But each of them is, in conjunction with factors such as poverty, illiteracy, demeaning occupation, malnutrition, physical and intellectual deformity and like disadvantages, a relevant criterion to identify socially and educationally backward classes of citizens for whom reservation is intended.

(3) Reservation contemplated under Article 16 is meant exclusively for backward classes of citizens who are not adequately represented in the services under the State.

(4) Only such classes of citizens who are socially and educationally backward are qualified to be identified as backward classes. To be accepted as backward classes for the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article 342 declaring them to be Scheduled Castes and Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notifications, presumed to be satisfied. In the case of the other backward classes of citizens qualified for reservation, the burden is on the State to show that these classes have been subjected to such discrimination in the past that they are reduced to a state of helplessness, poverty and consequential social and educational backwardness as in the case of the Scheduled Castes and the Scheduled Tribes. In other words, reservation is meant exclusively for the Harijans, the Girijans, the Adivasis, the Dalits or other like "depressed" classes or races or tribes most unfortunately referred to in the past as the "untouchables" or the "outcastes" by reason of their being born in what was wrongly regarded as low castes and associated with what was equally wrongly treated as demeaning occupations, or any other class of citizens afflicted by like degree of poverty and degradation caused by prior and continuing discrimination and exploitation, whatever be their professed faith, religion or caste. These classes of citizens, segregated in slums and ghettos and afflicted by grinding poverty, disease, ignorance, ill health and backwardness, and haunted by fear and anxiety, are the constitutionally intended beneficiaries of reservation, not because of their castes or occupations, which are merely incidental facts of history, but because of their

backwardness and disabilities stemming from identified past or continuing inequities and discrimination.

(5) Members of the Scheduled Castes or the Scheduled Tribes do not lose the benefits of reservation and other affirmative action programmes intended for backward classes merely by reason of their conversion from the Hindu or the Sikh or the Buddhist religion to any other religion, and all such persons shall continue to be accorded all such benefits until such time as they cease to be backward.

(6) Identification of backward classes for the purpose of reservation with reference to historical discrimination and its continuing ill effects is, however, subject to the overriding condition that no person whose means exceeded a predetermined economic level should be entitled to the protection of reservation, however backward he may be socially and educationally. He may, however, be considered for the benefits of other affirmative action programmes, but in doing so his comparative affluence in relation to other backward class candidates may be a relevant consideration to exclude him.

(7) Once a class of citizens is identified on correct principle as backward for the purpose of reservation, the "means test" must be strictly and uniformly applied to exclude all those persons in that class reaching above the predetermined economic level.

(8) Reservation in all cases must be confined to a minority of available posts or seats so as not to unduly sacrifice merits. The number of seats or posts reserved under Article 15 or Article 16 must at all times remain well below 50% of the total number of seats or posts.

(9) Reservation has no application to promotion. It is confined to initial appointment, whichever be the level or grade at which such appointment is made in the administrative hierarchy, and whether or not the post in question is borne on the cadre of the service.

(10) Once reservation is strictly confined to the constitutionally intended beneficiaries, as aforesaid, there will probably be no need to disappoint any deserving candidate legitimately seeking the benefit of reservation, for there will then be sufficient room well within the 50% limit for all candidates belonging to the backward classes as properly determined on correct principle. In that event, questions such as caste or religion will become merely academic and the competing maddening rush for "backward" label will vanish.

(11) A periodic administrative review of all affirmative action programmes, including reservation of seats or posts, must be conducted by a specially constituted Permanent Authority with a view to adjustment and readjustment of such programmes in proportion to the nature, degree and extent of backwardness. All such programmes must stand the test of judicial review whenever challenged. Reservation being exclusionary in character must necessarily stand the test of heightened administrative and judicial solicitude so as to be confined to the strict bounds of constitutional principles.

(12) Whenever and wherever poverty and backwardness are identified, it is the constitutional responsibility of the State to initiate economic and other measures to ameliorate the conditions of

the people residing in those regions. But economic backwardness without more does not justify reservation.

(13) Poverty demands affirmative action. Its eradication is a constitutional mendate. The immediate target to which every affirmative action programme contemplated by Article 15 or Article 16 is addressed is poverty causing backwardness. But it is only such poverty which is the continuing ill-effect of identified prior discrimination, resulting in backwardness comparable to that of the Scheduled Castes or the Scheduled Tribes, that justifies reservation.

(14) While reservation is a remedy for historical discrimination and its continuing ill effects, other affirmative action programmes are intended to redress discrimination of all kinds, whether current or historical.

(15) Any legitimate affirmative action must be supported by a valid classification based on an intelligible differentia distinguishing classes of citizens chosen for the protective measures from the generality of citizens excluded from such measures, and such differentia must bear a reasonable nexus with the object sought to be achieved, namely, the amelioration of the backwardness of the chosen classes of citizens, which implies a reasonable proportion between the aim of the action and the means employed for its accomplishment, and its discontinuance upon the accomplishment of the object.

(16) In the final analysis, poverty which is the ultimate result of inequities and which is the immediate cause and effect of backwardness has to be eradicated not merely by reservation as aforesaid, but by free medical aid, free elementary education, scholarships for higher education and other financial support, free housing, self-employment and settlement schemes, effective implementation of land reforms, strict and impartial operation of the law-enforcing machinery, industralisation, construction of roads, bridges, culverts, canals, markets, introduction of transport, free supply of water, electricity and other ameliorative measures particularly in areas densely populated by backward classes of citizens.

467. CONCLUSIONS:

A. The validity of the impugned Government Orders providing for reservation of posts depends on convincing proof of proper identification of backward classes of citizens by recourse to relevant criteria, such as poverty, illiteracy, disease, unhygienic living conditions, low caste and consequential isolation, and in accordance with correct principle, i.e., with reference to the continuing ill effects of historical discrimination resulting in social and educational backwardness comparable to that of the Scheduled Castes or the Scheduled Tribes, and inadequate representation of such classes of citizens in the services under the State, but subject to the overriding condition that all those persons whose means have exceeded a predetermined economic level shall be denied reservation. Amongst the aforementioned backward classes of citizens correctly identified to be qualified for reservation, preference may be legitimately extended to the comparatively poorer or more disadvantaged sections.

B. Reservation of seats or posts solely on the basis of economic backwardness i.e., without regard to evidence of historical discrimination, as aforesaid, finds no justification in the Constitution.

C. Reservation of seats or posts for backward classes of citizens, including those for the Scheduled Castes and the Scheduled Tribes, must remain well below 50% of the total seats or posts.

D. Reservation is confined to initial appointment to a post and has no application to promotion.

E. It is open to the State to adopt any valid affirmative action programme, otherwise than by reservation, for amelioration of the disabilities of all disadvantaged persons, including backward classes of citizens.

468. Neither the impugned orders of the Government of India (O.M. No. 36012/31/90-Estt(SCT) dated 13th August, 1990 and O.M. No. 36012/31/90-Estt(SCT) dated 25th September, 1991) nor the material relied upon by it nor the affidavits filed in support of the said orders disclose proper application of mind by the concerned authorities to the principle stated above for valid identification of the backward classes of citizens qualified for reservation in terms of Article 16 of the Constitution of India. The impugned orders are, therefore, unsustainable. The respondent-Government is accordingly directed to reconsider the question of reservation contemplated by Article 16(4) in the light of the aforesaid principle and pass appropriate orders.

ORDER

469. We have delivered our separate judgments. In the light of the reasons stated by us, the impugned orders [O.M. No. 36012/31/90-Estt(SCT) dated 13th August, 1990 and O.M. No. 36012/31/90 Estt (SCT) dated 25th September, 1991] issued by the Government of India are declared unenforceable for want of valid identification of backward classes of citizens qualified for reservation under Article 16 of the Constitution of India. In the circumstances, we direct the Union of India to re-examine the question of identification of the backward classes of citizens in accordance with the principle and directives contained in our respective judgments and pass appropriate orders providing for reservation under Article 16(4).

470. The above cases are disposed of accordingly. There shall be no order as to costs.

ANNEXURE

471. DR. AMBEDKAR'S SPEECH IN THE CONSTITUENT ASSEMBLY ON 30.11.1948

472. Now, Sir, to come to the other question which has been agitating the members of this House, viz., the use of the word "backward" in Clause (3) of Article 10, I should like to begin by making some general reservation so that members might be in a position to understand the exact import, the significance and the necessity for using the word "backward" in this particular clause. If members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tasted so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle

of equality of opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative - and it ought to be operative in their judgment to its fullest extent - there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind - the three principles, we had to reconcile, - they will see that no better formula could be produced than the one that is embodied in Sub-clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in Sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now - for historical reasons been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. But I think honourable Members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large, that it left no room for the rule to operate. I think this is sufficient to justify why the word "backward" has been used.

473. With regard to the minorities, there is a special reference to that in Article 296, where it has been laid down that some provision will be made with regard to the minorities. Of course, we did

not lay down any proportion. That is quite clear from the section itself, but we have not altogether omitted the minorities from consideration. Somebody asked me: "What is a backward community"? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. *A backward community is a community which is backward in the opinion of the Government*. My honourable Friend Mr. T.T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner. Mr. Krishnamachari asked : "Who is a reasonable man and who is a prudent man? These are matters of litigation". Of course, they are matters of litigation, but my honourable Friend, Mr. Krishnamachari will understand that the words "reasonable persons and prudent persons" have been used in very many laws and if he will refer only to the Transfer of Property Act, he will find that in very many cases the words "a reasonable person and a prudent person" have very well been defined and the court will not find any difficulty in defining it. I hope, therefore that the amendments which I have accepted, will be accepted by the House.

CONSTITUENT ASSEMBLY DEBATES, VOL. 7 (1948-49), pp. 701- 702.

* * *

Kuldip Singh, J.

474. The Government action on the Mandal Report evoked spontaneous reaction all over the country. The controversy brought to the four important constitutional issues for the determination of this Court. Nine-Judge Bench, specially constituted, has had a marathon-hearing on various aspects of Article 16 of the Constitution of India. There are five judgments, from Brother Judges on Mandal-Bench, in circulation. I have the pleasure of carefully reading these erudite expositions on various facets of Article 16 of the Constitution of India. I very much wanted to refrain from writing a separate judgment but keeping in view the importance of the issues involved and also not being able to persuade myself to agree fully with any of the judgments I have ventured to express myself separately. I may, however, say that on some of the vital issues I am in complete agreement with R.M. Sahai, J. The historical background and the factual-matrix have been succinctly narrated by Brother Judges and as such it is not necessary for me to cover the same.

475. I propose to deal with the following issues in seriatim:

A. Whether "class" in Article 16(4) of the Constitution means "caste"? Can caste be adopted as a collectivity to identify the backward classes for the purposes of Article 16(4)?

B. Whether the expression "any backward class of citizens" in Article 16(4) means "socially and educationally backward classes" as it is in Article 15(4)?

C. What is meant by the expression "any backward class of citizens...not adequately represented in the Services under the State" in Article 16(4)?

D. Whether Article 16(4) permits reservation of appointments or posts at the Stage of initial entry into Government Services or even in the process of promotion?

E. Whether Article 16(4) is exhaustive of the State-power to provide job-reservations?

F. If Article 16(1) does not permit job-reservations, can protective discrimination as a compensatory measure permissible, in any other form under Article 16(1)?

G. To what extent reservations are permissible under Article 16(4)? Below 50% or to any extent?

H. When a "backward class" has been identified, can a means-test be applied to skim-off the affluent section of the "backward class"?

I. Can poverty be the sole criterion for identifying the "backward class" under Article 16(4).

J. Is it mandatory to provide reservations by a legislative Act or it can be done by the State in exercise of its executive power?

K. Whether the identification of 3743 castes as a "backward class" by Mandal Commission is constitutionally valid?

A

476. Mr. Ram Jethmalani appearing for the State of Bihar has advanced an extreme argument that the 'class' under Article 16(4) means 'caste'. Mr. P.P. Rao on the other had vehemently argued that the Constitution of India, with secularism and equality of opportunity as its basic features, does not brook an argument of the type advanced by Mr. Jethmalani. According to him caste is a closed door. It is not a path - even if it is - it is a prohibited path under the Constitution.

477. We may pause and have a fresh-look at the socio-political history of India prior to the independence of the country.

478. Caste-system in this country is sui-generis to Hindu religion. The Hindu-orthodoxy believes that an early hymn in the Rg-Veda (the Purusasukta:- 10.90) and the much later Manava Dharma Sastra (law of Manu), are the sources of the caste-system. Manu, the law-giver cites the Purusasukta as the source and justification for the caste division of his own time. Among the Aryans the priestly caste was called the Brahmans, the warriors were called the Kshatriyas, the common people divided to agriculture, pastoral pursuits, trade and industry were called the Vaishyas and the Dasas or non-Aryans and people of mix-blood were assigned the status of Shudras. The Chaturvarna - system has been gradually distorted in shape and meaning and has been replaced by the prevalent caste-system in Hindu society. The caste system kept a large section of people in this country outside the fold of the society who were called the untouchables. Manu required that the dwelling of the untouchables shall be outside the village - their dress, the garments

of the dead - their food given to them in a broken dish. We are proud of the fact that the Framers of the Constitution have given a special place to the erstwhile untouchables under the Constitution. The so called untouchable-caste have been named as Scheduled Castes and Scheduled Tribes and for them reservations and other benefits have been provided under the Constitution. Even now if a Hindu- caste stakes its claim as high as that of Scheduled Castes it can be included in that category by following the procedure under the Constitution.

479. The caste system as projected by Manu and accepted by the Hindu society has proved to be the biggest curse for this country. The Chaturvarna-system under the Aryans was more of an occupational order projecting the division of labour. Thereafter, in the words of Professor Harold A. Gould in his book "The Hindu Caste System", the Brahmins "socialized the occupational order, and occupationalised the sacred order". With the passage of time the caste-system become the cancer-cell of the Hindu Society.

480. Before the invasions of the Turks and establishment of Muslim rule the caste-system had brought havoc to the social order. The Kshtriyas being the only fighters, three-fourth of the Hindu society was a mute witness to the plunder of the country by the foreigners. Mahmud Ghazni raided and looted India for seventeen times during 1000 AD to 1027 AD. In 1025 AD Mahmud Ghazni raided the famous temple of Somanath. How he plundered the shrine is a matter of history. Thereafter between 1175 AD and 1195 AD Mahmud Ghazni invaded India several times. According to the historians one of the causes of the defeat of the Indians at the hands of Turks was the prevalent social conditions especially the caste system of Hindus.

481. Mr. L.P. Sharma in his book 'Ancient History of India' writes that the prevalent social conditions, practice of untouchability and division of society by the caste-system among others were the causes of defeat of Rajputs at the hands of Turks. Mr. Sharma quotes various other historians in the following words:

Dr. K.A. Nizami, has also pointed out that the caste system weakened the Rajputs militarily because the responsibility of fighting was left to a particular section of the society i.e. the Kshatriyas. He writes, "The real cause of the defeat of the Indians lay in their social system and their invidious caste distinctions, which rendered the whole military organisation rickety and weak. Caste taboos and discriminations killed all sense of unity-social or political." Dr. K.S. Lal also writes that, "It was very much easy for the Muslims to get traitors from a society which was so unjustly divided. This was one of the reasons why all important cities of north India were lost to the invader (Muhammed of Ghur) within fifteen years." Dr. R.C. Majumdar writes, "No public upheaval greets the foreigners, nor are any organised efforts made to stop their progress. Like a paralysed body, the Indian people helplessly look on, while the conquerors march on their corpse.

482. The Hindus did not learn lesson from the invasions of the Turks and continued to perpetuate the caste system. In the middle of 15th century major part of north India including Delhi came to be occupied by the Afghans of Lodi. Ultimately Babar established the Moghul rule in India in 1526. After the Mughals the Britishers came and ruled this country till 1947.

483. This country remained under shackles of slavery for over one thousand years. The reason for our inability to fight the foreign-rule was the social de-generation of India because of the caste-

system. To rule this country it was not necessary to divide the people, the caste-system conveyed the message "Divided we are - come and rule us".

484. It was only in the later part of 19th century that the national movement took birth in this country. With the advent of the 20th century Mahatma Gandhi, Jawahar Lal Nehru alongwith other leaders infused national and secular spirit amongst the people of India. For the first time in the history of India caste, creed and religion were forgotten and people came together under one banner to fight the British rule. The caste-system was thrown to the winds and people from all walks of life marched together under the slogan of 'Quit-India'. It was not the Kshatriyas alone who were the freedom fighters - whole of the country fought for freedom. It was the unity and the integrity of the people of India which brought freedom to them after thousand years of slavery. The Constitution of India was drafted in the background of the freedom struggle.

485. Secularism is the basic feature of the Indian Constitution. It envisages a chohesive, unified and casteless society. The Constitution has completely obliterated the caste-system and has assured equality before law. Reference to caste under Articles 15(2) and 16(2) is only to obliterate it. The prohibition on the ground of caste is total, the mandate is that never again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism to egalitarianism-from feudalism to freedom.

486. The caste system which has been put in the grave by the framers of the Constitution is trying to raise its ugly head in various forms. Caste possess a serious threat to the secularism and as a consequence to the integrity of the country. Those who do not learn from the events of history are doomed to suffer again. It is, therefore, of utmost importance for the people of India to adhere in letter and spirit to the Constitution which has moulded this country into a sovereign, socialist, secular democratic republic and has promised to secure to all its citizens justice, social economic and political, equality of status and of opportunity.

487. Caste and class are different etymologically. When you talk of caste you never mean class or the vice-versa. Caste is an iron- frame into which people keep on falling by birth. M. Weber in his book 'The Religion of India' has described India as the land of 'the most inviolable organisation by birth'. Except the aura of caste there may not be any common thread among the caste-fellows to give them the characteristic of a class. On the other hand a class is a homogeneous group which must have some live and visible common traits and attributes.

488. Professor Andre Beteille, Department of Sociology, University of Delhi in his book "The Backward Classes in Contemporary India" has succinctly brought out the distinction between 'caste' and 'class' in the following words:-

Whichever way we look at it, a class is an aggregate of individuals (or, at best, of households), and, as such, quite different from a caste which is an enduring group. This distinction between an aggregate of individuals and an enduring group is of fundamental significance to the sociologist and I suspect, to the jurist as well. A class derives the character it has by virtue of the characteristics of its individual members. In the case of caste, on the other hand, it is the group that stamps the individual with its own characteristics. There are some affiliations which an individual may change, including that of his class; he cannot change his caste. At least in principle a caste remains

the same caste even when a majority of its individual members change there occupation, or their income, or even their relation to the means of production; it would be absurd from the sociological point of view to think of a class in this way. A caste is a grouping sui generis, very different from a class, particularly when we define class in terms of income or occupation.

489. Article 16(2) of the Constitution of India in clear terms states that "no citizen shall, on grounds only of religion, race, caste, sex descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State." In Juxtaposition Article 16(4) states that "nothing in this Article shall prevent the state from making any provisions for the reservations of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State". On a bare reading of the two sub-clauses of Article 16 it is obvious that the Constitution forbids classification on the ground of caste. No backward class can, therefore, be identified on the basis of caste.

490. We may refer to some of the judgments of this Court on the subject.

491. In R. Chitralekha and Anr. v. State of Mysore and Ors. MANU/SC/0030/1964 : [1964]6SCR368 , this Court observed as under:-

The important factor to be noticed in Article 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and Scheduled Tribes. Though it may be suggested that the wider expression "classes" is used in Clause (4) of Article 15 as there are communities without caste, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution from using the expression "backward classes or castes". The juxtaposition of the expression "backward classes" and "Scheduled Castes" in Article 15(4) also leads to a reasonable inference that the expression "classes" is not synonymous with castes....
This interpretation will carry out the intention of the Constitution expressed in the aforesaid Articles....
If we interpret the expression "classes" as "castes", the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as one of the considerations to ascertain whether person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution....
But what we intend to emphasize is that under no circumstance a "class" can be equated to a "caste", though the caste of an individual or a group or individual may be considered along with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution "It does not vitiate the classification if it satisfied other tests.

492. In Triloki Nath and Anr. v. State of Jammu & Kashmir and Ors. MANU/SC/0420/1968 : [1969] 1 SCR 103, this Court observed as under:-

Article 16 in the first instance by Clause (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression "backward class" is not used as synonymous with "backward caste" or "backward community....
In its ordinary connotation the expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution.

493. In State of Uttar Pradesh v. Pradip Tandon and Ors. MANU/SC/0086/1974 : [1975]2SCR761 , the following observations of this Court are relevant:-

The expression 'classes of citizens' indicates a homogeneous section of the people who are grouped together because of certain likeliness and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion not place of birth will be the uniform element of common attributes to make them a class of citizens.

494. Finally in Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 , this Court held as under:-

It is not necessary to remember that special provision is contemplated for classes of citizens and not for individual citizens as such, and so though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification is based solely on caste of the citizens, it may not be logical. Social backwardness is the result of poverty to a very large extent. Caste and poverty are both relevant for determining the backwardness.

495. It is, thus, obvious that this Court has firmly held that 'class' under Article 16(4) cannot mean 'caste'. Chitralekha's case is an authority on the point that caste can be totally excluded while identifying a 'backward class'. This Court in Pradip Tandon's case has held that caste cannot be the uniform element of common attributes to make it a class.

496. Secular feature of the Constitution is its basic structure. Hinduism, from which the caste-system flows, is not the only religion in India. Caste is an anathema to Muslims, Christians, Sikhs, Buddhists and Jains. Even Arya Smajis, Brahmo Smajis, Lingyats and various other denominations in this country do not believe in caste-system. If all these religions have to co-exist in India - can 'class' under Article 16(4) mean 'caste'? Can a caste be given a gloss of a 'class'? Can even the process of identifying a 'class' begin and end with 'caste'? One may interpret the Constitution from any angle the answer to these questions has to be in the negative. To say that in practice caste-system is being followed by Muslims, Christians, Sikhs and Buddhists in this country, is to be oblivious to the basic tenets of these religions. The prophets of these religions fought against casteism and founded these religions. Imputing caste-system in any form to these religions is impious and sacrilegious. This Court in M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439, held as under:-

.... Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise caste in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups.

497. I, therefore, hold that 'class' under Article 16(4) cannot be read as 'caste'. I further hold that castes cannot be adopted as collectivities for the purpose of identifying the "backward class" under Article 16(4). I entirely agree with the reasoning and conclusions reached by R.M. Sahai, J. to the effect that occupation (plus income or otherwise) or any other secular collectivity can be the basis for the identification of "Backward classes". Caste-collectivity is unconstitutional and as such not permitted.

B

498. The expression "--any backward class of citizens---" in Article 16(4) of the Constitution as understood till - date means 'socially and educationally backward class'. In Janki Prasad Parimoo and Ors. etc. etc. v. State of Jammu & Kashmir MANU/SC/0393/1973 : [1973]3SCR236 , Palekar, J. observed as under:-

Article 15(4) speaks about "socially and educationally backward classes of citizens". While Article 16(4) speaks only of "any backward class of citizens". However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward classes of citizens" in Article 15(4).

Mr. N.A. Palkiwala contended that the above quoted assumption by Palekar, J. was without any basis and wholly unjustified. According to him it was not settled by any judgment of this Court that the two expressions in Article 15(4) and 16(4) mean the same thing. Far from being "settled", no judgment of this Court had even suggested prior to 1973 that the expressions in the two Articles meant the same thing. He further contended that unfortunately, in subsequent cases it was not pointed out to this Court that the assumption of Palekar, J. was not correct and the wrong assumption of the learned Judge passed as correct. According to him an erroneous assumption, even by a judge of this Court, cannot and does not make the law. This Court in M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439, speaking through Gajendra Gadkar, J. observed as under:-

Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4). There can be no doubt that the Constitution makers assumed, as they were entitled to, that while making adequate reservation under Article 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4), beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasise that Article 15(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary.

Although in Balaji's case this Court observed "what is true in regard to Article 15(4) is equally true in regard to 16(4)" but this was entirely in different context. In the said case reservation made in the educational institutions under Article 15(4) were challenged on the ground that the same were void being violative of Articles 15(1) and 29(2) of the Constitution. In the above quoted observations this Court indicated that the reservations made under Article 16(4) can also be challenged on the same or similar grounds as the reservations under Article 15(4) of the Constitution of India. This Court did not examine the question as to whether the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward classes of citizens" under Article 15(4).

499. Articles 340 and 16(4) were in the original Constitution. Article 15(4) was inserted a year later by the Constitution First Amendment Act, 1951. Article 340 refers to "socially and educationally backward classes". The Framers of the Constitution did not, however, use the expression "socially and educationally backward" in Article 16(4). The definition of 'backward classes' as socially and educationally backward in Article 340, may have given rise to the assumption that it was not necessary to re-define the expression 'backward class' in Article 16(4). Be that as it may the fact remains that there is no reasoned judgment of this Court holding that the two expressions mean the same thing.

500. The same Constituent Assembly, which drafted the original Constitution, drafted Article 15(4) and brought it into the Constitution by way of Constitution First Amendment Act, 1951. Article 340 defining 'backward classes' was already in the original Constitution but in spite of that the Constituent Assembly defined the 'backward classes' for the purposes of Article 15(4) as "socially and educationally backward". It was, therefore, not the intention of the Framers of the Constitution to follow the definition given in Article 340, where ever the expression 'backward class' occurs in the Constitution. On the other hand it is plausible to assume that wherever the Framer of the Constitution wanted the 'backward classes' to be defined as "socially and educationally backward", they did so, leaving Article 16(4) to be interpreted in its context.

501. Articles 340 and 15(4) are part of the same Constitutional-Scheme. Socially and educationally backward classes may be identified by a commission appointed under Article 340 and the said commission- after investigation - may make recommendations, including the sanctioning of grants, for the uplift of the backward classes. Article 15(4) makes it possible to implement the recommendations of the commission and for that purpose permits protective discrimination by the State. Since there is identity of purpose between the two Article the 'backward class' in the context of these Article has been defined identically. But that is not true of Articles 15(4) and 16(4). When these two Articles of Constitution in juxtaposition enacted in consecutive years - use markedly different phraseology, well established canons of interpretation dictate that such meanings should be assigned to the words as are indicated by the difference in phraseology. Article 16(4) has different purpose than Article 15(4). The subject matter of Article 16(4) is the service under the State. It is a special provision enabling the State to make any provision for the reservation of appointments or posts in favour of the backward section of any class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The expression "backward" in the context of Article 16(4) is entirely different than the expression "socially and educationally backward class" in Article 15(4). Under Article 16(4) the backward class has to be culled-out from amongst the classes which are not adequately represented in the State Services.

Any species of backwardness is relevant in the context of Article 16(4). By contrast, any special provisions to be made under Article 15(4) - e.g. grants out of the public exchequer can only be made for "socially and educationally backward classes". What is to be identified under Article 16(4) is not the "backward class" but a "class of citizens" which is inadequately represented in the State-services. On the other hand it is the "backward class" which is to be identified under Article 15(4). When the two classes to be identified to the two articles are different the question of giving them the same meaning does not arise.

502. Constituent Assembly Debates Volume 7 (1948-1949) pages 684 to 702 contains the speeches of stalwarts like R.M. Nalavade, Dr. Dharma Prakash, Chandrika Ram, V.I. Muniswamy Pillai, T. Channiah, Santanu Kumar Das, H.J. Khandakar, Mohd. Ismail Sahib, Hukum Singh, K.M. Munshi, T.T. Krishnanichari, H.V. Kamant and Dr. B.R. Ambedkar on the draft Article 10(3) [corresponding to Article 16(4)]. In a nut-shell the discussion projected the following view-points:-

(1) The original draft Article 10(3) did not contain the word 'backward'. The original Article only contained the expression "any class of citizens". The word "backward" was inserted by the Drafting Committee at a later stage.

(2) The opinion of the members of the Constituent Assembly was that the word "backward" is vague, has not been defined and is liable to different interpretations. It was even suggested that ultimately the Supreme Court would interpret the Same. Mr. T.T. Krishnamchari even stated in lighter-tone that the loose drafting of the chapter on fundamental rights would be a paradise for the lawyers.

(3) Not a single member including Dr. Ambedkar gave even a suggestion that "backward class" in the said Article meant "socially and educationally backward.

(4) The purpose of Article 10(3) according to Dr. Ambedkar was that "there must at the same time be a provision made for the entry of certain communities which have so far been outside the Administration...that there shall be reservations in favour of certain communities which have not so far had a proper "look-in" so to say into the Administration."

(5) According to Dr. Ambedkar the said Article was enacted to safeguard two things namely the principle of equality of opportunity and to make provision for the entry of certain communities which have so far been outside the Administration. Dr. Ambedkar further stated: -

Unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental rights in the way in which it was passed by this Assembly.

503. The reading of the Constituent Assembly Debates makes it clear that the only object of enacting Article 16(4) was to give representation to the classes of citizens who are inadequately represented in the services of the State. The word "backward" was inserted later on only to reduce the number of such classes who are inadequately represented in the services of the State. The

intention of the Framers of the Constitution, gathered from the Constituent Assembly Debates, leaves no manner of doubt that the two "classes" to be identified in the two articles are different and as such the expressions used in the two articles cannot mean the same. Article 16(4) enables the State to make reservations for any backward section of a class which is inadequately represented in the services of the State. Almost every member who spoke on the draft Article 10(3) in the Constituent Assembly complained that the word "backward" in the said Article was vague and required to be defined but in spite of that. Dr. Ambedkar in his final reply did not say that the word "backward" meant "socially and educationally backward", rather he gave the explanation, quoted above which supports the reasoning that the word "backward" was inserted in Article 16(4) to identify the backward section of any class of citizens which is not adequately represented in the State-Services and for no other purpose.

504. I, therefore, hold that the expression "backward class of citizens" under Article 16(4) does not mean the same thing as the expression "any socially and educationally backward classes of citizens" in Article 15(4). The judgments of this Court wherein it is assumed that the two expressions in Articles 15(4) and 16(4) mean the same thing do not lay down correct law and are overruled to such extent.

C

505. Over a period of four decades this Court under a mistaken view read the expression "any backward class of citizens" in Article 16(4) to mean the same as "backward classes of citizens" in Article 15(4). Having held that the two Article operate in different fields, the crucial question which falls for consideration is what is meant by the expression "Any backward class of citizens...not adequately represented in the services under the State" in Article 16(4).

506. A laymen's look at Article 16(4) gathers the impression that the reservation under the said Article is permissible for the backward classes of citizens who are not adequately represented in the services under the State. But on closer scrutiny and examination it is clear that the reservations under Article 16(4) are provided for classes of citizens which are not adequately represented in the State Services. The original draft Article 10(3) [corresponding to Article 16(4)] was as under:-

10(3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any class of citizens who, in the opinion of the State, are not adequately represented in the services under the State.

507. Reading the original draft Article 10(3) leaves no manner of doubt that the manifest intention of the Framers of the Constitution was to provide reservation for those classes of citizens who are not adequately represented in the State services. It is common knowledge that during the British the State services were packed from amongst the persons who were on the right side of the regime. Mass of the Indian people who were active in the freedom struggle were kept out of State services. Article 16(4) was enacted with the sole purpose of giving representation to the classes of citizens who are not adequately represented therein. The sine qua non for providing reservation is the inadequate representation of the class concerned in the State services.

508. The word "backward" was inserted in the draft Article 10(3) by the Drafting Committee before the draft was finalised. The insertion of the word "backward" at a later stage did not change the intention with which the original draft Article 10(3) was brought into existence. Fortunately, for the people of this country, there are lengthy deliberations in the Constituent Assembly Debates which show the purpose and the object of adding the word "backward" in the draft Article 10(3). Dr. Ambedkar in his speech before the Constituent Assembly gave the object and purpose of enacting original draft Article 10(3) and also gave elaborate reasons for inserting the word "backward" in the said Article. The said speech is reproduced hereunder:-

Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind - the three principles, we had to reconcile, - they will see that no better formula could be produced than the one that is embodied in Sub-clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in Sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now - for historical reasons - been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this postition that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing, of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly." (Constituent Assembly Debates, Vol. 7, 1948-49 pages 701-702).

509. Dr. Ambedkar stated in clear terms that draft Article 10(3) now Article 16(4) was brought in by the framers of the Constitution to provide "reservations in favour of certain communities which

have not so far had a 'proper look-in' so to say into the administration." He nowhere stated that the reservations were meant for backward classes. According to him, the Article was enacted with the object of providing reservation to those classes of citizens who are not adequately represented in the State- Services. Dr. Ambedkar further elaborated the point when he stated "the administration which has now - for historical reasons - been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services". Dr. Ambedkar was not referring to backward or non-backward communities, he was only referring to the communities which were dominating the public services and those which were not permitted to enter the said services. While making it clear that the reservations are meant for those classes of citizens who are inadequately represented in the State-Services, Dr. Ambedkar visualised that conceding in full the demand of such communities, reserving majority of the seats for them and leaving minority of the seats unreserved, would render the guarantee under Article 16(1) nugatory. He illustrated the point by giving figures and stated that a safeguard was to be provided so that majority of the appointments/posts in the State-services are not consumed in the process of reservation. It was for that purpose, according to Dr. Ambedkar, the expression "backward" was inserted in the draft Article 10(3). The object of adding the word "backward" was only to reduce the number of claimants for the reserve posts. Instead of the whole class having inadequate representation in the State-services only the backward section of that class is made eligible for the reserve posts. In a nutshell, the reservation under Article 16(4) is not meant for backward classes but for backward sections of the classes which are not adequately represented in the State-services. There may be a class which is inadequately represented in the State-services and it may be backward as a whole, like the Scheduled Castes and the Scheduled Tribes. Such a class as a whole is eligible for the reserve posts.

510. "Not adequately represented in the services under the State" is the only test for the identification of a class under Article 16(4). Thereafter the 'Backward class' has to be culled-out from out of the classes which satisfy the test of inadequacy.

511. Under the Constitution the "backward class" which has been identified for preferential treatment is the "socially and educationally backward" class. The Constitutional-scheme is explicit. Articles 340 and 15(4) make it clear that wherever the Constitution intended to provide special compensatory treatment for the "backward classes" they have been defined as 'socially and educationally backward'. Article 16(4) is not in line with Articles 340 and 15(4). Article 16(4) does not provide job-reservations for the backward classes. That is why the expression "socially and educationally backward" has not been used therein. The classes of citizens to be identified under Article 16(4) are those who are not adequately represented in the services under the State.

512. Examine it from another angle. If the job-reservations under Article 16(4) are meant for "any backward class" then the expression "..not adequately represented.." has to be read in relation to the said class. Can it be done? Is it possible to classify the backward classes into those who are adequately represented in the State-services and those who are not? Can a class which is adequately represented in the State-services be considered backward? Negative is the answer to all these questions. A class which is adequately represented in the State-services cannot be considered a backward class. A class may not be backward even if it has inadequate representation in the State-services but once it secures adequate representation in the State-services it no longer remains backward. It is not possible to read the expression "not adequately represented" in Article 16(4) in

elation to "any backward class". If you do so then the said expression is rendered redundant. To make every word of Article 16(4) meaningful and workable the said expression can only be read in relation to "class of citizens".

513. Yet another way to examine. Scheduled Castes and Scheduled tribes are a 'class' by themselves and the Constitution permits protective discrimination to compensate them. Reservation of seats in the House of People and the Legislative Assemblies have been provided for them. Article 335 is special provision for taking into consideration their claims in the appointments to State-services. Had there been an intention to provide job- reservations in favour of weaker sections of society or for the 'socially and educationally backward classes' then scheduled castes and scheduled tribes would have been the first to be provided for by specific mention in Article 16(4). It is idle to say that the expression 'backward class of citizens' would include them, Article 15(4) uses the expression "...any special provision for advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes". Similarly Article 46 provides "The State shall promote...weaker section of the people, and, in particular, of the scheduled castes and scheduled tribes...". Thus where ever in the Constitution special protection has been provided for socially and educationally backward classes the scheduled castes and scheduled tribes have been specifically mentioned alongwith. Article 16(4) does not give protection to either of the two, it only provides for those who are inadequately represented in the State services. If the 'scheduled castes and scheduled tribes' and "socially and educationally backward classes" qualify the test of inadequacy they are eligible for the reserved seats under Article 16(4). The scheduled castes and scheduled tribes being the weakest of the weak per-se satisfy the test.

514. The condition precedent for a class to get benefit under Article 16(4) is not its backwardness but its inadequacy in State-services. Once inadequacy is established and the classes on that test are identified then the backward sections of those classes become eligible to the benefit of reservation. Classes, which are inadequately represented, can be identified by occupation, economic criterion, family income or from political sufferers, border areas, backward areas, communities kept out of State-services by the British or by any other method which the State may adopt. Once a class which is inadequately represented, is identified it is only the backward section of that class which is eligible for job-reservations. Backward section can be culled-out by adopting a means test, or on the basis of social, educational or economic backwardness. Once the classes are identified there can be no difficulty for the State to find out the backward-parts of those classes.

515. Mandal has identified 52% population of this country as backward. 22% have already been identified as Scheduled Castes and Scheduled Tribes. In a country with a population of 8.50 million people - 74% of which is backward - job-reservation can hardly be the source of reducing social and economic disparities in the society. Even the Mandal Report has characterised the job-reservations as "Palliatives". The Framers of the Constitution - with secularism, egalitarianism, integrity and unity as their avowed objects - could not have permitted horizontal division of the country into backward and non-backward for the sake of job-reservations.

516. I, therefore, hold that Article 16(4) permits reservation of appointments/posts in favour of classes of citizens which in the opinion of the State are not adequately represented in the services

under the State. Once such classes are identified then the reserve posts are offered to the backward sections of those classes.

517. Before parting with the subject I may say that the successive Governments, whether in the States or at the center, have been re-miss in the discharge of their obligations, under the Constitution, towards the poor and backward people of the country. Job-reservations as a dole, has been the vote-catching platter. Neither the job-reservations nor the reservation of seats in the educational institutions are of material help. Unless illiteracy and poverty are removed, the backward classes cannot be benefited by the reservations alone. Affirmative-Action Programme on war footing is needed to uplift the backwards. Liberal grants and subsidised schemes under Article 340 read with Articles 15(4) and 46 are needed to remove illiteracy and poverty. Housing, sanitation and other necessities of life are to be provided. Illiteracy is the root cause of backwardness. "Free and compulsory education" is nowhere within reach even 45 years after the independence. The legislations enabling free education are only on paper. A poor father, whose child is earning and contributing towards the family income, may not send the child to school even if the education is free. The State may consider compensating the father for the loss in income due to child's stopping work for going to school. It is not for this Court to suggest what the Government should do, we only say that the State has not done what it is required to do under the Constitution. Job-reservation is not the answer to the problem. Prof. Andre Beeville in his book (supra) has summed up the issue in the following words:-

What has gone wrong with our thinking on the backward classes is that we have allowed the problem to be reduced largely to that of job-reservation. The problems of the backward classes are too varied, too large and too acute to be solved by job-reservation alone. The point is not that job-reservation has contributed so little to the solution of these problems but, rather, that it has diverted attention from the masses of Harijans and Adivasis who are too poor and too lowly even to be candidates for the jobs that are reserved in their names. Job- reservation can attend only to the problems of middle class Harijans and Adivasis: the overwhelming majority of Adivasis and Harijans, like the majority of the Indian people, are outside this class and will remain outside it for the next several generations. Today, job reservation is less a way of solving age-old problems than one of buying peace for the moment. It would be foolish to blame only the government for wanting to buy peace in a country in which everyone wants to buy peace. It would be foolish also to recommend an intransigent attitude to a government which has neither the will to impost its power nor the imagination to think of alternatives. But unless it is able to offer to something better to the backward classes than it has done so far, reservation will continue to bedevil it.... In assessing any scheme of reservations today, we have to keep in mind the distinction between those schemes that are directed towards advancing social and economic equality, and those that are directed towards maintaining a balance of power. Reservations for the Scheduled Castes and Scheduled Tribes are, for all their limitations, directed basically towards the goal of greater equality overall. Reservations for the Other Backward Classes and for religious minorities, whatever advantages they may have, are directed basically towards a balance of power. The former are in tune with the spirit of the Constitution; the latter must lead sooner or later to what Justice Gajendragadkar has called a 'fraud on the Constitution'.

D

518. The next question for consideration is whether Article 16(4) provides reservation of appointments or posts at the stage of initial entry to Government services or even in the process of promotion. As at present the question is not res-integra. A Constitution Bench of this Court, in The General Manager, Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC , by a majority of three to two, has held that promotion to a selection post is covered by Article 16(4) of the Constitution of India. Rangachari's case has been followed by this Court in State of Punjab v. Hiralal and Ors. MANU/SC/0066/1970 : [1971]3SCR267 , and Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC . This Court has also referred to Rangachari's case in various other judgments. The reasoning of the majority in Rangachari's case has, however, been followed in the subsequent judgments of this Court without adding any further reason. Mr. Venugopal and Ms. Shyamla Pappu, learned Counsel for the petitioners have contended that majority judgment in Rangachari's case does not lay-down correct law.

519. The point in dispute in Rangachari's case was "is promotion to a selection post which is included in Article 16(1) and (2) covered by Article 16(4) or is it not?" The majority in Rangachari's case interpreted Articles 16(1), 16(2) and 16(4) as under:

(1) The matters relating to employment must include all matters in relation to employment both prior and subsequent to the appointment which are incidental to the employment and form part of the terms and conditions of such employment. Thus promotion to selection posts is included both under Article 16(1) and (2).

(2) Article 16(4) does not cover the entire field covered by Article 16(1) and (2). Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by Article 16(1) and (2) do not fall within the mischief of Article 16(4). For instance the conditions of service relating to employment such as salary, increment, gratuity, pension and the age of superannuation are matters relating to employment and as such they do not form the subject matter of Article 16(4).

(3) Both "appointments" and "posts" to which the operative part of Article 16(4) refers to and in respect of which the power to make reservation has been conferred on the State must necessarily be appointments and posts in the service. The word "posts" in Article 16(4) cannot mean ex-cadre posts in the context.

(4) The condition precedent for the exercise of the powers conferred by Article 16(4) is the inadequate representation of any backward class in the State services. The inadequacy may be numerical or qualitative. In the context the expression "adequately represented" imposts considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage. In a given case the State may well take the view that a certain percentage of selection posts should also be reserved.

(5) The word "posts" under Article 16(4) includes selection posts and as such reservation can be made not only in regard to appointments which are initial appointments but also in regard to selection posts which may be filled by promotion thereafter.

520. The first three findings of the majority in Rangachari's case reproduced above are unexceptionable, however, findings 4 and 5, with utmost respect, do not flow from the plain language of Article 16(4) of the Constitution of India.

521. There is no doubt that the backward classes should not only have adequate representation in the lowest cadres of services but they should also aspire to secure adequate representation in the higher services as well. Article 16(4) permits reservation for backward classes by way of direct recruitment to any of the cadres in the State services. Reservation can be made in direct recruitment to any cadre or service from Class-IV to Class-I of the State services. The majority in Rangachari's case has read in Article 16(4), what is not there, to support the element of qualitative representation.

522. The reservation permissible under Article 16(4) can only be "in favour of any backward class of citizens" and not for individuals. Article 16(1) guarantees a right to an individual citizens whereas Article 16(4) permits protective discrimination in favour of a class. It is, therefore, mandatory that the opportunity to compete for the reserve posts has to be given to a class and not to the individuals. When direct recruitment to a service is made the 'backward class' as a whole is given an opportunity to be considered for the reserve posts. Every member of the said class has a right to compete. But that is not true of the process of promotion. The backward class as a collectivity is nowhere in the picture; only the individuals, who have already entered the service against reserve-posts, are considered. In the higher echelons of State services - cadre strength being small - there may be very few or even a single 'backward class' candidate to be considered for promotion to the reserve post. An individual citizen's right guaranteed under Article 16(1) can only be curtailed by providing reservations for a 'backward class' and not for backward individuals. The promotional posts are not offered to the backward class. Only the individuals are benefited. The object, context and the plain language of Article 16(4) make it clear that the job-reservation can be done only in the direct recruitment and not when the higher posts are filled by way of promotion.

523. Examine from another angle. Article 16(4) provides for reservation of appointments or posts. Promotion is an incident of service which comes after appointment. 'Appointment' simpliciter means initial appointment to a service. Even the majority in Rangachari's case did not dispute this proposition of law. But interpreting the word "posts" to include selection posts it has been held that reservation can be made in the initial appointments as well as in regard to selection posts to be filled thereafter. With respect, it is not possible to construe the word "posts" in the manner the majority judgment in Rangachari's case has done. The expression "reservation of...posts in favour of any backward class of citizens" only means that the posts in any cadre or service can be reserved by the State Government. It is not possible to read in these lines the permissibility of reservation even in the process of promotion. This is the only interpretation which can be given in the context and also in conformity with the service jurisprudence.

524. It has been rightly held in Rangachari's case that Article 16(4) does not cover the entire field covered by Article 16(1) and (2). The conditions of service which are matters relating to

employment are protected by the doctrine of equality of opportunity and do not form the subject matter of Article 16(4). It is settled proposition of law that right to promotion is a condition of service. Once a person is appointed he is governed by the conditions of service applicable thereto. Appointment and conditions of service are two separate incidents of service. Conditions of service exclusively come within the expression "matters relating to employment" and are conversed by Article 16(1) and not by 16(4). When all other conditions of service fall out-side the purview of Article 16(4) and are exclusively covered by Article 16(1) then where is the justification to bring promotion within Article 16(4) by giving strained-meaning to the expression 'posts'. The only conclusion by reading Article 16(1), 16(2) and 16(4) which can be drawn is that all conditions of service including promotion are protected under Articles 16(1) and (2). Article 16(4) makes a departure only to the extent that it permits the State Government to make any provision for the reservation of appointments or posts at the initial stage of appointment and not in the process of promotion.

525. Constitution of India aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. If members of backward classes can maintain minimum necessary requirement of administrative efficiency not only representation but also preference in the shape of reservation may be given to them to achieve the goal of equality enshrined under the Constitution. Article 16(4) is a special provision for reservation of appointments and posts for them in Government services to secure their adequate representation. The entry of backward class candidates to the State services through an easier ladder is, therefore, within the concept of equality. When two persons one belonging to the backward class and another to the general category enter the same service through their respective channels then they are brought at par in the cadre of the service. A backward class entrant cannot be given less privileges because he has entered through easier-ladder and similarly a general class candidate cannot claim better rights because he has come through a tougher-ladder. After entering the service through their respective sources they are placed on equal footing and thereafter there cannot be any discrimination in the matter of promotion. Both must be treated equally in the matters of employment after they have been recruited to the service. Any further reservation for the backward class candidate in the process of promotion is not protected by Article 16(4) and would be violative of Article 16(1).

526. Although there is no factual material before us but it would not be hypothetical to assume that the reservation in promotion - based on or roster points - can lead to various anomalies such as the person getting the benefit of the reservation may jump over the heads of several of his seniors not only in his basic cadre but even in the higher cadres to which he is promoted out of turn. Even otherwise when once a member of the backward class has entered service via reserve post it would not be fair to keep on providing him easier ladders to climb the higher rungs of the State services in preference to the general category. Instead of reserving the higher posts for in-service members of the backward class the same should be filled by direct recruitment so that those members of backward class who are not in the State services may get an opportunity to enter the same.

527. For the reasons indicated above I hold that the interpretation given by the majority in Rangachari's case to Article 16(4), to the effect that it permits reservations in the process of promotion, is not permissible and as such cannot be sustained. Rangachari's case to that extent is over-ruled. I hold that Article 16(4) permits reservation of appointments or posts in favour of any

backward class of citizens only at the initial stage of entry into the State services. Article 16(4) does not permit reservation either to the selection posts or in any other manner in the process of promotion.

E & F

528. Article 16(1) provides equality of opportunity for all citizens in matters relating to State-services. Equals have to be treated equally whereas the unequals ought not to be treated equally. For effective implementation of the right guaranteed under Article 16(1) classification is permissible. Such classification has to be reasonable having regard to the object of the right. Article 16(4) is another facet of Article 16(1). It exclusively provides for reservation which is one of the forms of classification. Article 16(4) being a special provision regarding reservation it completely takes away such classification from the purview of Article 16(1). Thus the State power to provide job reservations is wholly exhausted under Article 16(4). No reservation of any kind is permissible under Article 16(1). Article 16(4) completely overrides Article 16(1) in the matter of job-reservations.

529. Article 16(4) thus exclusively deals with reservation and it cannot be invoked for any other form of classification. Article 16(1), however, permits protective discrimination, short of reservation, in the matters relating to employment in the State-services. On these issues I entirely agree and adopt the reasoning and the conclusions reached by R.M. Sahai, J. and hold as under:-

1. Article 16(1) and 16(4) operate in the same field.

2. Article 16(4) is exhaustive of the State-power to provide reservations in State-Services.

3. Protective discrimination, short of reservations, which satisfy the tests of reasonableness, is permitted under Article 16(1).

G

530. I have carefully read the reasoning and the conclusions reached by R.M. Sahai, J. on this issue. Agreeing with him I hold as hold:-

(i) that the reservation under Article 16(4) must remain below 50% and under no circumstance be permitted to go beyond 50%. Any reservation beyond 50% is constitutionally invalid.

(ii) It is for the State to adopt the methodology of providing reservations below 50%. The State may provide the said reservation in respect of the substantive vacancies arising in a year or in the cadre or service. It would be permissible to carry forward the reserve vacancies of one year to the next year. It is reiterated that the vacancies reserved in a year including those which are carried forward shall not exceed 50%.

(iii) No reservation of any kind can be made for any class or category whether backward or non-backward under Article 16(1).

H

531. The protective discrimination in the shape of job-reservations has to be programmed in such a manner that the most deserving section of the backward class is benefited. Means-test ensures such a result. The process of identifying backward class can not be perfected to the extent that every member of the said class is equally backward. There are bound to be disparities in the class itself. Some of the members of the class may have individually crossed the barriers of backwardness but while identifying the class they may have come within the collectivity. It is often seen that comparatively rich persons in the backward class-though they may not have acquired any higher level of education-are able to move in the society without being discriminated socially. The members of the backward class are differentiated into superior and inferior. The discrimination which was practiced on them by the superior class is in turn practiced by the affluent members of the backward class on the poorer members of the said class. The benefits of special privileges like job-reservations are mostly chewed up by the richer or more affluent sections of the backward classes and the poorer and the really backward sections among them keep on getting poorer and more backwad. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniformed. The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the State-services. It is, therefore, necessary that the benefit of the reservation must reach the poorer and the weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job-reservations is necessary to benefit the needy-sections of the class. I therefore, hold that means test is imperative to skim-off the affluent sections of the backward classes.

I

532. Whether a group of citizens living below poverty line or under poverty-conditions can be considered a backward class under Article 16(4)? In other words can a class of citizens be identified as backward solely on the basis of economic criterion? Emphatic yes, is my answer.

533. Poverty is the culprit - cause of all kinds of backwardness. A poor man has no money. He lacks ordinary means of subsistence. Indigence keeps him away from education. Poverty breeds backwardness all around the class into which it strikes. It invariably results in social, economic and educational backwardness. It is difficult to perceive on what reasoning one can say that a class of citizens living under poverty-conditions is not a backward class under Article 16(4). The main reason advanced in this respect is that social backwardness being the mandatory criterion for the identification of backward class under Article 16(4), poverty alone cannot be the basis for backwardness in relation to Article 16(4). The other reason advanced is that in this country except for a small percentage of the population, the people are generally poor. The argument is that reservation for all is reservation for none. It is necessary to examine the two reasons on the anvil of logic.

534. This Court, over a period of four decades, has been interpreting the expression "backward class" in "Article 16(4)" to mean "socially and educationally backward" on the mistaken assumption that the expression "any backward class of citizens" in Article 16(4) means the same thing as "socially and educationally backward classes" in Article 15(4).

535. Based on elaborate reasoning I have held in part B of this judgment that the expression "any backward class of citizens" in Article 16(4) cannot be confined to "socially and educationally backward classes". The concept of "any backward class of citizens" in Article 16(4) is much wider than the "backward classes" defined under Article 15(4). It is not correct to say that social backwardness is an essential characteristic of the 'backward class' under Article 16(4). The object of Article 16(4), as held by me in part C of this judgment, is to provide job-reservations for the backward sections of those classes of citizens which are not adequately represented in the State-services. In the context of Article 16(4) the economic criterion is essentially relevant. On the interpretation of Article 16(4) as given by me in parts B and C of this judgment, social backwardness is not the sine qua non for being a "backward class" under Article 16(4).

536. Even if it is assumed that a backward class under Article 16(4) means socially backward, any class of citizens living below poverty line would amply qualify to be a 'backward class'. Poverty has a direct nexus to social backwardness. It is an essential and dominant characteristic of poverty. A rich belonging to backward caste - depending upon his disposition - may be or may not be socially backward, but a poor Brahmin struggling for his livelihood invariably suffers from social backwardness. The reality of present-day life is that the economic standards confer social status on individuals. A poor person, however honest, has no social status around him whereas a rich smuggler moves in a high society. No statistics can hide the fact that there are millions of people, who belong to the so-called elite castes, are as poor and often a great deal poorer than a very large proportion of the backward classes. It is a fallacy to think that a person, though earning thousands of rupees or holding higher posts is still backward simply because he happens to belong to a particular caste or community whereas millions of people living below poverty line are forward because they were born in some other caste, or communities. Poverty never discriminates, it chooses its victims from all religions, castes and creeds. The pavement dwellers and the slum dwellers, belonging to different castes and religions, have a common thread of poverty around them. Are they not the backward classes envisaged under Article 16(4)? Poverty binds them together as a class. Classes of citizens living in chronic-cramping poverty are per-se socially backward. Poverty runs into generations. It may be result of the social or economic inequality of the past. During the British regime several communities who fought the Britishers and those who actively participated in the freedom struggle, were deliberately kept below the poverty line. There are vast areas in India, like Kalahandi in Orissa, which are perennially poverty-stricken. By and large poverty in this country is a historical factor. Looked from any angle it is not possible to hold that the citizens of India who are living under poverty conditions or below poverty line are not socially backward. It would be doing violence to the object, purpose and the language of Article 16(4) to say that the poor of the country are not eligible for job reservations under the said Article.

537. Simply because the bulk of the population of this country is poor and there may be a large number of claimants for the reserved-jobs that is no ground to deny the poor their right under Article 16(4). This reasoning will apply to the other backward classes with much more force. Mandal has identified 52% of the population as backward. Apart from that 22% are scheduled castes and scheduled tribes. Those who are canvassing reservations for 74% of the so called backward classes have no basis whatsoever to say that 40% poor of the country be denied the benefit of job reservations. The poor can be classified on the basis of income, occupation, conditions of living such as slum dwellers, pavement dwellers etc. and priorities worked out. They can be operationally defined, categorised, sub-categorised and thereafter the backward sections

can be identified for the purposes of Article 16(4). It is high time that we leave the dogmatic approach of making reservation in public services on the basis of caste as a symbol of social backwardness. We must adopt a practical measure to confining it only to low income groups of people having unremunerative occupations whose talents and abilities are subdued under the weight of poverty. I, therefore, hold that a backward class for the purposes of Article 16(4) can be identified solely on the basis of economic criteria.

J

538. This question has been examined by Brother Judges and they have held that the reservations can be provided by the Parliament, State Legislatures, statutory rules as well as by way of Executive Instructions issued by the Central Government and the State Governments from time to time. The Executive Instructions can be issued only when there are no statutory provisions on the subject. Executive Instructions can also be issued to supplement the statutory provisions when those provisions are silent on the subject of reservations. These propositions of law are unexceptionable and I reiterate the same. I, however, make it clear that any Executive Instruction [issued under Articles 16(4), 73 or 162] providing reservations, which goes contrary to statutory provisions or the rules under Article 309 or any other statutory rules, shall not be operative to the extent it is contrary to the statutory provisions/rules.

K

539. Legal aspects arising out of Article 16(4) have been discussed and decided. Finally we have to examine the process of identification of the backward classes and test the same at the anvil of Article 16(4) as interpreted by us. Mandal Commission was set up on January 1, 1979 under Article 340 to identify the classes for the purposes of Article 16(4). The Commission identified 3743 backward castes and submitted its report on December 31, 1980. No action was taken on the Mandal Report by the successive governments for a decade. The Mandal report was finally lifted from the Morgue by the government of the day which accepted the report and issued Memorandum dated August 13, 1990 providing reservations for 3743 backward castes identified by the Mandal Commission. Later on the successor government amended the reservation - policy by the Memorandum dated September 25, 1991. These Memoranda have been reproduced in the judgments proposed by brother Judges. Both the Memoranda are based on the Mandal Report. The reservations provided under the two Memoranda are to be extended to 3743 castes identified by the Mandal Commission. It is, therefore, necessary to find out whether the backward classes to which reservations under the Memoranda are being extended, have been constitutionally and validly identified. I do not agree with the theory - apparently without logic - that the Memoranda can be adjudicated de-hors Mandal Report. Elaborate arguments were addressed before us challenging the validity of Mandal Report by M/s. Palkhiwala, Venugopal, Shyamala Pappu and other learned Counsel appearing for the petitioners. Agreeing with the learned Counsel, I hold that the identification of 3743 castes as the 'beneficiary-class' for job reservations under Article 16(4), is wholly unconstitutional, invalid and cannot be acted upon. My reasons for holding so are as under:

(i) The terms of reference require the Commission "to determine the criteria for defining the socially and educationally backward classes". Assume that Mandal has done so. The reference and

the Mandal Commission's investigation is based on the legal fallacy that the expression "backward class of citizens" means the same thing as "socially and educationally backward classes of citizens" in Article 15(4). That is why the Commission was asked to identify socially and educationally backward classes. We have held that two expressions in Article 16(4) and 15(4) do not mean the same thing. The classes to be identified under Article 16(4) cannot be confined only to social and educational backwardness. The definition therein is much wider and is not limited as under Article 15(4). It is thus, evident that the identification of the "backward classes" under Article 16(4) cannot be based only on the criteria of social and educational backwardness. Other classes which could have been identified on the basis of occupation, economic standards, environments, backward area residence, etc. etc. have been left out of consideration. The identification done by Mandal is thus violative of Article 16(4) and as such cannot be sustained.

(ii) It has been held by me that the backward classes for the purpose of Article 16(4) are the backward sections of the classes who are inadequately represented in the State-services. Admittedly, this exercise was not done. Mandal identified the castes on the criteria of social and educational backwardness.

(iii) The Terms of Reference further required the Commission "to examine the desirability or otherwise of making provision for the reservation of appointments or tests...in public services". This most vital part of the Terms of Reference was wholly ignored by the Commission. Before making its recommendations the Commission was bound, by the Terms of Reference, to determine the desirability or otherwise of such reservations. The Commission did not at all investigate this essential part of the Terms of Reference.

(iv) Mandal has not done any survey to find out as to whether 3743 castes which according to him are the backward classes, under Article 16(4), had inadequate representation in the State services. There is no material on the record to show that 3743 castes identified by Mandal are not adequately represented in the State services. The conditions of inadequacy is a conditions precedent under Article 16(4) of the Constitution. This having not been established, the identification of the so called "backward classes", is wholly unconstitutional and inoperative.

(v) Para 12.7 of the report indicates that the list of backward castes was prepared from the following sources:-

1. Socio-educational field survey;

2. Census report of 1961;

3. Personal knowledge gained through extensive touring and from the evidence; and

4. Lists of other backward classes notified by various State Governments.

The so called "socio-educational field survey", was an eye-wash. Only two villages and one urban block in each district of the country was taken into consideration. According to the petitioners only .06% of the total villages in the country were surveyed. Mr. Venugopal relied on a chart showing the sources from which the list of castes was prepared by the Mandal Commission. The contents

of chart were not disputed before us by the Union of India. Mr. Venugopal pointed out that out of 3743 castes only 406 were subjected to the socio-educational field survey. To be precise the chart shows that only 10.85% castes were subjected to survey and the remaining castes were picked up from other sources. The Commission set up for the purposes of identifying backward classes is under an obligation to conduct comprehensive survey. A backward class, identified on the sole test of caste and that also with only 10.85% socio-educational survey, cannot be constitutionally valid under Article 16(4).

Large number of castes were picked up by the Mandal Commission from the State lists. It was illustrated before us that out of 260 castes identified from the Union Territory of Pondichhery only 14 were subjected to socio-educational survey. One was identified on personal assessment of the Commission and the remaining 245 castes were picked up from the State list. These facts are not denied by the Union of India in the affidavit filed in writ petition 930/90. Similarly large number of castes were taken from the lists of other backward classes operating in the States. It was wholly illegal for the Commission to adopt the State lists without any investigation and survey. It is not disputed that no Commission was ever set-up in Pondicherry to identify the backward classes. There is nothing in the Mandal report to show that the State lists which were adopted were ever prepared as a result of any survey, investigation or scrutiny. Mandal Report in paras 2.63 and 2.64 specifically states that Haryana, Himachal Pradesh, Assam, Pondicherry, Rajasthan, Orissa, Meghalaya and Delhi have notified lists of Other Backward Classes without their being any enquiry into their conditions. In para 2.65 it is mentioned that Andaman and Nicobar, Arunachal Pradesh, Chandigarh, Dadri and Nagar Haveli, Goa, Daman and Diu, Lakshadweep, Madhya Pradesh, Manipur, Mizoram, Nagaland, Sikkim, Tripura and West Bengal have never prepared a list of OBCS. If the State lists were to be declared as Other Backward Classes by the Central Government then no Commission under Article 340 was required - an Administrator could do the job. When 90% of the castes selected were not subjected to the socio-educatinal survey it is impermissible to treat the said castes as backward classes.

1961 census was also taken as a source for preparing the list of backward castes. There is nothing on the record to show as to why Mandal relied on 1961 census when the 1971 census was available. A statement filed by Mr. Venugopal after examining the government records shows that the castes were also picked up from the Kaka Kalelkar Commission Report. In para 1.13 Mandal condemns Kaka Kalelkar's Report, even otherwise the said report was rejected by the Government of India in 1955 but still Mandal adopts castes from the said Report.

It is, thus, obvious that hardly any investigation was done by the Mandal Commission to find out the backward classes for the purposes of Article 16(4). A collection of so called backward castes by a clerical-act based on drawing-room investigation cannot be the backward classes envisaged under Article 16(4). If the Castes enlisted by Mandal are permitted to avail the benefit of job-reservations, thereby depriving half the country's population of its right under Article 16(1) the result would be nothing but a fraud on the Constitution.

(vi) The Mandal report virtually re-writes Article 16(4) by substituting caste for class. The caste has been made the sole and exclusive test for determining the backward classes. Every other test-economic or non-economic has been wholly rejected. Para 1.21 of Mandal report states "the substitution of caste by economic tests will amount to ignoring the genesis of social backwardness

in the Indian society". Paras 11.5 and 11.25 of the Mandal report indicate that the caste was taken as a collectivity for the purposes of socio-educational survey. The "indicators" for determining social and educational backwardness were also applied to the castes alone. Every single piece of evidence and other material adverted to by the Commission was only for the purpose of determining whether a caste was backward. There was no investigation at all to find out whether a member or family in the caste was backward. The "indicators" invoked to determine backwardness were invariably applied to the castes and not to the individuals. What emerges is that in the first instance only a caste was taken as a collectivity. Thereafter no individual or a family of that caste was subjected to the "indicators". Only the castes were tested through the "indicators" and the result obtained. Thus the Caste has been made the sole, paramount, overriding and decisive factor. The methodology based on caste alone is unconstitutional as it violates Articles 16(2) and 16(4) of the Constitution of India.

(vii) The Mandal report invents castes even for non-Hindus. The obsession with casteism and the desire to apply the same yardstick to all indians impelled the Commission to identify backward classes among non-Hindus also by the exclusive test of caste (paras 12.11 to 12.18) regardless of the fact that caste is anathema to christenity, Islam and Sikhism. There are various other denominations and religions in the country like Buddhist, Jains, Arya Smajis, Lingyats etc. who do not believe in casteism. The net-result is that almost 25% of the population was not taken into consideration by the Mandal Commission. The approach was anti-secular and against the basic features of the Constitution.

(viii) The Mandal Commission has estimated the population of other backward classes in the country as 52%. To say the least the exercise to reach the figure of 52% is wholly imaginary. It is in the realm of conjecture. The conclusion arrived at in para 12.22 of the Mandal Report to the effect that backward classes constitute nearly 52% of the Indian population is based on 1931 census. It is wholly arbitrary to count the population of backward classes in the country on the basis of census which took place fifty years before the report was submitted. In order to reach the conclusion of 52% Mandal has added up the population of scheduled castes, scheduled tribes, non-Hindu communities (Muslims, Christians, Sikhs, Buddhists, Jains) and the forward Hindu castes and communities (Brahmans, Rajputs, Marathas, Jats, Vashya-Baniya etc., Kayastha, other forward Hindu castes/groups) which make 56.30% of the total population. Mandal has assumed that the residual population of 43.70% (100 minus 56.30 equivalent to 43.70%) consists of backward classes. It is difficult to imagine how anybody can accept such an illusory and wholly arbitrary calculations. It is pity that half of the country is being deprived of their fundamental right under Article 16(1) on the basis of the census exhumed from a sixty year old grave and the calculations which are unknown to logic and fair-play. Mandal further assumed, erroneously, that relative population growth of various communities at the time of Mandal report was the same as at the time of 1931 census. It is assured to think that there was no change in their population growth during the long period of 50 years. It is pertinent to observe that India of 1931 comprised of present India, Pakistan, Bangladesh, Burma and Sri Lanka and as such it would be wholly erroneous to relate the caste-based population situation of 1931 to that of 1980.

(ix) According to Mandal Commission's own showing the materials before the Commission were woefully inadequate. Essential data was nonexistent. "Hardly any State was able to give the desired information" (para 9.4). As regards representation of OBCs in Government services, the

information received by the Commission was "too sketchy and scrappy for any meaningful inference which may be valid for the country as a whole"(para 9.14). "No State Government could furnish figures regarding the level of literacy and education amongst other backward class" (para 9.30. "No lists of OBCs is maintained by the Central Government, nor their particulars are separately compiled in Government offices" (para 9.47).

Based on the reasoning and the conclusions reached by me in paras 'A' to 'K' of the judgment, I order and direct as under:-

(i) The identification of 3743 castes as a "backward class" by Mandal Commission is constitutionally invalid and cannot be acted upon.

(ii) Office Memorandum dated August 13, 1990 issued by the Government of India is unconstitutional, non-est and as such cannot be enforced.

(iii) Para 2(i) of the Office Memorandum dated September 25, 1991 adopts the means - test. The adoption of means test by the Government of India in principle is upheld. Since para 2(i) is applicable to the 3743 castes identified by the Mandal Commission, the said para shall not operate till the time "backward classes" for the purposes of Article 16(4) are identified by the Government of India in accordance with the law laid-down in this judgment.

(iv) Para 2(ii) of the Office Memorandum dated September 25, 1991 is upheld. Since this para is integral part of the two Memoranda dated August 13, 1990 and September 25, 1991, it cannot operate independently. I, however, hold that the Government of Indian can make reservations solely based on economic criterion by a separate order.

540. The writ petition and all connected matters are disposed of in the above terms with no order as to costs.

P.B. Sawant, J.

541. In a legal system where the Courts are vested with the power of judicial review, on occasions issues with social, political and economic overtones come up for consideration. They are commonly known as political questions. Some of them are of transient importance while others have portentous consequences for generations to come. More often than not such issues are emotionally hyper-charged and raise a storm of controversy in the society. Reason and rationalism become the first casualities, and sentiments run high. The Courts have, however, as a part of their obligatory duty, to decide them. While dealing with them the courts have to raise the issues above the contemporary dust and din, and examine them dispassionately, keeping in view, the long term interests of the society as a whole. Such problems cannot always be answered by the strict rules of logic. Social realities which have their own logic have also their role to play in resolving them. The present is an issue of the kind.

542. It is for the first time that a Nine-Judge Bench has been constituted to consider issues arising out of the provisions for reservations in the services under the State under Article 16 of the Constitution. The obvious purpose is to reconsider, if necessary, the propositions of law so far laid

down by this Court on the various aspects of the subject. While, therefore, it may be true that everything is at large and the Court is not inhibited in its approach and conclusions by the precedents, the view taken so far on certain facets of the subject, may be hard to disregard on the principle of stare decisis. This will be more so where certain situations have crystallised and have become a part of the social psyche over a period of time. They may be unsettled only at the risk of creating avoidable problems.

543. The reservation in State employment is not a phenomenon unknown to this country. It is traceable to a deliberate policy of affirmative action or positive discrimination adopted in some parts of the country as early as in the beginning of this century. It is equally known to the employment under the Central Government where reservations in favour of the Scheduled Castes and Scheduled Tribes have been in existence for a considerable time now. The reasons why the issue has assumed agitational proportion on account of the present reservations, may be varied. While it is true that the Court is concerned with the interpretation of the provisions of the Constitution on the subject and not either with the causes of the turmoil or the consequence of the interpretation of the law, it is equally true that the Constitution being essentially a political document, has to be interpreted to meet the "felt necessities of the time". To interpret it, ignoring the social, political, economic and cultural realities, is to interpret it not as a vibrant document alive to the social situation but as an immutable cold letter of law unconcerned with the realities. Our Constitution, unlike many others, incorporates in it the framework of the social change that is desired to be brought about. The change has to be ushered in as expeditiously as possible but at the same time with the least friction and dislocation in national life. The duty to bring about the smooth change over is cast on all institutions including the judiciary. A deep knowledge of social life with its multitudinous facets and their interactions, is necessary to decide social issues like the present one. A superficial approach will be counter-productive.

THE GROUND REALITIES

544. Because of its pernicious caste system which may truly be described as its original sin, the Indian society has, for ages, remained stratified. The origin of the caste system is shrouded in speculation, neither the historians nor the sociologists being able to trace it in its present form to any particular period of time or region, or to a specific cause or causes. The fact, however, remains that it consists of mobility-tight hierarchical social compartments. Every individual is born in and, therefore, with a particular caste which he cannot change. Hitherto, he had to follow the occupation assigned to his caste and he could not even think of changing it. The mobility to upper caste is forbidden, even if to-day he pursues the professions and occupations of the upper caste. He continues to be looked upon as a member of the lower caste even if his achievements are higher than of those belonging to the higher castes. In social intercourse, he has to take his assigned caste-place. The once casteless and unreligious Indian society of Vedic times became multi-factious and multi-religious mainly on account of the rebellion of the lower castes against the tyranny of the caste system and their exploitation by the higher castes. Various sects emerged within the Hindu fold itself to challenge the inequitous system. Distinct religions like Buddhism, Jainism and Sikhism were born as revolts against casteism. When, therefore, first Islam and then Christianity made their entries here and ruled this country, many from the lower castes embraced them to escape the tyranny and inequaity, while some from the higher castes for pelf and power. However, the change of religion did not always succeed in eliminating castes. The converts carried with them

their castes and occupations to the new religions. The result has been that even among Sikhs, Muslims and Christians casteism prevails in varying degrees in practice, their preaching notwithstanding. Only Zoroastrianism is an exception to the rule; but that is because entry into it by conversion is impermissible. Casteism has thus been the bane of the entire Indian society, the difference in its rigidity being of a degree varying from religion to religion and from region to region.

545. One of the worst effects of casteism with which we are directly concerned in the present case, was that access to knowledge and learned was denied to the lower castes, for centuries. It was not till the advent of the British Rule in this country that the doors of education were opened to them as well as to women who were considered as much disentitled to education as the Shudras. Naturally, all the posts in the administrative machinery (except those of the menials) were manned by the higher castes, which had the monopoly of learning. The concentration of the executive power in the hands of the select social groups had its natural consequences. The most invidious and self-perpetuating consequence was the stranglehold of a few high castes over the administration of the country from the lower to the higher rungs, to the deliberate exclusion of others. Consequently, all aspects of the high were controlled, directed and regulated mostly to suit the sectional interests of a small section of the society which numerically did not exceed 10% of the total population of the country. The state of the health of the nation was viewed through their eyes, and the improvement in its health was effected according to their prescription. It is naive to believe that the administration was carried on impartially, that the sectional interests were subordinated to the interests of the country and that justice was done to those who were outside the ruling fold. This state of affairs continues even till this day.

546. To accept that after the inauguration of the Constitution and the introduction of adult franchise, there has been a change in the administrative power balance is to be unrealistic to the point of being gullible. Undoubtedly, the lower castes and classes who constitute the overwhelming majority of no less than 75% of the population have secured for the first time in the history of this country, an advantage in terms of political leverage on account of their voting strength. We do see today that the political executive is not only fairly representative of the lower classes but many times dominantly so. But that is on account of the voting power and not on account of social, educational or economic advancement made by them. The entry into the administrative machinery does not depend on voting strength but on the competitive attainments requisite for the relevant administrative field and post. Those attainments can be had only as a result of the cumulative progress on social, educational and economic fronts. Political power by itself cannot usher in such progress. It has to be exercised to bring about the progress. The only known medium of exercising the power is the administrative machinery. If that machinery is not sympathetic to the purpose of the exercise, the political power becomes ineffective, and at times is also rendered impotent. The reason why, after forty four years of Independence and of vesting of political power in the hands of the people, the same section which dominated the nation's affairs earlier, continues to do so even today, lies here.

547. The paradoxical spectacle of political power being unable to deliver the goods to whom it desires, is neither unique nor new to this country. This has happened and happens whenever the implementing machinery is at cross purposes with the political power. Faced with the hostility of the administrative-executive to their plans for reform, realising the inequitous distribution of posts

in the administration between different castes and communities, and being genuinely interested in lifting the disadvantaged sections of the society in their States, the enlightened Rulers of some of the then Princely States took initiative and introduced reservations in the administrative posts in favour of the backward castes and communities since as early as the first quarter of this century. Mysore and Kolhapur were among the first to do so. On account of the movement for social justice and equality started by the Justice Party, the then Presidency of Madras [which then comprised the present State of Tamil Nadu, parts of the present Andhra Pradesh and Kerala] initiated reservations in the Government employment in 1921. It was followed by the Bombay Presidency which then comprised the major parts of the present States of Maharashtra, Karnataka and Gujarat. Thus the first quarter of this century saw reservations in Government employment in almost whole of the Southern India. It has to be noted that these reservations were not only in favour of the depressed classes which are today known as the Scheduled Castes, but also in favour of other backward castes and classes including what were then known as the intermediate castes. The policy did arouse hostility and resistance of the higher castes even at that time. The agitation against reservations to-day is only a new incarnation of the same attitude of hostility. The resistance is understandable. It springs from the real prospect of the loss of employment opportunities for the eligible young. But the deeper reason of the high castes for opposing the reservation may be the prospect of losing the hitherto exclusive administrative power and having to share it with others on an increasing scale. When it is realised that in a democracy, the political executive has a limited tenure and the administrative executive wields the real power, [they can truly be described as the permanent politicians], the antipathy to reservation on a pitched note, propelled by the prospective loss of power, is quite intelligible. The loss of employment opportunities can be made good by generating employment elsewhere and by adopting a rational economic structure with planned economy, planned population and planned education. That is where all sections of the society - whether pro or anti-reservation should concentrate. For even if all available posts are reserved or dereserved, they will not provide employment to more than an infinitesimal number of either of the sections. Unfortunately, it is not logic and sanity, but emotions and politics which dominate the issue. The loss of exclusive political power wielded through administrative machine, however, cannot be avoided except by perpetuating the status quo.

548. The consequences of the status quo are startling and ruinous to the country. One of the major causes of the backwardness of the country in all walks of life is the denial to more than 75% of the population, of an opportunity to participate in the running of the affairs of the country. Democracy does not mean mere elections. It also means equal and effective participation in shaping the destiny of the country. Needless to say that where a majority of the population is denied its share in actual power, there exists no real democracy. It is a harsh reality. It can be mended not by running away from it or by ignoring it, but by taking effective workable remedial measures. Those who point to the past achievements and the present progress of the country, forget that these achievements and the progress are by a tiny section of the society who got an opportunity to realise and use there talent. If all sections of the society had such opportunity, this country's achievements is all fields and walks of life would have been many times more. That this is a realistic estimate and not a mere rhetoric is proved by history. Dr. Ambedkar belongs to the very recent past. If what is handed down to us history is to be believed, then the epic 'Mahabharata' was penned by Vyasa, who was born of a fisher woman; 'Ramayana' was authored by Valmiki, who belonged to a tribe forced to live by depredations. The immortal poet Kalidasa's ancestry is not known. These few instances demonstrate that intelligence, perception, character, scholarship and talent are not a monopoly of

any section of the society. Given opportunity, those who are condemned to the lowliest stations in life can rise to the loftiest status in society. One can only guess how much this country has lost for want of opportunities to the vast majority all these centuries. This aspect of the present and the past history has a bearing on the "merit-contention" advanced against reservations.

In this connection, it will be worthwhile quoting what Pandit Nehru had to say on the subject in "Discovery of India":-

Therefore, not only must equal opportunities be given to all, but special opportunities for educational, economic and cultural growth must be given to backward groups so as to enable them to catch up with those who are ahead of them. Any such attempt to open the door of opportunities to all in India will release enormous energy and ability and transform the country with amazing speed.

549. The inequalities in Indian society are born in homes and sustained through every medium of social advancement. Inhuman habitations, limited and crippling social intercourse, low-grade educational institutions and degrading occupations perpetuate the inequities in myriad ways. Those who are fortunate to make their escape from these all-pervasive dragnets by managing to attain at least the minimum of attainments in spite of the paralysing effects of the debilitating social environment, have to compete with others to cross the threshold of their backwardness. Are not those attainments, however low by the traditional standards of measuring them, in the circumstances in which they are gained, more creditable? Do they not show sufficient grit and determination, intelligence, diligence, potentiality and inclination towards learning and scholarship? Is it fair to compare these attainments with those of one who had all the advantages of decent accommodation with all the comforts and facilities, enlightened and affluent family and social life, and high quality education? Can the advantages gained on account of the superior social circumstances be put in the scales to claim merit and flaunted as fundamental rights? May be in many cases, those coming from the high classes have not utilised their advantages fully and their score, though compared with others, is high, is in fact not so when evaluated against the backdrop of their superior advantages - may even be lower. With the same advantages, others might have scored better. In this connection, Dr. Ambedkar's example is worth citing. In his matriculation examination, he secured only 37.5% of the marks, the minimum for passing being 35% [See: "Dr. Ambedkar" by Dr. Dhananjay Keer]. If his potentialities were to be judged by the said marks, the country would have lost the benefit of his talent for all times to come.

550. Those who advance merit contention, unfortunately, also ignore the very basic fact - (though in other contexts, they may be the first to accept it) - that the traditional method of evaluating merit is neither scientific nor realistic. Marks in one-time oral or written test do not necessarily prove the worth or suitability of an individual to a particular post, much less do they indicate his comparative calibre. What is more, for different posts, different tests have to be applied to judge the suitability. The basic problems of this country are mass-oriented. India lives in villages, and in slums in towns and cities. To tackle their problems and to implement measures to better their lot, the country needs personnel who have firsthand knowledge of their problems and have personal interest in solving them. What is needed is empathy and not mere sympathy. One of the major reasons why during all these years after Independence, the lot of the downtrodden has not even been marginally improved and why majority of the schemes for their welfare have remained on

paper, is perceptibly traceable to the fact that the implementing machinery dominated as it is by the high classes, is indifferent to their problems. The Mandal Commission's lament in its report, that it did not even receive replies to the information sought by it from various Governments, departments and organizations on the caste-wise composition of their services, speaks volumes on the point. A policy of deliberate reservations and recruitment in administration from the lower classes, who form the bulk of the population and whose problems primarily are to be solved on a priority basis by any administration with democratic pretensions, is therefore, not only eminently just but essential to implement the Constitution, and to ensure stability, unity and prosperity of the country.

511. What should further not be forgotten is that hitherto for centuries, there have been cent per cent reservations in practice in all fields, in favour of the high castes and classes, to the total exclusion of others. It was a purely caste and class-based reservation. The administration in the States where the reservations are in vogue for about three quarters of a century now, further cannot be said to be inferior to others in any manner. The reservations are aimed at securing proper representation in administration to all sections of the society, intelligence and administrative capacity being not the monopoly of any one class, caste or community. This would help to promote healthy administration of the country avoiding sectarian approaches and securing the requisite talent from all available sources.

511A. The assumption that the reservations lead to the appointment or admission of non-meritorious candidates is also not factually correct. In the first instance, there are minimum qualifying marks prescribed for appointment/admission. Secondly, there is a fierce competition among the backward class candidates for the seats in the reserved quota. This has resulted in the cut-off marks for the seats in the reserved quota reaching near the cut-off line for seats in the general quota as some surveys made on the subject show. A sample of such surveys made on the State of Tamil Nadu by Era Sezhian and published in the issue of the "Hindu" dated 8th October, 1990 may be reproduced here:

Selection to professional courses : Cut-off level

Course of Study	Open Competition	Backward	Most Backward	Scheduled Caste
Engineering Course [Anna University]				
Computer Science	97.98%	96.58%	93.25%	84.38%
Electronics	97.74%	96.08%	92.16%	82.22%
Electrical	95.84%	95.42%	91.48%	81.98%
Mechanical Engg.	95.78%	94.10%	90.66%	79.21%
Medical Course [University of Madras]				
M. B. B. S.	95.22%	93.18%	89.62%	83.98%
Agricultural Course [Agricultural University, Coimbatore]				
B. Sc. Agri.	90.90%	90.08%	86.10%	78.04%
B. E. Agri.	92.66%	91.96%	87.46%	76.14%
Veterinary [Tamil Nadu Veterinary & Animal Sciences University]				
BVSc.	94.90%	93.48%	91.18%	85.24%
BFSc.	96.96%	95.58%	95.02%	93.02%

By what logic can it be said that the above marks secured by the candidates from the backward classes are not meritorious?

512. The reservations by their very nature have, however, to be imaginative, discriminating and gradual, if they are to achieve their desired goal. A dogmatic, unrealistic and hasty approach to any social problem proves, more often than not, self-defeating. This is more so when ills spread over centuries are sought to remedied. It is not possible to remove the backlog in representation at all levels of the administration in one generation. More difficult it is to do so in all fields and all branches of administration, and at the same pace. It will not only be destructive of the object of reservations but will positively be harmful even to those for whom it is meant - not to speak of the society as a whole. It must be remembered that some individual exceptions apart, even the advanced classes have not made it to the top in one generation. Such exceptions are found in backward classes as well.

PHILOSOPHY AND OBJECTIVES OF RESERVATIONS

513. The aim of any civilised society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society and, therefore, of its equal membership. The dignity of the individual is dented in direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing when equal opportunity to grow, govern, and give one's best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct or indirect as when the wherewithal's to avail of them are denied. Nevertheless, the consequences are as potent.

514. Inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all.

515. Likewise, the social and political justice pledged by the Preamble of the Constitution to be secured to all citizens, will remain a myth unless first economic justice is guaranteed to all. The liberty of thought and expression also will remain on paper in the face of economic deprivations. A remunerative occupation is a means not only of economic upliftment but also of instilling in the individual self-assurance, self-esteem and self-worthiness. It also accords him a status and dignity as an independent and useful member of the society. It enables him to participate in the affairs of the society without dependence on, or domination by, others, and on an equal plane depending upon the nature, security and remuneration of the occupation. Employment is an important and by far the dominant remunerative occupation, and when it is with the Government, semi-Government or Government-controlled organisation, it has an added edge. It is coupled with power and prestige of varying degrees and nature, depending upon the establishment and the post. The employment under the State, by itself, may, many times help achieve the triple goal of social, economic and political justice.

516. The employment - whether private or public - thus, is a means of social levelling and when it is public, is also a means of directly participating in the running of the affairs of the society. A

deliberate attempt to secure it to those who were designedly denied the same in the past, is an attempt to do social and economic justice to them as ordained by the Preamble of the Constitution.

517. It is no longer necessary to emphasise that equality contemplated by Article 14 and other cognate Article including Article 15(1), 16(1), 29(2) and 38(2) of the Constitution, is secured out only when equals are treated equally but also when unequals are treated unequally. Conversely, when unequals are treated equally, the mandate of equality before law is breached. To bring about equality between the unequals, therefore, it is necessary to adopt positive measures to abolish inequality. The equalising measure will have to use the same tools by which inequality was introduced and perpetuated. Otherwise, equalisation will not be of the unequals. Article 14 which guarantees equality before law would by itself, without any other provision in the Constitution, be enough to validate such equalising measures. The founders of the Constitution, however, thought it advisable to incorporate another provision, viz., Article 16 specifically providing for equality of opportunity in matters of public employment. Further they emphasised in Clause (4) thereof that for equalising the employment opportunities in the services under the State, the State may adopt positive measures for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not adequately represented in such services. By hind sight, the foresight shown in making the provision specifically, instead of leaving it only to the equally provision as under the U.S. Constitution, is more than vindicated.

In spite of decisions of this Court on almost all aspects of the problem, spread over the past more than forty years now, the validity, the nature, the content and the extent of the reservation is still under debate. The absence of such provision may well have led to total denial of equal opportunity in the most vital sphere of the State activity. Consequently, Article 38(2) which requires the State in particular to strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations, and Article 16 which enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people, and to protect them from social injustice and all forms of exploitation, and Article 335 which requires the State to take into consideration the claims of the Scheduled Castes and Scheduled Tribes in making the appointments to services and posts under the Union or States, would have, all probably remained on paper.

518. The trinity of the goals of the Constitution, viz., socialism, secularism and democracy cannot be realised unless all sections of the society participate in the State power equally, irrespective of their caste, community, race, religion and sex and all discriminations in the sharing of the State power made on those grounds are eliminated by positive measures.

519. Under Article 16(4), the reservation in the State employment is to be provided for a "class of people" which must be "backward" and "in the opinion of the State" is "not adequately represented" in the services of the State. Under Article 46, the State is required to "promote with special care" the "educational and economic interests" of the "weaker sections" of the people and "in particular", of the Scheduled Castes and Scheduled Tribes, and "to protect" them from "social injustice" and "all forms of exploitation". Since in the present case, we are not concerned with the reservations in favour of the SCs/STs, it is not necessary to refer to Article 335 except to point out that, it is in terms provided there that the claims of SCs/STs in the services are to be taken into consideration,

consistently with the maintenance of efficiency of administration. It must, therefore, mean that the claims of other backward class of citizens and weaker sections must also be considered consistently with the maintenance of the efficiency. For, whomsoever, therefore, reservation is made, the efficiency of administration is not to be sacrificed, whatever the efficiency may mean. That is the mandate of the Constitution itself.

520. The various provisions in the Constitution relating to reservation, therefore, acknowledge that reservation is an integral part of the principle of quality where inequalities exist. Further they accept the reality of inequalities and of the existence of unequal social groups in the Indian society. They are described variously as "socially and educationally backward classes" [Article 15(4) and Article 340], "backward class" [Article 16(4)] and "weaker sections of the people" [Article 46]. The provisions of the Constitution also direct that the unequal representation in the services be remedied by taking measures aimed at providing employment to the discriminated class, by whatever different expressions the said class is described. How does one identify the discriminated class is a question of methodology. But once it is identified, the fact that it happens to be a caste, race, or occupational group, is irrelevant. If the social group has hitherto been denied opportunity on the basis of caste, the basis of the remedial reservation has also to be the caste. Any other basis of reservation may perpetuate the status quo and may be inappropriate and unjustified for remedying the discrimination. When, in such circumstances, provision is made for reservations, for example, on the basis of caste, it is not a reservation in favour of the caste as a "caste" but in favour of a class or social group which has been discriminated against, which discrimination cannot be eliminated, otherwise. What the Constitution forbids is discrimination "only" on the basis of caste, race etc. However, when the caste also happens to be a social group which is "backward" or "socially and educationally backward" or a "weaker section", this discriminatory treatment in its favour, is not only on the basis of the caste.

521. The objectives of reservation may be spelt out variously. As the U.S. Supreme Court has stated in different celebrated cases, viz., Oliver Brown et. al. v. Board of Education of Topeka et. al. 347 US 483 : 98 L. Ed. 8731, Spottswood Thomas Boiling et. al. v. C. Melvin Sharpe et. al. 347 US 497 : 98 L. Ed. 884, Marco Defunis et. al. v. Charles Overgaard 416 US 312 : 40 L. Ed. 2d 164, Regents of the University of California v. Allan Bakke 438 US 265: 57 L. Ed. 2d 7.50, H. Earl Fullilove et. al. v. Philip M. Klutznick 448 US 448 : 65 L. Ed. 2d 902, and Metro Broadcasting, Inc. v. Federal Communication Commission. 111 L. Ed. 2d 445, rendered as late as on June 27, 1990 the reservation or affirmative action may be undertaken to remove the "persisting or present and continuing effects of past discrinimation"; to lift the "limitation on access to equal opportunities"; to grant "opportunity for full participation in the governance" of the society; to recognise and discharge "special obligations"; towards the disadvantaged and discriminated social groups"; "to overcome substantial chronic under-representation of a social group"; or "to serve the important governmental objectives". What applies to American society, applies ex proprio vigore to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous. Unlike in America, the all pervasive discrimination here is against a vast majority.

522. As has been pointed out earlier, our Constitution itself spells out the important objectives of the State Policy. There cannot be a more compelling goal than to achieve the unity of the country by integration of different social groups. Social integration cannot be achieved without giving

equal status to all. The administration of the country cannot also be carried on impartially and efficiently without the representation in it of all the social groups and interests, and without the aid and assistance of all the views and social experiences. Neither democracy nor unity will become real, unless all sections of the society have an equal and effective voice in the affairs and the governance of the country.

523. In a society such as ours where there exist forward and backward, higher and lower social groups, the first step to achieve social integration is to bring the lower or backward social groups to the level of the forward or higher social groups. Unless all social groups are brought on an equal cultural plane, social intercourse among the groups will be an impossibility. Inter-marriage as a matter of course and without inhibitions is by far the most potent means of effecting social integration. Inter-marriages between different social groups would not be possible unless all groups attain the same cultural level. Even in the same social group, marriages take place only between individuals who are on the same cultural plane. Culture is a cumulative product of economic and educational attainments leading to social accomplishment and refinement of mind, morals and taste. Employment and particularly the governmental employment promotes economic and social advancement which in turn also leads to educational advancement of the group Though it is true that economic and educational advancement is not necessarily accompanied by cultural growth, it is also equally true that without them cultural advancement is difficult. Employment is thus an important aid for cultural growth. To achieve total unity and integration of the nation, reservations in employment are, therefore, imperative, in the present state of our society.

524. Under the Constitution, the reservations in employment in favour of backward classes are not intended either to be indiscriminate or permanent. Article 16(4) which provides for reservations, also at the same time prescribes their limits and conditions. In the first place, the reservations are not to be kept in favour of every backward class of citizens. It is only that backward class of citizens which, in the opinion of the State, is "not adequately represented" in the services under the State, which is entitled to the benefit of the reservations. Secondly, and this follows from the first, even that backward class of citizens would cease to be the beneficiary of the reservation policy, the moment the State comes to the conclusion that it is adequately represented in the services.

THE IMPUGNED ORDERS OF THE GOVERNMENT

525. In order to appreciate the relevance of the questions which are to be answered by this Court, it is necessary first to analyse the provisions of the two impugned orders. The first order dated 13th August, 1990, acknowledges the fact that our society is multiple and undulating, and expressly refers to the Second Backward Classes Commission, popularly known as Mandal Commission and its report submitted to the Government of India on 31st December, 1980 and the purpose for which the Commission was appointed, viz., for early achievement of "the objective of social justice" enshrined in the Constitution. The order then states that the Government have considered carefully, the report of the Commission and the recommendations of the Commission in "the present context" regarding the benefits to be extended to the "Socially and Educationally Backward Classes" [SEBCs] as opined by the Commission. The order further declares that the Government are of the clear view that at the outset "certain weightage is to be provided to such classes in the services of the Union and other public undertakings". With this preface, the order proceeds to-

[1] provide for reservation of 27% of the vacancies in civil posts and services under the Union Government to "SEBCs";

[2] restrict the reservations to the vacancies, to be filled in by direct recruitment only (and thus by necessary implication excludes reservations in recruitment by promotion);

[3] leave the procedure to be followed for enforcing reservation to be detailed in instructions to be issued separately;

[4] make it clear that those belonging to SEBCs who enter into services in the open i.e., unreserved category are not to be counted for the purpose of calculating the reserved quota of 27%;

[5] specify that in the first phase of reservation, it is only SEBC castes and communities which are common to both the lists given in the report of the Mandal Commission and the list prepared by the State Government, would be the beneficiaries of the reservations;

[6] state that the list of such common castes and communities will be issued by the Government separately;

[7] give effect to the reservation from 7th August, 1990; and

[8] explain that the reservation quota will apply not only to the services under the Government of India but also to the services in the public sector undertakings and financial institutions including the public sector banks;

526. This order was amended by the second order of 25th September, 1991. The first purpose of the amendment, as stated in the opening paragraph of the order is to classify the SEBCs into two categories, namely, SEBCs and the poorer sections of the SEBCs, and to give the latter the benefit of reservations on preferential basis. The second purpose is to carve out a new category of "Other Economically Backward Sections" of the people (OEBSs) which are not covered by any existing schemes of reservation, and to provide reservation in services for them. To effectuate these two objectives, the order provides that -

[1] our of the 27% of the vacancies reserved for SEBCs, preference shall be given to candidates belonging to poorer sections of SEBCs. If sufficient number of candidates belonging to poorer sections of SEBCs are not available, the unfilled vacancies shall be filled by other SEBC candidates;

[2] 10% of the vacancies in civil posts and services shall be reserved for "Other Economically Backward Sections of the people" (OEBSs);

[3] The criteria for determining poorer sections of the SEBCs as well as OEBSs are to be issued separately.

The effect of the second order is to increase the reservations by 10% making the total reservations in the civil posts and services 59-1/2%, 22-1/2% for SCs/STs + 27% for SEBCs + 10% for OEBSs.

527. As has been pointed out earlier, Article 16(4) does not use the expression "Socially and Economically Backward Classes". Instead it uses the expression "Backward Classes of Citizens". It is Article 15(4) and Article 340 which use the expression "Socially and Educationally Backward Classes". Since the judicial decisions have equated the expression "backward class of citizens" with the expression "Socially and Educationally Backward Classes of Citizens", it appears that the impugned order have used the two expressions synonymously to mean the same class of citizens. The second order has gone even further. It has carved out yet another class of beneficiaries of reservation, namely, "Other Economically Backward Sections". As would be pointed out a little later, this new class of citizens cannot be a beneficiary of reservations in services under Clause (4) of Article 16 nor under Clause (1) thereof.

We may now proceed to deal with the specific questions raised before us.

Question I

Whether Article 16(4) is an exception to Article 16(1) and would be exhaustive of the right to reservation of posts in services under the State?

528. With the majority decision of this Court in State of Kerala and Anr. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC , having confirmed the minority opinion of Subba Rao, J. in T. Devadasan v. Union of India and Anr. MANU/SC/0270/1963 : (1965)IILLJ560SC , the settled judicial view is that Clause (4) of Article 16 is not an exception to Clause (1) thereof, but is merely an emphatic way of stating what is implicit in Clause (1).

529. Equality postulates not merely legal equality but also real equality. The equality of opportunity has to be distinguished from the equality of results. The various provisions of our Constitution and particularly those of Article 38, 46, 335, 338 and 340 together with the Preamble, show that the right to equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. It is a positive right, and the State is under an obligation to undertake measures to make it real and effectual. A mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them. However, as pointed out by Dr. Ambedkar while replying to the debate on the provision in the Constituent Assembly, it became necessary to incorporate Clause (4) in Article 16 at the insistence of the members of the Assembly and to allay and apprehensions in that behalf. Thus, what was otherwise clear in Clause (1) where the expression "equality of opportunity" is not used in a formal but in a positive sense, was made explicit in Clause (4) so that there was no mistake in understanding either the real import of the "right to equality" enshrined in the Constitution or the intentions of the Constitution framers in that behalf. As Dr. Ambedkar has stated in the same reply, the purpose of the Clause (4) was to emphasise that "there shall be reservation in favour of certain communities which have not so far had a proper look into, so to say, in the administration".

530. If, however, Clause (4) is treated as an exception to Clause (1), an important but unintended consequence may follow. There would be no other classification permissible under Clause (1), and

Clause (4) would be deemed to exhaust all the exceptions that can be made to Clause (1). It would then not be open to make provision for reservation in services in favour of say, physically handicapped, army personnel and freedom fighters and their dependents, project affected persons, etc. The classification made in favour of persons belonging to these categories is not hit by Clause (2). Apart from the fact that they cut across all classes, the reservation in their favour are made on considerations other than that of backwardness within the meaning of Clause (4). Some of them may belong to the backward classes while some may belong to forward classes or classes which have an adequate representation in the services. They are, however, more disadvantaged in their own class whether backward or forward. Hence, even on this ground it will have to be held that Article 16(4) carves out from various classes for whom reservation can be made, a specific class, viz., the backward class of citizens, for emphasis and to put things beyond doubt.

531. For these very reasons, it will also have to be held that so far as "backward classes" are concerned, the reservations for them can only be made under Clause (4) since they have been taken out from the classes for which reservation can be made under Article 16(1). Hence, Article 16(4) is exhaustive of all the reservations that can be made for the backward classes as such, but is not exhaustive of reservations that can be made for classes other than backward classes under Article 16(1). So also, no reservation can be made under Article 16(4) for classes other than "backward classes" implicit in that Article. They have to look for their reservations, to Article 16(1).

532. It may be added here that reservations can take various forms whether they are made for backward or other classes. They may consist of preferences, concessions, exemptions, extra facilities etc. or of an exclusive quota in appointments as in the present case. When measures other than an exclusive quota for appointments are adopted, they form part of the reservation measures or are ancillary to or necessary for availing of the reservations. Whatever the form of reservation, the backward classes have to look for them to Article 16(4) and the other classes to Article 16(4).

Question II:

What would be the content of the phrase "Backward Class" in Article 16(4) of the Constitution and whether caste by itself could constitute a class and whether economic criterion by itself could identify a class for Article 16(4) and whether "Backward Classes" in Article 16(4) would include the "weaker sections" mentioned in Article 46 as well?

533. The courts have, as will be instantly pointed out, equated the expression "backward classes of citizens" with the expression "Socially and Educationally Backward Classes of citizens ["SEBCs" for short] found in Article 15(4) and Article 340. Even the impugned orders have used the expression "socially and educationally backward classes of citizens". As a matter of fact, since the impugned orders have chosen to give the benefit of reservation expressly to SEBCs and since it is not suggested that SEBCs are not "backward class of citizens" within the meaning of Article 16(4), the discussion on the point is purely academic in the present case.

534. In this connection, a reference may first be made to Article 335 of the Constitution. There is no doubt that backward classes under Article 16(4) would also include SCs/STs for whose entry into services, provision is also made under Article 335. There is, however, a difference in the language of the two Articles. Whereas the provision of Article 16(4) is couched in an enabling

language, that of Article 335 is in a mandatory cast. It appears that it became necessary to make the additional provision of reservation for SCs/STs under Article 335 because for them the reservations in services were to be made as obligatory as reservations in the House of the People and the Legislative Assemblies under Articles 330 and 332 respectively. When we remember that Articles 330, 332 and 335 belong to the family of Article in Part XVI which makes "Special Provisions Relating to Certain Class", the additional and obligatory provision for SCs/STs under Article 335 becomes meaningful. It is probably because of the mandate of Article 335 and the level of backwardness of the SCs/STs - the most backward among the backward classes - that it also became necessary to caution and emphasise in the same vein, that the imperative claims of the SCs/STs shall be taken into consideration consistently with the efficiency of the administration, and not by sacrificing it. It cannot, however, be doubted that the same considerations will have to prevail while making provisions for reservations in favour of all backward classes under Article 16(4). To hold otherwise would not only be irrational but discriminatory between two classes of backward citizens.

535. We may now analyse Article 16 in the light of the question. In the first instance, it is necessary to note that neither Clauses (1) and (2) of Article 16 read together, nor Clause (2) of Article 29 prohibits discrimination and, therefore classification, which is not made only on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them. They do not prevent classification, if religion, race, caste etc. are coupled with other grounds or considerations germane for the purpose for which it is made. Secondly, Clauses (1) and (2) of Article 16 prevent discrimination against individuals and not against classes of citizens. Thirdly, Clause (4) of Article 16 enables the State to make special provision in favour of any backward "class" of citizens and not in favour of citizens who can be classified as backward. The emphasis is on "class of citizens" and not on "citizens". Fourthly, as has already been pointed out earlier, the class of citizens under Article 16(4) has not only to be backward but also a class which is not adequately represented in the services under the State. Fifthly, when we remember that the Scheduled Castes and Scheduled Tribes are also the members of the backward classes of citizens within the meaning of Article 16(4), the nature of backwardness of the backward class of citizens is implicit in Article 16(4) itself. Further, Part XVI of the Constitution which makes special provision under Article 338 for National Commission for Scheduled Castes and Scheduled Tribes for investigating their conditions, makes a similar provision under Article 340 for appointment of Commission to investigate the conditions also of "socially and educationally backward classes of citizens". The two provisions leave no doubt about the kind of backwardness that the Constitution takes care of in Article 16(4). What is more, Clause (4) of Article 15 which was added after the decision in The State of Madras v. Srimathi Champakam Dorairajan etc. MANU/SC/0007/1951 : [1951]2SCR525 , specifically mentions that nothing in Article 15 or in Clause (2) of Article 29, shall prevent the State from making any special provision for the advancement of and "socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes". The significance of this amendment should not be lost sight of. It groups "socially and educationally backward classes" with "Scheduled Castes and Scheduled Tribes". When it is remembered that Article 341 and 342 enable the President to specify by notification, the Scheduled Castes and Scheduled Tribes, it can hardly be debated that such specifications from time to time may only be from the socially and educationally backward classes or from classes whose economic backwardness is on account of their social and educational backwardness.

We may now refer to the decisions of this Court on the point.

536. In M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439, what fell for consideration was Article 15(4), and on the language of the said Article, it was held by this Court that the backwardness contemplated by the said Article was both social and educational. It is not either social or educational but it is both social and educational. In Janki Prasad Parimoo and Ors. etc. etc. v. State of Jammu & Kashmir and Ors. MANU/SC/0393/1973 : [1973]3SCR236 , which was a case under Article 16(4), this Court read "backward class of citizens" in Article 16(4) as "socially and educationally backward class of citizens", although Justice Palekar who delivered the judgment for the Court, proceeded to equate the two expressions on the assumption that "it was well-settled that the expression "backward class" in Article 16(4) means the same thing as the expression "any socially and educationally backward classes of citizens" in Article 15(4). It is true that no decision prior to this decision had in terms sought to equate the two expressions, and to that extent the said statement can be faulted as it is sought to be done before us.

In K.C. Vasanth Kumar and Anr. v. State of Karnataka MANU/SC/0033/1985 : [1985] Supp. 1 SCR 352, this Court was called upon to express opinion on the issue of reservation which may serve as a guideline to the Commission which the Government of Karnataka proposed to appoint for examining the question of affording better employment and educational opportunities to the Scheduled Castes and Scheduled Tribes and other backward classses. Hence, the interpretation of the expression "backward class of citizens" under Article 16(4) and of the expression "socially and educationally backward classes" under Article 15(4) and their co-relation, fell for consideration directly. The five Judges of the Bench with the exception of Chief Justice Chandrachud expressed their opinion on these two expressions. Desai, J. held that "Courts have more or less...veered round to the view that in order to be socially and educationally backward classes, the group must have the same indicia as Scheduled Castes and Scheduled Tribes". The learned Judge then proceeded to deal with what, according to him, was a narrow question, viz., whether caste-liable should be sufficient to identify social and educational backwardness. However, it appears that the learned Judge proceeded on the footing that the expression "backward class of citizens" was synonymous with the expression "socially and educationally backward classes of citizens". There is no discussion whether the two expressions are in fact similar and of the reasons for the same. Chinnappa Raddy, J. dealt with the two expressions a little extensively and came to the conclusion as follows:

Now, it is not suggested that the socially and educationally backward classes of citizens and the Scheduled Castes and Scheduled Tribes for whom special provision for advancement is contemplated by Article 15(4) are distinct and separate from the backward classes of citizens who are inadequately represented in the services under the State for whom reservation of posts and appointments is contemplated by Article 16(4). 'The backward classes of citizens' referred to in Article 16(4), despite the short description, are the same as 'the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes', so fully described in Article 15(4): Vide Trilokinath Tiku v. State of Jammu & Kashmir, and other cases.

Sen, J. also appears to have proceeded on the footing that the two expressions, viz., "socially and educationally backward classes" under Article 15(4) and "backward class of citizens" under Article 16(4) are synonymous.

Venkataramiah, J. [as he then was] held that "Article 15(4) and Article 16(4) are intended for the benefit of "those who belong to castes, communities which are traditionally disfavoured and which have suffered societal discrimination in the past". The other factors such as physical disability, poverty, place of habitation etc. - according to the learned Judge - were never in the contemplation of the makers of the Constitution while enacting these clauses." The learned Judge has held that "while relief may be given in such cases under Article 14, 15(1) and Article 16(1) by adopting a rational principle of classification, Article 14, Article 15(4) and Article 16(4) cannot be applied to them". The learned Judge has further held that "it is now accepted that the expressions 'socially and educationally backward classes of citizens' and 'the Scheduled Castes and the Scheduled Tribes' in Article 15(4) of the Constitution together are equivalent to 'backward class of citizens' in Article 16(4)".

537. There is, therefore, no doubt that the expression "backward class of citizens" is wider and includes in it "socially and educationally backward classes of citizens" and "Scheduled Castes and Scheduled Tribes".

538. The next question is whether the social and educational backwardness of the other backward classes has to be akin to or of the same level as that of the Scheduled Castes and the Scheduled Tribes. It is true that some decisions of this Court such as Balaji [supra] and State of Andhra Pradesh and Anr. v. P. Sugar MANU/SC/0028/1968 : [1968]3SCR595 , have taken the view that the backwardness of the backward class under Article 16(4) being social and educational, must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer. In Balaji it is stated:

It seems fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution makers felt no doubt that special provision had to be made for their advancement. It was realised that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them.

After referring to the provisions of Articles 338(3), 340(1), 341 and 342, the Court proceeded to hold as follows:

It would thus be seen that this provision contemplates that some Backward Classes may by the Presidential order be included in Scheduled Castes and Tribes. That helps to bring out the point that the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes.

539. The test laid down above of similarity of social and educational backwardness was accepted in P. Sagar [supra].

540. However, in State of Andhra Pradesh and Ors. v. U.S.V. Balram etc. MANU/SC/0061/1972 : [1972]3SCR247 , the earlier view has been explained by pointing out that the above decisions do not lay down that backwardness of the other backward classes must be exactly similar in all respects to that of the Scheduled Castes and the Scheduled Tribes. Further, in Parimoo [supra] the test laid down in Balaji has been explained in the following words:

Indeed all sections in the rural areas deserve encouragement but whereas the former by their enthusiasm for education can get on without special treatment, the latter require to be goaded into the social stream by positive efforts by the State. That accounts for the raison d'etre of the principle explained in Balaji's case which pointed out that backward classes for whose improvement special provision was contemplated by Article 15(4) must be comparable to Scheduled Castes and Scheduled Tribes who are standing examples of backwardness socially and educationally. If those examples are steadily kept before the mind the difficulty in determining which other classes should be ranked as backward classes will be considerably eased.

In Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr. MANU/SC/0068/1976 : [1977]1SCR194 , it is stated:

Backward classes for whose improvement special provisions are contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes. This Court has emphasised in decisions that the backwardness under Article 15(4) must be both social and educational.

class = "centeralign">x x x

The Concept of backwardness in Article 15(4) is not intended to be relative in the sense that classes who are backward in relation to the most advanced classes of society should be included in it.

541. These observations will also show that the test of comparable backwardness laid down in Balaji has not been and is not to be, understood to mean that backwardness of the other backward classes has to be of the same degree as or identical in all respects to, that of the Scheduled Castes and Scheduled Tribes. At the same time, the backwardness is not to be measured in terms of the forwardness of the forward classes and those who are less forward than the forward are to be classified as backward. The expression "backward class of citizens", as stated earlier, has been used in Article 16(4) in a particular context taking into consideration the social history of this country. The expression is used to denote those classes in the society which could not advance socially and educationally because of the taboos and handicaps created by the society in the past or on account of geographical or other similar factOrs. In fact, the expression "backward classes" could not be adequately encompassed in any particular formula and hence even Dr. Ambedkar while replying to the debate on the point stated as follows:

If honourable members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which

have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. But I think honourable members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large, that it left no room for the rule to operate. I think this is sufficient to justify why the word 'backward' has been used.

... Somebody asked me: "What is a backward community"? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government.

542. It will have, therefore, to be held that the backwardness of the backward classes other than the Scheduled Castes and Scheduled Tribes who are entitled to the benefit of the reservations under Article 16(4), need not be exactly similar in all respects to the backwardness of the Scheduled Castes and Scheduled Tribes. That it is not necessary that the social, educational and economic backwardness of the other backward classes should be exactly of the same kind and degree as that of the Scheduled Castes and the Scheduled Tribes is recognised by the various provisions of the Constitution itself since they make difference between the Scheduled Castes and the Scheduled Tribes on the one hand, and other "socially and educationally backward classes" or "backward class of the citizens" on the other. What is further, if the other backward classes are backward exactly in all respects as the Scheduled Castes and Scheduled Tribes, the President has the power to notify them as Scheduled Castes and Scheduled Tribes, and they would not continue to be the other backward classes. The nature of their backwardness, however, will have to be mainly social resulting in their educational and economic backwardness as that of the Scheduled Castes and Scheduled Tribes.

543. The next important aspect of the question is whether caste can be used for identifying socially and educationally backward classes.

544. There is no doubt that no classification can validly be made only on the basis of caste just as it cannot be made only on the basis of religion, race, sex, descent, place of birth or any of them, the same being prohibited by Article 16(2). What is, however, required to be done for the purposes of Article 16(4) is not classification but identification. The identification is of the backward classes of citizens, which have, as seen above, to be socially and, therefore, educationally and economically backward [for short described as socially and educationally backward]. Any factor - whether caste, race, religion, occupation, habitation etc. - which may have been responsible for the social and educational backwardness, would naturally also supply the basis for identifying such classes not because they belong to particular religion, race, caste, occupation, area etc. but because they are socially and educationally backward classes.

545. It is, however, contended that the adoption of caste as a factor even for identifying backwardness would perpetuate casteism. The argument, with respect, begs the question. It presumes that the caste are created the moment they are identified as backward classes for the purposes of Article 16(4). One of the most damaging and perpetuating social consequences of the caste system has admittedly been the discrimination suffered by certain castes and communities as such castes and communities. The result has been that these castes and communities as a whole continued to remain as backward classes. If, therefore, an affirmative action is to be taken to give them the special advantage envisaged by Article 16(4), it must be given to them because they belong to such discriminated castes. It is not possible to redress the balance in their favour on any other basis. A different basis would perpetuate the status quo and therefore the caste system instead of eliminating it. On the other hand, by giving the discriminated caste-groups the benefits in question, discrimination would in course of time be eliminated and along with it the casteism. It would thus be seen that the contention to the contrary is counter-productive and will in fact perpetuate, though unintentionally, the very caste system which it seeks to eliminate.

Prime Minister Nehru while replying to the very point raised in the discussion on the amendment to Article 15 by insertion of Clause (4), summarised the situation in the following words:

"... But you have to distinguish between backward classes which are specially mentioned in the Constitution that have to be helped to be made to grow and not think of them in terms of this community or that. Only if you think of them in terms of the community you bring in communalism. But if you deal with backward classes as such, whatever religion or anything else they may happen to belong to, then it becomes our duty to help them towards educational, social and economic advance."

[Lok Sabha Debates 16.5.1951 - Column 1821]

546. 'Class' is a wider term. 'Caste' is only a species of the 'class'. The relevant portions of the definitions of "class" and "caste" given in Shorter Oxford Dictionary may be reproduced here:

"Class,... 6. gen. A number of individuals [persons or things] possessing common attributes, and grouped together under a general or 'class' name;

2. Higher [Upper], Middle, Lower Classes [Mod.]".

"Caste. 1555. [ad. sp. and Pg. casta, race, lineage; orig. 'pure (stock or breed)', f. casta, fem. of casto:- L. castus [see CHASTE]. Formerly written cast. I.A. race, stock, or breed 1774. 2. spec. One of the hereditary classes into which society in India has long been divided. Also transf. 1613.

The members of each caste are socially equal, have the same religious rites, and generally follow the same occupation or profession; they have no social intercourse with those of another caste. The original castes were four: 1st, the Brahmans or priestly caste; 2nd, the Kshatriyas or military caste; 3rd, the Vaisyas or merchants; 4th, the Sudras, or artisans and labourers. Now almost every variety of occupation has its caste.

3. fig. A class who keep themselves socially distinct, or inherit exclusive privileges 1807.

4. this system among the Hindoos; also the position it confers, as in To lose, or renounce c. 1811, Also gen. and fig".

547. In view of the above meanings ascribed to the terms, it can hardly be argued that caste is not a class. A Caste has all the attributes of a class and can form a separate class. If, therefore, a caste is also a backward class within the meaning of Article 16(4), there is nothing in the said Article or in any other provision of the Constitution, to prevent the conferment of the special benefits under that Article on the said caste. Hence it can hardly be argued that caste in no circumstances may form the basis of or be a relevant consideration for identification of backward class of citizens.

It will be instructive in this connection to refer to the earlier decisions on the point.

548. The context in which the amendment to Article 15 was made being sufficiently illuminating on the subject, may first be noticed. In Champakam [supra], the Seven-Judge Bench of this Court struck down the classification made on the basis of caste, race and religion for the purposes of admission to educational institutions on the ground that Article 15 did not contain a clause such as Clause (4) of Article 16. The necessary corollary of that view is that with the clause like Clause (4) Article 16, the enumeration of backward classes on the basis of caste, race or religion would not be bad, and that is exactly what was held by the same Bench in a decision delivered on the same day in the case of B. Venkataramana v. The State of Madras and Anr. MANU/SC/0080/1951 : AIR (1951) SC 229. This was a case directly under Article 16(4) unlike Champakam which was under Article 15. In this case, the Communal G.O. of the Madras Government made reservations of posts for Harijans and backward Hindus as well as for other communities, viz., Muslims, Christians, Non-Brahmin Hindus and Brahmins. The Court upheld the reservations in favour of Harijans and backward Hindus holding that those reserved posts were so reserved not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such posts in favour of a backward class of citizens. The Court, however, struck down the reservations in favour of other than Harijans and backward Hindus on the ground that it was not possible to say that those classes were backward classes. It can be seen from this decision that the classification of the backward classes into Harijans and backward Hindus was upheld by the Court as being permissible under Article 16(4) since it was not a classification made on the ground of religion, race, caste etc. but because the said two groups were backward classes of citizens.

In Balaji it was observed as follows:

Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection, it is, however, necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves.

549. In R. Chitralekha and Ors. v. State of Mysore MANU/SC/0030/1964 : [1964]6SCR368 , the majority held that caste and class are not synonymous. However, it was also held that caste can be

one of the relevant factors though not the sole and dominant one to determine the social and eduational backwardness. The social and educational backwardness can be ascertained with the help of factors other than castes. The Court further held that if the entire caste is backward, it should be included in the list of Scheduled Castes. There can be castes whose majority is socially and educationally backward but minority may be more advanced than another small sub-caste, the total number of which is far less than the advanced minority. In such cases to give benefit to the advanced section of the majority of the socially and educationally backward castes will be unjust to others.

550. With respect, these observations leave many things unanswered. In the first instance, it is difficult to understand as to why, when the entire caste or for that matter the majority of the caste is socially and educationally backward, it could not be classified as a backward class, and why when it is done, the caste cannot become a class, as has been held in a later decision, i.e., Balram [supra]. Secondly, if the entire caste is backward, it is not necessary to include it in the list of Scheduled Castes unless it is contended that the backwardness of the other backward castes must be of the same nature, degree and level in all respects as that of the Scheduled Castes. The said observations also ignore that the expression "backward class of citizens" is wider than the expression "Scheduled Castes" as the former expression includes not only the Scheduled Castes but also other backward classes which may not be as backward as the Scheduled Castes. In any case, there is no reason, why before a backward caste is included in the list of Scheduled Castes, it should not be entitled to be accepted as a socially and educationally backward caste. Thirdly, when a minority of a socially and educationally backward caste is advanced, the remedy lies in denying the benefit of reservation to such minority and not neglect the majority.

551. In Minor P. Rajendran v. State of Madras and Ors. MANU/SC/0025/1968 : [1968]2SCR786 , it is held that a caste is also a class of citizens, and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such caste on that ground. It is also held that once the State shows that a particular caste is backward, it is for those who challenge it, to disprove it. The propositions laid down in this case are directly contrary to the propositions laid down in Chitralekha [supra].

In P. Sagar [supra], it is observed as follows:

In the context in which it occurs the expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted.

552. In Triloki Nath and Anr. v. State of Jummu & Kashmir and Ors. MANU/SC/0420/1968 : [1969] 1 SCR 103, it is held:

The expression 'backward classes' is not used as synonymous with 'backward caste' or 'backward community'. *The members of an entire caste or community may,* in the social, economic and educational scale of values at a given time, *be backward and may, on that account be treated as a*

backward class, but that is not because they are members of a caste or community, *but because they form a class.* In its ordinary connotation, the expression 'class' means a homogeneous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like; but for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or resdence, cannot be adopted, because it would directly offend the Constitution.

(emphasis supplied)

553. With respect, it may be added that when the members of an entire caste are backward and on that account are treated as a backward class, the expressions "backward caste" and "backward class" become synonymous.

554. In Minor A. Periakaruppan etc. v. State of Tamil Nadu and Ors. etc., 643. MANU/SC/0055/1970 : [1971]2SCR430 , it is observed that a caste has always been recongnised as a class. The decision refers in this connection to what is observed in Narayan Vasudev v. Emperor, MANU/MH/0047/1940 : AIR 1940 Bom 379, which observations are as follows:

In my opinion, the expression 'classes of His Majesty's subjects' in Section 153-A of the Code is used in restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or religion, and that the term "class" within that section carries with it the idea of numerical strength so large is could be grouped in a single homogeneous community.

555. The decision also quotes with approval from Paragraph 10, 11 and 13 of Chapter V of the Backward Classes Commission's Report [Kalelkar Commission Report] where it is observed:

We tried to avoid caste but we find it difficult to ignore caste in the present prevailing conditions. We wish it were easy to dissociate caste from social backwardness at the present juncture. In modern times anybody can take to any profession. The Brahman taking to tailoring, does not become a tailor by caste, nor is his social status lowered as a Brahman. A Brahman may be a seller of boots and shoes, and yet his social status is not lowered thereby. Social backwardness, therefore, is not today due to the particular profession of a person, but we cannot escape caste in considering the social backwardness in India.

It is not wrong to assure that social backwardness has largely contributed to the educational backwardness of a large number of social groups.

All this goes to prove that social backwardness is mainly based on racial tribal, caste and denominational differences.

556. The Court then observes that there is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. However, the Court thereafter proceeds also to state that the Government should

not proceed on the basis that once a caste is considered as a backward class, it should continue to be a backward class for all time. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as "take-off stage", the competition is necessary for their future progress.

557. In Balram, it was held that entire caste can be socially and educationally backward and in such circumstances reservation can be on the basis of castes not because they are castes but castes but because they are socially and educationally backward classes. It was also held that reservation can also be on the basis of the population of the different castes separately or social and educational backward classes. It was further held that if candidates from social and educational backward castes secure SO per cent or more seats of merit in the general pool, the list of backward classes need not be invalidated but the Government should be asked to review it.

558. In Jayasree [supra], it was observed as follows:

In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens Caste cannot however be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. The Commission found that the lower income group constitutes socially and educationally backward classes. The basis of he reservation is not income but social and educational backwardness determined on the basis of relevant criteria. If any classification of backward classes of citizens is based solely on the caste of the citizens it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty it will not be logical.

559. In Vasanth Kumar [supra], Chinnappa Reddy, J. stated as follows:

Any view of the caste system, class or cursory, will at once reveal the firm links which the caste system has with economic power. Land and learning, two of the primary sources of economic power in India, have till recently been the monopoly of the superior castes. Occupational skills were practised by the middle castes and in the economic system prevailing till now they could rank in the system next only to the castes constituting the landed and the learned gentry. The lowest in the hierarchy were those who were assigned the meanest tasks, the out-castes who wielded no economic power. The position of a caste in rural society is more often than not mirrored in the economic power wielded by it and vice versa. Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer its members. The poorer the members of a caste lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. Such we must recognise is the primeval force and omnipresence of caste in Indian Society, however, much we may like to wish it away. So sadly and oppressively deeprooted is caste in our country that it has cut across even the barriers of

religion. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that practitioner of other religious faiths and Hindu dissentients are sometimes as rigid adherents to the system of caste as the conservative Hindus. We find Christian Harijans, Christian Madars, Christian Reddys, Christian Kammas, Majbi Sikhs, etc. etc. In Andhra Pradesh there is a community known as Pinjaras or Dudekulas (known in the North as 'Rui Pinjane Wala' : Professional cottonbeaters) who are really Muslims but are treated in rural society, for all practical purposes, as a Hindu caste. Several other instances may be given.

560. Venkataramiah, J. [as he then was] in the same decision observed as follows:

An examination of the question in the background of the Indian social conditions shows that the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes or who belonged to particular races or tribes or religious minorities which were backward.

561. It will also be useful to note the trend of the thinking of some of the learned Judges of the Supreme Court on measures designed to redress the racial imbalance in that country in various fields. In Regents of the University of California, [supra], Marshall, J. expressed the view that in the light of the history of discrimination and its devastating impact on the lives of Negroes, bringing the Negroes into the mainstream of American life should be a State interest of the highest order, and that neither the history of the Fourteenth Amendment nor past Supreme Court decisions supported the conclusion that a University could not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctOrs. He also held that affirmative action programs of the type used by the University [to reserve seats for the Negroes] should not be held to be unconstitutional.

562. Blackmun, J. observed that it would be impossible to arrange and affirmative action programme in a racially neutral way and have it successful.

563. Brennan, J. observed that the claim that the law must be "colorblind" is more an aspiration rather than a description of reality and that any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI [of the Civil Rights Act, 1964] and its legislative history. On the contrary, he observed, that the prior decisions of the Court strongly suggested that Title VI did not prohibit the remedial use of the race where such action is constitutionally permissible. In this connection, it will be worthwhile to quote two passages from the learned Judge's opinion in that case. While dealing with equal protection clause in the Fourteenth Amendment, the learned Judge observed as follows:

The assertion of human equality is closely associated with the proposition that differences in colour or creed, birth or status, are neither significant nor relevant to the way in which person should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance" summed up by the shorthand phrase "our Constitution is colour-blind" has never been adopted by this Court as the proper meaning of the Equal Protection Cause. Indeed, we have expressly rejected this proposition on a number of occasions. Our cases have always implied that an "overriding statutory purpose" could be found that would justify racial classifications.... More recently...this

Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board which assigned students on the basis of race, was perse invalid because it was not colour-blind. We conclude, therefore, that racial classification are not perse invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

564. The conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account finds direct support in our cases construing congressional legislation designed to overcome the present effects of the past discrimination.

565. In *Fullilove* [supra] where the provision in the Public Works Employment Act, 1977 requiring that at least 10 per cent of the Federal funds granted for local public works projects, should be used by the State or the local grantees to procure services or supplies from businesses owned by minority group members, was challenged, Chief Justice Burger, speaking for himself, White and Powel, JJ. upheld the view expressed in the earlier decisions that *if the race was the consideration for earlier discrimination in remedial process, steps will almost invariably require to be based on racial factors and any other approach would freeze the status quo which is the very target of all remedies to correct* the imbalance introduced by the past racial discriminatory measures..1st.

[All emphasis supplied]

566. It is further not correct to say that the caste system is prevalent only among the Hindus, and other religions are free from it. Jains have never considered themselves as apart from Hindus. For all practical purposes and from all counts, there are no socially and educationally backward classes in the Jain community for those who embraced it mostly belonged to the higher castes. As regards Buddhists, if we exclude those who embraced Buddhism along with Dr. Ambedkar in 1955, the population of Buddhists is negligible. If, however, we include the new converts who have come to be known as Nav-Buddhists, admittedly almost all of them are from the Scheduled Castes. In fact, in some States, they were sought to be excluded from the list of Scheduled Castes and denied the benefit of reservations on the ground that they had no longer remained the lower castes among the Hindus qualifying to be included among the Scheduled Castes. On account of their agitation, this perverse reasoning was set right and today the Nav-Buddhists continue to get the benefit of reservation on the ground that their low status in society as the backward classes did not change with the change of their religion. As regards Sikhs, there is no doubt that the Sikh religion does not recognise caste system. It was in fact a revolt against it. However, the existence of Mazhabis, Kabirpanthis, Ramdasias, Baurias, Sareras and Sikligars and the demand of the leaders of the Sikhs themselves to treat them as Scheduled Castes could not be ignored and from the beginning they have been notified as a Scheduled Caste [See: pp 768-772 of Vol. I and p. 594 of Vol. IV of the Framing of India's Constitution - Ed. B. Shiva Rao]. As far as Islam is concerned, Islam also does not recognise castes or caste system. However, among the Muslims, in fact there are Ashrafs and Ajlafs, i.e., high born and low born. The Census Report of 1901 of the Province of Bengal records the following facts regarding the Muslims of the then Province of Bengal:

the conventional division of the Mahomedans into four tribes - Sheikh, Saiad, Moghul and Pathan - has very little application to this province [Bengal]. The Mahomedans themselves recognise two

main social divisions, (1) Ashraf or Sharaf and (2) Ajlaf. Ashraf means 'noble' and includes all undoubted descendants of foreigners and converts from high caste Hindus. All other Mahomedans including the occupational groups and all coverts of lower ranks, are known by the contemptuous terms, 'Ajlaf, 'Wretches' or 'mean people': they are also called Kamina or Itar, 'base' or Rasil, a corruption of Rizal, 'worthless'. In some places a third class, called Arzal or 'lowest of all', is added. With them no other Mahomedan would associate and they are forbidden to enter the mosque to use the public burian ground.

568. Within these groups there [sic] castes with social precedence of exactly the same nature as one finds among the Hindus.

1. Ashrat or better class Mahomedans.

(i) Saiads, (ii) Sheikhs, (iii) Pathans, (iv) Moghul, (v) Mallik, (vi) Mirza.

2. Ajlaf or lower class Mahomedans.

(i) Cultivating Sheikhs, and other who were originally Hindus but who do not belong to any functional group, and have not gained admittance to the Ashrat Community e.g. Pirali and Thakrai, (ii) Darzi, Jolaha, Fakir and Rangrez, (iii) Barhi, Bhathiara, Chik, Churihar, Dai, Dhawa, Dhunia, Gaddi, Kala, Kasai, Kula, Kunjara, Laheri, Mahifarosh, Mallah, Naliya, Nikari, (iv) Adbad, Bako Bediya, Bhat, Chamba, Dafali, Dhobi, Hajjam, Mucho, Nagarchi, Nat, Panwaria, Madaria, Tuntia.

3. Arzal or degraded class. Bhanar, Halalkhor, Hirja, Kashi, Lalbegi, Mangta, Mehtar.

The Census Superintendent mentions another feature of the Muslim social system, namely, the prevalence of the 'Panchayat system.' He states :

The authority of the Panchayat extends to social as well as trade matters and...mariage with people of other communities is one of the offences of which the governing body takes cognizance. The result is that these groups are often as strictly endogamous as Hindu castes. The prohibition on inter- marriage extends to higher as well as to lower castes, and a Dhuma, for example, may marry no one but a Dhuma. If this rule is transgressed, the offender is at once hauled up before the panchayat and ejected ignominiously from his community. A member of one such group cannot ordinarily gain admission to another, and he retains the designation of the community in which he was born even if he abandons its distinctive occupation and takes to other means of livelihood...thousands of Jolahas are butchers, yet there are still known as Jolahas.

[See: pp. 218-220 of Pakistan or Partition of India by Dr. B.R. Ambedkar.]

569. Similar facts regarding the then other Provinces could be gathered from their respective Census Reports. At present there are many social groups among Muslims which are included in the list of Scheduled Castes in some States. For example, in Tamil Nadu, Labbais including Rawthars and Marakayars are in the list of Scheduled Castes. This shows that the Muslims in India have not remained immune from the same social evils as are prevalent among the Hindus.

570. Though Christianity also does not recognise caste system, there are upper and lower castes among Christians. In Goa, for example, there are upper caste Catholic brahmins who do not marry Christians belonging to the lower castes. In many churches, the low caste Christians have to sit apart from the high caste Christians. There are constant bickerings between Goankars and Gawdes who form a clear cut division in Goan Christian society. In Andhra Pradesh there are Christian Harijans, Christian Madars, Christians Reddys, Christians Kammas etc. In Tamil Nadu, converts to Christianity from Scheduled Castes - Latin Catholics, Christians Shanars, Christian Nadars and Christian Gramani are in the list of Scheduled Castes. Such instances are many and vary from region to region.

571. The division of the society even among the other religious groups in this country between the high and low castes is only to be expected. Almost all followers of the non-Hindu religions except those of the Zoroastrianism, are converts from Hindu religion, and in the new religion they carried with them their castes as well. It is unnatural to expect that the social prejudices and biases, and the notions and feelings of superiority and inferiority, nurtured for centuries together, would disappear by a mere change of religion.

572. The castes were inextricably associated with occupations and the low and the mean occupations belonged to the lower castes. In the new religion, along with the castes, most of the converts carried their occupations as well. The backward classes among the Hindus and non-Hindus can, therefore, easily be identified by their occupations also. Whether, therefore, the backward classes are identified on the basis of castes or occupations, the result would be the same. For, it will lead to the identification of the same collectivities or communities. The social groups following different occupations are known among Hindus by the castes named after the occupations, and among non-Hindus by occupation names. Hence for identifying the backward classes among the non-Hindus, their occupations can furnish a valid test. It is for this reason that both Articles 15(4) and 16(4) do not use the word 'caste' and use the word 'class' which can take within its fold both the caste and occupational groups among the Hindus and non-Hindus.

573. The next issues arising out of this question is whether economic criterion by itself would identify the backward classes under Article 16(4) and whether the expression "backward class of citizens" in the said Article would include "weaker sections of the people" mentioned in Article 46.

574. Article 46 enjoins upon the State to promote with special care, the educational and economic interests of the "weaker sections" of the people, and in particular, of the SCs/STs and to protect them from social injustice and all forms of exploitation. The expression "weaker sections" of the people is obviously wider than the expression "backward class" of citizens in Article 16(4) which is only a part of the weaker sections. As has been discussed above, the expression "backward class" of citizens is used there in a particular context which is germane to the reservations in the services under the State for which that Article has been enacted. It has also been pointed out that in that context, read with Articles 15(4) and 340, the said expression means only those classes which are socially backward and whose educational and economic backwardness is on account of their social backwardness and which are not adequately represented in the services under the State. Hence, the expression "backward class" of citizens in Article 16(4) does not comprise all the weaker sections of the people, but only those which are socially and, therefore, educationally and economically

backward, and which are inadequately represented in the services. The expression "weaker sections of the people" used in Article 46, however, is not confined to the aforesaid classes only but also includes other backward classes as well, whether they are socially and educationally backward or not and whether they are adequately represented in the services or not. What is further, the expression "weaker sections" of the people does not necessarily refer to a group or a class. The expression can also take within its compass, individuals who constitute weaker sections or weaker parts of the society. This weakness may be on account of factors other than past social and educational backwardness. The backwardness again may be on account of poverty alone or on account of the present impoverishment arising out of physical or social handicaps. The instances of such weaker sections other than SCs/STs and socially and educationally backward classes may be varied, viz., flood - earthquake - cyclone - fire famine and project affected persons, war and riot torn persons, physically handicapped persons, those without any or adequate means of livelihood, those who live below the poverty line, slum dwellers etc. Hence the expression "weaker sections" of the people is wider than the expression "backward class" of citizens or "socially and educationally backward classes" and "SCs/STs". It connotes all sections of the society who are rendered weaker due to various causes. Article 46 is aimed at promoting their educational and economic interests and protecting them from social injustice and exploitation. This obligation cast on the State is consistent both with the Preamble as well as Article 38 of the Constitution.

575. However, the provisions of Article 46 should not be confused with those of Article 16(4) and hence the expression "weaker sections of the people" in Article 46 should not be mixed up with the expression "backward class of citizens" under Article 16(4). The purpose of Article 16(4) is limited. It is to give adequate representation in the services of the State to that class which has no such representation. Hence, Article 16(4) carves out a particular class of people and not individuals from the "weaker sections", and the class it carves out is the one which does not have adequate representation in the services under the State. The concept of "weaker sections" in Article 46 has no such limitation. In the first instance, the individuals belonging to the weaker sections may not from a class and they may be weaker as individuals only. Secondly, their weakness may not be the result of past social and educational backwardness or discrimination. Thirdly, even if they belong to an identifiable class but that class is represented in the services of the State adequately, as individuals forming weaker section, they may be entitled to the benefits of the measures taken under Article 46, but not to the reservations under Article 16(4). Thus, not only the concept of "weaker sections" under Article 46 is different from that of the "backward class" of citizens in Article 16(4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16(4). While those entitled to benefits under Article 16(4) may also be entitled to avail of the measures taken under Article 46, the converse is not true. If this is borne in mind, the reasons why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens under Article 16(4) would be more clear. To the consideration of that aspect we may now turn.

576. Economic backwardness is the bane of the majority of the people in this country. There are poor sections in all the castes and communities. Poverty runs across all barriers. The nature and degree of economic backwardness and its causes and effects, however, vary from section to section of the populace. Even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness is not on account of social

backwardness. The educational backwardness of some individuals among them may be on account of their proverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being the consequence of both their social and educational backwardness. Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced. Their social backwardness is the cause and not the consequence either of their economic or educational backwardness. It is necessary to bear this vital distinction in mind to understand the true import of the expression "backward class of citizens" in Article 16(4). If it is mere educational backwardness or mere economic backwardness that was intended to be specially catered to, there was no need to make a provision for reservation in employment in the services under the State. That could be taken care of under Articles 15(4), 38 and 46. The provision for reservation in appointments under Article 16(4) is not aimed at economic upliftment or alleviation of poverty. Article 16(4) is specifically designed to give a due share in the State power to those who have remained out of it mainly on account of their social and, therefore, educational and economic backwardness. The backwardness that is contemplated by Article 16(4) is the backwardness which is both the cause and the consequence of non-representation in the administration of the country. All other kinds of backwardness are irrelevant for the purpose of the said Article. Further, the backwardness has to be a backwardness of the whole class and not of some individuals belonging to the class, which individuals may be economically or educationally backward, but the class to which they belong may be socially forward and adequately or even more than adequately represented in the services. Since the reservation under Article 16(4) is not for the individuals but to a class which must be both backward and inadequately represented in the services, such individuals would not be beneficiaries of reservation under Article 16(4). It is further difficult to come across a "class" [not individuals] which is socially and educationally advanced but is economically backward or which is not adequately represented in the services of the State on account of its economic backwardness. Hence, mere economic or mere educational backwardness which is not the result of social backwardness, cannot be a criterion of backwardness for Article 16(4).

577. That only economic backwardness was not in the contemplation of the Constitution is made further clear by the fact that at the time the First Amendment to the Constitution which added Clause (4) to Article 15 of the Constitution, one of the Members, Prof. K.T. Shah wanted the elimination of the word "classes" in and the addition of the word "economically" to the qualifiers of the term "backward classes". This Amendment was not accepted. Prime Minister Nehru himself stated that the addition of the word "economically" would put the language of the Article at variance with that of Article 340. He added that "socially" is a much wider term including many things and certainly including "economically". This shows that economic consideration alone as the basis of backwardness was not only not intended but positively discarded.

578. The reasons for discarding economic criterion as the sole test of backwardness are obvious. If poverty alone is made the test, the poor from all castes, communities, collectivities and sections would compete for the reserved quota. In such circumstances, the result educationally would be obvious, namely, those who belong to socially and educationally advanced sections would capture

all the posts in the quota. This would leave the socially and educationally backward classes high and dry although they are not at all represented or are inadequately represented in the services, and the socially and educationally advanced classes are adequately or more than adequately represented in the services. It would thus result in defeating the very object of the reservations in services, under Article 16(4). It would, also provide for the socially and educationally advanced classes statutory reservations in the services in addition to their traditional but non-statutory cent per cent reservations. It will thus perpetuate the imbalance, and the inadequate representation of the backward classes in the services. It is naive to expect that the poor from the socially and educationally backward classes would be able to compete on equal terms with the poor from the socially and educationally advanced classes. There may be an equality of opportunity for the poor from both the socially advanced and backward classes. There will, however, be no equality of results since the competing capacity of the two is unequal. The economic criterion will thus lead, in effect, to the virtual deletion of Article 16(4) from the Constitution.

579. We may refer to some decisions of this Court cm this point.

580. In Chitralekha, which was a case under Article 15(4), it is observed:

It is, therefore, manifest that the Government as a temporary measure, pending an elaborate study, has taken into consideration only *the economic condition and occupation of the family concerned* as the criteria for backward classes within the meaning of Article 15(4) of the Constitution.

(Emphasis supplied)

581. The Supreme Court upheld the said classification. However, it must be noted that the classification there was not only on the ground of economic condition but was also based on the occupation of the family concerned.

582. Parimoo was a case under Article 16(4). On the test of backwardness, the Court has observed there as follows:

It is not merely the educational backwardness or the social backwardness which makes a class of citizens backward; the class identified as a class as above must be both educationally and socially backward. In India social and educational backwardness is further associated with economic backwardness and it is observed in Balaji's case referred to above that backwardness, socially and educationally is ultimately and primarily due to poverty. But if poverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may rise because even in sectors which are recognised as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of the population the people are generally poor - some being more poor, others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. His chief concern is, therefore, to determine whether the class or group is socially and educationally backward. Though the two words 'socially' and 'educationally' are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced, it. is generally

also socially advanced because of the reformative effect of education on that class. The words "advanced" and "backward" are only relative term;; - there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as being socially and educationally backward.

583. It will be observed from the above that poverty as the sole test of backwardness for Article 16(4) was discarded by this Court in the said decision. On the other hand, it is emphasised there that the poverty in question should be the result of social and educational backwardness.

584. This point has elaborately been dealt with by Chinnappa Reddy, J. in Vasanth Kumar where the learned Judge has taken pains to point out that although poverty is the dominant characteristic of all backwardness, it is not the cause of all backwardness :

We, therefore, see that everyone of the three dimensions propounded by Weber is intimately and inextricably connected with economic position. However, we look at the question of 'backwardness', whether from the angle of class, status or power, we find the economic factor at the bottom of it all and we find poverty, the culprit-cause and the dominant characteristic. Poverty, the economic factor brands all backwardness just as the erect posture brands the homosapiens and distinguishes him from all other animals, in the eyes of the beholder from Mars. But, whether his racial stock is Caucasian, Mongoloid, Negroid, etc. further investigation will have to be made. So too the further question of social and educational backwardness requires further scrutiny. In India, the matter is further aggravated, complicated and pitilessly tyrannised by the ubiquitous caste system, a unique and devastating system of gradation and degradation which has divided the entire Indian and particularly Hindu society horizontally into such distinct layers as to be destructive of mobility, a system which has penetrated and corrupted the mind and soul of every Indian citizen.

585. It is, therefore, clear that economic criterion by itself will not identify the backward classes under Article 16(4). The economic backwardness of the backward classes under Article 16(4) has to be on account of their social and educational backwardness.

Question III:

If economic criterion by itself could not constitute a Backward Class under Article 16(4), whether reservation of posts in services under the State, based exclusively on economic criterion would be covered by Article 16(1) of the Constitution?

586. While discussing Question No. I, it has been pointed out that so far as "backward classes" are concerned, Clause (4) of Article 16 is exhaustive of reservations meant for them. It has further been pointed out under Question No. II that the only "backward class" for which reservations are provided under the said clause is the socially backward class whose educational and economic backwardness is on account of the social backwardness. A class which is not socially and educationally backward though economically or even educationally backward is not a backward class for the purposes of the said clause. What follows from these two conclusions is that reservations in posts cannot be made in favour of any other class under the said clause. Further, the purpose of keeping reservations even in favour of the socially and educationally backward classes under Clause (4), is not to alleviate poverty but to give it an adequate share in power.

587. Clause (1) of Article 16 may permit classification on economic criterion. The purpose of such classification, however, can only be to alleviate poverty or relieve unemployment. If this is so, to individual or section of the society satisfying the criterion can be denied its benefits - and particularly the backward classes who are more in need of it. If, therefore, the backward classes within the meaning of Clause (4) are excluded from the reservations kept on economic criterion under Clause (1), it will amount to discrimination. Further, the objects of reservations under the two clauses are different. While those falling under Clause (1) from other than the backward classes, will continue to enjoy the reservations for ever, the backward classes can get 'he benefit of the reservation under Clause (4) only so long as they are not adequately represented in the services. What is more, those entering the services under Clause (1) may belong to classes which are adequately or more than adequately represented in the services. The reservations for them alone under Article 16(1) would virtually defeat the purpose of Article 16(4) and would be contrary to it. No different result will, further, ensue even if the reservations are kept for all the classes since as pointed out above, all the seats will be captured only by the socially and educationally advanced classes. The two clauses of the Article have to be read consistently with each other so as to lead to harmonious results. Hence, so long as the socially backward classes and the effects of their social backwardness continue to exist, the reservations in services on economic criterion alone would be impermissible either under Clause (4) or Clause (1) of Article 16.

588. Hence no reservation of posts in services under the State, based exclusively on economic criterion would be valid under Clause (1) of Article 16 of the Constitution.

Question IV:

Can the extent of reservation of posts in the services under the State under Article 16(4) or, if permitted under Article 16(1) and 16(4) together, exceed 50% of the posts in a cadre or Service under the State or exceed 50% of appointments in a cadre or service in any particular year and can such extent of reservation be determined without determining the inadequacy of representation of each class in the different categories and grades of Services under the State?

589. It has already been pointed out earlier that Clause (4) of Article 16 is not an exception to Clause (1) thereof. Even assuming that it is an exception, there is no numerical relationship between a rule and exception, and their respective scope depends upon the areas and situations they cover. How large the area of the exception will be, will of course, depend upon the circumstances in each case. Hence, legally, it cannot be insisted that the exception will cover not more than 50 per cent of the area covered by the rule. Whether, therefore, Clause (4) is held as an exception to Clause (1) or is treated as a more emphatic way of stating what is obvious under the said clause, has no bearing on the percentage of reservations to be kept under it. As Justice Hegde has stated in State of Punjab v. Hiralal and Ors. MANU/SC/0066/1970 : [1971]3SCR267 , "the length of the leap to be provided depends upon the gap to be covered". In Article 16(4) itself, there is no indication of the extent of reservation that can be made in favour of the backward classes. However, the object of reservation, viz., to ensure adequacy of representation, mentioned there, serves as a guide for the percentage of reservations to be kept. Broadly speaking, the adequacy of representation in the services will have to be proportionate to the proportion of the backward classes in the total population. In this connection, a reference may be made to the U.S. decision in Fullilove where 10% of the business was reserved for the blacks, their population being roughly

10 per cent of the total population. If the reservation is to be on the basis of the proportion of the population in this country, the backward classes being no less than 77-1/2 per cent [socially and educationally backward classes and Scheduled Castes and Scheduled Tribes taken together] the total reservation will have to be to that extent. It is not disputed that at present the reservations for the SCs/STs are roughly in proportion to their total population.

590. The adequacy of representation in administration is further to be determined on the basis of representation at all levels or in all posts in the administration. It is not only a question of numerical strength in the administration as a whole. It may happen that at the higher level there may be more representation for a class than at the lower level in terms of its population-ratio. This mostly happens with all the advanced classes. In that case, it cannot be said that the class in question is not represented adequately merely because the total representation is not numerically in proportion to the population-ratio. On the other hand, it may happen, as it does so far as the representation of the backward classes is concerned at the lower rungs they may be represented adequately or more than adequately. Yet at the higher rungs, their presence may be next to nil. In such cases, again, it cannot be said that the class is represented adequately. To satisfy the test of adequacy, therefore, what in necessary is an effective representation or effective voice in the administration, and not so much the numerical presence. It is instructive to note in this connection that Article 16(4) speaks of "adequate" and not proportionate representation. The practical question, therefore, is of the manner in which the adequate representation should be secured. Whatever the method adopted, it has also to be, consistent with the maintenance of the efficiency of the administration.

591. In this connection, it will first be worthwhile to quote what Dr. Ambedkar had to say with regard to the extent of reservations contemplated under Article 16(4) [Constituent Assembly Debates, Vol. 7 (1948-49) pp. 701-702]:

As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look = in' so to say into the administration. If honourable Members will bear these facts in the mind - the three principles, we had to reconcile, - they will see that no better formula could be produced than the one that is embodied in Sub-clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in Sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now - for historical reasons - been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment.

Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) of Article 10 must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.

592. Article 10 and 10(3) of the Draft Constitution corresponded to Article 16(1) and 16(4) of the Constitution. When we realise that these are the observations of the Chairman of the Drafting Committee, the Law Member of the Government and the champion of the backward classes, it should give us an insight into the mind of the framers of the Constitution on the subject. It is true that the said observations cannot be regarded as decisive on the point. The observations probably also proceeded on the assumption that Clause (4) of Article 16 was an exception to its Clause (1), and had a numerical relationship with the rule. Whatever the case may be, the observations do give a perceptive and viable guidance to the policy that should be followed in keeping reservations, and in particular on the extent of reservations at any particular point of time. There is, therefore, much force in the contention that at least as a guide to the policy on the subject, the observations cannot be ignored.

593. Although the view expressed in Balaji and Devadasan [supra], that the reservation should not exceed 50 per cent does not refer to Dr. Ambedkar's aforesaid observations and is, therefore, not based on it, and is based on other considerations, it cannot be said that it is not in consonance with the spirit, if not the letter, of the provisions.

594. It is seen earlier that 50 per cent rule was propounded in Balaji. The rule was propounded in the context of Article 15(4), but, while propounding it, this Court stated among other things, as follows:

... A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the center have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case.

595. A reference to Article 16(4) there, therefore, unmistakably shows that it is presumed that the same rule will apply to Article 16(4) as well. This rule, however, did not see uniform acceptance in all the decisions that followed. The case which immediately followed - *Davadasan* - applied this rule to the "carry forward rule" and struck down the same in its entirety, since 65 per cent of the vacancies for the year in question, came to be reserved for the SCs/STs by virtue of that rule. With respect, even on the application of the 50 per cent. rule, it was not necessary to strike down the "carry forward rule" itself. All that was necessary was to confine the carry forward vacancies for the year in question to 50 per cent. Be that as it may. In *Thomas*, the correctness of 50 per cent rule was questioned by Fazal Ali, J. who stated that although Clause (4) of Article 16 does not fix any limit on reservations, the same being part of Article 16, the State cannot be allowed to indulge in excessive reservation so as to defeat the policy of Article 16(1). The learned Judge, however,

added that as to what would be a suitable reservation within *permissible limits* will depend on the facts and circumstances of each case and no hard and fast rule can be laid down nor can this matter to reduced to a mathematical formula so as to be adhered to in all cases. The learned Judge then went on to say that although the decided cases till that time, had laid down that the percentage of reservation should not exceed 50, it was a rule of caution and did not exhaust all categories. He then gave an illustration of a State in which backward classes constituted 80 per cent of the total population, and stated that in such cases, reservation of 80 per cent of the jobs for them, can be justified. The learned Judge justified reservation to the said extent on the ground that the dominant object of the provision of Article 16(4) is to take steps to make inadequate representation of backward classes adequate. Of the other learned Judges constituting the Bench, Krishna Iyer J. agreed with Fazal Ali, J. and stated that the arithmetical limit of 50 per cent in one year set by earlier rulings *cannot "perhaps be pressed too far"*. He added that over-representation in a department does not depend on recruitment in a particular year but on the total strength of the cadre.

(Emphasis supplied)

596. In Vasanth Kumar Chinnappa Reddy, J. held that Thomas had undone the 50 per cent rule laid down in the earlier cases, while Venkataramiah, J. disagreed with the learned Judge on that point.

597. It does not appear further that Justice Iyer's support to Justice Fazal Ali's view in Thomas, was unqualified or remained unchanged. For in Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 : (1981)ILLJ209SC , after referring to Balaji and Davadasan, he stated as follows:

All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC & ST candidates be actually appointed to substantially more than 50 per cent of the promotional posts. Some excess will not affect as mathematical precision is different in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the 'carry forward' rule shall not result, in any given year, in the selection or appointments of SC & ST candidates considerably in excess of 50 per cent, we uphold Annexure I.

598. The learned Judge has supported this conclusion by the observations made by him in the earlier paragraph of his judgment which show that according to him the reservations made under Article 16(4) should not have the effect of virtually obliterating the rest of the Article - Clauses (1) and (2) thereof.

599. It is necessary in this connection, to point out that not only Article 16(4) but for that matter, Article 335 also does not speak of giving proportional representation to the backward classes and SCs/STs respectively. Article 16(4), as repeatedly pointed out earlier, in terms, speaks of "adequate" representation to the backward classes, while Article 335 speaks of the "claims" of the members of the SCs/STs. However, it cannot be disputed that whether it is the appointments of SCs/STs or other backward classes, both are to be made consistently with the maintenance of the efficiency in administration. Since the reservations contemplated under both the Articles include also the giving of concessions in marks, exemptions etc., it is legitimate to presume that the

Constitution framers being aware of the level of backwardness, did envisage that the inadequacy in the representation of the backward classes cannot be made up in one generation consistently with the maintenance of efficiency in the administration. In fact, as pointed out earlier, if the backward classes can provide candidates for filling up the posts in all fields and at all levels of administration in one generation, they would cease to be backward classes. What was in the mind of the Constitution framers was the removal of the inadequacy in representation over a period of time, on each occasion balancing the interests of the backward classes and the forward classes so as not to affect the provisions of equality enshrined in Articles 14 and 16(1) as also the interests of the society as a whole. As pointed out earlier, Dr. Ambedkar was not only not in favour of proportional representation but was on the contrary, of the firm view that the reservations under Article 16(4) should be confined to the minority of the posts/appointments. In fact, as the debate in the Constitutent Assembly shows nobody even suggested that the reservations under Article 16(4) should be in proportion to the population of the backward classes.

600. While deciding upon a particular percentage of reservations, what should further not be forgotten is that between the backward and the forward classes, there exists a sizeable section of the population, who being socially not backward are not qualified to be considered as backward. At the same time they have no capacity to compete with the forwards being educationally and economically not as advanced. Most of them have only the present generation acquaintance with education. They are, therefore, left at the mercy of chance-crumbs that may come their way. They have neither the benefit of the statutory nor of the traditional in-built reservations on account of the unequal social advantages. It is this section sandwiched between the two which is most affected by the reservation policy. The reservation-percentage has to be adjusted to meet their legitimate claims also.

601. In this connection, one more fact needs to be considered from a realistic angle. A mechanical approach in keeping reservations in all fields and at all levels of administrations and that too at a uniform percentage is unrealistic. There is no reason why the authorities concerned should not apply their mind and evolve a realistic in this bahalf. There are fields and levels of administration where either there may be no candidates from backward classes available or may not be available in adequate number. In such cases, either no reservations should be kept or reservations kept should be at an appropriate percentage. On the other hand, in fields and at levels where the candidates from the backward classes are available in suitable number, the maximum permissible reservations can be kept. The adjustment of the reservations and their percentages, field and grade-wise as well as from time to time, as per the availability of the candidates from the backward classes, is not only implicit in the constitutional provisions but is also warranted for purposeful and effective implementation of the spirit of those provisions.

602. In this connection, it is worth serious consideration whether reservations in the form of preference instead of exclusive quota should not be resorted to in the teaching profession in the interests of the backward classes themselves. Education is the source of advancement of the individual in all walks of life. The teaching profession, therefore, holds a key position in societal life. It is the quality of education received that determines and shapes the equipment and the competitive capacity of the individual, and lays the foundation for his career in life. It is, therefore, in the interests of all sections of the society - socially backward and forward - and of the nation as a whole, that they aim at securing and ensuring the best of education. The student whether he

belongs to the backward or forward class is also entitled to expect that he receives the best possible education that can be made available to him and correspondingly it is the duty and the obligation of the management of every educational institution to make sincere and diligent efforts to secure the services of the best available teaching talent. In the appointments of teachers, therefore, there should be no compromise on any ground. For as against the few who may get appointments as teachers from the reserved quota, there will be over the years thousands of students belonging to the backward classes receiving education whose competitive capacity needs to be brought to the level of the forward classes. What is more, incompetent teaching would also affect the quality of education received by the students from the other sections of the society. However, whereas those coming from the advanced sections of the society can make up their loss in the quality of education received, by education at home or outside through private tuitions and tutorial classes, those coming from the backward classes would have no means for making up the loss. The teachers themselves must further command respect which they will do more when they do not come through any reserved quota. The indiscipline in the educational campus is not a little due to the incompetence of the teachers from whatever section they may come, forward or backward. It is, therefore, necessary that there should be no exclusive quota kept in the teaching occupation for any section at all. However, if the candidates belonging to both backward and forward classes are equal in merit, preference should be given to those belonging to the backward classes. For one thing, they must also have a "look into" the teaching profession as in other professions. Secondly, in this vital profession also, the talent, the social experience and the new approach and outlook of the members of the backward classes is very much necessary. That will enrich the profession and the national life. Thirdly, it will also help to meet the complaints of the alleged step-motherly treatment received by the students from the backward classes and of the lack of encouragement to them even when they are more meritorious. Hence in the teaching profession, it is preference rather than reservation, which should be resorted to under Article 16(4) of the Constitution. A precaution, however, has to be taken to see that the selection body has a representation from the backward classes.

603. It must, however, be added that in judging the merits of the individuals for the profession of teaching as for any other profession, it is not the traditional test of marks obtained in examinations, but a scientific test based, among other things, on the aptitude in teaching, the capacity to express and convey thoughts, the scholarship, the character of the person, his interest in teaching, his potentiality as a teacher judged on the considerations indicated generally at the outset, should be adopted.

604. What is stated with regard to the teaching profession above is only by way of an illustration as to how the policy of reservation if it is to subserve its larger purpose can be modulated and applied rationally to different fields instead of clamping it mechanically in all the fields or withholding it from some areas altogether. It is not meant to lay down any proposition of law in that behalf.

605. The other aspect of the question is whether for the purposes of the percentage-limit of the reservations under Article 16, the reservations made under Clause (1) should be taken into consideration together with those made under Clause (4) of the Article.

606. As has already been pointed out above, the reservations on the basis of economic criterion alone would be impermissible under Clause (1). Assuming, however, that they are legal, they cannot cut into the reservations made for the backward classes under Clause (4) which are for the specific purpose of making up the adequacy in representation in the services.

607. However, reservations for individuals are permissible under Clause (1) on a ground other than economic, provided of course, the ground is not hit by Article 16(2). Instances of such individuals have been given earlier which need not be repeated here. There is, however, no need to made additional reservations for such individuals over and above those made under Clause (4). The individuals can be accommodated in the quota reserved for the backward, or in the unreserved or general category depending upon the class to which they belong. For example, the defence personnel and the freedom-fighters or their dependents, physically handicapped, etc. can be accommodated in the reserved quota under Article 16(4) if they belong to the backward classes, and in the unreserved posts/appointments if they belong to the unreserved categories. This is so because in their respective classes, they will be more disadvantaged than others belonging to those classes. Such a classification need not hit either Clause (1) or Clause (2) of Article 16 but would be justifiable. If this is done, there would be no occasion to keep extra posts/appointments reserved for them under Clause (1).

608. It is necessary to add here a word about reservations for women. Clause (2) of Article 16 bars reservation in services on the ground of sex. Article 15(3) cannot save the situation since all reservations in the services under the State can only be made under Article 16. Further, women come from both backward and forward classes. If reservations are kept for women as a class under Article 16(1), the same inequitous phenomenon will emerge. The women from the advanced classes will secure all the posts, leaving those from the backward classes without any. It will amount to indirectly providing statutory reservations for the advanced classes as such, which is impermissible under any of the provisions of Article 16. However, there is no doubt that women are a vulnerable section of the society, whatever the strata to which they belong. They are more disadvantaged than men in their own social class. Hence reservations for them on that ground would be fully justified, if they are kept in the quota of the respective class, as for other categories of persons, as explained above. If that is done, there is no need to keep a special quota for women as such and whatever the percentage-limit on the reservations under Article 16, need not be exceeded.

609. Yet another aspect of the matter is whether the extent of reservations should be determined [i] on the basis of the total strength of the particular cadre or service, or on the basis of the appointments made for that cadre in a particular year and [ii] without, determining the inadequacy of representation of each class in different categories and grades of the services under the State.

Both to avoid arbitrariness in appointments and to ensure the availability of the expected number of seats every year, for the reserved as well as the unreserved categories as per the pre-defined known norms, it is necessary that the reservations in appointments/posts are made year wise. Any other practice would give the authorities complete freedom as to when and at what percentage the reservations should be kept. It may happen that in some years, they may not keep reservations at all whereas in other years, they may reserve all or majority of the posts. Secondly, the periodicity of reservations may also vary depending upon the will of the authorities which may be influenced

by several unpredictable considerations. This would spell out uncertainties in the matter of appointments both for the reserved and unreserved categories. Hence the reservations will have to be kept and calculated on yearwise basis [See: C.A. Rajendran v. Union of India and Ors. MANU/SC/0358/1967 : (1968)IILLJ407SC , and better still, on the basis of the roster system with suitable number of points to correspond the average vacancies. To permit calculation, further, of the percentage of reservations on the basis of the total strength of the cadre and to enable the authorities concerned, as stated earlier, to keep either all the posts or a majority of them reserved from year to year till there is adequate representation of the reserved categories, will in the process deny to the unreserved categories completely or near completely, their due share in the appointments yearwise, thus obliterating Clause (1) of Article 16 totally over a given period of time. Hence as pointed out earlier, the extent of the percentage of the reservation should be calculated yearwise with due allowance to the operation of the rule with regard to the backlog, if any. Still better method is to regulate and calculate the appointments on the roster basis as stated earlier.

As regards point (ii), since the provisions of Article 16(4) are meant for providing adequate representation in the services to the backward classes, the representation has to be in all categories and grades in the services. The adequacy does not mean a mere proportionate numerical or quantitative strength. It means effective voice or share in power in running the administration. Hence, the extent of reservations will have to be estimated with reference to the representation in different grades and categories. (See: The General Manager, Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC).

610. To summarise, the question may be answered thus. There is no legal infirmity in keeping the reservations under Clause (4) alone or under Clause (4) and Clause (1) of Article 16 together, exceeding 50%. However, validity of the extent of excess of reservations over 50% would depend upon the facts and circumstances of each case including the field in which and the grade or level of administration for which the reservation is kept. Although, further, legally and theoretically the excess of reservations over 50% may be justified, it would ordinarily be wise and nothing much would be lost, if the intentions of the framers of the Constitution and the observations of Dr. Ambedkar, on the subject in particular, are kept in mind. The reservations should further be kept category and gradewise at appropriate percentages and for practical purposes the extent of reservations should be calculated category and gradewise.

Question V:

Does Article 16(4) permit the classification of 'Backward Classes' into Backward Classes and Most Backward Classes or permit classification among them based on economic or other considerations?

This question is really in two parts and the two do not mean and refer to the same classification. The first part refers to the classification of the backward classes into backward and most backward classes while the second speaks of internal classification of each backward class, into backward and more backward individuals or families. Both classifications are to be made on economic or other considerations. Whereas the first classification will place some backward classes in their entirety above other backward classes, the second will place some sections in each backward class

internally above the other sections in the same class. The second classification aims at what has popularly come to be known as weeding out of the so-called "creamy' or "advanced sections" from the backward classes. Although it is not that clear, the second order probably seeks to do it. We may first deal with the second classification.

Society does not remain static. The industrialisation and the urbanisation which necessarily followed in its wake, the advance on political, social and economic fronts made particularly after the commencement of the Constitution, the social-reform movements of the last several decades, the spread of education and the advantages of the special provisions including reservations secured so far, have all undoubtedly seen at least some individuals and families in the backward classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birth mark. It can further hardly be argued that once a backward class, always a backward class. That would defeat the very purpose of the special provisions made in the Constitution for the advancement of the backward classes, and for enabling them to come to the level of and to compete with the forward classes, as equal citizens. On the other hand, to continue to confer upon such advanced sections from the backward classes the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally. What is more, it will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to lap up all the special benefits to the exclusion and at the cost of the rest in those classes, thus keeping the rest in perpetual backwardness. The object of the special constitutional provisions is not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole. Hence, taking out the forwards from among the backward classes is not only permissible but obligatory under the Constitution. However, it is necessary to add that just as the backwardness of the backward groups cannot be measured in terms of the forwardness of the forward groups, so also the forwardness of the forwards among the backward classes cannot be measured in terms of the backwardness of the backward sections of the said classes. It has to be judged on the basis of the social capacities gained by them to compete with the forward classes. So long as the individuals belonging to the backward classes do not develop sufficient capacities of their, own to compete with others, they can hardly be classified as forward. The moment, however, they develop the requisite capacities, they would cease to be backward. It will be a contradiction in terms to call them backward and others more or most backwards. There will always be degrees of backwardness as there will be degrees of forwardness, whatever the structure of the society. It is not the degrees of backwardness or forwardness which justify classification of the society into forward and backward classes. It is the capacity or the lack of it to compete with others on equal terms which merits such classification. The remedy therefore, does not lie in classifying each backward class internally into backward and more backward, but in taking the forward from out of the backward classes altogether. Either they have acquired the capacity to compete with others or not. They cannot be both.

The mere fact further that some from the backward classes who are more advanced than the rest in that class or score more in competition with the rest of them and thus gain all the advantages of the special provisions such as reservations, is no ground for classifying the backwards into

backwards and most backwards. This phenomenon is evident among the forward classes too. The more advantaged among the forwards similarly gain unfair advantage over others among the forwards and secure all the prizes. This is an inevitable consequence of the present social and economic structure. The correct criterion for judging the forwardness of the forwards among the backward classes is to measure their capacity not in terms of the capacity of others in their class, but in terms of the capacity of the members of the forward classes, as stated earlier. If they cross the Rubicand of backwardness, they should be taken out from the backward classes and should be made disentitled to the provisions meant for the said classes.

It is necessary to highlight another allied aspect of the issue, in this connection. What do we mean by sufficient capacity to compete with others? Is it the capacity to compete for Class-IV or Class-Ill or higher class posts? A Class-IV employee's children may develop capacity to compete for Class-III posts and in that sense, he and his children may be forward compared to those in his class who have not secured even Class-IV posts. It cannot, however, be argued that on that account, he has reached the "creamy" level. If the adequacy of representation in the services as discussed earlier, is to be evaluated in terms of qualitative and not mere quantitative representation, which means representation in the higher rungs of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also. Such capacity will be acquired only when the backward sections reach those levels or at least, near those levels. Till that time, they cannot be called forwards among the backward classes, and taken out of the backward classes.

As regards the second part of the question, in Balaji it is observed that the backward classes cannot be further classified in backward and more backward classes. These observations, although made in the context of Article 15(4) which fell for consideration there, will no doubt be equally applicable to Article 16(4). The observation were made while dealing with the recommendations of the Nagan Gowda Committee appointed by the State of Karnataka which had recommended the classifications of the backward communities into two divisions, the Backward and the More Backward. While making those recommendations the Committee had applied one test, viz., "Was the standard of education in the community in question less than 50% of the State average? If it was, the community was regarded as more backward; if it was not, the community was regarded as backward". The Court opined that the sub-classification made by the Report and the order based thereupon was not justified under Article 15(4) which authorises special provision being made for 'really backward classes'. The Court further observed that in introducing two categories of backward classes, what the impugned order in substance purported to do was to devise measures "for the benefit of all the classes of citizens who are less advanced compared to the most advanced classes in the State". That, according to the Court, was not the scope of Article 15(4). The result of the method adopted by the impugned order was that nearly 90% of the population of the State was treated as Backward and that, observed the Court, illustrated how the order in fact divided the population of the State into most advanced and the rest, putting the latter into two categories of the Backward and the More Backward. Thus, the view taken there against the sub-classification was on the facts of that case which showed that almost 90% of the population of the State was classified as backward, the backwardness of the Backward [as against that of the More Backward] being measured in comparison to the most advanced classes in the State. Those who were less advanced than the most advanced, were all classified as Backward. The Court held that it is the More Backward or who were really backward who alone would be entitled to the benefit of the

provisions of Article 15(4). In other words, while the More Backward were classified there rightly as backward, the Backward were not classified rightly as backward.

It may be pointed out that in Vasanth Kumar, Chinnappa Reddy, J. after referring to the aforesaid view in Balaji observed that "the propriety of such test may be open to question on the facts of each case but there was no reason why on principle there cannot be a classification into backwards and More Backwards if both classes are not merely a little behind, but far for behind the most advanced classes. He further observed that in fact, such classification would be necessary to help the More Backward classes; otherwise those of the backward classes who might be a little more advanced than the more backward classes, would walk away with all the seats just as if reservation was confined to the More Backward classes and no reservation was made to the slightly more advanced of the backward classes, the backward classes would gain no seats since the advanced classes would walk away with all the seats available for the general category". With respect, this is the correct view of the matter. Whether the backward classes can be classified into Backward and More Backward, would depend upon the facts of each case. So long as both backward and more backward classes are not only comparatively but substantially backward than the advanced classes, and further, between themselves, there is a substantial difference in backwardness, not only it is advisable but also imperative to make the sub-classification if all the backward classes are to gain equitable benefit of the special provisions under the Constitution. To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic. Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points. The difference in their backwardness is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated 13th October, 1986 on reservations issued after the decision in Vasanth Kumar where the backward classes are grouped into five categories, viz., A, B, C, D, and E. In category A, fall such castes or communities as that of Bairagi, Banjari and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput. To lump both together would be to deny totally the benefit of special provisions to the former, the later taking away the entire benefits. On the other hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post. In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential. However, for each of them a special quota has to be prescribed as is done in the Karnataka Government order. If it is not done, as in the present case, and the reserved posts are first offered to the more backward and only the remaining to the backward or less backward, the more backward may take away all the posts leaving the backward with no posts. The backward will neither get his post in the reserved quota nor in the general category for want of capacity to compete with the forward.

Hence, it will have to be held that depending upon the facts of each case, sub-classification of the backward classes into the backward and more or most backward would be justifiable provided separate quotas are prescribed for each of them.

Questions VI:

Would making "any provision" under Article 16(4) for reservation "by the State" necessarily have to be by law made by the legislatures of the State or by law made by Parliament? Or could such provisions be made by an executive order?

The language of Article 16(4) is very clear. It enables the State to make a "provision" for the reservation of appointments to the posts. The provision may be made either by an Act of Legislature or by rule or regulation made under such Act or in the absence of both, by executive order. Executive order is no less a law under Article 13(3) which defines law to include, among other things, order, by-laws and notifications. The provisions of reservation under Article 16(4) being relatable to the recruitment and conditions of service under the State, they are also covered by Article 309 of the Constitution. Article 309 expressly provides that until provision in that behalf is made by or under an Act of the appropriate Legislature, the rules regulating the recruitment and conditions of service of persons appointed to Services under the Union or a State may be regulated by rules made by the President or the Governor as the case may be. Further, wherever the Constitution requires that the provisions may be made only by an Act of the Legislature, the Constitution has in express terms stated so. For example, the provisions of Article 16(3) speak of the Parliament making a law, unlike the provisions of Article 16(4) which permit the State to make "any provision". Similarly, Articles 302, 304 and 307 require a law to be enacted by the Parliament or a State Legislature as the case may be on the subjects concerned. These are but some of the provisions in the Constitution, to illustrate the point.

The impugned orders are no doubt neither enactments of the Legislature nor rules or regulations made under any Act of the Legislature. They are also not rules made by the President under Article 309 of the Constitution. They are undoubtedly executive orders. It is not suggested that in the absence of an Act or rules, the Government cannot make provisions on the subject by executive orders nor is it contended that the impugned orders made in exercise of the executive powers, have transgressed the limits of legislative powers of the Parliament. What is contended by Shri Venugopal is that power to make provisions on such vital subject must be shared with, and can only be exercised after due deliberations by, the Parliament. The contention, in essence, questions the method of exercising the power and not the absence of it. The method should be left to the discretion and the policy of the Government and the exigencies of the situation. It may be pointed out that, so far the reservations made by the Central Governments in favour of the SCs/STs and the State Government in favour of all backward classes, have been made by executive instructions, or by rules made under Article 309 of the Constitution. No reservations have been made by Acts of Legislatures. There is, therefore, no illegality attached to the impugned orders merely because the Government instead of enacting a statute for the purpose, has chosen to make the provisions by executive orders. Such executive orders having been made under Article 73 of the Constitution have for their operation an equal efficacy as an Act of the parliament or the rules made by the President under Article 309 of the Constitution.

If any authority is needed for the otherwise self-evident propostition, one may refer to the following decisions of this Court where reservations made by executive orders were upheld: See Balaji [supra], Mangal Singh v. Punjab State, Chandigarh and Ors. MANU/PH/0065/1968, Comptroller & Auditor General of India and Ors. v. Mohan Lal Mahotra and Ors. MANU/SC/0495/1991 : (1992)ILLJ335SC .

Question VII:

Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?

The answer to the question lies in the question itself. There are no special principles of judicial review nor does the scope of judicial review expand when the identification of backward classes and the percentage of the reservation kept for them is called in question. So long as correct criterion for the identification of the backward classes is applied, the result arrived at cannot be questioned on the ground that other valid criteria were also available for such identification. It is possible that the result so arrived at may be defective marginally or in marginal number of cases. That does not invalidate the exercise itself. No method is perfect particularly when sociological findings are in issue. Hence, marginal defects when found may be cured in individual cases but the entire finding is not rendered invalid on that account.

The corollary of the above is that when the criterion applied for identifying the backward classes is either perverse or per se defective or unrelated to such identification in that it is not calculated to give the result or is calculated to give, by the very nature of the criterion, a contrary or unintended result, the criterion is open for judicial examination.

The validity of the percentage of reservation for backward classes would depend upon the size of the backward classes in question. So long as it is not so excessive as to virtually obliterate the claims of others under Clause 16(1), it is not open to challenge. However, it is not necessary, and Article 16(4) does not suggest, that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total population. The only guideline laid down by Article 16(4), as pointed out elsewhere, is the adequacy of representation in the services. Within the said limits, it is in the discretion of the State to keep the reservation at reasonable level by taking into consideration all legitimate claims and the relevant factOrs. In this connection, the law laid down directly on the subject in the following decision is worth recounting:

611. In Balaji, the Court struck down the impugned order of reservations on the ground that it had categorised the backward classes on the sole basis of caste and also on the ground that the reservations made were to the extent of 68% which the Court held was inconsistent with the concept of the special provision and authorised by Article 15(4). The Court further held that for these two reasons the impugned order was a fraud on the constitutional power conferred on the State by Article 15(4). It may be pointed out at the cost of repetition, that the second reason was based on the premise that Clause (4) was an exception to Clauses (1) and (2) of Article 15, and that the exception had a numerical relationship with the rule.

612. In Devadasan the majority held that the 'carry forward' rule which resulted in the particular year in reserving 65% of the posts for Scheduled Castes and Scheduled Tribes, was unconstitutional since the reservations exceeded 30% of the vacancies. According to the Court, though under Article 16(4), reservation of reasonable percentage of posts for the members of the Scheduled Castes and the Scheduled Tribes was within the competence of the State, the method evolved must be such as to strike reasonable balance between the claims of the backward classes

and those of the other employees in order to effectuate the guarantee contained in Article 16(1), and that for this purpose each year of recruitment would have to be considered by itself. With respect, the majority decision was based on the reasoning of Balaji to which a reference has already been made. Justice Subba Rao dissented from this line of reasoning and it is his reasoning which came to be accepted later both in Thomas and Vasanth Kumar.

613. In P. Sagar [1968] 3 SCR 595, the Court upheld the decision of the High Court and dismissed the State's appeal on the ground that there was no material placed before the Court to show that the list of backward classes was prepared in conformity with the requirements of Article 15(4). The Court held that the list prepared was ex facie based on castes or communities, and was substantially the same which was struck down by the High Court in P. Sukhadev and Ors. v. The Government of Andhra Pradesh (1966) 1 AW.R. 294.

614. In Periakaruppan MANU/SC/0055/1970 : [1971]2SCR430 , it was observed that the list of backward classes is open to judicial review and the Government should always keep under review the question of reservations of seats, and only those classes which are really socially and educationally backward should be allowed to have the benefit of reservation. The reservation of seats should not be allowed to become a vested interest and since in that case the candidates of backward classes had secured 50% of the seats in the general pool, it, according to the Court, showed that the time had come for a de novo comprehensive examination of the question. In other words, it is laid down in this case that if some backward classes which are advanced continue to be, or are included in the list of, backward classes, the list can be questioned and a judicial scrutiny of the list will be permissible.

615. In Hira Lal [supra], it is observed that if the reservations made under Article 16(4) make the rule in Article 16(1) meaningless, the decision of the State would be open to judicial review. But the burden of establishing that a particular reservation is offensive to Article 16(1), is on the person who takes the plea.

To sum up, judicial scrutiny would be available [i] if the criterion inconsistent with the provisions of Article 16 is applied for identifying the classes for whom the special or unequal benefit can be given under the said Article; [ii] if the classes who are not entitled to the said benefit are wrongly included in or excluded from the list of beneficiaries of the special provisions. In such cases, it is not either the entire exercise of the entire list which becomes invalid, so long as the tests applied for identification are correct and the inclusion or exclusion is only marginal; and [iii] if the percentage of reservations is either disproportionate or unreasonable so as to deny the equality of opportunity to the unreserved classes and obliterates Article 16(1). Whether the percentage is unreasonable or results in the obliteration of Article 16(1), so far as the unreserved classes are concerned, it will depend upon the facts and circumstances of each case, and no hard and fast rule of general application with regard to the percentage can be laid down for all the regions and for all times.

Question VIII:

Would reservation of appointments or posts "in favour of any Backward Class" be restricted to the initial appointment to the post or would it extend to promotions as well?

None of the impugned Government memoranda provide for reservations in promotions. Hence, the question does not fall for consideration at all and any opinion expressed by this Court on the said point would be obiter. As has been rightly contended by Shri Parasaran, it is settled by the decisions of this Court that constitutional questions are decided only if they arise for determination on the facts, and are absolutely necessary to be decided. The Court, does not decide questions which do not arise. The tradition is both wise and advisable. There is a long line of decisions of this Court on the point. The principle is so well-settled and not disputed before us that it is not necessary to quote all the authorities on the subject. To mention only two of them, see The Central Bank of India v. Their Workmen MANU/SC/0142/1959 : [1960]1SCR200 and Harsharan Verma v. Union of India and Anr. MANU/SC/0112/1987 : AIR1987SC1969 .

The reservations in the services under Article 16(4), except in the case of SCs/STs, are in the discretion of the State. Whether reservations should at all be kept and if so, in which field and at what levels and in which mode of recruitment - direct or promotional - and at what percentage, are all matters of policy. Each authority is required to apply its mind to the facts and circumstances of the case before it and depending upon the field, the post, the extent of the existing representation of different classes, the need, if any, to balance the representation, the conflicting claims etc., decide upon the measures of reservations. The reservations, as stated earlier, cannot be kept mechanically even where it is permissible to do so. For some reasons, if Central Government, in the present case, has not thought it prudent and necessary to keep reservations in promotions, the decision of the Central Government should not be probed further. It is for the Government to frame its policy and not for this Court to comment upon it when it is not called upon to do so.

However, if it becomes necessary to answer the question, it will have to be held that the reservations both under Article 16(1) and 16(4) should be confined only to initial appointments. Except in the decision in Rangachari [supra], there was no other occasion for this Court to deliberate upon this question. In that decision, the Constitution Bench by a majority of three took the view that the reservations under Article 16(4) would also extend to the promotions on the ground that Article 16(1) and 16(2) are intended to give effect to Articles 14 and 15(1). Hence Article 16(1) should be construed in a broad and general, and not pedantic and technical way. So construed, "matters relating to employment" cannot mean merely matters prior to the act of appointment nor can 'appointment to any office' mean merely the initial appointment but must also include all matters relating to the employment, that are either incidental to such employment or form part of its terms and conditions, and also include promotion to a selection post. The Court further observed that:

Although Article 16(4), which in substance is an exception to Articles 16(1) and 16(2) and should, therefore, be strictly construed, the court cannot in construing it overlook the extreme solicitude shown by the Constitution for the advancement of socially and educationally backward classes of citizens.

The scope of Article 16(4), though not as extensive as that of Article 16(1) and (2), - and some of the matters relating to employment such as salary, increment, gratuity, pension and the age of superannuation, must fall outside its non-obstante clause, there can be no doubt that it must include appointments and posts in the services. To put a narrower construction on the word 'posts' would

be to defeat the object and the underlying policy. Article 16(4), therefore, authorises the State to provide for the reservation of appointments as well as selection posts.

616. The majority has, however, added that in exercising the powers under the Article, it should be the duty of the State to harmonise the claims of the backward classes and those of the other employees consistently with the maintenance of an efficient administration as contemplated by Article 335 of the Constitution.

617. Justice Wanchoo, one of the two Judge who differed with the majority view held that Article 16(4) implies, as borne out by Article 335, that the reservation of appointments or posts for backward classes cannot cover all or even a majority of the appointments and posts and the words "not adequately represented", do not convey any idea of quality but mean sufficiency of numerical representation in a particular service, taken not by its grades but as a whole. Appointments, according to the learned Judge, must, therefore, mean initial appointments and the reservation of appointments means the reservations of a percentage of initial appointments. The other learned Judge, viz., Ayyangar, J., forming the minority held that Article 16(4) has to be read and construed in the light of other provisions relating to services and particularly with reference to Article 335. So construed, the word "post" in that Article must mean posts not in the services but posts outside the services. Even assuming that it was not so, according to the learned Judge, the inadequacy of representation sought to be redressed by Article 16(4) meant quantitative deficiency of representation in a particular service as a whole and not in its grades taken separately, nor in respect of each single post in the service. By this reasoning the learned Judge held that Article 16(4) can only refer to appointments to the services at the initial stage and not at different stages after the appointment has taken place.

It has been pointed out earlier that the reservations of the backward classes under Article 16(4) have to be made consistently with the maintenance of the efficiency of administration. It is foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors. When reservations are kept in promotion, the inevitable consequence is the phenomenon of juniors, however low in the seniority list, stealing a march over their seniors to the promotional post. When further reservations are kept at every promotional level, the juniors not only steal march over their seniors in the same grade but also over their superiors at more than one higher level. This has been witnessed and is being witnessed frequently wherever reservations are kept in promotions. It is naive to expect that in such circumstances those who are superseded, [and they are many] can work with equanimity and with the same devotion to and interest in work as they did defore. Men are not saints. The inevitable result, in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration. When, further, the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined. This has admittedly a deleterious effect on the entire administration.

618. It is not only the efficiency of those who are thus superseded which deteriorates on account of such promotions, but those superseding have also no incentive to put in their best in work. Since they know that in any case they would be promoted in their reserved quota, they have no motivation

to work hard. Being assured of the promotion from the beginning, their attitude towards their duties and their colleagues and superiors is also coloured by this complex. On that account also the efficiency of administration is jeopardised.

With respect, neither the majority nor the minority in the Constitution Bench has noticed this aspect of the reservations in promotions. The latter decisions which followed Rangachari were also not called upon to and hence have not considered this vital aspect. The efficiency to which the majority has referred is with respect to the qualifications of those who would be promoted in the reserved quota.

619. The expression "consistently with the maintenance of efficiency of administration" used in Article 335 is related not only to the qualifications of those who are appointed, it covers all consequences to the efficiency of administration on account of such appointments. They would necessarily include the demoralisation of those already in employment who would be adversely affected by such appointments, and its effect on the efficiency of administration. The only reward that a loyal, sincere and hard-working employee expects and looks forward to in his service career is promotion. If that itself is denied to him for no deficiency on his part, it places a frustrating damper on his zeal to work and reduces him to a nervous wreck. There cannot be a more damaging effect on the administration than that caused by an unreasonable obstruction in the advancement of the career of those who run the administration. The reservations in promotions are, therefore, inconsistent with the efficiency of administration and are impermissible under the Constitution.

There is also not much merit in the argument that the adequacy of representation in the administration has to be judged not only on the basis of quantitative representation but also on the basis of qualitative representation in the administration and, hence, the reservations in promotions are a must. There is no doubt, as stated earlier, that the adequacy of representation in administration has also to be judged on the basis of the qualitative representation in it. However, the qualitative representation cannot be achieved overnight or in one generation. Secondly, such representation cannot be secured at the cost of the efficiency of the administration which is an equally paramount consideration while keeping reservations. Thirdly, the qualitative representation can be achieved by keeping reservations in direct recruitment at all levels. It is true that there is some basis for the grievance that when reservations are kept only in direct recruitment, on many occasions the rules for appointment to the posts particularly at the higher level of administration, are so framed as to keep no room for direct recruits. However, the remedy in such cases lies in ensuring that direct recruitment is provided for posts at all levels of the administration and the reservation is kept in all such direct recruitments.

It must further be remembered that there is a qualitative difference in the conditions of an individual who has entered the services as against those of one who is out of it, though both belong to the backward classes. The former joins the mainstream of all those similarly employed. Although it is true that he does not on that account become socially advanced at once, in some respects, he is not dissimilarly situated. The handicaps he suffers on account of his social backwardness can be removed, once employed, by giving him the necessary relaxations, exemptions, concessions and facilities to enable him to compete with the rest for the promotional posts where the promotions are by selection or on merit-cum-seniority basis. A provision can also be made to man the selection committees with suitable persons including those from the backward

classes and to devise methods of assessment of merits on impartial basis. The selection committee should also ensure that the claims of the backward class employees are not superseded. These measures, instead of the exclusive quota, will go a long way in instilling self-confidence and self-respect in those coming into the service through the reserved quotas. They may not have to face and work in a hostile and disrespectful atmosphere since they would have won their promotional posts by dint of their seniority and/or merit no less commendable than those of others. The urge to show merit and shine would also contribute to overall efficiency of the administration.

There is no doubt that the meaning of the various expressions and used in Article 16, viz., "matters relating to employment or appointment to any office", "any employment or office" and "appointments or posts" cannot be whittled down to mean only initial recruitment and hence the normal rule of the service jurisprudence of the loss of the birth-marks cannot be applied to the appointments made under the Article. However, as pointed out earlier, the exclusive quota is not the only form of reservation and where the report to it such as in the promotions, results in the inefficiency of the administration, it is illegal. But that is not the end of the road nor is a backward class employee helpless on account of its absence. Once he gets an equal opportunity to show his talent by coming into the mainstream, all he needs is the facility to achieve equal results. The facilities can be and must be given to him in the form of concessions, exemptions etc. such as relaxation of age, extra attempts for passing the examinations, extra training period etc. along with the machinery for impartial assessment as stated above. Such facilities when given are also a part of the reservation programme and do not fall foul of the requirement of the efficiency of the administration. Such facilities, however, are imperative if, not only the equality of opportunity but also the equality of results is to be achieved which is the true meaning of the right to equality.

Question 9:

Whether the matter should be sent back to the Five-Judge Bench?

The attacks against the impugned orders as formulated in the aforesaid eight questions, have been dealt with above. The only other attack against the impugned orders is that they are based on the Mandal Commission Report which suffers in its findings on some counts.

620. In the first imstance, it must be remembered that the Government could have passed the impugned orders without the assistance of any report such as the Mandal Commission Report. Nothing prevents the Government from providing the reservations if it is satisfied even otherwise that the backward classes have inadequate representation in the services under the State. It is however, a different matter that in the present case the Government had before it an investigation made by a independent Commission appointed under Article 340 of the Constitution to enable it to come to its conclusions that certain social groups which are socially and educationally backward are inadequately represented in the services and thereofore, deserved reservation therein. The Commission has given its own list of such backward classes and that it based primarily on the lists prepared by the States. It is true that in certain States, there are no lists and the Commission has, therefore, made its own lists for such States. However, while issuing the impugned orders the Government has taken precaution to see that the socially and educationally backward classes would comprise in the first phase the castes and communities which are common to the lists prepared by the Mandal Commission and the States. The result is that it is the State Government

lists of SEBCs which would prevail for the time being and those SEBCs mentioned in the lists of the Mandal Commission which are not in the State lists would not get the benefit of the impugned orders. It is not seriously contended before us that the State lists are prepared without application of mind or without any basis. It is no doubt urged that in certain States some castes and communities have come to be introduced in the lists of backward classes on the eve of the elections and thus the lists have been expanded from time to time. Assuming that there is some grain of truth in this allegation, the grievance in that behalf can be redressed by a fresh appraisal of the State lists by an independent machinery. The further attack against the lists prepared by the Mandal Commission is that they are prepared without an adequate and a proper survey with the result that some social groups which ought not to be in the SEBC lists have been included therein whereas others which ought to be there have been excluded. The third attack against the Commission-lists is that since there are States where there exist no lists of SEBCs, the SEBCs in those States would suffer and that would be a discrimination against them. The last attack is that the Commission has exaggerated the number of castes. While there are allegedly only 1051 backward castes, the Commission has given a list of about 3743 castes. Assuming that all these contentions are correct, all that they come to is that certain social groups which ought not to be in the SEBC lists are found there whereas others which ought not to be there are not there. Such defects can be expected in any survey of this kind since it is difficult to have a cent per cent accurate result in any sociological survey. In any case although the Mandal Commission on its survey has found the total population of SEBCs as 52 per cent, the reservation it has recommended is only 27 per cent which is almost half of the population of SEBCs according to its survey. The impugned orders have also restricted the reservations to 27 per cent. It is not suggested that the margin of error of the survey is as high as 50 per cent populationwise. Assuming, however, that the population of the SEBCs is not even 27% of the total population, even this defect can be cured by another independent survey. For the present, the list as envisaged in the impugned orders may be given effect to and in the meanwhile, a new Commission as suggested earlier may be appointed for preparing an accurate list of the backward classes. No harm would be done if in the meanwhile, at least half of those who are found backward are given the benefit of the impugned orders. If, therefore, the only purpose of sending the matter to the Five-Judge Bench now, is to find out the validity of the lists of the SEBCs, that purpose can hardly be fulfilled since the Bench cannot on its own and without adequate material invalidate the lists. The Bench would also have to direct a fresh inquiry into the matter, if it comes to the conclusion that the grievance made in that behalf is correct. The purpose would be better served if this Bench itself directs that the matter be examined afresh by a Commission newly appointed for the purpose. In any view of the matter, it is unnecessary to send the case back to the Five-Judge Bench.

The answers to the questions may now be summarised as follows:

Question 1:

Clause (4) of Article 16 is not an exception to Clause (1) thereof. It only carves out a section of the society, viz., the backward class of citizens for whom the reservations in services may be kept. The said clause is exhaustive of the reservations of posts in the services so far as the backward class of citizens is concerned. It is not exhaustive of all the reservations in the services that may be kept. The reservations of posts in the services for the other sections of the society can be kept under Clause (1) of that Article.

Question 2:

The backward class of citizens referred to in Article 16(4) is the socially backward class of citizens whose educational and economic backwardness is on account of their social backwardness. A caste by itself may constitute a class. However, in order to constitute a backward class the caste concerned must be socially backward and its educational and economic backwardness must be on account of its social backwardness.

The economic criterion by itself cannot identify a class as backward unless the economic backwardness of the class is on account of its social backwardness.

The weaker sections mentioned in Article 46 are a genus of which backward class of citizens mentioned in Article 16(4) constitute a species. Article 16(4) refers to backward classes which are a part of the weaker sections of the society and it is only for the backward classes who are not adequately represented in the services, and not for all the weaker sections that the reservations in services are provided under Article 16(4).

Question 3:

No reservations of posts can be kept in services under the State based exclusively on economic criterion either under Article 16(4) or under Article 16(1).

Question 4:

Ordinarily, the reservations kept both under Article 16(1) and 16(4) together should not exceed 50 per cent of the appointments in a grade, cadre or service in any particular year. It is only for extraordinary reasons that this percentage may be exceeded. However, every excess over 50 per cent will have to be justified on valid grounds which grounds will have to be specifically made out.

The adequacy of representation is not to be determined merely on the basis of the over all numerical strength of the backward classes in the services. For determining the adequacy, their representation at different levels of administration and in different grades has to be taken into consideration. It is the effective voice in the administration and not the total number which determines the adequacy of representation.

Question 5:

Article 16(4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only on the basis of the degrees of social backwardness and not on the basis of the economic consideration alone.

If backward classes are classified into backward and more or most backward classes, separate quotas of reservations will have to be kept for each of such classes. In the absence of such separate quotas, the reservations will be illegal.

It is not permissible to classify backward classes or a backward class social group into an advanced section and a backward section either on economic or any other consideration. The test of advancement lies in the capacity to compete with the forward classes. If the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4).

Question 6:

The provisions for reservations in the services under Article 16(4) can be made by an executive order.

Question 7:

There is no special law of judicial review when the reservations under Article 16(4) are under scrutiny. The judicial review will be available only in the cases of demonstrably perverse identification of the backward classes and in the cases of unreasonable percentage of reservations made for them.

Question 8:

It is not necessary to answer the question since it does not arise in the present case. However, if it has to be answered, the answer is as follows:

The reservations in the promotions in the services are unconstitutional as they are inconsistent with the maintenance of efficiency of administration.

However, the backward classes may be provided with relaxations, exemptions, concessions and facilities etc. to enable them to compete for the promotional posts with others wherever the promotions are based on selection or merit-cum-seniority basis.

Further, the committee or body entrusted with the task of selection must be representative and manned by suitable persons including those from the backward classes to make an impartial assessment of the merits.

To ensure adequate representation of the backward classes which means representation at all levels and in all grades in the service, the rules of recruitment must ensure that there is direct recruitment at all levels and in all grades in the services.

Question 9:

The matter should not be referred back to the Five-Judge Bench since almost all the relevant questions have been answered by this Bench. The grievance about the excessive, and about the wrong inclusion and exclusion of social groups in and from the list of backward classes can be examined by a new Commission which may be set up for the purpose.

Hence the following order:

ORDER

1. The benefit of Clause 2(1) of the first order dated 13th August, 1990 cannot be given to the advanced sections of the socially and educationally backward classes because they no longer belong to the socially and educationally backward classes although they may be members of the caste, occupational groups or other social groups which might have been named as socially and educationally backward classes in the lists which are issued or which may be issued under Clause 2(iv) of the said order. This clause if so read down, is valid.

The rest of the said order is valid.

The Government may evolve the necessary socioeconomic criterion to define the advanced sections of the backward classes to give effect to the order.

2. Clause 2(i) of the second order dated 25th September, 1991 is valid only if it is read down as under:

[a] No distinction can be made in the backward classes as poor and poorer sections thereof. The distinction can be made only between the advanced and the backward sections of the backward classes. The advanced sections are those who have acquired the capacity to compete with the forward classes. Such advanced sections no longer belong to the backward classes and as such are disentitled to the reservations under Article 16(4). The reservations can be made only for the benefit of the backward or the non-advanced sections of the backward classes.

[b] When backward classes are classified into backward and more or most backward classes as stated above on the basis of the degrees of social backwardness [and not on the basis of the economic criterion alone], exclusive quotas of reservations will have to be kept separately for the backward and the more or most backward classes. It will be impermissible to keep a common quota of reservation for all the backward classes together and make available posts for the backward classes only if they are left over after satisfying the requirements of the more or most backward classes. That may virtually amount to a total denial of the posts from the reserved quota to the backward classes.

[c] Clause 2(i) of the order dated 25th September, 1991 is, therefore, invalid, unless it is read, interpreted and implemented as above.

3. Clause 2(ii) of the said order is invalid since no reservations can be kept on economic criterion alone.

The writ petitions and transfer cases are disposed of in the above terms. No costs.

In view of the reasons given and the conclusions arrived at by me above, I agree with the conclusions recorded in paragraphs 122 and 124 and the directions given in paragraph 123[A], [B]

and [C] of the judgment being delivered by brother Jeevan Reddy, J. on behalf of himself, and on behalf of the learned Chief Justice and brothers Venkatacbaliah and Ahmadi, JJ.

R.M. Sahai, J.

621. Constitutional enigma of identifying 'backward classes' for 'protecting' or 'compensatory benefits' under constitutionally permissive discrimination visualised by Article 16(4) of the Constitution, except for scheduled castes and scheduled tribes, is as elusive today as it was when the issue was debated in the Constituent Assembly, or in Parliament in 1951, even after appointment of two commissions by the President under Article 340(1) of the Constitution, one, in 1953 known as Kaka Kalelkar Commission and other in 1979 which became famous as Mandal Commission, and furnished basis for reservation of appointment and posts for socially and economically backward classes (SEBC) in services under the Union, by Office Memorandum dated 13th August, 1990 amended further in September 1991 adding, yet, one more class of economically backward. Nature of these orders, their constitutional validity, principle of their issuance and legal infirmity, Mandal Commission Report, its basis and foundation, scope of reservation, its length width and depth were subject-matters of intensive debate in these Public Interest Litigations by members of the bar, representatives of various associations, and numerous intervenOrs. Range of controversy was, both wide and narrow touching various aspects sensible and sensitive. But before adverting to them it is imperative to thrash out, at the outset, if the issue of reservation of posts in services by the State is non-justiciable either because it is a political question or a matter of policy and even if justiciable then whether the rule of discretion requires to leave the field open for State activity to work it out by trial and arror.

'A"
(1)

622. Today the 'political thicket' has been entered with Baker v. Carr 369 U.S. 186 and Davis v. Sandemer 54 USLW 4898 even, in America where the English shadow of 'king can do no wrong' was most prominently reflected. The test now applied is if the controversy can be decided by 'judicially discernible and manageable standards' 54 USLW 4898 [1986]. 'The political questions doctrine, however, does not mean, that anything that is tinged with politics or even that any matter that might properly fall within the domain of the President or the Congress shall not be reviewable, for that would end the whole constitutional function of the court'. Under our Constitution, the yardstick is not if it is a legislative act or an executive decision on policy matter but whether it violates any constitutional guarantee or has potential of constitutional repercussions as enforcement of an assured right, under Chapter III of the Constitution, by approaching courts is itself a fundamental right. The 'constitutional fiction' of political question, therefore, should not be permitted to stand in way of the court to, 'deny the Nation the guidance on basic democratic problems'. Avoidance of entering into a political question may be desirable and may not be resorted to, 'not because of doctrine of separation of power or lack of rules but because of expediency' in larger interest for public good but legislatures, too, have, 'their authority measured by the Constitution' therefore absence of norms to examine political question has rarely any place in the Indian Constitutional jurisprudence. The, Constitution being, 'foremost a social document' the courts cannot, 'retreat behind' whenever they are called upon to discharge their constitutional obligation as 'if the judiciary bows to expediency and puts question in the political rather than in

the justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, then the judiciary has become a political 'instrument itself'. Thus,

Legislative or executive action reserving appointments or posts in services of the State is neither a political issue nor matter of policy.

* * * * *

'B'
(1)

623. Mis-conception appears to be prevailing that the judiciary by exercising power of judicial review on matters which involve political considerations asserts superior capability thus violates the democratic mandate vested by the people in elected representatives. The judiciary derive their authority as much from 'the people' the ultimate sovereign as the legislature or the executive. Each wing is a delegate of the Constitution. Each stand committed to be ruled under and governed by it. A legislature is elected by people to enact law in accordance with the Constitution, to work under and for it. By being people representative the mandate is to act in furtherance of ideals of democracy in accordance with provisions of the Constitution. No legislature or executive can enact a law or frame a policy against the dictates of the Constitution. 'Popular support expressed through the ballot box cannot validate an ultra vires action'. Elected representatives are as much oath bound to uphold and obey the Constitution as the judges appointed by the President. Both derive their power and authority from, the same source. What the Constitution says, what it means, how it is to be understood and applied was entrusted to the judiciary as when, 'The People' of India resolved, to secure to all its citizens justice, social, economic and political, 'The judiciary was seen as an extension of the Rights, for it was the courts that would give the Rights force'. A declaration by a government to reserve posts in services may be a matter of policy or even a political issue but an order issued or a law made directing reservation can be sustained, only, if it is found to be constitutional. Judicial review in our Constitution has not 'grown' nor it has been 'assumed' or 'inferred' or 'implied' nor 'acquired by force' or 'stealthily' but it was provided for by the founding fathers. The higher judiciary has been visualised as 'an arm of the social revolution'. When our Constitution was framed the Wednesbury principle evolved by the English Courts and the division of power adopted by American Constitution was fully known yet the country did not opt for vague resolutions as were adopted at Philadelphia Convention of United States in 1787 but decided to place the apex court as custodian of the Constitution by declaring that any declaration of law by it was binding under Article 141 of the Constitution, its decree and orders were enforceable under Article 142 throughout the country, and all civil and executive authorities are to act in furtherance of it under Article 144. The range of judicial review recognised by the superior judiciary in India is perhaps the widest and most extensive known in the world of law'. Kahar Singh and Anr. v. Union of India and Anr. MANU/SC/0240/1988 : 1989CriLJ941 , Unlike England or America its sweep extends to all other organs functioning under the Constitution. The Court discharged its constitutional obligation in such sensitive but constitutional matters as President's pardoning power, decision of speakers of legislative assemblies, Kihota Hollohon v. Zechilhu MANU/SC/0434/1993 : [1992] 1 SCR 309, President's power of dissolution of state legislative assemblies etc. State of Rajasthan and Ors. v. Union of India MANU/SC/0370/1977 : [1978]1SCR1 , Reliance on American decisions for very limited scope for interference was not of

much assistance as judicial power of the United States Supreme Court to examine race conscious measures or affirmative action either in economic field or admission programme in educational institutions was never doubted. The only difference was that the measures were tested either on what they described as 'close examination' or 'exacting judicial scrutiny'. For instance in University of California Regents v. Allan Bakke 57 L. Ed. 2d 750, it was the latter test that was applied. It was observed, 'in order to justify the use of a suspect classification a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is, 'necessary...to accomplishment of its purpose for the safeguarding of its interest'. Whereas in Fullilove it was observed that, 'programme that employs racial or ethnical criteria...calls for closer examination'. It was explained that when a programme employing a benign racial classification was adopted by an administrative agency on the explicit direction of congress, the courts were 'bound to approach' the 'task with appropriate deference to the congress, the co-equal branch charged by the Constitution with the power to provide for the "general welfare". H. Earl Fullilove v. Philip M. Klutznick 65 L. Ed. 2d 902 In Metro Broadcasting Inc. v. Federal Communications Commission 58 LW 5053, was reiterated and it was observed that, benign race conscious measure "mandated by the congress" even if these measures are not "remedial" in the sense of being designated to compensate victims of past-governmental or social discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of congress and are substantially related to achievement of those objectives'. Suffice it to say that the observations were made in different context for different purpose. The grant of broadcasting rights to minority was upheld by the majority as 'minority ownership programmes are critical means of promoting broadcasting diversity'. But even in this decision Justice Stevens who concurred with majority agreed with minority in Fullilove (supra) and observed, 'I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for desperate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate".'

(2)

624. The sweep and width of judicial power and authority exercised by this Court is much extensive and deep as the constitutional provisions mandate it to be so. Test for interference is constitutional violation. Due regard to legislative measures or executive action directed towards welfare measure has never been disputed by when they are overshadowed with extraneous compulsions or are arbitrary then, 'judicial interpretation gives better protection than the political branches'. Even the most reactionaries of American President Thomas Jefferson once said. 'The law of the land administered by upright judges would protect you from any exercise of power unauthorised by the Constitution of United States'. Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism.

(3)

625. Article 16(1) is a right created constitutionally in favour of all citizens and anyone is entitled to approach the courts against violation of his right by the State and assail State's latitude in

remedial measures or affirmative action to improve conditions of weaker sections or improve, lot of the backward class, if they are not so, 'tailored' as not to transgress the constitutional permissible limits. Any state action whether 'affirmative' or 'benign', 'protective' or 'competing' is constitutionally restricted first by operation of Article 16(4) and then by interplay of Articles 16(4) and 16(1). State has been empowered to invade the constitutional guarantee of 'all' citizens under Article 16(1) in favour of 'any' backward class of citizens only if in the opinion of the government it is inadequately represented. Objective being to remove disparity and enable the unfortunate ones in the society to share the services to secure equality in, 'opportunity and status' any state action must be founded on firm evidence of clear and legitimate identification of such backward class and their inadequate representation. Absence of either renders the action suspect. Both must exist in fact to enable State to assume jurisdiction to enable it to take remedial measures. 'Power to make reservations as contemplated by Article 16(4) can be exercised only to make the inadequate representations in the services adequate'. General Manager Southern Railway v. Rangachari MANU/SC/0388/1961 : (1970)IILLJ289SC , Use of expression, 'in the opinion of State' may result in greater latitude to State in determination of either backwardness or inadequacy of representation and sufficiency of material or mere error may not vitiate as State may be left in such field to experiment and learn by trial and error with little interference from the court but if the principle of identification itself is invalid or it is in violation of constitutionally permissible limits or if instead of carefully identifying the characteristics which could clothe the State with remedial action it engages in analysis which is illegal and invalid and is adopted not for remedial purposes but due to extraneous considerations than the court would be shirking in their constitutional obligation if they fail to apply the corrective. States' latitude is further narrowed when no existence of the two primary, basic or jurisdictional facts it proceeds to make reservation as the wisdom and legality of it has to be weighed in the balance of equality pledged and guaranteed to every citizen and tested on anvil of reasonableness to 'smoke out' any illegitimate use and restrict the State from crossing the clear constitutional limits. 'In framing a government which is to be administered by men over men, the great difficulty lies in this, you must first enable the government to control the governed, and in the next place oblige it to control itself.' Judicial Review has come to be one of the ways of obliging government to control itself. A reservation for a class which is not backward would be liable to be struck down. Similarly if the class is found to be backward but it is adequately represented the power cannot be exercised. Therefore, the exercise of power must precede the determination of these aspects each of which is mandatory. Since the exercise of power depends on existence of the two, its determination too must satisfy the basic requirement of being in accordance with Constitution, its belief and thought. Any determination of backward class in historical perspective may be legally valid and constitutionally permissible. But if in determination or identification of the backward class any constitutional provision is violated or it is contrary to basic feature of Constitution then the action is rendered vulnerable.

(4)

626. Reservation being negative in content to the right of equality guaranteed to every citizen by Article 16(1) it has to be tested against positive right of a citizen and a direct restriction on State power. Judicial review, thus, instead of being ruled out or restricted is imperative to maintain the balance. The court has a constitutional obligation to examine if the foundation for State's action was within constitutional periphery and even if it was, did the government prior to embarking upon solving the social, problem by raising, 'narrow bridge' under Article 16(4), to enable the 'weaker

sections of the people to cross the rubicon' Chinnappa Reddy, J. in K.C. Vasantha Kumar v. State of Karnataka, MANU/SC/0033/1985 : AIR1985SC1495 , discharged its duty of a responsible government by constitutional method so as to put it beyond any scrutiny by the 'eye and ear' of the Constitution. What comes out of the preceding discussion can be reduced thus:

(i) (a) Identification of backward class of persons and their inadequate representation in service are the basic or jurisdictional facts to empower the State to exercise the power of reservation.

(b) Either of the conditions precedent are assailable and are subject to judicial review.

(ii) Reservation of appointments and posts under Article 16(4) can be challenged if it is constitutionally invalid or even if it disturbs the balance of equality guaranteed under Article 16(1) for being unreasonable or arbitrary.

(iii) Burden to prove that reservation does not violate constitutional guarantee and is reasonable is on the State.

* * * * *

'C'
(1)

627. Our Constitution like many modern constitutions was also, 'a break with the past' and was framed with, 'a need for fresh look'. Centuries of deliberate and concerted effort to deface the society by creating caste consciousness, exploiting religious sentiments was attempted to be effaced by 'The People' when they resolved to constitute the country into a secular democratic republic. Preamble of the Constitution, echoing sentiments of nation, harassed for centuries by foreign domination, 'to secure, to all its citizens justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity and to promote among them all Fraternity assuring dignity of the individual' was not a mere flourish of words but was an ideal set-up for practice and observance as a matter of law through constitutional mechanism. Communal reservations were outlawed both from governance and administration. States and governments were prohibited from practising race, religion or caste in any form by Articles 15(1), 16(2) and 29(2). Classification made on religion, race and caste was held to be 'opposed to the Constitution and constitutes a clear violation of the fundamental rights'. The State of Madras v. Shrimathi Champakam Dorairajan MANU/SC/0007/1951 : [1951]2SCR525 . New beginning was made by abolishing untouchability, prohibiting exploitation and guaranteeing equality not only before law but in public services and employment both substantive and protective. Concern was shown for weaker sections of the society and backward class of citizens. Article 16(4) was in keeping with this philosophy. Reservation for 'any' backward class of citizens in services of the State was visualised as an integral part of equality of opportunity as phadge during freedom struggle was, 'equality not only of opportunity to be given to all but special opportunities for educational, economic and cultural growth must be given to backward group so as to anable them to catch up to those who are ahead of them'. Employment or appointment to an office in the State constituted a, 'new form of wealth' on the date the Constitution was enforced, therefore equal opportunity to all its citizens was constitutionally provided for without any

discrimination on religion, race or caste etc. But it would have been mere illusion if no provision was made to ensure similar opportunity to those citizens who remained backward either because of historically social reasons or economic poverty or poor quality of education or any other reason which could be determinative of backwardness. How the doctrine of equality, claimed to be 'the core of American democratic aspiration' was twisted, 'to relegate, racial minorities to inferior status by denying them, 'equal access to the opportunity enjoyed by others' under, cover of, 'separate but equal 'doctrine' commented by Justice Harlton in his dissenting opinion in Plessy v. Ferguson 163 US 537 (1896) as 'pernicious' was well known. The American myth that it was a 'nation of equals and a classless society' had been exploded. Technically and even legally probably the interpretation could be within provision of constitutional guarantee of equality but it was obnoxious and destructive of social equality. 'The effect of the majority decision in Plessy (supra) was to subordinate them until than dominant anti-discrimination principle of the Fourteenth Amendment to the Court created doctrine of reasonable vclassification.' Although the doctrine of Plessy was gradually abandoned finally but not before 1954 till Brown's case was decided. Therefore Article 16 while providing for equality of opportunity to all without any distinction and irrespective of forward or backward class of citizens took care to avoid recurrence of American experience by directing State to reserve posts for backward class if they were not adequately represented in services as, 'inequality does not harm only the unequals, it hurts the entire society'.

628. Thus Article 16(1) and (4) operate in same field. Both are directed towards achieving equality of opportunity in services under the State. One is broader in sweep and expansive in reach. Other is limited in approach and narrow in applicability. Former applies to 'all' citizens whereas latter is available to 'any' class of backward citizens. Use of words 'all' in 16(1) and 'any' in 16(4) read together indicate that they are part of same scheme. The one is substantive equality and other is protective equality. Article 16(1) is a fundamental right of a citizen whereas 16(4) is an obligation of the State. The former is enforceable in a court of law, whereas the latter is 'not constitutional compulsion' but an enabling provision. Whether Article 16(4) is 'in substance, an exception' CJ Ray in State of Karala and Ors. v. P.M. Thomas MANU/SC/0479/1975 : (1976)ILLJ376SC , or 'a proviso' or, 'emphatic way of putting the extent to which equality of opportunity could be carried' or 'presumed to exhaust all exception in favour of backward class' or 'expressly designed as benign discrimination devoted to lifting of backward classes', but if Article 16(1) is the, 'positive aspect of equality of opportunity' Article 16(4) is a complete code for reservation for backward class of citizens as it not only provides for exercise of power but also lays down the circumstances, in which the power can be exercised, and the purpose and extent of its exercise. One is mandatory and operates automatically whereas the other comes into play on identification of backward class of citizens and their inadequate representation.

(2)

629. Compensatory or remedial measures for lesser fortunate are thus not, ipso facto, violative of equal opportunity as our society was founded not on abstract theory that all men are equal but on realism of societal differences created by human methodology resulting in existence of the weak and the strog, poor and the rich. Preamble, the basic feature of the Constitution, therefore, promises equal opportunity and status and dignity to every citizen the actuality of which has been ensured by empowering the State to take positive steps under Article 15(4) and 16(4). Forty years of recount demonstrate flowering of principle of equal opportunity and encourage to intensify it for

the deserving, past or present. Reverse discrimination, an expression coined by American courts and jurists commented upon, 'as sharpened edge of a sword' as, 'it is as much as an evil as the discrimination it aims to overcome' as it violates, (a) formal justice (b) consistency (c) equality of opportunity (d) due process of equality, are expressions of one sided thinking without the grip of the constitutional goal set out by founding fathers that, 'equality of opportunity must be transformed into equality of results'. An enlightened society is one which takes care of the poor, the backward, the retarded, the handicapped as much as of the rich, the forward, the healthy and the gifted. Formal equality transforms into real equality when the disadvantage arising out of social circumstances is levelled and the least and the best advantaged are so paired by the State activism that differences and distinctions arising out of ascribed identify get gradually lost. Various articles of the Constitution reflect this philosophy. Article 16 is a classic example, and probably unparallel in the constitutional history of the world, where individualism advocated by West in eighteenth and nineteenth century co-exist with States predominant role in bridging the gulf between the needy and the affluent, the backward and the forward. It reflects modern and progressive thinking on Equality. As observed by Laski, 'By adequate opportunity we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal'. According to Ronald Dworkin, 'All human beings have a natural right to an equality of concern and respect, a right they possess not by virtue of birth, but simply as human beings with the capacity to make plans and give justice.' Articles 39 and 46 are extension of this belief and thought. Any legislative measure or executive order reserving appointments or posts cannot be assailed as being beyond constitutional sanction. As far back as 1951 it was held by a Seven Judges' Constitution Bench, of this Court 'Reservation of posts in favour of any backward class of citizens cannot therefore be regarded is unconstitutional'. B. Venkataramana v. The State of Madras and Anr. MANU/SC/0080/1951 : A.I.R. 1951 SC 229. Nor did the Constitution makers restricted the period of its continuance as was done for Anglo-Indians by Article 336 as an enlightened and progressive state a responsible government of a welfare country must decide itself periodically on prevalent social and economic conditions and not on political consideration or extraneous compulsion if the protective umbrella has to be kept opened, for whom and for how long.

(3)

630. Before proceeding further it may be mentioned that many decisions were cited of American Courts dealing with affirmative action for Negroes and a parallel was attempted to be drawn from it for justifying reservation for other backward classes. But this ignores that unlike the United States our Constitution itself provides for reservation for backward classes, therefore, it is unnecessary to derive inspiration from decisions given by American court on equal protection clause. They may be relevant for classification and nexus test under Article 14 or even for judging if the provision by being arbitrary was violative of equality doctrine but they cannot furnish relevant guideline for interpreting Article 16(4). How equality was distorted and how Blacks were made to suffer by biased and narrow construction of the concept of equality for nearly hundred years is a matter of history. To derive parallel from classification developed by American courts to support reservation on any ground for other backward classes would be constitutionally unjust and legally unsure. Whether American Constitution was or is colour blind or not but when our Constitution was framed caste was in, 'bad odour'. Deliberate 'Divide and Rule' policy of Britishers by perpetuating caste was in full glare, therefore, the founding fathers while guarantying equality prohibited discrimination on the ground of religion, race or caste etc. Unfortunate American

experience of, 'separate but equal' doctrine legitimatised in Plessy v. Ferguson resulting in segregating negroes and keeping them at distance from American prosperity was avoided by making the State responsible both for ameliorative measures or affirmative action and protective steps. The doctrine of, 'compelling State interest' developed by American Courts to support classification for even race conscious measures particularly in economic field or business regulation have no relevance as the state has been constitutionally empowered to remedy the social imbalance. From 'separate but equal? in Plessy to, 'freedom of choice' developed by Brown v. Director Board of Education 347 US 483 (1954) and Brown v. Director Board of Education 349 US 294 (1955) to, 'just schools' without label of white or Negro in Green v. Country School Board 391 US 430 [1968] to elimination of segregation 'root and branch' in Swann v. Charlotte, Mecklenburg Board of Education 402 US 1 [1970] may be a fascinating development for America but our constitutional provisions being more pragmatic and realistic to problem of equality in public employment it appears unnecessary and risky to derive any inspiration from American decision for interpreting, Article 16(4) as,

'In its Compensatory Programmes for depressed classes, India, has gone much further than the egalitarian western societies such as the Unites States'. The conclusion, thus, is that

(1) Article 16(1) and 16(4) operate in the same field.

(2) Article 16(4) is exhaustive of reservation.

(3) No period for reservation has been provided but every State must keep on evaluating periodically if it was necessary to continue reservation, and for whom.

* * * * *

'D'
(1)

631. Thus the real issue is not reservation but identification. Who, then, are the, 'backward class of citizens'? What is the meaning of the word, 'backward', 'class' and 'citizens' individually and taken together. How are they to be identified. By their caste, occupation, status, economic condition etc. Although the issue of reservation has been agitated before this Court, time and again, the occasion never arose to lay down any principle or test for determination of other backward classes. C.A. Rajendran v. Union of India and Ors. MANU/SC/0358/1967 : (1968)IILLJ407SC , Janaki Prasad Parimoo v. State of J.&K. MANU/SC/0393/1973 : [1973]3SCR236 , State of Kerala and Ors. v. N.M. Thomas and Ors. MANU/SC/0479/1975 : (1976)ILLJ376SC , and Karamchari Sangh v. Union of India MANU/SC/0058/1980 : (1981)ILLJ209SC , were no doubt concerned with Article 16 but they were cases of SC/ST who are constitutionally recongnised as, backward class of citizens. Champakan (supra), Trilokinath Tikku v. State of J & K MANU/SC/0234/1966 : (1967)IILLJ271SC , and Trilokinath and Ors. v. State of J & K MANU/SC/0420/1968 : [1969] 1 SCR 103 and A. Peeriakaruppan, etc. v. State of Tamilnadu MANU/SC/0055/1970 : [1971]2SCR430 , were concerned with reservation based on caste or religion. M.R. Balaji and Ors. v. State of Mysore MANU/SC/0080/1962 : [1963] Supp. 1 SCR 439, Heggade Janardhan Subbarye v. State of Mysore MANU/SC/0081/1962 : [1963] Supp. 1 SCR 475, P. Rajendran v. State of

Madras MANU/SC/0025/1968 : [1968]2SCR786 , State of Andhra Pradesh and Ors. P. Sagar MANU/SC/0028/1968 : [1968]3SCR595 , State of A.P. v. U.S.V. Balaram MANU/SC/0061/1972 : [1972]3SCR247 , State of Uttar Pradesh v. Pradeep Tandon MANU/SC/0086/1974 : [1975]2SCR761 , R. Chitralekha v. State of Mysore MANU/SC/0030/1964 : [1964]6SCR368 , and Km. KS. Jayshree v. State of Kerala MANU/SC/0068/1976 : [1977]1SCR194 , were concerned with reservation under Article 15(4). Except for Vasantha Kumar (supra) no exercise was undertaken to lay down any principle for determination of backward class. Reason for absence of any discussion appears to be that this Court while explaining the word 'backward' in Balaji observed that backward classes intended to be covered in Article 15(4) were comparable to SC/ST which was accepted and applied while deciding backward class under Article 16(4) as well. But the kind of comparability - 'Whether of status, of disabilities suffered, of economic or educational conditions or of representation in government service' was not elaborated nor it was undertaken even in Balram when the Court extended it to, 'really backward' even though not, 'exactly similar in all respects', as they were dealing with SC/ST.

(2)

632. The expression, 'any backward class of citizens' is of very wide import. Its width and depth shall be fully comprehended when significance of each word and the purpose of its use is explained. To preface the discussion on this vital aspect, on which divergence extended to extremes both legally and sentimentally, it may be stated that in certain decisions given by this Court due weight was not, given to the words, 'class' and 'citizens'. Latter is explained in Chapter II of the Constitution. Any person satisfying those conditions is a citizen of this country irrespective of race, religion or caste. Member of every community Hindu, Muslim, Christian, Sikh, Budh, Jain etc. who are citizens of this country and are backward and are not adequately represented in services are to be brought into National stream by protective or benign measures. Provisions of the Constitution apply to all equally and uniformly. Yardstick of backwardness must necessarily, therefore, has to be of universal application.

633. 'Class' has been linked with the word, 'backward' and has been read as one word, 'backward class' thus occasioning the debate that it should be understood as 'backward caste'. Whether such reading is permissible is another aspect which shall be adverted to, presently, but if the word, 'class' is read individually or in conjunction with words 'of citizens' then its plain meaning and purpose is to exclude any reservation for individual. In other words reservation contemplated is for group or collectivity of citizens who are backward and not for any individual. The expression 'any backward class of citizen' thus is capable of being construed as class of backwards, backward among any class of citizens, backward class etc. depending on for whom the reservation is being made and why.

634. Backward may be relative such as professional or occupational backwardness or it may be economic, social, educational or it may be racial such as in America or caste based as in Hindu social system or it may be natural such as physically handicapped or even of sex. Article 16 of the Constitution deals with equality of opportunity in services under the State. The meaning of the word 'backward' therefore, has to be understood with reference to opportunity in public employment. Since this is a constitutional issue it cannot be resolved by clinches founded on fictional mythological stories or misdirected philosophies or odious comparisons without any

regard to social and economic conditions but by pragmatic, purposive and value oriented approach to the Constitution as it is the fundamental law which requires careful navigation by political set up of the country and any deflection or deviation disturbing or threatening the social balance has to be restored, as far as possible, by the judiciary. Backwardness in such a vast country with divergent religions, culture, language, habits, social and economic conditions arising out of historical reasons, geographical locations, feudal system, rigidity of caste is bound to have regional flavour. For instance place of habitation and its environment was held in Pradeep Tandon (supra) to be determinative for social and educational backwardness in hills of U.P. Interaction of various forces have been responsible for backwardness in different parts of the country. A caste backward in one State may be advanced in another. That is why Dr. Ambedkar while quelling misgivings of members in the Constituent Assembly Debate had stated, that backwardness was being, 'left to be determined by the local government' Constituent Assembly Debates Vol. VII p. 701 (1948-49), probably, with hope and belief that once the problem was tackled by the State and backward citizens were adequately represented in State services the problem at the National level shall stand resolved automatically.

635. Individual backwardness in social sense is primarily economic. Article 16(4) however, is concerned with class backwardness. In technical sense as explained by sociologists it is a problem of 'social stratification' arising out of, as said by Max Weber, due to political, social or economic order. Class or group backwardness may arise due to exclusion of the entire collectivity as a result of combined or individual operation of any of these reasons. For instance in America as slavery receded after Civil War it was succeeded, 'by a caste system embodying white supremacy. Various "Jim Crow" laws, or segregation statutes, lent the sanction of the law to a racial ostracism found in churches and schools, in housing facilities, in restaurants and hotels, in most forms of public transportation, on the job, in universities and colleges, and ultimately in morgues and cemeteries. In addition, black Americans were long denied the right to vote, to serve on juries, and to run for public office.' The SC and ST in our country bore a close parallel to it except that their exclusion or segregation was mainly social. That is why the constitutional protection was provided for them. For granting similar benefit on backwardness to other group or collectivity the State must be satisfied, that, they were subjected to at least similar if not same treatment or were excluded from services for any of the reasons social, economic or political individually or collectively and continue to be excluded before they can be identified as backward class for purposes of Article 16(4). Article 340 is, however, concerned with social and educational backwardness. Since the impugned orders have been passed on identification of backward class by a Commission appointed by the President in exercise of power under this provision it will have to be examined if the Commission acted within the scope of its reference and how this expression has to be understood.

(3)

636. Can the word 'class' be understood as caste? What does the word 'class' mean? According to dictionary it means 'division of society according to status, rank, caste, merit, grace or quality'. Burton defines it, as 'category, classification, breed, caste, group, order, rank'. In Webster it is defined as, 'member or body of persons with common characteristics, social rank or caste'. Whereas Oxford defines caste as, 'race, leinage, pure stock or breed'. English historians have defined caste as, 'hereditary classes into which Hindu society is divided'. Sociologists describe it as, 'ascribed status'. Class is thus wider and may mean caste. Is it so for Article 16? In Hindi version of the

Constitution the word is 'varg' that is group and not 'jati' that is caste or community. The word class cannot and was not used as caste as it was constitutionally considered to be destructive of secularism. In our country caste system is peculiar to Hindus. It is unknown to Muslims, Christians, Sikhs, Buddhists and Jains. The Constitution was framed not for Hindus only. Provision was made for a society heterogeneous in character but secular in outlook. 'It was a compromistic formula', a positive effort to equalise one and all. Even among Hindus where caste system is an, 'institution most highly developed' the society is divided into large number of separate groups mostly functional or tribal in origin. By 20th Century the, 'lowest classes of Hindu society', came to be identified as depressed class' or 'untouchable - a name of comparatively recent origin'. Rigidity developed over years was partly due to Hindu orthodoxy and partly due to British exploitation. Whatever reason but scheduled castes and scheduled tribes were undoubtedly, 'truly', 'relatively' or 'really backward'. When the Constitution was framed the framers were aware of preferential treatment on religion, race and caste. In Southern States communal reservation in services was in vogue. Yet Dr. Ambedkar while defending the use of word 'backward' by drafting committee explained that, 'it was to enable other communities to share the services which for historical reasons, has been controlled by one community or a few community'. The word, 'community' has been defined in Webster Comprehensive Dictionary as, 'The people who reside in one locality and are subject to the same laws, have the same interests, the public or society at large'. And according to Oxford it means 'the quality of appertaining to all in common, common ownership, common character. Class was thus used in a wider sense and not in the restricted sense of caste.

(4)

637. Both the words 'backward' and 'class' thus are of very wide import. Assuming the two words as one and reading it as, 'backward class' the question is can it be understood as cluster of backward Hindu caste? Or in the broad and wide sense as extending and including 'any' backward class of citizens irrespective of race, religion or caste? Which construction would be in keeping with the constitutional purpose? Taking up the narrower construction, it may be stated that to interpret a constitutional provision its history, circumstances in which it was adopted as well as the events immediately surrounding its adoption are necessary to be looked into to appreciate the purpose and objective of its use. The word 'backward class' and started acquiring meaning at the end of 19th Century with commencement of enrolment on caste basis in 1891, recognition of special treatment to some and communal representation to others in early 20th Century. The Fort St. George Gazette No. 40 of November 1985 mentions grants-in-aid to schools for the untouchable. In 1921 backward community in Mysore meant, 'all other communities other than Brahmins'. In Bombay in 1925 backward classes were all except, 'Brahmin, Prabhus, Marwaris, Parsis, Banias and Chirstians'. Indian Statutory Commission (Hatlong Committee) defined Backward Classes in 1928 as 'castes or classes which are educationally backward. They include the depressed classes, aboriginals, hill tribes and criminal tribes. The United Province Hindu Backward Classes League founded in 1929 suggested Hindu Backward classes to be 'all of the listed communities belonging to non-dwijya (that is twice born) or degenerate or Sudras classes of Hindus'. Travancore in 1935 passed resolution on report of Justice Nokes on communal lines including all classes. Madras Provincial backward Classes League was founded in 1939 for securing separate treatment for 'forward non-brahmin communities'. It thus did not have a definite meaning. Somewhere it was everyone except Brahmins and others for the so-called Sudras. All depending on social and economic conditions prevailing in a particular State. In any case it 'never acquired a definite

meaning at the all India level. There had been no attempt to define it or employ it one the national level. The statement of Dr. Ambedker in the Constituent Assembly or determination of backwardness at local or State-level was thus not casual but an outcome of practical reality and historical truth.

(5)

638. Historically, therefore, what started as social upliftment measure for the down-trodden amongst Hindus in some princely States gradually developed into formation of various associations in different States encouraged by the social caste consciousness created by the Britishers to demonstrate backwardness for claiming preferential treatment injected in the society by communal representation. The Constitution makers were aware of this background. It is vividly reflected in the Constituent Assembly Debates. Therefore a very vital, question arises if the expression, 'backward class' used in Article 16(4) has to be read and understood as extending or applying to backward Hindu Castes only. Meaning of the word 'backward' and 'class' have already been explained. Language of the expression does not warrant reading of the expression as backward caste. When two words one wider an import and broader in application and other narrower were available and the Constitution makers opted for one the other, on elementary principle of construction, should be deemed to have been rejected. What was avoided by the framers of the Constitution, for good reasons and, to achieve the objective they had set up for the governance of the country cannot be brought back either by government or courts by interpretation or construction unless the consequences of accepting the literal or the normal meaning appears to be so unreasonable that the Constitution makers would have never intended. 'Although the spirit of an instrument especially of a Constitution is to be respected not less than its letter yet the spirit is to be collected chiefly from its words'. Justice Marshall in Sturges v. Crowninshield (1819) quoted in Encyclopaedia of the American Constitution, Vol. 1 by Levy, Karst & Mahoney For this reason alone any suggestion of accepting the expression as interchangeable with caste cannot be accepted. Even the spirit behind use of the expression was not to provide for cluster of castes, known as Sudras of the Hindu hierarchy before the Constitution, but for groups or class of different communities following different religions, as rights fundamental or otherwise have been guaranteed to members of every community irrespective of religion, race, caste or birth. Article 340 empowers President to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India. Such classes may belong to any community. Preferential treatment accorded to various communities before 1950 on basis of religion, race or caste was done away with. Promise was to take care of minorities as well. Article 335 ensured claim of SC/ST in services. Other backward citizens irrespective of race, religion were to be taken care of as, 'The Constitution was framed with grand compromise. A splendid compromise between formal equalitarian justice and compensatory justice through benign or protective discrimination was devised so beautifully that that was to serve the purpose of assimilation, integration was equal partnership in national building by making equal contribution in the main stream of life'. If Article 16(4) is confined to backward classes of Hindu hierarchy by narrowing it down to caste it would be doing violence to the language of the provision and the spirit in which the expression was used leading to injustice. No provision in the Constitution indicates that the expression has to be understood in such narrow sense. Reading it otherwise may lead to contradiction. Normal and natural meaning of an expression can be, disregarded only if it is found that the framers of the Constitution did not intend to use it in that sense and 'absurdity and

injustice of applying the provision would be so monstrous that all mankind would, without hesitation, unite in rejecting the application'. When the Constitution was framed the founding fathers were aware of the meaning and understanding of the word 'backward'. They were also aware that hereinafter members of all community were to be treated alike. The State was made responsible, therefore, for 'any' backward class of citizens coming from whatever community, caste or religion. State, therefore, cannot discriminate, while identifying backward class on race, religion, caste or birth.

(6)

639. True the discussions in the Constituent Assembly Debates centerd round caste and community. Even Dr. Ambedkar said, 'what are called backward classes are...nothing but a collection of certain castes'. That however cannot be conclusive for construing the expression as, the historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed may be taken into account, 'but not to interpret the Constitution', I.C. Golak Nath v. State of Punjab, MANU/SC/0029/1967 : [1967]2SCR762 . What emerged out of shared understanding by consensus was not backward caste but backward class, an expression of elasticity capable of expanding depending on the nature and purpose of its use. Motivation for use of expression 'backward class' might have come from a feeling to accommodate and benefit those who were deprived of entering into services due to social and economic conditions amongst Hindus. But what is being interpreted is a Constitution, a document, an instrument which is good not for a season or a session but for centuries during the course of which even the most stable society may undergo social, economic, political and scientific changes resulting in transformation of values. Are the values in the society same today as they were in 1950 or 1900? Words or expressions remain the same but its meaning and application with passage of time changes. When the framers of the Constitution deliberately used an expression of expansive nature then as said by Justice Frankfurter, 'they should be left to gather meaning from experience. For they relate to whole domain of social and economic fact and statesman who founded this nation knew too well that only a stagnant society remains unchanged'. This Court is being asked to interpret the provision in 1990. It cannot ignore the present by going into past.

The law, even as sit honours the past, must reach for justice of a kind not measured by force, by the pressures of interest groups, nor even by votes, but only by what reason and a sense of justice say is right. Brown was 'law' in 1954, even though the 'separate but equal' doctrine had half a century of precedent and practice behind it. Continuity is essential to law as a whole, but the continuity must be creative.

(7)

640. 'Caste is a reality'. Undoubtedly so are religion and race. Can they furnish basis for reservation of posts in services? Is the State entitled to practice it in any form for any purpose? Not under a Constitution wedded to secularism. State responsibility is to protect religion of different communities and not to practice it. Uplifting the backward class of citizens, promoting them socially and educationally taking care of weaker sections of society by special programmes, and policies is the primary concern of the State. It was visualised so by framers of the Constitution. But any claim of achieving these objectives through race, conscious measures or religiously

packed programmes would be uncharitable to the noble and pious spirit of the founding fathers, legally impermissible and constitutionally ultra vires. Deriving inspiration from the American philosophy that, 'just as the race of students must be considered in determining whether a constitutional violation has occurred so also must race be considered in formulating remedy' without any regard to the Preamble of our Constitution and provisions like Articles 15(1), 10(2) and 29(2) would be plunging our Nation into disaster not by what was adopted and promised as principle for governance for our people on our soil but from what has been laid down in a country which is yet far away from, 'equality of result' or 'substantive equality' so far Black or Brown are concerned.

641. Brown v. Board of Education (supra) which is considered as 'turning the clock back' on racial discrimination was given much after Venkataramana. Provisions like Article VI were introduced in America in 1964 only. When Bakke (supra) was delivered Justice Harshal lamented, 'this Court in the Civil Rights cases and Plessy v. Ferguson destroyed the movement towards complete equality. For almost a century no action was taken, and thus non-action was with the approval of the Court. Then we had Brown v. Board of Education and the Civil Rights Acts of Congress, followed by numerous affirmative action programmes. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California'. The lament was because of failure to bring the Negroes in the mainstream, 'in light of the sorry history of discrimination and its devastating impact on the lives of Negroes is to ensure that America will forever remain a divided society'. But to avoid any risk of keeping ours a divided society, the Constitution makers provided ample safeguards for Scheduled Castes and Scheduled Tribes (SC/ST) the only category of backward class which could be compared to the Negroes in America. American philosophy developed by courts that discrimination having arisen due to race consciousness the remedy too should be race based, appears to have been inspired by our constitutional provisions which takes every precaution to remedy the caste related evil of SC/ST by caste based reservation. But the same can not be adopted for other backward classes as it would be distortion of constitutional interpretation by importing a concept which was deliberately and purposely avoided. Insistence, for claiming reservation for the remaining or for all others who were in so-called broader category of Sudras not because they Were really backward without any regard to social and economic conditions, would be unfair to history and unjust to society. What is constitutionally provided has to be adhered to in spirit but not on assumption that all amongst Hindus who fell in the broader category of Sudras were subjected to same treatment as untouchables in India or Negroes in America. History, social or political, does not bear it out. Reservation for other backward class is no doubt constitutionally permisible, on social and economic conditions which prevailed in the country and are still prevailing and not on benign steps for Negroes upheld by foreign courts. Judicial activism has no doubt in America been remarkable in absence of any constitutional protection for the Negroes but our courts are not required to undertake the exercise as our constitutional statesmanship has no parallel in the world where to achieve egalitatian society truly and really it devised mechanism of treating the backward class of citizens, 'differently' by Articles 16(4) and 15(4) to bring them at par with others so that they could be treated equally. The policy of official discrimination is,

unique in the world both in the range of benefits involved and in the magnitude of the groups eligible for them.

(8)

642. Caste has never been accepted by this Court as exclusive or sole criteria for determination or identification of backward class. That is why the communal Government Order in Champakam and reservation, except for SC/ST and Hindu backward, in S. Venkatramana v. State of Madras MANU/SC/0080/1951 : AIR 1951 SC 229, were invalidated. Caste based evil was so repugnant that even when communal Government Order issued by the State of Madras a legacy of caste based reservation practised in Madras since thirties and forties was struck down and the Constitution was amended and Article 15(4) was added the basic philosophy against the caste was neither eroded nor mitigated and ameliorative steps were made state-responsibility for socially and educationally backward castes. Balaji adopted test of, comparability of backward classes with Scheduled Caste and Scheduled Tribe as a result of combined reading of Article 340(1) and Article 338(3). Two major drawbacks were noticed in identifying backward class with caste, one, 'it may not always be legal and may perhaps contain the vice of perpetuating the caste', and other 'if the caste of the group of citizens was made the sole basis for determining the social backwardness of the social group, the test would inevitably break down in relation to many sections of Indian society which do not recognise caste in the conventional sense known to Hindu society'. In Chitralekha the Court observed that 'caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court (Balaji) which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste'. P. Rajendran too did not differ with Balaji nor it carved out any new path. The Court accepted the determination of backward class as, the explanation given by the State of Madras had not been controverted by any rejoinder affidavit. The Court observed, 'that though the list shows certain caste the member of those castes are classes of educationally and socially backward citizens'. In Sagar the Court was concerned with a list where backwardness was determined amongst others on caste taking it as one of the relevant test for determination of backwardness. Therefore, the Court agreeing with Balaji observed, 'in determining whether a particular section forms a class caste cannot be excluded altogether. But in the determination of a class a test solely based upon caste or a community cannot also be accepted'. In Peeriakaruppan it was observed that, 'a caste has always been recognised as a class'. Support for this was sought {torn Rajendran and it was observed that it was authority 'for the proposition that the classification of backward classes on the basis of caste is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. But Rajendran was decided as the caste included in the list were in fact socially and educationally backward. Balram, too, followed the same and relying on Rajendran, Sagar and Peeriakaruppan upheld the test as entire caste was found to be socially and economically backward. 'Caste, ipso facto, is not class in secular state' was said in Soshit Karamchari. In Jayshree it was held that caste could not be made the sole basis for reservation. Ratio in Rajendran, Sagar, Balram and Peeriakaruppan are wrongly understood and erroneously applied. All these decisions turned on facts as the Court in each case upheld the classification not because it was done on caste but those included in the list deserved the protection. Different streams of thought may appear from various decisions but none has accepted caste as the sole criteria for determination of backwardness.

(9)

643. 'Backward class' in Article 16(4) thus cannot be read as backward caste. What is the scope then? Is it social backwardness, educational backwardness, economic backwardness, social and economic backwardness, natural backwardness etc.? In absence of any indication expressly or impliedly any group or collectivity which can be legitimately considered as, 'backward' for purposes of representation in service would be included in the expression 'backward class'. Word 'any' is indicative of that the backward class was not visualised in singular. When Constitution was framed the anxiety was to undo the historical backwardness. Yet a word of wider import was used to avoid any close-door policy. For instance, backwardness arising out of natural reasons was never contemplated. But today with developments of human rights effort is being made to encourage those to whom nature has not been so kind. Do such persons not form a class? Are they not backward? They cannot, obviously compete on equal level with others. Backwardness which the Constitution makers had to tackle by making special provision, due to social and economic condition, was different but that does not exclude backwardness arising due to different reasons in new set up.

644. Although dictionarily the word 'any' may mean one or few and even all yet the meaning of a word has to be understood in the context it has been used. In Article 16(4) it cannot mean all as it would render the whole Article unworkable. The only, reasonable, meaning that can be attributed to it is that it should be the States' discretion to pick out one or more than one from amongst numerous groups or collectivity identified or accepted as backward class for purposes of reservation. Whether such picking is reasonable and satisfies the test of judicial review is another matter. That explains the rationale for the non-obstante clause being discretionary and not mandatory. A State is not bound to grant reservation to every backward class. In one State or at one place or at one point of time it may be historical and social backwardness or geographical and habitational backwardness and at another it may be social and educational or backwardness arising out of natural cause.

(10)

645. From out of various backward class of citizens who could be provided protection under Article 16(4) the President has been empowered by Article 340 to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India. What does the expression 'socially and educationally backward classes' connote? How it should be understood? Is it social backwardness only? Is the educational backwardness surplus-age?. Article 340(1) of the Constitution reads as under:

The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

A bare reading of the Article indicates that the avowed objective of this provision is to empower the President to appoint a Commission to ascertain the difficulties and the problems of the socially

and educationally backward classes and to make recommendations so that steps may be taken by the Union and the States to solve their problems, remove their difficulties and improve their conditions. Since backwardness has been qualified by the words 'social and educational' the ambit of the expression is not as wide as backward class in Article 16(4). What does it mean then? A social class, 'is an aggregate of persons within a society possessing about the same status'. How to determine backwardness of such a class. The yardstick of backwardness in any society is, primarily, economic. But Indian society, 'has made caste as the sole hierarchy of social ranking and uses the caste system as the basic frame of reference'. Expert Panel of Mandal Commission described it as ascribed status, that is, status of a person determined by his birth. The social backwardness in pre-independence period, no doubt, arose because of caste stratification. Members of castes other than Brahmans, Thakurs and Vaishyas were socially backward. But with foreign domination, enlightened movements both social and religious, acquisition of wealth and power a gradual caste mobility took place not only to consolidate but even to assert a higher social status. 'The struggle launched by these backward castes as a subaltern in the pre-independence period, changed its course in the post independence period' due to vested interest in reservation, 'It is well known that up to year 1931, the last census year for which castes are recorded, there were several castes applying for changing their names to those indicative of higher caste status. In that period name indicated status. The trend now is to claim backwardness both among the Hindus and Muslims by claiming the same caste status by various devices as those who are legally considered as backward caste, are the beneficiaries of reservation. While determining social backwardness, therefore, one cannot loose sight of the type of society, the social mobility, the economic conditions, the political power. Even the Expert Panel noticed few of these but then it got lost in ascribed status. The social backwardness in 1990 for purposes of employment in services cannot be status by birth but backwardness arising out of other elements such as class, power etc. Dr. Pandey in his book [The Caste System in India] after an elaborate study has concluded,

1. Class, independent of caste, determines social ranking in Indian Society in certain domains;

2. Analysis of caste alone is not sufficient to provide the real picture of stratification in India to-day;

3. A proper study of stratification in modern India must concern with other dimensions, viz., class, status and power.

While explaining power he has observed in, 'past power was located in the dominant caste'. But it is now changing in two senses, 'first, power is shifting from one caste (or group of castes) to another. Secondly, power is shifting from caste itself and comes to be located in more differentiated political organs and institutions. This has been empirically found by Beeville, and others on the basis of his studies of Kammas and Reddis of Andhra Pradesh. Harrison writes: "This picture of political competition between the two caste groups is only a modern recurrence of an historic pattern dating back to the fourteenth century. Srinivas' analysis of politics in Mysore gives a central place to rivalries between the dominant castes: "As in Andhra, the Congress is dominated by two leading peasant castes, one of which is Lingayat and the other Okkaliga. Lingayat Okkaliga rivalry is colouring every issue, whether it be appointment to government posts or reservation of seats in colleges, or election to local bodies and legislatures." Both - Harrision's study in Andhra Pradesh and Srinivas 'in Mysore depict the rise to power of the two pairs of non-Brahman dominant

castes followed by the decline of the Brahmans".' Any determination of social backwardness, therefore, cannot be valid unless these important aspects are taken into consideration.

646. Educational backwardness too was not added just for recitation. No word in Statute, more so in a Constitution, can be read as surplus-age. In none of the decisions of this Court under Article 16(4) it has been held that educational backwardness was irrelevant. In Balaji declaration of minor community as educationally backward was not accepted as correct since the student community of 5 per thousand was not below the State average. In Balram the Court approved acceptance by the government of criteria adopted by the Commission for determining social and educational backwardness of the citizen, namely,

(i) the general poverty of the class or community as a whole;

(ii) Occupations pursued by the classes of citizens, the nature of which must be inferior or unclean or undignified and unremunerative or one which does not carry influence or power;

(iii) Caste in relation to Hindus; and

(iv) Educational backwardness.

In the hoary past the education amongst Hindus was confined to a particular class, that is, the Brahmins, but with advent of Muslim rule and British regime this barricading fell down, considerably, and the education spread amongst other classes as well. But even in those times there was a section of society which was kept away, deliberately, from education as they were not permitted to enter the schools and colleges. That has been done away with by the Constitution. Yet the educational with all efforts has not filtered to certain classes particularly in rural areas and many traditionally educationally backward still suffer from it. At the same time many groups or collectivity did not opt for education for various reasons, personal or otherwise. Therefore, a Commission appointed under Article 340 cannot determine only social backwardness. Any class to be backward under Article 340 must be both socially and educationally backward.

647. Two things emerge from it, one, that the backward class in Article 16(4) and socially and educationally in Article 340, being expressions with different connotations they cannot be understood in one and same sense. The one is wider and includes the other. A socially and educationally backward class may be backward class but not vice versa. Other is that such investigation cannot be caste based. Meaning of expression 'socially and educationally backward' class of citizens was explained in Pradeep Tandon as under:

The expression 'classes of citizens' indicates a homogenous section of the people who are grouped together because of (a) certain likeness and common traits and who are identified by some common attributes. The homogeneity of the class of citizen is social and educational backwardness. Neither caste nor religion nor place of birth will be uniform element or common attributes to make them a class of citizens.

648. Even when the report of first Backward Class Commission was submitted to the Government of India the memorandum prepared by it, and presented to the Parliament, emphasised that, efforts

should be made, 'to discover some criteria other than caste, which could be of practical application in determining the backward classes'. Three of the members of the Commission, 'were opposed to one of the most crucial recommendations of the Report, that is, the acceptance of caste as a criteria for social backwardness and reservations of posts in government service on that basis'. One of the reasons given for it by the Chairman in his letter was that adopting of caste criteria was, 'going to have a most unhealthy effect on the Muslim and Christian sections of the nation'.

649. When Second Backward Class Commission was appointed by the President under Article 340 it was required, 'to determine the criteria for determining the socially and educationally backward classes' and,

to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State.

The order further outlined the procedure to be followed by the Commission as required by Article 340 by directing it to

examine the recommendations of the Backward Classes Commission appointed earlier and the considerations which stood in the way of the acceptance of its recommendations by Government.

The Commission thus was required to undertake the exercise so as to avoid repetition of those failings of due to which the report of first Commission could not be implemented. The Commission was not oblivious of it as in paragraph 1.17 of the report it observed,

Though the above failings are serious, yet the real weakness of the Report lies in its internal contradictions. As stated in para 1.5 of this Chapter, three of the Members were opposed to one of the most crucial recommendations of the Report, that is, the acceptance of caste as a criterion for social backwardness and the reservation of posts in Government services on that basis.

Yet the Commission undertook extensive exercise for ascertaining social system and opined that,

12.4 In fact, caste being the basic unit of social organisation of Hindu society, castes are the only readily and clearly "recognisable and persistent collectivities.

Having done so it determined social and educational backwardness in paragraph 11.23 as under :

11.23 As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e., Social, Educational and Economic. They are:

A. Social

(i) Castes/Classes considered as socially backward by others.

(ii) Castes/Classes which mainly depend on manual labour for their livelihood.

(iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.

(iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational

(v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.

(vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average.

(vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. Economic

(viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households.

(xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

11.24 As the above three groups are not of equal importance for our purpose separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 points each, Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight one fact that socially and educationally backward classes are economically backward also.

11.25 It well be seen that from the values given to each Indicator, the total score adds up to 22. *All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50 per cent (i.e., 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'.*

(Emphasised supplied)

In paragraph 12.2 of the Report the Commission observed,

As the unit of identification in the above survey is caste, and caste is a peculiar feature of Hindu society only, the results of the survey cannot have much validity for non-Hindu communities. Criteria for their identification have been given separately.

The Commission, thus, on own showing identified socially and educationally backward class amongst Hindus on caste. The criteria for identifying non-Hindus backward classes was stated in paragraph 12.18:

(i) All untouchables converted to any non-Hindu religion; and

(ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples : Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.)

650. Caste was thus adopted as the sole criteria for determining social and educational backwardness of Hindus. For members of other communities test of conversion from Hinduism was adopted. The Commission, even, though noticed that the first Commission suffered from inherent defect of identifying on caste proceeded, itself, to do the same.

651. In preceding discussion it has been examined, in detail, as to why caste cannot be the basis of identification of backward class. The constitutional constraint in such identification does not undergo any change because different groups or collectivity identified on caste are huddled together and described as backward class. By grouping together, the cluster of castes does not loose its basic characteristic and continues to be caste.

652. No further need be said as whether the Commission acted in terms of its reference and whether the identification was constitutionally permissible and legally sound, before it could furnish for any exercise, legislative or executive, was to be undertaken by the government.

653. Use of expression, 'nothing in this Article shall prevent Parliament' in Article 16(4) cannot be read as empowering the State to make reservation under Article 16(4) on race, religion or caste. It would result in regenerating the communal representation in services infused by Britishers by different orders issued from 1924 to 1946. How such an expression should be interpreted need not be elaborated. Both the text books and judicial decisions are full of it. To comprehend the real meaning the provision itself, the setting or context in which it has been used, the purpose and background of its enactment should be examined, and interpretational exercise may be resorted to only if there is a compelling necessity for it. In earlier decisions rendered by the Court till sixties Article 16(4) was held to be exception to Article 16(1). But from 1976 onwards it has been understood differently. Today Article 16(1) and 16(4) are understood as part of one and same scheme directed towards promoting equality. Therefore what is destructive of equality for Article 16(1) would apply equally to Article 16(4). The non-obstante clause was to take out absolutism of Article 16(1) and not to destroy the negatism of Article 16(2).

654. Rule of statutory construction explained by jurists is to adopt a construction which may not frustrate the objective of enactment and result in negation of the objective sought to be achieved. Rigour of its application is even more severe in constitutional interpretation as unlike statute its

provisions cannot be amended or repealed easily. Accepting race, religion and caste as the remedy to undo the past evil would be against constitutional spirit, purpose and objectives. As stated earlier this remedy was adopted by the framers of the Constitution for SC/ST. What was not provided for others should be deemed, on principle of interpretation, not to have been approved and accepted. Even if two constructions of the provisions could have been possible, 'the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity and given rise to practical incovenience'. Since acceptance of caste, race or religion would be destructive of the entire constitutional philosophy and would be contrary to the Preamble of the Constitution it cannot be accepted as a legal method of identification of backward classes for Article 16(4).

655. Would the consequences be different if race, religion or caste etc. are coupled with some other factors? In other words, what is the effect of the word, 'only' in Article 16(2). In the context it has been used it operates, both, as permissive and prohibitive. If is permissive when State action, legislative or executive, is founded on any ground other than race, religion or caste. Whereas it is prohibitive if it is based exclusively on any of the grounds mentioned in Article 16(2). Javed Niaz Beg and Anr. v. Union of India and Anr. MANU/SC/0070/1980 : [1980]3SCR734 , furnishes best illustration of the former. A notification discriminating between candidates of North Eastern States, Tripura, Manipur etc. on the one hand and others for IAS examination and exempting them from offering language paper compulsory for everyone was upheld on linguistic concession. When it comes to any State action on race, religion or caste etc. the word, 'only' mitigates the constitutional prohibition. That is if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge. What does it mean? Can a State action founded on race, religion, caste etc. be saved under Article 16(2) if it is coupled with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. Use of word, 'only' was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well. For instance, in State of Rajasthan v. Pradip Singh, MANU/SC/0024/1960 : [1961]1SCR222 , where exemption granted to Muslims and Harijans from levy of cost for stationing additional police force was attempted to be defended because the notification was not based, 'only' on caste or religion but because persons belonging to these communities were found by the State not to have been guilty of the conduct which necessitated stationing of the police force it was struck down as discriminatory since it could not be shown by the State that there were no law abiding persons in other communities. Similarly identification of backward class by such factors as dependence of group or collectivity on manual labour, lower age of marriage, poor schooling, living in kuccha house etc. and applying it to caste would be violative of Article 16(2) not only for being caste based but also for violation of Article 14 because it, excludes other communities in which same factors exist only because they are not Hindus. Further the group or collectivity, thus, determined would not be caste coupled with other but on caste and caste alone.

656. Today if Article 16(2) is construed as justifying identification of backward class by equalizing them with those castes in which the customary marriage age is lower or majority of whom are living in kuccha houses or a sizeable number is working as manual labour then tomorrow the identification of backward class amongst other communities where caste does not exist on race or

religion coupled with these very considerations cannot be avoided. That would result in making reservation in public services on communal considerations. An interpretation or construction resulting in such catastrophical consequences must be avoided.

(12)

657. Backward used in Article 16(4)is wider than socially and educationally used in Article 15(4) and weaker sections used in Article 46. SC/ST are covered in either expression. But same cannot be said for others. Backward, cannot be defined as was, wisely, done by the Constitution makers. It has to emerge as a result of interaction of social and economic forces. It cannot be static. Many of those who were Sudras in 17th and 18th Centuries ceased to be so in 19th and 20th Century due to their educational advancement and social acceptablity. Members of various backward communities, both, in South and North who were moving upwards even before 1950 compare no less in education, status, economic advancement or political achievement with any other class in society. The average lower middle class of Muslims or Christians may not be better educationally or economically and in many cases even socially than the intermediate class of backward class of Sri Paik's list. For instance the bhisties (the water carriers in leather bags) among Muslims. Does Article 340 empowering President to ascertain educational and social backwardness of citizens of this country not include those poor socially degraded and educationally backward. Are they not citizens of this counrty? Could backwardness of Muslims, Christians and Buddhists be recognised for purposes of Article 16(4) only if they were converts from Hinduism or such backwardness for preferential treatment be recognised only if a group or class was Hindu at some time or was occupationally comparable to Hindus. That is if members of other community carry on occupation which is not practised by Hindus, for instance bhisties amongst Muslims, then they cannot be regarded as backward class even if it has been their hereditary occupation and they are socially, educationally and economiclly backward. A Commission appointed under Article 340 by the President is not to identify Hindu, backwards only but the backward class within the territory of India which includes Hindu, Muslim, Sikh or Christian etc. bora and residing in India within meaning of Article 5 of the Constitution. The expression is not only backward class but backward class of citizens. And citizens means all those who are mentioned in Articles 5 and 10 of the Constitution.

658. Thus neither from the language of Article 16(4) nor the literal test of interpretation nor from the spirit or purpose of interpretation nor the present - day social setting, warrants construction of the expression backward class as backward caste. Consequently what comes out of the examination from different aspects leads to conclusion that:

(1) Backward class in Article 16(4) cannot be read as backward caste.

(2) Expression 'backward class' is of wider import and there being no ambiguity or danger of unintended injustice in giving it its natural meaning it should be understood in its broader and normal sense.

(3) Backward class under Article 16(4) is not confined to erstwhile sudras or depressed classes or intermediate backward classes amongst Hindus only.

(4) Width of the expression includes in its fold any community Hindu, Muslim, Christian, Sikh, Budha, or Jain etc. as the expression is 'backward class of citizens'.

* * * * *

'E'

659. Reason for backwardness or inadequate representation in services of backward Hindus prior to 1950 were caste division, lack of education, poverty, feudalistic frame of society, and occupational helplessness. All these barriers are disappearing. Industrialisation has taken over. Education, through State effort and due to awareness of its importance, both, statistically and actually has improved. Feudalism died in fifties itself. Even the Mandal Commission accepts, this reality . Any identification of backward class for purposes of reservation, therefore, has to be tested keeping in view these factors as the exercise of power is in presenti. Importance of word 'is' in Article 16(4) should not be lost of. Backwardness and inadequacy should exist on the date the reservation is made. Reservation for a group which was educationally, economically and socially backward before 1950 shall not be valid unless the group continues to be backward today. The group should not have suffered only but it should be found to be suffering with such disabilities. If a class or community ceases to be economically and socially backward or even if it is so but is adequately represented then no reservation can be made as it no more continues to be backward even though it may not be adequately represented in service or it may be backward but adequately represented.

660. Ethical justification for reverse discrimination or protective benefits or ameliorative measures emanates from the moral of compensating such class or group for the past injustices inflicted on it and for promoting social values. Both these aspects are fully borne out from the Constitutional Assembly Debates. Anxiety was to uplift the backward classes by enabling them to participate in administration as they had been excluded by few who had monopolised the services. Objective was to change the social face as it shall advance public welfare, by demolishing rigidity of caste, promoting representation of those who till now were kept away thus providing status to them, restoring balance in the society, reducing poverty and increasing distribution of benefits and advantages to one and all. The compensatory principle implies that like an individual a group or class that has remained backward for whatever reason, should be provided every help to overcome the shortcomings but once disadvantage disappears the basis itself must go. For instance there may be four groups of different nature deserving such protection. Some of it may improve and come up in the social stream within short time. Can it be said that since they were kept excluded for hundred years the compensation by way of protective benefits should continue for hundred years. That would be mockery of protective discrimination. The compensation principle, 'makes little sense unless it is involved in connection with assertion that the malignant effects of prior deprivation are still continuing'. The social utility of preferential treatment extended to the disadvantage and weaker too should not be pushed too far on what happened in the past without looking to the present. Such construction of Article 16(4) arises not because of what has been said by some of the American judges but on plain and simple reading of the word, 'is' in the Article.

661. An egalitarian society or welfare state wedded to secularism does not and cannot mean a social order in which religion or caste ceases to exist. 'India is a seculiar but not an anti-religious

state. Article 25 is pride of our democracy. But that cannot be basis of state activities. May be caste is being exploited for political ends. Chinnappa Reddy, J. has very graphically described it in Karnataka Third Backward Class Commission Report (1990).

And, we have political parties and politicians who, if anything, are realists, fully aware of the deep roots of caste in Indian society and who, far from ignoring it, feed the fire as it were and give caste great importance in the choice of their candidates for election and flaunt the caste of the candidates before the electorate. They preach against caste in public and thrive on it in private.

662. Even Mandal Commission observed that what, 'caste lost on ritual front it gained on political front'. In politics caste may or may not play an important role but politics and constitutional exercise are not the same. A candidate may secure a ticket on caste considerations but if he or his agent or any person with his consent or his agent's consent appeals to vote or refrain from voting on ground of religion, race or caste then he is guilty of corrupt practice under Section 123(3) of the Representation of People Act and his election is liable to be set aside. Thus caste, race or religion are prohibited even in political process. What cannot furnish basis for exercise of electoral right and is constitutionally prohibited from being exercised by the State cannot furnish valid basis for constitutional functioning under Article 16(4). Utilization of caste as the basis for purpose of determination of backward class of citizens is thus constitutionally invalid and even ethically and morally not permissible. Existence of caste in the past and present, its continuance in future cannot be denied but insistence that since it is being practised or observed for political purpose even though unfortunately it should be the basis for identification of backwardness in services is not only robbing the Constitution of the fresh look it promised and guaranteed but would result in perpetuating a system under ugly weight of which the society had bent earlier.

Thus, (i) backwardness and inadequacy of representation in service must exist on the date the reservation is being made.

(ii) Any past injustice which entitles a group for protective discrimination must on principle of compensation or social justice be continuing on the date when reservation is being made.

* * * * *

'F'
(1)

663. 'It is easier to give power but difficult to give wisdom'. Dr. Ambedkar quoted this Burke's thought in the Constituent Assembly Debate and exhorted 'let us prove by our conduct that we have not only the power but also the wisdom to carry with us all sectors of the country which is bound to lead us to unity'. How to effectuate this wisdom? For Article 16(4) how to determine who can be legally considered to be backward class of citizens? The answer is simple. By adopting, constitutionally permissible methodology of identification irrespective of their race, religion or caste. The difficulty, however, arises in finding out the criteria. Although the work should normally be left to be undertaken by the State as the courts are ill equipped for such exercise due to lack of data, necessary expertise and relevant material but with development of role of courts from mere, 'superintend and supervise' to legitimate constitutional affirmative decision, this Court is not only

duty bound but constitutionally obliged to lay down principles for guidance for those who are entrusted with this responsibility, with a sense of duty towards the country as the occasion demands never more than now, but with remotest intention to interfere with legislative, or executive process. What the Nation should remember is that the basic values of constitutionalism guaranting judicial independence is to enable the courts to discharge their duty without being guided by any philosophy as judicial interpretation,

gives better protection than the political branches to the weak and outnumbered, to minorities and unpopular individuals, to the inadequately represented in the political process.

664. Before doing so it is necessary to be stated, at the outset, that identification of backward classes for purposes of different States may not furnish safe and sound basis for including all such groups or collectivities for reservation in services under the Union. Reason is that local conditions play major part in such exercise. For instance habitation in hills of U.P. was upheld as valid basis for identifying backwardness. Same may not be true of residents of hills in other States. Otherwise entire population of Kashmir may have to be treated as backward. In Kerala State most of the Muslims are identified as backward. Can this be valid basis for other States. Even the Mandal Commission noticed that some castes backward in one State are forward in others. If State list of every State is adopted as valid for central services it is bound to create confusion. One of the apparent abuse inherent in such inclusion is that it is apt to encourage paper mobility of citizens from a State where such class or caste is not backward to the State where it is so identified. This apart such inclusion may suffer from constitutional infirmity. Many groups or collectivities in different States are continuing or have been included in the State list due to various considerations political or otherwise. State of Karnataka is its best example. Commission after commission beginning from Gowda Commission, Venkataswamy Commission and Havanur Commission despite having found that some of the castes ceased to be backward they continue in the list due to their political pressure and economic power. Ghanshyam Shah 'Economic and Political Weekly' Vol. 26 (1991) p. 601 in 'Social Backwardness and Politics of Reservations', has pointed out, 'Among the sudras there are peasant castes, artisan castes and nomadic castes. Subjective perception of one's position in the 'varna' system varies and changes from time to time, place to place and context to context. For instance, the Patidars of Gujarat were considered sudras a few decades ago, but not they call themselves vaishyas, and are acknowledged as such by others. It is significant that they are not have-nots. Similar is the case of Vokkaligas and Lingayats of Karnataka, Reddies and Kammas of Andhra Pradesh, Marathas of Maharashtra and to some extent Yadavas of Bihar.' Yet these castes or group have been identified as backward class in their State. Whether such inclusion on political, economic and social condition is justified in State list or not but inclusion of a group or collectivity in list of socially and educationlly backward classes, which is a term narrower and different than backward class for services under the Union without proper identification only on State list may not be valid. For services under the Union, therefore, some principle may have to be evolved which may be of universal application to members of every community and which may be adopted by State, as well, after adjusting it with prevalent local conditions.

665. Ours is a country comprising of various communities. Each community follows different religion. Centuries of historical togetherness has influenced each other. Caste system which is peculiar to Hindus infiltrated even amongst Muslims, Christians, Sikhs or others although it has

no place in their religion. The Encyclopedia Americana International Edition describes the development thus,

All important communities, including the Muslims., Christians, and Sikhs, have some sort of caste scheme. These schemes are patterned after the Hindu system, since most of these people originally came from Hindu stock. The large-scale conversions that have been going on for centuries have modified Indian caste society. Thus traditional Hindu communal and connubial rituals and emphasis on inherited social status or rank though generally rejected in the Islamic or Christian religious ethic, nevertheless operate on social plain in these societies in India. In India social rites and customs very from region to region rather than from religion to religion. Among the Muslims, the Sayids, Sheikh, Pathan, and Momin, among others, function as exclusive endogamous caste groups. The Christians are divided into a number of groups, including the Chaldean Syrians, Jacobite Syrians, Latin Catholics, Marthom Syrians, Syrian Catholics, and Protestants. Each of these groups practices endogamy. Among the Catholics, the Syrian Romans and the Latin Romans generally do not intermarry. The Christians have not wholly discarded the idea of food restrictions and pollution by lower caste members. When lower caste Hindus were converted to Christianity a generation or two ago, they were not allowed to sit with high caste Christians in Church, and separate churches were erected for them.

666. On the social plain therefore there has been lack of mobility from one group to other. Amongst Hindus it has been more marked. Inter-se discrimination has been worse. Untouchables prior to 1950 have been victims of social persecutions not ony by the twice born but even the so-called intermediate backward classes. But what appears to be common in each community is that the caste divide is more or less occupational based. A washerman or a barber, a milkman or an agriculturist, are all known among Hindus by castes and amongst others by occupation. In fact they are all occupational. Very genesis of Chatur Varna was occupational.

According to Kroeber, castes are special form of social classes, 'which in tendency at least are present in every society. Castes differ from social classes, however, in that they have emerged into social consciousness to the point that custom and law attempt their rigid and permanent separation from one another'.... 'The jatis which developed later and which continued to grow in number have their economic significance; they are for the most part occupational groups and, in the traditional village economy, the caste system largely provides the machinery for the exchange of goods and services.

But these rigid stratifications are breaking today. The social inter-se barriers are rapidly disappearing. Values are fast changing. In fact many of the backward classes as observed by Sri Naik in his separate note to the Mandal Commission Report 'co-existed since times immemorial with upper castes and had therefore some scope to imbibe better association and what all its connotes'. Take for instance the list of the 'Intermediate Backward Class' where traditional occupation, according to Sri Naik has been, 'agriculture, market gardening, betal leaves, grovers, pastoral activities, village industries like artisans, tailors, dyers and weavers, petty business-cum-agricultural activities, heralding, temple service, toddy selling, oil mongering, combating, astrology etc. etc.'. Their backwardness has been primarily economic or educational. Mobility, too, occupational or professional has not been very rigid. An agriculturist or an artisan, a dyer or weaver had the occupational freedom of moving in any direction. Consideration for marriage or social

customs may be different. But that prevails in every strata of society. One sect of a caste or community Hindu or Muslim, or even Christian, forward or backward does not prefer marrying in another sect what to say of caste. But these considerations are not relevant for identifying backward class for public employment. Lack of education, at least among so-called intermediate backward classes, was more due to personal volition than social ostracisation. Historical social backwardness has already been taken care of by providing reservation to SC/ST and empowering President to include any group or collectivity found to be suffering from such disability. Same yardstick cannot be applied for socially and educationally backward class for whom the President has been empowered to appoint a Commission and who only after identification are to be deemed to be included as SC and ST by virtue of Article 338(10). From the preceding discussion it is clear that identification of such class cannot be caste based. Nor it can be founded, only, on economic considerations as 'Mere poverty' cannot be the test of backwardness. With these two negative considerations stemming out of constitutional constraints two positive considerations, equally important and basic in nature flow from principle of constitutional construction one that the effort should, primarily, be directed towards finding out a criteria which must apply uniformly to citizens of every community, second that the benefit should reach the needy. Various combinations excluding and including caste as relevant consideration have been discussed in different decisions which need not be mentioned as occasion to examine social and educational backwardness in public services and that also in union services never arose.

667. In sub-paragraph (ii) of paragraph 12.8 extracted earlier the Mandal Commission recommended occupational identification for non-Hindus if the community was traditionally known to carry on the hereditary occupation of their counterpart amongst Hindus and included in the test of OBC. The Commission thus recognised occupational divide among Hindus. If occupation amongst Hindus can be basis for identification of backwardness among non-Hindus then why cannot it furnish basis for identification amongst Hindus itself.

668. Ideal and wise method, therefore, would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be the caste itself. Find out their social acceptability and educational standard. Weight them in the balance of economic conditions. Result would be backward class of citizens needing genuine protective umbrella. Group or collectivity which may thus emerge may be members of one or the other community. Advantage of occupational based identification would be that it shall apply uniformly irrespective of race, religion and caste. Reason for accepting occupation based identification is that prior to 1950 Sudras amongst Hindus were all those who were not twice born. Amongst them there was vertical and occupational divisions. No similar to hierarchy existed amongst Muslims. Same is true of other communities. Sri Naik narrated a list of, 'intermediate backward classes' and 'depressed backward classes'. It may not be exhaustive. But it is indicative that different categories of persons are, normally, known by occupation they carry. 'Castes, therefore, are special form of classes which in tendency are present in every society'. It was said by Lord Bryce long back for America that classes way not be divided, for political purposes into upper and lower and richer and poorer, 'but according to their respective occupation they follow'. Class according to Tawny may get formed due to various reasons, 'war, the institution of private property, biological characteristic, the division of labour'. And, 'Even today, indeed though less regularly than in the past class tends to determine occupation rather than occupational class. So is the case in our society. It is immaterial

if caste has given rise to occupation or vice versa. In either case occupation can be the best starting point constitutionally permissible and legally valid for determination of backwardness.

669. For instance, priests either in Hindus or Mullahs in Muslims or Bishops or Padris amongst Christians or Granthi in Sikhs are considered to be at the top of hierarchal system. They cannot be considered to be backward in any community not because of their religion but the nature of occupation. Similarly the untouchables became outcaste due to nature of the job they performed. On lower level whether it is barber or tailor, washerman or milkman, agricultural class or artisan they are a group or class who can be identified in any community. Identifying them by caste may mean that a Muslim or Christian who for generations has been carrying on same occupation as his counterpart amongst Hindus cannot be identified as backward class. And if it is done then for Hindus it would be caste based whereas for others occupational. How far that would be legal and constitutional is one matter but if the yardstick of occupation is applied to every community the identification would be uniform without exclusion of any. For instance weavers or washerman. They may be both Hindus and Muslims. It would be unfair to include Hindu washerman and exclude Muslim washerman.

670. Having adopted occupation as the starting point next step should be to ascertain the social acceptability. A lawyer, a teaching and a doctor of any community whether he is a teacher of primary school or University, a Vaid or Hakim practising in the village or a professor in Medical college always commands social respect. Similarly social status amongst those who perform lower job depends on the nature of occupation. A person carrying on scavenging became an untouchable whereas others who were as lower as untouchable in the order became depressed. For instance coboler. Same did not apply to those who carried on better occupation. A person having landed property and carrying on agricultural occupation did not in social hierarchy command lesser respect than the one carrying on same occupation belonging to higher caste. But backwardness should be traditional. For instance only those washerman or tailor should be considered backward who have been carrying on this occupation for generations and not the modern dry cleaner or fashion tailOrs. If the collectivity satisfies both the tests then apply the test of education. What standard of education should be adopted should be concern of the State. Existence of, both, that is social and educational backwardness for a group or collectivity is indicated by Article 15(4) itself. Use of such expression was purposive. Mere educational or social backwardness would not have been sufficient as it would have enlarged the field thus frustrating the very purpose of the amendment. That is why it was observed in Balaji that the concept of backwardness was intended, 'to be relative in the sense that any class who is backward in relation to the most advanced classes should be included in it. And the purpose of amendment could be achieved if backwardness under Article 15(4) was understood as comprising of social and educational backwardness. It is not either social or educational, but it is both social and educational'. Reading the expression disjunctively and permitting inclusion of either socially or educationally backward class of citizens would defeat the very purpose. For instance some of the so-called higher castes who by nature of their occupation or caste have been accepted by society to be socially advanced may enter because of the group or collectivity having been educationally backward. Many agricultural occupationists both in South and North have chosen to remain educationally backward even though by virtue of their landed property they have always been compared to any higher class. Can such persons be permitted to take benefit of such benign measures. Not on the language, purpose and objective of these provisions.

671. After applying these tests the economic criteria or the means test should be applied. Poverty is the prime cause of all backwardness. It generates social and educational backwardness. But wealth or economic affluence cuts across all. A wealthy man irrespective of caste or community needs no crutches. Not in 1990 when money more than social status and education have become the index. Therefore, even if a group or collectivity is not educated or even socially backward but otherwise rich and affluent then it cannot be considered backward. There is no dearth of class or group who by the nature of the occupation they have been pursuing are economically well off. Including such groups would be doing injustice to others. Thus occupation should furnish the starting point of determination of backward class. And if in ultimate analysis any Hindu caste is found to be occupationally, socially, educationally and economically backward it should be regarded as eligible for benefit under Article 16(4) because it would be within constitutional sanction.

(2)

672. Identification alone does not entitle a group or class to be entitled for protective benefits. Such group or collectivity should be inadequately represented. Use of such words as a equate or inadequate are no doubt wide and vague and their meaning has to be gathered, 'largely on the point of view from which the facts may be proved are reconsidered'. But from the purpose and objective of Article 16(4) a collectivity or group which is found to be backward cannot qualify for being included if it is adequately represented. Word 'any' has great significance. In wider sense it extends to and includes all group or collectivity, which is as much 'any' backward class as any singularity. In the larger sense comprising of entire plurality it continues and may continue but in the limited sense the group may keep on getting in and out depending on continuance of those conditions which entitled it to be determined as backward. A government of a State or the Central Government may on evaluation after five or ten years direct a group or collectivity to be excluded from the list of backward classes if it finds it adequately represented. What is adequate representation is of course the primary concern of the government. But the exercise should be objective. For instance in some States it was found by Commissions appointed by their governments that certain castes were adequately represented. Yet because of extraneous reasons the government had to bow and include them in the list of backward classes. Such inclusion is a fraud of constitutional power. Any citizen has a right to challenge and court has obligation to strike it down by directing exclusion of such group from the backward class. Inadequacy provides jurisdiction not only for exercise of power but its continuance as well. If that itself ceases to exist the power cannot be continued to be exercised. Where power is coupled with duty the condition precedent must exist for valid exercise of power. Mere identification of collectivity or group by a Commission cannot clothe the government to exercise the power unless it further undertakes the exercise of determining if such group or collectivity is adequately or inadequately represented. The exercise is mandatory not in the larger sense alone but in the narrower sense as well.

* * * * *

'G'
(1)

673. More important that determination of backward class is the proportion in which reservation can be done as it is not only a social or economic problem or the question of empowering but a constitutional and legal issue which calls for serious deliberation. Although political statesmanship of the framers of the Constitution intended to confine it to 'minority of seats' the judicial pragmatism raised it 'broadly and generally' to less than 50% in Balaji and not beyond that in T. Devadason v. Union of India MANU/SC/0270/1963 : (1965)IILLJ560SC . Effect of these two decisions was that the reserved and non-reserved seats both for purposes of admission in educational institution under Article 15(4) and for appointment and posts in Article 16(4) were divided in half and half. But once the reservation climate spread in the country's environment it took over the political set up of different States to provide for reservation for different groups for different reasons. And legal justification for such reservation was provided for by the courts, either on the touchstone of Article 14 being a reasonable classification or under Article 16(1) as preferential treatment for disadvantaged groups. If in Chitra Ghosh and Anr. v. Union of India, MANU/SC/0042/1969 : [1970]1SCR413 , the provision for government nominees in medical colleges was upheld, 'as the government which bears the financial burden of running medical colleges' could not be, 'denied the right to decide from what sources the admission will be made' then D.N. Chanchala v. State of Mysore, MANU/SC/0040/1971 : AIR1971SC1762 , did not find it unreasonable to extend the principle of preferential treatment, of socially and educationally backward in Article 15(4), to children of political sufferers as 'it would not in any way be improper if that principle were to be applied to those who are handicapped but do not fall under Article 15(4)'. The reservation in favour of wards of defence personnel was upheld as a reasonable classification in Subhashini v. State of Mysore, MANU/KA/0105/1966 as the reservation was in national interest. Result of such extensions and justification was multiplication of categories and withdrawal of more and more seats and posts from open competition. And when observations were made in Thomas that 50% was, 'a rule of caution' and, 'percentage of reservation in proportion to population did not violate Article 16(4)', a virtual go by was given by various states to the balancing equality created by courts and reservations were made much beyond 50% and the High Courts had no option but to uphold them. Thus the combined effect of these principles, developed by Balaji and Davadason, on the one hand and Chitra Ghosh, Chanchala and Thomas on the other was that reservation up to 50% under Articles 15(4) and 16(4) and up to, 'reasonable extent' under Article 16(1). Under one it became SC/ST and BC and under the other wards of Military and Defence personnel, Jagdish Rai v. State of Haryana AIR 1977 Har 56, Political, sufferers, sportsman, Children of MISA, State of Karnataka v. Jacob Maltew ILR (1964) 2 Ker 53 and DSIR, Chhotey Lal v. State of U.P. MANU/UP/0039/1979 : AIR1979All135 , detenue etc. Is this sound either constitutionally or legally or socially?

(2)

674. Article 16(1), (2) and (4) is extracted below:

16. Equality of opportunity in matters of public employment-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.'

675. Originally this Article as introduced in the Constituent Assembly was Article 10 and its Sub-article (3) identical to Sub-article (4) of Article 16 provided for reservation, 'in favour of any class of citizens'. It was the Drafting Committee which qualified the expression, 'class of citizens' by adding the word 'backward' before it. Effect of this addition was that clause got narrowed and the reservation could be made only for those class of citizens who could be grouped as backward. Putting it the other way the framers of the Constitution decided against expansive reservation which under original proposal could have extended to any class of citizens. What was thus consciously and deliberately given up by exercising the option in favour of only those class of citizens who could be identified as backward then reservation in favour of any other class of citizens cannot legitimately and legally be accepted as valid. Extending it to other class of citizens under cover of reasonable classification would be constitutional distortion. What should be deemed to be prohibited in the light of historical background cannot be brought back from the backdoor on principle developed by the American courts under Equal Protection Clause as they had to rise to the occasion due to absence of a provision like Article 16(4), and the fractured interpretation put in the Slaughter house cases, which eroded the very foundation of Equal Protective clause 'mainly intended for the benefit of Negro freedom'.

676. Reservation co-related with population was not accepted even by the Constituent Assembly. On plain construction inadequacy of representation cannot be the measure of reservation. That is creative of jurisdiction only. In fact Dr. Ambedkar's illustration while persuading all sections to accept the drafting committee proposal is very instructive.

Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.

Even otherwise if the framers would have intended to provide for reservation to extent of backwardness of the population it would have been simpler to use the expression, 'in proportion to it' after the word 'backward class of citizens' and before 'is not' adequately represented. Article 16(4) then would have read as under:-

Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens in proportion to it is not adequately represented in the services under the State.

No rule of interpretation in absence of express or implied indication permits such substituted reading.

677. In Thomas, (supra 46) Mathew J., introduced concept of proportional equality from two American decisions Griffin v. Illionois 351 US (12) and Harper v. Virginia Board of Educations 383 US 663 [1966]. None of the decisions were concerned with affirmative action. The one related to payment of charges for translation of manuscript in appeal and other with levy of poll tax at uniform rate indiscriminately. In view of clear phraseology and the background of enactment of Article 16(4) any interpretation of it on ratio of American decisions cannot be of any help. Our Constitution does not approve of proportional representation either in services or even in Parliament as is illustrated by Article 331 of the Constitution which empowers the President to nominate not more than two members of the Anglo-Indian community to the House of People, irrespective of their population, if they are not adequately represented. Same is the theme of Dr. Ambedkar's speech, in Constituent Assembly, extracted earlier. For the same reasons the observation of Fazal Ali, J. in Thomas (supra),

...Decided cases 01 this Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16. The answer must necessarily be in the negative.

cannot be accepted as correct construction of Article 16(4). True as observed by Krishna Iyer, J., in Soshit Karamchari (Supra) and Chinnappa Reddy, J., in Vasantha Kumar (supra) that there is no constitutional provision restricting reservation to 50% but with profound respect, the debates in the Constituent Assembly, the provisions in the Constitution do not support the construction of Article 16(4) as empowering government to reserve posts for backward class of citizens in proportion to their population. Any construction of Article 16(4) cannot be divorced without taking into account Article 16(1). Equality in services has been balanced by providing equal opportunity to every citizen at the same time empowering the State to take protective measure for the backward class of citizens who are not adequately represented. This balancing of equality cannot be lost sight of while interpreting these provisions. Since there is no clear indication either way the role of the courts become both important and responsible, by interpreting the provision reasonably and with common sense so as to carry out the objective of its enactment. And the purpose was to enable the backward class of citizens to share the power if they were not adequately represented but not to grant proportional representation, a typical British concept rejected by our Bounding Fathers.

(4)

678. Equality has various shades. Its understanding and application have been shaped by social, economic and political conditions prevailing in the society. The reigning philosophy since 18th century has been the State's responsibility to reduce disparities amongst various sections of the population and promoting a just and social order in which benefits and advantages are evenly distributed. To achieve this basic objective various theories have been advanced from time to time. The formal equality advanced by Aristotle that equals should be treated equally and unequals unequally was as much result of social and economic conditions as the Rawls theory of justice or the Dworkin's concepts of right of all to treatment as equals. Liberty and right to equality taken individually may appear to pull in different directions. But viewed as part of justice and fairness the two are the primary tenets of modern egalitarian society. The real difficulty is translating them into practical working. The American concept of 'equal but separate' doctrine is the best illustration of distance between theory and practice of equal protection. The recognition and realisation that neither all men are equal nor are the circumstances in which they are born or grow are same gave rise to classification and grouping of persons similarly situated and extending them equal or same treatment. But the classification has to be reasonable and rational bearing a just relation with the legislative purpose and should not be invidious or arbitrary. In our constitutional scheme the classification in matters of employment or appointment in the services has been done constitutionally. From the entire class of all citizens any backward class has been classified for beneficial or benign treatment. The legislature or executive therefore cannot transgress it. Since the Constitution treats all citizens alike for purposes of employment except those who fall under Article 16(4) any further classification of grouping for reservation would be constitutionally invalid. No legislative exercise can transcendent the constitutional barrier. For valid classification legislature or executive measures must be co-related with legislative purpose or objective. Once the Constitution itself unfolded the purpose of achieving the goal of equality by permitting reservation for backward classes, only, any further reservation being beyond constitutional purpose would be impermissible and per se invalid.

679. Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is the avowed objective. Atoning for the past injustices on backward classes through Constitutional mechanism was morality raised to legal plain. Admonition to State not to deny equality before law or equal protection of laws found on sound public policy, is in reality the measure of fundamental right which every person enjoys. But, principle of the equal protection of law does not mean that, 'every law must have universal application to all persons who are not by nature, attainment or circumstance, in the same position', Dhirendra Kumar Mandal v. The Supdt. & Remembrancer of Legal Affairs to the Govt. of West Bengal and Anr. MANU/SC/0060/1954 : [1955]1SCR224 and the varying needs of different classes of persons require special treatment. Principle of reasonable classification was developed by theorists and courts to enable State to function effectively by classifying reasonably. But the theory developed by Tussman and Breck that equal Protection clause really dealt with the problem with the relation of two classes to each other one of individuals possessing the definite trait and the other of individuals tainted by the mischief at which the law aims said to be, 'the first comprehensive analysis of the Equal Protection Clause' may be applicable while considering the scope of Article 14 but once the Constitution makers treated employment in services separately by creating fundamental right in favour of all citizens in pursuance of the ideal of Preamble to secure to all its citizens equality in opportunity and status then it has to be understood in its own perspective. Various sub-articles of Article 16 specially Clause 4 indicates constitutional classification and

creation of two classes one dealt with in Article 16(1) and the other in Article 16(4). Principle of reasonable classification for purposes of creating another class or planting one class in another would be constitutionally infirm.

680. All the same the legislative anxiety of affirmative action by preferential treatment to disadvantaged group lagging behind may not be doubted. Difference between reservation and preferential treatment is that in one a group or class or collectivity is separately provided for and the competition is amongst them only. Whereas in preferential treatment the collectivity is part of the same group but it is permitted some weightage due to social, economic or any justifiable reason. For purposes of achieving equality by result Article 16 creates two compartments, one general and the other reserved and then both are paired together. But preference is available in the same compartment. Validity of one depends on constitutional sanction whereas the second has to stand on test of reasonableness. For instance the reservation of backward class cannot be assailed as being violative of constitutional guarantee whereas preferential treatment can be upheld only if it is reasonable with the nexus it seeks to achieve. Article 16 unlike Article 14 is a positive right of equal opportunity. Therefore, any preferential treatment shall have to be tested in the light of the constitutional objective the Article seeks to achieve. That is what is its natural, operation and effect. Reservation made for backward class of citizens achieves the constitutional goal of achieving equality of opportunity of all. Same cannot be said for others. Any reservation for any other class would be, as already explained, contrary to constitutional objective thus invalid. Wards of military personnel or political sufferers or any other class cannot be extended the benefit of benign discrimination as that would be violative of equality of opportunity. In absence of any objective or purpose discernible from the Constitution the State action would be liable to be struck down for absence of necessary co-relation between constitutional purpose and its means. Nexus such as national purpose or principle contained in Article 15(4) would not justify such action. Even preferential treatment by way of weightage may be permissible in very limited cases and any such measure would be liable to strict judicial scrutiny. Principle of Article 14 of reasonable classification may be relevant only to limited extent as to whether it is backed by reason and is justified but since it has to be tested further on touchstone on Article 16(1) the reasonable classification must be so tailored as not to contravene the right to equal opportunity.

681. No provision of reservation or preference can be so vigorously pursued as to destroy the very concept of equality. Benign discrimination or protection cannot under any constitutional system itself become principle clause. Equality is the rule. Protection is the exception. Exception cannot exhaust the rule itself. True no restriction was placed on size of reservation. But reason was the consensus understanding that it was for minority of seats. That apart the reservation under Article 16(4) cannot be taken in isolation. Article 16(1) and Article 16(4) being part of same objective and goal, any policy of reservation must constitutionally withstand the test of inter action between the two. In this perspective reservation cannot be except for, 'minority of seats'. Our founding fathers were aware that such policies were bound to have political overtones. Various considerations may result in influencing the political decision. That is why their validity in the constitutional framework was left to the courts. Observations by Dr. Ambedkar in Constituent Assembly Debates are quite pertinent,

If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the

reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.

Since this Court has consistently held that the reservation under Articles 15(4) and 16(4) should not exceed 50% and the States and the Union have by and large accepted this as correct it should be held as constitutional prohibition and any reservation beyond 50% would liable to be struck down. Therefore,

(i) Reservation under Article 16(4) should in no case exceed 50%;

(ii) No reservation can be made for any class other than backward class either under Article 16(1) or 16(4).

(iii) Preferential treatment in shape of weightage etc. can be given to those who are covered in Article 16(1) but that too has to be very restrictive.

'H'

682. Promotion is the most sensitive branch of service jurisprudence. Although its purpose is manifold but the principle objective is, 'to secure the best possible incumbents for the higher positions while maintaining the morale of the whole organisation' as it not only, 'serves the public interest' but is founded on the inherent principle that the higher one moves the greater is the responsibility he assumes.

683. Manner and method of promotion is usually linked with the nature of posts, if it is selection or non-selection. Reservation, for SC/ST, has been extended, to both, by this Court in Rangachari and Soshit Karamchari respectively reiterated in State of Punjab v. Hira Lal MANU/SC/0066/1970 : [1971]3SCR267 , and Comptroller and Auditor General of India, Gian Prakash v. K.S. Jagannathan and Anr. MANU/SC/0066/1986 : [1986]2SCR17 . In Rangachari it was held, 'The condition precedent may refer either to numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation'. In the context the expression, 'adequately represented imports consideration of size as well as values, numbers as well as the nature of appointments'.

684. But, inadequacy of representation is creative of jurisdiction only. It is not measure of backwardness. That is why less rigorous test or lesser marks and competition amongst the class of unequals at the point of entry has been approved both by this Court and American courts. But a student admitted to a medical or engineering college is further not granted relaxation in passing the examinations. In fact this has been explained as valid basis in American decisions furnishing justification for racial admissions on lower percentage. Rationale appears to be that every-one irrespective of the source of entry being subjected to same test neither efficiency is effected nor the equality is disturbed. After entry in service the class is one that of employees. If the social scar of backwardness is carried even, thereafter the entire object of equalisation stands frustrated. No further classification amongst employees would be justified as is not done amongst students.

685. Constitutional, legal or moral basis for protective discrimination is redressing identifiable backward class for historical injustice. That is they are today, what they would not have been but for the victimisation. Remedying this and to balance the unfair advantage gained by others is the constitutional responsibility. But once the advantaged and disadvantaged the so-called forward and backward, enter into the same stream then the past injustice stands removed. And the length of service, the seniority in cadre of one group to be specific the forward group is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimisation.

686. Equality either as propagated by theorists or as applied by courts seeks to remove inequality by, 'parity of treatment under parity of condition'. But once in 'order to treat some persons equally, we must treat them differently' has been done and advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.

687. Constitutional sanction is to reserve for backward class of persons. That is class or group interest has been preferred over individual. But promotion from a class or group of employees is not promoting a group or class but an individual. It is one against other. No forward class v. backward class or majority against minority. It would, thus, be contrary to the Constitution. Brother Kuldip Singh, for good and sound reasons has rightly opined, that, Rangachri cannot be held to be laying down good law.

* * * * *

'I'

688. Reservation, for, 'economically backward sections of the people who are not covered by any of the existing schemes of reservation', again, raises an important issue. De facto difficulties in determining such backwardness stands established by failure of the government to evolve any workable criteria even after lapse of one year since, 25th September, 1991, the date on which the order dated 23rd August 1990 directing reservation for backward class was amended and it was announced that, 'the criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.' But the de jure hurdles appear, even, greater. Any reservation resulting in curtailing right of equal opportunity is to withstand the test of equal protection or benign discrimination. Latter has been permitted for a class which had suffered injustices in the past and is suffering even now. It is an atonement of past segregation and discrimination such as Negroes in America and SC/ST of our country. And is being extended even to those who could legitimately be considered to be backward class. Since Article 16(4) has a constitutional purpose and is to operate only so long the goal is not achieved economic backwardness does not qualify for such protective measure. As even if such a class or collectivity is held to fall in the broader concept of the expression backward class of citizens it would not be eligible for the benefit as it would be incapable of satisfying the other mandatory requirement of being inadequately represented in services without which the State cannot have any jurisdiction to

exercise the power. Article 16(4) thus by its nature, and purpose cannot be applicable to economically backwards, except probably when a proper methodology is worked out to determine inadequacy of representation of such class.

689. Is it possible to reserve under Article 16(1)? Detailed reasons have been given, earlier, against any reservation under cover of doctrine of reasonable classification. Eradication of poverty which, 'is not to be exalted or praised, but is an evil thing which must be fought and stamped out' is one of the ideals set out in the Preamble of the Constitution as it postulates to achieve economic justice and exhorts the State under Article 38(2) to, 'minimise the inequality of income'. All the same can the State for this purpose reserve posts for the economically backwards in service. Right to equal protection of laws or equality before law in, 'benefits, and burdens' by operation of law, equally, amongst equals and unequally amongst unequals is firmly rooted in concept of equality developed by courts in this country and in America. But any reservation or affirmative action on economic criteria or wealth discrimination cannot be upheld under doctrine of reasonable classification. Reservation for backward class seeks to achieve the social purpose of sharing in services which had been monopolised by few of the forward classes. To bridge the gap, thus, created the affirmative actions have been upheld as the social and educational difference between the two classes furnished reasonable basis for classification. Same cannot be said for rich and poor. Indigence cannot be rational basis for classification for public employment. Any legislative measure or executive action operating unequally between rich and poor has been held to be suspect. A provision requiring a person to pay for trial manuscript before filing criminal appeal was struck down in Griffin v. Illinois 351 US 12 (195) as it amounted to denial of right of appeal to poor persons. In Harper v. Virginia Board of Elections 383 US 663 [1966] Poll tax for voting was invalidated as, 'wealth, like race, creed or colour, is not germane to one's ability to participate intelligently in the electoral process'. Protection was given to the appellants in effect or consequence of equal protection clause. Duty of State to protect against deprivation due to poverty should not be confused with States obligation to treat everyone uniformly and equally without discrimination. Protection against application of law due to difference in economic condition, cannot be equated with classification based on disproportion in wealth. Former is in realm of justice and fairplay whereas latter is equal protection to which every one is entitled. In the former unjust application of law may be cured by removing the offending part and thus apply the law uniformly to rich and poor. Whereas in latter the classification has to be justified on the nexus test. Poverty may have relevance and may furnish valid justification while dealing with social and economic measure. Any legislation or executive measure undertaken to remove disparity in wealth cannot be suspect but a classification based on economic conditions for purposes of Article 16(1) would be violative of equality doctrine.

690. More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should

be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class. Therefore,

(1) No reservation can be made on economic criteria.

(2) It may be under Article 16(4) if such class satisfies the test of inadequate representation.

(3) Exclusion of creamy layer is a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

* * * * *

'J'

691. Various infirmities were highlighted in the report of the Second Backward Class Commission and the consequent invalidity of the government order issued on it. Attack on the report varied from the reference being beyond Article 340 to manner and method of ascertaining backwardness by issuing questionnaire to hardly one per cent of the population, interviewing interested and biased persons only, relying on obsolete material such as caste census of 1931, importing personal knowledge, rewriting Hindu Varna by adding intermediate or middle caste between twice born and sudra, working out backward population erroneously as in 1931 only 67% of the population was Hindu and if 22% were SC and 43% backward then the remaining were 20% inflating backward classes by conjectures and assumptions as First Commission identified 2399 whereas the Second determined it at 3743 and the Anthropological Survey of India published a project report identifying only 1057 backward classes, and adopting caste as the sole and the only criteria for identifying backwardness etc. Action of the Govt. in accepting the report and issuing the Government Order was challenged for exhibition of sudden alacrity not on objective consideration but for extraneous reasons, acceptance of the report without any discussion or debate in the Parliament which was the least considering the far-reaching consequences of such report, acting by executive order instead of legislative measure, when reservation for backward class was being made in Union services for the first time, propriety of basing the action on a report rendered 10 years earlier without any regard to social and economic changes in the meantime when such period is normally considered sufficient for review and re-assessment of continuance of such actions, etc.

692. Many of these challenges appear to be well founded but any discussion on it is unnecessary for two reasons, one failure of any objective consideration of the report by the Government before issuing the orders and others some of the basic infirmities have been dealt with while dealing with the issue of identification of backward classes. Above all what is not provided in the Constitution, what was not accepted by the Government in 1956 what has not been approved by this Court even for backward classes in Article 16(4) was adopted by the Commission as the basis in its report submitted in 1978 for 'socially and educationally backward classes', an expression narrower and different than 'backward classes' and implemented in 1990 by the Government without even placing it before the Parliament or any objective consideration by it. An order reserving posts can no doubt be made even by the executive but the decision being of utmost importance as reservation

was being made in services under the Union for the first time the propriety demanded that it should have been placed before the Parliament. For growth and development of healthy conventions and traditions no provision in the Constitution or statute is needed. It may, however, not be out of place to mention that where rules framed under Rule 309 exist no executive order in violation of it can be passed.

693. Vital issues, by agreement of both sides, relating to reservation and preferential treatment in services have been discussed. On many of these this Court, to use the words of the Constitution Bench, has not spoken with, 'one voice'. Therefore, these public interest petitions, filed in unfortunate circumstances which are not necessary to be narrated, were referred to be heard by a larger bench of nine judges, 'to finally settle the legal positions relating to reservations'.

694. Finality, is necessary not only for courts or tribunal but for the guidance of the affirmative action ameliorative or preferential by the Legislature or the Executive. What should not be lost sight of is if history of discrimination and segregations of the SC/ST and the socially, educationally and economically backward in the darkest chapter of our social history, with no parallel any where in the world, then constitutional therapy to eradicate it root and branch too is unparalleled and even most developed and democratically advanced democracies, cannot match the socially oriented effort to achieve an egalitarian society. Practical equality or equality by result is the approach. Effort is to usher in a progressive society by bridging the gap between the forward and backward by demolishing the social barriers and enabling the lowest to share the power to remove inferiority and infuse feeling of equality. But without sacrificing efficiency and disturbing the equality equilibrium by confining it to minority of posts and treating them preferentially for such length of time, as a self operating mechanism, coming to an end once the constitutional objective of enabling them to stand on their own is fulfilled. Why reservation policy in services or the benefits of welfare measures pursued by different States for the weaker sections of the society have not percolated to the needy and deserving at the rock bottom is more a political issue than constitutional or legal. But no effort can succeed unless the policy makers eschew extraneous considerations and tackle the problem sincerely and with understanding. So long the identification of the backward class is not made properly and practically it would serve the vested interest only. And the 'halves' among Sudra or the intermediate backward classes shall not permit it to reach the have-nots the real and genuine backward classes.

695. No exception can be taken to the recommendations of the Mandal Commission for reservation for backward class of citizens in services by the Union. But commissions are only fact finding bodies. The constitutional responsibility of reserving posts rests with the government. Unfortunately neither in 1990 nor in 1991 this duty was discharged constitutionally or even legally. Whether the report was within the term of reference and if the Commission in identifying socially and educationally backward class repeated the same mistake as was done by the first Commission and if the Commission could adopt two different yardsticks for determining backwardness among Hindus and non-Hindus were aspects which were required to be gone into by the Government before issuing any order. The exercise of power to reserve is coupled with duty to determine backward class of citizens and if they were adequately represented. If the Government failed to discharge its duty then the exercise of power stands vitiated. No further need be said except to extract following words of William O. Douglas-

Judicial Review gives time for the sober second thought

* * * * *

CONCLUSIONS

696. Both the impugned orders issued by the respective governments in 1990 and 1991 reserving appointments and posts for socially and educationally backward classes of citizens, without discharging their constitutional obligation of examining if the identification of backward class by the Commission was in consonance with constitutional principle and philosophy of the basic feature of the Constitution and if the group or collectivity so identified was adequately represented or not which is the sine qua non for the exercise of the power under Article 16(4), are declared to be unenforceable.

(1) Reservation in public services either by legislative or executive action is neither a matter of policy nor a political issue. The higher courts in the country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has potential of constitutional repercussions.

(2) (a) Constitutional bar under Article 16(2) against state for not discriminating on race, religion or caste is as much applicable to Article 16(4) as to Article 16(1) as they are part of the same scheme and serve same constitutional purpose of ensuring equality. Identification of backward class by caste is against the Constitutional.

(b) The prohibition is not mitigated by using the word, 'only' in Article 16(2) as a cover and evolving certain socio-economic indicators and then applying it to caste as the identification then suffers from the same vice. Such identification is apt to become arbitrary as well as the indicators evolved and applied to one community may be equally applicable to other community which is excluded and the backward class of which is denied similar benefit.

697. Identification of a group or collectivity by any criteria other than caste, such as, occupation cum social cum educational cum economic criteria ending in caste may not be invalid.

(c) Social and educational backward class under Article 340 being narrower in import than backward class in Article 16(4) it has to be construed in restricted manner. And the words educationally backward in this Article cannot be disregarded while determining backwardness.

(3) Reservation under Article 16(4) being for any class of citizens and citizen having been defined in Chapter II of the Constitution includes not only Hindus but Muslims, Christians, Sikhs, Buddhists Jains etc. the principle of identification has to be of universal application so as to extend to every community and not only to those who are either converts from Hinduism or some of who carry on the same occupation as some of the Hindus.

(4) Reservation being extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but

the constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner, not to exceed 50%.

(5) Article 16(4) being part of the scheme of equality doctrine it is exhaustive of reservation, therefore, no reservation can be made under Article 16(1).

(6) Reservation in promotion is constitutionally impermissible as, once the advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.

(7) Economic backwardness may give jurisdication to state to reserve provided it can find out mechanism to ascertain inadequacy of representation of such class. But such group or collectivity does not fall under Article 16(1).

(8) Creamy layer amongst backward class of citizens must be excluded by fixation of proper income, property or status criteria.

698. Reservation by executive order may not be invalid but since it was being made for the first time in services under the Union propriety demanded that it should have been laid before Parliament not only to lay down healthy convention but also to consider the change in social, economic and political conditions of the country as nearly ten years had elapsed from the date of submissions of the report, a period considered sufficient for evaluation if the reservation may be continued or not.

699. Valuable assistance was rendered by Shri K.K. Venugopal and Shri N.A. Palkhiwala the learned senior counsel, who led the arguments and placed one view. They were ably supported by Shri P.P. Rao and Smt. Shyamala Pappu, senior advocates. Arguments were also advanced by Smt. Hingorani, Mr. Mehta, Mr. K.L. Sharma, Mr. S.M. Ashri, Mr. Vishal Jeet. Shri K.N. Rao and Col. Dr. D.M. Khanna appeared in person as interveners and were of assistance.

700. Shri Ram Jethmalani, the learned senior advocate appearing for the State of Bihar was equally helpful in projecting the other view. Shri K. Parasaran, the learned senior counsel for the Union of India while supporting. Shri Jethmalani placed a very dispassionate view of the entire matter. Shri Rajiv Dhawan was also very helpful. Shri R.K. Garg, Shri Shiv Pujan Singh, Shri J. Siva Subramaniam, Shri Poti, Smt. Rani Jethmalani also made submissions. Shri Ram Avadhesh Singh argued in person.

Back to Index

MANU/SC/0264/2020

Neutral Citation: 2020/INSC/264

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 528 and 373 of 2018

Decided On: 04.03.2020

Appellants: Internet and Mobile Association of India Vs**.** Respondent: Reserve Bank of India

Hon'ble Judges/Coram:

Rohinton Fali Nariman, Aniruddha Bose and V. Ramasubramanian, JJ.

Subject: Banking

Relevant Section:

Constitution Of India - Article 19(1)(g)

Case Note:

Banking - Virtual currency - Restriction on ban - Sections 3(1), 8(4) and 22(1) of Reserve Bank of India Act, 1934 - Respondent-Bank issued Statement on Developmental and Regulatory Policies which directed entities regulated by RBI not to deal with or provide services to any individual or business entities dealing with or settling virtual currencies and to exit relationship, if they already had one, with such individuals/business entities, dealing with or settling virtual currencies (VCs) - Following said Statement, RBI also issued circular directing entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies and to exit relationship with such persons or entities, if they were already providing such services to them - Hence, present petition - Whether impugned Circular directing entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies liable to be set aside on ground of proportionality.

Facts:

The Reserve Bank of India issued a Statement on Developmental and Regulatory Policies which directed the entities regulated by RBI not to deal with or provide services to any individual or business entities dealing with or settling virtual currencies and to exit the relationship, if they already have one, with such individuals/business entities, dealing with

or settling virtual currencies (VCs). Following the said Statement, RBI also issued a circular, in exercise of the powers conferred by Section 35A read with Section 36(1)(a) and Section 56 of the Banking Regulation Act, 1949 and Section 45JA and 45L of the Reserve Bank of India Act, 1934 and Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007, directing the entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies and to exit the relationship with such persons or entities, if they were already providing such services to them. The Petitioner challenging the said Statement and Circular and seeking a direction to the Respondents not to restrict or restrain banks and financial institutions regulated by RBI, from providing access to the banking services, to those engaged in transactions in crypto assets.

Held, while allowing the petitions:

(i) There could be no quarrel with the proposition that RBI had sufficient power to issue directions to its regulated entities in the interest of depositors, in the interest of banking policy or in the interest of the banking company or in public interest. If the exercise of power by RBI with a view to achieve one of these objectives incidentally causes a collateral damage to one of the several activities of an entity which did not come within the purview of the statutory authority, the same could not be assailed as a colourable exercise of power or being vitiated by malice in law. To constitute colourable exercise of power, the act must have been done in bad faith and the power must have been exercised not with the object of protecting the regulated entities or the public in general, but with the object of hitting those who form the target. To constitute malice in law, the act must have been done wrongfully and wilfully without reasonable or probable cause. The impugned Circular did not fall under the category of either of them. [6.122]

(ii) The argument that other stakeholders such as the Enforcement Directorate which was concerned with money laundering, the Department of Economic Affairs which was concerned with the economic policies of the State, SEBI which is concerned with security contracts and CBDT which was concerned with the tax regime relating to goods and services, did not see any grave threat and that therefore RBI's reaction was knee-jerk, was not acceptable. Enforcement Directorate can step in only when actual money laundering takes place, since the statutory scheme of Prevention of Money Laundering Act deals with a procedure which was quasi-criminal. SEBI could step in only when the transactions involve securities within the meaning of Section 2(h) of the Securities Contracts (Regulation) Act, 1956. CBDT would come into the picture only when the transaction related to the sale and purchase of taxable goods/commodities. Every one of these stakeholders has a different function to perform and were entitled to have an approach depending upon the prism through which they were obliged to look at the issue. Therefore, RBI could not be faulted for not adopting the very same approach as that of others. [6.128]

(iii) The examples provided in report of the European Central Bank show that there are VC Schemes set up by entities such as Nintendo, in which consumers can purchase points online by using a credit card or in retail stores by purchasing a Nintendo points card which could

not be converted back to real money. The Report also shows that one VC by name Linden Dollars was issued in a virtual world called Second life, where users create avatars (digital characters), which could be customized. Second life had its own economy where users can buy and sell goods and services from and to each other. But they first need to purchase Linden dollars using fiat currency. Later they could also sell Linden dollars in return for fiat currency. Therefore, it was clear that the very same virtual currency could have a unidirectional or bidirectional flow depending upon the scheme with which the entities come up. Moreover, the question whether anonymous VCs alone could have been banned leaving the pseudo-anonymous, was for experts and not for this Court to decide. In any case, the stand taken by RBI is that they had not banned VCs. Hence, the question whether RBI should have adopted different approaches towards different VCs does not arise. [6.135]

(iv) RBI is not just any other statutory authority. It was not like a stream which cannot be greater than the source. The RBI Act, 1934 is a pre-constitutional legislation, which survived the Constitution by virtue of Article 372(1) of the Constitution. The difference between other statutory creatures and RBI is that what the statutory creatures can do, could as well be done by the executive. The power conferred upon the delegate in other statutes can be tinkered with, amended or even withdrawn. But the power conferred upon RBI under Section 3(1) of the RBI Act, 1934 to take over the management of the currency from the central government, cannot be taken away. The sole right to issue bank notes in India, conferred by Section 22(1) could not also be taken away and conferred upon any other bank or authority. RBI by virtue of its authority, is a member of the Bank of International Settlements, which position cannot be taken over by the central government and conferred upon any other authority. Therefore, to say that it was just like any other statutory authority whose decisions cannot invite due deference, is to do violence to the scheme of the Act. In fact, all countries had central banks/authorities, which, technically have independence from the government of the country. To ensure such independence, a fixed tenure is granted to the Board of Governors, so that they are not bogged down by political expediencies. In the United States of America, the Chairman of the Federal Reserve is the second most powerful person next only to the President. Though the President appoints the seven-member Board of Governors of the Federal Reserve, in consultation with the Senate, each of them was appointed for a fixed tenure of fourteen years. Only one among those seven was appointed as Chairman for a period of four years. As a result of the fixed tenure of fourteen years, all the members of Board of Governors survive in office more than three governments. Even the European Central Bank headquartered in Frankfurt has a President, Vice-President and four members, appointed for a period of eight years in consultation with the European Parliament. World-wide, central authorities/banks are ensured an independence, but unfortunately Section 8(4) of the RBI Act, 1934 gives a tenure not exceeding five years, as the central government may fix at the time of appointment. Though the shorter tenure and the choice given to the central government to fix the tenure, to some extent, undermines the ability of the incumbents of office to be absolutely independent, the statutory scheme nevertheless provides for independence to the institution as such. Therefore, there was no argument that a policy decision taken by RBI did not warrant any deference. [6.141]

(v) The concern of RBI was and it ought to be, about the entities regulated by it. Till date, RBI had not come out with a stand that any of the entities regulated by it namely, the

nationalized banks/scheduled commercial banks/cooperative banks/NBFCs has suffered any loss or adverse effect directly or indirectly, on account of the interface that the VC exchanges had with any of them. As held by this Court in State of Maharashtra v. Indian Hotel and Restaurants Association, there must have been at least some empirical data about the degree of harm suffered by the regulated entities (after establishing that they were harmed). It was not the case of RBI that any of the entities regulated by it had suffered on account of the provision of banking services to the online platforms running VC exchanges. [6.172]

(vi) It was no doubt true that RBI had very wide powers not only in view of the statutory scheme of the enactments, but also in view of the special place and role that it had in the economy of the country. These powers could be exercised both in the form of preventive as well as curative measures. But the availability of power was different from the manner and extent to which it can be exercised. The power of RBI to take a pre-emptive action, this court was testing in this part of the order the proportionality of such measure, for the determination of which RBI needs to show at least some semblance of any damage suffered by its regulated entities. But there was none. When the consistent stand of RBI was that they had not banned VCs and when the Government of India was unable to take a call despite several committees coming up with several proposals including two draft bills, both of which advocated exactly opposite positions, it was not possible to hold that the impugned measure is proportionate. [6.173]

(vii) Therefore, the Petitioners were entitled to succeed and the impugned Circular was liable to be set aside on the ground of proportionality. Accordingly, the writ petitions are allowed and the Circular was set aside. The Statement though challenged in one writ petition, was not in the nature of a statutory direction and hence the question of setting aside the same did not arise. [7.1]

Disposition:
Petition Allowed

Industry: Media and Entertainment

Industry: Banks

JUDGMENT

V. Ramasubramanian, J.

1. THE STORY LINE:

1.1. Reserve Bank of India (hereinafter, "RBI") issued a "Statement on Developmental and Regulatory Policies" on April 5, 2018, paragraph 13 of which directed the entities regulated by RBI (i) not to deal with or provide services to any individual or business entities dealing with or settling virtual currencies and (ii) to exit the relationship, if they already have one, with such individuals/business entities, dealing with or settling virtual currencies (VCs).

1.2. Following the said Statement, RBI also issued a circular dated April 6, 2018, in exercise of the powers conferred by Section 35A read with Section 36(1)(a) and Section 56 of the Banking Regulation Act, 1949 and Section 45JA and 45L of the Reserve Bank of India Act, 1934 (hereinafter, "RBI Act, 1934") and Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007, directing the entities regulated by RBI (i) not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies and (ii) to exit the relationship with such persons or entities, if they were already providing such services to them.

1.3. Challenging the said Statement and Circular and seeking a direction to the Respondents not to restrict or restrain banks and financial institutions regulated by RBI, from providing access to the banking services, to those engaged in transactions in crypto assets, the Petitioners have come up with these writ petitions. The Petitioner in the first writ petition is a specialized industry body known as 'Internet and Mobile Association of India' which represents the interests of online and digital services industry. The Petitioners in the second writ petition comprise of a few companies which run online crypto assets exchange platforms, the shareholders/founders of these companies and a few individual crypto assets traders. It must be stated here that the individuals who are some of the Petitioners in the second writ petition are young high-tech entrepreneurs who have graduated from premier educational institutions of technology in the country.

Contents of the impugned Statement and Circular of RBI:

1.4. The Statement dated 05-04-2018 issued by RBI, impugned in these writ petitions, sets out various developmental and regulatory policy measures for the purpose of (i) strengthening Regulation and supervision (ii) broadening and deepening financial markets (iii) improving currency management (iv) promoting financial inclusion and literacy and (v) facilitating data management. Paragraph 13 of the said statement which falls under the caption "currency management" deals directly with virtual currencies and the same constitutes the offending portion of the impugned Statement. Therefore, paragraph 13 of the impugned Statement alone is extracted as follows:

13. Ring-fencing regulated entities from virtual currencies

Technological innovations, including those underlying virtual currencies, have the potential to improve the efficiency and inclusiveness of the financial system. However, Virtual Currencies (VCs), also variously referred to as crypto currencies and crypto assets, raise concerns of consumer protection, market integrity and money laundering, among others.

Reserve Bank has repeatedly cautioned users, holders and traders of virtual currencies, including Bitcoins, regarding various risks associated in dealing with such virtual currencies. In view of the associated risks, it has been decided that, with immediate effect, entities regulated by RBI shall not deal with or provide services to any individual or business entities dealing with or settling VCs. Regulated entities which already provide such services shall exit the relationship within a specified time. A circular in this regard is being issued separately.

1.5. The Circular dated 06-04-2018 deals entirely with virtual currencies and the prohibition on dealing with the same. This Circular is statutory in character, issued in exercise of the powers conferred by (i) the Reserve Bank of India Act, 1934 (ii) the Banking Regulation Act, 1949 and (iii) the Payment Settlement Systems Act, 2007. This Circular in its entirety is reproduced as follows:

Prohibition on dealing in Virtual Currencies (VCs)

Reserve Bank has repeatedly through its public notices on December 24, 2013, February 01, 2017 and December 05, 2017, cautioned users, holders and traders of virtual currencies, including Bitcoins, regarding various risks associated in dealing with such virtual currencies.

2. In view of the associated risks, it has been decided that, with immediate effect, entities regulated by the Reserve Bank shall not deal in VCs or provide services for facilitating any person or entity in dealing with or settling VCs. Such services include maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing with them and transfer/receipt of money in accounts relating to purchase/sale of VCs.

3. Regulated entities which already provide such services shall exit the relationship within three months from the date of this circular.

4. These instructions are issued in exercise of powers conferred by Section 35A read with Section 36(1)(a) of Banking Regulation Act, 1949, Section 35A read with Section 36(1)(a) and Section 56 of the Banking Regulation Act, 1949, Section 45JA and 45L of the Reserve Bank of India Act, 1934 and Section 10(2) read with Section 18 of Payment and Settlement Systems Act, 2007.

2. THE SETTING

2.1. The Statement dated 05-04-2018 and the Circular dated 06-04-2018 of RBI, impugned in these writ petitions, were a culmination of a flurry of activities by different stakeholders, nationally and globally, over a period of about 5 years. Therefore, it is necessary to see the setting in which (or the backdrop against which) the impugned decisions of RBI were posited. While doing so, it will also be necessary to take note of the developments that have taken place during the pendency of these writ petitions, so that we have a close-up as well as aerial view of the setting.

2.2. It was probably for the first time that RBI took note of technology risks in changing business environment, in their Financial Stability Report of June 2013. Paragraph 3.60 of this report noted that globally, the use of online and mobile technologies was driving the proliferation of virtual currencies. Therefore, the report stated that those developments pose challenges in the form of regulatory, legal and operational risks. Box 3.4 of the said report dealt specifically with virtual currency schemes and it started by defining virtual currency as a type of unregulated digital money, issued and controlled by its developers and used and accepted by the members of a specific virtual community. It was declared in Box 3.4 of the said report that "the regulators are studying the impact of online payment options and virtual currencies to determine potential risks associated with them".

2.3. In June 2013, the Financial Action Task Force (hereinafter, "FATF"), also known by its French name, Groupe d'action financière, which is an inter-governmental organization founded in 1989 on the initiative of G-7 to develop policies to combat money laundering, came up with what came to be known as "New Payment Products and Services Guidance" (NPPS Guidance, 2013). It was actually a Guidance for a Risk Based Approach to Pre-paid cards, Mobile Payments and Internet-based Payment Services. But this Guidance did not define the expressions 'digital currency', 'virtual currency', or 'electronic money', nor did it focus on virtual currencies, as distinct from internet based payment systems that facilitate transactions denominated in real money (such as Paypal, Alipay, Google Checkout etc.). Therefore, a short-term typologies project was initiated by FATF for promoting fuller understanding of the parties involved in convertible virtual currency systems and for developing a risk matrix.

2.4. On 24-12-2013, a Press Release was issued by RBI cautioning the users, holders and traders of virtual currencies about the potential financial, operational, legal and customer protection and security related risks that they are exposing themselves to. The Press Release noted that the creation, trading or usage of VCs, as a medium of payment is not authorized by any central bank or monetary authority and hence may pose several risks narrated in the Press Release.

2.5. On 27-12-2013, newspapers reported the first ever raid in India by the Enforcement Directorate, of 2 Bitcoin trading firms in Ahmedabad, by name, rBitco.in and buysellbitco.in. This was stated to be India's first raid on a Bitcoin trading firm and the second globally, after Federal Bureau of Investigation of the United States of America conducted a raid in October of the same year.

2.6. Thereafter, a report titled "Virtual Currencies - Key Definitions and Potential AML/CFT Risks" was issued in June 2014 by FATF, highlighting, both legitimate uses and potential risks associated with virtual currencies. What is of great significance about this FATF report is that it defined 2 important words. The FATF report defined 'Virtual currency' as a digital representation of value that can be traded digitally and functioning as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but not having a legal tender status. The FATF report also defined 'Cryptocurrency' to mean a math-based, decentralised convertible virtual currency protected by cryptography by relying on public and private keys to transfer value from one person to another and signed cryptographically each time it is transferred.

2.7. Again, in June 2015, FATF came up with a "Guidance for a Risk Based Approach to Virtual Currencies", which suggested certain recommendations, as follows:

A. Countries to identify, assess and understand risks and to take action aimed at mitigating such risks. National authorities to undertake a coordinated risk assessment of VC products and services that:

(1) enables all relevant authorities to understand how specific virtual currency products and services function and impact regulatory jurisdictions for Anti Money Laundering ('AML' for short)/Combating the Financing of Terrorism ('CFT' for short) treatment purposes;

(2) promote similar AML/CFT treatment for similar products and services having same risk profiles.

B. Where countries are prohibiting virtual currency products and services, they should take into account among other things, the impact a prohibition would have on local and global level of money laundering/terrorism financing risks, including whether prohibition would drive such payment activities underground, where they will operate without AML/CFT controls.

2.8. The FATF submitted a report in October 2015 on "Emerging Terrorist Financing Risks". The report was divided into four parts, under the captions (i) introduction (ii) financial management of terrorist organisations (iii) traditional terrorist financing methods and techniques and (iv) emerging terrorist financing threats and vulnerabilities. Even while acknowledging in part 3 of the report that the traditional methods of moving funds through the banking sector happens to be the most efficient way of movement of funds for terrorist organisations, the report acknowledged the emergence of new payment products and services in part 4 of the report. The report took note of different methods of terrorist financing, such as self-funding, crowd funding, social network fund raising with prepaid cards etc. Coming to virtual currencies, the report noted the following:

Virtual currencies have emerged and attracted investment in payment infrastructure built on their software protocols. These payment mechanisms seek to provide a new method for transmitting value over the internet. At the same time, virtual currency payment products and services (VCPPS) present ML/TF risks. The FATF made a preliminary assessment of these ML/TF risks in the report Virtual Currencies Key Definitions and Potential AML/CFT Risks. As part of a staged approach, the FATF has also developed Guidance focusing on the points of intersection that provide gateways to the regulated financial system, in particular convertible virtual currency exchangers.

Virtual currencies such as bitcoin, while representing a great opportunity for financial innovation, have attracted the attention of various criminal groups, and may pose a risk for TF (terrorist financing). ***This technology allows for anonymous transfer of funds internationally. While the original purchase of the currency may be visible (e.g., through the banking system), all following transfers of the virtual currency are difficult to detect****. The US Secret Service has observed that criminals are looking for and finding virtual currencies that offer: anonymity for both users and transactions; the ability to move illicit proceeds from one country to another quickly; low volatility, which results in lower exchange risk; widespread adoption in the criminal underground; and reliability.*

Law enforcement agencies are also concerned about the use of virtual currencies (VC) by terrorist organisations. They have seen the use of websites affiliated with terrorist organisations to promote the collection of bitcoin donations. In addition, law enforcement has identified internet discussions among extremists regarding the use of VC to purchase arms and education of less technical extremists on use of VC. For example, a posting on a blog linked to ISIL proposed using bitcoin to fund global extremist efforts.

(emphasis supplied)

In support of the above conclusions, the report also indicated a case study, which concerned the arrest of one Ali Shukri Ameen, who admitted to have had a Twitter account with 4000 followers. He claimed to have used his Twitter handle to provide instructions on how to use a virtual currency to mask the provision of funds to ISIL. In an article, the link to which he tweeted to his followers, it was elaborated how jihadists could utilize the virtual currency to fund their efforts. (It must be noted that the report also took note of how prepaid cards and other internet-based payment services could also be used for terror financing).

2.9. The Bank of International Settlements (hereinafter, "BIS") which is a body corporate established under the laws of Switzerland, way back in the year 1930 pursuant to an agreement signed at Hague on 22-01-1930 and owned by 60 Central Banks of different countries including RBI, has several committees, one of which is "Committee on Payments and Market Infrastructure" (CPMI). This committee started taking note of digital currencies, while dealing with innovations in retail payments. This committee formed a sub-group within the CPMI Working Group on Retail Payments, to undertake an analysis of digital currencies. On the basis of the findings of the subgroup, CPMI of BIS submitted a report in November 2015 on Digital currencies. The sub-group identified three key aspects relating to the development of digital currencies one of which was that the assets featured in digital currency schemes, typically have some monetary characteristics such as being used as a means of payment, but are not backed by any authority. In Note 1 under the Executive Summary of the said report, it was stated as follows: "although ***digital currencies typically do have some, but not all the characteristics of a currency, they may also have characteristics of a commodity or other asset. Their legal treatment can vary from jurisdiction to jurisdiction."*** (emphasis supplied) Paragraph 4 of the said report dealt with the "implications for central banks, of digital currencies and their underlying decentralized payment mechanisms". In the said paragraph, the report indicated that "digital currencies represent a technology for settling peer to peer payments without trusted third parties and may involve a non-sovereign currency". Though the report stated that the impact of digital currencies on the mainstream financial system is negligible as at that time, some of the implications indicated in the report may actually materialize if there was widespread adoption of digital currencies. Two risks were noted in the report and they were consumer protection and operational risks. But in so far as distributed ledger technology is concerned, the report was positive. However, the report cautioned that a widespread substitution of bank notes with digital currencies could lead to a decline in central banks' non-interest paying liabilities and that if the adoption and use of digital currencies were to increase significantly, the demand for existing monetary aggregates and the conduct of monetary policy could be affected. Nevertheless, the report stated that at present, the use of private digital currencies is too low for these risks to materialize.

2.10. In December 2015, the Financial Stability Report of RBI was issued, and it included a chapter on "Financial Sector Regulation". The same dealt with the challenges posed by technology-based innovations such as virtual currency schemes. In Box 3.1 of the said report, it was indicated that though the initial concerns over the emergence of virtual currency schemes were about the underlying design, episodes of excessive volatility in their value and their anonymous nature which goes against global money laundering Rules rendered their very existence questionable. However, the report noted that the regulators and authorities need to keep pace with developments, as many of the world's largest banks started supporting a joint effort for setting up of private blockchain and building an industry-wide platform for standardizing the use of technology.

2.11. In December 2016, the Financial Stability Report of RBI came. It took note of the rapid developments taking place in Fin Tech (financial technology) globally and exhorted the regulators to gear up to adopt technology (christened as RegTech). Paragraph 3.22 of the said report identified the establishment of regulatory sandboxes[1] and innovation hubs for testing new products and services and providing support/guidance to regulated as well as unregulated entities. The report also noted that fast paced innovations such as virtual currencies have brought risks and concerns about data security and consumer protection on one hand and far reaching potential impact on the effectiveness of monetary policy itself on the other hand. The report took note of the fact that many central banks around the world, had already started examining the feasibility of creating their own digital currencies, after fretting over them initially.

2.12. In January 2017, the Institute for Development and Research in Banking Technology (IDRBT) established by RBI in 1996 as an institution to work at the intersection of banking and technology submitted a Whitepaper on "Applications of blockchain technology to banking and financial sector in India". While dealing with the applications of blockchain technology in chapter 3, the whitepaper also enlisted the advantages and disadvantages of digital currency. While the advantages indicated were (i) control and security, (ii) transparency and (iii) very low transaction cost, the disadvantages indicated were risk and volatility.

2.13. On 01-02-2017, RBI again issued a Press Release cautioning users, holders and traders of virtual currencies. Closely on the heels of this Press Release, the Government of India, Ministry of Finance, constituted, in April 2017, an Inter-Disciplinary Committee comprising of the Special Secretary (Economic Affairs) and representatives of the Departments of Economic Affairs, Financial Services, Revenue, Home Affairs, Electronics and Information Technology, RBI, NITI Aayog, and State Bank of India. The task of the Committee was to (i) take stock of the status of VCs in India and globally, (ii) examine the existing global regulatory and legal structures and (iii) suggest measures for dealing with VCs. The Committee was mandated to submit a report within 3 months.

2.14. The report of the Inter-Disciplinary Committee was submitted on 25-07-2017 and it contained certain recommendations which are as follows:

(i) A very visible and clear warning should be issued through public media informing the general public that the Government does not consider crypto-currencies such as bitcoins as either coins or currencies. These are neither a legally valid medium of exchange nor a desirable way to store value. The Government also does not consider it desirable for people to use or invest in something which has no real underlying asset value.

(ii) A very visible and clear warning should be issued, through public media, advising all those who have been offering to buy or sell these currencies, or offering a platform to exchange these currencies, to stop this forthwith.

(iii) Those who have bought these currencies in good faith and are holding these should be advised to offload these in any jurisdiction where it is not illegal to do so.

(iv) All consumer protection and enforcement agencies should be advised to take action against all those who, despite these warnings, indulge in buying/selling or offering platform for trading of these currencies, since the presumption would be that it is being done with illegal, fraudulent or tax evading intent.

(v) If the Government agrees with the above recommendations, a committee should be constituted with members from DEA, RBI, SEBI, DoR, DoLA, Consumer Affairs, and MeitY, to suggest whether any further actions, including legislative changes, are required to make possession, trade and use of crypto-currencies expressly illegal and punishable.

(vi) Finally, it is clarified that none of the above recommendations are meant to restrict the use of blockchain technology for purposes other than that of creating or trading in crypto-currencies.

2.15. In August 2017, Securities and Exchange Board of India (SEBI) established a 10-member advisory panel to examine global fintech developments and report on opportunities for the Indian securities market. The goal of the new Committee on Financial and Regulatory Technologies was to help prepare India to adopt fintech solutions and foster innovations within the country.

2.16. On 02-11-2017, the Government of India constituted a committee chaired by the Secretary (Department of Economic Affairs) and comprising of Secretary, Ministry of Electronic and Information Technology, Chairman, SEBI and Deputy Governor, RBI (Inter-Ministerial Committee) to propose specific actions to be taken in relation to VCs.

2.17. At that stage, two persons, by name, Siddharth Dalmia and Vijay Pal Dalmia came up with a writ petition in WP (C) No. 1071 of 2017 Under Article 32 of the Constitution of India seeking the issue of a writ of mandamus directing the Respondents to declare as illegal and ban all virtual currencies as well as ban all websites and mobile applications which facilitate the dealing in virtual currencies. Similarly, another person, by name, Dwaipayan Bhowmick came up with a writ petition in WP (C) No. 1076 of 2017, seeking the issue of a writ of mandamus directing the Respondents to regulate the flow of Bitcoin (crypto money) and to constitute a committee of experts to consider the prohibition/Regulation of Bitcoin and other crypto currencies. On 13.11.2017, this Court ordered notice in both the writ petitions.

2.18. Around the same time, namely, November 2017, the Inter-Regulatory Working Group on Fintech and Digital Banking, set up by RBI, pursuant to a decision taken by the Financial Stability and Development Council Sub-Committee way back in April 2016, submitted a report. This report, in paragraph 2.1.3.2, dealt with Digital Currencies. It defined 'digital currencies' to mean digital representations of value, issued by private developers and denominated in their own unit of account. The Report also stated that "digital currencies are not necessarily attached to a fiat currency, but are accepted by natural or legal persons as a means of exchange."

2.19. Thereafter, RBI issued another Press Release dated 05-12-2017 reiterating the concerns expressed in earlier press releases. The Government of India, Ministry of Finance also issued a statement on 29-12-2017 cautioning the users, holders and traders of VCs that they are not recognized as legal tender and that the investors should avoid participating in them.

2.20. On 01-02-2018, the Minister of Finance, in his budget speech said that the Government did not consider crypto currencies as legal tender or coin and that all measures to eliminate the use of these currencies in financing illegitimate activities or as part of the payment system, will be taken by the Government. However, he also said that the Government will explore the use of blockchain technology proactively for ushering in digital economy.

2.21. The Central Board of Direct Taxes (CBDT), by an Office Memorandum dated 05-03-2018, submitted to the Department of Economic Affairs, a draft scheme proposing a ban on cryptocurrencies. But the draft scheme advocated a step-by-step approach, as many persons had already invested in cryptocurrencies. The scheme also contained an advice to carry out legislative amendments before banning them.

2.22. In the wake of a meeting of G-20 Finance Ministers and Central Bank Governors that was scheduled to be held in mid-March 2018, the Financial Stability Board[2] (FSB) sent out a communication dated 13-03-2018. It was indicated in the said communication that as per the initial assessment of FSB, crypto assets did not pose risks to global financial stability, as their combined global market value even at their peak, was less than 1% of global GDP. But the report also noted that the initial assessment was likely to change and that crypto assets raised a host of issues around consumer and investor protection as well as their use to shield illicit activity and for money laundering and terrorist financing.

2.23. The communique issued by G-20, after the meeting of its Finance Ministers and Central Bank Governors on March 19-20, 2018 also acknowledged that technological innovation including that underlying crypto assets, has the potential to improve the efficiency and inclusiveness of the financial system and the economy more broadly. But it also noted that crypto assets do raise issues with respect to consumer and investor protection, market integrity, tax evasion, money laundering and terrorist financing. Though crypto assets lacked the key attributes of sovereign currencies, they could, at some point, have financial stability implications. Therefore, the communique resolved to implement FATF standards and to call on international standard-setting bodies to continue their monitoring of crypto assets and their risks.

2.24. On 02-04-2018, RBI sent an e-mail to the Government, enclosing a note on regulating crypto assets. It was with reference to the record of discussions of the last meeting of the Inter-Ministerial Committee on virtual currency. This note examined the pros and cons of banning and regulating cryptocurrencies and suggested that it had to be done, backed by suitable legal provisions.

2.25. Immediately thereafter, the Statement dated 05-04-2018 and the Circular dated 06-04-2018, impugned in these writ petitions came to be issued by RBI. It appears that at around the same time (April 2018), the Inter-Ministerial Committee submitted its initial report, (or a precursor to the report) along with a draft bill known as Crypto Token and Crypto Asset (Banning, Control and Regulation) Bill, 2018.[3]

2.26. But in the meantime, a few companies which run online crypto assets exchange platforms together with the shareholders/founders of those companies and a few individual crypto assets traders came up with the first of the writ petitions on hand, namely WP (C) No. 373 of 2018, challenging the aforesaid Statement dated 05-04-2018 and Circular dated 06-04-2018. On 01-05-

2018 this writ petition was directed to be tagged along with the writ petitions WP (C) Nos. 1071 and 1076 of 2017 which sought a ban on or Regulation of cryptocurrencies.

2.27. On 11-05-2018, all the three writ petitions, namely WP (C) Nos. 1071 and 1076 of 2017 and 373 of 2018, came up for hearing. At that time, it was pointed out that a few High Courts were also seized of writ petitions concerning cryptocurrencies. Therefore, this Court gave liberty to RBI to move appropriate applications for transfer of all those cases to this Court.

2.28. Accordingly, RBI came up with transfer petitions and the transfer petitions were taken on Board on 17-05-2018 and a direction was issued that no High Court shall entertain any writ petition relating to the impugned Circular dated 06-04-2018. This Court also passed an interim order on 17-05-2018 permitting the Petitioners in WP (C) No. 1071 of 2017 to submit a representation to RBI with a further direction to RBI to deal with the same in accordance with law.

2.29. In the meantime, the Internet and Mobile Association of India came up with the second of the writ petitions on hand, namely WP (C) No. 528 of 2018 and notice was ordered in the said writ petition on 03-07-2018. While doing so, this Court issued a direction to RBI to dispose of the representation, if any, already submitted by the Association. Accordingly, RBI considered the representation and issued two communications dated 06-07-2018 and 09-07-2018.

2.30. On 23-07-2018, SEBI sent its comments on the 2018 Bill, to the Department of Economic Affairs. Their primary objection to the Bill was that they are not best suited to be the regulators of crypto assets and tokens.

2.31. Next came the Annual Report of RBI for the year 2017-2018. It contained a separate Box II. 3.2 on "Cryptocurrency: Evolving challenges". The relevant portion of the same reads as follows:

Though cryptocurrency may not currently pose systemic risks, its increasing popularity leading to price bubbles raises serious concerns for consumer and investor protection, and market integrity. Notably, Bitcoins lost nearly US$200 billion in market capitalisation in about two months from the peak value in December 2017. As per the CoinMarketCap, the overall cryptocurrency market had nearly touched US$800 billion in January 2018.

The cryptocurrency eco-system may affect the existing payment and settlement system which could, in turn, influence the transmission of monetary policy. *Furthermore, being stored in digital/electronic media - electronic wallets - it is prone to hacking and operational risks, a few instances of which have already been observed globally. There is no established framework for recourse to customer problems/disputes resolution as payments by cryptocurrencies take place on a peer-to-peer basis without an authorised central agency which regulates such payments. There exists a high possibility of its usage for illicit activities, including tax avoidance. The absence of information on counterparties in such peer-to-peer anonymous/pseudonymous systems could subject users to unintentional breaches of anti-money laundering laws (AML) as well as laws for combating the financing of terrorism (CFT) (Committee on Payments and Market Infrastructures - CPMI, 2015).* ***The Bank for International Settlements (BIS) has recently warned that the emergence of cryptocurrencies has become a combination of a bubble, a Ponzi scheme and an environmental disaster, and calls for policy responses (BIS, 2018)****. The Financial Action Task*

Force (FATF) has also observed that cryptoassets are being used for money laundering and terrorist financing. A globally coordinated approach is necessary to prevent abuses and to strictly limit interconnections with regulated financial institutions.

On a global level, regulatory responses to cryptocurrency have ranged from a complete clamp down in some jurisdictions to a comparatively 'light touch regulatory approach'. The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) have emerged as the primary regulators of cryptocurrencies in the United States, where these assets like most other jurisdictions, do not enjoy the legal tender status. Asian countries have experienced oversized concentration of crypto players - Japan and South Korea account for the biggest shares of crypto asset markets in the world. In the case of Bitcoins, half of transactions worldwide are carried out in Japan. In September 2017, Japan approved transactions by its exchanges in cryptocurrencies. China's exchanges hosted a disproportionately large volumes of global Bitcoin trading until their ban recently. [...]

Developments on this front need to be monitored as some trading may shift from exchanges to peer-to-peer mode, which may also involve increased usage of cash. Possibilities of migration of crypto exchange houses to dark pools/cash and to offshore locations, thus raising concerns on AML/CFT and taxation issues, require close watch.

(emphasis supplied)

2.32. In this background, all the four writ petitions namely WP (C) Nos. 1071 and 1076 of 2017 (seeking a ban) and WP (C) Nos. 373 and 528 of 2018 (challenging the indirect ban) came up for hearing, along with the transfer petitions, on 25-10-2018, when this Court was informed that the Union of India had already constituted a committee and that this Inter-Ministerial Committee was deliberating on the issue. Therefore, the writ petitions were adjourned to enable the Committee to come up with their recommendations.

2.33. It appears that the Committee so constituted, submitted a report on 28-02-2019 indicating the action to be taken in relation to virtual currencies. A bill known as "Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019" had also been prepared by then to be introduced in the Lok Sabha. To this report of the Committee, is appended, the minutes of the discussions of the Committee in the meetings held on 27-11-2017, 22-02-2018, and 09-01-2019. The contents of the report of the Inter-Ministerial Committee dated 28-02-2019, can be well understood only if we look at the Record of Discussions of the meetings of the Committee. The Record of Discussions held on 27-11-2017 shows that the Inter-Ministerial Committee was of the initial view that the banning option was difficult to implement and that it can also drive some operators underground, encouraging the use of such currencies for illegitimate purposes. But it was generally agreed in the said meeting that VCs cannot be treated as currency. However, in the meeting held on 22-02-2018, the Deputy Governor, RBI made an initial intervention and argued in favour of using the banning option. Eventually, the other members of the Committee agreed, and it was resolved in the said meeting that a detailed paper on the option of banning VCs, including a draft law could be prepared and submitted by RBI and CBDT. It was also resolved to prepare a detailed paper within Department of Economic Affairs on options of regulating crypto assets. Following the same, it was resolved in the next meeting held on 09-01-2019 that a Standing

Committee should be constituted to revisit certain issues. Eventually, the Inter-Ministerial Committee submitted the aforesaid report dated 28-02-2019. The key aspects of this report are:

i. Virtual currency is a digital representation of value that can be digitally traded and it can function as a medium of exchange and/or a unit of account and/or a store of value, though it does not have the status of a legal tender.

ii. Initial Coin Offerings (hereinafter, "ICO") are a way for companies to raise money by issuing digital tokens in exchange for fiat currency or cryptocurrency, but there is a clear risk with the issuance of ICOs as many of the companies are looking to raise money without having any tangible products. In the year 2018, as many as 983 ICOs were issued, through which funds to the tune of USD 20 billion were raised.

iii. Virtual currencies are accorded different legal treatment by different countries, which range from barter transactions to mode of payment to legal tender. Countries like China have imposed a complete ban.

iv. The mining of non-official virtual currencies is very resource-intensive requiring enormous amounts of electricity which may prove to be an environmental disaster.

v. They may also affect the ability of the Central Banks to carry out their mandates.

vi. China has not only banned trading in cryptocurrencies but also used its firewall to ban crypto currency exchanges. China even blocked crypto currency focused accounts from WeChat and crypto-currency related content from Baidu. However, Chinese traders use VPNs to circumvent these bans.

The report dated 28-02-2019 of the Inter-Ministerial Committee finally made certain recommendations which included a complete ban on private cryptocurrencies.

2.34. It is important to note here that the report of the Inter-Ministerial Committee dated 28-02-2019 not only recommended a ban, but also specifically endorsed the stand taken by RBI to eliminate the interface of institutions regulated by RBI from crypto currencies.

2.35. As a matter of fact, the issue of the impugned Circular by RBI was even taken note of by the Financial Stability Board (of G-20), in a document titled 'Crypto Assets Regulators Directory', submitted to G-20 Finance Ministers and Central Bank Governors in April 2019. While acknowledging the fact that RBI does not have a legal mandate to directly regulate crypto assets, this Directory indicated that with a view to ring fence its regulated entities from the risks associated with VCs, RBI has issued the impugned Circular.

2.36. In a report released in June 2019 under the caption 'Guidance for a risk-based approach to Virtual Assets and Virtual Asset Service Providers', FATF reiterated a risk-based approach advocated in FATF 2012 and 2015 recommendations. At the same time, this Guidance recognized that a jurisdiction has the discretion to prohibit VA activities and VASPs in order to support other policy goals not addressed in the Guidance such as consumer protection, safety and soundness or

monetary policy. But the Guidance also suggested that countries which prohibit VA activities or VASPs should also assess the effect that such prohibition may have on their money laundering and terrorist financing risks.

2.37. It is also relevant to note here that the Government was conscious of the impugned Circular issued by RBI. This can be seen from the answer provided by the Minister of State in the Ministry of Finance, on 16-07-2019 in response to a question raised in the Rajya Sabha (Unstarred question No. 2591). While answering in the negative, the question whether the Government had banned cryptocurrencies in the country, the Minister of State added that RBI has been issuing advisories, press releases and circulars.

2.38. On 22-07-2019, the Report of the Inter-Ministerial Committee, recommending a ban, along with the draft of the Bill "Banning of Crypto currency and Regulation of Official Digital Currency Bill 2019", was hosted in the website of the Department of Economic Affairs. Therefore, on 08-08-2019, the first two writ petitions namely WP (C) Nos. 1071 and 1076 of 2017 were delinked and adjourned to January 2020, since, the prayers made in these two writ petitions (seeking a ban) appeared substantially answered.

2.39. Thereafter, the present writ petitions were taken up for hearing and this Court passed an interim direction on 21-08-2019, directing the Reserve Bank of India to give a detailed point-wise reply to the representations dated 29-05-2018 and 30-05-2018. The reply already given by RBI to the representations dated 29-05-2018 and 30-05-2018 was found by this Court to be inadequate and hence this direction. Accordingly, RBI gave a detailed point-wise reply on 04-09-2019 and 18-09-2019. Thereafter, the present writ petitions were taken up for hearing.

3. FLASHBACK

3.1. The archaeological excavations carried out at the (world wide web) sites, reveal that this digital currency civilization is just 12 years old (at the most, 37 years). But these excavations became necessary since virtual currencies, known by different names such as crypto assets, crypto currencies, digital assets, electronic currency, digital currency etc., elude an exact and precise definition, making it impossible to identify them as belonging either to the category of legal tender solely or to the category of commodity/good or stock solely.

3.2. Any attempt to define what a virtual currency is, it appears, should follow the Vedic analysis of negation namely "neti, neti". Avadhuta Gita of Dattatreya says, "by such sentences as 'that thou are', our own self or that which is untrue and composed of the 5 elements, is affirmed, but the sruti says 'not this not that'."[4] The concept of Neti Neti is an expression of something inexpressible, but which seeks to capture the essence of that to which no other definition applies. This conundrum will squarely apply to crypto currencies and hence this flashback, into its genesis, so that its DNA is sequenced.

3.3. Though the idea of digital cash appears to have been first introduced by David Lee Chaum, an American Computer Scientist and Cryptographer way back in 1983 in a research paper and was actually launched by him in 1990 through a company by name Digicash, the company filed for bankruptcy in 1998, with Digicash becoming Digi-crash. But the actual story of creation of

cryptocurrencies began, in a more scientific way, according to Nathaniel Popper, the New York Times journalist,[5] in 1997, when a British Cypherpunk[6] by name Adam Back released a plan called hashcash, which claimed to have solved some of the problems that stalled the digital cash project. But this program had its shortcomings. Another Cypherpunk by name Nick Szabo, came up with a concept called bitgold, which attempted to solve hashcash's shortcomings. Soon, an American by name Wei Dai came up with something called b-money. Hal Finney, another American created his own option. But all of them had a common goal, which, as revealed by Adam Back was as follows:

What we want is fully anonymous, ultra low transaction cost, transferable units of exchange. If we get that going... the banks will become the obsolete dinosaurs they deserve to become.

3.4. But all these experiments continued to hit roadblocks, until the emergence of Satoshi Nakamoto (who still remains anonymous) in the world of netizens. It appears that Satoshi sent an e-mail in August 2008 to Adam Back attaching a white paper prepared by him on what was called 'Bitcoin'. The gist of what Satoshi stated in his paper is indicated in simple terms, for the understanding of the common man, by Nathaniel Popper, in his book as follows:

Rather than relying on a central bank or company to issue and keep track of the money - as the existing financial system and Chaum's DigiCash did - this system was set up so that every Bitcoin transaction, and the holdings of every user, would be tracked and recorded by the computers of all the people using the digital money, on a communally maintained database that would come to be known as the blockchain.

The process by which this all happened had many layers, and it would take even experts, months to understand how they all worked together. But the basic elements of the system can be sketched out in rough terms, and were in Satoshi's paper, which would become known as the Bitcoin white paper.

According to the paper, each user of the system could have one or more public Bitcoin addresses - sort of like bank account numbers - and a private key for each address. The coins attached to a given address could be spent only by a person with the private key corresponding to the address. The private key was slightly different from a traditional password, which has to be kept by some central authority to check that the user is entering the correct password. In Bitcoin, Satoshi harnessed the wonders of public-key cryptography to make it possible for a user - let's call her Alice again - to sign off on a transaction, and prove she has the private key, without anyone else ever needing to see or know her private key.

Once Alice signed off on a transaction with her private key she would broadcast it out to all the other computers on the Bitcoin network. Those computers would check that Alice had the coins she was trying to spend. They could do this by consulting the public record of all Bitcoin transactions, which computers on the network kept a copy of. Once the computers confirmed that Alice's address did indeed have the money she was trying to spend, the information about Alice's transaction was recorded in a list of all recent transactions, referred to as a block, on the blockchain. [...]

The result of this complicated process was something that was deceptively simple but never previously possible: a financial network that could create and move money without a central authority. No bank, no credit card company, no regulators. The system was designed so that no one other than the holder of a private key could spend or take the money associated with a particular Bitcoin address. What's more, each user of the system could be confident that, at every moment in time, there would be only one public, unalterable record of what everyone in the system owned. To believe in this, the users didn't have to trust Satoshi, as the users of DigiCash had to trust David Chaum, or users of the dollar had to trust the Federal Reserve. They just had to trust their own computers running the Bitcoin software, and the code Satoshi wrote, which was open source, and therefore available for everyone to review. If the users didn't like something about the Rules set down by Satoshi's software, they could change the rules. People who joined the Bitcoin network were, quite literally, both customers and owners of both the bank and the mint.

3.5. That Satoshi and the Cypherpunks who participated in the initial experiments developed Bitcoin as an alternative to conventional currency, to counter the problems of debasement of currency by central agencies, was made clear by Satoshi himself when he said: "The root problem with conventional currency is all the trust that's required to make it work. The Central Bank must be trusted not to debase the currency but the history of fiat currencies is full of breaches of that trust."

3.6. What attracted people to Satoshi's proposal, was the fact that while Central Banks had no restraints in unlimited printing of money, thereby devaluing all savings and holdings, the Bitcoin software had Rules to ensure that the process of creating new coins would stop after 21 million were out in the world. When Martti Malmi, a student at the Helsinki University of Technology, joined hands with Satoshi to improvise the project and to market it, he formulated the philosophy in the following words:

Be safe from the unfair monetary policies of the monopolistic Central Banks and the other risks of centralized power over a money supply. The limited inflation of Bitcoin system's money supply is distributed evenly (by CPU power) throughout the network, not monopolized to a banking elite.

3.7. Therefore, it is beyond any pale of doubt that irrespective of the metamorphosis (or gene mutation) it has undergone over the years, bitcoin, the Adam or Manu of the race of cryptocurrencies, was developed as an alternative to fiat currency. Keeping this birth chart of virtual currencies in mind, let us now see how the Petitioners are aggrieved by the impugned decisions of RBI, the grounds on which they challenge the same and the justification sought to be provided by RBI.

4. BACKGROUND SCORE (of the Petitioners)

4.1. The theme of the song of the Petitioners in one of the writ petitions, as fine-tuned by Shri Ashim Sood, learned Counsel, can be summarized as follows:

I. RBI has no power to prohibit the activity of trading in virtual currencies through VC exchanges since:

(i) Virtual currencies are not legal tender but tradable commodities/digital goods, not falling within the regulatory framework of the RBI Act, 1934 or the Banking Regulation Act, 1949.

(ii) Virtual currencies do not even fall within the credit system of the country, so as to enable RBI to fall back upon the Preamble to the RBI Act 1934, which gives a mandate to RBI to operate the currency and credit system of the country to its advantage.

(iii) Neither the power to regulate the financial system of the country to its advantage conferred Under Section 45JA, nor the power to regulate the credit system of the country conferred Under Section 45L of the RBI Act, 1934 exercisable in public interest and upon arriving at a satisfaction, is so elastic as to cover goods that do not fall within the purview of the financial system or credit system of the country.

(iv) The power to issue directions "in the public interest" conferred Under Section 35A(1)(a) of the Banking Regulation Act, 1949 and the power to caution or prohibit banking companies against entering into any particular transaction conferred Under Section 36(1)(a) do not extend to the issue of blanket directions that would deny access by virtual currency exchanges, to the banking services of the country, as the expression "public interest" appearing in a particular provision in a statute should take its colour from the context of the statute.

(v) The power conferred upon RBI Under Section 10(2) of the Payment and Settlement Systems Act, 2007 to issue guidelines for proper and efficient management of payment systems and Under Section 18 of the said Act to lay down policies relating to the Regulation of payment systems and to give directions pertaining to the conduct of business relating to payments systems, exercisable in public interest upon being satisfied, is also not applicable to virtual currency exchanges, as the services rendered by them do not fall within the definition of the expression "payment system" Under Section 2(1)(i) of the said Act.

II. Assuming but not admitting that RBI has the power to deal with the activities carried on by VCEs, the mode of exercise of such power can be tested on certain well established parameters. They are -

(i) application of mind/satisfaction/relevant and irrelevant considerations

(ii) Malice in law/colorable exercise of power

(iii) M.S. Gill reasoning

(iv) Calibration/Proportionality

III. All other stake holders such as the Department of Economic Affairs of the Government of India, Securities and Exchange Board of India, Central Board of Direct Taxes, etc., have actually recognized the positive and beneficial aspects of cryptocurrencies as digital assets and the Distributed Ledger Technology from which crypto currencies emanate and hence have recommended only a regulatory regime, but RBI has taken a contra position without any rational basis.

IV. Many of the developed and developing economies of the world, multinational and international bodies and the courts of various countries have scanned crypto currencies, but found nothing pernicious about them and even the attempt of the Government of India to bring a legislation banning crypto currencies, is yet to reach its logical end.

V. RBI should have taken into account the fact that the members of Petitioner association have taken necessary precautions including avoiding cash transactions, ensuring compliance with KYC norms, of their own accord and allowing peer-to-peer transactions only within the country.

VI. RBI has not applied its mind to the fact that not every crypto currency is anonymous. The report of the European Parliament also classified VCs into anonymous and pseudo-anonymous. Therefore, if the problem sought to be addressed is anonymity of transactions, the same could have been achieved by resorting to the least invasive option of prohibiting only anonymous VCs.

VII. It is a paradox that blockchain technology is acceptable to RBI, but crypto currency is not.

VIII. The benefit of the Rule of judicial deference to economic policies of the state is not available to RBI, as the impugned Circular is an exercise of power by a statutory body corporate and is neither a legislation nor an exercise of executive power. In any case, there is no deference in law to process but only to opinion emanating from the process. No study was undertaken by RBI before the impugned measure was taken and hence, the impugned decisions are not even based upon knowledge or expertise.

IX. While Regulation of a trade or business through reasonable restrictions imposed under a law made in the interests of the general public is saved by Article 19(6) of the Constitution, a total prohibition, especially through a subordinate legislation such as a directive from RBI, of an activity not declared by law to be unlawful, is violative of Article 19(1)(g). Whether a directive would tantamount to "Regulation" or "prohibition", depends upon the impact of the directive.

4.2. The contentions of the Petitioners in the other writ petition (WP (C) No. 373 of 2018), as set to tune by Shri Nakul Dewan, learned Senior Counsel, are:

I. The immediate effect of the impugned Circular is to completely severe the ties between the virtual currency market and the formal Indian economy, without actually a legislative ban on the trading of VCs, thereby promoting cash and black-market transactions.

II. The impugned Circular fails to take note of the difference between various VC schemes such as closed VC schemes, unidirectional flow VC schemes and bidirectional flow VC schemes and unreasonably differentiates between unidirectional flow schemes and bidirectional flow schemes, by targeting only bidirectional flow schemes.

III. VCs do not qualify as money, as they do not fulfil the four characteristics of money namely medium of exchange, unit of account, store of value and constituting a final discharge of debt and since RBI has accepted this position, they have no power to regulate it.

IV. Considering the fact that historically, money as understood in the social sense and money as understood in the legal sense, are different, the courts in different jurisdictions such as USA and Singapore have understood VCs to be akin to money or funds at times or as commodities/intangible properties at other times.

V. The impugned Circular is manifestly arbitrary, based on non-reasonable classification and it imposes disproportionate restrictions.

VI. A decision to prohibit an Article as res extra commercium is a matter of legislative policy and must arise out of an Act of legislature and not by a notification issued by an executive authority.

4.3. In addition to the aforementioned legal contentions, Shri Nakul Dewan learned Senior Counsel also submitted that as a result of the impugned Circular, the virtual currency exchange (VCE) run by one of the Petitioners in one writ petition was shut down on 30-03-2019, the VCE run by another Petitioner became non-operational, though their website still opens and the VCE run by yet another Petitioner by name Discidium Internet Labs Pvt. Ltd., not only became non-operational, but an amount of Rs. 12 crores lying in their account also got frozen. However, one VCE by name CoinDCX alone survives, by operating on a peer-to-peer (P2P) basis.

4.4. In support of their respective contentions, Shri Ashim Sood and Shri Nakul Dewan, the learned Counsels, relied upon a number of decisions of this Court and other courts. We shall refer to them when we take up their contentions for analysis.

5. SCRIPT (of RBI)

5.1. RBI has filed counter-affidavit in one of these writ petitions, covering the entire gamut. But the response of RBI to the contentions of the Petitioners is available not only in the counter-affidavit, but also in some communications issued by them pursuant to certain interim directions issued by this Court.

5.2. For instance, this Court passed an interim direction on 21-08-2019, after hearing lengthy arguments, directing the Reserve Bank of India to give a detailed point-wise reply to the representations dated 29-05-2018 and 30-05-2018. Pursuant to the said interim direction, RBI gave a detailed point-wise reply on 04-09-2019 and 18-09-2019. Therefore, RBI's stand in these cases has to be culled out not only from the counter-affidavit but also from the orders passed/replies issued to the representations of the writ Petitioners, during the pendency of these writ petitions.

5.3. In brief, the response of RBI to the issues raised by the Petitioners, as articulated by Shri Shyam Divan, learned Senior Counsel, can be summarized as follows:

(i) Virtual currencies do not satisfy the criteria such as store of value, medium of payment and unit of account, required for being acknowledged as currency.

(ii) Virtual currency exchanges do not have any formal or structured mechanism for handling consumer disputes/grievances.

(iii) Virtual currencies are capable of being used for illegal activities due to their anonymity/pseudo-anonymity.

(iv) Increased use of virtual currencies would eventually erode the monetary stability of the Indian currency and the credit system.

(v) The impugned decision of RBI is legislative in character and is in the realm of an economic policy decision taken by an expert body warranting a hands-off approach from the Court.

(vi) The impugned decision is within the range of wide powers conferred upon RBI under the Banking Regulation Act, 1949, the Reserve Bank of India Act, 1934 and the Payment and Settlement Systems Act, 2007.

(vii) No one has an unfettered fundamental right to do business on the network of the entities regulated by RBI.

(viii) The impugned decisions do not violate any of the rights guaranteed by Articles 14, 19 and 21 of the Constitution of India.

(ix) The impugned decisions are not excessive, confiscatory or disproportionate in as much as RBI has given three months' time to the affected parties to sever their relationships with the banks. This is apart from the repeated cautions issued to the stakeholders by RBI through Press Releases from the year 2013.

(x) The ambit of the 2013 press release was much wider than just consumer protection. RBI cautioned users, holders and traders of VCs about the potential financial, operational, legal, customer protection and security related risks they were exposing themselves to.

(xi) The host of material taken note of by RBI in their reports, the reports of the committees to which RBI was a party and the cautions repeatedly issued by RBI over a period of 5 years, would demonstrate the application of mind on the part of RBI. They also demonstrate that RBI did not proceed in haste but proceeded with great care and caution. Therefore, the satisfaction arrived at by them was too loud and clear to be ignored. The standard for considering the impugned Circular, is the existence of material and not the adequacy or sufficiency of such material.

(xii) In any case, there is no complete ban on virtual currencies or on the use of distributed ledger technology by the regulated entities.

(xiii) The impugned decisions were necessitated in public interest to protect the interest of consumers, the interest of the payment and settlement systems of the country and for protection of regulated entities against exposure to high volatility of the virtual currencies. RBI is empowered and duty bound to take such pre-emptive measures in public interest and the power to regulate includes the power to prohibit.

(xiv) The impugned decisions were necessitated because in the opinion of RBI, VC transactions cannot be termed as a payment system, but only peer-to-peer transactions which do not involve a

system provider under the Payments and Settlement Systems Act. Despite this, VC transactions have the potential to develop as a parallel system of payment.

(xv) The KYC norms followed by the VCEs are far below what other participants in the payments and monetary system follow. In any case, KYC norms are ineffective, as the inherent characteristic of anonymity of VCs does not get remedied.

(xvi) Cross-border nature of the trade in VCs, coupled with the lack of accountability, has the potential to impact the regulated payments system managed by RBI. A large constituent of the VC universe does not hold membership of the Petitioner association or is not even accountable for their acts but is material and instrumental in driving the VC trade.

(xvii) RBI or any other Government authority would not be able to curtail, limit, regulate or control the generation of VCs and their transactions, resulting in ever-present and inevitable financial risks.

6. UNFOLDING OF THE PLOT

6.1. In the light of the above factual matrix and the rival contentions, let us now see how the plot before us, unfolds.

I. No Power at all for RBI (Ultra vires)

6.2. The first ground of attack revolves around the power of RBI to deal with, regulate or even ban VCs and VCEs. The entire foundation of this contention rests on the stand taken by the Petitioners that VCs are not money or other legal tender, but only goods/commodities, falling outside the purview of the RBI Act, 1934, Banking Regulation Act, 1949 and the Payment and Settlement Systems Act, 2007. In fact, the impugned Circular of RBI dated 06-04-2018 was issued in exercise of the powers conferred upon RBI by all these three enactments. Therefore, if virtual currencies do not fall within subject matter covered by any or all of these three enactments and over which RBI has a statutory control, then the Petitioners will be right in contending that the Circular is ultra vires.

6.3. Hence it is necessary (i) first to see the role historically assigned to a central bank such as RBI, the powers and functions conferred upon and entrusted to RBI and the statutory scheme of all the above three enactments and (ii) then to investigate what these virtual currencies really are. Therefore, we shall divide our discussion in this regard into two parts, the first concerning the role, powers and functions of RBI and the second concerning the identity of virtual currencies.

Role assigned to, functions entrusted to and the powers conferred upon RBI as a Central Bank

6.4. The Reserve Bank of India was established under Act 2 of 1934 for the purpose of (i) regulating the issue of bank notes, (ii) keeping of reserves with a view to securing monetary stability in the country and (iii) operating the currency and credit system of the country to its advantage. The role of a central bank such as the Reserve Bank in an economy is to manage (i) the currency (ii) the money supply and (iii) interest rates. The unique feature of a central bank is the

monopoly that it has on increasing the monetary base in the state and the control it has in the printing of the national currency. The central bank virtually functions as "a lender of last resort" to banks suffering a liquidity crisis.

6.5. Historians trace the rise of modern central banks to the establishment of the Bank of England under a Royal Charter granted on 27-07-1694 through the Tonnage Act, 1694. The establishment of this bank in 1694 was not actually for stimulating the economy but for financing the war that England had with France. The currency crisis of 1797 and the creation of a ratio between the gold reserves held by the Bank of England and the notes that the bank could issue, under the Bank Charter Act, 1844 brought huge changes in the way the central bank was supposed to function.

6.6. In so far as India is concerned, the functions of a central bank were originally conferred upon the Imperial Bank of India, established in the year 1921, under the Imperial Bank of India Act, 1920. The reason why and the manner in which the Imperial Bank was established, is quite interesting to see. At the time when the British Crown took over the control of the territories in India, after the Sepoy Mutiny of 1857, there were three Presidency Banks, one in Calcutta, another in Bombay and the third in Madras. All these three banks established respectively in 1809, 1840 and 1843, were authorized to issue notes up to certain specified limits. But this privilege was withdrawn in 1862 under the Paper Currency Act, which vested the sole right to issue notes with the Government of India.

6.7. The question of absorption of the three Presidency Banks into a central bank came up for consideration on and off. Though the Chamberlain Commission, known as the Royal Commission on Indian Finance and Currency, appointed in 1913, felt the need for setting up a central bank, the proposal did not materialize. But after the First World War, the Presidency Banks themselves favoured an amalgamation. Therefore, the Imperial Bank of India Bill providing for the amalgamation of all the three Presidency Banks was passed in September 1920 and came into effect in January 1921. The trend of setting up central banks gained momentum internationally, after the International Financial Conferences held at Brussels in 1920 and at Genoa in 1922.

6.8. But the maintenance of an overvalued exchange rate to help British exporters, gave rise to a clash between the colonial administration and Indian business interests. The Congress sought devaluation and hence a Royal Commission was set up in 1925 to examine the matter. This Royal Commission on Indian Currency and Finance, also known as Hilton Young Commission (to which Dr. B.R. Ambedkar also contributed a statement), recommended the creation of a strong Central Bank for India in 1926. Though a bill known as the Gold Standard and Reserve Bank of India Bill, 1927 to give effect to the recommendations was introduced in the Legislative Assembly, it was withdrawn on 10-02-1928. From 1930 onwards, the question of establishing a Reserve Bank received fresh impetus, when Constitutional reforms for the country were undertaken.

6.9. The White Paper on Indian Constitutional Reforms, presented in March 1933, assumed that a Reserve Bank, free from political influence, would have to be set up and should already be successfully operating before the first Federal Ministry was installed.

6.10. Subsequently, a Departmental Committee (hereinafter referred to, as "the India Office Committee") was appointed in London by the India Office, which submitted a report dated 14-03-

1933. This report was followed up by the appointment of the "London Committee", which endorsed the India Office Committee's view that the Reserve Bank should be free from any political influence.

6.11. Therefore, a Bill drafted on the basis of the recommendations of the London Committee was introduced in September 1933. In 1934, the Bill was passed. The Reserve Bank of India commenced operations as the country's central bank on 01-04-1935. Under the Reserve Bank (Transfer of Public Ownership) Act, 1948, the bank was nationalized.

6.12. Once the historical background of the creation of RBI is understood, it will be easy to appreciate its role in the economy of the country and the functions and powers exercised by it statutorily.

6.13. As the Preamble of the RBI Act suggests, the object of constitution of RBI was threefold namely (i) regulating the issue of bank notes (ii) keeping of reserves with a view to securing monetary stability in the country and (iii) operating the currency and credit system of the country to its advantage.

6.14. In fact, the original Preamble of the Act contained only three paragraphs. But paragraphs 2 and 3 of the Preamble were substituted with 3 new paragraphs by Act 28 of 2016. Paragraphs 2 and 3 of the original Preamble and paragraphs 2 to 4 substituted in 2016, are presented in a tabular column as follows:

Paragraphs 2 and 3 as they originally stood	Paragraphs 2 to 4 now substituted
AND WHEREAS in the present disorganisation of the monetary systems of the world it is not possible to determine what will be suitable as a permanent basis for the Indian monetary system; BUT WHEREAS it is expedient to make temporary provision on the basis of the existing monetary system, and to leave the question of the monetary standard best suited to India to be considered when the international monetary position has become sufficiently clear and stable to make it possible to frame permanent measures;	AND WHEREAS it is essential to have a modern monetary policy framework to meet the challenge of an increasingly complex economy; AND WHEREAS the primary objective of the monetary policy is to maintain price stability while keeping in mind the objective of growth; AND WHEREAS the monetary policy framework in India shall be operated by the Reserve Bank of India;

6.15. It may be observed from the newly substituted paragraphs that RBI is now vested with the obligation to operate the monetary policy framework in India. An indication of the primary

objective of the monetary policy is provided in paragraph 3 which says that the maintenance of price stability is the prime objective even while the objective of growth is to be kept in mind. Paragraph 2 recognizes the necessity to have a modern monetary policy framework to meet the challenge of an increasingly complex economy.

6.16. Therefore, it is clear that after the amendment under Act 28 of 2016, the very task of operating the monetary policy framework has been conferred exclusively upon RBI.

6.17. Though the expression "monetary policy" is not defined in the Act, an entire chapter under the title "Monetary Policy" containing Sections 45Z to 45ZO was inserted as Chapter IIIF. The provisions of this chapter are given overriding effect upon the other provisions of the Act, Under Section 45Z. Under Section 45ZA(1), the central government is empowered to determine the inflation target in terms of the consumer price index, once in every 5 years, in consultation with RBI. The policy rate required to achieve the inflation target is to be determined by a Monetary Policy Committee, constituted Under Section 45ZB.

6.18. The object of establishment of RBI is also spelt out in Section 3(1). It says that "a bank to be called the Reserve Bank of India shall be constituted for the purpose of taking over the management of the currency from the Central Government and of carrying on the business of banking in accordance with the provisions of this Act".

6.19. Chapter III of the Act enlists the central banking functions of RBI. Section 17 authorizes RBI to carry on and transact several kinds of businesses listed therein, one of which, referred in Sub-section (15) is the making and issue of bank notes. Section 20 which forms part of Chapter III, obliges RBI (i) to accept monies for account of the central government (ii) to make payments up to the amount standing to the credit of its account and (iii) to carry out its exchange, remittance and other banking operations including the management of the public debt of the Union. Under Section 21, the central government is obliged to entrust all its money, remittance, exchange and banking transactions in India with RBI. Under Section 22(1), RBI has the sole right to issue bank notes in India (however, the central government has the power Under Section 28A(2) to issue Government of India notes of the denominational value of Rs. 1/-). It may also issue currency notes of the Government of India, on the recommendations of the Central Board, for a period fixed by the central government. Sub-section (2) of Section 22 goes one step further by stipulating that on and from the date on which Chapter III comes into force, the central government shall not issue any currency notes.

6.20. Section 26(1) makes every bank note a legal tender at any place in India in payment, which is guaranteed by the central government. Since a bank note issued by RBI is a legal tender guaranteed by the central government, the central government is also vested with the power Under Sub-section (2) of Section 26 to declare any series of bank notes of any denomination, to cease to be legal tender. But this can be done only on the recommendation of the Central Board of Directors of RBI.

6.21. Under Section 38, the central government is prohibited from putting into circulation any rupees, except through RBI. Similarly, RBI is also prohibited from disposing of rupee coin otherwise than for the purpose of circulation.

6.22. Chapter IIIB which contains provisions relating to non-banking institutions (NBFCs) receiving deposits and financial institutions, contains two important provisions, one in Section 45JA and another in Section 45L. Sub-section (1) of Section 45JA reads as follows:

45JA. Power of Bank to determine policy and issue directions.-- (1) If the Bank is satisfied that, in the public interest or to regulate the financial system of the country to its advantage or to prevent the affairs of any non-banking financial company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the non-banking financial company, it is necessary or expedient so to do, it may determine the policy and give directions to all or any of the non-banking financial companies relating to income recognition, accounting standards, making of proper provision for bad and doubtful debts, capital adequacy based on risk weights for assets and credit conversion factors for off balance-sheet items and also relating to deployment of funds by a non-banking financial company or a class of non-banking financial companies or non-banking financial companies generally, as the case maybe, and such non-banking financial companies shall be bound to follow the policy so determined and the direction so issued.

6.23. It may be seen that the aforesaid provision uses certain words similar to those found in paragraph 1 of the Preamble. While paragraph 1 of the Preamble speaks about the power of RBI to operate the currency and credit system of the country to its advantage, Section 45JA speaks about the power of RBI to regulate the financial system of the country to its advantage.

6.24. The salient feature of Section 45JA is that it empowers RBI, both (i) to determine the policy and (ii) to give directions to all NBFCs in respect of certain matters. The concerns sought to be addressed by Section 45JA(1) are (i) public interest (ii) financial system of the country (iii) interests of the depositors and (iv) interests of NBFCs.

6.25. Section 45L addresses yet another concern namely, the Regulation of the credit system of the country to its advantage. Section 45L reads as follows:

45L. Power of Bank to call for information from financial institutions and to give directions.--

(1) If the Bank is satisfied for the purpose of enabling it to regulate the credit system of the country to its advantage it is necessary so to do, it may--

(a) require financial institutions either generally or any group of financial institutions or financial institution in particular, to furnish to the Bank in such form, at such intervals and within such time, such statements, information or particulars relating to the business of such financial institutions or institution, as may be specified by the Bank by general or special order;

(b) give to such institutions either generally or to any such institution in particular, directions relating to the conduct of business by them or by it as financial institutions or institution.

(2) Without prejudice to the generality of the power vested in the Bank under Clause (a) of Sub-section (1), the statements, information or particulars to be furnished by a financial institution may relate to all or any of the following matters, namely, the paid-up capital, reserves or other liabilities,

the investments whether in Government securities or otherwise, the persons to whom, and the purposes and periods for which, finance is provided and the terms and conditions, including the rates of interest, on which it is provided.

(3) In issuing directions to any financial institution under Clause (b) of Sub-section (1), the Bank shall have due regard to the conditions in which, and the objects for which, the institution has been established, its statutory responsibilities, if any, and the effect the business of such financial institution is likely to have on trends in the money and capital markets.

6.26. It may be seen that the phrase "credit system of the country to its advantage", as found in paragraph 1 of the Preamble, is repeated in Sub-section (1) of Section 45L. The only difference between the two is that paragraph 1 of the Preamble speaks about the operation of the credit system, while Section 45L(1) speaks about Regulation of the credit system. While exercising the power to issue directions conferred by Clause (b) of Sub-section (1) of Section 45L, RBI is obliged Under Sub-section (3) of Section 45L to have due regard to certain things, one of them being "the effect the business of such financial institution is likely to have on trends in the money and capital markets".

6.27. Chapter IIID of the Act contains provisions for the Regulation of transactions in derivatives, money markets or securities, etc. The expression "money market instruments" is defined in Clause (b) of Section 45U as follows:

45U(b) "money market instruments" include call or notice money, term money, repo, reverse repo, certificate of deposit, commercial usance bill, commercial paper and such other debt instrument of original or initial maturity up to one year as the Bank may specify from time to time;

6.28. Section 45W empowers RBI to determine the policy relating to interest rates or interest rate products and to give directions in that behalf to all or any of the agencies dealing in securities, money market instruments, etc., for the purpose of regulating the financial system of the country to its advantage. Section 45W(1) reads as follows:

45W. Power to regulate transactions in derivatives, money market instruments, etc.--(1) The Bank may, in public interest, or to regulate the financial system of the country to its advantage, determine the policy relating to interest rates or interest rate products and give directions in that behalf to all agencies or any of them, dealing in securities, money market instruments, foreign exchange, derivatives, or other instruments of like nature as the Bank may specify from time to time:

Provided that the directions issued under this Sub-section shall not relate to the procedure for execution or settlement of the trades in respect of the transactions mentioned therein, on the Stock Exchanges recognised Under Section 4 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).

6.29. It is important to note that Section 45W(1) contains merely an illustrative list of transactions. This is seen by the use of the expression "other instruments of like nature" appearing in the above provision.

6.30. A careful scan of the RBI Act, 1934 in its entirety would show that the operation/Regulation of the credit/financial system of the country to its advantage, is a thread that connects all the provisions which confer powers upon RBI, both to determine policy and to issue directions.

6.31. RBI Act, 1934 is not the only Act from which RBI derives its powers. The Banking Regulation Act, 1949 is also a source of power for RBI to do certain things. This can be seen from the Statement of Objects and Reasons for the Banking Regulation Act, 1949. One of the main features of the Bill as indicated in the Statement of Objects and Reasons was "widening the powers of RBI so as to enable it to come to the aid of the banking companies in times of emergency".

6.32. Section 5 of the Banking Regulation Act, 1949 which contains the interpretation Clause defines the expression "banking policy" under Clause (ca) of Section 5. This definition reads as follows:

5(ca)" banking policy" means any policy which is specified from time to time by the Reserve Bank in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, the volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources;

6.33. Since Banking Regulation Act, 1949 was issued after the RBI Act, 1934 and the nationalization of RBI, Section 5(ca) borrows certain words such as "interest of the banking system" and "interest of the monetary stability" and "economic growth" from the RBI Act, 1934.

6.34. Section 8 of the Banking Regulation Act, 1949 prohibits a banking company from directly or indirectly dealing in the buying or selling or bartering of goods. The Explanation to Section 8 also defines the word "goods", for the purposes of Section 8. Section 8 reads as follows:

8 - Prohibition of trading -

Notwithstanding anything contained in Section 6 or in any contract, no banking company shall directly or indirectly deal in the buying or selling or bartering of goods, except in connection with the realisation of security given to or held by it, or engage in any trade, or buy, sell or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with such of its business as is referred to in Clause (i) of Sub-section (1) of Section 6:

PROVIDED that this Section shall not apply to any such business as is specified in pursuance of Clause (o) of Sub-section (1) of Section 6.

Explanation.--For the purposes of this section, "goods" means every kind of movable property, other than actionable claims, stocks, shares, money, bullion and specie, and all instruments referred to in Clause (a) of Sub-section (1) of Section 6.

6.35. Section 21 empowers RBI to determine the policy in relation to advances to be followed by banking companies. The determination of policy may be in (i) public interest (ii) interests of

depositors or (iii) interests of the banking policy. Once a policy is determined by RBI Under Section 21(1), all banking companies are bound to follow the policy.

6.36. No company can carry on banking business in India unless it holds a license issued by RBI. Under Section 22(1), RBI has power to issue license, subject to certain terms and conditions as it may think fit to impose.

6.37. Every banking company is obliged Under Section 27(1) of the Banking Regulation Act, 1949 to submit to RBI, monthly returns in the prescribed form, showing its assets and liabilities. RBI is conferred with powers Under Section 29A even to call for information about the affairs of any associate enterprise of a banking company. Under Sub-section (2) of Section 29A, RBI can even cause an inspection of any associate enterprise of a banking company. A power to conduct special audit of a banking company's accounts is also conferred upon RBI Under Section 30(1B).

6.38. Section 35A of Banking Regulation Act, 1949 empowers RBI to issue directions to banking companies. Such directions are binding on the banking companies. The directions Under Section 35A may be issued (i) in public interest (ii) in the interest of banking policy (iii) to prevent the affairs of the banking company from being conducted in a manner prejudicial to the interests of the depositors or of the banking company itself and (iv) to secure the proper management of the banking company. Section 35A(1) reads as follows:

35A. Power of the Reserve Bank to give directions.--(1) Where the Reserve Bank is satisfied that--

(a) in the public interest; or

(aa) in the interest of banking policy; or

(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or

(c) to secure the proper management of any banking company generally, it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

6.39. Section 35AA and Section 35AB, inserted by the Amendment Act 30 of 2017 (pursuant to the enactment of Insolvency and Bankruptcy Code, 2016), empowers RBI respectively (i) to issue directions to any banking company to initiate insolvency resolution process, if so authorized by the central government and (ii) to issue directions to any banking company for the resolution of stressed assets.

6.40. Section 36(1)(a) empowers RBI to caution or prohibit banking companies against entering into any particular transaction or class of transactions. Section 36(1)(a) reads follows:

36. Further powers and functions of Reserve Bank.--(1) The Reserve Bank may--(a) caution or prohibit banking companies generally or any banking company in particular against entering into any particular transaction or class of transactions, and generally give advice to any banking company;

Part IIA and IIAB of the Banking Regulation Act, 1949 confers powers upon the Reserve Bank (i) Under Section 36AA to remove managerial or other persons from office (ii) Under Section 36AB to appoint additional directors and (iii) Under Section 36ACA to order the supersession of the board of directors.

6.41. For a long time, RBI drew its powers only from the aforesaid 2 enactments, namely RBI Act, 1934 and the Banking Regulation Act, 1949. But with the passage of time, as the industrial economy grew and several banking companies came into existence and a need to fast track paper-based cheque processing increased, the banks came together to set up clearing houses. The clearing houses developed the procedure of netting (arriving at the multilateral net settlement). But with the advent of technology, new payment systems such as MICR clearing, Electronic Funds Transfer Systems, cash-based payment systems, RTGS (real time gross settlement) etc. became popular. The development of multiple payment systems, which operated only in the realm of contracts among various stakeholders, did not have a legislative sanction. Therefore, an Act known as the Payment and Settlement Systems Act, 2007 was enacted with the object of providing for the Regulation and supervision of payment systems in India and to designate RBI as the authority for that purpose.

6.42. It is seen from the Statement of Objects and Reasons of the Bill that RBI is empowered to regulate and supervise various payment and settlement systems in India including those operated by non-banks, card companies, other payment system providers and the proposed umbrella organization for retail payments. The Act further empowers RBI to (i) lay down the procedure for authorization of payment systems (ii) lay down the operation and technical standards for payment systems (iii) issue directions and guidelines to system providers (iv) call for information and furnish returns and documents from the service providers (v) audit and inspect the systems and premises of the system providers (vi) lay down the duties of the system providers and (vii) make Regulations for carrying out the provisions of the Act.

6.43. Section 2(1)(i) defines a "payment system". The Section reads as follows:

2(1)(i) "payment system" means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange;

Explanation.- For the purposes of this clause, "payment system" includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations;

6.44. Under Section 3 of the Payment and Settlement Systems Act, 2007 RBI is the designated authority for the Regulation and supervision of payment systems under the Act.

6.45. Chapter III of the Act deals with "authorisation of payment systems". Section 4(1) of the Payment and Settlement Systems Act, 2007 provides that any person other than RBI seeking to commence or operate a payment system shall take authorization from the Reserve Bank in that regard. Section 4(1) reads as follows:

4. Payment system not to operate without authorisation.-- (1) No person, other than the Reserve Bank, shall commence or operate a payment system except under and in accordance with an authorisation issued by the Reserve Bank under the provisions of this Act:

Provided that nothing contained in this Section shall apply to--

(a) the continued operation of an existing payment system on commencement of this Act for a period not exceeding six months from such commencement, unless within such period, the operator of such payment system obtains an authorisation under this Act or the application for authorisation made Under Section 7 of this Act is refused by the Reserve Bank;

(b) any person acting as the duly appointed agent of another person to whom the payment is due;

(c) a company accepting payments either from its holding company or any of its subsidiary companies or from any other company which is also a subsidiary of the same holding company;

(d) any other person whom the Reserve Bank may, after considering the interests of monetary policy or efficient operation of payment systems, the size of any payment system or for any other reason, by notification, exempt from the provisions of this section.

6.46. Chapter IV of the Act specifies the regulatory and supervisory powers of RBI. Under Section 10, RBI is empowered to prescribe certain standards and guidelines for the proper and efficient management of the payment systems. The Section reads as follows:

10. Power to determine standards.--(1) The Reserve Bank may, from time to time, prescribe--

(a) the format of payment instructions and the size and shape of such instructions;

(b) the timings to be maintained by payment systems;

(c) the manner of transfer of funds within the payment system, either through paper, electronic means or in any other manner, between banks or between banks and other system participants;

(d) such other standards to be complied with the payment systems generally;

(e) the criteria for membership of payment systems including continuation, termination and rejection of membership;

(f) the conditions subject to which the system participants shall participate in such fund transfers and the rights and obligations of the system participants in such funds.

(2) Without prejudice to the provisions of Sub-section (1), the Reserve Bank may, from time to time, issue such guidelines, as it may consider necessary for the proper and efficient management of the payment systems generally or with reference to any particular payment system.

6.47. Section 11 of the Act provides that any change in the system which would affect the structure or the operation of the payment system would require prior approval from the Reserve Bank. Section 11 reads as follows:

11. Notice of change in the payment system.--(1) No system provider shall cause any change in the system which would affect the structure or the operation of the payment system without--

(a) the prior approval of the Reserve Bank; and

(b) giving notice of not less than thirty days to the system participants after the approval of the Reserve Bank:

Provided that in the interest of monetary policy of the country or in public interest, the Reserve Bank may permit the system provider to make any changes in a payment system without giving notice to the system participants under Clause (b) or requiring the system provider to give notice for a period longer than thirty days.

(2) Where the Reserve Bank has any objection, to the proposed change for any reason, it shall communicate such objection to the systems provider within two weeks of receipt of the intimation of the proposed changes from the system provider.

(3) The system provider shall, within a period of two weeks of the receipt of the objections from the Reserve Bank forward his comments to the Reserve Bank and the proposed changes may be effected only after the receipt of approval from the Reserve Bank.

6.48. Section 17 empowers RBI to issue directions to a payment system or a system participant, which, in RBI's opinion is engaging in any act that is likely to result in systemic risk being inadequately controlled or is likely to affect the payment system, the monetary policy or the credit policy of the country. The Section reads as follows:

17. Power to issue directions.--Where the Reserve Bank is of the opinion that,--

(a) a payment system or a system participant is engaging in, or is about to engage in, any act, omission or course of conduct that results, or is likely to result, in systemic risk being inadequately controlled; or

(b) any action under Clause (a) is likely to affect the payment system, the monetary policy or the credit policy of the country,

the Reserve Bank may issue directions in writing to such payment system or system participant requiring it, within such time as the Reserve Bank may specify -

(i) to cease and desist from engaging in the act, omission or course of conduct or to ensure the system participants to cease and desist from the act, omission or course of conduct; or

(ii) to perform such acts as may be necessary, in the opinion of the Reserve Bank, to remedy the situation.

6.49. Section 18 of the Payment and Settlement Systems Act, 2007 further empowers RBI to issue directions to system providers or the system participants or any other person generally, to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest. The Section reads as follows:

18. Power of Reserve Bank to give directions generally.-- Without prejudice to the provisions of the foregoing, the Reserve Bank may, if it is satisfied that for the purpose of enabling it to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest, it is necessary so to do, lay down policies relating to the Regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and give such directions in writing as it may consider necessary to system providers or the system participants or any other person either generally or to any such agency and in particular, pertaining to the conduct of business relating to payment systems.

6.50. Thus, the RBI Act, 1934, the Banking Regulation Act, 1949 and the Payment and Settlement Systems Act, 2007 cumulatively recognize and also confer very wide powers upon RBI (i) to operate the currency and credit system of the country to its advantage (ii) to take over the management of the currency from central government (iii) to have the sole right to make and issue bank notes that would constitute legal tender at any place in India (iv) regulate the financial system of the country to its advantage (v) to have a say in the determination of inflation target in terms of the consumer price index (vi) to have complete control over banking companies (vii) to regulate and supervise the payment systems (viii) to prescribe standards and guidelines for the proper and efficient management of the payment systems (ix) to issue directions to a payment system or a system participant which in RBI's opinion is engaging in any act that is likely to result in systemic risk being inadequately controlled or is likely to affect the payment system, the monetary policy or the credit policy of the country and (x) to issue directions to system providers or the system participants or any other person generally, to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest.

6.51. Having taken note of the role of RBI as a central bank in the economy of the country, the functions entrusted to them and the powers conferred upon them under various statutes, let us undertake the exercise of fixing the identity of virtual currencies.

Fixing the identity of VCs

6.52. As we have stated in Part 3 of this judgment, the exact identity of virtual currencies eludes precision. Some call it an exchange of value, some call it a stock and some call it a good/commodity. There may be no difficulty in accepting the divergence of views, if those views are not driven by fear of Regulation. But if someone presents it as currency to a regulator of stock market and presents it as a commodity to a regulator of money market and so on and so forth, the

definition will not merely elude a proper molecular structure but also elude Regulation. This is where the problem of law lies. George Friedman, the founder and Chairman of Geopolitical Futures LLC, an online publication, aptly summarized this dilemma as follows: "Bitcoin is neither fish nor fowl...But both pricing it as a commodity when no commodity exists and trying to make it behave as a currency, seem problematic. The problem is not that it is not issued by the Government nor that it is unregulated. The problem is that it is hard to see what it is."

6.53. It is now universally accepted that Satoshi envisioned a digital analog to old-fashioned gold, a new kind of universal money that could be owned by everyone and spent anywhere. It was designed to live with a cleverly constructed decentralized network without central authority. Satoshi himself defined it as "a new electronic cash system that's fully peer-to-peer, with no trusted third party."

6.54. It is true that though, at its birth, it was conceived of only as an alternative to money, crypto currencies assumed different shapes, different shades and different utility values over the past decade and more. Several international monetary agencies/watchdogs are dabbling to find out what these are and they are also divided in their opinion. For instance, in a report submitted on 22-01-2019 to the International Monetary Fund (IMF), by Jeffrey Franks, Director of its Europe Office, under the title 'Cryptocurrencies and Monetary Policy', it is pointed out as follows:

1. Money has evolved over time, to meet customary demands, but its basic functions such as (A) retaining a store of value; (B) acting as means of payment and (C) acting as a unit of account, have all remained the same.

2. There are four basic characteristics of a crypto currency like bitcoin, they are (A) digital in nature (B) private (C) global and (D) run on an autonomous and de-centralized algorithm.

6.55. According to the said report, there are four factors which lie behind the rise of crypto currencies. They are: (1) the development of blockchain technology (2) concerns about conventional money and banking, that arose out of the sub-prime mortgage crisis in 2008 and the unconventional monetary policies/quantitative easing (3) privacy concerns and (4) political views about the role of the Government.

6.56. The IMF report says that crypto currencies perform poorly in terms of the three basic functions of currencies. While the store of value increased 2000% from January 2017 to December 2017, there was also a fall during the year 2018. As means of payment, the acceptance of crypto currencies, according to the IMF report is very low and a few companies such as Microsoft, Dish network etc. have begun to accept crypto currencies for limited transactions. As a unit of account, so far, no goods or services are priced in crypto currencies.

6.57. On its potential impact on the monetary policies of governments, the IMF report says the following:

But in the future, large crypto currencies holdings could complicate monetary policy management

Eventually the conclusions reached in the report are as follows:

• Crypto currencies today do not do a good job at fulfilling the main functions of money.

• They may be favoured by some for ideological, technological or monetary policy reasons.

• The blockchain technology they use does have some important advantages in controlling fraud and maintaining privacy.

• But they also open up avenues for tax evasion and criminal activity.

6.58. The Petitioners claim that today virtual currency is not money or other legal tender, but good/tradable commodity and hence RBI has no role in regulating/banning the same. RBI has also taken a stand that VCs are not recognized as legal tender, but they seek to justify the impugned decisions, on the ground that VCs are capable of being used as a medium of exchange. Therefore, it is necessary to see how VCs were defined (i) by regulators in different jurisdictions and (ii) by the governments and other statutory authorities of various countries, through statutory instruments and non-statutory directives and (iii) by courts of different jurisdictions.

DEFINITION OF VCs - BY REGULATORS

S. No.	Regulator	Definition of Virtual Currency
1.	International Monetary Fund[7]	VCs are digital representations of value, issued by private developers and denominated in their own unit of account.[8] VCs can be obtained, stored, accessed, and transacted electronically, and can be used for a variety of purposes, as long as the transacting parties agree to use them. The concept of VCs covers a wider array of "currencies," ranging from simple IOUs (I owe you) of issuers (such as Internet or mobile coupons and airline miles), to VCs backed by assets such as gold,[9] and "cryptocurrencies" such as Bitcoin. As digital representations of value, VCs fall within the broader category of digital currencies. However, they differ from other digital currencies, such as e-money, which is a digital payment mechanism for (and denominated in) fiat currency. VCs, on the other hand, are not denominated in fiat currency and have their own unit of account.

		VCs fall short of the legal concept of currency or money. At present, VCs do not completely fulfill the three economic roles associated with money: high price volatility of VCs limits their ability to serve as a reliable store of value; the current small size and limited acceptance network of VCs significantly restricts their use as a medium of exchange; as of now, there is little evidence that VCs are used as an independent unit of account.
2.	Financial Action Task Force	June 2015:[10] Virtual currency is a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is not issued nor guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency. October 2018:[11] Virtual Asset - A virtual asset is a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations. For the purposes of applying the FATF Recommendations, countries should consider virtual assets as "property," "proceeds," "funds," "funds or other assets," or other "corresponding value."
3.	European Central Bank	2012:[12] A virtual currency is a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community. This

		definition may need to be adapted in future if fundamental characteristics change. 2017:[13] Absent a universally accepted definition, 'virtual currencies' can be defined as digital representations of value which, despite not being issued by a central bank or another comparable public authority, nor being 'attached', subject to certain exceptions, to a fiat currency, are voluntarily accepted, by natural or legal persons, as a means of exchange, and which are stored, transferred and traded electronically, without a tangible, real-world representation. This definition of 'virtual currencies' captures decentralised, peer-to-peer VCs - as distinct from E-money or Internet (software)-based payment schemes, which merely facilitate transactions denominated in fiat money or in central bank-issued digital currencies - which, while devoid of legal tender status, fulfil, at least to some extent, all three traditional functions of money by way of agreement within their user community. This definition does not, however, extend to centrally-issued digital currencies, such as the central bank digital currencies under consideration, at the time of writing, in several jurisdictions. European Banking Authority in 2014:[14] VCs are defined as a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a FC, but is used by natural or legal persons as a means of exchange and can be transferred, stored or traded electronically.
4.	European Securities and Markets Authority[15]	Crypto-asset: A type of private asset that depends primarily on cryptography and Distributed Ledger Technology (DLT) or similar technology as part of their perceived or inherent value...Crypto-asset additionally means an asset that is not issued by a central bank.

5.	Financial Conduct Authority, United Kingdom[16]	Cryptoassets are a cryptographically secured digital representation of value or contractual rights that is powered by forms of DLT and can be stored, transferred or traded electronically. While cryptoassets can be used as a means of exchange, they are not considered to be a currency or money, as both the Bank of England and the G20 Finance Ministers and Central Bank Governors have previously set out. They are too volatile to be a good store of value, they are not widely accepted as a means of exchange, and they are not used as a unit of account.
6.	Internal Revenue Service, Department of Treasury, USA	2014:[17] "virtual currency" may be used to pay for goods or services, or held for investment. Virtual currency is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. Convertible VC is treated as property for U.S. federal tax purposes. General tax principles that apply to property transactions apply to transactions using virtual currency. VC is not treated as currency that could generate foreign currency gain or loss for U.S. federal tax purposes. 2018:[18] Virtual currency, as generally defined, is a digital representation of value that functions in the same manner as a country's traditional currency.
7.	Securities and Exchange Commission, USA	Bitcoin has been described as a decentralized, peer-to-peer virtual currency that is used like money - it can be exchanged for traditional currencies such as the U.S. dollar, or used to purchase goods or services, usually online. Unlike traditional currencies, Bitcoin operates without central authority or banks and is not backed by any government.[19] Speaking broadly, crypto currencies purport to be items of inherent value (similar, for instance, to cash or gold) that are designed to enable purchases, sales and other financial transactions.

		They are intended to provide many of the same functions as long-established currencies such as the U.S. dollar, euro or Japanese yen but do not have the backing of a government or other body.[20]
8.	Commodity Futures Trading Commission, USA	Section 1a(9) of the Act (US Commodity Exchange Act) defines "commodity" to include, among other things, "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(9). The definition of a "commodity" is broad. See, e.g., Board of Trade of City of Chicago v. SEC, MANU/FEVT/0281/1982 : 677 F. 2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.[21]
9.	Financial Crimes Enforcement Network, Department of Treasury, USA[22]	Virtual currency is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction. This guidance addresses "convertible" virtual currency. This type of virtual currency either has an equivalent value in real currency, or acts as a substitute for real currency.
10.	Canada Revenue Agency (CRA)[23]	Cryptocurrency is a digital representation of value that is not legal tender. It is a digital asset...that works as a medium of exchange for goods and services between the parties who agree to use it. CRA generally treats cryptocurrency like a commodity for purposes of Income Tax Act. Any income from transactions involving cryptocurrency is generally treated as business income or as a capital gain, depending on the circumstances. Virtual currency is digital asset that can be used to buy and sell goods or services. Cryptocurrency is a blockchain-based, virtual currency. When cryptocurrency is used to pay for goods or services, the rules for barter transactions apply for income tax purposes. A barter transaction occurs when any two persons agree to exchange good or services and carry out that exchange without legal

		currency. Virtual currency can also be bought or sold like commodity.[24]

DEFINITIONS UNDER STATUTORY ENACTMENTS AND NON-STATUTORY DIRECTIVES OF GOVERNMENTS

S. No.	Country	Statutory Enactment/Non-Statutory Directive	Section/Article defining VC
1.	Japan	Payment Services Act, 2009	Article 2(5): The term "Virtual Currency" as used in this Act means any of the following: (i) property value (limited to that which is recorded on an electronic device or any other object by electronic means, and excluding the Japanese currency, foreign currencies, and Currency-Denominated Assets; the same applies in the following item) which can be used in relation to unspecified persons for the purpose of paying consideration for the purchase or leasing of goods or the receipt of provision of services and can also be purchased from and sold to unspecified persons acting as counterparties, and which can be transferred by means of an electronic data processing system; and (ii) property value which can be mutually exchanged with what is set forth in the preceding item with unspecified persons acting as counterparties, and which can be transferred by means of an electronic data processing system.

			2019 amendment to this Act (to come into force from April 2020) uses the term "crypto assets (angoshisan)" in place of the term "virtual currency". The 2019 Amendment added crypto assets to the term "financial instruments" for the purposes of defining underlying assets of the derivative transactions subject to derivative Regulations under the FIEA (Financial Instruments and Exchange Act), and therefore the same Regulations applicable to other derivative transactions under the FIEA will apply to crypto asset derivative transactions. These Regulations include certain conduct Regulations, such as the notice requirement prior to trading, and prohibitions on making false statements, providing conclusive judgments, and engaging in uninvited solicitation.
2.	Malta	Virtual Financial Asset Act, 2018	Article 2(2): "virtual financial asset" or "VFA" means any form of digital medium recordation that is used as a digital medium of exchange, unit of account, or store of value and that is not - (a) electronic money; (b) a financial instrument; or (c) a virtual token; "virtual token" means a form of digital medium recordation whose utility, value or

			application is restricted solely to the acquisition of goods or services, either solely within the DLT platform on or in relation to which it was issued or within a limited network of DLT platforms.
3.	Canada	Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, 2002[25]	Section 1(2): virtual currency means (a) a digital representation of value that can be used for payment or investment purposes that is not a fiat currency and that can be readily exchanged for funds or for another virtual currency that can be readily exchanged for funds; or (b) a private key of a cryptographic system that enables a person or entity to have access to a digital representation of value referred to in paragraph (a).
4.	Bahamas	Payment Instruments (Oversight) Regulations, 2017	No specific legislation for crypto currencies. But according to Central Bank, Bahamas the Regulations which provide a framework for a system of national electronic payment services, apply to crypto currencies. Article 2(1): electronic money or e-money means electronically stored monetary value as represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions and which is accepted as a means of payment by persons other than the issuer, and includes monetary value stored

			magnetically or in any other tangible or intangible device (such as SIM card or software). A Bill is under consideration that would bring virtual currencies within the ambit of proceeds of crime legislation (Proceeds of Crime Bill, 2018). Clause (2) of the Bill defines: "virtual currency" as a digital representation of value which can be digitally traded and functions as - (a) a medium of exchange; (b) a unit of account; or (c) a store of value, that does not have legal tender status or carry any security or guarantee in any jurisdiction. "currency or money" means coin and paper money of any jurisdiction that is designated as legal tender or is customarily used and accepted as a medium of exchange, including virtual currency as a means of payment.
5.	Estonia	Money Laundering and Terrorist Financing Prevention Act, 2017	Section 3(9): cryptocurrencies (virtual currencies) are value represented in digital form that is digitally transferable, preservable, or tradable and that which natural persons or legal persons accept as a payment instrument, but that is not the legal tender of any country or funds (banknotes or coins, scriptural money held by banks, or electronic money).
6.	Latvia	Law on Prevention of Money Laundering and Terrorism and	Section 1 (22): virtual currency- a digital representation of value which can be transferred, stored or traded digitally and operate as a means of exchange, but has

		Proliferation Financing, as amended in 2017	not been recognised as a legal means of payment, cannot be recognised as a banknote and coin, non-cash money and electronic money, and is not a monetary value accrued in the payment instrument which is used in the cases referred to in Section 3, Clauses 10 and 11 of the Law on the Payment Services and Electronic Money;
7.	Liechtenstein	Due Diligence Act, 2009	Article 2(1)(l): Virtual currencies shall be understood to be digital monetary units, which can be exchanged for legal tender, used to purchase goods or services or to preserve value and thus assume the function of legal tender.
8.	Israel	Supervision of Financial Services Law, 5776-2016	Section 11A (7) defines financial asset. Financial asset includes virtual currency.[26]
9.	Jersey (Crown dependency)	Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016	Article 4(4): 'Virtual currency' means any currency which (whilst not itself being issued by, or legal tender in, any jurisdiction) - (a) digitally represents value; (b) is a unit of account; (c) functions as a medium of exchange; and (d) is capable of being digitally exchanged for money in any form. Article 4(5): For the avoidance of doubt, virtual currency does not include any instrument which represents or stores (whether digitally or otherwise) value that can be used only to

			acquire goods and services in or on the premises of, or under a commercial agreement with, the issuer of the instrument.
10.	Mexico	Financial Technology Institutions Law, 2018 (Chapter on Virtual Assets)	It defines virtual assets as representations of value electronically registered and utilized by the public as a means of payment for all types of legal transactions, which may only be transferred electronically.[27]
11.	Austria	Ministry of Finance	Treats virtual currency as 'other intangible commodity'.[28]
12.	Czech Republic	Vice Governor, Czech National Bank	Treats virtual currency as 'commodity'.[29]
13.	Germany	German Federal Financial Supervisory Authority	The Authority qualifies virtual currencies as "units of account" and therefore, "financial instruments". But bitcoin is considered to be crypto token by German Bundesbank (because it does not fulfil the typical functions of a currency).[30]
14.	Luxembourg	Minister of Finance	Recognized before the Parliament that crypto currencies are actual currencies.[31]
15.	Slovakia	Ministry of Finance, Slovakia published guidance	Virtual currencies must be treated as "short term financial assets other than money".[32]
16.	European Union	European Union's Directive 2018/843 of 30 May 2018 (5th Anti-Money Laundering Directive)[33]	Article 3(18): 'Virtual Currencies' means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or

			money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.
17.	United Kingdom	HM Revenue & Customs, UK[34]	Cryptoassets (or 'cryptocurrency' as they are also known) are cryptographically secured digital representations of value or contractual rights that can be: • transferred • stored • traded electronically HMRC does not consider cryptoassets to be currency or money. Cryptocurrencies have a unique identity and cannot therefore be directly compared to any other form of investment activity or payment mechanism.[35]
		Bank of England[36]	The first part of the word 'crypto', means 'hidden' or 'secret' reflecting the secure technology used to record who owns what, and for making payments between users. The second part of the word, 'currency,' tells us the reason cryptocurrencies were designed in the first place: a type of electronic cash. But cryptocurrencies aren't like the cash we carry. They exist electronically and use a peer-to-peer system. There is no central bank or government to manage

			the system or step in if something goes wrong.
18.	United States of America	New York [BitLicense Regulation (23 CRR-NY 200)]	Section 2(p): virtual currency means any type of digital unit that is used as a medium of exchange or a form of digitally stored value. Virtual currency shall be broadly construed to include digital units of exchange that: have a centralized repository or administrator; are decentralized and have no centralized repository or administrator; or may be created or obtained by computing or manufacturing effort. Virtual currency shall not be construed to include any of the following: (1) digital units that: (i) are used solely within online gaming platforms; (ii) have no market or application outside of those gaming platforms; (iii) cannot be converted into, or redeemed for, fiat currency or virtual currency; and (iv) may or may not be redeemable for real-world goods, services, discounts, or purchases; (2) digital units that can be redeemed for goods, services, discounts, or purchases as part of a customer affinity or rewards program with the issuer and/or other designated merchants or can be redeemed for digital units in another

			customer affinity or rewards program, but cannot be converted into, or redeemed for, fiat currency or virtual currency; or (3) digital units used as part of prepaid cards;
		North Carolina [Money Transmitters Act (§ 53-208.42)]	Virtual currency- A digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account, or a store of value but only to the extent defined as stored value under subdivision (19) of this section, but does not have legal tender status as recognized by the United States Government.
		Connecticut [General Statutes of Connecticut, Section 36a-596]	"Virtual currency" means any type of digital unit that is used as a medium of exchange or a form of digitally stored value or that is incorporated into payment system technology. Virtual currency shall be construed to include digital units of exchange that (A) have a centralized repository or administrator; (B) are decentralized and have no centralized repository or administrator; or (C) may be created or obtained by computing or manufacturing effort. Virtual currency shall not be construed to include digital units that are used (i) solely within online gaming platforms with no market or application outside such gaming platforms, or (ii) exclusively as part of a consumer affinity or rewards program, and can be applied solely as payment for purchases with the issuer or other designated merchants, but cannot be converted into or redeemed for fiat currency.

		Florida [Florida Money Laundering Act (Fla. Stat. § 896.101)]	(2) (j) "Virtual currency" means a medium of exchange in electronic or digital format that is not a coin or currency of the United States or any other country.
		Illinois [Digital Currency Regulatory Guidance (2017)][37]	A digital currency is an electronic medium of exchange used to purchase goods and services. A digital currency may also be exchanged for money. A digital currency, by nature of its properties detailed below, is distinct from money.
		Louisiana [Consumer and Investor Advisory on Virtual Currency by Office of Financial Institute (2014)][38]	Virtual currency is an electronic medium of exchange that does not have all the attributes of real or fiat currencies. Virtual currencies include cryptocurrencies, such as Bitcoin and Litecoin, which are not legal tender and are not issued or backed by any central bank or governmental authority. Virtual currencies are: • not backed by the United States or any other national government; • not insured by the Federal Deposit Insurance Corporation or any governmental agency; • not backed by any physical commodity, such as gold or silver; and • not legal tender for debts. Virtual currencies have legitimate purposes and can be purchased, sold, and exchanged with other types of virtual currencies or real currencies like the U.S. dollar. This can happen through various mechanisms such as exchangers, administrators, or merchants that are willing to accept virtual currencies in lieu of real currency.
		Michigan [Michigan	Convertible virtual currency is a digital representation of value that has

		Department of Treasury Guidance (January 2015)][39]	an equivalent value in real currency, such as the United States Dollar (USD), and/or acts as a substitute for real currency. A prominent example of convertible virtual currency is Bitcoin, a form of e-currency that has been around since 2008.
		Washington Uniform Money Services Act (RCW 19.230.010)	"Virtual currency" means a digital representation of value used as a medium of exchange, a unit of account, or a store of value, but does not have legal tender status as recognized by the United States government. "Virtual currency" does not include the software or protocols governing the transfer of the digital representation of value or other uses of virtual distributed ledger systems to verify ownership or authenticity in a digital capacity when the virtual currency is not used as a medium of exchange.
		Wyoming Wyoming Money Transmitter Act [W.S. 40-22-102(a)]	(xxii) "Virtual currency" means any type of digital representation of value that: (A) Is used as a medium of exchange, unit of account or store of value; and (B) Is not recognized as legal tender by the United States government.

6.59. It may be seen from the contents of the tables given above that there is unanimity of opinion among all the regulators and the governments of various countries that though virtual currencies have not acquired the status of a legal tender, they nevertheless constitute digital representations of value and that they are capable of functioning as (i) a medium of exchange and/or (ii) a unit of account and/or (iii) a store of value. The IMF, the FATF, the European Central Bank, the Financial Conduct Authority of the United Kingdom, the Internal Revenue Service of the United States, Department of Treasury and the Canadian Revenue Authority treat virtual currencies as digital representations of value. The European Central Bank went a step further by describing a virtual currency as a type of unregulated digital money. The Internal Revenue Service of the United States, Department of Treasury has recognized that a virtual currency can function in the same manner as a country's traditional currency. The Securities and Exchange Commission, USA also recognizes that virtual currencies are intended to perform many of the same functions as long-established currencies such as US dollar, Euro or Japanese Yen. Yet another wing of the United States Department of Treasury namely Financial Crimes Enforcement Network calls virtual currency as

a medium of exchange that operates like a currency in some environments, though it may not have all the attributes of a real currency.

6.60. The Bank of International Settlements, as pointed out in Part 2 of this judgment, got a sub-group within the Committee on Payments and Market Infrastructure (CPMI) to undertake an analysis of digital currencies. In a report submitted by them in November 2015, this sub-group recognized that though the use of private digital currencies was too low at that time for certain risks to materialize, the widespread substitution of bank notes over a period of time, with digital currencies, could lead to a decline in non-interest paying liabilities of central banks and that the conduct of the monetary policy could be affected.

6.61. Similarly, the state of Liechtenstein considers virtual currencies as digital monetary units which can be exchanged for legal tender and also be used to purchase goods or services, thereby assuming the character of a legal tender. The German Federal Financial Supervisory Authority treats virtual currencies as units of account and consequently as financial instruments. Luxembourg has taken an official position that crypto currencies are actual currencies. Some of the states in the Unites States of America have passed laws recognizing virtual currencies as electronic medium of exchange.

6.62. It is clear from the above that the governments and money market regulators throughout the world have come to terms with the reality that virtual currencies are capable of being used as real money, but all of them have gone into the denial mode (like the proverbial cat closing its eyes and thinking that there is complete darkness) by claiming that VCs do not have the status of a legal tender, as they are not backed by a central authority. But what an Article of merchandise is capable of functioning as, is different from how it is recognized in law to be. It is as much true that VCs are not recognized as legal tender, as it is true that they are capable of performing some or most of the functions of real currency.

6.63. The word "currency" is defined in Section 2(h) of the Foreign Exchange Management Act, 1999 (hereinafter, "FEMA") to include "all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers' cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments as may be notified by the Reserve Bank." The expression "currency notes" is also defined in Section 2(i) of FEMA to mean and include cash in the form of coins and bank notes. Again, FEMA defines "Indian currency" Under Section 2(q) to mean currency which is expressed or drawn in Indian rupees, but which would not include special bank notes and special one rupee notes issued Under Section 28A of the RBI Act. But RBI has taken a stand in paragraph 24 of its counter-affidavit that VCs do not fit into the definition of the expression "currency" Under Section 2(h) of FEMA, despite the fact that FATF, in its report on June 2014 on "Virtual Currencies: Key Definitions and Potential AML/CFT Risks" defined virtual currency to mean "digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status." According to the report, legal tender status is acquired only when it is accepted as a valid and legal offer of payment when tendered to a creditor.

6.64. Traditionally 'money' has always been defined in terms of the 3 functions or services that it provides namely (1) a medium of exchange (2) a unit of account and (3) a store of value. But in

course of time, a fourth function namely that of being a final discharge of debt or standard of deferred payment was also added. This fourth function is acquired by money through the conferment of the legal tender status by a Government/central authority. Therefore, capitalizing on this fourth dimension/function and drawing a distinction between money as understood in the social sense and money as understood in the legal sense, it was contended by Shri Nakul Dewan, learned Senior Counsel, with particular reference to the book 'Property Rights in Money' by David Fox and the decision of the Queen's Bench in Moss v. Hancock (1899) 2 QB 111 and the decision of the US Supreme Court in Wisconsin Central Ltd. v. United States MANU/USSC/0079/2018 : 585 US ___ 2018, 138 S. Ct. 2067 (2018), that so long as VCs do not qualify as money either in the legal sense (not having a legal tender status) or in the social sense (not being widely accepted by a huge population as a medium of exchange), they cannot be treated as currencies within the meaning of any of the statutory enactments from which RBI draws its energy and power.

6.65. But we do not think that RBI's role and power can come into play only if something has actually acquired the status of a legal tender. We do not also think that for RBI to invoke its power, something should have all the four characteristics or functions of money. Moss v. Hancock (supra), itself a century old decision (1899), relies upon the definition of 'money' as given by F.A. Walker in his treatise 'Money, Trade and Industry' (actual title of the book appears to be 'Money in its relation to Trade and Industry'), published in 1879 to the effect that "money is that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or the credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities."

6.66. But that 1879 definition cannot be accepted as perfect, final and everlasting, in modern times. Cross border transactions and technological advancements have removed many shackles created by old concepts (except perhaps those created by law courts). This fact has been recognized in the dissent of Breyer, J., in Wisconsin Central (supra) when he says "...what we view as money has changed over time. Cowrie shells once were such a medium but no longer are... our currency originally included gold, coins and bullion, but after 1934, gold could not be used as a medium of exchange... perhaps one day employees will be paid in Bitcoin or some other type of currency". In the linguistic sense, Oxford English Dictionary has already included "property or possessions of any kind viewed as convertible into money" within the definition of money. Therefore, Breyer, J., points out in his dissent "So, where does this duel of definitions lead us? Some seem too narrow; some seem too broad; some seem indeterminate. The result is ambiguity". He therefore concluded that stock options given to employees constitute money remuneration for the services rendered. But the majority proceeded on the basis that when the law was enacted, the term 'money' was not used in an expansive sense.

6.67. Neither the RBI Act, 1934 nor the Banking Regulation Act, 1949 nor the Payment and Settlement Systems Act, 2007 nor the Coinage Act, 2011 define the words 'currency' or 'money'. But FEMA defines the words 'currency', 'currency notes', 'Indian currency' and 'Foreign currency'. We have taken note of these definitions. Interestingly, Section 2(b) of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 defines money to include a cheque, postal order, demand draft, telegraphic transfer or money order. Clause (33) of Section 65B of the Finance Act,

1994, inserted by way of Finance Act, 2012 defines 'money' to mean "legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any other similar instrument, but shall not include any currency that is held for its numismatic value". This definition is important, for it identifies many instruments other than legal tender, which could come within the definition of money.

6.68. The Sale of Goods Act, 1930 does not define 'money' or 'currency' but excludes money from the definition of the word 'goods'. The Central Goods and Services Tax Act, 2017 defines 'money' Under Section 2(75) to mean "the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any other instrument recognised by RBI, when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value."

6.69 In CIT v. Kasturi & Sons Ltd. MANU/SC/1605/1999 : (1999) 3 SCC 346, a question arose as to whether the replacement by the insurer, of an Article destroyed by one of the perils as against which coverage is provided, would be taken to be "money" within the meaning of Section 41(2) of the Income Tax Act, 1961. This Court held that the word "money" used in Section 41(2) has to be interpreted only as actual money or cash and not as any other thing or benefit which could be evaluated in terms of money.

6.70. In Dhampur Sugar Mills Ltd. v. Commissioner of Trade Tax MANU/SC/8168/2006 : (2006) 5 SCC 624, this Court was concerned with the question whether the adjustment of price of molasses from the amount of license fee would amount to sale within the meaning of the U.P. Trade Tax Act, 1948. The argument advanced was that an exchange or barter cannot be said to be a sale. After referring to the phrase "cash, deferred payment or other valuable consideration", this Court pointed out that "money is a legal tender, but cash is narrower than money." This is for the reason that in contradistinction to cash, deferred payment or other valuable consideration would also come within the meaning of money, for the purpose of the Act.

6.71. Just as the very concept of 'money' or 'currency' has changed over the years, and different jurisdictions and different statutes have adopted different definitions of 'money' and 'currency', depending upon the issue sought to be addressed, the concept of VCs have also undergone a sea of change, with different regulators and statutory authorities adopting different definitions, leading to diametrically opposite views emerging from courts across the spectrum. Let us now see how courts in other jurisdictions have grappled with the definition of the word 'virtual currency'.

6.72. The Securities and Exchange Commission (SEC) of the United States of America prosecuted a person by name Trendon Shavers, who was the founder and operator of Bitcoin Savings and Trust (BTCST), for soliciting illicit investments in Bitcoin related opportunities from a number of lenders, defrauding them to the tune of 700,000 BTC in funds. While SEC contended that Bitcoin investments were securities, Shavers contended that Bitcoin is not money and hence, not 'securities'. But the Sherman Division Eastern District Court of Texas opined in SEC v. Trendon Shavers,[40] that: "It is clear that bitcoin can be used as money. It can be used to purchase goods or services and as Shavers stated, used to pay for individual living expenses. The only limitation of bitcoin is that it is limited to those places that accept it as currency. However, it can also be

exchanged for conventional currencies such as the US dollar, euro, yen and Yuan. Therefore, bitcoin is a currency or form of money..."

6.73. In United States v. Ulbricht 31F. Supp. 3d 540 (2014), the United States District Court, Southern District, New York was concerned with the Defendant's motion to dismiss four counts namely (i) participation in a narcotics trafficking conspiracy (ii) a continuing criminal enterprise (iii) computer hacking conspiracy and (iv) money laundering conspiracy, for which the Grand jury returned indictment. The allegation against the Defendant was that Ulbricht engaged in these offences by designing, launching and administering a website called Silk Road, as an online marketplace for illicit goods and services. According to the prosecution, Bitcoin was used to launder the proceeds. The website was available only to those using Tor (abbreviation for 'The Onion Router'), a free and open source software and a network that allows anonymous, untraceable internet browsing. Payments were allowed only through Bitcoin. Opposing the money laundering charge, Ulbricht contended that the use of Bitcoin did not involve a legally cognizable financial transaction. But the court held "Bitcoins carry value-that is their purpose and function-and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it US dollars, euros or some other currency".

6.74. The decision in Ulbricht (supra) was closely followed by another decision of the same court in United States v. Faiella 39F. Supp. 3d 544 (2014). This was also a case where the Defendants were charged with the operation of an underground market in the virtual currency bitcoin via the website Silk Road. Faiella moved the District court to dismiss count one of the indictments namely that of operating an unlicensed money transmitting business in violation of a particular statute. The contention of the Defendant was (i) that Bitcoin does not qualify as money (ii) that operating a Bitcoin exchange does not constitute "transmitting" of money and (iii) that he is not a money transmitter. While rejecting the motion, the court held "bitcoin clearly qualifies as money or funds under the plain meaning definitions. Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value and is used to conduct financial transactions." The decision in Trendon Shavers (supra) was relied upon.

6.75. While the district courts of USA took the view that virtual currency can be used as money, the Commodity Futures Trading Commission (CFTC) took a view in In re Coinflip, Inc,[41] that virtual currencies are "commodities". This was in relation to the initiation of public administrative proceedings to determine whether the Defendant was engaged in violation of the provisions of Commodity Exchange Act and the Commission's Regulations by operating an online facility named Derivabit offering to connect buyers and sellers of Bitcoin option contracts. Interestingly, the Defendant admitted an offer of settlement in anticipation of administrative proceedings.

6.76. Within a week, another entity, by name, TeraExchange LLC also submitted an offer of settlement before CFTC In the matter of TeraExchange LLC.[42] CFTC reiterated even in that case that Bitcoin is a commodity under the relevant statute. Another Bitcoin exchange, by name Bitfinex, also conceded the position, before the CFTC when public administrative proceedings were sought to be initiated against them. In the order accepting the offer of settlement, delivered on 02-06-2016 In the matter of BFXNA Inc, d/b/a BITFINEX,[43] CFTC recorded that Bitcoin and other virtual currencies are commodities under the relevant provisions of the statute.

6.77. In United States v. Murgio 209 F. Supp. 3d 698 (2016), which was also before the US District Court, S.D. New York, the Defendant was charged with operating Coin.mx, as an unlicensed money transmitting business. The government alleged that Murgio and his co-conspirators attempted to shield the true nature of his Bitcoin exchange business by operating through several front companies, to convince financial institutions that Coin.mx was just a members-only association of individuals interested in collectable items. Count one of the indictments was the alleged conspiracy in the operation of an unlicensed money transmitting business, punishable under 18 U.S.C. § 1960. Under Section 1960, a business must (i) transfer on behalf of public, (ii) funds and (iii) in violation of licensing and registration requirements, to qualify as an unlicensed money transmitting business. The court concluded that Bitcoins are funds within the plain meaning of the term, as the word "funds" would mean pecuniary resources, generally accepted as a medium of exchange or means of payment. Interestingly, the Defendant's contention that Bitcoin is a commodity as held by CFTC was rejected by the court.

6.78. However, despite the opinion of other District courts in four previous cases, the United States District Court, Eastern district of New York held in a preliminary hearing for injunctive relief, in Commodity Futures Trading Commission v. Patrick McDonnell[44] (Memorandum and order), that virtual currencies are commodities within the meaning of the Commodity Exchange Act. But it is seen from the order that there was no 'currency v. commodity' debate in the entire order.

6.79. A similar view was taken by United States District Court, District of Massachusetts in Commodity Futures Trading Commission v. My Big Coin Pay, Inc. et al.,[45] holding that since there is futures trading in virtual currencies, they constitute 'commodity' within the meaning of the Statute.

6.80. State of Florida v. Michell Abner Espinoza,[46] is an interesting case which came up before the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In that case, a Detective of the Miami Police department teamed up with a Special Agent of the Miami Electronic Crimes Task Force of the United States Secret Service to initiate an investigation into virtual currencies. After getting in touch with a person who advertised the sale of Bitcoins in an online platform run by a peer-to-peer Bitcoin exchange by name Localbitcoins.com, the team organized an undercover operation in December 2013/January 2014. The Detective offered to pay for the Bitcoins through stolen credit cards and when the transaction was about to take place, the offeror was arrested. He was charged with one count of unlawfully engaging in money services business and 2 counts of money laundering. The Defendant filed motions for dismissal and the State filed motions for striking out those motions. While allowing the Defendant's motion to dismiss all the 3 counts on the ground that the court will be unwilling to punish a man for selling his property to another, when his action falls under a statute that is so vaguely written that even legal professionals have difficulty finding a singular meaning, the court ruled as follows:

Nothing in our frame of references allows us to accurately define or describe Bitcoin..... Bitcoin may have some attributes in common with what we commonly refer to as money, but differ in many important aspects. While Bitcoins can be exchanged for items of value, they are not a commonly used means of exchange. They are accepted by some but not by all merchants or service providers. .... With such volatility they have a limited ability to act as a store of value, another important attribute of money. This Court is not an expert in economics, however it is very clear,

even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is equivalent of money. The Florida Legislature may choose to adopt statutes regulating virtual currency in future. At this time, however, attempting to fit the sale of Bitcoin into a statutory scheme regulating money services businesses is like fitting a square peg in a round hole.

6.81. But the decision of the Circuit Court was appealed to the Third District Court of Appeal, State of Florida. By an opinion rendered on 30-01-2019, reported as State of Florida v. Michell Abner Espinoza 264 So. 3d 1055 (2019) the Court of Appeal reversed the decision of the Circuit Court and held, after referring to the June 2014 Report of FATF titled "Virtual currencies: key definitions and potential AML/CFT risks" that given the plain language of the Florida statutes governing money service businesses and the nature of bitcoin and how it functions, Espinoza was acting both as a payment instrument seller and engaging in the business of a money transmitter. The Court of Appeal pointed out that the definition of a "payment instrument" included "a cheque, draft, warrant, money order, travelers' cheque, electronic instrument or other instrument, payment of money or monetary value, whether or not negotiable". The phrase "money services business" was defined in the statute to include any person who acts as a payment instrument seller. Since the expression monetary value means a medium of exchange, whether or not redeemable in currency, the court concluded that VCs are payment instruments and hence a person dealing with the same is in money services business. Though Bitcoin does not expressly fall within the definition of "currency" found in the statute, the court concluded that Bitcoin would certainly fall under the definition of a payment instrument. The Court of Appeal took note of the fact that several restaurants in the Miami area accepted Bitcoins as a form of payment and hence Bitcoin functions as a medium of exchange. (What is important to note about this decision is that it dealt with a penal statute. This is why the Circuit court followed the cautionary approach, not to allow a citizen to be prosecuted on the basis of conjectures about what is a money services business. But the Court of Appeal found on fundamentals that the business concerned a payment instrument and that therefore, there was no ambiguity.)

6.82. In a completely different context, the Singapore International Commercial Court ruled in B2C2 Ltd. v. Quoine Pte Ltd. [2019] SGHC (I) 3, that virtual currency can be considered as property which is capable of being held on trust. The case arose out of a dispute between a person who traded in virtual currencies and the VC Exchange platform on which he traded. The dispute revolved more around the breach of contract and breach of trust than around the identity of virtual currencies. It was in that context that the court opined that crypto currencies satisfied the definition of 'property' as provided by the House of Lords in National Provincial Bank v. Ainsworth MANU/UKHL/0002/1965 : [1965] 1 AC 1175 at 1248 to the effect that it must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability". The court further noted that "crypto currencies are not legal tender in the sense of being a regulated currency issued by a government but do have the fundamental characteristic of intangible property as being an identifiable thing of value". The decision of the Commercial Court was appealed to the Court of Appeal. While dismissing Quoine's appeal on breach of contract claim, but allowing it on breach of trust claim, the Court of Appeal held in Quoine Pte Ltd. v. B2C2 Ltd. [2020] SGCA (I) 02 that though crypto currencies are capable of assimilation into the general concepts of property, there are difficult questions as to the type of property that is involved. Therefore, the Court of Appeal did not take a final position on the question, since it felt that the precise nature of the property right involved, was not clear.

6.83. In a very recent decision, in AA v. Persons Unknown and Ors. Re Bitcoin [2019] EWHC 3556 (Comm), the English High Court ruled that Bitcoin is property. But this decision was on the basis of the definition adopted by UK Jurisdictional Taskforce of the Law Tech Delivery Panel, in its "Legal Statement on the Status of Cryptoassets and Smart Contracts", that crypto assets constitute property under English law. The facts out of which this decision arose, were peculiar. The IT system of a Canadian insurance company was hacked through a malware called Bitpaymer, which encrypted all the data of the company. A ransom equivalent of US $ 950,000 in Bitcoin was demanded by the hackers for decryption. After negotiations through a specialist intermediary by name Incident Response Company, the insurance company paid the ransom into a wallet and retrieved the data with the decryption tools provided by the hackers. Thereafter the insurance company engaged the services of a blockchain investigation outfit known as Chainalysis Inc., which found that of the total of 109.25 Bitcoins transferred as ransom, 13.25 Bitcoins (worth approximately US $ 120,000 at the time) had been converted into an untraceable fiat currency. The remaining 96 Bitcoins had been transferred to a "wallet" linked to a Virtual Currency exchange known as Bitfinex (registered in the British Virgin Islands). The insurance company then sued the VC Exchange before the High Court and sought ancillary disclosure orders to know the identity of persons who held the Bitcoins in the wallet of the exchange. The company also sought a proprietary injunction. Interestingly, the Court agreed to hear the application in private and protect the identity of the insurer which got hacked, for they feared retaliatory copycat attacks. The core issue before the court was whether crypto currencies constituted a form of property capable of being the subject matter of a proprietary injunction. After referring to Fry L.J's statement in Colonial Bank v. Whinney [1885] 30 ChD, that all things personal are either in possession or in action and that the law knows no third category between the two and also after referring to the four classic criteria for property, [namely they are (i) definable; (ii) identifiable by third parties; (iii) capable in their nature of assumption by third parties; and (iv) capable of some degree of permanence] set out by Lord Wilberforce in National Provincial Bank v. Ainsworth (supra), Bryan, J held in AA v. Persons Unknown that virtual currencies are neither choses in action (not embodying a right capable of being enforced in action) nor choses in possession (being virtual and incapable of being possessed). However, the court ruled that VCs can still be treated as property, by applying the 4 criteria laid down in National Provincial Bank and Law Tech Delivery Panel's Legal Statement, though it did not constitute a statement of the law. Bryan J. was convinced that the statement's detailed legal analysis of the proprietary status of cryptocurrencies was "compelling" and should be adopted by the court. Thus, what prevailed with the court was the definition provided by Law Tech Delivery Panel's UK Jurisdiction Task Force, which, unlike RBI, did not enjoy a statutory status, but was only an industry-led government backed initiative.

6.84. The ruling of the European Court of Justice in Skatteverket v. David Hedqvist,[47] was with particular reference to the identity of virtual currencies. ECJ was in this case asked to decide a reference from Supreme Administrative Court, Sweden on whether transactions to exchange a traditional currency for the 'Bitcoin' virtual currency or vice versa, which Mr. Hedqvist wished to perform through a company, were subject to value added tax. The opinion of the court was to the effect that:

(i) Bitcoin with bidirectional flow which will be exchanged for traditional currencies in the context of exchange transactions cannot be categorized as tangible property since virtual currency has no purpose other than to be a means of payment.

(ii) VC transactions do not fall within the concept of the supply of goods as they consist of exchange of different means of payment and hence, they constitute supply of services.

(iii) Bitcoin virtual currency being a contractual means of payment could not be regarded as a current account or a deposit account, a payment or a transfer, and unlike debt, cheques and other negotiable instruments (referred to in Article 135(1)(d) of the EU VAT Directive), Bitcoin is a direct means of payment between the operators that accept.

(iv) Bitcoin virtual currency is neither a security conferring a property right nor a security of a comparable nature.

(v) The transactions in issue were entitled to exemption from payment of VAT as they fell under the category of transactions involving 'currency [and] bank notes and coins used as legal tender'.

(vi) Article 135(1)(e) EU Council VAT Directive 2006/112/EC is applicable to non-traditional currencies i.e., to currencies other than those that are legal tender in one or more countries in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment.

The court accordingly concluded that virtual currencies would fall under this definition of non-traditional currencies.

6.85. Thus (i) depending upon the text of the statute involved in the case and (ii) depending upon the context, various courts in different jurisdictions have identified virtual currencies to belong to different categories ranging from property to commodity to non-traditional currency to payment instrument to money to funds. While each of these descriptions is true, none of these constitute the whole truth. Every court which attempted to fix the identity of virtual currencies, merely acted as the 4 blind men in the Anekantavada philosophy of Jainism,[48] (theory of non-absolutism that encourages acceptance of relativism and pluralism) who attempt to describe an elephant, but end up describing only one physical feature of the elephant.

6.86. RBI was also caught in this dilemma. Nothing prevented RBI from adopting a short circuit by notifying VCs under the category of "other similar instruments" indicated in Section 2(h) of FEMA, 1999 which defines 'currency' to mean "all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers' cheque, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments as may be notified by the Reserve Bank." After all, promissory notes, cheques, bills of exchange etc. are also not exactly currencies but operate as valid discharge (or the creation) of a debt only between 2 persons or peer-to-peer. Therefore, it is not possible to accept the contention of the Petitioners that VCs are just goods/commodities and can never be regarded as real money.

6.87. Once we are clear about the above confusion, and once it is accepted that some institutions accept virtual currencies as valid payments for the purchase of goods and services, there is no escape from the conclusion that the users and traders of virtual currencies carry on an activity that falls squarely within the purview of the Reserve Bank of India. The statutory obligation that RBI has, as a central bank, (i) to operate the currency and credit system, (ii) to regulate the financial

system and (iii) to ensure the payment system of the country to be on track, would compel them naturally to address all issues that are perceived as potential risks to the monetary, currency, payment, credit and financial systems of the country. If an intangible property can act under certain circumstances as money (even without faking a currency) then RBI can definitely take note of it and deal with it. Hence it is not possible to accept the contention of the Petitioners that they are carrying on an activity over which RBI has no power statutorily.

6.88. In Keshavlal Khemchand & Sons Pvt. Ltd. v. Union of India MANU/SC/0073/2015 : (2015) 4 SCC 770, this Court pointed out that "Reserve Bank of India is an expert body to which the responsibility of monitoring the economic system of the country is entrusted, under various enactments like the RBI Act, 1934, the Banking Regulation Act, 1949." Therefore, (i) in the teeth of the statutory scheme of these enactments (ii) from the way different courts and regulators of different jurisdictions have treated VCs and (iii) from the very characteristics of VCs, it is clear that they have the potential to interfere with the matters that RBI has the power to restrict or regulate. Hence, we have no hesitation in rejecting the first contention of the Petitioners that the impugned decision is ultra vires.

6.89. It was argued that the Preamble of the RBI Act speaks only about the role of RBI in operating the currency and credit system of the country to its advantage and that since virtual currencies may not form part of the credit system of the country as they are not recognized as currency, the invocation of the provisions of RBI Act was out of context.

6.90. But as pointed out elsewhere, RBI is the sole repository of power for the management of the currency, Under Section 3 of the RBI Act. RBI is also vested with the sole right to issue bank notes Under Section 22(1) and to issue currency notes supplied to it by the Government of India and has an important role to play in evolving the monetary policy of the country, by participation in the Monetary Policy Committee which is empowered to determine the policy rate required to achieve the inflation target, in terms of the consumer price index. Therefore, anything that may pose a threat to or have an impact on the financial system of the country, can be regulated or prohibited by RBI, despite the said activity not forming part of the credit system or payment system. The expression "management of the currency" appearing in Section 3(1) need not necessarily be confined to the management of what is recognized in law to be currency but would also include what is capable of faking or playing the role of a currency.

6.91. It is ironical that virtual currencies which took avatar (according to its creator Satoshi) to kill the demon of a central authority (such as RBI), seek from the very same central authority, access to banking services so that the purpose of the avatar is accomplished. As we have pointed out elsewhere, the very creation of digital currency/Bitcoin was to liberate the monetary system from being a slave to the central authority and from being operated in a manner prejudicial to private interests. Therefore, the ultra vires argument cannot be accepted when the provision of access to banking services without any interference from the central authority over a long period of time is perceived as a threat to the very existence of the central authority. Hence, we hold that RBI has the requisite power to regulate or prohibit an activity of this nature.

If at all, the power is only to regulate, not prohibit

6.92. The next contention that if at all, RBI is conferred only with the power to regulate, but not to prohibit, as seen from the express language of Section 45JA of the RBI Act, does not appeal to us. In Star India Pvt. ltd. v. Dept. of Industrial Policy and Promotion and Ors. MANU/SC/1238/2018 : (2019) 2 SCC 104, this Court opined that the word "regulate" has a very broad meaning including the power to prohibit. The following passage from K. Ramanathan v. State of Tamil Nadu MANU/SC/0034/1985 : 1985 (2) SCC 116 was quoted in Star India (supra):

19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere Regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to Regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a Rule or guiding principle to be followed, or the making of a Rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious Regulation consists of suppression. It would therefore appear that the word "Regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.

6.93. The contention that the power to prohibit something as res extra commercium is always a legislative policy and that therefore the same cannot be done through an executive fiat, omits to take note of the crucial role assigned to RBI in the economic sphere. It is true that in Godawat Pan Masala Products IP Ltd. and Anr. v. Union of India MANU/SC/0574/2004 : (2004) 7 SCC 68, it was held that whether an Article is to be prohibited as res extra commercium, is a matter of Legislative policy and must arise out of an Act of legislature and not by a mere executive notification. But we must remember that in Khoday Distilleries Ltd. v. State of Karnataka MANU/SC/0572/1995 : (1995) 1 SCC 574, while dealing with prohibitions on alcohol it was held that what articles and goods should be allowed to be produced, possessed, sold and consumed is to be left to the judgment of legislative and executive wisdom.

6.94. In any case, the projection of the impugned decisions of RBI as a total prohibition of an activity altogether, may not be correct. The impugned Circular does not impose a prohibition on the use of or the trading in VCs. It merely directs the entities regulated by RBI not to provide banking services to those engaged in the trading or facilitating the trading in VCs. Section 36(1)(a) of the Banking Regulation Act, 1949 very clearly empowers RBI to caution or prohibit banking companies against entering into certain types of transactions or class of transactions. The prohibition is not per se against the trading in VCs. It is against banking companies, with respect to a class of transactions. The fact that the functioning of VCEs automatically gets paralyzed or crippled because of the impugned Circular, is no ground to hold that it tantamount to total prohibition. So long as those trading in VCs do not wish to convert them into fiat currency in India and so long as the VCEs do not seek to collect their service charges or commission in fiat currency through banking channels, they will not be affected by this Circular. Admittedly, peer-to-peer transactions are still taking place, without the involvement of the banking channel. In fact, those actually buying and selling VCs without seeking to convert fiat currency into VCs or vice-versa,

are not affected by this Circular. It is only the online platforms which provide a space or medium for the traders to buy and sell VCs, that are seriously affected by the Circular, since the commission that they earn by facilitating the trade is required to be converted into fiat currency. Interestingly, the Petitioners argue on the one hand that there is total prohibition and argue on the other hand that the Circular does not achieve its original object of curtailing the actual trading, though it cripples the exchanges. If the first part of this submission is right, the latter cannot be and if the latter part is right, the former cannot be.

6.95. The reliance placed in this regard by the Petitioners on the decision of this Court in State of Rajasthan v. Basant Nahata MANU/SC/0547/2005 : (2005) 12 SCC 77 may not be appropriate. The said decision arose out of a challenge to the constitutional validity of Section 22A of the Registration Act, 1908 inserted by way of State Amendment by the State of Rajasthan. By the said amendment, the state government was conferred with unbridled powers to declare by notification in the official gazette, the registration of any document or class of documents as opposed to public policy. In exercise of the power so conferred, the state government issued notifications declaring the registration of an irrevocable power of attorney or a power of attorney to be in force for more than a certain period, authorizing the attorney to transfer any immovable property, as opposed to public policy. This Court found that the delegation made by Section 22A was uncanalised and unguided. In addition, the court found that a transaction between two persons capable of entering into contract, which does not contravene any statute, would be valid in law and that when the State of Rajasthan did not make such transactions illegal, it cannot strike at the documents recording such transactions. The court held that Section 22A cannot control the transactions which fall outside the scope of the Act, through a subordinate legislation.

6.96. But the said decision is of no assistance to the Petitioners, since none of the provisions of the RBI Act or the Banking Regulation Act are under challenge before us. The delegation itself is not in question before us. Unlike the Registration Act, Section 36(1)(a) of the Banking Regulation Act, 1949 empowers RBI to specifically target transactions. Moreover, RBI's role in the economy of the country is not akin to the power of any other delegate.

6.97. While holding that price fixation may normally be a legislative act, this Court pointed out in Union of India and Anr. v. Cynamide India ltd. and Anr. MANU/SC/0076/1987 : (1987) 2 SCC 720:

*...with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'.... The distinction between the two has usually been expressed as 'one between the general and the particular'. '**A legislative act is the creation and promulgation of a general Rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general Rule to a particular case in accordance with the requirements of policy**'. 'Legislation is the process of formulating a general Rule of conduct without reference to particular cases and usually operating in future;*

administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general Rules to particular cases'.

(emphasis supplied)

6.98. On the effect and force of delegated legislation, this Court held in St. Johns Teachers Training Institute v. Regional Director, NCTE MANU/SC/0092/2003 : (2003) 3 SCC 321:

The Regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature.

Similar views were expressed in Udai Singh Dagar v. Union of India MANU/SC/2872/2007 : (2007) 10 SCC 306, when the court held:"... a legislative Act must be read with the Regulations framed. A subordinate legislation, as is well known, when validly framed, becomes a part of the Act."

6.99. Law is well settled that when RBI exercises the powers conferred upon it, both to frame a policy and to issue directions for its enforcement, such directions become supplemental to the Act itself. In Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India MANU/SC/0685/1992 : (1992) 2 SCC 343, this Court followed the decisions in State of U.P. and Ors. v. Babu Ram Upadhya MANU/SC/0312/1960 : AIR 1961 SC 751 and D.K.V. Prasada Rao v. Govt. of A.P. MANU/AP/0156/1984 : AIR 1984 AP 75 to hold that Rules made under a statute must be treated as if they were contained in the Act and that therefore they must be governed by the same principles as the statute itself. Useful reference can also be made in this regard to the following observations in ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd. MANU/SC/0782/2010 : (2010) 10 SCC 1:

40. When a delegate is empowered by Parliament to enact a policy and to issue directions which have a statutory force and when the delegatee (RBI) issues such guidelines (policy) having statutory force, such guidelines have got to be read as supplement to the provisions of the BR Act, 1949. The "banking policy" is enunciated by RBI. Such policy cannot be said to be ultra vires the Act.

(emphasis supplied)

6.100. In his treatise on Administrative Law, Durga Das Basu[49] states:

The scope of judicial review is narrowed down when a statute confers discretionary power upon an executive authority to make such Rules or Regulations or orders 'as appear to him to be necessary' or 'expedient', for carrying out the purposes of the statute or any other specified purpose. ***In such a case, the check of ultra vires vanishes for all practical purposes inasmuch as the determination of the necessity or expediency is taken out of the hands of the Courts and the only ground upon which Courts may interfere is that the authority acted mala fide or never applied his mind to the matter, or applied an irrelevant principle in making a statutory order***.

(emphasis supplied)

6.101. In Jayantilal Amrit Lal Shodhan v. F.N. Rana MANU/SC/0046/1963 : AIR 1964 SC 648, the majority pointed out that there can be no assumption that the legislative functions are exclusively performed by the legislature, executive functions by the executive and judicial functions by the judiciary alone. The court indicated that the Constitution has not made an absolute or rigid division of functions between the three agencies of the state and that at times the exercise of legislative or judicial functions are entrusted to the executive. A very important observation made by the Constitution Bench in Jayantilal (supra) was as follows:

.....in addition to these quasi-judicial and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics.

6.102. In Shri Sitaram Sugar Co. Ltd. and Anr. v. Union of India and Ors. MANU/SC/0249/1990 : (1990) 3 SCC 223, the Constitution bench of this Court held that whether an order is characterized as legislative or administrative or quasi-judicial or whether it is a determination of law or fact, the judgment of the expert body entrusted with power is generally treated as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law.

6.103. It must be pointed out that the power of RBI is not merely curative but also preventive. This is acknowledged by this Court in Ganesh Bank of Kurunwad Ltd. and Ors. v. Union of India and Ors. MANU/SC/3707/2006 : (2006) 10 SCC 645, where it was held that RBI has a right to take pre-emptive action taking into account the totality of the circumstances.

It is not that when there is a run on the bank then only RBI must intervene or that it must intervene only when there are a good number of court proceedings against the bank concerned. RBI has to take into account the totality of the circumstances and has to form its opinion accordingly.

6.104. The impugned Circular is intended to prohibit banking companies from entering into certain territories. The Circular is actually addressed to entities regulated by RBI and not to those who do not come within the purview of RBI's net. But the exercise of such a power by RBI, over the entities regulated by it, has caused a collateral damage to some establishments like the Petitioners', who do not come within the reach of RBI's net.

6.105. The power of a statutory authority to do something has to be tested normally with reference to the persons/entities qua whom the power is exercised. The question to be addressed in such cases is whether the authority had the power to do that act or issue such a directive, qua the person to whom it is addressed. While persons who suffer a collateral damage can certainly challenge the action, such challenge will be a very weak challenge qua the availability of power.

6.106. Apart from the provisions of the RBI Act, 1934 and the Banking Regulation Act, 1949, the impugned Circular also refers to the power Under Section 18 of the Payment and Settlement Systems Act, 2007. In order to buttress their contention regarding the availability of power to regulate, the Petitioners refer to the definition of the expression "payment system" Under Section 2(1)(i) of the said Act and contend that VCEs do not operate any payment system and that since the power to issue directions Under Section 18 is only to regulate the payment systems, the

invocation of the said power to something that does not fall within the purview of payment system, is arbitrary.

6.107. But Section 18 of the Payment and Settlement Systems Act indicates (i) what RBI can do (ii) the persons qua whom it can be done and (iii) the object for which it can be done. In other words, Section 18 empowers RBI (i) to lay down policies relating to the Regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and (ii) to give such directions as it may consider necessary. These are what RBI can do Under Section 18. Coming to the second aspect, the persons qua whom the powers Under Section 18 can be exercised are (i) system providers (ii) system participants and (iii) any other person generally or any such agency. The expression "system provider" is defined Under Section 2(1)(q) to mean a person who operates an authorized payment system. The expression "system participant" is defined in Section 2(1)(p) to mean a bank or any other person participating in a payment system, including the system provider. Other than the expressions 'system provider' and 'system participant', Section 18 also uses the expressions 'any other person' and 'any such agency'.

6.108. It is true that the purposes for which the power Under Section 18 can be exercised, are also indicated in Section 18. They are (i) Regulation of the payment systems (ii) the interest of the management and operation of any payment system and (iii) public interest.

6.109. As we have pointed out elsewhere, the impugned Circular is primarily addressed to banks who are "system participants" within the meaning of Section 2(1)(p). The banks certainly have a system of payment to be effected between a payer and a beneficiary, falling thereby within the meaning of the expression payment system.

6.110. It may also be relevant to take note of the definition of the expressions "payment instruction" and "payment obligation" appearing in Clauses (g) and (h) of Sub-section (1) of Section 2 which read as follows:

2(1)(g) "payment instruction" means any instrument, authorisation or order in any form, including electronic means, to effect a payment,--

(i) by a person to a system participant; or

(ii) by a system participant to another system participant;

2(1)(h) "payment obligation" means an indebtedness that is owned by one system participant to another system participant as a result of clearing or settlement of one or more payment instructions relating to funds, securities or foreign exchange or derivatives or other transactions;

6.111. Therefore, in the overall scheme of the Payment and Settlement Systems Act, 2007, it is impossible to say that RBI does not have the power to frame policies and issue directions to banks who are system participants, with respect to transactions that will fall under the category of payment obligation or payment instruction, if not a payment system. Hence, the argument revolving around Section 18 should fail.

II. Mode of exercise of power:

Satisfaction/Application of mind/relevant and irrelevant considerations

6.112. That takes us to the next question whether the power was exercised properly in a manner prescribed by law. The argument of Shri Ashim Sood, learned Counsel for the Petitioner is that assuming that RBI has the requisite power Under Section 35A(1) of Banking Regulation Act, 1949 to do what it has done, the necessary sine qua non is the "satisfaction". Section 35A(1) of the Banking Regulation Act, 1949 as well as Section 45JA and 45L of the RBI Act, 1934 empower RBI to issue directions "if it is satisfied" about the existence of certain parameters. Satisfaction can be arrived at only by (i) gathering facts (ii) sifting relevant material from those which are irrelevant and (iii) forming an opinion about the cause and connection between relevant material and the decision proposed to be taken. In respect of each of these requirements, the learned Counsel relied upon certain judicial precedents.

6.113. But we do not think that in the facts of the present case, we could hold RBI guilty of non-application of mind. As a matter of fact, the issue as to how to deal with virtual currencies has been lingering with RBI from June 2013 onwards, when the Financial Stability Report took note of the challenges posed by virtual currencies in the form of regulatory, legal and operational risks. The Financial Stability Report of June 2013 led to a press release dated 24-12-2013 cautioning the users, holders and traders of virtual currencies about the potential financial, operational, legal and consumer protection and security related risks associated with virtual currencies. Then came the Financial Stability Report of December 2015 which raised concerns about excessive volatility in the value of VCs and their anonymous nature which went against global money laundering Rules rendering their very existence questionable. The Financial Stability Report of December 2016 also took note of the risks associated with virtual currencies qua data security and consumer protection. The report also recorded concerns about far reaching potential impact of the effectiveness of monetary policy itself. Therefore, the report suggested RegTech to deal with FinTech.

6.114. IDRBT, established by RBI to work at the intersection of banking and technology submitted a white paper in January 2017, which enlisted the advantages as well as disadvantages of digital currencies. This white paper was taken note of by RBI in the Financial Stability Report of June 2017. In the meantime, RBI issued a press release on 01-02-2017 once again cautioning the users, holders and traders of virtual currencies.

6.115. The sub-committee of the Financial Stability and Development Council took a decision in April 2016, pursuant to which RBI set up an Inter-Regulatory Working Group on FinTech and Digital Banking. This Working Group submitted a report in November 2017, after which RBI issued a third press release on 05-12-2017. Thereafter RBI also sent a mail on 02-04-2018 to the central government, enclosing a note on regulating crypto assets. To be fair to RBI, even this note examined the pros and cons of banning and regulating crypto currencies.

6.116. All the above sequence of events from June 2013 up to 02-04-2018 would show that RBI had been brooding over the issue for almost five years, without taking the extreme step. Therefore, RBI can hardly be held guilty of non-application of mind. If an issue had come up again and again before a statutory authority and such an authority had also issued warnings to those who are likely

to be impacted, it can hardly be said that there was no application of mind. For arriving at a "satisfaction" as required by Section 35A(1) of Banking Regulation Act, 1949 and Section 45JA and 45L of RBI Act, 1934, it was not required of RBI either to write a thesis or to write a judgment.

6.117. In fact, RBI cannot even be Accused of not taking note of relevant considerations or taking into account irrelevant considerations. RBI has taken into account only those considerations which multinational bodies and regulators of various countries such as FATF, BIS, etc., have taken into account. This can be seen even from the earliest press release dated 24-12-2013, which is more elaborate than the impugned Circular dated 06-04-2018. The press release dated 24-12-2013 reads as follows:

RBI cautions users of Virtual Currencies against Risks

The Reserve Bank of India has today cautioned the users, holders and traders of Virtual currencies (VCs), including Bitcoins, about the potential financial, operational, legal, customer protection and security related risks that they are exposing themselves to.

The Reserve Bank has mentioned that it has been looking at the developments relating to certain electronic records claimed to be "Decentralised Digital Currency" or "Virtual Currency" (VCs), such as, Bitcoins, litecoins, bbqcoins, dogecoins etc., their usage or trading in the country and the various media reports in this regard.

The creation, trading or usage of VCs including Bitcoins, as a medium for payment are not authorised by any central bank or monetary authority. No regulatory approvals, registration or authorisation is stated to have been obtained by the entities concerned for carrying on such activities. As such, they may pose several risks to their users, including the following:

• VCs being in digital form are stored in digital/electronic media that are called electronic wallets. Therefore, they are prone to losses arising out of hacking, loss of password, compromise of access credentials, malware attack etc. Since they are not created by or traded through any authorised central registry or agency, the loss of the e-wallet could result in the permanent loss of the VCs held in them.

• Payments by VCs, such as Bitcoins, take place on a peer-to-peer basis without an authorised central agency which regulates such payments. As such, there is no established framework for recourse to customer problems/disputes/charge backs etc.

• There is no underlying or backing of any asset for VCs. As such, their value seems to be a matter of speculation.

Huge volatility in the value of VCs has been noticed in the recent past. Thus, the users are exposed to potential losses on account of such volatility in value.

• It is reported that VCs, such as Bitcoins, are being traded on exchange platforms set up in various jurisdictions whose legal status is also unclear. Hence, the traders of VCs on such platforms are exposed to legal as well as financial risks.

• There have been several media reports of the usage of VCs, including Bitcoins, for illicit and illegal activities in several jurisdictions. The absence of information of counterparties in such peer-to-peer anonymous/pseudonymous systems could subject the users to unintentional breaches of anti-money laundering and combating the financing of terrorism (AML/CFT) laws.

The Reserve Bank has also stated that it is presently examining the issues associated with the usage, holding and trading of VCs under the extant legal and regulatory framework of the country, including Foreign Exchange and Payment Systems laws and Regulations.

6.118. When a series of steps taken by a statutory authority over a period of about five years disclose in detail what triggered their action, it is not possible to see the last of the orders in the series in isolation and conclude that the satisfaction arrived at by the authority is not reflected appropriately. In any case, pursuant to an order passed by this Court on 21-08-2019, RBI has given a detailed point-wise reply to the representations of the Petitioners. In these representations, the Petitioners have highlighted all considerations that they thought as relevant. RBI has given its detailed responses on 04-09-2019 and 18-09-2019. Therefore, the contention that there was no application of mind and that relevant considerations were omitted to be taken note of, loses its vigour in view of the subsequent developments.

Malice in law/colorable exercise

6.119. Drawing our attention to a reply given by RBI dated 26-04-2017 to a query under the Right to Information Act, and the reply given by Minister of State for Finance in response to a question raised in the Lok Sabha (Unstarred Question No. 2113) on 28-07-2017, wherein RBI took a position that they had no power to freeze the accounts either of defaulting companies or of shell companies, it was contended by Shri Ashim Sood, that the impugned Circular goes contrary to the position so taken officially, as the Circular has the effect of closing the accounts of VCEs and that therefore it was hit by arbitrariness and caprice.

6.120. But the above argument arises out of a misconception about the purport of the impugned Circular. The impugned Circular does not order either the freezing or the closing of any particular account of a particular customer. All that the impugned Circular says is that RBI regulated entities shall exit the relationship that they have with any person or entity dealing with or settling VCs, within three months of the date of the Circular. The regulated entities are directed not to provide services for facilitating any person or entity in dealing with or settling VCs. Some of the Petitioners herein are individuals and companies who run virtual currency exchanges. In case they have other businesses, the impugned Circular does not order the closure of their bank accounts relating to other businesses. The prohibition under paragraph 2 of the impugned Circular is with respect to the provision of services for facilitating any person or entity in dealing with or settling VCs. This prohibition does not extend either to the closing or the freezing of the accounts of the Petitioners in relation to their other ventures.

6.121. Taking clue from the averment contained in the counter-affidavit of RBI to the effect that "VCs are outside the ambit of the central authority's effective sphere of control and management" and also referring to the stand taken by RBI in their letter dated 04-09-2019 to the effect that "neither VCs nor the businesses involved in providing VC based services come under the

regulatory purview of RBI", it was contended by Shri Ashim Sood that the impugned Circular is a colourable exercise of power and tainted by malice in law, in as much as it seeks to achieve an object completely different from the one for which the power is entrusted. State of Punjab and Anr. v. Gurdial Singh and Ors. MANU/SC/0433/1979 : (1980) 2 SCC 471, Collector (District Magistrate) Allahabad and Anr. v. Raja Ram Jaiswal MANU/SC/0270/1985 : (1985) 3 SCC 1, and Kalabharati Advertising v. Hemant Vimalnath Narichania and Ors. MANU/SC/0674/2010 : (2010) 9 SCC 437 are relied upon in this regard.

6.122. But the above contention is completely misconceived. There can be no quarrel with the proposition that RBI has sufficient power to issue directions to its regulated entities in the interest of depositors, in the interest of banking policy or in the interest of the banking company or in public interest. If the exercise of power by RBI with a view to achieve one of these objectives incidentally causes a collateral damage to one of the several activities of an entity which does not come within the purview of the statutory authority, the same cannot be assailed as a colourable exercise of power or being vitiated by malice in law. To constitute colourable exercise of power, the act must have been done in bad faith and the power must have been exercised not with the object of protecting the regulated entities or the public in general, but with the object of hitting those who form the target. To constitute malice in law, the act must have been done wrongfully and wilfully without reasonable or probable cause. The impugned Circular does not fall under the category of either of them.

6.123. The argument that the invocation by RBI, of 'public interest' as a weapon, purportedly for the benefit of users, consumers or traders of virtual currencies is a colourable exercise of power also does not hold water. Once it is conceded that RBI has powers to issue directions in public interest, it is impossible to exclude users, consumers or traders of virtual currencies from the coverage. In fact, the repeated press releases issued by RBI from 2013 onwards indicate that RBI did not want the members of the public, which include users, consumers and traders of VCs, even to remotely think that virtual currencies have a legal tender status or are backed by a central authority. Irrespective of what VCs actually do or do not do, it is an accepted fact that they are capable of performing some of the functions of real currencies. Therefore, if RBI takes steps to prevent the gullible public from having an illusion as though VCs may constitute a valid legal tender, the steps so taken, are actually taken in good faith. The repeated warnings through press releases from December 2013 onwards indicate a genuine attempt on the part of RBI to safeguard the interests of the public. Therefore, the contention that the impugned Circular is vitiated by malice in law and that it is a colorable exercise of power, cannot be sustained.

6.124. Relying upon (i) the decision in Meerut Development Authority v. Assn. Management Studies and Anr. MANU/SC/0616/2009 : (2009) 6 SCC 171, wherein it was held that the term "public interest" must be understood and interpreted in the light of the entire scheme, purpose and object of the enactment (ii) the decision in Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi and Anr. MANU/SC/1103/2012 : (2012) 13 SCC 61, wherein it was held that the term "public interest" does not have a rigid meaning and takes its colour from the statute in which it occurs (iii) the decision in Utkal Contractors & Joinery (P) Ltd. and Ors. v. State of Orissa and Ors. MANU/SC/0077/1987 : (1987) 3 SCC 279, wherein it was held that the words of a statute take their colour from the reason for it and (iv) the decision in Empress Mills v. Municipal Committee, Wardha MANU/SC/0088/1957 : (1958) SCR 1102, wherein it was held that general

words and phrases must usually be construed as being limited to the actual object of the Act, it was contended that the expression 'public interest' appearing in Section 35A(1)(a) of the Banking Regulation Act, 1949, cannot be given an expansive meaning.

6.125. But the said argument does not take the Petitioners anywhere. As we have indicated elsewhere, the power Under Section 35A to issue directions is to be exercised under four contingencies namely (i) public interest (ii) interest of banking policy (iii) interest of the depositors and (iv) interest of the banking company. The expression "banking policy" is defined in Section 5(ca) to mean any policy specified by RBI (i) in the interest of the banking system (ii) in the interest of monetary stability and (iii) sound economic growth. Public interest permeates all these three areas.
This is why Section 35A(1)(a) is invoked in the impugned Circular. Therefore, we reject the argument that the impugned decision is a colorable exercise of power and it is vitiated by malice in law.

M.S. Gill Reasoning

6.126. The impugned Circular cannot be assailed on the basis of M.S. Gill[50] test, for two reasons. First is that in Chairman, All India Railway Recruitment Board v. K. Shyam Kumar and Ors. MANU/SC/0342/2010 : (2010) 6 SCC 614, this Court held that MS Gill test may not always be applicable where larger public interest is involved and that in such situations, additional grounds can be looked into for examining the validity of an order. This was followed in PRP Exports and Ors. v. Chief Secretary, Government of Tamil Nadu and Ors. MANU/SC/1290/2013 : (2014) 13 SCC 692. In 63 Moons Technologies ltd. and Ors. v. Union of India and Ors. MANU/SC/0629/2019, this Court clarified that though there is no broad proposition that MS Gill test will not apply where larger public interest is involved, subsequent materials in the form of facts that have taken place after the order in question is passed, can always be looked at in the larger public interest, in order to support an administrative order. The second reason why the weapon of MS Gill will get blunted in this case, is that during the pendency of this case, this Court passed an interim order on 21-08-2019 directing RBI to give a point-wise reply to the detailed representation made by the writ Petitioners. Pursuant to the said order, RBI gave detailed responses on 04-09-2019 and 18-09-2019. Therefore, the argument based on MS Gill test has lost its potency.

Calibration/Proportionality

6.127. The next argument is that the impugned measure is extreme and that it will not pass the test of proportionality. For the purpose of convenience, we shall take up this argument together with the argument revolving around Article 19(1)(g) while dealing with the reasonableness of the restriction.

III. Wait and watch approach of the other stakeholders

6.128. The argument that other stakeholders such as the Enforcement Directorate which is concerned with money laundering, the Department of Economic Affairs which is concerned with the economic policies of the State, SEBI which is concerned with security contracts and CBDT which is concerned with the tax regime relating to goods and services, did not see any grave threat

and that therefore RBI's reaction is knee-jerk, is not acceptable. Enforcement Directorate can step in only when actual money laundering takes place, since the statutory scheme of Prevention of Money Laundering Act deals with a procedure which is quasi-criminal. SEBI can step in only when the transactions involve securities within the meaning of Section 2(h) of the Securities Contracts (Regulation) Act, 1956. CBDT will come into the picture only when the transaction related to the sale and purchase of taxable goods/commodities. Every one of these stakeholders has a different function to perform and are entitled to have an approach depending upon the prism through which they are obliged to look at the issue. Therefore, RBI cannot be faulted for not adopting the very same approach as that of others.

IV. Light-touch approach of the other countries

6.129. The argument that most of the countries except very few like China, Vietnam, Pakistan, Nepal, Bangladesh, UAE, have not imposed a ban (total or partial) may not take the Petitioners anywhere. The list of countries where a ban similar to the one on hand and much more has been imposed discloses a commonality. Almost all countries in the neighborhood of India have adopted the same or similar approach (in essence India is ring fenced). In any case, our judicial decision cannot be colored by what other countries have done or not done. Comparative perspective helps only in relation to principles of judicial decision making and not for testing the validity of an action taken based on the existing statutory scheme.

6.130. There can also be no comparison with the approach adopted by countries such as UK, US, Japan, Singapore, Australia, New Zealand, Canada etc., as they have developed economies capable of absorbing greater shocks. Indian economic conditions cannot be placed on par. Therefore, we will not test the correctness of the measure taken by RBI on the basis of the approach adopted by other countries, though we have, for better understanding of the complexities of the issues involved, undertaken a survey of how the regulators and courts of other countries have treated VCs.

V. Precautionary steps taken by Petitioners

6.131. The next contention of the Petitioners is that the VC exchanges run by them have already put in place certain best practices such as (i) avoidance of cash transactions (ii) enhanced KYC norms and (iii) confining their services only to persons within India. Therefore, it is contended that all the issues flagged by RBI have already been addressed and that therefore, there was no necessity to disconnect the trade from the regular banking channels. But the fact of the matter is that enhanced KYC norms may remove anonymity of the customer, but not that of the VC. Even the European Parliament, in the portion of its report relied upon by Shri Ashim Sood accepts that the adequacy of mandatory registration of users (as a less invasive measure), whether or not of fully anonymous or pseudo anonymous crypto currencies depends on the users' compliance with the registration requirement. After pointing out that compliance will partly depend on an adequate sanctioning toolbox in the event of breach, the report wonders whether it is at all possible outside of the context of randomly bumping into it, at least when fully anonymous VCs are concerned. In any case, we are not experts to say whether the safety valves put in place could have addressed all issues raised by RBI.

VI. Different types of VCs require different treatments

6.132. Drawing our attention to a Report by the European Parliament under the caption 'Cryptocurrencies and Blockchain', released in July 2018, it is contended by Shri Ashim Sood, learned Counsel for the Petitioners that all virtual currencies are not fully anonymous. While some, such as Dash and Monero are fully anonymous, others such as Bitcoin are pseudo-anonymous. Therefore, it is contended that banning transactions only in fully anonymous VCs could have been a better and less intrusive measure. An identical argument is advanced by Shri Nakul Dewan learned Senior Counsel for the Petitioners, with reference to a report of October 2012 of the European Central Bank on "Virtual Currency Schemes". According to the said Report, Virtual Currency schemes can be classified into three types, depending upon their interaction with traditional real money and real economy. They are (i) closed virtual currency schemes basically used in an online game (ii) virtual currency schemes having a unidirectional flow (usually an inflow), with a conversion rate for purchasing the virtual currency which can subsequently be used to buy virtual goods and services, but exceptionally also to buy real goods and services and (iii) virtual currency schemes having a bidirectional flow, where they act like any other convertible currency with two exchange rates (buy and sell) which can subsequently be used to buy virtual goods and services as well as real goods and services.

6.133. Let us first deal with Shri Nakul Dewan's submission. In the very same October 2012 Report of the European Central Bank, it is accepted that virtual currencies (i) resemble money and (ii) necessarily come with their own dedicated retail payment systems. These two aspects are indicated in the Report to be covered by the term "Virtual Currency Scheme".

6.134. But the entire premise on which the Petitioners have developed their case is that they are neither money nor constitute a payment system. Therefore, if the Report of the European Central Bank is to be accepted, it should be accepted in total and cannot be selectively taken.

6.135. The examples provided in the October 2012 Report of the European Central Bank show that there are VC Schemes set up by entities such as Nintendo, in which consumers can purchase points online by using a credit card or in retail stores by purchasing a Nintendo points card which cannot be converted back to real money. The Report also shows that one VC by name Linden Dollars is issued in a virtual world called "Second life", where users create avatars (digital characters), which can be customized. Second life has its own economy where users can buy and sell goods and services from and to each other. But they first need to purchase Linden dollars using fiat currency. Later they can also sell Linden dollars in return for fiat currency. Therefore, it is clear that the very same virtual currency can have a unidirectional or bidirectional flow depending upon the scheme with which the entities come up. Moreover, the question whether anonymous VCs alone could have been banned leaving the pseudo-anonymous, is for experts and not for this Court to decide. In any case, the stand taken by RBI is that they have not banned VCs. Hence, the question whether RBI should have adopted different approaches towards different VCs does not arise.

VII. Acceptance of DLT and rejection of VCs is a paradox

6.136. It was argued that the acceptance of the Distributed Ledger Technology and the rejection of VCs is actually a contradiction in terms. This argument is based upon the various reports, both of RBI and of the Inter-Ministerial Group, to the effect that DLT is part of FinTech.

6.137. The above contention, in legal terms, is about the irrationality of the impugned decision. But there is nothing irrational about the acceptance of a technological advancement/innovation, but the rejection of a by-product of such innovation. There is nothing like a "take it or leave it" option.

VIII. RBI's decisions do not qualify for Judicial deference

6.138. It is contended by Shri Ashim Sood, learned Counsel for the Petitioners that the impugned Circular does not have either the status of a legislation or the status of an executive action, but is only the exercise of a power conferred by statute upon a statutory body corporate. Therefore, it is his contention that the judicial Rule of deference as articulated in R.K. Garg v. Union of India MANU/SC/0074/1981 : (1981) 4 SCC 675, BALCO Employees' Union (Regd.) v. Union of India and Ors. MANU/SC/0779/2001 : (2002) 2 SCC 333, and Swiss Ribbons Pvt. Ltd. and Anr. v. Union of India and Ors. MANU/SC/0079/2019 : (2019) 4 SCC 17, will not apply to the decision taken by a statutory body like RBI. If, a legislation relating to economic matters is placed at the highest pedestal, an executive decision with regard to similar matters will be placed only at a lower pedestal and the decision taken by a statutory body may not even be entitled to any such deference or reverence.

6.139. But given the scheme of the RBI Act, 1934 and the Banking Regulation Act, 1949, the above argument appears only to belittle the role of RBI. RBI is not just like any other statutory body created by an Act of legislature. It is a creature, created with a mandate to get liberated even from its creator. This is why it is given a mandate - (i) under the Preamble of the RBI Act 1934, to operate the currency and credit system of the country to its advantage and to operate the monetary policy framework in the country (ii) Under Section 3(1), to take over the management of the currency from the central government (iii) Under Section 20, to undertake to accept monies for account of the central government, to make payments up to the amount standing to the credit of its account and to carry out its exchange, remittance and other banking operations, including the management of the public debt of the Union (iv) Under Section 21(1), to have all the money, remittance, exchange and banking transactions in India of the central government entrusted with it (v) Under Section 22(1), to have the sole right to issue bank notes in India and (vi) Under Section 38, to get rupees into circulation only through it, to the exclusion of the central government. Therefore, RBI cannot be equated to any other statutory body that merely serves its master. It is specifically empowered to do certain things to the exclusion of even the central government. Therefore, to place its decisions at a pedestal lower than that of even an executive decision, would do violence to the scheme of the Act.

6.140. On the primary question of switching over to judicial "silent mode" or "hands off mode", qua economic legislation, it is not necessary to catalogue all the decisions of this Court such as State of Gujarat and Anr. v. Shri Ambica Mills Ltd. and Anr. MANU/SC/0092/1974 : (1974) 4 SCC 656, G.K. Krishnan v. Tamil Nadu MANU/SC/0315/1974 : (1975) 1 SCC 375, R.K. Garg v. Union of India (supra), State of M.P. v. Nandlal Jaiswal MANU/SC/0034/1986 : (1986) 4 SCC

566, P.M. Ashwathanarayana Setty v. State of Karnataka MANU/SC/0360/1988 : (1989) Supp (1) SCC 696, Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India (supra), T. Velayudhan v. Union of India MANU/SC/0500/1993 : (1993) 2 SCC 582, Delhi Science Forum v. Union of India MANU/SC/0360/1996 : (1996) 2 SCC 405, Bhavesh D. Parish v. Union of India MANU/SC/0392/2000 : (2000) 5 SCC 471, Ugar Sugar Works ltd. v. Delhi Administration and Ors. MANU/SC/0189/2001 : (2001) 3 SCC 635, BALCO Employees' Union (Regd.) v. Union of India (supra), Govt. of Andhra Pradesh and Ors. v. P. Laxmi Devi MANU/SC/1017/2008 : (2008) 4 SCC 720, Villianur Iyarkkai Padukappu Maiyam v. Union of India MANU/SC/0811/2009 : (2009) 7 SCC 561, D.G. of Foreign Trade v. Kanak Exports MANU/SC/1258/2015 : (2016) 2 SCC 226, State of J & K v. Trikuta Roller Flour Mills Pvt. Ltd. MANU/SC/1106/2017 : (2018) 11 SCC 260, and Pioneer Urban Land and Infrastructure Ltd. v. Union of India MANU/SC/1071/2019 : (2019) 8 SCC 416, as the entire history of the doctrine of deference from Lochner Era has been summarized by this Court in Swiss Ribbons Pvt. Ltd. v. Union of India (supra). In fact, even the learned Counsel for the Petitioners is ad idem with the learned Senior Counsel for RBI that economic Regulations require due judicial deference. The actual argument of the learned Counsel for the Petitioners is that such deference may differ in degree from being very weak in respect of the decision of a statutory authority, to being very strong in respect of a legislative enactment.

6.141. But as we have pointed out above, RBI is not just any other statutory authority. It is not like a stream which cannot be greater than the source. The RBI Act, 1934 is a pre-constitutional legislation, which survived the Constitution by virtue of Article 372(1) of the Constitution. The difference between other statutory creatures and RBI is that what the statutory creatures can do, could as well be done by the executive. The power conferred upon the delegate in other statutes can be tinkered with, amended or even withdrawn. But the power conferred upon RBI Under Section 3(1) of the RBI Act, 1934 to take over the management of the currency from the central government, cannot be taken away. The sole right to issue bank notes in India, conferred by Section 22(1) cannot also be taken away and conferred upon any other bank or authority. RBI by virtue of its authority, is a member of the Bank of International Settlements, which position cannot be taken over by the central government and conferred upon any other authority. Therefore, to say that it is just like any other statutory authority whose decisions cannot invite due deference, is to do violence to the scheme of the Act. In fact, all countries have central banks/authorities, which, technically have independence from the government of the country. To ensure such independence, a fixed tenure is granted to the Board of Governors, so that they are not bogged down by political expediencies. In the United States of America, the Chairman of the Federal Reserve is the second most powerful person next only to the President. Though the President appoints the seven-member Board of Governors of the Federal Reserve, in consultation with the Senate, each of them is appointed for a fixed tenure of fourteen years. Only one among those seven is appointed as Chairman for a period of four years. As a result of the fixed tenure of 14 years, all the members of Board of Governors survive in office more than three governments. Even the European Central Bank headquartered in Frankfurt has a President, Vice-President and four members, appointed for a period of eight years in consultation with the European Parliament. World-wide, central authorities/banks are ensured an independence, but unfortunately Section 8(4) of the RBI Act, 1934 gives a tenure not exceeding five years, as the central government may fix at the time of appointment. Though the shorter tenure and the choice given to the central government to fix the tenure, to some extent, undermines the ability of the incumbents of office to be absolutely independent, the statutory scheme nevertheless provides for independence to the institution as

such. Therefore, we do not accept the argument that a policy decision taken by RBI does not warrant any deference.

IX. Article 19(1)(g) challenge & Proportionality

6.142. The next ground of attack is on the basis of Article 19(1)(g). Any restriction to the freedom guaranteed Under Article 19(1)(g) should pass the test of reasonableness in terms of Article 19(6). It is contended by the Petitioners that since access to banking is the equivalent of the supply of oxygen in any modern economy, the denial of such access to those who carry on a trade which is not prohibited by law, is not a reasonable restriction and that it is also extremely disproportionate. It is further contended that the right to access the banking system is actually integral to the right to carry on any trade or profession and that therefore a legislation, subordinate or otherwise whose effect or impact severely impairs the right to carry on a trade or business, not prohibited by law, would be violative of Article 19(1)(g). Reliance is placed in this regard on the decisions of this Court in (i) Md. Yasin v. Town Area Committee MANU/SC/0012/1952 : (1952) SCR 572, where it was held that the right Under Article 19(1)(g) is affected when "in effect and in substance", the impugned measures brought about a total stoppage of business, both, in a commercial sense and from a practical point of view, even though there was no prohibition in form and (ii) Bennett Coleman & Co. v. Union of India MANU/SC/0038/1972 : (1972) 2 SCC 788, where this Court held that the impact and not the object of the measure will determine whether or not, a fundamental right is violated. It is further contended, on the strength of the decision in Md. Faruk v. State of Madhya Pradesh and Ors. MANU/SC/0046/1969 : (1969) 1 SCC 853, that the imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition and that when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest, lies heavily upon the state. It was held in the said decision that a law which directly infringes the right guaranteed Under Article 19(1)(g) may be upheld only if it is established that it seeks to impose reasonable restrictions in the interest of the general public and a less drastic restriction will not ensure the interest of the general public.

6.143. The parameters laid down in Md. Faruk are unimpeachable. While testing the validity of a law imposing a restriction on the carrying on of a business or a profession, the court must, as formulated in Md. Faruk, attempt an evaluation of (i) its direct and immediate impact upon of the fundamental rights of the citizens affected thereby (ii) the larger public interest sought to be ensured in the light of the object sought to be achieved (iii) the necessity to restrict the citizens' freedom (iv) the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public and (v) the possibility of achieving the same object by imposing a less drastic restraint.

6.144. There can also be no quarrel with the proposition that banking channels provide the lifeline of any business, trade or profession. This is especially so in the light of the restrictions on cash transactions contained in Sections 269SS and 269T of the Income Tax Act, 1961. When currency itself has undergone a metamorphosis over the centuries, from stone to metal to paper to paperless and we have ushered into the digital age, cashless transactions (not penniless transactions) require banking channels. Therefore, the moment a person is deprived of the facility of operating a bank account, the lifeline of his trade or business is severed, resulting in the trade or business getting

automatically shut down. Hence, the burden of showing that larger public interest warranted such a serious restriction bordering on prohibition, is heavily on RBI.

6.145. In the counter-affidavit filed in WP (C) No. 528 of 2018, RBI has raised 2 fundamental objections in this regard. The first is that corporate bodies/entities who have come up with the challenge are not 'citizens' and hence, not entitled to maintain a challenge Under Article 19(1)(g). This objection may hold good in respect of the writ petition filed by Internet and Mobile Association of India, which is described by them as a not-for-profit association of corporate entities who are in the trade. But this objection may not hold good in respect of the other writ petition, as the companies running VC exchanges have not come up alone. The shareholders and promoters have come up with the second writ petition along with those entities and hence the challenge Under Article 19(1)(g) cannot be said to be not maintainable.

6.146. The second objection of RBI is that there is no fundamental right to purchase, sell, transact and/or invest in VCs and that therefore, the Petitioners cannot invoke Article 19(1)(g). But this contention is liable to be rejected outright for two reasons namely, (i) that at least some of the Petitioners are not claiming any right to purchase, sell or transact in VCs, but claiming a right to provide a platform for facilitating an activity (of trading in VCs between individuals/entities who want to buy and sell VCs) which is not yet prohibited by law and (ii) that in any case the impugned Circular does not per se prohibit the purchase or sale of VCs. This is why it is contended by the learned Counsel for the Petitioners, that what is hit by the impugned Circular is not the actual target. The actual target of the impugned Circular, as seen from various communications and committee reports that preceded the same, is the trade in VCs. The object of hitting at trading in VCs, is to ensure (i) consumer protection (ii) prevention of violation of money laundering laws (iii) curbing the menace of financing of terrorism and (iv) safeguarding of the existing monetary/payment/credit system from being polluted. But hitting the target directly, is not within the domain of RBI and hence the impugned Circular purportedly seeks to protect only the regulated entities, by ring-fencing them. In the process, it has hit VC Exchanges and not the actual trading of VCs, though as a consequence, the volume of transactions in VCs (perhaps through VCEs alone) is stated to have come down. People who wish to buy and sell VCs can still do so merrily, without using the medium of a VC Exchange and without seeking to convert the virtual currencies into fiat currency. It is in this context that the contention revolving around Article 19(1)(g) has to be examined.

6.147. In order to test the validity of the impugned action on the touchstone of Article 19(1)(g), we may have to understand the fundamental distinction between (i) the purchase and sale of virtual currencies by and between two individuals or entities and (ii) the business of online exchanges that provide certain services such as the facility of buying and selling of virtual currencies, the storing or securing of the virtual currencies in what are known as wallets and the conversion of virtual currencies into fiat currency and vice versa. The buying and selling of crypto currencies through VC Exchanges can be by way of hobby or as a trade/business. The distinction between the two is that there may or may not exist a profit motive in the former, while it would, in the latter.

6.148. Persons who engage in buying and selling virtual currencies, just as a matter of hobby cannot pitch their claim on Article 19(1)(g), for what is covered therein are only profession, occupation, trade or business. Therefore hobbyists, who are one among the three categories of

citizens (hobbyists, traders in VCs and VC Exchanges), straightaway go out of the challenge Under Article 19(1)(g).

6.149. The second and third categories of citizens namely, those who have made the purchase and sale of VCs as their occupation or trade, and those who are running online platforms and VC exchanges can certainly pitch their claim on the basis of Article 19(1)(g). Technically speaking, the second category of citizens cannot claim that the impugned decision of RBI has the effect of completely shutting down their trade or occupation. Citizens who have taken up the trade of buying and selling virtual currencies are not prohibited by the impugned Circular (i) either from trading in crypto-to-crypto pairs (ii) or in using the currencies stored in their wallets, to make payments for purchase of goods and services to those who are prepared to accept them, within India or abroad. As a matter of fact, reports/articles in online journals suggest (i) that a few eateries such as Kolonial, a vintage themed pizzeria in Mumbai's Worli area, Suryawanshi restaurant in Indiranagar, Bengaluru and Suri Andhra Mess in Taramani, Chennai were accepting payments in virtual currencies (Mumbai and Chennai eateries are now closed and the one in Bangalore has stopped accepting) and (ii) that there are few intermediaries which accept payments in Bitcoins for gift cards which in turn facilitate online shopping from popular sites.

6.150. An important aspect to be taken note of is that virtual currencies cannot be stored anywhere, in the real sense of the term, as they do not exist in any physical shape or form. What is actually stored is the private keys, which can be used to access the public address and transaction signatures.

6.151. The software program in which the private and public keys of those who own virtual currencies is stored, is called a digital wallet. There are different types of wallets namely (i) paper wallet which is essentially a document that contains a public address for receiving the currency and a private key which allows the owner to spend or transfer the virtual currencies stored in the address (ii) mobile wallet, which is a tool which runs as an app on the smartphone, where the private keys are stored, enabling the owner to make payments in crypto currencies directly from the phone (iii) web wallet, in which the private keys are stored on a server which is constantly online (iv) desktop wallet, in which private keys are stored in the hard drive and (v) hardware wallet, where the private keys are stored in a hardware device such as pen drive.

6.152. All the above types of wallets except the desktop wallet allow a great degree of flexibility, in that they can be accessed from anywhere in the world. For instance, paper wallets are printed in the form of QR codes that can be scanned, and a transaction completed by using the private keys. Similarly, mobile wallets run as an app on the smartphone and hence they allow a person to use the crypto currency stored in the wallet for buying anything, even while travelling abroad, provided the vendor accepts payments in crypto currencies. Paper wallets and mobile wallets can also be used to draw fiat currency from virtual currency ATMs available in countries like USA, Canada, Switzerland, etc.

6.153. In other words, most of the wallets except perhaps desktop wallet, have great mobility and have transcended borders. Therefore, despite the fact that the users and traders of virtual currencies are also prevented by the impugned Circular from accessing the banking services, the impugned Circular has not paralyzed many of the other ways in which crypto currencies can still find their way to or through the market.

6.154. Persons who have suffered a deadly blow from the impugned Circular are only those running VC exchanges and not even those who are trading in VCs. Persons trading in VCs, even now have different options, some of which we have discussed above (wizards may have many more options). But the VC exchanges do not appear to have found out any other means of survival (at least as of now) if they are disconnected from the banking channels.

6.155. In all cases where legislative/executive action infringing the right guaranteed Under Article 19(1)(g) were set at naught by this Court, this Court was concerned with a ban/prohibition of an activity. The question of the prohibited/banned activities having the potential to destabilize an existing system, did not arise in those cases. The pleadings contained in the first writ petition filed by the Association, would show that three companies who are members of the Internet and Mobile Association of India, had a combined total of approximately 17 lakhs verified users throughout India. These companies held a combined total of approximately Rs. 1365 crores of user funds in trust. The approximate monthly transaction volume of just these three companies was around Rs. 5000 crores. Even according to the Petitioner, the crypto asset industry is estimated to have a market capitalization of approximately 430 billion US dollars globally. India is estimated to contribute between 2 and 10% based on varied estimates. It is admitted in WP (C) No. 373 of 2018 that the total number of investors in Indian crypto market was approximately 20 lakhs and the average daily trade volume was at least Rs. 150 crores, at the time when the writ petition was filed. Therefore, if a central authority like RBI, on a conspectus of various factors perceive the trend as the growth of a parallel economy and severs the umbilical cord that virtual currency has with fiat currency, the same cannot be very lightly nullified as offending Article 19(1)(g).

6.156. But nevertheless, the measure taken by RBI should pass the test of proportionality, since the impugned Circular has almost wiped the VC exchanges out of the industrial map of the country, thereby infringing Article 19(1)(g). On the question of proportionality, the learned Counsel for the Petitioners relies upon the four-pronged test summed up in the opinion of the majority in Modern Dental College and Research Centre v. State of Madhya Pradesh MANU/SC/0495/2016 : (2016) 7 SCC 353. These four tests are (i) that the measure is designated for a proper purpose (ii) that the measures are rationally connected to the fulfillment of the purpose (iii) that there are no alternative less invasive measures and (iv) that there is a proper relation between the importance of achieving the aim and the importance of limiting the right. The court in the said case held that a mere ritualistic incantation of "money laundering" or "black money" does not satisfy the first test and that alternative methods should have been explored.

6.157. Let us now see whether the impugned Circular would fail the four-pronged test. In fact, the Privy Council originally set forth in Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing MANU/UKPC/0024/1998 : [1999] 1 AC 69, only a three-fold test namely (i) whether the legislative policy is sufficiently important to justify limiting a fundamental right (ii) whether the measures designed to meet the legislative objective are rationally connected to it and (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective. These three tests came to be known as De Freitas test. But a fourth test namely "the need to balance the interests of society with those of individuals and groups" was added by the House of Lords in Huang v. Secretary of State for the Home Department MANU/UKHL/0041/2007 : [2007] UKHL 11. These four tests were more

elaborately articulated by the Supreme Court of United Kingdom in Bank Mellat v. HM Treasury (No. 2) MANU/UKSC/0080/2013 : [2013] UKSC 39.

6.158. Bank Mellat (supra) is an important decision to be taken note of, as it concerned almost an identical measure by which Her Majesty's Treasury restricted access to the UK's financial markets by a major Iranian commercial bank on account of its alleged connection with Iran's nuclear program. This was done by the Treasury by way of a direction under Schedule 7 of the Counter Terrorism Act, 2008, requiring all persons operating in the financial sector not to have any commercial dealings with Bank Mellat. Schedule 7 of the Act dealt with "terrorist financing and money laundering". This Schedule 7 has several parts, Part 1 providing "conditions for giving a direction", Part 2 indicating the "persons to whom a direction may be given", Part 3 laying down the requirements that may be imposed by a direction, Part 4 containing "procedural provisions and licensing", Part 5 dealing with enforcement and information powers, Part 6 dealing with civil penalties, Part 7 listing out the offences and Part 8 containing supplemental provisions. Paragraph 14 of Schedule 7 of the said Act enables the Treasury to issue general directions, to all persons or a description of persons operating in the financial sector. But certain procedural safeguards are provided in paragraph 14(2) as well as paragraph 9(6). Under paragraph 14(2), a general direction issued to persons operating in the financial sector, must be laid before the Parliament and will cease to have effect if not approved by a resolution of each House of Parliament before the end of 28 days. Under paragraph 9(6), the requirements imposed by a direction, either in the form of customer due diligence or in the form of ongoing monitoring or in the form of systematic reporting or in the form of limiting or ceasing business, should be proportionate, having regard to the advice given by the Financial Action Task Force or having regard to the reasonable belief that the Treasury has about the risks of terrorist financing or money laundering activities or the development of radiological, biological, nuclear or chemical weapons. In addition to these procedural safeguards, Section 63 of the aforesaid Act provided for a remedy to a person affected by any such decision of the Treasury, to apply to the High Court or in Scotland, to the Court of Session. Section 63(3) specifically recognized the application of the principles of judicial review, to the applications filed against such measures.

6.159. It is in the context of those specific statutory prescriptions for judicial review available in UK (unlike in India) that Bank Mellat challenged the Treasury's decision. The challenge was both on procedural and substantive grounds. By a majority of 6 to 3, the Supreme Court of the United Kingdom allowed the appeal of the Bank on procedural grounds. On the substantive grounds, the appeal of the Bank was allowed by a majority of 5 to 4.

6.160. Lord Reed who wrote a dissent both on the procedural grounds and the substantive grounds, traced the history of the doctrine of proportionality as follows:

68. The idea that proportionality is an aspect of justice can be traced back via Aquinas to the Nicomachean Ethics and beyond. The development of the concept in modern times as a standard in public law derives from the Enlightenment, when the relationship between citizens and their rulers came to be considered in a new way, reflected in the concepts of the social contract and of natural rights. As Blackstone wrote in his Commentaries on the Laws of England, 9th (1783), Vol 1, p 125, the concept of civil liberty comprises "natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". The idea

that the state should limit natural rights only to the minimum extent necessary developed in Germany into a public law standard known as Verhaltnismaáigkeit, or proportionality. From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada it spread to a number of other common law jurisdictions.

69. Proportionality has become one of the general principles of EU law, and appears in Article 5(4) of the Treaty on European Union ("TEU"). The test is expressed in more compressed and general terms than in German or Canadian law, and the relevant jurisprudence is not always clear, at least to a reader from a common law tradition. In R v. Ministry of Agriculture, Fisheries and Food, ex p Fedesa and Ors. (Case C-331/88) [1990] ECR I-4023, the European Court of Justice stated (para 13):

The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

The intensity with which the test is applied - that is to say, the degree of weight or respect given to the assessment of the primary decision-maker-depends upon the context.

70. As I have mentioned, proportionality is also a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see e.g. Sporrong and Lonnroth v. Sweden (1982) 5 EHRR 35, para 69). The court has described its approach to striking such a balance in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. In cases concerned with A1P1, for example, the court has often asked whether the person concerned had to bear an individual and excessive burden (see e.g. James v. United Kingdom (1986) 8 EHRR 123, para 50). The intensity of review varies considerably according to the right in issue and the context in which the question arises. Unsurprisingly, given that it is an international court, its approach to proportionality does not correspond precisely to the various approaches adopted in contracting states.

71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular

national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.

72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing MANU/UKPC/0024/1998 : [1999] 1 AC 69, 80 has been influential:

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

De Freitas was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement Under Articles 8 to 11 that an interference with the protected right should be necessary in a democratic society (eg Jersild v. Denmark (1994) Publications of the ECtHR Series A No. 298, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73. The De Freitas formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in Huang v. Secretary of State for the Home Department MANU/UKHL/0041/2007 : [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in R v. Oakes MANU/SCCN/0042/1986 : [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in R (Aguilar Quila) v. Secretary of State for the Home Department MANU/UKSC/0064/2011 : [2011] UKSC 45; [2012] 1 AC 621, para 45.

74. The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The

approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in De Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. In relation to the third of these criteria, Dickson CJ made clear in R v. Edwards Books and Art Ltd. MANU/SCCN/0004/1986 : [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois Elections Bd v. Socialist Workers Party MANU/USSC/0156/1979 : (1979) 440 US 173, 188, 189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in Alberta v. Hutterian Brethren of Wilson Colony MANU/SCCN/0031/2009 : [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).

6.161. Despite the fact that the Iranian bank succeeded by a greater majority on procedural grounds and by a thin majority on the substantive grounds, a common thread is seen, both, in the opinion of the majority and in the opinion of the minority. Firstly, it was agreed even by the majority that cases which lay in the areas of foreign policy and national security were once regarded as unsuitable for judicial scrutiny, but they have been opened up by the express terms of the 2008 Act, because they may engage the rights of designated persons or others under the European Convention on Human Rights. Therefore, there was unanimity of opinion that any assessment of rationality and proportionality must recognize that the nature of the issue required the Treasury to be allowed a large margin of judgment. Even Lord Sumption who wrote the lead judgment for the majority agreed that "the making of Government and legislative policy cannot be turned into a judicial process". An interesting statement made by Blackmun J in Illinois Elections Bd v. Socialist

Workers Party MANU/USSC/0156/1979 : (1979) 440 US 173 was quoted by Lord Reed in his dissent which reads "a judge would be unimaginative indeed if he could come up with something a little less drastic or a little less restrictive in almost any situation and thereby enable himself to vote to strike legislation down". In essence, there was unanimity of opinion on the fact that a margin of appreciation should certainly be allowed to the decision-maker. But on the ground of proportionality, the majority struck down the ban imposed by the UK Treasury. The highlights of the decision, as formulated by the court itself, read as follows:

(i) The essential question before the court was whether the interruption of Bank Mellat's commercial dealings in the UK bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its nuclear weapons programmes.

(ii) For the majority, there were two particular difficulties with the direction, namely (a) it did not explain or justify the singling out Bank Mellat; and (b) the justification was not one which Ministers advanced before Parliament, and was in some respects inconsistent with it.

(iii) The risk, according to the majority, was not specific to Bank Mellat but an inherent risk of banking, and the risk posed by Bank Mellat's access to those markets was no different from that posed by other comparable banks.

(iv) Singling out Bank Mellat, according to the court, was arbitrary and irrational, and disproportionate to any contribution which it could rationally be expected to make to the direction's objective.

(v) By contrast, the minority were satisfied that, in view of the wide margin of appreciation given to the Treasury in these matters, the direction was rationally connected to the objective and was proportionate.

6.162. We cannot and need not go as far as the majority had gone in Bank Mellat. U.K. has a statute where standards of procedure for judicial review are set out and the majority decision was on the application of those standards. But even by our own standards, we are obliged to see if there were less intrusive measures available and whether RBI has at least considered these alternatives. On the question of availability of alternatives, the July 2018 report of the European Union Parliament (titled 'Cryptocurrencies and Blockchain') is relied upon by Shri Ashim Sood. The relevant portion (in paragraph 5.4) reads as follows:

In this respect we also note that some cryptocurrencies that are now on the market, such as Dash and Monero, are fully anonymous, whereas others, such as Bitcoin and the like are pseudo-anonymous, basically meaning that if great effort is made and complex techniques are deployed, it is possible for authorities to find out users' identities. These fully anonymous cryptocurrencies are designed to stay in the dark and outside of the scope of authorities. After AMLD5 (Fifth Anti-Money Laundering Directive of the European union) this will no longer be possible to the fullest extent: the cryptocurrency users that want to convert their cryptocurrency into fiat currency via a virtual currency exchange or hold their portfolio via a custodian wallet provider, will be subject to customer due diligence. But, as aforementioned, there is still a whole world outside of these new obliged entities under AMLD5. It goes without saying that this may sound particularly interesting

for criminals seeking for new ways to launder money, finance terrorists or evade taxes. If a legislator does not want to outright ban these cryptocurrencies-and for not imposing such a ban a good argument is that cash is also fully anonymous and lawful-the only way to find out who uses them is to require users to register mandatorily. ***For reasons of proportionality it could then be considered to make the registration subject to a materiality threshold.***

(emphasis supplied)

6.163. The discussion in paragraph 5.7 of the July 2018 Report of the European Union Parliament also addresses the issue as to whether it is best to introduce an outright ban for some aspects linked to some crypto currencies. This paragraph reads as follows:

5.7. Is it not best to introduce an outright ban for some aspects linked to some cryptocurrencies?

The question arises whether some aspects relating to some cryptocurrencies should not just be banned and criminally sanctioned. To mind come the mixing process attached to Dash's feature PrivateSend and Monero's RingCT, stealth addresses and Kovri-project. In essence, these features are designed to make cryptocurrency users untraceable. But why is such degree of anonymity truly necessary? Would allowing this not veer too far towards criminals? Imposing a ban for such aspects surrounding cryptocurrencies that are aimed at making it impossible to verify their users and criminally sanctioning these aspects seems to be in line with the Council's conclusions of April 2018 on how to respond to malicious cyber activities, under which that the use of ICT for malicious purposes is unacceptable. Whatever the answer may be, we must again avoid being naive: even if a ban would be imposed, how do we detect a breach, given that the purpose of the object of the ban just is to obscure identities? Nevertheless, it would be worthwhile to consider introducing a ban. If authorities then bump into the prohibited activities, they have a legal basis for prosecution, insofar not yet available. Possibly, imposing a ban could also have a deterrent effect. of course, again there is the tension with data protection, but arguably in the balance of things the interest of authorities and society to more effectively combat money laundering, terrorist financing and tax evasion via well-defined specific bans outweighs the interest of persons desiring to hide their identities completely. In any event, imposing a ban should always be focused on specific aspects facilitating the illicit use of cryptocurrency too much. ***We are not in favour of general bans on cryptocurrencies or barring the interaction between cryptocurrency business and the formal financial sector as a whole, such as is the case in China for example. That would go too far in our opinion. As long as good safeguards are in place protecting the formal financial sector and more in general society as a whole, such as Rules combating money laundering, terrorist financing, tax evasion and maybe a more comprehensive set of Rules aiming at protecting legitimate users (such as ordinary consumers and investors), that should be sufficient.***

(emphasis supplied)

6.164. Thus, the ultimate recommendation made by the European Union Parliament in the paragraph extracted above, is not to go for a total ban of the interaction between crypto currency business and the formal financial sector as a whole. Obviously, RBI did not consider the availability of alternatives before issuing the impugned circular. But by an interim direction, issued on 21-08-2019 this Court directed RBI to give a detailed point-wise reply to the representations of

the Petitioners. Pursuant to the said order, RBI gave a reply dated 04-09-2019. In the reply, RBI has dealt with every one of the contentions of the Petitioners. The relevant portion reads as follows:

Firstly, the RBI has not prohibited VCs in the country. *The RBI has directed the entities regulated by it to not provide services to those persons or entities dealing in or settling VCs. The risks associated with VCs that are highlighted by the RBI stands mitigated so far as the entities regulated by it are concerned. Thus, the RBI been able to ring fence the entities regulated by it from being involved in activities that pose reputational and financial risks along with other legal and operational risks. For example, VCs have been used to defraud consumers in a Rs. 2000 crore scam in India whereby users were assured returns upon their investment in GainBitcoin and were paid their return in another form of VC, whose value was much lower than that of GainBitcoin.*

We do not agree that the Circular has the effect of forcing members to do deal in cash. The Circular neither directs nor encourages any dealing with respect to VCs at all. After the issuance of the Circular, some of the IAMAI member VC exchanges have been operating peer to peer VC exchanges. In P2P transfers, while the exchange provides a portal to match the orders of a seller and buyer, the consideration would flow directly from the buyer to the seller without the exchanges being an intermediary for this leg of the trade. The exchanges would only act as the intermediary for the storing the VCs till the time the transfer of the consideration from the buyer to the seller is complete. In other words, the exchanges act as an escrow agent for the transaction between the buyer and the seller. The buyers in the P2P transaction transfer the consideration directly to the seller's bank account. In any case, the capital flight problem mentioned by the Petitioner is not new and existed even before the issuance of the Circular. As mentioned earlier, the IAMAI VC exchanges allowed their customers to transfer VCs to foreign wallet addresses, even before the issuance of the Circular, exposing the customers to the risks of violating FEMA, AML/CFT guidelines.

The issues highlighted by IAMAI have been considered by the RBI. The RBI, as the banking and financial regulator of Indian markets, assessed the risks and benefits arising from the exponential and increasing use of VCs. The potential adverse impact of VCs on the banking sector and the digitization of the Indian payments industry, on account of the inherent nature of VCs, is lowered as a result of the Circular. The RBI stepped in as part of its duty to carry out preventive oversight to ensure that the banking system was not a casualty on account of the growth in VC trading. The Circular became all the more necessary as the use and trade through VCs continued to grow despite multiple cautions issued by the RBI. Further, the public should not lose faith in the Indian digital payments ecosystem as a consequence of any impact of VCs given its intrinsic nature. The focus of the digital payments in India will be defeated should the usage of VCs result in implications. Any unpleasant experience in using VCs can affect the public's trust in electronic payment systems in general.

It is in this context that the RBI had highlighted some of the possible ways to enforce the prohibition on VCs in the RBI Representation, which are as follows:

(i) Initial Coin Offerings ("ICOs") ought to be prohibited and VC asset funds may to be allowed to be set-up and/or operated within the legal jurisdiction of India as also perform such transactions in India. ICOs that were in the nature of multi-level marketing or pyramid schemes can be banned;

(ii) The FEMA and its Regulations can be enhanced to prevent and track remittances for the purpose of investing in VCs which are flowing out of the country under the LRS;

(iii) Enforcement agencies can take punitive action against entities/establishments that accept VCs as a medium of payment, as and when these agencies are faced with such instances; and

(iv) Regulators can issue warnings to the public and educated the public to the extent possible.

One must also be alive to the issue faced by the country. India is not a safe haven free from any external intrusions and terror attacks. India is plagued by the menace of cross border terror financing and money laundering. While laws have been enacted to counter terror financing and money laundering activities, the Government cannot permit anything which would facilitate or have the potential to facilitate such nefarious and illegal acts to incubate in the country. Any possible avenues which facilitate anonymous cross border fund transfer have to be acted upon swiftly and stringently dealt with. It is an admitted fact that VCs have been used to purchase illegal and illicit goods ranging from guns and ammunition to drugs. Therefore, the RBI's measures under the Circular become all the more necessary. With the Circular coming into effect, the banking system and the RBI's regulated entities would not be facilitating persons looking to obtain VCs for illegal trades. The additional measures taken by the RBI by way of the Circular were necessary as, despite multiple cautions, 5 million Indian users engaged in VC trades of INR 1 billion daily.

(emphasis supplied)

6.165. In Annexure B to their second response dated 18-09-2019, RBI has also dealt with every one of the additional safeguards proposed by one of the writ Petitioners, by name, Discidium Internet Labs Pvt., Ltd. and demonstrated as to how these safeguards may not be sufficient to ring fence the regulated entities:

Safeguards proposed by Petitioners	Response of RBI
Development of a dashboard and central repository	The technology and concept of a dashboard that is accessible by all the relevant government authorities is yet to be tested in India and cannot guarantee that the same will enable authorities to mitigate risks in relation to VCs, particularly the ones arising out of cross border transactions or illegal and nefarious activities. Such a development would require the association of various government authorities at different levels with implications on the roles and responsibilities of other regulatory/enforcement agencies and cannot be implemented by the RBI alone. Therefore, even assuming that the proposed structure is adequate enough, its implementation will entail other authorities to formulate the appropriate rules or directions in their jurisdictions, which is beyond the

	RBI's control. In any case, for such a development to come into existence, the Government will need to formulate and establish appropriate rules governing the nitty gritty of the same. In addition, VCs are difficult to monitor as their opaque nature makes it difficult to gather information and monitor their operations. Moreover, asserting jurisdiction over a particular VC transaction or market participant may prove challenging for national regulators in the light of the cross-border reach of the technology.
Formation of a self-regulatory organization and Restricting trade of crypto-assets to white listed addresses	Issuance and management have been a function solely of the sovereign/central bank and a collection of private entities cannot be trusted to perform this role. Moreover, when such VCs become widely used, the central bank's ability to control the money supply in the economy could get adversely impacted. In fact, implications of VCs vis-a-vis consumer protection, data privacy and security were also highlighted. It was also acknowledged that there are several uncertainties around the VC, particularly with respect to how the VC is secured, the extent to which there are measures to prevent and respond to the dramatic shifts of value; and the characterization of the sellers of such a VC. Additionally, it was recognized that there can be implications on the US monetary policy as another 'currency' not under the government control can adversely impact the Federal Reserve's monetary policy as the Federal Reserve would lose its monopoly on controlling inflation and inflation targeting though manipulating cash in the system.
Adoption of Aadhar based electronic KYC	Electronic KYC is currently permitted only for banks for individuals desirous of receiving any benefit or subsidy under any scheme notified Under Section 7 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies Benefits and Services) Act, 2016 or if an individual voluntarily uses his/her Aadhaar number for identification purpose. Moreover, the adoption of Aadhaar based electronic KYC may not be sufficient to address the risks stated by the RBI in the Press Releases. This is because for the RBI to issue norms/measures that sufficiently

	resolves and/or mitigated the stated risks of dealing in VCs, it has to be privy to the technicalities of the various types of VCs, their characteristics and difficulties and drawbacks. There is still a high level of uncertainty and ambiguity surrounding VCs. Regulators around the world are still in fact contemplating how to regulate initial coin offerings and how to tax them. The RBI is keeping a close tab on all such developments including the regulatory stand taken by each jurisdictions across the world and will consider implementing the same to the extent of its jurisdiction and in line with the policy framework that will be adopted by the Government of India in relation to VCs.
Mandatory capitalisation requirement	DILPL has failed to set out the benefit or security provided by the proposed mandatory capitalisation requirements. In the absence of any benefits prescribed by DILPL, the RBI has to rely upon conjecture and surmises to assume the purported benefits of this suggestion. Notably, the fact that certain jurisdictions prescribe mandatory capitalisation requirements does not necessarily make the suggestion beneficial or implementable in India. The only benefit which a reasonable person may assume is that the VC exchanges will have to be of a minimum prescribed size and value. However, the mandatory capitalisation requirement of VC exchanges would not reduce the inherent risks involved in VCs. VCs transactions would continue to be anonymous and untraceable. The mandatory capitalisation requirement does not reduce the use of VCs in nefarious activities and illegal cross-border transactions. Further, the mandatory capitalisation requirement does not provide any security or benefit to the monetary and banking system from the risks associated with VCs. Pertinently, the suggestion includes prescribing a mandatory capitalisation requirement in VCs itself. Given the instability and price fluctuations of VCs, the RBI rejects any suggestion of providing a security or capitalisation requirement in VC itself. Additionally, the suggested mandatory capitalisation requirement

	would also not reduce the risks to consumers arising not only from fraud but also from the possible loss of value given the fluctuations and manipulation VCs' value.
Insurance of crypto-assets	Firstly, Indian Insurance service providers are not governed by the RBI. Insurance providers come within the regulatory jurisdiction of the Insurance Regulatory and Development Agency ("IRDA"). Therefore, the RBI cannot assume jurisdiction over insurance providers by directing them to formulate tailored insurance policies for VC exchanges. It is for the purpose of such regulatory aspects, that the Inter-Ministerial Committee was constituted to study VCs. Accordingly, the RBI had, at that time, forwarded a copy of the Representation to the Inter-Ministerial Committee for their due consideration. Secondly, Indian insurance providers, as mandated by the IRDA, take a cautious approach to the insurance policies offered by them. Therefore, the insurance providers may not, either suo motu or on account of IRDA's directions, offer insurance policies to protect VCs. Further, this cautious approach includes various limitation or exclusion of liability clauses. Therefore, the insurance policies may not provide adequate cover in the event of any value degradation, loss or theft of VCs. Moreover, the highly speculative and fluctuating value of VCs is a risk which ought not to be borne by the insurance providers, who are already suffering from the various financial frauds in the Indian monetary and banking system.
Formation of an investor protection and education fund	DILPL suggests setting up an investor protection and education fund, for which the VC exchanges would transfer all proceeds earmarked towards their corporate social responsibility ("CSR") obligations under the Companies Act, 2013. This suggestion, as per the RBI, would not protect the customers as claimed by Discidium as the steps would be insufficient to provide adequate cover to customers. Notably, Discidium has not suggested that it create any additional buffer for the education and protection of its customers but instead, has merely suggested that VC exchanges transfer its existing legal obligations to create a fund which would purportedly benefit customers.

	Despite best efforts made to educate customers, the inherent risks in VCs would still remain. It is reiterated that VCs transactions would remain anonymous and open to facilitating illegal activities. It is unlikely that the education of customers would change the intent of nefarious customers, who would continue to conduct illicit transactions through VCs. The anonymous nature of VCs cannot be disputed. The transactions in VCs are anonymous due to the pseudonymous address or user handle. For instance, the reportedly largest transfer of Bitcoins, worth nearly USD 1 billion,[51] took place as recently as September 2019, was between anonymous accounts. Even if the exchanges try to mitigate the risks of cyber-attacks by subscribing to insurance products, the risks are likely to spread to sectors other than banking. Further, the utilisation of CSR funds is not regulated or governed by the RBI. Therefore, implementation of this suggestion would require other authorities to formulate necessary rules or directions, which is beyond the RBI's control and would depend on the final law passed by the Parliament based on the currently pending draft Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019.

6.166. Though at the time when the impugned Circular was issued, RBI has not obviously addressed many of the issues flagged by the writ Petitioners, RBI did in fact consider the issues raised by the Petitioners, pursuant to the order passed by this Court on 21-08-2019. RBI has also analyzed in Annexure B to the reply dated 18-09-2019 extracted above, the additional safeguards suggested by the Petitioners, to see if the purpose of the impugned measure can be achieved through less intrusive measures. While exercising the power of judicial review we may not scan the response of RBI in greater detail to find out if the response to the additional safeguards suggested by the Petitioners was just imaginary.

6.167. But at the same time we cannot lose sight of three important aspects namely, (i) that RBI has not so far found, in the past 5 years or more, the activities of VC exchanges to have actually impacted adversely, the way the entities regulated by RBI function (ii) that the consistent stand taken by RBI up to and including in their reply dated 04-09-2019 is that RBI has not prohibited VCs in the country and (iii) that even the Inter-Ministerial Committee constituted on 02-11-2017, which initially recommended a specific legal framework including the introduction of a new law namely, Crypto-token Regulation Bill 2018, was of the opinion that a ban might be an extreme tool and that the same objectives can be achieved through regulatory measures. Paragraph 7 of the 'Note-precursor to report' throws light on the same and hence it is reproduced as follows:

Options

7. The Committee has considered various approaches to achieve the objectives and notes:

Achieving the objectives by doing nothing

i. Issuing warnings may prevent unsophisticated consumers from dealing in VCs but it would not deter VC service providers or those raising funds through Initial Coin Offerings (ICOs), mis-sell or run Ponzi schemes.

ii. The recourse available to customers would be inadequate.

iii. Persons who provide VC services without necessary fit and proper criteria including capital and technology would continue to pose a heightened risk.

Achieving the objectives through banning

i. Consumer protection is a key concern but a ban might be an extreme too to address this. There are many things/activities that may be harmful but they are not all banned. Problems related to information asymmetry, concerns around market risks, law enforcement or threat to financial system cannot be adequately addressed through a ban.

ii. A ban would make dealing in VCs illegal but simultaneously it might decrease the ability of the law enforcement agencies and regulators to track and stop illegal activities.

iii. Ver few countries have actually banned VCs. A ban might not be in-step with India's position as an important centre of Information Technology services.

Achieving the objectives by regulating

i. Penalizing entities or persons who do not opt for Regulation under this Act and may choose to operate illegally may continue to be difficult.

6.168. The Crypto-token Regulation Bill, 2018 initially recommended by the Inter-Ministerial Committee contained a proposal (i) to prohibit persons dealing with activities related to crypto tokens from falsely posing these products as not being securities or investment schemes or offering investment schemes due to gaps in the existing regulatory framework and (ii) to regulate VC exchanges and brokers where sale and purchase may be permitted.

6.169. The key aspects of the Crypto-token Regulation Bill, 2018, found in paragraph 13 of the 'Note-precursor to report' shows that the Inter-Ministerial Committee was fine with the idea of allowing the sale and purchase of digital crypto asset at recognized exchanges. Paragraph 13 (iii) & (vii) of the 'Note-precursor to the report' reads as follows:

13. Key aspects are summarised below:

(i)...

(ii)...

(iii) The sale and purchase of digital crypto asset shall only be permitted at recognised exchanges.

(iv)...

(v)...

(vi)...

(vii) The registry of all holdings and transactions on the recognised exchanges shall be maintained at recognised depositories.

6.170. But within a year, there was a volte-face and the final report of the very same Inter-Ministerial Committee, submitted in February 2019 recommended the imposition of a total ban on private crypto currencies through a legislation to be known as "Banning of Cryptocurrency and Regulation of Official Digital Currency Act, 2019". The draft of the bill contained a proposal to ban the mining, generation, holding, selling, dealing in, issuing, transferring, disposing of or using crypto currency in the territory of India. At the same time, the bill contemplated (i) the creation of a digital rupee as a legal tender, by the central government in consultation with RBI and (ii) the recognition of any official foreign digital currency, as foreign currency in India.

6.171. In case the said enactment (2019) had come through, there would have been an official digital currency, for the creation and circulation of which, RBI/central government would have had a monopoly. But that situation had not arisen. The position as on date is that VCs are not banned, but the trading in VCs and the functioning of VC exchanges are sent to comatose by the impugned Circular by disconnecting their lifeline namely, the interface with the regular banking sector. What is worse is that this has been done (i) despite RBI not finding anything wrong about the way in which these exchanges function and (ii) despite the fact that VCs are not banned.

6.172. As we have pointed out earlier, the concern of RBI is and it ought to be, about the entities regulated by it. Till date, RBI has not come out with a stand that any of the entities regulated by it namely, the nationalized banks/scheduled commercial banks/cooperative banks/NBFCs has suffered any loss or adverse effect directly or indirectly, on account of the interface that the VC exchanges had with any of them. As held by this Court in State of Maharashtra v. Indian Hotel and Restaurants Association MANU/SC/0702/2013 : (2013) 8 SCC 519, there must have been at least some empirical data about the degree of harm suffered by the regulated entities (after establishing that they were harmed). It is not the case of RBI that any of the entities regulated by it has suffered on account of the provision of banking services to the online platforms running VC exchanges.

6.173. It is no doubt true that RBI has very wide powers not only in view of the statutory scheme of the 3 enactments indicated earlier, but also in view of the special place and role that it has in the economy of the country. These powers can be exercised both in the form of preventive as well as curative measures. But the availability of power is different from the manner and extent to which

it can be exercised. While we have recognized elsewhere in this order, the power of RBI to take a pre-emptive action, we are testing in this part of the order the proportionality of such measure, for the determination of which RBI needs to show at least some semblance of any damage suffered by its regulated entities. But there is none. When the consistent stand of RBI is that they have not banned VCs and when the Government of India is unable to take a call despite several committees coming up with several proposals including two draft bills, both of which advocated exactly opposite positions, it is not possible for us to hold that the impugned measure is proportionate.

7. CLIMAX

7.1. Therefore, in the light of the above discussion, the Petitioners are entitled to succeed and the impugned Circular dated 06-04-2018 is liable to be set aside on the ground of proportionality. Accordingly, the writ petitions are allowed and the Circular dated 06-04-2018 is set aside. The Statement dated 05-04-2018, though challenged in one writ petition, is not in the nature of a statutory direction and hence the question of setting aside the same does not arise.

7.2. There is still one more issue left. It is the freezing of the account of Discidium Internet Labs Pvt. Ltd., which is Petitioner No. 6 in WP (C) No. 373 of 2018. This company seems to have had an amount of Rs. 12,05,36,667.83/- in current account No. 3677101984 with the Central Bank of India, Worli, Mumbai. When the Petitioner made a request on 21-05-2018 to close the account and issue a demand draft, the Central Bank replied that they had referred the matter to their higher authorities/regulators. Therefore, Petitioner No. 6 has come up with an application in I.A. No. 110424 of 2019 for appropriate directions.

7.3. RBI has filed a reply to this application conceding that it had not directed the bank to freeze the account. It is specifically stated in paragraph 12 of the affidavit-in-reply of RBI that they did not issue any direction to the Central Bank of India to freeze the account. However, RBI has taken a stand that the prayer for release of the amount does not arise out of or incidental to the main writ petition.

7.4. But we think that the lukewarm response of RBI in this regard is wholly unjustified. Admittedly, the activities carried on by the Petitioner No. 6 were not declared as unlawful. It is the positive case of RBI that they did not in fact freeze the accounts of Petitioner No. 6. Therefore, RBI is obliged to direct the Central Bank of India to defreeze the account and release the funds. Hence, RBI is directed to issue instructions forthwith to the Central Bank of India, Worli branch, to defreeze the current account No. 3677101984 of Petitioner No. 6 in WP (C) No. 373 of 2018 and to release the funds lying in the account to the company together with interest at the rate applicable. There will be no order as to costs.

7.5. Before drawing the curtains down, we are bound to record, as in every artistic display, our appreciation for the skilful manner in which Shri Ashim Sood, learned Counsel, led the attack on the impugned Circular, but for which, the climax could not have had a nail biting finish.

[1] Regulatory sandbox refers to live testing of new products/services in a controlled/test regulatory environment.
[2] FSB was established by G-20 in April 2009, as a successor to the Financial Stability Forum founded in 1999 by G-7 Finance Ministers and Central Bank Governors.
[3] The fate of the 2018 Bill is not known but a fresh bill called 'Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019' has been submitted.
[4] tattvamasyadivakyena svatma hi pratipaditah neti neti srutirbruyad anrtam pancabhautikam-
[5] From his book "Digital Gold: Bitcoin and the inside story of the Misfits and Millionaires Trying to Reinvent Money".
[6] Cypherpunk is an activist advocating widespread use of strong cryptography and privacy enhancing technologies, as a route to social and political change. This word was added to the Oxford English Dictionary in November 2006.
[7] Virtual Currencies and Beyond: Initial Considerations, IMF Staff Discussion Note, Dong He et al., page 7, 16, 17 (January 2016) (available at https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf, last accessed on 27-02-2020) - presented by IMF Managing Director, Christine Lagarde, presented at the World Economic Forum (https://www.ccn.com/imf-director-talks-up-virtual-currencies-and-blockchain-tech/, last accessed on 27-02-2020).
[8] Given the fast evolving nature of the industry, a universal definition has yet to emerge and could quickly change as the VC ecosystem continues to transform.
[9] This type of VCs is backed by the combination of existing tangible assets or national currencies and the creditworthiness of the issuer.
[10] Guidance for a Risk-Based Approach - Virtual Currencies, FATF, page 26 (June 2015) available at http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf (Last accessed on 27-02-2020).
[11] Glossary of the FATF Recommendations (updated on October 2018) available at https://www.fatf-gafi.org/glossary/u-z/ (Last accessed on 27-02-2020).
[12] Virtual Currency Schemes, European Central Bank, page 13 (October 2012) available at http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf (Last accessed on 27-02-2020).
[13] Phoebus Athanassiou, Impact of Digital Innovation on the Processing of Electronic Payments and Contracting: An Overview of Legal Risks, Legal Working Paper Series, No. 16, European Central Bank (October 2017) available at https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp16.en.pdf?344b9327fec917bd7a8fd70864a94f6e (Last accessed on 27-02-2020).
[14] EBA Opinion on 'virtual currencies', page 11, 13 (July 2014) available at https://eba.europa.eu/sites/default/documents/files/documents/10180/657547/81409b94-4222-45d7-ba3b-7deb5863ab57/EBA-Op-2014-08%20Opinion%20on%20Virtual%20Currencies.pdf (Last accessed on 27-02-2020).
[15] Advice-Initial Coin Offerings and Crypto-Assets (January 2019) available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf (Last accessed on 27-02-2020).

[16] Guidance on Cryptoassets, Consultation Paper, CP 19/3, Financial Conduct Authority, page 7 (January 2019) available at https://www.fca.org.uk/publication/consultation/cp19-03.pdf (Last accessed on 27-02-2020) and Guidance on Cryptoassets, Feedback and Final Guidance to CP 19/3, Policy Statement, PS19/22 (July 2019) available at https://www.fca.org.uk/publication/policy/ps19-22.pdf (Last accessed on 27-02-2020).
[17] IRS Virtual Currency Guidance: Virtual Currency is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply (March 2014) available at https://www.irs.gov/newsroom/irs-virtual-currency-guidance (Last accessed on 27-02-2020) and https://www.irs.gov/pub/irs-drop/n-14-21.pdf (Last accessed on 27-02-2020).
[18] IRS reminds taxpayers to report virtual currency transactions (March 2018) available at https://www.irs.gov/newsroom/irs-reminds-taxpayers-to-report-virtual-currency-transactions (Last accessed on 27-02-2020).
[19] Investor Alert: Bitcoin and Other Virtual Currency-Related Investments (May 2014) available at https://www.Sec.gov/oiea/investor-alerts-bulletins/investoralertsia_bitcoin.html (Last accessed on 27-02-2020).
[20] Chairman Jay Clayton, Statement on Cryptocurrencies and Initial Coin Offerings (December 2017) available at https://www.Sec.gov/news/public-statement/statement-clayton-2017-12-11 (Last accessed on 27-02-2020).
[21] In the Matter of: Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan, CFTC Docket No. 15-29. 2015 WL 5535736 (September 17, 2015) available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf (Last accessed on 27-02-2020).
[22] Guidance-Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (March 2013) available at https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf (Last accessed on 27-02-2020).
[23] Guide for cryptocurrency users and tax professionals (Last modified on 27 June 2019) available at https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html (Last accessed on 27-02-2020).
[24] Virtual Currency (Last modified on 26 June 2019) available at https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency.html (Last accessed on 27-02-2020).
[25] As amended in June 2019, which amendment is yet to come into force.
[26] Regulation of Cryptocurrency Around the World - Israel, Report of The Law Library of Congress, Global Legal Research Center (June 2018) available at https://www.loc.gov/law/help/cryptocurrency/world-survey.php#israel (Last accessed on 27-02-2020).
[27] Regulation of Cryptocurrency Around the World - Mexico, Report of The Law Library of Congress, Global Legal Research Center (June 2018) available at https://www.loc.gov/law/help/cryptocurrency/world-survey.php#mexico (Last accessed on 27-02-2020).
[28] Regulation of Cryptocurrency Around the World - Austria, Report of The Law Library of Congress, Global Legal Research Center (June 2018) available at https://www.loc.gov/law/help/cryptocurrency/world-survey.php#austria (Last accessed on 27-02-2020).
[29] Regulation of Cryptocurrency Around the World - Czech Republic, Report of The Law

Library of Congress, Global Legal Research Center (June 2018) available at https://www.loc.gov/law/help/cryptocurrency/world-survey.php#czech (Last accessed on 27-02-2020).
[30] Regulation of Cryptocurrency Around the World - Germany, Report of The Law Library of Congress, Global Legal Research Center (June 2018) available at https://www.loc.gov/law/help/cryptocurrency/world-survey.php#germany (Last accessed on 27-02-2020).
[31] Regulation of Cryptocurrency Around the World - Luxembourg, Report of The Law Library of Congress, Global Legal Research Center (June 2018) available at https://www.loc.gov/law/help/cryptocurrency/world-survey.php#luxembourg (Last accessed on 27-02-2020).
[32] Regulation of Cryptocurrency Around the World - Slovakia, Report of The Law Library of Congress, Global Legal Research Center (June 2018) available at https://www.loc.gov/law/help/cryptocurrency/world-survey.php#slovakia (Last accessed on 27-02-2020).
[33] European Union's Directive 2018/843 available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN (Last accessed on 27-02-2020).
[34] Policy paper, Cryptoassets: Tax for Individuals (December 2019) available at https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals (Last accessed on 27-02-2020).
[35] Policy paper on Revenue and Customs Brief 9 (2014): Bitcoin and other cryptocurrencies, HM Revenue & Customs (March 3, 2014) available at https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies (Last accessed on 27-02-2020).
[36] What are cryptoassets (cryptocurrencies)? available at https://www.bankofengland.co.uk/knowledgebank/what-are-cryptocurrencies (Last accessed on 27-02-2020).
[37] Digital Currency Regulatory Guidance, Illinois Department of Financial and Professional Regulation (June 13, 2017) available at https://www.idfpr.com/Forms/DFI/CCD/IDFPR%20-%20Digital%20Currency%20Regulatory%20Guidance.pdf (Last accessed on 27-02-2020).
[38] Office of Financial Institutions, State of Louisiana, Consumer and Investor Advisory on Virtual Currency (August 2014) available at http://www.ofi.state.la.us/SOCGuidanceVirtualCurrency.pdf (Last accessed on 27-02-2020).
[39] Virtual Currency, Treasury Update published by the Tax Policy Division, Michigan Department of Treasury (Vol. 1(1), November 2015) available at https://www.michigan.gov/documents/treasury/Tax-Policy-November2015-Newsletter_504036_7.pdf (Last accessed on 27-02-2020).
[40] Case No. 4: 13-Cv-416 (August 6, 2013)
[41] CFTC Docket No. 15-29 dated 17-09-2015
[42] CFTC Docket No. 15-33 dated 24-09-2015
[43] CFTC Docket No. 16-19 dated 02-06-2016
[44] 18-Cv-361 dated 03-06-2018
[45] 18-Cv-10077-RWZ dated 26-09-2018
[46] F 14-2923 decided on 22-07-2016
[47] Case C-264/14 dated 22-10-2015

[48] According to this doctrine, truth and reality are perceived differently from different points of view and no single point is the complete truth.
[49] Ch. 4, Pg. 121, 6th Edition, 2004
[50] M S Gill v. The Chief Election Commissioner, MANU/SC/0209/1977 : (1978) 1 SCC 405
[51] https://www.vice.com/en_in/article/bjwjpd/someone-just-moved-a-billion-dollars-in-bitcoin-and-no-one-knows-whywhich; last accessed on September 12, 2019.

Back to Index

MANU/SC/0595/2007

Neutral Citation: 2007/INSC/28

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 1344-45 of 1976 with Writ Petition (Civil) Nos. 242 of 1988, 751 of 1990, 259, 454 and 473 of 1994, 238 of 1995, 35 of 1996 and 408/03, Civil Appeal Nos. 6045 and 6046 of 2002 and SLP (C) Nos. 14182, 14245, 14248, 14249, 14940, 14946, 14947, 14949, 14950, 14965, 14993, 15020, 15022, 15029, 26879, 26880, 26881, 26882, 26883, 26884, 26885 and 26886 of 2004

Decided On: 11.01.2007

Appellants: I.R. Coelho (Dead) by L.Rs. Vs**.** Respondent: State of Tamil Nadu and Ors.

Hon'ble Judges/Coram:

Y.K. Sabharwal, C.J., Ashok Bhan, Dr. Arijit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir and Devinder Kumar Jain, JJ.

Subject: Constitution

Relevant Section:

CONSTITUTION OF INDIA - Article 14; CONSTITUTION OF INDIA - Article 19, CONSTITUTION OF INDIA - Article 21

Authorities Referred:

H.M. Seervai in Constitutional Law of India (Fourth Edition Volume III); Democracy through Law by Lord Styen, Page 131; Federalist 47, 48, and 51 James Madison

Prior History:

From the Judgment and Order dated 23.9.1976 of the High Court of Judicature at Madras in W.P. Nos. 4386/1974 and 90/1975

Case Note:

Constitution of India - Article 31B--9th Schedule--Inclusion of a Statute in the 9th Schedule will not save it from being struck down as unconstitutional if it's effect is to abridge or

abrogate the fundamental rights guaranteed by Part III of and if such violation will violate the basic structure of the Constitution-- Vires of the Statute included in 9th Schedule is open to Judicial review--Article 368.

Gudalur Janmam Estates [Abolition and Conversion into Ryotwari] Act, 1969 and Section 2(c) of the West Bengal Land Holding Revenue Act, 1979, were struck down as unconstitutional. Both the Acts were included in the 9th Schedule of the Constitution by amending the Constitution. This was challenged and a 5 member Constitution Bench held that decision in Waman Rao & others v. Union of India & others [(1981) 2 SCC 362] requires reconsideration, in view of the decision in Minerva Mills Case and Maharao Sahib's case and 'it is to be made clear whether an Act or regulation which, or a part of which, is or has been found by the Supreme Court to be violative of one or more of the fundamental rights conferred by Articles 14,19 and 21 can be included in the 9th Schedule or whether it is only a constitutional amendment amending 9th Schedule which damages or destroys the basic structure of the Constitution which can be struck down'. In the light of the reference order, Nine member Bench of the Hon'ble Supreme Court framed the larger question 'Whether, on or after the date of Judgment in Keshvananda Bharathi's case, viz., 24-4-1973, it is permissible for the Parliament under Article 31B to immunise legislations from Fundamental rights by inserting them into the 9th Schedule and if so, what is the effect on the power of Judicial review of the Supreme Court'.

It was contended by Petitioners that Fundamental rights conferred by part III forms part of the basic structure and laws included in 9th Schedule when tested on the ground of affecting the basic structure shall have to be examined on the test of violation of fundamental rights. On the other hand, it was contended by Respondents that validity of legislations included in the 9th Schedule can only be tested on the touchstone of basic structure doctrine, lack of legislative competence and violation of other

Constitutional provisions and there cannot be Judicial review of such legislations on the ground of violation of fundamental rights chapter. After an elaborate precedential survey commencing from A.K. Gopalan's case in 1950 to Nagaraj's case in 2006, relying on the Doctrine of separation of powers, the Constitution Bench answered the reference holding that 'if a Statute is held to be unconstitutional and such Statute is included in 9th Schedule after 24-4-1973, such violation can be challenged as violative of the basic structure as indicated in Article 21 read with Articles 14 and 19 but that actions finalised on the basis of these Statutes shall not be open to challenge'.

Held:

In conclusion, we hold that:

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in Kesavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a Statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law (s) will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide Order dated 14th September, 1999 in I.RULE Coelho v. State of Tamil Nadu [(1999) 7 SCC 580].

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.

(vi) Action taken and transactions finalised as a result of the impugned Acts shall not be open to challenge.

Constitution of India--Article 31B--Judicial review of Statute included in 9th Schedule--If the law infringes the essence of any of the fundamental rights or any other aspect of basic structure, it will be struck down.

Held:

Cm it be said, after the evolution of the basic structure doctrine, that exclusion of these rights

at Parliament's will without any standard, cannot be subjected to judicial scrutiny as a result of the bar created by Article 31B? The obvious answer has to be in the negative. If some of the fundamental rights constitute a basic structure, it would not be open to immunise those legislations from full judicial scrutiny either on the ground that the fundamental rights are not part of the basic structure or on the ground that Part III provisions are not available as a result of immunity granted by Article 31B. The result of the aforesaid discussion is that since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case.

Constitution of India--Doctrine of Separation of Powers-- Parliament cannot be the judge of limitation of its power to amend the Constitution--Such function is to be exercised by an independent organ viz., Judiciary.

Held:

It is permissible for the Legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31 but subject to right of citizen to assail it on the enlarged judicial review concept. The Legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the Court after the enunciation of the basic structure doctrine. The constitutional amendments are subject to limitations and if the question of limitation is to be decided by the Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary.

Ratio Decidendi:

Essentially, it is the consequence of amendment which is relevant than its form to determine constitutional validity of the Ninth schedule laws on the touchstone of basic structure doctrine, to be adjudged by applying the direct impact and effect test, i.e. rights test

JUDGMENT

Y.K. Sabharwal, C.J.

1. In these matters we are confronted with a very important yet not very easy task of determining the nature and character of protection provided by Article 31-B of the Constitution of India, 1950 (for short, the 'Constitution') to the laws added to the Ninth Schedule by amendments made after 24th April, 1973. The relevance of this date is for the reason that on this date judgment in ***His Holiness Kesavananda Bharati, Sripadagalvaru v. State of Kerala and Anr. MANU/SC/0445/1973 :*** AIR1973SC1461 was pronounced propounding the doctrine of Basic Structure of the Constitution to test the validity of constitutional amendments.

Re : Order of Reference

2. The order of reference made more than seven years ago by a Constitution Bench of Five Judges is reported in ***I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu MANU/SC/0562/1999 :*** AIR1999SC3179 (14.9.1999) . The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (the Janmam Act), insofar as it vested forest lands in the Janmam estates in the State of Tamil Nadu, was struck down by this Court in ***Balmadies Plantations Ltd. and Anr. v. State of Tamil Nadu MANU/SC/0037/1972 :*** [1973]1SCR258 because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the Constitution (Thirty-fourth Amendment) Act, the Janmam Act, in its entirety, was inserted in the Ninth Schedule. By the Constitution (Sixty-sixth Amendment) Act, the West Bengal Land Holding Revenue Act, 1979, in its entirety, was inserted in the Ninth Schedule. These insertions were the subject matter of challenge before a Five Judge Bench.

The contention urged before the Constitution Bench was that the statutes, inclusive of the portions thereof which had been struck down, could not have been validly inserted in the Ninth Schedule.

3. In the referral order, the Constitution Bench observed that, according to ***Waman Rao and Ors. v. Union of India and Ors. MANU/SC/0091/1980 :*** [1981]2SCR1 , amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. The decision in ***Minerva Mills Ltd. and Ors. v. Union of India and Ors. MANU/SC/0075/1980 :*** [1981]1SCR206 , ***Maharao Sahib Shri Bhim Singhji v. Union of India and Ors. MANU/SC/0509/1980 :*** AIR1981SC234 were also noted and it was observed that the judgment in Waman Rao needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which, or a part of which, is or has been found by this Court to be violative of one or more of the fundamental rights conferred by Articles 14, 19 and 31 can be included in the Ninth Schedule or whether it is only a constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of nine Judges. This is how these matters have been placed before us.

Broad Question

4. The fundamental question is whether on and after 24th April, 1973 when basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court.

Development of the Law

5. First, we may consider, in brief, the factual background of framing of the Constitution and notice the developments that have taken place almost since inception in regard to interpretation of some of Articles of the Constitution.

The Constitution was framed after an in depth study of manifold challenges and problems including that of poverty, illiteracy, long years of deprivation, inequalities based on caste, creed, sex and religion. The independence struggle and intellectual debates in the Constituent Assembly show the value and importance of freedoms and rights guaranteed by Part III and State's welfare obligations in Part-IV. The Constitutions of various countries including that of United States of America and Canada were examined and after extensive deliberations and discussions the Constitution was framed. The Fundamental Rights Chapter was incorporated providing in detail the positive and negative rights. It provided for the protection of various rights and freedoms. For enforcement of these rights, unlike Constitutions of most of the other countries, the Supreme Court was vested with original jurisdiction as contained in Article 32.

6. The High Court of Patna in ***Kameshwar v. State of Bihar*** AIR 1951 Patna 91 held that a Bihar legislation relating to land reforms was unconstitutional while the High Court of Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in those States. The parties aggrieved had filed appeals before the Supreme Court. At the same time, certain Zamindars had also approached the Supreme Court under Article 32 of the Constitution. It was, at this stage, that Parliament amended the Constitution by adding Articles 31-A and 31-B to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights of the citizen. Article 31-B was not part of the original Constitution. It was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added after Eighth Schedule a new Ninth Schedule containing thirteen items, all relating to land reform laws, immunizing these laws from challenge on the ground of contravention of Article 13 of the Constitution. Article 13, inter alia, provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention thereof shall, to the extent of the contravention, be void.

Articles 31A and 31B read as under:

31A. Saving of laws providing for acquisition of estates, etc.- [(1) Notwithstanding anything contained in article 13, no law providing for-

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or Article 19 :

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) In this article,-

(a) the expression "estate", shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include-

(i) *any jagir, inam or muafi* or other similar grant and in the States of Tamil Nadu and Kerala, any *janmam* right;

(ii) any land held under *ryotwary* settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, *raiyat*, under-*raiyat* or other intermediary and any rights or privileges in respect of land revenue.

31B. Validation of certain Acts and Regulations.- Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or

abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

The Constitutional validity of the First Amendment was upheld in ***Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 :*** [1952]1SCR89 . The main object of the amendment was to fully secure the constitutional validity of Zamindari Abolition Laws in general and certain specified Acts in particular and save those provisions from the dilatory litigation which resulted in holding up the implementation of the social reform measures affecting large number of people. Upholding the validity of the amendment, it was held in Sankari Prasad that Article 13(2) does not affect amendments to the Constitution made under Article 368 because such amendments are made in the exercise of constituent power. The Constitution Bench held that to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament.

7. The Constitutional validity of the Acts added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 was challenged in petitions filed under Article 32 of the Constitution. Upholding the constitutional amendment and repelling the challenge in ***Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964*** : [1965]1SCR933 the law declared in Sankari Prasad was reiterated. It was noted that Articles 31A and 31B were added to the Constitution realizing that State legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenge in the courts of law on the ground that they contravene the fundamental rights guaranteed to the citizen by Part III. The Court observed that the genesis of the amendment made by adding Articles 31A and 31B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms. It noted that if pith and substance test is to apply to the amendment made, it would be clear that the Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfillment of the socio-economic policy viz. a policy in which the party in power believes. The Court further noted that the impugned act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. It noted that the object of the Act was to amend the relevant Articles in Part III which confer Fundamental Rights on citizens and as such it falls under the substantive part of Article 368 and does not attract the provision of Clause (b) of that proviso. The Court, however, noted, that if the effect of the amendment made in the Fundamental Rights on Article 226 is direct and not incidental and if in significant order, different considerations may perhaps arise.

8. Justice Hidayattulah, and Justice J.R. Mudholkar, concurred with the opinion of Chief Justice Gajendragadkar upholding the amendment but, at the same time, expressed reservations about the effect of possible future amendments on Fundamental Rights and basic structure of the Constitution. Justice Mudholkar questioned that "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of the Article 368?"

9. In ***I.C. Golak Nath and Ors. v. State of Punjab and Anr. MANU/SC/0029/1967 :*** [1967]2SCR762 a Bench of 11 Judges considered the correctness of the view that had been taken in Sankari Prasad and Sajjan Singh (supra). By majority of six to five, these decisions were overruled. It was held that the constitutional amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void. It was declared that the Parliament will have no power from the date of the decision (27th February, 1967) to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

Soon after ***Golak Nath's case***, the Constitution (24th Amendment) Act, 1971, the Constitution (25th Amendment) Act, Act, 1971, the Constitution (26th Amendment) Act, 1971 and the Constitution (29th Amendment) Act, 1972 were passed.

10. By Constitution (24th Amendment) Act, 1971, Article 13 was amended and after Clause (3), the following clause was inserted as Article 13(4):

13(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

Article 368 was also amended and in Article 368(1) the words "in exercise of its constituent powers" were inserted.

11. The Constitution (25th Amendment) Act, 1971 amended the provision of Article 31 dealing with compensation for acquiring or acquisition of properties for public purposes so that only the amount fixed by law need to be given and this amount could not be challenged in court on the ground that it was not adequate or in cash. Further, after Article 31B of the Constitution, Article 31C was inserted, namely:

31C.-Saving of laws giving effect to certain directive principles.- Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:*

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

12. The Constitution (26th Amendment) Act, 1971 omitted from Constitution Articles 291 (Privy Purses) and Article 362 (rights and privileges of Rulers of Indian States) and inserted Article 363A after Article 363 providing that recognition granted to Rulers of Indian States shall cease and privy purses be abolished.

The Constitution (29th Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms after Entry 64,

namely, Entry 65 - Kerala Land Reforms Amendment Act, 1969 (Kerala Act 35 of 1969); and Entry 66 - Kerala Land Reforms Amendment Act, 1971 (Kerala Act 35 of 1971).

These amendments were challenged in ***Kesavananda Bharati's case***. The decision in ***Kesavananda Bharati's case*** was rendered on 24th April, 1973 by a 13 Judges Bench and by majority of seven to six Golak Nath's case was overruled. The majority opinion held that Article 368 did not enable the Parliament to alter the basic structure or framework of the Constitution. The Constitution (24th Amendment) Act, 1971 was held to be valid. Further, the first part of Article 31C was also held to be valid. However, the second part of Article 31C that "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" was declared unconstitutional. The Constitution 29th Amendment was held valid. The validity of the 26th Amendment was left to be determined by a Constitution Bench of five Judges.

The majority opinion did not accept the unlimited power of the Parliament to amend the Constitution and instead held that Article 368 has implied limitations. Article 368 does not enable the Parliament to alter the basic structure or framework of the Constitution.

13. Another important development took place in June, 1975, when the Allahabad High Court set aside the election of the then Prime Minister Mrs. Indira Gandhi to the fifth Lok Sabha on the ground of alleged corrupt practices. Pending appeal against the High Court judgment before the Supreme Court, the Constitution (39th Amendment) Act, 1975 was passed. Clause (4) of the amendment inserted Article 329A after Article 329. Sub-clauses (4) and (5) of Article 329A read as under:

(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in Clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of Clause (4).

Clause (5) of the Amendment Act inserted after Entry 86, Entries 87 to 124 in the Ninth Schedule. Many of the Entries inserted were unconnected with land reforms.

14. In ***Smt. Indira Nehru Gandhi v. Raj Narain MANU/SC/0025/1975 :*** [1978]2SCR405 the aforesaid clauses were struck down by holding them to be violative of the basic structure of the Constitution.

About two weeks before the Constitution Bench rendered decision in ***Indira Gandhi's case,*** internal emergency was proclaimed in the country. During the emergency from 26th June, 1975 to March, 1977, Article 19 of the Constitution stood suspended by virtue of Article 358 and Articles 14 and 21 by virtue of Article 359. During internal emergency, Parliament passed Constitution (40th Amendment) Act, 1976. By Clause (3) of the said amendment, in the Ninth Schedule, after Entry 124, Entries 125 to 188 were inserted. Many of these entries were unrelated to land reforms.

15. Article 368 was amended by the Constitution (42nd Amendment) Act, 1976. It, inter alia, inserted by Section 55 of the Amendment Act, in Article 368, after Clause (3), the following Clauses (4) and (5):

368(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

16. After the end of internal emergency, the Constitution (44th Amendment) Act, 1978 was passed. Section 2, inter alia, omitted Sub-clauses (f) of Article 19 with the result the right to property ceased to be a fundamental right and it became only legal right by insertion of Article 300A in the Constitution. Articles 14, 19 and 21 became enforceable after the end of emergency. The Parliament also took steps to protect fundamental rights that had been infringed during emergency. The Maintenance of Internal Security Act, 1971 and the Prevention of Publication of Objectionable Matter Act, 1976 which had been placed in the Ninth Schedule were repealed. The Constitution (44th Amendment) Act also amended Article 359 of the Constitution to provide that even though other fundamental rights could be suspended during the emergency, rights conferred by Articles 20 and 21 could not be suspended. During emergency, the fundamental rights were read even more restrictively as interpreted by majority in Additional District Magistrate, Jabalpur v. Shivakant Shukla MANU/SC/0062/1976 : 1976CriLJ945 . The decision in Additional District Magistrate, Jabalpur about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions.

17. The fundamental rights received enlarged judicial interpretation in the post-emergency period. Article 21 which was given strict textual meaning in ***A.K Gopalan v. The State of Madras MANU/SC/0012/1950 :*** 1950CriLJ1383 interpreting the words "according to procedure established by law" to mean only enacted law, received enlarged interpretation in ***Maneka Gandhi v. Union of India MANU/SC/0133/1978 :*** [1978]2SCR621 . ***A.K. Gopalan*** was no longer good law. In Maneka Gandhi a Bench of Seven Judges held that the procedure established by law in

Article 21 had to be reasonable and not violative of Article 14 and also that fundamental rights guaranteed by Part III were distinct and mutually exclusive rights.

18. In ***Minerva Mills case*** (supra), the Court struck down Clauses (4) and (5) and Article 368 finding that they violated the basic structure of the Constitution. The next decision to be noted is that of ***Waman Rao (supra).*** The developments that had taken place post- Kesavananda Bharati's case have been noticed in this decision.

19. In ***Bhim Singhji (supra)*** , challenge was made to the validity of Urban Land (Ceiling and Regulation) Act, 1976 which had been inserted in the Ninth Schedule after ***Kesavananda Bharati's case.*** The Constitution Bench unanimously held that Section 27(1) which prohibited disposal of property within the ceiling limit was violative of Articles 14 and 19(1)(f) of Part III. When the said Act was enforced in February 1976, Article 19(1)(f) was part of fundamental rights chapter and as already noted it was omitted therefrom only in 1978 and made instead only a legal right under Article 300A. It was held in L. Chandra Kumar v. Union of India and Ors. MANU/SC/0261/1997 : [1997]228ITR725(SC) that power of judicial review is an integral and essential feature of the Constitution constituting the basic part, the jurisdiction so conferred on the High Courts and the Supreme Court is a part of inviolable basic structure of Constitution of India.

Constitutional Amendment of Ninth Schedule

20. It would be convenient to note at one place, various constitutional amendments which added/omitted various Acts/provisions in Ninth Schedule from Item No. 1 to 284. It is as under:

Amendment	Acts/Provisions added
1st Amendment (1951)	1-13
4th Amendment (1955)	14-20
17th Amendment (1964)	21-64
29th Amendment (1971)	65-66
34th Amendment (1974)	67-86
39th Amendment (1975)	87-124
40th Amendment (1976)	125-188
47th Amendment (1984)	189-202
66th Amendment (1990)	203-257
76th Amendment (1994)	257A
78th Amendment (1995)	258-284

Omission

In 1978 item 92 (Internal Security Act) was repealed by Parliamentary Act.

In 1977 item 130 (Prevention of Publication of Objectionable Matter) was repealed.

In 1978 the 44th amendment omitted items 87 (The Representation of People Act), 92 and 130.

Many additions are unrelated to land reforms.

21. The question is as to the scope of challenge to Ninth Schedule laws after 24th April, 1973

Article 32

The significance of jurisdiction conferred on this Court by Article 32 is described by Dr. B.R. Ambedkar as follows

most important Article without which this Constitution would be nullity

Further, it has been described as "the very soul of the Constitution and the very heart of it". Reference may also be made to the opinion of Chief Justice Patanjali Sastri in ***State of Madras v. V.G. Row MANU/SC/0013/1952 :*** 1952CriLJ966 to the following effect:

This is especially true as regards the "fundamental rights" as to which the Supreme Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.

The jurisdiction conferred on this Court by Article 32 is an important and integral part of the basic structure of the Constitution of India and no act of Parliament can abrogate it or take it away except by way of impermissible erosion of fundamental principles of the constitutional scheme are settled propositions of Indian jurisprudence [see ***Fertilizer Corporation Kamgar Union (Regd.), Sindri and Ors. v. Union of India and Ors. MANU/SC/0010/1980 :*** (1981)ILLJ193SC , ***State of Rajasthan v. Union of India and Ors. MANU/SC/0370/1977 :*** [1978]1SCR1 , ***M. Krishna Swami v. Union of India and Ors. MANU/SC/0222/1993 :*** AIR1993SC1407 , ***Daryao and Ors. v. The State of U.P. and Ors. MANU/SC/0012/1961 :*** [1962]1SCR574 and ***L. Chandra Kumar (supra)*** .

22. In ***S.R. Bommai and Ors. v. Union of India and Ors. MANU/SC/0444/1994 :*** [1994]2SCR644 it was reiterated that the judicial review is a basic feature of the Constitution and that the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation. It is a cardinal principle of our Constitution that no one can claim to be the sole judge of the power given under the Constitution and that its actions are within the confines of the powers given by the Constitution. It is the duty of this Court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution.

Principles of Construction

23. The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.
The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it

is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

Common Law Constitutionalism

24. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

According to Dr. Amartya Sen, the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.

According to Lord Steyn, judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law.

Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained.

Principles of Constitutionality

25. There is a difference between Parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not the Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in future, judicial review was to be abolished by a constituent amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in ***Kesavananda Bharati's case*** has to apply.

26. Granville Austin has been extensively quoted and relied on in ***Minerva Mills.*** Chief Justice Chandrachud observed that to destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure.

Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable" and "primordial".

They constitute the ark of the Constitution. (***Kesavananda Bharati : P.991, P.999)*** . The learned Chief Justice held that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Part III and IV together constitute the core of our Constitution and combine to form its conscience. **Anything that destroys the balance between the two parts will ipso facto destroy the essential element of the basic structure of the Constitution.** [Emphasis supplied] (Para 57). Further observes the learned Chief Justice, that the matters have to be decided not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. The observations made in the context of Article 31C have equal and full force for deciding the questions in these matters. Again the observations made in Para 70 are very relevant for our purposes. It has been observed that if by a Constitutional Amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired. But if the protection of those Articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as a matter of historical curiosity. These observations are very apt for deciding the extent and scope of judicial review in cases wherein entire Part III, including Articles 14, 19, 20, 21 and 32, stand excluded without any yardstick. The developments made in the field of interpretation and expansion of judicial review shall have to be kept in view while deciding the applicability of the basic structure doctrine - to find out whether there has been violation of any fundamental right, the extent of violation, does it destroy the balance or it maintains the reasonable balance.

27. The observations of Justice Bhagwati in ***Minerva Mills case*** show how Clause (4) of Article 368 would result in enlarging the amending power of the Parliament contrary to dictum in ***Kesavananda Bharati's case***. The learned Judge has said in Paragraph 85 that:

So long as Clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in ***Kesavananda Bharati's case***, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged, contrary to the decision of this Court in ***Kesavananda Bharati case***. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers.

28. In ***Minerva Mills*** while striking down the enlargement of Article 31C through 42nd Amendment which had replaced the words "of or any of the principles laid down in Part IV" with "the principles specified in Clause (b) or Clause (c) and Article 39", Justice Chandrachud said:

Section 4 of the Constitution (42nd Amendment) Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution.

29. In ***Indira Gandhi's case,*** for the first time the challenge to the constitutional amendment was not in respect of the rights to property or social welfare, the challenge was with reference to an electoral law. Analysing this decision, H.M. Seervai in Constitutional Law of India (Fourth Edition) says that "the judgment in the election case break new ground, which has important effects on ***Kesavananda Bharati's case*** itself (Para 30.18). Further the author says that "No one can now write on the amending power, without taking into account the effect of the Election case". (Para 30.19). The author then goes on to clarify the meaning of certain concepts - 'constituent power', 'Rigid' (controlled), or 'flexible' (uncontrolled) constitution, 'primary power', and 'derivative power'.

The distinction is drawn by the author between making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law making power and a power to amend the Constitution, a derivative power -derived from the Constitution and subject to the limitations imposed by the Constitution. No provision of the Constitution framed in exercise of plenary law making power can be ultra vires because there is no touch-stone outside the Constitution by which the validity of provision of the Constitution can be adjudged. The power for amendment cannot be equated with such power of framing the Constitution. The amending power has to be within the Constitution and not outside it.

30. For determining whether a particular feature of the Constitution is part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance (Chief Justice Chandrachud in ***Indira Gandhi's case***). The fundamentalness of fundamental rights has thus to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by this Court as distinct and separate rights. In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. This transition from a set of independent, narrow rights to broad checks on state power is demonstrated by a series of cases that have been decided by this Court. In ***The State of Bombay v. Bhanji Munji and Anr. MANU/SC/0034/1954 :*** [1955]1SCR777 relying on the ratio of ***Gopalan*** it was held that Article 31 was independent of Article 19(1)(f). However, it was in ***Rustom Cavasjee Cooper v. Union of India MANU/SC/0011/1970 :*** [1970]3SCR530 ***(popularly known as Bank Nationalization case)***

the view point of ***Gopalan*** was seriously disapproved. While rendering this decision, the focus of the Court was on the actual impairment caused by the law, rather than the literal validity of the law. This view was reflective of the decision taken in the case of ***Sakal Papers (P) Ltd. and Ors. v. The Union of India MANU/SC/0090/1961*** : [1962]3SCR842 where the court was faced with the validity of certain legislative measures regarding the control of newspapers and whether it amounted to infringement of Article 19(1)(a). While examining this question the Court stated that the actual effect of the law on the right guaranteed must be taken into account. This ratio was applied in ***Bank Nationalization case.*** The Court examined the relation between Article 19(1)(f) and Article 13 and held that they were not mutually exclusive. The ratio of Gopalan was not approved.

31. Views taken in ***Bank Nationalization case*** has been reiterated in number of cases (see ***Sambhu Nath Sarkar v. The State of West Bengal and Ors. MANU/SC/0163/1973 :*** [1974]1SCR1 , ***Haradhan Saha and Anr. v. The State of West Bengal and Ors. MANU/SC/0419/1974 :*** 1974CriLJ1479 and ***Khudiram Das v. The State of West Bengal and Ors. MANU/SC/0423/1974 :*** [1975]2SCR832 and finally the landmark judgment in the case of ***Maneka Gandhi (supra)*** . Relying upon ***Cooper's case*** it was said that Article 19(1) and 21 are not mutually exclusive. The Court observed in ***Maneka Gandhi's case:***

The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in R. C. Cooper's case, Shambhu Nath Sarkar's case and Haradhan Saha's case. Now, if a law depriving a person of "personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given, situation, ex hypothesi it must also' be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukherjea, J., in A. K. Gopalan's case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it "relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, The State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 and Kathi Raning Rawat v. The State of Saurashtra MANU/SC/0041/1952 : 1952CriLJ805 .

[emphasis supplied]

32. The decision also stressed on the application of Article 14 to a law under Article 21 and stated that even principles of natural justice be incorporated in such a test. It was held:

...In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is

therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21.

[emphasis supplied]

33. The above position was also reiterated by Krishna Iyer J., as follows:

The Gopalan (supra) verdict, with the cocooning of Article 22 into a self contained code, has suffered supersession at the hands of R. C. Cooper(1) By way of aside, the fluctuating fortunes of fundamental rights, when the proletariat and the proprietariat have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of sub- conscious forces in judicial notice when the cycloramic review starts from Gopalan, moves on to In re : Kerala Education Bill and then on to All India Bank Employees Union, next to Sakal Newspapers, crowning in Cooper [1973] 3 S.C.R. 530 and followed by Bennet Coleman and Sambu Nath Sarkar. Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached.

[emphasis supplied]

34. It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by state authorities. Thus post-***Maneka Gandhi's case*** it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of state power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.

The approach in the interpretation of fundamental rights has been evidenced in a recent case ***M. Nagaraj and Ors. v. Union of India and Ors. MANU/SC/4560/2006 :*** AIR2007SC71 in which the Court noted:

This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess

basic human rights independently of any constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part-III as fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In ***Sakal Papers (P) Ltd. v. Union of India and Ors.*** AIR 1967 SC 305 this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in ***A.K. Gopalan v. State of Madras.*** Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in ***A.K. Gopalan*** and held in its landmark judgment in ***Maneka Gandhi v. Union of India MANU/SC/0133/1978 :*** [1978]2SCR621 that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees.

[Emphasis supplied]

The abrogation or abridgment of the fundamental rights under Chapter III have, therefore, to be examined on broad interpretation, the narrow interpretation of fundamental rights chapter is a thing of past. Interpretation of the Constitution has to be such as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure.

Separation of Powers

35. The separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in ***Kesavananda Bharati's case*** by the majority. Later, it was reiterated in ***Indira Gandhi's case***. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution.

In fact, it was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In Federalist 47, 48, and 51 James Madison details how a separation of powers preserves liberty and prevents tyranny. In Federalist 47, Madison discusses Montesquieu's treatment of the separation of powers in the *Spirit of Laws* (Boox XI, Ch. 6). There Montesquieu writes, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.... Again, there is no liberty, if the judicial power be not separated from the legislative and executive." Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of government should not be entirely in the hands of another department of government.

Alexander Hamilton in Federalist 78 remarks on the importance of the independence of the judiciary to preserve the separation of powers and the rights of the people:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. (434)

Montesquieu finds tyranny pervades when there is no separation of powers:

There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

The Supreme Court has long held that the separation of powers is part of the basic structure of the Constitution. Even before the basic structure doctrine became part of Constitutional law, the importance of the separation of powers on our system of governance was recognized by this Court in ***Special Reference No. 1 of 1964*** (1965) 1 SCR 413.

Contentions

36. In the light of aforesaid developments, the main thrust of the argument of the petitioners is that post-1973, it is impermissible to immunize Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention. Further relying upon the clarification of Khanna, J, as given in ***Indira Gandhi's case***, in respect of his opinion in ***Kesavananda Bharati's case***, it is no longer correct to say that fundament rights are not included in the basic structure. therefore, the contention proceeds that since fundamental rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structure shall have to be examined on the fundamental rights test.

37. The key question, however, is whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights. Thus, it is necessary to examine what exactly is the content of the basic structure test. According to the petitioners, the consequence of the evolution of the principles of basic structure is that Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31B. Assuming that such immunity can be conferred, its constitutional validity would have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor. The power to make any law at will that transgresses Part III in its entirety would be incompatible with the basic structure of the Constitution. The consequence also is, learned Counsel for the petitioners contended, to emasculate Article 32 (which is part of fundamental rights chapter) in its entirety - if the rights themselves (including the principle of rule of law encapsulated in Article 14) are put out of the way, the remedy under Article 32 would be meaningless. In fact, by the exclusion of Part III, Article 32 would stand abrogated qua the Ninth Schedule laws. The contention is that the abrogation of Article 32 would be per se violative of the basic structure. It is also submitted that the constituent power under Article 368 does not include judicial power and that the power to establish judicial remedies which is compatible with the basic structure is qualitatively different from the power to exercise judicial power. The impact is that on the one hand the power under Article 32 is removed and, on the other hand, the said power is exercised by the legislature itself by declaring, in a way, Ninth Schedule laws as valid. On the other hand, the contention urged on behalf of the respondents is that the validity of Ninth Schedule legislations can only be tested on the touch-stone of basic structure doctrine as decided by majority in ***Kesavananda Bharati's case*** which also upheld the Constitution 29th Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of fundamental rights chapter. The fundamental rights chapter, it is contended, stands excluded as a result of protective umbrella provided by Article 31B and, therefore, the challenge can only be based on the ground of basic structure doctrine and in addition, legislation can further be tested for (i) lack of legislative competence and (ii) violation of other constitutional provisions. This would also show, counsel for the respondents argued, that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine.

Further, it was contended that the constitutional device for retrospective validation of laws was well known and it is legally permissible to pass laws to remove the basis of the decisions of the Court and consequently, nullify the effect of the decision. It was submitted that Article 31B and the amendments by which legislations are added to the Ninth Schedule form such a device, which 'cure the defect' of legislation.

38. The respondents contend that the point in issue is covered by the majority judgment in ***Kesavananda Bharati's case***. According to that view, Article 31B or the Ninth Schedule is a permissible constitutional device to provide a protective umbrella to Ninth Schedule laws. The distinction is sought to be drawn between the necessity for the judiciary in a written constitution and judicial review by the judiciary. Whereas the existence of judiciary is part of the basic framework of the Constitution and cannot be abrogated in exercise of constituent power of the Parliament under Article 368, the power of judicial review of the judiciary can be curtailed over certain matters. The contention is that there is no judicial review in absolute terms and Article 31B only restricts that judicial review power. It is contended that after the doctrine of basic structure which came to be established in ***Kesavananda Bharati's case***, it is only that kind of judicial review

whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. However, in every case where the constituent power excludes judicial review, the basic structure of the Constitution is not abrogated. The question to be asked in each case is, does the particular exclusion alter the basic structure. Giving immunity of Part III to the Ninth Schedule laws from judicial review, does not abrogate judicial review from the Constitution. Judicial review remains with the court but with its exclusion over Ninth Schedule laws to which Part III ceases to apply. The effect of placing a law in Ninth Schedule is that it removes the fetter of Part III by virtue of Article 31B but that does not oust the court jurisdiction. It was further contended that Justice Khanna in ***Kesavananda Bharati's case*** held that subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and will include within itself the power to add, alter or repeal various articles including taking away or abridging fundamental rights and that the power to amend the fundamental rights cannot be denied by describing them as natural rights. The contention is that the majority in ***Kesavananda Bharati's case*** held that there is no embargo with regard to amending any of the fundamental rights in Part III subject to basic structure theory and, therefore, the petitioners are not right in the contention that in the said case the majority held that the fundamental rights form part of the basic structure and cannot be amended. The further contention is that if fundamental rights can be amended, which is the effect of ***Kesavananda Bharati's case*** overruling ***Golak Nath's case***, then fundamental rights cannot be said to be part of basic structure unless the nature of the amendment is such which destroys the nature and character of the Constitution. It is contended that the test for judicially reviewing the Ninth Schedule laws cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution. The correct test is whether such laws damage or destroy that part of fundamental rights which form part of the basic structure. Thus, it is contended that judicial review of Ninth Schedule laws is not completely barred. The only area where such laws get immunity is from the infraction of rights guaranteed under Part III of the Constitution.

39. To begin with, we find it difficult to accept the broad proposition urged by the petitioners that laws that have been found by the courts to be violative of Part III of the Constitution cannot be protected by placing the same in the Ninth Schedule by use of device of Article 31B read with Article 368 of the Constitution. In ***Kesavananda Bharti's case***, the majority opinion upheld the validity of the Kerala Act which had been set aside in ***Kunjukutty Sahib etc. etc. v. The State of Kerala and Anr. MANU/SC/0634/1972 :*** [1973]1SCR326 and the device used was that of the Ninth Schedule. After a law is placed in the Ninth Schedule, its validity has to be tested on the touchstone of basic structure doctrine. In ***State of Maharashtra and Ors. v. Man Singh Suraj Singh Padvi and Ors. MANU/SC/0413/1978 :*** [1978]2SCR856 , a Seven Judge Constitution Bench, post-decision in ***Kesavananda Bharati's case*** upheld Constitution (40th Amendment) Act, 1976 which was introduced when the appeal was pending in Supreme Court and thereby included the regulations in the Ninth Schedule. It was held that Article 31B and the Ninth Schedule cured the defect, if any, in the regulations as regards any unconstitutionality alleged on the ground of infringement of fundamental rights.

40. It is also contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31B is not in question before us. Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have

vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power.

Validity of 31B

41. There was some controversy on the question whether validity of Article 31B was under challenge or not in ***Kesavananda Bharati.*** On this aspect, Chief Justice Chandrachud has to say this in ***Waman Rao :***

In ***Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 :*** [1965]1SCR933 , the Court refused to reconsider the decision in ***Sankari Prasad (supra)*** , with the result that the validity of the 1st Amendment remained unshaken. In ***Golaknath***, it was held by a majority of 6 : 5 that the power to amend the Constitution was not located in Article 368. The inevitable result of this holding should have been the striking down of all constitutional amendments since, according to the view of the majority, Parliament had no power to amend the Constitution in pursuance of Article 368. But the Court resorted to the doctrine of prospective overruling and held that the constitutional amendments which were already made would be left undisturbed and that its decision will govern the future amendments only. As a result, the 1st Amendment by which Articles 31A and 31B were introduced remained inviolate. It is trite knowledge that ***Golaknath*** was overruled in ***Kesavananda Bharati (supra)*** in which it was held unanimously that the power to amend the Constitution was to be found in Article 368 of the Constitution. The petitioners produced before us a copy of the civil Misc. Petition which was filed in ***Kesavananda Bharati, (supra)*** by which the reliefs originally asked for were modified. It appears therefrom that what was challenged in that case was the 24th, 25th and the 29th Amendments to the Constitution. The validity of the 1st Amendment was not questioned Khanna J., however, held-while dealing with the validity of the unamended Article 31C that the validity of Article 31A was upheld in ***Sankari Prasad, (supra)*** that its validity could not be any longer questioned because of the principle of stare decisis and that the ground on which the validity of Article 31A was sustained will be available equally for sustaining the validity of the first part of Article 31C (page 744) (SCC p.812, para 1518).

42. We have examined various opinions in ***Kesavananda Bharati's case*** but are unable to accept the contention that Article 31B read with the Ninth Schedule was held to be constitutionally valid in that case. The validity thereof was not in question. The constitutional amendments under challenge in ***Kesavananda Bharati's case*** were examined assuming the constitutional validity of Article 31B. Its validity was not in issue in that case. Be that as it may, we will assume Article 31B as valid. The validity of the 1st Amendment inserting in the Constitution, Article 31B is not in challenge before us.

Point in issue

43. The real crux of the problem is as to the extent and nature of immunity that Article 31B can validly provide. To decide this intricate issue, it is first necessary to examine in some detail the judgment in ***Kesavananda Bharati's case***, particularly with reference to 29th Amendment.

Kesavananda Bharati's case

44. The contention urged on behalf of the respondents that all the Judges, except Chief Justice Sikri, in ***Kesavananda Bharati's case*** held that 29th Amendment was valid and applied ***Jeejeebhoy's case***, is not based on correct ratio of ***Kesavananda Bharati's case***. Six learned Judges (Ray, Phalekar, Mathew, Beg, Dwivedi and Chandrachud, JJ) who upheld the validity of 29th Amendment did not subscribe to basic structure doctrine. The other six learned Judges (Chief Justice Sikri, Shelat, Grover, Hegde, Mukherjee and Reddy JJ) upheld the 29th Amendment subject to it passing the test of basic structure doctrine. The 13th learned Judge (Khanna, J), though subscribed to basic structure doctrine, upheld the 29th Amendment agreeing with six learned Judges who did not subscribe to the basic structure doctrine. therefore, it would not be correct to assume that all Judges or Judges in majority on the issue of basic structure doctrine upheld the validity of 29th Amendment unconditionally or were alive to the consequences of basic structure doctrine on 29th Amendment. Six learned Judges otherwise forming the majority, held 29th amendment valid only if the legislation added to the Ninth Schedule did not violate the basic structure of the Constitution. The remaining six who are in minority in ***Kesavananda Bharati's case***, insofar as it relates to laying down the doctrine of basic structure, held 29th Amendment unconditionally valid.

45. While laying the foundation of basic structure doctrine to test the amending power of the Constitution, Justice Khanna opined that the fundamental rights could be amended abrogated or abridged so long as the basic structure of the Constitution is not destroyed but at the same time, upheld the 29th Amendment as unconditionally valid. Thus, it cannot be inferred from the conclusion of the seven judges upholding unconditionally the validity of 29th Amendment that the majority opinion held fundamental rights chapter as not part of the basic structure doctrine. The six Judges which held 29th Amendment unconditionally valid did not subscribe to the doctrine of basic structure. The other six held 29th Amendment valid subject to it passing the test of basic structure doctrine. Justice Khanna upheld the 29th Amendment in the following terms:

We may now deal with the Constitution (Twenty ninth Amendment) Act. This Act, as mentioned earlier, inserted the Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries No. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty ninth Amendment) Act.

In his final conclusions, with respect to the Twenty-ninth Amendment, Khanna, J. held as follows:

(xv) The Constitution (Twenty-ninth Amendment) Act does not suffer from any infirmity and as such is valid.

Thus, while upholding the Twenty-ninth amendment, there was no mention of the test that is to be applied to the legislations inserted in the Ninth Schedule. The implication that the Respondents seek to draw from the above is that this amounts to an unconditional upholding of the legislations in the Ninth Schedule.

46. They have also relied on observations by Ray CJ., as quoted below, in ***Indira Gandhi (supra)***. In that case, Ray CJ. observed:

The Constitution 29th Amendment Act was considered by this Court in Kesavananda Bharati's case. The 29th Amendment Act inserted in the Ninth Schedule to the Constitution Entries 65 and 66 being the Kerala Land Reforms Act, 1969 and the Kerala Land Reforms Act, 1971. This Court unanimously upheld the validity of the 29th Amendment Act.... The view of seven Judges in Kesavananda Bharati's case is that Article 31-B is a constitutional device to place the specified statutes in the Schedule beyond any attack that these infringe Part III of the Constitution. The 29th Amendment is affirmed in Kesavananda Bharati's case (supra) by majority of seven against six Judges.

...Second, the majority view in Kesavananda Bharati's case is that the 29th Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights.

[Emphasis supplied]

The respondents have particularly relied on aforesaid highlighted portions.

47. On the issue of how 29th Amendment in ***Kesavananda Bharati case*** was decided, in ***Minerva Mills***, Bhagwati, J. has said thus:

The validity of the Twenty-ninth Amendment Act was challenged in ***Kesavananda Bharati case*** but by a majority consisting of Khanna, J. and the six learned Judges led by Ray, J. (as he then was) it was held to be valid. Since all the earlier constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in ***Sankari Prasad case*** and ***Sajian Singh's case*** and were accepted as valid in ***Golak Nath case*** and the Twenty Ninth Amendment Act was also held valid in ***Kesavananda Bharati case***, though not on the application of the basic structure test, and these constitutional amendments have been recognised as valid over a number of years and moreover, the statutes intended to be protected by them are all falling within Article 31A with the possible exception of only four Acts referred to above, I do not think, we would be justified in re-opening the question of validity of these constitutional amendments and hence we hold them to be valid. But, all constitutional amendments made after the decision in ***Kesavananda Bharati case*** would have to be tested by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not know the limitation on its amending power.

To us, it seems that the position is correctly reflected in the aforesaid observations of Bhagwati, J. and with respect we feel that Ray CJ. is not correct in the conclusion that 29th Amendment was unanimously upheld. Since the majority which propounded the basic structure doctrine did not unconditionally uphold the validity of 29th Amendment and six learned judges forming majority left that to be decided by a smaller Bench and upheld its validity subject to it passing basic structure doctrine, the factum of validity of 29th Amendment in ***Kesavananda Bharati case*** is not conclusive of matters under consideration before us.

48. In order to understand the view of Khanna J. in ***Kesavananda Bharati (supra)***, it is important to take into account his later clarification. In ***Indira Gandhi (supra)***, Khanna J. made it clear that

he never opined that fundamental rights were outside the purview of basic structure and observed as follows:

There was a controversy during the course of arguments on the point as to whether I have laid down in my judgment in Kesavananda Bharati's case that fundamental rights are not a part of the basic structure of the Constitution. As this controversy cropped up a number of times, it seems apposite that before I conclude I should deal with the contention advanced by learned Solicitor General that according to my judgment in that case no fundamental right is part of the basic structure of the Constitution. I find it difficult to read anything in that judgment to justify such a conclusion. What has been laid down in that judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to a fundamental right and is contained in Part III of the Constitution....

...The above observations clearly militate against the contention that according to my judgment fundamental rights are not a part of the basic structure of the Constitution. I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution.

Thus, after his aforesaid clarification, it is not possible to read the decision of Khanna J. in ***Kesavananda Bharati*** so as to exclude fundamental rights from the purview of the basic structure. The import of this observation is significant in the light of the amendment that he earlier upheld. It is true that if the fundamental rights were never a part of the basic structure, it would be consistent with an unconditional upholding of the Twenty-ninth Amendment, since its impact on the fundamental rights guarantee would be rendered irrelevant. However, having held that some of the fundamental rights are a part of the basic structure, any amendment having an impact on fundamental rights would necessarily have to be examined in that light. Thus, the fact that Khanna J. held that some of the fundamental rights were a part of the basic structure has a significant impact on his decision regarding the Twenty-ninth amendment and the validity of the Twenty-ninth amendment must necessarily be viewed in that light. His clarification demonstrates that he was not of the opinion that all the fundamental rights were not part of the basic structure and the inevitable conclusion is that the Twenty-ninth amendment even if treated as unconditionally valid is of no consequence on the point in issue in view of peculiar position as to majority abovenoted.

49. Such an analysis is supported by Seervai, in his book Constitutional Law of India (4th edition, Volume III), as follows:

Although in his judgment in the *Election Case*, Khanna J. clarified his judgment in Kesavananda's Case, that clarification raised a serious problem of its own. The problem was: in view of the clarification, was Khanna J. right in holding that Article 31-B and Schedule IX were unconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended? As we have seen, that problem was solved in *Minerva Mills Case* by holding that Acts inserted in Schedule IX after 25 April, 1973 were not unconditionally valid, but would have to stand the test of fundamental rights. (Para 30.48, page 3138)

But while the clarification in the Election Case simplifies one problem - the scope of amending power - it raises complicated problems of its own. Was Khanna J. right in holding Article 31B (and Schedule 9) unconditionally valid? An answer to these questions requires an analysis of the function of Article 31-B and Schedule 9. Taking Article 31-B and Schedule 9 first, their effect is to confer validity on laws already enacted which would be void for violating one of more of the fundamental rights conferred by Part III (fundamental rights)....

But if the power of amendment is limited by the doctrine of basic structure, a grave problem immediately arises....The thing to note is that though such Acts do not become a part of the Constitution, by being included in Schedule 9 [footnote: This is clear from the provision of Article 31-B that such laws are subject to the power of any competent legislature to repeal or amend them - that no State legislature has the power to repeal or amend the Constitution, nor has Parliament such a power outside Article 368, except where such power is conferred by a few articles.] *they owe their validity to the exercise of the amending power.* Can Acts, which destroy the secular character of the State, be given validity and be permitted to destroy a basic structure *as a result of the exercise of the amending power?* That, in the last analysis is the real problem; and it is submitted that if the doctrine of the basic structure is accepted, there can be only one answer. If Parliament, exercising constituent power cannot enact an amendment destroying the secular character of the State, neither can Parliament, exercising its constituent power, permit the Parliament or the State Legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result. To hold otherwise would be to abandon the doctrine of basic structure in respect of fundamental rights for every part of that basic structure can be destroyed by first enacting laws which produce that effect, and then protecting them by inclusion in Schedule 9. Such a result is consistent with the view that some fundamental rights are a part of the basic structure, as Khanna J. said in his clarification. (Para30.65, pages 3150-3151)

In other words, the validity of the 25th and 29th Amendments raised the question of *applying* the law laid down as to the scope of the amending power when determining the validity of the 24th Amendment. If that law was correctly laid down, it did not become incorrect by being wrongly applied. therefore the conflict between Khanna J.'s views on the amending power and on the unconditional validity of the 29th Amendment is resolved by saying that he laid down the scope of the amending power correctly but misapplied that law in holding Article 31-B and Schedule 9 unconditionally valid.... Consistently with his view that some fundamental rights were part of the basic structure, he ought to have joined the 6 other judges in holding that the 29th Amendment was valid, but Acts included in Schedule 9 would have to be scrutinized by the Constitution bench to see whether they destroyed or damaged any part of the basic structure of the Constitution, and if they did, such laws would not be protected. (Para30.65, page 3151)

50. The decision in ***Kesavananda Bharati (supra)*** regarding the Twenty-ninth amendment is restricted to that particular amendment and no principle flows therefrom. We are unable to accept the contention urged on behalf of the respondents that in ***Waman Rao's case*** Justice Chandrachud and in ***Minerva Mills case***, Justice Bhagwati have not considered the binding effect of majority judgments in ***Kesavananda Bharati's case***. In these decisions, the development of law post-***Kesavananda Bharati's*** case has been considered. The conclusion has rightly been reached, also having regard to the decision in Indira Gandhi's case that post-***Kesavananda Bharati's case*** or

after 24th April, 1973, the Ninth Schedule laws will not have the full protection. The doctrine of basic structure was involved in ***Kesavananda Bharati's case*** but its effect, impact and working was examined in ***Indira Gandhi's case, Waman Rao's case*** and ***Minerva Mills case***. To say that these judgments have not considered the binding effect of the majority judgment in ***Kesavananda Bharati's case*** is not based on a correct reading of ***Kesavananda Bharati.*** On the issue of equality, we do not find any contradiction or inconsistency in the views expressed by Justice Chandrachud in ***Indira Gandhi's case***, by Justice Krishna Iyer in ***Bhim Singh's case*** and Justice Bhagwati in ***Minerva Mills case.*** All these judgments show that violation in individual case has to be examined to find out whether violation of equality amounts to destruction of the basic structure of the Constitution.

51. Next, we examine the extent of immunity that is provided by Article 31B. The principle that constitutional amendments which violate the basic structure doctrine are liable to be struck down will also apply to amendments made to add laws in the Ninth Schedule is the view expressed by Chief Justice Sikri. Substantially, similar separate opinions were expressed by Shelat, Grover, Hegde, Mukherjea and Reddy, JJ.

In the four different opinions six learned judges came to substantially the same conclusion. These judges read an implied limitation on the power of the Parliament to amend the Constitution. Justice Khanna also opined that there was implied limitation in the shape of the basic structure doctrine that limits the power of Parliament to amend the Constitution but the learned Judge upheld 29th Amendment and did not say, like remaining six Judges, that the Twenty-Ninth Amendment will have to be examined by a smaller Constitution Bench to find out whether the said amendment violated the basic structure theory or not. This gave rise to the argument that fundamental rights chapter is not part of basic structure. Justice Khanna, however, does not so say in ***Kesavananda Bharati's case.***
therefore, ***Kesavananda Bharati's case*** cannot be said to have held that fundamental rights chapter is not part of basic structure. Justice Khanna, while considering Twenty-Ninth amendment, had obviously in view the laws that had been placed in the Ninth Schedule by the said amendment related to the agrarian reforms. Justice Khanna did not want to elevate the right to property under Article 19(1)(f) to the level and status of basic structure or basic frame-work of the Constitution, that explains the ratio of ***Kesavananda Bharati's case.*** Further, doubt, if any, as to the opinion of Justice Khanna stood resolved on the clarification given in ***Indira Gandhi's case***, by the learned Judge that in ***Kesavananda Bharati's case***, he never held that fundamental rights are not a part of the basic structure or framework of the Constitution.

52. The rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant Article, but subject to limitation of the doctrine of basic structure. True, it may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post-***Kesavananda Bharati's case*** which has limited the power of the Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure.

53. To decide the correctness of the rival submissions, the first aspect to be borne in mind is that each exercise of the amending power inserting laws into Ninth Schedule entails a complete removal of the fundamental rights chapter vis-a-vis the laws that are added in the Ninth Schedule.

Secondly, insertion in Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of the Constitution. There is no constitutional control on such nullification. It means an unlimited power to totally nullify Part III in so far as Ninth Schedule legislations are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ, viz. the judiciary.

54. While examining the validity of Article 31C in ***Kesavananda Bharati's case***, it was held that the vesting of power of the exclusion of judicial review in a legislature including a State legislature, strikes at the basic structure of the Constitution. It is on this ground that second part of Article 31C was held to be beyond the permissible limits of power of amendment of the Constitution under Article 368. If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part III of the Constitution has a key role to play in the application of the said doctrine. Regarding the status and stature in respect of fundamental rights in Constitutional scheme, it is to be remembered that Fundamental Rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. The object of the Fundamental Rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting Fundamental Rights and Directive Principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental Rights and Directive Principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution.

55. Fundamental rights enshrined in Part III were added to the Constitution as a check on the State power, particularly the legislative power. Through Article 13, it is provided that the State cannot make any laws that are contrary to Part III. The framers of the Constitution have built a wall around certain parts of fundamental rights, which have to remain forever, limiting ability of majority to intrude upon them. That wall is the 'Basic Structure' doctrine. Under Article 32, which is also part of Part III, Supreme Court has been vested with the power to ensure compliance of Part III. The responsibility to judge the constitutionality of all laws is that of judiciary. Thus, when power under Article 31-B is exercised, the legislations made completely immune from Part III results in a direct way out, of the check of Part III, including that of Article 32. It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution. In ***Waman Rao's case***, while discussing the application of basic structure doctrine to the first amendment, it was observed that the measure of the permissibility of an amendment of a pleading is how far it is consistent with the original; you cannot by an amendment transform the original into opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law.

56. Indeed, if Article 31B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the

basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise.

57. It is also contended for the respondents that Article 31A excludes judicial review of certain laws from the applications of Articles 14 and 19 and that Article 31A has been held to be not violative of the basic structure. The contention, therefore, is that exclusion of judicial review would not make the Ninth Schedule law invalid. We are not holding such law per se invalid but, examining the extent of the power which the Legislature will come to possess. Article 31A does not exclude uncatalogued number of laws from challenge on the basis of Part III. It provides for a standard by which laws stand excluded from Judicial Review. Likewise, Article 31C applies as a yardstick the criteria of Sub-clauses (b) and (c) of Article 39 which refers to equitable distribution of resources. The fundamental rights have always enjoyed a special and privileged place in the Constitution. Economic growth and social equity are the two pillars of our Constitution which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. Some of the rights in Part III constitute fundamentals of the Constitution like Article 21 read with Articles 14 and 15 which represent secularism etc. As held in ***Nagaraj***, egalitarian equality exists in Article 14 read with Article 16(4) (4A) (4B) and, therefore, it is wrong to suggest that equity and justice finds place only in the Directive Principles.

58. The Parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case. Take the example of freedom of Press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(a). If Article 19(1)(a) is sought to be amended so as to abrogate such right (which we hope will never be done), the acceptance of respondents contention would mean that such amendment would fall outside the judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31B. The impact of such an amendment shall have to be tested on the touchstone of rights and freedoms guaranteed by Part III of the Constitution. In a given case, even abridgement may destroy the real freedom of the Press and, thus, destructive of the basic structure. Take another example. The secular character of our Constitution is a matter of conclusion to be drawn from various Articles conferring fundamental rights; and if the secular character is not to be found in Part III, it cannot be found anywhere else in the Constitution because every fundamental right in Part III stands either for a principle or a matter of detail. therefore, one has to take a synoptic view of the various Articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the Articles in Part III. It is not necessary to multiply the illustrations.

59. After enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme. Justice Khanna in ***Kesavananda Bharati's case*** was considering the right to property and it is in that context it was said that no Article of the Constitution is immune from the amendatory process. We may recall what Justice Khanna said while dealing with the words

"amendment of the Constitution". His Lordship said that these words with all the wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. The opinion of Justice Khanna in ***Indira Gandhi*** clearly indicates that the view in ***Kesavananda Bharati's case*** is that at least some fundamental rights do form part of basic structure of the Constitution. Detailed discussion in ***Kesavananda Bharati's case*** to demonstrate that the right to property was not part of basic structure of the Constitution by itself shows that some of the fundamental rights are part of the basic structure of the Constitution. The placement of a right in the scheme of the Constitution, the impact of the offending law on that right, the effect of the exclusion of that right from judicial review, the abrogation of the principle on the essence of that right is an exercise which cannot be denied on the basis of fictional immunity under Article 31B.

60. In ***Indira Gandhi,s case***, Justice Chandrachud posits that equality embodied in Article 14 is part of the basic structure of the Constitution and, therefore, cannot be abrogated by observing that the provisions impugned in that case are an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our constitution. Dealing with Articles 14, 19 and 21 in ***Minerva Mills case***, it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. It was observed that three Articles of our constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. These Articles stand on altogether different footing. Can it be said, after the evolution of the basic structure doctrine, that exclusion of these rights at Parliament's will without any standard, cannot be subjected to judicial scrutiny as a result of the bar created by Article 31B? The obvious answer has to be in the negative. If some of the fundamental rights constitute a basic structure, it would not be open to immunise those legislations from full judicial scrutiny either on the ground that the fundamental rights are not part of the basic structure or on the ground that Part III provisions are not available as a result of immunity granted by Article 31B. It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in ***Kesavananda Bharati's case*** clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution.

It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution.
Rather these rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. This is the ratio of the decision in ***Indira Gandhi case.***

61. The history of the emergence of modern democracy has also been the history of securing basic rights for the people of other nations also. In the United States the Constitution was finally ratified only upon an understanding that a Bill of Rights would be immediately added guaranteeing certain basic freedoms to its citizens. At about the same time when the Bill of Rights was being ratified in America, the French Revolution declared the Rights of Man to Europe. When the death of colonialism and the end of World War II birthed new nations across the globe, these states

embraced rights as foundations to their new constitutions. Similarly, the rapid increase in the creation of constitutions that coincided with the end of the Cold War has planted rights at the base of these documents. Even countries that have long respected and upheld rights, but whose governance traditions did not include their constitutional affirmation have recently felt they could no longer leave their deep commitment to rights, left unstated. In 1998, the United Kingdom adopted the Human Rights Act which gave explicit affect to the European Convention on Human Rights. In Canada, the "Constitution Act of 1982" enshrined certain basic rights into their system of governance. Certain fundamental rights, and the principles that underlie them, are foundational not only to the Indian democracy, but democracies around the world. Throughout the world nations have declared that certain provisions or principles in their Constitutions are inviolable.

62. Our Constitution will almost certainly continue to be amended as India grows and changes. However, a democratic India will not grow out of the need for protecting the principles behind our fundamental rights. Other countries having controlled constitution, like Germany, have embraced the idea that there is a basic structure to their Constitutions and in doing so have entrenched various rights as core constitutional commitments. India's constitutional history has led us to include the essence of each of our fundamental rights in the basic structure of our Constitution. The result of the aforesaid discussion is that since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case.

63. We may also recall the observations made in ***Special Reference No. 1/64*** [(1965) 1 SCR 413] as follows:

...Whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative authority and there functions are normally confined to legislative functions, and the function and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country.

We are of the view that while laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it completely excludes Part III at will. For this reason, every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in Part III.

Extent of Judicial Review in the context of Amendments to the Ninth Schedule

64. We are considering the question as to the extent of judicial review permissible in respect of Ninth Schedule laws in the light of the basic structure theory propounded in ***Kesavananda Bharati's case.*** In this connection, it is necessary to examine the nature of the constituent power exercised in amending a Constitution. We have earlier noted that the power to amend cannot be equated with the power to frame the Constitution. This power has no limitations or constraints, it is primary power, a real plenary power. The latter power, however, is derived from the former. It has constraints of the document viz. Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body constituted, namely, the Parliament. The question before us is not about power to amend Part III after 24th April, 1973. As per ***Kesavananda Bharati***, power to amend exists in the Parliament but it is subject to the limitation of doctrine of basic structure. The fact of validation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the 'rights test' as part of the basic structure doctrine has to apply.

65. In ***Kesavananda Bharati's case***, the majority held that the power of amendment of the Constitution under Article 368 did not enable Parliament to alter the basic structure of the Constitution. ***Kesavananda Bharati's case*** laid down a principle as an axiom which was examined and worked out in ***Indira Gandhi's case, Minerva Mills, Waman Rao and Bhim Singh.*** As already stated, in Indira Gandhi's case, for the first time, the constitutional amendment that was challenged did not relate to property right but related to free and fair election. As is evident from what is stated above that the power of amending the Constitution is a species of law making power which is the genus. It is a different kind of law making power conferred by the Constitution. It is different from the power to frame the Constitution i.e. a plenary law making power as described by Seervai in Constitutional Law of India (4th Edn.).

The scope and content of the words 'constituent power' expressly stated in the amended Article 368 came up for consideration in ***Indira Gandhi's case***. Article 329-A(4) was struck down because it crossed the implied limitation of amending power, that it made the controlled constitution uncontrolled, that it removed all limitations on the power to amend and that it sought to eliminate the golden triangle of Article 21 read with Articles 14 and 19. (See also ***Minerva Mills case***).

It is ***Kesavananda Bharati's case*** read with clarification of Justice Khanna in ***Indira Gandhi's case*** which takes us one step forward, namely, that fundamental rights are interconnected and some of them form part of the basic structure as reflected in Article 15, Article 21 read with Article 14, Article 14 read with Article 16(4) (4A) (4B) etc. ***Bharti*** and ***Indira Gandhi's cases*** have to be read together and if so read the position in law is that the basic structure as reflected in the above Articles provide a test to judge the validity of the amendment by which laws are included in the Ninth Schedule.

66. Since power to amend the Constitution is not unlimited, if changes brought about by amendments destroy the identity of the Constitution, such amendments would be void. That is why when entire Part III is sought to be taken away by a constitutional amendment by the exercise of constituent power under Article 368 by adding the legislation in the Ninth Schedule, the question arises as to the extent of judicial scrutiny available to determine whether it alters the fundamentals

of the Constitution. Secularism is one such fundamental, equality is the other, to give a few examples to illustrate the point. It would show that it is impermissible to destroy Article 14 and 15 or abrogate or en bloc eliminate these Fundamental Rights. To further illustrate the point, it may be noted that the Parliament can make additions in the three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure.

67. The question can be looked at from yet another angle also. Can the Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in the Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in ***Kesavananda Bharati's case*** as a result of which secularism, separation of power, equality, etc. to cite a few examples would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution. Without equality the rule of law, secularism etc. would fail. That is why Khanna, J. held that some of the Fundamental Rights like Article 15 form part of the basic structure.

68. If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31B cannot be so used as to confer unlimited power. Article 31B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with the ***Kesavananda Bharati's case***. therefore Article 31B after 24th April, 1973 despite its wide language cannot confer unlimited or unregulated immunity. To legislatively override entire Part III of the Constitution by invoking Article 31B would not only make the Fundamental Rights overridden by Directive Principles but it would also defeat fundamentals such as secularism, separation of powers, equality and also the judicial review which are the basic feature of the Constitution and essential elements of rule of law and that too without any yardstick/standard being provided under Article 31B. Further, it would be incorrect to assume that social content exist only in Directive Principles and not in the Fundamental Rights. Article 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination. Article 15(1) limits the rights of the State by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, etc. and yet it permits classification for certain classes, hence social content exists in Fundamental Rights as well. All these are relevant considerations to test the validity of the Ninth Schedule laws.

69. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected.

There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.<mpara>
Realising that it is necessary to secure the enforcement of the Fundamental Rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts.

Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality which is a part of the basic structure can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure - rule of law, separation of power - the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure.

70. On behalf of the respondents, reliance has been placed on the decision of a nine Judge Constitution Bench in ***Attorney General for India and Ors. v. Amratlal Prajivandas and Ors. MANU/SC/0774/1994 :*** 1995CriLJ426 to submit that argument of a violation of Article 14 being equally violative of basic structure or Articles 19 and 21 representing the basic structure of the Constitution has been rejected. Para 20 referred to by learned Counsel for the respondent reads as under:

Before entering upon discussion of the issues arising herein, it is necessary to make a few clarificatory observations. Though a challenge to the constitutional validity of 39th, 40th and 42nd Amendments to the Constitution was leveled in the writ petitions on the ground that the said Amendments - effected after the decision in ***Keshavananda Bharati v. State of Kerala MANU/SC/0445/1973 :*** AIR1973SC1461 - infringe the basic structure of the Constitution, no serious attempt was made during the course of arguments to substantiate it. It was generally argued that Article 14 is one of the basic features of the Constitution and hence any constitutional amendment violative of Article 14 is equally violative of the basic structure. This simplistic argument overlooks the reason d'etre of Article 31B - at any rate, its continuance and relevance after Bharati - and of the 39th and 40th Amendments placing the said enactments in the IXth Schedule. Acceptance of the petitioners' argument would mean that in case of post-Bharati constitutional amendments placing Acts in the IXth Schedule, the protection of Article 31B would not be available against Article 14. Indeed, it was suggested that Articles 21 and 19 also represent the basic features of the Constitution. If so, it would mean a further enervation of Article 31B. Be that as it may, in the absence of any effort to substantiate the said challenge, we do not wish to express any opinion on the constitutional validity of the said Amendments. We take them as they are, i.e., we assume them to be good and valid. We must also say that no effort has also been made by the counsel to establish in what manner the said Amendment Acts violate Article 14.

71. It is evident from the aforenoted passage that the question of violation of Articles 14, 19 or 21 was not gone into. The bench did not express any opinion on those issues. No attempt was made to establish violation of these provisions. In Para 56, while summarizing the conclusion, the Bench did not express any opinion on the validity of 39th and 40th Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. These Acts were assumed to be good and valid. No arguments were also addressed with respect to the validity of 42nd Amendment Act. Every amendment to the Constitution whether it be in the form of amendment of any Article or amendment by insertion of an Act in the Ninth Schedule has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15 etc. As stated, laws included in the Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken by the Parliament to

include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of the Parliament.

In ***Waman Rao***, it was accordingly rightly held that the Acts inserted in the Ninth Schedule after 24th April, 1973 would not receive the full protection.

Exclusion of Judicial Review compatible with the doctrine of basic structure - concept of Judicial Review

72. Judicial review is justified by combination of 'the principle of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review' (Democracy through Law by Lord Styen, Page 131).

The role of the judiciary is to protect fundamental rights. A modern democracy is based on the twin principles of majority rule and the need to protect fundamental rights. According to Lord Styen, it is job of the Judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights.

Application of doctrine of basic structure

73. In ***Kesavananda Bharati's case***, the discussion was on the amending power conferred by unamended Article 368 which did not use the words 'constituent power'. We have already noted difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Article 368. By addition of the words 'constituent power' in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words 'constituent power' are inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to the Parliament. It is on this premise that Clauses 4 and 5 inserted in Article 368 by 42nd Amendment were struck down in ***Minerva Mills case***.

The relevance of ***Indira Gandhi's case, Minerva Mills case and Waman Rao's case*** lies in the fact that every improper enhancement of its own power by Parliament, be it Clause 4 of Article 329A or Clause 4 and 5 of Article 368 or Section 4 of 42nd Amendment have been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. They made Directive Principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms. It is in this context that we have to examine the power of immunity bearing in mind that after ***Kesavananda Bharati's case***, Article 368 is subject to implied limitation of basic structure.

74. The question examined in ***Waman Rao's case*** was whether the device of Article 31B could be used to immunize Ninth Schedule laws from judicial review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in affirmative. It has been said that it is likely to make the controlled

Constitution uncontrolled. It would render doctrine of basic structure redundant. It would remove the golden triangle of Article 21 read with Article 14 and Article 19 in its entirety for examining the validity of Ninth Schedule laws as it makes the entire Part III inapplicable at the will of the Parliament. This results in the change of the identify of the Constitution which brings about incompatibility not only with the doctrine of basic structure but also with the very existence of limited power of amending the Constitution. The extent of judicial review is to be examined having regard to these factors.

75. The object behind Article 31B is to remove difficulties and not to obliterate Part III in its entirety or judicial review. The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19is sought to be eliminated not only the 'essence of right' test but also the 'rights test' has to apply, particularly when ***Keshavananda Bharti*** and ***Indira Gandhi cases*** have expanded the scope of basic structure to cover even some of the Fundamental Rights.

The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III.

76. There is also a difference between the 'rights test' and the 'essence of right test'. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire Chapter is made inapplicable, 'the essence of the right' test as applied in ***M. Nagaraj's case (supra)*** will have no applicability. In such a situation, to judge the validity of the law, it is 'right test' which is more appropriate. We may also note that in ***Minerva Mills and Indira Gandhi's cases***, elimination of Part III in its entirety was not in issue. We are considering the situation where entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunization at will by the Parliament which, in our view, is incompatible with the implied limitation of the power of the Parliament. In such a case, it is the rights test that is appropriate and is to be applied. In ***Indira Gandhi's case*** it was held that for the correct interpretation, Article 368 requires a synoptic view of the Constitution between its various provisions which, at first sight, look disconnected. Regarding Articles 31A and 31C(validity whereof is not in question here) having been held to be valid despite denial of Article 14, it may be noted that these Articles have an indicia which is not there in Article 31B. Part III is amendable subject to basic structure doctrine. It is permissible for the Legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31B but subject to right of citizen to assail it on the enlarged judicial review concept. The Legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the Court after the enunciation of the basic structure doctrine.

77. The constitutional amendments are subject to limitations and if the question of limitation is to be decided by the Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to

enact law and decide the legality of the limitations cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary.

The power to grant absolute immunity at will is not compatible with basic structure doctrine and, therefore, after 24th April, 1973 the laws included in the Ninth Schedule would not have absolute immunity. Thus, validity of such laws can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these Articles. It has to be borne in view that the fact that some Articles in Part III stand alone has been recognized even by the Parliament, for example, Articles 20 and 21. Article 359 provides for suspension of the enforcement of the rights conferred by Part III during emergencies. However, by Constitution (44th Amendment) Act, 1978, it has been provided that even during emergencies, the enforcement of the rights under Articles 20 and 21 cannot be suspended. This is the recognition given by the Parliament to the protections granted under Articles 20 and 21. No discussion or argument is needed for the conclusion that these rights are part of the basic structure or framework of the Constitution and, thus, immunity by suspending those rights by placing any law in the Ninth Schedule would not be countenanced. It would be an implied limitation on the constituent power of amendment under Article 368. Same would be the position in respect of the rights under Article 32, again, a part of the basic structure of the Constitution.

78. The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. The point to be noted is that the application of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the Courts and not by prescribed authority under Article 368.

The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine.
therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder.

79. The power to amend the Constitution is subject to aforesaid axiom. It is, thus, no more plenary in the absolute sense of the term. Prior to ***Kesavananda Bharati,*** the axiom was not there. Fictional validation based on the power of immunity exercised by the Parliament under Article 368 is not compatible with the basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution. This Court being bound by all the provisions of the Constitution and also by the basic structure doctrine has necessarily to scrutinize the Ninth Schedule laws. It has to examine the terms of the statute, the nature of the rights involved, etc. to determine whether in effect and substance the statute violates the essential features of the Constitution. For so doing, it has to first find whether the Ninth Schedule law is violative of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is

destructive of the basic structure doctrine. If on such further examination the answer is again in affirmative, the result would be invalidation of the Ninth Schedule Law. therefore, first the violation of rights of Part III is required to be determined, then its impact examined and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow. Every time such amendment is challenged, to hark back to ***Kesavananda Bharati*** upholding the validity of Article 31B is a surest means of a drastic erosion of the fundamental rights conferred by Part III.

80. Article 31B gives validation based on fictional immunity. In judging the validity of constitutional amendment we have to be guided by the impact test. The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. Parliament is presumed to legislate compatibly with the fundamental rights and this is where Judicial Review comes in. The greater the invasion into essential freedoms, greater is the need for justification and determination by court whether invasion was necessary and if so to what extent. The degree of invasion is for the Court to decide. Compatibility is one of the species of Judicial Review which is premised on compatibility with rights regarded as fundamental. The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law.

81. The result of aforesaid discussion is that the constitutional validity of the Ninth Schedule Laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test, i.e., rights test, which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor.

In conclusion, we hold that:

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in ***Kesavananda Bharati's case*** read with ***Indira Gandhi's case***, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in ***Indira Gandhi's case***. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide Order dated 14th September, 1999 in ***I.R. Coelho v. State of Tamil Nadu MANU/SC/0562/1999 :*** AIR1999SC3179 .

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.

(vi) Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge. We answer the reference in the above terms and direct that the petitions/appeals be now placed for hearing before a

Three Judge Bench for decision in accordance with the principles laid down herein.

Back to Index

MANU/SC/1053/2018

Neutral Citation: 2018/INSC/881

IN THE SUPREME COURT OF INDIA

SLP (C) Nos. 30621, 31735, 35000 of 2011, 4831, 2839, 5860, 5859, 30841 of 2012, 8327, 6915, 16710-16711, 33163, 23344, 23339-23340 of 2014, 21343 of 2015, Civil Appeal Nos. 4562-4564 of 2017, SLP (C) No. 25191 of 2015, Civil Appeal Nos. 4880, 4878-4879 of 2017, SLP (C) No. 31191 of 2015, Civil Appeal Nos. 4876-4877, 4881 of 2017, SLP (C) No. 33688 of 2015, Civil Appeal No. 4882 of 2017, Contempt Petition (Civil) No. 314 of 2016 in SLP (C) No. 4831 of 2012, Civil Appeal Nos. 5247, 11817, 11816, 11820 of 2016, Transfer Petition (Civil) Nos. 608-609 of 2017, Civil Appeal Nos. 4833, 701-704 of 2017, 11822-11825, 11837-11840, 11842-11845, 11829-11832, 11847-11850, 11828 of 2016, Contempt Petition (Civil) No. 11 of 2017 in SLP (C) No. 19765 of 2015 (Arising out of SLP (C) Nos. 19765-19767 of 2015), Contempt Petition (Civil) No. 13 of 2017 in SLP (C) No. 19767 of 2015 (Arising SLP (C) Nos. 19765-19767 of 2015), SLP (C) No. 10638 of 2017, SLP (C) No. .... CC No. 6821 of 2017, SLP (C) Nos. 17491, 18844, 19422-19423, 24681 of 2017, SLP (C) No. ... of 2018, Dairy No. 28776 of 2017, SLP (C) No. ... of 2018, Dairy No. 29066 of 2017, SLP (C) No. ... of 2018, Dairy No. 30189 of 2017, SLP (C) No. ... of 2018, Dairy No. 31145 of 2017, SLP (C) Nos. 28446-28447, 28306 of 2017, SLP (C) No. ... of 2018, Dairy No. 33481 of 2017, SLP (C) Nos. 33481, 30942 of 2017, SLP (C) No. ... of 2018, Dairy No. 33488 of 2017, SLP (C) No. ... of 2018, Dairy No. 34271 of 2017, SLP (C) No. ... of 2018, Dairy No. 34520 of 2017, SLP (C) No. ... of 2018, Dairy No. 35324 of 2017, SLP (C) No. ... of 2018, Dairy No. 35577 of 2017, SLP (C) No. ... of 2018, Dairy No. 35818 of 2017, SLP (C) No. ... of 2018, Dairy No. 36305 of 2017, SLP (C) No. ... of 2018, Dairy No. 36377 of 2017, SLP (C) No. 31288 of 2017, SLP (C) No.... of 2018, Dairy No. 38895 of 2017, SLP (C) No. ... of 2018, Dairy No. 42413 of 2017, SLP (C) No. ... of 2018, Dairy No. 619 of 2018, SLP (C) No. ... of 2018, Dairy No. 969 of 2018, SLP (C) No. ... of 2018, Dairy No. 971 of 2018, SLP (C) No. ... of 2018, Dairy No. 1042 of 2018, SLP (C) No. ... of 2018, Dairy No. 1046 of 2018, SLP (C) No. ... of 2018, Dairy No. 1584 of 2018, SLP (C) No. ... of 2018, Dairy No. 2677 of 2018, SLP (C) No. ... of 2018, Dairy No. 7243 of 2018, SLP (C) Nos. 16469, 18925 of 2018, SLP (C) No. ... of 2018, Dairy No. 22349 of 2018 and SLP (C) No. 22985 of 2018

Decided On**:** 26.09.2018

Appellants: Jarnail Singh and Ors. Vs**.** Respondent: Lachhmi Narain Gupta and Ors.

Hon'ble Judges/Coram:

Dipak Misra, C.J.I., Kurian Joseph, Rohinton Fali Nariman, Sanjay Kishan Kaul and Indu Malhotra, JJ.

Subject: Constitution

Subject: Service

Relevant Section:

CONSTITUTION OF INDIA - Article 16(4)

Prior History / High Court Status:

From the Judgment and Order dated 15.07.2011 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 13218 of 2009 (MANU/PH/3767/2011)

Cases Overruled/Partly Overruled:

M. Nagaraj and Ors. vs. Union of India (UOI) and Ors. MANU/SC/4560/2006

Case Category:

SERVICE MATTERS - PROMOTION

Case Note:

Constitution - Reservation in promotion - Present reference filed for correctness of decision in M. Nagaraj v. Union of India which is in relation to equality of opportunity in matters of public employment - It had been argued that when case of Nagaraj states that State had to collect quantifiable data showing backwardness, such observation would be contrary to Indra Sawhney v. Union of India - Further, argued that creamy layer concept had not been applied in case of Indra Sawhney to Scheduled Castes and Scheduled Tribes and case of Nagaraj had misread Indira Sawhney judgment to apply this concept to Scheduled Castes and the Scheduled Tribes - Whether impugned judgment of M. Nagaraj v. Union of India in relation to promotion in reservation warrant any interference.

Facts:

The present reference had been filed for correctness of decision in M. Nagaraj v. Union of India which is in relation to equality of opportunity in matters of public employment. It had been argued that when Nagaraj states that the State has to collect quantifiable data showing backwardness, such observation would be contrary to the Indra Sawhney v. Union of India as it has been held therein that the Scheduled Castes and the Scheduled Tribes are the most backward among backward classes and it was, therefore, presumed that once they are contained in the Presidential List under Articles 341 and 342 of the Constitution of India, there was no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again. It was further argued that, the creamy layer concept had not been applied in Indra Sawhney to the Scheduled Castes and the Scheduled Tribes and Nagaraj had misread the said judgment to apply this concept to the Scheduled Castes and the

Scheduled Tribes. Once the Scheduled Castes and the Scheduled Tribes had been set out in the Presidential List, they shall be deemed to be Scheduled Castes and Scheduled Tribes, and the said List could not be altered by anybody except Parliament under Articles 341 and 342 of Constitution of India.

Held, while answering the reference:

(i) The reference to class in case of Nagaraj is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment. It was clear, therefore, that Nagaraj had, in unmistakable terms, stated that the State had to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. This Court was afraid that this portion of the judgment was directly contrary to the Indra Sawhney which had held that the test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression backward class of citizens. [14]

(ii) In fact, in case of E.V. Chinnaiah v. State of A.P. has referred to the Scheduled Castes as being the most backward among the backward classes. This was for the reason that the Presidential List contains only those castes or groups or parts thereof, which had been regarded as untouchables. Similarly, the Presidential List of Scheduled Tribes only refers to those tribes in remote backward areas who are socially extremely backward. Thus, it was clear that when Nagaraj requires the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes were concerned, this would clearly be contrary to the Indra Sawhney and would have to be declared to be bad on this ground. [15]

(iii) When Nagaraj applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. Therefore, this part of the judgment did not need to be revisited. [17]

(iv) Nagaraj had wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. This was for the simple reason that efficiency of administration has to be looked at every time promotions were made. As has been pointed in Indra Sawhney, there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, it was clear that Article 16(4-A) of Constitution had been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that was in question. [20]

(v) Thus, the judgment in Nagaraj did not need to be referred to a seven-Judge Bench. However, the conclusion in Nagaraj that the State had to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the Indra Sawhney was held to be invalid to this extent. [21]

JUDGMENT

Rohinton Fali Nariman, J.

1. The present group of cases arises out of two reference orders-the first by a two-Judge Bench referred to in a second reference order, dated 15.11.2017, which is by a three-Judge Bench, which has referred the correctness of the decision in **M. Nagaraj v. Union of India**, MANU/SC/4560/2006 : (2006) 8 SCC 212, ("**Nagaraj**"), to a Constitution Bench.

2. The controversy in these matters revolves around the interpretation of the following Articles of the Constitution of India:

16. Equality of opportunity in matters of public employment.--

xxx xxx xxx

(4-A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4-B) Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

xxx xxx xxx

335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.--The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

Provided that nothing in this Article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

xxx xxx xxx

341. Scheduled Castes.--(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under Clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said Clause shall not be varied by any subsequent notification.

xxx xxx xxx

342. Scheduled Tribes.--(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under Clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said Clause shall not be varied by any subsequent notification.

3. We have heard wide-ranging arguments on either side for a couple of days, raising several points. However, ultimately, we have confined arguments to two points which require serious consideration. The learned Attorney General for India, Shri K.K. Venugopal, led the charge for reconsideration of **Nagaraj** (supra). According to the learned Attorney General, **Nagaraj** (supra) needs to be revisited on these two points. First, when **Nagaraj** (supra) states that the State has to collect quantifiable data showing backwardness, such observation would be contrary to the nine-Judge Bench in **Indra Sawhney v. Union of India**, MANU/SC/0104/1993 : 1992 Supp (3) SCC 217, ("**Indra Sawhney (1)**"), as it has been held therein that the Scheduled Castes and the Scheduled Tribes are the most backward among backward classes and it is, therefore, presumed that once they are contained in the Presidential List Under Articles 341 and 342 of the Constitution of India, there is no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again. Secondly,

according to the learned Attorney General, the creamy layer concept has not been applied in **Indra Sawhney (1)** (supra) to the Scheduled Castes and the Scheduled Tribes and **Nagaraj** (supra) has misread the aforesaid judgment to apply this concept to the Scheduled Castes and the Scheduled Tribes. According to the learned Attorney General, once the Scheduled Castes and the Scheduled Tribes have been set out in the Presidential List, they shall be deemed to be Scheduled Castes and Scheduled Tribes, and the said List cannot be altered by anybody except Parliament Under Articles 341 and 342. The learned Attorney General also argued that **Nagaraj** (supra) does not indicate any test for determining adequacy of representation in service. According to him, it is important that we lay down that the test be the test of proportion of Scheduled Castes and Scheduled Tribes to

the population in India at all stages of promotion, and for this purpose, the roster that has been referred to in **R.K. Sabharwal v. State of Punjab**, MANU/SC/0259/1995 : (1995) 2 SCC 745 can be utilized. Other counsel who argued, apart from the learned Attorney General, have, with certain nuances, reiterated the same arguments.<mpara>
Ms. Indira Jaising, learned senior advocate, appearing on behalf of one of the Petitioners in C.A. No. 11816 of 2016, submitted that **Nagaraj** (supra) needs to be revisited also on the ground that Article 16(4-A) and 16(4-B) do not flow from Article 16(4), but instead flow from Articles 14 and 16(1) of the Constitution. She further argued that claims of the Scheduled Castes and the Scheduled Tribes are based on a reading of Articles 14, 15, 16, 16(4-A), 16(4-B), and 335 of the Constitution. It was further submitted that a further sub-classification within Scheduled Castes and Scheduled Tribes is impermissible, as has been held in **Indira Sawhney (1)** (supra) and in **E.V. Chinnaiah v. State of A.P.**, MANU/SC/0960/2004 : (2005) 1 SCC 394 ("Chinnaiah"). She argued that the decision in **Nagaraj** (supra) would have the effect of amending the Presidential Order relating to Scheduled Castes and Scheduled Tribes, which would violate Articles 341 and 342 of the Constitution of India, as Parliament alone can amend a Presidential Order. She concluded her argument by saying that the exercise of reading down a constitutional amendment to make it valid, conducted in **Nagaraj** (supra), was constitutionally impermissible. Shri P.S. Patwalia, learned senior advocate, appearing on behalf of the State of Tripura, reiterated some of the submissions and added that **Nagaraj** (supra) and **Chinnaiah** (supra) cannot stand together, which is why **Nagaraj** (supra) is per incuriam as it does not refer to the judgment in **Chinnaiah** (supra) at all.

4. On the other hand, Shri Shanti Bhushan has defended **Nagaraj** (supra) by stating that when **Nagaraj** (supra) speaks about backwardness of the "class", what is referred to is not Scheduled Castes and Scheduled Tribes at all, but the class of posts. Hence, it is clear that backwardness in relation to the class of posts spoken of would require quantifiable data, and it is in that context that the aforesaid observation is made. He also argued, relying upon **Keshav Mills Co. Ltd. v. Commissioner of Income-Tax, Bombay North**, MANU/SC/0102/1965 : (1965) 2 SCR 908, ("Keshav Mills"), that a Constitution Bench judgment which has stood the test of time, ought not to be revisited, and if the parameters of **Keshav Mills** (supra) are to be applied, it is clear that **Nagaraj** (supra) ought not to be revisited. Shri Rajeev Dhavan, learned senior advocate, has argued before us that **Nagaraj** (supra) has to be understood as a judgment which has upheld the constitutional amendments adding Articles 16(4-A) and 16(4-B) on the ground that they do not violate the basic structure of the Constitution. According to him, since equality is part of the basic structure, and **Nagaraj** (supra) has applied the 50% cutoff criterion, creamy layer, and no indefinite extension of reservation, as facets of the equality principle to uphold the said constitutional amendments, **Nagaraj** (supra) ought not to be revisited. According to the learned senior Counsel, "creamy layer" is a matter of applying the equality principle, as unequals within the same class are sought to be weeded out as they cannot be treated as equal to the others. The whole basis for application of the creamy layer principle is that those genuinely deserving of reservation would otherwise not get the benefits of reservation and conversely, those who are undeserving, get the said benefits. According to the learned senior advocate, the creamy layer principle applies to exclude certain individuals from the class and does not deal with group rights at all. This being the case, Articles 341 and 342 are not attracted. Further, Articles 341 and 342 do not concern themselves with reservation at all. They concern themselves only with identification of those who can be called Scheduled Castes and Scheduled Tribes. On the other hand, the creamy layer principle is applied by Courts to exclude certain persons from reservation made from within that

class on the touchstone of Articles 14 and 16(1) of the Constitution of India. He argued that even if it be conceded that creamy layer can fall within Articles 341 and 342, yet the Court's power to enforce fundamental rights as part of the basic structure cannot be taken away. Indeed, **Nagaraj** (supra) was a case pertaining to a constitutional amendment and, therefore, Articles 341 and 342 cannot stand in the way of applying the basic structure test to a constitutional amendment.

5. Shri Rakesh Dwivedi, learned senior advocate, appearing in C.A. No. 5247 of 2016, submitted that the crucial language contained in Article 16(4-A) is that the word "which" would show that Scheduled Castes and Scheduled Tribes have to continue to be "backward". If the expression "the Scheduled Castes and the Scheduled Tribes" in Article 16(4-A) would be read as "the Scheduled Castes and the Scheduled Tribes employees", this would become even clearer. Therefore, according to the learned senior advocate, continued social backwardness of the Scheduled Castes/Scheduled Tribes employees has necessarily to be assessed. While making promotions to higher level posts, it becomes clear that a Scheduled Caste/Scheduled Tribe employee may have cast off his backwardness when he/she reaches a fairly high stage in a service, for example, the post of Deputy Chief Engineer, at which stage, it would be open for the State to say that having regard to the absence of any backwardness of the Scheduled Caste/Scheduled Tribe employee at this stage, it would be expedient not to reserve anything further in posts above this stage. Shri Naphade, Shri Gopal Sankaranarayanan and other counsel followed suit and broadly supported the arguments of Shri Dhavan and Shri Dwivedi.

6. Since we are asked to revisit a unanimous Constitution Bench judgment, it is important to bear in mind the admonition of the Constitution Bench judgment in **Keshav Mills** (supra). This Court said:

[I]n reviewing and revising its earlier decision, this Court should ask itself whether in the interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When this Court decides questions of law, its decisions are, Under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations: -- What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been

followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court.

(at pp. 921-922)

7. We may begin with the nine-Judge Bench in **Indra Sawhney (1)** (supra). In this case, the lead judgment is of B.P. Jeevan Reddy, J., speaking on behalf of himself and three other learned Judges, with Pandian and Sawant, JJ., broadly concurring in the result by their separate judgments. Thommen, Kuldip Singh, and Sahai, JJ., dissented. The bone of contention in this landmark judgment was the Mandal Commission Report of 1980, which was laid before Parliament on two occasions-once in 1982, and again in 1983. However, no action was taken on the basis of this Report until 13.08.1990, when an Office Memorandum stated that after considering the said Report, 27% of the vacancies in civil posts and services under the Government of India shall be reserved for the Socially and Economically Backward Classes. This was followed by an Office Memorandum of 25.09.1991, by which, within the 27% of vacancies, preference was to be given to candidates belonging to the poorer Sections of the Socially and Economically Backward Classes; and 10% vacancies were to be reserved for Other Economically Backward Sections who were not covered by any of the existing schemes of reservation. The majority judgments upheld the reservation of 27% in favour of backward classes, and the further sub-division of more backward within the backward classes who were to be given preference, but struck down the reservation of 10% in favour of Other Economically Backward categories. In arriving at this decision, the judgment of Jeevan Reddy, J., referred to and contrasted Article 16(4) with Article 15(4), and stated that when Article 16(4) refers to a backward class of citizens, it refers primarily to social backwardness (See paragraph 774). Scheduled Castes and Scheduled Tribes, not being the subject matter before the Court, were kept aside as follows:

781. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes -- for it cannot be denied that Scheduled Castes include quite a few castes.

In dealing with the creamy layer concept insofar as it is applicable to backward classes, the last sentence of paragraph 792 also states:

792.... (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes).

In the summary of the discussion contained in paragraphs 796-797, it is stated, "the test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"." Jeevan Reddy, J. then went on to state that in certain posts, of specialities and super-specialities, provisions for reservation would not be advisable (See paragraph 838). Ultimately, the judgment decided that

reservation would apply at the stage of initial entry only and would not apply at the stage of promotion.

8. It is important to note that eight of the nine learned Judges in **Indra Sawhney (1)** (supra) applied the creamy layer principle as a facet of the larger equality principle. In fact, in **Indra Sawhney v. Union of India and Ors.,** MANU/SC/0771/1999 : (2000) 1 SCC 168 (**"Indra Sawhney (2)"**), this Court neatly summarized the judgments in **Indra Sawhney (1)** (supra), on the aspect of creamy layer as follows:

13. In *Indra Sawhney* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] on the question of exclusion of the "creamy layer" from the backward classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate judgments in this behalf which required the "creamy layer" to be identified and excluded.

14. The judgment of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned Judges, Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ. (as they then were). The said judgment laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an "advanced social level or status", he would no longer belong to the backward class and would have to be weeded out. Similar views were expressed by Sawant, Thommen, Kuldip Singh, and Sahai, JJ. in their separate judgments.

15. It will be necessary to refer to and summarise briefly the principles laid down in these five separate judgments for that would provide the basis for decision on Points 2 to 5.

16. While considering the concept of "means-test" or "creamy layer", which signifies imposition of an income limit, for the purpose of excluding the persons (from the backward class) whose income is above the said limit, in para 791, the Court has noted that counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for the Respondents strongly opposed any such distinction and submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criterion once again and sub-divide a backward class into two sub-categories. The Court negatived the said contention by holding that exclusion of such (creamy layer) socially advanced members will make the "class" a truly backward class and would more appropriately serve the purpose and object of Clause (4).

17. Jeevan Reddy, J. dealt with the "creamy layer" under Question 3*(d)* (paras 790, 792, 793 of SCC) and under Question 10 (paras 843, 844). This is what the learned Judge declared: there are Sections among the backward classes who are *highly advanced, socially and educationally* and they constitute the forward Section of that community. These advanced Sections do not belong to the true backward class. They are (para 790) "as forward as any other forward class member".

If some of the members are far too advanced *socially* (which in the context, necessarily means *economically* and, may also mean *educationally*) the connecting thread between them and the remaining class snaps. They would be misfits in the class." (SCC p. 724, para 792).

The learned Judge said: (SCC p. 724, para 792)

After *excluding* them alone, would the class be a compact class. In fact, such exclusion benefits the *truly* backward.

A line has to be drawn, said the learned Judge, between the forward in the backward and the rest of the backward but it is to be ensured that what is given with one hand is not taken away by the other. The basis of exclusion of the "creamy layer" must *not* be *merely economic, unless* economic advancement is so high that it necessarily means social advancement, such as where a member becomes owner of a factory and is himself able to give employment to others. In such a case, his income is a measure of his social status. In the case of agriculturists, the line is to be drawn with reference to the agricultural landholding. While fixing income as a measure, the limit is not to be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. There are again some offices in various walks of life -- the occupants of which can be treated as socially advanced, *without further inquiry*", such as IAS and IPS officers or others in All India services. In the case of these persons, their social status in society rises quite high and the person is no longer socially disadvantaged. Their children get full opportunity to realise their potential. They are in no way handicapped in the race of life. Their income is also such that they are above want. It is but logical that children of such persons are not given the benefits of reservation. If the categories or Sections above-mentioned are not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. The Central Government is, therefore, directed (para 793) to identify and notify the "creamy layer" within four months and after such notification, the "creamy layer" within the backward class shall "cease" to be covered by the reservations Under Article 16(4). Jeevan Reddy, J. finally directed (see Question 10) that the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. Income or the extent of property-holding of a person is to be taken as a measure of social advancement -- and on that basis -- the "creamy layer" within a given caste, community or occupational group is to be excluded to arrive at the *true* backward class. There is to be constituted a body which can go into these questions as follows: (SCC p. 757, para 847)

We direct that such a body be constituted both at Central level and at the level of the States within four months from today. ... There should be a periodic revision of these lists to *exclude* those who have ceased to be backward or for inclusion of new classes, as the case may be.

The creamy layer [see para 859, sub-para (3)(d)] can be, and must be excluded. Creamy layer has to be excluded and "economic criterion" is to be adopted as an indicium or measure of social advancement [para 860, sub-para (5)]. The socially advanced persons must be excluded [para 861(b)]. That is how Jeevan Reddy, J. summarised the position.

18. Sawant, J. too accepted (p. 553 of SCC) that "at least some individuals and families in the backward classes, -- however small in number, -- gain sufficient means to develop *capacities to compete* with others in every field. That is an *undeniable fact*. Social advancement is to be judged by the "capacity to compete" with forward castes, achieved by the members or Sections of the backward classes. Legally, therefore, these persons or Sections who reached that level are not entitled any longer to be called as part of the backward class, whatever their original birthmark. Taking out these "forwards" from the "backwards" is "obligatory" as these persons have crossed the Rubicon (pp. 553-54). On the crucial question as to what is meant by "capacity to compete",

the learned Judge explained (para 522) that if a person moves from Class IV service to Class III, that is no indication that he has reached such a stage of social advancement but if the person has successfully competed for "higher level posts" or at least "near those levels", he has reached such a state.

19. Thommen, J. (paras 287, 295, 296, 323) observed that if some members in a backward class acquire the necessary financial strength to raise themselves, the Constitution does not extend to them the protection of reservation. The creamy layer has to be "weeded out" and excluded, if it has attained a "certain predetermined economic level".

20. Kuldip Singh, J. (para 385) referred to the "*affluent*" Section of the backward class. Comparatively "such (*sic* rich) persons in the backward class -- though they may not have acquired a higher level of education -- are able to move in the society without being discriminated socially". These persons practise discrimination against others in that group who are comparatively less rich. It must be ensured that these persons do not "chew up" the benefits meant for the true backward class. "Economic ceiling" is to be fixed to cut off these persons from the benefits of reservation. In the result, the "means-test" is imperative to skim off the "*affluent*" Sections of backward classes.

21. Sahai, J. (para 629) observed that the individuals among the collectivity or the group who may have achieved a "social status" or "*economic affluence*", are disentitled to claim reservation. Candidates who apply for selection must be made to disclose the annual income of their parents which if it is beyond a level, they cannot be allowed to claim to be part of the backward class. What is to be the limit must be decided by the State. Income apart, provision is to be made that wards of those backward classes of persons who have achieved a particular status in society, be it *political* or *economic* or if their parents are in *higher services* then such individuals must be precluded from availing the benefits of reservation. Exclusion of "creamy layer" achieves a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

In paragraph 27 of the said judgment, the three-Judge Bench of this Court clearly held that the creamy layer principle sounds in Articles 14 and 16(1) as follows:

(i) Equals and unequals, twin aspects

27. As the "creamy layer" in the backward class is to be treated "on a par" with the forward classes and is not entitled to benefits of reservation, it is obvious that if the "creamy layer" is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as *equals* (forwards and creamy layer of backward classes) *cannot be treated unequally*. Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since *unequals* (the creamy layer) *cannot be treated as equals*, that is to say, equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant, J. where the learned Judge stated as follows: (SCC p. 553, para 520)

[T]o continue to confer upon such advanced sections... special benefits, would amount to treating *equals unequally*.... Secondly, to rank them with the rest of the backward classes would... amount to treating the *unequals equally*.

Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections 3, 4 and 6 in the light of the above principle...."

9. The next judgment with which we are directly concerned is the judgment in **Chinnaiah** (supra). In this case, the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, was challenged, and dismissed by a five-Judge Bench of the Andhra Pradesh High Court by a majority of 4:1. The 15% reservation that was made in favour of the Scheduled Castes was further apportioned among four groups in varying percentages-Group A to the extent of 1%; Group B to the extent of 7%; Group C to the extent of 6%; and Group D to the extent of 1%. In the lead judgment on behalf of the Constitution Bench, Hegde, J. set out three questions for consideration as follows:

12. From the pleadings on record and arguments addressed before us three questions arise for our consideration:

(*1*) Whether the impugned Act is violative of Article 341(2) of the Constitution of India?

(*2*) Whether the impugned enactment is constitutionally invalid for lack of legislative competence?

(*3*) Whether the impugned enactment creates sub-classification or micro-classification of Scheduled Castes so as to violate Article 14 of the Constitution of India?

Article 341 was then referred to, in which the Presidential List of Scheduled Castes is to be notified. Any inclusion or exclusion from the said list thereafter can only be done by Parliament Under Article 341(2) (See paragraph 13). The Court then rejected the splitting up of Scheduled Castes on the basis of backwardness into groups, and distinguished **Indra Sawhney (1)** (supra) (See paragraphs 19 to 21). It was then held:

26. Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in the case of *N.M. Thomas* [MANU/SC/0479/1975 : (1976) 2 SCC 310 : 1976 SCC (L&S) 227] it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List.

Indra Sawhney (1) (supra) was then referred to and distinguished as follows:

38. On behalf of the Respondents, it was pointed out that in *Indra Sawhney case* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217] the Court had permitted sub-classification of Other Backward Communities, as backward and more backward based on their comparative underdevelopment, therefore, the similar classification amongst the class enumerated in the Presidential List of Scheduled Castes is permissible in law. We do not think the principles laid down in *Indra Sawhney* case (supra) for sub-classification of Other Backward Classes can be applied as a precedent law for sub-classification or sub-grouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. This we think is

for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments.

39. Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the State's jurisdiction while exercising its executive or legislative function is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. In our opinion, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class.

40. Furthermore, the emphasis on efficient administration placed by Article 335 of the Constitution must also be considered when the claims of Scheduled Castes and Scheduled Tribes to employment in the services of the Union are to be considered.

Finally, the Court held:

43. The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of Clause (4) of Article 15 and Clause (4) of Article 16 of the Constitution, a further classification by way of micro-classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained.

44. For the reasons stated above, we are of the considered opinion that the impugned legislation apart from being beyond the legislative competence of the State is also violative of Article 14 of the Constitution and hence is liable to be declared as ultra vires the Constitution.

In a separate concurring judgment, Sinha, J., after referring to **Indra Sawhney (1)** (supra) and the creamy layer concept in paragraph 95, went on to state:

96. But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of Clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor.

It was then concluded:

111. The Constitution provides for declaration of certain castes and tribes as Scheduled Castes and Scheduled Tribes in terms of Articles 341 and 342 of the Constitution. The object of the said provisions is to provide for grant of protection to the backward class of citizens who are specified

in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and educational backwardness wherefrom they suffer. The President of India alone in terms of Article 341(1) of the Constitution is authorised to issue an appropriate notification therefor. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive.

Thus, the Court struck down the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000.

10. The judgment in **Chinnaiah** (supra) has been referred by a three-Judge Bench to a larger Bench by an order dated 20.08.2014. This is because, according to the three-Judge Bench, **Chinnaiah** (supra) is contrary to Article 338 of the Constitution of India and **Indra Sawhney (1)** (supra). Since the correctness of **Chinnaiah** (supra) does not arise before us, we need say no more about this reference which will be decided on its own merits.

11. Close on the heels of this judgment is the judgment in **Nagaraj** (supra). In this case, the addition of Articles 16(4-A) and 16(4-B) were under challenge on the ground that they violated the basic structure of the Constitution. After referring to the arguments of counsel for both sides, the Court held that equality is the essence of democracy and accordingly, part of the basic structure of the Constitution (See paragraph 33). The working test in the matter of application of this doctrine was then applied, referring to Chandrachud, J.'s judgment in **Indira Nehru Gandhi v. Raj Narain and Anr.,** MANU/SC/0304/1975 : 1975 Supp SCC 1 (See paragraphs 37 and 38). After dealing with reservation and its extent, the Court then went into the nitty-gritty of the constitutional amendments and held as follows:

Whether the impugned constitutional amendments violate the principle of basic structure?

101. The key question which arises in the matter of the challenge to the constitutional validity of the impugned amending Acts is -- whether the constitutional limitations on the amending power of Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution.

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" Rule and "consequential seniority" are not constitutional requirements. They are not implicit in Clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality Under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors

are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from Clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is--whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the Petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in *Virpal Singh* [MANU/SC/0113/1996 : (1995) 6 SCC 684: 1996 SCC (L&S) 1: (1995) 31 ATC 813], *Ajit Singh (I)* [MANU/SC/0319/1996 : (1996) 2 SCC 715: 1996 SCC (L&S) 540: (1996) 33 ATC 239: AIR 1996 SC 1189], *Ajit Singh (II)* [MANU/SC/0575/1999 : (1999) 7 SCC 209: 1999 SCC (L&S) 1239] and *Indra Sawhney* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets -- "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the Rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged Sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality."

xxx xxx xxx

104. Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation Under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as

the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality Under Article 16(4).

The Court then concluded as follows:

121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration Under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385], the concept of post-based roster with inbuilt concept of replacement as held in R.K. Sabharwal [MANU/SC/0259/1995 : (1995) 2 SCC 745: 1995 SCC (L&S) 548: (1995) 29 ATC 481].

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

12. We now come to the Constitution Bench judgment in **Ashoka Kumar Thakur v. Union of India,** MANU/SC/1397/2008 : (2008) 6 SCC 1. In this case, Article 15(5) inserted by the Constitution (Ninety-third Amendment) Act, 2005, was under challenge. Balakrishnan, C.J., after referring to various judgments of this Court dealing with reservation, specifically held that the "creamy layer" principle is inapplicable to Scheduled Castes and Scheduled Tribes as it is merely

a principle of identification of the backward class and not applied as a principle of equality (See paragraphs 177 to 186). Pasayat, J., speaking for himself and Thakker, J., stated that the focus in the present case was not on Scheduled Castes and Scheduled Tribes but on Other Backward Classes (See paragraph 293). Bhandari, J., in paragraphs 395 and 633 stated as follows:

395. In *Sawhney (1)* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] the entire discussion was confined only to Other Backward Classes. Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes."

xxx xxx xxx

633. In *Indra Sawhney (1)* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], creamy layer exclusion was only in regard to OBC. Reddy, J. speaking for the majority at SCC p. 725, para 792, stated that "[t]his discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes". Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes....

Raveendran, J., in a separate judgment, while referring to **Nagaraj** (supra), held as follows:

665. The need for exclusion of creamy layer is reiterated in the subsequent decisions of this Court in *Ashoka Kumar Thakur* v. *State of Bihar* [MANU/SC/0011/1996 : (1995) 5 SCC 403: 1995 SCC (L&S) 1248: (1995) 31 ATC 159], *Indra Sawhney* v. *Union of India* [MANU/SC/0153/1997 : (1996) 6 SCC 506: 1996 SCC (L&S) 1477] and *M. Nagaraj* v. *Union of India* [MANU/SC/4560/2006 : (2006) 8 SCC 212]. When *Indra Sawhney* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] has held that creamy layer should be excluded for purposes of Article 16(4), dealing with "backward class" which is much wider than "socially and educationally backward class" occurring in Articles 15(4) and (5), it goes without saying that without the removal of creamy layer there cannot be a socially and educationally backward class. Therefore, when a caste is identified as a socially and educationally backward caste, it becomes a "socially and educationally backward class" only when it sheds its creamy layer.

The Court ultimately upheld the Constitution (Ninety-third Amendment) Act, 2005, subject to the creamy layer test to be applied to Other Backward Classes. Bhandari, J. held that the amendment was not constitutionally valid so far as "private unaided" educational institutions were concerned.

13. At this stage, it is necessary to deal with the argument that **Nagaraj** (supra) needs to be revisited as it conflicts with **Chinnaiah** (supra). It will be noticed that though **Nagaraj** (supra) is a later judgment, it does not refer to **Chinnaiah** (supra) at all. Much was made of this by some of the learned Counsel appearing on behalf of the Appellants. It is important to notice that the majority judgment of Hegde, J. does not refer to the creamy layer principle at all. **Chinnaiah's** judgment (supra) in essence held that the Andhra Pradesh Scheduled Castes (Rationalisation of

Reservations) Act, 2000, which it considered, could not further sub-divide Scheduled Castes into four categories, as that would be violative of Article 341(2) of the Constitution of India for the simple reason that it is Parliament alone that can make any change in the Presidential List and not the State Legislatures. That this is the true ratio of the judgment is clear from a reading of the paragraphs that have been set out hereinabove. This being the case, as **Chinnaiah** (supra) does not in any manner deal with any of the aspects on which the constitutional amendments in Nagaraj's case (supra) were upheld, we are of the view that it was not necessary for **Nagaraj** (supra) to refer to **Chinnaiah** (supra) at all. However, it was further contended that apart from this ratio, **Chinnaiah** (supra) also decided that the sub-classification of Scheduled Castes, created by the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, also violated Article 14 of the Constitution of India. This was stated by **Chinnaiah** (supra) to be violative of Article 14 as the same would amount to tinkering with the List, which, as was held, could be done only by Parliament and not by State Legislatures. In our opinion, the true ratio of the judgment flows from a construction of Article 341. It is true that the Andhra Pradesh Act in question was also found to be violative of Article 14. We may only state that **Chinnaiah** (supra) dealt with a completely different problem, apart from dealing with a State statute and not a constitutional amendment, as was dealt with in **Nagaraj** (supra).

14. This brings us to whether the judgment in **Nagaraj** (supra) needs to be revisited on the other grounds that have been argued before us. Insofar as the State having to show quantifiable data as far as backwardness of the class is concerned, we are afraid that we must reject Shri Shanti Bhushan's argument. The reference to "class" is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment.
It is clear, therefore, that **Nagaraj** (supra) has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly contrary to the nine-Judge Bench in **Indra Sawhney (1)** (supra). Jeevan Reddy, J., speaking for himself and three other learned Judges, had clearly held, "[t]he test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"."
(See paragraphs 796 to 797). Equally, Dr. Justice Thommen, in his conclusion at paragraph 323(4), had held as follows:

323. *Summary*

xxx xxx xxx

(*4*) Only such classes of citizens who are socially and educationally backward are qualified to be identified as backward classes. To be accepted as backward classes for the purpose of reservation Under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President Under Article 341 or Article 342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notifications, presumed to be satisfied....

15. In fact, **Chinnaiah** (supra) has referred to the Scheduled Castes as being the most backward among the backward classes (See paragraph 43). This is for the reason that the Presidential List contains only those castes or groups or parts thereof, which have been regarded as untouchables. Similarly, the Presidential List of Scheduled Tribes only refers to those tribes in remote backward areas who are socially extremely backward.

Thus, it is clear that when **Nagaraj** (supra) requires the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to the **Indra Sawhney (1)** (supra) and would have to be declared to be bad on this ground.

However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class.

The genesis of this principle is to be found in **State of Kerala and Anr. v. N.M. Thomas and Ors.,** MANU/SC/0479/1975 : (1976) 2 SCC 310. This case was concerned with a test-relaxation Rule in promotions from lower division clerks to upper division clerks. By a 5:2 majority judgment, the said Rule was upheld as a Rule that could be justified on the basis that it became necessary as a means of generally giving a leg-up to backward classes. In paragraph 124, Krishna Iyer, J. opined:

124. A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).], the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one.

The whole object of reservation is to see that backward classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a Court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List Under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle Under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

16. We do not think it necessary to go into whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained Under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that Constitutional Courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or subgroup in the Presidential List may be kept out by Parliament on application of the creamy layer principle. One of the most important principles that has been frequently applied in constitutional law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341 and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, Constitutional Courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality Under Articles 14 and 16 of the Constitution of India. We do not agree with Balakrishnan, C.J.'s statement in **Ashoka Kumar Thakur** (supra) that the creamy layer principle is merely a principle of identification and not a principle of equality.

17. Therefore, when **Nagaraj** (supra) applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power Under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no need to refer **Nagaraj** (supra) to a seven-Judge Bench. We may also add at this juncture that Nagaraj (supra) is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied by a number of judgments of this Court, namely:

a. **Anil Chandra v. Radha Krishna Gaur,** MANU/SC/1639/2009 : (2009) 9 SCC 454 (two-Judge Bench) (See paragraphs 17 and 18).

b. **Suraj Bhan Meena and Anr. v. State of Rajasthan and Ors.,** MANU/SC/1042/2010 : (2011) 1 SCC 467 (two-Judge Bench) (See paragraphs 10, 50, and 67).

c. **U.P. Power Corporation v. Rajesh Kumar and Ors.,** MANU/SC/0334/2012 : (2012) 7 SCC 1 (two-Judge Bench) (See paragraphs 61, 81(ix), and 86).

d. **S. Panneer Selvam and Ors. v. State of Tamil Nadu and Ors.,** MANU/SC/0937/2015 : (2015) 10 SCC 292 (two-Judge Bench) (See paragraphs 18, 19, and 36).

e. **Chairman & Managing Director, Central Bank of India and Ors. v. Central Bank of India SC/ST Employees Welfare Association and Ors.,** MANU/SC/0017/2015 : (2015) 12 SCC 308 (two-Judge Bench) (See paragraphs 9 and 26).

f. **Suresh Chand Gautam v. State of U.P. and Ors.,** MANU/SC/0310/2016 : (2016) 11 SCC 113 (two-Judge Bench) (See paragraphs 2 and 45).

g. **B.K. Pavitra and Ors. v. Union of India and Ors.,** MANU/SC/0143/2017 : (2017) 4 SCC 620 (two-Judge Bench) (See paragraphs 17 to 22).

Further, **Nagaraj** (supra) has been approved by larger Benches of this Court in:

a. **General Categories Welfare Federation v. Union of India**, (2012) 7 SCC 40 (three-Judge Bench) (See paragraphs 2 and 3).

b. **Rohtas Bhankar v. Union of India**, MANU/SC/0611/2014 : (2014) 8 SCC 872 (five-Judge Bench) (See paragraphs 6 and 7).

In fact, the tests laid down in **Nagaraj** (supra) for judging whether a constitutional amendment violates basic structure have been expressly approved by a nine-Judge Bench of this Court in **I.R. Coelho (Dead) by L.Rs. v. State of Tamil Nadu and Ors.,** MANU/SC/0595/2007 : (2007) 2 SCC 1 (See paragraphs 61, 105, and 142). The entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in **Nagaraj** (supra) on the inadequacy of representation, which can be tested by the Courts. We may further add that the data would be relatable to the concerned cadre.

18. Dr. Dhavan referred to the judgment in **U.P. Power Corporation Ltd.** (supra), and placed before us the Constitution (One Hundred Seventeeth Amendment) Bill, 2012. This Bill was passed by the Rajya Sabha on 17.12.2012 but failed to get sufficient number of votes in the Lok Sabha and, therefore, could not become an Act. This Bill was tabled close upon the judgment in **U.P. Power Corporation Ltd.** (supra), and would have substituted Article 16(4-A) as follows:

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

extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State.

The Statement of Objects and Reasons for the said Bill read as follows:

The validity of the constitutional amendments was challenged before the Supreme Court. The Supreme Court while deliberating on the issue of validity of Constitutional amendments in the case of M. Nagaraj *v.* UOI and Ors., observed that the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation in promotion.

Relying on the judgment of the Supreme Court in M. Nagaraj case, the High Court of Rajasthan and the High Court of Allahabad have struck down the provisions for reservation in promotion in the services of the State of Rajasthan and the State of Uttar Pradesh, respectively. Subsequently, the Supreme Court has upheld the decisions of these High Courts striking down provisions for reservation in respective States.

It has been observed that there is difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. Moreover, there is uncertainty on the methodology of this exercise.

It will be seen that this Bill contains two things that are different from Article 16(4-A) as already enacted. First and foremost, it clarifies that the Scheduled Castes and the Scheduled Tribes that are notified Under Articles 341 and 342 shall be deemed to be backward, which makes it clear that no quantifiable data is necessary to determine backwardness. Secondly, instead of leaving it to the States to determine on a case to case basis whether the Scheduled Castes and the Scheduled Tribes are adequately represented in any class or classes of posts in the services under the State, the substituted provision does not leave this to the discretion of the State, but specifies that it shall be to the extent of the percentage of reservation provided to Scheduled Castes and Scheduled Tribes in the services of the State. This amendment was necessitated because a Division Bench of this Court in **U.P. Power Corporation Ltd.** (supra) had struck down Section 3(7) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Rule 8A of the U.P. Government Servants Seniority Rules, 1991, which read as under:

3. ***Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes*****--**

(1)-(6) xxx xxx xxx

(7) If, on the date of commencement of this Act, reservation was in force under government orders for appointment to posts to be filled by promotion, such government orders shall continue to be applicable till they are modified or revoked.

xxx xxx xxx

8-A. Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes-- Notwithstanding anything contained in Rules 6, 7 or 8 of these Rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall, on his promotion by virtue of Rule of reservation/roster, be entitled to consequential seniority also.

This Court considered **Nagaraj** (supra) in detail and in paragraph 81, culled out various principles which **Nagaraj** (supra) had laid down. We are concerned here with principles (ix) and (x) in particular, which read as under:

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.

19. We have already seen that, even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held by us to be contrary to the majority in **Indra Sawhney (1)** (supra). So far as the second part of the substituted Article 16(4-A) contained in the Bill is concerned, we may notice that the proportionality to the population of Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. We may only add that Article 46, which is a provision occurring in the Directive Principles of State Policy, has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker Sections of the people. Article 46 reads as follows:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections--The State shall promote with special care the educational and economic interests of the weaker Sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

This being the case, it is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas "backward classes" in Article 16(4) is equivalent to the "weaker Sections of the people" in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason, as has been pointed out by us earlier, that the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker Sections of society, and are, therefore, presumed to be backward. Shri Dwivedi's argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of

backwardness as the posts go higher, is an argument that goes to the validity of Article 16. If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Article 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in **Indra Sawhney (1)** (supra) when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in **Nagaraj** (supra). This being the case, we cannot countenance an argument which would indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of **Nagaraj** (supra) be upheld, namely, that there be quantifiable data for judging backwardness of the Scheduled Castes and the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of "creamy layer" which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes.

20. The learned Attorney General also requested us to lay down that the proportion of Scheduled Castes and Scheduled Tribes to the population of India should be taken to be the test for determining whether they are adequately represented in promotional posts for the purpose of Article 16(4-A). He complained that **Nagaraj** (supra) ought to have stated this, but has said nothing on this aspect.

According to us, **Nagaraj** (supra) has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. As has been pointed out by B.P. Jeevan Reddy, J.'s judgment in Indra Sawhney (1) (supra), there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, we make it clear that Article 16(4-A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that is in question.
For this purpose, the contrast of Article 16(4-A) and 16(4-B) with Article 330 of the Constitution is important. Article 330 reads as follows:

330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.--(1) Seats shall be reserved in the House of the People for--

(*a*) the Scheduled Castes;

(*b*) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and]

(*c*) the Scheduled Tribes in the autonomous districts of Assam.

(*2*) The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under Clause (1) shall bear, as nearly as may be, the same proportion to the total

number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union territory or part of the State or Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory.

(*3*) Notwithstanding anything contained in Clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State.

Explanation.--In this Article and in Article 332, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census.

It can be seen that when seats are to be reserved in the House of the People for the Scheduled Castes and Scheduled Tribes, the test of proportionality to the population is mandated by the Constitution. The difference in language between this provision and Article 16(4-A) is important, and we decline the invitation of the learned Attorney General to say any more in this behalf.

21. Thus, we conclude that the judgment in **Nagaraj** (supra) does not need to be referred to a seven-Judge Bench. However, the conclusion in **Nagaraj** (supra) that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in **Indra Sawhney (1)** (supra) is held to be invalid to this extent.

Back to Index

MANU/SC/1074/2018

Neutral Citation: 2018/INSC/898

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 194 of 2017 (Under Article 32 of the Constitution of India)

Decided On**:** 27.09.2018

Appellants: Joseph Shine **Vs.** Respondent: Union of India (UOI)

Hon'ble Judges/Coram:

Dipak Misra, C.J.I., A.M. Khanwilkar, Indu Malhotra, Rohinton Fali Narimanand Dr. D.Y. Chandrachud, JJ.

Subject: Criminal

Relevant Section:

INDIAN PENAL CODE, 1860 (IPC) - Section 497

Authorities Referred:

Black's Law Dictionary; J.W. Cecil Turner, Kenny's Outlines of Criminal Law, 19th Edn., 1966

Cases Overruled/Partly Overruled:

Sowmithri Vishnu vs. Union of India (UOI) and Ors. MANU/SC/0199/1985; V. Revathi vs. Union of India (UOI) and Ors. MANU/SC/0562/1988

Case Category:

LETTER PETITION AND PIL MATTER - WRIT PETITIONS (CRIMINAL) AND WRIT PETITIONS FILED AS PIL PERTAINING TO CRIMINAL INVESTIGATIONS/PROSECUTION

Case Note:

Constitution - Adultery - Challenge thereto - Articles 14,15,15(3) and 21 of Constitution of India, Section 497 of Indian Penal Code, 1860 and Section 198(2) of Code of Criminal

Procedure, 1973 - Present petition filed challenging constitutional validity of Section 497 of Code which makes adultery criminal offence and Section 198(2) of Code - Whether Section 497 of Code was violative of Article 14,15(1) and 21 of Constitution of India.

Facts:

The writ petition was filed challenging the validity of Section 497 of Indian Penal Code which makes adultery criminal offence and Section 198(2) of Code of Criminal Procedure, 1973.

Held, while allowing the petition:

Dipak Misra, C.J.I. (For himself and A.M. Khanwilkar, J.)

(i) The Section 497 of Code treats a married woman as a property of the husband. It was interesting to note that Section 497 Indian Penal Code did not bring within its purview an extra marital relationship with an unmarried woman or a widow. The dictionary meaning of adultery was that a married person commits adultery if he had sex with a woman with whom he had not entered into wedlock. As per Black's Law Dictionary, adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision had made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he could not be branded as a person who has committed adultery so as to invite the culpability of Section 497 Indian Penal Code. Section 198 Code of Criminal Procedure deals with a person aggrieved. Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 Indian Penal Code and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It did not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as was absolutely and manifestly arbitrary as it did not even appear to be rational and it could be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which was extremely excessive and disproportionate. This Court was constrained to think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she could take civil action but the husband is also entitled to take civil action. However, that did not save the provision as being manifestly arbitrary. That was one aspect of the matter. If the entire provision was scanned being Argus-eyed, it was noticed that on the one hand, it protects a woman and on the other, it did not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary. [23]

(ii) It was discernible that the Court, with the passage of time, had recognized the conceptual equality of woman and the essential dignity which a woman was entitled to have. There could be no curtailment of the same. But, Section 497 Indian Penal Code effectively did the same

by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, no hesitation in holding that the same offends Article 21 of the Constitution. [41]

(iii) Section 497 of Indian Penal Code was unconstitutional and adultery should not be treated as an offence, it is appropriate to declare Section 198 of Code of Criminal Procedure which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision had to pave the same path. [56]

Rohinton Fali Nariman, J. (Concurring)

(i) The ostensible object of Section 497, as pleaded by the State, being to protect and preserve the sanctity of marriage, was not in fact the object of Section 497 at all. The sanctity of marriage could be utterly destroyed by a married man having sexual intercourse with an unmarried woman or a widow, as has been seen hereinabove. Also, if the husband consents or connives at such sexual intercourse, the offence was not committed, thereby showing that it was not sanctity of marriage which was sought to be protected and preserved, but a proprietary right of a husband. Secondly, no deterrent effect had been shown to exist, or ever to have existed, which may be a legitimate consideration for a State enacting criminal law. Also, manifest arbitrariness was writ large even in cases where the offender happens to be a married woman whose marriage had broken down, as a result of which she no longer cohabits with her husband, and may in fact, had obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If, during this period, she had sex with another man, the other man was immediately guilty of the offence. [82]

(ii) The Section 497 of Code was also discriminatory and therefore, violative of Article 14 and Article 15(1). In treating a woman as chattel for the purposes of this provision, it was clear that such provision discriminates against women on grounds of sex only, and must be struck down on this ground as well. Section 198, Code of Criminal Procedure was also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 had also to be held constitutionally infirm. [83]

(iii) In case of Sowmithri Vishnu, this Court upheld Section 497 while repelling three arguments against its continuance. This judgment also must be said to be swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Articles 14, 15, and 21. Ancient notions of the man being the seducer and the woman being the victim permeate the judgment, which was no longer the case today. The moving times had not left the law behind as just seen, and so far as engaging the attention of law makers when reform of penal law is undertaken, this court hasten to add that even when the Code of Criminal Procedure was fully replaced in 1973, Section 198 continued to be on the statute book. Even as of today, Section 497 Indian Penal Code continues to be on the statute book. When these Sections are wholly outdated and had outlived their purpose, not only does the maxim of Roman law, cessante ratione legis, cessat ipsa lex, apply to interdict such law, but

when such law falls foul of constitutional guarantees, it is this Court's solemn duty not to wait for legislation but to strike down such law. As recently as in Shayara Bano case, it was only the minority view that one must wait for the law to change legislatively by way of social reform. The majority view was the exact opposite, which was why Triple Talaq was found constitutionally infirm and struck down by the majority. Also, the statement in this judgment that stability of marriages was not an ideal to be scorned, could scarcely be applied to this provision, as had seen that marital stability was not the object for which this provision was enacted. On all these counts, therefore, we overrule the judgment in Sowmithri Vishnu. Equally, the judgment in V. Revathi, which upheld the constitutional validity of Section 198 must, for similar reasons, be held to be no longer good law. Therefore, Section 497 of the Indian Penal Code, 1860 and Section 198 of the Code of Criminal Procedure, 1973 were violative of Articles 14, 15(1), and 21 of the Constitution of India and are, therefore, struck down as being invalid. [86]

Dr. D.Y. Chandrachud, J.

(i) While engrafting the provision into Chapter XX of the Penal Code-of offences relating to marriage-the legislature has based the offence on an implicit assumption about marriage. The notion which the law propounds and to which it imposes the sanctions of penal law was that the marital tie subordinates the role and position of the woman. In that view of marriage, the woman was bereft of the ability to decide, to make choices and give free expression to her personality. Human sexuality was an essential aspect of identity. Choices in matters of sexuality were reflective of the human desire for expression. Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice. Sharing of physical intimacies was a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality could not be dis-associated from the human personality. For, to be human involves the ability to fulfil sexual desires in the pursuit of happiness. Autonomy in matters of sexuality was thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in society and were premised on a voluntary acceptance by consenting parties. Section 497 denudes the woman of the ability to make these fundamental choices, in postulating that it was only the man in a marital relationship who can consent to his spouse having sexual intercourse with another. Section 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. The provision was proffered by the legislature as an effort to protect the institution of marriage. But it proceeds on a notion of marriage which was one sided and which denies agency to the woman in a marital tie. The ability to make choices within marriage and on every aspect concerning it was a facet of human liberty and dignity which the Constitution protects. In depriving the woman of that ability and recognising it in the man alone, Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage was crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality and is violative of Article 14. [122]

(ii) The procedural law which had been enacted in Section 198 of the Code of Criminal Procedure 1973 re-enforces the stereotypes implicit in Section 497. Cognizance of an offence under Chapter XX of the Penal Code can be taken by a Court only upon a complaint of a person aggrieved. In the case of an offence punishable under Section 497, only the husband of the woman was deemed to be aggrieved by the offence. In any event, once the provisions of Section 497 were held to offend the fundamental rights, the procedure engrafted in Section 198 would cease to have any practical relevance. [123]

(iii) Article 15(3) encapsulates the notion of protective discrimination. The constitutional guarantee in Article 15(3) could not be employed in a manner that entrenches paternalistic notions of protection. This latter view of protection only serves to place women in a cage. Article 15(3) did not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15, nor Article 15(3) allow discrimination against women. Discrimination which was grounded in paternalistic and patriarchal notions could not claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was seduced into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption was then granted to the woman in order to protect her. The protection afforded to women under Section 497 highlights the lack of sexual agency that the Section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy were crucial to substantive equality. Hence, Article 15(3) did not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women. [134]

(iv) The state undoubtedly had a legitimate interest in regulating many aspects of marriage. That was the foundation on which the state did regulate rights, entitlements and duties, primarily bearing on its civil nature. Breach by one of the spouses of a legal norm may constitute a ground for dissolution or annulment. When the state enacts and enforces such legislation, it did so on the postulate that marriage as a social institution has a significant bearing on the social fabric. But in doing so, the state was equally governed by the norms of a liberal Constitution which emphasise dignity, equality and liberty as its cardinal values. The legitimate aims of the state may, it must be recognized, extend to imposing penal sanctions for certain acts within the framework of marriage. Physical and emotional abuse and domestic violence are illustrations of the need for legislative intervention. The Indian state had legitimately intervened in other situations such as by enacting anti dowry legislation or by creating offences dealing with the harassment of women for dowry within a marital relationship. The reason why this constitutes a legitimate recourse to the sovereign authority of the state to criminalize conduct was because the acts which the state proscribes were deleterious to human dignity. In criminalizing certain types of wrongdoing against women, the state intervenes to protect the fundamental rights of every woman to live with dignity. Consequently, it was important to underscore that this judgment did not question the authority and even the duty of the state to protect the fundamental rights of women from being trampled upon in unequal societal structures. Adultery as an offence does not fit that

paradigm. In criminalizing certain acts, Section 497 had proceeded on a hypothesis which is deeply offensive to the dignity of women. It was grounded in paternalism, solicitous of patriarchal values and subjugates the woman to a position where the law disregards her sexuality. The sexuality of a woman is part of her inviolable core. Neither the state nor the institution of marriage could disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalizing adultery disregards something which was basic to human identity. Sexuality was a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It had a constitutional foundation as intrinsic to autonomy. It was in this view of the matter that we have concluded that Section 497 was violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21. [147]

Indu Malhotra, J.

(i) A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, could not prosecute her husband for marital infidelity. This provision was therefore ex facie discriminatory against women, and violative of Article 14. Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary. [165.3]

(ii) Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens. Section 497 is a penal provision for the offence of adultery, an act which was committed consensually between two adults who have strayed out of the marital bond. Such a provision could not be considered to be a beneficial legislation covered by Article 15(3) of the Constitution. [167]

(iii) The right to privacy and personal liberty was, however, not an absolute one, it was subject to reasonable restrictions when legitimate public interest was involved. It was true that the boundaries of personal liberty are difficult to be identified in black and white, however, such liberty must accommodate public interest. The freedom to have a consensual sexual relationship outside marriage by a married person, did not warrant protection under Article 21. [168]

Disposition:
Disposed of

JUDGMENT

Dipak Misra, C.J.I. (For himself and A.M. Khanwilkar, J.)

1. The beauty of the Indian Constitution is that it includes 'I' 'you' and 'we'. Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of

fundamental rights. If we have to apply the parameters of a fundamental right, it is an expression of judicial sensibility which further enhances the beauty of the Constitution as conceived of. In such a situation, the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the space in an annex to the main building. That is the manifestation of concerned sensitivity. Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master. Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written. It is advisable to remember what John Stuart Mill had observed:

The legal subordination of one sex to another-is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect equality, admitting no power and privilege on the one side, nor disability on the other.[1]

We are commencing with the aforesaid prefatory note as we are adverting to the constitutional validity of Section 497 of the Indian Penal Code (IPC) and Section 198 of the Code of Criminal Procedure (CrPC).

2. At this juncture, it is necessary to state that though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. The progression in law and the perceptual shift compels the present to have a penetrating look to the past.

3. When we say so, we may not be understood that precedents are not to be treated as such and that in the excuse of perceptual shift, the binding nature of precedent should not be allowed to retain its status or allowed to be diluted. When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total

insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts. To explicate, despite conferring many a right on women within the parameters of progressive jurisprudence and expansive constitutional vision, the Court cannot conceive of women still being treated as a property of men, and secondly, where the delicate relationship between a husband and wife does not remain so, it is seemingly implausible to allow a criminal offence to enter and make a third party culpable.

4. We may presently state the nature of the *lis*.

5. The instant writ petition has been filed Under Article 32 of the Constitution of India challenging the validity of Section 497 Indian Penal Code. A three-Judge Bench, on the first occasion, taking note of the authorities in ***Yusuf Abdul Aziz v. State of Bombay*** MANU/SC/0124/1954 : 1954 SCR 930 : AIR 1954 SC 321, ***Sowmithri Vishnu v. Union of India and Anr.*** MANU/SC/0199/1985 : (1985) Supp SCC 137 : AIR 1985 SC 1618, ***V. Revathi v. Union of India and Ors.*** MANU/SC/0562/1988 : (1988)2 SCC 72 and ***W. Kalyani v. State through Inspector of Police and Anr.*** MANU/SC/1455/2011 : (2012) 1 SCC 358 and appreciating the submissions advanced by the learned Counsel for the Petitioner, felt the necessity to have a re-look at the constitutionality of the provision. At that juncture, the Court noted that:

Prima facie, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, *prima facie*, appears to be quite archaic. When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice.

That is how the matter has been placed before us.

6. At this stage, one aspect needs to be noted. At the time of initial hearing before the three-Judge Bench, the decision in ***Yusuf Abdul Aziz*** (supra) was cited and the cited Law Report reflected that the judgment was delivered by four learned Judges and later on, it was noticed, as is reflectible from the Supreme Court Reports, that the decision was rendered by a Constitution Bench comprising of five Judges of this Court.

7. The said factual discovery will not detain us any further. In ***Yusuf Abdul Aziz*** (supra), the Court was dealing with the controversy that had travelled to this Court while dealing with a different fact situation. In the said case, the question arose whether Section 497 contravened Articles 14 and 15 of the Constitution of India. In the said case, the Appellant was being prosecuted for adultery Under Section 497 Indian Penal Code. As soon as the complaint was filed, the husband applied to the High Court of Bombay to determine the constitutional question Under Article 228 of the Constitution. The Constitution Bench referring to Section 497 held thus:

3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor.

The last sentence in Section 497 prohibits this. It runs--

"In such case the wife shall not be punishable as an abettor." It is said that this offends Articles 14 and 15.

The portion of Article 15 on which the Appellant relies is this:

The State shall not discriminate against any citizen on grounds only of... sex.

But what he overlooks is that that is subject to Clause (3) which runs--

Nothing in this Article shall prevent the State from making any special provision for women.....

The provision complained of is a special provision and it is made for women, therefore it is saved by Clause (3).

4. It was argued that Clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited.

5. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned Clause in Section 497 of the Indian Penal Code.

6. The Appellant is not a citizen of India. It was argued that he could not invoke Articles 14 and 15 for that reason. The High Court held otherwise. It is not necessary for us to decide this question in view of our decision on the other issue.

On a reading of the aforesaid passages, it is manifest that the Court treated the provision to be a special provision made for women and, therefore, saved by Clause (3) of Article 15. Thus, the Court proceeded on the foundation of affirmative action.

8. In this context, we may refer to the observation made by the Constitution Bench in ***Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.*** MANU/SC/1069/2004 : (2005) 2 SCC 673 while making a reference to a larger Bench. The said order reads thus:

12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms:

(*1*) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

(*2*) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(*3*) The above Rules are subject to two exceptions: (i) the abovesaid Rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the Rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh*[2] and *Hansoli Devi*[3].

In the light of the aforesaid order, it was necessary to list the matter before a Constitution Bench consisting of five Judges. As noted earlier, considering the manner in which we intend to deal with the matter, it is not necessary to refer to a larger Bench.

9. Sections 497 and 498 of Indian Penal Code read thus:

Section 497: Adultery

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Section 498: Enticing or taking away or detaining with criminal intent a married woman

Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

10. Section 198 of Code of Criminal Procedure provides for prosecution for offences against marriage. Section 198 is reproduced below:

198. Prosecution for offences against marriage.--(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that-

(a) Where such person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of Sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable Under Section 494 or Section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister 2, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

(2) For the purposes of Sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable Under Section 497 or Section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under Clause (a) of the proviso to Sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in Clause (b) of the proviso to Sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he

has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of Sub-section (4), and any document purporting to be a certificate required by that Sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence Under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under 3 [eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this Section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.

11. On a perusal of the aforesaid provision, it is clear that the husband of the woman has been treated to be a person aggrieved for the offences punishable Under Sections 497 and 498 of the Indian Penal Code. The rest of the proviso carves out an exception as to who is entitled to file a complaint when the husband is absent. It may be noted that the offence is non-cognizable.

12. The three-Judge Bench, while referring the matter, had briefly dwelled upon the impact of the provision. To appreciate the constitutional validity, first, we shall deal with the earlier pronouncements and the principles enunciated therein and how we can have a different perspective of such provisions. We have already referred to what has been stated in ***Yusuf Abdul Aziz*** (supra).

13. In ***Sowmithri Vishnu*** (supra), a petition preferred Under Article 32 of the Constitution challenged the validity of Section 497 Indian Penal Code. We do not intend to advert to the factual matrix. It was contended before the three-Judge Bench that Section 497 confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery; that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and that Section 497 does not take in cases where the husband has sexual relations with an unmarried woman with the result that husbands have a free licence under the law to have extramarital relationships with unmarried women. That apart, the submission was advanced that Section 497 is a flagrant instance of 'gender discrimination', legislative despotism' and 'male chauvinism'. At first blush, it may appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the Section is a kind of "romantic paternalism" which stems from the assumption that women, like chattels, are the property of men.

14. The Court referred to the submissions and held thus:

...The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence

of adultery. Were such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. For example, an argument could be advanced as to why the offence of robbery should be punishable with imprisonment for ten years Under Section 392 of the Penal Code but the offence of adultery should be punishable with a sentence of five years only: "Breaking a matrimonial home is no less serious a crime than breaking open a house." Such arguments go to the policy of the law, not to its constitutionality, unless, while implementing the policy, any provision of the Constitution is infringed. We cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the Legislature to consider whether Section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone....

Proceeding further, the three-Judge Bench held that the offence of adultery as defined in that Section can only be committed by a man, not by a woman. Indeed, the Section expressly provides that the wife shall not be punishable even as an abettor. No grievance can then be made that the Section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, the same point is reverted to; who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute.

15. The Court further held:

...Since Section 497 does not contain a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the Section is said to be bad. Counsel is right that Section 497 does not contain a provision for hearing the married woman with whom the Accused is alleged to have committed adultery. But, that does not justify the proposition that she is not entitled to be heard at the trial. We have no doubt that if the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. There is nothing, either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected, directly and immediately, by the decision of the court. In fact, instances are not unknown in criminal law where, though the prosecution is in the charge of the Public Prosecutor, the private complainant is given permission to oversee the proceedings. One step more, and the wife could be allowed a hearing before an adverse finding is recorded that, as alleged by her husband, the Accused had committed adultery with her. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in Section 497 cannot render that Section unconstitutional as violating Article 21.

After so stating, the Court placed reliance on ***Yusuf Abdul Aziz*** (supra) and held that the same does not offend Articles 14 and 15 of the Constitution and opined that the stability of marriages is not an ideal to be scorned. Being of this view, the Court dismissed the petition.

16. In ***V. Revathi v. Union of India and Ors.*** MANU/SC/0562/1988 : (1988) 2 SCC 72, the Court analysed the design of the provision and ruled:

...Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus both the husband and the wife are disabled from striking each other with the weapon of criminal law. The Petitioner wife contends that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband.....

It placed heavy reliance on the three-Judge Bench in ***Sowmithri Vishnu*** (supra) and proceeded to state that the community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. It further went on to say that it does not arm the two spouses to hit each other with the weapon of criminal law. That is why, neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination based on sex. While the outsider who violates the sanctity of the matrimonial home is punished, a rider has been added that if the outsider is a woman, she is not punished. There is, thus, reverse discrimination in "favour" of the woman rather than "against" her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus, there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis, the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus, no discrimination has been practised in circumscribing the scope of Section 198(2) Code of Criminal Procedure and fashioning it in such a manner that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer. Expressing this view, the Court held that the provision is not vulnerable to the charge of hostile discrimination.

17. In ***W. Kalyani v. State Thro' Inspector of Police and Anr.*** MANU/SC/1455/2011 : (2012) 1 SCC 358, the Court held:

10. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the Section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the Section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the Appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence.

Be it noted, the issue of constitutional validity did not arise in the said case.

18. At this juncture, we think it seemly to state that we are only going to deal with the constitutional validity of Section 497 Indian Penal Code and Section 198 Code of Criminal Procedure. The learned Counsel for the Petitioner submits that the provision by its very nature is arbitrary and invites the frown of Article 14 of the Constitution. In ***Shayara Bano v. Union of India and Ors.*** MANU/SC/1031/2017 : (2017) 9 SCC 1, the majority speaking through Nariman, J., ruled thus:

60. Hard as we tried, it is difficult to discover any ratio in this judgment, as one part of the judgment contradicts another part. If one particular statutory enactment is already under challenge, there is no reason why other similar enactments which were also challenged should not have been disposed of by this Court. Quite apart from the above, it is a little difficult to appreciate such declination in the light of Prem Chand Garg (supra). This judgment, therefore, to the extent that it is contrary to at least two Constitution 346 Bench decisions cannot possibly be said to be good law.

61. It is at this point that it is necessary to see whether a fundamental right has been violated by the 1937 Act insofar as it seeks to enforce Triple Talaq as a Rule of law in the Courts in India.

62. Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts-(1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the U.K., and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in State of U.P. v. Deoman Upadhyaya, MANU/SC/0060/1960 : (1961) 1 SCR 14 at 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the "discrimination" aspect of Article 14, and evolved a Rule by which subjects could be classified. If 347 the classification was "intelligible" having regard to the object sought to be achieved, it would pass muster Under Article 14's antidiscrimination aspect. Again, Subba Rao, J., dissenting, in Lachhman Das v. State of Punjab, MANU/SC/0032/1962 : (1963) 2 SCR 353 at 395, warned that:

50....Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content.

He referred to the doctrine of classification as a "subsidiary rule" evolved by courts to give practical content to the said Article.

63. In the pre-1974 era, the judgments of this Court did refer to the "rule of law" or "positive" aspect of Article 14, the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground. In S.G. Jaisinghani v. Union of India, MANU/SC/0361/1967 : (1967) 2 SCR 703, this Court held:

In this context it is important to emphasize that the absence of arbitrary power is the first essential of the Rule of law upon which our whole constitutional system is based. In a system governed by Rule of law, 348 discretion, when conferred upon executive authorities, must be confined within

clearly defined limits. The Rule of law from this point of view means that decisions should be made by the application of known principles and Rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any Rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey--"Law of the Constitution"--10th Edn., Introduction CX). "Law has reached its finest moments", stated Douglas, J. in United States v. Wunderlick [342 US 98],

9....when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered". It is in this sense that the Rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes [(1770) 4 Burr. 2528 at 2539],

...means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful....

This was in the context of service Rules being seniority rules, which applied to the Income Tax Department, being held to be violative of Article 14 of the Constitution of India.

19. Thereafter, our learned brother referred to the authorities in ***State of Mysore v. S.R. Jayaram*** MANU/SC/0362/1967 : (1968) 1 SCR 349, ***Indira Nehru Gandhi v. Raj Narain*** MANU/SC/0304/1975 : (1975) Supp SCC 1, ***E.P. Royappa v. State of Tamil Nadu*** MANU/SC/0380/1973 : (1974) 4 SCC 3, ***Maneka Gandhi v. Union of India*** MANU/SC/0133/1978 : (1978) 1 SCC 248, ***A.L. Kalra v. Project and Equipment Corporation of India Ltd.*** MANU/SC/0259/1984 : (1984) 3 SCC 316, ***Ajay Hasia v. Khalid Mujib Sehravardi*** MANU/SC/0498/1980 : (1981) 1 SCC 722, ***K.R. Lakshmanan v. State of T.N.*** MANU/SC/0309/1996 : (1996) 2 SCC 226 and two other Constitution Bench judgments in ***Mithu v. State of Punjab*** MANU/SC/0065/1983 : (1983) 2 SCC 277 and ***Sunil Batra v. Delhi Administration*** MANU/SC/0184/1978 : (1978) 4 SCC 494 and, eventually, came to hold thus:

It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".

And again:

...The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.

20. We respectfully concur with the said view.

21. In ***Yusuf Abdul Aziz*** (supra), the Court understood the protection of women as not discriminatory but as being an affirmative provision under Clause (3) of Article 15 of the Constitution. We intend to take the path of expanded horizon as gender justice has been expanded by this Court.

22. We may now proceed to test the provision on the touchstone of the aforesaid principles. On a reading of the provision, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted.

23. As we notice, the provision treats a married woman as a property of the husband. It is interesting to note that Section 497 Indian Penal Code does not bring within its purview an extra marital relationship with an unmarried woman or a widow. The dictionary meaning of "adultery" is that a married person commits adultery if he has sex with a woman with whom he has not entered into wedlock. As per Black's Law Dictionary, 'adultery' is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 Indian Penal Code. Section 198 Code of Criminal Procedure deals with a "person aggrieved". Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed Under Section 497 Indian Penal Code and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary.

24. Presently, we shall address the issue against the backdrop of Article 21 of the Constitution. For the said purpose, it is necessary to devote some space with regard to the dignity of women and the concept of gender equality.

25. In ***Arun Kumar Agrawal and Anr. v. National Insurance Co. Limited and Ors.*** MANU/SC/0507/2010 : (2010) 9 SCC 218, the issue related to the criteria for determination of compensation payable to the dependents of a woman who died in road accident. She did not have a regular income. Singhvi, J. rejected the stand relating to determination of compensation by

comparing a house wife to that of a house keeper or a servant or an employee who works for a fixed period. The learned Judge thought it unjust, unfair and inappropriate. In that context, the learned Judge stated:

26. In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

26. Ganguly, J., in his concurring opinion, referred to the Australian Family Property Law and opined that the said law had adopted a very gender sensitive approach. The learned Judge reproduced:

the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent.

27. In ***State of Madhya Pradesh v. Madanlal*** MANU/SC/0689/2015 : (2015) 7 SCC 681, the Court held:

Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error.

28. In ***Pawan Kumar v. State of Himachal Pradesh*** MANU/SC/0535/2017 : (2017) 7 SCC 780, the Court, dealing with the concept of equality and dignity of a woman, observed:

47. ...in a civilized society eve-teasing is causing harassment to women in educational institutions, public places, parks, railways stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated. A woman has her own space as a man has. She enjoys as much equality Under Article 14 of the Constitution as a man does. The right to live with dignity as guaranteed Under Article 21 of the Constitution cannot be violated by indulging in obnoxious act of eve-teasing. It affects the fundamental concept of gender sensitivity and justice and the rights of a woman Under Article 14 of the Constitution. That apart it creates an

incurable dent in the right of a woman which she has Under Article 15 of the Constitution. One is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom. It has to be kept in mind that she has a right to life and entitled to love according to her choice. She has an individual choice which has been legally recognized. It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject.

48. In a civilized society male chauvinism has no room. The Constitution of India confers the affirmative rights on women and the said rights are perceptible from Article 15 of the Constitution. When the right is conferred under the Constitution, it has to be understood that there is no condescendation. A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law. Equality has to be regarded as the summum bonum of the constitutional principle in this context.

29. Lord Keith in ***R v. R*** MANU/UKHL/0007/1991 : [1991] 4 All ER 481 at p. 484 declared:

marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.

30. Lord Denning[4] states:

A wife is no longer her husband's chattel. She is beginning to be regarded by the laws as a partner in all affairs which are their common concern.

31. In ***Shamima Farooqui v. Shahid Khan*** MANU/SC/0380/2015 : (2015) 5 SCC 705, the Court ruled:

Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniac ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority.

And again:

Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger-an outsider. That is the truth in essentiality.

32. In ***Voluntary Health Association of Punjab v. Union of India*** MANU/SC/0205/2013 : (2013) 4 SCC 1, one of us (Dipak Misra, J.), in his concurring opinion, stated that women have to be regarded as equal partners in the lives of men and it has to be borne in mind that they have equal role in the society, that is, in thinking, participating and leadership. The issue related to female foeticide and it was stated thus:

21. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and

social science abhors it. Henrik Ibsen emphasised on the individualism of woman. John Milton treated her to be the best of all God's work. In this context, it will be appropriate to quote a few lines from *Democracy in America* by Alexis de Tocqueville:

If I were asked ... to what the singular prosperity and growing strength of that people [Americans] ought mainly to be attributed, I should reply: To the superiority of their women.

22. At this stage, I may with profit reproduce two paragraphs from *Ajit Savant Majagvai* v. *State of Karnataka* MANU/SC/0822/1997 : (1997) 7 SCC 110: (SCC pp. 113-14, paras 3 & 4)

3. Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times. Even in sarcasm, they have not crossed the literary limit and have adhered to a particular standard of nobility of language. Even when a member of her own species, Madame De Stael, remarked 'I am glad that I am not a man; for then I should have to marry a woman', there was wit in it. When Shakespeare wrote, 'Age cannot wither her; nor custom stale, her infinite variety', there again was wit. Notwithstanding that these writers have cried hoarse for respect for 'woman', notwithstanding that Schiller said 'Honour women! They entwine and weave heavenly roses in our earthly life' and notwithstanding that the Mahabharata mentioned her as the source of salvation, crime against 'woman' continues to rise and has, today undoubtedly, risen to alarming proportions.

4. *It is unfortunate that in an age where people are described as civilised, crime against 'female' is committed even when the child is in the womb as the 'female' foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as a daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable. To torment a wife can only be described as the most hated and derisive act of a human being.*

And again:

23. In *Madhu Kishwar* v. *State of Bihar* MANU/SC/0468/1996 : (1996) 5 SCC 125 this Court had stated that Indian women have suffered and are suffering discrimination in silence.

28.... Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.
(SCC p. 148, para 28)

24. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility:

Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death.

25. Long back, Charles Fourier had stated:

The extension of women's rights is the basic principle of all social progress.

26. Recapitulating from the past, I may refer to certain sayings in the *Smritis* which put women in an elevated position. This Court in *Nikku Ram* case had already reproduced the first line of the shloka. The second line of the same which is also significant is as follows:

"यत्र तास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः"

Yatra tastu na pujyante sarvastatraphalah kriyah

A free translation of the aforesaid is reproduced below:

All the actions become unproductive in a place, where they are not treated with proper respect and dignity.

27. Another wise man of the past had his own way of putting it:

"भर्तृभ्रातृ पितृजाति श्रवश्रुश्वसुर देवरैः।
बन्धुभिश्च स्त्रियः पूज्या भूषणाच्छादनाशनैः।।"

Bhartr bhratr pitrijnati swasruswasuradevaraih Bandhubhisca striyah pujyah bhusnachhadanasnaih

A free translation of the aforesaid is as follows:

The women are to be respected equally on a par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour.

28. Yet again, the sagacity got reflected in following lines:

"भर्तृभ्रातृ पितृजाति श्रवश्रुश्वसुर देवरैः।
बन्धुभिश्च स्त्रियः पूज्या भूषणाच्छादनाशनैः।।"

Atulam yatra tattejah sarvadevasarirajam Ekastham tadabhunnari vyaptalokatrayam tvisa

A free translation of the aforesaid is reproduced below:

The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman.

29. From the past, I travel to the present and respectfully notice what Lord Denning had to say about the equality of women and their role in the society:

A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom--to develop her personality to the full as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

33. In ***Charu Khurana and Ors. v. Union of India and Ors.*** MANU/SC/1044/2014 : (2015) 1 SCC 192, speaking about the dignity of women, the Court held:

33. ... Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the mansion of dignity, for it is a highly cherished value. Clause (j) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to all citizens and see that they are not deprived of by reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

34. In ***Shakti Vahini v. Union of India and Ors.*** MANU/SC/0291/2018 : (2018) 7 SCC 192, the lis was in a different context. The Court reproduced a passage from Joseph J. Ellis which is also relevant for the present purpose. It reads:

We don't live in a world in which there exists a single definition of honour anymore, and it's a fool that hangs onto the traditional standards and hopes that the world will come around him.

35. In the said case, a contention was advanced that the existence of a woman is entirely dependent on the male view of the reputation of the family, the community and the milieu. The Court, in that context, observed:

5. ...The collective behaves like a patriarchal monarch which treats the wives, sisters and daughters subordinate, even servile or self-sacrificing, persons moving in physical frame having no individual autonomy, desire and identity. The concept of status is accentuated by the male members of the community and a sense of masculine dominance becomes the sole governing factor of perceptive honour.

36. We have referred to the aforesaid as we are of the view that there cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. That apart, there cannot be a community exposition of masculine dominance.

37. Having stated about the dignity of a woman, in the context of autonomy, desire, choice and identity, it is obligatory to refer to the recent larger Bench decision in ***K.S. Puttaswamy and Anr. v. Union of India and Ors.*** MANU/SC/1044/2017 : (2017) 10 SCC 1 which, while laying down that privacy is a facet of Article 21 of the Constitution, lays immense stress on the dignity of an individual. In the said judgment, it has been held:

108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

xxx xxxx xxx

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence..."

xxx xxx xxx

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.

xxx xxx xxx

525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual. 359 The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy

over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

38. In this context, we may profitably refer to ***National Legal Services Authority v. Union of India and Ors.*** MANU/SC/0309/2014 : (2014) 5 SCC 438 wherein A.K. Sikri, J., in his concurring opinion, emphasizing on the concept of dignity, has opined:

The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.

39. Very recently, in ***Common Cause (A Registered Society) v. Union of India and Anr.*** MANU/SC/0232/2018 : (2018) 5 SCC 1, one of us has stated:

... Human dignity is beyond definition. It may at times defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism. But what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling, and, as stated earlier, it deserves respect even when the person is dead and described as a "body"....

And again:

The concept and value of dignity requires further elaboration since we are treating it as an inextricable facet of right to life that respects all human rights that a person enjoys. Life is basically self-assertion. In the life of a person, conflict and dilemma are expected to be normal phenomena. Oliver Wendell Holmes, in one of his addresses, quoted a line from a Latin poet who had uttered the message, 'Death plucks my ear and says, Live-I am coming'. That is the significance of living. But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about

an innovative method of cure? To put it differently, should he/she be "guinea pig for some kind of experiment? The answer has to be an emphatic "Not because such futile waiting mars the pristine concept of life, corrodes 139 the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy.

In Mehmood Nayyar Azam v. State of Chhattisgarh and Ors. a two-Judge Bench held thus:

1....Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegragably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence"

40. In the said judgment, A.K. Sikri, J. reproduced a passage from Professor Upendra Baxi's lecture in First Justice H.R. Khanna Memorial Lecture which reads as follows:

I still need to say that the idea of dignity is a metaethical one, that is it marks and maps a difficult terrain of what it may mean to say being 'human' and remaining 'human', or put another way the relationship between 'self', 'others', and 'society'. In this formulation the word 'respect' is the keyword: dignity is respect for an individual person based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. Respect for dignity thus conceived is empowering overall and not just because it, even if importantly, sets constraints state, law, and Regulations.

41. From the aforesaid analysis, it is discernible that the Court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. But, Section 497 Indian Penal Code effectively does the same by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, we have no hesitation in holding that the same offends Article 21 of the Constitution.

42. Another aspect needs to be addressed. The question we intend to pose is whether adultery should be treated as a criminal offence. Even assuming that the new definition of adultery encapsules within its scope sexual intercourse with an unmarried woman or a widow, adultery is basically associated with the institution of marriage. There is no denial of the fact that marriage is treated as a social institution and regard being had to various aspects that social history has witnessed in this country, the Parliament has always made efforts to maintain the rights of women.

For instance, Section 498-A Indian Penal Code deals with husband or relative of husband of a woman subjecting her to cruelty. The Parliament has also brought in the Protection of Women from Domestic Violence Act, 2005. This enactment protects women. It also enters into the matrimonial sphere. The offences under the provisions of the said enactment are different from the provision that has been conceived of Under Section 497 Indian Penal Code or, for that matter, concerning bringing of adultery within the net of a criminal offence. There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. But the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social licence that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain their loyalty. We are not commenting on any kind of ideal situation but, in fact, focusing on whether the act of adultery should be treated as a criminal offence. In this context, we are reminded of what Edmund Burke, a famous thinker, had said, "a good legislation should be fit and equitable so that it can have a right to command obedience". Burke would like to put it in two compartments, namely, 'equity' and 'utility'. If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life.

43. Dealing with the concept of crime, it has been stated in "Principles of Criminal Liability"[5] thus:

1. *Definition of crime*.--There is no satisfactory definition of crime which will embrace the many acts and omissions which are criminal, and which will at the same time exclude all those acts and omissions which are not. Ordinarily a crime is a wrong which affects the security or well-being of the public generally so that the public has an interest in its suppression. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. It is, however, possible to instance many crimes which exhibit neither of the foregoing characteristics. An act may be made criminal by Parliament simply because it is criminal process, rather than civil, which offers the more effective means of controlling the conduct in question.

44. In *Kenny's Outlines of Criminal Law*, 19th Edn., 1966 by J.W. Cecil Turner, it has been stated that:

There is indeed no fundamental or inherent difference between a crime and a tort. Any conduct which harms an individual to some extent harms society, since society is made up of individuals; and therefore although it is true to say of crime that is an offence against society, this does not distinguish crime from tort. The difference is one of degree only, and the early history of the common law shows how words which now suggest a real distinction began rather as symbols of emotion than as terms of scientific classification.

And again:

So long as crimes continue (as would seem inevitable) to be created by government policy the nature of crime will elude true definition. Nevertheless it is a broadly accurate description to say that nearly every instance of crime presents all of the three following characteristics: (*1*) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (*2*) that among the measures of prevention selected is the threat of punishment; (*3*) that

legal proceedings of a special kind are employed to decide whether the person Accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so.

45. Stephen defines a "crime" thus:

A crime is an unlawful act or default which is an offence against the public, rendering the person guilty of such act or default liable to legal punishment. The process by which such person is punished for the unlawful act or default is carried on in the name of the Crown; although any private person, in the absence of statutory provision to the contrary, may commence a criminal prosecution. Criminal proceedings were formerly called pleas of the Crown, because the King, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community. Wherefore he is, in all cases, the proper prosecutor for every public offence.

46. Blackstone, while discussing the general nature of crime, has defined crime thus:

A crime, or misdemeanour, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours; which, properly speaking, are mere synonym terms: though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanours" only.

47. In this regard, we may reproduce a couple of paragraphs from ***Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly*** MANU/SC/0439/1986 : (1986) 3 SCC 156. They read as under:

25. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have nourished, reached their peak and passed away. In the year 1625, Carew, C.J., while delivering the opinion of the House of Lords in Re the Earldom of Oxford in a dispute relating to the descent of that Earldom, said:

... and yet time hath his revolution, there must be a period and an end of all temporal things, finis rerum, an end of names and dignities, and whatsoever is terrene....

The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from "The Rock" said:

O perpetual revolution of configured stars,

O perpetual recurrence of determined seasons,

O world of spring and autumn, birth and dying;

The endless cycle of idea and action, Endless invention, endless experiment.

26. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said: "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." *The law must, therefore, in a changing society march in tune with the changed ideas and ideologies.*

48. Reproducing the same, the Court in ***Common Cause (A Registered Society)*** (supra), has observed:

160. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognize such dynamism.

49. We have referred to the aforesaid theories and authorities to understand whether adultery that enters into the matrimonial realm should be treated as a criminal offence. There can be many a situation and we do not intend to get into the same. Suffice it to say, it is different from an offence committed Under Section 498-A or any violation of the Protection of Women from Domestic Violence Act, 2005 or, for that matter, the protection conceived of Under Section 125 of the Code of Criminal Procedure or Sections 306 or 304B or 494 Indian Penal Code. These offences are meant to sub-serve various other purposes relating to a matrimonial relationship and extinction of life of a married woman during subsistence of marriage. Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm. Under the existing provision, the husband is treated as an aggrieved person and the wife is ignored as a victim. Presently, the provision is reflective of a tripartite labyrinth. A situation may be conceived of where equality of status and the right to file a case may be conferred on the wife. In either situation, the whole scenario is extremely private. It stands in contradistinction to the demand for dowry, domestic violence, sending someone to jail for non-grant of maintenance or filing a complaint for second marriage. Adultery stands on a different footing from the aforesaid offences. We are absolutely conscious that the Parliament has the law making power. We make it very clear that we are not making law or legislating but only stating that a particular act, i.e., adultery does not fit into the concept of a crime. We may repeat at the cost of repetition that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to be left as a ground for divorce. For any other purpose as the Parliament has perceived or may, at any time, perceive, to treat it as a criminal offence will offend the two facets of Article 21 of the Constitution, namely, dignity of husband and wife, as the case may be, and the privacy attached to a relationship between the two. Let it be clearly stated, by no stretch of imagination, one can say, that Section 498-A or any other provision, as mentioned hereinbefore, also enters into the private realm of matrimonial relationship. In case of the said offences, there is no third party involved. It is the husband and his relatives. There has been correct imposition by law not to demand dowry

or to treat women with cruelty so as to compel her to commit suicide. The said activities deserve to be punished and the law has rightly provided so.

50. In this regard, we may also note how the extramarital relationship cannot be treated as an act for commission of an offence Under Section 306 Indian Penal Code. In ***Pinakin Mahipatray Rawal v. State of Gujarat*** MANU/SC/0916/2013 : (2013) 10 SCC 48, the Court has held:

27. Section 306 refers to abetment of suicide which says that if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment for a term which may extend to 10 years and shall also be liable to fine. The action for committing suicide is also on account of mental disturbance caused by mental and physical cruelty. To constitute an offence Under Section 306, the prosecution has to establish that a person has committed suicide and the suicide was abetted by the Accused. *The prosecution has to establish beyond reasonable doubt that the deceased committed suicide and the Accused abetted the commission of suicide. But for the alleged extramarital relationship, which if proved, could be illegal and immoral, nothing has been brought out by the prosecution to show that the Accused had provoked, incited or induced the wife to commit suicide.*

51. In the context of Section 498-A, the Court, in ***Ghusabhai Raisangbhai Chorasiya v. State of Gujarat*** MANU/SC/0167/2015 : (2015) 11 SCC 753, has opined that even if the illicit relationship is proven, unless some other acceptable evidence is brought on record to establish such high degree of mental cruelty, the Explanation (a) to Section 498-A Indian Penal Code, which includes cruelty to drive the woman to commit suicide, would not be attracted. The relevant passage from the said authority is extracted below:

21. ...True it is, there is some evidence about the illicit relationship and even if the same is proven, we are of the considered opinion that cruelty, as envisaged under the first limb of Section 498-A Indian Penal Code would not get attracted. It would be difficult to hold that the mental cruelty was of such a degree that it would drive the wife to commit suicide. Mere extra-marital relationship, even if proved, would be illegal and immoral, as has been said in *Pinakin Mahipatray Rawal*, but it would take a different character if the prosecution brings some evidence on record to show that the Accused had conducted in such a manner to drive the wife to commit suicide. In the instant case, the Accused may have been involved in an illicit relationship with Appellant 4, but in the absence of some other acceptable evidence on record that can establish such high degree of mental cruelty, the Explanation to Section 498-A Indian Penal Code which includes cruelty to drive a woman to commit suicide, would not be attracted.

52. The purpose of referring to the aforesaid authorities is to highlight how adultery has not been granted separate exclusive space in the context of Sections 306 and 498-A Indian Penal Code.

53. In case of adultery, the law expects the parties to remain loyal and maintain fidelity throughout and also makes the adulterer the culprit. This expectation by law is a command which gets into the core of privacy. That apart, it is a discriminatory command and also a socio-moral one. Two individuals may part on the said ground but to attach criminality to the same is inapposite.

54. We may also usefully note here that adultery as a crime is no more prevalent in People's Republic of China, Japan, Australia, Brazil and many western European countries. The diversity of culture in those countries can be judicially taken note of. Non-criminalisation of adultery, apart from what we have stated hereinabove, can be proved from certain other facets. When the parties to a marriage lose their moral commitment of the relationship, it creates a dent in the marriage and it will depend upon the parties how they deal with the situation. Some may exonerate and live together and some may seek divorce. It is absolutely a matter of privacy at its pinnacle. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said 'act' should be made a criminal offence especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness.

55. In this regard, another aspect deserves to be noted. The jurisprudence in England, which to a large extent, is adopted by this country has never regarded adultery as a crime except for a period of ten years in the reign of Puritanical Oliver Cromwell. As we see the international perspective, most of the countries have abolished adultery as a crime. We have already ascribed when such an act is treated as a crime and how it faces the frown of Articles 14 and 21 of the Constitution. Thinking of adultery from the point of view of criminality would be a retrograde step. This Court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.

56. As we have held that Section 497 Indian Penal Code is unconstitutional and adultery should not be treated as an offence, it is appropriate to declare Section 198 Code of Criminal Procedure which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision has to pave the same path.

57. In view of the foregoing analysis, the decisions in ***Sowmithri Vishnu*** (supra) and ***V. Revathi*** (supra) stand overruled and any other judgment following precedents also stands overruled.

58. Consequently, the writ petition is allowed to the extent indicated hereinbefore.

Rohinton Fali Nariman, J. (Concurring)

59. What is before us in this writ petition is the constitutional validity of an archaic provision of the Indian Penal Code ("IPC"), namely, Section 497, which makes adultery a crime. Section 497

appears in Chapter XX of the Indian Penal Code, which deals with offences relating to marriage. Section 497 reads as follows:

497. Adultery.--Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

The offence of bigamy, which is contained in Section 494 in the same Chapter, is punishable with a longer jail term which may extend to 7 years, but in this case, the husband or the wife, as the case may be, is liable to be prosecuted and convicted. Section 494 reads as follows:

494. Marrying again during lifetime of husband or wife.--Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.--This Section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

It will be noticed that the crime of adultery punishes only a third-party male offender as against the crime of bigamy, which punishes the bigamist, be it a man or a woman. What is therefore punished as 'adultery' is not 'adultery' *per se* but the proprietary interest of a married man in his wife.

Almost all ancient religions/civilizations punished the sin of adultery. In one of the oldest, namely, in Hammurabi's Code, death by drowning was prescribed for the sin of adultery, be it either by the husband or the wife. In Roman law, it was not a crime against the wife for a husband to have sex with a slave or an unmarried woman. The Roman *lex iulia de adulteriis coercendis* of 17 B.C., properly so named after Emperor Augustus' daughter, Julia, punished Julia for adultery with banishment. Consequently, in the case of adulterers generally, both guilty parties were sent to be punished on different islands, and part of their property was confiscated.

60. In Judaism, which again is an ancient religion, the Ten Commandments delivered by the Lord to Moses on Mount Sinai contains the Seventh Commandment-"Thou shalt not commit adultery"-set out in the book of Exodus in the Old Testament.[6] Equally, since the wages of sin is death, the book of Leviticus in the Old Testament prescribes the death penalty for the adulterer as well as the adulteress.[7]

61. In Christianity, we find adultery being condemned as immoral and a sin for both men and women, as is evidenced by St. Paul's letter to the Corinthians.[8] Jesus himself stated that a man incurs sin the moment he looks at a woman with lustful intent.[9] However, when it came to punishing a woman for adultery, by stoning to death in accordance with the ancient Jewish law, Jesus uttered the famous words, "let him who has not sinned, cast the first stone."[10]

62. In this country as well, in the Manusmriti, Chapters 4.134[11] and 8.352[12] prescribes punishment for those who are addicted to intercourse with wives of other men by punishments which cause terror, followed by banishment. The Dharmasutras speak with different voices. In the Apastamba Dharmasutra, adultery is punishable as a crime, the punishment depending upon the class or caste of the man and the woman.[13] However, in the Gautama Dharmasutra, if a man commits adultery, he should observe a life of chastity for two years; and if he does so with the wife of a vedic scholar, for three years.[14]

63. In Islam, in An-Nur, namely, Chapter 24 of the Qur'an, Verses 2 and 6 to 9 read as follows:

2. The adulteress and the adulterer, flog each of them (with) a hundred stripes, and let not pity for them detain you from obedience to Allah, if you believe in Allah and the Last Day, and let a party of believers witness their chastisement.[15]

xxx xxx xxx

6. And those who Accuse their wives and have no witnesses except themselves, let one of them testify four times, bearing Allah to witness, that he is of those who speak the truth.

7. And the fifth (time) that the curse of Allah be on him, if he is of those who lie.

8. And it shall avert the chastisement from her, if she testify four times, bearing Allah to witness, that he is of those who lie.

9. And the fifth (time) that the wrath of Allah to be on her, if he is of those who speak the truth.[16]

What is interesting to note is that if there are no witnesses other than the husband or the wife, and the husband testifies four times that his wife has committed adultery, which is met by the wife testifying four times that she has not, then earthly punishment is averted. The wrath of Allah alone will be on the head of he or she who has given false testimony-which wrath will be felt only in life after death in the next world.

64. In sixth-century Anglo-Saxon England, the law created "elaborate tables of composition" which the offended husband could accept in lieu of blood vengeance. These tables were schemes for payment of compensation depending upon the degree of harm caused to the cuckolded husband. However, as Christianity spread in England, adultery became morally wrong and therefore, a sin, as well as a wrong against the husband. Post 1066, the Normans who took over, viewed adultery not as a crime against the State, but rather as an ecclesiastical offence dealt with by the Church. The common law of England prescribed an action in tort for loss of consortium based on the property interest a husband had in his wife. Thus, the action for conversation, which is

compensation or damages, usually represented a first step in obtaining divorce in medieval England. In fact, adultery was the only ground for divorce in seventeenth-century England, which had to be granted only by Parliament. Interestingly enough, it was only after King Charles I was beheaded in 1649, that adultery became a capital offence in Cromwell's Puritanical England in the year 1650, which was nullified as soon as King Charles II came back in what was known as the 'restoration of the monarchy'. It will be seen therefore, that in England, except for an eleven-year period when England was ruled by the Puritans, adultery was never considered to be a criminal offence. Adultery was only a tort for which damages were payable to the husband, given his proprietary interest in his wife.[17] This tort is adverted to by a 1904 judgment of the Supreme Court of the United States in **Charles A. Tinker v. Frederick L. Colwell**, MANU/USSC/0260/1904 : 193 US 473 (1904), as follows:

... We think the authorities show the husband had certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful....

The assault vi et armis is a fiction of law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honour, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children."[18]

We think that it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the idea that the act of the Defendant is a violation of the marital rights of the husband in the person of his wife, and so the act of the Defendant is an injury to the person and also to the property rights of the husband.[19]

To similar effect is the judgment in **Pritchard v. Pritchard and Sims**, MANU/UKWA/0081/1966 : [1966] 3 All E.R. 601, which reconfirmed the origins of adultery or criminal conversation as under:

In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, there existed side by side under the common law three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed adultery with her. ..... In the action for adultery known as criminal conversation, which dates from before the time of BRACTON, and consequently lay originally in trespass, the act of adultery itself was the cause of action and the damages punitive at large. It lay whether the adultery resulted in the husband's losing his wife's society and services or not. All three causes of action were based on the recognition accorded by the common law to the husband's propriety interest in the person of his wife, her services and earnings, and in the property which would have been hers had she been feme sole.[20]

65. In England, Section LIX of the Divorce and Matrimonial Causes Act, 1857 abolished the common law action for criminal conversation while retaining, by Section XXXIII of the same Act, the power to award the husband damages for adultery committed by the wife. This position continued right till 1923, when the Matrimonial Causes Act, 1923 made adultery a ground for divorce available to both spouses instead of only the husband. The right of a husband to claim damages for adultery was abolished very recently by the Law Reforms (Miscellaneous Provisions) Act, 1970.[21]

66. In the United States, however, Puritans who went to make a living in the American colonies, carried with them Cromwell's criminal law, thereby making adultery a capital offence. Strangely enough, this still continues in some of the States in the United States. The American Law Institute, however, has dropped the crime of adultery from its Model Penal Code as adultery statutes are in general vague, archaic, and sexist. None of the old reasons in support of such statutes, namely, the controlling of disease, the preventing of illegitimacy, and preserving the traditional family continue to exist as of today. It was also found that criminal adultery statutes were rarely enforced in the United States and were, therefore, referred to as "dead letter statutes". This, plus the potential abuses from such statutes continuing on the statute book, such as extortion, blackmail, coercion etc. were stated to be reasons for removing adultery as a crime in the Model Penal Code.[22]

67. When we come to India, Lord Macaulay, in his draft Penal Code, which was submitted to the Law Commissioners, refused to make adultery a penal offence. He reasoned as follows:

The following positions we consider as fully established: first, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever has recourse to the Courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in cases of adultery to the Courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider their wives as useful members of their small household, that they generally complain not of the wound given to their affections, not of the stain on their honor, but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English Courts is, it seems, the real gist of most proceedings for adultery in the Mofussil. The essence of the injury is considered by the sufferer as lying in the "per quod servitium amisit." Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

These things being established it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes-those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury."

xxx xxx xxx

These arguments have not satisfied us that adultery ought to be made punishable by law. We cannot admit that a Penal code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that because an act is not punished at all it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross in gratitude and insolence, deserves more severe reprehension than the man who aims a blow in a passion, or breaks a window in a frolic. Yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow creature from death may be a far worse man than the starving wretch who snatches and devours the rice. Yet we punish the latter for theft, and we do not punish the former for hard-heartedness.

xxx xxx xxx

There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial.[23]

68. However, when the Court Commissioners reviewed the Penal Code, they felt that it was important that adultery be made an offence. The reasons for so doing are set out as follows:

353. Having given mature consideration to the subject, we have, after some hesitation, come to the conclusion that it is not advisable to exclude this offence from the Code. We think the reasons for continuing to treat it as a subject for the cognizance of the criminal courts preponderate. We conceive that Colonel Sleeman is probably right in regarding the difficulty of proving the offence according to the requirement of the Mohammedan law of evidence, which demands an amount of positive proof that is scarcely ever to be had in such a case, as having some effect in deterring the Natives from prosecuting adulterers in our courts, although the Regulations allow of a conviction

upon strong presumption arising from circumstantial evidence. This difficulty, if it has had the effect supposed, will be removed, should the Code be adopted. Colonel Sleeman's representation of the actual consequences of the present system, which, while it recognizes the offence, renders it, in the opinion of the Natives, almost impossible to bring an offender to justice, it will be observed, coincides with and confirms practically Mr. Livingstone's view of the result to be expected when the law refuses to punish this offence. The injured party will do it for himself; great crimes, assassinations, poisonings, will be the consequence. The law here does not refuse, but it fails to punish the offence, says Colonel Sleeman, and poisonings are the consequence.

354. Colonel Sleeman thinks that the Commissioners have wrongly assumed that it is the lenity of the existing law that it is complained of by the Natives, and believes that they would be satisfied with a less punishment for the offence than the present law allows; viz. imprisonment for seven years, if it were certain to follow the offender. He proposes that the punishment of a man "convicted of seducing the wife of another" shall be imprisonment which may extend to seven years, or a fine payable to the husband or both imprisonment and fine. The punishment of a married woman "convicted of adultery" he would limit to imprisonment for two years. We are not aware whether or not he intends the difference in the terms used to be significant of a difference in the nature of the proof against the man and the woman respectively.

355. While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note Q, regarding the condition of a women of this country, in deference to it we would render the male offender alone liable to punishment. We would, however, put the parties Accused of adultery on trial together, and empower the Court, in the event of their conviction, to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine. By Mr. Livingstone's Code, the woman forfeits her "matrimonial gains", but is not liable to other punishment.

356. We would adopt Colonel Sleeman's suggestion as to the punishment of the male offender, limiting it to imprisonment not exceeding five years, instead of seven years allowed at present, and sanctioning the imposition of a fine payable to the husband as an alternative, or in addition.

357. The punishment prescribed by the Code of Louisiana is imprisonment not more than six months, or fine not exceeding 2,000 dollars, or both. By the French Code, the maximum term of imprisonment is two years, with fine in addition, which may amount to 2,000 francs.

358. If the offence of adultery is admitted into the Penal Code, there should be a provision in the Code of Procedure to restrict the right of prosecuting to the injured husband, agreeably to Section 2, Act II of 1845.[24]

These are some of the reasons that led to the enactment of Section 497, Indian Penal Code.

69. At this stage, it is important to note that by Section 199 of the Code of Criminal Procedure, 1898, it was only the husband who was to be deemed to be aggrieved by an offence punishable Under Section 497, Indian Penal Code. Thus, Section 199 stated:

199. Prosecution for adultery or enticing a married woman.--No Court shall take cognizance of an offence Under Section 497 or Section 498 of the Indian Penal Code (XLV of 1860), except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.

70. Even when this Code was replaced by the Code of Criminal Procedure ("CrPC"), 1973, Section 198 of the Code of Criminal Procedure, 1973 continued the same provision with a proviso that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf. The said Section reads as follows:

198. Prosecution for offences against marriage.--(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that--

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of Sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable Under Section 494 or Section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

(2) For the purposes of Sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable Under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under Clause (a) of the proviso to Sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared,

the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in Clause (b) of the proviso to Sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of Sub-section (4), and any document purporting to be a certificate required by that Sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence Under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this Section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.

At this stage, it is important to advert to some of the judgments of the High Courts and our Court. In **Yusuf Abdul Aziz v. State**, MANU/MH/0138/1951 : 1952 ILR Bom 449, a Division Bench of the Bombay High Court, consisting of M.C. Chagla, C.J. and P.B. Gajendragadkar, J. held that Section 497 of the Indian Penal Code did not contravene Articles 14 and 15 of the Constitution. However, in an instructive passage, the learned Chief Justice stated:

... Mr. Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that this offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, we hope, when women were looked upon as property by their husbands. But that is an argument more in favour of doing away with Section 497 altogether.[25]

An appeal to this Court in **Yusuf Abdul Aziz v. State of Bombay**, MANU/SC/0124/1954 : 1954 SCR 930, (**"Yusuf Abdul Aziz"**), met with the same result.

This Court, through Vivian Bose, J., held that the last part of Section 497, which states that the wife shall not be punishable as an abettor of the offence of adultery, does not offend Articles 14 and 15 in view of the saving provision contained in Article 15(3), being a special provision made in favour of women.

This is an instance of Homer nodding. Apart from a limited *ratio* based upon a limited argument, the judgment applies a constitutional provision which is obviously inapplicable as Article 15(3), which states that, "nothing in this Article shall prevent the State from making a special provision

for women", would refer to the "State" as either Parliament or the State Legislatures or the Executive Government of the Centre or the States, set up under the Constitution after it has come into force. Section 497 is, in constitutional language, an "existing law" which continues, by virtue of Article 372(1), to apply, and could not, therefore, be said to be a law made by the "State", meaning any of the entities referred to above.

71. We have noticed a judgment of the Division Bench of the Bombay High Court in **Dattatraya Motiram More v. State of Bombay** MANU/MH/0142/1953 : AIR 1953 Bom 311, in which the Division Bench turned down a submission that Article 15(3) is confined to laws made after the Constitution of India comes into force and would also apply to existing law thus:

8. An argument was advanced by Mr. Patel that Article 15(3) only applies to future legislation and that as far as all laws in force before the commencement of the Constitution were concerned, those laws can only be tested by Article 15(1) and not by Article 15(1) read with Article 15(3). Mr. Patel contends that Article 15(3) permits the State in future to make a special provision for women and children, but to the extent the laws in force are concerned Article 15(1) applies, and if the laws in force are inconsistent with Article 15(1), those laws must be held to be void. Turning to Article 13(1), it provides:

All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

Therefore, before a law in force can be declared to be void it must be found to be inconsistent with one of the provisions of Part III which deals with Fundamental Rights, and the fundamental right which is secured to the citizen Under Article 15 is not the unlimited right Under Article 15(1) but the right Under Article 15(1) qualified by Article 15(3). It is impossible to argue that the Constitution did not permit laws to have special provision for women if the laws were passed before the Constitution came into force, but permitted the Legislature to pass laws in favour of women after the Constitution was enacted. If a law discriminating in favour of women is opposed to the fundamental rights of citizens, there is no reason why such law should continue to remain on the statute book. The whole scheme of Article 13 is to make laws, which are inconsistent with Part III, void, not only if they were in force before the commencement of the Constitution, but also if they were enacted after the Constitution came into force. Mr. Patel relies on the various provisos to Article 19 and he says that in all those provisos special mention is made to existing laws and also to the State making laws in future. Now, the scheme of Article 19 is different from the scheme of Article 15. Provisos to Article 19 in terms deal with law whether existing or to be made in future by the State, whereas Article 15 does not merely deal with laws but deals generally with any special provision for women and children, and therefore it was not necessary in Article 15(3) to mention both existing laws and laws to be made in future. But the exception made to Article 15(1) by Article 15(3) is an exception which applies both to existing laws and to laws which the State may make in future.

72. We are of the view that this paragraph does not represent the law correctly. In fact, Article 19(2)-(6) clearly refers to "existing law" as being separate from "the State making any law", indicating that the State making any law would be laws made after the Constitution comes into

force as opposed to "existing law", which are pre-constitutional laws enacted before the Constitution came into force, as is clear from the definition of "existing law" contained in Article 366(10), which reads as under:

366. Definitions.--In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say--

xxx xxx xxx

(10) "existing law" means any law, Ordinance, order, bye-law, Rule or Regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, Rule or Regulation;

73. Article 15(3) refers to the State making laws which therefore, obviously cannot include existing law. Article 15(3) is in this respect similar to Article 16(4), which reads as follows:

16. Equality of opportunity in matters of public employment.--

xxx xxx xxx

(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

The vital difference in language between Articles 15(3) and 16(4) on the one hand, and Article 19(2)-(6) on the other, must thus be given effect.

74. Coming back to **Yusuf Abdul Aziz** (supra), the difference in language between Article 15(3) and Article 19(2)-(6) was not noticed. The limited ratio of this judgment merely refers to the last sentence in Section 497 which it upholds. Its ratio does not extend to upholding the entirety of the provision or referring to any of the arguments made before us for striking down the provision as a whole.

75. We then come to **Sowmithri Vishnu v. Union of India and Anr.,** MANU/SC/0199/1985 : (1985) Supp SCC 137, (**"Sowmithri Vishnu"**). In this case, an Article 32 petition challenged the constitutional validity of Section 497 of the Penal Code on three grounds which are set out in paragraph 6 of the judgment. Significantly, the learned Counsel in that case argued that Section 497 is a flagrant instance of 'gender discrimination', 'legislative despotism', and 'male chauvinism'. This Court repelled these arguments stating that they had a strong emotive appeal but no valid legal basis to rest upon. The first argument, namely, an argument of discrimination was repelled by stating that the ambit of the offence of adultery should make the woman punishable as well. This was repelled by saying that such arguments go to the policy of the law and not its constitutionality. This was on the basis that it is commonly accepted that it is the man who is the seducer and not the woman. Even in 1985, the Court accepted that this archaic position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 be amended appropriately so as to take note of the transformation that society has undergone.

The Court then referred to the 42nd Law Commission Report, 1971, which recommended the retention of Section 497, with the modification that, even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The dissenting note of Mrs. Anna Chandi was also taken note of, where the dissenter stated that this is the right time to consider the question whether the offence of adultery, as envisaged in Section 497, is in tune with our present-day notions of women's status in marriage.

The second ground was repelled stating that a woman is the victim of the crime, and as the offence of adultery is considered as an offence against the sanctity of the matrimonial home, only those men who defile that sanctity are brought within the net of the law. Therefore, it is of no moment that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.

The third ground, namely, that Section 497 is underinclusive inasmuch as a husband who has sexual relations with an unmarried woman is not within the net of the law, was repelled stating that an unfaithful husband may invite a civil action by the wife for separation, and that the Legislature is entitled to deal with the evil where it is felt and seen most.

A challenge on the ground of Article 21 was also repelled, stating that the fact that a provision for hearing the wife is not contained in Section 497 cannot render that Section unconstitutional. This Court then referred to the judgment in **Yusuf Abdul Aziz** (supra) and stated that since it was a 1954 decision, and 30 years had passed since then, this Court was examining the position afresh. The Court ended with the sermon, "stability of marriages is not an ideal to be scorned."

76. In **V. Revathi v. Union of India and Ors.,** MANU/SC/0562/1988 : (1988) 2 SCC 72, this Court, after referring to **Sowmithri Vishnu** (supra), repelled a similar challenge to Section 198 of the Code of Criminal Procedure, 1973. After referring to **Sowmithri Vishnu** (supra), since Section 497, Indian Penal Code and Section 198, Code of Criminal Procedure go hand in hand and constitute a 'legislative packet' to deal with the offence of adultery committed by an outsider, the challenge to the said Section failed.

77. International trends worldwide also indicate that very few nations continue to treat adultery as a crime, though most nations retain adultery for the purposes of divorce laws. Thus, adultery continues to be a criminal offence in Afghanistan, Bangladesh, Indonesia, Iran, Maldives, Nepal, Pakistan, Philippines, United Arab Emirates, some states of the United States of America, Algeria, Democratic Republic of Congo, Egypt, Morocco, and some parts of Nigeria.

On the other hand, a number of jurisdictions have done away with adultery as a crime. The People's Republic of China, Japan, Brazil, New Zealand, Australia, Scotland, the Netherlands, Denmark, France, Germany, Austria, the Republic of Ireland, Barbados, Bermuda, Jamaica, Trinidad and Tobago, Seychelles etc. are some of the jurisdictions in which it has been done away with. In South Korea[26] and Guatemala,[27] provisions similar to Section 497 have been struck down by the constitutional courts of those nations.

78. The Supreme Court of Namibia, in an instructive judgment,[28] went into whether the criminal offence of adultery would protect marriages and reduce the incidence of adultery. It said:

[45] But does the action protect marriages from adultery? For the reasons articulated by both the SCA and the Constitutional Court, I do not consider that the action can protect marriage as it does not strengthen a weakening marriage or breathe life into one which is in any event disintegrating. [*DE* v. *RH*, MANU/SACC/0023/2015 : 2015 (5) SA 83 (CC) (Constitutional Court of South Africa) para 49]. The reasoning set out by the SCA is salutary and bears repetition:

But the question is: if the protection of marriage is one of its main goals, is the action successful in achieving that goal? The question becomes more focused when the spotlight is directed at the following considerations:

(a) First of all, as was pointed out by the German Bundesgericht in the passage from the judgment (JZ 1973, 668) from which I have quoted earlier, although marriage is--

a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence... consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it.

If the parties to the marriage have lost that moral commitment, the marriage will fail, and punishment meted out to a third party is unlikely to change that.

(b) Grave doubts are expressed by many about the deterrent effect of the action. In most other countries it was concluded that the action (no longer) has any deterrent effect and I have no reason to think that the position in our society is all that different. Perhaps one reason is that adultery occurs in different circumstances. Every so often it happens without any premeditation, when deterrence hardly plays a role. At the other end of the scale, the adultery is sometimes carefully planned and the participants are confident that it will not be discovered. Moreover, romantic involvement between one of the spouses and a third party can be as devastating to the marital relationship as (or even more so than) sexual intercourse.

(c) If deterrence is the main purpose, one would have thought that this could better be achieved by retaining the imposition of criminal sanctions or by the grant of an interdict in favour of the innocent spouse against both the guilty spouse and the third party to prevent future acts of adultery. But, as we know, the crime of adultery had become abrogated through disuse exactly 100 years ago while an interdict against adultery has never been granted by our courts (see, for example, Wassenaar v. Jameson, supra at 352H-353H). Some of the reasons given in Wassenaar as to why an interdict would not be appropriate are quite enlightening and would apply equally to the appropriateness of a claim for damages. These include, firstly, that an interdict against the guilty spouse is not possible because he or she commits no delict. Secondly, that as against a third party--

it interferes with, and restricts the rights and freedom that the third party ordinarily has of using and disposing of his body as he chooses;... it also affects the relationship of the third party with the claimant's spouse, who is and cannot be a party to the interdict, and therefore indirectly interferes with, and restricts her rights and freedom of, using and disposing of her body as she chooses'. [At 353E.]

(d) In addition the deterrence argument seems to depart from the assumption that adultery is the cause of the breakdown of a marriage, while it is now widely recognised that causes for the breakdown in marriages are far more complex. Quite frequently adultery is found to be the result and not the cause of an unhappy marital relationship. Conversely stated, a marriage in which the spouses are living in harmony is hardly likely to be broken up by a third party.[29]

79. Coming back to Section 497, it is clear that in order to constitute the offence of adultery, the following must be established:

(i) Sexual intercourse between a married woman and a man who is not her husband;

(ii) The man who has sexual intercourse with the married woman must know or has reason to believe that she is the wife of another man;

(iii) Such sexual intercourse must take place with her consent, i.e., it must not amount to rape;

(iv) Sexual intercourse with the married woman must take place without the consent or connivance of her husband.

80. What is apparent on a cursory reading of these ingredients is that a married man, who has sexual intercourse with an unmarried woman or a widow, does not commit the offence of adultery. Also, if a man has sexual intercourse with a married woman with the consent or connivance of her husband, he does not commit the offence of adultery. The consent of the woman committing adultery is material only for showing that the offence is not another offence, namely, rape.

81. The background in which this provision was enacted now needs to be stated. In 1860, when the Penal Code was enacted, the vast majority of the population in this country, namely, Hindus, had no law of divorce as marriage was considered to be a sacrament. Equally, a Hindu man could marry any number of women until 1955. It is, therefore, not far to see as to why a married man having sexual intercourse with an unmarried woman was not the subject matter of the offence. Since adultery did not exist as a ground in divorce law, there being no divorce law, and since a man could marry any number of wives among Hindus, it was clear that there was no sense in punishing a married man in having sex with an unmarried woman as he could easily marry her at a subsequent point in time. Two of the fundamental props or bases of this archaic law have since gone. Post 1955-1956, with the advent of the "Hindu Code", so to speak, a Hindu man can marry only one wife; and adultery has been made a ground for divorce in Hindu Law.

Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman's husband is obtained-the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the "licensor", namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has 'seduced' her, she being his victim. What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional

morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt, as has been held by this Court in **Shayara Bano v. Union of India and Ors.,** MANU/SC/1031/2017 : (2017) 9 SCC 1, as follows:

101.... Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.

82. It is clear, therefore, that the ostensible object of Section 497, as pleaded by the State, being to protect and preserve the sanctity of marriage, is not in fact the object of Section 497 at all, as has been seen hereinabove. The sanctity of marriage can be utterly destroyed by a married man having sexual intercourse with an unmarried woman or a widow, as has been seen hereinabove. Also, if the husband consents or connives at such sexual intercourse, the offence is not committed, thereby showing that it is not sanctity of marriage which is sought to be protected and preserved, but a proprietary right of a husband. Secondly, no deterrent effect has been shown to exist, or ever to have existed, which may be a legitimate consideration for a State enacting criminal law. Also, manifest arbitrariness is writ large even in cases where the offender happens to be a married woman whose marriage has broken down, as a result of which she no longer cohabits with her husband, and may in fact, have obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If, during this period, she has sex with another man, the other man is immediately guilty of the offence.

83. The aforesaid provision is also discriminatory and therefore, violative of Article 14 and Article 15(1). As has been held by us hereinabove, in treating a woman as chattel for the purposes of this provision, it is clear that such provision discriminates against women on grounds of sex only, and must be struck down on this ground as well. Section 198, Code of Criminal Procedure is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 has also to be held constitutionally infirm.

84. We have, in our recent judgment in **Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.,** MANU/SC/1044/2017 : (2017) 10 SCC 1, (**"Puttaswamy"**), held:

108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the

realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

xxx xxx xxx

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms Under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion Under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate Article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It

is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

xxx xxx xxx

482. Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in *Jolly George Varghese* v. *Bank of Cochin* [*Jolly George Varghese* v. *Bank of Cochin*, MANU/SC/0014/1980 : (1980) 2 SCC 360], at para 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in *Sunil Batra* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, MANU/SC/0184/1978 : (1978) 4 SCC 494: 1979 SCC (Cri.) 155], at paras 192, 197-B, 234 and 241 and Prem Shankar Shukla v. Delhi Admn. [Prem Shankar Shukla v. Delhi Admn., MANU/SC/0084/1980 : (1980) 3 SCC 526: 1980 SCC (Cri.) 815], at paras 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual.

xxx xxx xxx

525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual. [In 1834, Jacques-Charles DuPont de l'Eure associated the three terms liberty, equality and fraternity together in the *Revue Republicaine*, which he edited, as follows: "Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity." Many of our decisions recognise human dignity as being an essential part of the fundamental rights chapter. For example, see *Prem Shankar Shukla* v. *Delhi Admn.*, MANU/SC/0084/1980 : (1980) 3 SCC 526 at para 21, *Francis Coralie Mullin* v. *UT of Delhi*, MANU/SC/0517/1981 : (1981) 1 SCC 608 at paras 6, 7 and 8, *Bandhua Mukti Morcha* v. *Union of India*, MANU/SC/0051/1983 : (1984) 3 SCC 161 at para 10, *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, MANU/SC/0136/2010 : (2010) 3 SCC 786 at para 37, *Shabnam* v. *Union of India*, MANU/SC/0669/2015 : (2015) 6 SCC 702 at paras 12.4 and 14 and *Jeeja Ghosh* v. *Union of India*, MANU/SC/0574/2016 : (2016) 7 SCC 761 at para 37.] The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular

facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

The dignity of the individual, which is spoken of in the Preamble to the Constitution of India, is a facet of Article 21 of the Constitution. A statutory provision belonging to the hoary past which demeans or degrades the status of a woman obviously falls foul of modern constitutional doctrine and must be struck down on this ground also.

85. When we come to the decision of this Court in *Yusuf Abdul Aziz* (supra), it is clear that this judgment also does not, in any manner, commend itself or keep in tune with modern constitutional doctrine. In any case, as has been held above, its ratio is an extremely limited one as it upheld a wife not being punishable as an abettor which is contained in Section 497, Indian Penal Code. The focus on whether the provision as a whole would be constitutionally infirm was not there in the aforesaid judgment.

At this stage, it is necessary to advert to Chief Justice Chagla's foresight in the Bombay High Court judgment which landed up in appeal before this Court in **Yusuf Abdul Aziz's** (supra). Chief Justice Chagla had stated that since the underlying idea of Section 497 is that wives are properties of their husbands, Section 497 should not find a place in any modern Code of law, and is an argument in favour of doing away with Section 497 altogether. The day has long since arrived when the Section does, in fact, need to be done away with altogether, and is being done away with altogether.

86. In **Sowmithri Vishnu** (supra), this Court upheld Section 497 while repelling three arguments against its continuance, as has been noticed hereinabove. This judgment also must be said to be swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Articles 14, 15, and 21. Ancient notions of the man being the seducer and the woman being the victim permeate the judgment, which is no longer the case today. The moving times have not left the law behind as we have just seen, and so far as engaging the attention of law makers when reform of penal law is undertaken, we may only hasten to add that even when the Code of Criminal Procedure was fully replaced in 1973, Section 198 continued to be on the statute book. Even as of today, Section 497 Indian Penal Code continues to be on the statute book. When these Sections are wholly outdated and have outlived their purpose, not only does the maxim of Roman law, cessante ratione legis, cessat ipsa lex, apply to interdict such law, but when such law falls foul of constitutional guarantees, it is this Court's solemn duty not to wait for legislation but to strike down such law. As recently as in **Shayara Bano** (supra), it is only the minority view of Khehar, C.J.I. and S. Abdul Nazeer, J., that one must wait for the law to change legislatively by way of social reform. The majority view was the exact opposite, which is why Triple Talaq was found constitutionally infirm and struck down by the majority. Also, we are of the view that the statement in this judgment that stability of marriages is not an ideal to be scorned, can scarcely be applied to this provision, as we have seen that marital stability is not the object for which this provision was enacted. On all these counts, therefore, we overrule the judgment in **Sowmithri Vishnu** (supra). Equally, the judgment in **V. Revathi** (supra), which upheld the constitutional validity of Section 198 must, for similar reasons, be held to be no longer good law. We, therefore, declare that Section 497 of the Indian Penal Code, 1860 and Section 198 of the Code of Criminal Procedure, 1973 are violative of Articles 14, 15(1), and 21 of the Constitution of India and are, therefore, struck down as being invalid.

Dr. D.Y. Chandrachud, J.

Index

A Gender: the discursive struggle

B Judicial discourse on adultery

C Relics of the past

D Across frontiers

E Confronting patriarchy

F 'The Good Wife'

F.1 The entrapping cage

G Denuding identity-women as sexual property

G.1 Exacting fidelity: the intimacies of marriage

H Towards transformative justice

A Gender: the discursive struggle

87. Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the ideals of equality, dignity and freedom triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality. The case at hand enjoins this constitutional court to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices.

88. Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a 'discourse' about social structuring.[30] However, the discourse of law is not homogenous.[31] In the context particularly of Section 497, it regards individuals as 'gendered citizens'.[32] In doing so, the law creates and ascribes gender roles based on existing societal stereotypes. An understanding of law as a 'discourse' would lead to the recognition of the role of law in creating 'gendered identities'.[32]

89. Over the years, legal reform has had a significant role in altering the position of women in societal orderings. This is seen in matters concerning inheritance and in the protection against domestic violence. However, in some cases, the law operates to perpetuate an unequal world for

women. Thus, depending on the manner in which it is used, law can act as an agent of social change as well as social stagnation. Scholar Patricia Williams, who has done considerable work on the critical race theory, is sanguine about the possibility of law engendering progressive social transformation:

It is my deep belief that theoretical legal understanding and social transformation need not be oxymoronic[33]

The Constitution, both in text and interpretation, has played a significant role in the evolution of law from being an instrument of oppression to becoming one of liberation. Used in a liberal perspective, the law can enhance democratic values. As an instrument which preserves the status quo on the other hand, the law preserves stereotypes and legitimises unequal relationships based on preexisting societal discrimination. Constantly evolving, law operates as an important "site for discursive struggle", where ideals compete and new visions are shaped.[34]. In regarding law as a "site of discursive struggle", it becomes imperative to examine the institutions and structures within which legal discourse operates:[32]

The idea of neutral dialogue is an idea which denies history, denies structure, denies the positioning of subjects.[35]

In adjudicating on the rights of women, the Court must not lose sight of the institutions and values which have forced women to a shackled existence so far. To fully recognise the role of law and society in shaping the lives and identities of women, is also to ensure that patriarchal social values and legal norms are not permitted to further obstruct the exercise of constitutional rights by the women of our country.

90. In the preceding years, the Court has evolved a jurisprudence of rights-granting primacy to the right to autonomy, dignity and individual choice. The right to sexual autonomy and privacy has been granted the stature of a Constitutional right. In confronting the sources of gendered injustice which threaten the rights and freedoms promised in our Constitution, we set out to examine the validity of Section 497 of the Indian Penal Code. In doing so, we also test the constitutionality of moral and societal Regulation of women and their intimate lives through the law.

B Judicial discourse on adultery

91. This Court, on earlier occasions, has tested the constitutionality of Section 497 of the Indian Penal Code as well as Section 198(2) of the Code of Criminal Procedure.

Section 497 reads thus:

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Section 198(2) of the Code of Criminal Procedure reads thus:

(2) For the purposes of Sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable Under Section 497 or Section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

92. The decision of the Constitution Bench in **Yusuf Abdul Aziz** v. **State of Bombay** MANU/SC/0124/1954 : 1954 SCR 930, arose from a case where the Appellant was being prosecuted for adultery Under Section 497. On a complaint being filed, he moved the High Court to determine the constitutional question about the validity of the provision, Under Article 228. The High Court decided against the Appellant[177], but Chief Justice Chagla made an observation about the assumption underlying Section 497:

Mr. Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that the offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, when women were looked upon as property by their husbands.

A narrow challenge was addressed before this Court. The judgment of Justice Vivian Bose records the nature of the challenge:

3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor.

The last sentence in Section 497 prohibits this. It runs--

"In such case the wife shall not be punishable as an abettor". It is said that this offends Articles 14 and 15.

Hence, the challenge was only to the prohibition on treating the wife as an abettor. It was this challenge which was dealt with and repelled on the ground that Article 14 must be read with the other provisions of Part III which prescribe the ambit of the fundamental rights. The prohibition on treating the wife as an abettor was upheld as a special provision which is saved by Article 15(3). The conclusion was that:

5. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned Clause in Section 497 of the Indian Penal Code.

93. The challenge was to a limited part of Section 497: that which prohibited a woman from being prosecuted as an abettor. Broader issues such as whether (i) the punishment for adultery violates

Article 21; (ii) the statutory provision suffers from manifest arbitrariness; (iii) the legislature has, while ostensibly protecting the sanctity of marriage, invaded the dignity of women; and (iv) Section 497 violates Article 15(1) by enforcing gender stereotypes were neither addressed before this Court nor were they dealt with.

This Court construed the exemption granted to women from criminal sanctions as a 'special provision' for the benefit of women and thus, protected Under Article 15(3) of the Constitution. In **Union of India** v. **Elphinstone Spinning and Weaving Co. Ltd.**, MANU/SC/0019/2001 : (2001) 4 SCC 139 a Constitution Bench of this Court held:

17. ...When the question arises as to the meaning of a certain provision in a statute it is not only legitimate but proper to read that provision in its context. The context means the statute as a whole, the previous state of law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy....
36

It is of particular relevance to examine the mischief that the provision intends to remedy. The history of Section 497 reveals that the law on adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It was aimed at preventing the woman from exercising her sexual agency. Thus, Section 497 was never conceived to benefit women. In fact, the provision is steeped in stereotypes about women and their subordinate role in marriage. The patriarchal underpinnings of the law on adultery become evident when the provision is considered as a whole.

94. In the subsequent decision of the three judge Bench in **Sowmithri Vishnu** v. **Union of India** MANU/SC/0199/1985 : 1985 Supp SCC 137, the court proceeded on the basis that the earlier decision in **Yusuf Abdul Aziz** had upheld Section 497 against a challenge based on Articles 14 and 15 of the Constitution. This is not a correct reading or interpretation of the judgment.

95. **Sowmithri Vishnu** did as a matter of fact consider the wider constitutional challenge on the ground that after the passage of thirty years, "particularly in the light of the alleged social transformation in the behavioural pattern of women in matters of sex", it had become necessary that the matter be revisited. **Sowmithri Vishnu** arose in a situation where a petition for divorce by the Appellant against her husband on the ground of desertion was dismissed with the finding that it was the Appellant who had deserted her husband. The Appellant's husband then sued for divorce on the ground of desertion and adultery. Faced with this petition, the Appellant urged that a decree for divorce on the ground of desertion may be passed on the basis of the findings in the earlier petition. She, however, opposed the effort of the husband to urge the ground of adultery. While the trial court accepted the plea of the husband to assert the ground of adultery, the High Court held in revision that a decree of divorce was liable to be passed on the ground of desertion, making it unnecessary to inquire into adultery. While the petition for divorce was pending against the Appellant, her husband filed a complaint Under Section 497 against the person with whom the Appellant was alleged to be in an adulterous relationship. The Appellant then challenged the constitutional validity of Section 497.

The judgment of the three judge Bench indicates that three grounds of challenge were addressed before this Court: **first**, while Section 497 confers a right on the husband to prosecute the adulterer, it does not confer upon the wife to prosecute the woman with whom her husband has committed adultery; **second**, Section 497 does not confer a right on the wife to prosecute her husband who has committed adultery with another woman; and third, Section 497 does not cover cases where a man has sexual relations with an unmarried woman. The submission before this Court was that the classification Under Section 497 was irrational and 'arbitrary'. Moreover, it was also urged that while facially, the provision appears to be beneficial to a woman, it is in reality based on a notion of paternalism "which stems from the assumption that women, like chattels, are the property of men."

96. The decision in **Sowmithri Vishnu** dealt with the constitutional challenge by approaching the discourse on the denial of equality in formal, and rather narrow terms. Chandrachud, CJ speaking for the three judge Bench observed that by definition, the offence of adultery can be committed by a man and not by a woman. The court construed the plea of the Petitioner as amounting to a suggestion that the definition should be recast in a manner that would make the offence gender neutral. The court responded by observing that this was a matter of legislative policy and that the court could invalidate the provision only if a constitutional violation is established. The logic of the court, to the effect that extending the ambit of a statutory definition is a matter which requires legislative change is unexceptionable. The power to fashion an amendment to the law lies with the legislature. But this only leads to the conclusion that the court cannot extend the legislative prescription by making the offence gender neutral. It does not answer the fundamental issue as to whether punishment for adultery is valid in constitutional terms. The error in **Sowmithri Vishnu** lies in holding that there was no constitutional infringement. The judgment postulates that:

7. ...It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the Legislature to consider whether Section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone. The Law Commission of India in its Forty-second Report, 1971, recommended the retention of Section 497 in its present form with the modification that, even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The suggested modification was not accepted by the Legislature. Mrs. Anna Chandi, who was in the minority, voted for the deletion of Section 497 on the ground that "it is the right time to consider the question whether the offence of adultery as envisaged in Section 497 is in tune with our present-day notions of woman's status in marriage". The report of the Law Commission shows that there can be two opinions on the desirability of retaining a provision like the one contained in Section 497 on the statute book. But, we cannot strike down that Section on the ground that it is desirable to delete it.[37]

These observations indicate that the constitutional challenge was addressed purely from the perspective of the argument that Section 497 is not gender neutral, in allowing only the man but not to the woman in a sexual relationship to be prosecuted. The court proceeded on the assumption, which it regards as "commonly accepted that it is the man who is the seducer and not the woman." Observing that this position may have undergone some change, over the years, the decision holds that these are matters for the legislature to consider and that the desirability of deleting Section 497 is not a ground for invalidation.

97. The decision in **Sowmithri Vishnu** has left unanswered the fundamental challenge which was urged before the Court. Under Article 14, the challenge was that the statutory provision treats a woman purely as the property of her husband. That a woman is regarded no more than as a possession of her husband is evidenced in Section 497, in more than one context. The provision stipulates that a man who has sexual intercourse with the wife of another will not be guilty of offence if the husband of the woman were to consent or, (worse still, to connive. In this, it is evident that the legislature attributes no agency to the woman. Whether or not a man with whom she has engaged in sexual intercourse is guilty of an offence depends exclusively on whether or not her husband is a consenting individual. No offence exists if her husband were to consent. Even if her husband were to connive at the act, no offence would be made out. The mirror image of this constitutional infirmity is that the wife of the man who has engaged in the act has no voice or agency under the statute. Again, the law does not make it an offence for a married man to engage in an act of sexual intercourse with a single woman. His wife is not regarded by the law as a person whose agency and dignity is affected. The underlying basis of not penalising a sexual act by a married man with a single woman is that she (unlike a married woman) is not the property of a man (as the law would treat her to be if she is married). Arbitrariness is writ large on the provision. The problem with Section 497 is not just a matter of under inclusion. The court in **Sowmithri Vishnu** recognised that an under-inclusive definition is not necessarily discriminatory and that the legislature is entitled to deal with the evil where it is felt and seen the most. The narrow and formal sense in which the provisions of Article 14 have been construed is evident again from the following observations:

8. ...The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, we revert to the same point: Who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute.[38]

The decision of the three judge Bench does not address the central challenge to the validity of Section 497. Section 497, in its effort to protect the sanctity of marriage, has adopted a notion of marriage which does not regard the man and the woman as equal partners. It proceeds on the subjection of the woman to the will of her husband. In doing so, Section 497 subordinates the woman to a position of inferiority thereby offending her dignity, which is the core of Article 21. Significantly, even the challenge Under Article 21 was addressed on behalf of the Petitioner in that case in a rather narrow frame. The argument before this Court was that at the trial involving an offence alleged to have been committed Under Section 497, the woman with whom the Accused is alleged to have had sexual intercourse would have no right of being heard. It was this aspect alone which was addressed in **Sowmithri Vishnu** when the court held that such a right of being heard can be read in an appropriate case. Ultimately, the court held that:

12. ...It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationships is punishable by law. Stability of marriages is not an ideal to be scorned.[39]

Sowmithri Vishnu has thus proceeded on the logic that in specifying an offence, it is for the legislature to define what constitutes the offence. Moreover, who can prosecute and who can be prosecuted, are matters which fall within the domain of the law. The inarticulate major premise of the judgment is that prosecution for adultery is an effort to protect the stability of marriages and if the legislature has sought to prosecute only a limited class of 'adulterous relationships', its choice could not be questioned. '**Sowmithri Vishnu**' fails to deal with the substantive aspects of constitutional jurisprudence which have a bearing on the validity of Section 497: the guarantee of equality as a real protection against arbitrariness, the guarantee of life and personal liberty as an essential recognition of dignity, autonomy and privacy and above all gender equality as a cornerstone of a truly equal society. For these reasons, the decision in **Sowmithri Vishnu** cannot be regarded as a correct exposition of the constitutional position. **Sowmithri Vishnu** is overruled.

98. The decision of a two judge Bench in **V. Revathi** v. **Union of India** MANU/SC/0562/1988 : (1988) 2 SCC 72 involved a challenge to Section 497 (read with Section 198(2) of the Code of Criminal Procedure) which disables a wife from prosecuting her husband for being involved in an adulterous relationship. The court noted that Section 497 permits neither the husband of the offending wife to prosecute her nor does it permit the wife to prosecute her offending husband for being disloyal. This formal sense of equality found acceptance by the court. The challenge was repelled by relying on the decision in **Sowmithri Vishnu**. Observing that Section 497 and Section 198(2) constitute a "legislative packet", the court observed that the provision does not allow either the wife to prosecute an erring husband or a husband to prosecute the erring wife. In the view of the court, this indicated that there is no discrimination on the ground of sex. In the view of the court:

5. ...The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practised in circumscribing the scope of Section 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer.[40]

99. The decision in Revathi is a reiteration of **Sowmithri Vishnu**. It applies the doctrine of equality and the prohibition against discrimination on the ground of sex in a formalistic sense. The logic of the judgment is that since neither of the spouses (man or woman) can prosecute the erring spouse, the provision does not discriminate on the ground of sex. Apart from reading equality in a narrow confine, the judgment does not deal with crucial aspects bearing on the constitutionality of the provision. **Revathi**, like **Sowmithri Vishnu** does not lay down the correct legal principle.

C Relics of the past

Our Massachusetts magistracy...have not been bold to put in force the extremity of our righteous law against her. The penalty thereof is death. But in their great mercy and tenderness of heart they have doomed Mistress Prynne to stand only a space of three hours on the platform of the pillory,

and then and thereafter, for the remainder of her natural life to wear a mark of shame upon her bosom.[41]

100. Section 497 of the Indian Penal Code, 1860 makes adultery a punishable offence against "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man." It goes on to state that, "in such case the wife shall not be punishable as an abettor." The offence applies only to the man committing adultery. A woman committing adultery is not considered to be an "abettor" to the offence. The power to prosecute for adultery rests only with the husband of the woman.

Understanding the gendered nature of Section 497 needs an inquiry into the origins of the provision itself as well as the offence of adultery more broadly. The history of adultery throws light upon disparate attitudes toward male and female infidelity, and reveals the double standard in law and morality that has been applied to men and women.[42]

101. Throughout history, adultery has been regarded as an offence; it has been treated as a religious transgression, as a crime deserving harsh punishment, as a private wrong, or as a combination of these.[32] The earliest recorded injunctions against adultery are found in the ancient code of the Babylonian king Hammurabi, dating from circa 1750 B.C. The code prescribed that a married woman caught in adultery be bound to her lover and thrown into water so that they drown together.[43] By contrast, Assyrian law considered adultery to be a private wrong for which the husband or father of the woman committing adultery could seek compensation from her partner.[44] English historian Faramerz Dabhoiwala notes that the primary purpose of these laws was to protect the property rights of men:

Indeed, since the dawn of history every civilisation had prescribed severe laws against at least some kind of sexual immorality. The oldest surviving legal codes (c.2100-1700 BCE), drawn up by the kings of Babylon made adultery punishable by death and most other near Eastern and classical culture also treated it as a serious offence...The main concern of such laws was usually to uphold the honour and property rights of fathers, husbands and higher status groups....[45]

102. In Ancient Greco-Roman societies, there existed a sexual double standard according to which adultery constituted a violation of a husband's exclusive sexual access to his wife, for which the law allowed for acts of revenge.[46] In 17 B.C., Emperor Augustus passed the *Lex Julia de adulteriis coercendis*, which stipulated that a father was allowed to kill his daughter and her partner when caught committing adultery in his or her husband's house.[47] While in the Judaic belief adultery merited death by stoning for both the adulteress and her partner,[48] Christianity viewed adultery more as a moral and spiritual failure than as a public crime.[49] The penalties of the *Lex Julia* were made more severe by Christian emperors. Emperor Constantine, for instance, introduced the death penalty for adultery, which allowed the husband the right to kill his wife if she committed adultery.[47] Under the *Lex Julia*, adultery was primarily a female offence, and the law reflected the sentiments of upper-class Roman males.[51]

103. Once monogamy came to be accepted as the norm in Britain between the fourth and fifth centuries, adultery came to be recognized as a serious wrong that interfered with a husband's "rights" over his wife.[52] The imposition of criminal sanctions on adultery was also largely based

on ideas and beliefs about sexual morality which acquired the force of law in Christian Europe during the Middle Ages.[53] The development of canon law in the twelfth century enshrined the perception of adultery as a spiritual misdemeanour. In the sixteenth century, following the Reformation, adultery became a crucial issue because Protestants placed new emphasis on marriage as a linchpin of the social and moral order.[54] Several prominent sixteenth century reformers, including Martin Luther and John Calvin, argued that a marriage was irreparably damaged by infidelity, and they advocated divorce in such cases.[55]

Concerned with the "moral corruption" prevalent in England since the Reformation, Puritans in the Massachusetts Bay Colony introduced the death penalty for committing adultery.[56] The strict morality of the early English colonists is reflected in the famous 1850 novel 'The Scarlet Letter' by Nathaniel Hawthorne, in which an unmarried woman who committed adultery and bore a child out of wedlock was made to wear the letter A (for adulterer) when she went out in public; her lover was not so tagged, suggesting that women were punished more severely than men for adultery, especially when they had a child as evidence.[57]

104. In 1650, England enacted the infamous Act for Suppressing the Detestable Sins of Incest, Adultery and Fornication, which introduced the death penalty for sex with a married woman.[58] The purpose of the Act was as follows:

For the suppressing of the abominable and crying sins of...adultery... wherewith this Land is much defiled, and Almighty God highly displeased; be it enacted...That in case any married woman shall...be carnally known by any man (other than her husband)...as well the man as the woman...shall suffer death.

The Act was a culmination of long-standing moral concerns about sexual transgressions, sustained endeavours to regulate conjugal matters on a secular plain, and a contemporaneous political agenda of socio-moral reform.[59] It was repealed in 1660 during the Restoration. The common law, however, was still concerned with the effect of adultery by a married woman on inheritance and property rights. It recognized the "obvious danger of foisting spurious offspring upon her unsuspecting husband and bringing an illegitimate heir into his family."[60] Accordingly, secular courts treated adultery as a private injury and a tort for criminal conversation was introduced in the late 17th century, which allowed the husband to sue his wife's lover for financial compensation.[61]

105. In 19th century Britain, married women were considered to be chattel of their husbands in law, and female adultery was subjected to ostracism far worse than male adultery because of the problem it could cause for property inheritance through illegitimate children.[62] Consequently, many societies viewed chastity, together with related virtues such as modesty, as more central components of a woman's honor and reputation than of a man's.[63] The object of adultery laws was not to protect the bodily integrity of a woman, but to allow her husband to exercise control over her sexuality, in order to ensure the purity of his own bloodline. The killing of a man engaged in an adulterous act with one's wife was considered to be manslaughter, and not murder.[64] In **R.** v. **Mawgridge**, (1707) Kel. 119 Judge Holt wrote that:

...[A] man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for Jealousy is the Rage of a Man and **Adultery is the highest invasion of property.**

106. In his Commentaries on the Laws of England, William Blackstone wrote that under the common law, "the very being or legal existence of the woman [was] suspended during the marriage, or at least [was] incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performe[d] everything."[65] In return for support and protection, the wife owed her husband "consortium" of legal obligations, which included sexual intercourse.[66] Since adultery interfered with the husband's exclusive entitlements, it was considered to be the "highest possible invasion of property," similar to theft.[67] In fact, civil actions for adultery evolved from actions for enticing away a servant from a master and thus depriving the master of the quasi-proprietary interest in his services.[68]

Faramerz Dabhoiwala notes that a man's wife was considered to be his property, and that another man's "unlawful copulation" with her warranted punishment:

...[T]he earliest English law codes, which date from this time, evoke a society where women were bought and sold and lived constantly under the guardianship of men. Even in cases of consensual sex, its system of justice was mainly concerned with the compensation one man should pay to another for unlawful copulation with his female chattel.

107. When the Indian Penal Code was being drafted, adultery was not a criminal offence in common law. It was considered to be an ecclesiastical wrong "left to the feeble coercion of the Spiritual Court, according to the Rules of Canon Law."[69] Lord Thomas Babington Macaulay, Chairman of the First Law Commission of India and principal architect of the Indian Penal Code, considered the possibility of criminalizing adultery in India, and ultimately concluded that it would serve little purpose.[70] According to Lord Macaulay, the possible benefits from an adultery offence could be better achieved through pecuniary compensation.[55] Section 497 did not find a place in the first Draft Penal Code prepared by Lord Macaulay. On an appraisal of the facts and opinions collected from all three Presidencies about the feasibility criminalizing adultery, he concluded in his Notes to the Indian Penal Code that:

...All the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly; that scarcely any native of higher classes ever has recourse to the courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in case of adultery to the Courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider wives as useful members of their small households, that they generally complain not of the wound given to their affections, not of the stain on their honor, but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the women may be sent back." **These things being established, it seems to us that no advantage is to be expected from providing a punishment for adultery. We think it best to treat adultery merely as a civil injury.**[71]

108. The Law Commissioners, in their Second Report on the Draft Penal Code, disagreed with Lord Macaulay's view. Placing heavy reliance upon the status of women in India, they concluded that:

While we think that the offence of adultery ought not to be omitted from the code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in note Q, regarding the condition of the women, in this country, in deference to it, we would render the male offender alone liable to punishment. We would, however, put the parties Accused of adultery on trial "together", and empower the Court in the event of their conviction to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine.[72]

The Law Commissioners' decision to insert Section 497 into the Indian Penal Code was rooted in their concern about the possibility of the "natives" resorting to illegal measures to avenge the injury in cases of adultery:

The backwardness of the natives to have recourse to the courts of redress in cases of adultery, [Colonel Sleeman] asserts, "arises from the utter hopelessness on their part of ever getting a conviction in our courts upon any evidence that such cases admit of;" that is to say, in courts in which the Mahomedan law is observed. "The rich man...not only feels the assurance that he could not get a conviction, but dreads the disgrace of appearing publicly in one court after another, to prove...his own shame and his wife's dishonor. He has recourse to poison secretly, or with his wife's consent; and she will generally rather take it than be turned out into the streets a degraded outcast. The seducer escapes with impunity, he suffers nothing, while his poor victim suffers all that human nature is capable of enduring...The silence of the Penal Code will give still greater impunity to the seducers, while their victims will, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer.[73]

Section 497 and Section 198 are seen to treat men and women unequally, as women are not subject to prosecution for adultery, and women cannot prosecute their husbands for adultery. Additionally, if there is "consent or connivance" of the husband of a woman who has committed adultery, no offence can be established. In its 42nd Report, the Law Commission of India considered the legislative history of Section 497 and the purported benefit of criminal sanctions for adultery. The Committee concluded that, "though some of us were personally inclined to recommend repeal of the section, we think on the whole that the time has not yet come for making such a radical change in the existing position."[74] It recommended that Section 497 be retained, but with a modification to make women who commit adultery liable as well.

109. In its 156th Report, the Law Commission made a proposal which it believed reflected the "'transformation' which the society has undergone," by suggesting removing the exemption from liability for women Under Section 497.[75] In 2003, the Justice Malimath Committee recommended that Section 497 be made gender-neutral, by substituting the words of the provision with "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery."[76] The

Committee supported earlier proposals to not repeal the offence, but to equate liability for the sexes:

The object of the Section is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man (other than her husband).[55]

Neither the recommendations of the Law Commission nor those of the Malimath Committee have been accepted by the Legislature. Though women are exempted from prosecution Under Section 497, the underlying notion upon which the provision rests, which conceives of women as property, is extremely harmful. The power to prosecute lies only with the husband (and not to the wife in cases where her husband commits adultery), and whether the crime itself has been committed depends on whether the husband provides "consent for the allegedly adulterous act."

110. Women, therefore, occupy a liminal space in the law: they cannot be prosecuted for committing adultery, nor can they be aggrieved by it, by virtue of their status as their husband's property. Section 497 is also premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. The notion that women are 'victims' of adultery and therefore require the beneficial exemption Under Section 497 has been deeply criticized by feminist scholars, who argue that such an understanding of the position of women is demeaning and fails to recognize them as equally autonomous individuals in society.[77] Effectively, Indian jurisprudence has interpreted the constitutional guarantee of sex equality as a justification for differential treatment: to treat men and women differently is, ultimately, to act in women's interests.[78] The status of Section 497 as a "special provision"[79] operating for the benefit of women, therefore, constitutes a paradigmatic example of benevolent patriarchy.

111. Throughout history, the law has failed to ask the woman question.[80] It has failed to interrogate the generalizations or stereotypes about the nature, character and abilities of the sexes on which laws rest, and how these notions affect women and their interaction with the law. A woman's 'purity' and a man's marital 'entitlement' to her exclusive sexual possession may be reflective of the antiquated social and sexual mores of the nineteenth century, but they cannot be recognized as being so today. It is not the "common morality" of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires us to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of Section 497.

D Across frontiers

112. The last few decades have been characterized by numerous countries around the world taking measures to decriminalize the offence of adultery due to the gender discriminatory nature of adultery laws as well as on the ground that they violate the right to privacy. However, progressive action has primarily been taken on the ground that provisions penalising adultery are discriminatory against women either patently on the face of the law or in their implementation. Reform towards achieving a more egalitarian society in practice has also been driven by active

measures taken by the United Nations and other international human rights organizations, where it has been emphasized that even seemingly gender-neutral provisions criminalising adultery cast an unequal burden on women:[81]

Given continued discrimination and inequalities faced by women, including inferior roles attributed to them by patriarchal and traditional attitudes, and power imbalances in their relations with men, the mere fact of maintaining adultery as a criminal offence, even when it applies to both women and men, means in practice that women mainly will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality.

The abolishing of adultery has been brought about in equal measure by legislatures and courts. When decisions have been handed down by the judiciary across the world, it has led to the creation of a rich body of transnational jurisprudence. This Section will focus on a few select comparative decisions emanating from the courts of those countries where the provision criminalizing adultery has been struck down through judicial action. The decisions of these courts reflect how the treatment of the law towards adultery has evolved with the passage of time and in light of changing societal values.

113. In 2015, the South Korean Constitutional Court,[82] by a majority of 7-2 struck down Article 241 of the Criminal Law; a provision which criminalized adultery with a term of imprisonment of two years as unconstitutional. In doing so, South Korea joined a growing list of countries in Asia and indeed around the world that have taken the measure of effacing the offence of adultery from the statute books, considering evolving public values and societal trends. The Constitutional Court had deliberated upon the legality of the provision four times previously[83], but chose to strike it down when it came before it in 2015, with the Court's judgment acknowledging the shifting public perception of individual rights in their private lives.

The majority opinion of the Court was concurred with by five of the seven judges[84] who struck down the provision. The majority acknowledged that the criminal provision had a legitimate legislative purpose in intending "to promote the marriage system based on good sexual culture and practice and monogamy and to preserve marital fidelity between spouses." However, the Court sought to strike a balance between the legitimate interest of the legislature in promoting the institution of marriage and marital fidelity vis-a-vis the fundamental right of an individual to self-determination, which included sexual-self-determination, and was guaranteed Under Article 10 of their Constitution.[85] The Court held:

The right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners, implying that the provision at issue restricts the right to sexual self-determination of individuals. In addition, the provision at Issue also restricts the right to privacy protected Under Article 17 of the Constitution in that it restricts activities arising out of sexual life belonging to the intimate private domain.

The Court used the test of least restrictiveness, and began by acknowledging that there no longer existed public consensus on the criminalization of adultery, with the societal structure having changed from holding traditional family values and a typeset role of family members to sexual views driven by liberal thought and individualism. While recognizing that marital infidelity is

immoral and unethical, the Court stated that love and sexual life were intimate concerns, and they should not be made subject to criminal law. Commenting on the balance between an individual's sexual autonomy vis-à-vis societal morality, the Court remarked:

...the society is changing into one where the private interest of sexual autonomy is put before the social interest of sexual morality and families from the perspective of dignity and happiness of individuals.[86]

Next, the Court analysed the appropriateness and effectiveness of criminal punishment in curbing the offence of adultery. Addressing the question of whether adultery should be regulated, the Court stated that modern criminal law dictated that the State should not seek to interfere in an act that is not socially harmful or deleterious to legal interests, simply because it is repugnant to morality. Moreover, it held that the State had no business in seeking to control an individual's actions which were within the sphere of his or her constitutionally protected rights of privacy and self-determination.

Moving on to the effectiveness of the provision at hand, the Court remarked that criminalizing adultery did not help save a failing marriage. The Court remarked that it was obvious that once a spouse was Accused of adultery, the consequence was generally intensified spousal conflict as opposed to the possibility of family harmony:

Existing families face breakdown with the invoking of the right to file an accusation. Even after cancellation of the accusation, it is difficult to hope for emotional recovery between spouses. Therefore, the adultery crime can no longer contribute to protecting the marital system or family order. Furthermore, there is little possibility that a person who was punished for adultery would remarry the spouse who had made an accusation against himself/herself. It is neither possible to protect harmonious family order because of the intensified conflict between spouses in the process of criminal punishment of adultery.[87]

Addressing the concern that an abolition of a penal consequence would result in "chaos in sexual morality" or an increase of divorce due to adultery, the Court concluded that there was no data at all to support these claims in countries where adultery is repealed, stating:

Rather, the degree of social condemnation for adultery has been reduced due to the social trend to value the right to sexual self-determination and the changed recognition on sex, despite of the punishment of adultery. Accordingly, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy as it loses the function of regulating behaviour.[55]

The Court also analysed the argument that adultery provisions protected women:

It is true that the existence of adultery crimes in the past Korean society served to protect women. Women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological deterrence for men, and, furthermore, enabled female spouses to receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation.

However, the changes of our society diluted the justification of criminal punishment of adultery. Above all, as women's earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples.

Finally, the Court concluded its analysis by holding that the interests of enforcing monogamy, protecting marriage and promoting marital fidelity, balanced against the interference of the State in the rights to privacy and sexual autonomy were clearly excessive and therefore failed the test of least restrictiveness.[88]

114. In 2007, the Ugandan Constitutional Court in **Law Advocacy for Women in Uganda** v. **Attorney General of Uganda**[89], was called upon to Rule on the constitutionality of Section 154 of the Penal Code, on, the grounds that it violated various protections granted by the Ugandan Constitution and meted out discriminatory treatment between women and men. The law as it stood allowed a married man to have a sexual relationship with an unmarried woman. Moreover, only a man could be guilty of the offence of adultery when he had sexual intercourse with a married woman. The same provision, however, penalized a married woman who engaged in a sexual relationship with an unmarried or married man outside of the marriage. The penalties for the offence also prescribed a much stricter punishment for women as compared to their male counterparts.[90] The challenge was brought primarily Under Article 21 of the Ugandan Constitution, which guaranteed equality under the law, Article 24 which mandates respect for human dignity and protection from inhuman treatment and Article 33(1), which protected the rights of women under the Constitution.[91]

The Respondent prayed that the Court consider making the provision of adultery equal in its treatment of men and women, instead of striking it down completely. However, in its holding, the Court denied this request, holding it could not prescribe a punishment under penal law to change the statute. The Court held that Section 154 of the Penal Code was wholly unconstitutional as being violative of the provisions of the Constitution, and remarked:

...the Respondent did not point out to us areas that his Court can or should modify and adapt to bring them in conformity with the provisions of the Constitution. The Section is a penal one and this Court in our considered opinion cannot create a sentence that the courts can impose on adulterous spouses.

Consequently, it is our finding that the provision of Section 154 of the Penal Code Act is inconsistent with the stated provisions of the Constitution and it is void.[55]

115. In 2015, in **DE v. RH**,[92] the Constitutional Court of South Africa held that an aggrieved spouse could no longer seek damages against a third party in cases of adultery. Madlanga J poignantly remarked on the preservation of marriage:

...although marriage is 'a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties... Its essence... consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it'. If the

parties to the marriage have lost that moral commitment, the marriage will fail and punishment meted out to a third party is unlikely to change that.[93]

The decisions of the US Supreme Court bearing on the issue of privacy have been analysed in an incisive article, titled "For Better or for Worse: Adultery, Crime and The Constitution"[94], by Martin Siegel. He presents three ways in which adultery implicates the right to privacy. The first is that adultery must be viewed as a constitutionally protected marital choice. Second, that certain adulterous relationships are protected by the freedom of association and finally, that adultery constitutes an action which is protected by sexual privacy.[95] A brief study is also undertaken on whether action penalizing adultery constitutes a legitimate interest of the State.

The first privacy interest in adultery is the right to marital choice. The U.S. Supreme Court has upheld the values of 'fundamental liberty', 'freedom of choice' and 'the 'right to privacy' in marriage. With this jurisprudence, the author argues, it would be strange if a decision to commit adultery is not a treated as a matter of marriage and family life as expressed in **Cleveland Board**[96], 'an act occurring in marriage', as held in **Griswold**, 381 U.S. 1 (1967) or a 'matter of marriage and family life' as elucidated in **Carey**.[98]

Siegel posits that a decision to commit adultery is a decision 'relating to marriage and family relationships' and therefore, falls within the domain of protected private choices. He observes that the essence of the offence is in fact the married status of one of the actors, and the mere fact that the commission of the act consisted of a mere sexual act or a series of them is legally irrelevant. If the argument that adultery, though unconventional, is an act related to marriage and therefore fundamentally private is accepted, then it deserves equal protection. Siegel cites Laurence Tribe, on accepting the 'unconventional variants' that also form a part of privacy:

Ought the "right to marriage," as elucidated by Griswold, Loving v. Virginia, Zablocki, Boddie v. Connecticut and Moore, also include marriage's "unconventional variants"-in this case the adulterous union?[99]

The mere fact that adultery is considered unconventional in society does not justify depriving it of privacy protection. The freedom of making choices also encompasses the freedom of making an 'unpopular' choice. This was articulated by Justice Blackmun in his dissent in **Hardwick**, 478 U.S. 205:

A necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.[101]

Siegel concludes that the privacy protections afforded to marriage must extend to all choices made within the marriage:

The complexity and diversity among marriages make it all the more important that the privacy associated with that institution be construed to include all kinds of marriages, sexually exclusive as well as open, 'good', as well as 'bad'.[102]

Siegel then proceeds to examine the next privacy interest in adultery, that of the right to association. The right to freedom of association he states is 'a close constitutional relative of privacy'[103], and they often interact in an intertwined manner. Siegel proceeds to explain that adultery must not simply be looked at as an act of consensual adult sexual activity, as sexual activity may simply be one element in a continuum of interactions between people:

Sexual activity may be preliminary or incidental to a developing association, or it may be its final culmination and solidification. In either case, it is simply one more element of the relationship. Two people may have sex upon first meeting. In this case, associational interests seem less important, although "loveless encounters are sometimes prerequisites for genuine love relationships; to forbid the former is, therefore, to inhibit the latter.[104]

Next, Siegel examines the plausible protection of adultery through the lens of the freedom of expression. Since the act of engaging in sexual activity can be interpreted as being expressive, Siegel claims adultery might also implicate First Amendment rights. In support he cites a body of case law[105], where courts have held that First Amendment rights are not limited to merely verbal expression but also encompass the right to 'expressive association'.

In concluding his Section on the right to associate, Siegel warns against the dangers of classifying adultery solely as a sexual activity, as doing so would be akin to protecting a part of the relationship and criminalizing the other. This would be manifestly unjust:

It is difficult, both theoretically and practically, to single out the sexual contacts two people may have from the rest of their relationship-to criminalize the one and constitutionally protect as fundamental the other.[106]

Lastly, Siegel discusses the connection between adultery and the right to sexual privacy. It is accepted that a right to privacy safeguards an individual's deeply personal choices which includes a recognition accorded to the inherently private nature of all consensual adult sexual activity.[107] This understanding of sexual privacy found favour with the U.S. Supreme Court, which in **Thornburgh** v. **American College of Obstetricians and Gynaecologists**[108] quoted Charles Fried with approval:

The concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole.[109]

Siegel reiterates the underlying intangible value of adult consensual sexual activity:

The real importance of sexuality to humans, more so in today's world of effective birth control than ever, lies in the possibilities for self-realization and definition inherent in sexual choices. Sexual experience offers "self-transcendence, expression of private fantasy, release of inner tensions, and meaningful and acceptable expression of regressive desires to be again the free child-unafraid to lose control, playful, vulnerable, spontaneous, sensually loved.[110]

Reflecting on the relationship between marital privacy and associational freedom, Spiegel remarks the "heterogeneity of experience", resulting in a variety of choices, necessarily include the

adulterous union which must be protected since it is unrealistic to expect all individuals to conform to society's idea of sexuality:

Because sex is so much a part of our personhood, we should not expect that people different in so many other ways will be identical sexually. For some, adultery is a cruel betrayal, while for others it is just comeuppance for years of spousal neglect. In some marriages, sex is the epitome of commitment, while in others spouses jointly and joyfully dispense with sexual monogamy.[111]

In concluding the author states that the foregoing three-layered analysis left no room for doubt that adultery was a matter of marriage. It therefore deserved to be protected like all other affairs occurring in marriage and implicated routine privacy-based freedoms, and it was imperative to treat is as such. Spiegel concludes by quoting the U.S. Supreme Court in **Eisenstadt** v. **Braid**, on the importance of protecting the power to make a 'bad' choice in a marriage:

A marriage's privacy and autonomy are the best routes to safeguarding liberty and pluralism. This is no less true when the power to choose, as it inevitably will, results in bad choices. It is a confidence in nothing less than the theory underscoring our entire political order: Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully appraised of the merits of the controversy.[112]

While acknowledging the interest that the State has in preserving the institution of marriage, Siegel precisely points out the inefficacy of attaching criminal sanctions to adultery in the following words:

Even if we accept that a state is trying to foster the interests of specific deceived spouses by its laws criminalizing adultery, it is impossible to believe that a criminal penalty imposed on one of the spouses would somehow benefit a marriage instead of representing the final nail in its coffin. And if deterrence of adultery is the goal, then the state's failure to arrest and prosecute offenders has long since removed any fear of legal sanction.[113]

Deborah L Rhode in her book titled "Adultery" argues that "intermittent idiosyncratic invocations of adultery prohibitions do little to enforce marital vows or reinforce confidence in the Rule of law. There are better ways to signal respect for the institution of marriage and better uses of law enforcement than policing private, consensual sexual activity."[114]

E Confronting patriarchy

Norms and ideals arise from the yearning that it is an expression of freedom: it does not have to be this way, it could be otherwise.[115]

116. The Petitioner urged that (i) The full realisation of the ideal of equality enshrined in Article 14 of the Constitution ought to be the endeavour of this Court; (ii) the operation of Section 497 is a denial of equality to women in marriage; and (iii) the provision is manifestly arbitrary and amounts to a violation of the constitutional guarantee of substantive equality.

The act which constitutes the offence Under Section 497 of the Penal Code is a man engaging in sexual intercourse with a woman who is the "wife of another man". For the offence to arise, the man who engages in sexual intercourse must either know or have reason to believe that the woman is married. Though a man has engaged in sexual intercourse with a woman who is married, the offence of adultery does not come into being where he did so with the consent or connivance of her husband.

These ingredients of Section 497 lay bare several features which bear on the challenge to its validity Under Article 14. The fact that the sexual relationship between a man and a woman is consensual is of no significance to the offence, if the ingredients of the offence are established. What the legislature has constituted as a criminal offence is the act of sexual intercourse between a man and a woman who is "the wife of another man". No offence exists where a man who has a subsisting marital relationship engages in sexual intercourse with a single woman. Though adultery is considered to be an offence relating to marriage, the legislature did not penalise sexual intercourse between a married man and a single woman. Even though the man in such a case has a spouse, this is considered to be of no legal relevance to defining the scope of the offence. That is because the provision proceeds on the notion that the woman is but a chattel; the property of her husband. The fact that he is engaging in a sexual relationship outside marriage is of no consequence to the law. The woman with whom he is in marriage has no voice of her own, no agency to complain. If the woman who is involved in the sexual act is not married, the law treats it with unconcern. The premise of the law is that if a woman is not the property of a married man, her act would not be deemed to be 'adulterous', by definition.

117. The essence of the offence is that a man has engaged in an act of sexual intercourse with the wife of another man. But if the man to whom she is married were to consent or even to connive at the sexual relationship, the offence of adultery would not be established. For, in the eyes of law, in such a case it is for the man in the marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. Indeed, even if the two men (the spouse of the woman and the man with whom she engages in a sexual act) were to connive, the offence of adultery would not be made out.

118. Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect the 'institution of marriage', it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband. That is why no offence of adultery would be made out if her husband were to consent to her sexual relationship outside marriage. Worse still, if the spouse of the woman were to connive with the person with whom she has engaged in sexual intercourse, the law would blink. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision.

119. The test of manifest arbitrariness is rooted in Indian jurisprudence. In **E.P. Royappa** v. **State of Tamil Nadu** MANU/SC/0380/1973 : (1974) 4 SCC 3, Justice Bhagwati characterised equality as a "dynamic construct" which is contrary to arbitrariness:

85...Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. **Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14....**

[116]

The Constitution Bench in **Shayara Bano** v. **Union of India** MANU/SC/1031/2017 : (2017) 9 SCC 1 held the practice of Triple Talaq to be unconstitutional. Justice Rohinton Nariman, in his concurring opinion, applied the test of manifest arbitrariness to hold that the practice does not pass constitutional muster:

87. **The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the Rule of law, would violate Article 14.** Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P.* v. *McDowell and Co.*, MANU/SC/0427/1996 : (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.
[117]

On the application of the test of manifest arbitrariness to invalidate legislation, the learned Judge held thus:

101. ...there is no rational distinction between the two types of legislation when it comes to this ground of challenge Under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.[118]

120. The decision in **Shayara Bano**, holds that legislation or state action which is manifestly arbitrary would have elements of caprice and irrationality and would be characterized by the lack

of an adequately determining principle. An "adequately determining principle" is a principle which is in consonance with constitutional values. With respect to criminal legislation, the principle which determines the "act" that is criminalized as well as the persons who may be held criminally culpable, must be tested on the anvil of constitutionality. The principle must not be determined by majoritarian notions of morality which are at odds with constitutional morality.

In **Navtej Singh Johar** v. **Union of India**, (**"Navtej"**)[119] Justice Indu Malhotra emphasized the need for a "sound" or "rational principle" underlying a criminal provision:

...Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle...

Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community.

121. The hypothesis which forms the basis of the law on adultery is the subsistence of a patriarchal order. Section 497 is based on a notion of morality which fails to accord with the values on which the Constitution is founded. The freedoms which the Constitution guarantees inhere in men and women alike. In enacting Section 497, the legislature made an ostensible effort to protect the institution of marriage. 'Ostensible' it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees. Each of them is entitled to take decisions in accordance with his and her conscience and each must have the ability to pursue the human desire for fulfilment. Section 497 is based on the understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognising, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution. Section 497 treats a woman as but a possession of her spouse. The essential values on which the Constitution is founded-liberty, dignity and equality-cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness.

122. While engrafting the provision into Chapter XX of the Penal Code-"of offences relating to marriage"-the legislature has based the offence on an implicit assumption about marriage. The notion which the law propounds and to which it imposes the sanctions of penal law is that the marital tie subordinates the role and position of the woman. In that view of marriage, the woman is bereft of the ability to decide, to make choices and give free expression to her personality. Human sexuality is an essential aspect of identity. Choices in matters of sexuality are reflective of the human desire for expression. Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice. Sharing of physical intimacies is a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality cannot be dis-associated from the human personality. For, to be human involves the ability to fulfil sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in

society and are premised on a voluntary acceptance by consenting parties. Section 497 denudes the woman of the ability to make these fundamental choices, in postulating that it is only the man in a marital relationship who can consent to his spouse having sexual intercourse with another. Section 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. The provision is proffered by the legislature as an effort to protect the institution of marriage. But it proceeds on a notion of marriage which is one sided and which denies agency to the woman in a marital tie. The ability to make choices within marriage and on every aspect concerning it is a facet of human liberty and dignity which the Constitution protects. In depriving the woman of that ability and recognising it in the man alone, Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage is crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality and is violative of Article 14.

123. The procedural law which has been enacted in Section 198 of the Code of Criminal Procedure 1973 re-enforces the stereotypes implicit in Section 497. Cognizance of an offence under Chapter XX of the Penal Code can be taken by a Court only upon a complaint of a person aggrieved. In the case of an offence punishable Under Section 497, only the husband of the woman is deemed to be aggrieved by the offence. In any event, once the provisions of Section 497 are held to offend the fundamental rights, the procedure engrafted in Section 198 will cease to have any practical relevance.

124. Section 497 amounts to a denial of substantive equality. The decisions in Sowmithri and Revathi espoused a formal notion of equality, which is contrary to the constitutional vision of a just social order. Justness postulates equality. In consonance with constitutional morality, substantive equality is "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society."[120] To move away from a formalistic notion of equality which disregards social realities, the Court must take into account the impact of the Rule or provision in the lives of citizens.

The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals.[121] The disadvantage must be addressed not by treating a woman as 'weak' but by construing her entitlement to an equal citizenship. The former legitimizes patronising attitudes towards women. The latter links true equality to the realisation of dignity. The focus of such an approach is not simply on equal treatment under the law, but rather on the real impact of the legislation.[122] Thus, Section 497 has to be examined in the light of existing social structures which enforce the position of a woman as an unequal participant in a marriage.

Catherine Mackinnon implores us to look more critically at the reality of this family sphere, termed "personal," and view the family as a "crucible of women's unequal status and subordinate treatment sexually, physically, economically, and civilly."[123] In a social order which has enforced patriarchal notions of sexuality upon women and which treats them as subordinate to their spouses in heterosexual marriages, Section 497 perpetuates an already existing inequality.

125. Facially, the law may be construed to operate as an exemption from criminal sanctions. However, when viewed in the context of a social structure which considers the husband as the owner of the wife's sexuality, the law perpetuates a deeply entrenched patriarchal order. The true realisation of the substantive content of equality must entail an overhaul of these social structures. When all visible and invisible forms of inequality-social, cultural, economic, political or sexual-are recognised and obliterated; a truly egalitarian existence can be imagined.

F 'The Good Wife'

Article 15 of the Constitution reads thus:

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them.

126. Article 15 prohibits the State from discriminating on grounds only of sex. The Petitioners contend that (i) Section 497, in so far as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination; (ii) Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15.

From a joint reading of Section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure, the following propositions emerge:

i. Sexual relations by a married woman with another man outside her marriage without the consent of her husband is criminalized;

ii. In an 'adulterous relationship', the man is punished for adultery, while the woman is not (even as an abettor);

iii. Sexual relations by a married man with an unmarried woman are not criminalized;

iv. Section 497 accords primacy to the consent of the husband to determine whether criminality is attached to the man who has consensual sexual relations with the spouse of the former. Consent or willingness of the woman is irrelevant to the offence;

v. A man who has sexual relations with the spouse of another man is relieved of the offence only if her spouse has consented or, even connived; and

vi. Section 497, Indian Penal Code, read with Section 198, Code of Criminal Procedure, gives the man the sole right to lodge a complaint and precludes a woman from initiating criminal proceedings.

127. The operation of Section 497, by definition, is confined to the sexual relations of a woman outside her marriage. A man who has sexual intercourse with a married woman without the consent or connivance of her husband, is liable to be prosecuted under the Section. However, a married man may engage in sexual relations outside marriage with a single woman without any repercussion in criminal law. Though granted immunity from prosecution, a woman is forced to

consider the prospect of the penal action that will attach upon the individual with whom she engages in a sexual act. To ensure the fidelity of his spouse, the man is given the power to invoke the criminal sanction of the State. In effect, her spouse is empowered to curtail her sexual agency. The consent of the husband serves as the key to the exercise of the sexual agency of his spouse. That the married woman is in a consensual relationship, is of no consequence to the possible prosecution.

A married man may engage in sexual relations with an unmarried woman who is not his wife without the fear of opening his partner to prosecution and without the consent of his spouse. No recourse is provided to a woman against her husband who engages in sexual relations outside marriage. The effect of Section 497 is to allow the sexual agency of a married woman to be wholly dependent on the consent or connivance of her husband. Though Section 497 does not punish a woman engaging in adultery as an abettor, a married man and a married woman are placed on different pedestals in respect to their actions. The effect of Section 497, despite granting immunity from prosecution to the married woman, is to attach a notion of wrongdoing to the exercise of her sexual agency. Despite exempting her from prosecution, the exercise of her sexual agency is contingent on the consent or connivance of the husband. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, Section 497 discriminates between a married man and a married woman to her detriment on the ground of sex. This kind of discrimination is prohibited by the non-discrimination guarantee in Article 15 of the Constitution. Section 497 also places a woman within marriage and the man with whom she shares a sexual relationship outside marriage on a different footing.

128. Section 497 criminalizes the conduct of the man who has sexual intercourse with the wife of another without his consent. It exempts women from criminal liability. Underlying this exemption is the notion that women, being denuded of sexual agency, should be afforded the 'protection' of the law. In criminalizing the Accused who engages in the sexual relationship, the law perpetuates a gender stereotype that men, possessing sexual agency are the seducers, and that women, as passive beings devoid of sexual agency, are the seduced. The notion that a woman is 'submissive', or worse still 'naive' has no legitimacy in the discourse of a liberal constitution. It is deeply offensive to equality and destructive of the dignity of the woman. On this stereotype, Section 497 criminalizes only the Accused man.

129. Pertinent to the present enquiry, is that the provision allows only the husband to initiate a prosecution for adultery. The consent or connivance of the husband precludes prosecution. If a husband consents, his spouse is effectively granted permission to exercise her sexual agency with another individual. This guarantees a degree of control to the husband over the sexual agency of his spouse. As a relic of Victorian morality, this control over the sexual agency of the spouse, views the wife as the property of the husband. Fidelity of the woman, and the husband's control over it, is seen as maintaining the 'property' interest of a husband in his wife.[124] In this view, a woman is confounded with things that can be possessed. In construing the spouse as a passive or inanimate object, the law on adultery seeks to punish a person who attempts theft on the property of the husband. Coontz and Henderson write that the stabilization of property rights and the desire to pass on one's property to legitimate heirs, were what motivated men to restrict the sexual behavior of their wives.[125]

130. Underlying Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible. In condemning the sexual agency of the woman, only the husband, as the 'aggrieved' party is given the right to initiate prosecution. The proceedings once initiated, would be geared against the person who committed an act of 'theft' or 'trespass' upon his spouse. Sexual relations by a man with another man's wife is therefore considered as theft of the husband's property. Ensuring a man's control over the sexuality of his wife was the true purpose of Section 497.

Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values.

131. A provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. In its operation, law "permeates and is inseparable from everyday living and knowing, and it plays an important role in shaping (legal) consciousness."[126] A contextual reading of the law shows that it influences social practices, and makes "asymmetries of power seem, if not invisible, natural and benign".[127] Section 497 has a significant social impact on the sexual agency of women. It builds on existing gender stereotypes and bias and further perpetuates them. Cultural stereotypes are more forgiving of a man engaging in sexual relations than a woman. Women then are expected to be chaste before and faithful during marriage. In restricting the sexual agency of women, Section 497 gives legal recognition to socially discriminatory and gender-based norms. Sexual relations for a woman were legally and socially permissible when it was within her marriage. Women who committed adultery or non-marital sex were labeled immoral, shameful, and were criminally condemned.

In **Anuj Garg** v. **Hotel Association of India**, MANU/SC/8173/2007 : (2008) 3 SCC 1 this Court struck down Section 30 of the Punjab Excise Act, 1914 which prohibited the employment of women in premises where liquor or other intoxicating drugs were consumed by the public. Holding that the law suffered from "incurable fixations of stereotype morality and conception of sexual role", the Court took into account "traditional cultural norms as also the state of general ambience in the society" and held that "no law in its ultimate effect should end up perpetuating the oppression of women."

In **Navtej**, one of us (Chandrachud J.) held thus:

A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of

sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1).

132. Section 497 rests on and perpetuates stereotypes about women and sexual fidelity. In curtailing the sexual agency of women, it exacts sexual fidelity from women as the norm. It perpetuates the notion that a woman is passive and incapable of exercising sexual freedom. In doing so, it offers her 'protection' from prosecution. Section 497 denudes a woman of her sexual autonomy in making its free exercise conditional on the consent of her spouse. In doing so, it perpetuates the notion that a woman consents to a limited autonomy on entering marriage. The provision is grounded in and has a deep social effect on how society perceives the sexual agency of women. In reinforcing the patriarchal structure which demands her controlled sexuality, Section 497 purports to serve as a provision envisaged for the protection of the sanctity of marriage. In the context of a constitutional vision characterized by the struggle to break through the shackles of gender stereotypes and guarantee an equal citizenship, Section 497 entrenches stereotypes and existing structures of discrimination and has no place in a constitutional order.

F.1 The entrapping cage

133. Section 497 exempts a woman from being punished as an abettor. Underlying this exemption is the notion that a woman is the victim of being seduced into a sexual relationship with a person who is not her husband. In assuming that the woman has no sexual agency, the exemption seeks to be justified on the ground of being a provision that is beneficial to women and protected Under Article 15(3) of the Constitution. This is contrary to the remedy which Article 15(3) sought to embody. In **Government of A.P.** v. **P.B. Vijayakumar**, MANU/SC/0317/1995 : (1995) 4 SCC 520 a two judge Bench of this Court dealt with a challenge to Sub-rule (2) of Rule 22-A of the Andhra Pradesh State and Subordinate Service Rules, which gave women a preference in the matter of direct recruitment. Speaking for the Court, Justice Sujata v. Manohar held thus:

7. The insertion of Clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women....[128]

In **Independent Thought** v. **Union of India**, MANU/SC/1298/2017 : (2017) 10 SCC 800 Justice Madan B Lokur, speaking for a two judge Bench of this Court, adverted to the drafting history of Article 15(3) and held thus:

55. The response given by Dr. Ambedkar suggests that he certainly favoured special provisions for women and children with a view to integrate them into society and to take them out of patriarchal control...
[129]

56. What clearly emerges from this discussion is that Article 9(2) of the draft Constitution [now Article 15(3)] was intended to discriminate in favour of women and children-a form of affirmative action to their advantage.
129

134. Article 15(3) encapsulates the notion of 'protective discrimination'. The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of 'protection'. This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15, nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was 'seduced' into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to 'protect' her. The 'protection' afforded to women Under Section 497 highlights the lack of sexual agency that the Section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women.

G Denuding identity-women as sexual property

135. Charles Jean Marie wrote in 1911[131] about the central forms of adultery as an offence. The criminalisation of adultery came at a social cost: of disregarding the agency of a woman as a sentient being.

In all legislations the married woman is more or less openly considered as the property of the husband and is very often confounded, absolutely confounded, with things possessed. To use her, therefore, without the authority of her owner is theft...But adultery is not a common theft. An object, an inert possession, are passive things; their owner may well punish the thief who has taken them, but him only. **In adultery, the object of larceny, the wife, is a sentient and thinking being-that is to say, an accomplice in the attempt on her husband's property in her own person;** moreover he generally has her in his keeping....

The law on adultery is but a codified Rule of patriarchy. Patriarchy has permeated the lives of women for centuries. Ostensibly, society has two sets of standards of morality for judging sexual behaviour.[132] One set for its female members and another for males.[55] Society ascribes impossible virtues to a woman and confines her to a narrow sphere of behaviour by an expectation of conformity.[55] Raising a woman to a pedestal is one part of the endeavour. The second part is all about confining her to a space. The boundaries of that space are defined by what a woman should or should not be. A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack: to rape, honour killings, sex-determination and infanticide. As an embodiment of virtue, society expects the women to be a mute spectator to and even accepting of egregious discrimination within the home. This is part of the process of raising

women to a pedestal conditioned by male notions of what is right and what is wrong for a woman. The notion that women, who are equally entitled to the protections of the Constitution as their male counterparts, may be treated as objects capable of being possessed, is an exercise of subjugation and inflicting indignity. Anachronistic conceptions of 'chastity' and 'honour' have dictated the social and cultural lives of women, depriving them of the guarantees of dignity and privacy, contained in the Constitution.

136. The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.

The opinion delivered on behalf of four judges in **K.S. Puttaswamy** v. **Union of India** MANU/SC/1044/2017 : (2017) 10 SCC 1 has recognised the dangers of the "use of privacy as a veneer for patriarchal domination and abuse of women." On the delicate balance between the competing interests of protecting privacy as well dignity of women in the domestic sphere, the Court held:

The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty.

137. In "Seeing like a Feminist", Nivedita Menon has recognized the patriarchal family as the "basis for the secondary status of women in society."[133] Menon notes that 'the personal is political'.[55] Her scholarly work implores us to recognise spaces which may be considered personal such as the bedroom and kitchen. These spaces are immersed in power relations, but with ramifications for the public sphere.[55]

Control over women's sexuality is the key patriarchal assumption that underlies family and marriage.[55] When it shifts to the 'public' as opposed to the 'private', the misogyny becomes even more pronounced.[55] Section 497 embodies this. By the operation of the provision, women's sexuality is sought to be controlled in a number of ways. First, the husband and he alone is enabled to prosecute the man with whom his wife has sexual relations. Even in cases where the relationship is based on the consent of the woman, the law treats it as an offence, denying a woman who has voluntarily entered into a consensual relationship of her sexual agency. Second, such a relationship would be beyond the reach of penal law if her husband consents to it. The second condition is a telling reflection of the patriarchal assumption underlying the criminal provision: that the husband is the owner of the wife's sexual agency.

138. In remedying injustices, the Court cannot shy away from delving into the 'personal', and as a consequence, the 'public'. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and "granting" rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink-women are equal citizens of this nation, entitled to the protections of the Constitution. Any

legislation which results in the denial of these Constitutional guarantees to women, cannot pass the test of constitutionality.

Patriarchy and paternalism are the underpinnings of Section 497. It needs no iteration that misogyny and patriarchal notions of sexual control find no place in a constitutional order which has recognised dignity as intrinsic to a person, autonomy being an essential component of this right. The operation of Section 497 denotes that 'adulterous women' virtually exercise no agency; or at least not enough agency to make them criminally liable.[134] They are constructed as victims. As victims, they are to be protected by being exempt from sanctions of a criminal nature.[55] Not only is there a denial of sexual agency, women are also not seen to be harmed by the offence.[55] Thus, the provision is not simply about protecting the sanctity of the marital relationship. It is all about protecting a husband's interest in his "exclusive access to his wife's sexuality".[135]

139. Section 497 chains the woman to antediluvian notions of sexuality. Chief Justice Dipak Misra in **Navtej** emphasised the importance of sexual autonomy as a facet of individual liberty, thus protected Under Article 21 of the Constitution:

The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.

In **Navtej**, one of us (Chandrachud J.) held that the recognition of the autonomy of an individual is an acknowledgement of the State's respect for the capacity of the individual to make individual choices:

The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them.

To characterise a woman as a passive object, denuded of agency, is a denial of autonomy. The same judgment in **Navtej** has recognized sexual choices as an essential attribute of autonomy, intimately connected to the self-respect of the individual:

In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the 'Original Position' serves as a constructive model to illustrate the notion of choice behind a "partial veil of ignorance." Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society. The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of 'good' might be.

These neutrally desirable goods are described by Rawls as 'primary social goods' and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect. **Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy. Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner.**

G.1 Exacting fidelity: the intimacies of marriage

140. Marriage as a social institution has undergone changes. Propelled by access to education and by economic and social progress, women have found greater freedom to assert their choices and preferences. The law must also reflect their status as equals in a marriage, entitled to the constitutional guarantees of privacy and dignity. The opinion delivered on behalf of four judges in **Puttaswamy** held thus:

130. ...As society evolves, so must constitutional doctrine. The institutions which the Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty and dignity to every citizen.[136]

In **Navtej**, Justice Rohinton Nariman countered the assertion that the Court must "not indulge in taking upon itself the guardianship of changing societal mores" by holding thus:

...The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities. One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens. **These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism in India. Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes.**

141. Section 497 seeks the preservation of a construct of marriage in which female fidelity is enforced by the letter of the law and by the coercive authority of the state. Such a conception goes against the spirit of the rights-based jurisprudence of this Court, which seeks to protect the dignity of an individual and her "intimate personal choices". It cannot be held that these rights cease to exist once the woman enters into a marriage.

142. The identity of the woman must be as an 'individual in her own right'. In that sense, her identity does not get submerged as a result of her marriage. Section 497 lays down the norm that the identity of a married woman is but as the wife of her spouse. Underlying the norm is a notion of control over and subjugation of the woman. Such notions cannot withstand scrutiny under a liberal constitution. Chief Justice Dipak Misra in **Navtej** has drawn on the interrelationship between 'identity' and 'autonomy':

...Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society.

This Court in **Puttaswamy** has elucidated that privacy is the entitlement of every individual, with no distinction to be made on the basis of the individual's position in society.

271. Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.[137]

143. It would be useful to refer to decisions of this Court which have emphasised on the freedoms of individuals with respect to choices in relationships. In **Navtej**, Chief Justice Misra highlighted the indignity suffered by an individual when "acts within their personal sphere" are criminalised on the basis of regressive social attitudes:

An individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age old social perception. To harness such an essential decision, which defines the individualism of a person, by tainting it with criminality would violate the individual's right to dignity by reducing it to mere letters without any spirit.

The Chief Justice observed that the "organisation of intimate relations" between "consenting adults" is a matter of complete personal choice and characterised the "private protective sphere and realm of individual choice and autonomy" as a personal right:

It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. **However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.**

In **Shakti Vahini**, this Court has recognised the right to choose a partner as a fundamental right Under Articles 19 and 21 of the Constitution. In **Shafin Jahan**, "intimate personal choices" were held to be a protected sphere, with one of us (Chandrachud J) stating:

88. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable.

144. In **Navtej**, one of us (Chandrachud J) held that the right to sexual privacy is a natural right, fundamental to liberty and a soulmate of dignity. The application of Section 497 is a blatant violation of these enunciated rights. Will a trial to prove adultery lead the wife to tender proof of her fidelity? In **Navtej**, the principle was elucidated thus:

In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters.

In so far as two individuals engage in acts based on consent, the law cannot intervene. Any intrusion in this private sphere would amount to deprivation of autonomy and sexual agency, which every individual is imbued with.

In **Puttaswamy**, it was recognised that a life of dignity entails that the "inner recesses of the human personality" be secured from "unwanted intrusion":

127. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.[138]

145. In criminalizing adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of the penal law to a gender biased approach to the relationship of a man and a woman. The statute confounds paternalism as an instrument for protecting marital stability. It defines the sanctity of marriage in terms of a hierarchical ordering which is skewed against the woman. The law gives unequal voices to partners in a relationship.

This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty Under Article 21. Individuals in a relationship, whether within or outside marriage, have a legitimate expectation that each will provide to the other the same element of companionship and respect for choices. Respect for sexual autonomy, it must be emphasized is founded on the equality between spouses and partners and the recognition by each of them of the dignity of the other. Control over sexuality attaches to the human element in each individual.

Marriage-whether it be a sacrament or contract-does not result in ceding of the autonomy of one spouse to another.

146. Recognition of sexual autonomy as inhering in each individual and of the elements of privacy and dignity have a bearing on the role of the state in regulating the conditions and consequences of marital relationships. There is a fundamental reason which militates against criminalization of adultery. Its genesis lies in the fact that criminalizing an act is not a valid constitutional response to a sexual relationship outside the fold of marriage. Adultery in the course of a subsisting marital relationship may, and very often does question the commitment of the spouse to the relationship. In many cases, a sexual relationship of one of the spouses outside of the marriage may lead to the end of the marital relationship. But in other cases, such a relationship may not be the cause but the consequence of a pre-existing disruption of the marital tie. All too often, spouses who have drifted apart irrevocably may be compelled for reasons personal to them to continue with the veneer of a marriage which has ended for all intents and purposes. The interminably long delay of the law in the resolution of matrimonial conflicts is an aspect which cannot be ignored. The realities of human existence are too complex to place them in closed categories of right and wrong and to subject all that is considered wrong with the sanctions of penal law. Just as all conduct which is not criminal may not necessarily be ethically just, all conduct which is inappropriate does not justify being elevated to a criminal wrongdoing.

147. The state undoubtedly has a legitimate interest in regulating many aspects of marriage. That is the foundation on which the state does regulate rights, entitlements and duties, primarily bearing on its civil nature. Breach by one of the spouses of a legal norm may constitute a ground for dissolution or annulment. When the state enacts and enforces such legislation, it does so on the postulate that marriage as a social institution has a significant bearing on the social fabric. But in doing so, the state is equally governed by the norms of a liberal Constitution which emphasise dignity, equality and liberty as its cardinal values. The legitimate aims of the state may, it must be recognized, extend to imposing penal sanctions for certain acts within the framework of marriage. Physical and emotional abuse and domestic violence are illustrations of the need for legislative intervention. The Indian state has legitimately intervened in other situations such as by enacting anti dowry legislation or by creating offences dealing with the harassment of women for dowry within a marital relationship. The reason why this constitutes a legitimate recourse to the sovereign authority of the state to criminalize conduct is because the acts which the state proscribes are deleterious to human dignity. In criminalizing certain types of wrongdoing against women, the state intervenes to protect the fundamental rights of every woman to live with dignity. Consequently, it is important to underscore that this judgment does not question the authority and even the duty of the state to protect the fundamental rights of women from being trampled upon in unequal societal structures. Adultery as an offence does not fit that paradigm. In criminalizing certain acts, Section 497 has proceeded on a hypothesis which is deeply offensive to the dignity of women. It is grounded in paternalism, solicitous of patriarchal values and subjugates the woman to a position where the law disregards her sexuality. The sexuality of a woman is part of her inviolable core. Neither the state nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalizing adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we

have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21.

148. The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Section 497 denies the individual identity of a married woman, based on age-old societal stereotypes which characterised women as the property of their spouse. It is the duty of this Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life-irrespective of whether these spheres may be regarded as 'public' or 'private'.

H Towards transformative justice

149. Constitutional values infuse the letter of the law with meaning. True to its transformative vision, the text of the Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of dignity and equality for its citizens. One of the most significant of the battles for equal citizenship in the country has been fought by women. Feminists have overcome seemingly insurmountable barriers to ensure a more egalitarian existence for future generations. However, the quest for equality continues. While there has been a considerable degree of reform in the formal legal system, there is an aspect of women's lives where their subordination has historically been considered beyond reproach or remedy. That aspect is the family. Marriage is a significant social institution where this subordination is pronounced, with entrenched structures of patriarchy and romantic paternalism shackling women into a less than equal existence.

150. The law on adultery, conceived in Victorian morality, considers a married woman the possession of her husband: a passive entity, bereft of agency to determine her course of life. The provision seeks to only redress perceived harm caused to the husband. This notion is grounded in stereotypes about permissible actions in a marriage and the passivity of women. Fidelity is only expected of the female spouse. This anachronistic conception of both, a woman who has entered into marriage as well as the institution of marriage itself, is antithetical to constitutional values of equality, dignity and autonomy.

In enforcing the fundamental right to equality, this Court has evolved a test of manifest arbitrariness to be employed as a check against state action or legislation which has elements of caprice, irrationality or lacks an adequate determining principle. The principle on which Section 497 rests is the preservation of the sexual exclusivity of a married woman-for the benefit of her husband, the owner of her sexuality. Significantly, the criminal provision exempts from sanction if the sexual act was with the consent and connivance of the husband. The patriarchal underpinnings of Section 497 render the provision manifestly arbitrary.

151. The constitutional guarantee of equality rings hollow when eviscerated of its substantive content. To construe Section 497 in a vacuum (as did **Sowmithri Vishnu**) or in formalistic terms (as did **Revathi**) is a refusal to recognise and address the subjugation that women have suffered as a consequence of the patriarchal order. Section 497 is a denial of substantive equality in that it reinforces the notion that women are unequal participants in a marriage; incapable of freely consenting to a sexual act in a legal order which regards them as the sexual property of their spouse.

152. This Court has recognised sexual privacy as a natural right, protected under the Constitution. To shackle the sexual freedom of a woman and allow the criminalization of consensual relationships is a denial of this right. Section 497 denudes a married woman of her agency and identity, employing the force of law to preserve a patriarchal conception of marriage which is at odds with constitutional morality:

Infidelity was born on the day that natural flows of sexual desire were bound into the legal and formal permanence of marriage; in the process of ensuring male control over progeny and property, women were chained within the fetters of fidelity.[139]

Constitutional protections and freedoms permeate every aspect of a citizen's life-the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality.

153. Criminal law must be in consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster.

We hold and declare that:

1) Section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;

2) Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;

3) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; and

4) Section 497 is unconstitutional.

The decisions in Sowmithri Vishnu and Revathi are overruled.

Indu Malhotra, J.

154. The present Writ Petition has been filed to challenge the constitutional validity of Section 497 of the Indian Penal Code (hereinafter referred to asIndian Penal Code) which makes 'adultery' a criminal offence, and prescribes a punishment of imprisonment upto five years and fine. Section 497 reads as under:

***497. Adultery**--Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.*

155. The Petitioner has also challenged Section 198(2) of the Code of Criminal Procedure, 1973, (hereinafter referred to as "Cr.P.C."). Section 198(2) reads as under:

For the purpose of Sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable Under Section 497 or Section 498 of the said Code.

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

156. The word '*adultery*'[140] derives its origin from the French word 'avoutre', which has evolved from the Latin verb *'adulterium'* which means "to corrupt." The concept of a wife corrupting the marital bond with her husband by having a relationship outside the marriage, was termed as 'adultery'.

This definition of adultery emanated from the historical context of Victorian morality, where a woman considered to be the 'property' of her husband; and the offence was committed only by the adulterous man. The adulterous woman could not be proceeded against as an 'abettor', even though the relationship was consensual.

157. THE DOCTRINE OF COVERTURE

Adultery, as an offence, was not a crime under Common Law, in England. It was punishable by the ecclesiastical courts which exercised jurisdiction over sacramental matters that included marriage, separation, legitimacy, succession to personal property, etc.[141]

In England, coverture determined the rights of married women, under Common Law. A '*feme sole*' transformed into a '*feme covert*' after marriage. '*Feme covert*' was based on the doctrine of 'Unity of Persons' - i.e. the husband and wife were a single legal identity. This was based on notions of biblical morality that a husband and wife were 'one in flesh and blood'. The effect of 'coverture' was that a married woman's legal rights were subsumed by that of her husband. A married woman could not own property, execute legal documents, enter into a contract, or obtain an education against her husband's wishes, or retain a salary for herself.[142]

The principle of 'coverture' was described in William Blackstone's Commentaries on the Laws of England as follows:[143]

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into

that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquires by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all contracts made between husband and wife, when single, are voided by the intermarriage.

On this basis, a wife did not have an individual legal liability for her misdeeds, since it was legally assumed that she was acting under the orders of her husband, and generally a husband and wife were not allowed to testify either for, or against each other.

Medieval legal treatises, such as the Bracton[144], described the nature of 'coverture' and its impact on married women's legal actions. Bracton (supra) states that husbands wielded power over their wives, being their 'rulers' and 'custodians of their property'. The institution of marriage came under the jurisdiction of ecclesiastical courts. It made wives live in the shadow of their husbands, virtually 'invisible' to the law.

The principle of coverture subsisted throughout the marriage of the couple. It was not possible to obtain a divorce through civil courts, which refused to invade into the jurisdiction of the church. Adultery was the only ground available to obtain divorce.

The origin of adultery under Common Law was discussed in the English case Pritchard v. Pritchard and Sims MANU/UKWA/0081/1966 : [1966] 3 All E.R. 601, wherein it was held that:

In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, under the common law, three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed adultery with her...In the action for adultery, known as criminal conversation, which dates from before the time of BRACTON, and consequently lay originally in trespass, the act of adultery itself was the cause of action and the damages punitive at large. It lay whether the adultery resulted in the husband's losing his wife's society and services or not. All three causes of action were based on the recognition accorded by the common law to the husband's propriety which would have been hers had she been feme sole.

In the Victorian Era[145], women were denied the exercise of basic rights and liberties, and had little autonomy over their choices. Their status was pari materia with that of land, cattle and crop; forming a part of the 'estate' of their fathers as daughters prior to marriage, and as the 'estate' of their husband post-marriage.[146]

Lord Wilson in his Speech titled "*Out of his shadow: The long struggle of wives under English Law*"[147] speaks of the plight of women during this era:

8. An allied consequence of the wife's coverture was that she was not legally able to enter into a contract. Apart from anything else, she had no property against which to enforce any order against her for payment under a contract; so it was only a small step for the law to conclude that she did not have the ability to enter into the contract in the first place. If however, the wife went into a shop and ordered goods, say of food or clothing, which the law regarded as necessary for the household, the law presumed, unless the husband proved to the contrary, that she had entered into the contract as his authorised agent. So the shopkeeper could sue him for the price if the wife had obtained the goods on credit.

9. In the seventeenth century there was a development in the law relating to this so-called agency of necessity. It was an attempt to serve the needs of wives whose husbands had deserted them. The law began to say that, if a deserted wife had not committed adultery, she could buy from the shopkeeper all such goods as were necessary for her and, even if (as was highly likely) the husband had not authorised her to buy them, he was liable to pay the shopkeeper for them. But the shopkeeper had a problem. How was he to know whether the wife at the counter had been deserted and had not committed adultery? Sometimes a husband even placed a notice in the local newspaper to the effect, true or untrue, that his wife had deserted him or had committed adultery and that accordingly he would not be liable to pay for her purchase of necessaries.....

The remnants of 'coverture' sowed the seeds for the introduction of 'Criminal Conversation' as an actionable tort by a husband against his wife's paramour in England.

Criminal Conversation as a tort, gave a married man the right to claim damages against the man who had entered into a sexual relationship with his wife. The consent of the wife to the relationship, did not affect the entitlement of her husband to sue.

The legal position of matrimonial wrongs underwent a significant change with the passing of the Matrimonial Causes Act, 1857 in England.[148] Section 59 of this Act abolished the Common Law action for "criminal conversation".[149] Section 33 empowered the Courts to award damages to the husband of the paramour for adultery.[150] The claim for damages for adultery was to be tried on the same principles, and in the same manner, as actions for 'criminal conversation' which were formerly tried at Common Law.[16]

The status of the wife, however, even after the passing of the Matrimonial Causes Act, 1857 remained as 'property of the husband', since women had no right to sue either their adulterous husband or his paramour.

Gender equality between the spouses came to be recognised in some measure in England, with the passing of the Matrimonial Causes Act, 1923 which made 'adultery' a ground for divorce, available to both spouses, instead of only the husband of the adultrous wife. The right of the husband to claim damages from his wife's paramour came to be abolished by The Law Reform (Miscellaneous Provisions) Act of 1970 on January 1, 1971. In England, adultery has always been a civil wrong, and not a penal offence.

158. SECTION 497-HISTORICAL BACKGROUND

158.1. The Indo-Brahmanic traditions prevalent in India mandated the chastity of a woman to be regarded as her prime virtue, to be closely guarded to ensure the purity of the male bloodline. The objective was not only to protect the bodily integrity of the woman, but to ensure that the husband retains control over her sexuality, confirming her 'purity' in order to ensure the purity of his own bloodline.[151]

158.2. The first draft of the Indian Penal Code released by the Law Commission of India in 1837 did not include "adultery" as an offence. Lord Macaulay was of the view that adultery or marital infidelity was a private wrong between the parties, and not a criminal offence.[152]

The views of Lord Macaulay were, however, overruled by the other members of the Law Commission, who were of the opinion that the existing remedy for 'adultery' under Common Law would be insufficient for the 'poor natives', who would have no recourse against the paramour of their wife.[153]

158.3. The debate that took place in order to determine whether 'adultery' should be a criminal offence in India was recorded in 'Note Q' of '*A Penal Code prepared by the Indian Law Commissioners*'[154]. The existing laws[155] for the punishment of adultery were considered to be altogether inefficacious for preventing the injured husband from taking matters into his own hands.

The Law Commissioners considered that by not treating 'adultery' as a criminal offence, it may give sanction to immorality. The Report[153] states:

Some who admit that the penal law now existing on this subject is in practice of little or no use, yet think that the Code ought to contain a provision against adultery. They think that such a provision, though inefficacious for the repressing of vice, would be creditable to the Indian Government, and that by omitting such a provision we should give a sanction to immorality. They say, and we believe with truth, that the higher class of natives consider the existing penal law on the subject as far too lenient, and are unable to understand on what principle adultery is treated with more tenderness than forgery or perjury.

...That some classes of the natives of India disapprove of the lenity with which adultery is now punished we fully believe, but this in our opinion is a strong argument against punishing adultery at all. There are only two courses which in our opinion can properly be followed with respect to this and other great immoralities. They ought to be punished very severely, or they ought not to be punished at all. The circumstance that they are left altogether unpunished does not prove that the Legislature does not regard them with disapprobation. But when they are made punishable the degree of severity of the punishment will always be considered as indicating the degree of disapprobation with which the Legislature regards them. We have no doubt that the natives would be far less shocked by the total silence of the penal law touching adultery than by seeing an adulterer sent to prison for a few months while a coiner is imprisoned for fourteen years.

The Law Commissioners in their Report (supra) further stated:

...The population seems to be divided into two classes-those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those

who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury.

...No body proposes that adultery should be punished with a severity at all proportioned to the misery which it produces in cases where there is strong affection and a quick sensibility to family honour. We apprehend that among the higher classes in this country nothing short of death would be considered as an expiation for such a wrong. In such a state of society we think it far better that the law should inflict no punishment than that it should inflict a punishment which would be regarded as absurdly and immorally lenient.

The Law Commissioners considered the plight of women in this country, which was much worse than that of women in France and England. 'Note Q' (surpa) records this as the reason for not punishing women for the offence of adultery.

The relevant extract of 'Note Q' is reproduced herein below:

There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attention (sic) of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial.

Colonel Sleeman opposed the reasoning of the Law Commissioners on this subject. The 'backwardness of the natives' to take recourse to the courts for redress in cases of adultery, arose from 'the utter hopelessness on their part of getting a conviction.' He was of the view that if adultery is not made a crime, the adulterous wives will alone bear the brunt of the rage of their husbands. They might be tortured or even poisoned. In his view, offences such as adultery were inexcusable and must be punished. Colonel Sleeman observed:

The silence of the Penal Code will give still greater impunity to the seducers, while their victims will, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer.

...Sometimes the poorest persons will refuse pecuniary compensations; but generally they will be glad to get what the heads of their caste or circle of society may consider sufficient to defray the expenses of a second marriage. They dare not live in adultery, they would be outcasts if they did; they must be married according to the forms of their caste, and it is reasonable that the seducer of the wife should be made to defray these expenses for the injured husband. The rich will, of course, always refuse pecuniary compensation, and for the same reason that they would never prosecute the seducer in a civil court. The poor could never afford so to prosecute in such a court; and, as I have said, the silence of the Penal Code would be a solemn pledge of impunity to the guilty seducer, under the efficient government like ours, that can prevent the husband and father from revenging themselves except upon the females.[153]

This debate along with the recommendation of the Law Commissioners was considered by the Indian Law Commissioners while drafting the Indian Penal Code.

158.4. The relevant extract from the discussion on whether to criminalize adultery was as follows:

We have observed that adultery is recognised as an offence by the existing laws of all the Presidencies, and that an Act has been lately passed by the Governor-General of India in Council for regulating the punishment of the offence in the Bombay territories. Adultery is punishable by the Code Penal of France. It is provided for in the Code of Louisiana. The following are Mr. Livingston's observations on the subject. "Whether adultery should be considered as an offence against public morality, or left to the operation of the civil laws, has been the subject of much discussion. As far as I am informed, it figures in the penal law of all nations except the English; and some of their most celebrated lawyers have considered the omission as a defect.

Neither the immorality of the act, nor its injurious consequences on the happiness of females, and very frequently on the peace of society and the lives of its members, can be denied. The reason then why it should go unpunished does not seem very clear. It is emphatically one of that nature to which I have just referred, in which the resentment of the injured party will prompt him to take vengeance into his own hands, and commit a greater offence, if the laws of his country refuse to punish the lesser. It is the nature of man, and no legislation can alter it, to protect himself where the laws refuse their aid; very frequently where they do not; but where they will not give protection against injury, it is in vain that they attempt to punish him who supplies by his own energy their remissness. Where the law refuses to punish this offence, the injured party will do it for himself, he will break the public peace, and commit the greatest of all crimes, and he is rarely or never punished. Assaults, duels, assassinations, poisonings, will be the consequence. They cannot be prevented; but, perhaps, by giving the aid of the law to punish the offence which they are intended to avenge, they will be less frequent; and it will, by taking away the pretext for the atrocious acts, in a great measure insure the infliction of the punishment they deserve. It is for these reasons that the offence of adultery forms a chapter of this title.

Having given mature consideration to the subject, we have, after some hesitation, come to the conclusion that it is not advisable to exclude this offence from the Code. We think the reasons for continuing to treat it as a subject for the cognizance of the criminal courts preponderate.....

...While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note Q, regarding the condition of the women of this country, in deference to it we would render the male offender alone liable to punishment. We would, however, put the parties Accused of adultery on trial together, and empower the Court, in the event of their conviction, to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine. By Mr. Livingstone's Code, the woman forfeits her 'matrimonial gains', but is not liable to other punishment.

We would adopt Colonel Sleeman's suggestion as to the punishment of the male offender, limiting it to imprisonment not exceeding five years, instead of seven years allowed at present, and sanctioning the imposition of a fine payable to the husband as an alternative, or in addition.[153]

158.5. It was in this backdrop that Section 497 came to be included in the Indian Penal Code.

159. THE QUEST FOR REFORM

159.1. In June 1971, the 42nd Report of the Law Commission of India[156] analysed various provisions of the Indian Penal Code and made several important recommendations. With respect to the offence of 'adultery', the Law Commission recommended that the adulterous woman must be made equally liable for prosecution, and the punishment be reduced from 5 years to 2 years. This was however, not given effect to.

159.2. In August 1997, the Law Commission of India in its 156th Report[157] noted that the offence of adultery Under Section 497 is very limited in scope in comparison to the misconduct of adultery in divorce (civil proceedings). The Section confers only upon the husband the right to prosecute the adulterous male, but does not confer any right on the aggrieved wife to prosecute her adultererous husband. It was recommended to introduce an amendment to incorporate the concept of equality between sexes in marriage vis-a-vis the offence of adultery. The proposed change was to reflect the transformation of women's status in Indian society.

However, the recommendation was not accepted.

159.3. In March 2003, the Malimath Committee on Reforms of Criminal Justice System[158], was constituted by the Government of India, which considered comprehensive measures for revamping the Criminal Justice System. The Malimath Committee made the following recommendation with respect to "Adultery":

16.3.1 A man commits the offence of adultery if he has sexual intercourse with the wife of another man without the consent or connivance of the husband. The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore, there is no good

reason for not meting out similar treatment to wife who has sexual intercourse with a married man.

16.3.2 The Committee therefore suggests that Section 497 of the Indian Penal Code should be suitably amended to the effect that "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery....

The recommendations of the Malimath Committee on the amendment of Section 497 were referred to the Law Commission of India, which took up the matter for study and examination. The same is pending consideration.

160. CONTEMPORARY INTERNATIONAL JURISPRUDENCE

Before addressing the issue of the constitutional validity of Section 497 Indian Penal Code, it would be of interest to review how 'adultery' is treated in various jurisdictions around the world.

Adultery has been defined differently across various jurisdictions. For instance, adultery charges may require the adulterous relationship to be "open and notorious,'[159] or be more than a single act of infidelity, or require cohabitation between the adulterer and the adulteress. Such a definition would require a finding on the degree of infidelity.[160] In other instances, the spouses may also be punishable for adultery. Such a provision raises a doubt as to how that may secure the relationship between the spouses and the institution of marriage. Another variation, in some jurisdictions is that cognizance of the offence of adultery is taken only at the instance of the State, and its enforcement is generally a rarity.

160.1. Various legal systems have found adulterous conduct sufficiently injurious to justify some form of criminal sanction. Such conduct is one, which the society is not only unwilling to approve, but also attaches a criminal label to it.

• United States of America

In the United States of America, 17 out of 50 States continue to treat 'adultery' as a criminal offence under the State law.[161] The characterization of the offence differs from State to State.

In the case of *Oliverson* v. *West Valley City* 875 F. Supp. 1465, the constitutionality of the Utah adultery statute[163] was challenged. It was contended that the statute offends the right to privacy and violates substantive due process of law under the U.S. Constitution. The U.S. Court held that adultery is a transgression against the relationship of marriage which the law endeavors to protect. The State of Utah had an interest in preventing adultery. Whether to use criminal sanction was considered a matter particularly within the ambit of the legislature. Given the special interest of the State, it was considered rational to classify adultery as a crime.

A similar provision exists in the State of New York, wherein adultery is treated as a Class B misdemeanor.[164]

By way of contrast, in the State of North Carolina, it was held in the judgment of *Hobbs v. Smith*[165], that adultery should not be treated as a criminal offence. The Superior Court of North Carolina, relied on the judgment of the U.S. Supreme Court, in *Lawrence v. Texas* MANU/USSC/0070/2003 : 539 US 558 (2003) wherein it was recognized that the right to liberty provides substantial protection to consenting adults with respect to decisions regarding their private sexual conduct. The decision of an individual to commit adultery is a personal decision, which is sufficiently similar to other personal choices regarding marriage, family, procreation, contraception, and sexuality, which fall within the area of privacy. Following this reasoning in Lawrence, the Superior Court of the State of North Carolina held that the State Law criminalizing adultery violated the substantive due process, and the right to liberty under the Fourteenth Amendment to the U.S. Constitution, and the provision criminalizing adultery was declared unconstitutional.

• Canada

In Canada, the Code of Criminal Procedure of Canada Under Section 172 imposes criminal sanctions for adulterous conduct. This provision was introduced in 1918[166], and continues to remain on the Code of Criminal Procedure.

The Code of Criminal Procedure of Canada prohibits endangering the morals of children in a home where one "participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice."

Furthermore, Canada has a provision for granting divorce in cases of "breakdown of marriages", and adultery is a ground for establishing the same.[167]

• Malaysia

In Malaysia, adultery is punishable as a crime under the Islamic Laws. However, the Law Reform (Marriage and Divorce) Act, 1976 made it a civil wrong, for all non-Muslims. Similar to the position in Canada, this Act makes adultery a ground for granting divorce, as it is a proof of "Breakdown of Marriage".[168] Interestingly though, the Act also allows either spouse, to be an aggrieved party and claim damages from the adulterer or adulteress.[169]

• Japan

In Japan, the provision for adultery was somewhat similar to the present Section 497 of Indian Penal Code; it punished the woman and the adulterer only on the basis of the complaint filed by the husband. In case the act of adultery was committed with the consent of the husband, there would be no valid demand for prosecution of the offence[171]. This provision has since been deleted.[172] Adultery is now only a ground for divorce in Japan under the Civil Code.[173]

• South Africa

In South Africa, in the case of *DE* v. *RH*[174] The Constitutional Court of South Africa struck down adultery as a ground for seeking compensation by the aggrieved persons. The Court relied on an earlier judgment of *Green* v. *Fitzgerald* 1914 AD 88 wherein it was held that the offence of

adultery has fallen in disuse, and *"has ceased to be regarded as a crime"*.[16] The Court noted that even though adultery was of frequent occurrence in South Africa, and the reports of divorce cases were daily published in the newspapers in South Africa, the authorities took no notice of the offence.

• Turkey

In Turkey, the decision of the Constitutional Court of Turkey from 1996[176] is another instance where the Court struck down the provision of adultery as a criminal offence from the Turkish Penal Code of 1926. The Court noted that the provision was violative of the Right to Equality, as guaranteed by the Turkish Constitution since it treated men and women differently for the same act.

• South Korea

In South Korea, adultery as a criminal offence was struck down by the Constitutional Court of Korea in, what is popularly known as, the *Adultery Case of February 26, 2015*[178]. The Constitutional Court of Korea held that Article 241, which provided for the offence of adultery, was unconstitutional as it violated Article 10 of the Constitution, which promotes the right to personality, the right to pursue happiness, and the right to self-determination. The right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners. Article 241 was considered to restrict the right to privacy protected Under Article 17 of the Constitution since it restricts activities arising out of sexual life belonging to the intimate private domain. Even though the provision had a legitimate object to preserve marital fidelity between spouses, and monogamy, the court struck it down as the provision failed to achieve the "appropriateness of means and least restrictiveness" The Court held as follows:

In recent years, the growing perception of the Korean society has changed in the area of marriage and sex with the changes of the traditional family system and family members' role and position, along with rapid spread of individualism and liberal views on sexual life. Sexual life and love is a private matter, which should not be subject to the control of criminal punishment. Despite it is unethical to violate the marital fidelity, it should not be punished by criminal law....

.....

...The exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least. It belongs to a free domain of individuals for an adult to have voluntary sexual relationships, but it may be regulated by law when it is expressed and it is against the good sexual culture and practice. It would infringe on the right to sexual self-determination and to privacy for a State to intervene and punish sexual life which should be subject to sexual morality and social orders.

The tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes.

The Court concluded that it was difficult to see how criminalization of adultery could any longer serve the public interest of protecting the monogamy-based marriage system, maintain good sexual culture, and the marital fidelity between spouses. A consideration of Article 241 which punishes adultery failed to achieve the appropriateness of means and least restrictiveness. Since the provision excessively restricted a person's sexual autonomy and privacy by criminally punishing the private and intimate domain of sexual life, the said penal provision was said to have lost the balance of State interest and individual autonomy.

161. PREVIOUS CHALLENGES TO ADULTERY IN INDIA

This Court has previously considered challenges to Section 497 inter alia on the ground that the impugned Section was violative of Articles 14 and 15 of the Constitution.

161.1. In *Yusuf Abdul Aziz v. State of Bombay* MANU/SC/0124/1954 : 1954 SCR 930, Section 497 was challenged before this Court inter alia on the ground that it contravened Articles 14 and 15 of the Constitution, since the wife who is pari delicto with the adulterous man, is not punishable even as an "abettor." A Constitution Bench of this Court took the view that since Section 497 was a special provision for the benefit of women, it was saved by Article 15(3) which is an enabling provision providing for protective discrimination.

In *Yusuf Aziz* (supra), the Court noted that both Articles 14 and 15 read together validated Section 497.

161.2. Later, in *Sowmithri Vishnu* v. *Union of India and Anr.* MANU/SC/0199/1985 : (1985) Supp SCC 137, a three-judge bench of this Court addressed a challenge to Section 497 as being unreasonable and arbitrary in the classification made between men and women, unjustifiably denied women the right to prosecute her husband Under Section 497.

It was contended that Section 497 conferred a right only upon the husband of the adulterous woman to prosecute the adulterer; however, no such right was bestowed upon the wife of an adulterous man. The Petitioners therein submitted that Section 497 was a flagrant violation of gender discrimination against women. The Court opined that the challenge had no legal basis to rest upon. The Court observed that the argument really centred on the definition, which was required to be re-cast to punish both the male and female offender for the offence of adultery.

After referring to the recommendations contained in the 42nd Report of the Law Commission of India, the Court noted that there were two opinions on the desirability of retaining Section 497. However it concluded by stating that Section 497 could not be struck down on the ground that it would be desirable to delete it from the statute books.

The Court repelled the plea on the ground that it is commonly accepted that it is the man who is the 'seducer', and not the woman. The Court recognized that this position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone.

161.3. In *V. Revathi v. Union of India* MANU/SC/0562/1988 : (1988) 2 SCC 72, a two-judge bench of this Court upheld the constitutional validity of Section 497, Indian Penal Code and Section 198 of the Code of Criminal Procedure The Petitioner contended that whether or not the law permitted a husband to prosecute his disloyal wife, a wife cannot be lawfully disabled from prosecuting her disloyal husband. Section 198(2) Code of Criminal Procedure operates as a fetter on the wife in prosecuting her adulterous husband. Hence, the relevant provision is unconstitutional on the ground of obnoxious discrimination.

This Court held that Section 497 Indian Penal Code and Section 198(2) Code of Criminal Procedure together form a legislative package. In essence, the former being substantive, and the latter being largely procedural. Women, under these provisions, neither have the right to prosecute, as in case of a wife whose husband has an adulterous relationship with another woman; nor can they be prosecuted as the *pari delicto*.

161.4. The view taken by the two-judge bench in *Revathi* (supra), that the absence of the right of the wife of an adulterous husband to sue him, or his paramour, was well-balanced by the inability of the husband to prosecute his adulterous wife for adultery, cannot be sustained. The wife's inability to prosecute her husband and his paramour, should be equated with the husband's ability to prosecute his wife's paramour.

162. In the present case, the constitutionality of Section 497 is assailed by the Petitioners on the specific grounds that Section 497 is violative of Articles 14, 15 and 21.

162.1. Mr. Kaleeswaram Raj learned Counsel appearing for the Petitioners and Ms. Meenakshi Arora, learned Senior Counsel appearing for the Intervenors *inter alia* submitted that Section 497 criminalizes adultery based on a classification made on sex alone. Such a classification bears no rational nexus with the object sought to be achieved and is hence discriminatory.

It was further submitted that Section 497 offends the Article 14 requirement of equal treatment before the law and discriminates on the basis of marital status. It precludes a woman from initiating criminal proceedings. Further, the consent of the woman is irrelevant to the offence. Reliance was placed in this regard on the judgment of this Court in *W. Kalyani* v. *State* MANU/SC/1455/2011 : (2012) 1 SCC 358.

The Petitioners submit that the age-old concept of the wife being the property of her husband, who can easily fall prey to seduction by another man, can no longer be justified as a rational basis for the classification made Under Section 497.

An argument was made that the 'protection' given to women Under Section 497 not only highlights her lack of sexual autonomy, but also ignores the social repercussions of such an offence.

The Petitioners have contended that Section 497 of the Indian Penal Code is violative of the fundamental right to privacy Under Article 21, since the choice of a partner with whom she could be intimate, falls squarely within the area of autonomy over a person's sexuality. It was submitted that each individual has an unfettered right (whether married or not; whether man or woman) to engage in sexual intercourse outside his or her marital relationship.

The right to privacy is an inalienable right, closely associated with the innate dignity of an individual, and the right to autonomy and self-determination to take decisions. Reliance was placed on the judgment in *Shafin Jahan* v. *Asokan K.M. and Ors.* MANU/SC/0340/2018 where this Court observed that each individual is guaranteed the freedom in determining the choice of one's partner, and any interference by the State in these matters, would have a serious chilling effect on the exercise of the freedoms guaranteed by the Constitution.

The Petitioners placed reliance on the judgment of *K.S. Puttaswamy* v. *Union of India* MANU/SC/1044/2017 : (2017) 10 SCC 1 wherein a nine-judge bench of this Court held that the right to make decisions on vital matters concerning one's life are inviolable aspects of human personality. This Court held that:

169.... The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action....

The Petitioners and Intervenors have prayed for striking down Section 479 Indian Penal Code and Section 198(2) of the Code of Criminal Procedure as being unconstitutional, unjust, illegal, arbitrary, and violative of the Fundamental Rights of citizens.

162.2. On the other hand, Ms. Pinky Anand, learned ASG forcefully submitted that adultery must be retained as a criminal offence in the Indian Penal Code She based her argument on the fact that adultery has the effect of breaking up the family which is the fundamental unit in society. Adultery is undoubtedly morally abhorrent in marriage, and no less an offence than the offences of battery, or assault. By deterring individuals from engaging in conduct which is potentially harmful to a marital relationship, Section 497 is protecting the institution of marriage, and promoting social well-being.

The Respondents submit that an act which outrages the morality of society, and harms its members, ought to be punished as a crime. Adultery falls squarely within this definition.

The learned ASG further submitted that adultery is not an act that merely affects just two people; it has an impact on the aggrieved spouse, children, as well as society. Any affront to the marital bond is an affront to the society at large. The act of adultery affects the matrimonial rights of the spouse, and causes substantial mental injury.

Adultery is essentially violence perpetrated by an outsider, with complete knowledge and intention, on the family which is the basic unit of a society.

It was argued on behalf of the Union of India that Section 497 is valid on the ground of affirmative action. All discrimination in favour of women is saved by Article 15(3), and hence were exempted

from punishment. Further, an under-inclusive definition is not necessarily discriminatory. The contention that Section 497 does not account for instances where the husband has sexual relations outside his marriage would not render it unconstitutional.

It was further submitted that the sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life Under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law.

It was finally suggested that if this Court finds any part of this Section violative of the Constitutional provisions, the Court should read down that part, in so far as it is violative of the Constitution but retain the provision.

DISCUSSION AND ANALYSIS

163. Section 497 is a pre-constitutional law which was enacted in 1860. There would be no presumption of constitutionality in a pre-constitutional law (like Section 497) framed by a foreign legislature. The provision would have to be tested on the anvil of Part III of the Constitution.

164. Section 497 of the Indian Penal Code it is placed under Chapter XX of "*Offences Relating to Marriage*".

The provision of Section 497 is replete with anomalies and incongruities, such as:

i. Under Section 497, it is only the male-paramour who is punishable for the offence of adultery. The woman who is pari delicto with the adulterous male, is not punishable, even as an 'abettor'.

The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery[97].

ii. The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man, has no similar right to prosecute her husband or his paramour.

iii. Section 497 Indian Penal Code read with Section 198(2) of the Code of Criminal Procedure only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceedings for the offence of adultery.

iv. The act of a married man engaging in sexual intercourse with an unmarried or divorced woman, does not constitute 'adultery' Under Section 497.

v. If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery.

The anomalies and inconsistencies in Section 497 as stated above, would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory.

165. The constitutional validity of Section 497 has to be tested on the anvil of Article 14 of the Constitution.

165.1. Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination.

165.2. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied:

i. The classification is made on the basis of an 'intelligible differentia' which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and

ii. The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

The discriminatory provisions in Section 497 have to be considered with reference to the classification made. The classification must have some rational basis,[100] or a nexus with the object sought to be achieved.

With respect to the offence of adultery committed by two consenting adults, there ought not to be any discrimination on the basis of sex alone since it has no rational nexus with the object sought to be achieved.

Section 497 of the Indian Penal Code, makes two classifications:

i. The first classification is based on who has the right to prosecute:

It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery.

Conversely, a married woman who is the wife of the adulterous man, has no right to prosecute either her husband, or his paramour.

ii. The second classification is based on who can be prosecuted.

It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence.

The aforesaid classifications were based on the historical context in 1860 when the Indian Penal Code was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or 'property' of their husbands.

Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a 'theft' of his property, for which he could proceed to prosecute the offender.

The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.

165.3. A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore ex facie discriminatory against women, and violative of Article 14.

Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary.

166. A law which could have been justified at the time of its enactment with the passage of time may become outdated and discriminatory with the evolution of society and changed circumstances.[50] What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic.

A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality.[170]

Section 497 of the Indian Penal Code was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860's. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals.[154] This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background in which Section 497 was framed, is no longer relevant in contemporary society.

It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a Victim', and the male offender is the 'seducer'.

Section 497 fails to consider both men and women as equally autonomous individuals in society.

In *Anuj Garg* v. *Hotel Assn. of India*, MANU/SC/8173/2007 : (2008) 3 SCC 1 this Court held that:

20. At the very outset we want to define the contours of the discussion which is going to ensue. Firstly, the issue floated by the State is very significant, nonetheless it does not fall in the same class as that of rights which it comes in conflict with, ontologically. Secondly, the issue at hand has no social spillovers. The rights of women as individuals rest beyond doubts in this age. If we consider (various strands of) feminist jurisprudence as also identity politics, it is clear that time has come that we take leave of the theme encapsulated Under Section 30. And thirdly we will also focus our attention on the interplay of doctrines of self-determination and an individual's best interests.

....

26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. ....

The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by. A legislation that perpetuates such stereo-types in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution.

There is therefore, no justification for continuance of Section 497 of the Indian Penal Code as framed in 1860, to remain on the statute book.

167. Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens.

Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution.

The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as 'beneficial legislation'.

This Court in *Thota Sesharathamma and Anr.* v. *Thota Manikyamma (Dead) by Lrs. And Ors.* MANU/SC/0621/1991 : (1991) 4 SCC 312 held that:

Article 15(3) relieves from the rigour of Article 15 and charges the State to make special provision to accord to women socio-economic equality. As a fact Article 15(3) as a fore runner to common code does animate to make law to accord socio-economic equality to every female citizen of India, irrespective of religion, race, caste or religion.

In W. Kalyani v. State MANU/SC/1455/2011 : (2012) 1 SCC 358 this Court has recognised the gender bias in Section 497. The court in Kalyani (supra) observed that "*The provision is currently under criticism from certain quarters for showing a string gender bias for it makes the position of a married woman almost as a property of her husband.*"

The purpose of Article 15(3) is to further socio-economic equality of women. It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences.

A Section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination.

168. The Petitioners have contended that the right to privacy Under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage.

The right to privacy and personal liberty is, however, not an absolute one; it is subject to reasonable restrictions when legitimate public interest is involved.

It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to have a consensual sexual relationship outside marriage by a married person, does not warrant protection Under Article 21.

In the context of Article 21, an invasion of privacy by the State must be justified on the basis of a law that is reasonable and valid. Such an invasion must meet a three-fold requirement as set held in *Justice K.S. Puttaswamy (Retd.) and Anr.* v. *UOI and Anr.* (supra): (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. Section 497 as it stands today, fails to meet the three-fold requirement, and must therefore be struck down.

169. The issue remains as to whether 'adultery' must be treated as a penal offence subject to criminal sanctions, or marital wrong which is a valid ground for divorce.

169.1. One view is that family being the fundamental unit in society, if the same is disrupted, it would impact stability and progress. The State, therefore, has a legitimate public interest in preserving the institution of marriage.

Though adultery may be an act committed in private by two consenting adults, it is nevertheless not a victim-less crime. It violates the sanctity of marriage, and the right of a spouse to marital fidelity of his/her partner. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulteror and the adulteress, it impacts the growth and well-being of the children, the family, and society in general, and therefore must be subject to penal consequences.

Throughout history, the State has long retained an area of Regulation in the institution of marriage. The State has regulated various aspects of the institution of marriage, by determining the age when an adult can enter into marriage; it grants legal recognition to marriage; it creates rights in respect of inheritance and succession; it provides for remedies like judicial separation, alimony, restitution of conjugal rights; it regulates surrogacy, adoption, child custody, guardianship, partition, parental responsibility; guardianship and welfare of the child. These are all areas of private interest in which the State retains a legitimate interest, since these are areas which concern society and public well-being as a whole.

Adultery has the effect of not only jeopardising the marriage between the two consenting adults, but also affects the growth and moral fibre of children. Hence the State has a legitimate public interest in making it a criminal offence.

169.2. The contra view is that adultery is a marital wrong, which should have only civil consequences. A wrong punishable with criminal sanctions, must be a public wrong against society as a whole, and not merely an act committed against an individual victim.

To criminalize a certain conduct is to declare that it is a public wrong which would justify public censure, and warrant the use of criminal sanction against such harm and wrong doing.

The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the 'best interest' of the individual.

Andrew Ashworth and Jeremy Horder in their commentary titled 'Principles of Criminal Law'[130] have stated that the traditional starting point of criminalization is the 'harm principle' the essence of which is that the State is justified in criminalizing a conduct which causes harm to others. The authors opine that the three elements for criminalization are: (i) harm, (ii) wrong doing, and (iii) public element, which are required to be proved before the State can classify a wrongful act as a criminal offence.

John Stuart Mill states that "*the only purpose for which power can be rightly exercised over the member of a civilized community against his will is to prevent harm to others*.[162]

The other important element is wrongfulness. Andrew Simester and Andreas von Hirsch opine that a necessary pre-requisite of criminalization is that the conduct amounts to a moral wrong.[175] That even though sexual infidelity may be morally wrong conduct, this may not be a sufficient condition to criminalize the same.

170. In my view, criminal sanction may be justified where there is a public element in the wrong, such as offences against State security, and the like. These are public wrongs where the victim is not the individual, but the community as a whole.

Adultery undoubtedly is a moral wrong qua the spouse and the family. The issue is whether there is a sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law?

The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment.

The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.

The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil

remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

171. In view of the aforesaid discussion, and the anomalies in Section 497, as enumerated in para 11 above, it is declared that:

(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.

(ii) Section 198(2) of the Code of Criminal Procedure which contains the procedure for prosecution under Chapter XX of the Indian Penal Code shall be unconstitutional only to the extent that it is applicable to the offence of Adultery Under Section 497.

(iii) The decisions in Sowmithri Vishnu (supra), V. Rewathi (supra) and W. Kalyani (supra) hereby stand overruled.

---

[1]On the Subjection of Women, Chapter 1 (John Stuart Mill, 1869)
[2]*Union of India and Anr. v. Raghubir Singh (dead) by Lrs. etc.,* MANU/SC/0619/1989 : (1989) 2 SCC 754
[3]*Union of India and Anr. v. Hansoli Devi and Ors.,* MANU/SC/0768/2002 : (2002) 7 SCC 273
[4]The Due Process of Law (London, Butterworths, 1980, at page 212)
[5]*Halsbury's Laws of England*, 4th Edn., Vol. 11 p. 11,
[6]*Exodus* 20:14 (King James Version).
[7]*Leviticus* 20:10 (King James Version).
[8]1 *Corinthians* 6:9-10 (King James Version).
[9]*Matthew* 5:27-28 (King James Version).
[10]*John*, 8:7 (English Standard Version).
[11]The Laws of Manu 150 (Translation by G. Buhler, Clarendon Press, UK, 1886).
[12]*Id.*, 315.
[13]Dharmasutras-The Law Codes of Apastamba, Gautama, Baudhayana, And Vasistha 70-71 (Translation by Patrick Olivelle, Oxford University Press 1999).
[14]*Id.*, 116-117.
[15]The Koran (Al-Qur'an): Arabic-English Bilingual Edition with an Introduction by Mohamed A. 'Arafa 363 (Maulana Muhammad Ali Translation, Teller Books, 2018).
[16]Id.
[17]Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex between Domestic Relations Attorneys and Their Clients*, 23 Harvard Women's Law Journal 1, 21-22 (2000) ["Linda Fitts Mischler"].
[18]*Tinker* v. *Colwell*, MANU/USSC/0260/1904 : 193 U.S. 473, 481 (1904).
[19]*Id.*, 485.
[20]MANU/UKWA/0081/1966 : [1966] 3 All E.R. 601, 607.

[21]Section 4, Law Reforms (Miscellaneous Provisions) Act, 1970.
[22]Linda Fitts Mischler, *supra* n. 12, 23-25.
[23]A Penal Code prepared by the Indian Law Commissioners, and published by command of the Governor General of India in Council 91-93 (G.H. Huttmann, The Bengal Military Orphan Press, 1837).
[24]COPIES OF THE SPECIAL REPORTS OF THE INDIAN LAW COMMISSIONERS 76 (James C. Melvill, East India House, 1847).
[25]MANU/MH/0138/1951 : 1952 ILR Bombay 449, 454.
[26]2009 Hun-Ba 17, (26.02.2015) [Constitutional Court of South Korea].
[27]*Expediente* 936-95, (07.03.1996), *Repùblica de Guatemala Corte de Constitucionalidad* [Constitutional Court of Guatemala].
[28]James Sibongo v. Lister Lutombi Chaka and Anr. (Case No. SA77-14) (19.08.2016) [Supreme Court of Namibia].
[29]*Id.*, 17-19.
[30]Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 40
[31]Ibid at page 41
[32]Ibid
[33]Patricia Williams, The Alchemy of Race and Rights, Cambridge: Harvard University Press (1991)
[34]Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 41
[35]Gayatri Spivak, The Post Colonial Critic: Interviews, Strategies, Dialogies, Routledge (1990)
[36]Ibid. at page 164
[37]Ibid. at page 141
[38]Ibid. at page 142
[39]Ibid. at page 144
[40]Ibid. at page 76
[41]Nathaniel Hawthorne, The Scarlet Letter, Bantam Books (1850), at page 59
[42]See David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008)
[43]James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 10
[44]Ibid, at page 11
[45]Faramerz Dabhoiwala, The Origins of Sex: A History of the First Sexual Revolution (2012), at page 5
[46]David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 30
[47]Vern Bullough, Medieval Concepts of Adultery, at page 7
[48]The Oxford Encyclopaedia of Women in World History, (Bonnie G Smith ed.), Oxford, at page 27
[49]Martin Siegel, For Better or for Worse: Adultery, Crime & the Constitution, Vol. 30, Journal of Family Law (1991), at page 46
[50]Motor General Traders v. State of Andhra Pradesh, MANU/SC/0293/1983 : (1984) 1 SCC 222; See also Ratan Arya v. State of Tamil Nadu, MANU/SC/0550/1986 : (1986) 3 SCC 385
[51]James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 27
[52]Jeremy D. Weinstein, Adultery, Law, and the State: A History, Vol. 38, Hastings Law Journal (1986), at page 202; R. Huebner, A History of Germanic Private Law (F. Philbrick trans. 1918)

[53]James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 6
[54]David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 30
[55]Ibid.
[56]The Oxford Encyclopaedia of Women in World History, (Bonnie G Smith ed.), Oxford, at page 30
[57]James R. Mellow, Hawthorne's Divided Genius, The Wilson Quarterly (1982)
[58]Mary Beth Norton, Founding Mothers and Fathers: Gendered Power and the Forming of American Society (1996).
[59]Keith Thomas, The Puritans and Adultery: The Act of 1650 Reconsidered, in Puritans and Revolutionaries: Essays in Seventeenth-Century History Presented to Christopher Hill (Donald Pennington, Keith Thomas, eds.), at page 281
[60]Charles E. Torcia, Wharton's Criminal Law, Section 218, (1994) at page 528
[61]J.E. Loftis, Congreve's Way of the World and Popular Criminal Literature, Studies in English Literature, 1500-1900 36(3) (1996), at page 293
[62]Joanne Bailey, Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800 (2009), at page 143
[63]David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 28
[64]Blackstone's Commentaries on the Laws of England, Book IV (1778), at page 191-192
[65]William Blackstone, Commentaries on the Laws of England. Vol. I (1765), at pages 442-445
[66]Vera Bergelson, Rethinking Rape-By-Fraud in Legal Perspectives on State Power: Consent and Control (Chris Ashford, Alan Reed and Nicola Wake, eds.) (2016), at page 161
[67]R v. Mawgridge, (1707) Kel. 119
[68]Vera Bergelson, Rethinking Rape-By-Fraud in Legal Perspectives on State Power: Consent and Control (Chris Ashford, Alan Reed and Nicola Wake, eds.) (2016), at page 161
[69]Blackstone's Commentaries on the Laws of England, Book IV (1778), at pages 64-65
[70]Abhinav Sekhri, The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India, Socio-Legal Review (2016), at page 52
[71]Macaulay's Draft Penal Code (1837), Note Q
[72]Second Report on the Indian Penal Code (1847), at pages 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, at page 365
[73]*A Penal Code prepared by The Indian Law Commissioners* (1838), The Second Report on the Indian Penal Code, at page 74
[74]Law Commission of India, 42nd Report: Indian Penal Code (1971), at page 326
[75]Law Commission of India, 156th Report: Indian Penal Code (1997) at page 172
[76]Report of the Committee on Reforms of Criminal Justice System (2003), at page 190
[77]Abhinav Sekhri, The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India, Socio-Legal Review (2016), at page 63
[78]Brenda Cossman and Ratna Kapur, Subversive Sites: Feminist Engagements with Law in India (1996)
[79]Yusuf Abdul Aziz v. State of Bombay, MANU/SC/0124/1954 : 1954 SCR 930
[80]The 'Woman Question' was one of the great issues that occupied the middle of the nineteenth century, namely the social purpose of women. It is used as a tool to enquire into the status of women in the law and how they interact with and are affected by it; See Katherine T. Bartlett, Feminist Legal Methods, Harvard Law Review (1990)

[81]U N Working Group on Women's Human Rights: Report (18 October, 2012), available at: http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E
[82]Case No: 2009Hun-Ba17, (Adultery Case), South Korea Constitutional Court (February 26, 2015), available at http://english.ccourt.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do
[83]Firstpost, South Korean court abolishes law that made adultery illegal, (February 26, 2015), available at https://www.firstpost.com/world/south-korean-court-abolishes-law-saying-adultery-is-illegal-2122935. html
[84]Opinion of Justice Park Han-Chul, Justice Lee Jin-Sung, Justice Kim Chang-Jong, Justice Seo Ki-Seog and Justice Cho Yong-Ho (Adultery is Unconstitutional)
[85]Article 10 of the South Korean Constitution "All citizens are assured of human worth and dignity and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."
[86]Supra, note 64, Part V-A (3)(1) ('Change in Public's Legal Awareness' under the head of 'Appropriateness of Means and Least Restrictiveness')
[87]Supra, note 64, Part V-A (3)(3) ('Effectiveness of Criminal Punishment', under the head of 'Appropriateness of Means and Least Restrictiveness')
[88]Supra, note 64, Part V-A (5) ('Balance of Interests & Conclusion')
[89]Constitutional Petitions Nos. 13/05/& 05/06 in Law Advocacy for Women in Uganda v. Attorney General of Uganda, (2007) UGCC 1 (5 April, 2007), available at https://ulii.org/ug/judgment/constitutional-court/2007/1
[90]Reuters: 'Uganda scraps "sexist" adultery law', (April 5, 2007), available at https://www.reuters.com/article/us-uganda-adultery/uganda-scraps-sexist-adultery-law-idUSL0510814320070405
[91]Constitutional Petitions Nos. 13/05/& 05/06 in Law Advocacy for Women in Uganda v. Attorney General of Uganda, [2007] UGCC 1 (5 April, 2007), available at https://ulii.org/ug/judgment/constitutional-court/2007/1
[92]DE v. RH, MANU/SACC/0023/2015 : [2015] ZACC 18
[93]Ibid, at para 34
[94]Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol. 30, (1991) 45
[95]Ibid, at page 46
[96]Cleveland Board of Education v. LaFleur, 414 U.S. 623 (1973)
[97]W Kalyani v. State, MANU/SC/1455/2011 : (2012) 1 SCC 358; at para 10.
[98]Carey, v. Population Serv. Int'l, 431 U.S. 678
[99]Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol. 30, (1991) 70
[100]E.V. Chinnaiah v. State of A.P., MANU/SC/0960/2004 : (2005) 1 SCC 394 (A legislation may not be amenable to a challenge on the ground of violation of Article 14 of the Constitution if its intention is to give effect to Articles 15 and 16 or when the differentiation is not unreasonable or arbitrary).
[101]Ibid, at page 206
[102]Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol. 30, (1991) 74
[103]Ibid, at page 77

[104]Ibid, at, page 78
[105]Roberts v. United States Jaycees, MANU/USSC/0190/1984 : 468 U.S. 609, 618 (1984)
[106]Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol. 30, (1991) 78
[107]Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol. 30, (1991) 82
[108]Thornburgh v. American College of Obstetricians and Gynaecologists, MANU/USSC/0050/1986 : 476 U.S. 747 (1986)
[109]Ibid, at Page 777
[110]Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol. 30, (1991) at page 85
[111]Ibid, at Page 86
[112]Eisenstadt v. Baird, MANU/USSC/0240/1972 : 405 U.S. 438, 457 (1972)
[113]Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol. 30, (1991) 89
[114]Deborah Rhode, Adultery: Infidelity and the Law, (Harvard University Press, 2016)
[115]Iris Marion Young, Justice and the Politics of Difference, Princeton University Press, 1990
[116]Ibid. at page 38
[117]Ibid. at pages 91-92
[118]Ibid. at page 99
[119]Writ Petition (Criminal) No. 76 of 2016
[120]Kathy Lahey, Feminist Theories of (In)equality, in Equality and Judicial Nuetrality (S. Martin and K. Mahoney (eds.) (1987)
[121]Ratna Kapur On Woman, Equality and the Constitution: Through the Looking Glass of Feminism in Gender and Politics in India (Nivedita Menon ed.) (1993)
[122]Maureen Maloney, An Analysis of Direct Taxes in India: A Feminist Perspective, Journal of the Indian Law Institute (1988)
[123]Catherine A Mackinnon, Sex equality under the Constitution of India: Problems, prospects, and 'personal laws', Oxford University Press and New York University School of Law (2006)
[124]Phyllis Coleman, Who's Been Sleeping in My Bed? You and Me, and the State Makes Three, Vol. 24, Indian Law Review (1991)
[125]Women's Work, Men's Property: The Origins of Gender and Class (S Coontz and P Henderson eds.) (1986)
[126]Rosemary Coombe, Is There a Cultural Studies of Law?, in A Companion to Cultural Studies, Toby Miller (ed.), Oxford, (2001)
[127]Austin Sarat, Jonathan Simon, Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship, Yale Journal of Law & the Humanities, (2001), at page 19
[128]Ibid. at page 525
[129]Ibid. at page 837
[130]Oxford University Press, (7th Edn.) May 2013
[131]Charles Jean Marie Letorneau, The Evolution of Marriage (2011)
[132]Nandita Haksar, Dominance, Suppression and the Law in Women and the Law: Contemporary Problems (Lotika Sarkar and B. Sivaramayya eds.), Vikas Publishing House (1994)
[133]Nivedita Menon, Seeing like a Feminist, Zubaan Books (2012) at page 35
[134]Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in

India, Sage Publications (1996) at page 119
[135]Ibid. at page 120
[136]Ibid. at page 414
[137]Ibid. at page 484
[138]Ibid. at page 413
[139]Nivedita Menon, Seeing like a Feminist, Zubaan Books (2012) at page 135; quoting Archana Verma, Stree Vimarsh Ke Mahotsav (2010)
[140]The New international Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopedic Edition, Trident Press International (1996 Edn.) at page 21.
[141]Outhwaite, R.B. (2007). *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860*. Cambridge, UK: Cambridge University Press
[142]Fernandez, Angela "*Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity.*" Married Women and the Law: Coverture in England and the Common Law World, edited by Tim Stretton and Krista J. Kesselring, McGill-Queen's University Press, 2013, pp. 192-216.
[143]*Blackstone's Commentaries on the Laws of England*, Books III & IV (8th Edn.), 1778
[144]*Bracton: De Legibus Et Consuetudinibus Angli'* (Bracton on the Laws and Customs of England attributed to Henry of Bratton, c. 1210-1268) Vol III, pg. 115 *Available at* http://bracton.law.harvard.edu/index.html
[145]1807-1901 A.D.
[146]Margot Finn (1996). Women, Consumption and Coverture in England, c. 1760-1860. The Historical Journal, 39, pp 703-722
[147]The High Sheriff of Oxfordshire's Annual Law Lecture given by Lord Wilson on 9 October 2012 *Available at: https://www.supremecourt.uk/docs/speech-121009. pdf*
[148]Matrimonial Causes Act 1857; 1857 (20 & 21 Vict.) C. 85
[149]LIX. No Action for Criminal Conversation:
"*After this Act shall have come into operation no Action shall be maintainable in England for Criminal Conversation.*"
[150]XXXIII. Husband may claim Damages from Adulterers:
"*Any Husband may, either in a Petition for Dissolution of Marriage or for Judicial Separation, or in a Petition limited to such Object only, claim Damages from any Person on the Ground of his having committed Adultery with the Wife of such Petitioner, and such Petition shall be served on the alleged Adulterer and the Wife, unless the Court shall dispense with such Service, or direct some other Service to be substituted; and the Claim made by every such Petition shall be heard and tried on the same principle, in the same manner, and subject to the same or the like Rules and Regulations as actions for criminal conversations are now tried and decided in Courts of Common Law; and all the enactments herein contain with reference to the hearing and decision of Petitions to the Courts shall, so far as may be necessary, be deemed applicable to the hearing and decision of Petitions presented under this enactment."*
[151]Uma Chakravarti, *Gendering Caste Through a Feminist Lens*, STREE Publications (2003) at page 71.
[152]156th Report on the Indian Penal Code (Vol. I), Law Commission of India at para 9.43 at page 169 *Available at*: http://lawcommissionofindia.nic.in/101-169/Report 156 Vol.1.pdf
[153]*A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code
[154]*A Penal Code prepared by The Indian Law Commissioners*, (1838), Notes of Lord Thomas

Babington Macaulay, Note Q
[155]The laws governing adultery in the Colonial areas were laid down in Regulation XVII of 1817, and Regulation VII of 1819; the Law Commissioners observed that the strict evidentiary and procedural requirements, deter the people from seeking redress.
[156]42nd Report on the Indian Penal Code, Law Commission of India *Available at*: http://lawcommissionofindia.nic.in/1-50/report42. pdf
[157]156th Report on the Indian Penal Code (Vol. I), Law Commission of India, pages 169-172 Available at: http://lawcommissionofindia.nic.in/101-169/Report156Vol1. pdf
[158]*Report of the Committee on Reforms of Criminal Justice System*, Government of India, Ministry of Home Affairs, chaired by Justice V.S. Malimath, (2003) *Available at*:https://mha.gov.in/sites/default/files/criminal_justice_system.pdf
[159]Illinois Code of Criminal Procedure, 720 ILCS 5/11-35, Adultery
"(a) *A person commits adultery when he or she has sexual intercourse with another not his or her spouse, if the behavior is open and notorious,..."*
[160]Martin Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 Journal Of Family Law 45, 51-52 (1991)
[161]Abhinav Sekhri, The *Good, The Bad, and The Adulterous: Criminal Law and Adultery in India*, 10 Socio Legal Review 47 (2014)
[162]Mill, John S., Chapter I: Introductory, On Liberty, Published London: Longman, Roberts, & Green Co. 1869, 4th Edn.
[163]Utah Code Ann. 76-7-103, "*(1) A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse. (2) Adultery is a class B misdemeanour."*
[164]New York Penal Laws, Article 255.17-Adultery, *"A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse. Adultery is a class B misdemeanour."*
[165]No. 15 CVS 5646 (2017) [Superior Court of North Carolina)
[166]Code of Criminal Procedure of Canada, 1985, Section 172, "*(1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*
(2) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years."
[167]Divorce Act, 1968, "*Section 8(1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.*
(2) Breakdown of a marriage is established only if:
(a).....
(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
(i) committed adultery, or....."
[168]Section 54(1)(a), Law Reform (Marriage and Divorce) Act, 1976. [Malaysia] states,
"*54. (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:*
(a) that the Respondent has committed adultery and the Petitioner finds it intolerable to live with

the Respondent....
[169]*Section 58, Law Reform (Marriage and Divorce) Act, 1976. [Malaysia] states,*
58.(1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.
(2) A petition Under Sub-section (1) may include a prayer that the co-Respondent be condemned in damages in respect of the alleged adultery.
(3) Where damages have been claimed against a co-respondent--(a) if, after the close of the evidence for the Petitioner, the court is of the opinion that there is not sufficient evidence against the co-Respondent to justify requiring him or her to reply, the co-Respondent shall be discharged from the proceedings; or (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the Respondent and co-Respondent has been proved, the court may award the Petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element."
[170]John Vallamattom v. Union of India, MANU/SC/0480/2003 : (2003) 6 SCC 611
[171]Section 183, Penal Code, 1907 [Japan], *"Whoever commits adultery with a married woman will be punished by prison upto two years. The same applies to the other party of the adultery. These offences are only prosecuted on demand of the husband. If the husband has allowed the Adultery, his demand is not valid."* [as translated by Karl-Friedrich Lenz, in History of Law in Japan since 1868, ed. Wilhelm Rohl, published by Brill, 2005, at page 623]
[172]H. Meyers, "*Revision of Code of Criminal Procedure of Japan*" Washington Law Review & State Bar Journal, Vol. 25, (1950) at pp. 104-134
[173]Article 770, Civil Code, 1896. [Japan], "*Article 770 (1) Only in the cases stated in the following items may either husband or wife file a suit for divorce: (i) if a spouse has committed an act of unchastity;...."*
[174]*RH* v. *DE* (594/2013) MANU/SASC/0122/2014 : [2014] ZASCA 133 (25 September 2014)
[175]A P Simester and Andreas von Hirsch, Crimes, Harms, And Wrongs: On The Principles Of Criminalisation, Oxford: Hart Publishing (2011)
[176]Anayasa Mahkemesi, 1996/15; 1996/34 (Sept. 23, 1996)
See also, Anayasa Mahakemsi, 1998/3; 1998/28 (June 23, 1998) and Anayasa Mahakemsi, 1997/45. 1998/48 (July 16, 1998)
[177]MANU/MH/0138/1951 : AIR 1951 Bom 470
[178]Adultery Case, 27-1 (A) KCCR 20, February 26, 2015

Back to Index

MANU/SC/1044/2017

Neutral Citation: 2017/INSC/801

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 494 of 2012, Transferred Case (Civil) Nos. 151, 152 of 2013, Writ Petition (Civil) Nos. 833, 829, 932 of 2013, Contempt Petition (Civil) No. 144 of 2014 in Writ Petition (Civil) No. 494/2012, Transfer Petition (Civil) Nos. 313, 312 of 2014, SLP (Crl.) No. 2524/2014, Writ Petition (Civil) Nos. 37, 220/2015, Contempt Petition (Civil) No. 674/2015 in Writ Petition (Civil) No. 829/2013, Transfer Petition (Civil) No. 921/2015, Contempt Petition (Civil) No. 470/2015 in Writ Petition (Civil) No. 494/2012, Contempt Petition (Civil) No. 444/2016 in Writ Petition (Civil) No. 494/2012, Contempt Petition (Civil) No. 608/2016 in Writ Petition (Civil) No. 494/2012, Writ Petition (Civil) No. 797/2016, Contempt Petition (Civil) No. 844/2017 in Writ Petition (Civil) No. 494/2012, Writ Petition (Civil) Nos. 342 and 000372/2017 (Under Article 32 of the Constitution of India)

Decided On**:** 24.08.2017

Appellants: Justice K.S. Puttaswamy and Ors. Vs**.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

J.S. Khehar, C.J.I., Jasti Chelameswar, S.A. Bobde, R.K.Agrawal, Rohinton Fali Nariman, Abhay Manohar Sapre. Dr. D.Y. Chandrachud, Sanjay Kishan Kaul and S. Abdul Nazeer, JJ.

Subject: Constitution

Relevant Section:

CONSTITUTION OF INDIA - Article 19; CONSTITUTION OF INDIA - Article 21

Authorities Referred:

Seervai, Constitutional Law of India, 4th Edition; Thomas Cooley, Treatise on the Law of Torts, 2nd edition, 1888; William B Lockhart, Constitutional Law: Cases-Comments-Questions, 6th Edition, Page 394; B. Shiva Rao, The Framing of India's Constitution: A Study, 1968; B. Shiva Rao, The Framing of India's Constitution, Vol. 2, Pages 20-36, 147-153; Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press, 1966, Page 103; Phipson on Evidence, 9th Edition, Pages 215 and 474; Laurence H. Tribe, American Constitutional Law, 2nd Edition; PJ Fitzgerald, Salmond on Jurisprudence 217, 12th Edition, 1966; Roscoe Pound, The Spirit of the Common Law 88, 1921; Geoffrey Robertson, QC and Andrew Nicol, QC, Media Law, 5th Edition, Page 265; Felicia Lamport, The Assault on Privacy; John Stuart Mill, On Liberty; Rishika Taneja and Sidhant Kumar, Privacy Law: Principles, Injunctions and

Compensation, 2014; Siddhartha Mukherjee, The Gene: An Intimate History, 2016, Pages 78-85; Philip Bobbitt, Constitutional Interpretationp; Black's Law Dictionary

Cases Overruled/Partly Overruled:

M.P. Sharma and Ors. vs. Satish Chandra and Ors. MANU/SC/0018/1954
Kharak Singh vs. The State of U.P. and Ors. MANU/SC/0085/1962 (Partially)
Additional District Magistrate, Jabalpur vs. Shivakant Shukla MANU/SC/0062/1976
Union of India (U0I) and Ors. vs. Bhanudas Krishna Gawde and Ors. MANU/SC/0371/1977

Case Note:

Constitution - Right to privacy - Entitlement thereto - Articles 19 and 20 of Constitution - Bench of three judges of present Court, while considering constitutional challenge to aadhar card scheme of Union Government noted in its earlier order that norms for and compilation of demographic biometric data by government was questioned on ground that it violates right to privacy - Bench of three judges of present Court took note of several decisions of present Court in which right to privacy has been held to be constitutionally protected fundamental right - These subsequent decisions which affirmed existence of constitutionally protected right of privacy, were rendered by Benches of strength smaller than those in M.P. Sharma and Kharak Singh cases - Faced with this predicament and having due regard to far-reaching questions of importance involving interpretation of Constitution, it was felt that institutional integrity and judicial discipline would require reference to larger Bench - Hence Bench of three judges observed in its order that to determine whether there was any fundamental right of privacy under Constitution - Determination of this question would essentially entail whether decision recorded by present Court in M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors by eight-Judge Constitution Bench, and also, in Kharak Singh v. The State of U.P. and Ors. by six-Judge Constitution Bench, that there was no such fundamental right, was correct expression of constitutional position - Issue deserves to be placed before nine-Judge Constitution Bench - Hence, present reference - Whether there is constitutionally protected right to privacy.

Facts:

A Bench of three judges of present Court, while considering the constitutional challenge to the aadhar card scheme of the Union Government noted in its earlier order that the norms for and compilation of demographic biometric data by government was questioned on the ground that it violates the right to privacy. The Bench of three judges of present Court took note of several decisions of present Court in which the right to privacy has been held to be a constitutionally protected fundamental right. These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches of a strength smaller than those in M.P. Sharma and Kharak Singh cases. Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial

discipline would require a reference to a larger Bench. Hence the Bench of three judges observed in its order that to determine whether there was any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by present Court in M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors by an eight-Judge Constitution Bench, and also, in Kharak Singh v. The State of U.P. and Ors. by a six-Judge Constitution Bench, that there was no such fundamental right, was the correct expression of the constitutional position. Issue deserves to be placed before the nine-Judge Constitution Bench.

Held, while disposing off the reference:

Dr. D.Y. Chandrachud, J.:

(i) To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental was dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity was the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it was only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and was a core value which the protection of life and liberty was intended to achieve. [107]

(ii) The judgment in M.P. Sharma holds essentially that in the absence of a provision similar to the Fourth Amendment to the United States Constitution, the right to privacy could not be read into the provisions of Article 20 (3) of the Indian Constitution. The judgment did not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. M.P. Sharma was overruled to the extent to which it indicates to the contrary. [186]

(iii) Kharak Singh has correctly held that the content of the expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. Kharak Singh also correctly laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'. The first part of the decision in Kharak Singh which invalidated domiciliary visits at night on the ground that they violated ordered liberty was an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy was not a guaranteed right under our Constitution, was not reflective of the correct position. Similarly, Kharak Singh's reliance upon the decision of the majority in Gopalan was not reflective of the correct position in view of the decisions in Cooper and in Maneka. Kharak Singh to the extent that it holds that the right to privacy was not protected under the Indian Constitution was overruled. [187]

(iv) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution. Life and personal liberty were not creations of the Constitution. These rights were recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III. Judicial recognition of the existence of a constitutional right of privacy was not an exercise in the nature of amending the Constitution nor was the Court embarking on a constitutional function of that nature which was entrusted to Parliament. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it was important to underscore that privacy was not lost or surrendered merely because the individual was in a public place. Privacy attaches to the person since it was an essential facet of the dignity of the human being. Present Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the Rule of law. The meaning of the Constitution could not be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy would have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which was fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual. [188]

(v) Informational privacy was a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. Present Court commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These were matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee, for that purpose, the matter should be dealt with appropriately by the Union government having due regard to what has been set out in this judgment. [190]

Jasti Chelameswar, J.:

(vi) It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter was conceded at the bar. Therefore, even a fundamental right to privacy has limitations. The limitations were to be identified on case to case basis depending upon the nature of the privacy interest claimed. There were different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right of privacy, it was necessary to outline the manner in which such a right to privacy could be limited. [233]

(vii) The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. Gobind resorted to the compelling state interest standard in addition to the Article 21 reasonableness enquiry. From the United States where the terminology of 'compelling state interest' originated, a strict standard of scrutiny comprises two things-a 'compelling state interest' and a requirement of 'narrow tailoring' (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, compelling state interest does not have definite contours in the US. Hence, it was critical that this standard be adopted with some clarity as to when and in what types of privacy claims it was to be used. Only in privacy claims which deserve the strictest scrutiny was the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 would apply. When the compelling State interest standard was to be employed must depend upon the context of concrete cases. [236]

S.A. Bobde, J.,:

(viii) There is no doubt that privacy is integral to the several fundamental rights recognized by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right of privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since

privacy is always integrated with personal liberty, the constitutionality of the law which was alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty under Article 21 was liable to be tested. Under Article 21, the standard test at present was the rationality review expressed in Maneka Gandhi's case. This requires that any procedure by which the state interferes with an Article 21 right to be "fair, just and reasonable, not fanciful, oppressive or arbitrary. [281]

(ix) The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. M.P. Sharma and the majority opinion in Kharak Singh must stand overruled to the extent that they indicate to the contrary. The right to privacy is inextricably bound up with all exercises of human liberty - both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, *mutatis mutandis,* takes the form of whichever of their enjoyment its violation curtails. [283]

Rohinton Fali Nariman, J:

(x) This right is subject to reasonable Regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy was over fundamental personal choices that an individual was to make, State action could be restrained under Article 21 read with Article 14 if it was arbitrary and unreasonable; and under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by present Court for such legislation or subordinate legislation to pass muster under the said Article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that iss to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind. [369]

(xi) The inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. M.P. Sharma and the majority in Kharak Singh, to the extent that they indicate to the contrary, stand overruled. The later judgments of present Court recognizing privacy as a fundamental right do not need to be revisited. These cases were, therefore, sent back for adjudication on merits to the original Bench of three Judges of present Court. [377]

Abhay Manohar Sapre, J.:

(xii) It was not possible for the framers of the Constitution to incorporate each and every right be that a natural or common law right of an individual in Part III of the Constitution. Whenever occasion arose in the last fifty years to decide as to whether any particular right alleged by the citizen is a fundamental right or not, present Court with the process of judicial interpretation recognized with remarkable clarity several existing natural and common law rights of an individual as fundamental rights falling in Part III though not defined in the

Constitution. It was done keeping in view the fact that the Constitution is a sacred living document and, hence, susceptible to appropriate interpretation of its provisions based on changing needs of "We, the People" and other well defined parameters. [392]

(xiii) The "right to privacy" emanating from the two expressions of the preamble namely, "liberty of thought, expression, belief, faith and worship" and "Fraternity assuring the dignity of the individual" and also emanating from Article 19(1)(a) which gives to every citizen "a freedom of speech and expression" and further emanating from Article 19(1)(d) which gives to every citizen "a right to move freely throughout the territory of India" and lastly, emanating from the expression "personal liberty" under Article 21. Indeed, the right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition. [411]

(xiv) ''Right to privacy" is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law. [412]

Sanjay Kishan Kaul, J.:

(xv) The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices. [496]

(xvi) If the individual permits someone to enter the house it does not mean that others could enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation could hardly be the reason not to recognize this important, natural, primordial right as a fundamental right. [498]

(xvii) Let the right of privacy, an inherent right, be unequivocally a fundamental right embedded in part-III of the Constitution of India, but subject to the restrictions specified, relatable to that part. [502]

(xviii) The decision in M.P. Sharma which holds that the right to privacy is not protected by the Constitution stands over-ruled, the decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled, the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution and decisions subsequent to Kharak Singh which have enunciated the position above lay down the correct position in law. [504]

JUDGMENT

Dr. D.Y. Chandrachud, J.

This judgment has been divided into Sections to facilitate analysis. They are:

A. The reference

B. Decision in **M.P. Sharma**

C. Decision in **Kharak Singh**

D. **Gopalan doctrine:** fundamental rights as isolated silos

E. **Cooper** and **Maneka:** Interrelationship between rights

F. Origins of privacy

G. Natural and inalienable rights

H. Evolution of the privacy doctrine in India

I. The Indian Constitution

• Preamble

• Jurisprudence on dignity

• Fundamental Rights cases

• No waiver of Fundamental Rights

• Privacy as intrinsic to freedom and liberty

• Discordant Notes:

(i) **ADM Jabalpur**

(ii) **Suresh Koushal**

J. India's commitments under International law

K. Comparative law on privacy

(i) UK decisions

(ii) US Supreme Court decisions

(iii) Constitutional right to privacy in South Africa

(iv) Constitutional right to privacy in Canada

(v) Privacy under the European Convention on Human Rights and the European Charter

(vi) Decisions of the Inter-American Court of Human Rights

L. Criticisms of the privacy doctrine

a. Thomson's Reductionism

b. Posner's Economic critique

c. Bork's critique

d. Feminist critique

M. Constituent Assembly and privacy: limits of originalist interpretation

N. Is the statutory protection to privacy reason to deny a constitutional right?

O. Not an elitist construct

P. Not just a common law right

Q. Substantive Due Process

R. Essential nature of privacy

S. Informational privacy

T. Conclusions

A. The reference

1. Nine judges of this Court assembled to determine whether privacy is a constitutionally protected value. The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation. If privacy is to be construed as a protected

constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection.

2. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual. The preservation of constitutional liberty is, so to speak, work in progress. Challenges have to be addressed to existing problems. Equally, new challenges have to be dealt with in terms of a constitutional understanding of where liberty places an individual in the context of a social order. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analysed in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. While we revisit the question whether our constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

3. A Bench of three judges of this Court, while considering the constitutional challenge to the Aadhar card scheme of the Union government noted in its order dated 11 August 2015 that the norms for and compilation of demographic biometric data by government was questioned on the ground that it violates the right to privacy. The Attorney General for India urged that the existence of a fundamental right of privacy is in doubt in view of two decisions: the first-**M.P. Sharma** v. **Satish Chandra, District Magistrate, Delhi** MANU/SC/0018/1954 : (1954) SCR 1077 ("M.P. Sharma") was rendered by a Bench of eight judges and the second, in **Kharak Singh** v. **State of Uttar Pradesh** MANU/SC/0085/1962 : (1964) 1 SCR 332 ("Kharak Singh") was rendered by a Bench of six judges. Each of these decisions, in the submission of the Attorney General, contained observations that the Indian Constitution does not specifically protect the right to privacy. On the other hand, the submission of the Petitioners was that **M.P. Sharma** and **Kharak Singh** were founded on principles expounded in **A.K. Gopalan** v. **State of Madras MANU/SC/0012/1950 : AIR 1950 SC 27 ("Gopalan"). Gopalan**, which construed each provision contained in the Chapter on fundamental rights as embodying a distinct protection, was held not to be good law by an eleven-judge Bench in **Rustom Cavasji Cooper** v. **Union of India** MANU/SC/0011/1970 : (1970) 1 SCC 248 **("Cooper")**. Hence the Petitioners submitted that the basis of the two earlier decisions is not valid. Moreover, it was also urged that in the seven-judge Bench decision in **Maneka Gandhi** v. **Union of India** MANU/SC/0133/1978 : (1978) 1 SCC 248 ("Maneka"), the minority judgment of Justice Subba Rao in **Kharak Singh** was specifically approved of and the decision of the majority was overruled.

4. While addressing these challenges, the Bench of three judges of this Court took note of several decisions of this Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include: **Gobind** v. **State of Madhya Pradesh** MANU/SC/0119/1975 : (1975) 2 SCC 148 **("Gobind")**, **R Rajagopal** v. **State of Tamil Nadu** MANU/SC/0056/1995 : (1994) 6 SCC 632 **("Rajagopal")** and **People's Union for Civil Liberties** v. **Union of India** MANU/SC/0149/1997 : (1997) 1 SCC 301 ("PUCL"). These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy,

were rendered by Benches of a strength smaller than those in **M.P. Sharma** and **Kharak Singh**. Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench. Hence the Bench of three learned judges observed in its order dated 11 August 2015:

12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right Under Article 21. If the observations made in **M.P. Sharma** (supra) and **Kharak Singh** (supra) are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty Under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments-where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.

13. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the *ratio decidendi* of **M.P. Sharma** (supra) and **Kharak Singh** (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.

5. On 18 July 2017, a Constitution Bench presided over by the learned Chief Justice considered it appropriate that the issue be resolved by a Bench of nine judges. The order of the Constitution Bench reads thus:

During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors.-MANU/SC/0018/1954 : 1950(sic 1954) SCR 1077 by an eight-Judge Constitution Bench, and also, in Kharak Singh v. The State of U.P. and Ors.-1962 (1) SCR 332 by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position.

Before dealing with the matter any further, we are of the view that the issue noticed hereinabove deserves to be placed before the nine-Judge Constitution Bench. List these matters before the Nine-Judge Constitution Bench on 19.07.2017.

6. During the course of hearing, we have been ably assisted on behalf of the Petitioners by Mr. Gopal Subramanium, Mr. Kapil Sibal, Mr. Arvind Datar, Mr. Shyam Divan, Mr. Anand Grover, Ms. Meenakshi Arora, Mr. Sajan Poovayya and Mr. Jayant Bhushan, learned senior Counsel. Mr. J.S. Attri, learned senior Counsel supported them on behalf of the State of Himachal Pradesh. On

behalf of the Union of India, the Court has had the benefit of the erudite submissions of Mr. K.K. Venugopal, Attorney General for India. He has been ably supported by Mr. Tushar Mehta, Additional Solicitor General, Mr. Rakesh Dwivedi, senior counsel for the State of Gujarat, Mr. Aryama Sundaram for the State of Maharashtra, Mr. Gopal Sankaranarayanan and Dr. Arghya Sengupta respectively. While some state governments have supported the stand of the Union government, others have supported the Petitioners.

7. The correctness of the decisions in **M.P. Sharma** and **Kharak Singh**, is to be evaluated during the course of the reference. Besides, the jurisprudential correctness of subsequent decisions holding the right to privacy to be a constitutionally protected right is to be determined. The basic question whether privacy is a right protected under our Constitution requires an understanding of what privacy means. For it is when we understand what interests or entitlements privacy safeguards, that we can determine whether the Constitution protects privacy. The contents of privacy need to be analysed, not by providing an exhaustive enunciation or catalogue of what it includes but by indicating its broad contours. The Court has been addressed on various aspects of privacy including: (i) Whether there is a constitutionally protected right to privacy; (ii) If there is a constitutionally protected right, whether this has the character of an independent fundamental right or whether it arises from within the existing guarantees of protected rights such as life and personal liberty; (iii) the doctrinal foundations of the claim to privacy; (iv) the content of privacy; and (v) the nature of the regulatory power of the state.

B. **Decision in M.P. Sharma**

8. An investigation was ordered by the Union government under the Companies Act into the affairs of a company which was in liquidation on the ground that it had made an organized attempt to embezzle its funds and to conceal the true state of its affairs from the share-holders and on the allegation that the company had indulged in fraudulent transactions and falsified its records. Offences were registered and search warrants were issued during the course of which, records were seized. The challenge was that the searches violated the fundamental rights of the Petitioners Under Article 19(1)(f) and Article 20(3) of the Constitution. The former challenge was rejected. The question which this Court addressed was whether there was a contravention of Article 20(3). Article 20(3) mandates that no person Accused of an offence shall be compelled to be a witness against himself. Reliance was placed on a judgment[1] of the US Supreme Court holding that obtaining incriminating evidence by an illegal search and seizure violates the Fourth and Fifth Amendments of the American Constitution. While tracing the history of Indian legislation, this Court observed that provisions for search were contained in successive enactments of the Code of Criminal Procedure. Justice Jagannadhadas, speaking for the Bench, held that a search or seizure does not infringe the constitutional right guaranteed by Article 20(3) of the Constitution:

...there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20(3) as above explained. But a search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises.

They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense.[2]

9. Having held that the guarantee against self-incrimination is not offended by a search and seizure, the Court observed that:

A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. **When the Constitution makers have thought fit not to subject such Regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right,** by some process of strained construction. Nor is it legitimate to assume that the constitutional protection Under Article 20(3) would be defeated by the statutory provisions for searches.[3]

(Emphasis supplied)

10. These observations-to be more precise in one sentence-indicating that the Constitution makers did not subject the Regulation by law of the power of search and seizure to a fundamental right of privacy, similar to the Fourth amendment of the US Constitution, have been pressed in aid to question the existence of a protected right to privacy under our Constitution.

C. Decision in Kharak Singh

11. After being challaned in a case of dacoity in 1941, Kharak Singh was released for want of evidence. But the police compiled a "history sheet" against him. 'History sheets' were defined in Regulation 228 of Chapter XX of the U.P. Police Regulations as "the personal records of criminals under surveillance". Kharak Singh, who was subjected to regular surveillance, including midnight knocks, moved this Court for a declaration that his fundamental rights were infringed. Among the measures of surveillance contemplated by Regulation 236 were the following:

(a) Secret picketing of the house or approaches to the houses of suspects;

(b) domiciliary visits at night;

(c) thorough periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation;

(d) the reporting by constables and chaukidars of movements and absences from home;

(c) the verification of movements and absences by means of inquiry slips;

(f) the collection and record on a history-sheet of all information bearing on conduct.

12. This Court held that the freedom to move freely throughout the territory of India, guaranteed by Article 19(1)(d) was not infringed by a midnight knock on the door of the Petitioner since "his locomotion is not impeded or prejudiced in any manner".

13. When the decision in **Kharak Singh** was handed down, the principles governing the inter-relationship between the rights protected by Article 19 and the right to life and personal liberty Under Article 21 were governed by the judgment in **Gopalan. Gopalan** considered each of the articles in the Chapter on fundamental rights as embodying distinct (as opposed to over-lapping) freedoms. Hence in **Kharak Singh**, the Court observed:

In view of the very limited nature of the question before us it is unnecessary to pause to consider either the precise relationship between the "liberties" in Article 19(1)(a) & (d) on the one hand and that in Article 21 on the other, or the content and significance of the words "procedure established by law" in the latter Article, both of which were the subject of elaborate consideration by this Court in A.K. Gopalan v. State of Madras.[4]

14. The decision in **Kharak Singh** held that Clause (b) of Regulation 236 which provided for domiciliary visits at night was violative of Article 21. The Court observed:

Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories.[5]

15. In taking this view, Justice Rajagopala Ayyangar, speaking for a majority of five judges, relied upon the judgment of Justice Frankfurter, speaking for the US Supreme Court in **Wolf** v. **Colorado** 338 US 25 (1949), which held:

The **security of one's privacy** against arbitrary intrusion by the police ... is basic to a free society...

We have no hesitation in saying that were a State affirmatively to sanction such **police incursion into privacy** it would run counter to the guarantee of the Fourteenth Amendment.[6]

(Emphasis supplied)

While the Court observed that the Indian Constitution does not contain a guarantee similar to the Fourth Amendment of the US Constitution, it proceeded to hold that:

Nevertheless, these extracts would show that an **unauthorised intrusion into a person's home** and the disturbance caused to him thereby, **is as it were the violation of a common law right of a man an ultimate essential of ordered liberty**, if not of the very concept of civilisation. An English Common Law maxim asserts that "**every man's house is his castle**" and in **Semayne case** [5 Coke 91: 1 Sm LC (13th Edn.) 104at p. 105] where this was applied, it **was stated that "the**

house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that Semayne case [(1604) 5 Coke 91: 1 Sm LC (13th Edn.) 104 at p. 105] was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. **It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty"** which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.[7]

(Emphasis supplied)

16. **Kharak Singh** regards the sanctity of the home and the protection against unauthorized intrusion an integral element of "ordered liberty". This is comprised in 'personal liberty' guaranteed by Article 21. The decision invalidated domiciliary visits at night authorised by Regulation 236 (b), finding them to be an unauthorized intrusion into the home of a person and a violation of the fundamental right to personal liberty. However, while considering the validity of Clauses (c),(d) and (e) which provided for periodical enquiries, reporting by law enforcement personnel and verification of movements, this Court held as follows:

...the freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the Petitioner. As already pointed out, **the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.**[8]

(Emphasis supplied)

In the context of Clauses (c), (d) and (e), the above extract indicates the view of the majority that the right of privacy is not guaranteed under the Constitution.

17. Justice Subba Rao dissented. Justice Subba Rao held that the rights conferred by Part III have overlapping areas. Where a law is challenged as infringing the right to freedom of movement Under Article 19(1)(d) and the liberty of the individual Under Article 21, it must satisfy the tests laid down in Article 19(2) as well as the requirements of Article 21. Justice Subba Rao held that:

No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right Under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution.

But in this case no such defence is available, as admittedly there is no such law. So the Petitioner can legitimately plead that his fundamental rights both Under Article 19(1)(d) and Article 21 are infringed by the State.[9]

18. Justice Subba Rao held that Article 21 embodies the right of the individual to be free from restrictions or encroachments. In this view, though the Constitution does not expressly declare the right to privacy as a fundamental right, such a right is essential to personal liberty. The dissenting opinion places the matter of principle as follows:

In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected grooves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. **It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.** Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. **The pregnant words of that famous Judge, Frankfurter J., in *Wolf* v. *Colorado* [**[1949] 238 US 25**] pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one.** If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the Petitioner Under Article 21 of the Constitution.[10]

(Emphasis supplied)

Significantly, both Justice Rajagopala Ayyangar for the majority and Justice Subba Rao in his dissent rely upon the observations of Justice Frankfurter in **Wolf** v. **Colorado** which specifically advert to privacy. The majority, while relying upon them to invalidate domiciliary visits at night, regards the sanctity of the home as part of ordered liberty. In the context of other provisions of the Regulation, the majority declines to recognise a right of privacy as a constitutional protection. Justice Subba Rao recognised a constitutional by protected right to privacy, considering it as an ingredient of personal liberty.

D. Gopalan doctrine: fundamental rights as isolated silos

19. When eight judges of this Court rendered the decision in **M.P. Sharma** in 1954 and later, six judges decided the controversy in **Kharak Singh** in 1962, the ascendant and, even well established, doctrine governing the fundamental rights contained in Part III was founded on the **Gopalan** principle. In **Gopalan**, Chief Justice Kania, speaking for a majority of five of the Bench of six judges, construed the relationship between Articles 19 and 21 to be one of mutual exclusion. In this line of enquiry, what was comprehended by Article 19 was excluded from Article 21. The seven freedoms of Article 19 were not subsumed in the fabric of life or personal liberty in Article 21. The consequence was that a law which curtailed one of the freedoms guaranteed by Article 19 would be required to answer the tests of reasonableness prescribed by clauses 2 to 6 of Article 19 and those alone. In the Gopalan perspective, free speech and expression was guaranteed by Article 19(1)(a) and was hence excluded from personal liberty Under Article 21. Article 21 was but a residue. Chief Justice Kania held:

Reading Article 19 in that way it appears to me that the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to "personal liberty" contemplated by Article 21. "Personal liberty" covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression, "personal liberty" the right to freedom of speech (mentioned in Article 19(1)(a)) or the right to acquire, hold or dispose of property (mentioned in 19(1)(f)) cannot be considered a part of the personal liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads me to believe that those rights are not covered by the expression personal liberty. So read there is no conflict between Articles 19 and 21. The contents and subject-matters of Articles 19 and 21 are thus not the same and they proceed to deal with the rights covered by their respective words from totally different angles. As already mentioned in respect of each of the rights specified in sub-clauses of Article 19(1) specific limitations in respect of each is provided, while the expression "personal liberty" in Article 21 is generally controlled by the general expression "procedure established by law".[11]

'Procedure established by law' Under Article 21 was, in this view, not capable of being expanded to include the 'due process of law'. Justice Fazl Ali dissented. The dissent adopted the view that the fundamental rights are not isolated and separate but protect a common thread of liberty and freedom:

To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each Article is a code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come Under Articles 20 and 21 and also Under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with an Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d)... It seems clear that the addition of the word "personal" before "liberty" in Article 21 cannot change the meaning of the words used in Article 19, nor can it put a matter which is inseparably bound up with personal liberty beyond its place...[12]

20. In **Satwant Singh Sawhney** v. **D. Ramarathnam** MANU/SC/0040/1967 : (1967) 3 SCR 525 ("Satwant Singh Sawhney"), Justice Hidayatullah, speaking for himself and Justice R.S. Bachawat,

in the dissenting view noticed the clear lines of distinction between the dissent of Justice Subba Rao and the view of the majority in **Kharak Singh**. The observations of Justice Hidayatullah indicate that if the right of locomotion is embodied by Article 21 of which one aspect is covered by Article 19(1)(d), that would in fact advance the minority view in **Kharak Singh:**

Subba Rao J. (as he then was) read personal liberty as the antithesis of physical restraint or coercion and found that Articles 19(1) and 21 overlapped and Article 19(1)(d) was not carved out of personal liberty in Article 21. According to him, personal liberty could be curtailed by law, but that law must satisfy the test in Article 19(2) in so far as the specific rights in Article 19(1)(3) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does not amount to an unreasonable restriction within the meaning of Article 19(2) of the Constitution. As in that case there was no law, fundamental rights, both Under Article 19(1)(d) and Article 21 were held to be infringed. The learned Chief Justice has read into the decision of the Court a meaning which it does not intend to convey. He excludes from Article 21 the right to free motion and locomotion within the territories of India and puts the right to travel abroad in Article 21. He wants to see a law and if his earlier reasoning were to prevail, the law should stand the test of Article 19(2). But since Clause (2) deals with matters in Article 19(1) already held excluded, it is obvious that it will not apply. The law which is made can only be tested on the ground of articles other than Article 19 such as Articles 14, 20 and 22 which alone bears upon this matter. In other words, the majority decision of the Court in this case has rejected Ayyangar J.'s view and accepted the view of the minority in Kharak Singh case...

This view obviously clashes with the reading of Article 21 in Kharak Singh case, because there the right of motion and locomotion was held to be excluded from Article 21. In other words, the present decision advances the minority view in Kharak Singh case above the majority view stated in that case.[13]

E. Cooper and Maneka: Interrelationship between rights

21. The theory that the fundamental rights are water-tight compartments was discarded in the judgment of eleven judges of this Court in **Cooper. Gopalan** had adopted the view that a law of preventive detention would be tested for its validity only with reference to Article 22, which was a complete code relating to the subject. Legislation on preventive detention did not, in this view, have to meet the touchstone of Article 19(1)(d). The dissenting view of Justice Fazl Ali in **Gopalan** was noticed by Justice J.C. Shah, speaking for this Court, in **Cooper**. The consequence of the **Gopalan** doctrine was that the protection afforded by a guarantee of personal freedom would be decided by the object of the State action in relation to the right of the individual and not upon its effect upon the guarantee. Disagreeing with this view, the Court in **Cooper** held thus:

...it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action-legislative or executive - Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g. Articles 31(1) and 31(2); in still others, it

takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. **The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.**[14]

(Emphasis supplied)

22. The abrogation of the **Gopalan** doctrine in **Cooper** was revisited in a seven-judge Bench decision in **Maneka**. Justice P.N. Bhagwati who delivered the leading opinion of three Judges held that the judgment in Cooper affirms the dissenting opinion of Justice Subba Rao (in **Kharak Singh**) as expressing the valid constitutional position. Hence in **Maneka**, the Court held that:

It was in Kharak Singh v. State of U.P. [MANU/SC/0085/1962 : AIR 1963 SC 1295: (1964) 1 SCR 332: (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right Under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." **There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [**MANU/SC/0074/1970 : (1970) 2 SCC 298: (1971) 1 SCR 512**] the minority view must be regarded as correct and the majority view must be held to have been overruled.**[15]

(Emphasis supplied)

23. Following the decision in **Maneka**, the established constitutional doctrine is that the expression 'personal liberty' in Article 21 covers a variety of rights, some of which 'have been raised to the status of distinct fundamental rights' and given additional protection Under Article 19. Consequently, in **Satwant Singh Sawhney**, the right to travel abroad was held to be subsumed within Article 21 as a consequence of which any deprivation of that right could be only by a 'procedure established by law'. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right to travel abroad as a result of which the order of the Passport Officer refusing

a passport was held to be invalid. The decision in **Maneka** carried the constitutional principle of the over-lapping nature of fundamental rights to its logical conclusion. Reasonableness which is the foundation of the guarantee against arbitrary state action Under Article 14 infuses Article 21. A law which provides for a deprivation of life or personal liberty Under Article 21 must lay down not just any procedure but a procedure which is fair, just and reasonable.

24. The decisions in **M.P. Sharma** and **Kharak Singh** adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in **Gopalan**. This view stands abrogated particularly by the judgment in **Cooper** and the subsequent statement of doctrine in **Maneka**. The decision in **Maneka**, in fact, expressly recognized that it is the dissenting judgment of Justice Subba Rao in **Kharak Singh** which represents the exposition of the correct constitutional principle. The jurisprudential foundation which held the field sixty three years ago in **M.P. Sharma** and fifty five years ago in **Kharak Singh** has given way to what is now a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights Under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that state action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III.

25. The doctrinal invalidation of the basic premise underlying the decisions in **M.P. Sharma** and **Kharak Singh** still leaves the issue of whether privacy is a right protected by Part III of the Constitution open for consideration. There are observations in both decisions that the Constitution does not contain a specific protection of the right to privacy. Presently, the matter can be looked at from the perspective of what actually was the controversy in the two cases. **M.P. Sharma** was a case where a law prescribing a search to obtain documents for investigating into offences was challenged as being contrary to the guarantee against self-incrimination in Article 20(3). The Court repelled the argument that a search for documents compelled a person Accused of an offence to be witness against himself. Unlike a notice to produce documents, which is addressed to a person and whose compliance would constitute a testimonial act, a search warrant and a seizure which follows are not testimonial acts of a person to whom the warrant is addressed, within the meaning of Article 20(3). The Court having held this, the controversy in **M.P. Sharma** would rest at that. The observations in **M.P. Sharma** to the effect that the constitution makers had not thought it fit to subject the regulatory power of search and seizure to constitutional limitations by recognising a fundamental right of privacy (like the US Fourth amendment), and that there was no justification to impart it into a 'totally different fundamental right' are at the highest, stray observations.

26. The decision in **M.P. Sharma** held that in the absence of a provision like the Fourth Amendment to the US Constitution, a right to privacy cannot be read into the Indian Constitution. The decision in **M.P. Sharma** did not decide whether a constitutional right to privacy is protected by other provisions contained in the fundamental rights including among them, the right to life and personal liberty Under Article 21. Hence the decision cannot be construed to specifically exclude the protection of privacy under the framework of protected guarantees including those in Articles 19 or 21. The absence of an express constitutional guarantee of privacy still begs the question

whether privacy is an element of liberty and, as an integral part of human dignity, is comprehended within the protection of life as well.

27. The decision in **Kharak Singh** is noteworthy because while invalidating Regulation 236(b) of the Police Regulations which provided for nightly domiciliary visits, the majority construed this to be an unauthorized intrusion into a person's home and a violation of **ordered liberty**. While arriving at this conclusion, the majority placed reliance on the privacy doctrine enunciated by Justice Frankfurter, speaking for the US Supreme Court in **Wolf** v. **Colorado** (the extract from **Wolf** cited in the majority judgment specifically adverts to 'privacy' twice). Having relied on this doctrine to invalidate domiciliary visits, the majority in **Kharak Singh** proceeded to repel the challenge to other clauses of Regulation 236 on the ground that the right of privacy is not guaranteed under the Constitution and hence Article 21 had no application. This part of the judgment in **Kharak Singh** is inconsistent with the earlier part of the decision. The decision of the majority in **Kharak Singh** suffers from an internal inconsistency.

F. Origins of privacy

28. An evaluation of the origins of privacy is essential in order to understand whether (as the Union of India postulates), the concept is so amorphous as to defy description. The submission of the government is that the Court cannot recognize a juristic concept which is so vague and uncertain that it fails to withstand constitutional scrutiny. This makes it necessary to analyse the origins of privacy and to trace its evolution.

29. The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the *polis*) and the personal sphere of human life (termed *oikos*). This dichotomy may provide an early recognition of "a confidential zone on behalf of the citizen"[16]. Aristotle's distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm. On the other hand, activities in the private realm are more appropriately reserved for "private reflection, familial relations and self-determination"[17].

30. At a certain level, the evolution of the doctrine of privacy has followed the public-private distinction. **William Blackstone** in his **Commentaries** on **the Laws of England** (1765) spoke about this distinction while dividing wrongs into private wrongs and public wrongs. Private wrongs are an infringement merely of particular rights concerning individuals and are in the nature of civil injuries. Public wrongs constitute a breach of general and public rights affecting the whole community and according to him, are called crimes and misdemeanours.

31. **John Stuart Mill** in his essay, **'On Liberty'** (1859) gave expression to the need to preserve a zone within which the liberty of the citizen would be free from the authority of the state. According to Mill:

The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[18]

While speaking of a "struggle between liberty and authority"[19], Mill posited that the tyranny of the majority could be reined by the recognition of civil rights such as the individual right to privacy, free speech, assembly and expression.

32. **Austin** in his **Lectures on Jurisprudence** (1869) spoke of the distinction between the public and the private realms: *jus publicum* and *jus privatum.*

The distinction between the public and private realms has its limitations. If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena. The extent to which an individual expects privacy in a public street may be different from that which she expects in the sanctity of the home. Yet if dignity is the underlying feature, the basis of recognising the right to privacy is not denuded in public spaces. The extent of permissible state Regulation may, however, differ based on the legitimate concerns of governmental authority.

33. **James Madison**, who was the architect of the American Constitution, contemplated the protection of the faculties of the citizen as an incident of the inalienable property rights of human beings. In his words:

In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has property in his opinions and the free communication of them...

He has an equal property interest in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions...

Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.[20]

Madison traced the recognition of an inviolable zone to an inalienable right to property. Property is construed in the broadest sense to include tangibles and intangibles and ultimately to control over one's conscience itself.

34. In an Article published on 15 December 1890 in the Harvard Law Review, **Samuel D Warren** and **Louis Brandeis** adverted to the evolution of the law to incorporate within it, the right to life as "a recognition of man's spiritual nature, of his feelings and his intellect"[21]. As legal rights were broadened, the right to life had "come to mean the right to enjoy life-**the right to be let alone**". Recognizing that "only a part of the pain, pleasure and profit of life lay in physical things" and that "thoughts, emotions, and sensations demanded legal recognition", Warren and Brandeis revealed with a sense of perspicacity the impact of technology on the right to be let alone:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone". Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons...

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[22]

In their seminal article, Warren and Brandeis observed that:

The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of **an inviolate personality.**[23]

(Emphasis supplied)

The right "to be let alone" thus represented a manifestation of "an inviolate personality", a core of freedom and liberty from which the human being had to be free from intrusion. The technology which provided a justification for the need to preserve the privacy of the individual was the development of photography. The right to be let alone was not so much an incident of property as a reflection of the inviolable nature of the human personality.

35. The ringing observations of Warren and Brandeis on the impact of technology have continued relevance today in a globalized world dominated by the internet and information technology. As societies have evolved, so have the connotations and ambit of privacy.

36. Though many contemporary accounts attribute the modern conception of the 'right to privacy' to the Warren and Brandeis article, historical material indicates that it was **Thomas Cooley** who adopted the phrase "the right to be let alone", in his **Treatise on the Law of Torts**[24]. Discussing personal immunity, Cooley stated:

the right of one's person may be said to be a right of complete immunity; the right to be alone.[25]

Roscoe Pound described the Warren and Brandeis Article as having done "nothing less than add a chapter to our law"[26]. However, another writer on the subject states that:

This right to privacy was not new. Warren and Brandeis did not even coin the phrase, "right to privacy," nor its common soubriquet, "the right to be let alone".[27]

The right to be let alone is a part of the right to enjoy life. The right to enjoy life is, in its turn, a part of the fundamental right to life of the individual.

37. The right to privacy was developed by Warren and Brandeis in the backdrop of the dense urbanization which occurred particularly in the East Coast of the United States. Between 1790 and 1890, the US population had risen from four million to sixty-three million. The population of urban areas had grown over a hundred-fold since the end of the civil war. In 1890, over eight million people had immigrated to the US. Technological progress and rapid innovations had led to the private realm being placed under stress:

...technological progress during the post-Civil War decades had brought to Boston and the rest of the United States "countless, little-noticed revolutions" in the form of a variety of inventions which made the personal lives and personalities of individuals increasingly accessible to large numbers of others, irrespective of acquaintance, social or economic class, or the customary constraints of propriety. Bell invented the telephone in Boston; the first commercial telephone exchange opened there in 1877, while Warren and Brandeis were students at the Harvard Law School. By 1890 there were also telegraphs, fairly inexpensive portable cameras, sound recording devices, and better and cheaper methods of making window glass. Warren and Brandeis recognized that these advances in technology, coupled with intensified newspaper enterprise, increased the vulnerability of individuals to having their actions, words, images, and personalities communicated without their consent beyond the protected circle of family and chosen friends.[28]

Coupled with this was the trend towards 'newspaperization'[29], the increasing presence of the print media in American society. Six months before the publication of the Warren and Brandeis' article, **E.L. Godkin**, a newspaper man had published an Article on the same subject in Scribner's magazine in July 1890. Godkin, however, suggested no realistic remedy for protecting privacy against intrusion, save and except "by the cudgel or the horsewhip"[30]. It was Warren and Brandeis who advocated the use of the common law to vindicate the right to privacy.[31]

38. Criminal libel actions were resorted to in the US during a part of the nineteenth century but by 1890, they had virtually ceased to be "a viable protection for individual privacy"[32]. The Sedition Act of 1789 expired in 1801. Before truth came to be accepted as a defence in defamation actions, criminal libel prosecutions flourished in the State courts.[33] Similarly, truth was not regarded as a valid defence to a civil libel action in much of the nineteenth century. By the time Warren and Brandeis wrote their Article in 1890, publication of the truth was perhaps no longer actionable under the law of defamation. It was this breach or lacuna that they sought to fill up by speaking of the right to privacy which would protect the control of the individual over her personality.[34] The right to privacy evolved as a *"leitmotif"* representing "the long tradition of American individualism".[35]

39. Conscious as we are of the limitations with which comparative frameworks[36] of law and history should be evaluated, the above account is of significance. It reflects the basic need of every individual to live with dignity. Urbanization and economic development lead to a replacement of traditional social structures. Urban ghettos replace the tranquillity of self-sufficient rural livelihoods. The need to protect the privacy of the being is no less when development and

technological change continuously threaten to place the person into public gaze and portend to submerge the individual into a seamless web of inter-connected lives.

G. Natural and inalienable rights

40. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality.
The human element in life is impossible to conceive without the existence of natural rights.
In 1690, **John Locke** had in his **Second Treatise of Government** observed that the lives, liberties and estates of individuals are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference. In 1765, **William Blackstone** in his **Commentaries on the Laws of England** spoke of a "natural liberty". There were, in his view, absolute rights which were vested in the individual by the immutable laws of nature. These absolute rights were divided into rights of personal security, personal liberty and property. The right of personal security involved a legal and uninterrupted enjoyment of life, limbs, body, health and reputation by an individual.

41. The notion that certain rights are inalienable was embodied in the **American Declaration of Independence** (1776) in the following terms:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable rights**, that among these are life, liberty and the pursuit of happiness.

(Emphasis supplied)

The term inalienable rights was incorporated in the **Declaration of the Rights of Man and of the Citizen** (1789) adopted by the French National Assembly in the following terms:

For its drafters, to ignore, to forget or to depreciate the rights of man are the sole causes of public misfortune and government corruption. **These rights are natural rights, inalienable and sacred,** the National Assembly recognizes and proclaims them-it does not grant, concede or establish them-and their conservation is the reason for all political communities; within these rights figures resistance to oppression.

(Emphasis supplied)

42. In 1921, **Roscoe Pound**, in his work titled **"The Spirit of the Common Law"**, explained the meaning of natural rights:

Natural rights mean simply interests which we think ought to be secured; demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor state creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights,

the devices which law employs to secure such of these interests as it is expedient to recognize, are the work of the law and in that sense the work of the state.[37]

Two decades later in 1942, Pound in **"The Revival of Natural Law"** propounded that:

Classical natural law in the seventeenth and eighteenth centuries had three postulates. **One was natural rights**, qualities of the ideal or perfect man in a state of perfection by virtue of which he ought to have certain things or be able to do certain things. **These were a guarantee of stability because the natural rights were taken to be immutable and inalienable.** (2) The social compact, a postulated contract basis of civil society. Here was a guide to change. (3) An ideal law of which positive laws were only declaratory; an ideal body of perfect precepts governing human relations and ordering human conduct, guaranteeing the natural rights and expressing the social compact.[38]

(Emphasis supplied)

43. In 1955, **Edwin W Patterson** in **"A Pragmatist Looks At Natural Law and Natural Rights"** observed that rights which individuals while making a social compact to create a government, reserve to themselves, are natural rights because they originate in a condition of nature and survive the social compact. In his words:

The basic rights of the citizen in our political society are regarded as continuing from a prepolitical condition or as arising in society independently of positive constitutions, statutes, and judicial decisions, which merely seek to "secure" or "safeguard" rights already reserved. These rights are not granted by a benevolent despot to his grateful subjects. The "natural rights" theory thus provided a convenient ideology for the preservation of such important rights as freedom of speech, freedom of religion and procedural due process of law. As a pragmatist, I should prefer to explain them as individual and social interests which arise or exist normally in our culture and are tuned into legal rights by being legally protected.[39]

44. Natural rights are not bestowed by the state. They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation.

45. Distinguishing an inalienable right to an object from the object itself emphasises the notion of inalienability. All human beings retain their inalienable rights (whatever their situation, whatever their acts, whatever their guilt or innocence). The concept of natural inalienable rights secures autonomy to human beings. But the autonomy is not absolute, for the simple reason that, the concept of inalienable rights postulates that there are some rights which no human being may alienate. While natural rights protect the right of the individual to choose and preserve liberty, yet the autonomy of the individual is not absolute or total. As a theoretical construct, it would otherwise be strictly possible to hire another person to kill oneself or to sell oneself into slavery or servitude. Though these acts are autonomous, they would be in violation of inalienable rights. This is for the reason that:

...These acts, however autonomous, would be in violation of inalienable rights, as the theories would have it. They would be morally invalid, and ineffective actually to alienate inalienable

rights. Although self-regarding, they pretend to an autonomy that does not exist. Inalienable rights are precisely directed against such false autonomy.

Natural inalienable rights, like other natural rights, have long rested upon what has been called the law of nature of natural law. Perhaps all of the theories discussed above could be called law of nature or natural law theories. The American tradition, even as early as 1641, ten years before Thomas Hobbes published Leviathan, included claims of natural rights, and these claims appealed to the law of nature, often in terms. Without a moral order of the law of nature sort, natural inalienable rights are difficult to pose. "'It is from natural law, and from it alone, that man obtains those rights we refer to as inalienable and inviolable...Human rights can have no foundation other than natural law.[40]

46. The idea that individuals can have rights against the State that are prior to rights created by explicit legislation has been developed as part of a liberal theory of law propounded by **Ronald Dworkin**. In his seminal work titled **"Taking Rights Seriously"**[41] (1977), he states that:

Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.[42]

(Emphasis supplied)

Dworkin asserts the existence of a right against the government as essential to protecting the dignity of the individual:

It makes sense to say that a **man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence.**[43]

(Emphasis supplied)

Dealing with the question whether the Government may abridge the rights of others to act when their acts might simply increase the risk, by however slight or speculative a margin, that some person's right to life or property will be violated, Dworkin says:

But no society that purports to recognize a variety of rights, on the ground that a man's dignity or equality may be invaded in a variety of ways, can accept such a principle[44]...

If rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned[45]...

If the Government does not take rights seriously, then it does not take law seriously either[46]...

Dworkin states that judges should decide how widely an individual's rights extend. He states:

Indeed, the suggestion that rights can be demonstrated by a process of history rather than by an appeal to principle shows either a confusion or no real concern about what rights are...

This has been a complex argument, and I want to summarize it. Our constitutional system rests on a particular moral theory, namely, that men have moral rights against the state. The different clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular concepts; therefore, a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality...[47]

A later Section of this judgment deals with how natural and inalienable rights have been developed in Indian precedent.

H. Evolution of the privacy doctrine in India

47. Among the early decisions of this Court following **Kharak Singh was R.M. Malkani** v. **State of Maharashtra** MANU/SC/0204/1972 : (1973) 1 SCC 471. In that case, this Court held that Section 25 of the Indian Telegraph Act, 1885 was not violated because:

Where a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery battery line or post for intercepting or acquainting himself with the contents of any message. There was no element of coercion or compulsion in attaching the tape recorder to the telephone.
[48]

This Court followed the same line of reasoning as it had in **Kharak Singh** while rejecting a privacy based challenge Under Article 21. Significantly, the Court observed that:

Article 21 was invoked by submitting that the privacy of the Appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephone conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Court will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods.[49]

In other words, it was the targeted and specific nature of the interception which weighed with the Court, the telephone tapping being directed at a guilty person. Hence the Court ruled that the telephone conversation of an innocent citizen will be protected against wrongful interference by wiretapping.

48. In **Gobind** MANU/SC/0119/1975 : (1975) 2 SCC 148, a Bench of three judges of this Court considered a challenge to the validity of Regulations 855 and 856 of State Police Regulations under which a history sheet was opened against the Petitioner who had been placed under surveillance. The Bench of three judges adverted to the decision in **Kharak Singh** and to the validation of the

Police Regulations (other than domiciliary visits at night). By the time the decision was handed down in **Gobind**, the law in the US had evolved and this Court took note of the decision in **Griswold** v. **Connecticut** 381 US 479 (1965) **("Griswold")** in which a conviction under a statute on a charge of giving information and advice to married persons on contraceptive methods was held to be invalid. This Court adverted to the dictum that specific guarantees of the Bill of Rights have penumbras which create zones of privacy. The Court also relied upon the US Supreme Court decision in **Jane Roe** v. **Henry Wade** 410 US 113 (1973) in which the Court upheld the right of a married woman to terminate her pregnancy as a part of the right of personal privacy. The following observations of Justice Mathew, who delivered the judgment of the Court do indicate a constitutional recognition of the right to be let alone:

There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in Olmstead v. United States 277 US 438 (1928), the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore, they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone.[50]

These observations follow upon a reference to the Warren and Brandeis article; the two decisions of the US Supreme Court noted earlier; the writings of Locke and Kant; and to dignity, liberty and autonomy.

49. Yet a close reading of the decision in **Gobind** would indicate that the Court eventually did not enter a specific finding on the existence of a right to privacy under the Constitution. The Court indicated that if the Court does find that a particular right should be protected as a fundamental privacy right, it could be overridden only subject to a compelling interest of the State:

There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. **If the Court does find that a claimed right is entitled to protection as a fundamental privacy right,** a law infringing it must satisfy the compelling State interest test. **Then the question** would be whether a State interest is of such paramount importance as would justify an infringement of the right.
[51]

(Emphasis supplied)

While emphasising individual autonomy and the dangers of individual privacy being eroded by new developments that "will make it possible to be heard in the street what is whispered in the closet", the Court had obvious concerns about adopting a broad definition of privacy since the right of privacy "is not explicit in the Constitution". Observing that the concept of privacy overlaps with liberty, this Court noted thus:

Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. **Time works changes and brings into existence new conditions. Subtler and far reaching means of**

invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.[52]

(Emphasis supplied)

Justice Mathew proceeded to explain what any right of privacy must encompass and protect and found it to be implicit in the concept of ordered liberty:

Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give an analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.[53]

In adverting to ordered liberty, the judgment is similar to the statement in the judgment of Justice Rajagopala Ayyangar in **Kharak Singh** which found the intrusion of the home by nightly domiciliary visits a violation of ordered liberty.

The Court proceeded to hold that in any event, the right to privacy will need a case to case elaboration. The following observations were carefully crafted to hold that even on the "assumption" that there is an independent right of privacy emanating from personal liberty, the right to movement and free speech, the right is not absolute:

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, **even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy** as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.
[54]

(Emphasis supplied)

Again a similar "assumption" was made by the Court in the following observations:

...Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As Regulation 856 has the force of law, it cannot be said that the fundamental right of the Petitioner Under Article 21 has been violated by the provisions contained in it: for, what is guaranteed under that Article is that no person shall be

deprived of his life or personal liberty except by the procedure established by 'law'. We think that the procedure is reasonable having regard to the provisions of Regulations 853 (c) and 857.

55

(Emphasis supplied)

The Court declined to interfere with the Regulations.

50. The judgment in **Gobind** does not contain a clear statement of principle by the Court of the *existence* of an independent right of privacy or of such a right being an emanation from explicit constitutional guarantees. The Bench, which consisted of three judges, may have been constrained by the dictum in the latter part of **Kharak Singh**. Whatever be the reason, it is evident that in several places Justice Mathew proceeded on the "assumption" that if the right to privacy is protected under the Constitution, it is a part of ordered liberty and is not absolute but subject to restrictions tailor-made to fulfil a compelling state interest. This analysis of the decision in Gobind assumes significance because subsequent decisions of smaller Benches have proceeded on the basis that Gobind does indeed recognise a right to privacy. What the contours of such a right are, emerges from a reading of those decisions. This is the next aspect to which we now turn.

51. **Malak Singh** v. **State of Punjab and Haryana** MANU/SC/0157/1980 : (1981) 1 SCC 420 **("Malak Singh")** dealt with the provisions of Section 23 of the Punjab Police Rules under which a surveillance register was to be maintained among other persons, of all convicts of a particular description and persons who were reasonably believed to be habitual offenders whether or not, they were convicted. The validity of the Rules was not questioned in view of the decisions in **Kharak Singh** and Gobind. The Rules provided for modalities of surveillance. Justice O Chinnappa Reddy speaking for a Bench of two judges of this Court recognised the need for surveillance on habitual and potential offenders. In his view:

Prevention of crime is one of the prime purposes of the constitution of a police force. The preamble to the Police Act, 1861 says: "Whereas it is expedient to reorganise the police and to make it a more efficient instrument for the prevention and detection of crime." Section 23 of the Police Act prescribes it as the duty of police officers "to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisances". In connection with these duties it will be necessary to keep discreet surveillance over reputed bad characters, habitual offenders and other potential offenders. Organised crime cannot be successfully fought without close watch of suspects. But, **surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution** and the freedom of movement guaranteed by Article 19(1)(d). That cannot be permitted. This is recognised by the Punjab Police Rules themselves. Rule 23.7, which prescribes the mode of surveillance, permits the close watch over the movements of the person under surveillance but without any illegal interference. Permissible surveillance is only to the extent of a close watch over the movements of the person under surveillance and no more. So long as surveillance is for the purpose of preventing crime and is confined to the limits prescribed by Rule 23.7 we do not think a person whose name is included in the surveillance register can have a genuine cause for complaint. We may notice here that interference in accordance with law and

for the prevention of disorder and crime is an exception recognised even by European Convention of Human Rights to the right to respect for a person's private and family life. Article 8 of the Convention reads as follows:

(1) Everyone's right to respect for his private and family life, his home and his correspondence shall be recognised.

(2) There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals.[56]

(Emphasis supplied)

The Court did not consider it unlawful for the police to conduct surveillance so long as it was for the purpose of preventing crime and was confined to the limits prescribed by Rule 23.7 which, while authorising a close watch on the movement of a person under surveillance, contained a condition that this should be without any illegal interference. The object being to prevent crime, the Court held that the person who is subject to surveillance is not entitled to access the register nor was a pre-decisional hearing compliant with natural justice warranted. Confidentiality, this Court held, was required in the interest of the public, including keeping in confidence the sources of information. Again the Court held:

But all this does not mean that the police have a licence to enter the names of whoever they like (dislike?) in the surveillance register; nor can the surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free exercise and enjoyment of those freedoms; nor can the surveillance so intrude as to offend the dignity of the individual. Surveillance of persons who do not fall within the categories mentioned in Rule 23.4 or for reasons unconnected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules, will entitle a citizen to the court's protection which the court will not hesitate to give. The very Rules which prescribe the conditions for making entries in the surveillance register and the mode of surveillance appear to recognise the caution and care with which the police officers are required to proceed. The note following Rule 23.4 is instructive. It enjoins a duty upon the police officer to construe the Rule strictly and confine the entries in the surveillance register to the class of persons mentioned in the rule. Similarly Rule 23.7 demands that there should be no illegal interference in the guise of surveillance. Surveillance, therefore, has to be unobtrusive and within bounds.
[57]

The observations in **Malak Singh** on the issue of privacy indicate that an encroachment on privacy infringes personal liberty Under Article 21 and the right to the freedom of movement Under Article 19(1)(d). Without specifically holding that privacy is a protected constitutional value Under Article 19 or Article 21, the judgment of this Court indicates that serious encroachments on privacy impinge upon personal liberty and the freedom of movement. The Court linked such an encroachment with the dignity of the individual which would be offended by surveillance bereft

of procedural protections and carried out in a manner that would obstruct the free exercise of freedoms guaranteed by the fundamental rights.

52. **State of Maharashtra** v. **Madhukar Narayan Mardikar** MANU/SC/0032/1991 : (1991) 1 SCC 57 is another decision by a two-judge Bench which dealt with a case of a police inspector who was alleged to have attempted to have non-consensual intercourse with a woman by entering the hutment where she lived. Following an enquiry, he was dismissed from service but the punishment was modified, in appeal, to removal so as to enable him to apply for pensionary benefits. The High Court quashed the punishment both on the ground of a violation of the principles of natural justice, and by questioning the character of the victim. Holding that this approach of the High Court was misconceived, Justice A.M. Ahmadi (as the learned Chief Justice then was) held that though the victim had admitted "the dark side of her life", she was yet entitled to her privacy:

The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. **Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.** At the most the officer called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence.

58

(Emphasis supplied)

As the above extract indicates, the issue before this Court was essentially based on the appreciation of the evidence of the victim by the High Court. However, the observations of this Court make a strong statement of the bodily integrity of a woman, as an incident of her privacy.

53. The decision In **Life Insurance Corporation of India** v. **Prof Manubhai D Shah** MANU/SC/0032/1993 : (1992) 3 SCC 637, incorrectly attributed to the decision in **Indian Express Newspapers (Bombay) Pvt. Ltd.** v. **Union of India** MANU/SC/0406/1984 : (1985) 1 SCC 641 the principle that the right to free expression Under Article 19(1)(a) includes the privacy of communications. The judgment of this Court in **Indian Express** cited a U.N. Report but did no more.

54. The decision which has assumed some significance is **Rajagopal** MANU/SC/0056/1995 : (1994) 6 SCC 632. In that case, in a proceeding Under Article 32 of the Constitution, a writ was sought for restraining the state and prison authorities from interfering with the publication of an autobiography of a condemned prisoner in a magazine. The prison authorities, in a communication to the publisher, denied the claim that the autobiography had been authored by the prisoner while he was confined to jail and opined that a publication in the name of a convict was against prison

rules. The prisoner in question had been found guilty of six murders and was sentenced to death. Among the questions which were posed by this Court for decision was whether a citizen could prevent another from writing about the life story of the former and whether an unauthorized publication infringes the citizen's right to privacy. Justice Jeevan Reddy speaking for a Bench of two judges recognised that the right of privacy has two aspects: the first affording an action in tort for damages resulting from an unlawful invasion of privacy, while the second is a constitutional right. The judgment traces the constitutional protection of privacy to the decisions in **Kharak Singh** and **Gobind**. This appears from the following observations:

...The first decision of this Court dealing with this aspect is Kharak Singh v. State of U.P. MANU/SC/0085/1962 : [(1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329] A more elaborate appraisal of this right took place in a later decision in Gobind v. State of M.P. [MANU/SC/0119/1975 : (1975) 2 SCC 148: 1975 SCC (Cri) 468] wherein Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in Griswold v. Connecticut [381 US 479: 14 L Ed 2d 510 (1965)] and Roe v. Wade [410 US 113: 35 L Ed 2d 147 (1973)]...[59]

The decision in **Rajagopal** considers the decisions in **Kharak Singh** and Gobind thus:

... Kharak Singh MANU/SC/0085/1962 : [(1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329] was a case where the Petitioner was put under surveillance as defined in Regulation 236 of the U.P. Police Regulations...

Though right to privacy was referred to, the decision turned on the meaning and content of "personal liberty" and "life" in Article 21. Gobind [MANU/SC/0119/1975 : (1975) 2 SCC 148: 1975 SCC (Cri) 468] was also a case of surveillance under M.P. Police Regulations. Kharak Singh MANU/SC/0085/1962 : [(1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329] was followed even while at the same time elaborating the right to privacy...[60]

The Court held that neither the State nor its officials can impose prior restrictions on the publication of an autobiography of a convict. In the course of its summary of the decision, the Court held:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his home, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The Rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media

among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the Rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the Defendant) with reckless disregard for truth. In such a case, it would be enough for the Defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the Defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule...[61]

55. The judgment of Justice Jeevan Reddy regards privacy as implicit in the right to life and personal liberty Under Article 21. In coming to the conclusion, the judgment in **Rajagopal** notes that while **Kharak Singh** had referred to the right of privacy, the decision turned on the content of life and personal liberty in Article 21. The decision recognises privacy as a protected constitutional right, while tracing it to Article 21.

56. In an interesting research Article on '**State's surveillance and the right to privacy**', a contemporary scholar has questioned the theoretical foundation of the decision in **Rajagopal** on the ground that the case essentially dealt with cases in the US concerning privacy against governmental intrusion which was irrelevant in the factual situation before this Court.[62] In the view of the author, **Rajagopal** involved a publication of an Article by a private publisher in a magazine, authored by a private individual, albeit a convict. Hence the decision has been criticized on the ground that **Rajagopal** was about an action between private parties and, therefore, ought to have dealt with privacy in the context of tort law.[63] While it is true that in **Rajagopal** it is a private publisher who was seeking to publish an Article about a death row convict, it is equally true that the Court dealt with a prior restraint on publication imposed by the state and its prison officials. That is, in fact, how Article 32 was invoked by the publisher.

57. The intersection between privacy and medical jurisprudence has been dealt with in a series of judgments of this Court, among them being **Mr. X** v. **Hospital Z** MANU/SC/0733/1998 : (1998) 8 SCC 296. In that case, the Appellant was a doctor in the health service of a state. He was accompanying a patient for surgery from Nagaland to Chennai and was tested when he was to donate blood. The blood sample was found to be HIV+. The Appellant claiming to have been socially ostracized by the disclosure of his HIV+ status by the hospital, filed a claim for damages before the National Consumer Disputes Redressal Commission (NCDRC) alleging that the

hospital had unauthorizedly disclosed his HIV status resulting in his marriage being called off and in social opprobrium. Justice Saghir Ahmad, speaking for a Bench of two judges of this Court, adverted to the duty of the doctor to maintain secrecy in relation to the patient but held that there is an exception to the Rule of confidentiality where public interest will override that duty. The judgment of this Court dwelt on the right of privacy Under Article 21 and other provisions of the Constitution relating to the fundamental rights and the Directive Principles:

Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. It was in this context that it was held by this Court in Kharak Singh v. State of U.P. [MANU/SC/0085/1962 : AIR 1963 SC 1295: (1964) 1 SCR 332] that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in Gobind v. State of M.P. [MANU/SC/0119/1975 : (1975) 2 SCC 148: 1975 SCC (Cri) 468] in which the origin of "right to privacy" was traced and a number of American decisions, including Munn v. Illinois [94 US 113: 24 L Ed 77 (1877)], Wolf v. Colorado [338 US 25: 93 L Ed 1782 (1949)] and various articles were considered...
64

The Court read the decision in **Malak Singh** as reiterating the view taken earlier, on privacy in **Kharak Singh** and Gobind. The Court proceeded to rely on the decision in **Rajagopal**. The Court held that the right to privacy is not absolute and is subject to action lawfully taken to prevent crime or disorder or to protect the health, morals and the rights and freedoms of others. Public disclosure of even true facts, the Court held, may amount to invasion of the right to privacy or the right to be let alone when a doctor breaches confidentiality. The Court held that:

Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.
65

However, the disclosure that the Appellant was HIV+ was held not to be violative of the right to privacy of the Appellant on the ground that the woman to whom he was to be married "was saved in time by such disclosure and from the risk of being infected". The denial of a claim for compensation by the NCDRC was upheld.

58. The decision in **Mr. X** v. **Hospital Z** fails to adequately appreciate that the latter part of the decision in **Kharak Singh** declined to accept privacy as a constitutional right, while the earlier part invalidated domiciliary visits in the context of an invasion of 'ordered liberty'. Similarly, several observations in Gobind proceed on an assumption: if there is a right of privacy, it would comprehend certain matters and would be subject to a Regulation to protect compelling state interests.

59. In a decision of a Bench of two judges of this Court in PUCL[66], the Court dealt with telephone tapping. The Petitioner challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 and urged in the alternative for adopting procedural safeguards to curb arbitrary acts of telephone tapping. Section 5(2) authorises the interception of messages in transmission in the following terms:

On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially unauthorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this Sub-section.

60. The submission on the invalidity of the statutory provision authorising telephone tapping was based on the right to privacy being a fundamental right Under Articles 19(1) and 21 of the Constitution. Justice Kuldip Singh adverted to the observations contained in the majority judgment in **Kharak Singh** which led to the invalidation of the provision for domiciliary visits at night under Regulation 236(b). **PUCL** cited the minority view of Justice Subba Rao as having gone even further by invalidating Regulation 236, in its entirety. The judgment, therefore, construes both the majority and minority judgments as having affirmed the right to privacy as a part of Article 21:

Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh case MANU/SC/0085/1962 : [(1964) 1 SCR 332: AIR 1963 SC 1295] (majority and the minority opinions) to include that "right to privacy" as a part of the right to "protection of life and personal liberty" guaranteed under the said Article.
[67]

Gobind was construed to have upheld the validity of State Police Regulations providing surveillance on the ground that the 'procedure established by law' Under Article 21 had not been violated. After completing its summation of precedents, Justice Kuldip Singh held as follows:

We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined Under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtained "except according to procedure established by law".[68]

Telephone conversations were construed to be an important ingredient of privacy and the tapping of such conversations was held to infringe Article 21, unless permitted by 'procedure established by law':

The right to privacy - by itself - has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.[69]

The Court also held that telephone tapping infringes the guarantee of free speech and expression Under Article 19(1)(a) unless authorized by Article 19(2). The judgment relied on the protection of privacy Under Article 17 of the International Covenant on Civil and Political Rights (and a similar guarantee Under Article 12 of the Universal Declaration of Human Rights) which, in its view, must be an interpretative tool for construing the provisions of the Constitution. Article 21, in the view of the Court, has to be interpreted in conformity with international law. In the absence of Rules providing for the precautions to be adopted for preventing improper interception and/or disclosure of messages, the fundamental rights Under Articles 19(1)(a) and 21 could not be safeguarded. But the Court was not inclined to require prior judicial scrutiny before intercepting telephone conversations. The Court ruled that it would be necessary to lay down procedural safeguards for the protection of the right to privacy of a person until Parliament intervened by framing Rules Under Section 7 of the Telegraph Act. The Court accordingly framed guidelines to be adopted in all cases envisaging telephone tapping.

61. The judgment in **PUCL** construes the earlier decisions in Kharak Singh (especially the majority view on the invalidity of domiciliary visits), Gobind and **Rajagopal** in holding that the right to privacy is embodied as a constitutionally protected right Under Article 21. The Court was conscious of the fact that the right to privacy has "by itself" not been identified under the Constitution. The expression "by itself" may indicate one of two meanings. The first is that the Constitution does not recognise a standalone right to privacy. The second recognizes that there is no express delineation of such a right. Evidently, the Court left the evolution of the contours of the right to a case by case determination. Telephone conversations from the home or office were construed to be an integral element of the privacy of an individual. In **PUCL**, the Court consciously established the linkages between various articles conferring guarantees of fundamental rights when it noted that wire-tapping infringes privacy and in consequence the right to life and personal liberty Under Article 21 and the freedom of speech and expression Under Article 19(1)(a). The need to read the fundamental constitutional guarantees with a purpose illuminated by India's commitment to the international regime of human rights' protection also weighed in the decision. Section 5(2) of the Telegraph Act was to be regulated by Rules framed by the Government to render the modalities of telephone tapping fair, just and reasonable Under Article 21. The importance which

the Court ascribes to privacy is evident from the fact that it did not await the eventual formulation of Rules by Parliament and prescribed that in the meantime, certain procedural safeguards which it envisaged should be put into place.

62. While dealing with a case involving the rape of an eight year old child, a three-judge Bench of this Court in **State of Karnataka** v. **Krishnappa** MANU/SC/0210/2000 : (2000) 4 SCC 75 held:

Sexual violence apart from being... dehumanising... is an unlawful intrusion of the right to privacy and sanctity... It... offends her... dignity.[70]

Similar observations were made in **Sudhansu Sekhar Sahoo** v. **State of Orissa** MANU/SC/1184/2002 : (2002) 10 SCC 743.

63. In **Sharda** v. **Dharmpal** MANU/SC/0260/2003 : (2003) 4 SCC 493, the Appellant and Respondent were spouses. The Respondent sued for divorce and filed an application for conducting a medical examination of the Appellant which was opposed. The Trial Court allowed the application. The High Court dismissed the challenge in a Civil Revision which led the Appellant to move this Court. The Appellant argued before this Court that compelling her to undergo a medical examination violated her personal liberty Under Article 21 and that in the absence of an empowering provision, the matrimonial Court had no jurisdiction to compel a party to undergo a medical examination. Justice S.B. Sinha, speaking for the Bench of three judges, dealt with the first aspect of the matter (whether a matrimonial Court has jurisdiction to order a medical examination) in the following terms:

Even otherwise the court may issue an appropriate direction so as to satisfy itself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the court has adequate power to examine the party or get him examined by a qualified doctor, we are of the opinion that in an appropriate case the court may take recourse to such a procedure even at the instance of the party to the lis[71]...

Furthermore, the court must be held to have the requisite power even Under Section 151 of the Code of Civil Procedure to issue such direction either *suo motu* or otherwise which, according to him, would lead to the truth.[72]

64. The second question considered by the Court was whether a compulsive subjecting of a person to a medical examination violates Article 21. After noticing the observations in **M.P. Sharma** and **Kharak Singh** where it was held that the Constitution has not guaranteed the right of privacy, the Court held that in subsequent decisions, such a right has been read into Article 21 on an expansive interpretation of personal liberty. In the course of its judgment, the Court adverted to the decisions in Rajagopal, PUCL, Gobind and **Mr. X** v. **Hospital Z** on the basis of which it stated that it had "outlined the law relating to privacy in India". In the view of this Court, in matrimonial cases where a decree of divorce is sought on medical grounds, a medical examination is the only way in which an allegation could be proved. In such a situation:

If the Respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined Under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right...[73]

The right of privacy was held not to be breached.

65. In **District Registrar and Collector, Hyderabad** v. **Canara Bank** MANU/SC/0935/2004 : (2005) 1 SCC 496 ("Canara Bank"), a Bench of two judges of this Court considered the provisions of the Indian Stamp Act, 1899 (as amended by a special law in Andhra Pradesh). Section 73, which was invalidated by the High Court, empowered the Collector to inspect registers, books and records, papers, documents and proceedings in the custody of any public officer 'to secure any duty or to prove or would lead to the discovery of a fraud or omission'. Section 73 was in the following terms:

73. Every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to inspect for such purpose the registers, books, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge.

After adverting to the evolution of the doctrine of privacy in the US from a right associated with property[74] to a right associated with the individual[75], Chief Justice Lahoti referred to the penumbras created by the Bill of Rights resulting in a zone of privacy[76] leading up eventually to a "reasonable expectation of privacy"[77]. Chief Justice Lahoti considered the decision in **M.P. Sharma** to be "of limited help" to the discussion on privacy. However, it was **Kharak Singh** which invalidated nightly-domiciliary visits that provided guidance on the issue. The evaluation of **Kharak Singh** was in the following terms:

In...**Kharak Singh** v. **State of U P** [MANU/SC/0085/1962 : (1964) 1 SCR 332: (1963) 2 Cri LJ 329] the U.P. Regulations regarding domiciliary visits were in question and **the majority referred to Munn v. Illinois [**94 US 113: 24 L Ed 77 (1877)**] and held that though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to "life" in Article 21**. According to the majority, Clause 236 of the relevant Regulations in U.P., was bad in law; it offended Article 21 inasmuch as there was no law permitting interference by such visits. The majority did not go into the question whether these visits violated the "right to privacy". But, Subba Rao, J. while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy. In the discussion the learned Judge referred to Wolf v. Colorado [338 US 25: 93 L Ed 1782 (1949)]. **In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21**.[78]

(Emphasis supplied)

The decision in **Gobind** is construed to have implied the right to privacy in Articles 19(1)(a) and 21 of the Constitution:

We have referred in detail to the reasons given by Mathew, J. in Gobind to show that, the right to privacy has been implied in Articles 19(1)(a) and (d) and Article 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if **it has *reasonable basis or reasonable* materials to support it.**[79]

(Emphasis supplied)

The Court dealt with the application of Section 73 of the Indian Stamp Act (as amended), to documents of a customer in the possession of a bank. The Court held:

Once we have accepted in Gobind [MANU/SC/0119/1975 : (1975) 2 SCC 148: 1975 SCC (Cri) 468] and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept the line of Miller [425 US 435 (1976)] in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any unconstitutionality.[80]

Hence the Court repudiated the notion that a person who places documents with a bank would, as a result, forsake an expectation of confidentiality. In the view of the Court, even if the documents cease to be at a place other than in the custody and control of the customer, privacy attaches to persons and not places and hence the protection of privacy is not diluted. Moreover, in the view of the Court, there has to be a reasonable basis or material for the Collector to form an opinion that the documents in the possession of the bank would secure the purpose of investigating into an act of fraud or an omission in relation to duty. The safeguards which the Court introduced were regarded as being implicit in the need to make a search of this nature reasonable. The second part of the ruling of the Court is equally important for it finds fault with a statutory provision which allows an excessive delegation of the power conferred upon the Collector to inspect documents. The provision, the Court rules, would allow the customers' privacy to be breached by non-governmental persons. Hence the statute, insofar as it allowed the Collector to authorize any person to seek inspection, would be unenforceable. In the view of the Court:

Secondly, the impugned provision in Section 73 enabling the Collector to authorise "any person" whatsoever to inspect, to take notes or extracts from the papers in the public office suffers from the vice of excessive delegation as there are no guidelines in the Act and more importantly, the Section allows the facts relating to the customer's privacy to reach non-governmental persons and

would, on that basis, be an unreasonable encroachment into the customer's rights. This part of Section 73 permitting delegation to "any person" suffers from the above serious defects and for that reason is, in our view, unenforceable. The State must clearly define the officers by designation or state that the power can be delegated to officers not below a particular rank in the official hierarchy, as may be designated by the State.[81]

66. The significance of the judgment in **Canara Bank** lies first in its reaffirmation of the right to privacy as emanating from the liberties guaranteed by Article 19 and from the protection of life and personal liberty Under Article 21. Secondly, the Court finds the foundation for the reaffirmation of this right not only in the judgments in **Kharak Singh** and **Gobind** and the cases which followed, but also in terms of India's international commitments under the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR). Thirdly, the right to privacy is construed as a right which attaches to the person. The significance of this is that the right to privacy is not lost as a result of confidential documents or information being parted with by the customer to the custody of the bank. Fourthly, the Court emphasised the need to read procedural safeguards to ensure that the power of search and seizure of the nature contemplated by Section 73 is not exercised arbitrarily. Fifthly, access to bank records to the Collector does not permit a delegation of those powers by the Collector to a private individual. Hence even when the power to inspect and search is validly exercisable by an organ of the state, necessary safeguards would be required to ensure that the information does not travel to unauthorised private hands. Sixthly, information provided by an individual to a third party (in that case a bank) carries with it a reasonable expectation that it will be utilized only for the purpose for which it is provided. Parting with information (to the bank) does not deprive the individual of the privacy interest. The reasonable expectation is allied to the purpose for which information is provided. Seventhly, while legitimate aims of the state, such as the protection of the revenue may intervene to permit a disclosure to the state, the state must take care to ensure that the information is not accessed by a private entity. The decision in **Canara Bank** has thus important consequences for recognising informational privacy.

67. After the decision in **Canara Bank**, the provisions for search and seizure Under Section 132(5) of the Income Tax Act, 1961 were construed strictly by this Court in **P.R. Metrani** v. **Commissioner of Income Tax** MANU/SC/5082/2006 : (2007) 1 SCC 789 on the ground that they constitute a "serious intrusion into the privacy of a citizen". Similarly, the search and seizure provisions of Sections 42 and 43 of the NDPS[82] Act were construed by this Court in **Directorate of Revenue** v. **Mohd. Nisar Holia** MANU/SC/8167/2007 : (2008) 2 SCC 370. Adverting to **Canara Bank**, among other decisions, the Court held that the right to privacy is crucial and imposes a requirement of a written recording of reasons before a search and seizure could be carried out.

68. Section 30 of the Punjab Excise Act, 1914 prohibited the employment of "any man under the age of 25 years" or "any woman" in any part of the premises in which liquor or an intoxicating drug is consumed by the public. The provision was also challenged in **Anuj Garg** v. **Hotel Association of India** MANU/SC/8173/2007 : (2008) 3 SCC 1 on the ground that it violates the right to privacy. While holding that the provision is *ultra vires*, the two-judge Bench observed:

Privacy rights prescribe autonomy to choose profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship[83]...

Instead of prohibiting women employment in the bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. **Any other policy inference (such as the one embodied Under Section 30) from societal conditions would be oppressive on the women and against the privacy rights**[84]...

The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al.[85]

(Emphasis supplied)

69. In **Hinsa Virodhak Sangh** v. **Mirzapur Moti Kuresh Jamat** MANU/SC/1246/2008 : (2008) 5 SCC 33 ("Hinsa Virodhak Sangh"), this Court dealt with the closure of municipal slaughterhouses in the city of Ahmedabad for a period of nine days each year during the Jain observance of *paryushan*, pursuant to the resolution of the municipal corporation. The High Court had set aside the resolutions. In appeal, this Court observed as follows:

Had the impugned resolutions ordered closure of municipal slaughterhouses for a considerable period of time we may have held the impugned resolutions to be invalid being an excessive restriction on the rights of the butchers of Ahmedabad who practise their profession of meat selling. After all, butchers are practising a trade and it is their fundamental right Under Article 19(1)(g) of the Constitution which is guaranteed to all citizens of India. Moreover, it is not a matter of the proprietor of the butchery shop alone. There may be also several workmen therein who may become unemployed if the slaughterhouses are closed for a considerable period of time, because one of the conditions of the licence given to the shop-owners is to supply meat regularly in the city of Ahmedabad and this supply comes from the municipal slaughterhouses of Ahmedabad. Also, a large number of people are non-vegetarian and they cannot be compelled to become vegetarian for a long period. **What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court.** In R. Rajagopal v. State of T.N. [MANU/SC/0056/1995 : (1994) 6 SCC 632 : AIR 1995 SC 264] (vide SCC para 26: AIR para 28) this Court held that the right to privacy is implicit in the right to life and liberty guaranteed by Article 21. It is a "right to be let alone".[86]

(Emphasis supplied)

However, since the closure of slaughterhouses was for a period of nine days, the Court came to the conclusion that it did not encroach upon the freedom guaranteed by Article 19(1)(g). The restriction was held not to be excessive.

70. The decision in the **State of Maharashtra** v. **Bharat Shanti Lal Shah** MANU/SC/3789/2008 : (2008) 13 SCC 5 deals with the constitutional validity of Sections 13 to 16 of the Maharashtra Control of Organized Crime Act (MCOCA) which inter alia contains provisions for intercepting telephone and wireless communications. Upholding the provision, the Court observed:

The object of MCOCA is to prevent the organised crime and a perusal of the provisions of the Act under challenge would indicate that the said law authorises the interception of wire, electronic or oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organised crime. The procedures authorising such interception are also provided therein with enough procedural safeguards, some of which are indicated and discussed hereinbefore.[87]

The safeguards that the Court adverts to in the above extract include Section 14, which requires details of the organized crime that is being committed or is about to be committed, before surveillance could be authorized. The requirements also mandate describing the nature and location of the facilities from which the communication is to be intercepted, the nature of the communication and the identity of the person, if it is known. A statement is also necessary on whether other modes of enquiry or intelligence gathering were tried or had failed or why they reasonably appear to be unlikely to succeed if tried or whether these would be too dangerous or would likely result in the identification of those connected with the operation. The duration of the surveillance is restricted in time and the provision requires "minimal interception[88].

71. During the course of the last decade, this Court has had occasion to deal with the autonomy of a woman and, as an integral part, her control over the body. **Suchita Srivastava** v. **Chandigarh Administration** MANU/SC/1580/2009 : (2009) 9 SCC 1 (**"Suchita Srivastava"**) arose in the context of the Medical Termination of Pregnancy Act (MTP) Act, 1971. A woman who was alleged to have been raped while residing in a welfare institution run by the government was pregnant. The district administration moved the High Court to seek termination of the pregnancy. The High Court directed that the pregnancy be terminated though medical experts had opined that the victim had expressed her willingness to bear the child. The High Court had issued this direction without the consent of the woman which was mandated under the statute where the woman is a major and does not suffer from a mental illness. The woman in this case was found to suffer from a case of mild to moderate mental retardation. Speaking for a Bench of three judges, Chief Justice Balakrishnan held that the reproductive choice of the woman should be respected having regard to the mandate of Section 3. In the view of the Court:

There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood Under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. **The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.** This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. **Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.** However, in the case of

pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices. [89]

(Emphasis supplied)

The Court noted that the statute requires the consent of a guardian where the woman has not attained majority or is mentally ill. In the view of the Court, there is a distinction between mental illness and mental retardation and hence the State which was in-charge of the welfare institution was bound to respect the personal autonomy of the woman.

72. The decision in **Suchita Srivastava** dwells on the statutory right of a woman under the MTP Act to decide whether or not to consent to a termination of pregnancy and to have that right respected where she does not consent to termination. The statutory recognition of the right is relatable to the constitutional right to make reproductive choices which has been held to be an ingredient of personal liberty Under Article 21. The Court deduced the existence of such a right from a woman's right to privacy, dignity and bodily integrity.

73. In **Bhavesh Jayanti Lakhani** v. **State of Maharashtra** MANU/SC/1410/2009 : (2009) 9 SCC 551, this Court dealt with a challenge to the validity of an arrest warrant issued by a US court and a red corner notice issued by INTERPOL on the ground that the Petitioner had, in violation of an interim custody order, returned to India with the child. The Court did not accept the submission that the CBI, by coordinating with INTERPOL had breached the Petitioner's right of privacy. However, during the course of the discussion, this Court held as follows:

Right to privacy is not enumerated as a fundamental right either in terms of Article 21 of the Constitution of India or otherwise. It, however, by reason of an elaborate interpretation by this Court in Kharak Singh v. State of U.P. [MANU/SC/0085/1962 : AIR 1963 SC 1295: (1964) 1 SCR 332] was held to be an essential ingredient of "personal liberty".[90]

"This Court, however, in Gobind v. State of M.P. upon taking an elaborate view of the matter in regard to right to privacy vis-a-vis the Madhya Pradesh Police Regulations dealing with surveillance, opined that the said Regulations did not violate the "procedure established by law". However, a limited fundamental right to privacy as emanating from Articles 19(1)(a), (d) and 21 was upheld, but the same was held to be not absolute wherefore reasonable restrictions could be placed in terms of Clause (5) of Article 19.[91]

74. In Selvi v. State of Karnataka MANU/SC/0325/2010 : (2010) 7 SCC 263 **("Selvi")**, a Bench of three judges of this Court dealt with a challenge to the validity of three investigative techniques: narco-analysis, polygraph test (lie-detector test) and Brain Electrical Activation Profile (BEAP) on the ground that they implicate the fundamental rights Under Articles 20(3) and 21 of the Constitution. The Court held that the results obtained through an involuntary administration of these tests are within the scope of a testimonial, attracting the protective shield of Article 20(3) of the Constitution. Chief Justice Balakrishnan adverted to the earlier decisions rendered in the

context of privacy and noted that thus far, judicial understanding had stressed mostly on the protection of the body and physical actions induced by the state. The Court emphasised that while the right against self-incrimination is a component of personal liberty Under Article 21, privacy under the constitution has a meeting point with Article 20(3) as well. In the view of the Court:

The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" Under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties...

Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the "right against self-incrimination".[92]

In tracing the right to privacy Under Article 20(3), as well as Article 21, the decision marks a definite shift away from the **M.P. Sharma** rationale. The right not to be compelled to speak or to incriminate oneself when Accused of an offence is an embodiment of the right to privacy. **Selvi** indicates how the right to privacy can straddle the ambit of several constitutional rights-in that case, Articles 20(3) and 21.

75. In **Bhabani Prasad Jena** v. **Orissa State Commission for Women** MANU/SC/0555/2010 : (2010) 8 SCC 633, the Court was considering the question whether the High Court was justified in issuing a direction for a DNA test of a child and the Appellant who, according to the mother of the child, was the father. It was held that:

In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.[93]

76. In **Amar Singh** v. **Union of India** MANU/SC/0596/2011 : (2011) 7 SCC 69, a Bench of two judges of this Court dealt with a petition Under Article 32 alleging that the fundamental right to privacy of the Petitioner was being breached by intercepting his conversations on telephone services provided by a service provider. The Court held:

Considering the materials on record, this Court is of the opinion that it is no doubt true that the service provider has to act on an urgent basis and has to act in public interest. But in a given case, like the present one, where the impugned communication dated 9-11-2005 is full of gross mistakes, the service provider while immediately acting upon the same, should simultaneously verify the authenticity of the same from the author of the document. This Court is of the opinion that the service provider has to act as a responsible agency and cannot act on any communication. **Sanctity and regularity in official communication in such matters must be maintained especially when the service provider is taking the serious step of intercepting the telephone conversation of a person and by doing so is invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution**, as has been held by this Court.[94]

(Emphasis supplied)

77. In **Ram Jethmalani** v. **Union of India** MANU/SC/0711/2011 : (2011) 8 SCC 1 ("Ram Jethmalani"), a Bench of two judges was dealing with a public interest litigation concerned with unaccounted monies and seeking the appointment of a Special Investigating Team to follow and investigate a money trail. This Court held that the revelation of the details of the bank accounts of individuals without the establishment of a *prima facie* ground of wrongdoing would be a violation of the right to privacy. This Court observed thus:

Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values...

The rights of citizens, to effectively seek the protection of fundamental rights, under Clause (1) of Article 32 have to be balanced against the rights of citizens and persons Under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. **An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.**[95]

(Emphasis supplied)

The Court held that while the State could access details of the bank accounts of citizens as an incident of its power to investigate and prosecute crime, this would not enable a private citizen to compel a citizen to reveal bank accounts to the public at large.

78. In **Sanjoy Narayan** v. **High Court of Allahabad** MANU/SC/0997/2011 : (2011) 13 SCC 155, the two-judge Bench dealt with a contempt petition in respect of publication of an incorrect report in a newspaper which tarnished the image of the Chief Justice of a High Court. The Court made the following observations:

The unbridled power of the media can become dangerous if check and balance is not inherent in it. **The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person's fundamental right to privacy.**[96]

(Emphasis supplied)

79. In **Ramlila Maidan Incident** v. **Home Secretary, Union of India** MANU/SC/0131/2012 : (2012) 5 SCC 1, Justice B.S. Chauhan in a concurring judgment held that:

Right to privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India by this Court. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. Such a right has been extended even to woman of easy virtues as she has been held to be entitled to her right of privacy. However, right of privacy may not be absolute and in exceptional circumstance particularly surveillance in consonance with the statutory provisions may not violate such a right.[97]

In the view of the Court, privacy and dignity of human life have "always been considered a fundamental human right of every human being" like other constitutional values such as free speech. We must also take notice of the construction placed by the judgment on the decision in **Kharak Singh** as having "held that the right to privacy is a part of life Under Article 21 of the Constitution" and which was reiterated in **PUCL**.

80. The judgment of a Bench of two judges of this Court in **Bihar Public Service Commission** v. **Saiyed Hussain Abbas Rizwi** MANU/SC/1103/2012 : (2012) 13 SCC 61 dealt with the provisions of Section 8(1)(g) of the Right to Information Act, 2005. A person claiming to be a public-spirited citizen sought information under the statute from the Bihar Public Service Commission on a range of matters relating to interviews conducted by it on two days. The commission disclosed the information save and except for the names of the interview board. The High Court directed disclosure. Section 8(1)(g) provides an exemption from disclosure of information of the following nature:

information, the disclosure of which would endanger the life or physical safety of any person or identify
the source of information or assistance given in confidence for law enforcement and security purposes.

Justice Swatanter Kumar, speaking for the Court, held thus:

Certain matters, particularly in relation to appointment, are required to be dealt with great confidentiality. The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, **there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual.** All these protections have to be given their due implementation as they spring from statutory exemptions. **It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional protection is available to a person with regard to the right to privacy.** Thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India.[98]

(Emphasis supplied)

Significantly, though the Court was construing the text of a statutory exemption contained in Section 8, it dwelt on the privacy issues involved in the disclosure of information furnished in confidence by adverting to the constitutional right to privacy.

81. The decision **Lillu @ Rajesh** v. **State of Haryana** MANU/SC/0369/2013 : (2013) 14 SCC 643 emphasized the right of rape survivors to privacy, physical and mental integrity and dignity. The Court held thus:

In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. **Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.**[99]

(Emphasis supplied)

82. In **Thalappalam Service Cooperative Bank Limited** v. **State of Kerala** MANU/SC/1020/2013 : (2013) 16 SCC 82, another Bench of two judges considered the correctness of a decision of the Kerala High Court which upheld a circular issued by the Registrar of Cooperative Societies. By the circular all cooperative institutions under his administrative control were declared to be public authorities within the meaning of Section 2(h) of the Right to Information Act, 2005. Section 8(j) contains an exemption from the disclosure of personal information which has no relationship to any public activity or interest, or which would cause

"unwarranted invasion of the privacy of the individual" unless the authority is satisfied that the larger public interest justifies its disclosure. This Court observed that the right to privacy has been recognized as a part of Article 21 of the Constitution and the statutory provisions contained in Section 8(j) of the RTI Act have been enacted by the legislature in recognition of the constitutional protection of privacy. The Court held thus:

The right to privacy is also not expressly guaranteed under the Constitution of India. However, the Privacy Bill, 2011 to provide for the right to privacy to citizens of India and to regulate the collection, maintenance and dissemination of their personal information and for penalisation for violation of such rights and matters connected therewith, is pending. In several judgments including Kharak Singh v. State of U.P. [MANU/SC/0085/1962 : AIR 1963 SC 1295: (1963) 2 Cri LJ 329], R. Rajagopal v. State of T.N. [MANU/SC/0056/1995 : (1994) 6 SCC 632], People's Union for Civil Liberties v. Union of India [MANU/SC/0149/1997 : (1997) 1 SCC 301] and State of Maharashtra v. Bharat Shanti Lal Shah [MANU/SC/3789/2008 : (2008) 13 SCC 5] this Court has recognised the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.[100]

Recognising the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights Under Section 8(j), as already indicated.[101]

This Court held that on facts the cooperative societies were not public authorities and the decision under challenge was quashed.

83. In **Manoj Narula** v. **Union of India** MANU/SC/0736/2014 : (2014) 9 SCC 1, a Constitution Bench of this Court was hearing a petition filed in the public interest complaining of the increasing criminalization of politics. Dealing with the provisions of Article 75(1) of the Constitution, Justice Dipak Misra, while explaining the doctrine of "constitutional implications", considered whether the Court could read a disqualification into the provisions made by the Constitution in addition to those which have been provided by the legislature. In that context, the leading judgment observes:

In this regard, inclusion of many a facet within the ambit of Article 21 is well established. In **R. Rajagopal v. State of T.N. [**MANU/SC/0056/1995 : (1994) 6 SCC 632**], right to privacy has been inferred from Article 21.** Similarly, in **Joginder Kumar** v. **State of U.P.** [MANU/SC/0311/1994 : (1994) 4 SCC 260: 1994 SCC (Cri) 1172: AIR 1994 SC 1349], inherent rights Under Articles 21 and 22 have been stated. Likewise, while dealing with freedom of speech and expression and freedom of press, the Court, in Romesh Thappar v. State of Madras [MANU/SC/0006/1950 : AIR 1950 SC 124: (1950) 51 Cri LJ 1514], has observed that freedom of speech and expression includes freedom of propagation of ideas...

There is no speck of doubt that the Court has applied the doctrine of implication to expand the constitutional concepts, but the context in which the horizon has been expanded has to be borne in mind...

At this juncture, it is seemly to state that the principle of implication is fundamentally founded on rational inference of an idea from the words used in the text...

Any proposition that is arrived at taking this route of interpretation must find some resting pillar or strength on the basis of certain words in the text or the scheme of the text. In the absence of that, it may not be permissible for a court to deduce any proposition as that would defeat the legitimacy of reasoning. A proposition can be established by reading a number of articles cohesively, for that will be in the domain of substantive legitimacy.[102]

(Emphasis supplied)

84. In **National Legal Services Authority** v. **Union of India** MANU/SC/0309/2014 : (2014) 5 SCC 438 ("NALSA"), a Bench of two judges, while dealing with the rights of transgenders, adverted to international conventions acceded to by India including the UDHR and ICCPR. Provisions in these conventions which confer a protection against arbitrary and unlawful interference with a person's privacy, family and home would, it was held, be read in a manner which harmonizes the fundamental rights contained in Articles 14, 15, 19 and 21 with India's international obligations. Justice K.S. Radhakrishnan held that:

Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected Under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community Under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognise those rights.[103]

Explaining the ambit of Article 21, the Court noted:

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. UT of Delhi [MANU/SC/0517/1981 : (1981) 1 SCC 608: 1981 SCC (Cri) 212] (SCC pp. 618-19, paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings..."[104]

Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In Anuj Garg v. Hotel Assn. of India [MANU/SC/8173/2007 : (2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is

an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed Under Article 21 of the Constitution of India.[105]

Dr Justice A.K. Sikri wrote a lucid concurring judgment.

NALSA indicates the rationale for grounding of a right to privacy in the protection of gender identity within Article 15. The intersection of Article 15 with Article 21 locates a constitutional right to privacy as an expression of individual autonomy, dignity and identity. NALSA indicates that the right to privacy does not necessarily have to fall within the ambit of any one provision in the chapter on fundamental rights. Intersecting rights recognise the right to privacy. Though primarily, it is in the guarantee of life and personal liberty Under Article 21 that a constitutional right to privacy dwells, it is enriched by the values incorporated in other rights which are enumerated in Part III of the Constitution.

85. In **ABC** v. **The State (NCT of Delhi)** MANU/SC/0718/2015 : (2015) 10 SCC 1, the Court dealt with the question whether it is imperative for an unwed mother to specifically notify the putative father of the child of her petition for appointment as guardian of her child. It was stated by the mother of the child that she does not want the future of her child to be marred by any controversy regarding his paternity, which would indubitably result should the father refuse to acknowledge the child as his own. It was her contention that her own fundamental right to privacy will be violated if she is compelled to disclose the name and particulars of the father of her child. Looking into the interest of the child, the Bench directed that *"if a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary"*[106].

86. While considering the constitutional validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 which enunciated an institutional process for the appointment of judges, the concurring judgment of Justice Madan B Lokur in **Supreme Court Advocates on Record Association** v. **Union of India** MANU/SC/1183/2015 : (2016) 5 SCC 1 dealt with privacy issues involved if disclosures were made about a candidate under consideration for appointment as a Judge of the Supreme Court or High Court. Dealing with the right to know of the general public on the one hand and the right to privacy on the other hand, Justice Lokur noted that the latter is an "implicit fundamental right that all people enjoy". Justice Lokur observed thus:

The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. **This is a rather sweeping generalization which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy.** The balance between the two implied fundamental rights

is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.[107]

(Emphasis supplied)

87. A comprehensive analysis of precedent has been necessary because it indicates the manner in which the debate on the existence of a constitutional right to privacy has progressed. The content of the constitutional right to privacy and its limitations have proceeded on a case to case basis, each precedent seeking to build upon and follow the previous formulations. The doctrinal foundation essentially rests upon the trilogy of **M.P. Sharma-Kharak Singh-Gobind** upon which subsequent decisions including those in **Rajagopal, PUCL, Canara Bank**, Selvi and **NALSA** have contributed. Reconsideration of the doctrinal basis cannot be complete without evaluating what the trilogy of cases has decided.

88. **M.P. Sharma** dealt with a challenge to a search on the ground that the statutory provision which authorized it, violated the guarantee against self-incrimination in Article 20(3). In the absence of a specific provision like the Fourth Amendment to the US Constitution in the Indian Constitution, the Court answered the challenge by its ruling that an individual who is subject to a search during the course of which material is seized does not make a voluntary testimonial statement of the nature that would attract Article 20(3). The Court distinguished a compulsory search from a voluntary statement of disclosure in pursuance of a notice issued by an authority to produce documents. It was the former category that was held to be involved in a compulsive search, which the Court held would not attract the guarantee against self-incrimination. The judgment, however, proceeded further to hold that in the absence of the right to privacy having been enumerated in the Constitution, a provision like the Fourth Amendment to the US Constitution could not be read into our own. The observation in regard to the absence of the right to privacy in our Constitution was strictly speaking, not necessary for the decision of the Court in **M.P. Sharma** and the observation itself is no more than a passing observation. Moreover, the decision does not adjudicate upon whether privacy could be a constitutionally protected right under any other provision such as Article 21 or Under Article 19.

89. **Kharak Singh** does not contain a reference to **M.P. Sharma**. The decision of the majority in **Kharak Singh** is essentially divided into two parts; the first dealing with the validity of a Regulation for nocturnal domiciliary visits (which was struck down) and the second dealing with the rest of the Regulation (which was upheld). The decision on the first part, which dealt with Regulation 236(b) conveys an inescapable impression that the Regulation invaded the sanctity of the home and was a violation of ordered liberty. Though the reasoning of the Court does not use the expression 'privacy', it alludes to the decision of the US Supreme Court in **Wolf** v. **Colorado**, which deals with privacy. Besides, the portion extracted in the judgment has a reference to privacy specifically at two places. While holding domiciliary visits at night to be invalid, the Court drew sustenance from the right to life Under Article 21 which means something more than a mere animal existence. The right Under Article 21 includes the enjoyment of those faculties which render the right meaningful. Hence, the first part of the decision in **Kharak Singh** represents an amalgam of life, personal liberty and privacy. It protects interests which are grounded in privacy under the rubric of liberty. The difficulty in construing the decision arises because in the second part of its decision, the majority upheld the rest of the Regulation and observed (while doing so) that there is

an absence of a protected right to privacy under the Constitution. These observations in the second part are at variance with those dealing with the first. The view about the absence of a right to privacy is an isolated observation which cannot coexist with the essential determination rendered on the first aspect of the Regulation. Subsequent Benches of this Court in the last five decades and more, have attempted to make coherent doctrine out of the uneasy coexistence between the first and the second parts of the decision in **Kharak Singh**. Several of them rely on the protection of interests grounded in privacy in the first part, under the conceptual foundation of ordered liberty.

90. **Gobind** proceeded on the basis of an assumption and explains what according to the Court would be the content of the right to privacy if it is held to be a constitutional right. **Gobind** underlines that the right would be intrinsic to ordered liberty and would cover intimate matters such as family, marriage and procreation. **Gobind**, while recognizing that the right would not be absolute and would be subject to the regulatory power of the State, conditioned the latter on the existence of a compelling state interest. The decision also brings in the requirement of a narrow tailoring of the Regulation to meet the needs of a compelling interest. The Bench which decided **Gobind** adverted to the decision in **Kharak Singh** (though not **M.P. Sharma**). Be that as it may, **Gobind** has proceeded on the basis of an assumption that the right to privacy is a constitutionally protected right in India. Subsequent decisions of this Court have treated the formulation of a right to privacy as one that emerges out of **Kharak Singh** or **Gobind** (or both). Evidently, it is the first part of the decision in **Kharak Singh** which is construed as having recognized a constitutional entitlement to privacy without reconciling the second part which contains a specific observation on the absence of a protected constitutional right to privacy in the Constitution. Succeeding Benches of smaller strength were not obviously in a position to determine the correctness of the **M.P. Sharma** and **Kharak Singh** formulations. They had to weave a jurisprudence of privacy as new challenges emerged from a variety of sources: wire-tapping, narco-analysis, gender based identity, medical information, informational autonomy and other manifestations of privacy. As far as the decisions following upon **Gobind** are concerned, it does emerge that the assumptions which find specific mention in several parts of the decision were perhaps not adequately placed in perspective. **Gobind** has been construed by subsequent Benches as affirming the right to privacy.

91. The right to privacy has been traced in the decisions which have been rendered over more than four decades to the guarantee of life and personal liberty in Article 21 and the freedoms set out in Article 19.
In addition, India's commitment to a world order founded on respect for human rights has been noticed along with the specific articles of the UDHR and the ICCPR which embody the right to privacy.[108] In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary and, perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party. Consequently, as new cases brought new issues and problems before the Court, the content of the right to privacy has found elaboration in these diverse contexts. These would include telephone tapping (**PUCL**), prior restraints on publication of material on a death row convict (**Rajagopal**), inspection and search of confidential documents involving the banker-customer relationship (**Canara Bank**), disclosure of HIV status (**Mr. X** v. **Hospital Z**), food preferences and animal slaughter (**Hinsa Virodhak Sangh**), medical termination of pregnancy (**Suchita Srivastava**), scientific tests in criminal investigation (**Selvi**), disclosure of bank accounts held overseas (**Ram Jethmalani**) and the right of transgenders (**NALSA**). Early cases dealt with

police Regulations authorising intrusions on liberty, such as surveillance. As Indian society has evolved, the assertion of the right to privacy has been considered by this Court in varying contexts replicating the choices and autonomy of the individual citizen.

92. The deficiency, however, is in regard to a doctrinal formulation of the basis on which it can be determined as to whether the right to privacy is constitutionally protected. **M.P. Sharma** need not have answered the question; **Kharak Singh** dealt with it in a somewhat inconsistent formulation while Gobind rested on assumption. **M.P. Sharma** being a decision of eight judges, this Bench has been called upon to decide on the objection of the Union of India to the existence of such a right in the first place.

I. **The Indian Constitution**

Preamble

93. The Preamble to the Constitution postulates that the people of India have resolved to constitute India into a Republic which (among other things) is Sovereign and Democratic and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;...

94. In **Sajjan Singh** v. **State of Rajasthan** MANU/SC/0052/1964 : (1965) 1 SCR 933, Justice Mudholkar alluded to the fact that the Preamble to our Constitution is "not of the common run" as is the Preamble in a legislative enactment but was marked both by a "stamp of deep deliberation" and precision. This was suggestive, in the words of the Court, of the special significance attached to the Preamble by the framers of the Constitution.

95. In **Kesavananda Bharati** v. **State of Kerala** MANU/SC/0445/1973 : (1973) 4 SCC 225 (**"Kesavananda Bharati"**), Chief Justice Sikri noticed that the Preamble is a part of the Constitution. The Preamble emphasises the need to secure to all citizens justice, liberty, equality and fraternity. Together they constitute the founding faith or the blueprint of values embodied with a sense of permanence in the constitutional document. The Preamble speaks of securing liberty of thought, expression, belief, faith and worship. Fraternity is to be promoted to assure the dignity of the individual. The individual lies at the core of constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual. The Preamble envisions a social ordering in which fundamental constitutional values are regarded as indispensable to the pursuit of happiness. Such fundamental values have also found reflection in the foundational document of totalitarian regimes in other parts of the world. What distinguishes India is the adoption of a democratic way of life, founded on the Rule of law.

Democracy accepts differences of perception, acknowledges divergences in ways of life, and respects dissent.

Jurisprudence on dignity

96. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society.

The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well being of the community is determined. Human dignity is an integral part of the Constitution.
Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

97. In **Prem Shankar Shukla** v. **Delhi Administration** MANU/SC/0084/1980 : (1980) 3 SCC 526, which arose from the handcuffing of the prisoners, Justice Krishna Iyer, speaking for a three-judge Bench of this Court held:

...the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanize him and, therefore, to violate his very personhood, too often using the mask of 'dangerousness' and security...[109]

The Preamble sets the humane tone and temper of the Founding Document and highlights Justice, Equality and the dignity of the individual.[110]

98. A Bench of two judges in **Francis Coralie Mullin** v. **Union Territory of Delhi** MANU/SC/0517/1981 : (1981) 1 SCC 608 (**"Francis Coralie"**) while construing the entitlement of a detenue under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 to have an interview with a lawyer and the members of his family held that:

The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person...[111]

...the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.[112]

...We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings...
Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights...[113]

99. In **Bandhua Mukti Morcha** v. **Union of India** MANU/SC/0051/1983 : (1984) 3 SCC 161, a Bench of three judges of this Court while dealing with individuals who were living in bondage observed that:

...This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clause (e) and (f) of "Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and nor State-neither the Central Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials."[114]

100. Dealing with an allegation that activists of an organization were arrested and paraded throughout the town by the police and were beaten up in police custody, this Court in **Khedat Mazdoor Chetna Sangath** v. **State of M.P.** MANU/SC/0007/1995 : (1994) 6 SCC 260 held that:

It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation determine the correct facts and take strongest possible action against the Respondents who are responsible for these atrocities...[115]

If dignity or honor vanishes what remains of life.
[116]

101. Human dignity was construed in **M. Nagaraj** v. **Union of India** MANU/SC/4560/2006 : (2006) 8 SCC 212 by a Constitution Bench of this Court to be intrinsic to and inseparable from human existence. Dignity, the Court held, is not something which is conferred and which can be taken away, because it is inalienable:

The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it...
It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give. It simply is. Every human being has dignity by virtue of his existence...
[117]

India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realized only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realized.[118]

(Emphasis supplied)

102. In **Maharashtra University of Health Sciences** v. **Satchikitsa Prasarak Mandal** MANU/SC/0136/2010 : (2010) 3 SCC 786, this Court held that the dignity of the individual is a core constitutional concept. In **Selvi**, this Court recognised that:

...we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences...[119]

103. In **Dr. Mehmood Nayyar Azam** v. **State of Chhattisgarh** MANU/SC/0615/2012 : (2012) 8 SCC 1, this Court noted that when dignity is lost, life goes into oblivion. The same emphasis on dignity finds expression in the decision in **NALSA**.

104. The same principle was more recently reiterated in **Shabnam** v. **Union of India** MANU/SC/0669/2015 : (2015) 6 SCC 702 in the following terms:

This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being 'as a human being'. Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is alarmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the Accused derive from his dignity as a human being.[120]

105. The recent decision in **Jeeja Ghosh** v. **Union of India** MANU/SC/0574/2016 : (2016) 7 SCC 761 construed the constitutional protection afforded to human dignity. The Court observed:

...human dignity is a constitutional value and a constitutional goal. What are the dimensions of constitutional value of human dignity? It is beautifully illustrated by Aharon Barak[121] (former Chief Justice of the Supreme Court of Israel) in the following manner:

The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right.[122]

106. Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions-the autonomy of the individual-and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

107. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence.
Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

Fundamental Rights cases

108. In **Golak Nath** v. **State of Punjab** MANU/SC/0029/1967 : (1967) 2 SCR 762, there was a challenge to the Punjab Security of Land Tenures Act, 1953 and to the Mysore Land Reforms Act (as amended) upon their inclusion in the Ninth Schedule to the Constitution.

Chief Justice Subba Rao dwelt on the Rule of law and its purpose in ensuring that every authority constituted by the Constitution is subject to it and functions within its parameters. One of the purposes of constraining governmental power was to shield the fundamental freedoms against legislative majorities. This thought is reflected in the following extract from the judgment of Chief Justice Subba Rao:

...But, having regard to the past history of our country, it could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State. **It, therefore, preserves the natural rights against the State encroachment and constitutes the higher judiciary of the State as the sentinel of the said rights** and the balancing wheel between the rights, subject to social control. In short, the fundamental rights, subject to social control, have been incorporated in the Rule of law...[123]

(Emphasis supplied)

The learned Judge emphasised the position of the fundamental rights thus:

...They are the rights of the people preserved by our Constitution. **"Fundamental Rights" are the modern name for what have been traditionally known as "natural rights".** As one author puts: "they are moral rights which every human being everywhere all times ought to have simply because of the fact that in contradistinction with other things is rational and moral". They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out of his own life in the manner he likes best...[124]

(Emphasis supplied)

The fundamental rights, in other words, are primordial rights which have traditionally been regarded as natural rights. In that character these rights are inseparable from human existence. They have been preserved by the Constitution, this being a recognition of their existence even prior to the constitutional document.

109. In **Kesavananda Bharati**, a Bench of 13 judges considered the nature of the amending power conferred by Article 368 and whether the exercise of the amending power was subject to limitations in its curtailment of the fundamental freedoms. Chief Justice Sikri held that the fundamental rights are inalienable. In his view, the Universal Declaration of Human Rights had to be utilised to interpret the Constitution having regard to the mandate of Article 51. India, having acceded to the Universal Declaration, Sikri, C.J. held that the treatment of rights as inalienable must guide the interpretation of the Court. The Chief Justice relied upon a line of precedent holding these rights to be natural and inalienable and observed:

300. Various decisions of this Court describe fundamental rights as 'natural rights' or 'human rights'. Some of these decisions are extracted below:

There can be no doubt that the people of India have in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal, which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights so-called, I apprehend because they have been retained by the people and made paramount to the delegated powers, as in the American Model. (Per Patanjali Sastri, J., in Gopalan v. State of Madras. [MANU/SC/0012/1950 : AIR 1950 SC 27 : 1950 SCR 88, 198-199: 1950 SCJ 174]

(Emphasis supplied).

(ii) That Article (**Article 19**) enumerates certain freedoms under the caption 'right to freedom' and **deals with those great and basic rights which are recognised and guaranteed as the natural rights** inherent in the status of a citizen of a free country. (Per Patanjali Sastri, C J., in State of West Bengal v. Subodh Gopal Bose [MANU/SC/0018/1953 : AIR 1954 SC 92 : 1954 SCR 587, 596: 1954 SCJ 127])

(Emphasis supplied).

I have no doubt that the framers of our Constitution drew the same distinction and classed the natural right or capacity of a citizen 'to acquire, hold and dispose of property' with other natural rights and freedoms inherent in the status of a free citizen and embodied them in Article 19(1)... (ibid, p. 597)

(Emphasis supplied).

For all these reasons, I am of opinion that under the scheme of the Constitution, all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under Clause (1) of Article 19... (ibid, p. 600)

(Emphasis supplied).

(iii) **The people, however, regard certain rights as paramount, because they embrace liberty of action to the individual in matters of private life, social intercourse and share in the Government of the country and other spheres.** The people who vested the three limbs of Government with their power and authority, at the same time kept back these rights of citizens and also some times of non-citizens, and made them inviolable except under certain conditions. The rights thus kept back are placed in Part III of the Constitution, which is headed 'Fundamental Rights', and the conditions under which these rights can be abridged are also indicated in that Part. (Per Hidayatullah, J. in Ujjambai v. State of U.P. MANU/SC/0101/1961 : [(1963) 1 SCR 778, 926-27: AIR 1962 SC 1621])

(Emphasis supplied).

301. The High Court Allahabad has described them as follows:

(iv)...**man has certain natural or inalienable rights and that it is the function of the State, in order that human liberty might be preserved and human personality developed, to give recognition and free play to those rights**...suffice it to say that they represent a trend in the democratic thought of our age. (Motilal v. State of U.P.) [125]

(Emphasis supplied).

This was the doctrinal basis for holding that the fundamental rights could not be "amended out of existence". Elaborating all those features of the Constitution which formed a part of the basic structure, Sikri, C J held that:

The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the legislature, the executive and the judiciary;

(5) Federal character of the Constitution.[126]

Justices Shelat and Grover held that "[t]he dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV"[127] constituted a part of the basic structure.

Justices Hegde and Mukherjea emphasised that the primary object before the Constituent Assembly were: (i) to constitute India into a sovereign, democratic republic and (ii) to secure its citizens the rights mentioned in it. Hence, the learned Judges found it impossible to accept that the Constitution makers would have made a provision in the Constitution itself for the destruction of the very ideals which they had embodied in the fundamental rights. Hence, **Parliament had no power to abrogate** the fundamental features of the Constitution including among them "the essential features of the individual freedoms secured to the citizens".

On a careful consideration of the various aspects of the case, we are convinced that the **Parliament has no power to abrogate** or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, **the essential features of the individual freedoms secured to the citizens.** Nor has the Parliament the power to revoke the mandate to build a welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligation imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. **We are unable to agree with the contention that in order to build a welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution. Our Constitution envisages that the State should without delay make available to all the citizens of this country the real benefits of those freedoms in a democratic way.** Human freedoms are lost gradually and imperceptibly and their destruction is generally followed by authoritarian rule. That is what history has taught us. Struggle between liberty and power is eternal. Vigilance is the price that we like every other democratic society have to pay to safeguard the democratic values enshrined in our Constitution. Even the best of Governments are not averse to have more and more power to carry out their plans and programmes which they may sincerely believe to be in public interest. But a freedom once lost is hardly ever regained except by revolution. Every encroachment on freedom sets a pattern for further encroachments. **Our constitutional plan is to eradicate poverty without destruction of individual freedoms.**[128]

(Emphasis supplied)

Justice Jaganmohan Reddy held that:

...Parliament cannot Under Article 368 expand its power of amendment so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution...[129]

Justice Khanna in the course of the summation of his conclusions held, as regards the power of amendment, that:

The power of amendment Under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence, or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.[130]

Significantly, even though Justice Mathew was in the minority, the learned Judge in the course of his decision observed the importance of human dignity:

The social nature of man, the generic traits of his physical and mental constitution, his sentiments of justice and the morals within, his instinct for individual and collective preservations, his desire for happiness, his sense of human dignity, his consciousness of man's station and purpose in life, all these are not products of fancy but objective factors in the realm of existence...[131]

110. In **Indira Nehru Gandhi** v. **Raj Narain** (1975) 1 Suppl. SCC 1, Justice Khanna clarified that his view in **Kesavananda Bharati** is that Parliament in the exercise of its power to amend the Constitution cannot destroy or abrogate the basic structure of the Constitution. No distinction was made in regard to the scope of the amending power relating to the provisions of the fundamental rights and in respect of matters other than the fundamental rights:

...The limitation inherent in the word "amendment" according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles pertaining to fundamental rights as on other articles not pertaining to those rights...[132]

Justice Khanna noted that the right to property was held by him not to be a part of the basic structure. Justice Khanna observed that it would have been unnecessary for him to hold so, if none of the fundamental rights were to be a part of the basic structure of the Constitution.

111. Chandrachud C J, in the course of his judgment for the Constitution Bench in **Minerva Mills Ltd.** v. **Union of India** MANU/SC/0075/1980 : (1980) 3 SCC 625, traced the history of the evolution of inalienable rights, founded in inviolable liberties, during the course of the freedom movement and observed that both Parts III and IV of the Constitution had emerged as inseparably inter-twined, without a distinction between the negative and positive obligations of the state.

The Constitution, in this view, is founded on "the bedrock of the balance between Parts III and IV" and to give absolute primacy to one over the other would be to disturb the harmony of the Constitution. In the view of the Chief Justice:

The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved.

We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people...[133]

Articles 14 and 19, the Court held, confer rights essential for the proper functioning of a democracy and are universally so regarded by the Universal Declaration of Human Rights. Withdrawing the protection of Articles 14 and 19 was plainly impermissible and the immunity granted by the 42nd Amendment to the Constitution to a law against the challenge that it violates Articles 14 or 19 (if the law is for giving effect to the Directive Principles) amounted to a violation of the basic structure.

No waiver of Fundamental Rights

112. In **Behram Khurshed Pesikaka** v. **The State of Bombay** MANU/SC/0065/1954 : (1955) 1 SCR 613, Chief Justice Mahajan, speaking for the Constitution Bench, noted the link between the constitutional vision contained in the Preamble and the position of the fundamental rights as a means to facilitate its fulfilment. Though Part III embodies fundamental rights, this was construed to be part of the wider notion of securing the vision of justice of the founding fathers and, as a matter of doctrine, the rights guaranteed were held not to be capable of being waived. Mahajan, CJ, observed:

We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy.[134]

Privacy as intrinsic to freedom and liberty

113. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review

certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.

114. In **Olga Tellis** v. **Bombay Municipal Corporation** MANU/SC/0039/1985 : (1985) 3 SCC 545, Chandrachud C J, while explaining the ambit of Article 21 found a rationale for protecting the right to livelihood as an incident of the right to life. For, as the Court held, deprivation of livelihood would result in the abrogation of the right to life:

148. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life...[135]

115. In **Unnikrishnan** v. **State of Andhra Pradesh** MANU/SC/0333/1993 : (1993) 1 SCC 645, Justice Jeevan Reddy, speaking for this Court, held that though the right to education (as the Constitution then stood) was not "stated expressly as a fundamental right" in Part III, that would not militate against its being protected under the rubric of life Under Article 21. These decisions have been ultimately guided by the object of a Constitutional Court which must be to expand the boundaries of fundamental human freedoms rather than to attenuate their content through a constricted judicial interpretation In **Maneka**, it has been stated that:

The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by process of judicial construction...

"personal liberty" in Article 21 is of the widest amplitude.[136]

116. Now, would this Court in interpreting the Constitution freeze the content of constitutional guarantees and provisions to what the founding fathers perceived? The Constitution was drafted and adopted in a historical context. The vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present to the minds of the most perspicacious draftsmen. No generation, including the present, can have a monopoly over solutions or the confidence in its ability to foresee the future. As society evolves, so must constitutional doctrine. The institutions which the

Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty and dignity to every citizen.

117. Undoubtedly, there have been aberrations. In the evolution of the doctrine in India, which places the dignity of the individual and freedoms and liberties at the forefront, there have been a few discordant notes. Two of them need attention.

Discordant Notes

(i) **ADM Jabalpur**

118. In **ADM Jabalpur** v. **Shivakant Shukla** MANU/SC/0062/1976 : (1976) 2 SCC 521 (**"ADM Jabalpur"**), the issue before this Court was whether an order issued by the President Under Article 359(1) of the Constitution suspends the right of every person to move any Court for the enforcement of the right to personal liberty Under Article 21 upon being detained under a law providing for preventive detention. The submission of the detenues in this Court was that the suspension of the remedy to enforce Article 21 does not automatically entail suspension of the right or the Rule of law and that even during an emergency the Rule of law could not be suspended. A majority of four judges of this Court (Justice H.R. Khanna dissenting) held that:

Liberty is confined and controlled by law, whether common law or statute. It is in the words of Burke a regulated freedom. It is not an abstract or absolute freedom. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are given, they are given because the emergency is extraordinary, and are limited to the period of the emergency.[137]

Dealing with the issue as to whether Article 21 is the sole repository of the right to life, Ray C J, observed that where any right which existed before the commencement of the Constitution has been incorporated in Part III, the common law right would not exist under the Constitution. In a concurring judgment Justice Beg held that while adopting the Constitution, there was a notional surrender by the people of India of the control over these rights to a sovereign republic and it is only the Constitution which is supreme and which can confer rights and powers. There was, in this view, a notional surrender of individual freedom. Justice Beg held that:

The whole object of guaranteed fundamental rights is to make those basic aspects of human freedom, embodied in fundamental rights, more secure than others not so selected. In thus recognising and declaring certain basic aspects of rights as fundamental by the Constitution of the country, the purpose was to protect them against undue encroachments upon them by the legislative, or executive, and, sometimes even judicial (e.g. Article 20) organs of the State. The encroachment must remain within permissible limits and must take place only in prescribed modes. **The intention could never be to preserve something concurrently in the field of natural law or common law. It was to exclude all other control or to make the Constitution the sole repository of ultimate control over those aspects of human freedom which were guaranteed there.**[138]

(Emphasis supplied)

A similar position was adopted by Justice Chandrachud:

The right to personal liberty has no hallmark and therefore when the right is put in action it is impossible to identify whether the right is one given by the Constitution or is one which existed in the pre-Constitution era. If the argument of the Respondents is correct, no action to enforce the right to personal liberty can at all fall within the mischief of the Presidential Order even if it mentions Articles 19, 20, 21 and 22 because, every preliminary objection by the Government to a petition to enforce the right to personal liberty can be effectively answered by contending that what is being enforced is either the natural right to personal liberty or generally, the pre-Constitution right to personal liberty. **The error of the Respondents argument lies in its assumption, and in regard to the argument of some of the counsel in its major articulate premise, that the qualitative content of the non-constitutional or pre-constitutional right to personal liberty is different from the content of the right to personal liberty conferred by Part III of the Constitution...**[139]

(Emphasis supplied)

In his view:

It therefore does not make any difference whether any right to personal liberty was in existence prior to the enactment of the Constitution, either by way of a natural right, statutory right, common law right or a right available under the law of torts. Whatever may be the source of the right and whatever may be its jurisdiction, the right in essence and substance is the right to personal liberty. That right having been included in Part III, its enforcement will stand suspended if it is mentioned in the Presidential Order issued Under Article 359(1).[140]

Justice Bhagwati held as follows:

Now, to my mind, it is clear that when this principle of Rule of law that the Executive cannot deprive a person of his liberty except by authority of law, is recognised and embodied as a fundamental right and enacted as such in Article 21, it is difficult to comprehend how it could continue to have a distinct and separate existence, independently and apart from this Article in which it has been given constitutional vesture. I fail to see how it could continue in force Under Article 372 when it is expressly recognised and embodied as a fundamental right in Article 21 and finds a place in the express provisions of the Constitution. **Once this principle is recognised and incorporated in the Constitution and forms part of it, it could not have any separate existence apart from the Constitution, unless it were also enacted as a statutory principle by some positive law of the State...**[141]

(Emphasis supplied)

In his view, it is the Constitution which is supreme and if it ordains that a person who is detained otherwise than in accordance with law would not be entitled to enforce the right of personal liberty, the Court was duty bound to give effect to it:

...it cannot be overlooked that, in the ultimate analysis, the protection of personal liberty and the supremacy of law which sustains it must be governed by the Constitution itself. The Constitution is the paramount and supreme law of the land and if it says that even if a person is detained otherwise than in accordance with the law. he shall not be entitled to enforce his right of personal liberty, whilst a Presidential Order Under Article 359, Clause (1) specifying Article 21 is in force, I have to give effect to it. Sitting as I do, as a Judge under the Constitution, I cannot ignore the plain and emphatic command of the Constitution for what I may consider to be necessary to meet the ends of justice. It is said that law has the feminine capacity to tempt each devotee to find his own image in her bosom. No one escapes entirely. Some yield blindly, some with sophistication. Only a few more or less effectively resist. I have always leaned in favour of upholding personal liberty, for, I believe, it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have readily laid down their lives at its altar, in order to secure it, protect it and preserve it. But I do not think it would be right for me to allow my love of personal liberty to cloud my vision or to persuade me to place on the relevant provision of the Constitution a construction which its language cannot reasonably bear. I cannot assume to myself the role of Plato's "Philosopher King" in order to render what I consider ideal justice between the citizen and the State. After all, the Constitution is the law of all laws and there alone judicial conscience must find its ultimate support and its final resting place. It is in this spirit of humility and obedience to the Constitution and driven by judicial compulsion, that I have come to the conclusion that the Presidential Order dated June 27, 1975 bars maintainability of a writ petition for habeas corpus where an order of detention is challenged on the ground that it is mala fide or not under the Act or not in compliance with it.[142]

In his dissenting opinion, Justice Khanna emphatically held that the suspension of the right to move any Court for the enforcement of the right Under Article 21, upon a proclamation of emergency, would not affect the enforcement of the basic right to life and liberty. The Constitution was not the sole repository of the right to life and liberty:

I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the Rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness...
[143]

Even in the absence of Article 21, it would not have been permissible for the State to deprive a person of his life and liberty without the authority of the law:

Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the Rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which

cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law. No case has been cited before us to show that before the coming into force of the Constitution or in countries under Rule of law where there is no provision corresponding to Article 21, a claim was ever sustained by the courts that the State can deprive a person of his life or liberty without the authority of law...[144]

The remedy for the enforcement of the right to life or liberty would not stand suspended even if the right to enforce Article 21 is suspended:

Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359...[145]

Justice Khanna held that while wide powers to order preventive detention are vested in the State, there is no antithesis between the power to detain and power of the Court to examine the legality of such a detention:

The impact upon the individual of the massive and comprehensive powers of preventive detention with which the administrative officers are armed has to be cushioned with legal safeguards against arbitrary deprivation of personal liberty if the premises of the Rule of law is not to lose its content and become meaningless...[146]

119. The judgments rendered by all the four judges constituting the majority in **ADM Jabalpur** are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in **Kesavananda Bharati**, primordial rights. They constitute rights under natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the state without either the existence of the right to live or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force Under Article 372 of the Constitution. Justice Khanna was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the Rule of law which imposes restraints upon the

powers vested in the modern state when it deals with the liberties of the individual. The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the Rule of law.

120. A constitutional democracy can survive when citizens have an undiluted assurance that the Rule of law will protect their rights and liberties against any invasion by the state and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Justice Khanna must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions.

121. When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective of what was, but should never have been. The decision of the US Supreme Court in **Buck** v. **Bell** 274 US 200 (1927) ranks amongst the latter. It was a decision in which Justice Oliver Wendell Holmes Jr. accepted the forcible sterilization by tubular ligation of Carrie Bucks as part of a programme of state sponsored eugenic sterilization. Justice Holmes, while upholding the programme opined that: "three generations of imbeciles is enough"[147]. In the same vein was the decision of the US Supreme Court in **Korematsu** v. **United States** 323 US 214 (1944), upholding the imprisonment of a citizen in a concentration camp solely because of his Japanese ancestry.

ADM Jabalpur must be and is accordingly overruled. We also overrule the decision in **Union of India** v. **Bhanudas Krishna Gawde** MANU/SC/0371/1977 : (1977) 1 SCC 834, which followed **ADM Jabalpur**.

122. In **I.R. Coelho** v. **State of Tamil Nadu** MANU/SC/0595/2007 : (2007) 2 SCC 1, this Court took the view that **ADM Jabalpur** has been impliedly overruled by various subsequent decisions:

During Emergency, the fundamental rights were read even more restrictively as interpreted by the majority in ADM, Jabalpur v. Shivakant Shukla [MANU/SC/0062/1976 : (1976) 2 SCC 521]. The decision in ADM, Jabalpur [MANU/SC/0062/1976 : (1976) 2 SCC 521] about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions.[148]

We now expressly do so.

123. As a result of the Forty-Fourth Amendment to the Constitution, Article 359 has been amended to provide that during the operation of a proclamation of emergency, the power of the President to declare a suspension of the right to move a Court for the enforcement of the fundamental rights contained in Part III shall not extend to Articles 20 and 21.

(ii) Suresh Koushal

124. Another discordant note which directly bears upon the evolution of the constitutional jurisprudence on the right to privacy finds reflection in a two judge Bench decision of this Court in **Suresh Kumar Koushal** v. **NAZ foundation** MANU/SC/1278/2013 : (2014) 1 SCC 1 **("Koushal")**. The proceedings before this Court arose from a judgment[149] of the Delhi High Court holding that Section 377 of the Indian Penal Code, insofar as it criminalises consensual sexual acts of adults in private is violative of Articles 14, 15 and 21 of the Constitution. The Delhi High Court,

however, clarified that Section 377 will continue to govern non-consensual penile, non-vaginal sex and penile non-vaginal sex involving minors. Among the grounds of challenge was that the statutory provision constituted an infringement of the rights to dignity and privacy. The Delhi High Court held that:

...The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21...[150]

Section 377 was held to be a denial of the dignity of an individual and to criminalise his or her core identity solely on account of sexuality would violate Article 21. The High Court adverted at length to global trends in the protection of privacy-dignity rights of homosexuals, including decisions emanating from the US Supreme Court, the South African Constitutional Court and the European Court of Human Rights. The view of the High Court was that a statutory provision targeting homosexuals as a class violates Article 14, and amounted to a hostile discrimination on the grounds of sexual orientation (outlawed by Article 15). The High Court, however, read down Section 377 in the manner which has been adverted to above.

125. When the matter travelled to this Court, Justice Singhvi, speaking for the Bench dealt with several grounds including the one based on privacy-dignity. The Court recognised that the right to privacy which is recognised by Article 12 of the Universal Declaration and Article 17 of ICCPR has been read into Article 21 "through expansive reading of the right to life and liberty". This Court, however, found fault with the basis of the judgment of the High Court for the following, among other reasons:

...the Division Bench of the High Court overlooked that **a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted** (as per the reported orders) for committing offence Under Section 377 Indian Penal Code and this cannot be made sound basis for declaring that Section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.[151]

(Emphasis supplied)

The privacy and dignity based challenge was repelled with the following observations:

In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 Indian Penal Code violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian Legislature.[152]

(Emphasis supplied)

126. Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy Under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.

The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection.
Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the Rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties.
Sexual orientation is an essential attribute of privacy.
Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

127. The view in **Koushal** that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT. persons" is similarly, in our view, unsustainable.

The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.

128. The decision in **Koushal** presents a *de minimis* rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The *de minimis* hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the **Koushal** rationale that prosecution of a few is not an index of violation is flawed and cannot be

accepted. Consequently, we disagree with the manner in which **Koushal** has dealt with the privacy-dignity based claims of LGBT persons on this aspect.

Since the challenge to Section 377 is pending consideration before a larger Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding.

J. India's commitments under International law

129. The recognition of privacy as a fundamental constitutional value is part of India's commitment to a global human rights regime. Article 51 of the Constitution, which forms part of the Directive Principles, requires the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another[153]. Article 12 of the Universal Declaration of Human Rights, recognises the right to privacy:

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Similarly, the International Covenant on Civil and Political Rights was adopted on 16 December 1979 and came into effect on 23 March 1976. India ratified it on 11 December 1977. Article 17 of the ICCPR provides thus:

The obligations imposed by this Article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right.

The Protection of Human Rights Act, 1993 which has been enacted by Parliament refers to the ICCPR as a human rights instrument. Section 2(1)(d) defines human rights:

"human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

Section 2(1)(f) defines International Covenants:

"International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966 [and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify

Under Section 12(f) of the Protection of Human Rights Act, 1993, the National Human Rights Commission:

is entrusted with the function of studying treaties and other international instruments on human rights and make recommendations for their effective implementation.

130. The ICCPR casts an obligation on states to respect, protect and fulfil its norms. The duty of a State to respect mandates that it must not violate the right. The duty to protect mandates that the government must protect it against interference by private parties. The duty to fulfil postulates that government must take steps towards realisation of a right. While elaborating the rights Under Article 17, general comment 16 specifically stipulates that:

.....there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and practice.

Significantly, while acceding to the ICCPR, India did not file any reservation or declaration to Article 17. While India filed reservations against Articles 1, 9 and 13, there was none to Article 17:

Article 1 refers to the right to self-determination. The reservation to Article 1 states that "the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a Section of a people or nation-which is the essence of national integrity. ' The reservation to Article 9, which refers to the right to liberty and security of person, detention and compensation payable on wrongful arrest or detention, states that "the government of the Republic of India takes the position that the provisions of the Article shall be so applied as to be in consonance with the provisions of Clauses (3) to (7) of Article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State." The reservation to Article 13-which refers to protections for aliens, states that "the Government of the Republic of India reserves its right to apply its law relating to foreigners.

On 30 June 2014, a report was presented by the Office of the United Nations High Commissioner for Human Rights.[154] The report underscores that:

...there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice.[155]

131. In **Bachan Singh** v. **State of Punjab** MANU/SC/0055/1982 : (1980) 2 SCC 684 **("Bachan Singh")**, this Court considered in relation to the death penalty, the obligations assumed by India in international law, following the ratification of the ICCPR. The Court held that the requirements of Article 6 of the ICCPR are substantially similar to the guarantees contained in Articles 20 and 21 of the Constitution. The penal law of India was held to be in accord with its international commitments. In **Francis Coralie**, this Court, while explaining the ambit of Article 21, held that:

...there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights...[156]

132. In **Vishaka** v. **State of Rajasthan** MANU/SC/0786/1997 : (1997) 6 SCC 241, this Court observed that in the absence of domestic law, the Convention on the Elimination of Discrimination against Women (CEDAW) is applicable. In **NALSA**, while dealing with the rights of transgenders,

this Court found that the international conventions were not inconsistent with the fundamental rights guaranteed by the Constitution and must be recognised and followed.

133. The position in law is well settled. Where there is a contradiction between international law and a domestic statute, the Court would give effect to the latter. In the present case, there is no contradiction between the international obligations which have been assumed by India and the Constitution. The Court will not readily presume any inconsistency. On the contrary, constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation. In fact, the enactment of the Human Rights Act by Parliament would indicate a legislative desire to implement the human rights regime founded on constitutional values and international conventions acceded to by India.

K. Comparative Law

134. This Section analyses the evolution of the concept of privacy in other jurisdictions from a comparative law perspective. The Court is conscious of the limits of a comparative approach. Each country is governed by its own constitutional and legal structure. Constitutional structures have an abiding connection with the history, culture, political doctrine and values which a society considers as its founding principles. Foreign judgments must hence be read with circumspection ensuring that the text is not read isolated from its context. The countries which have been dealt with are:

(i) United Kingdom;

(ii) United States;

(iii) South Africa; and

(iv) Canada.

The narrative will then proceed to examine the decisions of the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights. These decisions are indicative of the manner in which the right to privacy has been construed in diverse jurisdictions based on the histories of the societies they govern and the challenges before them.

(i) U.K. decisions

The first common law case regarding protection of privacy is said to be **Semayne's Case**[157] (1604). The case related to the entry into a property by the Sheriff of London in order to execute a valid writ. The case is famous for the words of Sir Edward Coke:

That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose ...

Then, in the case of **Entick** v. **Carrington** (1765) 19 St. Tr. 1029, Entick's house had been forcibly entered into by agents of the State/King. Lord Camden CJ held that:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the Defendant is called upon to answer for bruising the grass and even treading upon the soil.

Privacy jurisprudence developed further in the 19th century. In 1849, in **Prince Albert** v. **Strange** (1849) 41 ER 1171, publication was sought to be restrained of otherwise unpublished private etchings and lists of works done by Prince Albert and Queen Victoria. In the High Court of Chancery, Lord Cottenham observed that:

... where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend upon any legal right, and to be effectual, it must be immediate.

However, the approach adopted by the Court in **Prince Albert** case took a different turn in the case of **Kaye** v. **Robertson** [1991] FSR 62. In this case, when the Appellant, after an accident, was recovering from brain surgery in a private hospital room, two journalists posed as doctors and took photographs of him. The Appellant attempted to obtain an order to restrain publication of the photographs. The Court of Appeal held that:

... in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy

The decision in **R** v. **Director of Serious Fraud Office, ex parte Smith** [1993] AC 1 discussed the question of the right to silence. The applicant (the chairman and managing director of a company) was charged of doing acts with the intent to defraud its creditors. After having been cautioned, he was asked to answer questions of the Director of the Serious Fraud Office. The issue was whether the requirement to answer questions infringed the right to silence. It was held that the powers of the Director of the Serious Fraud Office, under the Criminal Justice Act 1987, entitled him/her to compel the applicant to answer questions on pain of commission of a criminal offence. Lord Mustill, who delivered the leading opinion of the Court, held that:

[It] is a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business. All civilised states recognise this assertion of personal liberty and privacy. Equally, although there may be pronounced disagreements between states, and between individual citizens within states, about where the line should be drawn, few would dispute that some curtailment of the liberty is indispensable to the stability of society; and indeed in the United Kingdom today our lives are permeated by enforceable duties to provide information on demand, created by Parliament and tolerated by the majority, albeit in some cases with reluctance.

Lord Mustill's statement "underlines the approach taken by the common law to privacy" that "it recognised privacy as a principle of general value" and that "privacy had only been given discrete and specific protection at common law".[158]

This approach was diluted in the case of **Wainwright** v. **Home Office** [2004] 2 AC 406, where a mother and son were subjected to a strip-search when visiting a prison in 1997, in accordance with existing Prison Rules. The son, who was mentally impaired and suffered from cerebral palsy, later developed post-traumatic stress disorder. Claims for damages arising from trespass and trespass to the person were issued. At the time of the incident, the Human Rights Act, 1998 (HRA) had not yet come into force. When the case reached before House of Lords, it was argued that "the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by Article 8 of the European Convention for the Protection of Human Rights". It was further argued that reliance must be placed upon the judgment of Sedley LJ in **Douglas** v. **Hello! Ltd.** [2001] QB 967, where it was said that:

What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it **can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.**

(Emphasis supplied)

However, Lord Hoffman in **Wainwright** rejected all the contentions and held that:

I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence.

Lord Hoffman also observed that:

What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" ...

There seems to me a great difference between identifying privacy as a value which underlies the existence of a Rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values-principles only in the broadest sense-which direct its development...

Nor is there anything in the jurisprudence of the European Court of Human Rights which suggests that the adoption of some high level principle of privacy is necessary to comply with Article 8 of the Convention. The European Court is concerned only with whether English law provides an adequate remedy in a specific case in which it considers that there has been an invasion of privacy contrary to Article 8(1) and not justifiable Under Article 8(2).

There has been a transformation in this approach after the Human Rights Act, 1998 (HRA) came into force. For the first time, privacy was incorporated as a right under the British law.[159] In **Campbell** v. **MGN** [2004] 2 AC 457, a well-known model was photographed leaving a rehabilitation clinic, following public denials that she was a recovering drug addict. The photographs were published in a publication run by MGN. She sought damages under the English law through her lawyers to bring a claim for breach of confidence engaging Section 6 of the Human Rights Act. The House of Lords by majority decided in her favour. Lord Hope writing for the majority held:

[I]f there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified... [A] duty of confidence arises when confidential information comes to the knowledge of a person where he has notice that the information is confidential.

In holding so, Lord Hope relied upon the following statement of Lord Woolf in **A** v. **B Inc** [2003] QB 195

A duty of confidence will arise whenever a party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.

Lord Hope also held that the Courts, in order to decide a case, must carry out a "balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure".

Baroness Hale wrote a concurring judgment and held that:

The Human Rights 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence, as Lord Woolf CJ held in A v. B plc [2002] EWCA Civ 337, [2003] QB 195, 202, para 4:

[Articles 8 and 10] have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because, Under Section 6 of the 1998 Act, the court, as a public authority, is required not to 'act in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of these articles.

Later, in **Douglas** v. **Hello! Ltd.** [2006] QB 125, it was held that:

What the House [in Campbell] was agreed upon was that the knowledge, actual or imputed, that information is private will normally impose on anyone publishing that information the duty to justify what, in the absence of justification, will be a wrongful invasion of privacy.

Subsequent cases establish the contribution the HRA has made in jurisprudence on privacy in the UK. In **Associated Newspapers Limited** v. **His Royal Highness the Prince of Wales** [2006] EWCA Civ 1776, an appeal was made against the judgment in respect of the claim of Prince Charles for breach of confidence and infringement of copyright. The case brought about when 'The Mail on Sunday' published extracts of a dispatch by the Prince of Wales. The Court held that:

The information at issue in this case is private information, public disclosure of which constituted an interference with Prince Charles' Article 8 rights. As heir to the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive... Prince Charles has a valid claim based on breach of confidence and interference with his Article 8 rights.

In **Murray** v. **Big Pictures (UK) Ltd.** [2008] 3 WLR 1360, a photographer had taken a series of photographs of a writer's infant son, which were later published in a newspaper. The issue was whether there was misuse of private information by taking photographs. It was held that:

[The] question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher... [I]t is at least arguable that David had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought.

R v. **The Commissioner of Police of the Metropolis** [2011] UKSC 21 was a case concerning the extent of the police's power (under guidelines issued by the Association of Chief Police Officers- the ACPO guidelines) to indefinitely retain biometric data associated with individuals who are no longer suspected of a criminal offence. The UK Supreme Court, by a majority held that the police force's policy of retaining DNA evidence in the absence of 'exceptional circumstances' was unlawful and a violation of Article 8 of the European Convention on Human Rights. Lord Dyson, on behalf of the majority, held that:

It is important that, in such an important and sensitive area as the retention of biometric data by the police, the court reflects its decision by making a formal order to declare what it considers to be the true legal position. But it is not necessary to go further. Section 8(1) of the HRA gives the court a wide discretion to grant such relief or remedy within its powers as it considers just and appropriate. Since Parliament is already seized of the matter, it is neither just nor appropriate to make an order requiring a change in the legislative scheme within a specific period...

....he present ACPO guidelines are unlawful because they are incompatible with Article 8 of the ECHR. I would grant no other relief.

In the matter of an application by JR38 for Judicial Review (Northern Ireland) [2015] UKSC 42, the Appellant was involved in rioting in 2010, when still only 14 years of age. The police, in order to identify those responsible, and for the sake of deterrence, published CCTV footage depicting the Appellant in two newspapers. The issue involved was: "Whether the publication of photographs by the police to identify a young person suspected of being involved in riotous behaviour and attempted criminal damage can ever be a necessary and proportionate interference with that person's Article 8 rights?" The majority held that Article 8 was not engaged, as there was no reasonable expectation of privacy in the case. Lord Toulson (with whom Lord Hodge agreed), while stating that the conduct of the police did not amount, *prima facie*, to an interference with the Appellant's right to respect for his private life, held that:

The reasonable or legitimate expectation test is an objective test. It is to be applied broadly, taking account of all the circumstances of the case (as Sir Anthony Clarke said in Murray's case) and having regard to underlying value or values to be protected. Thus, for example, the publication of a photograph of a young person acting in a criminal manner for the purpose of enabling the police to discover his identity may not fall within the scope of the protection of personal autonomy which is the purpose of Article 8, but the publication of the same photograph for another purpose might.

Lord Clarke wrote a separate judgment concurring with Lord Toulson and held that:

... the criminal nature of what the Appellant was doing was not an aspect of his private life that he was entitled to keep private. He could not have had an objectively reasonable expectation that such photographs, taken for the limited purpose of identifying who he was, would not be published.

The decision in **PJS** v. **News Group Newspapers Ltd.** [2016] UKSC 26 dealt with an anonymised privacy injunction[160]. The injunction was sought by the claimant to restrain publication of details of his sexual relationship with two other people, on the ground that the publication would breach his rights to privacy and confidentiality, protected by Article 8 of ECHR. The UK Supreme Court by majority ruled in favour of the applicant. Speaking on behalf of the majority, Lord Mance held that:

... having regard to the nature of the material sought to be published and the identity and financial circumstances of the Appellant, that the Appellant's real concern is indeed with the invasion of privacy that would be involved in further disclosure and publication in the English media, and that any award of damages, however assessed, would be an inadequate remedy.

The HRA has rendered clarity on the existence of a right to privacy in UK jurisprudence and substantially resolved conflicting approaches regarding privacy in decided cases. The HRA, by incorporating the provisions of the European Convention on Human Rights (ECHR), has adopted the guarantee of the right to privacy into UK domestic law. The Convention, together with its adoption into domestic legislation, has led to a considerable change in the development of protection of human privacy in English law.

(ii) US Supreme Court decisions

The US Constitution does not contain an express right to privacy. But American privacy jurisprudence reflects that it has been protected under several amendments[161] of the US Constitution.

As early as 1886, in **Boyd** v. **United States** 116 US 616 (1886), the question before the US Supreme Court was whether compulsory production of a person's private papers to be used in evidence against him in a judicial proceeding, is an unreasonable search and seizure within the meaning of the Fourth Amendment. Justice Bradley delivered the opinion of the Court and held as follows:

The principles laid down in this opinion affect **the very essence of constitutional liberty and security... they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property,-it is the invasion of this sacred right...**

And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government... It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

(Emphasis supplied)

In two decisions in the 1920s, the Court read the Fourteenth Amendment's liberty to prohibit states from making laws interfering with the private decisions of parents and educators to shape the education of their children. In **Meyer** v. **Nebraska** 262 US 390 (1923), the Court struck down a state law that prohibited the teaching of foreign languages to students that had not yet completed the eighth grade. The Court in a 7:2 decision, written by Justice McReynolds, concluded that the state failed to show a compelling need to infringe upon the rights of parents and teachers to decide on the best course of education for young students. On liberty, Justice McReynolds held:

Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.

Two years later, in **Pierce** v. **Society of Sisters** (268) US 510 (1925), the Court, relying upon **Mayer** v. **Nebraska**, struck down the Oregon Compulsory Education Act, which mandated all children (between eight and sixteen years) to attend public schools. It was held the said statute is

an "unreasonable interference with the liberty of the parents and guardians to direct the upbringing of the children, and in that respect violates the Fourteenth Amendment".

In **Olmstead** v. **United States** 277 US 438 (1928), the question before the Court was whether the use of evidence of private telephone conversations, intercepted by means of wiretapping amounted to a violation of the Fourth and Fifth Amendments. In a 5:4 decision, it was held that there was no violation of the Fourth and Fifth Amendments. Chief Justice Taft wrote the majority judgment, holding that:

The Amendment itself shows that the search is to be of material things-the person, the house, his papers, or his effects.... The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the Defendants.

However, Justice Louis Brandeis wrote a dissenting opinion and observed that:

"... time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. **Moreover, "in the application of a constitution, our contemplation cannot be only of what has, been but of what may be."** The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions...

(Emphasis supplied)

He questioned whether the Constitution affords no protection against such invasions of individual security. Justice Brandeis answers this question in a celebrated passage:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They **conferred, as against the Government, the right to be let alone-the most comprehensive of rights, and the right most valued by civilized men.** To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment...

(Emphasis supplied)

The Court, in the case of **Griswold** v. **Connecticut** 381 US 479 (1965), invalidated a state law prohibiting the possession, sale, and distribution of contraceptives to married couples, for the reason that the law violated the right to marital privacy. Justice Douglas, who delivered the main opinion, observed that this right emanated from "penumbras" of the fundamental constitutional

guarantees and rights in the Bill of Rights, which together create "zones of privacy". Accordingly, it was held that:

The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees... Would we allow the police to search the sacred precincts of marital bedrooms of telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Justice Goldberg wrote in the concurring opinion that:

The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family-a relation as old and as fundamental as our entire civilization-surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government, though not specifically mentioned in the Constitution.

The 1967 decision in **Katz** v. **United States** 389 US 347 (1967) (**"Katz"**) overruled **Olmstead** v. **United States** (supra) and revolutionized the interpretation of the Fourth Amendment regarding the extent to which a constitutional right to privacy applies against government interference. In this case, Charles Katz was a gambler who used a public telephone booth to transmit illegal wagers. Unbeknownst to Katz, the FBI which was investigating Katz's activity, was recording his conversations via an electronic eavesdropping device attached to the exterior of the phone booth. Subsequently, Katz was convicted based on these recordings. He challenged his conviction, arguing that the recordings were obtained in violation of his Fourth Amendment rights. The constitutional question in the case was whether the 4th Amendment protection from 'unreasonable searches and seizures' was restricted to the search and seizure of tangible property, or did it extend to intangible areas such as conversations overheard by others. It was held that the Government's eavesdropping activities violated the privacy, upon which Petitioner justifiably relied, while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment, and that the Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements.

Prior to 1967 when determining the 'reasonable expectation of privacy' for purposes of discussing Fourth Amendment violations, the analysis was focused on whether the authority had trespassed on a private location. This 'trespass doctrine' was the prevailing test until **Katz**, which extended the protection of the Fourth Amendment from 'places' to 'people', affording individuals more privacy even in public. The 'trespass doctrine' applied in **Olmstead** v. **United States** (supra) was held to be no longer relevant.

Justice Stewart wrote the majority (7:1) opinion and held that:

One who occupies it [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is **surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.**

(Emphasis supplied)

Justice Harlan wrote the concurring judgment holding that:

a) that **an enclosed telephone booth is an area where, like a home...** a person has a constitutionally protected reasonable expectation of privacy; (b) that **electronic, as well as physical, intrusion into a place that is in this sense private may constitute a violation** of the Fourth Amendment....

(Emphasis supplied)

The reasonable expectation of privacy test was formulated as follows:

"....**the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people.** Generally, as here, the answer to that question requires reference to a "place." My understanding of the Rule that has emerged from prior decisions is that there is a twofold requirement, **first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected," because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.**

(Emphasis supplied)

In **Stanley** v. **Georgia** 394 US 557 (1969), the Court analyzed the constitutionality of a statute imposing criminal sanctions upon the knowing possession of obscene matter. The Court, in a unanimous decision, held that mere private possession of obscene matter cannot constitutionally be made a crime:

For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy...

[T]he rights that the Appellant is asserting in the case before us...the right to read or observe what he pleases-the right to satisfy his intellectual and emotional needs in the privacy of his own home.....the right to be free from state inquiry into the contents of his library...

Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Seven years after Griswold, the Court expanded the right to privacy beyond the 'marital bedroom' to include unmarried persons. In **Eisenstadt** v. **Baird** 405 US 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons, ruling that it violated the Equal Protection Clause of the Constitution:

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

The decision in **Paris Adult Theatre I** v. **Slaton** 413 US 49 (1973), upheld a state court's injunction against the showing of obscene films in a movie theatre, restricted to consenting adults. The Court distinguished the case from **Stanley** v. **Georgia** (supra), on the ground that the privacy of the home in **Stanley** was not the same as the commercial exhibition of obscene movies in a theatre. Chief Justice Burger observed that the prior decisions of the Supreme Court on the right to privacy only included those personal rights that were "fundamental" or "implicit in the concept of ordered liberty" such as "the personal intimacies of the home, the family, marriage, motherhood, procreation and childbearing" and held that:

Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation... The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive.

In the landmark decision on the right to abortion, **Roe** v. **Wade** 410 US 113 (1973), the Court dealt with the question of the right of an unmarried pregnant woman to terminate her pregnancy by abortion. The constitutionality of a Texas Statute prohibiting abortions except with respect to those procured or admitted by medical advice for the purpose of saving the life of the mother was challenged on the ground that the law improperly invaded the right and the choice of a pregnant woman to terminate her pregnancy and was violative of the "liberty" guaranteed under the Fourteenth Amendment and the right to privacy recognized in **Griswold**. The Court ruled 7:2 that a right to privacy under the Due Process Clause of the Fourteenth Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's interests in regulating abortions. Justice Blackmun delivered the majority judgment and held that:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first Section of the Fourteenth Amendment...

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

(Emphasis supplied)

The right to privacy in bank records was analysed by the US Supreme Court in **United States** v. **Miller** 425 US 435 (1976). In this case federal agents were investigating the Defendant for his involvement in a bootlegging conspiracy. The agents subpoenaed two banks and received his bank records. As a result, he was indicted. The question was whether an individual reasonably can expect that records kept incidental to his personal banking transactions will be protected from uncontrolled government inspection. In a 6:3 opinion, the Supreme Court held that a bank depositor has no Fourth Amendment interest in the records that his bank is required to keep in compliance with the Bank Secrecy Act of 1970, and that Miller had no right to privacy in his bank records. Writing for the majority, Justice Lewis F. Powell asserted that the "documents subpoenaed... are not [Miller's] 'private papers'," but instead, part of the bank's business records. It was held:

There is no legitimate "expectation of privacy" in the contents of the original checks and deposit slips, since the checks are not confidential communications, but negotiable instruments to be used in commercial transactions, and all the documents obtained contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities. The Act's recordkeeping requirements do not alter these considerations so as to create a protectable Fourth Amendment interest of a bank depositor in the bank's records of his account.

However, Justice Brennan dissented and held that:

A bank customer's reasonable expectation is that, absent a compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes... [A] depositor reveals many aspects of his personal affairs, opinions, habits, associations. Indeed, the totality of bank records provides a virtual current biography...Development of...sophisticated instruments have accelerated the ability of the government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.

Continuing its trend of expansion of individual rights in the 1960s and 1970s, particularly in the domain of reproductive health-the right to contraceptives as well as the right to abortion, the decision in **Carey** v. **Population Services International** 431 US 678 (1977) expanded these rights from adults to also include minors. In this case, a New York law banning sale of even non-prescription contraceptives by persons other than licensed pharmacists; sale or distribution to minors under sixteen; and contraceptive display and advertising was declared unconstitutional. Justice Brennan delivered the majority opinion of the Court and held that the Fourteenth Amendment is not for "adults alone" and "Minors, as well as adults, are protected by the Constitution":

This right of personal privacy includes "the interest in independence in making certain kinds of important decisions."... While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified

government interference are personal decisions "relating to marriage...; procreation...; contraception...; family relationships...; and childrearing and education..."

It was further held that:

The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices... This is understandable, for in a field that, by definition, concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive...

The Court also held that the right to privacy may be limited by a Regulation, which is governed by a sufficient 'compelling state interest'.

In **Smith** v. **Maryland** 442 US 735 (1979), it was held that installation and use of a 'pen register' was not a "search" within the meaning of the Fourth Amendment, and hence no warrant was required. Justice Blackmun delivered the majority (5: 4) opinion and held that the Petitioner's claim that he had a "legitimate expectation of privacy" could not be sustained:

First, **we doubt that people in general entertain any actual expectation of privacy in the numbers they dial.** All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law."

(Emphasis supplied)

The majority adopted the "reasonable expectation of privacy" test as formulated by Justice Harlan in **Katz** and held as follows:

[The] inquiry, as Mr. Justice Harlan aptly noted in his Katz concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy"... whether... the individual has shown that "he seeks to preserve [something] as private"... The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable,'"... whether... the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

Since the pen register was installed on telephone company property at the telephone company's central offices, Petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area."

Thus the Court held that the Petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialled, and that, even if he did, his expectation was not "legitimate." However, the judgment also noted the limitations of the **Katz** test:

Situations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection... In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.

Justice Stewart wrote the dissent, joined by Justice Brennan and held that there was a legitimate expectation of privacy in this case:

...the numbers dialled from a private telephone-like the conversations that occur during a call-are within the constitutional protection recognized in Katz. It seems clear to me that information obtained by pen register surveillance of a private telephone is information in which the telephone subscriber has a legitimate expectation of privacy. The information captured by such surveillance emanates from private conduct within a person's home or office-locations that without question are entitled to Fourth and Fourteenth Amendment protection. Further, that information is an integral part of the telephonic communication that, under Katz, is entitled to constitutional protection...

Justice Marshal dissented and opined on the dangers of permitting such surveillance, holding:

The use of pen registers, I believe, constitutes such an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships, as well as the First and Fourth Amendment interests implicated by unfettered official surveillance. Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts...

Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity...

I am unwilling to insulate use of pen registers from independent judicial review.

(Emphasis supplied)

In **Planned Parenthood** v. **Casey** 505 US 833 (1992), several Pennsylvania state statutory provisions regarding abortion such as spousal consent were challenged. The Court reaffirmed-what it called-the "essential holding[162] of **Roe** v. **Wade** (supra), and observed:

...Our precedents "have respected the private realm of family life which the state cannot enter."... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence,

of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State...

The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a Rule of law and a component of liberty we cannot renounce.

In **Minnesota** v. **Carter** 525 US 83 (1998), the question was whether the Fourth Amendment protected against the viewing by an outside police officer, through a drawn window blind, of the Defendants' bagging cocaine in an apartment. The Court answered this question in the negative. Chief Justice Rehnquist delivered the majority opinion of the Court noting that "[t]he text of the Amendment suggests that its protections extend only to people in "their" houses." The case was distinguished from **Minnesota** v. **Olson** 495 US 91 (1990), where the Supreme Court decided that an overnight guest in a house had the sort of expectation of privacy that the Fourth Amendment protects. The Court was of the view that while an overnight guest in a home may claim the protection of the Fourth Amendment, one who is merely present with the consent of the householder may not. The Respondents, in this case, were not overnight guests, but were present for a business transaction and were only in the home for a few hours. The Court held:

Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."...

And while it was a "home" in which Respondents were present, it was not their home...

the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between Respondents and the householder, all lead us to conclude.... any search which may have occurred did not violate their Fourth Amendment rights.

(Emphasis supplied)

Justice Ginsburg wrote the dissenting opinion joined by Justice Stevens and Justice Souter, and held that:

Our decisions indicate that people have a reasonable expectation of privacy in their homes in part because they have the prerogative to exclude others... Through the host's invitation, the guest gains a reasonable expectation of privacy in the home. Minnesota v. Olson, 495 U.S. 91 (1990), so held with respect to an overnight guest. The logic of that decision extends to shorter term guests as well.

In **Kyllo** v. **United States** 533 US 27 (2001), the Court held (5:4 majority) that the thermal imaging of the house of a person suspected of growing marijuana was a violation of the right to privacy. Justice Scalia delivered the opinion of the Court and held that there is no distinction between "off-the-wall" and "through-the-wall" surveillance as both lead to an intrusion into an individual's privacy:

Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment,"...

We...would have to develop a jurisprudence specifying which home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know in advance whether his through-the-wall surveillance picks up "intimate" details-and thus would be unable to know in advance whether it is constitutional...

(Emphasis supplied)

It was concluded that even though no "significant" compromise of the homeowner's privacy had occurred due to the thermal imaging, "the long view, from the original meaning of the Fourth Amendment" must be taken forward.

In **Lawrence** v. **Texas** 539 US 558 (2003), the Court in a 6:3 decision struck down the sodomy law in Texas and by extension invalidated sodomy laws in 13 other states, making same-sex sexual activity legal in every state and territory of the United States. The Court overturned its previous ruling on the same issue in the 1986 case, **Bowers** v. **Hardwick** 478 US 186 (1986), where it upheld a challenged Georgia statute and did not find a constitutional protection of sexual privacy. Justice Anthony Kennedy wrote the majority opinion (6: 3 decision) and held that:

The Petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime... It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Informational privacy was the core issue in **NASA** v. **Nelson** 562 US 134 (2011). The Court held unanimously that NASA's background checks of contract employees did not violate any constitutional privacy right. The employees had argued that their constitutional right to privacy as envisaged in previous US Supreme Court judgments namely **Whalen** v. **Roe** [163] (1977) and **Nixon** v. **Administrator of General Services** [164] (1977), was violated by background checks. The majority judgment delivered by Justice Alito, decided the case assuming that there existed a constitutional right to privacy. The Court held that:

We hold, however, that the challenged portions of the Government's background check do not violate this right in the present case. The Government's interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974, satisfy any "interest in avoiding disclosure" that may "arguably ha[ve] its roots in the Constitution... The Government has good reason to ask employees about their recent illegal-drug use."

The majority also rejected all the contentions regarding the misuse of collected data and held:

... the mere possibility that security measures will fail provides no "proper ground" for a broad-based attack on government information-collection practices. Ibid. Respondents also cite a portion of SF-85 that warns of possible disclosure "[t]o the news media or the general public." App. 89. By its terms, this exception allows public disclosure only where release is "in the public interest" and would not result in "an unwarranted invasion of personal privacy." Ibid. **Respondents have not cited any example of such a disclosure, nor have they identified any plausible scenario in which their information might be unduly disclosed under this exception... In light of the protection provided by the Privacy Act's nondisclosure requirement, and because the challenged portions of the forms consist of reasonable inquiries in an employment background check, we conclude that the Government's inquiries do not violate a constitutional right to informational privacy.**

(Emphasis supplied)

Justice Scalia, in a concurring opinion joined by Justice Thomas, agreed that the background checks did not violate any constitutional rights, but argued that the Court should have settled the constitutional privacy question in the negative. The view held was that there exists no constitutional right to informational privacy. Scalia J. criticized the Court's decision to evade the constitutional question, stating that:

If, on the other hand, the Court believes that there is a constitutional right to informational privacy, then I fail to see the minimalist virtues in delivering a lengthy opinion analyzing that right while coyly noting that the right is "assumed" rather than "decided"... **The Court decides that the Government did not violate the right to informational privacy without deciding whether there is a right to informational privacy, and without even describing what hypothetical standard should be used to assess whether the hypothetical right has been violated.**

(Emphasis supplied)

In **United States** v. **Jones** 565 US 400 (2012), it was held unanimously that installing a Global Positioning System (GPS) tracking device on a vehicle and using the device to monitor the vehicle's movements constitutes a search under the Fourth Amendment. However, the judges were split 5:4 as to the fundamental reasons behind the conclusion. Justice Scalia delivered the majority judgment, applying the trespass test. It was held that the Government's physical intrusion onto the Defendant's car for the purpose of obtaining information constituted trespass and therefore a "search". Justice Scalia, however, left unanswered the question surrounding the privacy implications of a warrantless use of GPS data without physical intrusion.

Justice Sonia Sotomayor, concurred with Justice Scalia, but addressed the privacy aspects of the judgment. Justice Sotomayor agreed with Justice Alito's concurrence that "physical intrusion is now unnecessary to many forms of surveillance", and held that "[i]n cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance". It was further observed:

GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual

associations. Disclosed in [GPS] data... will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on... The Government can store such records and efficiently mine them for information years into the future... And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility"...

The net result is that GPS monitoring-by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track-may "alter the relationship between citizen and government in a way that is inimical to democratic society".

(Emphasis supplied)

Justice Sotomayor concluded, by stating:

[I] doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited [or phone numbers dialled]... I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

In **Florida** v. **Jardines** 569 US 1 (2013), the Court held that police use of a trained detection dog to sniff for narcotics on the front porch of a private home is a "search" within the meaning of the Fourth Amendment to the US Constitution, and therefore, without consent, requires both probable cause and a search warrant. Justice Scalia who delivered the opinion of the Court held as follows:

We... regard the area "**immediately surrounding and associated with the home"**-.....as "part of the home itself for Fourth Amendment purposes." ....**This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened"**.

(Emphasis supplied)

Justice Kagan, in a concurring opinion, wrote:

Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell). And as in the hypothetical above, **that device was aimed here at a home- the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects... the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"-an expectation "that exists, and that is acknowledged to be reasonable".**

(Emphasis supplied)

Three years ago, in **Riley** v. **California** 573 US __ (2014) , the Court unanimously held that the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional. Chief Justice Roberts delivered the opinion of the Court and commented on the impact on privacy in an era of cell phones:

Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy...the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones...Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building... Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life...

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life"... The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple- get a warrant.

(Emphasis supplied)

In **Obergefell** v. **Hodges** 576 US __ (2015), the Court held in a 5:4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy authored the majority opinion (joined by Justices Ginsburg, Breyer, Sotamayor and Kagan):

Indeed, the Court has noted **it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.**

(Emphasis supplied)

The development of the jurisprudence on the right to privacy in the United States of America shows that even though there is no explicit mention of the word 'privacy' in the Constitution, the courts of the country have not only recognised the right to privacy under various Amendments of the Constitution but also progressively extended the ambit of protection under the right to privacy. In its early years, the focus was on property and protection of physical spaces that would be considered private such as an individual's home. This 'trespass doctrine' became irrelevant when it was held that what is protected under the right to privacy is "people, not places". The 'reasonable expectation of privacy' test has been relied on subsequently by various other jurisdictions while developing the right to privacy.
Having located the right to privacy in the 'person', American jurisprudence on the right to privacy has developed to shield various private aspects of a person's life from interference by the state- such as conscience, education, personal information, communications and conversations,

sexuality, marriage, procreation, contraception, individual beliefs, thoughts and emotions, political and other social groups. Various judgments of the Court have also analysed technological developments which have made surveillance more pervasive and affecting citizens' privacy. In all these cases, the Court has tried to balance the interests of the individual in maintaining the right to privacy with the interest of the State in maintaining law and order. Decisions of the Supreme Court decriminalizing consensual sexual activity between homosexuals and guaranteeing same-sex couples the right to marry indicate that the right to privacy is intrinsic to the constitutional guarantees of liberty and equal protection of laws.

(iii) Constitutional right to privacy in South Africa

In South Africa, the right to privacy has been enshrined in Section 14 of the Bill of Rights in the 1996 Constitution. Section 14 provides that:

14. Privacy.-Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.

In **National Media Ltd.** v. **Jooste** 1996 (3) SA 262 (A) , Justice Harms defined privacy in the following terms:

Privacy is an individual condition of life characterised by exclusion from the public and publicity. The condition embraces all those personal facts which a person concerned has determined him to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private

On the ambit of the right to privacy, the Court held that:

A right to privacy encompasses the competence to determine the destiny of private facts...

The individual concerned is entitled to dictate the ambit of disclosure...

the purpose and method [of] the disclosure... when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called "absolute rights of personality"...

It will also mean that rights of personality are of a lower order than real or personal rights.

In **Bernstein** v. **Bester and Ors.** 1996 (2) SA 751 (CC), the South African Supreme Court decided on a challenge to the constitutionality of certain Sections of the Companies Act, on the ground that

examination under these Sections violated the general right to personal privacy (Section 13). It was held that the provisions were not in breach of the Constitution. Justice Ackermann expounded upon the concept of privacy as follows:

The scope of privacy has been closely related to the concept of identity and... [that] the right... [is] based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity.

The Court observed that like every other right, the right to privacy also has its limits:

[67] In the context of privacy it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

The constitutional validity of laws making sodomy an offence was challenged in **National Coalition for Gay and Lesbian Equality** v. **Minister of Justice** 1999 (1) SA 6 (CC). It was held that the common law offence of sodomy was inconsistent with the Constitution of the Republic of South Africa, 1996. Ackermann J. described how discrimination leads to invasion of privacy and held that:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy...

Sachs J. discussed the interrelation between equality and privacy and held that:

...equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality.

On the meaning of 'autonomy', the Court observed that:

Autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that **people live in their**

bodies, their communities, their cultures, their places and their times....It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.

(Emphasis supplied)

Justice Sachs noted that the motif which links and unites equality and privacy, and which runs right through the protections offered by the Bill of Rights, is dignity.

In **Investigating Directorate: Serious Offences** v. **Hyundai Motor Distributors Ltd.** 2001 (1) SA 545 (CC), the Court was concerned with the constitutionality of the provisions of the National Prosecuting Authority Act that authorised the issuing of warrants of search and seizure for purposes of a "preparatory investigation".

Langa J. delivered judgment on the right to privacy of juristic persons and held that:

... privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows... from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs.

Highlighting the need to balance interests of the individual and the State, it was held that:

[54]...Search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances....On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property;...**A balance must therefore be struck between the interests of the individual and that of the state, a task that lies at the heart of the inquiry into the limitation of rights.**

(Emphasis supplied)

In **Minister of Home Affairs and Anr.** v. **Fourie and Anr.** 2006 (1) SA 524 (CC), the Constitutional Court of South Africa ruled unanimously that same-sex couples have a constitutional right to marry. The judgment delivered by Justice Sachs, held that:

Section 9(1) of the Constitution provides: "Everyone is equal before the law and has the right to equal protection and benefit of the law."... Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. **They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to**

be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law...

It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy...

(Emphasis supplied)

In **NM and Ors.** v. **Smith and Ors.** 2007 (5) SA 250 (CC), the names of three women who were HIV positive were disclosed in a biography. They alleged that the publication, without their prior consent, violated their rights to privacy, dignity and psychological integrity. The Court by majority held that the Respondents were aware that the applicants had not given their express consent but had published their names, thereby violating their privacy and dignity rights. Justice Madala delivered the majority judgment on the basis of the value of privacy and confidentiality in medical information and held that:

Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy...

Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear jeopardising an individual's right to make certain fundamental choices that he/she has a right to make. There is therefore a strong privacy interest in maintaining confidentiality.

The decision of the Court was that there must be a pressing social need for the right to privacy to be interfered with and that there was no such compelling public interest in this case.

In the dissenting opinion, Justice O'Regan held that the publication of the names and HIV status of the women was neither intentional nor negligent. In that view, the Respondents had assumed that consent was given because the applicants' names and HIV status were published in a publication, with no disclaimer regarding their consent to the contrary. While elaborating on the constitutional right of privacy, the Court held that:

... although as human beings we live in a community and are in a real sense both constituted by and constitutive of that community, we are nevertheless entitled to a personal sphere from which we may and do exclude that community. In that personal sphere, we establish and foster intimate human relationships and live our daily lives. This sphere in which to pursue our own ends and interests in our own ways, although often mundane, is intensely important to what makes human life meaningful.

According to the decision, there are two inter-related reasons for the constitutional protection of privacy-one flows from the "constitutional conception of what it means to be a human being" and the second from the "constitutional conception of the state":

An implicit part of [the first] aspect of privacy is the right to choose what personal information of ours is released into the public space. **The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information.** That decision should not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state.

...Secondly, we value **privacy as a necessary part of a democratic society and as a constraint on the power of the state**... In authoritarian societies, the state generally does not afford such protection. People and homes are often routinely searched and the possibility of a private space from which the state can be excluded is often denied. The consequence is a denial of liberty and human dignity. In democratic societies, this is impermissible.

(Emphasis supplied)

The limits of the right to privacy and the need to balance it with other rights emerge from the following observations:

Recognition of legitimate limits on the inviolability of personal space, however, does not mean that the space is not worthy of protection. The Constitution seeks to ensure that rights reinforce one another in a constructive manner in order to promote human rights generally. At times our Constitution recognises that a balance has to be found to provide protection for the different rights.

On the inter-relationship between the right to privacy, liberty and dignity, the Court observed that:

The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it **highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing.** We value privacy for this reason at least-that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community.

(Emphasis supplied)

The interim as well as the Final Constitution of South Africa contain explicit provisions guaranteeing the right to privacy. The Judges of South African Supreme Court have given an expansive meaning to the right, making significant inter-linkages between equality, privacy and dignity. In doing so, it has been acknowledged that the right to privacy does not exist in a vacuum, its contravention having a significant bearing on other citizen rights as well. Such an interpretation may prove to have a catalytic effect on a country transitioning from an apartheid state to a democratic nation.

(iv) Constitutional right to privacy in Canada

Although the Canadian Charter of Rights and Freedoms of 1982 ("the Charter") does not explicitly provide for a right to privacy, certain Sections of the Charter have been relied on by the Supreme Court of Canada to recognize a right to privacy. Most notably, Section 8[165] (the Canadian version of the Fourth Amendment of the US Constitution) has been employed in this respect. Privacy issues have also been recognized in respect of Section 7[166] of the Charter. In 1983, the Privacy Act was enacted to regulate how federal government collects, uses and discloses personal information.[167] The Personal Information Protection and Electronic Documents Act (PIPEDA) governs how private sector organisations collect, use and disclose personal information in the course of commercial activities

One of the landmark cases on the right to privacy was Hunter v. Southam Inc [1984] 2 SCR 145. This was also the first Supreme Court of Canada decision to consider Section 8 of the Charter. In this case, the Combines Investigation Act had authorized several civil servants to enter the offices of Southam Inc and examine documents. The company claimed that this Act violated Section 8 of the Canadian Charter. The Court unanimously held that the Combines Investigation Act violated the Charter as it did not provide an appropriate standard for administering warrants.

Dickson J. wrote the opinion of the Court and observed that the Canadian Charter is a "purposive document" whose purpose is to "guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines" and to constrain governmental action inconsistent with those rights and freedoms. The Court held that since Section 8 is an entrenched constitutional provision, it was "not vulnerable to encroachment by legislative enactments in the same way as common law protections."

The Court held that the purpose of Section 8 is to protect an individual's reasonable expectation of privacy but right to privacy must be balanced against the government's duty to enforce the law. It was further held that:

The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by Section 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

In **Her Majesty, The Queen** v. **Brandon Roy Dyment** [1988] 2 SCR 417, a patient had met with an accident on a highway. A doctor collected a sample of blood from his wound. The blood sample was taken for medical purposes but was given to a police officer. As a result of an analysis carried out by the police officer, the patient was charged with impaired driving. The Court held that the seizing of blood taken for medical purposes was a violation of Section 8 of the Charter and that the spirit of the Charter "must not be constrained by narrow legalistic classifications based on notions of property". It was further held:

[L]egal claims to privacy in this sense were largely confined to the home. But... **[t]o protect privacy only in the home... is to shelter what has become, in modern society, only a small part of the individual's daily environmental need for privacy...**

Privacy is at the heart of liberty in a modern state...Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

(Emphasis supplied)

On the importance of informational privacy, it was held:

This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit...

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

Justice La Forest wrote on the importance of consent and held that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity."

The Court found that the patient had a "well-founded" and "reasonable" expectation of privacy that his blood sample, collected by the doctor, would be used for medical purposes only and that such expectation "is intended to protect people not things". It was held that:

In the present case, however, the Respondent may, for some purposes perhaps, be deemed to have impliedly consented to a sample being taken for medical purposes, but he retained an expectation that his privacy interest in the sample continue past the time of its taking...Under these circumstances, the sample was surrounded by an aura of privacy meriting Charter protection. For the state to take it in violation of a patient's right to privacy constitutes a seizure for the purposes of Section 8.

R v. **Plant** MANU/SC/0111/1994 : [1993] 3 S.C.R. 281 is a leading decision of the Supreme Court of Canada on the protection of personal information under the Charter. In this case, a police officer, on the basis of information that marijuana was being grown in an area, accessed the electrical utility's computer system and discovered that a particular house was consuming an extremely high amount of electricity. Two officers then performed a warrantless perimeter search of the property and observed that the basement windows were covered with something opaque and a that a vent had been blocked using a plastic bag. On the basis of this information, the police obtained a warrant to search the home and discovered over a hundred seedling marijuana plants. The Accused was

charged with cultivation of marijuana and possession for the purpose of trafficking. The issue was whether the warrantless perimeter search of his home and the seizure of electricity consumption records violated his right against unreasonable search and seizure Under Section 8 of the Charter.

The judgment delivered by Justice Sopinka relied on a part of the **United States** v. **Miller** 425 US 435 (1976) decision, that in order to be constitutionally protected the information must be of a "personal and confidential" nature and held that:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that Section 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

The Court held that the perimeter search violated the Charter and that the seizure of consumption records was not in violation of Section 8. This decision was based on the ground that the pattern of electricity consumption revealed as a result of computer investigations could not be said to reveal intimate details since "electricity consumption reveals very little about the personal lifestyle or private decisions."

In **Her Majesty, The Queen** v. **Walter Tessling** (2004) SCC 67, the Supreme Court of Canada held that the use of thermal imaging by the police in the course of an investigation of a suspect's property did not constitute a violation of the accused's right to a reasonable expectation of privacy Under Section 8 of the Canadian Charter.

On the reasonable expectation of privacy, it was held that the totality of circumstances need to be considered with particular emphasis on both the existence of a subjective expectation of privacy, and the objective reasonableness of the expectation. The Court ruled that the cases of privacy interests (protected by Section 8 of the Canadian Charter) need to be distinguished between personal privacy, territorial privacy and informational privacy."

The Court relied on Justice Sopinka's understanding of the scope of the protection of informational privacy in **R** v. **Plant** (supra) and held that the information generated by FLIR imaging did not reveal a "biographical core of personal information" or "intimate details of [his] lifestyle", and therefore Section 8 had not been violated.

The decision in **R** v. **Spencer** (2014) SCC 43 was related to informational privacy. In this case, the Appellant used an online software to download child pornography onto a computer and shared it publicly. The police requested subscriber information associated with an IP address from the Appellant's Internet Service Provider and on the basis of it, searched the computer used by him. The Canadian Supreme Court unanimously ruled that the request for an IP address infringed the Charter's guarantee against unreasonable search and seizure. It was held that the Appellant had a reasonable expectation of privacy. In doing so, it assessed whether there is a "reasonable expectation of privacy" in the "totality of the circumstances", which includes "the nature of the privacy interests implicated by the state action" and "factors more directly concerned with the

expectation of privacy, both subjectively and objectively viewed, in relation to those interests". It was further held:

...factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: **(1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.**

(Emphasis supplied)

The issue in the case was whether there is a privacy interest in subscriber information with respect to computers used in homes for private purposes. The Court applied a broad approach in understanding the online privacy interests and held that:

Privacy is admittedly a "broad and somewhat evanescent concept"... [T]he Court has described three broad types of privacy interests-territorial, personal, and informational-which, while often overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations...

The Court found that the nature of Appellant's privacy interest in subscriber information relating to a computer used privately was primarily an informational one and held:

... the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information.

It then set out three key elements of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity. It further emphasised on the importance of anonymity in informational privacy, particularly in the age of the Internet and held that:

... anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure...

Though the Court stopped short of recognizing an absolute right to anonymity, it held that "anonymous Internet activity engages a high level of informational privacy". The Court further held that:

The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.

The Canadian Supreme Court has used provisions of the Charter to expand the scope of the right to privacy, used traditionally to protect individuals from an invasion of their property rights, to an individual's "reasonable expectation of privacy". The right to privacy has been held to be more

than just a physical right as it includes the privacy in information about one's identity. Informational privacy has frequently been addressed Under Section 8 of the Charter. Canadian privacy jurisprudence has developed with the advent of technology and the internet. Judicial decisions have significant implications for internet/digital privacy.

(v) Privacy under The European Convention on Human Rights and the European Charter

In Europe, there are two distinct but related frameworks to ensure the protection of the right of privacy. The first is the European Convention on Human Rights (ECHR), an international agreement to protect human rights and fundamental freedoms in Europe. The second is the Charter of Fundamental Rights of the European Union (CFREU), a treaty enshrining certain political, social, and economic rights for the European Union. Under ECHR ("the Convention"), the European Court of Human Rights (ECtHR), also known as the 'Strasbourg Court', is the adjudicating body, which hears complaints by individuals on alleged breaches of human rights by signatory states. Similarly, under CFREU ("the Charter), the Court of Justice of the European Union (CJEU), also called the 'Luxembourg Court', is the chief judicial authority of the European Union and oversees the uniform application and interpretation of European Union law, in co-operation with the national judiciary of the member states.

Article 8 of the ECHR provides that:

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Under the Charter, the relevant provisions are:

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these Rules shall be subject to control by an independent authority.

Article 52

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interests recognised by the Union of the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention of the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 52(3) provides for the ECHR as a minimum standard of human rights in the EU. Article 52(3) thus leads the EU to be indirectly bound by the ECHR as it must always be obeyed when restricting fundamental rights in the EU. Moreover, in the pre-Charter era, the protection of privacy was held to form part of the right to privacy in line with how the ECtHR in Strasbourg interprets Article 8 of ECHR till date[168].

Thus, in order to understand the protection extended to the right to privacy in EU, the jurisprudence of Article 8 of the Convention and Article 7 of the Charter need to be analyzed. The term 'private life' is an essential ingredient of both these provisions and has been interpreted to encompass a wide range of interests.

In the case of **Niemietz** v. **Germany**[169] (1992), the ECtHR observed that:

The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

Similarly, in **Costello-Roberts** v. **United Kingdom**[170] (1993), the ECtHR stated that "the notion of "private life" is a broad one" and "is not susceptible to exhaustive definition".

This broad approach is also present in the recent cases of European jurisprudence. In **S. and Marper** v. **United Kingdom** [2008] ECHR 1581, the ECtHR held, with respect to right to respect for private life, that:

...the concept of "private life"... covers the physical and psychological integrity of a person... It can therefore embrace multiple aspects of the person's physical and social identity... Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8... Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family... Information about the person's health is an important element of private life... The Court furthermore considers that an individual's ethnic identity must be regarded as another such element... The concept of private life moreover includes elements relating to a person's right to their image...

In **Uzun** v. **Germany**[171] (2010), the European Court of Human Rights while examining an application claiming violation of Article 8 observed that:

Article 8 protects, inter alia, a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"...

There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor...

Thus, the determination of a complaint by an individual Under Article 8 of the Convention necessarily involves a two-stage test[172], which can be summarized as below:

Stage 1: Article 8 para. 1

1.1 Does the complaint fall within the scope of one of the rights protected by Article 8 para 1?

1.2 If so, is there a positive obligation on the State to respect an individual's right and has it been fulfilled?

Stage 2: Article 8 para. 2

2.1 Has there been an interference with the Article 8 right?

2.2 If so,

2.2.1 is it in accordance with law?

2.2.2 does it pursue a legitimate aim?

2.2.3 is it necessary in a democratic society?

This test is followed by the Court each time it applies Article 8 in a given case.

In other words, a fair balance is struck between the general interest of the community and the interests of the individual.

The Grand Chamber of 18 judges at the ECtHR, in **S. and Marper** v. **United Kingdom** (supra), examined the claim of the applicants that their Right to Respect for Private Life Under Article 8 was being violated as their fingerprints, cell samples and DNA profiles were retained in a database after successful termination of criminal proceedings against them. The Court held that there had been a violation of Article 8 of the Convention. Finding that the retention at issue had constituted a disproportionate interference with the applicants' right to respect for private life, the Court held that "the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons...fails to strike a fair balance between the competing public and private interests and that the Respondent State has overstepped any acceptable margin of appreciation". It was further held that:

The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.

Applying the above principles, it was held that:

The Court notes at the outset that all three categories of the personal information retained by the authorities in the present cases, namely fingerprints, DNA profiles and cellular samples, constitute personal data within the meaning of the Data Protection Convention as they relate to identified or identifiable individuals. The Government accepted that all three categories are "personal data" within the meaning of the Data Protection Act 1998 in the hands of those who are able to identify the individual.

Regarding the retention of cellular samples and DNA profiles, it was held that:

Given the nature and the amount of personal information contained in cellular samples, their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion... [T]he DNA profiles' capacity to provide a means of identifying genetic relationships between individuals... is in itself sufficient to conclude that their

retention interferes with the right to the private life of the individuals concerned... The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life.

Regarding retention of fingerprints, it was held that:

...fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant...

In **Uzun** v. **Germany** (supra), the ECtHR examined an application claiming violation of Article 8 of European Convention of Human Rights where the applicant's data was obtained via the Global Positioning System (GPS) by the investigation agencies and was used against him in a criminal proceeding. In this case, the applicant was suspected of involvement in bomb attacks by the left-wing extremist movement. The Court unanimously concluded that there had been no violation of Article 8 and held as follows:

GPS surveillance of Mr. Uzun had been ordered to investigate several counts of attempted murder for which a terrorist movement had claimed responsibility and to prevent further bomb attacks. It therefore served the interests of national security and public safety, the prevention of crime and the protection of the rights of the victims. It had only been ordered after less intrusive methods of investigation had proved insufficient, for a relatively short period of time-three months-and it had affected Mr. Uzun only when he was travelling with his accomplice's car. Therefore, he could not be said to have been subjected to total and comprehensive surveillance. Given that the investigation concerned very serious crimes, the Court found that the GPS surveillance of Mr. Uzun had been proportionate.

The decision of the CJEU in the case **Asociacion Nacional de Establecimientos Financieros de Credito (ASNEF)** v. **Spain**[173] relied upon the Article 7 right to respect for private life and Article 8(1) of the Charter to find that the implementation in Spain of the Data Protection Directive was defective in that it applied only to information kept in a specified public data bank rather than more generally to public and private databases, on the basis that "the processing of data appearing in non-public sources necessarily implies that information relating to the data subject's private life will thereafter be known by the data controller and, as the case may be, by the third party or parties to whom the data is disclosed. This more serious infringement of the data subject's rights enshrined in Articles 7 and 8 of the Charter must be properly taken into account".

In **Digital Rights Ireland Ltd.** v. **Minister**[174] (2014), the CJEU examined the validity of a Data Protection Directive, which required telephone and internet service providers to retain details of internet and call data for 6 to 24 months, as well as related data necessary to identify the subscriber or user, so as to ensure that the data is available for the purpose of prevention, investigation, detection and prosecution of serious crimes. The Court ruled that the Directive is incompatible with Article 52(1) of the Charter, because the limitations which the said Directive placed were "not accompanied by the necessary principles for governing the guarantees needed to regulate access to the data and their use". It was held that:

To establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way.

While stating that data relating to the use of electronic communications is particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime, the Court looked into the proportionality of the interference with the right to privacy and held that:

As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight...

Highlighting that the said Directive does not provide for sufficient safeguards, it was held that by adopting the Directive, the EU "exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter."

In **RE** v. **The United Kingdom**[175] (2015), the applicant was arrested and detained on three occasions in relation to the murder of a police officer. He claimed violation of Article 8 under the regime of covert surveillance of consultations between detainees and their lawyers, medical advisors and appropriate adults[176] sanctioned by the existing law. The ECtHR held that:

The Court...considers that the surveillance of a legal consultation constitutes an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence... Consequently, in such cases it will expect the same safeguards to be in place to protect individuals from arbitrary interference with their Article 8 rights...

Surveillance of "appropriate adult"-detainee consultations were not subject to legal privilege and therefore a detainee would not have the same expectation of privacy....The relevant domestic provisions, insofar as they related to the possible surveillance of consultations between detainees and "appropriate adults", were accompanied by "adequate safeguards against abuse", notably as concerned the authorisation, review and record keeping. Hence, there is no violation of Article 8.

In **Roman Zakharov** v. **Russia**[177] (2015), ECtHR examined an application claiming violation of Article 8 of the Convention alleging that the mobile operators had permitted unrestricted interception of all telephone communications by the security services without prior judicial authorisation, under the prevailing national law. The Court observed that:

Mr. Zakharov was entitled to claim to be a victim of a violation of the European Convention, even though he was unable to allege that he had been the subject of a concrete measure of surveillance. Given the secret nature of the surveillance measures provided for by the legislation, their broad scope (affecting all users of mobile telephone communications) and the lack of effective means to challenge them at national level... Russian law did not meet the "quality of law" requirement and

was incapable of keeping the interception of communications to what was "necessary in a democratic society". There had accordingly been a violation of Article 8 of the Convention.

Both the ECtHR and the CJEU, while dealing with the application and interpretation of Article 8 of ECHR and Article 7 of the Charter, have kept a balanced approached between individual interests and societal interests. The two-step test in examining an individual claim related to a Convention right has strictly been followed by ECtHR.

(vi) Decisions of the Inter-American Court of Human Rights

Article 11 of the American Convention on Human Rights deals with the Right to Privacy. The provision is extracted below:

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

The decision in **Artavia Murillo ET AL. ("In Vitro Fertilization")** v. **Costa Rica**[178] (2012), addressed the question of whether the State's prohibition on the practice of in vitro fertilisation constituted an arbitrary interference with the right to private life. The Court held that:

The scope of the protection of the right to private life has been interpreted in broad terms by the international human rights courts, when indicating that this goes beyond the right to privacy. The protection of **private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. The effective exercise of the right to private life is decisive for the possibility of exercising personal autonomy on the future course of relevant events for a person's quality of life. Private life includes the way in which individual views himself and how he decides to project this view towards others, and is an essential condition for the free development of the personality...** Furthermore, the Court has indicated that motherhood is an essential part of the free development of a woman's personality. Based on the foregoing, the Court considers that the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense.

(Emphasis supplied)

In **Escher et al** v. **Brazil**[179] (2009), telephonic interception and monitoring of telephonic lines was carried out by the military police of the State between April and June 1999. The Court found that the State violated the American Convention on Human Rights and held that:

Article 11 applies to telephone conversations irrespective of their content and can even include both the technical operations designed to record this content by taping it and listening to it, or any other element of the communication process; for example, the destination or origin of the calls that are made, the identity of the speakers, the frequency, time and duration of the calls, aspects that can be verified without the need to record the content of the call by taping the conversation...

Article 11 of the Convention recognizes that every person has the right to respect for his honor, prohibits an illegal attack against honor and reputation, and imposes on the States the obligation to provide legal protection against such attacks. In general, the right to honor relates to self-esteem and self-worth, while reputation refers to the opinion that others have of a person...

[O]wing to the inherent danger of abuse in any monitoring system, this measure must be based on especially precise legislation with clear, detailed rules. The American Convention protects the confidentiality and inviolability of communications from any kind of arbitrary or abusive interference from the State or individuals; consequently, the surveillance, intervention, recording and dissemination of such communications is prohibited, except in the cases established by law that are adapted to the objects and purposes of the American Convention.

Like other international jurisdictions, the Inter-American Court of Human Rights dealt with the concept of privacy and private life in broad terms which enhance the value of liberty and freedom.

The development of the law on privacy in these jurisdictions has drawn sustenance from the importance and sanctity attributed to individual freedom and liberty. Constitutions which, like the Indian Constitution, contain entrenched rights place the dignity of the individual on a high pedestal. Despite cultural differences and disparate histories, a study of comparative law provides reassurance that the path which we have charted accords with a uniform respect for human values in the constitutional culture of the jurisdictions which we have analysed. These values are universal and of enduring character.

L. Criticisms of the privacy doctrine

135. The Attorney General for India, leading the arguments before this Court on behalf of Union of India, has been critical of the recognition being given to a general right of privacy. The submission has several facets, among them being:

(i) there is no general or fundamental right to privacy under the Constitution;

(ii) no blanket right to privacy can be read as part of the fundamental rights and where some of the constituent facets of privacy are already covered by the enumerated guarantees in Part III, those facets will be protected in any case;

(iii) where specific species of privacy are governed by the protection of liberty in Part III of the Constitution, they are subject to reasonable restrictions in the public interest as recognized in several decisions of this Court;

(iv) privacy is a concept which does not have any specific meaning or definition and the expression is inchoate; and

(v) the draftsmen of the Constitution specifically did not include such a right as part of the chapter on fundamental rights and even the ambit of the expression liberty which was originally sought to be used in the draft Constitution was pruned to personal liberty. These submissions have been buttressed by Mr. Aryama Sundaram, learned senior Counsel.

136. Criticism and critique lie at the core of democratic governance. Tolerance of dissent is equally a cherished value. In deciding a case of such significant dimensions, the Court must factor in the criticisms voiced both domestically and internationally. These, as we notice, are based on academic, philosophical and practical considerations.

137. The **Stanford Encyclopaedia of Philosophy** adverts to "several sceptical and critical accounts of privacy". The criticism is set out thus:

There are several sceptical and critical accounts of privacy. According to one well known argument there is no right to privacy and there is nothing special about privacy, because any interest protected as private can be equally well explained and protected by other interests or rights, most notably rights to property and bodily security (Thomson, 1975). Other critiques argue that privacy interests are not distinctive because the personal interests they protect are economically inefficient (Posner, 1981) or that they are not grounded in any adequate legal doctrine (Bork, 1990). Finally, there is the feminist critique of privacy, that granting special status to privacy is detrimental to women and Ors. because it is used as a shield to dominate and control them, silence them, and cover up abuse (MacKinnon, 1989).[180]

138. In a 2013 Article published in the Harvard Law Review, a professor of law at Georgetown Law Center, Georgetown University, described privacy as having an "image problem"[181]. Privacy, as she notes, has been cast as "old-fashioned at best and downright harmful at worst-anti-progressive, overly costly, and inimical to the welfare of the body politic"[182]. The consequences in her view are predictable:

...when privacy and its purportedly outdated values must be balanced against the cutting-edge imperatives of national security, efficiency, and entrepreneurship, privacy comes up the loser. The list of privacy counterweights is long and growing. The recent additions of social media, mobile platforms, cloud computing, data mining, and predictive analytics now threaten to tip the scales entirely, placing privacy in permanent opposition to the progress of knowledge.[183]

The Article proceeds to explain that the perception of privacy as antiquated and socially retrograde is wrong. Nonetheless, this criticism has relevance to India. The nation aspires to move to a knowledge based economy. Information is the basis of knowledge. The scales must, according to this critique, tip in favour of the paramount national need for knowledge, innovation and development. These concerns cannot be discarded and must be factored in. They are based on the need to provide economic growth and social welfare to large swathes of an impoverished society.

139. Another criticism, which is by **Robert Bork**, questions the choice of fundamental values of the Constitution by judges of the US Supreme Court and the theory (propounded by Justice Douglas in Griswold) of the existence of 'penumbras' or zones of privacy created by the Bill of Rights as a leap of judicial interpretation.[184]

140. The **Stanford Encyclopaedia of Philosophy** seeks to offer an understanding of the literature on privacy in terms of two concepts: reductionism and coherentism.[185] Reductionists are generally critical of privacy while the Coherentists defend fundamental values of privacy interests. The criticisms of privacy have been broadly summarised as consisting of the following:

a. Thomson's Reductionism[186]

Judith Jarvis Thomson, in an Article published in 1975, noted that while there is little agreement on the content of privacy, ultimately privacy is a cluster of rights which overlap with property rights or the right to bodily security. In her view, the right to privacy is derivative in the sense that a privacy violation is better understood as violation of a more basic right.

b. Posner's Economic critique[187]

Richard Posner, in **'the Economics of Justice'** published in 1981, argued that privacy is protected in ways that are economically inefficient. In his view, privacy should be protected only when access to information would reduce its value such as when a student is allowed access to a letter of recommendation for admission, rendering such a letter less reliable. According to Posner, privacy when manifested as control over information about oneself, is utilised to mislead or manipulate others.

c. Bork's critique

Robert Bork, in **'The Tempting of America: The Political Seduction of the Law'**[188], has been severe in his criticism of the protection of privacy by the US Supreme Court. In his view, Justice Douglas in **Griswold** did not derive privacy from some pre-existing right but sought to create a new right which has no foundation in the Bill of Rights, thereby overstepping the bounds of a judge by making new law and not by interpreting it.

Many theorists urge that the constitutional right to privacy is more correctly regarded as a right to liberty.

The powerful counter argument to these criticisms is that while individuals possess multiple liberties under the Constitution, read in isolation, many of them are not related to the kinds of concerns that emerge in privacy issues. In this view, liberty is a concept which is broader than privacy and issues or claims relating to privacy are a sub-set of claims to liberty.[189] Hence it has been argued that privacy protects liberty and that "privacy protection gains for us the freedom to define ourselves and our relations to others"[190]. This rationale understands the relationship between liberty and privacy by stipulating that while liberty is a broader notion, privacy is essential for protecting liberty. Recognizing a constitutional right to privacy is a reaffirmation of the individual interest in making certain decisions crucial to one's personality and being.

d. Feminist critique

Many writers on feminism express concern over the use of privacy as a veneer for patriarchal domination and abuse of women. Patriarchal notions still prevail in several societies including our own and are used as a shield to violate core constitutional rights of women based on gender and autonomy. As a result, gender violence is often treated as a matter of "family honour" resulting in the victim of violence suffering twice over-the physical and mental trauma of her dignity being violated and the perception that it has cause an affront to "honour". Privacy must not be utilised as a cover to conceal and assert patriarchal mindsets.

Catherine MacKinnon in a 1989 publication titled **'Towards a Feminist Theory of the State'**[191] adverts to the dangers of privacy when it is used to cover up physical harm done to women by perpetrating their subjection. Yet, it must also be noticed that women have an inviolable interest in privacy. Privacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state imposed sterilization programmes or mandatory state imposed drug testing for women.

The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty.

141. The submission that privacy has no accepted or defined connotation can be analysed with reference to the evolution of the concept in the literature on the subject. Some of the leading approaches which should be considered for an insight into the ambit and content of privacy:

(i) **Alan Westin**[192] defined four basic states of privacy which reflect on the nature and extent of the involvement of the individual in the public sphere. At the core is solitude-the most complete state of privacy involving the individual in an "inner dialogue with the mind and conscience".[193] The second state is the state of intimacy which refers not merely to intimate relations between spouses or partners but also between family, friends and colleagues. The third state is of anonymity where an individual seeks freedom from identification despite being in a public space. The fourth state is described as a state of reservation which is expressed as "the need to hold some aspects of ourselves back from others, either as too personal and sacred or as too shameful and profane to express"[194].

(ii) **Roger Clarke** has developed a classification of privacy on **Maslow's pyramid of values**[195]. The values described in Maslow's pyramid are: self-actualization, self-esteem, love or belonging, safety and physiological or biological need. Clarke's categories include (a) privacy of the person also known as bodily privacy. Bodily privacy is violated by compulsory extraction of samples of body fluids and body tissue and compulsory sterilization; (b) privacy of personal behaviour which is part of a private space including the home; (c) Privacy of personal communications which is expressed as the freedom of communication without interception or routine monitoring of one's communication by others; (d) Privacy of personal data which is linked to the concept of informational privacy.

(iii) **Anita Allen** has, in a 2011 publication, developed the concept of "unpopular privacy"[196]. According to her, governments must design "unpopular" privacy laws and duties to protect the common good, even if privacy is being forced on individuals who may not want it. Individuals under this approach are not permitted to waive their privacy rights. Among the component elements which she notices are: (a) physical or spatial privacy-illustrated by the privacy in the home; (b) informational privacy including information data or facts about persons or their communications; (c) decisional privacy which protects the right of citizens to make intimate choices about their rights from intrusion by the State; (d) proprietary privacy which relates to the protection of one's reputation; (e) associational privacy which protects the right of groups with certain defined characteristics to determine whom they may include or exclude.[197]

Privacy has distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control.[198]

Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person.
With regard to informational privacy, it has been stated that:

...perhaps the most convincing conception is proposed by Helen Nissenbaum who argues that privacy is the expectation that information about a person will be treated appropriately. This theory of "contextual integrity" believes people do not want to control their information or become inaccessible as much as they want their information to be treated in accordance with their expectation (Nissenbaum 2004, 2010, 2011).[199]

Integrated together, the fundamental notions of privacy have been depicted in a seminal Article published in 2017 titled "**A Typology of privacy**"[200] in the University of Pennsylvania Journal of International Law. The Article contains an excellent visual depiction of privacy, which is presented in the following format:

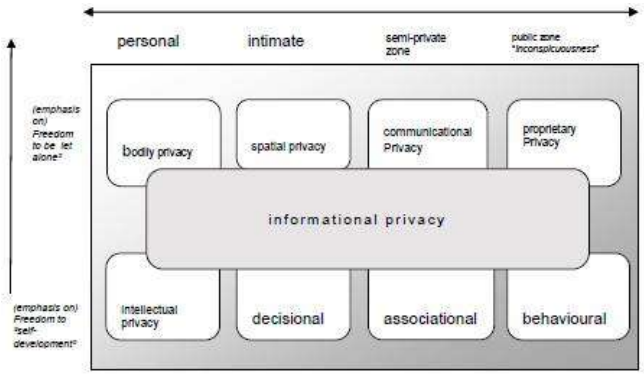

142. The above diagrammatical representation presents two primary axes: a horizontal axis consisting of four zones of privacy and a vertical axis which emphasises two aspects of freedom:

the freedom to be let alone and the freedom for self-development. The nine primary types of privacy are, according to the above depiction: (i) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to prevent others from violating one's body or from restraining the freedom of bodily movement; (ii) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy; (iii) communicational privacy which is reflected in enabling an individual to restrict access to communications or control the use of information which is communicated to third parties; (iv) proprietary privacy which is reflected by the interest of a person in utilising property as a means to shield facts, things or information from others; (v) intellectual privacy which is reflected as an individual interest in the privacy of thought and mind and the development of opinions and beliefs; (vi) decisional privacy reflected by an ability to make intimate decisions primarily consisting one's sexual or procreative nature and decisions in respect of intimate relations; (vii) associational privacy which is reflected in the ability of the individual to choose who she wishes to interact with; (viii) behavioural privacy which recognises the privacy interests of a person even while conducting publicly visible activities. Behavioural privacy postulates that even when access is granted to others, the individual is entitled to control the extent of access and preserve to herself a measure of freedom from unwanted intrusion; and (ix) informational privacy which reflects an interest in preventing information about the self from being disseminated and controlling the extent of access to information.

M. **Constituent Assembly and privacy: limits of originalist interpretation**

143. The founding fathers of the Constitution, it has been urged, rejected the notion of privacy being a fundamental right. Hence it has been submitted that it would be outside the realm of constitutional adjudication for the Court to declare a fundamental right to privacy. The argument merits close consideration.

144. On 17 March 1947, K.M. Munshi submitted Draft articles on the fundamental rights and duties of citizens to the Sub-committee on fundamental rights. Among the rights of freedom proposed in Clause 5 were the following[201]:

...(f) the right to the inviolability of his home,

(g) the right to the secrecy of his correspondence,

(h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to law or public authority...

145. On 24 March 1947, Dr. Ambedkar submitted a Memorandum and Draft articles on the rights of states and minorities. Among the draft articles on fundamental rights of citizens was the following[202]:

...10. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon

probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized...

146. The draft report of the Sub-committee submitted on 3 April 1947 contained a division between the fundamental rights into justiciable and non-justiciable rights. Clause 9(d) and Clause 10 provided as follows[203]:

9(d) The right of every citizen to the secrecy of his correspondence. Provision may be made by law to regulate the interception or detention of articles and messages in course of transmission by post, telegraph or otherwise on the occurrence of any public emergency or in the interests of public safety or tranquillity...

10. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

147. Dr. B.N. Rau in his notes on the draft report had reservations about Clause 10 which were expressed thus[204]:

Clause 10. If this means that there is to be no search without a court's warrant, it may seriously affect the powers of investigation of the police. Under the existing law, e.g., Code of Criminal Procedure, Section 165 (relevant extracts given below), the police have certain important powers. Often in the course of investigation, a police officer gets information that stolen property has been secreted in a certain place. If he searches it at once, as he can at present, there is a chance of his recovering it; but he has to apply for a court's warrant, giving full details, the delay involved, under Indian conditions of distance and lack of transport in the interior may be fatal.

A note was submitted by Sir Alladi Krishnaswamy Iyer on 10 April 1947 objecting to the 'secrecy of correspondence' mentioned in Clause 9(d) and the protection against unreasonable searches in Clause 10[205]:

Clause (d). In regard to secrecy of correspondence I raised a point during the discussions that it need not find a place in chapter on fundamental rights and it had better be left to the protection afforded by the ordinary law of the land contained in the various enactments. There is no such right in the American Constitution. Such a provision finds a place only in the post-First World War constitutions. The effect of the clauses upon the Sections of the Indian Evidence Act bearing upon privilege will have to be considered. Restrictions-vide chapter 9, Section 120-127. The result of this Clause will be that every private correspondence will assume the rank of a State paper, or, in the language of Section 123 and 124, a record relating to the affairs of State.

A Clause like this might checkmate the prosecution in establishing any case of conspiracy or abetment, the Plaintiff being helpless to prove the same by placing before the court the correspondence that passed between the parties which in all these cases would furnish the most material evidence. The opening words of the Clause "public order and morality" would not be of any avail in such cases. On a very careful consideration of the whole subject I feel that inclusion

of such a Clause in the chapter on fundamental rights will lead to endless complications and difficulties in the administration of justice. It will be for the committee to consider whether a reconsideration of the Clause is called for in the above circumstances.

Clause 10. Unreasonable searches, In regard to this subject I pointed out the difference between the conditions obtaining in America at the time when the American Constitution was drafted and the conditions in India obtaining at present after the provisions of the Code of Criminal Procedure in this behalf have been in force for nearly a century. The effect of the clause, as it is, will be to abrogate some of the provisions of the Code of Criminal Procedure and to leave it to the Supreme Court in particular cases to decide whether the search is reasonable or unreasonable. While I am averse to reagitating the matter I think it may not be too late for the committee to consider this particular clause.

During the course of the comments and suggestions on the draft Constitution, Jaya Prakash Narayan suggested the inclusion of the secrecy of postal, telegraphic and telephonic communications. Such an inclusion was, however, objected to on the following grounds[206]:

...It is also hardly necessary to include secrecy of postal, telegraphic and telephonic communications as a fundamental right in the Constitution itself as that might lead to practical difficulties in the administration of the posts and telegraph department. The relevant laws enacted by the Legislature on the subject (the Indian Post Office Act, 1898 and the Indian Telegraph Act, 1885) permit interception of communications sent through post, telegraph or telephone only in specified circumstances, such as, on the occurrence of an emergency and in the interests of public safety.

Eventually, Clause 9(d) and Clause 10 were dropped from the chapter dealing with fundamental rights.

148. This discussion would indicate that there was a debate during the course of the drafting of the Constitution on the proposal to guarantee to every citizen the right to secrecy of correspondence in Clause 9(d) and the protection to be secure against unreasonable searches and seizures in their persons houses, papers and assets. The objection to Clause 9(d) was set out in the note of dissent of Sir Alladi Krishnaswamy Iyer and it was his view that the guarantee of secrecy of correspondence may lead to every private correspondence becoming a state paper. There was also a feeling that this would affect the prosecution especially in cases of conspiracy or abetment. Similarly, his objection to Clause 10 was that it would abrogate some of the provisions of the Code of Criminal Procedure. B.N. Rau likewise stated that this would seriously affect the powers of investigation of the police. The Clause protecting the secrecy of correspondence was thus dropped on the ground that it would constitute a serious impediment in prosecutions while the protection against unreasonable searches and seizures was deleted on the ground that there were provisions in the Code of Criminal Procedure, 1898 covering the area. The debates of the Constituent Assembly indicate that the proposed inclusion (which was eventually dropped) was in two specific areas namely correspondence and searches and seizures. From this, it cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral element of the liberty and freedoms guaranteed by the fundamental rights.

149. The Constitution has evolved over time, as judicial interpretation, led to the recognition of specific interests and entitlements. These have been subsumed within the freedoms and liberties guaranteed by the Constitution. Article 21 has been interpreted by this Court to mean that life does not mean merely a physical existence. It includes all those faculties by which life is enjoyed. The ambit of 'the procedure established by law' has been interpreted to mean that the procedure must be fair, just and reasonable. The coalescence of Articles 14, 19 and 21 has brought into being a jurisprudence which recognises the inter-relationship between rights. That is how the requirements of fairness and non-discrimination animate both the substantive and procedural aspects of Article 21. These constitutional developments have taken place as the words of the Constitution have been interpreted to deal with new exigencies requiring an expansive reading of liberties and freedoms to preserve human rights under the Rule of law. India's brush with a regime of the suspension of life and personal liberty in the not too distant past is a grim reminder of how tenuous liberty can be, if the judiciary is not vigilant. The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. Nor can judges foresee every challenge and contingency which may arise in the future. This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationships that was unknown even in the recent past. Hence as Judges interpreting the Constitution today, the Court must leave open the path for succeeding generations to meet the challenges to privacy that may be unknown today.

150. The impact of the decision in **Cooper** is to establish a link between the fundamental rights guaranteed by Part III of the Constitution. The immediate consequence of the decision is that a law which restricts the personal liberties contained in Article 19 must meet the test of permissible restrictions contemplated by Clauses 2 to 6 in relation to the fundamental freedom which is infringed. Moreover, since the fundamental rights are inter-related, Article 21 is no longer to be construed as a residue of rights which are not specifically enumerated in Article 19. Both sets of rights overlap and hence a law which affects one of the personal freedoms Under Article 19 would, in addition to the requirement of meeting the permissible restrictions contemplated in clauses 2 to 6, have to meet the parameters of a valid 'procedure established by law' Under Article 21 where it impacts on life or personal liberty. The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights. Coupled with the breakdown of the theory that the fundamental rights are water-tight compartments, the post **Maneka** jurisprudence infused the test of fairness and reasonableness in determining whether the 'procedure established by law' passes muster Under Article 21. At a substantive level, the constitutional values underlying each Article in the Chapter on fundamental rights animate the meaning of the others. This development of the law has followed a natural evolution. The basis of this development after all is that every aspect of the diverse guarantees of fundamental rights deals with human beings. Every element together with others contributes in the composition of the human personality. In the very nature of things, no element can be read in a manner disjunctive from the composite whole. The close relationship between each of the fundamental rights has led to the recognition of constitutional entitlements and interests. Some of them may straddle more than one, and on occasion several, fundamental rights. Yet others may reflect the core value upon which the fundamental rights are founded. Even at the birth of the Constitution, the founding fathers recognised in the Constituent Assembly that, for instance, the freedom of speech and expression would comprehend the freedom of the press. Hence the guarantee of free speech and expression

has been interpreted to extend to the freedom of the press. Recognition of the freedom of the press does not create by judicial fiat, a new fundamental right but is an acknowledgment of that, which lies embedded and without which the guarantee of free speech and expression would not be complete. Similarly, Article 21 has been interpreted to include a spectrum of entitlements such as a right to a clean environment, the right to public health, the right to know, the right to means of communication and the right to education, besides a panoply of rights in the context of criminal law and procedure in matters such as handcuffing and speedy trial. The rights which have been held to flow out of Article 21 include the following:

(i) The right to go abroad-**Satwant Singh Sawhney** v. **D. Ramarathnam APO New Delhi** MANU/SC/0040/1967 : (1967) 3 SCR 525.

(ii) The right against solitary confinement-**Sunil Batra** v. **Delhi Administration** MANU/SC/0184/1978 : (1978) 4 SCC 494.

(iii) The right of prisoners against bar **fetters-Charles Sobraj** v. **Supdt. Central Jail** MANU/SC/0070/1978 : (1978) 4 SCC 104.

(iv) The right to legal aid-**M.H. Hoskot** v. **State of Maharashtra** MANU/SC/0119/1978 : (1978) 3 SCC 544.

(v) The right to speedy trial-**Hussainara Khatoon** v. **Home Secretary, State of Bihar** MANU/SC/0119/1979 : (1980) 1 SCC 81.

(vi) The right against handcuffing-**Prem Shankar Shukla** v. **Delhi Administration** MANU/SC/0084/1980 : (1980) 3 SCC 526.

(vii) The right against custodial violence-**Sheela Barse** v. **State of Maharashtra** MANU/SC/0382/1983 : (1983) 2 SCC 96.

(viii) The right against public hanging-**A.G. of India** v. **Lachma Devi** (1989) Suppl.(1) SCC 264.

(ix) Right to doctor's assistance at government hospitals-**Paramanand Katara** v. **Union of India** MANU/SC/0423/1989 : (1989) 4 SCC 286.

(x) Right to shelter-**Shantistar Builders** v. **N.K. Totame** MANU/SC/0115/1990 : (1990) 1 SCC 520.

(xi) Right to a healthy environment-**Virender Gaur** v. **State of Haryana** MANU/SC/0629/1995 : (1995) 2 SCC 577.

(xii) Right to compensation for unlawful arrest-**Rudal Sah** v. **State of Bihar** MANU/SC/0380/1983 : (1983) 4 SCC 141.

(xiii) Right to freedom from torture-Sunil Batra v. Delhi Administration MANU/SC/0184/1978 : (1978) 4 SCC 494.

(xiv) Right to reputation-Umesh Kumar v. State of Andhra Pradesh MANU/SC/0904/2013 : (2013) 10 SCC 591.

(xv) Right to earn a livelihood-Olga Tellis v. Bombay Municipal Corporation MANU/SC/0039/1985 : (1985) 3 SCC 545.

Neither is this an exercise in constitutional amendment brought about by judicial decision nor does it result in the creation of a new set of fundamental rights. The exercise has been one of interpreting existing rights guaranteed by the Constitution and while understanding the core of those rights, to define the ambit of what the right comprehends.

151. The draftsmen of the Constitution had a sense of history-both global and domestic-as they attempted to translate their vision of freedom into guarantees against authoritarian behaviour. The Constitution adopted a democratic form of government based on the Rule of law. The framers were conscious of the widespread abuse of human rights by authoritarian regimes in the two World Wars separated over a period of two decades. The framers were equally conscious of the injustice suffered under a colonial regime and more recently of the horrors of partition. The backdrop of human suffering furnished a reason to preserve a regime of governance based on the Rule of law which would be subject to democratic accountability against a violation of fundamental freedoms. The content of the fundamental rights evolved over the course of our constitutional history and any discussion of the issues of privacy, together with its relationship with liberty and dignity, would be incomplete without a brief reference to the course of history as it unravels in precedent. By guaranteeing the freedoms and liberties embodied in the fundamental rights, the Constitution has preserved natural rights and ring-fenced them from attempts to attenuate their existence.

Technology, as we experience it today is far different from what it was in the lives of the generation which drafted the Constitution. Information technology together with the internet and the social media and all their attendant applications have rapidly altered the course of life in the last decade. Today's technology renders models of application of a few years ago obsolescent. Hence, it would be an injustice both to the draftsmen of the Constitution as well as to the document which they sanctified to constrict its interpretation to an originalist interpretation. Today's problems have to be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society. We describe the Constitution as a living instrument simply for the reason that while it is a document which enunciates eternal values for Indian society, it possesses the resilience necessary to ensure its continued relevance. Its continued relevance lies precisely in its ability to allow succeeding generations to apply the principles on which it has been founded to find innovative solutions to intractable problems of their times. In doing so, we must equally understand that our solutions must continuously undergo a process of re-engineering.

N. Is the statutory protection to privacy reason to deny a constitutional right?

152. The Union government and some of the States which have supported it have urged this Court that there is a statutory regime by virtue of which the right to privacy is adequately protected and hence it is not necessary to read a constitutional right to privacy into the fundamental rights. This submission is sought to be fortified by contending that privacy is merely a common law right and the statutory protection is a reflection of that position.

153. The submission betrays lack of understanding of the reason why rights are protected in the first place as entrenched guarantees in a Bill of Rights or, as in the case of the Indian Constitution, as part of the fundamental rights. Elevating a right to the position of a constitutionally protected right places it beyond the pale of legislative majorities. When a constitutional right such as the right to equality or the right to life assumes the character of being a part of the basic structure of the Constitution, it assumes inviolable status: inviolability even in the face of the power of amendment. Ordinary legislation is not beyond the pale of legislative modification. A statutory right can be modified, curtailed or annulled by a simple enactment of the legislature. In other words, statutory rights are subject to the compulsion of legislative majorities. The purpose of infusing a right with a constitutional element is precisely to provide it a sense of immunity from popular opinion and, as its reflection, from legislative annulment. Constitutionally protected rights embody the liberal belief that personal liberties of the individual are so sacrosanct that it is necessary to ensconce them in a protective shell that places them beyond the pale of ordinary legislation. To negate a constitutional right on the ground that there is an available statutory protection is to invert constitutional theory. As a matter of fact, legislative protection is in many cases, an acknowledgment and recognition of a constitutional right which needs to be effectuated and enforced through protective laws.

For instance, the provisions of Section 8(1)(j) of the Right to Information Act, 2005 which contain an exemption from the disclosure of information refer to such information which would cause an unwarranted invasion of the privacy of the individual.

But the important point to note is that when a right is conferred with an entrenched constitutional status in Part III, it provides a touchstone on which the validity of executive decision making can be assessed and the validity of law can be determined by judicial review. Entrenched constitutional rights provide the basis of evaluating the validity of law. Hence, it would be plainly unacceptable to urge that the existence of law negates the rationale for a constitutional right or renders the constitutional right unnecessary.

O. Not an elitist construct

154. The Attorney General argued before us that the right to privacy must be forsaken in the interest of welfare entitlements provided by the State. In our view, the submission that the right to privacy is an elitist construct which stands apart from the needs and aspirations of the large majority constituting the rest of society, is unsustainable. This submission betrays a misunderstanding of the constitutional position.

Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Part III and embodying an aspiration for achieving socio-economic rights in Part IV.
The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilised though history to wreak the most egregious violations of human rights. Above all, it must be realised that it is the right to question, the right to scrutinize and the right to dissent which enables an informed citizenry to scrutinize the actions of government. Those who are governed are entitled to question those who govern, about the discharge of their constitutional duties including in the provision of socio-economic welfare benefits. The power to scrutinize and

to reason enables the citizens of a democratic polity to make informed decisions on basic issues which govern their rights.
The theory that civil and political rights are subservient to socio-economic rights has been urged in the past and has been categorically rejected in the course of constitutional adjudication by this Court.

155. Civil and political rights and socio-economic rights do not exist in a state of antagonism. The conditions necessary for realising or fulfilling socio-economic rights do not postulate the subversion of political freedom. The reason for this is simple. Socio-economic entitlements must yield true benefits to those for whom they are intended. This can be achieved by eliminating rent-seeking behaviour and by preventing the capture of social welfare benefits by persons who are not entitled to them. Capture of social welfare benefits can be obviated only when political systems are transparent and when there is a free flow of information. Opacity enures to the benefit of those who monopolize scarce economic resources. On the other hand, conditions where civil and political freedoms flourish ensure that governmental policies are subjected to critique and assessment. It is this scrutiny which sub-serves the purpose of ensuring that socio-economic benefits actually permeate to the under-privileged for whom they are meant.

Conditions of freedom and a vibrant assertion of civil and political rights promote a constant review of the justness of socio-economic programmes and of their effectiveness in addressing deprivation and want. Scrutiny of public affairs is founded upon the existence of freedom. Hence civil and political rights and socio-economic rights are complementary and not mutually exclusive.

156. Some of these themes have been addressed in the writings of the Nobel laureate, Amartya Sen. Sen compares the response of many non-democratic regimes in critical situations such as famine with the responses of democratic societies in similar situations.[207] His analysis reveals that the political immunity enjoyed by government leaders in authoritarian states prevents effective measures being taken to address such conditions:

For example, Botswana had a fall in food production of 17 percent and Zimbabwe one of 38 percent between 1979-1981 and 1983-1984, in the same period in which the food production decline amounted to a relatively modest 11 or 12 percent in Sudan and Ethiopia. But while Sudan and Ethiopia, with comparatively smaller declines in food output, had massive famines, Botswana and Zimbabwe had none, and this was largely due to timely and extensive famine prevention policies by these latter countries.

Had the governments in Botswana and Zimbabwe failed to undertake timely action, they would have been under severe criticism and pressure from the opposition and would have gotten plenty of flak from newspapers. In contrast, the Ethiopian and Sudanese governments did not have to reckon with those prospects, and the political incentives provided by democratic institutions were thoroughly absent in those countries. Famines in Sudan and Ethiopia-and in many other countries in sub-Saharan Africa-were fed by the political immunity enjoyed by governmental leaders in authoritarian countries. This would seem to apply to the present situation in North Korea as well.[208]

In the Indian context, Sen points out that the Bengal famine of 1943 "was made viable not only by the lack of democracy in colonial India but also by severe restrictions on reporting and criticism

imposed on the Indian press, and the voluntary practice of 'silence' on the famine that the British-owned media chose to follow"[209]. Political liberties and democratic rights are hence regarded as 'constituent components' of development.[210] In contrast during the drought which took place in Maharashtra in 1973, food production failed drastically and the per capita food output was half of that in sub-Saharan Africa. Yet there was no famine in Maharashtra where five million people were employed in rapidly organized public projects while there were substantial famines in sub-Saharan Africa. This establishes what he terms as "the protective role of democracy". Sen has analysed the issue succinctly:

The causal connection between democracy and the non-occurrence of famines is not hard to seek. Famines kill millions of people in different countries in the world, but they don't kill the rulers. The kings and the presidents, the bureaucrats and the bosses, the military leaders and the commanders never are famine victims. And if there are no elections, no opposition parties, no scope for uncensored public criticism, then those in authority don't have to suffer the political consequences of their failure to prevent famines. Democracy, on the other hand, would spread the penalty of famines to the ruling groups and political leaders as well. This gives them the political incentive to try to prevent any threatening famine, and since famines are in fact easy to prevent (the economic argument clicks into the political one at this stage), the approaching famines are firmly prevented.[211]

There is, in other words, an intrinsic relationship between development and freedom:

...development cannot really be seen merely as the process of increasing inanimate objects of convenience, such as raising the GNP per head, or promoting industrialization or technological advance or social modernization. These accomplishments are, of course, valuable-often crucially important-but their value must depend on what they do to the lives and freedoms of the people involved. For adult human beings, with responsibility for choice, the focus must ultimately be on whether they have the freedom to do what they have reason to value. In this sense, development consists of expansion of people's freedom.[212]

In an Article recently published in July 2017 in **Public Law**, titled "The Untapped Potential of the Mandela Constitution"[213], Justice Edwin Cameron, a distinguished judge of the Constitutional Court of South Africa, has provided a telling example. President Mbeki of South Africa doubted the medical science underlying AIDS and effectively obstructed a feasible ARV programme. This posture of AIDS denialism plunged South Africa into a crisis of public health as a result of which the drug Nevirapine which was offered to the South African government free of charge was refused. Eventually it was when the South African Constitutional Court intervened in the **Treatment Action Campaign decision**[214] that it was held that the government had failed the reasonableness test. The Article notes that as a result of the decision, the drug became available and "hundreds and thousands, perhaps millions, of lives have been saved". Besides, the Article notes that the judgment changed the public discourse of AIDS and "cut-through the obfuscation of denials and in doing so, dealt it a fatal blow"[215].

Examples can be multiplied on how a state sanctioned curtain of misinformation or state mandated black-outs of information can cause a serious denial of socio-economic rights. The strength of Indian democracy lies in the foundation provided by the Constitution to liberty and freedom.

Liberty and freedom are values which are intrinsic to our constitutional order. But they also have an instrumental value in creating conditions in which socio-economic rights can be achieved. India has no iron curtain. Our society prospers in the shadow of its drapes which let in sunshine and reflect a multitude of hues based on language, religion, culture and ideologies.

157. We need also emphasise the lack of substance in the submission that privacy is a privilege for the few. Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects.

It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.

P. Not just a common law right

158. There is also no merit in the defence of the Union and the States that privacy is merely a common law right. The fact that a right may have been afforded protection at common law does not constitute a bar to the constitutional recognition of the right. The Constitution recognises the right simply because it is an incident of a fundamental freedom or liberty which the draftsperson considered to be so significant as to require constitutional protection. Once privacy is held to be an incident of the protection of life, personal liberty and of the liberties guaranteed by the provisions of Part III of the Constitution, the submission that privacy is only a right at common law misses the wood for the trees. The central theme is that privacy is an intrinsic part of life, personal liberty and of the freedoms guaranteed by Part III which entitles it to protection as a core of constitutional doctrine. The protection of privacy by the Constitution liberates it, as it were, from the uncertainties of statutory law which, as we have noted, is subject to the range of legislative annulments open to a majoritarian government. Any abridgment must meet the requirements prescribed by Article 21, Article 19 or the relevant freedom. The Constitutional right is placed at a pedestal which embodies both a negative and a positive freedom. The negative freedom protects the individual from unwanted intrusion. As a positive freedom, it obliges the State to adopt suitable measures for protecting individual privacy. An apt description of this facet is contained in the **Max Planck Encyclopaedia of Comparative Constitutional Law**, in its Section on the right to privacy[216]:

2. The right to privacy can be both negatively and positively defined. The negative right to privacy entails the individuals are protected from unwanted intrusion by both the state and private actors into their private life, especially features that define their personal identity such as sexuality, religion and political affiliation, i.e. the inner core of a person's private life....

The positive right to privacy entails an obligation of states to remove obstacles for an autonomous shaping of individual identities.

Q. Substantive Due Process

159. During the course of the hearing, Mr. Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the State of Gujarat submitted that the requirement of a valid law with reference to Article 21 is not conditioned by the notion of substantive due process. Substantive due process, it was urged is a concept which has been evolved in relation to the US Constitution but is inapposite in relation to the Indian Constitution.

The history surrounding the drafting of Article 21 indicates a conscious decision by the Constituent Assembly not to introduce the expression "due process of law" which is incorporated in the Fifth and Fourteenth Amendments of the US Constitution. The draft Constitution which was prepared by the Drafting Committee chaired by Dr. B.R. Ambedkar contained a 'due process' Clause to the effect that 'nor any State shall deprive any person of life, liberty and property without due process of law'. The Clause as originally drafted was subjected to three important changes in the Constituent Assembly. Firstly, the reference to property was deleted from the above Clause of the draft Constitution. The members of the Constituent Assembly perceived that retaining the right to property as part of the due process Clause would pose a serious impediment to legislative reform particularly with the redistribution of property. The second important change arose from a meeting which Shri B.N. Rau had with Justice Felix Frankfurter in the US. In the US particularly in the years around the Great Depression, American Courts had utilised the due process Clause to invalidate social welfare legislation. In the Lochner[217] era, the US Supreme Court invalidated legislation such as statutes prohibiting employers from making their employees work for more than ten hours a day or sixty hours a week on the supposition that this infringed the liberty of contract. Between 1899 and 1937 (excluding the civil rights cases), 159 US Supreme Court decisions held state statutes unconstitutional under the due process and equal protection clauses. Moreover, 25 other statutes were struck down under the due process Clause together with other provisions of the American Constitution.[218] Under the due process clause, the US Supreme Court struck down labour legislation prohibiting employers from discriminating on the grounds of union activity; Regulation of wages; Regulation of prices for commodities and services; and legislation denying entry into business.[219] These decisions were eventually distinguished or overruled in 1937 and thereafter.[220]

160. The Constituent Assembly, in this background, made a second important change in the original draft by qualifying the expression 'liberty' with the word 'personal'. Shri B.N. Rau suggested that if this qualification were not to be introduced, even price control legislation would be interpreted as interfering with the opportunity of contract between seller and buyer (see in this context **B Shiva Rao's '*The Framing of India's Constitution*: A Study'**[221]).

161. The third major change which the Constituent Assembly made was that the phrase 'due process of law' was deleted from the text of the draft Constitution. Following B.N. Rau's meeting with Justice Frankfurter, the Drafting Committee deleted the phrase 'due process of law' and replaced it with 'procedure established by law'. **Granville Austin** refers to the interaction between Frankfurter and B.N. Rau and the reason for the deletion[222]:

Soon after, Rau began his trip to the United States, Canada, Eire, and England to talk with justices, constitutionalists, and statesmen about the framing of the Constitution. In the United States he met

Supreme Court Justice Felix Frankfurter, who told him that he considered the power of judicial review implied in the due process Clause both undemocratic-because a few judges could veto legislation enacted by the representatives of a nation-and burdensome to the Judiciary. Frankfurter had been strongly influenced by the Harvard Law School's great constitutional lawyer, James Bradley Thayer, who also feared that too great a reliance on due process as a protection against legislative oversight or misbehaviour might weaken the democratic process. Thayer's views had impressed Rau even before he met Frankfurter. In his Constitutional Precedents, Rau had pointed out that Thayer and Ors. had 'drawn attention to the dangers of attempting to find in the Supreme Court-instead of in the lessons of experience-a safeguard against the mistakes of the representatives of people'.

Though several members of the Constituent Assembly spoke against the deletion, Sir Alladi Krishnaswamy Ayyar supported the move on the ground that the expression 'due process' would operate as a great handicap for all social legislation and introduce "judicial vagaries into the moulding of law"[223]. In his words[224]:

...In the development of the doctrine of 'due process' the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting...

The Minimum Wage Law or a Restraint on Employment have in some cases been regarded as an invasion of personal liberty and freedom, by the United States Supreme Court in its earlier decisions, the theory being that it is an essential part of personal liberty that every person in the world be she a woman, be he a child over fourteen years of age or be he a labourer, has the right to enter into any contract he or she liked and it is not the province of other people to interfere with that liberty. On that ground, in the earlier decisions of Supreme Court it has been held that the Minimum Wages Laws are invalid as invading personal liberty...

The Clause may serve as a great handicap for all social legislation, and for the protection of women...

I trust that the House will take into account the various aspects of this question, the future progress of India, the well-being and the security of the States, the necessity of maintaining a minimum of liberty, the need for co-ordinating social control and personal liberty, before coming to a decision. One thing also will have to be taken into account, viz., that the security of the State is far from being so secure as we are imagining at present...

On the other hand, several members of the Constituent Assembly preferred the retention of the phrase 'due process', among them being Dr. Sitaramayya, T.T. Krishnamachari, K Santhanam, M.A. Ayyangar, Dr. B.V. Keskar, S.L. Saksena, Thakur Das Bhargava, Hukam Singh and four members of the Muslim League.[225] K.M. Munshi stated that[226]:

...a substantive interpretation of due process could not apply to liberty of contract-the basis on which the United States Supreme Court had, at the beginning of the century, declared some social legislation to be an infringement of due process and hence unconstitutional-but only to liberty of person, because 'personal' had been added to qualify liberty. 'When a law has been passed which entitles the government to take away the personal liberty of an individual, Munshi said, 'the court

will consider whether the law which has been passed is such as is required by the exigencies of the case and therefore, as I said, the balance will be struck between individual liberty and social control. Other Assembly members agreed: whilst not wishing to impede the passage of social reform legislation they sought to protect the individual's personal liberty against prejudicial action by an arbitrary Executive.

Dr. B.R. Ambedkar in an insightful observation, presented the merits and demerits of the rival viewpoints dispassionately. In his words[227]:

There are two views on this point. One view is this; that the legislature may be trusted not to make any law which would abrogate the fundamental rights of man, so to say, the fundamental rights which apply to every individual, and consequently, there is no danger arising from the introduction of the phrase 'due process'. Another view is this: that it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away by passion, by party prejudice, by party considerations, and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen. We are therefore placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefor would not say anything. I would leave it to the House to decide in any way it likes.

The amendments proposed by some members to reintroduce 'due process' were rejected on 13 December 1948 and the phrase "due process of law" was deleted from the original draft Constitution. However, Article 22 was introduced into the Constitution to protect against arbitrary arrest and detention by incorporating several safeguards.

162. In **Gopalan**, the Preventive Detention Act, 1950 was challenged on the ground that it denied significant procedural safeguards against arbitrary detention. The majority rejected the argument that the expression 'procedure established by law' meant procedural due process. Chief Justice Kania noted that Article 21 of our Constitution had consciously been drawn up by the draftsmen so as to not use the word 'due process' which was used in the American Constitution. Hence it was impermissible to read the expression 'procedure established by law' to mean 'procedural due process' or as requiring compliance with natural justice. Justice Patanjali Sastri held that reading the expression 'due process of law' into the Constitution was impermissible since it would lead to those 'subtle and elusive criteria' implied in the phrase which it was the deliberate purpose of the framers of our Constitution to avoid. Similarly, Justice Das also observed that our Constitution makers had deliberately declined to adopt "the uncertain and shifting American doctrine of due process of law" which could not, therefore, be read into Article 21. Hence, the view of the majority

was that once the procedure was established by a validly enacted law, Article 21 would not be violated.

163. In his celebrated dissent, Justice Fazl Ali pointed out that the phrase 'procedure established by law' was borrowed from the Japanese Constitution (which was drafted under American influence at the end of the Second World War) and hence the expression means 'procedural due process'. In Justice Fazl Ali's view the deprivation of life and personal liberty Under Article 21, had to be preceded by (i) a notice; (ii) an opportunity of being heard; (iii) adjudication by an impartial tribunal; and (iv) an orderly course of procedure. Formulating these four principles, Justice Fazl Ali held thus:

...Article 21 purports to protect life and personal liberty, and it would be a precarious protection and a protection not worth having, if the elementary principle of law under discussion which, according to Halsbury is on a par with fundamental rights, is to be ignored and excluded. In the course of his arguments, the learned Counsel for the Petitioner repeatedly asked whether the Constitution would permit a law being enacted, abolishing the mode of trial permitted by the existing law and establishing the procedure of trial by battle or trial by ordeal which was in vogue in olden times in England. The question envisages something which is not likely to happen, but it does raise a legal problem which can perhaps be met only in this way that if the expression "procedure established by law" simply means any procedure established or enacted by statute it will be difficult to give a negative answer to the question, but if the word "law" includes what I have endeavoured to show it does, such an answer may be justified. It seems to me that there is nothing revolutionary in the doctrine that the words "procedure established by law" must include the four principles set out in Professor Willis' book, which, as I have already stated, are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles, as the learned author points out and as the authorities show, are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits. I have only to add that it has not been seriously controverted that "law" in this Article means valid law and "procedure" means certain definite Rules of proceeding and not something which is a mere pretence for procedure.[228]

In **Maneka**, where the passport of the Petitioner was impounded without furnishing reasons, a majority of judges found that the expression 'procedure established by law' did not mean any procedure howsoever arbitrary or fanciful. The procedure had to be fair, just and reasonable. The views of Justices Chandrachud, Bhagwati and Krishna Iyer emerge from the following brief extracts:

Chandrachud, J.:

...But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.[229]

Bhagwati, J.:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.[230]

Krishna Iyer, J.:

...So I am convinced that to frustrate Article 21 by relying on any formal adjectival statute, however, flimsy or fantastic its provisions be, is to rob what the constitution treasures.

...To sum up, "procedure" in Article 21 means fair, not formal procedure. "Law" is reasonable law, not any enacted piece.[231]

Soon after the decision in **Maneka**, the Supreme Court considered a challenge to the provisions for solitary confinement Under Section 30(2) of the Prisons Act, 1894 which stipulated that a prisoner "under sentence of death" is to be kept in a cell apart from other prisoners. In **Sunil Batra** v. **Delhi Administration** MANU/SC/0184/1978 : (1978) 4 SCC 494, the Court pointed out that Sections 73 and 74 of the Penal Code which contain a substantive punishment by way of solitary confinement was not under challenge. Section 30(2) of the Prisons Act was read down by holding that the expression "under sentence of death" would apply only after the entire process of remedies had been exhausted by the convict and the clemency petition had been denied. Justice D.A. Desai, speaking for the majority, held that:

...the word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in **Maneka Gandhi**'s case that the law must be right, just and fair and not arbitrary, fanciful or oppressive.[232]

Justice Krishna Iyer took note of the fact that our Constitution does not contain a due process Clause and opined that after the decision in Maneka, the absence of such a Clause would make no difference:

...true, our Constitution has no 'due process' Clause or the VIIIth Amendment; but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same.[233]

164. A substantive challenge to the constitutional validity of the death penalty on a conviction on a charge of murder was raised in **Bachan Singh**[234]. The judgment noted:

136. Article 21 reads as under:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

If this Article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi, it will read as follows:

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

In the converse positive form, the expanded Article will read as below:

A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.[235]

Bachan Singh clearly involved a substantive challenge to the constitutional validity of a statutory provision. The majority adjudicated upon the constitutional challenge Under Article 21 and held that it did not suffer from substantive or procedural invalidity.

In his dissent[236], Justice Bhagwati significantly observed that the word "procedure" Under Article 21 would cover the entire process by which deprivation is effected and that would include not only "the adjectival" but also substantive part of law. In the view of the Court:

The word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of law.[237]

In **Mithu** v. **State of Punjab** MANU/SC/0065/1983 : (1983) 2 SCC 277 (**"Mithu"**), a Constitution Bench considered the validity of Section 303 of the Penal Code which provided for a mandatory death penalty where a person commits murder while undergoing a sentence of life imprisonment. Section 303 excluded the procedural safeguards Under Section 235(2) and 354(3) of the Code of Criminal Procedure under which the Accused is required to be heard on the question of sentence and "special reasons" need to be adduced for imposing the death sentence. In the course of the judgment, Chandrachud C J indicated examples of situations where a substantive enactment could be challenged on the touchstone of Articles 14 and 21. The observations of the Court, which are extracted below would indicate that while the Court did not use the expression "substantive due process" it recognised that a law would be amenable to challenge Under Article 21 not only on the ground that the procedure which it prescribes is not fair, just and reasonable but on the touchstone of having imposed a penalty which is savage or, as the Court held, an anathema of civilised jurisprudence:

These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that it is for the legislature to provide the punishment and for the courts to impose it. Two instances, undoubtedly extreme, may be taken by way of illustration for the purpose of showing how the **courts are not bound, and are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence. A law providing that an Accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21**. A savage sentence is anathema to the civilized jurisprudence of Article 21. These are, of course, extreme illustrations and we need have no fear that our legislatures will ever pass such laws. But **these examples serve to illustrate that the last word on the question of justice and fairness does not rest with the legislature.** Just as reasonableness of restrictions under Clauses (2) to (6) of Article

19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable. The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21.[238]

(Emphasis supplied)

In **A.K. Roy** v. **Union of India** MANU/SC/0051/1981 : (1982) 1 SCC 271, dealing with the question of preventive detention, a Constitution Bench of this Court adverted to the conscious decision in the Constituent Assembly to delete the expression 'due process of law' from Article 21. The Court held that:

The fact that England and America do not resort to preventive detention in normal times was known to our Constituent Assembly and yet it chose to provide for it, sanctioning its use for specified purposes. The attitude of two other well-known democracies to preventive detention as a means of regulating the lives and liberties of the people was undoubtedly relevant to the framing of our Constitution. But the framers having decided to adopt and legitimise it, we cannot declare it unconstitutional by importing our notions of what is right and wrong. **The power to judge the fairness and justness of procedure established by a law for the purposes of Article 21 is one thing: that power can be spelt out from the language of that article. Procedural safeguards are the handmaids of equal justice and since, the power of the government is colossal as compared with the power of an individual, the freedom of the individual can be safe only if he has a guarantee that he will be treated fairly. The power to decide upon the justness of the law itself is quite another thing: that power springs from a 'due process' provision such as is to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty or property "without due process of law".**[239]

(Emphasis supplied)

In **Saroj Rani** v. **Sudarshan Kumar** MANU/SC/0183/1984 : (1984) 4 SCC 90, this Court upheld the constitutional validity of the provision for restitution of conjugal rights contained in Section 9 of the Hindu Marriage Act, 1955. The Court found that the provision served a social purpose of preventing the breakdown of marriages and contained safeguards against its being used arbitrarily.

In **Mohd. Arif** v. **Supreme Court** MANU/SC/0754/2014 : (2014) 9 SCC 737, a Constitution Bench of this Court held that the expression "reasonable procedure" in the context of Article 21 would encompass an oral hearing of review petitions arising out of death penalties. Tracing the history of the evolution of Article 21, Justice Rohinton Fali Nariman, speaking for the majority in the Constitution Bench, observed as follows:

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty.[240]

More recently, Justice Chelameswar, speaking for a Bench of two judges in **Rajbala** v. **State of Haryana** MANU/SC/1416/2015 : (2016) 2 SCC 445, has struck a note of caution, by drawing

attention to the position that the expression 'due process of law' was consciously deleted in the drafting process after the framing of the Constitution. Hence, in the view of the learned Judge, it would be inappropriate to incorporate notions of substantive due process adopted in the US while examining the constitutionality of Indian legislation. The Court observed:

From the above extract from McDowell & Co. case it is clear that **the courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is "arbitrary" since such an exercise implies a value judgment and courts do not examine the wisdom of some specific provision of the Constitution. To undertake such an examination would amount to virtually importing the doctrine of "substantive due process" employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation**. As pointed out in the above extract, even in United States the doctrine is currently of doubtful legitimacy. This Court long back in A.S. Krishna v. State of Madras [MANU/SC/0035/1956 : 1957 SCR 399] declared that the doctrine of due process has no application under the Indian Constitution. As pointed out by Frankfurter, J. arbitrariness became a mantra.[241]

(Emphasis supplied)

The constitutional history surrounding the drafting of Article 21 contains an abundant reflection of a deliberate and studied decision of the Constituent Assembly to delete the expression 'due process of law' from the draft Constitution when the Constitution was adopted. In the Constituent Assembly, the Drafting Committee chaired by Dr. B.R. Ambedkar had included the phrase but it came to be deleted after a careful evaluation of the vagaries of the decision making process in the US involving interpretation of the due process clause. Significantly, present to the mind of the framers of our Constitution was the invalidation of social welfare legislation in the US on the anvil of the due process Clause on the ground that it violated the liberty of contract of men, women and children to offer themselves for work in a free market for labour. This model evidently did not appeal to those who opposed the incorporation of a similar phrase into the Indian Constitution.

Yet the debates in the Constituent Assembly indicate that there was a substantial body of opposition to the deletion of the due process clause, which eventually led Dr. B.R. Ambedkar to objectively sum up the rival view points for decision by the House. Evidently 'due process' was substituted with the expression 'procedure established by law'. 'Liberty' was qualified by 'personal'.

Having noticed this,

the evolution of Article 21, since the decision in Cooper indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or water tight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression 'procedure established by law' in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable. The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with

reference to Article 21 but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable procedure under the law and a law which does so may yet be susceptible to challenge on the ground that its content does not accord with the requirements of a valid law. The law is open to substantive challenge on the ground that it violates the fundamental right.

In dealing with a substantive challenge to a law on the ground that it violates a fundamental right, there are settled principles of constitutional interpretation which hold the field. The first is the presumption of constitutionality[242] which is based on the foundational principle that the legislature which is entrusted with the duty of law making best understands the needs of society and would not readily be assumed to have transgressed a constitutional limitation. The burden lies on the individual who asserts a constitutional transgression to establish it. Secondly, the Courts tread warily in matters of social and economic policy where they singularly lack expertise to make evaluations. Policy making is entrusted to the state.[243]

The doctrine of separation of powers requires the Court to allow deference to the legislature whose duty it is to frame and enact law and to the executive whose duty it is to enforce law. The Court would not, in the exercise of judicial review, substitute its own opinion for the wisdom of the law enacting or law enforcing bodies. In the context of Article 19, the test of reasonableness was explained in the erudite words of Chief Justice Patanjali Sastri in **State of Madras** v. **V.G. Row** MANU/SC/0013/1952 : (1952) SCR 597, where the learned Chief Justice held thus:

It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. **The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.** In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit of their interference with legislative judgment in such cases can only be dictated by their **sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all**, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable.[244]

(Emphasis supplied)

165. The Court, in the exercise of its power of judicial review, is unquestionably vested with the constitutional power to adjudicate upon the validity of a law. When the validity of a law is questioned on the ground that it violates a guarantee contained in Article 21, the scope of the challenge is not confined only to whether the procedure for the deprivation of life or personal liberty is fair, just and reasonable. Substantive challenges to the validity of laws encroaching upon the right to life or personal liberty has been considered and dealt with in varying contexts, such as the death penalty (**Bachan Singh**) and mandatory death sentence (**Mithu**), among other cases. A

person cannot be deprived of life or personal liberty except in accordance with the procedure established by law.

Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The inter-relationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well.

166. Above all, it must be recognized that judicial review is a powerful guarantee against legislative encroachments on life and personal liberty. To cede this right would dilute the importance of the protection granted to life and personal liberty by the Constitution. Hence, while judicial review in constitutional challenges to the validity of legislation is exercised with a conscious regard for the presumption of constitutionality and for the separation of powers between the legislative, executive and judicial institutions, the constitutional power which is vested in the Court must be retained as a vibrant means of protecting the lives and freedoms of individuals.

167. The danger of construing this as an exercise of 'substantive due process' is that it results in the incorporation of a concept from the American Constitution which was consciously not accepted when the Constitution was framed. Moreover, even in the country of its origin, substantive due process has led to vagaries of judicial interpretation. Particularly having regard to the constitutional history surrounding the deletion of that phrase in our Constitution, it would be inappropriate to equate the jurisdiction of a Constitutional Court in India to entertain a substantive challenge to the validity of a law with the exercise of substantive due process under the US Constitution. Reference to substantive due process in some of the judgments is essentially a reference to a substantive challenge to the validity of a law on the ground that its substantive (as distinct from procedural) provisions violate the Constitution.

R. **Essential nature of privacy**

168. What, then, does privacy postulate?
Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy.
The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt.

Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself.

Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated.

Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

169.

Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty.

Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind.

The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action.

Privacy of the body entitles an individual to the integrity of the physical aspects of personhood.

The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.

When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity.

The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.

Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.

An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms Under

Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion Under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate Article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting.
Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. This state of flux which represents a constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desire to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning Regulations. If the building bye laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by Regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation.

S. **Informational privacy**

170. Ours is an age of information. Information is knowledge. The old adage that "knowledge is power" has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence. Technology has made life fundamentally interconnected. The internet has become all pervasive as individuals spend more and more time online each day of their lives.

Individuals connect with others and use the internet as a means of communication. The internet is used to carry on business and to buy goods and services. Individuals browse the web in search of information, to send e-mails, use instant messaging services and to download movies. Online purchases have become an efficient substitute for the daily visit to the neighbouring store. Online banking has redefined relationships between bankers and customers. Online trading has created a new platform for the market in securities. Online music has refashioned the radio. Online books have opened up a new universe for the bibliophile. The old-fashioned travel agent has been rendered redundant by web portals which provide everything from restaurants to rest houses, airline tickets to art galleries, museum tickets to music shows. These are but a few of the reasons people access the internet each day of their lives.

Yet every transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests[245]. Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that don't, of things to be disclosed and those best hidden.

171. Popular websites install cookie files by the user's browser. Cookies can tag browsers for unique identified numbers, which allow them to recognise rapid users and secure information about online behaviour. Information, especially the browsing history of a user is utilised to create user profiles. The use of algorithms allows the creation of profiles about internet users. Automated content analysis of e-mails allows for reading of user e-mails. An e-mail can be analysed to deduce user interests and to target suitable advertisements to a user on the site of the window. The books which an individual purchases on-line provide footprints for targeted advertising of the same genre. Whether an airline ticket has been purchased on economy or business class, provides vital information about employment profile or spending capacity. Taxi rides booked on-line to shopping malls provide a profile of customer preferences. A woman who purchases pregnancy related medicines on-line would be in line to receive advertisements for baby products. Lives are open to electronic scrutiny. To put it mildly, privacy concerns are seriously an issue in the age of information.

172. A Press Note released by the Telecom Regulatory Authority of India on 3 July, 2017[246] is indicative of the prevalence of telecom services in India as on 31 December, 2016. The total number of subscribers stood at 1151.78 million, reflecting a 11.13 percent change over the previous year. There were 683.14 million urban subscribers and 468.64 million rural subscribers. The total number of internet subscribers stood at 391.50 million reflecting an 18.04 per cent change over the previous quarter. 236.09 million were broadband subscribers. 370 million is the figure of wireless internet subscribers. The total internet subscribers per 100 population stood at 30.56; urban internet subscribers were 68.86 per 100 population; and rural internet subscribers being 13.08. The figures only increase.

173. The age of information has resulted in complex issues for informational privacy. These issues arise from the nature of information itself. Information has three facets: it is nonrivalrous, invisible and recombinant[247]. Information is nonrivalrous in the sense that there can be simultaneous users

of the good-use of a piece of information by one person does not make it less available to another. Secondly, invasions of data privacy are difficult to detect because they can be invisible. Information can be accessed, stored and disseminated without notice. Its ability to travel at the speed of light enhances the invisibility of access to data, "information collection can be the swiftest theft of all[248]. Thirdly, information is recombinant in the sense that data output can be used as an input to generate more data output.

174. Data Mining processes together with knowledge discovery can be combined to create facts about individuals. Metadata and the internet of things have the ability to redefine human existence in ways which are yet fully to be perceived. This, as **Christina Moniodis** states in her illuminating Article results in the creation of new knowledge about individuals; something which even she or he did not possess. This poses serious issues for the Court. In an age of rapidly evolving technology it is impossible for a judge to conceive of all the possible uses of information or its consequences:

...The creation of new knowledge complicates data privacy law as it involves information the individual did not possess and could not disclose, knowingly or otherwise. In addition, as our state becomes an "information state" through increasing reliance on information-such that information is described as the "lifeblood that sustains political, social, and business decisions. It becomes impossible to conceptualize all of the possible uses of information and resulting harms. Such a situation poses a challenge for courts who are effectively asked to anticipate and remedy invisible, evolving harms." [249]

The contemporary age has been aptly regarded as "an era of ubiquitous dataveillance, or the systematic monitoring of citizen's communications or actions through the use of information technology"[250]. It is also an age of "big data" or the collection of data sets. These data sets are capable of being searched; they have linkages with other data sets; and are marked by their exhaustive scope and the permanency of collection.[251] The challenges which big data poses to privacy interests emanate from State and non-State entities. Users of wearable devices and social media networks may not conceive of themselves as having volunteered data but their activities of use and engagement result in the generation of vast amounts of data about individual lifestyles, choices and preferences. **Yvonne McDermott** speaks about the quantified self in eloquent terms:

...The rise in the so-called 'quantified self', or the self-tracking of biological, environmental, physical, or behavioural information through tracking devices, Internet-of-things devices, social network data and other means (?Swan. 2013) may result in information being gathered not just about the individual user, but about people around them as well. Thus, a solely consent-based model does not entirely ensure the protection of one's data, especially when data collected for one purpose can be repurposed for another.[252]

175. **Daniel J Solove** deals with the problem of "aggregation". Businesses and governments often aggregate a variety of information fragments, including pieces of information which may not be viewed as private in isolation to create a detailed portrait of personalities and behaviour of individuals.[253] Yet, it is now a universally accepted fact that information and data flow are "increasingly central to social and economic ordering"[254]. Individuals are identified with reference to tax records, voting eligibility, and government-provided entitlements. There is what is now described as "'veillant panoptic assemblage', where data gathered through the ordinary citizen's

veillance practices finds its way to state surveillance mechanisms, through the corporations that hold that data
[255].

176. The balance between data Regulation and individual privacy raises complex issues requiring delicate balances to be drawn between the legitimate concerns of the State on one hand and individual interest in the protection of privacy on the other.

177. The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one's identity. Data protection relates closely with the latter sphere. Data such as medical information would be a category to which a reasonable expectation of privacy attaches. There may be other data which falls outside the reasonable expectation paradigm.

Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality of consent. Related to the issue of consent is the requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use.

178. Another aspect which data protection regimes seek to safeguard is the principle of non-discrimination which ensures that the collection of data should be carried out in a manner which does not discriminate on the basis of racial or ethnic origin, political or religious beliefs, genetic or health status or sexual orientation.

179. Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State. One of the chief concerns which the formulation of a data protection regime has to take into account is that while the web is a source of lawful activity-both personal and commercial, concerns of national security intervene since the seamless structure of the web can be exploited by terrorists to wreak havoc and destruction on civilised societies. Cyber attacks can threaten financial systems. Richard A Posner, in an illuminating article, has observed:

Privacy is the terrorist's best friend, and the terrorist's privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents:
the internet, with its anonymity, and the secure encryption of digitized data which, when combined with that anonymity, make the internet a powerful tool of conspiracy. The government has a compelling need to exploit digitization in defense of national security...[256]

Posner notes that while "people value their informational privacy", yet "they surrender it at the drop of a hat" by readily sharing personal data in the course of simple daily transactions. The paradox, he observes, can be resolved by noting that as long as people do not expect that the details of their health, intimacies and finances among others will be used to harm them in interaction with other people, they are content to reveal those details when they derive benefits from the

revelation.[257] As long as intelligence personnel can be trusted to use the knowledge gained only for the defence of the nation, "the public will be compensated for the costs of diminished privacy in increased security from terrorist attacks[258]. Posner's formulation would indicate that the State does have a legitimate interest when it monitors the web to secure the nation against cyber attacks and the activities of terrorists.

180. While it intervenes to protect legitimate state interests, the state must nevertheless put into place a robust regime that ensures the fulfilment of a three-fold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21.

The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second,
the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness.
Legitimacy, as a postulate, involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the three-fold requirement for a valid law arises out of the mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

181. Apart from national security, the state may have justifiable reasons for the collection and storage of data. In a social welfare state, the government embarks upon programmes which provide benefits to impoverished and marginalised Sections of society. There is a vital state interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients.

Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the state to insist on the collection of authentic data.
But, the data which the state has collected has to be utilised for legitimate purposes of the state and ought not to be utilised unauthorizedly for extraneous purposes. This will ensure that the legitimate concerns of the state are duly safeguarded while, at the same time, protecting privacy concerns.
Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the state. Digital platforms are a vital tool of ensuring good governance in a social welfare state.

Information technology-legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

182. A distinction has been made in contemporary literature between anonymity on one hand and privacy on the other.[259] Both anonymity and privacy prevent others from gaining access to pieces of personal information yet they do so in opposite ways. Privacy involves hiding information whereas anonymity involves hiding what makes it personal. An unauthorised parting of the medical records of an individual which have been furnished to a hospital will amount to an invasion of privacy. On the other hand, the state may assert a legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic such as malaria or dengue to obviate a serious impact on the population. If the State preserves the anonymity of the individual it could legitimately assert a valid state interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.

183. Privacy has been held to be an intrinsic element of the right to life and personal liberty Under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.

184. The Union government constituted a Group of Experts on privacy under the auspices of the erstwhile Planning Commission. The Expert Group in its Report[260] (dated 16 October 2012) proposed a framework for the protection of privacy concerns which, it was expected, would serve as a conceptual foundation for legislation protecting privacy. The framework suggested by the expert group was based on five salient features: (i) Technological neutrality and interoperability with international standards; (ii) Multi-Dimensional privacy; (iii) Horizontal applicability to state and non-state entities; (iv) Conformity with privacy principles; and (v) A co-regulatory enforcement regime. After reviewing international best practices, the Expert Group proposed nine privacy principles. They are:

(i) Notice: A data controller shall give simple-to-understand notice of its information practices to all individuals in clear and concise language, before personal information is collected;

(ii) Choice and Consent: A data controller shall give individuals choices (opt-in/opt-out) with regard to providing their personal information, and take individual consent only after providing notice of its information practices;

(iii) Collection Limitation: A data controller shall only collect personal information from data subjects as is necessary for the purposes identified for such collection, regarding which notice has been provided and consent of the individual taken. Such collection shall be through lawful and fair means;

(iv) Purpose Limitation: Personal data collected and processed by data controllers should be adequate and relevant to the purposes for which it is processed. A data controller shall collect,

process, disclose, make available, or otherwise use personal information only for the purposes as stated in the notice after taking consent of individuals. If there is a change of purpose, this must be notified to the individual. After personal information has been used in accordance with the identified purpose it should be destroyed as per the identified procedures. Data retention mandates by the government should be in compliance with the National Privacy Principles;

(v) Access and Correction: Individuals shall have access to personal information about them held by a data controller; shall be able to seek correction, amendments, or deletion of such information where it is inaccurate; be able to confirm that a data controller holds or is processing information about them; be able to obtain from the data controller a copy of the personal data. Access and correction to personal information may not be given by the data controller if it is not, despite best efforts, possible to do so without affecting the privacy rights of another person, unless that person has explicitly consented to disclosure;

(vi) Disclosure of Information: A data controller shall not disclose personal information to third parties, except after providing notice and seeking informed consent from the individual for such disclosure. Third parties are bound to adhere to relevant and applicable privacy principles. Disclosure for law enforcement purposes must be in accordance with the laws in force. Data controllers shall not publish or in any other way make public personal information, including personal sensitive information;

(vii) Security: A data controller shall secure personal information that they have either collected or have in their custody, by reasonable security safeguards against loss, unauthorised access, destruction, use, processing, storage, modification, deanonymization, unauthorized disclosure [either accidental or incidental] or other reasonably foreseeable risks;

(viii) Openness: A data controller shall take all necessary steps to implement practices, procedures, policies and systems in a manner proportional to the scale, scope, and sensitivity to the data they collect, in order to ensure compliance with the privacy principles, information regarding which shall be made in an intelligible form, using clear and plain language, available to all individuals; and

(ix) Accountability: The data controller shall be accountable for complying with measures which give effect to the privacy principles. Such measures should include mechanisms to implement privacy policies; including tools, training, and education; external and internal audits, and requiring organizations or overseeing bodies extend all necessary support to the Privacy Commissioner and comply with the specific and general orders of the Privacy Commissioner.

185. During the course of the hearing of these proceedings, the Union government has placed on the record an Office Memorandum dated 31 July 2017 by which it has constituted a committee chaired by Justice B.N. Srikrishna, former Judge of the Supreme Court of India to review *inter alia* data protection norms in the country and to make its recommendations. The terms of reference of the Committee are:

a) To study various issues relating to data protection in India;

b) To make specific suggestions for consideration of the Central Government on principles to be considered for data protection in India and suggest a draft data protection bill.

Since the government has initiated the process of reviewing the entire area of data protection, it would be appropriate to leave the matter for expert determination so that a robust regime for the protection of data is put into place. We expect that the Union government shall follow up on its decision by taking all necessary and proper steps.

T. Our Conclusions

186. The judgment in **M.P. Sharma** holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20 (3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. **M.P. Sharma** is overruled to the extent to which it indicates to the contrary.

187. **Kharak Singh** has correctly held that the content of the expression 'life' Under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. **Kharak Singh** also correctly laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'. The first part of the decision in **Kharak Singh** which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, **Kharak Singh's** reliance upon the decision of the majority in **Gopalan** is not reflective of the correct position in view of the decisions in **Cooper** and in **Maneka. Kharak Singh** to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.

188. (A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;

(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution.
Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

(F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;

(G) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the Rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

(H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty Under Article 21, privacy is not an absolute right.

A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.
In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty Under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of
(i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them;
and

(I) Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

189. Decisions rendered by this Court subsequent to **Kharak Singh**, upholding the right to privacy would be read subject to the above principles.

190. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B.N. Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment.

191. The reference is answered in the above terms.

Jasti Chelameswar, J.

192. I have had the advantage of reading the opinion of my learned brothers Justice Nariman and Justice Chandrachud. Both of them in depth dealt with various questions that are required to be examined by this Bench, to answer the reference. The factual background in which these questions arise and the history of the instant litigation is set out in the judgments of my learned brothers. There is no need to repeat. Having regard to the importance of the matter, I am unable to desist recording few of my views regarding the various questions which were debated in this matter.

193. The following three questions, in my opinion, constitute the crux of the enquiry;

(i) Is there any Fundamental Right to Privacy under the Constitution of India?

(ii) If it exists, where is it located?

(iii) What are the contours of such Right?

194. These questions arose because Union of India and some of the Respondents took a stand that, in view of two larger bench judgments of this Court[261], no fundamental right of privacy is guaranteed under the Constitution.

195. Therefore, at the outset, it is necessary to examine whether it is the *ratio decidendi* of *M.P. Sharma* and *Kharak Singh* that under our Constitution there is no Fundamental Right of Privacy; and if that be indeed the ratio of either of the two rulings whether they were rightly decided? The issue which fell for the consideration of this Court in *M.P. Sharma* was-whether seizure of documents from the custody of a person Accused of an offence would amount to "testimonial compulsion" prohibited Under Article 20(3) of our Constitution?

196. The Rule against the "testimonial compulsion" is contained in Article 20(3)[262] of our Constitution. The expression "testimonial compulsion" is not found in that provision. The mandate contained in Article 20(3) came to be described as the Rule against testimonial compulsion. The Rule against self-incrimination owes its origin to the revulsion against the inquisitorial methods adopted by the Star Chamber of England[263] and the same was incorporated in the Fifth Amendment of the American Constitution.[264]

197. Does the Rule against "testimonial compulsion", entrenched as a fundamental right under our Constitution create a right of privacy?-is a question not examined in *M.P. Sharma*. It was argued in M.P. Sharma "that a search to obtain documents for investigation into an offence is a compulsory procuring of incriminatory evidence from the Accused himself and is, therefore, hit by Article 20(3) ..." by necessary implication flowing from "certain canons of liberal construction". Originally the Rule was invoked only against oral evidence. But the judgment in *Boyd v. United States* 116 US 616, extended the Rule even to documents procured during the course of a constitutionally impermissible search[265].

This Court refused to read the principle enunciated in Boyd into Article 20(3) on the ground: "we have nothing in our Constitution corresponding to the Fourth Amendment".

This Court held that the power of search and seizure is "an overriding power of the State for the protection of social security". It further held that such power (1) "is necessarily regulated by law"; and (2) Since the Constitution makers have not made any provision "analogous to the American Fourth Amendment", such a requirement could not be read into Article 20(3).

It was in the said context that this Court referred to the right of privacy:

A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such Regulation to Constitutional limitations by recognition of a **fundamental right to privacy, analogous to the American Fourth Amendment,** we have no justification to import it, into a totally different fundamental right, by some process of strained construction.

198. I see no warrant for a conclusion (which is absolute) that their lordships held that there is no right of privacy under our Constitution. All that, in my opinion, their Lordships meant to say was that contents of the U.S. Fourth Amendment cannot be imported into our Constitution, while interpreting Article 20(3). That is the boundary of *M.P. Singh's ratio*. Such a conclusion, in my opinion, requires a further examination in an appropriate case since it is now too well settled that the text of the Constitution is only the primary source for understanding the Constitution and the silences of the Constitution are also to be ascertained to understand the Constitution. Even according to the American Supreme Court, the Fourth Amendment is not the sole repository of the right to privacy[266]. Therefore, values other than those informing the Fourth Amendment can ground a right of privacy if such values are a part of the Indian Constitutional framework, and *M.P. Sharma* does not contemplate this possibility nor was there an occasion, therefore as the case was concerned with Article 20(3). Especially so as the Gopalan era compartmentalization ruled

the roost during the time of the *M.P. Sharma* ruling and there was no *Maneka Gandhi* interpretation of Part III as a cohesive and fused code as is presently.

Whether the right of privacy is implied in any other fundamental right guaranteed Under Articles 21, 14, 19 or 25 etc. was not examined in *M.P. Sharma*. The question whether a fundamental right of privacy is implied from these Articles, is therefore, *res integra* and *M.P. Sharma* is no authority on that aspect. I am, therefore, of the opinion that M.P. Sharma is not an authority for an absolute proposition that there is no right of privacy under our Constitution; and such is not the ratio of that judgment.

199. The issue in *Kharak Singh* was the constitutionality of police Regulations of UP which *inter alia* provided for 'surveillance' of certain categories of people by various methods, such as, domiciliary visits at night', 'verification of movements and absences' etc. Two judgments (4:2) were delivered. Majority took the view that the impugned Regulation insofar as it provided for 'domiciliary visits at night' is unconstitutional whereas the minority opined the impugned Regulation is in its entirety unconstitutional.

The Court was invited to examine whether the impugned Regulations violated the fundamental rights of *Kharak Singh* guaranteed Under Articles 21 and 19(1)(d). In that context, this Court examined the scope of the expression 'personal liberty' guaranteed Under Article 21. Majority declared that the expression "personal liberty" occurring Under Article 21: "is used in the Article as **compendious term to include within itself all the varieties of rights** which go to make up the "personal liberties" of man other than those dealt with in several clauses of Article 19(1)". In other words, while Article 19(1) deals with particular species or attributes of that freedom, personal liberty in Article 21 takes in and comprises the residue."

200. The *Kharak Singh* majority opined that the impugned Regulation insofar as it provided for 'domiciliary visits' is plainly "violative of Article 21". The majority took note of the American decision in *Wolf v. Colorado*, 338 US 25 wherein it was held that State lacks the authority to sanction "incursion into privacy" of citizens. Such a power would run counter to the guarantee of the Fourteenth Amendment[267] and against the "very essence of a scheme of ordered liberty".[268] The majority judgment in Kharak Singh noticed that the conclusion recorded in *Wolf* v. *Colorado* is based on the prohibition contained in the Fourth Amendment of the U.S. Constitution, and a corresponding provision is absent in our Constitution. Nonetheless, their Lordships concluded that the impugned Regulation insofar as it sanctioned domiciliary visits is plainly violative of Article 21. For this conclusion, their Lordships relied upon the English Common Law maxim that "every man's house is his castle"[269]. In substance domiciliary visits violate **liberty** guaranteed Under Article 21.

The twin conclusions recorded, viz., that Article 21 takes within its sweep various rights other than mere freedom from physical restraint; and domiciliary visits by police violate the right of *Kharak Singh* guaranteed Under Article 21, are a great leap from the law declared by this Court in *Gopalan*[270] - much before R.C. Cooper[271] and *Maneka Gandhi*[272] cases. The logical inconsistency in the judgment is that while on the one hand their Lordships opined that the maxim "every man's house is his castle" is a part of the liberty Under Article 21, concluded on the other, that absence of a provision akin to the U.S. Fourth Amendment would negate the claim to the right of privacy.

Both statements are logically inconsistent. In the earlier part of the judgment their Lordships noticed[273] that it is the English Common Law which formed the basis of the U.S. Fourth Amendment and is required to be read into Article 21; but nevertheless declined to read the right of privacy into Article 21. This is the incongruence.

201. Interestingly as observed by Justice Nariman, when it came to the constitutionality of the other provisions impugned in *Kharak Singh*, their Lordships held that such provisions are not violative of Article 21 since there is no right to privacy under our Constitution[274]. I completely endorse the view of my learned brother Nariman in this regard.

202. I now proceed to examine the salient features of the minority view.

(i) Disagreement with the majority on the conclusion that Article 21 contains those aspects of personal liberty excluding those enumerated Under Article 19(1);

(ii) after noticing that Gopalan held that the expression "personal liberty" occurring Under Article 21 is only the antithesis of physical restraint or coercion, opined that in modern world coercion need not only be physical coercion but can also take the form of psychological coercion;

(iii) "further the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life.";

(iv) Though "our Constitution does not expressly declare the right to privacy as a fundamental right", "the said right is an essential ingredient of personal liberty".

In substance *Kharak Singh* declared that the expression "personal liberty" in Article 21 takes within its sweep a bundle of rights. Both the majority and minority are *ad idem* on that conclusion. The only point of divergence is that the minority opined that one of the rights in the bundle is the right of privacy. In the opinion of the minority the right to privacy is "an essential ingredient of personal liberty". Whereas the majority opined that "the right of privacy is not a guaranteed right under our Constitution", and therefore the same cannot be read into Article 21.[275]

203. I am of the opinion that the approach adopted by the majority is illogical and against settled principles of interpretation of even an ordinary statute; and wholly unwarranted in the context of constitutional interpretation. If a right is recognised by the express language of a statute, no question of implying such a right from some provision of such statute arises. Implications are logical extensions of stipulations in the express language of the statute and arise only when a statute is silent on certain aspects. Implications are the product of the interpretative process, of silences of a Statute. It is by now well settled that there are implications even in written Constitutions.[276] The scope and amplitude of implications are to be ascertained in the light of the scheme and purpose sought to be achieved by a statute. The purpose of the statute is to be ascertained from the overall scheme of the statute. Constitution is the fundamental law adumbrating the powers and duties of the various organs of the State and rights of the SUBJECTS[277] and limitations thereon, of the State. In my opinion, provisions purportedly conferring power on the State are in fact limitations on the State power to infringe on the liberty of SUBJECTS. In the context of the

interpretation of a Constitution the intensity of analysis to ascertain the purpose is required to be more profound.[278]

The implications arising from the scheme of the Constitution are "Constitution's dark matter" and are as important as the express stipulations in its text. The principle laid down by this Court in *Kesvananda*[279], that the basic structure of the Constitution cannot be abrogated is the most outstanding and brilliant exposition of the 'dark matter' and is a part of our Constitution, though there is nothing in the text suggesting that principle. The necessity of probing seriously and respectfully into the invisible portion of the Constitution cannot be ignored without being disrespectful to the hard earned political freedom and the declared aspirations of the liberty of we the people of India'. The text of enumerated fundamental rights is "only the primary source of expressed information" as to what is meant by liberty proclaimed by the preamble of the Constitution.

204. To embrace a Rule that the text of the Constitution is the only material to be looked at to understand the purpose and scheme of the Constitution would not only be detrimental to liberties of SUBJECTS but could also render the administration of the State unduly cumbersome. Fortunately, this Court did not adopt such a Rule of interpretation barring exceptions like *Gopalan* (supra) and *ADM Jabalpur*[280]. Else, this Court could not have found the freedom of press Under Article 19(1)(a) and the other rights[281] which were held to be flowing from the guarantee Under Article 21. *Romesh Thappar*[282] and *Sakal Papers* (supra) are the earliest acknowledgment by this Court of the existence of Constitution's dark matter. The series of cases in which this Court subsequently perceived various rights in the expression life' in Article 21 is a resounding confirmation of such acknowledgment.

205. The U.S. VIth Amendment confers a "right to speedy and public trial" to the accused, the right "to be informed of the nature and cause of the accusation", the right to have the "assistance of counsel for his defence" etc. None of those rights are expressed in the text of our Constitution. Nonetheless, this Court declared these rights as implicit in the text of Articles 14 or 21. The VIIIth Amendment[283] of the American Constitution contains stipulations prohibiting excessive bails, fines, cruel and unusual punishments etc. Cruel punishments were not unknown to this country. They were in vogue in the middle ages. Flaying a man alive was one of the favoured punishments of some of the Rulers of those days. I only hope that this Court would have no occasion to hear an argument that the Parliament or State legislatures would be constitutionally competent to prescribe cruel punishments like amputation or blinding or flaying alive of convicts merely an account of a prescription akin to the VIIIth Amendment being absent in our Constitution.[284]

206. This Court by an interpretive process read the right to earn a livelihood[285], the right to education[286], the right to speedy trial[287], the right to protect one's reputation[288] and the right to have an environment free of pollution[289] in the expression life' Under Article 21 of the Indian Constitution.

Similarly, the right to go abroad[290] and the right to speedy trial of criminal cases[291] were read into the expression liberty occurring Under Article 21. This Court found delayed execution of capital punishment violated both the rights of life and liberty' guaranteed Under Article 21[292] and also

perceived reproductive rights and the individual's autonomy regarding sterilization to being inherent in the rights of life and liberty Under Article 21[293].

207. None of the above-mentioned rights are to be found anywhere in the text of the Constitution.

208. To sanctify an argument that whatever is not found in the text of the Constitution cannot become a part of the Constitution would be too primitive an understanding of the Constitution and contrary to settled cannons of constitutional interpretation. Such an approach regarding the rights and liberties of citizens would be an affront to the collective wisdom of our people and the wisdom of the members of the Constituent Assembly.
The fact that some of the members opined during the course of debates in that Assembly, that the right of privacy need not find an express mention in the Constitution, would not necessarily lead to the conclusion that they were oblivious to the importance of the right to privacy. Constituent Assembly was not a seminar on the right to privacy and its amplitude. A close scrutiny of the debates reveals that the Assembly only considered whether there should be an express provision guaranteeing the right of privacy in the limited context of 'searches' and 'secrecy of correspondence'. Dimensions of the right of privacy are much larger and were not fully examined. The question whether the expression 'liberty' in Article 21 takes within its sweep the various aspects of the right of privacy was also not debated. The submissions before us revolve around these questions. Petitioners assert that the right to privacy is a part of the rights guaranteed Under Article 19 and 21 and other Articles.
209. The Constitution of any country reflects the aspirations and goals of the people of that country voiced through the language of the few chosen individuals entrusted with the responsibility of framing its Constitution. Such aspirations and goals depend upon the history of that society. History invariably is a product of various forces emanating from religious, economic and political events[294]. The degree of refinement of the Constitution depends upon the wisdom of the people entrusted with the responsibility of framing the Constitution. Constitution is not merely a document signed by 284 members of the Constituent Assembly. It is a politically sacred instrument created by men and women who risked lives and sacrificed their liberties to fight alien rulers and secured freedom for our people, not only of their generation but generations to follow.
The Constitution cannot be seen as a document written in ink to replace one legal regime by another. It is a testament created for securing the goals professed in the Preamble[295]. Part-Ill of the Constitution is incorporated to ensure achievement of the objects contained in the Preamble.[296] We the People' of this country are the intended beneficiaries[297] of the Constitution. It must be seen as a document written in the blood of innumerable martyrs of Jalianwala Bagh and the like. Man is not a creature of the State. Life and liberty are not granted by the Constitution. Constitution only stipulates the limitations on the power of the State to interfere with our life and liberty. Law is essential to enjoy the fruits of liberty; it is not the source of liberty and emphatically not the exclusive source.

210. To comprehend whether the right to privacy is a Fundamental Right falling within the sweep of any of the Articles of Part-Ill, it is necessary to understand what "fundamental right" and the "right of privacy" mean conceptually. Rights arise out of custom, contract or legislation, including a written Constitution. The distinction between an ordinary legislation and an enacted Constitution is that the latter is believed and expected to be a relatively permanent piece of legislation which cannot be abrogated by a simple majority of representatives elected for a limited tenure to

legislative bodies created thereby. The Constitution of any country is a document which contains provisions specifying the Rules of governance in its different aspects. It defines the powers of the legislature and the procedures for law making, the powers of the executive to administer the State by enforcing the law made by the legislature and the powers of the judiciary. The underlying belief is that the Constitution of any country contains certain core political values and beliefs of the people of that country which cannot normally be tinkered with lightly, by transient public opinion.

211. The Constitution of India is one such piece of legislation. Comparable are constitutions of United States of America, Canada and Australia to mention only some. All such Constitutions apart from containing provisions for administration of the State, contain provisions specifying or identifying certain rights of citizens and even some of the rights of non-citizens (both the classes of persons could be collectively referred to as SUBJECTS for the sake of convenience). Such rights came to be described as "basic", "primordial", "inalienable" or "fundamental" rights. Such rights are a protective wall against State's power to destroy the liberty of the SUBJECTS.

Irrespective of the nomenclature adopted in different countries, such rights are believed in all democratic countries[298] to be rights which cannot be abridged or curtailed totally by ordinary legislation and unless it is established that it is so necessary to abridge or curtail those rights in the larger interest of the society. Several Constitutions contain provisions stipulating various attendant conditions which any legislation intending to abridge such (fundamental) rights is required to comply with.

212. Provisions of any written Constitution create rights and obligations, belonging either to individuals or the body politic as such. For example, the rights which are described as fundamental rights in Chapter-Ill of our Constitution are rights of individuals whereas provisions of dealing with elections to legislative bodies create rights collectively in the body politic mandating periodic elections. They also create rights in favour of individuals to participate in such electoral process either as an elector or to become an elected representative of the people/voters.

213. Though each of the rights created by a Constitution is of great importance for sustenance of a democratic form of Government chosen by us for achieving certain objectives declared in the Preamble, the framers of our Constitution believed that some of the rights enshrined in the Constitution are more crucial to the pursuit of happiness of the people of India and, therefore, called them fundamental rights. The belief is based on the study of human history and the Constitution of other nations which in turn are products of historical events.

The scheme of our Constitution is that the power of the State is divided along a vertical axis between the Union and the States and along the horizontal axis between the three great branches of governance, the legislative, the executive and the judiciary. Such division of power is believed to be conducive to preserving the liberties of the people of India. The very purpose of creating a written Constitution is to secure justice, liberty and equality to the people of India. Framers of the Constitution believed that certain freedoms are essential to enjoy the fruits of liberty and that the State shall not be permitted to trample upon those freedoms except for achieving certain important and specified objectives in the larger interests of society. Therefore, the authority of the State for making a law inconsistent with fundamental rights, is cabined within constitutionally proclaimed limitations.

214. Provisions akin to the Fundamental Rights guaranteed under our Constitution exist in American Constitution also[299]. They are anterior to our Constitution.

215. The inter-relationship of various fundamental rights guaranteed under Part III of the Constitution and more specifically between Articles 14, 19 and 21 of the Constitution has been a matter of great deal of judicial discourse starting from *A.K. Gopalan*. The march of the law in this regard is recorded by Justices Nariman and Chandrachud in detail.

216. *R.C. Cooper* and *Maneka Gandhi* gave a different orientation to the topic. Justice Bhagwati in *Maneka Gandhi* speaking for the majority opined[300] that in view of the later decision of this Court in *R.C. Cooper*, the minority view (in *Kharak Singh*) must be regarded as correct and the majority view must be held to be overruled. Consequently, it was held that any law which deprives any person of the liberty guaranteed Under Article 21 must not only be just, fair and reasonable, but must also satisfy that it does not at the same time violate one or some of the other fundamental rights enumerated Under Article 19, by demonstrating that the law is strictly in compliance with one of the corresponding clauses 2 to 6 of Article 19.[301]

217. In *Kharak Singh*, Ayyangar, J. speaking for the majority held that the expression 'personal liberty' used in Article 21 is a "compendious term to include within itself all varieties of rights which" constitute the "personal liberties of a man other than those specified in the several clauses of Article 19(1)." In other words, Article 19(1) deals with particular "species or attributes of personal liberty" mentioned in Article 21. "Article 21 takes in and comprises the residue." Such a construction was not accepted by the minority. The minority opined that both Articles 19 and 21 are independent fundamental rights but they are overlapping.[302]

218. An analysis of *Kharak Singh* reveals that the minority opined that the right to move freely is **an attribute of** personal liberty. Minority only disputed the correctness of the proposition that by enumerating certain freedoms in Article 19(1), the makers of the Constitution excluded those freedoms from the expression liberty in Article 21. The minority opined that both the freedoms enumerated in Article 19(1) and 21 are independent fundamental rights, though there is "overlapping".

The expression liberty' is capable of taking within its sweep not only the right to move freely, guaranteed Under Article 19(1)(d); but also each one of the other freedoms mentioned Under Article 19(1). Personal liberty takes within its sweep not only the right not to be subjected to physical restraints, but also the freedom of thought, belief, emotion and sensation and a variety of other freedoms. The most basic understanding of the expression liberty is the freedom of an individual to do what he pleases. But the idea of liberty is more complex than that. Abraham Lincoln's statement[303] that our nation "was conceived in liberty" is equally relevant in the context of the proclamation contained in our Preamble; and as evocatively expressed in the words of Justice Brandies;

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

- *Whitney v. California*, 274 U.S. 357, 375

219. The question now arises as to what is the purpose the framers of the Constitution sought to achieve by specifically enumerating some of the freedoms which otherwise would form part of the expression liberty'. To my mind the answer is that the Constituent Assembly thought it fit that some aspects of liberty require a more emphatic declaration so as to restrict the authority of the State to abridge or curtail them. The need for such an emphatic declaration arose from the history of this nation. In my opinion, the purpose sought to be achieved is two-fold. Firstly, to place the expression liberty' beyond the argumentative process[304] of ascertaining the meaning of the expression liberty, and secondly, to restrict the authority of the State to abridge those enumerated freedoms only to achieve the purposes indicated in the corresponding Clauses (2) to (6) of Article 19.[305] It must be remembered that the authority of the State to deprive any person of the fundamental right of liberty is textually unlimited as the only requirement to enable the State to achieve that result is to make a law'. When it comes to deprivation of the freedoms Under Article 19(1), the requirement is: (a) that there must not only be a law but such law must be tailored to achieve the purposes indicated in the corresponding sub-Article[306]; and (b) to declare that the various facets of liberty enumerated in Article 19(1) are available only to the citizens of the country but not all SUBJECTS.[307] As it is now clearly held by this Court that the rights guaranteed Under Articles 14 and 21 are not confined only to citizens but available even to non-citizens aliens or incorporated bodies even if they are incorporated in India etc.

220. The inter-relationship of Article 19 and 21, if understood as stated in para 28, the authority of the State to deprive any person of his liberty is circumscribed by certain factors;

(1) It can only be done under the authority of law

(2) law' in the context means a valid legislation.

(3) If the person whose liberty is sought to be deprived is a citizen and that liberty happens to be one of the freedoms enumerated in Article 19(1), such a law is required to be a reasonable within the parameters stipulated in Clauses (2) to (6) of Article 19, relevant to the nature of the entrenched freedom/s, such law seeks to abridge.

(4) If the person whose liberty is sought to be deprived of is a non-citizen or even if a citizen is with respect to any freedom other than those specified in Articles 19(1), the law should be just, fair and reasonable.

221. My endeavour *qua* the aforesaid analysis is only to establish that the expression liberty in Article 21 is wide enough to take in not only the various freedoms enumerated in Article 19(1) but also many others which are not enumerated. I am of the opinion that a better view of the whole scheme of the chapter on fundamental rights is to look at each one of the guaranteed fundamental rights not as a series of isolated points, but as a rational continuum of the legal concept of liberty i.e. freedom from all substantial, arbitrary encroachments and purposeless restraints sought to be made by the State. Deprivation of liberty could lead to curtailment of one or more of freedoms which a human being possesses, but for interference by the State.

222. Whether it is possible to arrive at a coherent, integrated and structured statement explaining the right of privacy is a question that has been troubling scholars and judges in various jurisdictions for decades.[308] Considerable amount of literature both academic and judicial came into existence. In this regard various taxonomies[309] have been proposed suggesting that there are a number of interests and values into which the right to privacy could be dissected.

223. Claims for protection of privacy interests can arise against the State and its instrumentalities and against non-State entities-such as, individuals acting in their private capacity and bodies corporate or unincorporated associations etc., without any element of State participation. Apart from academic literature, different claims based on different asserted privacy interests have also found judicial support. Cases arose in various jurisdictions in the context of privacy interests based on (i) Common Law; (ii) statutory recognition; and (iii) constitutionally protected claims of the right of privacy.

224. I am of the opinion that for answering the present reference, this Court is only concerned with the question whether SUBJECTS who are amenable to the laws of this country have a Fundamental Right of Privacy against the State[310]. The text of the Constitution is silent in this regard. Therefore, it is required to examine whether such a right is implied in any one or more of the Fundamental Rights in the text of the Constitution.

225. To answer the above question, it is necessary to understand conceptually identify the nature of the right to privacy.

226. My learned brothers have discussed various earlier decisions of this Court and of the Courts of other countries, dealing with the claims of the Right of Privacy. International Treaties and Conventions have been referred to establish the existence and recognition of the right to privacy in the various parts of the world, and have opined that they are to be read into our Constitution in order to conclude that there exists a Fundamental Right to privacy under our Constitution. While Justice Nariman opined -

94. This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. **M.P. Sharma** (supra) and the majority in **Kharak Singh** (supra), to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognizing privacy as a fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on merits to the original Bench of 3 honourable Judges of this Court in light of the judgment just delivered by us.

Justice Chandrachud held:

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

227. One of the earliest cases where the constitutionality of State's action allegedly infringing the right of privacy fell for the consideration of the US Supreme Court is *Griswold et al v. Connecticut*, 381 US 479. The Supreme Court of the United States sustained a claim of a privacy interest on the theory that the Constitution itself creates certain zones of privacy - 'repose' and 'intimate decision.[311] Building on this framework, Bostwick[312] suggested that there are in fact, three aspects of privacy - "repose", "sanctuary" and "intimate decision". "Repose" refers to freedom from unwarranted stimuli, "sanctuary" to protection against intrusive observation, and "intimate decision" to autonomy with respect to the most personal life choices. Whether any other facet of the right of privacy exists cannot be divined now. In my opinion, there is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy. The ever growing possibilities of technological and psychological intrusions by the State into the liberty of SUBJECTS must leave some doubt in this context. Definitional uncertainty is no reason to not recognize the existence of the right of privacy. For the purpose of this case, it is sufficient to go by the understanding that the right to privacy consists of three facets i.e. repose, sanctuary and intimate decision. Each of these facets is so essential for the liberty of human beings that I see no reason to doubt that the right to privacy is part of the liberty guaranteed by our Constitution.

228. History abounds with examples of attempts by governments to shape the minds of SUBJECTS. In other words, conditioning the thought process by prescribing what to read or not to read; what forms of art alone are required to be appreciated leading to the conditioning of beliefs; interfering with the choice of people regarding the kind of literature, music or art which an individual would prefer to enjoy.[313] Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which governments do not approve.[314] Insofar as religious beliefs are concerned, a good deal of the misery our species suffer owes its existence to and centres around competing claims of the right to propagate religion. Constitution of India protects the liberty of all SUBJECTS guaranteeing[315] the freedom of conscience and right to freely profess, practice and propagate religion. While the right to freely "profess, practice and propagate religion" may be a facet of free speech guaranteed Under Article 19(1)(a), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty. There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief etc. which form part of the liberty Under Article 21.

229. Concerns of privacy arise when the State seeks to intrude into the body of SUBJECTS.[316] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which fall within the zone of the right of privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there is a huge debate on those issues though it is still a grey area.[317] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.

Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision making process. The right to travel freely within the country or go abroad is an area falling within the right of privacy. The text of our Constitution recognised the freedom to travel throughout the country Under Article 19(1)(d). This Court has already

recognised that such a right takes within its sweep the right to travel abroad.[318] A person's freedom to choose the place of his residence once again is a part of his right of privacy[319] recognised by the Constitution of India Under Article 19(1)(e) though the predominant purpose of enumerating the above mentioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. The choice of appearance and apparel are also aspects of the right of privacy. The freedom of certain groups of SUBJECTS to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right of privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling Under Article 25. Informational traces are also an area which is the subject matter of huge debate in various jurisdictions falling within the realm of the right of privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect bio-metric data regarding all the residents of this country.

230. The above-mentioned are some of the areas where some interest of privacy exists. The examples given above indicate to some extent the nature and scope of the right of privacy.

231. I do not think that anybody in this country would like to have the officers of the State intruding into their homes or private property at will or soldiers quartered in their houses without their consent. I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life. Freedom of social and political association is guaranteed to citizens Under Article 19(1)(c). Personal association is still a doubtful area.[320] The decision making process regarding the freedom of association, freedoms of travel and residence are purely private and fall within the realm of the right of privacy. It is one of the most intimate decisions.

All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being.

The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21.

232. I am in complete agreement with the conclusions recorded by my learned brothers in this regard.

233. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case to case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right of privacy, it is

necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

234. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry[321]; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of 'compelling state interest'. The last of these four options is the highest standard of scrutiny[322] that a court can adopt. It is from this menu that a standard of review for limiting the right of privacy needs to be chosen.

235. At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions Under Article 19, then the standard of review would be as expressly provided Under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Article 21 is bleak. Without discounting that possibility, it needs to be noted that Article 21 is the bedrock of the privacy guarantee.

If the spirit of liberty permeates every claim of privacy, it is difficult if not impossible to imagine that any standard of limitation, other than the one Under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four.

236. The just, fair and reasonable standard of review Under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto.[323] *Gobind* resorted to the compelling state interest standard in addition to the Article 21 reasonableness enquiry. From the United States where the terminology of 'compelling state interest' originated, a strict standard of scrutiny comprises two things-a 'compelling state interest' and a requirement of 'narrow tailoring' (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, compelling state interest does not have definite contours in the US. Hence, it is critical that this standard be adopted with some clarity as to *when and in what types of privacy claims* it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard Under Article 21 will apply. When the compelling State interest standard is to be employed must depend upon the context of concrete cases.

However, this discussion sets the ground Rules within which a limitation for the right of privacy is to be found.

S.A. Bobde, J.

<u>The Origin of the Reference</u>

237. This reference calls on us to answer questions that would go to the very heart of the liberty and freedom protected by the Constitution of India. It arises in the context of a constitutional challenge to the Aadhaar project, which aims to build a database of personal identity and biometric information covering every Indian - the world's largest endeavour of its kind. To the Petitioners' argument therein that Aadhaar would violate the right to privacy, the Union of India, through its Attorney General, raised the objection that Indians could claim no constitutional right of privacy

in view of a unanimous decision of 8 Judges of this Court in *M.P. Sharma v. Satish Chandra* MANU/SC/0018/1954 : 1954 SCR 1077 and a decision by a majority of 4 Judges in *Kharak Singh v. State of Uttar Pradesh* MANU/SC/0085/1962 : AIR 1963 SC 1295.

238. The question, which was framed by a Bench of three of us and travels to us from a Bench of five, was the following:

12. We are of the opinion that the cases on hand raise far-reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right Under Article 21. If the observations made in *MP Sharma* and *Kharak Singh* are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty Under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncements made by larger Benches of this Court cannot be ignored by smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.

13. Therefore, in our opinion to give quietus to the kind of controversy raised in this batch of cases once and for all, it is better that the *ratio decidendi* of MP Sharma and *Kharak Singh* is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength[324].

239. We have had the benefit of submissions from Shri Soli Sorabjee, Shri Gopal Subramanium, Shri Shyam Divan, Shri Arvind Datar, Shri Anand Grover, Shri Sajan Poovayya, Ms. Meenakshi Arora, Shri Kapil Sibal, Shri P.V. Surendranath and Ms. Aishwarya Bhati for the Petitioners, and Shri K.K. Venugopal, learned Attorney General for the Union of India, Shri Tushar Mehta, learned Additional Solicitor General for the Union, Shri Aryama Sundaram for the State of Maharashtra, Shri Rakesh Dwivedi for the State of Gujarat, Shri Arghya Sengupta for the State of Haryana, Shri Jugal Kishore for the State of Chattisgarh and Shri Gopal Sankaranarayanan for an intervenor supporting the Respondents. We would like to record our appreciation for their able assistance in a matter of such great import as the case before us.

The Effect of M.P. Sharma and Kharak Singh

240. The question of whether Article 21 encompasses a fundamental right to privacy did not fall for consideration before the 8 Judges in the *M.P. Sharma* Court. Rather, the question was whether an improper search and seizure operation undertaken against a company and its directors would violate the constitutional bar against testimonial compulsion contained in Article 20(3) of the Constitution. This Court held that such a search did not violate Article 20(3). Its reasoning proceeded on the footing that the absence of a fundamental right to privacy analogous to the Fourth Amendment to the United States' constitution in our own constitution suggested that the

Constituent Assembly chose not to subject laws providing for search and seizure to constitutional limitations. Consequently, this Court had no defensible ground on which to import such a right into Article 20(3), which was, at any event, a totally different right.

241. *M.P. Sharma* is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not, but because it wrongly took the United States Fourth Amendment - which in itself is no more than a limited protection against unlawful surveillance - to be a comprehensive constitutional guarantee of privacy in that jurisdiction.

242. Neither does the 4:2 majority in *Kharak Singh v. State of Uttar Pradesh* (supra) furnish a basis for the proposition that no constitutional right to privacy exists. Ayyangar, J.'s opinion for the majority found that Regulation 236 (b) of the Uttar Pradesh Police Regulations, which inter alia enabled the police to make domiciliary visits at night was "*plainly violative of Article 21*"[325]. In reasoning towards this conclusion, the Court impliedly acknowledged a constitutional right to privacy. In particular, it began by finding that though India has no like guarantee to the Fourth Amendment, "*an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilization*"[326]. It proceeded to affirm that the statement in *Semayne's case* (1604) 5 Coke 91 that "*the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose*" articulated an "*abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty.*" Thus far, the Kharak Singh majority makes out the case of the Attorney General. But, in its final conclusion, striking down Regulation 236 (b) being violative of Article 21 could not have been arrived at without allowing that a right of privacy was covered by that guarantee.

243. The *M.P. Sharma* Court did not have the benefit of two interpretative devices that have subsequently become indispensable tools in this Court's approach to adjudicating constitutional cases. The first of these devices derives from *R.C. Cooper v. Union of India* MANU/SC/0011/1970 : (1970) 1 SCC 248 and its progeny - including *Maneka Gandhi v. Union of India* MANU/SC/0133/1978 : (1978) 1 SCC 248 - which require us to read Part III's guarantees of rights together. Unlike *AK Gopalan v. State of Madras* MANU/SC/0012/1950 : AIR 1950 SC 27 which held the field in M.P. Sharma's time, rights demand to be read as overlapping rather than in silos, so that Part III is now conceived as a constellation of harmonious and mutually reinforcing guarantees. Part III does not attempt to delineate rights specifically. I take the right to privacy, an indispensable part of personal liberty, to have this character. Such a view would have been wholly untenable in the AK Gopalan era.

244. M.P. Sharma also predates the practice of the judicial enumeration of rights implicit in a guarantee instantiated in the constitutional text. As counsel for the Petitioners correctly submitted, there is a whole host of rights that this Court has derived from Article 21 to evidence that enumeration is a well-embedded interpretative practice in constitutional law. Article 21's guarantee to the right to 'life' is home to such varied rights as the right to go abroad (*Maneka Gandhi v. Union of India*), the right to livelihood (*Olga Tellis v. Bombay Municipal Corporation*

MANU/SC/0039/1985 : (1985) 3 SCC 545) and the right to medical care (*Paramanand Katara v. Union of India* MANU/SC/0423/1989 : (1989) 4 SCC 286).

245. Therefore, nothing in *M.P. Sharma* and *Kharak Singh* supports the conclusion that there is no fundamental right to privacy in our Constitution. These two decisions and their inconclusiveness on the question before the Court today have been discussed in great detail in the opinions of Chelameswar J., Nariman J., and Chandrachud J., I agree with their conclusion in this regard. To the extent that stray observations taken out of their context may suggest otherwise, the shift in our understanding of the nature and location of various fundamental rights in Part III brought about by *R.C. Cooper* and *Maneka Gandhi* has removed the foundations of M.P. Sharma and Kharak Singh.

246. Petitioners submitted that decisions numbering atleast 30 - beginning with Mathews, J.'s full-throated acknowledgement of the existence and value of a legal concept of privacy in *Gobind v. State of M.P.* MANU/SC/0119/1975 : (1975) 2 SCC 148 - form an unbroken line of cases that affirms the existence of a constitutional right to privacy. In view of the foregoing, this view should be accepted as correct.

The Form of the Privacy Right

247. It was argued for the Union by Mr. K.K. Venugopal, learned Attorney General that the right of privacy may at best be a common law right, but not a fundamental right guaranteed by the Constitution. This submission is difficult to accept. In order to properly appreciate the argument, an exposition of the first principles concerning the nature and evolution of rights is necessary.

248. According to Salmond, rights are interests protected by 'rules of right', *i.e.*, by moral or legal rules[327]. When interests are worth protecting on moral grounds, irrespective of the existence of a legal system or the operation of law, they are given the name of a natural right. Accordingly, Roscoe Pound refers to natural law as a theory of moral qualities inherent in human beings, and to natural rights as deductions demonstrated by reason from human nature[328]. He defines natural rights, and distinguishes them from legal rights (whether at common law or under constitutions) in the following way:

Natural rights mean simply interests which we think ought to be secured demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor state creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights, the devices which law employs to secure such of these interests as it is expedient to recognize, are the work of the law and in that sense the work of the state.[329]

Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man.

249. Legal systems, which in India as in England, began as monarchies, concentrated the power of the government in the person of the king. English common law, whether it is expressed in the laws of the monarch and her Parliament, or in the decisions of the Courts, is the source of what the Attorney General correctly takes to be our own common law. *Semayne's case* (1604) 5 Coke 91,

in which it was affirmed that a man's home is his castle and that even the law may only enter it with warrant, clearly shows that elements of the natural right of privacy began to be received into the common law as early as in 1604. Where a natural law right could not have been enforced at law, the common law right is evidently an instrument by which invasions into the valued interest in question by one's fellow man can be addressed. On the very same rationale as *Seymayne*, Chapter 17 of the Indian Penal Code, 1860, treats trespass against property as a criminal offence[330].

250. With the advent of democracy and of limited constitutional government came the state, a new actor with an unprecedented capacity to interfere with natural and common law rights alike. The state differs in two material ways from the monarch, the previous site in which governmental power (including the power to compel compliance through penal laws) was vested. *First*, the state is an abstract and diffuse entity, while the monarch was a tangible, single entity. *Second*, the advent of the state came with a critical transformation in the status of the governed from being subjects under the monarch to becoming citizens, and themselves becoming agents of political power *qua* the state. Constitutions like our own are means by which individuals - the Preambular 'people of India' - create 'the state', a new entity to serve their interests and be accountable to them, and transfer a part of their sovereignty to it. The cumulative effect of both these circumstances is that individuals governed by constitutions have the new advantage of a governing entity that draws its power from and is accountable to them, but they face the new peril of a diffuse and formless entity against whom existing remedies at common law are no longer efficacious.

251. Constitutions address the rise of the new political hegemon that they create by providing for a means by which to guard against its capacity for invading the liberties available and guaranteed to all civilized peoples. Under our constitutional scheme, these means - declared to be fundamental rights - reside in Part III, and are made effective by the power of this Court and the High Courts Under Articles 32 and 226 respectively. This narrative of the progressive expansion of the types of rights available to individuals seeking to defend their liberties from invasion - from natural rights to common law rights and finally to fundamental rights - is consistent with the account of the development of rights that important strands in constitutional theory present[331].

252. This Court has already recognized the capacity of constitutions to be the means by which to declare recognized natural rights as applicable qua the state, and of constitutional courts to enforce these declarations. In *Kesavananda Bharati v. State of Kerala* MANU/SC/0445/1973 : (1973) 4 SCC 225, 1461 at p. 783, Mathew, J. borrows from Roscoe Pound to explain this idea in the following terms:

While dealing with natural rights, Roscoe Pound states on p. 500 of Vol. I of his Jurisprudence:

Perhaps nothing contributed so much to create and foster hostility to courts and law and constitutions as **this conception of the courts as guardians of individual natural rights against the State and against society**; this conceiving of the law as a final and absolute body of doctrine declaring these individual natural rights; this theory of constitutions as declaratory of common law principles, which are also natural-law principles, anterior to the State and of superior validity to enactments by the authority of the state; **this theory of Constitutions as having for their purpose to guarantee and maintain the natural rights of individuals against the Government and all**

its agencies. In effect, it set up the received traditional social, political, and economic ideals of the legal profession as a super-constitution, beyond the reach of any agency but judicial decision.

(Emphasis supplied)

This Court also recognizes the true nature of the relation between the citizen and the state as well as the true character and utility of Part III. Accordingly, in *People's Union of Civil Liberties v. Union of India* MANU/SC/0039/2005 : (2005) 2 SCC 436, it has recently been affirmed that the objective of Part III is to place citizens at centre stage and make the state accountable to them. In *Society for Unaided Private Schools of Rajasthan v. Union of India* MANU/SC/0311/2012 : (2012) 6 SCC 1 at 27, it was held that *"[f]undamental rights have two aspects, firstly, they act as fetter on plenary legislative powers, and secondly, they provide conditions for fuller development of our people including their individual dignity."*

253. Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: that a right must either be a common law right or a fundamental right. The only material distinctions between the two classes of right - of which the nature and content may be the same - lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the 'state', as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state. It is perfectly possible for an interest to simultaneously be recognized as a common law right and a fundamental right. Where the interference with a recognized interest is by the state or any other like entity recognized by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.

254. Privacy has the nature of being *both* a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.

The Content of the Right of Privacy

255. It might be broadly necessary to determine the nature and content of privacy in order to consider the extent of its constitutional protection. As in the case of 'life' Under Article 21, a precise definition of the term 'privacy' may not be possible. This difficulty need not detain us. Definitional and boundary-setting challenges are not unique to the rights guaranteed in Article 21. This feature is integral to many core rights, such as the right to equality. Evidently, the expansive character of any right central to constitutional democracies like ours has nowhere stood in the way of recognizing a right and treating it as fundamental where there are strong constitutional grounds on which to do so.

256. The existence of zones of privacy is felt instinctively by all civilized people, without exception. The best evidence for this proposition lies in the panoply of activities through which

we all express claims to privacy in our daily lives. We lock our doors, clothe our bodies and set passwords to our computers and phones to signal that we intend for our places, persons and virtual lives to be private. An early case in the Supreme Court of Georgia in the United States describes the natural and instinctive recognition of the need for privacy in the following terms:

The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature[332]".

The same instinctive resentment is evident in the present day as well. For instance, the non-consensual revelation of personal information such as the state of one's health, finances, place of residence, location, daily routines and so on efface one's sense of personal and financial security. In *District Registrar and Collector v. Canara Bank* MANU/SC/0935/2004 : (2005) 1 SCC 496 at 48, this Court observed what the jarring reality of a lack of privacy may entail:

...If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'.

257. 'Privacy' is *"[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions"*[333]. The right to be in this condition has been described as 'the right to be let alone'[334]. What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.

258. Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place. Privacy has a deep affinity with seclusion (of our physical persons and things) as well as such ideas as repose, solitude, confidentiality and secrecy (in our communications), and intimacy. But this is not to suggest that solitude is always essential to privacy. It is in this sense of an individual's liberty to do things privately that a group of individuals, however large, is entitled to seclude itself from others and be private. In fact, a conglomeration of individuals in a space to which the rights of admission are reserved - as in a hotel or a cinema hall -must be regarded as private. Nor is the right to privacy lost when a person moves about in public. The law requires a specific authorization for search of a person even where there is suspicion[335]. Privacy must also mean the effective guarantee of a zone of internal freedom in which to think. The disconcerting effect of having another peer over one's shoulder while reading or writing explains why individuals would choose to retain their privacy even in public. It is important to be able to keep one's work without publishing it in a condition which may be described as private. The vigour and vitality of the various expressive freedoms

guaranteed by the Constitution depends on the existence of a corresponding guarantee of cognitive freedom.

259. Even in the ancient and religious texts of India, a well-developed sense of privacy is evident. A woman ought not to be seen by a male stranger seems to be a well-established Rule in the Ramayana. *Grihya Sutras* prescribe the manner in which one ought to build one's house in order to protect the privacy of its inmates and preserve its sanctity during the performance of religious rites, or when studying the Vedas or taking meals. The *Arthashastra* prohibits entry into another's house, without the owner's consent[336]. There is still a denomination known as the *Ramanuj Sampradaya* in southern India, members of which continue to observe the practice of not eating and drinking in the presence of anyone else. Similarly in Islam, peeping into others' houses is strictly prohibited[337]. Just as the United States Fourth Amendment guarantees privacy in one's papers and personal effects, the *Hadith* makes it reprehensible to read correspondence between others. In Christianity, we find the aspiration to live without interfering in the affairs of others in the text of the Bible[338]. Confession of one's sins is a private act[339]. Religious and social customs affirming privacy also find acknowledgement in our laws, for example, in the Code of Civil Procedure's exemption of a *pardanashin* lady's appearance in Court[340].

260. Privacy, that is to say, the condition arrived at after excluding other persons, is a basic pre-requisite for exercising the liberty and the freedom to perform that activity. The inability to create a condition of selective seclusion virtually denies an individual the freedom to exercise that particular liberty or freedom necessary to do that activity.

261. It is not possible to truncate or isolate the basic freedom to do an activity in seclusion from the freedom to do the activity itself. The right to claim a basic condition like privacy in which guaranteed fundamental rights can be exercised must itself be regarded as a fundamental right. Privacy, thus, constitutes the basic, irreducible condition necessary for the exercise of 'personal liberty' and freedoms guaranteed by the Constitution. It is the inarticulate major premise in Part III of the Constitution.

Privacy's Connection to Dignity and Liberty

262. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilized societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. Privacy is an essential condition for the exercise of most of these freedoms. *Ex facie*, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.

263. Though he did not use the name of 'privacy', it is clear that it is what J.S. Mill took to be indispensable to the existence of the general reservoir of liberty that democracies are expected to

reserve to their citizens. In the introduction to his seminal On Liberty (1859), he characterized freedom in the following way:

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. **Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character;** of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence.[341]

(Emphasis supplied)

264. The first and natural home for a right of privacy is in Article 21 at the very heart of 'personal liberty' and life itself.

Liberty and privacy are integrally connected in a way that privacy is often the basic condition necessary for exercise of the right of personal liberty. There are innumerable activities which are virtually incapable of being performed at all and in many cases with dignity unless an individual is left alone or is otherwise empowered to ensure his or her privacy.
Birth and death are events when privacy is required for ensuring dignity amongst all civilized people. Privacy is thus one of those rights "instrumentally required if one is to enjoy"[342] rights specified and enumerated in the constitutional text.

265. This Court has endorsed the view that 'life' must mean "something more than mere animal existence"[343] on a number of occasions, beginning with the Constitution Bench in *Sunil Batra (I)*

v. Delhi Administration MANU/SC/0184/1978 : (1978) 4 SCC 494. *Sunil Batra* connected this view of Article 21 to the constitutional value of dignity. In numerous cases, including *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* MANU/SC/0517/1981 : (1981) 1 SCC 608, this Court has viewed liberty as closely linked to dignity. Their relationship to the effect of taking into the protection of 'life' the protection of "faculties of thinking and feeling", and of temporary and permanent impairments to those faculties. In *Francis Coralie Mullin*, Bhagwati, J. opined as follows[344]:

Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In Kharak Singh v. State of Uttar Pradesh, Subba Rao J. quoted with approval the following passage from the judgment of Field J. in *Munn v. Illinois* to emphasize the quality of life covered by Article 21:

By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world.

and this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first Sunil Batra case (*supra*). **Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling.** Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that **any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.**

(Emphasis supplied)

Privacy is therefore necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.

266. It is difficult to see how dignity - whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights - can be assured to the individual without privacy.

Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right of privacy is an integral part of both 'life' and 'personal liberty' Under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.

Privacy as a Travelling Right

267. I have already shown that the right of privacy is as inalienable as the right to perform any constitutionally permissible act. Privacy in all its aspects constitutes the springboard for the exercise of the freedoms guaranteed by Article 19(1). Freedom of speech and expression is always dependent on the capacity to think, read and write in private and is often exercised in a state of privacy, to the exclusion of those not intended to be spoken to or communicated with. A peaceful assembly requires the exclusion of elements who may not be peaceful or who may have a different agenda. The freedom to associate must necessarily be the freedom to associate with those of one's choice and those with common objectives. The requirement of privacy in matters concerning residence and settlement is too well-known to require elaboration. Finally, it is not possible to conceive of an individual being able to practice a profession or carry on trade, business or occupation without the right to privacy in practical terms and without the right and power to keep others away from his work.

268. *Ex facie*, privacy is essential to the exercise of freedom of conscience and the right to profess, practice and propagate religion vide Article 25. The further right of every religious denomination to maintain institutions for religious and charitable purposes, to manage its own affairs and to own and administer property acquired for such purposes *vide* Article 26 also requires privacy, in the sense of non-interference from the state. Article 28(3) expressly recognizes the right of a student attending an educational institution recognized by the state, to be left alone. Such a student cannot be compelled to take part in any religious instruction imparted in any such institution unless his guardian has consented to it.

269. The right of privacy is also integral to the cultural and educational rights whereby a group having a distinct language, script or culture shall have the right to conserve the same. It has also always been an integral part of the right to own property and has been treated as such in civil law as well as in criminal law *vide* all the offences and torts of trespass known to law.

270. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy.
This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.

Judicial Enumeration of the Fundamental Right to Privacy

271. There is nothing unusual in the judicial enumeration of one right on the basis of another under the Constitution. In the case of Article 21's guarantee of 'personal liberty', this practice is only natural if Salmond's formulation of liberty as "incipient rights"[345] is correct. By the process of enumeration, constitutional courts merely give a name and specify the core of guarantees already present in the residue of constitutional liberty. Over time, the Supreme Court has been able to imply by its interpretative process, that several fundamental rights including the right to privacy

emerge out of expressly stated Fundamental Rights. In *Unni Krishnan, J.P. v. State of A.P.* (1993) SCC 1 645, a Constitution Bench of this Court held that "*several unenumerated rights fall within Article 21 since personal liberty is of widest amplitude*"[346] on the way to affirming the existence of a right to education. It went on to supply the following indicative list of such rights, which included the right to privacy:

30. The following rights are held to be covered Under Article 21:

1. The right to go abroad. *Satwant Singh v. D. Ramarathnam A.P.O., New Delhi* MANU/SC/0040/1967 : (1967) 3 SCR 525.

2. The right to privacy. *Gobind v. State of M.P..*, MANU/SC/0119/1975 : (1975) 2 SCC 148. In this case reliance was placed on the American decision in *Griswold v. Connecticut*, 381 US 479 at 510.

3. The right against solitary confinement. *Sunil Batra v. Delhi Administration*, MANU/SC/0184/1978 : (1978) 4 SCC 494 at 545.

4. The right against bar fetters. *Charles Sobhraj v. Supdt. (Central Jail*, (1978) 4 SCR 104

5. The right to legal aid. *MH Hoskot v. State of Maharashtra*, MANU/SC/0119/1978 : (1978) 3 SCC 544.

6. The right to speedy trial. *Hussainara Khatoon v. Home Secy, State of Bihar*, MANU/SC/0119/1979 : (1980) 1 SCC 81

7. The right against hand cuffing. *Prem Shankar v. Delhi Administration* MANU/SC/0084/1980 : (1980) 3 SCC 526

8. The right against delayed execution. *TV Vatheeswaran v. State of Tamil Nadu*, MANU/SC/0383/1983 : (1983) 2 SCC 68.

9. The right against custodial violence. *Sheela Barse v. State of Maharashtra*, MANU/SC/0382/1983 : (1983) 2 SCC 96.

10. The Right against public hanging. *A.G. of India v. Lachmadevi*, (1989) Supp. 1 SCC 264

11. Doctor's Assistance. *Paramananda Katra v. Union of India*, MANU/SC/0423/1989 : (1989) 4 SCC 286.

12. Shelter *Santistar Builder v. N.K.I. Totame*, MANU/SC/0115/1990 : (1990) 1 SCC 520

In the case of privacy, the case for judicial enumeration is especially strong. It is no doubt a fair implication from Article 21, but also more. Privacy is be a right or condition, "logically presupposed"[347] by rights expressly recorded in the constitutional text, if they are to make sense.

As a result, privacy is more than merely a derivative constitutional right. It is the necessary and unavoidable logical entailment of rights guaranteed in the text of the constitution.

272. Not recognizing character of privacy as a fundamental right is likely to erode the very sub-stratum of the personal liberty guaranteed by the constitution. The decided cases clearly demonstrate that particular fundamental rights could not have been exercised without the recognition of the right of privacy as a fundamental right. Any derecognition or diminution in the importance of the right of privacy will weaken the fundamental rights which have been expressly conferred.

273. Before proceeding to the question of how constitutional courts are to review whether a violation of privacy is unconstitutional, three arguments from the Union and the states deserve to be dealt with expressly.

274. The Learned Attorney General relied on cases holding that there is no fundamental right to trade in liquor to submit by analogy that there can be no absolute right to privacy. Apprehensions that the recognition of privacy would create complications for the state in its exercise of powers is not well-founded. The declaration of a right cannot be avoided where there is good constitutional ground for doing so. It is only after acknowledging that the right of privacy is a fundamental right, that we can consider how it affects the plenary powers of the state. In any event, the state can always legislate a reasonable restriction to protect and effectuate a compelling state interest, like it may while restricting any other fundamental right. There is no warrant for the assumption or for the conclusion that the fundamental right to privacy is an absolute right which cannot be reasonably restricted given a sufficiently compelling state interest.

275. Learned Additional Solicitor General, Shri Tushar Mehta listed innumerable statutes which protect the right of privacy wherever necessary and urged that it is neither necessary nor appropriate to recognize privacy as a fundamental right. This argument cannot be accepted any more in the context of a fundamental right to privacy than in the context of any other fundamental right. Several legislations protect and advance fundamental rights, but their existence does not make the existence of a corresponding fundamental right redundant.

This is obviously so because legislations are alterable and even repealable unlike fundamental rights, which, by design, endure.

276. Shri Rakesh Dwivedi, appearing for the State of Gujarat, while referring to several judgments of the Supreme Court of the United States, submitted that only those privacy claims which involve a 'reasonable expectation of privacy' be recognized as protected by the fundamental right. It is not necessary for the purpose of this case to deal with the particular instances of privacy claims which are to be recognized as implicating a fundamental right. Indeed, it would be premature to do. The scope and ambit of a constitutional protection of privacy can only be revealed to us on a case-by-case basis.

The Test for Privacy

277. One way of determining what a core constitutional idea is, could be by considering its opposite, which shows what it is not. Accordingly, we understand justice as the absence of injustice, and freedom as the absence of restraint. So too privacy may be understood as the antonym of publicity. In law, the distinction between what is considered a private trust as opposed to a public trust illuminates what I take to be core and irreducible attributes of privacy. In *Deoki Nandan v. Murlidhar* MANU/SC/0085/1956 : (1956) SCR 756, four judges of this Court articulated the distinction in the following terms:

The distinction between a private trust and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment.

This same feature, namely the right of a member of public as such to enter upon or use such property, distinguishes private property from public property and private ways from public roads.

278. Privacy is always connected, whether directly or through its effect on the actions which are sought to be secured from interference, to the act of associating with others. In this sense, privacy is usually best understood as a relational right, even as its content frequently concerns the exclusion of others from one's society.

279. The trusts illustration also offers us a workable test for determining when a constitutionally cognizable privacy claim has been made, and the basis for acknowledging that the existence of such a claim is context-dependent. To exercise one's right to privacy is to *choose* and *specify* on two levels. It is to choose which of the various activities that are taken in by the general residue of liberty available to her she would like to perform, and to *specify* whom to include in one's circle when performing them. It is also autonomy in the negative, and takes in the choice and specification of which activities not to perform and which persons to exclude from one's circle. Exercising privacy is the signaling of one's intent to these specified others - whether they are one's co-participants or simply one's audience - as well as to society at large, to claim and exercise the right. To check for the existence of an actionable claim to privacy, all that needs to be considered is if such an intent to choose and specify exists, whether directly in its manifestation in the rights bearer's actions, or otherwise.

280. Such a formulation would exclude three recurring red herrings in the Respondents' arguments before us. *Firstly*, it would not admit of arguments that privacy is limited to property or places. So, for example, taking one or more persons aside to converse at a whisper even in a public place would clearly signal a claim to privacy, just as broadcasting one's words by a loudspeaker would signal the opposite intent. *Secondly*, this formulation would not reduce privacy to solitude. Reserving the rights to admission at a large gathering place, such as a cinema hall or club, would signal a claim to privacy. *Finally*, neither would such a formulation require us to hold that private information must be information that is inaccessible to all others.

Standards of Review of Privacy Violations

281. There is no doubt that privacy is integral to the several fundamental rights recognized by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right of privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which is alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty Under Article 21 is liable to be tested. Under Article 21, the standard test at present is the rationality review expressed in *Maneka Gandhi's* case. This requires that any procedure by which the state interferes with an Article 21 right to be "*fair, just and reasonable, not fanciful, oppressive or arbitrary"*[348].

282. Once it is established that privacy imbues every constitutional freedom with its efficacy and that it can be located in each of them, it must follow that interference with it by the state must be tested against whichever one or more Part III guarantees whose enjoyment is curtailed. As a result, privacy violations will usually have to answer to tests in addition to the one applicable to Article 21. Such a view would be wholly consistent with *R.C. Cooper v. Union of India*.

Conclusion

283. In view of the foregoing, I answer the reference before us in the following terms:

a. The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. *M.P. Sharma* and the majority opinion in *Kharak Singh* must stand overruled to the extent that they indicate to the contrary.

b. The right to privacy is inextricably bound up with all exercises of human liberty - both as it is specifically enumerated across Part III, and as it is guaranteed in the residue Under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails.

c. Any interference with privacy by an entity covered by Article 12's description of the 'state' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference affects.

Rohinton Fali Nariman, J.

Prologue

284. The importance of the present matter is such that whichever way it is decided, it will have huge repercussions for the democratic republic that we call *"Bharat"* i.e. India. A Bench of 9-Judges has been constituted to look into questions relating to basic human rights. A 3-Judge Bench of this Court was dealing with a scheme propounded by the Government of India popularly known as the Aadhar card scheme. Under the said scheme, the Government of India collects and compiles both demographic and biometric data of the residents of this country to be used for various purposes. One of the grounds of attack on the said scheme is that the very collection of such data

is violative of the "Right to Privacy". After hearing the learned Attorney General, Shri Gopal Subramanium and Shri Shyam Divan, a 3-Judge Bench opined as follows:

12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right Under Article 21. If the observations made in *M.P. Sharma* (supra) and *Kharak Singh* (supra) are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty Under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments-where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.

13. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of *M.P. Sharma* (supra) and *Kharak Singh* (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.

285. The matter was heard by a Bench of 5 learned Judges on July 18, 2017, and was thereafter referred to 9 learned Judges in view of the fact that the judgment in **M.P. Sharma and Ors.** v. **Satish Chandra, District Magistrate, Delhi, and Ors.** MANU/SC/0018/1954 : 1954 SCR 1077, was by a Bench of 8 learned Judges of this Court.

286. Learned senior Counsel for the Petitioners, Shri Gopal Subramanium, Shri Shyam Divan, Shri Arvind Datar, Shri Sajan Poovayya, Shri Anand Grover and Miss Meenakshi Arora, have argued that the judgments contained in **M.P. Sharma** (supra) and **Kharak Singh** v. **State of U.P.**, MANU/SC/0085/1962 : (1964) 1 SCR 332, which was by a Bench of 6 learned Judges, should be overruled as they do not reflect the correct position in law. In any case, both judgments have been overtaken by **R.C. Cooper** v. **Union of India**, MANU/SC/0011/1970 : (1970) 1 SCC 248, and **Maneka Gandhi** v. **Union of India** MANU/SC/0133/1978 : (1978) 1 SCC 248, and therefore require a revisit at our end. According to them, the right to privacy is very much a fundamental right which is co-terminus with the liberty and dignity of the individual. According to them, this right is found in Articles 14, 19, 20, 21 and 25 when read with the Preamble of the Constitution. Further, it was also argued that several international covenants have stated that the right to privacy is fundamental to the development of the human personality and that these international covenants need to be read into the fundamental rights chapter of the Constitution. Also, according to them, the right to privacy should be evolved on a case to case basis, and being a fundamental human right should only yield to State action if such State action is compelling, necessary and in public interest. A large number of judgments were cited by all of them. They also invited this Court to pronounce upon the fact that the right to privacy is an inalienable natural right which is not conferred by the Constitution but only recognized as such.

287. Shri Kapil Sibal, learned senior Counsel on behalf of the States of Karnataka, West Bengal, Punjab and Puducherry broadly supported the Petitioners. According to him, the 8-Judge Bench and the 6-Judge Bench decisions have ceased to be relevant in the context of the vastly changed circumstances of today. Further, according to him, State action that violates the fundamental right to privacy must contain at least four elements, namely:

• The action must be sanctioned by law;

• The proposed action must be necessary in a democratic society for a legitimate aim;

• The extent of such interference must be proportionate to the need for such interference;

• There must be procedural guarantees against abuse of such interference.

288. Shri P.V. Surendra Nath, appearing on behalf of the State of Kerala, also supported the Petitioners and stated that the constitutional right to privacy very much exists in Part III of the Constitution.

289. Appearing on behalf of the Union of India, Shri K.K. Venugopal, learned Attorney General for India, has argued that the conclusions arrived at in the 8-Judge Bench and the 6-Judge Bench decisions should not be disturbed as they are supported by the fact that the founding fathers expressly rejected the right to privacy being made part of the fundamental rights chapter of the Constitution. He referred in copious detail to the Constituent Assembly debates for this purpose. Further, according to him, privacy is a common law right and all aspects of privacy do not elevate themselves into being a fundamental right. If at all, the right to privacy can only be one amongst several varied rights falling under the umbrella of the right to personal liberty. According to him, the right to life stands above the right to personal liberty, and any claim to privacy which would destroy or erode this basic foundational right can never be elevated to the status of a fundamental right. He also argued that the right to privacy cannot be claimed when most of the aspects which are sought to be protected by such right are already in the public domain and the information in question has already been parted with by citizens.

290. Shri Tushar Mehta, learned Additional Solicitor General of India, appearing for UIDAI and the State of Madhya Pradesh, generally supported and adopted the arguments of the learned Attorney General. According to him, privacy is an inherently vague and subjective concept and cannot, therefore, be accorded the status of a fundamental right. Further, codified statutory law in India already confers protection to the individual's right to privacy. According to him, no further expansion of the rights contained in Part III of our Constitution is at all warranted. Also, the position under English Law is that there is no common law right to privacy. He cited before us examples of other countries in the world where privacy is protected by legislation and not by or under the Constitution.

291. Shri Aryama Sundaram, appearing for the State of Maharashtra, also supported the arguments made by the learned Attorney General. According to him, there is no separate "privacy" right and violation of a fundamental right should directly be traceable to rights expressly protected by Part III of the Constitution. Further, privacy is a vague and inchoate expression. He also referred to the

Constituent Assembly debates to buttress the same proposition that the right to privacy was expressly discountenanced by the framers of the Constitution. He went on to state that "personal liberty" in Article 21 is liberty which is circumscribed - i.e. it relates only to the person of the individual and is smaller conceptually than "civil liberty". According to him, the ratio of **Kharak Singh** (supra) is that there is no fundamental right to privacy, but any fundamental right that is basic to ordered liberty would certainly be included as a fundamental right. According to him, **Gobind** v. **State of Madhya Pradesh** MANU/SC/0119/1975 : (1975) 2 SCC 148, did not state that there was any fundamental right to privacy and the later judgments which referred only to **Gobind** (supra) as laying down such a right are incorrect for this reason.

292. Shri Rakesh Dwivedi, learned senior Counsel appearing for the State of Gujarat, has argued that both the Petitioners as well as the learned Attorney General have taken extreme positions. According to him, the Petitioners state that in the case of every invasion of a privacy right, howsoever trivial, the fundamental right to privacy gets attracted, whereas according to the learned Attorney General, there is no fundamental right to privacy at all. He asked us to adopt an intermediate position - namely, that it is only if the U.S. Supreme Court's standard that a Petitioner before a Court satisfies the test of "reasonable expectation of privacy" that such infraction of privacy can be elevated to the level of a fundamental right. According to Shri Dwivedi, individual personal choices made by an individual are already protected Under Article 21 under the rubric "personal liberty". It is only when individuals disclose certain personal information in order to avail a benefit that it could be said that they have no reasonable expectation of privacy as they have voluntarily and freely parted with such information. Also, according to him, it is only specialized data, if parted with, which would require protection. As an example, he stated that a person's name and mobile number, already being in the public domain, would not be reasonably expected by that person to be something private. On the other hand, what is contained in that person's bank account could perhaps be stated to be information over which he expects a reasonable expectation of privacy and would, if divulged by the bank to others, constitute an infraction of his fundamental right to privacy. According to him:

...when a claim of privacy seeks inclusion in Article 21 of the Constitution of India, the Court needs to apply the reasonable expectation of privacy test. It should see:

(i) What is the context in which a privacy law is set up.

(ii) Does the claim relate to private or family life, or a confidential relationship.

(iii) Is the claim serious one or is it trivial.

(iv) Is the disclosure likely to result in any serious or significant injury and the nature and the extent of disclosure.

(v) Is disclosure for identification purpose or relates to personal and sensitive information of an identified person.

(vi) Does disclosure relate to information already disclosed publicly to third parties or several parties willingly and unconditionally. Is the disclosure in the course of e-commerce or social media?

Assuming, that in a case that it is found that a claim for privacy is protected by Article 21 of the Constitution, the test should be following:

(i) the infringement should be by legislation. (ii) the legislation should be in public interest.

(iii) the legislation should be reasonable and have nexus with the public interest.

(iv) the State would be entitled to adopt that measure which would most efficiently achieve the objective without being excessive.

(v) if apart from Article 21, the legislation infringes any other specified Fundamental Right then it must stand the test in relation to that specified Fundamental Right.

(vi) Presumption of validity would attach to the legislations.

293. Shri A. Sengupta, appearing on behalf of the State of Haryana, has supported the arguments of the learned Attorney General and has gone on to state that even the U.S. Supreme Court no longer uses the right to privacy to test laws that were earlier tested on this ground. Any right to privacy is conceptually unsound, and only comprehensive data protection legislation can effectively address concerns of data protection and privacy. The Government of India is indeed alive to the need for such a law. He further argued that privacy as a concept is always marshaled to protect liberty and, therefore, argued that the formulation that should be made by this Court is whether a liberty interest is at all affected; is such liberty "personal liberty" or other liberty that deserves constitutional protection and is there a countervailing legitimate State interest.

294. Shri Jugal Kishore, appearing on behalf of the State of Chhattisgarh, has also broadly supported the stand of the learned Attorney General.

295. Shri Gopal Sankaranarayanan, appearing on behalf of the Centre for Civil Society, argued that **M.P. Sharma** (supra) and **Kharak Singh** (supra) are correctly decided and must be followed as there has been no change in the constitutional context of privacy from **Gopalan** (supra) through **R.C. Cooper** (supra) and **Maneka Gandhi** (supra). He further argued that being incapable of precise definition, privacy ought not to be elevated in all its aspects to the level of a fundamental right. According to him, the words "life" and "personal liberty" in Article 21 have already been widely interpreted to include many facets of what the Petitioners refer to as privacy. Those facets which have statutory protection are not protected by Article 21. He also argued that we must never forget that when recognizing aspects of the right to privacy as a fundamental right, such aspects cannot be waived and this being the case, a privacy interest ought not to be raised to the level of a fundamental right. He also cautioned us against importing approaches from overseas out of context.

Early Views on Privacy

296. Any discussion with regard to a right of privacy of the individual must necessarily begin with **Semayne's case**, 77 ER 194. This case was decided in the year 1603, when there was a change of guard in England. The Tudor dynasty ended with the death of Elizabeth I, and the Stuart dynasty, a dynasty which hailed from Scotland took over under James VI of Scotland, who became James I of England.[349] James I was an absolute monarch who ruled believing that he did so by Divine Right. **Semayne's case** (supra) was decided in this historical setting.

297. The importance of **Semayne's case** (supra) is that it decided that every man's home is his castle and fortress for his defence against injury and violence, as well as for his repose. William Pitt, the Elder, put it thus: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter, the rain may enter - *but the King of England cannot enter* - all his force dare not cross the threshold of the ruined tenement." A century and a half later, pretty much the same thing was said in **Huckle** v. **Money** 95 ER 768 (1763), in which it was held that Magistrates cannot exercise arbitrary powers which violated the *Magna Carta* (signed by King John, conceding certain rights to his barons in 1215), and if they did, exemplary damages must be given for the same. It was stated that, "To enter a man's house by virtue of a nameless warrant, in order to procure evidence is worse than the Spanish Inquisition, a law under which no Englishman would wish to live an hour."

298. This statement of the law was echoed in **Entick** v. **Carrington**, 95 ER 807 (1765), in which Lord Camden held that an illegal search warrant was "subversive of all the comforts of society" and the issuance of such a warrant for the seizure of all of a man's papers, and not only those alleged to be criminal in nature, was "contrary to the genius of the law of England." A few years later, in **Da Costa** v. **Jones** 98 ER 1331 (1778), Lord Mansfield upheld the privacy of a third person when such privacy was the subject matter of a wager, which was injurious to the reputation of such third person. The wager in that case was as to whether a certain Chevalier D'eon was a cheat and imposter in that he was actually a woman. Such wager which violated the privacy of a third person was held to be injurious to the reputation of the third person for which damages were awarded to the third person. These early judgments did much to uphold the inviolability of the person of a citizen.

299. When we cross the Atlantic Ocean and go to the United States, we find a very interesting Article printed in the Harvard Law Review in 1890 by Samuel D. Warren and Louis D. Brandeis [(4 Harv. L. Rev. 193)]. The opening paragraph of the said Article is worth quoting:

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis.* Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,- the right to be let alone; the right to liberty secures

the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession- intangible, as well as tangible.

300. This Article is of great importance for the reason that it spoke of the right of the individual "to be let alone". It stated in unmistakable terms that this right is not grounded as a property right, but is grounded in having the right of an "inviolate personality". Limitations on this right were also discussed in some detail, and remedies for the invasion of this right of privacy were suggested, being an action of tort for damages in all cases and perhaps an injunction in some. The right of privacy as expounded in this Article did not explore the ramifications of the said right as against State action, but only explored invasions of this right by private persons.

Three Great Dissents

301. When the Constitution of India was framed, the fundamental rights chapter consisted of rights essentially of citizens and persons against the State. Article 21, with which we are directly concerned, was couched in negative form in order to interdict State action that fell afoul of its contours. This Article, which houses two great human rights, the right to life and the right to personal liberty, was construed rather narrowly by the early Supreme Court of India. But then, there were Judges who had vision and dissented from their colleagues. This judgment will refer to three great dissents by Justices Fazl Ali, Subba Rao and Khanna.

302. Charles Evans Hughes, before he became the Chief Justice of the United States and while he was still a member of the New York Court of Appeals, delivered a set of six lectures at Columbia University.[350] The famous passage oft quoted in many judgments comes from his second lecture. In words that resonate even today, he stated:

A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.....

303. Brandeis, J. had a somewhat different view. He cautioned that "in most matters it is more important that the applicable Rule of law be settled than that it be settled right." [See **Burnet v. Coronado Oil & Gas Co.**, 285 U.S. 393 at 406 (1932)]. John P. Frank wrote, in 1958, of the Brandeis view as follows:

Brandeis was a great institutional man. He realized that .... random dissents .... weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents .... need to be saved for major matters if the Court is not to appear indecisive and quarrelsome..... To have discarded some of his separate opinions is a supreme example of Brandeis's sacrifice to the strength and consistency of the Court. And he had his reward: his shots were all the harder because he chose his ground.[351]

304. Whichever way one looks at it, the foresight of Fazl Ali, J. in **A.K. Gopalan** v. **State of Madras**, MANU/SC/0012/1950 : 1950 SCR 88, simply takes our breath away. The subject matter of challenge in the said case was the validity of certain provisions of the Preventive Detention Act

of 1950. In a judgment which anticipated the changes made in our constitutional law twenty years later, this great Judge said:

To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each Article is a code by itself and is independent of the others. In my opinion, it cannot be said that articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come Under Articles 20 and 21 and also Under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to Article 19(1)(f) and Article 31 both of which deal with the right to property and to some extent overlap each other."

(at page 148)

He went on thereafter to hold that the fact that "due process" was not actually used in Article 21 would be of no moment. He said:

It will not be out of place to state here in a few words how the Japanese Constitution came into existence. It appears that on the 11th October, 1945, General McArthur directed the Japanese Cabinet to initiate measures for the preparation of the Japanese Constitution, but, as no progress was made, it was decided in February, 1946, that the problem of constitutional reform should be taken over by the Government Section of the Supreme Commander's Headquarters. Subsequently the Chief of this Section and the staff drafted the Constitution with the help of American constitutional lawyers who were called to assist the Government Section in the task. This Constitution, as a learned writer has remarked, bore on almost every page evidences of its essentially Western origin, and this characteristic was especially evident in the preamble "particularly reminiscent of the American Declaration of Independence, a preamble which, it has been observed, no Japanese could possibly have conceived or written and which few could even understand" [See Ogg and Zink's "Modern Foreign Governments"]. One of the characteristics of the Constitution which undoubtedly bespeaks of direct American influence is to be found in a lengthy chapter, consisting of 31 articles, entitled "Rights and Duties of the People," which provided for the first time an effective "Bill of Rights" for the Japanese people. The usual safeguards have been provided there against apprehension without a warrant and against arrest or detention without being informed of the charges or without adequate cause (articles 33 and 34).

Now there are two matters which deserve to be noticed: (1) that the Japanese Constitution was framed wholly under American influence; and (2) that at the time it was framed the trend of judicial opinion in America was in favour of confining the meaning of the expression "due process of law" to what is expressed by certain American writers by the somewhat quaint but useful expression "procedural due process." That there was such a trend would be clear from the following passage which I quote from Carl Brent Swisher's "The Growth of Constitutional Power in the United States" (page 107):

The American history of its interpretation falls into three periods. During the first period, covering roughly the first century of government under the Constitution, due process was interpreted principally as a restriction upon procedure-and largely the judicial procedure-by which the government exercised its powers. During the second period, which, again roughly speaking, extended through 1936, due process was expanded to serve as a restriction not merely upon procedure but upon the substance of the activities in which the government might engage. During the third period, extending from 1936 to date, the use of due process as a substantive restriction has been largely suspended or abandoned, leaving it principally in its original status as a restriction upon procedure.

In the circumstances mentioned, it seems permissible to surmise that the expression "procedure established by law" as used in the Japanese Constitution represented the current trend of American judicial opinion with regard to "due process of law," and, if that is so, the expression as used in our Constitution means all that the American writers have read into the words "procedural due process." But I do not wish to base any conclusions upon mere surmise and will try to examine the whole question on its merits.

The word "law" may be used in an abstract or concrete sense. Sometimes it is preceded by an Article such as "a" or "the" or by such words as "any," "all," etc., and sometimes it is used without any such prefix. But, generally, the word "law" has a wider meaning when used in the abstract sense without being preceded by an article. The question to be decided is whether the word "law" means nothing more than statute law.

Now whatever may be the meaning of the expression "due process of law," the word "law" is common to that expression as well as "procedure established by law" and though we are not bound to adopt the construction put on "law" or "due process of law" in America, yet since a number of eminent American Judges have devoted much thought to the subject, I am not prepared to hold that we can derive no help from their opinions and we should completely ignore them.

(at pages 159-161)

He also went on to state that "law" in Article 21 means "valid law".

On all counts, his words were a cry in the wilderness. Insofar as his vision that fundamental rights are not in distinct watertight compartments but do overlap, it took twenty years for this Court to realize how correct he was, and in **R.C. Cooper** (supra), an 11-Judge Bench of this Court, agreeing with Fazl Ali, J., finally held:

52. In dealing with the argument that Article 31(2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby, it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 & 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action-legislative or executive-Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1)

and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g., Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.

53. We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions Under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(f) and 31(2) are mutually exclusive.[352]

(at page 289)

305. Insofar as the other part of Fazl Ali, J.'s judgment is concerned, that "due process" was an elastic enough expression to comprehend substantive due process, a recent judgment in **Mohd. Arif** v. **Registrar, Supreme Court of India and Ors.**, MANU/SC/0754/2014 : (2014) 9 SCC 737, by a Constitution Bench of this Court, has held:

27. The stage was now set for the judgment in *Maneka Gandhi* MANU/SC/0133/1978 : (1978) 1 SCC 248. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [*See:* at SCR pp. 646-648 per Beg, CJ., at SCR pp. 669, 671-674 and 687 per Bhagwati, J. and at SCR pp. 720-723 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus (SCR p.723, para 85):

85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses.

28. Close on the heels of Maneka Gandhi case came *Mithu* v. *State of Punjab*, MANU/SC/0065/1983 : (1983) 2 SCC 277, in which case the Court noted as follows: (SCC pp. 283-84, para 6)

6...In *Sunil Batra* v. *Delhi Administration*, MANU/SC/0184/1978 : (1978) 4 SCC 494, while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" Clause as in the American Constitution; the same consequence ensued after the decisions in the *Bank Nationalisation case* (1970) 1 SCC 248, and *Maneka Gandhi case* MANU/SC/0133/1978 : (1978) 1 SCC 248....

In *Bachan Singh (Bachan Singh* v. *State of Punjab* MANU/SC/0055/1982 : (1980) 2 SCC 684) which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi, it will read to say that: (SCC p.730, para 136)

136. No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty.[353]

(at pages 755-756)

306. The second great dissent, which is of Subba Rao, J., in **Kharak Singh** (supra), has a direct bearing on the question to be decided by us.[354] In this judgment, Regulation 237 of the U.P. Police Regulations was challenged as violating fundamental rights Under Article 19(1)(d) and Article 21. The Regulation reads as follows:

Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures:

(a) Secret picketing of the house or approaches to the house of suspects;

(b) domiciliary visits at night;

(c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation;

(d) the reporting by constables and chaukidars of movements and absences from home;

(e) the verification of movements and absences by means of inquiry slips;

(f) the collection and record on a history-sheet of all information bearing on conduct.

307. All 6 Judges struck down sub-para (b), but Subba Rao, J. joined by Shah, J., struck down the entire Regulation as violating the individual's right to privacy in the following words:

Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado (1949) 338 U.S. 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the Petitioner Under Article 21 of the Constitution.

(at page 359)

The 8 Judge Bench Decision in M.P. Sharma and the 6 Judge Bench Decision in Kharak Singh

308. This takes us to the correctness of the aforesaid view, firstly in light of the decision of the 8-Judge Bench in **M.P. Sharma** (supra). The facts of that case disclose that certain searches were made as a result of which a voluminous mass of records was seized from various places. The Petitioners prayed that the search warrants which allowed such searches and seizures to take place be quashed, based on an argument founded on Article 20(3) of the Constitution which says that no person Accused of any offence shall be compelled to be a witness against himself. The argument which was turned down by the Court was that since this kind of search would lead to the discovery of several incriminating documents, a person Accused of an offence would be compelled to be a witness against himself as such documents would incriminate him. This argument was turned down with reference to the law of testimonial compulsion in the U.S., the U.K. and in this country. While dealing with the argument, this Court noticed that there is nothing in our Constitution corresponding to the Fourth Amendment of the U.S. Constitution, which interdicts unreasonable searches and seizures. In so holding, this Court then observed:

It is, therefore, clear that there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20(3) as above explained. But search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense.

A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such Regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.

(at pages 1096-1097)

309. The first thing that strikes one on reading the aforesaid passage is that the Court resisted the invitation to read the U.S. Fourth Amendment into the U.S. Fifth Amendment; in short it refused to read or import the Fourth Amendment into the Indian equivalent of that part of the Fifth Amendment which is the same as Article 20(3) of the Constitution of India. Also, the fundamental right to privacy, stated to be analogous to the Fourth Amendment, was held to be something which could not be read into Article 20(3).

310. The second interesting thing to be noted about these observations is that there is no broad ratio in the said judgment that a fundamental right to privacy is not available in Part III of the Constitution. The observation is confined to Article 20(3). Further, it is clear that the actual finding in the aforesaid case had to do with the law which had developed in this Court as well as the U.S. and the U.K. on Article 20(3) which, on the facts of the case, was held not to be violated. Also we must not forget that this was an early judgment of the Court, delivered in the **Gopalan** (supra) era, which did not have the benefit of **R.C. Cooper** (supra) or **Maneka Gandhi** (supra). Quite apart from this, it is clear that by the time this judgment was delivered, India was already a signatory to the Universal Declaration of Human Rights, Article 12 of which states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

311. It has always been the law of this Court that international treaties must be respected. Our Constitution contains Directive Principle 51(c), which reads as under:

51. The State shall endeavour to-

(a) & (b) xxx xxx xxx

(c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another;

In order that legislation be effected to implement an international treaty, Article 253 removes legislative competence from all the States and entrusts only the Parliament with such legislation. Article 253 reads as follows:

253. Legislation for giving effect to international agreements. - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or

any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

We were shown judgments of the highest Courts in the U.K. and the U.S. in this behalf. At one extreme stands the United Kingdom, which states that international treaties are not a part of the laws administered in England. At the other end of the spectrum, Article VI of the U.S. Constitution declares:

xxx xxx xxx

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

xxx xxx xxx

It is thus clear that no succor can be drawn from the experience of either the U.K. or the U.S. We must proceed in accordance with the law laid down in the judgments of the Supreme Court of India.

312. Observations of several judgments make it clear that in the absence of any specific prohibition in municipal law, international law forms part of Indian law and consequently must be read into or as part of our fundamental rights. (For this proposition, see: **Bachan Singh** v. **State of Punjab**, MANU/SC/0055/1982 : (1980) 2 SCC 684 at paragraph 139, **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi and Ors.**, MANU/SC/0517/1981 : (1981) 1 SCC 608 at paragraph 8, **Vishaka and Ors.** v. **State of Rajasthan and Ors.**, MANU/SC/0786/1997 : (1997) 6 SCC 241 at paragraph 7 and **National Legal Services Authority** v. **Union of India**, MANU/SC/0309/2014 : (2014) 5 SCC 438 at paragraphs 51-60). This last judgment is instructive in that it refers to international treaties and covenants, the Constitution, and various earlier judgments. The conclusion in paragraph 60 is as follows:

The principles discussed hereinbefore on TGs and the international conventions, including *Yogyakarta Principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.

(at page 487)

313. In fact, the Protection of Human Rights Act, 1993, makes interesting reading in this context.

Section 2(1)(d) and (f) are important, and read as follows:

2. Definitions. - (1) In this Act, unless the context otherwise requires, -

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;

(e) xxx xxx xxx

(f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;

314. In terms of Section 12(f), one important function of the National Human Rights Commission is to study treaties and other international instruments on human rights and make recommendations for their effective implementation. In a recent judgment delivered by Lokur, J. in **Extra Judl. Exec. Victim Families Association and Anr.** v. **Union of India and Ors.** in W.P. (Crl.) No. 129 of 2012 decided on July 14, 2017, this Court highlighted the Protection of Human Rights Act, 1993 as follows:

29. Keeping this in mind, as well as the Universal Declaration of Human Rights, Parliament enacted the Protection of Human Rights Act, 1993. The Statement of Objects and Reasons for the Protection of Human Rights Act, 1993 is of considerable significance and accepts the importance of issues relating to human rights with a view, *inter alia*, to bring accountability and transparency in human rights jurisprudence. The Statement of Objects and Reasons reads as under:

1. India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights, adopted by the General Assembly of the United Nations on the 16th December, 1966. The human rights embodied in the aforesaid covenants stand substantially protected by the Constitution.

2. However, there has been growing concern in the country and abroad about issues relating to human rights. Having regard to this, changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures and systems of administration of justice; with a view to bringing about greater accountability and transparency in them, and devising efficient and effective methods of dealing with the situation.

3. Wide ranging discussions were held at various fora such as the Chief Ministers' Conference on Human Rights, seminars organized in various parts of the country and meetings with leaders of various political parties. Taking into account the views expressed in these discussions, the present Bill is brought before Parliament.

30. Under the provisions of the Protection of Human Rights Act, 1993 the NHRC has been constituted as a high-powered statutory body whose Chairperson is and always has been a retired Chief Justice of India. Amongst others, a retired judge of the Supreme Court and a retired Chief Justice of a High Court is and has always been a member of the NHRC.

31. In *Ram Deo Chauhan* v. *Bani Kanta Das* (MANU/SC/0960/2010 : (2010) 14 SCC 209), this Court recognized that the words 'human rights' though not defined in the Universal Declaration of Human Rights have been defined in the Protection of Human Rights Act, 1993 in very broad terms and that these human rights are enforceable by courts in India. This is what this Court had to say in this regard in paragraphs 47-49 of the Report:

Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. The Constitution and legislations of a civilised country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to the Rule of law put into force mechanisms for their enforcement and protection.

Human rights are universal in nature. The Universal Declaration of Human Rights (hereinafter referred to as UDHR) adopted by the General Assembly of the United Nations on 10-12-1948 recognises and requires the observance of certain universal rights, articulated therein, to be human rights, and these are acknowledged and accepted as equal and inalienable and necessary for the inherent dignity and development of an individual. Consequently, though the term "human rights" itself has not been defined in UDHR, the nature and content of human rights can be understood from the rights enunciated therein.

Possibly considering the wide sweep of such basic rights, the definition of "human rights" in the 1993 Act has been designedly kept very broad to encompass within it all the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, if a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights and NHRC has the jurisdiction to intervene for protecting it.

315. It may also be noted that the "International Principles on the Application of Human Rights to Communication Surveillance" (hereinafter referred to as the "Necessary and Proportionate Principles"), which were launched at the U.N. Human Rights Council in Geneva in September 2013, were the product of a year-long consultation process among civil society, privacy and technology experts. The Preamble to the Necessary and Proportionate Principles states as follows:

Privacy is a fundamental human right, and is central to the maintenance of democratic societies. It is essential to human dignity and it reinforces other rights, such as freedom of expression and information, and freedom of association, and is recognized under international human rights law.....

316. Ignoring Article 12 of the 1948 Declaration would by itself sound the death knell to the observations on the fundamental right of privacy contained in **M.P. Sharma** (supra).

317. It is interesting to note that, in at least three later judgments, this judgment was referred to only in passing in: (1) **Sharda** v. **Dharmpal**, MANU/SC/0260/2003 : (2003) 4 SCC 493 at 513-514:

54. The right to privacy has been developed by the Supreme Court over a period of time. A bench of eight judges in *M.P. Sharma* v. *Satish Chandra* (MANU/SC/0018/1954 : AIR 1954 SC 300) AIR at pp. 306-07, para 18, in the context of search and seizure observed that:

When the Constitution-makers have thought fit not to subject such Regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.

55. Similarly in *Kharak Singh* v. *State of U.P.* (MANU/SC/0085/1962 : AIR 1963 SC 1295), the majority judgment observed thus: (AIR p. 1303, para 20)

The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

56. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. (See *R. Rajagopal* v. *State of T.N.*, MANU/SC/0056/1995 : (1994) 6 SCC 632 and *People's Union for Civil Liberties* v. *Union of India*, MANU/SC/0149/1997 : (1997) 1 SCC 301). In some cases the right has been held to amalgam of various rights.

(2) **District Registrar and Collector, Hyderabad and Anr.** v. **Canara Bank etc.**, MANU/SC/0935/2004 : (2005) 1 SCC 496 at 516, where this Court held:

35. The earliest case in India to deal with "privacy" and "search and seizure" was *M.P. Sharma* v. *Satish Chandra* (MANU/SC/0018/1954 : 1954 SCR 1077) in the context of Article 19(1)(f) and Article 20(3) of the Constitution of India. The contention that search and seizure violated Article 19(1)(f) was rejected, the Court holding that a mere search by itself did not affect any right to property, and though seizure affected it, such effect was only temporary and was a reasonable restriction on the right. The question whether search warrants for the seizure of documents from the Accused were unconstitutional was not gone into. The Court, after referring to the American authorities, observed that in the US, because of the language in the Fourth Amendment, there was a distinction between legal and illegal searches and seizures and that such a distinction need not be imported into our Constitution. The Court opined that a search warrant was addressed to an officer and not to the Accused and did not violate Article 20(3). In the present discussion the case is of limited help. In fact, the law as to privacy was developed in later cases by spelling it out from the right to freedom of speech and expression in Article 19(1)(a) and the right to "life" in Article 21.

And (3) **Selvi** v. **State of Karnataka**, MANU/SC/0325/2010 : (2010) 7 SCC 263 at 363, this Court held as follows:

205. In *M.P. Sharma* (*M.P. Sharma* v. *Satish Chandra* MANU/SC/0018/1954 : AIR 1954 SC 300: 1954 SCC 1077), it had been noted that the Indian Constitution did not explicitly include a "right to privacy" in a manner akin to the Fourth Amendment of the US Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement.

318. It will be seen that different smaller Benches of this Court were not unduly perturbed by the observations contained in **M.P. Sharma** (supra) as it was an early judgment of this Court delivered in the **Gopalan** (supra) era which had been eroded by later judgments dealing with the inter-relation between fundamental rights and the development of the fundamental right of privacy as being part of the liberty and dignity of the individual.

319. Therefore, given the fact that this judgment dealt only with Article 20(3) and not with other fundamental rights; given the fact that the 1948 Universal Declaration of Human Rights containing the right to privacy was not pointed out to the Court; given the fact that it was delivered in an era when fundamental rights had to be read disjunctively in watertight compartments; and given the fact that Article 21 as we know it today only sprung into life in the post **Maneka Gandhi** (supra) era, we are of the view that this judgment is completely out of harm's way insofar as the grounding of the right to privacy in the fundamental rights chapter is concerned.

320. We now come to the majority judgment of 4 learned Judges in **Kharak Singh** (supra). When examining Sub-clause (b) of Regulation 236, which endorsed domiciliary visits at night, even the majority had no hesitation in striking down the aforesaid provision. This Court said that "life" used in Article 21 must mean something more than mere animal existence and "liberty" something more than mere freedom from physical restraint. This was after quoting the judgment of Field, J. in **Munn** v. **Illinois**, 94 U.S. 113 (1876). The majority judgment, after quoting from **Gopalan** (supra), then went on to hold that Article 19(1) and Article 21 are to be read separately, and so read held that Article 19(1) deals with particular species or attributes of personal liberty, whereas Article 21 takes in and comprises the residue.[355]

321. This part of the judgment has been expressly overruled by **R.C. Cooper** (supra) as recognized by Bhagwati, J. in **Maneka Gandhi** (supra):

5. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words 'personal liberty' as used in this article? This question incidentally came up for discussion in some of the judgments in *A.K. Gopalan* v. *State of Madras* (MANU/SC/0012/1950 : AIR 1950 SC 27: 1950 SCR 88: 51 Cri. LJ 1383) and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between Articles 19 and 21. It was in *Kharak Singh* v. *State of U.P.* (MANU/SC/0085/1962 : AIR 1963 SC 1295: (1964) 1 SCR 332: (1963) 2 Cri. LJ 329) that the

question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right Under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." There can be no doubt that in view of the decision of this Court in *R.C. Cooper* v. *Union of India* [MANU/SC/0074/1970 : (1970) 2 SCC 298: (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled.

(at pages 278-279)

322. The majority judgment in **Kharak Singh** (supra) then went on to refer to the Preamble to the Constitution, and stated that Article 21 contained the cherished human value of dignity of the individual as the means of ensuring his full development and evolution. A passage was then quoted from ***Wolf*** v. ***Colorado***, 338 U.S. 25 (1949) to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society. The Court then went on to quote the U.S. Fourth Amendment which guarantees the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures. Though the Indian Constitution did not expressly confer a like guarantee, the majority held that nonetheless an unauthorized intrusion into a person's home would violate the English Common Law maxim which asserts that every man's house is his castle. In this view of Article 21, Regulation 236(b) was struck down.

323. However, while upholding Sub-clauses (c), (d) and (e) of Regulation 236, the Court stated (at page 351):

As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

This passage is a little curious in that Clause (b) relating to domiciliary visits was struck down only on the basis of the fundamental right to privacy understood in the sense of a restraint against the person of a citizen. It seems that the earlier passage in the judgment which stated that despite the fact that the U.S. Fourth Amendment was not reflected in the Indian Constitution, yet any

unauthorized intrusion into a person's home, which is nothing but a facet of the right to privacy, was given a go by.

324. Peculiarly enough, without referring to the extracted passage in which the majority held that the right to privacy is not a guaranteed right under our Constitution, the majority judgment has been held as recognizing a fundamental right to privacy in Article 21. (See: **PUCL** v. **Union of India**, MANU/SC/0149/1997 : (1997) 1 SCC 301 at paragraph 14; **Mr. 'X'** v. **Hospital 'Z'**, MANU/SC/0733/1998 : (1998) 8 SCC 296 at paragraphs 21 and 22; **District Registrar and Collector, Hyderabad and Anr.** v. **Canara Bank, etc.**, MANU/SC/0935/2004 : (2005) 1 SCC 496 at paragraph 36; and **Thalappalam Service Cooperative Bank Limited and Ors.** v. **State of Kerala and Ors.**, MANU/SC/1020/2013 : (2013) 16 SCC 82 at paragraph 57).

325. If the passage in the judgment dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of Regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the majority judgment upholds the right to privacy as being contained in the fundamental rights chapter or otherwise. As the majority judgment contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent. In any case, we are of the view that the majority judgment is good law when it speaks of Article 21 being designed to assure the dignity of the individual as a most cherished human value which ensures the means of full development and evolution of a human being. The majority judgment is also correct in pointing out that Article 21 interdicts unauthorized intrusion into a person's home. Where the majority judgment goes wrong is in holding that fundamental rights are in watertight compartments and in holding that the right of privacy is not a guaranteed right under our Constitution. It can be seen, therefore, that the majority judgment is like the proverbial curate's egg - good only in parts. Strangely enough when the good parts alone are seen, there is no real difference between Subba Rao, J.'s approach in the dissenting judgment and the majority judgment. This then answers the major part of the reference to this 9-Judge Bench in that we hereby declare that neither the 8-Judge nor the 6-Judge Bench can be read to come in the way of reading the fundamental right to privacy into Part III of the Constitution.

326. However, the learned Attorney General has argued in support of the 8-Judge Bench and the 6-Judge Bench, stating that the framers of the Constitution expressly rejected the right to privacy being made part of the fundament rights chapter of the Constitution. While he may be right, Constituent Assembly debates make interesting reading only to show us what exactly the framers had in mind when they framed the Constitution of India. As will be pointed out later in this judgment, our judgments expressly recognize that the Constitution governs the lives of 125 crore citizens of this country and must be interpreted to respond to the changing needs of society at different points in time.

327. The phrase "due process" was distinctly avoided by the framers of the Constitution and replaced by the colourless expression "procedure established by law". Despite this, owing to changed circumstances, **Maneka Gandhi** (supra) in 1978, followed by a number of judgments, have read what was expressly rejected by the framers into Article 21, so that by the time of **Mohd. Arif** (supra), this Court, at paragraph 28, was able to say that the wheel has turned full circle and substantive due process is now part and parcel of Article 21. Given the technological revolution of the later part of the 20th century and the completely altered lives that almost every citizen of this

country leads, thanks to this revolution, the right to privacy has to be judged in today's context and not yesterday's. This argument, therefore, need not detain us.

328. The learned Attorney General then argued that between the right to life and the right to personal liberty, the former has primacy and any claim to privacy which would destroy or erode this basic foundational right can never be elevated to the status of a fundamental right. Elaborating further, he stated that in a developing country where millions of people are denied the basic necessities of life and do not even have shelter, food, clothing or jobs, no claim to a right to privacy as a fundamental right would lie. First and foremost, we do not find any conflict between the right to life and the right to personal liberty. Both rights are natural and inalienable rights of every human being and are required in order to develop his/her personality to the fullest. Indeed, the right to life and the right to personal liberty go hand-in-hand, with the right to personal liberty being an extension of the right to life. A large number of poor people that Shri Venugopal talks about are persons who in today's completely different and changed world have cell phones, and would come forward to press the fundamental right of privacy, both against the Government and against other private individuals. We see no antipathy whatsoever between the rich and the poor in this context. It seems to us that this argument is made through the prism of the Aadhar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, by which the Aadhar card is the means to see that various beneficial schemes of the Government filter down to persons for whom such schemes are intended. This 9-Judge Bench has not been constituted to look into the constitutional validity of the Aadhar Act, but it has been constituted to consider a much larger question, namely, that the right of privacy would be found, *inter alia*, in Article 21 in both "life" and "personal liberty" by rich and poor alike primarily against State action. This argument again does not impress us and is rejected.

329. Both the learned Attorney General and Shri Sundaram next argued that the right to privacy is so vague and amorphous a concept that it cannot be held to be a fundamental right. This again need not detain us. Mere absence of a definition which would encompass the many contours of the right to privacy need not deter us from recognizing privacy interests when we see them. As this judgment will presently show, these interests are broadly classified into interests pertaining to the physical realm and interests pertaining to the mind. As case law, both in the U.S. and India show, this concept has travelled far from the mere right to be let alone to recognition of a large number of privacy interests, which apart from privacy of one's home and protection from unreasonable searches and seizures have been extended to protecting an individual's interests in making vital personal choices such as the right to abort a fetus; rights of same sex couples-including the right to marry; rights as to procreation, contraception, general family relationships, child rearing, education, data protection, etc. This argument again need not detain us any further and is rejected.

330. As to the argument that if information is already in the public domain and has been parted with, there is no privacy right, we may only indicate that the question as to "voluntary" parting with information has been dealt with, in the judgment in **Miller** v. **United States**, 425 US 435 (1976). This Court in **Canara Bank** (supra) referred to the criticism of this judgment as follows:

(A) Criticism of Miller

(i) The majority in *Miller*, 425 US 435 (1976), laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof.

Tribe states in his treatise (see p. 1391) that this theory reveals "alarming tendencies" because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'." He observes that the majority in *Miller*, 425 US 435 (1976), confused "privacy" with "secrecy" and that "even their notion of secrecy is a strange one, for *a secret remains a secret even when shared with those whom one selects for one's confidence*". Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

Yet one can hardly be said to have *assumed a risk* of surveillance in a context where, as a practical matter, one had no choice. Only the most committed - and perhaps civilly committable - *hermit can live without a telephone, without a bank account, without mail*. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society.

He concludes (p. 1400):

In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self.

(*ii*) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:

It is beginning to look as if the only way someone living in our society can avoid '*assuming the risk*' that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under *totalitarian regimes*.

(at pages 520-521)

It may also be noticed that **Miller** (supra) was done away with by a Congressional Act of 1978. This Court then went on to state:

(B) Response to Miller by Congress

We shall next refer to the response by Congress to *Miller*, 425 US 435 (1976). (As stated earlier, we should not be understood as necessarily recommending this law as a model for India.) Soon

after *Miller*, 425 US 435 (1976), Congress enacted the Right to Financial Privacy Act, 1978 (Public Law No. 95-630) 12 USC with Sections 3401 to 3422). The statute accords customers of banks or similar financial institutions, certain rights to be notified of and a right to challenge the actions of Government in court at an anterior stage before disclosure is made. Section 3401 of the Act contains "definitions". Section 3402 is important, and it says that "except as provided by Section 3403(*c*) or (*d*), 3413 or 3414, no government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and that (1) such customer has authorised such disclosure in accordance with Section 3404; (2) such records are disclosed in response to (*a*) administrative subpoenas or summons to meet requirement of Section 3405; (*b*) the requirements of a search warrant which meets the requirements of Section 3406; (*c*) requirements of a judicial subpoena which meets the requirement of Section 3407; or (*d*) the requirements of a formal written requirement Under Section 3408. If the customer decides to challenge the Government's access to the records, he may file a motion in the appropriate US District Court, to prevent such access. The Act also provides for certain specific exceptions." (at page 522)

331. Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in **Jolly George Varghese** v. **Bank of Cochin**, MANU/SC/0014/1980 : (1980) 2 SCC 360 at paragraph 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in **Charles Sobraj** v. **Delhi Administration**, MANU/SC/0184/1978 : (1978) 4 SCC 494 at paragraphs 192, 197-B, 234 and 241 and **Prem Shankar Shukla** v. **Delhi Administration**, MANU/SC/0084/1980 : (1980) 3 SCC 526 at paragraphs 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual.

332. The judgment in **Stanley** v. **Georgia**, 22 L. Ed. 2d 542 at 549, 550 and 551 (1969) will serve to illustrate how privacy is conceptually different from an expressly enumerated fundamental right. In this case, the Appellant before the Court was tried and convicted under a Georgia statute for knowingly having possession of obscene material in his home. The U.S. Supreme Court referred to judgments which had held that obscenity is not within the area of constitutionally protected speech under the First Amendment to the U.S. Constitution. Yet, the Court held:

It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] ... necessarily protects the right to receive....." Martin v. City of Struthers, 319 US 141, 143, 87 L Ed 1313, 63 S Ct 862 (1943); see *Griswold* v. *Connecticut*, 381 US 479, 482, 14 L Ed 2d 510, 513, 85 S Ct 1678 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308, 14 L Ed 2d 398, 402, 403, 85 S Ct 1493 (1965) (Brennan, J., concurring); cf. Pierce v. Society of the Sisters, 268 U.S. 510, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925).

This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 US 507, 510, 92 L Ed 840, 847, 68 S Ct 665 (1948), is fundamental to our free society. Moreover, in the context of this case-a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home-that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy...

These are the rights that Appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases-the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that Appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

(Emphasis supplied)

The Court concluded by stating:

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.

333. This case, more than any other, brings out in bold relief, the difference between the right to privacy and the right to freedom of speech. Obscenity was held to be outside the freedom of speech amended by the First Amendment, but a privacy interest which related to the right to read obscene material was protected under the very same Amendment. Obviously, therefore, neither is privacy as vague and amorphous as has been argued, nor is it correct to state that unless it finds express mention in a provision in Part III of the Constitution, it should not be regarded as a fundamental right.

334. Shri Sundaram's argument that personal liberty is different from civil liberty need not detain us at all for the reason that at least qua the fundament right to privacy - that right being intimately connected with the liberty of the person would certainly fall within the expression "personal liberty".

335. According to Shri Sundaram, every facet of privacy is not protected. Instances of actions which, according to him, are not protected are:

• Taxation laws requiring the furnishing of information;

• In relation to a census;

• Details and documents required to be furnished for the purpose of obtaining a passport;

• Prohibitions pertaining to viewing pornography.

336. We are afraid that this is really putting the cart before the horse. Taxation laws which require the furnishing of information certainly impinge upon the privacy of every individual which ought to receive protection. Indeed, most taxation laws which require the furnishing of such information also have, as a concomitant provision, provisions which prohibit the dissemination of such information to others except under specified circumstances which have relation to some legitimate or important State or societal interest. The same would be the case in relation to a census and details and documents required to be furnished for obtaining a passport. Prohibitions pertaining to viewing pornography have been dealt with earlier in this judgment. The U.S. Supreme Court's decision in **Stanley** (supra) held that such prohibitions would be invalid if the State were to intrude into the privacy of one's home.

337. The learned Attorney General drew our attention to a number of judgments which have held that there is no fundamental right to trade in liquor and cited **Khoday Distilleries Ltd.** v. **State of Karnataka**, MANU/SC/0572/1995 : (1995) 1 SCC 574. Quite obviously, nobody has the fundamental right to carry on business in crime. Indeed, in a situation where liquor is expressly permitted to be sold under a licence, it would be difficult to state that such seller of liquor would not have the fundamental right to trade Under Article 19(1)(g), even though the purport of some of our decisions seems to stating exactly that - See the difference in approach between the earlier Constitution Bench judgment in **Krishna Kumar Narula** v. **State of Jammu and Kashmir**, MANU/SC/0034/1967 : (1967) 3 SCR 50, and the later Constitution Bench judgment in **Har Shankar** v. **The Dy. Excise and Taxation Commr.**, MANU/SC/0321/1975 : (1975) 1 SCC 737. In any event, the analogy to be drawn from the cases dealing with liquor does not take us further for the simple reason that the fundamental right to privacy once recognized, must yield in given circumstances to legitimate State interests in combating crime. But this arises only after recognition of the right to privacy as a fundamental right and not before. What must be a reasonable restriction in the interest of a legitimate State interest or in public interest cannot determine whether the intrusion into a person's affairs is or is not a fundamental right. Every State intrusion into privacy interests which deals with the physical body or the dissemination of information personal to an individual or personal choices relating to the individual would be subjected to the balancing test prescribed under the fundamental right that it infringes depending upon where the privacy interest claimed is founded.

338. The learned Attorney General and Shri Tushar Mehta, learned Additional Solicitor General, in particular, argued that our statutes are replete with a recognition of the right to privacy, and Shri Tushar Mehta cited provisions of the Right to Information Act, 2005, the Indian Easements Act, 1882, the Indian Penal Code, 1860, the Indian Telegraph Act, 1885, the Bankers' Books Evidence Act, 1891, the Credit Information Companies (Regulation) Act, 2005, the Public Financial Institutions (Obligation as to Fidelity and Secrecy) Act, 1983, the Payment and Settlement Systems Act, 2007, the Income Tax Act, 1961, the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, the Census Act, 1948, the Collection of Statistics Act,

2008, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Protection of Children from Sexual Offences Act, 2012 and the Information Technology Act, 2000. According to them, since these statutes already protect the privacy rights of individuals, it is unnecessary to read a fundamental right of privacy into Part III of the Constitution.

339. Statutory law can be made and also unmade by a simple Parliamentary majority. In short, the ruling party can, at will, do away with any or all of the protections contained in the statutes mentioned hereinabove.

Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights that the citizens of this country may enjoy despite the governments that they may elect. This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being.
The recognition of such right in the fundamental rights chapter of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments.
Statutes may protect fundamental rights; they may also infringe them. In case any existing statute or any statute to be made in the future is an infringement of the inalienable right to privacy, this Court would then be required to test such statute against such fundamental right and if it is found that there is an infringement of such right, without any countervailing societal or public interest, it would be the duty of this Court to declare such legislation to be void as offending the fundamental right to privacy.
This argument, therefore, also merits rejection.

340. Shri Rakesh Dwivedi referred copiously to the "reasonable expectation of privacy" test laid down by decisions of the U.S. Supreme Court. The origin of this test is to be found in the concurring judgment of Harlan, J. in **Katz** v. **United States**, 389 U.S. 347 (1967). Though this test has been applied by several subsequent decisions, even in the United States, the application of this test has been criticized.

341. In **Minnesota** v. **Carter**, 525 U.S. 83, 119 S. Ct. 469 at 477 (1998), the concurring judgment of Scalia, J. criticized the application of the aforesaid test in the following terms:

The dissent believes that "[o]ur obligation to produce coherent results" requires that we ignore this clear text and 4-century-old tradition, and apply instead the notoriously unhelpful test adopted in a "benchmar[k]" decision that is 31 years old. Post, at 110, citing *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In my view, the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in Katz, see id., at 360, 88 S. Ct. 507) is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,' " id., at 361, 88 S. Ct. 507, bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed (as the dissent would employ it here) to determine whether a "search or seizure" within the meaning of the Constitution has occurred (as opposed to whether that "search or seizure" is an "unreasonable" one), it has no plausible foundation in the text of the Fourth Amendment. That provision did not guarantee some generalized "right of privacy" and leave it to this Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable'." *Ibid.*

In **Kyllo** v. **United States**, 533 U.S. 27, 121 S. Ct. 2038 at 2043 (2001), the U.S. Supreme Court found that the use of a thermal imaging device, aimed at a private home from a public street, to detect relative amounts of heat within the private home would be an invasion of the privacy of the individual. In so holding, the U.S. Supreme Court stated:

The *Katz* test-whether the individual has an expectation of privacy that society is prepared to recognize as reasonable-has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure § 2.1(d), pp. 393-394 (3d ed. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188; *Carter, supra*, at 97, 119 S. Ct. 469 (SCALIA, J., concurring). But see Rakas, supra, at 143-144, n. 12, 99 S. Ct. 421. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes-the prototypical and hence most commonly litigated area of protected privacy-there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman*, 365 U.S., at 512, 81 S. Ct. 679 constitutes a search-at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.

342. It is clear, therefore, that in the country of its origin, this test though followed in certain subsequent judgments, has been the subject matter of criticism. There is no doubt that such a test has no plausible foundation in the text of Articles 14, 19, 20 or 21 of our Constitution. Also, as has rightly been held, the test is circular in the sense that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy. Whether such individual will or will not have such an expectation ought to depend on what the position in law is. Also, this test is intrinsically linked with the test of voluntarily parting with information, inasmuch as if information is voluntarily parted with, the person concerned can reasonably be said to have no expectation of any privacy interest. This is nothing other than reading of the "reasonable expectation of privacy" with the test in **Miller** (supra), which is that if information is voluntarily parted with, no right to privacy exists. As has been held by us, in **Canara Bank** (supra), this Court referred to **Miller** (supra) and the criticism that it has received in the country of its origin, and refused to apply it in the Indian context. Also, as has been discussed above, soon after **Miller** (supra), the Congress enacted the Right to Financial Privacy Act, 1978, doing away with the substratum of this judgment. Shri Dwivedi's argument must, therefore, stand rejected.

343. Shri Gopal Sankaranarayanan, relying upon the statement of law in **Behram Khurshid Pesikaka** v. **State of Bombay**, MANU/SC/0065/1954 : (1955) 1 SCR 613, **Basheshar Nath** v. **CIT**, MANU/SC/0064/1958 : (1959) Supp. (1) SCR 528 and **Olga Tellis** v. **Bombay Municipal Corporation**, MANU/SC/0039/1985 : (1985) 3 SCC 545, has argued that it is well established that fundamental rights cannot be waived. Since this is the law in this country, if this Court were to hold that the right to privacy is a fundamental right, then it would not be possible to waive any part of such right and consequently would lead to the following complications:

• All the statutory provisions that deal with aspects of privacy would be vulnerable.

• The State would be barred from contractually obtaining virtually any information about a person, including identification, fingerprints, residential address, photographs, employment details, etc., *unless* they were all found to be not a part of the right to privacy.

• The consequence would be that the judiciary would be testing what aspects of privacy could be *excluded* from Article 21 rather than what can be included in Article 21.

This argument again need not detain us. Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well. A simple example would suffice. If a person was to paste on Facebook vital information about himself/herself, such information, being in the public domain, could not possibly be claimed as a privacy right after such disclosure.

But, in pursuance of a statutory requirement, if certain details need to be given for the concerned statutory purpose, then such details would certainly affect the right to privacy, but would on a balance, pass muster as the State action concerned has sufficient inbuilt safeguards to protect this right - viz. the fact that such information cannot be disseminated to anyone else, save on compelling grounds of public interest.

The Fundamental Right to Privacy

344. This conclusion brings us to where the right to privacy resides and what its contours are. But before getting into this knotty question, it is important to restate a few constitutional fundamentals.

345. Never must we forget the great John Marshall, C.J.'s admonition that it is a Constitution that we are expounding. [(see: McCulloch v. Maryland, 17 U.S. 316 at 407 (1819)]. Indeed a Constitution is meant to govern people's lives, and as people's lives keep evolving and changing with the times, so does the interpretation of the Constitution to keep pace with such changes. This was well expressed in at least two judgments of this Court. In **Ashok Tanwar and Anr.** v. **State of H.P. and Ors.**, MANU/SC/1070/2004 : (2005) 2 SCC 104, a Constitution Bench stated as follows:

This apart, the interpretation of a provision of the Constitution having regard to various aspects serving the purpose and mandate of the Constitution by this Court stands on a separate footing. A constitution unlike other statutes is meant to be a durable instrument to serve through longer number of years, i.e., ages without frequent revision. It is intended to serve the needs of the day when it was enacted and also to meet needs of the changing conditions of the future. This Court in *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324, in paragraph 124, observed thus:

124. In judicial review of the vires of the exercise of a constitutional power such as the one Under Article 2, the significance and importance of the political components of the decision deemed fit by Parliament cannot be put out of consideration as long as the conditions do not violate the constitutional fundamentals. In the interpretation of a constitutional document, 'words are but the framework of concepts and concepts may change more than words themselves'. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that 'the intention of a Constitution is rather to outline principles than to engrave details'.

In the First *B.N. Rau Memorial Lecture on "Judicial Methods"* M. Hidayatullah, J. observed:

More freedom exists in the interpretation of the Constitution than in the interpretation of ordinary laws. This is due to the fact that the ordinary law is more often before courts, that there are always dicta of judges readily available while in the domain of constitutional law there is again and again novelty of situation and approach.

Chief Justice Marshall while deciding the celebrated *McCulloch v. Maryland* [4 Wheaton (17 US) 316: 4 L Ed 579 (1819)] (Wheaton at p. 407, L. Ed. at p. 602) made the pregnant remark-"we must never forget that it is the constitution we are expounding"- meaning thereby that it is a question of new meaning in new circumstances. Cardozo in his lectures also said: *"The great generalities of the Constitution have a content and a significance that vary from age to age."* Chief Justice Marshall in *McCulloch v. Maryland* [4 Wheaton (17 US) 316: 4 L Ed 579 (1819)] (L. Ed at pp 603-604) declared that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs". In this regard it is worthwhile to see the observations made in paragraphs 324 to 326 in *Supreme Court Advocates-on-Record Assn*, MANU/SC/0073/1994 : (1993) 4 SCC 441: (SCC pp. 645-46)

324. The case before us must be considered in the light of our entire experience and not merely in that of what was said by the framers of the Constitution. *While deciding the questions posed before us we must consider what is the judiciary today and not what it was fifty years back. The Constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions.* An eminent jurist observed that 'constitutional interpretation is as much a process of creation as one of discovery.'

325. It would be useful to quote hereunder a paragraph from the judgment of Supreme Court of Canada in *Hunter v. Southam Inc.* (1984) 2 SCR 145: [SCR at p.156 (Can)]

It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the Rules of statutory construction. *The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended.* It must, therefore, be capable of growth and development over time to

meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American Courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

326. The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. *The ordinary Rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution. In Minister of Home Affairs v. Fisher* [(1979) 3 All ER 21: 1980 AC 319] dealing with Bermudian Constitution, Lord Wilberforce reiterated that a Constitution is a document 'sui generis, calling for principles of interpretation of its own, suitable to its character'.

This Court in *Aruna Roy v. Union of India*, (2002) 7 SCC 368, recalled the famous words of the Chief Justice Holmes that "spirit of law is not logic but it has been experience" and observed that these words apply with greater force to constitutional law.

In the same judgment this Court expressed that Constitution is a permanent document framed by the people and has been accepted by the people to govern them for all times to come and that the words and expressions used in the Constitution, in that sense, have no fixed meaning and must receive interpretation based on the experience of the people in the course of working of the Constitution. The same thing cannot be said in relation to interpreting the words and expressions in a statute.

(at pages 114-116)

346. To similar effect is the judgment of a 9-Judge Bench in **I.R. Coelho (dead) by L.Rs.** v. **State of Tamil Nadu and Ors.**, MANU/SC/0595/2007 : (2007) 2 SCC 1, which states:

42. The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

(at page 79)

347. It is in this background that the fundamental rights chapter has been interpreted. We may also refer to paragraph 19 in **M. Nagaraj and Ors.** v. **Union of India and Ors.**, MANU/SC/4560/2006 : (2006) 8 SCC 212, for the proposition that any true interpretation of fundamental rights must be expansive, like the universe in which we live. The content of fundamental rights keeps expanding to keep pace with human activity.

348. It is as a result of constitutional interpretation that after **Maneka Gandhi** (supra), Article 21 has been the repository of a vast multitude of human rights[356].

349. In India, therefore, the doctrine of originalism, which was referred to and relied upon by Shri Sundaram has no place. According to this doctrine, the first inquiry to be made is whether the

founding fathers had accepted or rejected a particular right in the Constitution. According to the learned Attorney General and Shri Sundaram, the right to privacy has been considered and expressly rejected by our founding fathers. At the second level, according to this doctrine, it is not open to the Supreme Court to interpret the Constitution in a manner that will give effect to a right that has been rejected by the founding fathers. This can only be done by amending the Constitution. It was, therefore, urged that it was not open for us to interpret the fundamental rights chapter in such a manner as to introduce a fundamental right to privacy, when the founding fathers had rejected the same. It is only the Parliament in its constituent capacity that can introduce such a right. This contention must be rejected having regard to the authorities cited above. Further, in our Constitution, it is not left to all the three organs of the State to interpret the Constitution. When a substantial question as to the interpretation of the Constitution arises, it is this Court and this Court alone Under Article 145(3) that is to decide what the interpretation of the Constitution shall be, and for this purpose the Constitution entrusts this task to a minimum of 5 Judges of this Court.

350. Does a fundamental right to privacy reside primarily in Article 21 read with certain other fundamental rights?

351. At this point, it is important to advert to the U.S. Supreme Court's development of the right of privacy.

The earlier cases tended to see the right of privacy as a property right as they were part of what was called the 'Lochner era' during which the doctrine of substantive due process elevated property rights over societal interests[357]. Thus in an early case, **Olmstead** v. **United States**, 277 U.S. 438 at 474, 478 and 479 (1928), the majority of the Court held that wiretaps attached to telephone wires on public streets did not constitute a "search" under the Fourth Amendment since there was no physical entry into any house or office of the Defendants. In a classic dissenting judgment, Louis Brandeis, J. held that this was too narrow a construction of the Fourth Amendment and said in words that were futuristic that:

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?

352. Also in a ringing declaration of the right to privacy, that great Judge borrowed from his own co-authored article, written almost 40 years earlier, in order to state that the right of privacy is a constitutionally protected right:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized

the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Brandeis, J.'s view was held as being the correct view of the law in **Katz** (supra).

353. A large number of judgments of the U.S. Supreme Court since Katz (supra) have recognized the right to privacy as falling in one or other of the clauses of the Bill of Rights in the U.S. Constitution. Thus, in **Griswold** v. **Connecticut**, 381 U.S. 479 (1965), Douglas, J.'s majority opinion found that the right to privacy was contained in the penumbral regions of the First, Third, Fourth and Fifth Amendments to the U.S. Constitution. Goldberg, J. found this right to be embedded in the Ninth Amendment which states that certain rights which are not enumerated are nonetheless recognized as being reserved to the people. White, J. found this right in the due process Clause of the Fourteenth Amendment, which prohibits the deprivation of a person's liberty without following due process. This view of the law was recognized and applied in **Roe** v. **Wade**, 410 U.S. 113 (1973), in which a woman's right to choose for herself whether or not to abort a fetus was established, until the fetus was found "viable". Other judgments also recognized this right of independence of choice in personal decisions relating to marriage, **Loving** v. **Virginia**, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967); procreation, **Skinner** v. **Oklahoma**, 316 U.S. 535, 541-542, 62 S. Ct. 1110, 1113-1114, 86 L. Ed. 1655 (1942); contraception, **Eisenstadt** v. **Baird**, 405 U.S. 438, 453-454, 92 S. Ct. 1029, 1038-1039, 31 L. Ed. 2d 349 (1972), family relationships, **Prince** v. **Massachusetts**, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944); and child rearing and education, **Pierce** v. **Society of Sisters**, 268 U.S. 510, 535, 45 S. Ct. 571, 573, 69 L. Ed. 1070 (1925).

354. In a recent decision of the U.S. Supreme Court in **United States** v. **Jones**, 565 U.S. 400 (2012), the U.S. Supreme Court's majority judgment traces the right of privacy through the labyrinth of case law in Part II of Scalia, J.'s opinion, and regards it as a constitutionally protected right.

355. Based upon the prevalent thinking of the U.S. Supreme Court, a seminal judgment was delivered by Mathew, J. in **Gobind** (supra). This judgment dealt with the M.P. Police Regulations, similar to the Police Regulations contained in **Kharak Singh** (supra). After setting out the majority and minority opinions in the said judgment, Mathew, J. went on to discuss the U.S. Supreme Court judgments in Griswold (supra) and Roe (supra). In a very instructive passage the learned Judge held:

22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest

is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State.

23. Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individuals. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

(at pages 155-157)

The Police Regulations were, however, not struck down, but were termed as being perilously close to being unconstitutional.

356. Shri Sundaram has brought to our notice the fact that Mathew, J. did not declare privacy as a fundamental right. By this judgment, he reached certain conclusions on the assumption that it was a fundamental right. He is correct in this submission. However, this would not take the matter very much further inasmuch as even though the later judgments have referred to **Gobind** (supra) as the starting point of the fundamental right to privacy, in our view, for the reasons given by us in this judgment, even dehors **Gobind** (supra) these cases can be supported on the ground that there exists a fundamental right to privacy.

357. In **R. Rajagopal** v. **State of Tamil Nadu**, MANU/SC/0056/1995 : (1994) 6 SCC 632, this Court had to decide on the rights of privacy vis-a-vis the freedom of the press, and in so doing, referred to a large number of judgments and arrived at the following conclusion:

26. We may now summarise the broad principles flowing from the above discussion:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent-whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The Rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the Rule in (1) above-indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the Defendant) with reckless disregard for truth. In such a case, it would be enough for the Defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the Defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected

as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.[358]

(at pages 649-651)

358. Similarly, in **PUCL** v. **Union of India**, MANU/SC/0149/1997 : (1997) 1 SCC 301, this Court dealt with telephone tapping as follows:

17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined Under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

18. The right to privacy-by itself-has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

(at page 311)

The Court then went on to apply Article 17 of the International Covenant on Civil and Political Rights, 1966 which recognizes the right to privacy and also referred to Article 12 of the Universal Declaration of Human Rights, 1948 which is in the same terms. It then imported these international law concepts to interpret Article 21 in accordance with these concepts.

359. In **Sharda** v. **Dharmpal** (supra), this Court was concerned with whether a medical examination could be ordered by a Court in a divorce proceeding. After referring to some of the judgments of this Court and the U.K. Courts, this Court held:

81. To sum up, our conclusions are:

1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the court would not be in violation of the right to personal liberty Under Article 21 of the Indian Constitution.

3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the Respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

(at page 524)

In **Canara Bank** (supra), this Court struck down Section 73 of the Andhra Pradesh Stamp Act, as it concluded that the involuntary impounding of documents under the said provision would be violative of the fundamental right of privacy contained in Article 21. The Court exhaustively went into the issue and cited many U.K. and U.S. judgments. After so doing, it analysed some of this Court's judgments and held:

53. Once we have accepted in *Gobind* [MANU/SC/0119/1975 : (1975) 2 SCC 148: 1975 SCC (Cri.) 468] and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept the line of Miller, 425 US 435 (1976), in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any unconstitutionality.

56. In *Smt. Maneka Gandhi v. Union of India*, MANU/SC/0133/1978 : (1978) 1 SCC 248, a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given *additional protection* Under Article 19 (Emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred Under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21.

(at pages 523 and 524)

In **Selvi** v. **State of Karnataka** (supra), this Court went into an in depth analysis of the right in the context of lie detector tests used to detect alleged criminals. A number of judgments of this Court were examined and this Court, recognizing the difference between privacy in a physical sense and the privacy of one's mental processes, held that both received constitutional protection. This was stated in the following words:

224. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the "right to privacy" we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.

225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person "to impart personal knowledge about a relevant fact". The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" Under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.

(at pages 369-370)

360. All this leads to a discussion on what exactly is the fundamental right of privacy - where does it fit in Chapter III of the Constitution, and what are the parameters of its constitutional protection.

361. In an instructive Article reported in Volume 64 of the California Law Review, written in 1976, Gary L. Bostwick suggested that the right to privacy in fact encompasses three separate and distinct rights. According to the learned author, these three components are the components of repose, sanctuary, and intimate decision. The learned author puts it thus (at pages 1482-1483):

The extent of constitutional protection is not the only distinction between the types of privacy. Each zone protects a unique type of human transaction. Repose maintains the actor's peace; sanctuary allows an individual to keep some things private, and intimate decision grants the freedom to act in an autonomous fashion. Whenever a generalized claim to privacy is put forward without distinguishing carefully between the transactional types, parties and courts alike may become hopelessly muddled in obscure claims. The clear standards that appear within each zone

are frequently ignored by claimants anxious to retain some aspect of their personal liberty and by courts impatient with the indiscriminate invocation of privacy.

Finally, it should be recognized that the right of privacy is a continually evolving right. This Comment has attempted to show what findings of fact will lead to the legal conclusion that a person has a right to privacy. Yet the same findings of fact may lead to different conclusions of law as time passes and society's ideas change about how much privacy is reasonable and what kinds of decisions are best left to individual choice. Future litigants must look to such changes in community concerns and national acceptance of ideas as harbingers of corresponding changes in the contours of the zones of privacy.

362. Shortly thereafter, in 1977, an instructive judgment is to be found in **Whalen** v. **Roe**, 429 U.S. 589 at 598 and 599 by the U.S. Supreme Court. This case dealt with a legislation by the State of New York in which the State, in a centralized computer file, registered the names and addresses of all persons who have obtained, pursuant to a Doctor's prescription, certain drugs for which there is both a lawful and unlawful market. The U.S. Supreme Court upheld the statute, finding that it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support the legislation at hand. In an instructive footnote - 23 to the judgment, the U.S. Supreme Court found that the right to privacy was grounded after **Roe** (supra) in the Fourteenth Amendment's concept of personal liberty. Having thus grounded the right, the U.S. Supreme Court in a very significant passage stated:

At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control...

...Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and Anr. is the interest in independence in making certain kinds of important decisions.

363. In fact, in the Constitution of South Africa of 1996, which Constitution was framed after apartheid was thrown over by the South African people, the right to privacy has been expressly declared as a fundamental freedom as follows:

10. **Human dignity**

Everyone has inherent dignity and the right to have their dignity respected and protected.

12. **Freedom and security of the person**

(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

14. **Privacy**

Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.

The Constitutional Court of South Africa in **NM and Ors.** v. **Smith and Ors.**, 2007 (5) SA 250 (CC), had this to say about the fundamental right to privacy recognized by the South African Constitution:

131. The right to privacy recognizes the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore interdependent and mutually reinforcing. We value privacy for this reason at least - that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life.

132. This first reason for asserting the value of privacy therefore lies in our constitutional understanding of what it means to be a human being. An implicit part of this aspect of privacy is the right to choose what personal information of ours is released into the public space. The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should

not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state...

(Emphasis supplied)

364. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

• Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

• Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

• The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21;

ground personal information privacy Under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on 'privacy' being a vague and nebulous concept need not, therefore, detain us.

365. We have been referred to the Preamble of the Constitution, which can be said to reflect core constitutional values. The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed.

366. In his well-known thesis "On Liberty", John Stuart Mill, as far back as in 1859, had this to say:

.... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

(...)

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form or government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

Noting the importance of liberty to individuality, Mill wrote:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them..... The means of development which the individual loses by being prevented from gratifying his inclinations to the injury of others, are chiefly obtained at the expense of the development of other people.... To be held to rigid Rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object. But to be restrained in things not affecting their good, by their mere displeasure, develops nothing valuable, except such force of character as may unfold itself in resisting the restraint. If acquiesced in, it dulls and blunts the whole nature. To give any fair play to the nature of each, it is essential that different persons should be allowed to lead different lives.

(Emphasis supplied)

367. "Liberty" in the Preamble to the Constitution, is said to be of thought, expression, belief, faith and worship. This cardinal value can be found strewn all over the fundamental rights chapter. It can be found in Articles 19(1)(a), 20, 21, 25 and 26. As is well known, this cardinal constitutional value has been borrowed from the Declaration of the Rights of Man and of the Citizen of 1789, which defined "liberty" in Article 4 as follows:

Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.

Even in this limited sense, privacy begins where liberty ends - when others are harmed, in one sense, issues relating to reputation, restraints on physical locomotion etc. set in. It is, therefore, difficult to accept the argument of Shri Gopal Subramanium that "liberty" and "privacy" are interchangeable concepts. Equally, it is difficult to accept the Respondents' submission that there is no concept of "privacy", but only the constitutional concept of "ordered liberty". Arguments of both sides on this score must, therefore, be rejected.

368. But most important of all is the cardinal value of fraternity which assures the dignity of the individual.[359]

The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information.
It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

369. But this is not to say that such a right is absolute.

This right is subject to reasonable Regulations made by the State to protect legitimate State interests or public interest. However,
when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed.
For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained Under Article 21 read with Article 14 if it is arbitrary and unreasonable; and Under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said Article. Each of the tests evolved by this Court, qua legislation or executive action, Under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster.
In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

370. It is important to advert to one other interesting argument made on the side of the Petitioner. According to the Petitioners, even in British India, the right to privacy was always legislatively recognized. We were referred to the Indian Telegraph Act of 1885, vintage and in particular Section 5 thereof which reads as under:

5. (1) On the occurrence of any public emergency, or in the interest of the public safety, the Governor General in Council or a Local Government, or any officer specially authorized in this behalf by the Governor General in Council, may-

(a) take temporary possession of any telegraph established, maintained or worked by any person licensed under this Act; or

(b) order that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government or an officer thereof mentioned in the order.

(2) If any doubt arises as to the existence of a public emergency, or whether any act done under Sub-section (1) was in the interest of the public safety, a certificate signed by a Secretary to the Government of India or to the Local Government shall be conclusive proof on the point.

We were also referred to Section 26 of the Indian Post Office Act, 1898 for the same purpose.

26. **Power to intercept postal articles for public good.**- (1) On the occurrence of any public emergency, or in the interest of the public safety or tranquility, the Central Government, or a State Government, or any officer specially authorized in this behalf by the Central or the State Government may, by order in writing, direct that any postal Article or class or description of postal articles in course of transmission by post shall be intercepted or detained, or shall be disposed of in such manner as the authority issuing the order may direct.

(2) If any doubt arises as to the existence of a public emergency, or as to whether any act done under Sub-section (1) was in the interest of the public safety or tranquility, a certificate of the Central Government or, as the case may be, of the State Government shall be conclusive proof on the point.

371. Coming to more recent times, the Right to Information Act, 2005 in Section 8(1)(j) states as follows:

8. **Exemption from disclosure of information.-**

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

(a) to (i) xxx xxx xxx

(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

It will be noticed that in this statutory provision, the expression "privacy of the individual" is specifically mentioned. In an illuminating judgment, reported as **Thalappalam Service Co-operative Bank Limited and Ors.**, v. **State of Kerala and Ors.**, MANU/SC/1020/2013 : (2013) 16 SCC 82, this Court dealt with the right to information as a facet of the freedom of speech guaranteed to every individual. In certain instructive passages, this Court held:

57. The right to privacy is also not expressly guaranteed under the Constitution of India. However, the Privacy Bill, 2011 to provide for the right to privacy to citizens of India and to regulate the collection, maintenance and dissemination of their personal information and for penalization for violation of such rights and matters connected therewith, is pending. In several judgments including *Kharak Singh* v. *State of U.P.* (MANU/SC/0085/1962 : AIR 1963 SC 1295: (1963) 2 Cri. LJ 329), *R. Rajagopal* v. *State of T.N.* MANU/SC/0056/1995 : (1994) 6 SCC 632, *People's Union for Civil Liberties* v. *Union of India* MANU/SC/0149/1997 : (1997) 1 SCC 301 and *State of Maharashtra* v. *Bharat Shanti Lal Shah* MANU/SC/3789/2008 : (2008) 13 SCC 5, this Court has recognized the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.

58. The right to privacy is also recognized as a basic human right Under Article 12 of the Universal Declaration of Human Rights Act, 1948, which states as follows:

12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

59. Article 17 of the International Covenant on Civil and Political Rights Act, 1966, to which India is a party also protects that right and states as follows:

17. (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence nor to unlawful attacks on his honour and reputation.

60. This Court in *R. Rajagopal*, MANU/SC/0056/1995 : (1994) 6 SCC 632 held as follows: (SCC pp. 649-50, para 26)

(1)... The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.

62. The public authority also is not legally obliged to give or provide information even if it is held, or under its control, if that information falls under Clause (j) of Sub-section (1) of Section 8. Section 8(1)(j) is of considerable importance so far as this case is concerned, hence given below, for ready reference:

8. **Exemption from disclosure of information** - (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen -

(a) to (i) xxx xxx xxx

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to Parliament or a State Legislature shall not be denied to any person.

63. Section 8 begins with a non obstante clause, which gives that Section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in Clauses (a) to (j). The public authority, as already indicated, cannot access all the information from a private individual, but only those information which he is legally obliged to pass on to a public authority by law, and also only those information to which the public authority can have access in accordance with law. Even those information, if personal in nature, can be made available only subject to the limitations provided in Section 8(j) of the RTI Act. Right to be left alone, as propounded in *Olmstead* v. *United States* [72 L Ed 944: 277 US 438 (1928)], is the most comprehensive of the rights and most valued by civilized man.

64. Recognizing the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights Under Section 8(j), as already indicated. If the information sought for is personal and has no relationship with any public activity or interest or it will not subserve larger public interest, the public authority or the officer concerned is not legally obliged to provide those information. Reference may be made to a recent judgment of this Court in *Girish Ramchandra Deshpande* v. *Central Information Commissioner* MANU/SC/0816/2012 : (2013) 1 SCC 212, wherein this Court held that since there is no bona fide public interest in seeking information, the disclosure of said information would cause unwarranted invasion of privacy of the individual Under Section 8(1)(j) of the Act. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person from whom information is sought for, has also a right to privacy guaranteed Under Article 21 of the Constitution.

(at page 112-114)

372. There can be no doubt that counsel for the Petitioners are right in their submission that the legislature has also recognized the fundamental right of privacy and, therefore, it is too late in the day to go back on this. Much water has indeed flowed under the bridge since the decisions in **M.P. Sharma** (supra) and **Kharak Singh** (supra).

The Inalienable Nature of the Right to Privacy

373. Learned Counsel for the Petitioners also referred to another important aspect of the right of privacy. According to learned Counsel for the Petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in paragraph 12, refers to this aspect of the fundamental right contained.

It was, therefore, argued before us that given the international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognized and given the status of being fundamental. There is no doubt that the Petitioners are correct in this submission.
However, one important road block in the way needs to be got over.

374. In **Additional District Magistrate, Jabalpur** v. **S.S. Shukla**, MANU/SC/0062/1976 : (1976) 2 SCC 521, a Constitution Bench of this Court arrived at the conclusion (by majority) that Article 21 is the sole repository of all rights to life and personal liberty, and, when suspended, takes away those rights altogether.

A remarkable dissent was that of Khanna, J.[360]

The learned Judge held:

525. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that Article for obtaining relief from the court during the period of emergency. Question then arises as to whether the Rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is the sole repository of the right to life and personal liberty. After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the Rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life and liberty without due process, of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also

given expression in varying words to the principle that no one shall be derived of his life or liberty without the authority of law. The International Commission of Jurists, which is affiliated to UNESCO, has been attempting with, considerable success to give material content to "the Rule of law", an expression used in the Universal Declaration of Human Rights. One of its most notable achievements was the Declaration of Delhi, 1959. This resulted from a Congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers. "Respect for the supreme value of human personality" was stated to be the basis of all law (see page 21 of the *Constitutional and Administrative* Law by O. Hood Phillips, 3rd Ed.).

531. I am unable to subscribe to the view that when right to enforce the right Under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in Gopalan's case, such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359. I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coming into force of the Constitution.

(at pages 747 and 751)

375. According to us this is a correct enunciation of the law for the following reasons:

(i) It is clear that the international covenants and declarations to which India was a party, namely, the 1948 Declaration and the 1966 Covenant both spoke of the right to life and liberty as being "inalienable". Given the fact that this has to be read as being part of Article 21 by virtue of the judgments referred to supra, it is clear that Article 21 would, therefore, not be the sole repository of these human rights but only reflect the fact that they were

"inalienable"; that they inhere in every human being by virtue of the person being a human being;

(ii) Secondly, developments after this judgment have also made it clear that the majority judgments are no longer good law and that Khanna, J.'s dissent is the correct version of the law. Section 2(1)(d) of the Protection of Human Rights Act, 1993 recognises that the right to life, liberty, equality and dignity referable to international covenants and enforceable by Courts in India are "human rights". And international covenants expressly state that these rights are 'inalienable' as they inhere in persons because they are human beings. In **I.R. Coelho** (supra), this Court noticed

in paragraph 29 that, "The decision in *ADM Jabalpur*, MANU/SC/0062/1976 : (1976) 2 SCC 521, about the restrictive reading of the right to life and liberty stood impliedly overruled by various subsequent decisions.", and expressly held that these rights are natural rights that inhere in human beings thus:

61. The approach in the interpretation of fundamental rights has been evidenced in a recent case *M. Nagaraj v. Union of India*, MANU/SC/4560/2006 : (2006) 8 SCC 212, in which the Court noted: "20. *This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In Sakal Papers (P) Ltd. v. Union of India* [MANU/SC/0090/1961 : AIR 1962 SC 305: (1962) 3 SCR 842], this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in *A.K. Gopalan v. State of Madras* [MANU/SC/0012/1950 : AIR 1950 SC 27: 1950 SCR 88: 1950 Cri. LJ 1383]. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan [*A.K. Gopalan v. State of Madras* (MANU/SC/0012/1950 : AIR 1950 SC 27: 1950 SCR 88: 1950 Cri. LJ 1383)] *and held in its landmark judgment in Maneka Gandhi v. Union of India*, MANU/SC/0133/1978 : (1978) 1 SCC 248, *that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right.* The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees."

(at pages 85-86)

(iii) Seervai in a trenchant criticism of the majority judgment states as follows:

30. The result of our discussion so far may be stated thus: Article 21 does not confer a right to life or personal liberty: Article 21 assumes or recognizes the fact that those rights exist and affords protection against the deprivation of those rights to the extent there provided. The expression "procedure established by law" does not mean merely a procedural law but must also include substantive laws. The word "law" must mean a valid law, that is, a law within the legislative competence of the legislature enacting it, which law does not violate the limitations imposed on legislative power by fundamental rights. "Personal liberty" means the liberty of the person from external restraint or coercion. Thus Article 21 protects life and personal liberty by putting restrictions on legislative power, which Under Articles 245 and 246 is subject to the provisions of "this Constitution", and therefore subject to fundamental rights. The precise nature of this protection is difficult to state, first because among other things, such protection is dependent on reading Article 21 along with other Articles conferring fundamental rights, such as Articles 14, 20 and 22(1) and (2); and, secondly, because fundamental rights from their very nature refer to ordinary laws which deal with the subject matter of those rights.

31. The right to life and personal liberty which inheres in the body of a living person is recognized and protected not merely by Article 21 but by the civil and criminal laws of India, and it is unfortunate that in the *Habeas Corpus* Case this aspect of the matter did not receive the attention which it deserved. Neither the Constitution nor any law confers the right to life. That right arises from the existence of a living human body. The most famous remedy for securing personal liberty, the writ of *habeas corpus*, requires the production before the court of the body of the person alleged to be illegally detained. The Constitution gives protection against the deprivation of life and personal liberty; so do the civil and criminal laws in force in India... (See, Seervai, Constitutional Law of India (4th Edition) Appendix pg. 2219).

We are of the view that the aforesaid statement made by the learned author reflects the correct position in constitutional law. We, therefore, expressly overrule the majority judgments in **ADM Jabalpur** (supra).

376. Before parting with this subject, we may only indicate that the majority opinion was done away with by the Constitution's 44th Amendment two years after the judgment was delivered. By that Amendment, Article 359 was amended to state that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of rights conferred by Part III of the Constitution may remain suspended for the period during which such proclamation is in force, excepting Articles 20 and 21. On this score also, it is clear that the right of privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human being.

Conclusion

377. This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. **M.P. Sharma** (supra) and the majority in **Kharak Singh** (supra), to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognizing privacy as a

fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on merits to the original Bench of 3 honourable Judges of this Court in light of the judgment just delivered by us.

Abhay Manohar Sapre, J.

378. I have had the benefit of reading the scholarly opinions of my esteemed learned brothers, Justice J. Chelameswar, Justice S.A. Bobde, Justice Rohinton Fali Nariman and Dr. Justice D.Y. Chandrachud. Having read them carefully, I have nothing more useful to add to the reasoning and the conclusion arrived at by my esteemed brothers in their respective opinions.

379. However, keeping in view the importance of the questions referred to this Bench, I wish to add only few words of concurrence of my own.

380. In substance, two questions were referred to this Nine Judge Bench, first, whether the law laid down in the case of **M.P. Sharma and Ors.** v. **Satish Chandra, District Magistrate Delhi and Ors.** MANU/SC/0018/1954 : AIR 1954 SC 300 and **Kharak Singh** v. **State of Uttar Pradesh and Ors.** MANU/SC/0085/1962 : AIR 1963 SC 1295 insofar as it relates to the "*right to privacy of an individual*" is correct and second, whether "*right to privacy*" is a fundamental right under Part III of the Constitution of India?

381. Before I examine these two questions, it is apposite to take note of the Preamble to the Constitution, which, in my view, has bearing on the questions referred.

382. The Preamble to the Constitution reads as under:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; And to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

383. Perusal of the words in the Preamble would go to show that every word used therein was cautiously chosen by the founding fathers and then these words were arranged and accordingly placed in a proper order. Every word incorporated in the Preamble has significance and proper meaning.

384. The most important place of pride was given to the "People of India" by using the expression, **WE, THE PEOPLE OF INDIA**, in the beginning of the Preamble. The Constitution was accordingly adopted, enacted and then given to ourselves.

385. The keynote of the Preamble was to lay emphasis on two positive aspects - one, *"the Unity of the Nation"* and the second "*Dignity of the individual*". The expression "*Dignity*" carried with it moral and spiritual imports. It also implied an obligation on the part of the Union to respect the personality of every citizen and create the conditions in which every citizen would be left free to find himself/herself and attain self-fulfillment.

386. The incorporation of expression "*Dignity of the individual*" in the Preamble was aimed essentially to show explicit repudiation of what people of this Country had inherited from the past. Dignity of the individual was, therefore, always considered the prime constituent of the fraternity, which assures the dignity to every individual. Both expressions are interdependent and intertwined.

387. In my view, unity and integrity of the Nation cannot survive unless the dignity of every individual citizen is guaranteed. It is inconceivable to think of unity and integration without the assurance to an individual to preserve his dignity. In other words, regard and respect by every individual for the dignity of the other one brings the unity and integrity of the Nation.

388. The expressions "*liberty*", "*equality*" and "*fraternity*" incorporated in the Preamble are not separate entities. They have to be read in juxtaposition while dealing with the rights of the citizens. They, in fact, form a union. If these expressions are divorced from each other, it will defeat the very purpose of democracy.

389. In other words, liberty cannot be divorced from equality so also equality cannot be divorced from liberty and nor can liberty and equality be divorced from fraternity. The meaning assigned to these expressions has to be given due weightage while interpreting Articles of Part III of the Constitution.

390. It is, therefore, the duty of the Courts and especially this Court as sentinel on the *qui vive* to strike a balance between the changing needs of the Society and the protection of the rights of the citizens as and when the issue relating to the infringement of the rights of the citizen comes up for consideration. Such a balance can be achieved only through securing and protecting liberty, equality and fraternity with social and political justice to all the citizens under Rule of law (see- **S.S. Bola and Ors.** v. **B.D. Sardana and Ors.** MANU/SC/0813/1997 : 1997 (8) SCC 522).

391. Our Constitution has recognized certain existing cherished rights of an individual. These rights are incorporated in different Articles of Part III of the Constitution under the heading- Fundamental Rights. In so doing, some rights were incorporated and those, which were not incorporated, were read in Part III by process of judicial interpretation depending upon the nature of right asserted by the citizens on case-to-case basis.

392. It was not possible for the framers of the Constitution to incorporate each and every right be that a natural or common law right of an individual in Part III of the Constitution. Indeed, as we can see whenever occasion arose in the last 50 years to decide as to whether any particular right alleged by the citizen is a fundamental right or not, this Court with the process of judicial interpretation recognized with remarkable clarity several existing natural and common law rights of an individual as fundamental rights falling in Part III though not defined in the Constitution. It was done keeping in view the fact that the Constitution is a sacred living document and, hence,

susceptible to appropriate interpretation of its provisions based on changing needs of "We, the People" and other well defined parameters.

393. Article 21 is perhaps the smallest Article in terms of words (18) in the Constitution. It is the heart of the Constitution as was said by Dr. B.R. Ambedkar. It reads as under: -

No person shall be deprived of his life or personal liberty except according to procedure established by law.

394. This Article is in Part III of the Constitution and deals with Fundamental rights of the citizens. It has been the subject matter of judicial interpretation by this Court along with other Articles of Part III in several landmark cases beginning from **A.K. Gopalan** v. **State of Madras** MANU/SC/0012/1950 : AIR 1950 SC 27 up to **Mohd. Arif @ Ashfaq** v. **Registrar, Supreme Court of India** MANU/SC/0754/2014 : (2014) 9 SCC 737. In between this period, several landmark judgments were rendered by this Court.

395. Part III of the Constitution and the true meaning of the expression "*personal liberty*" in Article 21 and what it encompasses was being debated all along in these cases. The great Judges of this Court with their vast knowledge, matured thoughts, learning and with their inimitable style of writing coupled with the able assistance of great lawyers gradually went on to expand the meaning of the golden words (*personal liberty*) with remarkable clarity and precision.

396. The learned Judges endeavored and expanded the width of the fundamental rights and preserved the freedom of the citizens. In the process of the judicial evolution, the law laid down in some earlier cases was either overruled or their correctness doubted.

397. It is a settled Rule of interpretation as held in the case of **Rustom Cavasjee Cooper** v. **Union of India**, MANU/SC/0011/1970 : (1970) 1 SCC 248 that the Court should always make attempt to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and the content by process of judicial construction. Similarly, it is also a settled principle of law laid down in **His Holiness Kesavananda Bharati Sripadagalvaru** v. **State of Kerala and Anr.**, MANU/SC/0445/1973 : (1973) 4 SCC 225 that the Preamble is a part of the Constitution and, therefore, while interpreting any provision of the Constitution or examining any constitutional issue or while determining the width or reach of any provision or when any ambiguity or obscurity is noticed in any provision, which needs to be clarified, or when the language admits of meaning more than one, the Preamble to the Constitution may be relied on as a remedy for mischief or/and to find out the true meaning of the relevant provision as the case may be.

398. In my considered opinion, the two questions referred herein along with few incidental questions arising therefrom need to be examined carefully in the light of law laid down by this Court in several decided cases. Indeed, the answer to the questions can be found in the law laid down in the decided cases of this Court alone and one may not require taking the help of the law laid down by the American Courts.

399. It is true that while interpreting our laws, the English decisions do guide us in reaching to a particular conclusion arising for consideration. The law reports also bear the testimony that this

Court especially in its formative years has taken the help of English cases for interpreting the provisions of our Constitution and other laws.

400. However, in the last seven decades, this Court has interpreted our Constitution keeping in view the socio, economic and political conditions of the Indian Society, felt need of, We, the People of this Country and the Country in general in comparison to the conditions prevailing in other Countries.

401. Indeed, it may not be out of place to state that this Court while interpreting the provisions of Indian Companies Act, which is modeled on English Company's Act has cautioned that the Indian Courts will have to adjust and adapt, limit or extend, the principles derived from English decisions, entitled as they are to great respect, suiting the conditions to the Indian society as a whole. (See- **Hind Overseas (P) Ltd.** v. **Raghunath Prasad Jhunjhunwala and Anr.** MANU/SC/0050/1975 : (1976) 3 SCC 259). The questions referred need examination in the light of these principles.

402. In my considered opinion, "*right to privacy of any individual*" is essentially a natural right, which inheres in every human being by birth.
Such right remains with the human being till he/she breathes last.
It is indeed inseparable and inalienable
from human being.
In other words,
it is born with the human being and extinguish with human being.

403. One cannot conceive an individual enjoying meaningful life with dignity without such right. Indeed, it is one of those cherished rights, which every civilized society governed by Rule of law always recognizes in every human being and is under obligation to recognize such rights in order to maintain and preserve the dignity of an individual regardless of gender, race, religion, caste and creed. It is, of course, subject to imposing certain reasonable restrictions keeping in view the social, moral and compelling public interest, which the State is entitled to impose by law.

404. "*Right to privacy*" is not defined in law except in the dictionaries. The Courts, however, by process of judicial interpretation, has assigned meaning to this right in the context of specific issues involved on case-to-case basis.

405. The most popular meaning of "**right to privacy**" is - "**the right to be let alone**". In ***Gobind*** v. ***State of Madhya Pradesh and Anr.***, MANU/SC/0119/1975 : (1975) 2 SCC 148, K.K. Mathew, J. noticed multiple facets of this right (Para 21-25) and then gave a Rule of caution while examining the contours of such right on case-to-case basis.

406. In my considered view, the answer to the questions can be found in the law laid down by this Court in the cases beginning from **Rustom Cavasjee Cooper** (supra) followed by **Maneka Gandhi** v. **Union of India and Anr.** MANU/SC/0133/1978 : (1978) 1 SCC 248, **People's Union for Civil Liberties (PUCL)** v. **Union of India and Anr.**, MANU/SC/0149/1997 : (1997) 1 SCC 301, **Gobind's case** (supra), **Mr. "X"** v. **Hospital 'Z'** MANU/SC/0733/1998 : (1998) 8 SCC 296, **District Registrar & Collector, Hyderabad and Anr.** v. **Canara Bank and Ors.**,

MANU/SC/0935/2004 : (2005) 1 SCC 496 and lastly in **Thalappalam Service Coop. Bank Ltd. and Ors.** v. **State of Kerala and Ors.**, MANU/SC/1020/2013 : (2013) 16 SCC 82.

407. It is in these cases and especially the two - namely, **Gobind** (supra) and **District Registrar** (supra), their Lordships very succinctly examined in great detail the issue in relation to *"right to privacy"* in the light of Indian and American case law and various international conventions.

408. In **Gobind' case**, the learned Judge, K.K. Mathew J. speaking for the Bench held and indeed rightly in Para 28 as under:

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

409. Similarly in the case of **District Registrar** (supra), the learned Chief Justice R.C. Lahoti (as His Lordship then was) speaking for the Bench with his distinctive style of writing concluded in Para 39 as under:

39. We have referred in detail to the reasons given by Mathew, J. in Gobind to show that, the right to privacy has been implied in Articles 19(1)(a) and (d) and Article 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has reasonable basis or reasonable materials to support it.

410. In all the aforementioned cases, the question of "*right to privacy*" was examined in the context of specific grievances made by the citizens wherein their Lordships, *inter alia*, ruled that firstly, "*right to privacy*" has multiple facets and though such right can be classified as a part of fundamental right emanating from Article 19(1)(a) and (d) and Article 21, yet it is not absolute and secondly, it is always subject to certain reasonable restrictions on the basis of compelling social, moral and public interest and lastly, any such right when asserted by the citizen in the Court of law then it has to go through a process of case-to-case development.

411. I, therefore, do not find any difficulty in tracing the "*right to privacy*" emanating from the two expressions of the Preamble namely, "liberty of thought, expression, belief, faith and worship" and "Fraternity assuring the dignity of the individual" and also emanating from Article 19(1)(a) which gives to every citizen "a freedom of speech and expression" and further emanating from Article 19(1)(d) which gives to every citizen "a right to move freely throughout the territory of India" and lastly, emanating from the expression "personal liberty" Under Article 21. Indeed, the right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition.

412. In view of foregoing discussion, my answer to question No. 2 is that "*right to privacy*" is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law.

413. Similarly, I also hold that the "*right to privacy*" has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.

414. My esteemed learned brothers, Justice J. Chelameswar, Justice S.A. Bobde, Justice Rohinton Fali Nariman and Dr. Justice D.Y. Chandrachud have extensively dealt with question No. 1 in the context of Indian and American Case law on the subject succinctly. They have also dealt with in detail the various submissions of the learned senior Counsel appearing for all the parties.

415. I entirely agree with their reasoning and the conclusion on question No. 1 and hence do not wish to add anything to what they have said in their respective scholarly opinions.

416. Some learned senior Counsel appearing for the Petitioners, however, argued that the law laid down by this Court in some earlier decided cases though not referred for consideration be also overruled while answering the questions referred to this Bench whereas some senior counsel also made attempts to attack the legality and correctness of Aadhar Scheme in their submissions.

417. These submissions, in my view, cannot be entertained in this case. It is for the reason that firstly, this Bench is constituted to answer only specific questions; secondly, the submissions pressed in service are not referred to this Bench and lastly, it is a settled principle of law that the reference Court cannot travel beyond the reference made and is confined to answer only those questions that are referred. (See-**Naresh Shridhar Mirajkar and Ors.** v. **State of Maharashtra and Anr.** (1966) 3 SCR 744 at page 753).

418. Suffice it to say that as and when any of these questions arise in any case, the appropriate Bench will examine such questions on its merits in accordance with law.

419. Before I part, I wish to place on record that it was pleasure hearing the erudite arguments addressed by all the learned Counsel. Every counsel argued with brevity, lucidity and with remarkable clarity. The hard work done by each counsel was phenomenal and deserves to be complimented. Needless to say, but for their able assistance both in terms of oral argument as well as written briefs (containing thorough submissions, variety of case law and the literature on the subject), it was well nigh impossible to express the views.

Sanjay Kishan Kaul, J.

420. I have had the benefit of reading the exhaustive and erudite opinions of Rohinton F. Nariman, J, and Dr. D.Y. Chandrachud, J. The conclusion is the same, answering the reference that privacy is not just a common law right, but a fundamental right falling in Part III of the Constitution of India. I agree with this conclusion as privacy is a primal, natural right which is inherent to an individual. However, I am tempted to set out my perspective on the issue of privacy as a right, which to my mind, is an important core of any individual existence.

421. A human being, from an individual existence, evolved into a social animal. Society thus envisaged a collective living beyond the individual as a unit to what came to be known as the family. This, in turn, imposed duties and obligations towards the society. The right to "*do as you*

please" became circumscribed by norms commonly acceptable to the larger social group. In time, the acceptable norms evolved into formal legal principles.

422. "The right to be", though not extinguished for an individual, as the society evolved, became hedged in by the complexity of the norms. There has been a growing concern of the impact of technology which breaches this "right to be", or privacy - by whatever name we may call it.

423. The importance of privacy may vary from person to person dependent on his/her approach to society and his concern for being left alone or not. That some people do not attach importance to their privacy cannot be the basis for denying recognition to the right to privacy as a basic human right.

424. It is not India alone, but the world that recognises the right of privacy as a basic human right. The Universal Declaration of Human Rights to which India is a signatory, recognises privacy as an international human right.

425. The importance of this right to privacy cannot be diluted and the significance of this is that the legal conundrum was debated and is to be settled in the present reference by a nine-Judges Constitution Bench.

426. This reference has arisen from the challenge to what is called the 'Aadhar Card Scheme'. On account of earlier judicial pronouncements, there was a cleavage of opinions and to reconcile this divergence of views, it became necessary for the reference to be made to a nine-Judges Bench.

427. It is nobody's case that privacy is not a valuable right, but the moot point is whether it is only a common law right or achieves the status of a fundamental right under the *Grundnorm* - the Indian Constitution. We have been ably assisted by various senior counsels both for and against the proposition as to whether privacy is a Constitutional right or not.

PRIVACY

428. In the words of Lord Action:

the sacred rights of mankind are not to be rummaged for among old parchments of musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured by mortal power[361].

429. Privacy is an inherent right. It is thus not given, but already exists. It is about respecting an individual and it is undesirable to ignore a person's wishes without a compelling reason to do so.

430. The right to privacy may have different aspects starting from 'the right to be let alone' in the famous Article by Samuel Warren and Louis D. Brandeis[362]. One such aspect is an individual's right to control dissemination of his personal information. There is nothing wrong in individuals limiting access and their ability to shield from unwanted access. This aspect of the right to privacy has assumed particular significance in this information age and in view of technological improvements. A person-hood would be a protection of one's personality, individuality and

dignity.[363] However, no right is unbridled and so is it with privacy. We live in a society/community. Hence, restrictions arise from the interests of the community, state and from those of others. Thus, it would be subject to certain restrictions which I will revert to later.

PRIVACY & TECHNOLOGY

431. We are in an information age. With the growth and development of technology, more information is now easily available. The information explosion has manifold advantages but also some disadvantages. The access to information, which an individual may not want to give, needs the protection of privacy.

The right to privacy is claimed *qua* the State and non-State actors. Recognition and enforcement of claims qua non-state actors may require legislative intervention by the State.

A. Privacy Concerns Against The State

432. The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable. Edward Snowden shocked the world with his disclosures about global surveillance. States are utilizing technology in the most imaginative ways particularly in view of increasing global terrorist attacks and heightened public safety concerns.

One such technique being adopted by States is 'profiling'. The European Union Regulation of 2016[364] on data privacy defines 'Profiling' as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements[365]. Such profiling can result in discrimination based on religion, ethnicity and caste. However, 'profiling' can also be used to further public interest and for the benefit of national security.

433. The security environment, not only in our country, but throughout the world makes the safety of persons and the State a matter to be balanced against this right to privacy.

B. Privacy Concerns Against Non-State Actors

434. The capacity of non-State actors to invade the home and privacy has also been enhanced. Technological development has facilitated journalism that is more intrusive than ever before.

435. Further, in this digital age, individuals are constantly generating valuable data which can be used by non-State actors to track their moves, choices and preferences. Data is generated not just by active sharing of information, but also passively, with every click on the 'world wide web'. We are stated to be creating an equal amount of information every other day, as humanity created from the beginning of recorded history to the year 2003 - enabled by the 'world wide web'.[366]

436. Recently, it was pointed out that "'Uber', the world's largest taxi company, owns no vehicles. 'Facebook', the world's most popular media owner, creates no content. 'Alibaba', the most valuable retailer, has no inventory. And 'Airbnb', the world's largest accommodation provider, owns no real estate. Something interesting is happening."[367] 'Uber' knows our whereabouts and the places we frequent. 'Facebook' at the least, knows who we are friends with. 'Alibaba' knows our shopping habits. 'Airbnb' knows where we are travelling to. Social networks providers, search engines, e-mail service providers, messaging applications are all further examples of non-state actors that have extensive knowledge of our movements, financial transactions, conversations - both personal and professional, health, mental state, interest, travel locations, fares and shopping habits. As we move towards becoming a digital economy and increase our reliance on internet based services, we are creating deeper and deeper digital footprints - passively and actively.

437. These digital footprints and extensive data can be analyzed computationally to reveal patterns, trends, and associations, especially relating to human behavior and interactions and hence, is valuable information. This is the age of 'big data'. The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially.
A large number of people would like to keep such search history private, but it rarely remains private, and is collected, sold and analysed for purposes such as targeted advertising. Of course, 'big data' can also be used to further public interest. There may be cases where collection and processing of big data is legitimate and proportionate, despite being invasive of privacy otherwise.

438. Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision making processes and shaping behaviour. It can be used as a tool to exercise control over us like the 'big brother' State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford.

439. Thus, there is an unprecedented need for Regulation regarding the extent to which such information can be stored, processed and used by non-state actors. There is also a need for protection of such information from the State. Our Government was successful in compelling Blackberry to give to it the ability to intercept data sent over Blackberry devices. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated.[368]

440. The concept of 'invasion of privacy' is not the early conventional thought process of 'poking ones nose in another person's affairs'. It is not so simplistic. In today's world, privacy is a limit on the government's power as well as the power of private sector entities.[369]

441. George Orwell created a fictional State in *'Nineteen Eighty-Four.'* Today, it can be a reality. The technological development today can enable not only the state, but also big corporations and private entities to be the 'big brother'.

The Constitution of India-A Living Document

442. The Constitutional jurisprudence of all democracies in the world, in some way or the other, refer to 'the brooding spirit of the law', 'the collective conscience', 'the intelligence of a future day', 'the heaven of freedom', etc. The spirit is justice for all, being the cherished value.

443. This spirit displays many qualities, and has myriad ways of expressing herself - at times she was liberty, at times dignity. She was equality, she was fraternity, reasonableness and fairness. She was in Athens during the formative years of the *demoscratos* and she manifested herself in England as the Magna Carta. Her presence was felt in France during the Revolution, in America when it was being founded and in South Africa during the times of Mandela.

444. In our country, she inspired our founding fathers - The Sovereign, Socialist, Secular Democratic Republic of India was founded on her very spirit.

445. During the times of the Constituent Assembly, the great intellectuals of the day sought to give this brooding spirit a form, and sought to invoke her in a manner that they felt could be understood, applied and interpreted - they drafted the Indian Constitution.

446. In it they poured her essence, and gave to her a grand throne in Part III of the Indian Constitution.

447. The document that they created had her everlasting blessings, every part of the Constitution resonates with the spirit of Justice and what it stands for: '*peaceful, harmonious and orderly social living*'. The Constitution stands as a codified representation of the great spirit of Justice itself. It is because it represents that *Supreme Goodness* that it has been conferred the status of the *Grundnorm*, that it is the Supreme Legal Document in the country.

448. The Constitution was not drafted for a specific time period or for a certain generation, it was drafted to stand firm, for eternity. It sought to create a Montesquian framework that would endear in both war time and in peace time and in Ambedkar's famous words, "*if things go wrong under the new Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."*[370]

449. It has already outlived its makers, and will continue to outlive our generation, because it contains within its core, a set of undefinable values and ideals that are eternal in nature. It is because it houses these values so cherished by mankind that it lives for eternity, as a *Divine Chiranjeevi*.

450. The Constitution, importantly, was also drafted for the purpose of assisting and at all times supporting this 'peaceful, harmonious and orderly social living'. The Constitution thus lives for the people. Its deepest wishes are that civil society flourishes and there is a peaceful social order. Any change in the sentiments of the people are recognised by it. It seeks to incorporate within its fold all possible civil rights which existed in the past, and those rights which may appear on the horizon of the future. It endears. The Constitution was never intended to serve as a means to stifle the protection of the valuable rights of its citizens. Its aim and purpose was completely the opposite.

451. The founders of the Constitution, were aware of the fact that the Constitution would need alteration to keep up with the mores and trends of the age. This was precisely the reason that an unrestricted amending power was sought to be incorporated in the text of the Constitution in Part 20 Under Article 368. The very incorporation of such a plenary power in a separate part altogether is *prima facie* proof that the Constitution, even during the times of its making was intended to be a timeless document, eternal in nature, organic and living.

452. Therefore, the *theory of original intent* itself supports the stand that the original intention of the makers of the Constitutional was to ensure that it does not get weighed down by the originalist interpretations/remain static/fossilised, but changes and evolves to suit the felt need of the times. The original intention theory itself contemplates a Constitution which is organic in nature.

453. The then Chief Justice of India, Patanjali Sastri, in the State of West Bengal v. Anwar Ali Sarkar AIR 1952 SCR 284 observed as follows:

90. I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-bound as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs.

454. How the Constitution should be read and interpreted is best found in the words of Khanna, J., in Kesavananda Bharati v. State of Kerala MANU/SC/0445/1973 : (1973) 4 SCC 225 as follows:

1437. .... A Constitution is essentially different from pleadings filed in Court of litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State viz. the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration.

A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. ***It had (sic) its roots in the past, its continuity is reflected in the present and it is intended for the unknown future.*** The words of Holmes while dealing with the U.S. Constitution have equal relevance for our Constitution. Said the great Judge:

... the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. [See *Gompers v. United States*, 233 U.S. 604, 610 (1914)].

It is necessary to keep in view Marshall's great premises that "It is a Constitution we are expounding". To quote the words of Felix Frankfurter in his tribute to Holmes:

Whether the Constitution is treated primarily as a text for interpretation or as an instrument of Government may make all the difference in the word. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society. (See *Mr. Justice Holmes* edited by Felix Frankfurter, p. 58).

(Emphasis supplied)

455. In the same judgment, K.K. Mathew, J., observed:

1563... That the Constitution is a framework of great governmental powers to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forthwith an intensity that exacts more than reasonable satisfaction. [See Felix Frankfurter, of Law and Men, p. 35] As Wilson said, a living Constitution must be Darwinian in structure and practice. [See Constitutional Government in The United States, p. 25] The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment." [See Justice Holmes in Abrams v. United States, 250 US 616]...

456. In the context of the necessity of the doctrine of flexibility while dealing with the Constitution, it was observed in Union of India v. Naveen Jindal MANU/SC/0072/2004 : (2004) 2 SCC 510:

39. Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time.

40. Interpretation of the Constitution is a difficult task. While doing so, the Constitutional courts are not only required to take into consideration their own experience over the time, the international treaties and covenants but also keeping the doctrine of flexibility in mind. This Court times without number has extended the scope and extent of the provisions of the fundamental rights, having regard to several factors including the intent and purport of the Constitution-makers as reflected in Parts IV and IV-A of the Constitution of India.

457. The document itself, though inked in a parched paper of timeless value, never grows old. Its ideals and values forever stay young and energetic, forever changing with the times. It represents the pulse and soul of the nation and like a phoenix, grows and evolves, but at the same time remains young and malleable.

458. The notions of goodness, fairness, equality and dignity can never be satisfactorily defined, they can only be experienced. They are felt. They were let abstract for the reason that these rights, by their very nature, are not static. They can never be certainly defined or applied, for they change not only with time, but also with situations. The same concept can be differently understood, applied and interpreted and therein lies their beauty and their importance. This multiplicity of interpretation and application is the very core which allows them to be differently understood and applied in changing social and cultural situations.

459. Therefore, these core values, these core principles, are all various facets of the spirit that pervades our Constitution and they apply and read differently in various scenarios. *They manifest themselves differently in different ages, situations and conditions.* Though being rooted in ancient Constitutional principles, they find mention and applicability as different rights and social privileges. They appear differently, based on the factual circumstance. Privacy, for example is nothing but a form of dignity, which itself is a subset of liberty.

460. Thus, from the one great tree, there are branches, and from these branches there are sub-branches and leaves. Every one of these leaves are rights, all tracing back to the tree of justice. They are all equally important and of equal need in the great social order. They together form part of that '*great brooding spirit*'. Denial of one of them is the denial of the whole, for these rights, in manner of speaking, fertilise and nurture each other.

461. What is beautiful in this biological, organic growth is this: While the tree appears to be great and magnificent, apparently incapable of further growth, there are always new branches appearing, new leaves and buds growing. These new rights, are the rights of future generations that evolve over the passage of time to suit and facilitate the civility of posterity. They are equally part of this tree of rights and equally trace their origins to those natural rights which we are all born with. These leaves, sprout and grow with the passage of time, just as certain rights may get weeded out due to natural evolution.

462. At this juncture of time, we are incapable and it is nigh impossible to anticipate and foresee what these new buds may be. There can be no certainty in making this prediction. However, what remains certain is that there will indeed be a continual growth of the great tree that we call the Constitution. *This beautiful aspect of the document is what makes it organic, dynamic, young and everlasting. And it is important that the tree grows further, for the Republic finds a shade under its branches.*

463. The challenges to protect privacy have increased manifold. The observations made in the context of the need for law to change, by Bhagwati, J., as he then was, in National Textile Workers Union v. P.R. Ramakrishnan MANU/SC/0025/1982 : (1983) 1 SCC 228 would equally apply to the requirements of interpretation of the Constitution in the present context:

We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind.

464. It is wrong to consider that the concept of the supervening spirit of justice manifesting in different forms to cure the evils of a new age is unknown to Indian history. Lord Shri Krishna declared in Chapter 4 Text 8 of The Bhagavad Gita thus:

"परित्राणायसाधूनां विनाशायचदुष्कृताम्।
धर्मसंस्थापनार्थाय सम्भवामि युगे युगे ॥"

465. *The meaning of this profound statement, when viewed after a thousand generations is this:* That each age and each generation brings with it the challenges and tribulations of the times. But that Supreme spirit of Justice manifests itself in different eras, in different continents and in different social situations, as *different values* to ensure that there always exists the protection and preservation of certain eternally cherished rights and ideals. It is a reflection of this divine 'Brooding spirit of the law', 'the collective conscience', 'the intelligence of a future day' that has found mention in the ideals enshrined in *inter-alia*, Article 14 and 21, which together serve as the heart stones of the Constitution. The spirit that finds enshrinement in these articles manifests and reincarnates itself in ways and forms that protect the needs of the society in various ages, as the values of liberty, equality, fraternity, dignity, and various other Constitutional values, Constitutional principles. It always grows stronger and covers within its sweep the great needs of the times. This spirit can neither remain dormant nor static and can never be allowed to fossilise.

466. An issue like privacy could never have been anticipated to acquire such a level of importance when the Constitution was being contemplated. Yet, today, the times we live in necessitate that it be recognised not only as a valuable right, but as a right Fundamental in Constitutional jurisprudence.

467. There are sure to be times in the future, similar to our experience today, perhaps as close as 10 years from today or as far off as a 100 years, when we will debate and deliberate whether a certain right is fundamental or not. At that time it must be understood that the Constitution was always meant to be an accommodative and all-encompassing document, framed to cover in its fold all those rights that are most deeply cherished and required for a 'peaceful, harmonious and orderly social living.

468. The Constitution and its all-encompassing spirit forever grows, but never ages.

Privacy is essential to liberty and dignity

469. Rohinton F. Nariman, J., and Dr. D.Y. Chandrachud J., have emphasized the importance of the protection of privacy to ensure protection of liberty and dignity. I agree with them and seek to refer to some legal observations in this regard:

In Robertson and Nicol on Media Law[371] it was observed:

Individuals have a psychological need to preserve an intrusion-free zone for their personality and family and suffer anguish and stress when that zone is violated. Democratic societies must protect privacy as part of their facilitation of individual freedom, and offer some legal support for the individual choice as to what aspects of intimate personal life the citizen is prepared to share with others. This freedom in other words springs from the same source as freedom of expression: a liberty that enhances individual life in a democratic community.

470. Lord Nicholls and Lord Hoffmann in their opinion in *Naomi Campbell's* case[372] recognized the importance of the protection of privacy. Lord Hoffman opined as under:

50. *What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state-I have particularly in mind the position of the media, to which I shall return in a moment-but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter.*

51. The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. .... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity-the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

Lord Nicholls opined as under:

12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in R v. Dymont [1988] 2 SCR 417, 426.

471. Privacy is also the key to freedom of thought. A person has a right to think. The thoughts are sometimes translated into speech but confined to the person to whom it is made. For example, one may want to criticize someone but not share the criticism with the world.

Privacy - Right To Control Information

472. I had earlier adverted to an aspect of privacy - the right to control dissemination of personal information.

The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase "none of your business".
On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candor in disclosure of information.
An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation.
373

473. Dr. D.Y. Chandrachud, J., notes that recognizing a zone of privacy is but an acknowledgement that each individual must be entitled to chart and pursue the course of development of their personality. Rohinton F. Nariman, J., recognizes informational privacy which recognizes that an individual may have control over the dissemination of material which is personal to him. Recognized thus, from the right to privacy in this modern age emanate certain other rights such as the right of individuals to exclusively commercially exploit their identity and personal information, to control the information that is available about them on the 'world wide web' and to disseminate certain personal information for limited purposes alone.

474. Samuel Warren and Louis Brandeis in 1890 expressed the belief that an individual should control the degree and type of private - personal information that is made public:

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.... In every such case the individual is entitled to decide whether that which is his shall be given to the public.

This formulation of the right to privacy has particular relevance in today's information and digital age.

475. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details

about their lives - people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments[374].

476. There is no justification for making all truthful information available to the public. The public does not have an interest in knowing all information that is true. Which celebrity has had sexual relationships with whom might be of interest to the public but has no element of public interest and may therefore be a breach of privacy.[375] Thus, truthful information that breaches privacy may also require protection.

477. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.
[376]

478. Aside from the economic justifications for such a right, it is also justified as protecting individual autonomy and personal dignity. The right protects an individual's free, personal conception of the 'self.' The right of publicity implicates a person's interest in autonomous self-definition, which prevents others from interfering with the meanings and values that the public associates with her.[377]

479. Prosser categorized the invasion of privacy into four separate torts[378]:

1) Unreasonable intrusion upon the seclusion of another;

2) Appropriation of another's name or likeness;

3) Unreasonable publicity given to the other's private life; and

4) Publicity that unreasonably places the other in a false light before the public

From the second tort, the U.S. has adopted a right to publicity.[379]

480. In the poetic words of Felicia Lamport mentioned in the book "The Assault on Privacy[380]":

DEPRIVACY

Although we feel unknown, ignored As unrecorded blanks, Take heart! Our vital selves are stored In giant data banks,

Our childhoods and maturities, Efficiently compiled, Our Stocks and insecurities, All permanently filed,

Our tastes and our proclivities, In gross and in particular, Our incomes, our activities Both extra- and curricular.

And such will be our happy state Until the day we die When we'll be snatched up by the great Computer in the Sky

INFORMATIONAL PRIVACY

481. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right. The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big, and it cannot be said that a person should be profiled to the *nth* extent for all and sundry to know.

482. A high school teacher was fired after posting on her Facebook page that she was "so not looking forward to another [school] year" since that the school district's residents were "arrogant and snobby". A flight attended was fired for posting suggestive photos of herself in the company's uniform.[381] In the pre-digital era, such incidents would have never occurred. People could then make mistakes and embarrass themselves, with the comfort that the information will be typically forgotten over time.

483. The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The foot prints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle[382].

484. The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their mistakes. It is privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past.

485. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis as they learn their 'ABCs': Apple, Bluetooth, and Chat followed by Download, E-Mail, Facebook, Google, Hotmail, and Instagram.[383] They should not be subjected to the consequences of their childish mistakes and naivety, their entire life. Privacy of children will require special protection not just in the context of the virtual world, but also the real world.

486. People change and an individual should be able to determine the path of his life and not be stuck only on a path of which he/she treaded initially. An individual should have the capacity to change his/her beliefs and evolve as a person. Individuals should not live in fear that the views they expressed will forever be associated with them and thus refrain from expressing themselves.

487. Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right of privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.

488. Thus, The European Union Regulation of 2016[384] has recognized what has been termed as 'the right to be forgotten'. This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognize a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right cannot be exercised where the information/data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy.

Data Regulation

489. I agree with Dr. D.Y. Chandrachud, J., that formulation of data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of privacy concerns and legitimate State interests, including public benefit arising from scientific and historical research based on data collected and processed. The European Union Regulation of 2016[385] of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data may provide useful guidance in this regard. The State must ensure that information is not used without the consent of users and that it is used for the purpose and to the extent it was disclosed. Thus, for e.g., if the posting on social media websites is meant only for a certain audience, which is possible as per tools available, then it cannot be said that all and sundry in public have a right to somehow access that information and make use of it.

Test: Principle of Proportionality and Legitimacy

490. The concerns expressed on behalf of the Petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

(i) The action must be sanctioned by law;

(ii) The proposed action must be necessary in a democratic society for a legitimate aim;

(iii) The extent of such interference must be proportionate to the need for such interference;

(iv) There must be procedural guarantees against abuse of such interference.

The Restrictions

491. The right to privacy as already observed is not absolute. The right to privacy as falling in part III of the Constitution may, depending on its variable facts, vest in one part or the other, and would thus be subject to the restrictions of exercise of that particular fundamental right. National security

would thus be an obvious restriction, so would the provisos to different fundamental rights, dependent on where the right to privacy would arise. The Public interest element would be another aspect.

492. It would be useful to turn to The European Union Regulation of 2016[386]. Restrictions of the right to privacy may be justifiable in the following circumstances subject to the principle of proportionality:

(a) Other fundamental rights: The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.

(b) Legitimate national security interest

(c) Public interest including scientific or historical research purposes or statistical purposes

(d) Criminal Offences: the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security;

(e) The unidentifiable data: the information does not relate to identifiedor identifiable natural person but remains anonymous. The European Union Regulation of 2016[387] refers to 'pseudonymisation' which means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

(f) The tax etc: the regulatory framework of tax and working of financial institutions, markets may require disclosure of private information. But then this would not entitle the disclosure of the information to all and sundry and there should be data protection Rules according to the objectives of the processing. There may however, be processing which is compatible for the purposes for which it is initially collected.

Report of Group of Experts on Privacy

493. It is not as if the aspect of privacy has not met with concerns. The Planning Commission of India constituted the Group of Experts on Privacy under the Chairmanship of Justice A.P. Shah, which submitted a report on 16 October, 2012. The five salient features, in his own words, are as follows:

1. Technological Neutrality and Interoperability with International Standards: The Group agreed that any proposed framework for privacy legislation must be technologically neutral and interoperable with international standards. Specifically the Privacy Act should not make any reference to specific technologies and must be generic enough such that the principles and enforcement mechanisms remain adaptable to changes in society, the marketplace, technology, and the government. To do this it is important to closely harmonise the right to privacy with multiple international regimes, create trust and facilitate cooperation between national and

international stakeholders and provide equal and adequate levels of protection to data processed inside India as well as outside it. In doing so, the framework should recognise that data has economic value, and that global data flows generate value for the individual as data creator, and for businesses that collect and process such data. Thus, one of the focuses of the framework should be on inspiring the trust of global clients and their end users, without compromising the interests of domestic customers in enhancing their privacy protection.

2. **Multi-Dimensional Privacy:** This report recognises the right to privacy in its multiple dimensions. A framework on the right to privacy in India must include privacy-related concerns around data protection on the internet and challenges emerging therefrom, appropriate protection from unauthorised interception, audio and video surveillance, use of personal identifiers, bodily privacy including DNA as well as physical privacy, which are crucial in establishing a national ethos for privacy protection, though the specific forms such protection will take must remain flexible to address new and emerging concerns.

3. **Horizontal Applicability:** The Group agreed that any proposed privacy legislation must apply both to the government as well as to the private sector. Given that the international trend is towards a set of unified norms governing both the private and public sector, and both sectors process large amounts of data in India, it is imperative to bring both within the purview of the proposed legislation.

4. **Conformity with Privacy Principles:** This report recommends nine fundamental Privacy Principles to form the bedrock of the proposed Privacy Act in India. These principles, drawn from best practices internationally, and adapted suitably to an Indian context, are intended to provide the baseline level of privacy protection to all individual data subjects. The fundamental philosophy underlining the principles is the need to hold the data controller accountable for the collection, processing and use to which the data is put thereby ensuring that the privacy of the data subject is guaranteed.

5. **Co-Regulatory Enforcement Regime:** This report recommends the establishment of the office of the Privacy Commissioner, both at the central and regional levels. The Privacy Commissioners shall be the primary authority for enforcement of the provisions of the Act. However, rather than prescribe a pure top-down approach to enforcement, this report recommends a system of co-Regulation, with equal emphasis on Self-Regulating Organisations (SROs) being vested with the responsibility of autonomously ensuring compliance with the Act, subject to regular oversight by the Privacy Commissioners. The SROs, apart from possessing industry-specific knowledge, will also be better placed to create awareness about the right to privacy and explaining the sensitivities of privacy protection both within industry as well as to the public in respective sectors. This recommendation of a co-regulatory regime will not derogate from the powers of courts which will be available as a forum of last resort in case of persistent and unresolved violations of the Privacy Act.

494. The enactment of a law on the subject is still awaited. This was preceded by the Privacy Bill of the year of 2005 but there appears to have been little progress. It was only in the course of the hearing that we were presented with an office memorandum of the Ministry of Electronics and Information Technology dated 31.7.2017, through which a Committee of Experts had been

constituted to deliberate on a data protection framework for India, under the Chairmanship of Mr. Justice B.N. Srikrishna, former Judge of the Supreme Court of India, in order to identify key data protection issues in India and recommend methods of addressing them. So there is hope !

495. The aforesaid aspect has been referred to for purposes that the concerns about privacy have been left unattended for quite some time and thus an infringement of the right of privacy cannot be left to be formulated by the legislature. It is a primal natural right which is only being recognized as a fundamental right falling in part III of the Constitution of India.

CONCLUSION

496. The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

497. It was rightly expressed on behalf of the Petitioners that the technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible both by the State and non-State actors. It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.

498. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right.

499. There are two aspects of the opinion of Dr. D.Y. Chandrachud, J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal v. Naz Foundation MANU/SC/1278/2013 : (2014) 1 SCC 1. In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, inter alia, observed that the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section *ultra virus* of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon.
The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 123 & 124 of his

judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. Ones sexual orientation is undoubtedly an attribute of privacy.
The observations made in Mosley v. News Group Papers Ltd. (2008) EWHS 1777 (QB), in a broader concept may be usefully referred to:

130... It is not simply a matter of personal privacy v. the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.

131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in Von Hannover at (60) and (76), would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.

500. It is not necessary to delve into this issue further, other than in the context of privacy as that would be an issue to be debated before the appropriate Bench, the matter having been referred to a larger Bench.

501. The second aspect is the discussion in respect of the majority judgment in the case of ADM Jabalpur v. Shivkant Shukla MANU/SC/0062/1976 : (1976) 2 SCC 521 in both the opinions. In I.R. Coelho v. The State of Tamil Nadu MANU/SC/0595/2007 : (2007) 2 SCC 1 it was observed that the ADM Jabalpur case has been impliedly overruled and that the supervening event was the 44th Amendment to the Constitution, amending Article 359 of the Constitution. I fully agree with the view expressly overruling the ADM Jabalpur case which was an aberration in the constitutional jurisprudence of our country and the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection.

502. Let the right of privacy, an inherent right, be unequivocally a fundamental right embedded in part-III of the Constitution of India, but subject to the restrictions specified, relatable to that part. This is the call of today. The old order changeth yielding place to new.

ORDER OF THE COURT

503. The judgment on behalf of the Hon'ble Chief Justice Shri Justice Jagdish Singh Khehar, Shri Justice R.K. Agrawal, Shri Justice S Abdul Nazeer and Dr. Justice D.Y. Chandrachud was delivered by Dr. Justice D.Y. Chandrachud. Shri Justice J Chelameswar, Shri Justice S.A. Bobde, Shri Justice Abhay Manohar Sapre, Shri Justice Rohinton Fali Nariman and Shri Justice Sanjay Kishan Kaul delivered separate judgments.

504. The reference is disposed of in the following terms:

(i) The decision in **M.P. Sharma** which holds that the right to privacy is not protected by the Constitution stands over-ruled;

(ii) The decision in **Kharak Singh** to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;

(iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty Under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

(iv) Decisions subsequent to Kharak Singh which have enunciated the position in (iii) above lay down the correct position in law.

---

[1] Boyd v. United States, 116 US 616 (1886)

[2] MP Sharma (Supra note 1), at page 1096

[3] Ibid, at page 1096-97

[4] Kharak Singh (Supra note 2), at page 345

[5] Ibid, at pages 347-348

[6] Cited in Kharak Singh (Supra note 2), at page 348

[7] Ibid, at page 349

[8] Ibid, at page 351

[9] Ibid, at pages 356-357

[10] Ibid, at pages 358-359

[11] Gopalan (Supra note 3), at pages 36-37

[12] Ibid, at pages 52-53

[13] Ibid, at page 554

[14] Cooper (Supra note 4), at page 289 (para 52)

[15] Maneka (Supra Note 5), at page 278 (para 5)

[16] Michael C. James, "A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe", *Connecticut Journal of International Law* (Spring 2014), Vol. 29, Issue 2, at page 261

[17] Ibid, at page 262

[18] John Stuart Mill, *On Liberty*, Batoche Books (1859), at page 13

[19] Ibid, at page 6

[20] James Madison, "Essay on Property", in Gaillard Hunt ed., The Writings of James Madison (1906), Vol. 6, at pages 101-103.

[21] Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* (1890), Vol. 4, No. 5, at page 193

[22] Ibid, at pages 195-196

[23] Ibid, at page 205

[24] Thomas Cooley, Treatise on the Law of Torts (1888), 2nd edition

[25] Ibid, at page 29

[26] Dorothy J Glancy, "The Invention of the Right to Privacy", Arizona Law Review (1979) Vol. 21, No. 1, at page 1. The Article attributes the Roscoe Pound quotation to "Letter from Roscoe Pound to William Chilton (1916)" as quoted in Alpheus Mason, Brandeis: A Free Man's Life 70 (1956).

[27] Ibid, at pages 2-3.

[28] Ibid, at pages 7-8

[29] Ibid, at page 8

[30] Ibid, at page 9

[31] Ibid, at page 10

[32] Ibid, at page 12

[33] Ibid, at page 14

[34] Ibid, at Pages 15-16

[35] Id at Pages 21-22

[36] Illustratively, the Centre for Internet and Society has two interesting articles tracing the origin of privacy within Classical Hindu Law and Islamic Law. See Ashna Ashesh and Bhairav Acharya, "Locating Constructs of Privacy within Classical Hindu Law", *The Centre for Internet and Society*, available at https://cis-india.org/internet-governance/blog/loading-constructs-of-privacy-within-classical-hindu-law. See also Vidushi Marda and Bhairav Acharya, "Identifying Aspects of Privacy in Islamic Law", The Centre for *Internet and Society*, available at https://cis-india.org/internet-governance/blog/identifying-aspects-of-privacy-in-islamic-law

[37] Roscoe Pound, The Spirit of the Common Law, Marshall Jones Company (1921), at page 92

[38] Roscoe Pound, "The Revival of Natural Law", Notre Damne Lawyer (1942), Vol. 27, No. 4, at page 330

[39] Edwin W. Patterson, "A Pragmatist Looks At Natural Law and Natural Rights", in Arthur L. Harding ed., *Natural Law and Natural Rights* (1955), at pages 62-63

[40] Craig A. Ster and Gregory M. Jones, "The Coherence of Natural Inalienable Rights", UMKC Law Review (2007-08), Volume 76 (4), at pages 971-972

[41] Ronald Dworkin, *Taking Rights Seriously*, Duckworth (1977)

[42] Ibid, at page xi

[43] Ibid, at page 199

[44] Ibid, at page 203

[45] Ibid, at page 204

[46] Ibid, at page 205

[47] Ibid, at page 147

[48] Ibid, at page 476 (para 20)

[49] Ibid, at page 479 (para 31)

[50] Supra note 6, at page 155 (para 20)

[51] Ibid, at page 155 (para 22)

[52] Ibid, at page 156 (para 23)

[53] Ibid, at page 156 (para 24)

[54] Ibid, at page 157 (para 28)

[55] Ibid, at page 157-158 (para 31)

[56] Ibid, at pages 424-425 (para 6)

[57] Ibid, at page 426 (para 9)

[58] Ibid, at pages 62-63 (para 8)

[59] Ibid, at pages 639-640 (para 9)

[60] Ibid, at page 643 (para 13)

[61] Ibid, at pages 649-650 (para 26)

[62] Gautam Bhatia, "State Surveillance and the Right to Privacy in India: A Constitutional Biography", *National Law School of India Review* (2014), Vol. 26(2), at pages 138-139

[63] Ibid

[64] Ibid, at page 305 (para 21)

[65] Ibid, at page 307 (para 28)

[66] MANU/SC/0149/1997 : (1997) 1 SCC 301

[67] Ibid, at page 310 (para 14)

[68] Ibid, at page 311 (para 17)

[69] Ibid, at page 311 (para 18)

[70] Ibid, at page 82 (para 15)

[71] Ibid, at page 513 (para 52)

[72] Ibid, at page 513 (para 53)

[73] Ibid, at page 523 (para 76)

[74] Boyd v. United States, 116 US 616 (1886)

[75] Olmstead v. United States, 277 US 438 (1928)

[76] Griswold v. State of Connecticut, 381 US 479 (1965)

[77] Katz v. United States, 389 US 347 (1967)

[78] Supra Note 95, at page 516 (para 36)

[79] Ibid, at page 518 (para 39)

[80] Ibid, at page 523 (para 53)

[81] Ibid, at page 524 (para 54)

[82] Narcotic Drugs and Psychotropic Substances Act, 1985

[83] Ibid, at page 15 (para 35)

[84] Ibid, at pages 16-17 (para 43)

[85] Ibid, at page 19 (para 51)

[86] Ibid, at pages 46-47 (para 27)

[87] Ibid, at page 28 (para 61)

[88] Gautam Bhatia (supra note 82), at page 148

[89] Ibid, at page 15 (para 22)

[90] Ibid, at pages 584-585 (para 102)

[91] Ibid, at page 585 (para 103)

[92] Ibid, at pages 369-370 (paras 225-226)

[93] Ibid, at page 642 (para 21)

[94] Ibid, at page 84 (para 39)

[95] Ibid, at pages 35-36 (paras 83-84)

[96] Ibid, at page 156 (para 6)

[97] Ibid, at pages 119-120 (para 312)

[98] Ibid, at page 74 (para 23)

[99] Ibid, at page 648 (para 13)

[100] Ibid, at page 112 (para 57)

[101] Ibid, at page 114 (para 64)

[102] Ibid, at pages 47-48 (paras 69-70)

[103] Ibid, at page 490 (para 72)

[104] Ibid, at page 490 (para 73)

[105] Ibid, at page 491 (para 75)

[106] Ibid, at page 18 (para 28)

[107] Ibid, at page 676 (para 953)

[108] See Rishika Taneja and Sidhant Kumar, Privacy Law: Principles, Injunctions and Compensation, Eastern Book Company (2014), for a comprehensive account on the right to privacy and privacy laws in India.

[109] Ibid, at pages 529-530 (para 1)

[110] Ibid, at page 537 (para 21)

[111] Ibid, at page 618 (para 6)

[112] Ibid, at page 618 (para 7)

[113] Ibid, at pages 618-619 (para 8)

[114] Ibid, at page 183 (para 10)

[115] Ibid, at pages 262-263 (para 10)

[116] Ibid, at pages 271 (para 37)

[117] Ibid, at page 243-244 (para 26)

[118] Ibid, at pages 247-248 (para 42)

[119] Ibid, at page 376 (para 244)

[120] Ibid, at page 713 (para 14)

[121] Aharon Barak, Human Dignity-The Constitutional Value and the Constitutional Right, Cambridge University Press (2015)

[122] Supra Note 176, at page 792 (para 37)

[123] Ibid, at page 788

[124] Ibid, at page 789

[125] Supra note 155, at page 367-368 (para 300)

[126] Ibid, at page 366 (para 292)

[127] Ibid, at page 454 (para 582)

[128] Ibid, at pages 486-487 (para 666)

[129] Ibid, at page 666 (para 1212)

[130] Ibid, at page 824 (para 1537(vii))

[131] Ibid, at pages 866-867 (para 1676)

[132] Ibid, at page 115 (para 251)

[133] Ibid, at page 654 (para 57)

[134] Ibid, at pages 653-654

[135] Ibid, at page 572 (para 32)

[136] Maneka (Supra note 5), at page 280 (para 5)

[137] Ibid, at page 571 (para 33)

[138] Ibid, at page 604 (para 183)

[139] Ibid, at page 664 (para 379)

[140] Ibid, at page 666 (para 383)

[141] Ibid, at page 701 (para 459)

[142] Ibid, at pages 723-724 (para 487)

[143] Ibid, at page 747 (para 525)

[144] Ibid, at pages 749-750 (para 530)

[145] Ibid, at page 751 (para 531)

[146] Ibid, page 767 (para 574)

[147] A moving account of the times and the position is to be found in Siddhartha Mukherjee, The Gene: An Intimate History, Penguin Books Ltd. (2016), pages 78-85.

[148] Ibid, at page 76 (para 29)

[149] Naz Foundation v. Government of NCT, MANU/DE/0869/2009 : 2010 Cri LJ 94

[150] Ibid, at page 110 (para 48)

[151] Koushal (Supra note 216), at page 69-70 (para 66)

[152] Ibid, at page 78 (para 77)

[153] Article 51(c) of the Indian Constitution

[154] "The Right to privacy in the Digital age", Report of the Office of the United Nations High Commissioner for Human Rights (30 June 2014)

[155] Ibid, at page 5 (para 13)

[156] Francis Coralie (Supra note 159), at page 619 (para 8)

[157] Peter Semayne v. Richard Gresham, 77 ER 194

[158] Lord Neuberger, "Privacy in the 21st Century", UK Association of Jewish Lawyers and Jurists' Lecture (28 November 2012)

[159] The UK Human Rights Act incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Preamble of the Act states that it "gives further effect to rights and freedoms guaranteed" under the ECHR. Under the Act (S. 6), it is unlawful for any public authority, including a court or tribunal at any level, to act in a manner which is incompatible with a Convention right. The Convention rights take precedence over Rules of common law or equity, and over most subordinate legislations. The Act, thereby,

protects the right to privacy, which has been provided Under Article 8 (1) of the ECHR. See Ben Emmerson et al. (ed), *Human Rights and Criminal Justice*, Sweet & Maxwell (2000). See also "Concerns and Ideas about the Developing English Law of Privacy", Institute of Global Law, available online at http://www.ucl.ac.uk/laws/global_law/publications/institute/docs/privacy_100804. pdf.

[160] In English law, an anonymised injunction is "an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated". See "Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice" (2011), available online at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011. pdf

[161] The concept of privacy plays a major role in the jurisprudence of the First, Third, Fourth, Fifth, and Fourteenth Amendments. The Ninth Amendment has also been interpreted to justify broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.

[162] The essential holding of Roe, as summarized in *Planned Parenthood*, comprised of the following three parts: (1) a recognition of a woman's right to choose to have an abortion before foetal viability and to obtain it without undue interference from the State, whose pre-viability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

[163] 429 US 589 (1977). In this case, for the first time, the Court explicitly recognized an individual's interest in nondisclosure of information. The Court chose to address the status of privacy in the Constitution, underlining that the constitutional right to privacy remains largely undefined and then identified the types of constitutionally protected privacy interests as follows: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and Anr. is the interest in independence in making certain kinds of important decisions."

[164] 433 US 425 (1977). In this case, the former President of US, Nixon, was challenging the Presidential Recordings and Material Preservation Act, 1974 on the ground that it violated his right of privacy, as there would be intrusion through the screening of his documents. Nixon's plea was rejected by the Court, which held that "any intrusion [against privacy] must be weighed against the public interest".

[165] Section 8 of the Charter provides as follows: "Everyone has the right to be secure against unreasonable search or seizure."

[166] Section 7 of the Canadian Charter deals with life, liberty and security of person and states

that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[167] In *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773, the Supreme Court of Canada recognised the Privacy Act as having a "quasi-constitutional" status, as it is "closely linked to the values and rights set out in the Constitution". The Court also stated that the "The Privacy Act is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society".

[168] In the case of *J McB v. LE*, Case C-400/10 PPU, [2010] ECR I-nyr, the CJEU ruled that where Charter rights paralleled ECHR rights, the Court of Justice should follow any consistent jurisprudence of the European Court of Human Rights, elucidating that: "It is clear that the said Article 7 [of the EU Charter] contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR..." Reference can be passed to a case before ECtHR, *Varec SA v. Etat belge*, Case C-450/06, [2008] ECR I-581, where it was observed that that: "...the right to respect for private life, enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States.... is restated in Article 7 of the Charter of fundamental rights of the European Union".

[169] Application No. 13710/88, judgment dated 16 September 1992.

[170] Application No. 13134/87, judgment dated 25 March 1993.

[171] Application No. 35623/05

[172] Ursula Kilkelly, "The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights", *Council of Europe* (2001), at page 9

[173] C-468/10, 24 November, [2011] ECR I-nyr

[174] C-293/12

[175] Application No. 62498/11

[176] As per the facts of the case, an "appropriate adults" could be a relative or guardian, or a person experienced in dealing with mentally disordered or mentally vulnerable people.

[177] Application No. 47143/06

[178] Inter-Am. Ct. H.R. (Ser. C) No. 257

[179] Inter-Am. Ct. H.R. (Ser. C) No. 200

[180] "Privacy", *Stanford Encyclopaedia of Philosophy* (2002), available at

https://plato.stanford.edu/entries/privacy/

[181] Julie E Cohen, "What Privacy Is For", *Harvard Law Review* (2013), Vol. 126, at page 1904

[182] Ibid

[183] Ibid, at pages 1904-1905.

[184] For this criticism, see: Robert H Bork, "Neutral Principles and some First Amendment Problems", *Indiana Law Journal* (Fall 1971), Vol. 47(1), at pages 8-9

[185] Supra note 301

[186] Judith Jarvis Thomson, "The Right to Privacy", *Philosophy and Public Affairs* (1975), Vol. 4, at pages 295-314, as cited in Supra note 301

[187] Richard Posner, *The Economics of Justice*, Harvard University Press (1981), as cited in Supra note 301

[188] Robert Bork, *The Tempting of America: The Political Seduction of the Law*, Simon and Schuster (1990), as cited in Supra note 301

[189] Supra note 301

[190] Ibid

[191] Catherine MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press (1989), as cited in Supra note 301

[192] Westin's categorization of privacy is based on the specific values which it sub-serves. Westin has drawn support from the distinction made in 1960 by William L. Prosser for the purposes of civil privacy violations or torts, Westin adopted a value based approach, unlike the harms based approach of Prosser. For Prosser's work, see William L. Prosser, "Privacy", California Law Review (1960), Vol. 48(3), pages 383-423.

[193] Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38, Issue 2, at page 496

[194] Ibid, at page 497

[195] Ibid, at 498

[196] Ibid, at 500

[197] Ibid, at pages 500-501

[198] Bhairav Acharya, "The Four Parts of Privacy in India", *Economic & Political Weekly* (2015), Vol. 50 Issue 22, at page 32

[199] Ibid, at page 34

[200] Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38 Issue 2, at page 566

[201] B. Shiva Rao, *The Framing of India's Constitution*, Indian Institute of Public Administration (1967), Vol. 2, at page 75

[202] Ibid, at page 87

[203] Ibid, at page 139

[204] Ibid, at page 152

[205] Ibid, at pages 158-159

[206] B. Shiva Rao, The Framing of India's Constitution: A Study, Indian Institute of Public Administration (1968), at pages 219-220

[207] Amartya Sen, *Development as Freedom*, Oxford University Press (2000), at page 178-179

[208] Ibid, at page 179

[209] Amartya Sen, *The Idea of Justice*, Penguin Books (2009), at page 339

[210] Ibid, at page 347

[211] Amartya Sen, *Development as Freedom*, Oxford University Press (2000), at page 180

[212] Amartya Sen, "The Country of First Boys", Oxford University Press, Pg. 80-81

[213] Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", Public Law (2017), at page 394

[214] Minister of Health v. Treatment Action Campaign, (2002) 5 SA 721 (CC)

[215] Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", Public Law (2017), at page 395

[216] Anna Jonsson Cornell, "Right to Privacy", *Max Planck Encyclopaedia of Comparative Constitutional Law* (2015)

[217] Lochner v. New York, 198 US 45 (1905)

[218] William B Lockhart, et al, *Constitutional Law: Cases-Comments-Questions*, West Publishing Co. (1986), 6th edition, at page 394

[219] Adair v. United States, 208 US 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908) (fifth amendment); Adkins v. Children's Hosp. 261 US 525, 43 S. Ct. 22, 70 L. Ed. (1923) (fifth amendment); Tyson & Bro. v. Banton, 273 US 418, 47 S. Ct. 426, 71 L. Ed. 718 (1927); and New State Ice Co. v. Liebmann, 285 US 262, 52 S. Ct. 371, 76 L. Ed. 747 (1932)

[220] NLRB v. Jones & Laughlin Stell Corporation (1937);

West Coast Hotel Co. v. Parrish, 300 US 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937)

[221] B. Shiva Rao, *The Framing of India's Constitution: A Study*, Indian Institute of Public Administration (1968), at page 235. See also B. Shiva Rao, *The Framing of India's Constitution*, Vol. 2, at pages 20-36, 147-153

[222] Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press (1966), at page 103

[223] Constituent Assembly Debates, Vol. 7 (6th December 1948), available at http://parliamentofindia.nic.in/ls/debates/vol7p20b.htm

[224] Ibid

[225] Granville Austin (Supra note 358), at page 105

[226] Ibid, at pages 105-106

[227] Constituent Assembly Debates, Vol. 7 (13th December 1948), available at http://parliamentofindia.nic.in/ls/debates/vol7p25a.htm

[228] Gopalan (Supra note 3), at pages 60-61 (para 77)

[229] Maneka (Supra note 5), at page 323 (para 48)

[230] Ibid, at page 284 (para 7)

[231] Ibid, at page 338 (paras 82 and 85)

[232] Ibid, at pages 574-575 (para 228)

[233] Ibid, at page 518 (para 52)

[234] MANU/SC/0055/1982 : (1980) 2 SCC 684

[235] Ibid, at page 730 (para 136)

[236] MANU/SC/0055/1982 : (1982) 3 SCC 24

[237] Ibid, at page 55 (para 17)

[238] Ibid, at pages 284-285 (para 6)

[239] Ibid, at page 301 (para 35)

[240] Ibid, at page 756 (para 28)

[241] Ibid, at page 481 (para 64)

[242] Charanjit Lal Chowdhury v. The Union of India MANU/SC/0009/1950 : AIR 1951 SC 41; Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar MANU/SC/0024/1958 : AIR 1958 SC 538; Burrakur Coal Co. Ltd. v. Union of India MANU/SC/0106/1961 : AIR 1961 SC 954; Pathumma v. State of Kerala (1970) 2 SCR 537; R.K. Garg v. Union of India, MANU/SC/0074/1981 : (1981) 4 SCC 675; State of Bihar v. Bihar Distillery Limited MANU/SC/0354/1997 : AIR 1997 SC 1511; State of Andhra Pradesh v. K. Purushottam Reddy MANU/SC/0215/2003 : (2003) 9 SCC 564; Mardia Chemicals Ltd. v. Union of India, MANU/SC/0323/2004 : (2004) 4 SCC 311; State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, MANU/SC/1352/2005 : 2005 (8) SCC 534; Bhanumati v. State of Uttar Pradesh, MANU/SC/0515/2010 : (2010) 12 SCC 1; K.T. Plantation Pvt. Ltd. v. State of Karnataka, MANU/SC/0914/2011 : (2011) 9 SCC 1; State of Madhya Pradesh v. Rakesh Kohli, MANU/SC/0443/2012 : (2012) 6 SCC 312; Namit Sharma v. Union of India, MANU/SC/0744/2012 : (2013) 1 SCC 745

[243] R.K. Garg v. Union of India, MANU/SC/0074/1981 : (1981) 4 SCC 675; Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupesh Kurmarsheth MANU/SC/0055/1984 : AIR 1984 SC 1543; State of Andhra Pradesh v. McDowell, MANU/SC/0427/1996 : (1996) 3 SCC 709; Union of India v. Azadi Bachao Andolan, MANU/SC/1219/2003 : (2004) 10 SCC 1; State of U.P. v. Jeet S. Bisht, MANU/SC/7702/2007 : (2007) 6 SCC 586; K.T. Plantation Pvt. Ltd. v. State of Karnataka, MANU/SC/0914/2011 : (2011) 9 SCC 1; Bangalore Development Authority v. The Air Craft Employees Cooperative Society Ltd., MANU/SC/0053/2012 : 2012 (1) SCALE 646

[244] Ibid, at page 607

[245] See Francois Nawrot, Katarzyna Syska and Przemyslaw Switalski, "Horizontal application of fundamental rights-Right to privacy on the internet", *9th Annual European Constitutionalism Seminar* (May 2010), University of Warsaw, available at http://en.zpc.wpia.uw.edu.pl/wp-content/uploads/2010/04/9_Horizontal_Application_of_Fundamental_Rights.pdf

[246] Press Release 45/2017, available at http://trai.gov.in/sites/default/files/PR_No. 45of2017. pdf

[247] Christina P. Moniodis, "Moving from Nixon to NASA: Privacy 's Second Strand-A Right to

Informational Privacy", *Yale Journal of Law and Technology* (2012), Vol. 15 (1), at page 153

[248] Ibid

[249] Ibid, at page 154

[250] Yvonne McDermott, "Conceptualizing the right to data protection in an era of Big Data", *Big Data and Society* (2017), at page 1

[251] Ibid, at pages 1 and 4

[252] Ibid, at page 4

[253] Christina P. Moniodis, "Moving from Nixon to NASA: Privacy 's Second Strand-A Right to Informational Privacy", *Yale Journal of Law and Technology* (2012), Vol. 15 (1), at page 159. The Article attributes Daniel Solove's work on privacy as-Daniel J. Solove, Understanding Privacy 70 (2008).

[254] Ibid, at page 156

[255] Yvonne McDermott, "Conceptualizing the right to data protection in an era of Big Data", Big Data and Society (2017), at page 4.

[256] Richard A. Posner, "Privacy, Surveillance, and Law", *The University of Chicago Law Review* (2008), Vol.75, at page 251

[257] Ibid

[258] Ibid

[259] See in this connection, Jeffrey M. Skopek, "Reasonable Expectations of Anonymity", *Virginia Law Review* (2015), Vol. 101, at pages

[260] "Report of the Group of Experts on Privacy" (16 October, 2012), *Government of India*, available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf

[261] ***M.P. Sharma and Ors. v. Satish Chandra and Ors.***, MANU/SC/0018/1954 : AIR 1954 SC 300 and ***Kharak Singh*** *v.* ***State of U.P. and Ors.***, MANU/SC/0085/1962 : AIR 1963 SC 1295, (both decisions of Constitution Bench of Eight and Six Judges respectively).

[262] "Article 20(3) of the Constitution of India: "No person Accused of any offence shall be compelled to be a witness against himself."

[263] "In English law, this principle of protection against self-incrimination had a historical origin. It resulted from a feeling of revulsion against the inquisitorial methods adopted and the barbarous sentences imposed, by the Court of Star Chamber, in the exercise of its criminal

jurisdiction. This came to a head in the case of John Lilburn, 3 State Trials 1315, which brought about the abolition of the Star Chamber and the firm recognition of the principle that the Accused should not be put on oath and that no evidence should be taken from him. This principle, in course of time, developed into its logical extensions, by way of privilege of witnesses against self-incrimination, when called for giving oral testimony or for production of documents. A change was introduced by the Criminal Evidence Act of 1898 by making an Accused a competent witness on his own behalf, if he applied for it. But so far as the oral testimony of witnesses and the production of documents are concerned, the protection against self-incrimination continued as before. (See Phipson on Evidence, 9th Edition, pages 215 and 474).

These principles, as they were before the statutory change in 1898, were carried into the American legal system and became part of its common law. (See Wigmore on Evidence, Vol. VIII, pages 301 to 303). This was later on incorporated into their Constitution by virtue of the Fifth Amendment thereof."

[264] "Amendment v. of the American Constitution: "No person .....shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ..."

[265] A search in violation of the safeguards provided under the Fourth Amendment-"*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*"

[266] In *Griswold v. Connecticut*, 381 US 479, Douglas, J who delivered the opinion of the Court opined that the I, II, IV, v. and IX Amendments creates zones of privacy. Goldberg, J. opined that even the XIV Amendment creates a zone of privacy. This undoubtedly grounds a right of privacy beyond the IV amendment. Even after Griswold, other cases like Roe v. Wade, 410 U.S. 113 (1973) have made this point amply clear by sourcing a constitutional right of privacy from sources other than the IV amendment.

[267] Frankfurter, J.

[268] Murphy, J.

[269] See (1604) 5 Coke 91 - Semayne's case

[270] A.K. Gopalan v. State of Madras MANU/SC/0012/1950 : AIR 1950 SC 27

[271] RC Cooper v. Union of India MANU/SC/0011/1970 : (1970) 1 SCC 248

[272] Maneka Gandhi v. Union of India MANU/SC/0133/1978 : (1978) 1 SCC 248

[273] See F/N 3 (supra)

[274] Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the Petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

[275] Kharak Singh v. The State of U.P. and Ors., (1962) 1 SCR 332 at page 351
... Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the Petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

[276] (1947) 74 CLR 31 - The ***Melbourne Corporation*** *v.* ***The Commonwealth***
... Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-a-vis each other.

Also see: ***His Holiness Kesavananda Bharati Sripadagalvaru*** *v.* ***State of Kerala and Anr.***, MANU/SC/0445/1973 : (1973) 4 SCC 225

[277] Citizens and non-citizens who are amenable to the Constitutional authority of the State

[278] Two categories of Constitutional interpretation-textualist and living constitutionalist approach are well known. The former, as is illustrated by the Gopalan case, focuses on the text at hand i.e. the language of the relevant provision. The text and the intent of the original framers are determinative under the textualist approach. The living constitutionalist approach, while acknowledging the importance of the text, takes into account a variety of factors as aids to interpret the text. Depending on the nature of factor used, academics have added further nuance to the this approach of interpretation (For instance, in his book titled 'Constitutional Interpretation' (which builds on his earlier work titled 'Constitutional Fate'), Philip Bobbitt categorizes the six approaches to interpretation of Constitutions as historical, textual, prudential, doctrinal, structural, and ethical. The latter four approaches treat the text as less determinative than the former two approaches).

This Court has progressively adopted a living constitutionalist approach. Varyingly, it has interpreted the Constitutional text by reference to Constitutional values (liberal democratic ideals which form the bedrock on which our text sits); a mix of cultural, social, political and historical ethos which surround our Constitutional text; a structuralist technique typified by looking at the structural divisions of power within the Constitution and interpreting it as an integrated whole etc. This Court need not, in the abstract, fit a particular interpretative technique within specific pigeonholes of a living constitutionalist interpretation. Depending on which particular source is most useful and what the matter at hand warrants, the court can resort to variants of a living

constitutionalist interpretation. This lack of rigidity allows for an enduring constitution.

The important criticisms against the living constitutionalist approach are that of uncertainty and that it can lead to arbitrary exercise of judicial power. The living constitutionalist approach in my view is preferable despite these criticisms, for two reasons. First, adaptability cannot be equated to lack of discipline injudicial reasoning. Second, it is still the text of the constitution which acquires the requisite interpretative hues and therefore, it is not as if there is violence being perpetrated upon the text if one resorts to the living constitutionalist approach.

[279] *His Holiness Kesavananda Bharati Sripadagalvaru and Ors., v. State of Kerala and Anr.* MANU/SC/0445/1973 : (1973) 4 SCC 225

[280] ADM Jabalpur v. S.S. Shukla MANU/SC/0062/1976 : AIR 1976 SC 1207

[281] Sakal Papers (P) Ltd. and Ors. etc. v. Union of India MANU/SC/0090/1961 : AIR 1962 SC 305 at page 311 "Para 28. It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. Bearing this principle in mind it would be clear that the right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under Clause (2) of Article 19. The first decision of this Court in which this was recognized is Romesh Thapar v. State of Madras MANU/SC/0006/1950 : AIR 1950 SC 124.. There, this Court held that freedom of speech and expression includes freedom of propagation of ideas and that this freedom is ensured by the freedom of circulation. In that case this Court has also pointed out that freedom of speech and expression are the foundation of all democratic organisations and are essential for the proper functioning of the processes of democracy...."

[282] Romesh Thappar v. State of Madras MANU/SC/0006/1950 : AIR 1950 SC 124

[283] "VIII Amendment to the American Constitution:
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[284] *Mithu Etc. v. State of Punjab Etc. Etc.* MANU/SC/0065/1983 : AIR 1983 SC 473 - *"If a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21."*

[285] Olga Tellis v. Bombay Municipal Corporation MANU/SC/0039/1985 : (1985) 3 SCC 545

[286] Mohini Jain v. State of Karnataka MANU/SC/0357/1992 : (1992) 3 SCC 666, Unnikrishnan IP. v. State of Andhra Pradesh MANU/SC/0333/1993 : (1993) 1 SCC 645

[287] Mansukhlal Vithaldas Chauhan v. State of Gujarat MANU/SC/1303/1997 : (1997) 7 SCC 622

[288] State of Bihar v. Lal Krishna Advani MANU/SC/0716/2003 : (2003) 8 SCC 361

[289] Shantistar Builders v. Narayan Khimalal Totame MANU/SC/0115/1990 : (1990) 1 SCC 520, M.C. Mehta v. Kamal Nath (2000) 6 SCC 2013

[290] Satwant Singh Sawhney v. Asst. Passport Officer MANU/SC/0040/1967 : 1967 (3) SCR 525,

[291] In Re. Hussainara Khatoon and Ors. v. Home Secretary, Home Secretary, Bihar MANU/SC/0119/1979 : (1980) 1 SCC 81

[292] Vatheeswaran, T.V. v. State of T.N. MANU/SC/0383/1983 : (1983) 2 SCC 68

[293] Devika Biswas v. Union of India MANU/SC/0999/2016 : (2016) 10 SCC 726

[294] However, various forces which go into the making of history are dynamic. Those who are entrusted with the responsibility of the working of the Constitution must necessarily keep track of the dynamics of such forces. Evolution of science and growth of technology is another major factor in the modern world which is equally a factor to be kept in mind to successfully work the constitution.

[295] ***Kesavananda Bharati*** *(supra)* "Para 91.... Our Preamble outlines the objectives of the whole constitution. It expresses "what we had thought or dreamt for so long"."

[296] ***In re, The Kerala Education Bill, 1957*** MANU/SC/0029/1958 : AIR 1958 SC 956 "... To implement and fortify these supreme purposes set forth in the Preamble, Part III of our Constitution has provided for us certain fundamental rights."

[297] ***Bidi Supply Co. v. Union of India and Ors.*** MANU/SC/0040/1956 : AIR 1956 SC 479 at page 487 "Para 23. After all, for whose benefit was the Constitution enacted? What was the point of making all this other about fundamental rights? I am clear that the Constitution is not for the exclusive benefit governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker". It lays down for this land "a Rule of law" as understood in the free democracies of the world. It constitutes India into a Sovereign Republic and guarantees in every page rights and freedom to the side by side and consistent with the overriding power of the State to act for the common good of all.

[298] ***Bidi Supply Co. v. Union of India and Ors.*** MANU/SC/0040/1956 : AIR 1956 SC 479

Para 24.1 make no apology for turning to older democracies and drawing inspiration from them,

for though our law is an amalgam drawn from many sources, its firmest foundations are rooted in the freedoms of other lands where men are free in the democratic sense of the term. England has no fundamental rights as such and its Parliament is supreme but the liberty of the subject is guarded there as jealously as the supremacy of Parliament."

[299] The first 8 amendments to the Constitution are some of them.

[300] 5.....It was in *Kharak Singh v. State of U.P. and Ors.* that the question as to the, proper scope and meaning of the expression personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right Under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned". There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India (1970) 1 SCC 248 the minority view must be regarded as correct and the majority view must be held to have been overruled.....

[301] 6.....The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right Under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in R.C. Cooper's case, Shambhu Nath Sarkar's case and Haradhan Sana's case. Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred Under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukharjea, J., in A.K. Gopalan's case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14.....

[302] No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of

personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping.

[303]Gettysburg Speech

[304]That was exactly the State's submission in A.K. Gopalan's case which unfortunately found favour with this Court.

[305](2) Nothing in sub Clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub Clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

(3) Nothing in sub Clause (b) of the said Clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

(4) Nothing in sub Clause (c) of the said Clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

(5) Nothing in sub Clauses (d) and (e) of the said Clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

(6) Nothing in sub Clause (g) of the said Clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub Clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,
(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

[306] That was exactly the State's submission in A.K. Gopalan's case which unfortunately found favour with this Court.

[307] *See Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta and Ors. PAR.* 1955 SC 367, (Paras 34 and 38)

State Trading Corporation of India Ltd. v. The Commercial Tax Officer and Ors. MANU/SC/0038/1963 : AIR 1963 SC 1811, Para 20 Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs, Calcutta and Ors. MANU/SC/0094/1964 : AIR 1964 SC 1140, (Para 35)

Charles Sobraj v. Supdt. Central Jail, Tihar, New Delhi AIR 1978 SC 104, (Para 16)
Louis De Raedt v. Union of India and Ors. MANU/SC/0422/1991 : (1991) 3 SCC 554, (Para 13)

[308] ***Gobind*** *v.* ***State of Madhya Pradesh and Anr.***, MANU/SC/0119/1975 : (1975) 2 SCC 148 Para 23.... The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right....

[309] For a detailed account of the taxonomy of the constitutional right to privacy in India see, Mariyam Kamil, 'The Structure of the Right to Privacy in India' (MPhil thesis, University of Oxford, 2015).

[310]It is a settled principle of law that some of the Fundamental Rights like 14 and 29 are guaranteed even to non-citizens

[311] Griswold v. Connecticut 381 US 479 (1965) 487.

[312] Gary Bostwick, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision' (1976) 64 California Law Review 1447.

[313] *Stanley v. Georgia*, 394 U.S. 557 (1969) - that the mere private possession of obscene matter cannot constitutionally be made a crime....

.....State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

[314] MANU/SC/0061/1986 : (1986) 3 SCC 615, Bijoe Emmanuel and Ors. v. State Of Kerala and Ors.

[315] 25. Freedom of conscience and free profession, practice and propagation of religion.-
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus.

Explanation I.- The wearing and carrying of kirpans shall be deemed to be *included* in the profession of the Sikh religion.

Explanation II.- In Sub-clause (b) of Clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

[316] *Skinner v. Oklahoma*, 316 U.S. 535 (1942) - There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority-even those who have been guilty of what the majority defines as crimes-Jackson, J.

[317] For the legal debate in this area in US, See Chapter 15.11 of the American Constitutional Law by Laurence H. Tribe - 2nd Edition.

[318] Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : (1978) 1 SCC 248

[319] *Williams v. Fears*, 179 U.S. 270 (1900) - Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty,.....

[320] The High Court of AP held that Article 19(1)(c) would take within its sweep the matrimonial association in *T. Sareetha v. T. Venkata Subbaiah* MANU/AP/0161/1983 : AIR 1983 AP 356. However, this case was later overruled by this Court in *Saroj Rani v. Sudarshan Kumar Chadha* MANU/SC/0183/1984 : AIR 1984 SC 1562

[321] A challenge Under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of E.P. Royappa v. State of Tamil Nadu MANU/SC/0380/1973 : AIR 1974 SC 555, is very simply the lack of any reasoning.

[322] A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in Constitutional law that is Footnote Four in United States v. Carolene Products, 304 U.S. 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.

[323] District Registrar & Collector, Hyderabad v. Canara Bank MANU/SC/0935/2004 : AIR 2005

SC 186; State of Maharashtra v. Bharat Shanti Lal Shah MANU/SC/3789/2008 : (2008) 13 SCC 5.

[324] *Justice KS Puttaswamy (Retd.) v. Union of India*, W.P. (Civil) No. 494 of 2012, Order dated 11 August 2015

[325] *Id., at* p. 350

[326] *Id., at* p. 349

[327] PJ Fitzgerald, Salmond on Jurisprudence 217 (Twelfth Edition, 1966)

[328] Roscoe Pound, The Spirit of the Common Law 88 (1921)

[329] *Id., at* p. 92

[330] Several other pre-constitutional enactments which codify the common law also acknowledge a right to privacy, both as between the individuals and the government, as well as between individuals *inter se*. These include:
1. Section 126-9, The Indian Evidence Act, 1872 (protecting certain classes of communication as privileged)
2. Section 4, The Indian Easements Act, 1882 (defining 'easements' as the right to choose how to use and enjoy a given piece of land)
3. Section 5(2), The Indian Telegraph Act, 1885 (specifying the permissible grounds for the Government to order the interception of messages)
4. Sections 5 and 6, The Bankers Books (Evidence) Act, 1891 (mandating a court order for the production and inspection of bank records)
5. Section 25 and 26, The Indian Post Office Act, 1898 (specifying the permissible grounds for the interception of postal articles)

[331] Martin LOUGHLIN, The Foundations of Public Law 344-46 (2010)

[332] *Pavesich v. New England Life Insurance co. et al.*, 50 S.E. 68 (Supreme Court of Georgia)

[333] Black's Law Dictionary (Bryan Garner, ed.) 3783 (2004)

[334] Samuel D. Warren and Louis D. Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890)

[335] Narcotic Drugs and Psychotropic Substances Act, 1985, Section 42

[336] Kautilya's Arthashastra 189-90 (R. Shamasastri, trans., 1915)

[337] AA Maududi, Human Rights in Islam 27 (1982)

[338] Thessalonians 4:11 The Bible

[339] James 5:16 The Bible

[340] Code of Civil Procedure, 1989, Section 132

[341] John Stuart Mill, On Liberty and Other Essays 15-16 (Stefan Collini ed., 1989) (1859)

[342] Laurence H. Tribe and Michael C. Dorf, *Levels Of Generality In The Definition Of Rights*, 57 U. Chi. L. Rev. 1057 (1990) at 1068

[343] *Munn v. Illinois*, (1877) 94 US 113 (Per Field, J.) as cited In Kharak Singh at p. 347-8

[344] *Francis Coralie Mullin* at 7

[345] Salmond, at p. 228

[346] *Id. at* 29

[347] Laurence H. Tribe And Michael C. Dorf, *Levels Of Generality In The Definition Of Rights*, 57 U. Chi. L. Rev. 1057 (1990) at p. 1068

[348] *Maneka Gandhi v. Union of India* MANU/SC/0133/1978 : (1978) 1 SCC 248 at para 48

[349] It is interesting to note that from 1066 onwards, England has never been ruled by a native Anglo-Saxon. The Norman French dynasty which gave way to the Plantagenet dynasty ruled from 1066-1485; the Welsh Tudor dynasty then ruled from 1485-1603 AD; the Stuart dynasty, a Scottish dynasty, then ruled from 1603; and barring a minor hiccup in the form of Oliver Cromwell, ruled up to 1714. From 1714 onwards, members of a German dynasty from Hanover have been monarchs of England and continue to be monarchs in England.

[350] See, E. Gaffney Jr., "The Importance of Dissent and the Imperative of Judicial Civility" (1994) 28 Val. U.L. Rev 583.

[351] John P. Frank, Book Review, 10 J. Legal Education 401, 404 (1958).

[352] Shri Gopal Sankaranarayanan has argued that the statement contained in **R.C. Cooper** (supra) that 5 out of 6 learned Judges had held in **Gopalan** (supra) that Article 22 was a complete code and was to be read as such, is incorrect. He referred to various extracts from the judgments in **Gopalan** (supra) to demonstrate that this was, in fact, incorrect as Article 21 was read together with Article 22. While Shri Gopal Sankaranarayanan may be correct, it is important to note that at least insofar as Article 19 was concerned, none of the judgments except that of Fazl Ali, J. were prepared to read Articles 19 and 21 together. Therefore, on balance, it is important to note that **R.C. Cooper** (supra) cleared the air to state that none of the fundamental rights can be construed as being mutually exclusive.

[353] Shri Rakesh Dwivedi has argued before us that in **Maneka Gandhi** (supra), Chandrachud, J.

had, in paragraph 55 of the judgment, clearly stated that substantive due process is no part of the Constitution of India. He further argued that Krishna Iyer, J.'s statement in **Sunil Batra** (supra) that a due process Clause as contained in the U.S. Constitution is now to be read into Article 21, is a standalone statement of the law and that "substantive due process" is an expression which brings in its wake concepts which do not fit into the Constitution of India. It is not possible to accept this contention for the reason that in the Constitution Bench decision in **Mithu** (supra), Chandrachud, C.J., did not refer to his concurring judgment in **Maneka Gandhi** (supra), but instead referred, with approval, to Krishna Iyer, J.'s statement of the law in paragraph 6. It is this statement that is reproduced in paragraph 28 of **Mohd. Arif** (supra). Also, "substantive due process" in our context only means that a law can be struck down Under Article 21 if it is not fair, just or reasonable on substantive and not merely procedural grounds. In any event, it is Chandrachud, C.J's earlier view that is a standalone view. In **Collector of Customs, Madras** v. **Nathella Sampathu Chetty**, (1962) 3 SCR 786 at 816, a Constitution Bench of this Court, when asked to apply certain American decisions, stated the following:

It would be seen that the decisions proceed on the application of the "due process" Clause of the American Constitution. Though the tests of 'reasonableness' laid down by Clauses (2) to (6) of Article 19 might in great part coincide with that for judging of 'due process', it must not be assumed that these are identical, for it has to be borne in mind that the Constitution framers deliberately avoided in this context the use of the expression 'due process' with its comprehensiveness, flexibility and attendant vagueness, in favour of a somewhat more definite word "reasonable", and caution has, therefore, to be exercised before the literal application of American decisions.

Mathew, J. in **Kesavananda Bharati** v. **State of Kerala**, (1973) Supp. SCR 1 at 824, 825 and 826 commented on this particular passage thus:

When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources. In fact, you measure the reasonableness of a restriction imposed by law by indulging in an authentic bit of special legislation [See Learned Hand, Bill of Rights, p. 26]. "The words 'reason' and 'reasonable' denote for the common law lawyer ideas which the 'Civilians' and the 'Canonists' put under the head of the 'law of nature'...

...The limitations in Article 19 of the Constitution open the doors to judicial review of legislation in India in much the same manner as the doctrine of police power and its companion, the due process clause, have done in the United States. The restrictions that might be imposed by the Legislature to ensure the public interest must be reasonable and, therefore, the Court will have to apply the yardstick of reason in adjudging the reasonableness. If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause..

...In the light of what I have said, I am unable to understand how the word 'reasonable' is more definite than the words 'due process'...

[354] Chief Justice S.R. Das in his farewell speech had this to say about Subba Rao, J., "Then we have brother Subba Rao, who is extremely unhappy because all our fundamental rights are going to the dogs on account of some ill-conceived judgments of his colleagues which require reconsideration."

[355] This view of the law is obviously incorrect. If the Preamble to the Constitution of India is to be a guide as to the meaning of the expression "liberty" in Article 21, liberty of thought and expression would fall in Article 19(1)(a) and Article 21 and belief, faith and worship in Article 25 and Article 21. Obviously, "liberty" in Article 21 is not confined to these expressions, but certainly subsumes them. It is thus clear that when Article 21 speaks of "liberty", it is, atleast, to be read together with Articles 19(1)(a) and 25.

[356] (1) The right to go abroad. **Maneka Gandhi** v. **Union of India** MANU/SC/0133/1978 : (1978) 1 SCC 248 at paras 5, 48, 90, 171 and 216; (2) The right of prisoners against bar fetters. **Charles Sobraj** v. **Delhi Administration** MANU/SC/0184/1978 : (1978) 4 SCC 494 at paras 192, 197-B, 234 and 241; (3) The right to legal aid. **M.H. Hoskot** v. **State of Maharashtra** MANU/SC/0119/1978 : (1978) 3 SCC 544 at para 12; (4) The right to bail. **Babu Singh** v. **State of Uttar Pradesh** MANU/SC/0059/1978 : (1978) 1 SCC 579 at para 8; (5) The right to live with dignity. **Jolly George Varghese** v. **Bank of Cochin** MANU/SC/0014/1980 : (1980) 2 SCC 360 at para 10; (6) The right against handcuffing. **Prem Shankar Shukla** v. **Delhi Administration** MANU/SC/0084/1980 : (1980) 3 SCC 526 at paras 21 and 22; (7) The right against custodial violence. **Sheela Barse** v. **State of Maharashtra** MANU/SC/0382/1983 : (1983) 2 SCC 96 at para 1; (8) The right to compensation for unlawful arrest. **Rudul Sah** v. **State of Bihar** MANU/SC/0380/1983 : (1983) 4 SCC 141 at para 10; (9) The right to earn a livelihood. **Olga Tellis** v. **Bombay Municipal Corporation** MANU/SC/0039/1985 : (1985) 3 SCC 545 at para 37; (10) The right to know. **Reliance Petrochemicals Ltd.** v. **Proprietors of Indian Express Newspapers** MANU/SC/0412/1988 : (1988) 4 SCC 592 at para 34; (11) The right against public hanging. **A.G. of India** v. **Lachma Devi** MANU/SC/0313/1988 : (1989) Supp (1) SCC 264 at para 1; (12) The right to doctor's assistance at government hospitals. **Paramanand Katara** v. **Union of India** MANU/SC/0423/1989 : (1989) 4 SCC 286 at para 8; (13) The right to medical care. **Paramanand Katara** v. **Union of India** MANU/SC/0423/1989 : (1989) 4 SCC 286 at para 8; (14) The right to **Shelter Shantistar Builders** v. **N.K. Totame** MANU/SC/0115/1990 : (1990) 1 SCC 520 at para 9 and 13; (15) The right to pollution free water and air. **Subhash Kumar** v. **State of Bihar** MANU/SC/0106/1991 : (1991) 1 SCC 598 at para 7; (16) The right to speedy trial. **A.R. Antulay** v. **R.S. Nayak** MANU/SC/0326/1992 : (1992) 1 SCC 225 at para 86; (17) The right against illegal detention. **Joginder Kumar** v. **State of Uttar Pradesh** MANU/SC/0311/1994 : (1994) 4 SCC 260 at paras 20 and 21; (18) The right to a healthy environment. **Virender Gaur** v. **State of Haryana** MANU/SC/0629/1995 : (1995) 2 SCC 577 at para 7; (19) The right to health and medical care for workers. **Consumer Education and Research Centre** v. **Union of India** MANU/SC/0175/1995 : (1995) 3 SCC 42 at paras 24 and 25; (20) The right to a clean environment. **Vellore Citizens Welfare Forum** v. **Union of India** MANU/SC/0686/1996 : (1996) 5 SCC 647 at paras 13, 16 and 17; (21) The right against sexual harassment. **Vishaka and Ors.** v. **State of Rajasthan and Ors.** MANU/SC/0786/1997 : (1997) 6 SCC 241 at paras 3 and 7; (22) The right against noise pollution. **In Re, Noise Pollution** MANU/SC/0415/2005 : (2005) 5 SCC 733 at para 117; (23) The right to fair trial. **Zahira Habibullah Sheikh and Anr.** v. **State of Gujarat and Ors.** MANU/SC/1344/2006 : (2006) 3

SCC 374 at paras 36 and 38; (24) The right to sleep. In Re, Ramlila Maidan Incident MANU/SC/0131/2012 : (2012) 5 SCC 1 at paras 311 and 318; (25) The right to reputation. **Umesh Kumar** v. **State of Andhra Pradesh** MANU/SC/0904/2013 : (2013) 10 SCC 591 at para 18; (26) The right against solitary confinement. **Shatrugan Chauhan and Anr.** v. **Union of India** MANU/SC/0043/2014 : (2014) 3 SCC 1 at para 241.

[357] This era lasted from the early 20th Century till 1937, when the proverbial switch in time that saved nine was made by Justice Roberts. It was only from 1937 onwards that President Roosevelt's New Deal legislations were upheld by a majority of 5:4, having been struck down by a majority of 5:4 previously.

[358] It will be noticed that this judgment grounds the right of privacy in Article 21. However, the Court was dealing with the aforesaid right not in the context of State action, but in the context of press freedom.

[359] In 1834, Jacques-Charles Dupont de l'Eure associated the three terms liberty, equality and fraternity together in the Revue Republicaine, which he edited, as follows:
Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity.

Many of our decisions recognize human dignity as being an essential part of the fundamental rights chapter. For example, see **Prem Shankar Shukla** v. **Delhi Administration**, MANU/SC/0084/1980 : (1980) 3 SCC 526 at paragraph 21, **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi and Ors.**, MANU/SC/0517/1981 : (1981) 1 SCC 608 at paragraphs 6, 7 and 8, **Bandhua Mukti Morcha** v. **Union of India**, MANU/SC/0051/1983 : (1984) 3 SCC 161 at paragraph 10, **Maharashtra University of Health Sciences** v. **Satchikitsa Prasarak Mandal**, MANU/SC/0136/2010 : (2010) 3 SCC 786 at paragraph 37, **Shabnam** v. **Union of India**, MANU/SC/0669/2015 : (2015) 6 SCC 702 at paragraphs 12.4 and 14 and **Jeeja Ghosh** v. **Union of India**, MANU/SC/0574/2016 : (2016) 7 SCC 761 at paragraph 37.

[360] Khanna, J. was in line to be Chief Justice of India but was superseded because of this dissenting judgment. Nani Palkhivala in an Article written on this great Judge's supersession ended with a poignant sentence, "To the stature of such a man, the Chief Justiceship of India can add nothing." Seervai, in his monumental treatise "Constitutional Law of India" had to this to say:
53. If in this Appendix the dissenting judgment of Khanna J. has not been considered in detail, it is not for lack of admiration for the judgment, or the courage which he showed in delivering it regardless of the cost and consequences to himself. It cost him the Chief Justiceship of India, but it gained for him universal esteem not only for his courage but also for his inflexible judicial independence. If his judgment is not considered in detail it is because under the theory of precedents which we have adopted, a dissenting judgment, however valuable, does not lay down the law and the object of a critical examination of the majority judgments in this Appendix was to show that those judgments are untenable in law, productive of grave public mischief and ought to be overruled at the earliest opportunity. The conclusion which Justice Khanna has reached on the effect of the suspension of Article 21 is correct. His reminder that the Rule of law did not merely mean giving effect to an enacted law was timely, and was reinforced by his reference to

the mass murders of millions of Jews in Nazi concentration camps under an enacted law. However, the legal analysis in this Chapter confirms his conclusion though on different grounds from those which he has given." (at Appendix pg. 2229).

[361]The History of Freedom and Other Essays (1907), p. 587

[362] The Right to Privacy 4 HLR 193

[363] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

[364] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[365] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[366] Michael L. Rustad, SannaKulevska, Reconceptualizing the right to be forgotten to enable transatlantic data flow, 28 Harv. J.L. & Tech. 349

[367] https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/Tom Goodwin 'The Battle is for Customer Interface'

[368] Kadhim Shubber, Blackberry gives Indian Government ability to intercept messages published by Wired on 11 July, 2013 http://www.wired.co.uk/article/blackberry-india

[369] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

[370] Dhananjay Keer, Dr. Ambedkar: Life and Mission, Bombay: Popular Prakashan, 1971 [1954], p.410.)

[371] Geoffrey Robertson, QC and Andrew Nicol, QC, Media Law fifth edition p. 265

[372] Campbell v. MGN Ltd. 2004 UKHL 22

[373] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

[374] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

[375] The UK Courts granted in super-injunctions to protect privacy of certain celebrities by

tabloids which meant that not only could the private information not be published but the very fact of existence of that case & injunction could also not be published.

[376] The Second Circuit's decision in Haelan Laboratories v. Topps Chewing Gum. 202 F. 2d 866 (2d Cir. 1953) penned by Judge Jerome Frank defined the right to publicity as *"the right to grant the exclusive privilege of publishing his picture"*.

[377] Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition, 67 U. PITT.L. REV. 225, 282 (2005).

[378] William L. Prosser, Privacy, 48 CAL.L. REV. 383 (1960)

[379] the scope of the right to publicity varies across States in the U.S.

[380] Arthur R. Miller, The University of Michigan Press

[381] Patricia Sanchez Abril, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS.L.J. 63, 69 (2012).

[382] Ravi Antani, THE RESISTANCE OF MEMORY: COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES ?

[383] Michael L. Rustad, Sanna Kulevska, Reconceptualizing the right to be forgotten to enable transatlantic data flow, 28 Harv. J.L. & Tech. 349

[384] Supra

[385] Supra

[386] Supra

[387] Supra

Back to Index

MANU/SC/1054/2018

Neutral Citation: 2018/INSC/880

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 494 of 2012 (Under Article 32 of the Constitution of India), Transferred Case (Civil) Nos. 151, 152 of 2013, Writ Petition (Civil) Nos. 833, 829 of 2013, Transferred Petition (Civil) No. 1797 of 2013, Writ Petition (Civil) No. 932 of 2013, Transferred Petition (Civil) No. 1796 of 2013, Contempt Petition (Civil) No. 144 of 2014 in Writ Petition (Civil) No. 494 of 2012, Transferred Petition (Civil) Nos. 313, 312 of 2014, SLP (Crl.) No. 2524 of 2014, Writ Petition (Civil) Nos. 37, 220 of 2015, Contempt Petition (Civil) No. 674 of 2015 in Writ Petition (Civil) No. 829 of 2013, Transferred Petition (Civil) No. 921 of 2015, Contempt Petition (Civil) No. 470 of 2015 in Writ Petition (Civil) No. 494 of 2012, Writ Petition (Civil) No. 231 of 2016, Contempt Petition (Civil) No. 444 of 2016 in Writ Petition (Civil) No. 494 of 2012, Contempt Petition (Civil) No. 608 of 2016 in Writ Petition (Civil) No. 494 of 2012, Writ Petition (Civil) No. 797 of 2016, Contempt Petition (Civil) No. 844 of 2017 in Writ Petition (Civil) Nos. 494 of 2012, 342, 372, 841, 1058, 966, 1014, 1002, 1056 of 2017 and Contempt Petition (Civil) No. 34 of 2018 in Writ Petition (Civil) No. 1014 of 2017

Decided On: 26.09.2018

Appellants: Justice K.S. Puttaswamy and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.*

Hon'ble Judges/Coram:

Dipak Misra, C.J.I., A.M. Khanwilkar, A.K. Sikri, Ashok Bhushan and Dr. D.Y. Chandrachud, JJ.

Subject: Constitution

Cases Overruled/Partly Overruled:

Mohd. Saeed Siddiqui v. State of Uttar Pradesh and Ors. (MANU/SC/0350/2014); Yogendra Kumar Jaiswal and Ors. v. State of Bihar and Ors. (MANU/SC/1441/2015)

Authorities Referred:

"P.J. Fitzgerald, Salmond, Jurisprudence, p. 228; Harvard Law Review, Vol. 92, (1978), pages 353-409; G.P singh, Principles of Statutory Interpretation, 14th Edn.

HIGH COURT Status:

Judgment challenged *vide* MANU/SC/0030/2021 dated: 11.01.2021

Case Note:

Constitution - Aadhaar scheme - Right to privacy - Articles 14,19,21,110 and 110(1) of Constitution of India and Sections 7,28(5),29,29(1),29(2),33,47,57,59 of The Aadhaar Act, 2016 - Present petitions filed challenging constitutional validity of Aadhaar Act, 2016 and executive's Scheme notified by Government, by which Unique Identification Authority of India (UIDAI) was constituted to implement UIDAI Scheme - In writ petitions scheme had primarily been challenged on ground that it violates fundamental rights of innumerable citizens of India, namely, right to privacy falling under Article 21 of Constitution of India - Whether provisions of Aadhaar Act, 2016 was liable to be struck down as violative of constitution.

Facts:

The present petition filed to challenge The Aadhaar Act, 2016 and executive's Scheme notified by the Government, by which the Unique Identification Authority of India (UIDAI) was constituted to implement the UIDAI Scheme. It was the submission of the Petitioners that the Constitution balances rights of individuals against State interest. The Aadhaar completely upsets this balance and skews the relationship between the citizen and the State enabling the State to totally dominate the individual.

Held, while disposing off the petitions.

A.K. Sikri, J. (For Chief Justice, himself and A.M. Khanwilkar, J.)

(a) The architecture and structure of the Aadhaar Act reveals that the UIDAI was established as a statutory body which is given the task of developing the policy, procedure and system for issuing Aadhaar numbers to individuals and also to perform authentication thereof as per the provisions of the Act. For the purpose of enrolment and assigning Aadhaar numbers, enrolling agencies are recruited by the Authority. All the residents in India were eligible to obtain an Aadhaar number. To enable a resident to get Aadhaar number, he was required to submit demographic as well as biometric information i.e., apart from giving information relating to name, date of birth and address, biometric information in the form of photograph, fingerprint, iris scan was also to be provided. Aadhaar number given to a particular person was treated as unique number as it could not be reassigned to any other individual.

(b) Insofar as subsidies, benefits or services to be given by the Central Government or the State Government, as the case may be, was concerned, these Governments could mandate that receipt of these subsidies, benefits and services would be given only on furnishing proof of possession of Aadhaar number (or proof of making an application for enrolment, where Aadhaar number was not assigned). An added requirement was that such individual would undergo authentication at the time of receiving such benefits etc. A particular institution/body from which the aforesaid subsidy, benefit or service is to be claimed by such

an individual, the intended recipient would submit his Aadhaar number and is also required to give her biometric information to that agency. On receiving this information and for the purpose of its authentication, the said agency, known as Requesting Entity (RE), would send the request to the Authority which shall perform the job of authentication of Aadhaar number. On confirming the identity of a person, the individual is entitled to receive subsidy, benefit or service. Aadhaar number was permitted to be used by the holder for other purposes as well.

(c) In this whole process, any resident seeking to obtain an Aadhaar number is, in the first instance, required to submit her demographic information and biometric information at the time of enrolment. She, thus, parts with her photograph, fingerprint and iris scan at that stage by giving the same to the enrolling agency, which may be a private body/person. Likewise, every time when such Aadhaar holder intends to receive a subsidy, benefit or service and goes to specified/designated agency or person for that purpose, she would be giving her biometric information to that RE, which, in turn, shall get the same authenticated from the Authority before providing a subsidy, benefit or service.

(d) Attack of the Petitioners to the Aadhaar programme and its formation/structure under the Aadhaar Act was founded on the arguments that it is a grave risk to the rights and liberties of the citizens of this country which are secured by the Constitution of India. It militates against the constitutional abiding values and its foundational morality and has the potential to enable an intrusive state to become a surveillance state on the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a nine Judge Bench judgment of this Court in K.S. Puttaswamy.

(e) The Respondents, had attempted to shake the very foundation of the aforesaid structure of the Petitioners' case. They argue that in the first instance, minimal biometric information of the applicant, who intends to have Aadhaar number, is obtained which is also stored in CIDR for the purpose of authentication. Secondly, no other information is stored. It was emphasised that there was no data collection in respect of religion, caste, tribe, language records of entitlement, income or medical history of the applicant at the time of Aadhaar enrolment. Thirdly, the Authority also claimed that the entire Aadhaar enrolment eco-system is foolproof inasmuch as within few seconds of the biometrics having been collected by the enrolling agency, the said information gets transmitted the Authorities/CIDR, that too in an encrypted form, and goes out of the reach of the enrolling agency. Same was the situation at the time of authentication as biometric information does not remain with the requesting agency. Fourthly, while undertaking the authentication process, the Authority simply matches the biometrics and no other information is received or stored in respect of purpose, location or nature or transaction etc. Therefore, the question of profiling does not arise at all.

(f) In the said scenario, it was necessary, in the first instance, to find out the extent of core information, biometric as well as demographic, that is collected and stored by the Authority

at the time of enrolment as well as at the time of authentication. This exercise becomes necessary in order to consider the argument of the Petitioners about the profiling of the Aadhaar holders. On going through this aspect, on the basis of the powerpoint presentation given by CEO of UIDAI, and the arguments of both the sides, including the questions which were put by the Petitioners to CEO of UIDAI and the answers thereupon, the Court has come to the conclusion that minimal possible data, demographic and biometric, is obtained from the Aadhaar holders.

(g) The Court also noticed that the whole architecture of Aadhaar was devised to give unique identity to the citizens of this country. No doubt, a person could have various documents on the basis of which that individual can establish her identify. It may be in the form of a passport, PAN card, ration card and so on. For the purpose of enrolment itself number of documents were prescribed which an individual can produce on the basis of which Aadhaar card could be issued. Thus, such documents, in a way, were also proof of identity. However, there was a fundamental difference between the Aadhaar card as a mean of identity and other documents through which identity could be established. Enrolment for Aadhaar card also requires giving of demographic information as well as biometric information which is in the form of iris and fingerprints. This process eliminates any chance of duplication. It was emphasised that an individual could manipulate the system by having more than one or even number of PAN cards, passports, ration cards etc. When it comes to obtaining Aadhaar card, there was no possibility of obtaining duplicate card. Once the biometric information is stored and on that basis Aadhaar card was issued, it remains in the system with the Authority. Wherever there would be a second attempt for enrolling for Aadhaar and for this purpose same person gives his biometric information, it would be immediately get matched with the same biometric information already in the system and the second request would stand rejected. It was for this reason the Aadhaar card was known as Unique Identification (UID). Such an identity was unparalleled.

(h) There was, then, another purpose for having such a system of issuing unique identification cards in the form of Aadhaar card. A glimpse thereof is captured under the heading Introduction above, while mentioning how and under what circumstances the whole project was conceptualised. To put it tersely, in addition to enabling any resident to obtain such unique identification proof, it is also to empower marginalised Section of the society, particularly those who are illiterate and living in abject poverty or without any shelter etc. It gives identity to such persons also. Moreover, with the aid of Aadhaar card, they could claim various privileges and benefits etc. which were actually meant for these people.

(i) Identity of a person had a significance for every individual in his/her life. In a civilised society every individual, on taking birth, is given a name. Her place of birth and parentage also becomes important as she is known in the society and these demographic particulars also become important attribute of her personality. Throughout their lives, individuals were supposed to provide such information, be it admission in a school or college or at the time of taking job or engaging in any profession or business activity, etc. When all this information was available in one place, in the form of Aadhaar card, it not only becomes unique, it would also qualify as a document of empowerment. Added with this feature, when an individual knows that no other person can clone her, it assumes greater significance.

(j) Thus, the scheme by itself could be treated as laudable when it comes to enabling an individual to seek Aadhaar number, more so, when it is voluntary in nature. Howsoever benevolent the scheme may be, it had to pass the muster of constitutionality. According to the Petitioners, the very architecture of Aadhaar was unconstitutional on various grounds. (k) The Court has taken note of the heads of challenge of the Act, Scheme and certain Rules etc. and clarified that the matter was examined with objective examination of the issues on the touchstone of the constitutional provisions, keeping in mind the ethos of constitutional democracy, Rule of law, human rights and other basic features of the Constitution.

Discussing the scope of judicial review, the Court had accepted that apart from two grounds noticed in Binoy Viswam, on which legislative Act can be invalidated [(a) the Legislature does not have competence to make the law and b) law made is in violation of fundamental rights or any other constitutional provision], another ground, namely, manifest arbitrariness, could also be the basis on which an Act could be invalidated. The issues are examined having regard to the aforesaid scope of judicial review.

(l) From the arguments raised by the Petitioners and the grounds of challenge, it becomes clear that the main plank of challenge is that the Aadhaar project and the Aadhaar Act infringes right to privacy. Inbuilt in this right to privacy is the right to live with dignity, which was a postulate of right to privacy. In the process, discussion leads to the issue of proportionality, viz. whether measures taken under the Aadhaar Act satisfy the doctrine of proportionality.

(m) The Court discussed the contours of right to privacy, as laid down in K.S. Puttaswamy, principle of human dignity and doctrine of proportionality. After taking note of the discussion contained in different opinions of Judges, it stands established, without any pale of doubt, that privacy had now been treated as part of fundamental right. The Court had held that, in no uncertain terms, that privacy had always been a natural right which given an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namel intrusion with an individual's physical body, informational privacy and privacy of choice.

(n) As succinctly put by Nariman, J., first aspect involves the person himself/herself and guards a person's rights relatable to his physical body thereby controlling the uncalled invasion by the State. Insofar as second aspect, namely, informational privacy is concerned, it does not deal with a person's body but deals with a person's mind. In this manner, it protects a person by giving her control over the dissemination of material that is personal to her and disallowing unauthorised use of such information by the State. Third aspect of privacy relates to individual's autonomy by protecting her fundamental personal choices. These aspects have functional connection and relationship with dignity. In this sense, privacy was a postulate of human dignity itself. Human dignity had a constitutional value and its significance was acknowledged by the Preamble. Further, by catena of judgments, human dignity was treated as fundamental right as a facet not only of Article 21, but that of right to equality (Article 14) and also part of bouquet of freedoms stipulated in Article 19. Therefore, privacy as a right was intrinsic of freedom, liberty and dignity. Viewed in this manner, one

could trace positive and negative contents of privacy. The negative content restricts the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

(o) In developing the said concepts, the Court had been receptive to the principles in international law and international instruments. It was a recognition of the fact that certain human rights could not be confined within the bounds of geographical location of a nation but have universal application. In the process, the Court accepts the concept of universalisation of human rights, including the right to privacy as a human right and the good practices in developing and understanding such rights in other countries had been welcomed. In this hue, it could also be remarked that comparative law had played a very significant role in shaping the aforesaid judgment on privacy in Indian context, notwithstanding the fact that such comparative law has only persuasive value. The whole process of reasoning contained in different opinions of the Judges would, thus, reflect that the argument that it was difficult to precisely define the common denominator of privacy, was rejected. While doing so, the Court referred to various approaches to formulating privacy.

(p) This court also remarked the taxonomy of privacy, namely, on the basis of harms, interest and aggregation of rights. This court also discussed the scope of right to privacy with reference to the cases at hand and the circumstances in which such a right can be limited. In the process, we have also taken note of the passage from the judgment rendered by Nariman, J. in K.S. Puttaswamy stating the manner in which law had to be tested when it was challenged on the ground that it violates the fundamental right to privacy.

(q) One important comment which needs to be made at this stage relates to the standard of judicial review while examining the validity of a particular law that allegedly infringes right to privacy. The question was as to whether the Court was to apply strict scrutiny standard or the just, fair and reasonableness standard. In the privacy judgment, different observations were made by the different Judges and the aforesaid aspect was not determined authoritatively, may be for the reason that the Bench was deciding the reference on the issue as to whether right to privacy was a fundamental right or not and, in the process, it was called upon to decide the specific questions referred to it. This Court preferred to adopt a just, fair and reasonableness standard which was in tune with the view expressed by majority of Judges in their opinion. Even otherwise, this is in consonance with the judicial approach adopted by this Court while construing reasonable restrictions that the State could impose in public interest, as provided in Article 19 of the Constitution. Insofar as principles of human dignity were concerned, the Court, after taking note of various judgments where this principle was adopted and elaborated, summed up the essential ingredients of dignity jurisprudence by noticing that the basic principle of dignity and freedom of the individual was an attribute of natural law which becomes the right of all individuals in a constitutional democracy. Dignity had a central normative role as well as constitutional value.

(r) As per Dworkin, there are two principles about the concept of human dignity, First principle regards an intrinsic value of every person, namely, every person has a special

objective value which value was not only important to that person alone but success or failure of the lives of every person was important to all of us. It could also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle was that of personal responsibility, which means every person had the responsibility for success in her own life and, therefore, she must use her discretion regarding the way of life that would be successful from her point of view.

(s) Sum total of this exposition could be defined by explaining that as per the aforesaid view dignity was to be treated as empowerment which makes a triple demand in the name of respect for human dignity, namely respect for one's capacity as an agent to make one's own free choices, respect for the choices so made and respect for one's need to have a context and conditions in which one could operate as a source of free and informed choice.

(t) In the entire formulation of dignity right, respect for an individual is the fulcrum, which was based on the principle of freedom and capacity to make choices and a good or just social order was one which respects dignity via assuring contexts and conditions as the source of free and informed choice. The said discourse on the concept of human dignity is from an individual point of view. That was the emphasis of the Petitioners as well. That would be one side of the coin. A very important feature which the present case had brought into focus was another dimension of human dignity, namely, in the form of common good or public good. Thus, endeavour here was to give richer and more nuanced understanding to the concept of human dignity.

(u) Therefore, this court have to keep in mind humanistic concept of Human Dignity which was to be accorded to a particular segment of the society and, in fact, a large segment. Their human dignity was based on the socio-economic rights that were read in to the Fundamental Rights. When read socio-economic rights into human dignity, the community approach also assumes importance along with individualistic approach to human dignity. It had now been well recognise that at its core, human dignity contains three elements, namely, Intrinsic Value, Autonomy and Community Value. These were known as core values of human dignity. These three elements could assist in structuring legal reasoning and justifying judicial choices in hard cases.

(v) When it comes to dignity as a community value, it emphasises the role of the community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of good life. The relevant question was in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy. The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society was not incompatible, of course, with limitation resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an overlapping consensus that could be shared by most individuals and groups. Whenever such tension arises, the task of balancing was to be achieved by the Courts.

(w) In this way, the concept of human dignity had been widened to deal with the issues at hand. As far as doctrine of proportionality was concerned, after discussing the approaches

that are adopted by the German Supreme Court and the Canadian Supreme Court, which were somewhat different from each other, this Court has applied the tests as laid down in Modern Dental College & Research Centre, which were approved in K.S. Puttaswamy as well. However, at the same time, a modification was done by focusing on the parameters set down of Bilchitz which were aimed at achieving a more ideal approach. [446]

Dr. D.Y. Chandrachud, J.

(1) In order to deal with the challenge that the Aadhaar Act should not have been passed as a Money Bill, this Court was required to adjudicate whether the decision of the Speaker of the Lok Sabha to certify a Bill as a Money Bill, could be subject to judicial review. The judgment had analyzed the scope of the finality attributed to the Speaker's decision, by looking at the history of Article 110(3) of the Constitution, by comparing it with the comparative constitutional practices which accord finality to the Speaker's decision, by analyzing other constitutional provisions which use the phrase shall be final, and by examining the protection granted to parliamentary proceedings under Article 122. This judgment holds that the phrase shall be final used under Article 110(3) aims at avoiding any controversy on the issue as to whether a Bill was a Money Bill, with respect to the Rajya Sabha and before the President. The language used in Article 110(3) did not exclude judicial review of the Speaker's decision. This also applies to Article 199(3). The immunity from judicial review provided to parliamentary proceedings under Article 122 was limited to instances involving irregularity of procedure. The decisions of this Court in Special Reference, Ramdas Athawale and Raja Ram Pal hold that the validity of proceedings in Parliament or a State Legislature can be subject to judicial review when there is a substantive illegality or a constitutional violation. These judgments make it clear that the decision of the Speaker is subject to judicial review, if it suffers from illegality or from a violation of constitutional provisions. Article 255 had no relation with the decision of the Speaker on whether a Bill is a Money Bill. The three Judge Bench decision in Mohd. Saeed Siddiqui erroneously interpreted the judgment in Mangalore Beedi to apply Articles 212 (or Article 122) and 255 to refrain from questioning the conduct of the Speaker (under Article 199 or 110). The two judge Bench decision in Yogendra Kumar followed Mohd. Saeed Siddiqui. The correct position of law is that the decision of the Speaker under Articles 110(3) and 199(3) is not immune from judicial review. The decisions in Mohd. Saeed Siddiqui and Yogendra Kumar were accordingly overruled. The existence of and the role of the Rajya Sabha, as an institution of federal bicameralism in the Indian Parliament, constitutes a part of the basic structure of the Constitution. The decision of the Speaker of the Lok Sabha to certify a Bill as a Money Bill had a direct impact on the role of the Rajya Sabha, since the latter had a limited role in the passing of a Money Bill. A decision of the Speaker of the Lok Sabha to declare an ordinary Bill to be a Money Bill limits the role of the Rajya Sabha. The power of the Speaker could not be exercised arbitrarily in violation of constitutional norms and values, as it damages the essence of federal bicameralism, which is a part of the basic structure of the Constitution. Judicial review of the Speaker's decision, on whether a Bill was a Money Bill, was therefore necessary to protect the basic structure of the Constitution.

(2) To be certified a Money Bill, a Bill must contain only provisions dealing with every or any one of the matters set out in Sub-clauses (a) to (g) of Article 110(1). A Bill, which had

both provisions which fall within Sub-clauses (a) to (g) of Article 110(1) and provisions which fall outside their scope, will not qualify to be a Money Bill. Thus, when a Bill which had been passed as a Money Bill had certain provisions which fall beyond the scope of Sub-clauses (a) to (g) of Article 110(1), these provisions could not be severed. If the bill was not a Money Bill, the role of the Rajya Sabha in its legislative passage could not have been denuded. The debasement of a constitutional institution cannot be countenanced by the Court. Democracy survives when constitutional institutions were vibrant.

(3) The Aadhaar Act creates a statutory framework for obtaining a unique identity number, which was capable of being used for any purpose, among which availing benefits, subsidies and services, for which expenses were incurred from the Consolidated Fund of India, was just one purpose provided under Section 7. Clause (e) of Article 110(1) requires that a Money Bill must deal with the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India (or increasing the amount of the expenditure). Section 7 fails to fulfil this requirement. Section 7 does not declare the expenditure incurred to be a charge on the Consolidated Fund. It only provides that in the case of such services, benefits or subsidies, Aadhaar could be made mandatory to avail of them. Moreover, provisions other than Section 7 of the Act deal with several aspects relating to the Aadhaar numbers enrolment on the basis of demographic and biometric information, generation of Aadhaar numbers, obtaining the consent of individuals before collecting their individual information, creation of a statutory authority to implement and supervise the process, protection of information collected during the process, disclosure of information in certain circumstances, creation of offences and penalties for disclosure or loss of information, and the use of the Aadhaar number for any purpose. All these provisions of the Aadhaar Act did not lie within the scope of Sub-clauses (a) to (g) of Article 110(1). Hence, in the alternate, even if it was held that Section 7 bears a nexus to the expenditure incurred from the Consolidated Fund of India, the other provisions of the Act fail to fall within the domain of Article 110(1). Thus, the Aadhaar Act was declared unconstitutional for failing to meet the necessary requirements to have been certified as a Money Bill under Article 110(1).

(4) The argument that the Aadhaar Act was in pith and substance a Money Bill, with its main objective being the delivery of subsidies, benefits and services flowing out of the Consolidated Fund of India and that the other provisions were ancillary to the main purpose of the Act also holds no ground, since the doctrine of pith and substance was used to examine whether the legislature had the competence to enact a law with regard to any of the three Lists in the Seventh Schedule of the Constitution. The doctrine could not be invoked to declare whether a Bill satisfies the requirements set out in Article 110 of the Constitution to be certified a Money Bill. The argument of the Union of India misses the point that a Bill could be certified as a Money Bill only if it deals with all or any of the matters contained in Clauses (a) to (g) of Article 110(1).

(5) Having held that the Aadhaar Act was unconstitutional for having been passed as a Money Bill this judgment has also analysed the merits of the other constitutional challenges to the legislation as well as to the framework of the project before the law was enacted.

(6) The architecture of the Aadhaar Act seeks to create a unique identity for residents on the

basis of their demographic and biometric information. The Act sets up a process of identification by which the unique identity assigned to each individual was verified with the demographic and biometric information pertaining to that individual which was stored in a centralised repository of data. Identification of beneficiaries was integral and essential to the fulfilment of social welfare schemes and programmes, which were a part of the State's attempts to ensure that its citizens have access to basic human facilities. This judgment accepts the contention of the Union of India that there was a legitimate state aim in maintaining a system of identification to ensure that the welfare benefits provided by the State reach the beneficiaries who are entitled, without diversion.

(7) The Aadhaar programme involves application of biometric technology, which uses an individual's biometric data as the basis of authentication or identification and is therefore intimately connected to the individual. While citizens had privacy interests in personal or private information collected about them, the unique nature of biometric data distinguishes it from other personal data, compounding concerns regarding privacy protections safeguarding biometric information. Once a biometric system is compromised, it is compromised forever. Therefore, it ws imperative that concerns about protecting privacy must be addressed while developing a biometric system. Adequate norms must be laid down for each step from the collection to retention of biometric data. At the time of collection, individuals must be informed about the collection procedure, the intended purpose of the collection, the reason why the particular data set is requested and who would have access to their data. Additionally, the retention period must be justified and individuals must be given the right to access, correct and delete their data at any point in time, a procedure familiar to an opt-out option.

(8) Prior to the enactment of the Aadhaar Act, no mandatory obligation was imposed upon the Registrars or the enrolling agencies, to obtain informed consent from residents before recording their biometric data, to inform them how the biometric data would be stored and used and about the existence of adequate safeguards to secure the data. Moreover, prior to the enactment of the Act, while UIDAI had itself contemplated that an identity theft could occur at the time of enrollment for Aadhaar cards, it had no solution to the possible harms which could result after the identity theft of a person.

(9) The Regulations framed subsequently under the Aadhaar Act also did not provide a robust mechanism on how informed consent was to be obtained from residents before collecting their biometric data. The Aadhaar Act and Regulations were bereft of the procedure through which an individual can access information related to his or her authentication record. The Aadhaar Act clearly had no defined options that should be made available to the Aadhaar number holders in case they did not wish to submit identity information during authentication, nor do the Regulations specify the procedure to be followed in case the Aadhaar number holder did not provide consent for authentication.

(10) Sections 29(1) and (2) of the Act create a distinction between two classes of information (core biometric information and identity information), which were integral to individual identity and require equal protection. Section 29(4) of Act suffers from overbreadth as it gives wide discretionary power to UIDAI to publish, display or post core biometric

information of an individual for purposes specified by the Regulations.

(11) Sections 2(g), (j), (k) and (t) suffer from overbreadth, as these could lead to an invasive collection of biological attributes. These provisions give discretionary power to UIDAI to define the scope of biometric and demographic information and empower it to expand on the nature of information already collected at the time of enrollment, to the extent of also collecting any "such other biological attributes" that it may deem fit.

(12) There is no clarity on how an individual is supposed to update his/her biometric information, in case the biometric information mismatches with the data stored in CIDR. The proviso to Section 28(5) of the Aadhaar Act, which disallows an individual access to the biometric information that forms the core of his or her unique ID, was violative of a fundamental principle that ownership of an individual's data must at all times vest with the individual. UIDAI is also provided wide powers in relation to removing the biometric locking of residents. With this analysis of the measures taken by the Government of India prior to the enactment of the Aadhaar Act as well as a detailed analysis of the provisions under the Aadhaar Act, 2016 and supporting Regulations made under it, this judgment concludes that the Aadhaar programme violates essential norms pertaining to informational privacy, self-determination and data protection.

(13) The State was under a constitutional obligation to safeguard the dignity of its citizens. Biometric technology which is the core of the Aadhaar programme was probabilistic in nature, leading to authentication failures. These authentication failures have led to the denial of rights and legal entitlements. The Aadhaar project had failed to account for and remedy the flaws in its framework and design which has led to serious instances of exclusion of eligible beneficiaries as demonstrated by the official figures from Government records including the Economic Survey of India and research studies. Dignity and the rights of individuals could not be made to depend on algorithms or probabilities. Constitutional guarantees cannot be subject to the vicissitudes of technology. Denial of benefits arising out of any social security scheme which promotes socio-economic rights of citizens was violative of human dignity and impermissible under our constitutional scheme.

(14) The violations of fundamental rights resulting from the Aadhaar scheme were tested on the touchstone of proportionality. The measures adopted by the Respondents fail to satisfy the test of necessity and proportionality for the following reasons:

(a) Under the Aadhaar project, requesting entities can hold the identity information of individuals, for a temporary period. It was admitted by UIDAI that AUAs may store additional information according to their requirement to secure their system. ASAs had also been permitted to store logs of authentication transactions for a specific time period. It had been admitted by UIDAI that it gets the AUA code, ASA code, unique device code and the registered device code used for authentication, and that UIDAI would know from which device the authentication took place and through which AUA/ASA. Under the Regulations, UIDAI further stores the authentication transaction data. This was in violation of widely recognized data minimisation principles which mandate that data collectors and processors delete personal data records when the purpose for which it had been collected is fulfilled.

Moreover, using the meta-data related to the transaction, the location of the authentication could easily be traced using the IP address, which impacts upon the privacy of the individual.

(b) From the verification log, it was possible to locate the places of transactions by an individual in the past five years. It was also possible through the Aadhaar database to track the current location of an individual, even without the verification log. The architecture of Aadhaar poses a risk of potential surveillance activities through the Aadhaar database. Any leakage in the verification log poses an additional risk of an individual's biometric data being vulnerable to unauthorised exploitation by third parties.

(c) The biometric database in the CIDR is accessible to third-party vendors providing biometric search and de-duplication algorithms, since neither the Central Government nor UIDAI have the source code for the de-duplication technology which is at the heart of the programme. The source code belongs to a foreign corporation. UIDAI was merely a licensee. Prior to the enactment of the Aadhaar Act, without the consent of individual citizens, UIDAI contracted with L-1 Identity Solutions (the foreign entity which provided the source code for biometric storage) to provide to it any personal information related to any resident of India. This is contrary to the basic requirement that an individual has the right to protect herself by maintaining control over personal information. The protection of the data of citizens was a question of national security and could not be subjected to the mere terms and conditions of a normal contract.

(d) Before the enactment of the Aadhaar Act, MOUs signed between UIDAI and Registrars were not contracts within the purview of Article 299 of the Constitution, and therefore, did not cover the acts done by the private entities engaged by the Registrars for enrolment. Since there was no privity of contract between UIDAI and the Enrolling agencies, the activities of the private parties engaged in the process of enrolment before the enactment of the Aadhaar Act had no statutory or legal backing.

(e) Under the Aadhaar architecture, UIDAI was the sole authority which carries out all administrative, adjudicatory, investigative, and monitoring functions of the project. While the Act confers these functions on UIDAI, it did not place any institutional accountability upon UIDAI to protect the database of citizens' personal information. UIDAI also takes no institutional responsibility for verifying whether the data entered and stored in the CIDR was correct and authentic. The task has been delegated to the enrolment agency or the Registrar. Verification of data being entered in the CIDR was a highly sensitive task for which the UIDAI ought to have taken responsibility. The Aadhaar Act was also silent on the liability of UIDAI and its personnel in case of their non-compliance of the provisions of the Act or the Regulations.

(f) Section 47 of the Act violates citizens' right to seek remedies. Under Section 47(1) of Act, a court can take cognizance of an offence punishable under the Act only on a complaint made by UIDAI or any officer or person authorised by it. Section 47 was arbitrary as it fails to provide a mechanism to individuals to seek efficacious remedies for violation of their right to privacy. Further, Section 23(2)(s) of the Act requires UIDAI to establish a grievance redressal mechanism. Making the authority which was administering a project, also

responsible for providing a grievance redressal mechanism for grievances arising from the project severely compromises the independence of the grievance redressal body.

(g) While the Act creates a regime of criminal offences and penalties, the absence of an independent regulatory framework renders the Act largely ineffective in dealing with data violations. The architecture of Aadhaar ought to have, but had failed to embody within the law the establishment of an independent monitoring authority (with a hierarchy of regulators), along with the broad principles for data protection. This compromise in the independence of the grievance redressal body impacts upon the possibility and quality of justice being delivered to citizens. In the absence of an independent regulatory and monitoring framework which provides robust safeguards for data protection, the Aadhaar Act could not pass muster against a challenge on the ground of reasonableness under Article 14.

(h) No substantive provisions, such as those providing data minimization, had been laid down as guiding principles for the oversight mechanism provided under Section 33(2) of Act, which permits disclosure of identity information and authentication records in the interest of national security.

(i) Allowing private entities to use Aadhaar numbers, under Section 57 of Act would lead to commercial exploitation of the personal data of individuals without consent and could also lead to individual profiling. Profiling could be used to predict the emergence of future choices and preferences of individuals. These preferences could also be used to influence the decision making of the electorate in choosing candidates for electoral offices. This was contrary to privacy protection norms. Data cannot be used for any purpose other than those that have been approved. While developing an identification system of the magnitude of Aadhaar, security concerns relating to the data of billion citizens ought to be addressed. These issues had not been dealt with by the Aadhaar Act. By failing to protect the constitutional rights of citizens, Section 57 violates Articles 14 and 21.

(j) Section 57 of Act was susceptible to be applied to permit commercial exploitation of the data of individuals or to affect their behavioural patterns. Section 57 could not pass constitutional muster. Since it is manifestly arbitrary, it suffers from overbreadth and violates Article 14.

(k) Section 7 suffers from overbreadth since the broad definitions of the expressions services and benefits enable the government to regulate almost every facet of its engagement with citizens under the Aadhaar platform. If the requirement of Aadhaar was made mandatory for every benefit or service which the government provides, it was impossible to live in contemporary India without Aadhaar. The inclusion of services and benefits in Section 7 was a pre-cursor to the kind of function creep which is inconsistent with the right to informational self-determination. Section 7 of Act was therefore arbitrary and violative of Article 14 in relation to the inclusion of services and benefits as defined.

(l) The legitimate aim of the State could be fulfilled by adopting less intrusive measures as opposed to the mandatory enforcement of the Aadhaar scheme as the sole repository of

identification. The State had failed to demonstrate that a less intrusive measure other than biometric authentication would not subserve its purposes. That the state has been able to insist on an adherence to the Aadhaar scheme without exception was a result of the overbreadth of Section 7 of Act.

(m) When Aadhaar was seeded into every database, it becomes a bridge across discreet data silos, which allows anyone with access to this information to re-construct a profile of an individual's life. This was contrary to the right to privacy and poses severe threats due to potential surveillance.

(n) One right could not be taken away at the behest of the other. The State had failed to satisfy this Court that the targeted delivery of subsidies which animate the right to life entails a necessary sacrifice of the right to individual autonomy, data protection and dignity when both these rights are protected by the Constitution.

(15) Section 59 of the Aadhaar Act seeks to retrospectively validate the actions of the Central Government done prior to the Aadhaar Act pursuant to Notifications. Section 59 did not validate actions of the state governments or of private entities. Moreover, the notification of 2009 did not authorise the collection of biometric data. Consequently, the validation of actions taken under the notification by Section 59 did not save the collection of biometric data prior to the enforcement of the Act. While Parliament possesses the competence to enact a validating law, it must cure the cause of infirmity or invalidity. Section 59 fails to cure the cause of invalidity prior to the enactment of the Aadhaar Act. The absence of a legislative framework for the Aadhaar project left the biometric data of millions of Indian citizens bereft of the kind of protection which must be provided to comprehensively protect and enforce the right to privacy. Section 59 therefore fails to meet the test of a validating law since the complete absence of a regulatory framework and safeguards could not be cured merely by validating what was done under the notifications.

(16) The decision in Puttaswamy recognised that revenue constitutes a legitimate state aim in the three-pronged test of proportionality. However, the existence of a legitimate aim was insufficient to uphold the validity of the law, which must also meet the other parameters of proportionality spelt out in Puttaswamy.

(17) The seeding of Aadhaar with PAN cards depends on the constitutional validity of the Aadhaar legislation itself. Section 139AA of the Income Tax Act 1962 was based on the premise that the Aadhaar Act itself was a valid legislation. Since the Aadhaar Act itself was now held to be unconstitutional for having been enacted as a Money Bill and on the touchstone of proportionality, the seeding of Aadhaar to PAN Under Article 139AA did not stand independently.

(18) The 2017 amendments to the PMLA Rules fail to satisfy the test of proportionality. The imposition of a uniform requirement of linking Aadhaar numbers with all account based relationships proceeds on the presumption that all existing account holders as well as every individual who seeks to open an account in future was a potential money-launderer. No distinction had been made in the degree of imposition based on the client, the nature of the

business relationship, the nature and value of the transactions or the actual possibility of terrorism and money-laundering. The Rules also fail to make a distinction between opening an account and operating an account. Moreover, the consequences of the failure to submit an Aadhaar number are draconian. In their present form, the Rules were clearly disproportionate and excessive. This holding would not preclude the Union Government in the exercise of its Rule making power and the Reserve Bank of India as the regulator to re-design the requirements in a manner that would ensure due fulfillment of the object of preventing money-laundering, subject to compliance with the principles of proportionality as outlined in this judgment.

(19) Mobile phones had become a ubiquitous feature of the lives of people and the linking of Aadhaar numbers with SIM cards and the requirement of e-KYC authentication of mobile subscribers must necessarily be viewed in this light. Applying the proportionality test, the legitimate aim of subscriber verification, had to be balanced against the countervailing requirements of preserving the integrity of biometric data and the privacy of mobile phone subscribers. Mobile phones were a storehouse of personal data and reflect upon individual preferences, lifestyle and choices. The conflation of biometric information with SIM cards poses grave threats to individual privacy, liberty and autonomy. Having due regard to the test of proportionality which had been propounded in Puttaswamy and as elaborated in this judgment, the decision to link Aadhaar numbers with mobile SIM cards was neither valid nor constitutional. The mere existence of a legitimate state aim would not justify the disproportionate means which had been adopted in the present case. The biometric information and Aadhaar details collected by Telecom Service Providers shall be deleted forthwith and no use of the said information or details shall be made by TSPs or any agency or person or their behalf.

(20) Defiance of judicial orders (both interim and final) be it by the government or by citizens negates the basis of the Rule of law. Both propriety and constitutional duty required the Union government to move this Court after the enactment of the Aadhaar Act for variation of this Court's interim orders. Institutions of governance were bound by a sense of constitutional morality which requires them to abide by judicial orders.

(21) Identity was necessarily a plural concept. The Constitution also recognizes a multitude of identities through the plethora of rights that it safeguards. The technology deployed in the Aadhaar scheme reduces different constitutional identities into a single identity of a twelve-digit number and infringes the right of an individual to identify herself/himself through a chosen means. Aadhaar was about identification and was an instrument which facilitates a proof of identity. It must not be allowed to obliterate constitutional identity.

(22) The entire Aadhaar programme, since 2009, suffers from constitutional infirmities and violations of fundamental rights. The enactment of the Aadhaar Act did not save the Aadhaar project. The Aadhaar Act, the Rules and Regulations framed under it, and the framework prior to the enactment of the Act were unconstitutional.

(23) To enable the government to initiate steps for ensuring conformity with this judgment, it is directed under Article 142 that the existing data which has been collected shall not be

destroyed for a period of one year. During this period, the data shall not be used for any purpose whatsoever. At the end of one year, if no fresh legislation had been enacted by the Union government in conformity with the principles which had been enunciated in this judgment, the data shall be destroyed.

Creating strong privacy protection laws and instilling safeguards may address or at the very least assuage some of the concerns associated with the Aadhaar scheme which severely impairs informational self-determination, individual privacy, dignity and autonomy. In order to uphold the democratic values of the Constitution, the government needs to address the concerns highlighted in this judgment which would provide a strong foundation for digital initiatives, which are imminent in today's digital age. However, in its current form, the Aadhaar framework does not sufficiently assuage the concerns that have arisen from the operation of the project which had been discussed in this judgment. [787]

Ashok Bhushan, J.

(1) The requirement under Aadhaar Act to give one's demographic and biometric information does not violate fundamental right of privacy.

(2) The provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar Number pass three-fold test as laid down in Puttaswamy (supra) case, hence could not be said to be unconstitutional.

(3) Collection of data, its storage and use did n`ot violate fundamental Right of Privacy.

(4) Aadhaar Act did not create an architecture for pervasive surveillance.

(5) Aadhaar Act and Regulations provides protection and safety of the data received from individuals.

(6) Section 7 of the Aadhaar was constitutional. The provision did not deserve to be struck down on account of denial in some cases of right to claim on account of failure of authentication.

(7) The State while enlivening right to food, right to shelter etc. envisaged under Article 21 could not encroach upon the right of privacy of beneficiaries nor former could be given precedence over the latter.

(8) Provisions of Section 29 of Act was constitutional and did not deserves to be struck down.

(9) Section 33 of Act could not be said to be unconstitutional as it provides for the use of Aadhaar data base for police investigation nor it can be said to violate protection granted under Article 20(3).

(10) Section 47 of the Aadhaar Act could not be held to be unconstitutional on the ground that it did not allow an individual who finds that there was a violation of Aadhaar Act to

initiate any criminal process.

(11) Section 57 of Act, to the extent, which permits use of Aadhaar by the State or any body corporate or person, in pursuant to any contract to this effect was unconstitutional and void. Thus, the last phrase in main provision of Section 57 of Act, i.e. or any contract to this effect was struck down.

(12) Section 59 of Act had validated all actions taken by the Central Government under the notifications and all actions shall be deemed to have been taken under the Aadhaar Act.

(13) Parental consent for providing biometric information Under Regulation 3 and demographic information under Regulation 4 had to be read for enrolment of children between five to eighteen years to uphold the constitutionality of Regulations 3 and 4 of Aadhaar (Enrolment and Update) Regulations, 2016.

(14) Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 was not unconstitutional and did not violate Articles 14, 19(1)(g), 21 and 300A of the Constitution and Sections 3, 7 and 51 of the Aadhaar Act. Further Rule 9 as amended was not ultra vires to PMLA Act, 2002.

(15) Circular being unconstitutional was set aside.

(16) Aadhaar Act had been rightly passed as Money Bill. The decision of Speaker certifying the Aadhaar Bill, 2016 as Money Bill was not immuned from Judicial Review.

(17) Section 139-AA of Act did not breach fundamental Right of Privacy as per Privacy judgment in Puttaswamy case. [1173]

JUDGMENT

A.K. Sikri, J. (For Chief Justice, himself and A.M. Khanwilkar, J.)

1. Introduction and Preliminaries:

It is better to be unique than the best. Because, being the best makes you the number one, but being unique makes you the only one.

2. 'Unique makes you the only one' is the central message of Aadhaar, which is on the altar facing constitutional challenge in these petitions. 'Aadhaar' which means, in English, 'foundation' or 'base', has become the most talked about expression in recent years, not only in India but in many other countries and international bodies. A word from Hindi dictionary has assumed secondary significance. Today, mention of the word 'Aadhaar' would not lead a listener to the dictionary meaning of this word. Instead, every person on the very mentioning of this word 'Aadhaar' would associate it with the card that is issued to a person from where he/she can be identified. It is

described as an 'Unique Identity' and the authority which enrolls a person and at whose behest the Aadhaar Card is issued is known as Unique Identification Authority of India (hereinafter referred to as 'UIDAI' or 'Authority'). It is described as unique for various reasons. UIDAI claims that not only it is a foolproof method of identifying a person, it is also an instrument whereby a person can enter into any transaction without needing any other document in support. It has become a symbol of digital economy and has enabled multiple avenues for a common man. Aadhaar scheme, which was conceptualised in the year 2006 and launched in the year 2009 with the creation of UIDAI, has secured the enrolment of almost 1.1 billion people in this country. Its use is spreading like wildfire, which is the result of robust and aggressive campaigning done by the Government, governmental agencies and other such bodies. In this way it has virtually become a household symbol. The Government boasts of multiple benefits of Aadhaar.

3. At the same time, the very scheme of Aadhaar and the architecture built thereupon has received scathing criticism from a Section of the society. According to them, Aadhaar is a serious invasion into the right to privacy of persons and it has the tendency to lead to a surveillance state where each individual can be kept under surveillance by creating his/her life profile and movement as well on his/her use of Aadhaar. There has been no other subject matter in recent past which has evoked the kind of intensive and heated debate wherein both sides, for and against, argue so passionately in support of their respective conviction. The Petitioners in these petitions belong to the latter category who apprehend the totalitarian state if Aadhaar project is allowed to continue. They are demanding scrapping and demolition of the entire Aadhaar structure which, according to them, is anathema to the democratic principles and Rule of law, which is the bedrock of the Indian Constitution. The Petitioners have challenged the Aadhaar project which took off by way of administrative action in the year 2009. Even after Aadhaar got a shield of statutory cover, challenge persists as the very enactment known as Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred to as the 'Aadhaar Act') is challenged as constitutionally impermissible. The wide range of issues involved in this case is evident from the fact that it took almost four months for the parties to finish their arguments in these cases, and the Court witnessed highly skilled, suave, brilliant and intellectual advocacy, with the traces of passions as well.

4. The issue has generated heated public debate as well. Even outside the Court, there are groups advocating in favour of the Aadhaar scheme and those who are stoutly opposing the same. Interestingly, it is not only the commoners who belong to either of the two groups but intelligentsia is also equally divided. There have been number of articles, interviews for discourses in favour of or against Aadhaar. Those in favour see Aadhaar project as ushering the nation into a regime of good governance, advancing socio-economic rights, economic prosperity etc. and in the process they claim that it may make the nation a world leader. Mr. K.K. Venugopal, learned Attorney General for India, referred to the commendations by certain international bodies, including the World Bank. We clarify that we have not been influenced by such views expressed either in favour or against Aadhaar. Those opposing Aadhaar are apprehensive that it may excessively intrude into the privacy of citizenry and has the tendency to create a totalitarian state, which would impinge upon the democratic and constitutional values. Some such opinions of various persons/bodies were referred to during the arguments. Notwithstanding the passions, emotions, annoyance, despair, ecstasy, euphoria, coupled with rhetoric, exhibited by both sides in equal measure during the arguments, this Court while giving its judgment on the issues involved is required to have a posture

of calmness coupled with objective examination of the issues on the touchstone of the constitutional provisions.

5. Initiative in spearheading the attack on the Aadhaar structure was taken by the Petitioners, namely, Justice K.S. Puttaswamy (Retd.) and Mr. Pravesh Khanna, by filing Writ Petition (Civil) No. 494 of 2012. At that time, Aadhaar scheme was not under legislative umbrella. In the writ petition the scheme has primarily been challenged on the ground that it violates fundamental rights of the innumerable citizens of India, namely, right to privacy falling Under Article 21 of the Constitution of India. Few others joined the race by filing connected petitions. Series of orders were passed in this petition from time to time, some of which would be referred to by us at the appropriate stage. In 2016, with the passing of the Aadhaar Act, these very Petitioners filed another writ petition challenging the *vires* of the Act. Here again, some more writ petitions have been filed with the same objective. All these writ petitions were clubbed together. There are number of interventions as well by various individuals, groups, NGOs, etc., some opposing the petitions and some supporting the Aadhaar scheme.

6. Before we go into the premise on which the attack is laid on the constitutional validity of the Aadhaar project and the Aadhaar Act, it would be apposite to take note of the events in chronological order that shaped the formulation, take off and implementation of the Aadhaar scheme.

7. On March 03, 2006, approval was given by the Department of Information Technology, Ministry of Communications and Information Technology, Government of India for the project titled 'Unique Identification for BPL Families' to be implemented by the National Informatics Centre (NIC) for over a period of twelve months. As a result, a Processes Committee was set up on July 03, 2006 to suggest the process for updation, modification, addition and deletion of data and fields from the core database to be created under the Unique Identification for BPL Families project. This Committee, on November 26, 2006, prepared a paper known as 'Strategic Vision Unique Identification of Residents'. Based thereupon, the Empowered Group of Ministers (EGoM) was set up on December 04, 2006, to collate the National Population Register under the Citizenship Act, 1955 and the Unique Identification Number project of the Department of Information Technology. The EGoM was also empowered to look into the methodology and specific milestones for early and effective completion of projects and to take a final view on these projects. The EGoM was composed of the then Ministers of External Affairs, Home Affairs, Law, Panchayati Raj and Communications and Information Technology and the then Deputy Chairman, Planning Commission.

8. Various meetings on the Unique Identification (hereinafter referred to as 'UID') project were held from time to time. In the fourth meeting held on December 22, 2006, various aspects of proposed data elements and their formats were discussed. Thereafter, in its fifth meeting held on April 27, 2007, it was decided that the evolution of UID database would be in three stages in principle. The Committee further decided that linkage with major partner databases such as Household Survey of RD and the individual State Public Distribution System (PDS) databases should be taken up in a phased manner. On June 11, 2007, at the final stage of the project, a presentation on the UID project was made to the then Prime Minister by the Cabinet Secretary.

The sixth meeting of the UID project was held on June 15, 2007. The Committee, inter alia, took the following decisions:

(i) The numbering format of 11 digits was approved.

(ii) The need for UID authority to be created by an executive order under the aegis of the Planning Commission was appreciated in order to ensure pan-departmental and neutral identity for the authority.

(iii) The proposal for creation of Central and State UIDs was approved.

(iv) Department of Information Technology (DIT) was directed to work out modalities for linkage with Election Commission and initiate discussions with MoRD and PDS for linkage.

(v) In principle, approval of proposed sequence for phasing plan was granted.

9. In the seventh meeting held on August 30, 2007, the proposed administrative framework and structure of UID authority and manpower requirement, including financial implications, was discussed. It was decided that a detailed proposal based on the resource model be presented to the Committee for its 'in principle' approval. At this stage, EGoM convened its first meeting on November 27, 2007. At this meeting, a consensus emerged on the following points:

(i) There is a clear need for creating an identity related resident database, regardless of whether the database is created on a *de novo* collection of data or is based on an already existing data (such as the Election Commission's Voter List).

(ii) Additionally, there is a critical need to create an institutional mechanism that would 'own' the database and be responsible for its maintenance and updating.

(iii) The next meeting is to consider topics relating to collating the National Population Register (NPR) and UID schemes, including methodology, effective implementation techniques, identification of the institutional mechanism stated above, and the time Schedule for putting the scheme into operation.

A series of meetings took place thereafter to work out the modalities of the programme. Certain issues were raised therein and to address those issues, a Committee of Secretaries was formed. The said Committee gave its recommendations which were discussed by EGoM. After approving the Aadhaar Scheme in principle, it instructed the Cabinet Secretary to convene a meeting to finalise the detailed organisational structure of the UID.

10. After considering the recommendation of the Cabinet Secretary, Notification No. A-43011/02/2009-Admn. I was issued on January 28, 2009 by the Government of India which constituted and notified the UIDAI as an attached office under the aegis of the Planning Commission. Consequent to the constitution of UIDAI, allocation of Rs. 147.31 crores for Phase I of Aadhaar enrolments was approved by the Finance Minister on the recommendation of the Standing Committee on Finance. Demo-Official letter dated February 25, 2009, was sent by the

Secretary, Planning Commission to all Chief Secretaries of 35 States/Union Territories apprising them of their roles and responsibilities of the States/Union Territories in implementation of UIDAI, such as appointment of the State/UT UID Commissioners, logistics support and coordination with various departments and State units.

As they say, rest is history, which we recapitulate in brief hereinafter.

11. A core group was set up to advice and further the work related to UIDAI. Budgets were allocated to UIDAI to enable it to undertake its task. Staff was also allocated to it. Meetings of the core group took place from time to time. The core group, inter alia, decided that it was better to start with the electoral roll database of 2009 for undertaking the UIDAI project. The status of digitisation of PDS records, state-wise, was sought to be sent from the Department of Food and Public Distribution to the Standing Commission/UID. This and other steps taken in this direction culminated in issuance of Notification dated July 02, 2009 whereby Mr. Nandan Nilekani was appointed as the Chairman of UIDAI for an initial tenure of five years in the rank and status of a Cabinet Minister. He assumed charge on July 24, 2009. Thereafter, the Prime Minister's Council of UIDAI was constituted on July 30, 2009 which held its first meeting on August 12, 2009 where the Chairman of UIDAI made detailed representation on the broad strategy and approach of the proposed UID project. One of the proposals was to provide a legislative framework for UID at the earliest so that it could have the legal sanction to perform its function. Some other Committees like the Biometrics Standard Committee, Demographic Data Standards and Verification Procedure Committee were set up as a support system to the project, which submitted their respective reports in December 2009. Even a Cabinet Committee on UID was constituted vide orders dated October 22, 2009 which was headed by the Prime Minister with the aim to cover all issues relating to UIDAI, including its organisation, policies, programmes, schemes, funding and methodology to be adopted for achieving its objectives.

12. The matter was addressed in the Seventeenth Finance Commission Report also which was tabled in the Parliament on February 25, 2010. In this report, the Finance Commission suggested targeting of subsidies through UIDAI. By April 2010, UIDAI came out with its Strategy Overview. This Overview describes the features, benefits, revenue model and timelines of the UIDAI project. Furthermore, it outlined the goal of the UID to serve as a universal proof of identity, allowing residents to prove their identities anywhere in the country. The project would give the Government a clear view of India's population, enabling it to target and deliver services effectively, achieve greater returns on social investments and monitor money and resource flows across the country. It was felt that crucial to the achievement of this goal is the active participation of the central, state and local Governments as well as public and private sector entities. Only with their support will the project be able to realise a larger vision of inclusion and development in India.

13. A Cabinet Note bearing No. 4(4)/57/2010/CC-UIDAI for the Cabinet Committee on UIDAI was submitted on May 12, 2010. The Note outlined a brief background of UIDAI, proposed an approach for collection of demographic and biometric attributes of residents for the UID project and sought approval of the Cabinet Committee for adoption of the aforesaid approach and suggested that the same standards and processes be adhered to by the Registrar General of India for the NPR exercise and all other Registrars in the UID system. Rationale for inclusion of iris

biometrics was also submitted with the aforesaid Cabinet Note to explain the need for capturing iris scans at the time of capturing biometric details.

14. By September 2010 enrolment process of Aadhaar began with the nationwide launch of the Aadhaar project. In December 2010, UIDAI came out with a report on enrolment process known as 'UID Enrolment Proof-of-Concept Report' studying enrolment proof-of-concept in three rural areas of Karnataka, Bihar and Andhra Pradesh published by the UIDAI. According to this report, 'the biometric matching analysis of 40,000 people showed that the accuracy levels achieved by both iris and ten fingerprints were more than an order of magnitude better compared to using either of the two individually. The multi-modal enrolment was adequate to carry out de-duplication on a much larger scale, with reasonable expectations of extending it to all residents of India'.

15. Going by the recommendation of the Chairman of UIDAI for providing legislative framework to UIDAI, a Bill was introduced in the Rajya Sabha on December 03, 2010 known as 'National Identification Authority of India Bill, 2010'.

16. Various other steps were taken to smoothen the process of enrolment. There were studies from time to time on the effectiveness of the enrolment process. Notifications/orders were also issued by the Reserve Bank of India stating that an Aadhaar letter would be recognised by Banks to open bank accounts for a resident. Similar Orders/Notifications were issued by other authorities as well. On the first anniversary of Aadhaar launch, which fell on September 29, 2011, announcement was made that 10 crores enrolments and generation of more than 3.75 crores of Aadhaar had taken place. Some of the reports submitted in due course of time, which are relevant for our purposes, are taken note of at this stage:

(i) Report of the Task Force on an Aadhaar-Enabled Unified Payment Infrastructure for the direct transfer of subsidies on Kerosene, LPG and Fertilizer.

(ii) In March 2012, Fingerprint Authentication Report was submitted to UIDAI. This Report showcased the high accuracy rates of using fingerprints to authenticate identities. The study conducted in the rural setting representing typical demography of the population established that it is technically possible to use fingerprint to authenticate a resident in 98.13% of the population. The accuracy of 96.5% can be achieved using one best finger and 99.3% can be achieved using two fingers. Further improvement is possible if the device specifications are tightened to include only the best devices and certain mechanical guide is used to aid proper placement of the finger. It was also demonstrated through benchmarking that the authentication infrastructure is able to sustain one million authentications per hour.

(iii) Fifty Third Report of the Standing Committee on Finance on the 'Demands for Grants (2012-13)' of the Ministry of Planning was presented to the Lok Sabha and Rajya Sabha on April 24, 2012. This Report summarises the objectives and financial implications of the UID scheme being implemented under the aegis of the Planning Commission.

(iv) Iris Authentication Accuracy Report was submitted to UIDAI on September 12, 2012. This Report based on an empirical study of 5833 residents demonstrated iris authentication to be viable in Indian context. With current level of device readiness for iris capture, it is capable of providing

coverage for 99.67% of population with authentication accuracy of above 99.5%. Suggestions made in this document for the vendors, once implemented, will improve the rates further. The overall systems - network and software - have shown to meet desired requirements in real life condition. Finally, six different devices with variety of form and function are available to provide competitive vendor eco-system.

(v) Background Note on Introduction to Cash Transfers was prepared by the National Committee on Direct Cash Transfers in its first meeting on November 26, 2012. This Report outlines the advantages of cash transfers in the Indian context stating that a unique ID for all is a prerequisite for this purpose.

17. At this juncture, Writ Petition (Civil) No. 494 of 2012 was filed in which show-cause notice dated November 30, 2012 was issued by this Court. As pointed out above, this writ petition assailed Aadhaar scheme primarily on the ground that it violates right to privacy which is a facet of fundamental rights enshrined in Article 21 of the Constitution.

18. Counter affidavit thereto was filed by the Union of India as well as UIDAI. The stand taken by the Respondents, *inter alia*, was that right to privacy is not a fundamental right, which was so held by the eight Judge Bench judgment in *M.P. Sharma and 4 Others* v. *Satish Chandra Distt. Magistrate, Delhi and 4 Ors.* MANU/SC/0018/1954 : 1954 SCR 1077. This is notwithstanding the fact that thereafter in many judgments rendered by this Court, right to privacy was accepted as a facet of Article 21. Contention of the Respondents, however, was that those judgments were contrary to the dicta laid down in *M.P. Sharma* and were, therefore, *per in curium*. The matter on this aspect was heard by a three Judge Bench and after hearing the parties, the Bench deemed it appropriate to make the reference to the Constitution Bench. A five Judge Bench was constituted, which after considering the matter, referred the same to a nine Judge Bench to resolve the controversy in an authoritative manner. The nine Judge Bench judgment has given an unanimous answer to the Reference with conclusive, unambiguous and emphatic determination that right to privacy is a part of fundamental rights which can be traced to Articles 14, 19 and 21 of the Constitution of India.

19. We may also record at this stage that in this petition certain interim orders were passed from time to time. We may give the gist of some of the relevant orders:

(a) Order dated September 23, 2013 (two Judge Bench)

All the matters require to be heard finally. List all matters for final hearing after the Constitution Bench is over.

In the meanwhile, no person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant.

(b) Order dated November 26, 2013 (two Judge Bench)

After hearing the matter at length, we are of the view that all the States and Union Territories have to be impleaded as Respondents to give effective directions. In view thereof, notice be issued to all the States and Union Territories through standing counsel.

xx xx xx

Interim order to continue, in the meantime.

(c) Order dated March 16, 2015 (three Judge Bench)

In the meanwhile, it is brought to our notice that in certain quarters, Aadhaar identification is being insisted upon by the various authorities, we do not propose to go into the specific instances.

Since Union of India is represented by learned Solicitor General and all the States are represented through their respective counsel, we expect that both the Union of India and States and all their functionaries should adhere to the order passed by this Court on 23rd September, 2013.

(d) Order dated August 11, 2015 (three Judge Bench)

Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench, if the Union of India or the UIDAI proceed in the following manner:

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card.

2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen.

3. The Unique Identification Number or the Aadhaar card will not be used by the Respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of food grains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of LPG Distribution Scheme.

4. The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.

(d) Order dated October 15, 2015 (Constitution Bench)

3. After hearing the learned Attorney General for India and other learned senior Counsels, we are of the view that in paragraph 3 of the order dated 11.08.2015, if we add, apart from the other two Schemes, namely, P.D.S. Scheme and L.P.G. Distribution Scheme, the Schemes like The Mahatma Gandhi National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions), Prime Minister's Jan Dhan Yojana (PMJDY) and Employees' Provident Fund Organisation (EPFO) for the present, it would not dilute earlier order passed by this Court.

Therefore, we now include the aforesaid Schemes apart from the other two Schemes that this Court has permitted in its earlier order dated 11.08.2015.

4. We impress upon the Union of India that it shall strictly follow all the earlier orders passed by this Court commencing from 23.09.2013.

5. We will also make it clear that the Aadhaar card scheme is purely voluntary and it cannot be made mandatory till the matter is finally decided by this Court one way or the other.

(e) Order dated September 14, 2016 in WP (C) No. 686/2016

Having regard to the facts and circumstances of the case, the material evidence available on record and the submissions made by learned senior Counsel, we stay the operation and implementation of letters dated 14.07.2006 (i.e. Annexure P-5, P-6, P-7) for Pre-Matric Scholarship Scheme, Post-Matric Scholarship Scheme and Merit-cum-Means Scholarship Scheme to the extent they have made submission of Aadhaar mandatory and direct the Ministry of Electronics and Information Technology, Government of India, i.e. Respondent No. 2, to remove Aadhaar number as a mandatory condition for student registration form at the National Scholarship Portal of Ministry of Electronics and Information Technology, Government of India at the website....

20. It is also relevant to point out that against an order passed by the High Court of Bombay at Panaji, in some criminal proceedings, wherein the Authority was directed to pass on biometric information on a person, UIDAI had filed Special Leave Petition (Criminal) No. 2524 of 2014 challenging the said order with the submission that such a direction for giving biometric information was contrary to the provisions of the Aadhaar Act and the Authority was not supposed to give such an information, which was confidential. In the said special leave petition, order dated March 24, 2014 was passed staying the operation of the orders of the Bombay High Court. This order reads as under:

Issue notice.

In addition to normal mode of service, dasti service, is permitted.

Operation of the impugned order shall remain stayed.

In the meanwhile, the present Petitioner is restrained from transferring any biometric information of any person who has been allotted the Aadhaar number to any other agency without his consent in writing.

More so, no person shall be deprived of any service for want of Aadhaar number in case he/she is otherwise eligible/entitled. All the authorities are directed to modify their forms/circulars/likes so as to not compulsorily require the Aadhaar number in order to meet the requirement of the interim order passed by this Court forthwith.

Tag and list the matter with main matter i.e. WP (C) No. 494 of 2012.

21. Likewise, in Writ Petition (Civil) No. 1002 of 2017 titled *Dr. Kalyan Menon Sen* v. *Union of India and Ors.* where constitutional validity of linking bank accounts and mobile phones with Aadhaar linkage was challenged, interim order was passed on November 03, 2017 extending the last date of linking to December 31, 2017 and February 06, 2018 respectively. This order was extended thereafter and continues to operate.

22. We would also like to refer to the order dated September 14, 2011 passed in *People's Union for Civil Liberties (PDS Matter) v. Union of India and Ors.* MANU/SC/1211/2011 : (2011) 14 SCC 331, wherein various directions were given to ensure effective implementation of the PDS Scheme and in the process to also undertake the exercise of eliminating the task and ghost ration cards. In the same manner, vide order dated March 16, 2012 it was noted that the Government had set up a task force under the Chairmanship of Mr. Nandan Nilekani to recommend, amongst others, an IT strategy for the PDS. Mr. Nilekani was requested to suggest ways and means by which computerization process of the PDS can be expedited. Computerisation of PDS system was directed to be prepared and in this hue the process of computerisation with Aadhaar registration was also suggested.

In the same very case above, which also pertained to providing night shelters to homeless destitute persons, some orders were passed on February 10, 2010[1] as well as on September 14, 2011[2].

23. Again, in the case of *State of Kerala and Ors.* v. *President, Parent Teachers Association SNVUP School and Ors.* MANU/SC/0110/2013 : (2013) 2 SCC 705, where the Court was concerned with the problem of fake or bogus admissions, it was felt that instead of involving the Police in schools to prevent fake admissions, more appropriate method of verification would be Unique Identification (UID) card as means of verification.

Architecture of the Aadhaar Project and the Aadhaar Act:

24. Before adverting to the discussion on various issues that have been raised in these petitions, it would be apposite to first understand the structure of the Aadhaar Act and how it operates, having regard to various provisions contained therein. UIDAI was established in the year 2009 by an administrative order i.e. by resolution of the Govt. of India, Planning Commission, vide notification dated January 28, 2009. The object of the establishment of the said Authority was primarily to lay down policies to implement the Unique Identification Scheme (for short the 'UIS') of the Government, by which residents of India were to be provided unique identity number. The aim was to serve this as proof of identity, which is unique in nature, as each individual will have only one identity with no chance of duplication. Another objective was that this number could be used for identification of beneficiaries for transfer of benefits, subsidies, services and other purposes. This was the primary reason, viz. to ensure correct identification of targeted beneficiaries for delivery of various subsidies, benefits, services, grants, wages and other social benefits schemes which are funded from the Consolidated Fund of India. It was felt that the identification of real and genuine beneficiaries had become a challenge for the Government. In the absence of a credible system to authenticate identity of beneficiaries, it was becoming difficult to ensure that the subsidies, benefits and services reach to intended beneficiaries. As per the Government, failure to establish identity was proving to be major hindrance for the successful implementation of the welfare programmes and it was hitting hard the marginalised Section of the society and, in

particular, women, children, senior citizens, persons with disabilities, migrant unskilled and organised workers, and nomadic tribes. After the establishment of the Authority, vide the aforesaid notification, it started enrolling the residents of this country under the UIS. These residents also started using Aadhaar number allotted to them. It was found that over a period of time, the use of Aadhaar number had increased manifold. This necessitated ensuring security of the information contained in Aadhaar number as well as the information that generated as a result of the use of Aadhaar numbers. It was, thus, felt desirable to back the system with a Parliamentary enactment.

25. With this intention, the Aadhaar Bill was introduced with the following Introduction:

The Unique Identification Authority of India was established by a resolution of the Government of India in 2009. It was meant primarily to lay down policies and to implement the Unique Identification Scheme, by which residents of India were to be provided unique identity number. This number would serve as proof of identity and could be used for identification of beneficiaries for transfer of benefits, subsidies, services and other purposes.

Later on, it was felt that the process of enrollment, authentication, security, confidentiality and use of Aadhaar related information be made statutory so as to facilitate the use of Aadhaar number for delivery of various benefits, subsidies and services, the expenditures of which were incurred from or receipts therefrom formed part of the Consolidated Fund of India.

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 *inter alia*, provides for establishment of Unique Identification Authority of India, issuance of Aadhaar number to individuals, maintenance and updating of information in the Central Identities Data Repository, issues pertaining to security, privacy and confidentiality of information as well as offences and penalties for contravention of relevant statutory provisions.

26. After mentioning the reasons recorded above, Statement of Objects and Reasons for introducing the Bill also highlight the salient features thereof in the following manner:

5. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016, inter alia, seeks to provide for--

(a) issue of Aadhaar numbers to individuals on providing his demographic and biometric information to the Unique Identification Authority of India;

(b) requiring Aadhaar numbers for identifying an individual for delivery of benefits, subsidies, and services the expenditure is incurred from or the receipt therefrom forms part of the Consolidated Fund of India;

(c) authentication of the Aadhaar number of an Aadhaar number holder in relation to his demographic and biometric information;

(d) establishment of the Unique Identification Authority of India consisting of a Chairperson, two Members and a Member-Secretary to perform functions in pursuance of the objectives above;

(e) maintenance and updating the information of individuals in the Central Identities Data Repository in such manner as may be specified by Regulations;

(f) measures pertaining to security, privacy and confidentiality of information in possession or control of the Authority including information stored in the Central Identities Data Repository; and

(g) offences and penalties for contravention of relevant statutory provisions.

27. The Bill having been passed by the Legislature, received the assent of the President on March 25, 2016 and, thus, became Act (18 of 2016). Preamble to this Act again emphasises the aim and objective which this Act seeks to achieve. It reads:

An Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto.

28. Section 2 of the Act provides certain definitions. Some of the definitions can be noted at this stage itself, while other relevant definitions would be mentioned at the appropriate stage.

(a) "Aadhaar number" means an identification number issued to an individual Under Sub-section (3) of Section 3;

(b) "Aadhaar number holder" means an individual who has been issued an Aadhaar number under this Act;

(c) "authentication" means the process by which the Aadhaar number along with demographic information or biometric information of an individual is submitted to the Central Identities Data Repository for its verification and such Repository verifies the correctness, or the lack thereof, on the basis of information available with it;

(d) "authentication record" means the record of the time of authentication and identity of the requesting entity and the response provided by the Authority thereto;

xx xx xx

(f) "benefit" means any advantage, gift, reward, relief, or payment, in cash or kind, provided to an individual or a group of individuals and includes such other benefits as may be notified by the Central Government;

(g) "biometric information" means photograph, finger print, Iris scan, or such other biological attributes of an individual as may be specified by Regulations;

(h) "Central Identities Data Repository" means a centralised database in one or more locations containing all Aadhaar numbers issued to Aadhaar number holders along with the corresponding

demographic information and biometric information of such individuals and other information related thereto;

xx xx xx

(j) "core biometric information" means finger print, Iris scan, or such other biological attribute of an individual as may be specified by Regulations;

(k) "demographic information" includes information relating to the name, date of birth, address and other relevant information of an individual, as may be specified by Regulations for the purpose of issuing an Aadhaar number, but shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history;

(l) "enrolling agency" means an agency appointed by the Authority or a Registrar, as the case may be, for collecting demographic and biometric information of individuals under this Act;

(m) "enrollment" means the process, as may be specified by Regulations, to collect demographic and biometric information from individuals by the enrolling agencies for the purpose of issuing Aadhaar numbers to such individuals under this Act;

(n) "identity information" in respect of an individual, includes his Aadhaar number, his biometric information and his demographic information;

xx xx xx

(r) "records of entitlement" means records of benefits, subsidies or services provided to, or availed by, any individual under any programme;

xx xx xx

(u) "requesting entity" means an agency or person that submits the Aadhaar number, and demographic information or biometric information, of an individual to the Central Identities Data Repository for authentication;

(v) "resident" means an individual who has resided in India for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment;

(w) "service" means any provision, facility, utility or any other assistance provided in any form to an individual or a group of individuals and includes such other services as may be notified by the Central Government;

(x) "subsidy" means any form of aid, support, grant, subvention, or appropriation, in cash or kind, to an individual or a group of individuals and includes such other subsidies as may be notified by the Central Government.

29. Chapter II of the Act deals with enrolment. Section 3 in this Chapter entitles every resident to obtain the Aadhaar number by submitting his demographic information and biometric information. As noted above, demographic information includes information relating to the name, date of birth, address and 'other relevant information of an individual, as may be specified by Regulations for the purpose of issuing an Aadhaar number'. Photograph, fingerprint, iris scan, 'or such other biological attribute of an individual as may be specified by Regulations' are treated as biometric information. Sub-section (2) of Section 3 stipulates that the enrolling agency shall, at the time of enrolment, inform the individual undergoing enrolment of the following details in such manner as may be specified by Regulations, namely:

(a) the manner in which the information shall be used;

(b) the nature of recipients with whom the information is intended to be shared during authentication; and

(c) the existence of a right to access information, the procedure for making requests for such access, and details of the person or department in-charge to whom such requests can be made.

30. Section 4, *inter alia*, provides that Aadhaar number issued to an individual shall not be reassigned to any individual. In this sense, it makes an Aadhaar number given to a particular individual 'unique'. Section 5 delineates special measures for issuance of Aadhaar number to certain categories of persons and reads as under:

5. Special measures for issuance of Aadhaar number to certain category of persons.--The Authority shall take special measures to issue Aadhaar number to women, children, senior citizens, persons with disability, unskilled and unorganised workers, nomadic tribes or to such other persons who do not have any permanent dwelling house and such other categories of individuals as may be specified by Regulations.

31. Section 6 enables the Authority to update demographic and biometric information of the Aadhaar number holders from time to time.

32. Chapter III deals with 'authentication', which has generated the maximum debate in these proceedings. Section 7 falling under this Chapter mandates that proof of Aadhaar number would be necessary for receipt of certain subsidies, benefits and services etc. meaning thereby for availing such subsidies, benefits and services, it would be necessary for the intended beneficiary to possess Aadhaar number. In case of an individual to whom no Aadhaar number has been assigned, he/she would be required to show that application for enrolment has been given. Where the Aadhaar number is not assigned, proviso to Section 7 lays down that the individual shall be offered alternate and viable means of identification for delivery of subsidy, benefit or service. Section 8 deals with authentication of Aadhaar number and provides that on submission of request by any requesting entity, the Authority shall perform authentication of Aadhaar number. This authentication is in relation to biometric information or demographic information of an Aadhaar number holder. Before collecting identity information for the purpose of authentication, the requesting entity is to obtain consent of an individual and also to ensure that the identity information of that individual

is only used for submission to the Central Identities Data Repository (CIDR) for authentication. Sections 7 and 8 read as under:

7. Proof of Aadhaar number necessary for receipt of certain subsidies, benefits and services, etc.--The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment:

Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.

8. Authentication of Aadhaar number.--(1) The Authority shall perform authentication of the Aadhaar number of an Aadhaar number holder submitted by any requesting entity, in relation to his biometric information or demographic information, subject to such conditions and on payment of such fees and in such manner as may be specified by Regulations.

(2) A requesting entity shall--

(a) unless otherwise provided in this Act, obtain the consent of an individual before collecting his identity information for the purposes of authentication in such manner as may be specified by Regulations; and

(b) ensure that the identity information of an individual is only used for submission to the Central Identities Data Repository for authentication.

(3) A requesting entity shall inform, in such manner as may be specified by Regulations, the individual submitting his identity information for authentication, the following details with respect to authentication, namely--

(a) the nature of information that may be shared upon authentication;

(b) the uses to which the information received during authentication may be put by the requesting entity; and

(c) alternatives to submission of identity information to the requesting entity.

(4) The Authority shall respond to an authentication query with a positive, negative or any other appropriate response sharing such identity information excluding any core biometric information.

33. Under Section 10, the Authority is given power to engage one or more entities to establish and maintain the CIDR and to perform any other functions as may be specified by Regulations.

34. Chapter IV deals with the Establishment of the Authority. As per Section 11, the Central Government, by notification, shall establish an Authority to be known as the Unique Identification Authority of India. Notification dated July 12, 2016 was issued by the Central Government establishing the Authority. Other provisions in this Chapter deal with the composition of the Authority, qualifications for appointment of the Chairperson and Members of Authority; term of their office and their removal; and restrictions on their employment after cessation of office. It also provides for the functions of Chairperson as well as office of the Chief Executive Officer (CEO) and his functions and the meetings of the Authority etc. Powers and functions of the Authority are stipulated in Section 23.

35. Chapter V talks of grants to the Authority by the Central Government as well as accounts and audit and annual report of the Authority.

36. Chapter VI deals with the important aspects pertaining to 'protection of information'. Section 28 of the Aadhaar Act puts an obligation on the Authority to ensure the security of identity information and authentication records of individuals. Likewise, Section 29 imposes certain restrictions on sharing information i.e. core biometric information collected or created under the Act or the identity information. The biometric information collected and stored in electronic form, in accordance with this Act and Regulations made thereunder, is treated as 'electronic record' and 'sensitive personal data or information' by virtue of Section 30 of the Act. As these are very material and significant provisions of the Act, the same are reproduced verbatim in their entirety:

28. Security and confidentiality of information.--(1) The Authority shall ensure the security of identity information and authentication records of individuals.

(2) Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals.

(3) The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or Regulations made thereunder, and against accidental or intentional destruction, loss or damage.

(4) Without prejudice to Sub-sections (1) and (2), the Authority shall--

(a) adopt and implement appropriate technical and organisational security measures;

(b) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and

(c) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

29. Restriction on sharing information.--(1) No core biometric information, collected or created under this Act, shall be--

(a) shared with anyone for any reason whatsoever; or

(b) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

(2) The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by Regulations.

(3) No identity information available with a requesting entity shall be--

(a) used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or

(b) disclosed further, except with the prior consent of the individual to whom such information relates.

(4) No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by Regulations.

30. Biometric information deemed to be sensitive personal information.--The biometric information collected and stored in electronic form, in accordance with this Act and Regulations made thereunder, shall be deemed to be "electronic record" and "sensitive personal data or information", and the provisions contained in the Information Technology Act, 2000 (21 of 2000) and the Rules made thereunder shall apply to such information, in addition to, and to the extent not in derogation of the provisions of this Act.

Explanation.--For the purposes of this section, the expressions--

(a) "electronic form" shall have the same meaning as assigned to it in Clause (r) of Sub-section (1) of Section 2 of the Information Technology Act, 2000 (21 of 2000);

(b) "electronic record" shall have the same meaning as assigned to it in Clause (t) of Sub-section (1) of Section 2 of the Information Technology Act, 2000 (21 of 2000);

(c) "sensitive personal data or information" shall have the same meaning as assigned to it in Clause (iii) of the Explanation to Section 43-A of the Information Technology Act, 2000 (21 of 2000).

37. Section 32 provides that the Authority shall maintain authentication records in such manner and for such period as may be specified by Regulations and enables every Aadhaar number holder to obtain his authentication record in such manner as may be specified by Regulations. This provision also puts an embargo upon the Authority to collect, keep or maintain any information

about 'purpose of authentication'. Section 33, however, creates an exception to the provisions of Section 28(ii) and (v) as well as Section 29(ii) by stipulating that the information can be disclosed pursuant to an order of a court not inferior to that of a District Judge. It also carves out another exception in those cases where it becomes necessary to disclose the information in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government.

38. Sections 34 to 47 in Chapter VII of the Act enumerate various kinds of offences and provide penalties for such offences. For our purposes, relevant Section is Section 37 which makes act of disclosing identity information as offence which is punishable with imprisonment for a term which may extend to three years or with a fine which may extend to ten thousand rupees. In the case of a company, this fine can extend to one lakh rupees. Likewise, Section 38 provides for penalty for unauthorised access to the CIDR. Penalties for tampering with data in CIDR (Section 39) and unauthorised use by requesting entity (Section 40) are also stipulated.

Cognizance of offences under this Chapter can be taken by a court only on a complaint made by the Authority or any officer or person authorised by it.

39. Section 50 of the Act empowers the Central Government to issue directions to the Authority in writing from time to time and the Authority shall be bound to carry out such directions on questions of policy. Section 53 empowers the Central Government to make Rules to carry out the provisions of the Act generally as well as the specific matters enumerated in Sub-section (2) thereof. Section 54 empowers the Authority to make Regulations consistent with the Act and Rules made thereunder, for carrying out the provisions of the Act and, in particular, the matters mentioned in Sub-section (2). Such Rules and Regulations are to be laid before the Parliament, as provided in Section 55.

40. Section 57 provides that the Aadhaar Act would not prevent the use of Aadhaar number for establishing the identity of an individual for any purpose and reads as under:

57. Act not to prevent use of Aadhaar number for other purposes under law.--Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect:

Provided that the use of Aadhaar number under this Section shall be subject to the procedure and obligations Under Section 8 and Chapter VI.

41. If any difficulty arises in giving effect to the provisions of the Act, the Central Government is empowered to make provisions to remove those difficulties, provided that such provisions are not inconsistent with the provisions of the Act. Section 59, which is the last provision in the Act, is an attempt to save all the acts and actions of the Central Government under Notification dated January 28, 2009 vide which the Authority was established or the Department of Electronics and Information Technology under the Cabinet Secretariat Notification dated September 12, 2015. This provision is couched in the following language:

59. Savings.--Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing Notification Number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing Notification Number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act.

42. Regulations have been framed under the Act, namely, (1) The Aadhaar (Enrolment and Update) Regulations, 2016; (2) The Aadhaar (Authentication) Regulations, 2016; (3) The Aadhaar (Data Security) Regulations, 2016; and (4) The Aadhaar (Sharing of Information) Regulations, 2016. The relevant provisions in these Regulations are reproduced below:

The Aadhaar (Enrolment and Update) Regulations, 2016

4. **Demographic information required for enrolment.**--

(1) The following demographic information shall be collected from all individuals undergoing enrolment (other than children below five years of age):

(i) Name;

(ii) Date of Birth;

(iii) Gender;

(iv) Residential Address.

(2) The following demographic information may also additionally be collected during enrolment, at the option of the individual undergoing enrolment:

(i) Mobile number

(ii) Email address

(3) In case of Introducer-based enrolment, the following additional information shall be collected:

(i) Introducer name;

(ii) Introducer's Aadhaar number.

(4) In case of Head of Family based enrolment, the following additional information shall be collected:

(i) Name of Head of Family;

(ii) Relationship;

(iii) Head of Family's Aadhaar number;

(iv) One modality of biometric information of the Head of Family.

(5) The standards of the above demographic information shall be as may be specified by the Authority for this purpose.

(6) The demographic information shall not include race, religion, caste, tribe, ethnicity, language, record of entitlement, income or medical history of the resident.

The Aadhaar (Authentication) Regulations, 2016

3. **Types of Authentication**.--There shall be two types of authentication facilities provided by the Authority, namely--

(i) Yes/No authentication facility, which may be carried out using any of the modes specified in Regulation 4(2); and

(ii) e-KYC authentication facility, which may be carried out only using OTP and/or biometric authentication modes as specified in Regulation 4(2).

4. **Modes of Authentication**.--(1) An authentication request shall be entertained by the Authority only upon a request sent by a requesting entity electronically in accordance with these Regulations and conforming to the specifications laid down by the Authority.

(2) Authentication may be carried out through the following modes:

(a) Demographic authentication: The Aadhaar number and demographic information of the Aadhaar number holder obtained from the Aadhaar number holder is matched with the demographic information of the Aadhaar number holder in the CIDR.

(b) One-time pin based authentication: A One Time Pin (OTP), with limited time validity, is sent to the mobile number and/or e-mail address of the Aadhaar number holder registered with the Authority, or generated by other appropriate means. The Aadhaar number holder shall provide this OTP along with his Aadhaar number during authentication and the same shall be matched with the OTP generated by the Authority.

(c) Biometric-based authentication: The Aadhaar number and biometric information submitted by an Aadhaar number holder are matched with the biometric information of the said Aadhaar number holder stored in the CIDR. This may be fingerprints-based or iris-based authentication or other biometric modalities based on biometric information stored in the CIDR.

(d) Multi-factor authentication: A combination of two or more of the above modes may be used for authentication.

(3) A requesting entity may choose suitable mode(s) of authentication from the modes specified in sub-Regulation (2) for a particular service or business function as per its requirement, including multiple factor authentication for enhancing security. For the avoidance of doubt, it is clarified that e-KYC authentication shall only be carried out using OTP and/or biometric authentication.

xx xx xx

7. **Capturing of biometric information by requesting entity**.--(1) A requesting entity shall capture the biometric information of the Aadhaar number holder using certified biometric devices as per the processes and specifications laid down by the Authority.

(2) A requesting entity shall necessarily encrypt and secure the biometric data at the time of capture as per the specifications laid down by the Authority.

(3) For optimum results in capturing of biometric information, a requesting entity shall adopt the processes as may be specified by the Authority from time to time for this purpose.

xx xx xx

9. **Process of sending authentication requests**.--(1) After collecting the Aadhaar number or any other identifier provided by the requesting entity which is mapped to Aadhaar number and necessary demographic and/or biometric information and/or OTP from the Aadhaar number holder, the client application shall immediately package and encrypt these input parameters into PID block before any transmission, as per the specifications laid down by the Authority, and shall send it to server of the requesting entity using secure protocols as may be laid down by the Authority for this purpose.

(2) After validation, the server of a requesting entity shall pass the authentication request to the CIDR, through the server of the Authentication Service Agency as per the specifications laid down by the Authority. The authentication request shall be digitally signed by the requesting entity and/or by the Authentication Service Agency, as per the mutual agreement between them.

(3) Based on the mode of authentication request, the CIDR shall validate the input parameters against the data stored therein and return a digitally signed Yes or No authentication response, or a digitally signed e-KYC authentication response with encrypted e-KYC data, as the case may be, along with other technical details related to the authentication transaction.

(4) In all modes of authentication, the Aadhaar number is mandatory and is submitted along with the input parameters specified in sub-Regulation (1) above such that authentication is always reduced to a 1:1 match.

(5) A requesting entity shall ensure that encryption of PID Block takes place at the time of capture on the authentication device as per the processes and specifications laid down by the Authority.

xx xx xx

18. **Maintenance of logs by requesting entity**.--(1) A requesting entity shall maintain logs of the authentication transactions processed by it, containing the following transaction details, namely:

(a) the Aadhaar number against which authentication is sought;

(b) specified parameters of authentication request submitted;

(c) specified parameters received as authentication response;

(d) the record of disclosure of information to the Aadhaar number holder at the time of authentication; and

(e) record of consent of the Aadhaar number holder for authentication, but shall not, in any event, retain the PID information.

(2) The logs of authentication transactions shall be maintained by the requesting entity for a period of 2 (two) years, during which period an Aadhaar number holder shall have the right to access such logs, in accordance with the procedure as may be specified.

(3) Upon expiry of the period specified in sub-Regulation (2), the logs shall be archived for a period of five years or the number of years as required by the laws or Regulations governing the entity, whichever is later, and upon expiry of the said period, the logs shall be deleted except those records required to be retained by a court or required to be retained for any pending disputes.

(4) The requesting entity shall not share the authentication logs with any person other than the concerned Aadhaar number holder upon his request or for grievance redressal and resolution of disputes or with the Authority for audit purposes. The authentication logs shall not be used for any purpose other than stated in this sub-Regulation.

(5) The requesting entity shall comply with all relevant laws, Rules and Regulations, including, but not limited to, the Information Technology Act, 2000 and the Evidence Act, 1872, for the storage of logs.

(6) The obligations relating to authentication logs as specified in this Regulation shall continue to remain in force despite termination of appointment in accordance with these Regulations.

xx xx xx

26. **Storage and Maintenance of Authentication Transaction Data.**--(1) The Authority shall store and maintain authentication transaction data, which shall contain the following information:

(a) authentication request data received including PID block;

(b) authentication response data sent;

(c) meta data related to the transaction;

(d) any authentication server side configurations as necessary Provided that the Authority shall not, in any case, store the purpose of authentication.

The Aadhaar (Data Security) Regulations, 2016

3. **Measures for ensuring information security**.--(1) The Authority may specify an information security policy setting out inter alia the technical and organisational measures to be adopted by the Authority and its personnel, and also security measures to be adopted by agencies, advisors, consultants and other service providers engaged by the Authority, registrar, enrolling agency, requesting entities, and Authentication Service Agencies.

(2) Such information security policy may provide for:

(a) identifying and maintaining an inventory of assets associated with the information and information processing facilities;

(b) implementing controls to prevent and detect any loss, damage, theft or compromise of the assets;

(c) allowing only controlled access to confidential information;

(d) implementing controls to detect and protect against virus/malwares;

(e) a change management process to ensure information security is maintained during changes;

(f) a patch management process to protect information systems from vulnerabilities and security risks;

(g) a robust monitoring process to identify unusual events and patterns that could impact security and performance of information systems and a proper reporting and mitigation process;

(h) encryption of data packets containing biometrics, and enabling decryption only in secured locations;

(i) partitioning of CIDR network into zones based on risk and trust;

(j) deploying necessary technical controls for protecting CIDR network;

(k) service continuity in case of a disaster;

(l) monitoring of equipment, systems and networks;

(m) measures for fraud prevention and effective remedies in case of fraud;

(n) requirement of entering into non-disclosure agreements with the personnel;

(o) provisions for audit of internal systems and networks;

(p) restrictions on personnel relating to processes, systems and networks.

(q) inclusion of security and confidentiality obligations in the agreements or arrangements with the agencies, consultants, advisors or other persons engaged by the Authority.

(3) The Authority shall monitor compliance with the information security policy and other security requirements through internal audits or through independent agencies.

(4) The Authority shall designate an officer as Chief Information Security Officer for disseminating and monitoring the information security policy and other security-related programmes and initiatives of the Authority.

xx xx xx

5. **Security obligations of service providers, etc**.--The agencies, consultants, advisors and other service providers engaged by the Authority for discharging any function relating to its processes shall:

(a) ensure compliance with the information security policy specified by the Authority;

(b) periodically report compliance with the information security policy and contractual requirements, as required by the Authority;

(c) report promptly to the Authority any security incidents affecting the confidentiality, integrity and availability of information related to the Authority's functions;

(d) ensure that records related to the Authority shall be protected from loss, destruction, falsification, unauthorised access and unauthorised release;

(e) ensure confidentiality obligations are maintained during the term and on termination of the agreement;

(f) ensure that appropriate security and confidentiality obligations are provided for in their agreements with their employees and staff members;

(g) ensure that the employees having physical access to CIDR data centers and logical access to CIDR data centers undergo necessary background checks;

(h) define the security perimeters holding sensitive information, and ensure only authorised individuals are allowed access to such areas to prevent any data leakage or misuse; and

(i) where they are involved in the handling of the biometric data, ensure that they use only those biometric devices which are certified by a certification body as identified by the Authority and ensure that appropriate systems are built to ensure security of the biometric data.

The Aadhaar (Sharing of Information) Regulations, 2016.

3. **Sharing of information by the Authority**.--(1) Core biometric information collected by the Authority under the Act shall not be shared with anyone for any reason whatsoever.

(2) The demographic information and photograph of an individual collected by the Authority under the Act may be shared by the Authority with a requesting entity in response to an authentication request for e-KYC data pertaining to such individual, upon the requesting entity obtaining consent from the Aadhaar number holder for the authentication process, in accordance with the provisions of the Act and the Aadhaar (Authentication) Regulations, 2016.

(3) The Authority shall share authentication records of the Aadhaar number holder with him in accordance with Regulation 28 of the Aadhaar (Authentication) Regulations, 2016.

(4) The Authority may share demographic information and photograph, and the authentication records of an Aadhaar number holder when required to do so in accordance with Section 33 of the Act.

xx xx xx

6. **Restrictions on sharing, circulating or publishing of Aadhaar number**.--(1) The Aadhaar number of an individual shall not be published, displayed or posted publicly by any person or entity or agency.

(2) Any individual, entity or agency, which is in possession of Aadhaar number(s) of Aadhaar number holders, shall ensure security and confidentiality of the Aadhaar numbers and of any record or database containing the Aadhaar numbers.

(3) Without prejudice to sub-Regulations (1) and (2), no entity, including a requesting entity, which is in possession of the Aadhaar number of an Aadhaar number holder, shall make public any database or record containing the Aadhaar numbers of individuals, unless the Aadhaar numbers have been redacted or blacked out through appropriate means, both in print and electronic form.

(4) No entity, including a requesting entity, shall require an individual to transmit his Aadhaar number over the Internet unless such transmission is secure and the Aadhaar number is transmitted in encrypted form except where transmission is required for correction of errors or redressal of grievances.

(5) No entity, including a requesting entity, shall retain Aadhaar numbers or any document or database containing Aadhaar numbers for longer than is necessary for the purpose specified to the Aadhaar number holder at the time of obtaining consent.

43. To sum up broadly, the Authority is established under the Act as a statutory body which is given the task of developing the policy, procedure and system for issuing Aadhaar numbers to individuals and also to perform authentication thereof as per the provisions of the Act. For the purpose of enrolment and assigning Aadhaar numbers, enrolling agencies are recruited by the

Authority. All the residents in India are eligible to obtain an Aadhaar number. To enable a resident to get Aadhaar number, he is required to submit demographic as well as biometric information i.e., apart from giving information relating to name, date of birth and address, biometric information in the form of photograph, fingerprint, iris scan is also to be provided. Aadhaar number given to a particular person is treated as unique number as it cannot be reassigned to any other individual.

Insofar as subsidies, benefits or services to be given by the Central Government or the State Government, as the case may be, is concerned, these Governments can mandate that receipt of these subsidies, benefits and services would be given only on furnishing proof of possession of Aadhaar number (or proof of making an application for enrolment, where Aadhaar number is not assigned). An added requirement is that such individual would undergo authentication at the time of receiving such benefits etc. A particular institution/body from which the aforesaid subsidy, benefit or service is to be claimed by such an individual, the intended recipient would submit his Aadhaar number and is also required to give her biometric information to that agency. On receiving this information and for the purpose of its authentication, the said agency, known as Requesting Entity, would send the request to the Authority which shall perform the job of authentication of Aadhaar number. On confirming the identity of a person, the individual is entitled to receive subsidy, benefit or service. Aadhaar number is permitted to be used by the holder for other purposes as well.

44. In this whole process, any resident seeking to obtain an Aadhaar number is, in the first instance, required to submit her demographic information and biometric information at the time of enrolment. She, thus, parts with her photograph, fingerprint and iris scan at that stage by giving the same to the enrolling agency, which may be a private body/person. Likewise, every time when such Aadhaar holder intends to receive a subsidy, benefit or service and goes to specified/designated agency or person for that purpose, she would be giving her biometric information to that requesting entity, which, in turn, shall get the same authenticated from the Authority before providing a subsidy, benefit or service. Whenever request is received for authentication by the Authority, record of such a request is kept and stored in the CIDR. At the same time, provisions for protection of such information/data have been made, as indicated above. Aadhaar number can also be used for purposes other than stated in the Act i.e. purposes other than provided Under Section 7 of the Act, as mentioned in Section 57 of the Act, which permit the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect, to use the Aadhaar number for establishing the identity of an individual. It can be used as a proof of identity, like other identity proofs such as PAN card, ration card, driving licence, passport etc.

45. Piercing into the aforesaid Aadhaar programme and its formation/structure under the Aadhaar Act, foundational arguments are that it is a grave risk to the rights and liberties of the citizens of this country which are secured by the Constitution of India. It militates against the constitutional abiding values and its foundational morality and has the potential to enable an intrusive state to become a surveillance state on the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a nine Judge Bench judgment of this Court in *K.S. Puttaswamy and Anr*. v. *Union of India and Ors.*

MANU/SC/1044/2017 : (2017) 10 SCC 1. Most of the counsel appearing for different Petitioners (though not all) conceded that there cannot be a serious dispute insofar as allotment of Aadhaar number, for the purpose of unique identification of the residents, is concerned. However, apprehensions have been expressed about the manner in which the Scheme has been rolled out and implemented. The entire edifice of the aforesaid projection is based on the premise that it forces a person, who intends to enrol for Aadhaar, to part with his core information namely biometric information in the form of fingerprints and iris scan. These are to be given to the enrolment agency in the first instance which is a private body and, thus, there is risk of misuse of this vital information pertaining to an individual. Further, it is argued that the most delicate and fragile part, susceptible to misuse, is the authentication process which is to be carried out each time the holder of Aadhaar number wants to establish her identity. At that stage, not only the individual parts with the biometric information again with the RE (which may again be a private agency as well), the purpose for which such a person approaches the RE would also be known i.e. the nature of transaction which is supposed to be undertaken by the said person at that time. Such information relating to different transactions of a person across the life of the citizen is connected to a central database. This record may enable the State to profile citizens, track their movements, assess their habits and silently influence their behaviour. Over a period of time, the profiling would enable the State to stifle dissent and influence political decision making. It may also enable the State to act as a surveillant state and there is a propensity for it to become a totalitarian state. It is stressed that at its core, Aadhaar alters the relationship between the citizen and the State. It diminishes the status of the citizen. Rights freely exercised, liberties freely enjoyed, entitlements granted by the Constitution and laws are all made conditional, on a compulsory barter. The barter compels the citizen to give up her biometrics 'voluntarily', allow her biometrics and demographic information to be stored by the State and private operators and then used for a process termed 'authentication'.

To put it in nutshell, provisions of the Aadhaar Act are perceived by the Petitioners as giving away of vital information about the residents to the State not only in the form of biometrics but also about the movement as well as varied kinds of transactions which a resident would enter into from time to time. The threat is in the form of profiling the citizens by the State on the one hand and also misuse thereof by private agencies whether it is enrolling agency or requesting agency or even private bodies mentioned in Section 57 of the Act. In essence, it is stated that not only data of aforesaid nature is stored by the CIDR, which has the threat of being leaked, it can also be misused by non-State actors. In other words, it is sought to be highlighted that there is no assurance of any data protection at any level.

46. The Respondents, on the other hand, have attempted to shake the very foundation of the aforesaid structure of the Petitioners' case. They argue that in the first instance, minimal biometric information of the applicant, who intends to have Aadhaar number, is obtained which is also stored in CIDR for the purpose of authentication. Secondly, no other information is stored. It is emphasised that there is no data collection in respect of religion, caste, tribe, language records of entitlement, income or medical history of the applicant at the time of Aadhaar enrolment. Thirdly, the Authority also claimed that the entire Aadhaar enrolment ecosystem is foolproof inasmuch as within few seconds of the biometrics having been collected by the enrolling agency, the said information gets transmitted the Authorities/CIDR, that too in an encrypted form, and goes out of the reach of the enrolling agency. Same is the situation at the time of authentication as biometric information does not remain with the requesting agency. Fourthly, while undertaking the

authentication process, the Authority simply matches the biometrics and no other information is received or stored in respect of purpose, location or nature or transaction etc. Therefore, the question of profiling does not arise at all. A powerpoint presentation was given by Dr. Ajay Bhushan Pandey, CEO of the Authority, in the Court, while explaining various nuances of the whole process. In this presentation, the enrolment process has been projected in the following manner:

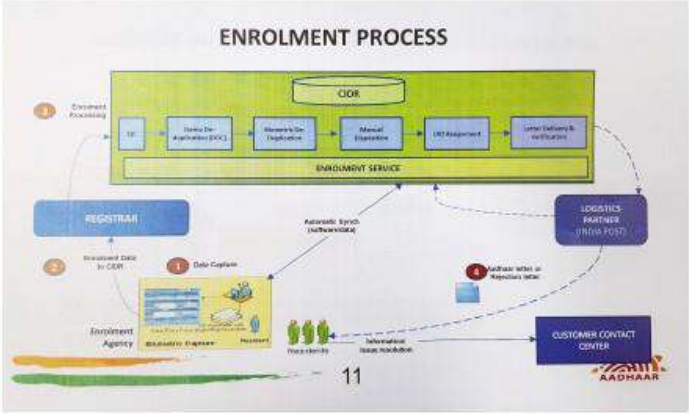

47. Insofar as Aadhaar authentication service is concerned, it was explained that the same is e-KYC wherein following process is involved:

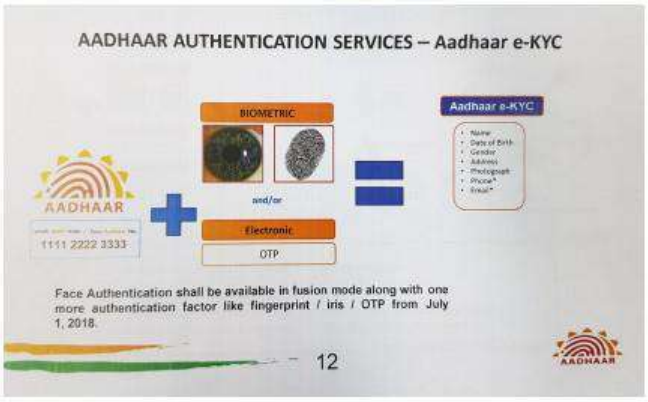

48. It was asserted with all vehemence that while doing the aforesaid authentication, no other information is collected or stored by the Authority/CIDR, specifically pointing that:

(a) The Authority does not collect purpose, location or details of transaction. Thus, it is purpose blind.

(b) The information collected as aforesaid remains in silos.

(c) Merging of silos is prohibited.

(d) The RE is provided answer only in Yes or No about the authentication of the person concerned.

(e) The authentication process is not exposed to the internet world.

(f) Security measures as per the provisions of Section 29(3) read with Section 38(g) as well as Regulation 17(1)(d) of the Authentication Regulations are strictly followed and adhere to.

The Aadhaar Authentication Security has been described in the following manner:

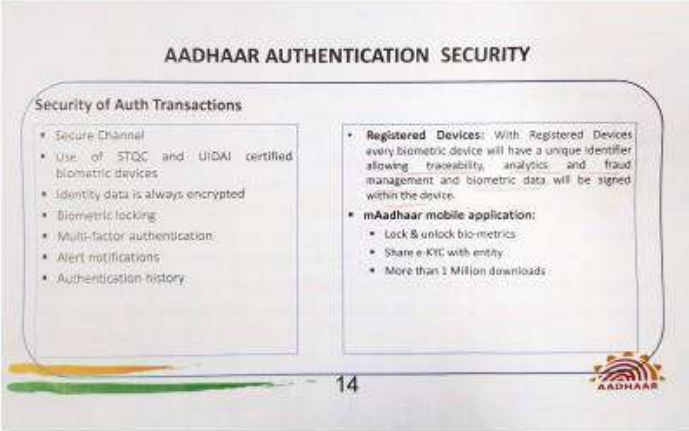

49. In this hue, the Authority has projected that the Aadhaar design takes full care of privacy and security of the persons. It is sought to be demonstrated by pointing out the following features:

(i) Privacy is ensured by the very design of Aadhaar which was conceived by the Authority from very inception and is now even incarnated in the Aadhaar Act because: (a) it is backed by minimal data, federated databases, optimal ignorance; and (b) there is no transaction/pooling data coupled with the fact that resident authorised access to identity data is available.

(ii) Aadhaar is designed for inclusion inasmuch as: (a) there is flexibility of demographic data, multi-modal biometrics, and flexible processes; (b) DDSVP Committee by Dr. V.N. Vittal, former CVC; and (c) Biometric design and Standards Committee by Dr. Gairola, Former DG, NIC.

(iii) All security numbers are followed which can be seen from: (a) PKI-2048 encryption from the time of capture, (b) adoption of best-in-class security standards and practices, and (c) strong audit and traceability as well as fraud detection.

50. It was explained that the security and data privacy is ensured in the following way:

(i) The data sent to ABIS is completely anonymised. The ABIS systems do not have access to resident's demographic information as they are only sent biometric information of a resident with

a reference number and asked to de-duplicate. The de-duplication result with the reference number is mapped back to the correct enrolment number by the Authorities own enrolment server.

(ii) The ABIS providers only provide their software and services. The data is stored in UIDAI storage and it never leaves the secure premises.

(iii) The ABIS providers do not store the biometric images (source). They only store template for the purpose of de-duplication (with reference number).

(iv) The encrypted enrolment packet sent by the enrolment client software to the CIDR is decrypted by the enrolment server but the decrypted packet is never stored.

(v) The original biometric images of fingerprints, iris and face are archived and stored offline. Hence, they cannot be accessed through an online network.

(vi) The biometric system provides high accuracy of over 99.86%. The mixed biometric have been adopted only to enhance the accuracy and to reduce the errors which may arise on account of some residents either not having biometrics or not having some particular biometric.

51. Above all, there is an oversight by Technology and Architecture Review Board (TARB) and Security Review Committee. This Board and Committee consists of very high profiled officers. The aforesaid security measures are shown by the Authority in the following manner:

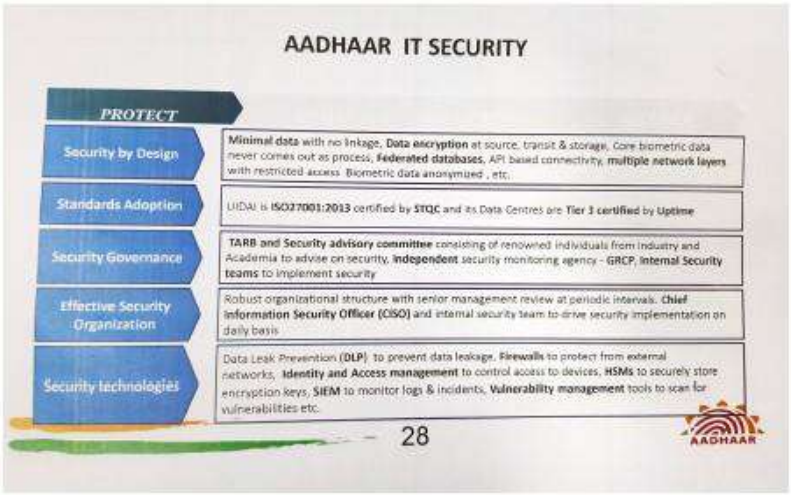

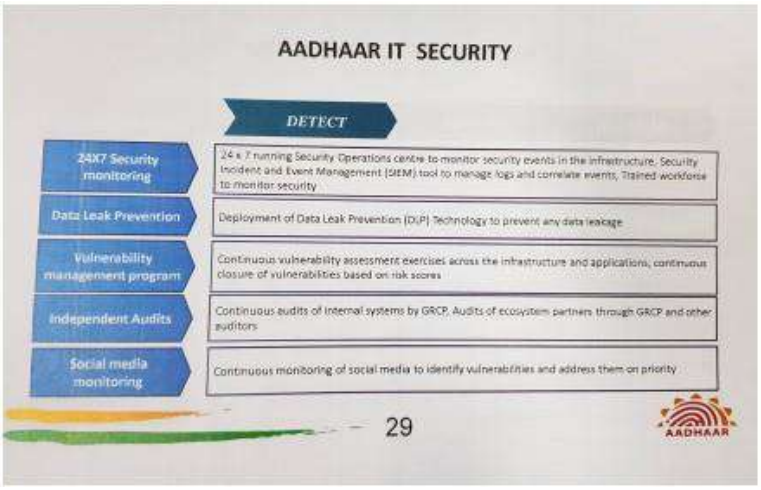

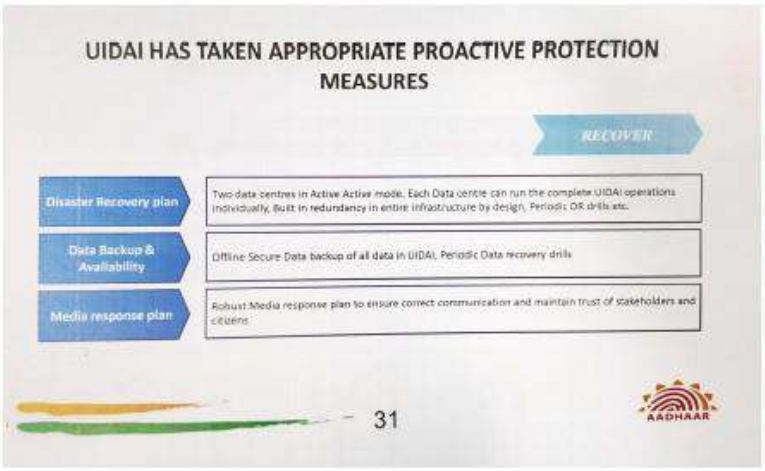

52. We may point out at this stage that to the powerpoint presentation by Dr. Pandey on the aforesaid lines, certain questions were put to him by Mr. Shyam Divan as well as Mr. Vishwanathan, senior advocates, and the answers thereto were given by Dr. Pandey. In order to have the complete picture, we will be well advised to reproduce these questions and their answers as well, which are as follows:

53. Questions and Answers to the queries raised by the Petitioners in W.P. (C) No. 1056 of 2017 entitled 'Nachiket Udupa and Anr. v. Union of India:

(1) What are the figures for authentication failures, both at the national and state level? Please provide a breakup, between fingerprints and iris.

Ans.: UIDAI cannot provide authentication failure rates at the state level since it does not track the location of the authentication transactions. Authentication failure rate at national level is as below:

Modality	Unique UID Participated	Failed Unique ID	Failed Percentage
IRIS	1,08,50,391	9,27,132	8.54%
FINGER	61,63,63,346	3,69,62,619	6.00%

It must be stated that authentication failures do not mean exclusion or denial from subsidies, benefits or services since the requesting entities are obliged under the law to provide for exception handling mechanisms.

(2) In case a person who is claiming a biometric exception (e.g. a person suffering from leprosy) does not have a mobile phone number, or has not given it in the enrolment form, or if the phone number changes - how will her Aadhaar enrolment and subsequent authentication occur and under which provision of law?

Ans.: Aadhaar enrolment is done for all residents, even of residents with leprosy. Biometric exception process is defined in the UIDAI resident enrolment process. In the case of a leprosy patient, who may not be able to do fingerprint authentication, iris authentication can be used for update (and add the mobile number). This was the reason for multi-modal enrolment and authentication being selected for use in Aadhaar.

Only in an unlikely scenario where both iris and fingerprint cannot be used for authentication, the mobile number is one of the methods for authentication. In cases where authentication through mobile number is not possible or feasible, the requesting entities have to provide their own exception and backup mechanism to ensure services to Aadhaar holders. As part of the exception handling mechanism, UIDAI has already implemented a digitally signed QR code into e-Aadhaar which allows agencies to verify the Aadhaar card in an off-line manner and trust the data (based on digital signature validation) without accessing e-KYC API service of UIDAI. This is a simple off-line mechanism to quickly verify the legitimacy of the Aadhaar card. But, it does not ensure that the person holding the card is the owner of that Aadhaar number. It needs either manual check of photo against the face of the individual (like the way ID is verified at the entry of airports) or some form of electronic authentication using Aadhaar authentication API or agency specific authentication scheme. QR code based verification allows Aadhaar number holders to use their ID on a day-to-day purpose without using online e-KYC authentication. The verification through offline QR code can be used for those purposes or cases where proof of presence or proof of ownership of card is not required.

The Aadhaar Act and Aadhaar (Enrolment and Update) Regulations, 2016 define special provision for enrolment of residents with biometric exception. Further, as per Regulation 14(i) of the Authentication Regulations, RE shall implement exception-handling mechanisms and backup identity authentication mechanisms to ensure seamless provision of authentication services to Aadhaar number holders. Accordingly, DBT Mission Cabinet Secretariat has issued a detailed circular dated December 19, 2017 regarding exception handling during use of Aadhaar in the benefit schemes of the Government.

(3) Are there any surprise checks, field studies done to check the authenticity of the exemption registers?

Ans.: As per Regulation 14(i) of the Authentication Regulations, this exception handling mechanism is to be implemented and monitored by the requesting entities and in case of the Government, their respective Ministries. Further, the DBT Mission Cabinet Secretariat had issued Circular dated December 19, 2017 on exception handling and audit of exceptions.

(4) Between the ages of 5-15 years, can a school, as an 'introducer', enrol a child without parental consent?

Ans.: School officials, if permitted to act as 'introducer', can enrol only when there is a parental consent to enrol. The disclosure requirement as per Section 3(2) of the Aadhaar Act and the Aadhaar (Enrolment and Update) Regulations, 2016 (Schedule-I) is implemented through the enrolment form which is signed by the resident making it informed disclosure. In case of children, the consent form will be signed by the parent/guardian.

(5) Once a child attains the age of 18 years, is there any way for them to opt out or revoke consent?

Ans.: It is not permissible under the Aadhaar Act. However, residents have the option of permanently locking their biometrics and only temporarily unlock it when needed for biometric authentication as per Regulation 11 of the Authentication Regulations.

(6) What is the status of the enrolments done by the 49,000 blacklisted enrolment operators? Please provide the number of enrolments done by them?

Ans.: UIDAI has a policy to enforce the process guidelines and data quality check during the enrolment process. 100% of the enrolment done by operators undergoes a quality assurance check, wherein every enrolment passes through a human eye. Any Aadhaar enrolment found to be contrary to the UIDAI process, the enrolment itself gets rejected and Aadhaar is not generated. The resident is advised to re-enroll. Once an operator is blacklisted or suspended, further enrolments cannot be carried out by him during the time the order of blacklisting/suspension is valid.

(7) What are the total number of biometric De-duplication rejections that have taken place till date? In case an enrolment is rejected either for: (a) duplicate enrolment and (b) other technical reason Under Regulation 14 of the Aadhaar Enrolment Regulations, what happens to the data packet that contains the stored biometric and demographic information?

Ans.: The total number of biometric de-duplication rejections that have taken place are 6.91 crores as on March 21, 2018. These figures do not pertain to the number of unique individuals who have been denied Aadhaar enrolment resulting in no Aadhaar issued to them. This figure merely pertains to the number of applications which have been identified by the Aadhaar de-duplication system as having matching biometrics to an existing Aadhaar number holder. The biometric de-duplication system is designed to identify as duplicate those cases where any one of the biometrics (ten fingers and two irises) match. However, very often it is found that all the biometrics match. It is highly improbable for the biometrics to match unless the same person has applied again. There are a number of reasons why the same person might apply more than once. For instance, many individuals innocently apply for enrolment multiple times because of the delay in getting their Aadhaar cards due to postal delays, loss or destruction of their cards or confusion about how the system works. Each time one applies for Aadhaar, the system identifies her as a new enrolment but when it recognises that the individual's biometrics match with already those in the database, thereafter further checks, including manual check through experienced personnels, are done. After that exercise, if it is found that the person is already registered, it rejects the enrolment application. One of their main reasons for rejection is that multiple people would put their biometric details like fingerprints for Aadhaar generation either as a fraudulent exercise or by mistake, which also would get rejected. There were many fakes and frauds in the earlier systems and several reports have found that almost 50% of the subsidies were getting pilfered away by fakes and duplicates in the system. Then, there would also be several such people who may have tried to defraud the Aadhaar enrolment system as well but failed get multiple Aadhaar numbers due to the stringent Aadhaar de-duplication process. Thus, the mere fact that 6.23 crore enrolments have been rejected as biometric duplicates does not mean that 6.23 crore people have been denied an Aadhaar number as has been alleged by the Petitioners. Any genuine person who does not have an Aadhaar number and whose enrolment has been rejected can always apply again for enrolment. It is worth noting that none of the de-duplication rejects have come forward to lodge complaints either with the Authority or with the Government about denial of Aadhaar number. None of them have even approached any Court of law. Evidently, the genuine residents have got themselves re-enrolled and the rest are those who were trying to reach the Aadhaar system by fraudulent means. That explains why no one has approached a court of law complaining denial of Aadhaar number. All the enrolment packets received by UIDAI (accepted/rejected) are archived in the CIDR irrespective of its status.

(8) If the figure of rejection of enrolment packets was 8 crore, as on 2015, what is the total rejection figure for enrolment packets as on date? How many field studies/physical verification have been done to ensure that these persons (who have been rejected) are indeed "False or duplicate" enrolments?

Ans.: The total rejection figure for enrolment packets is 18.0 cr. as on March 26, 2018. These rejections are due to various technical reasons like: (i) data quality reject such as address incomplete, name incomplete, use of expletives in names, address etc. photo is of object, photo of photo, age photo mismatch etc.; and (ii) OSI validation reject such as operator/supervisor/introducer validation failed, operator/supervisor/introducer/Head of Family biometric validation failed etc.

Those whose enrolments have been rejected for any reason and who do not have Aadhaar can re-enrol and obtain Aadhaar. Rejection of enrolments do not mean that the person will never be able to get Aadhaar.

(9) What does "any other appropriate response" Under Section 8(4) of the Aadhaar Act include?

Ans.: "Any other appropriate responses" includes e-KYC or limited e-KYC data. As per Regulation 3 of Authentication Regulations, UIDAI provides two types of authentication facilities, namely -

(i) Yes/No authentication facility; and

(ii) e-KYC authentication facility.

In Yes/No authentication, UIDAI provides the response as Yes or No along with relevant error codes, if any.

In e-KYC authentication, UIDAI provides the demographic data along with photograph and in case of mismatch/error, the relevant error codes.

54. Questions and Answers to the queries raised by the Petitioners in W.P. (C) No. 829 of 2013 entitled 'S.G. Vombatkere and Anr. v. Union of India:

(1) Please confirm that no UIDAI official verifies the correctness of documents offered at the stage of enrolment/updating.

Ans.: As per UIDAI process, the verification of the documents is entrusted to the Registrar. For Verification based on Documents, the verifier present at the Enrolment Centre will verify the documents. Registrars/Enrolment agency must appoint personnel for the verification of documents.

(2) Please confirm that UIDAI does not know whether the documents shown at the time of enrolment/updating are genuine or false.

Ans.: The answer is same as in (1) above.

(3) Please confirm:

(a) UIDAI does not identify the persons it only matches the biometric information received at the time of authentication with its records and provides a Yes/No response;

Ans.: Biometric authentication of an Aadhaar number holder is always performed as 1:1 biometric match against his/her Aadhaar number (identity) in CIDR. Based on the match, UIDAI provides Yes or No response. A "Yes" response means a positive identification of the Aadhaar number holder.

Each enrolment is biometrically de-duplicated against all (1.2 billion) residents to issue the Aadhaar number (or Unique Identity).

(b) UIDAI takes no responsibility with respect to the correctness of the name, date of birth or address of the person enrolled.

Ans.: The Name/Address/DOB are derived from the Proof of Identity (POI)/Proof of Address (POA) documents submitted during enrolments.

The enrolment/update packet (encrypted) retains a scanned copy of the POI/POA documents used for the enrolment which can be reviewed in case of dispute.

UIDAI maintains the update history of each Aadhaar number related to changes in name, address, date of birth etc.

(4) Please confirm:

(a) UIDAI takes no responsibility with respect to the correct identification of a person.

Ans.: Please refer to Answer (1) above. Additionally, it may be stated that enrolment of Aadhaar is done through a resident enrolment process and verification of the POI/POA document is done against the acceptable documents, as per the UIDAI valid list of documents as provided in Schedule II and III Aadhaar (Enrolment and Update) Regulations, 2016 read with Regulation 10.

UIDAI takes responsibility in creating and implementing standards, ensuring matching systems installed in CIDR work as they are designed to do, and providing options to Aadhaar holders in terms of controlling their identity (such as updating their data, locking their biometrics, etc.) and accessing their own authentication records. One of the key goals of Aadhaar is to issue a unique identity for the residents of India. Hence, each enrolment is biometrically de-duplicated against all (1.2 billion) residents to issue the Aadhaar number (or Unique Identity).

Section 4 of Aadhaar lays down the properties of an Aadhaar number. Sub-section (3) of Section 4 reads as under:

(3) An Aadhaar number, in physical or electronic form subject to authentication and other conditions, as may be specified by Regulations, may be accepted as proof of identity of the Aadhaar number holder for any purpose.

The requesting entities are at liberty to use any or multiple of authentication mode available Under Regulation 4 of Aadhaar (Authentication) Regulation, 2016 as per their requirements and needs of security etc.

(b) The biometric authentication is based on a probabilistic match of the biometric captured during authentication and the record stored with CIDR.

Ans.: Biometric authentication is based on 1:1 matching and, therefore, in that sense it is not probabilistic. If biometrics are captured it will lead to successful authentication. If biometrics are not well captured during authentication or an impostor tries authentication, it will lead to authentication failure. Aadhaar Proof of Concept studies show that a vast majority of residents (>98%) can successfully authenticate using biometric modalities such fingerprints and/or iris.

However, the Aadhaar Act and Regulations provides that an Aadhaar number holder cannot be denied service due to the failure of Aadhaar authentication. Hence, all Aadhaar applications must implement exception processes. Possible methods to implement the exception process include:

(i) Family Based Authentication: Family based applications such as PDS or Health applications may allow authentication by family members to allow resident to avail services.

(ii) Alternate Modalities: Some applications may use different modalities for exception handling. Alternate modalities include:

(a) Iris Authentication

(b) OTP Authentication (if allowed by policy)

(iii) Biometric Fusion: UIDAI is introducing face authentication as secondary authentication factor to reduce the rate of authentication failures, especially for senior citizens. At this time, face authentication will be used only conjunction with another authentication factor such as finger/iris/OTP.

(a) Face + Finger Fusion

(b) Face + Iris Fusion

(c) Face + OTP Fusion

(iv) Non Aadhaar Based Exception process: Applications may implement non-Aadhaar based exception process to ensure that no resident is denied service. Applications need to monitor the use of exceptions in their applications to prevent misuse of the exception process.

(v) Accordingly, DBT Mission Cabinet Secretariat had issued a detailed circular dated December 19, 2017 regarding use of Aadhaar in benefit schemes of Government - exception handling.

(5) Please confirm that with respect to individuals under 15 years and over 60 years of age, biometric authentication is likely to fail due to changes in/fading of biometrics such as fingerprints.

Ans.: Though there is no conclusive evidence to say that biometric authentication success is dependent upon age, slightly higher authentication failure rates have been observed only for fingerprints for senior citizens above the age of 70. A number of exception processes are provided in answer to Question 4(b) above to prevent denial of service for failure of authentication. Further,

in case of any issue in biometric authentication, an Aadhaar number holder may update his/her biometric at any of the Aadhaar enrolment centres, which is also provided for in the Aadhaar Act.

(6) Please confirm that the reasons why over 49000 enrolment operators were blacklisted include: (i) failure to verify documents presented; (ii) failure to maintain records of documents submitted; (iii) misuse of information submitted; and (iv) aiding or abetting false enrolments?

Ans.: UIDAI has a policy to enforce the process guidelines and data quality check during the enrolment process. 100% of the enrolments done by operators undergoes a quality assurance check. If any Aadhaar enrolment is found to be not as per the UIDAI process, the enrolment itself gets rejected and Aadhaar is not generated. If such mistake by an operator crosses a threshold defined in the policy, the operator is blacklisted/removed from the UIDAI ecosystem. As such, of the 49,000 operators who have been blacklisted/removed from the UIDAI eco-system, all the enrolments which were in violation of the process were rejected in the QA stage. Enrolment operators may be blacklisted for the following reasons:

• illegally charging the resident for Aadhaar enrolment

• poor demographic data quality

• invalid biometric exceptions

• other process malpractice

(7) Please confirm:

(a) At the stage of enrolment, there is no verification as to whether a person is an illegal immigrant.

(b) At the stage of enrolment, there is no verification about a person being resident in India for 182 days or more in the past 12 months.

(c) Foreign nationals may enrol and are issued Aadhaar numbers.

(d) Persons retain their Aadhaar number even after they cease to be resident. This is true of foreign nationals as well.

Ans.:

(a) At the time of enrolment, verification is done based upon documents provided by the resident. In case any violation of prescribed guidelines comes to light, the concerned Aadhaar is omitted/deactivated.

(b) This has been included through the enrolment form where resident undertakes and signs the disclosure:

Disclosure Under Section 3(2) of the Aadhaar (Targeted Delivery of Financial And Other Subsidies, Benefits and Services) Act, 2016.

I confirm that I have been residing in India for at least 182 days in the preceding 12 months & information (including biometrics) provided by me to the UIDAI is my own and is true, correct and accurate. I am aware that my information (including biometrics) will be used for generation of Aadhaar and authentication. I understand that my identity information (except core biometric) may be provided to an agency only with my consent during authentication or as per the provisions of the Aadhaar Act. I have a right to access my identity information (except core biometrics) following the procedure laid down by UIDAI."

(c) Aadhaar is issued to the resident of India and the word 'resident' is defined in Section 2(v) of the Aadhaar Act. Aadhaar numbers may be issued to foreign nationals who are resident in India. Section 2(v) reads as under:

'resident' means an individual who has resided in India for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment;

A foreign national fulfilling the above criteria is eligible for Aadhaar, provided he submits the acceptable POI/POA document as per the UIDAI valid list of documents.

(d) As per the Aadhaar Act, an Aadhaar number is issued to a resident who has been residing in India for at least 182 days in the preceding 12 months. An Aadhaar number is issued to an individual for life and may be omitted/deactivated in case of violation of prescribed guidelines only. Ineligibility of a person to retain an Aadhaar number owing to become non-resident may be treated as a ground for deactivation of Aadhaar number and Regulation 28(l)(f) of the Aadhaar Enrolment Regulations. This is in keeping with Section 31(1) and (3) of the Aadhaar Act wherein it is an obligation on an Aadhaar number holder to inform the UIDAI of changes in demographic information and for the Authority to make the necessary alteration.

(8) Please confirm the Points Of Service (POS) biometric readers are capable of storing biometric information.

Ans.: UIDAI has mandated use of Registered Devices (RD) for all authentication requests. With RDs, biometric data is signed within the device/RD service using the provider key to ensure it is indeed captured live. The device provider RD service encrypts the PID block before returning to the host application. This RD service encapsulates the biometric capture, signing and encryption of biometrics all within it. Therefore, introduction of RD in Aadhaar authentication system Rules out any possibility of use of stored biometric and replay of biometrics captured from other source. Requesting entities are not legally allowed to store biometrics captured for Aadhaar authentication Under Regulation 17(1)(a) of the Authentication Regulations.

(9) Referring to slide/page 13, please confirm that the architecture under the Aadhaar Act includes: (i) authentication user agencies (e.g. Kerala Dairy Farmers Welfare Fund Board); (ii) authentication service agencies (e.g. Airtel); and (iii) CIDR.

Ans.: UIDAI appoints Requesting Entities (AUA/KUA) and Authentication Service Agency (ASA) as per Regulation 12 of Authentication Regulations. List of Requesting Entitles (AUA/KUA) and Authentication Service Agency appointed by UIDAI is available on UIDAI's website. An AUA/KUA can do authentication on behalf of other entities Under Regulation 15 and Regulation 16.

(10) Please confirm that one or more entitles in the Aadhaar architecture described in the previous paragraph record the date and time of the authentication, the client IP, the device ID and purpose of authentication.

Ans.: UIDAI does not ask requesting entities to maintain any logs related to IP address of the device, GPS coordinates of the device and purpose of authentication. However, AUAs like banks, telecom etc., in order to ensure that their systems are secure, frauds are managed, they may store additional information as per their requirement under their respective laws to secure their system. Section 32(3) of the Aadhaar Act specifically prevents the UIDAI from either by itself or through any entity under its control to keep or maintain any information about the purpose of authentication.

Requesting entities are mandated to maintain following logs as per Regulation 18 of the Authentication Regulations. These are:

(i) the Aadhaar number against which authentication is sought;

(ii) specified parameters of authentication request submitted;

(iii) specified parameters received as authentication response;

(iv) the record of disclosure of information to the Aadhaar number holder at the time of authentication; and

(v) record of consent of the Aadhaar number holder for authentication, but shall not, in any event, retain the PID information.

Further, even if a requesting entity captures any other data as per their own requirement, UIDAI will only audit the authentication logs maintained by the requesting entity as per Regulation 18(1) of the Authentication Regulations.

ASAs are not permitted to maintain any logs related to IP address of the device, GPS coordinates of the device etc. ASAs are mandated to maintain logs as per Regulation 20 of the Authentication Regulations:

(i) identity of the requesting entity;

(ii) parameters of authentication request submitted; and

(iii) parameters received as authentication response.

Provided that no Aadhaar number, PID information, device identity related data and e-KYC response data, where applicable, shall be retained.

(11) Referring to slide/page 7 and 14, please confirm that 'traceability' features enable UIDAI to track the specific device and its location from where each and every authentication takes place.

Ans.: UIDAI gets the AUA code, ASA code, unique device code, registered device code used for authentication. UIDAI does not get any information related to the IP address or the GPS location from where authentication is performed as these parameters are not part of authentication (v2.0) and e-KYC (v2.1) API UIDAI would only know from which device the authentication has happened, through which AUA/ASA etc. This is what the slides meant by traceability. UIDAI does not receive any information about at what location the authentication device is deployed, its IP address and its operator and the purpose of authentication. Further, the UIDAI or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication Under Section 32(3) of the Aadhaar Act.

Summing up the Scheme:

55. The whole architecture of Aadhaar is devised to give unique identity to the citizens of this country. No doubt, a person can have various documents on the basis of which that individual can establish her identify. It may be in the form of a passport, Permanent Account Number (PAN) card, ration card and so on. For the purpose of enrolment itself number of documents are prescribed which an individual can produce on the basis of which Aadhaar card can be issued. Thus, such documents, in a way, are also proof of identity. However, there is a fundamental difference between the Aadhaar card as a mean of identity and other documents through which identity can be established. Enrolment for Aadhaar card also requires giving of demographic information as well as biometric information which is in the form of iris and fingerprints. This process eliminates any chance of duplication. It is emphasised that an individual can manipulate the system by having more than one or even number of PAN cards, passports, ration cards etc. When it comes to obtaining Aadhaar card, there is no possibility of obtaining duplicate card. Once the biometric information is stored and on that basis Aadhaar card is issued, it remains in the system with the Authority. Wherever there would be a second attempt for enrolling for Aadhaar and for this purpose same person gives his biometric information, it would immediately get matched with the same biometric information already in the system and the second request would stand rejected. It is for this reason the Aadhaar card is known as Unique Identification (UID). Such an identity is unparalleled.

56. There is, then, another purpose for having such a system of issuing unique identification cards in the form of Aadhaar card. A glimpse thereof is captured under the heading 'Introduction' above while mentioning how and under what circumstances the whole project was conceptualised. To put it tersely, in addition to enabling any resident to obtain such unique identification proof, it is also to empower marginalised Section of the society, particularly those who are illiterate and living in abject poverty or without any shelter etc. It gives identity to such persons also. Moreover, with the aid of Aadhaar card, they can claim various privileges and benefits etc. which are actually meant for these people.

Identity of a person has a significance for every individual in his/her life. In a civilised society every individual, on taking birth, is given a name. Her place of birth and parentage also becomes important as she is known in the society and these demographic particulars also become important attribute of her personality. Throughout their lives, individuals are supposed to provide such information: be it admission in a school or college or at the time of taking job or engaging in any profession or business activity, etc. When all this information is available in one place, in the form of Aadhaar card, it not only becomes unique, it would also qualify as a document of empowerment. Added with this feature, when an individual knows that no other person can clone her, it assumes greater significance.

57. Thus, the scheme by itself can be treated as laudable when it comes to enabling an individual to seek Aadhaar number, more so, when it is voluntary in nature. Howsoever benevolent the scheme may be, it has to pass the muster of constitutionality. According to the Petitioners, the very architecture of Aadhaar is unconstitutional on various grounds, glimpse whereof can be provided at this stage:

Gist of the challenge to the Aadhaar Scheme as well as the Act:

58. The Petitioners accept that the case at hand is unique, simply because of the reason that the programme challenged here is itself without precedent. According to them, no democratic society has adopted a programme that is similar in its command and sweep. The case is about a new technology that the Government seeks to deploy and a new architecture of governance that it seeks to build on this technology. The Petitioners are discrediting the Government's claim that biometric technology employed and the Aadhaar Act is greatly beneficial. As per the Petitioners, this is an inroad into the rights and liberties of the citizens which the Constitution of India guarantees. It is intrusive in nature. At its core, Aadhaar alters the relationship between the citizen and the State. It diminishes the status of the citizens. Rights freely exercised, liberties freely enjoyed, entitlements granted by the Constitution and laws are all made conditional, on a compulsory barter. The barter compels the citizens to give up their biometrics 'voluntarily', allow their biometrics and demographic information to be stored by the State and private operators and then used for a process termed 'authentication'. According to them, by the very scheme of the Act and the way it operates, it has propensity to cause 'civil death' of an individual by simply switching of Aadhaar of that person. It is the submission of the Petitioners that the Constitution balances rights of individuals against State interest. The Aadhaar completely upsets this balance and skews the relationship between the citizen and the State enabling the State to totally dominate the individual.

59. The challenge is directed at the constitutional validity of the following facets of Aadhaar:

(i) The Aadhaar programme that operated between January 28, 2009 until the bringing into force of the Aadhaar Act on July 12, 2016.

(ii) The Aadhaar Act (and alternatively certain provisions of that Act).

(iii) Elements of the Aadhaar project or programme that continues to operate, though not within the cover of the Aadhaar Act.

(iv) Specific Regulations framed under the Aadhaar Act, illustratively the Aadhaar (Authentication) Regulations, 2016.

(v) A set of subordinate legislation in the form of statutory rules/Regulations including the Money Laundering (Amendment) Rules, 2017.

(vi) All notifications (nearly 139) issued Under Section 7 of the Aadhaar Act (assuming the Act is upheld) insofar as they make Aadhaar mandatory for availing certain benefits/services/subsidies, including PDS, MGNREGA and social security pension.

(vii) Actions on the part of the authorities to make Aadhaar mandatory even where not covered by Section 7, inter alia: Actions by CBSE, NEET, JEE and UGC requirements for scholarship.

(viii) Specifically, actions on part of the Government mandating linking of mobile phones and Aadhaar vide DoT circular dated March 23, 2017.

(ix) Section 139AA of the Income Tax Act, 1961 insofar as it violates Article 21 by mandating linking Aadhaar to PAN and requiring Aadhaar linkage for filing returns.

60. Apart from the declaratory reliefs regarding *ultra vires and certiorari* to quash the provisions/actions enumerated above, there are certain other reliefs that are also sought, including:

(i) Suitable declarations regarding the physical autonomy of a person over her own body *qua* the Indian State.

(ii) Mandatory directions requiring the Respondents to give an option to persons who are enrolled with the Aadhaar programme to opt out and to delete the data with suitable certification for compliance.

(iii) Mandatory directions to all concerned authorities that should the Aadhaar Act, etc. be upheld, nevertheless, every person must be entitled to avail services, benefits etc. through alternative means of identification. Negatively, nothing can be withheld from a citizen merely because he/she does not have an Aadhaar Card or does not wish to use their Aadhaar Card.

(iv) Mandatory directions consistent with the fundamental right to privacy and the right of a citizen to be let alone that no electronic trial or record of his/her authentication be maintained.

61. On the aforesaid premise, the Petitioners point out following heads of challenge:

Surveillance:

62. The project creates the architecture for pervasive surveillance and unless the project is stopped, it will lead to an Orwellian State where every move of the citizen is constantly tracked and recorded by the State. The architecture of the project comprises a Central Identities Data Repository (CIDR) which stores and maintains authentication transaction data. The authentication record comprises the time of authentication and the identity of the requesting entity. Based on this architecture it is

possible for the State to track down the location of the person seeking authentication. Since the requesting entity is also identified, the activity that the citizen is engaging in is also known.

Violation of Fundamental Right to Privacy:

63. The fundamental right to privacy is breached by the Aadhaar project and the Aadhaar Act in numerous ways. Following are the illustrations given by the Petitioners:

(a) Between 2009-10 and July 2016 the project violated the right to privacy with respect to personal demographic as well as biometric information collected, stored and shared as there was no law authorising these actions.

(b) During both the pre-Act and post-Act periods, the project continues to violate the right to privacy by requiring individuals to part with demographic as well as biometric information to private enrolling agencies.

(c) By enabling private entities to use the Aadhaar authentication platform, the citizen's right to informational privacy is violated inasmuch as the citizen is compelled to 'report' his/her actions to the State.

(d) Even where a person is availing of a subsidy, benefit or service from the State, mandatory authentication through the Aadhaar platform (without an option to the citizen to use an alternative mode of identification) violates the right to informational privacy.

(e) With Aadhaar being made compulsory for holding a bank account, operating a cell phone, having a valid PAN, holding mutual funds, securing admission to school, taking a board examination, etc. the citizen has no option but to obtain Aadhaar. Compelling the citizen to part with biometric information violates individual autonomy and dignity.

(f) In a digital society an individual has the right to protect himself by controlling the dissemination of personal information, including biometric information. Compelling an individual to establish his identity by planting her biometric at multiple points of service violates privacy involving the person.

(g) The seeding of Aadhaar in distinct databases enables the content of information about an individual that is stored in different silos to be aggregated. This enables the State to build complete profiles of individuals violating privacy through the convergence of data.

Limited Government:

64. A fundamental feature of the Constitution is the sovereignty of the people with limited Government authority. The Constitution limits governmental authority in various ways, amongst them Fundamental Rights, the distribution of powers amongst organs of the State and the ultimate check by way of judicial review. The Aadhaar project is destructive of the limited Government. The Constitution is not about the power of the State, but about the limits on the power of the State.

Post Aadhaar, the State will completely dominate the citizen and alter the relationship between citizen and the State. The features of a totalitarian state is seen from:

(a) A person cannot conduct routine activities such as operating a bank account, holding an investment in mutual funds, receiving government pension, receiving scholarship, receiving food rations, operating a mobile phone without the State knowing about these activities.

(b) The State can build a profile of the individual based on the trial of authentication from which the nature of the citizen's activity can be determined.

(c) By disabling Aadhaar the State can cause civil death of the person.

(d) By making Aadhaar compulsory for other activities such as air travel, rail travel, directorship in companies, services and benefits extended by the State Governments and Municipal Corporations, etc. there will be virtually no zone of activity left where the citizen is not under the gaze of the State. This will have a chilling effect on the citizen.

(e) In such a society, there is little or no personal autonomy. The State is pervasive, and dignity of the individual stands extinguished.

(f) This is an inversion of the accountability in the Right to Information age: instead of the State being transparent to the citizen, it is the citizen who is rendered transparent to the State.

Impugned Act illegally passed as a 'Money Bill':

65. The Bill No. 47 of 2016 introduced in the Lok Sabha and which upon passage became the impugned Act was not a Money Bill in terms of Article 110 of the Constitution of India. Even though the object and purpose of the impugned legislation states that it is to be used for the delivery of subsidies, benefits and services, expenditure for which is incurred from the Consolidated Fund of India, the scope of the impugned Act is far beyond what is envisaged Under Article 110. Inasmuch as the impugned Act has not followed the constitutional procedure mandated for the passage of a law by disguising the statute as a 'Money Bill', there is no valid legislative process that has been followed in this case. The legislative process being colourable and since judicial review extends wherever Part III rights are violated, the Aadhaar Act is liable to be struck down.

Procedure followed violates Articles 14 and 21 of the Constitution:

66. The procedure adopted by the Respondents, both pre-Act and post-Act, is arbitrary and in violation of Articles 14 and 21 of the Constitution because:

(a) There is no informed consent at the time of enrolment. Individuals are not told about crucial aspects such as potential misuse of the information, the commercial value of the information, the storage of information in a centralised database, that the information supplied could be used against the individual in criminal proceedings pursuant to a court order, there is no opt-out option, the entire enrolment process is conducted by private entities without any governmental supervision, etc.

(b) UIDAI has no direct relationship with the enrolling agency which collects sensitive personal information (biometric and demographic).

(c) The data collected and uploaded in to the CIDR is not verified by any Government official designated by the UIDAI. The data collected and stored lacks integrity.

(d) The procedure at the stage of enrolment and authentication enables the enrolling agency as well as the 'requesting entity' to capture, store and misuse/use the biometric as well as demographic information without the UIDAI having any control over such misuse/use.

Unreliability of Biometrics and Exclusion:

67. The foundation of the project, i.e. biometrics, is an unreliable and untested technology. Moreover, biometric exceptions severely erode reliability. The biometric authentication system works on a probabilistic model. Consequently, entitlements are reduced from certainty to a chance delivery where the biometrics match. Across the country several persons are losing out on their entitlements, for say food rations, because of a biometric mismatch resulting in them being excluded from various welfare schemes. The project is not an 'identity' project but an 'identification' exercise. Unless the biometrics work, a person in flesh and blood, does not exist for the State.

Illegal Object:

68. It is submitted before us that the objective of creating a single pervasive identification over time is itself illegal. There are several facets to the illegality and amongst them is the very negation of an individual citizen's freedom to identify through different means. The coercive foundation of the impugned Act is in substance an illegal objective that renders the statute *ultra vires* Article 14 of the Constitution of India.

Democracy, Identity and Choice:

69. A citizen or resident in a democratic society has a choice to identify himself/herself through different modes in the course of his/her interactions generally in society as well as his/her interactions with the State. Mandating identification by only one highly intrusive mode is excessive, disproportionate and violates Articles 14, 19 and 21.

Children:

70. As per the Petitioners, there is no justification to include children in the Aadhaar programme for various reasons.

71. It may also be recorded at this juncture itself that insofar as the Aadhaar Act is concerned, following provisions thereof are specifically attacked as unconstitutional:

(i) Section 2(c) and 2(d) - authentication and authentication record, read with Section 32

(ii) Section 2(h) read with Section 10 of CIDR

(iii) Section 2(l) read with Regulation 23 of the Aadhaar (Enrolment and Updates) Regulation - 'enrolling agency'

(iv) Section 2(v) - 'resident'

(v) Section 3 - Aadhaar Number

(vi) Section 5 - Special treatment to children

(vii) Section 6 - Update of information

(viii) Section 7

(ix) Section 8

(x) Section 9

(xi) Chapter IV - Sections 11 to 23

(xii) Sections 23 and 54 - excessive delegation

(xiii) Section 23(2)(g) read with Chapter VI & VII - Regulations 27 to 32 of the Aadhaar (Enrolment and Update) Regulations, 2016

(xiv) Section 29

(xv) Section 33

(xvi) Section 47

(xvii) Section 48 - Power of Central Government to supersede UIDAI

(xviii) Section 57

(xix) Section 59

Some Introductory Remarks:

72. Before proceeding further, it would be necessary to state here the approach which we have adopted in dealing with various issues that are raised in these petitions. That may help in understanding the manner in which the matter is dealt with. This necessitates some introductory remarks:

(i) We may remark at this stage itself that many of the heads of challenge which are taken note of above are overlapping and, therefore, discussion on one aspect may provide substantial answers to the arguments advanced under the other head of challenge as well. Our endeavour, therefore, would be to eschew the repetitive discussion. However, our anxiety to bring clarity and also in order to have continuity of thought while discussing a particular head, may have led to some repetitions at different places. In any case, we would be dealing with the various heads of challenge, one by one, so as to cover the entire spectrum.

(ii) In order to have a smooth flow of discussion, we are going to formulate the questions which arise in all these petitions and then decide those issues. Since, number of advocates[3] appeared on both sides, many of the arguments addressed by them were overlapping and repetitive. In this scenario, we deem it proper to collate the arguments of all the counsel and present the same while undertaking the discussion on each of the issues. Thus, in the process, we would not be referring to each counsel and her arguments. We may, however, intend to place on record that all the counsel on both sides had taken the advocacy to its highest level by presenting all possible nuances of the complex issues involved. In the process, plethora of literature on such issues, including the law prevailing across the Globe was cited. We, therefore, place on record our appreciation of the sublime nature of lawyering in this case.

(iii) As pointed out above, many number of foreign judgments were cited during arguments. The history of this Court reflects that this Court has liberally accepted the good practices, Rules of interpretation and norms of constitutional courts of other jurisdictions. In fact, in drafting Indian Constitution itself, the framing fathers had studied various foreign models and adopted provisions from different Constitutions after deep reflection. Constitutional influences of system prevailing in some of the countries on Indian Constitution can be summarised as under:

From UK	- Parliamentary Type of Government - Cabinet System of Ministers - Bicameral Parliament - Lower House more powerful - Council of Minsters responsible to Lower House
From US	- Written Constitution - Executive head of State known as President and his being the Supreme Commander of the Armed Forces - Vice-President as the *ex-officio* Chairman of Rajya Sabha - Bill of Rights - Supreme Court - Provision of States - Independence of Judiciary and judicial review - Preamble - Removal of Supreme Court and High Court Judges
From USSR	- Fundamental Duties - Five Year Plan
From Australia	- Concurrent List - Language of the preamble - Provision regarding trade, commerce and intercourse
From Japan	- Law on which the Supreme Court function
From Weimar Constitution of Germany	- Suspension of Fundamental Rights during the emergency
From Canada	- Scheme of federation with a strong centre - Distribution of powers between the centre and the states and placing residuary powers with the centre
From Ireland	- Concept of Directive Principles of States Policy - Method of election of President - Nomination of members in the Rajya Sabha by the President

It was, therefore, but natural to find out the manner in which particular provisions have been interpreted by the constitutional courts of the aforesaid countries. Case law of this Court would reflect this for interpreting the provisions relating to 'Inter-State Trade, Commerce & Intercourse'. The case law of the Australian High Court is liberally referred as this Chapter is influenced by the provisions contained in the Australian Constitution. Likewise, for interpreting provisions of Part IX of the Constitution on 'Relations between the Union and the States' where Canadian model is followed, the judgments of Canadian Supreme Court have been cited by this Court from time to time. Influence of U.S. Constitutionalism, tempered by the wish to preserve India's own characteristics, while interpreting chapter relating to fundamental rights as well as power of judicial review is also discernible. A critical analysis of the various judgments of this Court, where foreign precedents are cited[4], formulates four typologies of use, namely:

(a) Where the court relies on foreign precedents for guidance on general constitutional principles and when necessary to;

(b) Where the court frames the issue posed for adjudication and/or to formulate evaluative test and frameworks;

(c) To distinguish the country's context from the foreign one[5];

(d) To 'read' in the Constitution implied or unenumerated rights[6].

It can be said that though this Court has been liberally relying upon the judgments of the constitutional courts of other countries, particularly when it comes to human rights discourse, at the same time, in certain situations, note of caution is also added to give a message that the judgment of other jurisdiction cannot be relied blindly and it would depend as to whether a particular judgment will fit in Indian context or not. As a matter of fact, in *Basheshar Nath*, the Court discussed the doctrine of waiver in force in the United States and rejected it firmly stating that:

:...the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution...We are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of the Constitution.

On the contrary, in *Romesh Thappar*, the Court completely based its decision to strike down a law restricting the free circulation of newspapers on two US precedents, *Ex Parte Jackson*, 96 US 727 (1878) and *Lovell* v. *City of Griffin*, 303 US 444 (1938), and affirmed that the protection of freedom of expression in India follows the maxim of Madison that the Court transposed from its quotation in *Near* v. *Minnesota*, 282 US 607 (1931) 717-18, according to which 'it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits'. Likewise, the role of foreign precedents in a majority opinion is confirmed in the decision of *His Holiness Kesavananda Bharati Sripadagalvaru* which clarifies Parliament's power to amend the Constitution. At the same time, looking to the use of foreign precedents in this judgment, Justice S.M. Sikri (as His Lordship then was), dealing with the interpretation of Article 368 of the Constitution, first of all, highlighted that:

No other Constitution in the world is like ours. No other Constitution combines under its wings such diverse peoples, numbering now more than 550 millions [sic], with different languages and religions and in different stages of economic development, into one nation, and no other nation is faced with such vast socio-economic problems.

After this premise, however, His Lordship accepts, in order to define what an 'amendment' is according to the Indian Constitution, the reasoning of Lord Greene in *Bidie* v. *General Accident, Fire and Life Assurance Corporation* (1948) 2 All ER 995, 998. and that of Justice Holmes in *Towne* v. *Eisner*, 245 US 418, which affirm that to understand a word it is necessary to understand the context in which it is inserted. To strengthen this, *James* v. *Commonwealth of Australia*, (1936) AC 578 is also referred to.

We have stated the trend in brief with a purpose. Number of judgments of U.K. Courts, German Supreme Court, European Commission of Human Rights (ECHR), U.S. Supreme Court etc. were

cited. However, there is no similarity in approach by these Courts in deciding a particular issue by applying different principles, particularly when it comes to the issues of data protection and privacy. In this backdrop, it becomes necessary, while referring to these judgments, to keep in mind the ethos, cultural background and vast socio-economic problems of this country and on that basis to accept a particular norm, or for that matter, to formulate a constitutional norm which is relevant in our context. That is the endeavour which is made by us.

(iv) Many arguments of the Petitioners relate to the working of the system. The Petitioners had argued that the architecture of Aadhaar, by its very nature, is probabilistic and, therefore, it may result in exclusion, in many cases. Therefore, rather than extending subsidies, benefits and services to the Section of society for which these are meant, it may have the tendency to exclude them from receiving such subsidies, benefits and services. The Respondents, on the other hand, have stated on affidavit that the attempt of the Respondents would be to ensure that no individual who is eligible for such benefits etc. is deprived form receiving those benefits, even when in a particular case, it is found that on authentication, his fingerprints or iris are not matching and is resulting into failure. It was clarified that since Aadhaar project is an ongoing project, there may be some glitches in its working and there is a continuous attempt to make improvements in order to ensure that it becomes foolproof over a period of time. We have eschewed detailed discussion in respect of those arguments, which may not have much relevance when judging the constitutional validity of the Act and the scheme. However, such arguments of exclusion etc. leading to violation of Articles 14 and 21 are dealt with at an appropriate stage. But the argument based on alleged inaccurate claims of savings by the Authority/Union of India in respect of certain programmes, like saving of USD 11 billion per annum due to the Aadhaar project, as well as savings in the implementation of the MGNREGA scheme, LPG subsidy, PDS savings need not detain us for long. Such rebuttals raised by the Petitioners may have relevance insofar as working of the Act is concerned. That by itself cannot be a ground to invalidate the statute.

(v) As mentioned above, notwithstanding the passions and emotions evoked on both sides in equal measure, this Court has adopted a lambent approach while dealing with the issues raised, having a posture of calmness coupled with objective examination of the issues on the touchstone of the constitutional provisions. We are in the age of constitutional democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the Rule of people through their representatives which is known as "formal democracy". It also has other precepts like Rule of law, human rights, independence of judiciary, separation of powers, etc. The framers of Indian Constitution duly recognized the aforesaid precepts of liberal and substantive democracy with Rule of law as an important and fundamental pillar. At the same time, in the scheme of the Constitution, it is the judiciary which is assigned the role of upholding Rule of law and protecting the Constitution and democracy.

The essence of Rule of law is to preclude arbitrary action. Dicey, who propounded the Rule of law, gave distinct meaning to this concept and explained that it was based on three kindered features, which are as follows:

(i) absence of arbitrary powers on the part of authorities;

(ii) equality before law; and

(iii) the Constitution is part of the ordinary law of the land.

There are three aspects of the Rule of law, which are as follows:

(a) A formal aspect which means making the law rule.

(b) A jurisprudential or doctrinal aspect which is concerned with the minimal condition for the existence of law in society.

(c) A substantive aspect as per which the Rule of law is concerned with properly balancing between the individual and society.

When we talk of jurisprudential Rule of law, it includes certain minimum requirements without which a legal system cannot exist and which distinguished a legal system from an automatic system where the leader imposes his will on everyone else. Professor Lon Fuller has described these requirements collectively as the '*inner morality of law*'. In addition to jurisprudential concept, which is important and an essential condition for the Rule of law, the substantive concept of the Rule of law is equally important and inseparable norm of the Rule of law in real sense. It encompasses the 'right conception' of the Rule of law propounded by Dworkin. It means guaranteeing fundamental values of morality, justice, and human rights, with a proper balance between these and the other needs of the society. Justice Aharon Barak, former Chief Justice of Israel, has lucidly explained this facet of Rule of law in the following manner:

The Rule of law is not merely public order, the Rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity and develop himself. The human being and human rights underlie this substantive perception of the Rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive Rule of law "is the Rule of proper law, which balances the needs of society and the individual". This is the Rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. The Judge must protect this rich concept of the Rule of law.

The 'rule of law', which is a fine sonorous phrase, is dynamic and ever expanding and can be put alongside the brotherhood of man, human rights and human dignity. About the modern Rule of law, Professor Garner observed:

The concept in its modern dress meets a need that has been felt throughout the history of civilization, law is not sufficient in itself and it must serve some purpose. Man is a social animal, but to live in society he has had to fashion for himself and in his own interest the law and other instruments of government, and as a consequence those must to some extent limit his personal liberties. The problem is how to control those instruments of government in accordance with the Rule of Law and in the interest of the governed.

Likewise, the basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Granville Austin while analyzing the functioning of Indian Constitution in first 50 years has described three distinguished strands of Indian Constitution: (i) protecting national unity and integrity, (ii) establishing the institution and spirit of democracy; and (iii) fostering social reforms. The strands are mutually dependent and inextricably intertwined in what he elegantly describes as a 'seamless web'. And there cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words "We the People...". What is the most important gift to the common person given by this Constitution is "fundamental rights" which may be called human rights as well.

Speaking for the vision of our founding fathers, in *State of Karnataka and Anr.* v. *Shri Ranganatha Reddy and Anr.* MANU/SC/0062/1977 : (1977) 4 SCC 471, this Court speaking through Justice Krishna Iyer observed:

The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril....
Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties.

In *Dattatraya Govind Mahajan* v. *State of Maharashtra* MANU/SC/0381/1977 : (1977) 2 SCC 548 the spirit of our Constitution was explained thus:

Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words 'Justice - social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of chose high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation.....
Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice.

In *National Human Rights Commission* v. *State of Arunachal Pradesh* MANU/SC/1047/1996 : (1996) 1 SCC 742, the Supreme Court explained it again, as under:

We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.

Looking the matter from this angle, when the judiciary is assigned the role of upholding the Rule of law, the first function of the judiciary is to protect the democracy as well as the Constitution. At the same time, second role of the Court, which is equally important, is to bridge the gap between the law and the society. In the process of undertaking this role, a third role, which is of equal significance also springs up. Judiciary is also to ensure that social and economic justice is meted out to the deserving lot by affirmative action of the State. Our attempt has been to strive the balancing of competing Constitutional norms. The complex issues are dealt with keeping in view this role of the Supreme Court as assigned by the Constitution; *albeit* within the constitutional norms.

Scope of Judicial Review:

73. The aforesaid discussion leads us to pick up and discuss another strand viz. the scope of judicial review in such matters.

74. Judicial review means the Supremacy of law. It is the power of the court to review the actions of the Legislature, the Executive and the Judiciary itself and to scrutinize the validity of any law or action. It has emerged as one of the most effective instruments of protecting and preserving the cherished freedoms in a constitutional democracy and upholding principles such as separation of powers and Rule of law. The Judiciary, through judicial review, prevents the decisions of other branches from impinging on the constitutional values. The fundamental nature of the Constitution is that of a limiting document, it curtails the powers of majoritarianism from hijacking the State. The power of review is the shield which is placed in the hands of the most judiciaries of constitutional democracies to enable the protection of the supreme document.

75. In *Binoy Viswam* v. *Union of India and Ors.* MANU/SC/0693/2017 : (2017) 7 SCC 59, scope of judicial review of legislative Act was described in the following manner:

76. Under the Constitution, Supreme Court as well as High Courts are vested with the power of judicial review of not only administrative acts of the executive but legislative enactments passed by the legislature as well. This power is given to the High Courts Under Article 226 of the Constitution and to the Supreme Court Under Article 32 as well as Article 136 of the Constitution. At the same time, the parameters on which the power of judicial review of administrative act is to be undertaken are different from the parameters on which validity of legislative enactment is to be examined. No doubt, in exercises of its power of judicial review of legislative action, the Supreme Court, or for that matter, the High Courts can declare law passed by Parliament or the State Legislature as invalid. However, the power to strike down primary legislation enacted by the Union or the State Legislatures is on limited grounds. Courts can strike down legislation either on the basis that it falls foul of federal distribution of powers or that it contravenes fundamental rights or other constitutional rights/provisions of the Constitution of India. No doubt, since the Supreme Court and the High Courts are treated as the ultimate arbiter in all matters involving interpretation of the Constitution, it is the courts which have the final say on questions relating to rights and

whether such a right is violated or not. The basis of the aforesaid statement lies in Article 13(2) of the Constitution which proscribes the State from making "any law which takes away or abridges the right conferred by Part III", enshrining fundamental rights. It categorically states that any law made in contravention thereof, to the extent of the contravention, be void.

77. We can also take note of Article 372 of the Constitution at this stage which applies to pre-constitutional laws. Article 372(1) reads as under:

372. ***Continuance in force of existing laws and their adaptation.***--(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.

In the context of judicial review of legislation, this provision gives an indication that all laws enforced prior to the commencement of the Constitution can be tested for compliance with the provisions of the Constitution by courts. Such a power is recognised by this Court in *Union of India* v. *Sicom Ltd.* In that judgment, it was also held that since the term "laws", as per Article 372, includes common law the power of judicial review of legislation, which is a part of common law applicable in India before the Constitution came into force, would continue to vest in the Indian courts.

78. ...These contours of the judicial review are spelled out in the clear terms in *Rakesh Kohli,* and particularly in the following paragraphs: (SCC pp. 321-22 & 325-27, paras 16-17, 26-28 & 30)

16. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad.

17. This Court has repeatedly stated that legislative enactment can be struck down by court only on two grounds, namely *(i)* that the appropriate legislature does not have the competence to make the law, and *(ii)* that it does not (sic) take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions. In *McDowell and Co.* while dealing with the challenge to an enactment based on Article 14, this Court stated in para 43 of the Report as follows: (SCC pp. 737-38)

43. ... A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. *(1)* lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. ... if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection Clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by Sub-clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of Article 19 and so on. *No enactment*

can be struck down by just saying that it is arbitrary or unreasonable. Some or the other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom.'

xx xx xx

26. In *Mohd. Hanif Quareshi*, the Constitution Bench further observed that there was always a presumption in favour of constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. It stated in para 15 of the Report as under: (AIR pp. 740-41)

15. ... The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

27. The above legal position has been reiterated by a Constitution Bench of this Court in *Mahant Moti Das* v. *S.P. Sahi*.

28. In *Hamdard Dawakhana* v. *Union of India,* inter alia, while referring to the earlier two decisions, namely, *Bengal Immunity Co. Ltd.* and *Mahant Moti Das*, it was observed in para 8 of the Report as follows: (*Hamdard Dawakhana case,* AIR p. 559)

8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy....

In *Hamdard Dawakhana*, the Court also followed the statement of law in Mahant Moti Das and the two earlier decisions, namely, *Charanjit Lal Chowdhury* v. *Union of India* and *State of Bombay* v. *F.N. Balsara* and reiterated the principle that presumption was always in favour of constitutionality of an enactment.

xx xx xx

30. A well-known principle that in the field of taxation, the legislature enjoys a greater latitude for classification, has been noted by this Court in a long line of cases. Some of these decisions are

Steelworth Ltd. v. *State of Assam* [*Steelworth Ltd.* v. *State of Assam*, MANU/SC/0092/1962 : 1962 Supp (2) SCR 589], *Gopal Narain* v. *State of U.P.* [*Gopal Narain* v. *State of U.P.* MANU/SC/0040/1963 : AIR 1964 SC 370], *Ganga Sugar Corpn. Ltd.* v. *State of U.P.* [*Ganga Sugar Corpn. Ltd.* v. *State of U.P.*, MANU/SC/0397/1979 : (1980) 1 SCC 223: 1980 SCC (Tax) 90], *R.K. Garg* v. *Union of India* [*R.K. Garg* v. *Union of India*, MANU/SC/0074/1981 : (1981) 4 SCC 675: 1982 SCC (Tax) 30] and *State of W.B.* v. *E.I.T.A. India Ltd.* [*State of W.B.* v. *E.I.T.A. India Ltd.*, MANU/SC/0240/2003 : (2003) 5 SCC 239]

xx xx xx

83. It is, thus, clear that in exercise of power of judicial review, the Indian courts are invested with powers to strike down primary legislation enacted by Parliament or the State Legislatures. However, while undertaking this exercise of judicial review, the same is to be done at three levels. In the first stage, the Court would examine as to whether impugned provision in a legislation is compatible with the fundamental rights or the constitutional provisions (substantive judicial review) or it falls foul of the federal distribution of powers (procedural judicial review). If it is not found to be so, no further exercise is needed as challenge would fail. On the other hand, if it is found that legislature lacks competence as the subject legislated was not within the powers assigned in the List in Schedule VII, no further enquiry is needed and such a law is to be declared as ultra vires the Constitution. However, while undertaking substantive judicial review, if it is found that the impugned provision appears to be violative of fundamental rights or other constitutional rights, the Court reaches the second stage of review. At this second phase of enquiry, the Court is supposed to undertake the exercise as to whether the impugned provision can still be saved by reading it down so as to bring it in conformity with the constitutional provisions. If that is not achievable then the enquiry enters the third stage. If the offending portion of the statute is severable, it is severed and the Court strikes down the impugned provision declaring the same as unconstitutional.

76. In support of the aforesaid proposition that an Act of the Parliament can be invalidated only on the aforesaid two grounds, passages from various judgments were extracted[11]. The Court also noted the observations from *State of A.P. and Ors.* v. *MCDOWELL & Co. and Ors.* MANU/SC/0427/1996 : (1996) 3 SCC 709 wherein it was held that apart from the aforesaid two grounds, no third ground is available to validate any piece of legislation. In the process, it was further noted that in *Rajbala and Ors.* v. *State of Haryana and Ors.* MANU/SC/1416/2015 : (2016) 2 SCC 445 (which followed *MCDOWELL & Co.* case), the Court held that a legislation cannot be declared unconstitutional on the ground that it is 'arbitrary' inasmuch as examining as to whether a particular Act is arbitrary or not implies a value judgment and courts do not examine the wisdom of legislative choices, and, therefore, cannot undertake this exercise.

77. The issue whether law can be declared unconstitutional on the ground of arbitrariness has received the attention of this Court in a Constitution Bench judgment in the case of *Shayara Bano* v. *Union of India and Ors.* MANU/SC/1031/2017 : (2017) 9 SCC 1. R.F. Nariman and U.U. Lalit, JJ. discredited the ratio of the aforesaid judgments wherein the Court had held that a law cannot be declared unconstitutional on the ground that it is arbitrary. The Judges pointed out the larger Bench judgment in the case of *Dr. K.R. Lakshmanan* v. *State of T.N. and Anr.* MANU/SC/0309/1996 : (1996) 2 SCC 226 and *Maneka Gandhi* v. *Union of India and Anr.*

MANU/SC/0133/1978 : (1978) 1 SCC 248 where 'manifest arbitrariness' is recognised as the third ground on which the legislative Act can be invalidated. Following discussion in this behalf is worthy of note:

87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the Rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P.* v. *McDowell and Co.*, MANU/SC/0427/1996 : (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

88. We only need to point out that even after *McDowell* [*State of A.P.* v. *McDowell and Co.*, MANU/SC/0427/1996 : (1996) 3 SCC 709], this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In *Malpe Vishwanath Acharya* v. *State of Maharashtra* [*Malpe Vishwanath Acharya* v. *State of Maharashtra*, MANU/SC/0905/1998 : (1998) 2 SCC 1], this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India

(*see* paras 8 to 15 and 31).

xx xx xx

99. However, in *State of Bihar* v. *Bihar Distillery Ltd.* [*State of Bihar* v. *Bihar Distillery Ltd.*, MANU/SC/0354/1997 : (1997) 2 SCC 453], SCC at para 22, in *State of M.P.* v. *Rakesh Kohli* [*State of M.P.* v. *Rakesh Kohli*, MANU/SC/0443/2012 : (2012) 6 SCC 312: (2012) 3 SCC (Civ) 481], SCC at paras 17 to 19, in *Rajbala* v. *State of Haryana* [*Rajbala* v. *State of Haryana*, MANU/SC/1416/2015 : (2016) 2 SCC 445], SCC at paras 53 to 65 and in *Binoy Viswam* v. *Union of India* [*Binoy Viswam* v. *Union of India*, MANU/SC/0693/2017 : (2017) 7 SCC 59], SCC at paras 80 to 82, McDowell [State of A.P. v. McDowell and Co., MANU/SC/0427/1996 : (1996) 3 SCC 709] was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation Under Article 14. As has been noted by us earlier in this judgment, *McDowell [State of A.P.* v. *McDowell and Co.*, MANU/SC/0427/1996 : (1996) 3 SCC 709] itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following *McDowell [State of A.P.* v. *McDowell and Co.*, MANU/SC/0427/1996 : (1996) 3 SCC 709] are, therefore, no longer good law.

78. The historical development of the doctrine of arbitrariness has been noticed by the said Judges in *Shayara Bano* in detail. It would be suffice to reproduce paragraphs 67 to 69 of the said

judgment as the discussion in these paras provide a sufficient guide as to how a doctrine of arbitrariness is to be applied while adjudging the constitutional validity of a legislation.

67. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the Rule of law contained in Article 14. In a significant passage, Bhagwati, J., in *E.P. Royappa* v. *State of T.N.* stated: (SCC p. 38, para 85)

85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. *From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14*, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

68. This was further fleshed out in *Maneka Gandhi* v. *Union of India*, where, after stating that various fundamental rights must be read together and must overlap and fertilise each other, Bhagwati, J., further amplified this doctrine as follows: (SCC pp. 283-84, para 7)

The nature and requirement of the procedure Under Article 21

7. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa* v. *State of T.N.*, namely, that: (SCC p. 38, para 85)

85. ... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14....

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. *The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14*. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

69. This was further clarified in *A.L. Kalra* v. *Project and Equipment Corporation*, following *Royappa* and holding that arbitrariness is a doctrine distinct from discrimination. It was held: (*A.L. Kalra case*, SCC p. 328, para 19)

19. ... It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in *Ajay Hasia case* and put the matter beyond controversy when it said: (SCC p. 741, para 16)

16. ... Wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" Under Article 12, Article 14 immediately springs into action and strikes down such State action.

This view was further elaborated and affirmed in *D.S. Nakara* v. *Union of India*. In *Maneka Gandhi* v. *Union of India* it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14.

The same view was reiterated in *Babita Prasad* v. *State of Bihar*, SCC at p. 285, para 31.

This doctrine is, thus, treated as a facet of both Articles 14 and 21 of the Constitution.

79. We would like to record that we have proceeded on the premise that manifest arbitrariness also furnishes a ground on the basis on which a legislative enactment can be judicially reviewed. In the process, even the constitutional validity of Section 139AA of the Income Tax Act, 1961 is given a fresh look on the touchstone of this norm.

Explaining the doctrine/principles on which the cases are to be decided:

80. Our discussion up to this stage, which gives a glimpse of the attack to the Aadhaar scheme and the Aadhaar Act, spearheaded by the Petitioners, would reveal that in the forefront is the right to privacy and that forms the main pillar on which the edifice of arguments is substantially constructed[12]. Inbuilt in this right to privacy is the right to live with dignity, which is a postulate of right to privacy. In the process, discussion leads to the issue of proportionality, viz. whether measures taken under the Aadhaar Act satisfy the doctrine of proportionality. We would, therefore, be well advised to explain these concepts, so that their application to the fact situation is undertaken with clear and stable norms in mind.

Contours of Right to Privacy:

81. It stands established, with conclusive determination of the nine Judge Bench judgment of this Court in *K.S. Puttaswamy* that right to privacy is a fundamental right. The majority judgment authored by Dr. D.Y. Chandrachud, J. (on behalf of three other Judges) and five concurring judgments of other five Judges have declared, in no uncertain terms and most authoritatively, right to privacy to be a fundamental right. This judgment also discusses in detail the scope and ambit of right to privacy. The relevant passages in this behalf have been reproduced above while taking note of the submissions of the learned Counsel for the Petitioners as well as Respondents. One interesting phenomenon that is discerned from the respective submissions on either side is that both sides have placed strong reliance on different passages from this very judgment to support their respective stances. A close reading of this judgment brings about the following features:

(i) *Privacy has always been a natural right*: The correct position in this behalf has been established by a number of judgments starting from *Gobind* v. *State of M.P.* MANU/SC/0119/1975 : (1975) 2 SCC 148 Various opinions conclude that:

(a) privacy is a concomitant of the right of the individual to exercise control over his or her personality.

(b) Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III.

(c) The fundamental right to privacy would cover at least three aspects - (i) intrusion with an individual's physical body, (ii) informational privacy, and (iii) privacy of choice.

(d) One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.

Following passages from different opinions reflect the aforesaid proposition:

Dr. D.Y. Chandrachud, J.:

42. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality.
The human element in life is impossible to conceive without the existence of natural rights. In 1690, *John Locke* had in his *Second Treatise of Government* observed that the lives, liberties and estates of individuals are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference. In 1765, *William Blackstone* in his *Commentaries on the Laws of England* spoke of a "natural liberty". There were, in his view, absolute rights which were vested in the individual by the immutable laws of nature. These absolute rights were divided into rights of personal security, personal liberty and property. The right of personal security involved a legal and uninterrupted enjoyment of life, limbs, body, health and reputation by an individual.

xx xx xx

46. Natural rights are not bestowed by the State. They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation.

xx xx xx

318. Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.

S.A. Bobde, J.:

415. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.

R.F. Nariman, J.:

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

• Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

• Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

• The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)*(d)* and *(e)* read with Article 21; ground personal information privacy Under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

xx xx xx

532. The learned Counsel for the Petitioners also referred to another important aspect of the right to privacy. According to the learned Counsel for the Petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in para 12, refers to this aspect of the fundamental right contained. It was, therefore, argued before us that given the international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognised and given the status of being fundamental. There is no doubt that the Petitioners are correct in this submission. However, one important roadblock in the way needs to be got over.

533. In *ADM, Jabalpur* v. *Shivakant Shukla*, a Constitution Bench of this Court arrived at the conclusion (by majority) that Article 21 is the sole repository of all rights to life and personal liberty, and, when suspended, takes away those rights altogether. A remarkable dissent was that of Khanna, J. [Khanna, J. was in line to be Chief Justice of India but was superseded because of this dissenting judgment. Nani Palkhivala in an Article written on this great Judge's supersession ended with a poignant sentence, "To the stature of such a man, the Chief Justiceship of India can add nothing." Seervai, in his monumental treatise *Constitutional Law of India* had this to say: "53. If in this Appendix the dissenting judgment of Khanna, J. has not been considered in detail, it is not for lack of admiration for the judgment, or the courage which he showed in delivering it regardless of the cost and consequences to himself. It cost him the Chief Justiceship of India, but it gained for him universal esteem not only for his courage but also for his inflexible judicial independence. If his judgment is not considered in detail it is because under the theory of precedents which we have adopted, a dissenting judgment, however valuable, does not lay down the law and the object of a critical examination of the majority judgments in this Appendix was to show that those judgments are untenable in law, productive of grave public mischief and ought to be overruled at the earliest opportunity. The conclusion which Justice Khanna has reached on the effect of the suspension of Article 21 is correct. His reminder that the Rule of law did not merely mean giving effect to an enacted law was timely, and was reinforced by his reference to the mass murders of millions of Jews in Nazi concentration camps under an enacted law. However, the legal analysis in this Chapter confirms his conclusion though on different grounds from those which he has given." (at Appendix p. 2229).] The learned Judge held: (SCC pp. 747 & 751, paras 525 & 531)

525. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that Article for obtaining relief from the court during the period of emergency. Question then arises as to whether the Rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is the sole repository of the right to life and personal liberty. After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the Rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life and liberty without due process, of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also given expression in varying words to the principle that no one shall be derived of his life or liberty without the authority of law. The International Commission of Jurists, which is affiliated to UNESCO, has been attempting with, considerable success to give material content to "the Rule of law", an expression used in the Universal Declaration of Human Rights. One of its most notable achievements *was the Declaration of Delhi, 1959*. This resulted from a Congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers. "Respect for the supreme value of human personality" was stated to be the basis of all law (see p. 21 of the *Constitutional and Administrative Law* by O. Hood Phillips, 3rd Edn.).

xx xx xx

531. I am unable to subscribe to the view that when right to enforce the right Under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the Framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in *Gopalan case* [*A.K. Gopalan* v. *State of Madras* MANU/SC/0012/1950 : AIR 1950 SC 27: 1950 SCR 88], such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359. I

am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coming into force of the Constitution.

S.K. Kaul, J.:

574. I have had the benefit of reading the exhaustive and erudite opinions of Rohinton F. Nariman and Dr D.Y. Chandrachud, JJ. The conclusion is the same, answering the reference that privacy is not just a common law right, but a fundamental right falling in Part III of the Constitution of India. I agree with this conclusion as privacy is a primal, natural right which is inherent to an individual. However, I am tempted to set out my perspective on the issue of privacy as a right, which to my mind, is an important core of any individual existence.

xx xx xx

620. I had earlier adverted to an aspect of privacy--the right to control dissemination of personal information.

The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase "none of your business".
On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candour in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation. [Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014<https://www.teachprivacy.com/10-reasons-privacy-matters/>.]

xx xx xx

625. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent. [The Second Circuit's decision in *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.*, 202 F 2d 866 (2d Cir 1953) penned by Jerome Frank, J. defined the right to publicity as "the right to grant the exclusive privilege of publishing his picture".]"

xx xx xx

646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or

her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognised as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognise this important, natural, primordial right as a fundamental right.

(ii) *The sanctity of privacy lies in its functional relationship with dignity:* Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusions. While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Further, privacy is a postulate of dignity itself. Also, privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen. This aspect is discussed in the following manner:

Dr. D.Y. Chandrachud, J.:

127. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.

xx xx xx

297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are

concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

xx xx xx

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

S.A. Bobde, J.:

407. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilised societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. Privacy is an essential condition for the

exercise of most of these freedoms. Ex facie, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.

408. Though he did not use the name of "privacy", it is clear that it is what J.S. Mill took to be indispensable to the existence of the general reservoir of liberty that democracies are expected to reserve to their citizens. In the introduction to his seminal *On Liberty* (1859), he characterised freedom in the following way:

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. *Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character*; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of Government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence." [John Stuart Mill, *On Liberty and Other Essays* (Stefan Collini Edition, 1989) (1859)]

409. The first and natural home for a right to privacy is in Article 21 at the very heart of "personal liberty" and life itself. Liberty and privacy are integrally connected in a way that privacy is often the basic condition necessary for exercise of the right of personal liberty. There are innumerable activities which are virtually incapable of being performed at all and in many cases with dignity unless an individual is left alone or is otherwise empowered to ensure his or her privacy. Birth and death are events when privacy is required for ensuring dignity amongst all civilised people. Privacy is thus one of those rights "instrumentally required if one is to enjoy" [Laurence H. Tribe and

Michael C. Dorf, "Levels of Generality in the Definition of Rights", 57 U Chi L Rev 1057 (1990) at p. 1068.] rights specified and enumerated in the constitutional text.

410. This Court has endorsed the view that "life" must mean "something more than mere animal existence" [*Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877) (Per Field, J.) as cited in *Kharak Singh*, MANU/SC/0085/1962 : (1964) 1 SCR 332 at pp. 347-48] on a number of occasions, beginning with the Constitution Bench in *Sunil Batra (1)* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, MANU/SC/0184/1978 : (1978) 4 SCC 494: 1979 SCC (Cri) 155] connected this view of Article 21 to the constitutional value of dignity. In numerous cases, including *Francis Coralie Mullin* v. *UT of Delhi* [*Francis Coralie Mullin* v. *UT of Delhi*, MANU/SC/0517/1981 : (1981) 1 SCC 608: 1981 SCC (Cri) 212], this Court has viewed liberty as closely linked to dignity. Their relationship to the effect of taking into the protection of "life" the protection of "faculties of thinking and feeling", and of temporary and permanent impairments to those faculties. In *Francis Coralie Mullin* [*Francis Coralie Mullin* v. *UT of Delhi*, MANU/SC/0517/1981 : (1981) 1 SCC 608: 1981 SCC (Cri) 212], Bhagwati, J. opined as follows: (SCC p. 618, para 7)

7. Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In *Kharak Singh* v. *State of U.P.* [*Kharak Singh* v. *State of U.P.* MANU/SC/0085/1962 : AIR 1963 SC 1295: (1963) 2 Cri LJ 329: (1964) 1 SCR 332], Subba Rao, J. quoted with approval the following passage from the judgment of Field, J. in *Munn* v. *Illinois* [*Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)] to emphasise the quality of life covered by Article 21: (*Kharak Singh case* [*Kharak Singh* v. *State of U.P.* MANU/SC/0085/1962 : AIR 1963 SC 1295: (1963) 2 Cri LJ 329: (1964) 1 SCR 332] AIR p. 1301, para 15)

15. ... "By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world." '

and this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first *Sunil Batra case* [*Sunil Batra* v. *Delhi Admn.*, MANU/SC/0184/1978 : (1978) 4 SCC 494: 1979 SCC (Cri) 155]. *Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling.* Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that *any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.*

Privacy is, therefore, necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.

411. It is difficult to see how dignity--whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights--can be assured to the individual without privacy. Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right to privacy is an integral part of both "life" and "personal liberty" Under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.

R.F. Nariman, J:

525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual. [In 1834, Jacques-Charles Dupont de l'Eure associated the three terms liberty, equality and fraternity together in the Revue Republicaine, which he edited, as follows: "Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity." Many of our decisions recognise human dignity as being an essential part of the fundamental rights chapter. For example, see *Prem Shankar Shukla* v. *Delhi Admn.*, MANU/SC/0084/1980 : (1980) 3 SCC 526 at para 21, *Francis Coralie Mullin* v. *UT of Delhi*, MANU/SC/0517/1981 : (1981) 1 SCC 608 at paras 6, 7 and 8, *Bandhua Mukti Morcha* v. *Union of India*, MANU/SC/0051/1983 : (1984) 3 SCC 161 at para 10, *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, MANU/SC/0136/2010 : (2010) 3 SCC 786 at para 37, *Shabnam* v. *Union of India*, MANU/SC/0669/2015 : (2015) 6 SCC 702 at paras 12.4 and 14 and *Jeeja Ghosh* v. *Union of India*, MANU/SC/0574/2016 : (2016) 7 SCC 761 at para 37.] The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

S.K. Kaul, J.:

618. Rohinton F. Nariman, and Dr D.Y. Chandrachud, JJ., have emphasised the importance of the protection of privacy to ensure protection of liberty and dignity. I agree with them and seek to refer to some legal observations in this regard:

618.1. In *Robertson and Nicol on Media Law* [Geoffrey Robertson, QC and Andrew Nicol, QC, *Media Law*, 5th Edn., p. 265.] it was observed:

Individuals have a psychological need to preserve an intrusion-free zone for their personality and family and suffer anguish and stress when that zone is violated. Democratic societies must protect privacy as part of their facilitation of individual freedom, and offer some legal support for the

individual choice as to what aspects of intimate personal life the citizen is prepared to share with others. This freedom in other words springs from the same source as freedom of expression: a liberty that enhances individual life in a democratic community.

618.2. Lord Nicholls and Lord Hoffmann in their opinion in *Naomi Campbell case*[*Campbell* v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)] recognised the importance of the protection of privacy. Lord Hoffman opined as under: (AC p. 472 H & 473 A-D, paras 50-51)

50. What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state--I have particularly in mind the position of the media, to which I shall return in a moment--but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other Judges who have considered the matter.

51. The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. ... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity--the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

618.3. Lord Nicholls opined as under: (*Naomi Campbell case* [*Campbell* v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)], AC p. 464 D-F, para 12)

12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J. in *R.* v. *Dyment* [*R.* v. *Dyment*, 1988 SCC OnLine Can SC 86 : (1988) 2 SCR 417], SCC OnLine Can SC para 17: SCR p. 426.

619. Privacy is also the key to freedom of thought. A person has a right to think. The thoughts are sometimes translated into speech but confined to the person to whom it is made. For example, one may want to criticise someone but not share the criticism with the world.

Chelameswar, J.:

372. History abounds with examples of attempts by Governments to shape the minds of subjects. In other words, conditioning the thought process by prescribing what to read or not to read; what forms of art alone are required to be appreciated leading to the conditioning of beliefs; interfering with the choice of people regarding the kind of literature, music or art which an individual would prefer to enjoy. [*Stanley* v. *Georgia*, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)"3. ... that the mere private possession of obscene matter cannot constitutionally be made a crime.***9. ... State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving Government the power to control men's minds." (SCC OnLine US SC paras 3 & 9)] Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which Governments do not approve. [*Bijoe Emmanuel* v. *State of Kerala*, MANU/SC/0061/1986 : (1986) 3 SCC 615] Insofar as religious beliefs are concerned, a good deal of the misery our species suffer owes its existence to and centres around competing claims of the right to propagate religion. Constitution of India protects the liberty of all subjects guaranteeing [**"25. *Freedom of conscience and free profession, practice and propagation of religion.***--(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law--(*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;(*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus. *Explanation I.*--The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. *Explanation II*.--In Sub-clause (*b*) of Clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."] the freedom of conscience and right to freely profess, practice and propagate religion. While the right to freely "profess, practice and propagate religion" may be a facet of free speech guaranteed Under Article 19(1)(*a*), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty. There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief, etc. which form part of the liberty Under Article 21.

373. Concerns of privacy arise when the State seeks to intrude into the body of subjects. [*Skinner* v. *Oklahoma*, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942)"*20.* There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority--even those who have been guilty of what the majority defines as crimes." (SCC OnLine US SC para 20)--Jackson, J.] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right to privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there is a huge debate on those issues though it is still a grey area. [For the legal debate in this area in US, See Chapter 15.11 of *American Constitutional Law* by Laurence H. Tribe, 2nd Edn.] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy. Similarly, the freedom

to choose either to work or not and the freedom to choose the nature of the work are areas of private decision-making process. The right to travel freely within the country or go abroad is an area falling within the right to privacy. The text of our Constitution recognised the freedom to travel throughout the country Under Article 19(1)(*d*). This Court has already recognised that such a right takes within its sweep the right to travel abroad. [*Maneka Gandhi* v. *Union of India*, MANU/SC/0133/1978 : (1978) 1 SCC 248] A person's freedom to choose the place of his residence once again is a part of his right to privacy [*Williams* v. *Fears*, 1900 SCC OnLine US SC 211 : 45 L Ed 186 : 179 US 270 (1900)--"*8.* Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty...." (SCC OnLine US SC para 8)] recognised by the Constitution of India Under Article 19(1)(*e*) though the predominant purpose of enumerating the abovementioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. The choice of appearance and apparel are also aspects of the right to privacy. The freedom of certain groups of subjects to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right to privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling Under Article 25. Informational traces are also an area which is the subject-matter of huge debate in various jurisdictions falling within the realm of the right to privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect biometric data regarding all the residents of this country. The abovementioned are some of the areas where some interest of privacy exists. The examples given above indicate to some extent the nature and scope of the right to privacy.

374. I do not think that anybody in this country would like to have the officers of the State intruding into their homes or private property at will or soldiers quartered in their houses without their consent. I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life. Freedom of social and political association is guaranteed to citizens Under Article 19(1)(*c*). Personal association is still a doubtful area. [The High Court of A.P. held that Article 19(1) (*c*) would take within its sweep the matrimonial association in *T. Sareetha* v. *T. Venkata Subbaiah*, MANU/AP/0161/1983 : AIR 1983 AP 356. However, this case was later overruled by this Court in *Saroj Rani* v. *Sudarshan Kumar Chadha*, MANU/SC/0183/1984 : (1984) 4 SCC 90 : AIR 1984 SC 1562.] The decision-making process regarding the freedom of association, freedoms of travel and residence are purely private and fall within the realm of the right to privacy. It is one of the most intimate decisions.

375. All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21.

376. I am in complete agreement with the conclusions recorded by my learned Brothers in this regard.

(iii) *Privacy is intrinsic to freedom, liberty and dignity:* The right to privacy is inherent to the liberties guaranteed by Part-III of the Constitution and privacy is an element of human dignity. The fundamental right to privacy derives from Part-III of the Constitution and recognition of this right does not require a constitutional amendment. Privacy is more than merely a derivative constitutional right. It is the necessary basis of rights guaranteed in the text of the Constitution. Discussion in this behalf is captured in the following passages:

Dr. D.Y. Chandrachud, J.:

127. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.

S.A. Bobde, J.:

416. There is nothing unusual in the judicial enumeration of one right on the basis of another under the Constitution. In the case of Article 21's guarantee of "personal liberty", this practice is only natural if Salmond's formulation of liberty as "incipient rights" [P.J. Fitzgerald, *Salmond on Jurisprudence* at p. 228.] is correct. By the process of enumeration, constitutional courts merely give a name and specify the core of guarantees already present in the residue of constitutional liberty. Over time, the Supreme Court has been able to imply by its interpretative process that several fundamental rights including the right to privacy emerge out of expressly stated fundamental rights. In *Unni Krishnan, J.P.* v. *State of A.P.* [*Unni Krishnan, J.P.* v. *State of A.P.*, MANU/SC/0333/1993 : (1993) 1 SCC 645], a Constitution Bench of this Court held that "several unenumerated rights fall within Article 21 since personal liberty is of widest amplitude" [*Unni Krishnan, J.P.* v. *State of A.P.*, MANU/SC/0333/1993 : (1993) 1 SCC 645 at p. 669, para 29] on the way to affirming the existence of a right to education. It went on to supply the following indicative list of such rights, which included the right to privacy: (SCC pp. 669-70, para 30)

30. The following rights are held to be covered Under Article 21:

1. The right to go abroad. *Satwant Singh* v. *D. Ramarathnam* [*Satwant Singh Sawhney* v. *D. Ramarathnam*, MANU/SC/0040/1967 : (1967) 3 SCR 525 : AIR 1967 SC 1836].

2. The right to privacy. *Gobind* v. *State of M.P.* [*Gobind* v. *State of M.P.*, MANU/SC/0119/1975 : (1975) 2 SCC 148: 1975 SCC (Cri) 468] In this case reliance was placed on the American decision in *Griswold* v. *Connecticut* [*Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)], US at p. 510.

3. The right against solitary confinement. *Sunil Batra (1)* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, MANU/SC/0184/1978 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155], SCC at p. 545.

4. The right against bar fetters. *Charles Sobhraj* v. *Supt., Central Jail* [*Charles Sobraj* v. *Supt., Central Jail*, MANU/SC/0070/1978 : (1978) 4 SCC 104 : 1978 SCC (Cri) 542].

5. The right to legal aid. *M.H. Hoskot* v. *State of Maharashtra* [*M.H. Hoskot* v. *State of Maharashtra*, MANU/SC/0119/1978 : (1978) 3 SCC 544: 1978 SCC (Cri) 468].

6. The right to speedy trial. *Hussainara Khatoon (1)* v. *State of Bihar* [*Hussainara Khatoon (1)* v. *State of Bihar*, MANU/SC/0119/1979 : (1980) 1 SCC 81: 1980 SCC (Cri) 23].

7. The right against handcuffing. *Prem Shankar* v. *Delhi Admn.* [*Prem Shankar Shukla* v. *Delhi Admn.*, MANU/SC/0084/1980 : (1980) 3 SCC 526 : 1980 SCC (Cri) 815]

8. The right against delayed execution. *T.V. Vatheeswaran* v. *State of T.N.* [*T.V. Vatheeswaran* v. *State of T.N.*, MANU/SC/0383/1983 : (1983) 2 SCC 68 : 1983 SCC (Cri) 342]

9. The right against custodial violence. *Sheela Barse* v. *State of Maharashtra* [*Sheela Barse* v. *State of Maharashtra*, MANU/SC/0382/1983 : (1983) 2 SCC 96: 1983 SCC (Cri) 353].

10. The right against public hanging. *Attorney General of India* v. *Lachma Devi* [*Attorney General of India* v. *Lachma Devi*, 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413].

11. Doctor's assistance. *Paramananda Katara* v. *Union of India* [*Parmanand Katara* v. *Union of India*, MANU/SC/0423/1989 : (1989) 4 SCC 286: 1989 SCC (Cri) 721].

12. Shelter. *Santistar Builders* v. *Narayan Khimalal Totame* [*Shantistar Builders* v. *Narayan Khimalal Totame*, MANU/SC/0115/1990 : (1990) 1 SCC 520].

In the case of privacy, the case for judicial enumeration is especially strong. It is no doubt a fair implication from Article 21, but also more. Privacy is a right or condition, "logically presupposed" [Laurence H. Tribe And Michael C. Dorf, "Levels Of Generality in the Definition of Rights", 57 U Chi L Rev 1057 (1990) at p. 1068.] by rights expressly recorded in the constitutional text, if they are to make sense. As a result, privacy is more than merely a derivative constitutional right.

It is the necessary and unavoidable logical entailment of rights guaranteed in the text of the Constitution.

R.F. Nariman, J:

482. Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in *Jolly George Varghese* v. *Bank of Cochin* [*Jolly George Varghese* v. *Bank of Cochin*, MANU/SC/0014/1980 : (1980) 2 SCC 360], at para 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in *Sunil Batra* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, MANU/SC/0184/1978 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155], at paras 192, 197-B, 234 and 241 and *Prem Shankar Shukla* v. *Delhi Admn.* [*Prem Shankar Shukla* v. *Delhi Admn.*, MANU/SC/0084/1980 : (1980) 3 SCC 526: 1980 SCC (Cri) 815], at paras 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual."

(iv) *Privacy has both positive and negative content:* The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

Dr. D.Y. Chandrachud, J.:

326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual."

(v) *Informational Privacy is a facet of right to privacy:* The old adage that 'knowledge is power' has stark implications for the position of individual where data is ubiquitous, an all-encompassing presence. Every transaction of an individual user leaves electronic tracks without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities. This proposition is described in the following manner:

Dr. D.Y. Chandrachud, J.:

300. Ours is an age of information. Information is knowledge. The old adage that "knowledge is power" has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence. Technology has made life fundamentally interconnected. The internet has become all-pervasive as individuals spend more and more time online each day of their lives.

Individuals connect with others and use the internet as a means of communication. The internet is used to carry on business and to buy goods and services. Individuals browse the web in search of information, to send e-mails, use instant messaging services and to download movies. Online purchases have become an efficient substitute for the daily visit to the neighbouring store. Online banking has redefined relationships between bankers and customers. Online trading has created a new platform for the market in securities. Online music has refashioned the radio. Online books have opened up a new universe for the bibliophile. The old-fashioned travel agent has been rendered redundant by web portals which provide everything from restaurants to rest houses, airline tickets to art galleries, museum tickets to music shows. These are but a few of the reasons people access the internet each day of their lives. Yet every transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests [See Francois Nawrot, Katarzyna Syska and Przemyslaw Switalski, "Horizontal Application of Fundamental Rights--Right to Privacy on the Internet", 9th Annual European Constitutionalism Seminar (May 2010), University of Warsaw, available at <http://en.zpc.wpia.uw.edu.pl/wp-content/uploads/2010/04/9_Horizontal_Application_of_Fundamental_Rights.pdf>.].
Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that do not, of things to be disclosed and those best hidden.

xx xx xx

304. Data mining processes together with knowledge discovery can be combined to create facts about individuals. Metadata and the internet of things have the ability to redefine human existence in ways which are yet fully to be perceived. This, as *Christina Moniodis* states in her illuminating article, results in the creation of new knowledge about individuals; something which even she or he did not possess. This poses serious issues for the Court. In an age of rapidly evolving technology it is impossible for a Judge to conceive of all the possible uses of information or its consequences:

... The creation of new knowledge complicates data privacy law as it involves information the individual did not possess and could not disclose, knowingly or otherwise. In addition, as our State becomes an "information State" through increasing reliance on information--such that information is described as the "lifeblood that sustains political, social, and business decisions. It becomes impossible to conceptualize all of the possible uses of information and resulting harms. Such a situation poses a challenge for courts who are effectively asked to anticipate and remedy invisible, evolving harms." [Christina P. Moniodis, "Moving from Nixon to NASA: Privacy's Second Strand--A Right to Informational Privacy", *Yale Journal of Law and Technology* (2012), Vol. 15 (1), at p. 154.]

The contemporary age has been aptly regarded as "an era of ubiquitous dataveillance, or the systematic monitoring of citizen's communications or actions through the use of information technology" [Yvonne McDermott, "Conceptualizing the Right to Data Protection in an Era of Big Data", *Big Data and Society* (2017), at p. 1.]. It is also an age of "big data" or the collection of data sets. These data sets are capable of being searched; they have linkages with other data sets; and

are marked by their exhaustive scope and the permanency of collection. [*Id*, at pp. 1 and 4.] The challenges which big data poses to privacy interests emanate from State and non-State entities. Users of wearable devices and social media networks may not conceive of themselves as having volunteered data but their activities of use and engagement result in the generation of vast amounts of data about individual lifestyles, choices and preferences. Yvonne McDermott speaks about the quantified self in eloquent terms:

... The rise in the so-called 'quantified self', or the self-tracking of biological, environmental, physical, or behavioural information through tracking devices, Internet-of-things devices, social network data and other means (?Swan. 2013) may result in information being gathered not just about the individual user, but about people around them as well. Thus, a solely consent-based model does not entirely ensure the protection of one's data, especially when data collected for one purpose can be repurposed for another." [Id, at p. 4.]

xx xx xx

328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the State but from non-State actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the State. The legitimate aims of the State would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union Government while designing a carefully structured regime for the protection of the data. Since the Union Government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B.N. Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union Government having due regard to what has been set out in this judgment.

S.K. Kaul, J.:

585. The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable. Edward Snowden shocked the world with his disclosures about global surveillance. States are utilising technology in the most imaginative ways particularly in view of increasing global terrorist attacks and heightened public safety concerns. One such technique being adopted by the States is "profiling". The European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] on data privacy defines "profiling" as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural

persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).]. Such profiling can result in discrimination based on religion, ethnicity and caste. However, "profiling" can also be used to further public interest and for the benefit of national security.

586. The security environment, not only in our country, but throughout the world makes the safety of persons and the State a matter to be balanced against this right to privacy.

587. The capacity of non-State actors to invade the home and privacy has also been enhanced. Technological development has facilitated journalism that is more intrusive than ever before.

588. Further, in this digital age, individuals are constantly generating valuable data which can be used by non-State actors to track their moves, choices and preferences. Data is generated not just by active sharing of information, but also passively, with every click on the "world wide web". We are stated to be creating an equal amount of information every other day, as humanity created from the beginning of recorded history to the year 2003--enabled by the "world wide web". [Michael L. Rustad, SannaKulevska, "Reconceptualizing the right to be forgotten to enable transatlantic data flow", (2015) 28 Harv JL & Tech 349.]

589. Recently, it was pointed out that " "Uber", the world's largest taxi company, owns no vehicles. "Facebook", the world's most popular media owner, creates no content. "Alibaba", the most valuable retailer, has no inventory. And "Airbnb", the world's largest accommodation provider, owns no real estate. Something interesting is happening." [Tom Goodwin "The Battle is for Customer Interface", <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/>.] "Uber" knows our whereabouts and the places we frequent. "Facebook" at the least, knows who we are friends with. "Alibaba" knows our shopping habits. "Airbnb" knows where we are travelling to. Social network providers, search engines, e-mail service providers, messaging applications are all further examples of non-State actors that have extensive knowledge of our movements, financial transactions, conversations--both personal and professional, health, mental state, interest, travel locations, fares and shopping habits. As we move towards becoming a digital economy and increase our reliance on internet-based services, we are creating deeper and deeper digital footprints--passively and actively.

590. These digital footprints and extensive data can be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour and interactions and hence, is valuable information. This is the age of "big data". The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially. A large number of people would like to keep such search history private, but it rarely remains private, and is collected, sold and analysed for purposes such as targeted advertising. Of course, "big data" can also be used to further public interest. There may be cases where collection and processing of big data is legitimate and proportionate, despite being invasive of privacy otherwise.

591. Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision-making processes and shaping

behaviour. It can be used as a tool to exercise control over us like the "big brother" State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford.

592. Thus, there is an unprecedented need for Regulation regarding the extent to which such information can be stored, processed and used by non-State actors. There is also a need for protection of such information from the State. Our Government was successful in compelling Blackberry to give to it the ability to intercept data sent over Blackberry devices. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated. [Kadhim Shubber, "Blackberry gives Indian Government ability to intercept messages" published by Wired on 11-7-2013 <http://www.wired.co.uk/article/blackberry-india>.]

593. The concept of "invasion of privacy" is not the early conventional thought process of "poking ones nose in another person's affairs". It is not so simplistic. In today's world, privacy is a limit on the Government's power as well as the power of private sector entities. [Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>.]

594. George Orwell created a fictional State in *Nineteen Eighty-Four*. Today, it can be a reality. The technological development today can enable not only the State, but also big corporations and private entities to be the "big brother".

xx xx xx

629. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right. The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big, and it cannot be said that a person should be profiled to the nth extent for all and sundry to know.

630. A high school teacher was fired after posting on her Facebook page that she was "so not looking forward to another [school] year" since the school district's residents were "arrogant and snobby". A flight attendant was fired for posting suggestive photos of herself in the company's uniform. [Patricia Sanchez Abril, "Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee", 49 Am Bus LJ 63 at p. 69 (2012).] In the pre-digital era, such incidents would have never occurred. People could then make mistakes and embarrass themselves, with the comfort that the information will be typically forgotten over time.

631. The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The footprints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle [Ravi Antani, "the resistance of memory: could the European union's right to be forgotten exist in the united states?", 30 Berkeley Tech LJ 1173 (2015).].

632. The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their mistakes. It is privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past.

633. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis as they learn their "ABCs": Apple, Bluetooth and chat followed by download, e-mail, Facebook, Google, Hotmail and Instagram. [Michael L. Rustad, SannaKulevska, "Reconceptualizing the right to be forgotten to enable transatlantic data flow", (2015) 28 Harv JL & Tech 349.] They should not be subjected to the consequences of their childish mistakes and naivety, their entire life. Privacy of children will require special protection not just in the context of the virtual world, but also the real world.

634. People change and an individual should be able to determine the path of his life and not be stuck only on a path of which he/she treaded initially. An individual should have the capacity to change his/her beliefs and evolve as a person. Individuals should not live in fear that the views they expressed will forever be associated with them and thus refrain from expressing themselves.

635. Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right to privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.

636. Thus, the European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] has recognised what has been termed as "the right to be forgotten". This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognise a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right cannot be exercised where the information/data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy."

(vi) *Right to privacy cannot be impinged without a just, fair and reasonable law:* It has to fulfill the test of proportionality i.e. (i) existence of a law; (ii) must serve a legitimate State aim; and (iii) proportionality.

Dr. D.Y. Chandrachud, J.:

310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfillment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

311. Apart from national security, the State may have justifiable reasons for the collection and storage of data. In a social welfare State, the Government embarks upon programmes which provide benefits to impoverished and marginalised Sections of society. There is a vital State interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients. Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the State to insist on the collection of authentic data. But, the data which the State has collected has to be utilised for legitimate purposes of the State and ought not to be utilised unauthorisedly for extraneous purposes. This will ensure that the legitimate concerns of the State are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology--legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

312. A distinction has been made in contemporary literature between anonymity on one hand and privacy on the other. [See in this connection, Jeffrey M. Skopek, "Reasonable Expectations of Anonymity", *Virginia Law Review* (2015), Vol. 101, at pp. 691-762.] Both anonymity and privacy prevent others from gaining access to pieces of personal information yet they do so in opposite ways. Privacy involves hiding information whereas anonymity involves hiding what makes it personal. An unauthorised parting of the medical records of an individual which have been furnished to a hospital will amount to an invasion of privacy. On the other hand, the State may

assert a legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic such as malaria or dengue to obviate a serious impact on the population. If the State preserves the anonymity of the individual it could legitimately assert a valid State interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.

313. Privacy has been held to be an intrinsic element of the right to life and personal liberty Under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.

xx xx xx

325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty Under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty Under Article 21. An invasion of life or personal liberty must meet the threefold requirement of (*i*) legality, which postulates the existence of law; (*ii*) need, defined in terms of a legitimate State aim; and (*iii*) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

S.A. Bobde, J.:

426. There is no doubt that privacy is integral to the several fundamental rights recognised by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right to privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which is alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty Under Article 21 is liable to be tested. Under Article 21, the standard test at present is the rationality review expressed in *Maneka Gandhi case* [*Maneka Gandhi* v. *Union of India*, MANU/SC/0133/1978 : (1978) 1 SCC 248]. This requires that any procedure by which the State interferes with an Article 21 right to be "fair, just and reasonable, not fanciful, oppressive or arbitrary" [*Maneka Gandhi* v. *Union of India*, MANU/SC/0133/1978 : (1978) 1 SCC 248 at p. 323, para 48].

R.F. Nariman, J.:

526. But this is not to say that such a right is absolute. This right is subject to reasonable Regulations made by the State to protect legitimate State interests or public interest. However,

when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained Under Article 21 read with Article 14 if it is arbitrary and unreasonable; and Under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, Under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

S.K. Kaul, J.:

638. The concerns expressed on behalf of the Petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

(*i*) The action must be sanctioned by law;

(*ii*) The proposed action must be necessary in a democratic society for a legitimate aim;

(*iii*) The extent of such interference must be proportionate to the need for such interference;

(*iv*) There must be procedural guarantees against abuse of such interference.

Chelameswar, J.:

377. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

378. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry [A challenge Under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of *E.P. Royappa* v. *State of T.N.*, MANU/SC/0380/1973 : (1974) 4 SCC 3: 1974 SCC (L&S) 165: AIR 1974 SC 555, is very simply the lack of any reasoning.]; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus

the amorphous standard of "compelling State interest". The last of these four options is the highest standard of scrutiny [A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in constitutional law, that is, fn 4 in *United States* v. *Carolene Products Co.*, 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.] that a court can adopt. It is from this menu that a standard of review for limiting the right to privacy needs to be chosen.

379. At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions Under Article 19, then the standard of review would be as expressly provided Under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Article 21 is bleak. Without discounting that possibility, it needs to be noted that Article 21 is the bedrock of the privacy guarantee. If the spirit of liberty permeates every claim of privacy, it is difficult, if not impossible, to imagine that any standard of limitation other than the one Under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four.

380. The just, fair and reasonable standard of review Under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. [*District Registrar and Collector* v. *Canara Bank*, MANU/SC/0935/2004 : (2005) 1 SCC 496 : AIR 2005 SC 186], [*State of Maharashtra* v. *Bharat Shanti Lal Shah*, MANU/SC/3789/2008 : (2008) 13 SCC 5] *Gobind* [*Gobind* v. *State of M.P.*, MANU/SC/0119/1975 : (1975) 2 SCC 148 : 1975 SCC (Cri) 468] resorted to the compelling State interest standard in addition to the Article 21 reasonableness enquiry. From the United States, where the terminology of "compelling State interest" originated, a strict standard of scrutiny comprises two things--a "compelling State interest" and a requirement of "narrow tailoring" (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, "compelling State interest" does not have definite contours in the US. Hence, it is critical that this standard be adopted with some *clarity as to when and in what types of privacy claims* it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard Under Article 21 will apply. When the compelling State interest standard is to be employed, must depend upon the context of concrete cases. However, this discussion sets the ground Rules within which a limitation for the right to privacy is to be found.

82. In view of the aforesaid detailed discussion in all the opinions penned by six Hon'ble Judges, it stands established, without any pale of doubt, that privacy has now been treated as part of fundamental rights. The Court has held, in no uncertain terms, that privacy has always been a natural right which gives an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namely:

(i) intrusion with an individual's physical body;

(ii) informational privacy; and

(iii) privacy of choice.

83. As succinctly put by Nariman, J. first aspect involves the person himself/herself and guards a person's rights relatable to his/her physical body thereby controlling the uncalled invasion by the State. Insofar as the second aspect, namely, informational privacy is concerned, it does not deal with a person's body but deals with a person's mind. In this manner, it protects a person by giving her control over the dissemination of material that is personal to her and disallowing unauthorised use of such information by the State. Third aspect of privacy relates to individual's autonomy by protecting her fundamental personal choices. These aspects have functional connection and relationship with dignity. In this sense, privacy is a postulate of human dignity itself. Human dignity has a constitutional value and its significance is acknowledged by the Preamble. Further, by catena of judgments, human dignity is treated as a fundamental right and as a facet not only of Article 21 but that of right to equality (Article 14) and also part of bouquet of freedoms stipulated in Article 19. Therefore, privacy as a right is intrinsic of freedom, liberty and dignity. Viewed in this manner, one can trace positive and negative contents of privacy. The negative content restricts the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

84. A brief summation of the judgment on privacy would indicate that privacy is treated as fundamental right. It is predicated on the basis that privacy is a postulate of dignity and the concept of dignity can be traced to the preamble of the Constitution as well as Article 21 thereof. Further, privacy is considered as a subset of personal liberty thereby accepting the minority opinion in *Kharak Singh* v. *State of U.P. and Ors.* MANU/SC/0085/1962 : AIR 1963 SC 1295 Another significant jurisprudential development of this judgment is that right to privacy as a fundamental right is not limited to Article 21. On the contrary, privacy resonates through the entirety of Part III of the Constitution which pertains to fundamental rights and, in particular, Articles 14, 19 and 21. Privacy is also recognised as a natural right which inheres in individuals and is, thus, inalienable. In developing the aforesaid concepts, the Court has been receptive to the principles in international law and international instruments. It is a recognition of the fact that certain human rights cannot be confined within the bounds of geographical location of a nation but have universal application. In the process, the Court accepts the concept of universalisation of human rights, including the right to privacy as a human right and the good practices in developing and understanding such rights in other countries have been welcomed. In this hue, it can also be remarked that comparative law has played a very significant role in shaping the aforesaid judgment on privacy in Indian context, notwithstanding the fact that such comparative law has only a persuasive value.

85. The whole process of reasoning contained in different opinions of the Hon'ble Judges would, thus, reflect that the argument that it is difficult to precisely define the common denominator of privacy, was rejected. While doing so, the Court referred to various approaches in formulating privacy[13]. An astute and sagacious analysis of the judgment by the Centre for Internet and Society brings about the following approaches which contributed to formulating the following right to privacy:

(a) Classifying privacy on the basis of 'harms', thereby adopting the approach conceptualised by Daniel Solove. In his book, *Understanding Privacy*[14], Daniel Solove makes a case for privacy being a family resemblance concept.

(b) Classifying privacy on the basis of 'interests': Gary Bostwick's taxonomy of privacy is among the most prominent amongst the scholarship that sub-areas within the right to privacy protect different 'interests' or 'justifications'. This taxonomy is adopted in Chelameswar, J.'s definition of 'privacy' and includes the three interests of privacy of repose, privacy of sanctuary and privacy of intimate decision. Repose is the 'right to be let alone', sanctuary is the interest which prevents others from knowing, seeing and hearing thus keeping information within the private zone, and finally, privacy of intimate decision protects the freedom to act autonomously.

(c) Classifying privacy as an 'aggregation of rights': This approach in classifying privacy as a right, as highlighted above, is not limited to one particular provision in the Chapter of Fundamental Rights under the Constitution but is associated with amalgam of different but connected rights. In formulating this principle, the Court has referred to scholars like Roger Clarke, Anita Allen etc. It has led to the recognition of private spaces or zones as protected under the right to privacy (thereby extending the ambit and scope of spatial privacy), informational privacy and decisional autonomy.

86. The important question that arises, which is directly involved in these cases, is:

What is the scope of the right to privacy and in what circumstances such a right can be limited?

87. Concededly, fundamental rights are not absolute. The Constitution itself permits State to impose reasonable restrictions on these rights under certain circumstances. Thus, extent and scope of the right to privacy and how and when it can be limited by the State actions is also to be discerned. As noted above, Nariman, J. has led the path by observing that "when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed". Therefore, examination has to be from the point of view of Articles 14, 19 and 21 for the reason that right to privacy is treated as having intimate connection to various rights in Part III and is not merely related to Article 21. Looked from this angle, the action of the State will have to be tested on the touchstone of Article 14. This judgment clarifies that the 'classification' test adopted earlier has to be expanded and instead the law/action is to be tested on the ground of 'manifest arbitrariness'. This aspect has already been discussed in detail under the caption 'Scope of Judicial Review' above. When it comes to examining the 'restrictions' as per the provisions of Article 19 of the Constitution, the judgment proceeds to clarify that a law which impacts dignity and liberty Under Article 21, as well as having chilling effects on free speech which is protected by Article 19(1)(a), must satisfy the standards of judicial review under both provisions. Therefore, such restriction must satisfy the test of judicial review under: (i) one of the eight grounds mentioned Under Article 19(2); and (ii) the restriction should be reasonable. This Court has applied multiple standards to determine reasonableness, including proximity, arbitrariness, and proportionality. Further, the reasonable restrictions must be in the interests of: (i) the sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order, (v) decency or morality or (vi) in relation to contempt of court, (vii) defamation or (viii) incitement to an offence.

88. The judgment further lays down that in the context of Article 21, the test to be applied while examining a particular provision is the 'just, fair and reasonable test' thereby bringing notion of proportionality.

89. The Petitioners have sought to build their case on the aforesaid parameters of privacy and have submitted that this right of privacy, which is now recognised as a fundamental right, stands violated by the very fabric contained in the scheme of Aadhaar. It is sought to be highlighted that the data which is collected by the State, particularly with the authentication of each transaction entered into by an individual, can be assimilated to construct a profile of such an individual and it particularly violates informational privacy. No doubt, there can be reasonable restrictions on this right, which is conceded by the Petitioners. It is, however, argued that right to privacy cannot be impinged without a just, fair and reasonable law. Therefore, in the first instance, any intrusion into the privacy of a person has to be backed by a law. Further, such a law, to be valid, has to pass the test of legitimate aim which it should serve and also proportionality i.e. proportionate to the need for such interference. Not only this, the law in question must also provide procedural guarantees against abuse of such interference.

90. At the same time, it can also be deduced from the reading of the aforesaid judgment that the reasonable expectation of privacy may vary from the intimate zone to the private zone and from the private zone to the public arena. Further, privacy is not lost or surrendered merely because the individual is in a public place. For example, if a person was to post on Facebook vital information about himself, the same being in public domain, he would not be entitled to claim privacy right. This aspect is highlighted by some of the Hon'ble Judges as under:

Dr. D.Y. Chandrachud, J.:

297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and

privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

xx xx xx

299. Privacy represents the core of the human personality and recognises the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. This state of flux which represents a constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desires to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning Regulations. If the building bye-laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by Regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation.

xx xx xx

307. The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one's identity. Data protection relates closely with the latter sphere. Data such as medical information would be a category to which a reasonable expectation of privacy attaches. There may be other data which falls outside the reasonable expectation paradigm. Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality of consent. Related to the issue of consent is the requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use.

S.A. Bobde, J:

421. Shri Rakesh Dwivedi, appearing for the State of Gujarat, while referring to several judgments of the Supreme Court of the United States, submitted that only those privacy claims which involve a "reasonable expectation of privacy" be recognised as protected by the fundamental right. It is not necessary for the purpose of this case to deal with the particular instances of privacy claims which are to be recognised as implicating a fundamental right. Indeed, it would be premature to do so. The scope and ambit of a constitutional protection of privacy can only be revealed to us on a case-by-case basis.

91. Though Nariman, J. did not subscribe to the aforesaid view in totality, however, His Lordship has also given an example that if a person has to post on Facebook vital information, the same being in public domain, she would not be entitled to the claim of privacy right.

92. We would also like to reproduce following discussion, in the opinion authored by Nariman, J., giving the guidance as to how a law has to be tested when it is challenged on the ground that it violates the fundamental right to privacy:

...Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well. A simple example would suffice. If a person was to paste on Facebook vital information about himself/herself, such information, being in the public domain, could not possibly be claimed as a privacy right after such disclosure. But, in pursuance of a statutory requirement, if certain details need to be given for the statutory purpose concerned, then such details would certainly affect the right to privacy, but would on a balance, pass muster as the State action concerned has sufficient inbuilt safeguards to protect this right--viz. the fact that such information cannot be disseminated to anyone else, save on compelling grounds of public interest.

93. One important comment which needs to be made at this stage relates to the standard of judicial review while examining the validity of a particular law that allegedly infringes right to privacy. The question is as to whether the Court is to apply 'strict scrutiny' standard or the 'just, fair and reasonableness' standard. In the privacy judgment, different observations are made by different Hon'ble Judges and the aforesaid aspect is not determined authoritatively, may be for the reason that the Bench was deciding the reference on the issue as to whether right to privacy is a fundamental right or not and, in the process, it was called upon to decide the specific questions referred to it. We have dealt with this aspect at the appropriate stage.

Principles of Human Dignity:

94. While undertaking the analysis of the judgment in *K.S. Puttaswamy*, we have mentioned that one of the attributes laid down therein is that the sanctity of privacy lies in its functional relationship with dignity. Privacy is the constitutional core of human dignity. In the context of Aadhaar scheme how the concept of human dignity is to be applied assumes significance.

95. In *Common Cause* v. *Union of India* MANU/SC/0232/2018 : (2018) 5 SCC 1, the concept of human dignity has been explained in much detail[15]. The concept of human dignity developed in the said judgment was general in nature which is based on right to autonomy and right of choice and it has become a constitutional value. In the last 40 years or so, this Court has given many landmark judgments wherein concept of human dignity is recognised as an attribute of fundamental rights. In the earlier years, though the meaning and scope of human dignity by itself was not expanded, this exercise has been undertaken in last few years. Earlier judgments have mentioned that human dignity is the intrinsic value of every human being and, in the process, a person's autonomy as an attribute of dignity stands recognised. The judgments rendered in the last few years have attempted to provide jurisprudential basis to the concept of human dignity itself.

96. In *National Legal Services Authority* v. *Union of India and Ors.* MANU/SC/0309/2014 : (2014) 5 SCC 438 while recognising the right of transgenders of self determination of their sex, the Court explained the contours of human dignity in the following words:

106. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspect of self-determination, dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.

107. More than 225 years ago, Immanuel Kant propounded the doctrine of free will, namely, the free willing individual as a natural law ideal. Without going into the detailed analysis of his aforesaid theory of justice (as we are not concerned with the analysis of his jurisprudence) what we want to point out is his emphasis on the "freedom" of human volition. The concepts of volition and freedom are "pure", that is not drawn from experience. They are independent of any particular body of moral or legal rules. They are presuppositions of all such rules, valid and necessary for all of them.

108. Over a period of time, two divergent interpretations of the Kantian criterion of justice came to be discussed. One trend was an increasing stress on the maximum of individual freedom of action as the end of law. This may not be accepted and was criticised by the protagonist of "hedonist utilitarianism", notably Bentham. This school of thought laid emphasis on the welfare of the society rather than an individual by propounding the principle of maximum of happiness to most of the people. Fortunately, in the instant case, there is no such dichotomy between the individual freedom/liberty we are discussing, as against public good. On the contrary, granting the right to choose gender leads to public good. The second tendency of the **Kantian criterion of justice was found in reinterpreting "freedom" in terms not merely of absence of restraint but in terms of attainment of individual perfection.** It is this latter trend with which we are concerned in the present case and this holds good even today. As pointed out above, after the Second World War, in the form of the UN Charter and thereafter there is more emphasis on the

attainment of individual perfection. In that united sense at least there is a revival of the natural law theory of justice. Blackstone, in the opening pages in his "Vattelian Fashion" said that the principal aim of society "is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature....

97. Thus, right of choice and right of self determination were accepted as facets of human dignity. It was also emphasised that in certain cases, like the case at hand (that of transgenders), recognition of this aspect of human dignity would yield happiness to the individuals and, at the same time, also be in public good.

98. Advancement in conceptualising the doctrine of human dignity took place in the case of *Shabnam* v. *Union of India and Ors.* MANU/SC/0669/2015 : (2015) 6 SCC 702 wherein this Court has gone to the extent of protecting certain rights of death convicts by holding that they cannot be executed till they exhaust all available constitutional and statutory remedies. In the process, the Court held as under:

15. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being '*as a human being*'. Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the Accused derive from his dignity as a human being. These may include the presumption that every person is innocent until proven guilty; the right of the Accused to a fair trial as well as speedy trial; right of legal aid, all part of human dignity. Even after conviction, when a person is spending prison life, allowing humane conditions in jail is part of human dignity. Prisons reforms or Jail reforms measures to make convicts a reformed person so that they are able to lead normal life and assimilate in the society, after serving the jail term, are motivated by human dignity jurisprudence.

16. In fact, this principle of human dignity has been used frequently by Courts in the context of considering the death penalty itself. Way back in the year 1972, the United States Supreme Court kept in mind this aspect in the case of *Furman* v. *Georgia* 408 US 238 (1972). The Court, speaking through Brennan, J., while considering the application of Eighth Amendment's prohibition on cruel and unusual punishments, summed up the previous jurisprudence on the Amendment as 'prohibit(ing) the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is '*cruel and unusual*', therefore, if it does not comport with human dignity'. In *Gregg* v. *Georgia* 428 US 153 (1976), that very Court, again through Brennan, J., considered that 'the fatal constitutional infirmity in the punishment of death is that it treats "*members of the human race as non-humans, as objects to be toyed with an discarded. (It is), thus, inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity*'. The Canadian Supreme Court, the Hungarian Constitutional Court and the South African Supreme Court have gone to the extent of holding that capital punishment constitutes a serious impairment of human dignity and imposes a limitation on the essential content of the fundamental rights to life and human dignity and on that touchstone declaring that dignity as unconstitutional.

99. Next judgment in this line of cases would be that of *Jeeja Ghosh and Anr.* v. *Union of India and Ors.* MANU/SC/0574/2016 : (2016) 7 SCC 761 wherein the Court, while expanding the jurisprudential basis, outlined three models of dignity which have been discussed by us above. These were referred to while explaining the normative role of human dignity, alongside, in the following manner:

37. The rights that are guaranteed to differently-abled persons under the 1995 Act, are founded on the sound principle of human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Such a right, now treated as human right of the persons who are disabled, has it roots in Article 21 of the Constitution. Jurisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are: (i) Theological Models, (ii) Philosophical Models, and (iii) Constitutional Models. Legal scholars were called upon to determine the theological basis of human dignity as a constitutional value and as a constitutional right. Philosophers also came out with their views justifying human dignity as core human value. Legal understanding is influenced by theological and philosophical views, though these two are not identical. Aquinas and Kant discussed the jurisprudential aspects of human dignity based on the aforesaid philosophies. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. Even right to equality is interpreted based on the value of human dignity. Insofar as India is concerned, we are not even required to take shelter under theological or philosophical theories. We have a written Constitution which guarantees human rights that are contained in Part III with the caption "Fundamental Rights". One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity. It is the purposive interpretation which has been adopted by this Court to give a content of the right to human dignity as the fulfilment of the constitutional value enshrined in Article 21. Thus, human dignity is a constitutional value and a constitutional goal. What are the dimensions of constitutional value of human dignity? It is beautifully illustrated by Aharon Barak (former Chief Justice of the Supreme Court of Israel) in the following manner:

The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the Constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right.

38. All the three goals of human dignity as a constitutional value are expanded by the author in a scholarly manner. Some of the excerpts thereof, are reproduced below which give a glimpse of these goals:

The first role of human dignity as a constitutional value is expressed in the approach that it comprises the foundation for all of the constitutional rights. Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights. According to Christoph Enders, it is the constitutional value that determines that every person has the right to have rights...

The second role of human dignity as a constitutional value is to provide meaning to the norms of the legal system. According to purposive interpretation, all of the provisions of the Constitution, and particularly all of the rights in the constitutional bill of rights, are interpreted in light of human dignity...

Lastly, human dignity as a constitutional value influences the development of the common law. Indeed, where common law is recognised, Judges have the duty to develop it, and if necessary, modify it, so that it expresses constitutional values, including the constitutional value of human dignity. To the extent that common law determines rights and duties between individuals, it might limit the human dignity of one individual and protect the human dignity of the other.

100. The concept was developed and expanded further in *K.S. Puttaswamy*. The Court held that privacy postulates the reservation of a private space for an individual, described as the right to be let alone, as a concept founded on autonomy of the individual. In this way, right to privacy has been treated as a postulate of human dignity itself. While defining so, the Court also remarked as under:

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty...
The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised...

101. This concept of dignity took a leap forwarded in the case of *Common Cause* v. *Union of India* MANU/SC/0232/2018 : (2018) 5 SCC 1 pertaining to passive euthanasia. Though this right was earlier recognised in *Aruna Ramachandra Shanbaug* v. *Union of India and Ors.* MANU/SC/0176/2011 : (2011) 4 SCC 454, a totally new dimension was given to this right, based on freedom of choice which is to be given to an individual accepting his dignity. There were four concurring opinions. In one of the opinions[16], the aspects of dignity are succinctly brought out in the following manner:

154. Dignity of an individual has been internationally recognised as an important facet of human rights in the year 1948 itself with the enactment of the Universal Declaration of Human Rights. Human dignity not only finds place in the Preamble of this important document but also in Article 1 of the same. It is well known that the principles set out in UDHR are of paramount importance and are given utmost weightage while interpreting human rights all over the world. The first and foremost responsibility fixed upon the State is the protection of human dignity without which any other right would fall apart. Justice Brennan in his book *The Constitution of the United States:* Contemporary Ratification has referred to the Constitution as "a sparkling vision of the supremacy of the human dignity of every individual".

155. In fact, in *Christine Goodwin* v. *United Kingdom* the European Court of Human Rights, speaking in the context of the Convention for the Protection of Human Rights and Fundamental

Freedoms, has gone to the extent of stating that "the very essence of the Convention is respect for human dignity and human freedom". In the South African case of *S.* v. *Makwanyane*, O'Regan, J. stated in the Constitutional Court that "without dignity, human life is substantially diminished".

xx xx xx

157. The concept and value of dignity requires further elaboration since we are treating it as an inextricable facet of right to life that respects all human rights that a person enjoys. Life is basically self-assertion. In the life of a person, conflict and dilemma are expected to be normal phenomena. Oliver Wendell Holmes, in one of his addresses, quoted a line from a Latin poet who had uttered the message, "Death plucks my ear and says, Live--I am coming". That is the significance of living. But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently, should he/she be "Guinea pig" for some kind of experiment? The answer has to be an emphatic "No" because such futile waiting mars the pristine concept of life, corrodes the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy.

xx xx xx

159. In *Mehmood Nayyar Azam* v. *State of Chhattisgarh*, a two-Judge Bench held thus: (SCC p. 6, para 1)

1. ... Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegregably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle", or "a hollow bubble". The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence".

xx xx xx

166. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of

interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognise such dynamism. The Constitution Bench in *Gian Kaur* [*Gian Kaur* v. *State of Punjab*, MANU/SC/0335/1996 : (1996) 2 SCC 648 : 1996 SCC (Cri) 374], as stated earlier, distinguishes attempt to suicide and abetment of suicide from acceleration of the process of natural death which has commenced. The authorities, we have noted from other jurisdictions, have observed the distinctions between the administration of lethal injection or certain medicines to cause painless death and non-administration of certain treatment which can prolong the life in cases where the process of dying that has commenced is not reversible or withdrawal of the treatment that has been given to the patient because of the absolute absence of possibility of saving the life. To explicate, the first part relates to an overt act whereas the second one would come within the sphere of informed consent and authorised omission. The omission of such a nature will not invite any criminal liability if such action is guided by certain safeguards. The concept is based on non-prolongation of life where there is no cure for the state the patient is in and he, under no circumstances, would have liked to have such a degrading state. The words "no cure" have to be understood to convey that the patient remains in the same state of pain and suffering or the dying process is delayed by means of taking recourse to modern medical technology. It is a state where the treating physicians and the family members know fully well that the treatment is administered only to procrastinate the continuum of breath of the individual and the patient is not even aware that he is breathing. Life is measured by artificial heartbeats and the patient has to go through this undignified state which is imposed on him. The dignity of life is denied to him as there is no other choice but to suffer an avoidable protracted treatment thereby thus indubitably casting a cloud and creating a dent in his right to live with dignity and face death with dignity, which is a preserved concept of bodily autonomy and right to privacy. In such a stage, he has no old memories or any future hopes but he is in a state of misery which nobody ever desires to have. Some may also silently think that death, the inevitable factum of life, cannot be invited. To meet such situations, the Court has a duty to interpret Article 21 in a further dynamic manner and it has to be stated without any trace of doubt that the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying. Here, the issue of choice also comes in. Thus analysed, we are disposed to think that such a right would come within the ambit of Article 21 of the Constitution.

102. In the other opinion[17], four facets of euthanasia were discussed, namely: (i) philosophy of euthanasia, (ii) morality of euthanasia, (iii) dignity in euthanasia, and (iv) economics of euthanasia. While discussing dignity in euthanasia, the three models of dignity, namely, theological, philosophical and constitutional model, were highlighted. Thereafter, postulates of dignity have been explained in the following manner:

292. Aharon Barak, former Chief Justice of the Supreme Court of Israel, attributes two roles to the concept of human dignity as a constitutional value, which are:

292.1. Human dignity lays a foundation for all the human rights as it is the central argument for the existence of human rights.

292.2. Human dignity as a constitutional value provides meaning to the norms of the legal system. In the process, one can discern that the principle of purposive interpretation exhorts us to interpret

all the rights given by the Constitution, in the light of the human dignity. In this sense, human dignity influences the purposive interpretation of the Constitution. Not only this, it also influences the interpretation of every sub-constitutional norm in the legal system. Moreover, human dignity as a constitutional value also influences the development of the common law.

xx xx xx

295. Dworkin, being a philosopher-jurist, was aware of the idea of a Constitution and of a constitutional right to human dignity. In his book, *Taking Rights Seriously*, he noted that everyone who takes rights seriously must give an answer to the question why human rights vis-a-vis the State exist. According to him, in order to give such an answer one must accept, as a minimum, the idea of human dignity. As he writes:

Human dignity ... associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognising him as a full member of the human community, and holds that such treatment is profoundly unjust.[18]

296. In his Book, Is *Democracy Possible Here?*[19] **Dworkin develops two principles about the concept of human dignity. First** principle regards the intrinsic value of every person viz. every person has a special objective value which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. **The second** principle, according to Dworkin, is that of personal responsibility. According to this principle, every person has the responsibility for success in his own life and, therefore, he must use his discretion regarding the way of life that will be successful from his point of view. Thus, Dworkin's jurisprudence of human dignity is founded on the aforesaid two principles which, together, not only define the basis but the conditions for human dignity. Dworkin went on to develop and expand these principles in his book, *Justice for Hedgehogs* (2011)[20].

297. When speaking of rights, it is impossible to envisage it without dignity. In his pioneering and all-inclusive *Justice for Hedgehogs*, he proffered an approach where respect for **human dignity, entails two requirements; first, self-respect** i.e. taking the objective importance of one's own life seriously; this represents the free will of the person, his capacity to think for himself and to control his own life and **second, authenticity** i.e. accepting a "special, personal responsibility for identifying what counts as success" in one's own life and for creating that life "through a coherent narrative" that one has chosen[21]. According to Dworkin, these principles form the fundamental criteria supervising what we should do in order to live well.[22] They further explicate the rights that individuals have against their political community,[23] and they provide a rationale for the moral duties we owe to others. This notion of dignity, which Dworkin gives utmost importance to, is indispensable to any civilised society. It is what is constitutionally recognised in our country and for good reason. Living well is a moral responsibility of individuals; it is a continuing process that is not a static condition of character but a mode that an individual constantly endeavours to imbibe. A life lived without dignity, is not a life lived at all for living well implies a conception of human dignity which Dworkin interprets includes ideals of self-respect and authenticity.

103. In summation, it can be said that the concept of human dignity dates back to thousands of years. Historically, human dignity, as a concept, found its origin in different religions which is

held to be an important component of their theological approach. Jurists have given this approach as 'theological model' of dignity. It is primarily based on the premise that human beings are the creation of God and cannot be treated as mere material beings. Human identity is more ethical than spiritual because man is creation of God; harm to a human being is harm to God. God, thus, wishes to grant human being recognition, dignity and authority. It is also religious belief that God is rational and determines his goals for himself. Likewise, human being created by God too is rational and determines his own goal. Therefore, man has freedom of will. A couple of centuries ago, philosophical approach was given to the conception of human dignity. This sphere was headed by German Philosopher Immanuel Kant whose moral theory is divided into two parts: ethics and right. According to Kant, a person acts ethically when he acts by force of a duty that a rational agent self-legislates onto his own will. Thus, he talked of free will of the human being. For Kant, ethics include duties of oneself (for example - to develop one's talents) and to others (for example - to contribute to their happiness). This ability is the human dignity of man. Philosophical approach, thus, is metaethical one, which is a journey from 'human being' and 'remaining human'. This is explained by Professor Upendra Baxi as the relationship between 'self', 'others' and 'society'. In this philosophical sense, dignity is 'respect' for an individual person based on the principle of freedom and capacity of making choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. To put it philosophically, each individual has a right to live her life the way she wants, without any subjugation. One can Rule others, but then it is never noble. It is immoral because the other is not a means to you, the other is an end to herself. Kant also maintains that to use the other as a means is the basic immoral act. Everything else that is immoral is immoral because of this, so this should be the criterion: Are you using the other as a means? Someone has put this remarkably in the following words:

Alexander the Great is not noble, only Gautam the Buddha is noble, for the simple reason that Buddha has no Rule over others but he is a matter of himself.

There is no part of his being which is not in tune with him. He has come to attain absolute harmony. There is no conflict in him, there is a reign of absolute peace. And his consciousness is supreme, nothing is above it - no instinct, no intellect, nothing is higher than his consciousness.

104. Historically, a transition has taken place into the idea of dignity by transforming the amalgam of theological approach (man as creation of God deserving dignity) and philosophical approach based on morality, by elevating human dignity as a constitutional norm attaching constitutional value to it. It is a transition from 'respect' to 'right' by making respect as enforceable right. The manner in which it has happened in India has been traced above.

105. From the aforesaid discussion, it follows that dignity as a jurisprudential concept has now been well defined by this Court. Its essential ingredients can be summarised as under:

The basic principle of dignity and freedom of the individual is an attribute of natural law which becomes the right of all individuals in a constitutional democracy. Dignity has a central normative role as well as constitutional value. This normative role is performed in three ways:

First, it becomes basis for *constitutional rights*;

Second, it serves as an *interpretative principle* for determining the scope of constitutional rights; and,

Third, it determines the *proportionality of a statute* limiting a constitutional right. Thus, if an enactment puts limitation on a constitutional right and such limitation is disproportionate, such a statute can be held to be unconstitutional by applying the doctrine of proportionality.

106. As per Dworkin, there are two principles about the concept of human dignity. First principle regards an 'intrinsic value' of every person, namely, every person has a special objective value, which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. It can also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle is that of 'personal responsibility', which means every person has the responsibility for success in her own life and, therefore, she must use her discretion regarding the way of life that will be successful from her point of view.

107. Sum total of this exposition is well defined by Professor Baxi by explaining that as per the aforesaid view, dignity is to be treated as 'empowerment' which makes a triple demand in the name of 'respect' for human dignity, namely:

(i) respect for one's capacity as an agent to make one's own free choices;

(ii) respect for the choices so made; and

(iii) respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

108. In this entire formulation, 'respect' for an individual is the fulcrum, which is based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'.

109. The aforesaid discourse on the concept of human dignity is from an individual point of view. That is the emphasis of the Petitioners as well. That would be one side of the coin. A very important feature which the present case has brought into focus is another dimension of human dignity, namely, in the form of 'common good' or 'public good'. Thus, our endeavour here is to give richer and more nuanced understanding to the concept of human dignity. Here, dignity is not limited to an individual and is to be seen in an individualistic way. A reflection on this facet of human dignity was stated in *National Legal Services Authority* (Transgenders' case), which can be discerned from the following discussion:

103. A corollary of this development is that while so long the negative language of Article 21 and use of the word "deprived" was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual without the sanction of law, the width and amplitude of this provision has now imposed a positive obligation (*Vincent Panikurlangara* v. *Union of India*) upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity e.g.:

(i) Maintenance and improvement of public health (*Vincent Panikurlangara* v. *Union of India*).

(ii) Elimination of water and air pollution (*M.C. Mehta* v. *Union of India*).

(iii) Improvement of means of communication (*State of H.P.* v. *Umed Ram Sharma*).

(iv) Rehabilitation of bonded labourers (*Bandhua Mukti Morcha* v. *Union of India*).

(v) Providing human conditions in prisons (*Sher Singh* v. *State of Punjab*) and protective homes (*Sheela Barse* v. *Union of India*).

(vi) Providing hygienic condition in a slaughterhouse (*Buffalo Traders Welfare Assn.* v. *Maneka Gandhi*).

104. The common golden thread which passes through all these pronouncements is that Article 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing this human right in terms of human development.

105. The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognise the right of one and all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential. Thus, the emphasis is on the development of an individual in all respects.

110. Christopher McCrudden, an Oxford Academic, in his Article '*Human Dignity and Judicial Interpretation of Human Rights*'[24] published in the European Journal of International Law on September 01, 2008 traces the evolution of concept of human dignity. In substance, his analysis is that in the early stages of social evolution, human dignity was understood as a concept associated with 'status'. Only those individuals were considered worthy of respect who enjoyed a certain status within the social construct. Though one finds statements about dignity of humans as human beings on account of the human being the highest creation of God and his possession of mind and the power of reason in the Oration of Marcus Tullius Cicero, a Roman Politician and Philosopher (63 BC), and in the works of Pico della Mirandola, a Reformation Humanist (1486) *'On the dignity of man'*, yet there existed human beings who were not considered as human beings. There were slaves who were treated at par with animals.

111. Kant expounded the theory that humans should be treated as an end in themselves and not merely as a means to an end with ability to choose their destiny. Emphasis was laid on the intrinsic worth of the human being. Based on this philosophy emerged the initial declaration of rights. Kant wrote thus:

Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (...) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so overall things.

112. Charles Bernard Renouvier, a French Philosopher, said:

Republic is a State which best reconciles dignity of individual with dignity of everyone.

113. Dignity extended to all citizens involves the idea of communitarism. A little earlier in 1798, Friedrich Schiller, a German poet of freedom and philosophy, brought out the connection between dignity and social condition in his work *"Wurde des Menschen"*. He said "(g)ive him food and shelter; when you have covered his nakedness, dignity will follow by itself." It was during the period that abolition of slavery became an important political agenda. Slavery was considered as an affront to human dignity.

114. The Universal Declaration of Human Rights (UDHR) recorded in the Preamble recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. It included freedom from fear and want as amongst the highest aspirations of the common people. This is of course subject to resources of each State. But the realisation is contemplated through national effort and international cooperation. Evidently, the UDHR adopts a substantive or communitarian concept of human dignity. The realisation of intrinsic worth of every human being, as a member of society through national efforts as an indispensable condition has been recognised as an important human right. Truly speaking, this is directed towards the deprived, downtrodden and have nots.

115. We, therefore, have to keep in mind humanistic concept of human dignity which is to be accorded to a particular segment of the society and, in fact, a large segment. Their human dignity is based on the socio-economic rights that are read in to the fundamental rights, as already discussed above.

116. When we read socio-economic rights into human dignity, the community approach also assumes importance along with individualistic approach to human dignity. It has now been well recognised that at its core, human dignity contains three elements, namely, intrinsic value, autonomy and community value. These are known as core values of human dignity. These three elements can assist in structuring legal reasoning and justifying judicial choices in 'hard cases'. It has to be borne in mind that human dignity is a constitutional principle, rather than free standing fundamental rights. Insofar as intrinsic value is concerned, here human dignity is linked to the nature of being. We may give brief description of these three contents of the idea of human dignity as below:

(I) Intrinsic Value:

The uniqueness of human kind is the product of a combination of inherent traits and features - including intelligence, sensibility, and the ability to communicate - that give humans a special status in the world, distinct from other species.[25] The intrinsic value of all individuals results in two basic postulates: anti-utilitarian and anti-authoritarian. The former consists of the formulation of Kant's categorical imperative that every individual is an end in him or herself, not a means for collective goals or the purposes of others. The latter is synthesized in the idea that the State exists for the individual, not the other way around. As for its legal implications, intrinsic value is the origin of a set of fundamental rights. The first of these rights is the right to life, a basic precondition

for the enjoyment of any other right. A second right directly related to the intrinsic value of each and every individual is equality before and under the law. All individuals are of equal value and, therefore, deserve equal respect and concern. This means not being discriminated against due to race, colour, ethnic or national origin, sex, age or mental capacity (the right to non-discrimination), as well as respect for cultural, religious, or linguistic diversity (the right to recognition). Human dignity fulfills only part of the content of the idea of equality, and in many situations it may be acceptable to differentiate among people. In the contemporary world, this is particularly at issue in cases involving affirmative action and the rights of religious minorities. Intrinsic value also leads to the right to integrity, both physical and mental. The right to physical integrity includes the prohibition of torture, slave labour, and degrading treatment or punishment. Discussions on life imprisonment, interrogation techniques, and prison conditions take place within the scope of this right. The right to mental integrity comprises the right to personal honour and image and includes the right to privacy.

(II) Autonomy:

Autonomy is the ethical element of human dignity. It is the foundation of the free will of individuals, which entitles them to pursue the ideals of living well and having a good life in their own ways. The central notion is that of self-determination: An autonomous person establishes the Rules that will govern his or her life. Kantian conception of autonomy is the will governed by the moral law (moral autonomy). Here, we are concerned with personal autonomy, which is value neutral and means the free exercise of the will according to one's own values, interests, and desires. Autonomy requires the fulfillment of certain conditions, such as reason (the mental capacity to make informed decisions), independence (the absence of coercion, manipulation and severe want), and choice (the actual existence of alternatives). Autonomy, thus, is the ability to make personal decisions and choices in life based on one's conception of the good, without undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, including basic freedoms (private autonomy) and the right of political participation (public autonomy).

It would be pertinent to emphasise here that with the rise of the welfare state, many countries in the world (and that includes India) also consider a fundamental right to minimum living conditions (the existential minimum) in the balancing that results into effective autonomy. Thus, there are three facets of autonomy, namely: private autonomy, public autonomy and the existential minimum. Insofar as the last component is concerned, it is also referred to as social minimum or the basic right to the provision of adequate living conditions has its roots in right to equality as well. In fact, equality, in a substantive sense, and especially autonomy (both private and public), are dependent on the fact that individuals are "free from want," meaning that their essential needs are satisfied. To be free, equal, and capable of exercising responsible citizenship, individuals must pass minimum thresholds of well-being, without which autonomy is a mere fiction. This requires access to some essential utilities, such as basic education and health care services, as well as some elementary necessities, such as food, water, clothing, and shelter. The existential minimum, therefore, is the core content of social and economic rights. This concept of minimum social right is protected by the Court, time and again.

(III) Community Value:

This element of human dignity as community value relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him. English poet John Donne expresses the same sentiments when he says 'no man is an island, entire of itself'[26]. The individual, thus, lives within himself, within a community, and within a state. His personal autonomy is constrained by the values, rights, and morals of people who are just as free and equal as him, as well as by coercive Regulation. Robert Post identified three distinct forms of social order: community (a "shared world of common faith and fate"), management (the instrumental organization of social life through law to achieve specific objectives), and democracy (an arrangement that embodies the purpose of individual and collective self-determination. These three forms of social order presuppose and depend on each other, but are also in constant tension.

Dignity as a community value, therefore, emphasises the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life. The relevant question here is in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society is not incompatible, of course, with limitation resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an "overlapping consensus"[27] that can be shared by most individuals and groups. Whenever such tension arises, the task of balancing is to be achieved by the Courts.

We would like to highlight one more significant feature which the issues involved in the present case bring about. It is the balancing of two facets of dignity of the same individual. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the Courts. For, there cannot be undue intrusion into the autonomy on the pretext of conferment of economic benefits. Precisely, this very exercise of balancing is undertaken by the Court in resolving the complex issues raised in the petitions.

Doctrine of Proportionality:

117. As noted above, whenever challenge is laid to an action of the State on the ground that it violates the right to privacy, the action of the State is to be tested on the following parameters:

(a) the action must be sanctioned by law;

(b) the proposed action must be necessary in a democratic society for a legitimate aim; and

(c) the extent of such interference must be proportionate to the need for such interference.

118. Doctrine of proportionality was explained by the Constitution Bench judgment of this Court in *Modern Dental College and Research Centre and Ors.* v. *State of Madhya Pradesh and Ors.* MANU/SC/0495/2016 : (2016) 7 SCC 353. In the first instance, therefore, it would be apt to reproduce the said discussion:

60....Thus, while examining as to whether the impugned provisions of the statute and Rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as "*doctrine of proportionality*". Jurisprudentially, "*proportionality*" can be defined as the set of Rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied [Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012)], a limitation of a constitutional right will be constitutionally permissible if:

(i) it is designated for a proper purpose;

(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;

(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally

(iv) there needs to be a proper relation ("*proportionality stricto sensu*" or "*balancing*") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

61. Modern theory of constitutional rights draws a fundamental distinction between the scope of the constitutional rights, and the extent of its protection. Insofar as the scope of constitutional rights is concerned, it marks the outer boundaries of the said rights and defines its contents. The extent of its protection prescribes the limitations on the exercises of the rights within its scope. In that sense, it defines the justification for limitations that can be imposed on such a right.

62. It is now almost accepted that there are no absolute constitutional rights [Though, debate on this vexed issue still continues and some constitutional experts claim that there are certain rights, albeit very few, which can still be treated as "absolute". Examples given are:(a) Right to human dignity which is inviolable,(b) Right not to be subjected to torture or to inhuman or degrading treatment or punishment. Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished. However, so far such attempts of the States have been thwarted by the judiciary.] and all such rights are related. As per the analysis of Aharon Barak [Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012).], two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the Rule of law. Thus, the requirement of proportional limitations of constitutional

rights by a sub-constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in Clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon--of both the right and its limitation in the Constitution--exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "*losing*" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "*constructive tension*". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. This tension between the two fundamental aspects--rights on the one hand and its limitation on the other hand--is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.

63. In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of "*proportionality*", which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional.

The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary.
This essence of doctrine of proportionality is beautifully captured by Dickson, C.J. of Canada in *R.* v. *Oakes* [*R.* v. *Oakes*, (1986) 1 SCR 103 (Can SC)], in the following words (at p. 138):

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutional protected right or freedom ... Second ... the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test..." Although the nature of the proportionality test will vary

depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be ... rationally connected to the objective. Second, the means ... should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

64. The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

65. We may unhesitatingly remark that this doctrine of proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read Clause (1) along with Clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in a plethora of judgments has held that the expression "*reasonable restriction*" seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of Clause (1) of Article 19 and the social control permitted by any of the Clauses (2) to (6). It is held that the expression "*reasonable*" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object (see *P.P. Enterprises* v. *Union of India*). At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations (see *Mohd. Hanif Quareshi* v. *State of Bihar*). In *M.R.F. Ltd.* v. *State of Kerala*, this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:

(1) The directive principles of State policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.

119. We may note at this stage that there is a growing awareness of the practical importance of the principle of proportionality for rights adjudication and it has sparked a wave of academic scholarship as well. The first integrates the doctrine of proportionality into a broader theoretical framework. It is propounded by Robert Alexy, premised on the theory of rights as principles and optimisation requirements[28]. For Alexy, all norms are either Rules or principles. Constitutional rights are principles, which means that they must be realised to the greatest extent factually and legally possible. For Alexy, the principle of proportionality follows logically from the nature of constitutional rights as principles. On the other hand, Mattias Kumm presented his theory of rights adjudication as Socratic contestation, with proportionality principle at its centre. As per Kumm, proportionality is the doctrinal tool which allows Judges to assess the reasonableness or plausibility, of a policy and thus to determine whether it survives Socratic contestation[29]. Recently, Kai Moller has proposed another theory, which is an autonomy-based theory of what he calls 'the global model of constitutional rights', at the core of which lies the obligation of the State to take the autonomy interests of every person adequately into account[30]. In this process, his understanding of autonomy leads to one consequence, viz., there will often be conflicts of autonomy interests, which have to be resolved in line with each agent's status as an equal. Here, the proportionality principle becomes the doctrinal tool which guides Judges through the process of resolving those conflicts.

One thing is clear from the above, i.e. jurisprudential explanations of proportionality principle. There may be some differences about the approach on the application of proportionality doctrine, it is certain that proportionality has become the *lingua franca* of judicial systems across borders, concerning the circumstances under which it is appropriate to limit fundamental rights.

120. The proportionality test which is stated in the aforesaid judgment, accepting Justice Barak's conceptualisation, essentially takes the version which is used by the German Federal Constitutional Court and is also accepted by most theorists of proportionality. According to this test, a measure restricting a right must, first, serve a legitimate goal (legitimate goal stage); it must, secondly, be a suitable means of furthering this goal (suitability or rational connection stage); thirdly, there must not be any less restrictive but equally effective alternative (necessity stage); and fourthly, the measure must not have a disproportionate impact on the right-holder (balancing stage).

121. Many issues arise while undertaking the exercise of proportionality inquiry. At legitimate goal stage, question arises as to what does it mean to speak of the goal of a policy, and what does it mean to require a goal to be legitimate?[31] With regard to the suitability and necessity stages, some of the open issues are how to deal with empirical uncertainty: should this lead to wide-ranging deference to the elected branches?[32] At the balancing stage, we have to ask the question of what it means to say that a right is 'balanced' against a competing right or public interest. One remarkable feature of the German test is that it tends to push most of the important issues into the last stage, viz., the balancing stage. At the legitimate goal stage, any goal that is legitimate will be accepted. At the suitability stage, even a marginal contribution to the achievement of the goal will

suffice. At the necessity stage, it is very rare for a policy to fail because less restrictive alternatives normally come with some disadvantage and cannot, therefore, be considered equally effective. Thus, the balancing stage dominates the legal analysis and is usually determinative of the outcome.

122. In contrast, Canadian Supreme Court has chartered different course while using proportionality test. *R.* v. *Oakes* (1986) 1 SCR 103 (popularly known as Oakes test), has held that the objective must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'; there must be a rational connection between measure and objective; the means must 'impair "as little as possible" the right or freedom in question'; and finally, 'there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"'. Under this test, arguably more issues are addressed at the earlier stages. Instead of accepting any legitimate goal, Oakes requires a goal 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. And the minimal impairment test is different from the German necessity test both in the way in which it is formulated (there is no requirement that the less restrictive measure be equally effective) and in the way it is applied in practice: the Canadian Supreme Court tends to resolve cases at that stage and not, as the German Federal Constitutional Court, at the balancing stage.

123. There is a great debate as to which out of the aforesaid two approaches is a better approach. Some jurists are of the view that the proper application of the German test leads to a practice of constitutional review with two connected problems: first, as pointed about above, usually almost all the moral work is done at the balancing stage, arguably rendering the earlier stages largely useless and throwing doubt on the truth of the popular argument that proportionality is a valuable doctrine partly because it structures the analysis of rights issues in a meaningful way. Secondly, the balancing act at the final stage is often carried out in an impressionistic fashion which seems to be largely unguided by principle and thus opens the door for subjective, arbitrary and unpredictable judgments encroaching on what ought to be the proper domain of the democratic legislature. These concerns can, however, be addressed. According to Bilchitz[33], first concern can be addressed by focusing on the necessity stage of the test. He takes issue with both the German test - according to which almost all policies are necessary because any alternative policy will usually have some disadvantage which means that it cannot be considered equally effective - and the Canadian minimal impairment test - which, taken seriously, narrows down the range of constitutionally acceptable policies far too much: 'minimal impairment' can be read as insisting that only one measure could pass constitutional scrutiny, namely the measure which impairs the right least.[34] So the alternatives seem to be either to construct the necessity (minimal impairment) test as filtering out almost nothing or to allow only one policy, thus rendering the elected branches partly superfluous. In order to preserve a meaningful but not unduly strict role for the necessity stage, Bilchitz proposes the following inquiry. First, a range of possible alternatives to the measure employed by the Government must be identified. Secondly, the effectiveness of these measures must be determined individually; the test here is not whether each respective measure realises the governmental objective to the same extent, but rather whether it realises it in a 'real and substantial manner'. Thirdly, the impact of the respective measures on the right at stake must be determined. Finally, an overall judgment must be made as to whether in light of the findings of the previous steps, there exists an alternative which is preferable; and this judgment will go beyond the strict

means-ends assessment favoured by Grimm and the German version of the proportionality test; it will also require a form of balancing to be carried out at the necessity stage.

124. Insofar as second problem in German test is concerned, it can be taken care of by avoiding 'ad-hoc balancing' and instead proceeding on some 'bright-line rules' i.e. by doing the act of balancing on the basis of some established Rule or by creating a sound rule. We may point out that whereas Chandrachud, J. has formulated the test of 'legitimate state interest', other two of the Judges, namely, Chelameswar and Sapre, JJ. have used the test of 'compelling state interest' and not 'legitimate state interest'. On the other hand, S.K. Kaul, J. has held that the test to be applied is whether the law satisfies 'public interest'. Nariman, J., on the other hand, pointed out that the Right to Information Act, 2005 has provided for personal information being disclosed to third parties subject to 'larger public interest' being satisfied. If this test is applied, the result is that one would be entitled to invoke 'large public interest' in lieu of 'legitimate state aim' or 'legitimate state interest', as a permissible restriction on a claim to privacy of an individual - a more lenient test. However, since judgment of Chandrachud, J. is on behalf of himself and three other Judges and S.K. Kaul, J. has also virtually adopted the same test, we can safely adopt the test of 'legitimate state interest' as the majority opinion, instead of applying the test of 'compelling state interest'.

125. In *Modern Dental College & Research Centre*, four sub components or proportionality which need to be satisfied were taken note of. These are:

(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right holder (balancing stage).

126. This has been approved in *K.S. Puttaswamy* as well. Therefore, the aforesaid stages of proportionality can be looked into and discussed. Of course, while undertaking this exercise it has also to be seen that the legitimate goal must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and also that such a right impairs freedom as little as possible. This Court, in its earlier judgments, applied German approach while applying proportionality test to the case at hand. We would like to proceed on that very basis which, however, is tempered with more nuanced approach as suggested by Bilchitz. This, in fact, is the amalgam of German and Canadian approach. We feel that the stages, as mentioned in *Modern Dental College & Research Centre* and recapitulated above, would be the safe method in undertaking this exercise, with focus on the parameters as suggested by Bilchitz, as this projects an ideal approach that need to be adopted.

Issues:

127. After setting the tone of the case, it is now time to specify the precise issues which are involved that need to be decided in these matters:

(1) Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?

(a) What is the magnitude of protection that needs to be accorded to collection, storage and usage of biometric data?

(b) Whether the Aadhaar Act and Rules provide such protection, including in respect of data minimisation, purpose limitation, time period for data retention and data protection and security?

(2) Whether the Aadhaar Act violates right to privacy and is unconstitutional on this ground?

{This issue is considered in the context of Sections 7 and 8 of the Aadhaar Act. Incidental issue of 'Exclusion' is also considered here}

(3) Whether children can be brought within the sweep of Sections 7 and 8 of the Aadhaar Act?

(4) Whether the following provisions of the Aadhaar Act and Regulations suffer from the vice of unconstitutionality:

(i) Sections 2(c) and 2(d) read with Section 32

(ii) Section 2(h) read with Section 10 of CIDR

(iii) Section 2(l) read with Regulation 23

(iv) Section 2(v)

(v) Section 3

(vi) Section 5

(vii) Section 6

(viii) Section 8

(ix) Section 9

(x) Sections 11 to 23

(xi) Sections 23 and 54

(xii) Section 23(2)(g) read with Chapter VI & VII - Regulations 27 to 32

(xiii) Section 29

(xiv) Section 33

(xv) Section 47

(xvi) Section 48

(xvii) Section 57

(xviii) Section 59

(5) Whether the Aadhaar Act defies the concept of Limited Government, Good Governance and Constitutional Trust?

(6) Whether the Aadhaar Act could be passed as 'Money Bill' within the meaning of Article 110 of the Constitution?

(7) Whether Section 139AA of the Income Tax Act, 1961 is violative of right to privacy and is, therefore, unconstitutional?

(8) Whether Rule 9(a)(17) of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and the notifications issued thereunder, which mandate linking of Aadhaar with bank accounts, are unconstitutional?

(9) Whether Circular dated March 23, 2017 issued by the Department of Telecommunications mandating linking of mobile number with Aadhaar is illegal and unconstitutional?

(10) Whether certain actions of the Respondents are in contravention of the interim orders passed by the Court, if so, the effect thereof?

128. We now proceed to discuss the arguments on these grounds, as advanced by the Petitioners, reply thereto and our conclusions thereupon.

Surveillance:

Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?

Education took us from thumb impression to signature Technology has taken us from signature to thumb impression, again.

129. It may be remarked at the outset that the argument of surveillance draws sustenance, to a larger extent, from privacy rights as well. Therefore, the arguments which were addressed under this caption have traces of privacy also. However, these are discussed in the context of surveillance state argument.

130. It was submitted that Aadhaar project creates the architecture of a 'cradle to grave' surveillance state and society. This means that it enables the State to profile citizens, track their movements, assess their habits and silently influence their behaviour throughout their lives. Over time, the

profiling enables the State to stifle dissent and influence political decision making. The architecture of the project comprises a Central Identities Data Repository which stores and maintains authentication transaction data. The authentication record comprises the time of authentication and the identity of the requesting entity. The UIDAI and the Authentication Service Agency (ASA) is permitted to store this authentication record for 2 + 5 years (as per Regulations 20 and 26/27 of the Authentication Regulations). Based on this architecture it is possible for the State to track down the location of the person seeking authentication. Since the requesting entity is also identified, the activity that the citizen is engaging in is also known. (Sections 2(d), 2(h), 8, 10, 32 of the Act read with Regulations 18, 20, 26 of the Aadhaar (Authentication) Regulation, 2016).

131. According to the Petitioners, the Authority has the following information (according to the document on technical specification of Aadhaar registered devices published by the Authority in February 2017) - Aadhaar number, name of Aadhaar holder, whether authentication failed or was successful, reason for such failure, requesting entities' Internet Protocol (IP) address, date and time of authentication, device ID and its unique ID of authentication device which can be used to locate the individual.

132. Authentication of Aadhaar number enables tracking, tagging and profiling of individuals as the IP Address of the authentication device gives an idea of its geographical location (determinable within the range of 2 kilometres), country, city, region, pin code/zip code). Mr. Divan submits that an individual is on an electronic leash, tethered to a central data repository that has the architecture to track all activities of an individual. The Aadhaar Act creates a database of all Indian residents and citizens with their core biometric information, demographic information and meta data. In light of the enormous potential of information, concentration of information in a single entity, i.e., the Authority, enabling easier access to aggregated information puts the State in a position to wield enormous power. Given that with advancements in technology, such information can affect every aspect of an individual's personal, professional, religious and social life, such power is a threat to individual freedoms guaranteed Under Articles 19(1)(a) to 19(1)(g) of the Constitution and other fundamental rights guaranteed Under Article 21 (Right to informational privacy) and Article 25 of the Constitution. It was submitted that the Aadhaar Act treats the entire populace of the country as potential criminals ignoring the necessity to balance the State's mandate of protection against crime with the right to personal bodily integrity which is envisaged Under Article 21 read with Article 20(3) of the Constitution. It does not require the collection of data to have a nexus with a crime. Mr. Sibal submits that in the decision in *Selvi and Ors.* v. *State of Karnataka* MANU/SC/0325/2010 : (2010) 7 SCC 263, this Court has held:

The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" Under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3).

133. It is argued that the Aadhaar Act, therefore, violates the right to protection from self-incrimination, and the right to privacy and personal dignity/bodily integrity Under Article 20(3) and Article 21.

134. It was argued that the Constitution of India repudiates mass surveillance as enabled by Aadhaar and the project ought to be struck down on this ground alone. There is no question of balancing or justification in case of a surveillance architecture.

135. Passages from various judgments were quoted in an attempt to establish that surveillance causes interference with right to privacy, life and liberty. From *Kharak Singh* v. *State of U.P.* MANU/SC/0085/1962 : (1964) 1 SCR 332, dissenting opinion of Subba Rao, J. (which has been upheld in K.S. Puttaswamy) was relied upon. With respect to how surveillance constricts right to life and liberty, His Lordship held that:

Now let us consider the scope of Article 21. The expression "life" used in that Article cannot be confined only to the taking away of life, i.e., causing death. In Munn v. Illinois (1), Field, J., defined "life" in the following words:

Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The expression '"liberty" is given a very wide meaning in America. It takes in all the freedoms. In Bolling v. Sharpe (2), the Supreme Court of America observed that the said expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its powers such as police power, the power of eminent domain, the power of taxation etc. The proper exercise of the power which is called the due process of law is controlled by the Supreme Court of America. In India the word "liberty" has been qualified by the word "Personal", indicating thereby that it is confined only to the liberty of the person. The other aspects of the liberty have been provided for in other Articles of the Constitution.

xx xx xx

It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado [[1949] 238 US 25] pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.

xx xx xx

The freedom of movement in Clause (d) of Article 19 therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The Petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do.

136. In the case of *District Registrar and Collector, Hyderabad and Anr.* v. *Canara Bank and Ors.* MANU/SC/0935/2004 : (2005) 1 SCC 496, this Court struck down provisions of a legislation on grounds that it was too intrusive of citizens' right to privacy. The case involved an evaluation of the Andhra Pradesh Stamp Act which authorized the collector to delegate "any person" to enter any premises in order to search for and impound any document that was found to be improperly stamped. After an exhaustive analysis of privacy laws across the world, and in India, the Court held that in the absence of any safeguards as to probable or reasonable cause or reasonable basis, this provision was violative of the constitutionally guaranteed right to privacy "both of the house and of the person". The Court held:

The A.P. amendment permits inspection being carried out by the Collector by having access to the documents which are in private custody i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents 'tending' to or leading to the various facts stated in Section 73 are in existence and Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to R. Rajagopal's case wherein the learned judges have held that the right to personal liberty also means the life free from encroachments unsustainable in law and such right flowing from Article 21 of the Constitution.

137. Reference was made to the U.S. Supreme Court case of *U.S.* v. *Jones* 132 S. Ct. 945 (2012) where the court held that installing a Global Positioning System (GPS) tracking device on a vehicle and using the device to monitor the vehicle's movements constitutes an unlawful search under the Fourth Amendment. Sotomayor, J. in her concurring judgment observed that Fourth Amendment search and seizure is not only concerned with physical trespassory intrusions on property but also non-physical violation of privacy that society recognizes as reasonable. She notes that GPS data can reveal an entire profile of a person simply by knowing the places she visits and that the Government can mine this data in the future:

With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory or owner-installed vehicle tracking devises or GPS enabled smart-phones ... In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the trespassory test may provide little guidance.

xx xx xx

GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations ... disclosed GPS data will be trips to the psychiatrist, plastic surgeon, abortion clinic, AIDS treatment centre, strip club, criminal defence attorney ...

Government can store such records and efficiently mine them for information years into the future... awareness that the government may be watching chills associational and expressive freedom ... it may alter the relationship between citizen and government in a way that is inimical to democratic society.

xx xx xx

I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection ... ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes")... ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

138. The judgment of the ECtHR in *Zakharov* v. *Russia*[35] was also referred to where the ECtHR examined an application claiming violation of Article 8 of the Convention (right to respect for private and family life) alleging that the mobile operators had permitted unrestricted interception of all telephone communications by the security services without prior judicial authorisation, under the prevailing national law. The Court observed that:

Mr. Zakharov was entitled to claim to be a victim of a violation of the European Convention, even though he was unable to allege that he had been the subject of a concrete measure of surveillance. Given the secret nature of the surveillance measures provided for by the legislation, their broad scope (affecting all users of mobile telephone communications) and the lack of effective means to challenge them at national level... Russian law did not meet the "quality of law" requirement and was incapable of keeping the interception of communications to what was "necessary in a democratic society". There had accordingly been a violation of Article 8 of the Convention... existence of arbitrary and abusive surveillance practices, which appear to be due to inadequate safeguards provided by law.

139. The Court held that any interference with the right to privacy Under Article 8 can only be justified Under Article 8(2) if it is in accordance with law, pursues one or more legitimate aims and is necessary in a democratic society to achieve such aim. "In accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the Rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must, thus, meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects. With respect to foreseeability of surveillance, the court held:

Foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are

likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed Rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.

xx xx xx

Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the Rule of law for the discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference.

140. The Court observed that the following minimum safeguards that should be set out in law in order to avoid abuses of power for surveillance are: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.

141. For establishing if the measures were "necessary in a democratic society" in pursuit of a legitimate aim, the Court observed:

When balancing the interest of the Respondent State in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant's right to respect for his or her private life, the national authorities enjoy a certain margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security. However, this margin is subject to European supervision embracing both legislation and decisions applying it. In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society".

142. Two other cases of violation of Article of the European Convention of Human Rights were cited, namely *Digital Rights Ireland Ltd.* v. *Minister for Communication, Marine and Natural Resources* [2014] All ER (D) 66 (Apr) and S and Marper v. United Kingdom (2008) ECHR 1581. In Digital Ireland, the European Parliament and the Council of the European Union adopted Directive 2006/24/EC (Directive), which regulated Internet Service Providers' storage of

telecommunications data. It could be used to retain data generated or processed in connection with the provision of publicly available electronic communications services or of public communications network for the purpose of fighting serious crime in the European Union (EU). The data included data necessary to trace and identify the source of communication and its destination, to identify the date, time duration, type of communication, IP address, telephone number and other fields. The European Court of Justice (ECJ) evaluated the compatibility of the Directive with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and declared the Directive to be invalid. According to the ECJ, the Directive interfered with the right to respect for private life Under Article 7 and with the right to the protection of personal data Under Article 8. It allowed very precise conclusion to be drawn concerning the private lives of the persons whose data had been retained, such as habits of everyday life, permanent or temporary places of residence, daily and other movements, activities carried out, social relationships and so on. The invasion of right was not proportionate to the legitimate aim pursued.

143. In *S and Marper*, the storing of DNA profiles and cellular samples of any person arrested in the United Kingdom was challenged before the ECtHR. Even if the individual was never charged, if criminal proceedings were discontinued, or if the person was later acquitted of any crime, their DNA profile could nevertheless be kept permanently on record. It held that there had been a violation of Article 8 of the ECHR. Fingerprints, DNA profiles and cellular samples, constituted personal data and their retention was capable of affecting private life of an individual. Retention of such data without consent, thus, constitutes violation of Article 8 as they relate to identified and identifiable individuals. The Court held that invasion of privacy was not "necessary in a democratic society as it did not fulfill any pressing social need. The blanket and indiscriminate nature of retention of data was excessive and did not strike a balance between private and public interest.

144. The Respondents, on the other hand, rebutted the arguments of the Petitioners that the architecture of the Aadhaar Act enables State surveillance. It was submitted that bare minimal information was obtained from the individual who enrolled for Aadhaar. Insofar as demographic information is concerned, it included name, date of birth, address, gender, mobile number and email address. The latter two are optional and meant for transmitting relevant information to the AMH and for One Time Password (OTP) based authentication. This information was in respect of an individual and is always in public domain. Section 2(k) of the Aadhaar Act specifically provides that Regulations cannot include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Therefore, sensitive information specifically stands excluded. This specific exclusion, in the context, ensures that the scope of including additional demographic information is very narrow and limited. It was also argued that even the biometric information was limited to the fingerprints and iris scan, which is considered to be the core biometric information. Such information is, again, frequently utilised globally to ascertain the identity of a person. The argument was, thus, that the information gathered was non-invasive and non-intrusive identity information.

145. It was also argued that the very scheme of the Aadhaar and the manner in which it operates excludes every possibility of data profiling and, therefore, the question of State surveillance would not arise. The powerpoint presentation which was given by Dr. Pandey, as has been stated above, was referred to, on the basis of which it was argued that the Aadhaar design takes full care of security of persons.

146. It was also argued by the Respondents that identity information data resides in the CIDR which is not in the control of the Government or the police force. The Authority is a body constituted as a body corporate having perpetual succession and a common seal. It is regulated by substantive and procedural checks to protect the identity information and authentication record. This information cannot be published, displayed or posted publicly. It does not have the authority to carry out surveillance. The State Governments and the police forces cannot obtain the information contained in the CIDR or the authentication records except in two situations contemplated by Section 33 - (i) When the District Judge orders so after giving an opportunity of hearing to the authority (even in this situation core biometric information will not be shared; and (ii) in the interest of National Security where a Joint Secretary or a superior officer of the Government of India specially authorizes in this behalf, and in this case every direction is reviewed by an oversight committee chaired by the Cabinet Secretary. Further, this direction is limited for three months and extendable by a further period of 3 months.

147. It was submitted that surveillance, if at all, can only be carried out by unauthorised use of CIDR information, despite its statutory prohibition and punitive injunctions or by other means such as physical surveillance. That is, however, an illegal surveillance. The architecture of the Act does not allow surveillance. It was submitted that the Petitioners have not made out a case of surveillance by the Authority but points out a mere possibility of surveillance.

148. We may reiterate that the argument of surveillance also has the reflections of privacy and in fact the argument is structured on the basis that the vital information which would be available with the Government can be utilised to create the profiling of individuals and retention of such information in the hands of the Respondents is a risky affair which may enable the State to do the surveillance of any individual it wants.

149. Insofar as the aspect of privacy of individual is concerned, that would be dealt with in detail while addressing that issue. To segregate issue of surveillance from privacy, we are focusing the discussion to the aspect whether there is sufficient data available with the Respondents which may facilitate the profiling and misuse thereof or whether there are sufficient safeguards to ward off the same. In the process, we would be discussing the issues pertaining to data protection as well. At the same time, there would be some overlapping of discussion inasmuch as it will have to be seen as to the collection, storage and use of biometric data satisfies the proportionality principle.

150. It is clear that the argument of the Petitioners is that on the basis of the data available with the Authority, there can be a profiling of an individual which may make the surveillance state. And such a mass surveillance is not permitted by the Constitution of India. The entire foofaraw about the Aadhaar architecture is the so-called enormous information that would be available to the Government on using Aadhaar card by residents. Two issues arise from the respective arguments of the parties:

(a) whether the architecture of the Aadhaar project enables the State to create a regime of surveillance?; and

(b) whether there are adequate provisions for data protection?

151. Insofar as issue (a) above is concerned, after going through the various aspects of the Aadhaar project, the provisions of the Aadhaar Act and the manner in which it operates, it is difficult to accept the argument of the Petitioners. The Respondents have explained that the enrolment and authentication processes are strongly regulated so that data is secure. The enrolment agency, which collects the biometric and demographic of the individuals during enrolment, is appointed either by UIDAI or by a Registrar [Section 2(s)]. The Registrars are appointed through MoUs or agreements for enrolment and are to abide by a code of conduct and processes, policies and guidelines issued by the Authority. They are responsible for the process of enrolment. Categories of persons eligible for appointment are limited by the Regulations. The agency employs a certified supervisor, an operator and a verifier under Enrolment and Update Regulations. Registrars and the enrolling agencies are obliged to use the software provided or authorized by UIDAI for enrolment purpose. The standard software has security features as specified by the Authority. All equipment used is as per the specification issued by the Authority. The Registrars are prohibited from using the information collected for any purpose other than uploading the information to CIDR. Sub-contracting of enrolment function is not allowed. The Code of Conduct contains specific directions for following the confidentiality, privacy and security protocols and submission of periodic reports of enrolment. Not only there are directions prohibiting manipulation and fraudulent practices but the Act contains penal provisions for such violations in Chapter VII of the Regulations. The enrolment agencies are empanelled by the Authority. They are given an enrolling agency code using which the Registrar can onboard such agency to the CIDR. The enrolment data is uploaded to the Central Identities Data Repository (CIDR) certified equipment and software with a digital signature of the Registrar/enrolling agency. The data is encrypted immediately upon capture. The decryption key is with the UIDAI solely. Section 2(ze) of the Information Technology Act, 2000 (hereinafter referred to as the 'IT Act') which defines 'secure systems' and Section 2(w) of the Act, which defines 'intermediaries' apply to the process. Authentication only becomes available through the Authentication Service Agency (ASA). They are regulated by the Aadhaar (Authentication) Regulations, 2016. Their role and responsibilities are provided by Regulation 19 of the Authentication Regulations. They are to use certified devices. The equipment or software has to be duly registered with or approved or certified by the Authority/agency. The systems and operations are audited by information system auditor. The requesting entities pass the encrypted data to the CIDR through the ASA and the response (Yes/No authentication or e-KYC information) also takes the same route back. The server of the ASA has to perform basic compliance and completeness checks on the authentication data packet before forwarding it to the CIDR. The Act prohibits sharing and disclosure of core biometric data Under Section 8 and 29. Other identity information is shared with requesting entity (AUAs and KUAs) only for the limited purpose of authentication. The data is transferred from the requesting entity to the ASA to the CIDR in an encrypted manner through a leased line circuitry using secure Protocols (Regulation 9 of the Authentication Regulations). The storage of data templates is in safely located servers with no public internet inlet/outlet, and offline storage of original encrypted data (PID blocks). There are safety and security provisions such as audit by Information Systems Auditor. Requesting entities are appointed through agreement. They can enter into agreement with sub-AUA or sub-KUA with permission of the UIDAI. Whatever identity information is obtained by the requesting entity is based on a specific consent of the Aadhaar number holder. The e-KYC data shared with the requesting entity can only be after prior consent of the Aadhaar holder. Such data cannot be shared and has to be stored in encrypted form. The biometric information used is not permitted to be stored. Only the logs of authentication transactions are maintained for a short period. Full

identity information is never transmitted back to the requesting entity. There is a statutory bar from sharing biometric information (Section 29(1)(a)/Section 29(4)). Data centres of ASA, requesting entities and CIDR should be within the territory of India. There are various other provisions for monitoring, auditing, inspection, limits on data sharing, data protection, punishments etc., grievance redressal mechanism, suspension and termination of services, etc. so that all actions the entities involved in the process are regulated. Regulation 3(i) & (j) of Aadhaar (Data Security) Regulation, 2016 enables partitioning of CIDR network into zones based on risk and trust and other security measures. CIDR being a computer resource is notified to be a "Protected System" Under Section 70 of the IT Act by the Central Government on December 11, 2015. Anyone trying to unlawfully gain access into this system is liable to be punished with 10 years imprisonment and fine. The storage involves end to end encryption, logical partitioning, firewalling and anonymisation of decrypted biometric data. Breaches of penalty are made punitive by Chapter VII of the Act. Biometric information is deemed to be an "electronic record", and "Sensitive personal data or information" under the IT Act. There are further guards under the Aadhaar (Data Security) Regulations, 2016.

152. That apart, we have recorded in detail the powerpoint presentation that was given by Dr. Ajay Bhushan Pandey, CEO of the Authority, which brings out the following salient features:

(a) During the enrolment process, minimal biometric data in the form of iris and fingerprints is collected. The Authority does not collect purpose, location or details of transaction. Thus, it is purpose blind. The information collected, as aforesaid, remains in silos. Merging of silos is prohibited. The requesting agency is provided answer only in *'Yes'* or *'No'* about the authentication of the person concerned. The authentication process is not exposed to the Internet world. Security measures, as per the provisions of Section 29(3) read with Section 38(g) as well as Regulation 17(1)(d) of the Authentication Regulations are strictly followed and adhered to.

(b) There are sufficient authentication security measures taken as well, as demonstrated in Slides 14, 28 and 29 of the presentation.

(c) The Authority has sufficient defence mechanism, as explained in Slide 30. It has even taken appropriate protection measures as demonstrated in Slide 31.

(d) There is an oversight by Technology and Architecture Review Board (TARB) and Security Review Committee.

(e) During authentication no information about the nature of transaction etc. is obtained.

(f) The Authority has mandated use of Registered Devices (RD) for all authentication requests. With these, biometric data is signed within the device/RD service using the provider key to ensure it is indeed captured live. The device provider RD service encrypts the PID block before returning to the host application. This RD service encapsulates the biometric capture, signing and encryption of biometrics all within it. Therefore, introduction of RD in Aadhaar authentication system Rules out any possibility of use of stored biometric and replay of biometrics captured from other source. Requesting entities are not legally allowed to store biometrics captured for Aadhaar authentication Under Regulation 17(1)(a) of the Authentication Regulations.

(g) The Authority gets the AUA code, ASA code, unique device code, registered device code used for authentication. It does not get any information related to the IP address or the GPS location from where authentication is performed as these parameters are not part of authentication (v2.0) and e-KYC (v2.1) API. The Authority would only know from which device the authentication has happened, through which AUA/ASA etc. It does not receive any information about at what location the authentication device is deployed, its IP address and its operator and the purpose of authentication. Further, the authority or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication Under Section 32(3) of the Aadhaar Act.

153. After going through the Aadhaar structure, as demonstrated by the Respondents in the powerpoint presentation from the provisions of the Aadhaar Act and the machinery which the Authority has created for data protection, we are of the view that it is very difficult to create profile of a person simply on the basis of biometric and demographic information stored in CIDR. Insofar as authentication is concerned, the Respondents rightly pointed out that there are sufficient safeguard mechanisms. To recapitulate, it was specifically submitted that there were security technologies in place (slide 28 of Dr. Pandey's presentation), 24/7 security monitoring, data leak prevention, vulnerability management programme and independent audits (slide 29) as well as the Authority's defence mechanism (slide 30). It was further pointed out that the Authority has taken appropriate proactive protection measures, which included disaster recovery plan, data backup and availability and media response plan (slide 31). The Respondents also pointed out that all security principles are followed inasmuch as: (a) there is PKI-2048 encryption from the time of capture, meaning thereby, as soon as data is given at the time of enrolment, there is an end to end encryption thereof and it is transmitted to the Authority in encrypted form. The said encryption is almost foolproof and it is virtually impossible to decipher the same; (b) adoption of best-in-class security standards and practices; and (c) strong audit and traceability as well as fraud detection. Above all, there is an oversight of Technology and Architecture Review Board (TARB) and Security Review Committee. This Board and Committee consist of very high profiled officers. Therefore, the Act has endeavoured to provide safeguards[36].

154. Issue (b) relates to data protection. According to the Petitioners there is no data protection and there is a likelihood of misuse of data/personal information of the individuals.

155. The question to be determined is whether the safeguards provided for the protection of personal biometric data in the Aadhaar Act and Rules are sufficient. The crucial tasks that the Court needs to undertake are - (i) to discuss the significance of data in the world of technology and its impact; (ii) to determine the magnitude of protection that should be accorded to collection, storage and use of sensitive biometric data, so that they can qualify as proportionate; and (iii) to determine whether the Aadhaar Act and Rules provide such data protection, thereby obviating any possibility of surveillance.

(i) Significance of Data:

156. Alvin Toffler in his illuminating Article titled '*What will our future be like?*' has presented mind boggling ideas. Toffler traces the transition - from agriculture society to industry society to knowledge based society. If we go back to the beginnings of time, agriculture was the prime source

and the entire mankind was based on agriculture. 350 years later with the invention of steam engines came the industrialized age and now what we are living through is the third gigantic wave, which is way more powerful than industrialized age. An age that is based on knowledge. Toffler emphasises that in today's society the only thing that leads to creation of wealth is knowledge. Unlike the past wherein economics was described as the science of the allocation of scarce resources, today we are primarily dependent on knowledge and that is not a scarce resource. Times are changing, we can no longer trust the straight line projection. His view is that we are going from a society which is more and more uniform to a highly de-massified society. Knowledge is power. We are in the era of information. Probably what Toffler is hinting is that access to this vast reservoir of information is available in digital world. Information is available online, at the touch of a button. With this, however, we usher into the regime of data.

157. In a recent speech by Mr. Benjamin Netanyahu, Prime Minister of Israel, while talking about innovation and entrepreneurship, he brought out an interesting phenomena in the world of free market principles, i.e. in the era of globalisation, in the following words:

Look at the ten leading companies in 2006, five energy companies, one IT company Microsoft and a mere ten years later, in 2016, a blink of an eye, in historical terms, its completely reversed, five IT companies one energy company left. The true wealth is in innovation - you know these companies - Apple, Google, Microsoft, Amazon, Facebook.

158. He adds by making a significant statement as the reason behind this change:

...there is a reason something is going on, it's a great change - you want to hear a jargan - it's a one sentence, this is a terrible sentence, but I have no other way to say, it's a confluence of big data, connectivity and artificial intelligence. Ok, you get that? You know what that does - it revolutionises old industries and it creates entirely new industries, so here is an old industry that Israel was always great in - Agriculture. We are always good in agriculture but now we have precision agriculture. You know what that is? See that drone in the sky is connected to a big database and there is sensor at the field and in the field there is drip irrigation and drip fertilization and now we can target with this technology the water that we give, the fertilizer that we give down to the individual plant that needs it. That's precision agriculture, that's Israel. Unbelievable.

159. This brings us to the world of data - big data. It has its own advantages of tremendous nature. It is making life of people easier. People can connect with each other even when they are located at places far away from each other. Not only they can converse with each other but can even see each other while talking. There is a wealth of information available on different networks to which they can easily access and satisfy their quest for knowledge within seconds by getting an answer. People can move from one place to the other with the aid of Global Positioning System (GPS). They can hear music and watch movies on their handy gadgets, including smart cellphones. We are in the age of digital economy which has enabled multiple avenues for a common man. Internet access is becoming cheaper by the day, which can be accessed not only through the medium of desktop computers or laptops and even other handy gadgets like smart phones. Electronic transactions like online shopping, bill payments, movie/train/air ticket bookings, funds transfer, e-wallet payments, online banking and online insurance etc. are happening with extreme ease at the touch of a finger. Such tasks can be undertaken sitting in drawing rooms. Even while travelling

from one place to the other in their car, they can indulge in all the aforesaid activities. In that sense, technology has made their life so easy.

160. However, there is another side to do as well, like any coin which has two sides. The use of such technologies is at the cost of giving away personal information, which is in the realm of privacy. In order to connect with such technologies and avail their benefits, the users are parting with their biometric information like fingerprints and iris as well as demographic information like their names, parentage, family members, their age, even personal information like their sex, blood group or even the ailments they are suffering from. Not only this, use of aforesaid facilities on net or any portal like Apple, Google, Facebook etc. involves tracking their movements, including the nature of activities, like the kind of shopping, the places from where shopping is done, the actual money spent thereon, the nature of movies watched etc. All this data is there with the companies in respect of its users which may even turn into metadata. In fact, cases after cases are reported where such data of users is parted with various purposes. Interestingly, for using such facilities, people knowingly and willingly, are ready to part with their vital personal information. Every transaction on a digital platform is linked with some form of sensitive personal information. It can be an individual's user name, password, account number, PAN number, biometric details, e-mail ID, debit/credit card number, CVV number and transaction OTP etc.

161. These have raised concerns about the privacy and protection of data, which has become a matter of great concern. Problem is not limited to data localisation but has become extra-territorial. There are issues of cross-border transfers of personal data, Regulation whereof is again a big challenge with which various opinions are grappling. There are even talks of convergence of regulatory regime in this behalf so that uniform approach is adopted in providing a legal ecosystem to regulate cross-border data transfer. Asian Business Law Institute (ABLI), in collaboration with Singapore Academy of Law (SAL) has, after undertaking in-depth study, compiled 14 country reports in their respective jurisdictions on the Regulation of cross-border data transfer and data localisation in Asia.

162. In the aforesaid scenario, interesting issue is posed by the Respondents, viz., when so much personal information about people is already available in public domain, how can there be an expectancy of data privacy. That aspect is dealt with while discussing the issue of privacy. Here, we are concerned with data protection under Aadhaar that is available with the State. As pointed out above, even in respect of private players, the data protection has become a matter of serious concern. When it comes to the State or the instrumentality of the State, the matter has to be taken with all seriousness, on the touchstone of constitutionalism and the concept of limited Government.

(ii) Law on Data Protection:

163. In order to determine this aspect, i.e. the nature and magnitude of data protection that is required to enable legal collection and use of biometric data, reliance can be placed on - (a) various existing legislations - both in India and across the world; and (b) case law including the judgment in *K.S. Puttaswamy*.

(a) Legislation in India:

(i) *Information Technology Act, 2000*

The only existing legislation covering data protection related to biometric information are Section 43A and Section 72A of the IT Act and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (hereinafter "Sensitive Personal Data Rules"). Although the IT Act and Rules do not determine the constitutionality of use of biometric data and information by the Aadhaar Act and Rules, they are instructive in determining the safeguards that must be taken to collect biometric information[231].

164. Following are the provisions which cover biometric information under the IT Act:

Section 43A of the IT Act attaches liability to a body corporate, which is possessing, handling and dealing with any 'sensitive personal information or data' and is negligent in implementing and maintaining reasonable security practices resulting in wrongful loss or wrongful gain to any person. 'Sensitive personal information or data' is defined Under Rule 3 of the Sensitive Personal Data Rules to include information relating to biometric data. Section 43A reads as follows:

43A. Compensation for failure to protect data. -Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

Explanation. -For the purposes of this section,-

(i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;

(ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;

(iii) "sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.]

165. Similarly, Section 72A of the IT Act makes intentional disclosure of 'personal information' obtained under a contract, without consent of the parties concerned and in breach of a lawful contract, punishable with imprisonment and fine. Rule 2(i) of the Sensitive Personal Data Rules define "personal information" to mean any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person. Thus, biometrics will form a part of "personal information". The Section reads as under-

72A. Punishment for disclosure of information in breach of lawful contract - Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.

166. The Sensitive Personal Data Rules provide for additional requirements on commercial and business entities (body corporates as defined Under Section 43A of the IT Act) relating to the collection and disclosure of sensitive personal data (including biometric information). The crucial requirements, which are indicative of the principles for data protection that India adheres to, *inter alia* include:

(i) The body corporate or any person who on behalf of body corporate collects, receives, possesses, stores, deals or handle information of provider of information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and ensure that the same are available for view.

(ii) Body corporate or any person on its behalf shall obtain consent in writing from the provider of the sensitive personal data or information regarding purpose of usage before collection of such information.

(iii) Body corporate or any person on its behalf shall not collect sensitive personal data or information unless--(a) the information is collected for a lawful purpose connected with a function or activity of the body corporate or any person on its behalf; and (b) the collection of the sensitive personal data or information is considered necessary for that purpose.

(iv) The person concerned has the knowledge of--(a) the fact that the information is being collected; (b) the purpose for which the information is being collected; (c) the intended recipients of the information; and (d) name and address of the agency collecting and retaining the information.

(v) Body corporate or any person on its behalf holding sensitive personal data or information shall not retain that information for longer than is required for the purposes for which the information may lawfully be used or is otherwise required under any other law for the time being in force.

(vi) Information collected shall be used for the purpose for which it has been collected.

(vii) Body corporate or any person on its behalf shall, prior to the collection of information, including sensitive personal data or information, provide an option to the provider of the information to not to provide the data or information sought to be collected.

(viii) Body corporate shall address any discrepancies and grievances of their provider of the information with respect to processing of information in a time bound manner.

(ix) Disclosure of sensitive personal data or information by body corporate to any third party shall require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise, unless such disclosure has been agreed to in the contract between the body corporate and provider of information, or where the disclosure is necessary for compliance of a legal obligation.

(x) A body corporate or a person on its behalf shall comply with reasonable security practices and procedure i.e. implement such security practices and standards and have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business. In the event of an information security breach, the body corporate or a person on its behalf shall be required to demonstrate, as and when called upon to do so by the agency mandated under the law, that they have implemented security control measures as per their documented information security programme and information security policies.

The above substantive and procedural safeguards are required for legal collection, storage and use of biometric information under the IT Act. They indicate the rigour with which such processes need to be carried out.

Position in other countries:

(a) *EUGDPR (European Union General Data Protection Regulation)*[37]

EUGDPR which was enacted by the EU in 2016 came into force on May 25, 2018 replacing the Data Protection Directive of 1995. It is an exhaustive and comprehensive legal framework that is aimed at protection of natural persons from the processing of personal data and their right to informational privacy. It deals with all kinds of processing of personal data while delineating rights of data subjects and obligations of data processors in detail. The following fundamental principles of data collection, processing, storage and use reflect the proportionality principle underpinning the EUGDPR -

(i) the personal data shall be processed lawfully, fairly, and in a transparent manner in relation to the data subject (*principle of lawfulness, fairness, and transparency*);

(ii) the personal data must be collected for specified, explicit, and legitimate purposes (*principle of purpose limitation*); (iii) processing must also be adequate, relevant, and limited to what is necessary (*principle of data minimization*) as well as accurate and, where necessary, kept up to date (*principle of accuracy*);

(iv) data is to be kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (*principle of storage limitation*);

(v) data processing must be secure (*principle of integrity and confidentiality*); and

(vi) data controller is to be held responsible (*principle of accountability*).

167. The EUGDPR Under Article 9 prohibits the collection of biometric data unless except in few circumstances which include (but are not limited to) -

(a) there is an explicit consent by the party whose data is being collected. The consent should be freely given, which is clearly distinguishable in an intelligible and easily accessible form, using clear and plain language. This consent can be withdrawn at any time without affecting the actions prior to the withdrawal;

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law;

(c) processing relates to personal data which is manifestly made public by the data subject; and

(d) processing is necessary for reasons of substantial public interest, and it shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

168. The Regulation also institutes rights of the data subject (the person whose data is collected), subject to exceptions, which include the data subject's right of access to information about the purpose of collection of data, details of data controller and subsequent use and transfer of data, the data subject's right to rectification of data, right to erasure or right to be forgotten, the data subject's right to restriction of processing, the right to be informed, the right to data portability and the data subject's right to object to illegitimate use of data.

(b) Biometric Privacy Act in the United States of America

169. Some States in the United States of America have laws regulating collection and use of biometric information. Illinois has passed Biometric Information Privacy Act (740 ILCS 14/1 or BIPA) in 2008. Texas has also codified the law for capture of use of biometric identifier (Tex. Bus. & Com. Code Ann. §503.001) in 2009. The Governor of the Washington State signed into law House Bill 1493 ("H.B. 1493") on May 16, 2017, which sets forth requirements for businesses who collect and use biometric identifiers for commercial purposes. BIPA, Illinois, for example makes it unlawful for private entities to collect, store, or use biometric information, such as retina/iris scans, voice scans, face scans, or fingerprints, without first obtaining individual consent for such activities. BIPA also requires that covered entities take specific precautions to secure the information.

(b) Case Laws:

170. In *K.S. Puttaswamy's* judgment, all the Judges highlighted the importance of informational privacy in the age of easy access, transfer, storage and mining of data. The means of aggregation and analysis of data of individuals through various tools are explained. Chandrachud, J. observed that with the increasing ubiquity of electronic devices, information can be accessed, stored and

disseminated without notice to the individual. Metadata and data mining make the individual's personal information subject to private companies and the state. In this background, His Lordship discusses the necessity of a data protection regime for safeguarding privacy and protecting the autonomy of the individual. The following observations in the conclusion of the judgment are worth quoting:

328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment.

171. S.K. Kaul, J. cited the *European Union General Data Protection Regulations*[37] to highlight the importance of data protection and the circumstances in which restrictions on the right to privacy may be justifiable subject to the principle of proportionality. These include balance against other fundamental rights, legitimate national security interest, public interest including scientific or historical research purposes or statistical purposes, criminal offences, tax purposes, etc.

172. There are numerous case laws - both American and European - presented by the Petitioners and the Respondents with respect to the collection, storage and use of biometric data which have been taken note of above. They are illustrative of the method and safeguards required to satisfy the proportionality principle while dealing with biometric data. The first set of cases cited by the Petitioners are cases from European Human Rights Courts.

173. The European Human Rights legislations have both explicitly and through case laws recognized the right to informational privacy and data protection. The EU Charter of Fundamental Rights states in Article 7 that 'everyone has the right to respect for his or her private and family life, home and communications' and in Article 8 it grants a fundamental right to protection of personal data. The first Article of the EU Charter affirms the right to respect and protection of human dignity. The ECHR also recognises the right to respect for private and family life, home and his correspondence which have been read to include protection of right to control over personal biometric information.

174. As pointed out above as well, a prominent case which addresses the question of storage of biometric data, i.e. whether storage and retention of DNA samples and fingerprints violates Article 8 of the ECHR, is *S and Marper*[38]. In this case, the storing of DNA profiles and cellular samples of any person arrested in the United Kingdom was challenged before the ECtHR. Even if the individual was never charged or if criminal proceedings were discontinued or if the person was

later acquitted of any crime, their DNA profile could nevertheless be kept permanently on record without their consent.

175. In a unanimous verdict, the seventeen-judge bench held that there had been a violation of Article 8 of the ECHR. Fingerprints, DNA profiles and cellular samples, constituted personal data and their retention was capable of affecting private life of an individual. The retention of such data without consent, thus, constitutes violation of Article 8 as they relate to identified and identifiable individuals. It held that:

84. ...fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant.

176. It articulated the proportionality principle in the following words:

101. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient.

xx xx xx

The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored ... The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse.

177. The issue in the case according to the Court was whether the retention of the fingerprints and DNA data of the applicants, as persons who had been suspected but not convicted of certain criminal offences, was justified Under Article 8 of the Convention.

178. The Court held that such invasion of privacy was not proportionate as it was not "necessary in a democratic society" as it did not fulfill any pressing social need. The blanket and indiscriminate nature of retention of data was excessive and did not strike a balance between private and public interest. It held:

125. the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and

private interests and that the Respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data.

179. The two crucial aspects of the case that need to be kept in mind are - First, in that case, the fingerprints were collected for criminal purposes and without the consent of the individual to whom the fingerprints belonged. Second, the fingerprints were to be stored indefinitely without the consent of the individual and that the individual did not have an option to seek deletion. These aspects were vital for the Court to decide that the retention violated the citizen's right to privacy.

180. Similarly, in the *Digital Ireland* case[39], the European Parliament and the Council of the European Union adopted Directive 2006/24/EC (Directive), which regulated Internet Service Providers' storage of telecommunications data. It could be used to retain data which was generated or processed in connection with the provision of publicly available electronic communications services or of public communications network, for the purpose of fighting serious crime in the European Union. The data included data necessary to trace and identify the source of communication and its destination, to identify the date, time duration, type of communication, IP address, telephone number and other fields. The Court of Justice of European Court (CJEU) evaluated the compatibility of the Directive with Articles 7 and 8 of the Charter and declared the Directive to be invalid.

181. According to the CJEU, the Directive interfered with the right to respect for private life Under Article 7 and with the right to the protection of personal data Under Article 8 of the Charter of Fundamental Rights of the European Union. It allowed very precise conclusion to be drawn concerning the private lives of the persons whose data had been retained, such as habits of everyday life, permanent or temporary places of residence, daily and other movements, activities carried out, social relationships and so on. The invasion of right was not proportionate to the legitimate aim pursued for the following reasons:

(i) Absence of limitation of data retention pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved.

(ii) Absence of objective criterion, substantive and procedural conditions to determine the limits of access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions. There was no prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data and their use to what is strictly necessary for attaining the objective pursued.

(iii) Absence of distinction being made between the categories of data collected based on their possible usefulness.

(iv) Period of retention i.e. 6 months was very long being not based on an objective criterion.

(v) Absence of Rules to protect data retained against the risk of abuse and against any unlawful access and use of that data.

(vi) Directive does not require the data in question to be retained within the European Union.

182. In *Tele 2 Sverige AB* v. *Post-och telestyrelsen*[40], the CJEU was seized with the issue as to whether in light of Digital Rights Ireland, a national law which required a provider of electronic communications services to retain meta-data (name, address, telephone number and IP address) regarding users/subscribers for the purpose of fighting crime was contrary to Article 7, 8 and 11 of the EU Charter. The CJEU struck down the provision allowing collection of such meta data on grounds of lack of purpose limitation, data differentiation, data protection, prior review by a court or administrative authority and consent, amongst other grounds. It held:

103. While the effectiveness of the fight against serious crime, in particular organised crime and terrorism (...) cannot in itself justify that national legislation providing for the general and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight.

xx xx xx

105. Second, national legislation (...) provides for no differentiation, limitation or exception according to the objective pursued. It is comprehensive in that it affects all persons using electronic communication services, even though those persons are not, even indirectly, in a situation that is liable to give rise to criminal proceedings. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious criminal offences. Further, it does not provide for any exception, and consequently it applies even to persons whose communications are subject, according to Rules of national law, to the obligation of professional secrecy.

xx xx xx

if it is to be ensured that data retention is limited to what is strictly necessary, it must be observed that, while those conditions may vary according to the nature of the measures taken for the purposes of prevention, investigation, detection and prosecution of serious crime, the retention of data must continue nonetheless to meet objective criteria, that establish a connection between the data to be retained and the objective pursued. In particular, such conditions must be shown to be such as actually to circumscribe, in practice, the extent of that measure and, thus, the public affected.

183. With respect to measures for data security and data protection the court held:

122. Those provisions require those providers to take appropriate technical and organisational measures to ensure the effective protection of retained data against risks of misuse and against any unlawful access to that data. Given the quantity of retained data, the sensitivity of that data and the risk of unlawful access to it, the providers of electronic communications services must, in order to ensure the full integrity and confidentiality of that data, guarantee a particularly high level of

protection and security by means of appropriate technical and organisational measures. In particular, the national legislation must make provision for the data to be retained within the European Union and for the irreversible destruction of the data at the end of the data retention period.

184. In *BVerfG*[41], the German Constitutional Court rendered on March 02, 2010 a decision by which provisions of the data retention legislation adopted for, *inter alia*, the prevention of crime were rendered void because of lack of criteria for rendering the data retention proportional.

185. In *Maximillian Schrems* v. *Data Protection Commissioner* [2016] 2 W.L.R. 873, the CJEU struck down the transatlantic US-EU Safe Harbor agreement that enabled companies to transfer data from Europe to the United States on the ground that there was not an adequate level of safeguard to protect the data. It held that the U.S. authorities could access the data beyond what was strictly necessary and proportionate to the protection of national security. The subject had no administrative or judicial means of accessing, rectifying or erasing their data.

186. In *Szabo and Vissy* v. *Hungary* Eur. Ct. H.R. 2016, the ECtHR held unanimously that there had been a violation of Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention on Human Rights. The case concerned Hungarian legislation on secret anti-terrorist surveillance introduced in 2011. The court held that the legislation in question did not have sufficient safeguards to avoid abuse. Notably, the scope of the measures could include virtually anyone in Hungary, with new technologies enabling the Government to intercept masses of data easily concerning even persons outside the original range of operation. Furthermore, the ordering of such measures was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary. There were no effective remedial measures in place, let alone judicial ones. The court held:

77. ... Rule of law implies, inter alia, that an interference by the executive authorities with an individual right should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort...

187. Thus, it is evident from various case laws cited above, that data collection, usage and storage (including biometric data) in Europe requires adherence to the principles of consent, purpose and storage limitation, data differentiation, data exception, data minimization, substantive and procedural fairness and safeguards, transparency, data protection and security. Only by such strict observance of the above principles can the State successfully discharge the burden of proportionality while affecting the privacy rights of its citizens.

188. The jurisprudence with respect to collection, use and retention of biometric information in the United States differs from the EU. In the US context, there is no comprehensive data protection regime. This is because of the federal system of American government, there are multiple levels of law enforcement--federal, state, and local. Different states have differing standards for informational privacy. Moreover, the U.S. has a sectoral approach to privacy, i.e. laws and Regulations related to data differ in different sectors such as health sector or student sector. In

most cases, however, the Fourth Amendment which prohibits "unreasonable searches and seizures" by the government has been read by courts to envisage various levels data protection.

189. At this juncture, we are not entering the debate as to whether the jurisprudence developed in United States is to be preferred or E.U. approach would be more suitable. Fact remains that importance to data protection in processing the data of the citizens is an accepted norm.

190. Observance of this fundamental principle is necessary to prevent a disproportionate infringement of the Fundamental Right of Privacy of a citizen. The question which now needs to be addressed is whether the Aadhaar Act and Rules incorporate these principles of data protection. We have already taken note of the provisions in the Act, which relate to data protection. However, a detailed analysis of the provisions of the Act needs to be undertaken for this purpose having regard to the principles that have emerged from case law in other jurisdiction and noted in paragraph 187 above.

Data Minimisation:

191. The Petitioners have argued that the Act enables data collection indiscriminately regarding all aspects of a person (biometrics, demographic details, authentication records, meta-data related to transaction) even though such data has no nexus to the purported object of subsidies, thus violating the principle of *data minimization*. The data collected is sufficient to indicate religion, class, social status, income, education and intimate personal details. Under Section 32 of the Act, authentication records are stored in the central database in the manner prescribed under the Regulations. Regulation 26 of the Authentication Regulations requires UIDAI to store "authentication transaction data" consisting of: (a) authentication request data received including PID block; (b) authentication response data sent; (c) meta data related to the transaction; and (d) any authentication server side configurations as necessary. The authentication record affords access to information that can be used and analyzed to systematically track or profile an individual and her activities.

192. As per the Respondents, Aadhaar involves minimal identity information for effective authentication. Four types of information collected for providing Aadhaar:

(i) Mandatory demographic information comprising name, date of birth, address and gender [Section 2(k) read with Regulation 4(1) of the Aadhaar (Enrolment and Update) Regulations, 2016];

(ii) Optional demographic information [Section 2(k) read with Regulation 4(2) of the Aadhaar (Enrolment and Update) Regulations, 2016];

(iii) Non-core biometric information comprising photograph;

(iv) Core biometric information comprising finger print and iris scan.

193. Demographic information, both mandatory and optional, and photographs does not raise a reasonable expectation of privacy Under Article 21 unless under special circumstances such as

juveniles in conflict of law or a rape victim's identity. Today, all global ID cards contain photographs for identification alongwith address, date of birth, gender etc. The demographic information is readily provided by individuals globally for disclosing identity while relating with others and while seeking benefits whether provided by government or by private entities, be it registration for citizenship, elections, passports, marriage or enrolment in educational institutions. Email ids and phone numbers are also available in public domain, For example in telephone directories. Aadhaar Act only uses demographic information which are not sensitive and where no reasonable expectation of privacy exists-name, date of birth, address, gender, mobile number and e mail address. Section 2(k) specifically provides that Regulations cannot include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Thus, sensitive information specifically stand excluded.

194. We find that Section 32 (3) of the Aadhaar Act specifically prohibits the authority from collecting, storing or maintaining, either directly or indirectly any information about the purpose of authentication. The proviso to Regulation 26 of Authentication Regulations is also to the same effect.

195. Thus, the principle of data minimization is largely followed.

196. With this, we advert to some other provisions, challenge whereof is based on threat to security of the data. These are Section 2(c), Section 2(g) and Section 2(h) read with Section 10 of the Aadhaar Act. Section 2(c) pertains to authentication. It is a process by which Aadhaar number along with demographic information or biometric information of an individual is submitted to the CIDR for its verification. On submission thereof, the CIDR verifies the correctness or lack of it. CIDR is defined in Section 2(h). Section 10 lays down that the Authority may engage one or more entities to establish or maintain the CIDR and to perform any other functions as may be specified by Regulations.

197. Insofar as authentication process is concerned, that has already been taken note of above. The manner in which it is explained by the Respondent authority, that may not pose much of a problem. As noted earlier, while seeking authentication, neither the location of the person whoso identity is to be verified nor the purpose for which authentication of such identity is needed, comes to the knowledge of the Authority and, therefore, such data collected by the Authority. Therefore, the threat to real time surveillance and profiling may be far-fetched. The Respondents have explained that Section 2(d) defines "authentication record" to mean the record of the time of authentication, identity of the RE and the response provided by the authority", Regulation 26 (a) to (d) does not go beyond the scope of Section 2(d). None of the four clauses of Regulation 26 entitle the authority to store data about the purpose for which authentication is being done. The device can therefore only tell the authority the identity of the RE, the PID, the time and nature of response, the code of the device and the authentication server side configurations. Identity of the RE does not include details of the organization which is seeking authentication as an RE provides authentication service to large number of government organizations who have agreements with it. Such a mechanism preventing the authority from tracking the nature of activity for which the authentication was required. To illustrate nic.in is an RE which provides authentication service to large number of Government organisations who have agreements with it. The authentication record would only contain information about the identity about the RE. It will give information only about the RE

(nic.in) and not about the organisation which is requiring authentication through the RE. In most cases the authentication is one time. Mr. Dwivedi has also explained that yet again, there may be organisations, which have branches in different part of India. Assuming Apollo Hospital (although in fact it is not an RE) has five branches in India. If Apollo Hospital seeks authentication as an RE, the authentication record will merely tell the identity of Apollo Hospital and its device code, but it will not indicate which branch of Apollo was seeking authentication and from which part of the country. Further, assuming that the Indira Gandhi International Airport is an RE and there is requirement of authentication at the point of entry and/or exit. All that the record will show that the ANH has entered the airport at a particular time but it will not show by which plane he is flying and to what destination. At the time of exit, it will only show that the person has exited the airport at a particular time. It will not show from which flight he has arrived and from which destination and at what time he has arrived or with whom he travelled.

198. However, other apprehension of the Petitioners is that storing of data for a period of seven years as per Regulations 20 and 26/27 of the Aadhaar (Authentication) Regulations, 2016 is too long a period. We may reproduce Regulations 26 and 27 of the Aadhaar (Authentication) Regulations, 2016 hereunder:

26. Storage and Maintenance of Authentication Transaction Data - (1) The Authority shall store and maintain authentication transaction data, which shall contain the following information:

(a) authentication request data received including PID block;

(b) authentication response data sent;

(c) meta data related to the transaction;

(d) any authentication server side configurations as necessary:

Provided that the Authority shall not, in any case, store the purpose of authentication.

27. Duration of storage - (1) Authentication transaction data shall be retained by the Authority for a period of 6 months, and thereafter archived for a period of five years.

(2) Upon expiry of the period of five years specified in sub-Regulation (1), the authentication transaction data shall be deleted except when such authentication transaction data are required to be maintained by a court or in connection with any pending dispute.

199. It is also submitted that Section 10 which authorises the Authority to engage one or more entities, which may be private entities, to establish and maintain CIDR is a serious threat to privacy and it even amounts to compromise on national sovereignty and security. Insofar as first argument is concerned, there appears to be some force in that. If authentication is the only purpose, we fail to understand why this authentication record is needed to be kept for a period of 2+5 years. No satisfactory explanation in this behalf was given.

200. Insofar as information regarding metadata is concerned, we may note that the Respondents distinguished between three types of meta-data: technical, business and process metadata. Process metadata describes the results of various operations such as logs key data, start time, end time, CPU seconds used, disk reads, disk writes, and rows processed. This data is valuable for purposes of authenticating transaction, troubleshooting, security, compliance and monitoring and improving performance. They submit that the metadata contemplated under this Regulation is Process metadata.

201. However, metadata is not defined in the Aadhaar Act. In common parlance, it is understood as information about data, example whereof was given by Mr. Sibal that the text of a message exchanged between two persons would be the data itself. However, surrounding circumstances like when the message was sent; from whom and to whom the message was sent; and location from which the message was sent would include meta data. As noted above, Mr. Dwivedi had tried to explain it away by stating that there are three types of meta data, namely, technical, business and process meta data. According to him, meta data under the Aadhaar Act refers to only process meta data. In support, he had referred to Section 2(d) of the Aadhaar Act which defines 'authentication record' to mean the record of the time of authentication, identity of requesting entity and the response provided by the Authority. He, thus, submitted that Regulation 26 would not go beyond Section 2(d). However, aforesaid explanation that meta data refers to process data only does not find specific mention. There is, thus, need to amend Regulation 26 to restrict it to process meta data, and to exclude other type of meta data specifically.

Purpose Limitation:

202. As per the Petitioners, there is no *purpose limitation*. Identity information collected for one purpose under the Act can be used for any other (new) purpose. Definition of "benefit" (Section 2(f)) and "service" (Section 2(w)) and "subsidy" (Section 2(x)), to which the personal data collected is supposed to be applied is not identifiable. It is open to the executive to notify that any advantage, gift, reward, relief, payment, provision, facility, utility or any other assistance aid, support, grant subvention, or appropriation may be made conditional on Aadhaar Authentication. Moreover, Under Section 57, the State, a body corporate or any person can avail authentication facility and access information under CIDR. This creates an open ended and unspecified set of laws and contracts for which Aadhaar can be used and defeats the principle of informed consent at the time of enrolment and purpose limitation.

203. Respondents controvert the aforesaid submission by arguing that there is purpose limitation under the Aadhaar Act as purpose of use of biometric data in the CIDR is limited to authentication for identification. The Aadhaar holder is made aware of such use of the Aadhaar card at the time of enrolment. The enrolling agency is obliged under the Enrolment Regulations to inform the individual about the manner in which the information shall be used, the nature of recipients with whom the information is to be shared during authentication; and the existence of a right to access information, the procedure for making request for such access and details of the person/department to whom request can be made. This information to individual is the basis for his consent for enrolment.

204. As per the Respondents, Section 57 is not an enabling provision which allows Aadhaar to be used for purposes other than Section 7, but is a limiting provision. It limits its use by State, Body Corporate or a person by requiring it to be sanctioned by any law in force or any contract and making the use subject to the proviso to Section 57. The proviso requires the use of Aadhaar under this Section to be subject to procedure and obligations Under Section 8 and Chapter VI of penalties. Section 8(2)(a) requires Requesting Entities (RE) (parties authorized to carry out authentication Under Section 57) to obtain the consent of an individual before collecting her identity information for the purposes of authentication in such manner as may be specified by Regulations. Section 8(3) enables this consent to be informed consent by requiring that an individual submitting her identity information for authentication shall be informed of the nature and the use of the information that may be shared upon authentication and the alternatives to submission of identity information to the requesting entity. This aspect is discussed in detail at a later stage, as it touches upon privacy aspects as well. Suffice it is to mention here that we have found some portion of Section 57 as offending and declared that unconstitutional.

Insofar as Sections 2(f), (w) and (x) are concerned, these provisions are discussed at a later stage[42]. We would like to mention here that we have read down these provisions. The aforesaid measure would subserve the purpose limitation as well.

Time Period for Data Retention:

205. We have touched upon this aspect hereinabove. According to Petitioners, the data is allowed to be retained for an *unreasonable long period of time*. Regulation 27 of the Authentication Regulations requires the UIDAI to retain the "authentication transaction data" (which includes the meta data) for a period of 6 months and to archive the same for a period of 5 years thereafter. Regulation 18(3) and 20(3) allow Requesting entities (RE) and Authentication Service Agencies to retain the authentication logs for a period of 2 years and then archive them for 5 years. It is required to be deleted only after 7 years unless retained by a court. The right of the citizen to erasure of data or right to be forgotten is severely affected by such Regulation. There is no provision to delete the biometric information in any eventuality once a person is enrolled.

We do not find any reason for archiving the authentication transaction data for a period of five years. Retention of this data for a period of six months is more than sufficient after which it needs to be deleted except when such authentication transaction data are required to be maintained by a Court or in connection with any pending dispute. Regulations 26 and 27 shall, therefore, be amended accordingly.

Data Protection and Security:

206. Petitioners argued that there are not enough safeguards for *data protection and security* in the Act. Section 28 of the Act which addresses security and confidentiality of information is vague and fails to lay down any standard of data security or prescribe any cogent measures which are to be taken to prevent data breaches. Section 54 empowers UIDAI to make Regulations related to various data management processes, security protocol and other technology safeguards. The Aadhaar (Data Security) Regulations, 2016 passed by UIDAI Under Section 54, vest in the authority a discretion to specify "an information security policy" (Regulation 3). This leads to

excessive delegation. Alternatively, it has not been subject to parliamentary oversight which Regulations Under Section 54 require. Further, the CIDR central database, unlike the ASAs and REs (under Authentication Regulation 22(1)), are not required to be located in data centres. The personal data is accessible by private entities such as AUAs and KUAs and other private entities such as banks, insurance companies and telecom service providers. There have been numerous data breaches in the Aadhaar system. These establish its vulnerability. There are not enough safeguards from data hack and data leak. The data is being used by private parties to build comprehensive databases containing information and profiles of individuals. Thus the project also lacks *transparency* of data and its use.

207. The Respondents contend that strong measures for data protection and security, taken at all stages of data collection, transfer, storage and use.

After deliberating over respective contentions, we are of the opinion that the following explanation furnished by the Respondents on various facets ensures data protection and security to a considerable extent:

(a) CIDR

208. Regulation 3(i) & (j) of Aadhaar (Data Security) Regulation 2016 enables partitioning of CIDR network into zones based on risk and trust and other security measures. CIDR being a computer resource is notified to be a "Protected System" Under Section 70 of the IT Act, 2000 by the Central Government on 11.12.2015. Anyone trying to unlawfully gain access into this system is liable to be punished with 10 years imprisonment and fine. The storage involves end to end encryption, logical partitioning, firewalling and anonymisation of decrypted biometric data. Breaches of penalty are made punitive by Chapter VII of the Act. Biometric information is deemed to be an "electronic record", and "Sensitive personal data or information" under the IT Act, 2000. There are further guards under The Aadhaar (Data Security) Regulation, 2016.

(b) Requesting Entities (AUA and KUA)

209. Other identity information is shared with Requesting Entity (AUAs and KUAs) only for the limited purpose of authentication. The data is transferred from the RE to the ASA (Authentication Service Agency) to the CIDR in an encrypted manner through a leased line circuitry using secure Protocols (Regulation 9 of the Authentication Regulations). The storage of data templates is in safely located servers with no public internet inlet/outlet, and offline storage of original encrypted data (PID blocks). There are safety and security provisions such as audit by Information Systems Auditor. REs are appointed through agreement. REs can enter into agreement with sub-AUA or sub-KUA with permission of the of UIDAI. Whatever identity information is obtained by the requesting entity is based on a specific consent of the Aadhaar number holder. The e-KYC data shared with the RE can only be after prior consent of the Aadhaar holder. Such data cannot be shared and has to be stored in encrypted form. The biometric information used is not permitted to be stored only the logs of authentication transactions are maintained for a short period. Full identity information is never transmitted back to RE. There is a statutory bar from sharing Biometric information [Section 29(1)(a)/Section 29(4)]. The Data centres of ASA, REs and CIDR should be within the territory of India.

(c) Enrolment Agencies and Registrars

210. The enrolment and Authentication processes are strongly regulated so that data is secure. The Enrolment agency, which collects the biometric and demographic of the individuals during enrolment, is appointed either by UIDAI or by a Registrar [Section 2(s)]. The registrar are appointed through MoUs or agreements for enrolment and are to abide by a code of conduct and processes, policies and guidelines issued by the authority. They are responsible for the process of enrolment. Categories of persons eligible for appointment are limited by the Regulations. The agency employees a certified supervisor, an operator and a verifier under Enrolment and Update Regulations. Registrars, enrolling agencies are obliged to use the software provided or authorized by UIDAI for enrolment purpose. The standard software has security features as specified by Authority. All equipment used are as per the specification issued by the authority. The Registrars are prohibited from using the information collected for any purpose other than uploading the information to CIDR. Sub-contracting of enrolment function is not allowed. The Code of Conduct contains specific directions for following the confidentiality, privacy and security protocols and submission of periodic reports of enrolment. Not only there are directions prohibiting manipulation and fraudulent practices but the Act contains penal provisions for such violations in Chapter VII of the Regulations. The enrolment agencies are empanelled by the authority. They are given an enrolling agency code using which the Registrar can onboard such agency to the CIDR. The enrolment data is uploaded to the Central Identities Data Repository (CIDR) certified equipment and software with a digital signature of the registrar/enrolling agency. The data is encrypted immediately upon capture. The decryption key is with the UIDAI solely. Section 2(ze) of the IT Act, which defines 'secure systems' and Section 2(w) of the Act, which defines 'intermediaries' apply to the process.

(d) Authentication Service Agency

211. Authentication only becomes available through the Authentication Service Agency (ASA). They are regulated by the Aadhaar (Authentication) Regulations, 2016. Their role and responsibilities are provided by Authentication Regulation 19. They are to use certified devices, equipment, or software are duly registered with or approved or certified by the Authority/agency. The systems and operations are audited by information system auditor. The REs pass the encrypted data to the CIDR through the ASA and the response (Yes/No authentication or e-KYC information) also takes the same route back. The server of the ASA has to perform basic compliance and completeness checks on the authentication data packet before forwarding it to the CIDR.

(e) Hacking

212. As far as hacking is concerned, the Respondents submit that the authority has involved adequate firewalling and other safety features. The biometric data stored in the CIDR is stored offline. Only templates are online. So far there has been no incidence of hacking. However, the authority is conscious of the hackers and it constantly updates itself to safe guard the data.

It may, however, be mentioned that of late certain reports have appeared in newspapers to the effect that some people could hack the website of CIDR, though it is emphatically denied by the

UIDAI. Since there are only newspapers reports to this effect which appeared after the conclusion of hearing in these cases and, therefore, parties could not be heard on this aspect, we leave this aspect of the matter at that with a hope that CIDR would find out the ways and means to curb any such tendency.

(f) Biometric Solution Providers

213. With respect to foreign companies owning software, Respondents submit that UIDAI has entered into licensing agreements with foreign biometric solution providers (BSP) for software. Even thought the source code of the software are retained by the BSP as it constitutes their Intellectual property, the data in the server rooms is secure as the software operates automatically and the biometric data is stored offline. There is no opportunity available to BSP to extract data as they have no access to it.

Substantive, Procedural or Judicial Safeguards:

214. Another grievance of the Petitioners is that the Act lacks any *substantive, procedural or judicial safeguards* against misuse of individual data. Section 23(2)(k) which allows sharing information of Aadhaar holders, in such manner as may be specified by Regulations. This means individual's identity information can be shared with the government. This may include demographic and core biometric information, include aspects such as DNA profiles, handwriting, voice-print etc., (in the future). Subsequent linkage with various state and non-state actors that interact with such individual may enable UIDAI to share greater information. The police can easily gain access to all biometric information, bank accounts of the individual, all mobile phones, and meta data associated with any associated linkages, information relating to all mutual funds, policies etc., information relating to travel by air or by rail by such person and so on.

215. In other cases of collection of information of this kind under other laws, there are exhaustive legal procedures. For example, Section 73 of the Indian Evidence Act, 1872 which allows the taking of handwriting samples only if necessary "for the purposes of any (specific) investigation", or in order to compare writing or signature that appears in relation to the facts of a particular case. Section 53 of the Code of Criminal Procedure allows medical examination of a person arrested on a charge of committing an offence if reasonable grounds exist for believing that an examination of his person will afford evidence as to the commission of the offence. Similarly provisions in various other statutes such as of the Foreign Exchange Regulation Act, 1973 (Sections 34-48); the Prevention of Money-Laundering Act, 2002 (Sections 17-19); the Narcotic Drugs and Psychotropic Substances Act, 1985 (Sections 41-42) and the Customs Act, 1962 (Chapter 13) which allow for search, seizure or even arrest, and thereby provide access to personal information also bear a nexus with a particular crime under investigation.

216. As per the Petitioners, the Investigating Agency can presently access fingerprints, only limited to cases of citizens who were arrested on the reasonable basis of having committed a crime, or were convicted of a crime, as per provisions of the Identification of Prisoners Act. In all such circumstances, not only are there adequate safeguards-such as permission from the Magistrate that collection is necessary for the purpose of investigation, but persons Accused of an offence presently can claim protection Under Article 20(3), thereby making it incumbent upon the

investigating agency to obtain such information in accordance with law, as described above. Further, unlike the Aadhaar Act, present day criminal statutes contain provisions for destruction of some kinds of core biometric data obtained [Section 7 of the Identification of Prisoners Act, 1920]. No such safeguards exist under the Aadhaar Act.

217. It is also argued that Section 33(2), which permits disclosure of identity information and authentication records under direction of an officer not below the rank of Jt. Secretary to Central Government in the interest of national security, has no provision for judicial review. The Oversight Committee does not have a judicial member.

218. Respondents submitted that Section 29 of the Aadhaar Act provides protection against disclosure of core biometric information. The biometric information cannot shared with anyone for any reason whatsoever; or used for any purpose other than generation of Aadhaar numbers and authentication under this Act. Section 8 ensure that the during authentication, biometric information of an individual is only used for submission to the Central Identities Data Repository.

219. We are of the view that most of the apprehensions of the Petitioners stand assuaged with the treatment which is given by us to some of the provisions. Some of these are already discussed above and some provisions are debated in the next issue. Summary thereof, however, can be given hereunder:

(a) Authentication records are not to be kept beyond a period of six months, as stipulated in Regulation 27(1) of the Authentication Regulations. This provision which permits records to be archived for a period of five years is held to be bad in law.

(b) Metabase relating to transaction, as provided in Regulation 26 of the aforesaid Regulations in the present form, is held to be impermissible, which needs suitable amendment.

(c) Section 33 of the Aadhaar Act is read down by clarifying that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing.

(d) Insofar as Section 33(2) of the Act in the present form is concerned, the same is struck down.

(e) That portion of Section 57 of the Aadhaar Act which enables body corporate and individual to seek authentication is held to be unconstitutional.

(f) We have also impressed upon the Respondents, as the discussion hereinafter would reveal, to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications thereto as may be deemed appropriate.

220. With the removal of the aforesaid provisions from the statute and the Rules, coupled with the statement of the Authority on affidavit that there is no record of any transactions carried out by the individuals which is even known (and, therefore, no question of the same being retained by the Authority), most of the apprehensions of the Petitioners are taken care of. At the same time, we may remind ourselves of the judgment in *G. Sundarrajan* v. *Union of India and Ors.*

MANU/SC/0466/2013 : (2013) 6 SCC 620. In that case, the Court noted the safety and security risk in the setting up of the nuclear power plant in the backdrop of Fukushima disaster and Bhopal Gas tragedy. Yet, keeping in view the importance of generation of nuclear energy, the Court observed that a balance should be struck between production of nuclear energy which was of extreme importance for the economic growth, alleviation of poverty, generation of employment, and the smaller violation to right to life Under Article 21. It took note of the opinion of experts committee and observed that 'adequate safety measure' have been taken. It noted huge expenditure of money running into crores and observed 'apprehension however legitimate it may be, cannot override the justification of the project. Nobody on this earth can predict what would happen in future and to a larger extent we have to leave it to the destiny. But once the justification test is satisfied, the apprehension test is bound to fail. Apprehension is something we anticipate with anxiety or fear, a fearful anticipation, which may vary from person to person'. The Court also held that 'nuclear power plant is being established not to negate right to life but to protect the right to life guaranteed Under Article 21 of the Constitution. No doubt, the Court took a view that this interest of people needed to be respected for their human dignity which was divinity. However, it was also stressed that generation of nuclear energy was a nuclear necessity and the project was for larger public benefit and consequently, individual interest or smaller public interest must yield. In such a situation, necessity for 'adequate care, caution, and monitoring at every stage' and 'constant vigil' was emphasised. Safety and security was read into Article 21. Acknowledging that proportionality of risk may not be 'zero', regard being had to the nature's unpredictability, the Court ruled that all efforts must be made to avoid disaster by observing the highest degree of constant alertness. In the directions of the Court, it was observed that 'maintaining safety is an ongoing process not only at the design level but also during the operation'. In the present case as well, we have come to the conclusion that Aadhaar Act is a beneficial legislation which is aimed at empowering millions of people in this country. The justification of this project has been taken note of in detail, which the subsequent discussion shall also demonstrate. In such a scenario only on apprehension, the project cannot be shelved. At the same time, data protection and data safety is also to be ensured to avoid even the remote possibility of data profiling or data leakage.

221. Notwithstanding the statutory provision discussed above, we are of the view that there is a need for a proper legislative mechanism for data protection. The Government is not unmindful of this essential requirement. During the arguments it was stated by Mr. K.K. Venugopal, learned Attorney General, that an expert committee heading by Justice B.N. Srikrishna (Retd.) was constituted which was looking into the matter. The said Committee has since given its report.

222. In this behalf, it may be worthwhile to mention that one of the first comprehensive reports on data protection and informational privacy was prepared by the Group of Experts[43] constituted by the Planning Commission of India under the Chairmanship of Retd. Justice A.P. Shah, which submitted a report on 16 October, 2012. The five salient features of this report were expected to serve as a conceptual foundation for legislation protecting privacy. The framework suggested by the expert group was based on five salient features: (i) Technological neutrality and interoperability with international standards; (ii) Multi-Dimensional privacy; (iii) Horizontal applicability to state and non-state entities; (iv) Conformity with privacy principles; and (v) A co-regulatory enforcement regime.

223. The Union Government, on 31 July 2017, had constituted a committee chaired by Retd. Justice B N Srikrishna, former Judge of the Supreme Court of India to review data protection norms in the country and to make recommendations. The Committee recently released its report and the first draft of the *Personal Data Protection Bill, 2018* which comprehensively addresses the processing of personal data where such data has been collected, disclosed, shared or otherwise processed within the territory of India. The bill has incorporated provisions and principles from the Europe's General Data Protection Regulation (EUGDPR).

224. The Draft Bill replaces the traditional concepts of data controller i.e. the entity which processes data and data subject i.e. the natural person whose data is being collected, with data 'fiduciary' and data 'principal'. It aims to create a trust-based relationship between the two.

225. The Bill largely incorporates data protection principles from the EUGDPR and EU data protection jurisprudence, including fair and reasonable processing of data, purpose limitation, collection limitation, lawful processing, storage limitation, data quality and accountability. The Draft bill and the report cull out rights and obligations of the data fiduciary and data controller respectively. These rights include the right to access and correction, the right to data portability and right to be forgotten - a right to prevent or restrict disclosure of personal data by a fiduciary. Most importantly, consent has been given a crucial status in the draft data protection law. Thus, a primary basis for processing of personal data must be individual consent. This consent is required to be free, informed, specific, clear and, in an important addition, capable of being withdrawn. The Authority under the Bill is obligated and empowered to ensure protection of data from misuse and compromise.

226. Processing of biometric data, classified as 'Sensitive Personal Data' (SPD), by the data fiduciary mandates additional safeguards (mentioned under Chapter IV of the Bill). For example, the data fiduciary is required to undertake Data Protection Impact Assessment under the provisions of the Bill. The Draft Bill allows processing of biometric data for the exercise of any function of the State authorised by law for the provision of any service or benefit to the data principal. Special provisions to protect sensitive and personal data of children also exist. For example, Data fiduciaries shall be barred from profiling, tracking, or behavioural monitoring of, or targeted advertising directed at, children and undertaking any other processing of personal data that can cause significant harm to the child.

227. For security of data and protection of breach, the Draft Bill has separate provisions which require use of methods such as de-identification and encryption and other steps necessary to protect the integrity of personal data and to prevent misuse, unauthorised access to, modification, disclosure or destruction of personal data. The data fiduciary is required to immediately notify the Authority of any personal data breach relating to any personal data processed by the data fiduciary where such breach is likely to cause harm to any data principal. It also incorporates a provision for Grievance Redressal.

228. The Draft Bill creates several exceptions and exemptions for processing data by the State. These are situations where rights and obligations of data principals and data fiduciaries may not apply in totality. Such situations include national security, prevention of crime, allocation of resources for human development, protection of revenue, etc. The committee asserts that such

exceptions have been envisaged in the Puttaswamy judgment as legitimate interests of the state and satisfy the proportionality test.

229. The Srikrishna Committee Report and the Draft Data Protection Bill are the first articulation of a data protection law in our country. They have incorporated many of the progressive data protection principles inspired by the EUGDPR. There may be indeed be scope for further fine tuning of this law through a consultative process, however, we are not far away from a comprehensive data protection regime which entrenches informational and data privacy within our laws and legal system. We hope that there would be a robust statutory regime in place in near future.

230. The aforesaid discussion leads us to hold that the protection that there is going to be a surveillance state created by the Aadhaar project is not well founded, and in any case, taken care of by the diffluence exercise carried out with the striking down certain offending provisions in their present form.

Privacy:

Whether Aadhaar Act violates right to privacy and is unconstitutional on this ground?

(This issue is considered in the context of Section 7 and Section 8 of the Act.)

231. The Petitioners submit that right to privacy and dignity and individual autonomy have been established by various cases. In *Gobind* v. *State of M.P.* MANU/SC/0119/1975 : (1975) 2 SCC 148, this Court held:

the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government, a sphere where he should be let alone.

xx xx xx

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

25. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality, and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against Government" a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.

26. As Ely says:

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case.

232. To recapitulate briefly, the judgment of *K.S. Puttaswamy* has affirmed the following -

(i) privacy has always been a natural right, and the correct position has been established by a number of judgments starting from *Gobind*. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. Equally, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. The fundamental right to privacy would cover at least three aspects--(i) intrusion with an individual's physical body, (ii) informational privacy and (iii) privacy of choice. Further, one aspect of privacy is the right to control the dissemination of personal information. Every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.

(ii) The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusions. While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy is a postulate of dignity itself. Privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen.

(iii) Privacy as intrinsic to freedom, liberty and dignity. The right to privacy is inherent to the liberties guaranteed by Part-III of the Constitution and privacy is an element of human dignity. The fundamental right to privacy derives from Part-III of the Constitution and recognition of this right does not require a constitutional amendment. Privacy is more than merely a derivative constitutional right. It is the necessary basis of rights guaranteed in the text of the Constitution.

(iv) Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

(v) Informational Privacy is a facet of right to privacy. The old adage that 'knowledge is power' has stark implications for the position of individual where data is ubiquitous, an all-encompassing presence. Every transaction of an individual user leaves electronic tracks, without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities.

(vi) Right to privacy cannot be impinged without a just, fair and reasonable law. It has to fulfil the test of proportionality i.e. (i) existence of a law (ii) must serve a legitimate State aim and (iii) proportionate.

233. We have also remarked, in paragraph 85 above, the taxonomy of privacy, namely, on the basis of 'harms', 'interest' and 'aggregation of rights'. We have also discussed the scope of right to privacy with reference to the cases at hand and the circumstances in which such a right can be limited. In the process, we have also taken note of the passage from the judgment rendered by Nariman, J. in *K.S. Puttaswamy* stating the manner in which law has to be tested when it is challenged on the ground that it violates the fundamental right to privacy. Keeping in mind all these considerations and parameters, we proceed to deal with the argument on right to privacy.

234. It is argued that the Aadhaar project, during the pre-Act period (2009/10 - July, 2016), violated the Right to Privacy with respect to personal demographic as well as biometric information collected, stored and shared as there was no law authorizing these actions. In a digital society an individual has the right to protect herself by controlling the dissemination of such personal information. Compelling an individual to establish her identity by planting her biometric at multiple points of service violates privacy involving the person. The seeding of Aadhaar in distinct data bases enables the content of information about an individual that is stored in different silos to be aggregated. This enables the State to build complete profiles of individuals violating privacy through the convergence of data.

235. It is also contended that the citizen's right to informational privacy is violated by authentication under the Aadhaar Act inasmuch as the citizen is compelled to 'report' her actions to the State. Even where a person is availing of a subsidy, benefit or service from the State Under Section 7 of the Act, mandatory authentication through the Aadhaar platform (without an option to the citizen to use an alternative mode of identification) violates the right to informational privacy. An individual's rights and entitlements cannot be made dependent upon an invasion of his or her bodily integrity and his or her private information which the individual may not be willing to share with the State. The bargain underlying Section 7 is an unconscionable, unconstitutional bargain. Section 7 is against the constitutional morality contained in both Part III as well the Part IV of the Constitution of India.

236. It was also highlighted that today the fastest growing businesses are network orchestrators, the likes of Facebook and Uber, which recreate a network of peers in which participants interact and share value in creation. The most important assets for these network orchestrators is information. Although, individuals share information with these entities, such information is scattered, not concentrated in a single authority or aggregated. If information, collected in different silos is aggregated and centralized, it can afford easy access to a person's complete profile, including her social groups, proclivities, habits, inclinations, tastes etc. The entity that holds the key to such information would then be in an extremely powerful position, especially if such entity is the State. Since informational privacy is a part of Right to Privacy, it had to be saved. The Petitioners pointed out that the significance of information being aggregated was noted by Hon'ble Court in *K.S. Puttaswamy* as follows:

300...Yet every transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests. Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships,

ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that don't, of things to be disclosed and those best hidden...

xx xx xx

305. Daniel J Solove deals with the problem of "aggregation". Businesses and governments often aggregate a variety of information fragments, including pieces of information which may not be viewed as private in isolation to create a detailed portrait of personalities and behaviour of individuals. Yet, it is now a universally accepted fact that information and data flow are "increasingly central to social and economic ordering". Individuals are identified with reference to tax records, voting eligibility, and government-provided entitlements. There is what is now described as "'veillant panoptic assemblage', where data gathered through the ordinary citizen's veillance practices finds its way to state surveillance mechanisms, through the corporations that hold that data.

237. It was further argued that test of proportionality was not satisfied as the extent of information collected is not proportionate to the 'compelling interest of the State'. Various judgments were citied where the principle of proportionality has been established by this Court. In *Chairman, All India Railway Recruitment Board* v. *K Shyam Kumar and Ors.* MANU/SC/0342/2010 : (2010) 6 SCC 614, this Court held as follows:

37....Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial review has examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

238. Attention was also drawn to the judgment in *Modern Dental College & Research Centre*, wherein this Court established the four-limb test of proportionality. It was argued that Aadhaar failed to meet the test laid down therein.

239. According to the Petitioners, there is no compelling state interest for State to know the details of the location and time of using Aadhaar authentication. Likewise, there are various other methods available for identification. Submission was that one of the objects of the Aadhaar project is to ensure targeted delivery in the disbursement of government subsidies benefits and services in India. Identification for this purpose can be carried out by various other identity documents issued by the government of India, such as passport, voting card, ration card, driving license, job card issued by NREGA duly signed by an officer of the State government, employment certificate by a public authority, birth certificate, school leaving certificate, PAN card, overseas Indian citizen card/PIO/OCI of Indian origin card. There is no justification to impose Aadhaar under as the exclusive means of identification Under Section 7, without which a person would be unable to secure her entitlements. Such mandate would not only infringe upon the privacy of a person and

violate a person's fundamental rights, but would also unreasonably deprive a person of her entitlements on a ground that has little connection with her right to receive such entitlements.

240. Judgment in the case of *Jordan and Ors.* v. *State* (2002) ZACC 22 was also cited wherein Sachs & O'Regan JJ. concurringly held that continuum of privacy rights start with the inviolable inner self, move to the home, and end with the public realm; and that commitment to dignity invests great value in the inviolability and worth of the body. Decisional privacy allows individuals to make decisions about their own body, and is an aspect of right to self determination. It is underscored by personal autonomy, which prevents the State from using citizens as puppets and controlling their body and decisions. Informational privacy deals with a person's mind and comprises of (i) anonymity, (ii) secrecy, and (iii) freedom. It is premised on the assumption that all information about a person is in a fundamental way her own, for her to communicate or retain for herself as she sees fit.

241. It was submitted that privacy rights against both the State and non-State actors. There is a qualitative difference between right to privacy against the State and against Non-state actors. Subba Rao. J's dissent in *Kharak Singh*, was relied upon wherein it was stated that the existence of concentrated and centralized State power, rather than its actual or potential use that creates the chilling effect and leads to psychological restraint on the ability of citizens to think freely. Therefore, individuals have a higher expectation of privacy from the State. In the vein, it was further submitted that the State was imposing disproportionate and unreasonable State compulsion. States do not have the power to compel their citizens to do particular acts, except in a narrow range of defined circumstances. As sentinels on the qui vive, Courts are duty bound to protect citizens against State compulsion, whether in the context of forcibly undergoing narco-analysis/lie detectors tests or forcibly undergoing sterilization. Compulsion can be used in limited circumstances such as punishment for law-breaking, compulsion in the aid of law enforcement, and compulsion to prevent potential law-breaking. These include fines, imprisonment, fingerprint collection for criminals and prisoners. Even in medical jurisprudence, the case of *Common Cause* v. *Union of India*[45] elaborates on the concepts of dignity, bodily integrity and decisional autonomy. For DNA tests and blood tests to be conducted a high standard of evidence is required. Similarly 'refusal of treatment' is a constitutionally protected liberty interest in the United States of America as stated in the case of *Cruzan* v. *Director, Missouri Dept. of Health* 497 US 361 (1990).

242. The Petitioners further submitted that although the Aadhaar Act is ostensibly framed as a voluntary entitlement to establish one's identity Under Section 3 read with Section 4(3) of the Aadhaar Act, the actions of the Executive and private entities Under Sections 7 and 57 have made possession of Aadhaar de facto mandatory. Residents have thus been forced to obtain an Aadhaar number, for continued access to statutory entitlements and services. 252 government schemes have been notified by various Ministries/Departments of the Central Government Under Section 7 (as on 30.11.2017) requiring Aadhaar as a condition precedent for availing services, subsidies and benefits including for persons with disabilities, for SC/STs, and for rehabilitation of Manual Scavengers. It has also been made mandatory for mobile services, banking and tax payments, registration of students of CBSE, amongst other things. It thus pervades every aspect of an individual's life. Concomitantly, there is no opt out option in the Aadhaar Act, which makes consent irrevocable and deprives individuals the ability to make decisions about their life.

243. As per the Petitioners, this kind of mandatory nature of Section 7 violates Article 14. They submit that mandatory authentication has caused, and continues to cause, exclusion of the most marginalized Sections of society. Proof of possession of an enrolment number or undergoing Aadhaar authentication is a mandatory pre-requisite for receiving subsidised food grain under the National Food Security Act. It creates "undue burden" on citizen which is unconstitutional. Successful monthly authentication is contingent on harmonious working of all attendant Aadhaar processes and technologies-i.e. correct Aadhaar-seeding, successful fingerprint recognition, mobile and wireless connectivity, electricity, functional POS machines and server capacity-each time. It is also dependant on age, disability (e.g. leprosy), class of work (e.g. manual labour), and the inherently probabilistic nature of biometric. Economic Survey of India 2016 reports that authentication failures have been as high as 49% in Jharkhand and 37% in Rajasthan, recognising that "failure to identify genuine beneficiaries results in exclusion error".

244. The exclusion is not simply a question of poor implementation that can be administratively resolved, but stems from the very design of the Act, i.e. the use of biometric authentication as the primary method of identification. Determination of legal entitlements is contingent on a positive authentication response from the UIDAI. Biometric technology does not guarantee 100% accuracy and is fallible, with inevitable false positives and false negatives that are design flaws of such a probabilistic system, especially because biometrics also change over time.

245. Classification caused by the Act lacks rational nexus. The entitlement of an individual depends upon status, and not proof of identity. At the point of use, The Biometric Authentication divides residents into two classes: those who have and do not have Aadhaar; and those who authenticate successfully, and those who do not. Given that the probability of biometric mismatch is greatest for the aged, disabled, and individuals engaging in manual labour - amongst the most vulnerable Sections of society-the decision to use periodic biometric authentications has a direct and disparate effect of violating fundamental rights of this class. This division bears no rational nexus with the question of status for receiving benefits. It leads to under-inclusion, and is thus arbitrary, causing an Article 14 violation.

246. It is also argued that mandatory nature of Section 7 violates Article 21 as well. The Aadhaar Act alters the entire design & institutional structure through which residents were receiving entitlements. Mandatory imposition of Aadhaar violates their rights to choose how to identify themselves to the government in a reasonable and non-intrusive fashion. On making Aadhaar mandatory, instead of the citizen's right to food and a correlative duty on the State to take action to ensure the proper fulfilment of such rights, the State is exercising its power to convert the constitutional rights of its citizens into liabilities.

247. As per the Petitioners, having established the infringement of Article 21, the invasion is not justified under the ***principle of proportionality***. The State's primary justification of eliminating welfare leakages and ensuring "better targeting" does not stand up to judicial scrutiny.

First, it has failed to discharge its burden of showing that the purported leakages were exclusively caused due to identity fraud, and that those leakages would not exist if Aadhaar is implemented. The state has not given any empirical data. Leakages exist due to eligibility frauds, quantity frauds and identity frauds. Studies filed in Petitioner's affidavits show that eligibility and quantity frauds

are the substantial cause for leakages. Assuming that the Aadhaar Act prevents leakages, the biometric identification system can, at best, only cure leakages related to identity fraud. The government's claims of savings inter alia of Rs. 14,000 crores in the PDS system, due to the deletion of 2.33 crore ration cards is incorrect, inflated, and based on wrong assumptions for the following reasons:

(a) it admittedly does not have estimates of leakages in PDS, nor has any study been done to see if POS machines are effective in removing PDS irregularities;

(b) it conflates issue of "bogus/ineligible ration cards" (eligibility fraud) with identity fraud;

(c) the figure of 2.33 crore includes West Bengal, where ration cards are issued to each person, as opposed to each household;

(d) a large number of these 2.33 crore cards were deleted even before Aadhaar-integration and seeding came into effect;

(e) the savings figure includes even those eligible beneficiaries who have been removed from the list due to failure to link Aadhaar properly; and

(f) it does not value the cost of loss of privacy. Most importantly, the basis for reaching such savings figure has not been disclosed.

Similarly, incorrect averments have been made in the context of LPG savings, using Aadhaar-enabled Direct Benefit Transfer ('DBT') scheme known as PAHAL.

Secondly, it has failed to show how the introduction of Aadhaar will stop the losses causes on any of the grounds above. Aadhaar is susceptible to its own unique forms of mischief by the vendor.

Thirdly, the State has failed to demonstrate that other, less invasive ways would be significantly worse at addressing the problem, especially given recent studies that found a significant reduction in PDS leakages, due to innovations devised to work within the PDS system; alternatives such as food coupons, digitisation of records, doorstep delivery, SMS alerts, social audits, and toll-free helplines have not been looked at.

Fourthly, the absence of proportionality is further established by the fact of systematic exclusion.

248. The Respondents refuted, in strongest possible manner, all the aforesaid submissions in the following manner:

(i) <u>No reasonable expectation of privacy</u>

At the outset it was argued that Right to Privacy exists when there is a reasonable expectation of privacy. *K.S. Puttaswamy* judgment, US case law, UK case laws and the European cases on Article 8 of ECHR were referred to determine the contours of reasonable expectation of privacy. Submission was that the Act operates in the public and relational sphere and not in the core, private

or personal sphere of residents. It involves minimal identity information for effective authentication. The purpose is limited to authentication for identification. Section 29 of the Aadhaar Act, 2016 provides protection against disclosure of identity information without the prior consent of the ANH concerned. Sharing is intended only for authentication purposes. It was also submitted that there is no reasonable expectation of privacy with respect to identity information collected under the Aadhaar Act for the purposes of authentication and therefore Article 21 is not attracted.

249. The Respondents point out that four types of information collected for providing Aadhaar (i). Mandatory demographic information comprising name, date of birth, address and gender [Section 2(k) read with Regulation 4(1) of the Aadhaar (Enrolment and Update) Regulations, 2016]; (ii) Optional demographic information [Section 2(k) read with Regulation 4(2) of the Aadhaar (Enrolment and Update) Regulations, 2016]. (iii) Non-core biometric information comprising photograph. (iv) Core biometric information comprising finger print and iris scan.

250. Demographic information, both mandatory and optional, and photographs does not raise a reasonable expectation of privacy Under Article 21 unless under special circumstances such as juveniles in conflict of law or a rape victim's identity. Today, all global ID cards contain photographs for identification alongwith address, date of birth, gender etc. The demographic information is readily provided by individuals globally for disclosing identity while relating with others and while seeking benefits whether provided by government or by private entities, be it registration for citizenship, elections, passports, marriage or enrolment in educational institutions. Email ids and phone numbers are also available in public domain, For example in telephone directories. Aadhaar Act only uses demographic information which are not sensitive and where no reasonable expectation of privacy exists-name, date of birth, address, gender, mobile number and e mail address. Section 2(k) specifically provides that Regulations cannot include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Thus, sensitive information specifically stand excluded.

251. Face Photographs for the purpose of identification are not covered by a reasonable expectation of privacy. Barring unpublished intimate photographs and photographs pertaining to confidential situations there will be no zone of privacy with respect to normal facial photographs meant for identification. Face-photographs are given by people for driving license, passport, voter id, school admissions, examination admit cards, employment cards, enrolment in professions and even for entry in courts. In our daily lives we recognize each other by face which stands exposed to all, all the time. The face photograph by itself reveals no information.

252. There is no reasonable expectation of privacy with respect to fingerprint and iris scan as they are not dealing with the intimate or private sphere of the individual but are used solely for authentication. Iris scan is nothing but a photograph of the eye, taken in the same manner as a face photograph. Fingerprints and iris scans are not capable of revealing any personal information about the individual except for serving the purpose of identification. Fingerprints are largely used in biometric attendance, laptops and mobiles. Even when a privacy right exists on a fingerprint, it will be weak. Finger print and iris scan have been considered to be the most accurate and non-invasive mode of identifying an individual. They are taken for passports, visa and registration by

the State and also used in mobile phones, laptops, lockers etc for private use. Biometrics are being used for unique identification in e passports by 120 countries.

(ii) Least intrusive and strict scrutiny tests do not apply in the proportionality test.

Learned Attorney General argued that the "least intrusive test" is not applicable while asserting the test of proportionality. He relied on various U.S. Supreme Court judgments which explicitly rejected the test and the case of *Modern Dental College & Research Centre* which does not use the least intrusive measure test while undertaking the proportionality test.

Mr. Dwivedi contends that the least intrusive means of achieving the state object, while carrying out the proportionality test, has been rejected by Indian courts in a catena of decisions as it involves a value judgment or second guessing of the Legislation. Such a test violates the separation of powers between the legislature and the judiciary. Even assuming that the 'least intrusive method' test applies, the exercise of determining the least intrusive method of identification is a technical exercise and cannot be undertaken in the court of law. Moreover, the Petitioners, who have furnished smartcards as an alternative, have not established that smartcards are less intrusive than the Aadhaar card authentication process.

The argument of applying the 'Strict Scrutiny Test' to test the Constitutionality of the Aadhaar Act by the Petitioners was flawed. Strict scrutiny test is a test conceptualised in the United States, only applied to 'super suspect legislations'. This compulsion arises because the scope of reasonable restrictions not having been specified specifically in the U.S. Constitution. That leaves the scrutiny of the Legislations by the courts based on the due process Clause in the U.S. Constitution. Such a test does not have applicability in India. In *Ashoka Kumar Thakur* MANU/SC/1397/2008 : (2008) 6 SCC 1, the court referred to the test of strict scrutiny, narrow tailoring and compelling interest and observed that these principles cannot be applied directly to India as affirmative action is Constitutionally supported.

(iii) Act satisfies Proportionality Test

Ld. Attorney General submitted that the legitimate state interest that the Aadhaar Act fulfils are prevention of leakages and dissipation of subsidies and social welfare benefits that are covered Under Section 7 of the Aadhaar Act. He also submits that the larger public/state interest is to be decided by the State and cannot be second guessed by the Judiciary. The state had rejected the idea of 'smart cards' and other alternative models after due deliberations.

The learned Attorney General cited various reports highlighting leakages, wastage, high costs and inefficiencies in the Public Distribution System, MGNREGA scheme and fuel subsidy. He cited the Thirteenth Finance Commission Report 2010-2015 which stated that creation of a biometric-based unique identity for all residents in the country has potential to address need of the government to ensure that only eligible persons are provided subsidies and that all eligible persons are covered. He also cited the Economic Surveys of 2014-15 and 2015-16 both of which dilated upon the benefits of Aadhaar. The 2015-16 Survey says that the use of Aadhaar has significantly reduced leakages in LPG and MGNREGA with limited exclusion of the poor by linking households' LPG customer numbers with Aadhaar numbers to eliminate 'ghosts' and duplicate

households from beneficiary rolls. The United Nations, in its report titled 'Leaving No One Behind: the imperative of inclusive development', praised India's decision of launching Aadhaar as it will be a step forward in ensuring inclusion of all people especially the poorest and the most marginalized.

This Court in the case of *PUCL* v. *Union of India* MANU/SC/1211/2011 : (2011) 14 SCC 331 has approved the recommendations of the High-powered committee headed by Justice D.P. Wadhwa, which recommended linking of Aadhaar with PDS and encouraged State Governments to adopt the same. The court also lauded the efforts of State government for using biometric identification. He also referred to the case of *Binoy Viswam* v. *Union of India* MANU/SC/0693/2017 : (2017) 7 SCC 59 where the economic rationale for and benefits of Aadhaar was discussed and validated.

Mr. Dwivedi has argued that 3% of GDP amounting to trillions of rupees is allocated by Governments towards subsidies, scholarships, pensions, education, food and other welfare programmes. But approximately half of if does not reach the intended beneficiaries. Aadhaar is necessary for fixing this problem as there is no other identification document which is widely and commonly possessed by the residents of the country and most of the identity documents do not enjoy the quality of portability. Moreover, Aadhaar lends assurance and accuracy on account of existence of fake, bogus and ghost cards, vide the process of de-duplication and authentication. De-duplication is ensured by the three sub systems are: (i) demographic de-duplication (ii) multi-ABIS multi-modal biometric de-duplication (iii) manual adjudication. Biometric system provides high accuracy of over 99.86 %. The mixed biometric have been adopted only to enhance the accuracy and to reduce the errors which may arise on account of some residents either not having biometrics or not having some particular biometric.

(iv) Act empowers various facets of right to life Under Article 21 The Ld. Attorney General submitted that Section 7 of the Act is traceable to Article 21 of the Constitution. Right to life is not a mere animal existence but the right to live with human dignity which includes the right to food, the right to shelter, right to employment, right to medical care, etc. Fulfilling these rights will justify the minimal invasion of the right to privacy of the citizens.

The counsel for the Respondent also referred to the case of *G. Sundarrajan* v. *Union of India* (2013) 6 SCC 670 in which the Petitioner therein challenged the violation of their Right to the Life due to the risk posed by the Kudanakulam Nuclear Plant. The court struck a balance between production of nuclear energy, which was of extreme importance for the economic growth, alleviation of poverty, generation of employment, and the violation of right to life and dignity Under Article 21 posed by the threat of a nuclear disaster. The court observed that adequate safety measure - both in design and operation - had been taken hence the violation of right to life was justified.

253. The argument of 'illusory consent' was refuted with the submission that Section 7 of the Act which mandatorily requires Aadhaar for receipt of benefit, service or subsidy linked to the Consolidated Fund of India, does not violate any Fundamental Rights. It involves a balancing of two Fundamental Rights: the Right to Privacy and the positive obligation of the State to ensure right to food, shelter and employment Under Article 21 of the Constitution. Aadhaar enables furtherance of Article 21 by eliminating leakages and ensuring that no deserving individual is

denied her/his entitlement. The object of the Act i.e. the efficient, transparent and targeted delivery of subsidies, benefits and services to genuine beneficiaries is in, furtherance of various facets of Article 21 of the poor people of India and in furtherance of the Directive Principles of State Policy inter alia Articles 38, 39, 41, 43, 47 and 48.

254. It was further argued that Section 7 is not a restriction at all and it does not require any surrender of Fundamental Rights. It is merely a regulatory procedure to receipt of subsidy, benefit or service. Section 7 purports to enliven the Fundamental Right Under Article 21, and Article 14. To achieve the goal of enlivening Fundamental Rights of the poor and the deprived and to prevent siphoning off the benefits, service or subsidy, it becomes necessary to require compliance with the condition of undergoing authentication.

255. Section 7 of the Aadhaar Act protects right to human dignity recognized by Article 21 of the Constitution. Aadhaar is used as means of authentication for availing services, benefits and subsidies. Welfare schemes funded from the consolidated fund of India such as PDS, scholarship, mid day meals, LPG subsidies, free education ensure that the Right to Life and Dignity of citizens are being enforced, which includes Justice (Social, Political and Economic). It also eliminates inequality with a view to ameliorate the poor, Dalits and other downtrodden classes and Sections of the society.

256. In response to the argument that Fundamental Right to Privacy cannot be waived, the Mr. Dwivedi submits that Section 7 of the Aadhaar Act does not involve any issue of waiver. When an individual undergoes any authentication to establish his identity to receive benefits, services or subsidy, he does so to enliven his Fundamental Right to life and personal liberty Under Article 21. When an individual makes a choice to enter into a relational sphere then his choice as to mode of identification would automatically get restricted on account of the autonomy of the individuals or institution with whom he wishes to relate. This is more so where the individual seeks employment, service, subsidy or benefits. Moreover, Aadhaar is of a Universal nature, unlike any other identification card which are not portable. They generally have a localized value and limited purpose.

257. In response to the arguments of the Petitioners that Aadhaar reduces individuals to numbers, it was submitted that the Aadhaar number is absolutely necessary for authentication and it is solely used for that purpose. It was argued that the Petitioner have conflated the concepts of identity and identification. Authentication is merely an identification process and does not alter the identity of an individual. Further Aadhaar number is a randomly generated number and bears no relation to the attributes of individuals. It is similar to an examiner allotting codes to examinees for administrative convenience.

258. It was also argued that the State has an obligation to enlivening right to food, right to shelter etc envisaged Under Article 21 and for this purpose they may encroach upon the right of privacy of the beneficiaries. The state requires to strike a fair balance between the right of privacy and right to life of beneficiaries. An example furnished by the counsel for this is the Prohibition Of Employment as Manual Scavengers and their Rehabilitation Act, 2013, which restricts a scavenger's right to practice any profession, occupation, trade or business Under Article 19(g) is order to enliven Article 21 and 17. The counsel also gave the example of the practice of

dwarftossing, which was banned in France. The law was challenged on ground that it interferes with the economic right of one practicing it. The challenge was negatived on the ground that permitting such a practice even though voluntary will be degrading of human dignity by Human Right Committee. Certain choices are restricted/prohibited by the Constitution itself (Articles 17, 18, 23 and 24). Article 23 abolishes forced labour so it prohibits even those choosing to indulge in forced labour from doing so. The aforesaid actually result in enhancement of the Fundamental Right. The person is emancipated from a social condition which is below human dignity. Similarly Section 7 of the Act involves an identification for the purpose of enhancing human dignity.

259. In response to the argument of Aadhaar causing exclusion, the learned Attorney General responded by saying that if authentication fails, despite more than one attempt, then the possession of Aadhaar number can be proved otherwise i.e. by producing the Aadhaar card. And those who do not have Aadhaar number can make an application for enrolment and produce the enrolment id number).

260. Before we proceed to analyse the respective submissions, it has also to be kept in mind that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. This can be discerned from the reading of Paras 297 to 307 of the judgment, relevant portions whereof have already been quoted above.

261. We may also clarify that the arguments of privacy are examined in the context of Sections 7 and 8 and the provisions related thereto under the Aadhaar Act. Validity of the other provisions of the Aadhaar Act, which is questioned in these proceedings, is dealt with separately. As per Section 7 of the Aadhaar Act in case an individual wants to avail any subsidy benefit or services, she is required to produce the Aadhaar number and, therefore, it virtually becomes compulsory for such a person. To that extent the Petitioners may be right in submitting that even if enrolment in Aadhaar is voluntary, it assumes the character of compulsory enrolment for those who want to avail the benefits Under Section 7. Likewise, authentication, as mentioned in Section 8, also becomes imperative. The relevant question, therefore, is as to whether invasion into this privacy meets the triple requirements or right to privacy.

(i) **Requirement of law:** The Parliament has now passed Aadhaar Act, 2016. Therefore, law on the subject in the form of a statute very much governs the field and, thus, first requirement stands satisfied. We may point out at this stage that insofar as period from 2009 (when the Aadhaar scheme was launched with the creation of Authority vide notification No. A-43011/02/2009-Admin. I dated January 28, 2009 till the date Aadhaar Act came into force i.e. March 26, 2016, it is the argument of the Petitioners that insofar as this period is concerned, it is not backed by any law and, therefore, notification dated January 28, 2009 should be struck down on this ground itself and all acts done including enrolment under the Aadhaar scheme from 2009 to 2016 should be invalidated. This aspect we propose to deal at a later stage. At this juncture, we are looking into the vires of Aadhaar Act. In that context, the first requirement stands fulfilled.

(ii) **Whether Aadhaar Act serves legitimate State aim?**

'Introduction' to the said Act gives the reasons for passing that Act and the 'Statement of Objects and Reasons' mentions the objectives sought to be achieved with the enactment of the Aadhaar Act. 'Introduction' reads as under:

The Unique Identification Authority of India was established by a resolution of the Government of India in 2009. It was meant primarily to lay down policies and to implement the Unique Identification Scheme, by which residents of India were to be provided unique identity number. This number would serve as proof of identity and could be used for identification of beneficiaries for transfer of benefits, subsidies, services and other purposes.

Later on, it was felt that the process of enrolment, authentication, security, confidentiality and use of Aadhaar related information be made statutory so as to facilitate the use of Aadhaar number for delivery of various benefits, subsidies and services, the expenditures of which were incurred from or receipts therefrom formed part of the Consolidated Fund of India.

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 inter alia, provides for establishment of Unique Identification Authority of India, issuance of Aadhaar number to individuals, maintenance and updating of information in the Central Identities Data Repository, issues pertaining to security, privacy and confidentiality of information as well as offences and penalties for contravention of relevant statutory provisions.

In the Statement of Objects and Reasons, it is inter alia mentioned that though number of social benefits schemes have been floated by the Government, the failure to establish identity of an individual has proved to be a major hindrance for successful implementation of those programmes as it was becoming difficult to ensure that subsidies, benefits and services reach the unintended beneficiaries in the absence of a credible system to authenticate identity of beneficiaries. The Statement of Objects and Reasons also discloses that over a period of time, the use of Aadhaar number has been increased manifold and, therefore, it is also necessary to take measures relating to ensuring security of the information provided by the individuals while enrolling for Aadhaar card. Having these parameters in mind, Para 5 of the Statement of Objects and Reasons enumerates the objectives which the Aadhaar Act seeks to achieve. It reads as under:

5. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 inter alia, seeks to provide for--

(a) issue of Aadhaar numbers to individuals on providing his demographic and biometric information to the Unique Identification Authority of India;

(b) requiring Aadhaar numbers for identifying an individual for delivery of benefits, subsidies, and services the expenditure is incurred from or the receipt therefrom forms part of the Consolidated Fund of India;

(c) authentication of the Aadhaar number of an Aadhaar number holder in relation to his demographic and biometric information;

(d) establishment of the Unique Identification Authority of India consisting of a Chairperson, two Members and a Member-Secretary to perform functions in pursuance of the objectives above;

(e) maintenance and updating the information of individuals in the Central Identities Data Repository in such manner as may be specified by Regulations;

(f) measures pertaining to security, privacy and confidentiality of information in possession or control of the Authority including information stored in the Central Identities Data Repository; and

(g) offences and penalties for contravention of relevant statutory provisions.

262. After taking into consideration the Statement of Objects and Reasons, a two Judge Bench of this Court in *Binoy Viswam v. Union of India and Ors.* MANU/SC/0693/2017 : (2017) 7 SCC 59, recapitulated the objectives of Aadhaar in the following manner:

125. By making use of the technology, a method is sought to be devised, in the form of Aadhaar, whereby identity of a person is ascertained in a flawless manner without giving any leeway to any individual to resort to dubious practices of showing multiple identities or fictitious identities. That is why it is given the nomenclature "unique identity". It is aimed at securing advantages on different levels some of which are described, in brief, below:

125.1. In the first instance, as a welfare and democratic State, it becomes the duty of any responsible Government to come out with welfare schemes for the upliftment of poverty-stricken and marginalised Sections of the society. This is even the ethos of Indian Constitution which casts a duty on the State, in the form of "directive principles of State policy", to take adequate and effective steps for betterment of such underprivileged classes. State is bound to take adequate measures to provide education, health care, employment and even cultural opportunities and social standing to these deprived and underprivileged classes. It is not that Government has not taken steps in this direction from time to time. At the same time, however, harsh reality is that benefits of these schemes have not reached those persons for whom that are actually meant.

125.1.1. India has achieved significant economic growth since Independence. In particular, rapid economic growth has been achieved in the last 25 years, after the country adopted the policy of liberalisation and entered the era of, what is known as, globalisation. Economic growth in the last decade has been phenomenal and for many years, the Indian economy grew at highest rate in the world. At the same time, it is also a fact that in spite of significant political and economic success which has proved to be sound and sustainable, the benefits thereof have not percolated down to the poor and the poorest. In fact, such benefits are reaped primarily by rich and upper middle classes, resulting into widening the gap between the rich and the poor.

125.1.2. Jean Dreze and Amartya Sen pithily narrate the position as under [An Uncertain Glory: India and its Contradictions]:

Since India's recent record of fast economic growth is often celebrated, with good reason, it is extremely important to point to the fact that the societal reach of economic progress in India has

been remarkably limited. It is not only that the income distribution has been getting more unequal in recent years (a characteristic that India shares with China), but also that the rapid rise in real wages in China from which the working classes have benefited greatly is not matched at all by India's relatively stagnant real wages. No less importantly, the public revenue generated by rapid economic growth has not been used to expand the social and physical infrastructure in a determined and well-planned way (in this India is left far behind by China). There is also a continued lack of essential social services (from schooling and health care to the provision of safe water and drainage) for a huge part of the population. As we will presently discuss, while India has been overtaking other countries in the progress of its real income, it has been overtaken in terms of social indicators by many of these countries, even within the region of South Asia itself (we go into this question more fully in Chapter 3, 'India in Comparative Perspective').

To point to just one contrast, even though India has significantly caught up with China in terms of GDP growth, its progress has been very much slower than China's in indicators such as longevity, literacy, child undernourishment and maternal mortality. In South Asia itself, the much poorer economy of Bangladesh has caught up with and overtaken India in terms of many social indicators (including life expectancy, immunisation of children, infant mortality, child undernourishment and girls' schooling). Even Nepal has been catching up, to the extent that it now has many social indicators similar to India's, in spite of its per capita GDP being just about one third. Whereas twenty years ago India generally had the second best social indicators among the six South Asian countries (India, Pakistan, Bangladesh, Sri Lanka, Nepal and Bhutan), it now looks second worst (ahead only of problem-ridden Pakistan). India has been climbing up the ladder of per capita income while slipping down the slope of social indicators.

125.1.3. It is in this context that not only sustainable development is needed which takes care of integrating growth and development, thereby ensuring that the benefit of economic growth is reaped by every citizen of this country, it also becomes the duty of the Government in a welfare State to come out with various welfare schemes which not only take care of immediate needs of the deprived class but also ensure that adequate opportunities are provided to such persons to enable them to make their lives better, economically as well as socially. As mentioned above, various welfare schemes are, in fact, devised and floated from time to time by the Government, keeping aside substantial amount of money earmarked for spending on socially and economically backward classes. However, for various reasons including corruption, actual benefit does not reach those who are supposed to receive such benefits. One of the main reasons is failure to identify these persons for lack of means by which identity could be established of such genuine needy class. Resultantly, lots of ghosts and duplicate beneficiaries are able to take undue and impermissible benefits. A former Prime Minister of this country [Late Shri Rajiv Gandhi] has gone on record to say that out of one rupee spent by the Government for welfare of the downtrodden, only 15 paisa thereof actually reaches those persons for whom it is meant. It cannot be doubted that with UID/Aadhaar much of the malaise in this field can be taken care of.

263. It may be highlighted at this stage that the Petitioners are making their claim on the basis of dignity as a facet of right to privacy. On the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised Section of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated in Para IV of the Constitution. The rationale

behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental Rights of life and personal liberty (Article 21) to ensure Justice, Social, Political and Economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid day meals, LPG subsidies, etc. These schemes involve 3% percentage of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the Petitioners seek to bank upon. The Constitution does not exist for a few or minority of the people of India, but "We the people". The goals set out in the Preamble of the Constitution do not contemplate statism and do not seek to preserve justice, liberty, equality an fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived Section of the society to receive such benefits on the premise that it is their fundamental right to claim such benefits. It is acknowledged by the Respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Article 47), though the said principles remain a source of inspiration. This entitlement has turned into a Constitutional fundamental right. This Constitutional obligation is reinforced by obligations under International Convention. The Universal Declaration of Human Rights (Preamble, Article 22 & 23) and International Covenant on Economic, Social and Cultural Rights to which India is a signatory, also casts responsibilities on all State parties to recognize the right of everyone to adequate food. Eradicating extreme poverty and hunger is one of the goals under the Millennium Development Goals of the United Nations. The Parliament enacted the National Security Food Act, 2013 to address the issue of food security at the household level. The scheme of the Act designs a targeted public distribution system for providing food grains to those below BPL. The object is to ensure to the people adequate food at affordable prices so that people may live a life with dignity. The reforms contemplated Under Section 12 of the Act include, application of information and communication technology tools with end to end computerization to ensure transparency and to prevent diversion, and leveraging Aadhaar for unique biometric identification of entitled beneficiaries. The Act imposes obligations on the Central Government, State Government and local authorities vide Chapter VIII, IX and X. Section 32 contemplates other welfare schemes. It provides for nutritional standards in Schedule II and the undertaking of further steps to progressively realize the objectives specified in Schedule III.

264. At this juncture, we would also like to mention that historic judgment of this Court in *His Holiness Kesavananda Bharati Sripadagalvaru* v. *State of Kerala and Anr.* MANU/SC/0445/1973 : (1973) 4 SCC 225 emphasised on the attainment of socio-economic rights and its interplay with fundamental rights. Following passages from the opinion rendered by Khanna, J. need a specific mention:

1477. I may also refer to another passage on p. 99 of *Grammar of Politics* by Harold Laski:

The state, therefore, which seeks to survive must continually transform itself to the demands of men who have an equal claim upon that common welfare which is its ideal purpose to promote.

We are concerned here, not with the defence of anarchy, but with the conditions of its avoidance. Men must learn to subordinate their self-interest to the common welfare. The privileges of some must give way before the rights of all. Indeed, it may be urged that the interest of the few is in fact the attainment of those rights, since in no other environment is stability to be assured.

1478. A modern State has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, uplift of the downtrodden, the raising of the standards of the vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with the larger interests of the society, the State acquires the power to subordinate the individual rights to the larger interests of society as a step towards social justice. As observed by Roscoe Pound on p. 434 of Volume I of *Jurisprudence* under the heading "Limitations on the Use of Property":

Today the law is imposing social limitations--limitations regarded as involved in social life. It is endeavouring to delimit the individual interest better with respect to social interests and to confine the legal right or liberty or privilege to the bounds of the interest so delimited.

To quote the words of Friedmann in *Legal Theory:*

But modern democracy looks upon the right to property as one conditioned by social responsibility by the needs of society, by the 'balancing of interests' which looms so large in modern jurisprudence, and not as pre-ordained and untouchable private right." (Fifth Edition, p. 406).

265. It would also be worthwhile to mark, in continuity with the aforesaid thought, what Dwivedi, J. emphasised.

...The Nation stands to-day at the cross-roads of history and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.

266. By no stretch of imagination, therefore, it can be said that there is no defined State aim in legislating Aadhaar Act. We may place on record that even the Petitioners did not seriously question the purpose *bona fides* of the legislature in enacting this law. In a welfare State, where measures are taken to ameliorate the sufferings of the downtrodden, the aim of the Act is to ensure that these benefits actually reach the populace for whom they are meant. This is naturally a legitimate State aim.

(iii) **Whether Aadhaar Act meets the test of proportionality?**

267. The concept and contours of doctrine of proportionality have already been discussed in detail. We have also indicated the approach that we need to adopt while examining the issue of proportionality.

This discussion bring out that following four subcomponents of proportionality need to be satisfied:

(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right holder (balancing stage).

268. We now proceed to examine as to whether these components meet the required parameters in the instant case.

(a) Legitimate Goal Stage: At this stage, the exercise which needs to be undertaken is to see that the State has legitimate goal in restricting the right. It is also to be seen that such a goal is of sufficient importance justifying overriding a constitutional right of freedom. Further, it impairs freedom as little as possible.

269. In our preceding discussion, we have already pointed out above that Aadhaar Act serves the legitimate state aim. That, in fact, provides answer to this component as well. Some additions to the said discussion is as follows:

It is a matter of common knowledge that various welfare schemes for marginalised Section of the society have been floated by the successive governments from time to time in last few decades. These include giving ration at reasonable cost through ration shops (keeping in view Right to Food), according certain benefits to those who are below poverty line with the issuance of BPL Cards, LPG connections and LPG cylinders at minimal costs, old age and other kinds of pensions to deserving persons, scholarships, employment to unemployed under Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA) Scheme. There is an emergence of socio-economic rights, not only in India but in many other countries world-wide. There is, thus, recognisation of civil and political rights on the one hand and emergence of socio-economic rights on the other hand. The boundaries between civil and political rights review as well as socio-economic rights review are rapidly crumbling. This rights jurisprudence created in India is a telling example.

270. This Court has developed a reputation as both a protector of Human Rights and an engine of economic and social reforms. In *People's Union for Civil Liberties (PUCL)* v. *Union of India* MANU/SC/0274/1997 : (2001) 5 Scale 303, the Court's treatment of Right to Food as a fundamental right has been seen as victory for India's impoverished population. The Court had passed orders enforcing the Government to take steps to ensure the effective implementation of the Food Distribution Schemes created by the Famine Code. Series of interim orders were passed

aimed at bringing immediate relief to the drought affected individuals. The benefits of the schemes were converted into legal entitlements by orders dated November 28, 2001 passed in the said case. Amongst other things, the Court ordered government to complete the identification of people who fell into the groups targeted for food distribution, issue cards to allow these people to collect the grain and distribute the grain to the relevant centres. The order also provided for governmental inspections to ensure fair quality grain. In this and subsequent orders, the court set the requirements on reporting, accountability, monitoring, transparency and dissemination of court orders aimed at ensuring that its orders are followed.

271. The purpose behind these orders was to ensure that the deserving beneficiaries of the scheme are correctly identified and are able to receive the benefits under the said scheme, which is their entitlement. The orders also aimed at ensuring 'good governance' by bringing accountability and transparency in the distribution system with the pious aim in mind, namely, benefits actually reached those who are rural, poor and starving.

272. Again, in *People's Union for Civil Liberties (PUCL)* case, orders dated January 20, 2010 were passed by the Division Bench of this Court directing the Government of Delhi to respond to the extreme weather conditions 'by setting up more shelters and protecting homeless people from the cold'. The assurance was extracted from the then Additional Solicitor General on behalf of the Government that affected people would be provided with shelter as a matter of priority and that arrangement should be made for this within a day.

273. In the context of Right to Education, this Court in *State of Bihar and Ors.* v. *Project Uchcha Vidya, Sikshak Sangh and Ors.*[45] passed orders on January 3, 2006 thereby directing that a committee be appointed to investigate departures from the State of Bihar's policy concerning the establishment of 'Project Schools' aimed at improving its poor education record. The Court appointed a committee to investigate the matter. The Court's order included details as to the composition and functions of the committee, guidelines as to what would constitute irregularities in the implementation of the policy and an expectation that the State of Bihar would take remedial action if the committee found any irregularities. The Court's approach to affirmative action in education is also instructive.

274. In *Ashoka Thakur* v. *Union of India*[46], the Court upheld the Ninety-Third Amendment to the Constitution, which allows for certain educational institutions to put in place special admissions Rules in order to advance India's 'socially or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes'.[47] The Court held that people who are wealthier and better educated (the 'creamy layer') should be excluded from the 27 per cent quota for 'Other Backward Classes' (OBC). This step was needed to ensure that benefits reached those people living in desperate poverty. In addition, the inclusion of particular groups in the OBC category had to be reviewed every five years.

275. In *Paschim Banga Ket Mazdoor Samity* v. *State of West Bengal* MANU/SC/0611/1996 : (1996) 4 SCC 37, the Court found that Article 21 encompasses a right to adequate medical facilities or health care. It also interpreted other fundamental rights in light of directive principles. Likewise, in *Mohini Jain* v. *State of Kerala and Ors.* MANU/SC/0357/1992 : (1992) 3 SCC 666, the Court held that the right to equality before the law in Article 14 includes a right to education. In the

subsequent case, *Unnikrishnan* v. *State of Andhra Pradesh* MANU/SC/0333/1993 : (1993) 1 SCC 645, the Court clarified its findings in *Mohini Jain*, stating that Article 14 gave rise to a right to primary education. Following the cases on education, in 1997 the Indian government proposed a constitutional Amendment recognising education for children under 14 as a fundamental right. This Amendment was passed in 2002 as Article 21A. One of the Court's earliest cases dealing with the role of the directive principles in constitutional interpretation is arguably also its most celebrated judgment. Some commentators see the decision in *Olga Tellis and Ors.* v. *Bombay Municipal Corporation and Ors.* 1985 SCR Supl. (2) 51 as a recognition of enforceable right to shelter.

276. The purpose of citing aforesaid judgments is to highlight that this Court expanded the scope of Articles 14 and 21 of the Constitution by recognising various socio-economic rights of the poor and marginalised Section of the society and, in the process, transforming the constitutional jurisprudence by putting a positive obligation on the State to fulfill its duty as per the Charter of Directive Principles of the State Policy, contained in Part IV of the Constitution. It is to be kept in mind that while acknowledging that economic considerations would play a role in determining the full content of the right to life, the Court also held that right included the protection of human dignity and all that is attached to it, 'namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms' (See *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi and Ors.* MANU/SC/0517/1981 : (1981) 2 SCR 516). It is, thus, of some significance to remark that it is this Court which has been repeatedly insisting that benefits to reach the most deserving and should not get frittered mid-way. We are of the opinion that purpose of Aadhaar Act, as captured in the Statement of Objects and Reasons and sought to be implemented by Section 7 of the Aadhaar Act, is to achieve the stated objectives. This Court is convinced by its conscience that the Act is aimed at a proper purpose, which is of sufficient importance.

(b) **Suitability or rationale connection stage:**

277. We are also of the opinion that the measures which are enumerated and been taken as per the provisions of Section 7 read with Section 5 of the Aadhaar Act are rationally connected with the fulfillment of the objectives contained in the Aadhaar Act. It may be mentioned that the scheme for enrolling under the Aadhaar Act and obtaining the Aadhaar number is optional and voluntary. It is given the nomenclature of unique identity. A person with Aadhaar number gets an identity. No doubt, there are many other modes by which a person can be identified. However, certain categories of persons, particularly those living in abject poverty and those who are illiterate will not be in a position to get other modes of identity like Pan Card, Passport etc. That apart giving unique identity of each resident of the country is a special feature of this scheme, more so, when it comes with the feature stated above, namely, no person can have more than one Aadhaar number; Aadhaar number given to a particular person cannot be reassigned again to any individual even if that is cancelled and there is hardly any possibility to have fake identity.

278. As pointed out above, enrolling for Aadhaar is not the serious concern of the Petitioners. It is only the process of authentication and other related issues which bothers the Petitioners which shall be considered at the appropriate stage. At this point of time, we are discussing the issue as to whether the limitation on the rights of the individuals is rationally connected to the fulfillment of

the purpose contained in the Aadhaar Act. Here, Section 5 talks of special measures for issuance of Aadhaar number to certain categories of persons. It gives identity to those persons who otherwise may not have any such identity. In that manner, it recognises them as residents of this nation and in that form gives them their 'dignity'.

279. Section 7, which provides for necessity of authentication for receipt of certain subsidies, benefits and services has a definite purpose and this authentication is to achieve the objectives for which Aadhaar Act is enacted, namely, to ensure that such subsidies, benefits and services reach only the intended beneficiaries. We have seen rampant corruption at various levels in implementation of benevolent and welfare schemes meant for different classes of persons. It has resulted in depriving the actual beneficiaries to receive those subsidies, benefits and services which get frittered away though on papers, it is shown that they are received by the persons for whom they are meant. There have been cases of duplicate and bogus ration cards, BPL cards, LPG connections etc. Some persons with multiple identities getting those benefits manifold. Aadhaar scheme has been successful, to a great extent, in curbing the aforesaid malpractices. By providing that the benefits for various welfare schemes shall be given to those who possess Aadhaar number and after undergoing the authentication as provided in Section 8 of the Aadhaar Act, the purpose is to ensure that only rightful persons receive these benefits. Non-action is not costly. It's the affirmative action which costs the Government. And that money comes from exchequer. So, it becomes the duty of the Government to ensure that it goes to deserving persons. Therefore, second component also stands fulfilled.

(c) **Necessity Stage:**

280. Insofar as third component is concerned, most of it stands answered while in the discussion that has ensued in respect of component No. 1 and 2. The manner in which malpractices have been committed in the past leaves us to hold that apart from the system of unique identity in Aadhaar and authentication of the real beneficiaries, there is no alternative measure with lesser degree of limitation which can achieve the same purpose. In fact, on repeated query by this Court, even the Petitioners could not suggest any such method.

(d) **Balancing Stage:**

281. With this, we now advert to the most important component of proportionality i.e. balancing between importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

282. Argument of the Petitioners is that Aadhaar project creates the architect of surveillance state and society, which is antithetical to the principles of democracy. It is premised on the basis that the Aadhaar project enables the State to profile citizens, track their movements, assess their habits and silently influence their behaviour throughout their lives. It may stifle dissent and influence political decision making. It is also argued that aggregation, storage and use of such stored information is violative of fundamental right to privacy, dignity and individual autonomy. Informational privacy is expected as part of right to privacy. The Act allows data aggregation as well. Such an Act is unconstitutional as there is violation of a fundamental rights but there is absence of procedural safeguards to protect data in the Act. It is also argued that extent of

information collected with the use of Aadhaar, specially by the methodology of authentication, is not proportionate to the 'compelling interest of the State' and there are various other methods available for identification. It is, thus, disproportionate and unreasonable state compulsion.

283. The Respondents, on the other hand, have argued that there cannot be any reasonable expectation of privacy inasmuch as the Aadhaar Act operates in the public and relationally sphere and not in the core, private or personal sphere of the residents. Moreover, it involves minimal identity information for effective authentication which stands the test of reasonableness. The Act is, thus, least intrusive and strict scrutiny test does not apply in the proportionality test. It is also the case of the Respondents that the Aadhaar Act does not allow aggregation at all and, therefore, all the apprehension are ill-founded and have no basis. It is also submitted that the Aadhaar Act is, in fact, the facilitator in empowering various facets of right to life Under Article 21 and thereby ensures that unprivileged class is also able to live with human dignity.

284. Before undertaking this exercise of balancing, we would like to point out that we are not convinced with the argument of the Respondents that there cannot be any reasonable expectation of privacy. No doubt, the information which is gathered by the UIDAI (whether biometric or demographic) is parted with by the individuals to other agencies/body corporates etc. in many other kinds of transactions as well, as pointed out by the Respondents. However, the matter is to be looked into from the angle that this information is collected and stored by the State or instrumentality of the State. Therefore, it becomes important to find out as to whether it meets the test of proportionality, and satisfies the condition that the measure must not have disproportionate impact on the right-holder (balancing stage). However, at the same time, the fact that such information about individuals is in public domain may become a relevant factor in undertaking the exercise of balancing.

285. We have already traced the objectives with which the Aadhaar Act has been enacted. No doubt, there is a right to privacy, which is now entrenched in fundamental rights. On the other hand, we are also concerned with the rights of those persons whose dignity is sought to be ensured by giving them the facilities which are necessary to live as dignified life. Therefore, balancing has to be done at two levels:

(i) Whether, 'legitimate state interest' ensures 'reasonable tailoring'? There is a minimal intrusion into the privacy and the law is narrowly framed to achieve the objective. Here the Act is to be tested on the ground that whether it is found on a balancing test that the social or public interest and the reasonableness of the restrictions outweigh the particular aspect of privacy, as claimed by the Petitioners. This is the test we have applied in the instant case.

(ii) There needs to be balancing of two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand. Axiomatically both the rights are founded on human dignity. At the same time, in the given context, two facets are in conflict with each other. The question here would be, when a person seeks to get the benefits of welfare schemes to which she is entitled to as a part of right to live life with dignity, whether her sacrifice to the right to privacy, is so invasive that it creates imbalance?

286. In a way, both the aforesaid questions have some overlapping inasmuch as even while finding answer to the second question, it will have to be determined as to whether there is a least intrusion into the privacy of a person while ensuring that the individual gets the benefits under the welfare schemes.

287. The Respondents seemed to be right when they argue that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those which concern matters over which there can be a reasonable expectation of privacy would be protected by Article 21. In this behalf, we may recapitulate the discussion on some significant aspects in *Puttaswamy:*

Privacy postulates the reservation of a private space, described as the right to be let alone. The integrity of the body and the sanctity of the mind can exist on the foundation of the individual's 'right to preserve a private space in which the human personality can develop' and this involves the ability to make choices. In this sense privacy is a postulate of human dignity itself. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated 'over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy'. Thoughts and behavioral patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy an individual is not judged by others. The judgment refers to the expert group report and identifies nine privacy principles pertaining to notice, choice and consent, collection limitation, purpose limitation, access and correction, non disclosure of information, security of data, openness or proportionality as to the scale, scope and sensitivity to the data collected, and accountability. At the same time, privacy is a subset of liberty. All liberties may not be exercised in privacy. It lies across the spectrum of protected freedoms. Further, the notion of reasonable expectation of privacy has both subjective and objective elements. At a subjective level it means 'an individual desires to be left alone'. On an objective plain privacy is defined by those Constitutional values which shape the content of the protected zone where the individual 'ought to be left alone'. Further, the notion of reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other 'the exercise of individual choices is subject the right of others to lead orderly lives'. The extent of the zone of privacy would, therefore, depend upon both the subjective expectation and the objective principle which defines a reasonable expectation.

It is pertinent to point out that while dealing with informational privacy, the judgment notes that privacy concerns are seriously an issue in the age of information. It also notes the data mining processes together with knowledge discovery, and the age of big data. The court finds that data Regulation and individual privacy raises complex issues requiring delicate balances to be drawn between the legitimate concerns of the State and individual interest in the protection of privacy, and in this sphere, data protection assumes significance. Data such as medical information would be a category to which a reasonable expectation of privacy attaches. There may be other data which falls outside the reasonable expectation paradigm. Data protection regimes seek to protect the autonomy of the individual. This is a complex exercise involving careful balancing. In this balancing process, following parameters are to be kept in mind:

(i) The judgment also holds that the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas. However, 'the privacy is not lost or surrendered merely because the individual is in a public space'.

(ii) One of the chief concerns is that 'while the web is a source of lawful activity - both personal and commercial, concerns of National security intervene since the seamless structure of the web can be exploited by terrorist to wreak havoc and destruction on civilized societies.' Noting an Article of Richard A. Posner, which says 'privacy is the terrorist's best friend..' It is observed that this formulation indicates that State has legitimate interest when it monitors the web to secure the Nation.

(iii) Apart from National security, State may have justifiable reasons for the collection and storage of data as where it embarks upon programs to provide benefits to impoverished and marginalized Sections of society and for ensuring that scarce public resources are not dissipated and diverted to non-eligible recipients. Digital platforms are a vital tool of ensuring good governance in a social welfare State and technology is a powerful enabler.

288. In the first instance, therefore, it is to be seen as to whether the Petitioners claim on the information supplied while authentication to be protected is based on reasonable expectation.

289. 'Reasonable Expectation' involves two aspects. First, the individual or individuals claiming a right to privacy must establish that their claim involves a concern about some harm likely to be inflicted upon them on account of the alleged act. This concern 'should be real and not imaginary or speculative'. Secondly, 'the concern should not be flimsy or trivial'. It should be a reasonable concern. It has to be borne in mind that the concept of 'reasonable expectation' has its genesis in the US case laws. UK judgments adopted the test of reasonable expectation from the US jurisprudence. The ECHR and ECJ judgments reveal a little divergence with regard to right of privacy. The ECHR in general adopts the approach that 'a person's reasonable expectation as to privacy may be significant, although, not necessarily conclusive factor'. This perhaps explains the apparent conflict as regards finger prints.

290. In the leading case *Katz* v. *US* 389 U.S. 347 Reasonable Expectation was stated to embrace two distinct questions. The first was whether the individual, by his conduct has exhibited an actual (subjective expectation of privacy), and the second, whether the subjective expectation is one that the society is prepared to recognize as reasonable. This was also followed in *Smith* v. *Marlyand* 442 US 735.

291. In the judgment of Court of Appeal in *R. Wood* v. *Commissioner* (2010) 1 WLR 123, the Appellant complained against taking and retention of his photograph in Central London in the context of a meeting by the police force to enable identification at a later time in the event of eruption of disorder and commission of offence. The concept of reasonable expectation was examined after surveying a series of judgments which sought to consider violation of Article 8 of the ECHR. The following pertinent aspects emerge:

(i) Whether information related to private or public matter?

(ii) Whether the material obtained was envisaged for a limited use or was likely to be made available to general public?

(iii) Private life was a broad term covering physical and psychological integrity of a person.

(iv) Storing of data relating to private life of an individual interferes with Article 8. However, in determining whether information retained involves any private life aspect would have to be determined with due regard to the specific context.

(v) Article 8, however protean, should not be so construed widely that its claims become unreal and unreasonable. Firstly, the threat to individuals personal autonomy must attain a certain level of seriousness. Secondly, the claimant must enjoy on the facts a reasonable expectation of privacy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by scope of justifications available to the State.

(vi) Reasonable expectation of privacy is a broad concept which takes into account all the circumstances of the case. They include attributes of the claimants, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence (or presence) of consent, the effect on the claimant and the purpose for which information is taken.

292. Therefore, when a claim of privacy seeks inclusion in Article 21 of the Constitution of India, the Court needs to apply the reasonable expectation of privacy test. It should, inter alia, see:

(i) What is the context in which a privacy claim is set up?

(ii) Does the claim relate to private or family life, or a confidential relationship?

(iii) Is the claim a serious one or is it trivial?

(iv) Is the disclosure likely to result in any serious or significant injury and the nature and extent of disclosure?

(v) Is disclosure relates to personal and sensitive information of an identified person?

(vi) Does disclosure relate to information already disclosed publicly? If so, its implication?

293. Under the Aadhaar Act Architecture, four types of information is to be given at the time of enrolment:

(i) Mandatory demographic information comprising name, date of birth, address and gender (Section 2(k) read with Regulation 4(1) of the Aadhaar (Enrolment and Update) Regulations, 2016).

(ii) Optional demographic information (Section 2(k) read with Regulation 4(2) of the Aadhaar (Enrolment and Update) Regulations, 2016).

(iii) Non core biometric information comprising photograph.

(iv) Core biometric information comprising finger print and iris scan.

294. Insofar as demographic information is concerned, it is required by the provisions of many other enactments as well like Companies Act, Special Marriage Act, Central Motor Vehicle Rules, Registration of Electoral Rules, The Citizenship Rules, The Passport Act and even Supreme Court Rules.

295. As regards core biometric information which comprises finger prints, iris scan, for the purpose of enrolling in Aadhaar scheme, we have already held earlier that it is minimal information required for enrolment. This information becomes essential for authentication use in a public sphere and in relational context.

296. It may also be mentioned that with the advent of science and technology, finger print and iris scan have been considered to be the most accurate and non invasive mode of identifying an individual. It is for this reason that these are taken also for driving licenses, passports, visa as well as at the time of registration of documents by the State. These are also used in mobile phones, laptops, lockers etc. for private use. International Civil Aviation Organisation (ICAO) has recommended use of biometric passports. Many civilized countries with robust democratic regime have also introduced biometric based identity cards. Therefore, collection of information in the four different categories mentioned above may not be unreasonable. However, as stated earlier as well, the issue is not of taking the aforesaid information for the purpose of enrolling in Aadhaar and for authentication. It is the storage and retention of this data, whenever authentication takes place, about which the concerns are raised by the Petitioners. The fears expressed by the Petitioners are that with the storage and retention of such data, profile of the persons can be created which is susceptible to misuse.

297. This aspect has already been dealt with earlier and apprehension of the Petitioners are taken care of. To recapitulate, at the time of enrolment, the data collected is minimal and there is no data collection in respect of religion, caste, tribe, language of records of entitlement income or medical history of the applicant at the time of Aadhaar enrolment. Full care is taken that even the minimal data collected at the time of enrolment does not remain with the enrolment agency and immediately gets transmitted to CIDR. Even at the time of authentication, the only exercise which is undertaken by the Authority is to see that the finger prints and/or iris scan of the concerned person sent for authentication match with the one which is in the system of Authority.

298. Let us advert to the second facet of balancing, namely, balancing of two fundamental rights. As already pointed out above, the Aadhaar Act truly seeks to secure to the poor and deprived persons an opportunity to live their life and exercise their liberty. By ensuring targeted delivery through digital identification, it not only provides them a nationally recognized identity but also attempts to ensure the delivery of benefits, service and subsidies with the aid of public exchequer/Consolidated Fund of India. National Security Food Act, 2013 passed by the Parliament seeks to address the issue of food, security at the household level. The scheme of that Act is aimed at providing food grains to those belonging to BPL categories. Like the MGNREGA Act, 2005 takes care of employment. The MGNREGA Act has been enacted for the enhancement, livelihood,

security of the households in rural areas of the country. It guarantees at least 100 days of wage employment in every financial year to at least one able member of every household in the rural area on assets creating public work programme. Sections 3 and 4 of the MGNREGA Act contain this guarantee. The minimum facilities to be provided are set out by Section 5 read with Schedule II. Section 22 provides for funding pattern and Section 23 provides for transparency and accountability. This Act is another instance of a rights based approach and it enlivens the Fundamental Right to life and personal liberty of Below Poverty Line people in rural areas.

299. We may mention here that Mr. Dwivedi had pointed out not only India but several other countries including western nations which have read socio-economic rights into human dignity and right to life. Hungary and South Africa have gone to the extent of making express provisions in their Constitutions.

The Federal Constitution Court of Germany in a decision dated February 09, 2010 while deciding the question whether the amount of standard benefit aid is compatible with the Basic Law held that:

The Fundamental Right to the guarantee of a subsistence minimum is in line with human dignity emerges from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law... Article 1.1 of the Basic Law established this claim. The principle of the social welfare State contained in Article 20.1 of the Basic Law, in turn grants to the Legislature the mandate to ensure a subsistence minimum for all that is in line with human dignity.

It is further held that:

if a person does not have the material means to guarantee an existence that is in line with human dignity because he or she is unable to obtain it either out of his or her gainful employment, or from own property or by benefits from third parties, the State is obliged within its mandate to protect human dignity and to ensure, in the implementation of its social welfare state mandate, that the material prerequisites for this are at the disposal of the person in need of assistance.

Similarly, in a latter judgment dated July 18, 2012 while deciding whether the amount of the cash benefit provided for in the Asylum Seekers Benefits Act was constitutional it reiterated that:

the direct constitutional benefit claim to the guarantee of a dignified minimum existence does only cover those means that are absolutely necessary to maintain a dignified life. It guarantees the entire minimum existence as a comprehensive fundamental rights guarantee, that encompasses both humans' physical existence, that is food, clothing, household items, housing, heating, hygiene, and health, and guarantees the possibility maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life, since a human as a person necessarily exists in a social context....

300. The Constitutional Court of South Africa in *Government of the Republic of South Africa and Ors.* v. *Grootboom* (2000) ZACC 19 held that:

...these rights need to be considered in the context of the socio-economic rights enshrined in the Constitution. They entrench the right to access to land, to adequate housing and to health care, food, water and social security....

301. In 1995, Hungary's Constitutional Court ruled that the right to social security as contained in Article 70/E of the Constitution obligated the State to secure a minimum livelihood through all of the welfare benefits necessary for the realization of the right to human dignity.

302. Even in Italy, the Courts have emphasized on the right to social security.

303. In *Budina* v. *Russia*[48], the European Court of Human Rights has recognized, in principle, that inadequate benefits could fall Under Article 3 of the European Convention on Human Rights (ECHR) on the right to be free from inhuman and degrading treatment.

304. In 1996, the Swiss Federal Court ruled that three Czechs illegally residing in Switzerland are entitled to social benefit in order to have a minimal level of subsistence for a life in dignity to prevent a situation where people "are reduced to beggars, a condition unworthy of being called human. It held:

...The federal constitution does not (though the 1995 draft new constitution is now different) explicitly provide for a fundamental right to a subsistence guarantee. One can however also derive unwritten constitutional right from it. A guarantee of freedoms not mentioned in the constitution by unwritten constitutional law was assumed by the exercise of other freedoms (mentioned in the constitution), or otherwise evidently indispensable components of the democratic constitutional order of the Federation.....

...The guaranteeing of elementary human needs like food, clothing and shelter is the condition for human existence and development as such. It is at the same time an indispensable component of a constitutional, democratic polity.

305. Nelson Mandela in his speech at Trafalgar Square in London in 2005 said:

...Massive poverty and obscene inequality are such terrible scourges of our times - times in which the world boasts breathtaking advances in science, technology, industry and wealth accumulation - that they have to rank alongside slavery and apartheid as social evils...And overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom.

306. Following passages by James Griffin in his book on "Human Rights" are worth noting:

10.1 THE HISTORICAL GROWTH OF RIGHTS:

Contrary to widespread belief, welfare rights are not a twentieth-century innovation, but are among the first human rights ever to be claimed. When in the twelfth and thirteenth centuries our modern conception of a right first appeared, one of the earliest examples offered was the right of those in dire need to receive aid from those in surplus. This right was used to articulate the attractive view

of property prevalent in the medieval Church. God has given all things to us in common, but as goods will not be cared for and usefully developed unless assigned to particular individuals, we creatures have instituted systems of property. In these systems, however, an owner is no more than a custodian. We all thus have a right, if we should fall into great need, to receive necessary goods or, failing that, to take them from those in surplus.

One finds, every occasionally, what seem to be human rights to welfare asserted in the Enlightenment, for example, by John Locke, Tom Paine, and William Cobbett. Following the Enlightenment, right to welfare have often appeared in national constitutions; for example, the French constitutions of the 1790s, the Prussian Civil Code (1794), the Constitutions of Sweden (1809), Norway (1814), The Netherlands (1814), Denmark (1849), and, skipping to the twentieth century, the Soviet Union (1936)-though it is not always clear that the drafters of these various documents thought of these fundamental civil rights as also human rights. By the end of the nineteenth century, political theorists were beginning to make a case that welfare rights are basic in much the sense that Civil and political rights a re. But it was **Franklin Roosevelt** who did most to bring welfare rights into public life. The Atlantic Charter (1941), signed by Roosevelt and Churchill but in this respect primarily Roosevelt's initiative, declared that in addition to the classical civil and political freedoms here were also freedoms from want and fear. In his State of the Union message of 1944, Roosevelt averred:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men'...

In our day these economic truths have become accepted as self evident. We have accepted, so to speak, a second Bill of Rights...

Among these are: The right to a useful and remunerative job.... The right to earn enough to provide adequate food and clothing and recreation...

The United Nations committee charged with drafting the Universal Declaration of Human Rights (1948), chaired by Eleanor Roosevelt, included most of the now standard welfare rights; rights to social security, to work, to rest and leisure, to medical care, to education, and 'to enjoy the arts and to share in scientific advancements and its benefits'. The Universal Declaration is a good example of how extensive-some would say lavish-proposed welfare rights have become.

...If human rights are protections of a form of life that is autonomous and free, they should protect life as well as that form of it. But if they protect life, must they not also ensure the wherewithal to keep body and soul together-that is, some minimum material provision? And as mere subsistence-that is, keeping body and soul together-is too meager to ensure normative agency, must not human rights guarantee also whatever leisure and education and access to the thought of others that are also necessary to being a normative agent?

That is the heart of the case. It appeals to our picture of human agency and argues that both life and certain supporting goods are integral to it. Life and certain supporting goods are necessary conditions of being autonomous and free. Many philosophers employ this necessary - condition

argument to establish a human right to welfare-or, at least, to establish the right's being as basic as any other rights.

I too want to invoke the necessary-conditions arguments; I should only want to strengthen it. It is now common to say that liberty rights and welfare rights are 'indivisible'. But that, also, is too weak. It asserts that one cannot enjoy the benefits of liberty rights without enjoying the benefits of welfare rights, and vice versa. But something stronger still may be said. There are forms of welfare that are empirically necessary conditions of a person's being autonomous and free, but there are also forms that are logically necessary-part of what we mean in saying that a person has these rights. The value in which human rights are grounded is the value attaching to normative agency. The norm arising from this value, of course, prohibits persons from attacking another's autonomy and liberty. But it prohibits more. The value concerned is being a normative agent, a self-creator, made in god's image.... The value resides not simply in one's having the undeveloped, unused capacities for autonomy and liberty but also in exercising them-not just in being able to be autonomous but also in actually being so. The norm associated with this more complex value would address other ways of failing to be an agent. It would require protecting another person from losing agency, at least if one can do this without great cost to oneself; it would require helping to restore another's agency if it has already been lost, say through giving mobility to the crippled or guidance to the blind, again with the same proviso. All of this is involved simply in having a right to autonomy or to liberty. Welfare claims are already part of the content of these rights. What, then, should we think of the common division of basic rights into 'classical' liberty rights and welfare rights? Into which of these two classes does the right to autonomy or to liberty go? Into which of the two classes do the difficult, apparently borderline cases go, such as rights to life, to property, to the pursuit of happiness, to security of person, and to privacy? The sensible response would be to drop the distinction. What is more, a right to welfare is a human right.

36. Amartya Sen in his book "Development as Freedom" says:

Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers-perhaps even the majority-of people. Sometimes the lack of substantive freedoms relates directly to economic poverty, which robs people of the freedom to satisfy hunger, or to achieve sufficient nutrition, or to obtain remedies for treatable illnesses, or the opportunity to be adequately clothed or sheltered, or to enjoy clean water or sanitary facilities. In other cases, the unfreedom links closely to the lack of public facilities and social care, such as the absence of epidemiological programs, or of organized arrangements for health care or educational facilities, or of effective institutions for the maintenance of local peace and order. In still other cases, the violation of freedom results directly from a denial of political and civil liberties by authoritarian regimes and from imposed restrictions on the freedom to participate in the social, political and economic life of the community.

307. In the aforesaid backdrop, this Court is called upon to find out whether Aadhaar Act strikes a fair balance between the two rights. In this context, we have to examine the importance of achieving the proper purpose and the social importance of preventing the limitation on the

constitutional rights. Insofar as importance of achieving the proper purpose is concerned, that has already been highlighted above. To reiterate some of the important features, it is to be borne in mind that the State is using Aadhaar as an enabler for providing deserving Section of the society their right to food, right to livelihood, right to receive pension and other social assistance benefits like scholarships etc. thereby bringing their right to life to fruition. This necessity of Aadhaar has arisen in order to ensure that such benefits are given to only genuine beneficiaries. The Act aims at efficient, transparent and targeted delivery of subsidies, benefits and services. In the process, it wants to achieve the objective of checking the corrupt practices at various levels of distribution system which deprive genuine persons from receiving these benefits. There have been reports relating to leakages in PDS as well as in fuel subsidies and also in working of MGNREGA scheme. Mr. Venugopal, learned Attorney General has given the following details about these reports:

(I) **Reports relating to leakages in PDS**

Several studies initiated by the Government as well as the World Bank and Planning Commission revealed that food grains did not reach the intended beneficiaries and that there was large scale leakages due to the failure to establish identity:

(a) The Comptroller and Auditor General of India in its Audit Report No. 3 of 2000 in its overview for the Audit Report observed that the Public Distribution Scheme suffered from serious targeting problems. 1.93 Crore bogus ration cards were found to be in circulation in 13 States and a significant portion of the subsidized food-grains and other essential commodities did not reach the beneficiaries due to their diversion in the open market.

(b) A Report titled "Budget Briefs: Targeted Public Distribution System (TPDS), GOI 2011-2012" prepared by Avani Kapur and Anirvan Chowdhury and published by the Accountability Initiative observed that there were large number of fake ration cards which were causing inefficiencies in targeting. Between July 2006 and July 2010, in Bihar, Madhya Pradesh, Uttar Pradesh and Orissa, total of 37 lakh ineligible/fake ration cards for households have been eliminated. Additionally, in Maharashtra and Madhya Pradesh, 29 lakh and 25 lakh ineligible ration cards were discovered and cancelled.

(c) World Bank published a Discussion Paper No. 380 titled "India's Public Distribution System: A National and International Perspective" dated November, 1997 co-authored by R. Radhakrishna and K. Subbarao, in which it was found that in the year in 1986-87 for every one rupee (Re. 1) transferred under the PDS, the expenditure incurred by the central government was Rs. 4.27.

(d) The Planning Commission of India in its Performance Evaluation Report titled "Performance Evaluation Report of Targeted Public Distribution System (TPDS)" dated March, 2005 found as follows:

(i) State-wise figure of excess Ration Cards in various states and the existence of over 1.52 Crore excess Ration Cards issued.

(ii) Existence of fictitious households and identification errors leading to exclusion of genuine beneficiaries.

(iii) Leakage through ghost BPL Ration Cards found to be prevalent in almost all the states under study.

(iv) The Leakage of food grains through ghost cards has been tabulated and the percentage of such leakage on an All India basis has been estimated at 16.67%.

(v) It is concluded that a large part of the subsidized food-grains were not reaching the target group.

(II) **Report relating to Fuel subsidies**

13. With respect of Kerosene subsidies:

(a) A Report titled "Budgetary Subsidies in India - Subsidizing Social and Economic Services" prepared by the National Institute of Public Finance and Policy dated March, found that the key to lowering volume of subsidies was better targeting without which, there was significant leakage to unintended beneficiaries, with only 70% of the kerosene reaching the poorer Section of society.

(b) The Economic Survey 2014-15 at Chapter 3 titled "Wiping Every Tear from every Eye: The JAM Number Trinity Solution" dated February, 2015 noted that only 59 percent of subsidized kerosene allocated via the PDS is actually consumed by households, with the remainder lost to leakage and only 46 percent of total consumption is by poor households.

14. With respect to the MGNREGA Scheme the following reports have found large scale leakages in the scheme:

(a) Report prepared by the V.V. Giri National Labour Institute and sponsored by the Department of Rural Development, Ministry of Rural Development, Government of India as "The study of Schedule of Rates for National Rural Employment Guarantee Scheme" observes that there was great fraud in making fake job cards and it was found that in many cases, it was found that workers performed one day's job, but their attendance was put for 33 days. The workers got money for one day while wages for 32 days were misappropriated by the people associated with the functioning of NREGS.

(b) The National Institute of Public Finance and Policy's report titled as "A Cost-benefit analysis of Aadhaar" dated 09.11.2012 estimated that a leakage of approximately 12 percent is being caused to the government on account of ghost workers and manipulated muster rolls and assumed that 5 percent of the leakages can be plugged through wage disbursement using Aadhaar-enabled bank accounts and 7 percent through automation of muster rolls.

(III) It was also pointed out that the Thirteenth Finance Commission Report for 2010-2015 dated December, 2009 at page 218 in "Chapter 12 - Grants in Aid" states that the creation of a biometric-based unique identity for all residents in the country has the potential to address need of the government to ensure that only eligible persons are provided subsidies and benefits and that all eligible persons are covered.

The relevant findings of the above Report are as follows:

(i) Government of India's expenditure on subsidies is expected to be about Rs. 1,11,000 Crore in 2009-10, or nearly 18 per cent of the non-plan revenue expenditure.

(ii) The data base of eligible persons presently maintained has both Type I (exclusion) and Type II (inclusion) errors. The first error arises from the difficulty faced by the poor in establishing their identity in order to be eligible for government subsidies and social safety net programmes. The second error arises because of the inability to cross-verify lists of eligible persons across district-level and state-level data bases to eliminate duplicate and ghost entries. We need to ensure that only eligible persons are provided subsidies and benefits and that all eligible persons are covered.

(iii) Creation of a biometric-based unique identity for all residents in the country has the potential to address both these dimensions simultaneously. It will provide the basis for focusing subsidies to target groups. Possession of such an identity will also enable the poor and underprivileged to leverage other resources like bank accounts, cell phones, which can empower them and catalyse their income growth. These benefits cannot be accessed by them presently due to their inability to provide acceptable identification. The initiative to provide unique IDs has the potential to significantly improve the governance and delivery framework of public services while substantially reducing transaction costs, leakages and frauds.

308. As against the above larger public interest, the invasion into the privacy rights of these beneficiaries is minimal. By no means it can be said that it has disproportionate effect on the right holder.

309. Intensity of review depends upon the particular context of question in a given case. There is yet another significant angle in these matters, which has to be emphasised at this stage viz. dignity in the form of autonomy (informational privacy) and dignity in the form of assuring better living standards, of the same individual. In the instant case, a holistic view of the matter, having regard to the detailed discussion hereinabove, would amply demonstrate that enrolment in Aadhaar of the unprivileged and marginalised Section of the society, in order to avail the fruits of welfare schemes of the Government, actually amounts to empowering these persons. On the one hand, it gives such individuals their unique identity and, on the other hand, it also enables such individuals to avail the fruits of welfare schemes of the Government which are floated as socio-economic welfare measures to uplift such classes. In that sense, the scheme ensures dignity to such individuals. This facet of dignity cannot be lost sight of and needs to be acknowledged. We are, by no means, accepting that when dignity in the form of economic welfare is given, the State is entitled to rob that person of his liberty. That can never be allowed. We are concerned with the balancing of the two facets of dignity. Here we find that the inroads into the privacy rights where these individuals are made to part with their biometric information, is minimal. It is coupled with the fact that there is no data collection on the movements of such individuals, when they avail benefits Under Section 7 of the Act thereby ruling out the possibility of creating their profiles. In fact, this technology becomes a vital tool of ensuring good governance in a social welfare state. We, therefore, are of the opinion that the Aadhaar Act meets the test of balancing as well.

310. We may profitably refer to the judgment of this Court in *People's Union for Civil Liberties (PUCL) and Anr.* v. *Union of India and Anr.* MANU/SC/0234/2003 : (2003) 4 SCC 399 which

dealt with the issue of right to privacy vis-a-vis in public interest and leaned in favour of public interest which can be seen from the following discussion:

121. It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same. In this context, I would like to recall the apt words of Mathew, J., in *Gobind* v. *State of M.P.* [1969 UJ (SC) 616] While analysing the right to privacy as an ingredient of Article 21, it was observed: (SCC p. 155, para 22)

22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an *important countervailing interest is shown to be superior.*

It was then said succinctly: (SCC pp. 155-56, para 22)

If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State-interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right."

It was further explained: (SCC p. 156, para 23)

[P]rivacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse *benami* is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure;....

311. In *Vernonia School District 47J* v. *Acton et ux., Guardians Ad Litem for Acton* 515 US 646 (1995), the Supreme Court of United States, while repelling the Fourth Amendment challenge wherein the Petitioner had adopted a Drug Policy which authorised random urinalysis drug testing of students participating in athletics programs, remarked as under:

Taking into account all the factors we have considered above-the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search-we conclude Vernonia's Policy is reasonable and hence constitutional.

312. This very exercise of balancing of two fundamental rights was also carried out in *Subramanian Swamy* v. *Union of India, Ministry of Law and Ors.* MANU/SC/0621/2016 : (2016) 7 SCC 221 where the Court dealt with the matter in the following manner:

122. In *State of Madras* v. *V.G. Row* [*State of Madras* v. *V.G. Row* MANU/SC/0013/1952 : AIR 1952 SC 196 : 1952 Cri LJ 966], the Court has ruled that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

xx xx xx

130. The principles as regards reasonable restriction as has been stated by this Court from time to time are that the restriction should not be excessive and in public interest. The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down any abstract standard or general pattern. It would depend upon the nature of the right which has been infringed or sought to be infringed. The ultimate "impact", that is, effect on the right has to be determined. The "impact doctrine" or the principle of "inevitable effect" or "inevitable consequence" stands in contradistinction to abuse or misuse of a legislation or a statutory provision depending upon the circumstances of the case. The prevailing conditions of the time and the principles of proportionality of restraint are to be kept in mind by the court while adjudging the constitutionality of a provision regard being had to the nature of the right. The nature of social control which includes public interest has a role. The conception of social interest has to be borne in mind while considering reasonableness of the restriction imposed on a right. The social interest principle would include the felt needs of the society.

xx xx xx

Balancing of fundamental rights

136. To appreciate what we have posed hereinabove, it is necessary to dwell upon balancing the fundamental rights. It has been argued by the learned Counsel for the Petitioners that the right conferred Under Article 19(1)(a) has to be kept at a different pedestal than the individual reputation which has been recognised as an aspect of Article 21 of the Constitution. In fact the submission is that right to freedom of speech and expression which includes freedom of press should be given

higher status and the individual's right to have his/her reputation should yield to the said right. In this regard a passage from *Sakal Papers (P) Ltd.* [*Sakal Papers (P) Ltd.* v. *Union of India*, MANU/SC/0090/1961 : (1962) 3 SCR 842 : AIR 1962 SC 305] has been commended to us. It says: (AIR pp. 313-14, para 36)

36. ... Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under Clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. *A citizen is entitled to enjoy each and every one of the freedoms together and Clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom.*

137. Having bestowed our anxious consideration on the said passage, we are disposed to think that the above passage is of no assistance to the Petitioners, for the issue herein is sustenance and balancing of the separate rights, one Under Article 19(1)(a) and the other, Under Article 21. Hence, the concept of equipoise and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom. In *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj* v. *State of Gujarat* [*Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj* v. *State of Gujarat*, MANU/SC/0034/1974 : (1975) 1 SCC 11], it has been observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests...

xx xx xx

194. Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective (see *P.P. Enterprises* v. *Union of India* [*P.P. Enterprises* v. *Union of India*, MANU/SC/0036/1982 : (1982) 2 SCC 33: 1982 SCC (Cri) 341]). Further, the reasonableness is examined in an objective manner from the standpoint of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations (see *Mohd. Hanif Quareshi* v. *State of Bihar* [*Mohd. Hanif Quareshi* v. *State of Bihar* MANU/SC/0027/1958 : AIR 1958 SC 731]).

313. Thus, even when two aspects of the fundamental rights of the same individual, which appear to be in conflict with each other, is done, we find that the Aadhaar Act has struck a fair balance between the right of privacy of the individual with right to life of the same individual as a beneficiary.

In the face of the all pervading prescript for accomplished socio-economic rights, that need to be given to the deprived and marginalised Section of the society, as the constitutional imperative embodied in these provisions of the Act, it is entitled to receive judicial imprimatur.

Re: Argument on Exclusion:

314. Some incidental aspects, however, remain to be discussed. It was argued by the Petitioners that the entire authentication process is probabilistic in nature inasmuch as case of a genuine person for authentication can result in rejection as biometric technology does not guarantee 100% accuracy. It may happen for various reasons, namely, advance age, damage to fingerprints due to accident, etc. Even in case of children the fingerprints may change when they grow up. The emphasis was that there was a possibility of failure in authentication for various reasons and when it happens it would result in the exclusion rather than inclusion. In such eventuality an individual would not only be denied the benefits of welfare schemes, it may threaten his very identity and existence as well and it would be violative of Articles 14 and 21 of the Constitution. The Authority has claimed that biometric accuracy is 99.76%. It was, however, submitted that where more than 110 crores of persons have enrolled themselves, even 0.232% failure would be a phenomenal figure, which comes to 27.60 lakh people. Therefore, the rate of exclusion is alarming and this would result in depriving needy persons to enjoy their fundamental rights, which is the so-called laudable objective trumpeted by the Respondents.

TO DICTATE FURTHER

Re.: Studies on exclusion

Re.: Finger prints of disabled, old persons etc. See other mode of identity

315. The aforesaid apprehensions are sought to be assuaged by the Respondents by submitting that Section 7 of the Act nowhere says that if authentication fails, the concerned person would be deprived of subsidies, benefits or services. It is only an enabling provision. It also provides that in case of such a failure, such an individual would be permitted to establish her identity by any other means so that genuine persons are not deprived of their benefits which are mentioned in Section 7 as the entire Act is to facilitate delivery of those benefits to such persons. Learned Attorney General also referred to the Circular dated October 24, 2017 in this behalf which is issued by the Authority. That, according to us, takes care of the problem.

316. We understand and appreciate that execution of the Aadhaar scheme, which has otherwise a laudable objective, is a 'work in progress'. There have been substantial improvements in the system over a period of time from the date of its launch. It was stated by the learned Attorney General as well as Mr. Rakesh Dwivedi, at the Bar, that whenever difficulties in implementation are brought to the notice of the Respondents, remedial measures are taken with promptness. Cases of denial of

services are specifically looked into which is very much needed in a welfare State and there can be a genuine hope that with the fine tuning of technology, i.e. the mode of advancement at rapid pace, such problems and concerns shall also be completely taken care of.

317. In fairness to the Petitioners, it is worth mentioning that they have referred to the research carried out by some individuals and even NGOs which have been relied upon to demonstrate that there are number of instances leading to the exclusion i.e. the benefits are allegedly denied on the ground of failure of authentication. The Respondents have refuted such studies. These become disputed question of facts. It will be difficult to invalidate provisions of Parliamentary legislations on the basis of such material, more particularly, when their credence has not been tested.

318. That apart, there is another significant and more important aspect which needs to be highlighted. The objective of the Act is to plug the leakages and ensure that fruits of welfare schemes reach the targeted population, for whom such schemes are actually meant. This is the larger purpose, and very important public purpose, which the Act is supposed to subserve. We have already held that it fulfills legitimate aim and there is a rational connection between the provisions of the Act and the goals which it seeks to attain. The Act passes the muster of necessity stage as well when we do not find any less restrictive measure which could be equally effective in achieving the aim. In a situation like this where the Act is aimed at achieving the aforesaid public purpose, striving to benefit millions of deserving people, can it be invalidated only on the ground that there is a possibility of exclusion of some of the seekers of these welfare schemes? Answer has to be in the negative. We may hasten to add that by no means, we are accepting that if such an exclusion takes place, it is justified. We are only highlighting the fact that the Government seems to be sincere in its efforts to ensure that no such exclusion takes place and in those cases where an individual who is rightfully entitled to benefits under the scheme is not denied such a benefit merely because of failure of authentication. In this scenario, the entire Aadhaar project cannot be shelved. If that is done, it would cause much more harm to the society.

319. We are also conscious of the situation where the formation of fingerprints may undergo change for various reasons. It may happen in the case of a child after she grows up; it may happen in the case of an individual who gets old; it may also happen because of damage to the fingers as a result of accident or some disease etc. or because of suffering of some kind of disability for whatever reason. Even iris test can fail due to certain reasons including blindness of a person. We again emphasise that no person rightfully entitled to the benefits shall be denied the same on such grounds. It would be appropriate if a suitable provision be made in the concerned Regulations for establishing an identity by alternate means, in such situations. Furthermore, if there is a 0.232% failure in authentication, it also cannot be said that all these failures were only in those cases where authentication was for the purpose of utilising for the benefit of the welfare schemes, i.e. with reference to Section 7 of the Act. It could have happened in other cases as well. Be as it may, there is yet another angle which has to be kept in mind and cannot be ignored. We have already highlighted above as to how the Aadhaar project is aimed at serving a much larger public interest. The Authority has claimed that biometric accuracy is 99.76% and the Petitioners have also proceeded on that basis. In this scenario, if the Aadhaar project is shelved, 99.76% beneficiaries are going to suffer. Would it not lead to their exclusion? It will amount to throwing the baby out of hot water along with the water. In the name of 0.232% failure (which can in any case be remedied) should be revert to the pre-Aadhaar stage with a system of leakages, pilferages and

corruption in the implementation of welfare schemes meant for marginalised Section of the society, the full fruits thereof were not reaching to such people? The Aadhaar programme was conceived and conceptualised by Mr. Nandan Nilekani under the leadership of then Prime Minister, a great economist himself. It went through rigorous process of testing about its effectiveness before it is launched. This has been stated in the beginning. The entire aim behind launching this programme is the 'inclusion' of the deserving persons who need to get such benefits. When it is serving much larger purpose by reaching hundreds of millions of deserving persons, it cannot be crucified on the unproven plea of exclusion of some. We again repeat that the Court is not trivialising the problem of exclusion if it is there. However, what we are emphasising is that remedy is to plug the loopholes rather than axe a project, aimed for the welfare of large Section of the society. Obviously, in order to address the failures of authentication, the remedy is to adopt alternate methods for identifying such persons, after finding the causes of failure in their cases. We have chosen this path which leads to better equilibrium and have given necessary directions also in this behalf.

320. Another facet which needs examination at this stage is the meaning that is to be assigned to the expression 'benefits' occurring in Section 7 of the Aadhaar Act, along with 'subsidies' and 'services'. It was argued that the expression 'benefits' is very lose and wide and the Respondents may attempt to bring within its sweep any and every kind of governmental activity in the name of welfare of communities, which would result in making the requirement of Aadhaar virtually mandatory. It was pointed out that by issuing various circulars the Government has already brought within the sweep of Section 7, almost 139 such subsidies, services and benefits.

321. No doubt, the Government cannot take umbrage under the aforesaid provision to enlarge the scope of subsidies, services and benefits. 'Benefits' should be such which are in the nature of welfare schemes for which resources are to be drawn from the Consolidated Fund of India.

Therefore actions by CBSE, NEET, JEE and UGC requirements for scholarship shall not be covered Under Section 7, unless it is demonstrated that the expenditure is incurred from Consolidated Fund of India. Further, the expression 'benefit' has to be read *ejusdem generis* with the preceding word 'subsidies'.

322. We also make it clear that a benefit which is earned by an individual (e.g. pension by a government employee) cannot be covered Under Section 7 of the Act, as it is the right of the individual to receive such benefit.

At the same time, we have gone through the list of notifications which are issued Under Section 7 of the Aadhaar Act. We find that most of these notifications pertain to various welfare schemes under which benefits, subsidies or services are provided to the intending recipients. Moreover, in order to avail the benefits, only one time verification is required except for few services where annual verification is needed. It is only in respect of fertilizer subsidy where authentication is required every time the fertilizer is disbursed. However, it is clarified that fertilizer is also given on the basis of other documents such as Kisan Credit Card, etc. At the same time, we hope that the Respondents shall not unduly expand the scope of 'subsidies, services and benefits' thereby widening the net of Aadhaar, where it is not permitted otherwise. Insofar as notifications relating

to children are concerned, we have already dealt with the same separately. We, thus, conclude this aspect as under:

(a) 'benefits' and 'services' as mentioned in Section 7 should be those which have the colour of some kind of subsidies etc., namely, welfare schemes of the Government whereby Government is doling out such benefits which are targeted at a particular deprived class.

(b) The expenditure thereof has to be drawn from the Consolidated Fund of India.

(c) On that basis, CBSE, NEET, JEE, UGC etc. cannot make the requirement of Aadhaar mandatory as they are outside the purview of Section 7 and are not backed by any law.

Children:

323. Though, we have upheld, in general, the validity of Section 7 of the Aadhaar Act, one specific aspect thereof is yet to be considered. Section 7 mandates requirement of Aadhaar for the purposes of receiving certain subsidies, benefits and services. Thus, any individual who wants to seek any of these subsidies, benefits and services is compulsorily required to have an Aadhaar number. This will include children as well. Some of the Petitioners as well as some other applicants who have intervened in these petitions have expressed their concern about the mandatory requirement of Aadhaar for children and subsequent linking for realising their basic rights including education. They have referred to various circulars and notifications issued through various functionaries, schools, The Ministry of Human Resource Development (MHRD) which have mandated production of Aadhaar card details for the children seeking admission to schools and to link the Aadhaar of the students already enrolled. We have held that Aadhaar is a voluntary scheme and, therefore, the Aadhaar number is to be allotted to an individual on his 'consent'. No doubt, for the purposes of utilising any of the benefits Under Section 7 of the Aadhaar Act, it becomes necessary to have Aadhaar number. However, the question is as to whether it can be extended to children? It is more so when they are not under legal capacity to provide any 'consent' under the law.

324. Article 21A of the Constitution guarantees right to education and makes it fundamental right of the children between 6 years and 14 years of age. Such a right cannot be taken away by imposing requirement of holding Aadhaar card, upon the children.

325. In view thereof, admission of a child in his school cannot be covered Under Section 7 of the Aadhaar Act as it is neither subsidy nor service. No doubt, the expression 'benefit' occurring in Section 7 is very wide. At the same time, it has to be given restrictive meaning and the admission of children in the schools, when they have fundamental right to education, would not be covered by Section 7, in our considered view. The Respondents made an attempt to justify the linkage of Aadhaar with child information and records by arguing that there have been several instances of either impersonations at examinations or bogus admissions which have the potential to pilfer away various scholarship schemes which the Government provides for weaker Sections from time to time. If this is the objective, then also requirement of Aadhaar cannot insisted at the time of admission but only at the stage of application for Government scholarships. Insofar as impersonation at examination is concerned, that can be easily checked and contained by other means with effective checks and balances. When there are alternative means, insistence on

Aadhaar would not satisfy the test or proportionality. This would violate the privacy right of the children importance whereto is given by the Constitution Bench in *K.S. Puttaswamy* in the following words:

633. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis as they learn their 'ABCs': Apple, Bluetooth, and Chat followed by Download, E-Mail, Facebook, Google, Hotmail, and Instagram. They should not be subjected to the consequences of their childish mistakes and naivety, their entire life. Privacy of children will require special protection not just in the context of the virtual world, but also the real world.

326. It is also important to note herein that the Juvenile Justice Act, 2015 while addressing children in need of care and protection and children in conflict with law enunciates that the records of the children are confidential and will not be parted with unless requested by the Children's Court. In contrast, the submission of the Union justifying linking of Aadhaar with student records on malpractice in examinations and potential bogus admissions with no safeguards whatsoever.

327. It has to be kept in mind that when the children are incapable of giving consent, foisting compulsion of having Aadhaar card upon them would be totally disproportionate and would fail to meet the proportionality test. As the law exists today, a child can hold property, operate a bank account, be eligible to be a nominee in an insurance policy or a bank account or have any financial transaction only through a legal guardian who has to be a major of sound mind. In cases where a child is in conflict with the law, the child is given a special criminal trial under the Juvenile Justice (Care and Protection of Children) Act, 2015 and there is a mandatory requirement for the records to be kept confidential and destroyed so that the criminal record of the child is not maintained. This is the position in law contained in Section 11 of the Indian Contract Act, 1872, Section 45ZA of the Banking Regulation Act, 1949, Section 39 of the Insurance Act, 1938, Section 90 of the Indian Penal Code (which provides that consent of the child who is under 12 years of age shall not be regarded as consent) etc. Thus, when a child is not competent to contract; not in a position to consent; barred from transferring property; prohibited from taking employment; and not allowed to open/operate bank accounts and, as a consequence, not in a position to negotiate her rights, thirsting upon compulsory requirement of holding Aadhaar would be an inviable inroad into their fundamental rights Under Article 21. The restriction imposed on such a right in the form of an Aadhaar cannot be treated as constitutionally justified. We may also mention here that State is supposed to keep in mind the best interest of the children which is regarded as primary consideration in our Constitution (See *R.D. Upadhyay* v. *State of Andhra Pradesh and Ors.* (2007) 15 SCC 49). The convention on the Rights of Child[49] reiterates that the best interests of the child will be the basic concern of the parents or legal guardians of the child. The Constitution affirms acting in the best interest of the children and confers the responsibility on the State to not only safeguard the best interests of children but also act in furtherance of it. Therefore, we are of the opinion that the State is constitutionally bound to facilitate and enable the parents and guardians of the children to assert their rights and act in their best interest and this has to be done without having any mandatory directives to it. The onus of overseeing and lawfully safeguarding the rights and immunities, to which children are entitled to, rests on the State and the authorities under it. Giving proper education to children and ensuring that they become valuable citizens of this nation subserves public interest. This is the mandate of Convention on the Rights of Child (CRC) as well. We may reproduce Article 27 of the CRC:

States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and Ors. responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

328. Article 8 of the CRC provides that:

(2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

(3) States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

329. Further, Article 16 of the Convention on the Rights of Child, 1989 bars children from being subject to arbitrary or unlawful interference in their privacy, family, home, or correspondence. One of the principles espousing the Juvenile Justice Act, 2015 is the principle of confidentiality. Section 24 of the Act, dealing with children in conflict with law, further emphasizes:

(2) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed.

330. Section 3 of the Juvenile Justice Act, 2015 expounds the principles underlying the process in dealing with children under the Statute. The principle of right to privacy and confidentiality emphasizes, "Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process."

331. We would like to reproduce the following observations of English quote in *Murray* v. *Big Pictures (UK) Ltd.* (2008) 3 WLR 1360 where greatest significance is attached to the privacy right when it comes to children. That was a case where photographer had taken a series of photographs of a writer's infant son, which were later published in a newspaper. The issue was whether there was misuse of private information by taking photographs. It was held that:

The question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred,

the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher...It is at least arguable that David had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought.

We may also record at this stage that various circulars, orders and notifications are issued by different Ministries and Departments Under Section 7 of the Aadhaar Act which pertain to children. Some of these are:

(1) National Child Labour Project (NCLP).

(2) Scholarship schemes which are given to school students, like National Means-cum-Merit Scholarship Scheme; National Scheme of Incentive to Girls for Secondary Education; Benefit to 6 to 14 years children under *Sarva Shiksha Abhiyan*; Inclusive Education of the Disabled at Secondary State; and Mid-day Meal for Children.

(3) Assistance/Scholarship given by the Department of Empowerment to the Persons with Disabilities, which include Scholarship Schemes for education of students with disabilities.

(4) Following Schemes floated by the Ministry of Women and Child Development, some of which relate to children:

(a) Supplementary Nutrition Programme under ICDS Scheme.

(b) Payment of honorarium to AWWs & AWHs under ICDS Scheme.

(c) Supplementary Nutrition for children offered at Creche Centres.

(d) Honorarium paid towards the Creche Workers and Creche Helpers.

(e) Maternity Benefit Programme (MBP).

(f) Scheme for Adolescent Girls.

(g) National Mission for Empowerment of Women.

(h) ICDS Training Programme.

(i) Ujjawala Scheme.

(j) Swadhar Scheme.

(k) Integrated Child Protection Scheme.

(l) STEP programme.

(m) Rashtriya Mahila Kosh.

(n) Pradhan Mantri Matru Vanana Yojana.

(5) Painting and Essay competitions for school children under IEC component of Human Resource Development and Capacity Building.

332. After considering the matter in depth and having regard to the discussion aforesaid, we hold as under:

(a) For the enrolment of children under the Aadhaar Act, it would be essential to have the consent of their parents/guardian.

(b) On attaining the age of majority, such children who are enrolled under Aadhaar with the consent of their parents, shall be given the right to exit from Aadhaar, if they so choose.

(c) Insofar as the school admissions of children are concerned, requirement of Aadhaar would not be compulsory as it is neither a service nor subsidy. Further, having regard to the fact that a child between the age of 6 to 14 years has the fundamental right to education Under Article 21A of the Constitution, school admission cannot be treated as 'benefit' as well.

(d) Benefits to children between 6 to 14 years under Sarva Shiksha Abhiyan, likewise, shall not require mandatory Aadhaar enrolment.

(e) For availing the benefits of other welfare schemes which are covered by Section 7 of the Aadhaar Act, though enrolment number can be insisted, it would be subject to the consent of the parents, as mentioned in (a) above.

(f) We also clarify that no child shall be denied benefit of any of these schemes if, for some reasons, she is not able to produce the Aadhaar number and the benefit shall be given by verifying the identity on the basis of any other documents. We may record that a statement to this effect was also made by Mr. K.K. Venugopal, learned Attorney General for India, at the Bar.

Challenge to the other provisions of the Aadhaar Act:

333. The Petitioners have challenged the constitutionality of certain other provisions of Aadhaar Act as well. They have submitted their reasons on the basis of which they are seeking the declaration to the effect these provisions are unconstitutional. We reproduce the provisions of Aadhaar Act as well as reasons given by the Petitioners in tabulated form, as under:

S. No.	Provisions of the Aadhaar Act	Reason for being unconstitutional
1.	Section 2(c) and 2(d)- authentication and authentication record, read with Section 32	'Authentication Record' includes the time of authentication and the identity of the requesting entity. The UIDAI and the Authentication Service Agency

		(ASA) is permitted to store this authentication record for 2+5 years (as per Regulations 20 and 26/27 of the Authentication Regulations). By definition it provides for real-time surveillance and profiling. The record stores both the time and the identity of the requesting entity.
2.	Section 2(h) read with Section 10 of CIDR	The notion of CIDR is by itself an unconstitutional database. The statute cannot operate without a CIDR. The notion of a CIDR where every individual's biometric as well as demographic information is centrally stored is an authoritarian or police state construct and has no place in a democracy that guarantees individual freedom. A CIDR from where data can be backed, and which is operated not by the Respondents but by foreign entities, is conceptually and constitutionally an impermissible compromise on national sovereignty and security. Notably, Section 10 empowers UIDAI to appoint one or more entity to establish and maintain the CIDR.
3.	Section 2(l) read with Regulation 23 of the Aadhaar (Enrolment and Updates) Regulation-'enrolling agency'	The notion of an enrolling agency as defined in Section 2(l) is also unconstitutional inasmuch as the agency, as defined, need not be a Government entity but could be a private entity. The collection of sensitive personal biometric and demographic data and information for the purposes of storage must be conducted by a Government agency alone since this is a bare minimum procedural safeguard against the misuse and commercial exploitation of private personal information. The State, acting as a trustee and fiduciary, cannot delegate or require private enrolling agencies to discharge this non-delegable function. Moreover, an enrolling agency

		that is operated privately cannot be entrusted with the crucial tasks of explaining the voluntary nature of Aadhaar enrolments and securing informed consent.
4.	Section 2(v)-'resident'	The expression 'Resident' defined in Section 2(v) is arbitrary and unconstitutional inasmuch as the Act creates no credible machinery for evaluating a claim that a person has been residing in India for a period of 182 days or more, in the 12 months immediately preceding the date of application for enrolment. The forms being used by the Respondents as also proof of identification and proof of address requirement being used by the Respondents until enactment of the statute nowhere require any proof relating to residence for 182 days. The impugned Act purports to validate all these enrolments. The forms being used by the Respondents do not even contain a declaration regarding the enrolee being resident for 182 days. Further, there is no requirement in the definition of 'Resident' that the person has to be legally resident and the expression would wrongly take in illegal immigrants as well.
5.	Section 3-Aadhaar Number	It is an 'entitlement'. It cannot be understood to be mandatory. The information provided Under Section 3(2) is of no relevance if obtaining Aadhaar is made mandatory. By design, Aadhaar was never meant to be mandatory.
6.	Section 5-Special treatment to children	Section 5 of the Aadhaar Act, inasmuch as it extends to children and persons with disabilities, implies that the State is securing biometric and demographic data even before the age of consent insofar as children are concerned. The Act in its coercive reach and application to children who have not attained the age of consent is per se unconstitutional

		and violate of the fundamental rights of the children.
7.	Section 6-Update of information	Section 6 of the Act is unconstitutional inasmuch as it enables the Respondents to continually compel residents to periodically furnish demographic and biometric information. This provision is coercive in operation and effect and not only undermines the so-called 'voluntary' nature of the programme (as falsely claimed by the Respondents) but also undermines the false claim with respect to the 'reliability of biometrics'.
8.	Section 8	Section 8 is unconstitutional inasmuch as it enables tracking, tagging and profiling of individuals through the authentication process. It is a charter for surveillance in real time and with a degree of specificity that enables persons' physical movements to be traced in real time. The authentication mandate in terms of Section 8 is not being worked by the Respondents through any proprietary technology and is outsourced to foreign entities or entities under the ownership and control of foreign companies and corporations. The entire framework and working of the authentication procedure in terms of Section 8 is an impermissible, permanent and irreversible compromise of national sovereignty and national security.
9.	Section 9	Section 9 of the Aadhaar Act is also unconstitutional inasmuch as the Aadhaar number is de facto serving as proof of citizenship and domicile. This is seen from various media reports where even in the absence of any rigorous verification process, Aadhaar numbers are being issued. The Petitioners submit that equally subversive of national security and national integrity is the practice of passports being issued based upon an Aadhaar card. In other words, persons

		who may not be entitled to passports are having Aadhaar numbers issued and thereafter securing passports in violation of the citizenship provisions.
10.	Chapter IV-Sections 11 to 23	The Petitioners submit that the whole of Chapter IV of the Act comprising Sections 11 to 23 is ultra vires and unconstitutional. The Constitution does not permit the establishment of an authority that in turn through an invasive programme can chain every Indian citizen/resident to a central data bank and maintain lifelong records and logs of that individual. The Constitution of India when read as a whole is designed for a nation of free individuals who enjoy a full range of rights and who are entitled under the Constitution to lead their lives without any monitoring or scrutiny or continuous oversight by the State or any of its organs. The high value of personal freedom runs throughout the fabric of the Indian Constitution and any authority created for the purpose of 'cradle to grave' scrutiny is directly violative of the personal freedom charter built into the Indian Constitution. The Constitution of India does not contemplate a 'nanny state' where the State oversees every individual's conduct and maintains a record of individual interactions. The UIDAI by design and function is created for an absolutely unconstitutional objective of invading privacy, electronically overseeing individuals and tethering them to a central data repository that will maintain lifelong records. The notion of individual freedom must entail the right to be alone; the right of an individual to be free from any monitoring so long as that individual does not breach or transgress any criminal law. Here, the establishment of the second Respondent is for an unconstitutional purpose of

		overseeing and monitoring individual conduct even where the person does not remotely fall foul of any law. The second Respondent is a State organ designed to invade individual freedom and whose purpose is to constrict individual freedom.
11.	Sections 23 and 54-excessive delegation	Section 23, read with Section 54 of the Aadhaar Act, is unconstitutional on the ground of excessive delegation. A perusal of the sub-clauses in Section 23(2) and Section 54(2) indicate that on every crucial aspect pertaining to biometric data, demographic information, the operation and working of the CIDR, generating and assigning Aadhaar numbers, authentication of Aadhaar numbers, omitting and deactivating Aadhaar numbers, commercial exploitation of information collected by the Government, etc. are all left entirely to the UIDAI without any sufficient defined legislative policy indicating the limits within which the UIDAI may legitimately operate. Having regard to the invasive nature of the Aadhaar programme, its deep and pervasive impact on civil liberties and the fiduciary/trusteeship principle based on which data and information is being collected, it was incumbent upon the legislature to set out detailed and adequate limits to restrict the discretion conferred on the UIDAI. The impugned provisions virtually give an unlimited charter to the UIDAI to ride rough shod over fundamental rights by framing Regulations as it pleases.
12.	Section 23(2)(g) read with Chapter VI & VII-Regulations 27 to 32 of the Aadhaar (Enrolment and Update) Regulations, 2016	This empowers the UIDAI alone to omit and deactivate an Aadhaar number with almost no redressal to the individual Aadhaar number holder. Regulation 27(2) provides that upon cancellation of an Aadhaar number, all services provided by the authority shall be permanently disabled. Regulation 28(2) provides that upon deactivation of an

		Aadhaar number, all numbers shall be temporarily suspended till such time that the Aadhaar number holder updates or rectifies the alleged error. Notably, as per Regulation 30, there shall be a post facto communication of omission or deactivation of the Aadhaar number shall be informed to the Aadhaar number holder. The only redressal mechanism provided under the Aadhaar Act is under Regulation 32 wherein a grievance redressal call centre shall be provided by the UIDAI. This provision provides unbridled power to the UIDAI to switch of the life of an individual. There is absolutely no redressal mechanism for the individual. He is not even provided with an opportunity of hearing prior to deactivation, which violates principles of natural justice.
13.	Section 29	This Section is liable to be struck down inasmuch as it pertains sharing of identity information. The provisions suffer from the vice of permitting the spread and dissemination of sensitive personal information through a network of entities and individuals for commercial gain or otherwise and allows for the sharing of information beyond the ostensible object of targeted deliveries. Both the biometric as well as the demographic information are entitled to the highest degree of protection and the impugned provision, inasmuch as it draws a distinction between core biometric information and other information, creates an artificial distinction into two classes of information which in law are both entitled to equal protection against sharing or dissemination.

		Sub-section (4) permits UIDAI by Regulation to permit 'core biometric information' to be displayed publicly.
14.	Section 33	Section 33 is unconstitutional inasmuch as it provides for the use of the Aadhaar database for police investigation pursuant to an order of a competent court. Section 3 violates the protection against self-incrimination as enshrined under Article 20(3) of the Constitution of India. Furthermore, Section 33 does not afford an opportunity of hearing to the concerned individual whose information is sought to be released by the UIDAI pursuant to the Court's order. This is contrary to the principles of natural justice. Section 33(2) provides for disclosure of information in the interest of national security pursuant to a direction of a competent officer. The said provision is also hit by the principles of protection against self-incrimination, as enshrined under Article 20(3) of the Constitution. Further, the impugned Act does not define 'interest of national security' or otherwise limit the circumstances where the said provision can be invoked. This makes the impugned provision unconstitutional as it suffers from the vice of vagueness and arbitrariness.
15.	Section 47	Section 47 of the impugned Act is unconstitutional inasmuch as it does not allow an individual citizen who finds that there is a violation of the impugned Act to initiate the criminal process. There could be several circumstances where UIDAI itself or some third party is guilty of having committed offences under the Act. By restricting the initiation of the criminal process, the Aadhaar Act renders the penal machinery ineffective and sterile. The said section creates a bar on a court to take cognizance of any offence under

		the impugned Act, save on a complaint made by the UIDAI or an officer authorized by it. In effect there is a bar of cognizance of a complaint made by an individual for breach of his biometric or demographic information which has been collected by the Respondent. Such bar is unconstitutional as it forecloses legal remedy to affected individuals.
16.	Section 48-Power of Central Government to supersede UIDAI	This Section is vague and arbitrary inasmuch as it permits the Central Government to take over the UIDAI. The Act does not define a 'public emergency'. This Section empowers the Central Government in an 'emergency' situation to be in a position to completely control the life of every citizen who is enrolled with the UIDAI.
17.	Section 57	Section 57 is patently unconstitutional inasmuch as it allows an unrestricted extension of the Aadhaar platform to users who may be Government agencies or private sector operators. This provision clearly shows that the impugned Act has a much wider scope than what may legitimately be considered as a Money Bill. Moreover, this provision enables the seeding of the Aadhaar number across service providers and other gateways and thereby enables the establishment of a surveillance state. The impugned provision enables the spread of applications and Aadhaar dependent delivery systems that are provided not from Consolidated Fund of India resources but through any other means. It is submitted that Section 57 also enables commercial exploitation of an individual's biometrics and demographic information by the Respondents as well as private entities. It ensures that creation of a surveillance society, where every entity assists the State to snoop upon an Aadhaar holder.

18.	Section 59	Section 59 of the impugned Act is unconstitutional inasmuch as it seeks to validate all action undertaken by the Central Government pursuant to the Notification dated January 28, 2009. It is submitted that there was no consent, let alone informed consent obtained from individuals at the time of enrolment under the said notification. Such enrolment which has been conducted without obtaining adequate consent is unconstitutional as it amounts to wrongful deprivation of the most intimate personal information of an individual. Indeed, taking of an individual's biometric information without informed consent is a physical invasion of his or her bodily integrity. The collection of demographic information through private entities and without proper counselling or written informed consent is illegal and incapable of being retrospectively ratified. All these records which have been illegally obtained and created without necessary consent out to be destroyed and cannot be said to be validated by the impugned provision. The Parliament cannot create a legal fiction of 'consent' where there was none. The executive under the Constitution of India cannot take away someone's fundamental right to privacy and then support its action on the proposition of law that 'retrospectively' deems consent must have been given. The said provision seeks to validate any action taken by the Central Government alone. The action of private enrolers is not even sought to be protected. Therefore, all collections made by private entities under the said

		notification should also stand invalidated and all data collected by private entities should be destroyed forthwith.	

334. We have already dealt with the issue of validity of some of the provisions. We would now advert to the remaining provisions, validity whereof is questioned.

Keeping in view the preceding discussion, challenge to most of these provisions would fail. Insofar as Section 2(l) read with Regulation 23 of the Aadhaar (Enrolment and Update) Regulations is concerned which deals with 'enrolling agency', main challenge is on the ground that the work of an enrolment could not have been given to a private entity as private entity cannot be entrusted with the crucial task of explaining the nature of Aadhaar enrolment and securing informed consent. Further, the task of collection of sensitive personal biometric and demographic data and information for the purpose of storage cannot be given to private hands. However, having regard to the nature of process that has been explained by the Authority, which ensures that immediately on enrolment, the concerned data collected by the private entity is beyond its control; it gets encrypted; and stands transmitted to CIDR, we do not find any basis of the apprehension expressed by the Petitioners.

335. Insofar as Section 2(v) is concerned which defines resident, there is nothing wrong with the definition. The grievance of the Petitioners is that the Aadhaar Act creates no credible machinery for availing a claim that a person has been residing in India for 182 days or more. Apprehension is expressed that this expression may also facilitate the entry of illegal immigrants. These aspects can be taken care of by the Respondents by providing appropriate mechanism. We direct the Respondents to do the needful in this behalf. However, that would not render the definition unconstitutional.

336. Section 3, by the very language thereof, mentions that it is an enabling provision which 'entitles' every resident to obtain Aadhaar number. Therefore, it is voluntary in nature. This is so held by Division Bench of this Court in Binoy Viswam in the following words:

93. Before proceeding to discuss this argument, one aspect of the matter needs clarification. There was a debate as to whether the Aadhaar Act is voluntary or even that Act makes enrolment under Aadhaar mandatory.

94. First thing that is to be kept in mind is that the Aadhaar Act is enacted to enable the Government to identify individuals for delivery of benefits, subsidies and services under various welfare schemes. This is so mentioned in Section 7 of the Aadhaar Act which states that proof of Aadhaar number is necessary for receipt of such subsidies, benefits and services. At the same time, it cannot be disputed that once a person enrols himself and obtains Aadhaar number as mentioned in Section 3 of the Aadhaar Act, such Aadhaar number can be used for many other purposes. In fact, this Aadhaar number becomes the Unique Identity (UID) of that person. Having said that, it is clear that there is no provision in the Aadhaar Act which makes enrolment compulsory. May be for the purpose of obtaining benefits, proof of Aadhaar card is necessary as per Section 7 of the Act. The proviso to Section 7 stipulates that if an Aadhaar number is not assigned to enable an individual,

he shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service. According to the Petitioners, this proviso, which acknowledges alternate and viable means of identification, and therefore makes Aadhaar optional and voluntary and the enrolment is not necessary even for the purpose of receiving subsidies, benefits and services under various schemes of the Government. The Respondents, however, interpret the proviso differently and their plea is that the words "if an Aadhaar number is not assigned to an individual" deal with only that situation where application for Aadhaar has been made but for certain reasons Aadhaar number has not been assigned as it may take some time to give Aadhaar card. Therefore, this proviso is only by way of an interim measure till Aadhaar number is assigned, which is otherwise compulsory for obtaining certain benefits as stated in Section 7 of the Aadhaar Act. Fact remains that as per the Government and Uidai itself, the requirement of obtaining Aadhaar number is voluntary. It has been so claimed by Uidai on its website and clarification to this effect has also been issued by Uidai.

95. Thus, enrolment under Aadhaar is voluntary. However, it is a moot question as to whether for obtaining benefits as prescribed Under Section 7 of the Aadhaar Act, it is mandatory to give Aadhaar number or not is a debatable issue which we are not addressing as this very issue is squarely raised which is the subject-matter of other writ petition filed and pending in this Court.

Therefore, the apprehension of the Petitioners that Section 3 is mandatory stands assuaged.

337. Section 5 is a special measure for issuance of Aadhaar number to certain category of persons which attempts to take care of certain disabilities with which certain individuals may be suffering. Therefore, this provision is for the benefit of the categories of persons mentioned in Section 5. No doubt, it mentions children and persons with disabilities as well, that is an aspect is already dealt with separately.

338. Section 6 deals only with the updation of demographic and biometric information. This may become necessary under certain circumstances. That by itself does not take away the voluntary nature of the programme.

339. Insofar Section 9 is concerned, validity thereof is challenged primarily on the ground that it serves as a proof of citizenship and domicile as well and some apprehensions are expressed on that basis. Such apprehensions have already been taken care of while discussing the issue No. 1 pertaining to surveillance.

340. We have already discussed in detail the purpose of constituting the Authority. In fact, the Act cannot operate without such an Authority and, therefore, it's constitution is imperative. Challenge to validity of Sections 11 to 23 is predicated on the arguments of surveillance etc. fails, having regard to our detailed discussion on the said aspect.

341. Section 23 read with Section 54 give power to the Authority to make certain Regulations. We do not find that this provision gives excessive delegation to the Authority. These aspects have already been discussed while determining the issue pertaining to surveillance.

342. Apprehension expressed *qua* Section 29 are equally unfounded. This Section rather imposes restrictions on sharing information. No doubt, Sub-section (2) states that the identity information (and specifically excludes core biometric information) can be shared only in accordance with the provisions of the Act and in such a manner as may be specified by Regulations. That would not make the provision unconstitutional when it is with the consent of the individual. In case, any Regulation is made which permits sharing of information that may contain undesirable circumstance/reason for sharing information, such a Regulation can always be struck down. Insofar as Sub-section (4) is concerned, it is generally in favour of the residents/individuals inasmuch as it states that information collected or created under this Act shall not be published, displayed or posted publicly. The is grievance, however, is that this provision enables the Authority to publish or display etc. such an information 'for the purposes as may be specified by Regulations'. The apprehension is that under this provision, the Government can always make Regulations permitting publication of such information under certain circumstances. At present, Regulations which are in force are the Aadhaar (Sharing of Information) Regulations, 2016. Chapter II thereof is titled 'restriction on sharing of identity information'. Regulation 3(1) which falls under this chapter puts a categorical ban on sharing of core biometric information collected by the Authority under the Act, by mandating that it shall not be sharing with anyone for any reason whatsoever. Sub-Regulation (2) of Regulation 3 permits sharing of demographic information and photograph of an individual collected by the Authority under the Act, only with the consent of the Aadhaar number holder, that too for authentication process in accordance with Authentication Regulations. As already held by us, insofar as utilisation of subsidies, benefits and services are concerned, the authentication would be needed by the provider of such services which would be the requesting entity and this provision has already been upheld. Sub-Regulation (3) permits sharing of authentication records of Aadhaar number holder with him in accordance with Regulation 28 of the Authentication Regulations. This provision facilitates obtaining the information from the Authority by the Aadhaar number holder herself. We are, thus, of the opinion that Section 29 and the sharing Regulations are the provisions enacted to protect the interest of Aadhaar card holders as they put restrictions on the sharing of information, which may be described as provisions pertaining to data protection and surveying legitimate state aim/interest as well. No doubt, Section 29 gives power to the delegatee to make Regulations. However, as already clarified above, as and when a Regulation is made, which impinges upon the privacy right of the Aadhaar card holders, that can always be challenged. As of now, sharing Regulations do not contain any such provision.

343. Section 33 provides for disclosure of information in certain cases. The challenge to this provision is predicated on the ground that it provides for the use of Aadhaar database for police verification, which is against the ethos of Article 20(3) of the Constitution of India, which is a Rule against self-incrimination. In order to appreciate this argument, we would like to reproduce Section 33 in its entirety:

33. (1) Nothing contained in Sub-section (2) or Sub-section (5) of Section 28 or Sub-section (2) of Section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made pursuant to an order of a court not inferior to that of a District Judge:

Provided that no order by the court under this Sub-section shall be made without giving an opportunity of hearing to the Authority.

(2) Nothing contained in Sub-section (2) or Sub-section (5) of Section 28 and Clause (b) of Sub-section (1), Sub-section (2) or Sub-section (3) of Section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government:

Provided that every direction issued under this subsection, shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology, before it takes effect:

Provided further that any direction issued under this Sub-section shall be valid for a period of three months from the date of its issue, which may be extended for a further period of three months after the review by the Oversight Committee.

344. A close look at Sub-section (1) of Section 33 would demonstrate that the Sub-section (1) is an exception to Section 28(2), Section 28(5) and Section 29(2) of the Act. Those provisions put a bar on the disclosure of an information thereby protecting the information available with the UIDAI in respect of any person. However, as per Sub-section (1), such information can be disclosed if there is an order of a court which order is not inferior to that of a District Judge. This provision, therefore, only states that in suitable cases, if court passes an order directing an Authority to disclose such an information, then the Authority would be obliged to do so. Thus, an embargo contained in Sections 28 and 29 is partially lifted only in the eventuality on passing an order by the court not inferior to that of District Judge. This itself is a reasonable safeguard. Obviously, in any proceedings where the Court feels such an information is necessary for the determination of controversy that is before the Court, before passing such an order, it would hear the concerned parties which will include the person in respect of whom the disclosure of information is sought. We, therefore, clarify that provisions of Sub-section (1) of Section 33 by reading into the provisions that an individual whose information is sought to be released shall be afforded an opportunity of hearing. There is a reasonable presumption that the said court shall take into consideration relevant law including Article 20(3) of the Constitution as well as privacy rights or other rights of that person before passing such an order. Moreover, a person in respect of whom order is passed shall also be heard and will have right to challenge the order in a higher forum. Not only this, proviso to Section 33(1) puts an additional safeguard by providing that even UIDAI shall be heard before an order is passed to this effect by the Court. In that sense, the Authority is to act as trustee and it may object to passing of the order by the court. Such a happening is actually taken place. We have already noticed that against the order of the High Court of Bombay in some criminal proceedings, order was passed directing the Authority to give biometric information of a person, the Authority had filed Special Leave Petition (Criminal) No. 2524 of 2014 challenging the said order on the ground that giving of such biometric information was contrary to the provisions of the Aadhaar Act as the information was confidential. This Court stays the operation of the said order which depicts that there are sufficient safeguards provided in Sub-section (1) of Section 33 itself.

345. Adverting to Sub-section (2) of Section 33, it can be seen that this provision enables disclosure of information including identity information records in the interest of national security. This

provision further states that the Authority is obliged to disclose such information in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government. Proviso thereto Sub-section (2) puts an additional safeguard by prescribing that every direction issued under this Sub-section shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology before it takes effect. Further, such a direction is valid only for a period of three months from the date of its issue which can be extended by another three months.

346. Main contention of the Petitioners in challenging the provisions of Sub-section (2) of Section 33 are that no definition of national security is provided and, therefore, it is a loose ended provision susceptible to misuse. It is also argued that there is no independent oversight disclosure of such data on the ground of security and also that the provision is unreasonable and disproportionate and, therefore, unconstitutional.

347. We may point out that this Court has held in *Ex-Armymen's Protection Services Private Limited* v. *Union of India and Ors.* MANU/SC/0151/2014 : (2014) 5 SCC 409 that what is in the interest of national security is not a question of law but it is a matter of policy. We would like to reproduce following discussion therefrom:

16. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of the State or not. It should be left to the executive. To quote Lord Hoffman in *Secy. of State for Home Deptt.* v. *Rehman* [(2003) 1 AC 153: (2001) 3 WLR 877: (2002) 1 All ER 122 (HL)]: (AC p. 192C)

... [in the matter] of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

17. Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases, it is the duty of the court to read into and provide for statutory exclusion, if not expressly provided in the Rules governing the field. Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party.

348. Even in *K.S. Puttaswamy*, this Court has recognised data retention by the Government which may be necessitated in the public interest and in the interest of national security. We may also usefully refer to the judgment of *People's Union for Civil Liberties (PUCL)* v. *Union of India and Anr.* MANU/SC/0149/1997 : (1997) 1 SCC 301. In that case, action of telephone tapping was challenged as serious invasion of individual's privacy. The Court found that Section 5(2) of the Telegraph Act, 1885 permits the interception of messages in circumstances mentioned therein i.e. 'occurrence of any public emergency' or 'in the interest of public safety'. The Court explained these expressions in the following manner:

28. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone-tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

349. Having regard to the aforesaid legal position, disclosure of information in the interest of national security cannot be faulted with. However, we are of the opinion that giving of such important power in the hands of Joint Secretary may not be appropriate. There has to be a higher ranking officer along with, preferably, a Judicial Officer. The provisions contained in Section 33(2) of the Act to the extent it gives power to Joint Secretary is, therefore, struck down giving liberty to the Respondents to suitably enact a provision on the aforesaid lines, which would adequately protect the interest of individuals.

350. We now advert to the challenge laid to Section 47 of the Aadhaar Act, which is captioned as 'cognizance of offences', it reads as under:

47. (1) No court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Authority or any officer or person authorised by it.

(2) No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence punishable under this Act.

351. Certain acts in Chapter VII are treated as offences and penalties are also provided, from Section 34 to 43.

352. Section 44 clarifies that this Act would apply for offence or contravention committed even outside India. Insofar as investigation of these offences is concerned, Section 45 provides that a police officer not below the rank of Inspector of Police shall investigate any offence under this Act. Section 46, thereafter, clarifies that penalties imposed under this Act shall not prevent the imposition of any other penalty or punishment under any other law for the time being in force. This scheme of Chapter VII makes very strict provisions in respect of enforcement of the Act which includes data protection as well. Last provision in Chapter VII is Section 47 which provides

that the cognizance would be taken only on a complaint made by the Authority or any officer or person authorised by it. Petitioners feel aggrieved by this provision as it does not permit an individual citizen whose rights are violated, to initiate the criminal process. Apprehensions are expressed by submitting that there may be a possibility where the Authority itself or some Governmental Authority may be guilty of committing the offences under the Act and, in such a situation, the Authority or any officer or person authorised by it may choose not to file any complaint.

353. According to the Respondents, the rationale behind Section 47 is to maintain purity and integrity of CIDR and the entire enrolment storage in the CIDR and authentication exercise can be handled only by the Authority. For this reason, it is the Authority which is empowered to lodge the complaint. It is also pointed out that similar provisions akin to Section 47 of the Aadhaar Act are contained in many other statutes. Reference is made to Section 22 of the Mines and Minerals (Development and Regulation) Act, 1957, Section 34 of the Bureau of Indian Standards Act, 1986, Section 34 of the Telecom Regulatory Authority of India Act, 1997, Section 47 of the Banking Regulation Act, 1949, Section 26(1) of the Securities and Exchange Board of India Act, 1992, Section 19 of the Environment (Protection) Act, 1986, Section 43 of the Air (Prevention and Control of Pollution) Act, 1981 and Section 57(1) of the Petroleum and Natural Gas Regulatory Board Act, 2006. The Respondents have also submitted that validity of such provisions have been tested and affirmed by this Court. Reference is made to the judgment in *Raj Kumar Gupta* v. *Lt. Governor, Delhi and Ors.* MANU/SC/0714/1997 : (1997) 1 SCC 556. The Respondents have also taken support of the decision of this Court in State (NCT of Delhi) v. Sanjay MANU/SC/0761/2014 : (2014) 9 SCC 772 wherein Section 22 of the Mines and Minerals (Development and Regulation) Act, 1957 was tested. Insofar as grievance and apprehension of the Petitioners is concerned, it can be taken care on interpreting the provisions by holding that the Authority can lodge a complaint of its own motion or at the request of the individual whose rights are affected thereby.

Notwithstanding the above, we are of the opinion that it would be in the fitness of things if Section 47 is amended by allowing individual/victim whose right is violated, to file a complaint and initiate the proceedings. We hope that this aspect shall be addressed at the appropriate level and if considered fit, Section 47 would be suitably amended.

354. Section 48 cannot be treated as vague or arbitrary. 'Public Emergency' is the expression which has been used in several other enactments and held to be constitutional. It can always be subject to scrutiny of the Courts.

355. With this, now we come to a provision which was highly debated. At the time of arguments, the Petitioners had taken strong exception to some of its aspects. We may first take note of the exact language of this provision:

57. Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect: Provided that the use of Aadhaar number under this Section shall be subject to the procedure and obligations Under Section 8 and Chapter VI.

356. In first blush, the provision appears to be innocuous. It enables Aadhaar holder to establish her identity for any purpose as well. In that sense, it may amount to empowering the Aadhaar number holder, when she is carrying unique identity. It is her identity card which she is able to use not only for the purposes mentioned in the Aadhaar Act but also for any other purpose.

357. The Petitioners, however, have pricked the provision with the submission that it may be susceptible to making deep in-roads in the privacy of individuals and is utterly disproportionate. The taint in the provision, as projected by the Petitioners, is that it brings in private parties as well, apart from the State within the fold of Aadhaar network giving untrammeled opportunity to them to invade the privacy of such user. The offending portion of the provision, according to them, is that:

(a) It allows 'any body corporate or person' (thereby encompassing private bodies/persons as well) to make use of authentication process, once an individual offers Aadhaar number for establishing her identity.

(b) The expression 'for any purpose' is wide enough, which may be susceptible to misuse.

(c) This is permitted not only pursuant to any law for time being in force but also pursuant to 'any contract to this effect' which would mean that individuals may be forced to give their consent in the form of contract for a purpose that may be justified or not thereby permitting the private parties to collect biometric information about the said individual.

358. It is argued that there are no procedural safeguards governing the actions of the private entities. Equally no remedy is provided in case such body corporate or person fails or denies services. In this hue, it is also argued that it is an excessive piece of legislation inasmuch as taking the umbrage of 'any law', the Regulations etc. can be framed by including within its fold much more than what is provided by Section 7 of the Aadhaar Act. It, therefore, according to the Petitioners, does not meet the test of proportionality. Mr. Divan submits that Section 57 is also patently unconstitutional inasmuch as it allows an unrestricted extension of the Aadhaar platform to users who may be government agencies or private sector operators. Moreover, this provision enables the seeding of the Aadhaar number across service providers and other gateways and thereby enables the establishment of a surveillance state. The impugned provision enables the spread of applications and Aadhaar dependent delivery systems that are provided not from Consolidated Fund of India resources but through any other means. He also submits that Section 57 also enables commercial exploitation of an individual's biometrics and demographic information by the Respondents as well as private entities.

359. As mentioned above, the Respondents contend that it is only an enabling provision which gives further facilities to Aadhaar card holder, as per her choice and is, thus, enacted for the benefit of such individuals.

360. We have already discussed in detail the principles on which doctrine of proportionality is built upon and the test which need to be satisfied. To put in nutshell, the proportionality principles seek to safeguard citizens from excessive Government measures. The inquiry, in such cases, is that a particular measure must not be disproportionate in two distinctive utilitarian senses:

(i) The cost or burdens of the measure must not clearly exceed the likely benefits, which can be described as 'ends' or 'ends-benefits' proportionality.

(ii) The measure must not be clearly more costly or more burdensome than equally alternative measures, which is also described by some jurists as a concept of necessity and narrow tailoring and can be referred to as 'means' or 'alternative-means' proportionality.

361. We have also discussed in detail the principle of proportionality that is developed in certain foreign legal regimes, particularly Germany and Canada. The Supreme Court of Canada in ***R.*** v. ***Oakes*** (1986) 1 SCR 103 developed a two-tier constitutional control test. Once the claimant has proved a violation of a right guaranteed in the charter, the government must satisfy two criteria to establish that the limit on individual rights "can be demonstrably justified in a free and democratic society."

362. First, measures limiting a constitutionally protected right must serve an important objective that "relate[s] to concerns which are pressing and substantial in a free and democratic society." Legislation limiting the rights of English-speaking parents in Quebec to educate their children in English-speaking schools[50] has been found lacking an important public objective. Likewise, the Supreme Court of Canada was unable to find any legitimate public objective that justified denying protection to gays and lesbians under Alberta's human rights law in *Vriend* v. *Alberta* (1998) 1 SCR 493. In *R.* v. *Zundel* (1992) 2 SCR 731, it also prohibited an intrusive use of a law that was unrelated to the objectives originally contemplated by the Parliament when that law was enacted.

363. Secondly, once an important public objective or end has been established, the selected means to attain it must be "reasonable and demonstrably justified." The Court said in *R.* v. *Big M Drug Mart Ltd.* (1985) 1 SCR 295 that this determination involves "a form of proportionality test". Although, it varies depending on the facts of the case, the test involves the balancing of public and individual interests based on three principles, which are as follows:

(i) the means must be rationally related to the objective. The court has infrequently struck down legislation for lack of any rational relation to the objective pursued. It employs a rather deferential and contextual approach to determine the rational relation of a provision to the desired end.

(ii) The means should "impair 'as little as possible' the right or freedom in question." This is believe to be the decisive element of proportionality review. It requires that the legislature adopt the least intrusive measure capable of attaining the desired objective.

(iii) The public objective and actual effects of the means adopted for its attainment must be proportionate to an important public end or objective. The court noted that even if the means satisfies the first two criteria, it may be declared unconstitutional in view of its disproportionate harmful effects on an individual.

364. Insofar as development of law in Germany is concerned, as already discussed in detail, proportionality is defined "as an expression of general right of the citizen towards the State that his freedom should be limited by the public authorities only to the extent indispensable for the protection of the public interest."[51] The principle of proportionality in German law incorporates

three important subprinciples: suitability, necessity, and proportionality in the narrower sense. According to the High Court of Germany, any government interference with basic rights must be suitable and necessary for reaching the ends sought. Its disadvantages to individuals "are generally only permissible if the protection of others or of the public interest requires them, after having due regard to the principle of proportionality."

365. The European Union has, by and large, adopted the German system. We have also taken note of the development of doctrine of proportionality in India through various judgments[52].

366. We may mention here that insofar as U.S. Supreme Court is concerned, it has refused to apply the least intrusive test[53] Though there was a debate at the bar as to whether this Court should adopt European approach of applying least intrusive test or go by American approach which repeatedly refused to apply this test. Without going into this debate, even when we apply the accepted norms laid down by this Court in *Modern Dental College and Research Centre* and *K.S. Puttaswamy* cases, we are of the view that a part of Section 57 does not pass the muster of proportionality doctrine.

367. The Respondents may be right in their explanation that it is only an enabling provision which entitles Aadhaar number holder to take the help of Aadhaar for the purpose of establishing his/her identity. If such a person voluntary wants to offer Aadhaar card as a proof of his/her identity, there may not be a problem.

368. Section 59, which is the last provision in the Act is aimed at validating actions taken by the Central Government pursuant to notification dated January 28, 2009 till the passing of the Act. It reads as under:

59. Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing notification number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing notification number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act.

369. The challenge to this provision is on the premise that in the regime which prevailed prior to the passing of the Act and the enrolments into Aadhaar scheme were done, that happened without the consent of the persons who sought enrolment and, therefore, those enrolments cannot be validated by making such a provision. It was argued that even the Act makes provisions for informed consent which is to be obtained from individuals at the time of enrolment and absence of such consent makes the very enrolment as impermissible thereby violating the right to privacy and such acts cannot be validated.

370. The contention of the Respondents, on the other hand, is that by the very nature of the provision, it is intended to be prospective in nature with a clear purport in mind, namely, to validate the notification dated August 21, 2009 vide which the Authority was created and the Aadhaar scheme was launched by administrative fiat. The purpose is to give it a statutory backing.

371. We find that Section 59 uses the expression 'anything done or any action under the resolution'. According to us, this terminology used in the provision by the legislature is clearly to cover all actions of the Authority including enrolment of individuals into Aadhaar scheme. The words 'shall be deemed to have been validly done or taken under this Act' at the end of the Section put the things beyond any pale of doubt. The legislative intent is clear, namely, to make the provision retrospective so as to cover the actions of the Authority from the date of its establishment. Reading the provision in the manner the Petitioners suggest would have the effect of annulling Section 59 itself. Such an interpretation cannot be countenanced. We are of the opinion that case is squarely covered by the Constitution Bench judgment of this Court in *West Ramnad Electric Distribution Co., Ltd.* v. *State of Madras and Anr.* MANU/SC/0060/1962 : (1963) 2 SCR 747 as well as *Bishambhar Nath Kohli and Ors.* v. *State of Uttar Pradesh and Ors.* MANU/SC/0019/1965 : (1966) 2 SCR 158.

372. We would also like to point out that the submission of the Petitioners that a particular action or a provision or statute which is hit by Article 14 cannot be allowed to be validated is repelled by this Court in *State of Mysore and Anr.* v. *D. Achiah Chetty, Etc.* MANU/SC/0153/1968 : (1969) 1 SCC 248.

The legislature is, thus, empowered to incorporate deeming provisions in a statute. This proposition has also been repeatedly affirmed by this Court. We may refer in this behalf the decision in *State of Karnataka* v. *State of Tamil Nadu and Ors.* MANU/SC/1571/2016 : (2017) 3 SCC 362 will be of relevance wherein the Court held as under:

72. The second limb of submission of Mr. Rohatgi as regards the maintainability pertains to the language employed Under Section 6(2) of the 1956 Act, which reads as follows:

6. (2) The decision of the Tribunal, after its publication in the Official Gazette by the Central Government Under Sub-section (1), shall have the same force as an order or decree of the Supreme Court.

73. Relying on Section 6(2), which was introduced by way of the Amendment Act, 2002 (Act 14 of 2002) that came into force from 6-8-2002, it is submitted by Mr. Rohatgi that the jurisdiction of this Court is ousted as it cannot sit over in appeal on its own decree. The said submission is seriously resisted by Mr. Nariman and Mr. Naphade, learned Senior Counsel contending that the said provision, if it is to be interpreted to exclude the jurisdiction of the Supreme Court of India, it has to be supported by a constitutional amendment adding at the end of Article 136(2) the words "or to any determination of any tribunal constituted under the law made by Parliament Under Article 262(2)" and, in such a situation, in all possibility such an amendment to the Constitution may be ultra vires affecting the power of judicial review which is a part of basic feature of the Constitution. The learned Senior Counsel for the Respondent has drawn a distinction between the conferment and the exclusion of the power of the Supreme Court of India by the original Constitution and any exclusion by the constitutional amendment. Be that as it may, the said aspect need not be adverted to, as we are only required to interpret Section 6(2) as it exists today on the statute book. The said provision has been inserted to provide teeth to the decision of the Tribunal after its publication in the Official Gazette by the Central Government and this has been done

keeping in view the Sarkaria Commission's Report on Centre-State Relations (1980). The relevant extract of the Sarkaria Commission's Report reads as follows:

17.4.19. The Act was amended in 1980 and Section 6-A was inserted. This Section provides for framing a scheme for giving effect to a Tribunal's award. The scheme, inter alia provides for the establishment of the authority, its term of office and other conditions of service, etc. But the mere creation of such an agency will not be able to ensure implementation of a Tribunal's award. Any agency set up Under Section 6-A cannot really function without the cooperation of the States concerned. Further, to make a Tribunal's award binding and effectively enforceable, it should have the same force and sanction behind it as an order or decree of the Supreme Court. We recommend that the Act should be suitably amended for this purpose.

***

17.6.05. The Inter-State Water Disputes Act, 1956 should be amended so that a Tribunal's award has the same force and sanction behind it as an order or decree of the Supreme Court to make a Tribunal's award really binding.

74. The Report of the Commission as the language would suggest, was to make the final decision of the Tribunal binding on both the States and once it is treated as a decree of this Court, then it has the binding effect. It was suggested to make the award effectively enforceable. The language employed in Section 6(2) suggests that the decision of the Tribunal shall have the same force as the order or decree of this Court. There is a distinction between having the same force as an order or decree of this Court and passing of a decree by this Court after due adjudication. Parliament has intentionally used the words from which it can be construed that a legal fiction is meant to serve the purpose for which the fiction has been created and not intended to travel beyond it. The purpose is to have the binding effect of the Tribunal's award and the effectiveness of enforceability. Thus, it has to be narrowly construed regard being had to the purpose it is meant to serve.

75. In this context, we may usefully refer to the *Principles of Statutory Interpretation*, 14th Edn. by G.P. Singh. The learned author has expressed thus:

In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created [*State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory* MANU/SC/0096/1953 : AIR 1953 SC 333; *State of Bombay* v. *Pandurang Vinayak* MANU/SC/0025/1953 : AIR 1953 SC 244: 1953 Cri. LJ 1094], and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. [*East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*, 1952 AC 109: (1951) 2 All ER 587 (HL); *CIT* v. *S. Teja Singh* MANU/SC/0062/1958 : AIR 1959 SC 352] But in so construing the fiction it is not to be extended beyond the purpose for which it is created [*Bengal Immunity Co. Ltd.* v. *State of Bihar* MANU/SC/0083/1955 : AIR 1955 SC 661; *CIT* v. *Amarchand N. Shroff* MANU/SC/0196/1962 : AIR 1963 SC 1448], or beyond the language of the Section by which it is created. [*CIT* v. *Shakuntala* MANU/SC/0175/1961 : AIR 1966 SC 719; *Mancheri Puthusseri Ahmed* v. *Kuthiravattam Estate Receiver*, MANU/SC/1238/1996 : (1996) 6 SCC 185: AIR 1997 SC 208] It cannot also be extended by importing another fiction. [*CIT* v. *Moon Mills Ltd.* MANU/SC/0179/1965 : AIR 1966 SC 870] The principles stated above

are 'well-settled'. [*State of W.B.* v. *Sadan K. Bormal*, MANU/SC/0441/2004 : (2004) 6 SCC 59: 2004 SCC (Cri.) 1739: AIR 2004 SC 3666] A legal fiction may also be interpreted narrowly to make the statute workable. [*Nandkishore Ganesh Joshi* v. *Commr., Municipal Corpn. of Kalyan and Dombivali*, MANU/SC/0908/2004 : (2004) 11 SCC 417: AIR 2005 SC 34]

76. In *Aneeta Hada* v. *Godfather Travels and Tours [Aneeta Hada v. Godfather Travels and Tours*, MANU/SC/0335/2012 : (2012) 5 SCC 661: (2012) 3 SCC (Civ) 350: (2012) 3 SCC (Cri.) 241], a three-Judge Bench has ruled thus: (SCC p. 681, paras 37-38)

37. In *State of T.N.* v. *Arooran Sugars Ltd.* [*State of T.N.* v. *Arooran Sugars Ltd.*, MANU/SC/0426/1997 : (1997) 1 SCC 326] the Constitution Bench, while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. Reference was made to *Chief Inspector of Mines* v. *Karam Chand Thapar* [*Chief Inspector of Mines* v. *Karam Chand Thapar* MANU/SC/0382/1961 : AIR 1961 SC 838: (1961) 2 Cri. LJ 1], *J.K. Cotton Spg. and Wvg. Mills Ltd.* v. *Union of India* [*J.K. Cotton Spg. and Wvg. Mills Ltd.* v. *Union of India*, MANU/SC/0403/1987 : 1987 Supp SCC 350: 1988 SCC (Tax) 26], *M. Venugopal* v. *LIC* [*M. Venugopal* v. *LIC*, MANU/SC/0310/1994 : (1994) 2 SCC 323: 1994 SCC (L&S) 664] and *Harish Tandon* v. *ADM, Allahabad* [*Harish Tandon* v. *ADM, Allahabad*, MANU/SC/0132/1995 : (1995) 1 SCC 537] and eventually, it was held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between which persons such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion.

38. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term "deemed" has to be read in its context and further, the fullest logical purpose and import are to be understood. It is because in modern legislation, the term "deemed" has been used for manifold purposes. The object of the legislature has to be kept in mind.

77. In *Hari Ram* [*State of U.P.* v. *Hari Ram*, MANU/SC/0226/2013 : (2013) 4 SCC 280: (2013) 2 SCC (Civ) 583], the Court has held that (SCC p. 293, para 18) in interpreting the provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created and after ascertaining the same, the court is to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction.

373. There is yet another angle from which the matter can be looked into. In any case, when the Aadhaar scheme/project under the Act has been saved from the challenge to its constitutionality, we see no reason to invalidate the enrolments which were made prior to the passing of this Act as it would lead to unnecessary burden and exercise of enrolling these persons all over again. Instead the problem can be solved by eliciting 'consent' of all those persons who were enrolled prior to the passing of the Act. Since, we have held that enrolment is voluntary in nature, those who specifically refuse to give the consent, they would be allowed to exit from Aadhaar scheme. After all, by getting Aadhaar card, an individual so enrolled is getting a form of identity card. It would

still be open to such an individual to make use of the said Aadhaar number or not. Those persons who need to avail any subsidy, benefit or service would need Aadhaar in any case. It would not be proper to cancel their Aadhaar cards. If direction is given to invalidate all those enrolments which were made prior to 2016 then such persons will have to undergo the rigours of getting themselves enrolled all over again. On the other hand, those who do not get any benefit of the nature prescribed Under Section 7 of the Act, it would always be open for them not to make use of Aadhaar card or to make use of this card in a limited sense, namely, showing it as a proof of their identity, without undergoing any authentication process. Therefore, to a large extent, it does not harm this later category as well.

We, thus, uphold the validity of Section 59. As a corollary, Aadhaar for the period from 2009 to 2016 also stands validated.

LIMITED GOVERNMENT, GOOD GOVERNANCE,

CONSTITUTIONAL TRUST AND CONSTITUTIONALISM

374. Mr. Shyam Divan and Mr. Gopal Subramanium, learned senior Counsel, submit that a fundamental feature of the Constitution is the sovereignty of the people with limited government authority. The Constitution limits governmental authority in various ways, amongst them Fundamental Rights, the distribution of powers amongst organs of the state and the ultimate check by way of judicial review. Article 245 of the Constitution of India is an express embodiment of the principle of limited government to the legislature inasmuch as it subjects laws to the Constitution:

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

375. The concept of limited government is the underlying difference between a 'Constitution' and 'Constitutionalism'. Mr. Shyam Divan refers to the introductory chapter of his book Indian Constitutional Law, Prof. M.P. Jain writes:

Modern political thought draws a distinction between 'Constitutionalism' and 'Constitution'. A country may have the 'Constitution' but not necessary 'Constitutionalism'. For example, a country with a dictatorship, where the dictator's word is law, can be said to have a 'Constitution' but not 'Constitutionalism'.

The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers. Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary. Unlimited powers jeopardise freedom of the people... If the Constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government... to preserve the basic freedoms of the individual, and to

maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism': it should have some in-built restrictions on the powers conferred by it on governmental organs.

'Constitutionalism' connotes in essence limited government or a limitation on government. Constitutionalism is the antithesis of arbitrary powers....

... As PROFESSOR VILE has remarked: "Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power...should be controlled in order that it should not itself be destructive of the values it was intended to promote.

376. Mr. Divan then cited various paragraphs from the cases of State of M.P. v. Thakur Bharat Singh MANU/SC/0043/1967 : (1967) 2 SCR 454, Gobind v. State of M.P. MANU/SC/0119/1975 : (1975) 2 SCC 148, S.P. Sampath Kumar v. Union of India MANU/SC/0851/1987 : (1987) 1 SCC 124, Sub-Committee on Judicial Accountability v. Union of India MANU/SC/0060/1992 : (1991) 4 SCC 699, I.R. Coelho v. State of T.N. MANU/SC/0595/2007 : (2007) 2 SCC 1, Nandini Sundar v. State of Chhattisgarh MANU/SC/0724/2011 : (2011) 7 SCC 547, which have reiterated and upheld the principle of limited governments and constitutionalism as a fundamental principle of our constitutional scheme.

377. He submitted that limited government is also enshrined within our Preamble, which is the essence of the Constitution of India, and entitles every individual citizen and the citizenry collectively to live, work, and enjoy their varied lives without being under the continuous gaze of the State. He cites Chelameswar, J. in K.S. Puttaswamy wherein he observed:

The Constitution of any country reflects the aspirations and goals of the people of that country (...) The Constitution cannot be seen as a document written in ink to replace one legal regime by another. It is a testament created for securing the goals professed in the Preamble. Part-III of the Constitution is incorporated to ensure achievement of the objects contained in the Preamble. 'We the People' of this country are the intended beneficiaries of the Constitution. Man is not a creature of the State. Life and liberty are not granted by the Constitution. Constitution only stipulates the limitations on the power of the State to interfere with our life and liberty. Law is essential to enjoy the fruits of liberty; it is not the source of liberty and emphatically not the exclusive source.

378. The Directive Principles of State Policy also envisage a limited government. Violation of fundamental rights cannot be justified by the State on grounds of administrative convenience in meeting its obligations under the Directive Principles of State Policy. Protection of fundamental rights is essential for public welfare contemplated under the Directive Principles of State Policy. This has been upheld in various cases such as Minerva Mills Ltd. v. Union of India MANU/SC/0075/1980 : (1980) 3 SCC 625, where Y.V. Chandrachud, C.J. observed:

57. (...) just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms.

379. Similarly, in *Kesavananda Bharati* v. *State of Kerala* MANU/SC/0445/1973 : (1973) 4 SCC 225, S.M. Sikri, C.J., *inter alia*, held:

209....In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble.

xx xx xx

299. I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Rights which I have already referred to and that Declaration describes some fundamental rights as inalienable. Various decisions of this Court describe fundamental rights as 'natural rights' or 'human rights'....

380. Mr. Divan quotes Seervai in his book *Constitutional Law of India*[54]: *A Critical Commentary* where he writes:

17.14... In India "Public Welfare" and "Welfare State" became in the language of the Chaldean Oracle, "God-given names of unexplained power", which absolved judges from a critical examination of the nature of fundamental rights, and why they were made legally enforceable and the nature of directive principles and why they were made legally unenforceable.

xx xx xx

17.20...it is simply not true that persons entrusted with the duty of implementing the directives will strive in good faith to implement them according to the expectations of the community.

xx xx xx

The question then arises: What is the agency for bringing about social and economic changes which would enable a welfare state to be created? The answer is, legislative and executive power controlled by constitutional limitations including fundamental rights ...

xx xx xx

17.30... the conferment of legally enforceable fundamental rights by our Constitution on persons, citizens and groups of persons was the most effective way of securing public welfare...Anything which enables those objectives to be realised as fully as is practicable must, broadly speaking, subserve public welfare...However, the Preamble, and to a large extent, Fundamental Rights, enable us to say that our Constitution has rejected a totalitarian form of government in favour of a liberal democracy. The emphasis of the Preamble is on securing the dignity of the individual ...

xx xx xx

17.34 But can fundamental rights acting as limitations on legislative and executive power secure public welfare as the framers of our Constitution intended? The answer is "Yes". For, when during the Emergency of 1975-77, almost all the fetters on legislative power became unenforceable, the public welfare suffered gravely and our free democratic constitution was twisted out of shape and came near to a dictatorship or a Police State....

381. The principles of constitutional trust, constitutional morality and good governance are also deeply intertwined with the principle of minimum government. In *Manoj Narula v. Union of India* MANU/SC/0736/2014 : (2014) 9 SCC 1, the Court, *inter alia*, held:

1. ... Democracy, which has been best defined as the government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance.

xx xx xx

75. The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the Rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality.

xx xx xx

82. In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as the primary one and any other interest secondary. The maxim salus populi suprema lex, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for fundamental rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision-making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not a Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependent upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation.

83. ... The issue of constitutional trust arises in the context of the debate in the Constituent Assembly that had taken place pertaining to the recommendation for appointment of a Minister to the Council of Ministers. Responding to the proposal for the amendment suggested by Prof. K.T.

Shah with regard to the introduction of a disqualification of a convicted person becoming a Minister, Dr B.R. Ambedkar had replied: (CAD Vol. VII, p. 1160)

His last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this: whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it not desirable, is it not sufficient that we should trust the Prime Minister, the legislature and the public at large watching the actions of the Ministers and the actions of the legislature to see that no such infamous thing is done by either of them? I think this is a case which may eminently be left to the good sense of the Prime Minister and to the good sense of the legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary.

382. It is submitted by Mr. Divan that the Aadhaar project is destructive of limited government, constitutionalism and constitutional trust. The Constitution is not about the power of the State, but about the limits on the power of the State. Post Aadhaar, the State will completely dominate the citizen and alter the relationship between citizen and State. The features of a Totalitarian State is seen from:

(a) A person cannot conduct routine activities such as operating a bank account, holding an investment in mutual funds, receiving government pension, receiving scholarship, receiving food rations, operating a mobile phone without the State knowing about these activities.(Sections 7, 32 and 57 of the Aadhaar Act).

(b) The State can build a profile of the individual based on the trail of authentication from which the nature of the citizen's activity can be determined. (Sections 2(d) and 32 of the Aadhaar Act and Regulation 20, 26 and 27 of the Aadhaar (Authentication) Regulation, 2016.

(c) By disabling Aadhaar the State can cause the civil death of the person. (Sections 23(2)(g) of the Aadhaar Act and Regulation 27 and 28 of the Aadhaar (Enrolment and Updates) Act, 2016).

(d) By making Aadhaar compulsory for other activities such as air travel, rail travel, directorship in companies, services and benefits extended by State governments and municipal corporations etc. there will be virtually no zone of activity left where the citizen is not under the gaze of the State. This will have a chilling effect on the citizen.

(e) In such a society, there is little or no personal autonomy. The State is pervasive, and dignity of the individual stands extinguished.

(f) This is an inversion of the accountability in the Right to Information age: instead of the State being transparent to the citizen, it is the citizen who is rendered transparent to the State.

383. Mr. Sibal also added that accountability of governments and the state is a phenomenon which is accepted across the world. In furtherance of the Right to information Act, 2005 was passed intended to ensure transparency and state accountability. Through Aadhaar, on the other hand, the

state seeks transparency and accountability of an individual's multifarious activities in the course of his everyday life. This fundamentally alters the relationship between the citizen and the State and skews the balance of power in favour of the State, which is anathema to the Constitution.

384. There is no dispute about the exposition of the principles of limited government and good governance, etc., as highlighted by the learned Counsel for the Petitioners and noted above.

We may add that we are the Republic and it becomes the duty of the Court to keep it. That can be achieved by asking the stakeholders to follow the Constitution, which we have. There are six key constitutional notions, a brilliant exposition whereof has been provided in the case of Manoj Narula v. Union of India MANU/SC/0736/2014 : (2014) 9 SCC 1. The idea of constitutional renaissance was first sounded in the said judgment. It is further elaborated in the case of *Government of NCT of Delhi* v. *Union of India* (2018) SCC Online SC 661 in the opinion penned down by one of us[55]. It stands severally described now as "a constant awakening as regards the text, context, perspective, purpose, and the Rule of law", an awakening that makes space for a "resurgent constitutionalism" and "allows no room for absolutism" nor any "space for anarchy". It is held, therein the term "rational anarchism" has "no entry in the field of constitutional governance or the Rule of law" and by the same token constitutional text and context resolutely repudiate the lineages of absolutism or the itineraries of dictatorship. One may then say that "constitutionalism" is the space between "absolutism" and "anarchy" and its constant repair and renewal is the prime function of adjudication.

385. In an illuminating Article titled '*A Constitutional Renaissance*' on the aforesaid verdict authored by Prof. Upendra Baxi[56], the learned Professor has made following pertinent comments:

Awakening is a constant process; renaissance has a beginning but knows no end because everyday fidelity to the vision, spirit and letter of the Constitution is the supreme obligation of all constitutional beings. One ought to witness in daily decisions an "acceptance of constitutional obligations" not just within the text of the Constitution but also its "silences". To thus reawaken is to be "obeisant to the constitutional conscience with a sense of constitutional vision". Second, courts should adopt that approach to interpretation which "glorifies the democratic spirit of the Constitution". "Reverence" for the Constitution (or constitutionalism) is the essential first step towards constitutional renaissance. Third, people are the true sovereigns, never to be reduced to the servile status of being a subject; rather as beings with rights, they are the source of trust in governance and founts of legitimacy. The relatively autonomous legislative, executive, administrative and adjudicatory powers are legitimate only when placed at the service of constitutional ends. All forms of public power are held in trust. And political power is not an end but a means to constitutional governance.

386. Since the arguments on limited government advanced by Mr. Shyam Divan were the same as advanced by him during the hearing of *Binoy Viswam*, our purpose would be served by reproducing the following discussion from the said judgment:

85. There cannot be any dispute about the manner in which Mr. Shyam Divan explained the concept of "limited Government" in his submissions. Undoubtedly, the Constitution of India, as an instrument of governance of the State, delineates the functions and powers of each wing of the

State, namely, the Legislature, the Judiciary and the Executive. It also enshrines the principle of separation of powers which mandates that each wing of the State has to function within its own domain and no wing of the State is entitled to trample over the function assigned to the other wing of the State. This fundamental document of governance also contains principle of federalism wherein the Union is assigned certain powers and likewise powers of the State are also prescribed. In this context, the Union Legislature i.e. Parliament, as well as the State Legislatures are given specific areas in respect of which they have power to legislate. That is so stipulated in Schedule VII to the Constitution wherein List I enumerates the subjects over which Parliament has the dominion, List II spells out those areas where the State Legislatures have the power to make laws while List III is the Concurrent List which is accessible both to the Union as well as the State Governments. The scheme pertaining to making laws by Parliament as well as by the legislatures of the State is primarily contained in Articles 245 to 254 of the Constitution. Therefore, it cannot be disputed that each wing of the State has to act within the sphere delineated for it under the Constitution. It is correct that crossing these limits would render the action of the State ultra vires the Constitution. When it comes to power of taxation, undoubtedly, power to tax is treated as sovereign power of any State. However, there are constitutional limitations briefly described above.

86. In a nine Judge Bench decision of this Court in *Jindal Stainless Ltd. and Anr.* v. *State of Haryana and Ors*. discussion on these constitutional limitations are as follows:

20. Exercise of sovereign power is, however, subject to Constitutional limitations especially in a federal system like ours where the States also to the extent permissible exercise the power to make laws including laws that levy taxes, duties and fees. That the power to levy taxes is subject to constitutional limitations is no longer res-integra. A Constitution Bench of this Court has in *Synthetics and Chemicals Ltd.* v. *State of U.P.* MANU/SC/0595/1989 : (1990) 1 SCC 109 recognised that in India the Centre and the States both enjoy the exercise of sovereign power, to the extent the Constitution confers upon them that power. This Court declared:

56 ... We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of Sovereign power which gives the State sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian States, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations." This power, according to some constitutional authorities, is to the public what necessity is to the individual. Right to tax or levy impost must be in accordance with the provisions of the Constitution.

21. What then are the Constitutional limitations on the power of the State legislatures to levy taxes or for that matter enact legislations in the field reserved for them under the relevant entries of List II and III of the Seventh Schedule. The first and the foremost of these limitations appears in Article 13 of the Constitution of India which declares that all laws in force in the territory of India

immediately before the commencement of the Constitution are void to the extent they are inconsistent with the provisions of Part III dealing with the fundamental rights guaranteed to the citizens. It forbids the States from making any law which takes away or abridges, any provision of Part III. Any law made in contravention of the said rights shall to the extent of contravention be void. There is no gain saying that the power to enact laws has been conferred upon the Parliament subject to the above Constitutional limitation. So also in terms of Article 248, the residuary power to impose a tax not otherwise mentioned in the Concurrent List or the State List has been vested in the Parliament to the exclusion of the State legislatures, and the States' power to levy taxes limited to what is specifically reserved in their favour and no more.

22. Article 249 similarly empowers the Parliament to legislate with respect to a matter in the State List for national interest provided the Council of States has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in national interest to do so. The power is available till such time any resolution remains in force in terms of Article 249(2) and the proviso thereunder.

23. Article 250 is yet another provision which empowers the Parliament to legislate with respect to any matter in the State List when there is a proclamation of emergency. In the event of an inconsistency between laws made by Parliament Under Articles 249 and 250, and laws made by legislature of the States, the law made by Parliament shall, to the extent of the inconsistency, prevail over the law made by the State in terms of Article 251.

24. The power of Parliament to legislate for two or more States by consent, in regard to matters not otherwise within the power of the Parliament is regulated by Article 252, while Article 253 starting with a non-obstante Clause empowers Parliament to make any law for the whole country or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

87. Mr. Divan, however, made an earnest endeavour to further broaden this concept of 'limited Government' by giving an altogether different slant. He submitted that there are certain things that the States simply cannot do because the action fundamentally alters the relationship between the citizens and the State. In this hue, he submitted that it was impermissible for the State to undertake the exercise of collection of bio-metric data, including fingerprints and storing at a central depository as it puts the State in an extremely dominant position in relation to the individual citizens. He also submitted that it will put the State in a position to target an individual and engage in surveillance thereby depriving or withholding the enjoyment of his rights and entitlements, which is totally impermissible in a country where governance of the State of founded on the concept of 'limited Government'. Again, this concept of limited government is woven around Article 21 of the Constitution.

88. Undoubtedly, we are in the era of liberalised democracy. In a democratic society governed by the Constitution, there is a strong trend towards the constitutionalisation of democratic politics, where the actions of democratically elected Government are judged in the light of the Constitution. In this context, judiciary assumes the role of protector of the Constitution and democracy, being the ultimate arbiter in all matters involving the interpretation of the Constitution.

387. We may observe that the matter is examined keeping in view the fundamental principles of constitutionalism in mind, and more particularly the principle that the concept of 'limited government' is applicable having regard to the fact that the three limbs of the State are to act within the framework of a written Constitution which assigns specific powers to each of the wing of the State and this presupposes that the sovereign power of the Parliament is circumscribed by the provisions of the Constitution and the legislature is supposed to Act within the boundaries delineated by the Constitution. The constitutionalism, which is the bedrock of Rule of law, is to be necessarily adhered to by the Parliament. Further, the power of judicial review which is accorded to the courts can be exercised to strike down any legislation or executive action if it is unconstitutional.

388. When we examine this issue in the context of discussion on various issues already dealt with, it is difficult to agree with the sweeping proposition advanced by the Petitioners that the Aadhaar project is destructive of limited government and constitutional trust. These submissions are premised on the architecture of the Aadhaar being constitutionally intrusive which threatens the autonomy of individuals and has a tendency of creating a surveillance state. In support, the Petitioners have referred to certain provisions of the Aadhaar Act. Some provisions which we found offending are struck down, some others have been read down and some are tweaked with. We feel that the statutory regime that would now govern the citizenry, wards off such a danger, if any.

MONEY BILL

Is the Aadhaar Act a validly enacted law having been passed as a Money Bill?

389. Mr. Chidambaram and Mr. Datar had laid attack on the Act on the ground that the Bill it could not have been introduced and passed by the Parliament as Money Bill. It was argued that the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 (for short the 'Bill') was wrongly certified as Money Bill Under Article 110 of the Constitution of India by the Hon'ble Speaker of the Lok Sabha, thereby, virtually excluding the Rajya Sabha from the legislative process and depriving the Hon'ble President of his power of return. This, according to them, is illegal and grossly violates the constitutional provisions.

390. It was submitted that Bills are of three kinds:

(i) Ordinary Bills (Article 107);

(ii) Financial Bills viz. subset of Ordinary Bills (Article 117);

(iii) Money Bill viz. subset of Financial Bills (Article 110).

391. Article 110 reads as under:

Article 110-Definition of "Money Bills".-

(1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:

(a) the imposition, abolition, remission, alteration or Regulation of any tax;

(b) the Regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in Sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmit led to the Council of States Under Article 109, and when it is presented to the President for assent Under Article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

392. It was submitted that a Money Bill may provide for matters enumerated in Clause (a) to (f) of Article 110. Clause (g) has been added because it may be necessary to include provisions that are only "incidental" to any of matters specified in (a) to (f). The learned Counsel pointed out the distinguishing features of a Money Bill are as below:

(i) It shall be introduced only on the recommendation of President (Article 117(1)).

(ii) It shall be introduced only in the House of the People (Article 117(1), 109(1)).

(iii) A Money Bill is transmitted by the Lok Sabha to the Rajya Sabha. Rajya Sabha thereafter may only make recommendations and return the Bill and not make amendments. The recommendations

may or may not be accepted by the Lok Sabha. If the Money Bill is not returned within 14 days, it is deemed to have been passed by both the Houses. (Article 109(2) to Article 109(5)).

(iv) Upon submission of a Money Bill to the President for his assent, the President cannot return the Money Bill with the message requesting that the Houses will reconsider the Bill (proviso to Article 111).

Hence, it is manifest that a Money Bill that a Money Bill is a special kind of Bill that has the effect of denuding the power of the Rajya Sabha of its power to amend the Bill and depriving the President of his power to return the bill for reconsideration. On that premise, it was argued that the provisions of a Money Bill must be construed very strictly and narrowly and only if a Bill falls strictly under definition of a Money Bill (Article 110), it can be passed as a Money Bill. If the provisions of the Bill fall outside the strict definition of Money Bill, the said Bill cannot be passed as a Money Bill.

393. Great emphasis was laid on the word 'only' appearing in Article 110 which signified that to qualify as a Money Bill, it has to strictly fall within one or more of the clauses of Article 110. For the interpretation of the word 'only', reference was made to the judgment in the case of *Hari Ram and Ors.* v. *Babu Gokul Prasad* MANU/SC/0110/1991 : (1991) Supp. 2 SCC 608:

3. Section 166 of M.P. Land Revenue Code, 1954 reads as under:

166. Any person who holds land for agricultural purposes from a tenure holder and who is not an occupancy tenant Under Section 169 or a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, shall be ordinary tenant of such land.

Explanation.-- For the purposes of this section--

(i) any person who pays lease money in respect of any land in the form of crop share shall be deemed to hold such land;

(ii) any person who cultivates land in partnership with the tenure holder shall not be deemed to hold such land;

(iii) any person to whom only the right to cut grass or to graze cattle or to grow singhara (Trapa bispinosa) or to propagate or collect lac is granted in any land shall not be deemed to hold such land for agricultural purposes.

A bare perusal of the Section indicates that any tenant other than occupancy tenant if he held the land for agricultural purposes from a tenure holder, then he became ordinary tenant by operation of law. Doubt if any stood removed by the explanation which clarifies the class of persons who could be deemed to be covered under a tenant other than occupancy tenant. Since it has been found that the land was let out to Appellant not only for the right to cut grass, he could not be held to be a person who was not holding the land for agricultural purposes. The word 'only' in Explanation (iii) is significant. It postulates that entire land should have been used for the purposes enumerated. If part of the land was used for cultivation, then the land could not be deemed to have been granted

for cutting grass only. It has been found that out of 5 and odd acres of land, the land under cultivation was 2 acres. Therefore, the negative Clause in Explanation (iii) did not apply and the Appellant became ordinary tenant Under Section 166. In 1959, M.P. Land Revenue Code was enacted and Section 185 provided for the persons who could be deemed to be occupancy tenants. Its relevant part is extracted below:

185. *Occupancy tenants*.-- (1) Every person who at the coming into force of this Code holds--

(i) in the Mahakoshal Region--

(*a*) ***

(*b*) ***

(*c*) any land as an ordinary tenant as defined in the Madhya Pradesh Land Revenue Code, 1954 (2 of 1955);

394. The learned Counsel also referred to *M/s. Saru Smelting (P) Ltd.* v. *Commissioner of Sales Tax, Lucknow* MANU/SC/0835/1993 : (1993) Supp. 3 SCC 97:

3. The contention of the Respondent is that Phosphorous Bronze is an alloy containing not only the metals mentioned in the aforesaid entry but Phosphorous also and as such it is not covered under the aforesaid entry. The words "other alloy containing any of these metals only" mean that the alloy made of these metals i.e. copper, tin, nickel or zinc only and that alone is covered under the said entry. It was submitted that if any other metal or substance is included in such an alloy, the same would not be covered under the aforesaid entry.

xx xx xx

5. We were referred to various dictionary meanings of the words 'Phosphorous Bronze' which have been noticed by the learned Judge dealing with the case in the High Court. We are really concerned with the interpretation of the entry. The emphasis in the entry is -- either it should be pure copper, tin, nickel or zinc and if it is an alloy containing two or more metals, it must be an alloy containing these metals only. The expression "only" is very material for understanding the meaning of the entry. Since the alloy in dispute contains Phosphorous, may be in a very small quantity, it cannot fall within Entry 2(a) of the aforesaid Notification. The appeal consequently fails and is dismissed with costs.

395. In order to demonstrate as to what would be the nature and scope of the Money Bill, reference was made to the following literature:

RELEVANT EXCERPTS FROM ERSKINE MAY'S "PARLIAMENTARY PRACTICE"

Definition of Money Bill-

Section 1(2) of the Act defines a 'Money Bill' as a public bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or Regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund or the national Loans Fund, or on money provided by Parliament or the variation or repeal of any such charges; Supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. For the purposes of this definition the expressions 'taxation', 'public money', and 'loan' respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes, matters which, on the other hand, are included within the scope of Commons financial privilege.

PROCEDURE IN PASSING MONEY BILL

A 'Money Bill' which has been passed by the House of Commons and sent up to the House of Lords at least one month before the end of the session, but is not passed by the House of Lords without amendment within one month after it is so sent up, is, unless the House of Commons direct to the contrary, to be presented for the Royal Assent and becomes an Act of Parliament on the Royal Assent being signified to it. A 'Money Bil', when it is sent up to the House of Lords and when it is presented to Her Majesty, must be endorsed with the Speaker's certificate that it is such a bill. Before giving this certificate the Speaker is directed to consult, if practicable, those two members of the Panel of Chairs who are appointed for the purpose at the beginning of each session by the Committee of Selection.

When the Speaker has certified a bill to be a 'Money Bill' this is recorded in the Journal; and Section 3 of the Parliament Act 1911 stipulates that such certificate is conclusive for all purposes and may not be questioned in a court of law.

No serious practical difficulty normally arises in deciding whether a particular bill is or is not a 'Money Bill'; and criticism has seldom been voiced of the Speaker's action in giving or withholding a certificate. A bill which contains any of the enumerated matters and nothing besides is indisputably a 'Money bill'. If it contains any other matters, then, unless these are 'subordinate matters incidental to' any of the enumerated matters so contained in the bill, the bill is not a 'Money bill'. Furthermore, even if the main object of a bill is to create a new charge on the Consolidated Fund or on money provided by Parliament, the bill will not be certified if it is apparent that the primary purpose of the new charge is not purely financial.

THE PARLIAMENTARY ACT, 1911

Chapter 13 of the Parliament Act, 1911 wherein Money Bill is defined as under:

(1) ...

(2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or Regulation of taxation; the imposition for the payment

of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this Sub-section the expressions "taxation", "public money", and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.

(3) There shall be endorsed on every Money Bill when it is sent up to the House of Lords and when it is presented to His Majesty for assent the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. Before giving his certificate, the Speaker shall consult, if practicable, two members to be appointed from the Chairmen's Panel at the beginning of each Session by the Committee of Selection.

RELEVANT EXCERPTS FROM THE CONSTITUTION OF IRELAND

(1) A Money Bill means a Bill which contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or Regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply, the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; matters subordinate and incidental to these matters or any of them.

(2) In this definition the expressions "taxation", "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

RELEVANT EXCERPTS FROM KAUL & SHAKDER'S "PRACTICE AND PROCEDURE OF PARLIAMENT", LOK SABHA SECRETARIAT AT INDIA

Speaker Mavalankar observed as follows:

Prima facie, it appears to me that the words of Article 110 (imposition, abolition, remission, alteration, Regulation of any tax) are sufficiently wide to make the Consolidated Bill a Money Bill. A question may arise as to what is the exact significance or scope of the word 'only' and whether and how far that word goes to modify or control the wide and general words 'imposition, abolition, remission, etc.'.

I think, *prima facie*, that the word 'only' is not restrictive of the scope of the general terms. If a Bill substantially deals with the imposition, abolition, etc., of a tax, then the mere fact of the inclusion in the Bill of other provisions which may be necessary for the administration of that tax or, I may say, necessary for the achievement of the objective of the particular Bill, cannot take away the Bill from the category of Money Bills. One has to look to the objective of the bill. Therefore, if the substantial provisions of the Bill aim at imposition, abolition, etc., of any tax then the other provisions would be incidental and their inclusion cannot be said to take it away from the category of a Money Bill. Unless one construes the word 'only' in this way it might lead to make Article 110 a nullity. No tax can be imposed without making provisions for its assessment, collection, administration, reference to courts or tribunals, etc, one can visualise only one Section in a Bill

imposing the main tax and there may be fifty other Sections which may deal with the scope, method, manner, etc., of that imposition.

Further, we have also to consider the provisions of Sub-clause (2) of Article 110; and these provisions may be helpful to clarify the scope of the word 'only', not directly but indirectly.

396. It was further submitted that though Clause (3) of Article 110 stipulates that decision of the Speaker on whether a Bill is a Money Bill or not is final, that did not mean that it was not subject to the judicial scrutiny and, therefore, in a given case, the Court was empowered to decide as to whether decision of the Speaker was constitutionally correct. In respect of Bill in question, it was argued that though Section 7 states that subsidies, benefits and services shall be provided from Consolidated Fund of India which was an attempt to give it a colour of Money Bill, some of the other provisions, namely, clauses 23(2)(h), 54(2)(m) and 57 of the Bill (which corresponds to Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act) do not fall under any of the clauses of Article 110 of the Constitution. Therefore, some provisions which were other than those covered by Money Bill and, therefore, introduction of the Bill as Money Bill was clearly inappropriate. It was also argued that, in this scenario, entire Act was bound to fail as there is no provision for severing clauses in Indian Constitution, unlike Section 55 of the Australian Constitution. Insofar as justiciability of the Speaker's decision is concerned, following judgments were referred to:

(i) *Sub-Committee on Judicial Accountability* v. *Union of India and Ors.* MANU/SC/0060/1992 : (1991) 4 SCC 699

(ii) *S.R. Bommai and Ors.* v. *Union of India and Ors.* MANU/SC/0444/1994 : (1994) 3 SCC 1

(iii) *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha and Ors.* MANU/SC/0241/2007 : (2007) 3 SCC 184

(iv) *Ramdas Athawale* v. *Union of India and Ors.* MANU/SC/0212/2010 : (2010) 4 SCC 1

(v) *Kihoto Hollohan* v. *Zachillhu and Ors.* MANU/SC/0753/1992 : (1992) Supp. 2 SCC 651

397. It was emphasised that the creation and composition of the Rajya Sabha (Upper House) is an indicator of, and is essential to, constitutional federalism. It is a part of basic structure of the Constitution as held in *Kuldip Nayar and Ors.* v. *Union of India and Ors.* MANU/SC/3865/2006 : (2006) 7 SCC 1. Therefore, Rajya Sabha could not have been by-passed while passing the legislation in question and doing away with this process and also right of the President to return the Bill has rendered the statute unconstitutional.

398. The learned Attorney General as well as Mr. Dwivedi and some other counsel appearing for Respondents refuted the aforesaid submissions in a strongest manner possible. It was argued that the Bill was rightly characterised as a Money Bill and introduced Under Article 110 of the Constitution. According to them, the heart of the Aadhaar Act is Section 7. It is not the creation of Aadhaar number per se which is the core of the Act, rather, that is only a means to identify the correct beneficiary and ensure "targeted delivery of subsidies, benefits and services", the expenditure for which is incurred from the Consolidated Fund of India. A conjoint reading of the

preamble to the Act along with Section 7 clearly discloses the legislative intent and the object of the Act, which is to ensure that subsidy, benefit or service for which expenditure is incurred from or the receipt therefrom forms part of, the Consolidated Fund of India should be targeted to reach the intended beneficiary. It was argued, without prejudice to the above, that the decision of the Speaker incorporated into a certificate sent to the President is final and cannot be the subject matter of judicial review. To support the aforesaid proposition, reference was made to the judgment in the case of *Mohd. Saeed Siddiqui* v. *State of Uttar Pradesh and Anr.* MANU/SC/0350/2014 : (2014) 11 SCC 415 wherein the Court held as under:

7. Leave granted in the special leave petition. This appeal is directed against the order dated 27-8-2012 passed by the Division Bench of the High Court of Judicature of Allahabad in *Mukul Upadhyay* v. *N.K. Mehrotra* [Civil Misc. Writ Petition No. 24905 of 2012 (Writ-C 24905 of 2012), order dated 27-8-2012 (All)] whereby the High Court, while allowing the amendment application to the writ petition and holding the writ petition to be maintainable, directed to list the petition on 27-9-2012 for hearing on merits. By way of the said amendment application, the writ Petitioner sought to add two grounds in the writ petition viz. the Amendment Act is violative of the provisions of the Constitution of India and the same was wrongly introduced as a Money Bill in clear disregard to the provisions of Article 199 of the Constitution of India. Accordingly, it was prayed to issue a writ, order or direction in the nature of mandamus declaring the Amendment Act as ultra vires the provisions of the Constitution of India.

xx xx xx

12. It was further submitted by Mr. Venugopal that the Amendment Act was not even passed by the State Legislature in accordance with the provisions of the Constitution of India and is, thus, a mere scrap of paper in the eye of the law. The Bill in question was presented as a Money Bill when, on the face of it, it could never be called as a Money Bill as defined in Articles 199(1) and 199(2) of the Constitution of India. Since the procedure for an ordinary Bill was not followed and the assent of the Governor was obtained to an inchoate and incomplete Bill which had not even gone through the mandatory requirements under the Constitution of India, the entire action was unconstitutional and violative of Article 200 of the Constitution of India.

xx xx xx

31. The main apprehension of the Petitioner is that the Bill that led to the enactment of the Amendment Act was passed as a Money Bill in violation of Articles 197 and 198 of the Constitution of India which should have been passed by both the Houses viz. U.P. Legislative Assembly and U.P. Legislative Council and was wrongly passed only by the U.P. Legislative Assembly. During the course of hearing, Mr. Desai, learned Senior Counsel appearing for the State of U.P., placed the original records pertaining to the proceedings of the Legislative Assembly, decision of the Speaker as well as the Governor, which we are going to discuss in the latter part of our judgment.

xx xx xx

34. The above provisions make it clear that the finality of the decision of the Speaker and the proceedings of the State Legislature being important privilege of the State Legislature viz. freedom of speech, debate and proceedings are not to be inquired by the courts. The "proceeding of the legislature" includes everything said or done in either House in the transaction of the parliamentary business, which in the present case is enactment of the Amendment Act. Further, Article 212 precludes the courts from interfering with the presentation of a Bill for assent to the Governor on the ground of non-compliance with the procedure for passing Bills, or from otherwise questioning the Bills passed by the House. To put it clear, proceedings inside the legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of Business. This is also evident from Article 194 which speaks about the powers, privileges of the Houses of the Legislature and of the members and committees thereof.

35. We have already quoted Article 199. In terms of Article 199(3), the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. We are conscious of the fact that in the decision of this Court in *Raja Ram Pal* v. *Lok Sabha* [MANU/SC/0241/2007 : (2007) 3 SCC 184], it has been held that the proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny.

36. Even if it is established that there was some infirmity in the procedure in the enactment of the Amendment Act, in terms of Article 255 of the Constitution the matters of procedure do not render invalid an Act to which assent has been given by the President or the Governor, as the case may be.

xx xx xx

43. As discussed above, the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. Further, as noted earlier, Article 252 also shows that under the Constitution the matters of procedure do not render invalid an Act to which assent has been given by the President or the Governor, as the case may be. Inasmuch as the Bill in question was a Money Bill, the contrary contention by the Petitioner against the passing of the said Bill by the Legislative Assembly alone is unacceptable.

399. It was submitted that the challenge on identical grounds was, thus, repelled in the aforesaid case wherein validity of legislative enactment of a State in question, on the same ground, namely, it could not called Money Bill as defined in Article 199 of the Constitution, which was pari materia with Article 110 of the Constitution qua the Parliament. Judgment in the case of *Yogendra Kumar Jaiswal and Ors.* v. *State of Bihar and Ors.* MANU/SC/1441/2015 : (2016) 3 SCC 183 was also referred to wherein the Court was concerned with Orissa Special Courts Act, 2006 which was also passed as Money Bill and was challenged as violative of Article 199 of the Constitution. It was argued that the Court held in this case that decision of the Speaker that the Bill in question is a Money Bill is final and such a decision cannot be disputed nor can the procedure of the state legislature can be questioned by virtue of Article 212 of the Constitution. The learned Attorney General specifically read out the following portion from the said judgment:

42. In this regard, we may profitably refer to the authority in *Mohd. Saeed Siddiqui* v. *State of U.P.* [*Mohd. Saeed Siddiqui* v. *State of U.P.*, MANU/SC/0350/2014 : (2014) 11 SCC 415], wherein a three-Judge Bench while dealing with such a challenge, held that Article 212 precludes the courts from interfering with the presentation of a Bill for assent to the Governor on the ground of non-compliance with the procedure for passing Bills, or from otherwise questioning the Bills passed by the House, for proceedings inside the legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of Business. Thereafter, the Court referring to Article 199(3) ruled that the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. The Court took note of the decision in *Raja Ram Pal* [*Raja Ram Pal* v. *Lok Sabha*, MANU/SC/0241/2007 : (2007) 3 SCC 184] wherein it has been held that the proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny. Eventually, the Court repelled the challenge.

43. In our considered opinion, the authorities cited by the learned Counsel for the Appellants do not render much assistance, for the introduction of a Bill, as has been held in *Mohd. Saeed Siddiqui* [*Mohd. Saeed Siddiqui* v. *State of U.P.*, MANU/SC/0350/2014 : (2014) 11 SCC 415], comes within the concept of "irregularity" and it does come within the realm of substantiality. What has been held in *Special Reference No. 1 of 1964* [*Powers, Privileges and Immunities of State Legislatures, In re, Special Reference No. 1 of 1964* MANU/SC/0048/1964 : AIR 1965 SC 745] has to be appositely understood. The factual matrix therein was totally different than the case at hand as we find that the present controversy is wholly covered by the pronouncement in *Mohd. Saeed Siddiqui* [*Mohd. Saeed Siddiqui* v. *State of U.P.*, MANU/SC/0350/2014 : (2014) 11 SCC 415] and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned Counsel for the Appellants.

400. Reliance was also placed on three judgments of Constitution Bench of this Court[57]. The learned Attorney General also submitted that even if it is presumed that there is illegality of procedure in the conduct of business in the Parliament, such parliamentary proceedings were immune from challenge. Attention of the Court was also drawn to Article 122, which prohibits any proceedings of Parliament being called in question on the ground of "***any alleged irregularity of procedure***". It was submitted that the decision and certification of the Speaker being a matter of procedure is included in the Chapter under the heads "Legislative Procedure" being Articles 107 to 111, "Procedure in Financial Matters" being Articles 112 to 117 and "Procedure Generally" being Article 118 to 122 placing beyond doubt that separation of powers is embedded in these provisions clearly excluding judicial review in matters of procedure. Submission was that if this is clearly a Money Bill, being placed beyond challenge in a Court of Law, then to term it as a Financial Bill as contended by the Petitioners would be wholly unjustified. Dilating the aforesaid proposition, it was pointed out that in the Draft Constitution prepared by the drafting committee, Article 101 provided for immunity of Parliamentary proceedings from judicial intervention on 'alleged irregularity of procedure'. This Article finally got renumbered as Article 122 in the Constitution of India. During the Constituent Assembly debates, Shri H.V. Kamath suggested an amendment to draft Article 101 to clarify that the validity of any Parliamentary proceedings shall not be called in question in any court. Accordingly, he suggested that the words 'called in question'

be replaced with 'called in question in any court'. Refuting this suggested amendment, Dr. B.R. Ambedkar categorically stated:

Sir, with regard to the amendment of Mr. Kamath, I do not think it is necessary, because where can the proceedings of Parliament be questioned in a legal manner except in a court? Therefore the only place where the proceedings of Parliament can be questioned in a le-gal manner and legal sanction obtained is the Court. Therefore it is unnecessary to mention the words which Mr. Kamath wants in his amendment. For the reason I have explained, ***the only forum there the proceedings can be questioned in a legal manner and legal relief obtained either against the President or the Speaker or any officer or Member, being the Court, it is unnecessary to specify the forum.*** Mr. Kamath will see that the marginal note makes it clear.

401. Support of the judgment rendered by Patna High Court in *Patna Zilla Truck Owners Association and Ors.* v. *State of Bihar and Ors.* MANU/BH/0004/1963 : AIR 1963 Pat 16 was also taken, which has been approved by the Constitution Bench judgment of this Court in *State of Punjab* v. *Sat Pal Dang and Ors.* MANU/SC/0414/1968 : (1969) 1 SCR 478. It was also argued that the legal position was similar in other Parliamentary democracies like Australia and Canada.

402. In any case, argued the learned Attorney General and Mr. Dwivedi, the Bill was rightly introduced as Money Bill as it merited such a description in law as well. To buttress this submission, doctrine of pith and substance was invoked as a guiding test. It was argued that Section 7 which was the heart and soul of the Aadhaar Act fulfilled this requirement as the subsidies, benefits and services, the expenditure of which is incurred from the Consolidated Fund of India. Therefore, conditions laid down in Article 110 were fully satisfied. Following judgments[58] explaining the doctrine of pith and substance were pressed into substance. It was submitted that undoubtedly in pith and substance, the object of the Aadhaar Act is to identify the correct beneficiaries and ensure the "targeted delivery of subsidies, benefits and services", the expenditure for which is incurred from the Consolidated Fund of India. The creation of the Aadhaar number and authentication facility are in furtherance of the object of the Aadhaar Act, which is permissible Under Article 110(g). It was also argued that Section 57, which has been attacked as being untraceable to any of the sub-clauses of (a) to (f) of Article 110 cannot be looked at in isolation. This Bill in its pith and substance should pass the test of being a Money Bill and not isolated provisions. On the contrary, Section 57 of the Act is also incidental to the object of the Act and creates a limitation upon use of Aadhaar by private parties wherein even though nothing prevents them from using Aadhaar for other purposes, the same has been subjected to the procedure and obligations of Section 8, which requires, inter alia, informed consent of the Aadhaar number holder, purpose limitation, i.e. the identity information will be used only for submission to CIDR for authentication and the private entity must provide alternatives to submission of such identity information, which, in other words, means that private parties cannot insist upon Aadhaar and make Aadhaar mandatory, unless required by law. Therefore, Section 57 is a limitation imposed under the Aadhaar Act on the use of Aadhaar number by private parties which is purely incidental to the object of the Act and would squarely fall within Article 110(g) of the Constitution.

403. At the outset, we would like to recognise the importance of Rajya Sabha (Upper House) in a bicameral system of the Parliament. The significance and relevance of the Upper House has been succinctly exemplified by this Court in *Kuldip Nayar's* case in the following words:

74. The growth of "bicameralism" in parliamentary forms of Government has been functionally associated with the need for effective federal structures. This nexus between the role of "Second Chambers" or Upper Houses of Parliament and better coordination between the Central Government and those of the constituent units, was perhaps first laid down in definite terms with the Constitution of the United States of America, which was ratified by the thirteen original States of the Union in the year 1787. The Upper House of the Congress of USA, known as the Senate, was theoretically modelled on the House of Lords in the British Parliament, but was totally different from the latter with respect to its composition and powers.

75. Since then, many nations have adopted a bicameral form of Central Legislature, even though some of them are not federations. On account of colonial rule, these British institutions of parliamentary governance were also embodied in the British North America Act, 1867 by which the Dominion of Canada came into existence and the Constitution of India, 1950. In Canada, Parliament consists of the House of Commons and the Senate (the Upper House). Likewise, the Parliament of the Union of India consists of the Lok Sabha (House of the People) and the Rajya Sabha (Council of States, which is the Upper House). In terms of their functions as agencies of representative democracies, the Lower Houses in the legislatures of India, USA and Canada, namely, the Lok Sabha, the House of Representatives and the House of Commons broadly follow the same system of composition. As of now, Members of the Lower Houses are elected from pre-designated constituencies through universal adult suffrage. The demarcation of these constituencies is in accordance with distribution of population, so as to accord equity in the value of each vote throughout the territory of the country. However, with the existence of constituent States of varying areas and populations, the representation accorded to these States in the Lower House becomes highly unequal. Hence, the composition of the Upper House has become an indicator of federalism, so as to more adequately reflect the interests of the constituent States and ensure a mechanism of checks and balances against the exercise of power by Central authorities that might affect the interests of the constituent States.

xx xx xx

79. The genesis of the Indian Rajya Sabha on the other hand benefited from the constitutional history of several nations which allowed the Constituent Assembly to examine the federal functions of an Upper House. However, "bicameralism" had been introduced to the provincial legislatures under the British Rule in 1921. The Government of India Act, 1935 also created an Upper House in the federal legislature, whose members were to be elected by the members of provincial legislatures and in case of Princely States to be nominated by the rulers of such territories. However, on account of the realities faced by the young Indian Union, a Council of States (the Rajya Sabha) in the Union Parliament was seen as an essential requirement for a federal order. Besides the former British provinces, there were vast areas of Princely States that had to be administered under the Union. Furthermore, the diversity in economic and cultural factors between regions also posed a challenge for the newly-independent country. Hence, the Upper House was instituted by the Constitution-framers which would substantially consist of members elected by the State Legislatures and have a fixed number of nominated members representing non-political fields. However, the distribution of representation between the States in the Rajya Sabha is neither equal nor entirely based on population distribution. A basic formula is used to assign relatively more weightage to smaller States but larger States are accorded weightage regressively for

additional population. Hence the Rajya Sabha incorporates unequal representation for States but with proportionally more representation given to smaller States. The theory behind such allocation of seats is to safeguard the interests of the smaller States but at the same time giving adequate representation to the larger States so that the will of the representatives of a minority of the electorate does not prevail over that of a majority.

80. In India, Article 80 of the Constitution of India prescribes the composition of the Rajya Sabha. The maximum strength of the House is 250 members, out of which up to 238 members are the elected representatives of the States and the Union Territories [Article 80(1)(b)], and 12 members are nominated by the President as representatives of non-political fields like literature, science, art and social services [Articles 80(1)(a) and 80(3)]. The members from the States are elected by the elected members of the respective State Legislative Assemblies as per the system of proportional representation by means of the single transferable vote [Article 80(4)]. The manner of election for representatives from the Union Territories has been left to prescription by Parliament [Article 80(5)]. The allocation of seats for the various States and Union Territories of the Indian Union is enumerated in the Fourth Schedule to the Constitution, which is read with Articles 4(1) and 80(2). This allocation has obviously varied with the admission and reorganisation of States.

404. The Rajya Sabha, therefore, becomes an important institution signifying constitutional fedaralism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides.

405. We would also like to observe at this stage that insofar as submission of the Respondents about the justiciability of the decision of the Speaker of the Lok Sabha is concerned, we are unable to subscribe to such a contention. Judicial review would be admissible under certain circumstances having regard to the law laid down by this Court in various judgments which have been cited by Mr. P. Chidambaran, learned senior Counsel appearing for the Petitioners, and taken note of in paragraph 396.

406. From the submissions of the learned Counsel for the parties as taken note of above, it is clear that the Petitioners accept that Section 7 of the Aadhaar Act has the elements of 'Money Bill'. The attack is on the premise that some other provisions, namely, clauses 23(2)(h), 54(2)(m) and 57 of the Bill (which corresponds to Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act) do not fall under any of the clauses of Article 110 of the Constitution and, therefore, Bill was not limited to only those subjects mentioned in Article 110. Insofar as Section 7 is concerned, it makes receipt of subsidy, benefit or service subject to establishing identity by the process of authentication under Aadhaar or furnish proof of Aadhaar etc. It is also very clearly declared in this provision that the expenditure incurred in respect of such a subsidy, benefit or service would be from the Consolidated Fund of India. It is also accepted by the Petitioners that Section 7 is the main provision of the Act. In fact, Introduction to the Act as well as the Statement of Objects and Reasons very categorically record that the main purpose of Aadhaar Act is to ensure that such subsidies, benefits and services reach those categories of persons, for whom they are actually

meant. Sections 2(f), (w) and (x) of the Aadhaar Act define benefit, service and subsidy respectively. These provisions read as under:

2(f) "benefit" means any advantage, gift, reward, relief, or payment, in cash or kind, provided to an individual or a group of individuals and includes such other benefits as may be notified by the Central Government;

2(w) "service" means any provision, facility, utility or any other assistance provided in any form to an individual or a group of individuals and includes such other services as may be notified by the Central Government;

2(x) "subsidy" means any form of aid, support, grant, subvention, or appropriation, in cash or kind, to an individual or a group of individuals and includes such other subsidies as may be notified by the Central Government.

407. As all these three kinds of welfare measures are sought to be extended to the marginalised Section of society, a collective reading thereof would show that the purpose is to expand the coverage of all kinds of aid, support, grant, advantage, relief provisions, facility, utility or assistance which may be extended with the support of the Consolidated Fund of India with the objective of targeted delivery. It is also clear that various schemes which can be contemplated by the aforesaid provisions, relate to vulnerable and weaker Section of the society. Whether the social justice scheme would involve a subsidy or a benefit or a service is merely a matter of the nature and extent of assistance and would depend upon the economic capacity of the State. Even where the state subsidizes in part, whether in cash or kind, the objective of emancipation of the poor remains the goal.

408. The Respondents are right in their submission that the expression subsidy, benefit or service ought to be understood in the context of targeted delivery to poorer and weaker Sections of society. Its connotation ought not to be determined in the abstract. For as an abstraction one can visualize a subsidy being extended by Parliament to the King; by Government to the Corporations or Banks; etc. The nature of subsidy or benefit would not be the same when extended to the poor and downtrodden for producing those conditions without which they cannot live a life with dignity. That is the main function behind the Aadhaar Act and for this purpose, enrolment for Aadhaar number is prescribed in Chapter II which covers Sections 3 to 6. Residents are, thus, held entitled to obtain Aadhaar number. We may record here that such an enrolment is of voluntary nature. However, it becomes compulsory for those who seeks to receive any subsidy, benefit or service under the welfare scheme of the Government expenditure whereof is to be met from the Consolidated Fund of India. It follows that authentication Under Section 7 would be required as a condition for receipt of a subsidy, benefit or service only when such a subsidy, benefit or service is taken care of by Consolidated Fund of India. Therefore, Section 7 is the core provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.

409. In this context, let us examine provisions of Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act. Insofar as Section 23 is concerned, it deals with powers and functions of the Authority. Sub-section (1) thereof says that the Authority shall develop the policy, procedure and systems for

issuing Aadhaar numbers to individuals and perform authentication thereof under this Act. As mentioned above, Under Section 3 of the Aadhaar Act, Aadhaar number is to be issued and authentication is performed Under Section 8 of the Aadhaar Act. Sub-section (2) stipulates certain specified powers and functions which the Authority may perform and Sub-section (h) thereof reads as under:

23(2)(h) specifying the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes for which Aadhaar numbers may be used.

410. This provision, thus, enables the Authority to specify the manner of use of Aadhaar with specific purpose in mind, namely, for providing or availing of various subsidies, benefits and services. These are relatable to Section 7. However, it uses the expression 'other purposes' as well. The expression 'other purposes' can be read ejusdem generis which would have its relation to subsidies, benefits and services as mentioned in Section 7 and it can be confined only to that purpose i.e. scheme of targeted delivery for giving any grant, relief etc. when it is chargeable to Consolidated Fund of India. Therefore, this provision, according to us, can be read as incidental to the main provision and would be covered by Article 110(g) of the Constitution. Section 54 confers power upon the Authority to make Regulations consistent with the Act and Rules made thereunder, for carrying out the provisions of the Act. Clause (m) of Sub-section (2) of Section 54 relates to Section 23(2)(h) as can be seen from its language.

54(2)(m) the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes for which Aadhaar numbers may be used under Clause (h) of Sub-section (2) of Section 23.

411. The interpretation which we have given to Section 23(2)(h) would apply here as well and, therefore, we do not find any problem with this provision also. Coming to Section 57 of the Aadhaar Act, it mentions that Aadhaar Act would not prevent use of Aadhaar number for other purposes under the law. It is only an enabling provision as it permits the use of Aadhaar number for other purposes as well. This provision is to be viewed in the backdrop that Section 7 is the core provision. We have already held that it has substantial nexus with the appropriation of funds from the Consolidated Fund of India and is directly connected with Article 110 of the Constitution. To facilitate this, UIDAI is established as Authority under the Act which performs various functions including that of a regulator needing funds for staff salary and it's own expenses. Respondents have rights remarked that the Authority is the performer in chief, the predominant dramatis personae. It appoints Registrars, enrollers, REs and ASAs; it lays down device and software specifications, and develops softwares too; it enrols; it de-duplicates; it establishes CIDR and manages it; it authenticates; it inspects; it prosecutes; it imposes disincentives; etc. And all this it does based on funds obtained by appropriations from Consolidated Fund of India (Section 24).

412. When we examine the provision of Section 57 in the aforesaid backdrop, as stated above, it only enables holder of Aadhaar number to use the said number for other purposes as well. That would not take away or dilute the sheen of Clause 7 (now Section 7) for which purposes the Bill was introduced as Money Bill. In any case, a part of Section 57 has already declared

unconstitutional whereby even a body corporate in private sector or person may seek authentication from the Authority for establishing the identity of an individual.

For all the aforesaid reasons, we are of the opinion that Bill was rightly introduced as Money Bill. Accordingly, it is not necessary for us to deal with other contentions of the Petitioners, namely, whether certification by the Speaker about the Bill being Money Bill is subject to judicial review or not, whether a provision which does not relate to Money Bill is severable or not. We reiterate that main provision is a part of Money Bill and other are only incidental and, therefore, covered by Clause (g) of Article 110 of the Constitution.

Section 139AA of the Income Tax Act, 1961:

413. The Division Bench of this Court in Binoy Viswam has already upheld the validity of Section 139AA of the Income Tax Act, 1961 by repelling the contention predicated on Articles 14 and 19 of the Constitution of India. No doubt, in the said judgment, the Court held that insofar as scope of judicial review of legislative act is concerned, it is available on two grounds, namely:

(i) The Act is not within the competence of the legislature which passed the law, and/or

(ii) It is in contravention of any fundamental rights stipulated in Part III of the Constitution or any other rights/provisions of the Constitution.

414. We have already acknowledged the existence of third ground as pointed out in *Shayara Bano* case, namely, 'manifest arbitrariness'. An Act which is manifestly arbitrary would be unreasonable and contrary to Rule of law and, therefore, violative of Article 14 of the Constitution. Even when we consider the provisions of Section 139AA of the Income Tax Act, 1961 from this point of view, it cannot be said that the provision suffers from the vice of manifest arbitrariness. On the contrary, in *Binoy Viswam* itself, the benevolent purpose for inserting such a provision as a bona fide move has been highlighted. Therefore, the provision needs this test as well. In this behalf, the Court observed:

101. The varying needs of different classes or Sections of people require differential and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate. The principle of equality of law, thus, means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike.

415. Since the issue as to whether right to privacy is a facet of fundamental rights or not was pending before the Constitution Bench, the challenge to Section 139AA was not examined in the context of privacy rights, specifically Article 21 of the Constitution though this aspect was argued. The Division Bench observed in this behalf, as under:

136. Subject to the aforesaid, these writ petitions are disposed of in the following manner:

136.1. We hold that Parliament was fully competent to enact Section 139-AA of the Act and its authority to make this law was not diluted by the orders of this Court.

136.2. We do not find any conflict between the provisions of the Aadhaar Act and Section 139-AA of the Income Tax Act inasmuch as when interpreted harmoniously, they operate in distinct fields.

136.3. Section 139-AA of the Act is not discriminatory nor it offends equality Clause enshrined in Article 14 of the Constitution.

136.4. Section 139-AA is also not violative of Article 19(1) (g) of the Constitution insofar as it mandates giving of Aadhaar enrolment number for applying for PAN cards, in the income tax returns or notified Aadhaar enrolment number to the designated authorities. Further, the proviso to Sub-section (2) thereof has to be read down to mean that it would operate only prospectively.

136.5. The validity of the provision upheld in the aforesaid manner is subject to passing the muster of Article 21 of the Constitution, which is the issue before the Constitution Bench in Writ Petition (Civil) No. 494 of 2012 and other connected matters. Till then, there shall remain a partial stay on the operation of the proviso to Sub-section (2) of Section 139-AA of the Act, as described above. No costs.

416. The nine Judge Bench has already, since then, answered the reference by holding that right to privacy is a fundamental right. Having regard to that, validity of Section 139AA of the Act needs to be tested on this ground.

417. As already explained above, the Constitution Bench has held that in *K.S. Puttaswamy* though privacy is a fundamental right *inter alia* traceable to the right to liberty enshrined in Article 21 of the Constitution, it is not an absolute right but subject to limitations. The Court also laid down the triple test which need to be satisfied for judging the permissible limits for invasion of privacy while testing the validity of any legislation. These are:

(a) The existence of a law.

(b) A "legitimate State interest"; and

(c) Such law should pass the "test of proportionality".

418. In the present case, there is no dispute that first requirement stands satisfied as Section 139AA is a statutory provision and, therefore, there is a backing of law. Mr. Tushar Mehta, learned ASG had argued that not only other two requirements are also satisfied, rather these have been specifically dealt with by the Division Bench in *Binoy Viswam* inasmuch as these aspects were eluded to, consider, examined and the Court recorded its findings on these aspects. We find force in this submission of Mr. Mehta. Insofar as requirement of 'legitimate State interest' is concerned, he pointed out that though Nariman, J. provided for a lenient test, namely, 'larger public interest' as against 'legitimate State interest', the provision satisfies both the tests. We agree with his

submission, as Section 139AA of the Income Tax Act, 1961 seeks to safeguard the following interest:

To prevent income tax evasion by requiring, through an amendment to the Income Tax Act, that the Aadhaar number be linked with the PAN.

419. The mandatory requirement of quoting/producing PAN number is given in Rule 114 and the Form 49A. While mandating that "every person", (the term "person" as defined Under Section 2(31) of the Act), shall apply for and get a PAN, the legislature also provided for the requirement so as to how such number will be given to every "person" in Rule 114 of the Income Tax Rules, the relevant part of which is Rule 114(1). While complying with the mandatory requirement (which have been in existence since 1989) and that for all "persons", many facts were required to be disclosed and such disclosure was/is in public interest including demographic details and biometrics i.e. left thumb impression/signature.

420. The Parliament, considering the "legitimate State interest" as well as the "larger public interest" has now introduced Section 139AA which is only an extension of Section 139A which requires linking of PAN number with Aadhaar number which is issued under the Act for the purpose of eliminating duplicate PANs from the system with the help of a robust technology solution. Therefore, those who have PAN number and have already provided the information required to get PAN number cannot claim to have any legitimate expectation of withholding any data required for Aadhaar under the ground of "privacy".

421. The Respondents have demonstrated with empirical data, in the common additional affidavit of Respondent Nos. 1 and 3 the existence of the "legitimate State interest" and "larger public interest". Being a unique identifier, the problem of bogus or duplicate PANs can be dealt with in a more systematic and full-proof manner (though, in the context of Articles 14 and 19 of the Constitution, but at the same time, relevant from the perspective of legitimate State interest also). Discussion on this aspect, in *Binoy Viswam*, proceeds as under:

60.2. PAN is the key or identifier of all computerised records relating to the taxpayer. The requirement for obtaining of PAN is mandated through Section 139-A of the Act. The procedure for application for PAN is prescribed in Rule 114 of the Rules. The forms prescribed for PAN application are Forms 49-A and 49-AA for Indian and foreign citizens/entities. Quoting of PAN has been mandated for certain transactions above specified threshold value in Rule 114-B of the Rules.

60.3. For achieving the objective of one PAN to one Assessee, it is required to maintain uniqueness of PAN. The uniqueness of PAN is achieved by conducting a de-duplication check on all already existing allotted PAN against the data furnished by new applicant. Under the existing system of PAN only demographic data is captured. De-duplication process is carried out using a phonetic algorithm whereby a Phonetic PAN (PPAN) is created in respect of each applicant using the data of applicant's name, father's name, date of birth, gender and status. By comparison of newly generated PPAN with existing set of PPANs of all Assessees duplicate check is carried out and it is ensured that same person does not acquire multiple PANs or one PAN is not allotted to multiple persons. Due to prevalence of common names and large number of PAN holders, the demographic

way of de-duplication is not foolproof. Many instances are found where multiple PANs have been allotted to one person or one PAN has been allotted to multiple persons despite the application of abovementioned de-duplication process. While allotment of multiple PANs to one person has the risk of diversion of income of person into several PANs resulting in evasion of tax, the allotment of same PAN to multiple persons results in wrong aggregation and assessment of incomes of several persons as one taxable entity represented by single PAN.

60.4. Presently verification of original documents in only 0.2% cases (200 out of 1,00,000 PAN applications) is done on a random basis which is quite less. In the case of Aadhaar, 100% verification is possible due to availability of online Aadhaar authentication service provided by the Uidai. Aadhaar seeding in PAN database will make PAN allotment process more robust.

60.5. Seeding of Aadhaar number into PAN database will allow a robust way of de-duplication as Aadhaar number is de-duplicated using biometric attributes of fingerprints and iris images. The instance of a duplicate Aadhaar is almost non-existent. Further seeding of Aadhaar will allow the Income Tax Department to weed out any undetected duplicate PANs. It will also facilitate resolution of cases of one PAN allotted to multiple persons.

xx xx xx

104. Insofar as the impugned provision is concerned, Mr. Datar had conceded that first test that of reasonable classification had been satisfied as he conceded that individual Assessees form a separate class and the impugned provision which targeted only individual Assessees would not be discriminatory on this ground. His whole emphasis was that Section 139-AA of the Act did not satisfy the second limb of the twin tests of classification as, according to him, this provision had no rational nexus with the object sought to be achieved. In this behalf, his submission was that if the purpose of the provision was to curb circulation of black money, such an object was not achievable by seeding PAN with Aadhaar inasmuch as Aadhaar is only for individuals. His submission was that it is only the individuals who are responsible for generating black money or money laundering. This was the basis for Mr. Datar's submission. We find it somewhat difficult to accept such a submission.

105. Unearthing black money or checking money laundering is to be achieved to whatever extent possible. Various measures can be taken in this behalf. If one of the measures is introduction of Aadhaar into the tax regime, it cannot be denounced only because of the reason that the purpose would not be achieved fully. Such kind of menace, which is deep-rooted, needs to be tackled by taking multiple actions and those actions may be initiated at the same time. It is the combined effect of these actions which may yield results and each individual action considered in isolation may not be sufficient. Therefore, rationality of a particular measure cannot be challenged on the ground that it has no nexus with the objective to be achieved. Of course, there is a definite objective. For this purpose alone, individual measure cannot be ridiculed. We have already taken note of the recommendations of SIT on black money headed by Justice M.B. Shah. We have also reproduced the measures suggested by the Committee headed by Chairman, CBDT on "Measures to Tackle Black Money in India and Abroad". They have, in no uncertain terms, suggested that one singular proof of identity of a person for entering into finance/business transactions, etc. may go a long way in curbing this foul practice. That apart, even if solitary purpose of de-duplication

of PAN cards is taken into consideration, that may be sufficient to meet the second test of Article 14. It has come on record that 11.35 lakh cases of duplicate PAN or fraudulent PAN cards have already been detected and out of this 10.52 lakh cases pertain to individual Assessees. Seeding of Aadhaar with PAN has certain benefits which have already been enumerated. Furthermore, even when we address the issue of shell companies, fact remains that companies are after all floated by individuals and these individuals have to produce documents to show their identity. It was sought to be argued that persons found with duplicate/bogus PAN cards are hardly 0.4% and, therefore, there was no need to have such a provision. We cannot go by percentage figures. The absolute number of such cases is 10.52 lakhs, which figure, by no means, can be termed as miniscule, to harm the economy and create adverse effect on the nation. The Respondents have argued that Aadhaar will ensure that there is no duplication of identity as biometrics will not allow that and, therefore, it may check the growth of shell companies as well.

xx xx xx

127. It would be apposite to quote the following discussion by the Comptroller and Auditor General in his report for the year 2011:

Widening of Tax Base

The Assessee base grew over the last five years from 297.9 lakh taxpayers in 2005-06 to 340.9 lakh taxpayers in 2009-10 at the rate of 14.4 per cent.

The Department has different mechanisms available to enhance the Assessee base which include inspection and survey, information sharing with other tax departments and third-party information available in annual information returns. Automation also facilitates greater crosslinking. Most of these mechanisms are available at the level of assessing officers. The Department needs to holistically harness these mechanisms at macro level to analyse the gaps in the Assessee base. Permanent Account Numbers (PANs) issued up to March 2009 and March 2010 were 807.9 lakhs and 958 lakhs respectively. The returns filled in 2008-09 and 2009-10 were 326.5 lakhs and 340.9 lakhs respectively. The gap between PANs and the number of returns filed was 617.1 lakhs in 2009-10. The Board needs to identify the reasons for the gap and use this information for appropriately enhancing the Assessee base. *The gap may be due to issuance of duplicate PAN cards and death of some PAN card holders. The Department needs to put in place appropriate controls to weed out the duplicate PANs and also update the position in respect of deceased Assessee. It is significant to note that the number of PAN card holders has increased by 117.7 per cent between 2005-06 to 2009-10 whereas the number of returns filed in the same period has increased by 14.4 per cent only.*

The total direct tax collection has increased by 128.8 per cent during the period 2005-06 to 2009-10. The increase in the tax collection was around nine times as compared to increase in the Assessee base. It should be the constant endeavour of the Department to ensure that the entire Assessee base, once correctly identified is duly meeting the entire tax liability. However, no assurance could be obtained that the tax liability on the Assessee is being assessed and collected properly. This comment is corroborated in Para 2.4.1 of Chapter 2 of this report where we have mentioned about our detection of undercharge of tax amounting to Rs. 12,842.7 crores in 19,230

cases audited during 2008-09. However, given the fact that ours is a test audit, the Department needs to take firm steps towards strengthening the controls available on the existing statutes towards deriving an assurance on the tax collections.

128. Likewise, the Finance Minister in his Budget speech in February 2013 described the extent of tax evasion and offering lesser income tax than what is actually due thereby labelling India as tax non-compliant, with the following figures:

India's tax to GDP ratio is very low, and the proportion of direct tax to indirect tax is not optional from the viewpoint of social justice. I place before you certain data to indicate that our direct tax collection is not commensurate with the income and consumption pattern of Indian economy. As against estimated 4.2 crore persons engaged in organised sector employment, the number of individuals filing return for salary income are only 1.74 crores. As against 5.6 crore informal sector individual enterprises and firms doing small business in India, the number of returns filed by this category are only 1.81 crores. Out of the 13.94 lakh companies registered in India up to 31-3-2014, 5.97 lakh companies have filed their returns for Assessment Year 2016-17. Of the 5.97 lakh companies which have filed their returns for Assessment Year 2016-17 so far, as many as 2.76 lakh companies have shown losses or zero income. 2.85 lakh companies have shown profit before tax of less than Rs. 1 crore. 28,667 companies have shown profit between Rs. 1 crore to Rs. 10 crores, and only 7781 companies have profit before tax of more than Rs. 10 crores. Among 3.7 crore individuals who filed the tax returns in 2015-16, 99 lakhs show income below the exemption limit of Rs. 2.5 lakh p.a. 1.95 crores show income between Rs. 2.5 to Rs. 5 lakhs, 52 lakhs show income between Rs. 5 to Rs. 10 lakhs and only 24 lakh people show income above Rs. 10 lakhs. Of the 76 lakh individual Assessees who declare income above Rs. 5 lakhs, 56 lakhs are in the salaried class. The number of people showing income more than 50 lakhs in the entire country is only 1.72 lakhs. We can contrast this with the fact that in the last five years, more than 1.25 crore cars have been sold, and number of Indian citizens who flew abroad, either for business or tourism, is 2 crores in the year 2015. From all these figures we can conclude that we are largely a tax non-compliant society. The predominance of the cash in the economy makes it possible for the people to evade their taxes. When too many people evade the taxes, the burden of their share falls on those who are honest and compliant.

129. The Respondents have also claimed that linking of Aadhaar with PAN is consistent with India's international obligations and goals. In this behalf, it is pointed out that India has signed the Inter-Governmental Agreement (IGA) with USA on 9-7-2015, for Improving International Tax Compliance and implementing the Foreign Account Tax Compliance Act (Fatca). India has also signed a multilateral agreement on 3-6-2015, to automatically exchange information based on Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters under the Common Reporting Scheme (CRS), formally referred to as the Standard for Automatic Exchange of Financial Account Information (AEoI). As part of India's commitment under Fatca and CRS, financial sector entities capture the details about the customers using the PAN. In case the PAN or submitted details are found to be incorrect or fictitious, it will create major embarrassment for the country. Under Non-filers Monitoring System (NMS), the Income Tax Department identifies non-filers with potential tax liabilities. Data analysis is carried out to identify non-filers about whom specific information was available in AIR, CIB data and TDS/TCS returns. Email/SMS and letters are sent to the identified non-filers communicating the information summary and seeking to know

the submission details of income tax return. In a large number of cases (more than 10 lakh PANs every year) it is seen that the PAN holder neither submits the response and in many cases the letters are return unserved. Field verification by field formations have found that in a large number of cases, the PAN holder is untraceable. In many cases, the PAN holder mentions that the transaction does not relate to them. There is a need to strengthen PAN by linking it with Aadhaar/biometric information to prevent use of wrong PAN for high value transactions.

422. Adverting to the aspect of proportionality, here again there was a specific discussion in *Binoy Viswam* as this argument was raised, though in the context of Article 19 of the Constitution. The Court after explaining the doctrine of proportionality specifically held that proportionality test stood applied with. Following discussion in the said judgment would amply demonstrate this proposition:

65. While monitoring the PILs relating to night shelters for the homeless and the right to food through the public distribution system, this Court has lauded and complimented the efforts of the State Governments for inter alia carrying out biometric identification of the head of family of each household to eliminate fictitious, bogus and ineligible BPL/AAY household cards.

xx xx xx

125.2. Menace of corruption and black money has reached alarming proportion in this country. It is eating into the economic progress which the country is otherwise achieving. It is not necessary to go into the various reasons for this menace. However, it would be pertinent to comment that even as per the observations of the Special Investigation Team (SIT) on black money headed by Justice M.B. Shah, one of the reasons is that persons have the option to quote their PAN or UID or passport number or driving licence or any other proof of identity while entering into financial/business transactions. Because of this multiple methods of giving proofs of identity, there is no mechanism/system at present to collect the data available with each of the independent proofs of ID. For this reason, even SIT suggested that these databases be interconnected. To the same effect is the recommendation of the Committee headed by Chairman, CBDT on measures to tackle black money in India and abroad which also discusses the problem of money laundering being done to evade taxes under the garb of shell companies by the persons who hold multiple bogus PAN numbers under different names or variations of their names. That can be possible if one uniform proof of identity, namely, UID is adopted. It may go a long way to check and minimise the said malaise.

125.3. Thirdly, Aadhaar or UID, which has come to be known as the most advanced and sophisticated infrastructure, may facilitate law-enforcement agencies to take care of problem of terrorism to some extent and may also be helpful in checking the crime and also help investigating agencies in cracking the crimes. No doubt, going by the aforesaid, and may be some other similarly valid considerations, it is the intention of the Government to give fillip to Aadhaar movement and encourage the people of this country to enrol themselves under the Aadhaar Scheme.

126. Whether such a scheme should remain voluntary or it can be made mandatory imposing compulsiveness on the people to be covered by Aadhaar is a different question which shall be addressed at the appropriate stage. At this juncture, it is only emphasised that mala fides cannot be

attributed to this scheme. In any case, we are concerned with the vires of Section 139-AA of the Income Tax Act, 1961 which is a statutory provision. This Court is, thus, dealing with the aspect of judicial review of legislation. Insofar as this provision is concerned, the explanation of the Respondents in the counter-affidavit, which has already been reproduced above, is that the primary purpose of introducing this provision was to take care of the problem of multiple PAN cards obtained in fictitious names. Such multiple cards in fictitious names are obtained with the motive of indulging into money laundering, tax evasion, creation and channelising of black money. It is mentioned that in de-duplication exercises, 11.35 lakh cases of duplicate PANs/fraudulent PANs have been detected. Out of these, around 10.52 lakhs pertain to the individual Assessees. Parliament in its wisdom thought that one PAN to one person can be ensured by adopting Aadhaar for allotment of PAN to individuals. As of today, that is the only method available i.e. by seeding of existing PAN with Aadhaar. It is perceived as the best method, and the only robust method of de-duplication of PAN database. It is claimed by the Respondents that the instance of duplicate Aadhaar is almost non-existent. It is also claimed that seeding of PAN with Aadhaar may contribute to widening of the tax case as well, by checking the tax evasions and bringing into tax hold those persons who are liable to pay tax but deliberately avoid doing so.

423. It has been stated by the Respondents, on affidavit, that analysis of Form 61/60 data using PAN Aadhaar linkage shows that a large number of PAN holders do not quote their PAN in the prescribed transactions to prevent linking of the transactions to the PAN. The analysis was performed by matching the Aadhaar number and person name reported in Form 61 (which was possible only due to linking of financial transactions/accounts with Aadhaar) with the Aadhaar and name of the entity available in the ITD PAN database (possible due to linking of PAN with Aadhaar). This analysis identified 1.65 crore non-PAN transactions reported through Form 61 (relating to FY 2016-17 and FY 2017-18) where PAN of the transacting party was present in the PAN database and was not mentioned filing a wrong form deliberately. These transactions totalled to around Rs. 33,000 crore (based on transaction amount reported). This is the amount of undisclosed high value transaction which would have gone undetected had it not been for Aadhaar linkage. Similar matching has also helped populating PAN in 1.12 lakh non-PAN transactions reported under Statement of Financial Transactions (SFT). Majority of the non-PAN transactions reported are around Deposit in Cash, Investment in time deposit, Sale of immovable property, Purchase of immovable property and Opening an account (other than savings and time deposit). Thus, linking of PAN with Aadhaar will significantly enhance legitimate collection of country's revenue.

424. Taking into account the aforesaid consideration as well as other factors mentioned above, we feel that there is a justifiable reason with the State for collection and storage of data in the form of Aadhaar and linking it with PAN insofar as Section 139AA of the Income Tax Act is concerned. We would like to reproduce para 311 of *K.S. Puttaswamy* judgment, which reads as under:

311. Apart from national security, the State may have justifiable reasons for the collection and storage of data. In a social welfare State, the Government embarks upon programmes which provide benefits to impoverished and marginalised Sections of society. There is a vital State interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients. Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for

extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the State to insist on the collection of authentic data. But, the data which the State has collected has to be utilised for legitimate purposes of the State and ought not to be utilised unauthorisedly for extraneous purposes. This will ensure that the legitimate concerns of the State are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology--legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

425. Following passages from *Subramanian Swamy* v. *Union of India, Ministry of Law and Ors.* MANU/SC/0621/2016 : (2016) 7 SCC 221 may also be relevant in this behalf and the same are reproduced below:

122. In State of Madras v. V.G. Row, the Court has ruled that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

xx xx xx

130. The principles as regards reasonable restriction as has been stated by this Court from time to time are that the restriction should not be excessive and in public interest. The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down any abstract standard or general pattern. It would depend upon the nature of the right which has been infringed or sought to be infringed. The ultimate "impact", that is, effect on the right has to be determined. The "impact doctrine" or the principle of "inevitable effect" or "inevitable consequence" stands in contradistinction to abuse or misuse of a legislation or a statutory provision depending upon the circumstances of the case. The prevailing conditions of the time and the principles of proportionality of restraint are to be kept in mind by the court while adjudging the constitutionality of a provision regard being had to the nature of the right. The nature of social control which includes public interest has a role. The conception of social interest has to be borne in mind while considering reasonableness of the restriction imposed on a right. The social interest principle would include the felt needs of the society.

xx xx xx

194. Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective (see *P.P. Enterprises* v. *Union of India*). Further, the

reasonableness is examined in an objective manner from the standpoint of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations (see *Mohd. Hanif Quareshi* v. *State of Bihar*).

On independent examination of the matter, the aforesaid exercise undertaken in the *Binoy Viswam* is hereby affirmed as we are in agreement therewith. We, thus, hold that the provisions of Section 139AA of the Income Tax Act, 1961 meet the triple test of right to privacy, contained in *K.S. Puttaswamy*.

Prevention of Money Laundering Rules:

426. The Petitioners have challenged amendment to Rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, (Rules, 2005) which was amended by Prevention of Money Laundering (Maintenance of Records) Seventh Amendment Rules, 2017. Rule 9 of the aforesaid Rules is amended by Second Amendment Rules, 2017 whereby following additions are made. The amendment reads as under:

(b) in Rule 9, for Sub-rule (4) to Sub-rule (9), the following sub-rules shall be substituted, namely:

(4) Where the client is an individual, who is eligible to be enrolled for an Aadhaar number, he shall for the purpose of Sub-rule (1) submit to the reporting entity,-

(a) the Aadhaar number issued by the Unique Identification Authority of India; and

(b) the Permanent Account Number or Form No. 60 as defined in Income Tax Rules, 1962,

and such other documents including in respect of the nature of business and financial status of the client as may be required by the reporting entity:

Provided that where an Aadhaar number has not been assigned to a client, the client shall furnish proof of application of enrolment for Aadhaar and in case the Permanent Account Number is not submitted, one certified copy of an 'officially valid document' shall be submitted.

Provided further that photograph need not be submitted by a client falling under Clause (b) of Sub-rule (1).

(4A) Where the client is an individual, who is not eligible to be enrolled for an Aadhaar number, he shall for the purpose of Sub-rule (1), submit to the reporting entity, the Permanent Account Number or Form No. 60 as defined in the Income Tax Rules, 1962:

Provided that if the client does not submit the Permanent Account Number, he shall submit one certified copy of an 'officially valid document' containing details of his identity and address, one recent photograph and such other documents including in respect of the nature or business and financial status of the client as may be required by the reporting entity.

(5) Notwithstanding anything contained in sub-rules (4) and (4A), an individual who desires to open a small account in a banking company may be allowed to open such an account on production of a self-attested photograph and affixation of signature or thumb print, as the case may be, on the form for opening the account:

Provided that-

(i) the designated officer of the banking company, while opening the small account, certifies under his signature that the person opening the account has affixed his signature or thumb print, as the case may be, in his presence;

(ii) the small account shall be opened only at Core Banking Solution linked banking company branches or in a branch where it is possible to manually monitor and ensure that foreign remittances are not credited to a small account and that the stipulated limits on monthly and annual aggregate of transactions and balance in such accounts are not breached, before a transaction is allowed to take place;

(iii) the small account shall remain operational initially for a period of twelve months, and thereafter for a further period of twelve months if the holder of such an account provides evidence before the banking company of having applied for any of the officially valid documents within twelve months of the opening of the said account, with the entire relaxation provisions to be reviewed in respect of the said account after twenty-four months;

(iv) the small account shall be monitored and when there is suspicion of money laundering or financing of terrorism or other high risk scenarios, the identity of client shall be established through the production of officially valid documents, as referred to in Sub-rule (4) and the Aadhaar number of the client or where an Aadhaar number has not been assigned to the client, through the production of proof of application towards enrolment for Aadhaar along with an officially valid document;

Provided further that if the client is not eligible to be enrolled for an Aadhaar number, the identity of client shall be established through the production of an officially valid document;

(v) the foreign remittance shall not be allowed to be credited into the small account unless the identity of the client is fully established through the production of officially valid documents, as referred to in Sub-rule (4) and the Aadhaar number of the client or where an Aadhaar number has not been assigned to the client, through the production of proof of application towards enrolment for Aadhaar along with an officially valid document:

Provided that if the client is not eligible to be enrolled for the Aadhaar number, the identity of client shall be established through the production of an officially valid document.

(6) Where the client is a company, it shall for the purposes of Sub-rule (1), submit to the reporting entity the certified copies of the following documents:

(i) Certificate of incorporation;

(ii) Memorandum and Articles of Association;

(iii) A resolution from the Board of Directors and power of attorney granted to its managers, officers or employees to transact on its behalf;

(iv) (a) Aadhaar numbers; and

(b) Permanent Account Numbers or Form 60 as defined in the Income Tax Rules, 1962,

issued to managers, officers or employees holding an attorney to transact on the company's behalf or where an Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this Clause if the managers, officers or employees holding an attorney to transact on the company's behalf are not eligible to be enrolled for Aadhaar number and do not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(7) Where the client is a partnership firm, it shall, for the purposes of Sub-rule (1), submit to the reporting entity the certified copies of the following documents:

(i) registration certificate;

(ii) partnership deed; and

(iii) (a) Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income Tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where an Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this clause, if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(8) Where the client is a trust, it shall, for the purposes of Sub-rule (1) submit to the reporting entity the certified copies of the following documents:

(i) registration certificate;

(ii) trust deed; and

(iii) (a) Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income Tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this Clause if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(9) Where the client is an unincorporated association or a body of individuals, it shall submit to the reporting entity the certified copies of the following documents:

(i) resolution of the managing body of such association or body of individuals;

(ii) power of attorney granted to him to transact on its behalf;

(iii) (a) the Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income Tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case the Permanent Account Number is not submitted an officially valid document shall be submitted; and

(iv) such information as may be required by the reporting entity to collectively establish the legal existence of such an association or body of individuals:

Provided that for the purpose of this Clause if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted."

(c) after Sub-rule (14), the following sub-rules shall be inserted, namely,-

(15) Any reporting entity, at the time of receipt of the Aadhaar number under provisions of this rule, shall carry out authentication using either e-KYC authentication facility or Yes/No authentication facility provided by Unique Identification Authority of India.

(16) In case the client referred to in sub-rules (4) to (9) of Rule 9 is not a resident or is a resident in the States of Jammu and Kashmir, Assam or Meghalaya and does not submit the Permanent Account Number, the client shall submit to the reporting entity one certified copy of officially valid document containing details of his identity and address, one recent photograph and such other document including in respect of the nature of business and financial status of the client as may be required by the reporting entity.

(17) (a) In case the client, eligible to be enrolled for Aadhaar and obtain a Permanent Account Number, referred to in sub-rules (4) to (9) of Rule 9 does not submit the Aadhaar number or the Permanent Account Number at the time of commencement of an account based relationship with a reporting entity, the client shall submit the same within a period of six months from the date of the commencement of the account based relationship:

Provided that the clients, eligible to be enrolled for Aadhaar and obtain the Permanent Account Number, already having an account based relationship with reporting entities prior to date of this notification, the client shall submit the Aadhaar number and Permanent Account Number by 31st December, 2017.

(b) As per Regulation 12 of the Aadhaar (Enrolment and Update) Regulations, 2016, the local authorities in the State Governments or Union-territory Administrations have become or are in the process of becoming UIDAI Registrars for Aadhaar enrolment and are organising special Aadhaar enrolment camps at convenient locations for providing enrolment facilities in consultation with UIDAI and any individual desirous of commencing an account based relationship as provided in this rule, who does not possess the Aadhaar number or has not yet enrolled for Aadhaar, may also visit such special Aadhaar enrolment camps for Aadhaar enrolment or any of the Aadhaar enrolment centres in the vicinity with existing registrars of UIDAI.

(c) In case the client fails to submit the Aadhaar number and Permanent Account Number within the aforesaid six months period, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client:

Provided that in case client already having an account based relationship with reporting entities prior to date of this notification fails to submit the Aadhaar number and Permanent Account Number by 31st December, 2017, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client.

(18) In case the identity information relating to the Aadhaar number or Permanent Account Number submitted by the client referred to in sub-rules (4) to (9) of Rule 9 does not have current address of the client, the client shall submit an officially valid documents to the reporting entity.

As can be seen from the above, linking of Aadhaar with the bank account is now mandatory. It applies not only to those bank accounts which would be opened after the bringing into force the amendment but even the existing accounts as well.

427. Linking of a banking account to Aadhaar is challenged as violative of Articles 14, 19(1)(g) and 21 of the Constitution and also of Prevention of Money Laundering Act, 2002. Elaborate submissions were made by Mr. Arvind Datar on the aforesaid aspects. It was argued that those persons who do not choose to enrol for Aadhaar number would not be in a position to open the bank account or even operate the existing bank account and there is no valid explanation as to why all bank accounts had to be authenticated. It was also argued that provisions of the Rule referred to companies, firms, trust etc. as well, though the Aadhaar Act is meant for establishing identity of individuals only. It was further submitted that in case a person fails to link Aadhaar with the bank account, such person would be rendered ineligible to operate the bank account, which would

amount to forfeiting her money lying in the account which belongs to her. This amounts to depriving the person from her property and is, therefore, violative of Article 300A of the Constitution as such a deprivation can take place only by primary legislation and not by subordinate legislation in the form of Rules. Much emphasis was also laid on the argument that the amended Rule does not pass the proportionality test.

428. Mr. Tushar Mehta, learned Additional Solicitor General, refuted the aforesaid submissions. He pointed out the objective with which the Prevention of Money Laundering Act was enacted, namely, to curb money laundering and black money, which is becoming a menace. Therefore, the amendment to Rules serves a legitimate State aim. He argued that the Rules are not arbitrary and satisfies the proportionality test also, having regard to the laudable objective which it seeks to serve.

429. After giving our thoughtful consideration to the various aspects, we feel that it is not even necessary to deal with each and every contention raised by the Petitioners. Our considered opinion is that it does not meet the test of proportionality and is also violative of right to privacy of a person which extends to banking details.

430. This Court has held in Ram Jethmalani and Ors. v. Union of India and Ors. MANU/SC/0711/2011 : (2011) 8 SCC 1 that revelation of bank details without prima facie ground of wrong doing would be violative of right to privacy. The said decision has been approved in *K.S. Puttaswamy*. Under the garb of prevention of money laundering or black money, there cannot be such a sweeping provision which targets every resident of the country as a suspicious person. Presumption of criminality is treated as disproportionate and arbitrary.

431. Nobody would keep black money in the bank account. We accept the possibility of opening an account in an assumed name and keeping black money therein which can be laundered as well. However, the persons doing such an Act, if at all, would be very few. More importantly, those having bank accounts with modest balance and routine transactions can be safely ruled out. Therefore, the provision in the present form does not meet the test of proportionality. Therefore, for checking this possible malice, there cannot be a mandatory provision for linking of every bank account.

432. In *Lal Babu Hussein* v. *Electoral Registration Officer and Ors.* MANU/SC/0645/1995 : (1995) 3 SCC 100, this Court had struck down the order of the Electoral Officer asking the residents of a particular en masse to prove their identity as unconstitutional. The Court held that the Electoral officer asking residents of a particular area en masse to prove their identity was unconstitutional. In the case, the EO went on the assumption that all inhabitants of a particular area were foreigners, notwithstanding their name appearing in earlier electoral rolls. The court held the following:

(a) Right to vote cannot be disallowed by insisting only on 4 proofs of identity-voters can rely on any other proof of identity and obtain right to vote.

(b) Notices were quashed because they failed to distinguish between existing voters who had voted several times and new voters.

(c) Large-scale presumption of illegality impermissible.

433. This linking is made compulsory not only for opening a new bank account but even for existing bank accounts with a stipulation that if the same is not done then the account would be deactivated, with the result that the holder of the account would not be entitled to operate the bank account till the time seeding of the bank account with Aadhaar is done. This amounts to depriving a person of his property. We find that this move of mandatory linking of Aadhaar with bank account does not satisfy the test of proportionality. To recapitulate, the test of proportionality requires that a limitation of the fundamental rights must satisfy the following to be proportionate: (i) it is designated for a proper purpose; (ii) measures are undertaken to effectuate the limitation are rationally connected to the fulfilment of the purpose; (iii) there are no alternative less invasive measures; and (iv) there is a proper relation between the importance of achieving the aim and the importance of limiting the right.

434. The Rules are disproportionate for the following reasons:

(a) a mere ritualistic incantation of "money laundering", "black money" does not satisfy the first test;

(b) no explanations have been given as to how mandatory linking of every bank account will eradicate/reduce the problems of "money laundering" and "black money";

(c) there are alternative methods of KYC which the banks are already undertaking, the state has not discharged its burden as to why linking of Aadhaar is imperative. We may point out that RBI's own Master Direction (KYC Direction, 2016) No. DBR. AML. BC. No. 81/14.01.001/2015-16 allows using alternatives to Aadhaar to open bank accounts.

435. There may be legitimate State aim for such a move as it aims at prevention of money laundering and black money. However, there has not been a serious thinking while making such a provision applicable for every bank account. Maintaining back account in today's world has almost become a necessity. The Government itself has propagated the advantages thereof and is encouraging people to open the bank account making it possible to have one even with Zero Balance under the *Pradhan Mantri Jan Dhan Yojana*. The Government has taken various measures to give a boost to digital economy. Under these schemes, millions of persons, who are otherwise poor, are opening their bank accounts. They are also becoming habitual to the good practice of entering into transactions through their banks and even by using digital modes for operation of the bank accounts. Making the requirement of Aadhaar compulsory for all such and other persons in the name of checking money laundering or black money is grossly disproportionate. There should have been a proper study about the methods adopted by persons who indulge in money laundering, kinds of bank accounts which such persons maintain and target those bank accounts for the purpose of Aadhaar. It has not been done.

436. We, thus, hold the amendment to Rule 9, by the Seventh Amendment Rules, 2017, in the present form, to be unconstitutional.

Linking of Mobile Number with Aadhaar

437. By a Circular dated March 23, 2017, the Department of Telecommunications has directed that all licensees shall reverify the existing mobile subscribers (pre-paid and post-paid) through Aadhaar based e-KYC process. In fine, it amounts to mandatory linking of mobile connections with Aadhaar, which requirement is not only in respect of those individuals who would be becoming mobile subscribers, but applies to existing subscribers as well.

438. It was the submission of the Petitioners that such a linking of the SIM card with Aadhaar number violates their right to privacy. It is argued that since it is a fundamental right, the restrictions/curb thereupon in the form of said linking does not satisfy the tests laid down in *K.S. Puttaswamy* inasmuch as it is neither backed by any law nor it serves any legitimate state aim nor does it meet the requirement of proportionality test.

439. At the outset, it may be mentioned that the Respondents have not been able to show any statutory provision which permits the Respondents to issue such a circular. It is administrative in nature. The Respondents have, however, tried to justify the same on the ground that there have been numerous instances where non-verification of SIM cards have posed serious security threats. Having regard to the same, this Court had given direction in *Lokniti Foundation* v. *Union of India and Anr*. MANU/SC/0548/2017 : (2017) 7 SCC 155 for the linking of SIM card with Aadhaar and it is pursuant to those directions that the Telecom Regulatory Authority of India (TRAI) recommended this step. Therefore, as per the Respondents, Circular dated March 23, 2017 is the outcome of the aforesaid directions and recommendations which should be treated as backing of law. According to them, direction of this Court is a law Under Article 141 of the Constitution. In addition, it is also argued that since Section 4 of the Indian Telegraph Act, 1885 empowers the Central Government to issue licenses for establishing, maintaining and working telegraphs, it is within the power of the Central Government to grant such licenses with condition and, therefore, Circular dated March 23, 2017 may be read as condition for grant of licenses. On this premise, attempt is to show that the Circular is issued in exercise of the powers contained in Section 4 of the Indian Telegraph Act, 1885 which is the force of law.

440. In order to appreciate the Respondents' contentions, we reproduce the relevant portion of Circular dated March 23, 2017, which reads as under:

Hon'ble Supreme Court, in its order dated 06.02.2017 passed in Writ Petition (C) No. 607/2016 filed by Lokniti Foundation v. Union of India, while taking into cognizance of "Aadhaar based e-KYC process for issuing new telephone connection" issued by the Department, has inter-alia observed that "an effective process has been evolved to ensure identity verification, as well as, the addresses of all mobile phone subscribers for new subscribers. In the near future, and more particularly, within one year from today, a similar verification will be completed, in case of existing subscribers." This amounts to a direction which is to be completed within a time frame of one year.

2. A meeting was held on 13.02.2017 in the Department with the telecom industry wherein UIDAI, TRAI and PMO representatives also participated to discuss the way forward to implement the directions of Hon'ble Supreme Court. Detailed discussions and deliberations were held in the meeting. The suggestions received from the industry have been examined in the Department.

3. Accordingly, after taking into consideration the discussions held in the meeting and suggestions received from telecom industry, the undersigned is directed to convey the approval of competent authority that all Licensees shall re-verify all existing mobile subscribers (prepaid and postpaid) through Aadhaar based e-KYC process as mentioned in this office letter No. 800-29/2010-VAS dated 16.08.2016. The instructions mentioned in subsequent paragraphs shall be strictly followed while carrying out the re-verification exercise.

441. In the first instance, it may be noticed that reference is made to the judgment of this Court in *Lokniti Foundation* which has prompted the Ministry of Communications to issue this circular. Paragraph 1 of the Circular itself states that the observations of the Court in *Lokniti Foundation* amount to a direction. Thus, the Circular is not issued in exercise of powers Under Section 4 of the Indian Telegraph Act, 1885 (though that itself would be debatable as to whether Section 4 gives such a power at all). Insofar as observations of this Court in that case are concerned, it is clear that in the said brief order, this Court did not go into the issue as to whether linking of SIM card with Aadhaar would be violate of privacy rights of the citizens. In that petition filed as a Public Interest Litigation, a prayer was made to the effect that identity of each subscriber and also the numbers should be verified so that unidentified and unverified subscribers are not allowed to misuse mobile numbers. In response, the Union of India had filed the counter affidavit bringing to the notice of the Court that the Department had launched Aadhaar based e-KYC for issuing mobile connections. Based on this statement, orders were passed by this Court. *Lis*, which is the subject matter of instant petitions, was not raised in the said case. Obviously, the Court did not deliberate on the aspects of necessity of such a provision in the light of right to privacy. It was a case where both the sides were at *ad idem*. In the absence of any such issue or discussion thereupon, such a case cannot be treated as precedent and as a corollary it cannot be termed as 'law' within the meaning of Article 13 or Article 141 of the Constitution. Moreover, we are unable to read the order in *Lokniti Foundation* as a direction of the Court. It simply disposed of the petition after recording the submission of the Union of India to the effect that the grievance of the Petitioner therein stood redressed by evolving the procedure of linking. On that the Court simply observed that undertaking given to this Court will be seriously taken and given effect to. No doubt, the Central Government, as a licensor, can impose conditions while granting licenses Under Section 4 of the Indian Telegraph Act, 1885. However, such directions/conditions have to be legally valid. When it affects the rights of the third parties (like the Petitioners herein who are not party to the licenses granted by the Government to the Telecom Service Providers) they have a right to challenge such directions. Here, the case made out by the Petitioners is that it infringes their right to privacy.

442. We are of the opinion that not only such a circular lacks backing of a law, it fails to meet the requirement of proportionality as well. It does not meet 'necessity stage' and 'balancing stage' tests to check the primary menace which is in the mind of the Respondent authorities. There can be other appropriate laws and less intrusive alternatives. For the misuse of such SIM cards by a handful of persons, the entire population cannot be subjected to intrusion into their private lives. It also impinges upon the voluntary nature of the Aadhaar scheme. We find it to be disproportionate and unreasonable state compulsion. It is to be borne in mind that every individual/resident subscribing to a SIM card does not enjoy the subsidy benefit or services mentioned in Section 7 of the Act.

We, therefore, have no hesitation in declaring the Circular dated March 23, 2017 as unconstitutional.

Violation of the orders passed by this Court:

Whether certain actions of the Respondents are in contravention of the interim orders passed by the Court, if so, the effect thereof?

443. It was vehemently argued that this Court had passed number of interim orders (which have already been taken note of in the beginning of this judgment) categorically stating that the Aadhaar enrolment is voluntary; that no person would be forced to enrol under the scheme; that a person would be told about the voluntary nature of the scheme; and that enrolment shall not be given to any illegal migrant. As per the Petitioners, notwithstanding these orders, the Central Government as well as the State Governments have issued various notifications requiring Aadhaar authentication for benefits, subsidies and schemes mandatory. In this manner, according to the Petitioners, the Respondents have violated the orders of this Court and it is the majesty of the Court which is at stake.

444. It is not in dispute that the aforesaid orders were passed when the Aadhaar Act had not come into force. After the enactment, Section 7 had altered the position statutorily. The notifications and circulars etc. are issued under this provision. Therefore, technically speaking, it cannot be held that these circulars are issued in contravention of the orders passed by this Court.

445. We feel that it would have been better had a clarification been obtained from the Court after the passing of the Aadhaar Act before issuing such circulars and orders Under Section 7. When the matter is *sub judice* in the Court and certain orders operating, the Respondents should have shown some fairness by taking that route, which expectation would be high where the Respondent is the State. However, it would be difficult to hold the Respondents in contempt of the orders passed by this Court. We may note that similar argument was advanced in *Binoy Viswam*, namely, insertion of Section 139AA in the Income Tax Act was in breach of interim orders passed by this Court. This argument was repelled in the following manner:

99. Main emphasis, however, is on the plea that Parliament or any State Legislature cannot pass a law that overrules a judgment thereby nullifying the said decision, that too without removing the basis of the decision. This argument appears to be attractive inasmuch as few orders are passed by this Court in pending writ petitions which are to the effect that the enrolment of Aadhaar would be voluntary. However, it needs to be kept in mind that the orders have been passed in the petitions where Aadhaar Scheme floated as an executive/administrative measure has been challenged. In those cases, the said orders are not passed in a case where the Court was dealing with a statute passed by Parliament. Further, these are interim orders as the Court was of the opinion that till the matter is decided finally in the context of right to privacy issue, the implementation of the said Aadhaar Scheme would remain voluntary. In fact, the main issue as to whether Aadhaar card scheme whereby biometric data of an individual is collected violates right to privacy and, therefore, is offensive of Article 21 of the Constitution or not is yet to be decided. In the process, the Constitution Bench is also called upon to decide as to whether right to privacy is a part of Article 21 of the Constitution at all. Therefore, no final decision has been taken. In a situation like this, it

cannot be said that Parliament is precluded from or it is rendered incompetent to pass such a law. That apart, the argument of the Petitioners is that the basis on which the aforesaid orders are passed has to be removed, which is not done. According to the Petitioners, it could be done only by making the Aadhaar Act compulsory. It is difficult to accept this contention for two reasons: first, when the orders passed by this Court which are relied upon by the Petitioners were passed when the Aadhaar Act was not even enacted. Secondly, as already discussed in detail above, the Aadhaar Act and the law contained in Section 139-AA of the Income Tax Act deal with two different situations and operate in different fields. This argument of legislative incompetence also, therefore, fails.

Summary and Conclusions:

446. (a) The architecture and structure of the Aadhaar Act reveals that the UIDAI is established as a statutory body which is given the task of developing the policy, procedure and system for issuing Aadhaar numbers to individuals and also to perform authentication thereof as per the provisions of the Act. For the purpose of enrolment and assigning Aadhaar numbers, enrolling agencies are recruited by the Authority. All the residents in India are eligible to obtain an Aadhaar number. To enable a resident to get Aadhaar number, he is required to submit demographic as well as biometric information i.e., apart from giving information relating to name, date of birth and address, biometric information in the form of photograph, fingerprint, iris scan is also to be provided. Aadhaar number given to a particular person is treated as unique number as it cannot be reassigned to any other individual.

(b) Insofar as subsidies, benefits or services to be given by the Central Government or the State Government, as the case may be, is concerned, these Governments can mandate that receipt of these subsidies, benefits and services would be given only on furnishing proof of possession of Aadhaar number (or proof of making an application for enrolment, where Aadhaar number is not assigned). An added requirement is that such individual would undergo authentication at the time of receiving such benefits etc. A particular institution/body from which the aforesaid subsidy, benefit or service is to be claimed by such an individual, the intended recipient would submit his Aadhaar number and is also required to give her biometric information to that agency. On receiving this information and for the purpose of its authentication, the said agency, known as Requesting Entity (RE), would send the request to the Authority which shall perform the job of authentication of Aadhaar number. On confirming the identity of a person, the individual is entitled to receive subsidy, benefit or service. Aadhaar number is permitted to be used by the holder for other purposes as well.

(c) In this whole process, any resident seeking to obtain an Aadhaar number is, in the first instance, required to submit her demographic information and biometric information at the time of enrolment. She, thus, parts with her photograph, fingerprint and iris scan at that stage by giving the same to the enrolling agency, which may be a private body/person. Likewise, every time when such Aadhaar holder intends to receive a subsidy, benefit or service and goes to specified/designated agency or person for that purpose, she would be giving her biometric information to that RE, which, in turn, shall get the same authenticated from the Authority before providing a subsidy, benefit or service.

(d) Attack of the Petitioners to the Aadhaar programme and its formation/structure under the Aadhaar Act is founded on the arguments that it is a grave risk to the rights and liberties of the citizens of this country which are secured by the Constitution of India. It militates against the constitutional abiding values and its foundational morality and has the potential to enable an intrusive state to become a surveillance state on the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a nine Judge Bench judgment of this Court in *K.S. Puttaswamy*.

(e) The Respondents, on the other hand, have attempted to shake the very foundation of the aforesaid structure of the Petitioners' case. They argue that in the first instance, minimal biometric information of the applicant, who intends to have Aadhaar number, is obtained which is also stored in CIDR for the purpose of authentication. Secondly, no other information is stored. It is emphasised that there is no data collection in respect of religion, caste, tribe, language records of entitlement, income or medical history of the applicant at the time of Aadhaar enrolment. Thirdly, the Authority also claimed that the entire Aadhaar enrolment eco-system is foolproof inasmuch as within few seconds of the biometrics having been collected by the enrolling agency, the said information gets transmitted the Authorities/CIDR, that too in an encrypted form, and goes out of the reach of the enrolling agency. Same is the situation at the time of authentication as biometric information does not remain with the requesting agency. Fourthly, while undertaking the authentication process, the Authority simply matches the biometrics and no other information is received or stored in respect of purpose, location or nature or transaction etc. Therefore, the question of profiling does not arise at all.

(f) In the aforesaid scenario, it is necessary, in the first instance, to find out the extent of core information, biometric as well as demographic, that is collected and stored by the Authority at the time of enrolment as well as at the time of authentication. This exercise becomes necessary in order to consider the argument of the Petitioners about the profiling of the Aadhaar holders. On going through this aspect, on the basis of the powerpoint presentation given by Dr. Ajay Bhushan Pandey, CEO of UIDAI, and the arguments of both the sides, including the questions which were put by the Petitioners to Dr. Pandey and the answers thereupon, the Court has come to the conclusion that minimal possible data, demographic and biometric, is obtained from the Aadhaar holders.

(g) The Court also noticed that the whole architecture of Aadhaar is devised to give unique identity to the citizens of this country. No doubt, a person can have various documents on the basis of which that individual can establish her identify. It may be in the form of a passport, PAN card, ration card and so on. For the purpose of enrolment itself number of documents are prescribed which an individual can produce on the basis of which Aadhaar card can be issued. Thus, such documents, in a way, are also proof of identity. However, there is a fundamental difference between the Aadhaar card as a mean of identity and other documents through which identity can be established. Enrolment for Aadhaar card also requires giving of demographic information as well as biometric information which is in the form of iris and fingerprints. This process eliminates any chance of duplication. It is emphasised that an individual can manipulate the system by having more than one or even number of PAN cards, passports, ration cards etc. When it comes to

obtaining Aadhaar card, there is no possibility of obtaining duplicate card. Once the biometric information is stored and on that basis Aadhaar card is issued, it remains in the system with the Authority. Wherever there would be a second attempt for enrolling for Aadhaar and for this purpose same person gives his biometric information, it would be immediately get matched with the same biometric information already in the system and the second request would stand rejected. It is for this reason the Aadhaar card is known as Unique Identification (UID). Such an identity is unparalleled.

(h) There is, then, another purpose for having such a system of issuing unique identification cards in the form of Aadhaar card. A glimpse thereof is captured under the heading 'Introduction' above, while mentioning how and under what circumstances the whole project was conceptualised. To put it tersely, in addition to enabling any resident to obtain such unique identification proof, it is also to empower marginalised Section of the society, particularly those who are illiterate and living in abject poverty or without any shelter etc. It gives identity to such persons also. Moreover, with the aid of Aadhaar card, they can claim various privileges and benefits etc. which are actually meant for these people.

(i) Identity of a person has a significance for every individual in his/her life. In a civilised society every individual, on taking birth, is given a name. Her place of birth and parentage also becomes important as she is known in the society and these demographic particulars also become important attribute of her personality. Throughout their lives, individuals are supposed to provide such information: be it admission in a school or college or at the time of taking job or engaging in any profession or business activity, etc. When all this information is available in one place, in the form of Aadhaar card, it not only becomes unique, it would also qualify as a document of empowerment. Added with this feature, when an individual knows that no other person can clone her, it assumes greater significance.

(j) Thus, the scheme by itself can be treated as laudable when it comes to enabling an individual to seek Aadhaar number, more so, when it is voluntary in nature. Howsoever benevolent the scheme may be, it has to pass the muster of constitutionality. According to the Petitioners, the very architecture of Aadhaar is unconstitutional on various grounds.

(k) The Court has taken note of the heads of challenge of the Act, Scheme and certain Rules etc. and clarified that the matter is examined with objective examination of the issues on the touchstone of the constitutional provisions, keeping in mind the ethos of constitutional democracy, Rule of law, human rights and other basic features of the Constitution.

Discussing the scope of judicial review, the Court has accepted that apart from two grounds noticed in *Binoy Viswam*, on which legislative Act can be invalidated [(a) the Legislature does not have competence to make the law; and b) law made is in violation of fundamental rights or any other constitutional provision], another ground, namely, manifest arbitrariness, can also be the basis on which an Act can be invalidated. The issues are examined having regard to the aforesaid scope of judicial review.

(l) From the arguments raised by the Petitioners and the grounds of challenge, it becomes clear that the main plank of challenge is that the Aadhaar project and the Aadhaar Act infringes right to

privacy. Inbuilt in this right to privacy is the right to live with dignity, which is a postulate of right to privacy. In the process, discussion leads to the issue of proportionality, viz. whether measures taken under the Aadhaar Act satisfy the doctrine of proportionality.

(m) In view of the above, the Court discussed the contours of right to privacy, as laid down in *K.S. Puttaswamy*, principle of human dignity and doctrine of proportionality. After taking note of the discussion contained in different opinions of six Hon'ble Judges, it stands established, without any pale of doubt, that privacy has now been treated as part of fundamental right. The Court has held that, in no uncertain terms, that privacy has always been a natural right which given an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namely:

(i) intrusion with an individual's physical body,

(ii) informational privacy and

(iii) privacy of choice.

(n) As succinctly put by Nariman, J., first aspect involves the person himself/herself and guards a person's rights relatable to his physical body thereby controlling the uncalled invasion by the State. Insofar as second aspect, namely, informational privacy is concerned, it does not deal with a person's body but deals with a person's mind. In this manner, it protects a person by giving her control over the dissemination of material that is personal to her and disallowing unauthorised use of such information by the State. Third aspect of privacy relates to individual's autonomy by protecting her fundamental personal choices. These aspects have functional connection and relationship with dignity. In this sense, privacy is a postulate of human dignity itself. Human dignity has a constitutional value and its significance is acknowledged by the Preamble. Further, by catena of judgments, human dignity is treated as fundamental right as a facet not only of Article 21, but that of right to equality (Article 14) and also part of bouquet of freedoms stipulated in Article 19. Therefore, privacy as a right is intrinsic of freedom, liberty and dignity. Viewed in this manner, one can trace positive and negative contents of privacy. The negative content restricts the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

(o) In developing the aforesaid concepts, the Court has been receptive to the principles in international law and international instruments. It is a recognition of the fact that certain human rights cannot be confined within the bounds of geographical location of a nation but have universal application. In the process, the Court accepts the concept of universalisation of human rights, including the right to privacy as a human right and the good practices in developing and understanding such rights in other countries have been welcomed. In this hue, it can also be remarked that comparative law has played a very significant role in shaping the aforesaid judgment on privacy in Indian context, notwithstanding the fact that such comparative law has only persuasive value.

The whole process of reasoning contained in different opinions of the Hon'ble Judges would, thus, reflect that the argument that it is difficult to precisely define the common denominator of privacy, was rejected. While doing so, the Court referred to various approaches to formulating privacy.

(p) We have also remarked above, the taxonomy of privacy, namely, on the basis of 'harms', 'interest' and 'aggregation of rights'. We have also discussed the scope of right to privacy with reference to the cases at hand and the circumstances in which such a right can be limited. In the process, we have also taken note of the passage from the judgment rendered by Nariman, J. in *K.S. Puttaswamy* stating the manner in which law has to be tested when it is challenged on the ground that it violates the fundamental right to privacy.

(q) One important comment which needs to be made at this stage relates to the standard of judicial review while examining the validity of a particular law that allegedly infringes right to privacy. The question is as to whether the Court is to apply 'strict scrutiny' standard or the 'just, fair and reasonableness' standard. In the privacy judgment, different observations are made by the different Hon'ble Judges and the aforesaid aspect is not determined authoritatively, may be for the reason that the Bench was deciding the reference on the issue as to whether right to privacy is a fundamental right or not and, in the process, it was called upon to decide the specific questions referred to it. This Court preferred to adopt a 'just, fair and reasonableness' standard which is in tune with the view expressed by majority of Judges in their opinion. Even otherwise, this is in consonance with the judicial approach adopted by this Court while construing 'reasonable restrictions' that the State can impose in public interest, as provided in Article 19 of the Constitution. Insofar as principles of human dignity are concerned, the Court, after taking note of various judgments where this principle is adopted and elaborated, summed up the essential ingredients of dignity jurisprudence by noticing that the basic principle of dignity and freedom of the individual is an attribute of natural law which becomes the right of all individuals in a constitutional democracy. Dignity has a central normative role as well as constitutional value. This normative role is performed in three ways:

First, it becomes basis for *constitutional rights*;

Second, it serves as an *interpretative principle* for determining the scope of constitutional rights; and,

Third, it determines the *proportionality of a statute* limiting a constitutional right. Thus, if an enactment puts limitation on a constitutional right and such limitation is disproportionate, such a statute can be held to be unconstitutional by applying the doctrine of proportionality.

(r) As per Dworkin, there are two principles about the concept of human dignity, First principle regards an 'intrinsic value' of every person, namely, every person has a special objective value which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. It can also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle is that of 'personal responsibility', which means every person has the responsibility for success in her own life and, therefore, she must use her discretion regarding the way of life that will be successful from her point of view.

(s) Sum total of this exposition can be defined by explaining that as per the aforesaid view dignity is to be treated as 'empowerment' which makes a triple demand in the name of 'respect' for human dignity, namely:

(i) respect for one's capacity as an agent to make one's own free choices;

(ii) respect for the choices so made; and

(iii) respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

(t) In the entire formulation of dignity right, 'respect' for an individual is the fulcrum, which is based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. The aforesaid discourse on the concept of human dignity is from an individual point of view. That is the emphasis of the Petitioners as well. That would be one side of the coin. A very important feature which the present case has brought into focus is another dimension of human dignity, namely, in the form of 'common good' or 'public good'. Thus, our endeavour here is to give richer and more nuanced understanding to the concept of human dignity.

(u) We, therefore, have to keep in mind humanistic concept of Human Dignity which is to be accorded to a particular segment of the society and, in fact, a large segment. Their human dignity is based on the socio-economic rights that are read in to the Fundamental Rights as already discussed above.

When we read socio-economic rights into human dignity, the community approach also assumes importance along with individualistic approach to human dignity. It has now been well recognised that at its core, human dignity contains three elements, namely, Intrinsic Value, Autonomy and Community Value. These are known as core values of human dignity. These three elements can assist in structuring legal reasoning and justifying judicial choices in 'hard cases'.

(v) When it comes to dignity as a community value, it emphasises the role of the community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of good life. The relevant question here is in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society is not incompatible, of course, with limitation resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an "overlapping consensus"[27] that can be shared by most individuals and groups. Whenever such tension arises, the task of balancing is to be achieved by the Courts.

We would like to highlight one more significant feature which the issues involved in the present case bring about. It is the balancing of two facets of dignity of the same individual. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article

21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the Courts. For, there cannot be undue intrusion into the autonomy on the pretext of conferment of economic benefits.

(w) In this way, the concept of human dignity has been widened to deal with the issues at hand. As far as doctrine of proportionality is concerned, after discussing the approaches that are adopted by the German Supreme Court and the Canadian Supreme Court, which are somewhat different from each other, this Court has applied the tests as laid down in *Modern Dental College & Research Centre*, which are approved in *K.S. Puttaswamy* as well. However, at the same time, a modification is done by focusing on the parameters set down of Bilchitz which are aimed at achieving a more ideal approach.

447. After stating the aforesaid manner in which different issues that arose are specified and discussed, these questions and conclusions thereupon are summarised below:

(1) *Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?*

Incidental Issues:

(a) What is the magnitude of protection that need to be accorded to collection, storage and usage of biometric data?

(b) Whether the Aadhaar Act and Rules provide such protection, including in respect of data minimisation, purpose limitation, time period for data retention and data protection and security?

Answer:

(a) The architecture of Aadhaar as well as the provisions of the Aadhaar Act do not tend to create a surveillance state. This is ensured by the manner in which the Aadhaar project operates.

(b) We have recorded in detail the powerpoint presentation that was given by Dr. Ajay Bhushan Pandey, CEO of the Authority, which brings out the following salient features:

(i) During the enrolment process, minimal biometric data in the form of iris and fingerprints is collected. The Authority does not collect purpose, location or details of transaction. Thus, it is purpose blind. The information collected, as aforesaid, remains in silos. Merging of silos is prohibited. The requesting agency is provided answer only in *'Yes'* or *'No'* about the authentication of the person concerned. The authentication process is not exposed to the Internet world. Security measures, as per the provisions of Section 29(3) read with Section 38(g) as well as Regulation 17(1)(d) of the Authentication Regulations, are strictly followed and adhered to.

(ii) There are sufficient authentication security measures taken as well, as demonstrated in Slides 14, 28 and 29 of the presentation.

(iii) The Authority has sufficient defence mechanism, as explained in Slide 30. It has even taken appropriate protection measures as demonstrated in Slide 31.

(iv) There is an oversight by Technology and Architecture Review Board (TARB) and Security Review Committee.

(v) During authentication no information about the nature of transaction etc. is obtained.

(vi) The Authority has mandated use of Registered Devices (RD) for all authentication requests. With these, biometric data is signed within the device/RD service using the provider key to ensure it is indeed captured live. The device provider RD service encrypts the PID block before returning to the host application. This RD service encapsulates the biometric capture, signing and encryption of biometrics all within it. Therefore, introduction of RD in Aadhaar authentication system Rules out any possibility of use of stored biometric and replay of biometrics captured from other source. Requesting entities are not legally allowed to store biometrics captured for Aadhaar authentication Under Regulation 17(1)(a) of the Authentication Regulations.

(vii) The Authority gets the AUA code, ASA code, unique device code, registered device code used for authentication. It does not get any information related to the IP address or the GPS location from where authentication is performed as these parameters are not part of authentication (v2.0) and e-KYC (v2.1) API. The Authority would only know from which device the authentication has happened, through which AUA/ASA etc. It does not receive any information about at what location the authentication device is deployed, its IP address and its operator and the purpose of authentication. Further, the authority or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication Under Section 32(3) of the Aadhaar Act.

(c) After going through the Aadhaar structure, as demonstrated by the Respondents in the powerpoint presentation from the provisions of the Aadhaar Act and the machinery which the Authority has created for data protection, we are of the view that it is very difficult to create profile of a person simply on the basis of biometric and demographic information stored in CIDR. Insofar as authentication is concerned, the Respondents rightly pointed out that there are sufficient safeguard mechanisms. To recapitulate, it was specifically submitted that there was security technologies in place (slide 28 of Dr. Pandey's presentation), 24/7 security monitoring, data leak prevention, vulnerability management programme and independent audits (slide 29) as well as the Authority's defence mechanism (slide 30). It was further pointed out that the Authority has taken appropriate pro-active protection measures, which included disaster recovery plan, data backup and availability and media response plan (slide 31). The Respondents also pointed out that all security principles are followed inasmuch as: (a) there is PKI-2048 encryption from the time of capture, meaning thereby, as soon as data is given at the time of enrolment, there is an end to end encryption thereof and it is transmitted to the Authority in encrypted form. The said encryption is almost foolproof and it is virtually impossible to decipher the same; (b) adoption of best-in-class security standards and practices; and (c) strong audit and traceability as well as fraud detection. Above all, there is an oversight of Technology and Architecture Review Board (TARB) and Security Review Committee. This Board and Committee consists of very high profiled officers. Therefore, the Act has endeavoured to provide safeguards.

(d) Insofar as use and protection of data is concerned, having regard to the principles enshrined in various cases, Indian and foreign, the matter is examined from the stand point of data minimisation, purpose limitation, time period for data retention, data protection and security (*qua* CIDR, requisite entities, enrolment agencies and Registrars, authentication service agency, hacking, biometric solution providers, substantive procedural or judicial safeguards). After discussing the aforesaid aspect with reference to certain provisions of the Aadhaar Act, we are of the view that apprehensions of the Petitioners stand assuaged with the striking down or reading down or clarification of some of the provisions, namely:

(i) Authentication records are not to be kept beyond a period of six months, as stipulated in Regulation 27(1) of the Authentication Regulations. This provision which permits records to be archived for a period of five years is held to be bad in law.

(ii) Metabase relating to transaction, as provided in Regulation 26 of the aforesaid Regulations in the present form, is held to be impermissible, which needs suitable amendment.

(iii) Section 33(1) of the Aadhaar Act is read down by clarifying that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing.

(iv) Insofar as Section 33(2) of the Act in the present form is concerned, the same is struck down.

(v) That portion of Section 57 of the Aadhaar Act which enables body corporate and individual to seek authentication is held to be unconstitutional.

(vi) We have also impressed upon the Respondents, to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications thereto as may be deemed appropriate.

(2) *Whether the Aadhaar Act violates right to privacy and is unconstitutional on this ground?*

Answer:

(a) After detailed discussion, it is held that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. This can be discerned from the reading of Paras 297 to 307 of the judgment.

(b) The Court is also of the opinion that the triple test laid down in order to adjudge the reasonableness of the invasion to privacy has been made. The Aadhaar scheme is backed by the statute, i.e. the Aadhaar Act. It also serves legitimate State aim, which can be discerned from the Introduction to the Act as well as the Statement of Objects and Reasons which reflect that the aim in passing the Act was to ensure that social benefit schemes reach the deserving community. The Court noted that the failure to establish identity of an individual has proved to be a major hindrance for successful implementation of those programmes as it was becoming difficult to ensure that subsidies, benefits and services reach the unintended beneficiaries in the absence of a credible system to authenticate identity of beneficiaries. The Statement of Objects and Reasons also

discloses that over a period of time, the use of Aadhaar number has been increased manifold and, therefore, it is also necessary to take measures relating to ensuring security of the information provided by the individuals while enrolling for Aadhaar card.

(c) It may be highlighted that the Petitioners are making their claim on the basis of dignity as a facet of right to privacy. On the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised Section of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated in Para IV of the Constitution. The rationale behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental Rights of life and personal liberty (Article 21) to ensure Justice, Social, Political and Economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid day meals, LPG subsidies, etc. These schemes involve 3% percentage of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the Petitioners seek to bank upon. The Constitution does not exist for a few or minority of the people of India, but "We the people". The goals set out in the Preamble of the Constitution do not contemplate statism and do not seek to preserve justice, liberty, equality an fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived Section of the society to receive such benefits on the premise that it is their fundamental right to claim such benefits. It is acknowledged by the Respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Article 47), though the said principles remain a source of inspiration. This entitlement has turned into a Constitutional fundamental right. This Constitutional obligation is reinforced by obligations under International Convention.

(d) Even the Petitioners did not seriously question the purpose and *bona fides* of the Legislature enacting the law.

(e) The Court also finds that the Aadhaar Act meets the test of proportionality as the following components of proportionality stand satisfied:

(i) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(ii) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(iii) There must not be any less restrictive but equally effective alternative (necessity stage).

(iv) The measure must not have a disproportionate impact on the right holder (balancing stage).

(f) In the process, the Court has taken note of various judgments pronounced by this Court pertaining to right to food, issuance of BPL Cards, LPG connections and LPG cylinders at minimal cost, old age and other kind of pensions to deserving persons, scholarships and implementation of MGNREGA scheme.

(g) The purpose behind these orders was to ensure that the deserving beneficiaries of the scheme are correctly identified and are able to receive the benefits under the said scheme, which is their entitlement. The orders also aimed at ensuring 'good governance' by bringing accountability and transparency in the distribution system with the pious aim in mind, namely, benefits actually reached those who are rural, poor and starving.

(h) All this satisfies the necessity stage test, particularly in the absence of any less restrictive but equally effective alternative.

(i) Insofar as balancing is concerned, the matter is examined at two levels:

(i) Whether, 'legitimate state interest' ensures 'reasonable tailoring'? There is a minimal intrusion into the privacy and the law is narrowly framed to achieve the objective. Here the Act is to be tested on the ground that whether it is found on a balancing test that the social or public interest and the reasonableness of the restrictions outweigh the particular aspect of privacy, as claimed by the Petitioners. This is the test we have applied in the instant case.

(ii) There needs to be balancing of two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand. Axiomatically both the rights are founded on human dignity. At the same time, in the given context, two facets are in conflict with each other. The question here would be, when a person seeks to get the benefits of welfare schemes to which she is entitled to as a part of right to live life with dignity, whether her sacrifice to the right to privacy, is so invasive that it creates imbalance?

(j) In the process, sanctity of privacy in its functional relationship with dignity is kept in mind where it says that legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to public arena. Reasonable expectation of privacy is also taken into consideration. The Court finds that as the information collected at the time of enrolment as well as authentication is minimal, balancing at the first level is met. Insofar as second level, namely, balancing of two competing fundamental rights is concerned, namely, dignity in the form of autonomy (informational privacy) and dignity in the form of assuring better living standards of the same individual, the Court has arrived at the conclusion that balancing at the second level is also met. The detailed discussion in this behalf amply demonstrates that enrolment in Aadhaar of the unprivileged and marginalised Section of the society, in order to avail the fruits of welfare schemes of the Government, actually amounts to empowering these persons. On the one hand, it gives such individuals their unique identity and, on the other hand, it also enables such individuals to avail the fruits of welfare schemes of the Government which are floated as socio-economic welfare measures to uplift such classes. In that sense, the scheme ensures dignity to such individuals. This facet of dignity cannot be lost sight of and needs to be acknowledged. We are, by no means, accepting that when dignity in the form of economic welfare is given, the State is entitled to rob that person of his liberty. That can never be allowed. We are concerned with the balancing of the

two facets of dignity. Here we find that the inroads into the privacy rights where these individuals are made to part with their biometric information, is minimal. It is coupled with the fact that there is no data collection on the movements of such individuals, when they avail benefits Under Section 7 of the Act thereby ruling out the possibility of creating their profiles. In fact, this technology becomes a vital tool of ensuring good governance in a social welfare state. We, therefore, are of the opinion that the Aadhaar Act meets the test of balancing as well.

(k) Insofar as the argument based on probabilistic system of Aadhaar, leading to 'exclusion' is concerned, the Authority has claimed that biometric accuracy is 99.76% and the Petitioners have also proceeded on that basis. In this scenario, if the Aadhaar project is shelved, 99.76% beneficiaries are going to suffer. Would it not lead to their exclusion? It will amount to throwing the baby out of hot water along with the water. In the name of 0.232% failure (which can in any case be remedied) should be revert to the pre-Aadhaar stage with a system of leakages, pilferages and corruption in the implementation of welfare schemes meant for marginalised Section of the society, the full fruits thereof were not reaching to such people?

(l) The entire aim behind launching this programme is the 'inclusion' of the deserving persons who need to get such benefits. When it is serving much larger purpose by reaching hundreds of millions of deserving persons, it cannot be crucified on the unproven plea of exclusion of some. It is clarified that the Court is not trivialising the problem of exclusion if it is there. However, what we are emphasising is that remedy is to plug the loopholes rather than axe a project, aimed for the welfare of large Section of the society. Obviously, in order to address the failures of authentication, the remedy is to adopt alternate methods for identifying such persons, after finding the causes of failure in their cases. We have chosen this path which leads to better equilibrium and have given necessary directions also in this behalf, viz.:

(i) We have taken on record the statement of the learned Attorney General that no deserving person would be denied the benefit of a scheme on the failure of authentication.

(ii) We are also conscious of the situation where the formation of fingerprints may undergo change for various reasons. It may happen in the case of a child after she grows up; it may happen in the case of an individual who gets old; it may also happen because of damage to the fingers as a result of accident or some disease etc. or because of suffering of some kind of disability for whatever reason. Even iris test can fail due to certain reasons including blindness of a person. We again emphasise that no person rightfully entitled to the benefits shall be denied the same on such grounds. It would be appropriate if a suitable provision be made in the concerned Regulations for establishing an identity by alternate means, in such situations.

(m) As far as subsidies, services and benefits are concerned, their scope is not to be unduly expanded thereby widening the net of Aadhaar, where it is not permitted otherwise. In this respect, it is held as under:

(i) 'Benefits' and 'services' as mentioned in Section 7 should be those which have the colour of some kind of subsidies etc., namely, welfare schemes of the Government whereby Government is doling out such benefits which are targeted at a particular deprived class.

(ii) It would cover only those 'benefits' etc. the expenditure thereof has to be drawn from the Consolidated Fund of India.

(iii) On that basis, CBSE, NEET, JEE, UGC etc. cannot make the requirement of Aadhaar mandatory as they are outside the purview of Section 7 and are not backed by any law.

(3) *Whether children can be brought within the sweep of Sections 7 and 8 of the Aadhaar Act?*

Answer:

(a) For the enrolment of children under the Aadhaar Act, it would be essential to have the consent of their parents/guardian.

(b) On attaining the age of majority, such children who are enrolled under Aadhaar with the consent of their parents, shall be given the option to exit from the Aadhaar project if they so choose in case they do not intend to avail the benefits of the scheme.

(c) Insofar as the school admission of children is concerned, requirement of Aadhaar would not be compulsory as it is neither a service nor subsidy. Further, having regard to the fact that a child between the age of 6 to 14 years has the fundamental right to education Under Article 21A of the Constitution, school admission cannot be treated as 'benefit' as well.

(d) Benefits to children between 6 to 14 years under Sarv Shiksha Abhiyan, likewise, shall not require mandatory Aadhaar enrolment.

(e) For availing the benefits of other welfare schemes which are covered by Section 7 of the Aadhaar Act, though enrolment number can be insisted, it would be subject to the consent of the parents, as mentioned in (a) above.

(f) We also clarify that no child shall be denied benefit of any of these schemes if, for some reasons, she is not able to produce the Aadhaar number and the benefit shall be given by verifying the identity on the basis of any other documents. This we say having regard to the statement which was made by Mr. K.K. Venugopal, learned Attorney General for India, at the Bar.

(4) *Whether the following provisions of the Aadhaar Act and Regulations suffer from the vice of unconstitutionality:*

(i) Sections 2(c) and 2(d) read with Section 32

(ii) Section 2(h) read with Section 10 of CIDR

(iii) Section 2(l) read with Regulation 23

(iv) Section 2(v)

(v) Section 3

(vi) Section 5

(vii) Section 6

(viii) Section 8

(ix) Section 9

(x) Sections 11 to 23

(xi) Sections 23 and 54

(xii) Section 23(2)(g) read with Chapter VI & VII-Regulations 27 to 32

(xiii) Section 29

(xiv) Section 33

(xv) Section 47

(xvi) Section 48

(xvii) Section 57

(xviii) Section 59

Answer:

(a) Section 2(d) which pertains to authentication records, such records would not include metadata as mentioned in Regulation 26(c) of the Aadhaar (Authentication) Regulations, 2016. Therefore, this provision in the present form is struck down. Liberty, however, is given to reframe the Regulation, keeping in view the parameters stated by the Court.

(b) Insofar as Section 2(b) is concerned, which defines 'resident', the apprehension expressed by the Petitioners was that it should not lead to giving Aadhaar card to illegal immigrants. We direct the Respondent to take suitable measures to ensure that illegal immigrants are not able to take such benefits.

(c) Retention of data beyond the period of six months is impermissible. Therefore, Regulation 27 of Aadhaar (Authentication) Regulations, 2016 which provides archiving a data for a period of five years is struck down.

(d) Section 29 in fact imposes a restriction on sharing information and is, therefore, valid as it protects the interests of Aadhaar number holders. However, apprehension of the Petitioners is that this provision entitles Government to share the information 'for the purposes of as may be specified by Regulations'. The Aadhaar (Sharing of Information) Regulations, 2016, as of now, do not

contain any such provision. If a provision is made in the Regulations which impinges upon the privacy rights of the Aadhaar card holders that can always be challenged.

(e) Section 33(1) of the Act prohibits disclosure of information, including identity information or authentication records, except when it is by an order of a court not inferior to that of a District Judge. We have held that this provision is to be read down with the clarification that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing. If such an order is passed, in that eventuality, he shall also have right to challenge such an order passed by approaching the higher court. During the hearing before the concerned court, the said individual can always object to the disclosure of information on accepted grounds in law, including Article 20(3) of the Constitution or the privacy rights etc.

(f) Insofar as Section 33(2) is concerned, it is held that disclosure of information in the interest of national security cannot be faulted with. However, for determination of such an eventuality, an officer higher than the rank of a Joint Secretary should be given such a power. Further, in order to avoid any possible misuse, a Judicial Officer (preferably a sitting High Court Judge) should also be associated with. We may point out that such provisions of application of judicial mind for arriving at the conclusion that disclosure of information is in the interest of national security, are prevalent in some jurisdictions. In view thereof, Section 33(2) of the Act in the present form is struck down with liberty to enact a suitable provision on the lines suggested above.

(g) Insofar as Section 47 of the Act which provides for the cognizance of offence only on a complaint made by the Authority or any officer or person authorised by it is concerned, it needs a suitable amendment to include the provision for filing of such a complaint by an individual/victim as well whose right is violated.

(h) Insofar as Section 57 in the present form is concerned, it is susceptible to misuse inasmuch as: (a) It can be used for establishing the identity of an individual 'for any purpose'. We read down this provision to mean that such a purpose has to be backed by law. Further, whenever any such "law" is made, it would be subject to judicial scrutiny. (b) Such purpose is not limited pursuant to any law alone but can be done pursuant to 'any contract to this effect' as well. This is clearly impermissible as a contractual provision is not backed by a law and, therefore, first requirement of proportionality test is not met. (c) Apart from authorising the State, even 'any body corporate or person' is authorised to avail authentication services which can be on the basis of purported agreement between an individual and such body corporate or person. Even if we presume that legislature did not intend so, the impact of the aforesaid features would be to enable commercial exploitation of an individual biometric and demographic information by the private entities. Thus, this part of the provision which enables body corporate and individuals also to seek authentication, that too on the basis of a contract between the individual and such body corporate or person, would impinge upon the right to privacy of such individuals. This part of the section, thus, is declared unconstitutional.

(i) Other provisions of Aadhaar Act are held to be valid, including Section 59 of the Act which, according to us, saves the pre-enactment period of Aadhaar project, i.e. from 2009-2016.

(5) Whether the Aadhaar Act defies the concept of Limited Government, Good Governance and Constitutional Trust?

Answer:

Aadhaar Act meets the concept of Limited Government, Good Governance and Constitutional Trust.

(6) *Whether the Aadhaar Act could be passed as 'Money Bill' within the meaning of Article 110 of the Constitution?*

Answer:

(a) We do recognise the importance of Rajya Sabha (Upper House) in a bicameral system of the Parliament. The significance and relevance of the Upper House has been succinctly exemplified by this Court in Kuldip Nayar's case. The Rajya Sabha, therefore, becomes an important institution signifying constitutional fedaralism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides.

(b) The Petitioners accept that Section 7 of the Aadhaar Act has the elements of 'Money Bill'. The attack is on the premise that some other provisions, namely, clauses 23(2)(h), 54(2)(m) and 57 of the Bill (which corresponds to Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act) do not fall under any of the clauses of Article 110 of the Constitution and, therefore, Bill was not limited to only those subjects mentioned in Article 110. Insofar as Section 7 is concerned, it makes receipt of subsidy, benefit or service subject to establishing identity by the process of authentication under Aadhaar or furnish proof of Aadhaar etc. It is also very clearly declared in this provision that the expenditure incurred in respect of such a subsidy, benefit or service would be from the Consolidated Fund of India. It is also accepted by the Petitioners that Section 7 is the main provision of the Act. In fact, introduction to the Act as well as Statement of Objects and Reasons very categorically record that the main purpose of Aadhaar Act is to ensure that such subsidies, benefits and services reach those categories of persons, for whom they are actually meant.

(c) As all these three kinds of welfare measures are sought to be extended to the marginalised Section of society, a collective reading thereof would show that the purpose is to expand the coverage of all kinds of aid, support, grant, advantage, relief provisions, facility, utility or assistance which may be extended with the support of the Consolidated Fund of India with the objective of targeted delivery. It is also clear that various schemes which can be contemplated by the aforesaid provisions, relate to vulnerable and weaker Section of the society. Whether the social justice scheme would involve a subsidy or a benefit or a service is merely a matter of the nature and extent of assistance and would depend upon the economic capacity of the State. Even where the state subsidizes in part, whether in cash or kind, the objective of emancipation of the poor remains the goal.

(d) The Respondents are right in their submission that the expression subsidy, benefit or service ought to be understood in the context of targeted delivery to poorer and weaker Sections of society. Its connotation ought not to be determined in the abstract. For as an abstraction one can visualize a subsidy being extended by Parliament to the King; by Government to the Corporations or Banks; etc. The nature of subsidy or benefit would not be the same when extended to the poor and downtrodden for producing those conditions without which they cannot live a life with dignity. That is the main function behind the Aadhaar Act and for this purpose, enrolment for Aadhaar number is prescribed in Chapter II which covers Sections 3 to 6. Residents are, thus, held entitled to obtain Aadhaar number. We may record here that such an enrolment is of voluntary nature. However, it becomes compulsory for those who seeks to receive any subsidy, benefit or service under the welfare scheme of the Government expenditure whereof is to be met from the Consolidated Fund of India. It follows that authentication Under Section 7 would be required as a condition for receipt of a subsidy, benefit or service only when such a subsidy, benefit or service is taken care of by Consolidated Fund of India. Therefore, Section 7 is the core provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.

(e) On examining of the other provisions pointed out by the Petitioners in an attempt to take it out of the purview of Money Bill, we are of the view that those provisions are incidental in nature which have been made in the proper working of the Act. In any case, a part of Section 57 has already been declared unconstitutional. We, thus, hold that the Aadhaar Act is validly passed as a 'Money Bill'.

(7) *Whether Section 139AA of the Income Tax Act, 1961 is violative of right to privacy and is, therefore, unconstitutional?*

Answer:

Validity of this provision was upheld in the case of *Binoy Viswam* by repelling the contentions based on Articles 14 and 19 of the Constitution. The question of privacy which, at that time, was traced to Article 21, was left open. The matter is reexamined on the touchstone of principles laid down in *K.S. Puttaswamy*. The matter has also been examined keeping in view that manifest arbitrariness is also a ground of challenge to the legislative enactment. Even after judging the matter in the context of permissible limits for invasion of privacy, namely: (i) the existence of a law; (ii) a 'legitimate State interest'; and (iii) such law should pass the 'test of proportionality', we come to the conclusion that all these tests are satisfied. In fact, there is specific discussion on these aspects in *Binoy Viswam's* case as well.

(8) *Whether Rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and the notifications issued thereunder which mandates linking of Aadhaar with bank accounts is unconstitutional?*

Answer:

(a) We hold that the provision in the present form does not meet the test of proportionality and, therefore, violates the right to privacy of a person which extends to banking details.

(b) This linking is made compulsory not only for opening a new bank account but even for existing bank accounts with a stipulation that if the same is not done then the account would be deactivated, with the result that the holder of the account would not be entitled to operate the bank account till the time seeding of the bank account with Aadhaar is done. This amounts to depriving a person of his property. We find that this move of mandatory linking of Aadhaar with bank account does not satisfy the test of proportionality. To recapitulate, the test of proportionality requires that a limitation of the fundamental rights must satisfy the following to be proportionate: (i) it is designated for a proper purpose; (ii) measures are undertaken to effectuate the limitation are rationally connected to the fulfilment of the purpose; (iii) there are no alternative less invasive measures; and (iv) there is a proper relation between the importance of achieving the aim and the importance of limiting the right.

(c) The Rules are held to be disproportionate for the reasons stated in the main body of this Judgment.

(9) *Whether Circular dated March 23, 2017 issued by the Department of Telecommunications mandating linking of mobile number with Aadhaar is illegal and unconstitutional?*

Answer:

Circular dated March 23, 2017 mandating linking of mobile number with Aadhaar is held to be illegal and unconstitutional as it is not backed by any law and is hereby quashed.

(10) Whether certain actions of the Respondents are in contravention of the interim orders passed by the Court, if so, the effect thereof?

Answer:

This question is answered in the negative.

448. In view of the aforesaid discussion and observations, the writ petitions, transferred cases, special leave petition, contempt petitions and all the pending applications stand disposed of.

Dr. D.Y. Chandrachud, J.

INDEX

B.4 Informational privacy

B.5 Restricting the right to privacy

B.6 Legitimate state interests

C. Submissions

C.1 Petitioners' submissions

C.2 Respondents' submissions

D. Architecture of Aadhaar: analysis of the legal framework

E. Passage of Aadhaar Act as a Money Bill

E.1 Judicial Review of the Speaker's Decision

E.2 Aadhaar Act as a Money Bill

F. Biometrics, Privacy and Aadhaar

F.1 Increased use of biometric technology

F.2 Consent in the collection of biometric data

F.3 Position before the Aadhaar legislation

F.4 Privacy Concerns in the Aadhaar Act

1. Consent during enrolment and authentication & the right to access information under the Aadhaar Act

2. Extent of information disclosed during authentication & sharing of core biometric information

3. Expansive scope of biometric information

4. Other concerns regarding the Aadhaar Act: Misconceptions regarding the efficacy of biometric information

5. No access to biometric records in database

6. Biometric locking

7. Key takeaways

G. Legitimate state aim

G.1 Directive Principles

G.2 Development and freedom

G.3 Identity and Identification

H. Proportionality

H.1 Harmonising conflicting rights

H.2 Proportionality standard in Indian jurisprudence

H.3 Comparative jurisprudence

H.4 Aadhaar: The proportionality analysis

H.5 Dignity and financial exclusion

H.6 Constitutional validity of Section 139AA of the Income Tax Act 1961

H.7 Linking of SIM cards and Aadhaar numbers

I. Money laundering rules

J. Savings in Section 59

K. Rule of law and violation of interim orders

L. Conclusion

A Introduction: technology, governance and freedom

449. Technology and biometrics are recent entrants to litigation. Individually, each presents specific claims: of technology as the great enabler; and of biometrics as the unique identifier. As recombinant elements, they create as it were, new genetic material. Combined together, they present unforeseen challenges for governance in a digital age. Part of the reason for these challenges is that our law evolved in a radically different age and time. The law evolved instruments of governance in incremental stages. They were suited to the social, political and economic context of the time. The forms of expression which the law codified were developed when paper was ubiquitous. The limits of paper allowed for a certain freedom: the freedom of individuality and the liberty of being obscure. Governance with paper could lapse into governance on paper. Technology has become a universal language which straddles culture and language. It confronts institutions of governance with new problems. Many of them have no ready answers.

450. Technology questions the assumptions which underlie our processes of reasoning. It reshapes the dialogue between citizens and the state. Above all, it tests the limits of the doctrines which democracies have evolved as a shield which preserves the sanctity of the individual.

451. In understanding the interface between governance, technology and freedom, this case will set the course for the future. Our decision must address the dialogue between technology and power. The decision will analyse the extent to which technology has reconfigured the role of the state and has the potential to reset the lines which mark off no-fly zones: areas where the sanctity of the individual is inviolable. Our path will define our commitment to limited government. Technology confronts the future of freedom itself.

452. Granville Austin, the eminent scholar of the Indian Constitution had prescient comments on the philosophy of the Indian Constitution. He found it in three strands:

The Constitution...may be summarized as having three strands: protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the mass of Indians...the three strands are mutually dependent and inextricably intertwined. Social revolution could not be sought or gained at the expense of democracy. Nor could India be truly democratic unless the social revolution had to establish a just society. Without national unity, democracy would be endangered and there would be little progress toward social and economic reform. And without democracy and reform, the nation would not hold together. With these three strands, the framers had spun a seamless web. Undue strain on, or slackness in any one strand would distort the web and risk its destruction and, with it, the destruction of the nation. Maintaining harmony between the strands predictably would present those who later work the Constitution with great difficulties...[59]

These three strands are much like the polycentric web of which Lon Fuller has spoken.[60] A pull on one strand shakes the balance between the others. The equilibrium between them preserves the equilibrium of the Constitution.

453. This Court has been tasked with adjudicating on the constitutional validity of the Aadhaar project. The difficulties that Granville Austin had predicted would arise in harmonising the strands of the "seamless web" are manifested in the present case. This case speaks to the need to harmonise the commitment to social welfare while safeguarding the fundamental values of a liberal constitutional democracy.

454. To usher in a social revolution, India espoused the framework of a welfare state. The Directive Principles are its allies. The state is mandated to promote the welfare of its citizens by securing and protecting as effectively as possible a social order in which there is social, economic and political justice. Government plays a vital role in the social and economic upliftment of the nation's citizenry by espousing equitable distribution of resources and creating equal opportunities. These are ideals that are meant to guide and govern State action. The State's commitment to improve welfare is manifested through the measures and programmes which it pursues.

455. The Constitution of India incorporated a charter of human freedoms in Part III and a vision of transformative governance in Part IV. Through its rights jurisprudence, this Court has attempted

to safeguard the rights in Part III and to impart enforceability to at least some of the Part IV rights by reading them into the former, as intrinsic to a constitutionally protected right to dignity. The Directive Principles are a reminder of the positive duties which the state has to its citizens. While social welfare is a foundational value, the Constitution is the protector of fundamental human rights. In subserving both those ideals, it has weaved a liberal political order where individual rights and freedoms are at the heart of a democratic society. The Constitution seeks to fulfil its liberal values by protecting equality, dignity, privacy, autonomy, expression and other freedoms.

456. Two recent books have explored the complexities of human identity. In "The Lies That Bind: Rethinking Identity"[61], Kwame Anthony Appiah states that a liberal constitutional democracy is not a fate but a project. He draws inspiration from the Roman playwright Terence who observes: "I am human. I think nothing human alien to me." Francis Fukuyama, on the other hand has a distinct nuance about identity. In "Identity: The Demand for Dignity and the Politics of Enlightenment[62], he writes about how nations can facilitate "integrative national identities" based on liberal democratic values. Reviewing the books, Anand Giridharadas noted that Fukuyama's sense of identity is "large enough to be inclusive but small enough to give people a real sense of agency over their society."[63]. Appiah and Fukuyama present two variants-for Appiah it has a cosmopolitan and global nature while it is more integrated with a nation state, for Fukuyama, though firmly rooted in a liberal constitutional order.

457. India has participated in and benefited from the reconfiguring of technology by the global community. We live in an age of information and are witness to a technological revolution that pervades almost every aspect of our lives. Redundancies and obsolescence are as ubiquitous as technology itself. Technology is a great enabler. Technology can be harnessed by the State in furthering access to justice and fostering good governance.

458. In an age symbolised by an information revolution, society is witnessing a shift to a knowledge economy[64]. In a knowledge economy, growth is dependent on the 'quantity, quality, and accessibility'[65] of information. The quest for digital India must nonetheless be cognisant of the digital divide. Access confronts serious impediments. Large swathes of the population have little or no access to the internet or to the resources required for access to information. With the growth of the knowledge economy, our constitutional jurisprudence has expanded privacy rights. A digital nation must not submerge the identities of a digitised citizen. While data is the new oil, it still eludes the life of the average citizen. If access to welfare entitlements is tagged to unique data sets, skewed access to informational resources should not lead to perpetuating the pre-existing inequalities of access to public resources. An identification project that involves the collection of the biometric and demographic information of 1.3 billion people[66], creating the largest biometric identity project in the world, must be scrutinized carefully to assess its compliance with human rights.

459. Empowered by the technology that accompanied the advent of the information age, the Aadhaar project was envisioned and born. The project is a centralised nation-wide identification system based on biometric technology. It aims to be a game changer in the delivery of welfare benefits through the use of technology. The project seeks to facilitate de-duplication, prevent revenue leakages and ensure a more cost and time efficient procedure for identification. Conceptualised on the use of biometrics and authentication, the Aadhaar identity card was

originally introduced as a matter of voluntary choice. It was made a requirement for state subsidies and benefits for which, expenses are incurred from the Consolidated Fund of India. It was later expanded to become necessary to avail of a host of other services. The project is multifaceted and expansive. Perhaps no similar national identity program exists in the world. The Aadhaar project has multifarious aspects, all of which have been the subject of a detailed challenge by the Petitioners. They have been met with an equally strong defence from the government, which has argued that the programme is indispensable to curb corruption, fraud and black money.

460. The Aadhaar project raises two crucial questions: First, are there competing interests between human rights and 'welfare furthering technology' in democratic societies? Can technologies which are held out to bring opportunities for growth, also violate fundamental human freedoms? Second, if the answer to the first is in the affirmative, how should the balance be struck between these competing interests?

461. Efficiency is a significant facet of institutional governance. But efficiencies can compromise dignity. When efficiency becomes a universal mantra to steam-roll fundamental freedoms, there is a danger of a society crossing the line which divides democracy from authoritarian cultures. At the heart of the grounds on which the Aadhaar project has been challenged, lies the issue of power. Our Constitution is a transformative document in many ways. One of them is in defining and limiting the State's powers, while expanding the ambit of individual rights and liberties. It protects citizens from totalitarian excesses and establishes order between the organs of the State, between the State and citizens and between citizens. Most importantly, it reaffirms the position of the individual as the core defining element of the polity. That is the justification to restrain power by empowering all citizens to be authors of their destiny. According to the Petitioners, the technological potential as well as the actual implementation of the Aadhaar project alters the balance between the state and its citizens in this relational sphere and has the potential to permanently redistribute power within the constitutional framework.

462. As far as citizen-state relations are concerned, the Constitution was framed to balance the rights of the individual against legitimate State interests. Being transformative, it has to be interpreted to meet the needs of a changing society. As the interpreter of the Constitution, it is the duty of this Court to be vigilant against State action that threatens to upset the fine balance between the power of the state and rights of citizens and to safeguard the liberties that inhere in our citizens.

463. The present case involves issues that travel to the heart of our constitutional structure as a democracy governed by the Rule of law. Among them is the scope of this Court's power of judicial review. The Aadhaar legislation was passed as a money bill in the Lok Sabha. Whether it was permissible, in constitutional terms, to by-pass the Rajya Sabha, is the question. The role of the Rajya Sabha in a bicameral legislative structure, the limits of executive power when it affects fundamental rights and the duty of the state to abide by interim orders of this Court are matters which will fall for analysis in the case.

464. The case is hence as much about the Rule of law and institutional governance. Accountability is a key facet of the Rule of law. Professor Upendra Baxi has remarked:

The problem of human rights, in situations of mass poverty, is thus one of redistribution, access and needs. In other words, it is a problem of "development", a process of planned social change through continuing exercise of public power. As there is no assurance that public power will always, or even in most cases, be exercised in favour of the deprived and dispossessed, an important conception of development itself is accountability, by the wielders of public power, to the people affected by it and people at large. Accountability is the medium through which we can strike and maintain a balance between the governors and the governed.[67]

These are some of the unique challenges of this case. They must be analysed in the context of our constitutional framework. The all-encompassing nature of the Aadhaar project, its magnitude and the resultant impact on citizens' fundamental rights, make it imperative to closely scrutinize the structure and effect of the project. For this will determine the future of freedom.

B The Puttaswamy[68] principles

465. A unanimous verdict by a nine judge Bench declared privacy to be constitutionally protected, as a facet of liberty, dignity and individual autonomy. In a voluminous judgment, the Court traced the origins of privacy and its content. The decision lays down the test of proportionality to evaluate the constitutional validity of restrictions on the right to privacy.

466. The protection of privacy emerges both from its status as a natural right inhering in every individual as well as its position as "a constitutionally protected right". As a constitutional protection, privacy traces itself to the guarantee of life and personal liberty in Article 21 of the Constitution as well as to other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III.

B.I. Origins: privacy as a natural right

467. **Puttaswamy** holds that the right to privacy inheres in every individual as a natural right. It is inalienable and attaches to every individual as a precondition for being able to exercise their freedom. The judgment of four judges (with which Justice Sanjay Kishan Kaul concurred) held:

42. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. **It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being.** Natural rights are inalienable because they are inseparable from the human personality.[69]

319. **Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within**.
[70]

In his concurring opinion, S.A. Bobde, J. opined:

392. ...Privacy, with which we are here concerned, **eminently qualifies as an inalienable natural right,** intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man.
[71]

Similarly, in his concurring opinion, Nariman, J. opined:

532. ...It was, therefore, argued before us that given the international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognized and given the status of being fundamental. **There is no doubt that the Petitioners are correct in this submission.**
[72]

In his concurring opinion, Abhay Manohar Sapre, J. opined:

557. In my considered opinion, "**right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth...**

It is indeed inseparable and inalienable from human being.
[73]

The judgment authoritatively settles the position. While privacy is recognized and protected by the Constitution as an intrinsic and inseparable part of life, liberty and dignity, it inheres in every individual as a natural right.

B.2 Privacy as a constitutionally protected right: liberty and dignity

468. The judgment placed the individual at the centre of the constitutional rights regime. The individual lies at the core of constitutional focus. The ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual. The Court held that privacy attaches to the person and not the place where it is associated. Holding that privacy protects the autonomy of the individual and the right to make choices, the judgment of four judges held:

108. ...**The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well being of the community is determined.** Human dignity is an integral part of the Constitution.
[74]

266. **Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Part III and embodying an aspiration for achieving socio-economic rights in Part IV.**

It was held that privacy rests in every individual "irrespective of social class or economic status" and that every person is entitled to the intimacy and autonomy that privacy protects:

271...It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. **The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.**
[75]

469. Recognizing that civil-political rights are not subservient to socio-economic rights, the Court held that "conditions necessary for realizing or fulfilling socio-economic rights do not postulate the subversion of political freedom."

266...The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilised through history to wreak the most egregious violations of human rights. Above all, it must be realised that it is the right to question, the right to scrutinize and the right to dissent which enables an informed citizenry to scrutinize the actions of government. Those who are governed are entitled to question those who govern, about the discharge of their constitutional duties including in the provision of socio-economic welfare benefits. The power to scrutinize and to reason enables the citizens of a democratic polity to make informed decisions on basic issues which govern their rights.
[76]

267... Conditions of freedom and a vibrant assertion of civil and political rights promote a constant review of the justness of socio-economic programmes and of their effectiveness in addressing deprivation and want. Scrutiny of public affairs is founded upon the existence of freedom. Hence civil and political rights and socio-economic rights are complementary and not mutually exclusive.
[77]

Significantly, the Court rejected the submission that there is a conflict between civil-political rights and socio-economic rights. Both in the view of the Court are an integral part of the constitutional vision of justice.

470. Privacy, it was held, reflects the right of the individual to exercise control over his or her personality. This makes privacy the heart of human dignity and liberty. Liberty and dignity are complementary constitutional entities. Privacy was held to be integral to liberty. Privacy facilitates the realization of constitutional freedoms. This Court held thus:

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

78

127....The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.
79

471. The assurance of human dignity enhances the quality of life. The "functional relationship" between privacy and dignity secures the "inner recesses of the human personality from unwanted intrusion". Privacy by recognizing the autonomy of an individual, protects the right to make choices essential to a dignified life. It thus enables the realization of constitutional liberties and freedoms. It was held in the judgment:

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.
70

298. ...Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.
80

472. Privacy is founded on the autonomy of the individual. The ability to make choices is at the core of the human personality. Its inviolable nature is manifested in the ability to make intimate decisions about oneself with a legitimate expectation of privacy. Privacy guarantees constitutional protection to all aspects of personhood. Privacy was held to be an "essential condition" for the exercise of most freedoms. As such, given that privacy and liberty are intertwined, privacy is necessary for the exercise of liberty. Bobde J, in his separate opinion held that:

409....Liberty and privacy are integrally connected in a way that privacy is often the basic condition necessary for exercise of the right of personal liberty. There are innumerable activities which are virtually incapable of being performed at all and in many cases with dignity unless an individual is left alone or is otherwise empowered to ensure his or her privacy.
81

411.... Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right of privacy is an integral part of both 'life' and 'personal liberty' Under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.
82

473. Apart from being a natural law right, the right to privacy was held to be a constitutionally protected right flowing from Article 21. Privacy is an indispensable element of the right to life and personal liberty Under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Tracing out the course of precedent in Indian jurisprudence over the last four decades, the view of four judges holds:

103. The right to privacy has been traced in the decisions which have been rendered over more than four decades to the guarantee of life and personal liberty in Article 21 and the freedoms set out in Article 19."
[83]

320. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution...
[70]

In a similar vein, Chelameswar J. while concurring with the view of four judges held:

375. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21.
[84]

474. Being indispensable to dignity and liberty, and essential to the exercise of freedoms aimed at the self-realization of every individual, privacy was held to be a common theme running across the freedoms and rights guaranteed not just by Article 21, but all of Part III of the Constitution. Bobde J. in his separate opinion held that:

406. It is not possible to truncate or isolate the basic freedom to do an activity in seclusion from the freedom to do the activity itself. The right to claim a basic condition like privacy in which guaranteed fundamental rights can be exercised must itself be regarded as a fundamental right. **Privacy, thus, constitutes the basic, irreducible condition necessary for the exercise of 'personal liberty' and freedoms guaranteed by the Constitution. It is the inarticulate major premise in Part III of the Constitution.**
[85]

415. **Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III.** In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy.

B.3 Contours of privacy

475. Privacy has been held to have distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control. The judgment of four judges held that:

248. Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in

public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person.

Similarly, Nariman J. in his separate opinion held:

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

• Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

• Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

• The privacy of choice, which protects an individual's autonomy over fundamental personal choices.[86]

476. However, it was held that this is not an exhaustive formulation of entitlements. In recording its conclusions, the opinion of four judges held:

324.

This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the Rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. **Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features.**
[87]

Additionally, Bobde J., in his separate opinion held that the right to privacy may also inhere in other parts of the Constitution beyond those specified in the judgment:

415. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. **This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.**[88]

B.4 Informational privacy

477. **Puttaswamy** held that informational privacy is an essential aspect of the fundamental right to privacy. It protects an individual's free, personal conception of the 'self.' Justice Nariman held that informational privacy "deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him". Any unauthorised use of such information may therefore lead to infringement of the right to privacy. In his concurring judgment, Justice Kaul held that informational privacy provides the right to an individual "to disseminate certain personal information for limited purposes alone". Kaul J. in his separate opinion held:

620. ...**The boundaries that people establish from others in society are not only physical but also informational.** There are different kinds of boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase "none of your business". ...
An individual has the right to control one's life while submitting personal data for various facilities and services. **It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation.**
89

478. A reasonable expectation of privacy requires that data collection does not violate the autonomy of an individual. The judgment of four judges noted the centrality of consent in a data protection regime. This was also highlighted in the separate concurring opinion of Justice Kaul:

625. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.
90

Consent, transparency and control over information are crucial to informational privacy. In this structure, Court has principally focused on the "individual" as central to our jurisprudence.

B.5 Restricting the right to privacy

479. There is an inherent importance of giving a constitutional status to privacy. Justice Nariman dealt with this:

490....The recognition of such right in the fundamental rights chapter of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments. Statutes may protect fundamental rights; they may also infringe them. In case any existing statute or any statute to be made in the future is an infringement of the inalienable right to privacy, this Court would then be required to test such statute against such fundamental right and if it is found that there is an infringement of such right, without any countervailing societal or public interest, it

would be the duty of this Court to declare such legislation to be void as offending the fundamental right to privacy.
91

A constitutional right may embody positive and negative 'aspects'. They signify mandates. At an affirmative level, they emphasise the content and diversity of our liberties. As a 'negative', they impose restraints on the state and limit the power of the state to intrude upon the area of personal freedom. 'Negative' in this sense reflects a restraint: the fundamental rights are a restraining influence on the authority of power. In addition to keeping itself within the bounds of its authority, the state may have a positive obligation to perform. Rights such as informational privacy and data protection mandate that the state must bring into being a viable legal regime which recognizes, respects, protects and enforces informational privacy. Informational privacy requires the state to protect it by adopting positive steps to safeguard its cluster of entitlements. The right to informational privacy is not only vertical (asserted and protected against state actors) but horizontal as well. Informational privacy requires legal protection because the individual cannot be left to an unregulated market place. Access to and exploitation of individual personal data-whether by state or non-state entities-must be governed by a legal regime built around the principles of consent, transparency and individual control over data at all times.

480. Privacy, being an intrinsic component of the right to life and personal liberty, it was held that the limitations which operate on those rights, Under Article 21, would operate on the right to privacy. Any restriction on the right to privacy would therefore be subjected to strict constitutional scrutiny. The constitutional requirements for testing the validity of any encroachment on privacy were dealt with in the judgment as follows:

325. ... In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty Under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.
87

These three-fold requirements emerge from the procedural and content-based mandate of Article 21. The first requirement is the enactment of a valid law, which justifies an encroachment on privacy. The second requirement of a legitimate State aim ensures that the law enacted to restrict privacy is constitutionally reasonable and does not suffer from **manifest arbitrariness.** The third requirement of proportionality ensures that the nature and quality of the encroachment on the right to privacy is not disproportionate to the purpose of the law. Proportionality requires the State to justify that the means which are adopted by the legislature would encroach upon the right to privacy only to the minimum degree necessary to achieve its legitimate interest.

Justice Nariman held thus:

495. ...Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if

it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well...

in pursuance of a statutory requirement, if certain details need to be given for the concerned statutory purpose, then such details would certainly affect the right to privacy, but would on a balance, pass muster as the State action concerned has sufficient inbuilt safeguards to protect this right-viz. the fact that such information cannot be disseminated to anyone else, save on compelling grounds of public interest.
92

481. While five judges of the Court adopted the "proportionality" standard to test a law infringing privacy, Justice Chelameswar discussed the need to apply of a "compelling state interest" standard, describing it as the "highest standard of scrutiny that a court can adopt". Describing Article 21 as the "bedrock" of privacy, the learned Judge held:

379. ...If the spirit of liberty permeates every claim of privacy, it is difficult if not impossible to imagine that any standard of limitation, other than the one Under Article 21 applies.[93]

380. The just, fair and reasonable standard of review Under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. Gobind resorted to the compelling state interest standard in addition to the Article 21 reasonableness enquiry. From the United States where the terminology of 'compelling state interest' originated, a strict standard of scrutiny comprises two things-a 'compelling state interest' and a requirement of 'narrow tailoring' (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, compelling state interest does not have definite contours in the US. Hence, it is critical that this standard be adopted with some clarity as to when and in what types of privacy claims it is to be used. **Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard Under Article 21 will apply. When the compelling State interest standard is to be employed must depend upon the context of concrete cases.**

94

Justice Chelameswar's view accepts the 'fair, just and reasonable' standard in the generality of cases, carving an exception in cases of a certain category where a heightened scrutiny must apply. Those categories of exception are not spelt out. They would, as the judge opined, be evolved on a case by case basis.

482. The Bench of nine judges had held that the contours of privacy exist across the spectrum of constitutionally protected freedoms. Privacy was held to be a necessary condition precedent to the enjoyment of the guarantees in Part III. This has enhanced the scope of the protection guaranteed to privacy. Consequently, privacy infringements will generally have to satisfy the other tests applicable apart from those Under Article 21. In his concurring opinion, Justice S.A. Bobde held:

427. Once it is established that privacy imbues every constitutional freedom with its efficacy and that it can be located in each of them, **it must follow that interference with it by the state must be tested against whichever one or more Part III guarantees whose enjoyment is curtailed.** As a result, privacy violations will usually have to answer to tests in addition to the one applicable to Article 21, Such a view would be wholly consistent with R.C. Cooper v. Union of India.
95

Any attempt by the State to restrict privacy must therefore meet the constitutional requirements prescribed for each provision of Part III, which the restriction infringes. In his concurring opinion, Justice Nariman held thus:

488... Every State intrusion into privacy interests which deals with the physical body or the dissemination of information personal to an individual or personal choices relating to the individual would be **subjected to the balancing test prescribed under the fundamental right that it infringes depending upon where the privacy interest claimed is founded.**[96]

Justice Nariman further held:

526. ...**when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed.** For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained Under Article 21 read with Article 14 if it is arbitrary and unreasonable; and Under Article 21 read with Article 19(1)(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said Article. Each of the tests evolved by this Court, qua legislation or executive action, Under Article 21 read with Article 14; or Article 21 read with Article 19(1) (a) in the aforesaid examples must be met in order that State action must pass muster.
97

The constitutional guarantee on protection of privacy was placed on a sure foundation. Since emanations of privacy are traceable to various rights guaranteed by Part III, a law or executive action which encroaches on privacy must meet the requirements of the constitutionally permissible restriction in relation to each of the fundamental rights where the claim is founded.

B.6 Legitimate state interests

483. Recognizing that the right to privacy is not absolute, the judgment recognizes that legitimate state interests may be a valid ground for the curtailment of the right subject to the tests laid down for the protection of rights. Justice Nariman held:

526....This right is subject to reasonable Regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed.
97

Recognizing that a legitimate state aim is a pre-requisite for any restriction on the right, the judgment of four judges held:

310. ...the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness.

484. The judgment sets out illustrations of legitimate State interests. The provisos to various fundamental rights were held to be an obvious restriction on the right to privacy. It was held that the State does have a legitimate interest in collection and storage of private information when it is related to security of the nation. Apart from the concerns of national security, an important State interest, it was held, lies in ensuring that scarce public resources reach the beneficiaries for whom they are intended. It was held thus:

311....Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes... Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the state to insist on the collection of authentic data.
98

Prevention and investigation of crime, protection of the revenue and public health were demarcated as being part of other legitimate aims of the State. The judgment places an obligation on the State to ensure that while its legitimate interests are duly preserved the data which the State collects is used only for the legitimate purposes of the State and is "not to be utilised unauthorizedly for extraneous purposes."

485. However, reiterating that every facet of privacy is to be protected, the judgment held that there should be a careful balance between individual interests and legitimate concerns of the state. Justice Nariman, in his separate opinion held:

488. Every State intrusion into privacy interests which deals with the physical body or the dissemination of information personal to an individual or personal choices relating to the individual would be subjected to the balancing test prescribed under the fundamental right that it infringes depending upon where the privacy interest claimed is founded.[96]

486. The judgment in **Puttaswamy** recognizes the right to privacy as a constitutional guarantee protected as intrinsic to the freedoms guaranteed by Part III of the Constitution. Privacy is integral to the realization of human dignity and liberty. A society which protects privacy, values the worth of individual self-realization. For it is in the abyss of solitude that the innermost recesses of the mind find solace to explore within and beyond.

C. Submissions

C.I. Petitioners' submissions

The Petitioners challenge the constitutional validity of:

a. The Aadhaar programme that operated between 28.01.2009 till the coming into force of the Aadhaar Act, 2016 on 12.07.2016;

b. The Aadhaar Act, 2016 (and alternatively certain provisions of the Act);

c. Regulations framed under the Aadhaar Act, 2016;

d. Elements of the Aadhaar programme that continue to operate without the cover of the Act;

e. Subordinate legislation including the Money Laundering (Amendment) Rules, 2017;

f. All notifications issued Under Section 7 of the Aadhaar Act in so far as they make Aadhaar mandatory for availing of certain benefits, services and subsidies; and

g. Actions which made Aadhaar mandatory even where the activity is not covered by Section 7 of the Act.

Mr. Shyam Divan, learned Senior Counsel submitted that the Aadhaar project and Act are ultra vires on the following grounds:

i. The project and the Act violate the fundamental right to privacy;

ii The architecture of the Aadhaar project enables pervasive surveillance by the State;

iii The fundamental constitutional feature of a 'limited government'-which is the sovereignty of the people and limited government authority-is changed completely post Aadhaar and reverses the relationship between the citizen and the State;

iv Due to the unreliability of biometric technology, there are authentication failures which lead to the exclusion of individuals from welfare schemes;

v A citizen or resident in a democratic society has a choice to identify herself through different modes in the course of her interactions generally in society, as well as in her interactions with the State. Mandating identification by only one mode is highly intrusive, excessive and disproportionate and violates Articles 14, 19 and 21; and

vi The procedure adopted by the State before and after the enactment of the law is violative of Articles 14 and 21 because:

a. There is no informed consent at the time of enrolment;

b. UIDAI does not have control over the enrolling agencies and requesting entities that collect sensitive personal information which facilitates capture, storage and misuse of information; and

c. The data collected and uploaded into the CIDR is not verified by any government official designated by UIDAI.

Mr. Kapil Sibal, learned Senior Counsel submits that the provisions of the Aadhaar Act are unconstitutional for the following reasons:

i The aggregation and concentration of sensitive personal information under the Aadhaar Act is impermissible because it is capable of being used to affect every aspect of an individual's personal, professional, religious and social life. It is therefore violative of the individual freedoms guaranteed Under Articles 19(1)(a) to 19(1)(g), 21 and 25 of the Constitution;

ii Such aggregation of information is also an infringement of informational privacy, which has been recognised in **Puttaswamy**;

iii Making Aadhaar mandatory unreasonably deprives citizens of basic rights and entitlements and infringes Article 21 of the Constitution;

iv Use of Aadhaar as an exclusive identity for availing of subsidies, benefits and services is disproportionate and violates Article 14 for being arbitrary and discriminatory against persons otherwise entitled to such benefits;

v Collection and storage of data with the government under the Aadhaar Act is violative of the right to protection from self-incrimination, and the right to privacy and personal dignity and bodily Integrity envisaged Under Article 20(3) and Article 21 of the Constitution;

vi To prescribe that Aadhaar is the only identity that enables a person to receive entitlements is contrary to the right of an individual under the Constitution to identify the person through other prescribed documentation such as electoral rolls or passports;

vii Section 7 of the Aadhaar Act is applicable only to such subsidies, benefits and services, for which the entire expenditure is directly incurred from the Consolidated Fund of India or from which the entire receipts directly form part of the Consolidated Fund of India;

viii Use of Aadhaar as the sole identity will not prevent pilferage and diversion of funds and subsidies, as faulty identification is only one of the factors that contributes to it; and

ix The Aadhaar project conditions the grant of essential benefits upon the surrender of individual rights.

Mr. Gopal Subramanium, learned Senior Counsel, made the following submissions:

i The Aadhaar project violates dignity Under Article 21 of the Constitution as recognised in the judgments-in **Puttaswamy, NALSA** MANU/SC/0309/2014 : (2014) 5 SCC 438 and **Subramanian Swamy** MANU/SC/0621/2016 : (2016) 7 SCC 221;

ii The Aadhaar project is unconstitutional as it seeks a waiver of fundamental rights;

iii The Aadhaar project violates the guarantees of substantive and procedural reasonableness Under Articles 14, 19 and 21;

iv Aadhaar perpetrates exclusion from social security schemes and is therefore discriminatory Under Article 14;

v The Aadhaar Act lacks legitimacy in its object in so far as it validates a breach of fundamental rights retrospectively;

vi Rights and entitlements conferred under the Constitution cannot be based on algorithmic probabilities which UIDAI cannot control;

vii No consequence is prescribed for non-authentication under the Aadhaar Act;

viii The Aadhaar Act violates Part IX of the Constitution, which provides for decentralisation (to Panchayats), while the Aadhaar scheme strikes at the federal structure of the Constitution; and

ix Breaches under the Aadhaar Act cannot be cured.

Mr. Arvind Datar, learned Senior Counsel has submitted:

i Rule 9 of the PMLA (Second Amendment) Rules, 2017 which requires mandatory linking of Aadhaar with bank accounts is unconstitutional and violates Articles 14, 19(1)(g), 21 and 300A of the Constitution, Sections 3, 7 and 51 of the Aadhaar Act, and is also ultra vires of the provisions of the PMLA Act, 2002 on the following grounds:

a. Under the impugned amended Rules, linkage of Aadhaar numbers to bank accounts is mandatory and persons not enrolling for Aadhaar cannot operate a bank account, which violates the spirit of Article 14 in entirety in so far it arbitrarily metes out unequal treatment based on unreasonable classification;

b The impugned Rules are violative of Article 19(1)(g) as the Rules refer to companies, firms, trusts, etc., whereas the Aadhaar Act is only to establish identity of "individuals";

c Non-operation of a bank account, even for a temporary period, leads to deprivation of an individual's property and therefore constitutes a violation Under Article 300A of the Constitution, which provides that deprivation can be done only by primary legislation; and

d The Rule has no nexus to the object of the PMLA Act, as the Act has no provision to make bank accounts non-operational;

ii Section 139AA of the Income Tax Act, 1961 is liable to be struck down as violative of Articles 14, 21 and 19(g) of the Constitution;

iii The decision in **Binoy Viswam** v. **Union of India** MANU/SC/0693/2017 : (2017) 7 SCC 59 requires re-consideration in view of the nine judge Bench decision in Puttaswamy;

iv In view of serious deficiencies in the Aadhaar Act, there is a need for guidelines Under Article 142 to protect *inter alia*, the right to privacy and to implement the mandate of the nine judge Bench in **Puttaswamy;**

v If the Aadhaar project is not struck down, it should be confined only for identification or authentication of persons who are entitled to subsidies, benefits and services for which expenditure is incurred from the Consolidated Fund of India;

vi Sections 2(g), 2(j) 7, 57 and 59 of the Aadhaar Act violate Articles 14, 21 and 300A of the Constitution; and

vii PMLA Rule 9 is arbitrary as it is contrary to the RBI Master Circular (issued in 2013), which provided a list of documents that were to be treated as 'identity proof', in relation to proof of name and proof of residence.

Mr. P. Chidambaram, learned Senior Counsel argued that the Aadhaar Act could not have been passed as a Money Bill. Thus, he submitted:

i. The only difference between financial bills and money bills is the term "only" in Article 110 of the Constitution which implies that the scope of money bills is narrower than the scope of financial bills and provisions relating to money bills must thus be construed strictly;

ii. The Aadhaar Act, which was passed as a money bill, should be struck down since many of its provisions such as Section 57 have no relation to the nature of a Money Bill and bear no nexus to the Consolidated Fund of India;

iii. Since Money Bills can only be introduced in the Lok Sabha, on account of the curtailment of the powers of the Rajya Sabha and the President, the relevant provisions must be accorded a strict interpretation;

iv. While Article 110(3) provides that the decision of the Speaker of the Lok Sabha as to whether a Bill is a 'Money Bill' shall be final, the finality is only with regard to the Parliament and does not exclude judicial review; and

v. Since the legislative procedure is illegal and the power of the Rajya Sabha has been circumvented to disallow legislative scrutiny of the Aadhaar bill, provisions of the Act cannot be severed to save the Act and the Act is liable to be struck down as a whole by the Court.

Mr. K.V. Vishwanathan, learned Senior Counsel made the following submissions:

i All acts done prior to the passage of the Act are void ab initio and are not saved or validated by Section 59. In any event, Section 59 is invalid;

ii Collection, storage and use of data under the Aadhaar project and Act are invalid for the following reasons:

a. The Aadhaar Act and the surrounding infrastructure has made the possession of Aadhaar de facto mandatory;

b. Compulsory collection of identity information violates various facets of the right to privacy- bodily privacy, informational privacy and decisional autonomy;

c. The Act is unconstitutional since it collects the identity information of children between 5-18 years without parental consent;

d. Centralised storage of identity information and the unduly long period of retention of transaction data and authentication records is disproportionate;

e. The Act and Regulations preclude Aadhaar number holders from accessing or correcting their identity information stored on the CIDR; and

f. The Act and Regulations lack safeguards to secure sensitive personal data.

iii. Services like health related services, and those related to food, pensions and daily wages claimed Under Section 7 of the Act have been denied because of biometric failure. Biometric infrastructure operates on a probabilistic system, which cannot be 'one hundred percent infallible'. Thus, the State needs to take steps to prevent the denial of benefits by adopting alternate methods for verification of identity. This is absent at present, resulting in a violation of Articles 14 & 21;

iv. No provision is made for a hearing against omission and deactivation of the Aadhaar number, which violates the principles of natural justice; and

v. Sections 2(g), 2(j), 2(k) and 23(2) of the Aadhaar Act suffer from excessive delegation and the allied Regulations are vague, manifestly arbitrary and unreasonable.

Mr. Anand Grover, learned Senior Counsel has submitted thus:

i The Aadhaar project extends far beyond the scope of the Aadhaar Act with no procedural safeguards. Hence it violates Article 21 in as much as it is without the support and sanction of law. The data collected is unauthorised, excessive and being illegally shared;

ii The use of biometric technology to establish identity is uncertain, unproven and unreliable leading to exclusion and a violation of Articles 14 and 21;

iii The lack of security in the Aadhaar project violates the right to privacy Under Article 21;

iv Excessive powers have been delegated to the UIDAI through the Aadhaar Act; and

v. Sections 33(2) and 57 of the Act are vague, overbroad and constitutionally invalid.

Ms. Meenakshi Arora, learned Senior Counsel contended that:

i. The general and indiscriminate retention of personal data, including metadata, and the ensuing possibility of surveillance by the State has a chilling effect on fundamental rights like the freedom of speech and expression, privacy, and dignity;

ii. Making Aadhaar the sole means of identification for various services impinges upon dignity as it amounts to requiring a license for the exercise of fundamental rights; and

iii. The Aadhaar project does not contain any specific provisions for data protection, apart from a mere general obligation on UIDAI, which is a violation of the obligation of the State to ensure that the right to life, liberty, dignity and privacy of every individual is not breached under Part III of the Constitution.

Mr. Sajjan Poovayya, learned Senior Counsel has urged the following submissions:

i The Aadhaar Act fails to satisfy the constitutional test of a just, fair and reasonable law;

ii Maintenance of Aadhaar records by the State Under Section 32 is an unwarranted intrusion by the State;

iii Use of personal information Under Section 33 is an unwarranted intrusion by the State;

iv Section 57 of the Act is contrary to the principle of purpose limitation; and

v. Sections 2(g) and 2(j), the proviso to Section 3(1), Section 23(2)(g) and Section 23(2)(n) read with Section 54(2)(l), and Section 29(4) of the Act suffer from the vice of excessive delegation.

Mr. C.U. Singh, learned Senior Counsel, argued that the rights of the child are violated through the Aadhaar project. A child has no right to give consent or to enter into a contract. A child in India, under law, has no power or right to bind herself to anything, to consent or enter into contracts. In this background, there is no compelling state interest to mandate Aadhaar for children. The fundamental right of a child to education cannot be made subject to production of Aadhaar. These requirements are not only contrary to domestic legislation protecting the rights of children but also against India's international obligations. Learned Counsel also spoke of the violation of the rights of homeless people who are denied benefits due to the lack of a fixed abode.

Mr. Sanjay Hegde, learned Senior Counsel has urged that since there is no 'essential practice' involved, exemptions must be allowed from the mandatory nature of the Aadhaar Act on the grounds of freedom of conscience Under Article 25 of the Constitution.

Ms. Jayna Kothari, learned Counsel arguing on behalf of an intervenor organization for transgender persons and sexual minorities urged that the Aadhaar Act discriminates against sexual minorities. Aadhaar Regulations require demographic information. The enrolment form has a third gender, but there is no uniformity across the board, and the documents that have to be produced to get an Aadhaar card do not always have that option. Aadhaar is being made mandatory for almost everything but transgender persons cannot get an Aadhaar because they do not have the gender

identity documents that Aadhaar requires. This non-recognition of gender identity leads to denial of benefits which is violative of both Articles 14 and 21.

It has also been argued before us in an intervention application that denial of Aadhaar to Non-Resident Indians leads to discrimination when NRIs seek to avail of basic services in India.

C.2 Respondents' submissions

Mr. K.K. Venugopal, Learned Attorney General for India, has submitted thus:

i. For the period prior to coming into force of the Aadhaar Act, because of the interim orders passed by the SC, obtaining an Aadhaar number or enrollment number was voluntary, and hence there was no violation of any right;

ii. Section 59 of the Aadhaar Act protects all actions taken from the period between 2010 till the passage of the Aadhaar Act in 2016;

iii. The judgments in *MP Sharma* and *Kharak Singh* being those of 8 and 6 judges respectively, holding that the right to privacy is not a fundamental right, judgments of smaller benches delivered during the period upto **Puttaswamy** would be per *incuriam*. Hence, the State need not have proceeded on the basis that a law was required for the purpose of getting an Aadhaar number or an enrolment number. As a result, the administrative actions taken would be valid as well as the receipt of benefits and subsidies by the beneficiaries;

iv. Subsequent to the Aadhaar Act, the Petitioners would have to establish that one or more of the tests laid down by the nine judge bench in **Puttaswamy** render the invasion of privacy resulting from the Aadhaar Act unconstitutional. The tests laid down in **Puttaswamy** have been satisfied and hence the Aadhaar Act is not unconstitutional for the following reasons:

a. The first condition in regard to the existence of a law has been satisfied;

b. Legitimate state interests such as preventing the dissipation of social welfare benefits, prevention of money laundering, black money and tax evasion, and protection of national security are satisfied through the Act;

c. The Aadhaar Act satisfies the test of proportionality by ensuring that a "rational nexus" exists between the objects of the Act and the means adopted to achieve its objects; and

d. For the purpose of testing legitimate State interest and proportionality, the Court must take note of the fact that each one of the subsidies and benefits Under Section 7 is traceable to rights Under Article 21 of the Constitution-such as the right to live with human dignity, the right to food, right to shelter, right to employment, right to medical care and education. If these rights are juxtaposed with the right to privacy, the former will prevail over the latter.

v. The Aadhaar Act was validly passed as a Money Bill on the following grounds:

a. The term 'targeted delivery of subsidies' contemplates an expenditure of funds from the Consolidated Fund of India, which brings the Aadhaar Act within the purview of a Money Bill Under Article 110 of the Constitution;

b. Sections 7, 24, 25 and the Preamble of the Act also support its classification as a Money Bill;

c. The Aadhaar Act has ancillary provisions, but they are related to the pith and substance of the legislation which is the targeted delivery of subsidies and benefits; and

d. Section 57 of the Act is saved by Article 110 (1) (g) of the Constitution as it is a standalone provision and even if a Bill is not covered under Clauses (a) to (f) of Article 110(1), it can still be covered Under Article 110 (1) (g).

Mr. Tushar Mehta, learned Additional Solicitor General, submitted:

i. Section 139AA of the Income Tax Act, was examined in **Binoy Viswam** in the context of Article 19 and fulfills the three tests laid down under **Puttaswamy** as well as the test of manifest arbitrariness laid down in **Shayara Bano** v. **Union of India** MANU/SC/1031/2017 : (2017) 9 SCC 1;

ii. The demographic information that is required for Aadhaar enrollment is already submitted while obtaining a PAN card and therefore individuals do not have a legitimate interest in withholding information;

iii. Linking Aadhaar to PAN is in public interest on the following grounds:

a. The State has a legitimate interest in curbing the menace of black money, money laundering and tax evasion, often facilitated by duplicate PAN cards, and the linking of Aadhaar to the PAN card will ensure that one person holds only one PAN Card, thereby curbing these economic offences;

b. Aadhaar-PAN linking is in public interest and satisfies the test of proportionality and reasonableness;

c. The individual interest gives way to a larger public interest and a statutory provision furthering state interest will take precedence over fundamental rights;

d. The Court must not interfere with the Legislature's wisdom unless the statutory measure is shockingly disproportionate to the object sought to be achieved;

e. India is a signatory to various international treaties under which it has obligations to take action to curb the menace of black money and money laundering in pursuance of which measures including the amendments to *inter alia* the Income Tax Act and the PMLA Act and Rules thereunder, have been brought about by the legislature;

f. Statutory provisions under Aadhaar Act and Income Tax Act are distinct and standalone. Moreover, the validity of one provision cannot be examined in the light of the other;

g. Ascribing a (mandatory or voluntary) character to the provisions of a statute is Parliament's prerogative and cannot be questioned by courts; and

h. Rule 9 of the amended PMLA Rules that mandates furnishing of an Aadhaar number to open a bank account is not ultra vires the Aadhaar Act. Similarly, the Rule that an existing bank account will become non-operational if not linked with Aadhaar within six months is not a penalty but a consequence to render the accounts of money launderers non-operational.

Mr. Rakesh Dwivedi, learned Senior Counsel, has submitted:

i. The right to privacy exists when there is a reasonable expectation of privacy. However, this reasonable expectation of privacy differs from one dataset to another since the Aadhaar Act draws a distinction between demographic information, optional demographic information (e.g. mobile number), core biometric information (fingerprints and iris scans) and biometric information such as photographs;

ii. Alternatively, the applicability of Article 21 has to be confined and limited to core biometric information;

iii. Fundamental rights are not absolute and can be restricted if permitted specifically. Article 21 expressly envisages deprivation by laws which seek to carry out legitimate objectives and are reasonable and proportionate;

iv. The Aadhaar Act does not cause exclusion because if authentication fails after multiple attempts, then the subsidies, benefits and services, can be availed of by proving the possession of an Aadhaar number, either by producing the Aadhaar card or by producing the receipt of the application for enrolment and producing the enrolment ID number;

v. Section 7 of the Aadhaar Act protects the right to human dignity recognized by Article 21 of the Constitution by providing services, benefits and subsidies. The Aadhaar Act is a welfare scheme in pursuance of the State's obligation to respect the fundamental rights to life and personal liberty; to ensure justice (social, political and economic) and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits;

vi. Socio-economic rights must be read into Part III of the Constitution since civil and political rights cannot be enjoyed without strengthening socio-economic rights;

vii. A welfare State has a duty to ensure that each citizen has access at least to the basic necessities of life. The idea of a socialist state under a mandate to secure justice-social, economic and political-will be completely illusory if it fails to secure for its citizens the basic necessities in life. There cannot be any dignity for those who suffer starvation, subjugation, deprivation and marginalization and those who are compelled to do work which is intrinsically below human dignity;

viii. The Aadhaar number does not convert individuals to numbers. The Aadhaar number is necessary for authentication and it is solely used for that purpose. The Petitioners have conflated

the concepts of identity and identification. Authentication through a number is merely a technological requirement which does not alter the identity of an individual;

ix. Even if there is a conflict between the right to privacy and the right to food and shelter, the Aadhaar Act strikes a fair balance. The Aadhaar Act ensures human dignity and the right to life and liberty, hence there would be no reasonable expectation of privacy and autonomy;

x. The requirement to obtain an Aadhaar number under the Aadhaar Act does not reflect a lack of trust in citizens. Authentication by the State does not presume that all its citizens are dishonest. The provisions of the Aadhaar Act are merely regulatory in nature-similar to the process of frisking at airports or other offices-since there is no effective method to ensure targeted delivery;

xi. The "least intrusive test" is not applicable in the present case. The requirement that the least intrusive means of achieving the State object must be adopted, has been rejected by Indian courts in a catena of decisions as it involves a value judgment and second guessing the wisdom of the legislature. Such a test violates the separation of powers between the legislature and the judiciary;

xii. Even assuming that the 'least intrusive method' test applies, the exercise of determining the least intrusive method of identification is a technical exercise and cannot be undertaken in a court of law;

xiii. The Petitioners who have furnished smartcards as an alternative to the Aadhaar card, have not established that smartcards are less intrusive than the Aadhaar card authentication process;

xiv. The 'strict scrutiny test' does not apply to the Aadhaar Act. That test is conceptualised in the United States, to be only applied to 'suspect classifications';

xv. Section 7 of the Aadhaar Act does not involve any waiver of fundamental rights;

xvi. There can be no assumption of mala fide against the government or the legislature. A mere possibility of abuse is not a ground to invalidate the Aadhaar Act;

xvii. Through Section 57, Parliament intended to make the use of the Aadhaar number available for other purposes due to the liberalization and privatization of the economy in areas earlier occupied by the government and public sector. Many private corporate bodies are operating parallel to and in competition with the public sector such as in banking, insurance, defence, and health. These are core sectors absolutely essential for national integrity, to the national economy and the life of people;

xviii. Sections 2(g), and (j) read with Section 54(2)(a) and Section 54(1) do not suffer from excessive delegation of power to UIDAI and there are sufficient guidelines coupled with restrictions. The Regulation making power of the Authority under the Act is limited by the use of the expression 'such other biological attribute' which will be interpreted ejusdem generis with the categories of information mentioned before namely, fingerprints and iris scan. These categories have certain characteristics: firstly, they do not contain genetic information; secondly, they are non-intrusive; thirdly, apart from carrying out authentication they do not reveal any other

information of the individual; fourthly, these are modes of identification used for identifying a person even without digital technology; fifthly, they are capable of being used for instantaneous digital authentication; and sixthly, they are biological attributes enabling digital authentication. The addition of biological attributes, Under Section 54, must mandatorily be laid before the Parliament Under Section 55. This is an additional check on the Regulation making power of UIDAI;

xix. Under Section 2(k), which defines demographic information, certain sensitive categories of information such as 'race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history' of the person are excluded. The term 'other relevant information' has to be *construed ejusdem generis* and would have to be necessarily demographic in nature as contrasted with biometric information;

xx. Aadhaar is necessary, as 3% of India's GDP amounting to trillions of rupees is allocated by Governments towards subsidies, scholarships, pensions, education, food and other welfare programmes. But approximately half of if does not reach the intended beneficiaries. Aadhaar is necessary for fixing this problem as no other identification document is widely and commonly possessed by the residents of the country and most of the other identity documents do not enjoy the quality of portability;

xxi. The enrolment and authentication processes under the Aadhaar Act are strongly regulated so that the data is secure;

xxii. The security of the CIDR is also ensured through adequate measures and safeguards;

xxiii. The Aadhaar Act ensures that UIDAI has control over the requesting entity during the authentication process;

xxiv. Enrolment Regulations ensure that the requirement of informed consent of individuals is fulfilled while securing the Aadhaar card in the following ways:

a. Firstly, the resident is given an opportunity of verifying his or her information for accuracy before uploading;

b. Secondly, the details and the supporting documents are provided by the resident, or an introducer (in specific cases);

c. Thirdly, the enrolling agency is obliged to inform the individual about the manner in which the information shall be used, the nature of recipients with whom the information is to be shared during authentication; and the existence of a right to access information, the procedure for making request for such access and details of the person/department to whom a request can be made; and

d. Fourthly, the uploading of information is done in the presence of the individual.

xxv. When an individual makes a choice to enter into a relational sphere then his or her choice as to mode of identification would automatically get restricted on account of the autonomy of the

individuals or institution with whom they wish to relate. This is more so where the individual seeks employment, service, subsidy or benefits;

xxvi. The Central government has the power to direct the linking of Aadhaar card, with SIM card, as it is proportional to the object sought to be achieved in the interest of national security;

xxvii. Regarding the process of authentication and metadata retained under the Act, it is submitted:

a. The only purpose of the Aadhaar project is authentication and there is no power under the Act to analyze data;

b. The Aadhaar Act does not involve big data or learning algorithms. It merely utilizes a matching algorithm for the purpose of authentication;

c. Metadata contemplated is process or technical metadata and does not reveal anything about the individual. Section 2(d) of the Act defines "authentication record" to mean the record of the time of authentication, identity of the RE and the response provided by the Authority", and the relevant authentication Regulation, Regulation 26, does not go beyond the scope of Section 2(d) of the Act;

d. Moreover, Regulation 26 and Section 32(3) of the Act prohibit the Authority from collecting or storing any information about the purpose of authentication; and

e. Only limited technical metadata is required to be stored in an effort to exercise control over REs by way of audits.

xxviii. Regarding the security of the Aadhaar data, it is submitted:

a. The provisions of the Information Technology Act, 2000 and the punitive measures provided there are made applicable to Aadhaar data Under Section 30 of the Aadhaar Act; and

b. Anyone attempting to gain unauthorized access to the CIDR faces stringent punishment, including imprisonment upto 10 years.

xxix. On the control exercised by the Authority over the Requesting Entities (RE), the following was urged before the Court:

a. The standard of control exercised by the Authority on the Requesting Entities is 'fair and reasonable' as laid down Under Article 21 of the Constitution;

b. This control includes requirements that the RE's procure the fingerprint device from vendors controlled by the Authority, with the Authority also providing the hardware and software of the device. The device is subject to quality checks, and must be certified by the Authority before being used by the RE. The Authority also takes measures to ensure that data is sent to it in an encrypted form;

c. The license is given to the RE from the Authority only after an audit of the RE is conducted, and the audit report is approved; and

d. The data collected by these REs is segregated and there exists no way of aggregating this data. During authentication requests, the full identity information of the individual will never be transmitted back to the REs by the Authority as there exists a statutory bar from sharing Biometric information Under Sections 29 (1) (a) and 29(4) of the Act.

xxx. UIDAI has entered into licensing agreements with foreign biometric solution providers (BSP) for software. Even though the source code of the software is retained by the BSP as it constitutes their intellectual property, the data in the server rooms is secure as the software operates automatically and the biometric data is stored offline. There is no opportunity available to the BSP to extract data as they have no access to it;

xxxi. Prior to the enactment of the Aadhaar Act, the Aadhaar project was governed by the provisions of the Information Technology Act, 2000. Section 72A of the Information Technology Act, 2000 provides for punishment for disclosure of information in breach of law or contract;

xxxii. The architecture of the Aadhaar Act does not enable any real possibility, proximate or remote, of mass surveillance in real time by the State;

xxxiii. The giving of identity information and undergoing authentication has no direct and inevitable effect on Article 19(1)(a). Alternatively, even if Article 19(1)(a) is attracted, Article 19(2) would protect Section 7 of the Aadhaar Act as it has a direct and proximate nexus to public order and security of the State;

xxxiv. In response to the argument that the requirements of Aadhaar number and authentication for benefits, services and subsidies would be ultra vires Article 243-G and items 11, 12, 16, 17, 23, 25 and 28 of the XIth Schedule, it is submitted that the Panchayats get only such powers as are given to it by the legislature of the State. Article 243-G is merely enabling. There is no compulsion upon the State to endow the Panchayats with powers relating to the items specified in the XIth Schedule;

xxxv. On the validity and purpose of Section 57, it is urged:

a. Section 57 is not an enabling provision. It merely provides, as it states, that the provisions of the Act would not prevent the use of Aadhaar for other purposes;

b. However, Section 57 imposes a limitation on any such use for other purposes, that the use must be sanctioned by any law in force or any contract;

c. Another limitation is presented by the proviso to Section 57, which says that the use of the Aadhaar number shall be subject to the procedure and obligations Under Section 8 and Chapter VI, which would necessarily also subject it to the operation of Chapter VII (dealing with Offences & Penalties) of the Act;

d. Under Section 57, the State, a body corporate or any other person cannot become Requesting Entities unless the limitations provided for Under Section 57 are complied with;

e. Section 57 imposes limitations, and the use is backed by authentication, protection of information and punitive measures;

f. The expressions 'pursuant to any law or any contract', and 'to this effect'-necessarily entail that where the State makes a law or any body corporate enters into a contract, the law or contract should be prior in point of time to the making of any application for becoming a Requesting Entity or a Sub-Authentication User Agency Under Regulation 12 of the Authentication Regulations; and

g. A large number of small service providers simply cannot become Requesting Entities Under Section 57, as they will not meet the rigorous standard demanded by the eligibility conditions which are prescribed by the Regulations to become Authentication User Agencies (AUA)/KYC User Agencies (KUA). Therefore, this provision does not create a situation whereby the common man is required to undergo authentication in all activities.

xxxvi. The Aadhaar Act is not exclusionary but inclusionary since it provides all citizens the bare necessities for a dignified existence;

xxxvii. Having the option to opt-out is not a constitutional requirement.

Mr. Neeraj Kishan Kaul, learned Senior Counsel, made the following submissions:

i. Aadhaar is a speedy and reliable tool for identification and authentication and there is no reason to hold it invalid;

ii. Private entities and AUAs/KUAs that have built their businesses around it should be allowed to use Aadhaar authentication services;

iii. Section 57 is an enabling provision and private players should be given the choice to use the Aadhaar authentication services as a tool for verification if there is a consensus between private players' and their customers;

iv. Aadhaar authentication has benefited women in villages and migrants and increased the reach of microfinance institutions, thus reducing predatory financing; and

v. A statute cannot be struck down on the ground that there is scope for misuse.

Mr. Jayant Bhushan, learned Senior Counsel appearing for the Reserve Bank of India urged the following submissions before the Court:

i. RBI, in exercise of its powers under the Banking Regulation Act, 1949 and Rule 9 of the PMLA Rules, 2005 issued an amended Master Circular on April 20, 2018 which mandates that Aadhaar has to be submitted to a Reporting Entity. This circular conforms with the PMLA rules;

ii. Rule 9(14) of the PMLA Rules provides that the Regulator-the RBI in this case, lay down guidelines incorporating the requirements of sub-rules 9(1)-(13), which would include enhanced or simplified measures to verify identity; and

iii. The requirement of submission of Aadhaar to the RE is in exercise of this power Under Rule 9(14).

Mr. Gopal Sankarnarayanan, learned Counsel, has submitted:

i. The Aadhaar Act as a whole does not violate the fundamental right to privacy;

ii. The factors that save the Aadhaar Act from failing the proportionality test are (a) Voluntariness to subject one 's identity information to obtain the Aadhaar; (b) Informed consent when such identity information is utilized; and (c) A draw on the Consolidated Fund of India;

iii. Right to identity is a fundamental right as a part of the right to dignity, which is being realized by the Aadhaar Act;

iv. The right to identity is also recognized under India's international obligations under instruments such as the UDHR and ICCPR;

v. In view of the large scale enrolments that have already taken place and the expenditure incurred by the Government out of public funds, it would be in overarching public interest to give Section 59 full effect. If this were not done, the only avenue available to the Government would be to undertake the mammoth enrolment task all over again under a new regime, affording only a pyrrhic victory to the Petitioners, while there would be substantial revenue losses to the Government and deprivation of beneficial schemes to those eligible, in the meanwhile;

vi. Certain provisions of the Aadhaar Act have to be struck down or read down so that the Act as a whole can continue to serve its essential purpose-namely Sections 47, Section 8(4) and Section 29(2) of the Act; and

vii. Section 139AA of the Income Tax Act, 1961 violates Article 14 and 21 of the Constitution.

Mr. Zoheb Hossain, learned Counsel, made the following submissions:

i. The right to privacy cannot be asserted vicariously on behalf of others in a representative capacity in a Public Interest Litigation, because unlike other constitutional rights, right to privacy is a personal right. No Section 7 beneficiary has claimed a violation of their right to privacy despite the pendency of the petitions for 6 years before this Court and therefore, the Petitioners' challenge, in a representative capacity, to Section 7 on the ground of a violation of the right to privacy of third parties is not maintainable;

ii. There is no increased threat to privacy due to Aadhaar at the level of requesting entities (RE) for the following reasons:

a. REs are already in possession of personal information of individuals and inclusion of Aadhaar does not in any manner increase the threat to privacy;

b. Any information disclosed by REs will not be on account of Aadhaar and will have to be dealt with under domain specific legislations, or a data protection regime or agreements between the REs and their customers; and

c. REs have data of their own customers and not of other REs' customers, so there is no possibility of surveillance.

iii. Safeguards against disclosure of information in the Aadhaar Act are superior to the safeguards laid down in the **PUCL** case MANU/SC/1211/2011 : (2011) 14 SCC 331. Sections 8, 28 and 29 along with Chapter VII which deals with Offences and Penalties, provide for protection of information and Section 33 lays down a strict procedure for disclosure. Even though the Aadhaar Act is not required to meet the same standard as laid down in **PUCL**, the safeguards in the Act are not only adequate with regard to identity information and authentication records, but far exceed the safeguards laid down **PUCL**;

iv. The Petitioners cannot contend that Section 33(2) of the Aadhaar Act goes against the principles of natural justice and is disproportionate (as it does not define the term "national security") for the following reasons:

a. What is in the interest of "national security" is not a question of law but that of policy lying in the executive domain; and

b. Principles of natural justice cannot be observed strictly in a situation implicating national security. In such cases, it is the duty of the court to read into and provide for statutory exclusion.

v. The laws, which are under challenge, are a part of a concerted scheme to promote redistributive justice and ensure substantive equality, in furtherance of Articles 14, 38, 39B and 39C. These laws ensure a more transparent and a cleaner system, root out revenue leakages and evasion of taxes, thereby giving genuine beneficiaries their rightful share in subsidies;

vi. The object of the Aadhaar Act, contrary to what the Petitioners have argued, is totally unrelated to suppression of freedom of speech and any incidental effect, if at all, would not implicate the right Under Article 19(1)(a);

vii. The Petitioners cannot contend that Section 47 of the Aadhaar Act is arbitrary or unreasonable for the following reasons:

a. The offences and penalties under the Act are intended to maintain the purity of data of the Aadhaar number holder and the integrity of the CIDR, which are integral in achieving the object of the Act;

b. Enrolment, storage of data in CIDR, and authentications are so vast and inherently technical that any breach of the provisions, can be effectively dealt with by the UIDAI;

c. The individual has not been left remediless, as he/she can make a complaint to the UIDAI directly or through the grievance redressal centre [Regulation 32 of the Aadhaar (Enrolment and Update) Regulations, 2016]. After a complaint has been made, the UIDAI would be obliged to examine the complaint and accordingly lodge a complaint in a Court in terms of Section 47 of the Aadhaar Act;

d. Section 56 of the Aadhaar Act makes it clear that application of other laws, like the IT Act, is not barred.

viii. Aadhaar must be made mandatory Under Section 7 of the Aadhaar Act for the following reasons:

a. Because of the involvement of biometrics, it is almost impossible for one person to obtain two Aadhaar numbers. This will help in checking the entry of fake and duplicate beneficiaries into any welfare scheme;

b. Other methods which were employed over the last 70 years to check duplication, siphoning of money in welfare schemes, large-scale tax evasion, generation of black money, and appearance and re-appearance of duplicates, have turned out to be futile. If Aadhaar is made voluntary, the same problems are likely to creep back into the system; and

c. The State is bound to deploy the best technology available to it to ensure proper allocation of resources as there is a constitutional mandate upon the State Under Article 14 to efficiently utilize its resources.

ix. There is no conflict between the Aadhaar Act and the Income Tax Act as they are both stand alone laws and their scope of operation is different;

x. Through the Aadhaar Act, the State is furthering the following obligations under Part III and Part IV of the Constitution and international obligations:

a. The State has a positive obligation for securing socio-economic rights;

like the basic right to food, shelter and livelihood of people arising out of Article 21, even though it is worded negatively;

b. The Supreme Court has observed that civil & political rights and socio-economic rights in India are placed on the same pedestal **[PUCL]**. Aadhaar is a means of achieving the latter set of rights. The proportionality analysis would therefore require a balancing of rights in this context;

c. Articles 38, 39(b), (c), (e), (f), 41, 43, 47 and 51(c) impose a constitutional mandate on the State to ensure effective and efficient utilization of public resources;

d. The State is the trustee of public resources towards people, and inaction of the State to plug the continuous leakage of public resources and revenues would violate both, the principle of non-

arbitrariness and reasonableness envisaged by Article 14 as well as the constitutional doctrine of public trust; and

e. The creation of Aadhaar infrastructure and enactment of the Aadhaar Act is a step towards the government pursuing India's international obligations under the ICESCR.

xi. While testing proportionality, reasonableness of a restriction has to be determined in an objective manner from the standpoint of the interests of the general public and not from the perspective of an individual right bearer claiming invasion[99]; and

xii. With regard to the alleged conflict between Section 29(2) of the Aadhaar Act and Section 4(b)(xii) of the RTI Act, the former cannot be struck down as unconstitutional for the following reasons:

a. A provision can be struck down only if it is in violation of the Constitution or if the legislature lacks competence, not on the ground that it is in conflict with another law;

b. In any case, the obligations of public authorities under both these provisions are different, as the public authority under the RTI Act can publish the details of beneficiaries from the existing database and the information received by the UIDAI is not required to be shared or displayed publicly. However, if any information is displayed publicly, it can be challenged by an aggrieved person on the ground of privacy which would be completely unrelated to the present challenge;

c. The two laws operate in their distinct fields and there is no conflict between them; and

d. A conflict between two statutes is required to be reconciled through harmonious construction. However, since there is no conflict between these two laws, there is no need for harmonious construction.

D. Architecture of Aadhaar: analysis of the legal framework

487. The architecture of the Aadhaar Act envisages the creation of a unique identity for residents on the basis of demographic and biometric information. The Act envisages a process of identification by which the unique identity assigned to each individual is verified with the demographic and biometric information pertaining to that individual which is stored in a centralised repository of data known as the Central Identities Data Repository (CIDR). The former part of the legislative design is implemented by its regulatory provisions governing enrolment[100] of individuals who would be allotted a unique identity number. The latter part of the legislative design consists of the process of 'authentication'.

488. In order to facilitate an understanding of the key aspects of the law, Section 2 provides a dictionary of meanings. 'Aadhaar number' is defined in Section 2(a) as the identification number issued to the individual Under Sub-section (3) of Section 3. The individual to whom an Aadhaar number is issued is described in Section 2(b) as the 'Aadhaar number holder'. The expression 'authentication' is defined in Section 2(c) thus:

(c) "Authentication" means the process by which the Aadhaar number alongwith demographic information or biometric information of an individual is submitted to the Central Identities Data Repository for its verification and such Repository verifies the correctness or lack thereof, on basis of information available with it.

Section 2(d) speaks of the 'authentication record' as the record of the time of authentication, the identity of the requesting entity and the response provided by UIDAI. The crucial definitions are those of 'biometric information', 'core biometric information', 'demographic information' and 'identity information'. These are as follows:

(g) "biometric information" means photograph, finger print, Iris scan, or other such biological attributes of an individual as may be specified by Regulations;

...

(j) "core biometric information" means finger print, Iris scan, or such other biological attribute of an individual as may be specified by Regulations;

(k) "demographic information" includes information relating to the name, date of birth, address and other relevant information of an individual, as may be specified by Regulations for the purpose of issuing an Aadhaar number, but shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history.

...

(n) "identity information" in respect of an individual, includes his Aadhaar number, his biometric information and his demographic information.

The largest subset of the above definitions consists of 'identity information' which is defined in an inclusive sense to comprehend the Aadhaar number, biometric information and demographic information. Demographic information is defined as information related to the name, date of birth and address and other information pertaining to an individual as is specified by the Regulations. Significantly, Section 2(k) excludes, by a mandate, race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history from the purview of demographic information. Biometric information consists, Under Section 2(g), of the photograph, fingerprint, Iris scan, or other such biological attributes of an individual as may be specified by Regulations. Core biometric information in Section 2(j) excludes photographs (which form part of biometric information). Apart from photographs, other biometric information is comprehended within core biometric information and may be expanded to include other biological attributes specified in the Regulations to be made under the Act.

489. The identity information of an individual is stored in a central depository. Section 2(h) defines "Central Identities Data Repository" as a centralised database in one or more locations containing all Aadhaar numbers issued to Aadhaar number holders along with the corresponding demographic information and biometric information of such individuals and other related information. The CIDR is the backbone of the Aadhaar Act. All the information collected or created under the Act

is stored in it. For the establishment and maintenance of the CIDR, it has been provided[101] under the Act that UIDAI may engage one or more entities, which can also perform any other functions as may be specified by Regulations. The Act does not prohibit the engagement of private entities for the establishment and maintenance of the CIDR.

490. Section 3, pertains to the entitlement to obtain an 'Aadhaar Number', which forms a part of Chapter II titled 'enrolment'. Section 3 comprises of three parts: (i) an entitlement of every resident to obtain an Aadhaar number; (ii) a requirement of submitting demographic and biometric information to be enrolled; and (iii) a process of undergoing enrolment. Section 3 provides thus:

Section (3): Aadhaar Number.-

(1) Every resident shall be entitled to obtain an Aadhaar number by submitting his demographic information and biometric information by undergoing the process of enrolment:

Provided that the Central Government may, from time to time, notify such other category of individuals who may be entitled to obtain an Aadhaar number.

(2) The enrolling agency shall, at the time of enrolment, inform the individual undergoing enrolment of the following details in such manner as maybe specified by Regulations, namely:

(a) The manner in which the information shall be used;

(b) The nature of recipients with whom the information is intended to be shared during authentication; and

(c) The existence of a right to access information, the procedure for making requests for such access and details of the person or department in-charge to whom such requests can be made.

(3) On receipt of the demographic information and biometric information Under Sub-section (1), the Authority shall, after verifying the information, in such manner as may be specified by Regulations, issue an Aadhaar number to such individual.

Significantly, Sub-section (1) of Section 3 recognises an entitlement, of every resident[102] to obtain an Aadhaar number. An entitlement postulates a right. A right contemplates a liberty, for it is in the exercise of the liberty that the individual asserts a right. What is a matter of an entitlement is evidently a matter of option and not a compulsion. That constitutes the fundamental postulate of Section 3. However, the entitlement to obtain the Aadhaar number is conditioned by the requirement of submitting demographic and biometric information and participating in the process of enrolment.

491. The collection of demographic and biometric information is carried out by an enrolling agency. "Enrolling agency" has been defined Under Section 2(l) of the Act as an agency, appointed by UIDAI or a Registrar[103], for collecting demographic and biometric information of individuals under the Act. The enrolling agency need not be an entity of the state. The definition opens the space for engagement of private entities in the collection of individual information for the process

of enrolment. The enrolling agencies have to set up enrolment centers and they have to function in accordance with the procedure specified by UIDAI.[104] Sub-section (2) of Section 3 requires the enrolling agency to disclose to the individual, who is undergoing enrolment, three important facets. The first is the manner in which the information which is disclosed by the individual would be used. The second relates to the nature of the recipients with whom the information is likely to be shared during the course of authentication. The third is founded upon the individual's right of access to the information disclosed. All these three facets are crucial to the legislative design because they try to place individual autonomy at the forefront of the process. An individual who discloses biometric and demographic information has a statutory entitlement to fully understand how the information which is disclosed is going to be used and with whom the information is likely to be shared during authentication.[105] Access of the information supplied to the individual, it has been argued, is an integral feature of the design created by the statute. These three facets are conditions precedent to the disclosure of information by the individual. Before the individual does so, he or she must have a full disclosure which would enable them to form an informed decision on the exercise of the choice which underlies an entitlement to an Aadhaar number. The entitlement which is recognised by Sub-section (1) is enforced by the mandatory requirements of Sub-section (2). Before an Aadhaar number is issued, Sub-section (3) requires the authority to verify the information disclosed, in the manner prescribed by Regulations. The Act leaves it to Regulations to specify how verification will be carried out.

492. Sections 4, 5 and 6 indicate the characteristics which are attributed to Aadhaar numbers, legislative recognition of the steps necessary to ensure financial inclusion and the requirement of periodical updation of information. Under Section 4, three important features attach to the possession of an Aadhaar number. The first is that the number is unique to one individual and to that individual alone. Once assigned, the Aadhaar number cannot be reassigned to any other individual. The second feature is that an Aadhaar number is random and bears no relation to the attributes or identity of its holder. The third feature of Section 4 is that once assigned, an Aadhaar number can be accepted as proof of identify of its holder "for any purpose".

Under Section 5, UIDAI is under a mandate to adopt special measures to issue Aadhaar numbers to women, children, senior citizens, the differently abled, unskilled and unorganised workers, nomadic tribes, persons who do not have permanent places of abode and to other categories which may be defined by the Regulations. Section 6 contains an enabling provision by which the authority may require holders to update their demographic and biometric information periodically, as specified Under Regulations. An Aadhaar number also does not, by itself, constitute a conferment of a right of citizenship, or domicile (Section 9).

493. Chapter III provides for Authentication. By virtue of Section 7, an enabling provision has been made by which the Union or state governments may **require** proof of an Aadhaar number for receiving subsidies, benefits and services for which the expenditure is incurred from (or the receipts form part of) the Consolidated Fund of India. Section 7 is in the following terms:

7. Proof of Aadhaar number necessary for receipt of certain subsidies, benefits and services, etc.- The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated

Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment:

Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.

Section 3 (as explained earlier) postulates an entitlement to an Aadhaar number. An entitlement envisages a right which may (or may not) be exercised by the resident. An entitlement is, after all, an option. Section 7, however, contemplates a **requirement**. It covers subsidies, benefits or services that are charged to the Consolidated Fund of India; the connect being either in regard to the source of expenditure or the receipts. The statutory definitions of the expressions 'benefit', 'service' and 'subsidy' are contained in Clauses (f), (w) and (x) of Section 2 which provide as follows:

(f) "benefit" means any advantage, gift, reward, relief, or payment, in cash or kind, provided to an individual or a group of individuals and includes such other benefits as may be notified by the Central Government;

(w) "service" means any provision, facility, utility or any other assistance provided in any form to an individual or a group of individuals and includes such other services as may be notified by the Central Government;

(x) "subsidy" means any form of aid, support, grant, subvention, or appropriation, in cash or kind, to an individual or a group of individuals and includes such other subsidies as may be notified by the Central Government.

494. Section 7 encapsulates a purpose, a condition and a requirement. The purpose incorporated in the provision is to establish the identity of an individual. The condition which it embodies is for the receipt of a subsidy, benefit or service for which the expenditure is incurred or the receipts form part of the Consolidated Fund of India. Where the purpose and condition are fulfilled, the central or state governments may require that the individual should (i) undergo authentication; or (ii) furnish proof of possession of an Aadhaar number; or (iii) provide proof of an application for enrolment where the Aadhaar number has not been assigned. Three alternatives are stipulated in Section 7. Where the purpose and condition (noted above) are fulfilled, the individual has to undergo authentication. Alternately, the individual has to furnish proof that he or she possesses an Aadhaar number. However, if an Aadhaar number has not been assigned to the individual, he or she would have to make an application for enrolment. In a situation where no Aadhaar number has been assigned as yet, the proviso stipulates that alternate and viable means of identification would be provided to the individual for the delivery of subsidies, benefits or services. Section 7 indicates that while the central or state governments can mandate that an individual must undergo authentication as a condition for the receipt of a subsidy, benefit or service, a failure of authentication cannot be held out as a ground to deny benefits, subsidies or services. That is for the reason that in the absence of authentication, possession of an Aadhaar number would suffice. Moreover, even if an individual does not possess an Aadhaar number, the mandate of Section 7 would be subserved by producing an application for enrolment.

Section 3 which speaks of an entitlement to obtain an Aadhaar number stands in contrast to Section 7 under which an Aadhaar number may be required as a condition for the receipt of a subsidy, benefit or service. As an entitlement, Section 3 makes the possession of an Aadhaar number optional. Section 7 is an enabling power by which the central or state governments may make the requirement of an Aadhaar number compulsive or mandatory where a person desires a subsidy, benefit or service for which expenditure is incurred from or the receipt of which forms part of the Consolidated Fund of India. Section 7 acts as an overriding provision over Section 3.

495. The manner in which an authentication is carried out is elaborated upon by Section 8. Section 8 is in the following terms:

Authentication of Aadhaar number.-

(1) The Authority shall perform authentication of the Aadhaar number of an Aadhaar number holder submitted by any requesting entity, in relation to his biometric information or demographic information, subject to such conditions and on payment of such fees and in such manner as may be specified by Regulations.

(2) A requesting entity shall-

(a) unless otherwise provided in this Act, obtain the consent of an individual before collecting his identity information for the purposes of authentication in such manner as may be specified by Regulations; and

(b) ensure that the identity information of an individual is only used for submission to the Central Identities Data Repository for authentication.

(3) A requesting entity shall inform, in such manner as may be specified by Regulations, the individual submitting his identify information for authentication, the following details with respect to authentication, namely:

(a) the nature of information that may be shared upon authentication;

(b) the uses to which the information received during authentication may be put by the requesting entity; and

(c) alternatives to submission of identity information to the requesting entity.

(4) The Authority shall respond to an authentication query with a positive, negative or any other appropriate response sharing such identity information excluding any core biometric information.

As we have noticed earlier, authentication involves a process in which the Aadhaar number, together with the demographic or biometric information, is submitted to the CIDR for verification and is verified to be correct or otherwise by the repository on the basis of the information available with it. Under Sub-section (1) of Section 8 authentication has to be performed on a request

submitted by a requesting entity. The expression 'requesting entity' is defined in Section 2(u) as follows:

(u) "requesting entity" means an agency or person that submits the Aadhaar number, and demographic information or biometric information, of an individual to the Central Identities Data Repository for authentication.

This definition also does not prohibit the engagement of private agencies for the process of authentication. Under Sub-section (2) of Section 8, every requesting entity is bound to obtain the consent of the individual before collecting his or her identity information for the purpose of authentication. Moreover, the requesting entity must ensure that the identity information is submitted only for the purpose of authentication to the CIDR. Before the requesting entity submits the identity information for authentication, it is under a mandate of law to disclose (i) the nature of the information that may be shared upon authentication; (ii) the use to which information received during authentication may be put; and (iii) alternatives to the submission of identity information.[106] During the course of authentication, UIDAI is required to respond to an authentication query with a positive, negative or appropriate response sharing such identity information excluding core biometric information.[107] Core biometric information cannot be shared. The modes of authentication are as mentioned in Regulation 4 of the Aadhaar (Authentication) Regulations 2016. It can be based on (i) demographic information; (ii) a one-time password with limited time validity; (iii) biometrics or (iv) multi-factor authentication (a combination of two or more of the above). The Requesting Agency chooses the mode according to its requirement.

496. UIDAI is the umbrella entity under the Aadhaar Act. The statutory backing to the authority of UIDAI to undertake the responsibility for the processes of enrolment and authentication and maintenance of CIDR has been provided under Chapter IV of the Act. Section 11 provides that the Central Government shall, by notification, establish UIDAI, a body corporate[108], to be responsible for the processes of enrolment and authentication and perform such other functions as are assigned to it under the Act. The composition of UIDAI has been provided Under Section 12: a Chairperson (appointed on part-time or full-time basis); two part-time Members, and the chief executive officer who shall be the Member-Secretary, to be appointed by the Central Government. Section 23 enunciates the powers and functions of the UIDAI. Sub-section (1) of Section 23 requires UIDAI to develop the policy, procedure and systems for issuing Aadhaar numbers to individuals and to perform authentication. Section 23(2) provides an inclusive list of the powers and functions of UIDAI:

(2) Without prejudice to Sub-section (1), the powers and functions of the Authority, inter alia, include--

(a) specifying, by Regulations, demographic information and biometric information required for enrolment and the processes for collection and verification thereof;

(b) collecting demographic information and biometric information from any individual seeking an Aadhaar number in such manner as may be specified by Regulations;

(c) appointing of one or more entities to operate the Central Identities Data Repository;

(d) generating and assigning Aadhaar numbers to individuals;

(e) performing authentication of Aadhaar numbers;

(f) maintaining and updating the information of individuals in the Central Identities Data Repository in such manner as may be specified by Regulations;

(g) omitting and deactivating of an Aadhaar number and information relating thereto in such manner as may be specified by Regulations;

(h) specifying the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes for which Aadhaar numbers may be used;

(i) specifying, by Regulations, the terms and conditions for appointment of Registrars, enrolling agencies and service providers and revocation of appointments thereof;

(j) establishing, operating and maintaining of the Central Identities Data Repository;

(k) sharing, in such manner as may be specified by Regulations, the information of Aadhaar number holders, subject to the provisions of this Act;

(l) calling for information and records, conducting inspections, inquiries and audit of the operations for the purposes of this Act of the Central Identities Data Repository, Registrars, enrolling agencies and other agencies appointed under this Act;

(m) specifying, by Regulations, various processes relating to data management, security protocols and other technology safeguards under this Act;

(n) specifying, by Regulations, the conditions and procedures for issuance of new Aadhaar number to existing Aadhaar number holder;

(o) levying and collecting the fees or authorising the Registrars, enrolling agencies or other service providers to collect such fees for the services provided by them under this Act in such manner as may be specified by Regulations;

(p) appointing such committees as may be necessary to assist the Authority in discharge of its functions for the purposes of this Act;

(q) promoting research and development for advancement in biometrics and related areas, including usage of Aadhaar numbers through appropriate mechanisms;

(r) evolving of, and specifying, by Regulations, policies and practices for Registrars, enrolling agencies and other service providers;

(s) setting up facilitation centres and grievance redressal mechanism for redressal of grievances of individuals, Registrars, enrolling agencies and other service providers;

(t) such other powers and functions as may be prescribed.

Under Section 54, UIDAI is empowered to make Regulations and Rules consistent with the Act, for carrying out the provisions of the Act. Sub-section (2) of Section 54 provides that UIDAI may make Regulations covering any of the following matters:

(a) the biometric information under Clause (g) and the demographic information under Clause (k), and the process of collecting demographic information and biometric information from the individuals by enrolling agencies under Clause (m) of Section 2;

(b) the manner of verifying the demographic information and biometric information for issue of Aadhaar number Under Sub-section (3) of Section 3;

(c) the conditions for accepting an Aadhaar number as proof of identity of the Aadhaar number holder Under Sub-section (3) of Section 4;

(d) the other categories of individuals Under Section 5 for whom the Authority shall take special measures for allotment of Aadhaar number;

(e) the manner of updating biometric information and demographic information Under Section 6;

(f) the procedure for authentication of the Aadhaar number Under Section 8;

(g) the other functions to be performed by the Central Identities Data Repository Under Section 10;

(h) the time and places of meetings of the Authority and the procedure for transaction of business to be followed by it, including the quorum, Under Sub-section (1) of Section 19;

(i) the salary and allowances payable to, and other terms and conditions of service of, the chief executive officer, officers and other employees of the Authority Under Sub-section (2) of Section 21;

(j) the demographic information and biometric information under Clause (a) and the manner of their collection under Clause (b) of Sub-section (2) of Section 23;

(k) the manner of maintaining and updating the information of individuals in the Central Identities Data Repository under Clause (f) of Sub-section (2) of Section 23;

(l) the manner of omitting and deactivating an Aadhaar number and information relating thereto under Clause (g) of Sub-section (2) of Section 23;

(m) the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes for which Aadhaar numbers may be used under Clause (h) of Sub-section (2) of Section 23;

(n) the terms and conditions for appointment of Registrars, enrolling agencies and other service providers and the revocation of appointments thereof under Clause (i) of Sub-section (2) of Section 23;

(o) the manner of sharing information of Aadhaar number holder under Clause (k) of Sub-section (2) of Section 23;

(p) various processes relating to data management, security protocol and other technology safeguards under Clause (m) of Sub-section (2) of Section 23;

(q) the procedure for issuance of new Aadhaar number to existing Aadhaar number holder under Clause (n) of Sub-section (2) of Section 23;

(r) manner of authorising Registrars, enrolling agencies or other service providers to collect such fees for services provided by them under Clause (o) of Sub-section (2) of Section 23;

(s) policies and practices to be followed by the Registrar, enrolling agencies and other service providers under Clause (r) of Sub-section (2) of Section 23;

(t) the manner of accessing the identity information by the Aadhaar number holder under the proviso to Sub-section (5) of Section 28;

(u) the manner of sharing the identity information, other than core biometric information, collected or created under this Act Under Sub-section (2) of Section 29;

(v) the manner of alteration of demographic information Under Sub-section (1) and biometric information Under Sub-section (2) of Section 31;

(w) the manner of and the time for maintaining the request for authentication and the response thereon Under Sub-section (1), and the manner of obtaining, by the Aadhaar number holder, the authentication records Under Sub-section (2) of Section 32;

(x) any other matter which is required to be, or may be, specified, or in respect of which provision is to be or may be made by Regulations.

Section 11(1), read with Sections 23(2) and 54(2), indicates that UIDAI is the sole authority vested with the power and responsibility of carrying out numerous functions. These functions include:

(i) collection of demographic information and biometric information from individuals;

(ii) generating and assigning Aadhaar numbers to individuals;

(iii) performing authentication of Aadhaar numbers;

(iv) maintaining and updating the information of individuals in the CIDR;

(v) omitting and deactivating of an Aadhaar number;

(vi) specifying the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes;

(vii) specifying the terms and conditions for appointment of Registrars, enrolling agencies and service providers and revocation of appointments;

(viii) specifying various processes relating to data management, security protocols and other technological safeguards under the Act;

(ix) setting up facilitation centres and mechanisms for the redressal of the grievances of individuals, Registrars, enrolling agencies and other service providers; and

(x) other functions prescribed by the Central government.

The Act does not set any limits within which the sole authority of UIDAI may operate. UIDAI has been conferred with discretionary powers as provided in the above provisions. The architecture of Aadhaar keeps UIDAI at the centre of all processes.

497. For the purpose of performing the functions of collecting, storing, securing, processing of information, delivery of Aadhaar numbers to individuals or performing authentication, Clause (a) of Section 23(3) contemplates that UIDAI may enter into Memoranda of Understanding or agreements with the central or state governments, Union territories or other agencies. In discharging its functions, UIDAI may appoint, by notification, a number of Registrars, engage and authorise such agencies to collect, store, secure and process information or perform authentication or such other functions in relation to it, as may be necessary for the purposes of the Act (Section 23 (3) (b)). For the efficient discharge of its functions, UIDAI may also engage consultants, advisors and other persons as may be required (Section 23(4)). These, like many other provisions, open the scope for the involvement of private entities in the Aadhaar project. This is also evident from Section 57 of the Act, which allows the use of the Aadhaar number, by the state, corporate entities or persons to establish the identity of an individual:

57. Act not to prevent use of Aadhaar number for other purposes under law.-

Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect:

Provided that the use of Aadhaar number under this Section shall be subject to the procedure and obligations Under Section 8 and Chapter VI.

498. The responsibility to ensure the security of identity information and authentication records of individuals has been placed on UIDAI.[109] UIDAI is also required to ensure confidentiality of identity information and authentication records of individuals,[110] except in circumstances, where disclosure of information is permitted by the Act.[111] Section 28(3) requires UIDAI to take all necessary measures to ensure that the information in its possession or control, including information stored in the CIDR, is secured and protected against access, use or disclosure not permitted under the Act or Regulations, and against accidental or intentional destruction, loss or damage. For the purpose of maintaining the security and confidentiality of the information of individuals, UIDAI is also required, Under Section 28(4), to:

(a) adopt and implement appropriate technical and organisational security measures;

(b) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and

(c) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

Except where it has otherwise been provided in the Aadhaar Act, a burden is placed (Under Section 28(5)) upon UIDAI, its officers, other employees (whether during service or thereafter), and any agency that maintains the CIDR not to reveal any information stored or the authentication record to anyone. An Aadhaar number holder, however, may request UIDAI to provide access to identity information excluding core biometric information in the manner as may be specified by Regulations (proviso to Section 28(5)).

Section 29 puts restrictions on sharing of information, collected or created under the Act. Sub-section (1) of Section 29 provides that:

(1) No core biometric information, collected or created under this Act, shall be--

(a) shared with anyone for any reason whatsoever; or

(b) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

Sub-section (2) contemplates that the identity information, other than core biometric information, collected or created under the Act may be shared only in accordance with the provisions of the Act and in the manner as may be specified by Regulations.

A burden is placed, Under Section 29(3), upon a requesting entity to ensure that any identity information available with it, is neither used for any purpose, other than that specified to the individual at the time of submitting identity information for authentication; nor disclosed further, except with the prior consent of the individual to whom such information relates.

Sub-section (4) prohibits publishing, display or posting publicly of any Aadhaar number or core biometric information collected or created under the Act in respect of an Aadhaar number holder, except for such purposes as may be specified by the Regulations. Section 30 contemplates that the biometric information collected and stored in an electronic form is to be deemed "sensitive personal data or information". The provision specifically relates to biometric information. The provision dilutes the protection that should be given to demographic information. Further, a statutory duty has been placed upon UIDAI to maintain authentication records in the manner and for a time period prescribed by Regulations.[112] The issue of maintenance of authentication records by UIDAI has been contentious and is dealt in a subsequent Section titled "Proportionality". A statutory right is provided to every Aadhaar number holder to obtain his authentication record in the manner specified by Regulations.[113] Section 32(3) prohibits UIDAI (either by itself or through any entity under its control) to collect, keep or maintain any information about the purpose of authentication.

499. The Aadhaar Act allows disclosure of individual information in limited circumstances. The manner and purpose for which information of individuals, including identity information or authentication records, can be disclosed has been provided Under Section 33 of the Act. Section 33 states:

(1) Nothing contained in Sub-section (2) or Sub-section (5) of Section 28 or Sub-section (2) of Section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made pursuant to an order of a court not inferior to that of a District Judge:

Provided that no order by the court under this Sub-section shall be made without giving an opportunity of hearing to the Authority.

(2) Nothing contained in Sub-section (2) or Sub-section (5) of Section 28 and Clause (b) of Sub-section (1), Sub-section (2) or Sub-section (3) of Section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government:

Provided that every direction issued under this Sub-section, shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology, before it takes effect:

Provided further that any direction issued under this Sub-section shall be valid for a period of three months from the date of its issue, which may be extended for a further period of three months after the review by the Oversight Committee.

The Aadhaar Act provides two categories: a "court order" and "in the interest of national security", where the personal information of an individual can be disclosed.

Under Section 31, in case any demographic information or biometric information of an Aadhaar number holder is found to be incorrect, is lost or changes subsequently, the Aadhaar number holder is required to request UIDAI to make an alteration in his or her record in the CIDR in the manner specified by Regulations. On receipt of a request for alteration of demographic or biometric information, UIDAI is vested with the power, subject to its satisfaction, to make alterations as required in the record relating to the Aadhaar number holder and to intimate the alteration to the holder. Sub-section (4) of Section 31 prohibits alteration of any identity information in the CIDR except in the manner provided in the Act or Regulations made in this behalf.

500. Chapter VII provides offences and penalties. Under Section 34, a penalty has been provided for impersonation at the time of enrolment. Section 35 creates a penalty for impersonation of the Aadhaar number holder by changing demographic or biometric information. Section 37 provides a penalty for disclosing identity information (which was collected in the course of enrolment or authentication).

Under Section 38, a penalty for unauthorised access to the CIDR has been provided. Section 38 provides thus:

Whoever, not being authorised by the Authority, intentionally,--

(a) accesses or secures access to the Central Identities Data Repository;

(b) downloads, copies or extracts any data from the Central Identities Data Repository or stored in any removable storage medium;

(c) introduces or causes to be introduced any virus or other computer contaminant in the Central Identities Data Repository;

(d) damages or causes to be damaged the data in the Central Identities Data Repository;

(e) disrupts or causes disruption of the access to the Central Identities Data Repository;

(f) denies or causes a denial of access to any person who is authorised to access the Central Identities Data Repository;

(g) reveals any information in contravention of Sub-section (5) of Section 28, or shares, uses or displays information in contravention of Section 29 or assists any person in any of the aforementioned acts;

(h) destroys, deletes or alters any information stored in any removable storage media or in the Central Identities Data Repository or diminishes its value or utility or affects it injuriously by any means; or

(i) steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used by the Authority with an intention to cause damage,

shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to a fine which shall not be less than ten lakh rupees.

Section 39 imposes a penalty for tampering with data in the CIDR. Sections 40 and 41 impose penalties on requesting and enrolment agencies in case they act in contravention of the obligations imposed upon them under the Act. Section 42 provides for a general penalty for an offence under the Act or the Rules or Regulations made thereunder, for which no specific penalty is provided under the Act. Under Section 43, when an offence has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Section 44 indicates that the provisions of the Act would apply to any offence or contravention committed outside India by any person, irrespective of nationality. The power to investigate offences under the Act has been placed, Under Section 45, on a police officer not below the rank of Inspector of Police.

Section 47(1) of the Act puts a bar on the courts from taking cognizance of any offence punishable under the Act, except when a complaint is made by UIDAI or any officer or person authorised by it. The provision indicates that the scope of cognizance is limited. It does not allow an individual who finds that there is any violation under the Act, to initiate criminal proceedings. The scope of grievance redressal under the Act is restrictive and works only on the action of UIDAI or a person authorised by it. UIDAI has set up a grievance redressal mechanism as contemplated by Section 23(2)(s) of the Aadhaar Act. There is no grievance redressal mechanism if any breach or offence is committed by UIDAI itself. The right of an individual to seek remedy under the Act if his/her rights are violated will be discussed subsequently. Under Sub-section (2), no court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate can try any offence punishable under the Act.

Section 48 empowers the Central Government to supersede UIDAI, in certain situations. Under Section 50, UIDAI, in exercise of its powers or performance of its functions under the Act, shall be bound by the written directions on questions of policy of the Central Government. Section 51 vests power in UIDAI to delegate to any member, officer or any other person, its powers and functions under the Act (except the power Under Section 54) as it may deem necessary. Section 51 grants a wide discretion to the UIDAI to delegate any of its powers and functions.

Section 55 requires every Rule and Regulation made under the Aadhaar Act to be laid down before each House of Parliament. The Section states:

55. Laying of Rules and Regulations before Parliament.-

Every Rule and every Regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the Rule or Regulation, or both the Houses agree that the Rule or Regulation should not be made, the Rule or Regulation shall thereafter have effect only in such

modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that Rule or Regulation.

UIDAI needs to place the Regulations framed by it before Parliament.

501. The architecture of Aadhaar is integral to the exercise of analyzing the reasonableness of the entire project. Whether the architecture addresses the concerns raised by the Petitioners is an essential component of this exercise. The architecture of Aadhaar must pass the constitutional requirements of reasonableness and proportionality. This aspect will be dealt under the heading of "proportionality" in a subsequent part of this judgment.

E Passage of Aadhaar Act as a Money Bill

502. The Petitioners challenge the constitutionality of the Aadhaar Act, contending that it could not have been passed as a Money Bill. According to the submission, the Aadhaar Act did not qualify as a Money Bill Under Article 110 of the Constitution, and it legislates on matters which fall outside that provision. The Attorney General for India submitted that the Constitution accords finality to the decision of the Speaker as to whether a Bill is a Money Bill and hence the question whether the Aadhaar Act fulfils the requirements of being categorized as Money Bill is not open to judicial review. The Attorney General also urged that the Aadhaar Act does fall Under Article 110.

Article 110 provides thus:

(1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:

(a) the imposition, abolition, remission, alteration or Regulation of any tax;

(b) the Regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in Sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States Under Article 109, and when it is presented to the President for assent Under Article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

503. The key questions before this Court are:

(i) Whether Under Article 110(3), the decision of the Speaker of the Lok Sabha, that a Bill is a Money Bill, is immune from judicial review;

(ii) If the answer to (i) is in the negative, whether the Aadhaar Act is a Money Bill Under Article 110(1) of the Constitution; and

(iii) If the Bill to enact the Aadhaar Act was not a Money Bill, whether a declaration of unconstitutionality will result from its legislative passage as a Money Bill in the Lok Sabha.

E.I Judicial Review of the Speaker's Decision

504. Article 109 provides for a special procedure in respect of Money Bills. It provides that a Money Bill shall not be introduced in the Council of States, the Rajya Sabha. After a Money Bill is introduced in the Lok Sabha and passed by it, the Bill has to be transmitted to the Rajya Sabha for its recommendations. Article 110(4) provides that when a 'Money Bill' is transmitted from the Lower House to the Upper House, it must be endorsed with a certificate by the Speaker of the Lower House that it is a Money Bill. From the date of the receipt of the Money Bill, the Rajya Sabha is bound to return the Bill to the Lok Sabha, within a period of fourteen days, with its recommendations. The Lok Sabha has the discretion to "either accept or reject all or any of the recommendations" made by the Rajya Sabha.[114] If the Lok Sabha accepts any of the recommendations of the Rajya Sabha, the Money Bill is deemed to have been passed by both Houses of the Parliament "with the amendments recommended" by the Rajya Sabha and accepted by the Lok Sabha.[115] However, when the Lok Sabha "does not accept any of the recommendations" of the Rajya Sabha, the Money Bill is said to have been passed by both Houses in the form in which it was originally passed by the Lok Sabha.[116] If a Money Bill after being passed by the Lok Sabha and transmitted to the Rajya Sabha for its recommendations is not returned to the Lok Sabha within a period of fourteen days, it is then deemed to have been passed by both the Houses of the Parliament in the form in which it was originally passed by the Lok Sabha.[117] When a Money Bill has been passed by the Houses of the Parliament, Article 111 requires it to be presented to the President along with the Lok Sabha Speaker's certificate for assent[118]. Article 117(1) also provides

that a Bill "making provision for any of the matters specified in Sub-clauses (a) to (f) of Clause (1) of Article 110" shall also not be introduced in the Rajya Sabha.

505. The Constitution contains corresponding provisions for Money Bills introduced in and passed by a state legislative assembly. Article 198 provides a special procedure for Money Bills in the state legislative assembly. Article 199(3) provides for the finality of the decision of the Speaker of the Legislative Assembly. Under Article 200, when a Money Bill has been passed by the State Legislature, it is to be presented to the Governor, along with the Speaker's certificate, for assent.[119]

Article 107 contains provisions for the introduction and passing of Bills in general and provides thus:

(1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of Article 108, lapse on a dissolution of the House of the People.

506. Ordinary bills can be passed only when they are agreed to by both Houses. Amendments suggested by one House have to be agreed upon by both the Houses for the bill to be passed. Both Houses of Parliament have a vital role assigned by the Constitution in the passage of ordinary bills. Deviating from the important role which it assigns to the Rajya Sabha in the passage of legislation, the Constitution carves out a limited role for the Rajya Sabha in the passage of Money Bills.

507. The Constitution confers special powers on the Speaker of the Lok Sabha in the passage of a Money Bill. Ordinary bills (other than Money Bills) can originate in either House of Parliament. They can be scrutinised, debated in and amended in both the Houses of Parliament during the course of passage. A Bill is not regarded as being passed by Parliament until both the Houses agree to its passage without amendments or with the amendments as proposed. A constitutional discretion is conferred on the Speaker of the Lok Sabha to decide whether a Bill is a Money Bill. When the Speaker of the Lok Sabha declares a Bill to be a Money Bill, the Rajya Sabha is left only with the option to make recommendations to the Bill within the deadline of fourteen days. Being only recommendations, they do not bind the Lok Sabha. They may either be accepted or rejected by the Lok Sabha.

508. The Rajya Sabha is a constitutional body in a bicameral legislature. The makers of the Constitution adopted bicameralism from Britain. The origin of the limited role that the Upper House has in the passing of a Money Bill can be traced to the British Parliament Act, 1911, which will be discussed in a subsequent part of this analysis. The draftspersons of the Constitution were conscious of the impact of a misuse of institutional power. They provided for a detailed blue print of the architecture of constitutional governance. It is necessary to understand our constitutional history in order to comprehend the scope of the finality attributed to the Speaker's decision on whether or not a Bill is a Money Bill.

509. The origins of the procedure of passing Money Bills in the United Kingdom are older than the Parliament Act of 1911. The authoritative treatise[120], by Thomas Erskine May, on the law, privileges, proceedings and usage of Parliament in Britain dwells on the history of the evolution of the relationship between the House of Commons and the House of Lords with regard to their powers of taxation and in relation to national revenue and public expenditure.[121]

A grant imposed by the House of Commons would become law in effect, only after the assent of the House of Lords and of the Queen.[122] While the House of Commons enjoyed the legal right to originate grants for nearly 300 years, the House of Lords was originally not precluded from amending a Bill. But in 1671[123] and 1678[124] respectively, the Commons passed two resolutions to curtail the powers of the House of Lords so that only the Commons had the sole right to direct or limit the scope of a Bill regarding taxation and government expenditure. The House of Lords was excluded from altering any such Bill.

The exclusion of the Lords was so strictly followed that the Commons even denied to the former, the power of authorising the taking of fees, imposing pecuniary penalties or of varying the mode of suing for them, or of applying them when recovered, though such provisions were necessary to give effect to the general enactments of a Bill.[125] Since this strict enforcement was found to be "attended with unnecessary inconvenience", it led to the adopting of a Standing Order in 1849 which accommodated space to the House of Lords for suggesting amendments on legislative issues.[126] However, the constitutional skirmishes continued. They eventually led to the passage of the Parliament Act of 1911, which essentially deprived the House of Lords of the right to reject Money Bills.

510. The Parliament Act 1911 was explicitly aimed at "regulating the relations between the two Houses of Parliament"[127]. The Preamble of the Act indicates that it was enacted for "restricting the existing powers of the House of Lords"[207]. Section 1(1) provides for the power of the House of Lords on Money Bills:

If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be present to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

"Money Bill" was defined statutorily for the first time. Section 1(2) provided:

A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or Regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, [the National Loans Fund] or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this Sub-section the expressions "taxation", "public money", and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes."

The use of the expression "means" in the definition of a Money Bill indicates it was exhaustively defined. A Bill would be a Money Bill, if the Speaker of the House of Commons opined that it contains "only" certain specific provisions. Under Section 1(3), when a Money Bill is sent up to the House of Lords and to Her Majesty for assent, it should be endorsed by a certificate of the Speaker of the House of Commons that it is a Money Bill. This Sub-section also provides that before giving his certificate, the Speaker may consult "two members to be appointed from the Chairman's Panel at the beginning of each Session by the Committee of Selection". Therefore, the Speaker has to certify any bill which in his or her opinion falls within the definition of a Money Bill. Any bill containing provisions outside the definition would not be certified as a Money Bill. The Speaker does not certify a Bill until it has reached the form in which it will leave the House of Commons, that is, at the end of its Commons stage. The Speaker can only decide whether or not to certify a Bill once it has passed the House.[128]

Section 3 of the 1911 Act provides finality to the certificate issued by the Speaker and renders it immune from judicial review. According to it:

Any certificate of the Speaker of the House of Commons given under this Act **shall be conclusive for all purposes, and shall not be questioned in any court of law.**

The Act provides finality to the decision of the Speaker of the House of Commons. By using the phrase "shall not be questioned in any court of law", the Act grants immunity to the Speaker's decision from judicial review.

The statutory concept of a 'Money Bill' and the Speaker's certification of a Bill as a 'Money Bill' introduced by the Parliament Act, 1911 ultimately found its way into the Constitution of India, but with significant modifications.

511. In India, the categorization of Money Bills can be said to have begun from the Commonwealth of India Bill 1925, which was drafted by a National Convention comprised of 250 members, with Tej Bahadur Sapru as its Chairman. Article 36 of the Commonwealth Bill provided:

36. (a) Any Bill which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

(b) Bills imposing taxation- shall deal only with the imposition of taxes, and any provision therein dealing with any other matter shall be of no effect.

(c) Bills for the appropriation of revenues or moneys or imposing taxation shall be introduced only by a member of the Cabinet, and can only originate in the Legislative Assembly.

The Bill neither provided a definition of a Money Bill nor did it discuss the role of the Speaker of the Assembly of elected representatives.

In its Madras session of December 1927, the Indian National Congress, as a response to the setting up of the Simon Commission (which did not have any Indian members) decided to set up an All Parties' Conference to draft a Constitution for India. With Motilal Nehru as the Chairman of the Committee constituted by the All Parties' Conference, a Report was prepared. Article 17 of the Nehru Report provided a definition of a Money Bill:

17. A money bill means a bill which contains only provisions dealing with all or any of the following subjects, namely the imposition, repeal, remission, alteration or Regulation of taxation; the imposition, for the payment of debt or other financial purposes, of charges on public revenues or monies, or the variation or repeal of any such charges; the supply, appropriation, receipt, custody, issue or audit of accounts of public money; the raising of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this definition the expression "taxation", "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

The definition of a Money Bill in the Nehru Report, was drawn from the Parliament Act, 1911 in Britain. Article 18 of the Report provided that the "question whether a bill is or is not a money bill will be decided by the president of the House of Representatives". The House of Representatives (the Lower House) was provided the final authority to either accept or reject the recommendations made by the Senate (the Upper House). Article 19 of the Report provided thus:

A money bill passed by the House of Representatives shall be sent to the Senate for its recommendations and it shall be returned not later than... days therefrom to the House of Representatives, which may pass it, accepting or rejecting all or any of the recommendations of the Senate; and the bill so passed shall be deemed to have been passed by both chambers.

While the Constituent Assembly of India was in session, the Socialist Party of India came up with a "Draft Constitution of the Republic of India", based on its ideologies. Article 147 of its Draft Constitution provided:

147. (1) A Bill making provision-

(a) for imposing, abolishing, remitting, altering or regulating any tax; or

(b) for regulating the borrowing of money, or giving any guarantee by the Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Government; or

(c) for declaring any expenditure to be expenditure charged on the public revenues, or for increasing the amount of any such expenditure shall be deemed as a money Bill and shall not be introduced or moved except on the recommendation of the Government.

(2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the Imposition of fines or other pecuniary penalties, or for the demand and payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration, or Regulation of tax by any local authority or body for local purposes.

(3) In case of dispute whether a Bill is a money Bill or not, the decision of the Speaker, or in his absence of the Deputy Speaker, shall be final.

The Draft Constitution of the Socialist Party conferred a discretion on the Speaker of the Lower House, and in his absence, on the Deputy Speaker, to decide whether a Bill is a Money Bill.

512. There was another model present before the makers of the Indian Constitution. British India was governed by the provisions of the Government of India Act, 1935, which provided for two Houses of Parliament-the Council of States (Upper House) and Federal Assembly (Lower House). Section 37 of the Government of India Act 1935 made special provisions for financial bills:

37.-(1) A Bill or amendment making provision-(a) for imposing or increasing any tax; or (b) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government; or (c) for declaring any expenditure to be expenditure charged on the revenues of the Federation, or for increasing the amount of any such expenditure, shall not be introduced or moved except on the recommendation of the Governor-General, and a Bill making such provision shall not be introduced in the Council of State.

Under the 1935 Act, there was no provision for a Speaker's certificate regarding a Financial Bill. Section 38(1) authorized each House to make Rules regulating its procedure and for the conduct of its business, subject to the provisions of the Act.

A Financial Bill could be introduced only "on the recommendation of the Governor-General". Section 41 provided a general immunity from judicial review on the "ground of any alleged irregularity of procedure":

41(1). The validity of any proceedings in the Federal Legislature shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or other member of the Legislature in whom powers are vested by or under this Act for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

The Constituent Assembly evidently had these legislative precedents relating to Money Bills which it would have considered while formulating its drafts.

513. While the proceedings of the Constituent Assembly were in motion, Sir B.N. Rau, as its constitutional advisor, prepared a memorandum of the Draft Constitution for the Union Constitution Committee. It envisaged a Parliament of the Union consisting of the President and two Houses--the Senate and the House of Representatives.[129] One of the proposals discussed in the meetings of the Union Constitution Committee was that "Money Bills would originate in the House of the People and the power of the other House would be limited to making suggestions for amendment, which the House of the People could accept or reject".[207] B Shiva Rao has recorded what transpired during the course of the proceedings of the Constituent Assembly:

The Draft also included provisions regarding legislative procedure, procedure in financial matters and general procedure for the conduct of business. No Bill could be submitted for the President's assent unless it had been passed in identical form by both Houses. Except in the case of Money Bills, both Houses enjoyed equal powers; and difference between the two Houses were to be settled by a majority vote in a joint sitting of both Houses convened by the President... Money Bills were defined in the Draft as comprising Bills proposing the imposition or increase of any tax, regulating the borrowing of money by the Government of India or the giving of financial guarantees, or declaring any item of expenditure as "charged" on the revenues, i.e. placing it outside the vote of the House of the People. The general principle approved by the Constituent Assembly was that financial control over the executive would' be-exercised by the House of the People. Accordingly the Draft provided that Money Bills could originate only in that House. The powers of the Council of States in the case of Money Bills were restricted to making suggestions for amendment. If these suggestions were, not accepted by the House of the People, or if the Council of States did not return a Bill within thirty days with its suggestions for amendment, the Bill would be 'deemed to have been' passed by both Houses in the form in which it was passed' by the House of the People" and submitted to the President for his assent'.[130]

514. The draft prepared by the Constitutional Advisor provided a definition of a Money Bill, which was inspired by Section 37 of the Government of India Act 1935, Section 53 of the Commonwealth of Australia Constitution Act 1900[131] and Article 22 of the Constitution of Ireland 1937.[132] Article 75 of this draft of the Constitution provided that "if any question arises whether a Bill is a 'money bill' or not, the decision of the Speaker of the House of the People thereon shall be final."[207] Neither Section 37 of the Government of India Act 1935 nor Section 53 of the Commonwealth of Australia Constitution Act 1900 has a similar provision which accords legal finality to the decision of the Speaker. The draft provision was similar to Article 22 of the Constitution of Ireland 1937, which provides:

1. **The Chairman of Dail Eireann[133] shall certify any Bill which, in his opinion, is a Money Bill to be a Money Bill, and his certificate shall, subject to the subsequent provisions of this section, be final and conclusive.**

2. Seanad Eireann[134], by a resolution, passed at a sitting at which not less than thirty members are present, may request the President to refer the question whether the Bill is or is not a Money Bill to a Committee of Privileges.

3. If the President after consultation with the Council of State decides to accede to the request he shall appoint a Committee of Privileges consisting of an equal number of members of Dail Eireann

and of Seanad Eireann and a Chairman who shall be a Judge of the Supreme Court: these appointments shall be made after consultation with the Council of State. In the case of an equality of votes but not otherwise the Chairman shall be entitled to vote.

4. The President shall refer the question to the Committee of Privileges so appointed and the Committee shall report its decision thereon to the President within twenty-one days after the day on which the Bill was sent to Seanad Eireann.

5. The decision of the Committee shall be final and conclusive.

6. If the President after consultation with the Council of State decides not to accede to the request of Seanad Eireann, or if the Committee of Privileges fails to report within the time hereinbefore specified the certificate of the Chairman of Dail Eireann shall stand confirmed.

515. The draft prepared by the Advisor to the Constituent Assembly did not adopt the above provision in its entirety. It adopted the part on the finality of the certification of the Speaker on whether a Bill is a Money Bill. The Irish model of dispute resolution, which provided for a mechanism to review the Speaker's certification, was not adopted.

Subsequently, in its report submitted to the President of the Constituent Assembly on 5 December 1947, the Expert Committee on Financial Provisions suggested an amendment to the draft provision, to the effect that:

When a Money Bill is sent from the Lower House to the Upper, a certificate of the Speaker of the Lower House saying that it is a Money Bill should be attached to, or endorsed on, the bill and a provision to that effect should be made in the Constitution on the lines of the corresponding provision in the Parliament Act, 1911. **This will prevent controversies about the matter outside the Lower House.**[135]

Certification of any Bill by the Speaker of the Lower House as a Money Bill, was envisaged for procedural simplicity to avoid causing confusion in the Upper House of Parliament.

516. The final provision which has assumed the form of Article 110 of the Constitution, does not contain the exact language used in the Act of 1911. The 1911 Act of the British Parliament consciously excluded judicial review of the certificate of the Speaker of the House of Commons. The intention of the British Parliament is clear from the specific language used in Section 3 of the Act. Section 3 accords finality to the decision of the Speaker by providing that any certificate of the Speaker of the House of Commons "shall be conclusive for all purposes, and shall not be questioned in any court of law". The certification of the Speaker is both conclusive and immune from judicial review. The framers of the Indian Constitution did not adopt this language. Rather, they chose to adopt the phrase "shall be final". The phrase used in the Act of 1911 expressly excluded courts from exercising their power of judicial review over the decision of the Speaker of the House of Commons. This language was used in the 1911 Act to put an end to the constitutional skirmishes experienced by the House of Lords and the House of Commons in Britain for more than five hundred years, leading to the enactment of the 1911 Act.[136] The deviation from incorporating the language, used in the 1911 Act, into the Indian Constitution is reflective of the

intention of our Constitution makers that they did not want to confer the same status on the power assigned to the Speaker of the Lok Sabha, as is provided to the Speaker of the House of Commons. Had their intention been otherwise, they would have used the same language as that provided under the 1911 Act. Finality would operate as between the Houses of Parliament. It did not exclude judicial review by a constitutional Court.

517. The British legal system adopts the principle of parliamentary sovereignty. That is not so in India. Ours is a system founded on the supremacy of the Constitution. Judicial review is an essential component of constitutional supremacy. A Constitution Bench of this Court in **Kalpana Mehta** v. **Union of India** MANU/SC/0519/2018 : (2018) 7 SCC 1 has, while noticing this distinction, held:

...The fundamental difference between the two systems lies in the fact that parliamentary sovereignty in the Westminster form of government in the UK has given way, in the Indian Constitution, to constitutional supremacy. Constitutional supremacy mandates that every institution of governance is subject to the norms embodied in the constitutional text. The Constitution does not allow for the existence of absolute power in the institutions which it creates. Judicial review as a part of the basic features of the Constitution is intended to ensure that every institution acts within its bounds and limits.
137

518. The purpose of judicial review is to ensure that constitutional principles prevail in interpretation and governance. Institutions created by the Constitution are subject to its norms. No constitutional institution wields absolute power. No immunity has been attached to the certificate of the Speaker of the Lok Sabha from judicial review, for this reason. The Constitution makers have envisaged a role for the judiciary as the expounder of the Constitution. The provisions relating to the judiciary, particularly those regarding the power of judicial review, were framed, as Granville Austin observed, with "idealism"[138]. Courts of the country are expected to function as guardians of the Constitution and its values. Constitutional courts have been entrusted with the duty to scrutinize the exercise of power by public functionaries under the Constitution. No individual holding an institutional office created by the Constitution can act contrary to constitutional parameters. Judicial review protects the principles and the spirit of the Constitution. Judicial review is intended as a check against arbitrary conduct of individuals holding constitutional posts. It holds public functionaries accountable to constitutional duties. If our Constitution has to survive the vicissitudes of political aggrandisement and to face up to the prevailing cynicism about all constitutional institutions, notions of power and authority must give way to duties and compliance with the Rule of law. Constitutional institutions cannot be seen as focal points for the accumulation of power and privilege. They are held in trust by all those who occupy them for the moment. The impermanence of power is a sombre reflection for those who occupy constitutional offices. The Constitution does not contemplate a debasement of the institutions which it creates. The office of the Speaker of the House of People, can be no exception. The decision of the Speaker of the Lok Sabha in certifying a Bill as a Money Bill is liable to be tested upon the touchstone of its compliance with constitutional principles. Nor can such a decision of the Speaker take leave of constitutional morality.

519. Our Constitution does not provide absolute power to any institution. It sets the limits for each institution. Our constitutional scheme envisages a system of checks and balances. The power of the Speaker of the Lok Sabha, to decide whether a Bill is a Money Bill, cannot be untrammelled. The contention that the decision of Speaker is immune from judicial review and cannot be questioned, is contrary to the entire scheme of the Constitution, which is premised on transparency, non-arbitrariness and fairness. The phrase "shall be final" used in Article 110(3) has been adopted, as mentioned earlier, from Article 22 of the Irish Constitution. The provisions of Article 22 of the Irish Constitution provide a mechanism for review of the certificate issued by the Speaker. Recourse is provided under the Irish Constitution by which the members of the Upper House of the Irish Parliament can request the President of Ireland to refer the question of whether a Bill is a Money Bill, to a Committee of Privileges. If the President refers the question to this Committee, the decision of the Committee stands "final and conclusive". The members of the Constituent Assembly did not adopt this mechanism. Absence of this mechanism does not mean that the decision of the Speaker of the Lok Sabha cannot be subject to checks and balances, of which judicial review is an indispensable facet. The Speaker has to act within the domain, which the Constitution accords to the office of the Speaker. The power conferred on the Speaker of the Lok Sabha cannot be exercised arbitrarily, for it could damage the scheme of the Constitution. Judicial review is the ultimate remedy to ensure that the Speaker does not act beyond constitutional entrustment.

520. The scope of the phrase "shall be final" can also be understood by looking at the proceedings of the Constituent Assembly. The constitutional foundation of Article 110(4) is based upon a suggestion of the Expert Committee on Financial Provisions that when a Money Bill is transmitted from the Lower House to the Upper House, it should be endorsed by the Speaker's certificate, so as to prevent any controversy "about the matter outside the Lower House". Therefore, the finality provided to the decision of the Speaker as to whether a Bill is a Money Bill or not, is aimed at avoiding any controversy on the issue in the Rajya Sabha and before the President. Had it been intended to prevent the court from adjudicating upon the validity of the decision of the Speaker, the language of the Article would have made it explicit. Where a constitutional provision evinces a specific intent to exclude judicial review, clear words to that effect are used. Articles 243O(a)[139], 243ZG(a)[140] and 329(a) specifically use the phrase-"shall not be called in question in any court". For instance, Article 329(a) provides thus:

Notwithstanding anything in this Constitution --

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made Under Article 327 or Article 328, **shall not be called in question in any court.**

521. In **N.P. Ponnuswami** v. **Returning Officer, Namakkal Constituency, Namakkal, Salem District** MANU/SC/0049/1952 : 1952 SCR 218, a six judge Bench of this Court, while construing the provisions of Article 329, compared it to the preceding Articles, and held thus:

5. ...A notable difference in the language used in Articles 327 and 328 on the one hand, and Article 329 on the other, is that while the first two articles begin with the words "subject to the provisions of this Constitution", the last Article begins with the words "notwithstanding anything in this

Constitution". It was conceded at the Bar that the effect of this difference in language is that whereas any law made by Parliament Under Article 327, or by the State Legislature Under Article 328, cannot exclude the jurisdiction of the High Court Under Article 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Article 329.
141

522. In order to understand the scope of the finality attached to the Speaker's decision Under Article 110(3), it would be useful to analyse how in the case of other constitutional provisions, the words "shall be final" have been interpreted by this Court. Articles 217(3)[142], 311(3)[143] and paragraph 6(1) of the Tenth Schedule[144] contain the phrase "shall be final". In **Union of India** v. **Jyoti Prakash Mitter** MANU/SC/0061/1971 : (1971) 1 SCC 396, this Court held that it can examine the legality of an order passed by the President on the determination of the age of a Judge of the High Court Under Article 217 (3) of the Constitution. The six judge Bench held:

32. ...The President acting Under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the Rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence...Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion.[145]

The President was held to perform a judicial function in making a determination Under Article 217(3).

The question of finality Under Article 311(3) was dealt with by a Constitution Bench of this Court in **Union of India** v. **Tulsiram Patel** MANU/SC/0373/1985 : (1985) 3 SCC 398. The Court held that the finality given to the decision of the disciplinary authority by Article 311(3) that it is not reasonably practicable to hold an enquiry, is not binding upon the Court so far as its power of judicial review is concerned.

The constitutional validity of the provisions contained in the Tenth Schedule to the Constitution came up for consideration before a Constitution Bench of this Court in **Kihoto Hollohan** v. **Zachillhu** MANU/SC/0753/1992 : (1992) Supp (2) SCC 651. The Constitution Bench held that the power vested in the Speaker or the Chairman under the Schedule, is a judicial power, and was amenable to judicial review:

111. ...That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen is valid. **But the concept of statutory finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review Under Articles 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.**
146

The Bench had also clarified that:

101. ...The principle that is applied by the courts is that in spite of a finality Clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations....[147]

Undoubtedly, the finality clauses contained in Article 217(3), 311(3) and in paragraph 6(1) of the Tenth Schedule were held not to exclude judicial review since the essential nature of the power is judicial. A constitutional function is entrusted to the Speaker to certify a Bill as a Money Bill Under Article 110(3), to which the attributes of a judicial power do not apply. Indeed, the power which is entrusted to the Speaker Under Article 110(3) is integral to the legislative process. But, the fact that the authority which a constitutional functionary exercises is not of a judicial character, is not sufficient to lead to the conclusion that a finality Clause governing the exercise of that power makes it immune from judicial review. Where the entrustment of the power is subject to the due fulfilment of constitutional norms, the exercise of jurisdiction is amenable to judicial review, to the extent necessary to determine whether there has been a violation of a constitutional mandate. The nature and extent of judicial review would undoubtedly vary from a situation where finality has been attached to a judicial, administrative or quasi-judicial power. However, a Clause on finality notwithstanding, it is open to the constitutional court to determine as to whether there has been a violation of a constitutional mandate as a result of which the decision suffers from a constitutional infirmity. The entrustment of a constitutional function to the Speaker Under Article 110(3) to certify a Bill as a Money Bill is premised on the fulfilment of the norms stipulated in Article 110(1). A certification can be questioned on the ground that the Bill did not fulfil the conditions stipulated in Article 110(1) to be designated as a Money Bill. If that is established, the certification would be contrary to constitutional mandate. Whether that is so can be judicially scrutinized.

523. The notion that an entrustment of power is absolute has a colonial origin. Law under a colonial regime was not just an instrument to maintain order but was a source of subordination. Recognition of the vesting of absolute authority was but a reflection of the premise that those who ruled could not be questioned. Those who were ruled had to accept the authority of the ruler. Nothing can be as divorced from constitutional principle as these normative foundations of colonial law and history. The notion that power is absolute is inconsistent with a Constitution which subjects the entrustment of functions to public functionaries to the restraints which accompany it. Our law must recognise the need to liberate its founding principles from its colonial past. The Court should not readily accept the notion that the authority vested in a constitutional functionary is immune from judicial review. In the absence of a specific exclusion of judicial review, none can be implied. Moreover, any exclusion of judicial review must be tested on the anvil of its functionality. A specific exclusion of judicial review, in order to be valid, must serve a constitutional function. The test of functionality must relate to whether an exclusion of review is necessary to fulfil the overarching need for the proper discharge of a constitutional role. Exclusion of review, to be valid, must fulfil the requirement of a constitutional necessity. Its purpose cannot be to shield an excess

of power from being questioned before the Court. Nor is the fact that a power is vested in a high functionary a ground to shield it from scrutiny. The ultimate test is whether the exclusion of judicial review is express and specific and, whether such an exclusion is designed to achieve a constitutional purpose that meets the test of functionality, assessed in terms of a constitutional necessity. In the seventh decade of the republic, our interpretation of the Constitution must subserve the need to liberate it from its colonial detritus.

This approach was adopted by a seven judge Bench of this Court in **Krishna Kumar Singh** v. **State of Bihar** MANU/SC/0009/2017 : (2017) 3 SCC 1. While interpreting the ordinance making power of the Governor, the Court held that the interpretation of the Constitution must be "carefully structured" to ensure that the power remains what the framers of our Constitution intended it to be. The Bench held:

91. ...The issue which needs elaboration is whether an ordinance which by its very nature has a limited life can bring about consequences for the future (in terms of the creation of rights, privileges, liabilities and obligations) which will enure beyond the life of the ordinance. **In deciding this issue, the court must adopt an interpretation which furthers the basic constitutional premise of legislative control over ordinances. The preservation of this constitutional value is necessary for parliamentary democracy to survive on the sure foundation of the Rule of law and collective responsibility of the executive to the legislature. The silences of the Constitution must be imbued with substantive content by infusing them with a meaning which enhances the Rule of law.** To attribute to the executive as an incident of the power to frame ordinances, an unrestricted ability to create binding effects for posterity would set a dangerous precedent in a parliamentary democracy. The court's interpretation of the power to frame ordinances, which originates in the executive arm of government, cannot be oblivious to the basic notion that the primary form of law making power is through the legislature....
148

The ordinance making power was held to be an exceptional power to meet a "constitutional necessity".

524. The marginal note to Article 122 is: "Courts not to inquire into proceedings of Parliament". The Article reads thus:

122. (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

This Court must deal with the question whether the Speaker's decision Under Article 110(3) is protected by Article 122. Article 122 prohibits courts from examining the validity of any proceedings in Parliament on the ground that there was "any alleged irregularity of procedure". The content of the expression "procedure" referred to in the Article, is indicated in Article 118 of

the Constitution. The marginal note to Article 118 provides for "Rules of procedure". Article 118 provides as follows:

118. (1) Each House of Parliament may make **rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.**

(2) Until Rules are made under Clause (1), the Rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make Rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by Rules of procedure made under Clause (3), shall preside.

525. Articles 118 to 122 are covered under the rubric of the general heading-"Procedure Generally". Article 118 provides for Rules to be made by each House of Parliament for regulating the procedure and conduct of its business. The Article subjects these contemplated Rules to the provisions of the Constitution. The provision does not indicate that these Rules will stand above the Constitution. They are, on the contrary, subject to the Constitution. The Rules framed Under Article 118, are procedural in nature. The procedure contemplated Under Articles 118 to 122 is distinct from substantive constitutional requirements. The obligation placed on the Speaker of the Lok Sabha to certify whether a Bill is a Money Bill is not a mere matter of "procedure" contemplated Under Article 122. It is a constitutional requirement, which has to be fulfilled according to the norms set out in Article 110. Article 122 will not save the action of the Speaker, if it is contrary to constitutional norms provided Under Article 110. The Court, in the exercise of its power of judicial review, can adjudicate upon the validity of the action of the Speaker if it causes constitutional infirmities. Article 122 does not envisage exemption from judicial review, if there has been a constitutional infirmity. The Constitution does not endorse a complete prohibition of judicial review Under Article 122. It is only limited to an "irregularity of procedure".

526. This Court has on several occasions restricted the scope of the bar provided Under Article 122 (and under corresponding Article 212 for the States) and has distinguished an "irregularity of procedure" from "illegality". In **Special Reference No. 1 of 1964** MANU/SC/0048/1964 : AIR 1965 SC 745, a seven judge Bench of this Court brought home that distinction in the context of Article 212(1) with the following observations:

61. ...Article 212(2) confers immunity on the officers and members of the Legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. Article 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the

legislative chamber if his case is that the said proceedings suffer **not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular....**

In **Ramdas Athawale** v. **Union of India** MANU/SC/0212/2010 : (2010) 4 SCC 1 ("Ramdas Athawale"), a Constitution Bench of this Court extended the above formulation to Article 122 of the Constitution:

36. This Court Under Article 143, *Constitution of India, In re* (*Special Reference No. 1 of 1964*) [MANU/SC/0048/1964 : AIR 1965 SC 745: (1965) 1 SCR 413] (also known as Keshav Singh case [MANU/SC/0048/1964 : AIR 1965 SC 745: (1965) 1 SCR 413]) while construing Article 212(1) observed that it may be possible for a citizen to call in question in the appropriate Court of law, the validity of any proceedings inside the Legislature if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinized in a Court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular. The same principle would equally be applicable in the matter of interpretation of Article 122 of the Constitution.
149

A Constitution Bench of this Court reaffirmed the distinction between a "procedural irregularity" and an "illegality" in **Raja Ram Pal** v. **Hon'ble Speaker, Lok Sabha** MANU/SC/0241/2007 : (2007) 3 SCC 184 ("Raja Ram Pal"). The Bench held that courts are not prohibited from exercising their power of judicial review to examine any illegality or unconstitutionality in the procedure of Parliament:

386. ...Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text. Applying the principle of "expressio unius est exclusio alterius" (whatever has not been included has by implication been excluded), **it is plain and clear that prohibition against examination on the touchstone of "irregularity of procedure" does not make taboo judicial review on findings of illegality or unconstitutionality...**[150]

398. ... the Court will decline to interfere if the grievance brought before it is restricted to allegations of "irregularity of procedure". But in case gross illegality or violation of constitutional provisions is shown, the judicial review will not be inhibited in any manner by Article 122, or for that matter by Article 105.
151

The Court distinguished the constitutional background in India from that of England, holding that while England has adopted a regime of exclusive parliamentary dominance, India is governed by a system of checks and balances provided in the Constitution:

366. The touchstone upon which Parliamentary actions within the four-walls of the Legislature were examined was both the constitutional as well as substantive law. **The proceedings which may be tainted on account of substantive illegality or unconstitutionality, as opposed to those suffering from mere irregularity thus cannot be held protected from judicial scrutiny by Article 122(1)** in as much as the broad principle laid down in Bradlaugh [(1884) 12 QBD 271] acknowledging **exclusive cognizance of the Legislature in England has no application to the system of governance provided by our Constitution wherein no organ is sovereign and each organ is amenable to constitutional checks and controls, in which scheme of things, this Court is entrusted with the duty to be watchdog of and guarantor of the Constitution.**[152]

The principle which emerges from these decisions is that the decision of the Speaker is amenable to judicial review, if it suffers from illegality or from a violation of constitutional provisions.

527. The Attorney General advanced the submission that this Court has on previous occasions refrained from scrutinizing the decision of the Speaker on whether a Bill is a Money Bill. Those decisions require discussion for adjudicating the present case. In **Mangalore Ganesh Beedi Works** v. **State of Mysore** MANU/SC/0347/1962 : 1963 Supp (1) SCR 275 (**"Mangalore Beedi"**), a new system of coinage was introduced by amending the Indian Coinage Act. Under the new system, while one rupee was divided into a hundred naya paisas, the old legal tender of sixteen annas or sixty four pice remained legal tender equivalent to one hundred naya paisas. The Appellant, which was a firm registered under the Mysore Sales Tax Act, had to pay an additional amount as sales tax due to change in the currency. It was argued that by the substitution of 2 naya paisas (the new currency) in place of 3 pies (the old currency) as tax, there was a change in the tax imposed by the Mysore Sales Tax Act, which could only have been done by passing a Money Bill Under Articles 198, 199 and 207 of the Constitution and since no Money Bill was introduced or passed for the enhancement of the tax, the tax was illegal and invalid. The contention, therefore, was that the procedure envisaged for passing a Money Bill ought to have been, but was not, followed. The Constitution Bench dismissed the appeal, holding that the substitution of a new coinage i.e. naya paisas in place of annas, pice and pies did not amount to an enhancement of tax. It was held to be merely a substitution of one coinage by another of equivalent value. This Court held that the levy of tax in terms of naya paisas was not unconstitutional nor was it a taxing measure but it dealt merely with the conversion of the old coinage into new coinage. Having held this, the Bench also remarked:

5. ...Even assuming that it is a taxing measure its validity cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202 of the Constitution. Article 212 prohibits the validity of any proceedings in a legislature of a State from being called in question on the ground of any alleged irregularity of procedure and Article 255 lays down that requirements as to recommendation and previous sanction are to be regarded as matters of procedure only...

The Court having found that a substitution of coinage did not result in an enhancement of tax, Article 199 was not attracted. The legislative measure was not a Money Bill. Once that was the case, the subsequent observations (extracted above) proceeded on an assumption: that even if it were a taxing measure, it would be saved by Article 255. The court having held that no enhancement of tax was involved in a mere substitution of coinage, the alternative hypothesis is

not a part of the ratio and was unnecessary. The ratio was that substitution of a new coinage did not amount to a Money Bill. The decision of the Constitution Bench in **Mangalore Beedi** dealt with the contention that a Money Bill was unconstitutionally passed as an ordinary Bill. The Bench held that substitution of coinage did not make it a Money Bill. The decision contains a general observation regarding the immunity of proceedings in a state legislature. A scholarly article[153] has correctly referred to the general remarks made in **Mangalore Beedi** as unnecessary and not the ratio since the issue was already decided on merits, by holding that the substitution of coinage was not an enhancement of tax.

528. A three judge Bench of this Court in **Mohd. Saeed Siddiqui** v. **State of Uttar Pradesh** MANU/SC/0350/2014 : (2014) 11 SCC 415 (**"Mohd. Saeed Siddiqui"**) dealt with the constitutional validity of the Uttar Pradesh Lokayukta and Up-Lokayuktas (Amendment) Act, 2012. Section 5(1) of the unamended Act provided a term of six years for the Lokayukta. Section 5(3) provided that on ceasing to hold office, the Lokayukta or Up-Lokayukta shall be ineligible for further appointment. The new State government, which came in office, introduced a Bill which was passed as the Uttar Pradesh Lokayukta and Up-Lokayuktas (Amendment) Act, 2012, by which the term of the U.P. Lokayukta and Up-Lokayukta was extended from six years to eight years or till the successor enters upon office. The Amendment Act also limited the ineligibility of the Lokayuktas or Up-Lokayuktas for further appointment under the Government of Uttar Pradesh. The Amendment Act was challenged on the ground that it was passed as a Money Bill when, on the face of it, it could never have been called a Money Bill Under Article 199 of the Constitution. The Bench rejected the petition holding that the question "whether a Bill is a Money Bill or not can be raised only in the State Legislative Assembly by a member thereof when the Bill is pending in the State Legislature and before it becomes an Act". It relied upon the observations made in **Mangalore Beedi**, to formulate following principles:

(i) the validity of an Act cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202; (ii) Article 212 prohibits the validity of any proceedings in a Legislature of a State from being called in question on the ground of any alleged irregularity of procedure; and (iii) Article 255 lays down that the requirements as to recommendation and previous sanction are to be regarded as a matter of procedure only. It is further held that the validity of the proceedings inside the Legislature of a State cannot be called in question on the allegation that the procedure laid down by the law has not been strictly followed and that no Court can go into those questions which are within the special jurisdiction of the Legislature itself, which has the power to conduct its own business.

The judgment also made a reference to the seven judge Bench decision in **Pandit MSM Sharma** v. **Dr Shree Krishna Sinha** MANU/SC/0020/1960 : AIR 1960 SC 1186 ("MSM Sharma").

The "proceedings of the Legislature" were held to include "everything said or done in either House" in the transaction of parliamentary business. Relying upon Articles 212 and 255, the Bench accorded finality to the decision of the Speaker:

43. As discussed above, the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. Further, as noted earlier, Article

255 also shows that under the Constitution the matters of procedure do not render invalid an Act to which assent has been given to by the President or the Governor, as the case may be. Inasmuch as the Bill in question was a Money Bill, the contrary contention by the Petitioner against the passing of the said Bill by the Legislative Assembly alone is unacceptable.[154]

Making a passing reference to the decision of the Constitution Bench in **Raja Ram Pal**, the Bench opined that even if it is established that there was some infirmity in the procedure in the enactment of the Amendment Act, it will be protected by Article 255 of the Constitution.

529. Subsequently, a two judge Bench of this Court in **Yogendra Kumar Jaiswal** v. **State of Bihar** MANU/SC/1441/2015 : (2016) 3 SCC 183 (**"Yogendra Kumar"**) dealt with the constitutional validity of the Orissa Special Courts Act, 2006. The law was enacted by the State legislature, keeping in view the accumulation of properties disproportionate to their known sources of income by persons who have held or hold high political and public offices. The legislature provided special courts for speedy trial of certain classes of offences and for confiscation of properties. The Appellants, who were public servants and facing criminal cases, challenged the Act on the ground that it was introduced in the State Assembly as a Money Bill though it did not have any characteristics of a Money Bill Under Article 199 of the Constitution. The Court dismissed the petitions, following the decision in **Mohd. Saeed Siddiqui**. It held that:

43. In our considered opinion, the authorities cited by the learned Counsel for the Appellants do not render much assistance, for the introduction of a bill, as has been held in Mohd. Saeed Siddiqui (supra), comes within the concept of "irregularity" and it does come with the realm of substantiality. What has been held in the Special Reference No. 1 of 1964 (supra) has to be appositely understood. The factual matrix therein was totally different than the case at hand as we find that the present controversy is wholly covered by the pronouncement in Mohd. Saeed Siddiqui (supra) and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned Counsel for the Appellants.
[155]

Special Reference No. 1 of 1964 was distinguished in **Yogendra Kumar**. Article 255 provides:

No Act of Parliament or of the Legislature of a State, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given--

(a) where the recommendation required was that of the Governor, either by the Governor or by the President;

(b) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;

(c) where the recommendation or previous sanction required was that of the President, by the President.

530. Article 255 speaks about a situation where a "recommendation or previous sanction" is required to be given by the Governor, Rajpramukh or, as the case may be, by the President. The absence of a recommendation or previous sanction will not invalidate the law, where the Act has received the assent of the Governor or the President. Subsequent assent, in other words, cures the absence of recommendation or sanction. Article 255 is in no way related to the decision or certificate of the Speaker of the Lok Sabha or of the State Legislative Assembly on whether a Bill is a Money Bill. Moreover, Article 255 does not apply to Articles 110 for the simple reason that the latter does not embody either a previous sanction or recommendation. Article 255 does not envisage superseding the role of the Upper House of Parliament or the State Legislature. **Mohd. Saeed Siddiqui** proceeds on an erroneous understanding of Article 255. **Mohd. Saeed Siddiqui** was followed in **Yogendra Kumar**. These two judgments cite the same three articles -- Articles 199,[156] 212,[157] and 255, to refrain from questioning the conduct of the Speaker, without noticing that Article 255 does not apply there.

Further, **MSM Sharma**, which was referred in **Mohd. Saeed Siddiqui** was discussed in the **Special Reference** to hold that the validity of any proceedings in a legislative chamber can be questioned if such proceedings suffer from illegality. The consistent thread which emerges from the judgments in **Special Reference, Ramdas Athawale** and **Raja Ram Pal** is that the validity of proceedings in Parliament or a State Legislature can be subject to judicial review on the ground that there is an illegality or a constitutional violation. Moreover, the judgment in **Yogendra Kumar** followed **Mohd. Saeed Siddiqui. Siddiqui** was based on an erroneous understanding of **Mangalore Beedi**. The decision of the Speaker Under Articles 110(3) and 199(3) is not immune from judicial review.

The three judge Bench decision in **Mohd. Saeed Siddiqui** and the two judge Bench decision in **Yogendra Kumar** are overruled.

531. Barring judicial review of the Lok Sabha Speaker's decision would render a certification of a Bill as a Money Bill immune from scrutiny, even where the Bill does not, objectively speaking, deal only with the provisions set out in Article 110(1). The decision of the Speaker of the Lok Sabha whether a Bill is a Money Bill impacts directly upon the constitutional role which will be discharged by the Rajya Sabha in relation to it. The Lok Sabha alone does not represent Parliament. The Indian Parliament is bicameral. The Constitution envisages a special role for the Rajya Sabha. In order to truly understand the relevance of the Rajya Sabha in the Indian context, an analysis of major bicameral systems is necessary, as an exercise in comparative law.

532. Bicameral legislatures are not unique to either the Presidential or Parliamentary forms of government. Democracies with a Presidential form of government have adopted bicameral legislatures, the United States being the leading example. Among Parliamentary democracies, India and the UK have adopted bicameral legislatures. They are predominant in federal countries. Where second chambers exist, they vary in terms of powers and composition. Together, their powers and composition shape the impact that they have on legislation.[158] The phenomenon of the bicameral system has two different historic origins. It was first established in England, and later in the US.[159] Both these models have been replicated across the globe.

533. Britain developed some of the earliest institutional practices that came to be emulated through the Western world. A separate powerful legislature was initiated when King John in 1215 gave a written commitment to seek the consent of Parliament to levy taxes to which he was entitled by feudal prerogative. Over the next five centuries, the British Parliament was transformed from an institution summoned at the desire of the ruler to one which met on regular occasions to develop policy inclinations independent of the wishes of the ruler.[160] In the fourteenth century, Parliament was divided into two chambers: one chamber (the House of Lords) in which debate took place with the feudal lords and a second chamber (the House of Commons) where the citizens were represented.[163] The upper chamber of the British Parliament, the Lords, comprised of hereditary peers (whose number varied with the discretion of the King to create them). The lower chamber, the Commons, represented individuals satisfying a substantial property requirement. The two chambers in Britain reflected a kind of class division. Before the beginning of the eighteenth century, several factors such as civil war, regicide, experimentation with a republic, and the restoration of the titular monarch caused power to be permanently shifted from the King to Parliament.[161]

Around the same time, the British colonies in North America were crafting institutions of their own. Colonial legislatures were being conceptualized on similar lines, with some exceptions, to British Parliament. The Constitution for the newly formed United States adopted a bicameral system.[162] The legislature in the United States was innovative, for it created a bicameral arrangement that replaced a class basis (as was in existence in Britain) for chamber representation with a modified federal basis. The Constitutional Convention of 1787 had provided for a lower chamber, a directly-elected House of Representatives, where each voter had an equal vote in elections, and an upper chamber, a Senate, to which each state could send two members, elected indirectly by the state parliaments. The Convention was a compromise between those who wanted a parliament in which the states, irrespective of their population size, would have an equal voice, and those who wanted a Parliament for the newly formed federal nation where the participating states were represented in proportion to the size of their population. A system with two differently composed chambers was ultimately chosen to be the only way out of the deadlock.[163] The rationale for a bicameral legislature comprising of a directly elected Lower House and an indirectly elected Upper House was best articulated by James Madison, in the *Federalist Papers:*

First... a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient...

Second. The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions...

Third. Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a

variety of important errors in the exercise of their legislative trust... A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained...

Fourth. The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government...[164]

Madison conceptualized that the second chamber would fulfil significant roles:

(a) it would provide the certainty that the government will not neglect its obligations to its constituents, as the chamber provides an extra check on it;

(b) it can curb the actions of the other chamber if it gives into the urge to follow 'sudden and pronounced sentimental reactions'; (c) it can meet the need for expertise in the framing of laws and the interests of the country, and thus help to avoid legislative mistakes; and (d) it can be a factor for stability that ensures continuity in the administration of the country.

534. Bicameralism, in both systems, emerged as a development associated with the changing conceptions of the state. The literature on bicameralism has highlighted the importance of having a second chamber in the legislature of a state. William Riker has emphasized that a bicameral structure acts as a control over the tyranny of a majority.[165] Levmore similarly echoes this thought:

At the very least, if the two chambers consider an issue simultaneously, one chamber's agenda setter will be at the mercy of the order of consideration in the second chamber. Bicameralism can thus be understood as an antidote to the manipulative power of the convenor, or agenda setter, when faced with cycling preferences.[166]

A study[167] commissioned by the Dutch Ministry of the Interior and Kingdom Relations analysed the design of the bicameral system in several countries. The study consulted constitutional texts and literature on the evolution of bicameralism and came to the finding that:

Historically, the creation of bicameral systems, both in the federal and the aristocratic variant, always was a concession to those (states or estates) who risked losing power in the new setting. In emerging democracies, and up until the present day, the choice of a bicameral system appears as a means of dispelling fear about the consequences of democratisation and reconciling established elites with the democratisation process. In developed democracies, the rationale of a bicameral system is now sought primarily in the possibility of combining different systems of representation (particularly in federal systems) and in the possibility of reconsideration by a different chamber in the legislative, making it possible to avoid making mistakes and enhancing both the quality and the stability of the legislation. In majority systems of the Westminster model-where the government is part of the lower house and it tends to have a stable majority-a senate moreover is sometimes ascribed the role of giving more independent input into the parliamentary work, less determined by party discipline, and of paying more attention to the interests of minorities. A bicameral system is, for that reason, sometimes recommended as a means to protect minorities against a tyranny of the majority... Finally, a bicameral system may also increase efficiency

because it is possible to divide the legislative workload between two chambers. That can be the case when the two chambers absorb a sort of division of labour (e.g. an emphasis on technical legal quality in the senate). In many bicameral systems, moreover, it can be decided to put bills to either house, and the senate also has a right of initiative.[168]

535. The importance of the second chamber increases when there is no single party Rule in Parliament. Governments that lack Upper-House majority support find it difficult to pass Bills.[169] Elliot Bulmer notes pertinently that in a democracy, a second chamber addresses the inability of the elected chamber to adequately represent a diverse society. In this view, a second chamber may enable a "more nuanced and complete representation of society, with greater representation for territorial, communal or other minorities".[170]

While discussing the advantage of second chambers in republican legislatures, Rogers observes that the institution of a second chamber generates legislative advantage only "if the chambers differ significantly from one another".[171] Quoting from the work of various scholars, he observes:

Hammond and Miller find that "The stability-inducing properties of bicameralism are... dependent on the existence of distinctly different viewpoints in the two chambers"... Buchanan and Tullock conclude similarly that, "unless the bases for representation are significantly different in the two houses, there would seem to be little excuse for the two-house system"... Because two "congruent" chambers would ostensibly not significantly affect policy outcomes, Lijphart described bicameral systems with congruent chambers as "weak" forms of bicameralism...[207]

536. Bicameralism, when entrenched as a principle in a constitutional democracy, acts as a check against the abuse of power by constitutional means or its use in an oppressive manner. As a subset of the constitutional principle of division of power, bicameralism is mainly a safeguard against the abuse of the constitutional and political process. A bicameral national parliament can hold the government accountable and can check or restrain the misuse of government power. Among its other roles is that of representing local state units, acting as a body of expert review, and providing representation for diverse socio-economic interests or ethno-cultural minorities.

While deliberating over the necessity of having a second chamber, the Constituent Assembly had the benefit of examining the constitutional history of several other nations. The constitutional advisor, B N Rau, found the issue of second chambers to be "one of the most vexing questions of political science".[172] Under colonial rule, bicameralism had already been introduced. The first bicameral legislature as the national assembly for India was established by the Government of India Act 1919. The Government of India Act, 1935 had created an Upper House in the federal legislature which consisted of members elected by the provincial legislatures as well as representatives sent by numerous princely states that were not under the direct control of the British government. The 1935 Act became the blueprint for the structure of Parliament in the new Constitution. The Rajya Sabha, as the Upper House of the Parliament, was adopted into the Constitution. The vision of the Constitution makers behind the establishment of the Upper House of Parliament has found expression in the classic work of Granville Austin:

The members of the Constituent Assembly had one predominant aim when framing the Legislative provisions of the Constitution: to create a basis for the social and political unity of the country...

The goals of the Constituent Assembly... were to bring popular opinion into the halls of government, and, by the method of bringing it there, to show Indians that although they were many peoples, they were but one nation.[173]

537. Article 80 of the Constitution deals with the composition of the Rajya Sabha. The maximum strength of this chamber is 250 members, out of which up to 238 members are elected representatives from the states and union territories. 12 members are nominated by the President among persons with a special knowledge or practical experience in literature, science, art and social service. Members representing the states are elected by the state legislatures through proportional representation by means of a single transferable vote[174]. The method of electing representatives from Union territories has been left to prescription by Parliament.[175] In a departure from the American model of equal representation for the states, the allocation of seats in the Rajya Sabha to the States and Union territories is in accordance with the division provided in the Fourth Schedule of the Constitution (read with Articles 4(1) and 80(2)). The reason behind this division of seats is "to safeguard the interests of the smaller states while at the same time ensuring the adequate representation of the larger states, so that the will of the representatives of a minority of the electorate does not prevail over that of those who represented the majority"[176]. In this sense, the Rajya Sabha has a special structure.

538. The institutional structure of the Rajya Sabha has been developed to reflect the pluralism of the nation and its diversity of language, culture, perception and interest. The Rajya Sabha was envisaged by the makers of the Constitution to ensure a wider scrutiny of legislative proposals. As a second chamber of Parliament, it acts as a check on hasty and ill-conceived legislation, providing an opportunity for scrutiny of legislative business. The role of the Rajya Sabha is intrinsic to ensuring executive accountability and to preserving a balance of power. The Upper Chamber complements the working of the Lower Chamber in many ways. The Rajya Sabha acts as an institution of balance in relation to the Lok Sabha and represents the federal structure[177] of India. Both the existence and the role of the Rajya Sabha constitute a part of the basic structure of the Constitution. The architecture of our Constitution envisions the Rajya Sabha as an institution of federal bicameralism and not just as a part of a simple bicameral legislature. Its nomenclature as the 'Council of States' rather than the 'Senate' appropriately justifies its federal importance.[178] Seervai has observed that the federal principle is dominant in our Constitution. While adverting to several of its federal features, Seervai emphasises the position of the Rajya Sabha as an integral element:

First and foremost, Parliament (the Central Legislature) is dependent upon the States, because one of its Houses, the Council of States, is elected by the Legislative Assemblies of the States. Where the ruling party, or group of parties, in the House of the People has a majority but not an overwhelming majority, the Council of States can have a very important voice in the passage of legislation other than financial Bills. Secondly, a Bill to amend the Constitution requires to be passed by each House of Parliament separately by an absolute majority in that House and by not less than two-thirds of those present and voting. Since the Council of States is indirectly elected by the State Legislatures, the State Legislatures have an important say in the amendment of the Constitution because of the requirement of special majorities in each House. Thirdly, the very important matters mentioned in the proviso to Article 368 (Amendment of the Constitution) cannot be amended unless the amendments passed by Parliament are ratified by not less than half the

number of Legislatures of the States... Fourthly, the amendment of Article 352 by the 44th Amendment gives the Council of States a most important voice in the declaration of Emergency, because a proclamation of emergency must be approved by *each House* separately by majorities required for an amendment of the Constitution... Fifthly, the executive power of the Union is vested in the President of India who is not directly elected by the people but is elected by an electoral college consisting of (a) the elected members of the Legislative Assemblies of the States and (b) the elected members of both Houses of Parliament... Directly the State Legislatures have substantial voting power in electing the President; that power is increased indirectly through the Council of States, which is elected by the Legislative Assemblies of States.[179]

539. The Rajya Sabha represents the constituent states of India. It legitimately holds itself as the guardian of the interest of the component states in a federal polity. It endeavours to remain concerned and sensitive to the aspirations of the states, thereby strengthening the country's "federal fabric" and "promotes national integration".[180] Being the federal chamber of Parliament, the Rajya Sabha enjoys some special powers, which are not even available to the Lok Sabha, under the Constitution[181]:

(i) Article 249 of the Constitution provides that Rajya Sabha may pass a resolution, by a majority of not less than two-thirds of the Members present and voting to the effect that it is necessary or expedient in the national interest that Parliament should make a law with respect to any matter enumerated in the State List. Then, Parliament is empowered to make a law on the subject specified in the resolution for the whole or any part of the territory of India. Such a resolution remains in force for a maximum period of one year but this period can be extended by one year at a time by passing a further resolution;

(ii) Under Article 312 of the Constitution, if Rajya Sabha passes a resolution by a majority of not less than two-thirds of the Members present and voting declaring that it is necessary or expedient in the national interest to create one or more All India Services common to the Union and the States, Parliament has the power to create by law such services; and

(iii) Under the Constitution, President is empowered to issue Proclamations in the event of national emergency (Article 352), in the event of failure of constitutional machinery in a State (Article 356), or in the case of financial emergency (Article 360). Normally, every such Proclamation has to be approved by both Houses of Parliament within a stipulated period. Under certain circumstances, however, Rajya Sabha enjoys special powers in this regard. If a Proclamation is issued at a time when the dissolution of the Lok Sabha takes place within the period allowed for its approval, then the Proclamation can remain effective if a resolution approving it, is passed by Rajya Sabha.

540. The Rajya Sabha is a permanent body as it is not subject to dissolution.[182] Being an indirectly elected House, it has no role in the making or unmaking of the Government and therefore it is comparatively "free from compulsions of competitive party politics".[183] As a revising chamber, the Constitution makers envisioned that it will protect the values of the Constitution, even if it is against the popular will. The Rajya Sabha is a symbol against majoritarianism.

A Constitution Bench of this Court in **Kuldip Nayar** v. **Union of India** MANU/SC/3865/2006 : (2006) 7 SCC 1 highlighted the importance of the Rajya Sabha:

47. The Rajya Sabha is a forum to which experienced public figures get access without going through the din and bustle of a general election which is inevitable in the case of Lok Sabha. It acts as a revising chamber over the Lok Sabha. The existence of two debating chambers means that all proposals and programmes of the Government are discussed twice. As a revising chamber, the Rajya Sabha helps in improving Bills passed by the Lok Sabha...
184

541. Participatory governance is the essence of democracy. It ensures responsiveness and transparency. An analysis of the Bills revised by the Rajya Sabha reveals that in a number of cases, the changes recommended by the Rajya Sabha in the Bills passed by the Lok Sabha were eventually carried out.[185] The Dowry Prohibition Bill is an example of a legislation in which the Rajya Sabha's insistence on amendments led to the convening of a joint sitting[186] of the two Houses and in that sitting, one of the amendments suggested by the Rajya Sabha was adopted without a division.[185] The Rajya Sabha has a vital responsibility in nation building, as the dialogue between the two houses of Parliament helps to address disputes from divergent perspectives. The bicameral nature of Indian Parliament is integral to the working of the federal Constitution. It lays down the foundations of our democracy. That it forms a part of the basic structure of the Constitution, is hence based on constitutional principle. The decision of the Speaker on whether a Bill is a Money Bill is not a matter of procedure. It directly impacts on the role of the Rajya Sabha and, therefore, on the working of the federal polity.

542. There is a constitutional trust which attaches to the empowerment of the Speaker of the Lok Sabha to decide whether a legislative measure is a Money Bill. Entrustment of the authority to decide is founded on the expectation that the Speaker of the Lok Sabha will not dilute the existence of a co-ordinate institution in a bicameral legislature. A constitutional trust has been vested in the office of the Speaker of the Lok Sabha. By declaring an ordinary Bill to be a Money Bill, the Speaker limits the role of the Rajya Sabha. This power cannot be unbridled or bereft of judicial scrutiny. If the power of the Speaker is exercised contrary to constitutional norms, it will not only limit the role of the Rajya Sabha, but denude the efficacy of a legislative body created by the Constitution. Such an outcome would be inconsistent with the scheme of the Indian Constitution. Judicial review is necessary to ensure that the federal features of the Constitution are not transgressed.

E.2 Aadhaar Act as a Money Bill

This Court must now deal with whether the Aadhaar Act was validly passed as a Money Bill.

543. Article 110(1) of the Constitution defines a Money Bill. For a Bill to be a Money Bill, it must contain "only provisions" dealing with every or any one of the matters set out in Sub-clauses (a) to (g) of Clause 1 of Article 110. The expression "if it contains only provisions dealing with all or any of the following matters, namely..." is crucial. Firstly, the expression "if" indicates a condition and it is only upon the condition being fulfilled that the deeming fiction of a Bill being a Money Bill for the purposes of the Chapter will arise. Secondly, to be a Money Bill, the Bill should have

only those provisions which are referable to Clauses (a) to (g). The condition is much more stringent than stipulating that the Bill should incorporate any of the matters spelt out in Clauses (a) to (g). The words "only provisions" means that besides the matters in sub Clauses (a) to (g), the Bill shall not include anything else. Otherwise, the expression "only" will have no meaning. The word "only" cannot be treated to be otiose or redundant. Thirdly, the two expressions "if it contains only provisions" and "namely" indicate that Sub-clauses (a) to (g) are exhaustive of what a Money Bill may contain. The contents of a Money Bill have to be confined to all or any of the matters specified in Sub-clauses (a) to (g). Fourthly, Sub-clause (g) covers any matter incidental to Sub-clauses (a) to (f). A matter is incidental when it is ancillary to what is already specified. Sub-clause (g) is not a residuary entry which covers all other matters other than those specified in Sub-clauses (a) to (f). If Sub-clause (g) were read as a catch-all residuary provision, it would defeat the purpose of defining a class of Bills as Money Bills. What is incidental Under Sub-clause (g) is that which is ancillary to a matter which is already specified in Sub-clauses (a) to (f). The test is not whether it is incidental to the content of a Bill but whether it is incidental to any of the matters specifically enumerated in Sub-clauses (a) to (f). The Attorney General would request the court to read the word "only" before "if" and not where it occurs. If the submission were to be accepted, it would lead to the consequence that the Bill would be a Money Bill if it contained provisions dealing with Clause (a) to (g), even if it contained other provisions not relatable to these clauses. We cannot rewrite the Constitution, particularly where it is contrary to both text, context and intent.

Clause (2) of Article 110 provides that a Bill shall not be deemed to be a Money Bill just for the reason that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes. Like in the Parliament Act of 1911, the definition of a Money Bill provided Under Article 110(1) is exhaustive in nature. A Bill can be a Money Bill if it contains "only provisions" dealing with all or any of the matters listed Under Sub-clauses (a) to (g) of Article 110(1).

544. A Financial Bill is different from a Money Bill. Article 117 provides for special provisions relating to Financial Bills. Clause (1) of Article 117 states:

(1) A Bill or amendment making provision for any of the matters specified in Sub-clauses (a) to (f) of Clause (1) of Article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States.

A Financial Bill does not need to have "only provisions" dealing with Sub-clauses (a) to (f) of Article 110. The provisions of Article 110(1) are therefore narrow and exhaustive.

545. As a matter of interpretation, the use of the word "only" indicates that a particular entry is exhaustive and is inapplicable to anything which falls outside its scope. This Court has interpreted the expression "only" as a word of exclusion and restriction.[187] The interpretation of Article 110(1) as being restrictive in nature is also supported by the proceedings in the Constituent Assembly of India. Article 110 corresponds to Article 90 of the Draft Constitution. On 20 May 1949, a member of the Constituent Assembly, Ghanshyam Singh Gupta, proposed an amendment in Clause (1) of

Article 90 to delete the word "only". He stated that a Bill can be a Money bill even while containing other provisions. Gupta argued:

This Article is a prototype of Section 37 of the Government of India Act which says that a Bill or amendment providing for imposing or increasing a tax or borrowing money, etc. shall not be introduced or moved except on the recommendation of the Governor-General. This means that the whole Bill need not be a money Bill: it may contain other provisions, but if there is any provision about taxation or borrowing, etc. It will come under this Section 37, and the recommendation of the Governor-General is necessary. Now **Article 90 says that a Bill shall be deemed to be a money Bill if it contains only provisions dealing with the imposition, Regulation, etc., of any tax or the borrowing of money, etc. This can mean that if there is a Bill which has other provisions and also a provision about taxation or borrowing etc., it will not become a money Bill. If that is the intention I have nothing to say; but that if that is not the intention I must say the word "only" is dangerous, because if the Bill does all these things and at the same time does something else also it will not be a money Bill.** I do not know what the intention of the Drafting Committee is but I think this aspect of the Article should be borne in mind.[188]

Another member Naziruddin Ahmad also emphasized on the deletion of the word "only". The concern of these two members was that the word "only" restricts the scope of a Bill being passed as a Money Bill. Their apprehension was that if a Bill has other provisions which are unrelated to the clauses mentioned in draft Article 90, the Bill would not qualify to be a Money Bill in view of the word "only". The amendment suggested by these members was listed to be put to vote on a later date. The amendment was rejected when it was put to vote on 8 June 1949. The framers of the Indian Constitution consciously rejected the said amendment.

546. When a Bill is listed as a Money Bill, it takes away the power of the Rajya Sabha to reject or amend the Bill. The Rajya Sabha can only make suggestions to a Money Bill, which are not binding on the Lok Sabha. The Constitution makers would have been aware about the repercussions of a Bill being introduced as a Money Bill. As the role of the Rajya Sabha is limited in the context of Money Bills, the scope of what constitutes a Money Bill was restricted by adopting the word "only" in Draft Article 90. A Bill to be a Money Bill must not contain any provision which falls outside Clauses (a) to (g) of Article 110(1). The Constitution has carefully used the expression "dealing with" in Article 110 (1) and not the wider legislative form "related to". A Bill, which has both-certain provisions which fall within Sub-clauses (a) to (g) of Article 110(1) and other provisions which fall outside will not qualify to be a Money Bill. It is for this reason that there cannot also be any issue of the severability of the provisions of a Bill, which has certain provisions relating to Sub-clauses (a) to (g) of Article 110(1), while also containing provisions which fall beyond. Any other interpretation would result in rewriting the Constitution. If a Bill contains provisions which fall outside Sub-clauses (a) to (g), it is not a Money Bill. The Rajya Sabha is entitled as part of its constitutional function to legislative participation. The entirety of the Bill cannot be regarded as a Money Bill, once it contains any matters which fall beyond Sub-clauses (a) to (g). Once that is the position, it could be impossible to sever those parts which fall within Sub-clauses (a) to (g) and those that lie outside. The presence of matters which travel beyond Sub-clauses (a) to (g) has consequences in terms of the nature of the Bill and the legislative participation of the Rajya Sabha. If the constitutional function of the Rajya Sabha has been denuded on the hypothesis that this Bill

was a Money Bill, the consequence of a finding in judicial review that the Bill is not a Money Bill must follow. Any other construction will reduce bicameralism to an illusion.

This interpretation is also supported by the judgment of a Bench of seven judges of this Court in **Krishna Kumar Singh** v. **State of Bihar** MANU/SC/0009/2017 : (2017) 3 SCC 1, where it held that the ordinance making power conferred upon the President and the Governors is limited by the requirements set out by Articles 123 and 213. This Court had held:

59. ...The constitutional conferment of a power to frame ordinances is in deviation of the normal mode of legislation which takes place through the elected bodies comprising of Parliament and the state legislatures. Such a deviation is permitted by the Constitution to enable the President and Governors to enact ordinances which have the force and effect of law simply because of the existence of circumstances which can brook no delay in the formulation of legislation. In a parliamentary democracy, the government is responsible collectively to the elected legislature. The subsistence of a government depends on the continued confidence of the legislature. **The ordinance making power is subject to the control of the legislature over the executive. The accountability of the executive to the legislature is symbolised by the manner in which the Constitution has subjected the ordinance making power to legislative authority. This, the Constitution achieves by the requirements of Article 213...**
189

547. The authority of the Lok Sabha to pass a Money Bill is based on the requirements set out Under Article 110. The framers of the Indian Constitution deliberately restricted the scope of Article 110(1) to ensure that the provision is not an avenue to supersede the authority of the Rajya Sabha. The intention of the Constitution makers is clear. The Lok Sabha cannot introduce and pass a legislative measure in the garb of a Money Bill, which could otherwise have been amended or rejected by the Rajya Sabha. Bicameralism is a founding value of our democracy. It is a part of the basic structure of the Constitution. Introduction and passing of a Bill as a Money Bill, which does not qualify to be a Money Bill Under Article 110(1) of the Constitution, is plainly unconstitutional. The Lok Sabha is not entrusted with the entire authority of Parliament. The Lok Sabha, the Rajya Sabha and the President together constitute the Parliament of India. The Lok Sabha is a body of elected representatives and represents the aspirations of citizens. Yet, like every constitutional institution, it is part of this basic structure of the Constitution. A political party or a coalition which holds the majority in the Lok Sabha cannot subvert the working of the Constitution, against which Dr. B.R. Ambedkar had warned[190] in the Constituent Assembly. A ruling government has to work within constitutional parameters and has to abide by constitutional morality.

548. The Constitution of India is not a mere parchment of paper. It was written with the vision of those who gave blood and sweat to freedom: political personalities, social reformers and constitution framers. It symbolises a faith in institutions, justice and good governance. That vision cannot be belied. The Speaker of the Lok Sabha has an onerous constitutional duty to ensure that a Bill, which is not a Money Bill is not passed as a Money Bill. The Speaker of the Lok Sabha, the Chairman of the Rajya Sabha, the members of the Lok Sabha and the Rajya Sabha, and the President need to work in constitutional solidarity to ensure that no provision of the Constitution is diluted or subverted.

549. The Aadhaar Act was passed as a Money Bill. The provisions of the Act need to be analysed to determine whether the Act is a Money Bill.

The Preamble of the Act states that it is:

An Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto.

The Preamble focuses on the delivery of subsidies, benefits and services for which the expenditure is borne from the Consolidated Fund of India. But the essential issue is whether the Act confines itself to matters which fall within the ambit of Article 110.

550. Section 3 entitles every resident[191] in India to obtain an Aadhaar number by submitting his or her demographic information, by undergoing the process of enrolment. Section 2(m) defines "enrolment" as the process to collect demographic and biometric information from individuals by the enrolling agencies for the purpose of issuing Aadhaar numbers to such individuals. After receiving the demographic and biometric information of the individual, the Unique Identification Authority of India (UIDAI) would verify the information and shall issue an Aadhaar number to such an individual.[192] Section 4(3) provides that the Aadhaar number may be accepted as proof of identity for "any purpose". Section 5 requires UIDAI to take special measures to issue Aadhaar numbers to "women, children, senior citizens, persons with disability, unskilled and unorganised workers, nomadic tribes or to such other persons who do not have any permanent dwelling house and such other categories of individuals". Under Section 6, UIDAI may require Aadhaar number holders to update their demographic information and biometric information, from time to time so as to ensure continued accuracy of their information in the Central Identities Data Repository ("CIDR"). The Aadhaar Act defines CIDR as a centralised database containing all Aadhaar numbers issued to Aadhaar number holders along with the corresponding demographic information and biometric information of such individuals and other related information.[193]

551. Section 7 requires proof of an Aadhaar number as a necessary condition to avail subsidies, benefits and services, for which the expenditure is borne from the Consolidated Fund of India. The proviso to Section 7 states that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service. Section 8(1) requires UIDAI to perform authentication[194] of the Aadhaar number of an Aadhaar number holder, in relation to his or her biometric information or demographic information submitted by any requesting entity[195]. Under Section 8(2), a requesting entity is required to obtain the consent of an individual before collecting his or her identity information for the purposes of authentication. The requesting entity must ensure that the identity information of an individual collected by it is only used for submission to the CIDR for authentication. Section 8(3) requires a requesting entity to inform the individual submitting identity information for authentication certain details with respect to authentication.

552. Chapter IV of the Act deals with UIDAI. Section 11 establishes UIDAI as the body responsible for the processes of enrolment and authentication and for performing functions

assigned to it under the Act. The Act provides for the composition of UIDAI[196], qualifications of its members[197], terms of office[198] of its chairperson and members, their removal[199] and functions[200]. Section 23, which deals with the powers and functions of UIDAI, authorizes it to develop the policy, procedure and systems for issuing Aadhaar numbers to individuals and to perform authentication. Section 23(h) states that UIDAI has the power to specify the "manner of use of Aadhaar numbers" for the purposes of providing or availing of various subsidies, benefits, services and "other purposes" for which Aadhaar numbers may be used. Under Section 23(3), UIDAI may enter into a Memorandum of Understanding or agreement with the Central Government or State Governments or Union territories or other agencies for the purpose of performing any of the functions in relation to collecting, storing, securing or processing of information or delivery of Aadhaar numbers to individuals or performing authentication.

553. Chapter V deals with grants, accounts and audit and annual reports of UIDAI. Section 25 provides that the fees or revenue collected by UIDAI shall be credited to the Consolidated Fund of India. Chapter VI deals with protection of information collected from individuals for authentication. Section 28(3) requires UIDAI to take all necessary measures to ensure that the information in its possession or control, including information stored in the CIDR, is secured and protected against access, use or disclosure (not permitted under the Act or the Regulations), and against accidental or intentional destruction, loss or damage. Section 29 imposes restrictions on sharing of core biometric information, collected or created under the Act. Section 32(2) entitles every Aadhaar number holder to obtain his or her authentication record in such manner as may be specified by Regulations. Section 33 provides for disclosure of information pursuant to a court order or in the interest of national security.

554. Chapter VII of the Act (Sections 34 to 47) provides for offences and penalties. Section 34 provides for penalty for impersonation at the time of enrolment. Section 35 provides a penalty for impersonation of an Aadhaar number holder by changing demographic or biometric information. Under Section 37, a penalty for disclosing identity information (which was collected in the course of enrolment or authentication) is provided. Section 38 provides a penalty for unauthorised access to the CIDR. Section 39 imposes a penalty for tampering with data in the CIDR. Under Sections 40 and 41, a penalty has been provided for requesting entities and enrolment agencies, in case they act in contravention of the obligations imposed upon them under the Act. Section 44 indicates that the provisions of the Act would apply to any offence or contravention committed outside India by any person, irrespective of nationality.

555. Section 48 empowers the Central Government to supersede UIDAI in certain situations. Section 50 states that UIDAI is bound by directions on questions of policy given by the Central Government. Section 51 authorizes the UIDAI to delegate to any member, officer of the Authority or any other person, such of its powers and functions (except the power Under Section 54) as it may deem necessary. Section 53 empowers the Central Government to make Rules to carry out the provisions of the Act. Under Section 54(2)(m), UIDAI can make Regulations providing the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and "other purposes" for which Aadhaar numbers may be used. Section 57 authorizes the State or any body corporate or person to use an Aadhaar number for establishing the identity of an individual "for any purpose", subject to the procedure and obligations Under Section 8 and Chapter VI of the Act. Section 59 seeks to validate the actions taken by the Central

Government pursuant to the notifications dated 28 January 2009 and 12 September 2015, and prior to the enactment of the Aadhaar Act.

This broad description of the provisions of the Aadhaar Act indicates that the Act creates a framework for obtaining a unique identity number-the Aadhaar number-by submitting demographic and biometric information and undergoing the process of enrolment and authentication. The Act indicates that the Aadhaar number may be accepted as proof of identity for any purpose. The Act, in other words, creates a platform for one pan-India and nationally acceptable identity. It creates a central database (CIDR) for storage of identity information collected from individuals. Sections 3 to 6 specifically deal with the process of **enrolment**. Section 3 entitles every resident to hold an Aadhaar number. Section 4(3) states that the Aadhaar number so generated may be used as a proof of identity "for any purpose". The primary object of the legislation is to create one national identity for every resident. It seeks to do so by legislating a process for collecting demographic and biometric information. The Act has created an authority to oversee the fulfilment of its provisions. In its primary focus and initiatives, the law traverses beyond the territory reserved by Article 110 for a Money Bill. Sections 7 to 10 deal with **authentication** of information submitted at the time of enrolment. Section 8 creates **obligations on requesting entities** to ensure that **consent is obtained** from individuals before collecting their identity information and that the identity information of such individual is only used for submission to the CIDR for authentication. Sections 11 to 23 **create a statutory authority** (UIDAI) and assign responsibilities to it for the processes of enrolment and authentication and to discharge other functions assigned to it under the Act, including developing the policy, procedure and systems for issuing Aadhaar numbers to individuals. Section 23(2)(h) provides that apart from availing of various subsidies, benefits, and services, Aadhaar numbers may be used for "other purposes". Sections 28 to 33 deal with protection of information, and provide for **security** and **confidentiality** of identity information and restrictions on sharing of information. Section 28 imposes obligations on the UIDAI to ensure the security and confidentiality of identity information and authentication records of individuals, which are in its **possession** or **control**, including information **stored** in CIDR. **Disclosure** of identity information and authentication records can be made Under Section 33, pursuant to a **court order** (not below the rank of District Judge) or in the **interest of national security** in pursuance of a direction of an officer (not below the rank of Joint Secretary to the Government of India). Sections 34 to 47 deal with substantive **offences and penalties** created under the Act. Sections 54(2)(m) states that Regulations can be made by UIDAI specifying the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and "other purposes" for which Aadhaar numbers may be used. Section 57 authorizes the use of Aadhaar number by anyone (whether by the State or any body corporate or person under law or contract) for establishing the identity of an individual "for any purpose".

556. Section 7 makes the use of the Aadhaar number mandatory for availing subsidies, benefits or services, for which expenditure is incurred from the Consolidated Fund of India. The scheme of the Act deals with several aspects relating to the unique identity number. The unique identity is capable of being used for **multiple purposes**: availing benefits, subsidies and services, for which expenses are incurred from the Consolidated Fund of India, is just one purpose, among others. The Preamble to the Aadhaar Act indicates that the main objective was to achieve an efficient and "targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from

the Consolidated Fund of India". The substantive provisions of the Act are, however, not confined to the object specified in the Preamble. Indeed, they travel far beyond the boundaries of a money bill Under Article 110(1). The enrolment on the basis of demographic and biometric information, generation of Aadhaar number, obtaining consent of individuals before collecting their individual information, creation of a statutory authority to implement and supervise the process, protection of information collected during the process, disclosure of information in certain circumstances, creation of offences and penalties for disclosure or loss of information, and the use of the Aadhaar number for any purpose lie outside the ambit of Article 110. These themes are also not incidental to any of the matters covered by Sub-clauses (a) to (f) of Article 110(1). The provisions of Section 57 which allow the use of an Aadhaar number by bodies corporate or private parties for any purpose do not fall within the ambit of Article 110. The legal framework of the Aadhaar Act creates substantive obligations and liabilities which have the capability of impacting on the fundamental rights of residents.

557. A Bill, to be a Money Bill, must contain only provisions which fall within the ambit of the matters mentioned in Article 110. Section 7 of the Act allows the Aadhaar number to be made mandatory for availing of services, benefits and subsidies for which expenditure is incurred from the Consolidated Fund of India. Under Clause (e) of Article 110(1) the money bill must deal with the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India (or increasing the amount of expenditure). Significantly, Section 7 does not declare the expenditure incurred on services, benefits or subsidies to be a charge on the Consolidated Fund of India. What Section 7 does is to enact a provision allowing for Aadhaar to be made mandatory, in the case of services, benefits or subsidies which are charged to the Consolidated Fund. Section 7 does not declare them to be a charge on the Consolidated Fund. It provides that in the case of services, benefits or subsidies which are already charged to the Consolidated Fund, Aadhaar can be made mandatory to avail of them. Section 7, in other words, is a provision for imposing a requirement of authentication and not declaring any expenditure to be a charge on the Consolidated Fund of India. Hence, even Section 7 is not within the ambit of Article 110(1)(e). However, even if Section 7 were to be held to be referable to Article 110, that does not apply to the other provisions of the Act. The other provisions of the Act do not in any event fall within the ambit of Article 110(1). Introducing one provision-Section 7-does not render the entirety of the Act a Money Bill where its other provisions travel beyond the parameters set out in Article 110. Section 57 of the Act in particular (which creates a platform for the use of the Aadhaar number by the private entities) can by no stretch of logic be covered Under Article 110(1). The other provisions of the Act do not deal with that which has been provided Under Sub-clauses (a) to (g) of Article 110. As regards the 'incidental' provision Under Article 110(1)(g), the provisions of the Aadhaar Act are not "incidental to any of the matters specified in Sub-clauses (a) to (f)". Even if it is assumed that there is one provision (Section 7) which is relatable to Sub-clause (e) of Article 110(1), the other provisions of the Act are unrelated to Article 110(1).

558. This Court must also advert to the legislative history prior to the enactment of the Aadhaar Act. An attempt to provide a legislative framework governing the Aadhaar project was first made by introducing the National Identification Authority of India Bill, 2010 ("NIA Bill"). The NIA Bill was introduced in the Rajya Sabha on 3 December 2010. The Preamble of the Bill indicated its purpose:

A Bill to provide for the establishment of the National Identification Authority of India for the purpose of issuing identification numbers to individuals residing in India and to certain other classes of individuals and manner of authentication of such individuals to facilitate access to benefits and services to such individuals to which they are entitled and for matters connected therewith or incidental thereto.

The main objective of the Bill was to establish the National Identification Authority of India to issue unique identification numbers (called 'Aadhaar') to residents of India and to any other category of people for the purpose of facilitating access to benefits and services. Chapter II (Clauses 3 to 10) of the Bill dealt with Aadhaar numbers. Clause 3 of the Bill entitled every resident to obtain an Aadhaar number on providing demographic and biometric information to the Authority in such manner as may be specified. Clause 4(3) stated that an Aadhaar number shall be accepted, subject to authentication, as proof of identity of the Aadhaar number holder. Chapter III (Clauses 11 to 23) dealt with the National Identification Authority of India. Clause 11 provided for establishment of the Authority by the Central Government. Clause 23 empowered the Authority to develop the policy, procedure and systems for issuing Aadhaar numbers to residents and to perform authentication. Clause 23(2)(h) stated that the Authority may specify the usage and applicability of the Aadhaar number for delivery of various benefits and services. Establishing, operating and maintaining of the Central Identities Data Repository (CIDR) by the Authority was provided under Clause 23(2)(j). Chapter IV (Clauses 24 to 27) provide for grants, accounts and audit and annual reports related to the Authority. Clause 25 stated that the fees or revenue collected by the Authority shall be credited to the Consolidated Fund of India and the entire amount would be transferred to the Authority. Chapter V (Clauses 28 and 29) dealt with creation of an Identity Review Committee and its functions. The functions of the Review Committee included ascertaining the extent and pattern of usage of Aadhaar numbers across the country and preparing a report annually along with recommendations. Chapter VI (Clauses 30 to 33) dealt with the protection of individual identity information and authentication records. Clause 30(1) required the Authority to ensure the security and confidentiality of identity information and authentication records of individuals. Clause 30(2) required the Authority to take measures (including security safeguards) to ensure that the information in the possession or control of the Authority (including information stored in the Central Identities Data Repository) is secured and protected against any loss or unauthorised access or use or unauthorised disclosure. Clause 33 stated that individual information may be disclosed pursuant a court order or in the interest of national security. Chapter VII (Clauses 34 to 46) created offences and penalties under the law. Clause 47 empowered the Central Government to supersede the Authority. Clause 50 authorized the Authority to delegate to any Member, officer of the Authority or any other person such of its powers and functions (except the power under Clause 53). Clause 57 sought to validate actions taken by the Central Government under the Planning Commission's notification of 2009.

559. Since the UID programme involved complex issues, the NIA Bill was referred, on 10 December 2010, to the Standing Committee on Finance, chaired by Mr. Yashwant Sinha, for examination and report. The Standing Committee comprised of 21 members from the Lok Sabha and 10 members from the Rajya Sabha. The Standing Committee submitted its Report[201] on 11 December 2011. The Report raised several objections to the Bill, which included those summarised below:

(i) Since law making was underway, the bill being pending, any executive action is as violative of Parliament's prerogatives as promulgation of an ordinance while one of the Houses of Parliament is in session;

(ii) While the country is facing a serious problem of illegal immigrants and infiltration from across the borders, the National Identification Authority of India Bill, 2010 proposes to entitle every resident to obtain an Aadhaar number, apart from entitling such other category of individuals as may be notified from time to time. This will, it is apprehended, make even illegal immigrants entitled for an Aadhaar number;

(iii) The issue of a unique identification number to individuals residing in India and other classes of individuals under the Unique Identification (UID) Scheme is riddled with serious lacunae and concern areas. For example, the full or near full coverage of marginalized Sections for issuing Aadhaar numbers could not be achieved mainly due to two reasons viz. (a) the UIDAI doesn't have the statistical data relating to them; and (b) estimated failure of biometrics is expected to be as high as 15% because a large chunk of population is dependent on manual labour;

(iv) Despite the presence of serious differences of opinion within the Government on the UID scheme, the scheme continues to be implemented in an overbearing manner without regard to legalities and other social consequences;

(v) The UID scheme lacks clarity on many issues including even the basic purpose of issuing an "Aadhaar" number. Although the scheme claims that obtaining an Aadhaar number is voluntary, an apprehension has developed in the minds of people that in future, services/benefits including food entitlements would be denied in case they do not an have an Aadhaar number;

(vi) It is also not clear as to whether possession of an Aadhaar number would be made mandatory in future for availing of benefits and services. Even if the Aadhaar number links entitlements to targeted beneficiaries, it may not ensure that beneficiaries have been correctly identified. Thus, the present problem of proper identification would persist;

(vii) Though there are significant differences between the identity system of other countries and the UID scheme, yet there are lessons from the global experience to be learnt before proceeding with the implementation of the UID scheme, which the Ministry of Planning has ignored completely;

(viii) Considering the huge database and possibility of misuse of information, the enactment of a national data protection law is a pre-requisite for any law that deals with large scale collection of information from individuals and its linkages across separate databases. In the absence of data protection legislation, it would be difficult to deal with issues like access to and misuse of personal information, surveillance, profiling, linking and matching of data bases and securing confidentiality of information;

(ix) The Standing Committee strongly disapproved of the hasty manner in which the UID scheme was approved. Unlike many other schemes/projects, no comprehensive feasibility study, which ought to have been done before approving such an expensive scheme, was done involving all

aspects of the UID scheme including a cost-benefit analysis, comparative costs of Aadhaar numbers and various existing forms of identity, financial implications and prevention of identity theft, for example, using hologram enabled ration cards to eliminate fake and duplicate beneficiaries;

(x) The UID scheme may end up being dependent on private agencies, despite contractual agreements made by the UIDAI with several private vendors. As a result, the beneficiaries may be forced to pay over and above the charges to be prescribed by the UIDAI for availing of benefits and services, which are now available free of cost;

(xi) The scheme is full of uncertainty in technology as a complex scheme is built up on untested and unreliable technology and on several assumptions. It is also not known as to whether the proof of concept studies and assessment studies undertaken by the UIDAI have explored the possibilities of maintaining accuracy to a large level of enrolment of 1.2 billion people; and

(xii) The Committee felt that entrusting the responsibility of verification of information of individuals to the registrars to ensure that only genuine residents get enrolled into the system may have far reaching consequences for national security. Given the limitation of any mechanism such as a security audit by an appropriate agency that would be set up for verifying the information, it is not evident as to whether a complete verification of information of all Aadhaar number holders is practically feasible; and whether it would deliver the intended results without compromising national security.

With these apprehensions about the UID scheme, the Standing Committee on Finance categorically conveyed that the National Identification Authority of India Bill, 2010 was not acceptable. The Committee urged the Government to reconsider and review the UID scheme and the proposals contained in the Bill and bring forth a fresh legislation before Parliament. Ultimately, the NIA Bill was withdrawn from the Rajya Sabha on 3 March, 2016.

560. A comparison of the Aadhaar Act 2016 and NIA Bill 2010 reveals that both have a common objective and framework-establishing a system of unique identity numbers, which would be implemented and monitored by a statutory authority. The NIA Bill was not a Money Bill. It was never passed by the Rajya Sabha. The Bill was scrutinized by a Standing Committee on Finance, which had 10 members from the Rajya Sabha and 21 from the Lok Sabha. The NIA Bill did not contain a provision, similar to Section 7 of the Aadhaar Act. Yet, as discussed earlier, the presence of Section 7 does not make the Aadhaar Act a Money Bill. Introducing the Aadhaar Act as a Money Bill deprived the Rajya Sabha of its power to reject or amend the Bill. Since the Aadhaar Act in its current form was introduced as a Money Bill in the Lok Sabha, the Rajya Sabha had no option other than of making recommendations to the Bill. The recommendations made by the Rajya Sabha (which also included deletion of Section 57) were rejected by the Lok Sabha. The legislative history is a clear pointer to the fact that the subsequent passage of the Bill as a Money Bill by-passed the constitutional authority of the Rajya Sabha. The Rajya Sabha was deprived of its legitimate constitutional role by the passage of the Bill as a Money Bill in the Lok Sabha.

561. The Court must also address the contention of the Respondents that the Aadhaar Act is "in pith and substance" a Money Bill. The learned Attorney General for India has submitted that

though the Act has ancillary provisions, its main objective is the delivery of subsidies, benefits and services flowing out of the Consolidated Fund of India and that the other provisions are related to the main purpose of the Act which was giving subsidies and benefits. It has been submitted that the real test to be applied in the present dispute is the doctrine of pith and substance.

562. This Court has applied the doctrine of pith and substance when the legislative competence of a legislature to enact a law is challenged. The doctrine is applied to evaluate whether an enactment which is challenged falls within an entry in one of the three Lists in the Seventh Schedule over which the legislature has competence Under Article 246 of the Constitution. The Seventh Schedule to the Constitution distributes legislative powers between the Union and the States. When a law enacted by a legislature is challenged on the ground of a lack of legislative competence, the doctrine of pith and substance is invoked. Under the doctrine, the law will be valid if in substance, it falls within the ambit of a legislative entry on which the legislature is competent to enact a law, even if it incidentally trenches on a legislative entry in a separate list. The constitutional rationale for the application of this doctrine has been explained in a Constitution Bench decision of this Court in **A.S. Krishna** v. **State of Madras** MANU/SC/0035/1956 : 1957 SCR 399:

8. ...But then, it must be remembered that we are construing a federal Constitution. **It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces.** The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. The British North America Act, 1867, which established a federal Constitution for Canada, enumerated in Sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. **Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two Sections overlapped, and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires, regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires, even though it might incidentally trench on topics not within its legislative competence....**

The decision of a three judge Bench of this Court in **State of Maharashtra** v. **Bharat Shanti Lal Shah** MANU/SC/3789/2008 : (2008) 13 SCC 5 has summarized the process of reasoning which must be followed by the Court while applying the doctrine of pith and substance. The Court held:

43. ...If there is a challenge to the legislative competence the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. **In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the respective Legislature under the constitutional scheme.** Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an

entry in the State List but there is only an incidental encroachment on topics in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the topics in the Union List.
202

563. The doctrine of pith and substance is mainly used to examine whether the legislature has the competence to enact a law with regard to any of the three Lists provided under the Constitution. It cannot be applied to sustain as a Money Bill, a Bill which travels beyond the constitutional boundaries set out by Article 110 Whether a Bill is validly passed as a Money Bill has nothing to do with the legislative competence of the legislature Under Article 246 of the Constitution. Whether a Bill is a Money Bill has to be tested within the boundaries of Article 110. The submission of the Attorney General boils down to this: 'ignore the expression "only provisions dealing with all or any of the following matters" and hold the Bill to be a Money Bill by treating Section 7 as its dominant provision'. This cannot be accepted. This would ignore the express and clear language of Article 110. As we have emphasised earlier, the submission of the Attorney General requires the court to transpose the word "only" from its present position to a place before "if". That would be to rewrite the Constitution to mean that a Bill would be a Money Bill if it contained some provisions which fall Under Sub-clauses (a) to (g). The Constitution says to the contrary: a Bill is a Money Bill if it contains "only provisions" dealing with one or more of the matters set out in Sub-clauses (a) to (g). Looked at in another way, all the provisions of the Aadhaar Act (apart from Section 7) cannot be read as incidental to Section 7. Such a view is belied by a plain reading of the Act, as indicated earlier. Moreover, we have also indicated reasons why even Section 7 cannot be held to be referable to Article 110. Section 7 does not deal with the declaring of any expenditure as expenditure charged to the Consolidated Fund. Section 7 allows for making Aadhaar mandatory for availing of subsidies, benefits or services the expenditure incurred on which is charged to the Consolidate Fund. Section 7 does not charge any expenditure to the Consolidated Fund. It deals with making Aadhaar mandatory.

In support of their contention, the Respondents have also relied upon a two judge Bench decision in **Union of India** v. **Shah Goverdhan L Kabra Teachers' College** MANU/SC/0882/2002 : (2002) 8 SCC 228 to submit that the doctrine of pith and substance can be used in any context. The Court held:

7. It is further a well-settled principle that entries in the different lists should be read together without giving a narrow meaning to any of them. Power of the Parliament as well as the State legislature are expressed in precise and definite terms. While an entry is to be given its widest meaning but it cannot be so interpreted as to over-ride another entry or make another entry meaningless and in case of an apparent conflict between different entries, it is the duty of the court to reconcile them. When it appears to the Court that there is apparent overlapping between the two entries the doctrine of "pith and substance" has to be applied to find out the true nature of a legislation and the entry with which it would fall. In case of conflict between entries in List I and List II, the same has to be decided by application of the principle of "pith and substance". **The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, it cannot be held to be invalid, merely because it incidentally encroaches on matters assigned to another legislature.** When a law is impugned as being ultra-vires of the legislative competence,

what is required to be ascertained is the true character of the legislation. If on such an examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object and scope and effect, is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance. **The doctrine of "pith and substance' has to be applied not only in cases of conflict between the powers of two legislatures but in any case where the question arises whether a legislation is covered by particular legislative power in exercise of which it is purported to be made.**
[203]

The decision is of no assistance to the submission in the present dispute. The observations made by the Court are in relation to the power to legislate Under Article 246 of the Constitution. It is unconnected to the question of a Money Bill. Therefore, the argument that the Aadhaar Act is "in pith and substance" a Money Bill is rejected.

564. Introducing the Aadhaar Act as a Money Bill has bypassed the constitutional authority of the Rajya Sabha. The passage of the Aadhaar Act as a Money Bill is an abuse of the constitutional process. It deprived the Rajya Sabha from altering the provisions of the Bill by carrying out amendments. On the touchstone of the provisions of Article 110, the Bill could not have been certified as a Money Bill. In his last address to the Constituent Assembly on 25 November 1949, Dr B R Ambedkar had stated:

The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depends are the people and the political parties they will set up as their instruments to carry out their wishes and their politics.[204]

565. The Rajya Sabha has an important role in the making of laws. Superseding the authority of the Rajya Sabha is in conflict with the constitutional scheme and the legitimacy of democratic institutions. It constitutes a fraud on the Constitution. Passing of a Bill as a Money Bill, when it does not qualify for it, damages the delicate balance of bicameralism which is a part of the basic structure of the Constitution. The ruling party in power may not command a majority in the Rajya Sabha. But the legislative role of that legislative body cannot be obviated by legislating a Bill which is not a Money Bill as a Money Bill. That would constitute a subterfuge, something which a constitutional court cannot countenance. Differences in a democratic polity have to be resolved by dialogue and accommodation. Differences with another constitutional institution cannot be resolved by the simple expedient of ignoring it. It may be politically expedient to do so. But it is constitutionally impermissible. This debasement of a democratic institution cannot be allowed to pass. Institutions are crucial to democracy. Debasing them can only cause a peril to democratic structures. The Act thus fails to qualify as a Money Bill Under Article 110 of the Constitution. Since the Act was passed as a Money Bill, even though it does not qualify to be so, the passage of the Act is an illegality. The Aadhaar Act is in violation of Article 110 and therefore is liable to be declared unconstitutional.

F Biometrics, Privacy and Aadhaar

Any situation that allows an interaction between man and machine is capable of incorporating biometrics"[205]

566. The term 'biometric' is derived from the Greek nouns 'βίος' (life) and 'μέτρον' (measure) and means 'measurement of living species'.[206] Biometric technologies imply that "unique or distinctive human characteristics of a person are collected, measured and stored for the automated verification of a claim made by that person for the identification of that person."[207] These systems thus identify or verify the identity or a claim of persons on the basis of the automated measurement and analysis of their biological traits (such as fingerprints, face and iris) or behavioral characteristics (such as signature and voice).

567. The idea that parts of our body can be used to identify our unique selves is not new. Prints of hand, foot and finger have been used since ancient times because of their unique characteristics. Before the advent of biometric systems, however, human characteristics were compared in a manual way. Today's biometric systems hence differ from manual verification methods in that technology allows for automated comparison of human characteristic(s) in place of a regime of manual verification that existed earlier. It must be understood that biometric systems themselves do not identify individuals. For identification, additional information which is already stored in databases is needed since biometric systems can only compare information which is already submitted.[207] Integral to such a system is the matching of a claim of identity with biometric data collected and stored earlier.

In general, biometric applications are referred to as systems which allow one to authenticate claims. The verb 'to authenticate' can be described as 'making authentic, legally valid'.[207] Originally, fingerprints were the most commonly known and used biometric traits, but with improvements in technology, multiple sources of biometric information have emerged. These include data related to facial features, iris, voice, hand geometry and DNA. Each trait is collected using different technologies and can be used for different purposes separately or in combination, to strengthen and improve the accuracy and reliability of the identification process.[208]

In general, biometric information is developed by processing extractable key features of an individual into an 'electronic digital template', which is then encrypted and stored in a database. When an individual connects with the system to verify his/her identity for any purpose, the information is used by matching the 'electronic digital template' saved with the biometric information presented, based on which comparison, the individual's identity will be confirmed or rejected. The intended purpose of biometric technology is to confirm the identity of individuals through a "one to one" identification check. This system compares a source of biometric data with existing data for that specific person.

F.I. Increased use of biometric technology

568. There had been an initial increase in the usage of biometric technology in both developed and developing countries by both the private and the public sector. However, despite the increased adoption of biometric technologies by developed countries in the 1980s and 1990s, recent trends

depict their reluctance to deploy biometric technology-or at least mass storage of biometric data-because of privacy concerns.[209] Key instances included the scrapping of the National Identity Register and ID cards in the UK, and Germany's decision to reject a centralised database when deploying biometric passports.[207] By contrast, in developing countries there is a rise in the deployment of biometric technology since it is being portrayed to citizens as a means to establishing their legal identity and providing them access to services, as well as a tool for achieving economic development. However, too often these goals are prioritised at the expense of their right to privacy and other human rights.[207] Simon Davies, an eminent privacy expert, points out that it is not an accident or coincidence that biometric systems are most aggressively tried out with welfare recipients since they are not in a position to resist the State-mandated intrusion.[210]

There has been a particular increase in the use of biometric technology in identification programs in developing countries. This is because "biometrics include a wide range of biological measures which are considered sufficiently unique at a population level to allow individual identification with high rates of accuracy".[211] Lack of formal identification and official identity documentation in the developing world is a serious challenge which impedes the ability of governments as well as development organisations to provide essential goods and services to the populations they serve.[207] Further, identification is also essential to the gathering of accurate data which is required for monitoring the progress of government programmes.[207] However, while biometric technology brings many advantages, the flip side is that the same technology can also lead to human rights violations:

When adopted in the absence of strong legal frameworks and strict safeguards, biometric technologies pose grave threats to privacy and personal security, as their application can be broadened to facilitate discrimination, profiling and mass surveillance. The varying accuracy and failure rates of the technology can lead to misidentification, fraud and civic exclusion.[209]

569. The adoption of biometric technologies in developing countries in particular poses unique challenges since the implementation of new technologies in these countries is rarely preceded by the enactment of robust legal frameworks. Assessments of countries where a legal mechanism to regulate new technologies or protect data has followed as an afterthought have shown that there exists a huge risk of mass human rights violations where individuals are denied basic fundamental rights, and in extreme cases, even their identity.[212]

570. Technology today brings with it tremendous power and is much like two sides of a coin. When applied productively, it allows individuals around the world to access information, express themselves and participate in local and global discussions in real-time in ways previously thought unimaginable. The flip side is the concern over the abuse of new technology, including biometrics, by the State and private entities by actions such as surveillance and large-scale profiling. This is particularly acute, given the fact that technological advancements have far outpaced legislative change. As a consequence, the safeguards necessary to ensure protection of human rights and data protection are often missing. The lack of regulatory frameworks, or the inadequacy of existing frameworks, has societal and ethical consequences and poses a constant risk that the concepts of privacy, liberty and other fundamental freedoms will be misunderstood, eroded or devalued.[207]

571. Privacy has been recognized as a fundamental human right in various national constitutions and numerous global and regional human rights treaties. In today's digital age, the right to privacy is "the cornerstone that safeguards who we are and supports our on-going struggle to maintain our autonomy and self-determination in the face of increasing state power."[213]

572. The proliferation of biometric technology has facilitated the invasion of individual privacy at an unprecedented scale. The raw information at the heart of biometrics is personal by its very nature.[208] The Aadhaar Act recognises this as sensitive personal information. Biometric technology is unique in the sense that it uses part of the human body or behaviour as the basis of authentication or identification and is therefore intimately connected to the individual concerned. While biometric technology raises some of the same issues that arise when government agencies or private firms collect any personal information about citizens, there are specific features that distinguish biometric data from other personal data, making concerns about biometric technology of particular importance with regard to privacy protection.[207]

573. There are two main groups of privacy-related interests that are directly pertinent to the contemporary discussion on the ethical and legal implications of biometrics.[207] The first group falls under 'informational privacy' and is concerned with control of personal information. The ability to control personal information about oneself is closely related to the dignity of the individual, self-respect and sense of personhood. The second interest group falls under the rubric of 'physical privacy'. This sense of privacy transcends the purely physical and is aimed essentially at protecting the dignity of the human person. It is a safeguard against intrusions into persons' physical bodies and spaces. Another issue is of property rights with respect to privacy, which concerns the appropriation and ownership of interests in human personality. In many jurisdictions, the basis of informational privacy is the notion that all information about an individual is in some fundamental way their own property, and it is theirs to communicate or retain as they deem fit.

574. The collection of most forms of biometric data requires some infringement of the data subject's personal space. Iris and fingerprint scanners require close proximity of biometric sensors to body parts such as eyes, hands and fingertips.

Even in the context of law enforcement and forensic identification, the use of fingerprinting is acknowledged to jeopardise physical privacy. Many countries have laws and Regulations which are intended to regulate such measures, in order to protect the individual's rights against infringement by state powers and law enforcement. However, biometrics for the purpose of authentication and identification is different as they do not have a specific goal of finding traces related to a crime but are instead conducted for the purpose of generating identity information specific to an individual. This difference in purpose actually renders the collection of physical biometrics a more serious breach of integrity and privacy. It indicates that there may be a presumption that someone is guilty until proven innocent. This would be contrary to generally accepted legal doctrine that a person is innocent until proven guilty and will bring a lot of innocent people into surveillance schemes.

575. Concerns about physical privacy usually take a backseat as compared to concerns about informational privacy. The reason for this is that physical intrusion resulting from the use of biometric technology usually results from the collection of physical information. However, for

some people of specific cultural or religious backgrounds, even the mental harm resulting from physical intrusion maybe quite serious.[208]

Another concern is that the widespread usage of biometrics substantially undermines the right to remain anonymous.[207] People desire anonymity for a variety of reasons, including that it is fundamental to their sense of freedom and autonomy. Anonymity may turn out to be the only tool available for ordinary people to defend themselves against being profiled. Thus, it is often argued that biometric technology should not be the appropriate choice of technology as biometrics by its very nature is inconsistent with anonymity. Given the manner in which personal information can be linked and identified using biometric data, the ability to remain anonymous is severely diminished. While some argue that "it is not obvious that more anonymity will be lost when biometrics are used", this argument may have to be evaluated in light of the fact that there is no existing identifier that can be readily equated with biometrics.[207] No existing identifier can expose as much information as biometric data nor is there any other identifier that is supposed to be so universal, long-lasting and intimately linked as biometrics. To say that the use of biometrics will not cause further loss of anonymity may thus be overly optimistic. Semi-anonymity maybe possible, provided that the biometric system is carefully designed from the inception. Another significant change brought about by biometric technology is the precipitous decline of 'privacy by obscurity', which is essentially "a form of privacy afforded to individuals inadvertently by the inefficiencies of paper and other legacy recordkeeping."[213] Now that paper records worldwide are giving way to more efficient digital record-keeping and identification, this form of privacy is being extinguished, and sometimes without commensurate data privacy protections put in place to remedy the effects of the changes.[207]

576. Biometrically enhanced identity information, combined with demographic data such as address, age and gender, among other data, when used in increasingly large, automated systems creates profound changes in societies, particularly in regard to data protection, privacy, and security. Biometrics are at the very heart of identification systems. There are numerous instances in history where the persecution of groups of civilians on the basis of race, ethnicity and religion was facilitated through the use of identification systems. There is hence an alarming need to ensure that the on-going development of identification systems be carefully monitored, while taking into account lessons learnt from history.

577. It is important to justify the usage of biometric technology given the invasion of privacy. When the purpose of collecting the biometric data is just for authentication and there is little or no benefit in having stronger user identification, it is difficult to justify the collection of biometric information. The potential fear is that there are situations where there are few or no benefits to be gained from strong user verification/identification and this is where biometric technology may be unnecessary.[208] (Example: When ascertaining whether an individual is old enough to go to a bar and drink alcohol, it is unnecessary to know who the person is, when all that is needed to be demonstrated is that the individual is of legal age). Fundamental rights are likely to be violated in case biometrics are used for applications merely requiring a low level of security.

578. Biometric data, by its very nature, is intrinsically linked to characteristics that make us 'humans' and its broad scope brings together a variety of personal elements. It is argued that the collection, analysis and storage of such innate data is dehumanising as it reduces the individual to

but a number. Ultimately, organisations and governmental agencies must demonstrate that there is a compelling legitimate interest in using biometric technology and that an obligatory fingerprint requirement is reasonably related to the objective for which it is required. One way of avoiding unnecessary collection of biometric data is to set strict legal standards to ensure that the intrusion into privacy is commensurate with and proportional to the need for the collection of bio-metric data.[207]

F.2 Consent in the collection of biometric data

579. Rules on the collection of physical data by government agencies usually specify under what conditions a person can be required to provide fingerprints and/or bodily tissues. If consent is required, Rules are in place to regulate the scope of consent. If forced searches are allowed, specifications are usually provided as to how and by whom the search will be performed. Therefore, the legal questions surrounding the issue should be:

(a) If required, what exactly should be the extent of coverage of the consent?

(b) When is the compulsory collection of biometric information required and who is eligible to conduct it?

(c) What is the procedure to do so?

(d) What exactly should be filed and stored?

580. Biometric technology is far from being a mature technology and a variety of errors inevitably occur. Mature technology is a popular term for any technology for which any improvements in deployment are evolutionary rather than revolutionary.[214] Once a biometric system is compromised, it is compromised forever. In the event of biometric identity theft, there would appear to be no alternative but to withdraw the user from the system. Passwords and numbers can be changed, but how does one change the basic biological features that compromise biometrics in the event that there is a theft?

All of these parameters need to be applied to test the validity of the Aadhaar legislation in a two-part inquiry: First, reports and steps taken by the Government of India that guided the introduction and role of biometrics before the enactment of the Aadhaar Act will be analysed, which will be followed by an analysis of relevant provisions concerning the intersection of biometric technology and privacy, as they are enshrined in the Aadhaar Act, 2016 and supporting Regulations made under it.

F.3 Position before the Aadhaar legislation

Summary of Pre-Enactment Events

581. On 3 March 2006, the Department of Information Technology, Ministry of Communications & Information Technology, gave its approval for implementation of the project 'Unique ID for Below Poverty Line Families' (BPL) by the National Informatics Centre over a period of 12

months.[215] This was followed by a Processes Committee being set up a few months later on 3 July 2006, to suggest the processes for updation, modification, addition and deletion of data from the core database to be created under the Unique ID ("UID") for BPL Families Project.[216] The Processes Committee prepared a paper titled 'Strategic Vision: Unique Identification of Residents'[217]. The paper recommended the linkage of the UID database with other databases which would ensure continuous updation and user-based validation and use of the Election Commission's database as the base database.[207] The document inter-alia, also stated that statutory backing would be required for adoption of UID in the long term;[207] focus and conviction would be required on security and privacy to ensure adoption by different stakeholders;[207] while 'transparency v. right to privacy' was another challenge that would have to be addressed.[207] Biometrics, however, found no mention in the paper at this stage.

Thereafter, on 4 December 2006, an Empowered Group of Ministers (**"EGoM"**), was constituted with the approval of the Prime Minister to collate the National Population Register (**"NPR"**) under the Citizenship Act 1955 and the Unique Identification Number Project.[218] In its meeting held on 27 April 2007, the Processes Committee decided that the UID database would evolve in three stages: initial, intermediate and final. Biometrics was mentioned for the first time in the context of UID, when the committee agreed that if the infrastructure was available and the photograph and/or biometrics of a resident was obtainable along with other information, it would be captured in the initial and intermediate stages as well.[219] Subsequently, the EGoM approved the establishment of a UID Authority under the Planning Commission on 28 January 2008.[220] while the strategy to collate NPR and UID was also approved. The EGoM also agreed that the collection of data under the NPR exercise could include collection of photographs and biometrics to the extent feasible, while it was also resolved that the data collected under the NPR would be handed over to the UID Authority for maintenance and updation. The EGoM, in its fourth meeting dated 4 November 2008 decided that initially, the UIDAI will be established as an executive body under the Planning Commission for a period of 5 years. UIDAI, it was envisaged, will create its database from the electoral roll of the ECI and verify it through Below Poverty Line and Public Distribution System data, but it would also have the authority to take its own decisions as to how a database should be built.[221] Consequently, the Government of India issued a notification on 28 January 2009 constituting the UIDAI as an attached office and executive authority under the aegis of the Planning Commission.

582. Following the constitution of UIDAI, the Secretary, Planning Commission addressed a letter to Chief Secretaries of all States/UTs on 6 May 2009 enclosing a brief write up on UIDAI and UID numbers for resident Indians. The letter included the concept, implementation strategy, model of the project along with the role and responsibilities of the states/UTs.[222] It was also decided that partner databases for two-way linkages between the UID database and the partner databases for maintenance and continuous updation of the UID databases would be ECI database, Ministry of Rural Development-rural household survey database and the State ration card (PDS) databases.

583. The first meeting of the PM's Council of UIDAI, was held on 12 August 2009. Various proposals were approved by the Council,[223] by which it was decided, among other things, that the proposal to designate UIDAI as an apex body to set standards in the area of biometrics and demographic data structures be approved. On 29 September 2009, UIDAI set up the Biometrics

Standards Committee (**"BSC"**) to frame biometric standards for UIDAI. The Committee was assigned with the following mandate:[224]

• To develop biometric standards that will ensure interoperability of devices, systems and processes used by various agencies that use the UID system.

• To review the existing standards of Biometrics and, if required, modify/extend/enhance them so as to serve the specific requirements of UIDAI relating to de-duplication and Authentication.

This was followed by the creation of the Demographic Data Standards and Verification Procedure Committee (**"DDSVPC"**) on 9 October 2009, with the following mandate:[225]

• Review/modify/extend/enhance the existing standards of Demographic data and recommend the Demographic Data standards (The data fields and their formats/structure, etc.) that will ensure interoperability and standardization of basic demographic data and their structure used by various agencies that use the UID system; and

• Recommend the Process of Verification of this demographic data in order to ensure that the data captured, at the time of enrolment of the residents into the UID system, is correct.

584. The DDSVPC in its report dated 9 December 2009, stated that UIDAI had selected biometrics features as the primary method to check for duplicate identity. In order to ensure that an individual was uniquely identified in an easy and cost-effective manner, it was necessary to ensure that the captured biometric information was capable of carrying out de-duplication at the time when information was collected.[226] The Know Your Resident (**"KYR"**) verification procedure was introduced to ensure that "*key demographic data is verified properly so that the data within UID system can be used for authentication of identity by various systems*". Three distinct methods of verification were to be acceptable under UID. Verification could be based on:

• Supporting documents;

• An introducer system under which a network of "approved" introducers can introduce a resident and vouch for the validity of the resident's information; and (This idea was borrowed from the account opening procedure in the banks.)

• The process adopted for public scrutiny in the National Population Register.

585. In order to verify the correctness of certain mandatory fields, such as name, date-of-birth, and address, a "Proof of Identity" (PoI) and "Proof of Address" (PoA) would be required. This would comprise of documents containing the resident's name and photograph and the name and address, respectively. On 9 April 2010, the collection of iris biometrics for the NPR exercise was approved.[227]

586. A strategy overview issued by UIDAI in **April 2010** described the features, benefits, revenue model and timelines of the project.[228] The survey outlined that UIDAI would collect the following demographic and biometric information from residents in order to issue a UID number:

• Name

• Date of birth

• Gender

• Father's/Husband's/Guardian's name and UID number (optional for adult residents)

• Mother's/Wife's/Guardian's name and UID number (optional for adult residents)

• Introducer's name and UID number (in case of lack of documents)

• Address

• All ten fingerprints, photograph and both iris scans

On 12 May 2010, a note outlining the background of UIDAI, and proposing an approach for collection of demographic and biometric attributes of residents for the UID project was submitted to the Cabinet Committee on UIDAI.[229] Permission of the Union Cabinet was sought to ensure that the approach which was proposed should be adhered to by the Registrar General of India for the NPR exercise and by all other Registrars in the UID system. The rationale behind the inclusion of iris biometrics and the need for capturing iris scans at the time of capturing biometric details was also explained.

This was followed by the introduction of the National Identification Authority of India Bill, 2010 (NIAI Bill) in the Rajya Sabha on 3 December 2010. On 13 February 2011, the one millionth Aadhaar card was delivered. Thereafter, on 11. April 2011, the Central Government notified the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 [**"IT Rules"**] Under Section 43A of the IT Act, 2000. On 29 September 2011, the Aadhaar project completed one year. An announcement was made of the generation of ten crore enrolments and of more than 3.75 crore Aadhaar numbers.

Analysis of UIDAI Reports & Rights of Registrars

A. Biometrics Standards Committee (BSC) Report

587. BSC in its report dated 30 December 2009 stated that it held extensive meetings and discussions with international experts and technology suppliers. A technical sub-group was formed to collect Indian fingerprints and analyze quality. Over 2,50,000 fingerprint images from 25,000 persons were sourced from the districts of Delhi, UP, Bihar and Orissa. Nearly all the images were from rural regions, and were collected by different agencies using different capture devices, and through different operational processes. The BSC report is silent about the pretext on which fingerprints of 25,000 people were collected. This action of UIDAI raises privacy concerns especially since the fingerprints were collected from rural regions where people may not have been aware or made aware by UIDAI before collection of fingerprints, of the possible privacy harms of giving up biometrics.

BSC after reviewing international standards and current national recommendations, concluded that a fingerprints-based biometric system was to be at the core of UIDAI's de-duplication efforts and that the ISO 19794 series of biometrics standards for fingerprints, face and iris set by the International Standards Organization (ISO) were most suitable for the UID project.[230] BSC also observed that while a fingerprints-based biometric system shall be at the core of UIDAI's de-duplication efforts, its accuracy in the Indian context could not predicted in the absence of empirical data:

The Committee notes that face is the most commonly captured biometric, and frequently used in manual checking. However, stand-alone, automatic face recognition does not provide a high level of accuracy, and can only be used to supplement a primary biometric modality. Fingerprinting, the oldest biometric technology, has the largest market share of all biometrics modalities globally. ... Based on these factors, the Committee recognizes that a fingerprints-based biometrics system shall be at the core of the UIDAI's de-duplication efforts...

The Committee, however, is also conscious of the fact that de-duplication of the magnitude required by the UIDAI has never been implemented in the world. In the global context, a de-duplication accuracy of 99% has been achieved so far, using good quality fingerprints against a database of up to fifty million. Two factors, however, raise uncertainty about the accuracy that can be achieved through fingerprints. First, retaining efficacy while scaling the database size from fifty million to a billion has not been adequately analyzed. Second, fingerprint quality, the most important variable for determining de-duplication accuracy, has not been studied in depth in the Indian context.[207]

588. In its report for discussion titled "Technical Standards for Digital Identity Systems for Digital Identity", the Identification for Development (ID4D) initiative, a cross-departmental effort report of the World Bank, noted that UIDAI had not implemented "an important security standard, ISO 24745, which provides guidance for the protection of biometric information for confidentiality and integrity during storage or managing identities ... due to the complexity of applicable compliance procedures" for the Aadhaar system.[232] Proponents of the program argue that in all fairness to UIDAI, it has to be noticed that the ISO 24745 standard was published in August 2011 whereas the report of BSC had already been submitted to UIDAI in January 2010. However, Mr. Myung Geun Chun, the Project Editor of ISO 24745, is reported to have stated that ISO 24745 standard is an 'invaluable tool' for addressing 'unique privacy concerns' like 'unlawful processing and use of data' raised by biometric identification because of its binding nature 'which links biometrics with personally identifiable information'.[233]

ISO 24745 seeks to *"safeguard the security of a biometric system and the privacy of data subjects with solid countermeasures"*.[207] ISO 24745 standard specifies:

• "Analysis of threats and countermeasures inherent in biometric and biometric system application models;

• Security requirements for binding between a biometric reference and an identity reference;

• Biometric system application models with different scenarios for the storage and comparison of biometric references;

• Guidance on the protection of an individual's privacy during the processing of biometric information.[207]

B. Strategy Overview of 2010

In this report, a balance was sought to be struck between 'privacy and purpose' in respect of the information of the residents which was collected. The report states that 'agencies' may store the information of the residents at the time of enrolment, but they will not have access to the information stored in the UID database.[235] Further, for the purposes of authentication, requests made by the agencies would be answered through a 'Yes' or a 'No' response only.[207] Under the sub-heading "Protecting Privacy and Confidentiality", the report stated that the additional information which was being sought from people was only biometric information like fingerprints and iris scans, as other information was already available with public and private agencies in the country.[236] Right to privacy and confidentiality were sought to be protected by putting necessary provisions "in place".[207] It was also observed in the context of privacy that loss of biometric information of a resident who is a victim of identity theft, especially when such information is linked to banking, social security and passport records, risks financial and other assets and the reputation of the resident.[237] According to the review, the envisaged UIDAI Act (which was still under contemplation at the time of publishing of this report and had not yet been legislated) would have remedies for the following offences:

• "Unauthorized disclosure of information by anyone in UIDAI, Registrar or the Enrolling agency;

• Disclosure of information violating the protocols set in place by UIDAI;

• Sharing any of the data on the database with anyone;

• Engaging in or facilitating analysis of the data for anyone;

• Engaging in or facilitating profiling of any nature for anyone or providing information for profiling of any nature for anyone;

• All offences under the Information Technology Act shall be deemed to be offences under UIDAI if directed against UIDAI or its database."[207]

However, according to the report, UIDAI was to concern itself only with identity fraud and any grievances in respect of document fraud (counterfeit/misleading documents) were to be left to the Registrar enrolling the resident.[238]

589. The following conclusions emerge from the UIDAI's strategy overview: *Firstly*, the UIDAI was aware of the importance of biometric information before the Aadhaar programme had been rolled out. *Secondly*, UIDAI had itself contemplated a scenario of identity theft which could occur at the time of enrollment for Aadhaar cards. However, it had no solution to the possible harms

which could result after the identity theft of a person, more so when the potential 'UIDAI Act' was still in the pipeline and was not eventually enacted until 2016.

C. Registrars

590. The term 'Registrar' was first defined by UIDAI in its DDSVPC Report as "*any government or private agency that will partner with UIDAI in order to enroll and authenticate residents*".[239] In the Strategy Overview, the term was defined as "*agencies such as central and state departments and private sector agencies who will be 'Registrars' for the UIDAI*".[240]

The Strategy Overview also stated that:

Registrars will process UID applications, and connect to the CIDR to de-duplicate resident information and receive UID numbers. These Registrars can either be enrollers, or will appoint agencies as enrollers, who will interface with people seeking UID numbers. The Authority will also partner with service providers for authentication. **If the Registrar issues a card to the resident,** the UIDAI will recommend that the card contain the UID number, name and photograph. **They will be free to add any more information related to their services (such as Customer ID by bank). They will also be free to print/store the biometric collected from the applicant on the issued card.** If more registrars store such biometric information in a single card format, the cards will become interoperable for offline verification. **But the UIDAI will not insist on, audit or enforce this.**[241]

591. In the 'Aadhaar Handbook for Registrars 2010' ("2010 Handbook"), following policy guidelines were laid down in respect of Registrars:

1. "Registrars may retain the biometric data collected from residents enrolled by them. However, the Registrar will have to exercise a fiduciary duty of care with respect to the data collected from residents and will be responsible for loss, unauthorized access to and misuse of data in their custody.

2. In order to ensure data integrity and security, the biometrics captured shall be encrypted upon collection by using the encryption key defined by the Registrar. It is the responsibility of the Registrar to ensure the safety, security and confidentiality of this data which is in their custody. The Registrar must protect the data from unauthorized access and misuse. **The UIDAI will define guidelines for the storage of biometric data in order to give the Registrar some guidance on ensuring security of the data.** The Registrar shall have to define their own security policy and protocols to ensure safety of the Biometric data. The Registrars shall bear liability for any loss, unauthorized access and misuse of this data. **In the interest of transparency, it is recommended that the Registrar inform the resident that they will be keeping the biometric data and also define how the data will be used and how it will be kept secure.**[242]

In the 'Aadhaar Handbook for Registrars 2013' (**"2013 Handbook"**), it was stated that ***"UIDAI has defined security guidelines for the storage of biometric data"***.[243] While it is indicated in the handbook that guidelines for storage were defined by UIDAI, it is evident that this took place only

after 2010 before which the registrars were functioning without guidelines mandating how the biometric data was to be kept secure.

The following guideline finds mention both in the Handbook of 2010 and 2013:

In the interest of transparency, it is recommended that the Registrar inform the resident that they will be keeping the biometric data and also define how the data will be used and how it will be kept secure.[244]

However, it is apparent from this guideline that it was merely a recommendation to the Registrars, and no obligation was cast upon the Registrars, to inform residents that their biometric data will be stored by them and how the data was to be used and kept secure. In contrast, Regulation 5 of the Aadhaar (Sharing of Information) Regulations 2016, states:

Responsibility of any agency or entity other than requesting entity with respect to Aadhaar number. --

(1) Any individual, agency or entity which collects Aadhaar number or any document containing the Aadhaar number, shall: (a) collect, store and use the Aadhaar number for a lawful purpose; **(b) inform the Aadhaar number holder the following details:i. the purpose for which the information is collected; ii. whether submission of Aadhaar number or proof of Aadhaar for such purpose is mandatory or voluntary, and if mandatory, the legal provision mandating it; iii. alternatives to submission of Aadhaar number or the document containing Aadhaar number, if any; (c) obtain consent of the Aadhaar number holder to the collection, storage and use of his Aadhaar number for the specified purposes.**

(2) Such individual, agency or entity shall not use the Aadhaar number for any purpose other than those specified to the Aadhaar number holder at the time of obtaining his consent.

(3) Such individual, agency or entity shall not share the Aadhaar number with any person without the consent of the Aadhaar number holder.

592. What the Registrar is obliged to do under law after the enactment of the Aadhaar Act, was a recommendation to the Registrar prior to the enactment of the Aadhaar Act. Thus, it is uncertain whether residents were informed about where and how their data would be kept secure since the guidelines to the Registrars were only recommendatory in nature. Similarly, in a UIDAI document titled 'Roles and Responsibilities of Enrollment Staff, 2017', one of the 'Fifteen Commandments that an Operator must remember during Resident Enrollment' is *"Make sure that the resident is well informed that his/her biometric will only be used for Aadhaar Enrolment/Update and no other purpose"*.[245] However, in the UIDAI document titled 'Enrollment Process Essentials, 2012', there is no mention of any such obligation being placed upon the enrolment staff.[246] In the absence of informed consent for the collection of data, a shadow of potential illegality is cast.

F.4 Privacy Concerns in the Aadhaar Act

1. Consent during enrolment and authentication & the right to access information under the Aadhaar Act

593. Section 3(2) of the Aadhaar Act requires enrolment agencies to inform the individual being enrolled about: a) the manner in which information shall be used; b) the nature of recipients with whom the information is to be shared during authentication; and c) the existence of a right to access information. However, the Enrolment Form in Schedule I of the Enrolment Regulations does not offer any clarification or mechanism on how the mandate of Section 3(2) is to be fulfilled.

The right of an individual to access information related to his or her authentication record is recognized in Section 3(2)(c) and Section 32(2) of the Aadhaar Act. However, the supplementary Regulations that complement the Act are bereft of detail on the procedure to access such information.

Similarly, Regulation 9(c) of the Enrolment Regulations states that the procedure for accessing data would be provided to residents through the enrolment form, which is found in Schedule I to the Enrolment Regulations. However, all that Schedule I states is: *"I have a right to access my identity information (except core biometrics) following the procedure laid down by UIDAI"*, without any such procedure actually being laid down.

594. Section 2(I) of the Act, which defines an enrolling agency read with Regulation 23 of the Aadhaar (Enrolment and Update) Regulations allows for the collection of sensitive personal data (demographic and biometric information) of individuals by private agencies, which also have to discharge the burden of explaining the voluntary nature of Aadhaar registration and obtaining an individual's informed consent.

The Authentication Regulations, framed Under Sub-section (1), and Sub-clauses (f) and (w) of Sub-section (2) of Section 54 of the Aadhaar Act deal with the authentication framework for Aadhaar numbers, the governance of authentication agencies and the procedure for collection, storage of authentication data and records. Regulation 5 (1) states what details shall be made available to the Aadhaar number holder at the time of authentication which are *a) the nature of information that will be shared by the Authority upon authentication, (b) the uses to which the information received during authentication may be put; and (c) alternatives to submission of identity information.* Regulation 6 (2) mandates that a requesting entity shall obtain the consent of an Aadhaar number holder for authentication in physical or, preferably, in electronic form and maintain logs or records of the consent obtained in the manner and form as may be specified by the Authority for this purpose.

Although Regulation 5 mentions that at the time of authentication, requesting entities shall inform the Aadhaar number holder of alternatives to submission of identity information for the purpose of authentication, and Regulation 6 mandates that the requesting entity shall obtain the consent of the Aadhaar number holder for the authentication, in neither of the above circumstances do the Regulations specify the clearly defined options that should be made available to the Aadhaar number holder in case they do not wish to submit identity information, nor do the Regulations specify the procedure to be followed in case the Aadhaar number holder does not provide consent.

This is a significant omission. Measures for providing alternatives must be defined in all identity systems, particularly those that are implemented on a large scale.

2. Extent of information disclosed during authentication & sharing of core biometric information

595. Section 8(4) of the Act permits the Authority to respond to an authentication query with a "*positive, negative or any other appropriate response sharing such identity information excluding any core biometric information*". The Petitioners have argued that the wide ambit of this provision gives the Authority discretion to respond to the requesting entity with information including an individual's photograph, name, date of birth, address, mobile number, email address and any other demographic information that was disclosed at the time of enrolment.

Moreover, it must be realized that even if core biometric information cannot be shared, demographic information is nonetheless, sensitive. Regulation 2(j) of the Authentication Regulations[247] provides that a digitally signed response with e-KYC data[248] [which is defined in Regulation 2(k)] can be returned to the requesting entity, while Regulation 3(ii)[249] provides for this form of authentication (e-KYC) by UIDAI.

596. Section 29(1) of the Aadhaar Act expressly states that '*core biometric information can never be shared with anyone for any reason whatsoever or be used for any purpose other than generation of Aadhaar numbers and authentication under this Act*'. However, this provision which seemingly protects an individual's core biometric information from being shared is contradicted by Section 29(4)[250] of the Act, the proviso to which grants UIDAI the power to publish, display or post core biometric information of an individual for purposes specified by the Regulations. The language of this Section is overbroad and which could lead to transgressions and abuse of power. Moreover, Sub-Sections 29(1) and (2), in effect, create distinction between two classes of information (core biometric information and identity information), which are integral to individual identity. Identity information requires equal protection as provided to core biometric information.

3. Expansive scope of biometric information

597. Definitions of biometric information [Section 2(g)], core biometric information [Section 2(j)] and demographic information [Section 2(k)] under the Aadhaar Act are inclusive and expansive. Section 2(g) defines 'biometric information' as "photograph, fingerprint, iris scan, or such other biological attributes of an individual as may be specified by Regulations". Section 2(j) defines 'core biometric information' as "*fingerprint, Iris scan, or such other biological attribute of an individual as may be specified by Regulations*". Section 2(t) explains that the Regulations are to be made by UIDAI, which is the supreme authority under the Act. Sections 2(g), (j), (k) and (t) give discretionary power to UIDAI to define the scope of biometric and demographic information. Although the Act specifically provides what information can be collected, it does not specifically prohibit the collection of further biometric information. The scope of what can, in addition, be collected, has been left to Regulations. These provisions empower UIDAI to expand on the nature of information already collected at the time of enrolment, to the extent of also collecting '*such other biological attributes*' that it may deem fit by specifying it in Regulations at a future date.

The definitions of these Sections provide the government with unbridled powers to add to the list of biometric details that UIDAI can require a citizen to part with during enrolment which might even amount to an invasive collection of biological attributes including blood and urine samples of individuals.

4. Other concerns regarding the Aadhaar Act: Misconceptions regarding the efficacy of biometric information

598. The uniqueness of a fingerprint in forensic science remains an assumption without watertight proof. The uniqueness of biometric data is not absolute, it is relative. Not everyone will have a particular biometric trait, or an individual's biometric trait may be significantly different from the 'normal' expected trait. Some people may be missing fingerprints due to skin or other disease, which may cause further problems when enrolling a large population in a fingerprint-based register. Discrimination concerns may also be raised in such a case. Therefore, a large scale biometric scheme will usually need to utilise more than one biometric. For example-both fingerprint and face to ensure all people can be enrolled.[251]

The stability of even so called stable types of biometric data is not absolute. Each time an individual places a fingerprint on a fingerprint reader, the pattern may appear to be the same from a short distance, but there are actually small differences in the pattern due to dryness, moisture and elasticity of the skin. Moreover, cuts and scratches can alter the pattern. Similarly, even the iris, a popular biometric measurement suffers from difficulties in obtaining a valid image. The iris can also be hindered by specula reflections in uncontrolled lighting situations. These problems also apply to other relatively stable biometric identifiers.[252]

599. Sections 6[253] and 31(2)[254] of the Aadhaar Act place an additional onus on individual Aadhaar holders to update their information. These provisions create a legal mandate on individuals to ensure that their information is accurate within the CIDR. It is an acknowledgement that an individual's biometric information may change from time to time. Natural factors like ageing, manual labour, injury and illness can cause an individual's biometric information to be altered over the course of a lifetime. Critics of the Aadhaar program however point to the fact that provisions for updation fly in the face of UIDAI's repeated advertisements that Aadhaar enrolment is a "one-time" affair, as it is not and will never be. Moreover, there is no way in which a person can estimate that he or she is due for an update, as this is not something that can be discerned by actions as innocuous as looking in the mirror or at one's fingers, and therefore there remains no objective means of complying with the above sections. In fact, an authentication failure and a subsequent denial of welfare benefits, a subsidy or a service that an individual is entitled to might be the only way one comes to the conclusion that his or her biometrics need to be updated in the CIDR.[255]

Moreover, since the promise of Aadhaar as a unique identity hinges on the uniqueness of biometrics, it would be logical to assume that any update to biometric data should go through the same rigour as a new enrolment. Regulation 19(a), entitled 'Modes of Updating Residents Information' under Chapter IV of the Aadhaar (Enrolment and Update) Regulations, 2016 provides:

19. Mode of Updating Residents Information:

a) At any enrolment centre with the assistance of the operator and/or supervisor. The resident will be biometrically authenticated and shall be required to provide his Aadhaar number along with the identity information sought to be updated.

This raises the question as to how an individual will update his/her biometric information. If the biometric information stored in CIDR has changed, the present biometrics will lead to mismatch during authentication. This Regulation does not provide any real clarity on how updation should be taking place in practice for the following reasons:

1. As required by the Regulation, can an individual be asked to undergo biometric authentication, when the purpose is to update the biometrics?

2. Does the provision amount to an implied expectation that an individual is supposed to revisit the enrolment centre before all ten fingers and two irises (core biometric information) are rendered inaccurate for the purposes of authentication?[207]

This is also evidence of the fact that an Aadhaar enrolment is not a one-time affair.

5. No access to biometric records in database

600. The proviso to Section 28(5)[256] of the Aadhaar Act disallows an individual access to the biometric information that forms the core of his or her unique ID (Aadhaar). The lack of access is problematic for the following reasons: First, verification of whether the biometrics have been recorded correctly or not in the first place is not possible. This becomes critical when that same information forms the basis of identity and is the basis of authentication and subsequent access to welfare benefits and other services. Second, there is a great potential for fraudulently replacing a person's biometric identity in the database, as the individual has no means to verify the biometric information that has been recorded at the time of enrolment. Even an entity like the enrolment operator (with a software hack) could upload someone else's biometrics against another person.[257] Denial of access to the individual violates a fundamental principle of data protection: ownership of the data must at all times vest with the individual. Overlooking this fundamental principle is manifestly arbitrary and violative of Article 14.

6. Biometric locking

601. Authentication Regulations 11 (1) and (4) provide for the facility of Biometric Locking. Regulation 11(1) provides:

The Authority may enable an Aadhaar number holder to permanently lock his biometrics and temporarily unlock it when needed for biometric authentication.

Regulation 11(4) provides:

The Authority may make provisions for Aadhaar number holders to remove such permanent locks at any point in a secure manner.

The provision allowing biometric locking is salutary to the extent that it allows Aadhaar number holders to permanently lock their biometrics and temporarily unlock them only when needed for biometric authentication. But the Regulation is problematic to the extent that it also empowers the UIDAI to make provisions to remove such locking without any specified grounds for doing so.[258]

7. Key takeaways

602. The use of biometric technology is only likely to grow dramatically both in the private and public sector. On our part, we can only ensure that the strides made in technology are accompanied by stringent legal and technical safeguards so that biometrics do not become a threat to privacy.[259]

603. There is no unique concept of privacy and there maybe trade-offs between privacy and other objectives.[260] The challenge regarding privacy is best put in the following words:

The definition of privacy in any jurisdiction must take into account cultural, historical, legal, religious and other local factors. One size may not fit all countries, regions, or cultures when it comes to privacy or to some elements of privacy. In addition, views of privacy change as time passes and technology advances. However, different perspectives are not a barrier to evaluating privacy but a challenge.[207]

The relationship between biometrics and privacy is completely shaped by the design of the systems and the framework within which private and personal data is handled. Unfortunately, particularly in developing countries the adoption of biometrics has not been accompanied by an adequate discussion of privacy concerns.[207] Biometrics can also be a "staunch friend of privacy" when the technology is used for controlling access and to restrict unauthorized personnel from gaining access to sensitive personal information.[261] While evaluating privacy consequences of biometric technology, it is also important to bear in mind that there cannot be an assumption that current privacy protections which may be appropriate for the present state of technology will also be sufficient in the future.[260] Technology will continue to develop as will the need to develop corresponding privacy protections. Concerns around privacy and data protection will have to be addressed. "Fair Information Practices (FIPs), Privacy by Design (PbD), and Privacy Impact Assessments (PIAs)"[207] might be useful in addressing these concerns. FIPs offer the substantive content for a privacy policy. PbD offers a proactive approach to the protection of privacy that relies on advance planning rather responding to problems after they arise. PIAs offer a formal way to consider and assess the privacy consequences of technology or other choices, including consideration of alternatives early in the planning stages. These three methodologies are not mutually exclusive and can be combined to achieve the just and optimal result for society.[207]

604. Of particular significance is the "Do Not Harm" principle which means that biometrics and digital identity should not be used by the issuing authority, typically a government, or adjacent parties to serve purposes that could harm the individuals holding the identification.[262] Identity systems, whether in paper or digital, must work for the public good and must do no harm. However, identity systems due to their inherent power, can cause harm when placed into hostile hands and used improperly. Great care must be taken to prevent this misuse. "Do No Harm" requires rigorous evaluation, foresight, and continual oversight.[207]

605. There are many adversarial actors-from private espionage groups to foreign governments, who may try to exploit data vulnerabilities. There is also the threat of abuse of power by future governments. However, creating and instilling strong privacy protection laws and safeguards may decrease these risks-such as the framework provided by the EUGDPR[263] . In order to uphold democratic values, the government needs to curtail its own powers concerning the tracking of all citizens and prevent the needless collection of data. Such protections may assuage the fears and uphold the long-term legitimacy of Aadhaar. If the legislative process takes into account public feedback and addresses the privacy concerns regarding Aadhaar, it would provide a solid basis for more digital initiatives, which are imminent in today's digital age. However, in its current form, the Aadhaar framework does not address the privacy concerns issues discussed in this Section of the judgment.

G Legitimate state aim

G.I Directive Principles

606. The Union government has contended that the legitimate state interest in pursuing the Aadhaar project flows from the solicitous concern shown in the text and spirit of the Constitution for realising socio-economic rights. The right to food must, according to the view proposed before the Court, trump over the right to privacy. The Aadhaar project, it has been urged, seeks to fulfil socio-economic entitlements.

607. The Constituent Assembly did not work in a vacuum. The idealism with which the members of the Assembly drafted the Constitution was the result of the "social content of the Independence movement"[264] , which came from the awareness of the members about the existing conditions of the Indian masses. Granville Austin has therefore referred to the Constitution as a "social document" and a "modernizing force", whose provisions reflect "humanitarian sentiments".[265] The Constitution was the medium through which the nascent Indian democracy was to foster many goals. Austin observes:

Transcendent among [the goals] was that of social revolution. **Through this revolution would be fulfilled the basic needs of the common man, and, it was hoped, this revolution would bring about fundamental changes in the structure of Indian society.**[266]

Austin has further observed:

The first task of [the] Assembly... [was] to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.[236]

In his work titled "The Constitution of India: A Contextual Analysis", Arun K Thiruvengadam identified one such goal of the Constitution as follows:

The Indian Constitution sought to lay the blueprint for economic development of the vast subcontinental nation, which was an imperative for a populace that was largely illiterate, poor and

disproportionately situated in rural societies that had limited access to many essential social goods and infrastructural facilities.[267]

By establishing these positive obligations of the state, the members of the Constituent Assembly made it the responsibility of future Indian governments **to find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate 'the powers of all men equally for contributions to the common good'.**[268]

608. The draftpersons of the Constitution believed that the driving force to bring social change rested with the State. This is evident from an instance during the proceedings of the Constituent Assembly. Dr. B R Ambedkar had submitted to the Assembly a social scheme to be incorporated into the Constitution, which included provisions to cover every adult Indian by life insurance. However, his social scheme was rejected on the ground that such provisions should be left to legislation and need not be embodied into the Constitution.[269]

609. The social and economic goals which were contemplated at the time of Independence remain at the forefront of the State's agenda even today. Certain parts of the Constitution play a leading role in declaring the blueprint of its social intent. Directive Principles were specifically incorporated into the Constitution for this purpose. Though not enforceable in courts, the principles are "fundamental in the governance of the country" and it is the duty of the State to apply these principles while making laws.[270] The essence of the Directive Principles lies in Article 38 of the Constitution, which places an obligation on the State to secure a social order for the promotion of the welfare of the people. Titled as Part IV of the Constitution, the Directive Principles are symbolic of the welfare vision of the Constitution makers.

Article 38 of the Constitution provides that:

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Clauses (b), (c), (e) and (f) of Article 39 provide thus:

39. The State shall, in particular, direct its policy towards securing-

...

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

..

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 41 speaks of the right to work, to education, and to public assistance:

41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 43 contemplates a living wage and conditions of work which provide a decent standard of life:

43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Article 47 casts a positive obligation upon the State to raise the level of nutrition and the standard of living and to improve public health, as among its primary duties. Reflecting a constitutional vision of socio-economic justice, the values adopted in the Directive Principles are to be progressively realised in the course of social and economic development.

610. In a recently published book titled "Supreme Court of India: The Beginnings", George H Gadbois, Jr. observes that the Indian Constitution, "easily the lengthiest fundamental law in the world, probably ranks also as one of the most eclectic ever produced".[271] Reflecting upon the constitutional models from which the draftspersons of India's Constitution drew sustenance, Gadbois states:

The Constitution makes provision for a parliamentary system adapted from the British model, a federation patterned after the Government of India Act of 1935 and the Canadian Constitution, a set of emergency powers similar to those set forth in the Weimar Constitution, a lengthy list of fundamental rights adapted from the American experience with a Bill of Rights, a Supreme Court endowed with express powers of judicial review for which the American Supreme Court served as the model, and list of "Directive Principles of State Policy" patterned after the Constitution of Eire.[272]

Reflecting on the Directive Principles, Gadbois observes:

Suffice to say that the directive principles have provided the constitutional basis and justification for the Government's efforts to establish a welfare state, or, to use the designation preferred by Indian leaders, a "socialist pattern of society".[273]

The sanction behind the Directives, according to him "is political and not juridical". On the other hand, the fundamental rights are justiciable because Article 13 provides that a law which takes them away or abridges them will be void. The conflict as Gadbois sees it is this:

the directive principles are a set of instructions to the Government of the day to legislate into being a welfare state, which means, of course, an emphasis on the social and economic uplift of the community at large and a corresponding subtraction from individual rights. It is the duty of the Government to apply these principles in making laws. In short, the Constitution confers upon the Supreme Court the task of making the fundamental rights meaningful against possible infringements by the legislatures and executives, and makes it obligatory for the Government to bring about changes in the social and economic life of the nation, changes which were bound to affect adversely some private rights.

It is conceivable at least, that both the Supreme Court and the Government could have pursued their respective tasks without conflict, but this did not happen. The legislatures, purporting to be doing no more than carrying out the duties prescribed in the directive principles, enacted legislation which the Supreme Court found to be in conflict with some of the fundamental rights.[274]

This formulation by Gadbois formed part of a dissertation in **April 1965**. The evolution of jurisprudence in India since then has altered the Constitutional dialogue. Over time, the values enshrined in the Directive Principles have been read into the guarantees of freedom in Part III. In incremental stages, the realisation of economic freedom has been brought within the realm of justiciability, at least as a measure of the reasonableness of legislative programmes designed to achieve social welfare.

611. As our constitutional jurisprudence has evolved, the Directive Principles have been recognised as being more than a mere statement of desirable goals. By a process of constitutional interpretation, the values contained in them have been adopted as standards of reasonableness to expand the meaning and ambit of the fundamental rights guaranteed by Part III of the Constitution.[275] In doing so, judicial interpretation has attempted to imbue a substantive constitutional content to the international obligations assumed by India in the Universal Declaration of Human Rights and the International Covenant on Economic and Social and Cultural Rights. Eradicating extreme poverty and hunger is a significant facet of the Millennium Development Goals of the United Nations. Social welfare legislation is but a step to achieve those goals. The enactment of the National Food Security Act 2013 constituted a milestone in legislative attempts to provide food security at the household level. The Act discerns a targeted Public Distribution System for providing food-grains to those below the poverty line. The Rules contemplated in Section 12(2)(b), incorporate the application of Information and Communication Technology tools to ensure transparency of governance and prevent a diversion of benefits. Another important piece of legislation has been the Mahatma Gandhi National Rural Employment

Guarantee Act (MGNREGA) Act 2005 which was enacted for the enhancement of livelihood and security of rural households. The Act guarantees a hundred days of wage employment in every financial year to at least one able-bodied member of every household in rural areas in public works programmes designed to create public assets. Both the National Food Security Act 2013 and the MGNREGA Act 2005 follow a rights-based approach in dealing with endemic problems of poverty and deprivation in rural areas. Leveraging Aadhaar for biometric identification of beneficiaries, it has been argued by the Respondents, is an intrinsic part of the legislative effort to ensure that benefits in terms of food security and employment guarantee are channelised to those for whom they are meant.

G.2 Development and freedom

612. Many scholars have delved into the substantive themes of the Indian Constitution. Upendra Baxi has argued that the Indian Constitution has four sovereign virtues: "rights, justice, development, and governance"[276]. Baxi notes that they are "intertwined and interlocked with the rest and, in contradictory combination/recombinations with both the constitutional and social past and their future images".[207] Development is a leading aspect of our constitutional vision. Development in the constitutional context is not only economic development assessed in terms of conventional indicators such as the growth of the gross domestic product or industrial output. The central exercise of development in a constitutional sense is addressing the "deprivation, destitution and oppression"[277] that plague an individual's life.

613. In a traditional sense, freedom and liberty mean an absence of interference by the state into human affairs. Liberty assumes the character of a shield. The autonomy of the individual is protected from encroachment by the state. This formulation of political rights reflects the notion that the state shall not be permitted to encroach upon a protected sphere reserved for individual decisions and choices. What the state is prevented from doing is couched in a negative sense. Civil and political rights operate as restraints on state action. They postulate a restriction on the state. Isaiah Berlin formulates the negative conception of liberty thus:

I am ... free to the degree to which no man or body of man interferes with my activity. Political liberty is simply the area within which a man can act unobstructed by others.[278]

614. Individual freedom, in this conception, imposes a duty of restraint on the state. Modern ideas of neo liberalism have funnelled this notion. Neo-liberalism postulates that the increasing presence of the state is a threat to individual autonomy. A free market economy with minimum state control, in this view, is regarded as integral to protecting individual rights and freedoms. FA Hayek construes the content of liberty as meaning the absence of obstacles. Resultantly, this notion of liberty regards the role of the state in a narrow jurisprudential frame. Attempts by the state to pursue social justice or to use its authority for redistribution of wealth would in this conception not be a legitimate use of state power.[279]

615. The notion that liberty only consists of freedom from restraint does not complete the universe of its discourse. Broader notions of liberty are cognizant of the fact that individuals must be enabled to pursue their capacities to the fullest degree. Social and economic discrimination poses real barriers to access education, resources and the means to a dignified life. This approach to

understanding the content of freedom construes the ability to lead a dignified existence as essential to the conception of liberty and freedom. The integral relationship between removal of socio-economic inequality and freedom has been eloquently set out by Amartya Sen in "Development as Freedom"[280]:

Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers-perhaps even the majority-of people. Sometimes the lack of substantive freedoms relates directly to economic poverty, which robs people of the freedom to satisfy hunger, or to achieve sufficient nutrition, or to obtain remedies for treatable illnesses, or the opportunity to be adequately clothed or sheltered, or to enjoy clean water or sanitary facilities. In other cases, the unfreedom links closely to the lack of public facilities and social care, such as the absence of epidemiological programs, or of organized arrangements for health care or educational facilities, or of effective institutions for the maintenance of local peace and order. In still other cases, the violation of freedom results directly from a denial of political and civil liberties by authoritarian regimes and from imposed restrictions on the freedom to participate in the social, political and economic life of the community.

In Sen's analysis, human development is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives. Taking it further, Sen has recognized an important co-relation in terms of the non-availability of basic economic conditions:

Economic unfreedom, in the form of extreme poverty, can make a person a helpless prey in the violation of other kinds of freedom... Economic unfreedom can breed social unfreedom, just as social or political unfreedom can also foster economic unfreedom.[281]

616. The notion of freedom as an agency has been developed by Sen as part of the 'capability theory'. The necessary consequence of focusing upon major sources of unfreedom, in a social and economic perspective, is that the removal of these restraints is essential to the realization of freedom. If true freedom is to be achieved through the removal of conditions which cause social and economic deprivation, the role of the state is not confined to an absence of restraint. On the contrary, the state has a positive obligation to enhance individual capabilities. Martha Nussbaum[282] argues that realising freedom requires the state to discharge positive duties. Nussbaum expresses a threshold level of capability below which true human functioning is not available. Freedom is seen in terms of human development and is the process by which individuals can rise above capability thresholds. In the realisation of basic rights, the state is subject to positive duties to further the fulfilment of freedom.

617. The broader conception of freedom and liberty which emerges from the writings of Sen and Nussbaum has direct consequences upon how we view civil and political rights and socio-economic rights. The distinction between the two sets of rights becomes illusory once civil and political rights are regarded as comprehending within their sweep a corresponding duty to take

such measures as would achieve true freedom. Henry Shue[283] suggests that rights give rise to corresponding duties. These duties include:

(i) a duty to respect;

(ii) a duty to protect; and

(iii) a duty to fulfil.

Duties of **respect** embody a restraint on affecting the rights of others. Duties to **protect** mandate that the state must restrain others in the same manner as it restrains itself. The state's duty of non-interference extends to private individuals. The duty to **fulfil** connotes aiding the deprived in the realisation of rights. This imposes a corresponding duty to create the conditions which will facilitate the realisation of the right. The right which is protected for the individual will also signify an expectation that the state must create institutions enabling the exercise of facilitative measures or programmes of action, of an affirmative nature. The state has affirmative obligations to fulfil in the realisation of rights. These positive duties of the state are readily apparent in the context of welfare entitlements when the state must adopt affirmative steps to alleviate poverty and the major sources of economic and social non-freedom. But the thesis of Nussbaum and Shue have an important role for the state to discharge in ensuring the fulfilment of political rights as well. In a highly networked and technology reliant world, individual liberty requires the state to take positive steps to protect individual rights. Data protection and individual privacy mandate that the state put in place a positive regime which recognises, respects and protects the individual from predatory market places. The state has a positive duty to create an autonomous regulatory framework in which the individual has access to remedies both against state and non-state actors, both of whom pose grave dangers of assault on the individual as an autonomous entity. Failure to discharge that duty is a failure of the state to respect, protect and fulfil rights.

Dr. Ambedkar's prophetic final address to the Constituent Assembly elaborates that vision:

On the social plane, we have in India a society based on the principle of graded inequality with elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality...How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which [this] Assembly has [so] laboriously built up.[284]

The pursuit of social welfare and security is a central aspect of development. The State, in Ambedkar's vision, would be the main instrumentality in the debate on development, which has to revolve around the social, economic and political spheres and would be guided by the values of the Constitution.

618. Social opportunities are the facilities and "arrangements that society makes" for education, healthcare and nutrition, which "influence the individual's substantive freedom to live better".[285] Social security measures include programmes which intend to promote the welfare of the population through assistance measures guaranteeing access to sufficient resources. The social security framework is not only important for individual development, but also for effective participation in economic and political activities. Social security programmes flow from 'economic and social rights'-also called as "welfare rights" [286] or second generation rights. These rights, recognized for the first time under the Universal Declaration on Human Rights, 1948 include a large list of freedoms and claims under its "protective umbrella". They include not only basic political rights, but the right to work, the right to education, protection against unemployment and poverty, the right to join trade unions and even the right to just and favourable remuneration.[287] Social security programmes as an instrument for the removal of global poverty and other economic and social deprivations are at the centre stage in the global discourse. Article 22 of the Universal Declaration of Human Rights expressly recognises that every member of society is entitled to the right to social security and to the realisation of economic, social and cultural rights. Those rights are stated to be indispensable for dignity and to the free development of personality. The realisation of these rights has to be facilitated both through national efforts and international co-operation and in accordance with the organisation and the resources of each state. Article 22 stipulates that:

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

In a similar vein, Article 23 comprehends a conglomeration of rights including (i) the right to work; (ii) free choice of employment; (iii) just and favourable conditions of work; (iv) protection against unemployment; (v) equal pay for equal work without any discrimination; (vi) just and favourable remuneration for work; and (vii) formation and membership of trade unions. Article 23 construes these rights as a means of ensuring both for the individual and the family, an "existence worthy of human dignity" supplemented if necessary "by other means of social protection".

India having adopted the UDHR, its principles can legitimately animate our constitutional conversations. Both Articles 22 and 23 are significant in recognising economic rights and entitlements in matters of work and social security. Both the articles recognise the intrinsic relationship between human dignity and the realisation of economic rights. Measures of social protection are integral to the realisation of economic freedom and to fulfil the aspiration for human dignity.

619. India adopted and ratified the Covenant on Civil and Political Rights as well as the Covenant on Economic, Social and Cultural Rights. India acceded to the Covenant on Economic, Social and Cultural Rights on 10 April 1979. According to the Preamble, the states who are parties to the Covenant have recognized that:

the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

Freedom is thus defined in terms of the absence of fear and want. Moreover, freedom consists in the enjoyment of a conglomeration of rights: economic, social and cultural as well as civil and political rights. There is in other words no dichotomy between the two sets of rights.

Article 11 of the Covenant on Economic, Social and Cultural Rights imposes positive obligations on the covenanting states:

Article 11.

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (a) Taking into account the problems of both food-importing the food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

620. The Masstricht Guidelines on Violations of Economic, Social and Cultural Rights (January 1997) stipulate that:

It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

The Guidelines also stipulate that like civil and political rights, economic, social and cultural rights impose three different types of obligations on states: the obligation to respect, protect and fulfil. The guidelines recognize that violations of economic, social and cultural rights can occur through acts of commission and omission on the part of states. The omission or failure of states to take measures emanating from their legal obligations may result in such violations. Among them is the failure to enforce legislation or to put into effect policies designed to implement the provisions of the Covenant. In similar terms, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights cast affirmative duties on states to take

immediate steps towards realizing the rights contained in the Covenant. Clauses 16, 21 and 27 of the guidelines are thus:

16. All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.

21. The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.

The office of the UN High Commissioner for Human Rights notified General Comment No. 3, which was adopted at the fifth session of the Committee on Economic, Social and Cultural Rights on 14 December 1990. The Comment states:

...while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

Similarly, General Comment No. 12 on the right to adequate food was adopted at the twentieth session of the Committee on Economic, Social and Cultural Rights on 12 May 1999. It states:

The Committee observes that while the problems of hunger and malnutrition are often particularly acute in developing countries, malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries, Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world's population.

The emphasis on the lack of **access** to available food is significant to the present discourse. It indicates that access to food requires institutional mechanisms to ensure that the available resources reach the beneficiaries for whom they are intended.

621. Section 2(1)(f) of the Protection of Human Rights Act 1993 specifically adverts to the Covenant on Economic, Social and Cultural Rights:

2. (1)(f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16th December, 1996 and such other Covenant or Convention

adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;

Under Section 12(f), the National Human Rights Commission has been entrusted with the function of studying treaties and other international instruments of human rights and to make recommendations for their effective implementation. Parliament has statutorily incorporated India's obligations at international law under the above covenants as a part of the national effort to realise fundamental human freedoms. Achieving economic freedom is integral to that mission. In his classic work "The Idea of Justice", Amartya Sen has observed in this regard:

The inclusion of second-generation rights makes it possible to integrate ethical issues underlying general ideas of global development with the demands of deliberative democracy, both of which connect with human rights and quite often with an understanding of the importance of advancing human capabilities.[288]

622. Social security thus acts as an underpinning link with development. There is also a two-way relationship between development and social security (expansion of human capability). Dreze and Sen have dealt with this relationship in their following observation:

Growth generates resources with which public and private efforts can be systematically mobilized to expand education, health care, nutrition, social facilities, and other essentials of fuller and freer human life for all. And the expansion of human capability, in turn, allows a faster expansion of resources and production, on which economic growth ultimately depends... Well-functioning public services, especially (but not only) in fields such as education and health, are also critical in fostering participatory growth as well as in ensuring that growth leads to rapid improvements in people's living conditions.[289]

The authors have further observed that apart from education and healthcare, India faces larger issues of accountability in the "public sector as a whole".[290] The lack of progress in public services acts as a huge barrier to improve the quality of life of people.[291] It has been observed:

The relative weakness of Indian social policies on school education, basic healthcare, child nutrition, essential land reform and gender equity reflects deficiencies of politically engaged public reasoning and social pressure, not just inadequacies in the official thinking of the government.[292]

The future of Indian democracy therefore depends on how it engages itself with the issues of accountability in transfer of basic human facilities to the common man.

623. The State has a legitimate aim to ensure that its citizens receive basic human facilities. In order to witness development, the huge amount of expenditure that the State incurs in providing subsidies and benefits to the common citizens, must be accompanied by accountability and transparency. Legislative and institutional changes are often capable of creating an atmosphere of transparency and accountability. The most visible example of a legislative enactment which brought institutional changes is the Right to Information Act, 2005. Commentators have often highlighted the importance of this legislation by deliberating upon how it has been successful at "curbing corruption and restoring accountability in public life"[293]. According to the State, though

the Aadhaar programme is not in itself a social security programme, the institutional framework established by the Act, seeks to act, in a way, as an extension of social security programmes. The State has a legitimate concern to check that the welfare benefits which it marks for those, who are entitled, reach them without diversion. The Aadhaar programme, it is argued, acts as an instrument for the realization of the benefits arising out of the social security programmes. The Aadhaar programme, it was further contended, fulfils the State's concern that its resources are utilised fully for human development.

It has been contended by the Respondents that since the establishment of the UIDAI in 2009, its basic mandate is to provide a unique identity number to residents. The number would subserve two purposes. First, it would serve as a proof of identity. Second, it would be used for the purpose of identifying beneficiaries for the transfer of social welfare benefits, provided by the state. The rationale for establishing a method of identification is to ensure that the benefits provided by social welfare programmes formulated by the State reach the beneficiaries for whom they are intended. As a policy intervention, a unique measure of identification is intended, it has been argued, to secure financial inclusion. A significant hurdle in the success of social welfare programmes is that benefits do not reach the targeted population. The reason for this may have something to do intrinsically with the condition of the individuals as much as with their larger socio-economic circumstances. Migrant labour and labour in the unorganised sector lacks fixity of abode. The nature of their work renders their lives peripatetic. Nomadic tribes, particularly in inaccessible areas, may not have fixed homes. In many cases, traditional occupations require individuals to move from place to place, dependent on seasonal changes. Then again, groups of citizens including women, children and the differently abled may face significant difficulties in accessing benefits under publicly designed social welfare programmes as a result of factors such as gender, age and disability.

624. Unequal access to welfare benefits provided by the State becomes a significant source of deprivation resulting in a denial of the means to sustain life and livelihood. Before the adoption of Aadhaar based-identity, there were multiple platforms for identification of residents. They created a situation where those with no identity had no access to the means of sustaining a dignified life. Equally significant, as a policy intervention, was the issue of capture. While on the one hand, large swathes of the population had no access to welfare assistance, benefits could be captured by persons not entitled to them either by the assertion of fake or multiple identities. Setting up a fake identity enables an individual to pass off as another and to secure a benefit to which that individual is not entitled. Fake identities compound the problem of capture by allowing individuals to receive multiple benefits through shell identities. Policy makers were confronted with the serious problems posed by fake and multiple identities since they imposed a burden on the exchequer while at the same time diluting the efficacy of state designed social welfare measures. The burden on the exchequer is illustrated by situations where persons who are not entitled to benefits secure them in the guise of being persons entitled to them. When imposters secure benefits which are not meant for them, they deprive in the process, persons who are genuinely entitled to benefits. The class of beneficiaries of social welfare programmes is, so to speak, adulterated by the capture of benefits by those not entitled to them. This raises serious concerns of the deprivation of human rights. The capture of benefits has the consequence of depriving those to whom these benefits should legitimately flow, of the measures designed by the state to protect its populace from human want and need. The resources deployed by the state are from its public revenues. When designing a

unique measure of identification, the state must be guided by the necessity of ensuring financial inclusion and of protecting against financial exclusion. Every citizen who is eligible for social welfare benefits should obtain them. No person who is entitled should be excluded. Individuals who do not qualify for social welfare benefits should not capture them by passing off as individuals entitled. Enforcing and implementing a robust platform for identification of beneficiaries must ensure that social welfare benefits reach the hands of those who fulfil the conditions of eligibility and are not captured by rent-seeking behaviour of those to whom social welfare benefits are not designed. This constitutes a legitimate object of state policy. Reaching out to the targeted population is a valid constitutional purpose. Social welfare measures are an intrinsic part of state policy designed to facilitate dignified conditions of existence to the marginalised, especially those who live below the poverty line. Identification of beneficiaries is crucial to the fulfilment of social welfare programmes.

625. These concerns form the basis of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016. As its Statement of Objects and Reasons explains:

The correct identification of targeted beneficiaries for delivery of various subsides, benefits, services, grants, wages and other social benefits schemes which are funded from the Consolidated Fund of India has become a challenge for the Government. The failure to establish identity of an individual has proved to be a major hindrance for successful implementation of these programmes. This has been a grave concern for certain categories of persons, such as women, children, senior citizens, persons with disabilities, migrant unskilled and unorganised workers, and nomadic tribes. In the absence of a credible system to authenticate identity of beneficiaries, it is difficult to ensure that the subsidies, benefits and services reach to intended beneficiaries.

The Statement of Objects and Reasons indicates that the enactment is designed to ensure "the **effective, secure and accurate** delivery of benefits, subsidies and services from the Consolidated Fund of India to targeted beneficiaries". The architecture of the law contemplates regulating the following aspects:

(a) issue of Aadhaar numbers to individuals on providing.. demographic and biometric information to the Unique Identification Authority of India;

(b) requiring, Aadhaar numbers for identifying an individual for delivery of benefits, subsidies, and services (where) the expenditure is incurred from or the receipt therefrom forms part of the Consolidated Fund of India;

(c) authentication of the Aadhaar number of an Aadhaar number holder in relation to his demographic and biometric information;

(d) establishment of the Unique Identification Authority of India... to perform functions in pursuance of the objectives above;

(e) maintenance and updating the information of individuals in the Central Identities Data Repository in such manner as may be specified by Regulations;

(f) measures pertaining to security, privacy and confidentiality of information in possession or control of the Authority including information stored in the Central Identities Data Repository; and

(g) offences and penalties for contravention of relevant statutory provisions.

The Preamble to the enactment indicates that Parliament designed the legislation as an instrument of good governance, to secure an "**efficient, transparent and targeted delivery** of subsidies, benefits and services" for which the expenditure is incurred from the Consolidated Fund to resident individuals.

626. The Aadhaar platform is not a social welfare benefit in itself. Essentially, what it seeks to achieve is to provide a unique identity to every resident. This identity, in the form of an Aadhaar number, is obtained upon the submission of demographic and biometric information in the course of enrolment. The legislative design envisages that the identity of the individual is verified through the process of authentication by which the biometric data stored in the central repository is matched with the biometric information submitted for authentication. Aadhaar is a platform for verification of identity based principally on biometric information. In facilitating the process of establishing the identity of the individual who seeks social welfare benefits envisaged in Section 7, Aadhaar has an instrumental role. It is instrumental in the sense that as a measure of state policy, it seeks to bring about financial inclusion by providing a means of identification to every segment of the population including those who may not have been within the coverage of traditional markers of identity. As an instrument for verifying identity, Aadhaar seeks to ensure that social welfare benefits are obtained by persons eligible to do so and are not captured by the ineligible. Relying on an asserted reliability of biometric markers, the Aadhaar platform attempts to eliminate, or at least to curb rent-seeking behaviour.

The rationale underlying Section 7 is the targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In the seven decades since Independence, the Union Government has put into place social welfare measures including the public distribution system, free education, scholarships, mid-day meals and LPG subsidies to ameliorate the conditions of existence of the poor and marginalised. There is a state interest in ensuring that the welfare benefits which the state provides reach those for whom they are intended.

G.3 Identity and Identification

627. Identity is inseparable from the human personality. An identity is a statement of who an individual is. Our identities define who we are. They express what we would wish the world to know us as. The human personality is, at a certain level, all about identity, for it is through the assertion of identity that each individual seeks to preserve the core of his or her humanity. An identity is the persona which an individual puts forth in a multitude of relationships. The significance of our identity lies in our ability to express the core of our beings. When the Constitution protects our right to be and to be what we are, it creates a space where the individual is immune from interference. By recognizing our liberty as autonomous persons, the Constitution recognizes our ability to preserve and shape our identities in interactions with others.

Identity may be, but is not always based upon immutable characteristics that are defined at birth. What is immutable may not be or, at any rate, is not generally understood as being capable of change. But even here, the immutability of our features is relative to our own existence and is capable of being shaped by the social milieu in which human beings lead their lives. Features about our biological being which are defined at birth are, after all, not as constraining upon our identities as is often assumed to be the case. That is because these immutable features are also constantly engaged with our social and cultural environment. They shape and are influenced by that environment.

628. There is a distinction between identity and identification. Identification is a matter of proof- of establishing that a person is actually, the individual who claims a right or entitlement. In their daily interactions, individuals have to distinguish themselves from others, whether it be in the course of employment, travel, civil union, location, community perspectives, revenue obligations or access to benefits. Identification is a proof of identity or evidence of identity. Identification is mandatory in numerous activities of day to day life: a passport is necessary for international travel, a voter ID is required for exercising electoral rights, a driving license is necessary to ply a vehicle and an arms license is needed to possess a fire arm. The holder of a policy of medical insurance will have a card depicting his or her identity which is a proof of holding a valid policy for availing medical benefits.

629. Under international law, recognition of identity is an obligation of a nation state. Article 6 of the Universal Declaration of Human Rights provides that "everyone has the right to recognition everywhere as a person before the law". Article 16 of the International Covenant on Civil and Political Rights is in similar terms. Article 8 of the UN Convention on the Rights of the Child mandates that State parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. The importance of identity is recognized by Article 3 of the American Convention on Human Rights. The Inter-American Juridical Committee (IAJC) of the Organisation of American States (OAS) has in fact provided that:

12. The right to identity is consubstantial to the attributes and human dignity. Consequently it is an enforceable basic human right erga omnes as an expression of a collective interest of the overall international community that does not admit derogation or suspension in cases provided in the American Convention on Human Rights.

...

15. The Committee considers that the right to identity is, among its most relevant implications and scope, to constitute an autonomous right that is based on the Regulations of international law and those that derive from the actual cultural elements considered in the domestic legal systems of the States, in order therefore to satisfy the specificity of the individual, with his or her rights that are unique, singular and identifiable.[294]

630. In **National Legal Services Authority** v. **Union of India** MANU/SC/0309/2014 : (2014) 5 SCC 438, this Court held that gender identity is fundamental to and an essential component for the

enjoyment of civil rights by the transgender community. Self-determination of identity has been held to be an essential facet of Article 21. In the view of this Court:

74. The recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

75. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg* v. *Hotel Association of India*[15] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed Under Article 21 of the Constitution of India.

Identity assumes a complex character in a networked society. Shah adopts the following definition of a networked society[295]:

a network society is a society where the key social structures and activities are organized around electronically processed information networks. So it's not just about networks or social networks, because social networks have been very old forms of social organization. It's about social networks which process and manage information and are using microelectronic based technologies[296].

631. In a networked society, an individual is a data subject and a quantified self. The individual is a data subject since his or her data is stored in a database. Shah notes that there is an ambivalence about whether the data subject is the individual whose identity becomes the basis of validating the data or whether the data subject is the identity of the individual as it gets constructed through data sets. The individual becomes a quantified self where data which is distributed across various systems is "curated" to form a comprehensive profile of an individual.

632. The Aadhaar project was intended to allow a unique **identity** to enable individuals to "navigate through disconnected and often hostile governmental database systems". Shah notes that ever since 2009, the terms 'identity' and 'identification' were used as part of the Aadhaar project inter-changeably, introducing "a curious conflation and interoperability"[297] between these notions. 'Identification' is the ability of a network device to identify an individual by scanning unique data sets, from personal information to biometric details such as finger print and iris scan, which would be stored in a massive centralized database. UIDAI posited that identification took place through its yes/no mechanism by which the centralised database would provide a response to whether the biometric details submitted for authentication match those in the repository. Technologically, at this level, Aadhaar was to be a **means of identification**. Yet at another level, the Aadhaar project also offered itself as providing a documentary identity to persons who may not have possessed one at all. Shah, in the course of his article, has this to state about the conflation between identity and identification in the Aadhaar project:

This ambiguity and conflation cannot merely be attributed to a semantic slip of the keyboard, but to a much larger phenomenon which points to the construction of a new notion of the individual, through big data streams and measures of self-quantification. It offers us a techno-social framework where the machine function of identification is wedded to the human expression of identity, and thus offers an inroad into looking at what happens when our identities are mediated, mitigated, facilitated, and contained by the ways in which the networked technologies of authentication and verification operate. It is a crucial shift where the identity of a person is ontologically defined through the logics and logistics of networked computation that form the Aadhaar project. This is why the Aadhaar enrolment system, for instance, does not check the veracity of the information that the individual gives it. For the enrolment, the individual needs no proof to substantiate or validate the information provided. The name, the address, the description, etc. are empty signifiers and it is possible for anybody to assume any identity as long as they give the inviolable data of biometric recognition. Thus, the identity of the person being enrolled and registered is almost insignificant and has value only in how it would now always identify the individual through the credentials or information provided. The Aadhaar network governance system is concerned only with the identifiers rather than the narrative, iterative, forms of identity and expression, and this is where we begin examining the ways in which identity is shaped, understood, and used to construct the notion of an individual in computation systems.[207]

633. Identity includes the right to determine the forms through which identity is expressed and the right not to be identified. That concept is now "flipped" so that identification through identifiers becomes the only form of identity in the time of database governance. This involves a radical transformation in the position of the individual.

The submission which has been urged on behalf of the Petitioners is that an individual entitled to the protection of the freedoms and liberties guaranteed by Part III of the Constitution must have the ability to assert a choice of the means of identification for proving identity. Requiring an individual to prove identity on the basis of one mode alone will, it is submitted, violate the right of self-determination and free choice.

634. The Aadhaar (Enrolment and Update) Regulations, 2016 stipulate in Regulation 4, the demographic information which is required for enrolment. Regulation 4 is in the following terms:

4. Demographic information required for enrolment.-

(1) The following demographic information shall be collected from all individuals undergoing enrolment (other than children below five years of age):

(i) Name;

(ii) Date of Birth;

(iii) Gender;

(iv) Residential Address.

(2) The following demographic information may also additionally be collected during enrolment, at the option of the individual undergoing enrolment:

(i) Mobile number;

(ii) Email address.

(3) In case of Introducer-based enrolment, the following additional information shall be collected:

(i) Introducer name;

(ii) Introducer's Aadhaar number.

(4) In case of Head of Family based enrolment, the following additional information shall be collected:

(i) Name of Head of Family;

(ii) Relationship;

(iii) Head of Family's Aadhaar number;

(iv) One modality of biometric information of the Head of Family.

(5) The standards of the above demographic information shall be as may be specified by the Authority for this purpose.

(6) The demographic information shall not include race, religion, caste, tribe, ethnicity, language, record of entitlement, income or medical history of the resident.

Regulation 9 postulates that at the time of enrolment, the enrolling agency shall inform the individual who is undergoing enrolment of (i) the manner in which the information shall be used; (ii) the nature of recipients with whom the information is intended to be shared during authentication; and (iii) the existence of a right to access information. Under Regulation 10, a resident seeking enrolment has to submit an application for enrolment together with copies of supporting documents for proof of identity, address and date of birth. Schedule II indicates a list of supporting documents which are accepted for verification of identity, address and date of birth. If a resident does not possess the supporting documents, enrolment is contemplated through an introducer or a Head of Family. Schedule II contains as many as eighteen documents which are accepted towards proof of identity and thirty three documents as proof of address. The Aadhaar Act, it has been contended, allows the resident to identify herself through any of the stipulated documents for the purpose of availing an Aadhaar number. The Aadhaar number can be availed of to secure a subsidy, benefit or service Under Section 7, the expenditure of which is drawn from the Consolidated Fund of India.

Article 266 of the Constitution provides as follows:

266. Consolidated Funds and public accounts of India and of the States

(1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled the "Consolidated Fund of India", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State".

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

635. The Union Government is the custodian of the Consolidated Fund Under Article 266. All revenues received by the government form part of the Consolidated Fund. No part of its proceeds can be "appropriated except in accordance with law and for the purpose and in the manner" which is provided by the Constitution. As the custodian of the fund, the Union Government, it has been submitted by the Respondents, had the Aadhaar Act enacted through Parliament. The Act places a restriction on the right of the individual to utilize any other identification save and except for the Aadhaar number, for the purpose of availing of a subsidy, benefit or service that involves an expenditure from the Consolidated Fund. The purpose of making an Aadhaar number mandatory for the delivery of benefits, services and subsidies funded from the Consolidated Fund is to confirm the identity of the individual to whom the benefit is being transferred. This was in order to ensure that the benefits under social welfare programmes funded by the Consolidated Fund reach the hands of targeted beneficiaries. The Union Government which expends huge sums of money in its welfare schemes was apprised of the fact that money which was meant for the beneficiaries was being siphoned off through ghosts and duplicates. As a result, genuine beneficiaries would be deprived of their basic rights. Cornering of benefits by the creation of bogus identities seriously impacted upon social welfare measures adopted by the Union Government as an instrument of fostering social and economic development. It was to deal with this evil that the Aadhaar project assumed a statutory character in 2016. Through the provisions of the law, Parliament intended that Aadhaar should become an effective instrument of de-duplication. This is premised on the view of the legislating body that the use of biometrics would render it difficult, if not impossible, to obtain fake identities. Aadhaar, in other words, was adopted as a matter of legislative policy to curb the evil of shell companies and ghost identities. Where the State expends large sums on social welfare projects, it has a legitimate interest in ensuring that the resources which it deploys reach the hands of those for whom they are meant.

Thus, there are two important facets of the Aadhaar regime which must be noticed. The first is that Under Section 3, it is a voluntary option of the individual to choose Aadhaar as a form of identification. However, if the individual seeks a subsidy, benefit or service for which the expenditure is incurred from the Consolidated Fund of India, Aadhaar becomes a mandatory requirement. The second important feature is the requirement of informed consent when the individual parts with identity information. The mandate of Section 7 must be understood from the perspective of the obligation imposed on the State to ensure effective and efficient utilization of public resources. Article 266 reinforces that mandate in its stipulation that all monies out of the Consolidated Fund of India can only be appropriated in accordance with law, for the purpose of and in the manner provided by the Constitution. The State is a trustee of public resources. The adoption of Aadhaar is in fulfilment of the doctrine of public trust. The state is under a bounden obligation to ensure that its revenues which are placed in the Consolidated Fund are appropriated in accordance with law and are not diverted for extraneous purposes. These principles have been elucidated in the decisions of this Court in **Natural Resources Allocation, In Re, Special Reference No. 1 of 2012** MANU/SC/0793/2012 : (2012) 10 SCC 1, **Centre for Public Interest Litigation** v. **Union of India** (2012) 3 SCC 1, **Reliance Telecom Limited** v. **Union of India** MANU/SC/0036/2017 : (2017) 4 SCC 269.

The mandate of Section 7 is founded on a legitimate state interest. The state has a vital interest in ensuring that public revenues are duly accounted, that the Consolidated Fund is utilized for purposes authorized by law; that funds for development reach genuine beneficiaries and that scarce public resources meant for those at the foot of the socio-economic ladder are not mis-utilized by rent-seeking behavior.

H. Proportionality

636. The Petitioners have challenged the constitutional validity of the Aadhaar project and the Aadhaar Act on various grounds including the violation of the fundamental rights of citizens including the right to privacy and dignity. The Respondents, in defense, have argued that Aadhaar is an enabler of identity and empowers citizens to realise various facets of the right to life, such as the right to food and livelihood.

637. The learned Attorney General has argued that the use and authentication of the Aadhaar number is a necessary and proportionate measure to ensure targeted delivery of financial benefits and services and to prevent 'leakages'. He submits that the Aadhaar scheme satisfies the test of proportionality: it has a rational nexus with the goal that it seeks to achieve, and since welfare benefits enhance the right to live with dignity, the latter will prevail over the right to privacy. Mr. Rakesh Dwivedi, learned Senior Counsel has argued that the "least intrusive test" is not accepted in Indian jurisprudence. He submits that even if the test were to be accepted, the exercise of determining whether a measure is the least intrusive is a technical issue for which the Court lacks the requisite expertise. He states that this exercise "cannot be undertaken in the courts with the assistance of lawyers who equally have no expertise in the field" and that "such an exercise involves research, study by the experts and courts cannot substitute the same". Mr. Gopal Sankaranarayanan, learned Counsel, submits that the means adopted "at the moment" are no more than is necessary for ensuring that the "avowed objects" are served, and that they balance individual interests (fundamental rights) with societal interests (directive principles). He further

submits that the fact there are various limitations in place ensure that "some balance" is achieved between the breach of privacy and the object sought to be achieved.

This Court must now perform the delicate task of 'balancing' these competing interests by subjecting the Aadhaar Act to the proportionality test.

H.I Harmonising conflicting rights

638. In the 2003 edition of his celebrated work, Granville Austin recounts the words of Prime Minister Morarji Desai that freedom and bread are not incompatible, but further adds, 'Neither could they easily be sought together'.[298] As mentioned earlier, Granville Austin had insightfully spoken about how the strands of the Constitution of unity-integrity, democracy and social revolution could come in conflict with one another creating challenges for those who work with the Constitution.[299] Some of the questions inherent in the Constitution according to him are "Democracy for whom? Justice for whom? What is Justice? What are the appropriate means of employing the Constitution's means' among citizens, between them and their government?"[207] It was due to the foresight of the framers of the Constitution that they insisted that neither the strand of social revolution nor the strand of democracy was to be pursued at the expense of the other.[207]

The ostensible conflict between bread and freedom has also been explored in the works of Professor Upendra Baxi. In a seminal essay on human rights in 1984 which he calls the "the great gift of classical and contemporary human thought to culture and civilization"[300], he discusses the widening sphere of human rights thought and action to new arenas and constituencies as "New rights arise from the womb of the old."[301] He draws on the distinction between basic human needs and human rights and argues that the constant struggle between these two forces is the essence of the difference between the right to be human approach and the human rights approach.[207] It is rightly pointed out that a discussion on human rights will always constitute an inherent aspect of the larger debate of development. He opines that whatever meaning maybe ascribed to the term "development", it must ensure that people will not be deprived of the right to remain human:

Whatever it may be made to mean, "development" must at least mean this: people will be given the right to be and remain human. Total and continuing destitution and impoverishment exposes people to a loss of their humanity. In no society that takes human rights seriously should there be allowed a state of affairs where human beings become subhuman--that is, when they perforce have to surrender even those sonorously recited "inalienable" rights of man... The expression "human rights" presupposes a level at which biological entities are bestowed with the dignity of being called human. The bearers of human rights must have an implicit right to be and remain human, allowing them some autonomy of choice in planning survival.[302]

Thus, the broader matrix of human rights includes within it the inalienable and fundamental right to always 'be and remain human'. Professor Upendra Baxi notes that this broader debate between human rights and the 'right to be human' is reflective of the bread v. freedom conflict. It is noted that historically, freedom might have been chosen over bread due to the vast enumeration of liberal rights it includes, despite the acute awareness that without bread, freedom of speech and assembly, of association, of conscience and religion, of political participation, symbolic adult suffrage may all be meaningless.[303] At the same time, Baxi points out the danger in choosing bread at the cost

of freedom, given that historically in the absence of freedom, human beings have been subject to the most egregious indignities:

The provision of "bread" may justify indefinite postponement of the provision of any kind of "freedom". In the absence of such freedom, even the promised "bread" may not be realized by the masses; indeed, they even lose, in the process, their power to protest at the indignity of regime sponsored starvation. This, indeed, is a possibility which has materialized more often than not.[304]

Baxi concludes that the choice between bread and freedom is a false antithesis. The challenge is not a choice in the abstract between bread and freedom but rather the balancing of the two:[305]

But the issues are not really "bread" and/or "freedom" in the abstract, but rather who has how much of each, for how long, at what cost to others, and why. Some people have both "bread" and "freedom"; others have "freedom" but little "bread" or none at all; yet others have half a loaf (which is better than none, surely!) with or without freedom; and still others have a precarious mix where "bread" is assured if certain (not all) freedoms are bartered.[306]

It is the foremost duty of the State to work towards achieving and maintaining a fine balance, taking into account these myriad considerations. The State must always be guided by the knowledge and sense of duty that in a true democracy, the citizens cannot be made to choose between rights and needs, as they are equally entitled to both. As the sentinel of justice and protector of fundamental rights, it is the responsibility of this Court to act as a check and ensure that government action or inaction does not endanger or threaten to disturb the balance that the Constitution seeks to achieve. It is imperative to remember that both 'bread' and 'freedom' play a vital role in the guaranteeing to our citizens the gamut of human rights and freedoms that make human existence meaningful.

639. While exercising judicial review, courts are often confronted with situations involving conflicts between rights, tensions between individuals arising from the assertion of rights and discord arising out of the assertion of the same right by two or more individuals. Conflicts between rights arise when the assertion of a fundamental human right by an individual impacts upon the exercise of distinct freedoms by others. The freedom of one individual to speak and to express may affect the dignity of another. A person may be aggrieved when the free exercise of the right to speak by someone impinges upon his or her reputation, which is integral to the right to life Under Article 21. A conflict will, in such a situation, arise between a right which is asserted Under Article 19(1)(a) by one citizen and the sense of injury of another who claims protection of the right to dignity Under Article 21. Conflicts also arise when the exercise of rights is perceived to impact upon the collective identity of another group of persons. Conflicts may arise when an activity or conduct of an individual, in pursuit of a freedom recognised by the Constitution, impinges upon the protection afforded to another individual under the rubric of the same human right. Such a situation involves a conflict arising from a freedom which is relatable to the same constitutional guarantee. Privacy is an assertion of the right to life Under Article 21. The right to a dignified existence is also protected by the same Article. A conflict within Article 21 may involve a situation when two freedoms are asserted as political rights. A conflict may also envisage a situation where an assertion of a political right under the umbrella of the right to life stands in conflict with the

assertion of an economic right which is also comprehended by the protection of life under the Constitution.

Such conflicts require the court to embark on a process of judicial interpretation. The task is to achieve a sense of balance. An ideal situation would be one which would preserve the core of the right for both sets of citizens whose entitlements to freedom appear to be in conflict. Realistically, drawing balances is not a simple task. Balances involve sacrifices and the foregoing of entitlements. In making those decisions, a certain degree of value judgment is inevitable. The balance which the court draws may be open to criticism in regard to its value judgment on the relative importance ascribed to the conflicting rights in judicial decision making. In making those fine balances, the court can pursue an objective formulation by relying upon those values which the Constitution puts forth as part of its endeavour for a just society. Our Constitution has in Part III recognised the importance of political freedom. In Part IV, the Constitution has recognised our social histories of discrimination and prejudice which have led to poverty, deprivation and the absence of a dignified existence to major segments of society. Holding Part III in balance with Part IV is integral to the vision of social and economic justice which the Constitution has sought to achieve consistent with political democracy. Difficult as this area is, a balancing of rights is inevitable, when rights asserted by individuals are in conflict.

640. Several decisions of this Court over the last two decades have sought to bring order to the clash between fundamental rights. In **People's Union for Civil Liberties (PUCL)** v. **Union of India** MANU/SC/0234/2003 : (2003) 4 SCC 399, this Court was called upon to balance the right to information of voters (requiring the disclosure of the assets of candidates and their spouses at an election) with the right to privacy implicit in Article 21. In drawing the balance, a bench of three Judges of this Court gave primacy to the entitlement of citizens to be informed about the affairs of those who would represent them in electoral democracy. As the Court held:

121...By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given.
307

The Court held that the provision contained in the Representation of People Act 1951 for a disclosure of assets and liabilities only to the Speaker or to the Chairman of the House did not adequately protect the citizen's right to information, resulting in a violation of the guarantee of free speech and expression.

641. In **Thalappalam Service Cooperative Bank Limited** v. **State of Kerala** MANU/SC/1020/2013 : (2013) 16 SCC 82, this Court dealt with a conflict between the right to information [(protected by Article 19(1)(a)] and the right to privacy (protected by Article 21). The Court observed:

61. The right to information and right to privacy are, therefore, not absolute rights, both the rights, one of which falls Under Article 19(1)(a) and the other Under Article 21 of the Constitution of India, can obviously be regulated, restricted and curtailed in the larger public interest. Absolute or uncontrolled individual rights do not and cannot exist in any modern State. Citizens' right to get information is statutorily recognised by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble and other provisions of the Act.
308

The Court held that the balance between the right to information and the right to privacy is drawn under the Right to Information Act 2005: if the information which is sought is personal and has no relationship with a public activity or interest, a public authority is not legally bound to provide such information. If the information which is sought is to be made available in the larger public interest, reasons have to be recorded because the person from whom the information is sought has a right to privacy guaranteed by Article 21. **Thalappalam** considered a conflict arising between two fundamental rights, the right to information protected by Article 19(1)(a) and the right to privacy which is protected by Article 21.

642. More recently, in **G Sundarrajan** v. **Union of India** MANU/SC/0466/2013 : (2013) 6 SCC 620, a two judge Bench considered a challenge to the establishment of a nuclear power plant on the ground that it would violate the right to life guaranteed by Article 21. Noting that there was a need to draw a balance between the assertion of several rights including the protection of the environment, the Court observed that the larger public interest must prevail:

198. We have to resolve the issue whether the establishment of NPP would have the effect of violating the right to life guaranteed Under Article 21 to the persons who are residing in and around Kudankulam or by establishing the NPP, it will uphold the right to life in a larger sense. While balancing the benefit of establishing Kknpp Units 1 to 6, with right to life and property and the protection of environment including marine life, we have to strike a balance, since the production of nuclear energy is of extreme importance for the economic growth of our country, alleviate poverty, generate employment, etc. While setting up a project of this nature, we have to have an overall view of larger public interest rather than smaller violation of right to life guaranteed Under Article 21 of the Constitution.
309

In **Subramanian Swamy** v. **Union of India** MANU/SC/0621/2016 : (2016) 7 SCC 221, the learned Chief Justice, speaking for a Bench of two judges emphasised the need for a sense of balance when the assertion of fundamental rights by two citizens is in conflict:

137...One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests.
310

Noting that the "balancing of fundamental rights is a constitutional necessity", the Court has attempted to harmonise reputation as an intrinsic element of the right to life Under Article 21 with criminal defamation as a restriction Under Article 19(2).

643. In **Asha Ranjan** v. **Chandrakeshwar Prasad** (2017) 4 SCC 397, this Court dealt with a case involving a conflict between the fundamental rights of two individuals within Article 21. There was on the one hand an assertion of the right to life on the part of an individual Accused of an offence, who claimed a right to a fair trial, and the protection of the interests of the victim which was also relatable to the same fundamental right Under Article 21. In resolving the conflict, the Court gave expression to the need to preserve "paramount collective interests":

61...circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, ... may be different than the principle to be applied in intra-conflict between the same fundamental right. To elaborate, as in this case, the Accused has a fundamental right to have a fair trial Under Article 21 of the Constitution. Similarly, the victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. However, when there is intra-conflict of the right conferred under the same article, like fair trial in this case, the test that is required to be applied, we are disposed to think, it would be "paramount collective interest" or "sustenance of public confidence in the justice dispensation system".[311]

644. These decisions indicate that the process of resolving conflicts arising out of the assertion of different fundamental rights and conflicts within the same fundamental right, necessarily involves judicial balancing. In finding a just balance this Court has applied norms such as the 'paramount public interest'. In seeking to draw the balance between political freedoms and economic freedoms, the Court must preserve the euphony between fundamental rights and directive principles. It is on their co-existence that the edifice of the Constitution is founded. Neither can exist without the other. Democracy rejects the totalitarian option of recognising economic entitlements without political liberty. Economic rights have become justiciable because of the constitutional guarantees founded on freedom and the Rule of law. The Constitution is founded on democratic governance and is based on the protection of individual freedom. Freedom comprehends both fundamental political freedoms as well as basic human rights. A just balance between the two is integral to the fulfilment of India's constitutional commitment to realise human liberty in a social context which is cognizant of the histories of discrimination and prejudice suffered by large segments of our society. Where the question is related to the limiting the right to privacy, **Puttaswamy** requires the test of proportionality. It has, therefore, to be tested whether the Aadhaar scheme fulfils the test of proportionality.

645. The test of proportionality, which began as an unwritten set of general principles of law, today constitutes the dominant "best practice" judicial standard for resolving disputes that involve either a conflict between two rights claims or between a right and a legitimate government interest.[312] It

has become a "centrepiece of jurisprudence" across the European continent as well as in common law jurisdictions including the United Kingdom, South Africa and Israel.[313] Proportionality is the "defining doctrinal core of a transnational rights-based constitutionalism"[314]. It has been raised to the rank of a fundamental constitutional principle,[207] and represents a global shift from a culture of authority to a culture of justification.[315] Servin argues that jurisprudence on privacy has evolved from the "right to be let alone", to now being centered around the principle of proportionality.[316]

646. Subjecting the Aadhaar scheme to the test of proportionality does not mean that the Court is second-guessing the wisdom of the legislature. State action must be subjected to judicial scrutiny to ensure that it passes constitutional muster. The test of proportionality stipulates that the nature and extent of the State's interference with the exercise of a right (in this case, the rights to privacy, dignity, choice, and access to basic entitlements) must be proportionate to the goal it seeks to achieve (in this case, purported plugging of welfare leakage and better targeting).

Within the framework of constitutional interpretation, proportionality serves as a test to determine the extent to which fundamental rights can be limited in the face of legislative intervention which purports to further social and public interest aims. Aharon Barak, the former Chief Justice of the Supreme Court of Israel has described the importance of the proportionality test as thus:[317]

Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights ... Our democracy is characterized by the fact that it imposes limits on the ability to violate human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his right, which cannot be breached even by majority.

In applying the proportionality test, the Court cannot mechanically defer to the State's assertions. Especially given the intrusive nature of the Aadhaar scheme, such deference to the legislature is inappropriate. The State must discharge its burden by demonstrating that rights-infringing measures were necessary and proportionate to the goal sought to be achieved.

H.2 Proportionality standard in Indian jurisprudence

647. In India, the principle of proportionality has a long jurisprudential history which has been adverted to in a judgment[318] of this Court:

On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. **Ever since 1950, the principle of 'proportionality' has indeed been applied vigorously to legislative (and administrative action) in India.** While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India...this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices.

The early decisions of this Court may not have used the expression "proportionality". But the manner in which the court explained what would be a permissible restraint on rights indicates the seeds or the core of the proportionality standard. Proportionality has been the core of reasonableness since the 1950s. **Chintaman Rao** v. **State of Madhya Pradesh** MANU/SC/0008/1950 : 1950 SCR 759 concerned a State legislation which empowered the government to prohibit people in certain areas from manufacturing *bidis*. The object of the law was to ensure the supply of adequate labour for agricultural purposes in areas where *bidi* manufacturing was an alternative source of employment for persons likely to be engaged in agricultural labour. The Court held that the State need not have prohibited all labourers from engaging in bidi manufacturing throughout the year in order to satisfy the objective. Justice Mahajan, on behalf of a Constitution Bench held:

6. The phrase "reasonable restriction" connotes that **the limitation imposed** on a person in enjoyment of the right should not be arbitrary or **of an excessive nature, beyond what is required in the interests of the public**. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. **Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness** and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality.

648. **State of Madras** v. **V G Row** MANU/SC/0013/1952 : 1952 SCR 597 considered whether the action of the Tamil Nadu government in declaring an association unlawful violated Article 19(1)(c) of the Constitution. Chief Justice Patanjali Sastri, speaking for the Constitution Bench, propounded what has come to be regarded as a classic statement of the principle of proportionality in our law:

15. ...the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, **the disproportion of the imposition,** the prevailing conditions at the time, should all enter into the judicial verdict....

The decision of the Constitution Bench in **State of Bihar** v. **Kamla Kant Misra** MANU/SC/0061/1969 : (1969) 3 SCC 337 concerned a challenge to the second part of Sub-section (6) of Section 144 of the Code of Criminal Procedure on the ground that it violated Sub-clauses (b), (c) and (d) of Clause (1) of Article 19 of the Constitution. Justice K S Hegde, speaking for the majority, observed:

15. One of the important tests to find out whether a restriction is reasonable is to see ...**whether the restriction is in excess of the requirement** or whether it is imposed in an arbitrary manner.
319

649. In **Mohammed Faruk** v. **State of Madhya Pradesh** MANU/SC/0046/1969 : (1969) 1 SCC 853 a Constitution Bench of this Court held that in determining the proportionality of a measure

restricting an individual's right Under Article 19(1)(g) of the Constitution, the factors to be taken into consideration would include whether a less drastic restriction would have served the purpose. As the Court held:

10...The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom,
[...],
the possibility of achieving the object by imposing a less drastic restraint, [...]
or that a less drastic restriction may ensure the object intended to be achieved.
320

In **Bishambhar Dayal Chandra Mohan** v. **State of Uttar Pradesh** MANU/SC/0056/1981 : (1982) 1 SCC 39, "reasonable restriction" was held to mean that the limitation imposed on the enjoyment of a right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public.

650. The decision in **Om Kumar** v. **Union of India** MANU/SC/0704/2000 : (2001) 2 SCC 386 concerned the quantum of punishment imposed in departmental disciplinary proceedings. Justice M. Jagannadha Rao, speaking for a two judge Bench, defined proportionality in the following terms:

28. By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or **least restrictive choice of measures** has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are however given an area of discretion or a range of choices **but as to whether the choice made infringes the rights excessively or not is for** the Court. That is what is meant by proportionality.
321

In **Teri Oat Estates** v. **U.T., Chandigarh** MANU/SC/1098/2003 : (2004) 2 SCC 130, this Court adopted a similar interpretation of proportionality.

651. In **Modern Dental College and Research Centre** v. **State of Madhya Pradesh**, MANU/SC/0495/2016 : (2016) 7 SCC 353 a Constitution Bench of this Court while dealing with a challenge to the vires of the Madhya Pradesh Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007, held that proportionality is the correct test to apply in the context of Article 19(6). Justice A K Sikri, speaking for the Court, held thus:

60... the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as 'Doctrine of Proportionality'. **Jurisprudentially, 'proportionality' can be defined as the set of Rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible...**[322]

While expounding on the theory of proportionality, Justice AK Sikri referred to Aharon Barak's seminal book[323] on proportionality:

60... A limitation of a constitutional right will be constitutionally permissible if: (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."
[324]

Justice Sikri held that laws limiting constitutional rights must satisfy the test of proportionality:

63. ...The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to **the purpose, and such measures are necessary....**[325]

64. The exercise which, therefore, to be taken is to find out as to **whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.**[326]

652. In **KS Puttaswamy** v. **Union of India** MANU/SC/1044/2017 : (2017) 10 SCC 1, one of us (Chandrachud J.), speaking for four judges, laid down the tests that would need to be satisfied under our Constitution for violations of privacy to be justified. This included the test of proportionality:

325...A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty Under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.
[327]

The third principle (iii above) adopts the test of proportionality to ensure a rational nexus between the objects and the means adopted to achieve them. The essential role of the test of proportionality

is to enable the court to determine whether a legislative measure is disproportionate in its interference with the fundamental right. In determining this, the court will have regard to whether a less intrusive measure could have been adopted consistent with the object of the law and whether the impact of the encroachment on a fundamental right is disproportionate to the benefit which is likely to ensue. The proportionality standard must be met by the procedural and substantive aspects of the law.

Justice Sanjay Kishan Kaul, in his concurring opinion, suggested a four-pronged test as follows[328]:

(i) The action must be sanctioned by law;

(ii) The proposed action must be necessary in a democratic society for a legitimate aim;

(iii) The extent of such interference must be proportionate to the need for such interference;

(iv) There must be procedural guarantees against abuse of such interference.

The 'test of proportionality' is a judicially-entrenched principle which has invigorated fundamental rights jurisprudence in the country. The application of the proportionality standard in rights-based adjudication is well-recognised across diverse jurisdictions.

H.3 Comparative jurisprudence

653. Since some of the concerns raised by the Aadhaar scheme have arisen for the first time in India, it would be appropriate to discuss judgments of foreign jurisdictions which have inquired into the proportionality of measures many of them similar to those prescribed under the Aadhaar Act.

654. The Privy Council formulated the parameters of proportionality in **Elloy de Freitas** v. **Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing,** [1999] 1 AC 69 elaborating a three-fold test:

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Subsequently in **Huang (FC)** v. **Secretary of State for the Home Department,** [2007] UKHL 11 the House of Lords added a fourth parameter which is "the need to balance the interests of society with those of individuals and groups."

655. In the **Federal Census Act Case (Volkszahlungsurteil)**, (1983) 65 BVerfGE 1 the Federal Constitutional Court of the Federal Republic of Germany dealt with a challenge to the German Federal Census Act, 1983, which provided for collection of citizens' basic personal information, including, *inter alia*, source of income, occupation, supplementary employment, educational background and hours of work. Certain provisions provided for transmission of statistical data to

local governments for the purposes of regional planning, surveying, environmental protection, and redrawing of election districts. The Court struck down provisions permitting transfer of statistical data to local authorities on the ground that they enabled authorities to compare census data with local housing registries. The Court observed that the combination of statistical data and a personalized registry could lead to the identification of particular persons, which would lead to a chilling effect upon individuals' right to informational self-determination.

The Court developed a 'fundamental right of informational self-determination' drawing from Articles 1(1) and 2(1) of the German Constitution, which protect the fundamental right to human dignity and the right to freely develop one's personality. Explaining the importance of this right in the context of risks occasioned by modern data processing, the Court noted that:

The freedom of individuals to make plans or decisions in reliance on their personal powers of self-determination may be significantly inhibited if they cannot with sufficient certainty determine what information on them is known in certain areas of their social sphere and in some measure appraise the extent of knowledge in the possession of possible interlocutors. A social order in which individuals can no longer ascertain who knows what about them and when and a legal order that makes this possible would not be compatible with the right to informational self-determination...This would not only restrict the possibilities for personal development of those individuals but also be detrimental to the public good since self-determination is an elementary prerequisite for the functioning of a free democratic society predicated on the freedom of action and participation of its members...The fundamental right guarantees in principle the power of individuals to make their own decisions as regards the disclosure and use of their personal data.[329]

The Court, while recognizing the right to informational self-determination, observed that distinct silos of data "can be pieced together with other data collections particularly when individual integrated information systems are built up - to add up to a partial or virtually complete personality profile," and that too with, "the person concerned having no means of controlling its truth and application."[329] Of crucial importance is the Court's observation that the right to informational self-determination is particularly endangered because in reaching decisions, one no longer has to rely on manually collected registries and files. Today, the technical means of storing individual statements about personal or factual situations of a certain or verifiable person with the aid of automatic data processing are practically unlimited and can be retrieved in a matter of seconds irrespective of distances.[330]

The Court noted, however, that the right to informational self-determination is not absolute and that public sector entities could collect personal data under certain conditions. The Court held that there must be a statutory basis for this informational activity, and that it must satisfy the principle of proportionality. On the need for a statutory basis, the Court held that:

The use of the data is limited to the purpose specified by law. If for no other reason than because of the dangers associated with automated data processing, protection is required against unauthorized use-including protection against such use by other governmental entities-through a prohibition on the transfer and use of such data[331]

Clearly defined conditions must be created for processing to ensure that individuals do not become mere data subjects in the context of the automated collection and processing of the information pertaining to their person. Both the absence of a connection with a specific purpose that can be recognized and verified at all times and the multifunctional use of data, reinforce the tendencies that are to be checked and restricted by data-protection legislation, which represents the concrete manifestation of the constitutionally guaranteed right to informational self-determination.[332]

On the principle of proportionality, the Court held that:

The legislature must in its statutory Regulations respect the principle of proportionality. This principle, which enjoys constitutional status, follows from the nature of the fundamental rights themselves, which, as an expression of the general right of the public to freedom from interference by the state, may be restricted by the public powers in any given case only insofar as indispensable for the protection of public interests ... In view of the threats described above that arise from the use of automated data processing, the legislature must more than was the case previously, adopt organizational and procedural precautions that work counter to the threat of violation of the right of personality ...[333]

The survey program of the 1983 Census Act also satisfies, to the extent relevant to the matter under review, the principle of proportionality. A measure to achieve the intended purpose must therefore be suitable and necessary; the intensity of the attendant action may not be disproportionate to the importance of the matter and the compromises imposed upon the public.[334]

The Court concluded that according to the principles of purpose specification and proportionality, not only must the purpose for which data is being collected be specified at the time of collection, but the data acquired must also not exceed that which is absolutely necessary for accomplishing the specified purpose. In light of this, the Court directed the German Parliament to amend the law in certain particulars before the census could be carried out, and to close all loopholes in the law that may lead to abuses in the collection, storage, use and transfer of personal data.

656. The ECtHR dealt with whether retention of DNA samples of individuals who were arrested but who were later acquitted or had charges against them dropped was a violation of the right to privacy. In **S and Marper** v. **United Kingdom**, (2008) 48 EHRR 1169 the ECtHR noted the "blanket and indiscriminate nature of the power of retention":

The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken--and retained--from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."[335]

The Court concluded that the retention constituted a disproportionate interference with the Applicants' right to privacy:

125...That the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the Respondent State has overstepped any acceptable margin of appreciation in this regard. **Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society...**

The Court rejected the government's arguments that fingerprints constituted neutral, objective, irrefutable and unintelligible material, holding that they contained unique information about an individual, allowing their precise identification in certain circumstances. The Court concluded that the collection of fingerprints was therefore capable of affecting private life, and retention of such information without consent "cannot be regarded as neutral or insignificant."

657. In 2012, the French Constitutional Council ("Council") - the body that reviews the constitutionality of French laws - declared four provisions of the Identity Protection Act, which proposed the introduction of a new national biometric ID for citizens, to be unconstitutional.[336] Articles 3 and 5 were among the provisions that were struck down. Article 3 authorized that the national ID card may contain data which would enable the holder to identify himself or herself on electronic communication networks or use his or her electronic signature. The Article stated that:

If requested by its holder, the national identity card may also contain data, stored separately, enabling it to identify itself on electronic communication networks and to affix its electronic signature. Upon each use, the interested party shall decide which identification data are to be transmitted electronically.

The Council observed that Article 3 did not stipulate the nature of the data that was being collected, nor did it provide any guarantee of maintaining confidentiality. Thus, the Council declared Article 3 to be unconstitutional:

that the provisions of Article 3 do not specify either the nature of the "data" through which these functions may be implemented or the guarantees ensuring the integrity and confidentiality of this data; that they do not define in any greater detail the conditions under which the persons implementing these functions are to be authenticated, especially when they are minors or are subject to legal protection; that accordingly, Parliament acted in excess of its powers; that accordingly Article 3 must be ruled unconstitutional;

Article 5 allowed for the establishment of a database of personal information which would include, in addition to the marital status and residence of the holder, their height, eye colour, fingerprints and photograph for the issuance of French passports and national ID cards and for conducting investigations involving certain offences if authorised by a public prosecutor or a judge.

The Council relied on Article 34 of the French Constitution to hold that it was incumbent upon the Parliament to strike a balance between safeguarding public order and bringing offenders to justice on one hand, and the right to privacy on the other. The Council placed reliance on the Declaration of the Rights of Man and the Citizen of 1789. Article 2 of the Declaration states "The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are liberty, property, safety and resistance to oppression". The Council held that the liberty proclaimed by Article 2 includes the right to respect for private life, and accordingly, that "the collection, registration, conservation, consultation and communication of personal data must be justified on grounds of general interest and implemented in an adequate manner, proportionate to this objective." The Council held that Article 5 violated the French Constitution as the nature of the data collected was such that it would facilitate the identification of French citizens on the basis of their fingerprints, thus breaching the right to respect for private life:

Considering however that, given its object, this database containing personal data is intended to collect data relating to almost all of the population of French nationality; that **since the biometric data registered in this file, including in particular fingerprints, are themselves liable to be compared with physical traces left involuntarily by an individual or collected unbeknown to him, they are particularly sensitive; that the technical characteristics of this database as defined by the contested provisions enable it to be consulted for purposes other than the verification of an individual's identity**; that the provisions of the act referred authorise this database to be consulted or viewed not only in relation to the issue or renewal of identity and travel documents or to verify the holder of such a document, but also for other purposes of an administrative nature or by the investigating police;...

...having regard to the nature of the data registered, the scope of this processing, its technical characteristics and the conditions under which it may be consulted, the provisions of Article 5 violate the right to respect for privacy in a manner which cannot be regarded as proportionate to the goal pursued; that accordingly, Articles 5 and 10 of the act must be ruled unconstitutional...

Subsequently, Law 2012-410 of March 27, 2012, on Identity Protection was published in the official gazette of France, without Articles 3 and 5, which had been rendered unconstitutional by the Council.[337]

658. **Aycaguer** v. **France**[338] concerned the applicant's refusal to undergo biological testing, the result of which was to be included in the national computerised DNA database. As a result of his refusal, he was convicted. The ECtHR held that the Regulations on the storage of DNA profiles did not provide individuals with sufficient protection, due to its duration and the fact that the data could not be deleted. The Court concluded that the Regulations failed to strike a balance between competing public and private interests and held, unanimously, that there had been a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

659. The Conseil d'Etat[339] in **Association pour la promotion de l'image**[340] was asked whether a decree regulating the use and storage of data from biometric passports was lawful. One of the stipulations of the decree was that eight fingerprints were stored by the authorities, while only two were required for the passport. The Conseil d'Etat stated that the collection and retention of six

more fingerprints to be centrally stored was irrelevant and excessive in relation to the purpose of the computerized database.

660. In **Digital Rights Ireland Ltd.** v. **Minister**,[341] the Court of Justice of the European Union held that the EU legislature had exceeded the limits of the principle of proportionality in relation to certain provisions of the Charter of Fundamental Rights of the European Union - Articles 7, 8 and 52(1) - by adopting the Data Retention Directive. According to the Directive, member states were obliged to store citizens' telecommunications data for a minimum of 6 months and a maximum of 24 months. The Directive empowered police and security agencies to request access to details such as IP address and time of use of all e-mails, phone calls and text messages sent or received.

The Court applied the test of proportionality to the measures. It was noted that metadata allows officials to make precise conclusions about a person's private life, and dragnet data collection creates a chilling effect based on the sense that one's life is subject to surveillance at all times. On the nature of metadata, the Court observed that:

Taken as a whole, [metadata] may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.[342]

The Court found that surveillance serves an important public interest - public security - and that the right to security is itself a fundamental right Under Article 6 of the Charter.[343] However, the Court adopted a two-pronged proportionality test to conclude that the Directive's retention and access requirements were not proportional to that interest.

...According to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives.[344]

The retention measure was held to be unnecessary to fulfill the objective of fighting against serious crime:

As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. **However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight.[345]**

The Court criticized the Directive for failing to lay down any clear or precise Rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It observed that the Directive was overbroad because it applied to all data, regardless of the

existence of suspicion, and contained no criteria for limiting government access or safeguards for preventing abuse:

...Directive 2006/24 covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime...

...Whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.[346]

Not only is there a general absence of limits in Directive 2006/24 but Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 simply refers, in Article 1(1), in a general manner to serious crime, as defined by each Member State in its national law.[347]

The Court concluded that the Directive failed to set out "clear and precise rules"[348] for access or for how states should judge the period of time for which data should be held, and "entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary."[349] The Court struck down the Directive on the basis of the scope of the data to be retained,[350] the lack of limits imposed on state access,[351] and the failure to distinguish between the treatment of data based on its usefulness and relevance.[352]

Of crucial importance is the Court's emphasis that the judicial review of the EU legislature's discretion "should be strict" because of "the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24".[353] In addition, the Court emphasized that even highly important objectives such as the fight against serious crime and terrorism cannot justify measures which lead to forms of interference that go beyond what is 'strictly necessary'.[345]

661. In **Michael Schwarz** v. **Stadt Bochum**, [2013] EUECJ C-291/12 the Court of Justice of the European Union was called upon to examine the validity of a provision in a Council Regulation that obliged persons applying for a passport to provide fingerprints which would be stored in that passport. In considering whether this Regulation was valid and necessary, the Court observed:

...Article 1(2) of Regulation No. 2252/2004 does not provide for **the storage of fingerprints except within the passport itself, which belongs to the holder alone.**[347]

The Regulation not providing for any other form or method of storing those fingerprints, it cannot in and of itself...be interpreted as providing a legal basis for the centralised storage of data collected thereunder or for the use of such data for purposes other than that of preventing illegal entry into the European Union.[354]

In those circumstances, the arguments put forward by the referring court concerning the risks linked to possible centralisation cannot, in any event, affect the validity of that Regulation and would have, **should the case arise, to be examined in the course of an action brought before the competent courts against legislation providing for a centralised fingerprint base.** In the light of the foregoing, it must be held that Article 1(2) of Regulation No. 2252/2004 does not imply any processing of fingerprints that would go beyond what is necessary in order to achieve the aim of protecting against the fraudulent use of passports. It follows that the interference arising from Article 1(2) of Regulation No. 2252/2004 is justified by its aim of protecting against the fraudulent use of passports.[355]

The Court held that although the taking and storing of fingerprints in passports constituted an infringement of the right to respect for private life and the right to protection of personal data, Article 1(2) of Regulation No. 2252/2004 did not imply any processing of fingerprints that would go beyond what is necessary in order to achieve the aim of protecting against the fraudulent use of passports and was therefore valid.

662. In **Madhewoo** v. **The State of Mauritius,** [2016] UKPC 30 the Judicial Committee of the Privy Council heard an appeal from a judgment of the Supreme Court of Mauritius regarding the constitutionality of the provisions of The National Identity Card (Miscellaneous Provisions) Act, 2013. The Act required biometric information including fingerprints, to be stored in a central register in which particulars of the identity of every citizen of Mauritius were to be recorded.

The Supreme Court upheld provisions of the Act that provided for the compulsory taking of fingerprints. However, the Court struck down those provisions that provided for the biometric data to be stored in a central register. The Appellant appealed to the Committee, contending that the provisions providing for the compulsory taking of fingerprints should also be struck down as unconstitutional.

The Appellant challenged the following provisions of the Act: (i) the storage of data in a register in electronic data Under Section 3; (ii) the obligation to provide biometric information Under Section 4; (iii) the collection of information, in electronic form, for a national ID card Under Section 5; (iv) the compulsory production of an identity card to a policeman Under Section 7(1A) in response to a request Under Section 7(1)(b); and (v) the gravity of the potential penalties for non-compliance Under Section 9(3), before the Mauritian Supreme Court. The challenge was on the ground that the implementation of the biometric identity card and the permanent storage of biometric data contravened provisions of the Mauritian Constitution and the Civil Code.

Regarding the challenge to Section 4 (2)(c) of the Act, which provided that, "every person who applies for an identity card shall allow his fingerprints, and other biometric information about himself, to be taken and recorded ... for the purpose of the identity card," the Supreme Court noted that the right to privacy Under Section 9(1) of the Constitution was not an absolute right and interference with that right could be permitted Under Section 9(2), if a law that interfered with that right was in the interest, *inter alia*, of public order. The Committee noted the Supreme Court's approach to determining whether Section 4(2)(c) fell foul of the Constitution, which was based on the test laid down in **S and Marper** v. **The United Kingdom** [2008] ECHR 1581:

In addressing the question whether Section 4(2)(c) of the 1985 Act (as amended) was reasonably justifiable in a democratic society the Supreme Court drew on jurisprudence of the European Court of Human Rights in S v. The United Kingdom...In substance the Court asked whether the measure pursued a legitimate aim, whether the reasons given by the national authorities for the interference in pursuit of that aim were relevant and sufficient, and whether the measure was proportionate to the aim pursued. This evaluation is essentially the same as that adopted by the courts in the United Kingdom in relation to Article 8(2) of the ECHR, in which the courts ask themselves (a) whether the measure is in accordance with the law, (ii) whether it pursues a legitimate aim, and (iii) whether the measure will give rise to interferences with fundamental rights which are disproportionate, having regard to the legitimate aim pursued. In relation to (iii), the courts ask themselves: (a) whether the objective is sufficiently important to justify a limitation of the protected right, (b) whether the measure is rationally connected to the objective, (c) whether a less intrusive measure could have been used without compromising the achievement of the objective (in other words, whether the limitation on the fundamental right was one which it was reasonable for the legislature to impose), and (d) whether the impact of the infringement of the protected rights is disproportionate to the likely benefit of the measure.

The Committee reproduced the Mauritian Supreme Court's holding that the provisions of the Act which enforced the compulsory taking and recording of fingerprints interfered with the Appellant's rights guaranteed Under Section 9(1) of the Constitution,[356] but that the law was justifiable on grounds of public interest and public order:

We find that it can hardly be disputed that the taking of fingerprints within the applicable legal framework pursues the legitimate purpose of establishing a sound and secure identity protection system for the nation and thus answers a pressing social need affording indispensable protection against identity fraud. Such a purpose, as has been amply demonstrated, is vital for proper law enforcement in Mauritius. Furthermore, taking into consideration the appropriate safeguards in the taking of fingerprints for their insertion in the cards, and the relatively limited degree of interference involved, we are led to conclude that such interference is proportionate to the legitimate aim pursued. [2016] UKPC 30, at page 10

Thus, the Mauritian Supreme Court upheld provisions of the Act which provided for the compulsory taking of fingerprints. The Appellant also challenged Section 3 of the Act, which provided for biometric data to be stored in a register. The Supreme Court, after taking into consideration witness testimonies on the purpose of data collection, noted that though there may have been a legitimate aim for storing and collecting this data, "sufficiently strong reasons...to

establish that such storage and retention of data for an indefinite period is proportionate to the legitimate aim pursued" were not established.[357] Thus, the Court held that:

... it is inconceivable that there can be such uncontrolled access to personal data in the absence of the vital safeguards afforded by judicial control. The potential for misuse or abuse of the exercise of the powers granted under the law would be significantly disproportionate to the legitimate aim which the Defendants have claimed in order to justify the retention and storage of personal data under the Data Protection Act.[237]

Thus, while the Supreme Court noted that the law providing for the storage and retention of personal biometric data constituted a permissible derogation Under Section 9(2) of the Constitution,[305] it held that since the Respondent had not established that provisions dealing with storage and retention were reasonably justifiable in a democratic society, they were unconstitutional.

The Judicial Committee did not interfere with the Supreme Court's decision. However, it noted an inconsistency in the Supreme Court's order wherein it held that the law providing for the storage and retention of fingerprints and other biometric data constitutes a permissible derogation Under Section 9(2) of the Constitution, whilst simultaneously holding the same provisions to be unconstitutional. The Committee reconciled the holding to be:

A law providing for the storage and retention of fingerprints and other personal biometric data regarding the identity of a person **in principle** constitutes a permissible derogation, in the interests of public order, Under Section 9(2) of the Constitution.

663. The learned Attorney General has relied on cases from other jurisdictions to buttress his contention that the collection and use of biometric information for various services have been found to be legal. 'Biometric data[358] ' is defined in the General Data Protection Regulation thus:

personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data.

The learned Attorney General cited the following judgments of the US Supreme Court: **Vernonia School District 47J** v. **Acton ("Acton"),** 515 U.S. 646 (1995), **Skinner** v. **Railway Labor Executives' Association ("Skinner"),** 489 U.S. 602 (1989) **Whalen** v. **Roe ("Whalen")**, 429 U.S. 589 (1977), **United States** v. **Dionisio ("Dionisio")** 410 U.S. 1 (1973) and **Bowen** v. **Roy ("Bowen").** 476 U.S. 693 (1986) Only **Acton, Skinner** and **Dionisio** were decided in the context of biometrics, which as we have found before, forms the bedrock of the Aadhaar program. In **Acton**, the court held that the action of the authorities conducting random drug testing of high school athletes was legal since the conditions of collection were nearly identical to those typically encountered in public restrooms. As a result, it was found that, privacy interests of the students were negligibly affected. In **Skinner**, the court found the actions of the Federal Railroad Administration (**"FRA"**) requiring mandatory blood and urine testing of employees involved in train accidents to be constitutional. The court observed that railroad accidents, if not prevented, could cause massive loss of life and property. Further, it was held that FRA's Regulations fulfilled

a "special need" because of the interest of the government in ensuring safety of railroads and were therefore, not "an undue infringement on the justifiable expectations of privacy of covered employees". In **Whalen**, the Court found that retention of patients' information such as their name, address and age, under the New York State Controlled Substances Act, 1972, was not in violation of the constitutional right to privacy as the Court was satisfied that the statute provided for proper safeguards and redressal against theft and loss of information. In **Dionisio**, the Court found no constitutional infirmity with the issuance of a subpoena to procure voice recording exhibits by tapping telephones in order to investigate crimes. The Court held that "neither the summons to appear before the grand jury, nor its directive to make a voice recording, infringed upon any interest protected by the Fourth Amendment".

The Court observed that a compelled display of identifiable physical characteristics does not infringe upon an "interest protected by the privilege against compulsory self-incrimination". In **Bowen**, the Court upheld the provisions of a welfare scheme which required citizens to furnish their social security number, rejecting the argument that the use of a social security number violated the Appellant's Native American beliefs. The Court held that the Free Exercise Clause of the First Amendment could not be construed to place a requirement on the government to conduct its internal affairs in consonance with the religious beliefs of particular citizens.

In **In re Crawford**, 194 F. 3d 954 (9th Cir. 1999) the Ninth Circuit upheld provisions of the Bankruptcy Code which mandated public disclosure of a Bankruptcy Petition Preparers' Social Security Number on documents submitted to the Court, noting that the provision had been enacted to serve governmental interests of preventing fraud and providing public access to judicial proceedings.

664. Some decisions of lower courts in the US which have considered the validity of laws or actions of the State deploying biometrics and which have been cited by the Respondents are: **Haskell** v. **Harris ("Haskell"),** 669 F. 3d 1049 (9th Cir. 2012), **Utility Workers Union of America** v. **Nuclear Regulatory Commission ("UWUA")**, 664 F. Supp. 136 (S.D.N.Y. 1987), Nicholas A Iacobucci v. City of Newport ("Iacobucci"), 785 F. 2d 1354 (6th Cir. 1986), **Thom** v. **New York Stock Exchange ("Thom"),** 306 F. Supp. 1002 (S.D.N.Y. 1969), **Perkey** v. **Department of Motor Vehicles ("Perkey"),** (1986) 42 Cal. 3d 185, **Buchanan** v. **Wing (Buchanan),** N.Y.S. 2d 865, **People** v. **Stuller ("Stuller"),** 10 Cal. App. 3d 582 (1970), **United States** v. **Kelly ("Kelly")** 55 F. 2d 67 (2d Cir. 1932) and **Brown** v. **Brannon ("Brannon").** 358 F. Supp. 133 (M.D.N.C. 1975) At first blush, it does seem that these cases support the Respondents' stand, however, we cannot lose sight of the context in which the courts came to the conclusion emphasised by the Respondents in support of their submissions. In **Haskell**, the Ninth Circuit found a Californian law which authorized law enforcement officers to collect DNA in the form of a sample from the buccal swab of the mouth of felony arrestees, who had not been convicted, to be constitutional. The Court noted that the arrestees had reduced privacy interests; the physical intrusion of collecting a buccal swab was de minimis in nature; there were stringent limits on the manner in which the information was to be used; and the interest of the State in deterring future criminal acts to exculpate innocent arrestees aided in prison administration and law enforcement. For the above reasons, the Court found that the infringement of privacy of the felony arrestees was justified. In **UWUA**, the Ninth Circuit ruled that a law requiring individuals working in nuclear power facilities to submit their fingerprints for identification and criminal history record checks

was not unconstitutional. In **Iacobucci**, an ordinance which required employees of liquor selling establishments which permitted nude dancing, to be fingerprinted and photographed by the police department, was held constitutional. The Court observed that fingerprinting and photographing of employees of retail liquor establishments bore a rational relationship to the legitimate aim of elimination of crime. In **Thom**, a New York statute, which as a condition of employment, required all the employees of member firms of national stock exchanges to be fingerprinted, was upheld. The Court ruled that fingerprinting was a necessary means of verifying the existence or non-existence of a prior criminal record, in order to avert any threat posed by an employee who was in a position to commit theft of securities. In **Perkey**, the Californian Supreme Court upheld the actions of the state mandating an individual to provide a fingerprint in order to obtain a driver's license. The Court held that fingerprint technology was the only reliable means of ensuring the integrity of the records of the department of motor vehicles as other methods such as handwriting specimens and photographs were not reliable. Thus, the submission of fingerprints as part of the license application process, bore a rational relationship to the State's goal of promoting safe and lawful use of highways. In **Buchanan**, the Court upheld the eligibility requirement for a welfare aid scheme which mandated participation in an identity verification procedure known as Automated Finger Imaging System (AFIS), rejecting the challenge based on religious beliefs of the Petitioner. The Court held that the Petitioner had failed to prove that the AFIS involved any invasive procedures, noting that she had acknowledged that she had never seen finger imaging performed and had no idea whether a laser was involved. In **Stuller**, the constitutionality of a law which required "temporary and itinerant classes of employees" to undergo fingerprinting in order to protect "visitors and residents" of a resort city from crime and loss, both against people and against property, was upheld. In **Kelly**, the Circuit Court of Appeals rejected a claim for return of fingerprints of the Defendant which had been obtained after he had been arrested by prohibition agents, holding that there was no reason to interfere with a method of identifying persons "charged with a crime". In **Brannon**, the court held that a law requiring "massagists" to submit their fingerprints, photographs and reports of their medical examinations in order to obtain licenses was valid, noting that the fingerprints and photographs would aid in their identification as well as in the enforcement of criminal statutes relating to public morality and decency.

665. The cases cited by the learned Attorney General would not be applicable in the context of the Aadhaar program. The cases cited dealt with narrowly tailored legislations set out to achieve very specific objectives. For instance, courts upheld statutes aimed at protecting a nuclear facility or to prevent theft of securities, where incidents of sabotage or breach of security would have led to national disasters. These national disasters in turn would have resulted in the immediate loss of human life or in a situation of financial emergency. Such laws, were therefore, enacted in order to assuage security concerns which, if not implemented, could lead to incidents of massive losses of life and property.

Some of the statutes upheld, permitted collection of DNA samples, fingerprints and photographs for identification. The objective behind these laws was prevention of crime, albeit on a comparatively smaller scale. Moreover, the courts in these cases were also satisfied that the procedures involved in collecting biometrics were not invasive enough to strike them down as unconstitutional or that there were adequate safeguards to prevent misuse.

The aforementioned cases will not apply in the backdrop of the Aadhaar program because they were rendered broadly in the context of prevention of crime. It needs no reiteration that an entire population cannot be presumed to be siphoning huge sums of money in welfare schemes or viewed through the lens of criminality, and therefore, considered as having a diminished expectation of privacy. The judgments cited by the Respondents which were decided in the context of crime, require the State to at least form a reasonable belief about the criminal antecedents of individuals or their potential to commit crimes. On the contrary, by collecting identity information, the Aadhaar program treats every citizen as a potential criminal without even requiring the State to draw a reasonable belief that a citizen might be perpetrating a crime or an identity fraud. When the State is not required to have a reasonable belief and judicial determination to this effect, a program like Aadhaar, which infringes on the justifiable expectations of privacy of citizens flowing from the Constitution, is completely disproportionate to the objective sought to be achieved by the State.

666. The fundamental precepts of proportionality, as they emerge from decided cases can be formulated thus:

1. A law interfering with fundamental rights must be in pursuance of a legitimate state aim;

2. The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and liberties must be based on the existence of a rational connection between those measures, the situation in fact and the object sought to be achieved;

3. The measures must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim;

4. Restrictions must not only serve a legitimate purposes; they must also be necessary to protect them; and

5. The State must provide sufficient safeguards relating to the storing and protection of centrally stored data. In order to prevent arbitrary or abusive interference with privacy, the State must guarantee that the collection and use of personal information is based on the consent of the individual; that it is authorised by law and that sufficient safeguards exist to ensure that the data is only used for the purpose specified at the time of collection. Ownership of the data must at all times vest in the individual whose data is collected. The individual must have a right of access to the data collected and the discretion to opt out.

667. Privacy and proportionality are two interlocking themes that recur consistently in the above judgments. Privacy, also construed as "informational self-determination", is a fundamental value. There is a consistent emphasis on the impact on personal dignity if private information is widely available and individuals are not able to decide upon its disclosure and use. This right of controlling the extent of the availability and use of one's personal data is seen as a building block of data protection-especially in an environment where the state of technology facilitates ease of collection, analysis and dissemination of information.

668. The blanket and indiscriminate collection of information is seen as a violation of privacy, which is a constituent of the right to liberty. An extensive power to retain collected data is also

seen as a disproportionate interference with the right to privacy and not necessary in a democratic society. The judgments hold that unlimited data retention and unrestricted state access both constitute a disproportionate interference with privacy and data protection. They also emphasize the need to clearly stipulate the nature of the data being collected and ensure its confidentiality. Provisions where these principles are not respected cannot be regarded as valid. While courts do recognize the need for public order and security, they emphasize the need to strike a balance between safeguarding public order and the right to privacy.

669. The principle of proportionality also recurs through these judgments, which note that the collection and use of information must be limited to the purpose specified by law and to the extent indispensable for the protection of public interest. The striking of a balance between public and private interests is crucial to proportionality. The judgments hold that there must be a protection against unauthorized use and clearly defined conditions for processing of data collected. Those conditions must not be excessive and must be justified on grounds of public interest and implemented in a manner proportionate to the objective. Too broad a scope of data collected and retained, the lack of limits imposed on access to data by authorities and a failure to distinguish between the treatment of data based on its usefulness and relevance are seen by Courts as constituting grounds for striking down the measure. While the State's imperatives are seen as relevant, emphasis is laid on retention and access requirements being proportionate to those imperatives and the need to prevent against abuse. Courts have upheld Regulations that are necessary to achieve the legitimate aims and not excessive in their nature or impact.

The issue is whether the Aadhaar project and the Act, Rules and Regulations meet the test of proportionality.

H.4 Aadhaar: the proportionality analysis

670. Under Aadhaar, the State has put forth an objective of transferring subsidies and entitlements to its citizens. The aim was to curb leakages and to increase transparent and efficient "targeted delivery of subsidies, benefits and services". However, the Act in the present form has surpassed a tailored objective and has sought to administer every facet of the citizen-state engagement through mandatory biometric-enabled Aadhaar linking. The violations of fundamental rights that result from the operation of the Aadhaar scheme will have to be evaluated on the touchstone of legitimate state interest and proportionality.

Since biometric systems have been employed, it is fundamental to understand that the right to privacy and its protection must be at the centre of the debate, from the very onset of the decision to use biometric data. It is vital that adequate safeguards are set down for every step of the process from collection to retention of biometric data. At the time of collection, individuals must be informed about the collection procedure, the intended purpose of the collection, the reason why the particular data set is requested and who will have access to their data. Additionally, the retention period must be justified and individuals must be given the right to access, correct and delete their data at any point in time, a procedure familiar to an opt-out option. The intended purpose should always act as a shining light and adequate caution must be taken to ensure that there is no function creep with the lapse of time, in order to prevent the use of the data for new, originally unintended purposes. Measures to protect privacy would include enacting more

entrenched and specific legislation so that the right to privacy is not only recognized but protected in all its aspects. Meeting this obligation would necessarily mean enactment of data protection legislation as well. The choice of particular techniques and the role of components in the architecture of the technology also have a strong impact on the privacy protections provided by the biometric system.

During the course of the hearing, the CEO of UIDAI, Mr. Ajay Bhushan Pandey was permitted on the request of the learned Attorney General to make a power-point presentation before the Court, explaining the architecture and working of the Aadhaar project. On the basis of the presentation, Mr. Shyam Divan, counsel for the Petitioners had served a list of questions to the Respondents. Responses to these questions have been filed by UIDAI. Analysing the power-point presentation by the CEO, questions addressed by Mr. Divan and the responses filed by the Respondents will facilitate an understanding of the architecture of the Aadhaar project.

Our analysis indicates that the correctness of the documents submitted by an individual at the stage of enrolment or while updating information is not verified by any official of UIDAI or of the Government. UIDAI does not take institutional responsibility for the correctness of the information entering its database. It delegates this task to the enrolment agency or the Registrar. The following response has been submitted by the Respondents to the queries addressed specifically on this aspect:

As per UIDAI process, the verification of the documents is entrusted to the Registrar. For Verification based on Documents, the verifier present at the Enrolment Centre will verify the documents. Registrars/Enrolment agency must appoint personnel for the verification of documents.

671. UIDAI does not identify the persons who enrol within the Aadhaar system. Once the biometric information is stored in the CIDR during enrolment, it is only matched with the information received at the time of authentication. Biometric authentication of an Aadhaar number holder is performed as a "one to one" biometric match against the biometric information of the Aadhaar number holder in CIDR. Based on the match, UIDAI provides a 'yes' or 'no' response. Whether the information which is entering into CIDR is correct or not is a task entrusted to the enrolling agency or the Registrars. UIDAI does not assume responsibility for it.

The task of verifying whether a person is an illegal resident has also been left to the enrolling agencies. At the stage of enrolment, a verification of whether a person has been residing in India for 182 days or more in the past twelve months is done on the basis of a 'self-declaration' of the individual. The declaration which has been provided in the Aadhaar enrolment forms is thus:

Disclosure Under Section 3(2) of The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services Act, 2016.

I confirm that I have been residing in India for at least 182 days in the preceding 12 months & information (including biometrics) provided by me to the UIDAI Is my own and is true, correct and accurate. I am aware that my information including biometrics will be tested for generation of Aadhaar and authentication. I understand that my identity information (except core biometric) may

be provided to an agency only with my consent during authentication or as per the provisions of the Aadhaar Act. I have a right to access my identity information (except core biometrics) following the procedure laid down by UIDAI.

672. The Petitioners have argued that persons who were enrolled under the Aadhaar programme before the Act came into force on 12 September 2016 (more than a hundred crore) were not even required to make this declaration. The authenticity of the documents submitted (along with the declaration) is not checked by UIDAI.

The exception handling process permitting the use of alternative modes of identification if the Aadhaar authentication fails, is also left to the discretion of the Requesting Entity. On this aspect, the response which has been provided to the Court is thus:

As per Regulation 14(i) of Aadhaar (Authentication) Regulations 2016, requesting entities shall implement exception-handling mechanisms and back-up identity authentication mechanisms to ensure seamless provision of authentication services to Aadhaar number holders. Therefore, this exception handling mechanism is to be implemented and monitored by the requesting entities and in case of the government, their respective ministries.

Forty-nine thousand enrolment operators have been blacklisted by UIDAI. In reply to the question of the Petitioners asking the reasons for blacklisting of the enrolment operators, UIDAI has stated that a data quality check is done during the enrolment process and if any Aadhaar enrolment is found to be not to be compliant with the UIDAI process, the enrolment gets rejected and an Aadhaar number is not generated. An operator who crosses a threshold defined in the policy, is blacklisted/removed from the UIDAI ecosystem. UIDAI has provided information that forty-nine thousand operators were blacklisted/removed from the UIDAI ecosystem for the following reasons: (a) illegally charging residents for Aadhaar enrolment; (b) poor demographic data quality; (c) invalid biometric exceptions; and (d) other process malpractices. Once an operator is blacklisted or suspended, further enrolments cannot be carried out by it until the order of blacklisting/suspension is valid.

673. The Aadhaar architecture incorporates the role of Authentication User Agencies (AUAs) and Authentication Service Agencies (ASAs). ASAs, under the Aadhaar (Authentication) Regulations, have been defined as entities providing necessary infrastructure for ensuring secure network connectivity and related services for enabling a requesting entity to perform authentication using the authentication facility provided by UIDAI.[360] AUAs have been defined under the Aadhaar (Authentication) Regulations as requesting entities that use the Yes/No authentication facility provided by UIDAI.[361] "Yes/No authentication facility" is a type of authentication facility in which the identity information and Aadhaar number securely submitted with the consent of the Aadhaar number holder through a requesting entity, are matched against the data available in the CIDR, and the Authority responds with a digitally signed response containing a "Yes" or "No", along with other technical details related to the authentication transaction, excluding identity information.[362] The other type of authentication facility is the e-KYC authentication facility, in which the biometric information and/or OTP and Aadhaar number securely submitted with the consent of the Aadhaar number holder through a requesting entity, are matched against the data available in the CIDR, and the Authority returns a digitally signed response containing e-KYC data along with

other technical details related to the authentication transaction. A requesting entity which, in addition to being an AUA, uses e-KYC authentication facility provided by UIDAI is called a "e-KYC User Agency" or "KUA".[363] Under Regulation 15(2), a requesting agency may permit any other agency or entity to perform Yes/No authentication by generating and sharing a separate license key for every such entity through the portal provided by UIDAI to the said requesting entity. It has also been clarified that sharing of a license key is only permissible for performing Yes/No authentication, and is prohibited in case of e-KYC authentication.[364]

The Petitioners have contended that the points of service (PoS) biometric readers are capable of storing biometric information. The response which UIDAI has provided is extracted below:

UIDAI has mandated use of Registered Devices (RD) for all authentication requests. With Registered Devices biometric data is signed within the device/RD service using the provider key to ensure it is indeed captured live. The device provider RD Service encrypts the PID block before returning to the host application. This RD Service encapsulates the biometric capture, signing and encryption of biometrics all within it. Therefore, introduction of RD in Aadhaar authentication system Rules out any possibility of use of stored biometric and replay of biometrics captured from other source. Requesting entities are not legally allowed to store biometrics captured for Aadhaar authentication Under Regulation 17(1)(a) of Aadhaar (Authentication) Regulations 2016.

674. A PID block is defined in Regulation 2(n) of Aadhaar (Authentication) Regulations, 2016 as the Personal Identity Data element, which includes necessary demographic and/or biometric and/or OTP collected from the Aadhaar number holder during authentication. Regulation 17(1)(c) allows the requesting entity to store the PID block when "it is for buffered authentication where it may be held temporarily on the authentication device for a short period of time, and that the same is deleted after transmission". Thus, under the Aadhaar project, requesting entities can hold the identity information of individuals, even if for a temporary period.

It was further contended by the Petitioners that authentication entities in the Aadhaar architecture are capable of recording the date and time of the authentication, the client IP, the device ID and purpose of authentication. In response, UIDAI stated that it does not ask requesting entities to maintain any logs related to the IP address of the device, GPS coordinates of the device and purpose of authentication. It was, however, admitted that in order to ensure that their systems are secure and frauds are managed, AUAs like banks and telecom providers may store additional information according to their requirement to secure their system.

675. The process of sending authentication requests has been dealt with in Regulation 9 of the Aadhaar (Authentication) Regulations. It provides that after collecting the Aadhaar number or any other identifier provided by the requesting entity which is mapped to the Aadhaar number and necessary demographic and/or biometric information and/or OTP from the Aadhaar number holder, the client application immediately packages and encrypts the input parameters into the PID block before transmission and sends it to the server of the requesting entity using secure protocols. After validation, the server of a requesting entity passes the authentication request to the CIDR, through the server of the Authentication Service Agency. The Regulation further provides that the authentication request must be digitally signed by the requesting entity and/or by the Authentication Service Agency, pursuant to the mutual agreement between them. Based on the

mode of authentication requested, the CIDR validates the input parameters against the data stored and returns a digitally signed Yes or No authentication response, or a digitally signed e-KYC authentication response with encrypted e-KYC data, as the case may be, along with other technical details related to the authentication transaction. In all modes of authentication, the Aadhaar number is mandatory and is submitted along with the input parameters such that authentication is always reduced to a 1:1 match. Clause (5) of Regulation 9 provides that a requesting entity shall ensure that encryption of PID Block takes place at the time of capture on the authentication device according to the processes and specifications laid down by UIDAI. Regulation 18(1) provides that a requesting entity would maintain logs of the authentication transactions processed by it, containing the following transaction details:

(a) the Aadhaar number against which authentication is sought;

(b) specified parameters of authentication request submitted;

(c) specified parameters received as authentication response;

(d) the record of disclosure of information to the Aadhaar number holder at the time of authentication; and

(e) record of consent of the Aadhaar number holder for authentication.

The provision excludes retention of PID information in any case. Regulations 18(2) and 18(3) allow the retention of the logs of authentication transactions by the requesting entity for a period of two years. Upon the expiry of two years the logs have to be archived for a period of five years or the number of years required by the laws or Regulations governing the entity, whichever is later. Upon the expiry of this period, the logs shall be deleted except those records which are required to be retained by a court or for any pending disputes. Regulation 20(1) provides that an Authentication Service Agency would maintain logs of the authentication transactions processed by it, containing the following transaction details:

(a) identity of the requesting entity;

(b) parameters of authentication request submitted; and

(c) parameters received as authentication response.

The Regulation excludes retention of Aadhaar number, PID information, device identity related data and e-KYC response data. Under Regulations 20(2) and 20(3), authentication logs shall be maintained by the ASA for a period of two years, during which period the Authority and/or the requesting entity may require access to such records for grievance redressal, dispute redressal and audit in accordance with the procedure specified in the Regulations. The authentication logs shall not be used for any purpose other than that stated. Upon the expiry of the period of two years, the authentication logs shall be archived for a period of five years. Upon the expiry of five years or the number of years required by the laws or Regulations governing the entity whichever is later, the authentication logs shall be deleted except those logs which are required to be retained by a

court or for pending disputes. Section 2(d)[365] of the Aadhaar Act allows storage of the record of the time of authentication. These provisions permit the storage of logs of authentication transactions for a specific time period.

The power-point presentation made by the CEO of UIDAI states that:

"With registered devices every biometric device will have a unique identifier allowing traceability, analytics and fraud management and biometric data will be signed within the device.

The response further indicates that UIDAI gets the AUA code, ASA code, unique device code, registered device code used for authentication, and that UIDAI would know from which device the authentication has happened and through which AUA/ASA. The response provided by the Respondents states:

UIDAI does not get any information related to the IP address or the GPS location from where authentication is performed as these parameters are not the part of authentication (v2.0) and e-KYC (v2.1) API. UIDAI would only know from which device the authentication has happened, through which AUA/ASA etc. This is what the slides meant by traceability. UIDAI does not receive any information about at what location the authentication device is deployed, its IP address and its operator and the purpose of authentication. Further, the UIDAI or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication Under Section 32(3) of the Aadhaar Act.

However, Regulation 26, which deals with the storage and maintenance of Authentication Transaction Data clearly provides that UIDAI shall store and maintain authentication transaction data, which shall contain the following information:

(a) authentication request data received including PID block;

(b) authentication response data sent;

(c) meta data[366] related to the transaction; and

(d) any authentication server side configurations[367] as necessary.

The only data, which has been excluded from retention under this provision, like Section 32(3) of the Aadhaar Act, is the purpose of authentication. Regulation 27 provides that the authentication transaction data shall be retained by UIDAI for a period of six months, and will thereafter be archived for five years, upon which, the authentication transaction data shall be deleted except when it is required to be maintained by a court or in connection with any pending dispute. These provisions indicate that under the Aadhaar architecture, UIDAI stores authentication transaction data. This is in violation of the widely recognized data minimisation principles which seek that data collectors and processors delete personal data records when the purpose for which it has been collected is fulfilled. The lack of specification of security standards and the overall lack of transparency and inadequate grievance redressal mechanism under the Aadhaar program greatly exacerbate the overall risk associated with data retention. In the Aadhaar regime, an Authentication

User Agency (AUA) connects to the CIDR and uses Aadhaar authentication to validate a user and enable its services. The responsibility for the logistics of service delivery rests with the AUAs. In this federated model, Authentication Service Agencies (ASAs) transmit authentication requests to CIDR on behalf of one or more AUAs. However, any device that communicates via the Internet is assigned an IP address. Using the metadata related to the transaction, the location of the authentication can easily be traced using the IP address.

676. The Petitioners have also brought the attention of this Court to bear on an expert report, with respect to security and Aadhaar, which was filed along with an Additional Affidavit dated 09 March 2018. The report dated 4 March 2018 is titled as "**Analysis of Major Concern about Aadhaar Privacy and Security**" and has been authored by Professor Manindra Agrawal. Professor Agrawal is the N Ramarao Professor at IIT Kanpur and is a member of the Technology and Architecture Review Board (TARB) and of the Security Review Committee of UIDAI. Professor Agarwal's Report deals with the notion of *differential privacy*. Differential privacy makes it possible for tech entities to collect and share aggregate information about user habits, while maintaining the privacy of individual users. The Report states that differential privacy of a protocol is the change in the privacy of people when the protocol is introduced without altering any other protocol present. If the differential privacy of a protocol is "non-negative", the protocol does not compromise privacy in any way. There are four existing Aadhaar databases:

(i) The 'person database' stores personal attributes of a person (name, address, age, etc.) along with his/her Aadhaar number;

(ii) The reference database stores the Aadhaar number of a person along with a unique reference number (which has no relationship with the Aadhaar number of an individual);

(iii) The biometric database stores biometric information of a person along with the unique reference number; and

(iv) The verification log records all ID verifications done in the past five years. For each verification, it stores the biometric data, Aadhaar number, and ID of the device on which verification was done.

The report analyses the situation if any of the databases gets leaked. The report remarks:

Finally, let us turn attention to Verification Log. Its leakage may affect both the security and the privacy of an individual as one can extract identities of several people (and hence can keep changing forged identities) and also locate the places of transactions done by an individual in the past five years. Note that differential privacy of this becomes negative since without access to this database it is not possible to track locations of an individual in past five years (as opposed to tracking current location which is possible). Therefore, Verification Log must be kept secure.

The Report underlines the importance of ensuring the security of verification logs in the Aadhaar database. The leakage of verification logs is capable of damaging the security and privacy of individuals since the report notes that from the verification log, it is possible to locate the places of transactions by an individual in the past five years. A breach in verification log would allow a

third party to access the location of the transactions of an individual over the past five years. The report indicates that it is possible through the Aadhaar database to track the location of an individual. The Aadhaar database is different from other databases such as PAN Card or driving license. The Aadhaar database is universal and contains the biometrics of an individual. The threshold to scrutinize the effects of this database is therefore much higher as compared to that of other databases.

677. In **Puttaswamy**, Justice Kaul (in his concurring judgment) emphasized upon the concerns regarding surveillance of individuals. The learned Judge held:

The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable...

One such technique being adopted by States is 'profiling'. The European Union Regulation of 2016 on data privacy defines 'Profiling' as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements. Such profiling can result in discrimination based on religion, ethnicity and caste.
[368]

Justice Kaul also dealt with the need to regulate the conduct of private entities vis-a-vis profiling of individuals:

The capacity of non-State actors to invade the home and privacy has also been enhanced. Technological development has facilitated journalism that is more intrusive than ever before...[369]

...[I]n this digital age, individuals are constantly generating valuable data which can be used by non-State actors to track their moves, choices and preferences. Data is generated not just by active sharing of information, but also passively...

These digital footprints and extensive data can be analyzed computationally to reveal patterns, trends, and associations, especially relating to human behavior and interactions and hence, is valuable information. This is the age of 'big data'. The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially.
[370]

678. Section 2(c) of the Aadhaar Act is capable of revealing the identity of an individual to UIDAI. Section 2(d) permits storage of record of the time of authentication. Through meta data and in the light of the observations made in the Professor Manindra Agarwal Report, it can easily be concluded that it is possible through the UIDAI database to track the location of an individual. Further, the verification logs reveal the details of transactions over the past five years. The

verification logs are capable of profiling an individual. Details of the transaction include what the transaction was (whether authentication request was accepted/rejected), where it was sent from, and how it was sent. The only thing not stored in the transaction is its purpose.

679. The threat to privacy arises not from the positive identification that biometrics provide, but the ability of third parties to access this in an identifiable form and link it to other information, resulting in secondary use of that information without the consent of the data subject. This erodes the personal control of an individual over the uses of his or her information. The unauthorised secondary use of biometric data is perhaps the greatest risk that biometric technology poses to informational privacy.[371] The Manindra Agarwal Report acknowledges that the biometric database in the CIDR is accessible by third-party vendors providing biometric search and de-duplication algorithms. The other three databases are stored, in encrypted form, by UIDAI.

In this regard, it would be necessary to deal with the Contract (dated 24 August 2010) signed between UIDAI and L1 Identity Solutions (the foreign entity which provided the source code for biometric storage). It has been submitted by the Petitioners that the contract gives L1 Identity Solutions free access to all personal information about all residents in India. The contract specifies that UIDAI ('the purchaser') has the right in perpetuity to use all original newly created processes "identified" by M/S L-1 Identity Solutions "solely during execution" of the contract to the purchaser's unique specifications and which do not contain any pre-existing intellectual property right belonging to L-1 Identity Solutions.[372] UIDAI was provided the license of the software (proprietary algorithms) developed by L-1 Identity Solutions. However, it has been clarified in the Contract that:

The Contract and the licenses granted herein are not a sale of a copy of the software and do not render Purchaser the owner of M/S L-1 Identity Solutions Operating Company's proprietary ABIS and SDK software.[207]

The Contract authorises L-1 Identity Solutions to retain proprietary ownership of all intellectual property rights in and to goods, services and other deliverables to the purchaser under the Contract that are modifications or derivative works to their pre-existing technologies, software, goods, services and other works. If a modification or derivative work made by L-1 Identity Solutions or its consortium members contains unique confidential information of the purchaser, then, the contract provides that the former shall not further license or distribute such modification or derivative to any other customer or third party other than the purchaser without the purchaser's prior written permission.[207] Clause 13.3 provides:

M/S L-1 Identity Solutions Operating Company/The team of M/S L-1 Identity Solutions Operating Company shall ensure that while it uses any software, hardware, processes, document or material in the course of performing the Services, it does not infringe the Intellectual Property Rights of any person and M/S L-1 Identity Solutions Operating Company shall keep the Purchaser indemnified against all costs, expenses and liabilities howsoever, arising out any illegal or unauthorized use (piracy) or in connections with any claim or proceedings relating to any breach or violation of any permission/license terms or infringement of any Intellectual Property Rights by M/S L-1 Identity Solutions Operating Company or the team of M/S L-1 Identity Solutions Operating Company during the course of performance of the Services. In case of infringement by

M/S L-1 Identity Solutions Operating Company/The team of M/S L-1 Identity Solutions Operating Company, M/S L-1 Identity Solutions Operating Company shall have sole control of the defense and all related settlement negotiations.

Clause 13.4 deals with information privacy. It provides:

M/S L-1 Identity Solutions Operating Company/The team of M/S L-1 Identity Solutions Operating Company shall not carry any written/printed document, layout diagrams, floppy diskettes, hard disk, storage tapes, other storage devices or any other goods/material proprietary to Purchaser into/out of Datacenter Sites and UIDAI Locations without written permission from the Purchaser.

Clause 15, titled as "data and hardware", provides:

15.1 By virtue of this Contract, M/s. L-1 Identity Solutions Operating Company/The team of M/s. L-1 Identity Solutions Operating Company may have access to personal information of the Purchaser [UIDAI] and/or a third party or any resident of India, any other person covered within the ambit of any legislation as may be applicable. The purchaser shall have the sole ownership of and the right to use all such data in perpetuity including any data or other information pertaining to the residents of India that may be in the possession of M/s. L-1 Identity Solutions Operating Company or the Tram of M/s. L-1 Identity Solutions Operating Company in the course of performing.

15.2 The purchaser shall have the sole ownership of and the right to use, proprietary Biometric templates of residents of India as created and maintained by M/S L-1 Identity Solutions Operating Company in the course of performing the Services under this Contract. In the event of termination or expiry of contract, M/S L-1 Identity Solutions Operating Company shall transfer all the proprietary templates to UIDAI in an electronic storage media in a form that is freely retrievable for reference and usage in future.

15.3 The Data shall be retained by M/S L-1 Identity Solutions Operating Company not more than a period of 7 years as per Retention Policy of Government of India or any other policy that UIDAI may adopt in future.

Under the Contract, L-1 Identity Solutions retains the ownership of the biometric software. UIDAI has been given only the license to use the software. Neither the Central Government nor the UIDAI have the source code for the de-duplication technology which is at the heart of the programme. The source code belongs to a foreign corporation. UIDAI is merely a licensee. It has also been provided that L-1 Identity Solutions can be given access to the database of UIDAI and the personal information of any individual.

680. This Court in **Puttaswamy** had emphasized on the centrality of consent in protection of data privacy:

307...Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the

centrality of consent. Related to the issue of consent is the requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use.

Prior to the enactment of the Aadhaar Act, an individual had no right of informed consent. Without the consent of individual citizens, UIDAI contracted with L-1 Identity Solutions to provide any information to it for the performance of the Contract. It has been provided in the Contract that L-1 Identity Solutions would indemnify UIDAI against any loss caused to it. However, the leakage of sensitive personal information of 1.2 billion citizens, cannot be remedied by a mere contractual indemnity. The loss of data is irretrievable. In a digital society, an individual has the right to protect herself by maintaining control over personal information. The protection of data of 1.2 billion citizens is a question of national security and cannot be indemnified by a Contract.

681. Mr. Shyam Divan, learned senior Counsel for the Petitioners, has also drawn the attention of this Court to the Memorandum of Understanding (MoU) signed between UIDAI and various entities for carrying out the process of enrolment. Before the enactment of the Aadhaar Act, UIDAI existed as an executive authority, under the erstwhile Planning Commission and then under the Union Ministry of Communications and Information Technology. Mr. Divan has argued that the activities of the private parties engaged in the process of enrolment had no statutory or legal backing. It was his contention that MOUs signed between UIDAI and Registrars are not contracts within the purview of Article 299 of the Constitution, and therefore, do not cover the acts done by the private entities engaged by the Registrars for enrolment. In **Monnet Ispat and Energy Ltd.** v. **Union of India** MANU/SC/0601/2012 : (2012) 11 SCC 1, this Court had held:

290. What the Appellants are seeking is in a way some kind of a specific performance when there is no concluded contract between the parties. **An MOU is not a contract, and not in any case within the meaning of Article 299 of the Constitution of India."**
373

The MoUs entered into by UIDAI do not fall within the meaning of Article 299 of the Constitution. There is no privity of contract between UIDAI and the Enrolling agencies.

682. This Court held in **Puttaswamy** that any law which infringes the right to privacy of an individual needs to have stringent inbuilt safeguards against the abuse of the process. The Aadhaar Act envisages UIDAI as the sole authority for the purpose of the Act. It entrusts UIDAI with a wide canvass of functions, both administrative and adjudicatory. It performs the functions of appointing enrolling agencies, registrars and requesting entities. Currently, there are 212 Registrars and 755 enrolling agencies in different states of the country.[374] Monitoring the actions of so many entities is not a task easily done. Responsibility has also been placed on UIDAI to manage and secure the central database of identity information of individuals. UIDAI is also required to ensure that data stored in CIDR is kept secure and confidential. It has been placed with the responsibility for the protection of the identity information of 1.2 billion citizens. UIDAI is entrusted with discretionary powers under the architecture of Aadhaar, including the discretion to share the personal information of any individual with the biometric service providers (BSPs) for the performance of contracts with them.

683. The proviso to Section 28(5) provides only for a request to UIDAI for access to information and does not make access to information a right of the individual. This would mean that it would be entirely upon the discretion of the UIDAI to refuse to grant access to the information once a request has been made. It is also not clear how a person is supposed to know that the biometric information contained in the database has changed if he/she does not have access to it. UIDAI is also empowered to investigate any breach under the Act, as a result of which any offence under the Act will be cognizable only if a complaint is filed by UIDAI. UIDAI is not an independent monitoring agency.

Under the Aadhaar architecture, UIDAI is the only authority which carries out all the functions, be it administrative, adjudicatory, investigative, or monitoring of the project. While the Act confers such major functions on UIDAI, it does not place any institutional accountability upon UIDAI to protect the database of citizens' personal information. The Act is silent on the liability of UIDAI and its personnel in case of non-compliance of the provisions of the Act or the Regulations made under it. Under Section 23(2)(s) of the Act, UIDAI is required to establish a grievance redressal mechanism. Making the authority administering a project, also responsible for providing for the framework to address grievances arising from the project, severely compromises the independence of the grievance redressal body.[375] Section 47 of the Act violates the right to seek remedy. Under Section 47(1), a court can take cognizance of an offence punishable under the Act only on a complaint made by UIDAI or any officer or person authorised by it. There is no grievance redressal mechanism if any breach or offence is committed by UIDAI itself. The law must specify who is to be held accountable. The Act lacks a mechanism through which any individual can seek speedy redressal for his/her data leakage and identity theft. Compensation must be provided for any loss of data of an individual. A stringent and independent redressal mechanism and options for compensation must be incorporated in the law. Section 47 is arbitrary as it fails to provide a mechanism to individuals to seek efficacious remedies for violation of their right to privacy. Whether it is against UIDAI or a private entity, it is critical that the individual retains the right to seek compensation and justice. This would require a carefully designed structure.[376]

684. An independent and autonomous authority is needed to monitor the compliance of the provisions of any statute, which infringes the privacy of an individual. A fair data protection regime requires establishment of an independent authority to deal with the contraventions of the data protection framework as well as to proactively supervise its compliance. The independent monitoring authority must be required to prescribe the standards against which compliance with the data protection norms is to be measured. It has to independently adjudicate upon disputes in relation to the contravention of the law. Data protection requires a strong regulatory framework to protect the basic rights of individuals. The architecture of Aadhaar ought to have, but has failed to embody within the law the establishment of an independent monitoring authority (with a hierarchy of regulators), along with the broad principles for data protection.[377] The principles should include that the means of collection of data are fair and lawful, the purpose and relevance is clearly defined, user limitations accompanied by intelligible consent requirements are specified and subject to safeguards against risks such as loss, unauthorised access, modification and disclosure.[378] The independent authority needs to be answerable to Parliament. In the absence of a regulatory framework which provides robust safeguards for data protection, the Aadhaar Act does not pass muster against a challenge on the ground of Article 14. The law fails to meet the norms expected of a data protection regime which safeguards the data of 1.2 billion Indians. The absence of a

regulatory framework leaves the law vulnerable to challenge on the ground that it has failed to meet the requirements of fair institutional governance under the Rule of law.

685. The scheme of the Aadhaar Act is postulated on the norms enunciated in Chapter VI for the protection of information and their enforcement under a regime of criminal offences and penalties under Chapter VII. Providing a regime under law for penalizing criminal wrongdoing is necessary. But, criminal offences are not a panacea for a robust regulatory framework under the auspices of an autonomous regulatory body. Violations in regard to the integrity of data may be incremental. Millions of data transactions take place in the daily lives of a community of individuals. Violations in regard to the integrity of data are numerous. Some of them may appear to be trivial, if looked at in isolation. However, cumulatively, these violations seriously encroach on the dignity and autonomy of the individual. A regime of criminal law may not in itself be adequate to deal with all these violations in terms of their volume and complexity. It is hence necessary that the criminal law must be supplemented by an independent regulatory framework. In its absence, there is a grave danger that the regime of data protection, as well as the administration of criminal justice will be rendered dysfunctional. Unfortunately, a regulatory framework of the nature referred to above is completely absent. UIDAI which is established and controlled by the Union Government possesses neither the autonomy nor the regulatory authority to enforce the mandate of the law in regard to the protection of data. The absence of a regulatory framework renders the legislation largely ineffective in dealing with data violations. Data protection cannot be left to an unregulated market place. Nor can the law rest in the fond hope that organized structures within or outside government will be self-compliant. The Aadhaar Act has manifestly failed in its legislative design to establish and enforce an autonomous regulatory mechanism. Absent such a mechanism, the state has failed to fulfil the obligation cast upon it to protect the individual right to informational self-determination.

686. Section 33(2), which permits disclosure of identity information and authentication records in the interest of national security, specifies a procedure for oversight by a committee. However, no substantive provisions have been laid down as guiding principles for the oversight mechanism such as the principle of data minimisation.

687. Privacy concerns relating to the Aadhaar project have been the subject of wide ranging deliberation. Biometric data offers strong evidence of one's identity since it represents relatively unique biological characteristics which distinguish one person from another. As biometric data can be usually linked to only one individual it acts as a powerful, unique identifier that brings together disparate pieces of personal information about an individual. As a relatively unique identifier, biometric data not only allows individuals to be tracked, but it also creates the potential for the collection of an individual's information and its incorporation into a comprehensive profile. Central databases, data matching/linking and profiling are technical factors that facilitate 'function creep' (the slippery slope according to which information can be used for functions other than that for which it was collected). Privacy advocates believe that any identification scheme can be carried out with a hidden agenda and that the slippery slope effect can be relevant to several factors such as motivations of governments and business, and on the existence of safeguards. The special nature of biometric data makes function creep more likely and even attractive. The legal measures possible to control function creep are still limited. However, there are several ways in which function creep can be curtailed. They include (i) limiting the amount of data that is collected for

any stated purpose; (ii) enabling Regulation to limit technological access to the system; (iii) concerted debates with all stakeholders and public participation; (iv) dispersion of multiple enablers for a system; and (v) enabling choices for user participation.

688. This Court held in **Puttaswamy** that a reasonable expectation of privacy requires that data collection must not violate the autonomy of an individual. The Court has held consent, transparency, and control over information as the cornerstones over which the fundamentals of informational privacy stand. The Court had made it clear that an individual has the right to prevent others from using his or her image, name and other aspects of personal life and identity for commercial purposes without consent. An Aadhaar number is a unique attribute of an individual. It embodies unique information associated with an individual. The manner in which it is to be used has to be dependent on the consent of the individual.

689. Section 57 of the Aadhaar Act allows the use of an Aadhaar number for establishing the identity of an individual "for any purpose" by the state, private entities and persons. Allowing private entities to use Aadhaar numbers will lead to commercial exploitation of an individual's personal data without his/her consent and could lead to individual profiling. The contention is that Section 57 fails to meet the requirements set out in the **Puttaswamy** judgment.

In this regard, reference must be drawn to a 2010 policy paper. A group of officers was created by the Government of India to develop a framework for a privacy legislation that would balance the need for privacy protection with security and sectoral interests, and respond to the need for domain legislation on the subject. An approach paper for the legal framework for a proposed legislation on privacy was prepared by the group and was uploaded on the website of the Government of India. The paper noted the repercussions of having a project based on a database of unique individual IDs:

Data privacy and the need to protect personal information is almost never a concern when data is stored in a decentralized manner. However, all this is likely to change with the implementation of the UID Project. One of the inevitable consequences of the UID Project will be that the UID Number will unify multiple databases. As more and more agencies of the government sign on to the UID Project, the UID Number will become the common thread that links all those databases together. Over time, private enterprise could also adopt the UID Number as an identifier for the purposes of the delivery of their services or even for enrolment as a customer...Once this happens, the separation of data that currently exists between multiple databases will vanish...

Such a vast interlinked public information database is unprecedented in India. It is imperative that appropriate steps be taken to protect personal data before the vast government storehouses of private data are linked up and the threat of data security breach becomes real.[379]

The Paper highlighted the potential of exploitation that the UID project possessed. The potential was that the UID data could be used directly or indirectly by market forces for commercial exploitation as well as for intrusions by the State into citizens' privacy. The Paper contained an incisive observation in regard to the exploitation of citizens' data by private entities:

Similarly, the private sector entities such as banks, telecom companies, hospitals etc are collecting vast amount of private or personal information about individuals. There is tremendous scope for both commercial exploitation of this information without the consent/knowledge of the individual consent and also for embarrassing an individual whose personal particulars can be made public by any of these private entities. The IT Act does provide some safeguards against disclosure of data/information stored electronically, but there is no legislation for protecting the privacy of individuals for all information that may be available with private entities.

In view of the above, privacy of individual is to be protected both with reference to the actions of Government as well as private sector entities.[207]

The Paper highlighted the need for a stringent privacy protection mechanism, which could prevent individual data from commercial exploitation as well as individual profiling.

690. Reference must also be drawn to Chapter V of the National Identification Authority of India Bill, 2010, which provided for the constitution of an Identity Review Committee. The proposed Committee was to be entrusted to carry out the function of ascertaining the extent and pattern of usage of Aadhaar numbers across the country. The Committee was required to prepare a report annually in relation to the extent and pattern of usage of the Aadhaar numbers along with its recommendations thereon and submit it to the Central Government. The idea behind the establishment of such a Committee was to limit the extent to which Aadhaar numbers could be used. These provisions have not been included in the Aadhaar Act, 2016. Instead, the Act allows the use of Aadhaar number for any purpose by the State as well as private entities. This is a clear case of overbreadth and an instance of manifest arbitrariness.

691. Section 57 indicates that the legislature has travelled far beyond its stated object of ensuring targeted delivery of social welfare benefits. Allowing the Aadhaar platform for use by private entities overreaches the purpose of enacting the law. It leaves bare the commercial exploitation of citizens data even in purported exercise of contractual clauses. This will result in a violation of privacy and profiling of citizens.

An Article titled "**Privacy and Security of Aadhaar: A Computer Science Perspective**"[380] underlines the risk of profiling and identification that is possible by the use of Aadhaar numbers. It states:

The Aadhaar number is at the heart of the Aadhaar scheme and is one of the biggest causes of concern. Recall that the Aadhaar number is a single unique identifier that must function across multiple domains. Given that the Aadhaar number must necessarily be disclosed for obtaining services, it becomes publicly available, not only electronically but also often in human readable forms as well, thereby increasing the risk that service providers and other interested parties may be able to profile users across multiple service domains. Once the Aadhaar number of an individual is (inevitably) known, that individual may be identified without consent across domains, leading to multiple breaches in privacy.

692. The risks which the use of Aadhaar "for any purpose" carries is that when it is linked with different databases (managed by the State or by private entities), the Aadhaar number becomes the

central unifying feature that connects the cell phone with geo-location data, one's presence and movement with a bank account and income tax returns, food and lifestyle consumption with medical records. This starts a "causal link" between information which was usually unconnected and was considered trivial.[381] Thus, linking Aadhaar with different databases carries the potential of being profiled into a system, which could be used for commercial purposes. It also carries the capability of influencing the behavioural patterns of individuals, by affecting their privacy and liberty. Profiling individuals could be used to create co-relations between human lives, which are generally unconnected. If the traces of Aadhaar number are left in every facet of human life, it will lead to a loss of privacy. The repercussions of profiling individuals were anticipated in 1966 by Alexander Solzhenitsyn in '*Cancer Ward*'[382]. His views are prescient to our age:

As every man goes through life he fills in a number of forms for the record, each containing a number of questions. A man's answer to one question on one form becomes a little thread, permanently connecting him to the local centre of personnel records administration. There are thus hundreds of little threads radiating from every man, millions of threads in all. If these threads were suddenly to become visible, the whole sky would look like a spider's web, and if they materialised as elastic bands, buses, trams and even people would all lose the ability to move, and the wind would be unable to carry torn newspapers or autumn leaves along the streets of the city. They are not visible, they are not material, but every man is constantly aware of their existence... Each man, permanently aware of his own invisible threads, naturally develops a respect for the people who manipulate the threads...

The invisible threads of a society networked on biometric data have grave portents for the future. Unless the law mandates an effective data protection framework, the quest for liberty and dignity would be as ephemeral as the wind.

693. A novelist's vision is threatening to become a reality in our times. Profiling can impact individuals and their behaviour. Since data collection records the preferences of an individual based on the entities which requested for proof of identity, any such pattern in itself is crucial data that could be used to predict the emergence of future choices and preferences of individuals. These preferences could also be used to influence the decision making of the electorate in choosing candidates for electoral offices. Such a practice would be unhealthy for the working of a democracy, where a citizen is deprived of free choice. In the modern digital era, privacy protection does not demand that data should not be collected, stored, or used, but that there should be provable guarantees that the data cannot be used for any purpose other than those that have been approved. In any of the programmes employed, it is imperative that the state takes strong data privacy measures to prevent theft and abuse. Moreover, it must be realized that an identification system like Aadhaar, which is implemented nationwide, will always be more prone to external threats. The State is always open to threat from its adversaries, and a national level identification system can become an easy target for anyone looking to cause serious damage as individuals' biometric credentials are at risk in the process. Therefore, it is vital that state action ascertain security vulnerabilities while developing an identification system. These issues have not been dealt with by the Aadhaar Act. There is currently limited legislative or other regulatory guidance to specify whether private or public organisations are prevented from sharing or selling biometric information to others. Section 57 cannot be applied to permit commercial exploitation of the data

of individuals or to affect their behavioural patterns. Section 57 does not pass constitutional muster. It is manifestly arbitrary, suffers from overbreadth and violates Article 14.

694. At its core, the Aadhaar Act attempts to create a method for identification of individuals so as to provide services, subsidies and other benefits to them. The Preamble of the Act explains that the architecture of the Act seeks to provide "efficient, transparent and targeted delivery of subsidies, benefits and services" for which the expenditure is incurred from the Consolidated Fund to resident individuals. Section 7 of the Act makes the proof of possession of Aadhaar number or Aadhaar authentication as a mandatory condition for receipt of a subsidy, benefit or service, which incurs expenditure from the Consolidated Fund of India. The scope of Section 7 is very wide. It leaves the door open for the government to route more benefits, subsidies and services through the Consolidated Fund of India and expand the scope of Aadhaar. Any activity of the government paid for from the Consolidated Fund of India ranging from supply of subsidised grains and LPG, to use of roads and civic amenities, healthcare, and even rebates to tax payers could come under such an umbrella. The scope of Section 7 could cover every basic aspect of the lives of citizens. The marginalized Sections of society, who largely depend upon government's social security schemes and other welfare programmes for survival could be denied basic living conditions because of a mismatch in biometric algorithms. The notifications issued by government Under Section 7 of the Act, which require mandatory proof of possession of an Aadhaar number or requiring authentication, cover 252 schemes, including schemes for children (such as benefits under the Sarva Shiksha Abhiyan or getting meals under the Mid-day meal scheme, painting and essay competitions for children, scholarships on merit), schemes relating to rehabilitation of bonded labour and human trafficking, scholarship schemes for SC/ST students, universal access to tuberculosis care, pensions, schemes relating to labour and employment, skill development, personnel and training, agriculture and farmers' welfare, primary and higher education, social justice, benefits for persons with disabilities, women and child development, rural development, food distribution, healthcare, panchayati raj, chemicals & fertilizers, water resources, petroleum and natural gas, science and technology, sanitation, textiles, urban development, minority affairs, road transport, culture, tourism, urban housing, tribal affairs and stipends for internship for students. The list is ever expanding and is endless. These notifications cover a large number of facilities provided by the government to its citizens. Every conceivable facility can be brought under the rubric of Section 7. From delivery to deliverance, almost every aspect of the cycle of life would be governed by the logic of Aadhaar.

695. When Aadhaar is seeded into every database, it becomes a bridge across discreet data silos, which allows anyone with access to this information to re-construct a profile of an individual's life. It must be noted while Section 2(k) of the Aadhaar Act excludes storage of individual information related to race, religion, caste, tribe, ethnicity, language, income or medical history into CIDR, the mandatory linking of Aadhaar with various schemes allows the same result in effect. For instance, when an individual from a particular caste engaged in manual scavenging is rescued and in order to take benefit of rehabilitation schemes, she/he has to link the Aadhaar number with the scheme, the effect is that a profile as that of a person engaged in manual scavenging is created in the scheme database. The stigma of being a manual scavenger gets permanently fixed to her/his identity. What the Aadhaar Act seeks to exclude specifically is done in effect by the mandatory linking of Aadhaar numbers with different databases, under cover of the delivery of benefits and services.

Moreover, the absence of proof of an Aadhaar number would render a resident non-existent in the eyes of the State, and would deny basic facilities to such residents. Section 7 thus makes a direct impact on the lives of citizens. If the requirement of Aadhaar is made mandatory for every benefit or service which the government provides, it is impossible to live in contemporary India without Aadhaar. It suffers from the vice of being overbroad. The scope of subsidies provided by the government (which incur expenditure from the Consolidated Fund) is not the same as that of other benefits and services which the government provides to its citizens. Therefore, benefits and services cannot be measured with the same yardstick as subsidies. The inclusion of services and benefits in Section 7 is a precursor to the kind of function creep which is inconsistent with privacy and informational self-determination. The broad definitions of the expressions 'services and 'benefits' would enable government to regulate almost every facet of its engagement with citizens under the Aadhaar platform. Section 7 suffers from clear overbreadth in its uncanalised application to services and benefits.

696. The open-ended nature of the provisions of Section 7 is apparent from the definition of 'benefit' in Section 2(f) and of 'service' in Section 2(w). 'Benefit' is defined to mean any advantage, gift, reward, relief or payment in cash or kind provided to an individual or a group of individuals. 'Service' is defined to mean any provision, facility, utility, or any other assistance provided in any form to an individual or a group of individuals. These are broad and unstructured terms under which the government can cover the entire gamut of its activities involving an interface with the citizen. The provision has made no requirement to determine whether in the first place biometric identification is necessary in each case and whether a less intrusive modality should suffice. Both the definitions include such other services as may be notified by the Central government. The residuary Clause is vague and ambiguous and leaves it to the Central government at its uncharted discretion to expand on what benefits and services would be covered by the legislation. The manner in which these definitions have been expansively applied to cover a wide range of activities is attributable to the vagueness implicit in Section 7.

Can the provisions of Section 7 be applied with any justification to pensions payable on account of the past service rendered by a person to the state? Pension, it is well settled, is not a largesse or bounty conferred by the state. Pension, as a condition of service, attaches as a recompense for the long years of service rendered by an individual to the state and its instrumentalities. Pensioners grow older with passing age. Many of them suffer from the tribulations of old age including the loss of biometrics. It is unfair and arbitrary on the part of the state to deny pension to a person entitled to it by linking pensionary payments to the possession of an Aadhaar number or to its authentication. A right cannot be denied on the anvil of requiring one and only one means of identification. The pension disbursing authority is entitled to lay down Regulations (which are generally speaking, already in place) to ensure the disbursal of pension to the person who is rightfully entitled. This aim of the government can be fulfilled by other less intrusive measures. The requirement of insisting on an Aadhaar number for the payment of pensionary benefits involves a breach of the principle of proportionality. Such a requirement would clearly be contrary to the mandate of Article 14.

Similarly, the state as a part of its welfare obligations provides numerous benefits to school going children, including mid-day meals or scholarships, to children belonging to the marginalised segments of the society. Should the disbursal of these benefits be made to depend upon a young

child obtaining an Aadhaar number or undergoing the process of authentication? The object of the state is to ensure that the benefits which it offers are being availed of by genuine students who are entitled to them. This legitimate aim can be fulfilled by adopting less intrusive measures as opposed to the mandatory enforcement of the Aadhaar scheme as the sole repository of identification. The state has failed to demonstrate that a less intrusive measure other than biometric authentication will not subserve its purposes. That the state has been able to insist on adherence to the Aadhaar scheme without exception is a result of the overbreadth of Section 7. Consequently, the inclusion of benefits and services in Section 7 suffers from a patent ambiguity, vagueness and overbreadth which renders the inclusion of services and benefits arbitrary and violative of Article 14.

697. Various entities are involved in the Aadhaar project. Their inter-dependencies require a greater onus to be put on them so as to match privacy and security requirements. The architecture of Aadhaar treats individuals as data. However, the core must be about personhood. The architecture of Aadhaar is destroyed by a lack of transparency, accountability and limitations. Safeguards for protection of individual rights ought to have been explicitly guaranteed by design and default.[378] The presence of accountability and transparency within the Aadhaar architecture ought to be a necessary requirement so as to overcome the fear of the loss of privacy and liberty. Without these safeguards, the legislation and its architecture cannot pass muster under proportionality.

It is also important to highlight that identity is a vital facet of personality and hence of the right to life Under Article 21 of the Constitution. Identity is essential and inalienable to human relationships and in the dealings of an individual with the State. The notion that individuals possess only one, or at the least, a dominant identity is not sound constitutional principle. The Constitution has been adopted for a nation of plural cultures. It is accepting of diversity in every walk of life. Diversity of identity is an expression of the plurality which constitutes the essence of our social culture. Amartya Sen in '**The Argumentative Indian**'[384] demonstrates the untenability of the notion that identity is exclusive. He rejects the notion of an exclusive identity as "preposterous", observing that in different settings, individuals rely upon and assert varying identities:

Each of us invokes identities of various kinds in disparate contexts. The same person can be of Indian origin, a Parsee, a French citizen, a US resident, a woman, a poet, a vegetarian, an anthropologist, a university professor, a Christian, a bird watcher, and an avid believer in extraterrestrial life and of the propensity of alien creatures to ride around the cosmos in multicoloured UFOs. Each of these collectivities, to all of which this person belongs, gives him or her a particular identity. They can all have relevance, depending on the context.[152]

Sen's logic, drawn from how individuals express their personalities in the real world, has a strong constitutional foundation. In the protection which it grants to a diverse set of liberties and freedoms, the Constitution allows for the assertion of different identities. The exercise of each freedom may generate a distinct identity. Combinations of freedoms are compatible with composite identities. Sen also rejects the notion that individuals "discover their identities with little room for choice". The support for such a notion, as he observes, comes from communitarian philosophy, according to which identity precedes choice:

As Professor Michael Sandel has explained this claim (among other communitarian claims): 'community describes not just what they *have as* fellow citizens but also what they are, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity In this view, identity comes before reasoning and choice.[152]

Sen rejects the above idea on the ground that it does not reflect a universally valid principle. Undoubtedly, some identities are 'given'. But even here, as Sen explains, the issue is not whether an identity can be selected by an individual in all cases but whether the individual has a choice over the relative weight to be ascribed to different identities:

The point at issue is not whether any identity whatever can be chosen (that would be an absurd claim), but whether we have choices over alternative identities or combinations of identities, and perhaps more importantly, whether we have some freedom in deciding what priority to give to the various identities that we may simultaneously have. People's choices may be constrained by the recognition that they are, say, Jewish or Muslim, but there is still a decision to be made by them regarding what importance they give to that particular identity over others that they may also have (related, for example, to their political beliefs, sense of nationality, humanitarian commitments or professional attachments).[385]

Sen reasons that identity is a plural concept and the relevance of different identities depends on the contexts in which they are asserted:

Identity is thus a quintessentially plural concept, with varying relevance of different identities in distinct contexts. And, most importantly, we have choice over what significance to attach to our different identities. There is no escape from reasoning just because the notion of identity has been invoked. Choices over identities do involve constraints and connections, but the choices that exist and have to be made are real, not illusory. In particular, the choice of priorities between different identities, including what relative weights to attach to their respective demands, cannot be only a matter of discovery. They are inescapably decisional, and demand reason-not just recognition.[386]

698. The Constitution recognizes, through the rights which it protects, a multitude of identities and the myriad forms of its expression. Our political identities as citizens define our relationship with the nation state. The rights which the Constitution recognizes as fundamental liberties constitute a reflection of the identity of the self. As we speak, so we profess who we are. An artist who paints, the writer who shares a thought, the musician who composes, the preacher who influences our spirituality and the demagogue who launches into human sensibilities are all participants in the assertion of identity. In this participative process, the identities of both the performer and the audience are continuously engaged. Identity at a constitutional level is reflected in the entitlement of every individual, protected by its values, to lead a way of life which defines the uniqueness of our beings. The Constitution recognizes a multitude of identities, based on the liberties which it recognizes as an inseparable part of our beings. To be human is to have a multitude of identities and be guaranteed the right to express it in various forms. The state which must abide by a written Constitution cannot require any person to forsake one or more identities. Constitutional freedoms compel the state to respect them.

699. Technologies that affect how our identities function must be subject to constitutional norms. The existence of individual identity is the core of a constitutional democracy. Addressing the Constituent Assembly on 4th November 1948, Dr B.R. Ambedkar had emphasised on the importance of individual identity in our constitutional framework:

I am glad that the Draft Constitution has... adopted the individual as its unit.[387]

Having an individual identity is an important part of the human condition. The negation of identity is the loss of personhood, which in turn affects the freedom of choice and free will. Personhood constructs democracy. It represents the quality of democracy. Our decided cases have recognized the intimate relationship between human liberty and identity. The traveller in **Maneka Gandhi** v. **Union of India** MANU/SC/0133/1978 : (1978) 1 SCC 248, the employee complaining of sexual harassment in **Vishaka** v. **State of Rajasthan** MANU/SC/0786/1997 : (1997) 6 SCC 241, the guardian of the minor in **Githa Hariharan (Ms)** v. **Reserve Bank of India** MANU/SC/0117/1999 : (1999) 2 SCC 228, the bar employee in **Anuj Garg** v. **Hotel Association of India** MANU/SC/8173/2007 : (2008) 3 SCC 1, the transgender in **National Legal Services Authority** v. **Union of India** MANU/SC/0309/2014 : (2014) 5 SCC 438, the tribal worker in **Madhu Kishwar** v. **State of Bihar** MANU/SC/0468/1996 : (1996) 5 SCC 125 and the oppressed victim of state violence in **Nandini Sundar** v. **State of Chattisgarh** MANU/SC/0724/2011 : (2011) 7 SCC 547 are all engaged in the assertion of identity. **Puttaswamy** recognizes the role of the individual as "the core of constitutional focus" and "the focal point of the Constitution". Justice Kaul's concurring opinion recognised that the individual has the right to control her identity.[207]

It was submitted by the Petitioners that a unique identity number infringes the identity of the individual since it reduces every resident to a number. Ascribing to the holder of an Aadhaar card, a unique identity number must not infringe constitutional identities. The Aadhaar Act indicates, in its Statement of Objects and Reasons, that correct identification of targeted beneficiaries is necessary and that a failure to establish the identity of an individual is a major hindrance in the disbursal of welfare benefits. Section 3(1) recognizes the entitlement of every resident to obtain an Aadhaar number. Section 4(3) provides that an Aadhaar number may be accepted as proof of identity. Section 7(1) indicates that its purpose is for establishing the identity of an individual for the receipt of services, benefits or subsidies drawn from the Consolidated Fund. These provisions cannot be allowed to displace constitutional identities. Nor can the provisions of Section 7 reduce an individual to a nameless or faceless person.

700. Aadhaar is about identification and is an instrument which facilitates a proof of identity. It must not obliterate constitutional identity. The definition of demographic information in Section 2(k) excludes race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. However, as has been specifically discussed before, the linking of the Aadhaar number to different databases is capable of profiling an individual, which could include information regarding her/his race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Thus, the impact of technology is such that the scheme of Aadhaar can reduce different constitutional identities into a single identity of a 12-digit number and infringe the right of an individual to identify herself/himself with choice.

701. Social security schemes and programmes are a medium of existence of a large segment of society. Social security schemes in India, such as the PDS, were introduced to protect the dignity of the marginalized. Exclusion from these schemes defeats the rationale for the schemes which is to overcome chronic hunger and malnutrition. Exclusion is violative of human dignity. As discussed previously in detail, the statistics recorded in government records and the affidavits filed by the Petitioners point out glaring examples of exclusion due to technical errors in Aadhaar. The authentication failures in the Aadhaar scheme have caused severe disruptions particularly in rural India. Exclusion as a consequence of biometric devices has a disproportionate impact on the lives of the marginalized and poor. This Court cannot turn a blind eye to the rights of the marginalized. It may be the fashion of the day to advance the cause of a digital nation. Technology is undoubtedly an enabler. It has become a universal unifier of our age. Yet, the interface between technology and basic human rights cannot be oblivious to social reality. Compulsive linking of biometrics to constitutional entitlements should not result in denial to the impoverished. There exists a digital divide. To railroad those on one side of that divide unconcerned about social and technical constraints which operate in society is to defeat the purpose of social welfare. The Court has to be specifically conscious of the dignity of the underprivileged. The Court must fulfill its role of protecting constitutional values even if it affects a small percentage of the population. The exclusion errors in this case have led to grave injustice to the marginalized. The Court, therefore, has to play an active role in protecting their dignity.

702. The institution of rights places a heavy onus on the State to justify its restrictions. No right can be taken away on the whims and fancies of the State. The State has failed to justify its actions and to demonstrate why facilitating the targeted delivery of subsidies, which promote several rights such as the right to food for citizens, automatically entails a sacrifice of the right to privacy when both these rights are protected by the Constitution. One right cannot be taken away at the behest of the other especially when the State has been unable to satisfy this Court that the two rights are mutually exclusive. The State has been unable to respond to the contention of the Petitioners that it has failed to consider that there were much less rights-invasive measures that could have furthered its goals. The burden of proof on the State was to demonstrate that the right to food and other entitlements provided through the Aadhaar scheme could not have been secured without the violating the fundamental rights of privacy and dignity. Dworkin in his classical book "Taking Rights Seriously", while answering the question whether some rights are so important that the State is justified in doing all it can to maintain even if it abridges other rights, states that:

But no society that purports to recognize a variety of rights, on the ground that a man's dignity or equality may be invaded in a variety of ways, can accept such a principle... **If rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned.**[388]

703. There is no antinomy between the right to privacy and the legitimate goals of the State. An invasion of privacy has to be proportional to and carefully tailored for achieving a legitimate aim. While the right to food is an important right and its promotion is a constitutional obligation of the State, yet the right to privacy cannot simply and automatically yield to it. No legitimate goal of the State can be allowed at the cost of infringement of a fundamental right without passing the test of constitutionality. While analysing the architecture of Aadhaar, this Court has demonstrated how the purported safeguards in the Aadhaar architecture are inadequate to protect the integrity of

personal data, the right of informational self-determination and above all rights attributable to the privacy-dignity-autonomy trilogy. It is also concluded that the Aadhaar scheme is capable of destroying different constitutional identities. The financial exclusion caused due to errors in Aadhaar based authentication violate the individual's right to dignity. The Aadhaar scheme causes an unwarranted intrusion into fundamental freedoms guaranteed under the Indian Constitution since the Respondents have failed to demonstrate that these measures satisfy the test of necessity and proportionality.

H.5 Dignity and financial exclusion

704. Our jurisprudence reflects a keen awareness of the need to achieve dignity. The nine judge Bench decision in **Puttaswamy** also emphasized the seminal value of dignity in our constitutional scheme. Human dignity is a strengthening bond in the relationship between Parts III and IV of the Constitution. Reading the Directive Principles contained in Part IV in the context of the right to life (in Part III of the Constitution) has significant implications both for the substantive content of the right and on the ability of the state in pursuit of its positive obligation to secure conditions of a dignified existence. Dignity is an integral element of natural law and an inalienable constitutional construct. To lead a dignified life is a constitutional assurance to an individual. Dr Ambedkar conceptualized four basic premises on which a political democracy can rest:

Political Democracy rests on four premises which may be set out in the following terms:

(i) The individual is an end in himself.

(ii) That the individual has certain inalienable rights which must be guaranteed to him by the Constitution.

(iii) **That the individual shall not be required to relinquish any of his constitutional rights as a condition precedent to the receipt of a privilege.**

(iv) **That the State shall not delegate powers to private persons to govern others.**[389]

Interpreting the words of Dr Ambedkar in a constitutional context, any action on the part of the State which forces an individual to part with her or his dignity or any other right under Part III will not be permissible.

705. The experience of living with chronic hunger; recurring uncertainty about the availability of food; debt bondage; low and highly underpaid work; self-denial; and sacrifice of other survival needs, being discriminated against[390] are instances of the loss of dignity for the marginalized. The State has social security programmes and legislation to improve the living conditions of the marginalized and to protect their dignity and means of livelihood. However, as documented in the works of Sainath, Dreze, Sen and other authors, India has "utterly poor standards of the social services provided to common folk, whether it is the Mid-day Meal Scheme, the Sarva Shiksha Abhiyan, Integrated Child Development Services, Public Distribution system, healthcare at the primary health centres, district hospitals and even public https://www.epw.in/journal/2008/17/special-articles/living-hunger-deprivation-among-aged-

single-women-and-people hospitals in the state capitals"[391]. This manner of addressing the deprivations faced by the marginalized crushes their dignity.

Any action or inaction on the part of the State which is insensitive to and unconcerned about protecting the dignity of the marginalized is constitutionally impermissible. Denial of benefits arising out of any social security scheme which promotes socio-economic rights of the marginalized, would not be legitimate under the Constitution, for the reason that such denial violates human dignity. No individual can be made to part with his or her dignity. Responsibility for protection of dignity lies not only with governments but also with individuals, groups and entities.

It is in the above background that this Court must deal with the next contention of the Petitioners. The submission of the Petitioners is that identity recognition technology may be based on a system which is deterministic or probabilistic. Biometric authentication systems work on a probabilistic model. For the purposes of authentication, a comparison is through a template which reduces the finger print to a scale and then, a minutea. The claim of the Petitioners is that as a result, identities are reduced from certainty to a chance.

706. Section 7 of the Aadhaar Act makes it mandatory for an individual to undergo authentication or furnish proof of possession of an Aadhaar number in order to avail a subsidy, benefit or service, which incurs expenditure from the Consolidated Fund of India. In the Aadhaar based Biometric Authentication, the Aadhaar number and biometric information submitted by an Aadhaar number holder are matched with the biometric information stored in the CIDR. This may be fingerprints-based or iris-based authentication or other biometric modalities based on biometric information stored in the CIDR.[392]

It has been submitted that failure of the authentication process results in denial of a subsidy, benefit or service contemplated Under Section 7 of the Act. It has been contended that non-enrolment in the Aadhaar scheme and non-linking of the Aadhaar number with the benefit, subsidy or service causes exclusion of eligible beneficiaries. It is the submission of the Petitioners that authentication of biometrics is faulty, as biometrics are probabilistic in nature. It is the case of the Petitioners that Aadhaar based biometric authentication often results in errors and thus leads to exclusion of individuals from subsidies, benefits and services provided Under Section 7. Across the country, it has been urged, several persons are losing out on welfare entitlements because of a biometric mis-match. Mr. Divan has argued in his written submissions, that "the project is not an 'identity' project but 'identification' exercise and unless the biometrics work, a person in flesh and blood, does not exist for the state".

In order to deal with this contention, it is necessary to understand whether biometrics authentication can result in errors in matching. People are identified by three basic means: "by something they know, something they have, or something they are".[393] Biometrics fall within the last category, and, as such, should presumably be less susceptible to being copied or forged. However, various factors can reduce the probability of accurate human identification, and this increases the probability of a mismatch. Human fallibility can produce errors. [394]

707. In the United States of America, the National Academy of Science published a report in 2010 on biometrics titled "Biometric Recognition: Challenges & Opportunities"[395]. The report was based on a study carried out by several reputed scientists and researchers under the aegis of the National Research Council, the National Academy of Engineering and the Institute of Medicine. This report highlights the nature of biometrics as follows:

Biometric recognition systems are inherently probabilistic and their performance needs to be assessed within the context of this fundamental and critical characteristic. Biometric recognition involves matching, within a tolerance of approximation, of observed biometric traits against previously collected data for a subject. Approximate matching is required due to the variations in biological attributes and behaviors both within and between persons.[396]

The report also took note of how changes in an individual's biometrics may occur due to a number of factors:

Biometric characteristics and the information captured by biometric systems can be affected by changes in age, environment, disease, stress, occupational factors, training and prompting, intentional alterations, socio-cultural aspects of the situation in which the presentations occurs, changes in human interface with the system, and so on. As a result, each interaction of the individual with the system (at enrolment, identification and so on) will be associated with different biometric information. Individuals attempting to thwart recognition for one reason or another also contribute to the inherent uncertainty in biometric systems.[207]

The report had also stated that biometrics can result in exclusion of people if it is used for claiming entitlement to a benefit:

When used in contexts where individuals are claiming enrollment or entitlement to a benefit, biometric systems could disenfranchise people who are unable to participate for physical, social, or cultural reasons. For these reasons, the use of biometrics--especially in applications driven by public policy, where the affected population may have little alternative to participation--merits careful oversight and public discussion to anticipate and minimize detrimental societal and individual effects and to avoid violating privacy and due process rights.

Social, cultural, and legal issues can affect a system's acceptance by users, its performance, or the decisions on whether to use it in the first place--so it is best to consider these explicitly in system design. Clearly, the behavior of those being enrolled and recognized can influence the accuracy and effectiveness of virtually any biometric system, and user behavior can be affected by the social, cultural, or legal context. Likewise, the acceptability of a biometric system depends on the social and cultural values of the participant populations.[397]

The report underlines that the relationship between an individual's biometric traits and data records has the potential to cause disenfranchisement, when a Section of the population is excluded from the benefits of positive claim systems. The report thus states that:

Policies and interfaces to handle error conditions such as failure to enroll or be recognized should be designed to gracefully **avoid violating the dignity, privacy,** or due process rights of the participants.

708. Els Kindt in a comprehensive research titled "Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis"[206], deals with the nature of biometrics. The book notes that error rates in biometric systems lead to a situation where entitled data subjects will be falsely rejected from the process of database matching. This will adversely affect the rights of individuals. It has been observed that:

The error rates imply also that the system will allow impostors. This is equally important because the security of biometric systems should be questioned in case of high false accept rates. This element should be given sufficient weight in the decision to implement a biometric system for security purposes...

Other tests clearly indicated increased error rates for young persons, in case of aging, in particular for face and for disabled persons. Individuals with health problems may also be falsely rejected or no longer be recognized, although they were previously enrolled. In some cases, (non-)enrolment will be a significant problem. It is clear that these data subjects need additional protection."[398]

The book underlines the risk inherent in the limited accuracy of biometrics.[207]

709. A recently published book titled **"Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor"**[399], authored by Virginia Eubanks, deals with the impact of data mining, policy algorithms, and predictive risk models on economic inequality and democracy in America. Eubanks outlines the impacts of automated decision-making on public services in the USA through three case studies relating to welfare provision, homelessness and child protection services. Eubanks looks at these three areas in three different parts of the United States: Indiana, Los Angeles and Pittsburgh, to examine what technological automation has done in determining benefits and the problems it causes. The author records that in Indiana, one million applications for health care, food stamps, and cash benefits in three years were denied, because a new authentication system interpreted any application mistake as "failure to cooperate". In Los Angeles, an algorithm calculates the comparative vulnerability of thousands of homeless people so as to prioritize them for an inadequate pool of housing resources. In Pittsburgh, child services use an algorithm to predict future behaviour. Statistics are used to predict which children might be future victims of abuse or neglect. Eubanks shows how algorithms have taken over for human interaction and understanding. She has argued that automated decision-making is much wider in reach and is likely to have repercussions unknown to non-digital mechanisms, such as nineteenth-century poorhouses in America. Poorhouses were tax-supported residential institutions to which people were required to go if they could not support themselves.[400] People who could not support themselves (and their families) were put up for bid at public auction. The person who got the contract (which was for a specific time-frame) got the use of the labour of the poor individual(s) for free in return for feeding, clothing, housing and providing health care for the individual and his/her family. The practice was a form of indentured servitude and hardly had any recourse for protection against abuse. Eubanks considers the technology based decision-making for poverty management as the extension of the poorhouses of the 19th century:

America's poor and working-class people have long been subject to invasive surveillance, midnight raids, and punitive public policy that increase the stigma and hardship of poverty. During the nineteenth century, they were quarantined in county poorhouses. During the twentieth century, they were investigated by caseworkers, treated like criminals on trial. Today, we have forged what I call a digital poorhouse from databases, algorithms, and risk models. It promises to eclipse the reach and repercussions of everything that came before.

Like earlier technological innovations in poverty management, digital tracking and automated decision-making hide poverty from the professional middle-class public and give the nation the ethical distance it needs to make inhuman choices: who gets food and who starves, who has housing and who remains homeless, and which families are broken by the state. The digital poorhouse is a part of a long American tradition. We manage the individual poor in order to escape our shared responsibility for eradicating poverty.[401]

The author further remarks:

While poorhouses have been physically demolished, their legacy remains alive and well in the automated decision-making systems that encage and entrap today's poor. For all their high-tech polish, our modern systems of poverty management-automated decision-making, data mining, and predictive analysis-retain a remarkable kinship with the poorhouses of the past. Our new digital tools spring from punitive, moralistic views of poverty and create a system of high-tech containment and investigation. **The digital poorhouse deters the poor from accessing public resources; polices their labor, spending, sexuality, and parenting; tries to predict their future behavior; and punishes and criminalizes those who do not comply with its dictates. In the process, it creates ever-finer moral distinctions between the 'deserving' and 'undeserving' poor, categorizations that rationalize our national failure to care for one another.**[402]

Eubanks builds the argument that automated decision-making technology does not act as a facilitator for welfare schemes for the poor and only acts as a gatekeeper:

New high-tech tools allow for more precise measuring and tracking, better sharing of information, and increased visibility of targeted populations. In a system dedicated to supporting poor and working-class people's self-determination, such diligence would guarantee that they attain all the benefits they are entitled to by law. In that context, integrated data and modernized administration would not necessarily result in bad outcomes for poor communities. But automated decision-making in our current welfare system acts a lot like older, atavistic forms of punishment and containment. It filters and diverts. It is a gatekeeper, not a facilitator.[403]

The crux of the book is reflected in the following extract:

We all live in the digital poorhouse. We have always lived in the world we built for the poor. We create a society that has no use for the disabled or the elderly, and then are cast aside when we are hurt or grow old. We measure human worth based only on the ability to earn a wage, and suffer in a world that undervalues care and community. We base our economy on exploiting the labor of racial and ethnic minorities, and watch lasting inequities snuff out human potential. We see the

world as inevitably given by bloody competition and are left unable to recognize the many ways we cooperate and lift each other up.

But only the poor lived in the common dorms of the county poorhouse. Only the poor were put under the diagnostic microscope of scientific clarity. Today, we all live among the digital traps we have laid for the destitute.[404]

Automating Inequality demonstrates the problems with authentication and algorithmic technology and indicates that the system, which was intended to provide assistance for the short term and help people out of poverty, has become a system to perpetuate poverty and injustice.

710. Errors in biometrics matching imply that an individual will not be considered a part of the biometrics database. If a benefit or service is subject to the matching of biometrics, then any mismatch would result in a denial of that benefit or service. Exclusion based on technological errors, with no fault of the individual, is a violation of dignity. The fate of individuals cannot be left to the vulnerabilities of technological algorithms or devices. 'To live is to live with dignity'.[405] Arbitrary exclusion from entitled benefits or subsidies is a violation of dignity. If any such project has to survive, then it has to be ensured that individual dignity is protected. These concerns have to be addressed.

As mentioned earlier, concerns regarding the application of biometrics in the Aadhaar project were discussed in 2009 by the Biometrics Standards Committee of UIDAI[406], which was of the view that the large magnitude of the Aadhaar project raised uncertainty about the accuracy of biometrics.[207] The Strategy Overview[407] published by UIDAI, in 2010, had discussed the risks associated with biometrics perceived by UIDAI itself. Under the heading of 'Project Risk', the overview stated the UID project does face certain risks in its implementation, which have to be addressed through its architecture and in the design of its incentives. It stated:

1) Adoption Risks: There will have to be sufficient, early demand from residents for the UID number. Without critical mass among key demographic groups (the rural and the poor) the number will not be successful in the long term. **To ensure this, the UIDAI will have to model de-duplication and authentication to be both effective and viable for participating agencies and service providers...**

3) Enrolment Risks: The project will have to be carefully designed to address risks of low enrolment - such as creating sufficient touch points in rural areas, enabling and motivating Registrars, ensuring that documentary requirements don't derail enrolment in disadvantaged communities - as well as managing difficulties in address verification, name standards, lack of information on date of birth, and hard to record fingerprints.

4) Risks of Scale: The project will have to handle records that approach one billion in number. This creates significant risks in biometric de-duplication as well as in administration, storage, and continued expansion of infrastructure.

5) Technology risks: Technology is a key part of the UID program, and this is the first time in the world that storage, authentication and de-duplication of biometrics are being attempted on this

scale. **The authority will have to address the risks carefully - by choosing the right technology in the architecture, biometrics, and data management tools; managing obsolescence and data quality; designing the transaction services model and innovating towards the best possible result.**

6) Privacy and security risks: The UIDAI will have to ensure that resident data is not shared or compromised.[408]

Technological error would result in authentication failures. The concerns raised by UIDAI ought to have been resolved before the implementation of the Aadhaar project. Poor connectivity in rural India was a major concern. The majority of the Indian population lives in rural areas. Even a small percentage of error results in a population of crores being affected. Denial of subsidies and benefits to them due to the infirmities of biometric technology is a threat to good governance and social parity.

711. The issue of exclusion needs to be considered at three different levels: (i) before the implementation of the Aadhaar Act, when biometrics were being used since 2009; (ii) under the provisions of the Act; and (iii) at the practical level during the implementation of the Aadhaar programme.

Before the enactment of the Aadhaar Act in 2016, the Standing Committee on Finance, which examined the NIA Bill, was concerned about the impact of Aadhaar on marginalized Sections of society. Since the availing of subsidies and benefits was to depend upon Aadhaar based authentication, any error in the authentication would result in a denial of the benefits of social security schemes for the marginalized. In 2011, the report of the Standing Committee noted, thus:

The full or near full coverage of marginalized Sections for issuing Aadhaar numbers could not be achieved mainly owing to two reasons viz. (i) the UIDAI doesn't have the statistical data relating to them; and (ii) **estimated failure of biometrics is expected to be as high as 15% due to a large chunk of population being dependent on manual labour.**[409]

The Economic Survey 2016-17 has adverted to authentication failures while discussing the concept of Universal Basic Income (UBI). The Survey, which is an official document of the Union government, states that UBI is premised on the idea that a just society needs to guarantee to each individual a minimum income which they can count on, and which provides the necessary material foundation for a life with access to basic goods and a life of dignity.[410] UBI was to be implemented by providing cash transfers (for availing benefits of social security schemes) to the bank accounts of beneficiaries. The implementation of UBI was to be undertaken through what is described as the JAM trinity: Jan-Dhan Bank Accounts, Aadhaar data and Mobile phones. However, the Survey noted that while Aadhaar is designed to solve the identification problem, it cannot solve the "targeting problem" on its own. The Survey emphasized the need to build state capacity and that "the state will still have to enhance its capacities to provide a whole range of public goods".[411] The Survey has recorded the statistics of authentication failures of Aadhaar in several regions of the country:

While Aadhaar coverage speed has been exemplary, with over a billion Aadhaar cards being distributed, some states report authentication failures: estimates include 49 percent failure rates for Jharkhand, 6 percent for Gujarat, 5 percent for Krishna District in Andhra Pradesh and 37 percent for Rajasthan. Failure to identify genuine beneficiaries results in exclusion errors.[412]

No failure rate in the provision of social welfare benefits can be regarded as acceptable. Basic entitlements in matters such as foodgrain, can brook no error. To deny food is to lead a family to destitution, malnutrition and even death.

712. A recent Office Memorandum dated 19 December 2017 issued by the Cabinet Secretariat of the Union government[413] acknowledges that the Aadhaar enrolment process has not been completed and that infrastructure constraints are capable of posing difficulties in online authentication. The Memorandum provides that those beneficiaries who do not possess Aadhaar, shall be provided a subsidy, benefit or service based on alternate identification documents as contemplated by Section 7 of the Aadhaar Act. It also requires efforts to be made to ensure that all beneficiaries are facilitated to get enrolment under the Aadhaar programme. The Memorandum creates a mechanism for availing subsidies, benefits or services in cases where Aadhaar authentication fails:

(i) Departments and Bank Branches may make provisions for IRIS scanners along with fingerprint scanners wherever feasible;

(ii) In cases of failure due to lack of connectivity, offline authentication systems such as QR code based coupons, Mobile based OTP or TOTP may be explored; and

(iii) In all cases where online authentication is not feasible, the benefit/service may be provided on the basis of possession of Aadhaar, after duly recording the transaction in a register, to be reviewed and audited periodically.

The figures from the Economic Survey of India indicate that there are millions of eligible beneficiaries across India who have suffered financial exclusion. The Cabinet Secretariat has pro-actively acknowledged the need to address matters of exclusion by implementing alternate modalities, apart from those set out in Section 7. Options (i) and (ii) above were to be implemented in future. This exercise should have been undertaken by the government in advance. Problems have to be anticipated when a project is on the drawing board, not after severe deprivations have been caused by the denial of social welfare benefits.

713. Exclusion of citizens from availing benefits of social security schemes because of failures or errors in Aadhaar based biometric authentication has also been documented in research studies and academic writings published by members of civil society, including Reetika Khera and Jean Dreze. Similar testimonies have been recorded in affidavits submitted before this Court by civil society activists. Hearing the voices of civil society must be an integral part of the structural design of a project, such as Aadhaar. In the absence of a credible mechanism to receive and respond to feed-back, the state has to depend on its own personnel who may not always provide reliable and candid assessments of performance and failure.

714. ABBA (Aadhaar based biometric authentication) refers to the practice of installing a Point of Sale (PoS) machine equipped with a fingerprint reader and authenticating a person each time she accesses her entitlements.[414] Dreze has stated that for successful authentication in PDS outlets, several technologies need to work simultaneously.[415] These are[416]:

(a) Seeding of Aadhaar numbers: An eligible individual can become a beneficiary and access the PDS system only if her Aadhaar number is correctly seeded onto the PDS database and added to the household ration card;

(b) Point of Sale (PoS) machines: The process at the PDS outlet is dependent on the PoS machine. If it malfunctions, no transaction can be made. The first step in the process requires the dealer to enter the ration card number of the beneficiary's household onto the PoS machine;

(c) Internet connection: Successful working of the PoS machine depends on internet connectivity as verification of the ration card number and the beneficiary's biometric fingerprint is carried out over the internet;

(d) Remote Aadhaar servers: Remote Aadhaar servers verify the ration card number and initiate fingerprint authentication; and

(e) Fingerprint recognition software: The beneficiary proves her identity by submitting to fingerprint recognition in the PoS machine. Upon verification, the PoS machine indicates that the beneficiary is genuine and that foodgrains can be distributed to her household.

The above procedure requires that at the time of purchase of PDS grains each month, any one person listed on the ration card needs to authenticate themselves. Similarly, for pensions, elderly persons must go to the point of delivery to authenticate themselves. Reetika Khera has observed that since ABBA on PoS machines is currently a monthly activity, so each of its associated technologies (correct Aadhaar-seeding, mobile connectivity, electricity, functional PoS machines and UIDAI servers and fingerprint recognition) needs to work for a person to get their entitlement.[417] Dreze has referred to the above procedure as "a wholly inappropriate technology for rural India"[415]. Network failures and other glitches routinely disable this sort of technology. Dreze has further observed that in villages with poor connectivity, it is a "recipe for chaos"[207] .

715. A government-commissioned sample study[418] in Andhra Pradesh to ascertain the efficiency of Aadhaar-based social programmes in the case of subsidised grains indicated that technical deficiencies are depriving the poor of their access to food. The study was commissioned by the state government after it was found that 22% of the PDS beneficiaries did not take the ration in the month of May 2015. The sample study, which covered five PDS outlets in three districts, found that half of the beneficiaries of PDS in the surveyed areas could not access their ration quota due to glitches, lack of training and mismatches linked to Aadhaar. In the survey, a majority of beneficiaries reported fingerprint mismatches and the inability of fair-price shop owners to operate point-of-sale (POS) devices correctly as major hurdles. Aadhaar numbers did not match with ration card numbers in many cases.

Another survey[419] of 80 households conducted in Hyderabad finds that despite the introduction of technology-intensive authentication and payment systems, a significant number of those vulnerable and dependent on Public Distribution System (PDS) for food grains are failing to realise their right to food. The survey revealed that among 80 surveyed households, 89% reported receiving full entitlements at correct prices even before the introduction of Aadhaar-based biometric authentication (ABBA). In contrast, 10% of households were excluded due to authentication failures due to reported errors with one or more of its five technological components.

716. An Article titled **"Aadhaar and Food Security in Jharkhand: Pain without Gain?"**[420], based on a household survey in rural Jharkhand, examines various issues related to compulsory ABBA for availing PDS benefits. The Article notes the impact of PDS on the lives of the rural poor, who visit the ration shop every month. In "their fragile and uncertain lives", the PDS provides a "modicum of food and economic security". The Article notes that in ABBA, the failure of authentication results in denial of food from ration shops. The household is unable to get food rations for no fault of its own. The Article comes to the conclusion that the imposition of ABBA on the PDS in Jharkhand is a case of "pain without gain", as it has led to serious problems of exclusion (particularly for vulnerable groups such as widows, the elderly and manual workers). The Article further notes that ABBA has neither failed to reduce quantity fraud (which is the main form of PDS corruption in Jharkhand), nor has it helped to address other critical shortcomings of the PDS in Jharkhand, such as the problem of missing names in ration cards, the identification of Antyodaya (poorest of the poor) households, or the arbitrary power of private dealers. The Article identifies poor internet connectivity as one of the reasons for authentication failures and eventual exclusion:

Sporadic internet connectivity is another major hurdle. Sometimes, light rain is enough to disrupt connectivity or the electricity supply. Every step in the ABBA process--ration card verification, biometric authentication, electronic upload of transactions, updating NFSA [National Food Security Act] lists and entitlements on the PoS[421] [Point of Sale] machine-- depends on internet connectivity. Further, even with stable connectivity, biometric authentication is not always easy. Biometric failures are especially common for two groups: the elderly, and manual labourers. Both are particularly vulnerable to food insecurity.[422]

The Article regards the denial of basic services to the poor due to failure of ABBA as a form of grave injustice:

Imposing a technology that does not work on people who depend on it for their survival is a grave injustice.[423]

As we have noted in an earlier part of this judgment, even the Economic Survey of India 2016-17 found a 49% failure rate for beneficiaries in Jharkhand and 37% in Rajasthan. Those at the receiving end are the poorest of the poor.

Reetika Khera looks at the impact of Aadhaar-integration with security schemes (primarily in MGNREGA, PDS and social security pensions).[424] The author also discusses briefly the impact of Aadhaar on liquefied petroleum gas (LPG) subsidy and the application of Aadhaar in the mid-day

meal (MDM) scheme. In coming to its conclusions, the Article has relied upon quantitative data from primary field studies, secondary data from government portals, figures obtained through queries made under the Right to Information (RTI) Act, and responses to questions in Parliament. In Khera's words, Aadhaar is becoming a "tool of exclusion":

Savings or exclusion? The government claimed that Aadhaar integration saved 399 crore up to 31 December 2016 (GoI 2017c). At a given level of benefits, a reduction in government expenditure in any particular transfer scheme can be on two counts: removal of ghosts and duplicates ("efficiency"); and a fall in the number of genuine beneficiaries ("shrinkage"), for instance, if they do not link their Aadhaar numbers when required. Across welfare schemes, the government has been treating any reduction in expenditure as "savings," even when it comes from shrinkage. This is true for SSP [social security pension] as well. For instance, in Rajasthan, pensioners were "mistakenly" recorded as dead and this was presented as Aadhaar-enabled savings (Yadav 2016f). In Jharkhand too, pensioners' names have been deleted because they did not complete Aadhaar-seeding formalities or pensions stopped due to seeding errors (Sen 2017a). Studying 100 pensioners, selected from 10 randomly-selected villages from five blocks of Ranchi district in February 2017, Biswas (2017) finds that 84% of her Respondents receive pensions but irregularity in payments was a big issue. The remaining 16% were not receiving it due to Aadhaar-related issues.[425]

Puja Awasthi documents the plight of individuals suffering from leprosy, who have been denied pensions due to not being able to get enrolled into the Aadhaar system. Leprosy can damage fingerprints and thus make an individual incapable of providing biometrics. Awasthi's article[426] notes that Aadhaar is capable of causing a denial of benefits or services to 86,000 citizens, who suffer from leprosy.

These writings show how in most cases, an authentication failure means that the individual/household was denied the benefit of a social security programme for no fault of their own. Some have gone hungry. Some reportedly lost their lives.[427]

717. A person's biometrics change over time. For persons, who are engaged in manual labour, and persons who are disabled or aged, fingerprints actually cannot be captured by biometric devices. The material which has been relied upon in this segment originates from government's official documents as well as from distinguished academics and researchers from civil society. There exist serious issues of financial exclusion. Pensions for the aged particularly in cases where a pension is earned for past service - are not charity or doles. They constitute legal entitlements. For an old age pensioner, vicissitudes of time and age obliterate fingerprints. Hard manual labour severely impacts upon fingerprints. The elderly, the disabled and the young are the most vulnerable and a denial of social welfare entitlements verily results in a deprivation of the right to life. Should the scholarship of a girl child or a midday meal for the young be made to depend on the uncertainties of biometric matches? Our quest for technology should not be oblivious to the country's real problems: social exclusion, impoverishment and marginalisation. The Aadhaar project suffers from crucial design flaws which impact upon its structural probity. Structural design in delivering welfare entitlements must be compliant with structural due process, to be in accord with Articles 14 and 21. The Aadhaar project has failed to account for and remedy the flaws in its framework and design which lead to serious issues of exclusion. Dignity and rights of individuals cannot be

based on algorithms or probabilities. Constitutional guarantees cannot be subject to the vicissitudes of technology.

718. Structural due process imposes requirements on public institutions and projects at the macro level. Structural due process requires that the delivery of social welfare benefits must be effective and timely. Those who are eligible for the benefits must not face exclusion. Procedures for the disbursal of benefits must not be oppressive. They must be capable of compliance both by those who disburse and by those who receive the benefits. Deployment of technology must factor in the available of technological resources in every part of the coverage area and the prevailing levels of literacy and awareness. Above all, the design of the project will be compliant with structural due process only if it is responsive to deficiencies, accountable to the beneficiaries and places the burden of ensuring that the benefits reach the marginalised on the state and its agencies.

H.6 Constitutional validity of Section 139AA of the Income Tax Act 1961

719. Section 139AA of the Income Tax Act 1961 which was inserted by the Finance Act 2017, mandates the quoting of an Aadhaar number in the application for a Permanent Account Number (PAN) and in the return of income tax. Failure to intimate an Aadhaar number results in the PAN being deemed invalid retrospectively.

Section 139AA reads thus:

Quoting of Aadhaar number.- (1) Every person who is eligible to obtain Aadhaar number shall, on or after the 1st day of July, 2017, quote Aadhaar number-

(i) in the application form for allotment of permanent account number;

(ii) in the return of income:

Provided that where the person does not possess the Aadhaar Number, the Enrolment ID of Aadhaar application form issued to him at the time of enrolment shall be quoted in the application for permanent account number or, as the case may be, in the return of income furnished by him.

(2) Every person who has been allotted permanent account number as on the 1st day of July, 2017, and who is eligible to obtain Aadhaar number, shall intimate his Aadhaar number to such authority in such form and manner as may be prescribed, on or before a date to be notified by the Central Government in the Official Gazette:

Provided that in case of failure to intimate the Aadhaar number, the permanent account number allotted to the person shall be deemed to be invalid and the other provisions of this Act shall apply, as if the person had not applied for allotment of permanent account number.

(3) The provisions of this Section shall not apply to such person or class or classes of persons or any State or part of any State, as may be notified by the Central Government in this behalf, in the Official Gazette.

Explanation. - For the purposes of this section, the expressions -

(i) "Aadhaar number", "Enrolment" and "resident" shall have the same meanings respectively assigned to them in Clauses (a), (m) and (v) of Section 2 of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (18 of 2016);

(ii) "Enrolment ID" means a 28 digit Enrolment Identification Number issued to a resident at the time of enrolment.

720. In **Binoy Viswam** v. **Union of India ("Binoy Viswam")**, MANU/SC/0693/2017 : (2017) 7 SCC 59 a two judge Bench (consisting of Dr Justice AK Sikri and Justice Ashok Bhushan) upheld the constitutional validity of Section 139AA. Since the issue of whether privacy is a constitutionally guaranteed right was pending before a Bench of nine judges (the decision in **Puttaswamy** was still to be delivered), the two judge Bench did not dwell on the challenge to the legislation on the ground of privacy and Under Article 21. The Bench examined other submissions based on Articles 14 and 19 and on the competence of Parliament to enact the law.

721. The decision in **Binoy Viswam** holds that in assessing the constitutional validity of a law, two grounds of judicial review are available:

(i) The legislative competence of the law-making body which has enacted the law, over the subject of legislation; and

(ii) Compliance with Part III of the Constitution, which enunciates the fundamental rights, and with the other provisions of the Constitution.

Holding that a third ground of challenge - that the law in question is arbitrary - is not available, the decision in *Binoy Viswam* placed reliance on the enunciation of law by a three judge Bench in **State of AP** v. **McDowell & Co. (Mcdowell).** MANU/SC/0427/1996 : (1996) 3 SCC 709 **McDowell** ruled that while a challenge to a statute on the ground that it violates the principle of equality Under Article 14 is available, a statute cannot be invalidated on the ground that it is arbitrary:

43...In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection Clause enshrined therein...

No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act.[428]

In **Binoy Viswam**, the two judge Bench observed that the "contours" of judicial review had been spelt out in **State of Madhya Pradesh** v. **Rakesh Kohli**, MANU/SC/0443/2012 : (2012) 6 SCC 312 and more recently in **Rajbala** v. **State of Haryana**. MANU/SC/1416/2015 : (2016) 2 SCC 445 Reiterating the same position, **Binoy Viswam** holds:

81. Another aspect in this context, which needs to be emphasised, is that a legislation cannot be declared unconstitutional on the ground that it is "arbitrary" inasmuch as examining as to whether a particular Act is arbitrary or not implies a value judgment and the courts do not examine the wisdom of legislative choices and, therefore, cannot undertake this exercise.[429]

722. In the decision of the Constitution Bench in **Shayara Bano** v. **Union of India ("Shayara Bano"),** MANU/SC/1031/2017 : (2017) 9 SCC 1 Justice Rohinton Nariman speaking for himself and Justice Uday U Lalit noticed that the dictum in McDowell, to the effect that "no enactment can be struck down by just saying it is arbitrary or unreasonable" had failed to notice the judgment of the Constitution Bench in **Ajay Hasia** v. **Khalid Mujib Sehravardi ("Ajay Hasia"),** MANU/SC/0498/1980 : (1981) 1 SCC 722 and a three judge Bench decision in **Dr K R Lakshmanan** v. **State of T N ("Lakshmanan")** MANU/SC/0309/1996 : (1996) 2 SCC 226. In **Ajay Hasia**, the Constitution Bench traced the evolution of the doctrine of equality beyond its origins in the doctrine of classification. Ajay Hasia ruled that since the decision in **E P Royappa** v. **State of Tamil Nadu**, MANU/SC/0380/1973 : (1974) 4 SCC 3 it had been held that equality had a substantive content which, simply put, was the antithesis of arbitrariness. Consequently:

16....**Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" Under Article 12, Article 14 immediately springs into action and strikes down such State action.** In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.
[430]

The principle of arbitrariness was applied for invalidating a State law by the three judge Bench decision in **Lakshmanan**. It was, in this context that Justice Nariman speaking for two Judges in the Constitution Bench in **Shayara Bano** held that manifest arbitrariness is a component of Article 14. Hence, a law which is manifestly arbitrary would violate the fundamental right to equality:

87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the Rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."

[431]

Justice Nariman has observed that even after **McDowell**, challenges to the validity of legislation have been entertained on the ground of arbitrariness (**Malpe Vishwanath Acharya** v. **State of Maharashtra**, MANU/SC/0905/1998 : (1998) 2 SCC 1, **Mardia Chemicals Ltd.** v. **Union of**

India, MANU/SC/0323/2004 : (2004) 4 SCC 311, **State of Tamil Nadu** v. **K Shyam Sunder**, (2011) 8 SCC 737, **Andhra Pradesh Dairy Development Corporation Federation** v. **B Narasimha Reddy** MANU/SC/1020/2011 : (2011) 9 SCC 286 and **K T Plantation Private Limited** v. **State of Karnataka** MANU/SC/0914/2011 : (2011) 9 SCC 1).

723. In **Shayara Bano**, Justice Nariman has adverted to the decisions which have followed **McDowell** including the two judge Bench decision in **Binoy Viswam**. These decisions, in the view of Justice Nariman, are therefore no longer good law:

99. However, in State of Bihar v. Bihar Distillery Ltd., SCC at para 22, in State of M.P. v. Rakesh Kohli, SCC at paras 17 to 19, in Rajbala v. State of Haryana, SCC at paras 53 to 65 and in Binoy Viswam v. Union of India, SCC at paras 80 to 82, **McDowell** was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation Under Article 14. As has been noted by us earlier in this judgment, McDowell itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell are, therefore, no longer good law.[432]

In the above extract, Justice Nariman has specifically held that the McDowell test which barred a challenge to a law on the ground of arbitrariness ignored a binding Constitution Bench view in **Ajay Hasia** and that of a three judge Bench in **Lakshmanan**. Moreover, the above extract from **Shayara Bano** disapproves of the restriction on judicial review in **Binoy Viswam**, which follows **McDowell**. Justice Kurian Joseph, in the course of his decision has specifically agreed with the view expressed by Justice Nariman:

5...However, on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness, I agree with the illuminating exposition of law by Nariman J. I am also of the strong view that the constitutional democracy of India cannot conceive of a legislation which is arbitrary.

724. In **Puttaswamy**, the judgment delivered on behalf of four Judges expressly recognized the impact of Article 14 in determining whether a law which is challenged on the ground that it violates Article 21 meets both the procedural as well as the substantive content of reasonableness. The Court held:

291... the evolution of Article 21, since the decision in Cooper indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or watertight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression "procedure established by law" in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable. The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable procedure under the law and a law which does so may yet be susceptible to challenge on the ground that its content does

not accord with the requirements of a valid law. The law is open to substantive challenge on the ground that it violates the fundamental right."
433

The same principle has been emphasized in the following observations:

294...Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The interrelationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well.
434

725. In **Binoy Viswam**, the two judge Bench held that while enrolment under the Aadhaar Act is voluntary, it was legitimately open to the Parliament, while enacting Section 139AA of the Income Tax Act to make the seeding of the Aadhaar number with the PAN card mandatory. The court held that the purpose of making it mandatory under the Income Tax Act was to curb black money, money laundering and tax evasion. It was open to Parliament to do so and its legislative competence could not be questioned on that ground. The court held that the legislative purpose of unearthing black money and curbing money laundering furnished a valid nexus with the objective sought to be achieved by the law:

105. Unearthing black money or checking money laundering is to be achieved to whatever extent possible. Various measures can be taken in this behalf. If one of the measures is introduction of Aadhaar into the tax regime, it cannot be denounced only because of the reason that the purpose would not be achieved fully. Such kind of menace, which is deep-rooted, needs to be tackled by taking multiple actions and those actions may be initiated at the same time. It is the combined effect of these actions which may yield results and each individual action considered in isolation may not be sufficient. Therefore, rationality of a particular measure cannot be challenged on the ground that it has no nexus with the objective to be achieved. Of course, there is a definite objective. For this purpose alone, individual measure cannot be ridiculed. We have already taken note of the recommendations of SIT on black money headed by Justice M.B. Shah. We have also reproduced the measures suggested by the Committee headed by Chairman, CBDT on "Measures to Tackle Black Money in India and Abroad". They have, in no uncertain terms, suggested that one singular proof of identity of a person for entering into finance/business transactions, etc. may go a long way in curbing this foul practice. That apart, even if solitary purpose of de-duplication of PAN cards is taken into consideration, that may be sufficient to meet the second test of Article 14. It has come on record that 11.35 lakh cases of duplicate PAN or fraudulent PAN cards have already been detected and out of this 10.52 lakh cases pertain to individual Assessees. Seeding of Aadhaar with PAN has certain benefits which have already been enumerated. Furthermore, even when we address the issue of shell companies, fact remains that companies are after all floated by individuals and these individuals have to produce documents to show their identity. It was sought to be argued that persons found with duplicate/bogus PAN cards are hardly 0.4% and, therefore, there was no need to have such a provision. We cannot go by percentage figures. The absolute

number of such cases is 10.52 lakhs, which figure, by no means, can be termed as miniscule, to harm the economy and create adverse effect on the nation. The Respondents have argued that Aadhaar will ensure that there is no duplication of identity as biometrics will not allow that and, therefore, it may check the growth of shell companies as well.

106. Having regard to the aforesaid factors, it cannot be said that there is no nexus with the objective sought to be achieved.

435

The court observed that it was a harsh reality of our times that the benefit of welfare measures adopted by the State does not reach the segments of society for whom they are intended:

125.1.3... However, for various reasons including corruption, actual benefit does not reach those who are supposed to receive such benefits. One of the main reasons is failure to identify these persons for lack of means by which identity could be established of such genuine needy class. Resultantly, lots of ghosts and duplicate beneficiaries are able to take undue and impermissible benefits. A former Prime Minister of this country has gone on record to say that out of one rupee spent by the Government for welfare of the downtrodden, only 15 paisa thereof actually reaches those persons for whom it is meant. It cannot be doubted that with UID/Aadhaar much of the malaise in this field can be taken care of.
436

In this context, the court also noted that as a result of de-duplication exercises, 11.35 lakh cases of duplicate PANs/fraudulent PANs had been detected out of which 10.52 lakh cases pertained to individual assesses. The court upheld the decision of Parliament as the legislating body of seeding PANs with Aadhaar as "the best method, and the only robust method of de-duplication of PAN database".

726. The edifice of Section 139AA is based on the structure created by the Aadhaar Act. Section 139AA of the Income Tax Act 1962 is postulated on the requirement of Aadhaar having been enacted under a valid piece of legislation. The validity of the legislation seeding Aadhaar to PAN is dependent upon and cannot be segregated from the validity of the parent Aadhaar legislation. In fact, that is one of the reasons why in **Binoy Viswam**, the Article 21 challenge was not adjudicated upon since that was pending consideration before a larger Bench. The validity of seeding Aadhaar to PAN Under Section 139AA must therefore depend upon the constitutional validity of the Aadhaar Act as it is determined by this Court. Further Rule 114B of the Income Tax Rules 1962 provides for a list of transactions for which a person must quote a PAN card number. Rule 114B requires that a person must possess a PAN card for those transactions. These are summarized below:

• "Sale or purchase of a motor vehicle or vehicle, as defined in Clause (28) of Section 2 of the Motor Vehicles Act, 1988 (59 of 1988) which requires registration by a registering authority under Chapter IV of that Act, other than two wheeled vehicles.

• Opening an account [other than a time-deposit and a Basic Savings Bank Deposit Account] with a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in Section 51 of that Act).

• Making an application to any banking company or a cooperative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in Section 51 of that Act) or to any other company or institution, for issue of a credit or debit card.

• Opening of a demat account with a depository, participant, custodian of securities or any other person registered Under Sub-section (1A) of Section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992).

• Payment to a hotel or restaurant against a bill or bills at any one time.

• Payment in connection with travel to any foreign country or payment for purchase of any foreign currency at any one time.

• Payment to a Mutual Fund for purchase of its units.

• Payment to a company or an institution for acquiring debentures or bonds issued by it.

• Payment to the Reserve Bank of India, constituted Under Section 3 of the Reserve Bank of India Act, 1934 (2 of 1934) for acquiring bonds issued by it.

• Deposit with,--

• banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in Section 51 of that Act);

• Post Office.

• Purchase of bank drafts or pay orders or banker's cheques from a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in Section 51 of that Act).

• A time deposit with, --

• a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in Section 51 of that Act);

• a Post Office;

• a Nidhi referred to in Section 406 of the Companies Act, 2013 (18 of 2013); or

• a non-banking financial company which holds a certificate of registration Under Section 45-IA of the Reserve Bank of India Act, 1934 (2 of 1934), to hold or accept deposit from public.

• Payment for one or more pre-paid payment instruments, as defined in the policy guidelines for issuance and operation of pre-paid payment instruments issued by Reserve Bank of India Under Section 18 of the Payment and Settlement Systems Act, 2007 (51 of 2007), to a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in Section 51 of that Act) or to any other company or institution.

• Payment as life insurance premium to an insurer as defined in Clause (9) of Section 2 of the Insurance Act, 1938 (4 of 1938).

• A contract for sale or purchase of securities (other than shares) as defined in Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).

• Sale or purchase, by any person, of shares of a company not listed in a recognised stock exchange.

• Sale or purchase of any immovable property.

• Sale or purchase, by any person, of goods or services of any nature other than those specified above."

The decision in **Puttaswamy** has recognised that protection of the interests of the revenue constitutes a legitimate state aim in the three-pronged test of proportionality. The circumstances which have been adverted to in the decision in **Binoy Viswam** are a sufficient indicator of the legitimate concerns of the revenue to curb tax evasion, by embarking upon a programme for de-duplication of the Pan data base. A legitimate state aim does exist. However, that in itself is not sufficient to uphold the validity of the law, which must meet the other parameters of proportionality spelt out in **Puttaswamy**. The explanation to Section 139AA adopts the definition of the expressions 'Aadhaar number', 'enrolment' and 'resident' from the parent Aadhaar legislation. The seeding of Aadhaar with Pan cards must depend for its validity on the constitutional validity of the Aadhaar legislation. Hence, besides affirming that the object of the measure in Section 139AA constitutes a legitimate state aim, the decision of this Court in regard to the validity of Aadhaar will impact upon the seeding of PAN with Aadhaar, which Section 139AA seeks to achieve.

H.7 Linking of SIM cards and Aadhaar numbers

727. In **Avishek Goenka** v. **Union of India** MANU/SC/0344/2012 : (2012) 5 SCC 275, a three judge Bench of this Court dealt with a public interest litigation seeking to highlight the non-observance of norms, Regulations and guidelines relating to subscriber verification by Telecom Service Providers (TSPs). The Department of Telecommunications (DoT), in the course of the proceedings, filed its instructions stating its position in regard to the verification of prepaid and postpaid mobile subscribers. While concluding the proceedings, this Court directed the constitution of an expert committee comprising of representatives of TRAI and DoT. The court mandated that the following issues should be examined by the Committee:

(*a*) Whether re-verification should be undertaken by the service provider/licensee, DoT itself or any other central body?

(*b*) Is there any need for enhancing the penalty for violating the instructions/guidelines including sale of pre-activated SIM cards?

(*c*) Whether delivery of SIM cards may be made by post? Which is the best mode of delivery of SIM cards to provide due verification of identity and address of a subscriber?

(*d*) Which of the application forms i.e. the existing one or the one now suggested by TRAI should be adopted as universal application form for purchase of a SIM card?

(*e*) In absence of Unique ID card, whether updating of subscriber details should be the burden of the licensee personally or could it be permitted to be carried out through an authorised representative of the licensee?

(*f*) In the interest of national security and the public interest, whether the database of all registered subscribers should be maintained by DoT or by the licensee and how soon the same may be made accessible to the security agencies in accordance with law?[437]

In pursuance of the above directive, DoT issued instructions on the verification of new mobile subscribers on 9 August 2012. On 6 January 2016, TRAI addressed a communication to DoT recommending that the new procedure for subscriber verification was "cumbersome and resource intensive" and hence should be replaced by an Aadhaar linked e-KYC mechanism. Following this, DoT issued a directive on 16 August 2016 to launch an Aadhaar e-KYC service across all licenced service areas for issuance of mobile connections. However, it was stated that the e-KYC process was an alternative, in addition to the existing process of issuing mobile connections to subscribers and would not be applicable for bulk, outstation and foreign customers.

728. A public interest litigation was filed before this Court Under Article 32 in **Lokniti Foundation** v. **Union of India** MANU/SC/0548/2017 : (2017) 7 SCC 155. The relief which claimed was that there should be a definite mobile phone subscriber verification to ensure a hundred per cent verification of subscribers. Responding to the petition, the Union Government informed this Court that DoT had launched an Aadhaar based e-KYC for issuing mobile connections on 16 August 2016, by which customers as well as point of sale agents of TSPs will be authenticated by UIDAI. A statement was made by the learned Attorney General that an effective programme for verification of prepaid connections would be devised within one year. In view of the statement of the AG, the petition was disposed of by a two judge Bench in terms of the following directions:

5. In view of the factual position brought to our notice during the course of hearing, we are satisfied, that the prayers made in the writ petition have been substantially dealt with, and an effective process has been evolved to ensure identity verification, as well as, the addresses of all mobile phone subscribers for new subscribers. In the near future, and more particularly, within one year from today, a similar verification will be completed, in the case of existing subscribers. While complimenting the Petitioner for filing the instant petition, we dispose of the same with the hope and expectation, that the undertaking given to this Court, will be taken seriously, and will be given effect to, as soon as possible.
[438]

Following the decision, DoT issued a directive on 23 March 2017 to all licensees stating that a way forward had been found to implement the directions of the Supreme Court. Based on the hypothesis that this Court had directed an E-KYC verification, DoT proceeded to implement it on 23 March 2017.

729. Mr. Rakesh Dwivedi, learned Senior Counsel appearing on behalf of UIDAI and the State of Gujarat supported the measure. He submitted that the licences of all TSPs are issued Under Section 4 of the Indian Telegraph Act 1885. Since the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs, TSPs, it was urged, have to operate the telegraph under a license and the Central Government is entitled to impose conditions on the licensee. The instruction issued by DoT on 23 March 2017 has, it is urged, the sanction of Section 4 of the Indian Telegraph Act 1885.

730. We must at the outset note the ambit of the proceedings before this Court in **Lokniti Foundation**. In response to the public interest litigation, it was the Union Government which relied on its decision of 16 August 2016 to implement e-KYC verification for mobile subscribers. The petition was disposed of since the prayers were substantially dealt with and the court perceived that an effective process had been adopted to ensure identity verification together with verification of addresses. Existing subscribers were directed to be verified in a similar manner within one year. The issue as to whether the seeding of Aadhaar with mobile SIM cards was constitutionally valid did not fall for consideration.

731. The decision to link Aadhaar numbers with SIM cards and to require e-KYC authentication of mobile subscribers has been looked upon by the Union government purely as a matter of efficiency of identification. TRAI's letter dated 6 January 2016 states that the new procedure for subscriber verification which it had adopted was "cumbersome and resource intensive". The issue as to whether Aadhaar linked e-KYC authentication would seriously compromise the privacy of mobile subscribers did not enter into the decision making calculus. In applying the test of proportionality, the matter has to be addressed not just by determining as to whether a measure is efficient but whether it meets the test of not being disproportionate or excessive to the legitimate aim which the state seeks to pursue. TRAI and DoT do have a legitimate concern over the existence of SIM cards obtained against identities which are not genuine. But the real issue is whether the linking of Aadhaar cards is the least intrusive method of obviating the problems associated with subscriber verification. The state cannot be oblivious to the need to protect privacy and of the dangers inherent in the utilization of the Aadhaar platform by telecom service providers. In the absence of adequate safeguards, the biometric data of mobile subscribers can be seriously compromised and exploited for commercial gain. While asserting the need for proper verification, the state cannot disregard the countervailing requirements of preserving the integrity of biometric data and the privacy of mobile phone subscribers. Nor can we accept the argument that cell phone data is so universal that one can become blase about the dangers inherent in the revealing of biometric information.

732. The submission that a direction of this nature could have been given to TSPs Under Section 4 of the Indian Telegraph Act 1885 does not answer the basic issue of its constitutional validity, which turns upon the proportionality of the measure. Having due regard to the test of proportionality which has been propounded in **Puttaswamy** and as elaborated in this judgment,

we do not find that the decision to link Aadhaar numbers with mobile SIM cards is valid or constitutional. The mere existence of a legitimate state aim will not justify the means which are adopted. Ends do not justify means, at least as a matter of constitutional principle. For the means to be valid, they must be carefully tailored to achieve a legitimate state aim and should not be either disproportionate or excessive in their encroachment on individual liberties.

733. Mobile technology has become a ubiquitous feature of our age. Mobile phones are not just instruments to facilitate a telephone conversation. They are a storehouse of data reflecting upon personal preferences, lifestyles and individual choices. They bear upon family life, the workplace and personal intimacies. The conflation of biometric data with SIM cards is replete with grave dangers to personal autonomy. A constitution based on liberal values cannot countenance an encroachment of this nature. The decision to link Aadhaar numbers to SIM cards and to enforce a regime of e-KYC authentication clearly does not pass constitutional muster and must stand invalidated. All TSPs shall be directed by the Union government and by TRAI to forthwith delete the biometric data and Aadhaar details of all subscribers within two weeks. The above data and Aadhaar details shall not be used or purveyed by any TSP or any other person or agency on their behalf for any purpose whatsoever.

I. Money laundering rules

734. Parliament enacted a law on money-laundering as part of a concerted effort by the international community to deal with activities which constitute a threat to financial systems and to the integrity and sovereignty of nations. The Statement of Objects and Reasons accompanying the introduction of the Bill contains an elucidation of the reasons for the enactment:

Introduction

Money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. To obviate such threats international community has taken some initiatives. It has been felt that to prevent money-laundering and connected activities a comprehensive legislation is urgently needed. To achieve this objective the Prevention of Money-laundering Bill, 1998 was introduced in the Parliament. The Bill was referred to the Standing Committee on Finance, which presented its report on 4th March 1999 to the Lok Sabha. The Central Government broadly accepted the recommendation of the Standing Committee and incorporated them in the said Bill along with some other desired changes.

Statement of Objects and Reasons

It is being realized, world over, that money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. Some of the initiatives taken by the international community to obviate such threat are outlined below:

(a) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.

(b) the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money laundering.

(c) the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The recommendations were classified under various heads. Some of the important heads are-

(i) declaration of laundering of monies carried through serious crimes a criminal offence;

(ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;

(iii) confiscation of the proceeds of crime;

(iv) declaring money-laundering to be an extraditable offence; and

(v) promoting international co-operation in investigation of money-laundering.

(d) the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23rd February 1990, inter alia, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering.

(e) the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to the 10th June 1998 has made another declaration regarding the need to combat money-laundering. India is a signatory to this declaration.

735. The expressions "beneficial owner, reporting entity and intermediary" are defined respectively in Clauses (fa), (wa) and (n) of the Act thus:

(fa) "beneficial owner" means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person.

(wa) "reporting entity" means a banking company, financial institution, intermediary or a person carrying on a designated business or profession.

(n) "intermediary" means,-

(i) a stock-broker, sub-broker share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser or any other intermediary associated with securities market and registered Under Section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992); or

(ii) an association recognised or registered under the Forward Contracts (Regulation) Act, 1952 (74 of 1952) or any member of such association; or

(iii) intermediary registered by the Pension Fund Regulatory and Development Authority; or

(iv) a recognised stock exchange referred to in Clause (f) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).

The Prevention of Money-Laundering (Maintenance of Records) Rules 2005 were amended by the Prevention of Money-Laundering (Maintenance of Records) Second Amendment Rules 2017. By the amendment, several definitions were introduced with reference to the provisions of the Aadhaar Act. These are:

'(aaa) "Aadhaar number" means an identification number as defined Under Sub-section (a) of Section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016;

(aab) "authentication" means the process as defined Under Sub-section (c) of Section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016;

(aac) "Resident" means an individual as defined Under Sub-section (v) of Section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016;

(aad) "identity information" means the information as defined in Sub-section (n) of Section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016;

(aae) "e - KYC authentication facility" means an authentication facility as defined in Aadhaar (Authentication) Regulations, 2016;

(aaf) "Yes/No authentication facility" means an authentication facility as defined in Aadhaar (Authentication) Regulations, 2016...

Similarly, the expression "**officially valid document**" was amended to read as follows:

(d) *"officially valid document"* means the passport, the driving licence, the Permanent Account Number (PAN) Card, the Voter's Identity Card issued by [Election Commission of India, job card issued by NREGA duly signed by an officer of the State Government, the letter issued by the Unique Identification Authority of India containing details of name, address and **Aadhaar number or any other document as notified by the Central Government in consultation with the [Regulator]:**

[Provided that where simplified measures are applied for verifying the identity of the clients the following documents shall be deemed to be officially valid documents:

(a) identity card with applicant's Photograph issued by the Central/State Government Departments, Statutory/Regulatory Authorities, Public Sector Undertakings, Scheduled Commercial Banks and Public Financial Institutions;

(b) letter issued by a gazette officer, with a duly attested photograph of the person].

736. Rule 9 of the 2005 Rules requires every reporting entity to carry out client due diligence at the time of the commencement of an account-based relationship. Due diligence requires a verification of the identity of the client and a determination of whether the client is acting on behalf of a beneficial owner, who then has to be identified. Rule 9(3) defines the expression "beneficial owner" for the purpose of Sub-rule 1. Rule 9(4) requires an individual client to submit an Aadhaar number. Rule 9(3) and Rule 9(4) are extracted below:

9. Client Due Diligence.--(1) Every reporting entity shall--

xxxxx

xxxxx

(3) The beneficial owner for the purpose of Sub-rule (1) shall be determined as under--

(a) where the client is a company, **the beneficial owner is the natural person(s),** who, whether acting alone or together, or through one or more juridical person, has a controlling ownership interest or who exercises control through other means.

Explanation.--For the purpose of this sub-clause-

1. **"Controlling ownership interest"** means ownership of or entitlement to more than twenty-five per cent of shares or capital or profits of the company;

2. **"Control" shall include the right to appoint majority of the directors or to control the management or policy** decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements;

(b) where the client is **a partnership firm,** the beneficial owner is the natural person(s) who, whether acting alone or together, or through one or more juridical person, has I ownership of/entitlement to more than fifteen per cent of capital or profits of the partnership;

(c) where the client is **an unincorporated association** or body of individuals, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person, has ownership of or entitlement to more than fifteen per cent of the property or capital or profits of such association or body of individuals;

(d) where no natural person is identified under (a) or (b) or (c) above, **the beneficial owner is the relevant natural person who holds the position of senior managing official;**

(e) where the client is a trust, the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with fifteen per cent or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership; and

(f) **where the client or the owner of the controlling interest is a company listed on a stock exchange,** or is a subsidiary of such a company, it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such companies.

(4) **Where the client is an individual, who is eligible to be enrolled for an Aadhaar number,** he shall for the purpose of Sub-rule (1) submit to the reporting entity, -

(a) **the Aadhaar number issued by the Unique Identification Authority of India; and**

(b) **the Permanent Account Number or Form No. 60** as defined in Income-tax Rules, 1962, and such other documents including in respect of the nature of business and financial status of the client as may be required by the reporting entity:

Provided that where an Aadhaar number has not been assigned to a client, the client shall furnish proof of application of enrolment for Aadhaar and in case the Permanent Account Number is not submitted, one certified copy of an 'officially valid document' shall be submitted.

Provided further that photograph need not be submitted by a client falling under Clause (b) of Sub-rule (1).

Sub-rule 15 of Rule 9 requires the reporting entity to carry out authentication at the time of receipt of the Aadhaar number:

(15) Any reporting entity, at the time of receipt of the Aadhaar number under provisions of this rule, shall carry out authentication using either e-KYC authentication facility or Yes/No authentication facility provided by Unique Identification Authority of India.

Sub-rule 17 allows a period of six months for a client who is eligible to be enrolled for Aadhaar and to obtain a PAN to submit it upon the commencement of the account-based relationship. Failure to do so, would result in the account ceasing to be operational until the Aadhaar number and PAN are submitted. Clauses a and c of Sub-rule 17 provide as follows:

(17) (a) In case the client, eligible to be enrolled for Aadhaar and obtain a Permanent Account Number, referred to in sub-rules (4) to (9) of Rule 9 does not submit the Aadhaar number or the Permanent Account Number at the time of commencement of an account based relationship with a reporting entity, the client shall submit the same within a period of six months from the date of the commencement of the account based relationship:

Provided that the clients, eligible to be enrolled for Aadhaar and obtain the Permanent Account Number, already having an account based relationship with reporting entities prior to date of this

notification, the client shall submit the Aadhaar number and Permanent Account Number by 31st December, 2017.

(c) In case the client fails to submit the Aadhaar number and Permanent Account Number within the aforesaid six months period, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client:

Provided that in case client already having an account based relationship with reporting entities prior to date of this notification fails to submit the Aadhaar number and Permanent Account Number by 31st December, 2017, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client.

737. The statutory mandate for the framing these Rules is contained in Sections 12, 15 and 73 of the PMLA. Insofar as is material, Section 12 provides as follows:

12. Reporting entity to maintain records:

(1) Every reporting entity shall-

(a) maintain a record of all transactions, including information relating to transactions covered under Clause (b), in such manner as to enable it to reconstruct individual transactions;

(b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;

(c) **verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;**

(d) **identify the beneficial owner, if any, of such of its clients, as may be prescribed;**

(e) **maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.**

(2) Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force, shall be kept confidential.

(3) The records referred to in Clause (a) of Sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

(4) The records referred to in Clause (e) of Sub-section (1) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been close, whichever is later.

(5) The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this Chapter.

Section 12 imposes a statutory obligation on reporting entities to maintain records and to verify the identity of their clients and beneficial owners in the manner prescribed. The procedure for and manner in which information is furnished by reporting entities is specified Under Sub-Section 1 of Section 12 by the Central Government in consultation with the Reserve Bank of India. Section 15 provides as follows:

15. Procedure and manner of furnishing information by reporting entities:

The Central Government may, in consultation with the Reserve Bank of India, prescribe the procedure and the manner of maintaining and furnishing information by a reporting entity Under Sub-section (1) of Section 12 for **the purpose of implementing the provisions of this Act.**

The Rule making power is referable to the provisions of Section 73, which insofar as is material, provides as follows:

73. Power to make rules-

(1) The Central Government may, by notification, make Rules for carrying out the provisos of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such Rules may provide for all or any of the following matters, namely-

(j) the manner and the conditions in which identity of clients shall be verified by the reporting entities under Clause (c) of Sub-section (1) of Section 12;

(jj) the manner of identifying beneficial owner, if any, from the clients by the reporting entities under Clause (d) of Sub-section (1) of Section 12;

(k) the procedure and the manner of maintaining and furnishing information Under Sub-section (1) of Section 12 as required Under Section 15;

(x) any other matter which is required to be, or may be, prescribed.

Section 12(1)(c) requires the reporting entity to verify the identity of its clients "in such manner and subject to such conditions" as may be prescribed. The provisions of the rules, including Sub-rule 17(c) of Rule 9 have been challenged on the ground that they suffer from the vice of excessive delegation.

738. In **Bombay Dyeing and Mfg** v. **Bombay Environmental Action Group** MANU/SC/1197/2006 : (2006) 3 SCC 434, this Court has re-affirmed the well-settled legal test which determines the validity of delegated legislation. The court held:

104...By reason of any legislation, whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution,

should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith.

The essential legislative function consists in the determination of legislative policy and of formally enacting it into a binding Rule of conduct. Once this is carried out by the legislature, ancillary or subordinate functions can be delegated. Having laid down legislative policy, the legislation may confer discretion on the executive to work out the details in the exercise of the Rule making power, though, in a manner consistent with the plenary enactment (**J K Industries Ltd.** v. **Union of India** MANU/SC/8111/2007 : (2007) 13 SCC 673).

739. The Reserve Bank of India had issued a Master Circular dated 25 February 2016 in exercise of its statutory powers Under Section 35A of the Banking Regulation Act 1949 (read with Section 56) and Rule 9(14) of the Prevention of Money-Laundering (Maintenance of Records) Rules 2005. Following the amendment of the PMLA Rules, the Master Circular of the Reserve Bank has been updated on 20 April 2018.

The basic issue which needs to be addressed is whether the amendments which were brought about to the PMLA Rules in 2017 meet the test of proportionality.

740. In 2005, the Central Government in consultation with the Reserve Bank of India notified the Prevention of Money-Laundering (Maintenance of Records) Rules 2005 Under Section 73 of the parent Act. The expression 'officially valid document' was defined in Rule 2(d) in the following terms:

(d) "officially valid document" means the passport, the driving licence, the Permanent Account Number (PAN) Card, the Voter's Identity Card issued by[439] [Election Commission of India, job card issued by NREGA duly signed by an officer of the State Government, the letter issued by the Unique Identification Authority of India[440] [or the National Population Register] containing details of name, address and Aadhaar number or any other document as notified by the Central Government in consultation with the [Regulator];

Rule 9(4) required the submission to the reporting entity, where the client is an individual, a certified copy of an officially valid document containing details of identity and address. Rule 9(4) read as follows:

(4) Where the client is an individual, he shall for the purpose of Sub-rule (1), submit to the reporting entity, one certified copy of an "officially valid document" containing details of his identity and address, one recent photograph and such other documents including in respect of the nature of business and financial status of the client as may be required by the reporting entity:

Under Rule 9(14), the regulator was empowered to issue guidelines, in terms of the provisions of the rule, and to prescribe enhanced or simplified measures to verify the identity of a client, taking into consideration the type of client, business relationship, and the nature and value of transactions based on the overall money-laundering and terrorist financing risks involved. Under the above Rules there were six 'officially valid documents': the passport, driving licence, Permanent Account

Number (PAN) Card, NREGA job card, Voter's Identity Card and a letter of UIDAI containing details of name, address and details of Aadhaar number. or any other document notified by the Central Government in consultation with the Regulator.

741. In the Master Circular issued by the Reserve Bank of India on 25 February 2016, a provision was made for the submission by customers, at their option, of one of the six officially valid documents (OVDs) for proof of identity and address. Rule 3(vi) defined the expression 'officially valid document' in similar terms:

(vi) "officially valid document" means the passport, the driving licence, the Permanent Account Number (PAN) Card, the Voter's Identity Card issued by the Election Commission of India, job card issued by NREGA duly signed by an officer of the State Government, letter issued by the Unique Identification Authority of India containing details of name, address and Aadhaar number.

Explanation: Customers, at their option, shall submit one of the six OVDs for proof of identity and proof of address.

Customer due diligence and on-going due diligence were defined thus:

Customer Due Diligence (CDD)" means indemnifying and verifying the customer and the beneficial owner using 'Officially Valid Documents' as a 'proof of identity' and a 'proof of address'.

"On-going Due Diligence" means regular monitoring of transactions in accounts to ensure that they are consistent with the customers' profile and source of funds.

742. Chapter III of the Master Circular provided for regulated entities (including banks) to specify a customer acceptance policy. Clause 15 of the Master Circular *inter alia* specified that customers shall not be required to furnish additional OVDs if the OVD already submitted, contained both proof of identity and address. Chapter VI which provided for a due diligence procedure allowed customers to submit one of the six OVDs for proof of identity and address. Under Part v. of Chapter VI, banks were required to conduct ongoing due diligence particularly in regard to large and complex transactions above a threshold. Clause 39 of the Circular provided for a partial freezing and closure of accounts:

39. **Partial freezing and closure of accounts**

(a) Where REs are unable to comply with the CDD requirements mentioned at Part I to v. above, they shall not open accounts, commence business relations or perform transactions. In case of existing business relationship which is not KYC compliant, banks shall ordinarily take step to terminate the existing business relationship after giving due notice.

(b) As an exception to the Rule, banks shall have an option to choose not to terminate business relationship straight away and instead opt for a phased closure of operations in this account as explained below:

i. The option of 'partial freezing' shall be exercise after giving due notice of three months to the customers to comply with KYC requirements.

ii. A reminder giving a further period of three months shall also be given.

iii. Thereafter, 'partial freezing' shall be imposed by allowing credits and disallowing all debits with the freedom to close the accounts in case of the account being KYC non-compliant after six months of issue first notice.

iv. All debits and credits from/to the accounts shall be disallowed, in case of the account being KYC non-compliant after six months of imposing 'partial freezing',

v. The account holders shall have the option, to revive their accounts by submitting the KYC documents.

(c) When an account is closed whether without 'partial freezing' or after 'partial freezing', the reason for that shall be communicated to account holder.

Chapter VIII provided for reporting requirements to the Financial Intelligence Unit. Chapter IX dealt with compliance with requirements/obligations under international agreements. Clause 58 of Chapter X stipulated reporting requirements under the Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standards (CRS).

743. As a result of the amendment to the Rules brought about in 2017, Rule 9(4) mandates that in the case of a client who is an individual, who is eligible to be enrolled for an Aadhaar number, submission of the Aadhaar number is mandatory. Instead of furnishing an option to submit one of six OVDs, submission of Aadhaar number alone is mandated. Where an Aadhaar number has not been assigned, proof of an application for enrolment is required to be submitted. Under Rule 9(15), the reporting entity at the time of receipt of an Aadhaar number is under an obligation to carry out authentication using either the e-KYC authentication facility or the yes/no authentication provided by UIDAI. If a client who is eligible to be enrolled for Aadhaar and to obtain a PAN card does not submit its details while commencing an account based relationship, there is a period of six months reserved for submission. Those who already have accounts are required to submit their Aadhaar numbers by a stipulated date. Failure to do so, renders the account subject to the consequence that it shall cease to be operational until compliance is effected.

Following the amendments to the rules, the Reserve Bank has updated its Master Circular on 20 April 2018 to bring it into conformity with the amended rules.

744. In deciding whether the amendment brought about in 2017 to the Rules is valid, it is necessary to bear in mind what has already been set out earlier on the aspect of proportionality. Does the requirement of the submission or linking of an Aadhaar number to every account-based relationship satisfy the test of proportionality?

The state has a legitimate aim in preventing money-laundering. In fact, it is with a view to curb and deal with money-laundering that the original version of the Master Circular as well as its

updated version impose conditions for initial and on-going due diligence. The Reserve Bank has introduced several reporting requirements including those required to comply with FATCA norms. The existence of a legitimate state aim satisfies only one element of proportionality. In its submissions, the Union government has dealt only with legitimate aim, leaving the other elements of proportionality unanswered. Requiring every client in an account based relationship to link the Aadhaar number with a bank account and to impose an authentication requirement, is excessive to the aim and object of the state. There can be no presumption that all existing account holders as well as every individual who seeks to open an account in future is a likely money-launderer. The type of client, the nature of the business relationship, the nature and value of the transactions and the terrorism and laundering risks involved may furnish a basis for distinguishing between cases and clients. The Rules also fail to make a distinction between opening an account and operating an account. If an account has been opened in the past, it would be on the basis of an established identity. The consequences of the non-submission of an Aadhaar number are draconian. Non-submission within the stipulated period will result in a consequence of the account ceasing to be operational. A perfectly genuine customer who is involved in no wrongdoing would be deprived of the use of the moneys and investments reflected in the account, in violation of Article 300A of the Constitution purely on an assumption that he or she has indulged in money-laundering. The classification is over-inclusive: a uniform requirement of such a nature cannot be imposed on every account based relationship irrespective of the risks involved to the financial system. The account of a pensioner or of a salaried wage earner cannot be termed with the same brush as a high net-worth individual with cross-border inflows and outflows. Treating every account holder with a highly intrusive norm suffers from manifest arbitrariness. Moreover, there is no specific provision in the Act warranting a consequence of an account holder being deprived of the moneys standing in the account, even if for a temporary period. Section 12(1)(c) empowers a reporting entity to verify the entity or its client in such a manner and "subject to such conditions" as may be prescribed. This does not envisage a consequence of an account ceasing to be operational. Blocking an account is a deprivation of property Under Article 300A. The Union Government has been unable to discharge the burden of establishing that this was the least intrusive means of achieving its aim to prevent money-laundering or that its object would have been defeated if it were not to impose the requirement of a compulsory linking of Aadhaar numbers with all account based relationships with the reporting entity. Money-laundering is indeed a serious matter and the Union Government is entitled to take necessary steps including by classifying transactions and sources which give rise to reasonable grounds for suspecting a violation of law. But, to impose a uniform requirement of linking Aadhaar numbers with all account based relationships is clearly disproportionate and excessive. It fails to meet the test of proportionality and suffers from manifest arbitrariness. While we have come to the above conclusion, we clarify that this would not preclude the Union Government in the exercise of its Rule making power and the Reserve Bank of India as the regulator to re-design the requirements in a manner that would ensure due fulfillment of the object of preventing money-laundering, subject to compliance with the principles of proportionality as outlined in this judgment.

J. Savings in Section 59

745. Section 59 of the Aadhaar Act provides:

Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing notification number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing notification number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act.

746. The Petitioners have submitted that all acts done pursuant to the Notifications dated 28 January 2009 and 12 September 2015, under which the Aadhaar programme was created and implemented, violate fundamental rights and were not supported by the authority of law. It has been submitted that the collection, storage and use of personal data by the State and private entities, which was done in a legislative vacuum as the State failed to enact the Aadhaar Act for six years, is now being sought to be validated by Section 59. It has been contended that since the acts done prior to the enactment of the Aadhaar Act are in breach of fundamental rights, Section 59 is invalid. Moreover, Section 59 does not operate to validate the collection of biometric data prior to the enforcement of the Aadhaar Act.

It has been submitted that a validating law must remove the cause of invalidity of previous acts: it would not be effective if it simply deems a legal consequence without amending the law from which the consequence could follow. In the present case, it has been contended, Section 59 does not create a legal fiction where the Aadhaar Act is deemed to have been in existence since 2009 and that it only declares a legal consequence of the acts done by the Union since 2009.

It has also been submitted that Section 59 is invalid and unconstitutional inasmuch as for Aadhaar enrolments done before 2016, there was neither informed consent nor were any procedural guarantees and safeguards provided under a legal framework. Section 59, it is contended, cannot cure the absence of consent and other procedural safeguards, provided under the Aadhaar Act, to the enrolments done prior to the enactment of the Act.

747. The Respondents have submitted that Section 59 protects the actions taken by the Central government. It does not contemplate the maintenance of any data base, containing identity information, by the State governments. The State governments, it is urged, have destroyed the biometric data collected during Aadhaar enrolments before the Act came into force, from their server. It has been contended that Section 59 is retrospective in nature as it states that it shall operate from an earlier date.

The Respondents have relied upon the judgments of this Court in **West Ramnad Electric Distribution Co. Ltd.** v. **State of Madras** MANU/SC/0060/1962 : (1963) 2 SCR 747 **("West Ramnad"), State of Mysore v. D. Achiah Chetty, Etc** MANU/SC/0153/1968 : (1969) 1 SCC 248 **("Chetty"), and Hari Singh v. Military Estate Officer** MANU/SC/0614/1972 : (1972) 2 SCC 239 **("Hari Singh")** to contend that the legislature can, by retrospective operation, cure the invalidity of actions taken under a law which is void for violating fundamental rights.

It has also been contended that before the advent of the Aadhaar Act, no individual has been enrolled under compulsion, and since all enrolments were voluntary, they cannot be considered to be in breach of Article 21 or any other fundamental right. It is further submitted that non-

adjudication of the issue of whether collection of identity information violates the right to privacy, does not prevent the Parliament from enacting a validating clause. Reliance has also been placed on **State of Karnataka** v. **State of Tamil Nadu** MANU/SC/1571/2016 : (2017) 3 SCC 362 to submit that Section 59 creates a deemed fiction as a result of which one has to imagine that all actions taken under the notifications were taken under the Act.

748. Section 7 provides that the Central Government or the State Governments may require proof of an Aadhaar number as a necessary condition for availing a subsidy, benefit or service for which the expenditure is incurred from the Consolidated Fund of India. Section 3 provides that the Aadhaar number shall consist of demographic and biometric information of an individual. "Biometric information", Under Section 2(g), means a photograph, finger print, Iris scan, or such other biological attributes of an individual as may be specified by Regulations. Section 4(3) provides that an Aadhaar number may be used as a proof of identity "for any purpose". Section 57 authorizes a body corporate or person to use the Aadhaar number for establishing the identity of an individual "for any purpose". The proviso to Section 57 provides that the use of an Aadhaar number under the Section shall be subject to the procedure and obligations Under Section 8 and Chapter VI of the Act. Section 8 sets out the procedure for authentication. It states that for authentication, a requesting entity shall obtain the consent of an individual before collecting identity information and shall ensure that the identity information is only used for submission to the Central Identities Data Repository for authentication. It does not envisage collection of identity information for any other purpose. Chapter VI of the Act, which deals with protection of information, provides for security and confidentiality of identity information collected under the Act, imposes restrictions on sharing that information and classifies biometrics as sensitive personal information.

749. The scheme of the Aadhaar Act creates a system of identification through authentication of biometric information and authorises the Central and State governments to assign the task of collecting individual biometric information for the purpose of generation of Aadhaar numbers to private entities. The Act authorises the use of Aadhaar numbers by the Central government, state governments and the private entities for establishing the identity of a resident for any purpose. The Act also contains certain safeguards regarding storage and use of biometric information. The actions taken before the enactment of the Aadhaar Act have to be tested upon the touchstone of the legal framework provided under the Act.

750. Section 59 is a validating provision. It seeks to validate all the actions of the Central Government prior to the Aadhaar Act, which were done under the notifications of 28 January 2009 and 12 September 2015. Section 59 does not validate actions of the state governments or of private entities. Acts undertaken by the State governments and by private entities are not saved by Section 59.

751. The Planning Commission's notification dated 28 January 2009 created UIDAI, while giving it the responsibility of laying down a plan and policies to implement a unique identity (UID) scheme. UIDAI was only authorized to own and operate the UID database, with a further responsibility for the updation and maintenance of the database on an ongoing basis. Significantly, the 2009 notification did not contain any reference to the use of biometrics for the purpose of the generation of Aadhaar numbers. The notification gave no authority to collect biometrics.

Biometrics, finger prints or iris scans were not within its purview. There was no mention of the safeguards and measures relating to the persons or entities who would collect biometric data, how the data would be collected and how it would be used. The website of the Press Information Bureau of the Government of India states that, by the time Aadhaar Act was notified by the Central government, UIDAI had generated about 100 crore Aadhaar numbers.[441] The collection of biometrics from individuals prior to the enactment of the Aadhaar Act does not fall within the scope of the 2009 notification. Having failed to specify finger prints and iris scans in the notification, the validating provision does not extend to the collection of biometric data before the Act. The 2009 notification did not provide authority to any government department or to any entity to collect biometrics. Since the collection of biometrics was not authorised by the 2009 notification, Section 59 of the Aadhaar Act does not validate these actions.

752. The collection of the biometrics of individuals impacts their privacy and dignity. Informed consent is crucial to the validity of a state mandated measure to collect biometric data. Encroachment on a fundamental right requires the enacting of a valid law by the legislature.[442] The law will be valid only if it meets the requirements of permissible restrictions relating to each of the fundamental rights on which there is an encroachment. Privacy animates Part III of the Constitution.[443] The invasion of any right flowing from privacy places a heavy onus upon the State to justify its actions. Nine judges of this Court in **Puttaswamy** categorically held that there must be a valid law in existence to encroach upon the right to privacy. An executive notification does not satisfy the requirement of a valid law contemplated in **Puttaswamy**. A valid law, in this case, would mean a law enacted by Parliament, which is just, fair and reasonable. Any encroachment upon the fundamental right to privacy cannot be sustained by an executive notification.

There is also no merit in the submission of the Respondents that prior to the enactment of the Aadhaar Act, no individual has been enrolled under compulsion, and since all enrolments were voluntary, these cannot be considered to be in breach of Article 21 or any other fundamental right. The format of the first two enrolment forms used by UIDAI, under which around 90 crore enrolments were done, had no mention of informed consent or the use of biometrics. Hence, this submission is rejected.

Apart from the existence of a valid law which authorises an invasion of privacy, **Puttaswamy** requires that the law must have adequate safeguards for the collection and storage of personal data. Data protection, which is intrinsic to privacy, seeks to protect the autonomy of the individual. The judgment noted the centrality of consent in a data protection regime. The Aadhaar Act provides certain safeguards in Section 3(2) and Section 8(3) for the purposes of ensuring informed consent, and in terms of Section 29 read with Chapter VII in the form of penalties. The safeguards provided under the Act were not in existence before the enactment of the Act. The collection of biometrics after the 2009 notification and prior to the Aadhaar Act suffers from the absence of adequate safeguards. While a legislature has the power to legislate retrospectively, it cannot retrospectively create a deeming fiction about the existence of safeguards in the past to justify an encroachment on a fundamental right. At the time when the enrolments took place prior to the enactment of the Aadhaar Act in September 2016, there was an absence of adequate safeguards. Section 59 cannot by a deeming fiction, as it were, extend the safeguards provided under the Act to the enrolments done earlier. This will be impermissible simply because the informed consent of those individuals, whose Aadhaar numbers were generated in that period cannot be retrospectively legislated by an

assumption of law. Moreover, it is a principle of criminal law that it cannot be applied retrospectively to acts which were not offences at the time when they took place. Article 20(1) of the Constitution provides that "No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence". The application of the criminal provisions of the Act, provided under Chapter VII of the Act which deals with "Offences and Penalties", cannot be extended to the period prior to the enactment of the Aadhaar Act.

753. The Respondents submit that the collection of biometrics prior to the Aadhaar Act was adequately safeguarded by the provisions of the Information Technology Act 2000; specifically those provisions, which were inserted or amended by the Information Technology (Amendment) Act, 2008.

Section 43A of the Act provides for compensation for failure to protect data:

Where a body corporate, possessing, dealing or handling any **sensitive personal data** or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

Explanation: For the purposes of this section,-

(i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;

(ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.

(iii) **"sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.**

754. Rule 3 of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 made by the Central government Under Section 43A, defines "sensitive personal data or information":

Sensitive personal data or information of a person means such personal information which consists of information relating to:

(i) password;

(ii) financial information such as Bank account or credit card or debit card or other payment instrument details;

(iii) physical, physiological and mental health condition;

(iv) sexual orientation;

(v) medical records and history;

(vi) Biometric information;

(vii) any detail relating to the above clauses as provided to body corporate for providing service; and

(viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise.

Provided that, any information that is freely available or accessible in public domain or furnished under the Right to Information Act, 2005 or any other law for the time being in force shall not be regarded as sensitive personal data or information for the purposes of these rules.

Section 66C provides a punishment for identity theft:

66C. Punishment for identity theft.-

Whoever, fraudulently[444] or dishonestly[445] make use of the electronic signature, password or any other **unique identification feature** of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.

Section 66E provides for punishment for the violation of the privacy of an individual:

Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

The explanation to the Section provides that "transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons. "Capture", with respect to an image, has been defined to mean videotaping, photographing, filming or recording by any means. "Private area" means the "naked or undergarment clad genitals, pubic area, buttocks or female breast." "Publishes" has been defined as reproduction in the printed or electronic form and making it available for public.

Section 72A provides for punishment for disclosure of information in breach of a lawful contract:

Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material **to any other person** shall be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both.

Section 43A applies only to bodies corporate and has no application to government or to its departments. Explanation (i) defines body corporate to mean any company and to include a firm, sole proprietorship or other association of individuals engaged in professional or commercial activities. Personal information leaked or lost by government agencies will not be covered Under Section 43A. The scope of Section 66E is limited. It only deals with the privacy of the "private area" of any person. It does not deal with informational privacy. The scope of Section 72A is also limited. It only penalises acts of disclosing personal information about a person obtained while providing services under a lawful contract. Section 66C deals with identity theft and punishes the dishonest or fraudulent use of the unique identification feature of a person. The Information Technology Act also does not penalise unauthorised access to the Central Identities Data Repository. Many of the safeguards which were introduced by the Aadhaar Act were not comprehended in the provisions of the Information Technology Act. Indeed, it was the absence of those safeguards in the Information Technology Act which required their introduction in the Aadhaar Act. Hence, the Attorney General is not correct in submitting that India operated under a regime of comprehensive safeguards governing biometric data during the period when the Aadhaar project was governed by an executive notification, in the absence of a legislative framework. The absence of a legislative framework rendered the collection of biometric data vulnerable to serious violations of privacy. There are two distinct facets here. First, the absence of a legislative framework for the Aadhaar project between 2009 and 2016 left the biometric data of millions of Indian citizens bereft of the kind of protection which a law, as envisaged in **Puttaswamy**, must provide to comprehensively protect and enforce the right to privacy. Second, the notification of 2009 does not authorise the collection of biometric data. Consequently, the validation of actions taken under the 2009 notification by Section 59 does not save the collection of biometric data prior to the enforcement of the Act. Privacy is of paramount importance. No invasion of privacy can be allowed without proper, adequate and stringent safeguards providing not only penalties for misuse or loss of one's personal information, but also for protection of that person.

755. The Respondents have relied upon several judgments where this Court has upheld validating statutes, which, they contend, are similar to Section 59. The first decision which needs to be discussed is the judgment of the Constitution Bench in **West Ramnad**, which dealt with a validating statute of the Madras Legislature. Act 43 of 1949 of the Madras Legislature which sought to acquire electricity undertakings in the state was struck down for want of legislative competence. In the meantime, the Constitution came into force, and under the Seventh Schedule, the State acquired legislative competence. A fresh law was enacted in 1954. Section 24 sought to validate actions done and taken under the 1949 Act. Section 24 provided thus:

Orders made, decisions or directions given, notifications issued, proceedings taken and acts or things done, in relation to any undertaking taken over, **if they would have been validly made,**

given, issued, taken or done, had the Madras Electricity Supply Undertakings (Acquisition) Act 1949 (Madras Act 43 of 1949), and the Rules made thereunder been in force on the date on which the said orders, decisions or directions, notifications, proceeding, acts or things were made, given, issued, taken or done are **hereby declared to have been validly made, given, issued, taken or done, as the case may be, except to the extent to which the said orders, decisions, directions, notifications, proceedings, acts or things are repugnant to the provisions of this Act.**

Section 24 was held to be a provision, which saved and validated actions validly taken under the provisions of the earlier Act, which was invalid from the inception. Justice Gajendragadkar, speaking for the Court, interpreted Section 24 thus:

12. The first part of the Section deals, inter alia, with **notifications which have been validly issued under the relevant provisions of the earlier Act** and it means that if the earlier Act had been valid at the relevant time, it ought to appear that the notifications in question could have been and had in fact been made properly under the said Act. **In other words, before any notification can claim the benefit of Section 24, it must be shown that it was issued properly under the relevant provisions of the earlier Act, assuming that the said provisions were themselves valid and in force at that time.** The second part of the Section provides that the notifications covered by the first part are declared by this Act to have been validly issued; the expression "hereby declared" clearly means "declared by this Act" and that shows that the notifications covered by the first part would be treated as issued under the relevant provisions of the Act and would be treated as validly issued under the said provisions. The third part of the Section provides that the statutory declaration about the validity of the issue of the notification would be subject to this exception that the said notification should not be inconsistent with or repugnant to the provisions of the Act. **In other words, the effect of this Section is that if a notification had been issued properly under the provisions of the earlier Act and its validity could not have been impeached if the said provisions were themselves valid, it would be deemed to have been validly issued under the provisions of the Act, provided, of course, it is not inconsistent with the other provisions of the Act.** The Section is not very happily worded, but on its fair and reasonable construction, there can be no doubt about its meaning or effect.

756. The second decision is a four judge Bench judgment in **Chetty**, which dealt with the competence of a legislature to remedy a discriminatory procedure retrospectively. There were two Acts in Mysore for acquisition of private land for public purposes-the Mysore Land Acquisition Act, 1894 and the City of Bangalore Improvement Act, 1945. The Respondent challenged a notification which was issued under the 1894 Act for the acquisition of his land in Bangalore, on the ground that recourse to the provisions of the Land Acquisition Act was discriminatory because in other cases the provisions of the Improvement Act were applied. The High Court accepted the contention, against which there was an appeal to this Court. During the pendency of the appeal, the Bangalore Acquisition of Lands (Validation) Act, 1962 was passed. The 1962 Act contained two provisions. Section 2 provided:

2. *Validation of certain acquisition of lands and proceedings and orders connected therewith.-*

(1) Notwithstanding anything contained in the City of Bangalore Improvement Act, 1945 (Mysore Act 5 of 1945), or in any other law, or in any judgment, decree or order of any court:

(a) every acquisition of land for the purpose of improvement, expansion or development of the City of Bangalore or any area to which the City of Bangalore Improvement Act, 1945, extends, **made by the State Government acting or purporting to act under the Mysore Land Acquisition Act, 1894 (Mysore Act 7 of 1894),** at any time before the commencement of this Act, and every proceeding held, notification issued and order made in connection with the acquisition of land for the said purpose **shall be deemed for all purposes to have been validly made, held to issue, as the case may be, and any acquisition proceeding commenced under the Mysore Land Acquisition Act, 1894,** for the said purpose before the commencement of this Act but not concluded before such commencement, may be continued under the Land Acquisition Act, 1894 (Central Act 1 of 1894), as extended to the State of Mysore by the Land Acquisition (Mysore Extension and Amendment) Act, 1961, and accordingly no acquisition so made, no proceeding held, no notification issued and no order made by the State Government or by any authority under the Mysore Land Acquisition Act, 1894, or the Land Acquisition Act, 1894, in connection with any such acquisition shall be called in question on the ground that the State Government was not competent to make acquisition of land for the said purpose under the said Act or on any other ground whatsoever;

(b) any land to the acquisition of which the provisions of Clause (a) are applicable shall, after it has vested in the State Government, be deemed to have been transferred, or stand transferred, as the case may be, to the Board of Trustees for the improvement of the City of Bangalore.

The Act of 1962 validated all acquisitions made, proceedings held, notifications issued or orders made under the Mysore Land Acquisition Act before the validating law came into force. The Validation Act was challenged on the ground that it was discriminatory to provide two Acts which prescribed two different procedures under the acquisition laws in the same field. This Court found that the legislature retrospectively made a single law for the acquisition of properties and upheld the validating Act. It was held:

15. If two procedures exist and one is followed and the other discarded, there may in a given case be found discrimination. But the Legislature has still the competence to put out of action retrospectively one of the procedures leaving one procedure only available, namely, the one followed and thus to make disappear the discrimination. In this way a Validating Act can get over discrimination. Where, however, the legislative competence is not available, the discrimination must remain for ever, since that discrimination can only be removed by a legislature having power to create a single procedure out of two and not by a legislature which has not that power.

757. In **West Ramnad**, the validation depended upon the condition that a notification or act ought to have been validly issued or done under the earlier statute, presuming that the earlier Act was itself valid at that time. In the present case, there was no earlier law governing the actions of the government for the collection of biometric data. The Aadhaar Act was notified in 2016. The Planning Commission's notification of 2009 and the Ministry of Information and Technology's notification of 2015 were not issued under any statute. Therefore, the validating law in **West**

Ramnad was clearly of a distinct genre. West Ramnad will be of no assistance to the Union of India.

758. The decision in **Chetty** in fact brings out the essential attributes of a validating law. The existence of two legislations governing the field of land acquisition had been found to be discriminatory and hence violative of Article 14 by the High Court (on the basis of the position in law as it then stood). During the pendency of the appeal before this Court, the legislature enacted a validating law which removed the cause for invalidity. The reason the state law had been invalidated by the High Court was the existence of two laws governing the same field. This defect was removed. To use the words of this Court, the legislature "put out of action retrospectively one of the procedures" as a result of which only one procedure was left in the field. The decision in **Chetty** thus brings out the true nature of a validating law. A validating law essentially removes the deficiency which is found to exist in the earlier enactment. By curing the defect, it validates actions taken under a previous enactment.

759. The third judgment of seven judges is in **Hari Singh**. The constitutionality of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 was challenged on the ground that Section 5(1) contravened Article 14. Section 5(1) conferred power on the Estate Officer to make an order of eviction against persons who were in unauthorised occupation of public premises. During the pendency of the appeal before this Court, the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 was enacted, which validated all actions taken under the Act of 1958. The constitutional validity of the 1971 Act was also challenged. Section 20 of the later Act provided:

Notwithstanding any judgment, decree or order of any court, **anything done or any action taken** (including Rules or orders made, notices issued, evictions ordered or effected, damages assessed, rents or damages or costs recovered and proceedings initiated) **or purported to have been done or taken under the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 shall be deemed to be as valid and effective as if such thing or action was done or taken under the corresponding provisions of this Act** which, Under Sub-section (3) of Section 1 **shall be deemed to have come into force on the 16th day of September, 1958**....

The Court held that the legislature has the power to validate actions under an earlier law by removing its infirmities. In that case, validation was achieved by enacting the 1971 Act with retrospective effect from 1958 and legislating that actions taken under the earlier law will be deemed to be as valid and effective as if they were taken under the 1971 Act. The Court held:

24. The 1958 Act has not been declared by this Court to be unconstitutional... The arguments on behalf of the Appellants therefore proceeded on the footing that the 1958 Act will be presumed to be unconstitutional. It was therefore said that the 1971 Act could not validate actions done under the 1958 Act. The answer is for the reasons indicated above that the Legislature was competent to enact this legislation in 1958 and the Legislature by the 1971 Act has given the legislation full retrospective operation. The Legislature has power to validate actions under an earlier Act by removing the infirmities of the earlier Act. The 1971 Act has achieved that object of validation.

The Court approved the Constitution Bench decision in **West Ramnad:**

16. The ruling of this Court in West Ramnad Electric Distribution Co. Ltd. case establishes competence of the legislature to make laws retrospective in operation for the purpose of validation of action done under an earlier Act which has been declared by a decision of the court to be invalid. It is to be appreciated that the validation is by virtue of the provisions of the subsequent piece of legislation.

In **Hari Singh**, the validating Act retrospectively authorised the actions undertaken under the previous Act, which had been invalidated by a court decision. The validating law of 1971 was enacted with retrospective effect from 1958.

760. Reliance was placed by the Respondents on the judgments of this Court in **Jaora Sugar Mills (P) Ltd.** v. **State of Madhya Pradesh** MANU/SC/0038/1965 : (1966) 1 SCR 523 (Jaora Sugar Mills), **SKG Sugar Ltd.** v. **State of Bihar** MANU/SC/0063/1974 : (1974) 4 SCC 827 **("SKG Sugar") and Krishna Chandra Gangopadhyaya** v. Union of India MANU/SC/0143/1975 : (1975) 2 SCC 302 ("Krishna Chandra"), to contend that in the case of fiscal legislation, where an enactment was struck down for violating Article 265 or the fundamental rights, of a citizen, validating Acts were enacted after removing the flaw and that in cases where the state Legislature was held to be incompetent to enact a taxing measure, a validating law was enacted by Parliament by making a substantive provision.

761. In **Jaora Sugar Mills**, a state law imposing cess was struck down for want of legislative competence. Parliament enacted the Sugarcane Cess (Validation) Act, 1961 to validate the imposition of cess under the invalidated state law. Section 3(1) of the 1961 Act provided:

12. ...Notwithstanding any judgment, decree or order of any Court, all cesses imposed, assessed or collected or purporting to have been imposed, assessed or collected **under any State Act** before the commencement of this act shall be deemed to have been validly imposed, assessed or collected in accordance with law, **as if the provisions of the State Acts** and of all notifications, orders and Rules issued or made thereunder, in so far as such provisions relate to the imposition, assessment and collection of such cess had been included in and **formed part of this Section and this Section had been in force at all material times when such cess was imposed, assessed or collected;** ....

The Section was upheld. Speaking for the Constitution Bench, Chief Justice Gajendragadkar held:

14.... What Parliament has done by enacting the said Section is not to validate the invalid State Statutes, but **to make a law concerning the cess covered by the said Statutes and to provide that the said law shall come into operation retrospectively.** There is a radical difference between the two positions. Where the legislature wants to validate an earlier Act which has been declared to be invalid for one reason or another, it proceeds to remove the infirmity from the said Act and validates its provisions which are free from any infirmity.

The state law was held to be invalid for want of legislative competence. Parliament, which was competent to enact a law on the subject, did so with retrospective effect and validated actions which were taken under the invalid state law.

762. In **SKG Sugar**, a state law-Bihar Sugar Factories Control Act, 1937 -was declared unconstitutional. In 1969, during President's Rule in Bihar, Parliament enacted the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1969. Section 66(1) of the Act provided:

12. ...Notwithstanding any judgment, decree or order of any court, **all cesses and taxes imposed,** assessed or collected or purporting to have been imposed, assessed or collected **under any State law,** before the commencement of this Act, shall be deemed to have been validly imposed, assessed or collected in accordance with law **as if this Act had been in force at all material times** when such cess or tax was imposed, assessed or collected and accordingly....[446]

The Constitution Bench held:

32... By virtue of the legal fiction introduced by the validating provision in Section 66(1), the impugned notification will be deemed to have been issued not necessarily under the Ordinance No. 3 of 1968 but under the President's Act, itself, deriving its legal force and validity directly from the latter.[447]

763. In **Krishna Chandra**, provisions of the Bihar Land Reforms Act, 1950 were struck down for want of legislative competence. Parliament enacted the Mines and Minerals (Regulation and Development) Act, 1957 to validate those provisions with retrospective effect. Section 2 provided that:

1...(2). **Validation of certain Bihar State laws and action taken and things done connected therewith.-**

(1) **The laws specified in the Schedule shall be and shall be deemed always to have been, as valid as if the provisions contained therein had been enacted by Parliament.**

(2) Notwithstanding any judgment, decree or order of any court, **all actions taken,** things done, Rules made, notifications issued or purported to have been taken, done, made or issued and rents or royalties realised **under any such laws shall be deemed to have been validly taken, done,** made, issued or realised, as the case may be, as if this **section had been in force at all material times when such action was taken,** things were done, Rules were, made, notifications were issued, or rents or royalties were realised, and no suit or other proceedings shall be maintained or continued in any court for the refund of rents or royalties realised under any such laws.

(3) For the removal of doubts, it is hereby declared that nothing in Sub-section (2) shall be construed as preventing any person from claiming refund of any rents or royalties paid by him in excess of the amount due from him under any such laws.[448]

The central issue in the case was whether a statute and a Rule earlier declared to be unconstitutional or invalid, can be retroactively enacted through fresh validating legislation by the competent Legislature. The Court held that it could be.

764. Section 59 of the Aadhaar Act is different from the validating provisions in **Jaora Sugar Mills, SKG Sugar** and **Krishna Chandra**. In those cases, state laws were invalid for want of

legislative competence. Parliament, which undoubtedly possessed legislative competence, could enact a fresh law with retrospective effect and protect actions taken under the state law. The infirmity being that the earlier laws were void for absence of competence in the legislature, the fresh laws cured the defect of the absence of legislative competence.

765. Parliament and the State Legislatures have plenary power to legislate on subjects which fall within their legislative competence. The power is plenary because the legislature can legislate with prospective as well as with retrospective effect. Where a law suffers from a defect or has been invalidated, it is open to the legislature to remove the defect. While doing that, the legislature can validate administrative acts or decisions made under the invalid law in the past. The true test of a validation is that it must remove the defects in the earlier law. It is not enough for the validating law to state that the grounds of invalidity of the earlier law are deemed to have been removed. The validating law must remove the deficiencies. There were several deficiencies in the collection of biometric data during the period between 2009 and 2016, before the Aadhaar Act came into force. The first was the absence of enabling legislation. As a result, the collection of sensitive personal information took place without the authority of law. Second, the notification of 2009 did not authorize the collection of biometric data. Third, the collection of biometric data was without an enabling framework of the nature which the Aadhaar Act put into place with effect from 2016. The Aadhaar Act introduced a regime for obtaining informed consent, securing the confidentiality of information collected from citizens, penalties and offences for breach and regulated the uses to which the data which was collected could be put. In the absence of safeguards, the collection of biometric data prior of the enactment of Aadhaar Act 2016 is *ultra vires*.

766. Section 59 does not remove the cause for invalidity. First, Section 59 protects actions taken under the notification of 2009. The notification does not authorize the collection of biometric data. Hence, Section 59 would not provide legal authority for the collection of biometrics between 2009 and 2016. Second, it was through the Aadhaar Act, that safeguards were sought to be introduced for ensuring informed consent, confidentiality of information collected, restrictions on the use of the data and through a regime of penalties and offences for violation. Section 59 does not cure the absence of these safeguards between 2009 and 2016. Section 59 fails to meet the test of a validating law for the simple reason that the absence of safeguards and of a regulatory framework is not cured merely by validating what was done under the notifications of 2009 and 2016. There can be no dispute about the principle that the legislature is entitled to cure the violation of a fundamental right. But in order to do so, it is necessary to cure the basis or the foundation on which there was a violation of the fundamental right. The deficiency must be demonstrated to be cured by the validating law. Section 59 evidently fails to do so. It fails to remedy the deficiencies in regard to the conditions under which the collection of biometric data took place before the enforcement of the Aadhaar Act in 2016.

The Respondents submitted that Section 59 creates a deemed fiction and cited a few judgments in support of this contention. In **Bishambhar Nath Kohli** v. **State of Uttar Pradesh** MANU/SC/0019/1965 : (1966) 2 SCR 158, an Ordinance repealed another Ordinance. Section 58(3) of the repealing Ordinance stated:

6. ...The repeal by this Act of the Administration of Evacuee Property Ordinance, 1949 or the Hyderabad Administration of Evacuee Property Regulation or of any corresponding law shall not

affect the previous operation of that Ordinance, Regulation or corresponding law, and subject thereto, anything done or **any action taken in the exercise of any power conferred by or under that Ordinance, Regulation or corresponding law, shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action was taken.**

767. A Constitution Bench of this Court held that by virtue of Section 58, all things done and actions taken under the repealed ordinance are deemed to be done or taken in exercise of the powers conferred by the repealing Act, as if that Act were in force on the day on which that thing was done or action was taken. The things done or actions taken under the repealed ordinance are to be deemed by fiction to have been done or taken under the repealing Act. The actions were validated because the Act, in this case, was deemed to be "in force on the day on which such thing was done or action was taken". Section 59 of the Aadhaar Act does not create this fiction. The Aadhaar Act does not come in force on the date on which the actions, which this Section seeks to validate, were taken.

768. A three judge Bench headed by one of us, Hon'ble Mr. Justice Dipak Misra (as the learned Chief Justice then was) in **State of Karnataka** v. **State of Tamil Nadu** MANU/SC/1571/2016 : (2017) 3 SCC 362, was dealing with a batch of civil appeals filed against a final order of the Cauvery Water Disputes Tribunal constituted under the Inter-State River Water Disputes Act, 1956. Section 6(2) of the 1956 Act provides:

72...6(2).The decision of the Tribunal, after its publication in the Official Gazette by the Central Government Under Sub-section (1), shall have the same force as an order or decree of the Supreme Court.[449]

Relying on Section 6(2), it was contended that the jurisdiction of this Court is ousted as it cannot sit in appeal on its own decree. The Court did not accept the submission and held:

74. The language employed in Section 6(2) suggests that the decision of the tribunal shall have the same force as the order or decree of this Court. There is a distinction between having the same force as an order or decree of this Court and passing of a decree by this Court after due adjudication. The Parliament has intentionally used the words from which it can be construed that a legal fiction is meant to serve the purpose for which the fiction has been created and **not intended to travel beyond it.** The purpose is to have the binding effect of the tribunal's award and the effectiveness of enforceability. Thus, it has to be narrowly construed regard being had to the purpose it is meant to serve...[450]

81. ...it is clear as crystal that the Parliament did not intend to create any kind of embargo on the jurisdiction of this Court. The said provision was inserted to give the binding effect to the award passed by the tribunal. **The fiction has been created for that limited purpose.**[451]

The judgment makes it clear that a deeming fiction cannot travel beyond what was originally intended. As stated earlier, the action of collecting and authentication of biometrics or the requirement of informed consent finds no mention in the 2009 notification. Therefore, Section 59

cannot be held to create a deeming fiction that all the actions taken under the notifications issued were done under the Act and not under the aforesaid notifications.

769. This Court must also deal with the Respondents' submission that Parliament is not debarred from enacting a validation law even though the Court did not have the opportunity to Rule on the validity of the notifications which are purported by Section 59 to have been validated. The Respondents have placed reliance on a two judge Bench decision in **Amarendra Kumar Mohapatra** v. **State of Orissa**. MANU/SC/0120/2014 : (2014) 4 SCC 583 This case involved a challenge to the constitutional validity of the Orissa Service of Engineers (Validation of Appointment) Act, 2002 enacted to regularise ad hoc appointments of employees. The issue before the Court was whether the Orissa Act was in effect a validation statute to validate any illegality or defect in a pre-existing Act or Rule in existence. The Court held that since the Orissa Act merely regularised the appointment of graduate Stipendiary Engineers working as ad hoc Assistant Engineers as Assistant Engineers, it could not be described as a validating law. It was held the legislation did not validate any such nonexistent act, but simply appointed the ad hoc Assistant Engineers as substantive employees of the State by resort to a fiction. This Court held:

31...a prior judicial pronouncement declaring an act, proceedings or Rule to be invalid is not a condition precedent for the enactment of a Validation Act. Such a piece of legislation may be enacted to remove even a perceived invalidity, which the Court has had no opportunity to adjudge. Absence of a judicial pronouncement is not, therefore, of much significance for determining whether or not the legislation is a validating law.
452

The Court further held that:

25. ... when the validity of any such Validation Act is called in question, **the Court would have to carefully examine the law and determine whether (i) the vice of invalidity that rendered the act, rule, proceedings or action invalid has been cured by the validating legislation (ii) whether the legislature was competent to validate the act, action, proceedings or Rule declared invalid in the previous judgments and (iii) whether such validation is consistent with the rights guaranteed by Part III of the Constitution.** It is only when the answer to all these three questions is in the affirmative that the Validation Act can be held to be effective and the consequences flowing from the adverse pronouncement of the Court held to have been neutralised.

770. The two judge Bench relied upon the Constitution Bench decision of this Court in **Shri Prithvi Cotton Mills Ltd.** v. **Broach Borough Municipality** MANU/SC/0057/1969 : (1969) 2 SCC 283 to formulate the following pre-requisites of a piece of legislation that purports to validate any act, rule, action or proceedings:

(a) The legislature enacting the Validation Act should be competent to enact the law and;

(b) the cause for ineffectiveness or invalidity of the Act or the proceedings needs to be removed.

These judgments suggest that while there can be no disagreement with the proposition that a legislature has the power, within its competence, to make a law to validate a defective law, the validity of such a law would depend upon whether it removes the cause of ineffectiveness or invalidity of the previous Act or proceedings. Parliament has the power to enact a law of validation to cure an illegality or defect in the pre-existing law, with or without a judicial determination. But that law should cure the cause of infirmity or invalidity. Section 59 fails to cure the cause of invalidity prior to the enactment of the Aadhaar Act.

K Rule of law and violation of interim orders

771. The Rule of law is the cornerstone of modern democratic societies and protects the foundational values of a democracy. When the Rule of law is interpreted as a principle of constitutionalism, it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary State power. It also assumes the generality of law: the individual's protection from arbitrary power consists in the fact that her personal dealings with the State are regulated by general rules, binding on private citizens and public officials alike.[453]

It envisages a fundamental separation of powers among different organs of the State. Separation of power supports the accountability aspect of the Rule of law. Separation of the judicial and executive powers is an essential feature of the Rule of law. By entrusting the power of judicial review to courts, the doctrine prevents government officials from having the last word on whether they have acted illegally. The separation of judicial power provides an effective check on the executive branch.[454]

772. The concepts of the Rule of law and separation of powers have been integral to Indian constitutional discourse. While both these concepts have not been specified in as many words in the Constitution, they have received immense attention from this Court in its judgments. Though the Indian Constitution does not follow the doctrine of separation of powers in a rigid sense, the following statement of the law by Chief Justice Mukherjea in **Ram Sahib Ram Jawaya Kapur** v. **State of Punjab** MANU/SC/0011/1955 : (1955) 2 SCR 225 is widely regarded as defining the core of its content:

12...The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another...

Separation of powers envisages a system of checks and balances, which ensures governance by law and not by the caprice of those to whom governance is entrusted for the time being. By curbing excesses of power, it has a direct link with the preservation of institutional rectitude and individual liberty. In **S.G. Jaisinghani** v. **Union of India** MANU/SC/0361/1967 : (1967) 2 SCR 703, this Court held that:

14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the Rule of law upon which our whole constitutional system is based. In a system

governed by Rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The Rule of law from this point of view means that decisions should be made by the application of known principles and Rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any Rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law...

The separation of powers between the legislature, the executive and the judiciary has been declared to be part of the basic structure of the Constitution. In **Kesavananda Bharati** v. **State of Kerala** MANU/SC/0445/1973 : (1973) 4 SCC 225, Chief Justice Sikri held that:

292...The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the legislature, the executive and the judiciary;

(5) Federal character of the Constitution.[455]

Justice HR Khanna held that the Rule of law meant "supremacy of the Constitution and the laws as opposed to arbitrariness"[456]. The same view is expressed in subsequent decisions of this Court.[457] In **Smt. Indira Nehru Gandhi** v. **Shri Raj Narain** MANU/SC/0304/1975 : 1975 Supp SCC 1, Chief Justice AN Ray held the Rule of law to be the basis of democracy.

The functional relationship between separation of powers and the Rule of law was discussed by a Constitution Bench of this Court in **State of Tamil Nadu** v. **State of Kerala** MANU/SC/0425/2014 : (2014) 12 SCC 696, as follows:

98. Indian Constitution, unlike the Constitution of United States of America and Australia, does not have express provision of separation of powers. However, the structure provided in our Constitution leaves no manner of doubt that the doctrine of separation of powers runs through the Indian Constitution. It is for this reason that this Court has recognized separation of power as a basic feature of the Constitution and an essential constituent of the Rule of law. The doctrine of separation of powers is, though, not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the Constitution. Indian Constitution has made demarcation without drawing formal lines between the three organs--legislature, executive and judiciary.

This Court has consistently held judicial review to be an essential component of the separation of powers as well as of the Rule of law. Judicial review involves determination not only of the constitutionality of law but also of the validity of administrative action. It protects the essence of the Rule of law by ensuring that every discretionary power vested in the executive is exercised in a just, reasonable and fair manner.

773. In a **reference** (1965) 1 SCR 413 Under Article 143 of the Constitution, a seven judge Bench held that irrespective of "whether or not there is distinct and rigid separation of powers under the Indian Constitution", the judicature has been entrusted the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of citizens. It was held:

41...When a statute is challenged on the ground that it has been passed by Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not... If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country...

In his celebrated dissent in **Additional District Magistrate, Jabalpur** v. **Shivakant Shukla** MANU/SC/0062/1976 : (1976) 2 SCC 521, Justice HR Khanna, while referring to the Rule of law as the "antithesis of arbitrariness", held:

527...Rule of law is now the accepted norm of all civilised societies...
[E]verywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every State the problem arises of reconciling human rights with the requirements of public interest. Such harmonising can only be attained by the existence of independent courts which can hold the balance between citizen and State and compel Governments to conform to the law.
458

774. Judicial review has been held to be one of the basic features of the Constitution. A seven judge Bench of this Court, in **L Chandra Kumar** v. **Union of India** MANU/SC/0261/1997 : (1997) 3 SCC 261, declared:

78... the power of judicial review over legislative action vested in the High Courts Under Article 226 and in the Supreme Court Under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure.
459

The complementary relationship between judicial review, the Rule of law and the separation of powers is integral to working of the Constitution. This Court in I R Coelho v. State of Tamil Nadu MANU/SC/0595/2007 : (2007) 2 SCC 1 held thus:

129... Equality, Rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no Rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.
460

Judicial review, by protecting individual rights, promotes the foundational values of the Constitution and the Rule of law. This Court took note of this aspect in **Puttaswamy**:

295. Above all, it must be recognized that judicial review is a powerful guarantee against legislative encroachments on life and personal liberty. To cede this right would dilute the importance of the protection granted to life and personal liberty by the Constitution. Hence, while judicial review in constitutional challenges to the validity of legislation is exercised with a conscious regard for the presumption of constitutionality and for the separation of powers between the legislative, executive and judicial institutions, the constitutional power which is vested in the Court must be retained as a vibrant means of protecting the lives and freedoms of individuals.
461

775. Constitutional adjudication facilitates answers to the silences of the Constitution. The task of interpretation is to foster the spirit of the Constitution as much as its text. This role has exclusively been conferred on the Supreme Court and the High Courts to ensure that its values are not diminished by the legislature or the executive. Our Court has been conscious of this role. In **Krishna Kumar Singh** v. **State of Bihar** MANU/SC/0009/2017 : (2017) 3 SCC 1, while dealing with the question whether an ordinance (promulgated by the Governor) which has a limited life can bring about consequences for the future (in terms of the creation of rights, privileges, liabilities and obligations) which will enure beyond its life, a seven judge Bench held that:

91. ...**The silences of the Constitution must be imbued with substantive content by infusing them with a meaning which enhances the Rule of law.** To attribute to the executive as an incident of the power to frame ordinances, an unrestricted ability to create binding effects for posterity would set a dangerous precedent in a parliamentary democracy. The court's interpretation of the power to frame ordinances, which originates in the executive arm of government, cannot be oblivious to the basic notion that the primary form of law making is through the legislature...
462

The Court held that the ordinance making power must be carefully structured to ensure that it remains what the framers of our Constitution intended it to be: an exceptional power to meet a constitutional necessity.

776. In a constitutional democracy, the power of government, is defined, limited, and distributed by the fundamental norms of the Constitution. A constitutional democracy holds its political regime accountable, responsible, or answerable for its decisions and actions while in public office.[463] A constitutional democracy determines the degree and manner of distribution of political authority among the major organs or parts of the government. The limits of each institution are set by the Constitution. No institution which has been created by the Constitution can have absolute power. Separation of powers, envisaged by the Constitution between different institutions acts as a check and balance among the institutions and promotes the Rule of law by ensuring that no institution can act in an arbitrary manner. Judicial review as a part of the basic structure of the Indian Constitution and as an essential component of the Rule of law and separation of powers, is intended to ensure that every institution acts within its limits. Judicial review promotes transparency, consistency and accountability in the administration of law, and notions of equity, justice and fairness[464]. Constitutionalism thus puts a legal limitation on the government. It

envisages the existence of limited government. Discretion conferred upon an institution of governance, be it the legislature or the executive, is confined within clearly defined limits of the Constitution. Not only are the organs of the State required to operate within their defined legitimate spheres; they are bound to exercise their powers within these spheres without violating the Constitution.[7] Judicial review is a sanction and agency to enforce the limitations imposed by the Constitution upon the authority of the organs of the State.

This formulation of the limited power of political authority has been recognized in several judgments of this Court. In **State of M.P.** v. **Thakur Bharat Singh** MANU/SC/0043/1967 : (1967) 2 SCR 454, a Constitution Bench held:

5. ...Our federal structure is founded on certain fundamental principles: (1) **the sovereignty of the people with limited Government authority** i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) **There is a distribution of powers between the three organs of the State--legislative, executive and judicial--each organ having some check direct or indirect on the other; and (3) the Rule of law which includes judicial review of arbitrary executive action**...

777. In a decision rendered by a Constitution Bench, in **S.P. Sampath Kumar** v. **Union of India** MANU/SC/0851/1987 : (1987) 1 SCC 124, Chief Justice P.N. Bhagwati, in his concurring opinion, held:

3. ...It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution...
The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the Rule of law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities....
[8]

778. In **I R Coelho** v. **State of Tamil Nadu** MANU/SC/0595/2007 : (2007) 2 SCC 1, a nine judge Bench held that control over government power ensures that the foundational values of a democracy are not damaged:

43...The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision-making...

The role of the judiciary is to protect fundamental rights. A modern democracy is based on the twin principles of majority Rule and the need to protect fundamental rights. According to Lord Steyn, it is job of the judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights.

The Rule of law is an implied limitation on the authority of any institution in a constitutional democracy.[9]

779. Interim orders of courts are an integral element of judicial review. Interim directions issued on the basis of the *prima facie* findings in a case are temporary arrangements till the matter is finally decided. Interim orders ensure that the cause which is being agitated does not become infructuous before the final hearing.[10] The power of judicial review is not only about the writs issued by superior courts or the striking down of governmental action. Entrustment of judicial review is accompanied by a duty to ensure that judicial orders are complied with. Unless orders are enforced, citizens will lose faith in the efficacy of judicial review and in the legal system.

It is in the background of the above constitutional position that this Court must deal with the contention that the interim orders passed by this Court, during the adjudication of the present dispute were not observed. This Court has consistently insisted, through its interim orders, on a restraint on the mandatory use of Aadhaar. It has been submitted that the interim orders have been violated and several contempt petitions are pending[297] before this Court.

780. Prior to the enactment of the Aadhaar Act, the scheme was challenged before this Court. By its interim order dated 23 September 2013[460], a two judge Bench directed:

All the matters require to be heard finally. List all matters for final hearing after the Constitution Bench is over.

In the meanwhile, no person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar Card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant." (sic)

This was followed by an order dated 26 November 2013 where the earlier order was continued:

After hearing the matter at length, we are of the view that all the States and Union Territories have to be impleaded as Respondents to give effective directions. In view thereof notice be issued to all the States and Union Territories through standing counsel...

Interim order to continue, in the meantime.

While considering another petition, **Unique Identification Authority of India** v. **Central Bureau of Investigation**[406], this Court directed in an interim order dated 24 March 2014:

In the meanwhile, the present Petitioner is restrained from transferring any biometric information of any person who has been allotted the Aadhaar number to any other agency without his consent in writing... **More so, no person shall be deprived of any service for want of Aadhaar number in case he/she is otherwise eligible/entitled. All the authorities are directed to modify their forms/circulars/likes so as to not compulsorily require the Aadhaar number in order to meet the requirement of the interim order passed by this Court forthwith...** Tag and list the matter with main matter i.e. WP(C) No. 494/2012.

On 16 March 2015, while considering WP (Civil) 494 of 2012, this Court noted a violation of its earlier order dated 23 September 2013 and directed thus:

The matters require considerable time for hearing... **In the meanwhile, it is brought to our notice that in certain quarters, Aadhaar identification is being insisted upon by the various authorities. We do not propose to go into the specific instances. Since Union of India is represented by learned Solicitor General and all the States are represented through their respective counsel, we expect that both the Union of India and States and all their functionaries should adhere to the Order passed by this Court on 23rd September, 2013.**

By an order dated 11 August 2015, a three judge Bench referred the issue as to whether privacy is a fundamental right to a bench of a larger strength of judges. The following interim directions were issued:

Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench if the Union of India or the UIDAI proceed in the following manner:

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card;

2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen;

3. The Unique Identification Number or the Aadhaar card will not be used by the Respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme;

4. The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.

On 15 October 2015, a Constitution Bench of this Court partially modified the order dated 11 August 2015, thus:

3...we are of the view that in paragraph 3 of the Order dated 11.08.2015, if we add, apart from the other two Schemes, namely, P.D.S. Scheme and the L.P.G. Distribution Scheme, the Schemes like The Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS), National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions), Prime Minister's Jan Dhan Yojana (PMJDY) and Employees' Provident Fund Organisation (EPFO) for the present, it would not dilute earlier order passed by this Court. Therefore, we now include the aforesaid Schemes apart from the other two Schemes that this Court has permitted in its earlier order dated 11.08.2015.

4. We impress upon the Union of India that it shall strictly follow all the earlier orders passed by this Court commencing from 23.09.2013.

5. We will also make it clear that the Aadhaar card Scheme is purely voluntary and it cannot be made mandatory till the matter is finally decided by this Court one way or the other.

After the Aadhaar Act was enacted there was a challenge in **All Bengal Minority Students Council** v. **Union of India**[383], to a letter written to the Chief Secretaries/Administrators of all State Governments/Union territory Administrations by the Under Secretary to the Government of India, by which the requirement of the submission of Aadhaar for claiming benefits under a scheme was made mandatory. By an order dated 14 September 2016, a two judge Bench directed as follows:

...we stay the operation and implementation of letters dated 14.07.2006 (i.e. Annexure P-5, P-6 and P-7) for Pre-Matric Scholarship Scheme, Post-Matric Scholarship Scheme and Merit-cum-Means Scholarship Scheme to the extent they have made submission of Aadhaar mandatory and direct the Ministry of Electronics and Information Technology, Government of India i.e. Respondent No. 2 to remove Aadhaar number as a mandatory condition for student Registration form at the National Scholarship Portal of Ministry of Electronics and Information Technology, Government of India at the website http://scholarships.gov.in/newStudentRegFrm and stay the implementation of Clause (c) of the 'Important Instructions' of the advertisement dated 20.08.2016 for the Pre-Matric Scholarship Scheme, Post-Matric Scholarship Scheme and Merit-cum-Means Scholarship Scheme, during the pendency of this writ petition.

It has been submitted that the notifications and circulars, which make the application of Aadhaar mandatory, are contrary to the interim orders passed by this Court. It has been contended that the Respondents have flouted the most elementary norms of good governance and have disrespected judicial orders. This contention requires serious consideration.

781. The legislature cannot simply declare that the judgment of a court is invalid or that it stands nullified. In **Kalpana Mehta**, a Constitution Bench of this Court held:

255...If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible

and does not constitute a violation of the separation doctrine. That indeed is the basis on which validating legislation is permitted.[359]

Where a final judgment or order of this Court is sought to be undone by an Act of Parliament, it is imperative that the basis of the Court's judgment or order is removed. It has been held by this Court in **Bhubaneshwar Singh** v. **Union of India** MANU/SC/0844/1994 : (1994) 6 SCC 77:

11. From time to time controversy has arisen as to whether the effect of judicial pronouncements of the High Court or the Supreme Court can be wiped out by amending the legislation with retrospective effect. Many such Amending Acts are called Validating Acts, validating the action taken under the particular enactments by removing the defect in the statute retrospectively because of which the statute or the part of it had been declared ultra vires. Such exercise has been held by this Court as not to amount to encroachment on the judicial power of the courts. **The exercise of rendering ineffective the judgments or orders of competent courts by changing the very basis by legislation is a well-known device of validating legislation.** This Court has repeatedly pointed out that such validating legislation which removes the cause of the invalidity cannot be considered to be an encroachment on judicial power. **At the same time, any action in exercise of the power under any enactment which has been declared to be invalid by a court cannot be made valid by a Validating Act by merely saying so unless the defect which has been pointed out by the court is removed with retrospective effect. The validating legislation must remove the cause of invalidity. Till such defect or the lack of authority pointed out by the court under a statute is removed by the subsequent enactment with retrospective effect, the binding nature of the judgment of the court cannot be ignored.**
330

When the Aadhaar Act was notified on 25 March 2016, the interim directions issued by this Court were in operation. Was it then open to government to launch upon a virtual spree of administrative notifications making Aadhaar a mandatory requirement of virtually every aspect of human existence from birth until death?

The position which the Union government has adopted before this Court is simply this: interim directions were issued by this Court when the Aadhaar project was governed by executive instructions. Once a law was enacted by Parliament, a statutory authorisation was brought into existence to enable government to issue administrative instructions. Hence, compliance with the interim orders stands obviated upon the enactment of the law.

782. This defence of government can be scrutinized at two levels-the first as a matter of statutory interpretation and the second, on a broader foundation which engages the judicial power of this Court. As a matter of statutory interpretation, the Aadhaar Act did not, as it could not have, merely nullified the interim orders of this Court. Section 59 has no provision which gives it overriding effect notwithstanding any judgment, decree or order of a court. The interim orders do not stand superseded. Apart from approaching the issue purely as a matter of statutory interpretation, there are broader concerns which arise from the manner in which the authorities proceeded, oblivious to the interim directions. Interim directions were issued by this Court in a situation where a constitutional challenge was addressed in a batch of petitions on the ground that the Aadhaar project was offensive to fundamental rights, including the right to privacy. So significant was the

nature of the challenge that it was referred initially to a Constitution Bench and thereafter, to a bench of nine-judges of this Court for resolving the question as to whether privacy is a protected fundamental right. The collection and storage of biometric data and its use for the purpose of authentication is the subject of a constitutional challenge. Noting the nature of the challenge and after considering the serious issues which have arisen in the case, successive benches of this Court issued a series of interim directions. The purport of those directions is that Aadhaar could not be made mandatory except for specified schemes which were listed by the court. Moreover, in the context of the serious grievance of financial exclusion, the court directed that no individual should be excluded from the receipt of welfare entitlements, such as food-grains, for want of an Aadhaar number. The constitutional challenge was not obviated merely on the enactment of the Aadhaar Act. The law gave a statutory character to a project which since 2009 was possessed of an administrative or executive nature. The constitutional challenge to some of the basic features underlying the collection of biometric data still remained to be addressed by the court. The proceedings before this Court are testimony to the fact that the issue of constitutionality was indeed live. That being the position, the issuance of a spate of administrative notifications is in defiance of the interim orders passed by this Court. Judicial orders, be they interim or final, cannot simply be wished away. If governments or citizens were allowed to ignore judicially enforceable directions, that would negate the basis of the Rule of law. Both propriety and constitutional duty required Union government to move this Court after the enactment of the Aadhaar Act for variation of the interim orders. Such an application would have required this Court to weigh on the one hand the subsequent development of the law being passed (something which would be relied upon by government) with the constitutional concerns over the entire biometric project. It is not as if that the mere enactment of the law put an end to the constitutional challenge. The existence of law (post 2016) is only one aspect to be considered in deciding the interim arrangement which would hold the field when the constitutional challenge was pending adjudication before this Court. Institutions of governance are bound by a sense of constitutional morality which requires them to abide by judicial orders. What seems to emerge from the course of action which has been followed in the present case by government is a perception that judicial directions can be ignored on a supposed construction of the statute. Besides the fact that this construction is erroneous in law, it is above all, the fundamental duty of this Court to ensure that its orders are not treated with disdain. If we were not to enforce a punctilious compliance with our own directions by government, that would ring a death-knell of the institutional position of the Supreme Court. If governments were free to ignore judicial directions at will, could a different yardstick be applied to citizens? The obligation to comply with judicial orders is universal to our polity and admits of no exception. Confronted with a brazen disregard of our interim orders, I believe that we have no course open except to stand firm.

783. The power of judicial review conferred on an independent judiciary requires that other organs of the State respect the authority of Courts. This Court in **P Sambamurthy** v. **State of Andhra Pradesh** (1987) 1 SCC 362, while highlighting the importance of judicial review in the Rule of law regime, held thus:

4. ... it is a basic principle of the Rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the

executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the Rule of law is maintained and every organ of the State is kept within the limits-of the law. **Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound, the death-knell of the Rule of law. The Rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet get away with it.**[324]

784. A Bench of two judges in **Re: Arundhati Roy** MANU/SC/0160/2002 : (2002) 3 SCC 343 held that for the courts to protect the Rule of law, it is necessary that the dignity and authority of the courts have to be respected and protected. It was held:

'Rule of Law' is the basic Rule of governance of any civilised democratic policy. Our Constitutional scheme is based upon the concept of Rule of Law which we have adopted and given to ourselves. Everyone, whether individually or collectively is unquestionably under the supremacy of law. Whoever the person may be, however high he or she is, no-one is above the law notwithstanding how powerful and how rich he or she may be. **For achieving the establishment of the Rule of law, the Constitution has assigned the special task to the judiciary in the country. It is only through the courts that the Rule of law unfolds its contents and establishes its concept. For the judiciary to perform its duties and functions effectively and true to the spirit with which it is sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs.**
[314]

The accountability of power, as a component of the Rule of law, requires that the power vested in any organ of the State, and its agents, can only be used for promotion of constitutional values and vision.[306] Governmental authority may only be exercised in accordance with written laws which are adopted though an established procedure. No action of the legislature or the executive can undermine the authority of the courts, except according to established principles. Disrespect of court orders results in impairment of the dignity of the courts.

785. Constitutional morality requires a government not to act in a manner which would become violative of the Rule of law.[234] Constitutional morality requires that the orders of this Court be complied with, faithfully. This Court is the ultimate custodian of the Constitution. The limits set by the Constitution are enforced by this Court. Constitutional morality requires that the faith of the citizens in the constitutional courts of the country be maintained. The importance of the existence of courts in the eyes of citizens has been highlighted in Harper Lee's classic "To Kill a Mockingbird":

But there is one way in this country in which all men are created equal--there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. **That institution, gentlemen, is a court.** It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.

Many citizens, although aggrieved, are not in a condition to reach the highest Court. The poorest and socially neglected lack resources and awareness to reach this Court. Their grievances remain unaddressed. Such individuals suffer injury each day without remedy. Disobedience of the interim orders of this Court and its institutional authority, in the present case, has made a societal impact. It has also resulted in denial of subsidies and other benefits essential to the existence of a common citizen. Constitutional morality therefore needs to be enforced as a valid response to these arbitrary acts. Non-compliance of the interim orders of this Court is contrary to constitutional morality. Constitutional morality, as an essential component of the Rule of law, must neutralise the excesses of power by the executive. The brazen manner in which notifications have been issued making Aadhaar mandatory, despite the interim order of this Court is a matter of serious concern. Deference to the institutional authority of the Supreme Court is integral to the values which the Constitution adopts. The postulate of a limited government is enforced by the role of the Supreme Court in protecting the liberties of citizens and holding government accountable for its transgressions. The authority of this Court is crucial to maintaining the fine balances of power on which democracy thrives and survives. The orders of the Court are not recommendatory-they are binding directions of a constitutional adjudicator. Dilution of the institutional prestige of this Court can only be at the cost of endangering the freedom of over a billion citizens which judicial review seeks to safeguard.

786. Courts-as it is often said-have neither the power of the purse nor the sword. Our authority lies in constitutional legitimacy as much as in public confidence. Combined together they impart moral and institutional authority to the Court. That sense of legitimacy and duty have required me to assert once again the norms of a written Constitution and the Rule of law. This judgment has taken a much wider postulation. Having held the Aadhaar Act prior to its passage not to be a Money Bill, I have delved into the merits of the constitutional challenge for two reasons:

i. Merits have been argued in considerable detail both by Petitioners and the Union of India; and

ii. As a logical consequence of the view that the Aadhaar legislation is not a Money Bill, it would be open to the government to reintroduce fresh legislation. The principles governing a law regulating the right to data protection and informational privacy have hence been delineated.

L Conclusion

787. The present dispute has required this Court to analyze the provisions of the Aadhaar Act and Regulations, along with the framework as it existed prior to the enactment of the Act, through the prism of the Constitution and the precedents of this Court. My conclusions are outlined below:

(1) In order to deal with the challenge that the Aadhaar Act should not have been passed as a Money Bill, this Court was required to adjudicate whether the decision of the Speaker of the Lok Sabha to certify a Bill as a Money Bill, can be subject to judicial review. The judgment has analyzed the scope of the finality attributed to the Speaker's decision, by looking at the history of Article 110(3) of the Constitution, by comparing it with the comparative constitutional practices which accord finality to the Speaker's decision, by analyzing other constitutional provisions which use the phrase "shall be final", and by examining the protection granted to parliamentary proceedings Under Article 122. This judgment holds that:

(a) The phrase "shall be final" used Under Article 110(3) aims at avoiding any controversy on the issue as to whether a Bill is a Money Bill, with respect to the Rajya Sabha and before the President. The language used in Article 110(3) does not exclude judicial review of the Speaker's decision. This also applies to Article 199(3).

(b) The immunity from judicial review provided to parliamentary proceedings Under Article 122 is limited to instances involving "irregularity of procedure". The decisions of this Court in **Special Reference, Ramdas Athawale** and **Raja Ram Pal** hold that the validity of proceedings in Parliament or a State Legislature can be subject to judicial review when there is a substantive illegality or a constitutional violation. These judgments make it clear that the decision of the Speaker is subject to judicial review, if it suffers from illegality or from a violation of constitutional provisions.

(c) Article 255 has no relation with the decision of the Speaker on whether a Bill is a Money Bill. The three Judge Bench decision in **Mohd. Saeed Siddiqui** erroneously interpreted the judgment in **Mangalore Beedi** to apply Articles 212 (or Article 122) and 255 to refrain from questioning the conduct of the Speaker (under Article 199 or 110). The two judge Bench decision in **Yogendra Kumar** followed **Mohd. Saeed Siddiqui**. The correct position of law is that the decision of the Speaker Under Articles 110(3) and 199(3) is not immune from judicial review. The decisions in **Mohd. Saeed Siddiqui** and **Yogendra Kumar** are accordingly overruled.

(d) The existence of and the role of the Rajya Sabha, as an institution of federal bicameralism in the Indian Parliament, constitutes a part of the basic structure of the Constitution. The decision of the Speaker of the Lok Sabha to certify a Bill as a Money Bill has a direct impact on the role of the Rajya Sabha, since the latter has a limited role in the passing of a Money Bill. A decision of the Speaker of the Lok Sabha to declare an ordinary Bill to be a Money Bill limits the role of the Rajya Sabha. The power of the Speaker cannot be exercised arbitrarily in violation of constitutional norms and values, as it damages the essence of federal bicameralism, which is a part of the basic structure of the Constitution. Judicial review of the Speaker's decision, on whether a Bill is a Money Bill, is therefore necessary to protect the basic structure of the Constitution.

(2) To be certified a Money Bill, a Bill must contain "only provisions" dealing with every or any one of the matters set out in Sub-clauses (a) to (g) of Article 110(1). A Bill, which has both provisions which fall within Sub-clauses (a) to (g) of Article 110(1) and provisions which fall outside their scope, will not qualify to be a Money Bill. Thus, when a Bill which has been passed as a Money Bill has certain provisions which fall beyond the scope of Sub-clauses (a) to (g) of Article 110(1), these provisions cannot be severed. If the bill was not a Money Bill, the role of the Rajya Sabha in its legislative passage could not have been denuded. The debasement of a constitutional institution cannot be countenanced by the Court. Democracy survives when constitutional institutions are vibrant.

(3) The Aadhaar Act creates a statutory framework for obtaining a unique identity number, which is capable of being used for "any" purpose, among which availing benefits, subsidies and services, for which expenses are incurred from the Consolidated Fund of India, is just one purpose provided Under Section 7. Clause (e) of Article 110(1) requires that a Money Bill must deal with the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India (or

increasing the amount of the expenditure). Section 7 fails to fulfil this requirement. Section 7 does not declare the expenditure incurred to be a charge on the Consolidated Fund. It only provides that in the case of such services, benefits or subsidies, Aadhaar can be made mandatory to avail of them. Moreover, provisions other than Section 7 of the Act deal with several aspects relating to the Aadhaar numbers: enrolment on the basis of demographic and biometric information, generation of Aadhaar numbers, obtaining the consent of individuals before collecting their individual information, creation of a statutory authority to implement and supervise the process, protection of information collected during the process, disclosure of information in certain circumstances, creation of offences and penalties for disclosure or loss of information, and the use of the Aadhaar number for "any purpose". All these provisions of the Aadhaar Act do not lie within the scope of Sub-clauses (a) to (g) of Article 110(1). Hence, in the alternate, even if it is held that Section 7 bears a nexus to the expenditure incurred from the Consolidated Fund of India, the other provisions of the Act fail to fall within the domain of Article 110(1). Thus, the Aadhaar Act is declared unconstitutional for failing to meet the necessary requirements to have been certified as a Money Bill Under Article 110(1).

(4) The argument that the Aadhaar Act is in pith and substance a Money Bill, with its main objective being the delivery of subsidies, benefits and services flowing out of the Consolidated Fund of India and that the other provisions are ancillary to the main purpose of the Act also holds no ground, since the doctrine of pith and substance is used to examine whether the legislature has the competence to enact a law with regard to any of the three Lists in the Seventh Schedule of the Constitution. The doctrine cannot be invoked to declare whether a Bill satisfies the requirements set out in Article 110 of the Constitution to be certified a Money Bill. The argument of the Union of India misses the point that a Bill can be certified as a Money Bill "**only**" if it deals with all or any of the matters contained in Clauses (a) to (g) of Article 110(1).

(5) Having held that the Aadhaar Act is unconstitutional for having been passed as a Money Bill this judgment has also analysed the merits of the other constitutional challenges to the legislation as well as to the framework of the project before the law was enacted.

(6) The architecture of the Aadhaar Act seeks to create a unique identity for residents on the basis of their demographic and biometric information. The Act sets up a process of identification by which the unique identity assigned to each individual is verified with the demographic and biometric information pertaining to that individual which is stored in a centralised repository of data. Identification of beneficiaries is integral and essential to the fulfilment of social welfare schemes and programmes, which are a part of the State's attempts to ensure that its citizens have access to basic human facilities. This judgment accepts the contention of the Union of India that there is a legitimate state aim in maintaining a system of identification to ensure that the welfare benefits provided by the State reach the beneficiaries who are entitled, without diversion.

(7) The Aadhaar programme involves application of biometric technology, which uses an individual's biometric data as the basis of authentication or identification and is therefore intimately connected to the individual. While citizens have privacy interests in personal or private information collected about them, the unique nature of biometric data distinguishes it from other personal data, compounding concerns regarding privacy protections safeguarding biometric information. Once a biometric system is compromised, it is compromised forever. Therefore, it is

imperative that concerns about protecting privacy must be addressed while developing a biometric system. Adequate norms must be laid down for each step from the collection to retention of biometric data. At the time of collection, individuals must be informed about the collection procedure, the intended purpose of the collection, the reason why the particular data set is requested and who will have access to their data. Additionally, the retention period must be justified and individuals must be given the right to access, correct and delete their data at any point in time, a procedure familiar to an opt-out option.

(8) Prior to the enactment of the Aadhaar Act, no mandatory obligation was imposed upon the Registrars or the enrolling agencies, to obtain informed consent from residents before recording their biometric data, to inform them how the biometric data would be stored and used and about the existence of adequate safeguards to secure the data. Moreover, prior to the enactment of the Act, while UIDAI had itself contemplated that an identity theft could occur at the time of enrollment for Aadhaar cards, it had no solution to the possible harms which could result after the identity theft of a person.

(9) The Regulations framed subsequently under the Aadhaar Act also do not provide a robust mechanism on how informed consent is to be obtained from residents before collecting their biometric data. The Aadhaar Act and Regulations are bereft of the procedure through which an individual can access information related to his or her authentication record. The Aadhaar Act clearly has no defined options that should be made available to the Aadhaar number holders in case they do not wish to submit identity information during authentication, nor do the Regulations specify the procedure to be followed in case the Aadhaar number holder does not provide consent for authentication.

(10) Sections 29(1) and (2) of the Act create a distinction between two classes of information (core biometric information and identity information), which are integral to individual identity and require equal protection. Section 29(4) suffers from overbreadth as it gives wide discretionary power to UIDAI to publish, display or post core biometric information of an individual for purposes specified by the Regulations.

(11) Sections 2(g), (j), (k) and (t) suffer from overbreadth, as these can lead to an invasive collection of biological attributes. These provisions give discretionary power to UIDAI to define the scope of biometric and demographic information and empower it to expand on the nature of information already collected at the time of enrollment, to the extent of also collecting any "**such other biological attributes**" that it may deem fit.

(12) There is no clarity on how an individual is supposed to update his/her biometric information, in case the biometric information mismatches with the data stored in CIDR. The proviso to Section 28(5) of the Aadhaar Act, which disallows an individual access to the biometric information that forms the core of his or her unique ID, is violative of a fundamental principle that ownership of an individual's data must at all times vest with the individual. UIDAI is also provided wide powers in relation to removing the biometric locking of residents. With this analysis of the measures taken by the Government of India prior to the enactment of the Aadhaar Act as well as a detailed analysis of the provisions under the Aadhaar Act, 2016 and supporting Regulations made under it, this

judgment concludes that the Aadhaar programme violates essential norms pertaining to informational privacy, self-determination and data protection.

(13) The State is under a constitutional obligation to safeguard the dignity of its citizens. Biometric technology which is the core of the Aadhaar programme is probabilistic in nature, leading to authentication failures. These authentication failures have led to the denial of rights and legal entitlements. The Aadhaar project has failed to account for and remedy the flaws in its framework and design which has led to serious instances of exclusion of eligible beneficiaries as demonstrated by the official figures from Government records including the Economic Survey of India 2016-17 and research studies. Dignity and the rights of individuals cannot be made to depend on algorithms or probabilities. Constitutional guarantees cannot be subject to the vicissitudes of technology. Denial of benefits arising out of any social security scheme which promotes socio-economic rights of citizens is violative of human dignity and impermissible under our constitutional scheme.

(14) The violations of fundamental rights resulting from the Aadhaar scheme were tested on the touchstone of proportionality. The measures adopted by the Respondents fail to satisfy the test of necessity and proportionality for the following reasons:

(a) Under the Aadhaar project, requesting entities can hold the identity information of individuals, for a temporary period. It was admitted by UIDAI that AUAs may store additional information according to their requirement to secure their system. ASAs have also been permitted to store logs of authentication transactions for a specific time period. It has been admitted by UIDAI that it gets the AUA code, ASA code, unique device code and the registered device code used for authentication, and that UIDAI would know from which device the authentication took place and through which AUA/ASA. Under the Regulations, UIDAI further stores the authentication transaction data. This is in violation of widely recognized data minimisation principles which mandate that data collectors and processors delete personal data records when the purpose for which it has been collected is fulfilled. Moreover, using the meta-data related to the transaction, the location of the authentication can easily be traced using the IP address, which impacts upon the privacy of the individual.

(b) From the verification log, it is possible to locate the places of transactions by an individual in the past five years. It is also possible through the Aadhaar database to track the current location of an individual, even without the verification log. The architecture of Aadhaar poses a risk of potential surveillance activities through the Aadhaar database. Any leakage in the verification log poses an additional risk of an individual's biometric data being vulnerable to unauthorised exploitation by third parties.

(c) The biometric database in the CIDR is accessible to third-party vendors providing biometric search and de-duplication algorithms, since neither the Central Government nor UIDAI have the source code for the de-duplication technology which is at the heart of the programme. The source code belongs to a foreign corporation. UIDAI is merely a licensee. Prior to the enactment of the Aadhaar Act, without the consent of individual citizens, UIDAI contracted with L-1 Identity Solutions (the foreign entity which provided the source code for biometric storage) to provide to it any personal information related to any resident of India. This is contrary to the basic requirement that an individual has the right to protect herself by maintaining control over personal

information. The protection of the data of 1.2 billion citizens is a question of national security and cannot be subjected to the mere terms and conditions of a normal contract.

(d) Before the enactment of the Aadhaar Act, MOUs signed between UIDAI and Registrars were not contracts within the purview of Article 299 of the Constitution, and therefore, do not cover the acts done by the private entities engaged by the Registrars for enrolment. Since there is no privity of contract between UIDAI and the Enrolling agencies, the activities of the private parties engaged in the process of enrolment before the enactment of the Aadhaar Act have no statutory or legal backing.

(e) Under the Aadhaar architecture, UIDAI is the sole authority which carries out all administrative, adjudicatory, investigative, and monitoring functions of the project. While the Act confers these functions on UIDAI, it does not place any institutional accountability upon UIDAI to protect the database of citizens' personal information. UIDAI also takes no institutional responsibility for verifying whether the data entered and stored in the CIDR is correct and authentic. The task has been delegated to the enrolment agency or the Registrar. Verification of data being entered in the CIDR is a highly sensitive task for which the UIDAI ought to have taken responsibility. The Aadhaar Act is also silent on the liability of UIDAI and its personnel in case of their non-compliance of the provisions of the Act or the Regulations.

(f) Section 47 of the Act violates citizens' right to seek remedies. Under Section 47(1), a court can take cognizance of an offence punishable under the Act only on a complaint made by UIDAI or any officer or person authorised by it. Section 47 is arbitrary as it fails to provide a mechanism to individuals to seek efficacious remedies for violation of their right to privacy. Further, Section 23(2)(s) of the Act requires UIDAI to establish a grievance redressal mechanism. Making the authority which is administering a project, also responsible for providing a grievance redressal mechanism for grievances arising from the project severely compromises the independence of the grievance redressal body.

(g) While the Act creates a regime of criminal offences and penalties, the absence of an independent regulatory framework renders the Act largely ineffective in dealing with data violations. The architecture of Aadhaar ought to have, but has failed to embody within the law the establishment of an independent monitoring authority (with a hierarchy of regulators), along with the broad principles for data protection. This compromise in the independence of the grievance redressal body impacts upon the possibility and quality of justice being delivered to citizens. In the absence of an independent regulatory and monitoring framework which provides robust safeguards for data protection, the Aadhaar Act cannot pass muster against a challenge on the ground of reasonableness Under Article 14.

(h) No substantive provisions, such as those providing data minimization, have been laid down as guiding principles for the oversight mechanism provided Under Section 33(2), which permits disclosure of identity information and authentication records in the interest of national security.

(i) Allowing private entities to use Aadhaar numbers, Under Section 57, will lead to commercial exploitation of the personal data of individuals without consent and could also lead to individual profiling. Profiling could be used to predict the emergence of future choices and preferences of

individuals. These preferences could also be used to influence the decision making of the electorate in choosing candidates for electoral offices. This is contrary to privacy protection norms. Data cannot be used for any purpose other than those that have been approved. While developing an identification system of the magnitude of Aadhaar, security concerns relating to the data of 1.2 billion citizens ought to be addressed. These issues have not been dealt with by the Aadhaar Act. By failing to protect the constitutional rights of citizens, Section 57 violates Articles 14 and 21.

(j) Section 57 is susceptible to be applied to permit commercial exploitation of the data of individuals or to affect their behavioural patterns. Section 57 cannot pass constitutional muster. Since it is manifestly arbitrary, it suffers from overbreadth and violates Article 14.

(k) Section 7 suffers from overbreadth since the broad definitions of the expressions 'services and 'benefits' enable the government to regulate almost every facet of its engagement with citizens under the Aadhaar platform. If the requirement of Aadhaar is made mandatory for every benefit or service which the government provides, it is impossible to live in contemporary India without Aadhaar. The inclusion of services and benefits in Section 7 is a pre-cursor to the kind of function creep which is inconsistent with the right to informational self-determination. Section 7 is therefore arbitrary and violative of Article 14 in relation to the inclusion of services and benefits as defined.

(l) The legitimate aim of the State can be fulfilled by adopting less intrusive measures as opposed to the mandatory enforcement of the Aadhaar scheme as the sole repository of identification. The State has failed to demonstrate that a less intrusive measure other than biometric authentication would not subserve its purposes. That the state has been able to insist on an adherence to the Aadhaar scheme without exception is a result of the overbreadth of Section 7.

(m) When Aadhaar is seeded into every database, it becomes a bridge across discreet data silos, which allows anyone with access to this information to re-construct a profile of an individual's life. This is contrary to the right to privacy and poses severe threats due to potential surveillance.

(n) One right cannot be taken away at the behest of the other. The State has failed to satisfy this Court that the targeted delivery of subsidies which animate the right to life entails a necessary sacrifice of the right to individual autonomy, data protection and dignity when both these rights are protected by the Constitution.

(15) Section 59 of the Aadhaar Act seeks to retrospectively validate the actions of the Central Government done prior to the Aadhaar Act pursuant to Notifications dated 28 January 2009. and 12 September 2015. Section 59 does not validate actions of the state governments or of private entities. Moreover, the notification of 2009 did not authorise the collection of biometric data. Consequently, the validation of actions taken under the 2009 notification by Section 59 does not save the collection of biometric data prior to the enforcement of the Act. While Parliament possesses the competence to enact a validating law, it must cure the cause of infirmity or invalidity. Section 59 fails to cure the cause of invalidity prior to the enactment of the Aadhaar Act. The absence of a legislative framework for the Aadhaar project between 2009 and 2016 left the biometric data of millions of Indian citizens bereft of the kind of protection which must be provided to comprehensively protect and enforce the right to privacy. Section 59 therefore fails to meet the

test of a validating law since the complete absence of a regulatory framework and safeguards cannot be cured merely by validating what was done under the notifications of 2009 and 2016.

(16) The decision in **Puttaswamy** recognised that revenue constitutes a legitimate state aim in the three-pronged test of proportionality. However, the existence of a legitimate aim is insufficient to uphold the validity of the law, which must also meet the other parameters of proportionality spelt out in **Puttaswamy**.

(17) The seeding of Aadhaar with PAN cards depends on the constitutional validity of the Aadhaar legislation itself. Section 139AA of the Income Tax Act 1962 is based on the premise that the Aadhaar Act itself is a valid legislation. Since the Aadhaar Act itself is now held to be unconstitutional for having been enacted as a Money Bill and on the touchstone of proportionality, the seeding of Aadhaar to PAN Under Article 139AA does not stand independently.

(18) The 2017 amendments to the PMLA Rules fail to satisfy the test of proportionality. The imposition of a uniform requirement of linking Aadhaar numbers with all account based relationships proceeds on the presumption that all existing account holders as well as every individual who seeks to open an account in future is a potential money-launderer. No distinction has been made in the degree of imposition based on the client, the nature of the business relationship, the nature and value of the transactions or the actual possibility of terrorism and money-laundering. The Rules also fail to make a distinction between opening an account and operating an account. Moreover, the consequences of the failure to submit an Aadhaar number are draconian. In their present form, the Rules are clearly disproportionate and excessive. We clarify that this holding would not preclude the Union Government in the exercise of its Rule making power and the Reserve Bank of India as the regulator to re-design the requirements in a manner that would ensure due fulfillment of the object of preventing money-laundering, subject to compliance with the principles of proportionality as outlined in this judgment.

(19) Mobile phones have become a ubiquitous feature of the lives of people and the linking of Aadhaar numbers with SIM cards and the requirement of e-KYC authentication of mobile subscribers must necessarily be viewed in this light. Applying the proportionality test, the legitimate aim of subscriber verification, has to be balanced against the countervailing requirements of preserving the integrity of biometric data and the privacy of mobile phone subscribers. Mobile phones are a storehouse of personal data and reflect upon individual preferences, lifestyle and choices. The conflation of biometric information with SIM cards poses grave threats to individual privacy, liberty and autonomy. Having due regard to the test of proportionality which has been propounded in **Puttaswamy** and as elaborated in this judgment, the decision to link Aadhaar numbers with mobile SIM cards is neither valid nor constitutional. The mere existence of a legitimate state aim will not justify the disproportionate means which have been adopted in the present case. The biometric information and Aadhaar details collected by Telecom Service Providers shall be deleted forthwith and no use of the said information or details shall be made by TSPs or any agency or person or their behalf.

(20) Defiance of judicial orders (both interim and final) be it by the government or by citizens negates the basis of the Rule of law. Both propriety and constitutional duty required the Union government to move this Court after the enactment of the Aadhaar Act for variation of this Court's

interim orders. Institutions of governance are bound by a sense of constitutional morality which requires them to abide by judicial orders.

(21) Identity is necessarily a plural concept. The Constitution also recognizes a multitude of identities through the plethora of rights that it safeguards. The technology deployed in the Aadhaar scheme reduces different constitutional identities into a single identity of a 12-digit number and infringes the right of an individual to identify herself/himself through a chosen means. Aadhaar is about identification and is an instrument which facilitates a proof of identity. It must not be allowed to obliterate constitutional identity.

(22) The entire Aadhaar programme, since 2009, suffers from constitutional infirmities and violations of fundamental rights. The enactment of the Aadhaar Act does not save the Aadhaar project. The Aadhaar Act, the Rules and Regulations framed under it, and the framework prior to the enactment of the Act are unconstitutional.

(23) To enable the government to initiate steps for ensuring conformity with this judgment, it is directed Under Article 142 that the existing data which has been collected shall not be destroyed for a period of one year. During this period, the data shall not be used for any purpose whatsoever. At the end of one year, if no fresh legislation has been enacted by the Union government in conformity with the principles which have been enunciated in this judgment, the data shall be destroyed.

Creating strong privacy protection laws and instilling safeguards may address or at the very least assuage some of the concerns associated with the Aadhaar scheme which severely impairs informational self-determination, individual privacy, dignity and autonomy. In order to uphold the democratic values of the Constitution, the government needs to address the concerns highlighted in this judgment which would provide a strong foundation for digital initiatives, which are imminent in today's digital age. However, in its current form, the Aadhaar framework does not sufficiently assuage the concerns that have arisen from the operation of the project which have been discussed in this judgment.

Ashok Bhushan, J.

788. The challenge in this batch of cases can be divided in two parts, firstly, the challenge to Executive's Scheme dated 28.01.2009 notified by the Government of India, by which the Unique Identification Authority of India (hereinafter referred to as "UIDAI") was constituted to implement the UIDAI Scheme, and secondly challenge to The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred to as "Act, 2016").

789. The group of cases can be divided into four broad heads. First head consists of the sixteen Writ Petitions filed Under Article 32 of the Constitution of India in this Court challenging the notification dated 28.01.2009 and/or the Act, 2016.

Second group consists of seven Transfer Cases/Transfer petitions to be heard alongwith Writ Petitions filed Under Article 32.

Group three consists of only one Special Leave Petition (Criminal) No. 2524 of 2014 filed by UIDAI and Anr. Fourth group consists of seven Contempt Petitions, which have been filed alleging violation of the interim orders passed by this Court in Writ Petitions and SLP (Criminal) as noted above.

790. Before we come to the different prayers made in the Writ Petitions wherein Executive Scheme dated 28.01.2009 as well as Act, 2016 has been challenged, it is useful to notice certain background facts, which lead to issuance of notification dated 28.01.2009 as well as the Act, 2016.

791. India is a country, which caters a sea of population. When the British left our country in 1947, total population of the country was only 330 million, which has rapidly increased into enormous figure of 1.3 billion as on date. The Citizenship Act, 1955 was enacted by the Parliament for the acquisition and determination of Indian Citizenship. Our constitutional framers have provided for adult franchise to every adult citizens. Election Commission of India had taken steps to provide for an identity card to each person to enable him to exercise his franchise. The Citizenship Act, 1955 was amended by the Act 6 of 2004 whereas Section 14A was inserted providing that Central Government may compulsorily register every citizen of India and issue national identity card to him. The Planning Commission of the Government of India conceived a Unique Identification Project for providing a Unique Identity Number for each resident across the country, which was initially envisaged primarily as the basis for the efficient delivery of welfare services.

792. At first, in the year 2006, administrative approval was granted for the project "Unique Identity for BPL Families". A Process Committee was constituted, which prepared a strategic vision on the Unique Identification Project. The Process Committee furnished a detailed proposal to the Planning Commission in the above regard. The Prime Minister approved the constitution of an empowered Group of Ministers to collate the two spheres, the national population register under the Citizenship Act, 1955 and the Unique Identification Number Project of the Department of Information Technology. The empowered Group of Ministers recognised the need for creating an identity related resident database and to establish an institutional mechanism, which shall own the database and shall be responsible for its maintenance and updations on ongoing basis. The empowered Group of Ministers held various meetings to which inputs were provided from different sources including Committee of Secretaries. The recommendation of empowered Group of Ministers to constitute Unique Identification Authority of India (hereinafter referred to as "UIDAI") was accepted with several guidelines laying down the roles and responsibilities of the UIDAI. The UIDAI was constituted under the aegis of Planning Commission of India. The Notification dated 28.01.2009 was issued constituting the UIDAI, providing for its composition, roles and responsibilities.

793. In the year 2010, a bill namely the National Identification Authority of India Bill, 2010 providing for the establishment of the National Identification Authority of India for the purpose of issuing identification numbers to individuals residing in India and to certain other classes of individuals, manner of authentication of such individuals to facilitate access to benefits and services to which they are entitled and for matters connected therewith or incidental thereto was introduced. The Bill was pending in the Parliament when the first Writ Petition i.e. Writ Petition (C) No. 494 of 2012-Justice *K.S. Puttaswamy* (Retd.) and Anr. v. Union of India and Ors. Was filed. The Writ Petition Under Article 32 was filed on the ground that fundamental rights of the

innumerable citizens of India namely Right to Privacy falling Under Article 21 of the Constitution of India are adversely affected by the Executive action of the Central Government proceeding to implement an Executive order dated 28.01.2009 and thereby issuing Aadhaar numbers to both citizens as also illegal immigrants presently illegally residing in the country. While the Bill namely "National Identification Authority of India Bill, 2010", which had already been introduced in the Rajya Sabha on 03.12.2010 and referred to the Standing Committee, had been rejected. The Writ Petition prayed for following reliefs:

(A) ISSUE a writ in the nature of mandamus restraining the Respondents Nos. 1 to 3 from issuing Aadhaar Numbers by way of implementing its Executive order dated 28.01.2009 (Annexure "P-1") which tentamount to implementing the provisions of the National Identification Authority of India Bill, 2010 pending before the Parliament until and unless the said Bill is considered and passed by the Parliament and becomes an Act of Parliament.

(B) Pass such other order/s as this Hon'ble Court may deem fit and proper in the circumstances of the case.

794. Writ Petition (C) No. 829 of 2013-Mr. S.G. Vombatkere and Anr. v. Union of India and Ors., was filed by Mr. S.G. Vombatkere and Bezwada Wilson questioning the UID Project and Aadhaar Scheme. The UID Project and Aadhaar Scheme were contended to be illegal and violative of fundamental rights. It was also contended that the Scheme has no legislative sanction. Various other grounds for attacking the Scheme were enumerated in the Writ Petition. Writ Petition (C) No. 833 of 2013-Ms. Aruna Roy and Anr. v. Union of India and Ors., was also filed challenging the UID Scheme. Other Writ Petitions being Writ Petition (C) No. 932 of 2013 and Writ Petition (C) No. 37 of 2015 came to be filed challenging the UID Scheme.

795. S.G. Vombatkere and Bezwada Wilson filed another Writ Petition (C) No. 220 of 2015 challenging the exercise of preparation of the National Population Register. Section 14A of the Citizenship Act, 1955 was also challenged as void and ultra vires. Petitioners have referred to earlier Writ Petition (C) No. 829 of 2013 and adopted the grounds already raised in the earlier Writ Petition. Writ Petitioner had also challenged the collection of confidential biometric informations, which is neither sanctioned nor authorised under any Act or Rules.

796. The Parliament enacted the Act, 2016, which contains following preamble:

An Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto.

797. The Writ Petition (C) No. 231 of 2016-Shri Jairam Ramesh v. Union of India and Ors., was filed by Shri Jairam Ramesh seeking a direction declaring the Act, 2016 as unconstitutional, null and void and ultra vires. Writ Petition (C) No. 797 of 2016-S.G. Vombatkere and Ors. v. Union of India and Ors., was also filed by S.G. Vombatkere and Bezwada Wilson challenging the Act, 2016. The Petitioners have also referred to earlier Writ Petition (C) No. 829 of 2013 and Writ Petition (C) No. 220 of 2015. The writ Petitioners alleged various grounds for challenging the Act, 2016.

Apart from seeking a direction to declare the Act, 2016 ultra vires, unconstitutional and null and void, prayers for declaring various Sections of Act, 2016 as ultra vires, unconstitutional and null and void were also made. The writ Petitioners claimed lots of reliefs from a to w, it is useful to quote the reliefs a to d, which are to the following effect:

a) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 is ultra vires, unconstitutional, null and void and in particular violate Articles 14, 19 and 21 of the Constitution of India;

b) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that Sections 2(h), 2(l), 2(m), 2(v), 3, 5, 6, 7, 8, 9, 10, Chapter IV, Section 23 read with Section 54, Section 29, Section 30, Section 33, Section 47, Section 57 and Section 59 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 are ultra vires, unconstitutional, null and void and in particular violate Articles 14, 19, 20(3) and 21 of the Constitution of India;

c) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that the right to privacy is a fundamental right guaranteed under Part III of the Constitution of India;

d) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that no person may be deprived of receiving any financial subsidy or other subsidy or benefit or services from the State on the ground that he or she does not have an Aadhaar number;

798. Writ Petition (C) No. 342 of 2017-Shantha Sinha and Anr. v. Union of India and Anr. Was filed challenging the Act, 2016. Apart from seeking a direction to declare various Sections of Act, 2016 as null and void, writ Petitioners also prayed for a direction declaring Sections 2(h), 2(l), 2(m), 2(v), 3, 5, 6, 7, 8, 9, 10, Chapter IV, Section 23 read with Section 54, Section 29, Section 30, Section 33, Section 47, Section 57 and Section 59 of the Act, 2016 as ultra vires, unconstitutional and null and void. Writ Petition (Civil) No. 372 of 2017-Shankar Prasad Dangi v. Bharat Cooking Coal Limited and Anr., was filed by Shankar Prasad Dangi, who claims to be employed under the Bharat Cooking Coal Limited. Petitioner filed the writ petition seeking a mandamus directing the Respondents not to compel the Petitioner to submit the Aadhaar Card copy. The Petitioner placed reliance on Order of this Court dated 14.09.2016 in Writ Petition (C) No. 686 of 2016. Writ Petition (C) No. 841 of 2017 has also been filed by State of West Bengal challenging various notifications issued Under Section 7 of the Act, 2016. The Petitioner also sought a direction declaring that no person may be deprived of receiving any benefit or services from the State on the ground that he or she does not have an Aadhaar number or Aadhaar enrolment. Writ Petition (C) No. 1058 of 2017-Mathew Thomas v. Union of India and Ors. has been filed challenging the Act, 2016. The writ Petitioner also prayed for declaring Prevention of Money Laundering Rules (Second Amendment) 2017 as violative of Articles 14, 19 and 21 of the Constitution. Section 139AA of the Income Tax Act, 1961 was also prayed to be declared as violative of Articles 14, 19 and 21 of the Constitution.

799. Writ Petition (C) No. 966 of 2017-Raghav Tankha v. Union of India through its Secretary and Ors. has been filed seeking following prayers:

a) Issue a Writ of Mandamus or any other appropriate writ, order or direction Under Article 32 of the Constitution of India, directing the Respondents to declare that Aadhaar is not mandatory for the purpose of authentication while obtaining a mobile connection; or the re-verification of Subscribers, being completely illegal, arbitrary and mala fide; and/or

b) Issue a Writ of Mandamus or any other appropriate writ, order or direction Under Article 32 of the Constitution of India, directing the Respondents Number 2 to 6, to take immediate steps in the present situation, for restraining and banning the transfer of data from UIDAI to Private Telecom Service Providers and Aadhaar being made the only option of authentication; and/or

800. Writ Petition (C) No. 1014 of 2017-M.G. Devasahayam and Ors. v. Union of India and Anr. has been filed, where following prayers have been made:

a) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction declaring Rule 9 of the Prevention of Money Laundering Rules, 2017 as amended by the Prevention of Money Laundering (Second Amendment) Rules, 2017 as ultra vires, unconstitutional, null and void and in particular violate Articles 14, 19 and 21 of the Constitution of India;

b) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction declaring that bank accounts will not be denied or ceased on the basis that he or she does not have an Aadhaar number;

c) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction in the nature of mandamus against the Respondents directing them to forthwith forbear from implementing or acting pursuant to or in implementation of Rule 9 of the Prevention of Money Laundering Rules, 2017 as amended by the Prevention of Money Laundering (Second Amendment) Rules, 2017;

d) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction in the nature of mandamus against the Respondents directing them to forthwith clarify by issuing appropriate announcements, circulars and/or directions that no citizen of India is required to obtain an Aadhaar number/Aadhaar card and that the program under the Aadhaar Act is entirely voluntary even for opening or maintaining the bank accounts and carrying financial transactions;

e) This Hon'ble Court may be pleased to award costs relating to the present petition to the Petitioners; and

f) This Hon'ble Court may be pleased to issue any other writ/order/direction in the nature of mandamus as this Hon'ble Court may deem fit an proper in the circumstances of the case.

801. Writ Petition (C) No. 1002 of 2017-Dr. Kalyani Menon Sen v. Union of India and Ors. also sought declaration that Rule 2(b) of the Prevention of Money Laundering (Maintenance of Records) Second Amendment Rules, 2017 is ultra vires. Circular dated 23.03.2017 issued by the Department of Telecommunication was also sought to be declared as ultra vires, unconstitutional,

null and void. A further direction was sought declaring that pursuant to the Circular dated 23.03.2017, the mobile phone numbers of subscribers will not be made in-operational, and future applicants will not be coerced to submit their Aadhaar numbers. Certain other reliefs have also been claimed in the writ petition. Writ Petition (C) No. 1056 of 2017-Nachiket Udupa and Anr. v. Union of India and Ors. has been filed challenging the Act, 2016 and with other prayers, which is as follows:

A. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 [ACT No. 18 of 2016] as illegal and violative of Articles 14, 19(1)(a) and 21 of the Constitution of India;

B. In the alternative to Prayer (A), issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy against Respondent No. 3 to provide 'opt-out' or process to delete identity information from Central Identities Data Repository at the option of Aadhaar Number Holders;

C Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Enrolment and Update) Regulations, 2016 being illegal, and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

D. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Authentication) Regulations, 2016 as being illegal and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

E. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Data Security) Regulations, 2016 as being illegal, and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

F. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Sharing of Information) Regulations, 2016 as being illegal, and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

G. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Direction issued by Respondent No. 2 on 23.03.2017 vide File No. 800-262/2016-AS. II, as being illegal, ultra vires the Aadhaar Act and violative the Articles 14, 19(1)(a) and 21, of the Constitution;

H. In the alternative to Prayer (G) above, issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to Respondent No. 2 to prohibit all Telecom Service Providers from storing, retaining, making copies or in any manner dealing with Aadhaar Number, biometric information or any demographic information received

from Respondent No. 3 in the process of authentication and/or identity verification of mobile numbers;

I. Pass such further and other orders as this Hon'ble Court may deem fit and proper in the instant facts and circumstances.

802. There are seven Transfer Cases/Transfer Petitions to be heard alongwith the Writ Petitions filed Under Article 32, where the issues pertaining to UID Scheme and other related issues were also raised before different High Courts. Four Transfer Applications have been filed by Indian Oil Corporation Limited praying for transfer of different writ petitions pending in different High Courts to be heard alongwith Writ Petition (C) No. 494 of 2012-Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., which was considering the same issues. This Court had passed order in few transfer petitions allowing the same and issued certain directions, rest of transfer petitions are also allowed.

803. One Transfer Petition has also been filed by Union of India for transferring Writ Petition (C) No. 2764 of 2013-Sri v. Viswanandham v. Union of India and Ors., pending in the High Court of Hyderabad. It is not necessary to notice various issues in the pending different writ petitions, which were sought to be transferred by above transfer petitions/transfer cases. Issues pending in different High Courts were more or less same, which have been raised in leading Writ Petition (C) No. 494 of 2012-Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. and other writ petitions, which were entertained and pending in this Court. Special Leave Petition (Crl.) No. 2524 of 2014 has been filed by UIDAI and Anr. challenging the interim order dated 18.03.2014 passed by High Court of Bombay at Goa in Criminal Writ Petition No. 10 of 2014-Unique Identification Authority of India Through its Director General and Anr. v. Central Bureau of Investigation. On an application filed by the Central Bureau of Investigation, a Magistrate passed an order on 22.10.2013 directing the UIDAI to provide certain data with regard to a case of a rape of seven years old child. The Bombay High Court at Goa passed an order dated 18.03.2014 issuing certain interim directions, which were challenged by UIDAI in the aforesaid special leave petition. This Court passed an interim order on 24.03.2014 staying the order passed by Bombay High Court at Goa. This Court also by the interim order restrained the UIDAI to transfer any biometric information of any person who has been allotted the Aadhaar number to any other agency without his consent in writing. This special leave petition was directed to be listed alongwith Writ Petition (C) No. 494 of 2012.

804. This Court in Writ Petition (C) No. 494 of 2012 has issued various Interim Orders dated 23.09.2013, 24.03.2014, 16.03.2015, 11.08.2015 and 15.10.2015.

805. Seven Contempt Petitions have been filed. Out of seven, five contempt petitions have been filed alleging violation of the aforesaid interim orders and praying for issuing proceedings against the Respondents contemnor for willful disobeying the interim orders. One Contempt Petition (C) No. 674 of 2015 in W.P.(C) No. 829 of 2013 has been filed for issuing proceedings against the Respondents contemnor for wilfully disobeying the orders dated 23.09.2013, 24.03.2014 and 16.03.2015 passed by this Court. The other Contempt Petition (C) No. 34 of 2018 in W.P.(C) No. 1014 of 2017 has been filed against the Respondent contemnors for wilfully disobeying the order

dated 03.11.2017 passed by this Court in the aforesaid writ petition. All the contempt applications are pending without any order of issuing notice in the contempt petitions.

806. Writ Petition (C) No. 494 of 2012: Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. has been treated as leading petition wherein various orders and proceedings have been taken, few of such orders and proceedings also need to be noted. An interim order dated 23.09.2013 was passed in Writ Petition (C) No. 494 of 2012 which is to the following effect:

Issue notice in W.P.(C) No. 829/2013. Application for deletion of the name of Petitioner No. 1 in T.P.(C) Nos. 47 of 2013 is allowed.

T.P.(C) Nos. 47-48 of 2013 and T.P.(C) No. 476 of 2013 are allowed in terms of the signed order.

All the matters require to be heard finally. List all matters for final hearing after the Constitution Bench is over.

In the meanwhile, no person should suffer for not getting the Aadhaar card inspite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar Card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant.

807. By order dated 26.11.2013 all the States and Union Territories were impleaded as Respondents to give effective directions. Interim order passed earlier was also continued. On 24.03.2014 following order was passed in SLP(Crl.) No. 2524 of 2014:

Issue notice.

In addition to normal mode of service, dasti service, is permitted.

Operation of the impugned order shall remain stayed.

In the meanwhile, the present Petitioner is restrained from transferring any biometric information of any person who has been allotted the Aadhaar number to any other agency without his consent in writing.

More so, no person shall be deprived of any service for want of Aadhaar number in case he/she is otherwise eligible/entitled. All the authorities are directed to modify their forms/circulars/likes so as to not compulsorily require the Aadhaar number in order to meet the requirement of the interim order passed by this Court forthwith.

Tag and list the matter with main matter i.e. WP(C) No. 494/2012.

808. This Court on 16.03.2015 in Writ Petition (C) No. 494 of 2012 directed both the Union of India and the States and all their functionaries should adhere to the order dated 23.09.2013.

809. A three-Judge Bench on 11.08.2015 passed an order referring the matter to a Bench of appropriate strength. After reference was made on a prayer made by the Petitioners, following interim directions were also passed by the Bench:

Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench if the Union of India or the UIDA proceed in the following manner:

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card;

2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen;

3. The Unique Identification Number or the Aadhaar card will not be used by the Respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of food grains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme;

4. The information about an individual obtained by the Unique 15 Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation. Ordered accordingly.

810. A Constitution Bench of five Judges on 15.10.2015 passed an order after hearing application filed by the Union of India for seeking certain clarification/modification in the earlier order dated 11.08.2015, part of order, which is relevant for the present case is as follows:

3. After hearing the learned Attorney General for India and other learned senior Counsels, we are of the view that in paragraph 3 of the Order dated 11.08.2015, if we add, apart from the other two Schemes, namely, P.D.S. Scheme and the L.P.G. Distribution Scheme, the Schemes like The Mahatma Gandhi National Rural Employment Guarantee Scheme 12 (MGNREGS), National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions) Prime Minister's Jan Dhan Yojana (PMJDY) and Employees' Provident Fund Organisation (EPFO) for the present, it would not dilute earlier order passed by this Court. Therefore, we now include the aforesaid Schemes apart from the other two Schemes that this Court has permitted in its earlier order dated 11.08.2015.

5. We will also make it clear that the Aadhaar card Scheme is purely voluntary and it cannot be made mandatory till the matter is finally decided by this Court one way or the other.

811. A three-Judge Bench of this Court in its reference order dated 11.08.2015 noticed that these cases raise far-reaching questions of importance, which involves interpretation of the Constitution. Two earlier decisions of this Court, i.e., ***M.P. Sharma and Ors. v. Satish Chandra and Ors.,*** 1954 AIR SC 300, rendered by eight Judges and Anr. judgment rendered by six-Judges Bench in ***Kharak Singh v. State of U.P. and Ors.*** MANU/SC/0085/1962 : AIR 1963 SC 1295 were noticed and it was observed that in the event the observations made in the above two judgments are to be read

literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty Under Article 21 would be denuded of vigour and vitality. The three-Judge Bench observed that to give quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of M.P. Sharma (supra) and Kharak Singh (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.

812. By order dated 18.07.2017, a Constitution Bench considered it appropriate that the issue be resolved by a Bench of Nine Judge. Following order was passed on 18.07.2017 by a Constitution Bench:

During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors.-1950 SCR 1077 by an eight-Judge Constitution Bench, and also, in **Kharak Singh** v. **The State of U.P. and Ors.**-1962 (1) SCR 332 by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position.

Before dealing with the matter any further, we are of the view that the issue noticed hereinabove deserves to be placed before the nine-Judge Constitution Bench. List these matters before the Nine-Judge Constitution Bench on 19.07.2017.

Liberty is granted to the learned Counsel appearing for the rival parties to submit their written briefs in the meantime.

813. A nine-Judge Constitution Bench proceeded to hear and decide all aspects of right of privacy as contained in the Constitution of India.

814. Dr. D.Y. Chandrachud delivered opinion on his behalf as well as on behalf of Khehar, CJ., Agrawal, J. and Nazeer, J. Jasti Chelameswar, J., Bobde, J., Sapre, J. and Kaul, J. also delivered concurring, but separate opinions. The opinion of all the nine Judges delivered in above cases held that right of privacy is a right which is constitutionally protected and it is a part of protection guaranteed Under Article 21 of the Constitution of India. Explaining the essential nature of privacy, Dr. D.Y. Chandrachud, J. in paragraphs 297 and 298 laid down following:

297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the

mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms Under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables

the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion Under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate Article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

815. Privacy has been held to be an intrinsic element of the right to life and personal liberty Under Article 21 and has a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. It was further held that like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable.

816. The nine-Judge Constitution Bench also noticed the context of right of privacy under the international covenants. The protection of right of privacy as developed in U.K. decision, decisions of US Supreme Court, constitutional right to privacy in South Africa, constitutional right to privacy in Canada, privacy under European convention on human rights and under Charter of fundamental rights of European Union were considered with reference to decision rendered by foreign courts.

817. Justice D.Y. Chandradhud in his judgment traced the right of privacy from the judgments of this Court which were rendered for the last five decades. Referring to International Law on the subject, following observations were made by Justice D.Y. Chandradhud, J.:

103...In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary and, perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party. Consequently, as new cases brought new issues and problems before the Court, the content of the right to privacy has found elaboration in these diverse contexts.

818. All contours of the right of privacy having been noticed with all its dimensions, precautions and safeguards to be applied to protect fundamental rights guaranteed under the Constitution of India, we while proceeding to decide the issues raised herein have to proceed in the light of nine-Judge Constitution Bench of this Court as noticed above.

819. We have been manifestly benefited by able and elaborate submissions raised before us by many eminent learned senior Counsel appearing for both the parties. Learned Counsel for both the parties have advanced their submissions with clarity, conviction and lot of persuasions. On occasions very passionate arguments were advanced to support the respective submissions.

820. Different aspects of the case have been taken up and advanced by different counsel as per understanding between them which enlightened the Court on varied aspects of the case. The submissions have been advanced on behalf of the Petitioners by learned senior Advocates, namely, Shri Kapil Sibal, Shri Gopal Subramanium, Shri P. Chidambaram, Shri Shyam Divan, Shri K.V. Viswanathan, Shri Neeraj Kishan Kaul, Ms. Meenakshi Arora, Shri C.U. Singh, Shri Anand Grover, Shri Sanjay R. Hegde, Shri Arvind P. Datar, Shri V. Giri, Shri Sajan Poovayya and Shri P.V. Surendra Nath. A large number of other counsel also assisted us including Mr. Gopal Sankaranarayanan. On behalf of Respondents arguments were led by the learned Attorney General, Shri K.K. Venugopal. We have also heard Shri Tushar Mehta, Additional Solicitor General, Shri Rakesh Dwivedi, learned senior Counsel and Shri Zohaib Hossain.

821. We also permitted Dr. Ajay B. Pandey, Chief Executive Officer, UIDAI to give a power presentation to explain actual working of the system. After the power presentation was presented by Dr. Pandey in the presence of the learned Counsel for the parties, learned Counsel have also thereafter raised certain questions in respect of the power presentation, which the Respondents during submissions have tried to explain. In view of the enormity of submissions raised by the different learned Counsel appearing for the Petitioners, we proceed to notice different part of submissions together. As noted above writ petitions have been filed at two stages, firstly, when UIDAI Scheme was being impleaded by the Executive order dated 28.01.2009. Secondly, challenge was raised when Act, 2016 was enacted. The challenge to the Scheme dated 24.01.2009 contained almost same grounds on which Act, 2016 has been attacked. Additional ground to challenge the Scheme was that Scheme having not been backed by law, the entire exercise was unconstitutional and violative of fundamental rights guaranteed under the Constitution of India and deserved to be set aside. The Act, 2016 having enacted and now statutory scheme is in place, we shall first proceed to notice the submissions attacking the Act, 2016 which challenge has been substantial and elaborately raised before us.

Petitioner's Submissions

822. The submissions advanced by different learned Counsel for the Petitioners instead of noticing individually are being noted together in seriatim, which are as follows:

823. The Aadhaar project initiated by Executive notification dated 28.01.2009 as well as impugned Act, 2016 violates Article 21. The constitutional rights of a person protected Under Articles 19 and 21 of the Constitution is violated as individuals are compelled to part with their demographic and biometric information at the point of collection. Biometric data is part of one's body and control over one's body lies on the very centre of the Right of Privacy. Decisional privacy allows individual to make a decision about their own body and is an aspect of right of self-determination. The Aadhaar Project including the Aadhaar Act violate the informational privacy. Data collection at the enrolment centres, the Data retention at Central Identities Data Repositories (CIDR), usage and sharing of data violates Right of Privacy. There is complete absence of safeguards at the stage of collection, retention and use of data. Act, 2016 and Regulations framed thereunder lack safeguards to secure sensitive personal data of a person.

824. The Aadhaar project including Act, 2016 creates an architecture for pervasive surveillance, which again violate fundamental Right to Privacy. Personal data collected under the Executive

scheme dated 28.01.2009 was without any individual's consent. The Act, 2016 although contemplate that enrolment under Aadhaar is voluntary but in actual working of the Act, it becomes defacto compulsory. The Act, 2016 does not pass the three-fold test as laid down by Nine Judges Bench in Privacy Judgment-**K.S. Puttaswamy v. Union of India**, MANU/SC/1044/2017 : (2017) 10 SCC 1, hereinafter referred to as "Puttaswamy case". The Three-fold test laid down in Puttaswamy's case are:

(i) legality, which postulates the existence of law;

(ii) need, defined in terms of a legitimate state aim; and

(iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them;

825. It is submitted that a law to pass Under Article 21 should be a law according to procedure established by law. The Act, 2016 violates both Article 14 and Article 21 of the Constitution of India. A legitimate State aim, which ensure that nature and content of the law, which imposes the restriction falls within the reasonable restrictions mandated by Article 14 is also not fulfilled. State has not been able to discharge its burden that Aadhaar project has been launched for a legitimate State aim. The third requirement, which require that the means that are adopted by the legislature are proportional to the object sought to be fulfilled by the law is also not fulfilled since the provisions of the Act and Regulations framed thereunder does not satisfy the Proportionality Test. The various provisions of Act, 2016 and Regulations framed thereunder are unconstitutional. Section 6 of the Act, 2016 is unconstitutional inasmuch as it enable the Respondents to continually compel residents to periodically furnish demographic and biometric information. Section 7 of the Act, 2016 is unconstitutional inasmuch as it seeks to render the constitutional and statutory obligations of the State to provide benefits, subsidies and services, conditional upon an individual bartering his or her biometric and demographic information. Section 8 is unconstitutional since it enables tracking, tagging and profiling of individuals through the authentication process. Section 8 delineate a regime of surveillance, which enables persons' physical movements to be traced. Section 9 of the Act, 2016 is also unconstitutional inasmuch as the Aadhaar number is de facto serving as proof of citizenship and domicile. The provisions of Chapter IV, i.e., Sections 11 to 33 are ultra vires and unconstitutional. The Constitution does not permit the establishment of an authority that in turn through an invasive programme can claim every Indian citizen/resident to a central data bank and maintain lifelong records and logs of that individual. Sections 23 and 54 of the Act, 2016 are also unconstitutional on the ground of excessive delegation. Section 29 of the Act, 2016 is also liable to be struck down inasmuch as it permits sharing of identity information. Section 33 is unconstitutional inasmuch as it provides for the use of the Aadhaar data base for police investigation pursuant to an order of a competent court. Section 33 violates the protection against self-incrimination as enshrined Under Article 20(3) of the Constitution of India. Furthermore, Section 33 does not afford an opportunity of hearing to the concerned individual whose information is sought to be released by the UIDAI pursuant to the court's order. This is contrary to the principles of natural justice. Section 47 is also unconstitutional inasmuch as it does not allow an individual citizen who finds that there is a violation of the Act, 2016 to initiate the criminal process. Section 48, which empowers the Central Government to supersede UIDAI is vague and arbitrary.

826. Elaborating submission with regard to Section 7, it is submitted that Section 7 is unconstitutional and violative of Article 14 making Aadhaar mandatory, which has no nexus with the subsidies, benefits and services. A person cannot be forced into parting with sensitive personal information as a condition for availing benefits or services. Section 7 also falls foul of Article 14 since firstly such mandatory authentication has caused, and continues to cause, exclusion of the most marginalised Sections of society; and secondly, this exclusion is not simply a question of poor implementation that can be administratively resolved, but stems from the very design of the Act, i.e. the use of biometric authentication as the primary method of identification. There is large scale exclusion to the mostly marginalised society not being able to identify themselves by identification process. There is sufficient material on record to indicate general deprivation, which itself is sufficient to struck down Section 7 of the Act.

827. Elaborating submission on unconstitutionality of Section 57, it is contended that Section 57 allows an unrestricted extension of the Aadhaar information to users who may be Government agencies or private sector operators. Section 57 enables commercial exploitation of an individual's biometrics and demographic information by the Respondents as well as private entities. The provision also ensures creation of a surveillance society, where every entity assists the State to snoop upon an Aadhaar holder. The use of Aadhaar infrastructure by private entities is unconstitutional.

828. Elaborating submissions on Section 59, it is contended that Section 59 is unconstitutional inasmuch as it seeks to validate all action undertaken by the Central Government pursuant to the notification dated 28.01.2009. Enrolment in pursuance of notification dated 28.01.2009 having been done without an informed consent amounts to deprivation of the intimate personal information of an individual violating the fundamental Right of Privacy. All steps taken under the notification dated 28.01.2009 were not backed by any law, hence unconstitutional and clearly violate Article 21, which cannot be cured in a manner as Section 59 pretend to do.

829. The Act is unconstitutional since it collects the identify information of children between five to eighteen years without parental consent. The Aadhaar architecture adopts foreign technologies, on which UIDAI does not have any control, exposing data leak endangering life of people and security of nation.

830. Rule 9 as amended by PMLA Rules, 2017 is unconstitutional being violative of Articles 14, 19(1)(g), 21 and 300A of the Constitution of India. Rule 9 also violates Sections 3, 7 and 51 of the Act, 2016 and ultra vires to the provisions of PMLA Act, 2002.

831. Section 139AA of the Income Tax Act, 1961 is liable to be struck down as violative of Articles 14, 19(1)(g) and 21 of the Constitution in view of Privacy Judgment-**Puttaswamy (supra)**.

832. The Mobile Linking Circular dated 23.03.2017 issued by Ministry of Communications, Department of Telecommunications is ultra vires.

833. The Aadhaar Act, 2016 has wrongly been passed as a Money Bill. The Aadhaar Act, 2016 is not a Money Bill. The Speaker of Lok Sabha wrongly certified the bill as a Money Bill Under Article 110 of the Constitution of India virtually excluding the Rajya Sabha from legislative

process and depriving the Hon'ble President of his power of return. Clauses 23(2)(g), Section 54(2)(m) and Section 57 of The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 and the corresponding Sections of the Act, 2016 as notified clearly do not fall under any of the Clauses of Article 110 of the Constitution. The Act of Speaker certifying the bill as a Money Bill is clearly violation of constitutional provisions. Judicial Review of decision of Speaker certifying it as Money Bill is permissible on the ground of illegality. The Aadhaar Bill being not a money bill and having been passed by Parliament as a Money Bill, this ground alone is sufficient to strike down the entire Act, 2016.

834. Learned Attorney General replying the above submissions of the counsel for the Petitioners submits:

835. In the Privacy judgment ***P.S. Puttaswamy case (supra)*** all nine Judges uniformly agreed that privacy is a fundamental right traceable to the right to liberty Under Article 21 of the Constitution and hence subject to the same limitations as applicable to the said Article. It has further been held that right of privacy is not absolute and is subject to limitations. Justice D.Y. Chandrachud in his lead judgment laid down that following three tests are required to be satisfied for judging the permissible limits of the invasion of privacy Under Article 21 of the Constitution:

(a) The existence of a law;

(b) A legitimate State interest; and

(c) The said Law should pass the test of proportionality.

836. The above tests have also been agreed by other Judges who have delivered the separate judgment. Justice J. Chelameswar and Justice A.N. Sapre have used the test of compelling State interest whereas Justice R.F. Nariman stated that if this test is applied, the result is that one would be entitled to invoke larger public interest in lieu of legitimate State aim. The legitimate State aim obviously will lead to public interest, hence in the event test of legitimate State aim is fulfilled, the test of public interest stands fulfilled. After enactment of Act, 2016, the first condition in regard to the existence of a law stands satisfied. The Act requires only the bare demographic particulars, while eschewing most other demographic particulars. The Act further contains adequate safeguards for protection of information and preventing abuse through a catena of offences and penalties. The provisions of Act ensure that the law is a just, fair and reasonable and not fanciful, oppressive or arbitrary.

837. The legitimate State interest or a larger public interest permeates through the Act, 2016 which is clearly indicated by the following:

A. Preventing the dissipation of subsidies and social welfare benefits which is covered by Section 7 of the Aadhaar Act;

B. Prevention of black money and money laundering by imposing a requirement by law for linking Aadhaar for opening bank accounts;

C. To prevent income tax evasion by requiring, through an amendment to the Income Tax Act, that the Aadhaar number be linked with the PAN; and

D. To prevent terrorism and protect national security by requiring that Aadhaar be linked to SIM cards for mobile phones.

838. The Aadhaar Act, 2016 was enacted with prolonged deliberations and study. The Petitioners have failed to establish any arbitrariness in the Act. The right to life Under Article 21 is not the right to a mere animal existence, but the right to live with human dignity which would include the right to food, the right to shelter, the right to employment, the right to medical care, education etc. If these rights are juxtaposed against the right to privacy, the former will and prevail over the latter. In so far as implementation of Aadhaar project prior to coming into force of Act, 2016, since obtaining an Aadhaar number or an enrolment number was voluntary, especially because of the interim orders passed by this Court, no issue of violation of any right, leave alone a fundamental right, could arise. The judgments of this Court in ***M.P. Sharma and Kharak Singh (supra)*** being those of eight Judges and six Judges respectively, holding that the right to privacy is not a fundamental right, the judgments of smaller benches delivered during the period upto 2016 would be per incuriam, as a result of which the State need not to have proceeded on the basis that a law was required for the purpose of getting an Aadhaar number or an enrolment number. As a result, the Executive instructions issued for this purpose would be valid as well as the receipt of benefits and subsidies by the beneficiaries. In any view of the matter, Section 59 of the Act protects all actions taken during the period 2010 until the passing of the Aadhaar Act in 2016.

839. Learned Attorney General submitted that Aadhaar Act has rightly been characterised as Money Bill as understood Under Article 110 of the Constitution. The heart of the Aadhaar Act is Section 7. It is not the creation of Aadhaar number per se which is the core of the Act, rather, that is only a means to identify the correct beneficiary and ensure 'targeted delivery of subsidies, benefits and services', the expenditure for which is incurred from the Consolidated Fund of India. The decision of the Speaker incorporated into a certificate sent to the President is final and cannot be the subject matter of judicial review.

840. The decision and certification of the Speaker being a matter of procedure is included in the Chapter under the head 'Legislative Procedure' which clearly excluded judicial review. The present issue is squarely covered by the decisions of this Court.

841. Section 57, which has been attacked as being untraceable to any of the sub-clauses of (a) to (f) of Article 110 cannot be looked at in isolation. The Bill in its pith and substance should pass the test of being a Money Bill and not isolated provisions.

842. Learned Additional Solicitor General of India, Shri Tushar Mehta, also advanced submissions on few aspects of the matter. On Section 139AA of Income Tax Act, 1961 it is submitted that Petitioners can succeed only when they demonstrate that Section 139AA is violative of right to privacy on the following tests as laid down by nine-Judge Constitution Bench in ***Puttaswamy case***:

(i) absence of a law;

(ii) absence of legitimate State interest"

(iii) provisions being hit by lack of proportionality;

(iv) the provisions being manifestly arbitrary.

843. It is submitted that two-Judge Bench judgment of this Court in ***Binoy Biswam v. Union of India and Ors.*** MANU/SC/0693/2017 : (2017) 7 SCC 59, had upheld the vires of Section 139AA subject to issue of privacy which at that point of time was pending consideration. It is further submitted that provision pertaining to Permanent Account Number (PAN) was inserted in the Income Tax Act by Section 139A with effect from 01.04.1989 which obliged every person to quote PAN for different purposes as enumerated in Section 139A. The Petitioners or anyone else never felt aggrieved by requirement of getting PAN Under Section 139A and Parliament on considering the legitimate State interest has introduced Section 139AA which is only an extension of Section 139A which requires linking of PAN with Aadhaar number.

844. The Income Tax Act was amended by the Parliament by inserting Section 139AA in the legitimate State interest and in larger public interest. The object of linking was to remove bogus PAN cards by linking with Aadhaar, expose shell companies and thereby curb the menace of black money, money laundering and tax evasion. Problem of multiple PAN cards to same individuals and PAN cards in the name of fictitious individuals are common medium of money laundering, tax evasion, creation and channeling of black money.

845. Linking of Aadhaar with PAN is consistent with India's international obligations and Goals. India has signed the Inter-Governmental Agreement (IGA) with the USA on July, 9, 2015, for improving International Tax Compliance and implementing the Foreign Account Tax Compliance Act. It is submitted that prior to 01.07.2017 already 1.75 crore tax payers had linked their PAN with Aadhaar on a voluntary basis. Replying the arguments based on the interim orders passed by this Court in the present group of petitions, it is submitted that enactment of Aadhaar Act, 2016 has taken away and cured the basis of the interim order passed by this Court since one of the submissions which was made before this Court in passing the interim orders was that there was no law, that Aadhaar project was being implemented without backing of any law and during the said period the interim orders were passed. The Aadhaar Act addresses the concern of this Court as reflected in the interim orders passed before enactment of the Act.

846. Shri Mehta further contended that there is presumption to the constitutionality of a statute and unless one attacking the statute satisfies the Court that the statute is unconstitutional, the presumption will be there that statute is constitutional. Shri Mehta has further submitted that there is no presumption of criminality or guilt on the requirement to link Aadhaar.

847. Elaborating the doctrine of proportionality, Additional Solicitor General submits that Section 139A fully satisfies the aforesaid test of proportionality.

848. Additional Solicitor General in support of Prevention of Money-laundering (Maintenance of Records) Second Amendment Rules, 2017 submits that the State has sought to make the provisions of PMLA more robust and ensure that the ultimate object of the Act is achieved. The Amendment

Rules, 2017 place an obligation on part of the reporting entity to seek the details with regard to Aadhaar number of every client. It is submitted that the said Rules have to be read in consonance with the object of the PMLA and the principles of "beneficial owner" behind the corporate veil of shell companies, etc. It is submitted that the PMLA empowers the State to utilise the uniqueness of Aadhaar in order to tackle the problem of money laundering. It is submitted that the PMLA Act, with a clear emphasis on the investigation of the biological persons behind the corporate entities, establishes a mechanism wherein receiving benefits through benami or shell companies through related/connected Directors, fictitious persons or other personnel is eliminated.

849. Section 139AA and PMLA Rules amended in 2017 are co-ordinated in their operation. The PMLA Rules are not ultra vires. Mr. Mehta has also referred to international Conventions declaring money laundering to be a very serious offence. He submits that Prevention of Money Laundering Act, 2002 was enacted in the context of concrete international efforts to tackle the menace of money laundering. Shri Mehta has also emphasised on the necessity of verification of bank accounts with Aadhaar number. He submits that the verification of bank account by way of Aadhaar is done for the reason that often bank accounts are opened in either fictitious names or in the name of wrong persons on the basis of forged identity documents and financial crimes are committed. It is seen that accommodation entries are mostly provided through the banking channels by bogus companies to convert black money into white. Benami transactions routinely take place through banking channels. All of the above, can to a large extent be checked by verifying Aadhaar with bank accounts to ensure that the account belongs to the person who claims to be the account holder and that he or she is a genuine person. Verification of bank account with Aadhaar also ensures that the direct benefit transfer of subsidies reach the Aadhaar verified bank account and is not diverted to some other account. Shell companies are often used to open bank accounts to hold unaccounted money of other entities under fictitious identities which will also be curbed once Aadhaar verification is initiated.

850. Shri Mehta further contends that impugned PMLA Rules do not violate Article 300A. Amendment Rules, 2017 also cannot be said to be ultra vires to the parent Act since it advances the object of the Act and is not ultra vires of any provision of the Act. The Amendment Rules are required to be placed before the Parliament which serve a purpose of check by the Legislature. As per Section 159 of the Act any notification Under Section 29 is to be placed before the Parliament and Parliament may amend or reject the same. The Rules, 2017 are just, fair and reasonable and in furtherance of the object of the Act and do not provide for any arbitrary, uncanalised or unbridled power.

851. Shri Rakesh Dwivedi, learned senior Counsel, appearing on behalf of UIDAI and State of Gujarat has made elaborate submissions while replying the arguments of Petitioners. The right to privacy is part of Article 21. The autonomy of individual is associated over matters which can be kept private. These are concerns over which there is a reasonable expectation of privacy. The reasonable expectation involves two aspects. Firstly, the individual or individuals claiming a right to privacy must establish that their claim involves a concern about some harm likely to be inflicted upon them on account of the alleged act. This concern should be real and not imaginary or speculative. Secondly, the concern should not be inflated.

852. The Act, 2016 operates in the relational sphere and not in the core, private or personal sphere of residents. It involves minimal identity information for effective authentication. The purpose is limited to authenticate for identification. The Act operates in a public sphere. Section 29 of the Aadhaar Act, 2016 provides protection against disclosure of identity information without the prior consent of the Aadhaar Number holder concerned. Sharing is intended only for authentication purposes.

853. It is submitted that by their very nature the demographic information and photograph sought to be collected cannot be said to be of such a nature as would make it a part of a reasonable expectation paradigm. Today, globally all ID cards and passports contain photographs for identification along with address, date of birth, gender etc. The demographic information is readily provided by individuals globally for disclosing identity while relating with others; while seeking benefits whether provided by government or by private entities. People who get registered for engaging in a profession, who take admissions in Schools/Colleges/university, who seek employment in the government or private concerns and those who engage in various trade and commerce are all required to provide demographic information and even photographs. There is no expectation of privacy in providing those information for the above purposes.

854. There are lot of enactments which require disclosure of demographic information comprising name, address, email address etc., for example Central Motor Vehicle Rules, 1989, Companies Act, 2013, Special Marriage Act, The Registration of Electoral Rules, 1960, The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2009 and the Passports Act. However, there are certain special contexts in which non-disclosure of demographic information could be considered as raising a reasonable expectation of privacy such as where juveniles in conflict with law are involved or where a rape victim's identity or medical information is involved. Thus, unless some such special context or aggravating factor is established, there would not be any reasonable expectation of privacy with respect to demographic information.

855. As regards the core biometric information, comprising finger prints and iris scans it would be pertinent to bear in mind that the Aadhaar Act is not dealing with the intimate or private sphere of the individual. The core biometrics are being collected from residents for authentication use in a public sphere and in relational context in which regard there is no reasonable expectation of privacy in relation to fingerprints and iris scans. Iris scan is nothing but a photograph of the eyes taken from a camera. From fingerprints and iris scans nothing is revealed with regard to a person.

856. Use of fingerprints with regard to registration of documents is an accepted phenomena. The use of mandatory requirement of biometric attendance is increasing day by day both in public and private sector. Thus, requirement of fingerprints and iris scan would not attract the fundamental right of privacy. The fingerprint and iris scan have been considered to be most accurate and non-invasive mode of identifying an individual.

857. The information collected under the Act, 2016 does not involve processing for economic and sociological purposes. Further, in the data center de-duplication process is based on anonymization and what is stored in the servers for authentication process are simply templates and encrypted information of Aadhaar number and demographics. The identity data collected is stored offline.

There is no internet connectivity. Thus, there is more than a reasonable security protection under the Act.

858. The rationale of Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental Rights of life and personal liberty and to eliminate inequality with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some of such schemes are PDS, scholarship, mid day meals, LPG subsidies, free education, etc.

859. The requirement to undergo authentication on the basis of Aadhaar number is made mandatory by Section 7. This requirement is only for "undertaking authentication". However, if authentication fails, despite more than one attempt then the possession of Aadhaar number can be proved otherwise, i.e., by producing the Aadhaar card, and those who do not have Aadhaar number can make an application for enrolment and produce the enrolment id number (EID). This takes care of non-exclusion.

860. Aadhaar Act truly seeks to secure to the poor and deprived persons an opportunity to live their life and exercise their liberty. By ensuring targeted delivery through digital identification, it not only provides them a nationally recognised identity but also attempts to ensure the delivery of benefits, service and subsidies with the aid of public exchequer/Consolidated Fund of India. And it does so without impacting the Fundamental Right to Privacy of the Indians or at best minimally impacting it with adequate safeguards.

861. Regarding the numerization or numericalization of individual argument, it is submitted that the Aadhaar number does not convert the human being into a number. The objective of the Aadhaar number is to enable authentication which is done on a 1:1 matching basis, i.e., to say when the requesting entity feeds the Aadhaar number along with some identity information then the CIDR picks up the template having that Aadhaar number automatically and matches identity information with the encrypted information in the template. This Aadhaar number is, therefore, absolutely essential for the technological success of authentication. It is, therefore, a technology requirement and it does not amount to numerization or numericalisation. The contention of the Petitioners ignores the distinction between identity and identification. The 12 digit Aadhaar number is not given by UIDAI to alter the identity of the individual. It is provided to the enrolled individual to enable his identification through authentication. Authentication is a multi dimensional identifying process. The Aadhaar number is one element or one identifier in the process of identification through authentication. It is identificational in nature. Section 2(a) of Aadhaar Act defines Aadhaar number to mean "an identification number". Section 2(c) defines authentication as a process requiring submission of Aadhaar number to CIDR for verification. Further, Section 4(2) provides that the Aadhaar number shall be a random number and shall bear no relation to the attributes or identity of the Aadhaar number holder. It is proof of identity and not identity itself.

862. Replying the submission of the Petitioners that fundamental right of privacy/dignity/autonomy Under Article 21 could not be waived. It is submitted that Section 7 of Aadhaar Act does not involve any issue of waiver. When an individual undergoes any

authentication to establish his identity to receive benefits, services or subsidies, he does so to enliven his fundamental right to life and personal liberty Under Article 21.

863. With regard to Section 57, it is submitted that since an infrastructure for establishing identity of residents is available, therefore, Parliament intends to make the use of Aadhaar number available for other purposes provided the need for the service of authentication arises pursuant to any law or contract. The rationale seems to be that due to liberalisation and privatisation in many governmental and public sector zones, private corporate bodies are operating in parallel and in competition with public sector-banking, insurance, defence, health etc. These are vital core sectors absolutely essential for National integrity, National economy and life of people. In many areas private bodies operate under common regulators such as TRAI, Airport Authority, IRDA etc. Then there is rapidly growing e-commerce.

864. In Reply to the submission of Shri Kapil Sibal that the real object of the Act was to provide data to the digital giants like Google, Facebook and other private players, it is contended that there is no factual foundation for this submission in any writ petition. In the Act there is a complete bar with respect to sharing of core biometric information vide Section 29(1). The non-core biometric information is to be shared only as per the provisions of the Act and Regulations and with prior consent and only for the purpose of authentication.

865. On the submission of the Petitioners that power of UIDAI to add identity information by Regulation is unguided and violative of Article 14, it is submitted that Clauses (g) and (j) of Section 2 use the expression 'such other biological attribute'. This general expression needs to be construed by applying the doctrine of *ejusdem generis*. The use of word 'such' implies similarity with what is specifically mentioned before the general expression. The Regulations framed by UIDAI are required to be laid before the Parliament Under Section 55. Section 55 is a mandatory provision. The Parliament has power to modify the Regulation and also to reject the Regulation. This is a legislative check on the Regulation making power.

866. Almost 3% of GDP amounting to trillions of rupees is allocated by Governments towards subsidies, scholarships, pensions, education, food and other welfare programmes. But approximately half of it does not reach the intended beneficiaries. A former Prime Minister said only 15 out of 100 rupees reaches the target person. This was confirmed by the Planning Commission. In the Audit Report No. 3 of 2000 CAG stated in "Overview" that programmes suffered from serious targeting problems. It noted that bogus ration cards were being used for diversions (1.93 crores bogus).

867. Even otherwise, there is no other identification document which is widely and commonly possessed by the residents of the country and most of the identity documents do not enjoy the quality of portability. They also do not lend assurance and accuracy on account of existence of fake, bogus and ghost cards. Therefore, there was need of a biometric Aadhaar number which enables de-duplication and authentication.

868. Shri Dwivedi submits that security and data privacy is ensured in the following manner:

(i) The data sent to ABIS is completely anonymised. The ABIS systems do not have access to resident's demographic information as they are only sent biometric information of a resident with a reference number and asked to de-duplicate. The de-duplication result with the reference number is mapped back to the correct enrolment number by the Authorities own enrolment server.

(ii) The ABIS providers only provide their software and services. The data is stored in UIDAI storage and it never leaves the secure premises.

(iii) The ABIS providers do not store the biometric images (source). They only store template for the purposes of de-duplication (with reference number).

(iv) The encrypted enrolment packet sent by the enrolment client software to the CIDR is decrypted by the enrolment server but the decrypted packet is never stored.

(v) The original biometric images of fingerprints, iris and face are archived and stored offline. Hence, they cannot be accessed through an online network.

(vi) The biometric system provides high accuracy of over 99.86%. The mixed biometric have been adopted only to enhance the accuracy and to reduce the errors which may arise on account of some residents either not having biometrics or not having some particular biometric.

869. Biometrics are being used for unique identification in e-passports by 120 countries. Out of these many countries use fingerprints and/or iris scans. Additionally 19 European Countries have smart National Identity cards having chips containing biometric information. A number of African and Asian countries are also using biometrics for identification. The ECHR and ECJ have not declared the use of biometrics or the collection and storage of data for the said purpose to be violative of Human Rights. It has infact been upheld in the context of passports, by the ECJ.

870. On the submissions that de-duplication/authentication software has been received from three foreign suppliers and since the source code of the algorithm is with the foreign suppliers, therefore, they can easily obtain the data in the CIDR merely by manipulation of the algorithm, Shri Dwivedi submits that foreign biometric solution providers only provide the software, the server and hardware belongs to UIDAI. So far the software is concerned UIDAI uses the software as licensee. There is no free access to the server room which is wholly secured by security guards. The enrolment data packet, after being received in the data center, is decrypted for a short duration to enable extraction of minutiae and preparation of templates. Once the template is prepared the entire biometric data is stored offline under the complete control of the UIDAI officials.

871. It is correct that the source code for the algorithms provided are retained by the BSPs which constitutes the intellectual property right of the BSP, however, it does not introduce any insecurity of data in the CIDR as the softwares operate automatically in the servers located in the server rooms and also because the software functions only on the basis of the templates whilst the biometric data is stored offline.

872. During the submissions, Shri Dwivedi also emphasised on prohibition of sharing of core biometric information. As per Section 29(1) read with Regulation 17(1) of the Aadhaar (Sharing

of Information) Regulations, 2016. Referring to various Regulations of the above Regulations. Shri Dwivedi submitted that the architecture of Aadhaar and its functioning does not permit CIDR to note about parties of any transaction or location of the individual seeking identification of his Aadhaar number. Requesting Agency is strictly restricted to sharing of only demographic information plus photograph and for authentication only, and this is also with express and separate prior consent of the ANH. Requesting Entities cannot share authentication logs with any person other than the ANH or for grievance redressal and resolution of disputes or with the Authority for audit and shall not be used for any purpose other than stated in Regulation 18(5).

873. Elaborating on security Shri Dwivedi submitted that Section 28(4) mandates that the UIDAI shall ensure that the agencies appointed by it have in place the appropriate technical and organizational security measures for the information and ensure that the agreements or arrangements entered into with such agencies impose obligations equivalent to those imposed on the Authority and require such agencies to act only on instructions from the Authority.

874. RE shall ensure that the identity information of the ANH or any other information generated during the authentication is kept confidential, secure and protected against access, use and disclosure not permitted under the Act and Regulations. [Regulation 17(1)(e)]. The private key used for digitally signing the authentication request and the license keys are kept secure and access controlled [Regulation 17(1)(f) and 22(3)]. All relevant laws and Regulations in relation to data storage and data protection relating to Aadhaar based identity information in their systems, that of their agents and with authentication devices are compiled with [Regulation 17(1)(g)].

875. Regulation 22(4) provides that RE shall adhere to all Regulations, information security policies, processes, standards, specifications and guidelines issued from time to time.

876. By virtue of Section 56 and 61 of the Aadhaar Act, 2016, the provisions of IT Act, 2000 are applicable except where it is inconsistent with Aadhaar Act. The regular regime under the IT Act with all its provisions for punishment and penalty are attracted since the biometric information is an electronic record and the data is sensitive personal data or information as defined in the IT Act, 2000. On submission of the Petitioner that there is no mechanism for raising any grievance, Shri Dwivedi submits that UIDAI has set up grievance redressal cell as contemplated Under Section 23(1)(s) of the Act. Any ANH can make a complaint for redressal of grievance.

877. The Petitioner's submission that Aadhaar Act enables the State to put the entire population of the country in an electronic leash and to track them all the time and it has converted itself as the State into a totalitarian State, it is submitted that none of the four clauses of Regulation 26 entitle the authority to store data about the purpose for which authentication is being done. Section 32(3) of the Aadhaar Act specifically prohibits the authority from collecting, storing or maintaining, whether directly or indirectly any information about the purpose of authentication. The proviso to Regulation 26 is also to the same effect. Here, "the purpose of authentication" means the nature of activity being conducted by ANH in relation to which the authentication is required and is being done.

878. It is submitted that the devices which are used for the purpose of authentication are not geared or designed to record the nature of the activity being done by the ANH which necessitates

authentication. The device can only tell the authority about the time of authentication, the identity of the RE, the PID, the time and nature of response, the code of the device and the authentication server side configurations. Hence, with the aid of authentication record it is not possible for the UIDAI to track the nature of activity being engaged into by the ANH. In fact, in overwhelming majority of cases the authentication record would not enable the authority to know even the place/location where the activity is performed by the ANH. The reason is that there are about 350 number of REs. The REs alone can authenticate with the help of CIDR and this is done by them through the ASA. In a large number of cases, the organizations requiring authentication would be doing so through some RE with whom they have some agreements. To illustrate nic.in is an RE which provides authentication service to large number of government organizations who have agreements with it. The authentication record would only contain information about the identity about the RE. It will give information only about the RE(nic.in) and not about the organization which is requiring authentication through the RE. In most cases the authentication is one time.

879. It is submitted that biometrics is being increasingly resorted to for identification purposes by many countries. At least 19 countries in Europe are using biometric smart cards where data is stored in the chip. These smart cards are similar to the smart cards which were used under the 2006 Act in U.K. The important difference lies in the extent of data of the individual which is stored in the smart card. The European cards unlike the UK, do not store 50 categories of data which was being stored in the UK card that came to be abolished in 2010 by the Repealing Act, 2010. In some European countries the smart cards are issued in a decentralized manner, as in Germany. But in some other countries the smart cards are issued in a centralized manner. In either case, the State is possessed of all the information which is stored in the chip of the smart card, though it may not involve authentication. These smart cards are considered to be property of the State and the State can require the production of the smart card for identification at any time. Estonia is considered to be a pioneer and leader in the field of the use of biometrics and it has a centralized data base.

880. It is submitted that the architecture of the Aadhaar Act does not lead to any real possibility, proximate or remote of mass surveillance in real time by the State. This is not an Act for empowering surveillance by the State. It merely empowers the State to ensure proper delivery of welfare measures mandated by Directive Principles of State Policy(Part IV of the Constitution) which actually enliven the Fundamental Rights Under Article 14, 19 and 21 of the Constitution for a vast majority of the poor and down trodden in the country and thereby to bring about their comprehensive emancipation. It seeks to ensure, justice, social, economic and political for the little Indians.

881. Responding on the arguments raised by the Petitioner on Section 47 of the Act, it is submitted that Section 47 has rationale. The offences and penalties under Chapter VII are all intended to maintain the purity and integrity of CIDR which has been established of the ANH. Secondly, the entire enrolment, storage in CIDR and authentication exercise is so vast and that any breach can be handled with efficiency and effectively only by UIDAI. There are similar enactments which contain similar provisions which have been upheld by this Court. An individual can make a complaint to UIDAI directly or through grievance redressal cell. The authority would be obliged to examine the complaints and to lodge the complaint in the Court as per Section 47. Additionally, the individual is generally likely to have a complaint of identity theft, cheating or disclosure. In

such a situation he can always invoke the provisions of Sections 66C, 66D and 72A of the IT Act, 2000. The said offences carry identical penalties.

882. Elaborating on Section 59 of the Act, it is submitted that Section 59 purports to provide a statutory basis to the resolution of the Government of India, Planning Commission dated 28.01.2009 and also to validate anything done or any action taken by the Central Government under the said resolution. Section 59 of the Aadhaar Act seeks to continue what was done and the actions which were taken under the Resolution dated 28.01.2009. Section 59 is clearly extending its protection retrospectively to that which was done under the notification dated 28.01.2009.

883. Section 59 provides a deemed fiction. As a result of this deemed fiction one has to imagine that all the actions taken under the aforesaid notifications were done under the Act and not under the aforesaid notifications.

884. Replying the submission of the Petitioner that large scale of marginal Section of the society is deprived due to exclusion from getting the benefits and the Act violates Article 14 of the Constitution, it is submitted that there is no exclusion on account of de-duplication. It cannot be denied that there may be some cases where due to non-identification, a person may have been put to some dis-advantage but on failure of authentication the authorities have clear discretion to accept other means of identification to deliver the subsidies and benefits. In any view of the matter on some administrative lapses and some mistakes in implementation does not lead to conclude that Act is unconstitutional and wrong implementation of the Act does not effect the constitutionality of the statutes.

885. Learned Counsel for the parties have placed reliance on several judgments of this Court and Foreign Courts in support of their respective submissions which we shall notice while considering the respective submissions hereinafter.

886. Apart from hearing elaborate submissions made by the learned Counsel for the Petitioners as well as the Respondents, we have also heard several learned Counsel for the intervener. The submission made by the intervener has already been covered by learned Counsel for the Petitioners as well as for the Respondents, hence it needs no repetition.

887. We have considered the submissions raised before us. From the pleadings on record and the submissions made following are the main issues which arise for consideration:

(1) Whether requirement under Aadhaar Act to give one's demographic and biometric information is violative of fundamental right of privacy ?

(2) Whether the provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar number are unconstitutional and do not pass three fold test as laid down in ***Puttaswamy case*** ?

(3) Whether collection of data of residents, its storage, retention and use violates fundamental right of privacy ?

(4) Whether Aadhaar Act creates an architecture for pervasive surveillance amounting to violation of fundamental right of privacy ?

(5) Whether the Aadhaar Act provides protection and safety of the data collected and received from individual ?

(6) Whether Section 7 of Aadhaar Act is unconstitutional since it requires that for purposes of establishment of identity of an individual for receipt of a subsidy, benefit or service such individual should undergo authentication or furnish proof of possession of Aadhaar number or satisfy that such person has made an application for enrolment ? Further the provision deserves to be struck down on account of large number of denial of rightful claims of various marginalised Section of society and down trodden?

(7) Can the State while enlivening right to food, right to shelter etc. envisaged Under Article 21 encroach upon the rights of privacy of the beneficiaries ?

(8) Whether Section 29 of the Aadhaar Act is liable to be struck down inasmuch as it permits sharing of identity information ?

(9) Whether Section 33 is unconstitutional inasmuch as it provides for the use of Aadhaar data base for Police investigation, which violates the protection against self-incrimination as enshrined Under Article 20(3) of the Constitution of India ?

(10) Whether Section 47 of Aadhaar Act is unconstitutional inasmuch as it does not allow an individual who finds that there is a violation of Aadhaar Act to initiate a criminal process ?

(11) Whether Section 57 of Aadhaar Act which allows an unrestricted extension of Aadhaar information of an individual for any purpose whether by the State or any body, corporate or person pursuant to any law or contact is unconstitutional ?

(12) Whether Section 59 is capable of validating all actions taken by the Central Government under notification dated 28.01.2009 or under notification dated 12.09.2015 and all such actions can be deemed to be taken under the Aadhaar Act?

(13) Whether Aadhaar Act is unconstitutional since it collects the identity information of children between 5 to 18 years without parental consent ?

(14) Whether Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 is unconstitutional being violative of Article 14, 19(1)(g), 21 and 300A of Constitution of India and Section 3, 7, 51 of Aadhaar Act. Further, whether Rule 9 is ultra vires to the PMLA Act, 2002. itself.

(15) Whether circular dated 23.02.2017 issued by the Department of Telecommunications, Government of India is ultra vires.

(16) Whether Aadhaar Act could not have been passed as Money Bill ? Further, whether the decision of Speaker of Lok Sabha certifying the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Bill, 2016 as Money Bill is subject to judicial review ?

(17) Whether Section 139-AA of the Income Tax Act, 1961 is unconstitutional in view of the Privacy judgment in ***Puttaswamy case?***

(18) Whether Aadhaar Act violates the Interim Orders passed by this Court in Writ Petition (C) No. 494 of 2012 & other connected cases?

Issue Nos.1 and 2	Whether requirement under Aadhaar Act to give one's demographic and biometric information is violative of fundamental right of privacy ? And Whether the provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar number are unconstitutional and do not pass three fold test as laid down in *Puttaswamy case ?*

888. Before we answer the above issues we need to look into the object and purpose for which Aadhaar Act was enacted. The Statement of Objects and Reasons particularly paragraph 5 of such Statement throws light on the object for which Legislation came into existence. Paragraph 5 of the Statement of Objects and Reasons is as follows:

5. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016, inter alia, seeks to provide for--

(a) issue of Aadhaar numbers to individuals on providing his demographic and biometric information to the Unique Identification Authority of India;

(b) requiring Aadhaar numbers for identifying an individual for delivery of benefits, subsidies, and services the expenditure is incurred from or the receipt therefrom forms part of the Consolidated Fund of India;

(c) authentication of the Aadhaar number of an Aadhaar number holder in relation to his demographic and biometric information;

(d) establishment of the Unique Identification Authority of India consisting of a Chairperson, two Members and a Member-Secretary to perform functions in pursuance of the objectives above;

(e) maintenance and updating the information of individuals in the Central Identities Data Repository in such manner as may be specified by Regulations;

(f) measures pertaining to security, privacy and confidentiality of information in possession or control of the Authority including information stored in the Central Identities Data Repository; and

(g) offences and penalties for contravention of relevant statutory provisions.

889. Preamble to any Act is a key to read and unfold an enactment. The Preamble of Aadhaar Act reads:

An Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto.

890. Section 2 of the Act is definition clause. Section 2(a) defines "Aadhaar number" in the following manner:

2(a) "Aadhaar number" means an identification number issued to an individual Under Sub-section (3) of Section 3;

891. Sections 2(g) and 2(k) define "biometric information" and "demographic information" which is to the following effect:

2(g) "biometric information" means photograph, finger print, Iris scan, or such other biological attributes of an individual as may be specified by Regulations;

(k) "demographic information" includes information relating to the name, date of birth, address and other relevant information of an individual, as may be specified by Regulations for the purpose of issuing an Aadhaar number, but shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history;

892. Section 3 of the Act deals with Aadhaar enrolment. Section 3 is as follows:

3.(1) Every resident shall be entitled to obtain an Aadhaar number by submitting his demographic information and biometric information by undergoing the process of enrolment: Provided that the Central Government may, from time to time, notify such other category of individuals who may be entitled to obtain an Aadhaar number.

(2) The enrolling agency shall, at the time of enrolment, inform the individual undergoing enrolment of the following details in such manner as may be specified by Regulations, namely:

(a) the manner in which the information shall be used;

(b) the nature of recipients with whom the information is intended to be shared during authentication; and

(c) the existence of a right to access information, the procedure for making requests for such access, and details of the person or department in-charge to whom such requests can be made.

(3) On receipt of the demographic information and biometric information Under Sub-section (1), the Authority shall, after verifying the information, in such manner as may be specified by Regulations, issue an Aadhaar number to such individual.

893. The challenge in this batch of cases is challenge to the Act and its various provisions on the ground that the Act and its provisions violate right of privacy which is now recognised as fundamental right. All aspects of privacy right, which is accepted as a fundamental right Under Article 21, have been elaborately and authoritatively dealt by nine-Judge Constitution Bench of this Court in ***Puttaswamy case (supra)***.

894. **Alan F. Westin** in his work "Privacy and Freedom" defined privacy as "the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behaviour to others".

895. Dr. D.Y. Chandrachud, J., in his opinion (which expresses majority opinion) in paragraph 3 of the judgment while analysing the concept of privacy held:

3. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of State and non-State entities regulates aspects of social existence which bear upon the freedom of the individual. The preservation of constitutional liberty is, so to speak, work in progress. Challenges have to be addressed to existing problems. Equally, new challenges have to be dealt with in terms of a constitutional understanding of where liberty places an individual in the context of a social order. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analysed in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. While we revisit the question whether our Constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

896. Dwelling on essential nature of privacy in paragraphs 297 and 298 following has been laid down by Dr. D.Y. Chandrachud, J.:

297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are

inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself....

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.

897. This Court has further held that like the right to life and liberty, privacy is not absolute. Any curtailment or deprivation of that right would have to take place under a regime of law. In paragraph 313 following has been held:

313. Privacy has been held to be an intrinsic element of the right to life and personal liberty Under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.

898. Further elaboration of the core of privacy has been stated in the following words in paragraphs 322, 323 and 326:

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

899. The first issue which is under consideration is as to whether requirement under the Aadhaar Act to give one's biometric and demographic information is violative of fundamental right of privacy. Demographic and biometric information has been defined in Section 2 as noted above. Biometric information and demographic information are two distinct concepts as delineated in the Act itself. We first take up the demographic information which includes information relating to the name, date of birth, address and other relevant information of an individual, as may be specified by Regulations for the purpose of issuing an Aadhaar number. There is also injunction in Section 2(k) that demographic information shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Thus, demographic information which are contemplated to be given in the Act are very limited information. The Regulations have been framed under Act, namely, Aadhaar (Enrolment and Update) Regulations, 2016. Regulation 4 enumerates demographic information which shall be collected from individuals undergoing enrolment. Regulation 4 is as follows:

4. Demographic information required for enrolment.--(1) The following demographic information shall be collected from all individuals undergoing enrolment (other than children below five years of age):

(i) Name;

(ii) Date of Birth;

(iii) Gender;

(iv) Residential Address.

(2) The following demographic information may also additionally be collected during enrolment, at the option of the individual undergoing enrolment:

(i) Mobile number;

(ii) Email address.

(3) In case of Introducer-based enrolment, the following additional information shall be collected:

(i) Introducer name;

(ii) Introducer's Aadhaar number.

(4) In case of Head of Family based enrolment, the following additional information shall be collected:

(i) Name of Head of Family;

(ii) Relationship;

(iii) Head of Family's Aadhaar number;

(iv) One modality of biometric information of the Head of Family.

(5) The standards of the above demographic information shall be as may be specified by the Authority for this purpose.

(6) The demographic information shall not include race, religion, caste, tribe, ethnicity, language, record of entitlement, income or medical history of the resident.

900. A perusal of Regulation 4 indicates that information which shall be collected from individual are his name, date of birth, gender and residential address. The additional information which can be collected at the option of the individual is mobile number and e-mail address. Schedule I of the Regulation contains format of enrolment form which contains columns for information as contemplated Under Regulation 4.

901. The information contemplated Under Regulation 4 are nothing but information relating to identity of the person.

902. Every person born on earth takes birth at a place at a time with a parentage. In the society person is identified as a person born as son or daughter of such and such. The identity of person from the time of taking birth is an identity well known and generally every person describes himself or herself to be son or daughter of such and such person.

903. Every person, may be a child in school, a person at his workplace, relates himself or herself with his or her parent's, place of birth etc., in interaction with his near and dear and outside world

a person willingly and voluntarily reveals his identity to others in his journey of life. The demographic information are readily provided by individuals globally for disclosing identity while relating with others; while seeking benefits whether provided by government or by private entities. People who get registered for engaging in a profession, who take admissions in schools/colleges/university, who seek employment in the government or private concerns, and those who engage in various trade and commerce are all required to provide demographic information. Hence, it can be safely said that there cannot be a reasonable expectation of privacy with regard to such information. There are large number of statutes which provide for giving demographic information by the individuals. For inclusion of name of a person in the Electoral List as per the Registration of Electoral Rules, 1960 framed under the Representation of People Act, 1950, a person is required to give similar demographic information in Form II, i.e., name, date of birth, gender, current address and permanent address, which also contains optional particulars of email address and mobile number. Under Central Motor Vehicle Rules, 1989 person making an application for driving licence is required to give name, parent, permanent address, temporary address, date of birth, place of birth, educational qualification, etc.

904. Under Special Marriage Act, name, condition, occupation, age, dwelling place, age, etc. are to be given. Thus, providing such demographic information in most of the statutes clearly indicates that those information are readily provided and no reasonable expectation of privacy has ever been claimed or perceived in above respect.

905. It is well settled that breach of privacy right can be claimed only when claimant on the facts of the particular case and circumstances have "reasonable expectation of privacy". In Court of Appeal in ***Regina (Wood) v. Commissioner of Police of the Metropolis,*** (2009) EWCA Civ 414: (2010) 1 WLR 123, following was held:

22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a "reasonable expectation of privacy" (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the State pursuant to Article 8(2). I shall say a little in turn about these three antidotes to the overblown use of Article 8.

24. As for the second-a "reasonable expectation of privacy"-I have already cited paragraph 51 of Von Hannover, with its reference to that very phrase, and also to a "legitimate expectation" of protection. One may compare a passage in Lord Nicholls' opinion in Campbell at paragraph 21:

Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into

account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.

In the same case Lord Hope said at paragraph 99:

The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.

In Murray v. Big Pictures (UK) Ltd. Sir Anthony Clarke MR referred to both of these passages, and stated:

35... [S]o far as the relevant principles to be derived from Campbell are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question....

36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

906. The reasonable expectation of privacy test was also noticed and approved in privacy judgment, Dr. D.Y. Chandrachud, J. has referred judgment of US Supreme Court in ***Katz v. United States***, 389 US 347 (1967), following has been observed by this Court in ***K.S. Puttaswamy (supra)*** in paragraph 185:

The majority adopted the "reasonable expectation of privacy" test as formulated by Harlan, J. in *Katz* and held as follows:

7. [The] inquiry, as Mr. Justice Harlan aptly noted in his Katz 66 concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy" ... whether ... the individual has shown that "he seeks to preserve [something] as private". ... The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as "reasonable" " ... whether ... the individual's expectation, viewed objectively, is "justifiable" under the circumstances. ...

8. ... Since the pen register was installed on telephone company property at the telephone company's central offices, Petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area".

Thus the Court held that the Petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not "legitimate". However, the judgment also noted the limitations of the Katz test:

Situations can be imagined, of course, in which Katz 66 two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. ... In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognised Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.

907. After noticing several judgments of US Supreme Court, D.Y. Chandrachud, J. in ***K.S. Puttaswamy (supra)*** has noted that the reasonable expectation of privacy test has been relied on by various other jurisdictions while developing the right of privacy. In paragraph 195 following has been held:

195. The development of the jurisprudence on the right to privacy in the United States of America shows that even though there is no explicit mention of the word "privacy" in the Constitution, the courts of the country have not only recognised the right to privacy under various amendments to the Constitution but also progressively extended the ambit of protection under the right to privacy. In its early years, the focus was on property and protection of physical spaces that would be considered private such as an individual's home. This "trespass doctrine" became irrelevant when it was held that what is protected under the right to privacy is "people, not places". The "reasonable expectation of privacy" test has been relied on subsequently by various other jurisdictions while developing the right to privacy.

908. As noted above an individual in interaction with society or while interacting with his close relatives naturally gives and reveals his several information e.g. his name, age, date of birth, residential address, etc. We are of the opinion that in giving of those information there is no reasonable expectation of privacy. Thus, we conclude that demographic information required to be given in the process of enrolment does not violate any right of privacy.

909. Every person born gets a name after his birth. He strives throughout his life to establish himself to be recognised by society. Recognition by fellow man and society at large is cherished dream of all human being, for fulfilling the above dream, he does not hide himself from society rather takes pride in reasserting himself time and again when occasion arises. He proclaims his identity time and again.

910. The right to identity is an essential component of an individual in her relationship with the State. The identification is only the proof of identity and everyone has right to prove his identity by an acceptable means. Aadhaar is contemplated as one PAN INDIA identity, which is acceptable proof of identity in every nook and corner of the country.

911. Reference of International Declaration and covenants have been made to assert that providing for an identity to every resident is an international obligation of India. In this reference following has been referred to:

Name of the Convention [Date of Accession]	Provision

Universal Declaration of Human Rights, 1948 [10.12.1948]	**Article 6:** Everyone has the right to recognition everywhere as a person before the law.
International Covenant on Civil and Political Rights, 1976	**Article 16:** Everyone shall have the right to recognition everywhere as a person before the law.
UN Convention on the Rights of the Child, 1989 [11.12.1992]	**Article 8:** States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. **Article 29(1)**: States Parties agree that the education of the child shall be directed to:.... (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;....

912. We may also notice one of the applications filed by an organisation, namely, Swatantra, which works for and represents the interests of the transgender and sexual minorities communities in India. The submission has been made on behalf of organisation that Aadhaar Act and Rules making the Unique Identification Number (UID) or the Aadhaar number mandatory and requiring them to provide their personal demographic and biometric information for enrolment is a serious infringement of the constitutional right to privacy and dignity of transgender persons. It is submitted that the transgender community has experienced a history of legally and socially sanctioned violence and discrimination from private individuals and State authorities. Reference of Criminal Tribes Act, 1871 and certain State legislations has been made in this regard. The applicant also refers to judgment of this Court in ***National Legal Services Authority and Union of India and Ors.*** MANU/SC/0309/2014 : 2014 (5) SCC 438, where this Court has held that the freedom of expression includes one's right to expression of a self-identified gender identity through dress, action behaviour etc. The submission has been made that making the disclosure of gender

Under Section 2 of the Aadhaar Act and Regulation 4 of the Aadhaar (Enrolment & Update) Regulations violates Article 14 of the Constitution.

913. Further, the Aadhaar Act amounts to discrimination against transgender persons Under Article 15 of the Constitution on the ground of gender. Further, it is contended that disclosure of gender identity violates Article 21 and Article 19(1) (a) of the transgender persons.

914. We having considered the provisions of the Act and Enrolment and Update Regulations and having found that disclosure of demographic information does not violate any right of privacy, the said conclusion shall also be fully applicable with regard to transgender. This Court in ***NALSA (supra)*** has held that Article 19(1)(a) which provides that all citizens shall have the right to freedom of speech and expression which includes one's right to expression and his self-identified gender, it is the right of a person to identify his gender. In paragraphs 69 and 72 of the judgment following has been laid down:

69. Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

72. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected Under Article 19(1) (a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community Under Article 19(1) (a) of the Constitution of India and the State is bound to protect and recognize those rights.

915. When this Court has already recognised the constitutional right of transgenders of their self-identification and it has been further held that self-identification relates to their dignity. Dignity is a human right which every human being possesses. Article 15 came for consideration in the said judgment where this Court held that Article 15 has used the expression 'citizen' and 'sex' which expressions are 'gender neutral'. The protection of fundamental rights is equally applicable to transgenders. Paragraph 82 is as follows:

82. Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited

to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

916. This Court having recognised the right of transgenders to their self-identity in which transgenders also feel pride as human being, the mere fact that under Enrolment and Update Regulations they are required to provide demographic information regarding gender does not, in any manner, affect their right of privacy. There is no expectation of right of privacy with regard to gender. The aforesaid right having been clearly recognised by this Court, expression of those rights of self-identification cannot, in any manner, be said to affect their right to privacy. We, thus, conclude that with regard to transgenders also no right of privacy is breached in giving the demographic information. In so far as biometric information as held above, ample justification has been found which satisfied the three fold test as laid down in ***Puttaswamy case***, which is equally applicable to transgender also.

917. Now, we come to the biometric information as referred to in Section 2(g) and required to be given in the process of enrolment by a person. Biometric information means photographs, fingerprints, iris scan and other such biometric attributes of an individual as may be specified by the Regulations. Biometric informations are of physical characteristics of a person. A person has full bodily autonomy and any intrusion in the bodily autonomy of a person can be readily accepted as breach of his privacy. In **Regina (Wood) v. Commissioner of Police of the Metropolis (supra)**, in paragraph 21, following has been laid down by Lord LJ.:

21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him-should make him-master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (the Von Hannover case 40 EHRR I, paragraph 50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the State shows an objective justification for doing so.

918. U.S. Supreme Court in **United States v. Antonio Dionisio,** 35 L. Ed. 2D 67 had occasion to consider physical characteristic of a person's voice in context of violation of privacy rights. With regard to fingerprints, it was noticed that the fingerprinting itself involves none of the probing into an individual's private life. In paragraph Nos. 21, 22 following was stated:

[21, 22] In Katz v. United States, supra, we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office...." 389 U.S., at 351, 19 L Ed 2d 576. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any

more than he can reasonably expect that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:

Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection... the underlying identifying characteristics--the constant factor throughout both public and private communications--are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large.'" United States v. Doe (Schwartz), 457 F2d, at 898-899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." Schmerber v. California, 384 US, at 769-770, 16L Ed 2d 908. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "pat-down" in Terry--"surely... an annoying, frightening and perhaps humiliating experience." Terry v. Ohio, 392 US, at 24-25, 20 L Ed 2d 889. Rather, this is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." Davis v. Mississippi, 394 US, at 727, 22 L Ed 2d 676: cf. Thom v. New York Stock Exchange, 306 F Supp 1002, 1009.

919. The Petitioners have relied upon **S. and Marper v. The United Kingdom**, a judgment of Grand Chamber of European Court of Human Rights dated 04.12.2008. European Court of Human Rights on an application submitted by Mr. S. and Mr. Marper allowed their claim of violation of Article 8 of Convention. Applicants had complained that the authorities had continued to retain their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with an acquittal or had been discontinued. In the above context, nature of fingerprints and DNA samples came to be examined in reference of breach of Article 8 of the Convention. The retention of DNA samples and fingerprints was held to be interference with the right to respect for private life. In paragraph 84, following was held:

84. The Court is of the view that the general approach taken by the Convention organs in respect of photographs and voice samples should also be followed in respect of fingerprints. The Government distinguished the latter by arguing that they constituted neutral, objective and irrefutable material and, unlike photographs, were unintelligible to the untutored eye and without a comparator fingerprint. While true, this consideration cannot alter the fact that fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant.

920. One important observation, which has been made in the above case was that on the question whether the personal information retained by the authorities involves any of the private-life aspects, due regard has to be given to the specific context in which the information at issue has been recorded. Following was stated in paragraph 67:

67..... However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, *mutatis mutandis, Friedl, cited above, §§49-51, and Peck v. the United Kingdom, cited above, §59).*

921. The biometric data as referred to in Section 2(g) thus may contain biological attributes of an individual with regard to which a person can very well claim a reasonable expectation of privacy but whether privacy rights have been breached or not needs to be examined in the subject context under which the informations were obtained.

922. Having found that biometric information of a person may claim a reasonable expectation of privacy, we have to answer as to whether obtaining biometric information in context of enrolment breaches the right of privacy of individual or not.

923. D.Y. Chandrachud, J. in **Puttaswamy (supra)** held that all restraints on privacy, i.e. whether a person has reasonable expectation of privacy, must fulfill three requirements before a restraint can be held to be justified. In Paragraph 319, following has been held:

310. While it intervenes to protect legitimate state interests, the state must nevertheless put into place a robust regime that ensures the fulfillment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and

liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

924. We, thus, have to test the provisions of Aadhaar Act in light of three-fold test as have been laid down above. The First requirement, which need to be fulfilled is existence of law. Admittedly, Aadhaar Act is a Parliamentary law, hence the existence of law is satisfied. Mere existence of law may not be sufficient unless the law is fair and reasonable. The Aadhaar Act has been enacted with an object of providing Aadhaar number to individuals for identifying an individual for delivery of benefits, subsidies and services. Several materials have been brought on the record which reflect that in the several studies initiated by the Government as well as the World Bank and Planning Commission, it was revealed that food grains released by the Government for the beneficiaries did not reach the intended beneficiaries and there was large scale leakages due to the failure to establish identity. Reference to Audit Report No. 3 of 2000 of Comptroller & Auditor General of India is made in this regard. The Planning Commission of India in its Performance Evaluation Report titled "Performance Evaluation Report of Targeted Public Distribution System(TPDS)" dated March, 2005 found as follows:

I. State-wise figure of excess Ration Cards in various states and the existence of over 1.52 Crore excess Ration Cards issued.

II. Existence of fictitious households and identification errors leading to exclusion of genuine beneficiaries.

III. Leakage through ghost BPL Ration Cards found to be prevalent in almost all the States under study.

IV. The leakage of food grains through ghost cards has been tabulated and the percentage of such leakage on an All India basis has been estimated at 16.67%.

V. It is concluded that a large part of the subsidized food-grains were not reaching the target group.

925. The Law, i.e., Aadhaar Act, which has been brought to provide for unique identity for delivery of subsidies, benefits or services was a dire necessity, which decision was arrived at after several reports and studies. Aadhaar Act was, thus, enacted for a legitimate State aim and fulfills the criteria of a law being fair and reasonable. Learned Attorney General has also placed reliance on report of United Nations titled "Leaving No One Behind: the imperative of inclusive development", which has stated as follows:

The decision of India in 2010 to launch the Aadhaar programme to enrol the biometric identifying data of all its 1.2 billion citizens, for example, was a critical step in enabling fairer access of the people to government benefits and services. Programmes such as Aadhaar have tremendous potential to foster inclusion by giving all people, including the poorest and most marginalized, an official identify. Fair and robust systems of legal identity and birth registration are recognised in the new 2030 Agenda for Sustainable Development as an important foundation for promoting inclusive societies.

926. Learned Attorney General has also relied on Resolution of the United Nations General Assembly dated 25.09.2015 titled "Transforming our World: the 2030 Agenda for Sustainable Development". It is submitted that by the said resolution, the following goal was adopted"-

16.9 by 2030, provide legal identity for all, including birth registration.

927. In this context, judgment of U.S. Supreme Court in **Otis R. Bowen, Secretary of Health and Human Services, et al. v. Stephen J. Roy et al.,** 476 U.S. 693 (1986) is referred where the statutory requirement that an applicant provide a social security number as a condition of eligibility for the benefits in question was held to be not violative. It was held that requirement is facially neutral in religious terms, applies to all applicants for the benefits involved, and clearly promotes a legitimate and important public interest. Chief Justice Burger writing the opinion of the Court stated:

The general governmental interests involved here buttress this conclusion. Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference. Moreover, legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.

The test applied in cases like Wisconsin v. Yoder, 406 U.S. 205 : 92 S. Ct. 1526 : 32 L. Ed.2d 15 (1972), is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

928. Repelling an argument that requirement of providing social security account number for obtaining financial aid to dependent children violates the right to privacy, following was held in **Doris McElrath v. Joseph A. Califano**, in Para 11:

[11] The Appellants' principal contention on appeal is that the federal and state Regulations requiring dependent children to acquire and submit social security account numbers as a condition of eligibility for AFDC benefits are statutorily invalid as being inconsistent with and not authorized by the Social Security Act. We find the arguments advanced in support of this contention to be without merit and hold that the challenged Regulations constitute a legitimate condition of eligibility mandated by the Congress under the Social Security Act. Accord, Chambers v. Klein, 419 F. Supp. 569 (D.N.J. 1976), aff'd mem., 564 F.2d 89 (3d Cir. 1977); Green v. Philbrook, 576 F.2d 440 (2d Cir. 1978); Arthur v. Department of Social and Health Services, 19 Wn. App. 542,

576 P.2d 921 (1978). We therefore conclude that the district court properly dismissed the Appellants' statutory invalidity allegations for failure to state a claim upon which relief could be granted.

929. Now, we come to third test, i.e., test of proportionality. D.Y. Chandrachud, J. in Puttaswamy **(supra)** has observed "Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law". In **Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors.** MANU/SC/0495/2016 : (2016) 7 SCC 353, Dr. Sikri, J explaining the concept of proportionality laid down following in Paragraphs 64 and 65:

64. The exercise which, therefore, to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

65. We may unhesitatingly remark that this doctrine of Proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read Clause (1) along with Clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in plethora of judgments has held that the expression "reasonable restriction" seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of Clause (1) of Article 19 and the social control permitted by any of the Clauses (2) to (6). It is held that the expression "reasonable" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object {See **P.P. Enterprises v. Union of India** MANU/SC/0036/1982 : (1982) 2 SCC 33. At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations {See Mohd. Hanif Quareshi v. State of Bihar MANU/SC/0027/1958 : 1959 SCR 629). In M.R.F. Ltd. v. State of Kerala MANU/SC/0702/1998 : (1998) 8 SCC 227, this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:

(1) The directive principles of State Policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour the constitutionality of the Act will naturally arise.

930. One of the submissions of the Petitioner to contend that proportionality test is not fulfilled in the present case is; State did not adopt an alternative and more suitable and least intrusive method of identification, i.e., smart card or other similar devices. While examining the proportionality of a Statute, it has to be kept in mind that the Statute is neither arbitrary nor of an excessive nature beyond what is required in the interest of public. The Statutory scheme, which has been brought in place has a reasonable relation to the object which the legislation seeks to achieve and the legislation does not exceed the object. The object of Aadhaar Act as noticed above was to provide for unique identity for purposes of delivery of benefits, subsidies and services to the eligible beneficiaries and to ward of misappropriation of benefits and subsidies, ward of deprivation of eligible beneficiaries. European Court of Justice has taken a view that the proportionality merely involves an assessment that the measures taken was not more than necessary. Reference is made to the judgment of Digital Rights Ireland Ltd. v. Minister for Communications [2015] QBECJ, wherein it was held:

46. In that regard, according to the settled case law of the court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives: see Afton Chemical Ltd. v. Secretary of State for Transport (Case C-343/09) [2010] ECR I-7027, para 45; the Volker case [2010] ECR I-11063, para 74; Nelson v. Deutsche Lufthansa AG (Joined Cases C-581/10 and C-629/10) [2013] 1 All ER (Comm.) 385, para 71; Sky Osterreich GmbH v. Osterreichischer Rundfunk (Case C-283/11) [2013] All ER (EC) 633, para 50; and Schaible v. Land Baden-Wiirttemberg (Case C-101/12) EU:C:2013:66I; 17 October 2013, para 29.

931. United Kingdom Supreme Court in **AB v. Her Majesty's Advocate**, [2017] UK SC 25, held that it is not for the Court to identify the alternative measures, which may be least intrusive. In Para 37 and 39, following has been held:

37. I am not persuaded. It is important to recall that the question of whether the Parliament could have used a less intrusive measure does not involve the court in identifying the alternative measure which is least intrusive. The court allows the legislature a margin of discretion and asks whether the limitation on the Article 8 right is one which it was reasonable for the Parliament to propose: Bank Mellat v. HM Treasury (No 2) [2013] UKSC 38, [2014] AC 700, para 75 per Lord Reed;

39. The balance, which this Court is enjoined to address, is different. It is the question of a fair balance between the public interest and the individual's right to respect for his or her private life Under Article 8. The question for the court is, in other words, whether the impact of the

infringement of that right is proportionate, having regard to the likely benefit of the impugned provision.

932. The biometric information which are obtained for Aadhaar enrolment are photographs, fingerprints and iris scan, which are least intrusion in physical autonomy of an individual. U.S. Supreme Court in **John Davis v. State of Mississippi,** 394 US 721 (1969), indicated that Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. The physical process by which the fingerprints are taken does not require information beyond the object and purpose. Therefore, it does not readily offend those principles of dignity and privacy, which are fundamental to each **legislation of due process**. One of the apprehension, which was expressed by Petitioners that since as per definition of biometric information contained in Section 2(g), further, biological attributes of an individual may be specified by Regulations, which may be more intrusive. Section 2(g) use the word "such biological attributes". Thus, applying the principles of ejusdem generis, the biological attributes can be added by the Regulations, has to be akin to one those mentioned in Section 2(g), i.e. photographs, fingerprints and iris scan. In event, such biological attributes is added by Regulations, it is always open to challenge by appropriate proceedings but the mere fact that by Regulations any such biometric attributes can be added, there is no reason to accept the contention that biological attributes, which can be added may be disproportionate to the objective of the Act. Biometric information, thus, which is to be obtained for enrolment are not disproportionate nor the provisions of Aadhaar Act requiring demographic and biometric information can be said to be not passing three-fold test as laid down in Puttaswamy **(supra)** case. We, thus, answer Issue Nos. 1 and 2 in following manner:

Ans. 1 and 2:(i) requirement under Aadhaar Act to give one's demographic and biometric information does not violate fundamental right of privacy.

(ii) The provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar Number pass three-fold test as laid down in **Puttaswamy (supra)** case, hence cannot be said to be unconstitutional.

ISSUE NOS.3,4 AND 5	COLLECTION, STORAGE, RETENTION, USE, SHARING AND SURVEILLACE.

933. The Aadhaar Act provides complete architecture beginning with enrolment. The enrolment means process to collect demographic and biometric information from individuals by enroling agencies. The enroling agencies have to set up enrolment centers and have to function in accordance with the procedure specified by UIDAI. Section 8 contemplates for authentication for Aadhaar number which authentication was done by authority. When a request is made for identification by any requesting entity in respect to biometric or demographic information of Aadhaar number holder, the authority may engage one or more entities to establish and maintain central identity data repository. Section 28 provides for the security and confidentiality of information which is to the following effect:

28.(1) The Authority shall ensure the security of identity information and authentication records of individuals.

(2) Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals.

(3) The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or Regulations made thereunder, and against accidental or intentional destruction, loss or damage.

(4) Without prejudice to Sub-sections (1) and (2), the Authority shall--

(a) adopt and implement appropriate technical and organisational security measures;

(b) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and

(c) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

(5) Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone:

Provided that an Aadhaar number holder may request the Authority to provide access to his identity information excluding his core biometric information in such manner as may be specified by Regulations.

934. The Act contains specific provision providing that no core biometric information collected under the Act is shared to anyone for any reason whatsoever or use for any purpose other than generation of Aadhaar number or authentication under this Act. The statute creates injunction for requesting entity to use identity information data for any purpose other than that specified to the individual at the time for submitting any identification. Section 29 provides for not sharing information collected or created under this Act, which is to the following effect:

29.(1) No core biometric information, collected or created under this Act, shall be--

(a) shared with anyone for any reason whatsoever; or

(b) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

(2) The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by Regulations.

(3) No identity information available with a requesting entity shall be--

(a) used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or Security and confidentiality of information.

(b) disclosed further, except with the prior consent of the individual to whom such information relates.

(4) No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by Regulations.

935. Section 30 itself contemplates that biometric information are sensitive personal data or information. There are strict conditions envisaged in Section 33 for disclosure of information. The disclosure of information is contemplated only on two contingencies. Firstly, when an order is passed by a Court not inferior to that of District Judge and secondly when the disclosure is made in the interest of national security in pursuance of a direction of the officer not below the rank of Joint Secretary to the Government of India.

936. Chapter VII of the Act deals with the offences and penalties for impersonation at the time of enrolment penalty for disclosing identity information is provided Under Sections 34 to 37. Section 38 provides for penalty who accesses or secures access to the Central Identities Data Repository. Section 39 provides for penalty who uses or tampers with the data in the Central Identities Data Repository. Section 40 provides for penalty whoever, being a requesting entity, uses the identity information of an individual in contravention of Sub-section (3) of Section 8. Section 41 deals with penalty for non-compliance by an enrolling agency or requesting entity. Section 42 deals with general penalty. Section 42 is as follows:

42. Whoever commits an offence under this Act or any Rules or Regulations made thereunder for which no specific penalty is provided elsewhere than this section, shall be punishable with imprisonment for a term which may extend to one year or with a fine which may extend to twenty-five thousand rupees or, in the case of a company, with a fine which may extend to one lakh rupees, or with both.

937. Regulations have been framed under the Act, namely, (1) The Aadhaar (Enrolment and Update) Regulations, 2016, (2) The Aadhaar (Authentication) Regulations, 2016, (3) The Aadhaar (Data Security) Regulations, 2016 and (4) The Aadhaar (Sharing of Information) Regulations, 2016.

938. We have already noticed the detailed submissions of learned Counsel for UIDAI. Following are the measures by which Security Data of privacy is ensured. The security and data privacy is ensured in the following manner:

i. The data sent to ABIS is completely anonymised. The ABIS systems do not have access to resident's demographic information as they are only sent biometric information of a resident with a reference number and asked to de-duplicate. The de-duplication result with the reference number is mapped back to the correct enrolment number by the Authorities own enrolment server.

ii. The ABIS providers only provide their software and services. The data is stored in UIDAI storage and it never leaves the secure premises.

iii. The ABIS providers do not store the biometric images (source). They only store template for the purpose of de-duplication (with reference number)

iv. The encrypted enrolment packet sent by the enrolment client software to the CIDRis decrypted by the enrolment server but the decrypted packet is never stored.

v. The original biometric images of fingerprints, iris and face are archived and stored offline. Hence, they cannot be accessed through an online network.

vi. The biometric system provides high accuracy of over 99.86%. The mixed biometric have been adopted only to enhance the accuracy and to reduce the errors which may arise on account of some residents either not having biometrics or not having some particular biometric.

939. After the enrolment and allotting an Aadhaar number to individual the main function of the authority is authentication of an Aadhaar number holder as and when request is made by the requesting agency. The authentication facility provided by the authority is Under Section 3 of the Authentication Regulations, 2016 which is to the following effect:

3. Types of Authentication.--

There shall be two types of authentication facilities provided by the Authority, namely--

(i) Yes/No authentication facility, which may be carried out using any of the modes specified in Regulation 4(2); and

(ii) e-KYC authentication facility, which may be carried out only using OTP and/or biometric authentication modes as specified in Regulation 4(2).

940. Various modes of authentication are provided in Regulation 4 of Authentication Regulations 2016, which are: Demographic authentification; One time pin-based authentication; Biometric-based authentification and Multi-factor authentification. A requesting entity may choose suitable mode of authentication for particular function or business function as per its requirement.

941. Regulation 7 provides for capturing biometric information by requesting entity which is to the following effect:

7. Capturing of biometric information by requesting entity.--

(1) A requesting entity shall capture the biometric information of the Aadhaar number holder using certified biometric devices as per the processes and specifications laid down by the Authority.

(2) A requesting entity shall necessarily encrypt and secure the biometric data at the time of capture as per the specifications laid down by the Authority.

(3) For optimum results in capturing of biometric information, a requesting entity shall adopt the processes as may be specified by the Authority from time to time for this purpose.

942. Regulation 9 deals with process of sending authentification requests. Sub-Regulation (1) of Regulation 9 contends the safe method of transmission of the authentication requests.

943. The Aadhaar (Data Security) Regulations, 2016 contain detail provisions to ensuring data security. Regulation 3 deals with measures for ensuring information security. Regulation 5 provides security obligations of the agencies, consultants, advisors and other service providers engaged by the Authority for discharging any function relating to its processes.

944. The Aadhaar (Sharing of Information) Regulations, 2016 also contain provisions providing for restrictions on sharing identity information. Sub-Regulation (1) of Regulation 3 provides that core biometric information collected by the Authority under the Act shall not be shared with anyone for any reason whatsoever.

945. Sharing of Information Regulations, 2016 also contain various other restrictions. Regulation 6 contains restrictions on sharing, circulating or publishing of Aadhaar number which is to the following effect:

6. **Restrictions on sharing, circulating or publishing of Aadhaar number.--**

(1) The Aadhaar number of an individual shall not be published, displayed or posted publicly by any person or entity or agency.

(2) Any individual, entity or agency, which is in possession of Aadhaar number(s) of Aadhaar number holders, shall ensure security and confidentiality of the Aadhaar numbers and of any record or database containing the Aadhaar numbers.

(3) Without prejudice to sub-Regulations (1) and (2), no entity, including a requesting entity, which is in possession of the Aadhaar number of an Aadhaar number holder, shall make public any database or record containing the Aadhaar numbers of individuals, unless the Aadhaar numbers have been redacted or blacked out through appropriate means, both in print and electronic form.

(4) No entity, including a requesting entity, shall require an individual to transmit his Aadhaar number over the Internet unless such transmission is secure and the Aadhaar number is transmitted in encrypted form except where transmission is required for correction of errors or redressal of grievances.

(5) No entity, including a requesting entity, shall retain Aadhaar numbers or any document or database containing Aadhaar numbers for longer than is necessary for the purpose specified to the Aadhaar number holder at the time of obtaining consent.

946. The scheme of the Aadhaar Act indicates that all parts of the entire process beginning from enrolment of a resident for allocation of Aadhaar number are statutory regulated.

947. The Authentication Regulations, 2016 also limit the period for retention of logs by requesting entity. Regulation 18(1) which is relevant in this context is as follows:

18. **Maintenance of logs by requesting entity.-**

(1) A requesting entity shall maintain logs of the authentication transactions processed by it, containing the following transaction details, namely:

(a) the Aadhaar number against which authentication is sought;

(b) specified parameters of authentication request submitted;

(c) specified parameters received as authentication response;

(d) the record of disclosure of information to the Aadhaar number holder at the time of authentication; and

(e) record of consent of the Aadhaar number holder for authentication, but shall not, in any event, retain the PID information.

948. The residents' information in CIDR are also permitted to be updated as per provisions of the Aadhaar (Enrolment and Update) Regulations, 2016. An over view of the entire scheme of functions under the Aadhaar Act and Regulations made thereunder indicate that after enrolment of resident, his informations including biometric information are retained in CIDR though in encrypted form. The major function of the authority under Aadhaar Act is authentication of identity of Aadhaar number holder as and when requests are made by requesting agency, retention of authentication data of requesting agencies are retained for limited period as noted above. There are ample safeguards for security and data privacy in the mechanism which is at place as on date as noted above.

949. Shri Shyam Divan, learned senior Counsel appearing for the Petitioners has passionately submitted that entire process of authentication as is clear from actual working of the Aadhaar programme reveals that Aadhaar Act enables the State to put the entire population of the country in an electronic leash and they are tracked 24 hours and 7 days. He submits that putting the entire

population under surveillance is nothing but converting the State into a totalitarian State. Elaborating his submission, Shri Divan submits that process of authentication creates authentication records of (1) time of authentication, (2) identity of the requesting entity. Both requesting entity and UIDAI have authentication transactions data which record the technical details of transactions. The devices which are used by the requesting entities have IP address which enables knowledge about geographical information of Aadhaar number holder with knowledge of his location, details of transaction, every person can be tracked and by aggregating the relevant data the entire population is put on constant surveillance. Aadhaar programme endeavours all time mass surveillance by the State which is undemocratic and violates the fundamental rights of individual.

950. The meta data regarding authentication transactions which are stored with the authority are potent enough to note each and every transaction of resident and to track his activities is nothing but surveillance. Regulation 26 of Authentication Regulations, 2016 provides storage of meta data related to the transaction. Regulation 26 which is relevant is as follows:

26. **Storage and Maintenance of Authentication Transaction Data.**--(1) The Authority shall store and maintain authentication transaction data, which shall contain the following information:

(a) authentication request data received including PID block;

(b) authentication response data sent;

(c) meta data related to the transaction;

(d) any authentication server side configurations as necessary Provided that the Authority shall not, in any case, store the purpose of authentication.

951. We may first notice as to what is meta data which is referred to in Regulation 26 above. The UIDAI receives the requests for authentication of ANH. The request for authentication received by requesting agency does not contain any information as to the purpose of authentication neither requesting agency nor UIDAI has any record pertaining to purpose for which authentication has been sought by Aadhaar number holder. The meta data referred to in Regulation 26(c) is only limited technical meta data.

952. Shri Kapil Sibal had submitted that CIDR holds the entire Aadhaar database retained by CIDR. It has become a soft target for internal/external/indigenous/foreign attacks and single point of failure. Shri Sibal has referred to a RBI report which states:

Thanks to Aadhaar, for the first time in the history of India, there is now a readily available single target for cyber criminals as well as India's external enemies. In a few years, attacking UIDAI data can potentially cripple Indian businesses and administration in ways that were inconceivable a few years ago. The loss to the economy and citizens in case of such an attack is bound to be incalculable.

953. He has further submitted that a digital world is far more susceptible to manipulation than the physical world. No legislation can or should allow an individual's personal data to be put at risk, in the absence of a technologically assured and safe environment. Such level of assurance is impossible to obtain in the digital space. Biometric, core biometric and demographic information of an individual, once part of the digital world is irretrievable: a genie out of the bottle that cannot be put back. The digital world is a vehicle to benefit the information economy. A move from an information economy to creating an architecture for an information polity has far reaching consequences impacting the most personal rights, protected by the right to privacy. The technology acquired by the UIDAI has also been criticised by the Opaque Foreign Technologies.

954. The above submissions have been strongly refuted by learned Attorney General and learned Counsel appearing for the UIDAI. It is submitted by the Respondents that the above submissions regarding mass surveillance have been made on misconception regarding actual operation of the entire process.

955. The meta data which is aggregation of authentication transactions does not contain any detail of actual transaction done by ANH. In the event, in a period of 30 days, 30 requesting agencies, may be one or different, have requested for authentication the UIDAI has only the recipient of demographic/biometric of ANH authentication without any information regarding purposes of authentication. Thus, even if authentication details are aggregated, there is no information with the UIDAI regarding purpose of authentication nor authentication leaves for any trail so as to keep any track by UiDAI to know the nature of transaction or to keep any kind of surveillance as alleged. Section 32 Sub-section (3) of the Aadhaar Act specifically prohibits the authority from collecting or maintaining either directly or indirectly any information for the purpose of authentication.

956. Proviso to Regulation 26 is also to the same effect i.e. provided that the authority shall not, in any case, store the purpose of authentication.

957. Elaborating on CIDR, Shri Dwivedi submits that CIDR is a centralised database which contains all Aadhaar numbers issued with corresponding demographic and biometric information. It is a "Protected System" notified Under Section 70 of Information Technology Act, 2000. The storage involves end to end encryption, logical partitioning, fire walling and anonymisation of decrypted biometric data. The encryption system follows a private key/public model and the private key is available only with UIDAI at the processing location. Hence even if data packets are lost or stolen the biometric information regarding the same cannot be accessed. At the CIDR there is multi-layer technological security to afford protection from hacking, and there is also deployment of armed forces to prevent unauthorised physical access into the CIDR Area. Additionally entry is electronically controlled. There are CIDR at two location already and some other locations are likely to be set up to ensure that data is not lost even in the remote eventuality of a disaster. The CIDR is centrally managed. The templates of finger prints and iris data are generated in ISO format and the same along with demographic data and photo are stored securely in the authentication server database. This database is used for authentication in the manner provided in Aadhaar (Authentication) Regulation 2016.

958. In view of above, the apprehension raised by Shri Kapil Sibal that CIDR is a soft target is misplaced.

959. To support his submission, Shri Shyam Divan, learned Counsel for the Petitioner has placed reliance on judgment of the United States Supreme Court in **United States v. Antoine Jones,** 132 S. Ct. 945 (2012).

960. A large number of foreign judgments touching various aspects of accumulation of data, retention of data, surveillance, has been cited by both the parties to support their respective stand. It is necessary to have an over view of the opinion expressed by various Courts in other countries of the world. The present age being the age of technology and information, the issues pertaining to storage and retention of personal data in different contexts have come up before several Courts of different countries which also need to be noted.

961. The Petitioners have relied on European Court, Human Rights in **S. and Marper v. The United Kingdom**, 2008 (48) EHRR 50. The applicants, S. and Marper had submitted two applications against the United Kingdom, Great Britain and Northern Ireland Under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The applicants complained that the authorities had continued to retain their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with an acquittal or had been discontinued. The applicants had applied for judicial review of the police decisions not to destroy the fingerprints and samples which application was rejected. The Court of appeal upheld the decision of the Administrative Court. The House of Lords had also dismissed the appeal on 22nd July, 2004. The House of Lords had taken the view that the mere retention of fingerprints and DNA samples did not constitute an interference with the right to respect for private life but stated that, if he were wrong in that view, he regarded any interference as very modest indeed.

962. BARONESS HALE disagreed with the majority considering that the retention of both fingerprint and DNA data constituted an interference by the State in a person's right to respect for his private life and thus required justification under the Convention. The application of the applicant was taken by European Court of Human Rights (Strasbourg Court). The Strasbourg Court noticed that majority of the Council of Europe member States allow the compulsory taking of fingerprints and cellular samples in the context of criminal proceedings. The United Kingdom is the only member State expressly to permit the systematic and indefinite retention of DNA profiles and cellur samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued.

963. Strasbourg Court held that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. It was further held that in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained. In paragraph 67 following has been laid down:

67....However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained

(*see, mutatis mutandis, Friedl, cited above, 49-51, and Peck v. The United Kingdom, cited above, 59*).

964. Following was laid down in paragraph 73 & 77:

73. Given the nature and the amount of personal information contained in cellular samples, their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion (see Aman cited above, 69).

77. In view of the foregoing, the Court concludes that the retention of both cellular samples and DNA profiles discloses an interference with the applicants' right to respect for their private lives, within the meaning of Article 8(1) of the Convention.

965. The Court also considered the issue of retention of fingerprints, and held that retention of fingerprints may also give rise to important private life concerns. The Court also held that the domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of Article 8. Following was held in paragraph 103:

103. The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (see *mutatis mutandis, Z., cited above, 95*). The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

966. United Kingdom Supreme Court had occasion to consider the issue of retention of data in ***Regina (Catt) v. Association of Chief Police Officers of England, Wales and Northern Ireland and Anr.*** (2015) 2 WLR 664-(2015) UKSC 9. The UK Supreme Court in the above case also noticed the judgment of Strasbourg in ***S. and Marper v. The United Kingdom***. The appeal before UK Supreme Court was concerned with the systematic collection retention by police authorities of electronic data about individuals and whether it is contrary to Article 8 of the European Convention. The Appellant before the Court had accepted that it was lawful for the police to make a record of the events in question as they occurred, but contends that the police interfered with their rights Under Article 8 of the Convention by thereafter retaining the information on a searchable database. After noticing the jurisprudence of the European Court of Human Rights **Lord Sumption** stated following in paragraph 33:

33. Although the jurisprudence of the European Court of Human Rights is exacting in treating the systematic storage of personal data as engaging Article 8 and requiring justification, it has consistently recognised that (subject always to proportionality) public safety and the prevention and detection of crime will justify it provided that sufficient safeguards exist to ensure that personal

information is not retained for longer than is required for the purpose of maintaining public order and preventing or detecting crime, and that disclosure to third parties is properly restricted: see Bouchacourt v. France, given 17 December 2009, paras 68-69, and Brunet v. France (Application No. 21010/10) (unreported) given 18 September 2014, para 36. In my opinion, both of these requirements are satisfied in this case. Like any complex system dependent on administrative supervision, the present system is not proof against mistakes. At least in hindsight, it is implicit in the 2012 report of HMIC and the scale on which the database was weeded out over the next two years that the police may have been retaining more records than the Code of Practice and the MOPI guidelines really required. But the judicial and administrative procedures for addressing this are effective, as the facts disclosed on this appeal suggest.

967. The preponderance of authorities on the subject of retention of data is that retention of personal data effecting personal life of an individual may interfere in his right of privacy and the State can justify its retention subject to proportionality and subject to there being sufficient safeguards to personal information is not retained for longer than it required.

968. Reverting back to the Aadhaar Act, it is clear that requesting entity as well as authority are required to retain authentication data for a particular period and thereafter it will be archived for five years and thereafter authentication data transaction shall be deleted except such data which is required by the Court in connection with any pending dispute. We had already noticed that data which is retained by the entity and authority for certain period is minimal information pertaining to identity authentication only no other personal data is retained. Thus, provisions of Aadhaar Act and Regulations made thereunder fulfill three fold test as laid down in ***Puttaswamy case (supra)***, hence, we conclude that storage and retention of data does not violate fundamental right of privacy.

969. Now, we come to issue of surveillance, which has been very strongly raised by Petitioners. Shri Shyam Divan, learned Counsel for the Petitioners has relied on judgment of U.S. Supreme Court in **United States v. Antoine Jones,** 132 S. Ct. 945 (2012). Antoine Jones, owner and operator of a nightclub was under suspicion of trafficking in narcotics. A warrant was issued authorising installation of an electronic tracking device on the jeep registered in the name of John's wife. Agents installed a GPS tracking device in the jeep when it was parked in a public parking. On the basis of data obtained from the device, the Government charged Jones for several offences. In trial, Jones found a locational data obtained form the GPS device. A verdict of guilt was returned, which on appeal was reversed by United States, Appeal for District Columbia.

970. Matter was taken to the U.S. Supreme Court. Fourth Amendment provides "the right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." **Justice Scalia**, delivering the opinion of the Court affirmed the judgment of Court of Appeal. **Justice Sotomayor** concurring wrote:

I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." Ante, at 950, n. 3. In this case, the Government installed a Global Positioning System (GPS) tracking device on Respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for

the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection. See, e.g., **Silverman v. United States**, 365 U.S. 505 : 511-512 S1 S. Ct. 679 : 5 L. Ed.2d 734 (1961).

971. The above case was a case where tracking device, i.e., GPS was installed in the vehicle with purpose and motive of surveillance and obtaining data to be used against Jones. Present is not a case where it can be said that Aadhaar infrastructure is designed in a manner as to put a surveillance on Aadhaar number holder (ANH).

972. Another judgment which is relied by Shri Shyam Divan is judgment of European Court of Human Rights in Strasbourg Court in **Roman Zakharov v. Russia** decided on 04.12.2015. In the above case, the applicant alleged that the system of secret interception of mobile telephone communications in Russia violated his right to respect for his private life and correspondence and that he did not have any effective remedy in that respect. In Para 148 of the judgment, the case of the applicant was noted in the following words:

148. The applicant complained that the system of covert interception of mobile telephone communications in Russia did not comply with the requirements of Article 8 of the Convention, which reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

973. The Court came to the following conclusion:

175. The Court notes that the contested legislation institutes a system of secret surveillance under which any person using mobile telephone services of Russia providers can have his or her mobile telephone communications intercepted, without ever being notified of the surveillance. To that extent, the legislation in question directly affects all users of these mobile telephone services.

974. The Strasbourg Court held that there had been violation of Article 8 of the Convention. The above case also does not help the Petitioners in reference to Aadhaar structure. Above case was a clear case of surveillance by interception of mobile telecommunication.

975. Another judgment relied by Shri Shyam Divan is **Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources** decided on 08.04.2014. Para 1 of the judgment notice:

These requests for a preliminary ruling concern the validity of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or

processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC(OJ 2006 L 105, p. 54).

976. Directive 2006/24 laid down the obligation on the providers of publicly available electronic communications services or of public communications networks to retain certain data which are generated or processed by them. Noticing various articles of the Directives, the Court in Paragraph 27 noted:

27. Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.

977. The directives were held to be violating the principles of proportionality. The above case was also a case of retaining data pertaining to communications by service providers. The retention of communication data is a clear case of intrusion in privacy. The above is also a case which in no manner help the Petitioners when contrasted with the Aadhaar architecture.

978. At this juncture, we may also notice one submission raised by the Petitioners that Aadhaar Act could have devised a less intrusive measure/means. It was suggested that for identity purpose, the Government could have devised issuance of a smart card, which may have contained a biometric information and retain it in the card itself, which would not have begged the question of sharing or transfer of the data. We have to examine the Aadhaar Act as it exists. It is not the Court's arena to enter into the issue as to debate on any alternative mechanism, which according to the Petitioners would have been better. Framing a legislative policy and providing a mechanism for implementing the legislative policy is the legislative domain in which Court seldom trench.

979. We may refer to a judgment of U.K. Supreme Court **AB v. Her Majesty's Advocate,** [2017] UKSC 25, where U.K. Supreme Court has not approved the arguments based on less intrusive means. Court held that whether the Parliament would have used a less intrusive means does not involve the Court in identifying an alternative measure, which is least intrusive. In Para 37, following has been laid down:

37. I am not persuaded. It is important to recall that the question of whether the Parliament could have used a less intrusive measure does not involve the court in identifying the alternative measure which is least intrusive. The court allows the legislature a margin of discretion and asks whether the limitation on the Article 8 right is one which it was reasonable for the Parliament to propose: Bank Mellat v. HM Treasury (No 2) [2013] UKSC 38 : [2014] AC 700, para 75 per Lord Reed; Animal Defenders International v. United Kingdom (2013) 57 EHRR 21, para 110. Had the 2009 Act provided that the reasonable belief defence would not be available if on an earlier occasion the Accused had been charged with an offence which itself objectively entailed a warning of the illegality of consensual sexual activity with older children, the fact that there were other options, which were less intrusive, to restrict the availability of that defence would not cause an infringement of the individual's Article 8 right. The problem for the Lord Advocate in this appeal is where to find such a warning.

980. We may profitably note the judgment of Privy Council arising from a decision of Supreme Court of Mauritius-*Madhewoo v. State of Mauritius*. The case relates to a national identity card, which was brought in effect by an Act namely, the National Identity Card Act, 1985 providing for adult citizens of Mauritius to carry identity cards. The Act was amended in 2013 by which Government introduced a new smart identity card, which incorporates on a chip on the citizen's fingerprints and other biometric information relating to his/her characteristics. A citizen of the Republic of Mauritius did not apply for National Identity Card and he challenged the validity of the 2013 Act. The Supreme Court of Mauritius held that the provisions of 1985 Act, which enforce the compulsory taking and recording of fingerprints of a citizen disclosed an interference with the Appellant's rights guaranteed Under Section 9(1) of the Constitution. The Section 9(1) provided "except with his own consent, no person shall be subject to the search of his person or his private or the entry by others in his premises." Supreme Court had rejected the challenge to the other provisions of the Constitution. Matter was taken to the Privy Council. The challenge made before the Privy Council was noticed in Para 7 of the judgment, which is to the following effect:

7. In this appeal the Appellant challenges the constitutionality of (a) the obligation to provide fingerprints and other biometric information Under Section 4, (b) the storage of that material on the identity card Under Section 5, (c) the compulsory production of an identity card to a policeman Under Section 7(1A) in response to a request Under Section 7(1)(b), and (d) the gravity of the potential penalties Under Section 9(3) for non-compliance. He claims, first, that the implementation of the new biometric identity card is in breach of Sections 1, 2, 3, 4, 5, 7, 9, 15, 16 and 45 of the Constitution coupled with Article 22 of the Civil Code (which provides that everyone has the right to respect for his private life and empowers courts with competent jurisdiction to prevent or end a violation of privacy) and, secondly, that the collection and permanent storage of personal biometric data, including fingerprints, on the identity card are in breach of those Sections of the Constitution and that Article of the Civil Code.

981. The Privy Council agreed with the decision of the Supreme Court that compulsory taking of fingerprints and the extraction of minutiae involved an interference with the Appellant's Section 9 rights which required to be justified Under Section 9(2). The challenge raised before the Privy Council has been noticed in Para 25, which challenges were repelled. Paras 25 and 26 are as follows:

25. The Appellant challenges the Supreme Court's evaluation because, he submits, the creation of a reliable identity card system does not justify the interference with his fundamental rights. He submits that the obligation to provide his fingerprints interferes with his right to be presumed innocent and also that an innocuous failure to comply with Section 4(2)(c) could give rise to draconian penalties Under Section 9(3) of the Act (para 6 above). He also points out that in India a proposal for a biometric identity card was held to be unconstitutional, and, in the United Kingdom, libertarian political opposition resulted in the repeal of legislation to introduce biometric identity cards. The interference, he submits, is disproportionate.

26. In the Board's view, these challenges do not undermine the Supreme Court's assessment. First, the requirement to provide fingerprints for an identity card does not give rise to any inference of criminality as it is a requirement imposed on all adult citizens. It is true that, if circumstances arose in which a police officer was empowered to require the Appellant to produce his identity card and

the government had issued card readers, the authorities would have access to his fingerprint minutiae which they could use for the purposes of identification in a criminal investigation. But that does not alter the presumption of innocence. Secondly, the penalties in Section 9(3) are maxima for offences, including those in Section 9(1), which cover serious offences such as forgery and fraudulent behaviour in relation to identity cards. The Sub-section does not mandate the imposition of the maximum sentence for any behaviour. Thirdly, while judicial rulings on international instruments and the constitutions of other countries can often provide assistance to a court in interpreting the provisions protecting fundamental rights and freedoms in its own constitution, the degree of such assistance will depend on the extent to which the documents are similarly worded.

982. As noticed above, learned Counsel for the Petitioners has raised various issues pertaining to security and safety of data and CIDR. Apprehensions raised by the Petitioners does not furnish any ground to struck down the enactment or a legislative policy. This Court in **G. Sundarrajan v. Union of India and Others.** MANU/SC/0466/2013 : (2013) 6 SCC 620, had occasion to consider India's National Policy and challenge to a Nuclear Project, which was launched by the Government upholding the legislative policy, the Court laid down following in Paras 15 and 15.1:

15. India's National Policy has been clearly and unequivocally expressed by the legislature in the Atomic Energy Act. National and International policy of the country is to develop control and use of atomic energy for the welfare of the people and for other peaceful purposes. NPP has been set up at Kudankulam as part of the national policy which is discernible from the Preamble of the Act and the provisions contained therein. It is not for Courts to determine whether a particular policy or a particular decision taken in fulfillment of a policy, is fair. Reason is obvious, it is not the province of a court to scan the wisdom or reasonableness of the policy behind the Statute.

15.1. Lord MacNaughten in Vacher & Sons Ltd. v. London Society of Compositors (1913) AC 107 HL has stated:

..... Some people may think the policy of the Act unwise and even dangerous to the community..... But a Judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled Rules of construction.

983. This Court also held that a project cannot be stopped merely on the ground of apprehension. In the present case, also lot of apprehensions of possibilities of insecurity of data has been raised. In India, there is no specific data protection laws like law in place in United Kingdom. In Privacy judgment-**Puttaswamy (supra)**, this Court has noticed that **Shri Krishna Commission** is already examining the issue regarding data protection and as has been stated by learned Attorney General before us, after the report is received, the Government will proceed with taking steps for bringing a specific law on data protection. We need not say anything more on the above subject. After we have reserved the judgment, Srikrishna Commission has submitted its report containing a draft Personal Data Protection Bill, 2018 in July 2018. The report having been submitted, we hope that law pertaining to Personal Data Protection shall be in place very soon taking care of several apprehensions expressed by Petitioners.

984. The Aadhaar architecture is to be examined in light of the statutory regime as in place. We have noticed the Regulations framed under Aadhaar Act, which clearly indicate that Regulations brings in place statutory provisions for data protection, restriction on data sharing and other aspects of the matter. Several provisions of penalty on data breach and violation of the provisions of the Act and Regulations have been provided.

985. We have no reason to doubt that the project will be implemented in accordance with the Act and the Regulations and there is no reason to imagine that there will be statutory breaches, which may affect the data security, data protection etc. In view of foregoing discussions, we are of the considered opinion that Statutory regime as delineated by the Aadhaar Act and the Regulations fulfills the threefold test as laid down in **Puttaswamy (supra)** and the law, i.e. Aadhaar Act gives ample justification for legitimate aim of the Government and the law being proportional to the object envisaged. The Petitioners during their submissions have also attacked various provisions of Enrolment and Update Regulations, Authentication Regulations, Data Security Regulations and Sharing of Information Regulations. All the above Regulations have been framed in exercise of power Under Section 54 of the Act on the matters covered by the Act. We having held that by collection of data, its retention, storage, use and sharing, no Privacy Right is breached, we are of the view that related Regulations also pass the muster of three-fold tests as laid down in ***K. Puttaswamy case***. The provisions of Act in the above regard having passed the muster of three-fold tests, the related Regulations also cannot be held to breach Right of Privacy. Thus, challenge to Regulations relating to collection, storage, use, retention and sharing fails and it is held that they do not violate Constitutional Rights of Privacy. In result, we answer the Issue Nos. 3, 4 and 5 in following manner:

Ans. 3, 4, 5:

(i) Collection of data, its storage and use does not violate fundamental Right of Privacy.

(ii) Aadhaar Act does not create an architecture for pervasive surveillance.

(iii) Aadhaar Act and Regulations provides protection and safety of the data received from individuals.

Issue Nos. 6 and 7	Whether Section 7 of Aadhaar Act is unconstitutional? Whether right to food, shelter etc. envisaged under Article 21 shall take precedence on the right to privacy of the beneficiaries?

986. Shri Pandit Jawahar Lal Nehru while concluding debate on "Aims and Objects Resolution" on 22.01.1947 in the Constituent Assembly of India stated:

The first task of this Assembly is to free India through a new constitution to feed the starving people and cloth the naked masses and to give every Indian fullest opportunity to develop himself according to his capacity. This is certainly a great task.

987. After attaining the freedom the country proceeded to realise the dream and vision which founding fathers of our democratic system envisaged. The Constitution of India apart from enumerating various Fundamental Rights including right to life has provided for Directive Principles of State Policy under Chapter IV of the Constitution which was to find objectives in governess of the country. Article 38 provided that State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. It further provided that the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

988. After enforcement of the Constitution almost all the Governments worked towards the object of elimination of poverty and to empower marginal/poor Section of the society. The endeavour of the Government was always to frame policies keeping in view the "little Indian" who is in the centre of all policies and governance.

989. Section 7 of the Aadhaar Act is the most important provision of the Aadhaar Act around which entire architecture of Aadhaar Act has been built. Section 7 is to the following effect:

7. The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment: Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.

990. The objects and reasons of the Act as noticed above as well as the Preamble of the Act focus on targeted delivery of financial and other subsidies, benefits and services which are envisaged in Section 7. The Petitioners challenge the constitutionality of Section 7. They submit that Section 7 seeks to render the constitutional and statutory obligations of the State to provide benefits, subsidies and services, conditional upon an individual parting with his or her biometric and demographic information. An individual's rights and entitlements cannot be made dependent upon an invasion of his or her bodily integrity and his or her private information which the individual may not be willing to share with the State. The bargain underlying Section 7 is an unconscionable, unconstitutional bargain. An individual has constitutional right to receive benefits, subsidies and services which is fundamental right and it is State's obligation to provide for fulfillment of that fundamental right. He submitted that there is no rationale in enactment of Section 7 neither there was any legitimate state interest nor the provision is proportionate. The Petitioners submit that provision of requiring every person to undergo authentication to avail benefits/services/entitlements, falls foul of Article 14. Since, firstly such mandatory authentication has caused, and continues to cause, exclusion of the most marginalised Section of society; and secondly this exclusion is not simply a question of poor implementation that can be administratively resolved, but stems from the very design of the Act. Learned Counsel for the Petitioners have referred to and relied on several materials in support of their submissions that

working of Section 7 has caused exclusion. Since a large number of persons who are entitled to receive benefits, subsidies and services are unable to get it due to not being able to authenticate due to various reasons like old age, change of biometric and other reasons. The Petitioners have referred to affidavits filed by several individuals and NGOs who after field verification brought materials before this Court to support their submission regarding large scale exclusion. It is further contended that State's contention that Circular dated 24.10.2017 has resolved implementation issued cannot be accepted. The authentication system in the Aadhaar Act is probabilistic. Biometric technology does not guarantee 100% accuracy and it is fallible, refers UIDAI's own Report on "Role of Biometric Technology in Aadhaar Entrolment" (2012) has been made where Report stated that biometric accuracy after accounting for the biometric failure to enrol rate, false positive identification rate, and false negative identification rate, was 99.768% accuracy. For a population over 119.22 crore enrolled in Aadhaar, it is a shocking admission of the fact that there are 27.65 lakh people who are excluded from benefits linked to Aadhaar. It is contended that validity of an act is to be judged not by its object or form, but by its effect on fundamental rights. Mandatory authentication at the point of use violates Article 21. It is contended that the Government has failed to discharge its burden of proof Under Article 21. The State has also failed to satisfy the test of proportionality which makes Section 7 unconstitutional.

991. The Petitioners further submit that the claim of the Government that by Aadhaar authentication the State has been able to save 11 billion per annum is incorrect and without any basis. It is further submitted that massive savings under Mahatma Gandhi National Rural Employment Guarantee Scheme under Financial Benefits Accrued on account for DBT/Aadhaar since 2014 claims of substantial savings upto 2015-16 the amount of reported savings is shown as Rs. 3000 crores and upto 2016-17 it is shown as Rs. 11,741 crores. Referring to the claim of the Government that he submitted facts of job cards could be only 67, 637 were found to be job cards linked to more than one Aadhaar number. Thus, maximum saving for this period would be 127.88 crores compared to the inflated figure of Rs. 3000 crores. The Financial Benefits claimed under PAHAL scheme was Rs. 14,672 crores which is not correct. Referring to Comptroller and Auditor General Report, it is pointed out that with respect to 2014-15, the real outcome of savings is only 1.33 crores. He submits that major saving was on account of decrease in off-take of domestic subsidised cylinders of consumer and decrease in fuel prices. On Public Distribution System referring to answer to a question in Lok Sabha on 26.07.2016 it is submitted that the Minister of Consumer Affairs, Food and Public Distribution has stated only that approximately 2.33 crores ration cards were deleted during 2013-2016.

992. Learned Attorney General has referred to material on record to justify the legitimate state aim which led to enactment of Section 7. Learned Attorney General refers to Report No. 3 of 2000 of the Comptroller and Auditor General of India which has been brought on record as Annexure R-I to the common additional affidavit on behalf of Respondents. He submits that the Comptroller and Auditor General in his Report states that 1.93 crore bogus ration cards were found to be in circulation in 13 States. Report further states that a signification portion of the subsidised food-grains and other essential commodities did not reach the beneficiaries due to their diversion in the open market. The Performance Report of the Planning Commission of India titled "Performance Evaluation Report of Targeted Public Distribution System (TPDS)" dated March, 2005 which has been brought on record as Annexure-R-6 to the common additional affidavit on behalf of Respondents notes following:

i. State-wise figure of excess Ration Cards in various states and the existence of over 1.52 crore excess Ration Cards issued [Page 362 of CAA]

ii. Exercise of fictitious households and identification errors leading to exclusion of genuine beneficiaries.

iii. Leakage through ghost BPL Ration Cards found to be prevalent in almost all the states under study. [Pg. 369 of CAA)

iv. The Leakage of food grains through ghost cards has been tabulated and the percentage of such leakage on an All India basis has been estimated at 16.67% [Pg.370 of CAA].

v. It is concluded that a large part of the subsidised food grains were not reaching the target group.

993. Similar reports regarding few subsidies have been referred and relied.

994. Learned Attorney General has also relied on the report submitted by V.V. Giri National Labour Institute and sponsored by the Department of Rural Development, Ministry of Rural Development, Government of India which examined various aspects of National Rural Employment Guarantee Scheme while studying the Schedule of rates for National Rural Employment Guarantee Scheme. In paragraph 12.8 (Annexure R-4) to the common additional affidavit on behalf of Respondents following has been stated:

2. "There was great fraud in making fake cards, muster rolls were not maintained properly, and work was not provided to job seekers sometimes. In many cases, it was found that workers performed one day's job, but their attendance was put for 33 days. The workers got money for one day while wages for 32 days were misappropriated by the people associated with the functioning of NREGS.

995. Another report dated 09.11.2012 of National Institute of Public Finance and Policy's "A Cost-benefit analysis of Aadhaar" estimated that a leakage of approximately 12 percent is being caused to the Government on account of ghost workers and manipulated muster rolls. Thirteenth Finance Commission Report for 2010-2015 dated December, 2000 in Chapter 12 states:

creation of a biometric-based unique identity for all residents in the country has the potential to address need of the government to ensure that only eligible persons are provided subsidies and benefits and that all eligible persons are covered.

996. Various other reports have been referred to and relied by Learned Attorney General to substantiate his case that there was large leakage and pilferation of subsidies which were allocated by the Government under different schemes.

997. This Court had occasion to consider public distribution system in ***PUCL v. Union of India,*** MANU/SC/1211/2011 : (2011) 14 SCC 331, the Court noticed the report of High Powered Committee headed by Justice D.P. Wadhwa, retired Judge of this Court who had submitted report

on the Public Distribution System. One of the actions suggested by the Committee was noticed in paragraphs 2 and 12, Component II:

2. In order to implement this system across the country, the following actions are suggested by the Committee:

.....

Component II: Electronic authentication of delivery and payments at the fair price shop level. In order to ensure that each card-holder is getting his due entitlement, computerisation has to reach literally every doorstep and this could take long. Moreover, several States have already started implementing smart cards, food coupons, etc. which have not been entirely successful. Reengineering these legacy systems and replacing it with the online Aadhaar authentication at the time of food-grain delivery will take time. This is therefore proposed as Component II.

12. As far as possible, the State Governments should be directed to link the process of computerisation of Component 2 with Aadhaar registration. This will help in streamlining the process of biometric collection as well as authentication. The States/UTs may be encouraged to include the PDs related KYR+ field in the data collection exercise being undertaken by various Registrars across the country as part of the UID (Aadhaar) enrolment.

998. This Court again in the same proceeding passed another judgment on 16.03.2012 ***PUCL v. Union of India***, MANU/SC/0394/2012 : (2013) 14 SCC 368 in which following was stated in paragraphs 2 and 4:

2. There seems to be a general consensus that computerisation is going to help the public distribution system in the country in a big way. In the affidavit it is stated that the Department of Food and Public Distribution has been pursuing the States to undertake special drive to eliminate bogus/duplicate ration cards and as a result, 209.55 lakh ration cards have been eliminated since 2006 and the annual saving of foodgrain subsidy has worked out to about Rs. 8200 crores per annum. It is further mentioned in the affidavit that end-to-end computerisation of public distribution system comprises creation and management of digitised beneficiary database including biometric identification of the beneficiaries, supply chain management of TPDS commodities till fair price shops.

4. In the affidavit it is further mentioned that the Government of India has set up a task force under the Chairmanship of Mr. Nandan Nilekani, Chairman, UIDAI, to recommend, amongst others, an IT strategy for the public distribution system. We request Mr. Nandan Nilekani to suggest us ways and means by which computerisation process of the public distribution system can be expedited. Let a brief report/affidavit be filed by Mr. Nandan Nilekani within four weeks from today.

999. As noted above the figures as claimed by the Respondents regarding benefits after implementation of Aadhaar scheme in the MGNREGA and PDS etc. are refuted by the Petitioners. Petitioners' case is that amounts of savings which are claimed are not correct and at best there was only meager benefit of savings from the implementation of the scheme. We need not to enter into the issue regarding respective claims in the above regard. The reasons which led to enactment of

Section 7 that benefits and subsidies are substantially diverted and are not able to reach have been made out even if saving were not substantial but meager.

1000. The report and material which have been brought on record by the Government fully demonstrate the legitimate aim of the State in enacting Section 7. This Court in ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.*** MANU/SC/0517/1981 : 1981 (1) SCC 608, while elaborating on right of life Under Article 21, held that the right to life includes the right to live with dignity and all that goes along with it namely the bar necessaries of life such as adequate nutrition, clothing and shelter.

1001. The United Nation under Universal Declaration of Human Rights also acknowledges everyone has a right to standard of living which includes food, clothing, housing and medical care. Article 25 of the Declaration which was made in 1948 is as follows:

25.1 Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

1002. The English author, JOHN BERGER said:

The poverty of our century is unlike that of any other. It is not, as poverty was before, the result of natural scarcity, but of a set of priorities imposed upon the rest of the world by the rich. Consequently, the modern poor are not pitied...but written off as trash.

1003. The identification of the poor, as was referred by **John Berger** is the first step to realise the UN Declaration of Human Rights as well as the Fundamental Rights guaranteed under the Constitution of India. The Aadhaar Act brings into existence a process of identification which is more accurate as compared to other identity proofs.

1004. At this stage, we need to notice one more submission which was raised by the learned Attorney General. It has been submitted by the learned Attorney General that subsidies and benefits Under Section 7 of the Aadhaar Act are traceable to Article 21. It is submitted that if the rights which are sought to be realised by means of Section 7 are juxtaposed against the right of privacy, the former will prevail over the latter. The issue is as to whether the State by enlivening right to food and shelter envisaged Under Article 21 encroach upon the right of privacy ? There cannot be a denial that there may be inter se conflict between fundamental rights recognised by the Constitution in reference to a particular person. The Court has to strive a balance to leave enough space for exercise of both the fundamental rights.

1005. It cannot be accepted that while balancing the fundamental rights one right has to be given preference. We may notice that privacy judgment i.e. ***Puttaswamy case*** has noticed and already rejected this argument raised by the learned Attorney General in paragraph 266 in the following words:

266. The Attorney General argued before us that the right to privacy must be forsaken in the interest of welfare entitlements provided by the State. In our view, the submission that the right to privacy is an elitist construct which stands apart from the needs and aspirations of the large majority constituting the rest of society, is unsustainable. This submission betrays a misunderstanding of the constitutional position. Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Part III and embodying an aspiration for achieving socio-economic rights in Part IV. The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilised through history to wreak the most egregious violations of human rights....

1006. One of the submissions which has been raised by the Petitioners targeting the Aadhaar authentication is that biometric system under the Aadhaar architecture is probabilistic. Biometric technology does not guarantee 100% accuracy and it is fallible, with inevitable false positives and false negatives that are design flaws of such a probabilistic system. We have noted above the reliance on UIDAI's Report of the year 2012 where UIDAI itself has claimed that biometric accuracy was 99.768%. The Petitioner is still criticising that since. 232% failures are there which comes to 27.65 lakh people who are excluded from benefits linked to Aadhaar. The above submission of the Petitioner ignores one aspect of the matter as has been contended by the Respondents that in case where there is biometric mis-match of a person even possession of an Aadhaar number is treated sufficient for delivery of subsidies and benefits. Thus, physical possession of Aadhaar card itself may mitigate biometric mis-match. However, in case of mismatch instruments are there to accept other proof of identity, the Respondents have referred to Circular dated 24.10.2017 issued by UIDAI. The Circular dated 24.10.2017 has been criticised by the Petitioners stating that violation of right cannot be left to vagaries of administration. There cannot be any dispute to the above propositions. It is the obligation of the State to ensure that there is no violation of fundamental rights of a person. Section 7 is an enabling provision which empowers the State Government to require that such individual undergo authentication for receipt of a subsidy, benefit or service but neither Section 7 nor orders issued by the Central Government and State Government can be read that in the event authentication of a person or beneficiary fails, he is not to be provided the subsidies and benefits or services. The provision is couched as an enabling provision but it cannot be read as a provision to negate giving subsidies, benefits or services in the event of failure of authentication. We are of the view that Circular dated 24.10.2017 which fills a gap and is a direction facilitating delivery of benefits and subsidies does not breach by provisions of the Act.

1007. Now, we come to arguments of exclusion as advanced by the Petitioners in support of their submission that exclusion makes Section 7 arbitrary and violative of Articles 14 and 21. From the material brought on record by the parties, we have no reason to doubt that there has been denial to few persons due to failure of authentication. There is ample material on record to indicate that prior to enforcement of Aadhaar Scheme there had been large number of denial of benefits and subsidies to real beneficiaries due to several reasons as noted above. Functioning of scheme formulated by the Government for delivery of benefits and subsidies to deserving persons is a large scale scheme running into every nook and corner of the country. When such scheme of Government is implemented, it is not uncommon that there may be shortcomings and some denial. There is no material on record to indicate that as compared to non-receipt of eligible beneficiaries prior to enforcement of the Act, there is increase of failure after the implementation of the Act. It

cannot be accepted that few cases of exclusion as pointed out by the Petitioners makes Section 7 itself arbitrary and violative of Articles 14 and 21. Pitfalls and shortcomings are to remove from every system and it has been fairly submitted by the learned Attorney General as well as learned Counsel for the UIDAI that as and when difficulties in implementation and cases of denial are brought into the notice, remedial measures are taken. The Respondents are still ready to take such remedial measures to ensure that there is no denial of subsidies to deserving persons. We, however, are of the view that denial of delivery of benefits and subsidies to deserving persons is a serious concern and violation of the rights of the persons concerned. It has to be tackled at all level and the administration has to gear up itself and implementation authority has to gear up itself to ensure that rightful beneficiaries are not denied the constitutional benefits which have been recognised and which are being implemented by the different schemes of the Government. Both the Government and UIDAI are fully empowered to make Rules and Regulations Under Sections 53 and 54 of the Aadhaar Act respectively and exclusions have to be taken care by exercising the power Under Section 53 by the Central Government and Under Section 54 by the UIDAI to remedy such shortcomings and denial. We are sure that both the Central Government and UIDAI shall advert to the exclusionary factors.

1008. We may also notice a judgment of the US Supreme Court in ***Otis R. Bowen, Secretary of Health and Human Services, et al. v. Stephen J. Roy et al.,*** 476 US 693 (1986). The US Supreme Court held that statutory requirement that a state agency utilise Social Security numbers in administering the programs in question does not violate the Free Exercise Clause. The Appellants applied and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program. They, however, refused to comply, with the requirement that participants in these programs furnish their state welfare agencies with the Social Security numbers of the members of their household as a condition of receiving benefits. Appellants had contended that obtaining a Social Security number for their 2-year-old daughter, would violate their Native American religious beliefs. On refusal to give Social Number, benefits payable to the Appellants were terminated. The claim of the Appellants was dismissed. The challenge raised by the Appellants was noticed in the following words:

Appellees raise a constitutional challenge to two features of the statutory scheme here.4 They object to Congress' requirement that a state AFDC plan "must... provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number." 42 U.S.C. § 602(a)(25). They also object to Congress' requirement that "such State agency shall utilize such account numbers... in the administration of such plan." Ibid. .5 We analyze each of these contentions, turning to the latter contention first.

1009. The U.S. Supreme Court upheld the requirement of providing of Social Security number. Following has been observed:

The general governmental interests involved here buttress this conclusion. Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to

substantial deference. Moreover, legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.

The test applied in cases like Wisconsin v. Yoder, U.S. 205, 92 S. Ct. 1526, 32 L. Ed.2d 15 (1972), is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.17 Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

1010. Another case of the Appellate Division of the Supreme Court of the State of New York which needs to be noticed is in the matter of ***Buchanan v. Wing***, 664 N.Y. 2d 865. In the above case Petitioners were recipients of Aid to Families with Dependent Children, the facts of the case have been noticed in the following words:

Petitioners and their four minor children are recipients of Aid to Families with Department Children (hereinafter ADC) (Social Services Law 343 et seq.) and food stamps from the Broome County Department of Social Services (hereinafter the Department). In February 1996, Petitioners received notice from the Department that they were to participate in an identity verification procedure known as the automated finger imaging system (hereinafter AFIS) as a condition of eligibility for benefits required by 18 NYCRR 351.2(a)(245 A.D. 2d 635). Petitioners responded that they would not participate because of their religious convictions. Respondent Commissioner of the Department thereafter discontinued their ADC and food stamp entitlements for failure to comply.

1011. The Petitioners refused to participate in an identify verification by procedure known as automated finger imaging system which was a condition of eligibility for benefits. Upholding the process of verification by finger imaging following was laid down:

We have examined Petitioners' constitutional claims and find them to be without merit. In our view, Petitioners' failure to articulate a viable claim that they are being required to participate in an invasive procedure that is prohibited by their religious beliefs is dispositive of their arguments claiming a violation of their freedom to exercise their religion pursuant to the Federal and State Constitutions (US Const 1st Amend; NY Const, art I, 3). We are also unpersuaded by Petitioners' contention that the Department violated NY Constitution, Article XVII, 1 (which provides that aid and care of the needy are public concerns and shall be provided by the State) by discontinuing their public assistance benefits. Since Petitioners cannot be classified as needy until such time as they are finger imaged to determine whether they are receiving duplicate benefits, no violation of this constitutional provision has been stated. Moreover, contrary to Petitioners' arguments, the discontinuance of public assistance to their entire family unit (see, 18 NYCRR 352.30)(245 A.D. 2d 637) does not infringe the constitutional rights of their children (who are not named Petitioners

in light of valid legislation premising the eligibility of the children within the family unit upon the eligibility of the entire household (see, Matter of Jessup v. D'Elia, 69 N.Y. 2d 1030).

1012. Another judgment which has been relied by the Respondents is ***Doris McElrath v. Joseph A. Califano, Jr., Secretary of Health, Education and Welfare,*** 615 F.2d 434. Under Social Security Act, 1935, a public assistance program of federal and state cooperation providing financial aid to needy dependent children and the parents or relatives with whom they reside, one of the conditions which was added so that as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number. The contention of the Appellant was noticed in paragraph 11 which is to the following effect:

[11] The Appellants' principal contention on appeal is that the federal and state Regulations requiring dependent children to acquire and submit social security account numbers as a condition of eligibility for AFDC benefits are statutorily invalid as being inconsistent with and not authorized by the Social Security Act. We find the arguments advanced in support of this contention to be without merit and hold that the challenged Regulations constitute a legitimate condition of eligibility mandated by the Congress under the Social Security Act. Accord, Chambers v. Klein, 419 F. Supp. 569 (D.N.J. 1976), aff'd mem., 564 F.2d 89 (3d Cir. 1977); Green v. Philbrook, 576 F.2d 440 (2d Cir. 1978); Arthur v. Department of Social and Health Services, 19 Wn. App. 542, 576 P.2d 921 (1978). We therefore conclude that the district court properly dismissed the Appellants' statutory invalidity allegations for failure to state a claim upon which relief could be granted.

1013. The Appellant had also contended that disclosure of social security account number violates their constitutional rights to privacy. Said argument was rejected. While rejecting the argument following was stated in paragraph 20:

[20] Finally, the Appellants maintain that the social security account number disclosure requirement violates their constitutional rights to privacy and to equal protection of the law. We disagree. The constitutional guarantee of the right to privacy embodies only those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." Roe v. Wade,: 410 U.S. 113, 152 : 93 S. Ct. 705, 726 : 35 L. Ed.2d 147 (1973). It is equally well-settled that "[w]elfare benefits are not a fundamental right...." Lavine v. Milne, 424 U.S. 577, 584, n. 9, 96 S. Ct. 1010, 1015, 47 L. Ed.2d 249 (1976). Accordingly, we regard the decision of Mrs. McElrath whether or not to obtain social security account numbers for her two minor children in order to receive welfare benefits as involving neither a fundamental right nor a right implicit in the concept of ordered liberty. Chambers v. Klein, 419 F. Supp. 569, 583 (D.N.J. 1976), aff'd mem. 564 F.2d 89 (3d Cir. 1977). This case is not concerned with a decision impacting the privacy of the Appellants on the magnitude of criminal sanctions or an absolute prohibition on the Appellants' conduct. See, e. g., Griswold v. Connecticut,: 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.652d 510 (1965); Eisenstadt v. Baird,: 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed.2d 349 (1972). Rather, it is concerned with a condition of AFDC eligibility and the only sanction for not complying is to forego certain governmental benefits. Simply stated, the claim of the Appellants to receive welfare benefits on their own informational terms does not rise to the level of a constitutional guarantee. Moreover, the contention that disclosure of one's social security account number violates the right to privacy has been consistently rejected in other related contexts. See, e.g., Cantor v. Supreme

Court of Pennsylvania, 353 F. Supp. 1307, 1321-22 (E.D. Pa. 1973); Conant v. Hill, 326 F. Supp. 25, 26 (E.D. Va. 1971).

1014. The trends of judgments as noted above do indicate that condition for identification or disclosing particular identity number for receiving a benefit from State does not violate any of the Constitutional rights. We, thus, find that Section 7 fulfills the three fold tests as laid down in ***Puttaswamy case***.

1015. Shri Gopal Subramanium relying on Article 243G and Eleventh Schedule of the Constitution submits that Aadhaar Scheme and its authentication for benefits, subsidies and services militate against the above Constitution provision and hence are ultra vires to the Constitution. Article 243G deals with powers, authority and responsibilities of Panchayats, which is to the following effect:

243G. Powers, authority and responsibilities of Panchayats: Subject to the provisions of this Constitution the Legislature of a State may, by law, endow the Panchayats with such powers and authority and may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to---

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

1016. Article 243G(b) refers to Eleventh Schedule to the Constitution. Eleventh Schedule contains list of several matters. Shri Subramanium relies on Item No. 11, 12, 16, 17, 23, 25 and 28, which are as under:

11. Drinking Water.

12. Fuel and Fodder.

16. Poverty alleviation programme.

17. Education, including primary and secondary schools.

23. Health and Sanitation, including hospitals, primary health centres and dispensaries.

25. Women and child development.

28. Public distribution system.

1017. Article 243G is an enabling provision, which enable the State Legislature, by law, to endow the Panchayats with such powers and authorities as may be necessary to enable them to function as institutions of self-government. The Items on which State, by law, can endow Panchayats in

Eleventh Schedule are items to deal with subjects enumerated therein. For example, Item No. 16 deals with Poverty alleviation programme and Item No. 28 deals with Public Distribution System. State is fully competent to make laws to authorise the Panchayats to take over all the matters enumerated in Eleventh Schedule. The question to be considered is as to whether the Aadhaar Act in any manner militate with Constitutional provisions of Article 243G. The Aadhaar Act is an Act enacted by Parliament, which is referable to Entry 97 of List I. The Aadhaar Act has been enacted to provide for efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith. The Act, thus, has been enacted to regulate the expenditure, which is incurred from the Consolidated Fund of India. No conflict between the Aadhaar Act and any law, which may be enacted by State under List II is seen. Even if any conflict is supposed, the Doctrine of Pith and Substance has to be applied to find out nature of two legislations. In Pith and Substance, the Aadhaar Act cannot be said to be entrenching upon any law, which may be made by the State under Item No. 5 of List II. In this context, reference is made to judgment of this Court in **State of Uttar Pradesh and Anr.** v. **Zila Parishad, Ghaziabad and Anr.** MANU/SC/0085/2013 : (2013) 11 SCC 783. In the above case, provisions of Article 243G came to be considered in reference to public distribution orders issued by the State Government in exercise of delegated powers under Essential Commodities Act, 1955. The Central Government in exercise of power Under Section 3 of the Essential Commodities Act, the Government of U.P. issued an order dated 10.8.1999, conferring the power to allot and cancel the fair price shops in rural areas, with certain guidelines, on the Gram Panchayats. Subsequently, the State Government withdrew that order and reinforced the earlier policy dated 03.07.1990 under which the power was vested with the District Magistrate or an authority designated by him to allot or cancel the licenses for Fair Price Shops. The Central Government, in exercise of power Under Section 3 of the Essential Commodities Act, issued an order dated 31.8.2001, wherein its powers were delegated to State Government. State Government, in pursuance thereof, issued an order designating the officers of the District level, viz., District Magistrate, Sub-Divisional Magistrate, District Supply Officer to ensure the proper supply and distribution of such commodities. Zila Parishad, Ghaziabad filed a Writ Petition in the High Court challenging the Order dated 13.01.2000 by which the power was withdrawn from the Gram Panchayats. The Writ Petition was allowed by the High Court against which State of Uttar Pradesh filed an appeal. The submission was raised before this Court on behalf of the writ Petitioner that denuding the power from Panchayats will be against the constitutional provision of Article 243G. Such argument on behalf of Petitioner has been noticed in Paragraph 14. This Court after considering the provisions of Article 243G and other relevant provisions has laid down in Paras 23 and 24:

23. *The High Court has considered the nature of the aforesaid constitutional provision and held as under: (Zila Panchayat case 1, AWC pp. 3981-82, para 16)*

16. In our opinion, this provision is only an enabling provision. It enables the Legislature of a State to endow the Panchayats with certain powers. ... Hence, the Legislature of a State is not bound to endow the Panchayats with the powers referred to Article 243-G, and it is in its discretion to do so or not. At any event there is no mention of the public distribution system in Article 243-G of the Constitution.

Thus, it is evident that the High Court has taken a view that the provision of Article 243-G is merely an enabling provision, and it is not a source of legislation. This view seems to be in consonance with the law laid down by this Court in U.P. Gram Panchayat Adhikari Sangh v. Daya Ram Saroj 4 wherein an observation has been made that Article 243-G is an enabling provision as it enables the Panchayats to function as institutions of self-government. Further, this Court noted that such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, subject to such conditions as may be specified therein, with respect to the implementation of schemes for economic development and social justice as may be entrusted to them, including those in relations to the matters listed in the Eleventh Schedule. The enabling provisions are further subject to the conditions as may be specified. Therefore, it is for the State Legislature to consider conditions and to make laws accordingly. It is also open to the State to eliminate or modify the same.

24. *Therefore, it is apparent that Article 243-G read with the Eleventh Schedule is not a source of legislative power, and it is only an enabling provision that empowers a State to endow functions and devolve powers and responsibilities to local bodies by enacting relevant laws. The local bodies can only implement the schemes entrusted to them by the State.*

1018. This Court in the above case has reiterated that Article 243G read with Eleventh Schedule is not a source of legislative power, and it is only an enabling provision that empowers a State to endow functions and devolve powers and responsibilities to local bodies by enacting relevant laws. We, thus, are unable to accept the submission of Shri Gopal Subramanium that Aadhaar Act is ultra vires to Article 243G and Eleventh Schedule to the Constitution.

1019. One more submission of the Petitioners which needs to be considered is regarding probabilistic nature of biometric solution. We proceed on premise that Aadhaar structure is probabilistic, the Petitioners themselves have referred to UIDAI Report where biometric accuracy has been stated to be 99.768%. Stephen Hawkin in his book: "God Created The Integers" states:

Over the centuries, the efforts of these mathematicians have helped the human race to achieve great insight into nature, such as the realisation that the earth is round, that the same force that causes an apple to fall here on earth is also responsible for the motions of the heavenly bodies, that space is finite and not eternal, that time and space are intertwined and warped by matter and energy, and that the future can only be determined probabilistically. Such revolutions in the way we perceive the world have always gone hand in hand with revolutions in mathematical thought. Isaac Newton could never have formulated his laws without the analytic geometry of Rene Descartes and Newton's own invention of calculus. It is hard to imagine the development of either electrodynamics or quantum theory without the methods of Jean Baptiste Joseph Fourier or the work on calculus and the theory of complex functions pioneered by Carl Friedrich Gauss and Augustin Louis Cauchy-and it was Henri Lebesgue's work on the theory of measure that enabled John von Neumann to formulate the rigorous understanding of quantum theory that we have today. Albert Einstein could not have completed his general theory of relativity had it not been for the geometric ideas of Bernhard Riemann. And practically all of modern science would be far less potent (if it existed at all) without the concepts of probability and statistics pioneered by Pierre-Simon Laplace.

1020. The science and technology keeps on changing with pace of time. A scientific invention or module which is invented or launched keeps on improving with time. The ready example is improvement in quality and programmes of mobile phone which has seen steep development in the last one decade. Even if authentication under Aadhaar scheme is probabilistic as on date, we have no doubt that the steps will be taken to minimise the mis-natch and to attain more accuracy in the result. In view of the foregoing discussion we are of the view that the State has given sufficient justification to uphold the constitutionality of Section 7. We, thus, answer Question Nos. 6 and 7 in the following manner:

Ans. 6: Section 7 of the Aadhaar is constitutional. The provision does not deserve to be struck down on account of denial in some cases of right to claim on account of failure of authentication.

Ans. 7: The State while enlivening right to food, right to shelter etc. envisaged Under Article 21 cannot encroach upon the right of privacy of beneficiaries nor former can be given precedence over the latter.

Issue No. 8	**Whether Section 29 of the Aadhaar Act is liable to be struck down?**

1021. The ground to challenge Section 29 is that it permits sharing of identity information. It is submitted that sharing of identity information is breach of Right of Privacy. Section 29 is a provision, which contains restrictions on sharing information as is clear from the heading of the section. Section 29 Sub-section (1) contains prohibition on sharing of any core biometric information collected or created under this Act. Section 29 for ready reference is extracted as below:

29. Restriction on sharing information. (1) No core biometric information, collected or created under this Act, shall be--

(a) shared with anyone for any reason whatsoever; or

(b) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

(2) The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by Regulations.

(3) No identity information available with a requesting entity shall be--

(a) used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or

(b) disclosed further, except with the prior consent of the individual to whom such information relates.

(4) No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by Regulations.

1022. Sub-section (2) permits sharing of identity information, other than core biometric information, only in accordance with the provisions of this Act and in such manner as may be specified by Regulations. Further Sub-section (3) prohibits requesting entity to use identity information for any purpose other than that specified to the individual or to disclose any information without the consent of individual. Sub-section (4) provides that no Aadhaar number or core biometric information shall be published, displayed or posted publicly, except for the purposes as may be specified by Regulations. The attack on Section 29 that it permits sharing of information is thus wholly misconceived. The objective of the Act is to protect the information and privacy of an individual and so the Section is not liable to be struck down on the specious ground that it permits sharing of the information. Further Sub-section (3) engraft a provision of sharing identity information by requesting entity with consent of the individual. When a person consents about sharing of his identity information, he cannot complain breach of Privacy Right. Petitioners take exception of provision of Sub-section (2), which permits identity information other than core biometric information to be shared in accordance with the provisions of this Act and in such manner as may be specified by the Regulations. When an Act or Regulation regulates and controls sharing of the information, the provision is regulatory and has been engrafted to protect individual's Privacy Right. The Aadhaar (Sharing of Information) Regulations, 2016 again contains in Chapter II-Restrictions on sharing of identity information. Regulation 3 is restriction on Authority. Regulation 4 is restriction on requesting entity. Regulation 5 fixes responsibility of any agency or entity other than requesting entity with respect to Aadhaar number. Regulation 6 provides restriction on sharing, circulating or publishing of Aadhaar number.

1023. We, thus, conclude that the provision of Section 29 and the Sharing Regulations contains a restriction and cannot be in any manner be held to violate any of the constitutional rights of a person. Objective of the Act is to put restrictions on the sharing information, which also is a legitimate State aim. The provision Under Section 29 which permits sharing of identity information except core biometric information in accordance with the Act and Regulations cannot be said to be disproportionate nor unreasonable. Legislature can very well enumerates circumstances and conditions where sharing of information becomes necessary. One of the circumstances where sharing of the information is specifically engrafted in Sub-section(2) of Section 33, which provides that nothing contained in Sub-section (3) of Section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India. Thus, the circumstances which can contemplate for sharing information is reasonable and proportionate. We, thus, held that provisions of Section 29 is constitutional and does not deserves to be struck down. Issue No. 8 is answered in the following manner:

Ans. 8: Provisions of Section 29 is constitutional and does not deserves to be struck down.

Issue No. 9	**Whether Section 33 is Constitutional ?**

1024. Section 33 of the Aadhaar Act, 2016 is as follows:

33. Disclosure of information in certain cases.-(1) Nothing contained in Sub-section (2) or Sub-section (5) of Section 28 or Sub-section (2) of Section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made pursuant to an order of a court not inferior to that of a District Judge:

Provided that no order by the court under this Sub-section shall be made without giving an opportunity of hearing to the Authority.

(2) Nothing contained in Sub-section (2) or Sub-section (5) of Section 28 and Clause (b) of Sub-section (1), Sub-section (2) or Sub-section (3) of Section 29 shall apply in respect of any disclosure of information, including identity information records, made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government:

Provided that every direction issued under this Sub-section, shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology, before it takes effect:

Provided further that any direction issued under this Sub-section shall be valid for a period of three months from the date of its issue, which may be extended for a further period of three months after the review by the Oversight Committee.

1025. The first limb of argument of the Petitioner is that Section 33 is unconstitutional since it provides for the use of the Aadhaar data base for Police verification which violates the protection against self-incrimination as enshrined Under Article 20(3) of the Constitution of India.

1026. Sub-section (1) of Section 33 contains an ample restriction in respect of any disclosure information which can be done only in pursuance of an order of the court not inferior to that of a District Judge. The restriction in disclosure of information is reasonable and has valid justification. The authority whose duty is to safeguard the entire data has to be heard before passing an order by the court which amply protects the interest of a person whose data is to be disclosed. An order of the court not inferior to that of a District Judge for disclosure of information itself is an ample protection to that, for no unreasonable purpose data shall be disclosed. Attacking on Sub-section (2) of Section 33, it is contended that although (i) disclosure of information has been permitted in the interest of the national security but there is no definition of national security, (ii) there is no independent oversight disclosure of such data on the ground of security, (iii) the provision is neither fair nor reasonable. Section (2) of Section 33 is disproportionate and unconstitutional.

1027. Section 33 Sub-section (2) contains two safeguards. Firstly, disclosure of information is to be made in the interest of national security and secondly, in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government, who is specially authorised in this behalf by an order of the Central Government. National security, thus, has to be determined by a higher officer who is specifically authorised in this behalf. This Court in ***Ex. Armymen's Protection***

Services P. Ltd. v. Union of India (UOI) and Ors., MANU/SC/0151/2014 : 2014 (5) SCC 409, has held that what is in the interest of national security is not a question of law but that it is matter of a policy. Following was held in paragraphs 16 and 17:

16. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of State or not. It should be left to the Executive. To quote Lord Hoffman in Secretary of State for the Home Department v. Rehman (2003) 1 AC 153:...in the matter of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive.

17. Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases it is the duty of the Court to read into and provide for statutory exclusion, if not expressly provided in the Rules governing the field. Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party.

1028. The International Courts have also dealt the issue. In a case, namely, **Census Act(BverfGE 65, 1)**, judgment of Federal Constitution Court of Germany, judgment dated 11.10.2013, the Court had occasion to consider the case in the context of data processing and protection of individual information against self-incrimination and use of their personal data. Dealing with right of information and self-determination the Court held that individuals have no right in the sense of absolute, unrestricted control over their data. Following was held by the Court:

The guarantee of this right to informational self-determination" is not entirely unrestricted. Individuals have no right in the sense of absolute, unrestricted control over their data; they are after all human persons who develop within the social Community and are dependent upon communication. Information, even if related to individual persons, represents a reflection of societal reality that cannot be exclusively assigned solely to the parties affected. The Basic Law, as has been emphasized several times in the case law of the Federal Constitutional Court, embodies in negotiating the tension between the individual and the Community a decision in favour of civic participation and civic responsibility(see BverfGE 4, 7 [15]; 8, 274 [329]; 27, 344 [351 and 352]; 33, 303 [334]; 50, 290 [353]; 56, 37 [49]).

Individuals must therefore in principle accept restriction on their right to informational self-determination in the overriding general public interest.

1029. Another judgment of European Commission of Human Rights in ***M.S. against Sweden*** was a case that applicant has complained that copies of her medical records containing information on treatment have been forwarded by the clinic without her information to the Insurance Co. The case of the applicant was noticed in paragraph 39 which is to the following effect:

39. The applicant submits that the women's clinic's submission of copies of her medical records to the Social Insurance Office without her knowledge or consent interfered with her right to respect for her private life. She maintains that the information contained in these records were of a highly sensitive and private nature. Allegedly, she could not anticipate, when she claimed compensation from the Office, that information on the abortion performed several years after alleged back injury would be forwarded to the Office. She further refers to the fact that the information in question is not protected by the same level of confidentiality at the Office as at the clinic.

1030. The Commission held that information was rightly submitted to the Insurance Co. in accordance with law. It is also relevant to refer the judgment of this Court in ***People's Union for Civil Liberties(PUCL) v. Union of India,*** MANU/SC/0149/1997 : 1997 (1) SCC 301, where the writ petition was filed Under Article 32 alleging serious invasion of an individual's privacy on the account of Telephone-tapping. The Court adverted to the Indian Telegraph Act, 1885 and the Rules framed thereunder. The Court has noticed that Section 5(2) of the Telegraph Act permits the interception of messages in accordance with the said section, "Occurrence of any public emergency" or "in the interest of public safety". In paragraph 28 following was held:

28. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said Section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non. for the application of the provisions of Section 5(2) of the Apt. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said Section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action.

1031. This Court issued various directions providing for certain safeguards regarding an order for Telephone-tapping. Thus, on fulfillment of statutory conditions when telephonic conversation can be intercepted no exception can be taken for disclosure of information in the interest of national security.

1032. The power given Under Section 33 to disclose information cannot be said to be disproportionate. The disclosure of information in the circumstances mentioned in Section 33 is reasonable and in the public interest.

1033. We are satisfied that the provision fulfills three fold test as laid down in ***Puttaswamy case***. There are no grounds to declare Section 33 as unconstitutional.

1034. We also need to advert to one of the submissions of the Petitioner that permitting disclosure of information for police investigation violates the protection against self-incrimination as provided Under Article 20 Sub-clause (3). It is true that Under Section 33 the Court may order for disclosure of information even for a police investigation. But information so received in no manner can be said to violate the protection given Under Article 20 Sub-clause (3). The basic information which are with the UIDAI are demographic and biometric information. In this context, reference is made to 11-Judge Constitution Bench judgment of this Court in ***State of Bombay v. Kathi KALU Oghad*** MANU/SC/0134/1961 : AIR 1961 SC 1808. The Constitution Bench had occasion to consider Sub-clause (3) of Article 20 of the Constitution. In the above case from the Accused who

was charged Under Section 302/34 Indian Penal Code during the investigation prosecution has obtained three specimen of hand-writing which were compared by his hand-writing which was part of the evidence. A question was raised as to the admissibility of the specimen of hand-writing, it was contended that use of specimen of hand-writing violated protection Under Article 20(3). This Court in paragraph 16 laid down following:

(16) In view of these considerations, we have come to the following conclusions:

(1) An Accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the Accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the Accused person had been compelled to make the impugned statement.

(2) The mere questioning of an Accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written Dagduas but also production of documents or giving materials which may be relevant at a trial to determine the guilt innocence of the Accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person Accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person Accused must have stood in the character of an Accused person at the time he made the statement. It is not enough that he should become an Accused, any time after the statement has been made.

1035. From what has been held in the above case, it is clear that 'to be a witness' is not equivalent to 'furnishing evidence' in its widest significance. The use of information retained by the UIDAI given by the order of the Court Under Section 33 cannot be said to be violating the protection as contained Under Article 20(3). Thus, Article 20(3) is not violated by disclosure of information Under Section 33. In view of the foregoing discussion, we hold that Section 33 is constitutional.

1036. One of the decisions on which Shri K.V. Viswanathan has placed reliance in support of his submission regarding violation of Article 20(3) as well as Article 21 of the Constitution is ***Selvi and Ors. v. State of Karnataka,*** MANU/SC/0325/2010 : 2010(7) SCC 263. In the above case this Court had considered as to whether certain scientific techniques, namely, narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases violate Sub-clause (3) of Article 20 as well as Article 21. The legal issues and questions of law have been noted in paragraphs 2 and 11 to the following effect:

2. The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

11. At this stage, it will be useful to frame the questions of law and outline the relevant sub-questions in the following manner:

I. Whether the involuntary administration of the impugned techniques violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution?

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

I-B. Whether the results derived from the impugned techniques amount to `testimonial compulsion' thereby attracting the bar of Article 20(3)?

II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution?

1037. After considering large number of cases of this Court as well as judgments rendered by Foreign Courts, a conclusion was recorded that those tests, since they are a means for imparting personal knowledge about relevant facts, hence, they come within the scope of testimonial compulsion thereby attracting the protective shield of Article 20(3). In paragraph 189 following was held:

189. In light of the preceding discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as `personal testimony', since they are a means for `imparting personal knowledge about relevant facts'. Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come

within the scope of `testimonial compulsion', thereby attracting the protective shield of Article 20(3).

1038. In so far as question of violation of Article 21 is concerned, this Court, in paragraphs 225 and 226 has held:

225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact'. The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of `personal liberty' Under Article 21. Hence, our understanding of the `right to privacy' should account for its intersection with Article 20(3). Furthermore, the `rule against involuntary confessions' as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.

226. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the `right against self-incrimination'. However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21.

1039. The nature of tests which were under consideration in the aforesaid case, were elaborately noticed by this Court and the tests were found to be in nature of substantial intrusion in the body and mind of an individual, hence, it was held that they violate Article 20(3) as well as Article 21. It is, however, relevant to notice that this Court in ***Selvi*** judgment itself has noticed the distinction in so far as use of fingerprints were concerned. This Court had noticed earlier judgment of ***State of Bombay v. Kathi Kalu Oghad*** MANU/SC/0134/1961 : AIR 1961 SC 1808 with approval. The biometric information that is fingerprints and iris scan can not be equated to the tests which came for consideration in ***Selvi's case***. Hence, the judgment of this Court in ***Selvi*** does not in any manner support the case of the Petitioners. Answer to question No. 3 is in following Manner:

Ans. 9: Section 33 cannot be said to be unconstitutional as it provides for the use of Aadhaar data base for police investigation nor it can be said to violate protection granted Under Article 20(3).

Issue No. 10	***Whether Section 47 of the Aadhaar Act is Unconstitutional?***

1040. The Petitioner submits that Section 47 of the Aadhaar Act is unconstitutional since it does not allow an individual who is victim of violation of Aadhaar Act to initiate a criminal process. It is submitted that the person who is victim of an offence under the Aadhaar Act has no remedy to file a complaint and Section 47 of the Act restrict the filing of complaint only by Authorities or Officers or persons authorised by it.

1041. The above submission is refuted by the Respondent that Section 47 has a rationale. The offences and penalties under Chapter VII of the Aadhaar Act are all intended to maintain the purity and integrity of CIDR and the entire enrolment storage in CIDR and authentication exercise can only be efficiently and effectively handled by UIDAI. Thus, jurisdiction to submit a complaint has been conferred to UIDAI which is the most entrusted entity for maintaining the purity of Aadhaar Scheme and is also affected by offences committed under the Aadhaar Act. Section 47 provides as follows:

47. Cognizance of Offence-(1) No court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Authority or any officer or person authorised by it.

(2) No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence punishable under this Act.

1042. Provisions akin to Section 47 are found in most of Statutes which Statutes defines offences under the Statute and provide penalty and punishment thereunder. Following are some of the Statues which contains a provision akin to Section 47 of Aadhaar Act:

1) Section 22 of Mines and Minerals(Development & Regulation) Act, 1957-No Court shall take cognizance of any offence punishable under this Act or any Rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government.

2) **Section 34 of the Bureau of Indian Standards Act, 1986**-No Court shall take cognizance of an offence punishable under this Act, save on a complaint made by or under the authority of the Government or Bureau or by any officer empowered in this behalf by the Government or the Bureau, or any consumer or any association recognized in this behalf by the Central or State Government.

3) **Section 26(1) of SEBI Act, 1992**-No Court shall take cognizance of any offence punishable under this Act or any Rules or Regulations made thereunder, save on a complaint made by the Board.

4) **Section 34 of Telecom Regulatory Authority of India Act, 1997**-No Court shall take cognizance of any offence punishable under this Act or the Rules or Regulations made thereunder, save on a complaint made by the Authority.

5) **Section 57(1) of Petroleum and Natural gas Regulatory Board Act, 2007** (sic 2006)-No Court shall take cognizance of any offence punishable under Chapter IX save on a complaint made by the Board or by any investigating agency directed by the Central Government.

6) **Section 47 of Banking Regulation Act, 1949**-No court shall take a cognizance of any offence punishable Under Sub-section (5) of Section 36AA or Section 46 except upon complaint in writing made by an officer of the Reserve Bank or, as the case may be, the National Bank generally or specially authorised in writing in this behalf by the Reserve Bank, or as the case may be, the National Bank and no court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class or any court superior thereto shall try any such offence.

7) **Section 19 of Environment (Protection) Act, 1986**-No court shall take cognizance of any offence under this Act except on a complaint made by-(a) the Central Government or any authority or officer authorised in this behalf by that Government, or (b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Central Government or the authority or officer authorised as aforesaid.

8) **Section 43 of The Air (Prevention and Control of Pollution) Act, 1981**-(1) No Court shall take cognizance of any offence under this Act except on a complaint made by-(a) a Board or any officer authorised in this behalf by it; or (b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint to the Board or officer authorised as aforesaid, and no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

1043. Large number of Special Acts which defines offences under the Act and their penalty contains provision akin to Section 34 of the Aadhaar Act. Special Acts are enacted for serving special objects towards offences under the Act. The initiation and prosecution of offences under the Special Act are kept by the specified authority to keep the initiation and prosecution in the hands of the authorities under the Special Act which acts as deterrent and prosecutions are brought to its logical end. Further, objective of such provisions is to discourage frivolous and vexatious complaints.

1044. This Court in ***Rajkumar Gupta v. Lt. Governor, Delhi and Ors.*** MANU/SC/0714/1997 : (1997) 1 SCC 556, had occasion to consider Section 34(1) of the Industrial Disputes Act, 1947 and objective behind putting such restriction. Section 34 of Industrial Disputes Act provided that no Court shall take cognizance of any offence punishable under this Act or of the abetment of any such offence, save on complaint made by or under the authority of the appropriate Government. Section 34 of Industrial Disputes Act is *pari materia* with Section 47 of the Aadhaar Act. This Court noticing the objective of Section 34 laid down following in the paragraph 16. The Court held that Section 34 is in the nature of limitation on the entitlement of workman or trade union or an employer to complain of offences under the Act. Following was laid down in paragraph 16:

16. At the same time, the provisions of Section 34 are in the nature of a limitation on the entitlement of a workman or a trade union or an employer to complain of offences under the said Act. They should not, in the public interest, be permitted to make frivolous, vexatious or otherwise patently

untenable complaints, and to this end Section 34 requires that no complaint shall be taken cognizance of unless it is made with the authorization of the appropriate Government.

1045. In so far as the submission that there is no forum for a person victim of an offence under Aadhaar Act, suffice to say that Section 47 can be invoked by the authority on its own motion or when it receives a complaint from a victim. The authority i.e. UIDAI has varied powers and functions as enumerated in Section 23 of the Act. It is the authority who is most entrusted in ensuring that the provisions of the Act are implemented in accordance with the Act and offenders should be punished. In so far as remedy of victim is concerned, there are few facts which need to be kept in mind.

1046. The Information Technology Act, 2000 defines electronic record in Section 2(t) which is to the following effect:

Section 2(t)-"electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

1047. The demographic and biometric information which is collected for enrolment of the resident in electronic data as defined in Section 2(t) of Information Technology Act and expressly stated in Section 30 of Aadhaar Act. Chapter 11 of the Information Technology Act defines offences. Section 66C, Section 66D and Section 72 of the Information Technology Act defines offences and provides for penalty, which is to the following effect:

66C. Punishment for identity theft-Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.

66D. Punishment for cheating by personation by using computer resource-Whoever, by means for any communication device or computer resource cheats by personating, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.

72. Penalty for breach of confidentiality and privacy-Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, Rules or Regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

1048. With regard to an offence which falls within the definition of 'offences' a victim can always file complaint or lodge an F.I.R.. Section 46 of the Aadhaar Act clearly provides that the penalties under the Aadhaar Act shall not interfere with other punishments. Section 46 is as follows:

46. Penalties not to interfere with other punishments.-No penalty imposed under this Act shall prevent the imposition of any other penalty or punishment under any other law for the time being in force.

1049. This Court in **State (NCT of Delhi) v. Sanjay,** MANU/SC/0761/2014 : (2014) 9 SCC 772, had occasion to consider the provisions of Section 22 of the Mines and Minerals (Development & Regulations) Act, 1957 which provision is similar to Section 47 of the Aadhaar Act. The question arose that whether in case the complaint has not been filed by the authority Under Section 22, whether cognizance can be taken of the offence if it falls within definition of any of the offences under the Indian Penal Code. There was divergence of opinions between the different High Courts. This Court after noticing earlier judgments of this Court, laid down following in paragraphs 17 and 73.

17. Since conflicting views have been taken by the Gujarat High Court, the Delhi High Court, the Kerala High Court, the Calcutta High Court, the Madras High Court and the Jharkhand High Court, and they are in different tones, it is necessary to settle the question involved in these appeals.

73. *After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-a-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under Indian Penal Code. Hence, for the commission of offence Under Section 378 Indian Penal Code, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly.*

1050. The limitation as contained in Section 47 in permitting taking cognizance of any offence punishable under Aadhaar Act only on a complaint made by the authority or any officer or person authorised by it, has legislative purpose and objective, as noticed above. We thus do not find any unconstitutionality in Section 47 of the Aadhaar Act. In view of the foregoing discussions, the answer to Issue No. 10 is in following manner:

Ans. 10: Section 47 of the Aadhaar Act cannot be held to be unconstitutional on the ground that it does not allow an individual who finds that there is a violation of Aadhaar Act to initiate any criminal process.

Issue No. 11	**Whether Section 57 of Aadhaar Act is unconstitutional?**

1051. Section 57 of the Act, which contains a heading "Act not to prevent use of Aadhaar Number for other purposes under law" provides:

57. Act to prevent use of Aadhaar number for other purposes under law.-Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect:

Provided that the use of Aadhaar number under this Section shall be subject to the procedure and obligations Under Section 8 and Chapter VI.

1052. Attacking the provision of Section 57, Petitioners contends that broad and unlimited scope of activities covered Under Section 57 and kinds of private entities permitted to use Aadhaar is entirely disproportionate beyond the means and objectives of the Act and without any compelling State interests. There are no procedural safeguards governing the actions of private entities and no remedy for undertaking's failure or service denial. The individual, who wish to be enrolled have given their consent only for Aadhaar subsidies, benefits and services, which cannot be assumed for other purposes. Section 57 has to be struck down on the ground of excessive delegation. "Any purpose" indicates absence of guidelines. Any purpose does not mean all purposes and several aspects of human existence. Section 57 violates all principles of proportionality.

1053. Refuting the above submission of the Petitioners, the Respondents submits that, Section 57 is not an enabling provision, it merely provides as it states that the provisions of the Act would not prevent the use of Aadhaar for other purposes. In fact, Section 57 employs limitation on such user for other purposes, which is engrafted in Proviso to Section 59. The use of Aadhaar having been made subject to procedure and obligations Under Section 8 and Chapter VI, the contract must provide for authentication Under Section 8 and protection and formulation under Chapter VI also obviously entail the operation of Chapter VII (Offences and Penalties). Section 57 does not have any relation to other laws, which may be made by Parliament, the other laws made by Parliament would have to be tested on their own merits. Section 57 is not a provision enabling the making of a law or rather it is actually a limitation or restriction to law, which may be made with respect to use of Aadhaar number. The apprehension expressed by the Petitioners is about the wide extension of use of Aadhaar in private spheres is completely misplaced.

1054. One of the grounds of attack of the Petitioners to Section 57 is that it is disproportionate and does not satisfy the proportionality test as laid down in Privacy Judgment-**Puttaswamy case**. Before proceeding further, it becomes necessary to look into the proportionality test, its content and parameters.

1055. Patanjali Shastri, Chief Justice, as he then was speaking for a Constitution Bench in **State of Madras v. V.G. Row** MANU/SC/0013/1952 : AIR 1952 SC 196, while elaborating the expression reasonable restrictions on the exercise of right as occurring in Clause (5) of Article 19 of the Constitution laid down that reasonable restriction should not be disproportionate. Following was observed in Paragraph 15:

15..... It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent

and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

1056. A Two Judge Bench of this Court in **Om Kumar and Ors. v. Union of India,** MANU/SC/0704/2000 : (2001) 2 SCC 386 elaborately considered the concept of proportionality in reference to legislative action. This Court held that ever since the principle of proportionality as noted above applied in India, Jagannadha Rao, J. had referred to judgments of Canadian Supreme Court in **R v. Oakes** (1986) 26 DLR 2001 and has noticed the three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be 'proportionality' between the effects of the measures and the objective.

1057. Again, in **Teri Oat Estates (P) Ltd. v. U.T. Chandigarh and Ors.** MANU/SC/1098/2003 : (2004) 2 SCC 130, Sinha, J. had elaborately reviewed the principle of proportionality. In Paragraph 46, following has been held:

46. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority:

maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve.

1058. The most elaborate consideration of the Doctrine of Proportionality was made in **Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors.** MANU/SC/0495/2016 : (2016) 7 SCC 353. The validity of legislation passed by State of Madhya Pradesh Legislature came for consideration. The Court (speaking through Dr. Justice A.K. Sikri, one of us) held that exercise that is required to be undertaken is the balancing of fundamental right and restrictions imposed, which is known as Doctrine of Proportionality. In Paragraph 60, following has been stated:

60. .....

Thus, while examining as to whether the impugned provisions of the statute and Rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as "doctrine of proportionality". Jurisprudentially, "proportionality" can be defined as the set of Rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four subcomponents of proportionality which need to be satisfied, a limitation of a constitutional right will be constitutionally permissible
if:

(i) it is designated for a proper purpose;

(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;

(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally

(iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

1059. Elaborating the constitutional principles, it was laid down that the Constitution permit constitutional rights to be limited to protect public interests or the rights of others. The conflict between two fundamental aspects, i.e. rights on the one hand and its limitation on the other hand- is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context. What criteria is to be adopted in for a proper balancing has been explained in Paragraphs 63 and 64:

63. In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of "proportionality", which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. This essence of doctrine of proportionality is beautifully captured by Dickson, C.J. of Canada in R. v. Oakees, (1986) 1 SCR 103 (Can SC), in the following words (at p. 138):

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutional protected right or freedom ... Second ... the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This

involves "a form of proportionality test..." Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be ... rationally connected to the objective. Second, the means ... should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

64. The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

1060. The application of Doctrine of Proportionality, while examining validity of the Statute has been accepted in other countries as well. Judgments of the U.S. Supreme Court as well as of United Kingdom, Canadian Supreme Court and Australian Court shows that they have applied proportionality principle while judging a Statute. European Court of Human Rights and other international bodies have recognised the said principle. Privacy judgment in **Puttaswamy case** has also accepted the proportionality doctrine for judging validity of a Statute. In the three-fold test evolved in Privacy Judgment, proportionality is the third component. Dr. D.Y. Chandrachud, J. in Paragraph 310 has stated following in respect of proportionality:

310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and

liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

1061. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law.

1062. European Court of Justice in **Michael Schwarz v. Stadt Bochum** in its judgment dated 17.10.2013, while considering a directive of the European Parliament and on the protection of individuals with regard to the processing of personal data and on the free movement of such data, has applied the proportionality principle. Following was laid down in Paragraph 40:

40. Fourth, the Court must establish whether the limitations placed on those rights are proportionate to the aims pursued by Regulation No. 2252/2004 and, by extension, to the objective of preventing illegal entry into the European Union. It must therefore be ascertained whether the measures implemented by that Regulation are appropriate for attaining those aims and do not go beyond what is necessary to achieve them (see Volker and Markus Schedule and Eifert, paragraph 74).

1063. Court of Justice of the European Union in **Digital Rights Ireland Ltd. v. Minister for Communications** [2015] QBECJ 127 had occasion to consider the validity of Parliament and Council Directive 2006/24/EC on the retention of data generated or processed by them in connection with the provision of publicly available electronic communications services or of public communications networks. Applying the principle of proportionality, it was held that principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives. Following was laid down in Paragraph 46:

46. In summary, Directive 2006/24 is characterised by its functional duality. It is, on the one hand, an entirely traditional Directive which seeks to harmonise national laws that are disparate (recital (5) in the Preamble to Directive 2006/24 states that national laws "vary considerably") or likely to become so, and was adopted in the interests of the functioning of the internal market and precisely calibrated for that purpose, as the court ruled in *Ireland v. European Parliament*. However, it is also, on the other hand, a Directive which, even in its harmonising function, seeks to establish where appropriate, obligations-in particular data retention obligations-which constitute, as I shall show later, serious interference with the enjoyment of the fundamental rights guaranteed to European citizens by the Charter, in particular the right to privacy and the right to the protection of personal data.

1064. Another judgment by Court of the Justice of European Union (Grand Chamber) is **Tele 2 Sverige AB v. Post-och telesyrelsen**. A directive of European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector came for consideration. In Paras 95, 96 and 116 following was laid down:

95. With respect to that last issue, the first sentence of Article 15(1) of Directive 2002/58 provides that Member States may adopt a measure that derogates from the principle of confidentiality of communications and related traffic data where it is a 'necessary, appropriate and proportionate measure within a democratic society', in view of the objectives laid down in that provision. As regards recital 11 of that directive, it states that a measure of that kind must be 'strictly' proportionate to the intended purpose. In relation to, in particular, the retention of data, the requirement laid down in the second sentence of Article 15(1) of that directive is that data should be retained 'for a limited period' and be 'justified' by reference to one of the objectives stated in the first sentence of Article 15(1) of that directive.

96. Due regard to the principle of proportionality also derives from the Court's settled case-law to the effect that the protection of the fundamental right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary (judgments of 16 December 2008, Satakunnan Markkinaporssi and Satamedia, C-73/07, EU:C:2008:727, paragraph 56; of 9 November 2010, Volker and Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, paragraph 77; the *Digital Rights* judgment, paragraph 52, and of 6 October 2015, Schrems, C-362/14, EU:C:2015:650, paragraph 92).

116. As regards compatibility with the principle of proportionality, national legislation governing the conditions under which the providers of electronic communications services must grant the competent national authorities access to the retained data must ensure, in accordance with what was stated in paragraphs 95 and 96 of this judgment, that such access does not exceed the limits of what is strictly necessary.

1065. The U.S. Supreme Court while considering the said test has repeatedly refused to apply the least intrusive test. **Vernonia School District v. Wayne Acton**, 515 US 646, 132 L. Ed. 2D 564, was a case where a Student Athlete Drug Policy was adopted by the School District, which authorised random urine analysis drug testing of students participating in the District School Athletic Programme. A student was denied participation in Football game since he and his parents had refused to sign the testing consent forms. The Actons filed suit, seeking for a declaratory and injunctive relief from enforcement of the Policy. One of the submissions raised was that Policy is disproportionate since it asks all the athletes to undergo urine analysis, the test is not least intrusive test. Repelling the least intrusive test, following was held:

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." Brief for Respondents 45-46. We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. Skinner, supra, at 629, n. 9, 103 l Ed 2d 639, 109 S Ct. 1402 (collecting cases).

1066. To the same effect is another judgment of U.S. Supreme Court in **Board of Education of Independent School District v. Lindsay Earls,** 536 US 822 : 153 L. Ed. 2d. 735.

1067. The submission of the Respondents that least intrusive test cannot be applied to judge the proportionality of Aadhaar Act has been refuted by Petitioners. Petitioners submit that least intrusive test is a test, which was applied in large number of cases and i.e. the test which may ensure that there is a minimal invasion of privacy. It is submitted that the Respondents could have switched to a smart card, which itself contain the biometric information of a person. Respondents submitted that least intrusive test has not been approved either in the **Modern Dental (supra)** or in the **Puttaswamy** case. We are also of the view that there are several reasons due to which least intrusive test cannot be insisted. For applying the least intrusive test, the Court has to enter comparative analysis of all methods of identification available, which need to be examined with their details and compared. Court has to arrive at finding as to which mode of identity is a least intrusive. We are of the view that comparison of several modes of identity and to come to a decision, which is least intrusive is a matter, which may be better left to the experts to examine. Further, there are no proper pleadings and material with regard to other modes of identification, which could have been adopted by the State, to come to a definite conclusion by this Court.

1068. After noticing the parameters of proportionality, we now need to apply proportionality and other tests to find out as to whether Section 57 satisfies the proportionality and other tests. Section 57 begins with the phrase "nothing contained in this Act shall prevent the use of Aadhaar number....." for establishing the identity of an individual for any purpose. Section 57 reveals following concepts and ides, which can be para phrased in following manner:

(a) Nothing contained in this Act shall prevent the use of Aadhaar number for identifying the identity of an individual for any purpose.

(b) Whether by the State or body corporate or private person.

(c) Pursuant to any law, for the time being in force or any contract to this effect.

1069. The basic theme of the Aadhaar Act to implement the Aadhaar programme was for purposes of disbursement of subsidies, benefits or services to individuals entitled for the same. By various notifications issued Under Section 7, the Government has made applicable Aadhaar authentication for large number of schemes namely 133 in number. The idea behind Section 57 is that Aadhaar is liberated from the four corners of the Act and it may not be confined to use Under Section 7 alone. The Act does not prohibit the use of Aadhaar for any other purpose. Section 57 is thus in a way clarificatory in nature, which enable the use of Aadhaar for any other purposes. The Petitioners have two basic objections. Firstly, they submitted that use of word "any purpose" is unguided and uncontrolled and secondly it can be used by body corporate or persons, pursuant to any law, for the time being in force or any contract to this effect. **Puttaswamy** judgment has already laid down that any infringement of Privacy right should pass three-fold test as noticed above. The first test, which needs to be satisfied for non-intrusion in privacy right is that it should be backed by law. Section 57 cannot be treated as a law, which permit use of Aadhaar number for any purpose. The law providing for use of Aadhaar for any purpose should be rational and proportional. There has to be some object to be achieved by use of Aadhaar, in a particular case, the legislature has ample power to provide for legislative scheme by an enactment making use of Aadhaar and use of Aadhaar has to be backed by a valid law. In event, it is accepted on the strength of Section 57 that a State or body corporate or person, on the basis of any contract to this effect,

are permitted to use Aadhaar it shall be wholly unguided and uncontrolled, which is prone to violate the right of privacy. Section 57 makes use of Aadhaar on two basis. Firstly, "pursuant to any law, for the time being in force" and secondly "any contract to this effect". When the legislature uses the phrase "pursuant to any law, for the time being in force", obviously the word law used in Section 57 is a law other than Section 57 of Aadhaar Act, 2016 and the Regulations framed thereunder. When any law permits user of Aadhaar, its validity is to be tested on the anvil of three-fold test as laid down in **Puttaswamy** case, but permitting use of Aadhaar on any contract to this effect, is clearly in violation of Right of Privacy. A contract entered between two parties, even if one party is a State, cannot be said to be a law.

1070. We thus, are of the view that Section 57 in so far as it permits use of Aadhaar on "any contract to this effect" is clearly unconstitutional and deserves to be struck down. We may again clarify that Section 57 has to be read only to mean that it clarifies that nothing contained in Aadhaar Act shall prevent the use of Aadhaar for establishing the identity of an individual for any purpose, in pursuant to any law. Section 57 itself is not a law, which may permit use of Aadhaar for any purpose. There has to be a valid law in existence, which should also pass the threefold test as laid down in **Puttaswamy** case for making provision for use of Aadhaar.

1071. In view of the foregoing discussions, we held that Section 57, to the extent, which permits use of Aadhaar by the State or any body corporate or person, in pursuant to any contract to this effect is unconstitutional and void. Thus, the last phrase in main provision of Section 57, i.e. "or any contract to this effect" is struck down. **Issue No. 11 is answered in the following manner:**

Ans. 11: Section 57, to the extent, which permits use of Aadhaar by the State or any body corporate or person, in pursuant to any contract to this effect is unconstitutional and void. Thus, the last phrase in main provision of Section 57, i.e. "or any contract to this effect" is struck down.

Issue No. 12	**Whether Section 59 is void or unconstitutional?**

1072. Learned Counsel for the Petitioners have submitted that prior to enactment of Aadhaar Act there was no law and all actions undertaken in pursuance of the executive order dated 28.01.2009 including taking of demographic and biometric information of an individual was not backed by any law violated fundamental right of privacy. Violation of fundamental right of privacy cannot be cured by any subsequent legislation. It is well settled that Executive actions, which breach fundamental right of a person must have the authority of law to support it. A post-constitutional law or executive act that violates fundamental rights is still born and void ab initio. Further there was no consent, let alone informed consent obtained from individuals at the time of enrolment under the said notification. A validating law must remove the cause of invalidity of previous acts. The cause of invalidity in the present case was the absence of a law governing privacy infringements. However, Section 59 does not create such a legal fiction where the Aadhaar Act is deemed to have been in existence since 2009. It only declares a legal consequence of acts done by Union since 2009, which it cannot do. No procedural safeguards existed pre-2016 and thus, even assuming that Section 59 is validly enacted, it has to be declared unconstitutional for violating Articles 14 and 21.

1073. Replying the above submissions, Respondents submit that Section 59 is retrospective, saving provision which provides a retrospective effect to the notification dated 28.01.2009 and anything done or action taken by the Central Government under the said Resolution.

1074. The expression 'anything done or any action under the Resolution' is wide enough to cover all the actions including memorandum of undertaken which UIDAI executed as Department of Central Government. Section 59 seeks to save and continue under the said Act what was done under the executive scheme. The submission that breach of fundamental right cannot be retrospectively cured is incorrect. The last phrase of Section 59 uses the expression "shall be deemed", this expression clearly indicates creation of fiction with the object of providing legislative support to the action taken before the Act. That seeks to continue the entire architecture of Aadhaar which established under the Government Resolution dated 28.01.2009. As a result of deeming provision all the actions under the aforesaid scheme shall be deemed to have been done under the Act and not under the aforesaid notification. We may have a look on Section 59 of the Act which provides:

59. Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing notification number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing notification number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act.

1075. Justice G.P. Singh in Principles of Statutory Interpretation, 14th Edition, while explaining the legal fiction sum up the Principle in the following words:

The Legislature is quite competent to create a legal fiction, in other words, to enact a deeming provision for the purpose of assuming existence of a fact which does not really exist provided the declaration of nonexistent facts as existing does not offend the constitution. Although the word 'deemed' is usually used, a legal fiction may be enacted without using that word. For instance, the words 'as if' can also be used to create a legal fiction.

In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the Section by which it is created.

1076. A Constitution Bench judgment of this Court in ***M/s. West Ramnad Electric Distribution Co. Ltd. v. The State of Madras and Anr.*** MANU/SC/0060/1962 : AIR 1962 SC 1753, has been heavily relied by the Respondents. The Madras Legislature had passed an Act, the Madras Electricity Supply Undertakings (Acquisition) Act, 1949 for supply of electricity in the province of Madras. By an order dated 17.05.1951 Appellant undertaking was acquired and possession was directed to be taken. There was challenge to 1949 Act which challenge was upheld by this Court in ***Rajahmundry Electric Supply Corporation Ltd. v. State of Andhra Pradesh*** MANU/SC/0023/1954 : AIR 1954 SC 251, on the ground that Act was beyond the legislative

competence of the Madras Legislature. The Madras Legislature passed another Act, the Madras Electricity Supply Undertakings (Acquisition) Act, 1949, which also received the Presidential assent. The Act purported to validate the action taken under the 1949 Act. A writ petition was filed in Madras High Court challenging the action taken under 1949 Act to continue the possession. The writ petition was dismissed and the matter was taken to this Court. The contention which was raised before this Court has been noticed in paragraph 8 in the following words:

8.... Mr. Nambiar further contends that this notification was invalid for two reasons; it was invalid because it has been issued under the Provisions of an Act which was void as being beyond the legislative competence of the Madras Legislature, and it was void for the additional reason that before it was issued, the Constitution of India had come into force and it offended against the provisions of Article 31 of the Constitution, and so, Article 13(2) applied. Section 24 of the Act, no doubt, purported or attempted to validate this notification, but the said attempt has failed because the Act being prospective, Section 24 cannot have retrospective operation. That, in substance, is the first contention raised before us.

1077. Section 24 of the 1949 Act which created a deeming fiction validating the actions taken under the earlier Act has been noticed in paragraph 11 which is to the following effect:

11. Let us then construe Section 24 and decide whether it serves to validate the impugned notification issued by the Respondent on the 21st September, 1951.

Section 24 reads thus:

Orders made, decisions or directions given, notifications issued, proceedings taken and acts of things done, in relation to any undertaking taken ever, if they would have been validly made, given, issued, taken or done, had the Madras Electricity Supply Undertakings (Acquisition) Act, 1949 (Madras Act XLIII of 1949), and the Rules made thereunder been in force on the date on which the said orders, decisions or directions, notifications, proceeding, acts or things, were made, given, issued, taken or done are hereby declared to have been validly made, given, issued, taken or done, as the case may be, except to the extent to which the said orders, decisions, directions, notifications, proceedings, acts or things are repugnant to the provisions of this Acts."

1078. Repelling the submission of counsel for the Appellant it was held that Section 24 had been enacted for the purpose of retrospectively validating action taken under the provisions of the earlier Act. Following was held in paragraph 13:

13....If the Act is retrospective in operation and Section 24 has been enacted for the purpose of retrospectively validating actions taken under the provisions of the earlier Act, it must follow by the very retrospective operation of the relevant provisions that at the time when the impugned notification was issued, these provisions were in existence. That is the plain and obvious effect of the retrospective operation of the statute. Therefore in considering whether Article 31(1) has been complied with or not, we must assume that before the notification was issued, the relevant provisions of the Act were in existence and so, Article 31(1) must be held to have been complied with in that sense.

1079. The submission was made that notification issued under the earlier Act contravenes Article 31 which is a fundamental right and cannot be cured by the subsequent law. The contention has been noted in paragraph 15:

15. That takes us to the larger issue raised by Mr. Nambiar in the present appeals. He contends that the power of the legislature to make laws retrospective cannot validly be exercised so as to care the contravention of fundamental rights retrospectively. His contention is that the earlier Act of 1949 being dead and non-existent, the impugned notification contravened Article 31(1) and this contravention of a fundamental right cannot be cured by the legislature by passing a subsequent law and making it retrospective. In support of this argument, he has relied on the decision of this Court in Deep Chand v. The State of Uttar Pradesh MANU/SC/0023/1959 : (1959) Supp. 2 S.C.R. 8 : (AIR 1959 SC 648)....

1080. It was held by the Constitution Bench that the Legislature can effectively exercise power of validating action taken under the law which was void for the reason that it contravened fundamental right. In paragraph 16 following has been held:

16....If a law is invalid for the reason that it has been passed by a legislature without legislative competence, and action is taken under its provisions, the said action can be validated by a subsequent law passed by the same legislature after it is clothed with the necessary legislative power. This position is not disputed. If the legislature can by retrospective legislation cure the invalidity in actions taken in pursuance of laws which were void for want of legislative competence and can validate such action by appropriate provisions, it is difficult to see why the same power cannot be equally effectively exercised by the legislature in validating actions taken under law which are void for the reason that they contravened fundamental rights. As has been pointed out by the majority decision in Deep Chand's case, the infirmity proceeding from lack of legislative competence as well as the infirmity proceeding from the contravention of fundamental rights lead to the same result and that is that the offending legislation is void and honest. That being so, if the legislature can validate actions taken under one class of void legislation, there is no reason why it cannot exercise its legislative power to validate actions taken under the other class of void legislation. We are, therefore, not prepared to accept Mr. Nambiar's contention that where the contravention of fundamental rights is concerned, the legislature cannot pass a law retrospectively validate actions taken under a law which was void because it contravened fundamental rights.

1081. Shri Shyam Divan submits that the above judgment of this Court in ***M/s. West Ramnad Electric Distribution Co. Ltd.*** is not applicable. He submits that unlike Section 59 of Aadhaar Act, the provisions in ***West Ramnad*** **case** had no limiting words such as 'action taken by the Central Government'. Further even under the ***West Ramnad*** case principle, the action can be saved would have to be proper under the previous regime. ***West Ramnad*** actions were under an earlier statute that was declared ultra vires, which cannot be saved Under Section 59 of the Aadhaar Act. The collection of biometrics from individuals right upto 2016 cannot be described as lawful and intra vires the 2009 notification. If it were ultra vires the 2009 notification, Section 59 of the Aadhaar Act cannot validate the action.

1082. We have already noticed the ratio of the judgment as stated in paragraph 16 in the judgment in ***West Ramnad*** **case** that even if earlier action which is sought to be validated was ultra vires and

violates constitutional right, it could have been very well validated by retrospective statute creating a deeming fiction. We are of the view that ratio laid down in ***West Ramnad*** **case** is fully applicable in the present case.

1083. Another Constitution Bench in ***Bishambhar Nath Kohli and Ors. v. State of Uttar Pradesh and Ors.*** MANU/SC/0019/1965 : AIR 1966 SC 573, had occasion to consider the deeming fiction as contained under Act 31 of 1950. Section 58(3) of Act 31 of 1950 as deeming provision that anything done or action taken in exercise of the power conferred under Ordinance 27 of 1949 is to be deemed to have been done or taken in exercise of the power conferred by or under Act 31 of 1950. In paragraphs 7 and 8 of the judgment following has been laid down:

7. By Ordinance 27 of 1949 a proceeding commenced under Ordinance 12 of 1949 or anything done or action taken in the exercise of the powers conferred under that Ordinance was to be deemed a proceeding commenced, thing done and action taken under the former Ordinance as if that Ordinance were in force on the date on which the proceeding was commenced, thing was done or action was taken. Section 58(3) of Act 31 of 1950 contained a similar deeming provision that anything done or action taken in exercise of the power conferred under Ordinance 27 of 1949 is to be deemed to have been done or taken in exercise of the power conferred by or under Act 31 of 1950, as if the Act were in force on the day on which such thing was done or action was taken.

8. By this chain of fictions, things done and actions taken under Ordinance 12 of 1949 are to be deemed to have been done or taken in exercise of the powers conferred under Act 31 of 1950, as if that Act we re in force on the day on which such thing was done or action taken. The order passed by the Deputy Custodian Under Section 6 of Ordinance 12 of 1949 was, therefore, for the purpose of this proceeding, to be deemed an order made in exercise of the power conferred by Act 31 of 1950 as if that Act were in force on the day on which the order was passed.

1084. The ratio of judgment in ***West Ramnad(supra)*** has been repeatedly applied by this Court in several judgments. Reference is made to ***Hari Singh and Ors. v. The Military Estate Officer and Anr.*** MANU/SC/0614/1972 : 1972 (2) SCC 239, which was a case rendered by a seven-Judge Constitution Bench. In paragraph 16 following has been held:

16. The ruling of this Court in West Ramnad Electric Distribution Co. Ltd. (1) case establishes competence of the legislature to make laws retrospective in operation for the purpose of validation of action done under an earlier Act which has been declared by a decision of the court to be invalid. It is to be appreciated that the validation is by virtue of the provisions of the subsequent piece of legislation.

1085. Justice Krishna Iyer, J. in ***Krishna Chandra Gangopadhyaya and Ors. v. The Union of India and Ors.*** MANU/SC/0143/1975 : 1975 (2) SCC 302, while considering validation of Act held that the Legislature can retrospectively validate what otherwise was inoperative law or action. In paragraph 25 following has been held:

25. The ratio of ***West Ramnad (supra)*** is clear. The Legislature can retrospectively validate what otherwise was inoperative law or action. Unhappy wording, infelicitous expression or imperfect

or inartistic drafting may not necessarily defeat, for that reason alone, the obvious object of the validating law and its retrospective content.

1086. This Court again in ***ITW Signode India Ltd. v. Collector of Central Excise***, MANU/SC/0938/2003 : 2004 (3) SCC 48, held that curative statutes by their very nature are intended to operate upon and affect past transaction. In paragraph 61 following has been held:

61. A statute, it is trite, must be read as a whole. The plenary power of legislation of the Parliament or the State Legislature in relation to the legislative fields specified under Seventh Schedule of the Constitution of India is not disputed. A statutory act may be enacted prospectively or retrospectively. A retrospective effect indisputably can be given in case of curative and validating statute. In fact curative statutes by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing. However, the scope of the validating act may vary from case to case.

1087. The argument that an action or provision hit by Article 14 can never be validated was specifically rejected by this Court in ***The State of Mysore and Anr. v. d. Achiah Chetty, Etc.,*** MANU/SC/0153/1968 : (1969) 1 SCC 248, in paragraph 15 following has been held:

15. Mr. S.T. Desai, however, contends that an acquisition hit by Article 14 or anything done previously cannot ever be validated, unless the vice of unreasonable classification is removed and the Validating Act is ineffective for that reason. This argument leads to the logical conclusion that a discrimination arising from selection of one law for action rather than the other, when two procedures are available, can never be righted by removing retrospectively one of the competing laws from the field. This is a wrong assumption....

1088. A statute creates a legal fiction to achieve a legislative purpose. We may refer to the celebrated judgment of Lord Asquith in ***East End Dwelling Co. Ltd. And Finsury Borough Council***, 1952 AC 109, following is the enunciation of Lord Asquith:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

1089. Legislature has often created legal fiction to save several actions which had happened prior to enactment. Reference is made to judgment of this Court in ***Nar Bahadur Bhandari and Anr. v. State of sikkim and Ors.*** MANU/SC/0369/1998 : (1998) 5 SCC 39. In the above case deeming fiction was created by Section 30 of Prevention of Corruption Act, 1988. Section 30 provides that any action taken or purported to have been done or taken under or in pursuance of the Acts so repeated shall be deemed to have been done or taken under 1988 Act. Following was stated in paragraph 10:

10....In the present case, the Act of 1988 is the repealing Act. Sub-section (2) of Section 30 reads as follows:

30(2) Notwithstanding such repeal, but without prejudice to the application of Section 6 of the General Clauses Act 1897 (10 of 1897), anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under or in pursuance of the corresponding provision of this Act.

12. The said Sub-section while on the one hand ensures that the application of Section 6 of the General Clauses Act is not prejudiced, on the other it expresses a different intention as contemplated by the said Section 6. The last part of the above Sub-section introduces a legal fiction whereby anything done or action taken under or in pursuance of the Act of 1947 shall be deemed to have been done or taken under or in pursuance of corresponding provisions of the Act of 1988. That is, the fiction is to the effect that the Act of 1988 had come into force when such thing was done or action was taken.

1090. An elaborate consideration on deeming fiction was made by three-Judge Bench of this Court in ***State of Karnataka v. State of Tamil Nadu and Ors.*** MANU/SC/1571/2016 : (2017) 3 SCC 362, one of us, Justice Dipak Misra, as he then was, speaking for the Court in paragraphs 72 to 74:

72. The second limb of submission of Mr. Rohatgi as regards the maintainability pertains to the language employed Under Section 6(2) of the 1956 Act, which reads as follows:

6(2) The decision of the Tribunal, after its publication in the Official Gazette by the Central Government Under Sub-section (1), shall have the same force as an order or decree of the Supreme Court.

73. Relying on Section 6(2), which was introduced by way of Amendment Act 2002 (Act No. 14 of 2002) that came into force from 6.8.2002, it is submitted by Mr. Rohatgi that the jurisdiction of this Court is ousted as it cannot sit over in appeal on its own decree. The said submission is seriously resisted by Mr. Nariman and Mr. Naphade, learned senior Counsel contending that the said provision, if it is to be interpreted to exclude the jurisdiction of the Supreme Court of India, it has to be supported by a constitutional amendment adding at the end of Article 136(2) the words "or to any determination of any tribunal constituted under the law made by Parliament Under Article 262(2)" and, in such a situation, in all possibility such an amendment to the Constitution may be ultra vires affecting the power of judicial review which is a part of basic feature of the Constitution. Learned senior Counsel for the Respondent has drawn a distinction between the conferment and the exclusion of the power of the Supreme Court of India by the original Constitution and any exclusion by the constitutional amendment. Be that as it may, the said aspect need not be adverted to, as we are only required to interpret Section 6(2) as it exists today on the statute book. The said provision has been inserted to provide teeth to the decision of the tribunal after its publication in the official gazette by the Central Government and this has been done keeping in view the Sarkaria Commission's Report on Centre-State relations (1980). The relevant extract of the Sarkaria Commission's Report reads as follows:

17.4.19 The Act was amended in 1980 and Section 6A was inserted. This Section provides for framing a scheme for giving effect to a Tribunal's award. The scheme, inter alia provides for the establishment of the authority, its term of office and other condition of service, etc. but the mere creation of such an agency will not be able to ensure implementation of a Tribunal's award. Any agency set up Under Section 6A cannot really function without the cooperation of the States concerned. Further, to make a Tribunal's award binding and effectively enforceable, it should have the same force and sanction behind it as an order or decree of the Supreme Court. We recommend that the Act should be suitably amended for this purpose.

17.6.05 - The Inter-State Water Disputes Act, 1956 should be amended so that a Tribunal's Award has the same force and sanction behind it as an order or decree of the Supreme Court to make a Tribunal's award really binding.

74....Parliament has intentionally used the words from which it can be construed that a legal fiction is meant to serve the purpose for which the fiction has been created and not intended to travel beyond it. The purpose is to have the binding effect of the tribunal's award and the effectiveness of enforceability. Thus, it has to be narrowly construed regard being had to the purpose it is meant to serve.

1091. In paragraphs 75, 76 and 77 following has been laid down:

75. In this context, we may usefully refer to the Principles of Statutory Interpretation, 14th Edition by G.P. Singh. The learned author has expressed thus:

In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created 1, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not be extended beyond the purpose for which is created, or beyond the language of the Section by which it is created 4. It cannot also be extended by importing another fiction 5. The principles stated above are 'well-settled'. A legal fiction may also be interpreted narrowly to make the statute workable.

76. In Aneeta Hada v. Godfather Travels and Tours, MANU/SC/0335/2012 : (2012) 5 SCC 661, a three-Judge Bench has ruled thus:

37. In State of T.N. v. Arooran Sugars Ltd., MANU/SC/0426/1997 : (1997) 1 SCC 326 the Constitution Bench, while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. Reference was made to Chief Inspector of Mines v. Karam Chand Thapar MANU/SC/0382/1961 : AIR 1961 SC 838, J.K. Cotton Spg. and Wvg. Mills Ltd. v. Union of India, MANU/SC/0403/1987 : 1987 Supp. SCC 350, M. Venugopal v. LIC, MANU/SC/0310/1994 : (1994) 2 SCC 323 and ***Harish Tandon v. ADM, Allahabad,*** MANU/SC/0132/1995 : (1995) 1 SCC 537 and eventually, it was held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between which persons such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion."

38. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term "deemed" has to be read in its context and further, the fullest logical purpose and import are to be understood. It is because in modern legislation, the term "deemed" has been used for manifold purposes. The object of the legislature has to be kept in mind."

77. In Hari Ram, the Court has held that in interpreting the provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created and after ascertaining the same, the court is to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction.

1092. Applying the ratio of this Court as noticed above, it is clear that Parliamentary legislative intent of Section 59 is to save all actions taken by Central Government under the notification dated 28.01.2009 and notification dated 12.09.2015 deeming the same to have been validly done under the Aadhaar Act by creating a legal fiction. The intention to save all actions taken under the aforesaid two notifications and treat them to have done under that Act is clear, it is the purpose and object of Section 59. Section 59 has to be interpreted to give meaning to the legislative intent to hold otherwise shall defeat the purpose of Section 59. As observed, Legislature by legislative device can cover actions taken earlier while creating any legal fiction which has actually been done by Section 59.

1093. There is one more submission of the Petitioners to be considered. Petitioner's case is that there was no consent or informed consent obtained from individuals for enrolment made consequent to notification dated 28.01.2009, the notification dated 28.01.2009 and the scheme thereafter does not clearly indicate that the enrolment for Aadhaar was voluntary. This Court has issued an interim order directing the enrolment be treated as voluntary, hence, it cannot be accepted that those got enrolled after 28.01.2009 did not give consent. The individual provided demographic information and gave biometric information and also signed the enrolment form. The residents after the enrolment were required to confirm that information contained were provided by them and are of his own true and correct. On sign slip, he was required to sign or put his thumb impression themselves. It is on the record that more than 100 crores enrolment were completed prior to enforcement of Aadhaar Act 2016. On the basis of Aadhaar Act large number of persons must have received benefits of subsidies and services, thus, the enrolments prior to enforcement of Act, 2016 cannot be declared illegal and void. In view of the aforementioned discussion, we answer the Issue No. 12 in the following manner;

Ans. 12: Section 59 has validated all actions taken by the Central Government under the notifications dated 28.01.2009 and 12.09.2009 and all actions shall be deemed to have been taken under the Aadhaar Act.

Issue No. 13	Whether Collecting the identity information of children between 5 to 18 years is unconstitutional?

1094. Section 5 of the Act provides that the Authority shall take special measures to issue Aadhaar number to women, children, senior citizens, persons with disability, unskilled and unorganised workers, nomadic tribes or to such other persons who do not have any permanent dwelling house and such other categories of individuals as may be specified by Regulations. Section 5 contemplates special measures for issuance of Aadhaar number to children. The Aadhaar (Enrolment and Update) Regulations, 2016 contains some special measures. One of the special measures is Regulation 5, which provides for information required for enrolment of children below five years of age. Regulation 5 is as follows:

5. Information required for enrolment of children below five years of age. - (1) For children below the five years of age, the following demographic and biometric information shall be collected:

(a) Name

(b) Date of Birth

(c) Gender

(d) Enrolment ID or Aadhaar number of any one parent, preferably that of the mother in the event both parents are alive, or guardian. The Aadhaar number or EID of such parent or guardian is mandatory, and a field for relationship will also be recorded.

(e) The address of such child which is the same as that of the linked parent/guardian.

(f) Facial image of the child shall be captured. The biometric information of any one parent/guardian shall be captured or authenticated during the enrolment.

(2) The Proof of Relationship (PoR) document as listed in Schedule II for establishing the relationship between the linked parent/guardian and the child shall be collected at the time of enrolment. Only those children can be enrolled based on the relationship document (PoR), whose names are recorded in the relationship document.

1095. For children below five, no core biometric informations are captured and only biometric information of any one parent/guardian is captured. The objection raised by Petitioners is with regard to children between 5 to 18 years on the ground that they being minors, parental consent is not taken. We have noted above that for Aadhaar enrolment, for verification of information consent is obtained from the person submitting for enrolment. Thus, the enrolment for Aadhaar number is on consent basis. Although, it is different matter that for the purpose of obtaining any benefit or service, a person is obliged to enrol for Aadhaar. The Petitioners are right in their submissions that for enrolment of a children between 5 and 18 years, there has to be consent of their parents or guardian because they themselves are unable to give any valid consent for enrolment. We, thus, have to read parental consent in Regulation 4 in so far as children of 5 to 18 years are concerned

so that the provision in reference to children between 5 to 18 years may not become unconstitutional. We thus answer Question No. 13 in following manner:

Ans. 13: Parental consent for providing biometric information Under Regulation 3 & demographic information Under Regulation 4 has to be read for enrolment of children between 5 to 18 years to upheld the constitutionality of Regulations 3 & 4 of Aadhaar (Enrolment and Update) Regulations, 2016.

Issue No.14	Whether Rule 9 as amended by the Prevention of Money-Laundering (Second Amendment) Rules, 2017 is unconstitutional?

1096. For answering the above issue we need to advert to the objects and scheme of the Prevention of Money-Laundering Act, 2002 (PMLA, 2002). The scheme as delineated by the Prevention of Money-Laundering (Maintenance of Records) Rules, 2005 also need to be looked into before coming to the Second Amendment Rules, 2017. The PMLA, 2002 has been enacted to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. The Act has long Preamble entire of which needs to be noted, which is as follows:

An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;

AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme; AND

WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration;

1097. Two international declarations have been specifically mentioned in the Preamble which pave the way for the enactment. The resolution adopted by the General Assembly of the United Nations on 23rd February, 1990 contained the recommendations on money-laundering of the Financial Action Task Force aforesaid. The Political Declaration and Action Plan against money-laundering by the United Nations General Assembly held on 10.06.1998 which called upon the States Members of the United Nations to adopt its declaration to the following effect:

Political Declaration and Action Plan against Money Laundering

adopted at the Twentieth Special Session of the United Nations General Assembly devoted to "countering the world drug problem together"

New Your, 10 June 1998(excerpts)

"We, the States Members of the United Nations,

... ...

15. Undertake to make special efforts against the laundering of money linked to drug trafficking and, in that context, emphasize the importance of strengthening international, regional and subregional cooperation, and recommend that States that have not yet done so adopt by the year 2003 national money-laundering legislation and programmes in accordance with relevant provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as well as the measures for countering money-laundering, adopted at the present session;

.....

"COUNTERING MONEY-LAUNDERING"

The General Assembly,

... .

Emphasizing the enormous efforts of a number of States to draw up and apply domestic legislation that identifies the activity of money-laundering as a criminal offence,

Realizing the importance of progress being made by all States in conforming to the relevant recommendations and the need for States to participate actively in international and regional initiatives designed to promote and strengthen the implementation of effective measures against money-laundering,

1. Strongly condemns the laundering of money derived from illicit drug trafficking and other serious crimes, as well as the use of the financial systems of States for that purpose;

2. Urges all States to implement the provisions against money-laundering that are contained in the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 1988 and the other relevant international instruments on money-laundering, in accordance with fundamental constitutional principles, by applying the following principles:

(a) Establishment of a legislative framework to criminalize the laundering of money derived from serious crimes in order to provide for the prevention, detection, investigation and prosecution of the crime of money-laundering through, inter alia:

(i) Identification, freezing, seizure and confiscation of the proceeds of crime;

(ii) International cooperation; and mutual legal assistance in cases involving money-laundering;

(iii) Inclusion of the crime of money-laundering in mutual legal assistance agreements for the purpose of ensuring judicial assistance in investigations, court cases or judicial proceedings relating to that crime;

(b) Establishment of an effective financial and regulatory regime to deny criminals and their illicit funds access to national and international financial systems, thus preserving the integrity of financial systems worldwide and ensuring compliance with laws and other Regulations against money-laundering through:

(i) Customer identification and verification requirements applying the principle of "know your customer", in order to have available for competent authorities the necessary information on the identity of clients and the financial movements that they carry out;

(ii) Financial record-keeping;

(iii) Mandatory reporting of suspicious activity;

(iv) Removal of bank secrecy impediments to efforts directed at preventing, investigating and punishing money-laundering;

(v) Other relevant measures;

(c) Implementation of law enforcement measures to provide tools for, inter alia:

(i) Effective detection, investigation, prosecution and conviction of criminals engaging in moneylaundering activity;

(ii) Extradition procedures;

(iii) Information-sharing mechanisms;

1098. The modern world is more focused on economic growth. Every nation tries to march forward in achieving the rapid economic growth. Economics is factor which not only plays a major role in the future of nation but also in all human organisations. Most of the individuals also aspire for their financial well being but for the financial system and working of economic, road blocks are felt both by the nations and human organisations. The siphoning away of huge volumes of money from normal economic growth poses a real danger to the economics and affects the stability of the global market which also empowers corruption organised crime. Proceeds of money-laundering are disguised to acquire properties and other assets or to make investments. At some stage money-laundering involves conversion process with the objective to give the appearance that the money has a legitimate source. The banking and financial secrecy is another bottleneck for countries who genuinely want to counter money-laundering. It is inherent in the activity of money-laundering to keep the entire process secret. The Parliament with the objectives outlined in the international declaration enacted the PMLA Act. Para 1 of the Statement of Objects and Reasons of Act is stated as follows:

STATEMENT OF OBJECTS AND REASONS

It is being realised, world over, that money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. Some of the initiatives taken by the international community to obviate such threat are outlined below:

(a) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.

(b) the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of moneylaundering.

(c) the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of moneylaundering. The recommendations were classified under various heads. Some of the important heads are-

(i) declaration of laundering of monies carried through serious crimes a criminal offence;

(ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;

(iii) confiscation of the proceeds of crime;

(iv) declaring money-laundering to be an extraditable offence; and

(v) promoting international cooperation in investigation of moneylaundering.

(d) the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23rd February, 1990, inter alia, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering.

(e) the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to the 10th June, 1998 has made another declaration regarding the need to combat moneylaundering. India is a signatory to this declaration.

.....

1099. Paragraph two of the Statement of Objects and Reasons noticed the legislative process which was initiated by introducing the Prevention of Money-Laundering Bill, 1998 which was introduced in the Lok Sabha. The Bill was referred to the Standing Committee on Finance, which submitted its report on 04.03.1999 to the Lok Sabha. Various recommendations of the Standing Committee were accepted by the Central Government and made provisions of the said recommendations in

the Bill. Thereafter, the Bill was presented in the Parliament which after receiving the assent of the President published in the Gazette on 01.07.2005. Act, 2002 has been amended by various Parliamentary Acts. By amendments made in the year 2013 by Act 2 of 2013, the Legislature has attempted to keep the pace with the other countries of the world by making more stringent provision to prevent money-laundering which is the root as well as the result of the black money economy. Money-laundering is defined Under Section 3 which is to the following effect:

3. Offence of money-Laundering.-Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

1100. Section 2 (ha) defines client and Section 2(wa) defines reporting entity which are as follows;

2. (ha) "client" means a person who is engaged in a financial transaction or activity with a reporting entity and includes a person on whose behalf the person who engaged in the transaction or activity, is acting;

(wa) "reporting entity" means a banking company, financial institution, intermediary or a person carrying on a designated business or profession;

1101. Section 12 lays down various obligations on reporting entity to maintain records. Section 12(1)(c) reads:

Section 12. Reporting entity to maintain records.-(l) Every reporting entity shall-

... ...

(c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;

1102. The Central Government in exercise of its Rule making power has made Rules, namely, the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 (hereinafter referred to as "Rules, 2005). In the present case challenge is to Rule 9 as amended by Second Amendment Rules, 2017. We may thus notice the amendments made in Rule 9 by Second Amendment Rules, 2017. By Second Amendment Rules, 2017, Sub-rule (4) to Sub-rule (9) of Rule 9 were substituted in following manner:

(b) in Rule 9, for Sub-rule (4) to Sub-rule (9), the following sub-rules shall be substituted, namely:

(4) Where the client is an individual, who is eligible to be enrolled for an Aadhaar number, he shall for the purpose of Sub-rule (1) submit to the reporting entity,-

(a) the Aadhaar number issued by the Unique Identification Authority of India; and

(b) the Permanent Account Number or Form No. 60 as defined in Income-tax Rules, 1962,

and such other documents including in respect of the nature of business and financial status of the client as may be required by the reporting entity:

Provided that where an Aadhaar number has not been assigned to a client, the client shall furnish proof of application of enrolment for Aadhaar and in case the Permanent Account Number is not submitted, one certified copy of an 'officially valid document' shall be submitted.

Provided further that photograph need not be submitted by a client falling under Clause (b) of Sub-rule (1).

(4A) Where the client is an individual, who is not eligible to be enrolled for an Aadhaar number, he shall for the purpose of Sub-rule (1), submit to the reporting entity, the Permanent Account Number or Form No. 60 as defined in the Income-tax Rules, 1962:

Provided that if the client does not submit the Permanent Account Number, he shall submit one certified copy of an 'officially valid document' containing details of his identity and address, one recent photograph and such other documents including in respect of the nature or business and financial status of the client as may be required by the reporting entity.

(5) Notwithstanding anything contained in sub-rules (4) and (4A), an individual who desires to open a small account in a banking company may be allowed to open such an account on production of a self-attested photograph and affixation of signature or thumb print, as the case may be, on the form for opening the account:

Provided that-

(i) the designated officer of the banking company, while opening the small account, certifies under his signature that the person opening the account has affixed his signature or thump print, as the case may be, in his presence;

(ii) the small account shall be opened only at Core Banking Solution linked banking company branches or in a branch where it is possible to manually monitor and ensure that foreign remittances are not credited to a small account and that the stipulated limits on monthly and annual aggregate of transactions and balance in such accounts are not breached, before a transaction is allowed to take place;

(iii) the small account shall remain operational initially for a period of twelve months, and thereafter for a further period of twelve months if the holder of such an account provides evidence before the banking company of having applied for any of the officially valid documents within twelve months of the opening of the said account, with the entire relaxation provisions to be reviewed in respect of the said account after twenty-four months;

(iv) the small account shall be monitored and when there is suspicion of money laundering or financing of terrorism or other high risk scenarios, the identity of client shall be established through the production of officially valid documents, as referred to in Sub-rule (4) and the Aadhaar number of the client or where an Aadhaar number has not been assigned to the client, through the

production of proof of application towards enrolment for Aadhaar along with an officially valid document;

Provided further that if the client is not eligible to be enrolled for an Aadhaar number, the identity of client shall be established through the production of an officially valid document;

(v) the foreign remittance shall not be allowed to be credited into the small account unless the identity of the client is fully established through the production of officially valid documents, as referred to in sub Rule (4) and the Aadhaar number of the client or where an Aadhaar number has not been assigned to the client, through the production of proof of application towards enrolment for Aadhaar along with an officially valid document:

Provided that if the client is not eligible to be enrolled for the Aadhaar number, the identity of client shall be established through the production of an officially valid document.

(6) Where the client is a company, it shall for the purposes of Sub-rule (1), submit to the reporting entity the certified copies of the following documents:

(i) Certificate of incorporation;

(ii) Memorandum and Articles of Association;

(iii) A resolution from the Board of Directors and power of attorney granted to its managers, officers or employees to transact on its behalf;

(iv) (a) Aadhaar numbers; and

(b) Permanent Account Numbers or Form 60 as defined in the Income-tax Rules, 1962.

issued to managers, officers or employees holding an attorney to transact on the company's behalf or where an Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this Clause if the managers, officers or employees holding an attorney to transact on the company's behalf are not eligible to be enrolled for Aadhaar number and do not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(7) Where the client is a partnership firm, it shall, for the purposes of Sub-rule (1), submit to the reporting entity the certified copies of the following documents:

(i) registration certificate;

(ii) partnership deed; and

(iii) (a) Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income-tax Rules, 1962.

issued to the person holding an attorney to transact on its behalf or where an Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this clause, if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(8) Where the client is a trust, it shall, for the purposes of Sub-rule (1) submit to the reporting entity the certified copies of the following documents:

(i) registration certificate;

(ii) trust deed; and

(iii) (a) Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income-tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this Clause if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(9) Where the client is an unincorporated association or a body of individuals, it shall submit to the reporting entity the certified copies of the following documents:

(i) resolution of the managing body of such association or body of individuals;

(ii) power of attorney granted to him to transact on its behalf;

(iii) (a) the Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income-tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case the Permanent Account Number is not submitted an officially valid document shall be submitted; and

(iv) such information as may be required by the reporting entity to collectively establish the legal existence of such an association or body of individuals:

Provided that for the purpose of this Clause if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted."

(c) after Sub-rule (14), the following sub-rules shall be inserted, namely,-

"(15) Any reporting entity, at the time of receipt of the Aadhaar number under provisions of this rule, shall carry out authentication using either e-KYC authentication facility or Yes/No authentication facility provided by Unique Identification Authority of India.

(16) In case the client referred to in sub-rules (4) to (9) of Rule 9 is not a resident or is a resident in the States of Jammu and Kashmir, Assam or Maghalaya and does not submit the Permanent Account Number, the client shall submit to the reporting entity one certified copy of officially valid document containing details of his identity and address, one recent photograph and such other document including in respect of the nature of business and financial status of the client as may be required by the reporting entity.

(17) (a) In case the client, eligible to be enrolled for Aadhaar and obtain a Permanent Account Number, referred to in sub-rules (4) to (9) of Rule 9 does not submit the Aadhaar number or the Permanent Account Number at the time of commencement of an account based relationship with a reporting entity, the client shall submit the same within a period of six months from the date of the commencement of the account based relationship:

Provided that the clients, eligible to be enrolled for Aadhaar and obtain the Permanent Account Number, already having an account based relationship with reporting entities prior to date of this notification, the client shall submit the Aadhaar number and Permanent Account Number by 31st December, 2017.

(b) As per Regulation 12 of the Aadhaar (Enrolment and Update) Regulations, 2016, the local authorities in the State Governments or Union-territory Administrations have become or are in the process of becoming UIDAI Registrars for Aadhaar enrolment and are organising special Aadhaar enrolment camps at convenient locations for providing enrolment facilities in consultation with UIDAI and any individual desirous of commencing an account based relationship as provided in this rule, who does not possess the Aadhaar number or has not yet enrolled for Aadhaar, may also visit such special Aadhaar enrolment camps for Aadhaar enrolment or any of the Aadhaar enrolment centres in the vicinity with existing registrars of UIDAI.

(c) In case the client fails to submit the Aadhaar number and Permanent Account Number within the aforesaid six months period, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client:

Provided that in case client already having an account based relationship with reporting entities prior to date of this notification fails to submit the Aadhaar number and Permanent Account

Number by 31st December, 2017, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client.

(18) In case the identity information relating to the Aadhaar number or Permanent Account Number submitted by the client referred to in sub-rules (4) to (9) of Rule 9 does not have current address of the client, the client shall submit an officially valid document to the reporting entity.

1103. The challenge to Second Amendment Rules, 2017 is on the ground that it violate Articles 14, 19(1)(g), 21 and 300A of the Constitution of India; Sections 3, 7 and 51 of the Aadhaar Act and also ultra vires to the provisions of PMLA Act, 2002.

1104. Elaborating his submissions Shri Arvind P. Datar learned senior Counsel submits that Second Amendment Rules violate Article 14 and 21 since persons choosing not to enrol for Aadhaar number cannot operate bank account and valid explanation has to be given as to why all banks have to be authenticated.

1105. Violative of Article 19(1)(g) because the Rules refer to companies, firms, trusts, etc. whereas Aadhaar Act is only to establish identity of individuals. Violative of Article 300A since even temporary deprivation can only be done by primary legislation. The Second Amendment Rules do not pass proportionality test. No proper purpose has been established. No explanation has been given that the measures undertaken to such are rationale and connected to the fulfillment of the purpose and there are no alternative measures with a lesser degree of legislation. When the banks have already verified all accounts as per e-KYC norms, it is completely arbitrary to make permanent linking/seeding of all Aadhaar numbers with the bank accounts. Second Amendment Rules fail to satisfy the proportionality test, are irrational, and manifestly arbitrary.

1106. Shri Tushar Mehta, learned Additional Solicitor General refuting the submission, submits that Second Amendment Rules carry on the object of 2002, Act. The verification of bank account by way of Aadhaar is done for the reason that often bank accounts are opened in either fictitious names or in the name of wrong persons on the basis of forged identity documents and financial crimes are committed. It is seen that accommodation entries are mostly provided through the banking channels by bogus companies to convert black money into white. Benami transactions routinely take place through banking channels. All of the above, can to a large extent be checked by verifying Aadhaar with bank accounts to ensure that the account belongs to the person who claims to be the account holder and that he or she is a genuine person. Verification of bank account with Aadhaar also ensures that the direct benefit transfer of subsidies reach the Aadhaar verified bank account and is not diverted to some other account. Shell companies are often used to open bank accounts to hold unaccounted money of other entities under fictitious identities which will also be curbed once Aadhaar verification is initiated.

1107. Now, we come to the respective submissions of the parties. A perusal of the Second Amendment Rules, 2017 indicates that the State has sought to make the provisions of PMLA more robust and ensure that the ultimate object of the Act is achieved. Aadhaar Act, 2016 having been enacted with effect from 01.07.2016, it was decided to get the accounts verified by Aadhaar. Amended Rules help all concerned to detect fictitious, ghost and benami accounts. The object of the PMLA and the definition of beneficial owner Act seeks to traverse behind the corporate veil

of shell companies and spurious Directors in order to ascertain the real natural persons controlling the accounts in the reporting entities. The Amendment Rules applicable to reporting entities and the legitimate aim sought to be achieved by the State that is conclusive identification of a natural person or the beneficial owner. The statutory Rules cast an obligation on all account holders to get their identity verified by Aadhaar mechanism and those who are already holding account in the reporting entity they are required to submit the Aadhaar number or proof of their applied Aadhaar identity. When a statute puts obligation on account holder to get identity verification in a particular manner a person chose not to obtain Aadhaar number cannot complain his dis-entitlement of operating his account. The submission of the Petitioner that there is no valid explanation as to why all bank accounts have to be authenticated also cannot be accepted. Aadhaar provides a mechanism truly identifies an account holder, which eliminates fraudulent accounts existed of non-existed persons and in ghost names. The object of inserting the Rule is to make it possible to weed out fake and duplicate PANs and false bank accounts. The Second Amendment Rules are step in direction to cure the menace of fake bank accounts held by the shell companies in the name of dummy directors, money laundering, terror financing etc. It is relevant to notice that Aadhaar number is required to be given at the time of opening of the account based relationship and not for every transaction conducted by an account holder of the bank. Those who have already existing accounts are required to submit only once their Aadhaar number for verification. The requirement of Aadhaar number being given only for once is not any cumbersome or undue burden on an account holder. The object of the Second Amendment Rules is towards the legitimate aim of the State and having nexus with the object sought to be achieved by the enactment. The submission of Aadhaar number only once by an account holder is a proportionate measure. We have already referred to judgments where doctrine of proportionality has been expounded. While adjudging a statutory provision from the angle of the proportionality the Court has to examine as to whether statutory measure contained in statutory provision is not excessive as against the object which seeks to achieve. The legislature has margin of discretion while providing for one or other measures to achieve an object. Unless the measures foully unreasonable and disproportionate, court does not normally substitutes its opinion. On the basis of Rule 9(17)(c), Petitioner contends that in the event account holder fails to submit the Aadhaar number and PAN within a period as mentioned in the aforesaid Rules account shall cease to be operational till the time Aadhaar number and PAN is submitted by the client. Petitioner alleged violation of Article 300A. The Petitioner's case is that account of a person is his property to which he cannot be deprived, saved by the authority of law. For non-submission of Aadhaar number and PAN only consequence which is contemplated by Sub-rule (c) is that account shall cease to be operational. We are of the view that the account remains belonging to the account holder and the amount in the account is only his amount and there is no deprivation of the property of account holder. Under the banking Rules and procedures, there are several circumstances where account becomes un-operational. A non-operational account also is an account which belongs to the account holder and amount laying in the non-operational account is neither forfeited by the bank nor taken out from the said account. Further, account is ceased operational only till the time Aadhaar number and PAN is submitted. The consequences provided is only to effectuate the purpose of the Act and the Rules i.e. account be verified by Aadhaar mechanism. It is not the intent to deprive the account holder of the amount lying in the account. We, thus, do not find any substance in the submission of the Petitioner that Rule 9(17)(c) violates right Under Article 300A. Aadhaar number providing for verification of an account also cannot be held to be violating right Under Article 21. The reporting entity i.e. banks and financial institutions under various statutes are required to provide information of a bank

account to different authorities including income tax authority, account verification by Aadhaar is not for the purpose of keeping a track on the transaction done by an individual. As noted above Aadhaar number has to be given only once for opening of the account or for verification of the account and transactions are not to be made on the basis of Aadhaar verification each time.

1108. One of the submissions which has been made by the Petitioner also is that Rules violate Article 19(1)(g). It is submitted that Rule refers to companies, firms, trusts etc. whereas Aadhaar Act is only to establish identity of individual. For example Sub-rule (6) of Rule 9 as amended by Second Amendment Rules, 2017 provides that where client is a company, it shall for the purposes of Sub-rule (1), submit to the reporting entity the certified copies of the documents enumerated therein. Rule requiring Aadhaar number and PAN or Form 60 as defined in Income Tax Rules, 1962, issued to managers, officers or employees holding an attorney to transact on the company's behalf, is for the purpose to find out the beneficial owner behind the company. One of the objects of the Act is to detect money-laundering wherever it is found. Inquiring details of the company to find out shell companies and ghost companies and the real beneficial owner cannot be said to be foreign to the object of the Act. Companies, partnership firms, trusts or incorporated institutions or body of individuals cannot complain any violation of rights Under Article 19(1)(g). There is no amount of restriction in the right of aforesaid in carrying out any profession, or any trade or business. Petitioners have also contended that amended Rule 9 also violates Section 3, 7 and 51 of the Aadhaar Act. Section 3 provides for enrolment under Aadhaar scheme. Section 7 provides for requirement of proof of Aadhaar number for receipt of certain subsidies, benefits and services, etc. Section 51 relates to delegation by the authority to any Member, officer of the authority or any other person such of the powers and functions under the said Act except the power Under Section 54. Rules cannot be held in any manner violating Sections 3, 7 and 51. The Rules provide for use of Aadhaar for verification of bank account by law as contemplated by Section 57 of the Aadhaar Act.

1109. It is further submitted that Amendment Rules are also ultra vires to the PMLA, 2002. Shri Arvind P. Datar has also referred to judgment of the U.K. Supreme Court in ***Bank Mellat v. Her Majesty's Treasury,*** (2013) UKSC 39. He has relied on principle of proportionality as summed in paragraph 20 which is to the following effect:

20. *...The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 *at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532 *(in particular the speech of Lord Steyn), R v. Shayler* [2003] 1 AC 247 *at paras 57-59 (Lord Hope of Craighead), Huang v. Secretary of State for the Home Department* [2007] 2 AC 167 *at para 19 (Lord Bingham of Cornhill) and R (Quila) v. Secretary of State for the Home Department* [2012] 1 AC 621 *at para 45.* ***Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences,***

a fair balance has been struck between the rights of the individual and the interests of the community. *These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.*

1110. The principles of proportionality as noticed in the aforesaid judgment are substantially same which had been laid down in ***Puttaswamy case*** and ***Modern Dental (supra)*** only one difference in the above two judgments is that although both the judgments noticed the least intrusive test but in ultimate conclusion the said test was not reflected in the ratio of the above two judgments.

1111. In the foregoing discussions, we come to the conclusion that Rule 9 of Second Amendment Rules, 2017 fully satisfies three-fold test as laid down in ***Puttaswamy case*** and the submission that the Rule is unconstitutional has to be rejected. We answer Issue No. 14 in the following manner:

Ans. 14: Rule 9 as amended by PMLA (Second Amendment)

Rules, 2017 is not unconstitutional and does not violate Articles 14, 19(1)(g), 21 & 300A of the Constitution and Sections 3, 7 & 51 of the Aadhaar Act. Further Rule 9 as amended is not ultra vires to PMLA Act, 2002.

Issue No. 15	Circular dated 23.03.2017 issued by Ministry of Communications, Department of Telecommunications

1112. The Petitioners have attacked the circular dated 23.03.2017 and submitted that the circular is ultra vires. By circular dated 23.03.2017, Department of Telecommunications has directed that all licensees shall re-verify all existing mobile subscribers (prepaid and postpaid) through Aadhaar based e-kyc process. Petitioners submitted that linking the sim with Aadhaar number is breach of privacy violating Article 21 of the Constitution. Elaborating their challenge, it is contended that circular dated 23.03.2017 is not covered by any of the provisions of Aadhaar Act neither Section 7 nor Section 57. Circular dated 23.03.2017 is not a law under Part III of the Constitution and thus same cannot put any restriction on privacy right. It is submitted that circular dated 23.03.2017 does not satisfy three-fold test as laid down in Privacy judgment.

1113. Learned Counsel for the Respondents justifying the linking of Aadhaar with sim card submits that non-verifying sim cards, have caused serious security threats, which has been noticed by this Court in several judgments. It is submitted that circular dated 23.03.2017 was issued on the basis of recommendation of Telecom Regulatory Authority of India. Respondents further submits that circular dated 23.03.2017 has been issued in reference to this Court's direction in **Lokniti Foundation v. Union of India and Anr.** MANU/SC/0548/2017 : (2017) 7 SCC 155. This Court having approved the action, no exception can be taken by the Petitioner to the circular dated 23.03.2017. It is submitted that the Central Government, which has right to grant license can always put a condition in the license obliging the licensee to verify the sim cards under the Aadhaar verification. To impose such condition is in the statutory power granted to the Government Under Section 4 of the Indian Telegraph Act, 1885.

1114. We need to scrutinise the circular dated 23.03.2017 on the ground of attack alleged by the Petitioners and justification as offered by the Respondents. Circular dated 23.03.2017 has been addressed by the Ministry of Communications, Department of Telecommunications to all Unified Licensees/Unified Access Service Licensees/Cellular Mobile Telephone Service Licensees with subject: implementation of orders of Supreme Court regarding 100% E-KYC of existing subscribers. Para 1 to 3 of the circular may be noticed, which are to the following effect:

Hon'ble Supreme Court, in its order dated 06.02.2017 passed in Writ Petition (C) No. 607/2016 filed by Lokniti Foundation v. Union of India, while taking into cognizance of "Aadhaar based E-KYC process for issuing new telephone connection" issued by the Department, has inter-alia observed that "*an effective process has been evolved to ensure identity verification, as well as, the addresses of all mobile phone subscribers for new subscribers. In the near future, and more particularly, within one year from today, a similar verification will be completed, in case of existing subscribers.*" This amounts to a direction which is to be completed within a time frame of one year.

2. A meeting was held on 13.02.2017 in the Department with the telecom industry wherein UIDAI, TRAI and PMO representatives also participated to discuss the way forward to implement the directions of Hon'ble Supreme Court. Detailed discussions and deliberations were held in the meeting. The suggestions received from the industry have been examined in the Department.

3. Accordingly, after taking into consideration the discussions held in the meeting and suggestions received from telecom industry, the undersigned is directed to convey the approval of competent authority that all Licensees shall re-verify all existing mobile subscribers (prepaid and postpaid) through Aadhaar based E-KYC process as mentioned in this office letter No. 800-29/2010-VAS dated 16.08.2016. The instructions mentioned in subsequent paragraphs shall be strictly followed while carrying out the re-verification exercise.

1115. The circular of the Department of Telecommunications directing the licensees to mandatorily verify existing sim subscribers in turn resulted in mobile telephone service licensees directing the subscribers to get their sim seeded with Aadhaar. Repeated messages and directions have been issued by Cellular Mobile Telephone Service operators. Compulsory seeding of Aadhaar with mobile numbers has to be treated to be an intrusion in Privacy Right of a person. Any invasion on the Privacy Right of a person has to be backed by law as per the three-fold test enumerated in **Puttaswamy case (supra)**. Existence of a law is the foremost condition to be fulfilled for restricting any Privacy Right. Thus, we have to first examine whether circular dated 23.03.2017 can be said to be a 'law'.

1116. The law as explained in Article 13(3) has to be applied for finding out as to what is law. Article 13(3)(a) gives an inclusive definition of law in following words:

(a) "law" includes any Ordinance, order, bye-law, rule, Regulation, notification, custom or usage having in the territory of India the force of law;

1117. The circular dated 23.03.2017 at best is only an executive instruction issued on 23.03.2017 by the Ministry of Communications, Department of Telecommunications. The circular does not

refer to any statutory provision or statutory base for issuing the circular. The subject of circular as noted above indicate that circular has been issued for implementation of orders of Supreme Court regarding 100% E-KYC based re-verification of existing subscribers. It is necessary to notice the judgment of this Court dated 06.02.2017, a reference to which is made in the circular itself. The order dated 06.02.2017 was issued by this Court in a Writ Petition filed by **Lokniti Foundation v. Union of India and Anr.** MANU/SC/0548/2017 : (2017) 7 SCC 155. The Petitioners have filed a writ petition with a prayer that identity of each subscriber and also the members should be verified so that unidentified and unverified subscribers cannot misuse mobile phone. After issuing the notice, Union of India had filed a counter affidavit, where Union of India stated that Department has launched Aadhaar based E-KYC for issuing mobile connections on 16.8.2016.

1118. Paras 2 to 6 of the judgment, which is relevant for the present purpose are as follows:

2. Consequent upon notice being issued to the Union of India, a short counter affidavit has been filed on its behalf, wherein, it is averred as under:

22. That however, the department has launched 'Aadhaar based E-KYC for issuing mobile connections' on 16th August, 2016 wherein the customer as well as Point of Sale (PoS) Agent of the TSP will be authenticated from Unique Identification Authority of India (UIDAI) based on their biometrics and their demographic data received from UIDAI is stored in the database of TSP along with time stamps. Copy of letter No. 800-29/2010-VAS dated 16.08.2016 is annexed herewith and marked as Annexure R-1/10.

23. As on 31.01.2017, 111.31 Crores Aadhaar card has been issued which represent 87.09% of populations. However, still there are substantial number of persons who do not have Aadhaar card because they may not be interested in having Aadhaar being 75 years or more of age or not availing any benefit of pension or Direct Benefit Transfer (DBT). Currently Aadhaar card or biometric authentication is not mandatory for obtaining a new telephone connection. As a point of information, it is submitted that those who have Aadhaar card/number normally use the same for obtaining a new telephone connection using E-KYC process as mobile connection can be procured within few minutes in comparison to 1-2 days being taken in normal course.

24. That in this process, there will be almost 'NIL' chances of delivery of SIM to wrong person and the traceability of customer shall greatly improve. Further, since no separate document for Proof of Address or Proof of Identity will be taken in this process, there will be no chances of forgery of documents.

3. The learned Attorney General, in his endeavour to demonstrate the effectiveness of the procedure, which has been put in place, has invited our attention to the application form, which will be required to be filled up, by new mobile subscribers, using e-KYC process. It was the submission of the learned Attorney General, that the procedure now being adopted, will be sufficient to alleviate the fears, projected in the writ petition.

4. Insofar as the existing subscribers are concerned, it was submitted on behalf of the Union of India, that more than 90% of the subscribers are using pre-paid connections. It was pointed out, that each pre-paid connection holder, has to per force renew his connection periodically, by making

a deposit for further user. It was submitted, that these 90% existing subscribers, can also be verified by putting in place a mechanism, similar to the one adopted for new subscribers. Learned Attorney General states, that an effective programme for the same, would be devised at the earliest, and the process of identity verification will be completed within one year, as far as possible.

5. In view of the factual position brought to our notice during the course of hearing, we are satisfied, that the prayers made in the writ petition have been substantially dealt with, and an effective process has been evolved to ensure identity verification, as well as, the addresses of all mobile phone subscribers for new subscribers. In the near future, and more particularly, within one year from today, a similar verification will be completed, in the case of existing subscribers. While complimenting the Petitioner for filing the instant petition, we dispose of the same with the hope and expectation, that the undertaking given to this Court, will be taken seriously, and will be given effect to, as soon as possible.

6. The instant petition is disposed of, in the above terms.

1119. Para 5 of the judgment contains the operative portion of the order, which states "we dispose of the same with the hope and expectation, that the undertaking given to this Court, will be taken seriously, and will be given effect to, as soon as possible". The order of this Court as extracted above itself states that the Court itself did not give any direction rather noticed the stand of Union of India where it informed to the Court that the department has already launched Aadhaar based e-KYC for issuing mobile connections. For 90 per cent of the existing subscribers, Attorney General has stated that an effective programme would be devised at the earliest and will be completed within one year.

1120. We are clear in our mind that this Court on 06.02.2017 only noticed the stand of the Union of India and disposed of the writ petition expecting that undertaking given to this Court shall be given effect to.

1121. The circular dated 23.03.2017 cites the order of this Court as a direction, which according to department was to be completed within the time frame of one year. Circular further states that the meeting was held on 13.02.2017 in the Department with the telecom industry wherein UIDAI, TRAI and PMO representatives also participated.

1122. This Court thus in **Lokniti case (supra)** did not examine the Aadhaar based e-KYC process in context of right of privacy. Thus, the order of this Court dated 06.02.2017 cannot absolve the Government from justifying its circular as per law.

1123. One of the submissions, which has been raised by the Respondents to cite a statutory base to the circular is that the circular has been issued in pursuance of recommendation made by TRAI Under Section 11(1)(a) of TRAI Act, 1997. Section 11 of the TRAI Act, 1997 provides for function of authority Section 11(1)(a):

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non-compliance of terms and conditions of licence;

xxxxxxxxxxxxxxxx

1124. One of the functions of the TRAI is to give recommendations as per Section 11(1)(a) on the matters enumerated therein. The recommendations of TRAI were only recommendations and the mere fact that circular dated 23.03.2017 was issued after the recommendation was sent by TRAI, circular dated 23.03.2017 does not acquire any statutory character. Circular dated 23.03.2017 thus cannot be held to be a law within the meaning of Part III of the Constitution.

1125. Shri Rakesh Dwivedi, learned Counsel appearing for the Respondents has submitted that the Central Government being licensor, it is fully entitled to provide for any condition in its license, which condition becomes binding on the licensee. Referring to license agreement for Unified Licensees, Shri Dwivedi submits that one of the conditions in the agreement was Condition No. 16.1 which is to the following effect:

16.1 The Licensee shall be bound by the terms and conditions of this License Agreement as well as instructions as are issued by the Licensor and by such orders/directions/Regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time.

1126. Shri Dwivedi has also relied on a number of judgments in support of his submissions that conditions can be validly laid down. he has relied on **Bagalkot Cement Co. Ltd. v. R.K. Pathan and Ors.** MANU/SC/0261/1962 : AIR 1963 SC 439, where this Court while considering the Industrial Employment (Standing Orders) Act, 1946 observed that object of the Act was to require the employers to make the conditions of employment precise and definite and the Act ultimately intended to prescribe these conditions in the form of Standing Orders so that what used to be governed by a contract herebefore would now be governed by the Statutory Standing Orders.

1127. The above judgment at best can be read to mean that conditions, which are enumerated in the Standing Orders become statutory conditions. No benefit of the judgment can be taken by the Respondents in the present case since even if it is put in the condition in the agreement between licensee and subscribers that licensee shall be bound to instructions as issued by licensor, the said condition does not become statutory nor take shape of a law. **Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr.** MANU/SC/0667/1975 : (1975) 1 SCC 421 was relied, where this Court held that Rules and Regulations framed by ONGC, LIC and Industrial Finance Corporation have the force of law. There cannot be any denial that Rules framed under statutory provisions will have force of law, thus, this case has no application. Similarly, reliance on **Lily Kurian v. Sr. Lewina and Ors.** MANU/SC/0041/1978 : (1979) 2 SCC 124, **Alpana V. Mehta v. Maharashtra State Board of Secondary Education and Anr.** MANU/SC/0055/1984 : (1984) 4 SCC 27, **St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and Anr.** MANU/SC/0092/2003 : (2003) 3 SCC 321 were all

cases, where conditions were laid down under the Regulations, which were statutory in nature. Those cases in no manner help the Respondents.

1128. Shri Dwivedi has also relied on judgment of this Court in **Union of India and Anr. v. Association of Unified Telecom Service Providers of India and Ors.** MANU/SC/1252/2011 : (2011) 10 SCC 543. This Court referring to Section 4 of the Telegraph Act laid down following in paragraph 39:

39. The proviso to Sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a license in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a license in his favour on such conditions and in consideration of such terms as it thinks fit, a license granted under proviso to Sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee.

1129. There cannot be any dispute to the right of the Central Government to part with exclusive privilege in favour of any person by granting license on such a condition and in consideration of such terms as it thinks fit. But mere issuing an instruction to the licensees to adopt mandatory process of e-KYC by Aadhaar verification in no manner exalt the instructions or directives as a law. Circular dated 23.03.2017, thus, cannot be held to be a law and direction to re-verification of all existing mobile subscribers through Aadhaar based e-KYC cannot be held to be backed by law, hence cannot be upheld.

1130. There is one more aspect of the matter, which needs to be looked into. Aadhaar Act has only two provisions under which Aadhaar can be used, i.e. Section 7 and Section 57. Present is not a case of Section 7 since present is not a case of receiving any subsidy, benefit or service. What Section 57 contemplate is that "use of Aadhaar can be provided by a law". Words "by a law" used in Section 57 obviously mean a valid law framed by competent legislation and other than the Aadhaar Act. No law has been framed by permitting use of Aadhaar for verification of sim of existing subscribers. There being no law framed for such use of Aadhaar, Section 57 is also not attracted.

1131. There are only above two contingencies, where Aadhaar can be used and circular dated 23.03.2017 being not covered by any of above contingencies, circular dated 23.03.2017 deserves to be set aside.

Ans. 15: Circular dated 23.03.2017 being unconstitutional is set aside.

Issue No. 16	Whether Aadhaar Act is a Money Bill and decision of Speaker certifying it as Money Bill is not subject to Judicial Review of this Court?

1132. The Aadhaar Act has been passed by Parliament as Money Bill. Shri P. Chidambaram, learned senior Counsel appearing for the Petitioners contends that Aadhaar Act is not a Money Bill, it being not covered by any of the Clauses Under Article 110 of the Constitution of India. He further submits that decision of the Speaker certifying Aadhaar Bill as Money Bill being illegal and contrary to the express constitutional provisions deserves to be interfered with and such decision of the Speaker is also subject to Judicial Review by this Court. The word "only" used in Article 110 has significance and a Bill, which does not contain only, the provisions pertaining to Clause (a) to (f) cannot be regarded as Money Bill. Respondents cannot fall on Clause (g) to support the Money Bill, which Clause cannot be invoked unless the provisions of Bill are covered by any of the clauses from (a) to (f).

1133. Shri K.K. Venugopal, learned Attorney General refuting the above submission submits that Aadhaar Bill has correctly been passed as Money Bill. He submits that the certification granted by Speaker that Aadhaar Bill is a Money Bill has been made final by virtue of Article 110(3), hence it cannot be questioned in any Court. The decision of Speaker certifying the Bill as Money Bill is not subject to Judicial Review. It is further submitted by learned Attorney General that even on looking the Aadhaar Bill on merits, it satisfies the conditions as enumerated Under Article 110(1). He submits that Aadhaar Bill is clearly referable to Clause(c), Clause(e) and Clause(g) of Article 110(1). He submits that the heart of the Aadhaar Act is Section 7 which is with regard to payment of subsidies, benefits or services and for which the expenditure is incurred form the Consolidated Fund of India. Article 122 also puts an embargo in questioning validity of any proceedings in Parliament. Certification of Bill as Money Bill is matter of Parliamentary procedure hence Article 122 also save the said decision from being questioned in a Court of Law.

1134. Article 110 and Article 122, which falls for consideration in the present case are as follows:

110. Definition of "Money Bills".-

(1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:

(a) the imposition, abolition, remission, alteration or Regulation of any tax;

(b) the Regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in Sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States Under Article 109, and when it is presented to the President for assent Under Article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

122. Courts not to inquire into proceedings of Parliament.-(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

1135. We need to first advert to the submission pertaining to question as to whether decision of Speaker certifying the Bill as Money Bill is subject to Judicial Review of this Court or being related to only procedure, is immuned from Judicial Review Under Article 122. Article 110(3) gives finality to the decision of the Speaker of the House of the People on question as to whether a Bill is Money Bill or not. The word occurring in sub-article (3) of Article 110 are "shall be final". Article 122(1) puts an embargo on questioning the validity of any proceeding in the Parliament on the ground of any alleged irregularity or procedure. The Constitution uses different expressions in different articles like "shall be final", "shall not be questioned", "shall not be questioned in any Court of Law" etc.

1136. This Court has examined the scope of Judicial Review in reference to Parliamentary proceedings. A similar Constitutional provision giving finality to the decision of the Speaker is contained in Para 6 of Tenth Schedule where a question whether a person has become disqualified or not is to be referred to the decision of the Chairman or the Speaker and his decision shall be final. Para 6 sub-clause(1) is quoted as below:

6. Decision on questions as to disqualification on ground of defection.-(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

1137. The Constitution Bench had occasion to consider Para 6 in **Kihoto Hollohan v. Zachillhu and Ors.** MANU/SC/0753/1992 : 1992 Supp. (2) SCC 651, Justice M.N. Venkatachaliah, as he then was elaborately considered the rival contentions. It was also contended before this Court that in view of the finality of the decision of the Speaker in Para 6 of Tenth Schedule, the decision of the Speaker is beyond Judicial Review. In Para 78, following has been stated:

78. These two contentions have certain overlapping areas between them and admit of being dealt with together. Paragraph 6(1) of the Tenth Schedule seeks to impart a statutory finality to the decision of the Speaker or the Chairman. The argument is that, this concept of 'finality' by itself, excludes Courts' jurisdiction. Does the word "final" render the decision of the Speaker immune from Judicial Review? It is now well accepted that a finality Clause is not a legislative magical incantation which has that effect of telling off Judicial Review. Statutory finality of a decision presupposes and is subject to its consonance with the statute.....

In Para 80 to 85, following has been held:

80. In Durga Shankar Mehta v. Raghuraj Singh MANU/SC/0099/1954 : AIR 1954 SC 520 the order of the Election Tribunal was made final and conclusive by Section 105 of the Representation of the People Act, 1951. The contention was that the finality and conclusiveness clauses barred the jurisdiction of the Supreme Court Under Article 136. This contention was repelled. It was observed: (AIR p. 522)

...[B]ut once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any parliamentary legislation.

... But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised.....

... The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land....

Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or effect the overriding powers which this Court can exercise in the matter of granting special leave Under Article 136 of the Constitution.

81. Again, in Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 : [1971] 3 SCR 483 a similar finality Clause in Article 217(3) of the Constitution camp up for consideration. This Court said: (SCC pp. 410-1, Para 32)

...The President acting Under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the Rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence."

82. Referring to the expression "final" occurring in Article 311(3) of the Constitution this Court in Union of India v. Tulsiram Patel, MANU/SC/0373/1985 : [1985] Supp. 2 SCR 131 held: (SCC p. 507. Para 138)

...The finality given by Clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by Clause (b)....

83. If the intendment is to exclude the jurisdiction of the superior Courts, the language would quite obviously have been different. Even so, where such exclusion is sought to be effected by an amendment the further question whether such an amendment would be destructive of a basic feature of the Constitution would arise. But comparison of the language in Article 363(1) would bring out in contrast the kind of language that may be necessary to achieve any such purpose.

84. In Brundaban Nayak v. Election Commission of India MANU/SC/0214/1965 : [1965] 3 SCR 53, in spite of finality attached by Article 192 to the decision of the Governor in respect of disqualification incurred by a member of a State Legislature subsequent to the election, the matter was examined by this Court on an appeal by special leave Under Article 136 of the Constitution against the decision of the High Court dismissing the writ petition filed Under Article 226 of the Constitution. Similarly in Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 : [1971] 3 SCR 483, in spite of finality attached to the order of the President with regard to the determination of age of a Judge of the High Court Under Article 217(3) of the Constitution, this Court examined the legality of the order passed by the President during the pendency of an appeal filed Under Article 136 of the Constitution.

85. There is authority against the acceptability of the argument that the word "final" occurring in Paragraph 6(1) has the effect of excluding the jurisdiction of the Courts in Articles 136, 226 and 227.

1138. The above Constitution Bench judgment clearly support the case of the Petitioners that finality attached to the decision of the Speaker Under Article 110(3) does not inhibit the Court in exercising its Judicial Review. We may also refer to the Constitution Bench judgment of this Court in Special Reference No. 1 of 1964 MANU/SC/0048/1964 : AIR 1965 SC 745 where this Court had occasion to consider Article 212, which is a provision relating to the legislature of the State pari materia to Article 122. Constitution Bench has held that what is protected Under Article 212

from being questioned is on the ground of any alleged irregularity or procedure. The said ground does not apply in case of illegality of the decision. The next case, which needs to be considered is again a Constitution Bench judgment of this Court in **Raja Rampal v. Hon'ble Speaker, Lok Sabha and Ors.** MANU/SC/0241/2007 : (2007) 3 SCC 184. The Constitution Bench in the above case had occasion to consider the question of issue of Judicial Review of a decision of Speaker disqualifying from membership of the Parliament. A submission was raised before the Court by virtue of Article 122 of the Constitution, which puts an embargo on questioning any proceeding of the Parliament, the decision of the Speaker is immuned from the Judicial Review. The above submission has been noticed in Para 364 of the judgment in following words:

364. The submissions of the learned Counsel for the Union of India and the learned Additional Solicitor General seek us to read a finality Clause in the provisions of Article 122(1) in so far as parliamentary proceedings are concerned. On the subject of finality clauses and their effect on power of judicial review, a number of cases have been referred that may be taken note of at this stage.

1139. In Paras 376, 377, 384 and 386 following has been held:

376. In our considered view, the principle that is to be taken note of in the aforementioned series of cases is that notwithstanding the existence of finality clauses, this Court exercised its jurisdiction of judicial review whenever and wherever breach of fundamental rights was alleged. The President of India while determining the question of age of a Judge of a High Court Under Article 217(3), or the President of India (or the Governor, as the case may be) while taking a decision Under Article 311(3) to dispense with the ordinarily mandatory inquiry before dismissal or removal of a civil servant, or for that matter the Speaker (or the Chairman, as the case may be) deciding the question of disqualification under Para 6 of the Tenth Schedule may be acting as authorities entrusted with such jurisdiction under the constitutional provisions. Yet, the manner in which they exercised the said jurisdiction is not wholly beyond the judicial scrutiny. In the case of the Speaker exercising jurisdiction under the Tenth Schedule, the proceedings before him are declared by Para 6(2) of the Tenth Schedule to be proceedings in Parliament within the meaning of Article 122. Yet, the said jurisdiction was not accepted as non-justifiable. In this view, we are unable to subscribe to the proposition that there is absolute immunity available to the Parliamentary proceedings relating to Article 105(3). It is a different matter as to what parameters, if any, should regulate or control the judicial scrutiny of such proceedings.

377. In U.P. Assembly case (Special Reference No. 1 of 1964) MANU/SC/0048/1964 : AIR 1965 SC 745, the issue was authoritatively settled by this Court, and it was held, at SCR pp. 455-56, as under: (AIR p. 768, para 62)

Article 212(1) seems to make it possible for a citizen to call in question *in the appropriate court of law the validity of any proceedings inside the legislative chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality.* If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinized in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular.

384. The prohibition contained in Article 122(1) does not provide immunity in cases of illegalities. In this context, reference may also be made to Sarojini Ramaswami v. Union of India, MANU/SC/0439/1992 : (1992) 4 SCC 506. The case mainly pertained to Article 124(4) read with the Judges (Inquiry) Act, 1968. While dealing, inter alia, with the overriding effect of the Rules made Under Article 124(5) over the Rules made Under Article 118, this Court at pp. 187-88 made the following observations: (SCC p. 572, para 94)

94. We have already indicated the constitutional scheme in India and the true import of clauses(4) and (5) of Article 124 read with the law enacted Under Article 124(5), namely, the Judges (Inquiry) Act, 1968 and the Judges (Inquiry) Rules, 1969, which, inter alia contemplate the provision for an opportunity to the Judge concerned to show cause against the finding of 'guilty' in the report before Parliament takes it up for consideration along with the motion for his removal. Along with the decision in U.P. Assembly Case (Special Reference No. 1 of 1964) has to be read the declaration made in Sub-Committee on Judicial Accountability, MANU/SC/0060/1992 : (1991) 4 SCC 699 that 'a law made Under Article 124(5) will override the Rules made Under Article 118 and shall be binding on both the Houses of Parliament. *A violation of such a law would constitute illegality and could not be immune from judicial scrutiny Under Article 122(1)*.' The scope of permissible challenge by the Judge concerned to the order of removal made by the President Under Article 124(4) in the judicial review available after making of the order of removal by the President will be determined on these considerations.

386. Article 122(1) thus must be found to contemplate the twin test of legality and constitutionality for any proceedings within the four walls of Parliament. The fact that the U.P. Assembly case (Special Reference No. 1 of 1964) dealt with the exercise of the power of the House beyond its four walls does not affect this view which explicitly interpreted a constitutional provision dealing specifically with the extent of judicial review of the internal proceedings of the legislative body. In this view, Article 122(1) displaces the English doctrine of exclusive cognizance of internal proceedings of the House rendering irrelevant the case law that emanated from courts in that jurisdiction.
Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text. Applying the principle of "expressio unius est exclusio alterius" (whatever has not been included has by implication been excluded), it is plain and clear that prohibition against examination on the touchstone of "irregularity of procedure" does not make taboo judicial review on findings of illegality or unconstitutionality.

1140. The above case is a clear authority for the proposition that Article 122 does not provide for immunity in case of illegality. What is protected is only challenge on the ground of any irregularity or procedure. The immunity from calling in question the Parliamentary decision on the ground of violation of procedure as has been provided in the Constitution is in recognition of the principles that Parliament has privilege regarding procedure and any challenge on the ground of violation of any procedure is not permissible.

1141. Shri K.K. Venugopal relied on Two Judgments of this Court in support of his submission namely, **Mohd. Saeed Siddiqui v. State of Uttar Pradesh and Anr.** MANU/SC/0350/2014 : (2014) 11 SCC 415 and **Yogendra Kumar Jaiswal and Ors. v. State of Bihar and Ors.**

MANU/SC/1441/2015 : (2016) 3 SCC 183. He submits that in both the decisions, this Court while dealing with the question of challenge to Money Bill has clearly held that the decision of Speaker certifying a Bill as Money Bill is final and cannot be questioned.

1142. We need to consider the above decisions in detail. **Mohd. Saeed Siddiqui (supra)** was a judgment delivered by a Three Judge Bench of this Court. U.P. Lokayukta Act and U.P. Lokayukta (Amendment) Act, 2012 was subject matter of challenge. One of the submissions in that regard has been noted in Para 12, which is to the following effect:

12. It was further submitted by Mr. Venugopal that the Amendment Act was not even passed by the State Legislature in accordance with the provisions of the Constitution of India and is, thus, a mere scrap of paper in the eye of the law. The Bill in question was presented as a Money Bill when, on the face of it, it could never be called as a Money Bill as defined in Articles 199(1) and 199(2) of the Constitution of India. Since the procedure for an Ordinary Bill was not followed and the assent of the Governor was obtained to an inchoate and incomplete Bill which had not even gone through the mandatory requirements under the Constitution of India, the entire action was unconstitutional and violative of Article 200 of the Constitution of India.

1143. This Court after noticing Articles 199 and 212, which are pari materia to Articles 109 and 122 stated that proceeding in support of legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of business. This Court considered the issues from Paragraphs 34 to 38, which is to the following effect:

34. The above provisions make it clear that the finality of the decision of the Speaker and the proceedings of the State Legislature being important privilege of the State Legislature, viz., freedom of speech, debate and proceedings are not to be inquired by the Courts. The "proceeding of the legislature" includes everything said or done in either House in the transaction of the Parliamentary business, which in the present case is enactment of the Amendment Act. Further, Article 212 precludes the courts from interfering with the presentation of a Bill for assent to the Governor on the ground of non-compliance with the procedure for passing Bills, or from otherwise questioning the Bills passed by the House. To put it clear, proceedings inside the legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of Business. This is also evident from Article 194 which speaks about the powers, privileges of the Houses of the Legislature and of the members and committees thereof.

35. We have already quoted Article 199. In terms of Article 199(3), the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. We are conscious of the fact that in the decision of this Court in Raja Ram Pal v. Lok Sabha MANU/SC/0241/2007 : (2007) 3 SCC 184, it has been held that the proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny.

36. Even if it is established that there was some infirmity in the procedure in the enactment of the Amendment Act, in terms of Article 255 of the Constitution the matters of procedures do not render

invalid an Act to which assent has been given by the President or the Governor, as the case may be.

37. In M.S.M. Sharma v. Shree Krishna Sinha MANU/SC/0020/1960 : AIR 1960 SC 1186 and Mangalore Ganesh Beedi Works v. State of Mysore MANU/SC/0347/1962 : AIR 1963 SC 589, the Constitution Benches of this Court held that:

(i) the validity of an Act cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202;

(ii) Article 212 prohibits the validity of any proceedings in a Legislature of a State from being called in question on the ground of any alleged irregularity of procedure; and

(iii) Article 255 lays down that the requirements as to recommendation and previous sanction are to be regarded as a matter of procedure only.

It is further held that the validity of the proceedings inside the legislature of a State cannot be called in question on the allegation that the procedure laid down by the law has not been strictly followed and that no Court can go into those questions which are within the special jurisdiction of the legislature itself, which has the power to conduct its own business.

38. Besides, the question whether a Bill is a Money Bill or not can be raised only in the State Legislative Assembly by a member thereof when the Bill is pending in the State Legislature and before it becomes an Act. It is brought to our notice that in the instant case no such question was ever raised by anyone.

1144. This Court came to the conclusion that question pertaining to the procedure in the House could not have been questioned by virtue of Article 212. Another judgment, which has been relied by learned Attorney General is judgment of this Court in **Yogendra Kumar Jaiswal (supra)**. The above judgment was rendered by Two Judge Bench. This Court in the above case examined the question whether introduction of Orissa Special Courts Act, 2006 as a Money Bill could be called in question in a Court. This Court considered the issue in Paragraphs 38 to 43, which are to the following effect:

38. First, we shall take up the issue pertaining to the introduction of the Bill as a Money bill in the State Legislature. Mr. Vinoo Bhagat, learned Counsel appearing for some of the Appellants, has laid emphasis on the said aspect. Article 199 of the Constitution, defines "Money Bills". For our present purpose, Clause (3) of Article 199 being relevant is reproduced below:

199. (3). If any question arises whether a Bill introduced in the legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.

We have extracted the same as we will be referring to the authorities as regards interpretation of the said clause.

39. Placing reliance on Article 199, the learned Counsel would submit that the present Act which was introduced as a money bill has remotely any connection with the concept of money bill. It is urged by him that the State has made a Sisyphean endeavour to establish some connection. The High Court to repel the challenge had placed reliance upon Article 212 which stipulates that the validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

40. The learned Counsel for the Appellants has drawn inspiration from a passage from Powers, Privileges and Immunities of State Legislatures. In re, Special Reference No. 1 of 1964 MANU/SC/0048/1964 : AIR 1965 SC 745, wherein it has been held that Article 212(1) lays down that the validity of any proceedings in the legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure and Article 212(2) confers immunity on the officers and members of the legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order, in the legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. The Court opined that Article 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the Legislative Chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is not more than that the procedure was irregular. Thus, the said authority has made a distinction between illegality of procedure and irregularity of procedure.

41. Our attention has also been drawn to certain paragraphs from the Constitution Bench decision in Raja Ram Pal v. Lok Sabha MANU/SC/0241/2007 : (2007) 3 SCC 184. In the said case, in paras 360 and 366, it has been held thus: (SCC pp. 347 & 350)

360. The question of extent of judicial review of parliamentary matters has to be resolved with reference to the provision contained in Article 122(1) that corresponds to Article 212 referred to in M.S.M. Sharma v. Shree Krishna Sinha MANU/SC/0020/1960 : AIR 1960 SC 1186 [Pandit Sharma (2)]. On a plain reading, Article 122(1) prohibits "the validity of any proceedings in Parliament" from being 'called in question' in a court merely on the ground of "irregularity of procedure". In other words, the procedural irregularities cannot be used by the court to undo or vitiate what happens within the four walls of the legislature. But then, "procedural irregularity" stands in stark contrast to "substantive illegality' which cannot be found included in the former. We are of the considered view that this specific provision with regard to check on the role of the judicial organ vis-a-vis proceedings in Parliament uses language which is neither vague nor ambiguous and, therefore, must be treated as the constitutional mandate on the subject, rendering unnecessary search for an answer elsewhere or invocation of principles of harmonious construction.

* * *

366. The touchstone upon which parliamentary actions within the four walls of the legislature were examined was both the constitutional as well as substantive law. The proceedings which may be tainted on account of substantive illegality or unconstitutionality, as opposed to those suffering

from mere irregularity thus cannot be held protected from judicial scrutiny by Article 122(1) inasmuch as the broad principle laid down in Bradlaugh (1884) LR 12 QBD 271: 53 LJQB 290: 50 LT 620 (DC), acknowledging exclusive cognizance of the legislature in England has no application to the system of governance provided by our Constitution wherein no organ is sovereign and each organ is amenable to constitutional checks and controls, in which scheme of things, this Court is entrusted with the duty to be watchdog of and guarantor of the Constitution.

42. In this regard, we may profitably refer to the authority in Mohd. Saeed Siddiqui v. State of U.P. MANU/SC/0350/2014 : (2014) 11 SCC 415, wherein a three-Judge Bench while dealing with such a challenge, held that Article 212 precludes the courts from interfering with the presentation of a Bill for assent to the Governor on the ground of non-compliance with the procedure for passing Bills, or from otherwise questioning the Bills passed by the House, for proceedings inside the legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of Business. Thereafter, the Court referring to Article 199(3) ruled that the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. The Court took note of the decision in Raja Ram Pal (supra) wherein it has been held that the proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny. Eventually, the Court repelled the challenge.

43. In our considered opinion, the authorities cited by the learned Counsel for the Appellants do not render much assistance, for the introduction of a Bill, as has been held in **Mohd. Saeed Siddiqui (supra)**, comes within the concept of "irregularity" and it does come with the realm of substantiality. What has been held in the Special Reference No. 1 of 1964 (supra) has to be appositely understood. The factual matrix therein was totally different than the case at hand as we find that the present controversy is wholly covered by the pronouncement in Mohd. Saeed Siddiqui (supra) and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned Counsel for the Appellants.

1145. The consideration in the above case indicate that this Court has merely relied on judgment of Three Judge Bench in Mohd. Saeed Siddiqui (supra). The Court based its decision on finality attached to the decision of the Speaker in Article 199(3) as well as bar on challenge of proceeding of the legislature on an irregularity procedure as contained in Article 212. The question is, where a Speaker certify a Bill as a Money Bill and it is introduced and passed as a Money Bill, this only a question of procedure or not? Article 107 contains provisions as to introduction of passing of bills. Article 107(2) state that subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses of Parliament. However, the requirement of passing a Bill by both the Houses is not applicable in case of Money Bills. Article 110 defines as to what is the Money Bill. A Money Bill is constitutionally defined and a Bill shall be a Money Bill only if it is covered by Article 110(1). A Bill, which does not fulfill the conditions as enumerated in Article 110(1) and it is certified as Money Bill, whether the Constitutional conditions enumerated in Article 110(1) shall be overridden only by certificate of Speaker?

1146. We have noticed the Constitution Bench judgment in **Kihoto Hollohan (supra) and Raja Ram Pal (supra)** that finality of the decision of the Speaker is not immuned from Judicial Review. All Bills are required to be passed by both Houses of Parliament. Exception is given in case of Money Bills and in the case of joint sitting of both houses. In event, we accept the submission of learned Attorney General that certification by Speaker is only a matter of procedure and cannot be questioned by virtue of Article 122(1), any Bill, which does not fulfill the essential constitutional condition Under Article 110 can be certified as Money Bill bye-passing the Upper House. There is a clear difference between the subject "irregularity of procedure" and "substantive illegality". When a Bill does not fulfill the essential constitutional condition Under Article 110(1), the said requirement cannot be said to be evaporated only on certification by Speaker. Accepting the submission that certification immunes the challenge on the ground of not fulfilling the constitutional condition, Court will be permitting constitutional provisions to be ignored and bye-passed. We, thus, are of the view that decision of Speaker certifying the Bill as Money Bill is not only a matter of procedure and in event, any illegality has occurred in the decision and the decision is clearly in breach of the constitutional provisions, the decision is subject to Judicial Review. We are, therefore, of the view that the Three Judge Bench judgment of this Court in **Mohd. Saeed Siddiqui (supra)** and Two Judge Bench judgment of this Court in **Yogendra Kumar Jaiswal (supra)** does not lay down the correct law. We, thus, conclude that the decision of the Speaker certifying the Aadhaar Bill as Money Bill is not immuned from Judicial Review.

1147. We having held that the decision of Speaker certifying the Aadhaar Bill as a Money Bill is open to Judicial Review. We now proceed to examine as to whether Speaker's decision certifying the Aadhaar Bill as Money Bill contravenes any of the Constitutional provisions, i.e., Whether the decision is vitiated by any Constitutional Illegality? For determining the main issue, which need to be answered is as to whether Aadhaar Bill is covered by any of Clauses (a) to (f) of Article 110(1). That Clause(g) shall be applicable only when any of Clauses (a) to (f) are attracted. Clause (g) which contemplate that any matter incidental to any of the matters specified in Sub-clauses (a) to (f), can be a provision in a Bill presupposes that main provisions have to fall in any of the Clauses (a) to (f). The heart of the Aadhaar Act is Section 7, which is to the following effect:

7. Proof of Aadhaar number necessary for receipt of certain subsidies, benefits and services, etc.- The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment:

Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.

1148. A condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India, has been provided by Section 7, i.e. undergoing of an individual to an authentication. The Preamble of the Act as well as objects and reasons as noticed above also indicate that the Act has been enacted to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and

services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto. Thus, the theme of the Act or main purpose and object of the Act is to bring in place efficient, transparent and targeted deliveries of subsidies, benefits and services, which expenditure is out from the Consolidated Fund of India. Thus, the above provisions of the Act is clearly covered by Article 110(1)(c) and (e).

1149. Shri P. Chidambaram, learned Counsel for Petitioners has laid much emphasis on the word "only" as occurring in Article 110(1). The word "only" used in Article 110(1) has purpose and meaning. The legislative intendment was that main and substantive provisions should be only any or all of the clauses from (a) to (f). In event, the main and substantive provision of the Act are not covered by Clauses (a) to (f), the said Bill cannot be said to be a Money Bill. It will not be out of place to mention here that in Constituent Assembly, an amendment was moved for deletion of word "only" on 20.05.1949, Hon'ble Shri Ghanshyam Singh Gupta moved the amendment in Draft Article 90. It is useful to extract the above debate, which is to the following effect:

The Honourable Shri Ghanshyam Singh Gupta (C.P. & Berar: General): Sir, I beg to move:

That in Clause (1) of Article 90, the word 'only' be deleted.

This Article is a prototype of Section 37 of the Government of India Act which says that a Bill or amendment providing for imposing or increasing a tax or borrowing money, etc. shall not be introduced or moved except on the recommendation of the Governor-General. This means that the whole Bill need not be a money Bill: it may contain other provisions, but if there is any provision about taxation or borrowing, etc. It will come under this Section 37, and the recommendation of the Governor-General is necessary. Now Article 90 says that a Bill shall be deemed to be a money Bill if it contains only provisions dealing with the imposition, Regulation, etc., of any tax or the borrowing of money, etc. This can mean that if there is a Bill which has other provisions and also a provision about taxation or borrowing etc., it will not become a money Bill. If that is the intention I have nothing to say; but that if that is not the intention I must say the word "only" is dangerous, because if the Bill does all these things and at the same time does something else also it will not be a money Bill. I do not know what the intention of the Drafting Committee is but I think this aspect of the Article should be borne in mind.

1150. After discussion, Mr. Naziruddin Ahmad also suggested that the position of the word "only" in connection with Amendment No. 1669 should be specially considered. It is a word which is absolutely misplaced. On that day, the consideration was deferred and again in the debate on 06.06.1949, Constituent Assembly took up the discussion. The President of the Constituent Assembly placed the amendment for vote on 08.06.1949, which amendment was negativated. Thus, use of word "only" in Article 110(1) has its purpose, which is a clear restriction for a Bill to be certified as a Money Bill.

1151. Other provisions of the Act can be said to be incidental to the above matter. The architecture of the Aadhaar Act veer round the Government's constitutional obligation to provide for subsidies, benefits and services to the individuals, who are entitled for such subsidies, benefits and services. Section 24 contemplates the appropriation made by Parliament by law for grant of sums of money

for the purposes of Aadhaar Act. The disbursement of subsidies, benefits and services from the Consolidated Fund of India is in substance, the main object of the Act for which Aadhaar architecture has been envisaged and other provisions are only to give effect to the above main theme of the Act. Other provisions of the Act are only incidental provisions to main provision. Section 57 on which much attack has been made by the learned Counsel for the Petitioners that it cannot be covered by any of the provisions from (a) to (f) of Article 110(1). Suffice it to say that Section 57 is a provision which clarifies that nothing contained in Aadhaar Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect. The applicability of the provision of Section 57 comes into play when Aadhaar Number is allocated to an individual after completing the process under the Act. Section 57 is also a incidental provision covered by sub-clause(g) of Article 110(1). Section 57 is a limitation imposed under the Act on the use of Aadhaar Number by State or any body corporate or any private party. We, thus, are of the view that Aadhaar Bill has rightly been certified as the Money Bill by the Speaker, which decision does not violate any constitutional provision, hence does not call for any interference in this proceeding. Issue No. 16 is answered in the following manner:

Ans. 16: Aadhaar Act has been rightly passed as Money Bill. The decision of Speaker certifying the Aadhaar Bill, 2016 as Money Bill is not immuned from Judicial Review.

Issue No. 17	Whether Section 139-AA of the Income Tax Act, 1961 is unconstitutional in view of the Privacy judgment in Puttaswamy case?

1152. Section 139-AA was challenged by a bunch of writ petitions, which were decided by this Court in **Binoy Viswam v. Union of India and Ors.** MANU/SC/0693/2017 : (2017) 7 SCC 59. The writ petitions were disposed of upholding the vires of Section 139-AA. Para 136 of the judgment contains operative portion, which is to the following effect:

136. Subject to the aforesaid, these writ petitions are disposed of in the following manner:

136.1 We hold that the Parliament was fully competent to enact Section 139-AA of the Act and its authority to make this law was not diluted by the orders of this Court.

136.2. We do not find any conflict between the provisions of the Aadhaar Act and Section 139AA of the Income Tax Act inasmuch as when interpreted harmoniously, they operate in distinct fields.

136.3. Section 139-AA of the Act is not discriminatory nor it offends equality Clause enshrined in Article 14 of the Constitution.

136.4. Section 139-AA is also not violative of Article 19(1)(g) of the Constitution insofar as it mandates giving of Aadhaar enrollment number for applying for PAN cards, in the income tax returns or notified Aadhaar enrollment number to the designated authorities. Further, the proviso to Sub-section (2) thereof has to be read down to mean that it would operate only prospectively.

136.5. The validity of the provision upheld in the aforesaid manner is subject to passing the muster of Article 21 of the Constitution, which is the issue before the Constitution Bench in Writ Petition (Civil) No. 494 of 2012 and other connected matters. Till then, there shall remain a partial stay on the operation of the proviso to Sub-section (2) of Section 139-AA of the Act, as described above. No cost.

1153. As per the above judgment, the validity of the provisions of Section-139AA was upheld subject to passing the muster of Article 21 of the Constitution, which was the issue pending before the Constitution Bench in Writ Petition (C) No. 494 of 2012 and other connected matters. The Constitution Bench judgment in **Puttaswamy** was delivered on 24.08.2017. Right of Privacy has been held to be fundamental right, any restriction on such fundamental right has been held to be valid when it passes the muster of three-fold test as laid down there. In the lead judgment of Dr. Justice D.Y. Chandrachud, three-fold test are:

(a) The existence of law;

(b) A legitimate State interest and

(c) such law should pass the test of proportionality.

1154. Dr. Justice Chandrachud has delivered the judgment for himself and three other Hon'ble Judges, Justice Sanjay Kishan Kaul in paragraph 639 has upheld the test of proportionality. As a result, at-least five out of nine Judges requires the proportionality test to be applied. In addition to tests propounded by a Constitution Bench in **Puttaswamy** case, an additional test as propounded by a Five Judges Constitution Bench of this Court in **Shayara Bano v. Union of India**, MANU/SC/1031/2017 : (2017) 9 SCC 1, Justice R.F. Nariman has laid down a test of "manifest arbitrariness". Reading the Nine Judge Bench decision in **Puttaswamy** case and Five Judge Bench decision in **Shayara Bano's** case, the Petitioner can succeed to the challenge to Section 139-AA only if they successfully demonstrate the said provision to be violative of Right to Privacy on the basis of the following tests:

(i) Absence of law;

(ii) Absence of Legitimate State Interest; (iii) The provision being hit by lack of proportionality.

(iv) The provision being manifestly arbitrary, which can be traced to Article 14. [The test to determine "manifest arbitrariness" is to decide whether the enactment is drastically unreasonable and/or capricious, irrational or without adequate determining principle"]

1155. The learned Attorney General relies on following interest, which according to him are safeguarded by Section 139-AA to satisfy the legitimate State interest:

a. To prevent income tax evasion by requiring, through an amendment to the Income Tax Act, that the Aadhaar number be linked with the PAN; and

b. Prevention, accumulation, circulation and use of black money and money laundering by imposing a requirement by law for linking Aadhaar for opening bank accounts;

c. To prevent terrorism and protect national security and prevention of crime by requiring that Aadhaar number be linked to SIM cards for mobile phones.

1156. **Binoy Viswam** has examined Section 139-AA on the Principle of Doctrine of Proportionality in Paragraphs 123 to 125:

123. Keeping in view the aforesaid parameters and principles in mind, we proceed to discuss as to whether the "restrictions" which would result in terms of the proviso to Sub-section (2) of Section 139-AA of the Act are reasonable or not.

124. Let us revisit the objectives of Aadhaar, and in the process, that of Section 139-AA of the Act in particular.

125. By making use of the technology, a method is sought to be devised, in the form of Aadhaar, whereby identity of a person is ascertained in a flawless manner without giving any leeway to any individual to resort to dubious practices of showing multiple identities or fictitious identities. That is why it is given the nomenclature "unique identity". It is aimed at securing advantages on different levels some of which are described, in brief, below:

125.1. In the first instance, as a welfare and democratic State, it becomes the duty of any responsible Government to come out with welfare schemes for the upliftment of poverty-stricken and marginalised Sections of the society. This is even the ethos of Indian Constitution which casts a duty on the State, in the form of "directive principles of State policy", to take adequate and effective steps for betterment of such underprivileged classes. State is bound to take adequate measures to provide education, health care, employment and even cultural opportunities and social standing to these deprived and underprivileged classes. It is not that Government has not taken steps in this direction from time to time. At the same time, however, harsh reality is that benefits of these schemes have not reached those persons for whom that are actually meant.

125.1.1. India has achieved significant economic growth since Independence. In particular, rapid economic growth has been achieved in the last 25 years, after the country adopted the policy of liberalisation and entered the era of, what is known as, globalisation. Economic growth in the last decade has been phenomenal and for many years, the Indian economy grew at highest rate in the world. At the same time, it is also a fact that in spite of significant political and economic success which has proved to be sound and sustainable, the benefits thereof have not percolated down to the poor and the poorest. In fact, such benefits are reaped primarily by rich and upper middle classes, resulting into widening the gap between the rich and the poor.

125.1.2. Jean Dreze and Amartya Sen pithily narrate the position as under:

Since India's recent record of fast economic growth is often celebrated, with good reason, it is extremely important to point to the fact that the societal reach of economic progress in India has been remarkably limited. It is not only that the income distribution has been getting more unequal

in recent years (a characteristic that India shares with China), but also that the rapid rise in real wages in China from which the working classes have benefited greatly is not matched at all by India's relatively stagnant real wages. No less importantly, the public revenue generated by rapid economic growth has not been used to expand the social and physical infrastructure in a determined and well-planned way (in this India is left far behind by China). There is also a continued lack of essential social services (from schooling and health care to the provision of safe water and drainage) for a huge part of the population. As we will presently discuss, while India has been overtaking other countries in the progress of its real income, it has been overtaken in terms of social indicators by many of these countries, even within the region of South Asia itself (we go into this question more fully in Chapter 3, 'India in Comparative Perspective').

To point to just one contrast, even though India has significantly caught up with China in terms of GDP growth, its progress has been very much slower than China's in indicators such as longevity, literacy, child undernourishment and maternal mortality. In South Asia itself, the much poorer economy of Bangladesh has caught up with and overtaken India in terms of many social indicators (including life expectancy, immunisation of children, infant mortality, child undernourishment and girls' schooling). Even Nepal has been catching up, to the extent that it now has many social indicators similar to India's, in spite of its per capita GDP being just about one third. Whereas twenty years ago India generally had the second best social indicators among the six South Asian countries (India, Pakistan, Bangladesh, Sri Lanka, Nepal and Bhutan), it now looks second worst (ahead only of problem-ridden Pakistan). India has been climbing up the ladder of per capita income while slipping down the slope of social indicators.

125.1.3. It is in this context that not only sustainable development is needed which takes care of integrating growth and development, thereby ensuring that the benefit of economic growth is reaped by every citizen of this country, it also becomes the duty of the Government in a welfare State to come out with various welfare schemes which not only take care of immediate needs of the deprived class but also ensure that adequate opportunities are provided to such persons to enable them to make their lives better, economically as well as socially. As mentioned above, various welfare schemes are, in fact, devised and floated from time to time by the Government, keeping aside substantial amount of money earmarked for spending on socially and economically backward classes. However, for various reasons including corruption, actual benefit does not reach those who are supposed to receive such benefits. One of the main reasons is failure to identify these persons for lack of means by which identity could be established of such genuine needy class. Resultantly, lots of ghosts and duplicate beneficiaries are able to take undue and impermissible benefits. A former Prime Minister of this country has gone on record to say that out of one rupee spent by the Government for welfare of the downtrodden, only 15 paisa thereof actually reaches those persons for whom it is meant. It cannot be doubted that with UID/Aadhaar much of the malaise in this field can be taken care of.

125.2. Menace of corruption and black money has reached alarming proportion in this country. It is eating into the economic progress which the country is otherwise achieving. It is not necessary to go into the various reasons for this menace. However, it would be pertinent to comment that even as per the observations of the Special Investigation Team (SIT) on black money headed by Justice M.B. Shah, one of the reasons is that persons have the option to quote their PAN or UID or passport number or driving licence or any other proof of identity while entering into

financial/business transactions. Because of this multiple methods of giving proofs of identity, there is no mechanism/system at present to collect the data available with each of the independent proofs of ID. For this reason, even SIT suggested that these databases be interconnected. To the same effect is the recommendation of the Committee headed by Chairman, CBDT on measures to tackle black money in India and abroad which also discusses the problem of money laundering being done to evade taxes under the garb of shell companies by the persons who hold multiple bogus PAN numbers under different names or variations of their names. That can be possible if one uniform proof of identity, namely, UID is adopted. It may go a long way to check and minimise the said malaise.

125.3. Thirdly, Aadhaar or UID, which has come to be known as the most advanced and sophisticated infrastructure, may facilitate law-enforcement agencies to take care of problem of terrorism to some extent and may also be helpful in checking the crime and also help investigating agencies in cracking the crimes. No doubt, going by the aforesaid, and may be some other similarly valid considerations, it is the intention of the Government to give fillip to Aadhaar movement and encourage the people of this country to enrol themselves under the Aadhaar Scheme.

1157. In Paragraphs 122 to 125 of *Binoy Viswam*, it has also been observed that the measures taken may go a long way to check and minimise the malaise of black money.

1158. Dr. Justice D.Y. Chandrachud in **Puttaswamy** case in Paragraph 311 has stated:

311. ..... Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology - legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

1159. In **Puttaswamy** case, Justice Sanjay Kishan Kaul has noted the European Union General Data Protection Regulation and observed that restrictions on the right to privacy may be justifiable on the ground of Regulation of taxes and financial institutions. In Paragraph 640, Justice Kaul has held:

640. It would be useful to turn to the European Union Regulation of 2016. Restrictions of the right to privacy may be justifiable in the following circumstances subject to the principle of proportionality:

(a) Other fundamental rights: The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.

(*b*) Legitimate national security interest.

(*c*) Public interest including scientific or historical research purposes or statistical purposes.

(*d*) *Criminal offences*: The need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security;

(*e*) *The unidentifiable data*: The information does not relate to identified or identifiable natural person but remains anonymous. The European Union Regulation of 2016 refers to "pseudonymisation" which means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

(*f*) *The tax, etc.*: The regulatory framework of tax and working of financial institutions, markets may require disclosure of private information. But then this would not entitle the disclosure of the information to all and sundry and there should be data protection Rules according to the objectives of the processing. There may however, be processing which is compatible for the purposes for which it is initially collected.

1160. Section 139-AA thus clearly enacted to fulfill the legitimate State interest. Section 139-A which came into effect w.e.f. 01.04.1989 provide for Permanent Account Number (PAN) and the provision also provided that statutory mandatory provisions as to when "every person" shall quote such number (PAN number) for various purposes as enumerated in Section 139A. Introduction of Section 139-AA is an extension and implication of Section 139A. The introduction of Section 139-AA was for the purpose of eliminating duplicate PANs from the system with the help of a robust technology solution.

1161. The new Section 139-AA in the Income Tax Act seeks to remove bogus PAN cards by linking with Aadhaar, expose shell companies and thereby curb the menace of black money, money laundering and tax evasion. The fact that the tax base of India is very narrow and that we are a largely tax non-compliant society is evident from some of the startling figures in the budget speech of the Finance Minister. Linking of PAN with Aadhaar will at least ensure that duplicate and fake PAN cards which are used for the purpose of tax evasion will be eliminated and is one of the many fiscal measures to eliminate black money from the system.

1162. The **Binoy Viswam** has referred to other relevant rationals for enactment of Section 139-AA. Section 139-AA also cannot be said to be disproportionate. The Section has been enacted to achieve the legitimate State aim. Section 139-AA is a law framed by Parliament, which require linking of the Aadhaar with PAN. The means which are sought to be achieved by such enactment cannot be said to be disproportionate in any manner. It has been further submitted that Section 139-AA unfairly attracts only individual Assessees and not other tax paying Assessees, who may also be involved in financial frauds. The above submission need not detain us since Aadhaar number can be obtained by the individuals and not by the entities hence Section-139AA can only apply to individuals. In any event, the legislature cannot be expected to address all issues relating to a particular evil at one go. Section 139-AA is a required first step to weed out fake PANs for individuals; it is perfectly acceptable for the legislature to weed out fake PANs for other tax-paying entities at a later stage. Such a view is also endorsed in judicial decisions. In **Namit Sharma v. Union of India,** MANU/SC/0744/2012 : (2013) 1 SCC 745 (per Swatanter Kumar, J.) this Court observed:

43. The Rule of equality or equal protection does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programme. So long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.....

1163. Thus, the legislature is within its remit to only target individual Assessees with Section 139-AA, and not every other tax-paying entity. The law does not have to provide for complete coverage of tax-payers who may be indulging in financial fraud but may envisage 'degrees of harm' and act on that basis. In this context, the Aadhaar number is being mandated for all individual Assessees. This is applicable to natural persons as well as persons who together constitute legal persons (e.g. Partners in a partnership, members of a company etc.) and hence provides significant coverage to weed out duplicate PANs and hence reduce the incidence of financial and tax frauds through these means. Aadhaar's inclusion into PAN is meant to curb tax evasion, sham transactions, entry providers which are rampantly carried out on account of bogus PANs. Aadhaar's unique de-duplication based on biometric identification has been hailed as the most sophisticated system by the World Bank. Inclusion of Aadhaar into PAN eliminates the inequality between honest tax payers and non-compliant, dishonest ones who get away without paying taxes. Inclusion of Aadhaar into PAN promotes rather than negates equality. It bolsters equality and is consistent with Article 14.

1164. In result, Section 139-AA is fully compliant of three-fold test as laid down in **Puttaswamy's** case. Section 139-AA, thus does not breach fundamental Right of Privacy of an individual and Section 139-AA cannot be struck down on that ground.

Ans. 17: Section 139-AA does not breach fundamental Right of Privacy as per Privacy judgment in **Puttaswamy** case.

Issue No. 18	Whether Aadhaar Act violates the Interim Orders passed by this Court in Writ Petition (C) No. 494 of 2012?

1165. The Petitioners submits that this Court has passed various Interim Orders in Writ Petition (C) No. 494 of 2012 from 23.09.2013 to 15.10.2015. On 23.09.2013, this Court directed "In the meanwhile, no person should suffer not getting the Aadhaar card inspite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar Card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant".

1166. On 11.08.2015, this Court issued following order:

Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench if the Union of India or the UIDA proceed in the following manner:

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card;

2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen;

3. The Unique Identification Number or the Aadhaar card will not be used by the Respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme;

4. The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.

By subsequent order of 15.10.2015, some more Schemes were included.

1167. It is submitted that the Central Government and the State Government issued various notifications numbering 139, requiring Aadhaar authentication for various benefits, subsidies and schemes. The issuance of such orders is in breach of above Interim Orders passed by this Court.

1168. In **Binoy Viswam (supra)** an argument was advanced that enactment of Section 139-AA was in breach of the Interim Order passed in Writ Petition (C) No. 494 of 2012. The said argument was considered and in Para 99 it was held as follows:

99. Main emphasis, however, is on the plea that Parliament or any State Legislature cannot pass a law that overrules a judgment thereby nullifying the said decision, that too without removing the basis of the decision. This argument appears to be attractive inasmuch as few orders are passed by this Court in pending writ petitions which are to the effect that the enrolment of Aadhaar would be voluntary. However, it needs to be kept in mind that the orders have been passed in the petitions where Aadhaar Scheme floated as an executive/administrative measure has been challenged. In those cases, the said orders are not passed in a case where the Court was dealing with a statute passed by Parliament. Further, these are interim orders as the Court was of the opinion that till the matter is decided finally in the context of right to privacy issue, the implementation of the said Aadhaar Scheme would remain voluntary. In fact, the main issue as to whether Aadhaar card scheme whereby biometric data of an individual is collected violates right to privacy and, therefore, is offensive of Article 21 of the Constitution or not is yet to be decided. In the process, the Constitution Bench is also called upon to decide as to whether right to privacy is a part of Article 21 of the Constitution at all. Therefore, no final decision has been taken. In a situation like this, it cannot be said that Parliament is precluded from or it is rendered incompetent to pass such a law. That apart, the argument of the Petitioners is that the basis on which the aforesaid orders are passed has to be removed, which is not done. According to the Petitioners, it could be done only by making the Aadhaar Act compulsory. It is difficult to accept this contention for two reasons: first, when the orders passed by this Court which are relied upon by the Petitioners were passed when the Aadhaar Act was not even enacted. Secondly, as already discussed in detail above, the Aadhaar Act and the law contained in Section 139-AA of the Income Tax Act deal with two different

situations and operate in different fields. This argument of legislative incompetence also, therefore, fails.

1169. We have noticed that the Writ Petition (C) No. 494 of 2012 was filed at the time when Aadhaar Scheme was being implemented on the basis of executive's instructions dated 28.01.2009. In the Writ Petition filed prior to enactment of Act, 2016, challenge to Aadhaar Scheme was founded on following:

i. The requirement of making Aadhaar mandatory for availing benefits under various social service schemes by way of an executive order and

ii. Concerns regarding the right to privacy of the individuals, which emanated on account of collection of biometric data under the Aadhaar scheme, which is without any legislative backing.

1170. Aadhaar Act, 2016 gives legislative backing to the Aadhaar Scheme. The Act contains specific provisions prohibiting disclosure of core biometric information collected in Aadhaar enrolment. It is submitted that Schemes notified Under Section 7 of the Act were on the strength of Aadhaar enactment and cannot be said to be a violation of interim orders of this Court. The submission that interim orders directed the Aadhaar to be voluntary, it is submitted by the Respondent that consent was obtained from individuals, who came for enrolment under the Aadhaar Act. It is submitted that all those, who were enrolled under the Statutory Scheme dated 28.01.2009, the consent was given by the individuals in verifying their informations.

1171. We, thus, conclude that Aadhaar Act cannot be struck down on the ground that it is in violation of interim orders passed by this Court in Writ Petition (C) No. 494 of 2012. Issue No. 18 is answered in following manner:

Ans. 18: The Aadhaar Act does not violate the interim orders passed in Writ Petition (C) No. 494 of 2012 and other Writ Petitions.

1172. I had gone through the erudite and scholarly opinion of Justice A.K. Sikri (which opinion is on his own behalf and on behalf of Chief Justice and Justice A.M. Khanwilkar) with which opinion I broadly agree. Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 has been struck down by my esteemed brother which provision has been upheld by me. My reasons and conclusions are on the same line except few where my conclusions are not in conformity with the majority opinion.

CONCLUSIONS:

1173. In view of above discussions, we arrive at following conclusions:

(1) The requirement under Aadhaar Act to give one's demographic and biometric information does not violate fundamental right of privacy.

(2) The provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar Number pass three-fold test as laid down in Puttaswamy (supra) case, hence cannot be said to be unconstitutional.

(3) Collection of data, its storage and use does not violate fundamental Right of Privacy.

(4) Aadhaar Act does not create an architecture for pervasive surveillance.

(5) Aadhaar Act and Regulations provides protection and safety of the data received from individuals.

(6) Section 7 of the Aadhaar is constitutional. The provision does not deserve to be struck down on account of denial in some cases of right to claim on account of failure of authentication.

(7) The State while enlivening right to food, right to shelter etc. envisaged Under Article 21 cannot encroach upon the right of privacy of beneficiaries nor former can be given precedence over the latter.

(8) Provisions of Section 29 is constitutional and does not deserves to be struck down.

(9) Section 33 cannot be said to be unconstitutional as it provides for the use of Aadhaar data base for police investigation nor it can be said to violate protection granted Under Article 20(3).

(10) Section 47 of the Aadhaar Act cannot be held to be unconstitutional on the ground that it does not allow an individual who finds that there is a violation of Aadhaar Act to initiate any criminal process.

(11) Section 57, to the extent, which permits use of Aadhaar by the State or any body corporate or person, in pursuant to any contract to this effect is unconstitutional and void. Thus, the last phrase in main provision of Section 57, i.e. "or any contract to this effect" is struck down.

(12) Section 59 has validated all actions taken by the Central Government under the notifications dated 28.01.2009 and 12.09.2009 and all actions shall be deemed to have been taken under the Aadhaar Act.

(13) Parental consent for providing biometric information Under Regulation 3 & demographic information Under Regulation 4 has to be read for enrolment of children between 5 to 18 years to uphold the constitutionality of Regulations 3 & 4 of Aadhaar (Enrolment and Update) Regulations, 2016.

(14) Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 is not unconstitutional and does not violate Articles 14, 19(1)(g), 21 & 300A of the Constitution and Sections 3, 7 & 51 of the Aadhaar Act. Further Rule 9 as amended is not ultra vires to PMLA Act, 2002.

(15) Circular dated 23.03.2017 being unconstitutional is set aside.

(16) Aadhaar Act has been rightly passed as Money Bill. The decision of Speaker certifying the Aadhaar Bill, 2016 as Money Bill is not immuned from Judicial Review.

(17) Section 139-AA does not breach fundamental Right of Privacy as per Privacy judgment in Puttaswamy case.

(18) The Aadhaar Act does not violate the interim orders passed in Writ Petition (C) No. 494 of 2012 and other Writ Petitions.

1174. Now, we revert back to the batch of cases, which have come up for consideration before us.

1175. We having considered and answered the issues arising in this batch of cases, all the Writ Petitions filed Under Article 32 deserves to be disposed of in accordance with our conclusions as noted above. All Transfer Cases/Transfer Petitions are also deserves to be decided accordingly.

1176. Now, we come to the Criminal Appeal arising out of S.L.P. (Crl.) No. 2524 of 2014. The above S.L.P. (Crl.) arose out of an order passed by Judicial Magistrate First Class dated 22.10.2013 by which Judicial Magistrate First Class directed DG, UIDAI and Dy. Dg. UIDAI Technology Centre, Bangalore to provide the necessary data to the Respondent C.B.I. The said order was challenged in the High Court by means of Criminal Writ Petition, in which the order was passed by the High Court on 26.02.2014 giving rise to S.L.P. (Crl.) No. 2524 of 2014.

1177. We have noticed above that according to Aadhaar Act Section 33 disclosure of information can be made as per Sub-section (1) pursuant to an order of Court, not inferior to that of District Judge. The order directing for disclosure of information having been passed by Judicial Magistrate First Class, in the present case, the order is not in consonance with Sub-section (1) of Section 33, hence the order passed by Judicial Magistrate, First Class dated 22.10.2013 and order of the High Court passed in reference to the said order deserves to be set aside. Criminal Appeal is allowed accordingly.

1178. No case is made out to initiate any contempt proceedings in the contempt applications as prayed for. All the contempt petitions are dismissed.

1179. In result, this batch of cases is decided in following manner:

(i) All the Writ Petitions filed Under Article 32 as well as Transfer Cases are disposed of as per our conclusions recorded above.

(ii) Criminal Appeal arising out of S.L.P. (Criminal) No. 2524 of 2014 is allowed.

(iii) All the contempt applications are closed.

1180. Before we part, we record our deep appreciation for the industry, hard work and eloquence shown by learned Counsel for the parties appearing before us, which was amply demonstrated in their respective arguments. Learned Counsel have enlightened us with all relevant concerned materials available in this country and abroad. The concern raised by these Public Interest

Litigations is a concern shown for little Indian for whom the Society, Government and Court exists. We appreciate the concern and passion expressed before us by learned Counsel appearing for both the parties as well as those, who were permitted to intervene in the matter. We close by once more recording of our appreciation for the cause espoused in these cases.

---

[1](2010) 5 SC 318
[2](2010) 13 SCC 45
[3]S/Shri Kapil Sibal, Gopal Subramaniam, P. Chidambaram, Shyam Divan, K.V. Viswanathan, Neeraj Kishan Kaul, C.U. Singh, Anand Grover, Sanjay R. Hegde, Arvind P. Datar, v. Giri, Rakesh Dwivedi, Jayant Bhushan, Sajan Poovayya, P.V. Surendra Nath, Senior Advocates, K.K. Venugopal, Attorney General for India, Tushar Mehta, Additional Solicitor General of India, Gopal Sankaranarayanan and Zoheb Hossain, Advocates.
[4]Thiruvengadam, The Use of Foreign Law in Constitutional Cases in India and Singapore (2010)
[5]Basheshar Nath v. Commissioner of Income Tax, Delhi and Rajasthan and Anr., MANU/SC/0064/1958 : 1959 Supp (1) SCR 528
[6]Romesh Thappar v. State of Madras, MANU/SC/0006/1950 : 1950 SCR 594
[7]Durga Das Basu, Limited Government and Judicial Review, LexisNexis, (2016) at pages 123-124
[8]Ibid, at pages 128-129
[9]K.T. Plantation (P) Ltd. v. State of Karnataka, MANU/SC/0914/2011 : (2011) 9 SCC 1
[10]State of Assam v. Barak Upatyaka DU Karmachari Sanstha, MANU/SC/0387/2009 : (2009) 5 SCC 694
[11]State of M.P. v. Rakesh Kohli, MANU/SC/0443/2012 : (2012) 6 SCC 312; Ashoka Kumar Thakur v. Union of India, MANU/SC/1397/2008 : (2008) 6 SCC 1
[12]There are few other incidental and ancillary issues raised by the Petitioners as well, which we propose to discuss and deal with after answering these fundamental submissions.
[13]See the analysis of this judgment by the Centre for Internet and Society, https://cis-india.org/internet-governance/blog/the-fundamental-right-to-privacy-an-analysis
[14]Daniel Solove, *Understanding Privacy*, Cambridge, Massachusetts: Harvard University Press, 2008.
[15]See paras 72-79 of the judgment
[16]Rendered by Dipak Misra, CJI
[17]Rendered by A.K. Sikri, J.
[18]Ronald Dworkin, *Taking Rights Seriously* (A&C Black, 2013) 239.
[19]Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006)
[20]Harvard University Press, 2011.
[21]Kenneth W. Simons, "Dworkin's Two Principle of Dignity: An Unsatisfactory Non-Consequentialist Account of Interpersonal Moral Duties", 90 Boston Law Rev. 715 (2010)]
[22]Footnote 33 above.
[23]Footnote 32 above.

[24]Published in the European Journal of International Law on September 01, 2008
[25]See George Kateb, Human Dignity 5 (2011) ("[W]e can distinguish between the dignity of every human individual and the dignity of the human species as a whole.").
[26]See John Donne, XVII. Mediation, in Devotions upon Emergent Occasions 107, 108-09 (Uyniv. Of Mich. Press 1959) (1624)
[27]"Overlapping consensus" is a term coined by John Rawls that identifies basic ideas of justice that can be shared by supporters of different religious, political, and moral comprehensive doctrines.
[28]Robert Alexy, A Theory of Constitutional Rights, (Oxford, Oxford University Press, 2002)
[29]M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point and Purpose of Rights-Based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 141; M Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the point of Judicial Review' (2007) 1 European Journal of Legal Studies.
[30]K Moller, The Global Model of Constitutional Rights (Oxford, Oxford University Press, 2012).
[31]On this issue there is a detailed discussion in M Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos (ed), Law, Rights and Discourse: The Legal Philosophy of Robert Alexy (Oxford, Hart Publishing, 2007) 131; Moller, the Global Model of Constitutional Rights (Oxford, Oxford University Press, 2012) ch 7.
[32]As a proposal of how to deal with uncertainty, see Alexy's 'Second Law of Balancing', which he proposes in the Postscript to A Theory of Constitutional Rights (Oxford, Oxford University Press, 2002).
[33]'Necessity and Proportionality: Towards A Balanced Approach?', Hart Publishing, Oxford and Portland, Oregon, 2016.
[34]On the various problems which the Canadian Supreme Court created for itself because of its early unfortunate statements on proportionality see S Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 Supreme Court Law Review 501.
[35](2015) Application No. 47143/2006
[36]We may also take on record responsible statements of the learned Attorney General and Mr. Dwivedi who appeared for UIDAI that no State would be interested in any mass surveillance of 1.2 Billion people of the country or even the overwhelming majority of officers and employees or professionals. The very idea of mass surveillance by State which pursues what an ANH does all the time and based on Aadhaar is an absurdity and an impossibility. According to them, the Petitioners submission is based on too many imaginary possibilities, viz.: (i) Aadhaar makes it possible for the State to obtain identity information of all ANH. It is possible that UIDAI would share identity information/authentication records in CIDR notwithstanding statutory prohibition and punitive injunctions in the Act. It is possible that the State would unleash its investigators to surveil a sizeable section of the ANH, if not all based on the authentication records. It is submitted that given the architecture of the Aadhaar Act, there are no such possibilities and in any event, submission based on imaginary possibility do not provide any basis for questioning the validity of Aadhaar Act. (ii) None of the writ petitions set forth specific facts and even allegations that any Aadhaar number holder is being subjected to surveillance by UIDAI or the Union/States. The emphasis during the argument was only on the possibility of surveillance based on electronic track trails and authentication records. It was asserted that there are tools in

the market for track back. The entire case was speculative and conjectural. In Clapper, Director of National Intelligence v. Amnesty International USA, the majority judgment did not approve the submissions in the context of Foreign Intelligence Surveillance Act and one of the reason was that the allegations were conjectural and speculative. There were no facts pleaded on the basis of which the asserted threat could be fairly traced to. However, we have not deliberated on this argument.

[37]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[38]S and Marper v. United Kingdom [2008] ECHR 1581

[39]Digital Rights Ireland Ltd. v. Minister for Communication, Marine and Natural Resources [2014] All ER (D) 66 (Apr)

[40]*Tele 2 Sverige AB v. Post-och telestyrelsen* and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis, Joined Cases C-203/15 and C-698/15, 2016

[41]2.03. 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08

[42]See paragraphs 320 to 322

[43]"Report of the Group of Experts on Privacy" (16 October, 2012), Government of India, available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf

[44]Writ Petition (Civil) No. 215 of 2005

[45]Civil Appeal No. 6626-6675 of 2001

[46]Writ Petition (Civil) No. 265 of 2006, judgment delivered on April 10, 2008.

[47]The challenge made in the case related to 'Other Backward Classes' rather than the Scheduled Castes or Tribes.

[48]App. No. 45603/05 decided on 18.06.2009

[49]India acceded to the UN Convention on the Rights of the Child in December 1992 to reiterate its commitment to the cause of the children.

[50]Quebec Ass'n of Protestant Sch. Bds. v. Quebec (A.G.), (1984) 2 SCR 66

[51]See Nicholas Emiliou, The Principle of Proportionality in European Law: A comparative Study 5 (Kluwer Law Int'l. 1996).

[52]Om Kumar and Ors. v. Union of India, MANU/SC/0704/2000 : (2001) 2 SCC 386 where R. v. Oakes was referred to and relied upon; Teri Oat Estates (P) Ltd. v. U.T., Chandigarh and Ors., MANU/SC/1098/2003 : (2004) 2 SCC 130 where the Court stressed upon maintaining a proper balance between adverse effect which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve; Modern Dental College and Research Centre and *K.S. Puttaswamy* amongst others.

[53]Vernonia School District v. Wayne Acton, 515 US 646, 132 L. Ed. 2D 564, Board of Education of Independent School District v. Lindsay Earls, 536 US 822=153 L. Ed. 2d. 735.

[54]H.M. Seervai, Constitutional Law of India: A Critical Commentary (N.M. Tripathi Private Limited, Bombay, 4th Ed., Vol. 2, 1993) at pages 1928-1937.

[55]Dipak Misra, CJI

[56]Published in The Indian Express on July 16, 2018

[57]Mangalore Ganesh Beedi Works v. State of Mysore and Anr., MANU/SC/0347/1962 : 1963 Supp (1) SCR 275; Ramdas Athawale v. Union of India and Ors., MANU/SC/0212/2010 : (2010) 4 SCC 1, and; M.S.M. Sharma v. Dr. Shree Krishna Sinha and Ors. MANU/SC/0020/1960 : AIR 1960 SC 1186

[58]A.S. Krishna v. State of Madras, MANU/SC/0035/1956 : (1957) SCR 399; Union of India and

Ors. v. Shah Goverdhan L. Kabra Teachers' College, MANU/SC/0882/2002 : (2002) 8 SCC 228, and; P.N. Krishna Lal and Ors. v. Government of Kerala and Anr., MANU/SC/1007/1995 : 1995 Supp (2) SCC 187

[59]Granville Austin, Working a Democratic Constitution: A History of the Indian Experience, Oxford University Press (2003) at page 6

[60]Lon L. Fuller and Kenneth I. Winston, The Forms and Limits of Adjudication, Harvard Law Review, Vol. 92, (1978), at pages 353-409

[61]Kwame Anthony Appiah, The Lies That Bind: Rethinking Identity, Liveright Publishing (2018).

[62]Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Enlightenment, Farrar, Straus and Giroux (2018).

[63]Anand Giridharadas, 'What is Identity?', The New York Times, 27 August, 2018.

[64]Peter F Drucker, The Age of Discontinuity: Guidelines to Our Changing Society, Harper & Row (1969). Drucker's book popularized the term 'Knowledge Economy'.

[65]'What is Knowledge Economy?', IGI Global: Disseminator of Knowledge, available at: https://www.igi-global.com/dictionary/indigenous-knowledges-and-knowledge-codification-in-the-knowledge-economy/16327

[66]Krishnadas Rajagopal, 'Aadhaar in numbers: key figures from UIDAI CEO's presentation to the Supreme Court', The Hindu, (March 22, 2018). Aadhaar enrollment as of March 2018 stood at over 1 billion.

[67]Upendra Baxi, The Right To Be Human: Some Heresies, India International Centre Quarterly, Vol. 13, (1986).

[68]Justice K.S. Puttaswamy (Retd.) v. Union of India ("Puttaswamy"), MANU/SC/1044/2017 : (2017) 10 SCC 1

[69]Ibid, at page 365

[70]Ibid, at page 508

[71]Ibid, at pages 536-537

[72]Ibid, at page 605

[73]Ibid, at page 614

[74]Ibid, at page 403

[75]Ibid, at page 484

[76]Ibid, at pages 481-482

[77]Ibid, at page 482

[78]Ibid, at pages 406-407

[79]Ibid, at page 413

[80]Ibid, at page 499

[81]Ibid, at page 543

[82]Ibid, at page 544

[83]Ibid, at page 401

[84]Ibid, at page 531

[85]Ibid, at pages 541-542

[86]Ibid, at page 598

[87]Ibid, at page 509

[88]Ibid, at page 545

[89]Ibid, at page 627

[90]Ibid, at page 629

[91]Ibid, at pages 580-581
[92]Ibid, at page 583
[93]Ibid, at page 532
[94]Ibid, at pages 532-533
[95]Ibid, at page 549
[96]Ibid, at page 580
[97]Ibid, at page 601
[98]Ibid, at page 505
[99]Modern Dental College and Research Centre v. State of Madhya Pradesh, MANU/SC/0495/2016 : (2016) 7 SCC 353.
[100]Section 2(m) states: "enrolment" means the process, as may be specified by Regulations, to collect demographic and biometric information from individuals by the enrolling agencies for the purpose of issuing Aadhaar numbers to such individuals under this Act.
[101]Section 10, Aadhaar Act
[102]Section 2(v) states: "resident" means an individual who has resided in India for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment
[103]Section 2(s) states: "Registrar" means any entity authorised or recognised by the Authority for the purpose of enrolling individuals under this Act
[104]Regulation 7, Aadhaar (Enrolment and Update) Regulations, 2016
[105]Section 3(2), Aadhaar Act.
[106]Section 8(3), Aadhaar Act
[107]Section 8(4), Aadhaar Act
[108]Section 11(2), Aadhaar Act
[109]Section 28(1), Aadhaar Act
[110]Section 28(2), Aadhaar Act
[111]Section 33, Aadhaar Act
[112]Section 32(1), Aadhaar Act
[113]Section 32(2), Aadhaar Act
[114]Article 109(2), The Constitution of India
[115]Article 109(3), The Constitution of India
[116]Article 109(4), The Constitution of India
[117]Article 109(5), The Constitution of India
[118]Article 110(4), The Constitution of India
[119]Article 199(4), The Constitution of India
[120]Thomas Erskine May, A treatise on the law, privileges, roceedings and usage of Parliament, Ninth Edition (1883)
[121]Ibid, at pages 637-638. It notes: "At length, when the Commons had increased in political influence, and the subsidies voted by them had become the principal source of national revenue, they gradually assumed their present position in regard to taxation and supply, and included the Lords as well as themselves in their grants. So far back as 1407, it was stated by King Henry IV, in the ordinance called "The Indemnity of the Lords and Commons", that grants were "granted by the Commons, and assented to by the Lords"."
[122]Ibid, at page 638
[123]Ibid, at page 641. The Resolution stated: "That in all aids given to the king by the Commons, the rate or tax ought not to be altered".

[124]Ibid. The Resolution stated: "That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons: and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants; which ought not to be changed or altered by the House of Lords."
[125]Ibid, at pages 642-643
[126]Ibid, pages 646-647
[127]Preamble of the Parliament Act 1911
[128]House of Lords, Select Committee on the Constitution, Money Bills and Commons Financial Privilege (2011), available at https://publications.parliament.uk/pa/ld201011/ldselect/ldconst/97/97. pdf
[129]B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 420
[130]Ibid, at pages 427-428
[131]The said provision provides: "Powers of the Houses in respect of legislation. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law. The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications. Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."
[132]B Shiva Rao, The Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration (2012), at page 32, as quoted in Pratik Datta, Shefali Malhotra & Shivangi Tyagi, Judicial Review and Money Bills, NUJS Law Review (2017)
[133]Lower House in Ireland
[134]Upper House in Ireland
[135]B Shiva Rao, The Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration, at page 281
[136]Pratik Datta, Shefali Malhotra & Shivangi Tyagi, Judicial Review and Money Bills, NUJS Law Review (2017)
[137]Ibid, at para 227
[138]Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at page 205
[139]Article 243O(a), which is a part of the chapter on Panchayats, provides: "Notwithstanding anything in this Constitution,-- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243K, shall not be called in question in any court."
[140]Article 243ZG(a), which is a part of the chapter on Municipalities, provides: "Notwithstanding

anything in this Constitution,-- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZA shall not be called in question in any court."
[141]Ibid, at para 5
[142]Article 217 (3) states: "If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final."
[143]Article 311(3) states: "If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."
[144]Paragraph 6(1) states "If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman, or, as the case may be, the Speaker of such House and his decision shall be final: Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final."
[145]Ibid, at page 397
[146]Ibid, at page 711
[147]Ibid, at page 708
[148]Ibid, at pages 76-77
[149]Ibid, at pages 13-14
[150]Ibid, at page 359
[151]Ibid, at page 362
[152]Ibid, at page 350
[153]Pratik Datta, Shefali Malhotra & Shivangi Tyagi, Judicial Review and Money Bills, Vol 10, NUJS Law Review (2017).
[154]Mohd. Saeed Siddiqui, Ibid, at page 430
[155]Ibid, at page 229
[156]Corresponding provision for the Union is Article 110 of the Constitution.
[157]Corresponding provision for the Union is Article 122 of the Constitution.
[158]Fathali M. Moghaddam, The SAGE Encyclopaedia of Political Behaviour (2017).
[159]Betty Drexhage, Bicameral Legislatures: An International Comparison, Ministry of the Interior and Kingdom Relations-Netherlands (2015), at page 7
[160]Abhinay Muthoo & Kenneth A. Shepsle, The Constitutional Choice of Bicameralism, in Institutions and Economic Performance (Elhanan Helpman ed.), Harvard University Press (2008), at pages 251-252
[161]Abhinay Muthoo & Kenneth A. Shepsle, The Constitutional Choice of Bicameralism, in Institutions and Economic Performance (Elhanan Helpman ed.), Harvard University Press (2008), at page 252
[162]Betty Drexhage, Bicameral Legislatures: An International Comparison, Ministry of the Interior and Kingdom Relations-Netherlands (2015), at page 8
[163]Betty Drexhage, Bicameral Legislatures: An International Comparison, Ministry of the Interior and Kingdom Relations-Netherlands (2015), at page 7
[164]James Madison, The Federalist No. 62-The Senate, The Federalist Papers (1788), available at

http://www.constitution.org/fed/federa62.html
[165]William H. Riker, The Justification of Bicameralism, International Political Science Review (1992), Vol. 13, Issue 1, at pages 101-16.
[166]Saul Levmore, Bicameralism: When Are Two Decisions Better than One?, International Review of Law and Economics (1992), Vol. 12, at pages 147-148.
[167]Betty Drexhage, Bicameral Legislatures: An International Comparison, Ministry of the Interior and Kingdom Relations-Netherlands (2015).
[168]Ibid, at pages 11-12
[169]James N. Druckman & Michael F. Thies, The Importance of Concurrence: The Impact of Bicameralism on Government Formation and Duration, American Journal of Political Science (2002), Vol. 46, No. 4, at pages 760-771.
[170]Elliot Bulmer, Bicameralism, International Institute for Democracy and Electoral Assistance (2017), at page 4
[171]James R. Rogers, The Advantage of Second Chambers in Republican Legislatures: An Informational Theory, at page 6, available at https://ecpr.eu/Filestore/PaperProposal/beb20221-c2c5-4475-9b9f-74bb3f1512a7.pdf
[172]Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at page 195
[173]Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at pages 180 & 203
[174]Article 80(4), The Constitution of India
[175]Article 80(5), The Constitution of India
[176]Sidharth Chauhan, Bicameralism: comparative insights and lessons, Seminar (February, 2013) available at http://india-seminar.com/2013/642/642_sidharth_chauhan.html
[177]In SR Bommai v. Union of India (AIR 1994 SC 1998), a seven-judge Bench of this Court held: "Democracy and federalism are the essential features of our Constitution and are part of its basic structure."
[178]Rajya Sabha Secretariat, Second Chamber In Indian Parliament: Role and Status of Rajya Sabha, (2009), at page 2. See also M.N. Kaul and S.L. Shakdher, Practice and Procedure of Parliament, Lok Sabha Secretariat (2001)
[179]H M Seervai, Constitutional Law of India, Universal Law Co. Pvt. Ltd, Vol. 1, (1991), at pages 299-300.
[180]Rajya Sabha Secretariat, Second Chamber In Indian Parliament: Role and Status of Rajya Sabha, (2009), at page 6.
[181]Rajya Sabha Secretariat, Structure and Functions of Rajya Sabha Secretariat, (2009), at pages 2-3
[182]Under Article 83(1), the Rajya Sabha is a permanent body with members being elected for 6 year terms and one-third of the members retiring every 2 years.
[183]Rajya Sabha Secretariat, Second Chamber In Indian Parliament: Role and Status of Rajya Sabha, (2009), at pages 7-8
[184]Ibid, at page 47
[185]Rajya Sabha Secretariat, Second Chamber In Indian Parliament: Role and Status of Rajya Sabha, (2009), at page 5
[186]Dr. Ambedkar explained that the joint sitting had been kept at the centre because of the federal character of the Central Legislature. See Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at page 202

[187]Hari Ram v. Baby Gokul Prasad, MANU/SC/0110/1991 : (1991) Supp (2) SCC 608; M/s Saru Smelting (P) Ltd. v. Commissioner of Sales Tax, Lucknow, MANU/SC/0835/1993 : (1993) Supp (3) SCC 97.
[188]Constituent Assembly Debates (20 May 1949)
[189]Ibid, at page 61
[190]Constituent Assembly Debates (4 November, 1948). Dr Ambedkar had remarked: "... it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution."
[191]Section 2(v) provides: "resident" means an individual who has resided in India for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment.
[192]Section 3(3), Aadhaar Act
[193]Section 2(h), Aadhaar Act
[194]Section 2(c) provides: "authentication" means the process by which the Aadhaar number alongwith demographic information or biometric information of an individual is submitted to the Central Identities Data Repository for its verification and such Repository verifies the correctness, or the lack thereof, on the basis of information available with it.
[195]Section 2 (u) provides: "requesting entity" means an agency or person that submits the Aadhaar number, and demographic information or biometric information, of an individual to the Central Identities Data Repository for authentication
[196]Section 12, Aadhaar Act
[197]Section 13, Aadhaar Act
[198]Section 14, Aadhaar Act
[199]Section 15, Aadhaar Act
[200]Section 17, Aadhaar Act
[201]Forty-Second Report, Standing Committee on Finance (2011-12), available at http://www.prsindia.org/uploads/media/UID/uid%20report.pdf
[202]Ibid, at page 21
[203]Ibid, at pages 233-234
[204]Constituent Assembly (25 November 1949)
[205]Gary Roethenbaugh, (cited in A. Cavoukian, Privacy and Biometrics, Information and Privacy Commissioner, Ontario, Canada, 1999, page 11, available at http://www.ipc.on.ca/images/Resources/pri-biom.pdf
[206]Els J. Kindt, Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis, Springer (2013)
[207]Ibid.
[208]Nancy Yue Liu, Bio-Privacy: Privacy Regulations and the Challenge of Biometrics, Routledge (2013).
[209]Privacy International, Biometrics: Friend or foe of privacy?, available at https://privacyinternational.org/sites/default/files/2017-11/Biometrics_Friend_or_foe.pdf
[210]Simon Davies, as cited in John D. Woodward, Biometric Scanning, Law & Policy: Identifying the Concerns-Drafting the Biometric Blueprint, University of Pittsburgh Law Review, (1997)
[211]Daniel M. L Storisteanu, Toby L. Norman, Alexandra Grigore and Alain B. Labrique, Can biometrics beat the developing world's challenges?, Biometric Technology Today (2016)
[212]Privacy International, Biometrics, available at

https://privacyinternational.org/topics/biometrics
[213]Pam Dixon, A Failure to Do No Harm-India's Aadhaar biometric ID program and its inability to protect privacy in relation to measures in Europe and the U.S., Health and Technology (2017), Vol. 7, at pages 539-567
[214]Segen's Medical Dictionary, 2012.
[215]Ministry of Communication & Information Technology, Department of Information Technology, Administrative Approval for the project-"Unique ID for BPL families", dated March 03, 2006 (Annexure R-1, List of Pre-enactment dates and events for the Aadhaar project submitted by the Learned AG).
[216]Department of Information Technology, Notification: Setting up of a Process Committee to suggest the processes for updation, modification, addition & deletion of data and fields from the core database to be created under the Unique ID for BPL families project, dated July 03, 2006 (Annexure R-2, List of Pre-enactment dates and events for the Aadhaar project submitted by the learned AG).
[217]Strategic Vision: Unique Identification of Residents, dated 26 November 2006 (Annexure R-3, List of Pre-enactment dates and events for the Aadhaar project submitted by the learned AG).
[218]Constitution of an Empowered Group of Ministers to collate two schemes-the National Population Register under the Citizenship Act, 1955 and the Unique Identification Number (UID) project of the Department of Information Technology (Annexure R-4, List of Pre-enactment dates and events for the Aadhaar project submitted by the learned AG).
[219]Planning Commission, No. 4(4)/56/2005-C&I, Minutes of the Fifth Meeting of the Unique ID project under the Chairmanship of Dr. Arvind Virmani (Annexure R-6, List of Pre-enactment dates and events for the Aadhaar project submitted by the learned AG).
[220]Minutes of the Second Meeting of the EGoM to collate two schemes-The National Population Register under the Citizenship Act, 1955 and the Unique Identification number (UID) project of the Department of Information Technology (Annexure R-10, List of Pre-enactment dates and events for the Aadhaar project submitted by the learned AG).
[221]Minutes of the Fourth Meeting of the EGoM to collate two schemes-The National Population Register under the Citizenship Act, 1955 and the Unique Identification Number (UID) project of the Department of Information Technology (Annexure R-12, List of Pre-enactment dates and events for the Aadhaar project submitted by the learned AG).
[222]Secretary, Government of India, Planning Commission, D.O. No. A-11016/02/09-UIDAI (Annexure R-22, List of Pre-enactment dates and events for the Aadhaar project submitted by the learned AG).
[223]Planning Commission, Minutes of the meeting of the PM's Council of UIDAI (Annexure R-35, List of Pre-enactment dates and events for the Aadhaar project submitted by the Learned AG).
[224]Planning Commission, UIDAI, Office Memorandum, available at https://www.uidai.gov.in/images/resource/Biometric_Standards_Committee_Notification.pdf.
[225]DDSVPC (UIDAI), DDSVPC Report, dated 09 December 2009, available at https://uidai.gov.in/images/UID_DDSVP_Committee_Report_v1.0.pdf,at pages 5-6.
[226]Ibid, at page 4
[227]Annexure R-43, Volume II, List of Pre-enactment dates and events for the Aadhaar project, Submissions by the AG
[228]UIDAI, UIDAI Strategy Overview, available at http://www.prsindia.org/uploads/media/UID/UIDAI%20STRATEGY%20OVERVIEW.pdf.

[229]Annexure R-46, Volume II, List of Pre-enactment dates and events for the Aadhaar project, Submissions by the AG
[230]UIDAI Committee on Biometrics, Biometrics Design Standards For UID Applications, at page 4
[231]A challenge to the Aadhaar project for violation of IT Act and Rules has been filed in the Delhi High Court in the matter of Shamnad Basheer v. UIDAI and Ors. Therefore, we are not dealing with this aspect, nor does it arise for consideration in these proceedings.
[232]Identification for Development (World Bank Group), Technical Standards for Digital Identity Systems for Digital Identity Draft for Discussion, available at http://pubdocs.worldbank.org/en/579151515518705630/ID4D-Technical-Standards-for-Digital-Identity.pdf, at page 22.
[233]Katie Bird, Is your biometric data safe online? ISO/IEC standard ensures security and privacy, (11 August 2011), available at https://www.iso.org/news/2011/08/Ref1452.html.
[234]Manoj Narula v. Union of India, MANU/SC/0736/2014 : (2014) 9 SCC 1
[235]UIDAI, UIDAI Strategy Overview, available at http://www.prsindia.org/uploads/media/UID/UIDAI%20STRATEGY%20OVERVIEW.pdf, at page 4
[236]Ibid, at page 32
[237]Ibid, at page 33
[238]Ibid, at page 34
[239]DDSVPC (UIDAI), DDSVPC Report, (9 December 2009), available at https://uidai.gov.in/images/UID_DDSVP_Committee_Report_v1.0.pdf, at page 5
[240]UIDAI, UIDAI Strategy Overview, available at http://www.prsindia.org/uploads/media/UID/UIDAI%20STRATEGY%20OVERVIEW.pdf, at page 2
[241]Ibid, at page 15
[242]UIDAI, Aadhaar Handbook for Registrars, available at http://doitc.rajasthan.gov.in/administrator/Lists/Downloads/Attachments/26/aadhaar_handbook_version.pdf, at page 11
[243]Annexure R-74, Volume III, List of Pre-enactment dates and events for the Aadhaar project, Submissions by the AG.
[244]UIDAI (Planning Commission), Aadhaar Handbook for Registrars (2010), available at http://indiamicrofinance.com/wp-content/uploads/2010/08/Aadhaar-Handbook.pdf, at page 11; UIDAI (Planning Commission), Aadhaar Handbook for Registrars (2013), at page 16 (Annexure R-74, List of Pre-enactment dates and events for the Aadhaar project submitted by the Learned AG).
[245]UIDAI, Roles and Responsibilities of Enrolment Staff, available at https://idai.gov.in/images/annexure_b_roles_and_responsibility_of_enrolment_staff. Pdf, at page 8
[246]UIDAI, Enrolment Process Essentials (13 December 2012), available at http://www.nictcsc.com/images/Aadhaar%20Project%20Training%20Module/English%20Training%20Module/module2_aadhaar_enrolment_process17122012.pdf
[247]Regulation 2(j) of Aadhaar (Authentication) Regulations: "e-KYC authentication facility" means a type of authentication facility in which the biometric information and/or OTP and Aadhaar number securely submitted with the consent of the Aadhaar number holder through a requesting entity, is matched against the data available in the CIDR, and the Authority returns a

digitally signed response containing e-KYC data along with other technical details related to the authentication transaction.
[248]Regulation 2(k) of Aadhaar Authentication Regulations: "e-KYC data" means demographic information and photograph of an Aadhaar number holder.
[249]Regulation 3(ii) of Aadhaar (Authentication) Regulations, 2016: "3. Types of Authentication- There shall be two types of authentication facilities provided by the Authority, namely-- (i) Yes/No authentication facility, which may be carried out using any of the modes, (ii) e-KYC authentication facility, which may be carried out only using OTP and/or biometric authentication modes as specified in regulation 4(2)".
[250]Section 29(4) states: "No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations."
[251]Ramesh Subramanian, Computer Security, Privacy & Politics: Current Issues, Challenges & Solutions, IRM Press, at pages 99-100
[252]Ibid, at page 100
[253]Section 6 states: "The Authority may require Aadhaar number holders to update their demographic information and biometric information, from time to time, in such manner as may be specified by regulations, so as to ensure continued accuracy of their information in the Central Identities Data Repository."
[254]Section 31(2) states: "In case any biometric information of Aadhaar number holder is lost or changes subsequently for any reason, the Aadhaar number holder shall request the Authority to make necessary alteration in his record in the Central Identities Data Repository in such manner as may be specified by regulations."
[255]L. Vishwanath, Four Reasons You Should Worry About Aadhaar's Use of Biometrics, The Wire (28 March, 2017), available at https://thewire.in/rights/real-problem-aadhaar-lies-biometrics
[256]Section 28(5) states: "Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone: Provided that an Aadhaar number holder may request the Authority to provide access to his identity information excluding his core biometric information in such manner as may be specified by regulations."
[257]L. Vishwanath, Four Reasons You Should Worry About Aadhaar's Use of Biometrics, The Wire (28 March, 2017), available at https://thewire.in/rights/real-problem-aadhaar-lies-biometrics
[258]The Centre for Internet & Society, Analysis of Key Provisions of the Aadhaar Act Regulations, (31 March, 2017), available at https://cis-india.org/internet-governance/blog/analysis-of-key-provisions-of-aadhaar-act-regulations.
[259]A. Cavoukian, Privacy and Biometrics, Information and Privacy Commissioner Canada (1999), available at http://www.ipc.on.ca/images/Resources/pri-biom.pdf
[260]Robert Gellman. Privacy and Biometric ID Systems: An Approach Using Fair Information Practices for Developing Countries, CGD Policy Paper 028 Washington DC: Centre for Global Development (1 August 2013), available at https://www.cgdev.org/sites/default/files/privacy-and-biometric-ID-systems_0.pdf
[261]John D Woodward, Biometrics: Identifying Law & Policy Concerns, in Biometrics (AK Jain

A.K., R. Bolle, and S. Pankanti eds.), Springer (1996)
[262]Pam Dixon, A Failure to Do No Harm-India's Aadhaar biometric ID program and its inability to protect privacy in relation to measures in Europe and the U.S., Health and Technology, Vol. 7 (2017), at pages 539-567
[263]General Data Protection Regulation, available at https://gdpr-info.eu/
[264]Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1999) at page xxii
[265]Ibid, at pages 62, xiii and xxii
[266]Ibid, at page xxi
[267]Arun K Thiruvengadam, The Constitution of India: A Contextual Analysis, (Bloomsbury 2017), at page 1
[268]Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1999) at page 66
[269]Ibid, at page 99
[270]Article 37, The Constitution of India
[271]George H Gadbois, JR, Supreme Court of India: The Beginnings (Vikram Raghavan and Vasujith Ram eds.), Oxford University Press (2017), at page 193
[272]Ibid, at pages 193-194
[273]Ibid, at page 195
[274]Ibid, at pages 195-196
[275]Minerva Mills Ltd. v. Union of India, MANU/SC/0075/1980 : (1980) 3 SCC 625
[276]Upendra Baxi, "A known but an indifferent judge": Situating Ronald Dworkin in contemporary Indian jurisprudence, International Journal of Constitutional Law, (2003) at page 582
[277]Amartya Sen, Development as Freedom, Oxford University Press (2000), at page xii
[278]Isaiah Berlin, Two Concepts of Liberty, available at http://faculty.www.umb.edu/steven.levine/courses/Fall%202015/What%20is%20Freedom%20Writings/Berlin.pdf
[279]F A Hayek, The Constitution of Liberty, Routledge & Kegan Paul, (1960) at pages 11, 207-208
[280]Amartya Sen, Development as Freedom, Oxford University Press (2000) at page 3-4
[281]Ibid, at page 8
[282]Martha Nussbaum, Women and Human Development, Cambridge University Press, (2000)
[283]Henry Shue, Basic Rights: Subsistence, Affluence and US Foreign Policy, Princeton University Press, Second Edition (1996)
[284]Constituent Assembly Debates (25 November 1949)
[285]Amartya Sen, Development as Freedom, Oxford University Press (2000), at page 39
[286]Amartya Sen, The Idea of Justice, Penguin (2009) at pages 379-380
[287]Ibid, at page 380
[288]Amartya Sen, The Idea of Justice, Penguin (2009) at page 381
[289]Jean Dreze and Amartya Sen, An Uncertain Glory, Penguin (2013), at pages x and xi
[290]Ibid, at page xi
[291]Jean Dreze and Amartya Sen, An Uncertain Glory, Penguin (2013), at page 33
[292]Amartya Sen, The Idea of Justice, Penguin (2009) at page 349
[293]Jean Dreze and Amartya Sen, An Uncertain Glory, Penguin (2013), at page 100
[294]Opinion on the Right to Identity, 2007, available at

http://www.oas.org/en/sla/iajc/docs/ijc_current_agenda_Right_to_Identity.pdf
[295]Nishant Shah, Identity and Identification - the Individual in the Time of Networked Governance, Socio Legal Review, available at http://www.sociolegalreview.com/wp-content/uploads/2015/12/Identity-and-Identification-the-Individual-in-the-Time-of-Networked-Governance.pdf
[296]Manuel Castells, Conversation with Manuel Castells, Globetrotter, available at http://globetrotter.berkeley.edu/people/Castells/castells-con4.html
[297]Contempt Petition (Civil) No. 144/2014 in WP (C) No. 494/2012; Contempt Petition (Civil) No. 674/2014 in WP (C) No. 829/2013; Contempt Petition (Civil) No 444/2016 in WP (C) No. 494/2012
[298]Granville Austin, Working a Democratic Constitution: A History of the Indian Experience, Oxford University Press (2003), at page 652
[299]Ibid, at page 651
[300]Upendra Baxi, From Human Rights to the Right to be Human: Some Heresies, India International Centre Quarterly, Vol. 13, No. 3/4, Pg. 185, (December 1986)
[301]Ibid, at page 185
[302]Ibid, at page 187
[303]Ibid, at page 186
[304]Ibid, at page 190
[305]Article 9. Protection of privacy of home and other property: (2) Nothing contained in or done under the authority of any law shall be held to be consistent with or in contravention of this section to the extent that the law in question makes provision - (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of mineral resources or the development or utilisation of any other property in such a manner as to promote the public benefit; (b) for the purpose of protecting the rights or freedoms of other persons; (c) to enable an officer or agent of the government or a local authority, or a body corporate established by law for public purpose, to enter on the premises of any person in order to value those premises for the purpose of any tax, rate or due, or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the government, the local authority or that body corporate, as the case may be; or (d) to authorise, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order, Except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society
[306]Nandini Sundar v. State of Chhattisgarh, MANU/SC/0724/2011 : (2011) 7 SCC 547
[307]Ibid, at page 472
[308]Ibid, at page 112
[309]Ibid, at page 714
[310]Ibid, at page 319
[311]Ibid, at page 433
[312]Jud Mathews and Alec Stone Sweet, All things in Proportion? American Rights Review and the Problem of Balancing, Emory Law Journal, Vol. 60 (2011)
[313]Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, Columbia Journal of Transnational Law, Vol. 47 (2008)
[314]Ibid, at page 346
[315]Moshe Cohen-Eliya and Iddo Porat, Proportionality and the Culture of Justification, American

Journal of Comparative Law Vol. 59 (2011) (cited in); Etienne Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights, South African Journal on Human Rights, Vol. 10 (1994)
[316]Andrew B. Serwin, Privacy 3.0 - The Principle of Proportionality, University of Michigan Journal of Law Reform, Vol. 42 (2009)
[317]Adalah v. The Minister of Interior, HCJ 7052/03, English translation available at http://elyon.court.gov.il/files_eng/03/520/070a47/03070520.a47.pdf
[318]Om Kumar v Union of India, MANU/SC/0704/2000 : (2001) 2 SCC 386
[319]Ibid, at page 345
[320]Ibid, at page 857
[321]Ibid, at page 399
[322]Ibid, at page 412
[323]Aharon Barak, Proportionality: Constitutional Rights and their Limitations, Cambridge University Press (2012)
[324]Ibid, at page 369
[325]Ibid, at page 414
[326]Ibid, at page 415
[327]Ibid, at para 638
[328]Jürgen Bröhmer et al., "BVerfGE 65, 1 - Census Act" in 60 Years German Basic Law: The German Constitution and its Court-Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights (Suhainah Wahiduddin ed.), (2012) at Pages 147-148, available at http://www.kas.de/wf/doc/kas_32858-1522-1-30.pdf?121123115540
[329]Census Act Case, (1983)
[330]Ibid at pages 83-84
[331]Ibid, at page 150.
[332]Ibid, at page 151
[333]Ibid, at page 149
[334]Ibid, at page 154
[335]Ibid, at Paragraph 119
[336]Decision No. 2012-652 DC of 22 March 2012 by Le Conseil Constitutionnel, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/sample-of-decisions-in-relevant-areas-dc/decision/decision-no-2012-652-dc-of-22-march-2012.105428.html
[337]LOI n° 2012-410 du 27 mars 2012 relative à la protection de l'identité, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025582411&dateTexte=&categorieLien =id.
[338]Application no. 8806/12
[339]The Conseil d'Etat (Council of State) is a body of the French government that acts as legal advisor of the executive branch and as the supreme court for administrative justice
[340]Conseil d' Etat in France, 26 October 2011
[341]C-293/12 and C-594/12
[342]Ibid, at para 27
[343]Ibid, at para 42
[344]Ibid, at para 46
[345]Ibid, at para 51
[346]Ibid, at paras 57-59
[347]Ibid, at para 60

[348]Ibid, at para 54
[349]Ibid, at para 65
[350]Ibid, at paras 56 -58
[351]Ibid, at paras 60-62
[352]Ibid, at paras 59, 63- 64
[353]Ibid, at para 48
[354]Ibid, at para 61
[355]Ibid, at para 62
[356]Maharajah Madhewoo v. The State of Mauritius & Anr., 2015 SCJ 177, at page 23
[357]Ibid, at page 31
[358]Article 4(14)
[359]Ibid, at page 126
[360]Regulation 2(f), Aadhaar (Authentication) Regulations
[361]Regulation 2(g), Aadhaar (Authentication) Regulations
[362]Regulation 2(p), Aadhaar (Authentication) Regulations
[363]Regulation 2(l), Aadhaar (Authentication) Regulations
[364]Regulation 15, Aadhaar (Authentication) Regulations
[365]Section 2(d) states: "authentication record" means the record of the time of authentication and identity of the requesting entity and the response provided by the Authority
[366]AUA code, ASA code, unique device code, registered device code used for authentication, and that UIDAI would know from which device the authentication has happened
[367]An important configuration could be IP address
[368]Puttaswamy at para 585
[369]Puttaswamy at para 587
[370]Puttaswamy at para 588
[371]Nancy Yue Liu, Bio-Privacy: Privacy Regulations and the Challenge of Biometrics, Routledge (2013) at page 76
[372]Clause 13.1 of the Contract
[373]Ibid, at page 153
[374]As submitted by Mr. Rakesh Dwivedi, learned senior counsel for the State of Gujarat
[375]The Centre for Internet & Society, Salient Points in the Aadhaar Bill and Concerns, available at https://cis-india.org/internet-governance/salient-points-in-the-aadhaar-bill-and-concerns.
[376]Shankkar Aiyar, Aadhaar: A Biometric History of India's 12-Digit Revolution, Westland (2017), at pages 226-227
[377]Subhashis Banerjee, Architecture for privacy, The Indian Express (5 May 2018), available at https://indianexpress.com/article/opinion/columns/architecture-for-privacy-data-protection-facebook-india-united-states-5163819/
[378]Shankkar Aiyar, Aadhaar: A Biometric History of India's 12-Digit Revolution, Westland (2017), at page 226
[379]Government of India, Approach Paper for a Legislation on Privacy (2010), available at http://www.prsindia.org/uploads/media/UID/aproach_paper.pdf
[380]Shweta Agrawal, Subhashis Banerjee, and Subodh Sharma, Privacy and Security of Aadhaar: A Computer Science Perspective, Economic & Political Weekly (16 September 2017), Vol. 52, available at https://www.epw.in/journal/2017/37/special-articles/privacy-and-security-aadhaar.html
[381]Nishant Shah, Digital Native: Cause an effect, The Indian Express (17 June 2018), available at

https://indianexpress.com/article/technology/social/digital-native-cause-an-effect-5219977/
[382]Aleksandr Solzhenitsyn, Cancer Ward, The Bodley Head (1968)
[383]WP (Civil) No. 686/2016
[384]Amartya Sen, The Argumentative Indian, Penguin (2005), at page 350
[385]Ibid, at page 351
[386]Ibid, at page 352
[387]Constituent Assembly Debates (4 November, 1948)
[388]Ronald Dworkin, Taking Rights Seriously (1977), at pages 203-204
[389]Dr. Babasaheb Ambedkar: Writings and Speeches (Vol. 1), Dr. Ambedkar Foundation (2014)
[390]Harsh Mander, Living with Hunger: Deprivation among the Aged, Single Women and People with Disability, Economic & Political Weekly (April 26, 2008), Vol. 43, available at https://www.epw.in/journal/2008/17/special-articles/living-hunger-deprivation-among-aged-single-women-and-people
[391]Dignity, Not Mere Roti, Economic & Political Weekly (10 August, 2013), Vol. 48, available at https://www.epw.in/journal/2013/32/editorials/dignity-not-mere-roti.html
[392]UIDAI, Aadhaar Authentication, available at https://uidai.gov.in/authentication.html
[393]United States General Accounting Office, Technology Assessment: Using Biometrics for Border Security (2002), available at http://www.gao.gov/new.items/d03174.pdf.
[394]Jeremy Wickins, The ethics of biometrics: the risk of social exclusion from the widespread use of electronic identification, Science & Engineering Ethics (2007), at pages 45-54
[395]Biometric Recognition: Challenges & Opportunities (Joseph N. Pato and Lynette I. Millett eds.), National Academy of Science-United States of America (2010), available at https://www.nap.edu/read/12720/chapter/1
[396]Ibid, at page 3
[397]Ibid, at pages 10-11
[398]Ibid, at page 363
[399]Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor, St. Martin's Press (2018)
[400]Tommy L. Gardner, Spending Your Way to the Poorhouse, Authorhouse (2004), at page 221
[401]Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor, St. Martin's Press (2018), at pages 12-13
[402]Ibid, at page 16
[403]Ibid, at pages 81-82
[404]Ibid, at page 188
[405]Puttaswamy, at para 119
[406]SLP (Crl.) No. 2524/2015
[407]UIDAI, UIDAI Strategy Overview, (2010), available at http://www.prsindia.org/uploads/media/UID/UIDAI%20STRATEGY%20OVERVIEW.pdf
[408]Ibid, at page 38
[409]Forty-Second Report of the Standing Committee on Finance (2011), available at http://www.prsindia.org/uploads/media/UID/uid%20report.pdf, at page 30
[410]Government of India, Economic Survey 2016-17, available at https://www.thehinducentre.com/multimedia/archive/03193/Economic_Survey_20_3193543a.pdf, at page 173
[411]Ibid, at page 174
[412]Ibid, at page 194

[413]Office Memorandum dated 19 December 2017, available at https://dbtbharat.gov.in/data/om/Office%20Memorandum_Aadhaar.pdf
[414]Reetika Khera, Impact of Aadhaar on Welfare Programmes, Economic & Political Weekly, Vol. 52 (16 December 2017), available at https://www.epw.in/journal/2017/50/special-articles/impact-aadhaar-welfare-programmes.html
[415]Jean Dreze, Dark clouds over the PDS, The Hindu (10 September 2016), available at https://www.thehindu.com/opinion/lead/Dark-clouds-over-the-PDS/article14631030.ece
[416]Anmol Somanchi, Srujana Bej, and Mrityunjay Pandey, Well Done ABBA? Aadhaar and the Public Distribution System in Hyderabad, Economic & Political Weekly (18 February 2017), Vol. 52, available at https://www.epw.in/journal/2017/7/web-exclusives/well-done-abba.html
[417]Reetika Khera, Impact of Aadhaar on Welfare Programmes, Economic & Political Weekly, Vol. 52 (16 December 2017), available at https://www.epw.in/journal/2017/50/special-articles/impact-aadhaar-welfare-programmes.html
[418]Society for Social Audit, Accountability and Transparency, FP Shops Left Over Beneficiaries Report, available at http://www.socialaudit.ap.gov.in/SocialAudit/LoadDocument?docName=Fair%20Price%20Work%20%20Shops%20(Ration%20Card%20Holders)%20-%20Beneficiaries%20Report.pdf&type=application. See also Aadhaar-based projects failing the poor, says Andhra govt. study, Hindustan Times (7 October 2015), available at https://www.hindustantimes.com/india/aadhaar-based-projects-failing-the-poor-says-andhra-govt-study/story-7MFBCeJcfl85Lc5zztON6L.html
[419]Anmol Somanchi, Srujana Bej, and Mrityunjay Pandey, Well Done ABBA? Aadhaar and the Public Distribution System in Hyderabad, Economic & Political Weekly, Vol. 52 (18 February 2017), available at https://www.epw.in/journal/2017/7/web-exclusives/well-done-abba.html
[420]Jean Drèze, Nazar Khalid, Reetika Khera, and Anmol Somanchi, Aadhaar and Food Security in Jharkhand: Pain without Gain?, Economic & Political Weekly, Vol. 52 (16 December 2017).
[421]Ibid, at page 51. The article states: "[PoS] is a handheld device installed at every PDS outlet ("ration shop") and connected to the Internet. The list of ration cards attached to that outlet, and their respective entitlements, are stored in the PoS machine and updated every month. When a cardholder turns ups, the PoS machine first "authenticates" her by matching her fingerprints with the biometric data stored against her Aadhaar number in the Central Identities Data Repository (CIDR). The machine then generates a receipt with the person's entitlements, which are also audible from a recorded message... The transaction details are also supposed to be entered by the dealer in the person's ration card."
[422]Ibid, at page 55
[423]Ibid, at page 58
[424]Reetika Khera, Impact of Aadhaar on Welfare Programmes, Economic & Political Weekly, Vol. 52 (16 December 2017), available at https://www.epw.in/journal/2017/50/special-articles/impact-aadhaar-welfare-programmes.html
[425]Ibid, at page 66
[426]Puja Awasthi, Good enough to vote, not enough for Aadhaar, People's Archive of Rural India, available at https://ruralindiaonline.org/articles/good-enough-to-vote-not-enough-for-aadhaar
[427]Yet another Aadhaar-linked death? Denied rations for 4 months, Jharkhand woman dies of hunger, Scroll (3 Feb. 2018), available at: https://scroll.in/article/867352/yet-another-aadhaar-linked-death-jharkhand-woman-dies-of-hunger-after-denial-of-rations; Denied food because she did not have Aadhaar-linked ration card, Jharkhand girl dies of starvation, Scroll (16 Oct 2017),

available at: https://scroll.in/article/854225/denied-food-because-she-did-not-have-aadhaar-linked-ration-card-jharkhand-girl-dies-of-starvation
[428]Ibid, at page 124
[429]Ibid, at page 125
[430]Ajay Hasia at page 741
[431]Ibid, at pages 91-92
[432]Ibid, at page 97
[433]Ibid, at page 495
[434]Ibid, at page 496
[435]Ibid, at pages 134-135
[436]Ibid, at page 146
[437]Ibid, at page 283
[438]Ibid, at page 156
[439]Substituted by G.S.R. 980(E), dated 16-12-2010 (w.e.f. 16-12-2010)
[440]Inserted by G.S.R. 544(E)
[441]Press Information Bureau, UIDAI generates a billion (100 crore) Aadhaars A Historic Moment for India, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=138555
[442]A Constitution Bench of this Court in State of Madhya Pradesh v. Thakur Bharat Singh (MANU/SC/0043/1967 : AIR 1967 SC 1170) held: "All executive action which operates to the prejudice of any person must have the authority of law to support it... Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority."
[443]Puttaswamy, at para 272
[444]Section 25, Indian Penal Code states: ""Fraudulently".--A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise"
[445]Section 24, Indian Penal Code states: ""Dishonestly"- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly"
[446]Ibid, at page 831
[447]Ibid, at page 835
[448]Ibid, at page 306
[449]Ibid, at page 405
[450]Ibid, at page 406
[451]Ibid, at page 408
[452]Ibid, at page 604
[453]T.R.S. Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (2001), available at http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199267880.001.0001/acprof-9780199267880-chapter-2
[454]Denise Meyerson, The Rule of Law and the Separation of Powers (2004), available at http://www5.austlii.edu.au/au/journals/MqLJ/2004/1.html
[455]Ibid, at page 366
[456]Ibid, at para 1529
[457]Smt. Indira Nehru Gandhi v. Shri Raj Narain, MANU/SC/0304/1975 : 1975 (Supp.) SCC 1; State of Bihar v. Bal Mukund Sah, MANU/SC/0195/2000 : (2000) 4 SCC 640]; I.R. Coelho (Dead) by L.Rs. v. State of Tamil Nadu, MANU/SC/0595/2007 : (2007) 2 SCC 1.
[458]Ibid, at page 748

[459]Ibid, at page 301
[460]The interim order was in WP (Civil No. 494 of 2012)
[461]Ibid, at page 497
[462]Ibid, at page 76
[463]Almon Leroy Way, Jr., Constitutional Democracy & Other Political Regimes, available at http://www.proconservative.net/CUNAPolSci201PartTWOA.shtml
[464]In Sheela Barse v. State of Maharashtra (MANU/SC/0382/1983 : (1983) 2 SCC 96), the Supreme Court insisted on fairness to women in police lock-up and also drafted a code of guidelines for the protection of prisoners in police custody, especially female prisoners. In Veena Sethi v. State of Bihar (AIR 1982 S.C. 1470), the Supreme Court extended the reach of rule of law to the poor who constitute the bulk of India by ruling that rule of law does not merely for those who have the means to fight for their rights and expanded the locus standi principle to help the poor

[*] Related Supreme Court Orders MANU/SCOR/02583/2021 and MANU/SC/0030/2021

Back to Index

MANU/SC/0019/2015

Neutral Citation: 2015/INSC/22

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 193 of 2015 (Arising out of SLP (C) No. 32039 of 2012)

Decided On**:** 09.01.2015

Appellants: Kailash Nath Associates **Vs.** Respondent: Delhi Development Authority

Hon'ble Judges/Coram:

Ranjan Gogoi and Rohinton Fali Nariman, JJ.

Subject: Commercial

Subject: Contract

Relevant Section:

INDIAN CONTRACT ACT, 1872 - Section 74

Prior History / High Court Status:

From the Judgment and Order dated 28.05.2012 of the High Court of Delhi at New Delhi in RFA (OS) No. 10 of 2008 in CS (OS) 396 of 1994 (MANU/DE/2199/2012)

Disposition:
Appeal Allowed

Case Category:

ORDINARY CIVIL MATTER

Case Note:

Contract - Earnest money - Forfeiture of - Present appeal filed against order whereby Division Bench held that forfeiture of earnest money by Respondent-DDA was in order - Whether Respondent-DDA was justified in forfeiting earnest money - Held, it was arbitrary for Respondent-DDA to forfeit earnest money as there was no breach of contract on part of

Appellant and Respondent-DDA not having been put to any loss - Forfeiture of earnest money took place long after agreement had been reached - It was obvious that amount sought to be forfeited on facts of present case was sought to be forfeited without any loss being shown - In fact it had been shown that far from suffering any loss, Respondent-DDA had received much higher amount on re-auction of same plot of land - Materials showed that there was no breach of contract by Appellant - Division Bench was not justified in holding that Respondent-DDA made profit from re-auction as that would fly in face of most basic principle on award of damages - Therefore, order of refund of earnest money forfeited together with interest was restored and impugned order was liable to be set aside - Appeal allowed. [paras 42, 44 and 45]

JUDGMENT

Rohinton Fali Nariman, J.

1. Leave granted.

2. The present appeal arises out of a public auction conducted by the Delhi Development Authority ("DDA") wherein the Appellant made the highest bid for Plot No. 2-A, Bhikaji Cama Place, District Centre, New Delhi for 3.12 Crores (Rupees Three Crores Twelve Lakhs). As per the terms and conditions of the auction, the Appellant, being the highest bidder, deposited a sum of Rs. 78,00,000/- (Rupees Seventy Eight Lakhs), being 25% of the bid amount, with the DDA, this being earnest money under the terms of the conditions of auction. The relevant provisions in the conditions of auction read as follows:

(ii) The highest bidder shall, at the fall of the hammer, pay to the Delhi Development Authority through the officer conducting the auction, 25% of the bid amount as earnest money either in cash or by Bank Draft in favour of the Delhi Development Authority, or Cheque guaranteed by a Scheduled Bank as "good for payment for three months" in favour of the Delhi Development Authority. If the earnest money is not paid, the auction held in respect of that plot will be cancelled.

(iii) The highest bid shall be subject to the acceptance of Vice-Chairman, DDA or such other officer(s) as may be authorized by him on his behalf. The highest bid may be rejected without assigning any reason.

(iv) In case of default, breach or non-compliance of any of the terms and conditions of the auction or mis-representation by the bidder and/or intending purchaser, the earnest money shall be forfeited.

(v) The successful bidder shall submit a duly filled-in application in the form attached immediately after the close of the auction of plot in question.

(vi) When the bid is accepted by the DDA, the intending purchaser shall be informed of such acceptance in writing and the intending purchaser shall, within 3 months thereof, pay to the Delhi Development Authority, the balance 75% amount of the bid, in cash or by Bank Draft in favour of the Delhi Development Authority or by Cheque guaranteed by a Scheduled Bank as "good for

payment for three months" in favour of the Delhi Development Authority. If the bid is not accepted, the earnest money will be refunded to the intending purchaser without any interest unless the earnest money is forfeited under para 2(iv) above.

3. On 18.2.1982, the DDA acknowledged the receipt of Rs. 78,00,000/- (Rupees Seventy Eight Lakhs), accepted the Appellant's bid and directed the Appellant to deposit the remaining 75% by 17.5.1982. However, as there was a general recession in the industry, the Appellant and persons similarly placed made representations sometime in May, 1982 for extending the time for payment of the remaining amount. The DDA set up a High Powered Committee to look into these representations. The High Powered Committee on 21.7.1982 recommended granting the extension of time to bidders for depositing the remaining amount of 75%. Based on the High Powered Committee's report, by a letter dated 11.8.1982, the DDA extended time for payment upto 28.10.1982 with varying rates of interest starting from 18% and going upto 36%.

4. Another High Powered Committee was also set up by the DDA in order to find out whether further time should be given to the Appellant and persons similarly situate to the Appellant.

5. The second High Powered Committee recommended that the time for payment be extended and specifically mentioned the Appellant's name as a person who should be given more time to pay the balance amount. Despite the fact that on 14.5.1984 the DDA accepted the recommendations of the second High Powered Committee, nothing happened till 1.12.1987. Several letters had been written by the Appellant to DDA from 1984 to 1987 but no answer was forthcoming by the DDA.

6. *Vide* a letter dated 1.12.1987, which is an important letter on the basis of which the fate of this appeal largely depends, the DDA stated as follows:

WITHOUT PREJUDICE'
DELHI DEVELOPMENT AUTHORITY
VIKAS SADAN
I.N.A.

New Delhi-23.....198...

No. F. 32(2)/82/Impl.-I/4

From: DIRECTOR (C.L.)

DELHI DEVELOPMENT AUTHORITY

To,

M/s. Kailash Nath & Associates,
1006, Kanchanjanga Building,
18, Bara Khamba Road,
New Delhi-110001.

Sub: Regarding payment of balance premium in respect of Plot No. 2-A situated in Bhikaji Cama Place Distt. Centre.

Sir,

With reference to the above subject, I am directed to inform you that your case for relaxing the provisions of Nazul Rules, 1981, to condone the delay for the payment of balance premium in installments was referred to the Govt. of India, Min. of Urban Development. Before the case is further examined by the Govt. of India, Min. of Urban Development, you are requested to give your consent for making payment of balance amount of 75% premium within the period as may be fixed alongwith 18% interest charges p.a. on the belated payment. Further the schedule of payment and conditions if any will be as per the directions issued by the Ministry of Urban Development, Govt. of India. It is, however, made clear that this letter does not carry any commitment.

Your consent should reach to this office within 3 days from the date of issue of this letter.

Dated 1.12.87

Yours faithfully,
Sd/
DIRECTOR (C.L.)

7. The Appellant replied to the said letter on the same day itself in the following terms:

KAILASH NATH & ASSOCIATES
Tel.: 3312648, 3314269
1006, KANCHENJUNGA,
18, BARAKHAMBA ROAD,
NEW DELHI-110001

Regd. Ack. Due.

December 1, 1987.

The Director (C.L.),
Delhi Development Authority,
Vikas Sadan, I.N.A.,
New Delhi-110023.

Subject: Payment of balance premium in respect of plot No. 2-A Bhikaji Cama Place Distt. Centre, New Delhi.

Dear Sir,

We are thankful to you for your letter No. F. 30(2)/82-Impl.-I/4 dated nil received by us this afternoon, on the above subject.

We hereby give our consent that we shall make the payment of the balance amount of 75% premium within the period as may be fixed as per the schedule of payment and conditions, if any imposed, as per the directions issued by the Ministry of Urban Development, Govt. of India, alongwith 18% interest charges per annum on the belated payment.

We now request you to kindly convey us your formal approval to our making the said payment in installments as requested for.

Thanking you,

Yours faithfully
For KAILASH NATH & ASSOCIATES,
Sd/
Partner

Advance copy sent through Special Messenger.

8. The Central Government informed the DDA *vide* a letter dated 1.3.1990 that the land auctioned to the Appellant was not Nazul land and, therefore, the Central Government would have nothing further to do with the matter. Meanwhile, the Appellant filed Writ Petition No. 2395 of 1990 in the Delhi High Court in which it claimed that persons similar to the Appellant, namely, M/s. Ansal Properties and Industries Private Limited and M/s. Skipper Tower Private Limited had been allowed to pay the balance 75% premium and were in fact allotted other plots. Pleading Article 14, the Appellant stated that they were entitled to the same treatment.

9. By a judgment and order dated 2.9.1993, the Delhi High Court held that as the auction was held as per terms and conditions of the auction, a dispute regarding the same is a matter of contract and cannot be gone into in proceedings Under Article 226 of the Constitution. It was further observed that on facts, the Court found no force in the contention raised on behalf of the Appellant regarding discrimination. An SLP against this order was also dismissed on 16.12.1993 by the Supreme Court stating that the Appellant is at liberty to take whatever steps are permitted to the Appellant under law to challenge forfeiture of earnest money, which had been done by a letter of 6.10.1993. This letter is also important for the correct determination of this appeal and is set out hereinbelow:

REGD.A.D.

DELHI DEVELOPMENT AUTHORITY
VIKAS SADAN
I.N.A.

New Delhi-23, 6.10.1993

No. F. 32(2)/82/CL/3816

From: DY. DIRECTOR (C.L.).

To,

M/s. Kailash Nath & Associates,
1006, Kanchanjanga Building,
18, Bara Khamba Road,
New Delhi-110001.

Subject: Plot No. 2-A in Bhikaji Cama Place Distt. Centre.

Sir,

Consequent upon your failure to deposit the balance 75% premium of the aforesaid plot and dismissal of C.W.P. No. 2395 of 1990 by the Hon'ble High Court, Delhi, I am directed to inform you that the bid/allotment of the said plot in your favour has been cancelled and earnest money amounting to Rs. 78,00,000/- deposited by you at the time of auction has been forfeited.

Yours faithfully,
Sd/
(JAGDISH CHANDER)
DEPUTY DIRECTOR (C.L.)"

10. The Appellant then filed a suit for specific performance on 17.2.1994 and in the alternative for recovery of damages and recovery of the earnest amount of Rs. 78,00,000/- (Rupees Seventy Eight Lakhs). Shortly after the suit was filed, on 23.2.1994, the DDA re-auctioned the premises which fetched a sum of Rs. 11.78 Crores (Rupees Eleven Crores Seventy Eight Lakhs).

11. The learned Single Judge by a judgment and order dated 10.9.2007 dismissed the Appellant's suit for specific performance and damages but ordered refund of the earnest money forfeited together with 9% per annum interest. The learned Single Judge held:

65. Defendant No. 1 instead of following the aforesaid course, found merit in the representations received not only from the Plaintiff but such similar situated parties. It is in view thereof that the matter went as far as setting up of two committees to repeatedly examine the matter and to come to a conclusion. The case of Defendant No. 1 was that the material produced by the Plaintiff and such similar persons gave rise to a cause to extend the time for making the payment subject to certain terms and conditions. However, in view of the perception of Defendant No. 1 that the consent of UOI, Defendant No. 2, would be required, the land being Nazul land, the file was forwarded to Defendant No. 2. The matter did not rest at this since thereafter UOI did grant such consent but sent back the file of the Plaintiff only on account of the fact that the land in question was not Nazul land. The net effect of this is that there was no permission required from the UOI and the decision taken by Defendant No. 1 to extend the time period for making the payment, thus, stood as it is.

66. In my considered view, it is not open for Defendant No. 1 to state that while it recommended the case of other similarly situated parties in case of Nazul land to the Government and obtained permission for grant of extension of time, in case of non-Nazul land where such permission was not required, a different parameter was required to be followed. It may be mentioned at the cost of repetition that the Plaintiff was a party which volunteered to pay interest @18% per annum unlike some of the other parties. There is merit in the contention of learned Counsel for the Plaintiff that Defendant No. 1 after treating the contract as subsistent having extended time for making the payment was at least required to give a notice to the Plaintiff to perform the agreement prior to terminating the agreement and could not straightaway terminate the same. This conclusion can draw strength from the observations in Halsbury Laws of England (supra) referred to aforesaid as also in ***Webb v. Hughes*** *(supra). It is clearly a case where there has been waiver of the time being essence of the contract by conduct of the parties and, thus, Defendant No. 1 was required to give notice on the day appointed for completion of the contract failing which only termination could take place.*

67. There were numerous communications exchanged between the parties. The recommendations of the two high-powered committees constituted by Defendant No. 1 made its recommendations which were accepted by Defendant No. 1 vide its resolution dated 14.5.1984 (Ex. DW2/P-4). Having accepted the recommendations, in the case of the Plaintiff Defendant No. 1 was required to do nothing further but mistakenly referred the case to UOI for its approval assuming the case to be one of Nazul land. Plaintiff sent repeated reminders vide letters dated 9-12-1985 (Ex. P-11), 20-10-1986 (Ex. P-12), 10-12-1986 (Ex. P-13), 10-02-1987 (Ex. P-14), 11-04-1987 (Ex. P-16), 10-08-1987 (Ex. P-17) and 10-10-1987 (Ex. P-18) calling upon Defendant No. 1 to give an offer of deposit of balance 25% of the premium so as to bring the total payment equivalent to 50% of the total premium and for release of the possession of the land to the Plaintiff for purpose of construction. Defendant No. 1 vide its letter received on 1.12.1987 by the Plaintiff (Ex. P-19) sought the consent of the Plaintiff to abide by the recommendations of the high-powered committee and the consent was duly given on the even date (Ex. P-20). Thereafter no offer was made to the Plaintiff and without any notice of compliance for payment, the letter of cancellation dated 6.10.1993 (Ex. P-26) was issued. It appears that Defendant No. 1 itself was not aware of the land being non-Nazul land as the first communication was addressed to the Plaintiff only on 1.3.1990.

68. The present case is one where Defendant No. 1 has not even suffered a loss. The plot was to be purchased by the Plaintiff at Rs. 3.12 crores and it was finally sold to a third party at Rs. 11.78 crores, i.e. almost three and a half times the price. During this period Defendant No. 1 continued to enjoy the earnest money of the Plaintiff of Rs. 78.00 lacs.

69. In view of the prolonged period, exchange of communications, the Plaintiff making various offers but not complying with the initial terms, Defendant No. 1 taking its own time in the decision making process, I am of the considered view that the Plaintiff is entitled to the refund of the earnest money of Rs. 78.00 lacs but no further amount is liable to be paid to the Plaintiff.

12. DDA appealed against the Single Judge's judgment to a Division Bench of the Delhi High Court. The Division Bench set aside the judgment of the Single Judge holding that the forfeiture of the earnest money by the DDA was in order.

13. Shri Paras Kuhad, learned Senior Advocate appearing on behalf of the Appellant, urged that time may have been of the essence under the original terms and conditions of the auction. However, time had been extended on several occasions and, therefore, ceased to be of the essence. In answer to the letter dated 1.12.1987, the Appellant promptly replied and said it would be willing to pay the entire 75% with 18% interest and, therefore, there was no breach of contract on the part of the Appellant. Further, since the DDA sold the plot for 11.78 Crores (Rupees Eleven Crores Seventy Eight Lakhs), there was no loss caused to the DDA and, hence forfeiture of earnest money would not be in accordance with the agreement or in accordance with law.

14. Shri Amarendra Sharan, learned Senior Advocate appearing on behalf of the DDA, rebutted these contentions and added that the case was covered by the judgment in **Shree Hanuman Cotton Mills and Anr. v. Tata Aircraft Ltd.** MANU/SC/0086/1969 : 1970 (3) SCR 127. He argued further that since the letter of 1.12.1987 had been issued under a mistake of fact, it would be void Under Section 20 of the Contract Act and the said letter should, therefore, be ignored. If it is ignored, then the termination of the contract and the forfeiture of earnest money are completely in order as the Appellant was in breach. The fact that the DDA ultimately sold the plot for a much larger sum, according to learned Counsel, would be irrelevant inasmuch as the contractual term agreed upon between parties would entitle him to forfeit earnest money on breach without any necessity of proving actual loss.

15. Having heard learned Counsel for the parties, it is important at the very outset to notice that earnest money can be forfeited Under Sub-clause (iv) set out hereinabove, only in the case of default, breach, or non-compliance of any of the terms and conditions of the auction, or on misrepresentation by the bidder. It may be noted that the balance 75% which had to be paid within three months of the acceptance of the bid, was not insisted upon by the DDA. On the contrary, after setting up two High Powered Committees which were instructed to look into the grievances of the Appellant, the DDA extended time at least twice. It is, therefore, very difficult to say that there was a breach of any terms and conditions of the auction, as the period of three months which the DDA could have insisted upon had specifically been waived. It is nobody's case that there is any misrepresentation here by the bidder. Therefore, Under Sub-clause (iv), without more, earnest money could not have been forfeited.

16. The other noticeable feature of this case on facts is that DDA specifically requested the Appellant to give their consent to make the balance payable along with 18% interest charges on belated payment. This was on the footing that the Nazul Rules of 1981 would be relaxed by the Central Government. The reason why the letter is marked "without prejudice" and the DDA made it clear that the letter does not carry any commitment, is obviously because the Central Government may not relax the provision of the Nazul Rules, in which case nothing further could be done by the DDA. If, however, the Central Government was willing to condone the delay, DDA would be willing to take 75% of the outstanding amount along with 18% interest.

17. Mr. Sharan argued that since the Central Government ultimately found that this was not a Nazul land, the letter was obviously based on a mistake of fact and would be void Under Section 20 of the Contract Act. We are afraid we are not able to accept this plea. Long after the Central Government informed DDA (on 1.3.1990) that the property involved in the present case is not Nazul land, the DDA by its letter of 6.10.1993 cancelled the allotment of the plot because the

Appellant had failed to deposit the balance 75%. DDA's understanding, therefore, was that what was important was payment of the balance 75% which was insisted upon by the letter dated 1.12.1987 and which was acceded to by the Respondent immediately on the same date. Further, Mr. Sharan's argument that since the letter was "without prejudice" and since no commitment had been made, they were not bound by the terms of the letter also fails to impress us. The letter was without prejudice and no commitment could have been given by the DDA because the Central Government may well not relax the Nazul Rules. On the other hand, if the Central Government had, later on, relaxed the Nazul Rules, DDA could not be heard to say that despite this having been done, DDA would yet cancel the allotment of the plot. That this could not have been done is clear because of the aforesaid construction of the letter dated 1.12.1987 and also because DDA is a public authority bound by Article 14 and cannot behave arbitrarily.

18. It now remains to deal with the impugned judgment of the Division Bench.

19. The Division Bench followed the judgment of **Tilley v. Thomas** (1867 3 Ch. A 61) and distinguished the judgment in **Webb v. Hughes** V.C.M. 1870. It further went on to follow **Anandram Mangturam v. Bholaram Tanumal** ILR 1946 Bom 218 and held:

The decision holds that the principle of law is that where, by agreement, time is made of the essence of the contract, it cannot be waived by a unilateral act of a party and unless there is consensus ad-idem between the parties and a new date is agreed to, merely because a party to a contract agrees to consider time being extended for the opposite party to complete the contract, but ultimately refuses to accord concurrence would not mean that the party has by conduct waived the date originally agreed as being of the essence of the contract. (At para 32)

20. In our judgment, **Webb's** case would directly apply to the facts here. In that case, it was held:

But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated.

21. Based on the facts of this case, the Single Judge was correct in observing that the letter of cancellation dated 6.10.1993 and consequent forfeiture of earnest money was made without putting the Appellant on notice that it has to deposit the balance 75% premium of the plot within a certain stated time. In the absence of such notice, there is no breach of contract on the part of the Appellant and consequently earnest money cannot be forfeited.

22. **Tilley v. Thomas** (1867 3 Ch. A 61) would not apply for the reason that the expression "without prejudice" was only used as stated above because the Central Government may not relax the Nazul Rules.

23. In **Anandram Mangturam v. Bholaram Tanumal** MANU/MH/0018/1945 : ILR 1946 Bom 218, two separate judgments were delivered, one by Chief Justice Stone and the other by Chagla, J. as he then was. Stone C.J. held:

In my judgment, reading the correspondence as a whole, it at no stage passed from the melting pot of negotiations to crystallize as an agreement to extend the time for the performance of the contract. The attitude of the purchaser throughout the correspondence was: "Satisfy us that you are doing your best to obtain the goods from your suppliers and we will then consider fixing a new date for delivery of the goods to us". On the other hand the attitude of the vendors throughout the correspondence was to avoid the purchaser's demand and to simply say: "You know that we cannot effect delivery from our suppliers and until we do so we cannot deliver the goods to you". There was never in my judgment any consensus ad-idem, no agreement, express or implied, to extend the time either to any particular date or to the happening of some future event. Mere forbearance in my opinion to institute proceedings or to give notice of rescission cannot be an extension of the time for the performance of a contract within the meaning of Section 63 of the Contract Act. (at 226 & 227)

Chagla, J. in a separate judgment held:

Under Section 55 of the Indian Contract Act, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but it is clear to my mind that the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under Section 63 of the Indian Contract Act, the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But it is clear again that such an extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and thereby bring about an agreement for extension of time. Therefore it is only as a result of the operation of Section 63 of the Indian Contract Act that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee. (at 229)

24. The aforesaid judgment would apply in a situation where a promisee accedes to the request of the promisor to extend time that is fixed for his own benefit. Thus, in **Keshavlal Lallubhai Patel and Ors. v. Lalbhai Trikumlal Mills Ltd.** MANU/SC/0031/1958 : 1959 SCR 213, this Court held:

The true legal position in regard to the extension of time for the performance of a contract is quite clear Under Section 63 of the Indian Contract Act. Every promisee, as the section provides, may extend time for the performance of the contract. The question as to how extension of time may be agreed upon by the parties has been the subject-matter of some argument at the Bar in the present appeal. There can be no doubt, we think, that both the buyer and the seller must agree to extend time for the delivery of goods. It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit.

25. However, such is not the position here. In the present case, the Appellant is the promisor and DDA is the promisee. In such a situation, DDA can certainly unilaterally extend the time for payment Under Section 63 of the Contract Act as the time for payment is not for DDA's own benefit but for the benefit of the Appellant. The present case would be covered by two judgments of the Supreme Court. In **Citi Bank N.A.** v. **Standard Chartered Bank** MANU/SC/0793/2003 : (2004) 1 SCC Page 12, this Court held:

50. Under Section 63, unlike Section 62, a promisee can act unilaterally and may

(i) dispense with wholly or in part, or

(ii) remit wholly or in part, the performance of the promise made to him, or

(iii) may extend the time for such performance, or

(iv) may accept instead of it any satisfaction which he thinks fit.

26. Similarly in **S. Brahmanand v. K.R. Muthugopal** MANU/SC/1446/2005 : (2005) 12 SCC 764 the Supreme Court held:

34. Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6-1992 the Defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the Plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party. [See in this connection the observations of this Court in ***Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd.*** *MANU/SC/0031/1958 : 1959 SCR 213 : AIR 1958 SC 512, para 8. See also in this connection* ***Saraswathamma v. H. Sharad Shrikhande*** *MANU/KA/0215/2005 : AIR 2005 Kant 292 and* ***K. Venkoji Rao v. M. Abdul Khuddur Kureshi*** *MANU/KA/0026/1991 : AIR 1991 Kant 119, following the judgment in Keshavlal Lallubhai Patel (supra).] Thus, in this case there was a variation in the date of performance by express representation by the Defendants, agreed to by the act of forbearance on the part of the Plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article.* ***Pazhaniappa Chettiyar v. South Indian Planting and Industrial Co. Ltd.*** *[MANU/KE/0093/1952 : AIR 1953 Trav Co 161] was a similar instance where the contract when initially made had a date fixed for the performance of the contract but the Court was of the view that "in the events that happened in this case, the agreement in question though started with fixation of a period for the completion of the transaction became one without such period on account of the peculiar facts and circumstances already explained and the contract, therefore, became one in which no time was fixed for its performance" and held that what was originally covered by the first part of Article 113 of the Limitation Act, 1908 would fall under the second part of the said article because of the supervening circumstances of the case. (at Page 777)*

27. Coming to the application of Article 14, the Division Bench in paragraph 37 stated:

37. Now, in India, reasonableness in State action is a facet of Article 14 of the Constitution of India and in the field of contract would have a considerable play at the precontract stage. Once parties have entered into a contractual obligation, they would be bound by the contract and the only reasonableness would be of the kind envisaged by the Supreme Court in the decision reported as MANU/SC/0018/1962 : AIR 1963 SC 1144 ***T.P. Daver v. Lodge Victoria*** *No. 363 SC Belgaum and Ors. On the subject of a member of a club being expelled, and the relationship being a contract as per the rules and Regulations of the club, adherence whereto was agreed to by he who became a member of the club and the management of the club, the Supreme Court observed that in such private affairs, it would be good faith in taking an action which is rooted in the minds of modern men and women i.e. in a modern democratic society and no more. The decision guides that where a private affair i.e. a contract is so perverted by a party that it offends the concept of a fair-play in a modern society, alone then can the action be questioned as not in good faith and suffice would it be to state that anything done not in good faith would be unreasonably done.*

28. It will be noticed at once that **T.P. Daver v. Lodge Victoria** No. 363, S.C. Belgaum MANU/SC/0018/1962 : 1964 (1) SCR 1, is not an authority on Article 14 at all. It deals with clubs and the fact that rules or bye-laws which bind members of such clubs have to be strictly adhered to. On the other hand in **ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.** MANU/SC/1080/2003 : (2004) 3 SCC 553 at paras 22 and 23, the Supreme Court held:

22. We do not think the above judgment in VST Industries Ltd. [MANU/SC/0760/2000 : (2001) 1 SCC 298 : 2001 SCC (L and S) 227] supports the argument of the learned Counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd. [MANU/SC/0760/2000 : (2001) 1 SCC 298 : 2001 SCC (L and S) 227] against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated Under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ Petitioner in that case that the said industry was obligated under the statute concerned to perform certain public functions; failure to do so would give rise to a complaint Under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty, if there is a failure a writ petition Under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the Respondent is an instrumentality of a State, there is no dispute but the question is: was the first Respondent discharging a public duty or a public function while repudiating the claim of the Appellants arising out of a contract? Answer to this question, in our opinion, is found in the judgment of this Court in the case of ***Kumari Shrilekha Vidyarthi v. State of U.P.*** *[MANU/SC/0504/1991 : (1991) 1 SCC 212 : 1991 SCC (L and S) 742] wherein this Court held: (SCC pp. 236-37, paras 22 & 24)*

The impact of every State action is also on public interest. ... It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the Appellants the first Respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first Respondent.

29. Based on the facts of this case, it would be arbitrary for the DDA to forfeit the earnest money on two fundamental grounds. First, there is no breach of contract on the part of the Appellant as has been held above. And second, DDA not having been put to any loss, even if DDA could insist on a contractual stipulation in its favour, it would be arbitrary to allow DDA as a public authority to appropriate Rs. 78,00,000/- (Rupees Seventy Eight Lakhs) without any loss being caused. It is clear, therefore, that Article 14 would apply in the field of contract in this case and the finding of the Division Bench on this aspect is hereby reversed.

30. We now come to the reasoning which involves Section 74 of the Contract Act. The Division Bench held:

38. The learned Single Judge has held that the property was ultimately auctioned in the year 1994 at a price which fetched DDA a handsome return of Rupees 11.78 crores and there being no damages suffered by DDA, it could not forfeit the earnest money.

39. The said view runs in the teeth of the decision of the Supreme Court reported as MANU/SC/0086/1969 : AIR 1970 SC 1986 ***Shree Hanuman Cotton Mills and Anr. v. Tata Aircraft Ltd.*** *which holds that as against an amount tendered by way of security, amount tendered as earnest money could be forfeited as per terms of the contract.*

40. We may additionally observe that original time to pay the balance bid consideration, as per Ex. P-I was May 18, 1982 and as extended by Ex. P-8 was October 28, 1982. That DDA could auction the plot in the year 1994 in the sum of Rupees 11.78 crore was immaterial and not relevant evidence for the reason damages with respect to the price of property have to be computed with reference to the date of the breach of the contract.

31. Section 74 as it originally stood read thus:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.

32. By an amendment made in 1899, the Section was amended to read:

74. Compensation for breach of contract where penalty stipulated for.--When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is

entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.--A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.--When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.--A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads "Of the consequences of breach of contract". It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract Under Section 74 only where damage or loss is caused by such breach.

34. In Fateh Chand v. Balkishan Das MANU/SC/0258/1963 : 1964 (1) SCR 515, this Court held:

The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

....

Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum

stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.(At page 526, 527)
Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a Plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a Plaintiff or a Defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the Plaintiff is entitled from the Defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.(At page 530)

35. Similarly, in Maula Bux v. Union of India (UOI) MANU/SC/0081/1969 : 1970 (1) SCR 928, it was held:

Forfeiture of earnest money under a contract for sale of property-movable or immovable-if the amount is reasonable, does not fall within Section 74. That has been decided in several cases: ***Kunwar Chiranjit Singh v. Har Swarup*** *MANU/KE/0093/1952 : A.I.R. 1926 P.C. 1; Roshan Lal v. The Delhi Cloth and General Mills Co. Ltd. Delhi MANU/UP/0088/1910 : I.L.R. All. 166; Muhammad Habibullah v. Muhammad Shafi I.L.R. All. 324; Bishan Chand v. Radha Kishan Das I.D. 19 All. 49. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.*

Counsel for the Union, however, urged that in the present case Rs. 10,000/- in respect of the potato contract and Rs. 8,500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the Plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation". It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or

damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the Plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made. (At page 933,934)

36. In Shree Hanuman Cotton Mills and Anr. v. Tata Aircraft Limited MANU/SC/0086/1969 : 1970 (3) SCR 127 it was held:

From a review of the decisions cited above, the following principles emerge regarding "earnest":

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest (At page 139)

The learned Attorney General very strongly urged that the pleas covered by the second contention of the Appellant had never been raised in the pleadings nor in the contentions urged before the High Court. The question of the quantum of earnest deposit which was forfeited being unreasonable or the forfeiture being by way of penalty, were never raised by the Appellants. The Attorney General also pointed out that as noted by the High Court the Appellants led no evidence at all and, after abandoning the various pleas taken in the plaint, the only question pressed before the High Court was that the deposit was not by way of earnest and hence the amount could not be forfeited. Unless the Appellants had pleaded and established that there was unreasonableness attached to the amount required to be deposited under the contract or that the clause regarding

forfeiture amounted to a stipulation by way of a penalty, the Respondents had no opportunity to satisfy the Court that no question of unreasonableness or the stipulation being by way of penalty arises. He further urged that the question of unreasonableness or otherwise regarding earnest money does not at all arise when it is forfeited according to the terms of the contract.

In our opinion the learned Attorney General is well founded in his contention that the Appellants raised no such contentions covered by the second point, noted above. It is therefore unnecessary for us to go into the question as to whether the amount deposited by the Appellants, in this case, by way of earnest and forfeited as such, can be considered to be reasonable or not. We express no opinion on the question as to whether the element of unreasonableness can ever be considered regarding the forfeiture of an amount deposited by way of earnest and if so what are the necessary factors to be taken into account in considering the reasonableness or otherwise of the amount deposited by way of earnest. If the Appellants were contesting the claim on any such grounds, they should have laid the foundation for the same by raising appropriate pleas and also led proper evidence regarding the same, so that the Respondents would have had an opportunity of meeting such a claim. (At page 142)

37. And finally in ONGC Ltd. v. Saw Pipes Ltd. MANU/SC/0314/2003 : (2003) 5 SCC 705, it was held:

64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in ***Fateh Chand*** *case [MANU/SC/0258/1963 : AIR 1963 SC 140 : (1964) 1 SCR 515 at p. 526] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.*

67...*In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be*

against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the Respondent was informed that it would be required to pay stipulated damages.

68. *From the aforesaid discussions, it can be held that:*

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

38. It will be seen that when it comes to forfeiture of earnest money, in **Fateh Chand's** case, counsel for the Appellant conceded on facts that Rs. 1,000/- deposited as earnest money could be forfeited. (See: MANU/SC/0258/1963 : 1964 (1) SCR Page 515 at 525 and 531).

39. Shree Hanuman Cotton Mills and Anr. which was so heavily relied by the Division Bench again was a case where the Appellants conceded that they committed breach of contract. Further, the Respondents also pleaded that the Appellants had to pay them a sum of Rs. 42,499/- for loss and damage sustained by them. (See: MANU/SC/0086/1969 : 1970 (3) SCR 127 at Page 132). This being the fact situation, only two questions were argued before the Supreme Court: (1) that the amount paid by the Plaintiff is not earnest money and (2) that forfeiture of earnest money can be legal only if the amount is considered reasonable. (at page 133). Both questions were answered against the Appellant. In deciding question two against the Appellant, this Court held:

But, as we have already mentioned, we do not propose to go into those aspects in the case on hand. As mentioned earlier, the Appellants never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited is so large that the forfeiture is bad in law. Nor have they raised any contention that the amount of deposit is so unreasonable and therefore forfeiture of the entire amount is not justified. The decision in Maula Bux's [1970] 1 SCR 928 had no occasion to consider the question of reasonableness or otherwise of the earnest deposit being forfeited. Because, from the said judgment it is clear that this Court did not agree with the view of the High Court that the deposits made, and which were under consideration, were paid as earnest money. It is under those circumstances that this Court proceeded to consider the applicability of Section 74 of the Contract Act. (At page 143)

40. From the above, it is clear that this Court held that **Maula Bux's** case was not, on facts, a case that related to earnest money. Consequently, the observation in **Maula Bux** that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of 5 Judges in **Fateh Chand's** case is that all stipulations naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English Common Law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in **Fateh Chand's** case was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.

41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (along with which earnest money has to be paid) may well have been rejected. In such cases, Section 74 may not be attracted on its plain language because it applies only "when a contract has been broken".

42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated

amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found *inter alia* in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the Section.

4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the Appellant. Further, we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages - namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.

45. A great deal of the argument before us turned on notings in files that were produced during cross-examination of various witnesses. We have not referred to any of these notings and, consequently, to any case law cited by both parties as we find it unnecessary for the decision of this case.

46. Mr. Sharan submitted that in case we were against him, the earnest money that should be refunded should only be refunded with 7% per annum and not 9% per annum interest as was done in other cases. We are afraid we are not able to agree as others were offered the refund of earnest money way back in 1989 with 7% per annum interest which they accepted. The DDA having chosen to fight the present Appellant tooth and nail even on refund of earnest money, when there was no breach of contract or loss caused to it, stands on a different footing. We, therefore, turn down this plea as well.

47. In the result, the appeal is allowed. The judgment and order of the Single Judge is restored. Parties will bear their own costs.

Back to Index

MANU/SC/0062/2020

Neutral Citation: 2020/INSC/65

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 547 of 2020 (Arising out of SLP (C) No. 18659 of 2019), Civil Appeal No. 548 of 2020 (Arising out of SLP (C) No. 18763 of 2019), Civil Appeal No. 549 of 2020 (Arising out of SLP (C) No. 23703 of 2019) and Civil Appeal No. 550 of 2020 (Arising out of SLP (C) No. 24146 of 2019)

Decided On: 21.01.2020

Appellants: Keisham Meghachandra Singh **Vs.** Respondent: The Hon'ble Speaker, Manipur Legislative Assembly and Ors.

Hon'ble Judges/Coram:

Rohinton Fali Nariman, Aniruddha Bose and V. Ramasubramanian, JJ.**Subject: Election**

Subject: Constitution

Prior History / High Court Status:

From the Judgment and Order dated 23.07.2019 of the High Court of Manipur at Imphal in W.P. (C) No. 70 of 2018 (MANU/MN/0125/2019)

Authorities Referred:

Black's Law Dictionary

Case Note:

Election - Disqualification - Adjudication by speaker - Applications were filed for disqualification of Respondent No. 3 before Speaker of Legislative Assembly stating that Respondent No. 3 was disqualified under paragraph 2(1)(a) of Tenth Schedule - Since no action was taken by Speaker, writ petition was filed before High Court to direct Speaker to decide disqualification petition within reasonable time - High Court stated that as issue of whether High Court can direct Speaker to decide disqualification petition within certain timeframe was pending before Supreme Court - After waiting for certain period, Appellant filed writ petition before same High Court to declare that Respondent No. 3 had incurred disqualification for being member of Legislative Assembly - High Court declined to grant

any relief in writ petition - Hence, present appeal - Whether disqualification petition of Respondent No.3 pending before speaker warrant any directions by this court.

Facts:

The Respondent No. 3, contested as a candidate and was duly elected in election of legislative assembly. Applications were filed for the disqualification of Respondent No. 3 were filed before the Speaker of the Legislative Assembly stating that Respondent No. 3 was disqualified under paragraph 2(1)(a) of the Tenth Schedule. Since no action was taken on any of these petitions by the Speaker, writ petition was filed before the High Court in which the Petitioner prayed that the High Court direct the Speaker to decide his disqualification petition within a reasonable time. The High Court stated that as the issue of whether a High Court can direct a Speaker to decide a disqualification petition within a certain timeframe is pending before the Supreme Court the High Court could not pass any order in the matter, and the matter was ordered to be listed so as to await the outcome of the cases pending before the Supreme Court. After waiting for certain time, the Appellant, filed Writ Petition before the same High Court to declare that Respondent No. 3 has incurred disqualification for being a member of the Legislative Assembly. The High Court came to a finding that since the very same issue was pending before a Constitution Bench of the Supreme Court, it would not be appropriate for the High Court to pass any order for the time being, which would include orders relating to the inaction or indecision on the part of the Speaker, as well as the issuing of a writ of quo warranto.

Held, while allowing the appeal:

(i) A reading of the decisions, shows that what was meant to be outside the pale of judicial review in Kihoto Hollohan case were quia timet actions in the sense of injunctions to prevent the Speaker from making a decision on the ground of imminent apprehended danger which will be irreparable in the sense that if the Speaker proceeds to decide that the person be disqualified, he would incur the penalty of forfeiting his membership of the House for a long period. Kihoto Hollohan case did not, therefore, in any manner, interdict judicial review in aid of the Speaker arriving at a prompt decision as to disqualification under the provisions of the Tenth Schedule. Indeed, the Speaker, in acting as a Tribunal under the Tenth Schedule was bound to decide disqualification petitions within a reasonable period. What was reasonable would depend on the facts of each case, but absent exceptional circumstances for which there was good reason, a period of three months from the date on which the petition is filed is the outer limit within which disqualification petitions filed before the Speaker must be decided if the constitutional objective of disqualifying persons who have infracted the Tenth Schedule is to be adhered to. This period had been fixed keeping in mind the fact that ordinarily the life of the Lok Sabha and the Legislative Assembly of the States is five years and the fact that persons who have incurred such disqualification did not deserve to be MPs/MLAs even for a single day, as found in Rajendra Singh Rana case, if they had infracted the provisions of the Tenth Schedule. [28]

(ii) It was time that Parliament had a rethink on whether disqualification petitions ought to be entrusted to a Speaker as a quasi-judicial authority when such Speaker continues to belong to a particular political party either de jure or de facto. Parliament may seriously consider amending the Constitution to substitute the Speaker of the Lok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification which arise under the Tenth Schedule with a permanent Tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court, or some other outside independent mechanism to ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning of our democracy. [30]

(iii) It was not possible to accede to Appellant's submission that this Court issue a writ of quo warranto quashing the appointment of the Respondent No. 3 as a minister of a cabinet. A disqualification under the Tenth Schedule from being an MLA and consequently minister must first be decided by the exclusive authority in this behalf, namely, the Speaker of the Manipur Legislative Assembly. It was also not possible to accede to the argument of Appellant that the disqualification petition be decided by this Court in these appeals given the inaction of the Speaker. It could not be said that the facts in the present case were similar to the facts in Rajinder Singh Rana. In the present case, the life of the legislative assembly comes to an end only after certain period unlike in Rajinder Singh Rana case where, but for this Court deciding the disqualification petition in effect, no relief could have been given to the Petitioner in that case as the life of the legislative assembly was about to come to an end. The only relief that could be given in these appeals was that the Speaker of the Manipur Legislative Assembly be directed to decide the disqualification petitions pending before him within a period of four weeks from the date on which this judgment is intimated to him. In case no decision was forthcoming even after a period of four weeks, it would be open to any party to the proceedings to apply to this Court for further directions/reliefs in the matter. [31]

JUDGMENT

Rohinton Fali Nariman, J.

1. Leave granted.

2. The Appeals in the present case raise important questions relating to the Tenth Schedule to the Constitution of India (hereinafter referred to as "Tenth Schedule"). The election for the 11th Manipur Legislative Assembly was conducted in March, 2017. The said Assembly election produced an inconclusive result as none of the political parties were able to secure a majority i.e. 31 seats in a Legislative Assembly of 60 seats in order to form the Government. The Indian National Congress (hereinafter referred to as "Congress Party") emerged as the single largest party with 28 seats, the Bharatiya Janata Party (hereinafter referred to as "BJP") coming second with 21 seats. The Respondent No. 3, in the Civil Appeal arising out of SLP(C) No. 18659 of 2019, contested as a candidate nominated and set up by the Congress Party and was duly elected as such. On 12.03.2017, immediately after the declaration of the results, Respondent No. 3 along with various BJP members met the Governor of the State of Manipur in order to stake a claim for

forming a BJP-led Government. On 15.03.2017, the Governor invited the group lead by the BJP to form the Government in the State. On the same day, the Chief Minister-Designate sent a letter to the Governor for administering oath as Ministers to eight elected MLAs including Respondent No. 3. On the same day, Respondent No. 3 was sworn in as a Minister in the BJP-led government and continues as such till date.

3. As many as thirteen applications for the disqualification of Respondent No. 3 were filed before the Speaker of the Manipur Legislative Assembly between April and July, 2017 stating that Respondent No. 3 was disqualified under paragraph 2(1)(a) of the Tenth Schedule. The present petition that was filed by the Appellant, in the Civil Appeal arising out of SLP(C) No. 18659 of 2019, was dated 31.07.2017.

4. Since no action was taken on any of these petitions by the Speaker, one T.N. Haokip filed a writ petition being Writ Petition (C) No. 353 of 2017 before the High Court of Manipur at Imphal, in which the Petitioner prayed that the High Court direct the Speaker to decide his disqualification petition within a reasonable time. On 08.09.2017, the High Court stated that as the issue of whether a High Court can direct a Speaker to decide a disqualification petition within a certain timeframe is pending before a Bench of 5 Hon'ble Judges of the Supreme Court the High Court cannot pass any order in the matter, and the matter was ordered to be listed so as to await the outcome of the cases pending before the Supreme Court.

5. After waiting till January, 2018, on 29.01.2018, the Appellant, in the Civil Appeal arising out of SLP(C) No. 18659 of 2019, filed Writ Petition (C) No. 17 of 2018 before the same High Court asking for the following reliefs:

i. Issue Rule Nisi;

ii. To issue an appropriate Writ, Order or Direction as to this Hon'ble Court may deem fit and proper;

iii. To declare that Respondent No. 3 has incurred disqualification for being a member of the Manipur Legislative Assembly under para 2(1) (a) of the Xth Schedule to the Constitution of India in terms of law laid down by the Constitution Bench of the Hon'ble Supreme Court in Rajendra Singh Rana and Ors. v. Swami Prasad Maurya and Ors. reported in MANU/SC/0993/2007 : (2007) 4 SCC 270.

iv. If the Hon'ble High Court is pleased to consider that the prayer made in para No. (ii) and (iii) above deserve merit for a favourable order, a writ in the nature of Quo Warranto be issued ousting Respondent No. 3 from the post/office of Minister.

6. The writ petition was taken up and heard by the High Court and disposed of by the impugned judgment dated 23.07.2019. The questions that the High Court posed before itself, which required consideration at its hands, were stated as follows:

(a) Whether, in the facts and circumstances of the present case, the Respondent No. 1 can be said to have failed to discharge its duties as enjoined in the Tenth Schedule to the Constitution of India to decide the petitions?

(b) If the above issue (a) is answered in the affirmative, whether the Respondent No. 3 has prima facie incurred disqualification?

(c) If the Respondent No. 3 is found to have incurred a prima facie disqualification, whether this Court can issue an order disqualifying the Respondent No. 3 from being a member of the Manipur Legislative Assembly or alternatively, whether this Court has the power and jurisdiction to issue a writ of quo warranto declaring the holding of the post of a Minister by the Respondent No. 3 as illegal, as it being without any authority of law?

7. In answer to a preliminary objection taken by the Speaker that judicial review is shut out in cases like the present, the High Court held that the Speaker is a quasi-judicial authority who is required to take a decision within a reasonable time, such reasonable time obviously being a time which is much less than five years since the life of the House was five years. The High Court held that the remedy provided in the Tenth Schedule is in essence an alternative remedy to be exhausted before approaching the High Court, and this being the case, if such alternative remedy is found to be ineffective due to deliberate inaction or indecision on the part of the Speaker, the Court cannot be denied jurisdiction to issue an appropriate writ to the Speaker. Consequently, the preliminary objection was dismissed and the Court went on to hear the writ petition on merits. On the facts as stated above, following **Ravi S. Naik v. State of Maharashtra** MANU/SC/0366/1994 : 1994 Supp. (2) SCC 641, the Court found that the voluntary giving up of the membership of a political party may be express or implied by conduct, and that the unequivocal conduct of the Respondent No. 3 becoming a Minister in a BJP-led Government after fighting the election by being a member of the Congress Party would make it clear that the disqualification contained in paragraph 2(1)(a) of the Tenth Schedule is clearly attracted. The High Court then cited several judgments on the writ of *quo warranto* but ultimately came to a finding that since the very same issue was pending before a Constitution Bench of the Supreme Court, it would not be appropriate for the High Court to pass any order for the time being, which would include orders relating to the inaction or indecision on the part of the Speaker, as well as the issuing of a writ of *quo warranto*. The High Court thus ultimately declined to grant any relief in the writ petition, as a result of which the Appellant is before us.

8. Shri Kapil Sibal, learned Senior Advocate appearing on behalf of the Appellant, in the Civil Appeal arising out of SLP(C) No. 18659 of 2017, has argued that the Speaker in the present case has deliberately refused to decide the disqualification petitions before him. This is evident from the fact that no decision is forthcoming till date on petitions that were filed way back in April, 2017. Further, it is clear that notice in the present disqualification petition was issued by the Speaker only on 12.09.2018, long after the petition had been filed, and as correctly stated by the High Court, it cannot be expected that the Speaker will decide these petitions at all till the life of the Assembly of 5 years expires. In these circumstances, he has exhorted us to issue a writ of *quo warranto* against Respondent No. 3 stating that he has usurped a constitutional office, and to declare that he cannot do so.

For this purpose, he has cited several judgments of this Court. He has also argued that though it is correct to state that whether a writ petition can at all be filed against inaction by a Speaker is pending before a Bench of 5 Judges of this Court, yet, it is clear from a reading of paragraph 110 of **Kihoto Hollohan v. Zachillhu and Ors.** MANU/SC/0753/1992 : (1992) Supp. (2) SCC 651, that all that was interdicted by that judgment was the grant of interlocutory stays which would prevent a Speaker from making a decision and not the other way around. For this purpose, he read to us Black's Law Dictionary on the meaning of a *quia timet* action, and argued that the judgment read as a whole would make it clear that if the constitutional objective of checking defections is to be achieved, judicial review in aid of such goal can obviously not be said to be interdicted. He also strongly relied upon the observations of this Court in **Rajendra Singh Rana v. Swami Prasad Maurya** MANU/SC/0993/2007 : (2007) 4 SCC 270 and exhorted us to uphold the reasoning contained in the impugned judgment and then issue a writ of *quo warranto* against Respondent No. 3.

9. Mrs. Madhavi Divan, learned Addl. Solicitor General appearing for the Hon'ble Speaker of the Manipur Legislative Assembly, has argued that the reliefs prayed for in the writ petition filed by the Appellant, in the Civil Appeal arising out of SLP(C) No. 18659 of 2017, are diametrically opposed to the relief asked for in Writ Petition (C) No. 353 of 2017, as a result of which, there being mutually destructive pleas and prayers made in the two writ petitions, no relief ought to be granted in the present case. In any case, the prayers asked for in the present case are directly interdicted by the judgment of a Constitution Bench of this Court in **Kihoto Hollohan** (supra) inasmuch as a writ of *quo warranto* cannot possibly be granted without first deciding whether Respondent No. 3 stands disqualified, which is within the exclusive jurisdiction of the Speaker. She argued that the High Court was wholly incorrect in holding that the Speaker's decision under the Tenth Schedule would be in the nature of an alternative remedy and held that this would be directly contrary to several judgments of this Court, in particular, **Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative** Assembly MANU/SC/0768/2016 : (2016) 8 SCC 1, which states that the Speaker has exclusive jurisdiction to decide disqualification questions that are referred to him. In any case, she argued that a Three Judge Bench cannot decide the present case and has to await the judgment of a Five Judge Bench which has been made on a specific reference made by a Two Judge Bench of this Court. She also distinguished the sheet anchor of Shri Sibal's case i.e. the judgment in **Rajendra Singh Rana** (supra) by stating that the facts there were completely different and that ultimately judicial review took place only because there was a final decision of the Speaker in that case. Further, because of the fact that the life of the Assembly was about to end, this Court using its powers Under Article 142 of the Constitution of India in an extra-ordinary situation decided the petition for disqualification itself. Both these features are absent in the present case. Thus, according to her, while the ultimate conclusion in the High Court judgment is correct, all the findings in favor of the Appellant fly in the face of judgments of this Court.

10. Having heard learned Counsel for both the parties, it is important to first set out the reference order of this Court dated 08.11.2016 in **S.A. Sampath Kumar v. Kale Yadaiah and Ors.** SLP(C) No. 33677/2015. A Division Bench of this Court after referring to **Speaker, Haryana Vidhan Sabha v. Kuldeep Bishnoi and Ors.** MANU/SC/0801/2012 : (2015) 12 SCC 381, and **Speaker, Orissa Legislative Assembly v. Utkal Keshari Parida** MANU/SC/0040/2013 : (2013) 11 SCC 794, then held:

We have considered the aforesaid submissions of both the learned Attorney General and the learned Counsel appearing on behalf of the Petitioner. We feel that a substantial question as to the interpretation of the Constitution arises on the facts of the present case. It is true that this Court in Kihoto Hollohan's case laid down that a quia timet action would not be permissible and Shri Jayant Bhushan, learned senior Counsel appearing on behalf of some of the Respondents has pointed out to us that in P. Ramanatha Aiyar's Advanced Law Lexicon a quia timet action is the right to be protected against anticipated future injury that cannot be prevented by the present action. Nevertheless, we are of the view that it needs to be authoritatively decided by a Bench of five learned Judges of this Court, as to whether the High Court, exercising power Under Article 226 of the Constitution, can direct a Speaker of a legislative assembly (acting in quasi judicial capacity under the Tenth Schedule) to decide a disqualification petition within a certain time, and whether such a direction would not fall foul of the quia timet action doctrine mentioned in paragraph 110 of Kihoto Hollohan's case. We cannot be mindful of the fact that just as a decision of a Speaker can be corrected by judicial review by the High Court exercising jurisdiction Under Article 226, so prima facie should indecision by a Speaker be correctable by judicial review so as not to frustrate the laudable object and purpose of the Tenth Schedule, which has been referred to in both the majority and minority judgments in Kihoto Hollohan's case. The facts of the present case demonstrate that disqualification petitions had been referred to the Hon'ble Speaker of the Telangana State Legislative Assembly on 23rd August, 2014, and despite the hopes and aspirations expressed by the impugned judgment, the Speaker has chosen not to render any decision on the said petitions till date. We, therefore, place the papers before the Hon'ble Chief Justice of India to constitute an appropriate Bench to decide this question as early as possible.

11. We would have acceded to Mrs. Madhavi Divan's plea that in view of this order of a Division Bench of this Court, the hearing of this case ought to be deferred until the pronouncement by a Five Judge Bench of this Court on the issues raised in the present petition. However, we find that this very issue was addressed by a Five Judge Bench judgment in **Rajendra Singh Rana** (supra) and has already been answered. Unfortunately, the decision contained in the aforesaid judgment was not brought to the notice of the Division Bench which referred the matter to Five Hon'ble Judges of this Court, though **Rajendra Singh Rana** (supra) was sought to be distinguished in **Kuldeep Bishnoi** (supra), which was brought to the notice of the Division Bench of this Court.

12. Backtracking a little, it is important to first set out what was decided in the majority decision in **Kihoto Hollohan** (supra). A Bench of 3 learned Judges of this Court set out, in paragraph 24 of the judgment, several questions that required decision in that case. We are directly concerned with questions (E) and (F), which are so set out and which read as follows:

24. On the contentions raised and urged at the hearing the questions that fall for consideration are the following:

xxx xxx xxx

(*E*) That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts the immunity Under Articles 122 and 212. The Speaker and the Chairman in relation to the exercise of the powers under the Tenth Schedule shall not be subjected to the jurisdiction of any Court.

The Tenth Schedule seeks to and does create a new and non-justiciable area of rights, obligations and remedies to be resolved in the exclusive manner envisaged by the Constitution and is not amenable to, but constitutionally immune from, curial adjudicative processes.

(*F*) That even if Paragraph 7 erecting a bar on the jurisdiction of Courts is held inoperative, the Courts' jurisdiction is, in any event, barred as Paragraph 6(1) which imparts a constitutional 'finality' to the decision of the Speaker or the Chairman, as the case may be, and that such concept of 'finality' bars examination of the matter by the Courts.

13. The majority judgment noticed that before the Constitution (Fifty Second Amendment) Act, 1985 inserting the Tenth Schedule into the Constitution of India, two abortive attempts were made in view of the recommendations of the Committee on Defections to enact an anti-defection law. The first was the Constitution (Thirty Second Amendment) Bill, 1973, which lapsed on account of dissolution of the House; and the second was the Constitution (Forty Eighth Amendment) Bill, 1979 which also so lapsed. The Court in paragraphs 9 and 13 referred to the object of the Constitution (Fifty Second Amendment) Act, 1985 as follows:

9. This brings to the fore the object underlying the provisions in the Tenth Schedule. The object is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy. The remedy proposed is to disqualify the Member of either House of Parliament or of the State Legislature who is found to have defected from continuing as a Member of the House. The grounds of disqualification are specified in Paragraph 2 of the Tenth Schedule.

xxx xxx xxx

13. These provisions in the Tenth Schedule give recognition to the role of political parties in the political process. A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party. The provisions of Paragraph 2(1)(*a*) proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his membership of the legislature and go back before the electorate. The same yardstick is applied to a person who is elected as an Independent candidate and wishes to join a political party after the election.

14. The Court dealt with contentions (E) and (F) together as follows:

95. In the present case, the power to decide disputed disqualification under Paragraph 6(1) is pre-eminently of a judicial complexion.

96. The fiction in Paragraph 6(2), indeed, places it in the first Clause of Article 122 or 212, as the case may be. The words "proceedings in Parliament" or "proceedings in the legislature of a State" in Paragraph 6(2) have their corresponding expression in Articles 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures.

97. That apart, even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of members Under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House; but only before the Speaker as a specially designated authority. The decision under Paragraph 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, no immunity Under Articles 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule.

xxx xxx xxx

100. By these well known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under Paragraph 6(1) of the Tenth Schedule is a Tribunal.

xxx xxx xxx

109. In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under Paragraph 6, the scope of judicial review Under Articles 136, and 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under Paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with Rules of natural justice and perversity.

110. In view of the limited scope of judicial review that is available on account of the finality Clause in Paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a *quia timet* action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence.

111. In the result, we hold on contentions (E) and (F):

That the Tenth Schedule does not, in providing for an additional grant (*sic* ground) for disqualification and for adjudication of disputed disqualifications, seek to create a non-justiciable constitutional area. The power to resolve such disputes vested in the Speaker or Chairman is a judicial power.

That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the speakers/Chairmen is valid. But the concept of statutory finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review Under Articles 136, 226 and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.

That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood and explained in *Keshav Singh case* [(1965) 1 SCR 413 : AIR 1965 SC 745] to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words 'be deemed to be proceedings in Parliament' or 'proceedings in the legislature of a State' confines the scope of the fiction accordingly.

The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no *quia timet* actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

15. In **Rajendra Singh Rana** (supra), this Court dealt with an order made by the Speaker of the Uttar Pradesh Legislative Assembly dated 06.09.2003. On the facts in that case, the 14th Legislative Assembly Election for the State of U.P. was held in February, 2002 and since none of the political parties secured the requisite majority, a coalition government was formed headed by Ms. Mayawati, leader of the Bahujan Samaj Party (hereinafter referred to as "BSP"). On 25.08.2003, the Cabinet took a unanimous decision for recommending dissolution of the Assembly, after which, on 27.08.2003, 13 members of the Legislative Assembly elected to the Assembly on tickets of the BSP met the Governor and requested him to invite the leader of the Samajwadi Party, namely, Shri Mulayam Singh Yadav, to form the Government. On 29.08.2003, the Governor invited the leader of the Samajwadi Party to form the Government and gave him a time of two weeks to prove his majority in the Assembly. On 04.09.2003, Mr. S.P. Maurya, leader of the BSP filed a petition before the Speaker under the Tenth Schedule praying that the 13 BSP MLAs who had proclaimed support to Shri Mulayam Singh Yadav before the Governor on 27.08.2003 had incurred the disqualification mentioned in paragraph 2(1)(a) of the Tenth Schedule. Meanwhile, a group of 37 MLAs, said to be on behalf of 40 MLAs elected on BSP tickets, requested the Speaker to recognize the split in the BSP on the basis that one-third of the members of BSP consisting of 109 legislators had separated from the BSP. On 06.09.2003, therefore, the Speaker did three things - first, he accepted that 37 out of 109 comprises one-third of the members of the BSP, which amounted to a split, this group being known as the Loktantrik Bahujan Dal. This Dal had merged with the Samajwadi Party which merger was then accepted by the very same order dated 06.09.2003. Third, the Speaker did not decide the application seeking disqualification of the 13 MLAs who were part of the 37 MLAs who appeared before the Speaker, and adjourned the disqualification petition. Meanwhile, since a writ petition was filed in the High Court of Judicature at Allahabad before the Lucknow Bench against this order, the Speaker passed another order on 14.11.2003, stating that the order adjourning the petition for disqualification would continue until after the High Court decided the writ petition. However, on 07.09.2005, even before the writ petition was disposed of by a Full Bench of the High Court, the Speaker passed an order rejecting the petition filed for disqualifying of 13 MLAs of the BSP.

16. On these facts, the Court noted in paragraph 17 of the judgment that the order dated 06.09.2003 is the subject matter of challenge in the writ petition filed before the High Court. In paragraph 30 of the judgment, this Court made it clear that the order of the Speaker dated 07.09.2005 would have no independent legs to stand on, stating as follows:

30....This last order is clearly inconsistent with the Speaker's earlier order dated 14-11-2003 and still leaves open the question whether the petition seeking disqualification should not have been decided first or at least simultaneously with the application claiming recognition of a split. If the order recognising the split goes, obviously this last order also cannot survive. It has perforce to go.

17. After referring to this Court's decision in **Kihoto Hollohan** (supra) and **Ravi S. Naik** (supra) in para 22 of the judgment, the Court held:

22. ...Suffice it to say that the decision of the Speaker rendered on 6-9-2003 was not immune from challenge before the High Court Under Articles 226 and 227 of the Constitution of India.

18. The Court then went on to hold:

25. ...On the scheme of Articles 102 and 191 and the Tenth Schedule, the determination of the question of split or merger cannot be divorced from the motion before the Speaker seeking a disqualification of a member or members concerned. It is therefore not possible to accede to the argument that under the Tenth Schedule to the Constitution, the Speaker has an independent power to decide that there has been a split or merger of a political party as contemplated by paras 3 and 4 of the Tenth Schedule to the Constitution. The power to recognise a separate group in Parliament or Assembly may rest with the Speaker on the basis of the Rules of Business of the House. But that is different from saying that the power is available to him under the Tenth Schedule to the Constitution independent of a claim being determined by him that a member or a number of members had incurred disqualification by defection. To that extent, the decision of the Speaker in the case on hand cannot be considered to be an order in terms of the Tenth Schedule to the Constitution. The Speaker has failed to decide the question, he was called upon to decide, by postponing a decision thereon. There is therefore some merit in the contention of the learned Counsel for BSP that the order of the Speaker may not enjoy the full immunity in terms of para 6(1) of the Tenth Schedule to the Constitution and that even if it did, the power of judicial review recognised by the Court in *Kihoto Hollohan* [MANU/SC/0753/1992 : 1992 Supp (2) SCC 651 : AIR 1993 SC 412 : (1992) 1 SCR 686] is sufficient to warrant interference with the order in question.

19. The Court also hastened to add:

29. In the case on hand, the Speaker had a petition moved before him for disqualification of 13 members of BSP. When that application was pending before him, certain members of BSP had made a claim before him that there has been a split in BSP. The Speaker, in the scheme of the Tenth Schedule and the Rules framed in that behalf, had to decide the application for disqualification made and while deciding the same, had to decide whether in view of para 3 of the Tenth Schedule, the claim of disqualification had to be rejected. We have no doubt that the Speaker had totally misdirected himself in purporting to answer the claim of the 37 MLAs that there has

been a split in the party even while leaving open the question of disqualification raised before him by way of an application that was already pending before him. This failure on the part of the Speaker to decide the application seeking a disqualification cannot be said to be merely in the realm of procedure. It goes against the very constitutional scheme of adjudication contemplated by the Tenth Schedule read in the context of Articles 102 and 191 of the Constitution. It also goes against the Rules framed in that behalf and the procedure that he was expected to follow. It is therefore not possible to accept the argument on behalf of the 37 MLAs that the failure of the Speaker to decide the petition for disqualification at least simultaneously with the petition for recognition of a split filed by them, is a mere procedural irregularity. We have no hesitation in finding that the same is a jurisdictional illegality, an illegality that goes to the root of the so-called decision by the Speaker on the question of split put forward before him. Even within the parameters of judicial review laid down in *Kihoto Hollohan* [MANU/SC/0753/1992 : 1992 Supp (2) SCC 651: AIR 1993 SC 412: (1992) 1 SCR 686] and in *Jagjit Singh* v. *State of Haryana* [MANU/SC/5473/2006 : (2006) 11 SCC 1 : (2006) 13 Scale 335] it has to be found that the decision of the Speaker impugned is liable to be set aside in exercise of the power of judicial review.

20. The Court then adverted to the scope of judicial review being limited as decided in **Kihoto Hollohan** (supra) as follows:

39. On the side of the 37 MLAs, the scope of judicial review being limited was repeatedly stressed to contend that the majority of the High Court had exceeded its jurisdiction. Dealing with the ambit of judicial review of an order of the Speaker under the Tenth Schedule, it was held in *Kihoto Hollohan* [MANU/SC/0753/1992 : 1992 Supp (2) SCC 651 : AIR 1993 SC 412 : (1992) 1 SCR 686]: (SCC p. 706, paras 95-97)

95. In the present case, the power to decide disputed disqualification under para 6(1) is pre-eminently of a judicial complexion.

96. The fiction in para 6(2), indeed, places it in the first Clause of Article 122 or 212, as the case may be. The words 'proceedings in Parliament' or 'proceedings in the legislature of a State' in para 6(2) have their corresponding expression in Articles 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures.

97. That apart, even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of Members Under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House; but only before the Speaker as a specially designated authority. The decision under para 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, no immunity Under Articles 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising power under para 6(1) of the Tenth Schedule.

After referring to the relevant aspects, it was held: (SCC p. 707, para 100)

100. By these well known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under para 6(1) of the Tenth Schedule is a Tribunal.

It was concluded: (SCC p. 710, para 109)

109. In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under para 6, the scope of judicial review Under Articles 136 and 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under para 6 would be confined to jurisdictional errors only viz. infirmities based on violation of constitutional mandate, mala fides, non-compliance with Rules of natural justice and perversity.

The position was reiterated by the Constitution Bench in *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha* [MANU/SC/0241/2007 : (2007) 3 SCC 184: JT (2007) 2 SC 1]. We are of the view that contours of interference have been well drawn by *Kihoto Hollohan* [MANU/SC/0753/1992 : 1992 Supp (2) SCC 651 : AIR 1993 SC 412 : (1992) 1 SCR 686] and what is involved here is only its application.

40. Coming to the case on hand, it is clear that the Speaker, in the original order, left the question of disqualification undecided. Thereby he has failed to exercise the jurisdiction conferred on him by para 6 of the Tenth Schedule. Such a failure to exercise jurisdiction cannot be held to be covered by the shield of para 6 of the Schedule. He has also proceeded to accept the case of a split based merely on a claim in that behalf. He has entered no finding whether a split in the original political party was prima facie proved or not. This action of his, is apparently based on his understanding of the ratio of the decision in *Ravi S. Naik case* [MANU/SC/0366/1994 : 1994 Supp (2) SCC 641 : (1994) 1 SCR 754]. He has misunderstood the ratio therein. Now that we have approved the reasoning and the approach in *Jagjit Singh case* [MANU/SC/5473/2006 : (2006) 11 SCC 1 : (2006) 13 Scale 335] and the ratio therein is clear, it has to be held that the Speaker has committed an error that goes to the root of the matter or an error that is so fundamental, that even under a limited judicial review the order of the Speaker has to be interfered with. We have, therefore, no hesitation in agreeing with the majority of the High Court in quashing the decisions of the Speaker.

41. In view of our conclusions as above, nothing turns on the arguments urged on what were described as significant facts and on the alleged belatedness of the amendment to the writ petition. It is indisputable that in the order that was originally subjected to challenge in the writ petition, the Speaker specifically refrained from deciding the petition seeking disqualification of the 13 MLAs. On our reasoning as above, clearly, there was an error which attracted the jurisdiction of the High Court in exercise of its power of judicial review.

21. Finding that the life of the Assembly was about to end and that if the 13 members were found to be disqualified their continuance in the Assembly even for a day would be illegal and unconstitutional, and that their holding of office as Ministers would also be illegal, the Court stated that it was bound to protect the Constitution and its values, and the principles of democracy, which is a basic feature of the Constitution, and then went on to declare that the writ petition will stand allowed with a declaration that the 13 members who met the Governor on 27.08.2003 stand disqualified from the U.P. Legislative Assembly w.e.f. 27.08.2003 on the ground contained in paragraph 2(1)(a) of the Tenth Schedule.

22. It is clear from a reading of the judgment in **Rajendra Singh Rana** (supra) and, in particular, the underlined portions of paragraphs 40 and 41 that the very question referred by the Two Judge Bench in **S.A. Sampath Kumar** (supra) has clearly been answered stating that a failure to exercise jurisdiction vested in a Speaker cannot be covered by the shield contained in paragraph 6 of the Tenth Schedule, and that when a Speaker refrains from deciding a petition within a reasonable time, there was clearly an error which attracted jurisdiction of the High Court in exercise of the power of judicial review.

23. Indeed, the same result would ensue on a proper reading of **Kihoto Hollohan** (supra). Paragraphs 110 and 111 of the said judgment when read together would make it clear that what the finality Clause in paragraph 6 of the Tenth Schedule protects is the exclusive jurisdiction that vests in the Speaker to decide disqualification petitions so that nothing should come in the way of deciding such petitions. The exception that is made is also of importance in that interlocutory interference with decisions of the Speaker can only be qua interlocutory disqualifications or suspensions, which may have grave, immediate, and irreversible repercussions. Indeed, the Court made it clear that judicial review is not available at a stage prior to the making of a decision by the Speaker either by a way of *quia timet* action or by other interlocutory orders.

24. A *quia timet* action has been described in Black's Law Dictionary as follows:

Quia Timet. Because he fears or apprehends. In equity practice, the technical name of a bill filed by a party who seeks the aid of a court of equity, *because he fears* some future probable injury to his rights or interests, and relief granted must depend on circumstances.

25. The leading judgment referred to insofar as *quia timet* actions are concerned is the judgment in **Fletcher v. Bealey** (1884) 28 Ch. D. 688. In this case, a *quia timet* action was asked for to interdict the tort of nuisance in order to prevent noxious liquid from flowing into a river. Pearson, J. after referring to earlier judgments on *quia timet* action then held at page 698:

I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action.

26. This statement of the law has subsequently been followed by recent English decisions reported as **London Borough of Islington v. Margaret Elliott** MANU/UKWA/0097/2012 : [2012] EWCA Civ. 56 (See paragraph 30) and **Vastint Leeds BV v. Persons Unknown** MANU/UKCH/0240/2018 : [2018] EWHC 2456 (Ch.) in which a *quia timet* injunction was described in the following terms:

26. Gee describes a quia timet injunction in the following terms [Gee, Commercial Injunctions, 6th ed (2016) at [2-035]]:

A quia timet (since he fears) injunction is an injunction granted where no actionable wrong has been committed, to prevent the occurrence of an actionable wrong, or to prevent repetition of an actionable wrong.

The decision in **Fletcher** (supra) was referred to in approval in paragraph 30 of the aforesaid judgment.

27. The decision in **Fletcher** (supra) was also referred to by this Court in **Kuldip Singh v. Subhash Chander Jain** MANU/SC/0206/2000 : (2000) 4 SCC 50 as follows:

6. A *quia timet* action is a bill in equity. It is an action preventive in nature and a specie of precautionary justice intended to prevent apprehended wrong or anticipated mischief and not to undo a wrong or mischief when it has already been done. In such an action the court, if convinced, may interfere by appointment of receiver or by directing security to be furnished or by issuing an injunction or any other remedial process. In *Fletcher* v. *Bealey* [(1885) 28 Ch D 688 : 54 LJ Ch 424 : 52 LT 541], Mr. Justice Pearson explained the law as to actions *quia timet* as follows:

There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action.

28. A reading of the aforesaid decisions, therefore, shows that what was meant to be outside the pale of judicial review in paragraph 110 of **Kihoto Hollohan** (supra) are *quia timet* actions in the sense of injunctions to prevent the Speaker from making a decision on the ground of imminent apprehended danger which will be irreparable in the sense that if the Speaker proceeds to decide that the person be disqualified, he would incur the penalty of forfeiting his membership of the House for a long period. Paragraphs 110 and 111 of **Kihoto Hollohan** (supra) do not, therefore, in any manner, interdict judicial review in aid of the Speaker arriving at a prompt decision as to disqualification under the provisions of the Tenth Schedule. Indeed, the Speaker, in acting as a Tribunal under the Tenth Schedule is bound to decide disqualification petitions within a reasonable period. What is reasonable will depend on the facts of each case, but absent exceptional circumstances for which there is good reason, a period of three months from the date on which the petition is filed is the outer limit within which disqualification petitions filed before the Speaker must be decided if the constitutional objective of disqualifying persons who have infracted the Tenth Schedule is to be adhered to. This period has been fixed keeping in mind the fact that ordinarily the life of the Lok Sabha and the Legislative Assembly of the States is 5 years and the fact that persons who have incurred such disqualification do not deserve to be MPs/MLAs even for a single day, as found in **Rajendra Singh Rana** (supra), if they have infracted the provisions of the Tenth Schedule.

29. In the years that have followed the enactment of the Tenth Schedule in 1985, this Court's experience of decisions made by Speakers generally leads us to believe that the fears of the

minority judgment in **Kihoto Hollohan** (supra) have actually come home to roost. Verma, J. had held:

181. The Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out. The question as to disqualification of a Member has adjudicatory disposition and, therefore, requires the decision to be rendered in consonance with the scheme for adjudication of disputes. Rule of law has in it firmly entrenched, natural justice, of which, Rule against bias is a necessary concomitant; and basic postulates of Rule against bias are: *nemo judex in causa sua* -- 'A Judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased'; and 'it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' This appears to be the underlying principle adopted by the framers of the Constitution in not designating the Speaker as the authority to decide election disputes and questions as to disqualification of members Under Articles 103, 192 and 329 and opting for an independent authority outside the House. The framers of the Constitution had in this manner kept the office of the Speaker away from this controversy. There is nothing unusual in this scheme if we bear in mind that the final authority for removal of a Judge of the Supreme Court and High Court is outside the judiciary in the Parliament Under Article 124(4). On the same principle the authority to decide the question of disqualification of a Member of Legislature is outside the House as envisaged by Articles 103 and 192.

182. In the Tenth Schedule, the Speaker is made not only the sole but the final arbiter of such dispute with no provision for any appeal or revision against the Speaker's decision to any independent outside authority. This departure in the Tenth Schedule is a reverse trend and violates a basic feature of the Constitution since the Speaker cannot be treated as an authority contemplated for being entrusted with this function by the basic postulates of the Constitution, notwithstanding the great dignity attaching to that office with the attribute of impartiality.

30. It is time that Parliament have a rethink on whether disqualification petitions ought to be entrusted to a Speaker as a quasi-judicial authority when such Speaker continues to belong to a particular political party either de jure or de facto. Parliament may seriously consider amending the Constitution to substitute the Speaker of the Lok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification which arise under the Tenth Schedule with a permanent Tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court, or some other outside independent mechanism to ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning of our democracy.

31. It is not possible to accede to Shri Sibal's submission that this Court issue a writ of *quo warranto* quashing the appointment of the Respondent No. 3 as a minister of a cabinet led by a BJP government. Mrs. Madhavi Divan is right in stating that a disqualification under the Tenth Schedule from being an MLA and consequently minister must first be decided by the exclusive authority in this behalf, namely, the Speaker of the Manipur Legislative Assembly. It is also not possible to accede to the argument of Shri Sibal that the disqualification petition be decided by this Court in these appeals given the inaction of the Speaker. It cannot be said that the facts in the present case are similar to the facts in **Rajinder Singh Rana** (supra). In the present case, the life

of the legislative assembly comes to an end only in March, 2022 unlike in **Rajinder Singh Rana** (supra) where, but for this Court deciding the disqualification petition in effect, no relief could have been given to the Petitioner in that case as the life of the legislative assembly was about to come to an end. The only relief that can be given in these appeals is that the Speaker of the Manipur Legislative Assembly be directed to decide the disqualification petitions pending before him within a period of four weeks from the date on which this judgment is intimated to him. In case no decision is forthcoming even after a period of four weeks, it will be open to any party to the proceedings to apply to this Court for further directions/reliefs in the matter.

32. The impugned judgment of the High Court dated 23.07.2019 is set aside. The Civil Appeals arising out of SLP(C) No. 18659 of 2019 and SLP(C) No. 18763 of 2019 are partly allowed and the Civil Appeals arising out of SLP(C) No. 23703 of 2019 and SLP(C) No. 24146 of 2019 are dismissed in terms of this judgment. No order as to costs.

Back to Index

MANU/SC/0753/1992

Neutral Citation: 1991/INSC/287

IN THE SUPREME COURT OF INDIA

Transfer Petition (Civil) No. 40 of 1991 and Writ Petition (Civil) No. 17 of 1991

Decided On: 18.02.1992

Appellants: Kihoto Hollohan **Vs.** Respondent: Zachillhu and Ors.

Hon'ble Judges/Coram:

M.N. Venkatachaliah, L.M. Sharma, J.S. Verma, K. Jayachandra Reddy and S.C. Agrawal, JJ.

Subject: Constitution

Subject: Election

Relevant Section:

Constitution of India - Article 368

Authorities Referred:

Westel Woodbury Willoughby in "Constitutional law of the United States"; "Oliver Wendell Holmes - Free Speech and the Living Constitution" 1991 Edition: New York University Publication

Case Note:

Constitution - validity of amendment - Constitution (52nd Amendment) Act, 1985 - petition challenging insertion of 10th schedule to Constitution - para 7 of 10 Schedule which brings about change in operation of Articles 136, 226 and 227 made without ratification of State Legislature as provided under Article 368 (2) invalid - non observance of such condition precedent does not affect severability of Para 7 from other parts of amendment - 52nd amendment excluding para 7 valid - para 2 of 10th Schedule neither violate democratic rights of elected members nor freedom of speech and freedom of vote and conscience - Para 2 is not violative of Articles 105 and 194 - Speakers/Chairmen under 10th Schedule exercise power of Tribunal to adjudicate rights and obligations of elected members and their decisions amenable to judicial review - judicial review does not cover any stage prior to making decisions by Presiding Officers - interlocutory interference can be made when interlocutory disqualifications or suspension may have grave, immediate and irreversible repercussion

and consequence - concept of statutory finality of decisions of Presiding Officers in Para 6 (2) does not affect right of judicial review under Articles 136, 226 and 227 based on violation of constitutional mandates, mala fides, non-compliance with Rules of natural justice and perversity - deeming provision in Para 6 (2) would attract immunity analogous to that of Articles 122 (1) and 212 (1) as explained in Kesav Singh's case.

ORDER

The Transfer Petition is allowed and the Writ Petition, Rule No. 2421 of 1990 on the file of the High Court of Guwahati is withdrawn to this Court for the purpose of deciding the constitutional issues and of declaring the law on the matter.

In accordance with the majority opinion, the factual controversies raised in the Writ Petition will, however, have to be decided by the High Court Applying the principles declared and laid down by the majority. The Writ Petition is, accordingly remitted to the High Court for such disposal in accordance with law.

M.N. Venkatachaliah, J.

1. In these petitions the constitutional validity of the Tenth Schedule of the Constitution introduced by the Constitution (Fifty-Second Amendment) Act, 1985, is assailed. These two cases were amongst a batch of Writ Petitions, Transfer Petitions, civil Appeals, Special Leave Petitions and other similar and connected matters raising common questions which were all heard together. On 12.11.1991 we made an order pronouncing our findings and conclusions upholding the constitutional validity of the amendment and of the provisions of the Tenth Schedule, except for Paragraph 7 which was declared invalid for want of ratification in terms of and as required by the proviso to Article 368 (2) of the Constitution. In the order dated 12.11.1991 our conclusions were set out and we indicated that the reasons for the conclusions would follow later. The reasons for the conclusions are now set out.

2. This order is made in Transfer Petition No. 40 of 1991 and in Writ Petition No. 17 of 1991. We have not gone into the factual controversies raised in the Writ-Petition before the Writ-Petition before the Guwahati High Court in Rule No. 2421 of 1990 from which Transfer Petition No. 40 of 1991 arises. Indeed, in the order of 12th November, 1991 itself the said Writ Petition was remitted to the High Court for its disposal in accordance with law.

3. Shri F.S. Nariman, Shri Shanti Bhushan, Shri M.C. Bhandare, Shri Kapil Sibal, Shri Sharma and Shri Bhim Singh, learned Counsel addressed arguments in support of the petitions. Learned Attorney-General, Shri Soli J. Sorabjee, Shri R.K. Garg, Shri Santhosh Hegde sought to support the constitutional validity of the amendment. Shri Ram Jethmalani has attacked the validity of the amendment for the same reasons as put forward by Shri Sharma.

4. Before we proceed to record our reasons for the conclusions reached in our order dated 12th November, 1991, on the contentions raised and argued, it is necessary to have a brief look at the provisions of the Tenth Schedule. The Statement of Objects and Reasons appended to the Bill which was adopted as the Constitution (Fifty-Second Amendment) Act, 1985 says:

The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundation of our democracy and the principles which sustain it. With this object, an assurance was given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.

On December 8, 1967, the Lok sabha had passed an unanimous Resolution in terms following:

a high-level Committee consisting of representatives of political parties and constitutional experts be set up immediately by Government to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects and make recommendations in this regard.

The said Committee known as the "Committee on Defections" in its report dated January 7, 1969, inter-alia, observed:

Following the Fourth General Election, in the short period between March 1967 and February, 1968, the Indian political scene was characterised by numerous instances of change of party allegiance by legislators in several States. Compared to roughly 542 cases in the entire period between the First and Fourth General Election, at least 438 defections occurred in these 12 months alone. Among Independents, 157 out of a total of 376 elected joined various parties in this period. That the lure of office played a dominant part in decisions of legislators to defect was obvious from the fact that out of 210 defecting legislators of the States of Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan Uttar Pradesh and West Bengal, 116 were included in the Council of Ministers which they helped to bring into being by defections. The other disturbing features of this phenomenon were: multiple acts of defections by the same persons or set of persons (Haryana affording a conspicuous example); few resignations of the membership of the legislature of explanations by individual defectors, indifference on the part of defectors to political proprieties, constituency preference or public opinion; and the belief held by the people and expressed in the press that corruption and bribery were behind some of these defections.

(Emphasis supplied)

The Committee on Defections recommended that a defector should be debarred for a period of one year or till such time as he resigned his seat and got himself re-elected from appointment to the office of a Minister including Deputy Minister or Speaker or Deputy Speaker, or any post carrying salaries or allowances to be paid from the Consolidated Fund of India or of the State or from the funds of Government Undertakings in public sector in addition to those to which the defector might be entitled as legislator. The Committee on Defections could not however, reach an agreed conclusion in the matter of disqualifying a defector from continuing to be a Member of Parliament/State Legislator.

Keeping in view the recommendations of the committee on Defections, the Constitution (Thirty-Second Amendment) Bill, 1973 was introduced in the Lok Sabha on May 16, 1973. It provided for disqualifying a Member from continuing as a Member of either House of Parliament or the State Legislature on his voluntarily giving up his membership of the political party by which he

was set up as a candidate at such election or of which he became a Member after such election, or on his voting or abstaining from voting in such House contrary to any direction issued by such political party or by any person or authority authorised by it in this behalf without obtaining prior permission of such party, person or authority. The said Bill, however, lapsed on account of dissolution of the House. Thereafter, the Constitution (Forty-eight Amendment) Bill, 1979 was introduced in the Lok Sabha which also contained similar provisions for disqualification on the ground of defection. This Bill also lapsed and it was followed by the Bill which was enacted into the Constitution (Fifty Second Amendment) Act, 1985.

5. This brings to the fore the object underlying the provisions in the Tenth Schedule. The object is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy. The remedy proposed is to disqualify the Member of either House of Parliament or of the State Legislature who is found to have defected from continuing as a Member of the House. The grounds of disqualification are specified in Paragraph 2 of the Tenth Schedule.

Paragraph 2(1) relates to a Member of the House belonging to a political party by which he was set up as a candidate at the election. Under Paragraph 2(1) (a) such a Member would incur disqualification if he voluntarily gives up his membership of such political party. Under Clause (b) he would incur the disqualification if he votes or abstains from voting in the House contrary to "any direction" issued by the political party to which he belongs or by any person or authority authorised by it in this behalf without obtaining, in either case, prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. This sub para would also apply to a nominated member who is a Member of a political party on the date of his nomination as such Member or who joins a political party within six months of his taking oath.

Paragraph 2(2) deals with a Member who has been elected otherwise than as a candidate set up by any political party and would incur the disqualification if he joins any political party after such election. A nominated Member of the House would incur his disqualification under sub para (3) if he joins any political party after the expiry of six months from the date on which he takes his seat.

6. Paragraphs 3 and 4 of the Tenth Schedule, however, exclude the applicability of the provisions for disqualification under para 2 in cases of "split" in the original political party or merger of the original political party with another political party.

These provisions in the Tenth Schedule give recognition to the role of political parties in the political process. A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party. The provisions of Paragraph 2(1) (a) proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves and political party which had set him up as a candidate at the election, then he should give up his Membership of the legislature and go back before the electorate. The same yard stick is applied to a person who is elected as an Independent candidate and wishes to join a political party after the election.

Paragraph 2 (1) (b) deals with a slightly different situation i.e. a variant where dissent becomes defection. If a Member while remaining a Member of the political party which had set him up as a candidate at the election, votes or abstains from voting contrary to "any direction" issued by the political party to which he belongs or by any person or authority authorised by it in this behalf he incurs the disqualification. In other words, it deals with a Member who expresses his dissent from the stand of the political party to which he belongs by voting or abstaining from voting in the House contrary to the direction issued by the political party.

Paragraph 6 of the Tenth Schedule reads:

6 (1) If any question arises as to whether a Member of a House has become subject to disqualification under this Schedule the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such Member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub-Paragraph (1) of this Paragraph in relation to any question as to disqualification of a Member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212.

Paragraph 7 says:

7. Bar of jurisdiction of courts: Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a Member of a House under this Schedule.

7. The challenge to the constitutional validity of the Amendment which introduces the Tenth Schedule is sought to be sustained of many grounds. It is urged that the constitutional Amendment introducing Paragraph 7 of the Tenth Schedule, in terms and in effect, seeks to make a change in Chapter IV of Part V. of the Constitution in that it denudes the jurisdiction of the Supreme Court under Article 136 of the Constitution of India and in Chapter V. of part VI in that it takes away the jurisdiction of the High Courts under Article 226 and that, therefore, the legislative Bill, before presentation to the President for assent, would require to be ratified by the Legislature of not less than one half of the States by resolution to that effect. In view of the admitted position that no such ratification was obtained for the Bill, it is contended, the whole Amending Bill-not merely Paragraph 7- fails and the amendment merely remains an abortive attempt to bring about an amendment. It is further contended that the very concept of disqualification for defection is violative of the fundamental values and principles underlying Parliamentary democracy and violates an elected representative's freedom of speech, right to dissent and freedom of conscience and is, therefore, unconstitutional as destructive of a basic feature of the Indian Constitution. It is also urged that the investiture in the Speaker or the Chairman of the power to adjudicate disputed defections would violate an important incident of another basic feature of the Constitution, viz., Parliamentary democracy. It is contended that an independent, fair and impartial machinery for

resolution of electoral disputes is an essential and important incident of democracy and that the vesting of the power of adjudication in the Speaker or the Chairman-who, in the India Parliamentary system are nominees of political parties and are not obliged to resign their party affiliations after election-is violative of this requirement.

It is alternatively contended that if it is to be held that the amendment does not attract the proviso to Article 368(2), then Paragraph 7 in so far as it takes away the power of judicial review, which, in itself, is one of the basic features of the Constitution is liable to be struck down.

8. There are certain other contentions which, upon a closer examination, raise issues more of construction than constitutionality. For instance, some arguments were expanded on the exact connotations of a "split" as distinct from a "defection" within the meaning of Paragraph 3. Then again, it was urged that under Paragraph 2(b) the expression "any direction" is so wide that even a direction,, which if given effect to and implemented might bring about a result which may itself be obnoxious to and violative of constitutional ideals and values would be a source of disqualification. These are,, indeed, matters of construction as to how,, in the context in which the occasion for the introduction of the Tenth Schedule arose and the high purpose it is intended to serve, the expression "any direction" occurring in Paragraph 2(b) is to be understood. Indeed, in one of the decisions cited before us (Prakash Singh Badal and Ors. v. Union of India and Ors. MANU/PH/0106/1987 : AIR 1987 P&H 263) this aspect has been considered by the High Court. The decision was relied upon before us. We shall examine it presently.

9. Supporting the constitutionality of the Amendment, Respondents urge that the Tenth Schedule creates a non- justiciable constitutional area dealing with certain complex political issues which have no strict adjudicatory disposition. New rights and obligations are created for the first time uno-flatu by the Constitution and the Constitution itself has envisaged a distinct constitutional machinery for the resolution of those disputes. These rights, obligations and remedies, it is urged, which are in their very nature and innate complexities are in political thickets and are not amenable to judicial processes and the Tenth Schedule has merely recognised this complex character of the issues and that the exclusion of this area is constitutionally preserved by imparting a finality to the decisions of the Speaker or the Chairman and by deeming the whole proceedings as proceedings within Parliament or within the House of Legislature of the States envisaged in Articles 122 and 212, respectively, and further by expressly excluding the Courts' jurisdiction under Paragraph 7.

Indeed, in constitutional and legal theory, it is urged,, there is really no ouster of jurisdiction of Courts or of Judicial Review as the subject-matter itself by its inherent character and complexities is not amenable to but outside judicial power and that the ouster of jurisdiction under Paragraph 7 is merely a consequential constitutional recognition of the non-amenability of the subject-matter to the judicial power of the State, the corollary of which is that the Speaker or the Chairman,, as the case may be, exercising powers under Paragraph 6(1) of the Tenth Schedule function not as a statutory Tribunal but as a part of the State's Legislative Department.

It is, therefore, urged that no question of the ouster of jurisdiction of Courts would at all arise inasmuch as in the first place, having regard to the political nature of the issues, the subject-matter is itself not amenable to judicial power. It is urged that the question in the last analyses pertains to the constitution of the House and the Legislature is entitled to deal with it exclusively.

10. It is further urged that Judicial Review - apart from Judicial Review of the legislation as inherent under a written constitution -is merely a branch of administrative law remedies and is by no means a basic feature of the Constitution and that, therefore, Paragraph 7, being a constitutional provision cannot be invalidated on some general doctrine not found in the Constitution itself.

11. On the contentions raised and urged at the hearing the questions that fall for consideration are the following:

(A) The Constitution (Fifty-Second Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule is destructive of the basic structure of the constitution as it is violative of the fundamental principles of Parliamentary democracy, a basic feature of the Indian constitutionalism and is destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions of the Tenth Schedule seek to penalise and disqualify elected representatives for the exercise of these rights and freedoms which are essential to the sustenance of the system of Parliamentary democracy.

(B) Having regard to the legislative history and evolution of the principles underlying the Tenth Schedule, Paragraph 7 thereof in terms and in effect, brings about a change in the operation and effect of Article 136, 226 and 227 of the Constitution of India and, therefore, the Bill introducing the amendment attracts the proviso to Article 368(2) of the constitution and would require to be ratified by the legislative of the States before the Bill is presented for Presidential assent.

(C) In view of the admitted non-compliance with proviso to Article 368(2) not only Paragraph 7 of the Tenth Schedule, but also the entire Bill resulting in the Constitution (Fifty-Second Amendment) Act, 1985, stands vitiated and the purported amendment is abortive and does not in law bring about a valid amendment.

Or whether, the effect of such non-compliance invalidates Paragraph 7 alone and the other provisions which, by themselves, do not attract the proviso do not become invalid.

(D) That even if the effect of non-ratification by the legislature of the States is to invalidate Paragraph 7 alone, the whole of the Tenth Schedule fails for non- severability. Doctrine of severability, as applied to ordinary statutes to promote their constitutionality, is inapplicable to constitutional Amendments.

Even otherwise, having regard to legislative intent and scheme of the Tenth Schedule, the other provisions of the Tenth Schedule, after the severance and excision of Paragraph 7, become truncated, and unworkable and cannot stand and operate independently. The Legislature would not have enacted the Tenth Schedule without Paragraph 7 which forms its heart and core.

(E) That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts the immunity under Articles 122 and 212. The Speaker and the Chairman in relation to the exercise of the powers under the Tenth Schedule shall not be subjected to the jurisdiction of any Court.

The Tenth Schedule seeks to and does create a new and non-justiciable area of rights, obligations and remedies to be resolved in the exclusive manner envisaged by the Constitution and is not amenable to, but constitutionally immune from curial adjudicative processes.

(F) That even if Paragraph 7 erecting a bar on the jurisdiction of Courts is held inoperative, the Courts' jurisdiction is, in any event, barred as Paragraph 6(1) which imparts a constitutional `finality' to the decision of the Speaker or the Chairman, as the case may be, and that such concept of `finality' bars examination of the matter by the Courts.

(G) The concept of free and fair elections as a necessary concomitant and attribute of democracy which is a basic feature includes an independent impartial machinery for the adjudication of the electoral disputes. The Speaker and the Chairman do not satisfy these incidents of an independent adjudicatory machinery.

The investiture of the determinative and adjudicative jurisdiction in the Speaker or the Chairman, as the case may be, would, by itself, vitiate the provision on the ground of reasonable likelihood of bias and lack of impartiality and therefore denies the imperative of an independent adjudicatory machinery. The Speaker and Chairman are elected and hold office on the support of the majority party and are not required to resign their Membership of the political party after their election to the office of the Speaker or Chairman.

(H) That even if Paragraph 7 of the Tenth Schedule is held not to bring about a change or affect Articles 136, 226 and 227 of the Constitution, the amendment is unconstitutional as it erodes and destroys judicial review which is one of the basic features of the constitution.

12. Re: Contention(A):

(The Tenth Schedule is part of the constitution and attracts the same cannons of construction as are applicable to the expounding of the fundamental law. One constitutional power is necessarily conditioned by the others as the Constitution is one "coherent document". Learned Counsel for the Petitioners accordingly say that Tenth Schedule should be read subject to the basic features of the Constitution. The Tenth Schedule and certain essential incidents of democracy, it is urged, cannot co- exist.

In expounding the processes of the fundamental law, the Constitution must be treated as a logical-whole. Westel Woodbury Willoughby in the "Constitutional Law of the United States" states:

The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore,, logically proper, and indeed imperative, to construe one part in the light of the provisions of the other parts.

[2nd Edn. Vol.1 page 65]

A constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances - a distinction which differentiates a

statue from a Charter under which all statutes are made. Cooley on "Constitutional Limitations" says:

Upon the adoption of an amendment to a constitution, the amendment becomes a part thereof; as much so as if it had been originally incorporated in the Constitution; and it is to be construed accordingly.

[8th Edn. Vol. 1 page 129]

13. In considering the validity of a constitutional amendment the changing and the changed circumstances that compelled the amendment are important criteria. The observations of the U.S. Supreme Court in Maxwell v. Dow (44 lawyer's Edition 597 at page 605) are worthy of note:

...to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen and then to construe it,, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted....

The report of the Committee on Defections took note of the unprincipled and unethical defections induced by considerations of personal gains said:

...What was most heartening was the feeling of deep concern over these unhealthy developments in national life on the part of the leaders of political parties themselves. Parliament mirrored this widespread concern....

[page 1]

14. It was strenuously contended by Shri Ram Jethmalani and Shri Sharma that the provisions of the Tenth Schedule constitute a flagrant violation of those fundamental principles and values which are basic to the sustenance of the very system of Parliamentary democracy. The Tenth Schedule, it is urged, negates those very foundational assumptions of Parliamentary democracy; of freedom of speech; of the right to dissent and of the freedom of conscience. It is urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the disease itself, are adopted. The Tenth Schedule, they say, seeks to throw away the baby with the bath-water. Learned Counsel argue that "crossing the floor", as it has come to be called, mirrors the meanderings of a troubled conscience on issues of political morality and to punish an elected representative for what really amounts to an expression of conscience negates the very democratic principles which the Tenth Schedule is supposed to preserve and sustain. Learned Counsel referred to the famous speech to the Electors of Bristol, 1774, where Edmund Burke reportedly said:

It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions to theirs -and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his

enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living.... Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.

[see: Parliament Functions, Practice & Procedures by JAG Griffith and Michael Ryle 1989 Edn. page 70]

15. Shri Jethmalani and Shri sharma also relied upon certain observations of Lord Shaw in Amalgamated Society or Railway Servants v. Osborne [1910 A.C. 87] to contend that a provision which seeks to attach a liability of disqualification of an elected Member for freely expressing his views on matters of conscience, faith and political belief are indeed restraints on the freedom of speech - restraints opposed to public policy. In that case a registered trade union framed a rule enabling it to levy contributions on the Members to support its efforts to obtain Parliamentary representation by setting up candidates at elections. It also framed a rule requiring all such candidates to sign and accept the conditions of the Labour Party and be subject to its whip. The observations in the case relied upon by Learned Counsel are those of Lord Shaw of Dunfermline who observed:

Take the testing instance: should his view as to right and wrong on a public issue as to the true line of service to the realm, as to the real interests of the constituency which has elected him, or even of the society which pays him, differ from the decision of the parliamentary party and the maintenance by it of its policy, he has come under a contract to place his vote and action into subjection not to his own convictions, but to their decisions. My Lords, I do not think that such a subjection is compatible either with the spirit of our parliamentary constitution or with that independence and freedom which have hither-to been held to lie at the basis of representative government in the United Kingdom.

[page 111]

For the people having reserved to themselves the choice of their representatives, as the fence to their properties, could do it for no other end but that they might always be freely chosen, and so chosen freely act and advise, as the necessity of the commonwealth and the public good should upon examination and mature debate be judged to require....

[page 113]

Still further, in regard to the Members of Parliament himself, he too is to be free; he is not to be the paid mandatory of any man, or organization of men, nor is he entitled to bind himself to subordinate his opinions on public questions to others, for wages, or at the peril of pecuniary loss; and any contract of this character would not be recognized by a Court of law, either for its enforcement or in respect of its breach...

[page 115]

It is relevant to observe here that the rule impugned in that case was struck down by the Court of Appeal - whose decision was upheld by the House of Lords - on grounds of the Society's

competence to make the rule. It was held that the rule was beyond its powers. Lord Shaw, however, was of the view that the impugned rule was opposed to those principles of public policy essential to the working of a representative government. The view expressed by Lord Shaw was not the decision of the House of Lords in the case.

But, the real question is whether under the Indian constitutional scheme is there any immunity from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements?

16. The points raised in the petitions are, indeed, far-reaching and of no small importance - invoking the `sense of relevance of constitutionally stated principles to unfamiliar settings'. On the one hand there is the real and imminent threat to the very fabric of Indian democracy posed by certain levels of political behavior conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. there is the legislative determination through experimental constitutional processes to combat that evil.

On the other hand, there are, as in all political and economic experimentations, certain side-effects and fall- out which might affect and hurt even honest dissenters and conscientious objectors. These are the usual plus and minus of all areas of experimental legislation. In these areas the distinction between what is constitutionally permissible and what is outside it is marked by a `hazy gray-line' and it is the Court's duty to identify, " darken and deepen" the demarcating line of constitutionality --- a task in which some element of Judges' own perceptions of the constitutional ideals inevitably participate. There is no single litmus test of constitutionality. Any suggested sure decisive test, might after all furnish a "transitory delusion of certitude" where the "complexities of the strands in the web of constitutionality which the Judge must alone disentangle" do not lend themselves to easy and sure formulations one way or the other. It is here that it becomes difficult to refute the inevitable legislative element in all constitutional adjudications.

17. All distinctions of law - even Constitutional law - are, in the ultimate analyses, "matters of degree". At what line the `white' fades into the `black' is essentially a legislatively perceived demarcation.

In his work "Oliver Wendell Holmes - Free Speech and the Living Constitution" (1991 Edition: New York University Publication) Pohlman says:

All distinctions of law, as Holmes never tired of saying, were therefore "matters of degree." Even in the case of constitutional adjudication, in which the issue was whether a particular exercise of power was within or without the legislature's authority, the judge's decision "will depend on a judgment or intuition more subtle than any articulate major premise." As the particular exertion of legislative power approached the hazy gray line separating individual rights from legislative powers, the judge's Assessment of constitutionality became a subtle value judgment. The judge's decision was therefore not deductive, formal, or conceptual in any sense.

[page 217]

[Emphasis supplied]

Justice Holmes himself had said:

Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other.

[Emphasis supplied]

[See: "Theory of Torts" American Law Review 7 (1873)

The argument that the constitutional remedies against the immorality and unprincipled chameleon-like changes of political hues in pursuit of power and pelf suffer from something violative of some basic feature of the Constitution, perhaps, ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The onslaughts on their sensibilities by the incessant unethical political defections did not dull their perception of this phenomenon as a canker eating into the vitals of those values that make democracy a living and worth-while faith. This is prominently an area where Judges should defer to legislative perception of and reaction to the pervasive dangers of unprincipled defections to protect the community. "Legislation may begin where an evil begins". Referring to the judicial philosophy of Justice Holmes in such areas, Pohlman again says:

A number of Holmes's famous aphorisms point in the direction that judges should defer when the legislature reflected the pervasive and predominant values and interests of the community. He had, for example, no "practical" criterion to go on except "what the crowd wanted." He suggested, in a humorous vein that his epitaph....No judge ought to interpret a provision of the Constitution in a way that would prevent the American people from doing what it really wanted to do. If the general consensus was that a certain condition was an "evil" that ought to be corrected by certain means, then the government had the power to do it: "Legislation may begin where an evil begins"; "Constitutional law like other mortal contrivances has to take some chances." "Some play must be allowed to the joints if the machine is to work." All of these rhetorical flourishes suggest that Holmes deferred to the legislature if and when he thought it accurately mirrored the abiding beliefs, interests, and values of the American public.

(Emphasis supplied)

[See: Justice Oliver Wendell Holmes -Free Speech and the Living Constitution by H.L. Pohlman 1991 Edn. page 233]

18. Shri Sharma contends that the rights and immunities under Article 105(2) of the Constitution which according to him are placed by judicial decisions even higher than the fundamental-right in Article 19(1)(a), have violated the Tenth Schedule. There are at least two objections to the acceptability of this contention. The first is that the Tenth Schedule does not impinge upon the rights or immunities under Article 105(2). Article 105(2) of the Constitution provides:

105. Powers, privileges, etc., of the Houses of Parliament and of the Members and committees thereof.- (1).... (2) No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

The freedom of speech of a Member is not an absolute freedom. That apart, the provisions of the Tenth Schedule do not purport to make a Member of a House liable in any `Court' for anything said or any vote given by him in Parliament. It is difficult to conceive how Article 105(2) is a source of immunity from the consequences of unprincipled floor-crossing.

Secondly, on the nature and character of electoral rights this Court in Jyoti Basu and Ors. v. Debi Ghosal and 3 S.C.R. 318 observed:

A right to elect, fundamental though it is to a democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation.

[Page 326]

Democracy is a basic feature of the constitution. Whether any particular brand or system of Government by itself, has this attribute of a basic feature, as lone as the essential characteristics that entitle a system of government to be called democratic are otherwise satisfied is not necessary to be gone into. Election conducted at regular, prescribed intervals is essential to the democratic system envisaged in the constitution. So is the need to protect and sustain the purity of the electoral process. That may take within it the quality, efficacy and adequacy of the machinery for resolution of electoral disputes. From that it does not necessarily follow that the rights and immunities under sub-article (2) of Article 105 of the Constitution, are elevated into fundamental rights and that the Tenth Schedule would have to be struck down for its inconsistency with Article 105 (2) as urged by Shri Sharma.

19. Parliamentary democracy envisages that matters involving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion and persuasion are, therefor, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not unoften the view expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of

view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines.

But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on "Parliament, Functions, Practice & Procedure" (1989 Edn. page 119) say:

Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate. It is natural for Members to accept the opinion of their Leaders and Spokesmen on the wide variety of matters on which those Members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy.

(Emphasis supplied)

Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to "any directions" Issued by the political party. The provision, however, recognises two exceptions: one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "Any Direction" in Clause (b) of Paragraph 2(1) whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately.

20. The working of the modern Parliamentary democracy is complex. The area of the inter-se relationship between the electoral constituencies and their elected representatives has many complex features and overtones. The citizen as the electorate is said to be the political sovereign. As long as regular general elections occur, the electorate remains the arbiter of the ultimate composition of the representative legislative body to which the Government of the day is responsible. There are, of course,, larger issues of theoretical and philosophical objections to the

legitimacy of a representative Government which might achieve a majority of the seats but obtains only minority of the electoral votes. It is said that even in England this has been the phenomenon in every general elections in this century except the four in the years 1900, 1918, 1931 and 1935.

But in the area of the inter-relationship between the constituency and its elected representative, it is the avowed endeavour of the latter to requite the expectations of his voters. Occasionally, this might conflict with his political obligations to the political party sponsoring him which expects--and exacts in its own way - loyalty to it. This duality of capacity and functions are referred to by a learned author thus:

The functions of Members are of two kinds and flow from the working of representative government. When a voter at a general election, in that hiatus between parliaments, puts his cross against the name of the candidate he is [most often] consciously performing two functions: seeking to return a particular person to the house of commons as Member for that constituency; and seeking to return to power as the government of the country a group of individuals of the same party as that particular person. The voter votes for a representative and for a government. He may know that the candidate he votes has little chance of being elected....

When a candidate is elected as a Member of the House of Commons, he reflects those two functions of the voter. Whatever other part he may play, he will be a constituency M.P. As such, his job will be to help his constituents as individuals in their dealings with the departments of State. He must listen to their grievances and often seek to persuade those in authority to provide remedies. He must have no regard to the political leanings of his constituents for the represents those who voted against him or who did not vote at all as much as those who voted for him. Even if he strongly disagrees with their complaint he may still seek to represent it, though the degree of enthusiasm with which he does so is likely to be less great.

[See: Parliament - Function. Practice and Procedures by JAG Griffith and Ryle - 1989 Edn. page 69]

So far as his own personal views on freedom of conscience are concerned,, there may be exceptional occasions when the elected representative finds himself compelled to consider more closely how he should act. Referring to these dilemmas the authors say:

...The first is that he may feel that the policy of his party whether it is in office or in opposition, on a particular matter is not one of which he approves. He may think this because of his personal opinions or because of its special consequences for his constituents or outside interests or because it reflects a general position within the party with which he cannot agree. On many occasions, he may support the party despite his disapproval. But occasionally the strength of his feeling will be such that he is obliged to express his opposition either by speaking or by abstaining on a vote or even by voting with the other side. Such opposition will not pass unnoticed and, unless the matter is clearly one of conscience, he will not be popular with the party whips.

The second complication is caused by a special aspect of parliamentary conduct which not frequently transcends party lines. Members, who are neither Ministers nor front-bench Opposition spokesmen, do regard as an important part of their function the general scrutiny of Governmental

activity. This is particularly the role of select committees which have, as we shall see, gained new prominence since 1979. No doubt, it is superficially paradoxical to see Members on the Government side of the House joining in detailed criticism of the administration and yet voting to maintain that Government in office. But as one prominent critic of government has said, there is nothing inherently contradictory in a Member sustaining the Executive in its power or helping it to overcome opposition at the same time as scrutinising the work of the executive in order both to improve it and to see that power is being exercised in a proper and legitimate fashion.

[page 69 and 70]

Speaking of the claims of the political party on its elected Member Rodney Brazier says:

Once returned to the House of Commons the Member's party expects him to be loyal. This is not entirely unfair or improper, for it is the price of the party's label which secured his election. But the question is whether the balance of a Member's obligations has tilted too far in favour of the requirements of party. The nonsense that a Whip-- even a three-line whip--is no more than a summons to attend the House, and that, once there, the Member is completely free to speak and vote as he thinks fit, was still being put about, by the Parliamentary Private Secretary to the Prime Minister, as recently as 1986. No one can honestly believe that. Failure to vote with his party on a three-line whip without permission invites a party reaction. This will range (depending on the circumstances and whether the offence is repeated) from a quiet word from a Whip and appeals to future loyalty, to a ticking- off or a formal reprimand (perhaps from the Chief Whip himself), to any one of a number of threats. The armoury of intimidation includes the menaces that the Member will never get ministerial office, or go on overseas trips sponsored by the party, or be nominated by his party for Commons Committee Memberships, or that he might be deprived of his party's whip in the House, or that he might be reported to his constituency which might wish to consider his behaviour when reselection comes round again.....Does the Member not enjoy the Parliamentary privilege of freedom of speech? How can his speech be free in the face of such party threats? The answer to the inquiring citizen is that the whip system is part of the conventionally established machinery of political organisation in the house, and has been ruled not to infringe a Member's parliamentary privilege in any way. The political parties are only too aware of utility of such a system,, and would fight in the last ditch to keep it.

[See; Constitutional Reform - Reshaping the British Political System by Rodney Brazier, 1991 Edn. pages 48 and 49]

The learned author, referring to cases in which an elected Member is seriously unrepresentative of the general constituency opinion, or whose personal behaviour falls below standards acceptable to his constituents commends that what is needed is some additional device to ensure that a Member pays heed to constituents' views. Brazier speaks of the efficacy of device where the constituency can recall its representative. Brazier says:

What sort of conduct might attract the operation of the recall power? First, a Member might have misused his Membership of the House, for example to further his personal financial interests in a manner offensive to his constituents. They might consider that the action taken against him by the house (or, indeed, lack of action) was inadequate.....Thirdly, the use of a recall power might be

particularly apt when a member changed his party but declined to resign his seats and fight an immediate by-election. It is not unreasonable to expect a Member who crosses the floor of the House, or who joins a new party, to resubmit himself quickly to the electors who had returned him in different colours of course, in all those three areas of controversial conduct the ordinary process of reselection might well result in the Member being dropped as his party's candidate (and obviously would definitely have that result in the third case). But that could only occur when the time for reselection came; and in any event the constituency would still have the Member representing them until the next general election. A cleaner and more timely parting of the ways would be preferable. Sometimes a suspended sentence does not meet the case.

[page 52 and 53]

Indeed, in a sense an anti-defection law is a statutory variant of its moral principle and justification underlying the power of recall. What might justify a provision for recall would justify a provision for disqualification for defection. Unprincipled defection is a political and social evil.

It is perceived as such by the legislature. People, apparently, have grown distrustful of the emotive political exultations that such floor-crossings belong to the sacred area of freedom of conscience, or of the right to dissent or of intellectual freedom. The anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct-- whose awkward erosion and grotesque manifestations have been the base of the times - above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation. We should, we think, defer to this legislative wisdom and perception. The choices in constitutional adjudications quite clearly indicate the need for such deference. "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are adopted to that end..." are constitutional. [See Kazurbach v. Morgan: 384 US 641].

21. It was then urged by Shri Jethmalani that the distinction between the conception of "defection" and "split" in the Tenth Schedule is so thin and artificial that the differences on which the distinction rests are indeed an outrageous defiance of logic. Shri Jethmalani urged that if floor-crossing by one Member is an evil, then a collective perpetration of it by 1/3rd of the elected Members of a party is no better and should be regarded as an aggravated evil both logically and from the part of its aggravated consequences. But the Tenth Schedule, says Shri Jethmalani, employs its own inverse ratiocination and perverse logic to declare that where such evil is perpetrated collectively by an artificially classified group of not less than 1/3rd Members of that political party that would not be a "defection" but a permissible "split" or "merger".

This exercise to so hold-up the provision as such crass imperfection is performed by Shri Jethmalani with his wonted forensic skill. But we are afraid what was so attractively articulated, on closer examination, is, perhaps, more attractive than sound. The underlying premise in declaring an individual act of defection as forbidden is that lure of office or money could be presumed to have prevailed. Legislature has made this presumption on its own perception and Assessment of the extant standards of political proprieties and morality. At the same time legislature envisaged the need to provide for such "floor-crossing" on the basis of honest dissent. That a particular course of conduct commended itself to a number of elected representatives might, in itself, lend credence and reassurance to a presumption of bonafide. The presumptive impropriety of motives

progressively weakens according as the numbers sharing the action and there is nothing capricious and arbitrary in this legislative perception of the distinction between `defection' and `split'.

Where is the line to be drawn? What number can be said to generate a presumption of bonafides ? Here again the Courts have nothing else to go by except the legislative wisdom and, again, as Justice Holmes said, the Court has no practical criterion to go by except "what the crowd wanted". We find no substance in the attack on the statutory distinction between "defection" and "split".

Accordingly we hold:

that the Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended.

The Provisions of Paragraph 2 do not violate any rights or freedom under Articles 105 and 194 of the Constitution.

The provisions are salutary and are intended to strengthen the fabric of Indian Parliamentary democracy by curbing unprincipled and unethical political defections.

The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in they affect the democratic rights of elected Members and, therefore, of the principles of Parliamentary democracy is unsound and is rejected.

22. Re: Contention (B):

The thrust of the point is that Paragraph 7 brings about a change in the provisions of chapter IV of Part V. and chapter V. of Part VI of the Constitution and that, therefore, the amending Bill falls within proviso to Article 368 (2). We might, at the outset, notice Shri Sibal's submission on a point of construction of Paragraph 7. Shri Sibal urged that Paragraph 7, properly construed, does not seek to oust the jurisdiction of courts under Articles, 136, 226 and 227 but merely prevents an interlocutory intervention or a quia-timet action. He urged that the words "in respect of any matters connected with the disqualification of a Member" seek to bar jurisdiction only till the matter is finally decided by the speaker or Chairman, as the case may be, and does not extend beyond that stage and that in dealing with the dimensions of exclusion of the exercise of judicial power the broad considerations are that provisions which seek to exclude Courts' jurisdiction shall be strictly construed. Any construction which results in denying the Courts' it, it is urged, not favoured. Shri Sibhal relied upon the following observations of this Court in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and Ors. v. Union of India MANU/SC/0050/1970 : [1971] 1 SCC 85:

...The proper forum under our Constitution for determining a legal dispute is the Court which is by training and experience, assisted by properly qualified advocates, fitted to perform that task. A provision which purports to exclude the jurisdiction of the Courts in certain matters and to deprive the aggrieved party of the normal remedy will be strictly construed, for it is a principle not to be whittled down that an aggrieved party will not, unless the jurisdiction of the Courts is by clear

enactment or necessary implication barred, be denied his right to seek recourse to the Courts for determination of his rights....

The Court will avoid imputing to the Legislature an intention to enact a provision which flouts notions of justice and norms of fairplay, unless a contrary intention is manifest from words plain and unambiguous. A provision in a statute will not be construed to defeat its manifest purpose and general values which animate its structure. In an avowedly democratic polity, statutory provisions ensuring the security of fundamental human rights including the right to property will, unless the contrary mandate be precise and unqualified, be construed liberally so as to uphold the right. These rules apply to the interpretation of constitutional and statutory provisions alike.

[page 94-95]

It is true that the provision which seeks to exclude the jurisdiction of Courts is strictly construed. See also, Mask and Company v. Secretary of State MANU/PR/0022/1940 : AIR 1940 P.C. 105.

But the rules of construction are attracted where two or more reasonably possible constructions are open on the language of the statute. But, here both on the language of paragraph 7 and having regard to the legislative evolution of the provision, the legislative intent is plain and manifest. The words "no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member" are of wide import and leave no constructional options. This is reinforced by the legislative history of the anti-defection law. The deliberate and purposed presence of Paragraph 7 is clear from the history of the previous proposed legislations on the subject. A comparison of the provisions of the Constitution (Thirty-second Amendment) Bill, 1973 and the Constitution (Forty-eight Amendment) Bill, 1978, (both of which had lapsed) on the one hand and the Constitution (52nd Amendment) Bill, 1985, would bring-out the avowed and deliberate intent of Paragraph 7 in the Tenth Schedule. The previous Constitution (32nd and 48th Amendment) Bills contained similar provisions for disqualification on grounds of defections, but these Bills did not contain any clause ousting the jurisdiction of the court. Determination of disputed disqualifications was left to the Election Commission as in the case of other disqualifications under Article 102 and 103 in the case of members of Parliament and Articles 191 and 192 in the case of Members of Legislature of the States. The Constitution (Fifty-second Amendment) Bill for the first time envisaged the investiture of the power to decide disputes on the speaker or the Chairman. The purpose of the enactment of Paragraph 7, as the debates in the House indicate, was to bar the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution of India, Shri Sibal's suggested contention would go against all these over-whelming interpretative criteria apart from its unacceptability on the express language of paragraph 7.

23. But it was urged that no question of change in Articles 136, 226 and 227 of the Constitution within the meaning of clause (b) of the proviso to Article 368(2) arises at all in view of the fact that the area of these rights and obligations being constitutionally rendered non- justiciable, there is no judicial review under Articles 136, 226 and 227 at all in the first instance so as to admit of any idea of its exclusion. Reliance was placed on the decisions of this Court in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 : [1952] SCR 89 and Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965] 1 SCR 933.

24. In Sankari Prasad's case, the question was whether the Amendment introducing Articles 31A and 31B in the Constitution required ratification under the said proviso. Repelling this contention it was observed:

It will be seen that these articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of certain kind of property from the operation of Articles 13 read with other relevant articles in Part III, while Article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs "for the enforcement of any of the rights conferred by Part III" or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, no because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases. [1982 SCR 89 at 108]

In Sajjan Singh's case, a similar contention was raised against the validity of the Constitution (17th Amendment) Act, 1964 by which Article 31A was again amended and 44 statutes was whether the amendment required ratification under the proviso the Article 368. This Court noticed the question thus:

The question which calls for our decision is: what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected?

[P. 940]

Negativing the challenge to the amendment on the ground of nonratification, it was held:

... Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfillment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by Article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained....

[P.944]

The propositions that fell for consideration is Sankari Prasad Singh's and Sajjan Singh's cases are indeed different. There the jurisdiction and power of the Courts under Articles 136 and 226 were not sought to be taken away nor was there any change brought about in those provisions either "in terms or in effect", since the very rights which could be adjudicated under and enforced by the

Courts were themselves taken away by the Constitution. The result was that there was no area for the jurisdiction of the Courts to operate upon. Matters are entirely different in the context of paragraph 7. Indeed the aforesaid cases, by necessary implication support the point urged for the Petitioners. The changes in Chapter IV of Part V. and Chapter V of Part VI envisaged by the proviso need not be direct. The change could be either "in terms of or in effect". It is not necessary to change the language of Articles 136 and 226 of the Constitution to attract the proviso. If in effect these Articles are rendered ineffective and made inapplicable where these articles could otherwise have been invoked or would, but for Paragraph 7, have operated there is `in effect' a change in those provisions attracting the proviso. Indeed this position was recognised in Sajjan Singh's case where it was observed:

If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise.

[P.944]

In the present cases, though the amendment does not bring in any change directly in the language of Article 136, 226 and 227 of the Constitution, however, in effect paragraph 7 curtails the operation of those Articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Article 136, 226 and 227 within the meaning of Clause (b) of the proviso to Article 368(2). Paragraph 7, therefore, attracts the proviso and ratification was necessary.

Accordingly, on Point B, we hold:

That having regard to the background and evolution of the principles underlying the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the constitution in terms and in effect bring about a change in the operation and effect to Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-Article (2) of Article 368 of the Constitution of India.

25. Re: Contentions `C' and `D':

The criterion for determining the validity of a law is the competence of law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on mode of exercise of the power. Though the amending power in a constitution is in the nature of a constituent power and differs in content from the Legislative power, the limitations imposed on the constituent power my be substantive as well as procedural. Substantive limitations are those which restrict the field of exercise of the amending power and exclude some areas from its ambit. Procedural limitations are those which impose restrictions with regard to the mode of the exercise of the amending power. Both these limitations, however, touch and affect the constituent power itself, disregard of which invalidates its exercise.

26. The Constitution provides for amendment in Articles 4, 169, 368, paragraph 7 of Fifth Schedule and paragraph 21 of Sixth Schedule. Article 4 makes provisions for amendment of the First and

the Fourth Schedules, Article 169 provides for amendment in the provision of the Constitution which may be necessary for abolition or creation of Legislative Councils in States, paragraph 7 of the Fifth Schedule provides for amendment of the Fifth Schedule and paragraph 21 of Sixth Schedule provides for amendment of the Sixth Schedule. All these provisions prescribe that the said amendments can be made by a law made by Parliament which can be passed like any other law by a simple majority in the House of Parliament. Article 368 confers the power to amend the rest of the provisions of the Constitution. In sub- Article (2) of Article 368, a special majority - two-thirds of the members of each House of Parliament present and voting and majority of total membership of such House - is required to effectuate the amendments. The proviso to sub- article (2) of Article 368 imposes a further requirement that if any change in the provisions set out in clauses (a) to (e) of the proviso, is intended it would then be necessary that the amendment be ratified by the legislature of not less than one-half of the States.

Although there is no specific enumerated substantive limitation on the power in Article 368, but as arising from very limitation in the word `amend', a substantive limitation is inherent on the amending power so that the amendment does not alter the basic structure or destroy the basic features of the Constitution. The amending power under Article 368 is subject to the substantive limitation in that the basic structure cannot be altered or the basic features of the Constitution destroyed. The limitation requiring a special majority is a procedural one. Both these limitations impose a fetter on the competence of Parliament to amend the Constitution and any amendment made in disregard of these limitations would go beyond the amending power.

27. While examining the constitutional validity of laws the principle that is applied is that if it is possible to construe a statute so that its validity can be sustained against a constitutional attack it should be so construed and that when part of a statute is valid and part is void, the valid part must be separated from the invalid part. This is done by applying the doctrine of severability. The rationale of this doctrine has been explained by Cooley in the following words;

It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional.

[Cooley's Constitutional Limitations; 8th Edn. Vol. 1, p. 359-360]

In R.M.D. Chamarbaugwalla v. Union of India MANU/SC/0020/1957 : [1957] SCR 930, this Court has observed:

The question whether a statute, which is void in part is to be treated as void in to, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds: It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, Sections 91 and 92 of the Canadian Constitution, and Section 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act. [P.940]
The doctrine of severability has been applied by this Court in cases of challenge to the validity of an amendment on the ground of disregard of the substantive limitations on the amending power, namely, alteration of the basic structure. But only the offending part of the amendment which had the effect of altering the basic structure was struck down while the rest of the amendment was unheld, See : Shri Kesavananda Bharti Sripadagalavaru v. State of Kerala MANU/SC/0516/1972 : [1973] Supp. SCR 1; Minerva Mills Ltd. and Ors. v. Union of India and Ors. MANU/SC/0075/1980 : [1981] 1 SCR 206; P. Sambhamurthy and Ors. etc. v. State of Andhra Pradesh and Anr. : [1987] 1 SCR 879.

28. Is there anything in the procedural limitations imposed by sub- Article (2) of Article 368 which excludes the doctrine of severability in respect of a law which violates the said limitations? Such a violation may arise when there is a composite Bill or what is in statutory context or jargon called a `Rag-Bag' measure seeking amendments to several statutes under one amending measure which seeks to amend various provisions of the Constitution some of which may attract Clauses (a) to (e) of the proviso to Article 368(2) and the Bill, though passed by the requisite majority in both the Houses of Parliament has received the assent of the President without it being sent to States for ratification or having been so sent fails to receive such ratification from not less than half the States before the Bill is presented for assent. Such an Amendment Act is within the competence of Parliament insofar as it relates to provisions other than those mentioned in clauses (a) to (e) of proviso to Article 368(2) but in respect of the amendments introduced in provisions referred to in clauses (a) to (e) of proviso to Article 368(2), Parliament alone is not competent to make such amendments on account of some constitutionally recognised federal principle being invoked. If the doctrine of severability can be applied it can be upheld as valid in respect of the amendments within the competence of Parliament and only the amendments which Parliament alone was not competent to make could be declared invalid.

29. Is there anything compelling in the proviso to Article 368(2) requiring it to be construed as excluding the doctrine of severability to such an amendment? It is settled rule of statutory construction that "the proper function of a proviso is to except and deal with a case which could otherwise fall within the general language of the main enactment, and its effect is confined to that case" and that where "the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms". [See: Madras and Southern Mahratta railway company v. Bezwada Municipality (1944) 71 I.A. 133 at P. 122; Commissioner of Income Tax, Mysore v. Indo-Mercantile Bank Ltd. MANU/SC/0070/1959 : [1959] Supp. 2 SCR 256at p. 266.

The proviso to Article 368(2) appears to have been introduced with a view to giving effect to the federal principle. In the matter of amendment of provisions specified in Clauses (a) to (e) relating to legislative and executive powers of the States vis-à-vis the Union, the Judiciary, the election of the President and the amending power itself, which have a bearing on the States, the proviso imposes an additional requirement of ratification of the amendment which seeks to effect a change in those provisions before the Bill is presented for the assent of the President. It is salutary that the scope of the proviso is confined to the limits prescribed therein and is not construed so as to take away the power in the main part of Article 368 (2). An amendment which otherwise fulfills the requirements of Article 368(2) and is outside the specified cases which require ratification cannot be denied legitimacy on the ground alone of the company it keeps. The main part of Article 368(2) directs that when a Bill which has been passed by the requisite special majority by both the Houses has received the assent of the President "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso cannot have the effect of interdicting this constitutional declaration and mandate to mean that in a case where the proviso has not been complied-even the amendments which do not fall within the ambit of the proviso also become abortive. The words "the amendment shall also require to be ratified by the legislature" indicate that what is required to be ratified by the legislatures of the States is the amendment seeking to make the change in the provisions referred to in Clauses (a) to (e) of the proviso. The need for and the requirement of the ratification is confined to that particular amendment alone and not in respect of amendments outside the ambit of the proviso. The proviso can have, therefore, no bearing on the validity of the amendments which do not fall within its ambit. Indeed the following observations of this Court in Sajjan Singh case (supra) are apposite:

In our opinion, the two parts of Article 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged.

[P.940]

30. During the arguments reliance was placed on the words "before the Bill making provision for such amendment is presented to the President for assent" to sustain the argument that these words imply that the ratification of the Bill by not less than one-half of the States is a condition -precedent for the presentation of the Bill for the assent of the President. It is further argued that a Bill which seeks to make a change in the provisions referred to in clauses (a) to (e) of the proviso cannot be presented before the President for his assent without such ratification and if assent is given by the

President in the absence of such ratification, the amending Act would be void and ineffective in its entirety.

A similar situation can arise in the context of the main part of Article 368(2) which provides: "when the bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting, it shall be presented to the president". Here also a condition is imposed that the Bill shall be presented to the President for his assent only after it has been passed in each House by the prescribed special majority. An amendment in the First and Fourth Schedule referable to Article 4 can be introduced by Parliament by an ordinary law passed by simple majority. There may be a Bill which may contain amendments made in the First and Fourth Schedules as well as amendments in other provisions of the constitution excluding those referred to in the proviso which can be amended only by a special majority under Article 368(2) and the Bill after having been passed only by an ordinary majority instead of a special majority has received the assent of the President. The amendments which are made in the First and Fourth Schedules by the said amendment Act were validly made in view of Article 4 but the amendments in other provisions were in disregard to Article 368(2) which requires a special majority. Is not the doctrine of severability applicable to such an amendment so that amendments made in the First and Fourth Schedules may be upheld while declaring the amendments in the other provisions as ineffective? A contrary view excluding the doctrine of severability would result in elevating a procedural limitation on the amending power to a level higher than the substantive limitations.

31. In Bribery Commissioner v. Pedrick Ranasinghe (1965 A.C. 172), the Judicial Committee has had to deal with a somewhat similar situation. This was a case from Ceylon under the Ceylon (Constitution) Order of 1946. Clause (4) of Section 29 of the said Order in council contained the amending power in the following terms;

(4)In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present). Every certificate of the Speaker under this sub- section shall be conclusive for all purposes and shall not be questioned in any court of law.

In that case, it was found that Section 41 of the Bribery Amendment Act, 1958 made a provision for appointment of a panel by the Governor-General on the advice of the Minister of Justice for selecting members of the Bribery Tribunal while Section 55 of the constitution vested the appointment, transfer, dismissal and disciplinary control of judicial officers in the Judicial Service Commission. It was held that the legislature had purported to pass a law which, being in conflict with Section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers and could only be made by laws which comply with the special legislative procedure laid down in Section 29(4). Since

there was nothing to show that the Bribery Amendment Act, 1951 was passed by the necessary two-thirds majority, it was held that "any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra vires". Applying the doctrine of severability the Judicial Committee, however, struck down the offending provision, i.e. Section 41 alone. In other words passing of the Bill by special majority was the condition precedent for presentation of the Bill for the assent. Disregard of such a condition precedent for presenting a Bill for assent did not result in the entire enactment being vitiated and the law being declared invalid in its entirety but it only had the effect of invalidation of a particular provision which offended against the limitation on the amending power. A comparison of the language used in Clause (4) of Section 29 with that of Article 368(2) would show that both the provisions bear a general similarity of purpose and both the provisions require the passing of the Bill by special majority before it was presented for assent.

The same principle would, therefore, apply while considering the validity of a composite amendment which makes alterations in the First and Fourth Schedules as well as in other provisions of the Constitution requiring special majority under Article 368(2) and such a law, even though passed by the simple majority and not by special majority, may be upheld in respect of the amendments made in the First and Fourth Schedules. There is really no difference in principle between the condition requiring passing of the Bill by a special majority before its presentation to the President for assent contained in Article 368(2) and the condition for ratification of the amendment by the legislatures of not less than one-half of the States before the Bill is presented to the President for assent contained in the proviso. The principle of severability can be equally applied to a composite amendment which contains amendments in provisions which do not require ratification by States as well as amendment in provisions which require such ratification and by application of the doctrine of severability, the amendment can be upheld in respect of the amendments which do not require ratification and which are within the competence of Parliament alone. Only these amendments in provisions which require ratification under the proviso need to be struck down or declared invalid.

32. The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part of the law and whether after severance what survives can stand independently and is workable. If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the `Committee on Defections' as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief in our body-politic. The ouster of jurisdiction of Courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection. It cannot be said that the constituent body would not have enacted the other provisions in the Tenth Schedule if it has known that Paragraph 7 was not valid. Nor can it be said that the rest of the provisions of the Tenth Schedule cannot stand on their own even if Paragraph 7 is found to be unconstitutional. The provisions of Paragraph 7 can, therefore, be held to be severable from the rest of the provisions.

We accordingly hold on contentions `C' and `D':

That there is nothing in the said proviso to Article 368 (2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the Amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368(2) that " thereupon the Constitution shall stand amended" the operation of the proviso should not be extended to constitutional amendments in Bill which can stand by themselves without such ratification.

That, accordingly, the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent of its provisions which are amenable to the legal-sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (52nd Amendment) Act, 1985, excluding Paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Article 368(2) was not so ratified.

That Paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from the main provisions of the Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable part. The remaining provisions of the Tenth Schedule can and do stand independently of Paragraph 7 and are complete in themselves workable and are not truncated by the excision of Paragraph 7.

33. Re: Contentions `E' and `F':

These two contentions have certain over-lapping areas between them and admit of being dealt with together. Paragraph 6(1) of the Tenth Schedule seeks to impart a statutory finality to the decision of the Speaker or the Chairman. The argument is that, this concept of `finality' by itself, excludes Courts' jurisdiction. Does the word "final" render the decision of the Speaker immune from Judicial Review? It is now well-accepted that a finality clause is not a legislative magical incantation which has that effect of telling of Judicial Review. Statutory finality of a decision presupposes and is subject to its consonance with the statute.
On the meaning and effect of such finality clause, Prof. Wade in `Administrative Law' 6th Edn, at page 720 says:

Many statues provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review. As will be seen in this and the following section, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. `Finality' is a good thing but justice is a better.

If a statute says that the decision `shall be final' or `shall be final and conclusive to all intents and purposes' this is held to mean merely that there is no appeal: judicial control of legality is unimpaired. "Parliament only gives the impress of finality to the decisions of the tribunal on

condition that they are reached in accordance with the law. This has been the consistent doctrine for three hundred years.

Learned Professor further says:

The normal effect of a finality clause is therefore to prevent any appeal. There is no right of appeal in any case unless it is given by statute. But where there is general provision for appeals, for example, from quarter session to the High Court by case stated, a subsequent Act making the decision of quarter session final on some specific matter will prevent an appeal. But in one case the Court of Appeal has deprived a finality clause of part even of this modest content, holding that a question which can be resolved by certiorari or declaration can equally well be the subject of a case stated, since this is only a matter of machinery. This does not open the door to appeals generally, but only to appeals by case stated on matters which could equally well be dealt with by certiorari or declaration, i.e., matter subject to judicial review.

A provision for finality may be important in other contexts, for example when the question is whether the finding of one tribunal may be reopened before another, or whether an interlocutory order is open to appeal....

[Page 721]

Lord Devlin had said "Judicial interference with the executive cannot for long greatly exceed what Whitehall will accept" and said that a decision may be made un- reviewable "And that puts the lid on". Commenting on this Prof. Wade says: "But the Anisminic case showed just the opposite, when the House of Lord removed the lid and threw it away." [See: Constitutional Fundamentals, the Hamlyn Lectures, 1989 Edn. p.88]

In Durga Shankar Mehta v. Raghuraj Singh MANU/SC/0099/1954 : AIR 1954 SC 520 the order of the Election Tribunal was made final and conclusive by Section 105 of the Representation of the People Act, 1951. The contention was that the finality and conclusiveness clauses barred the jurisdiction of the Supreme Court under Article 136. This contention was repelled. It was observed:

...but once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any parliamentary legislation.

... But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised.

... The powers given by Article 136 of the Constitution, however, are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land....

Section 105 of the Representation of the People Act certainly give finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for any further appeal but

that cannot in any way cut down or effect the overriding powers which this Court can exercise in the matter of granting special leave under Article 136 of the Constitution.

[p.522]

34. Again, in Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 : [1971] 3 SCR 483 a similar finality clause in Articles 217(3) of the Constitution camp up for consideration. This Court said:

...The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the president the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence...." (p-505).

Referring to the expression "final" occurring in Article 311(3) of the Constitution this Court in Union of India and Anr. v. Tulsiram Patel and Ors. MANU/SC/0373/1985 : [1985] Supp. 2 SCR 131 at page 274 held:

...The finality given by Clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevance of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by Clause (b)....

35. If the intendment is to exclude the jurisdiction of the superior Courts, the language would quite obviously have been different. Even so, where such exclusion is sought to be effected by an amendment the further question whether such an amendment would be destructive of a basic feature of the Constitution would arise. But comparison of the language in Article 363(1) would bring out in contrast the kind of language that may be necessary to achieve any such purpose.

In Brundaban Nayak v. Election Commission of India and Anr. MANU/SC/0214/1965 : [1965] 3 SCR 53, in spite of finality attached by Article 192 to the decision of the Governor in respect of disqualification incurred by a member of a State Legislature subsequent to the election, the matter was examined by this Court on an appeal by special leave under Article 136 of the Constitution against the decision of the High Court dismissing the writ petition filed under Article 226 of the Constitution. Similarly in Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 : [1971] 3 SCR 483, in spite of finality attached to the order of the President with regard to the determination of age of a Judge of the High Court under Article 217 (3) of the Constitution, this Court examined the legality of the order passed by the President during the pendency of an appeal filed under Article 136 of the Constitution.

There is authority against the acceptability of the argument that the word "final" occurring in Paragraph 6(1) has the effect of excluding the jurisdiction of the Courts in Articles 136, 226 and 227.

36. The cognate questions are whether a dispute of the kind envisaged by Paragraph 6 of the Tenth Schedule is in a non-justiciable area and that, at all events, the fiction in Paragraph 6(2) that all proceedings under Paragraph 6(1) of the Tenth Schedule be deemed to be "proceedings in Parliament" of "Proceedings in the Legislature of a State" attracts immunity from the scrutiny by Courts as under Article 122 or 212, as the case may be.

Implicit in the first of these postulates is the premise that questions of disqualification of members of the House are essentially matters pertaining to the Constitution of the House and, therefore, the Legislature is entitled to exert its exclusive power to the exclusion of the judicial power. This assumption is based on certain British legislature practices of the past in an area which is an impalpable congeries of legal rules and conventions peculiar to and characteristic of British Parliamentary traditions. Indeed, the idea appears to have started with the proposition that the Constitution of the House was itself a matter of privilege of the House. Halsbury contains this statement:

1493, Privilege of the House of Commons in relation to its constitution: In addition to possessing a complete control over the Regulation of its own proceedings and the conduct of its members, the House of Commons claims the exclusive right of providing, as it may deem fit, for its own proper constitution.

(Emphasis supplied)

(See: Halsbury's Laws of England, 4th Edn. Vol. 34 Pages 603 & 604)

But in the Indian constitutional dispensation the power to decide a disputed disqualification of an elected member of the House is not treated as a matter of privilege and the power to resolve such electoral disputes is clearly judicial and not legislative in nature. The fact that election disputes were at some stage decided by the House of Commons itself was not conclusive that even their power was legislative. The controversy, if any, in this area is put at rest by the authoritative earlier pronouncements of this Court.

37. In Indira Nehru Gandhi v. Raj Narain MANU/SC/0304/1975 : [1976] 2 SCR 347 Beg J., referring to the historical background relating to the resolution of electoral disputes by the House of Common said:

I do not think that it is possible to contend, by resorting to some concept of a succession to the powers of the medieval "High Court of Parliament" in England, that a judicial power also devolved upon our Parliament through the constituent Assembly, mentioned in Section 8 of the Indian Independence Act of 1947. As already indicated by me, the Constituent assembly was invested with law making and not judicial powers. Whatever judicial power may have been possessed once by English kings sitting in Parliament, constituting the highest Court of the realm in medieval England, have devolved solely on the House of Lords as the final court of appeal in England. "King

in Parliament" had ceased to exercise judicial powers in any other way long before 1950. And, the House of Commons had certainly not exercised a judicial power as a successor to the one time jurisdiction of the "King in Parliament" with the possible exception of the power to punish for its contempts....

[p.627 & 628]

In the same case, Justice Mathew made these observations as to the imperative judicial nature of the power to resolve disputes.

The concept of democracy as visualised by the Constitution presupposes the representation of the people in Parliament and State Legislatures by the method of election. And, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections....

[p.504]

In whichever body or authority, the jurisdiction is vested, the exercise of the jurisdiction must be judicial in character. This court has held that in adjudicating an election dispute an authority is performing a judicial function and a petition for leave to appeal under Article 136 of the Constitution would lie to this Court against the decision notwithstanding the provisions of Article 329(b).

(Emphasis supplied)

[p.506]

It is also useful to recall the following observations of Gajendragadkar J., on the scope of Article 194(3) of the Constitution, which is analogous to Article 105(3) in Special Reference No. 1 of 1964 [1965] 1 SCR 413:

This clause requires that the powers, privileges and immunities which are claimed by the House must be shown to have subsisted at the commencement of the Constitution, i.e., on January 26, 1950. it is well-known that out of a large number of privileges and powers which the House of commons claimed during the days of its bitter struggle for recognition, some were given up in course of time, and some virtually faded out by desuetude; and so, in every case where a power is claimed, it is necessary to enquire whether it was an existing power at the relevant time. It must also appear that the said power was not only claimed by the House of Commons, but was recognised by the English Courts. It would obviously be idle to contend that if a particular power which is claimed by the House was claimed by the House of Commons but was not recognised by the English Courts, it would still be upheld under the latter part of Clause (3) only on the ground that it was in fact claimed by the House of Commons. In other words, the inquiry which is

prescribed by this clause is: is the power in question shown or proved to have subsisted in the House of Commons at the relevant time?

(See page 442)

This question is answered by Beg, J. in Indira Nehru Gandhi's case:

I think, at the time our Constitution was framed, the decision of an election dispute had ceased to be a privilege of the House of Commons in England and therefore, under Article 105(3), it could not be a privilege of Parliament in this country.

[p.505]

38. Indeed, in dealing with the disqualifications and the resolution of disputes relating to them under Articles 191 and 192 or Article 102 and 103, as the case may be, the Constitution has evinced a clear intention to resolve electoral-disputes by resort to the judicial power of the State. Indeed, Justice Khanna in Indira Nehru Gandhi's case said:

Not much argument is needed to show that unless there be a machinery for resolving an election dispute and for going into the allegations that elections were not free and fair being vitiated by malpractices, the provision that a candidate should not resort to malpractices would be in the nature of a mere pious wish without any legal sanction. It is further plain that if the validity of the election declared to be valid only if we provide a forum for going into those grounds and prescribe a law for adjudicating upon those grounds.... (See page 468)

It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the non-justiciable legislative area. The classic exposition of Justice Issacs J., in Australian Boot Trade Employees Federation v. Whybrow and Company [1910] 10 CLR 226 at page 317, as to what distinguishes a judicial power from a legislative power was referred to with the approval of this Court in Express Newspaper Ltd. v. Union of India MANU/SC/0157/1958 : AIR 1958 SC 578 at 611. Issacs J., stated:

If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties- in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for non-conformity then the determination that so prescribes, call it an award, or arbitration, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorises it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceeding, though called an arbitration, is rather in the nature of an appraisement or ministerial act.

In the present case, the power to decide disputed disqualification under Paragraph 6(1) is preeminently of a judicial complexion.

39. The fiction in Paragraph 6(2), indeed, places it in the first clause of Article 122 or 212, as the case may be. The words "proceedings in Parliament" or "proceedings in the legislature of a State" in Paragraph 6(2) have their corresponding expression in Articles 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures.

That apart, even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of members under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House; but only before the Speaker as a specially designated authority. The decision under paragraph 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule.

40. But then is the Speaker or the Chairman acting under Paragraph 6(1) is a Tribunal? "All tribunals are not courts, though all Courts are Tribunals". The word "Courts" is used to designate those Tribunals which are set up in an organised State for the Administration of Justice. By Administration of justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the Courts are there to restore the vinculum juris, which is disturbed. See: Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala and Ors. MANU/SC/0060/1961 : [1962] 2 SCR 339. In that case Hidayatullah, J. said:

...By "courts" is meant courts of civil judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the courts have "an air of detachment". But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient.

[p.362]

Where there is a lis-an affirmation by one party and denial by another-and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is a exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court.

In Associated Cement Companies Ltd. v. P.N. Sharma and Anr. MANU/SC/0215/1964 : [1965]2 SCR 366, this Court said:

... The main and the basic test, however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State's judicial power.....There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding....

[p.386 and 387]

By these well-known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under paragraph 6(1) of the Tenth Schedule is a Tribunal.

41. In the operative conclusions we pronounced on 12th November, 1991 we indicated in clauses G and H therein that Judicial review in the area is limited in the manner indicated. If the adjudicatory authority is a tribunal, as indeed we have held it to be, why, then, should its scope be so limited? The finality clause in paragraph 6 does not completely exclude the jurisdiction of the courts under Articles 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction.

The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations.<mpara>
While exercising their certiorari jurisdiction, the courts have applied the test whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction. An ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action but precludes challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction. An ouster clause attaching finality to a determination, therefore, does oust certiorari to some extent and it will be effective in ousting the power of the court to review the decision of an inferior tribunal by certiorari if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice. See: Administrative Law by H.W.R. Wade, 6th Edn., pp. 724-726; Anisminic Ltd. v. Foreign Compensation commission [1969] 2 AC 147; S.E. Asia Fire Bricks v. Non-Metallic Products [1981] A.C. 363.

In Makhan Singh v. State of Punjab MANU/SC/0039/1963 : [1964] 4 SCR 797, while considering the scope of judicial review during the operation of an order passed by the President under Article 359(1) suspending the fundamental right guaranteed under Article 21 of the Constitution, it has been held that the said order did not preclude the High Court entertaining a petition under Article 226 of the Constitution where a detenu had been detained in violation of the mandatory provisions

of the detention law or where the detention has been ordered mala fide. It was emphasised that the exercise of a power mala fide was wholly outside the scope of the Act conferring the power and can always be successfully challenged. (p. 825)

Similarly in State of Rajasthan v. Union of India MANU/SC/0370/1977 : [1978] 1 SCR 1, decided by a seven judge Bench, high Court was considering the challenge to the validity of a proclamation issued by the President of India under Article 356 of the constitution. At the relevant time under clause (5) of Article 356, the satisfaction of the President mentioned in Clause (1) was final and conclusive and it could not be questioned in any court on any ground. All the learned judges have expressed the view that the proclamation could be open to challenge if it is vitiated by mala fides. While taking this view, some of the learned judges have made express reference to the provisions of clause(5).

In this context, Bhagwati, J (as the learned Chief Justice then was) speaking for himself and A.C. Gupta, J. has stated:

Of course by reason of Clause (5) of Article 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself. Take, for example, a case where the President gives the reason for taking action under Article 356, cl. (1) and says that he is doing so, because the Chief Minister of the State is below five feet in height and, therefore, in his opinion a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so called satisfaction of the President in such a case not be challenged on the ground that it is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all. (pp. 82-83)

Untwalia, J. has held as follows:

I, however, must hasten to add that I cannot persuade myself to subscribe to the view that under no circumstances an order of proclamation made by the President under Article 356 can be challenged in a Court of Law. And, I am saying so notwithstanding the provision contained in clause (5) of the said Article introduced by the Constitution (38th Amendment) Act, 1975."(p. 94) "But then, what did I mean by saying that situation may arise in a given case where the jurisdiction of the Court is not completely ousted? I mean this. If, without entering into the prohibited area, remaining on the fence, almost on the face of the impugned order or the threatened action of the President it is reasonably possible to say that in the eye of law it is no order or action as it is in flagrant violation of the very words of a particular Article, justifying the conclusion that the order is ultra vires, wholly illegal or passed mala fide, in such a situation it will be tantamount in law to be no order at all. Then this Court is not powerless to interfere with such an order and may, rather, must strike it down."(p. 95) Similarly, Fazal Ali, J. has held: "Even if an issue is not justiciable, if the circumstances relied upon by the executive authority are absolutely extraneous and irrelevant, the Courts have the undoubted power to scrutinise such an e exercise of the executive power. Such a judicial scrutiny is one which comes into operation when the exercise of the executive power is colourable or mala fide and based on extraneous or irrelevant considerations." (p. 116) "It is true

that while an order passed by the President under Article 356 is put beyond judicial scrutiny by Clause (5) of Article 356, but this does not mean that the Court possesses no jurisdiction in the matter at all. Even in respect of cl. (5) of Article 356, the Courts have a limited sphere of operation in that on the reasons given by the President in his order if the Courts find that they are absolutely extraneous and irrelevant and based on personal and illegal consideration the Courts are not powerless to strike down the order on the ground of mala fide if proved. (p.120)

In Union of India v. Jyoti Prakash Mitter (supra), dealing with the decision of the President under Article 217 (3) on the question as to the age of a judge of the High Court, requiring a judicial approach it was held that the field of judicial review was enlarged to cover violation of rules of natural justice as well as an order based on no evidence because such errors are errors of jurisdiction.

c In Union of India and Anr. v. Tulsiram Patel and Ors. (supra) this Court was dealing with Article 311 (3) of the constitution which attaches finality to the order of the disciplinary authority on the question whether it was reasonably practicable to hold an inquiry. It was observed that though the `finality' clause did not bar jurisdiction it did indicate that the jurisdiction is limited to certain grades.

In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under paragraph 6, the scope of judicial review under Articles 136, 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity.

In view of the limited scope of judicial review that is available on account of the finality clause in paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings.

Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence.

42. In the result, we hold on contentions E and F: That the Tenth Schedule does not, in providing for an additional grant for disqualification and for adjudication of disputed disqualifications, seek to create a nonjusticiable constitutional area. The power to resolve such disputes vested in the Speaker or chairman is a judicial power.

That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen is valid. But the concept of statutory finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.

That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood and explained in Keshav Singh's Case Spl. Ref. No. 1, [1965] 1 SCR 413, to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words "be deemed to be proceedings in Parliament" or "proceedings in the Legislature of a State" confines the scope of the fiction accordingly.

The Speaker/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairman. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no quia timet actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

43. Re: Contention(G):

The argument is that an independent adjudicatory machinery for resolution of electoral disputes is an essential incident of democracy, which is a basic feature of Indian constitutionalism . It is urged that investiture of the power of resolving such disputes in the Speaker or the Chairman does not answer this test of an independent, impartial quality of the adjudicatory machinery. It is, therefore, urged that Paragraph 6(1) of the Tenth Schedule is violative of a basic feature.

It is also urged that a Speaker, under the Indian Parliamentary tradition is not required to resign his membership of the political party on whose strength he gets elected and that inevitably the decision of the Speaker is not free tugs and pulls of political polarisations. It is urged that the Speaker who has not resigned his membership of the political party cannot be impartial and, at all events, his functioning will not be free from reasonable likelihood of bias.

44. The Tenth Schedule breaks away from the constitutional pattern for resolution of disqualifications envisaged in Articles 103 and 192 of the Constitution which vest jurisdiction in this behalf in the President or the Governor acting according to the opinion of Election Commission. The disqualifications for defection could very well have been included in Article 102(1) or 191(1) as a ground, additional to the already existing grounds under clauses (a) to (e) in which event, the same dispute resolution machinery would have dealt with the disqualifications for defections also. But the Tenth Schedule, apparently. attempted a different experiment in respect of this particular ground of disqualification.

45. The question is, whether the investiture of the determinative jurisdiction in the Speaker would by itself stand vitiated as denying the idea of an independent adjudicatory authority. We are afraid the criticism that the provision incurs the vice of unconstitutionality ignores the high status and importance of the office of the Speaker in a Parliamentary democracy. The office of the speaker is held in the highest respect and esteem in Parliamentary traditions. The evolution of the institution

of Parliamentary democracy has as its pivot the institution of the Speaker. `The Speaker holds a high, important and ceremonial office. All questions of the well being of the House are matters of Speaker's concern'. The Speaker is said to be the very embodiment of propriety and impartiality. He performs wide ranging functions including the performance of important functions of a judicial character.

Mavalankar, who was himself a distinguished occupant of that high office, says:

In parliamentary democracy, the office of the Speaker is held in very high esteem and respect. There are many reasons for this. Some of them are purely historical and some are inherent in the concept of parliamentary democracy and the powers and duties of the Speaker. Once a person is elected Speaker, he is expected to be above parties, above politics. In other words, he belongs to all the members or belongs to none. He holds the scales of justice evenly irrespective of party or person, though no one expects that he will do absolute justice in all matters; because, as a human being he has his human drawbacks and shortcomings. However, everybody knows that he will intentionally do no injustice or show partiality. "Such a person is naturally held in respect by all.

[See : G. V. Mavalankar: The Office of Speaker, Journal of Parliamentary Information, April 1956, Vol. 2, No. 1, p.33]

Pundit Nehru referring to the office of the Speaker said:

...The speaker represents the House. He represents the dignity of the House, the freedom of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the nation's freedom and liberty. Therefore, it is right that that should be an honoured position, a free position and should be occupied always by men of outstanding ability and impartiality.

[See: HOP. Deb. Vol. IX (1954), CC 3447-48]

Referring to the Speaker, Erskine may says:

The Chief characteristics attaching to the office of Speaker in the House of Commons are authority and impartiality. As a symbol of his authority he is accompanied by the Royal Mace which is borne before him when entering and leaving the chamber and upon state occasions by the Sergeant at Arms attending the House of commons, and is placed upon the table when he is in the chair. In debate all speeches are addressed to him and he calls upon Members to speak - a choice which is not open to dispute. When he rises to preserve order or to give a ruling on a doubtful point he must always be heard in silence and no Member may stand when the Speaker is on his feet. Reflections upon the character or actions of the Speaker may be punished as breaches of privilege. His action cannot be criticized incidentally in debate or upon any form of proceeding except a substantive motion. His authority in the chair is fortified by many special powers which are referred to below. Confidence in the impartiality of the Speaker is an indispensable condition of the successful working of procedure, and many conventions exist which have as their object not only to ensure the impartiality of the Speaker but also to ensure that his impartiality is generally recognised....

[See: Erskine May - Parliamentary Practice - 20th edition p. 234 and 235]

M.N. Kaul and S.L. Shakdher in `Practice and procedure of Parliament' 4th Edition, say:

The all important conventional and ceremonial head of Lok Sabha is the Speaker. Within the walls of the House his authority is supreme. This authority is based on the Speaker's absolute and unvarying impartiality - the main feature of the office, the law of its life. The obligation of impartiality appears in the constitutional provision which ordains that the Speaker is entitled to vote only in the case of equality of votes. Moreover, his impartiality within the House is secured by the fact that he remains above all considerations of party or political career, and to that effect he may also resign from the party to which he belonged.

[p. 104]

46. It would, indeed, be unfair to the high traditions of that great office to say that the investiture, in it of this Jurisdiction would be vitiated for violation of a basic feature of democracy. It is inappropriate to express distrust in the High office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that high office. The Robes of the Speaker to change and elevate the man inside.

47. Accordingly, the contention that the vesting of adjudicatory functions in the Speakers/Chairmen would by itself vitiate the provision on the ground of likelihood of political bias is unsound and is rejected. The Speakers/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and to take far reaching decisions in the functioning of Parliamentary democracy. Vestiture of power of adjudicate questions under the Tenth Schedule in such a constitutional functionaries should not be considered exceptionable.

48. Re: Contention H:

In the view we take of the validity of paragraph 7 it is unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and paragraph 7 of the Tenth Schedule violates such basic structure.

49. We may now notice one other contention as to the construction of the expression `any direction' occurring in paragraph 2(1)(b). It is argued that if the expression really attracts within its sweep every direction or whip of any kind whatsoever it might be unduly restrictive of the freedom of speech and the right of dissent and that, therefore, should be given a meaning limited to the objects and purposes of the Tenth Schedule. Learned Counsel relied upon and commended to us the view taken by the minority in the Full Bench decision of Punjab and Haryana High Court in Parkash Singh Badal and Ors. v. Union of India and Ors. [MANU/PH/0106/1987 : AIR 1987 P&H 263] where such a restricted sense was approved. Tewatia J. said:

If the expression : "any direction" is to be literally construed then it would make the people's representative a wholly political party's representative, which decidedly he is not. The Member would virtually lose his identity and would become a rubber stamp in the hands of his political

party. Such interpretation of this provision would cost it, its constitutionality, for in that sense it would become destructive of democracy/parliamentary democracy, which is the basic feature of the Constitution. Where giving of narrow meaning and reading down of the provision can save it from the vice of unconstitutionality the Court should read it down particularly when it brings the provision in line with the avowed legislative intent....." ".....the purpose of enacting paragraph 2 could be no other than to insure stability of the democratic system, which in the context of Cabinet/Parliamentary form of Government on the one hand means that a political party or a coalition of political parties which has been voted to power, is entitled to govern till the next election, and on the other, that opposition has a right to censure the functioning of the Government and even overthrow it by voting it out of power if it had lost the confidence of the people, then voting or abstaining from voting by a Member contrary to any direction issued by his party would by necessary implication envisage voting or abstaining from voting in regard to a motion or proposal, which if failed, as a result of lack or requisite support in the House, would result in voting the Government out of power, which consequence necessarily follows due to well established constitutional convention only when either a motion of no confidence is passed by the House or it approves a cut-motion in budgetary grants. Former because of the implications of Article 75(3) of the Constitution and latter because no Government can function without money and when Parliament declines to sanction money, then it amounts to an expression of lack of confidence in the Government. When so interpreted the Clause (b) of sub-paragraph (1) of paragraph 2 would leave the Members free to vote according to their views in the House in regard to any other matter that comes up before it.

[p.313 & 314]

The reasoning of the learned judge that a wider meaning of the words "any direction" would `cost it its constitutionality' does not commend to us. But we approve the conclusion that these words require to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule. Those objects and purposes define and limit the contours of its meaning. The assignment of a limited meaning is not to read it down to promote its constitutionality but because such a construction is a harmonious construction in the context. There is no justification to give the words the wider meaning.

While construing Paragraph 2(1)(b) it cannot be ignored that under the Constitution members of Parliament as well as of the State legislature enjoy freedom of speech in the House though this freedom is subject to the provisions of the constitution and the rules and standing orders regulating the Procedure of the House [Art. 105(1) and Article 194(1)]. The disqualification imposed by Paragraph 2(1) (b) must be so construed as not to unduly impinge on the said freedom of speech of a member. This would be possible if Paragraph 2(1)(b) is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections motivated by the lure of office or other similar considerations. The said object would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of Government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme on which the political party to which the member belongs went to the polls. For this purpose the direction given by the political party to a member belonging to it, the violation of

which may entail disqualification under paragraph 2(1)(b), would have to be limited to a vote on motion of confidence or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the elaborate. The voting or abstinence from voting by a member against the direction by the political party on such a motion would amount to disapproval of the programme of the basis of which he went before the electorate and got himself elected and such voting or abstinence would amount to a breach of the trust reposed in him by the electorate.

Keeping in view the consequences of the disqualification i.e., termination of the membership of a House; it would be appropriate that the direction or whip which results in such disqualification under Paragraph 2(1)(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Paragraph 2(1)(b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction.

50. There are some submissions as to the exact import of a "split - whether it is to be understood an instantaneous, one time event or whether a "split" can be said to occur over a period of time. The hypothetical poser was that if one-third of the members of a political party in the legislature broke-away from it on a particular day and a few more members joined the splinter group a couple of days later, would the latter also be a part of the "split" group. This question of construction cannot be in vacuo. In the present cases, we have dealt principally with constitutional issues. The meaning to be given to "split" must necessarily be examined in a case in which the question arises in the context of its particular facts. No hypothetical predications can or need be made. We, accordingly,, leave this question open to be decided in an appropriate case.

51. Before parting with the case, we should advert to one other circumstance. During the interlocutory stage, the constitution bench was persuaded to make certain interlocutory orders which, addressed as they were to the Speaker of the House, (though, in a different capacity as an adjudicatory forum under the Tenth Schedule) engendered complaints of disobedience culminating in the filing of petitions for initiation of proceedings of contempt against the Speaker. It was submitted that when the very question of jurisdiction of the Court to deal with the matter was raised and even before the constitutionality of Paragraph 7 had been pronounced upon, self restraint required that no interlocutory orders in a sensitive area of the relationship between the legislature and the Courts should been made.

The purpose of interlocutory orders is to preserve in status-quo the rights of the parties, so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. One of the contentions urged was as to the invalidity of the amendment for non-compliance with the proviso to Article 368(2) of the Constitution. It has now been unanimously held that Paragraph 7 attracted the proviso to Article 368(2). The interlocutory orders in this case were necessarily justified so that, no land-slide changes were allowed to occur rendering proceedings ineffective and infructuous.

52. With the finding and observations as aforesaid W.P. No. 17 of 1991 is dismissed. Writ petition in Rule No. 2421 of 1990 in the High Court of Gauhati is remitted back to the High Court for

disposal in accordance with law and not inconsistent with the findings and observations contained in this order.

J.S. Verma, J.

53. This matter relating to disqualification on the ground of defection of some members of the Negaland legislative Assembly under the Tenth Schedule inserted by the Constitution (Fifty-Second Amendment) Act, 1985, was heard along with some other similar matters relating to several Legislative Assemblies including those of Manipur, Meghalaya, Madhya Pradesh, Gujarat and Goa, since all of them involved the decision of certain constitutional questions relating to the constitutional validity of para 7 of the Tenth Schedule and consequently the validity of the Constitution (Fifty-Second Amendment) Act, 1985 itself. At the hearing, several Learned Counsel addressed us on account of which the hearing obviously took some time. Even during the course of the hearing, the actions of some Speakers tended to alter the status quo, in some cases resulting in irreversible consequences which could not be corrected in the event of para 7 of the Tenth Schedule being held invalid or the impugned orders of the Speakers being found justiciable and, on merits illegal and, therefore, the urgency increased of deciding the questions debated before us at the earliest. For this reason, we indicated during the course of the hearing that we would pronounce our operative conclusions soon after conclusion of the hearing with reasons therefor to follow. Accordingly, on conclusion of the hearing on November 1, 1991, we indicated that the operative conclusions would be pronounced by us at the next sitting of the Bench when it assembled on November 12, 1991 after the Diwali Vacation. The operative conclusions of the majority (Venkatachaliah, Reddy and Agrawal, JJ.) as well as of the minority (Lalit Mohan Sharma and J.S. Verma, JJ.)were thus pronounced on November 12, 1991. We are now indicating herein our reasons for the operative conclusions of the minority view.

54. The unanimous opinion according to the majority as well as the minority is that para 7 of the tenth Schedule enacts a provision for complete exclusion of judicial review including the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and 227 of the Constitution and, therefore, it makes in terms and in effect a change in Articles 136, 226 and 227 of the Constitution which attracts the proviso to clause (2) of Article 368 of the Constitution; and therefore, ratification by the specified number of State Legislatures before the Bill was presented to the President for his assent was necessary, in accordance therewith. The majority view is that in the absence of such ratification by the State legislatures, it is para 7 alone of the Tenth Schedule which is unconstitutional; and it being severable from the remaining part of the Tenth Schedule, para 7 alone is liable to be struck down rendering the speakers' decision under para 6 that of a judicial tribunal amenable to judicial review by the Supreme court and the High courts under Article 136, 226 and 227. The minority opinion is that the effect of invalidity of para 7 of the Tenth Schedule is to invalidate the entire Constitution (Fifty- Second Amendment) Act, 1985 which inserted the Tenth Schedule since the President's assent to the bill without prior ratification by the State Legislatures is non est. The minority view also is that para 7 is not severable from the remaining part of the Tenth Schedule and the Speaker not being an independent adjudicatory authority for this purpose as contemplated by a basic feature of democracy, the remaining part of the Tenth Schedule is in excess of the amending powers being violative of a basic feature of the Constitution. In the minority opinion, we have held that the entire Constitution

(Fifty-Second Amendment) Act, 1985 is unconstitutional and an abortive attempt to make the constitutional Amendment indicated therein.

55. Before proceeding to give our detailed reasons, we reproduce the operative conclusions pronounced by us on November 12, 1991 in the minority opinion (Lalit Mohan Sharma and J.S. Verma, JJ.) as under:

For the reasons to be given in our detailed judgment to follow, our operative conclusions in the minority opinion on the various constitutional issues are as follows:

1. Pare 7 of the Tenth Schedule, in clear terms and in effect, excludes the jurisdiction of all courts, including the Supreme Court under Article 136 and the High Courts under Articles 226 and 227 to entertain any challenge to the decision under para 6 on any ground even of illegality or perversity, not only at an interim stage but also after the final decision on the question of disqualification on the ground of defection.

2. Para 7 of the Tenth Schedule, therefore, in terms and in effect, makes a change in Article 136 in Chapter IV of Part V; and Articles 226 and 227 in Chapter V of Part VI of the Constitution attracting the proviso to Clause (2) of Article 368.

3. In view of para 7 in the Bill resulting in the Constitution (Fifty-Second Amendment) Act, 1985, it was required to be ratified by the Legislature of not less than one-half of the States as a condition precedent before the Bill could be presented to the President for assent, in accordance with the mandatory special procedure prescribed in the proviso to Clause (2) of Article 368 for exercise of the constituent power. Without ratification by the specified number of State Legislatures, the stage for presenting the Bill for assent of the President did not reach and, therefore, the so- called assent of the President was non est and did not result in the constitution standing amended in accordance with the terms of the Bill.

4. In the absence of ratification by the specified number of State Legislatures before presentation of the Bill to the President for his assent, as required by the proviso to Clause (2) of Article 368, it is not merely para 7 but, the entire Constitution (Fifty-Second Amendment) Act, 1985 which is rendered unconstitutional, since the constituent power was not exercised as prescribed in Article 368, and therefore, the Constitution did not stand amended in accordance with the terms of the Bill providing for the amendment.

5. Doctrine of Severability cannot be applied to a Bill making a constitutional amendment where any part thereof attracts the proviso to Clause (2) of Article 368.

6. Doctrine of Severability is not applicable to permit striking down para 7 alone saving the remaining provisions of the Bill making the Constitutional Amendment on the ground that para 7 alone attracts the proviso to Clause (2) of Article 368.

7. Even otherwise, having regard to the provisions of the Tenth Schedule of the Constitution inserted by the Constitution (Fifty-Second Amendment) Act, 1985, the Doctrine of Severability does not apply to it.

8. Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of Members of the House is envisaged as a attribute of this basic feature. The tenure of the Speaker who is the authority in the Tenth Schedule to decide this dispute is dependent on the continuous support of the majority in the House and, therefore, he (the Speaker) does not satisfy the requirement of such an independent adjudicatory authority; and his choice as the sole arbiter in the matter violates an essential attribute of the basic feature.

9. Consequently, the entire Constitution (Fifty- Second Amendment) Act, 1985 which inserted the Tenth Schedule together with Clause (2) in Articles 102 and 191, must be declared unconstitutional or an abortive attempt to so amend the Constitution.

10. It follows that all decisions rendered by the several Speakers under the Tenth Schedule must also be declared nullity and liable to be ignored.

11. On the above conclusions, it does not appear necessary or appropriate to decide the remaining questions urged.

56. it is unnecessary in this judgment to detail the facts giving rise to the debate on the constitutional issues relating to the validity of the Tenth Schedule, more particularly para 7 therein, introduced by the Constitution (Fifty-second Amendment) Act, 1985. Suffice it to say that these matters arise out of certain actions of the Speakers of several Legislative Assemblies under the Tenth Schedule. Arguments on these questions were addressed to us by several learned Counsel, namely, the learned Attorney General, S/Shri A.K. Sen, Shanti Bhushan, M.C. Bhandare, F.S. Nariman, Soli J. Sorabjee, R.K. Garg, Kapil Sibal, M.R. Sharma, Ram Jethmalani, N.S. Hegde, O.P. Sharma, Bhim Singh and R.F. Nariman. It may be mentioned that some Learned Counsel modified their initial stand to some extent as the hearing progressed by advancing alternative arguments as well. Accordingly, the several facets of each constitutional issue debated before us were fully focused during the hearing. The main debate, however, was on the construction of paras 6 and 7 of the Tenth Schedule and the validity of the Constitutional Amendment. Arguments were also addressed on the question of violation, if any, of any basic feature of the Constitution by the provisions of the Tenth Schedule.

57. The points involved in the decision of the constitutional issues for the purpose of our opinion may be summarised broadly as under:

(A) Construction of para 6 of the Tenth Schedule. Its effect and the extent of exclusion of judicial review thereby.

(B) Construction of para 7 of the Tenth Schedule. Its effect and the extent of exclusion of judicial review thereby.

(C) In case of total exclusion of judicial review including the jurisdiction of Supreme Court under Article 136 and the High Courts under Articles 226 and 227 of the Constitution by the Tenth Schedule, does para 7 make a change in these Articles attracting the proviso to Clause (2) of Article 368 of the Constitution ?

(D) The effect of absence of prior ratification by the State Legislatures before the Bill making provisions for such amendment was presented to the President for assent, on the constitutional validity of the Tenth Schedule.

(E) Severability of para 7 from the remaining part of the Tenth Schedule and its effect on the question of constitutional validity of the Tenth Schedule.

(F) Violation of basic feature of the Constitution, if any, by the Tenth Schedule as a whole or any part thereof and its effect on the constitutionality for this reason.

(G) Validity of the Tenth Schedule with reference to the right of dissent of members with particular reference to Article 105.

58. As indicated by us in our operative conclusions pronounced earlier, we need not express our concluded opinion on the points argued before us which are not necessary for supporting the conclusion reached by us that the entire Tenth Schedule and consequently the Constitution (Fifty-Second Amendment) Act, 1985 is unconstitutional on the view we have taken on the other points. We are, therefore, giving our reasons only in respect of the points decided by us leading to the conclusion we have reached.

59. At this stage, it would be appropriate to mention the specific stand of the Speakers taken at the hearing. The learned Counsel who appeared for the several Speakers clearly stated that they were instructed to apprise us that the Speakers did not accept the jurisdiction of this Court to entertain these matters in view of the complete bar on jurisdiction of the courts enacted in para 7 read with para 6 of the Tenth Schedule. Accordingly, they abstained from addressing us on the merits of the impugned orders which led to these matters being brought in this Court in spite of our repeated invitation to them to also address us on merits in each case, which all the other Learned Counsel did. No doubt, this Court's jurisdiction to decide the constitutional validity of the Tenth Schedule was conceded, but no more.

60. It is in these extra-ordinary circumstances that we had to hear these matters. We need not refer herein to the details of any particular case since the merits of each case are dealt separately in the order of that case. Suffice it to say that the unanimous view of the Bench is that the Speakers' decision disqualifying a member under the Tenth Schedule is not immune from judicial scrutiny. According to the majority it is subject to judicial scrutiny on the ground of illegality or perversity which in the minority view, it is a nullity liable to be so declared and ignored.

61. We consider it apposite in this context to recall the duty of the Court in such delicate situations. This is best done by quoting Chief Justice Marshall in Cohens v. Virginia 6 Wheat 264, 404, 5 L. Ed.257, 291 [1821], wherein he said:

It is most true, that this Court will not take Jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

XXX XXX XXX

...If the question cannot be brought in a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend....

(Emphasis supplied)

62. More recently, Patanjali Sastri, CJ., while comparing the role of this Court in the constitutional scheme with that of the U.S. Supreme Court, pointed out in the State of Madras v. V.G. Row MANU/SC/0013/1952 : [1952] SCR 597 that the duty of this Court flows from express provisions in our Constitution while such power in the U.S. Supreme Court has been assumed by the interpretative process giving a wide meaning to the "due process" clause. Sastri, CJ., at p.605, spoke thus:

Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted `due process' clause in the Fifth and Fourteenth Amendments. If, then, the, courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the `fundamental rights', as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with legislatures in the country.

(Emphasis supplied)

63. We are in respectful agreement with the above statement of Sastri, CJ, and wish to add that even though such an obvious statement may have been necessary soon after the Constitution came

into force and may not be a necessary reminder four decades later at this juncture, yet it appears apposite in the present context to clear the lingering doubts in some minds. We have no hesitation in adding further that while we have no desire to clutch at jurisdiction, at the same time we would not be deterred in the performance of this constitutional duty whenever the need arises.

64. We would also like to observe the unlike England, where there is no written Constitution and Parliament is supreme, in our country there is a written Constitution delineating the spheres of jurisdiction of the legislature and the judiciary whereunder the power to construe the meaning of the provisions in the Constitution and the laws is entrusted to the judiciary with finality attached to the decision of this Court inter alia by Article 141 about the true meaning of any enacted provision and Article 144 obliges all authorities in the country to act in aid of this Court. It is, therefore, not permissible in our constitutional scheme for any other authority to claim that power in exclusivity, or in supersession of this Court's verdict. Whatever be the controversy prior to this Court entertaining such a matter, it must end when the court is seized of the matter for pronouncing its verdict and it is the constitutional obligation of every person and authority to accept its binding effect when the decision is rendered by this Court. It is also to be remembered that in our constitutional scheme based on democratic principles which include governance by rule of law, every one has to act and perform his obligations according to the law of the land and it is the constitutional obligation of this Court to finally say what the law is. We have no doubt that the Speakers and all others sharing their views are alive to this constitutional scheme, which is as much the source of their jurisdiction as it is of this Court and also conscious that the power given to each wing is for the performance of a public duty as a constitutional obligation and not for self-aggrandisement. Once this perception is clear to all, there can be no room for any conflict.

65. The Tenth Schedule was inserted in the Constitution of India by the Constitution (Fifty-Second Amendment) Act, 1985 which came into force with effect from 1.3.1985 and is popularly known as the Anti-Defection Law. The Statement of Objects and Reasons says that this amendment in the Constitution was made to combat the evil of political defections which has become a matter of national concern and unless combated, is likely to undermine the very foundations of our democratic system and the principles which sustained it. This amendment is, therefore, for outlawing defection to sustain our democratic principles. The Tenth Schedule contains eight paras. Para 1 is the interpretation clause defining `House' to mean either House of Parliament or the legislative Assembly or, as the case may be, either House of the Legislature of a State. The expressions `legislature party' and `original political party' which are used in the remaining paras are also defined. Para 2 provides for disqualification on ground of defection. Para 3 provides that disqualification on ground of defection is not to apply in case of split indicating therein the meaning of `split. Para 4 provides that disqualification on ground of defection is not to apply in case of merger. Para 5 provides exemption for the Speaker or the Deputy speaker of the House of the People or of the Legislative Assembly of the State, the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State from the applicability of the provisions of the Tenth Schedule. Para 8 contains the rule making power of the Chairman or the Speaker.

66. For the purpose of deciding the jurisdiction of this Court and the justiciability of the cause, it is paras 6 and 7 which are material and they read as under:

6. Decision on questions as to disqualification of ground of defection. -

1. If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

2. All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature, of a State within the meaning of Article 212.

7. Bar of Jurisdiction on courts.-

Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

We shall now deal with the points involved enumerated earlier.

Points `A' & `B' - Paras 6 & 7 of Tenth Schedule

67. In support of the objection raised to the jurisdiction of this Court and the justiciability of the Speaker's decision relating to disqualification of a member, it has been urged that sub-paragraph (1) of para 6 clearly lays down that the decision of the Chairman or, as the case may be, the Speaker of such House shall be final and sub- paragraph (2) proceeds to say that all proceedings under sub-paragraph (1) 'shall be deemed to the proceedings in Parliament..... or,..... proceedings in the Legislature of a State' within the meaning of Article 122 or Article 212, as the case may be. It was urged that the clear provision in para 6 that the decision of the Chairman/Speaker on the subject of disqualification under this Schedule shall be final and the further provision that all such proceedings `shall be deemed to be proceedings in Parliament.... or,.... proceedings in the Legislature of as State', within the meaning of Article 122 or Article 212, as the case may be, clearly manifests the intention that the jurisdiction of all courts including the Supreme Court is ousted in such matters and the decision on this question is not justiciable. Further argument is that para 7 in clear words thereafter reiterates that position by saying that `notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule. In other words, the argument is that para 6 by itself provides for ouster of the jurisdiction of all courts including the Supreme Court and para 7 is a remanifestation of that clear intent in case of any doubt arising from para 6 alone. On this basis it was urged that the issue raised before us is not justiciable and the Speaker or the Chairman, as the case may be, not being `Tribunal' within the meaning of that expression used in Article 136 of the Constitution, their decision is not open to judicial review.

68. In reply, it was urged that finality Clause in sub- paragraph (1) of para 6 does not exclude the jurisdiction of the high Courts under Articles 226 and 227 and of this Court under Article 136. Deeming provision in sub-paragraph (2) of Para 6, it was urged, has the only effect of making it a `proceedings in Parliament' or `proceedings in the Legislature of a State' to bring it within the ambit of clause (1) of Articles 122 or 212 but not within Clause (2) of these Articles. The expression `proceedings in Parliament' and `proceedings in the Legislature of a State' are used only in Clause (1) of Articles 122 and 212 but not in clause (2) of either of these Articles, on account of which the scope of the fiction cannot be extended beyond the limitation implicit in the specific words used in the legal fiction. This being so, it was argued that immunity extended only to `irregularity of procedure' but not to illegality as held in Keshav Singh - [1965] 1 SCR 413. In respect of para 7, the reply is that the expression `no court' therein must be similarly construed to refer only to the courts of ordinary jurisdiction but not the extra- ordinary jurisdiction of the High Courts under Article 226 & 227 and the Plenary jurisdiction of Supreme Court under Article 136. It was also argued that the Speaker/Chairman while deciding the question of disqualification of member under para 6 exercises a judicial function of the State which otherwise would be vested in the courts and, therefore, in this capacity he acts as `Tribunal amenable to the jurisdiction under Articles 136, 226 and 227 of the Constitution. Shri Sibal also contended that the bar in para 7 operates only at the interim stage, like other election disputes, and not after the final decision under para 6.

69. The finality clause in sub-paragraph (1) of para 6 which says that the decision of the Chairman or, as the case may be, the Speaker of such House shall be final is not decisive. It is settled that such a finality clause in a statute by itself is not sufficient to exclude the jurisdiction of the High Courts under Articles 226 and 227 and the Supreme Court under Article 136 of the Constitution, the finality being for the statute alone. This is apart from the decision being vulnerable on the ground of nullity. Accordingly, sub-paragraph (1) alone is insufficient to exclude the extra-ordinary jurisdiction of the High Courts and the plenary jurisdiction of this Court. The legal fiction in sub-paragraph (2) of para 6 can only bring the proceedings under sub-paragraph (1) thereof within the ambit of Clause (1) of Article 122 or Clause (1) 212, as the case may be since the expressions used in sub-paragraph (2) of para 6 of the tenth Schedule are `shall be deemed to be proceedings in Parliament' or `proceedings in the Legislature of a State' and such expressions find place both in Articles 122 and 212 only in Clause (1) and not clause (2) thereof. The ambit of the legal function must be confined to the limitation implicit in the words used for creating the fiction and it cannot be given an extended meaning to include therein something in addition. It is also settled that a matter falling within the ambit of clause (1) of either of these two Article is justiciable on the ground of illegality or perversity in spite of the immunity it enjoys to a challenge on the ground of `irregularity of procedures'.

70. To overcome this result, it was argued that such matter would fall within the ambit of Clause (2) of both Articles 122 and 212 because the consequence of the order of disqualification by the Speaker/Chairman would relate to the conduct of business of the House. In the first place, the two separate clauses in Articles 122 and 212 clearly imply that the meaning and scope of the two cannot be identical even assuming there be some overlapping area between them. What is to be seen is the direct impact of the action and its true nature and not the further consequences flowing therefrom. it cannot be doubted in view of the clear language of sub-paragraph (2) of para 6 that it relates to clause (1) of both Articles 122 and 212 and the legal fiction cannot, therefore, be

extended beyond the limits of the express words used in the fiction. In construing the fiction it is not to be extended beyond the language of the Section by which it is created and its meaning must be restricted by the plain words used. It cannot also be extended by importing another fiction. The fiction in para 6(2) is a limited one which serves its purpose by confining it to clause (1) alone of Articles 122 and 212 and, therefore,, there is no occasion to enlarge its scope by reading into it words which are not there and extending it also to Clause (2) of these Articles. See Commissioner of Income-tax v. Ajax Products Ltd. MANU/SC/0139/1964 : [1965] 1 SCR 700.

71. Moreover, it does appear to us that the decision relating to disqualification of a member does not relate to regulating procedure or the conduct of business of the House provided for in Clause (2) of Articles 122 and 212 and taking that view would amount to extending the fiction beyond its language and importing another fiction for this purpose which is not permissible. That being so, the matter falls within the ambit of Clause (1) only of Articles 122 and 212 as a result of which it would be vulnerable on the ground of illegality and perversity and, therefore, justiciable to that extent.

72. It is, therefore, not possible to uphold the objection of jurisdiction on the finality clause or the legal fiction created in para 6 of the Tenth Schedule when justiciability of the clause is based on a ground of illegality or perversity (see Keshav Singh - [1965] 1 SCR 413). This in our view is the true construction and effect of para 6 of Tenth Schedule.

73. We shall now deal with para 7 of the Tenth Schedule.

74. The words in para 7 of the Tenth Schedule are undoubtedly very wide and ordinarily mean that this provision supersedes any other provision in the Constitution. This is clear from the use of the non obstinate clause `notwithstanding anything in this Constitution' as the opening words of para 7. The non obstinate clause followed by the expression `no court shall have any jurisdiction' leave no doubt that the bar of jurisdiction of courts contained in para 7 is complete excluding also the jurisdiction of the Supreme court under Article 136 and that of the High Courts under Articles 226 and 227 of the Constitution relating to matters covered by para 7. The question, therefore, is of the scope of para 7. The scope of para 7 for this purpose is to be determined by the expression `in respect of any matter connected with disqualification of a member of a House under this Schedule'.

75. One of the constructions suggested at the hearing was that this expression covers only the intermediate stage of the proceedings relating to disqualification under para 6 and not the end stage when the final order is made under para 6 on the question of disqualification. It was suggested that this construction would be in line with the construction made by this Court in its several decisions relating to exclusion of Courts' jurisdiction in election disputes at the intermediate state under Article 329 of the Constitution. This construction suggested of para 7 does not commend to us since it is contrary to the clear and unambiguous language of the provision. The expression `in respect of any matter connected with the disqualification of a member of a House under this Schedule' is wide enough to include not merely the intermediate stage of the proceedings relating to disqualification but also the final order on the question of disqualification made under para 6 which is undoubtedly such a matter. There is thus express exclusion of all courts' jurisdiction even in respect of the final order.

76. As earlier indicated by virtue of the finality clause and the deeming provision in para 6, there is exclusion of all courts' jurisdiction to a considerable extent leaving out only the area of justiciability on the ground of illegality or perversity which obviously is relatable only to the final order under para 6. This being so, enactment of para 7 was necessarily made to bar the jurisdiction of courts also in respect of matters falling outside the purview of the exclusion made by para 6. para 7 by itself and more so when read along with para 6 of the Tenth Schedule, leaves no doubt that exclusion of all courts' jurisdiction by para 7 is total leaving no area within the purview, even of the Supreme Court or the High Courts under Articles 136, 226 and 227. The language of para 7 being explicit, no other aid to construction is needed. Moreover, the speech of the Law Minister who piloted the Bill in the Lok Sabha and that of the Prime Minister in the Rajya Sabha as well as the debate on this subject clearly show that these provisions were enacted to keep the entire matter relating to disqualification including the Speakers' final decision under para 6 on the question of disqualification, wholly outside the purview of all courts including the Supreme Court and the High Courts. The legislative history of the absence of such a provision excluding the courts' jurisdiction in the two earlier Bills which lapsed also re- inforces the conclusion that enactment of para 7 was clearly to provide for total ouster of all courts' jurisdiction.

77. In the face of this clear language, there is no rule of construction which permits the reading of para 7 in any different manner since there is no ambiguity in the language which is capable of only one construction, namely, total exclusion of the Jurisdiction of all courts including that of the Supreme Court and the High Courts under Articles 136, 226 and 227 of the Constitution in respect of every matter connected with the disqualification of a member of a House under the Tenth Schedule including the final decision rendered by the Speaker/Chairman, as the case may be. Para 7 must, therefore, be read in this manner alone.

78. The question now is of the effect of enacting such a provision in the Tenth Schedule and the applicability of the proviso to Clause (2) of Article 368 of the Constitution.

Point `C' - Applicability of Article 368(2) Proviso

79. The above construction of para 7 of the Tenth Schedule gives rise to the question whether it thereby makes a change in Article 136 which is in Chapter IV of part V. and Articles 226 and 227 which are in Chapter V of Part VI of the Constitution. If the effect of para 7 is to make such a change in these provisions so that the proviso to Clause (2) of Article 368 is attracted, then the further question which arises is of the effect on the Tenth Schedule of the absence of ratification by the specified number of State Legislatures, it being admitted that no such ratification of the Bill was made by any of the State Legislatures.

80. Prima facie it would appear that para 7 does seek to make a change in Articles 136, 226 and 227 of the Constitution inasmuch as without para 7 in the Tenth Schedule a decision of the Speaker/ Chairman would be amenable to the jurisdiction of the Supreme Court under Article 136 and of the high Courts under Articles 226 and 227 as in the case of decisions as to other disqualifications provided in Clauses (1) of Article 102 or 191 by the President/Governor under Article 103 or 192 in accordance with the opinion of the Election Commission which was the Scheme under the two earlier Bills which lapsed. However, some Learned Counsel contended placing reliance on Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar MANU/SC/0013/1951 : [1952]

SCR 89 and Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965] 1 SCR 933 that the effect of such total exclusion of the jurisdiction of the Supreme Court and the High Courts does not make a change in Articles 136, 226 and 227. A close reading of these decisions indicates that instead of supporting this contention, they do infact negative it.

81. In Sankari Prasad, the challenge was to Articles 31A and 31B inserted in the Constitution by the Constitution (First Amendment) Act, 1951. One of the objections was based on absence of ratification under Article 368. While rejecting this argument, the Constitution Bench held as under:

It will be seen that these Articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Article 13 read with other relevant articles in Part III, while Article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs "for the enforcement of any of the rights conferred by Part III" or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extend, but because there would be no occasion hereafter for the exercise of their powers in such cases.

[Emphasis supplied]

82. The test applied was whether the impugned provisions inserted by the Constitutional Amendment did `either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136'. Thus the change may be either in terms i.e. explicit or in effect in these Articles to require ratification. The ground for rejection of the argument therein was that the remedy in the courts remained unimpaired and unaffected by the change and the change was really by extinction of the right to seek the remedy. In other words, the change was in the right and not the remedy of approaching the court since there was no occasion to invoke the remedy, the right itself being taken away. To the same effect is the decision in Sajjan Singh, wherein Sankari Prasad was followed stating clearly that there was no justification for reconsidering Sankari Prasad.

83. Distinction has to be drawn between the abridgement or extinction of a right and restriction of the remedy for enforcement of the right. If there is an abridgement or extinction of the right which results in the disappearance of the cause of action which enables invoking the remedy and in the absence of which there is no occasion to make a grievance and invoke the subsisting remedy, then the change brought about is in the right and not the remedy. To this situation, Sankari Prasad and Sajjan Singh apply. On the other hand, if the right remains untouched so that a grievance based thereon can arise and, therefore, the cause of action subsists, but the remedy is curtailed or extinguished so that the cause of action cannot be enforced for want of that remedy, then the change made is in the remedy and not in the subsisting right. To this latter category, Sankari Prasad and Sajjan Singh have no application. This is clear from the above-quoted passage in Sankari Prasad which clearly brings out this distinction between a change in the right and a change in the remedy.

84. The present case, in unequivocal terms, is that of destroying the remedy by enacting para 7 in the Tenth Schedule making a total exclusion of judicial review including that by the Supreme Court under Article 136 and the High Courts under Articles 226 and 227 of the Constitution. But for para 7 which deals with the remedy and not the right, the jurisdiction of the Supreme Court under Article 136 and that of the High Courts under Articles 226 and 227 would remain unimpaired to challenge the decision under para 6, as in the case of decisions relating to other disqualifications specified in clause (1) of Articles 102 and 191, which remedy continues to subsist. Thus, this extinction of the remedy alone without curtailing the right, since the question of disqualification of a member on the ground of defection under the Tenth Schedule does required adjudication on enacted principles, results in making a change in Article 136 in Chapter IV in Part V. and Articles 226 and 227 in Chapter V in Part VI of the Constitution.

85. On this conclusion, it is undisputed that the proviso to clause (2) of Article 368 is attracted requiring ratification by the specified number of State Legislatures before presentation of the Bill seeking to make the constitutional amendment to the President for his assent.

Point `D' - Effect of absence of ratification

86. The material part of Article 368 is as under:

368. Power of Parliament to amend the Constitution and Procedure therefore. - (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent Power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill, for the purpose in either House of parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in -

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those legislatures before the Bill making provision for such amendment is presented to the President for assent.

(Emphasis supplied)

87. it is Clause (2) with its proviso which is material. The main part of Clause (2) prescribes that a constitutional amendment can be initiated only by the introduction of a Bill for the purpose and when the Bill is passed by each House by a majority of the total membership of that House and by a majority of not less than tow-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill. In short, the Bill not being passed by the required majority is presented to the President for his assent to the Bill and on giving of the assent, the Constitution stands amended accordingly. Then comes, the proviso which says that `if such an amendment seeks to make any change' in the specified provisions of the Constitution, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent. In other words, the proviso contains a constitutional limitation on the amending power; and prescribes as a part of the special procedure, prior assent of the State legislatures before Presentation of the Bill to the President for his assent in the case of such Bills. This is a condition interposed by the proviso in between the passing of the Bill by the requisite majority in each House and presentation of the Bill to the President for his assent, which assent results in the Constitution automatically standing amended in accordance with terms of the Bill. Thus, the Bills governed by the proviso cannot be presented to the President for his assent without the prior ratification by the specified number of State Legislatures or in other words, such ratification is a part of the special procedure or a condition precedent to presentation of the Bill governed by the proviso to the President for his assent. It logically follows that the consequence of the Constitution standing amended in accordance with the terms of the Bill on assent by the President, which is the substantive part of Article 368, results only when the Bill has been presented to the President for his assent in conformity with the special procedure after performance of the conditions precedent, namely, passing of the Bill by each House by the requisite majority in the case of all Bills; and in the case of Bills governed by the proviso, after the Bill has been passed by the requisite majority in each House and it has also been ratified by the legislature of not less than one-half of the States.

88. The constituent power for amending the Constitution conferred by Article 368 also prescribes the mandatory procedure in clause (2) including its proviso, for its exercise. The constituent power cannot, therefore, be exercised in any other manner and non-compliance of the special procedure so prescribed in Article 368 (2) cannot bring about the result of the Constitution standing amended in accordance with the terms of the Bill since that result ensues only at the end of the prescribed mandatory procedure and not otherwise. The substantive part of Article 368 which provides for the resultant amendment is the consequence of strict compliance of the mandatory special procedure prescribed for exercise of the constituent power and that result does not ensue except in the manner prescribed.

89. The true nature and import of the amending power and procedure under Article 368 as distinguished from the ordinary legislative procedure was indicated in Kesavananda Bhartim MANU/SC/0114/1972 : [1973] Supp. SCR 1 at pp. 561, 563 & 565:

...Under Article 368 However, a different and special procedure is provided for amending the constitution. A Bill has to be introduced in either House of Parliament and must be passed by each House separately by a special majority. It should be passed not only by 2/3rds majority of the members present and voting but also by a majority of the total strength of the House. No joint sitting of the two Houses is permissible. In the case of certain provisions of the Constitution which directly or indirectly affect interstate relations, the proposed amendment is required to be ratified by the Legislatures which is not a legislative process of not less than one half of the States before the Bill proposing the amendment is presented to the President for his assent. The procedure is special in the sense that it is different and more exacting or restrictive than the one by which ordinary laws are made by Parliament. Secondly in certain matters the State Legislatures are involved in the process of making the amendment. Such partnership between the Parliament and the State Legislatures in making their own laws by the ordinary procedure is not recognised by the Constitution. It follows from the special provision made in Article 368 for the amendment of the Constitution that our Constitution is a `rigid' or `controlled' constitution because the Constituent Assembly has "left a special direction as to how the constitution is to be changed. In view of Article 368, when the special procedure is successfully followed, the proposed amendment automatically becomes a part of the constitution or, in other words, it writes itself into the constitution.

XXX XXX XXX

... But when it comes to the amendment of the Constitution, a special procedure has been prescribed in Article 368, Since the result of following the special procedure under the Article is the amendment of the constitution the process which brings about the result is known as the exercise of constituent power by the bodies associated in the task of the amending the constitution. It is, therefore, obvious, that when the Parliament and the State Legislatures function in accordance with Article 368 with a view to amend the constitution, they exercise constituent power as distinct from their ordinary legislative power under Articles 245 to 248. Article 368 is not entirely procedural. Undoubtedly part of it is procedural. But there is a clear mandate that on the procedure being followed the `proposed amendment shall become part of the constitution, which is the substantive part of Article 368. Therefore, the peculiar or special power to amend the constitution is to be sought in Article 368 only and not elsewhere.

XXX XXX XXX

...The true position is that the alchemy of the special procedure prescribed in Article 368 produces the constituent power which transport the proposed amendment into the constitution and gives it equal status with the other parts of the constitution.

(Emphasis supplied)

90. Apart from the unequivocal language of clause (2) including the proviso therein indicating the above result of prior ratification being a part of the special procedure or condition precedent for valid assent of the President, the same result is reached even by another route. The ordinary role of a proviso is to carve out an exception from the general rule in the main enacting part. The main enacting part of clause (2) lays down that on a Bill for a constitutional amendment being passed in each House by a requisite majority, it shall be presented to the President for his assent and on the

assent being given, the Constitution shall stand amended in accordance with the terms of the Bill. The proviso then carves out the exception in case of Bills seeking to make any change in the specified Articles of the Constitution prescribing that in the case of those Bills, prior ratification by the Legislatures of not less than one-half of the States is also required before the Bill is presented to the President for assent. This means that a Bill falling within the ambit of the proviso is carved out of the main enactment in clause (2) as an exception on account of which it cannot result in amendment of the Constitution on the President's assent without prior ratification by the specified number of State Legislatures. The proviso in Clause (2) is enacted for and performs the function of a true proviso by qualifying the generality of the main enactment in Clause (2) in providing an exception and taking out of the main enactment in clause (2) such Bills which but for the proviso would fall within the main part. Not only the language of the main enactment in Clause (2) and the proviso thereunder is unequivocal to give this clear indication but the true role of a proviso, the form in which the requirement of prior ratification if such a Bill by the State Legislatures is enacted in Article 368 lend further assurance that this is the only construction of Clause (2) with its proviso which can be legitimately made. If this be the correct constructions of Article 368 (2) with the proviso as we think it is, then there is no escape from the logical conclusion that a Bill to which the proviso applies does not result in amending the Constitution in accordance with its terms on assent of the President if it was presented to the President for his assent and the President gave his assent to the Bill without prior ratification by the specified number of the State Legislatures. This is the situation in the present case.

91. Thus the requirement of prior ratification by the State Legislatures is not only a condition precedent forming part of the special mandatory procedure for exercise of the constituent power and a constitutional limitation thereon but also a requirement carving out an exception to the general rule of automatic amendment of the Constitution on the President's assent to the Bill.

92. In other words, Clause (2) with the proviso therein itself lays down that President's assent does not result in automatic amendment of the Constitution in case of such a Bill it was not duly ratified before presentation to the President for his assent. Nothing more is needed to show that not only para 7 of the Tenth Schedule but the entire Constitution (Fifty-Second Amendment) Act, 1985 is still born or an abortive attempt to amend the Constitution for want of prior ratification by the State Legislatures of the Bill before its presentation to the President for his assent.

93. The result achieved in each case is the same irrespective of the route taken. If the route chosen is for construing the language of Clause (2) with the proviso merely a part of it, the requirement or prior ratification is a condition precedent forming part of the special mandatory procedure providing that the constituent power in case of such a Bill can be exercised in this manner alone, the mode prescribed for other Bills being forbidden. If the route taken is of treating the proviso as carving out an exception from the general rule which is the normal role of a proviso, then the result is that the consequence of the Constitution standing amended in terms of the provisions of the Bill on the President's assent as laid down in the main part of Clause (2) does not ensue without prior ratification in case of a Bill to which the proviso applies. There can thus be no doubt that para 7 of the Tenth Schedule which seeks to make a change in Article 136 which is a part of Chapter IV of Part V. and Articles 226 and 227 which form part of Chapter V of Part VI of the Constitution, has not been enacted by incorporation in a Bill seeking to make the constitutional Amendment in the manner prescribed by clause (2) read with the proviso therein of Article 368. Para 7 of the Tenth

Schedule is, therefore, unconstitutional and to that extent at least the Constitution does not stand amended in accordance with the Bill seeking to make the Constitutional Amendment. The further question now is: its effect on the validity of the remaining part of the Tenth Schedule and consequently the Constitution (Fifty-Second Amendment) Act, 1985 itself.

Point `E' - Severability of para 7 of Tenth Schedule

94. The effect of absence of ratification indicated above suggests inapplicability of the Doctrine of Severability. In our opinion, it is not para 7 alone but the entire Tenth Schedule may the Constitution (Fifty-Second Amendment) Act, 1985 itself which is rendered unconstitutional being an abortive attempt to so amend the Constitution. It is the entire Bill and not merely rely para 7 of the Tenth Schedule therein which required prior ratification by the State Legislatures before its presentation to the President for his assent, it being a joint exercise by the Parliament and State Legislatures. The stage for presentation of Bill to the President for his assent not having reached, the President's assent was non est and it could not be result in amendment of the Constitution in accordance with the terms of the Bill for the reasons given earlier. Severance of para 7 of the Tenth Schedule could not be made for the purpose of ratification or the President's assent and, therefore, no such severance can be made even for the ensuing result. If the President's assent cannot validate para 7 in the absence of prior ratification, the same assent cannot be accepted to bring about a difference result with regard to the remaining part of the Bill.

95. On this view, the question of applying the Doctrine of Severability to strike down para 7 alone retaining the remaining part of Tenth Schedule does not arise since it presupposes that the Constitution stood so amended on the President's assent. The Doctrine does not apply to a still born legislation.

96. The Doctrine of Severability applies in a case where an otherwise validly enacted legislation contains a provision suffering from a defect of lack of legislative competence and the invalid provision is severable leaving the remaining valid provisions a valid provisions a viable whole. This doctrine has no application where the legislation is not validly enacted due to non-compliance of the mandatory legislative procedure such as the mandatory special procedure prescribed for exercise of the constituent power. It is not possible to infuse life in a still born by any miracle of deft surgery even though it may be possible to continue life by removing a Congenitally defective part by surgical skill. Even the highest degree of surgical skill can help only to continue life but it cannot infuse life in the case of still birth.

97. With respect, the contrary view does not give due weight to the effect of a condition precedent forming part of the special procedure and the role of a proviso and results in rewriting the proviso to mean that ratification is not a condition precedent but merely an additional requirement of such a Bill to make that part effective. This also fouls with the expression `Constitution shall stand amended.....' on the assent of President which is after the stage when the amendment has been made and ratified by the State Legislatures as provided. The historical background of drafting the proviso also indicates the significance attached to prior ratification as a condition precedent for valid exercise of the constituent power.

98. We are unable to read the Privy Council decision in The Bribery Commissioner V. Pedrick Ranasinghe [1965] AC 172 as an authority to support applicability of the Doctrine of Severability in the Present case. In Kesavananda Bharati, the substance of that decision was indicated by Mathew, J., at p. 778 of S.C.R., thus:

... that though Ceylon Parliament has plenary power of ordinary legislation, in the exercise of its constitution power it was subject to the special procedure laid down in s, 29 (4)....

99. While Section 29(4) of Ceylon (Constitution) Order was entirely procedural with no substantive part therein, Article 368 of the Indian Constitution has also a substantive part as pointed out in Kesavananda Bharati. This distinction also has to be borne in mind.

100. The challenge in Ranasinghe was only to the legality of a conviction made under the Bribery Act, 1954 as amended by the Bribery Amendment Act, 1958 on the ground that the Tribunal which had made the conviction was constituted Under Section 41 of the Amending Act which was invalid being in conflict with Section 55 of the Constitution and not being enacted by exercise of constituent power in accordance with Section 29(4) of the Ceylon (Constitution) Order. Supreme Court of Ceylon quashed the conviction holding Section 41 of the Amending Act to be invalid for this reason. The Privy Council affirmed that view and in this context held that Section 41 could be severed from rest of the Amending Act. Ranasinghe was not a case of a Bill passed in exercise of the constituent power without following the special procedure of Section 29(4) but of a Bill passed in exercise of the ordinary legislative power containing other provisions which could be so enacted, and including therein Section 41 which could be made only in accordance with the special procedure of Section 29(4) of the Constitution. The Privy Council made a clear distinction between legislative and constituent powers and reiterated the principles thus:

...The effect of Section 5 of the Colonial Laws Validity Act, which is framed in a manner somewhat similar to Section 29(4) of the Ceylon Constitution was that where a legislative power is given subject to certain manner and form, that power does not exist unless and until the manner and form is complied with Lord Sankey L.C. said:

A Bill, within the scope of Sub-section (6) of Section 7A, which received the Royal Assent without having been approved by the electors in accordance with that section, would not be a valid act of the legislature. It would be ultra vires Section 5 of the Act of 1865.

101. The Bribery Amendment Act, 1958, in Ranasinghe, was enacted in exercise of the ordinary legislative power and therein was inserted Section 41 which could be made only in exercise of the constituent power according to the special procedure prescribed in Section 29(4) of the Ceylon (Constitutions) Order. In this situation, only Section 41 of the Amending Act was held to be invalid and severed because the special procedure for the constituent power was required only for that provision and not the rest. In the instant case the entire Tenth Schedule is enacted in exercise of the Constituent power under Article 368, not merely para 7 therein, and this has been done without following the mandatory special procedure prescribed. It is, therefore, not a case of severing the invalid constituent part from the remaining ordinary legislation. Ranasinghe could have application if in an ordinary legislation outside the ambit of Article 368, a provision which could be made only in exercise of the constituent power according to Article 368 had been inserted

without following the special procedure, and severance of the invalid constituent part alone was the question. Ranasinghe is, therefore, distinguishable.

102. Apart from inapplicability of the Doctrine of Severability to a Bill to which the proviso to Clause (2) of Article 368 applies, for the reasons given, it does not apply in the present case to strike down para 7 alone retaining the remaining part of the Tenth Schedule. In the first place, the discipline for exercise of the constituent power was consciously and deliberately adopted instead of resorting to the mode of ordinary legislation in accordance with Sub-clause (e) of Clause (1) of Articles 102 and 191, which would render the decision on the question of disqualification on the ground of defection also amenable to judicial review as in the case of decision on questions relating to other disqualifications. Moreover, even the test applicable for applying the Doctrine of Severability to ordinary legislation as summarised in R.M.D. Chamarbaughwalla v. The Union of India MANU/SC/0020/1957 : [1957] S.C.R. 930, indicates that para 7 alone is not severable to permit retention of the remaining part of the Tenth Schedule as valid legislation. The settled test whether the enactment would have been made without para 7 indicates that the legislative intent was to make the enactment only with para 7 therein and not without it. This intention is manifest throughout and evident from the fact that but for para 7 the enactment did not require the discipline of Article 368 and exercise of the constituent power. Para 7 follows para 6 the contents of which indicate the importance given to para 7 while enacting the Tenth Schedule. The entire exercise, as reiterated time and again in the debates, particularly the Speech of the Law Minister while piloting the Bill in the Lok Sabha and that of the Prime Minister in the Rajya Sabha, was to emphasise that total exclusion of judicial review of the Speaker's decision by all courts including the Supreme Court, was the prime object of enacting the Tenth Schedule. The entire legislative history shows this. How can the Doctrine of Severability be applied in such a situation to retain the Tenth Schedule striking down para 7 alone ? This is further reason for inapplicability of this doctrine.

Point `F'- Violation of basic features

103. The provisions in the Tenth Schedule minus para 7, assuming para 7 to be severable as held in the majority opinion, can be sustained only if they do not violate the basic structure of the Constitution or damage any of its basic features. This is settled by Kesavananda Bharti MANU/SC/0516/1972 : [1973] Supp. S.C.R. 1. The question, therefore, is whether there is violation of any of the basic features of the Constitution by the remaining part of the Tenth Schedule, even assuming the absence of ratification in accordance with the proviso to clause (2) of Article 368 results in invalidation of para 7 alone.

104. Democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the Postulates of free and fair elections is provision for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority.
It is only by a fair adjudication of such disputes relating to validity of electrons and subsequent disqualifications of members that true reflection of the electoral mandate and governance by rule of law essential for democracy can be ensured. In the democratic pattern adopted in our Constitution, not only the resolution of election dispute is entrusted to a judicial tribunal, but even the decision on questions as to disqualification of members under Articles 103 and 192 is by the President/Governor in accordance with the opinion of the Election Commission. The constitutional

scheme, therefore, for decision on questions as to disqualification of members after being duly elected, contemplates adjudication of such disputes by an independent authority out side the House, namely, President/Governor in accordance with the opinion of the Election Commission, all of whom are high constitutional functionaries with security of tenure independent of the will of the House. Sub-clause (e) of clause (1) in Articles 102 and 191 which provides for enactment of any law by the Parliament to prescribe any disqualification other than those prescribed in the earlier sub-clauses of clause (1), clearly indicates that all disqualifications of members were contemplated within the scope of Articles 102 and 191. Accordingly, all disqualifications including disqualification on the ground of defection, in our constitutional scheme, are different species of the same genus, namely, disqualification, and the constitutional scheme does not contemplate any difference in their basic traits and treatment. It is undisputed that the disqualification on the ground of defection could as well have been prescribed by an ordinary law made by the Parliament under Articles 102 (1) (e) and 191 (1) (e) instead of by resort to the constituent power of enacting the Tenth Schedule. This itself indicates that all disqualifications of members according to the constitutional scheme were meant to be decided by an independent authority outside the House such as the President/Governor, in accordance with the opinion of another similar independent constitutional functionary,, the Election Commission of India, who enjoys the security of tenure of tenure of a Supreme Court judge with the same terms and conditions of office. Thus, for the purpose of entrusting the decision of the question of disqualification of a member, the constitutional scheme envisages an independent authority outside the House and not within it, which may be dependent on the pleasure of the Majority in the House for its tenure.

105. The Speaker's office is undoubtedly high and has considerable aura with the attribute of impartiality. This aura of the office was even greater when the Constitution was framed and yet the farmers of the Constitution did not choose to vest the authority of adjudicating disputes as to disqualification of members to the Speaker; and provision was made in Articles 103 and 192 for decision of such disputes by the President/Governor in accordance with the opinion of the Election Commission. To reason is not far to seek.

106. The Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out. The question as to disqualification of a member has adjudicatory disposition and, therefore, requires the decision to be rendered in consonance with the scheme for adjudication of disputes. Rule of law has in it firmly entrenched, natural justice, of which, rule against Bias is a necessary concomitant; and basic postulates of Rule against Bias are; Nemo judex in causa sua - `A Judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased'; and `it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' This appears to be the underlying principle adopted by the framers of the Constitution in not designating the Speaker as the authority to decide election disputes and questions as to disqualification of members under Articles 103, 192 and 329 and opting for an independent authority outside the House. The framers of the Constitution had in this manner kept the office of the Speaker away from this controversy. There is nothing unusual in this scheme if we bear in mind that the final authority for removal of a Judge of the Supreme Court and High Court its outside the judiciary in the Parliament under Article 124(4). On the same principle the authority to decide the question of disqualification of a member of legislature is outside the House as envisaged by Articles 103 and 192.

107. In the Tenth Schedule, the Speaker is made not only the sole but the final arbiter of such dispute with no provision for any appeal or revision against the Speaker's decision to any independent outside authority. This departure in the Tenth Schedule is a reverse trend and violates a basic feature of the Constitution since the speaker cannot be treated as an authority contemplated for being entrusted with this function by the basic postulates of the Constitution, notwithstanding the great dignity attaching to that office with the attribute of impartiality.

108. It is the Vice-President of India who is ex-officio chairman of the Rajya Sabha and his position, being akin to that of the President of India, is different from that of the Speaker. Nothing said herein relating to the office of the Speaker applies to the Chairman of the Rajya Sabha, that is, the Vice-President of India. However, the only authority named for the Lok Sabha and the Legislative Assemblies is the Speaker of the House and entrustment of this adjudicatory function fouls with the constitutional scheme and, therefore, violates a basic feature of the Constitution. Remaining part of the Tenth Schedule also is rendered invalid notwithstanding the fact that this defect would not apply to the Rajya Sabha alone whose Chairman is the Vice-President of India, since the Tenth Schedule becomes unworkable for the Lok Sabha and the State Legislatures. The Statutory exception of Doctrine of Necessity has no application since designation of authority in the Tenth Schedule is made by choice while enacting the legislation instead of adopting the other available options.

109. Since the conferment of authority is on the Speaker and that provision cannot be sustained for the reason given, even without para 7, the entire Tenth Schedule is rendered invalid in the absence of any valid authority for decision of the dispute.

110. Thus, even if the entire Tenth Schedule cannot be held unconstitutional merely on the ground of absence of ratification of the Bill, assuming it is permissible to strike down para 7 alone, the remaining part of the Tenth Schedule is rendered unconstitutional also on account of violation of the aforesaid basic feature. Irrespective of the view on the question of effect of absence of ratification, the entire Tenth Schedule must be struck down as unconstitutionally.

Point `G' - Other contentions

111. We have reached the conclusion that para 7 of the Tenth Schedule is unconstitutional; that the entire Tenth Schedule is constitutionally invalid in the absence of prior ratification in accordance with the proviso to Clause (2) of Article 368; that the Doctrine of Severability does not apply in the present case of a constitutional amendment which suffers from the defect of absence of ratification as required by the proviso to Clause (2) of Article 368; that the remaining part of the Tenth Schedule minus para 7 is also unconstitutional for violation of a basic feature of the Constitution; and that the entire Tenth Schedule is, therefore, constitutionally invalid rendering the Constitution (Fifty-Second Amendment) Act, 1985 still born and an abortive attempt to amend the constitution. In view of this conclusion, it is not necessary for us to express our concluded opinion on the other grounds of challenge to the constitutional validity of the entire Tenth Schedule urged at the hearing on the basis of alleged violation of certain other basic features of the Constitution including the right of members based on Article 105 of the Constitution.

112. These are our detailed reasons for the operative conclusions pronounced by us earlier on November 12, 1991.

Back to Index

MANU/SC/0227/1995

Neutral Citation: 1994/INSC/572

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 481 of 1989 etc.

Decided On: 02.12.1994

Appellants: L. Chandra Kumar **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
Kuldip Singh, B.L. Hansaria and S.B. Majmudar, JJ.

Subject: Constitution

Subject: Service

Relevant Section:
ADMINISTRATIVE TRIBUNALS ACT, 1985 - Section 5(6)

Prior History:
From the Judgument and Order dated 2.11.88 of the Madras High Court in W.P. No. 8673 of 1988.

Case Note:
Constitution - power of administrative Tribunal - whether Tribunals have power equal to High Courts - judicial discord as to equality of status of Tribunals - reconsideration of judgment laid down in previous case - matter placed before Chief Justice for Constitution of appropriate Bench.

JUDGMENT

1. The challenge to the validity of Section 5(6) of the Administrative Tribunals Act, 1985 (the 'Act') has unmasked greater issues, to examine which, we have come to the conclusion that the judgment of this Court in S.P. Sampath Kumar v. Union of India MANU/SC/0851/1987 : (1987)ILLJ128SC , which is by a Constitution Bench of five learned Judges, needs to be reconsidered by a larger Bench. Our reasons follow.

2. The Constitution (Forty-second Amendment) Act, 1976 inserted Part XIV-A in the Constitution which contains Articles 323-A and 323-B. These Articles conceive of setting up of various

tribunals as adjudicatory bodies. They, inter alia, contain provisions which enable, not only the Parliament but even State Legislatures, to exclude the jurisdiction of all courts except that of this Court under Article 136 with respect to matters falling within the jurisdiction of the concerned tribunals. The Act came to be enacted by the Parliament in exercise of the powers conferred on it by Article 323-A of the Constitution. The vires of the Act was challenged before this Court which was upheld in Sampath Kumar's case.

3. While upholding the validity of Section 28 of the Act in Sampath, Kumar's case this Court took the view that the power of judicial review need not always be exercised by regular courts and the same can be exercised by an equally efficacious alternative mechanism. Apart from making suggestions relating to the eligibility etc. of the persons who could be appointed as Chairman, Vice-Chairmen or Members of the Tribunal this Court stated that every bench of the Tribunal should consist of one Judicial Member and one Administrative Member

4. The primary reason, according to us, for having a fresh-look at the issues involved in Sampath Kumar's case is the observations of the Bench therein by which the tribunals have been equated with the High Courts. A two-Judge Bench of this Court in J.B. Chpara v. Union of India MANU/SC/0459/1986 : (1987)ILLJ255SC i relying upon Sampath Kumar has held that the Tribunals have the jurisdiction, power and authority even to adjudicate upon questions pertaining to the constitutional validity or otherwise of a rule framed by the President of India under the proviso to Article 309 of the Constitution. They can even adjudicate on the vires of the Acts of Parliament and State Legislatures. Section 5(6) of the Act gives this power, if the Chairman of the tribunal so desires, even to a single Administrative Member. It is a different matter that no Chairman would like to do so; but that has no relevance while examining the validity of the sub-section which reads as below:

Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorised by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify:

Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the Chairman or, as the case may be, referred to him for transfer to, such Bench as the Chairman may deem fit.

5. In Amulya Chandra Kalita v. Union of India MANU/SC/0503/1991 : (1990)ILLJ523SC , a two-Judge Bench of this Court held that the Administrative Member of Tribunal alone is not competent to hear and decide a case. This view was taken after referring to what has been pointed out in Sampath Kumar's case requiring Bench of the Tribunal to consist of one judicial Member and one Administrative Member following which observation, the Act was amended to say so, vide its Section 5(2) as substituted by Act 19 of 1986. The attention of the Bench deciding Amulya Chandra Kalita's case, however, was not invited to Section 5(6).

6. The aforesaid point came to be examined again; and this time by a three-Judge Bench in Dr. Mahabal Ram v. Indian Council of Agricultural Research MANU/SC/0638/1994 : (1991)IILLJ112SC . (The judgment was, however, rendered on May 3, 1991). When she attention of this Bench was drawn to Section 5(6) of the Act, it opined that any matter involving questions of law or interpretation of constitutional provision should be assigned to a two-Member Bench and parties can request the single Member to refer the matter to a larger bench of two Members and such request should ordinarily be accepted. In pursuant to these observations an order was passed by the Chairman of the Central Administrative Tribunal on December 18, 1991 which is in consonance with the same. It deserves notice that Mahabal Ram's case there was no challenge to the validity of Sub-section (6), but the same has been assailed here.

7. Shri Rama Jois, in assailing the validity of Sub-section (6), has raised larger issues before us one of which relate to the view taken in Sampath Kumar's case that judicial power need not always be exercised by regular courts. According to the learned Counsel, this is contrary to the dicta laid down even in Kesvananda Bharati v. State of Kerala MANU/SC/0445/1973 : AIR1973SC1461 . Indeed, this is the view which has been taken recently by a Full Bench of Andhra Pradesh High Court in Sakinala Harinath v. State of Andhra Pradesh MANU/AP/0251/1993 : [1994] 1 APLJ 1. For the sake of completeness it may be mentioned that the decision in Sakinala has been assailed before this Court in C.A. No. 169/94 which has been referred to a Constitution Bench.

8. Another facet of the case focussed by Shri Rama Jois relates to the equality of status between the Tribunals and the High Courts. A note discordant to that of Sampath Kumar was struck in this regard by a three-Judge Bench of this Court in M.B. Majumdar v. Union of India MANU/SC/0404/1990 : (1991)IILLJ585bSC , holding that Administrative Tribunals cannot be equated with the High Courts in all respect and they are not deemed High Courts, because of which Members of Tribunals cannot claim equality with High Court Judges as regarded pay and age of superannuation. Mention may also be made about the view taken by this Court in State of Orissa v. Bhagwan Sarangi, (SLP(C) No. 2129/91 disposed of on 1.10.91) that a Tribunal established under the Act is nonetheless a tribunal and it cannot side-track a decision of the concerned High Court.

9. It would not be out of place to refer to a three Judge Bench decision of this Court in R.K. Jain v. Union of India MANU/SC/0291/1993 : 1993 (4) SCC 119, in which need for the Members of the Tribunals (which was CEGAT in that case set up with the aid of Article 323-B but what was stated therein would apply proprio vigore to the Tribunal at hand) having adequate legal expertise, judicial experience and legal training was emphasised to enable the Tribunal to become effective alternative institutional mechanism and to dispense with High Courts' power of judicial review. Ramaswamy, J., however, opined that such tribunals being creature of statutes can in no case claim the status of the High Court or parity or as substitutes.

10. The aforesaid post-Sampath Kumar cases do require in our considered view, a fresh look by a larger-Bench over all the issues adjudicated by this Court in Sampath Kumar's case including the question whether the Tribunal can at all have an Administrative Member on its Bench, if it were to have the power of even deciding constitutional validity of a statute or 309 Rule, as conceded in Chopra's case (supra). Examination of this aspect would be necessary to instill confidence in the minds of people (and litigants) which is the greatest prop of the judiciary.

11. Let the records be placed before Hon'ble the Chief Justice of India for Constitution of an appropriate Bench

Back to Index

MANU/SC/1166/2013

Neutral Citation: 2013/INSC/748

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 68 of 2008, Contempt Petition (Civil) No. D26722 of 2008 in Writ Petition (Criminal) No. 68 of 2008, SLP (Crl.) No. 5986 of 2006, SLP (Crl.) No. 5200 of 2009, Criminal Appeal No. 1410 of 2011 and Criminal Appeal No. 1267 of 2007 (Under Article 32 of the Constitution of India)

Decided On: 12.11.2013

Appellants: Lalita Kumari **Vs.** Respondent: Govt. of U.P. and Ors.

Hon'ble Judges/Coram:

P. Sathasivam, C.J.I., B.S. Chauhan, Ranjana Prakash Desai Ranjan Gogoi and S.A. Bobde, JJ.

Subject: Criminal

Relevant Section:

Code of Criminal Procedure, 1973 (CrPC) - Section 154

Disposition:
Disposed of

Case Note:

Criminal - Cognizable offence - Receipt of information - Police officer - Foremost duty - Present reference moved seeking to direct Police Officers to register FIR as their foremost duty on receiving complaint about cognizable offence - Whether a police officer is bound to register First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of Code of Criminal Procedure, 1973 - Whether a police officer has power to conduct a "preliminary inquiry" in order to test veracity of such information before registering FIR

Facts:

The present writ petition, under Article 32 of the Constitution, has been filed by one Lalita Kumari (minor) through her father, viz., Shri Bhola Kamat for the issuance of a writ of Habeas Corpus or direction(s) of like nature against the Respondents herein for the protection of his minor daughter who has been kidnapped. The grievance in the said writ

petition is that on 11.05.2008, a written report was submitted by the Petitioner before the officer in-charge of the police station concerned who did not take any action on the same. Thereafter, when the Superintendent of Police was moved, an FIR was registered. According to the Petitioner, even thereafter, steps were not taken either for apprehending the accused or for the recovery of the minor girl child.

Held, while disposing off the reference

(1) As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Section 154, i.e., the provision imposing requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Section 156, i.e., the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of the informant, would act as an "extremely valuable safeguard" against the excessive, mala fide and illegal exercise of investigative powers by the police. [31]

(2) The use of the word "shall" in Section 154(1) of the Code clearly shows the legislative intent that it is mandatory to register an FIR if the information given to the police discloses the commission of a cognizable offence. [40]

(3) The First Information Report is in fact the "information" that is received first in point of time, which is either given in writing or is reduced to writing. It is not the "substance" of it, which is to be entered in the diary prescribed by the State Government. [48]

(4) The non qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code is for the reason that the police officer should not refuse to record any information relating to the commission of a cognizable offence on the ground that he is not satisfied with the reasonableness or credibility of the information. [64]

(5) In terms of the language used in Section 154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. FIR) about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an FIR when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under Section154 of the Code about the commission of a cognizable offence must be registered as an FIR so as to initiate an offence. [73]

(6) Conducting an investigation into an offence after registration of FIR under Section 154

of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law. [76]

(7) The object sought to be achieved by registering the earliest information as FIR is inter alia two fold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc., later. [83]

(8) The registration of FIR either on the basis of the information furnished by the informant under Section 154(1) of the Code or otherwise under Section 157(1) of the Code is obligatory. [88]

(9) While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. [98]

(10) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. [111]

(11) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. [111]

JUDGMENT

P. Sathasivam, C.J.I.

1. The important issue which arises for consideration in the referred matter is whether "a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short 'the Code') or the police officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering the same?"

2. The present writ petition, under Article 32 of the Constitution, has been filed by one Lalita Kumari (minor) through her father, viz., Shri Bhola Kamat for the issuance of a writ of *Habeas Corpus* or direction(s) of like nature against the Respondents herein for the protection of his minor daughter who has been kidnapped. The grievance in the said writ petition is that on 11.05.2008, a written report was submitted by the Petitioner before the officer in-charge of the police station concerned who did not take any action on the same. Thereafter, when the Superintendent of Police was moved, an FIR was registered. According to the Petitioner, even thereafter, steps were not taken either for apprehending the accused or for the recovery of the minor girl child.

3. A two-Judge Bench of this Court in, ***Lalita Kumari*** v. ***Government of Uttar Pradesh and Ors.*** (2008) 7 SCC 164, after noticing the disparity in registration of FIRs by police officers on case to case basis across the country, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police/Commissioners of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaint petitions for appropriate direction(s) to the police to register the case immediately and for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown.

4. Pursuant to the above directions, when the matter was heard by the very same Bench in ***Lalita Kumari*** v. ***Government of Uttar Pradesh and Ors.*** (2008) 14 SCC 337, Mr. S.B. Upadhyay, learned senior counsel for the Petitioner, projected his claim that upon receipt of information by a police officer in-charge of a police station disclosing a cognizable offence, it is imperative for him to register a case under Section 154 of the Code and placed reliance upon two-Judge Bench decisions of this Court in ***State of Haryana*** v. ***Bhajan Lal*** MANU/SC/0115/1992 : 1992 Supp. (1) SCC 335, ***Ramesh Kumari*** v. ***State (NCT of Delhi)*** MANU/SC/8037/2006 : (2006) 2 SCC 677 and ***Parkash Singh Badal*** v. ***State of Punjab*** MANU/SC/5415/2006 : (2007) 1 SCC 1. On the other hand, Mr. Shekhar Naphade, learned senior Counsel for the State of Maharashtra submitted that an officer in-charge of a police station is not obliged under law, upon receipt of information disclosing commission of a cognizable offence, to register a case rather the discretion lies with him, in appropriate cases, to hold some sort of preliminary inquiry in relation to the veracity or otherwise of the accusations made in the report. In support of his submission, he placed reliance upon two-Judge Bench decisions of this Court in ***P. Sirajuddin*** v. ***State of Madras*** MANU/SC/0158/1970 : (1970) 1 SCC 595, ***Sevi*** v. ***State of Tamil Nadu*** MANU/SC/0218/1981 : 1981 Supp SCC 43, ***Shashikant*** v. ***Central Bureau of Investigation*** MANU/SC/8639/2006 : (2007) 1 SCC 630, and ***Rajinder Singh Katoch*** v. ***Chandigarh Admn.*** MANU/SC/8052/2007 : (2007) 10 SCC 69. In view of the conflicting decisions of this Court on the issue, the said bench, vide order dated 16.09.2008, referred the same to a larger bench.

5. Ensuing compliance to the above direction, the matter pertaining to Lalita Kumari was heard by a Bench of three-Judges in ***Lalita Kumari*** v. ***Government of Uttar Pradesh and Ors.*** MANU/SC/0157/2012 : (2012) 4 SCC 1 wherein, this Court, after hearing various counsel representing Union of India, States and Union Territories and also after adverting to all the conflicting decisions extensively, referred the matter to a Constitution Bench while concluding as under:

97. We have carefully analysed various judgments delivered by this Court in the last several decades. We clearly discern divergent judicial opinions of this Court on the main issue: whether under Section 154 Code of Criminal Procedure, a police officer is bound to register an FIR when a cognizable offence is made out or he (police officer) has an option, discretion or latitude of conducting some kind of preliminary inquiry before registering the FIR.

98. The learned Counsel appearing for the Union of India and different States have expressed totally divergent views even before this Court. This Court also carved out a special category in the case of medical doctors in the aforementioned cases of *Santosh Kumar* and *Suresh Gupta* where

preliminary inquiry had been postulated before registering an FIR. Some counsel also submitted that the CBI Manual also envisages some kind of preliminary inquiry before registering the FIR.

99. The issue which has arisen for consideration in these cases is of great public importance. In view of the divergent opinions in a large number of cases decided by this Court, it has become extremely important to have a clear enunciation of law and adjudication by a larger Bench of this Court for the benefit of all concerned--the courts, the investigating agencies and the citizens.

100. Consequently, we request the Hon'ble the Chief Justice to refer these matters to a Constitution Bench of at least five Judges of this Court for an authoritative judgment.

6. Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also.

7. Heard Mr. S.B. Upadhyay, learned senior counsel for the Petitioner, Mr. K.V. Vishwanathan, learned Additional Solicitor General for the Union of India, Mr. Sidharth Luthra, learned Additional Solicitor General for the State of Chhattisgarh, Mr. Shekhar Naphade, Mr. R.K. Dash, Ms. Vibha Datta Makhija, learned senior counsel for the State of Maharashtra, U.P. and M.P. respectively, Mr. G. Sivabalamurugan, learned Counsel for the accused, Dr. Ashok Dhamija, learned Counsel for the CBI, Mr. Kalyan Bandopodhya, learned senior counsel for the State of West Bengal, Dr. Manish Singhvi, learned AAG for the State of Rajasthan and Mr. Sudarshan Singh Rawat.

8. In order to answer the main issue posed before this Bench, it is useful to refer the following Sections of the Code:

154. Information in cognizable cases.-- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156. Police officer's power to investigate cognizable case. (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court

having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

157. Procedure for investigation: (1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.

(2) In each of the cases mentioned in Clauses (a) and (b) of the proviso to Sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that subsection, and, in the case mentioned in Clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

Contentions:

9. At the foremost, **Mr. S.B. Upadhyay**, learned senior counsel, while explaining the conditions mentioned in Section 154 submitted that Section 154(1) is mandatory as the use of the word 'shall' is indicative of the statutory intent of the legislature. He also contended that there is no discretion left to the police officer except to register an FIR. In support of the above proposition, he relied on

the following decisions, viz., ***B. Premanand and Ors.*** v. ***Mohan Koikal and Ors.*** MANU/SC/0249/2011 : (2011) 4 SCC 266, ***M/s. Hiralal Rattanlal Etc. Etc.*** v. ***State of U.P. and Anr. Etc. Etc.*** MANU/SC/0553/1972 : (1973) 1 SCC 216 and ***Govindlal Chhaganlal Patel*** v. ***Agricultural Produce Market Committee, Godhra and Ors.*** MANU/SC/0125/1975 : (1975) 2 SCC 482.

10. Mr. Upadhyay, by further drawing our attention to the language used in Section 154(1) of the Code, contended that it merely mentions 'information' without prefixing the words 'reasonable' or 'credible'. In order to substantiate this claim, he relied on the following decisions, viz., ***Bhajan Lal (supra), Ganesh Bhavan Patel and Anr.*** v. ***State of Maharashtra*** MANU/SC/0083/1978 : (1978) 4 SCC 371, ***Aleque Padamsee and Ors.*** v. ***Union of India and Ors.*** MANU/SC/2975/2007 : (2007) 6 SCC 171, ***Ramesh Kumari (supra), Ram Lal Narang*** v. ***State (Delhi Administration)*** MANU/SC/0216/1979 : (1979) 2 SCC 322 and ***Lallan Chaudhary and Ors.*** v. ***State of Bihar and Anr.*** MANU/SC/4524/2006 : (2006) 12 SCC 229. Besides, he also brought to light various adverse impacts of allowing police officers to hold preliminary inquiry before registering an FIR.

11. **Mr. K.V. Viswanathan**, learned Additional Solicitor General appearing on behalf of Union of India submitted that in all the cases where information is received under Section 154 of the Code, it is mandatory for the police to forthwith enter the same into the register maintained for the said purpose, if the same relates to commission of a cognizable offence. According to learned ASG, the police authorities have no discretion or authority, whatsoever, to ascertain the veracity of such information before deciding to register it. He also pointed out that a police officer, who proceeds to the spot under Sections 156 and 157 of the Code, on the basis of either a cryptic information or source information, or a rumour etc., has to immediately, on gathering information relating to the commission of a cognizable offence, send a report (ruqqa) to the police station so that the same can be registered as FIR. He also highlighted the scheme of the Code relating to the registration of FIR, arrest, various protections provided to the accused and the power of police to close investigation. In support of his claim, he relied on various decisions of this Court viz., ***Bhajan Lal (supra), Ramesh Kumari (supra)*** and ***Aleque Padamsee (supra)***. He also deliberated upon the distinguishable judgments in conflict with the mandatory proposition, viz., ***State of Uttar Pradesh*** v. ***Bhagwant Kishore Joshi*** MANU/SC/0066/1963 : (1964) 3 SCR 71, ***P. Sirajuddin (supra), Sevi (supra), Shashikant (supra), Rajinder Singh Katoch (supra), Jacob Mathew*** v. ***State of Punjab and Anr.*** MANU/SC/0457/2005 : (2005) 6 SCC 1. He concluded his arguments by saying that if any information disclosing a cognizable offence is led before an officer in-charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. Further, he emphasized upon various safeguards provided under the Code against filing a false case.

12. **Dr. Ashok Dhamija**, learned Counsel for the CBI, submitted that the use of the word "shall" under Section 154(1) of the Code clearly mandates that if the information given to a police officer relates to the commission of a cognizable offence, then it is mandatory for him to register the offence. According to learned Counsel, in such circumstances, there is no option or discretion given to the police. He further contended that the word "shall" clearly implies a mandate and is unmistakably indicative of the statutory intent. What is necessary, according to him, is only that the information given to the police must disclose commission of a cognizable offence. He also

contended that Section 154 of the Code uses the word "information" simpliciter and does not use the qualified words such as "credible information" or "reasonable complaint". Thus, the intention of the Parliament is unequivocally clear from the language employed that a mere information relating to commission of a cognizable offence is sufficient to register an FIR. He also relied on ***Bhajan Lal (supra), Ramesh Kumari (supra), Aleque Padamsee (supra), Lallan Chaudhary (supra), Superintendent of Police, CBI*** v. ***Tapan Kumar Singh*** MANU/SC/0299/2003 : (2003) 6 SCC 175, ***M/s. Hiralal Rattanlal (supra), B. Premanand (supra), Khub Chand*** v. ***State of Rajasthan*** MANU/SC/0015/1966 : AIR 1967 SC 1074, ***P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra), State of West Bengal*** v. ***Committee for Protection of Democratic Rights, West Bengal*** MANU/SC/0121/2010 : (2010) 3 SCC 571. He also pointed out various safeguards provided in the Code against filing a false case. In the end, he concluded by reiterating that the registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. Further, he also clarified that the preliminary inquiry conducted by the CBI, under certain situations, as provided under the CBI Crime Manual, stands on a different footing due to the special provisions relating to the CBI contained in the Delhi Special Police Establishment Act, 1946, which is saved under Sections 4(2) and 5 of the Code.

13. **Mr. Kalyan Bandopadhyay**, learned senior Counsel appearing on behalf of the State of West Bengal, submitted that whenever any information relating to commission of a cognizable offence is received, it is the duty of the officer in-charge of a police station to record the same and a copy of such information, shall be given forthwith, free of cost, to the informant under Section 154(2) of the Code. According to him, a police officer has no other alternative but to record the information in relation to a cognizable offence in the first instance. He also highlighted various subsequent steps to be followed by the police officer pursuant to the registration of an FIR. With regard to the scope of Section 154 of the Code, he relied on ***H.N. Rishbud and Inder Singh*** v. ***State of Delhi*** MANU/SC/0049/1954 : AIR 1955 SC 196, ***Bhajan Lal (supra), S.N. Sharma*** v. ***Bipen Kumar Tiwari*** MANU/SC/0182/1970 : (1970) 1 SCC 653, ***Union of India*** v. ***Prakash P. Hinduja*** MANU/SC/0446/2003 : (2003) 6 SCC 195, ***Sheikh Hasib alias Tabarak*** v. ***State of Bihar*** MANU/SC/0180/1971 : (1972) 4 SCC 773, ***Shashikant (supra), Ashok Kumar Todi*** v. ***Kishwar Jahan and Ors.*** MANU/SC/0162/2011 : (2011) 3 SCC 758, ***Padma Sundara Rao (Dead) and Ors.*** v. ***State of T.N. and Ors.*** MANU/SC/0182/2002 : (2002) 3 SCC 533, ***P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra)*** and ***Mannalal Khatic*** v. ***The State*** MANU/WB/0117/1967 : AIR 1967 Cal 478.

14. **Dr. Manish Singhvi**, learned Additional Advocate General for the State of Rajasthan, submitted that Section 154(1) of the Code mandates compulsory registration of FIR. He also highlighted various safeguards inbuilt in the Code for lodging of false FIRs. He also pointed out that the only exception relates to cases arising under the Prevention of Corruption Act as, in those cases, sanction is necessary before taking cognizance by the Magistrates and the public servants are accorded some kind of protection so that vexatious cases cannot be filed to harass them.

15. **Mr. G. Sivabalamurugan**, learned Counsel for the Appellant in Criminal Appeal No. 1410 of 2011, after tracing the earlier history, viz., the relevant provisions in the Code of Criminal Procedure of 1861, 1872, 1882 and 1898 stressed as to why the compulsory registration of FIR is mandatory. He also highlighted the recommendations of the Report of the 41st Law Commission

and insertion of Section 13 of the Criminal Law (Amendment) Act, 2013 with effect from 03.02.2013.

16. **Mr. R.K. Dash**, learned senior counsel appearing for the State of Uttar Pradesh, though initially commenced his arguments by asserting that in order to check unnecessary harassment to innocent persons at the behest of unscrupulous complainants, it is desirable that a preliminary inquiry into the allegations should precede with the registration of FIR but subsequently after considering the salient features of the Code, various provisions like Sections 2(4)(h), 156(1), 202(1), 164, various provisions from the U.P. Police Regulations, learned senior counsel contended that in no case recording of FIR should be deferred till verification of its truth or otherwise in case of information relating to a cognizable offence. In addition to the same, he also relied on various pronouncements of this Court, such as, ***Mohindro*** v. ***State of Punjab*** MANU/SC/1010/2001 : (2001) 9 SCC 581, ***Ramesh Kumari (supra), Bhajan Lal (supra), Parkash Singh Badal (supra), Munna Lal*** v. ***State of Himachal Pradesh*** MANU/HP/0033/1991 : 1992 Crl. L.J. 1558, ***Giridhari Lal Kanak*** v. ***State and Ors.*** MANU/MP/0620/2001 : 2002 Crl. L.J. 2113 and ***Katteri Moideen Kutty Haji*** v. ***State of Kerala*** MANU/KE/0071/2002 : 2002 (2) Crimes 143. Finally, he concluded that when the statutory provisions, as envisaged in Chapter XII of the Code, are clear and unambiguous, it would not be legally permissible to allow the police to make a preliminary inquiry into the allegations before registering an FIR under Section 154 of the Code.

17. **Mr. Sidharth Luthra**, learned Additional Solicitor General appearing for the State of Chhattisgarh, commenced his arguments by emphasizing the scope of reference before the Constitution Bench. Subsequently, he elaborated on various judgments which held that an investigating officer, on receiving information of commission of a cognizable offence under Section 154 of the Code, has power to conduct preliminary inquiry before registration of FIR, viz., ***Bhagwant Kishore Joshi (supra), P. Sirajuddin (supra), Sevi (supra)*** and ***Rajinder Singh Katoch (supra)***. Concurrently, he also brought to our notice the following decisions, viz., ***Bhajan Lal (supra), Ramesh Kumari (supra), Parkash Singh Badal (supra)***, and ***Aleque Padamsee (supra)***, which held that a police officer is duty bound to register an FIR, upon receipt of information disclosing commission of a cognizable offence and the power of preliminary inquiry does not exist under the mandate of Section 154. Learned ASG has put forth a comparative analysis of Section 154 of the Code of Criminal Procedure of 1898 and of 1973. He also highlighted that every activity which occurs in a police station [Section 2(s)] is entered in a diary maintained at the police station which may be called as the General Diary, Station Diary or Daily Diary. He underlined the relevance of General Diary by referring to various judicial decisions such as ***Tapan Kumar Singh (supra), Re: Subbaratnam and Ors.*** AIR 1949 Madras 663. He further pointed out that, presently, throughout the country, in matrimonial, commercial, medical negligence and corruption related offences, there exist provisions for conducting an inquiry or preliminary inquiry by the police, without/before registering an FIR under Section 154 of the Code. He also brought to our notice various police rules prevailing in the States of Punjab, Rajasthan, U.P., Madhya Pradesh, Kolkata, Bombay, etc., for conducting an inquiry before registering an FIR. Besides, he also attempted to draw an inference from the Crime Manual of the CBI to highlight that a preliminary inquiry before registering a case is permissible and legitimate in the eyes of law. Adverting to the above contentions, he concluded by pleading that preliminary inquiry before registration of an FIR should be held permissible. Further, he emphasized that the power to carry out an inquiry or preliminary

inquiry by the police, which precedes the registration of FIR will eliminate the misuse of the process, as the registration of FIR serves as an impediment against a person for various important activities like applying for a job or a passport, etc. Learned ASG further requested this Court to frame guidelines for certain category of cases in which preliminary inquiry should be made.

18. **Mr. Shekhar Naphade**, learned senior counsel appearing on behalf of the State of Maharashtra, submitted that ordinarily the Station House Officer (SHO) should record an FIR upon receiving a complaint disclosing the ingredients of a cognizable offence, but in certain situations, in case of doubt about the correctness or credibility of the information, he should have the discretion of holding a preliminary inquiry and thereafter, if he is satisfied that there is a *prima facie* case for investigation, register the FIR. A mandatory duty of registering FIR should not be cast upon him. According to him, this interpretation would harmonize two extreme positions, viz., the proposition that the moment the complaint disclosing ingredients of a cognizable offence is lodged, the police officer must register an FIR without any scrutiny whatsoever is an extreme proposition and is contrary to the mandate of Article 21 of the Constitution of India, similarly, the other extreme point of view is that the police officer must investigate the case substantially before registering an FIR. Accordingly, he pointed out that both must be rejected and a middle path must be chosen. He also submitted the following judgments, viz., ***Bhajan Lal (supra), Ramesh Kumari (supra), Parkash Singh Badal (supra)***, and ***Aleque Padamsee (supra)*** wherein it has been held that if a complaint alleging commission of a cognizable offence is received in the police station, then the SHO has no other option but to register an FIR under Section 154 of the Code. According to learned senior counsel, these verdicts require reconsideration as they have interpreted Section 154 de hors the other provisions of the Code and have failed to consider the impact of Article 21 on Section 154 of the Code.

19. Alongside, he pointed out the following decisions, viz., ***Rajinder Singh Katoch (supra), P. Sirajuddin (supra), Bhagwant Kishore Joshi (supra)*** and ***Sevi (supra)***, which hold that before registering an FIR under Section 154 of the Code, it is open to the police officer to hold a preliminary inquiry to ascertain whether there is a *prima facie* case of commission of a cognizable offence or not. According to learned senior counsel, Section 154 of the Code forms part of a chain of statutory provisions relating to investigation and, therefore, the scheme of provisions of Sections 41, 157, 167, 169, etc., must have a bearing on the interpretation of Section 154. In addition, he emphasized that giving a literal interpretation would reduce the registration of FIR to a mechanical act. Parallelly, he underscored the impact of Article 21 on Section 154 of the Code by referring to ***Maneka Gandhi*** v. ***Union of India*** MANU/SC/0133/1978 : (1978) 1 SCC 248, wherein this Court has applied Article 21 to several provisions relating to criminal law. This Court has also stated that the expression "law" contained in Article 21 necessarily postulates law which is reasonable and not merely statutory provisions irrespective of its reasonableness or otherwise. Learned senior counsel pleaded that in the light of Article 21, provisions of Section 154 of the Code must be read down to mean that before registering an FIR, the police officer must be satisfied that there is a *prima facie* case for investigation. He also emphasized that Section 154 contains implied power of the police officer to hold preliminary inquiry if he bona fide possess serious doubts about the credibility of the information given to him. By pointing out Criminal Law (Amendment) Act, 2013, particularly, Section 166A, Mr. Naphade contended that as far as other cognizable offences (apart from those mentioned in Section 166A) are concerned, police has a discretion to hold preliminary inquiry if there is some doubt about the correctness of the information.

20. In case of allegations relating to medical negligence on the part of the doctors, it is pointed out by drawing our attention to some of the decisions of this Court viz., ***Tapan Kumar Singh (supra), Jacob Mathew (supra)*** etc., that no medical professional should be prosecuted merely on the basis of the allegations in the complaint. By pointing out various decisions, Mr. Naphade emphasized that in appropriate cases, it would be proper for a police officer, on receipt of a complaint of a cognizable offence, to satisfy himself that at least *prima facie* allegations levelled against the accused in the complaint are credible. He also contended that no single provision of a statute can be read and interpreted in isolation, but the statute must be read as a whole. Accordingly, he prayed that the provisions of Sections 41, 57, 156, 157, 159, 167, 190, 200 and 202 of the Code must be read together. He also pointed out that Section 154(3) of the Code enables any complainant whose complaint is not registered as an FIR by the officer in-charge of the police station to approach the higher police officer for the purpose of getting his complaint registered as an FIR and in such a case, the higher police officer has all the powers of recording an FIR and directing investigation into the matter. In addition to the remedy available to an aggrieved person of approaching higher police officer, he can also move the concerned Magistrate by making a complaint under Section 190 thereof. He further emphasized that the fact that the legislature has provided adequate remedies against refusal to register FIR and to hold investigation in cognizable offences, is indicative of legislative intent that the police officer is not bound to record FIR merely because the ingredients of a cognizable offence are disclosed in the complaint, if he has doubts about the veracity of the complaint. He also pointed out that the word "shall" used in the statute does not always mean absence of any discretion in the matter. For the said proposition, he also highlighted that this Court has preferred the rule of purposive interpretation to the rule of literal interpretation for which he relied on ***Chairman Board of Mining Examination and Chief Inspector of Mines and Anr.*** v. ***Ramjee*** MANU/SC/0061/1977 : (1977) 2 SCC 256, ***Lalit Mohan Pandey*** v. ***Pooran Singh*** MANU/SC/0422/2004 : (2004) 6 SCC 626, ***Prativa Bose*** v. ***Kumar Rupendra Deb Raikat*** MANU/SC/0251/1963 : (1964) 4 SCR 69. He further pointed out that it is impossible to put the provisions of Section 154 of the Code in a straightjacket formula. He also prayed for framing of some guidelines as regards registration or non-registration of FIR. Finally, he pointed out that the requirement of Article 21 is that the procedure should be fair and just. According to him, if the police officer has doubts in the matter, it is imperative that he should have the discretion of holding a preliminary inquiry in the matter. If he is debarred from holding such a preliminary inquiry, the procedure would then suffer from the vice of arbitrariness and unreasonableness. Thus, he concluded his arguments by pleading that Section 154 of the Code must be interpreted in the light of Article 21.

21. **Ms. Vibha Datta Makhija**, learned senior counsel appearing for the State of Madhya Pradesh submitted that a plain reading of Section 154 and other provisions of the Code shows that it may not be mandatory but is absolutely obligatory on the part of the police officer to register an FIR prior to taking any steps or conducting investigation into a cognizable offence. She further pointed out that after receiving the first information of an offence and prior to the registration of the said report (whether oral or written) in the First Information Book maintained at the police station under various State Government Regulations, only some preliminary inquiry or investigative steps are permissible under the statutory framework of the Code to the extent as is justifiable and is within the window of statutory discretion granted strictly for the purpose of ascertaining whether there has been a commission or not of a cognizable offence. Hence, an investigation, culminating into a Final Report under Section 173 of the Code, cannot be called into question and be quashed due to

the reason that a part of the inquiry, investigation or steps taken during investigation are conducted after receiving the first information but prior to registering the same unless it is found that the said investigation is unfair, illegal, *mala fide* and has resulted in grave prejudice to the right of the accused to fair investigation. In support of the above contentions, she traced the earlier provisions of the Code and current statutory framework, viz., Criminal Law (Amendment) Act, 2013 with reference to various decisions of this Court. She concluded that Section 154 of the Code leaves no area of doubt that where a cognizable offence is disclosed, there is no discretion on the part of the police to record or not to record the said information, however, it may differ from case to case.

22. The issues before the Constitution Bench of this Court arise out of two main conflicting areas of concern, viz.,

(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused.

Discussion:

23. The FIR is a pertinent document in the criminal law procedure of our country and its main object from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and to bring to book the guilty.

24. Historical experience has thrown up cases from both the sides where the grievance of the victim/informant of non-registration of valid FIRs as well as that of the accused of being unnecessarily harassed and investigated upon false charges have been found to be correct.

25. An example of the first category of cases is found in ***State of Maharashtra*** v. ***Sarangdharsingh Shivdassingh Chavan and Anr.*** MANU/SC/1055/2010 : (2011) 1 SCC 577 wherein a writ petition was filed challenging the order of the Collector in the District of Buldhana directing not to register any crime against Mr. Gokulchand Sananda, without obtaining clearance from the District Anti-Money Lending Committee and the District Government Pleader. From the record, it was revealed that out of 74 cases, only in seven cases, charge sheets were filed alleging illegal moneylending. This Court found that upon instructions given by the Chief Minister to the District Collector, there was no registration of FIR of the poor farmers. In these circumstances, this Court held the said instructions to be *ultra vires* and quashed the same. It is argued that cases like above exhibit the mandatory character of Section 154, and if it is held otherwise, it shall lead to grave injustice.

26. In ***Aleque Padamsee (supra)***, while dealing with the issue whether it is within the powers of courts to issue a writ directing the police to register a First Information Report in a case where it was alleged that the accused had made speeches likely to disturb communal harmony, this Court held that "the police officials ought to register the FIR whenever facts brought to their notice show

that a cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code." As such, the Code itself provides several checks for refusal on the part of the police authorities under Section 154 of the Code.

27. However, on the other hand, there are a number of cases which exhibit that there are instances where the power of the police to register an FIR and initiate an investigation thereto are misused where a cognizable offence is not made out from the contents of the complaint. A significant case in this context is the case of ***Preeti Gupta*** v. ***State of Jharkhand*** MANU/SC/0592/2010 : (2010) 7 SCC 667 wherein this Court has expressed its anxiety over misuse of Section 498A of the Indian Penal Code, 1860 (in short 'the Indian Penal Code') with respect to which a large number of frivolous reports were lodged. This Court expressed its desire that the legislature must take into consideration the informed public opinion and the pragmatic realities to make necessary changes in law.

28. The above said judgment resulted in the 243rd Report of the Law Commission of India submitted on 30th August, 2012. The Law Commission, in its Report, concluded that though the offence under Section 498A could be made compoundable, however, the extent of misuse was not established by empirical data, and, thus, could not be a ground to denude the provision of its efficacy. The Law Commission also observed that the law on the question whether the registration of FIR could be postponed for a reasonable time is in a state of uncertainty and can be crystallized only upon this Court putting at rest the present controversy.

29. In order to arrive at a conclusion in the light of divergent views on the point and also to answer the above contentions, it is pertinent to have a look at the historical background of the Section and corresponding provisions that existed in the previous enactments of the Code of Criminal Procedure.

Code of Criminal Procedure, 1861

139. Every complaint or information preferred to an officer in charge of a police station, shall be reduced into writing and the substance thereof shall be entered in a diary to be kept by such officer, in such form as shall be prescribed by the local government.

Code of Criminal Procedure, 1872

112. Every complaint preferred to an officer in charge of a police station, shall be reduced into writing, and shall be signed, sealed or marked by the person making it; and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the local government.

Code of Criminal Procedure, 1882

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

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

Code of Criminal Procedure, 1898

154. Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Government may prescribe in this behalf.

Code of Criminal Procedure, 1973

154. Information in cognizable cases: 1) Every information relating to the commission of a cognizable offence, it given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[Provided that if the information is given by the woman against whom an offence under Sections 326A, 326B, 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer:

Provided further that:

(a) in the event that the person against whom an offence under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal code is alleged to have been committed or attempted is temporarily or permanently mentally or physically disabled then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under Clause (a) of Sub-section (5A) of Section 164 as soon as possible.]

(Inserted by Section 13 of 'The Criminal Law (Amendment) Act, 2013 w.e.f. 03.02.2013)

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

A perusal of the above said provisions manifests the legislative intent in both old codes and the new code for compulsory registration of FIR in a case of cognizable offence without conducting any Preliminary Inquiry.

30. The precursor to the present Code of 1973 is the Code of 1898 wherein substantial changes were made in the powers and procedure of the police to investigate. The starting point of the powers of police was changed from the power of the officer in-charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing and into the book separately prescribed by the Provincial government for recording such first information.

31. As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Section 154, i.e., the provision imposing requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Section 156, i.e., the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of the informant, would act as an "extremely valuable safeguard" against the excessive, *mala fide* and illegal exercise of investigative powers by the police.

32. Provisions contained in Chapter XII of the Code deal with information to the police and their powers to investigate. The said Chapter sets out the procedure to be followed during investigation. The objective to be achieved by the procedure prescribed in the said Chapter is to set the criminal law in motion and to provide for all procedural safeguards so as to ensure that the investigation is fair and is not *mala fide* and there is no scope of tampering with the evidence collected during the investigation.

33. In addition, Mr. Shekhar Naphade, learned senior counsel contended that insertion of Section 166A in Indian Penal Code indicates that registration of FIR is not compulsory for all offences other than what is specified in the said Section. By Criminal Law (Amendment) Act 2013, Section 166A was inserted in Indian Penal Code which reads as under:

Section 166A--Whoever, being a public servant.-

(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

(c) fails to record any information given to him under Sub-section (1) of Section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under Section 326A, Section 326B, Section 354, Section 354B, Section 370, Section 370A, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, Section 509 shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years and shall also be liable to fine.

Section 166A(c) lays down that if a public servant (Police Officer) fails to record any information given to him under Section 154(1) of the Code in relation to cognizable offences punishable under Sections 326A, 326B, 354, 354B, 370, 370A, 376, 376A, 376B, 376C, 376D, 376E or Section 509, he shall be punished with rigorous imprisonment for a term which shall not be less than six months but may extend to two years and shall also be liable to fine. Thus, it is the stand of learned Counsel that this provision clearly indicates that registration of FIR is imperative and police officer has no discretion in the matter in respect of offences specified in the said section. Therefore, according to him, the legislature accepts that as far as other cognizable offences are concerned, police has discretion to hold a preliminary inquiry if there is doubt about the correctness of the information.

34. Although, the argument is as persuasive as it appears, yet, we doubt whether such a presumption can be drawn in contravention to the unambiguous words employed in the said provision. Hence, insertion of Section 166A in the Indian Penal Code vide Criminal Law (Amendment) Act 2013, must be read in consonance with the provision and not contrary to it. The insertion of Section 166A was in the light of recent unfortunate occurrence of offences against women. The intention of the legislature in putting forth this amendment was to tighten the already existing provisions to provide enhanced safeguards to women. Therefore, the legislature, after noticing the increasing crimes against women in our country, thought it appropriate to expressly punish the police officers for their failure to register FIRs in these cases. No other meaning than this can be assigned to for the insertion of the same.

35. With this background, let us discuss the submissions in the light of various decisions both in favour and against the referred issue.

Interpretation of Section 154:

36. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. All that we have to see at the very outset is what does the provision say? As a result, the language employed in Section 154 is the determinative factor of the legislative intent. A plain reading of Section 154(1) of the Code provides that any information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police station shall be reduced into writing by him or under his direction. There is no ambiguity in the language of Section 154(1) of the Code.

37. At this juncture, it is apposite to refer to the following observations of this Court in ***M/s. Hiralal Rattanlal (supra)*** which are as under:

22...In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear....

The above decision was followed by this Court in ***B. Premanand (supra)*** and after referring the abovesaid observations in the case of ***Hiralal Rattanlal (supra)***, this Court observed as under:

9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide *Swedish Match AB* v. *SEBI* MANU/SC/0693/2004 : (2004) 11 SCC 641.

The language of Section 154(1), therefore, admits of no other construction but the literal construction.

38. The legislative intent of Section 154 is vividly elaborated in ***Bhajan Lal (supra)*** which is as under:

30. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined Under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer incharge of a police station" (within the meaning of Section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information

of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "*information*" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "*reasonable complaint*" and "*credible information*" are used. Evidently, the non qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that '*every complaint or information*' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

39. Consequently, the condition that is *sine qua non* for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

'Shall'

40. The use of the word "**shall**" in Section 154(1) of the Code clearly shows the legislative intent that it is mandatory to register an FIR if the information given to the police discloses the commission of a cognizable offence.

41. In ***Khub Chand (supra)***, this Court observed as under:

7...The term "shall" in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations....

42. It is relevant to mention that the object of using the word "shall" in the context of Section 154(1) of the Code is to ensure that all information relating to all cognizable offences is promptly registered by the police and investigated in accordance with the provisions of law.

43. Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable offences", a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

44. Therefore, the context in which the word "shall" appears in Section 154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register FIRs, all these factors clearly show that the word "shall" used in Section 154(1) needs to be given its ordinary meaning of being of "mandatory" character. The provisions of Section 154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer in-charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.

45. In view of the above, the use of the word 'shall' coupled with the Scheme of the Act lead to the conclusion that the legislators intended that if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer in-charge of the police station. Reading 'shall' as 'may', as contended by some counsel, would be against the Scheme of the Code. Section 154 of the Code should be strictly construed and the word 'shall' should be given its natural meaning. The golden rule of interpretation can be given a go-by only in cases where the language of the section is ambiguous and/or leads to an absurdity.

46. In view of the above, we are satisfied that Section 154(1) of the Code does not have any ambiguity in this regard and is in clear terms. It is relevant to mention that Section 39 of the Code casts a statutory duty on every person to inform about commission of certain offences which

includes offences covered by Sections 121 to 126, 302, 64A, 382, 392 etc., of the Indian Penal Code. It would be incongruous to suggest that though it is the duty of every citizen to inform about commission of an offence, but it is not obligatory on the officer-incharge of a Police Station to register the report. The word 'shall' occurring in Section 39 of the Code has to be given the same meaning as the word 'shall' occurring in Section 154(1) of the Code.

'Book'/'Diary'

47. It is contented by learned ASG appearing for the State of Chhattisgarh that the recording of first information under Section 154 in the 'book' is subsequent to the entry in the General Diary/Station Diary/Daily Diary, which is maintained in police station. Therefore, according to learned ASG, first information is a document at the earliest in the general diary, then if any preliminary inquiry is needed the police officer may conduct the same and thereafter the information will be registered as FIR.

48. This interpretation is wholly unfounded. The First Information Report is in fact the "information" that is received first in point of time, which is either given in writing or is reduced to writing. It is not the "substance" of it, which is to be entered in the diary prescribed by the State Government. The term 'General Diary' (also called as 'Station Diary' or 'Daily Diary' in some States) is maintained not under Section 154 of the Code but under the provisions of Section 44 of the Police Act, 1861 in the States to which it applies, or under the respective provisions of the Police Act(s) applicable to a State or under the Police Manual of a State, as the case may be. Section 44 of the Police Act, 1861 is reproduced below:

44. Police-officers to keep diary.--It shall be the duty of every officer in charge of a police-station to keep a general diary in such form as shall, from time to time, be prescribed by the State Government and to record therein all complaints and charged preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for any inspect such diary.

49. It is pertinent to note that during the year 1861, when the aforesaid Police Act, 1861 was passed, the Code of Criminal Procedure, 1861 was also passed. Section 139 of that Code dealt with registration of FIR and this Section is also referred to the word "diary", as can be seen from the language of this Section, as reproduced below:

139. Every complaint or information preferred to an officer in charge of a Police Station, shall be reduced into writing, and the substance thereof shall be entered in a **diary** to be kept by such officer, in such form as shall be prescribed by the local government.

Thus, Police Act, 1861 and the Code of Criminal Procedure, 1861, both of which were passed in the same year, used the same word "diary".

50. However, in the year 1872, a new Code came to be passed which was called the Code of Criminal Procedure, 1872. Section 112 of the Code dealt with the issue of registration of FIR and is reproduced below:

112. Every complaint preferred to an officer in charge of a Police station shall be reduced into writing, and shall be signed, sealed, or marked by the person making it; and the substance thereof shall be entered in a **book** to be kept by such officer in the form prescribed by the Local Government.

51. It is, thus, clear that in the Code of Criminal Procedure, 1872, a departure was made and the word 'book' was used in place of 'diary'. The word 'book' clearly referred to FIR book to be maintained under the Code for registration of FIRs.

52. The question that whether the FIR is to be recorded in the FIR Book or in General Diary, is no more *res integra*. This issue has already been decided authoritatively by this Court.

53. In ***Madhu Bala*** v. ***Suresh Kumar*** MANU/SC/0806/1997 : (1997) 8 SCC 476, this Court has held that FIR must be registered in the FIR Register which shall be a book consisting of 200 pages. It is true that the substance of the information is also to be mentioned in the Daily diary (or the general diary). But, the basic requirement is to register the FIR in the FIR Book or Register. Even in ***Bhajan Lal (supra)***, this Court held that FIR has to be entered in a book in a form which is commonly called the First Information Report.

54. It is thus clear that registration of FIR is to be done in a book called FIR book or FIR Register. of course, in addition, the gist of the FIR or the substance of the FIR may also be mentioned simultaneously in the General Diary as mandated in the respective Police Act or Rules, as the case may be, under the relevant State provisions.

55. The General Diary is a record of all important transactions/events taking place in a police station, including departure and arrival of police staff, handing over or taking over of charge, arrest of a person, details of law and order duties, visit of senior officers etc. It is in this context that gist or substance of each FIR being registered in the police station is also mentioned in the General Diary since registration of FIR also happens to be a very important event in the police station. Since General Diary is a record that is maintained chronologically on day-today basis (on each day, starting with new number 1), the General Diary entry reference is also mentioned simultaneously in the FIR Book, while FIR number is mentioned in the General Diary entry since both of these are prepared simultaneously.

56. It is relevant to point out that FIR Book is maintained with its number given on an annual basis. This means that each FIR has a unique annual number given to it. This is on similar lines as the Case Numbers given in courts. Due to this reason, it is possible to keep a strict control and track over the registration of FIRs by the supervisory police officers and by the courts, wherever necessary. Copy of each FIR is sent to the superior officers and to the concerned Judicial Magistrate.

57. On the other hand, General Diary contains a huge number of other details of the proceedings of each day. Copy of General Diary is not sent to the Judicial Magistrate having jurisdiction over the police station, though its copy is sent to a superior police officer. Thus, it is not possible to keep strict control of each and every FIR recorded in the General Diary by superior police officers and/or the court in view of enormous amount of other details mentioned therein and the numbers changing every day.

58. The signature of the complainant is obtained in the FIR Book as and when the complaint is given to the police station. On the other hand, there is no such requirement of obtaining signature of the complainant in the general diary. Moreover, at times, the complaint given may consist of large number of pages, in which case it is only the gist of the complaint which is to be recorded in the General Diary and not the full complaint. This does not fit in with the suggestion that what is recorded in General Diary should be considered to be the fulfillment/compliance of the requirement of Section 154 of registration of FIR. In fact, the usual practice is to record the complete complaint in the FIR book (or annex it with the FIR form) but record only about one or two paragraphs (gist of the information) in the General Diary.

59. In view of the above, it is useful to point out that the Code was enacted under Entry 2 of the Concurrent List of the Seventh Schedule to the Constitution which is reproduced below:

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

On the other hand, Police Act, 1861 (or other similar Acts in respective States) were enacted under Entry 2 of the State List of the Seventh Schedule to the Constitution, which is reproduced below:

2. Police (including railway and village police) subject to the provisions of Entry 2A of List I.

60. Now, at this juncture, it is pertinent to refer Article 254(1) of the Constitution, which lays down the provisions relating to inconsistencies between the laws made by the Parliament and the State Legislatures. Article 254(1) is reproduced as under:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

Thus it is clear from the mandate of Article 254(1) of the Constitution that if there is any inconsistency between the provisions of the Code and the Police Act, 1861, the provisions of the Code will prevail and the provisions of the Police Act would be void to the extent of the repugnancy.

61. If at all, there is any inconsistency in the provisions of Section 154 of the Code and Section 44 of the Police Act, 1861, with regard to the fact as to whether the FIR is to be registered in the FIR book or in the General Diary, the provisions of Section 154 of the Code will prevail and the provisions of Section 44 of the Police Act, 1861 (or similar provisions of the respective corresponding Police Act or Rules in other respective States) shall be void to the extent of the repugnancy. Thus, FIR is to be recorded in the FIR Book, as mandated under Section 154 of the Code, and it is not correct to state that information will be first recorded in the General Diary and only after preliminary inquiry, if required, the information will be registered as FIR.

62. However, this Court in ***Tapan Kumar Singh (supra)***, held that a GD entry may be treated as First information in an appropriate case, where it discloses the commission of a cognizable offence. It was held as under:

15. It is the correctness of this finding which is assailed before us by the Appellants. They contend that the information recorded in the GD entry does disclose the commission of a cognizable offence. They submitted that even if their contention, that after recording the GD entry only a preliminary inquiry was made, is not accepted, they are still entitled to sustain the legality of the investigation on the basis that the GD entry may be treated as a first information report, since it disclosed the commission of a cognizable offence.

16. The parties before us did not dispute the legal position that a GD entry may be treated as a first information report in an appropriate case, where it discloses the commission of a cognizable offence. If the contention of the Appellants is upheld, the order of the High Court must be set aside because if there was in law a first information report disclosing the commission of a cognizable offence, the police had the power and jurisdiction to investigate, and in the process of investigation to conduct search and seizure. It is, therefore, not necessary for us to consider the authorities cited at the Bar on the question of validity of the preliminary inquiry and the validity of the search and seizure.

Xxx

19. The High Court fell into an error in thinking that the information received by the police could not be treated as a first information report since the allegation was vague inasmuch as it was not stated from whom the sum of rupees one lakh was demanded and accepted. Nor was it stated that such demand or acceptance was made as motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show in exercise of his official function, favour or disfavour to any person or for rendering, attempting to render any service or disservice to any person. Thus there was no basis for a police officer to suspect the commission of an offence which he was empowered under Section 156 of the Code to investigate.

63. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR Book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

'Information'

64. The legislature has consciously used the expression "information" in Section 154(1) of the Code as against the expression used in Section 41(1)(a) and (g) where the expression used for arresting a person without warrant is "reasonable complaint" or "credible information". The expression under Section 154(1) of the Code is not qualified by the prefix "reasonable" or "credible". The non qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code is for the reason that the police officer should not refuse to record any information relating to the commission of a cognizable offence on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, reasonableness or credibility of the said information is not a condition precedent for the registration of a case.

65. The above view has been expressed by this Court in ***Bhajan Lal (supra)*** which is as under:

32...in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "*information*" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "*reasonable complaint*" and "*credible information*" are used. Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word.

66. In ***Parkash Singh Badal (supra)***, this Court held as under:

65. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" [as defined under Section 2(c) of the Code] if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" [within the meaning of Section 2(o) of the Code] and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "first information report" and which act of entering the information in the said form is known as registration of a crime or a case.

66. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an inquiry as to whether the information laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157 thereof. In case an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him

discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

67. It has to be noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Sections 41(1)(a) or (g) of the Code wherein the expressions "reasonable complaint" and "credible information" are used. Evidently, the non qualification of the word "information" in Section 154(1) unlike in Sections 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, "reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that "every complaint or information" preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that "every complaint" preferred to an officer in charge of a police station shall be reduced in writing. The word "complaint" which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word "information" was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the Code. An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.

68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

67. In ***Ramesh Kumari (supra)***, this Court held as under:

4. That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more res integra. The point of law has been set at rest by this Court in *State of Haryana v. Bhajan Lal*. This Court after examining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 and 32 of the judgment as under:

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to

investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression *'information'* without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, *'reasonable complaint'* and *'credible information'* are used. Evidently, the non qualification of the word 'information' in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word 'information' without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that *'every complaint or information'* preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.

(Emphasis in original)

Finally, this Court in para 33 said:

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

5. The views expressed by this Court in paras 31, 32 and 33 as quoted above leave no manner of doubt that the provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of such information disclosing cognizable offence.

68. In ***Ram Lal Narang (supra)***, this Court held as under:

14. Under the Code of Criminal Procedure, 1898, whenever an officer in charge of the police station received information relating to the commission of a cognizable offence, he was required to enter the substance thereof in a book kept by him, for that purpose, in the prescribed form (Section 154 Code of Criminal Procedure). Section 156 of the Code of Criminal Procedure invested the Police with the power to investigate into cognizable offences without the order of a Court. If, from the information received or otherwise, the officer in charge of a police station suspected the commission of a cognizable offence, he was required to send forthwith a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and then to proceed in person or depute one of his subordinate officers to proceed to the spot, to investigate the facts and circumstances of the case and to take measures for the discovery and arrest of the offender (Section 157 Code of Criminal Procedure). He was required to complete the investigation without unnecessary delay, and, as soon as it was completed, to forward to a Magistrate empowered to take cognizance of the offence upon a police report, a report in the prescribed form, setting forth the names of the parties, the nature of the information and the names of the persons who appeared to be acquainted with the circumstances of the case [Section 173(1) Code of Criminal Procedure]. He was also required to state whether the accused had been forwarded in custody or had been released on bail. Upon receipt of the report submitted under Section 173(1) Code of Criminal Procedure by the officer in charge of the police station, the Magistrate empowered to take cognizance of an offence upon a police report might take cognizance of the offence [Section 190(1)(b) Code of Criminal Procedure]. Thereafter, if, in the opinion of the Magistrate taking cognizance of the offence, there was sufficient ground for proceeding, the Magistrate was required to issue the necessary process to secure the attendance of the accused (Section 204 Code of Criminal Procedure). The scheme of the Code thus was that the FIR was followed by investigation, the investigation led to the submission of a report to the Magistrate, the Magistrate took cognizance of the offence on receipt of the police report and, finally, the Magistrate taking cognizance issued process to the accused.

15. The police thus had the statutory right and duty to "register" every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report. These statutory rights and duties of the police were not circumscribed by any power of superintendence or interference in the Magistrate; nor was any sanction required from a Magistrate to empower the Police to investigate into a cognizable offence. This position in law was well-established. In *King Emperor* v. *Khwaja Nazir Ahmad* the Privy Council observed as follows:

Just as it is essential that everyone accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere

with those statutory rules by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Courts to intervene in an appropriate case when moved under Section 491 of the Code of Criminal Procedure to give directions in the nature of Habeas Corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then... In the present case, the police have under Sections 154 and 156 of the Code of Criminal Procedure, a statutory right to investigate a cognizable offence without requiring the sanction of the Court....

Ordinarily, the right and duty of the police would end with the submission of a report under Section 173(1) Code of Criminal Procedure upon receipt of which it was up to the Magistrate to take or not to take cognizance of the offence. There was no provision in the 1898 Code prescribing the procedure to be followed by the police, where, after the submission of a report under Section 173(1) Code of Criminal Procedure and after the Magistrate had taken cognizance of the offence, fresh facts came to light which required further investigation. There was, of course, no express provision prohibiting the police from launching upon an investigation into the fresh facts coming to light after the submission of the report under Section 173(1) or after the Magistrate had taken cognizance of the offence. As we shall presently point out, it was generally thought by many High Courts, though doubted by a few, that the police were not barred from further investigation by the circumstance that a report under Section 173(1) had already been submitted and a Magistrate had already taken cognizance of the offence. The Law Commission in its 41st report recognized the position and recommended that the right of the police to make further investigation should be statutorily affirmed. The Law Commission said:

14.23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused.

Accordingly, in the Code of Criminal Procedure, 1973, a new provision, Section 173(8), was introduced and it says:

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2).

69. In ***Lallan Chaudhary (supra)***, this Court held as under:

8. Section 154 of the Code thus casts a statutory duty upon the police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.

9. In *Ramesh Kumari* v. *State (NCT of Delhi)* this Court has held that the provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case.

10. The mandate of Section 154 of the Code is that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. In other words, reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154 of the Code.

A perusal of the above-referred judgments clarify that the reasonableness or creditability of the information is not a condition precedent for the registration of a case.

Preliminary Inquiry

70. Mr. Naphade relied on the following decisions in support of his arguments that if the police officer has a doubt about the veracity of the accusation, he has to conduct preliminary inquiry, viz., ***E.P. Royappa*** v. ***State of Tamil Nadu*** MANU/SC/0380/1973 : (1974) 4 SCC 3, ***Maneka Gandhi (supra), S.M.D. Kiran Pasha*** v. ***Government of Andhra Pradesh*** MANU/SC/0473/1989 : (1990) 1 SCC 328, ***D.K. Basu*** v. ***State of W.B.*** MANU/SC/0157/1997 : (1997) 1 SCC 416, ***Uma Shankar Sitani*** v. ***Commissioner of Police, Delhi and Ors.*** : (1996) 11 SCC 714, ***Preeti Gupta (supra), Francis Coralie Mullin*** v. ***Administrator, Union Territory of Delhi*** MANU/SC/0517/1981 : (1981) 1 SCC 608, ***Common Cause, A Registered Society*** v. ***Union of India*** MANU/SC/0437/1999 : (1999) 6 SCC 667, ***District Registrar and Collector, Hyderabad*** v. ***Canara Bank*** MANU/SC/0935/2004 : (2005) 1 SCC 496 and ***Ranjitsing Brahmajeetsing Sharma*** v. ***State of Maharashtra*** MANU/SC/0268/2005 : (2005) 5 SCC 294.

71. Learned senior counsel for the State further vehemently contended that in appropriate cases, it would be proper for a police officer, on receipt of a complaint of a cognizable offence, to satisfy himself that *prima facie* the allegations levelled against the accused in the complaint are credible. In this regard, Mr. Naphade cited the following decisions, viz. ***Tapan Kumar Singh (supra), Bhagwant Kishore Joshi (supra), P. Sirajuddin (supra), Sevi (supra), Shashikant (supra), Rajinder Singh Katoch (supra), Vineet Narain*** v. ***Union of India*** MANU/SC/0827/1998 : (1998) 1 SCC 226, ***Elumalai*** v. ***State of Tamil Nadu*** MANU/TN/0610/1983 : 1983 LW (CRL) 121, ***A. Lakshmanarao*** v. ***Judicial Magistrate, Parvatipuram*** MANU/SC/0076/1970 : AIR 1971 SC 186,

State of Uttar Pradesh v. ***Ram Sagar Yadav and Ors.*** MANU/SC/0118/1985 : (1985) 1 SCC 552, ***Mona Panwar*** v. ***High Court of Judicature of Allahabad*** MANU/SC/0087/2011 : (2011) 3 SCC 496, ***Apren Joseph*** v. ***State of Kerala*** MANU/SC/0078/1972 : (1973) 3 SCC 114, ***King Emperor*** v. ***Khwaja Nazir Ahmad*** MANU/PR/0007/1944 : AIR 1945 PC 18 and ***Sarangdharsingh Shivdassingh Chavan (supra)***.

72. He further pointed out that the provisions have to be read in the light of the principle of malicious prosecution and the fundamental rights guaranteed under Articles 14, 19 and 21. It is the stand of learned senior counsel that every citizen has a right not to be subjected to malicious prosecution and every police officer has an in-built duty under Section 154 to ensure that an innocent person is not falsely implicated in a criminal case. If despite the fact that the police officer is not *prima facie* satisfied, as regards commission of a cognizable offence and proceeds to register an FIR and carries out an investigation, it would result in putting the liberty of a citizen in jeopardy. Therefore, learned senior counsel vehemently pleaded for a preliminary inquiry before registration of FIR.

73. In terms of the language used in Section 154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. FIR) about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an FIR when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under Section 154 of the Code about the commission of a cognizable offence must be registered as an FIR so as to initiate an offence. The requirement of Section 154 of the Code is only that the report must disclose the commission of a cognizable offence and that is sufficient to set the investigating machinery into action.

74. The insertion of Sub-section (3) of Section 154, by way of an amendment, reveals the intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused.

75. The maxim *expression unius est exclusion alterius* (expression of one thing is the exclusion of another) applies in the interpretation of Section 154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register.

76. Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law.

77. The term inquiry as per Section 2(g) of the Code reads as under:

2(g) - "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

Hence, it is clear that inquiry under the Code is relatable to a judicial act and not to the steps taken by the Police which are either investigation after the stage of Section 154 of the Code or termed as 'Preliminary Inquiry' and which are prior to the registration of FIR, even though, no entry in the General Diary/Station Diary/Daily Diary has been made.

78. Though there is reference to the term 'preliminary inquiry' and 'inquiry' under Sections 159 and Sections 202 and 340 of the Code, that is a judicial exercise undertaken by the Court and not by the Police and is not relevant for the purpose of the present reference.

79. Besides, learned senior counsel relied on the special procedures prescribed under the CBI manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of the CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that the CBI is constituted under a Special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derive its power to investigate from this Act.

80. It may be submitted that Sections 4(2) and 5 of the Code permit special procedures to be followed for special Acts. Section 4 of the Code lays down as under:

Section 4. Trial of offences under the Indian Penal Code and other laws. (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

It is thus clear that for offences under laws other than Indian Penal Code, different provisions can be laid down under a special Act to regulate the investigation, inquiry, trial etc., of those offences. Section 4(2) of the Code protects such special provisions.

81. Moreover, Section 5 of the Code lays down as under:

Section 5. Saving-Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

Thus, special provisions contained in the DSPE Act relating to the powers of the CBI are protected also by Section 5 of the Code.

82. In view of the above specific provisions in the Code, the powers of the CBI under the DSPE Act, cannot be equated with the powers of the regular State Police under the Code.

Significance and Compelling reasons for registration of FIR at the earliest

83. The object sought to be achieved by registering the earliest information as FIR is inter alia two fold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc., later.

84. Principles of democracy and liberty demand a regular and efficient check on police powers. One way of keeping check on authorities with such powers is by documenting every action of theirs. Accordingly, under the Code, actions of the police etc., are provided to be written and documented. For example, in case of arrest under Section 41(1)(b) of the Code, arrest memo along with the grounds has to be in writing mandatorily; under Section 55 of the Code, if an officer is deputed to make an arrest, then the superior officer has to write down and record the offence etc., for which the person is to be arrested; under Section 91 of the Code, a written order has to be passed by the concerned officer to seek documents; under Section 160 of the Code, a written notice has to be issued to the witness so that he can be called for recording of his/her statement, seizure memo/panchnama has to be drawn for every article seized etc.

8

5. The police is required to maintain several records including Case Diary as provided under Section 172 of the Code, General Diary as provided under Section 44 of the Police Act etc., which helps in documenting every information collected, spot visited and all the actions of the police officers so that their activities can be documented. Moreover, every information received relating to commission of a non-cognizable offence also has to be registered under Section 155 of the Code.

86. The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also to ensure 'judicial oversight'. Section 157(1) deploys the word 'forthwith'. Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.

87. The Code contemplates two kinds of FIRs. The duly signed FIR under Section 154(1) is by the informant to the concerned officer at the police station. The second kind of FIR could be which is registered by the police itself on any information received or other than by way of an informant [Section 157(1)] and even this information has to be duly recorded and the copy should be sent to the Magistrate forthwith.

88. The registration of FIR either on the basis of the information furnished by the informant under Section 154(1) of the Code or otherwise under Section 157(1) of the Code is obligatory. The obligation to register FIR has inherent advantages:

a) It is the first step to 'access to justice' for a victim.

b) It upholds the 'Rule of Law' inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.

c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.

d) It leads to less manipulation in criminal cases and lessens incidents of 'ante-dates' FIR or deliberately delayed FIR.

89. In ***Thulia Kali*** v. ***State of Tamil Nadu*** MANU/SC/0276/1972 : (1972) 3 SCC 393, this Court held as under:

12...First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained....

90. In ***Tapan Kumar Singh (supra)***, it was held as under:

20. It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete

investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law.
The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation.
The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can.

91. In ***Madhu Bala (supra)***, this Court held:

6. Coming first to the relevant provisions of the Code, Section 2(d) defines "complaint" to mean any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Under Section 2(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which a police officer may in accordance with the First Schedule (of the Code) or under any other law for the time being in force, arrest without a warrant. Under Section 2(r) "police report" means a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173 of the Code. Chapter XII of the Code comprising Sections 154 to 176 relates to information to the police and their powers to investigate. Section 154 provides, inter alia, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information if given in writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Section 156 of the Code with which we are primarily concerned in these appeals reads as under....

9. The mode and manner of registration of such cases are laid down in the Rules framed by the different State Governments under the Indian Police Act, 1861. As in the instant case we are concerned with Punjab Police Rules, 1934 (which are applicable to Punjab, Haryana, Himachal Pradesh and Delhi) framed under the said Act we may now refer to the relevant provisions of those Rules. Chapter XXIV of the said Rules lays down the procedure an officer in charge of a police station has to follow on receipt of information of commission of crime. Under Rule 24.1 appearing in the Chapter every information covered by Section 154 of the Code must be entered in the First Information Report Register and the substance thereof in the daily diary. Rule 24.5 says that the First Information Report Register shall be a printed book in Form 24.5(1) consisting of 200 pages and shall be completely filled before a new one is commenced. It further requires that the cases shall bear an annual serial number in each police station for each calendar year. The other requirements of the said Rules need not be detailed as they have no relevance to the point at issue.

10. From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a "complaint" the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to "register a case" makes an order of investigation under Section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable "case" and the Rules framed under the Indian Police Act, 1861 it (the police) is duty-bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same.

92. According to the Statement of Objects and Reasons, protection of the interests of the poor is clearly one of the main objects of the Code. Making registration of information relating to commission of a cognizable offence mandatory would help the society, especially, the poor in rural and remote areas of the country.

93. The Committee on Reforms of Criminal Justice System headed by Dr. Justice V.S. Malimath also noticed the plight faced by several people due to non-registration of FIRs and recommended that action should be taken against police officers who refuse to register such information. The Committee observed:

7.19.1 According to the Section 154 of the Code of Criminal Procedure, the office incharge of a police station is mandated to register every information oral or written relating to the commission of a cognizable offence. Non-registration of cases is a serious complaint against the police. The National Police Commission in its 4th report lamented that the police "evade registering cases for taking up investigation where specific complaints are lodged at the police stations". It referred to a study conducted by the Indian Institute of Public Opinion, New Delhi regarding "Image of the Police in India" which observed that over 50% of the Respondents mention non-registration of complaints as a common practice in police stations.

7.19.2 The Committee recommends that all complaints should be registered promptly, failing which appropriate action should be taken. This would necessitate change in the mind - set of the political executive and that of senior officers.

7.19.4 There are two more aspects relating to registration. The first is minimization of offences by the police by way of not invoking appropriate sections of law. We disapprove of this tendency. Appropriate sections of law should be invoked in each case unmindful of the gravity of offences involved. The second issue is relating to the registration of written complaints. There is an increasing tendency amongst the police station officers to advise the informants, who come to give oral complaints, to bring written complaints. This is wrong. Registration is delayed resulting in valuable loss of time in launching the investigation and apprehension of criminals. Besides, the complainant gets an opportunity to consult his friends, relatives and sometimes even lawyers and often tends to exaggerate the crime and implicate innocent persons. This eventually has adverse

effect at the trial. The information should be reduced in writing by the SH, if given orally, without any loss of time so that the first version of the alleged crime comes on record.

7.20.11 It has come to the notice of the Committee that even in cognizable cases quite often the Police officers do not entertain the complaint and send the complainant away saying that the offence is not cognizable. Sometimes the police twist facts to bring the case within the cognizable category even though it is non-cognizable, due to political or other pressures or corruption. This menace can be stopped by making it obligatory on the police officer to register every complaint received by him. Breach of this duty should become an offence punishable in law to prevent misuse of the power by the police officer.

94. It means that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered. Keeping in view the NCRB figures that show that about 60 lakh cognizable offences were registered in India during the year 2012, the burking of crime may itself be in the range of about 60 lakh every year. Thus, it is seen that such a large number of FIRs are not registered every year, which is a clear violation of the rights of the victims of such a large number of crimes.

95. Burking of crime leads to dilution of the rule of law in the short run; and also has a very negative impact on the rule of law in the long run since people stop having respect for rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in the society.

96. Therefore, reading Section 154 in any other form would not only be detrimental to the Scheme of the Code but also to the society as a whole. It is thus seen that this Court has repeatedly held in various decided cases that registration of FIR is mandatory if the information given to the police under Section 154 of the Code discloses the commission of a cognizable offence.

Is there a likelihood of misuse of the provision?

97. Another, stimulating argument raised in support of preliminary inquiry is that mandatory registration of FIRs will lead to arbitrary arrest, which will directly be in contravention of Article 21 of the Constitution.

98. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the Court.

99. It is also relevant to note that in ***Joginder Kumar*** v. ***State of U.P. and Ors.*** MANU/SC/0311/1994 : (1994) 4 SCC 260, this Court has held that arrest cannot be made by police in a routine manner. Some important observations are reproduced as under:

20...No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

100. The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately. It is the imaginary fear that "merely because FIR has been registered, it would require arrest of the accused and thereby leading to loss of his reputation" and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence.

101. This can also be seen from the fact that Section 151 of the Code allows a police officer to arrest a person, even before the commission of a cognizable offence, in order to prevent the commission of that offence, if it cannot be prevented otherwise. Such preventive arrests can be valid for 24 hours. However, a Maharashtra State amendment to Section 151 allows the custody of a person in that State even for up to a period of 30 days (with the order of the Judicial Magistrate) even before a cognizable offence is committed in order to prevent commission of such offence. Thus, the arrest of a person and registration of FIR are not directly and/or irreversibly linked and they are entirely different concepts operating under entirely different parameters. On the other hand, if a police officer misuses his power of arrest, he can be tried and punished under Section 166.

102. Besides, the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The Section itself states that a police officer can start investigation when he has a '*reason to suspect the commission of an offence*'. Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

103. Likewise, giving power to the police to close an investigation, Section 157 of the Code also acts like a check on the police to make sure that it is dispensing its function of investigating cognizable offences. This has been recorded in the 41st Report of the Law Commission of India on the Code of Criminal Procedure, 1898 as follows:

14.1...If the offence does not appear to be serious and if the station-house officer thinks there is no sufficient ground for starting an investigation, he need not investigate but, here again, he has to send a report to the Magistrate who can direct the police to investigate, or if the Magistrate thinks fit, hold an inquiry himself.

14.2. A noticeable feature of the scheme as outlined above is that a Magistrate is kept in the picture at all stages of the police investigation, but he is not authorized to interfere with the actual investigation or to direct the police how that investigation is to be conducted.

Therefore, the Scheme of the Code not only ensures that the time of the police should not be wasted on false and frivolous information but also that the police should not intentionally refrain from doing their duty of investigating cognizable offences. As a result, the apprehension of misuse of the provision of mandatory registration of FIR is unfounded and speculative in nature.

104. It is the stand of Mr. Naphade, learned senior Counsel for the State of Maharashtra that when an innocent person is falsely implicated, he not only suffers from loss of reputation but also from mental tension and his personal liberty is seriously impaired. He relied on the ***Maneka Gandhi (supra)***, which held the proposition that the law which deprives a person of his personal liberty must be reasonable both from the stand point of substantive as well as procedural aspect is now firmly established in our Constitutional law. Therefore, he pleaded for a fresh look at Section 154 of the Code, which interprets Section 154 of the Code in conformity with the mandate of Article 21.

105. It is true that a delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel.

Exceptions:

106. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offence, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.<mpara>

107. In the context of medical negligence cases, in ***Jacob Mathew (supra)***, it was held by this Court as under:

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

108. In the context of offences relating to corruption, this Court in P. Sirajuddin (supra) expressed the need for a preliminary inquiry before proceeding against public servants.

109. Similarly, in Tapan Kumar Singh (supra), this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that at the time the first information is received, the same does not disclose a cognizable offence.

110. Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether

the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

Conclusion/Directions:

111. In view of the aforesaid discussion, we hold:

(i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

112. With the above directions, we dispose of the reference made to us. List all the matters before the appropriate Bench for disposal on merits.

Back to Index

MANU/SC/0903/2020

Neutral Citation: 2020/INSC/666

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 804 of 2020, Misc. Application No. 1058 of 2020 in Writ Petition (Civil) No. 640 of 2017, Misc. Application No. 1152 of 2020 in Writ Petition (Civil) No. 279 of 2017, Writ Petition (Civil) Nos. 867 of 2020, 1431 of 2019, Transfer Petition (Civil) Nos. 905-915 of 2020, Civil Appeal Nos. 3505-3506 of 2020 (Arising out of SLP (C) Nos. 9587-9588 of 2020), Transfer Petition (Civil) Nos. 1356-1360 of 2020 (Arising out of Dairy No. 18900 of 2020), Misc. Application No. 1481 of 2020 in Writ Petition (Civil) No. 279 of 2017, Writ Petition (Civil) Nos. 995, 991 of 2020, Misc. Application No. 1654 of 2020 in Writ Petition (Civil) No. 279 of 2017, Writ Petition (Civil) No. 1085 of 2020, Misc. Application No. 1811 of 2020 in Writ Petition (Civil) No. 279 of 2017 and Civil Appeal No. 3598 of 2020 (Arising out of SLP (C) No. 11612 of 2020)

Decided On: 27.11.2020

Appellants: Madras Bar Association **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

L. Nageswara Rao, Hemant Gupta and S. Ravindra Bhat, JJ.

Subject: Constitution

Subject: Service

Relevant Section:

Finance Act, 2014 - Section 183; Finance Act, 2014 - Section 184

Case Category:

LETTER PETITION AND PIL MATTER

HIGH COURT Status:

Judgment challenged *vide* MANU/SC/0075/2021 dated: 12.02.2021; Judgment challenged *vide* MANU/SC/0270/2021 dated: 25.01.2021

Case Note:

Constitution -Validity of Statute - Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and Other Conditions of Service of Members] Rules, 2020 (2020 Rules) - Vires thereof challenged as being violative of Articles 14, 21 and 50 of the Constitution of India, 1950 - Impugned Rules deal with the qualification and appointment of members by recruitment, procedure for inquiry into misbehavior, House Rent Allowance and other Conditions of Service - Constitutionality thereof also contended to be violative of the principles of separation of powers and independence of the judiciary - Whether the impugned rules liable to be declared as ultra vires?

Facts:

The present matter pertains to constitutionality of various provisions concerning the selection, appointment, tenure, conditions of service, and ancillary matters relating to various tribunalswhich act in aid of the judicial branch.The core controversy arose was consideration about the constitutional validity of the "Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and Other Conditions of Service of Members] Rules, 2020" (2020 Rules).

Held, while disposing the Appeals:

The Appeals were disposed with directions namely, (i) The Union of India shall constitute a National Tribunals Commission which shall act as an independent body to supervise the appointments and functioning of Tribunals, as well as to conduct disciplinary proceedings against members of Tribunals and to take care of administrative and infrastructural needs of the Tribunals, in an appropriate manner. (ii) Instead of the four-member Search-cum-Selection Committees provided for in Column (4) of the Schedule to the 2020 Rules with the Chief Justice of India or his nominee, outgoing or sitting Chairman or Chairperson or President of the Tribunal and two Secretaries to the Government of India, the Search-cum-Selection Committees should comprise of the members as directed. (iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be recommended to be included in the waiting list.(iv) The Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of five years and shall be eligible for reappointment with necessary amendments as directed in Rule 9(2); (v) The Union of India to make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other members of the Tribunals or to pay house rent allowance, as directed; (vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial members in the Tribunals; (vii) The members of the Indian Legal Service shall be eligible for appointment as judicial members in the Tribunals as per conditions laid; (viii) Rule 8 of the 2020 Rules shall be amended to reflect that the recommendations of the Search-cum-Selection Committee in matters of disciplinary actions shall be final and to be implemented by the Central Government; (ix) The Union of India shall make appointments to Tribunals within three months from the date on which the

Search-cum-Selection Committee completes the selection process and makes its recommendations; (x) The 2020 Rules shall have prospective effect and will be applicable from 12.02.2020, as per Rule 1(2) of the 2020 Rules; (xi) Appointments made prior to the 2017 Rules are governed by the parent Acts and Rules which established the concerned Tribunals; (xii) Appointments made under the 2020 Rules till the date of this judgment, shall not be considered invalid, insofar as they conformed to the recommendations of the Search-cum-Selection Committees in terms of the 2020 Rules; (xiii) In case the Search-cum-Selection Committees have made recommendations after conducting selections in accordance with the 2020 Rules, appointments shall be made within three months from today and shall not be subject matter of challenge on the ground that they are not in accord with this judgment.(xiv) The terms and conditions relating to salary, benefits, allowances, house rent allowance etc. shall be in accordance with the terms indicated in, and directed by this judgment; (xv) The Chairpersons, Vice Chairpersons and members of the Tribunals appointed prior to 12.02.2020 shall be governed by the parent statutes and Rules as per which they were appointed. The 2020 Rules shall be applicable with the modifications directed in the preceding paragraphs to those who were appointed after 12.02.2020. [53]

Writ Petitions, Transfer Petitions, Civil Appeals and all the Applications are disposed of as per the directions passed.Dispensation of justice by the Tribunals can be effective only when they function independent of any executive control: this renders them credible and generates public confidence. To ensure that the Tribunals should not function as another department under the control of the executive, repeated directions have been issued which have gone unheeded forcing the Petitioner to approach this Court time and again. It is high time that such practice is put to an end. It is crucial that these tribunals are run by a robust mix of experts, i.e. those with experience in policy in the relevant field, and those with judicial or legal experience and competence in such fields. The functioning or non-functioning of any of these tribunals due to lack of competence or understanding has a direct adverse impact on those who expect effective and swift justice from them. The role of both the courts as upholders of judicial independence, and the executive as the policy making and implementing limb of governance, is to be concordat and collaborative. This Court expects that the present directions are adhered to and implemented, so that future litigation is avoided.The Government is, accordingly, directed to strictly adhere to the directions given and not force the Petitioner-Madras Bar Association to knock the doors of this Court again.[55]

Disposition:
Disposed of

JUDGMENT

L. Nageswara Rao, J.

1. This Court is once again, within the span of a year, called upon to decide the constitutionality of various provisions concerning the selection, appointment, tenure, conditions of service, and ancillary matters relating to various tribunals, 19 in number, which act in aid of the judicial branch. That the judicial system and this Court in particular has to live these deja vu moments, time and

again (exemplified by no less than four constitution bench judgments) in the last 8 years, speaks profound volumes about the constancy of other branches of governance, in their insistence regarding these issues. At the heart of this, however, are stakes far greater: the guarantee of the Rule of law to each citizen of the country, with the concomitant guarantee of equal protection of the law. This judgment is to be read as a sequel, and together with the decision of the Constitution Bench in Rojer Mathew v. South Indian Bank Limited MANU/SC/1563/2019 : (2020) 6 SCC 1.

2. The core controversy arising for this Court's consideration is the constitutional validity of the "Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and Other Conditions of Service of Members] Rules, 2020" (hereinafter referred to as "the 2020 Rules").

3. Before considering the merits of the case, it is necessary to refer to the events preceding the issuance of the 2020 Rules for a better understanding of the dispute. Like many other nations, India recognized the need for Tribunalisation of justice to provide for adjudication by persons with ability to decide disputes in specific fields as well as to provide expedited justice in certain kinds of cases. Part XIV-A was inserted in the Constitution of India by the Constitution (42nd Amendment) Act, 1976. Article 323-A enables the Parliament to constitute administrative tribunals for adjudication of the disputes relating to the recruitment and conditions of service of persons appointed to public posts in connection with the affairs of the Union or of any State or any local or other authority. According to Article 323-B, the appropriate Legislature may constitute Tribunals for adjudication of any dispute, complaints, or other offences with respect to all or any of the matters specified in Clause (2) therein. The vires of the Administrative Tribunals Act, 1985 (enacted by Parliament in furtherance of Article 323A, for setting up administrative tribunals for adjudication of service disputes of public servants) was challenged in proceedings Under Article 32 of the Constitution of India. Two questions that were posed in the said Writ Petition related to the exclusion of jurisdiction of the High Court Under Articles 226 and 227 of the Constitution in service matters, the composition of the administrative Tribunal and the mode of appointment of Chairman, Vice-Chairman and Members. While holding that the bar on jurisdiction of the High Courts' cannot be a ground of attack, this Court in S.P. Sampath Kumar v. Union of India MANU/SC/0851/1987 : (1987) 1 SCC 124 held that the Tribunal "should be a real substitute of the High Courts not only in form and de jure but in content and de facto". The Central Government was directed to make modifications to the Administrative Tribunals Act, 1985 pertaining to the composition of the Tribunal to ensure selection of proper and competent people to the posts of Presiding Officers of the Tribunal.

4. The judgment in S.P. Sampath Kumar (supra) was referred to a larger Bench for re-consideration in view of later rulings, notably R.K. Jain v. Union of India MANU/SC/0291/1993 : [1993] 4 SCC 119 which had called for a review with respect to functioning of tribunals. In L. Chandra Kumar v. Union of India MANU/SC/0261/1997 : (1997) 3 SCC 261, this Court held that the power of judicial review vested in the High Courts and this Court Under Articles 226 and 227, and 32 is a part of the basic structure of the Constitution. Therefore, the Court held that the Tribunals cannot act as substitutes of the High Courts and this Court, and that their functioning is only supplementary and that all decisions of administrative Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. Addressing the issue of the dependence of tribunals on the Executive for administrative requirements, a recommendation was made for creation of a single umbrella organisation which will be an independent supervisory body to

oversee the working of the Tribunals. This Court was also of the opinion that the Ministry of Law and Justice, Government of India should be the nodal Ministry.

5. Part I-B and Part I-C were inserted in the Companies Act, 1956 providing for the constitution of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT). Madras Bar Association filed a Writ Petition in the Madras High Court challenging the vires of the above provisions on the grounds of violation of Rule of law, doctrine of separation of powers and the independence of the judiciary, which are essential features of the basic structure of the Constitution. The Madras High Court allowed the Writ Petition, which was subject matter of several appeals which were disposed of by this Court in Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 1. This Court was of the opinion that while it cannot be said that the Legislature is denuded the power to transfer judicial functions performed by courts to Tribunals, nevertheless independent judicial Tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of law. It was held in the above judgment that judicial independence and separation of judicial power from the executive, are part of common law traditions implicit in a Constitution like ours. The creation of the NCLT and NCLAT was upheld. However, the defects found in Parts I-B and I-C of the Companies Act, 1956 were directed to be rectified by suitable amendments with modifications suggested by this Court in order to uphold the judicial independence of the Tribunals. The suggestions pertained to composition of the Search-cum-Selection Committee (for appointment of members of the tribunals), qualifications for appointment, and service conditions of members of the Tribunals. Later, Madras Bar Association had assailed the constitutional validity of the National Tax Tribunal Act, 2005. This Court held the National Tax Tribunal Act, 2005 to be unconstitutional.[1] Nonetheless, the vesting of adjudicatory functions in Tribunals was held to be not violative of the basic structure of the Constitution. The Companies Act, 2013 replaced the earlier Act of 1956 in which amendments were made to provisions relating to the establishment of NCLT and NCLAT. A Writ Petition was filed Under Article 32 by the Madras Bar Association questioning the amended provisions of Chapter XXVII of the Companies Act, 2013, and more particularly Sections 408, 409, 411(3), 412, 413, 425, 431 and 434. The complaint of the Madras Bar Association in the said Writ Petition was that the offending provisions were analogous to the provisions in the 1956 Act which were found to be unconstitutional by this Court in Union of India v. Madras Bar Association (2010) (supra). The constitutional validity of the provisions in Chapter XXVII of the Companies Act, 2013 was upheld by a judgment in Madras Bar Association v. Union of India MANU/SC/0610/2015 : (2015) 8 SCC 583. However, this Court was of the view that certain provisions relating to composition of the Search-cum-Selection Committee and qualification of Members of the Tribunals are invalid as they are contrary to the directions issued by the earlier judgment in Union of India v. Madras Bar Association (2010) (supra).

6. By the Finance Act, 2017, amendments were made to certain Acts to provide for merger of Tribunals and other authorities, and conditions of service of Chairpersons, Members, etc. According to Section 183 of the Finance Act, 2017, the provisions of Section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal or Appellate Tribunal or other authorities, as specified under Column (2) of the Eighth Schedule to the Finance Act, 2017 on and from the appointed day i.e. 26.05.2017. It was further provided that Section 184 shall not apply to those holding such

office immediately before the appointed day. Section 184 empowered the Central Government to make Rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Presiding Officer, Vice-President, or Member of the Tribunal or the Appellate Tribunal or other authorities as specified in Column (2) of the Eighth Schedule to the 2020 Rules. Maximum tenure of the aforementioned persons was fixed as five years. Chairperson, Chairman or Presiding Officer of the Tribunals cannot continue beyond 70 years. Likewise, the Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member shall be entitled to continue till they attain the age of 67 years. The validity of the Finance Act, 2017 and the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2017 (hereinafter referred to as "the 2017 Rules") came up for consideration before this Court in Rojer Mathew v. South Indian Bank Limited MANU/SC/1563/2019 : (2020) 6 SCC 1. This Court formulated the following issues for consideration:

86.1. (I.) Whether the "Finance Act, 2017" insofar as it amends certain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a "Money Bill" Under Article 110 and consequently is validly enacted?

86.2. (II.) If the answer to the above is in the affirmative then whether Section 184 of the Finance Act, 2017 is unconstitutional on account of excessive delegation?"

86.3 III. If Section 184 is valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on functioning of Tribunals?

86.4 IV. Whether there should be a Single Nodal Agency for administration of all Tribunals?

86.5 V. Whether there is a need for conducting a Judicial Impact Assessment of all Tribunals in India?

86.6 VI. Whether judges of Tribunals set up by Acts of Parliament Under Articles 323-A and 323-B of the Constitution can be equated in 'rank' and 'status' with Constitutional functionaries?

86.7 VII. Whether direct statutory appeals from Tribunals to the Supreme Court ought to be detoured?

86.8 VIII. Whether there is a need for amalgamation of existing Tribunals and setting up of benches.

7. The issue pertaining to whether the Finance Act, 2017 was a "Money Bill" (and if not, the need for it to be passed by the Rajya Sabha) was referred to a larger Bench and it was held that Section 184 of the Finance Act, 2017 does not suffer from excessive delegation of legislative functions. The 2017 Rules were struck down as being contrary to the principles of the Constitution as interpreted by various decisions of this Court (including those previously referred to herein). The Central Government was directed to reformulate the Rules strictly in conformity and in accordance

with the principles delineated by this Court in its earlier judgments read with the observations made in the judgment in Rojer Mathew (supra). Non-discriminatory and uniform conditions of service including assured tenure were directed to be formulated by the Central Government in the new set of Rules. A Writ of Mandamus was issued to the Ministry of Law & Justice to carry out a judicial impact assessment for all the Tribunals. Appointments to the Tribunals, Appellate Tribunals and the other Authorities were directed to be held in accordance with the respective statutes which governed the conditions of service of members of Tribunals before the enactment of the Finance Act, 2017 till a fresh set of Rules were made by the Central Government. The Union of India was granted liberty to seek modification of the said order after fresh Rules are framed.

8. Thereafter, by a Notification dated 12.02.2020, the Central Government in exercise of the power conferred by Section 184 of the Finance Act, 2017 made the impugned 2020 Rules. The 2020 Rules which deal with the qualification and appointment of members by recruitment, procedure for inquiry into misbehavior, House Rent Allowance and other Conditions of Service are the subject matter of challenge in these cases before us and will be dealt with in detail in the succeeding paragraphs.

9. Pursuant to the liberty granted by this Court in the judgment of Rojer Mathew (supra), the Union of India filed Miscellaneous Application No. 1152 of 2020 placing the 2020 Rules before this Court and seeking a direction that the 2020 Rules would apply to all persons appointed as Members, President, Chairperson, etc. of Tribunals after the appointed day i.e. 26.05.2017. Several applications were filed by Bar Associations and the Members of the Tribunals seeking directions to fill up the vacant posts by making appointments to the Tribunals and for clarifications relating to the retrospective operation of the 2020 Rules. The Madras Bar Association filed a Writ Petition Under Article 32 seeking a declaration that the 2020 Rules are ultra vires of Article 14, 21 and 50 of the Constitution apart from being violative of the principles of separation of powers and independence of the judiciary. According to the Writ Petitioner, the 2020 Rules were also contrary to the earlier judgments of this Court in Union of India v. Madras Bar Association (2010) 11 SCC 1 (supra), Madras Bar Association v. Union of India MANU/SC/0875/2014 : (2014) 10 SCC 1 (supra) and Rojer Mathew (supra). Other Writ Petitions filed in the High Courts were transferred to this Court.

10. We requested Mr. Arvind P. Datar, learned Senior Counsel who has been actively associated with the litigation from the beginning and who was appointed as Amicus Curiae in the earlier rounds to assist this Court as Amicus Curiae to which he readily and graciously accepted. We have heard Mr. Arvind P. Datar, learned Senior Counsel (Amicus Curiae), Mr. Mukul Rohtagi, Mr. C.A. Sundaram, learned Senior Counsel, Mr. Vikas Singh, learned Senior Counsel, Ms. Anitha Shenoy, learned Senior Counsel, Mr. K.K. Venugopal, learned Attorney General for India, Mr. Balbir Singh, learned Additional Solicitor General, Mr. S.V. Raju, learned Additional Solicitor General, Mr. R. Balasubramanium, learned Senior Counsel, Mr. A.S. Chandhiok, learned Senior Counsel, Mr. Virender Ganda, learned Senior Counsel, Mr. M.S. Ganesh, learned Senior Counsel, Mr. Sidharth Luthra, learned Senior Counsel, Mr. C.S. Vaidyanathan, learned Senior Counsel, Mr. Guru Krishnakumar, learned Senior Counsel, Mr. Rakesh Kumar Khanna, learned Senior Counsel, Mr. Gautam Misra, learned Senior Counsel, Mr. P.S. Narasimha, learned Senior Counsel and other learned Counsel appearing for the parties. For the sake of convenience, Writ Petition (Civil) No. 804 of 2020 filed by the Madras Bar Association is taken as the lead case. The points raised in the

said Writ Petition will broadly cover all the issues that have been the subject matter of discussion during the course of the hearing of this case.

11. The main issues raised in the Writ Petition are that the 2020 Rules are unconstitutional as:

a) The Search-cum-Selection Committees provided for in the 2020 Rules did not conform to the principles of judicial dominance;

b) Appointment of persons without judicial experience to the posts of Judicial Members/Presiding Officer/Chairpersons is in contravention to the earlier judgments of this Court;

c) The term of office of the Members for four years is contrary to the earlier decisions of this Court;

d) Advocates are not being made eligible for appointment to most of the Tribunals;

e) Administrative control of the executive in matters relating to appointments and conditions of service is violative of the principles of separation of powers and independence of judiciary and demonstrates non-application of mind.

NATIONAL TRIBUNALS COMMISSION:

12. Mr. Datar, learned Amicus Curiae submitted that there is an imperative need for the Tribunals to function independently and free from executive control. Tribunals which are exercising power once vested with the High Courts and adjudicating disputes should be completely independent to infuse confidence in the mind of the litigant public. He relied upon the observations of Vivian Bose, J. in Bidi Supply Co. v. Union of India MANU/SC/0040/1956 : (1956) SCR 267 which are as follows:

The heart and core of a democracy lies in the judicial process, and that means independent and fearless judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking.

13. Mr. Datar also referred to the Reports of the Franks[2] and Leggatt[3] Committees which describe the role of Tribunals in the United Kingdom in a detailed manner. Mr. Datar brought to our notice that the recommendations of the Leggatt Committee were cited with approval in the judgment of this Court in Union of India v. Madras Bar Association (2010) (supra). According to the learned Amicus Curiae, the administrative support is provided by a Department of the Government of India, the Secretary of which is a Member of the Search-cum-Selection Committee. He cited the judgment of this Court in L. Chandra Kumar (supra) to argue that there should be a wholly independent agency for the administration of all the Tribunals. The learned Amicus Curiae also brought to our notice a statement made by Mr. Arun Jaitley, the then Minister of Law and Justice on the floor of the Parliament on 02.08.2001 that there was a proposal to set up a Central Tribunals Division. According to the learned Amicus Curiae, setting up a National Tribunals Commission as a supervisory body over the Tribunals would go a long way in improving the effective functioning of the Tribunals and enhancing the public image of the Tribunals. The mounting arrears in the Tribunals is mainly due to the delay in filling up the vacancies of the Presiding

Officers and members of the Tribunals. The learned Amicus Curiae suggested that there should be a National Tribunals Commission manned by retired Judges of the Supreme Court, Chief Justices of the High Courts and Members from the Executive which will have a full-time Secretary performing the following functions:

a) Selection of candidates;

b) Re-appointment of candidates;

c) Conducting of inquiry against Members;

d) Sanction leave of Members wherever necessary;

e) Monitor the functioning of the Tribunals, in particular, the arrears and disposal of cases and filling up of vacancies and ensuring adequate infrastructure; and

f) Ensure adequate infrastructure and IT support.

14. The learned Attorney General was also of the opinion that constitution of a National Tribunals Commission would provide a solution to the existing problems and ensure the smooth functioning of the Tribunals.

15. Docket explosion and mounting arrears are serious problems faced by the justice system in this country. Initially, creation of Tribunals was understood to provide a solution to the problems and to ease the burden on the Constitutional Courts. Specialized Tribunals were set up to meet the exigencies of adjudication of disputes in some branches of law. A constant complaint has been that the Tribunals are not free from the Executive control and that they are not perceived to be independent judicial bodies. There is an imperative need to ensure that the Tribunals discharge the judicial functions without any interference of the Executive whether directly or indirectly.

16. This Court has been repeatedly urging the Union of India to set up a single umbrella organization which would be an independent body to supervise the functioning of the Tribunals and ensure that the independence of the Members of the Tribunals is maintained. For the first time, this Court in its judgment in L. Chandra Kumar (supra) persuaded the Government of India to have the Ministry of Law as the nodal Ministry which would appoint an independent supervisory body to oversee the working of the Tribunals. The observations in L. Chandra Kumar are to the following effect:

96....The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number

of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

17. In para 70 of Union of India v. Madras Bar Association (2010) (supra), this Court deprecated the practice of administrative support from the Departments other than the Ministry of Law and Justice. Dependence on the parent Ministry or departments by the Members of the Tribunal for their facilities and administrative needs was found to be contrary to the principle of independence of the judiciary. Later, the learned Amicus Curiae submitted 'a concept note' on the National Tribunals Commission which was approved by this Court in Rojer Mathew v. South Indian Bank Limited MANU/SC/1562/2018 : (2018) 16 SCC 341. This Court was of the opinion that an autonomous oversight body should be established for recruitment of members and functioning of the Tribunals. In fact, the Court in Rojer Mathew (supra) even held that control of the tribunals by the executive is fraught and undermines their independence:

168. We are in complete agreement with the analogy elucidated by the Constitution Bench in the Fourth Judges Case (supra) for compulsory need for exclusion of control of the Executive over quasi-judicial bodies of Tribunals discharging responsibilities akin to Courts. The Search-cum-Selection Committees as envisaged in the Rules are against the constitutional scheme inasmuch as they dilute the involvement of judiciary in the process of appointment of members of tribunals which is in effect an encroachment by the executive on the judiciary.

18. The suggestions made by the learned Amicus Curiae regarding the setting up of All India Tribunal Service on the pattern prevalent in the United Kingdom was accepted. This Court was convinced that the performance and functioning of the Members of the Tribunals must be reviewed by the said independent body in the same way as superintendence by the High Courts Under Article 235 of the Constitution. By an order dated 07.05.2018, this Court in fact, recommended constitution of a wholly independent agency to oversee the working of the Tribunals.

19. While considering the vires of validity of the 2017 Rules, this Court in Rojer Mathew (supra) referred to the current problems faced by the Tribunals. Administration of the Tribunals by the sponsoring or parent Ministry or Department concerned and dependence for financial, administrative or other facilities by the Tribunals on the said Department which is a litigant before them are some of the serious problems highlighted by this Court. There is a likelihood of the independence of adjudication process being compromised in a situation where the Tribunal is made dependent for its needs on a litigant. The need for financial independence of the Tribunals has been dealt with by this Court in Rojer Mathew (supra). A direction was given to the Ministry of Finance to earmark separate and dedicated funds for the Tribunals from the Consolidated Fund of India so

that the Tribunals will not be under the financial control of the parent Departments. We reiterate the importance of the constitution of an autonomous oversight body for recruitment and supervision of the performance of the Tribunals. It is high time that the observations and suggestions made in this regard by this Court shall be implemented by the Union of India. An independent body headed by a retired Judge of the Supreme Court supervising the appointments and the functioning of the Tribunals apart from being in control of any disciplinary proceedings against the Members would not only improve the functioning of the Tribunals but would also be in accordance with the principles of judicial independence. We also notice that in the final directions and conclusions recorded in Roger Mathew (supra)[4], the wisdom or legality of setting up such an independent oversight body was not doubted and it was not referred to a larger Bench, since the view in L. Chandra Kumar on this point was not doubted.

20. In view of the preceding discussion, we direct the Union of India to set up a National Tribunals Commission as suggested by this Court by its order dated 07.05.2018 at the earliest. Setting up of such Commission would enhance the image of the Tribunals and instill confidence in the minds of the litigants. Dependence of the Tribunals for all their requirements on the parent Department will not extricate them from the control of the executive. Judicial independence of the Tribunals can be achieved only when the Tribunals are provided the necessary infrastructure and other facilities without having to lean on the shoulders of the executive. This can be achieved by establishment of an independent National Tribunals Commission as suggested above. To stop the dependence of the Tribunals on their parent Departments for routing their requirements and to ensure speedy administrative decision making, as an interregnum measure, we direct that there should be a separate "tribunals wing" established in the Ministry of Finance, Government of India to take up, deal with and finalize requirements of all the Tribunals till the National Tribunals Commission is established.

SEARCH-CUM-SELECTION COMMITTEE:

21. The contention of the learned Amicus Curiae is that the composition of the Search-cum-Selection Committees to make recommendations for appointment as Chairman or Chairperson or President and the other members of the Tribunals is contrary to the requirements of judicial dominance as held by the judgments of this Court. Mr. Datar submitted that the Schedule to the 2020 Rules provides for the Search-cum-Selection Committees for all the 19 Tribunals which broadly consist of the Chief Justice of India or a Judge of the Supreme Court nominated by him (who will serve as the Chairperson of the Search-cum-Selection committee), outgoing Chairman or Chairperson or President of the Tribunal in case of appointment of the Chairman or Chairperson or President of the Tribunal or the sitting Chairman or Chairperson or President of the Tribunal in case of appointment of other members of the Tribunal and two Secretaries to the Government of India. He stated that the Search-cum-Selection Committees cannot have the Secretaries of the sponsoring departments as its members, as held by this Court in Madras Bar Association v. Union of India (2014) (supra).

22. During the course of arguments, the learned Attorney General submitted that the 2020 Rules would be amended providing for a casting vote to the Chairperson of the Search-cum-Selection Committee to allay the apprehension of the Petitioner. In that event, judicial dominance in the Search-cum-Selection Committee can be maintained as the Chief Justice of India or his nominee

and the Presiding Officer of the Tribunal who is normally a retired Judge of the Supreme Court or a retired Chief Justice of a High Court, who represent the judiciary, along with a casting vote to the Chief Justice of India or his nominee, will be in majority in the Search-cum-Selection Committee. In response to the submission of the learned Attorney General, Mr. Datar argued that there are some Tribunals where the Presiding Officer of the Tribunal is not a retired Judge of the Supreme Court or Chief Justice of the High Court or Judge of a High Court. According to Mr. Datar, the Selection Committee should consist of the Chief Justice of India or his nominee along with another Judge of the Supreme Court and two Secretaries who are not from the sponsoring departments with a casting vote to the Chief Justice of India or his nominee.

23. The learned Attorney General for India in his usual fairness submitted that the composition of the Search-cum-Selection Committees, according to the 2020 Rules consist of the Chief Justice of India or his nominee, the Chairman or Chairperson or President or the outgoing Chairman or Chairperson or President of the Tribunal and two Secretaries to the Government of India. He submitted that there has been no instance where the Secretaries to Government disagreed with the views of the Judge of the Supreme Court. All the decisions of the Search-cum-Selection Committees till now have been unanimous. In any event, he suggested that in case of a dead lock, the Chairperson of the Search-cum-Selection Committee who is Chief Justice of India or his nominee shall have a casting vote and the 2020 Rules will be amended accordingly to include the casting vote to the Chairperson of the Search-cum-Selection Committee. The learned Attorney General further submitted that in case the Chairman or Chairperson or President of the Tribunal is himself seeking re-appointment, the Search-cum-Selection Committee shall have another Judge of the Supreme Court as a Member. He submitted that the acceptance of the request made by the Petitioner that there should be two Judges of the Supreme Court in the Search-cum-Selection Committee will lead to practical difficulties. There are 475 members in all the Tribunals put together and there will be frequent retirements and to fill up the said posts, the requirement for the meetings of the Search-cum-Selection Committees will arise on a regular basis. It might not be possible for two Judges of the Supreme Court to spare so much time in view of their already busy schedules. Countering the submission of the learned Amicus Curiae that Rule 4 of the 2020 Rules is violative of the judgments of this Court, the learned Attorney General submitted that this Court in Union of India v. Madras Bar Association (2010) (supra) accepted that the Secretary of the department concerned can be a member of the Search-cum-Selection Committee. It is to be noted that this Court held to the contrary in Madras Bar Association v. Union of India (2014) (supra). He argued that in view of the law laid down by this Court in Sundeep Kumar Bafna v. State of Maharashtra MANU/SC/0239/2014 : (2014) 16 SCC 623 that in case of a conflict between decisions of two Coordinate Benches of this Court, the law laid down by the earlier Bench shall prevail. He further stated that in a later judgment in Madras Bar Association v. Union of India (2015) (supra) this Court approved the Search-cum-Selection Committee consisting of the Secretary of the sponsoring department.

24. The issue of constitution of the Search-cum-Selection Committees for appointment to the posts of Chairperson and Members of the Tribunal has been dealt with by this Court earlier. Section 10FX of the Companies Act, 1956 provided for constitution of a Search-cum-Selection Committee consisting of the Chief Justice of India or his nominee as the Chairperson and four Secretaries to the Government of India from the Ministry of Finance and Company Affairs, Ministry of Labour, and Ministry of Law and Justice respectively as Members. The validity of Section 10FX was

challenged by the Madras Bar Association as being violative of the principles of separation of powers and judicial independence. This Court in Union of India v. Madras Bar Association (2010) (supra) while dealing with a judgment of the Madras High Court held that Parts IB and IC of the Companies Act can be made operational only after making suitable amendments suggested therein. In respect of the Search-cum-Selection Committee, the amendment suggested by this Court was that it should consist of the Chief Justice of India or his nominee as Chairperson and another Judge of the Supreme Court and two Secretaries of the Government of India from the Ministry of Finance and Company Affairs and the Ministry of Law and Justice. It is relevant to mention that in the said judgment, this Court took note of the fact that the Secretary of the sponsoring department is serving as a member of the Search-cum-Selection Committee. This Court was of the opinion that the Tribunals will not be considered independent unless reforms that were implemented in the United Kingdom pursuant to the Report of the Leggatt Committee are implemented in the Tribunals in India. Nonetheless, this Court observed that the Secretary, Ministry of Finance and Company Affairs can be a member of the Search-cum-Selection Committee for appointment of members to NCLT and NCLAT.

25. In the meanwhile, the Madras Bar Association filed another Writ Petition challenging the creation of the National Tax Tribunal. With regard to the constitution of the Search-cum-Selection Committee for the National Tax Tribunal, this Court in Madras Bar Association v. Union of India (2014) (supra) observed that a party to a litigation, i.e. the Secretary of the concerned department, cannot be permitted to participate in the selection process for appointment to the posts of Chairperson and Members of the Tribunal. This Court was of the opinion that the said procedure would be contrary to the recognised constitutional conventions reiterated by Lord Diplock in Hinds v. R. (1976) 1 All ER 353 (PC), which is as follows:

It would make a mockery of the Constitution, if the legislature could transfer the jurisdiction previously exercisable by holders of judicial offices to holders of a new court/Tribunal (to which some different name was attached) and to provide that persons holding the new judicial offices should not be appointed in the manner and on the terms prescribed for appointment of members of the judicature.

26. Provisions made for the NCLT and NCLAT in the Companies Act, 2013 were again the subject matter of challenge before this Court in Madras Bar Association v. Union of India (2015) (supra). Section 412 of the Companies Act, 2013 deals with the selection of the Members of the NCLT and NCLAT. The President of the Tribunal, the Chairperson and Judicial Members of the Appellate Tribunal shall be appointed after consultation with the Chief Justice of India. The Search-cum-Selection Committee for appointment of the Members of the Tribunal and the Technical Members of the Appellate Tribunal shall consist of the Chief Justice of India or his nominee, a Senior Judge of the Supreme Court or the Chief Justice of a High Court and the Secretaries of the Ministry of Corporate Affairs, Ministry of Law and Justice and the Ministry of Finance. In Madras Bar Association v. Union of India (2015) (supra), this Court expressed its displeasure in the constitution of the Search-cum-Selection Committee which is contrary to the principles laid down in its earlier judgment in Union of India v. Madras Bar Association (2010) (supra). Section 412(2) of the Companies Act, 2013 was held to be not valid as it was found to be against the binding precedents of this Court in Union of India v. Madras Bar Association (2010) (supra). A direction was issued to remove the deficiency in the constitution of the Search-cum-Selection Committee

by bringing the same into accord with sub-para (viii) of para 120 of the judgment in Union of India v. Madras Bar Association (supra).

27. The 2017 Rules were made in exercise of the powers conferred Under Section 184 of the Finance Act, 2017. Rule 4 provides for method of recruitment to the post of Chairman or Chairperson or President and the Members of the Tribunals. Under the 2017 Rules, the Search-cum-Selection Committee consisted of the Chief Justice of India or his nominee as the Chairperson and the Chairman of the Tribunal along with the Secretaries to Government. While striking down the 2017 Rules, this Court in Rojer Mathew (supra) commented that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain[5]. This Court further observed that excessive interference by the executive in appointment of the members would be detrimental to the independence of judiciary and an affront to the doctrine of separation of powers. The principles laid down in the aforementioned judgments are binding precedents which have to be implemented by the Respondent. However, the 2020 Rules which are in challenge in the Writ Petitions replicate the 2017 Rules in respect of the constitution of the Search-cum-Selection Committees, insofar as they do not ensure judicial dominance. We appreciate the stand taken by the learned Attorney General that a casting vote will be given to the Chief Justice of India or his nominee as the Chairperson of the Search-cum-Selection Committee. We also accept the submission of the learned Attorney General that normally the Chairperson of the Tribunal would be a retired Judge of the Supreme Court or the Chief Justice of a High Court. As such, two members of the judiciary with a casting vote to the Chairperson of the Search-cum-Selection Committee should ensure judicial dominance over the selection process and take care of the grievances of the Writ Petitioner. Mr. Datar submitted that there are certain Tribunals in which the Chairperson may not be a judicial member. In such Tribunals, we are of the opinion that the Search-cum-Selection Committee should have a retired Judge of the Supreme Court or a retired Chief Justice of a High Court nominated by the Chief Justice of India in place of the Chairperson of the Tribunal.

28. The learned Attorney General stated that the 2020 Rules would be amended to reflect that whenever the re-appointment of the Chairman or Chairperson or President of a Tribunal is considered by the Search-cum-Selection Committee, the Chairman or Chairperson or President of the Tribunal shall be replaced by a retired Judge of the Supreme Court or a retired Chief Justice of a High Court nominated by the Chief Justice of India. We approve this submission of the Attorney General.

29. It has been repeatedly held by this Court that the Secretaries of the sponsoring departments should not be members of the Search-cum-Selection Committee. We are not in agreement with the submission of the learned Attorney General that the Secretary of the sponsoring department being a member of the Search-cum-Selection Committee was approved by this Court in Union of India v. Madras Bar Association (2010) (supra) and it would prevail over the later judgment in Madras Bar Association v. Union of India (2014) (supra). We have already referred to the findings recorded in paragraph 70 of the judgment in Union of India v. Madras Bar Association (2010) (supra) that the sponsoring department should not have any role to play in the matter of appointment to the posts of Chairperson and members of the Tribunals. Though the ultimate direction of the Court was to constitute a Search-cum-Selection Committee for appointment of members to NCLT and NCLAT of which Secretary, Ministry of Finance and Company Affairs is

a member, the ratio of the judgment is categorical, which is to the effect that Secretaries of the sponsoring departments cannot be members of the Search-cum-Selection Committee. We, therefore, see no conflict of opinion in the two judgments as argued by the learned Attorney General. However, we find merit in the submission of the learned Attorney General that the presence of the Secretary of the sponsoring or parent department in the Search-cum-Selection Committee will be beneficial to the selection process. But, for reasons stated above, it is settled that the Secretary of the parent or sponsoring Department cannot have a say in the process of selection and service conditions of the members of Tribunals. Ergo, the Secretary to the sponsoring or parent Department shall serve as the Member-Secretary/Convener to the Search-cum-Selection Committee and shall function in the Search-cum-Selection Committee without a vote.

30. The Government of India is duty bound to implement the directions issued in the earlier judgments and constitute the Search-cum-Selection Committees in which the Chief Justice of India or his nominee shall be the Chairperson along with the Chairperson of the Tribunal if he is a retired Judge of the Supreme Court or a retired Chief Justice of a High Court and two Secretaries to the Government of India. In case the Tribunal is headed by a Chairperson who is not a judicial member, the Search-cum-Selection Committee shall consist of the Chief Justice of India or his nominee as Chairperson and a retired Judge of the Supreme Court or a retired Chief Justice of a High Court to be nominated by the Chief Justice of India and Secretary to the Government of India from the Ministry of Law and Justice and a Secretary of a department other than the parent or sponsoring department to be nominated by the Cabinet Secretary. As stated above, the Secretary of the parent or sponsoring department shall serve as the Member-Secretary or Convener, without a vote.

31. Rule 4(2) of the Rules postulates that a panel of two or three persons shall be recommended by the Search-cum-Selection Committee from which the appointments to the posts of Chairperson or members of the Tribunal shall be made by the Central Government. The learned Amicus Curiae voiced serious objections to Rule 4(2) on the ground that it would be compromising judicial independence. According to Mr. Datar, the procedure for appointment to the Tribunals should be completely outside executive control. The learned Attorney General stated that a panel of names consisting two or three persons is essential because their antecedents have to be examined by the Intelligence Bureau before appointing them to a Tribunal. He suggested that the number of persons to be recommended can be two instead of three to limit the discretion of the Appointments Committee of the Cabinet. The recommendations for appointments by the Search-cum-Selection Committee should be final and the executive should not be permitted to exercise their discretion in the matter of appointments to the Tribunals. Accordingly, we direct that Rule 4(2) of the 2020 Rules shall be amended and till so amended, that it be read as empowering the Search-cum-Selection Committee to recommend the name of only one person for each post. However, taking note of the submissions made by the learned Attorney General regarding the requirement of the reports of the selected candidates from the Intelligence Bureau, another suitable person can be selected by the Search-cum-Selection Committee and placed in the waiting list. In case, the report of the Intelligence Bureau regarding the selected candidate is not satisfactory, then the candidate in the waiting list can be appointed.

TERM OF OFFICE

32. Mr. Datar argued that the term of office of the Chairperson and the members of the Tribunal should be for a minimum period of five years by relying upon the judgments of this Court in S.P. Sampath Kumar (supra), Union of India v. Madras Bar Association (2010) (supra) and Rojer Mathew (supra). He referred to Section 184 of the Finance Act, 2017 which stipulated the term of office shall be for a period not exceeding five years. He submitted that in spite of this Court holding that the tenure should be between five to seven years, the 2020 Rules have provided for only four years as the maximum term. According to him, a term of minimum five years for the members of the Tribunals with a right of re-appointment is mandatory. Citing Rule 9(2) of the 2020 Rules which stipulates that the term of office shall be four years or till a person attains the age of 65 years whichever is earlier, the learned Amicus Curiae argued that a Judge of a High Court will not get more than three years as a member of the Tribunal after his retirement at the age of 62 years even if he is appointed immediately after his superannuation. He mentioned that in 18 out of the 19 Tribunals governed by the 2020 Rules, retired Judges of High Courts can be appointed either as Vice Chairperson or as the member. In view of the delay in making appointments, most of such retired Judges of High Courts will normally have a very short tenure of not more than two years. Therefore, Mr. Datar submitted that Rule 9(2) requires to be struck down as being arbitrary.

33. According to the learned Attorney General, as the term of four years is subject to re-appointment, it would not make much of a difference if the term fixed is four years instead of five years. He mentioned that due to the provision for re-appointment, eligible lawyers who shall be appointed at the age of 45 years will have the advantage of four or five extensions or till the said member reaches the age of 65 years.

34. This Court directed the extension of the tenure of the members of the Tribunal from three years to seven or five years subject to their eligibility in the case of Union of India v. Madras Bar Association (2010) (supra). This Court was of the opinion that the term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, the term would be over. In the said judgment it was further observed that the Tribunals would function effectively and efficiently only when they are able to attract younger members who have a reasonable period of service. In spite of the above precedent, a tenure of three years was fixed for the members of Tribunals in the 2017 Rules. While setting aside the 2017 Rules, this Court in Rojer Mathew (supra) held that a short period of service of three years is anti-merit as it would have the effect of discouraging meritorious candidates to accept the posts of judicial members in the Tribunals. In addition, this Court was also convinced that the short tenure of members increases interference by the executive jeopardizing the independence of judiciary.

35. The 2020 Rules are not in compliance with the principles of law laid down in Union of India v. Madras Bar Association (2010) (supra) and Rojer Mathew (supra) in respect of the tenure of the members of the Tribunals in spite of this Court repeatedly holding that short tenure of members is detrimental to the efficiency and independence of the Tribunals. Rule 9(1) of the 2020 Rules provide for a term of four years or till a Chairman or Chairperson or President attains the age of 70 years whichever is earlier. No rationale except that four years is more than three years prescribed in the 2017 Rules (described as too short, in Roger Mathew (supra)) was put forward on behalf of the Union of India. In so far as the posts of Vice Chairman or Vice-Chairperson or Vice-President and members are concerned, Rule 9(2) fixes the tenure as four years or till they attain the age of 65 years whichever is earlier. In view of the law laid down in the earlier judgments,

we direct the modification of the tenure in Rules 9(1) and 9(2) of the 2020 Rules as five years in respect of Chairman or Chairperson, Vice Chairman or Vice-Chairperson and the members. Rule 9(1) permits a Chairman, Chairperson or President of the Tribunal to continue till 70 years which is in conformity with Parliamentary mandate in Section 184 of the Finance Act. However, Rule 9(2) provides that Vice Chairman and other members shall hold office till they attain 65 years. We are in agreement with the submission made by the learned Amicus Curiae that under the 2020 Rules, the Vice Chairman, Vice-Chairperson or Vice-President or members in almost all the Tribunals will have only a short tenure of less than three years if the maximum age is 65 years. We, therefore, direct the Government to amend Rule 9(1) of the 2020 Rules by making the term of Chairman, Chairperson or President as five years or till they attain 70 years, whichever is earlier and other members dealt with in Rule 9(2) as five years or till they attain 67 years, whichever is earlier.

36. Section 184 of the Finance Act, 2017 provides for reappointment of Chairpersons, Vice-Chairpersons and members of the Tribunals on completion of their tenure. There is no mention of reappointment in the 2020 Rules. However, the learned Attorney General submitted that the members shall be entitled to seek reappointment. Reappointment for at least one term shall be provided to the persons who are appointed to the Tribunals at a young age by giving preference to the service rendered by them.

HOUSE RENT ALLOWANCE

37. According to Rule 15 of the 2020 Rules, the Chairperson and the other members of the Tribunals shall be entitled to house rent allowance at the same rate admissible to officers of the Government of India holding grade 'A' posts carrying the same pay. The contention of the learned Amicus Curiae is that it is a well-known fact that it is difficult to get Judges of High Courts of merit and ability as members of Tribunals, particularly due to the absence of a provision for housing. Lack of housing facilities becomes a deterrent for retired Judges from States outside Delhi to accept appointments to the Tribunals. It will not be possible for a retired Judge of the Supreme Court or the Chief Justice of a High Court or a Judge of a High Court to get suitable accommodation in Delhi, where most of the Tribunals are situated, for Rs. 75,000/- per month which is paid as house rent allowance. Similarly, where tribunals have benches, members (especially those drawn from amongst Advocates) would find it hard put to find accommodation if there is insufficient incentive, whenever they have to move to different cities. The learned Attorney General relied upon the observations made by this Court in Rojer Mathew (supra) that the retired Judges of the High Court cannot be equated with the sitting Judges of the High Court and are not entitled to the same perquisites. It is also the submission of the learned Attorney General that it is not possible to provide housing to all the Presiding Officers and members of the Tribunals in view of the acute shortage of housing in Delhi.

38. Experience has shown that lack of housing in Delhi has been one of the reasons for retired Judges of the High Courts and the Supreme Court to not accept appointments to Tribunals. At the same time, scarcity of housing is also a factor which needs to be kept in mind. The only way to find a solution to this problem is to direct the Government of India to make serious efforts to provide suitable housing to the Chairperson and the members of the Tribunals and in case providing housing is not possible, to enhance the house rent allowance to Rs. 1,25,000/- for

members of Tribunals and Rs. 1,50,000/- for the Chairman or Chairperson or President and Vice Chairman or Vice Chairperson or Vice President of Tribunals. In other words, an option should be given to the Chairperson and the members of the Tribunals to either apply for housing accommodation to be provided by the Government of India as per the existing Rules or to accept the enhanced house rent allowance. This direction shall be effective from 01.01.2021.

ADVOCATES AS JUDICIAL MEMBERS

39. The learned Amicus Curiae complained of the deliberate exclusion of the Advocates from being considered for appointment as judicial members in a majority of Tribunals by the 2020 Rules. It was argued that in respect of seven tribunals (such as Central Administrative Tribunal, Income Tax Appellate Tribunal, Customs Excise and Sales Tax Appellate Tribunal, etc.), the 2020 Rules impose a new condition whereby Advocates without 25 years of experience are ineligible. It is submitted that there is nothing in the provisions of the Finance Act, 2017, with respect to exclusion, from consideration, of Advocates, nor any restrictive condition and, on the other hand, the parent enactments and previously existing Rules enabled Advocates (who were eligible to be appointed as Judges of High Courts) to be considered for appointment for these tribunals. The learned Amicus curiae argued that it would be very difficult for competent and successful Advocates, in the concerned field, to uproot themselves and accept membership of tribunals, if they are to be eligible at the late age of 50 years and resultantly, those less competent would be willing, contrary to public interest. The Attorney General had submitted that exclusion of Advocates was a matter of policy and that the eligibility condition wherever they could be considered, in some tribunals of 25 years practice, was to bring about parity with members of the Indian Legal Service, who could, in some instances be considered for appointment as judicial members. During the submissions, the Attorney General had fairly stated that the 2020 Rules will be amended making Advocates eligible for appointment in the tribunals where they are presently excluded under the 2020 Rules as judicial members provided, they have 25 years of experience. This is in line with the previous rulings of this Court that advocates and retired judges are to be considered as judicial members of tribunals. Furthermore, this Court notices that the 2017 Rules did not exclude Advocates from consideration; nor did they impose restrictive eligibility conditions, such as 25 years of experience.

40. The learned Amicus Curiae submitted that stipulation of 25 years of experience would be a serious handicap in selecting meritorious candidates from among advocates. He suggested that Advocates with the standing of 15 years at the bar should be made eligible for being considered for appointment as judicial members to the Tribunals. The learned Amicus Curiae further submitted that Advocates should be made eligible for appointment to Single Member Tribunals, particularly to the Debt Recovery Tribunals as their experience in law can be suitably utilized. It is the submission of learned Attorney General that though the Constitution prescribes that an Advocate having experience of 10 years can be considered for appointment as a Judge of a High Court, normally an Advocate is considered only after he attains the age of 45 years. He suggested that an experience of 25 years at the Bar would make Advocates at the age of 47-48 years eligible for appointment as judicial members of the Tribunals. It would be attractive for the Advocates to apply for appointment to the post of judicial members of the Tribunals after having experience of 25 years, especially due to the provision for re-appointment.

41. In view of the submission of the learned Attorney General that the 2020 the Rules will be amended to make Advocates eligible for appointment to the post of judicial members of the Tribunals, the only question that remains is regarding their experience at the bar. While the Attorney General suggested that an advocate who has 25 years of experience should be considered for appointment as a Judicial member, the learned Amicus Curiae suggested that it should be 15 years. An Advocate of a High Court with experience of ten years is qualified for appointment as a Judge of the High Court as per Article 217(2) of the Constitution of India. As the qualification for an advocate of a High Court for appointment as a Judge of a High Court is only 10 years, we are of the opinion that the experience at the bar should be on the same lines for being considered for appointment as a judicial member of a Tribunal. Exclusion of Advocates in 10 out of 19 tribunals, for consideration as judicial members, is therefore, contrary to Union of India v. Madras Bar Association (2010) (11) SCC 1 Para 120(i) @ page 65, and Madras Bar Association v. Union of India MANU/SC/0610/2015 : (2015)(8) SCC 583 Para 27, page 608. However, it is left open to the Search-cum-Selection Committee to take into account in the experience of the Advocates at the bar and the specialization of the Advocates in the relevant branch of law while considering them for appointment as judicial members.

ELIGIBILITY OF MEMBERS OF INDIAN LEGAL SERVICE

42. The grievance of the learned Amicus Curiae is that members of the Indian Legal Service have been made eligible for appointment as judicial members to some Tribunals in spite of the judgment of this Court in Union of India v. Madras Bar Association (2010) (supra), wherein it was held that they can only be appointed as technical members. The contention of the Union of India is that there is a conflict of opinion in Union of India v. Madras Bar Association (2010) (supra) and the judgment of this Court in S.P. Sampath Kumar (supra). It was argued that this Court in S.P. Sampath Kumar (supra) upheld the appointment of the members of the Indian Legal Service as judicial members whereas in Union of India v. Madras Bar Association (2010) (supra), it was held that the members of the Indian Legal Services can only be appointed as technical members of Tribunals. It was argued by the learned Attorney General that the judgment of this Court in S.P. Sampath Kumar (supra) shall prevail over a later judgment as both the judgments are delivered by Constitution Benches of five Judges. Further submission made by the learned Attorney General is that members of Indian Legal Service are practicing lawyers who have experience of 7 years to 13 years depending upon the grade in which they were recruited. He also referred to the different cadres in the Indian Legal Service which are directly related to law such as Advocates-on-Record or instructing counsel working in the Central Agency Section in this Court or holding the post of Director of Prosecution in the Central Bureau of Investigation or legal advisors in the Ministry of Law and Justice. The learned Attorney General further submitted that the experience of the members of Indian Legal Service in various branches of law would stand in good stead for their appointment as judicial members. The learned Amicus Curiae does not have an objection to members of Indian Legal Service who are practicing in Courts as Government Advocates to be considered for appointment as judicial members in Tribunals. But he suggested that this can be done only by a legislative amendment in light of the law laid down in Union of India v. Madras Bar Association (2010) (supra). He also submitted that specialization being a mandatory requirement for Advocates should be the same for members of the Indian Legal Service.

43. As we have already held that Advocates are entitled to be considered as judicial members of the Tribunals, we see no harm in members of the Indian Legal Service being considered as judicial members, provided they satisfy the criteria relating to the standing at the bar and specialization required. The judgment of Union of India v. Madras Bar Association (2010) (supra) did not take note of the above points relating to the experience of members of Indian Legal Service at the bar. The Indian Legal Service was considered along with the other civil services for the purpose of holding that the members of Indian Legal Service are entitled to be appointed only as technical members. In the light of the submission made by the learned Attorney General and the Amicus Curiae, we hold that the members of Indian Legal Service shall be entitled to be considered for appointment as a judicial member subject to their fulfilling the other criteria which advocates are subjected to. In addition, the nature of work done by the members of the Indian Legal Service and their specialization in the relevant branches of law shall be considered by the Search-cum-Selection Committee while evaluating their candidature.

44. We would wish to emphasize here that the setting up of tribunals, and the subject matters they are expected to deal with, having regard to the challenges faced by a growing modern economy, are matters of executive policy. When it comes to personnel who would operate these tribunals (given that the issues they decide would ultimately reach this Court, in appellate review or in some cases, judicial review), competence, especially in matters of law as well as procedure to be adopted by such judicial bodies, becomes matters of concern for this Court. These tribunals discharge a judicial role, and with respect to matters entrusted to them, the jurisdiction of civil courts is usually barred. Therefore, wherever legal expertise in the particular domain is implicated, it would be natural that advocates with experience in the same, or ancillary field would provide the "catchment" for consideration for membership. This is also the case with selection of technical members, who would have expertise in the scientific or technical, or wherever required, policy background. These tribunals are expected to be independent, vibrant and efficient in their functioning. Appointment of competent lawyers and technical members is in furtherance of judicial independence. Younger advocates who are around 45 years old bring in fresh perspectives. Many states induct lawyers just after 7 years of practice directly as District Judges. If the justice delivery system by tribunals is to be independent and vibrant, absorbing technological changes and rapid advances, it is essential that those practitioners with a certain vitality, energy and enthusiasm are inducted. 25 years of practice even with a five-year degree holder, would mean that the minimum age of induction would be 48 years: it may be more, given the time taken to process recommendations. Therefore, a tenure without assured re-engagements would not be feasible. A younger lawyer, who may not be suitable to continue after one tenure (or is reluctant to continue), can still return, to the bar, than an older one, who may not be able to piece her life together again.

REMOVAL OF MEMBERS

45. Rule 8 of the 2020 Rules provides the procedure for inquiry of misbehavior or incapacity of a member. According to the said Rule, the preliminary scrutiny of the complaint is done by the Central Government. If the Central Government finds that there are reasonable grounds for conducting an inquiry into the allegations made against a member in the complaint, it shall make a reference to the Search-cum-Selection Committee which shall conduct an inquiry and submit the report to the Central Government. The learned Amicus Curiae argued that there is no clarity in the

Rules as to whether the reports submitted by the Search-cum-Selection Committee are binding on the Central Government. According to Mr. Datar, it is impermissible for the Central Government to further scrutinize the report of the Search-cum-Selection Committee which comprises of sitting and retired Judges. He submitted that the proper procedure to be followed in matters of complaints against the Presiding Officers and members of the Tribunals is that a preliminary scrutiny may be made by the Central Government and the report should be placed before the Search-cum-Selection Committee. It is open to the Search-cum-Selection Committee to accept or reject the preliminary scrutiny. In case the Search-cum-Selection Committee is of the opinion that the findings of the preliminary scrutiny are correct, then the Search-cum-Selection Committee should be entitled to proceed further to conduct an inquiry on its own, if it so choses. The findings of the Search-cum-Selection Committee shall be final and the action recommended by the Search-cum-Selection Committee shall be implemented by the Central Government.

46. The learned Attorney General submitted that the preliminary scrutiny done by the Central Government, according to Rule 8(1) is only for the purpose of weeding out frivolous complaints. The learned Attorney General has also fairly submitted that the recommendations made by the Search-cum-Selection Committee shall be implemented by the Central Government. We are in agreement with the submissions of the learned Attorney General.

TIME LIMIT FOR APPOINTMENT

47. The learned Amicus Curiae brought to our notice that there are several instances where appointments are delayed even after the selections are completed by the Search-cum-Selection Committee. The learned Attorney General also agreed that there is an imminent need for appointments to be made in an expeditious manner, but implored that no time be fixed for making appointments. The very reason for constituting Tribunals is to supplement the functions of the High Courts and the other Courts and to ensure that the consumer of justice gets speedy redressal to his grievances. This would be defeated if the Tribunals do not function effectively. It has been brought to our notice that there are a large number of unfilled vacancies hampering the progress of the functioning of the Tribunals. The pendency of cases in the Tribunals is increasing mainly due to the lack of personnel in the Tribunals which is due to the delay in filling up the vacancies as and when they arise due to the retirement of the members. There is imminent need for expediting the process of selections and appointments to ensure speedy justice. We, therefore, direct that the Government of India shall make the appointments to the Tribunals within three months after the Search-cum-Selection Committee completes the selection and makes its recommendations.

RETROSPECTIVITY OF THE 2020 RULES

48. The learned Amicus Curiae submitted that the 2020 Rules have been made in exercise of the powers conferred by Section 184 of the Finance Act, 2017. Rule 1(2) provides that Rules shall come into force on the date of their publication in the Official Gazette. According to the learned Amicus Curiae, the Rules have come into force on 12.02.2020, the date on which they were notified. He stated that it is a well settled principle that delegated legislations such as Rules, notifications and circulars cannot have retrospective effect unless the parent statute itself permits such retrospective effect. He stated that Section 183 of the Finance Act, 2017 enabled the notification of Rules made Under Section 184 to take effect from the appointed day. Under Section

157(a) of the Finance Act, 2017, the appointed day means such date as the Central Government by notification in the Official Gazette appoint. The date on which Rules were notified is 12.02.2020. The learned Amicus Curiae relied upon the judgment of this Court in Sri Vijayalakshmi Rice Mills v. State of A.P. MANU/SC/0051/1976 : (1976) 3 SCC 37 to argue that the Rules cannot be given retrospective effect. He stated that the 2017 Rules have become non est after being struck down in Rojer Mathew (supra) and the 2020 Rules cannot be treated as an amendment or modification of the 2017 Rules. He stressed on the point that giving retrospective effect to 2020 Rules would result in inequitable consequences and serious hardship. For instance, some Vice Chairpersons, Vice Presidents and Vice Chairmen were appointed for a period of three years with an upper age limit of 67 years under the 2017 Rules. However, under the 2020 Rules their appointment period is four years with the upper age limit of 65 years. The term of office of persons who are appointed under the 2017 Rules would be altered if the 2020 Rules are given retrospective effect. The learned Amicus Curiae was supported by other Senior Counsel who vehemently argued that the 2020 Rules are only prospective.

49. The Attorney General argued that Section 183 of the Finance Act, 2017 provided that the Rules made Under Section 184 shall have effect from the appointed day which was 26.05.2017. As per Section 183, all persons appointed prior to 26.05.2017 would be governed by the old Acts and Rules under which the Tribunals were established and those who are appointed after 26.05.2017 would be governed by the 2017 Rules. The Attorney General further argued that though the 2017 Rules were struck down by this Court in Rojer Mathew (supra), an opportunity was given to the Government of India to frame new Rules and place them before this Court. As the new Rules have been framed in exercise of powers under the Finance Act, 2017, the 2020 Rules would be effective from 26.05.2017. The Government of India has filed M.A. No. 1152 of 2020 in Writ Petition (C) No. 279 of 2017 seeking a direction that the 2020 Rules would apply to all persons appointed as Members, Presidents and Chairpersons to the Tribunals after appointed day i.e. 26.05.2017 in accordance with the mandate of Section 183 of the Finance Act.

50. Before expressing our view on this point, it would be necessary to refer to certain interim orders that were passed by this Court in Rojer Mathew (supra). By an order dated 09.02.2018, this Court gave certain interim directions regarding constitution of the Search-cum-Selection Committee and other issues in relation to appointments to the post of members of the Central Administrative Tribunal. The direction with which we are concerned at present pertains to appointments that were directed to be made pursuant to the recommendations of the interim Search-cum-Selection Committee which shall abide by the conditions of service stipulated in the old Acts and Rules. By an order dated 20.03.2018, the order passed on 09.02.2018 was clarified by this Court and the tenure of the Chairperson and the members was directed to be for a period of five years. There is another order passed on 21.08.2018 by this Court in Writ Petition (C) No. 279 of 2017 by which it was clarified that appointments made to the post of members of the Customs Excise Sales Tax Appellate Tribunal shall be for a period of five years or till the member attains the age of 62 years. This Court clarified that the President shall continue till he attains the age of 65 years. In respect of the Central Administrative Tribunal, the old Rules were directed to be applied.

51. The 2017 Rules have been declared as being contrary to the parent enactment and the principles envisaged in the Constitution and hence struck down by this Court in Rojer Mathew (supra). The

Central Government was directed to reformulate the Rules in conformity and in accordance with the principles delineated by this Court in its earlier judgment and the observations made in Rojer Mathew (supra). The 2020 Rules are made in exercise of the power conferred Under Section 184 of the Finance Act which came into force on their publication in the official Gazette as per Rule 1(2). The date of publication of the 2020 Rules is 12.02.2020. We are unable to accept the submission of learned Attorney General that the 2020 Rules which replaced the 2017 Rules shall come into force with effect from 26.05.2017 which was the appointed day in accordance with the 2017 Rules. It is true that the 2017 Rules were brought into force from 26.05.2017 and Section 183 of the Finance Act provides for any appointment made after the appointed day shall be in accordance with the Rules made Under Section 184 of the Finance Act, 2017. 2017 Rules which have come into force with effect from 26.05.2017 in accordance with Section 183 have been struck down by this Court. The 2020 Rules which came into force from the date of their publication in the Official Gazette, i.e. 12.02.2020, cannot be given retrospective effect. The intention of Government of India to make the 2020 Rules prospective is very clear from the notification dated 12.02.2020. In any event, subordinate legislation cannot be given retrospective effect unless the parent statute specifically provides for the same.[6]

52. As we have held that the 2020 Rules are not retrospective, the point that remains to be determined is the applicable Rules for appointments that were made prior to the 2020 Rules. The appointments made during the pendency of Rojer Mathew (supra) on the date of interim orders passed therein and appointments made after the judgment of Rojer Mathew (supra), like the appointments made prior to the 2017 Rules are, no doubt, to be governed by the then existing parent Acts and Rules. In view of the interim orders passed by this Court in Rojer Mathew (supra), appointments made during the pendency of the case in this Court are also to be governed by the parent Acts and Rules and the clarifications issued by this Court in Rojer Mathew (supra). According to paragraph 224 of the judgment in Rojer Mathew (supra), the appointments to the Tribunals were directed to be in terms of the respective Acts and Rules which governed appointments to Tribunals prior to the enactment of the Finance Act, 2017. For the purpose of clarity, we hold that all appointments made prior to the 2020 Rules which came into force on 12.02.2020 shall be governed by the parent Acts and Rules. Any appointment made after the 2020 Rules have come into force shall be in accordance with the 2020 Rules subject to the modifications directed in the preceding paragraphs of this judgment.

53. The upshot of the above discussion leads this Court to issue the following directions:

(i) The Union of India shall constitute a National Tribunals Commission which shall act as an independent body to supervise the appointments and functioning of Tribunals, as well as to conduct disciplinary proceedings against members of Tribunals and to take care of administrative and infrastructural needs of the Tribunals, in an appropriate manner. Till the National Tribunals Commission is constituted, a separate wing in the Ministry of Finance, Government of India shall be established to cater to the requirements of the Tribunals.

(ii) Instead of the four-member Search-cum-Selection Committees provided for in Column (4) of the Schedule to the 2020 Rules with the Chief Justice of India or his nominee, outgoing or sitting Chairman or Chairperson or President of the Tribunal and two Secretaries to the Government of India, the Search-cum-Selection Committees should comprise of the following members:

(a) The Chief Justice of India or his nominee--Chairperson (with a casting vote).

(b) The outgoing Chairman or Chairperson or President of the Tribunal in case of appointment of the Chairman or Chairperson or President of the Tribunal (or) the sitting Chairman or Chairperson or President of the Tribunal in case of appointment of other members of the Tribunal (or) a retired Judge of the Supreme Court of India or a retired Chief Justice of a High Court in case the Chairman or Chairperson or President of the Tribunal is not a Judicial member or if the Chairman or Chairperson or President of the Tribunal is seeking re-appointment--member;

(c) Secretary to the Ministry of Law and Justice, Government of India--member;

(d) Secretary to the Government of India from a department other than the parent or sponsoring department, nominated by the Cabinet Secretary--member;

(e) Secretary to the sponsoring or parent Ministry or Department--Member Secretary/Convener (without a vote). Till amendments are carried out, the 2020 Rules shall be read in the manner indicated.

(iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be recommended to be included in the waiting list.

(iv) The Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of five years and shall be eligible for reappointment. Rule 9(2) of the 2020 Rules shall be amended to provide that the Vice-Chairman, Vice-Chairperson and Vice President and other members shall hold office till they attain the age of sixty-seven years.

(v) The Union of India shall make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other members of the Tribunals. If providing housing is not possible, the Union of India shall pay the Chairman or Chairperson or President and Vice-Chairman, Vice-Chairperson, Vice President of the Tribunals an amount of Rs. 1,50,000/- per month as house rent allowance and Rs. 1,25,000/- per month for other members of the Tribunals. This direction shall be effective from 01.01.2021.

(vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial members in the Tribunals. While considering advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

(vii) The members of the Indian Legal Service shall be eligible for appointment as judicial members in the Tribunals, provided that they fulfil the criteria applicable to advocates subject to suitability to be assessed by the Search-cum-Selection Committee on the basis of their experience and knowledge in the specialized branch of law.

(viii) Rule 8 of the 2020 Rules shall be amended to reflect that the recommendations of the Search-cum-Selection Committee in matters of disciplinary actions shall be final and the recommendations of the Search-cum-Selection Committee shall be implemented by the Central Government.

(ix) The Union of India shall make appointments to Tribunals within three months from the date on which the Search-cum-Selection Committee completes the selection process and makes its recommendations.

(x) The 2020 Rules shall have prospective effect and will be applicable from 12.02.2020, as per Rule 1(2) of the 2020 Rules.

(xi) Appointments made prior to the 2017 Rules are governed by the parent Acts and Rules which established the concerned Tribunals. In view of the interim orders passed by the Court in Rojer Mathew (supra), appointments made during the pendency of Rojer Mathew (supra) were also governed by the parent Acts and Rules. Any appointments that were made after the 2020 Rules came into force i.e. on or after 12.02.2020 shall be governed by the 2020 Rules subject to the modifications directed in the preceding paragraphs of this judgment.

(xii) Appointments made under the 2020 Rules till the date of this judgment, shall not be considered invalid, insofar as they conformed to the recommendations of the Search-cum-Selection Committees in terms of the 2020 Rules. Such appointments are upheld, and shall not be called into question on the ground that the Search-cum-Selection Committees which recommended the appointment of Chairman, Chairperson, President or other members were in terms of the 2020 Rules, as they stood before the modifications directed in this judgment. They are, in other words, saved.

(xiii) In case the Search-cum-Selection Committees have made recommendations after conducting selections in accordance with the 2020 Rules, appointments shall be made within three months from today and shall not be subject matter of challenge on the ground that they are not in accord with this judgment.

(xiv) The terms and conditions relating to salary, benefits, allowances, house rent allowance etc. shall be in accordance with the terms indicated in, and directed by this judgment.

(xv) The Chairpersons, Vice Chairpersons and members of the Tribunals appointed prior to 12.02.2020 shall be governed by the parent statutes and Rules as per which they were appointed. The 2020 Rules shall be applicable with the modifications directed in the preceding paragraphs to those who were appointed after 12.02.2020. While reserving the matter for judgment on 09.10.2020, we extended the term of the Chairpersons, Vice-Chairpersons and members of the Tribunals till 31.12.2020. In view of the final judgment on the 2020 Rules, the retirements of the Chairpersons, Vice-Chairpersons and the members of the Tribunals shall be in accordance with the applicable Rules as mentioned above.

54. We will be failing in our duty unless we acknowledge the invaluable assistance of Mr. Arvind Datar, learned Amicus Curiae, Mr. K.K. Venugopal, learned Attorney General, Mr. S.V. Raju and

Mr. Balbir Singh, learned Additional Solicitors General and the other Senior Counsel and advocates.

55. For the aforementioned reasons, the Writ Petitions, Transfer Petitions, Civil Appeals and all the Applications are disposed of.

Epilogue

Dispensation of justice by the Tribunals can be effective only when they function independent of any executive control: this renders them credible and generates public confidence. We have noticed a disturbing trend of the Government not implementing the directions issued by this Court. To ensure that the Tribunals should not function as another department under the control of the executive, repeated directions have been issued which have gone unheeded forcing the Petitioner to approach this Court time and again. It is high time that we put an end to this practice. Rules are framed which are completely contrary to the directions issued by this Court. Upon the tribunals has devolved the task of marking boundaries of what is legally permissible and feasible (as opposed to what is not lawful and is indefensible) conduct, in a normative sense guiding future behavior of those subject to the jurisdictions of such tribunals. This task is rendered even more crucial, given that appeals against their decisions lie directly to the Supreme Court and public law intervention on the merits of such decisions is all but excluded. Also, these tribunals are expected to be consistent, and therefore, adhere to their precedents, inasmuch as they oversee regulatory behavior in several key areas of the economy. Therefore, it is crucial that these tribunals are run by a robust mix of experts, i.e. those with experience in policy in the relevant field, and those with judicial or legal experience and competence in such fields. The functioning or non-functioning of any of these tribunals due to lack of competence or understanding has a direct adverse impact on those who expect effective and swift justice from them. The resultant fallout is invariably an increased docket load, especially by recourse to Article 226 of the Constitution of India. These aspects are highlighted once again to stress that these tribunals do not function in isolation, but are a part of the larger scheme of justice dispensation envisioned by the Constitution and have to function independently, and effectively, to live up to their mandate. The involvement of this Court, in the series of decisions, rendered by no less than six Constitution Benches, underscores the importance of this aspect. The role of both the courts as upholders of judicial independence, and the executive as the policy making and implementing limb of governance, is to be concordat and collaborative. This Court expects that the present directions are adhered to and implemented, so that future litigation is avoided.

The Government is, accordingly, directed to strictly adhere to the directions given above and not force the Petitioner-Madras Bar Association, which has been relentless in its efforts to ensure judicial independence of the Tribunals, to knock the doors of this Court again.

---

[1]Madras Bar Association v. Union of India, MANU/SC/0875/2014 : (2014) 10 SCC 1.
[2]the Franks Report of 1957 was issued by a British committee of inquiry chaired by Sir Oliver Franks; the committee was set up by the Lord Chancellor, in view of concerns voiced with regard

to the range, and diversity of tribunals, uncertainty regarding the procedures they followed and lack of cohesion and supervision.
[3]Finalized in 2001, the Sir Andrew Leggatt Committee reviewed the existing tribunal system in UK in its report 'Tribunals for Users - One System, One Service'. The Report, highlighted concerns in the court system, such as delay, expense, technicality and formality, lack of expertise etc and recommended, a new 'independent, coherent, professional, cost-effective, user friendly' and structurally reformed Tribunal system
[4]See para 238 of Rojer Mathew (supra), which refers only the issue relating to Money Bills to a larger bench.
[5]It was held that
"163. We are in agreement with the contentions of the Learned Counsel for the Petitioner(s), that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain. The doctrine of separation of powers has been well recognised and re-interpreted by this Court as an important facet of the basic structure of the Constitution, in its dictum in Kesavananda Bharati v. State of Kerala, and several other later decisions. The exclusion of the Judiciary from the control and influence of the Executive is not limited to traditional Courts alone, but also includes Tribunals since they are formed as an alternative to Courts and perform judicial functions."
[6]ITO v. M.C. Ponnoose, MANU/SC/0477/1969 : (1969) 2 SCC 351; Sri Vijayalakshmi Rice Mills v. State of A.P., MANU/SC/0051/1976 : (1976) 3 SCC 37.

Back to Index

MANU/SC/1203/1997

Neutral Citation: 1996/INSC/1514

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 3255 of 1984

Decided On: 19.12.1996

Appellants: Mafatlal Industries Ltd. and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

A.M. Ahmadi, C.J., J.S. Verma, S.C. Agrawal, B.P. Jeevan Reddy, Dr. A.S. Anand, B.L. Hansaria, S.C. Sen, K.S. Paripoornan and B.N. Kirpal, JJ.

Subject: Excise

Subject: Law of Evidence

Relevant Section:

CONSTITUTION OF INDIA - Article 265

Cases Overruled/Partly Overruled:

State of Madhya Pradesh vs. Bhailal Bhai and Ors. MANU/SC/0029/1964 ; Jogta Coal Co. Ltd. vs. Commissioner of Income-tax, West Bengal MANU/SC/0071/1959

Prior History:

Appeal From the Judgment and Order dated 6-4-1984 of the Gujarat High Court in F.A. No. 1681 of 1980

Disposition:
Disposed of

Case Note:

Held: Refund - Levy of duty held to be unconstitutional or paid under a mistake of law-- Jurisdiction of civil courts not ousted, since the authorities acting under the statute lack

inherent jurisdiction--Claim being outside the ambit of Excise Act, the remedy will lie way of a suit under Sec. 72 of the Contract Act or a writ petition under Art. 226 of the Constitution--Limitation under S. 17(1)(c) of the Limitation Act will be applicable to such claims--CEA: S. 11B.

2. Retrospectivity--Refund--Unjust enrichment--Amended provisions of S. 11B of CEA--"Deemed protest"--In cases of pending decrees and orders, it must be deemed that duties were paid "under protest" within the meaning of the second proviso to clause (1) of S. 11B of CEA, to enable the assessee to file a fresh application for refund under S. 11B(2).

Industry: Textile

JUDGMENT

B.P. Jeevan Reddy, J.

1. Significant questions concerning the refund of Excise and Customs duties collected contrary to law - in all its shades - arise for consideration in these appeals and writ petitions. They involve the correctness of certain earlier decisions of this Court, concept of unjust enrichment, interpretation of Article 265 of the Constitution of India and of the provisions of the Central Excises and Salt Act, 1944 and the Customs Act et al. As far back as August 14, 1984, Civil Appeal No. 1794 of 1984 and the connected special leave petitions were referred to a Bench of seven Judges by a Bench of two learned Judges, since the referring Bench doubted the correctness of the five-Judge Bench decision in Sales Tax Officer, Banaras and Ors. v. Kanhaiyalal Mukundlal Saraf MANU/SC/0129/1958 : [1959]1SCR1350 . When the matter came up before a seven-Judge Bench, it was brought to our notice that a seven-Judge Bench has followed the decision in Kanhaiyalal in State of Kerala v. Aluminium Industries Limited (1965) 16 S.T.C. 689. Accordingly, the matters were directed to be posted before a nine-Judge Bench. Meanwhile, several matters raising identical or connected issues got tagged on. Leave granted in Special Leave Petitions.

2. In the year 1991, the Parliament enacted the Central Excises and Customs Law (Amendment) Act, 1991 (being Act 40 of 1991) substantially amending the provisions relating to refund in both the Central Excises and Salt Act and the Customs Act, besides introducing several new provisions therein. Writ petitions challenging the validity of the said amendment are also posted before us. Apart from the validity, the meaning and purport of the amended provisions also falls for consideration. For the sake of convenience, we would refer to the relevant provisions in the Central Excises and Salt Act inasmuch as the relevant provisions in both the enactments are identical.

3. The Central Excises and Salt Act, 1944 (the Act) was enacted with a view "to consolidate and amend the law relating to Central Duties of Excise and Salt". The Statement of Objects and Reasons [vide Gazette of India, 1943, Part-V, P. 243) stated inter alia:

The administration of internal commodity taxation in British India has grown up piecemeal over many years and has been considerably expanded during the last decade. Hitherto the introduction of a new central duty of excise has required the enactment of self-contained law and the preparation of a separate set of statutory rules. There are no less than 10 separate excise Acts...and 11 sets of

statutory rules; and there are also 5 Acts relating to salt....This agglomeration of statutes and regulations dealing with similar matters is neither convenient for the public nor conducive to well-organized administrations...

(2) It is accordingly proposed to consolidate in a single enactment all the laws relating to central duties of excise and to the tax on salt and to embody therein a Schedule, similar to that in the Indian Tariff Act, 1934, setting forth the rates of duty leviable on each class of goods. At the same time, the statutory rule will be similarly amalgamated and disembarrassed of their unnecessary details. *The Act and the consolidated statutory rules, together with as many manuals of departmental instructions as may be necessary, will then form a complete Central Excise Code*, which will simplify the administration of this branch of the revenue system and aid such further development as may be necessary...

(emphasis added)

4. Section 2 defines the several expressions occurring in the Act. Section 3 is the charging section while Section 4 deals with valuation of excisable goods for the purposes of charging of duties of excise. Section 5 provides for remission of duties on goods found deficient in quantity. Section 5A empowers the Central Government to grant exemption from duty of excise in public interest. Section 9 provides for punishment for violation of the provisions of the Act and the Rules. Section 11 provides for recovery of sums due to Government as arrears of land revenue. Section 11A, which was introduced with effect from November 17, 1980, provides for recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Section 11B, which too was introduced with effect from the same date and by the same Amendment Act (Act 25 of 1978), provides for refund of duties. Chapter-III deals with powers and duties of officers and land holders while Chapter-IV deals with transport by sea. Chapter-V contains special provisions relating to salt. Chapter- VI deals with adjudication of confiscations and penalties while Chapter VI-A introduced by the Finance (No. 2) Act, 1980 (with effect from October 11, 1982) provides for appeals against the orders of the original and appellate authorities. In certain matters, a reference is provided to the concerned High Court and in other cases, a direct appeal to this Court is provided from the orders of the Tribunal. Chapter-VII contains supplementary provisions. Section 37 confers upon the Central Government the power to make rules to carry into effect the purposes of the Act and in respect of several matters mentioned therein.

5. Rules have been made by the Central Government in exercise of power conferred upon them by Section 37. The rules are very elaborate and provide for various matters and situations, to all of which it is not necessary to refer for the purposes of this case. Suffice it to mention that, broadly speaking, there are two methods of removal of excisable goods. One is, what may be called, general method where the goods are cleared on payment of duty and the other is what is called the self-removal procedure. The Rules provide for approval of classification list and price list. In case of dispute regarding classification of excisable goods or valuation (approval of the price list), there are provisions under which provisional orders can be made which would be operative pending the dispute and shall be subject to final decision in the matter. The Rules also provide for self-determination of duty in certain cases. In short, the Rules provide for all possible situations that may arise under the Act.

6. The particular provisions in the Act and the Rules relevant to the controversy herein may now be noticed a little more closely. Sections 11A and 11-B are complimentary to each other. While Section 11-A provides for recovery of duties not collected or short-collected by Revenue, Section 11-B provides for refund of taxes collected in excess of what is legitimately due under the Act. Section 11-A has remained untouched by the Amendment Act 40 of 1991 though it has been amended in certain minor respects by subsequent enactments. Omitting portions not necessary to the present controversy, Section 11-A, as it stands today, reads as follows:

11-A. Recovery of duties not levied or not paid or short- levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short- levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words 'six months', the words 'five years' were substituted.

Explanation.- ...

(ii) 'relevant date' means, -

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid...

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder ;

7. Coming to Section 11-B, before it was amended by Act 40 of 1991, it read as follows (again omitting portions not necessary for the present purposes):

11B. Claim for refund of duty.- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Whereas a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

Explanation. - For the purpose of this section...

(B) 'relevant date' means-

(f) in any other case, the date of payment of duty.

8. Section 11-B along with Section 11-A was introduced by Customs, Central Excises and Salt and Central Board of Revenue (Amendment) Act, 1978 with effect from November 17, 1980, a fact mentioned hereinbefore. Until the enactment and enforcement of Sections 11-A and 11-B, the recovery and refund of excise duties was governed by the Rules. Rules 11 which dealt with claims for refund of duty, as in force prior to August 6, 1977 read as follows:

Rule 11. No refund of duties or charges erroneously paid, unless claimed within three months. -- No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rules 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be.

9. Rule 11 was amended with effect from August 6, 1977 and it remained in force till the coming into force of Section 11-B. Rule 11, as it obtained during the said period, read as follows:

Rule 11. Claim for refund of duty. - (1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty.

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation. - Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.

Explanation. -- For the purposes of this rule, 'refund' includes rebate referred to in Rules 12 and 12A.

10. We may now set out Section 11-B, as amended by Act 40 of 1991. (Even subsequent to 1991, there have been certain minor amendments to the said section.) As it stands today. Section 11-B reads as follows (portions not necessary for the purposes of the present controversy omitted):

11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to --

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, Specify:

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

Explanation. -- For the purposes of this section,...

(B) 'relevant date' means--

(f) in any other case, the date of payment of duty.

11. The said Amendment Act also amended Section 11-C, besides introducing Section 11-D and an entire new chapter, Chapter II-A. Since Section 11-C does not fall for our consideration, we need not refer to it. Section 11-D reads as follows:

11-D. Duties of excise collected from the buyer to be deposited with the Central Government. -- (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application

under that section in such cases shall be the date of the public notice to be issued by the Assistant Commissioner of Central Excise.

12. Chapter II-A comprises of four section, Sections 12-A to 12-D . They read thus:

12A. Price of goods to indicate the amount of duty paid thereon. -Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

12B. Presumption that incidence of duty has been passed on to the buyer. - Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer Welfare Fund. - (1) There shall be established by the Central Government a Fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in Sub-section (2) of 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by Central Government the purposes of this Fund.

12D. Utilisation of the Fund. -- (1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the Authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

13. The refund of excise duties - which is the main topic of the controversy herein - was thus governed by different provisions over the years. To wit:

(i) upto August 6, 1977, the refund of duties was governed by Rule 11, as it stood upto that date;

(ii) between August 6, 1977 and November 16, 1980, refund of duties was governed by Rule 11, as it obtained during the said period;

(iii) From November 16, 1980 upto September 19, 1991 (date of coming into force of 1991 (Amendment) Act), the refund of duties was governed by Section 11B, as it stood during the said period;

(iv) with effect from September 19, 1991, the refund of duties is governed by Section 11B, as amended by Act 40 of 1991 and the allied provisions.

14. Though different provisions governed the subject of refund during different times, there is one feature uniformly common to them all, viz., they purport to be exhaustive on the subject of refund and they provide a period of limitation for making such claims. Rule 11, as it stood prior to August 6, 1977, not only carried the title "No refund of duties or charges erroneously paid unless claimed within three months", it provided specifically that no duties/charges "shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officer within three months from the date of such payment or adjustment, as the case may be". Similarly, Rule 11, as it obtained between August 6, 1977 and November 16, 1980, provided that claims for refund shall be made "before the expiry of six months from the date of payment of duty". (Of course, this period of limitation did not apply where the duty was paid under protest.) Sub-rule (4) of Rule 11 provided in express terms that "save as otherwise provided by or under these rules, no claim for refund of any duty shall be entertained". The situation obtaining under Section 11B, as it stood during the period November 16, 1980 to September 19, 1991, was no different. Sub-section (1) provided that a claim for refund shall to be filed "before the expiry of six months from the relevant date" and Sub-section (4) provided in specific terms that "save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Section 11B, as amended by 1991 (Amendment) Act, is similarly worded. Sub-section (1) now provides that a claim for refund has to be filed "before the expiry of six months from the relevant date" and Sub-section (3) declares in emphatic terms that "notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or any other provisions of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2)". Sub-section (2), it may be mentioned, provides the circumstances in which and the grounds on which a refund shall be made, or shall be denied, as the case may be. It is necessary to emphasise that the exclusivity of these provisions relating to refund - and conversely the bar to other proceedings created by them - is specific to the subject of refund and is apart from and in addition to the general bar implicit in the Act or expressed in some of its other provisions, as the case may be. Because the Act creates new rights and liabilities and also provides the machinery for assessment and adjudication of those rights and liabilities, a bar to the jurisdiction to civil court arises by necessary implication - an aspect dealt with at some length later. (Also see Principle No. 3 enunciated in Kamala Mills Ltd. v. State of Bombay MANU/SC/0291/1965 : [1965]57ITR643(SC) dealt with in Paras 30 to 33.) The point to be stressed is that the exclusive nature of the refund provision expressly declared in Rule 11 and Section 11-B, at all points of time, is an express and specific one contained in a special statute. It is not the usual finality clause found in several statutes; it is much more.

15. The validity of the aforesaid provisions (providing a period of limitation for making claims of refund and declaring that no refund claim shall be entertained except under and in accordance with the said provisions) has never been challenged seriously. Though in certain with petitions now before us, validity of Section 11-B (as amended in 1991) is challenged - which challenge is dealt

with hereinafter and rejected - the main submission of Sri F.S. Nariman, leading the arguments on behalf of the appellants- petitioners has been that these provisions do not preclude the filing of a suit or the filing of a writ petition claiming refund where the tax has been collected contrary to law by virtue of Article 265 of the Constitution and that the question of passing on the burden of duty is totally irrelevant in the matter of refund. Once the provisions of the Act including the aforesaid provisions, viz., Rule 11 and Section 11-B, as they stood from time to time, are taken as valid and effective, they constitute "law" with the meaning of Article 265, It may be remembered that the aforesaid provisions relating to refund have always been accompanied by and are complimentary to the provisions relating to recovery of duties legitimately due under law, but not collected. The recovery provisions also contained and do contain a corresponding period of limitation, i.e., three months or six months, as the case may be. This period of six months can be extended upto a maximum period of five years in cases where non-payment of duty was on account of fraud, collusion, wilful mis-statement or suppression of fact or contravention of the provisions of the Act and the Rules indulged in with intent to evade payment of duty.

16. Article 265 of the Constitution is declaratory in nature. It says that "no tax shall be levied or collected except by authority of law". This no doubt means that taxes collected contrary to law have to be refunded. But where a taxing enactment contains provisions providing for and governing the refund of taxes collected without the authority of law, the validity of such provisions, if and when questioned, has to be examined with reference to other provisions of the Constitution. Article 265 does not itself lay down any criteria for testing the validity of a statute. When it speaks of "law", it no doubt refers to a valid law but the validity of a law has to be determined with reference to other provisions in the Constitution.

17. We must, however, pause here and explain the various situations in which claims for refund may arise. They may arise in more than one situation. One is where a provision of the Act under which tax is levied is struck down as unconstitutional for transgressing the constitutional limitations. This class of cases, we may call, for the sake of convenience, as cases of "unconstitutional levy". In this class of cases, the claim for refund arises outside the provisions of the Act, for this is not a situation contemplated by the Act.

18. Second situation is where the tax is collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts, i.e., an erroneous finding of fact. This class of cases may be called, for the sake of convenience, as illegal levy. In this class of cases, the claim for refund arises under the provisions of the Act. In other words, these are situations contemplated by, and provided for by, the Act and the Rules.

19. The above distinction is not only accepted in all jurisdictions but is also not disputed before us.

20. So far as the first category (unconstitutional levy) is concerned, there is no dispute before us that it is open to the person claiming refund to either file a suit for recovery of the tax collected from him or to file a writ petition under Article 226 of the Constitution for an appropriate direction of refund. The only controversy on this score is whether the manufacturer/payer is entitled to such refund where he has already passed on the burden of the duty to others.

21. With respect to the second category of cases, there is a good amount of controversy. While the Union of India says that such claims of refund should be put forward and determined only under and in accordance with the provisions of the Act and the Rules, the contention of the appellants-petitioners is that even in such cases a suit or writ is maintainable on the ground that the tax has been collected without the authority of law, i.e., contrary to Article 265 of the Constitution. In other words, while according to the Union of India, such claims of refund should be filed within the time prescribed by the Act and the Rules and should and can be dealt with only under the provisions of the Act and the Rules, the appellants-petitioners say that such claim can be made in suits and writ petitions as well and that too without reference to the period of limitation prescribed in Rule 11 or Section 11-B, as the case may be.

22. There is as yet a third and an equally important category. It is this : a manufacturer (let us call him "X") pays duty either without protest or after registering his protest. It may also be a case where he disputes the levy and fights it out upto first Appellate or second Appellate/Revisional level and gives up the fight, being unsuccessful therein. It may also be a case where he approaches the High Court too, remains unsuccessful and gives up the fight. He pays the duty demanded or it is recovered from him, as the case may be. In other words, so far as "X" is concerned, the levy of duty becomes final and his claim that the duty is not leviable is finally rejected. But it so happens that sometime later - may be one year, five years, ten years, twenty years or even fifty years - the Supreme Court holds, in the case of some other manufacturer that the levy of that kind is not exigible in law. (We must reiterate - we are speaking of a case where a provision of the Act whereunder the duty is struck down as unconstitutional. We are speaking of a case involving interpretation of the provisions of the Act, Rules and Notifications.) The question is whether 'X' can claim refund of the duty paid by him on the ground that he has discovered the mistake of law when the Supreme Court has declared the law in the case of another manufacturer and whether he can say that he will be entitled to file a suit or a writ petition for refund of the duty paid by him within three years of such discovery of mistake? Instances of this nature can be multiplied. It may not be a decision of the Supreme Court that leads 'X' to discover his mistake; it may be a decision of the High Court. It may also be a case where 'X' fights upto first appellate or second appellate stage, gives up the fight, pays the tax and then pleads that he has discovered the mistake of law when the High Court has declared the law. The fact is that such claims have been entertained both in writ petitions and suits until now, purporting to follow the law declared in Kanhaiyalal, and are being allowed and decreed, sometimes even with interest. The Union of India says that this can never be. It says, a manufacturer must fight his own battle and only if he succeeds therein, can he claim refund. He cannot take advantage of success of another manufacturer and that no suit or writ is maintainable by him for refund on the ground of alleged discovery of mistake of law on the declaration of law by this Court or a High Court (or a Tribunal or any other authority under the Act) in the case of another person. The Union of India denies that such a person can plead payment of duty under a mistake of law within the meaning of Section 72 of the Contract Act. It also denies that such a writ petition or a suit can be filed within three years of such " discovery of mistake of law".

23. The Union of India submits that Kanhaiyalal has been wrongly decided. They submit that no suit or a writ petition lies for refund of duty except in the case of "unconstitutional levy" as specified hereinabove and even here, they say, such claim is subject to the proof that burden of the duty has not been passed on to the purchaser. In all other cases, they say, claims of refund can be

made, and must be made, only under and in accordance with the provisions of the Act/Rules aforesaid, governing the subject of refund - and in no other manner and in no other forum. It is also suggested that, in any event, since Kanhaiyalal does not deal with the effect of passing on the duty to a third party - it was neither raised nor considered therein - it is no authority for the proposition that the manufacturer/payer can recover the duty paid in any of the above three categories of cases even if he has passed on the burden to others. The petitioners-appellants, on the other hand, support the reasoning of, and the law declared in, Kanhaiyalal and say that it has been the law over the last thirty seven years and has been followed consistently, without a demur, by larger and smaller Benches of this Court and that there are no good or compelling reasons to depart from or over-rule the said decision.

THE FACTS OF AND THE PRINCIPLES ENUNCIATED IN KANHAIYALAL:

24. The respondent, Kanhaiyalal Mukundlal Saraf, was a partnership firm. It had entered into certain forward contracts in silver bullion at Benaras. For the Assessment Years 1948-49, 1949-50 and 1950-51, the forward transactions were brought to tax under assessment orders dated May 31, 1949, October 30, 1950 and August 22, 1951 respectively. On February 27, 1952, the Allahabad High Court held in Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur (1952) A.L.J. 332, that the provisions of the Uttar Pradesh Sales Tax Act taxing forward contracts were ultra vires the Uttar Pradesh Legislature. The respondent applied for refund of tax paid by it basing its claim on Budh Prakash Jai Prakash. It was declined by the Commissioner of Sales Tax. Thereupon, the respondent filed a writ petition in the Allahabad High Court seeking the quashing of the aforesaid three assessment orders and for a direction to refund the tax collected. Meanwhile, the judgment of the Allahabad High Court in Budh Prakash Jai Prakash was affirmed by this Court on May 3, 1954. The writ petition filed by the respondent came up for hearing before a learned Single Judge on November 30, 1956 and was allowed, as prayed for. In the special appeal filed by the department, it was contended that the said amount having been paid under a mistake of law was not recoverable. The department, however raised no objection to the maintainability of the writ petition. Indeed, it expressly gave it up. The Division Bench applied Section 72 of the Contract act and affirmed the judgment of the learned Single Judge. The matter was then brought to this Court. In this Court, it was sought to be contended that the only course open to the respondent was to follow the procedure prescribed by the Uttar Pradesh Sales Tax Act and that since that was not done, the assessee could not approach the civil courts. It was also contended that a writ petition would not lie for refund of money. These two contentions were not allowed to be raised by this Court (N.H. Bhagwati, J. speaking for the Constitution Bench) in view of the categorical statement made on behalf of the department before the special Bench of the High Court. The Court then referred to Section 72 of the Contract Act and observed that it does not make any distinction between a mistake of law and a mistake of fact and that it takes in both kinds of mistakes. The Court referred to the legal position obtaining in England, United States of America and Australia that money paid under a mistake of law is not recoverable but observed that so far as India is concerned, Section 72 governs the situation and since the language of the section is plain and unambiguous, it is not permissible to rely upon the position of law obtaining in England or, other countries. The Court then referred to the decisions of High Courts in India on the meaning and interpretation of Section 72, viz., the decisions of the Bombay and Madras High Courts in Wolf & Sons v. Dadyaba Khimji & Co. I.L.R. (1919) Bom. 631 and Appavoo Chettiar v. South Indian Railway, A.I.R. (1929) Mad. 648 holding that money paid under a mistake of law is not

recoverable and to the contrary decision of the Calcutta High Court in Jagdish Prasad Pannalal v. Produce Exchange Corporation Ltd., MANU/WB/0114/1945 : A.I.R. (1946) Cal. 245. The Court observed that the said conflict has since been resolved by Privy Council in Shiba Prasad Singh v. Srish Chandra Nundi MANU/PR/0052/1949, expressly approving and affirming the view taken by the Calcutta High Court and holding further that the expression 'mistake' in Section 72 should be given its due and natural meaning which means that it takes in both mistakes of fact and law. The Privy Council observed : "It may be well to add that their Lordships judgment does not imply that every sum paid under mistake is recoverable, no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise". This Court expressed its approval of the view taken by the Privy Council and proceeded to deal with the contention urged on behalf of the appellant (Revenue) that having regard to the fact that the payment of tax by the respondent was voluntary and also because the monies so received by the State have been spent away by it, the respondent was not entitled to recover the said amounts. (The appellant-Revenue sought to bring its case within the observations of the Privy Council, quoted hereinabove, which speak of the plaintiff being disentitle to relief on grounds of "estoppel or otherwise".) Both the objections were rejected by this Court. With respect to the objection that the payments were voluntary and, therefore, not recoverable, this Court observed that "if the State of U.P. was not entitled to receive the sales tax on these transactions, the provision in that behalf being ultra vires, that could not avail the State and amounts were paid by the respondent even though they were not due by contract or otherwise. The respondent committed the mistake in thinking that the monies paid were due when in fact they were not due and that mistake, on being established, entitled it to recover the same back from the State under Section 72 of the Indian Contract Act". The Court then dealt with the argument that under Section 72, monies paid by way of tax could not be recovered and rejected it. It held : No distinction can therefore be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act, even though such a distinction has been made to America...To hold that tax paid by mistake of law cannot be recovered under Section 72 will be not to interpret the law but to make a law by adding some such words as 'otherwise than by way of taxes' after the word 'paid'. "The Court accordingly observed that both the parties were labouring under a mistake of law since they were not aware of the true position which they came to know only when Allahabad High Court delivered its judgment in Budh Prakash Jai Prakash and when it was affirmed by this Court in appeal. The Court proceeded to observe that "the State of mind of the respondent would be the only thing relevant to consider in this context and once the respondent established that the payments were made by it under a mistake of law...it was entitled to recover back the said amounts and the State of U.P. was bound to repay or return the same to the respondent irrespective of any other consideration." The Court also observed that there was nothing in circumstances of that case to support a plea of estoppel against the respondent and reiterated its understanding of the legal position thus : "On a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like". With respect to the plea of estoppel put forward by the appellant-Revenue, the Court held that there was no question of estoppel in that case because both the parties were labouring under a mistake of law. The Court went further and observed : "equitable considerations...could scarcely be imported when there is a

clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him". The Court also observed that the fact that the State of Uttar Pradesh had not retained the monies paid by the respondent but had spent them away in the ordinary course of the State business would not make any difference to the position and that the respondent was entitled to recover back the monies paid by it under a mistake of law under the plain terms of Section 72.

25. It is well to remember that (a) this was a case where the relevant provisions of the Uttar Pradesh Sales Tax Act were held to be ultra vires the Uttar Pradesh Legislature, i.e., beyond the legislative competence of the State Legislature and (b) it was a case were the assessee filed a writ petition in the High Court seeking the quashing or relevant assessment orders and for a consequential order of refund, basing its claim upon the judgment of the High Court in another assessee's case. In other words, orders in the assessee's own case had become final. He sought to reopen them, by way of a writ petition, in view of the invalidation of the relevant provisions of the Act by High Court and this Court in the case of another assessee. Yet another circumstance to be noticed is that though the Uttar Pradesh Sales Tax Act contained a provision providing for refund, it was neither referred to nor discussed.

26. Now, what are the propositions emerging from this decision? They are : (1) Section 72 of the Contract Act does not make any distinction between a mistake of law and the mistake of fact; it takes in both kinds of mistake. (2) The Rule then obtaining in England and certain other countries that paid under a mistake of law are not recoverable has no relevance to this country. Here, the matter is governed by Section 72 of the Contract Act. (3) Where the taxes are paid under a mistake of law, the person paying is entitled to recover the same from the State on establishing the mistake. This consequence flows from Section 72 of the Contract Act. On such mistake being established, the State is bound to repay or return the amounts irrespective of any other consideration. (4) The right to recover or the obligation to refund mentioned in (3) above is subject, however, to "questions of estoppel, waiver, limitation or the like". (5) There is no question of estoppel where both parties were labouring under a mistake of law. (6) Equitable considerations cannot be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him. (7) The fact that the State has spent away the taxes for the purposes of State is no defence to a claim for refund of taxes paid under a mistake of law, in view of the plain terms of Section 72.

SUBSEQUENT DECISIONS OF THIS COURT ON THE QUESTION OF REFUND:

27. Before we deal with the correctness of the proposition in Kanhaiyalal, it would be appropriate to refer to the subsequent decisions of this Court on the subject of refund of taxes collected without the authority of law and see how Kanhaiyalal has been followed, understood or distinguished, as the case may be.

28. The first decision to be referred in this behalf is the decision of a seven-Judge Bench in State of Kerala v. Aluminium Industries Ltd. (1965) 16 S.T.C. 689. The respondent was a dealer registered under the Kerala Sales Tax Act. During the year 1950-51, it paid certain amounts by way of sales tax. Subsequently, it filed a writ petition claiming refund of Rs. 80,048-13-6 on the ground that sales on which tax has been levied were exempt from tax under Article 286(1)(a) of the Constitution, as it then stood. The High Court allowed the writ petition partly directing refund

of Rs. 54,375-5-0. Only the State of Kerala appealed. The respondent-assessee's case was that when it paid the tax, it did not know that the said transactions were not exigible to tax. It claimed that it discovered its mistake only after the payment. The claim for refund was resisted by the State of Kerala contending inter alia that inasmuch as the tax was paid voluntarily, it was not recoverable in law. The High Court had rejected the State's plea relying upon the decision of this Court in Kanhaiyalal. The appeal was heard by a seven-Judge Bench of this Court which observed that in the light of the decision in Kanhaiyalal, money paid under a mistake of law is recoverable under Section 72 of the Contract Act and that there can be no question of estoppel when the mistake of law is common to both the parties. The Bench further observed, "in such a case where tax is levied by mistake of law it is ordinarily the duty of State, subject to any provision in the law relating to sales tax (and no such provision has been brought to our notice), to refund the tax. If refund is not made, remedy through court is open subject to the same restrictions and also to the period of limitation (see Article 96 of the Limitation Act, 1908), namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake (see State of Madhya Pradesh v. Bhailal Bhai)". The Court held that "it was the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund if mistake was proved and the claim was made within the period of limitation". It is clear from a reading of the Judgment that neither party questioned the correctness of the decision in Kanhaiyalal and accordingly it was followed implicitly. This decision, though rendered by a larger Bench, does not itself lay down any principle.

29. In State of Madhya Pradesh and Ors. v. Bhailal Bhai MANU/SC/0029/1964 : [1964]6SCR261 , the tax imposed upon the tobacco imported by the respondents was held to be unconstitutional on the ground that it was violative of Article 301 of the Constitution and not saved by Article 304(a). The claim for refund of such taxes was also upheld on the ground that it was a case of a tax paid under a mistake within the meaning of Section 72 of the Contract Act. Kanhaiyalal was followed. It was also observed that though there is no limitation prescribed for filing a writ petition under Article 226 of the Constitution, the maximum period fixed by the Legislature as the time within which a suit for similar relief has to be filed can be taken as the reasonable period for approaching the High Court.

30. Kamala Mills Ltd. v. State of Bombay MANU/SC/0291/1965 : [1965]57ITR643(SC) , decided by a Special Bench of seven learned Judges, lays down several propositions which are of crucial relevance to the issues arising herein. The appellant was a dealer registered under the Bombay Sales Tax Act. During the year 1950-51, it was assessed to sales tax on certain sales treating them as 'inside' sales. However, according to the ratio of the decision of this Court in Bengal Immunity Co. Ltd. v. State of Bihar and Ors. MANU/SC/0083/1955 : [1955]2SCR603 , delivered on September 6, 1965, the said sales were in truth 'outside sales, not taxable under the Bombay Act. Since the time for adopting the remedies provided by the Bombay Act had become barred meanwhile, the appellant filed a suit for recovery of the sales tax illegally collected from it in respect of 'outside' sales. The respondent-State contended inter alia that the suit was barred by virtue of Section 20 of the Bombay Act. The plea was upheld by the trial court and the suit dismissed. On appeal, the High Court affirmed. The matter was then brought to this Court. Three questions were raised for consideration before this Court, viz. (1) whether an assessment in violation of a statutory provision could claim the status of an assessment made under the Act within the meaning of Section 20; (2) whether the decision by the appropriate authority as to the nature

of the transaction was a decision on a collateral fact, the finding on which alone conferred jurisdiction on the authority to levy the tax, or was it a decision on a question of fact which had to be determined by the authority before itself as one of the issues before it; and (3) whether Section 20 was valid if construed as being a complete bar to a suit such as filed by the appellant.

31. Section 20 of the Bombay Act read as follows.

20. Save as is provided in Section 23, no assessment made and no order passed under this Act or the rules made thereunder by the Commissioner or any person appointed under Section 3 to assist him shall be called into question in any Civil Court, and save as it provided in sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order.

32. The answers given by the seven-Judge Bench are to the following effect:

(a) As held by this Court in Firm & Illuri Subbayya Chetty & Sons v. State of Andhra Pradesh MANU/SC/0211/1963 : [1963]50ITR93(SC) , the words "any assessment made under this Act" were wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments were correct or not. The words "an assessment made" cannot mean an assessment properly and correctly made. Since the appellant was calling in question the orders of assessment made against it, its challenge in the suit was plainly prohibited by Section 20.

(b) The provisions of the Bombay Act make it clear that all questions pertaining to the liability of the dealers to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax, or not, are all matters to be determined by the authorities under the Act. It is impossible to accept the argument of the appellant that the finding of the appropriate authority that a particular transaction is taxable under the provisions of the Act is a finding on a collateral fact and, therefore, the resort to civil court is open. On the contrary, the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the appropriate authority and no part of it can be said to constitute a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such. Even if the appropriate authority, holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction which is an 'outside' sale is not an 'outside' sale and proceeds to levy sales tax on it, it cannot be said that the decision of the appropriate authority is without jurisdiction.

(c) Where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right a liability shall be determined by the Tribunal so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are provided by the statute or not. In other words, if the court comes to the conclusion that the Act does not provide any remedy to make a claim for recovery of illegally collected tax and yet Section 20 prohibits such a claim being made before an ordinary civil court, the court might hesitate to construe Section 20 as creating an absolute bar. If for any reason, Section 20 is construed strictly as constituting an absolute bar, the question may arise with respect to its constitutionality. Looked at from the above angle, it cannot be said that the Bombay Act does not

provide an alternative remedy for the claim which the appellant put forward in the suit. Section 22-B empowered the appellate/revisional authority under the Act to extend the period of limitation if they are satisfied that party applying for such extension had sufficient cause for not preferring the appeal and revision during the prescribed period. Section 23-A further provided for rectification of mistakes. In this view of the matter, it cannot be said that the claim of the appellant could not have been agitated under and in accordance with the provisions of the Bombay Act.

(d) Section 20 was constitutionally valid on the same reasoning on which Section 18-A of the Madras General Sales Tax Act was held to be valid in Firm & Illuri Subbayya Chetty & Sons.

(e) Insofar as the challenge to the constitutionality of Section 20 of the Bombay Act is concerned, the suit cannot be said to be barred. Section 20 does not take in the challenge to the validity of the section itself. But inasmuch as Section 20 is found to be constitutional, the plaintiff cannot get any relief.

33. Sri F.S. Nariman strongly emphasised the provision in Section 22-B of the Bombay Act and the absence of a similar provision in the Central Excise Act/Customs Act. With respect, we are not able to appreciate this argument. Section 22-B merely empowered the appellate/revisional authorities to extend the time prescribed for filing an appeal or revision, as the case may be. Section 22-B did not provide for extension of the time prescribed for making an application for refund under Section 13 of the Act. Even in the Central Excise and Customs Act, there are provisions empowering the appellate authorities to extend the time prescribed for filing the appeal. (There is no provision for revision now.) Of course, there is no provision for extending the time limit prescribed in Section 11-B. But there was no such provision in the Bombay Act either. If so, we are unable to see any distinction between the Bombay Act the enactments concerned herein in this behalf. We must say that we are in respectful agreement with the propositions enunciated in this decision and propose to apply them to the provisions concerned in these matters.

34. K.S. Venkataraman & Co. v. State of Madras MANU/SC/0293/1965 : [1966]60ITR112(SC) is significant for the reason it differs from the decision of the Privy Council in Raleigh Investment Co. Ltd. v. The Governor General in Council (1947) L.R. 74 IA 50. The appellant was assessed to sales tax in respect of certain works contracts executed by them during the years 1948-49 to 1952-53. On 5th April, 1954, the Madras High Court declared that the relevant provisions of the Madras General Sales Tax Act, 1939 empowering the State to assess indivisible building contracts were beyond the competence of the State Legislature. On March 23, 1955, the appellant instituted a suit for recovery of the amount paid by it on building/works contracts. Both the trial court and the High Court dismissed the suit relying upon the decision of the Privy Council in Raleigh Investment Co. Ltd. and observing that the only remedy of the appellant was to pursue the machinery provided by the statute. This Court by a majority (Subba Rao, Wanchoo and Sikri, JJ. -Shah and Ramaswami, JJ. dissenting) did not agree with the proposition in Raleigh Investment Co. Ltd. that a contention relating to the validity of the Act can be raised before the authorities under the Act. The Court held that an authority created by a statute cannot question the vires of the statute or any of its provisions and that the authorities must act under the Act and not outside it. The Court further held that if the authorities act under a provision which is invalid being beyond the competence of the legislature enacting it, it cannot be said that the authorities are acting under the Act. The question relating to the validity of the Act, the Court held, cannot also be gone into by the High Court acting in its

special advisory jurisdiction provided by Section 64 of the Madras Act. Accordingly, it was held that the suit for refund was maintainable and that the period of limitation is three years from the date on which the mistake became known to the plaintiff. This again was a case where the provisions, under which the disputed tax was levied, were declared unconstitutional on the ground of lack of legislative competence.

35. In Dhulabhai and Ors. v. State of Madhya Pradesh and Anr. MANU/SC/0157/1968 : [1968]3SCR662 , a Constitution Bench of this Court discussed at length the question when does a suit lie for recovery of taxes imposed and collected under a taxing enactment, to wit, the Madhya Bharat Sales Tax Act, 1950 and enunciated seven propositions. Suits were filed by the appellants for recovery of certain taxes on the ground that the same were collected from them against the constitutional prohibition contained in Article 301. Hidayatullah, CJ., speaking for the Constitution Bench, summarised the position emerging from the decisions of this Court on the subject in the following words:

(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar on the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunal constituted under that Act. Even the High Court cannot go into that question on the revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared

to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

36. In the above summary, Proposition No. 5, however, requires a little elucidation. A reading of the judgment shows that the said proposition is based upon the earlier decisions of this Court in K.S. Venkataraman Bharat Kala Bhandar Ltd. v. M.C. Dhamangaon MANU/SC/0267/1965 : [1966]59ITR73(SC) . K.S. Venkataraman, as pointed out hereinabove, was a case where the suit was filed for refund of amounts collected under provisions declared ultra vires the State Legislature, i.e., a case of what we have called 'unconstitutional levy. Bharat Kala Bhandar Ltd. was a case were there was no machinery provided in the Central Provinces and Berar Municipal Act for refund of tax assessed and recovered in violation of the constitutional limitations. It was held that "one of the corollaries flowing from the principle that the Constitution is the fundamental law of the land is that the normal remedy of a suit will be available for obtaining redress against the violation of a constitutional provision. The Court must, therefore, lean in favour of construing a law in such a way as not to take away this right and render illusory the protection afforded by the Constitution". As a matter of fact, the tax levied in this case was found to be void being violative of the provisions in Article 276 of the Constitution and Section 142-A of the Government of India Act, 1935. The words "in excess of the constitutional limits" must, therefore, be understood in the context of the ratio of the above two decisions. So for as the words" illegally collected" in Proposition No. 5 are concerned, it is obvious that they go along with the preceding words, i.e., where a tax is collected in disregard of the constitutional limitations, it will be a tax illegally collected and a suit lies. It would not be reasonable to understood the words "illegally collected" dissociated from their context or in a manner contrary to the ratio of Kamala -Mills, which was expressly referred to and followed in this decision.

37. The facts of the decision in Tilokchand Motichand and Ors. v. H.B. Munshi and Anr. MANU/SC/0127/1968 : [1969]2SCR824 are rather interesting. They tell us how the Court viewed the attempt of a person who tried to take advantage of the decision in another person's case rendered several years later. The authorities under the Bombay Sales Tax Act refunded certain amounts to the petitioners-dealers on the condition that they should pass on the said amounts to their customers (these amounts were earlier collected by the dealers from their customers and paid to the State). On the ground that the dealers have failed to pass on the said amounts to their customers, the authorities forfeited the said amounts under Section 21(4) of the Bombay Sales Tax Act, 1953. The dealers filed a writ petition in the Bombay High Court challenging the constitutional validity of Section 21(4). A learned Single Judge dismissed the writ petition holding that inasmuch as the petitioners-dealers have defrauded their customers, they were not entitled to any relief under Article 226. The appeal preferred by the dealers was dismissed by the Division Bench of the High Court holding that even if there was a violation of petitioners' fundamental right, the High Court was not bound to come to their help in view of their conduct. The dealers accordingly paid up the said amount in installments between August, 1959 and August, 1960. More than seven years later, i.e., on September 29, 1967, this Court struck down Section 12(A)(iv) of the Bombay Sales Tax Act, 1946 corresponding to Section 21(4) of the 1953 Act in Kantilal Babulal v. H.C. Patel, MANU/SC/0308/1967 : 21 S.T.C. 174. On February 9, 1968, the petitioners

filed a writ petition in this Court under Article 32 of the Constitution for refund of the aforesaid amounts on the assumption that Section 21(4) is unconstitutional in view of the decision of this Court in Kantilal Babulal. They submitted that though they had raised other grounds in support of their attack upon the validity of Section 21(4) in the High Court, they were not aware of the particular ground upon which the corresponding provision in the 1946 Act was struck down by this Court in Kantilal Babulal, This Court, by majority (Hidayatullah, CJ., Bachawat and Mitter, JJ.) dismissed the writ petition holding that the judgment of the High Court dismissing the writ petition filed by the writ petitioner operates as res judicata and bars the petition under Article 32. Hidayatullah, C.J. made the following relevant observations:

The petitioner moved the High Court for the relief on the ground that the recovery from him was unconstitutional. He set out a number of grounds but did not set out the ground on which ultimately in another case recovery was struck down by this Court. That ground was that the provisions of the Act were unconstitutional. *The question is: can the petitioner in this case take advantage, after a lapse of a number of years, of the decision of this Court? He moved the High Court but did not come up in appeal to this Court,* His contention is that the ground on which his petition was dismissed was different and the ground on which the statute was struck down was not within his knowledge and therefore he did not know of it and pursue it in this Court. To that I answer that law will presume that he knew the exact ground of unconstitutionality. Everybody is presumed to know the law. It was his duty to have brought the matter before this Court for consideration. *In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another person more adventurous than he in his turn got the statute declared unconstitutional, and got a favourable decision.* If I were to hold otherwise, then the decision of the High Court in any case once adjudicated upon and acquiesced in may be questioned in a fresh litigation revived only with the argument, that the correct position was not known to the petitioner at the time when he abandoned his own litigation. I agree with the opinion of my brethren Bachawat and Mitter, JJ. that there is no question here of a mistake of law entitling the petitioner to invoke analogy of the Article in the Limitation Act. The grounds on which he moved the Court might well have impressed this Court which might also have decided the question of the unconstitutionality of the Act as was done in the subsequent litigation by another party. The present petitioner should have taken the right ground in the High Court and taken it in appeal to this Court after the High Court decided against it. *Not having done so and having abandoned his own litigation years ago, I do not think that this Court should apply the analogy of the Article in the Limitation Act and give him the relief now.*

(Emphasis added)

38. Bachawat, J. held that a writ under Article 32 will no doubt issue as a matter of course where infringement of fundamental right is established but that does not mean that in giving relief under the said article, this Court would ignore all laws and procedure. The learned Judge also emphasised the discretionary nature of jurisdiction.

39. Reference may also be made to the decision of K.K. Mathew, J. (sitting with Alagiriswami, J.) in D. Cawasji & Co. Etc. v. State of Mysore and Anr. MANU/SC/0060/1974 : 1978(2)ELT154(SC) . The appellant paid education cess levied under the Mysore Elementary Education Act, 1941 (as amended in 1968). The Mysore High Court struck down the relevant

provisions levying the cess in 1968 on a writ petition filed by the appellant, which was affirmed by this Court in 1971. In the middle of the year 1968, the appellant filed a writ petition claiming refund of the cess amount paid by him. The claim was rejected by the High Court on the ground of delay. On the matter being brought to this Court, this Court held following Bhailal Bhai and Aluminium Industries that taxes paid without the authority of law can be recovered by way of a writ petition and that by virtue of Section 17(1)(c) of the Limitation Act, 1963, the period of limitation does not begin to run, in a suit for relief on the ground of mistake, until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it. Mathew, J. did realise the implication of the said holding. The learned Judge make these perceptive observations:

We are aware that *the result of this view would be* to enable a person to recover the amount paid as tax even after several years of the date of payment, if some other party would successfully challenge the validity of the law under which the payment was made and if only a suit or writ petition is filed for refund by the person within three years from the date of declaration of the invalidity of the law. *That might both be inexpedient and unjust so far as the State is concerned.*

(Emphasis added)

The learned Judge proceeded to observe further:

A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in part expended, which would often be the case, if the suit or application could be brought at any time within three years, be it a hundred years' after the date of payment. Nor is there any provision under which the court deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so[1].

40. The appeals were, however, dismissed holding that since the appellant has failed to claim the relief of refund in the first writ petition filed by him, he is disentitled from doing so by way of a separate subsequent writ petition. It was observed that it is not open to the appellant to split up his claim for refund and file writ petitions in a piece-meal fashion. The decision is significant for pointing out the irrational and unjust consequences of the holding in Bhailal Bhai and Aluminium Industries which implicitly followed Kanhaiyalal. The decision is also significant for pointing out the adverse impact of public interest inherent in holding (See Kanhaiyalal again) that the plea that the State has expended the taxes on public purposes is no defence to a claim for refund.

41. We may at this juncture refer to a very significant decision in R.S. Joshi v. Ajit Mills MANU/SC/0300/1977 : [1978]1SCR338 rendered by a seven-Judge Constitution Bench. Section 46 of the Bombay Sales Tax Act, 1959 provided that no person shall collect any sum by way of sales tax which is not exigible according to law. Section 37 provided for penalties in case of violation of the provisions of Section 46. Not only the person so collecting was liable to pay a penalty not exceeding Rupees two thousand but in addition thereto, any sum collected by the person by way of tax in contravention of Section 46 was also liable to be forfeited to the State Government. The constitutionality of the said provision was questioned on the basis of the earlier decision of this Court in R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad

MANU/SC/0035/1964 : [1964]6SCR867 . The challenge was repelled. The following observations of Krishna Iyer, J. are apposite:

The professed object of the law is clear. The motive of the legislature is irrelevant to castigate an Act as a colourable device. The interdict on public mischief and the insurance of consumer interests against likely, albeit, unwitting or 'ex abundanti cautela' excesses in the working of a statute are not merely an ancillary power but surely a necessary obligation of a social welfare state. One potent prohibitory process for this consummation is to penalize the trader by casting a no-fault or absolute liability to 'cough up' to the State the total 'unust' taking snapped up and retained by him 'by way of tax' where tax is not so due from him, apart from other punitive impositions to deter and to sober the merchants whose arts of dealing with customers may include 'many a little makes a mickle'. If these steps in reasoning have the necessary nexus with the power to tax under Entry 54 List II, it passes one's comprehension how the impugned legislation can be denounced as exceeding legislative competence or as a 'colourable device' or as 'supplementary, not complimentary' ....In our view, the true key of constitutional construction is to view the equity of the statute and sense the social mission of the law, language permitting, against the triune facets of justice high-lighted in the Preamble to the Paramount Parchment, read with a spacious signification of the listed entries concerned.

42. The learned Judge also observed that social justice clauses integrally connected with the taxing provisions cannot be viewed as a mere device. The Court held that since the forfeiture of the sums collected by way of tax contrary to law was by way of penalty, the legislation was within the purview of Entry 54 of List II and constitutionally valid. In our view, the approach adopted in this case in of great relevance in the matters before us.

DECISIONS OF THIS COURT WHICH HAVE APPLIED THE DOCTRINE OF UNJUST ENRICHMENT

43. Shiv Shanker Dal Mills Etc. v. State of Haryana and Ors. Etc. MANU/SC/0032/1979 : [1980]1SCR1170 arose with reference to market fees collected under a provision which was struck down by this Court in Kewal Krishan Puri v. State of Punjab and Ors. MANU/SC/0029/1979 : [1979]3SCR1217 . The enhancement of market fee from two to three percent was held to be bad, whereupon the traders demanded refund of the excess market fee collected from them. This Court held that though refund of the fee so collected my be legally due to the traders, the traders may be repaid amount only to the extent they have not passed on the burden to their customers. To the extent they have passed on, it held, they were not entitled. This principle was deduced from the concept of distributory justice underlying Article 38 and 39 of the Constitution of India as from the discretionary nature of the power under Article 226 of the Constitution. Following the Principle enunciated by this Court in Newabgunj Sugar Mills v. Union of India and Ors. MANU/SC/0045/1975 : [1976]1SCR803 , the Court devised a scheme of refund by the market committees providing for refund of amounts to those from whom illegal collections had been made by the traders.

44. Amar Nath Om Prakash v. State, of Punjab and Ors. Etc. MANU/SC/0224/1984 : [1985]2SCR72 was also a case arising with reference to market fee, i.e., an indirect tax. Section 23-A of the Punjab Agricultural Produce Markets Act enabled the market committees to "retain

the fee levied and collected by it from a licensee in excess of that leviable under Section 23, if the burden of such fee was passed on by the licensee to the next purchaser of the Agricultural Produce in respect whereof such fee was levied and collected". The validity of the said provision was called in question in this case. This Court negatived the challenge holding that the primary purpose of the said section was to prevent refund of licence fee to dealers who have already passed on the burden of such fee to purchasers and who want to unjustly enrich themselves by obtaining refund from the market committee. The said provision, it was held, recognised that the consumer public who have borne the ultimate burden are the persons really entitled to refund and since the market committee represents their interests, it is entitled to retain the amount. It was pointed out that the provision for retention by market committee had to be made because of the practical impossibility of tracing the individual purchasers and consumers who have ultimately borne the burden. It was held that it was "really a law returning to the public what it has taken form the public, by enabling the Committee to utilise the amount for the performance of services required of it under the Act. Instead of allowing middlemen to profiteer by ill-gotten gains, the legislature has devised a procedure to undo the wrong item that has been done by the excessive levy by allowing the Committees to retain the amount to be utilised hereafter for the benefit of the very persons for whose benefit the Marketing legislation was enacted." The Court observed that Section 23-A was akin to the provision concerned in Orient Paper Mills Limited v. State of Orissa MANU/SC/0066/1961 : [1962]1SCR549 which too disabled a dealer from claiming a refund of the fee paid by him, in case he has already passed on the burden to the next purchaser. The approach adopted by this Court in this case meets our respectful approval.

45. State of Madhya Pradesh v. Vyankatlal and Anr. MANU/SC/0258/1985 : [1985]3SCR561 marks a definite milestone in the application of the doctrine of unjust enrichment. In exercise of the powers conferred upon him by the Madhya Bharat Essential Supplies (Temporary Powers) Act, the Director of Civil Supplies, issued a notification fixing ex-factory prices of sugar for different sugar factories. The supply price was a little higher than the ex-factory price. The notification required the difference between the supply price and the ex-factory price to be credited to the Madhya Bharat Government Sugar Fund. Pursuant to the demands made by the State, the sugar mills deposited certain amounts into the said Fund under protest and then instituted suits for refund of the amounts so deposited. The High Court upheld the plea of the sugar mills that the Director of Civil Supplies had no authority in law to fix the ex-factory prices. This meant that the sugar mills were entitled to the refund of the amounts paid by them into the Fund. The State appealed to this Court against the said decision. Following the principle of Shiv Shankar Dal Mills and Amar Nath Om Prakash, this Court held that even though there is no specific provision in Madhya Bharat Act providing that the sugar mills are not entitled to refund in case they have passed on the burden to the purchasers, the said principle can safely be applied to the facts of the case before them. The Court observed:

The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. Only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. The amount deposited towards the Fund was to be utilised for the development of sugarcane. If it is not possible to identify the persons on whom had the burden been placed for payment towards the Fund, the amount of the Fund can be utilised by the Government for the purpose for which the Fund was created, namely, development of sugarcane. There is no question of refunding the amount to the

respondents who had not eventually paid the amount towards the Fund. Doing so would virtually amount to allow the respondents unjust enrichment.

46. We express our respectful agreement with the above approach.

47. The same approach was adopted in the case of entry tax in Indian Aluminium Company Ltd. v. Thane Municipal Corporation MANU/SC/0712/1991 : [1992] Supp. 1 S.C.C. 480, Indian Oil Corporation v. Municipal Corporation, Jalandhar [1992] 1 S.C.C. 333 and in Entry Tax Officer v. Chandanmal Champalal MANU/SC/0106/1995 : [1994]1SCR657 .

DECISIONS OF THIS COURT DEALING DIRECTLY WITH THE 1991 (AMENDMENTS) ACT:

48. The first decision of this Court to consider the amended Section 11-B is in Union of India and Ors. v. Jain Spinners Ltd. and Anr. MANU/SC/0391/1992 : 1992(61)ELT321(SC) . The validity of the 1991 (Amendment) Act was, however, neither raised nor considered by the court. The impugned orders of the High Court, made before the coming into force of the 1991 (Amendment) Act, directing refund of the excess duty collected to the manufacturers, this Court held, would defeat the provisions of amended Section 11-B which had come into force during the pendency of the refund proceedings. The Court held that so long as the refund proceedings are pending, the amended provisions get attracted and disentitle the manufacturer-payer from claiming any refund contrary to the said provisions. In other words, the contention of the manufacturers that the amended Section 11-B applies only to claims of refund arising after the coming into force of the said Amendment Act was rejected.

49. In Union of India v. I.T.C. MANU/SC/0327/1993 : [1993] Supp. 4 S.C.C. 326, it was held by this Court (Kuldip Singh and Dr. A.S. Anand, JJ.) that the amended Section 11-B applies to all pending cases, including those pending in appeal before the Supreme Court. It was held that the amended provisions do apply to such a case a well, notwithstanding the fact that the refund amount was drawn out by the manufacturer, under the orders of the Court, whether subject to furnishing of adequate guarantees or otherwise. The Court held further that by virtue of the 1991 (Amendment) Act, the court is bound to, take notice of the change in law governing refunds and accordingly it called upon the manufacturer-assesses to furnish documentary or other evidence to establish that the amount of duty of excise in relation to which the refund is claimed had not been passed on by him to any other person. Since the manufacturer could not establish the said fact, the Court declined to grant refund in terms of the amended Section 11-B. It must be noted that the plea of unjust enrichment was not specifically raised before the High Court and was raised only in the appeal before this Court. The objection of the manufacturer on this Court was repelled saying that since the 1991 Amendment was not there, the non-raising of the said defence cannot preclude the Revenue from raising the said plea after the coming into force of the Amendment Act. The Court also invoked the presumption contained in Section 12-B holding that the said presumption is attracted to pending proceedings as well.

DECISIONS OF FOREIGN COURTS ON THE SUBJECT:

50. A number of decisions rendered by foreign courts have been brought to our notice, of which we may notice a few - only with a view to note how different constitutional courts are viewing the problem, of refund of taxes collected contrary to law.

51. United Kingdom ; Until 1992, the law in England was that taxes paid under a mistake or law were not recoverable whereas taxes paid under a mistake of fact or under compulsion were held recoverable. This position was radically altered by the decision of House of Lords in Woolwich Building Society v. Inland Revenue Commissioners (No. 2) (1992) 3 All. E.R. 737 : (1993) 1 A.C. 70.

52. The first thing to be noticed with respect to the decision in Woolwich Building Society is that it deals with a direct tax, viz., income tax and not with a indirect tax. Secondly, it is a case where the Regulations under which taxes were demanded and collected, were held to be ultra vires and void. In other words, it was a case "in which an excessive assessment was made on a taxpayer due to some error of fact or law". For this reason, it was held that the remedy of the taxpayer lay in common law and not the ones provided by the statute itself. The majority (Lord Goff, Lord Browne-Wilkinson and Lord Slynn of Hadly), even while holding that taxes paid under a mistake of law are recoverable, hedged the rule with certain riders. Lord Goff held that where a tax or duty is paid by a citizen pursuant to an unlawful demand "common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right" (P. 759). This principle he deduced from the Bills of Rights (1688) which proclaimed inter alia that taxes should not be levied without the authority of Parliament. The learned Law Lord indicated that same rule may also govern cases where excess tax is collected by misconstruction of law, though he declined to express a final opinion on the question. He also did not express any definite opinion on the question - what would be the position, if the plaintiff passes on the burden of tax to another. The learned Law Lord agreed that the law can place shorter time-limits for making such claims of restitution and referred in that connection to the position obtaining in German Law where formal objection has to be lodged within one month of the notification to enable a citizen to claim refund of amounts collected unlawfully. The German Law further provides that one citizen cannot benefit from the successful formal objection of another citizen; the rule is that the person should himself object and take proceedings within the prescribed time-limit. The minority (Lord Keith of Kinkel and Lord Jauncey of Tullichettle), however, stuck to the prevailing view that taxes paid under a mistake of law are not recoverable.

53. Strictly speaking, this decision is of little relevance to us. Firstly, it deals with a direct tax. In the case of a direct tax, there can be no question of passing on the burden of the tax to others as in the case of an indirect tax. All that the decision says, reversing the hitherto prevailing theory, that taxes paid under a mistake of law ought to be refunded.

54. CANADA : In Air Canada et al v. The Queen in Right of British Columbia et al (59 D.L.R. (4th) 161), the learned Judges (including Wilson, J. who dissented on one issue to be indicated shortly) looked at the claim of refund of taxes recovered contrary to law from two standpoints, viz., Constitutional Law and Law of Restitution. They held that the distinction between mistake of fact and mistake of law should play no part in Law of Restitution and further that the rule that

"taxes paid under a mistake of law are not recoverable" should have no place in Constitutional Law. La Forest, J. put the position in the following words:

In my view the distinction between mistake of fact and mistake of law should play no part in the law of restitution. Both species of mistake, if one can be distinguished from the other, should, in an appropriate case, be considered as factors which can make an enrichment at the plaintiff's expense 'unjust' or 'unjustified'. This does not imply, however, that recovery will follow in every case where a mistake has been shown to exist. If the defendant can show that the payment was made in settlement of an honest claim, or that he has changed his position as a result of the enrichment, then restitution will be denied. Even were I not of the opinion that this 'rule' should be abolished, I would not be prepared to extend to the constitutional plane a rule so replete with technicality and difficulty as the mistake of law rule. Constitutional adjudication invites the formulation of broad principles suitable to the accommodation and resolution of broad social and political values, and this much criticized rule seems singularly unsuited for that purpose.

55. Even so, the learned Judge held that the claim of the Airlines should be denied on the ground that it passed on the burden to its customers notwithstanding the fact that by doing so, the province would be benefited at the expense of the Airlines. The learned Judge, in fact, went further and held that even if the Airlines could show that they themselves bore the burden of taxes, recovery of ultra vires taxes should be denied, at least in the case of unconstitutional statutes except where the relationship between the State and a particular taxpayer resulting in the collection of taxes is unjust or oppressive in the circumstances. This rule against recovery, the learned Judge held, is based on concerns for the protection of the treasury and the recognition of the reality that if the tax was refunded, modern government would be driven to the inefficient course of re-imposing it either on the same or a new generation of taxpayers to finance the operations of the government. This rule, however, was held inapplicable where the tax is extracted from a taxpayer through a misapplication of law. The following observations from his opinion are relevant:

While it will take some time for the courts to work out the limits of the developing law of restitution, it is useful on this point to examine the *American experience*. Professor George C. Palmer, in his work, the Law of Restitution, makes the following comment (1986) Supplement, at p. 255):

There is no doubt that if the tax authority retains a payment to which it was not entitled it has been unjustly enriched. *It has not been enriched at the taxpayer's expense, however, if he has shifted the economic burden of the tax to others.* Unless restitution for their benefit can be worked out, *it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer.*

In my view there is merit to this observation, and if it were necessary I would apply it to this case as the evidence supports that the airlines had passed on to their customers the burden of the tax imposed upon them. *The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss.* Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. *If the airlines have not shown that they bore the burden of the tax, then they have not made out their*

claim. What the province received is relevant only in so far as it was received at the airlines' expense.

This alone is sufficient to deny the airlines' claim. However, even if the airlines could show that they bore the burden of the tax, I would still deny recovery. It is clear that the principles of unjust enrichment can operate against a government to ground restitutionary recovery, but *in this kind of case, where the effect of an unconstitutional or ultra vires statute is in issue, I am of the opinion that special considerations operate to take this case out of the normal restitutionary framework, and require a rule responding to the specific underlying policy concerns in this area...A related concern, and one prevalent through many of the authorities and much of the academic literature is the fiscal chaos* that would result if the general rule favoured recovery, particularly where a long-standing taxation measure is involved. That this is not an unfounded concern can be seen by reference to one incident in the United States. A

provision has been inserted in the United States Internal Revenue Code removing the distinction between mistakes of fact and mistakes of law because of the harsh and unjust results that had occurred under the general rule. This, however, placed a severe strain on the United States Treasury when the Supreme Court in *United States v. Butler,* 297 U.S. 1, 80 L.Ed. 477 (1936), held unconstitutional the Agricultural Adjustment Act making almost one billion dollars in invalid taxes (a respectable amount now but overwhelming during the depression) repayable by the government. Faced with this situation, Congress immediately passed an Act which provided that no refunds for such taxes would be allowed unless the claimant could establish the burden of the tax.

(Emphasis added)

56. Wilson, J., however, differed with the majority on the effect of passing on of the burden of tax by the plaintiff. The learned Judge opined that where taxes are recovered under an unlawful statute, they must be returned irrespective of the fact whether the taxpayer has passed on the burden to its customers or not. The learned Judge refused to accept the plea of fiscal chaos, as a sufficient ground for denying the refund.

57. It is brought to our notice by Sri F.S. Nariman that in another Judgment delivered on the same day by the Canadian Supreme Court in Canadian Pacific Airlines Limited v. British Columbia (1989) 59 I.L.R. 218, the Court held that the C.P. Air could recover the social service tax paid on purchases of equipment and parts but that the tax paid by it on alcoholic beverages is not recoverable for the reason that the latter tax was imposed on passengers who consume the liquor - and not on C.P. Air. Sri Nariman has also placed a copy of the judgment in this case before us. It is evident from a reading of the judgment that it was not a case of tax levied and collected under an invalid statute but a case where the tax was collected wrongly by misinterpreting the provisions of the statute - in which situation, the taxes are refundable according to the decision in Air Canada. In this view of the matter, it may not be necessary to refer to the opinions of learned Judges. It is not suggested that any contrary principle is enunciated in this case.

58. The law in Canada appears rather paradoxical to an Indian Lawyer. It says that while taxes collected under an unconstitutional statute need not be refunded (even if the Burden of tax has not been passed on to a third party), taxes collected by misinterpreting/misapplying the provisions of

the statute ought to be refunded. This circumstances emphasises how the jurisprudence in each country has developed differently. We, on our part, have to evolve appropriate principle to meet the emerging situation, keeping in mind the development of law in our own country, our own circumstances and above all, our own constitutional philosophy. At the same time, we express our broad agreement with the approach and thinking of the majority Judges in Air Canada.

59. AUSTRALIA : In Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1995) 69 A.L.J. 51, the Australian High Court rejected the plea of the State that inasmuch as the plaintiff has passed on the burden of illegally collected tax to others, it is not entitled to restitution, Mason, C.J. observed:

The argument that a plaintiff who passes on a tax or charge will receive a windfall of will unjustly be enriched if recovery from a public authority is permitted rests at bottom upon the economic view that the plaintiff should not recover if the burden of the imposition of the tax or charge has been shifted to third parties. *In the context of the law of restitution, this economic view encounters major difficulties.* The first is that to deny recovery when the plaintiff shifts the burden of the imposition of the tax or charge to third parties *will often leave a plaintiff who suffers loss or damage without a remedy.* That consequence suggests that, if the economic argument is to be converted into a legal proposition the proposition must be that, the plaintiff's recovery should be limited to compensation for loss or damage sustained. The third is that an inquiry into and a determination of the loss or damage sustained by a plaintiff who passes on a tax or charge is a very complex undertaking. And finally, it has long been thought that, despite Lord Mansfield's statement in *Moses v. Macferian,* the basis of restitutionary relief is not compensation for loss or damage sustained but restoration to the plaintiff of what has been taken or received from the plaintiff without justification.

(Emphasis supplied)

60. It is obvious that the learned Chief Justice looked at the matter from the point of view of the law of restitution alone which fact would also be evident from the following observations (at P. 63):

As between the plaintiff and the defendant, the plaintiff having paid away its money by mistake in circumstances in which the defendant has no title to retain the moneys, the plaintiff has the superior claim. The plaintiff's inability to distribute the proceeds to those who recoup the plaintiff was, in my view, an immaterial consideration.

61. Dawson, J. also took the same view. The following observations of the learned Judge, however, indicate the nature of the violation in this case, which is of quite some significance:

No question such as that which arose in *Air Canada v. British Columbia,* (1989) 59 ILR 161 would arise in the present case. *In the Canadian case a majority of the Supreme Court held that, whilst moneys paid under a mistake of law might be recovered upon the basis of unjust enrichment, that doctrine did not extent to moneys paid under unconstitutional legislation. No question of unconstitutionality arises in this case.* The application of the common law would also raise the question whether the principle of unjust enrichment can be invoked when moneys paid under a

mistake of fact or law constitute an expense which has been passed on to someone else, as the respondent insurer is said to have passed on the overpayments of stamp duty to its insured in this case. *The better view would seem to be that it is the unjust enrichment of the payee rather than loss suffered by the payer which should govern entitlement to restitution but, having regard to the view which I take, it is unnecessary to determine that question in these proceedings.*

(Emphasis supplied)

62. E.E.C. : Administration Delle Finanze Dello Stato (State Finance Administration) v. San Giorgio SPA (1985) 2 C.M.L.R. 658 was decided by the Court of Justice of the European Community.

63. Italy, which is a member of a European Economic Community made a law, Section 10(1) whereof provided that a "person who has paid import duties, manufacturing taxes, taxes on consumption or State taxes which have been unduly levied, even prior to the entry into force of this decree, is not entitled to the repayment of the sums paid when the charge in question has been passed on in any way whatsoever to other persons, except in cases of substantive error". Sub-section (2) further provided that "the charge is presumed to have been passed on whenever the goods in respect of which payment was effected have been transferred even after processing, transformation, erection, assembly or adaptation in the absence of documentary proof to the contrary". The question before the Court was whether the said provision was contrary to Article 12 of the E.E.C. Treaty (Treaty of Rome) which prohibited imposition of any customs duties between the member States. It was held that it does. The entire discussion in the judgment revolves around the incompatibility of both the provisions. We do not, therefore, see any relevance of the decision to the question at issue before us.

64. USA. : In this context, we may refer to a decision of the Supreme Court of the United States of America in United States v. Jefferson Electric Manufacturing Co., 78 L.Ed. 859. Section 424 of the Revenue Act, 1928 provided that "no refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924, or sub-division (3) of Section 900 of Revenue Act of 1921, or of the Revenue Act of 1918, unless...(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article, subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount although collected from the purchaser or lessee, was returned to him". The said provision was attacked as violative of the due process clause in the Fifth Amendment to the United States Constitution. The attack was repelled holding that the provision being based upon equitable principles which underlie an action in assumpsit for money had and received is not an unreasonable provision. The Court further observed that an action in assumpsit for money and received is of equitable character aiming at the abstract justice of the case and is less restricted and fettered by technical rules and formalities than any other form of action. The Court conceded that if the tax was illegally levied, under the system then in force, the taxpayer had acquired a right to have it refunded without showing whether he bore the burden of the tax or had shifted it to the purchases. Even so, it was held that the requirements imposed by Section 424 which the taxpayer should satisfy before he can claim refund were reasonable and equitable. The following observations of the Court are apposite:

But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.

We do not perceive in the restriction any infringement of due process of law. If the tax payer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition of refunding the tax to him, that he give a bond to use the refunded money in reimbursing them....The present contention is particularly faulty in that it overlooks the fact that the Statutes providing for refunds and for suits on claims therefore proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said : 'This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of thereon. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo at bono belongs to the plaintiff. If was encouraged and, to a great extent, brought into used by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action.

65. We express our broad agreement with the approach adopted by the United State Supreme Court.

66. Sri Nariman, however, referred to the second alternate condition imposed by Section 424 which provided that if the manufacturer gives a bond undertaking to refund the same to purchaser within a particular period, he would be entitled to claim refund. Learned Counsel submitted that such a condition could have been imposed in the Central Excises and Customs Act as well. He submitted that even if it is legitimate for the Parliament to prescribe that in case the money was passed on, it must be made over to the person from whom it was collected, all this should be done through the medium of the manufacturer/taxpayer and not through any other medium. We must say that we are not concerned with the question of desirability of a provision which could have been made but with the legality of the provision which has been made. It cannot be suggested that the Parliament should necessarily have made such a provision or that in the absence of such a provision, the provisions made are violative of Article 265 of the Constitution.

PART-II

WAS KANHAIYALAL CORRECTLY DECIDED AND IF NOT, IN WHAT RESPECTS:

67. The first question that has to be answered herein is whether Kanhaiyalal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act; (2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to re-open the orders which

have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or re-opening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.

68. Re. : (I) : Hereinbefore, we have referred to the provisions relating to refund obtaining from time to time under the Central Excise and Salt Act. Whether it is Rule 11 (as it stood from time to time) or Section 11-B (as it obtained before 1991 or subsequent thereto), they invariably purported to be exhaustive on the question of refund, Rule 11, as in force prior to August 6, 1977, stated that "no duties and charges which have been paid or have been adjusted...shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officers within three months from the date of such payment or adjustment, as the case may be". Rule 11, as in force between August 6, 1977 and November 17, 1980 contained Sub-rule (4) which expressly declared : "(4) Save as otherwise provided by or under this rule, no claim of refund of any duty shall be entertained". Section 11-B, as in force to April, 1991 contained Sub-section (4) in identical words. It said : "(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Sub-section (5) was more specific and emphatic. It said : "Notwithstanding anything contained in any other law, the provisions of this Section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim." It started with a non-obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of Section 11-B, as it now stands, it to the same effect - indeed, more comprehensive and all-encompassing. It says, "(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or in any law for the time being in force, no refund shall be made except as provided in sub-section". The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in Para 14, and has to be respected so long as it stands. The validity of these provision has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended Section 11-B is questioned, no specific reasons have been assigned why a provision of the nature of Sub-section (3) of Section 11-B (amended) is unconstitutional. Applying the propositions enunciated by a seven-Judge Bench of this Court in Kamala Mills, it must be held that Section 11-B (both before and after amendments valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation for delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of Section 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond

challenge, To repeat - and it is necessary to do so - so long as Section 11-B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11-A and 11-B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. Sections 11-A and 11-B are complimentary to each other. (To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz.,) where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available -except to the limited extent pointed out in Kamala Mills. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The jurisdiction of a civil Court is expressly barred - vide Sub-section (5) of Section 11-B, prior to its amendment in 1991, and Sub-section (3) of Section 11-B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made under Section 11-B/Rule 11. Since 1981, an appeal is provided to this Court also from the order of the Tribunal. While Tribunal is not a departmental organ, this Court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11-B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken taken under the "authority of law", within the meaning of Article 265. In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provisions, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11-B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11-B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11-B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act.

So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction for this Court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot

bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

69. There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11-B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11-B. The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the Constitutional provisions, viz., Article 265. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 - an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be a parody of economic Justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden - that would be economic justice. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assesses on the declaration of invalidity of the provisions by the court. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 78 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule - an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right following from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same - there is no automatic or unconditional right to refund.

70. Re.: (II) : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quite. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet[2]. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision rendered by a High Court or the Supreme Court

in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long at that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law. The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturer/assesses all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excises Act and the Rules made thereunder including Section 11-B/Rule 11 too constitute "law" within the meaning of Article 265 and that in the face of said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11-B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on

account of a misinterpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11-A and 11-B. As held by a seven-Judge Bench in Kamala Mills, following the principles enunciated in Firm & Illuri Subbaiya Chetty, the words "any assessment made under this Act" are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words "an assessment made" cannot mean an assessment properly and correctly made. It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is ununderstandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of Central Excise Act also constitute "law" within the context of Bombay Sales tax Act and the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11-B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable, as demonstrated hereinbefore. As a matter of facts, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have becomes final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11-B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case a similar point is decided in favour of the manufacturer/assesses.

(see the pertinent observations of Hidayatullah, CI. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith.

71. Re. : (III) : For the purpose of this discussion, we take the situation arising from the declaration of invalidity of a provision of the Act under which duty his been paid or collected, as the bases, inasmuch as that is the only situation surviving in view of our holding on (I) and (II). In such cases the claim for refund is maintainable by virtue of the declaration contained in Article 265 as also under Section 72 of the Contract Act as explained hereinbefore subject, to one exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of the decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it. In such cases, the plaintiff may also invoke Section 17(1)(c) of the Limitation Act for the purpose of determining the period of limitation for filing a suit. It may also be permissible to adopt a similar rule of limitation in the case of writ petitions seeking refund in such cases. But whether the right to refund or restitution, as it is called, is treated as a constitutional right flowing from Article 265 or a statutory right arising from Section 72 of the Contract Act, it is neither automatic nor unconditional. The position arising under Article 265 is dealt with later in Paras 75 to 77. Here we shall deal with the position under Section 72. Section 72 is a rule of equity. This is not disputed by Sri F,S. Nariman or any of the other counsel appearing for the appellants-petitioners. Once it is a rule of equity, it is un-understandable how can it be said that equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is, in our respectful opinion, a contradiction in terms. Indeed, in Kanhaiyalal, the Court accepts that the right to recover the taxes - or the obligation of the State to refund such taxes - under Section 72 of the Contract Act is subject to "questions of estoppel, waiver, limitation or the like", but at the same time, the decision holds that equitable considerations cannot be imported because of the clear and unambiguous language of Section 72. With great respect, we think that a certain amount of inconsistency is involved in the aforesaid two propositions. "Estoppel, waiver...or the like", though rules of evidence, are yet based upon rules of equity and good conscience. So is Section 72. We are, therefore, of the opinion that equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72. Now, one of the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be re compensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty. Where such a claim is made, it would be wholly permissible for the court to call upon the petitioner/plaintiff to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in I.T.C. In this connection, it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within the exclusive knowledge of the manufacturer. He has the relevant evidence - best evidence - in his possession. Nobody else can be reasonably called

upon to prove that fact. Since the manufacturer is claiming the refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is an equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rules of equity but also because both the Central Excises duties and the Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these duties are indirect taxes, meant to be passed on, is statutorily recognised by Section 64A of the Sale of Goods Act, 1930 (which was introduced by Indian Sales of Goods (Amendment) Act, 1940 and substituted later by Act 33 of 1963). As originally introduced, Section 64-A read:

64A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time -

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of, such deduction.

72. As substituted in 1963, and as it stands today, Section 66-A reads thus:

64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. - (1) Unless different intention appears from that terms of the contract in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax paid where tax was chargeable at that time, --

(a) if such imposition or increase so takes effect that the decreased tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and sue for and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, on be sued for, or in respect of, such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes, namely:

(a) any duty of customs or excise on goods ;

(b) any tax on the sale or purchase of goods.

73. Sub-section (2), it may be noted, expressly makes the said provisions applicable to duty of customs and duties of excise on goods. This fact was also recognised by the Federal Court in The Province of Madras v. Boddu Paidanna & Sons MANU/FE/0008/1942 : (1942) F.C.R. 90 and by this Court in R.C. Jall v. Union of India MANU/SC/0315/1962 : [1962] supp. S.C.R. 436. In such a situation, it would be legitimate for the court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption of fact which a court is entitled to draw under Section 114 of the Indian Evidence Act. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies upon the person who claims the refund (plaintiff/petitioner) and it is for him to allege and establish that as a fact he has not passed on the duty and, therefore, equity demands that his claim for refund be allowed. This is the position de hors 1991 (Amendment) Act and as we shall point out later, the said Amendment Act has done no more than to give statutory recognition to the above concepts. This is the position whether the refund is claimed by way of a suit or by way of a writ petition. It needs to be stated and stated in clear terms that the claims for refund by a person who has passed on the burden of tax to another has nothing to commend itself; not law; not equity and certainly not a shred of justice or morality. In the case of a writ petition under Article 226, it may be noted, there is an additional factor : the power under Article 226 is a discretionary one and will be exercised only on furtherance of interests of justice. This factor too obliges the High Court to inquire and find out whether the petitioner has in fact suffered any loss or prejudice or whether he has passed on the burden. In the latter event, the court will be perfectly justified in refusing to grant relief. The power cannot be exercised to unjustly enrich a person.

74. Re. : (IV) : We are also of the respectful opinion that that Kanhaiyalal is not right in saying that the defence of spending away the amount of tax collected under an unconstitutional law is not a good defence to a claim for refund. We think it is subject to this rider :

where the petitioner- plaintiff alleges and establishes that he has not passed on the burden of the duty to others, his claim for refund may not be refused. In other words, if he is not able to allege and establish that he has not passed on the burden to others, his claim for refund will be rejected whether such a claim is made in a suit or writ petition. It is a case of balancing public interest vis-a-vis private interest. Whether the petitioner-plaintiff has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes. The money really belongs to a third party - neither to the petitioner/plaintiff nor to the State - and to such third party it must go. But where it cannot be so done, it is better that it is retained by the State. By any standard of reasonableness, it is difficult to prefer the petitioner-plaintiff over the State.
Taxes are necessary for running the State and for various public purposes and this is the view taken in all jurisdictions. It has also been emphasised by this Court in D. Cawasji wherein Mathew, J.

not only pointed out the irrational and unjust consequences flowing from the holding in Bhailal Bhai and Aluminium Industries but also pointed out the adverse impact on public interest resulting from the holding that expending the taxes collected by the State is not a valid defence (see Paras 39 and 40). This would not be a case of unjust enrichment of the State, as suggested by the petitioners-appellants. The very idea of "unjust enrichment" is inappropriate in the case of the State, which is in position of parens patrea, as held in Charan Lal Sahu v. Union of India MANU/SC/0285/1990 : AIR1990SC1480 . And even if such a concept is tenable, even then, it should be noticed that the State is not being enriched at the expense of the petitioner- plaintiff but at someone else's expense who is not the petitioner-plaintiff. As rightly explained by Saikia, J. in Mahabir Kishore and Ors. v. State of Madhya Pradesh MANU/SC/0051/1990 : [1990]184ITR548(SC) , "the principle of unjust enrichment requires - first that the defendant has been 'enriched' by the receipt of a 'benefit'; secondly, that this enrichment is 'at the expense of the plaintiff; and thirdly, that the retention of the enrichment be just. This justifies restitution." We agree with the holding in Air Canada (quoting Professor George C. Palmer) that in such a case, "it seems preferable to leave the enrichment with the tax authority instead of putting judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer". The Canadian Supreme Court has further emphasised - and, in our opinion, rightly - the "fiscal chaos that would result if the general rule favoured recovery, particularly where the long standing taxation measure is involved". In this connection, the majority decision refers to what happened in United States. In United States v. Butler (1936) 80 L.Ed. 477, the Agricultural Adjustment Act was held unconstitutional, the result of which was refund of almost one billion dollars collected under the said statute. In such a situation, it is pointed out, the Congress passed an Act which provided that no refunds shall be allowed unless the claimant establishes that he himself bore the burden of tax. Similar provision was also made in another enactment, viz., Section 424 of the Revenue Act, 1928, the validity of which has been upheld by the United Stated Supreme Court in Jefferson (supra).

75. In this connection, Sri K. Parasaran has rightly emphasised the distinction between the constitutional values obtaining in countries like United States of America, Canada and Australia - or for that matter, United Kingdom - and the values obtaining under our Constitution.[3] Unlike the economically neutral - if not pro-capitalist - Constitutions governing those countries, the Indian Constitution has set before itself the goal of "Justice, Social, Economic and Political" - a total re-structuring of our society - the goal being what is set out in Part-IV of the Constitution and, in particular, in Articles 38 and 39. Indeed, the aforesaid words in the preamble constitute the motto of our Constitution. If we can call it one. Article 38 enjoins upon the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life". Article 39 lays down the principles of policy to be followed by the State. It says that the State shall, in particular direct its policy towards securing "(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". Refunding the duty paid by a manufacturer/assesses in situations where he himself has not suffered any loss or prejudice (i.e., where he has passed on the burden to others) is no economic justice; it is the very negation of economic Justice. By doing so, the State would be conferring an unearned and unjustifiable windfall upon the manufacturing community thereby contributing to concentration of wealth in a small class of persons which may

not be consistent with the common good. The preamble and the aforesaid articles do demand that where a duty cannot be refunded to the real persons who have bore the burden, for one or the other reason, it is but appropriate that the said amounts are retained by the State for being used for public good (See Amar Nath Om Prakash). Indeed, even in an economically neutral Constitution, like that of United States of America, such a course has been adopted by the State and upheld by the Courts. It would be rather curious - nay, ridiculous - if such a course were held to be bad under our Constitution which speaks of economic and distributive justice, opposes concentration of wealth in a few hands and when the Forty - Second (Amendment) Act describes our Republic as a Socialist Republic.

76. It is true that some of the concepts now affirmed by us, e.g., effect of passing on and the relevance of our Constitutional values in the matter of judging the legitimacy of a claim for refund were not presented to the Bench which decided Kanhaiyalal but that can be no ground for not entertaining or accepting those concepts. As observed by Thomas Jefferson, as far back as 1816, "laws and institutions must go hand-in-hand with the progress of the human mind...as new discoveries are made, new truths are discovered and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the time...." The very same thought was expressed by Krishna Iyer, J. in State of Karnataka v. Ranganath Reddey MANU/SC/0062/1977 : [1978]1SCR641 with particular reference to our Constitutional philosophy and values:

Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality...
It is right that the rule of law enshrined in our Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels of feudal roots, invades our lives and fashions our destiny.

The learned Judge quoted Granville Austin, saying:

The Judiciary was to be the arm of the social revolution, upholding the quality that Indians had longed for in colonial days....The courts were also idealised because, as guardians of the Constitution, they would be the expression of the new law created by Indians for Indians.

77. That "the material resources of the community" are not confined to public resources but include all resources, natural and man-made public and private owned" is repeatedly affirmed by this Court. (See Ranganath Reddy, Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal MANU/SC/0040/1982 : [1983]1SCR1000 and State of Tamil Nadu Etc. Etc. v. L. Abu Kavur Bai and Ors. Etc. MANU/SC/0073/1983 : [1984]1SCR725 . We are of the considered opinion that Sri Parasaran is right in saying that the philosophy and the core values of our Constitution must be kept in mind while understanding and applying the provisions of Article 265 of the Constitution of India and Section 72 of the Contract Act (containing as it does an equitable principle) - for that matter, in construing any other provision of the Constitution and the laws. Accordingly, we hold that even looked at from the constitutional angle, the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position even if Article 265 can be invoked - we have held, it cannot be - for claiming refund of

taxes collected by misinterpretation or misapplication of a provision of law, rules notifications or regulation.

PART-III

VALIDITY AND MEANING OF THE PROVISIONS INTRODUCED BY THE 1991 (AMENDMENT) ACT:

78. While examining the validity and reasonableness of the provisions introduced by the 1991 (Amendment) Act, it is necessary to bear in mind certain principles relevant in that behalf. In R.K. Garg v. Union of India MANU/SC/0074/1981 : [1982]133ITR239(SC) , this Court held that:

laws relating to economic activities should be viewed with grater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial defence to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved....
The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry' that exact wisdom and nice adaptation of remedy are not always possible and that 'judgment is largely a prophecy based on meagre and uninterrupted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in Secy. of Agriculture v. Central Roig. Refining Co. (1950) 94 L.ed. 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

79. To the same effect are the observations by Khanna, J, in Keshavananda Bharati v. State of Kerala [1973] Suppl. S.C.R. 755. The learned Judge said, "in exercising the power of judicial

review the courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience". To the same effect are the observations in Tamil Nadu Education Department Ministerial and General Subordinate Service Association v. State of Tamil and Anr. MANU/SC/0480/1979 : [1980]1SCR1026 (Krishna Iyer, J.).

It is equally well-settled that mere possibility of abuse of a provision by those in-charge of administering it cannot be a ground for holding the provision procedurally or substantively unreasonable. In Collector of Customs, Madras v. Nathella Sampathu Chetty and Anr. MANU/SC/0089/1961 : 1983ECR2198D(SC) , this Court observed : "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity". It was said in State of Rajasthan v. Union of India MANU/SC/0370/1977 : [1978]1SCR1 , "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief. (Also see Commissioner, Hindu Religious Endowment, Madras v. Lakshmindra Thirtha Swamiar of Shirur Mutt MANU/SC/0136/1954 : [1954]1SCR1005 .

80. Section 11-B, as amended in 1991, has been set out in Para 10 hereinabove. Sub-section (1) of Section 11-B says that every claim for refund shall be made before the Assistant Commissioner of Central Excise within six months of the relevant date. The application shall have to be in the prescribed form and manner and shall be accompanied by documentary and other evidence including those referred to in Section 12-A to establish that the duty claimed by way of refund has not been passed on by him to any other person. The proviso to Sub-section (1) expressly states that pending applications for refund made before the commencement of the 1991 (Amendment) Act shall be deemed to have been made under subsection (1) of Section 11-B as amended in 1991 and that the same shall be dealt with in accordance with Sub-section (2). Sub-section (2) provides that only in situations specified in Clauses (a) to (f) therein will the refund be granted to the applicant; in all other cases, the amount will be credited to the Fund established under Section 12-C. Sub-section (3) declares that notwithstanding anything to the contrary contained in (a) any judgment, decree, order, or direction of the Appellate Tribunal or any Court or (b) any other provision of this Act or the rules made thereunder or (c) any other law for the time being in force, not refund shall be made except as provided in Sub-section (2). Sub-section (1) of Section 11-D too opens with a non-obstante clause. It provides for making over of excise duty, realised by a person from his buyer, to the Central Government forthwith. Sub-section (2) says that duty so paid shall be adjusted against the duty payable by him on finalisation of assessment. The sub-section further says that if on such adjustment, any surplus duty is left, it shall be dealt with in ,. accordance with Section 11-B. Section 12-A requires every person liable to pay duty to indicate prominently in sales invoices, documents of assessment and other similar documents, the amount of duty forming part of the price at which the goods are sold. Section 12-B creates a rebuttable presumption of law that every person paying the duty shall be deemed to have passed on the full incidence of duty to the buyer of such goods. Section 12-C provides for the establishment of the Consumer Welfare Fund (Fund) while Section 12-D provides for rules being made to specify the manner in which the monies in the Fund shall be utilised. Rules have indeed been made under Section 12-D, which provide for grants being made to Consumer's Welfare Organisations for being spent on welfare of consumers.

81. The challenge to the validity of the provisions introduced by the 1991 (Amendment) Act has been presented under various heads which we now proceed to deal with separately.

MEANING AND SCOPE OF SUB-SECTION (3) OF SECTION 11-B:

82. A good amount of debate took place before us on the question whether Sub-section (3) makes Section 11-B exhaustive of all kinds of refund claims including those which are refundable as a consequence of appellate/revisional order and/or as as consequence of orders made by the High Court/Supreme Court. Sri Nariman pointed out that in Rule 11 (as it was in force during the period August 6, 1977 to November 17, 1980), Sub-rule (3) expressly provided that "where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf' and that Sub-section (3) of Section 11-B, before its amendment in 1991, was also in identical terms. But, Sri Nariman says, Sub-section (3) of Section 11-B has now been dropped; there is no corresponding provision in Section 11-B as it now stands, which means, says the counsel, that even a refund claim arising as a result of an appellate order or an order of a court has also got to be made under and in accordance with Sub-sections (1) and (2) of Section 11-B and will be disposed of in terms of Sub-section (2) of the said section, as amended in 1991. This consequence, learned Counsel says, is unjust, unreasonable and arbitrary. There is no reason why a period who becomes entitled to refund of duty as a result of appellate or court order should also be made to apply and satisfy all the requirements of Sub-sections (1) and (2) of Section 11-B (amended) when he is entitled to such refund as a matter of right. Sri Nariman submits that if a manufacturer/assesses, who succeeds in vindicating his claim after a long fight - may be, upto this Court - and applies for refund is asked to satisfy that he has not passed on the burden of tax to another, he would rather keep quite than fighting the levy. There would be no incentive for him to file the appeal/appeals or approach the higher courts which also involves substantial expense. If after all this fight and expense, he is to be denied the refund on the ground that he has passed on the burden of duty to third parties, why should he fight and spend money for fighting the litigation, says the counsel. Sri Sorabjee and Sri Salve too emphasised this aspect and said that this situation would lead to many an undesirable consequence. The assessing/approving officer (original authority) would become the monarch; whatever he says would be the law since there would be nobody interested in challenging his order. Illegal levies would become the order of the day. Such a situation, the learned Counsel point out, is neither in the interest of law nor in the interest of consumer or the larger public interest. It is accordingly submitted that it would be just and proper that the amended Section 11-B is held not to take in refund claims arising as a consequence of appellate or a superior court order. We do not think it is possible to agree. Such a holding would run against the very gain of the entire philosophy underlying the 1991 Amendment. The idea underlying in the said provisions is that no refund shall be ordered unless the claimant establishes that he has not passed on the burden to others. Sub-section (3) of the amended Section 11-B is emphatic. It leaves no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. There is no reason why an exception should be made in favour of such claims which would nullify the provision to a substantial degree. So far as "lack of incentive" argument is concerned, it has no doubt given us a pause; it is certainly a substantial plea, but there are adequate answers to it. Firstly, the rule means that only the person who has actually suffered loss or prejudice would fight the levy and apply for refund in case of success. Secondly, in a competitive market economy, as the one we have embarked upon since

1991-92, the manufacturer's self interest lies in producing more and selling it at competitive prices - the urge to grow. A favourable decision does not merely mean refund; it has a beneficial effect for the subsequent period as well. It is incorrect to suggest that the disputes regarding classification, valuation and claims for exemptions are fought only for refund; it is for more substantial reasons, though the prospect of refund is certainly an added attraction. It may, therefore, be not entirely right to say that the prospect of not getting the refund would dissuade the manufacturers from agitating the questions of exigibility, classification, approval of price lists or the benefit of exemption notifications. The dis-incentive, if any, would not be significant. In this context, it would be relevant to point out that the position was no different under Rule 11, or for that matter Section 11-B, prior to its amendment in 1991. Sub-rules (3) and (4) of Rule 11 (as it obtained between August 6, 1977 and November 17, 1980) read together indicate that even a claim for refund arising as a result of an appellate or other order of a superior court/authority was within the purview of the said rule though treated differently. The same position continued under Section 11-B, prior to its amendment in 1991. Sub-sections (3) and (4) of this section are in the same terms as Sub-rules (3) and (4) of Rule 11; if anything, Sub-section (5) was more specific and emphatic. It made the provisions of Section 11-B exhaustive on the question of refund and excluded the jurisdiction of the civil court in respect of all refund claims. Sub-rule (3) of Rule 11 or Sub-section (3) of Section 11-B (prior to 1991) did not say that refund claims arising out of or as a result of the orders of a superior authority or court are outside the purview or Rule 11/Section 11-B. They only dispensed with the requirement of an application by the person concerned which consequentially meant non-application of the rule of limitation; otherwise, in all other respects, even such refund claims had to be dealt with under Rule 11/Section 11-B alone. That is the plain meaning of Sub-rule (3) of Rule 11 and Sub-sections (3) and (4) of Section 11-B (prior to 1991 Amendment). There is no departure from that position under the amended Section 11-B. All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so.

83. It is then pointed out by the learned Counsel for the petitioners-appellants that if the above interpretation is placed upon amended Section 11-B, a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11-B and the expression "relevant date" has been defined in Clause (B) of the Explanation appended to Sub-section (1) of Section 11-B to mean the date of payment of duty in case other than these falling under Clauses (a) (b) (c) (d) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11-B. The second proviso to Section 11-B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other

aspect. If one reads the second proviso to Sub-section (1) of Section 11-B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned Counsel.

84. It was then submitted that Rule 233B which prescribes the procedure to be followed in cases where duty is paid under protest requires the assessee to state the grounds for payment of duty under protest and that it may well happen that the authority to whom the letter of protest is submitted may refuse to record it, if he is not satisfied with the ground of protest. In our opinion, the said apprehension is not well-founded. Sub-rules (1) (2) and (3) of Rule 233-B read as follows:

RULE 233B. Procedure to be followed in cases where duty is paid under protest. - (1) Where an assessee desires to pay duty under protest he shall deliver to the proper officer a letter to this effect and give grounds for payment of the duty under protest.

(2) On receipt of the said letter, the proper officer shall give an acknowledgement to it.

(3) The acknowledgement so given shall, subject to the provisions of the Sub-rule (4), be the proof that the assessee has paid the duty under protest from the day on which the letter of protest was delivered to the proper officer.

85. The rule no doubt requires the assessee to mention the "grounds for payment of the duty under protest" but it does not empower the proper officer, to whom the latter of protest is given, to sit in judgment over the grounds. The assessee need not particularise the grounds of protests. It is open to him to say that according to him, the duty is not exigible according to law. All that the proper officer is empowered to do is to acknowledge the letter of protest when delivered to him - and that acknowledgement shall be the proof that the duty has been paid under protest. A reading of the rule shows that the procedure prescribed therein is evolved only with a view to keep a record of the payment of duty under protest. It is meant to obviate any dispute whether the payment is made under protest or not. Any person paying the duty under protest has to follow the procedure prescribed by the Rule and once he does so, it shall be taken that he paid the duty under protest. The period of limitation of six months will then have no application to him.

86. We may clarify at this stage that when the duty is paid under the orders of Court (whether by way of an order granting stay, suspension, injunction or otherwise) pending an appeal/reference/writ petition, it will certainly be a payment under protest; in such a case, it is obvious, it would not be necessary to lodge the protest as provided by Rule 233-B.

WHETHER SECTION 11-B IS RETROSPECTIVE?

87. It is submitted by the learned Counsel for the petitioners- appellants that the amended Section 11-B is prospective in operation and cannot apply to pending proceedings. In support of this contention, it is submitted that according to Sub-section (1), the application for refund has to be accompanied by "documentary or other evidence including the documents referred to in Section 12-A" to prove that the incidence of duty has not been passed on by the applicant to any other person. It is submitted that Section 12-A was also inserted by the very same 1991 (Amendment) Act and, therefore, it is not expected of any manufacturer/assesses to maintain the records required

by Section 12-A, prior to its coming into force. It is submitted that in respect of an application filed before the commencement of the said Act, it is not possible to comply with the requirement of Sub-section (1) insofar as it requires the filing of documents referred to in Section 12-A. This circumstance is pointed out as a ground for holding that the amended Section 11-B applies on to refund applications filed after coming into force of the 1991 (Amendment) Act. It is further submitted that the right to recover excess duty paid is both a constitutional and a statutory right. It is also a substantive right, it is submitted, as held in Commissioner of Sales Tax, Uttar Pradesh v. Auriaya Chamber of Commerce, Allahabad MANU/SC/0411/1986 : [1987]167ITR458(SC) and Patel India Private Limited v. Union of India and Ors. MANU/SC/0054/1973 : 1973ECR1(SC) . All these factors, it is submitted, militate against giving retrospective effect to Section 11-B. It is difficult to agree with the propositions in the light of the specific and clear language of the first proviso to the Sub-section (1). The first proviso expressly declares that "where an application for refund has been made before the commencement of the Central Excises and Customs (Amendment) Act, 1991, such application shall be deemed to have been made under this Sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act". In the face of this proviso, it is idle to contend that Sub-sections (1) and (2) of Section 11-B do not apply to pending proceedings. They apply to all proceedings where the refund has not been made finally and unconditionally. Where the duty has been refunded under the orders of the court pending disposal of an appeal, writ or other proceedings, it would not be a case of refund finally and unconditionally, as explained in Jain Spinners and I.T.C. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the period prescribed for filing the appeal against such order has also expired - before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be re-opened and/or be governed by Section 11-B(3) (as amended by the 1991 (Amendment) Act). This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us. So far as the difficulty or impossibility of filing the documents referred to in Section 12-A is concerned, it is obvious that the said requirement cannot be insisted upon in cases where the application is filed prior to the commencement of the Act or for the period anterior to the commencement of the said Amendment Act, though the burden of proving that the burden of duty has not been passed on by him is still upon the applicant. Sub-section (1) of Section 11-B of general application. It not merely governs the pending applications but also provides for future applications. Reasonably construed and read together, the said provisions mean that in respect of pending applications, the requirement is only to produce such documentary and other evidence as is sufficient to establish that the incidence of duty, refund of which is claimed, has not been passed on by the applicant to any other person. The requirement of enclosing the documents referred to in Section 12-A is obligatory only where the claim or refund pertains to the period subsequent to the commencement of the 1991 (Amendment) Act.

88. There is yet another circumstance : Section 12B does not create a new presumption unknown till then; it merely gives statutory shape to an existing situation, as explained hereinbefore. At the most, it can be said that there were two views on the subject and Section 12B affirms one of them. Even without Section 12-B, the true position is the same, as held by us in the earlier part of this judgment. The obligation to prove that duty has not been passed on to another person is always there as a pre-condition to claim of refund. It cannot also be said that by giving retrospective effect to Section 11-B, any vested rights or substantive rights are being taken away. The deprivation, if

at all, is not real. The manufacturer has already collected the duty from his purchaser and has thus reimbursed itself. By applying for refund yet, he is trying to reap a windfall; deprivation of that cannot be said to be real or substantial prejudice or loss. A manufacturer had no vested legal right to refund even when he had passed on the burden of duty to others. No law conferred such a right in him - not Article 265, nor Section 11-B. It was only on account of an incorrect view of law taken in Kanhaiyalal - and that cannot be treated as a vested legal right. Correction of judicial error does not amount to deprivation of vested/substantive rights, even though a person may be deprived of an unwarranted advantage he had under the over-ruled decision, In cases, where the burden is not passed on, there is no prejudice; he can always get the refund.

IS SECTION 11-B A MERE DEVICE TO RETAIN ILLEGALLY COLLECTED TAXES?

89. A major attack is mounted by the learned Counsel for petitioners-appellants on Section 11-B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12- D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Sri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Sri Nariman. It is a colourable device - declaimed Sri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Sri Parasaran to this criticism runs thus : it ill-becomes the manufacturer/assesses to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said Provisions. Clause (e) of the proviso to Sub-section (2) of Section 11-B does provides for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method - says Sri Parasaran.

90. We agree with Sri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12-C which creates the Consumer Welfare Fund and Section 12-D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provides for "grants" being made in favour of consumer organisations for being spent on welfare of consumers. But, this is perhaps for

the reason that Clause (e) of the proviso to Sub-section (2) of Section 11-B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in Clause (e) of Explanation-B appended to Section 11-B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. Certain practical difficulties may arise as pointed out by the appellants-petitioners : (i) the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund, he has to go to the place where the duty has been paid by the manufacturer and apply there; (ii) purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claims will be filed only by purchasers of high priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground - assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg and other decisions cited in Paras 78 and 79).

DO SECTIONS 11-B AND 12-B HAVE THE EFFECT OF CHANGING THE VERY NATURE OF EXCISE DUTY?

91. It is next contended that in a competitive atmosphere or for other commercial reasons, it may happen that the manufacturer is obliged to sell his goods at less than its proper price. The suggestion is that the manufacturer may have to forego not only his profit but also part of excise duty and that in such a case levy and collection of full excise duty would cease to be a duty of excise; it will become a tax on income or on weightiness. We are unable to appreciate this argument. Ordinarily, no manufacturer will sell his products at less than the cost-price plus duty. He cannot survive in business if he does so. Only in case of distress sales, such a thing understandable but distress sales are not a normal feature and cannot, therefore, constitute a basis for judging the validity or reasonableness of a provision. Similarly, no one will ordinarily pass on less excise duty than what is exigible and payable. A manufacturer may dip into his profits but would not further dip into the excise duty component. He will do so only in the case of a distress sale again. Just because duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing on the duty. Nor does it follow therefrom that the manufacturer is absorbing the duty himself. The manner of preparing the invoice is not conclusive. Generally speaking, every manufacturer will sell his goods at something above the cost-price plus duty. There may be a loss-making concern but the loss occurs not because of the levy of the excise duty -which is uniformly levied on all manufacturers of similar goods - but for other reasons. No manufacturer can say with any reasonableness that he cannot survive in business unless he collects the duty from both ends. The requirement complained of (prescribed by Section 11-B) is thus beyond reproach - and so are Sections 12-A and 12-B. All that Section 12-A requires is that every person who is liable to pay duty of excise on any goods, shall, at the time of clearance of the goods, prominently indicate in all the relevant documents the amount of such duty which will from part of the price at which the goods are to be sold, while Section 12-B raises a presumption of law that until the contrary is proved, every person who has paid the duty of excise on any goods shall be deemed to

have passed on the full incidence of such duty to the buyer of such goods. Since the presumption created by Section 12-B is a rebuttable presumption of law -and not a conclusive presumption - there is no basis for impugning its validity on the ground of procedural unreasonableness or otherwise. This presumption is consistent with the general pattern of commercial life. It indeed gives effect to the very essence of an indirect tax like the excise duty/customs duty. A manufacturer who has not passed on the duty can always prove that fact and if it is found that duty was not leviable on the transaction, he will get back the paid. Ordinarily speaking, no manufacturer would take the risk of not passing on the burden of duty. It would not be an exaggeration to say that whenever a manufacturer entertains a doubt, he would pass on the duty rather than not passing it on. It must be remembered that manufacturers as a class are knowledgeable persons and more often than not have the benefit of legal advice. And until about 1992, at any rate, Indian market was by and large a sellers' market.

92. For a proper appreciation of the learned Counsel's contention, it would be appropriate to examine the scheme of the Act and the Rules concerning the valuation of excisable goods and their clearance/removal. Section 4 deals with valuation of excisable goods. The assessable value under Section 4 determined on the basis of the normal price referred to in Section 4(1)(a) and in certain cases under Section 4(1)(b). In either case, the excise duty and certain specified amounts are deductible. More important, in the documents submitted by the manufacturer for determination of the assessable value, he has to clearly state the excise duty payable as well as other charges and discounts which he claims to be deductible. Ordinarily speaking, a manufacturer has to file a classification list first (Rule 173-B) for approval by the Proper Officer. On the basis of the approved classification list and the rate of duty approved therein, he files a price list for approval as contemplated by Rule 173-C. Prior to April 1, 1994, the price list has to be declared in the form prescribed for the purpose which form required the manufacturer to disclose clearly and separately the excise duty and other deductions claimed by him. The Form requires the manufacturer to declare that the facts stated therein are true. After the price list is approved, "removal" begins. Under the Self Removal Procedure (S.R.P.), the procedure in vogue until recently - speaking broadly - was that at the time to removal of goods, gate pass in Form G.P. I had to be issued which required the manufacturer to mention several particulars of the goods removed including the rate of duty and the total duty paid. Form G.P. I too had to be verified by, the manufacturer declaring that the facts stated therein are true. From the price list and the gate pass, therefore, it was easy to ascertain the duty component of the price. It may also be mentioned that G.P. I required the name and address of the consignee as well as the manner of transport to be mentioned therein. (More often than not the sale of excisable goods is simultaneous with the removal/clearance.) In addition to the above, the manufacturer was required to file monthly returns (RT-12) as provided by Rule 173-G. The monthly returns had to be filed every month, within seven days of the succeeding month in respect of all clearances during that month. The RT-12 also provides for several particulars including the rate of duty and duty payable. These documents clearly and cogently disclose the excise duty that has been paid. Since April 1, 1994, however, there is said to have occurred a change in the procedure. Under the new Rules, a proforma has been provided under which a declaration is to be filed indicating inter alia the tariff-chapter heading applicable and the effective rate of duty assessable on the goods. This Form has to be filled in and filed by the manufacturer with a declaration that the particulars stated therein are true. In the place of gate pass, provision is now made for a special form of invoice which gives full particulars of the price, assessable value, rate of duty and duty actually paid. From the invoice and the proforma now

prescribed, it is equally easy to ascertain the duty component, i.e., the effective duty paid and passed on to the purchaser.

93. We may also mention that, in case of S.R.P., the Rules require that every assessee shall keep a current account with the Collector/Commissioner. He has to make periodical credits in the current account by cash payment into the treasury so as to keep the balance sufficient to cover the duty due on the goods intended to be removed at any time. On each consignment removed by him, he has to pay the duty determined by him by debiting the same to the current account before removal of the goods. As stated already, in the case of S.R.P. also, the manufacturer has to file the monthly returns in Form RT-12 which have to be assessed by the Proper Officer as required by Rule 173-I. The Proper Officer adjusts the duty paid by the manufacturer against the duty assessed by him. if as a result of such adjustment, it is found, during the course of assessment of RT-12 Forms, that duty has not been levied or paid or has been short-levied or short-paid, the authority is entitled to make a demand for the same according to law.

94. Indeed, it is suggested on behalf of the Union of India that if, in any case, a manufacturer is obliged to sell his goods at a price lower than the normal price declared under Section 4 (for the purposes of determining the assessable value), it is always open to him to approach the excise authorities for re- determination of the assessable value. In other words, he can ask for reduction in the excise duty component on the ground that he is obliged to sell his goods at a lower price on account of various commercial compulsions.

95. Rule 9-B provides for provisional assessment in situations specified in Clauses (a) (b) and (c) of Sub-rule (1). The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be.<mpara>
However, if the final orders passed under Sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B(5) re-agitating the issues already decided under Rule 9-B -assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11-B. It follows logically that position would be the same in the converse situation.

NATURE AND CHARACTER OF REFUND CLAIMS UNDER THE CENTRAL EXCISES AND SALT ACT AND THE CUSTOMS ACT:

96. It would be evident from the above discussion that the claims for refund under the said two enactments constitute an independent regimen. Every decision favourable to an assessee/manufacturer, whether on the question of classification, valuation or any other issue, does

not automatically entail refund. Section 11-B of the Central Excises and Salt Act and Section 27 of the Contract Act, whether before or after 1991 Amendment - as interpreted by us herein - make every refund claim subject to proof of not passing-on the burden of duty to others. Even if a suit is filed, the very same condition operates. Similarly, the High Court while examining its jurisdiction under Article 226 - and this Court while acting under Article 32 - would insist upon the said condition being satisfied before ordering refund. Unless the claimant for refund establishes that he has not passed on the burden of duty to another, he would not be entitled to refund, whatever be the proceeding and whichever be the forum. Section 11-B/Section 27 are constitutionally valid, as explained by us hereinbefore. They have to be applied and followed implicitly wherever they are applicable.

MEANING AND PURPORT OF SECTION 11-D:

97. It was contended by the learned Counsel for the appellants-petitioners that Section 11-D provides for double taxation. It was contended that Sub-section (1) of Section 11-D makes the manufacturer liable to pay duty which he collects from the buyer as part of the price of goods even where the manufacturer has already paid the duty at the time of removal. We do not think that there is any foundation for the said understanding or apprehension. There are no words in the section which provided for payment of duty twice over. All that the section says is this : the amount collected by a person/manufacturer from the buyer of goods as representing duty of excise shall be paid over to the State; even if the tax collected by the manufacturer from his purchaser is more than the duty due according to law, the whole amount collected as duty has to be paid over to the State; if on the assessment being made it is found that the duty collected and paid over by the manufacturer is more than the duty due according to law, such surplus amount shall either be credited to the Fund or be paid over to the person who has borne the incidence of such amount in accordance with the provisions of Section 11-B. It is obvious that if in a given case, the manufacturer has collected less amount as representing the duty of excise than what is due according to law, he is not relieved of the obligation to pay the full duty according to law. This is the general purport and meaning of Section 11-D. There may be cases where goods are removed/cleared without effecting their sale. In such a case, Section 11-D is not attracted. It is attracted only when goods are sold. The purport of this section is in accord with Section 11-B and cannot be faulted.

98. A clarification : The situation in the case of captive consumption has not been dealt with by us in this opinion. We leave that question open.

PART - IV

99. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis- applying the provisions of the

Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf.

While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and give effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way or a suit or by way of a writ petition.

This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of Sub-section (1) of Section 17 of the limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case

may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. It other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to' the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner- plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

(viii) The decision of this Court in Income Tax Officer Benaras v. Kanhaiyalal Mukundlal Saraf MANU/SC/0129/1958 : [1959]1SCR1350 must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiyalal have also been wrongly decided to the above extent. This declaration - or the law laid down in Propositions (i) to (vii) above - shall not however entitle the State to recover to taxes/duties already refunded and in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

(x) By virtue of Sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in Sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf.

So far as the jurisdiction of the High Courts under Article 226 of the Constitution - or of this Court under Article 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners

MANU/SC/0391/1992 : 1992(61)ELT321(SC) and Union of India v. I.T.C. MANU/SC/0327/1993 : [1993] Supp 4 S.C.C. 326 have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be re-opened and/or governed by Section 11-B(3) (as amended by the 1991 (Amendment) Act). This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11-B does provide for the purchase making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962.

100. We take note of the fact that writ petitions/writ appeals/suits claiming refund of excise duties/customs duties may be pending as on today. They are liable to fail on the ground of maintainability by virtue of the law declared herein. Since the law is being declared and clarified by us now, we make the following directions : in cases where writ petitions, writ appeals (by whatever appellation they are called) or suits (at whatever stage they may be, as on today) are pending as on today, and provided they have not already taken proceedings for refund under the Act, it shall be open to the petitioners/appellants/plaintiffs to file applications for refund under Section 11-B within sixty days from today. If the applications are so filed by them, they shall not be rejected on the ground of limitation and shall be dealt with according to law. We make it clear that this direction applies only to petitioners/appellants/plaintiffs in pending writ petitions/writ appeals/suits (pending as on today), as explained hereinabove, and not to any others. The applications so filed under Section 11-B shall be disposed of under Section 11-B, as interpreted herein, and in accordance with law. It is obvious that if any of such petitioners/appellants/plaintiffs already taken proceedings for refund under the Act and having failed therein - either partly or wholly - have resorted to writ petition or suit, they shall not be entitled to the benefit of this direction.

101. The individual cases may now be listed before a Division Bench for being disposed of in this light of the judgment.

There shall be no order as to costs.

A.M. Ahmadi, C.J.

102. I have had the benefit of studying the judgments of my learned brothers Reddy, Sen and Paripoornan, JJ. Pursuant to the discussions that I have had with them and with all my other learned brothers on this bench, I find myself to be broadly in agreement with the conclusions recorded by Reddy, J. subject to the two aspects on which I have recorded my views hereunder:

The first of these is the issue regarding the extent to which the jurisdiction of ordinary courts is ousted in respect of claims for refund of taxes illegally levied and collected. In my view, it would be incorrect to hold, as Reddy, J. has done, that every claim for refund of illegal or unauthorised levy of tax is necessarily required to be made in accordance with the provisions of the Central

Excise Act, 1944 (hereinafter called "the Excise Act"). The leading authority governing this issue is the decision of this Court in Dhulabhai and Ors. v. State of Madhya Pradesh and Anr. MANU/SC/0157/1968 : [1968]3SCR662 . In this case, after analysing the leading decisions in the field, this Court laid down the following propositions with a view to determining the extent to which the jurisdiction of civil courts can be ousted:

(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular act to find out the intendment becomes necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

103. In view of these propositions, which have been reiterated by this Court on several occasions and thus constitute sound law, it is clear that actions by way of suits or petitions under Article 226 of the Constitution cannot be completely eliminated. The claims for refund can arise under three

broad classes and the issue of ouster of jurisdiction of civil courts can be understood by focusing on the parameters of these classes which are as follows:

Class I ; Unconstitutional levy" - where claims for refund are founded on the ground that the provision of the Excise Act under which the tax was levied is unconstitutional.

Cases falling within this class are clearly outside the ambit of the Excise Act. In such cases assessees can either file a suit under Section 72 of the Contract Act, 1872 (hereinafter called "Contract Act") or invoke the writ jurisdiction of the High Court under Article 226 of the Constitution.

Class II: "Illegal levy" - where claims for refund are founded on the ground that there is misinterpretation/misapplication/erroneous interpretation of the Excise Act and the Rules framed thereunder.

Ordinarily, all such claims must be preferred under the provisions of the Excise Act and the Rules framed thereunder by strictly adhering to the stipulated procedure. However, in cases where the authorities under the Excise Act arrogate to themselves jurisdiction even in cases where there is clear want of jurisdiction, the situation poses some difficulty. Reddy, J. has held that in all cases, except where unconstitutionality is alleged, the remedy is to be pursued within the framework of the Excise Act. This is a dangerous proposition for it will not cater to situations where the authorities under the Excise Act assume authority in cases where there is an inherent lack of jurisdiction. This is because, if one were to follow Reddy, J.'s reasoning, the authorities under the Act will have the final say over situations in which they totally lack inherent jurisdiction. In such a situation, there is nothing to prevent the authorities from exercising jurisdiction in cases which are ultra vires the Excise Act but intra vires the Constitution. To that extent, I would hold that in cases where the authorities under the Excise Act initiate action though lacking in inherent jurisdiction, the remedy by way of a suit under Section 72 of the Contract Act or a writ under Article 226 of the Constitution, will lie. Such a conclusion will not frustrate the exclusion of jurisdiction of civil courts by the Excise Act because the areas where as authority acting under a statute is said to lack inherent jurisdiction have been clearly demarcated by several decisions of this Court.

Class III: "Mistake of Law" - where claims for refund are initiated on the basis of a decision rendered in favour of another assessee holding the levy to be : (1) unconstitutional; or (2) without inherent jurisdiction.

104. Ordinarily, no assessee can be allowed to reopen proceedings that have been finally concluded against him on the basis of a favourable decision in the case of another assessee. This is because an order which has become final in the case of an assessee will continue to stand until it is specifically recalled or set aside in his own case.

105. In cases where the levy of a tax has been held to be (1) unconstitutional; or (2) void for want of inherent jurisdiction (as explained in Class II), it is open for the assesses to take advantage of the declaration of the law so made and claim refunds on the ground that they paid the tax Under a

mistake of law. This is because such claims are outside the ambit of the Excise Act. In such cases, the limitation period applicable will be that specified in Section 17(1)(c) of the Limitation Act.

106. Reddy, J. has moulded an exception to the above stated principle. He has held that where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be ignored or put aside as if it did not exist on the basis of the decision in another person's case. However, in my opinion, since the levy of tax has been held to be unconstitutional (which would lead to the conclusion that it should never have been levied in the first place) such an interpretation would be unfair to an assessee who had the foresight to discern the unconstitutionality of the provision (albeit on a different ground) but was unfortunate in not being able to convince the concerned court of the unconstitutionality of the provisions. Considering the gravity of the case, in my opinion, it should be left open to such an assessee to use legal remedy as may be available to him to have the earlier order reviewed or recalled on the basis of the order made in the subsequent case. If he succeeds, well and good; if he fails, he must take the consequence of an adverse order against him.

107. On the issue of the retrospective application of the amended provisions of the Excise Act, I wish to emphasise on practical difficulty that may arise. Reddy, J. has held that in respect of proceedings that have been finally culminated, there is no question of reopening proceedings, and retrospectively applying the amended Section 11B. However, in respect of decrees and orders that have become final but have not been executed, the non obstante clause, Section 11B(3), provides as follows:

(3) *Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court* or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, *no refund shall be made except as provided in Sub-section (2).*

(Emphasis added)

108. It is, therefore, clear that in respect of such decrees and orders, the procedure and conditions prescribed in Section 11B will have to be complied with. However, under the scheme of the amended Excise Act, the application for refund which is a pre- requisite for invoking Section 11B(2), is required to be made within six months from the payment of duty. It is obvious that this requirement cannot be complied with in respect pending decrees and orders. But it must at the same time be realised that in such a case, the assessee was protesting the recovery of the excise duty from him for which he had even initiated legal proceedings. It would therefore be in order to assume that he had paid the duty even though he was protesting its recovery. To ensure that such orders and decrees are not frustrated, it must be deemed that the duties of excise in such cases were paid "under protest" within the meaning of the second proviso to Clause (1) of Section 11B. This would enable the assessees in such cases to file fresh applications under Section 11B(2), thereby complying with the scheme of the amended Excise Act.

109. Subject to the above, I agree with the rest of the conclusions reached by Reddy, J.

K.S. Paripoornan, J.

110. Common questions of law arise for consideration in this batch of cases. Initially the matter came up before a two Member Bench. The said Bench felt that the decision of the Constitution Bench comprising of 5 Judges in Sales Tax Officer, Benaras and Ors. v. Kanhaiya Lal Mukundlal Saraf MANU/SC/0129/1958 : [1959]1SCR1350 requires reconsideration and referred the matter to a larger bench of 7 Judges. When the matter came up before a Bench of 7 Judges, it was noticed that Kanhaiya Lal's case (supra) was expressly approved by a bench of 7 Judges in the decision reported in State of Kerala v. Aluminium Industries Ltd. (1965) 16 STC 689, and so, by order dated 28.7.1993, the said Bench directed that the matter may be placed before the learned Chief Justice for constituting a still larger Bench. That is how this batch of cases came up before a Bench of 9 Judges. We heard, Sri F.S. Nariman, Sri Soli Sorabjee and Sri Harish Salve, Senior Advocates, who appeared for the different assessees (claimants) and Sri K. Parasaran and Sri M. Chandrashekhar, Senior Advocate who appeared for the Union of India.

111. Stated briefly, the controversy centers round the tenability or otherwise of the claim for refund of the amounts paid be way of excise duty under the Central Excises and Salt Act, 1944, now titled as Central Excise Act, 1944 (hereinafter referred to as 'the Excise Act') on the ground that it was so done under "mistake of law". It will be convenient to deal with the controversy by adverting to the minimal facts in the main appeal argued before us - Civil Appeal No. 3255 of 1984 - Mafatlal Industries Ltd., Ahmedabad v. Union of India. The appellant is a textile mill situate at Ahmedabad. The appellant and a few other mills manufacture "blended yarn". The said blended yearn was captively consumed by the various mills for manufacture of fabric, popularly known as "art silk" fabric. For the period prior to March 16/17, 1972, the mills paid excise duty on blended yarn manufactured for captive consumption under Tariff Item 18 or 18A of the First Schedule to the Excise Act. In Special Application No. 1058/72 filed by M/s. Calico Mills, who manufactured fabrics and was captively consuming blended yarn, produced by it for manufacturing fabric known as "art silk fabric", a Division Bench of the Gujarat High Court by judgment dated 15.1.1976, held that the levy of the excise duty on blended yarn prior to March 16/17, 1972, under tariff Item 18 or 18A was clearly ultra vires. The High Court directed refund of the excise duty levied for 3 years prior to institution of the petition, which was instituted on 6.5.1972. The appellant and other mill-owners stated that as a result of the declaration of the law as aforesaid by the Court, they were not liable to pay excise duty on blended yarn up to March 16/17, 1972 and that they had paid the excise duty on the same upto that date under mistake of law. They requested for refund of the excise duty so paid till March 16/17, 1972, stating that such duty was illegally recovered from them. The Revenue did not refund the excise duty as claimed. So, the appellant and others filed suits within three years of the aforesaid judgment (15.1.1976) for refund of excise duty illegally recovered from them, with interest. The trial court decreed the suits. In the appeals filed by the Union of India against the aforesaid decrees passed by the trial court, the High Court of Gujarat allowed the appeals and set aside the decrees passed by the trial courts, by judgment dated 6.4.1984. It was held that in order to successfully sustain the claim of restitution based on Section 72 of the Contract Act, the person claiming restitution should prove "loss or injury" to him, and in the cases before them, the excise duty paid on blended yarn was ultimately passed on to the buyer of the fabric, and so the claim for restitution will not lie. In other words, in cases where an assessee has "passed on" the duty paid by or realised from him, he has suffered no loss or injury, and the action for restitution

is unsustainable. The aforesaid statement of the law is seriously disputed by the appellants in Civil Appeal No. 3255/84 and others.

112. In the ultimate analysis, the main question that falls for consideration in this batch of cases is, whether in an action claiming refund of excise duty (tax) paid under mistake of law, is it essential for the person claiming such refund, to establish "loss or injury" to him? In other words, in cases where the person from whom the excise duty (tax) is collected, has "passed on" the liability or deemed to have passed on the liability, is it open to him to claim refund of the duty paid by him, placing reliance on Section 72 of the Indian Contract Act? The further question as to whether an action by way of civil suit or a writ petition under Article 226 of the Constitution will lie in the light of various amendments to the Act, claiming "refund" or "restitution", also arises for consideration.

113. I perused the draft judgment prepared by my learned brother Jeeven Reddy, J., wherein on the main question, he has held that if the person claiming the refund has passed on the burden of duty to another and has not really suffered any loss or prejudice, there is no question of reimbursing him and he cannot successfully sustain an action for restitution, based on Section 72 of the Indian Contract Act. With great respect, I fully concur with the aforesaid conclusion of my learned brother. But, in view of the importance of the question raised, I would like to record my own reasons for the aforesaid conclusion. I shall separately deal with the maintainability of the action either by way of suit or petition under Article 226 of the Constitution - the extent to which there is ouster of jurisdiction of Courts.

114. In this batch of cases, the claims by different assessees for refund of excise duty paid by them under mistake of law arise over a period of years, and the claims were made in different proceeding - before the departmental authorities, by way of civil suits and writ petitions under Article 226 of the Constitution, which are in appeal before us.

Broadly, the basis for the various refund claims can be classified into 3 groups or categories:

(I) The levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.

(II) The levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.

(III) Mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law.

For the periods during which the refund were claimed, there were different statutory provisions which governed the subject. They are -

(a) Period up to 7.8.1977 - Rule 11 of the Central Excise Rules, before amendment;

(b) Period from 7.8.1977 to 16.11.80 - Rule 11 of the Central Excise Rules, as amended;

(c) Period from 16.11.1980 to 19.9.1991 - Section 11A and Section 11B of the then Central Excises & Salt Act;

(d) Period after 19.9.1991 - Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991.

The circumstances and grounds on the basis of which the refund can be claimed, the period within which it should be so done, the forum before which the claim should be preferred and whether the decision thereon is subject to the jurisdiction of ordinary courts, vary from period to period. We shall advert to such provision and their impact on various aspects regarding the claim for refund a little later.

Rule 11 of the Central Excise Rules which dealt with claims for refund of duty as it was in force prior to 7.8.1977, is to the following effect:

Rule 11. No refund of duties or charges erroneously paid, unless claimed within three months. - No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertance, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be.

It should be noted that Rule 11 before amendment did not provide for any ouster of jurisdiction of courts. We shall deal with Rule 11-A as amended and Sections 11A and B of the Excise Act a little later. The Revenue states that in view of these later provisions, there is ouster of jurisdiction of courts, relating to claims for refund.

115. The claims by different assessee for refund arose and are/were preferred during different periods. After Rule 11 was amended and Sections 11A and B were inserted in the Act, the statute contained provisions making them exclusive for claiming refund. Be that as it may, it is only relevant to state at this juncture that in all cases, irrespective of the relevant statutory provisions in the Excise Act and/or the Rules, the claims for refund were made in different proceedings mainly based on Section 72 of the India Contract Act. So the main issue, in all the cases, that arises for consideration is, whatever be the nature of the attack regarding the levy, or the basis put forward for claiming refund, or the period for which refund is claimed or the character of the proceedings in which it was so done, or the different nature or character of the statutory provisions either providing or not providing as to how and in what manner the claim should be made, - whether the claim for refund is tenable in any of the proceedings, for any period, based on Section 72 of the Contract Act, if the assessee has "passed on" the liability to the consumer or third party?

116. The levy under the Excise Act is an indirect tax (duty). A duty of excise is levied on the manufacture or production of goods. Ordinarily, it is levied on the manufacturer or producer of goods. (Since the levy is in relation to or in connection with the manufacture or production of

goods, it may be levied even at a point later than manufacture or production of the goods.) The duty levied will form part of the total cost of the manufacturer or producer. The levy being a component of the price for which the goods are sold, is ordinarily passed on to the customer. It is a matter of common knowledge that every prudent businessman will adjust his affairs in his best interests and pass on the duty levied or leviable on the commodity to the consumer. That is the presumption in law.

117. The claim for refund in these cases is based upon the plea that excise duty was paid when it was not exigible. It was so done under mistake of law. Refund is claimed basing the action under Section 72 of the Contract Act, which is to the following effect:

Liability for person to whom 72. A person to whom money has money is paid or thing been paid, or anything delivered, delivered, by mistake or under by mistake or under coercion, coercion. must repay or return it.

Illustrations

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Chapter V of the Indian Contract Act is styled thus : "Of Certain Relations Resembling Those Created By Contract". The Chapter contains five sections - Section 68 to 72. The rights and liabilities dealt with in those Sections accrue from relations resembling those created by contract. It is not a real contract, but one implied in law or a quasi-contract.

Law is fairly settled that "Money paid under a mistake or on a consideration which has wholly failed or under duress falls under the general head of money "had and received." An action for money "had and received." An action for money "had and received" is an action "founded on simple contract" which has been called quasi contract or restitution". Pollock & Mulla Indian Contract And Specific Relief Acts (10th Edition) page 598.

118. The Law of Restitution is founded upon the principle of "unjust enrichment". As stated by the learned authors, Lord Goff of Chieveley and Gareth Jones "The Law of Restitution" (3rd Edn.) 1986. "It presupposes three things : first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit. These three subordinate principles are closely interrelated." (page 16).

Cheshire Fifoot & Furmston's "Law of Contract" (12th Edn.) 1991, page 649.)

119. The second aspect aforesaid, namely, that the defendant has been enriched "at the plaintiffs' expense", has been considered by Peter Birks (Professor of Civil Law, University of Edinburgh) "introduction to the Law of Restitution" rather elaborately. The principles discernible from the

above discussion has bee succinctly stated by Endrew Burrows : The Law of Restitution (1993), at page 16, thus:

It is the major theme of Birks' work that this phrase ambiguously conceals two different ideas in the law of restitution. The first, and most natural meaning, is that the defendant's gain represents a loss to the plaintiff : in Birks' terminology a 'subtraction from' the plaintiff'. The second, and less obvious meaning, is that the defendant's gain has been acquired by committing a wrong against the plaintiff.

(Emphasis supplied)

The person claiming restitution should have suffered a "loss of injury". In my opinion, in cases where the assessee or the person claiming refund has passed on the incidence of tax to a third person, how can it be said that he has suffered a loss of injury? How is it possible to say that he has got ownership or title to the amount claimed, which he has already recouped from a third party? So, the very basis requirement for a claim of restitution under Section 72 of the Contract Act is that the person claiming restitution should plead and prove a loss or injury to him; in, other words, he has not passed on the liability. If it is not so done, the action for restitution or refunds, should fail.

120. In this connection, the decision of a three-member Bench of this Court in Mulamchand v. State of Madhya Pradesh MANU/SC/0009/1968 : [1968]3SCR214 , affords some guidance. The appellant in that case, purchased a right to pluck, collect and remove the forest produce from the proprietors. The right was acquired before the propriety rights vested in the State of Madhya Pradesh by Act No. 1 of 1951 - called the Abolition Act. Acting under the Act, in April, 1951 the Deputy Commissioner auctioned the forest produce of villages covered by the purchases of the appellant. Amongst others, the appellant had deposited a sum of Rs. 10,000 towards the right to collect lac from the forest. It turned out that the provisions of Article 299 of the Constitution were not complied with and the contract entered into by appellant therein with the State of Madhya Pradesh was void. The appellant claimed refund on the basis that there was no valid contract. The trial court as well as the appellant court held that the appellant having worked out the contract by collecting the lac from the jungles in pursuance of the agreement, was not entitled to refund of the amount of deposit. In the appeal filed by the appellant, this Court held that if the money is deposited and the goods are supplied or services rendered in terms of the contract, the provision of Section 70 of the Contract, Act may be applicable and, can be invoked by the aggrieved party to the void contract. This Court further held at pages 1222-23, thus:

The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, *quasi-contract or restitution. In Fibrosa v. Fairbaim*, (1943) AC 32 Lord Wright has stated the legal position as follows:

...any civilised system of law is bound to provide remedies for cases of what has been called *unjust enrichment* or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called *quasi-contract or restitution.*

(7) In Nelson v. Larholt (1948) 1 KB 339 Lord Denning has observed as follows.

It is no longer appropriate to draw a distinction between law and equity, Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass *the niceties of the old forms* of action. *Remedies now depend on the substance of the right,* not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders *restitution of the justice of the case so requires.*

(Emphasis supplied)

This Court further stated the law thus:

...It is well established that a person who seeks restitution has a duty to account to the defendant *for what he has received in the transaction from which his right to restitution arises. In other words, an accounting by the plaintiff is a condition of restitution from the defendant* (See 'Restatement of the Law of Restitution', American Law Institute, 1937 Edn., p. 634).

(Emphasis supplied)

The observations extracted above indisputably point out that a person who seeks restitution, has a duty to disclose or account for what he has received in the transaction. An accounting is a condition precedent in an action for restitution. By way of analogy, it can be stated that in cases where restitution is claimed under Section 72 of the Contract Act, on the ground of payment due to mistake of law, the person claiming restitution, should plead and prove that "he has not passed on" the liability to another. That is the nature of "accounting" in cases falling under Section 72 of the Contract Act. In my opinion, the High Court was justified in law in holding that since the excise duty paid by the appellant was ultimately passed on to the buyers of the fabric, and that the appellant has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, was unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991).

121. Mr. F.S. Nariman, Senior Counsel for the appellants, contended that in an action for restitution under Section 72 of the Contract Act, the question as to whether the incidence of duty or tax has been passed on, is an irrelevant factor. There is no such requirement in the statute. The sheet-anchor of the appellant's case is founded on the decision of the Constitution Bench in Kanhaiya Lal's case (supra), which was followed by a Bench of 7 Judges in Aluminium Industries' case (1965) 16 STC 689. It was argued that the decision in Kanhaiya Lal's case was followed subsequently in Tilokchand Motichand and Ors. v. H.B. Munshi and Anr. MANU/SC/0127/1968 : [1969]2SCR824 ; D. Cawasji & Co., Etc. Etc. v. The State of Mysore and Anr. MANU/SC/0060/1974 : 1978(2)ELT154(SC) ; Dhanyalakshmi Rice Mills Etc. v. The Commissioner of Civil Supplies and Anr. MANU/SC/0065/1976 : [1976]3SCR387 Etc. The plea was that the law laid down in Kanhaiya Lal's case has stood the test of time for nearly four decades and there is no requirement either in Section 72 of the Indian Contract Act or in any of the above decisions, holding that in order to claim refund or restitution based on Section 72 of the Contract Act, the liability (duty) should not have been passed on. Our attention was also invited to the

decision of House of Lords in Woolwich Building Society v. Inland Revenue Commissioners (No. 2) (1992) 3 All ER 737, of the Canadian Court in Air Canada case (59 D.L.R. (4th series) 161) (in particular dissenting judgment of Wilson, J.), of the decision of the Australian Court in Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 69 A.L.J. 51, of the European Economic Committee in San Giorgio S.P.A. case (1985) 2 C.M.L.R. 658, and the decision of the United State Supreme Court in United States v. Jefferson Electric Manufacturing Co., 78 Lawyers' Edition 859, It was argued that the preponderance of judicial opinion in other jurisdictions also is in favour of the view, that "passing on" of the liability, is an irrelevant factors for consideration in an action for restitution, and at any rate, it cannot form the basis of a valid defence in an action for "restitution". Mr. Parasaran, Senior Counsel for the Union of India contended that the question of "passing on" of the liability never arose for consideration in Kanhaiya Lal's case nor was it decided. The said decision cannot be an authority for the proposition that a person claiming refund of tax on the ground of mistake of law is not obliged to allege and prove that it has not been passed on; on the other hand, it is mandatory for a claimant in such cases to allege and prove that he suffered a loss or detriment. Then and then alone, that Court can grant the equitable relief of restitution. Counsel also contended that the principle in Kanhaiya Lal's case (supra) has not been uniformly followed by this Court subsequently. Counsel also distinguished the various foreign decisions that were brought to our notice and highlighted the fact that those decisions were rendered on their own facts. Counsel further contended that in cases of indirect levy of tax (ess or fee) which was passed on, this Court has negatived the claim for refund in a few cases. Our attention was invited to the following decisions:

Shiv Shanker Dal Mills Etc. Etc. v. State of Haryana and Ors. Etc. MANU/SC/0032/1979 : [1980]1SCR1170 ; State of Madhya Pradesh v. Vyankatlal and Anr. MANU/SC/0258/1985 : [1985]3SCR561 , 566-568; Amar Nath Om Parkash and Ors. Etc. v. State of Punjab and Ors. Etc. MANU/SC/0224/1984 : [1985]2SCR72 ; Indian Aluminium Company Limited v. Thane Municipal Corporation MANU/SC/0712/1991 : [1992] Supp. 1 SCC 480 (488-489) and State of Rajasthan and Ors. v. Novelty Stores Etc. MANU/SC/0223/1995 : AIR1995SC1132 .

122. The main case relied on, Kanhaiya Lal's case (supra) requires a little detailed examination. The respondent, Kanhaiya Lal was a firm. For the assessment years 1948-49, 1949-50 and 1950-51, its forward transactions were brought to tax by the Assessing Authority - the Sales Tax Officer, as per Assessment orders dated 31.5.1949, 30.10.1950 and 22.8.1951. On 27.2.1952, the Allahabad High Court in Messrs Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur and Ors. (1952) A.L.J. 332 held that the provisions of the Uttar Pradesh Sales Tax Act, taxing forward contracts were ultra vires the U.P. Legislature. The said judgment was affirmed by this Court or 3.5.1954. The attempts of the assessee to obtain refund of tax basing its claim on Budh Prakash Jai Prakash case before the statutory authorities were futile. Thereafter, the assessee-firm filed a writ petition in the High Court, praying to quash the assessment orders, and for direction for refund of tax illegally collected. By judgment dated 30.11.1956, a learned single Judge of the High Court, allowed the writ petition. In the appeal, the Revenue contended that since the tax was paid under mistake of law, it was not recoverable. Even so, relying on Section 72 of the Contract Act, the Division Bench affirmed the decision of the single Judge. The Revenue took up the matter in appeal before this Court. The pleas of the appellant-Revenue, that the assessee should have followed the procedure prescribed by the U.P. Sales Tax Act and, that the writ petition filed for

refund of money would not lie, were not allowed to be urged by this Court. Mainly, two questions arose before this Court for consideration -

(i) Whether the term "Mistake" occurring in Section 72 of the Contract Act took within its fold "mistake of Law" as well as "mistake of fact"?

(ii) Whether the tax paid under mistake of law can be recovered under Section 72 of the Indian Contract Act?

This Court held that word "mistake" occurring in Section 72 of the Contract Act has been used without any qualification or limitation and, so, it takes within its fold "mistake of law" as well as "mistake of fact". On the second question, this Court held that once it is established that the payment, even though it be a tax, has been made by the party under a mistake of law, the party is entitled to recover the same and a party who received the tax is bound to repay or return it. This Court held that there can be no distinction in a tax liability and any other liability on a plain reading of Section 72 and the plea that tax paid by mistake of law cannot be recovered under Section 72, will not be a proper interpretation of the relevant provisions, but to make a law, adding such words as "otherwise than by way of taxes" after the word "paid". The scope of Section 72 was considered only within a limited sphere. It should be noticed that no question was raised before this Court that in order to claim refund (restitution) of sales tax paid, - (an indirect levy) - under Section 72, the claimant should necessarily prove that he has sustained "a loss, or injury". In other words, the tax collected by him has not been passed on to a third party. Dealing with the plea that the position in law obtaining in England, America and Australia that money paid under mistake of law could not be recovered, and that similar considerations should weigh in interpreting Section 72, the Court held that the true meaning and intent of Section 72 should be interpreted on its own terms, divorced from all considerations, as to what was the state of previous law or the law in England or elsewhere. This Court made further observations to the following effect:

If it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act, even though such a distinction has been made in America vide the passage from Willoughby on the Constitution of the United States, Vol. 1, p. 12 op cit. To hold that tax paid by mistake of law cannot be recovered under Section 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" after the word "paid".

Voluntary payment of such tax liability was not by itself enough to preclude the respondent from recovering the said amounts, once it was established that the payments were made under a mistake of law. On a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been voluntarily, *subject however to questions of estoppel, waiver, limitation or the like.* If, once that circumstance is established the party is entitled to the relief claimed.

No question of estoppel can ever arise where both the parties, as in the present case, are labouring under the mistake of law and one party is not more to blame than the other.

The other circumstances would be such as would entitle a court of equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the court to award the relief to the plaintiff. These are, however, *equitable considerations and could scarcely be imported when there is a clear* and unambiguous provision of law which entitles the plaintiff to the relief claimed by him.

Merely because the State of U.P. had not retained the monies paid by respondent but had spent them away in the ordinary course of the business of the State would not make any difference to the position and under the plain terms of Section 72 of the Indian Contract Act the respondent would be entitled to recover back the monies paid by it to the State of U.P. under mistake of Law.

(Emphasis supplied)

123. It is apparent that in Kanhaiya Lal's case there was no plea by the Revenue that since the assessee has passed on the tax, the claim for refund is unsustainable. Such a question was not posed before this Court for consideration. One of the main aspects to be proved in a claim for restitution, that the person claiming restitution should have suffered a loss or injury in order to sustain an action, was not urged and was not considered. In such a situation the following observations of Lord Halsbury in Quinn v. Leathem (1901) A.C. 495 at p. 506, quoted with approval by a Constitution Bench of this Court in State of Orissa v. Sudhansu Sekhar Misra MANU/SC/0047/1967 : (1970)ILLJ662SC and again in Orient Paper and Industries Ltd. and Anr. v. State of Orissa and Ors. MANU/SC/0169/1991 : [1991] Supp. 1 SCC 81, at page 96, should govern the matter.

...there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. *The other is that a case is only an authority for what it actually decides.* I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

(Emphasis supplied)

The above in Kanhaiya Lal's case, and the cases following the said case. The said decisions cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution.

It also appears that there is some inconsistency in the Kanhaiya Lal's case. The basis in an action for restitution under Section 72 of the Contract Act, rests upon the equitable doctrine of unjust enrichment. The Court observed on page 1364 that the recovery of the money paid under mistake of law or fact can be recovered "subject however to questions of estoppel, waiver, limitation or the

like". Even so, at page 1366, the Court has observed "equitable considerations could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claims by him." The very basis of the claim, though statutorily incorporated in Section 72 of the Contract Act, is equitable in nature and if so, how can it be said that equitable considerations should not be applied in adjudicating the claim for restitution (refund)? If an assessee has passed on the tax to the consumer or a third party and sustained no loss or injury, grant of refund to him will result in a windfall to him. Such a person will be unjustly enriched. This will result in the assessee or the claimant obtaining a benefit, which is neither legally nor equitably due to him. In other words, such a person is enabled to obtain an unjust benefit" at the cost of innumerable persons to whom the liability (tax) has been passed on and to whom really the refund or restitution is due. The above factors certainly disentitle such a person from claiming restitution. If the decision in Kanhaiya Lal's case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect to the learned Judges, who rendered the above decisions, I express my dissent thereto.

124. Shri Nariman and Shri Sorabjee also contended that if the relief of refund is withheld or denied on the ground that the assessee has passed on the tax (liability) to the consumer or third party, It will result in a position where the State is enabled to retain and appropriate the unlawful collection to itself. The plea was that Article 265 of the Constitution of India contains a mandate to the effect that "no tax shall be levied or collected except by authority of law". It was argued that this is a basic feature of the Constitution and cannot be ignored. If no tax can be collected except by authority of law, the same logic would prevail for retention of amounts collected without the authority of law. Reference was made in this connection to the decision of the Madras High Court in Rayalaseema Constructions v. Dy. Commercial Tax Officer, MANU/TN/0221/1959 : 10 STC 345 (355-356) and affirmed by this Court in Dy. Commercial Tax Officer, Madras v. Rayalaseema Constructions 17 STC 505. The plea urged was that, if the assessee, is denied the refund, the State Government could retain the amount illegally collected, and it would amount to violation of the constitutional mandate enshrined in Article 265 of the Constitution. An equitable principle will not hold good against a constitutional mandate. On the other hand, Counsel for the Union of India, Sri K. Parasaran, brought to our notice the following portion of the Preamble and Article 39(b) and (c) of the Constitution to contend that Article 265 of the Constitution cannot be construed in a vacuo or isolation, but should be construed in the light of the basic principles contained in other parts of the Constitution -viz. - the Preamble and the Directive Principles of State Policy:

Preamble

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizen:

JUSTICE, social, economic and political;

x x x

Article 39(b)-(c):

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(Emphasis supplied)

Mr. Parasaran also urged that it should be borne in mind that excise duty is an indirect levy or tax which could be passed on. Innumerable persons bear the brunt. And it is passed on, ordinarily by prudent businessmen. The decisions in R,C. Jail v. Union of India MANU/SC/0315/1962 : [1962] Supp. 3 SCR 436 and The Province of Madras v. Boddu Paidanna and Sons MANU/FE/0008/1942 : (1942) F.C.R. 90, were referred to. Reference also was made to Section 64A of Sale of Goods Act, 1930 which was substituted later by Act 33 of 1963 to show that the levy could be passed on and so recognised by statute, and in the above background, there is a presumption that excise duty has been passed on. The scope of Article 39(b) of the Constitution, as laid down by this Court in State of Karnataka and Anr. Etc, v. Shri Ranganatha Reddy and Anr. Etc. MANU/SC/0062/1977 : [1978]1SCR641 ; Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. and Anr. MANU/SC/0040/1982 : [1983]1SCR1000 ; State of Tamil Nadu Etc. Etc. v. L. Abu Kavur Bai and Ors. MANU/SC/0073/1983 : [1984]1SCR725 was highlighted. Reliance was placed on Amar Nath Om Prakash and Ors. Etc. v. State of Punjab and Ors. Etc. MANU/SC/0224/1984 : [1985]2SCR72 , at pp. 96, 97, 99, 100; Shiv Shanker Dal Mills Etc. Etc. v. State of Haryana and Ors. Etc. MANU/SC/0032/1979 : [1980]1SCR1170 and Walaiti Ram Mahabir Prasad v. State of Punjab and Ors. MANU/PH/0165/1984, at p. 124, to stress the point that the persons claiming refund who were only middle-men, should not be unjustly enriched and allowed to make a "fortune" as it were, at the expense of innumerable unidentifiable innocent consumers and that "public interest" requires that such persons claiming refund should not be unduly or unjustly benefited; and, public interest is better served, if the State is allowed to retain the collection of tax, which could be made/spent, for the benefit of the "public.

125. On an evaluation of the rival pleas urged in the matter, I am of the view that the plea of Counsel for Union of India should prevail.

Following the decision in the Province of Madras case (supra) and other cases, a Constitution Bench of this Court in R.C. Jall v. Union of India (supra) at page 451 stated the nature and character of excise duty, thus:

Excise duty is primarily a duty on the production of manufactured of goods produced or manufactured within the country. *It in an indirect duty which the manufacturer or producer passes on to the ultimate consumer,* that is, its ultimate incidence will *always* be on the consumer.

(Emphasis supplied)

Section 64A of the Sale of Goods Act after its amendment by Act 33 of 1963, in providing that in contract of sale amount of increased or decreased taxes, may be added or deducted by the seller or by the buyer, in case of increase or decrease or remitted, after the making of the contract for the

sale or purchase of such goods, without stipulation as to the payment of tax where a tax was not chargeable at the time of making the contract, expressly states that the provisions shall apply to any duty of customs or excise and any tax on the sale or purchase of goods. The scope of Article 39(b) of the Constitution which has as its basis the concept of "distributive justice", as explained in three cases referred to in the previous paragraph; Shri Ranganatha Reddy MANU/SC/0062/1977 : [1978]1SCR641 ; Sanjeev Coke v. Bharat MANU/SC/0040/1982 : [1983]1SCR1000 and L. Abu MANU/SC/0073/1983 : [1984]1SCR725 go to show that the words "material resources" occurring in Article 39 Clause (b) will take in, natural or physical resources and also movable or immovable property and it would include all private and public sources of meeting material needs, and not merely confined to public possessions. So also, the three cases, shiv Shanker Dal Mill's case MANU/SC/0032/1979 : [1980]1SCR1170 , Amar Nath Om Prakash's case MANU/SC/0224/1984 : [1985]2SCR72 and Walaiti Ram Mahabir Prasad MANU/PH/0165/1984, emphasise the principle that the persons who have passed on the burden of the levy - middlemen - should not be allowed to profiteer by illgotten gains and unjustly enriched. An analysis of the above decisions in detail will point out that if Article 265 of Constitution is literally interpreted and in isolation, and refund ordered, in cases where excise duty has been passed on, it will result in a mockery, totally ignoring the other salient features of the Constitution and the ground realities. As the Preamble states, the Constitution was enacted by the people, to secure to all the citizen, justice, political, social and economic. It is fairly settled by the decisions of this Court, that the directive principles contained in Part IV of the Constitution are fundamental in the governance of this country and all organs of the State including the judiciary are bound to enforce those directives. In interpreting the various provisions of the Constitution, the courts have to be realistic and should be alive to the needs of the times. The courts have a responsibility to ensure proper and meaningful interpretation of the directive principle and to adjust or harmonise the objectives enshrined in the Preamble - justice, political, social and economic and the directive principles contained in Part IV, with the individual rights. In the process, it is permissible to restrict, abridge, curtail and in extreme cases, abrogate other rights in the Constitution, if found necessary and expedient, in particular situations. In the light of the above, I hold that Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to the claim of restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto. The observation of a three-Member Bench of this Court in Orissa Cement Ltd. v. State of Orissa MANU/SC/0381/1991 : [1991]2SCR105 , is apposite in this context.

We are inclined to accept the view urged on behalf of the State that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the court has, and must be held to have, a certain amount of discretion. It is a well settled proposition that it is open to the court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice.

126. It is open to the Court to deny the equitable remedy of refund (restitution) in such cases. The attempt of persons who have passed on the liability in claiming refund is only to strike at a bargain - to make a fortune at the expense of innumerable unidentifiable consumers. Such persons have suffered no loss. On the other hand, if the State is allowed to retain the amount, it will be available

to the community at large and could be made use of for public purposes. On this basis as well, the denial of refund or restitution is valid. There is nothing abhorrent or against public policy if refund or restitution is withheld in such a situation. It should also be stated that in cases of indirect levy of tax which was passed on, this Court has negatived the claim for refund in a few cases, mentioned in paragraph 12 (supra); - Shiv Shanker Dal Mills v. State of Haryana MANU/SC/0032/1979 : [1980]1SCR1170 ; State of Madhya Pradesh v. Vyankatlal and Anr. MANU/SC/0258/1985 : [1985]3SCR561 ; Amar Nath Om Prakash and Ors. v. State of Punjab and Ors. MANU/SC/0224/1984 : [1985]2SCR72 ; Indian Aluminium Company Limited v. Thane Municipal Corporation [1992] 1 Supp. 1 SCC 480 (488-489) and State of Rajasthan and Ors. v. Novelty Stores etc. MANU/SC/0223/1995 : AIR1995SC1132 .

127. It now remains to consider the foreign decisions brought to our notice. The various decisions of foreign courts and their scope have been very exhaustively considered by Jeevan Reddy, J. in his judgment under the heading "Decisions of foreign courts on the subject". I am in broad agreement with my learned brother Jeevan Reddy, J., in the analysis of the various decisions aforesaid. It is unnecessary to cover that ground over again.

128. In this context, it will not be out of place to note that academicians have bestowed great thought and in various articles dealt with the matter in sufficient detail, particularly with reference to the foreign decisions brought to our notice. To mention a few, they are -

(1) When Money is paid in Pursuance of a void authority...." - A duty to replay? by Peter Birks: (Public Law (1992) page 580)

(2) "Restitution of taxes, levies and other imposts: Defining the extent of the Woolwich Principle" - by J. Beatson: Law Quarterly Review Vol. 109 (1993) Page 401.

(3) "Restitution of Overpaid Tax, Discretion and Passing-on" - by J. Beatson. (Law Quarterly Review Vol. 111 (1995) page 375 Notes.

(4) "Unjust Enrichment" - by Steve Hedley (Cambridge Law Journal 1995 (578-599).

(5) "Unjust Enrichment Claims: A Comparative Overview" - by Brice Dickson (Cambridge Law Journal (1995) (100-126)

(6) "The Law of Taxation is not an Island - Overpaid Taxes and the Law of Restitution" - by Graham Virgo; (British Tax Review (1993) (442-467)

(7) "Payments of Money under Mistake of Law: A Comparative View" - by Gareth Jones [Cambridge Law Journal (1993) Comment (225)]

(8) "Restitution, Misdirected Funds and Change of Position" - by Ewen McKendrick [Modern Law Review (1992) Vol. 55 (377-385)].

In some of the articles, the defences to a claim for restitution of overpaid taxes, has been dealt with the detail. One of them is the article by Graham Virgo's appearing in British Tax Review (1993)

(pp. 442-467) titled "The Law of Taxation is not an Island - Overpaid Taxes and the Law of Restitution", pages 462 and 463 under the sub-heading "Passing on", the learned author has made the following comment:

(vii) Passing on 48[4]

Since restitution at common law is based upon the principle of reversing an unjust enrichment, it is important to determine whether the defendant was actually enriched at the plaintiff's expense. This raises a difficult problem where the Revenue was initially enriched at taxpayer's expense, by virtue of the receipt of overpaid tax, *but the taxpayer did not ultimately suffer a loss because the burden of the payment was passed on to somebody else.* This could arise if the taxpayer pays excessive VAT and passes the amount overpaid on to customers 49[5]. As a matter of principle it could be argued that, in such a case, the taxpayer should not be allowed to recovery the amount overpaid from the Revenue, because recovery *would mean that the taxpayer was unjustly enriched* at the expense of *those who ultimately bore* the burden of the tax 50[6]. A possible solution to this is to allow those who effectively paid the tax to recover from the tax payer, who in turn should recover from the Revenue, *However, typically in cases of passing on there are many people who effectively bear the burden of the tax and to encourage actions by them would be impractical and unrealistic, Thus, in such cases the best approach is to allow the Revenue a defence of passing on and enable it to retain the tax and use it for the public benefit.*

However, it remains uncertain to what extent a defence of passing on exists in English law 51[7]. Such a defence is recognised by European Community law. In *Administration delle Finanze dello Stato v. SpA San Giorgio* it was held that Community law does not prevent Member States from "disallowing repayment of charges which have been unduly levied to do so would entail unjust enrichment of the recipients," for example where the unduly levied charges have been incorporated in the price of goods and passed on to purchasers, Although this decision is confined to charges levied contrary to the rules or Community law, the very fact that Community law accepts the validity of a defence of passing on and accepts that the rationale of it *is to avoid the unjust enrichment of the initial taxpayer, is a good reason for the defence to be adopted-generally in English law.* It would be odd if there were a divergence of approach between English and Community law on this matter.

However, it must be noted that Community law "does not prevent" Member States from adopting a defence of passing on. The *San Giorgio* case is not authority for the proposition that Member States *must* adopt such a defence. There has been some disquiet expressed as to the need for such a defence in theory and how it would work in practice. The defence was rejected in *Mason v. New South Wales.* The operation of the defence is fraught with difficulties because it is not easy to show that the charge was passed on in the price of goods. For the price of goods is affected by many factors, conditional upon the state of the market. Advocate General Mancini in the *San Giorgio* case said that the "passing on of charges is not generally relevant because of the innumerable variables which affect price formation in a free market and because of the consequent impossibility of definitively relating any part of the price exclusively to a certain cost." Thus, may be the price of goods was increased in an attempt to recoup the tax paid to the Revenue from the purchasers of goods, but this in turn may have had an impact on sales volume resulting in an overall loss. The

burden of the enrichment cannot really be said to have been passed on when the initial taxpayer suffers a net loss.

It is submitted that in principle a defence of passing on should exist, with a burden of proving this being on the Revenue: in unlawfully demanded the taxes and so it should show that repayment would unjustly enrich the taxpayer. It is unlikely that such a defence would operate successfully in practice in many cases because of the difficulty of proving that the tax was actually passed on.

(Emphasis supplied)

Similarly, in the Article by J. Beatson (1993) 109 L.Q.R. 401 (427-428), the learned author has stated regarding passing on, thus:

"Passing on." The Law Commission raised the question of whether a payer who was "passed on" to others, for instance by price increases, the higher cost he has borne because of the overpayment should be precluded from recovering. This defence is permitted by European Community Law so long as it does not have the effect of making the right to recover impossible in practice or excessively difficult to exercise. However, it has been criticised, technically because, inter alia, price increases should mean that less will be sold, and also because of difficulties of proof. These difficulties were noted by Lord Goff, and arguments for a similar limit were not accepted by the High Court of Australia in Mason v. South Wales. However, the underlying rationale of a "passing on" defence might be achieved by providing, as in the statutes on recovery of Value Added Tax and car tax, that recovery should not be allowed if the payee can show that the payer would be unjustly enriched if he recovered the payment. This would be consistent with the basic equitable features that have influenced the development of the action for money had and received. It is also possible that such a limit would achieve the same policy ends as the "reasonable and just" limit in provisions such as Section 33 of the Taxes Management Act 1970 and, if so, it might provide a useful method of achieving a measure of rationalisation. (pp. 427-428)

129. Mention may also be made about the Law Commission's Report in England, Law Consultation Paper No. 120 "Restitution of Payments made under a mistake of law" - wherein, after discussing the entire case law of England and other jurisdiction, an observation is made thus:

3.85. In principle there would appear to be no reason why such a defence should not apply to cases where the authority can prove on the balance of probabilities that the payer would be unjustly enriched because the charge has been passed on. The views of consulters on the general issue of a "passing on" defence are invited.

In Kanhaiya Lal's case MANU/SC/0129/1958 : [1959]1SCR1350 , this Court was not inclined to accept the defence in mitigation that the State has not retained the amount, but has spent them away in the ordinary course of governmental activities. This plea in defence based on the theory of "Change of Position" has been dealt with by Graham Virgo in his article in British Tax Review (1993) at pages 458-459. See also the views expressed in this behalf by a two-Member Bench of this Court in D. Cawasji & Co. v. State of Mysore MANU/SC/0060/1974 : 1978(2)ELT154(SC) .

130. I am of the view that the above academic opinion has got much force. However, it is subject to one aspect, stated hereunder. As held by me earlier, ordinarily, the presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the 'duty element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an in depth analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge of the taxpayer, the burden of proving that the liability has not been passed on should lie on him. It is held accordingly.

131. The next important question that falls to be considered is, as to what extent the jurisdiction of the ordinary courts is ousted regarding claims for refund of tax illegally levied or collected?

According to the Revenue, the Act is a special enactment creating new rights and liabilities and has also made exhaustive provisions, to ventilate the grievances against all illegal and improper assessments by way of appeals, revisions etc. and also to obtain refunds in appropriate cases by following certain procedures and fulfilling some conditions. A hierarchy of tribunals is provided to afford relief to the assessees. Elaborate alternate remedies provided by the Act, taken along with the specific bar of the jurisdiction of courts provided in Rule 11 (as amended) and Section 11(B) of the Act, and in particular specifying the conditions and procedure for entertaining claims for refund, period of limitation within which the claim should be preferred, etc. will oust/bar the jurisdiction of ordinary courts in that regard. (Attention was also drawn to Sections 11C 11D and also to Sections 12A to D of the Act, to stress the scheme of the Act). On the other hand, counsel for the assesses-claimants urged that the provisions in the Act dealing with refund of tax "unconstitutionally" or "illegally" or "unauthorisedly" collected are not exhaustive. Even so, in cases where the levy is unconstitutional or illegal or without jurisdiction, the jurisdiction of the Civil Courts is not barred to annul the levy and/or order refund.

132. As stated by me earlier in paragraph 5 of this judgment, the claims for refund can be classified broadly into 3 groups. They are -

(I) the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.

(II) the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure.

(III) mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation) he initiated action for refund of the tax paid by him, due to mistake of law.

133. The relevant provisions of law that existed during different periods dealing with the claim for refund are different in content and scope. They are as follows:

(a) Period up to 7.8.1977 - Rule 11 of the Central Excise Rules, before amendment;

(b) Period from 7.8.1977 to 16.11.80 - Rule 11 of the Central Excise Rules, as amended;

(c) Period from 16.11.1980 to 19.9.1991 - Section 11A and Section 11B of the Central Excises & Salt Act; and

(d) Period after 19.9.1991 - Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991.

Rule 11 of the Central Excise Rules which was in force prior to 7.8.1977, has been quoted in paragraph 5 of this judgment. It contains no specific provision relating to ouster of jurisdiction of the courts.

134. Rule 11 of the Central Excise Rules as amended, Section 11A and Section 11B before Amendment Act 40 of 1991 and Section 11B, as amended by Act 40 of 1991, will be more important to consider the question of ouster of jurisdiction of courts. Sections 11C 11D as also Sections 12A to D of the Act, will throw light on the scheme of the Act as amended. They are as follows (insofar as they are relevant in the instant cases):-

Rule 11 as amended

Rule 11. Claim for refund of duty. -

(1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty.

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation.- Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Whether as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.

Explanation. - For the purposes of this rule, 'refund' includes rebate referred to in Rules 12 and 12A.

Section 11-A

11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) when any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously, refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words 'six months', the words 'five years' were substituted.

Explanation. -...

(u) 'relevant date' means, -

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid...

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

SECTION 11-B BEFORE AMENDMENT BY ACT 40/1991

11B. *Claim for refund of duty.* - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) *Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.*

(5) *Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.*

Explanation. - For the purpose of this section....

(B) 'relevant date' means -

(1) in any other case, the date of payment of duty.

SECTIONS 11B 11D AND 12A TO D, AS AMENDED BY ACT 40/1991

11B. *Claim for refund of duty.* - (1) Any person claiming refund of any duty or excise may make as application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, *him and the incidence of such duty had not been passed on by him to any other person:*

Provided that where an application for refund has been *made before the commencement* of the Central Excises and Customs Laws (Amendment) Act, 1991, such *application shall be deemed to have been made under this sub-section as amended by the said Act* and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable material used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) *Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).*

Explanation. - For the purposes of this section,...

(B) 'relevant date' means -

(f) in any other case, the date of payment of duty.

(Emphasis supplied)

Section 11C deals with the power of Central Government to dispense with recovery of excise duty in certain specified cases, which is not necessary for our discussion. Section 11D and Sections 12A to D highlight the new scheme of the Act, relating to refund and they are as follows:

11D. Duties of excise collected from the buyer to be deposited with the Central Government.

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the rules made thereunder every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against duty of excise payable by the person on the finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application

under that section in such cases shall be the date of the public notice to be issued by the Assistant Commissioner of Central Excise.

12A Price of goods to indicate the amount of duty paid thereon

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sale invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

12B. Presumption that incidence of duty has been passed on to the buyer

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer welfare fund

(1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in Sub-section (2) of Section 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

12D. Utilisation of the Fund

(1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

It is evident that Rule 11, before amendment, provided a time limit to apply for refund. Rule 11(4) as amended, Section 11B Clauses (4) and (5) before amendment and Section 11B Clause (3) after amendment, specifically oust the jurisdiction of the ordinary courts. Detailed provisions are also provided to ventilate the grievances and making such provisions exclusive. Other ancillary or

incidental provisions are specified in Sections 11D and 12A to D - Section 11D provides that every person, who collects excise duty from the buyer, should deposit the same with the Central Government. It will be adjusted against the duty of excise payable by the person concerned on finalisation of the assessment. Section 11D requires clarification. Excise duty is, ordinarily paid or payable at the time of clearance of the goods. The sale of the goods may be later. So, if excise duty due is already paid by the manufacturer, and later collected by him when the goods are sold, such collection, need not be paid to the Government. Only if the duty has not been paid already or if any excess is collected over the duty already paid, then only an occasion arises for payment of the duty collected or excess collected - and this is the purport of Section 11D. The said section (Section 11D) should be understood in the above practical and business sense. Section 12A provides that the price of the goods sold should indicate the amount of duty, which will form part of the price. Section 12B states that the person, who has paid the duty of excise on any goods under the Act, shall be deemed to have passed on the incidence of such duty to the buyer of such goods. It is a rebuttable presumption. Section 12C creates the "Consumer Welfare Fund". The amount of duty referred to in Sections 11B(2) 11C(2) and 11D(2) shall be credited in the said Fund. Section 12D provides that the Fund shall be utilised for the welfare of the consumers.

135. The question that falls to be considered is as to how far or to what extent the jurisdiction of the ordinary courts is barred, in view of the alternate remedies provided by the Act by way of appeals, revisions, claims for refund and the period of limitation provided therefor, etc. and specifically excluding the jurisdiction of the civil courts for claiming refund? In discussing this aspect, one has to bear in mind the content of Article 265 also. It will apply where the statute is unconstitutional or invalid and also where the collection is unauthorised/illegal, i.e., without "authority of law".

136. It is settled law that exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. There are a few decisions of Judicial Committee of the Privy Council and innumerable decisions of this Court which have dealt with the matter in detail. I propose to deal, only with the landmark decisions on the subject. In Secretary of State v. Mask & Co. MANU/PR/0022/1940, the Judicial Committee laid down the law thus:

...It is settled law that the exclusion of the jurisdiction of the Civil

Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even *if jurisdiction is so excluded,* the Civil Courts have jurisdiction to examine into cases where the provisions of the Act *have not been complied with, or the statutory tribunal has not acted in conformity* with the fundamental principles of judicial procedure.

(Emphasis supplied)

The scope of the above observation has been explained by a Constitution Bench of this Court, in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh MANU/SC/0211/1963 : [1963]50ITR93(SC) . The minimal facts in this case will be relevant to understand the scope of the decision. The case arose under the Madras General Sales Tax Act, 1939. Section 18A of the

Act provided that no suit or other proceeding shall except expressly provided in the Act, be instituted in any court to set aside or modify any assessment made under the Act. The Act also contained provisions by way of appeals, revisions and further revision to the High Court. The levy under the Act was only on "purchase" of 'ground-nuts', but the Sales Tax authorities brought to tax the "sales" turnover and collected tax. The assessee contended that levy of tax on the sales turnover as distinguished from the purchase turnover is illegal, and filed a suit for recovery of the amount so collected. It should be noticed that the assessee himself voluntarily made a return and paid the tax. In such circumstances, the question arose, whether the suit so filed is maintainable in view of the adequate alternate remedies provided by the Act and the ouster of jurisdiction of the courts expressly contained in Section 18A of the Act? On the facts of the case, it was held that the suit was barred. In considering the question of exclusion of jurisdiction of the civil courts to entertain civil actions by virtue of specific provisions contained in the special statute, reference was made to the decision of the Judicial Committee in Secretary of State v. Mask & Co. (supra). After referring to the observations of the Judicial Committee quoted hereinabove, this Court in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh MANU/SC/0211/1963 : [1963]50ITR93(SC) explained the said observations thus:

...It is necessary to add that these observations, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under provisions of the relevant taxing statute, its validity can be challenged by a suit on *the ground that it is incorrect on the merits* and as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute *as would make the entire proceedings before the appropriate authority illegal and without jurisdiction.* Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is *cases of this* character where the defect or the infirmity in the order *goes to the root of the order and makes it in law invalid and void* that these observations may perhaps be invoked in support of the plea that civil court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute. In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant *that on the merits, the decision of the assessing authority was wrong cannot be the subject-matter of the suit because S. 18-A* clearly bars such a claim in the civil courts.

(Emphasis supplied)

In this case, the relevant Act contained detailed and specific provisions by way of appeal, revision etc. to ventilate the grievances of the assessee. In addition thereto, there was specific provision ousting the jurisdiction of the courts. Even so, the court did not hold that the principles laid down in Mask & Co. case are inapplicable. The principles in Mask & Co. case were affirmed and explained.

137. The decision of the Privy Council in Mask & Co. case (supra), and other decisions of the Privy Council and of this Court, were surveyed in detail by a Constitution Bench of this Court in Dulabhai Etc. v. State of Madhya Pradesh and Anr. MANU/SC/0157/1968 : [1968]3SCR662 . In

that case, the assessees filed a suit for refund of the tax on the ground that it was illegally collected from them being against the constitutional prohibition contained in Article 301 of the Constitution of India and not saved in Article 304(a) of the Constitution. Section 17 of the relevant Act was pleaded in defence as a bar to the maintainability of the suit. Section 17 provided that no assessment made ' and no order passed under the Act or the Rules by any of the statutory authorities, shall be called in question in any case. The court held that notwithstanding, the alternate remedies by way of appeal, revision, rectification and reference to the High Court, the tax therein was levied without a complete charging section and this affected the jurisdiction of the tax authorities, and so, the suit was maintainable, and decreed the suit. After referring to the relevant decisions and in particular, Secretary of State v. Mask & Co. MANU/PR/0022/1940; Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh MANU/SC/0211/1963 : [1963]50ITR93(SC) , this Court held in paragraph 28 of the judgment, thus:

The Constitution Bench, however went on to examine the rulings of the Judicial Committee in Mask and Co.'s and Realign Investment Co.'s cases, 67 Ind App 222 - MANU/PR/0022/1940. Dealing with the former case, this Court pointed out that non-compliance with the provisions of the statute meant non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and *without jurisdiction...*

(Emphasis supplied)

Referring to the facts Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh MANU/SC/0211/1963 : [1963]50ITR93(SC) , it was further observed:

The case of Firm of Illuri Subbayya MANU/SC/0211/1963 : [1963]50ITR93(SC) *may be said to be decided on special facts with additional reference to the addition of Section 18-A* excluding the jurisdiction of civil court and the special remedies provided in Sections 12-A to 12-D by which the matter could be taken to the highest civil court in the State.

(Emphasis supplied)

This Court also considered the facts and the actual decision of the Special Bench of 7-Judges in Kamala Mills Ltd. v. State of Bombay MANU/SC/0291/1965 : [1965]57ITR643(SC) in detail, with reference to Section 20 of the Bombay Sales Tax Act, 1946, and observed thus:

The Special Bench refrained from either accepting the dictum of Mask Co. 's case MANU/PR/0022/1940 or rejecting it, to the effect that even if jurisdiction is excluded by a provision making the decision of the authorities final, the civil courts have jurisdiction to examine into cases where the provisions of the particular Act are not complied with.

It is evident from the above, that the principle laid down in Mask & Co. case, though explained, was not questioned, or departed from, either, in Illuri Subbayya Chetty's case or Kamala Mills case. In a subsequent decision - Ram Swamp v. Shikar Chand MANU/SC/0338/1965 : [1966]2SCR553 , a Constitution Bench of this Court again considered the scope of the decisions in Mask & Co.'s case (supra) and Kamala Mills's case (supra). Ram Swamp's case arose under the U.P. (Temporary) Control of Rent and Eviction Act. Section 3(4) of the Act provided that the order

passed by the designated authority shall be final and Section 16 thereof further provided that the order passed by the State Government or the District Magistrate, shall not be called in question in any court. In other words, the jurisdiction of civil courts was excluded in relation to the matters covered by orders included within the provisions of Sections 3(4) and 16 of the said Act. The Constitution Bench approached the matter thus:

One of the points which is often treated as relevant in dealing with the question about the exclusion of civil Courts' jurisdiction, *is whether the special statute* which, it is urged, *excludes such jurisdiction,* has used clear and unambiguous words indicating that intention. Another test which is applied is: does the said statute provide for *an adequate and satisfactory alternative remedy to a party* that may be aggrieved by the relevant order under its material provisions? Applying these *two tests,* it does appear that the words used in S. 3(4) and S. 16 are clear. Section 16 in terms provides that the order made under this Act to which the said section applies shall not be called in question in any Court. This is an express provision excluding the civil Courts' jurisdiction. Section 3(4) does not expressly exclude the jurisdiction of the civil Courts, but, in the context, the inference that the civil Courts jurisdiction is intended to be excluded, appears to be inescapable. Therefore, we are satisfied that Mr. Goyal is right in *contending that the jurisdiction of the civil Courts is excluded in relation to matters covered by the orders included within the provisions of S. 3(4) and S. 16.*

(Emphasis supplied)

Even so, this Court proceeded to state in paragraph 13 at page 896, to the following effect:

This conclusion, *however, does not necessarily* mean that the plea against the validity of the order passed by the District Magistrate, or the Commissioner, or the State Government, *can never be raised in a civil Court. In our opinion, the bar created by the relevant provisions of the Act excluding the jurisdiction of the civil Courts cannot operate in cases where the plea raised before the civil Court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity.*

(Emphasis supplied)

This Court referred to the decisions of the Judicial Committee, in Secretary of State v. Jatindra Nath Choudhry MANU/PR/0052/1924 : AIR (1924) PC 175 and the decision in Mask & Co., and also quoted the observations in the latter case which have been quoted hereinbefore (para 27 - supra) and concluded thus:

In *Kamala Mills Ltd. v. The State of Bombay,* MANU/SC/0291/1965 : C.A. No. 481 of 1963, dated 23.4.1965 ; MANU/SC/0291/1965 : [1965]57ITR643(SC) , while dealing with a *similar point, this Court has considered the effect of the two decisions of the Privy Council,* one in the case of Mask and Co., 67 Ind App 222. MANU/PR/0022/1940 (supra), and the other in *Raleigh Investment Co. v. Governor-General in Council,* 74 I A 50 at pp. 62-63: AIR (1947) PC 78 at pp. 80-81. The *Conclusion reached by this Court in* M/s. Kamala Mill's case C.A. No. 481 of 1963 dated 23.4.1965: MANU/SC/0291/1965 : [1965]57ITR643(SC) . (supra) *also support the view which we are taking in the present appeal.*

(Emphasis supplied)

It is evident that in Ram Swamp's case, this Court expressed the view that the decision in Kamala Mills' case is in accord with Mask & Co.'s case, and the bar of jurisdiction of civil courts cannot operate in cases where the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity - in other words, where the order or proceeding is attacked as one passed without jurisdiction. Again, the principle laid down in Mask & Co.'s case was only reiterated and observations were made that the decision in Kamala Mills' case was in accord with the decision in Mask & Co. 's case. It is important to notice that Gajendragadkar, C.J., spoke for the Bench in all the three decisions: Illuri Subbayya Chetty MANU/SC/0211/1963 : [1963]50ITR93(SC) ; Kamala Mill MANU/SC/0081/1964 : 1965CriLJ33 and Ram Swamp MANU/SC/0338/1965 : [1966]2SCR553 .

In considering Mask & Co. MANU/PR/0022/1940 and Kamala Mills MANU/SC/0291/1965 : [1965]57ITR643(SC) the Constitution Bench in Ram Swamp's case MANU/SC/0338/1965 : [1966]2SCR553 held that if the proceeding assailed is totally invalid and a nullity or without jurisdiction, the jurisdiction of the civil courts is not barred. Again, the principle laid down in Mask & Co (supra) was only affirmed.

On an analysis of the various decisions, this Court laid down the law in paragraph 32 at page 89, thus (Dulabhai's case):

Neither of the two cases of Firm of Illuri Subbayya MANU/SC/0211/1963 : [1963]50ITR93(SC) can be *said to run counter to the series of cases earlier noticed.* The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

(1) Whether the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, *does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles* of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as *ultra vires* cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision *is already declared unconstitutional or the constitutionality* of any provision is to be *challenged, a suit is open.* A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) where the particular Act *contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.*

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

(Emphasis supplied)

Dulabhai's case (supra) has been consistently followed by this Court later - see: Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Gum v. The State of Andhra Pradesh and Ors. MANU/SC/0391/1969 : [1970]2SCR714 and other cases.

138. Applying the law laid down in the decisions aforesaid, it is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc. as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No. (1) (3) (4) and (5) in Dulabhai's case, as explained hereinabove, as one passed outside the Act and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application. Collector of Central Excise, Chandigarh v. Doaba Co-operative Sugar Mills Ltd., Jalandhar [1988] Supp. SCC 683; Escorts Ltd. v. Union of India and Ors. : [1994] Supp. 3 SCC 86. Rule 11 before and after amendment, or S. 11B, cannot affect Section 72 of the Contract Act or the provisions of Limitation Act in such situations. My answer to the claims for refund broadly falling under the three groups or categories enumerated in paragraph 5 of this Judgment is as follows:

Category (I) where the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act:-

In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit or a petition under Article 226 of the Constitution, and pray for appropriate relief inclusive of refund within the period of limitation provided by the appropriate law. *[Dulabhai's* case (supra) - para 32 - Clauses (3) and (4)].

Category (II) where the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act. Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure:-

Under this category every error of fact or law committed by the statutory authority or Tribunal, irrespective of its gravity, or nature of infirmity will not be covered. It is confined to exceptional cases, "where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of judicial procedure", as stated in *Mask & Co.'s* (supra) and in *Dulabhai's* case (supra). The scope of the above dicta, should be understood in the background of/in accord with the observations of the earlier Constitution Bench of this Court in *Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh,* MANU/SC/0211/1963 : [1963]50ITR93(SC) , to the following effect:

...Non-compliance with the provisions of the statute, to which reference is made by the Privy Council must, we think, be noncompliance with such fundamental provisions of the statute *as would make the entire proceedings before the appropriate authority illegal and without jurisdiction.* Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is *cases of this* character where the defect or the infirmity in the order *goes to the root of the order and makes it in law invalid and void....*

[Dulabhai's case (supra) -- para 32 Clause (1)]

(Emphasis supplied)

Here also, the appropriate action should be laid within the period of limitation provided by the appropriate law and also can invoke Section 72 of the Contract Act, as the case may be.

Category (III) - Mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (i.e. without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee, either by the High Court or the Supreme Court and as soon as the assessee came to know of the judgment (within the period of limitation) he initiated action for refund of the tax paid by him, due to mistake of law:

In this category, assessees who initiated proceedings and impugned the assessments/claimed refund, for any reason, either by way of suit or petition under Article 226 of the Constitution, and the action was dismissed on merits, they cannot maintain an action over again. He who fights and runs away, cannot have another day. If the levy or imposition was held to be unconstitutional or illegal or not exigible in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim cannot, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law. The claim will be unsustainable and barred by res judicata. Tilokchand Motichand and Ors. v. H.B. Munshi, Commissioner of Sales

Tax, Bombay and Anr. MANU/SC/0127/1968 : [1969]2SCR824 . (This will be confined to the period for which action was laid and lost).

Subject to the above, if a levy or imposition of tax is held to be unconstitutional or illegal or not exigible in law i.e. without jurisdiction, it is open to the assessee to take advantage of the declaration of the law so made, and pray for appropriate relief inclusive of refund on the ground that tax was paid due to mistake of law, provided he initiated action within the period of limitation prescribed under the Limitation Act. Such assessee should prove the necessary ingredients to enable him to claim the benefit under Section 72 of the Contract Act read with Section 17 of the Limitation Act. Dulabhai's case (supra) - para 32 - Clauses (4) and (5).

139. It should be borne in mind, that in all the three categories of cases, the assessee should prove the fundamental factor that he has not "passed on" the tax to the consumer or third party and that he suffered a loss or injury. This aspect should not be lost sight of, in whatever manner, the proceeding is initiated - suit, Article 226, etc.

140. As observed earlier, proposition No. (1) or clause No. (1) enunciated in Dulabhai's case (supra) should be understood in the background of or in accord with the observations of the earlier Constitution Bench in Illuri Subbayya Chetty's case - MANU/SC/0211/1963 : [1963]50ITR93(SC) as quoted in para 27 (supra) - (see para 29 of this judgment).

Opinions may differ as to when it can be said that in the "public law" domain, the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void (Referred to in Illuri Subbayya Chetty's case and approved in Dulabhai case). The matter may have to be considered in the light of the provisions of the particular statute in question and the fact situation obtaining, in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases the non-compliance or error or mistake, committed by the statutory authority or Tribunal, makes the decision rendered ultra-vires or a nullity or one without jurisdiction? If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance. Since the landmark decision in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147 : (1969) 1 All ER 208 (H.L.), the legal world seems to have accepted that any "jurisdictional error" as understood in the liberal or modern approach, laid down therein, makes a decision ultra vires or a nullity or without jurisdiction and the "ouster clauses", are construed restrictively, and such provisions whatever their stringent language be, have been held not to prevent challenge on the ground that the decision is ultra vires and being a complete nullity, it is not a decision within the meaning of the Act. The concept of jurisdiction has acquired "new dimensions". The original or pure theory of jurisdiction means, "the authority to decide", and it is determinable at the commencement, and not at the conclusion of the inquiry. The said approach has been given a go bye in Anisminic case, as we shall see from the discussion hereinafter (See De Smith, Woolf and Jowell - Judicial Review of Administrative Action (1995 edn.) P. 268 ; Halsbuny's Laws of England (4th edn.) p. 114 - para 67 - foot note (9). As Sir William Wade observes in his book, Administrative Law (7th edn.), 1994, at p. 299, "The tribunal must not only have jurisdiction at the outset, but must retain it unimpaired until it has discharged its task". The

decision in Anisminic case has been cited with approval in a number of cases by this Court: Citation of few such cases; Union of India v. Tarachand Gupta & Bros. MANU/SC/0220/1971 : 1983(13)ELT1456(SC) , A.R. Antulay v. R.S. Nayak and Anr. MANU/SC/0002/1988 : 1988CriLJ1661 , R.B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT) and Anr. MANU/SC/0429/1989 : [1989]176ITR169(SC) ; N. Parthasarathy Etc. Etc. v. Controller of Capital Issues and Anr. Etc. Etc. MANU/SC/0592/1991 : [1991]2SCR329 ; Associated Engineering Co. v. Government of Andhra Pradesh and Anr. MANU/SC/0054/1992 : [1991]2SCR924 ; Shiv Kumar Chadha v. Municipal Corporation of Delhi and Ors. MANU/SC/0522/1993 : [1993]3SCR522 . Delivering the judgment of a two-Member Bench in Shri M.L. Sethi v. Shri R.P. Kapur MANU/SC/0245/1972 : [1973]1SCR697 Methew, J. in paragraphs 10 and 11 of the judgment explained the legal position after Anisminic case to the following effect:

The word "jurisdiction" is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in *Anisminic Ltd. v. Foreign Compensation Commission* (1969) 2 AC 147, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by *Lord Denman in R. v. Bolton,* [1841] 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. *In Anisminic Ltd.,* (1969) 2 AC 147 Lord Reid said:

Put there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.

In the same case, Lord Pearce Said:

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity.

11. The dicta or the majority of the House of Lords, in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". *The effect of the dicta*

in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. That comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a Statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or addressing themselves to a wrong question". The majority opinion in the case leaves a court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow....

In a subsequent Constitution Bench decision, *Hari Prasad Mulshankar Trivedi v. V.B. Raju and Ors.* MANU/SC/0015/1973 : [1974]1SCR548 , delivering the judgment of the Bench, Mathew, J., in para 27 at page 2608 of the judgment, stated thus:

...Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anisminic Case. (1967) 3 W.L.R. 382, we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word "jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context (see Per Diplock, J. at p. 394 in the Anisminic Case). Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. *"At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic". S.A. De Smith,* "Judicial Review of Administrative Action". 2nd Edn., p. 98.)" (1968 edition)

(emphasis supplied)

The observation of the learned author (S.A. De Smith) was continued in its third edition (1973) at page 98 and in its fourth edition (1980) at page 112 of the book. The observation aforesaid was based on the then prevailing academic opinion only as is seen from the foot notes. It should be stated that the said observation is omitted from the latest edition of the book De Smith, Woolf and Jowell - Judicial Review of Administrative Action - 5th edition (1995) as is evident from page 229; probably due to later developments in the law and the academic opinion that has emerged due to the change in the perspective.

141. After 1980, the decision in Anisminic case came up for further consideration before the House of Lords, Privy Council and other courts. The three leading decisions of the House of Lords wherein Anisminic principle, was followed and explained, are the following: In re Racal Communications Ltd. (1981) AC 374, O'Reilly and Ors. v. Mackman and Ors. (1983) 2 AC 237, Regina v. Hull University Visitor [1993] AC 682. It should be noted that In re Racal's case, the Anisminic principle was held to be inapplicable in the case of (superior) court where the decision of the court is made final and conclusive by the statute. (The superior court referred to in this decision is the High Court) (1981) AC 374 (383, 384, 386, 391). In the meanwhile, the House of

Lords in Council for Civil Service Union and Ors. v. Minister For the Civil Service (1985) 1 AC 374 enunciated three broad grounds for judicial review, as "legality", "procedural propriety" and "rationality" and this decision had its impact in the development of the law in post-Anisminic period. In the light of the above four important decisions of the House of Lords, other decisions of the court of appeal, Privy Council, etc. and the later academic opinion in the matter the entire case law on the subject has been reviewed in leading text books. In the latest edition of De Smith on "Judicial review of Administrative Action" - edited by Lord Woolf and Jowell, Q.C. [(Professor of Public Law) (Fifth edition) - (1995)], Chapter 5, titled as "Jurisdiction, Vires, Law and Fact" (pp. 223-294), there is exhaustive analysis about the concept, "jurisdiction", and its ramifications. The authors have discussed the pure theory of jurisdiction, the innovative decision in "Anisminic" case (1969) 2 AC 147, the development of the law in the post Anisminic period, the scope of the "finality" Clauses (exclusion of jurisdiction of courts) in the statutes, and have laid down a few propositions at pages 250-256 which could be advanced on the subject. The authors have concluded the discussion thus at page 256 ;

After Anisminic virtually every error of law is a jurisdictional error, and the only place left for non-jurisdictional error is where the components of the decision made by the inferior body included matters of fact and policy as well as law, or where the error was evidential (concerning for example the burden of proof or admission of evidence). Perhaps the most precise indication of jurisdictional error is that advanced by Lord Diplock in Racal Communications, when he suggested that a tribunal is entitled to make an error when the matter "involves, as many do inter-related questions of law, fact and degree". Thus it was for the county court judge in *Peariman* to decide whether the installation of central heating in a dwelling amounted to a "structural alteration extension or addition". This was a "typical question of mixed law, fact and degree which only a scholiast would think it appropriate to dissect into two separate questions, one for decision by the superior court, viz. the meaning of these words, a question which must entail considerations of degree, and the other for decision by a county court, viz. the application of words to the particular installation, a question which also entails considerations of degree.

It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. *The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled.* What remains is likely quickly to fall away as *the courts rightly insist that all administrative action should be, simply, lawful, whether or not jurisdictionally lawful.*

(Emphasis supplied)

142. The jurisdictional control exercised by superior courts over subordinate courts, tribunals or other statutory bodies and the scope and content of such power has been pithily stated in Halsbury Laws of England : 4th edition (Reissue), 1989, volume 1(1), P. 113 to the following effect:

The inferior court or tribunal lacks jurisdiction if it has no power to enter upon an inquiry into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an inquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a *major error* of substance, form or procedure, or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior Court or tribunal or other

body, however, goes to jurisdiction. Jurisdiction to decide a matter imports *a limited power to decide that matter incorrectly.*

A tribunal lacks jurisdiction if (I) it is improperly constituted, or (2) the proceedings have been improperly instituted, or (3) authority to decide has been delegated to it unlawfully, or (4) it is without competence to deal with a matter by reason of the parties, the area in which the issue arose, the nature of the subject matter, the value of that subject matter, or the non-existence of any other prerequisite of a valid adjudication. *Excess of jurisdiction is not materially distinguishable from lack of jurisdiction and the expressions may be used interchangeably.*

Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional. (p. 114)

There is a presumption in construing statutes which confer jurisdiction or discretionary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will exceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper procedure required by law, which takes legally irrelevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and answers the wrong question. (pp. 119-120)

The presumption that error of law goes to jurisdiction of a particular statute, so that the relevant body will not exceed its jurisdiction by going wrong in law. Previously, the courts were more likely to find that errors of law were within jurisdiction; *but with the modem approach errors of law will be held to fall within a body's jurisdiction only in exceptional cases.* The courts will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament" (p.120)

Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof (pp. 121-122)

(Emphasis supplied)

143. H.W.R. Wade and C.F. Forsyth in their book - Administrative Law, Seventh Edition (1994) - discuss the subject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head "Jurisdiction over Fact and Law" in Chapter 9, pages 284 to 320. The decisions before Anisminic and those in the post Anisminic period have been discussed in detail. At pages 319-320, the authors give the Summary of Rules thus:

Jurisdiction over fact and law: Summary

At the end of a chapter *which is top-heavy with obsolescent material* it may be useful to summarise the position as shortly as possible. *The overall picture is of an expanding system* struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long-established rules together *with the simpler and broader rules which have now superseded them, much for the benefit of the law.* Together they are as follows:

Errors of fact

Old rule The court would quash only if the erroneous fact was jurisdictional.

New rule The court will quash if an erroneous and decisive fact was

(a) jurisdictional

(b) found on the basis of no evidence; or

(c) wrong, misunderstood or ignored.

Errors of law

Old rule The court would quash only if the error was

(a) jurisdictional; or

(b) on the face of the record.

New rule The court will quash for any decisive error, because all errors of law are now jurisdictional.

(emphasis supplied)

144. The scope of the exclusionary clauses contained in the statutes has been considered in great detail with reference to the decisions of the superior courts in England and also the decisions of the Supreme Court of India by Justice G.P. Singh (former Chief Justice, M.P. High Court) in "Principles of Statutory Interpretation", 6th edition (1996) at page 475. The law is stated thus:

A review of the relevant authorities on the point leads to the following conclusions:

(1) An Exclusionary Clause using the formula 'an order of the tribunal under this Act shall not be called in question in any Court' is ineffective to prevent the calling in question of an order of the tribunal if the order is really not an order under the Act but a nullity.

(2) Cases of nullity may arise when there is lack of jurisdiction at the stage of commencement of enquiry e.g., when (a) authority is assumed under an ultra vires statute; (b) the tribunal is not

properly constituted, or is disqualified to act; (c) the subject-matter or the parties are such over which the tribunal has no authority to inquire; and (d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry.

(3) Cases of nullity may also arise during the course or at the conclusion of the inquiry, These cases are also cases of want of jurisdiction if the word 'jurisdiction' is understood in a wide sense. Some examples of these cases are (a) when the tribunal has wrongly determined a jurisdictional question of fact or law; (b) when it has failed to follow the fundamental principles of judicial procedure, e.g. has passed the order without giving an opportunity of hearing to the party affected; (c) when it has violated the fundamental provisions of the Act, e.g., when it fails to take into account matters which it is required to take into account or when it takes into account extraneous and irrelevant matters; (d) when it has acted in bad faith; and (e) when it grants a relief or makes an order which it has no authority to grant or make; "as also (f) when by misapplication of the law it has asked itself the wrong question.

With great respect to the learned author, I would adopt the above statement of law, as my own.

I would conclude this aspect by holding that the jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra).

145. Two decisions of this Court rendered after Section 11B of the Act was amended in 1991, deserve mention. They are - Union of India and Ors. v. Jain Spinners Limited and Anr. MANU/SC/0391/1992 : 1992(61)ELT321(SC) ; Union of India and Ors. v. ITC Ltd. MANU/SC/0327/1993 : 1993ECR5(SC) . In Jain spinners case, the application for refund itself was filed before the concerned statutory Authority (Assistant Collector, Central Excise). While the said application was pending, Section 11B of the Act came into force. There was an earlier interim order passed by the High Court directing the deposit of the duty levied with a liberty to the Revenue to withdraw it, subject to the condition that the amount will be refunded if the assessee succeeded ultimately. The Assistant Collector applying the amendments effected in 1991, declined to order refund, holding that the assessee had passed on the incidence of duty to others. It was upheld by this Court notwithstanding the interim orders and other proceedings of the High Court. Basically, the application for refund was filed before the concerned statutory authority, who negatived the claim by giving effect to the provisions of the Amendment Act. There was no attack in the above case that the levy or collection as one unauthorised or unconstitutional or without jurisdiction or illegal. In Union of India v. ITC Ltd. the Jain Spinners case (supra) was followed. The main aspect that arose for consideration in the latter case was whether the assessee had passed on the incidence of duty to the consumers or other persons. In spite of the repeated orders of this Court, the assessee failed to establish that the burden of excess excise duty was borne by it and was not passed on to any other person. The assessee had filed five applications for refund. Three of them were allowed by the statutory authorities in the appeals. Only two refund applications were rejected which were assailed in the High Court. The High Court allowed the said applications, directing the Revenue to refund the amounts due as per the two refund applications. In Appeal, this Court stressed the fact that the assessee was not able to substantiate that the burden of excess excise duty was borne

by it and was not passed on to any other person. Incidentally, this Court also referred to the amended provisions of the Act (11B, 12B etc.) and held that the amended provisions would apply when the matter regarding refund was still pending for adjudication in this Court. In this case also the levy or collection was not assailed as unconstitutional or illegal or without jurisdiction and, in consequence refund was called for. The above two cases did not deal with the maintainability of action in the ordinary courts where the levy or collection is assailed on the ground that it is unconstitutional, illegal or without jurisdiction.

146. The changes brought about by the Central Excise and Customs Laws (Amendment) Act, 1991 (w.e.f. 20.9.1991) regarding refund and the scope of Section 11B read with Section 12B was the subject of great controversy before us. The Amendment Act 1991 is also attacked as unconstitutional, illegal, invalid and unreasonable and as a "device" to deny refund legitimately due. The relevant statutory provisions have been extracted earlier in this judgment. Briefly stated the position is this. Clause (3) of Section 11B provides that notwithstanding any judgment, decree or order of the appellate tribunal or any court etc. no refund shall be made except as provided in Sub-section (2), In other words, the procedure to obtain refund is made exclusive as per Section 11B(3) of the Act. The application, therefore, shall be made under Section 11B(1) and dealt with by the concerned authority under Section 11B(2) of the Act. These provisions mandate amongst other things that the person claiming refund should substantiate that the incidence of duty has not been passed on by him to any other person. The application should also be filed within the time prescribed in the said sub-section. Section 11B(2) and Section 11B(3) go together. Under Section 11B(2), in certain specified cases, the duty paid will be refunded to the applicant. One such case is, the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person and substantiates the same. In cases not falling within the proviso to Section 11B(2) of the Act the duty collected will be credited to the Consumer Welfare Fund and the said Fund will be utilised as per Section 12D of the Act.

147. As stated, Section 11B(2) and Section 11B(3) go together. The applications for refund made before the commencement of the Amendment Act, 1991, shall be deemed to have been made under Section 11B(1) of the Act as amended and it shall be dealt with in accordance with Section 11B(2) of the Act. The Section contemplates disposal of the applications pending on the date of the Amendment Act as also fresh applications filed after the Amendment Act, 1991, as per the amended provisions. Counsel for the assessees urged that the provisions relating to refund and, in particular, Section 11B(2) and (3) as amended in 1991 cannot apply to:

1. 'Refund' made or due as per orders passed by Court, in a suit or in a petition under Article 226 of the Constitution of India, which have become final.

2. refunds ordered by the statutory authority concerned which have become final.

It is obvious that in such cases no application can or will be deemed to be pending on the date of the commencement of the Amendment Act. No application praying for refund is to be filed in such cases, either. No further probe, regarding the requisites for obtaining refund specified in the Amendment Act, 1991, is called for in such cases. The above aspects are fairly clear.

Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1) (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. I am of the opinion, that if the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances.
It is not so herein. Shri Prithvi Cotton Mills Ltd. and Anr. v. Broach Borough Municipality and Ors. MANU/SC/0057/1969 : [1971]79ITR136(SC) and Madan Mohan Pathak v. Union of India and Ors. Etc. MANU/SC/0253/1978 : (1978)ILLJ406SC . See also Comorin Match Industries (P) Ltd. v. State of Tamil Nadu MANU/SC/1149/1996 : 1996ECR233(SC) . Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases. It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply only to (1) refund applications made before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the commencement of the Amendment Act, 1991 (Cases dealt with in paras 5 and 29 of this judgment will not be covered by the above to the extent stated therein).

148. Excise duty is an indirect levy. It is intended or presumed to be passed on. This is so under the ordinary law. Section 12B of the Act only provides a statutory rebuttable presumption in that regard. If it turns out that the levy is not exigible, it is refundable to the person who had borne the liability. Ordinarily, in the case of indirect taxes, such persons will be innumerable and cannot be easily identified or located. If the duty, which is not exigible, is refunded to the person who had not borne the liability, it will result in an unjust benefit to him. So the Act has provided in Section 11B(2), that in such cases where the duty is refundable, it will be credited to the Consumer Welfare Fund (Section 12C). However, the proviso to Section 11B(2) provides that the duty of excise will be refunded in few specified cases, subject to certain conditions -- one of them is the manufacturer -- in cases, where he has not passed on the incidence to any other person [Clause (d)]. Those provisions will apply only for refunds to be made under the Act. In the totality of the factual situation, it cannot be said that the provisions ushered in by Amendment Act, 1991 -- and the scheme formulated in Sections 11B and 12A to D -- are, a "device" or invalid or arbitrary or unreasonable (except to the extent stated in para 38 supra) or in any way constitutionally infirm (Of course, the cases dealt with in paras 5 and 29 are excluded to the extent stated therein). Brother Jeevan Reddy, J. has dealt with this matter rather elaborately and there is no need to elaborate the matter any further.

In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters. [See Collector of Customs, Madras v. Nathella Sampathu

Chetty and Anr. MANU/SC/0089/1961 : 1983ECR2198D(SC) ; Khyerbari Tea Company and Anr. v. State of Assam and Ors. AIR 1984 SC 925; R.K. Garg v. Union of India and Ors. AIR 1981 SC 2138; Gaurishanker and Ors. v. Union of India and Ors. MANU/SC/0010/1995 : AIR1995SC55 and Union of India and Anr. Etc. Etc. v. A. Sanyasi Rao and Ors. Etc. Etc. MANU/SC/0326/1996 : [1996]219ITR330(SC) , etc.]

149. Before closing I should specifically deal with two important aspects. In this judgment I have dealt with cases where duty is paid on items which are consumed as such. Due to paucity of details, the case of captive consumption has not been dealt with. It is made clear that whatever is stated in this judgment will not apply in the cases of goods which are captively consumed.

Chapter II-A of the Act was inserted by way of amendment in 1991. The establishment, working, administration and utilisation to the Consumer Welfare Fund is in its stage of infancy. The scheme or set-up envisaged by Sections 12C and 12D and its working will require an in-depth evaluation by the appropriate authorities in order to vouchsafe that the scheme is not rendered a mere ritual or illusory, but is meaningful and effective for the present, I do not want to deal with that aspect in detail.

150. For the sake of convenience, I shall summarise my conclusions as here-under: (in case of doubt, the body of the judgment should be looked into).

(A) If the excise duty paid by the assessee was ultimately passed on to the buyers or any other person, and that the assessee has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, is unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991.)

(B) The decision in Kanhaiya Lal's case and the cases following the same, cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution.

If the decision in Kanhaiya Lal's case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect of the learned Judges, who rendered the above decisions, I express my dissent thereto. In this context, the observations in para 29 - Clause III shall also be borne in mind.

(C) Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto.

(D) The presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the 'duty" element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an indepth analysis in the innumerable cases to ascertain and find out whether

the taxpayer has passed on the liability. The matter being within the exclusive knowledge to the taxpayer, the burden of proving that the liability has not been passed on should lie on him.

(E) It is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc., as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No. (1) (3) (4) and (5) in Dulabhai's case, as one passed outside the Act, and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application.

(F) The attack against the illegal or unauthorised levy as also the relief of refund may fall ordinarily within the three categories specified in paragraph 29 of the judgment. An action by way of suit or writ petition under Article 226 of the Constitution of India will lie in the cases, and subject to the conditions stated in paragraphs 29 and 30 of the judgment.

(G) The jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra).

(H) Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1) (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. If the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases.

(I) It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply, only to (1) refund applications made under the statute and filed before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the "commencement of the Amendment Act, 1991. (cases dealt with in paras 5 and 29 of this judgment will not be covered by the above to the extent stated therein).

(J) The proviso to Section 11B(2), provides, that the duty of excise will be refunded in few specified cases, subject to certain conditions - one of them is the manufacturer - in cases, where he has not passed on the incidence to any other person [Clause (d)]. Those provisions will apply only

for refunds to be made under the Act. In the totality of the factual situation, it cannot be said, that the provisions ushered in by Amendment Act, 1991 - and the scheme formulated in Sections 11B and 12A to B -- (in the light of the clarifications made in the body of the judgment, and more particularly in paras 25 and 40 above) are, a "device" or invalid or arbitrary or unreasonable (except to the extent stated in para 38 supra) or in any way constitutionally infirm. (Of course, the cases dealt with in paras 5 and 29 are excluded to the extent stated therein).

151. The principles laid down in this judgment should be applied to the fact situation obtaining in individual cases and should be disposed of accordingly.

The matters may be placed before My Lord the Chief Justice for appropriate orders in this behalf.

B.L. Hansaria, J.

152. The conclusions arrived at by learned brother Paripoornan, J. and the reasons given in support thereof, have my respectful concurrence. I have nothing useful to add. The time at my disposal does not really permit me to do so, as the draft of this judgment reached my hands on the night of 15th instant; indeed, the first draft judgment of the case got me in the evening of 13th of this month.

S.C. Sen, J.

153. Leave granted in the Special Leave Petitions.

154. In C.A. No. 3255 of 1984 and a number of other cases which have been heard together, questions have been raised, firstly, as to whether a refund of Central Excise Duty wrongly realised from a tax-payer can be withheld on the ground of what is described as 'unjust enrichment', without any specific provision of law to that effect; secondly, whether the position was altered after the Central Excise Act, 1944 was amended by the Central Excises and Customs Law (Amendment) Act, 1991 which came into effect on September 20, 1991? By virtue of this amendment Section 11B along with a few other sections of the Central Excise Act, 1944 stood amended. I shall deal with both these questions separately. But before entering into that controversy, it is important to bear in mind the provisions of Article 265 of the Constitution and its amplitude. It has also to be seen what is the scope, meaning and purport and also the import of what is described as 'unjust enrichment'. A challenge has also been made to the validity of the amendments made to the Central Excise Act. That will also have to be examined.

ARTICLE 265

155. Article 265 of the Constitution lays down that "no tax shall be levied or collected except by authority of law." The mandate of the Constitution is lucid and clear and must be taken to mean what it says. 'No tax' takes in every type of tax. It has been contended on behalf of the Union of India that Article 265 merely lays down that no direct tax shall be levied or collected except by authority of law. The first question is that if that was the intention of the Constitution makers, then why did they not say so in so many words? 'Taxation' has been defined in Article 366(28) to include the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed

accordingly. Therefore, the word 'tax' will include any tax general, local or special. That means every kind of tax direct or indirect will come within the ambit of Article 265.

156. It has also to be noted that Article 265 is included in Part XII of the Constitution which deals with Finance, Property, Contracts and Suits. Chapter I of Part XII deals with Finance. Under this heading, both direct and indirect taxes have been dealt within a number of Articles. Article 268 deals with stamp duties and duties of excise on medicinal and toilet preparations. Article 269 deals with duties in respect of succession to property other than agricultural land, estate duty in respect of property other than agricultural land, terminal taxes on goods or passengers, taxes on railway fares and freights, taxes other than stamp duties on transactions in stock-exchanges and futures markets and taxes on the sale or purchase of newspapers and on advertisements published therein. Article 270 deals with taxes on income other than agricultural income. Article 272 deals with Union duties of excise, other than duties of excise on medicinal and toilet preparations. Article 276 deals with taxes for the benefit of a State or a municipality, district board, local board or other local authority in respect of professions, trades, callings or employments. Article 277 deals with taxes, duties, cesses or fees which were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area. Article 287 deals with tax on the consumption or sale of electricity. All these Articles go to show that Part XII, Chapter I, deals with not only direct taxes like taxes on income or duties in respect of succession to property, but also deals with indirect taxes like stamp duty, duties of excise on medicinal and toilet preparations, other duties of excise, terminal taxes on goods, taxes on railway freights, taxes on transactions in stock- exchanges and futures markets and taxes on sale or purchase of newspaper. In the context of all these Articles in Chapter I of Part XII dealing with direct and indirect taxes, it is difficult to hold that the mandate at the beginning of the Chapter that "no tax shall be levied or collected except by authority of law", was meant to be confined to direct taxes only and not to other types of taxes which were specifically enumerated in a number of other Articles in Chapter I of Part XII of the Constitution.

157. Moreover, this argument, if accepted, will have dangerous implications. It will mean that the Constitution has impliedly empowered the Government to levy and collect indirect taxes without any authority of law. Bearing in mind that the bulk of the taxes imposed by the Union and practically the entire amount of taxes collected by the States is by indirect levies, the constitutional protection against unlawful taxes will become meaningless and devoid of any substance.

158. Mr. Parasaran, appearing on behalf of Union of India has argued that Article 265 has to be read along with the Directive principles. The State has been enjoined to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. I do not see how this provision or any other provision of Article 39 can in any way whittle down the scope of Article 265 of the Constitution. If the provisions of Article 39 are to be construed as a licence given to the State to retain whatever has been collected however unlawfully, then why should any distinction be made between direct taxes and indirect taxes? If the argument is taken to its logical conclusion, it will mean that the State will be at liberty to retain whatever it has gathered unlawfully by direct as well as indirect taxation and use the same for the purpose of common good according to its perception. The victims of unlawful activities of the State will have no remedy against the State. This reasoning, if accepted, will have the effect of turning the State into a Leviathan in which the individuals have

only such rights as may be permissively given by the State. The various constitutional guarantees given to protect the individuals from the oppression by State will become futile and without any meaning and substance. Neither Article 38 nor Article 39, in any way, empower the State to levy or retain taxes without any authority of law.

159. The importance and effectiveness of the Directive Principles of the State Policy have been laid down in Article 31C in the following words:

37C Saving of laws giving effect to certain directive principles. -Notwithstanding anything contained in Article 13, no law giving effect of the policy of the State towards securing all or any of the principles laid down in part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

160. The disputes raised in this case do not relate to enforcement of the guarantees contained in Article 14 or Article 19 of the Constitution in any manner. The laws of Central Excise have been enforced since 1944 or even earlier. It is a tax on manufacture of goods. The object of the tax is to raise revenue for the Government. But this can only be done in accordance with law. No man can be subjected to an unlawful exaction made by the State by whatever process in disregard of the guarantee given by Article 265 of the Constitution.

161. In my judgment, apart from its boldness, there is no merit in this contention that guarantee contained in Article 265 of the Constitution must be restricted to direct taxes only. In my judgment, Article 265 must be implemented in letter and spirit as it stands and all the tax laws and all Government actions to realise and retain tax must be tested on the anvil of this guarantee. The courts should jealously guard against any attempt to whittle down or do away with any of the guarantees given under the Constitution to the citizens. In my judgment, Article 265 will have to be given full effect in cases of direct as well as indirect taxation. If any tax has been levied and collected without authority of law, then the State has committed a wrong and that wrong must be undone by the State by returning the tax unlawfully collected to the person from whom it was collected.

162. The Court has a duty to uphold the Constitution in letter and spirit. If the Court comes to the conclusion that a levy of tax is unlawful, the Court will direct the Government to return the tax. It is not for the Court to enquire how the tax-payer has managed his affairs after payment of the unlawful levy. It is but natural that the tax-payer will try to raise funds by raising price or cutting down costs or forgoing profits to get over the loss caused by the unlawful exaction of tax. There is usually considerable time gap from payment of any illegal levy and obtaining an order of refund. In most of the cases several years pass before refund of duty paid can be obtained. In such a situation, it is impossible for the taxpayer company not to do something to raise money somehow to carry on its business. Merely because a manufacturer has raised its price after paying the illegal

levy cannot be a ground for denying him the constitutional guarantee contained in Article 265. The constitutional guarantee is unconditional and unequivocal and must be enforced regardless of what the manufacturer does after payment of tax. If the manufacturer has done something unlawful, steps must be taken against him. If this Court holds that constitutional guarantees ought to be enforced depending upon the conduct of the manufacturer after payment of the illegal levy, then the Court would be adding a rider to Article 265 which is not permissible. By this forced interpretation the Court will not be upholding the Constitution, but will be undermining it.

163. A point has been made that the manufacturer has passed on the burden of the illegal levy to his customers by raising his price of the goods. But that is no reason why the guarantee given by the Constitution should not be enforced. The manufacturer may have been compelled to raise the price because of the imposition of an illegal levy. But that is no reason to dilute the mandate contained in Article 265 of the Constitution. Article 265 forbids the State from making an unlawful levy or collecting taxes unlawfully. The bar is absolute. It protects the citizens from any unlawful exaction of tax. So long as Article 265 is there, the State cannot be permitted to levy any tax without authority of law and if any tax has been collected unlawfully that must be restored to the person from whom it was collected. If the tax has been collected from any person unlawfully, it is the taxpayer's money which is in unlawful possession of the State. The State has a constitutional obligation to give back the money to the tax- payer. An act done in violation of constitutional mandate is void and no right flows out of that void act to the State. The State is in unlawful possession of the taxpayer's property. The State cannot retain it on any equitable ground nor can it give it to any other person out of any supposed equitable consideration. The constitutional mandate cannot be ignored on the pretext of any rule of equity or on the ground of what is perceived as substantive justice. Every word of the Constitution has to be treated as sacrosanct and respected and obeyed by the State and the Legislature and enforced by the Court.

164. The Court cannot, by torturing the language of Article 265 or by any other means, construe it so as to give it a meaning which it does not naturally bear. It was observed in the case of Commissioner of Inland Revenue v. Rossminster Ltd. (1980) AC 952 at 1018 that in construing a statutory provision, the rule of construction must be "however much a court may deprecate an Act, it must apply it. It cannot by torturing its language or any other means construe it so as to give a meaning which the Parliament did not clearly intend it to bear". The same rule of construction will apply for construing a constitutional provision. The Court may dislike Article 265 and its natural consequence. But because of that the Court cannot torture its language to bring out a meaning which the words do not naturally bear. Once it is established that a levy or collection of tax is void, no legal or equitable right is acquired by the State in the unlawfully collected money. The right to get refund accrues to the person who pays it the moment an illegal levy or collection is made. Once the levy or collection is declared illegal, the illegally collected amount has to be immediately paid back to the person from whom it was collected. The refund order is made to enforce the right of the tax-payer which accrued when the tax was illegally levied and collected from him. This is an absolute obligation under the Constitution, No statute can provide otherwise. If a collection of tax is found to be illegal being in contravention of the provisions of Central Excise Act, then it not only violates the Act but also the Constitution. If the Central Excise Act is amended or any separate act is passed to provide for denial of refund to the taxpayer, in any manner, then such amendment or Act is as offensive to the Constitution as the illegal levies themselves were. If the tax has been illegally exacted from a person, then he has been denied the protection given to him by the

Constitution. The denial of the right to recover the unlawfully collected tax is denial of the protection given to citizen by Article 265.

165. A similar question was examined by the Judicial Committee of the Privy Council in an appeal from Australia in Commissioner for Motor Transport v. Antill Ranger & Co. Pvt. Ltd. (1966) 3 All. E.R. There, certain charges had been levied by the State of New South Wales under an Act in connection with inter-State transactions. These charges where held to be violative of Section 92 of the Commonwealth of Australian Constitution. Subject to imposition of uniform duties of customs, Section 92 guarantees freedom of trade, commerce and intercourse among the States by internal carriage or ocean navigation. The levy under the Principal Act having been declared unlawful, an Act called the state Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 was passed barring and extinguishing the right of recovery of any sums collected or recovered under the Principal Act. It was made clear that the provisions of the Barring Act would apply to proceedings pending at the commencement of the Act as well as proceedings brought after the commencement of the Act. The validity of the Barring Act was challenged. It was pointed out by the Judicial Committee that if the Act was valid, it would be a complete answer to the claim of the taxpayers. But the validity of the relevant provisions of the Barring Act could be no greater or no less if they had been contained in the Principal Act itself. It was held that neither prospectively nor retrospectively can a State law make lawful that which the Constitution says is unlawful. If the statute laid down that the charges in respect of inter-State trade should be imposed and that, if they were illegally imposed and collected, they should nevertheless, be retained, such an enactment would be illegal. The statutory immunity accorded to illegal acts is as offensive to the Constitution as the illegal acts themselves.

166. The Judicial Committee posed the following question"....Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves, and, applied to the present circumstances, that question is whether, if the imposition of charges in respect of inter-state trade is invalid as an offence against Section 92, it is not equally an offence to deny the right to recover them after they have been unlawfully exacted."

167. The Judicial Committee answered the question by saying that:

It appears to their Lordships that to this question there can be only one answer. It cannot be too strongly emphasise or too often repeated that, in the words of the High Court, the immunity given by Section 92 to trade, commerce and intercourse cannot be transient or illusory. Yet, how fugitive would that protection be if effect where given to the argument of the appellants in this case.

168. The Judicial Committee clearly recognised Section 92 of the Australian Constitution as a measure of protection to the respondents who were the taxpayers. The judicial Committee emphasised, this protection could not be allowed to be transient or illusory. We should also not allow the protection to the tax- payers by Article 265 of our Constitution to be transient and illusory.

169. The Judicial Committee went on to give an illustration which is also useful for the purpose of this case. A trader desiring to engage in inter-State trade and confronted with the provisions of an unlawful Act may conform to its requirements and submit to the pecuniary exactions in order

that he may be able to carry on his business. He can test the legality of the exactions in a court of law and if he was right and these sums were unlawfully exacted, he is entitled to the protection afforded by Section 92 of the Constitution. What is his situation if then he finds himself by a later provision of the same Act or by a subsequent Act once more subjected to the same exactions? The burden of his trade remains just what it was; the freedom of his trade has been in the same degree impaired. In letter and spirit, Section 92 is in the same measure defeated.

170. An argument was advanced before the Judicial Committee that the Barring Act did not impose any burden on trade but only barred the right of property viz., the right to sue for money...which accrued after the trading operations were over, the Judicial Committee rejected this argument by observing that "...an enactment whose only object is to validate an exaction which the section renders unlawful would in their Lordships' opinion be a mockery of the spirit of the Constitution".

171. In the case before us, a very similar situation has arisen. The levy and collection of excise duty has been found to be illegal. It has been levied and collected in violation of the Central Excise Act and also the guarantee contained in the Constitution. The levy is void. It has denied the taxpayer the protection given by the Constitution. If illegally collected tax is not immediately restored to the taxpayer, the guarantee given by the Constitution will be a mockery. The constitutional guarantee is not hedged by any clause. A trader may trade with his goods as he likes. The terms and conditions under which he sells his goods is a matter between him and the purchaser. He may raise his price high enough to include costs and taxes. If he does so with the agreement of the buyer, he does not lose his right to get back what had been collected from him illegally or the protection of Article 265 of the Constitution. That will be putting a rider on the Constitution. The Court is not permitted to write the Constitution but is duty bound to enforce it.

172. The view of the Judicial Committee was that but for Section 92 of the Australian Constitution, the Barring Act might have been held to be valid. In the instant case also, the amended provisions of Section 11B of the Central Excise Act might have been held to be valid but for Article 265 of the Indian Constitution. The right to get refund arose the moment an illegal levy was imposed. As was pointed out in that case, the taxpayer had no option but to pay this levy; otherwise he could not have carried on his trade at all. The goods would not be cleared without payment of the illegal demand made by the excise authority. This does not debar him from pointing out that the collection of tax was illegal and claiming return of the illegal levy.

173. The American Constitution does not contain anything similar to Article 265 of our Constitution. The U.S. Supreme Court, therefore, had no difficulty in upholding the validity of Section 424 of Revenue Act of 1928 in the case of United States v. Jefferson Electric Manufacturing Company 78 L.Ed. 859. Section 424 provided:

Section 424 Refund of automobile accessories tax.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924...unless either -

(1) pursuant to a judgment of a court in an action duly begun prior to April 30, 1928 ; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him:....

174. The Act came into force on 29th May, 1928. The section was challenged on the ground that it was violative of the Fifth Amendment of the American Constitution in that a taxpayer was being deprived of his property without due process of law and his private property was being taken away for public use without just compensation. It was held ;

The contention is made that sub-division (a) (2), when construed and applied as we hold it should be infringes the due process clause of the Fifth Amendment to the Constitution in that it strikes down rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928. This contention is pertinent, because the cases now being considered were begun after April 30, 1928, and in each the tax in question was paid before Section 424 was enacted, which was May 29, 1928.

If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that Section 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them. But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.

We do not perceive in the restriction any infringement of due process of law....

175. What the U.S. Supreme Court held in that case was that the new enactment did not infringe the due process of law and, therefore, could not be struck down. The U.S. Supreme Court did not have to consider the impugned section in the light of a provision similar to Article 265 of the Indian Constitution. But there were two important observations which have to be borne in mind:

(1) If the tax was erroneous and illegal, a right accrued to the taxpayer when he paid the tax to have it refunded without showing as to whether he bore the burden of tax or shifted it to the purchaser.

(2) Section 424 applied to rights accrued theretofore and still subsisting but not sued on prior to April 30, 1928.

176. A question similar to the one dealt with by the American Supreme Court also came up before the Supreme Court of Canada, in the case of Air Canada v. British Columbia (1989) 59 D.L.R. 4th

161. The principles laid down in Air Canada case cannot be understood unless one bears in mind the peculiar facts of the case which has been recorded in detail in the judgment of La Forest, J.

177. The dispute was confined to the taxes paid by Air Canada in the 23 month period between August 1, 1974 and July 1, 1976. The tax was levied under the Gasoline Tax Act, 1948. The Act as it stood on August 1, 1974 provided that every purchaser shall pay a tax equal to 10 cents per gallon on all gasoline purchased except gasoline purchased for use in an aircraft, which was taxed at a lower rate. Section 2 defined "Purchaser" as under:

"Purchaser" means any person who within the Province purchases gasoline when sold for the first time after its manufacture in or importation into the Province.

178. An identical provision in a cognate statute was struck down by the Privy Council which led to retroactive amendment of the Gasoline Tax Act by inserting Section 25 which was as under:

25(1) In this section "purchaser" means any person who, within the Province, after August 1, 1974 and before July 8, 1976 purchased or received delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for a principal who was acquiring the gasoline for use or consumption by the principal or by other persons at his expense.

(2) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 15c a gallon on all gasoline purchased by him after August 1, 1974 and before February 28, 1975, but

(a) where gasoline was purchased for use in an aircraft the tax shall be 8c a gallon, and

(b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 10c a gallon.

(3) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 17c a gallon on all gasoline purchased by him after February 27, 1975 and before July 8, 1976, but

(a) where gasoline was purchased for use in an aircraft the tax shall be 5c a gallon, and

(b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 12c a gallon.

(4) x x x

(5) Where after August 1, 1974 and before July 8, 1976, money was collected or purported to have been collected as taxes, penalties or interest under this Act, the money shall by this section be conclusively deemed to have been confiscated by the government without compensation.

179. These amendment were statutorily given retroactive character by Section 62(5) of the Finance Statutes Amendment Act, 1981. By this change of definition of purchaser what was an indirect tax earlier was converted into a direct tax. The tax was on gasoline purchased by a purchaser for his own use or consumption or for consumption of other persons at his expense or on behalf of or as an agent for the principal for use or consumption by the principal or by other persons at his expense. Although, it was provided by Sub-section (5) that the amount which was collected before the amendment of the Act between August 1, 1974 and July 1, 1976 as tax shall be conclusively deemed to have been confiscated by the Government without compensation, according to La Forest, J., the Section really does not mean what it says. A fund of money illegally collected was lying with the Province. Having imposed the tax retroactively, the Province merely was enabled to retain the amount in its hands by adjusting it against the tax which has subsequently become payable by the amended provision. The tax retained and the tax payable were identical amounts. This in sum and substance, was the judgment of La Forest, J. The rest of the observations of La Forest, J. in Air Canada case appears to be obiter.

180. After referring to the amended Section, La Forest, J. said:

That the tax is a direct tax I have no doubt. Since at least bank of Toronto v. Lambe (1887), 12 App. CAS. 575, the generally accepted test of what constitutes a direct tax has been that of John Stuart Mill: A direct tax is one which is demanded from the very person who it is intended or desired should pay it". That person is clearly identified in the definition in the 1976 Act as the ultimate consumer of the gasoline; there is no passing on of the tax to others, whatever may be the opportunities of recouping the amount of the tax by other means (a. very different thing).

181. Referring to the new Section 25 brought into existence by the 1981 Act, La Forest, J. identified the real issue of the case in the following words:

None of the judges in the courts below casts any doubt on the legislative power of the province to impose a retroactive tax in the manner provided in Section 25(1) to (4). What they really disagreed about was the effect of Section 25(5) on those provisions. In common with these judges. I am unable to see any constitutional impediment to the province's enacting Section 25(1) to (4). On the reasoning regarding the 1976 Act, these provisions seem to be a proper exercise of its power to impose direct taxation in the province, the sole difference being that the 1981 provisions are given retroactive effect, a result that is not constitutionally barred. The real question, then, is whether when Section 25(1) to (4) are conjoined to Section 25(5), they become so coloured by the latter provision as to make all of Section 25 ultra vires.

182. That question was answered by La Forest, J. in the following words:

That, of course, raises the issue whether Section 25(5) is itself ultra vires. There are, in my view, some serious difficulties in establishing its invalidity. It may be, if the provision stood alone, that it could be successfully maintained that it violates the principle, in the Amax decision. I need not consider that situation because it does not stand alone. It is the fifth of five subsections, the first four of which impose a valid direct tax, and it must obviously be read in that context. It must also be read in light of the well-known principle that it must be assumed that the legislature intended to stay within the confines of its constitutional competence. While, as Esson, J.A. notes, the

expression "confiscated" is distasteful, one should not permit it to mislead us regarding the purpose of Section 25(5). The function of the courts is not to give the legislature lessons intact. Their function, rather is to attempt to discover what the legislature, however, clumsily was attempting to achieve by the language it used, a task that should, as already noted, be informed by the presumption that the legislature intended to stay within its constitutional powers.

In the context in which it appears, Section 25(5) seems to be nothing more nor less than machinery for collecting the taxes properly imposed in the first four subsections of Section 25. It must be remembered that the amounts illegally collected under the ultra vires provision before 1974 would be equal to the taxes levied under Section 25(1) to (4). Administratively, the taxes levied under the invalid scheme were collected in the same manner and in the same amounts and from the same taxpayers as would have occurred if the scheme had originally been framed along the lines of Section 25(1) to (4). What the legislature attempted to do by Section 25(5), therefore, was to provide collection machinery whereby the moneys owing by the taxpayers under the latter provision could simply be taken out of the equal amounts it had collected from those taxpayers under the invalid tax. It was in that sense that the moneys were deemed to have been confiscated by the government.

183. Having reached this conclusion, La Forest, J. distinguished this case with the principles laid down in Amax case in the following manner:

In that case, the Legislature sought, by giving itself immunity, to avoid repaying an unlawful tax. This was simply an indirect way of giving effect to the invalid statute....The situation is entirely different here. The legislature did directly what it was empowered to do impose a direct tax under Sub-sections (1) to (4). I see no reason why it could not then take that tax out of moneys it had improperly collected from the taxpayers under the ultra vires statutes, just as it could have set it off against any other obligation of the government to the taxpayers. The good fortune of the legislature, in the unusual facts of this case, in having collected amounts that matched precisely those owing by each taxpayer under Section 25(1) to (4) affords no reason to brand as unconstitutional a tax that it can validly impose and collect.

184. This is the ratio of the decision of La Forest, J. An unconstitutional levy brought about by an indirect tax was cured retroactively by a direct levy. What was collected wrongfully under an indirect levy was retained by adjusting the unlawful collection against what turned out to be a valid collection under the new law. Section 25(5) was clumsily worded in that it had used the word "confiscated". Properly understood, according to La Forest, J., it did not really confiscate the amount already paid but adjusted that amount against the subsequent lawful demands made under the retroactively amended provisions.

185. Thereafter, La Forest, J. went on to discuss the points raised on "mistake of law". La Forest, J. came to the conclusion after review of the case law that "in my view, the distinction between mistake of fact and mistake of law should play no part in the law of restitution. " But he was of the view that recovery of taxes imposed by a legislation subsequently declared ultra vires could not be allowed "even if the airlines could show that they bore the burden of the tax...."

186. The view on ultra vires taxes as expressed by La Forest, J. is an extreme proposition which may be acceptable in accordance with the Constitution laws of Canada, but it cannot be held valid under our system.

Wilson, J. who dissented in part held:

It is, in my view, impossible to divorce Section 25(1) to (4) from Section 25(5) of the Gasoline Tax Act, R.S.B.C. 1979, c.152. The only possible basis for the confiscation under Section 25(5) is the imposition of the retroactive tax under Section 25(1) to (4). Certainly the payments made under the ultra vires legislation could not support such a confiscation since the moneys were not as a constitutional matter properly exigible under that legislation....

Averting to "Mistake of Law" Wilson, J. observed:

...Whatever the nature of the mistake, the key question, my colleague suggests, should be whether the respondent has been unjustly enriched at the appellants' expense or whether there is some specific reason which makes restitution inappropriate in the circumstances. My colleague concludes that there was unjust enrichment in this case but he finds two reasons why restitution is inappropriate. The first is that the appellants in all likelihood passed on the burden of the ultra vires tax. to their customers; the unjust enrichment of the respondent was therefore not shown to be at the expense of the appellants. The second is that the general rule of recovery should, as a matter of policy, be reversed where the person unjustly enriched is a governmental body....

Wilson, J. went on to observe:

It is, however, my view that payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments 'under protest'. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.

187. Adverting to the argument that any refund to the taxpayer who has passed on the burden of tax to the ultimate consumer will result in an unmerited "windfall" to him, Wilson, J. observed:

My colleague advances another reason why the appellants should be denied recovery in this case, he says, in effect, that the appellants would be receiving a "windfall" if they received their money back because in all likelihood they have already recouped the payments made on account of the ultra vires tax from their customers. In terms of my colleague's analysis, the appellants are unable to show that the unjust enrichment of the province was at their expense. In my view there is no requirement that they be able to do so. Where the payments were made pursuant to an

unconstitutional statute there is no legitimate basis on which they can be retained. As Dickson, J. stated in Amax, supra, at p.10:

To allow moneys collected under compulsion, pursuant to an ultra vires statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

. . .

Indeed, even on my colleague's unjust enrichment analysis Dickson, J. found in Nepean, supra, that there were no equitable reasons of principle or policy to preclude recovery from Ontario Hydro.

188. I shall deal with Sections 11B 11D and 12A to 12D of Central Excise Act as amended by the Act 40, 1991 later in this judgment in greater detail. But it may be noted that now these provisions have made it practically impossible for a taxpayer to get back what had been collected unlawfully from him, whatever the wording of the statute may be. La Forest, J. interpreted Sub-section (5) of Section 25 of the Gasoline Tax Act and construed that although the word "confiscation" was used, the provision was not confiscatory but was really a provision for setting off of the new claims arising out of the retroactive statute against the moneys which were lying in the hands of the Province even though unlawfully collected. In the present case, although the term "confiscation" has not been used in Sections 11B 11D and 12A to 12D these provisions, in effect, have confiscated without any compensation all illegally gathered taxes which came within their ambit.

189. Air Canada case came up for further consideration in the case of Allied Air Conditioning Inc. v. British Columbia 76 B.C.L.R. (2) 218. Here the question was whether a taxpayer could recover the moneys which were collected as tax, but were not properly payable. The plaintiff had paid Social Service Tax to the Province of British Columbia totalling to $ 500,000. In the judgment of Oliver, J, it was stated that the required elements at the heart of the law of restitution was (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff and (3) an absence of any juristic reason for the enrichment.

190. Oliver, J. stated that the distinction between recovery of money paid under mistake of fact and money paid under mistake of law had now been swept away by the decision in Air Canada Case. On the day on which the judgment in he case of Air Canada was pronounced, a second judgment was delivered in the case of Air Canada v. British Columbia ("C.P. Air"); 1989 36 B.C.L.R. 185. There the dispute related to social Service Tax, wrongly paid on (a) aircraft parts and equipment and (b) alcoholic beverages sold to passengers on the flight. The Supreme Court held that C.P.A. could recover the Social Service Tax paid on purchasers of equipment and parts, but the tax paid on alcoholic beverages sold to passengers was imposed on the passengers who consumed the liquor and therefore, the C.P.A. was not entitled to recover the same. Oliver, J. observed that "it can be agreed that both taxes were passed on to customers by Air Canada in the price of airline tickets." La Forest, J. in the C.P.A. case held that Social Service Tax paid by the airlines was not properly payable on either aircraft parts or on alcoholic beverages. Having found that the tax was inapplicable, La Forest, J. concluded "there seems no reason to refuse Air Canada the recovery it seeks. There is nothing to indicate it ever abandoned this claim." The claim for

recovery of the tax paid on alcoholic beverages was rejected on the ground that "the tax was imposed on the passengers, not Air Canada. Air Canada was simply an agent to collect it under the Act, and, in fact, obtained a fee for doing so. I am unable to see how it could identify the passengers who consumed the liquor, so its repayment to Air Canada would simply amount to windfall to the airline."

191. The contention of the plaintiffs in Allied Air Conditioning Inc. Case before Oliver, J. was that the observations of La Forest, J. that "a passing-on defence is available to the taxing authority whenever the taxpayer can be shown to have passed on the tax burden, regardless of whether it was passed on "specifically and directly" or generally in the price charged to customers" was obiter. The true reasoning of the Supreme Court with respect to the passing-on defence can be gleaned from its decision in C.P. Air in which it allowed a passing-on defence where the tax was "directly and specifically" passed on to customers but not where the tax was merely included generally in the price of airline tickets.

192. In the end, after noting that the comment of La Forest, J. at page 179 that "this alone is sufficient to deny the airlines' claim, Oliver, J. stated that rest of the decision of the La Forest, J. was obiter. Oliver, J., however, disposed of the case before him by observing:

In the present case the invoices given by the plaintiffs to their customers for lump sum contracts did not set out any amounts charged for materials, labour or taxes; simply the lump sum itself was shown. The evidence discloses that many factors, including the competitive environment and the plaintiff's profit margin goals, influence the amount of the lump sum.

In my opinion, it cannot be said in such a case that the tax is passed directly and specifically to customers so that they become the true taxpayers. While it is difficult to make specific comparisons, the situation in the present case more closely resembles the tax paid on aircraft parts and equipment in C.P. Air than the tax paid on alcoholic drinks in that case.

I find that in all the circumstances no passing- on defence is available and that the plaintiffs are entitled to restitution of the amounts they are claiming as wrongly paid taxes, subject to any applicable limitation period.

193. In the case of Woolwich building Society v. Inland Revenue Commissioners (No. 2) (1992) 3 All E.R. 737 at 763. Lord Goff cited with approval the dissenting view expressed by the Wilson, J. in Air Canada Case (supra) after quoting from the judgment and noting the fact that:

She also rejected the proposed defence of 'passing on' (at 160-170). Accordingly in her opinion the taxpayer should be entitled to succeed.

I cannot deny that I find the reasoning of Wilson, J. most attractive. Moreover, I agree with her that, if there is to be a right to recovery in respect of taxes exacted unlawfully by the Revenue, it is irrelevant to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, for that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue.

Furthermore, like Wilson, J, I very respectfully doubt the advisability of imposing special limits on recovery in the case of 'unconstitutional or ultra vires levies'.

194. In the concluding part of the judgment, Lord Goff recognised the difficulties involved in the doctrine of 'passing on'. Lord Goff pointed out that the question need not be finally decided in that case. It was observed ;

It will be a matter for consideration whether the fact that the plaintiff has passed on the tax or levy so that the burden has fallen on another should provide a defence to his claim. Although this is contemplated by the Court of justice of the European Communities in the San Giorgio case, it is evident from Air Canada v. British Columbia that the point is not without its difficulties; and the availability of such a defence may depend on the nature of the tax or other levy....

195. In the case of Commissioner of State Revenue v. Royal Insurance Australia Ltd. 182 C.L.R. 51, the question before the Australian High Court was whether a taxpayer is entitled to recover overpayment of stamp duty. It was held that there was no obligation to refund the overpayment because Sub-section (1) of Section 111 of the Stamps Act conferred discretionary power on the Commissioner to refund the money but did not create any duty to do so. Therefore, the finding that there was an overpayment did not give rise to any enforceable obligation to make refund. One of the points that came up for consideration was disruption of public finance as a consequence of restitution. Mason, C.J. did not uphold this contention. He observed that:

That proposition was accepted by La Forest, J. in Air Canada v. British Columbia but it was repudiated by Wilson, J. in her dissenting judgment for reasons which, to my mind, are compelling....

196. Mason, C.J. went on to observe that the argument that the plaintiff will receive a windfall or will unjustly enrich if recovery from public authority is permitted, cannot be accepted straightaway. He further observed:

...In the context of the law of restitution, this economic view encounters major difficulties. The first is that to deny recovery when the plaintiff shifts the burden of the imposition of the tax or charge to third parties will often leave a plaintiff who suffers loss or damage without a remedy. That consequence suggests that, if the economic argument is to be converted into a legal proposition, the proposition must be that the plaintiff's recovery should be limited to compensation for loss or damage sustained. The third is that an inquiry into and a determination of the loss or damage sustained by a plaintiff who passes on a tax or charge is a very complex undertaking. And, finally, it has long been thought that, despite Lord Mansfield's statement in Moses v. Macferlan, the basis of restitutionary relief is not compensation for loss or damage sustained but restoration to the plaintiff of what has been taken or received from the plaintiff without justification.

197. After a review of the large number of cases cited, Mason, C.J. concluded:

The United States and European decisions demonstrate that any acceptance of the defence of passing on is fraught with both practical and theoretical difficulties. Indeed, the difficulties are so

great that, in my view, the defence should not succeed unless it is established that the defendant's enrichment is not at the expense of the plaintiff but at the expense of some other person or persons.

198. Brennan, J. who agreed with Mason, C.J. that the appeal should be dismissed, held that:

The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter.

199. In the concurrent judgment of Dawson, J., there are certain observations to which I shall refer later on in this judgment.

200. All these cases go to show the complexity of the problem of doctrine of "passing on". The U.S. view appears to be that but for the law passed in 1924, illegally collected tax had to be refunded even if it was passed on to the consumers. The majority view of the Canadian Supreme Court was to the contrary. However, the dissenting judgment of Wilson, J. was found preferable by Mason, C.J. in Australia as well as by Lord Goff who spoke for the House of Lords in England. But the English decision as well as the Australian decisions were founded on common law and Bill of Rights.

201. In none of these countries any constitutional provision akin to Article 265 fell for consideration. The debate whether a taxpayer is entitled to get refund when the levy is found illegal is concluded by Article 265 of the Constitution in our country. The protection afforded to the taxpayer is total and complete. It cannot be taken away under any circumstances or by any legislative action. The Constitution being sacrosanct and overriding, in my view, any tax collected unlawfully, must be returned to the taxpayer. Whether the taxpayer has passed on the burden of the tax to the consumers or not is a matter of no consequence.

202. The constitutional embargo is on both the levy and collection of tax without authority of law. It has been repeatedly asserted by the Courts that every taxing law has three parts. First is charge, the second is computation which results in a demand of tax and the third is recovery of the tax so computed. The Constitution has enjoined that there must be a valid levy. The word 'levy' has also been understood in a broad sense in various cases to include not only the imposition of the charge but also the whole process upto raising of the demand. The Constitution guarantees that not only the levy should be lawful but also collection of tax must also be done with the authority of law. The State is not permitted to exact any tax from a citizen without the authority of law and without following the procedure laid down by law. This guarantee has to be strictly enforced not only in the matter of levy but also in the matter of collection. It was pointed out by this Court in the case of Municipal Council, Khurai and Anr. v. Kamal Kumar and Anr. MANU/SC/0227/1964 : [1965]2SCR653 that Article 265 of the Constitution clearly implies that the procedure to impose a liability upon the taxpayer has to be strictly complied with. Where it is not complied with, the liability to pay a tax cannot be said to be according to law. In that case, a validly passed municipal law was sought to be enforced, but the objections of the ratepayer were not dealt with by the Municipal Council as a whole but by a sub-committee. The Court held that this was erroneous. The phrase 'levy and collection' indicates that all the steps in making a man liable to pay a tax and

exaction of tax from him must be in accordance with law. There must be a valid statute which will be properly followed. All steps must be taken according to statutory provisions. Recovery of tax must also be according to law. No one can be subjected to levy or tax or deprived of his money by the State without authority of law.

203. Article 39 of the Constitution has directed the State to formulate its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These provisions do not in any way curtail the scope and effect of Article 265. Section 39 does not enjoin that unlawfully collected properties should be used by the State for the common good. Nor does it say that the operation of the economic system should be so moulded as to prevent concentration of wealth, by unlawful means. Article 39 cannot be a basis for retaining whatever has been gathered unlawfully by the Government for common good. Simply stated the Directive Principles of State Policy do not license the Government to rob Peter to pay Paul.

204. It has been repeatedly asserted by the Supreme Court of the United States that it is the duty of the Courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. (See Boyd v. United States 116 US 616 (1886). Actually, that should be the main function of the Court. Otherwise, independence of the judiciary will become meaningless.

Independent tribunals of justice...will be naturally led to resist every encroachment upon- rights expressly stipulated for in the Constitution by the declaration of rights.

Madison, I Annals of Cong. 439 (1789).

205. Repeatedly, in various contexts, it has been emphasised that constitutional rights of citizens should not be watered down however desirable the end result of a particular case may be. The Constitution is to last for ever. If for one particular case, out of its perceived notion of expediency, the Court cuts down the scope and effect of a constitutional provision, the Court will be failing in its bounden duty to uphold the Constitution. The Court should not be guided by any policy of expedition but only by the dictates of what has been laid by the Constitution and what the American Courts refer to as "Imperative of Judicial Integrity." It is the imperative of judicial integrity that Article 265 is upheld as it is. If it is allowed to be destroyed in this case, there is no reason why other Articles of the Constitution should not slowly and steadily be whittled away to take away all the other guarantees given to the citizens by the Constitution. This case, then, would be a dangerous precedent for demolition of the Constitution, article by article.

206. Apart from that, the Government cannot be allowed to say that it has broken the law but it will retain the fruits thereof. As was observed by Mr. Justice Brandeis in Olmstead v. United States 277. US 438 (1928):

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example....If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

207. In the case of Mapp v. Ohio 367 US 643 (1961), Mr. Justice Claks delivering the opinion of the Court in a case where the State tried to use in evidence he materials gathered as a result of unlawful search, on the ground that it was very desirable to do so in the facts of that case observed:

Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in true administration of justice.

208. In may view, the scope and effect of Article 265 cannot be whittled down in any manner in order to enable the Government to retain unlawfully gathered tax on the pretext that a refund will unduly enrich the taxpayers. Whatever the consequence may be, the provisions of the Constitution must be upheld as they stand.

209. In my judgment, Article 265 does not permit the State to levy or collect any tax without the authority of law. This is a protection afforded to the citizens by the Constitution from State oppression in financial matters. This protection given to the citizens must be jealously guarded by the Courts. If any tax has been gathered unlawfully by the State, It cannot be retained by the State. If any law has been passed for retention of the illegal levy, it must be struck down in the same manner as the Judicial Committee struck down the Barring Act in the case of Commissioner for Motor Transport v. Antill Ranger & Co. Pty. Ltd., (supra).

WHO IS THE TAX-PAYER UNDER THE CENTRAL EXCISE ACT?

210. The taxable event for payment of central excise is manufacture of excisable goods. The Central Excise Act has a long history and the courts have never been in doubt that the excise duty under the various Excise Acts was payable by the manufacturer and if there was any excess payment, the refund of the excess amount of tax must be made to the manufacturer who had actually paid the duty. In this connection, it has to be borne in mind that the Central Excise and Salt Act. 1944 is a consolidating Act. In the statement of objects and reasons it is stated:

The administration of internal commodity taxation in British India has grown up piecemeal over many years and has been considerably expanded during the last decade. Hitherto, the introduction of a new central duty of excise has required the enactment of a self-contained law and the preparation of a separate set of statutory rules. There are now no less than 10 separate excise Acts (the excise on kerosene being covered by a part of the Indian Finance Act, 1922) and 11 sets of statutory rules; and there are also 5 Acts relating to salt, the duty on which is by a wide margin the oldest of our taxes on indigenous commodities. The taxes being closely akin to one another, the methods of collection follow the name general pattern and many of the provisions of the various Acts are identical or closely similar; and this is the case also with many of the statutory rules. The an glomeration of statute and regulations dealing with similar matters is neither convenient for the public nor conducive to well-organised administration.

. . .

3. The intention of the Bill is to reproduce provisions already existing in the Acts which it is proposed to appeal but in the process certain small amendments have been made, either in

modernising the language or for dovetailing the provisions and otherwise adapting them to present circumstances. These amendments are the minimum consistent with each blending and adaptation.

211. Section 39 of the Act, when it was passed in 1944, stood as under:

39. The enactments specified in the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof. But all rules made, notifications published, licences, passes or permits granted, powers conferred and other things done under any such enactment and now in force shall, so far as they are not inconsistent with this Act, be deemed to have been respectively made, published, granted, conferred or done under this Act.

The Third Schedule contained as many as 17 Acts which were entirely repealed. The Acts were inter alia, The Motor Spirit (Duties) Act, 1970. The Silver (Excise Duty) Act. 1930. The Sugar (Excise Duty) Act, 1934, the Matches (Excise Duty) Act, 1934. The Iron and Steel Duties Act, 1934. The Tyres (Excise Duty) Act, 1941, The Tobacco (Excise Duty) Act, 1943 and the Vegetable Product (Excise Duty) Act, 1943 and Mechanical Lighters (Excise Duty) Order, 1934.

212. In all these Acts the Central Government were empowered to make rule for assessment and collection of duty, issue of notice requiring payment, the manner in which the duties shall be payable and the recovery of duty not paid. The rules also provided for appeals in case the tax-payer was aggrieved by any order.

213. Elaborate provisions were made for payment of excise duty on various products, the manner in which the duty was to be paid, imposition of penalty in case of evasion of duty and also the remedies to a tax-payer including refund of any excess amount of duty paid. If an assessee succeeded in appeal, the appellate authority was competent to give suitable direction to grant relief to the assessee. For example, under the Sugar (Excise Duty) Order, 1934 duty was imposed on certain varieties of sugar. Provisions was made for filing of monthly returns (Rule 5). The Collector was empowered to make assessment and also summary assessment (Rule 6). Provisions for refunds and remissions of duty were made (Rule 9). Any dispute could be determined by a suitably empowered officer (Rule 11) and appeal also lay to such authority as the Local Government might direct (Rule 12). Any order of the Collector or such authority could be revised by the Local Government or such higher authority as the Local Government might direct. A time limit for filing of appeals was provided in Rule 13. Rule 16 entitled the Collector to recover duty which had been short levied through inadvertence, error or misconstruction of the law by the Collector, or through misstatement as to quantify on the part of the owner of a factory, or even when erroneously refunds had been made. Rule 17 provided, "No duty which has been paid and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction shall be returned unless such claim is made within three months from the date of such payment". Likewise, in the Mechanical Lighters (Excise Duty) Order, 1934 a duty of excise was imposed on manufacture of mechanical lighters. Such manufacturer was required to take a licence from the Collector (Rule 4). The manufacture could only take place in terms of the licence. Every holder of licence had to keep a correct daily account (Rule 7). Within five days after the close of such month, every holder of a licence had to submit to the Collector a monthly return showing the number of mechanical lighters removed from the manufactory during that month (Rule 8). On receipt of the return, the Collector would make an assessment. The Collector was

empowered to make a summary assessment (Rule 9). Provisions for refunds and remissions were contained in Chapter IV. Chapter V dealt with miscellaneous provisions including provision for preferring an appeal, firstly to the Local Government or to such higher authority as the Local Government might direct. Appeal could also be made to the Central Board of Revenue and any order could be revised by the Governor General in Council (Rule 22). Rule 23 imposed a time limit of three months for preferring an appeal. Rule 26 dealt with short levy through inadvertence, error or misconstruction on the part of the Collector, or through mis-statement as to the quantity on the part of the owner of the manufactory. Recovery could also be made when erroneous refunds had been made. Such claims of refund had to be, made within three months from the date of such payment. Some provisions were made in the other Orders or statutes by directly providing for payment of tax, appeals and refunds or by incorporating provisions of other Acts like Sea Customs Act. What is important to remember is that it was never in doubt that it was the manufacturer who was liable to pay tax and also entitled to get refund of any tax paid to the State through "inadvertence, error or misconstruction."

214. This scheme was continued in the consolidating Act of 1944. As was stated in the object clause of the Act the Act sought to consolidate the existing legislations and did not seek to bring about any fundamental changes in the legislation. In fact even under the Central Excise and Salt Act, 1944 after the levy of duty if the tax-payer felt aggrieved he could go up on appeal and claim that the levy was excessive or unlawful and if he succeeded, he got refund of the excess amount paid. This is how the Act was understood and interpreted.

215. Now it is being argued that if excess amount of duty has been realised the tax-payer should not get back the excess payment because it is morally wrong. The burden of tax has been passed on to the consumers who are the real tax-payers.

216. This argument cannot be upheld for three reasons:

(1) When a statute of this nature, which is a consolidating Act, is passed, the Court should not presume that the Legislature was unaware of the scheme of the earlier statutes and how the law was understood and administered. The Legislature avowedly did not bring about any fundamental change in the structure of these existing laws in passing the consolidation Act. Tax was to be paid on manufacture of the excisable goods. There were provisions for assessment and computation of tax. Provisions were also made for appeals, recovery of tax in cases of short levy and refund of tax in cases of excess realisation. The duty of the Court is not to legislate but to find out the intention of the Legislature. The legislative intent was to consolidate and continue the laws that were existing in one comprehensive statute and even when the new statute was in force the Legislature did not think fit to stop refund of a wrong levy of tax to the manufacturer and thereby confer a right to the consumers to get refund before the amendment made in 1991.

217. Before that the Central Excise Act did not recognise any right of the consumer of excisable goods to get a refund of duty.

(2) Refund of tax whether under Income Tax Act, Wealth Tax Act, gift Tax Act, Estate Duty Act, Sales Tax Act, Customs Act or the Central Excise Act has to be given under the statutory provisions contained in the Act. Refund in a taxing statute is to be made not on the ground of

compensation for loss or damage sustained by a tax-payer but on the principle of restoration to the tax-payer of what had been collected from him without justification of law. This was highlighted by Mason, C.J. in the Australian Case (supra). It is not without significance that in all the tax laws, the word 'refund' has been preferred to 'restitution' or 'compensation'. The dictionary meaning of 'refund' is "to give or pay back money etc.", Webster Comprehensive Dictionary, International Edition 1984. When a taxing statute provides for refund, it is not to be understood as a section providing for compensation for loss or damage. Refund of tax means returning to the assessee what had been taken or received from him unlawfully.

(3) Under the Central Excise Act, there is only one tax which is levied by Section 3 and the tax-payer is the person who pays the charge levied by Section 3. The taxable event under the charging section is manufacture. This is the duty which a manufacturer has to pay before he can remove the manufactured goods from his factory. What the buyer of the goods pays to the manufacturer is the price of the goods. No duty is levied by the Central Excise Act upon the buyer. What the buyer pays to the manufacturer is not under any charge imposed by any statute. What he pays is the price of the goods. The price is a matter of contract between the buyer and the seller. Whatever the buyer pays and the seller gets is the price of the goods, even though the tax element is included in the price. I shall refer to the decided cases later in the judgment.

218. Section 3, which is the charging Section, reads:

3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied.

(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods which are produced or manufactured in India as and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985.

PROVIDED that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India,

shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 (51 of 1975).

Explanation 1 : Where in respect of any such like goods, any duty of customs leviable under the said Section 12 is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable under the said Section 12 at the highest of those rates.

Explanation 2 : In this proviso, -

(i) "free trade zone" means the Kandla Free Trade Zone and the Santa Cruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify in this behalf;

(ii) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act.

(1A) The provisions of Sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government, as they apply in respect of goods which are not produced or manufactured by Government.

(2) The Central Government may, by notification in the official gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed -

(a) for different classes or descriptions of the same excisable goods; or

(b) for excisable goods of the same class or description --

(i) produced or manufactured by different classes of producers or manufacturers; or

(ii) sold to different classes of buyers:

PROVIDED that in fixing different tariff values in respect of excisable goods falling under Sub-clause (i) or Sub-clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods.

219. Actually there has been a very little change in the charging section since 1944, except that since 1985 excise duty has to be paid at the rates set forth in the "Schedule to the Central Excise Tariff Act, 1985". Before this amendment with effect from 28.2.1986, the levy was at the rates set forth in the First Schedule of the Central Excise Act. Since 1944 the taxable event continues to be production and manufacture or excisable goods. The moment any excisable goods are produced or manufactured, levy of excise duty is attracted. The time and manner of payment of duty have been fixed by Rule 9 of the Central Excise Rules:

RULE 9. time and manner of payment of duty. - (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector

may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form:

Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under Rule 27 or Rule 47 or in a warehouse appointed or registered under Rule 140 or may be exported under bond as provided in Rule 13:

Provided further that such goods may be removed without payment or on part payment of duty leviable thereon if the Central Government, by notification in the Official Gazette, allow the goods to be so removed under Rule 49:

220. Rule 9A inter alia lays down that the rate of duty and tariff valuation shall be the rate and valuation in force in the case of goods removed from a factory or a warehouse on the date of the actual removal of such goods from such factory or warehouse. Even if any excisable goods are lost after manufacture, the duty will have to be paid. Clause (iii) of sub Rule (4) of Rule 9A provides:

Rule 9A(4). The rate and valuation, if any, applicable to cases of losses of goods shall -

(i)...

(ii)...

(iii) where the loss occurs in storage, whether in a factory or in a warehouse, be the rate and valuation, if any, in force on the date on which such loss is discovered by the proper officer or made known to him.

221. These provisions have undergone minor alterations from time to time but there is not the slightest doubt that the levy of excise duty is on manufacture of goods. The taxable event is the manufacture. The duty will have to be paid regardless of the destination of the goods. Even if the goods are lost before clearance, duty will have to be paid, whether the manufacturer after removal of the goods, is able to sell the goods or not is a matter of no consequence. Once the taxable event has happened the duty has to be paid. There is no escape from it. This is a strict liability foisted on manufacture by Section 3. But nothing in excess of this strict liability can be collected by the Excise Officers, If something is levied or collected which is beyond the charging section, then that has to be paid back to the tax-payer. Whatever tax has been levied or collected in violation of law has to be restored to the person from whom such illegal levy has been extracted. Otherwise the guarantee under Article 265 becomes meaningless.

222. The argument that the real tax-payer is the person who buys the goods from the manufacturer or the ultimate consumer because duty is included in the price, forms a component of the price and is thereby passed on to the consumer, does not bear scrutiny. Excise duty is payable because of the charge levied by Section 3. Whether the manufacturer is able to sell his goods or not, excise duty will have to be paid. If a man is able to pass on the burden or not is something with which the Excise Act is not concerned. If as a result of high excise tariff the price becomes too high and the goods become unsaleable, the manufacturer may go out of business but will not be absolved from payment of duty. Hardships suffered by the manufactures may be redressed by the Government

for which power has been retained in the Central Excise Act (Section 5A). But a manufacturer cannot decline to pay excise duty on the ground of inability to sell his products and failure to pass on the burden of the duty.

223. If the Central Excise Officer discovers that the duty of excise has not been levied or paid or has been short levied or short paid, he has a right to recover the duty from the manufacturer (Section 11A). The short levy may have been due to an oversight or mistake committed by the Excise Officer. It may be that the goods manufactured have already been sold off and it will not be possible for the manufacturer to recover the amount of duty from his customers. That is a post-duty situation with which the Excise Act is not concerned. The Central Excise Act is only concerned about collection of the duty levied by Section 3 on the manufacture of goods. In the scheme of the Act, the consumer who purchases the goods from the manufacturer and pays cum-duty price does not pay any tax either directly or through the manufacturer. If a manufacturing company goes into liquidation after selling off all its products, the Excise Officer can in no way realise any short levy or under levy from the, consumer. A tax is a compulsory levy imposed by the statute which is something quite different from purchase-price. If a person having paid the tax increases the price of the goods, what the purchaser pays the tax-payer is not the tax but the price of the goods. The price usually comprises of costs, taxes and profits. But there is only one tax and one tax-payer who pays the tax. If there is short levy or under levy of excise duty due to any reason, the excise authority has no right to chase the consumers for the arrears of tax. In no sense of the term the consumer can be treated as the tax-payer under the Central Excise Act. Moreover, if the consumer is a businessman, the cum-duty price will be deductible from his income under the Income Tax Act.

224. The charge of duty under the Central Excise act is imposed by Section 3. It has to be computed in the manner laid down in the rules and paid also in the way rule provides. The charge of tax is to be recovered from every person "who produces, cures or manufactures any excisable goods" (Rule 7). It may also be recovered from person who stores such goods in a warehouse. It further provides that the duty shall be payable "at such time and place and to such person as may be designated". Rule 7 really supplements the charging section and specifies the person who has to pay excise duty and to whom, where and within which time the duty is to be paid. Rule 9, which has been set out earlier in the judgment, places a bar on removal of goods from the place of manufacture "until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these rules or as the Collector may require". Under the scheme of the Excise Act and the rules, these are the only provisions by which excise duty is made payable. The charge is declared in Section 3. The liability to pay duty is cast on any person who produces, cures or manufactures any excisable goods or stores such goods in a warehouse (Rule 7). Time and manner of payment of duty is laid down by Rule 9. Date for determination of duty and tariff valuation is provided by Rule 9A and Rule 9B provides for provisional assessment to duty. It is provided that when the duty leviable on the goods is assessed finally, the duty provisionally assessed has to be adjusted against the duty finally assessed and if the duty provisionally assessed falls short of, or is in excess of, the duty finally assessed, the assessee has to pay the deficiency or be entitled to refund, as the case may be. Provisions were also made for recovery of duties not levied or not paid, or short-levied or not paid in full or erroneously refunded (Rule 10). Rule 10A provided residuary powers for recovery of duties for which any specific provision had not been made in the Act or the Rules. Rule 10B dealt with claim for refund of duties.

225. Rules 10A and 10B were as under:

10A. Residuary Powers for Recovery of Sums Due to Government. - (1) Where these rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short levied, or of any other sum of any kind payable to the Central Government under the Act or these rules, the proper officer may serve a notice on the person from whom such duty, deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under Sub-rule (1), shall determine the amount of duty, deficiency in duty or sum due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Asst. Collector of Central Excise may, in any particular case, allow.

10B. Claim for refund of duty. - Any person claiming refund of any duty paid by him may, make an application, for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation. - Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by applicant should be refunded to him, he may make an order accordingly.

(3) Where, as a result of any order, passed in appeal or revision, under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules, no claim for refund of any duty shall be entertained.

Explanation : For the purposes of these rule 'refund' includes rebate referred to in Rules 12 and 12A.

226. Rules 10A and 10B were in force till 1980. These two rules were substantially adopted in Section 11A and 11B of the Central Excises and Salt Act, 1944 by the Customs Central Excises and Salt Act and Central Boards of Revenue (Amendment) Act, 1978. The two sections came into force on 17.11.1980. It is well-settled that these two rules (Rules 10A and 10B) are complementary. Rule 10A invests the Government with the power to recover duty where any duty

had not been levied or paid or had been short-levied or erroneously refunded or any duty assessed had not been paid in full. In such a case, the proper officer within six months could serve a notice on a person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice.

227. Likewise, Rule 10B enabled a person to claim "refund of any duty paid by him". This could be done by an application for refund of such duty to the Assistant Collector of Central Excise before expiry of six months from the date of payment of duty. Where any duty was paid provisionally under Rue 9B, the period of six months was to be computed from the date on which the duty was adjusted after final determination of the value. If as a result of any appellate or revisional order refund of duty is due to any person, the proper officer had to refund the amount to such person even without any application.

228. There is nothing in the Act which enables or enjoins the manufacturer to pass on the duty of excise to the purchaser nor is any duty cast on the purchaser to pay the excise duty. It is the manufacturer who has to pay the duty imposed by Section 3 by virtue of the provisions of Rule 7 and in the manner laid down in Rules 9A and 9B. He is the person against whom proceedings for recovery could be taken in case of non-levy or short-levy or erroneous refund of duty. Only a person who was under a legal obligation to pay duty under Section 3 read with Rule 7 and has actually paid duty in the manner laid down in Rule 9 (or any other rule), can claim refund of duty.

'Duty' has been defined by Rule 2(v) to mean "the duty payable under Section 3 of the Act". All these provisions go to show that there is only one duty payable under the Central Excise Act. It has to be paid by the manufacturer or producer of the excisable goods. In fact stringent provisions have been made to ensure that there is no evasion of duty by the manufacturer. Under Rule 43 the manufacturer is required to give notice before commencement of production. He has also to give a notice before stopping or resuming production of such goods. He has also to give particulars of the raw-materials used for production and if there is any change in the nature of the raw-material that has also to be conveyed to the Collector of Excise. Under Rule 49 duty has to be paid by a manufacturer only when the goods are removed from the factory premises or an approved place of storage. But a manufacturer has to pay on demand the duty leviable on any goods which cannot be accounted for or which are not shown to have been lost or destroyed by natural causes or by an unavoidable accident during handling or storage of such goods.

229. The procedure of clearance is contained in Rule 52. The manufacturer has to make an application in triplicate to proper officer in proper form at least twelve hours before the removal of the goods. The officer has to assess amount of duty on the goods on production of evidence that the sum has been paid into the treasury or the approved Bank as has been provided in the Rules. This rule has also importance for our purpose. Duty of Central Excise is to be paid into the treasury or the Bank specified in Rule 52. Any payment made by any person by way of price has not been treated as payment of duty by the Central Excise Act. Rule 53 enjoins every manufacturer to make stock account of his goods. Monthly return has to be filed showing the quantity of goods manufactured, the quantity removed on payment of duty, the quantity removed for export without payment of duty and such other particulars as may be prescribed. Materials used for manufacturing of the goods have also to be accounted for under the provisions of Rule 55. It is not really necessary to examine the scope of procedure for the duty-paid materials or under MODVAT scheme. All

these elaborate rules and procedures have been made for payment and collection of duty by and from the manufacturer.

230. The Central Excise Act has not made the manufacturer an agent of the State for collection of tax from the consumers. If an illegal levy has been made on the manufacturer and any tax has been collected unlawfully from him by the State, the State cannot refuse to return the unlawfully collected amount. The amount which has been unlawfully collected is the property of the tax-payer. If the law has been broken by the State and an unlawful levy has been made the State is not at liberty to distribute the amount so collected on any supposed equitable principle to somebody other than the actual tax-payer without a specific provision of law to that effect. If this is allowed, the legal wrong done to the tax-payers will remain unredressed. In the case of Baidyanath Ayurved Bhawan (P) Ltd. v. Excise Commissioner, U.P. and Ors. MANU/SC/0337/1970 : [1971]2SCR590 , a Bench of Three Judges of this Court reiterated that the Court should not concern itself with the policy behind the provisions of the statute or even with its impact. The observations of Rowlatt, J. in Cape Brandy Syndicate v. Commissioner of Inland Revenue (1921) 1 K.B. 64, was cited in the judgment that "in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

231. In the case of R.C Parsi v. Union of India MANU/SC/0315/1962 : AIR1962SC1281 after quoting with approval the observations of Lord Simonds in The Judicial Committee, in governor General in Council v. Province of Madras MANU/PR/0006/1945, Subba Rao, J. observed as under:

...the said tax can be levied at a convenient stage so long as the character of the impost, that is it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on fair construction of the provisions of a particular Act.

232. In Bharat Kala Bhandar (Private) Ltd. v. Municipal Committee, Dhamangaon MANU/SC/0267/1965 : [1966]59ITR73(SC) , the subject matter of dispute was a municipal levy. The appellant claimed repayment of an excess amount of tax recovered by the Municipality. Although the facts and the subject mater of the decision was municipal levy which is quite different from the facts of this case, there is an important observation made by a Constitution Bench of Five Judges:

The Constitution is the fundamental law of the land and it is wholly unnecessary to provide in any law made by the legislature that anything done in disregard of the Constitution is prohibited. Such a prohibition is to be read in every enactment.

233. Here we are dealing with a taxing legislation. Like all other taxing statutes the Central Excise Act has a charging section, provisions for computation and quantification of the charge and also collection of the charge (Sections 11 and 11A) and also for refund of duty (Section 11B). The Court cannot ignore these provisions and hold without any specific charge levied to that effect in

the Act that the ultimate consumer is the real tax- payer. The refund must be made of excess realisation of the duty of excise to the manufacturer. The Government has not imposed nor realised any duty from the ultimate consumer.

234. The structure of the Excise Act has to be borne in mind. Duty is levied on manufacture and collected from the manufacturer according to the rules. The well-known distinction between levy and assessment and between levy and collection will have to be borne in mind in this Connection. In the case of Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd. MANU/SC/0377/1972 : 1978(2)ELT416(SC) , it was held by this Court that:

The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when the payment of tax is enforced, there is a levy". We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to us to extend to "collection". Article 265 of the Constitution does not seem to us to extend to "collection". Article 265 of the Constitution makes a distinction between "levy" and "collection". We also find that in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Ors. v. The Elphinstone Spinning and Weaving Mills Co. Ltd., this Court made a distinction between "levy" and "collection" as used in the Act and the rules before us. It said there with reference to Rule 10:

We are not inclined to accept the contention of Dr. Syed Mohammad that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3(1) specifically says: There shall be levied and collected in such a manner as may be prescribed the duty of excise....
It is to be noted that Sub-section (i), uses both the expressions - 'levied and collected' and that clearly shows that the expression 'levy' has not been used in the Act or the Rules as meaning actual collection.

235. I fail to see how a person who has been subjected to levy of excise duty and from whom the duty has been collected cannot get the refund of the duty but only a person who has neither been charged any duty nor paid any duty under the Act can claim refund of the duty. This will be clearly against Article 265 of the Constitution.

REFUND

236. Sections 11A and 11B before its amendment in 1991 stood as under:

11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) when any duty of excise has not been levied or paid or has been short- levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the

relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer," the words "Collector of Central Excise, " and for the words "six months", the words "five years" were substituted.

Explanation, - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under Sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this section,

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means:

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short levied or short-paid -

(A) Where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder:

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

Explanation : For the purpose of this section:

(a) "refund" includes rebate of duty of excise on excisable rebate of duty India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) "relevant date" means. -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid:

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) In a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability of the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in a case where duty of excise is paid provisionally under this Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(f) In any other case, the date of payment of duty.

237. Section 11B before its amendment in 1991 provided by Sub-section (1) "Any person claiming refund of any of duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date". By Sub-section (2), the Assistant Collector was required to examine the application and if he was satisfied that "the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly". Sub-section (3) dealt with the consequence of an order passed in appeal or revision under the Act. It provided that if as a result of any appellate or revisional order, any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount. Sub-section (4) provided that no claim for refund for any duty of excise shall be entertained except as provided by or under this Act. Sub-section (5) laid down that the provisions of this Section will also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty.

238. In order to claim refund, a person has to establish that he has paid the duty. The duty is what is paid pursuant to the charge levied by Section 3 and quantified in the manner laid down in the rules. Rule 3(v) of the Central Excise Rules also says that "duty" means the duty payable under Section 3 of the Act. The time and manner of payment of duty will have to be in accordance with the provisions of Rules 9 and 9A (4). There is no other duty charged under the Central excise Act and there is no other way a duty can be paid under the Central Excise Act. It is the person who has paid the duty of central excise under the charge imposed by the Act and within the time and in the manner laid down by the Act, who can claim the refund of duty under Section 11B. "Any person claiming refund of any duty of excise" must be the person who has paid the aforesaid duty in the aforesaid manner. A consumer or buyer cannot say that he has paid any duty of excise. The duty is only on the manufacturer and not on the consumer. Under Sub-section (2), the Excise Officer has to be satisfied that whole or any part of the duty of excise should be refunded to the person who has paid the duty.

239. This is the law in respect of payment of duty as obtaining refund of duty paid in excess. The buyer or the consumer does not pay any "duty" and, therefore, he is precluded from making any application for refund under Section 11B. A person who has not paid any duty in law cannot claim a refund on the ground that he has borne the burden of duty.

240. The Excise officer is a creature of the statute. His powers and functions are circumscribed by the statute. He can realise tax strictly in accordance with the statute. He cannot realise tax beyond the charge imposed by Section 3 out of any extra-statutory considerations. If more tax than permissible under the charge imposed by Section 3 has been collected, it must be returned to the taxpayer. There is nothing in the Act which enables the Excise Officer to embark upon an inquiry to find out whether after payment of the duty, the manufacturer has sold his goods and if so, has included this amount in his price. It is not a ground on which the Excise officer can refuse to refund the excess amount of duty paid by the manufacturer in the mode and manner laid down by the Act. A taxation statute has to be construed strictly. The Excise Officer cannot insert a proviso to the Section and say that even if the levy is illegal and the manufacturer is otherwise entitled to refund of duty under Section 11B, he will not be given this refund if he has included the duty element in the price of the goods manufactured by him.

241. The Excise Officer has no discretionary power to refuse to pay refund even when he was satisfied that excess payment of duty contrary to law has been collected or paid. Though Sub-section (2) of Section 11B or earlier Rule 11A used the language that the Central Excise Officer "may make an order of refund". The word 'may', in this context, has to be construed as 'must'. The section does not give the Central Excise Officer any discretion once he was satisfied that excess payment had been made. He cannot withhold payment on some extraneous reasons. This point was dealt with at length in the Australian case of Commissioner of State Revenue v. Royal Insurance (1995) 69 ALJ51 by Dawson, J. There, Section 111(1) of the Stamps Act, provided:

Where the comptroller finds in any case that duty has been over-paid, whether before or after the commencement of the Stamps Act, 1978 he may refund to the company, person or firm of persons which or who paid the duty the amount of duty found to be overpaid.

242. This section was later on amended to provide that the Comptroller "must refund the amount of the overpaid duty" upon an application made within three years of overpayment. There was no dispute that a huge amount of Stamp duty had been overpaid by Royal in respect of premiums for workers compensation insurance. The overpayments had been passed on. The comptroller made a decision not to refund the overpaid duty. Royal initiated an action for the recovery of the amount. It was unsuccessful before the Trial Judge who reached the conclusion that the use of the word 'may' in Section 111(1) gave the Comptroller a discretion whether or not to refund the overpaid tax. The Full Court on appeal came to a contrary conclusion. It held that after being satisfied that over payment had been made, it was not open to the comptroller to refuse to refund the duty. One of the points argued was the Act was amended later to use the word 'shall' in place of 'may'. Dawson, J. observed that this was of no consequence. On behalf of the Comptroller it was argued that a number of considerations might justify her withholding of refund of overpaid stamp duty and submitted that the possibility of these situations arising explains why the Legislature had used the word 'may' Chief among these considerations was the impossibility of ensuring that where the duty had been passed on to some other person, any refund should be similarly passed on. It was

argued that unlikelihood of Royal's passing on of any refund would result in a windfall to it because the burden of the duty had in fact been borne by its customers.

243. Dawson, J. repelled this contention by saying ;

But that it is a situation for which the legislature might have provided had it wished to do so and its failure to do so does not indicate an intention to give to the Comptroller a discretion to retain payments of stamp duty which were not made pursuant to any legal obligation.

. . .

The absence of any qualification of this kind in Section 111(1) suggests to my mind an obligation to refund the overpaid duty rather than a discretion to withhold repayment in situations which the legislature might have specified but did not.

It must be borne in mind that the occasion for the exercise of the authority conferred by Section 111(1) is the finding of an overpayment of stamp duty; that is to say, a finding that the comptroller received moneys to which she had no entitlement. The sub-section must be read either as requiring her to refund the overpayment or as conferring a discretion upon her to keep the moneys notwithstanding that she had no entitlement to receive them. The principle that a statute will not be read as authorising expropriation without compensation unless an intention to do so is clearly expressed has been described as a firmly established rule of law'.

244. Dawson, J. also expressed the view that the Comptroller did not have a discretion which had to be exercised in accordance with law of restitution. He pointed out that the occasion for the exercise of the authority was identified. The only question which arose was whether the authority must be exercised when the necessary finding of overpayment had been made or whether its exercise was discretionary. Dawson, J. observed that "if the common law, rather than the sub-section, were to govern the Comptroller's obligation to make a refund, then no doubt a refund would now be required."

245. In fact, this principle is very important to understand the problem raised in this Court. The Central Excise Act provided for every situation for levy, collection and refund of tax. If an overpayment has been made for whatever reason, the amount has to be refunded. The Excise Officer, who deals with an application for refund, has to find out whether an overpayment has been made under the Act. He may, for any reason to be found in the Act, decline to give refund. He cannot travel beyond the Act to find other considerations for withholding the refund. As Dawson, J. pointed out if that was the intention of the Legislature, the Legislature would have expressly provided for it. Dawson, J. observed:

However, as I have said, I do not regard Section 111(1) as conferring a discretion. Once the Comptroller found that duty had been overpaid, she was under an obligation to refund it.

246. Since Dawson, J. concluded that Section 111(1) did not confer any discretion to the Comptroller to withhold payment of an unlawful levy, he did not express any final opinion on the

question of unjust enrichment and passing on of the overpayment of stamp duty to the insurer in that case. However, Dawson, J. observed:

The better view would seem to be that it is the unjust enrichment of the payee rather than loss suffered by the payer which should govern entitlement to restitution, but, having regard to the view which I take, it is unnecessary to determine that question in these proceedings.

247. I am also of the view that the Excise Act before its amendment in 1991, in particular Rule 10B and later Section 11B, did not confer any power on the Excise Officer to withhold refund on any ground of "unjust enrichment", after being satisfied that overpayment of tax has been made.

248. Moreover, refund is to be claimed within six months from the date of payment of tax which means within six months from removal of the goods from the factory. A company may take a very long time to dispose of its goods after clearance. But a claim for refund has to be made within the short time permitted by the Act. These provisions are indicative of the fact that refund claim has to be made regardless of the sale of the goods.

249. That passing on of the incidence of tax was not relevant consideration is also borne out by Sub-section (3) of Section 11B as well as Sub-rule (3) of Rule 10B, e.g., if there is dispute as to classification of the goods and the assessee takes resort to filing of an appeal which ends in favour of the assessee, refund will have to be made of the excess amount of tax realised to the assessee without his having to make any claim in that regard. In such a situation, the Assistant Collector of Central Excise is not empowered, before refunding the money, to make an enquiry as to whether the duty has been passed on to the consumers.

250. The concept of "passing on the duty " cannot be fitted in the provisions of the Excise Duty Act before its amendment in 1991. As has been repeatedly asserted in a number of cases that in a taxing statute, there is nothing to be added and there is nothing to be taken out and the words must be interpreted as they stand. There is no equity about taxation. To introduce the concept of "unjust enrichment" in the Act even before its amendment in 1991 is not permissible by any canon of construction. Our attention has not been drawn to any provision of the Act which is concerned about the consumer of the product after they pass out of the factory gate. The rule and the Section dealing with the refund do not contain any provision that the Excise officer will be entitled to withhold refund if it is found that the duty has been passed on to the consumers. As I have stated earlier powers and functions of the Excise Officer are circumscribed by the Act. He cannot take into consideration anything which is not specifically contained in the Act.

251. The contention of Mr. Parasaran on behalf of the Union of India has been that the incidence of tax is on the ultimate consumer. As I have pointed out earlier, the Central Excise Act is not at all concerned with the ultimate consumer. Even if it is not possible for a manufacturer to sell the goods, the duty will have to be paid. If it is found after sale of the goods that there is any short levy or under levy, the duty will still have to be paid by the manufacturer. If there is a penalty imposable because of short levy or under levy or any interest is payable, it is the manufacturer who has to bear it. If the goods are lost after production, the manufacturer will have to pay duty on the lost goods.

252. The sum up, under the Central Excise Act, 1944, there is only one duty and that has been imposed on manufacture. This duty has to be paid before clearance. This duty has to be paid in the manner and mode laid down by the Act. The Act does not impose any other duty. The Act is not concerned with what happens after the goods have been cleared. If the duty has been erroneously imposed, the refund of the duty must be made to the person on whom it is imposed. Refund of tax must not be confused with restitution or compensation. In my judgment, there is only one taxpayer and it is the person who pays the tax at the time of clearance of goods. There is no other tax imposed by the Central Excise Act. How the burden of tax is borne or its economic impact on the manufacturer are not matters within the purview of the Central Excise Act. No notice of these considerations can be taken in deciding the application for refund by the Excise Officer. Article 265 of the Constitution enjoins that no duty shall be levied ! and collected except in accordance with law. If it is found that a manufacturer has been asked to pay more than what he is liable to pay under the Central Excise Act, he is immediately entitled to get the refund of the wrongfully collected duty. This constitutional guarantee cannot be sidetracked in any manner.

PRICE

253. Every manufacturer tries to maximise his profits. When he sells goods, he fixes a price at which he can make the maximum profits. Higher prices do not necessarily fetch higher profits. The manufacture has to sell his products and if the prices are to high, the products will not sell. He has to fix a price keeping in view the costs incurred by him (this will include costs of production as well as selling costs and also the overheads) and also the taxes he has to pay. He will also have to take into consideration the market forces, the effective demand for his products and also the nature and price of the competing products in the market. He will only fix such a price which "the traffic can bear'. It is wrong to presume that if taxes are raised, the manufacturer has merely to pass on the burden to the consumers by raising the price.

254. It should always be borne in mind that a manufacturer has to generate sufficient income to pay for the prices of inputs, wages to the employees, rents, fuel charges, overheads and many other charges, including direct and indirect taxes.

255. Every type of tax, except only those which are levied on the profits like Income Tax and Surtax on company's profits, will have to be included in the price. The price must be high enough to fetch sufficient income to the manufacturer to pay for all these things and stay in business. If the manufacturer is a company, as the appellant herein is, out of the profits, specific and general reserves will have to be created. Provisions have to be made for known liabilities like provident fund and gratuity for workers, etc. Debenture holders and preferential share- holders will have to be paid. Dividends will also have to be paid to the share-holders who have invested their money in the company. All these things will have to be paid out of the profits made by a company after paying all the expenses including excise and other duties. A manufacturer has also to take into account that all the goods produced by him may not be sold in the year of production itself. That means a large amount of circulating capital will remain blocked. This will also lead to higher interest charges. In fact, there is hardly a company which does not have to carry inventories of tax-paid finished good year after year. Goods distributed for sale to various outlets may not be sold for months or even years. Such goods may ultimately have to be sold at large discounts or even at a loss. Many products after some time cannot be sold at all for various reasons. In the case of BSC

Footwear Limited v. Ridgway (1972) A.C. 544, the House of Lords dealt with a case of a well-known shoe manufacturing company. It was found that the unsold stock of shoes of the company at the end of the trading year was generally about a third of the quantity actually sold in that year. Substantial part of the stock-in-hand at the end of the year would be sold either at reduced prices in January sales and thereafter at even lower prices in later sales. The question in that case was how to value the unsold stock at the end of the trading year. That question does not arise in this case, but it is illustrative of the difficulty of selling goods produced by a manufacturer. Can it be said in such cases when a substantial portion of the goods are being sold at an undervalue and thus causing large erosion of profits, that the incidence of duty has been merrily passed on to the consumers'? The goods could not be sold except by reducing the price drastically. It is difficult to say that in such a case incidence of tax is being borne by the consumers and the loss by the producer. BSC Footwear's Case illustrates the predicament of an average manufacturer, A substantial quantity of tax-paid products cannot be disposed of as a matter of course and the manufacturer has to get rid of the unsold products by organising first sale at a discount thereafter at even lower prices.

256. This is a problem with every manufacturer and to assume that the excise duty can be passed on to the consumer without any corresponding loss to the manufacturer is to ignore reality.

257. In the case of British Paints India Limited v. Commissioner of Income Tax, West Bengal MANU/WB/0118/1974 : [1978]111ITR53(Cal) , the problem was once again of valuation of unsold stock of a paint manufacturer. It was recognised that paints had a very short "shelf life". In other words, unsold cans of paints lying on the shelves of the various outlets of the manufacturer could not retain its quality and utility for indefinite length of time and became unfit for market. In that case, the question was whether the Company was entitled to depart from the usual practice of valuing the unsold stock at the end of the year on cost or market price, whichever was lower, basis. The Court said Yes. The Court held that the Company was entitled to value its unsold stock of the goods "in process" on the basis of the cost of raw materials and finished products on the basis of its costs. It was recognised that the company might have to sell a portion of its products ultimately at a vastly reduced price.

258. I have not understood the concept of passing on of tax liability. If this argument is taken to its logical conclusion, then it means that the manufacturing company does not incur any expenditure at all. The taxes as well as the costs of production are recovered through price. Will that mean that a company does not have any cost of production? The wages of labourers, their provident fund, gratuity, bonus, the costs of raw-material, the fuel charges, the overheads; all these things have to be paid out of the money generated by the company. This can only be done through price obtained by the sale of goods. A suit for short sale by a manufacturing company or recovery of money for over charging can be defeated by saying that all these things have been passed on to the consumer. An electricity supply company or a coal supplier can also take the plea, faced with an allegation of excessive charge, that in any event the charges have been passed on to the consumers. As I have emphasised earlier that it is not possible to split up the price of a commodity and find out how much is attributable to labour, how much to cost of production and how much to the overheads.

259. That the buyer pays nothing but the price, has been made clear by Section 2(10) and also Section 4 of the Sale of Goods Act. Section 64A permits the seller to add an amount equal to any new tax imposed or any tax increased if such imposition or increment has taken place after the contract was entered into and if a different intention does not appear from the terms of the contract.

260. Incidentally, it should be noted that Lord Goddard, J. took into consideration Section 27 of Finance (No. 2) Act, 1940 which appears to be similar to Section 64A of our Sale of Goods Act, 1930. Section 64A provides:

64A. In contracts of sale, amount of increased or decreased taxes to be added or deduced. - Unless different intention appears from the terms of the contract in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax paid where tax was chargeable at that time,-

(a) if such imposition or increase so takes effect that the decreased tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes, namely;

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.

261. The English Law in this regard is the same.

262. Lord goddard's judgment goes to show that even if the duty element was separately shown in the invoice what the buyer pays is the price of the product and nothing else. The seller similarly gets only the price. Lord Goddard, J. also noted the fact in that case that the burden of the tax had been passed on. This according to Lord Goddard J., did not make any difference.

263. In the case of Paprika v. Board of Trade (1944) 1 KB 327, a person was called upon to pay penalty which was three times the price at which the articles were expected to be sold. The Divisional Court rejected the argument that the tax element in the price should be excluded because it was no price at all. It was an amount which would ultimately go to the Government. The Court recognised the fact that the price could be affected by the tax element but "it does not cease to be the price which buyer has to pay even if the price is expressed to be as X plus purchase tax."

264. This case was cited with approval by Lord Goddard, J. (as His Lordship then was) in the case of Love v. Norman Wright (Builders) Ltd. (1944) 1 All ELR618, the question before the Court of Appeal was whether the seller of goods under a contract made after the purchase tax had been imposed by law could call upon the purchaser to pay the tax exigible in respect of the sale in addition to the agreed price at which the goods were to be supplied. Goddard, J., pointed out that a seller quoted a price X plus purchase tax, the buyer must pay the tax as part of the purchase price. Conversely, if a seller agreed to supply goods for a certain sum, then he could not call on the buyer to pay anything extra for tax additionally, unless he was authorised by any statute to do so.

265. In George Oakes (Private) Ltd. v. State of Madras and Ors. this Court was called upon to consider whether a dealer can pass on his tax liability as such to his customer. In that decision while rejecting the contention that the tax liability as such can be transferred to the buyers, this Court referred to the observations of Lawrence. J. in Paprika Ltd. and Anr. v. Board of Trade (supra) and Goddard, L.J., in Love v. Norman Wright (Builders) Ltd. (supra).

266. In the former case, Lawrence, J. observed:

Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands it does not cease to be the price which the buyer has to pay even if the price is expressed as X plus purchase tax.

267. In love's Case, Goddard, LJ. observed:

Where an article is taxed, whether by purchase tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax but on a sale there is only one consideration, though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not.

268. In that decision, reference was also made to the decision of this Court in Tata Iron and Steel Co. Ltd. v. State of Bihar MANU/SC/0123/1958 : [1958]1SCR1355 . Therein Das, C.J. who delivered the majority judgment of the court said:

The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. This is further made clear by the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. This also makes it clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller. The buyer is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. See Love v. Norman Wright (Builders), Ltd.

From all these observations, it is clear that when the seller passes on his tax liability to the buyer, the amount recovered by the dealer is really part of the entire consideration paid by the buyer and the distinction between the two amounts - tax and price - loses all significance.

269. These decisions were re-affirmed by this Court in the case of Delhi Cloth and General Mills Co. Ltd. v. Commissioner of Sales Tax, Indore MANU/SC/0606/1971 : AIR1971SC2216 .

270. In the case of Delhi Cloth and General Mils Co. Ltd. v. The Commissioner of Sales Tax, Indore MANU/SC/0606/1971 : AIR1971SC2216 , Hegde, J., speaking for the Court, once again emphasised:

Unless the price of an article is controlled, it is always open to the buyer and the seller to agree upon the price to be payable. While doing so it is open to the dealer to include in the price the tax payable by him to the Government. If he does so, he cannot be said to be collecting the tax payable by him from his buyers. The levy and collection of tax is regulated by law and not by contract. So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection that may be made by the dealer from his customers the same can only be considered as valuable consideration for the goods sold.

271. I have been at great pains to emphasise that if the seller passes on his tax liability to the buyer, the amount equivalent to the tax received by the Seller is part of the entire sale consideration. It is not collection of tax, because levy and collection of tax is regulated by law and not by contract. Whatever may have been collected by a seller from his customer on account of tax, the same can only be considered as valuable consideration for the 'price' of the goods sold.

272. What the buyer pays is the price of the goods and not the components of the price. Production costs, selling costs, overheads, taxes, everything goes into fixation of the price. Moreover, the market conditions will have to be taken into account. If the price is too high for the market to bear, the goods will not sell, In order to absorb the excise duty the manufacturer may have to cut various types of costs. It may have to reduce its profit, pay lesser dividends to shareholders, he may not readily agree to any increment in pay or payment of bonus or other benefits to the workers. It has not been explained how it can be readily assumed that all that the seller has to do to absorb higher duty is to include it in its price and pass it on to the consumers?

273. If preamble to the Constitution and social justice is borne in mind, then it may as well be argued, as Karl Marx did, that every article of manufacture is congealed labour. If the labour is given just reward for the work done by him, no surplus value will be left. It is this surplus value extracted from the labour through the pricing mechanism that becomes the manufacturer's profit. To prevent "unjust enrichment", the entire surplus should go back to the labour.

274. But, here we are not concerned with social and economic theories, but only with the prosaic realm of law as it stands. Harold Laski in his well-known book "Introduction to Politics" pointed out the difference between role of law and role of politics by saying that the lawyers will have to take the law as it stands. It is not for them to ask why those laws should be our laws? What ends

do these laws serve? Why should these ends be our ends? Whereas a student of politics may ask all these questions. Laski said, "We have to add, so to say, a teleology to law."

275. In this case also we are not entitled to add any teleology to law. We have to take the Central Excise Act as it stands. We may or may not like the law. But for that reason we cannot discard it or its language to bring out an abnormal meaning. If the meaning of 'price' as given in the Sale of Goods Act is borne in mind and its implications as explained in judgments referred to hereinabove are kept in view, then it can never be said that the seller has charged anything but the price of the goods from his buyer. He cannot by a contract call upon the buyer to pay any tax which is the prerogative of a taxing statute. Even if he quotes the price as x (Costs) + Y (Taxes) + Z (Profit), what the buyer will pay is the price of the goods and nothing else, neither the costs nor the taxes are passed on to the buyer.

UNJUST ENRICHMENT

276. The facile assumption that when excise duty is imposed or raised,, it can be passed on to the consumer by merely raising the price with no corresponding loss or detriment to the manufacturer has not been made on the basis of any market study. In fact, before the new amendments were effected no in-depth study was at all done by the legislature. The basic premise of this line of reasoning is fallacious. The Finance Minister in his budget speech for the year 1994 206 ITR 19 stated:

Over the years, our indirect tax structure has grown into a complex maze of high and multiple rates, with numerous exemptions, and different rates being applicable for the same product for different uses and users. This has resulted in unnecessary complexity leading to administrative abuse, mounting litigation and uncertain economic impact. All this has effectively eroded the tax base and buoyancy of the system and created serious economic distortions....

277. To illustrate the enormity of excise burden which has to be borne by the manufacturers, it may be mentioned that in the Central excise Tariff Act, 1985, duty on oils used for skin-care was 105 per cent and duty on residual oil which was not specifically mentioned under the heading 3305.90 was 105 per cent. The duty on paints and varnishes under the heading 32.09 was as high as 60 per cent. Under the heading 33.07 pre-shave, shaving or after-shave preparations had to bear duty of 105 per cent. The example of high excise duty can be multiplied. It cannot be blindly assumed that levy of excise duty does not cause any financial hardship or loss to the manufacturers because they can merrily pass it on to the consumers. In fact, in very many cases, the Central Government had to issue exemption notifications on the representation made by industries exemption goods wholly or partially from excise duty having regard to the plight to which the industries had been reduced under the impact of taxation. The economic reality that rise in duty causes financial hardship to the manufacturer and that the manufacturer cannot get rid of that hardship by simply passing on the duty has been recognised by the Central Government itself by giving relief to the manufacturers by various exemption notifications. Even in cases where exemption notifications could not be issued retrospectively, an Act was passed to help the manufacturers.

278. The Central Duties of Excise (Retrospective Exemption) Act. 1986 was passed on 8th September, 1986 to give retrospective effect to certain notifications to enable the excise authorities to refund duties of excise which had already been collected in certain cases. It was stated by Section 2 of the Act that the Act shall be deemed to have and to have always had, effect on and from the 1st day of March, 1986. It went on to provide:

(2) The duties of excise which have been collected, but which would not have been so collected if the said notification had been in force at all material times, shall be refunded:

(3) The duties of excise which have become payable, but which would not have been so payable if the said notification had been in force at all material times, shall not be required to be paid.

(4) Any person claiming refund of any duty of excise under Sub-section (2) may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the. commencement of this Act.

279. It had the effect of refunding the duties of excise which had already been collected and declaring the duties of excise which had become payable (but would not have been payable if the notifications had been in force) shall not be required to be paid. This Act was passed in recognition of the fact that high excise duty causes hardship to the manufacturers. They must be given relief even with retrospective effect.

280. This Act is important for the purpose of this case because it goes to show the legislative intent. The Legislature never intended before 1991 that refund of excise duty will not be given to the manufacturers but to the buyers of the goods. The Central Excise Act is totally silent on this aspect of the matter and we shall not add a rider to the Central Excise Act to deny any refund due to the manufacturer.

281. It has also to be borne in mind that the rates of duty in India is much higher than in U.S.A., Australia or Canada. Its economic impact is much greater. In fact in the case of United States v. Jefferson Electric Manufacturing Company, (supra), the dispute related to levy of excise duty at the rate of 5 per cent. In Air Canada' Case, the disputed duty was 5 cents per gallon. It is needless to speculate how the Courts would have reacted if they had to face the high tax regime that exists in India.

282. Mason, C.J. in the case of Commissioner of State Revenue v. Royal Insurance Australia Ltd., (supra), noted how the theory that the burden imposed by higher excise duty can be passed on to the consumers without any economic loss to the manufacturer has been rejected in various Courts in the United States, Canada and also Australia. Mason, C.J. observed that this economic theory had major difficulties. The first was that to deny recovery when the plaintiff shifted the burden of the imposition of the tax or charge to third parties will often leave a plaintiff who suffered loss or damage without a remedy. Another reason given by Mason, C.J. was that an inquiry into and a determination of the loss or damage sustained by a plaintiff who had passed on a tax or charge was a very complex undertaking.

283. Mason, C.J. also pointed out that the basis of restitutionary relief was not compensation for loss or damage sustained but restoration of the plaintiff of what has been taken or received from the plaintiff without justification. Mason, CJ in his judgment illustrated the proposition with a number of cases to show that the doctrine of "Passing on" was fraught with many difficulties. An American case was cited where the Supreme Court of U.S. had rejected the doctrine of "passing on" under anti- trust laws where plaintiff had passed on overpayments to their customers Hanover Shoe Inc. v. United Shoe Machinery Corporation (1968) 392 US 481. Commenting on this, Mason, CJ. observed that though the context is different, the reasons given for the rejection were relevant for the present case. They include the difficulty of determining the economic impact upon the plaintiff's business of passing on the overpayment, the practical problems which availability of the defence would generate involving "massive evidence and complicated theories". Further the defence would probably apply all the way down the chain of distribution to the ultimate consumer who would have little interest to sue. The U.S. Supreme Court also noted that economic theories rely upon the assumptions which do not operate in the real world, thereby making the proof of passing on extremely difficult. This view was also expressed in the opinion of Advocate General in Administration delle Finanze dello Stato v. San Giorgio SPA (1985) 2 CMLR 658.

284. Mason, C J. Concluded that:

The United States and European decisions demonstrate that any acceptance of the defence of passing on is fraught with both practical and theoretical difficulties. Indeed, the difficulties are so great that, in my view, the defence should not succeed unless it is established that the defendant's enrichment is not at the expense of the plaintiff but at the expense of some other person or persons.

285. In view of all these, I see no basis to deny the refund to a manufacturer on the facile assumption that burden of duty has been passed on to the consumers without any loss or detriment to the manufacturer. The absurdity of this doctrine of "passing on" can well be demonstrated by the following examples.

286. Supposing, a manufacturer of pulp sells his product to a rayon manufacturer which uses the pulp to manufacture rayon it can be said that the burden of duty has been passed on to the rayon manufacturer. The rayon manufacturer, in his turn, includes the cum-duty price in his costs and includes it in his price when he sells his yarn to a cloth manufacturer. The cloth manufacturer in his turn will include the duty-paid price of rayon in his costs and will sell his products to a garment manufacturer at duty-paid price. The garment maker will sell the garments to the actual users. Can the last consumer establish that he has borne the incidence of an illegal excise duty imposed on pulp and claim refund of the unlawful duty on pulp. Can he at all be made aware of such an unlawful levy on pulp? Or will it be that the rayon manufacturer will get the refund as a consumer of pulp even though he has included the duty paid price in his costs of raw material for production of rayon and has thereby passed on the burden to his customers. These illustrations can be multiplied ad infinitum. If a scrap dealer buys duty paid scrap and sells to a car-parts manufacturer who in his turn treats such price as his cost and includes it in his price (duty included) and sells the parts to a car manufacturer, who in his turn sells cars to the actual users, who will get back any illegal levy of excise duty on scraps?

287. This problem has other dimensions. Excise Act cannot be viewed in isolation. If there is an illegal levy of paper and a lawyer buys paper at cum-duty price, he gets deduction of the entire sum in computation of income under the Income Tax. Can he claim refund of excise duty as being the ultimate consumer? As I said earlier, these are not isolated examples. But things that are happening in everyday life. Duty paid price charged by a manufacturer is his income for Income Tax purposes, turn over for sales tax and turn over tax. It has a variety of other fiscal dimensions. How can it ever be assumed that an illegal levy of tax will be a source of joy for the taxpayer? He will happily pass on the burden and merrily enjoy the refund.

288. The argument by reference to the Directive principles that unlawfully collected tax must be retained by the government for the common good of the people and also to involve the weaker sections of the people may have a populist appeal, but is without any basis having regard to the provisions of the Central Excise Act as well as Excise Tariff Act.

289. The Central Excise Act levies a tax on manufacture of goods. Very often goods are manufactured by small scale industries or individuals for the benefit of large industries. If a small scale paper pulp manufacturer who struggles to exist, cannot get back an illegal levy of excise duty because the consumer, a large scale viscose fibre manufacturer, has ultimately borne the burden of the duty and the illegally collected duty is paid back to that large company, the weaker section far from being benefited, will be thoroughly robbed. In fact, if we look at the Central Excise Tariff Act, it will be seen that the vast majority of the products are not for household use or for common man. The list of excisable commodities starts with Animal Products, which may include products of the kind unfit or unsuitable for human consumption; Guts, bladders or stomachs of animals or animal blood; or animal fat, other than pig fat (Chapter 2). Obviously these have industrial uses, but a common man will not buy them. Likewise, lac, Gums, Resins (Chapter 13), Bituminous and Asphalt, chemical compound (Chapter 27), Chemical Compounds - Organic and Inorganic (Chapter 28), Explosives, Pyrotechnic Products; Pyrophoric Alloys and other Combustible Preparations (Chapter 36) will only be used by large industries. A large number of chemical products are taxed under the heading Miscellaneous Chemical Products, like Graphite, Activated Carbon, Rubber Accelerators, compound plasticisers, organic composite solvents (Chapter 38), charged fire extinguishing grenade are not used by the common man.

290. In fact, the Schedule to the Central Excise Tariff Act has as many as 96 chapters and appears to contain more entries relating to goods which are used by trade and industry than common man in every day life like Base Metals, Iron and steel. Aluminium Metal (Chapter 72), Nuclear Reactors, Boilers, machineries, mechanical appliances; parts thereof, electric motors and generators, rotary converters, transformers, static converters, electro-magnets, etc. (Chapter 85). The Schedule also include Railway or tramway Locomotives, Rolling-Stock and parts thereof; Railway or Tramway Track Fixtures and Fittings and parts thereof; Mechanical Traffic Signalling Equipment of all kinds (Chapter 86). This Entry is followed by Vehicles other than Railway or tramway etc. (Chapter 87). This Entry includes motor cars, motor vehicles, tanks and other armoured fighting vehicles and also parts and accessories of the motor cars and motor vehicles principally designed for transport of persons, motor vehicles for the transport of goods. Even here it should be noted that, having regard to the price of the motor cars and motor vehicles, it is not the weaker section of the population who uses these vehicles. In the name of benefiting the weaker section, unlawfully and illegally levied duty of excise on parts and accessories and various inputs

manufactured by small manufacturers for use of the large manufacturers will not be returned to them but handed over to the large manufacturer or rich consumers who has the resource and ability to claim it.

291. There are of course household goods or goods of everyday necessity like edible oil, toothpaste, tooth brush, soap, some textile articles and possibly some items falling under paper and paper board are used by common man in everyday life. But taking an overall view of the tariff items in the Schedule to the Central Excise Tariff Act, it can hardly be said that excise duty by and large is on goods to be used by the common man. Moreover, there are many industries reserved for small scale sector. This has been done to protect small scale industries from competition from the big manufacturers. If for example, a manufacturer of wrist watch strap (reserved for small sector) is unable to get back any illegally imposed duty of excise because the watch straps have been sold to large watch manufacturing company and that large company is given the refund, the weaker section will not benefit in any way.

292. Even for the consumer goods, it is not in the realm of belief that an ordinary buyer will be able to chase the Excise Officer and claim refund of duty illegally imposed on the manufacturer. For example, a person buying tooth brush from the local grocery shop, will not retain the cash memo for years and years and even if he does so, he will not know that there is a dispute about the levy of excise duty pending. Furthermore, a man who purchases tooth brush in Madras will not be able to claim refund of duty from the proper Excise Officer who has jurisdiction over the company at Bombay. We shall bear all these considerations in mind before trying to interpret the law in a way which will benefit the weaker sections of the people and give them a sense of participation in the development of the country.

293. Moreover, only the manufacturer has to separately show the duty element in his invoice. The wholesaler, the distributor or the retailer has no such obligation. Ordinary customers buy their goods at the retail outlet, where even if a cash-memo if given, the duty element will not be shown separately. How will the common man know that he has paid any duty and if so of what amount?

294. In my view, the entire argument based on "unjust enrichment" is founded on a false premise. It will be wrong to assume that the duty element can be included in the price and that no prejudice will be caused to the manufacturer by the levy or enhancement of the duty. To take this position is to ignore the economic realities.

295. There may also be situation when a manufacturer will not be able to certify that he has not passed on the duty even though he has borne it. Supposing a manufacturer is charging Rs. 100 per unit of good. The price of Rs. 100 is calculated on the basis of Rs. 80 as costs, Rs. 10 as profits and Rs. 10 as excise duty. The excise duty element is enhanced unlawfully by Rs. 5. In such a case, the manufacturer may either raise the price of the goods by Rs. 5 or he may decide to reduce his profit to Rs. 5 and sell the goods at the same price. In the second case when the manufacturer reduces the profit element to Rs. 5 "and sells the goods at Rs. 100, can it be said that he has passed on the burden of excise duty to his customers. The price is inclusive of the duty element. In a sense, the burden of duty borne by the manufacturer has been passed on. But then again, the manufacturer has suffered diminution of profit. Can it be said in such a case that if the manufacturer manages to get an order of refund of duty, it will be unethical for him to get the amount because this will be

"unlawful enrichment"? The manufacturer in a case like this will not be in a position to certify that the burden of duty has not been included in the price of the goods but the fact remains that in order to maintain the price of goods at the optimum level the manufacturer had to suffer loss of profit. The Central government has been empowered to exempt, generally or absolutely by notification, excisable goods from the whole or any part of the duty imposed thereon. Judicial notice must be taken that in very many cases, having regard to the hardship suffered by the industry and representations made by the industry, duties have been reduced or exempted by issuing appropriate notifications or even by legislation.

SCOPE OF SECTION 11B 11D 12A 12B 12C AND 12D OF THE CENTRAL EXCISE ACT, 1944

296. Sections 11B and 11D in Chapter II and Sections 12A 12B 12C and 12D in Chapter II-A are now to be considered:

11B. Claim for refund of duty.

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

PROVIDED that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act;

PROVIDED FURTHER that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

PROVIDED that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credits of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

PROVIDED FURTHER that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

(4) Every Notification under Clause (f) of the first proviso to Sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should ceases to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under Clause (f) of the first proviso to Sub-section (2), including any such notification approved or modified under Sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Explanation : For the purposes of this section, -

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable material used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purpose aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of Section 5A, the date of issue of such order;

(f) in any other case, the date of payment of duty.

. . .

11D. Duties of excise collected from the buyer to be deposited with the Central Government.

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by Assistant Commissioner of Central Excise.

. . .

12A. Price of goods to indicate the amount of duty paid thereon.

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sale invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

12B. Presumption that incidence of duty has been passed on to the buyer.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer welfare fund.

(1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in Sub-section (2) of Section 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

12D, Utilisation of the fund.

(1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

297. Section 11B(1) contemplates that for claiming refund of any duty of excise a person has to apply with documentary evidence to establish, (1) the amount of duty of excise was collected from him or paid by him and (2) the incidence of such duty has not been passed on by him to any other person. Sub-section (2) of Section 11B provides that if the Excise officer is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order

accordingly. The refundable amount, however, will be credited to a Fund. The proviso lays down certain circumstances under which the duty may be paid to applicant. Clause (d) of the proviso says that the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person, will be refunded to him. These provisions are not in consonance with the charging provisions of the Excise Act and the Rules. The well-known principle of fiscal legislation is that the charge lies where it falls. It cannot be shifted by a contract. Acts relating to Income Tax, Wealth Tax, Sales Tax as well as Excise Duty have charging sections. A man may contract with somebody to pay his Income Tax, a seller may contract with somebody else to pay his Sales Tax and a manufacturer may contract with a third party to pay the duty of excise. These contracts are not enforceable by or against the Revenue. The Central Excise Act imposes a tax on manufacture. This tax has to be paid before the goods are cleared in the manner laid down by the Act and the Rules. There is no other duty of excise payable under the Act. I have referred to various decisions wherein it has been pointed out that the contract between the manufacturer and a buyer is of no consequence in the matter of payment and collection of excise duty. The question of passing on can only arise after the duty has been fully paid. The duty of excise is never borne by the buyer as stated in Clause (e) of the proviso. The buyer may pay a sum equivalent to the duty of excise pursuant to a contract with the manufacturer, but that is a matter of contract.

298. The duty impose on and collected from manufacturer, if it is found to be in excess of the charge imposed by Section 3, has to be returned to manufacturer and nobody else, otherwise charging provision, rules for computation of charge and imposition and collection of duty will become meaningless. If any amount has been realised by the Excise Officer in excess of the charge imposed by the charging section, then such collection is beyond the competence of the Act and also violates Article 265 of the Constitution. It was pointed out in the case of Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd. MANU/SC/0377/1972 : 1978(2)ELT416(SC) , that Article 265 of the Constitution makes a distinction between levy and collection. Levy may include both imposition of a tax as well as assessment. 'Collection' will be recovery of tax. If it is found that a tax-payer has been levied more than the permissible limit imposed by the charging section read with Excise Tariff Act and the Rules, the levy is bad. The Collection pursuant to this levy is equally bad. Such levy and collection are dehors the provisions of the Excise Act. There is no way that the Central Excise Authority can retain the amount or use the amount. In any way it has to refund the amount to the person from whom it has been unlawfully collected by the Excise Officer. The Central Excise Act, as Hegde, J. pointed out in the case of Delhi Cloth and General Mills (supra), duty is imposed by a statute whereas the cum-duty price is paid by the j purchaser under a contract with the manufacturer. No portion of the cum-duty price in law can be treated as the duty of excise. Nothing which is not imposed by Section 3 and collected under the provisions of the Excise Act and Rules, can be called "duty of excise". In my view this is the basic principle of any tax law. If by any device any amount which is not leviable in law has been levied and collected from a tax- payer, then retention of such amount will be unlawful.

299. Any provision appearing or trying to bar recovery of illegally collected tax is violative of Article 265 of the Constitution and must be struck down as the Barring Act was struck down by the Privy Council in the case of Commissioner for Motor Transport v. Antill Ranger & Co. Pty. Ltd. (supra). If the realisation of tax in excess of the chance imposed by the Excise Act read with Excise Tariff Act and Rules, then such levy of tax is not authorised by law. The Collection of such excess unlawful levy is also invalid. As the judicial Committee pointed out if the levy is invalid as

an offence against Section 92, it is equally an offence to deny the right to recover it after it has been unlawfully exacted. Therefore, in my view, once it is established that more than what is payable under the statute has been collected from the tax-payer, the tax-payer automatically gets a right to get back the Whole amount. If the right is sought to be effectively taken away by imposing conditions, then the law imposing these conditions must be declared to be bad and ultra vires the Constitution.

300. There is another aspect of this matter.

Excise Officer cannot tax more than what is permitted by the statute. If the levy is in excess of the statute, then its retention by the State is unauthorised by law. What is being retained is not in enforcement of the charging section but something else. Such illegally collected tax is not the property of the State and is not within the disposing power of the State.
If the money has to be utilised by the State, the State has to find out some legitimacy for having possession of the money. In the Canadian case of Air Canada v. British Columbia (supra) retroactive amendment of the Gasoline Tax Act was passed with a new definition of 'purchaser' to make a levy valid and retain the illegally collected amount by setting off against the claim raised by the amended Act. That is the only way in which La Forest, J. could justify, what was otherwise a confiscatory provision. In this case, there has been no attempt to give legitimacy to the holding of the amount or utilisation of the amount by the Government. The entire amount was collected unlawfully. The original sin has not been cured as in Canada by a retroactive charge.

301. I shall now examine the other provisions of the newly added sections. Sub-section (1) of Section 11B requires an application for refund to be made. Sub-section (2) requires the Assistant Commissioner to pass an order of refund provided the conditions set out therein are fulfilled. Sub-section (3) merely lays down that no refund shall be made except as provided in Sub-section (2). There is a non obstante clause that this will operate notwithstanding anything to the contrary contained in any judgment, decree, order etc. It is obvious that new provisions will apply in cases where applications for refund were made before the new provisions came into force and also subsequently. Sub-section (3) has no retrospective effect. When a case has been finally heard and disposed of and no application for refund need be made, Sub-section (3) cannot apply. If there is a judgment, decree or order which has to be carried out, the Legislature cannot take away the force and effect of that judgment, decree or order, except by amending the law retrospectively on the basis of which the judgment was pronounced.

302. I have indicated earlier in the judgment and shall not repeat that it is practically impossible for an ultimate consumer to make an application for refund under Section 11B. He has to know that there is a dispute about levy of excess duty which is going on between the manufacturer and the excise authority. He has to know the outcome of that dispute. He has also to find out what is the amount of duty he has borne. This is a difficult process because the ultimate consumer may have a cash-memo from his retail-seller. Retail-seller usually does not give the break up of duty in the price he charges. The new law requires a manufacturer at the time of clearance of the goods to prominently indicate in the invoice and other documents the amount of such duty which will from part of the price. There is no such requirement for the dealers down the line. It is incomprehensible how a person who buys a cake of soap will know the duty content in the price and whether the excise duty levied was valid or not and how will he find out which is the proper officer, to whom

to make an application in the prescribed form for refund of duty and what sort of evidence will he be having in his possession to authenticate his claim? It is rightly contended by Mr. Nariman that all these provisions are only an eye-wash to retain the illegally exacted excess levy by the Government which as a matter of fact what is actually being done.

303. Now I shall deal with Section 11D. Excise duty is levied by the charging Section 3. It has to be paid according to the Excise Tariff Act, 1985 and the rules. Before clearance of the goods, the assessee is required by Rule 173B to file what is known as price/classification List in which full particulars of the goods manufactured and intended to be removed from his factory has to be given. The Chapter heading and sub-heading number under which the goods are to be assessed under Tariff Act has also to be indicated. The assessee has also to state the rate of duty leviable on each such goods. On the basis of the declaration made by the assessee, the Excise Officer has to make his calculation of duty. For the purpose of proper valuation of the goods assessable ad valorem, pro-forma price list for commodities has to be filed. The value of the goods have to be calculated by making deductions from the wholesale price in accordance with Section 4(4) of the Excise Act. There may be dispute as to the valuation or rate of duty for which an adjudication proceedings may have to be taken. But without the approval, of the Excise Officer, no goods can be removed from the factory. The assessee has also to maintain an Account Current. This is laid down by Section 173G:

RULE 173G. Procedure to be followed by the assessee. - (1) Every assessee shall keep an account-current with the Commissioner separately for each excisable goods..., in such forms and manner as the Commissioner may require, of the duties payable on the excisable goods and in particular such account...shall be maintained in triplicate by using indelible pencil and double-sided carbon, and the assessee shall periodically make credit in such account-current, by cash payment into the treasury so as to keep the balance, in such account- current, sufficient to cover the duty due on the goods intended to be removed at any time; and every such assessee shall pay the duty determined by him for each consignment by debit to such account-current before removal of the goods:

304. This rule requires advance payment of tax. Money has to be deposited in the treasury well in advance before removal of the goods.

305. Section 11D is a curious piece of legislation. Even after the full amount of duty has been paid and goods have been cleared, the manufacturer is being called upon to deposit with the Central Government any amount collected from the buyer representing duty of excise. In other words, having paid the full amount of duty of excise, the manufacturer is being called upon deposit the duty element in the price of his goods to be deposited to the credit of the Central Government. The only justification for this appears to be that the entire amount will be held till finalisation of the assessment. But the Section provides that if there is any surplus left after such adjustment, the surplus shall not come back to the seller but will be credited to the Fund or paid to the person who has borne the incidence of the duty in accordance with the provisions of Section 11B which means the ultimate consumer.

306. An attempt has been made to salvage this Section by construing that this Section will apply only if duty has not been paid on the goods or if any excess collection has been made over and above the duty already paid. It is very difficult to agree to such a construction. There cannot be a

blanket statutory direction to pay everything collected from a buyer on account of excise duty to be paid over to the Excise Officer. If it is in the nature of advance tax, there has to be some attempt to fix a percentage which needs to be handed over. Otherwise, it will be unreasonable restriction on trade. The sale price is a part of the circulating capital. Goods are converted into money and money is again utilised to manufacture goods. If a substantial portion of this money is taken away without having regard to the actual or probable necessity for the collection, it will be unreasonable restraint on the right of a person to carry on business. Moreover, the amount may be kept till finalisation of assessment. The assessment may not be finalised till the dispute has been decided finally by CEGAT or even by this Court. Will the money be blocked up till then? Supposing the assessee succeeds, why will he not get back the money with interest?

307. This provision has to be contrasted with the advanced tax collected under the Income Tax Act. Such collection is authorised by the charging Section of the Act Section 4(2) because otherwise, the collection would have gone beyond the scope of the charge. The rate on which the tax is to be collected and the basis is clearly stated, High Court rates of interest is payable both by the assessee and the Government in appropriate cases. But if an amount is taken in advance, then the residue after adjustment of tax must go back to the taxpayer.

308. That is not the scheme here. So, this cannot be treated something in the nature of advance collection of tax where duty has not at all been paid on the goods.

309. The second point that this has been done to safeguard against any excess collection from the consumer is equally unreasonable. The excise duty is a duty on the manufacture of the goods. Once full amount of duty has been collected, the excise authority cannot control any contract between the purchaser and the seller. The Excise Act imposes a charge on manufacturer. There is no charge of duty levied by the Excise Act on excess collection by the manufacturer from the buyer. Any question of excess collection by the manufacturer from the buyer is entirely out of the purview of the charging section. If the assessee has collected on account of excise duty from the purchaser more than what he has paid, perhaps, a purchaser can bring an action against the seller. In the event of a contractual dispute between the purchaser and the seller, the relevant statutes will be the Contract Act, the Sale of Goods Act and similar other statutes. But the Central Excise Officer cannot under any circumstances, lay his hands on anything more than what is actually levied by the Act. He cannot collect something which is not payable under the charging section even for the purpose of directing it to the Fund or to the actual consumer. The entire Section 11D is ultra vires the charge levied by the Excise Act itself.

310. Moreover, the entire sale price (duty included), will form part of the sales turn over of the assessee on which sales tax will have to be paid under the State Acts. Turn over tax will have to be paid by big assessees. The purchaser may also have to pay purchase tax on the purchase price. In such cases, how will the State Revenue authorities determine the quantum of turn over of sales or purchase for levy of sales tax or purchase tax? The sales proceeds will be income of the assessee for the purpose of levy of income tax.

311. Unlike the Income Tax, Act, the assessee has not been given any option to show that he is not liable to pay the amount which is being taken away from his proceeds. He has no opportunity of getting a hearing on this issue. The Income Tax Act enables the assessee, in such circumstances,

to dispute the estimation of advance tax made by the Income Tax Officer and file his own estimate (or course at his own peril). Here he has no option but to pay without any hearing.

312. I repeat that a manufacturer cannot be called upon to pay anything except the duty imposed by the charging provisions. Even if the final assessment has not been made, goods may be allowed to be cleared by paying the admitted amount of duty and furnishing the security for the disputed amount. The security may be keeping sufficient money in the Account Current with the Excise Department or even by furnishing a bond or a bank guarantee. This is provided by the Rules.

313. There is no legal or rational basis for a blanket provision to deposit whatever is included on account of excise duty in the price of the goods sold.

314. The position gets curio user after the deposit. After adjustment of the tax against the deposit, the surplus amount is not returned to the manufacturer. It has to be credited to the Fund or paid to the person who has borne the incidence of tax i.e., the ultimate consumer. In other words, the manufacturer will be robbed of a portion of his sale price for no rhyme or reason. This may also have the effect of nullifying the sale contract entered into by the manufacturer with the buyer. The buyer had agreed to pay an agreed price which may include the duty element. The seller agreed to sell the goods to the buyer at that price. Section 64A of the Sale of Goods Act protects the interests of both. How can a portion of that price be taken away and credited to a Fund or paid to the ultimate consumer? What will happen to the contract? The only effect of Section 11D is to rob the manufacturer of a portion of his legitimate dues. These provisions are not in aid of the charge on manufacture levied by the Central Excise Act, but are in excess of the charge and are confiscatory in nature and have to be struck down.

315. It appears to me that by these newly amended provisions, the Legislature has merely created a device or a cloak to confiscate the property of the tax-payer. In such a situation, a Bench of Five Judges of this Court in Raja Jagannath Baksh Singh v. State of Uttar Pradesh MANU/SC/0184/1962 : [1962]46ITR169(SC) , said that the law has to be struck down as passed in colourable exercise of the power of taxation. It was observed by Gajendragadkar, J., speaking for the Bench:

... the conclusion that a taxing statute is colourable would not and cannot normally be raised merely on the finding that the tax imposed by it is unreasonably high or heavy, because the reasonableness of the extent of the levy is always a matter within the competence of the Legislature. Such a conclusion can be reached where in passing the Act, the Legislature has merely adopted a device and a cloak to confiscate the property of the citizen taxed. If, however, such a conclusion is reached on the consideration of all relevant facts, that is separate and independent ground for striking down the Act.

316. So far as Sections 12A and 12B are concerned, only thing that, has to be pointed out is that these two sections do not change the character of the price of the goods. Both these elements were taken into consideration by Lord Goddard, J. in the case of Love v. Norman Wright (Builders) Ltd. (supra). It was stated that even if the burden of duty was passed on and the price was expressed as Pound X plus duty, even then what the buyer paid was price of the goods and not the duty and the

seller obtained the price and nothing else. This principle was reaffirmed time and again, as we have noted earlier in the judgment, in a number of cases by this Court.

317. Apart from what has been stated hereinabove, I find that the entire group of these sections is dehors the charging section of the Central Excise Act. The Central Excise Act imposes a duty on manufacture of goods. Various provisions have been made for computation and collection of that duty. Anything collected in excess of that charge is unlawful. If any provision is made for retention of duties collected without any authority of law, then such provision will be beyond the scope of the charge. It will amount to collecting and retaining something which is not at all duty payable under Section 3.

318. The Legislature has now authorised the Excise Department to retain the illegal levy. In my judgment, these provisions are ultra vires the charge levied by Section 3 and cannot be sustained in any way. In the language of Lord Mac Millan in Avrshire Employers Mutual Insurance Association Ltd. v. Commissioners of Inland Revenue 27 Tax Cases 331, 337, the legislature has missed fire.

319. The scope of charge in a taxing Act is of the highest importance. Nothing can be realised under a taxing Act beyond that. The new provisions of the Excise Act are not in aid of the charge imposed by Section 3. These sections are designed to enable the Excise Department to retain what was collected over and above the charge. The amounts collected in excess of what is actually payable under the charging section is not excise duty at all. Nothing can be collected under a taxing Act which is not authorised by the charging section read with the machinery provisions.

320. The new provisions not only effectively bar recovery of unlawful levies by the tax-payer but have also taken away from him a portion of the price at which he has contracted to sell the goods to the purchasers. How can a portion of the sale price be taken away and retained by the Excise Officer or returned to the buyer in derogation of a contract of sale passes comprehension.

321. I have already noted earlier in the judgment the impossibility of finding out on whom the incidence of charge falls and also the various unworkable problems created by these ill-conceived amendments. In my view, the amended provisions must be struck down as violative of Article 265 and the guarantee contained in Article 19(1)(g) of the Constitution of India.

322. I am further of the view, the Legislature has merely adopted a device and a cloak to confiscate the property of the tax-payer by not only withholding repayment of unlawfully gathered tax but also taking away a portion of the sale price collected from the buyer without any lawful demand or excuse. Every person has a right to contract and bargain for the price. Section 11D places unreasonable fetter to the freedom to carry on trade and commerce and violates the guarantee given by Article 19(1)(g) of the Constitution.

323. Various other points were raised in these cases. I am not dealing with them separately, but I express my respectful concurrence with the views of my learned Brother Paripoornan, J. that an action by way of a suit or writ petition will be maintainable, depending upon the facts and circumstances of the case. I am entirely in agreement with the view expressed by him and the reasoning thereof on points E, F and G of the concluding part of his judgment.

324. In conclusion, I hold that the Government is permitted to levy and retain only that much of excise duty which can be lawfully levied and collected under the Central Excise Act read with the Central Excise Tariff Act, 1985 and the Central Excise Rules and various notifications issued from time to time. Anything collected beyond this is unlawful and cannot be retained by the Government under any pretext. The illegal levy and collection of duty violate not only the Central Excise Act and the Rules but also offends Article 265 of the Constitution of India.

325. I am of the view that the provisions of Section 11B is a device for denying the claim for refund of duty to a tax-payer and must be struck down as violative of Article 265 of the Constitution. It in effect tries to perpetuate an illegal levy without altering the basis of the law under which the levy was made in any way. It is also a colourable piece of legislation and must be struck down.

326. Section 11D imposes unreasonable restriction on the right to carry trade and violates Article 19(1)(g). Excise authority cannot deny the manufacturer the freedom to commerce and trade and take away a portion of the contract price even without raising any demand or giving any hearing. The Excise Officer cannot under any circumstance give the balance to the ultimate consumer or credit the amount to the Fund. Section 11D is arbitrary and is a colourable piece of legislation and is hereby struck down.

327. Section 12C and 12D are parts of a device to withhold refunds of unlawfully gathered tax. These provisions are also violative of Article 265 of the Constitution.

328. I express my respectful agreement with the views expressed by my learned Brother Paripoornan, J. that an action by way of a suit or writ petition will be maintainable, depending upon the facts and circumstances of the case. I am entirely in agreement with the views expressed by him and the reasoning on points 'E', 'F and 'G' of the concluding part of his judgment. I also agree with my learned brother Paripoornan, J.'s holding on points 'H' and T subject to my views that in view of Article 265 of the Constitution, the Excise Department is not entitled to withhold refund of any unlawfully collected duty of excise under any circumstances. Any provision to that effect will be ultra vires Article 265 of the Constitution. Such illegally collected duties must be returned to the person from whom it has been collected.

329. In my judgment, the appeal should be allowed and the writ petitions should succeed.

330. There will be no order as to costs.

---

331. It is a matter of regret that inspite of this clear enunciation as far back as 1975, Parliament took no steps, until 1991, to make a law providing that where the payer passes on the burden of the tax to another, he cannot recover the same from the State. Sri F.S. Nariman naturally stressed this inaction and made it a basis for contending that any decision over-turning Kanhaiyalal must only have prospective effect.

332. Situation would be the same where he fights upto High Court and failing therein, he keeps quiet.

333. This discussion, we may reiterate, it also relevant on the nature of the constitutional right to refund or restitution as it is called - flowing from Article 265 referred to in Paras 71 to 73.

334. This defence differs from that of change of position because with the latter the issue relates to the conduct of the payee. With the defence of passing on the issue relates to the conduct of the pay.

335. This specifically dealt with by F.A. 1989, Section 24(5) discussed infra, which denies the repayment of VAT if it would unjustly enrich the recipient of the payment.

336. In Moses v. Macferlan (1760) 2 Burr. 1005 at p. 1020 Lord Mansfield said that the payee "may defend himself by everything which shows that the plaintiff, ex aequo et bono, is not entitled to the whole of his demand, or to any part of it." This principle suggest that a defence of passing on should exist, for simple reasons of justice.

337. In Woolwich, supra, Lord Goff deferred the issue of the existence of a passing on defence, suggesting (at p. 178) that the availability to such a defence may depend on the nature of the tax. It is submitted that the only real relevance of the nature of the tax relates to the case of determining whether the burden of the tax really was passed on.

Back to Index

MANU/SC/0075/1980

Neutral Citation: 1980/INSC/142

IN THE SUPREME COURT OF INDIA

Writ Petition Nos. 356-361 of 1977

Decided On: 09.05.1980

Decided On: 31.07.1980

Appellants: Minerva Mills Ltd. and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Y.V. Chandrachud, C.J., A.C. Gupta, N.L. Untwalia, P.N. Bhagwati and P.S. Kailasam, JJ.

Subject: Constitution

Relevant Section:

Constitution of India - Article 13; Constitution of India - Article 14

Disposition:
Disposed of

Authorities Referred:

Weavers Constitutional Law, 1946 Ed pp.68 ; American Jurisprudence, 2nd. Vol. 16, pp. 299-301; Mr. H.M. Seervai"Constitutional Law of India,"; Indian Constitution -- Cornerstone of a Nation. Edn. 1966.

Case Note:

(i) Constitution - amendment - Articles 13, 14, 19, 31-A, 31-B, 31-C, 32, 38, 132, 133, 134, 141, 226, 352 and 368 of Constitution of India - vires of Articles 368 (4) and 368 (5) introduced by Section 55 of Constitution of India (43rd Amendment) Act under challenge - Article 368 (5) conferred upon Parliament unlimited power to amend Constitution - Article 368 (4) deprived Courts of its power of judicial review over constitutional amendments - Article 368 (5) struck down as Parliament had only limited amending power - such limited power cannot be enlarged into absolute power - by expanding its amending powers Parliament cannot destroy its basic structure - donee of limited power cannot convert such power into unlimited one -

Article 368 (4) prohibiting judicial review violates basic structure - held, Articles 368 (4) and 368 (5) unconstitutional.

(ii) Directive principles of State policy - whether directive principles can have supremacy over fundamental rights - merely because directive principles are non-justiciable it does not mean that they are subservient to fundamental rights - destroying fundamental rights in order to achieve goals of directive principles amounts to violation of basic structure - giving absolute primacy to one over another disturbs harmony - goals of directive principles should be achieved without abrogating fundamental rights - directive principles enjoy high place in constitutional scheme - both fundamental rights and directive principles to be read in harmony - held, amendments in Article 31C introduced by Section 4 of 42nd Amendment Act unconstitutional.

Industry: Textile

JUDGMENT

Y.V. Chandrachud, J.

1. Section 4 of the Constitution (Forty-second Amendment) Act, 1976, which came into force with effect from January 8, 1977 amended Article 31C of the Constitution by substituting the words and figures "all or any of the principles laid down in Part IV for the words and figures "the principles specified in Clause (b) or Clause (c) of Article 39". Article 31C, as amended reads thus:

31C. Notwithstanding anything contained in Article 31. no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31, and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that ft does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Section 4 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution.

2. Section 55 of the Constitution (Forty-second Amendment) Act, 1976, which came into force with effect from January 8, 1977 inserted Sub-sections (4) and (5) of Article 368 which read thus:

(4) No amendment of this Constitution (including the provisions of Part III; made for purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

3. Section 55 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it removed all limitations on the power, of the Parliament to amend the Constitution and confers power upon it to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure.

4. Fuller reasons for the decisions will follow later whereupon, the Writ Petitions will be set down for hearing for consideration of the other points involved therein.

P.N. Bhagwati, J.

5. The question which arises for determination in these writ petitions is as to whether Section 4 of the Constitution (42nd Amendment) Act of 1976 amending Article 31C of the Constitution is constitutionally valid. I cannot persuade myself to pass an order pronouncing upon this question without a reasoned judgment, since the question is one of grave and momentous consequence involving, as it does, the validity of a constitutional amendment. I would, therefore, prefer to pass a final order in this case when I deliver my reasoned judgment on the reopening of the court after the Summer Vacation.

Y.V. Chandrachud, C.J. dated 1st July, 1960 (For himself and A.C. Gupta, N.L. Untwalia and P.S. Kailasam, JJ.)

6. In Kesavanauda Bharati MANU/SC/0445/1973 : AIR1973SC1461 this Court held by a majority that though by Article 368 Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure. The question for consideration in this group of petitions under Article 38 is whether Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 transgress that limitation on the amending power.

7. Petitioner No. 1 which is a limited company owned a textile undertaking called Minerva Mills situated in the State of Karnataka. This undertaking was nationalised and taken over by the Central Government under the provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974, Petitioners 2 to 6 are shareholders of Petitioner No. 1, some of whom are also unsecured creditors and some secured creditors.

8. Respondent 1 is the Union of India, Respondent 2 is the National Textile Corporation Limited in which the textile undertaking of Minerva Mills comes to be vested under Section 3(2) of the Nationalisation Act of 1974. Respondent 3 is a subsidiary of the 2nd respondent.

9. On August 20, 1970, the Central Government appointed a Committee under Section 15 of the Industries (Development and Regulation) Act, 1951 to make a full and complete investigation of the affairs of the Minerva Mills Ltd., as it was of the opinion that there had been or was likely to be substantial fall in the volume of production. The said Committee submitted its report to the Central Government in January 1971, on the basis of which the Central Government passed an order dated October 19, 1971 under Section 18A of the Act of 1951, authorising Respondent 2 to take over the management of the Minerva Mills Ltd. on the ground that its affairs were being managed in a manner highly detrimental to public interest.

10. By these petitions, the petitioners challenge the constitutional validity of certain provisions of the Sick Textile Undertakings (Nationalisation) Act and of the order dated October 19, 1971. We are not concerned with the merits of that challenge at this stage. The petitioners further challenge the constitutionality of the Constitution (39th Amendment) Act which inserted the impugned Nationalisation Act as Entry 105 in the 9th Schedule to the Constitution. That raises a question regarding the validity of Article 31B of the Constitution with which we propose to deal in another batch of petitions. Finally, the petitioners challenge the constitutionality of Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 and it is this contention alone with which we propose to deal in these petitions.

11. The challenge to the validity of Sections 4 and 55 of the 42nd Amendment rests on the ratio of the majority judgment in Kesavananda Bharati. The several opinions rendered in that case have been discussed and analysed threadbare in texts and judgments too numerous to mention. All the same, we cannot avoid making a brief resume of the majority judgments since the petitioners must stand or fall by them. Those judgments, on the point now in issue, were delivered by Sikri, C. J., Shelat and Grover, JJ., Hegde and Mukherjea, JJ., Jaganmohan Ready, J. and Khanna, J.

12. Sikri C. J., held that the fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence. According to the learned Chief Justice, fundamental rights conferred by Part III of the Constitution cannot be abrogated, though a reasonable abridgement of those rights could be effected in public interest. There is a limitation on the power of amendment by necessary implication which was apparent from a reading of the preamble and therefore, according to the learned Chief Justice, the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the preamble, made in order to carry out the basic objectives of the Constitution. Accordingly, every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.

13. Shelat and Grover, JJ., held that the preamble to the Constitution contains the clue to the fundamentals of the Constitution. According to the learned Judges, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles have to be balanced and harmonised. This balance and harmony between two integral parts of the Constitution forms a basic element of the Constitution which cannot be altered. The word "amendment" occurring in Article 368 must therefore be construed in such a manner as to preserve the power of the Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation on

the amending power which precluded Parliament from abrogating or changing the identity of the Constitution or any of its basic features.

14. Hegde and Mukherjea, JJ., held that the Constitution of India which is essentially a social rather than a political document, is founded on a social philosophy and as such has two main features: basic and circumstantial. The basic constituent remained constant, the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements of fundamental features. The building of a welfare State, the learned Judges said, is the ultimate goal of every Government but that does not mean that in order to build a welfare State, human freedoms have to suffer a total destruction. Applying these tests, the learned Judges invalidated Article 31C even in its unamended form.

15. Jaganmohan Reddy, J., held that the word "amendment" was used in the same of permitting a change, in contradistinction to destruction, which the repeal or abrogation brings about. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held that the essential elements of the basic structure of the Constitution are reflected in its preamble and that some of the important features of the Constitution are justice, freedom of expression and equality of status and opportunity. The word "amendment" could not possibly embrace the right to abrogate the pivotal features and the fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed. According to the learned Judge, the provisions of Article 31C, as they stood then, conferring power on Parliament and the State Legislatures to enact laws for giving effect to the principles specified in Clauses (b) and (c) of Article 39, altogether abrogated the right given by Article 14 and were for that reason unconstitutional. In conclusion, the learned Judge held that though the power of amendment was wide, it did not comprehend the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements of the basic structure of the Constitution or to destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.

16. Khanna, J. broadly agreed with the aforesaid views of the six learned Judges and held that the word "amendment" postulated that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution. According to the learned Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution", in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution.

17. The summary of the various judgments in Kesavananda Bharati MANU/SC/0445/1973 : AIR1973SC1461 was signed by nine out of the thirteen Judges. Paragraph 2 of the summary reads to say that according to the majority, "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". Whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view.

18. The question which we have to determine on the basis of the majority view in Kesavananda Bharati is whether the amendments introduced by Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements.

19. Section 4 of the 42nd Amendment, which was brought into force with effect from January 3, 1977 amended Article 31C of the Constitution by substituting the words and figures "all or any of the principles laid down in Part IV" for the words and figures "the principles specified in Clause (b) or Clause (c) of Article 39". Article 31C, as amended by the 42nd Amendment Act reads thus:

31C, Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 of Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

20. Section 55 of the Constitution (Forty-second Amendment) Act, 1976, which was also brought into force with effect from January 3, 1977 inserted clauses (4) and (5) in Article 368 which read thus:

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

21. We will first take up for consideration the comparatively easier question as regards the validity of the amendments made by Section 55 of the 42nd Amendment. It introduces two new Clauses in Article 368, namely, Clauses (4) and (5). Clause (5) speaks for itself and is self-explanatory. Its avowed purpose is the "removal of doubts" but after the decision of this Court in Kesavananda Bharati. MANU/SC/0445/1973 : AIR1973SC1461 there could be no doubt as regards the existence of limitations on the Parliament's power to amend the Constitution. In the context of the constitutional history of Article 368, the true object of the declaration contained in Article 368 is the removal of those limitations. Clause (5) confers upon the Parliament a vast and undefined power to amend the Constitution, even so as to distort it out of recognition. The theme song of the majority decision in Kesavananda Bharati is:

Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity.

The majority conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. And what fears can that judgment raise or misgivings generate if it only means this and no more. The Preamble assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice - social, economic and political; Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of "Fraternity assuring the dignity of the individual and the unity of the Nation". The newly introduced Clause (5) of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever". No constituent power can conceivably go higher than the sky-high power conferred by Clause (5), for it even empowers the Parliament to "repeal the provisions of this Constitution", that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political Justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend.

22. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

23. The very 42nd Amendment which introduced Clauses (4) and (5) in Article 368 made amendments to the preamble to which no exception can be taken. Those amendments are not only within the framework of the Constitution but they give vitality to its philosophy; they afford strength and succor to its foundations. By the aforesaid amendments, what was originally described as a "Sovereign Democratic Republic" became a "Sovereign Socialist Secular Democratic Republic" and the resolution to promote the 'unity of the Nation' was elevated into a promise to promote the "unity and integrity of the Nation". These amendments furnish the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution. They offer promise of more; they do not scuttle a precious heritage.

24. In Smt. Indira Nehru Gandhi v. Raj Narain MANU/SC/0304/1975 : [1976]2SCR347 Khanna, J., struck down Clause 4 of Article 329A of the Constitution which abolished the forum for adjudicating upon a dispute relating to the validity of an election, on the ground that the particular

Article which was introduced by a constitutional amendment violated the principle of free and fair elections which is an essential postulate of democracy and which, in its turn, is a part of the basic structure of the Constitution. Mathew, J., also struck down the Article on the ground that it damaged the essential feature of democracy , One of us, Chandrachud, J., reached the same conclusion by holding that the provisions of the Article were an outright negation of the right of equality conferred by Article 14, a right which, more than any other, is a basic postulate of the Constitution. Thus, whereas amendments made to the preamble by the 42nd Amendment itself afford an illustration of the scope of the amending power, the case last referred to afford an illustration of the limitations on the amending power.

25. Since, for the reasons above mentioned, Clause (5) of Article 368 transgresses the limitations on the amending power, it must be held to be unconstitutional.

26. The newly introduced Clause (4) of Article 368 must suffer the same fate as Clause (5) because the two Clauses are inter-linked. Clause (5) purports to remove all limitations on the amending power while Clause (4) deprives the courts of their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power.

27. If a constitutional amendment cannot be pronounced to be invalid even if it destroys the basic structure of the Constitution, a law passed in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down. Article 13 of the Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which is not open to challenge.

28. Clause (4) of Article 368 is in one sense an appendage of Clause (5), though we do not like to describe it as a logical consequence of Clause (5). If it be true, as stated in Clause (5), that the Parliament has unlimited power to amend the Constitution, courts can have no jurisdiction to strike down any constitutional amendment as unconstitutional. Clause (4), therefore, says nothing more or less than what Clause (5) postulates. If Clause (5) is beyond the amending power of the Parliament, Clause (4) must be equally beyond that power and must be struck down as such.

29. The next question which we have to consider is whether the amendment made by Section 4 of the 42nd Amendment to Article 31C of the Constitution is valid. Mr. Palkhivala did not challenge the validity of the unamended Article 31C and indeed that could not be done. The unamended Article 31C forms the subject-matter of a separate proceeding and we have indicated therein that

it is constitutionally valid to the extent to which it was upheld in Kesavananda Bharati MANU/SC/0445/1973 : AIR1973SC1461 .

30. By the amendment introduced by Section 4 of the 42nd Amendment, provision is made in Article 31-C saying that no law giving effect to the policy of the State towards securing "all or any of the principles laid down in Part IV" shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. It is manifest that the scope of laws which fall within Article 31C has been expanded vastly by the amendment. Whereas under the original Article 31C, the challenge was excluded only in respect of laws giving effect to the policy of the State towards securing "the principles specified in Clause (b) or Clause (c) of Article 39" under the amendment, all laws giving effect to the policy of the State towards securing "all or any of the principles laid down in Part IV" are saved from a constitutional challenge under Arts- 14 and 19. (The reference to Article 31 was deleted by the 44th Amendment as a consequence of the abolition of the right to property as a fundamental right.) The question for consideration in the light of this position is whether Section 4 of the 42nd Amendment has brought about a result which is basically and fundamentally different from the one arising under the unamended article. If the amendment does not bring about any such result its validity shall have to be upheld for the same reasons for which the validity of the unamended article was upheld.

31. The argument of Mr. Palkhivala, who appears on behalf of the petitioners, runs thus: The amendment introduced by Section 4 of the 42nd Amendment destroys the harmony between Parts III and IV of the Constitution by making the fundamental rights conferred by Part III subservient to the directive principles of State Policy set out in Part IV of the Constitution. The Constitution makers did not contemplate a disharmony or imbalance between the fundamental rights and the directive principles and indeed they were both meant to supplement each other. The basic structure of the Constitution rests on the foundation that while the directive principles are the mandatory ends of government, those ends can be achieved only through permissible means which are set out in Part III of the Constitution. In other words, the mandatory ends set out in Part IV can be achieved not through totalitarian methods but only through those which are consistent with the fundamental rights conferred by Part III. If Article 31C as amended by the 42nd Amendment is allowed to stand, it will confer an unrestricted licence on the legislature and the executive, both at the center and in the States, to destroy democracy and establish an authoritarian regime. All legislative action and every governmental action purports to be related, directly or indirectly, to some directive principle of State policy. The protection of the amended article will therefore be available to every legislative action under the sun. Article 31-C abrogates the right to equality guaranteed by Article 14, which is the very foundation of a republican form of government and is by itself a basic feature of the Constitution.

32. The learned Counsel further argues that it is impossible to envisage that a destruction of the fundamental freedoms guaranteed by Part III is necessary for achieving the object of some of the directive principles like equal justice and free legal aid, organising village panchayats , providing living wages for workers and just and humane conditions of work, free and compulsory education for children, organisation of agriculture and animal husbandry, and protection of environment and wild life. What the Constituent Assembly had rejected by creating a harmonious balance between parts III and IV is brought back by the 42nd Amendment.

33. Finally it is urged that the Constitution had made provision for the suspension of the right to enforce fundamental rights when an emergency is proclaimed by the President. Under the basic scheme of the Constitution, fundamental rights were to lose their supremacy only during the period that the proclamation of emergency is in operation. Section 4 of the 42nd Amendment has robbed the fundamental rights of their supremacy and made them subordinate to the directive principles of State policy as if there were a permanent emergency in operation. While Article 359 suspends the enforcement of fundamental rights during the emergency. Article 31C virtually abrogates them in normal times. Thus, apart from destroying one of the basic features of the Constitution, namely, the harmony between Parts III and IV, Section 4 of the 42nd Amendment denies to the people the blessings of a free democracy and lays the foundation for the creation of an authoritarian State.

34. These contentions were stoutly resisted by the learned Attorney General thus: Securing the implementation of directive principles by the elimination of obstructive legal procedures cannot ever be said to destroy or damage the basic features of the Constitution. Further, laws made for securing the objectives of Part IV would necessarily be in public interest and will fall within Article 19(5) of the Constitution, in so far as Clauses (d) and (e) of Article 19(1) are concerned. They would therefore be saved in any case. The history of the Constitution, particularly the incorporation of Articles 31(4) and 31(6) and the various amendments made by Articles 31A, 31B and the amended Article 31C, which were all upheld by this Court, establish the width of the amending power under Article 368. The impugned amendment therefore manifestly falls within the sweep of the amending power.

35. The learned Attorney General further argues: A law which fulfils the directive of Article 38 is incapable of abrogating fundamental freedoms or of damaging the basic structure of the Constitution inasmuch as that structure itself is founded on the principle of justice --social, economic and political. Article 38, which contains a directive principle, provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. A law which complies with Article 38 cannot conceivably abrogate the fundamental freedoms except certain economic rights and that too, for the purpose of minimising inequalities. A law which will abrogate fundamental freedoms will either bring about social injustice or economic injustice or political injustice. It will thereby contravene Article 38 rather than falling within it and will for that reason be outside the protection of Article 31C. In any event, each and every violation of Article 14 or Article 19 does not damage the basic structure of the Constitution.

36. The learned Additional Solicitor General has submitted a carefully prepared Chart of 11 decisions of this Court ranging from Anwar Ali Sarkar MANU/SC/0033/1952 : 1952CriLJ510 to Haji Kader Kutty MANU/SC/0392/1968 : [1969]1SCR645 in order to show the possible impact of amended Article 31C on cases where this Court had held provisions of certain statutes to be violative of Article 14. He urged on the basis of his tabulated analysis that there can be many cases which are not relatable to directive principles and will not therefore be saved by the amended article. Those cases are reported in Anwar Ali Sarkar; Lachmandas Ahuja MANU/SC/0034/1952 : 1952CriLJ1167 ; Habeeb Mohamed MANU/SC/0080/1953 : 1953CriLJ1158 ; Moopil Nair MANU/SC/0042/1960 : [1961]3SCR77 ; Jialal MANU/SC/0122/1962 : [1963]2SCR864 : Hazi Abdul Shakur MANU/SC/0262/1964 : [1964]8SCR217 ; Devi Das MANU/SC/0305/1967 :

[1967]3SCR557 ; Osmania University MANU/SC/0061/1966 : [1967]2SCR214 ; New Manek Chowk MANU/SC/0242/1967 : [1967]2SCR679 : Anandji Haridas MANU/SC/0298/1967 : [1968]1SCR661 and Haji Kader Kutty. He has also submitted a chart of 13 cases involving laws relatable to directive principles in which the fundamental rights were abridged but not abrogated. Since abridgement of fundamental rights in public interest is permissible as it does not damage the basic structure, laws similar to those involved in the 13 cases will not have to seek the protection of the amended article. These illustrative cases are: Ram Prasad Sahi MANU/SC/0013/1953 : [1953]4SCR1129 ; Rao Manohar Singhji, MANU/SC/0017/1954 : [1954]1SCR996 Kunhikoman MANU/SC/0095/1961 : AIR1962SC723 ; Orissa Cement MANU/SC/0097/1962 : (1962)ILLJ400SC ; Krishnasami Naidu MANU/SC/0039/1964 : [1964]7SCR82 Mukanchand MANU/SC/0017/1964 : [1964]6SCR903 ; Nalla Raja Reddy MANU/SC/0041/1967 : [1967]3SCR28 : Jalan Trading Co. MANU/SC/0185/1966 : (1966)IILLJ546SC ; Kamrup MANU/SC/0269/1967 : [1968]1SCR561 ; Mizo District Council MANU/SC/0058/1966 : [1967]1SCR1012 ; Balammal MANU/SC/0342/1968 : [1969]1SCR90 ; Rashbihari Panda MANU/SC/0054/1969 : [1969]3SCR374 and R. C. Cooper MANU/SC/0011/1970 : [1970]3SCR530 .

37. The argument of the learned Additional Solicitor General proceeds thus: For extracting the ratio of Kesavananda Bharati MANU/SC/0445/1973 : AIR1973SC1461 one must proceed on the basis that there were as many cases as there were declarations sought for by the petitioners therein. The majority in regard to Article 368 is different from the majority in regard to the decision in respect of Article 31C. The binding ratio in regard to Article 368 as well as the ratio resulting in upholding the validity of the first part of Article 31C will both sustain the validity of Section 4 of the 42nd Amendment. In regard to fundamental rights, the ratio of the judgments of 12 out of 13 Judges, i.e., all excepting Jaganmohan Reddy J. will empower amendment of each one of the articles in Part III, so long as there is no total abrogation of the fundamental rights which constitute essential features of the basic structure of the Constitution. Abrogation of fundamental rights which do not constitute essential features of the basic structure or abridgement of fundamental rights which constitute such essential features is within the permissible limits of amendment. The unamended Article 31C having been upheld by the majority in Kesavananda Bharati both on the ground of stare decisis and on the ground of "contemporaneous practical exposition", the amended Article 31C must be held to be valid, especially since it has not brought about a qualitative change in comparison with the provisions of the unamended article. A harmonious and orderly development of constitutional law would require that the phrases 'inconsistent with' or 'take away' which occur in Articles 31A, 31B and 31C should be read down to mean 'restrict' or 'abridge' and not 'abrogate'. If two constructions of those expressions were reasonably possible, the Court should accept that construction which would render the constitutional amendment valid.

38. The learned Counsel further argues: The directive principles, including the one contained in Article 38, do not cover the exercise of each and every legislative power relatable to the Seventh Schedule of the Constitution. Besides, the directive principles being themselves fundamental in the governance of the country, no amendment of the Constitution to achieve the ends specified in the directive principles can ever alter the basic structure of the Constitution. If the unamended Article 31C is valid in reference to laws relatable to Article 39(b) and (c) no dichotomy can be made between laws relatable to these provisions on the one hand and laws relatable to other directive principles. A value Judgment is not permissible to the Court in this area.

39. It is finally urged by the learned Additional Solicitor General that judicial review is not totally excluded by the amended Article 31C because it will still be open to the Court to consider:

(i) whether the impugned law has 'direct and reasonable nexus' with any of the directive principles;

(ii) whether the provisions encroaching on fundamental rights are integrally connected with and essential for effectuating the directive principles or are at least ancillary thereto;

(iii) whether the fundamental right encroached upon is an essential feature of the basic structure of the Constitution; and

(iv) if so, whether the encroachment, in effect, abrogates that fundamental right.

40. Besides these contentions Mr. R. K. Garg has filed a written brief on behalf of the Indian Federation of Working Journalists, opposing the contentions of Mr. Palkhivala. So have the learned Advocates General of the State of Karnataka and Uttar Pradesh, Mr. Aruneshwar Gupta has filed a brief on behalf of the State of Rajasthan supporting the submissions of Mr. Palkhivala. So has the State of Rajasthan. The Advocates-General of Maharashtra, Kerala, West Bengal and Orissa appeared through their respective advocates.

41. Both the Attorney General and the Additional Solicitor General have raised a preliminary objection to the consideration of the question raised by the petitioners as regards the validity of Sections 4 and 55 of the 42nd Amendment. It is contended by them that the issue formulated for consideration of the court; "whether the provisions of the Forty-second Amendment of the Constitution which deprived the Fundamental Rights of their Supremacy and, inter alia, made them subordinate to the directive principles of State Policy are ultra vires the amending power of Parliament?" is too wide and academic. It is urged that since it is the settled practice of the court not to decide academic questions and since property rights claimed by the petitioners under Articles 19(1)(f) and 31 do not survive after the 44th Amendment, the court should not entertain any argument on the points raised by the petitioners.

42. In support of this submission reliance is placed by the learned Counsel on the decisions of the American Supreme Court in Commonwealth of Massachusetts v. Andrew W. Mellon (1922) 87 L ed 1078 George Ashwander v. Tennesee Valley Authority (1935) 80 L ed 688 and on Weavers Constitutional Law, 1946 Ed pp.68 and American Jurisprudence, 2nd. Vol. 16, pp. 299-301. Reliance is also placed on certain decisions of this Court to which it is unnecessary to refer because the Attorney-General and the Additional Solicitor General are right that it is the settled practice of this Court not to decide academic questions. The American authorities on which the learned Counsel rely take the view that the constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in the manner of an academic discussion. In other words, the courts do not anticipate constitutional issues so as to assume in advance that a certain law may be passed in pursuance of a certain constitutional amendment which may offend against the provisions of the Constitution. Similarly, our court has consistently taken the view that we will not formulate a rule of constitutional law broader than is required by the precise fails to which it is to be applied. It is only when the rights of persons are directly involved that relief is granted by this Court.

43. But, we find it difficult to uphold the preliminary objection because, the question raised by the petitioners as regards the constitutionality of Sections 4 and 55 of the 42nd Amendment is not an academic or a hypothetical question. The 42nd Amendment is there for any one to see and by its Sections 4 and 55 Amendments have been made to Articles 31C and 368 of the Constitution. An order has been passed against the petitioners under Section 18A of the Industries (Development and Regulation) Act, 1951, by which the petitioners are aggrieved.

44. Besides there are two other relevant considerations which must be taken into account while dealing with the preliminary objection. There is no constitutional or statutory inhibition against the decision of questions before they actually arise for consideration. In view of the importance of the question raised and in view of the fact that the question has been raised in many a petition, it is expedient in the interest of Justice to settle the true position. Secondly, what we are dealing with is not an ordinary law which may or may not be passed so that it could be said that our jurisdiction is being invoked on the hypothetical consideration that a law may be passed in future which will injure the rights of the petitioners. We are dealing with a constitutional amendment which has been brought into operation and which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes. We therefore, overrule the preliminary objection and proceed to determine the point raised by the petitioners.

45. The main controversy in these petitions centers round the question whether the directive principles of State policy contained in Part IV can have primacy over the fundamental rights conferred by Part III of the Constitution. That is the heart of the matter. Every Other consideration and all other contentions are in the nature of by-products of that central theme of the case. The competing claims of parts III and IV constitute the pivotal point of the case because. Article 31C as amended by Section 4 of the 42nd Amendment provides in terms that a law giving effect to any directive principle cannot be challenged as void on the ground that it violates the rights conferred by Article 14 or Article 19. The 42nd Amendment by its Section 4 thus subordinates the fundamental rights conferred by Articles 14 and 19 to the directive principles,

46. The question of questions is whether in view of the majority decision in Kesavananda Bharati MANU/SC/0445/1973 : AIR1973SC1461 it is permissible to the Parliament to so amend the Constitution as to give a position of precedence to directive principles over the fundamental rights. The answer to this question must necessarily depend upon whether Articles 14 and 19, which must now give way to laws passed in order to effectuate the policy of the State towards securing all or any of the principles of Directive Policy, are essential features of the basic structure of the Constitution. It is only if the rights conferred by these two articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. If they are a part of the basic structure, they cannot be obliterated out of existence in relation to a category of laws described in Article 31C or, for the matter of that, in relation to laws of any description whatsoever, passed in order to achieve any object or policy whatsoever. This will serve to bring out the point that a total emasculation of the essential features of the Constitution is, by the ratio in Kesavananda Bharati, not permissible to the Parliament.

47. There is no doubt that though the courts have always attached very great importance to the preservation of human liberties, no less importance has been attached to some of the Directive Principles of State Policy enunciated in Part IV. In the words of Granville Austin, (The Indian

Constitution: Cornerstone of a Nation, p. 50) the Indian Constitution is first and foremost a social document and the majority of its provisions are aimed at furthering the goals of social revolution by establishing the conditions necessary for its achievement. Therefore, the importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasized. Those principles project the high ideal which the Constitution aims to achieve. In fact Directive principles of State policy are fundamental in the governance of the country and the Attorney General is right that there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. The promise of a better tomorrow must be fulfilled today, day after tomorrow it runs the risk of being conveniently forgotten. Indeed, so many tomorrows have come and gone without a leaf turning that today there is a lurking danger that people will work out their destiny through the Compelled cult of their own "dirty hands". Words bandied about in marbled halls say much but fail to achieve as much.

48. But there is another competing constitutional interest which occupies an equally important place in that scheme. That interest is reflected in the provisions of Part III which confer fundamental rights, some on citizens as Articles 15, 16 and 19 do and some on all persons alike as Articles 14, 20, 21 and 22 do. As Granville Austin says:

The core of the commitment to the social revolution lies in Parts III and IV.. These are the conscience of the Constitution.

49. It is needless to cite decisions which have extolled and upheld the personal freedoms -- their majesty, and in certain circumstances, their inviolability. It may however be profitable to see how the American Supreme Court, dealing with a broadly comparable Constitution, has approached the claim for those freedoms.

50. In Barbara Elfbrandt v. Imogene Russell (1966) 16 L ed 2d 321 the U. S. Supreme Court was considering the constitutionality of an Arizona Statute requiring State employees to take a loyalty oath. Justice Douglas, speaking for the majority, observed while striking down the provision that:

Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved'.... "The objectionable quality of ... over-breadth" depends upon the existence of a statute "susceptible of sweeping and improper application".... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

51. In United States v. Harbet Guest (1966) 16 L ed 2d 239 though the right to travel freely throughout the territory of the United States of America does not find an explicit mention in the American Constitution, it was held that the right to travel from one State to another occupied a position fundamental to the concept of the Federal Union and the reason why the right was not expressly mentioned in the American Constitution, though it was mentioned in the Articles of Confederation, was that "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created".

52. This position was reiterated in Winfield Dunn v. James F. Blumstein (1972) 31 L ed 2d 274 It was held therein that freedom to travel throughout the United States was a basic right under the Constitution and that the right was an unconditional personal right whose exercise may not be conditioned. Therefore, any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, was unconstitutional.

53. In New York Times Co. v. United States (1971) 29 L ed 2d 822 the United States Government sought an injunction against the publication, by the New York Times, of the classified study entitled "History of U. S. Decision-Making Process on Vietnam Policy". It was held by a majority of six Judges that any system of prior restraints of expression comes to the United States Supreme Court bearing a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint.

54. In National Association for the Advancement of Colored People v. State of Alabama (1958) 2 L ed 2d 1488 a unanimous court while dealing with an attempt to oust the National Association of Coloured People from the State of Alabama held:

In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

55. In Frank Palko v. State of Connecticut (1937) 82 L ed 288 Justice Cardozo delivering the opinion of the Court in regard to the right to freedom of thought and speech observed:

Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

56. In Jesse Cantwell v. State of Connecticut (1939) 84 L ed 1213 Justice Roberts who delivered the opinion of the Court observed:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

57. In Arthur Terminiello v. City of Chicago (1949) 93 L ed 1131 Justice Douglas delivering the majority opinion of the Court, while dealing with the importance of the right to free speech, observed:

The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in De Jonge v. Oregon (1936) 299 US 35381 L ed 27857 S Ct 255 it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programmes is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute (Chaplinsky v. New Hampshire (1941) 315 US 56885 L ed 103462 S Ct 766 is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See Bridges v. California (1941) 314 US 25286 L ed 192 62 S Ct 190 159 ALR 1346 Craig v. Harney (1946) 331 US 367 91 L ed 1546 67 S Ct 1249There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

58. The history of India's struggle for independence and the debates of the Constituent Assembly show how deeply our people value their personal liberties and how those liberties are regarded as an indispensable and integral part of our Constitution. It is significant that though Parts III and IV appear in the Constitution as two distinct fasciculus of articles, the leaders of our independence movement drew no distinction between the two kinds of State's obligations -- negative and positive.

"Both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself. The Indian Constitution: Cornerstone of a Nation by Granville Austin, p. 52." The demand for inalienable rights traces its origin in India to the 19th Century and flowered into the formation of the Indian National Congress in 1885. Indians demanded equality with their British rulers on the theory that the rights of the subjects cannot in a democracy be inferior to those of the rulers. Out of that demand grew the plants of equality and free speech. Those and other basic rights found their expression in Article 16 of the Constitution of India Bill, 1895. A series of Congress resolutions reiterated that demand between 1917 and 1919. The emergence of Mahatma Gandhi on the political scene gave to the freedom movement a new dimension: it ceased to be merely anti-British; it became a movement for the acquisition of rights of liberty for the Indian Community. Mrs. Besant's Commonwealth of India Bill, 1925 and the Madras Congress resolution of 1928 provided a striking continuity for that movement. The Motilal Nehru Committee appointed by the Madras Congress resolution said at pp. 89-90:

It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances .... Another reason why great importance attaches to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution.

India represents a mosaic of humanity consisting of diverse religious, linguistic and caste groups. The rationale behind the insistence on fundamental rights has not yet lost its relevance, alas or not. The Congress Session of Karachi adopted in 1931 the Resolution on Fundamental Rights as well as on Economic and Social change. The Sapru Report of 1945 said that the fundamental rights should serve as a "standing warning" to all concerned that:

What the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life.

59. The Indian nation marched to freedom in this background. The Constituent Assembly resolved to enshrine the fundamental rights in the written text of the Constitution. The interlinked goals of personal liberty and economic freedom then came to be incorporated in two separate parts, nevertheless parts of an integral, indivisible scheme which was carefully and thoughtfully nursed over half a century. The seeds sown in the 19th Century saw their fruition in 1950 under the leadership of Jawaharlal Nehru and Dr. Ambedkar. To destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure.

60. Fundamental rights occupy a unique place in the lives of civilized societies and have been variously described in our Judgments as "transcendental", "inalienable" and "primordial." For us, it has been said in Kesavananda Bharati (1973) Supp SCR 1 (p. 991) AIR 1978 SC 1461 they constitute the ark of the Constitution.

61. The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.

62. This is not mere semantics.

The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice--social, economic and political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved.
We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people.
Those rights are not an end in themselves but are the means to an end.
The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But
just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms.
One of the faiths of our founding fathers was the purity of means. Indeed, under our law, even a dacoit who has committed a murder cannot be put to death in the exercise of right of self-defence after he has made good his escape. So great is the insistence of civilised laws on the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.

63. It is in this light that the validity of the amended Article 31C has to be examined. Article 13(2) says that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of that Clause shall to the extent of the contravention be void. Article 31C begins with a non obstante clause by putting Article 13 out of harm's way. It provides for a certain consequence notwithstanding anything contained in Article 13. It then denudes Articles 14 and 19 of their functional utility by providing that the rights conferred by these Articles will be no barrier against passing laws for giving effect to the principles laid down in Part IV. On any reasonable interpretation, there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31C. The startling consequence which the amendment has produced is that even if a law is in total defiance of the mandate of Article 13 read with Articles 14 and 19, its validity will not be open to question so long as its object is to secure a directive principle of State Policy. We are disposed to accept the submission of the learned Solicitor General, considering the two charts of cases submitted by him, that it is possible to conceive of laws which will not attract Article 31C since they may not bear direct and reasonable nexus with the provisions of Part IV. But, that, in our opinion, is beside the point. A large majority of laws, the bulk of them, can at any rate be easily justified as having been passed for the purpose of giving effect to the policy of the State towards securing some principle or the other laid down in Part IV. In respect of all such laws, which will cover an extensive gamut of the relevant legislative activity, the protection of Articles 14 and 19 will stand wholly withdrawn. It is then no answer to say, while determining whether the basic structure of the Constitution is altered, that at least some laws will fall outside the scope of Article 31C.

64. We have to decide the matter before us not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. An author, who writes exclusively on foreign matters, shall have been totally deprived of the right of free speech and expression if he is prohibited from writing on foreign matters. The fact therefore that some laws may fall outside the scope of Article 31C is no answer to the contention that the withdrawal of protection of Articles 14 and 19 from a large number of laws destroys the basic structure of the Constitution.

65. It was repeatedly impressed upon us, especially by the Attorney General, that Article 38 of the Constitution is the kingpin of the directive principles and no law passed in order to give effect to the principle contained therein can ever damage or destroy the basic structure of the Constitution. That Article provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice - social, economic and political, shall inform all the institutions of the national life. We are unable to agree that all the Directive Principles of State Policy contained in Part IV eventually verge upon Article 38. Article 38 undoubtedly contains a broad guideline, but the other directive principles are not mere illustrations of the principle contained in Article 38. Secondly, if it be true that no law passed for the purpose of giving effect to the directive principle contained in Article 38 can damage or destroy the basic structure of the Constitution, what was the necessity, and more so the justification, for providing by a constitutional amendment that no law which is passed for giving effect to the policy of the State towards securing any principle laid down in Part IV shall be deemed to be void on the ground that it Is inconsistent with or takes away or abridges the rights conferred by Articles 14 and 19 ? The object and purpose of the amendment of Article 31C is really to save laws which cannot be saved under Article 19(2) to (6). Laws which fall under those provisions are in the nature of reasonable restrictions on the fundamental rights in public interest and therefore they abridge but do not abrogate the fundamental rights. It was in order to deal with laws which do not get the protection of Article 19(2) to (6) that Article 31C was amended to say that the provisions of Article 19, inter alia, cannot be invoked for voiding the laws of the description mentioned in Article 31C.

66. Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of a democracy. They are universally so regarded, as is evident from the Universal Declaration of Human Rights. Many countries in the civilised world have parted with their sovereignty in the hope and belief that their citizens will enjoy human freedoms. And they preferred to be bound by the decisions and decrees of foreign tribunals on matters concerning human freedoms. If Articles 14 and 19 are put out of operation in regard to the bulk of laws which the legislatures are empowered to pass, Article 32 will be drained of its life-blood. Article 32(4) provides that the right guaranteed by Article 32 shall not be suspended except as otherwise provided for by the Constitution. Section 4 of the 42nd Amendment found an easy way to circumvent Article 32(4) by withdrawing totally the protection of Articles 14 and 19 in respect of a large category of laws, so that there will be no violation to complain of in regard to which redress can be sought under Article 32. The power to take away the protection of Article 14 is the power to discriminate without a valid basis for classification. By a long series of decisions this Court has held that Article 14 forbids class legislation but it does not forbid classification. The purpose of withdrawing the protection of Article 14, therefore, can only be to acquire the power to enact class legislation. Then again, regional chauvinism will have a field-day if Article 19(1)(d)

is not available to the citizens. Already, there are disturbing trends on a part of the Indian horizon. Those trends will receive strength and encouragement if laws can be passed with immunity, preventing the citizens from exercising their right to move freely throughout the territory of India. The nature and quality of the amendment introduced by Section 4 of the 42nd Amendment is therefore such that it virtually tears away the heart of basic fundamental freedoms.

67. Article 31C speaks of laws giving effect to the policy of the "State". Article 12 which governs the interpretation of Article 31C provides that the word "State" in Part III includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Wide as the language of Article 31C is, the definition of the word "State" in Article 12 gives to Article 31C an operation of the widest amplitude. Even if a State Legislature passes a law for the purpose of giving effect to the policy by a local authority towards securing a directive principle, the law will enjoy immunity from the provisions of Articles 14 and 19. The State Legislatures are thus given an almost unfettered discretion to deprive the people of their civil liberties.

68. The learned Attorney General argues that the State is under an obligation to take steps for promoting the welfare of the people by bringing about a social order in which social, economic and political justice shall inform all the institutions of the national life. He says that the deprivation of some of the fundamental rights for the purpose of achieving this goal cannot possibly amount to a destruction of the basic structure of the Constitution. We are unable to accept this contention. The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when Government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by the Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment.

69. The learned Attorney General and the learned Solicitor General strongly impressed upon us that Article 31C should be read down so as to save it from the challenge of unconstitutionality. It was urged that it would be legitimate to read into that Article the intendment that only such laws would be immunised from the challenge under Articles 14 and 19 as do not damage or destroy the basic structure of the Constitution. The principle of reading down the provisions of a law for the purpose of saving it from a constitutional challenge is well-known. But we find it impossible to accept the contention of the learned Counsel in this behalf because, to do so will involve a gross distortion of the principle of reading down, depriving that doctrine of its only or true rationale when words of width are used inadvertently. The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor

indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment.

70. Mr. Palkhivala read out to us an extract from the speech of the then Law Minister who, while speaking on the amendment to Article 31C, said that the amendment was being introduced because the government did not want the "let and hindrance" of the fundamental rights. If the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends. In fact, to accept the argument that we should read down Article 31C, so as to make it conform to the ratio of the majority decision in Kesavananda Bharati AIR 1978 SC 1461 is to destroy the avowed purpose of Article 31C as indicated by the very heading "Saving of Certain Laws" under which Articles 31A, 31B and 31C are grouped. Since the amendment to Article 31C was unquestionably made with a view to empowering the legislatures to pass laws of a particular description even if those laws violate the discipline of Articles 14 and 19, it seems to us impossible to hold that we should still save Article 31C from the challenge of unconstitutionality by reading into that Article words which destroy the rationale of that Article and an intendment which is plainly contrary to its proclaimed purpose.

71. A part of the same argument was pressed upon us by the learned Additional Solicitor General who contended that it would still be open to the Courts under Article 31C to decide four questions: i) Does the law secure any of the directive principles of the State policy? (ii) Is it necessary to encroach upon fundamental rights in order to secure the object of the directive principles? (iii) What is the extent of such encroachment, if any? and (iv) Does that encroachment violate the basic structure of the Constitution?

72. This argument is open to the same criticism to which the argument of the learned Attorney General is open and which we have just disposed of. Reading the existence of an extensive judicial review into Article 31C is really to permit the distortion of the very purpose of that article. It provides expressly that no law of a particular description shall be deemed to be void on the ground that it violates Article 14 or Article 19. It would be sheer adventurism of a most extraordinary nature to undertake the kind of judicial enquiry which, according to the learned Additional Solicitor General, the courts are free to undertake.

73. We must also mention, what is perhaps not fully realised, that Article 31C speaks of laws giving effect to the "Policy of the State", "towards securing all or any of the principles laid down in Part IV." In the very nature of things it is difficult for a court to determine whether a particular law gives effect to a particular policy. Whether a law is adequate enough to give effect to the policy of the State towards securing a directive principle is always a debatable question and the courts cannot set aside the law as invalid merely because, in their opinion, the law is not adequate enough to give effect to a certain policy. In fact, though the clear intendment of Article 31C is to shut out all Judicial review, the argument of the learned Additional Solicitor General calls for a doubly or trebly extensive judicial review than is even normally permissible to the courts. Be it remembered that the power to enquire into the question whether there is a direct and reasonable nexus between

the provisions of a law and a directive principle cannot confer upon the courts the power to sit in judgment over the policy itself of the State. At the highest,

courts can, under Article 31C, satisfy themselves as to the identity of the law in the sense whether it bears direct and reasonable nexus with a directive principle.
If the court is satisfied as to the existence of such nexus, the inevitable consequence provided for by Article 31C must follow.
Indeed, if there is one topic on which all the 13 Judges in Kesavananda Bharati MANU/SC/0445/1973 : AIR1973SC1461 were agreed, it is this: that
the only question open to judicial review under the unamended Article 31C was whether there is a direct and reasonable nexus between the impugned law and the provisions of Article 38(b) and (c).
Reasonableness is evidently regarding the nexus and not regarding the law.
It is therefore impossible to accept the contention that it is open to the courts to undertake the kind of enquiry suggested by the Additional Solicitor General. The attempt therefore to drape Article 31C into a democratic outfit under which an extensive judicial review would be permissible must fail.

74. We should have mentioned that a similar argument was advanced in regard to the amendment effected by Section 56 of the 42nd Amendment to Article 368, by the addition of Clauses (4) and (5) therein. It was urged that we should so construe the word "amendment" in Clause (4) and the word "amend" in Clause (5) as to comprehend only such amendments as do not destroy the basic structure of the Constitution. That argument provides a striking illustration of the limitations of the doctrine of reading down. The avowed purpose of Clauses (4) and (5) of Article 368 is to confer power upon the Parliament to amend the Constitution without any "limitation whatever". Provisions of this nature cannot be saved by reading into them words and intendment of a diametrically opposite meaning and content.

75. The learned Attorney General then contends that Article 31C should be upheld for the same reasons for which Article 31A(1) was upheld. Article 31A(1) was considered as a contemporaneous practical exposition of the Constitution since it was inserted by the very First Amendment which was passed in 1951 by the same body of persons who were members of the Constituent Assembly. We can understand that Article 31A can be looked upon as a contemporaneous practical exposition of the intendment of the Constitution, but the same cannot be said of Article 31C. Besides, there is a significant qualitative difference between the two Articles. Article 31A, the validity of which has been recognised over the years, excludes the challenge under Articles 14 and 10 in regard to a specified category of laws. If by a constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired. But if the protection of those articles is withdrawn in respect of a uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as a matter of historical curiosity.

76. An attempt was made to equate the provisions of Article 31C with those of Article 31A in order to lend plausibility to the contention that since Article 31A was also upheld on the ground of stare decisis, Article 31C can be upheld on the same ground. We see no merit in this contention.

In the first place, as we have indicated above, the five matters which are specified in Article 31A are of such quality, nature, content and character that at least a debate can reasonably arise whether abrogation of fundamental rights in respect of those matters will damage or destroy the basic structure of the Constitution. Article 31C does not deal with specific subjects. The directive principles are couched in broad and general terms for the simple reason that they specify the goals to be achieved. Secondly, the principle of stare decisis cannot be treated as a fruitful source of perpetuating curtailment of human freedoms. No court has upheld the validity of Article 31A on the ground that it does not violate the basic structure of the Constitution". There is no decision on the validity of Article 31A which can be looked upon as a measuring rod of the extent of the amending power. To hark back to Article 31A every time that a new constitutional amendment is challenged is the surest means of ensuring a drastic erosion of the fundamental rights conferred by Part III. Such a process will insidiously undermine the efficacy of the ratio of the majority judgment in Kesavananda Bharati MANU/SC/0445/1973 : AIR1973SC1461 regarding the inviolability of the basic structure. That ratio requires that the validity of each new constitutional amendment must be judged on its own merits.

77. Nor indeed are we impressed by a limb of the same argument that when Article 31A was upheld on the ground of stare decisis, what was upheld was a constitutional device by which a class of subject-oriented laws was considered to be valid. The simple ground on which Article 31A was upheld, apart from the ground of contemporaneous practical exposition, was that its validity was accepted and recognised over the years and, therefore, it was not permissible to challenge its constitutionality. The principle of stare decisis does not imply the approval of the device or mechanism which employed for the purpose of framing a legal or constitutional provision.

78. It was finally urged by the learned Attorney General that if we uphold the challenge to the validity of Article 31C, the validity of Clauses (2) to (8) of Article 19 will be gravely imperiled because those Clauses will also then be liable to be struck down as abrogating the rights conferred by Article 19(1) which are an essential feature of the Constitution. We are unable to accept this contention. Under Clauses (2) to (6) of Article 19, restrictions can be imposed only if they are reasonable and then again, they can be imposed in the interest of a stated class of subjects only. It is for the courts to decide whether restrictions are reasonable and whether they are in the interest of the particular subject. Apart from other basic dissimilarities, Article 31C takes away the power of judicial review to an extent which destroys even the semblance of a comparison between its provisions and those of Clauses (2) to (6) of Article 19. Human ingenuity, limitless though it may be, has yet not devised a system by which the liberty of the people can be protected except through the intervention of courts of law.

79. Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.

80. These then are our reasons for the order which we passed on May 9, 1980 to the following effect:

Section 4 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution.

Section 55 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it removes all limitations on the power of the Parliament to amend the Constitution and confers power upon it to amend the Constitution, so as to damage or destroy its basic or essential features or it basic structure.

81. There will be no order as to costs.

P.N. Bhagwati, J.

82. The petitioners in Writ Petitions Nos. 656 and 600 of 1977, Wamanrao v. The Union of India (hereinafter referred to as Wamanrao's case) and other allied petitions have challenged the constitutional validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act 1961 (hereinafter referred to as the principal Act) as amended by the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act 1972 (hereinafter referred to as Act 21 of 1975) and the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act 1975 (hereinafter referred to as Act 47 of 1975) and the Maharashtra Agricultural Lands (Ceiling on Holdings) Amendment Act 1975 (hereinafter referred to as Act 2 of 1976) on the ground that the amended provisions of the Act are violative of Articles 14, 19(1)(f), 31 and 31A of the Constitution. We shall hereafter for the sake of convenience refer to the Principal Act as duly amended by the subsequent Acts 21 of 1975, 47 of 1975 and 2 of 1976 as "the impugned legislation". It is not necessary for the purpose of this opinion to set out the relevant provisions of the impugned legislation but it is sufficient to state that it imposed a maximum ceiling on the holding of agricultural land in the State of Maharashtra and provided for acquisition of land held in excess of the ceiling and for the distribution of such excess land to landless and other person - with a view to securing the distribution of agricultural land in a manner which would best subserve the common good of the people. The impugned legislation recognised two units for the purpose of ceiling on holding of agricultural land. One was 'person' which by its definition in Section 2, Sub-section (2) included a family and 'family' by virtue of Section 2 Sub-section (11) included a Hindu Undivided Family and in the case of other persons, a group or unit the members of which by custom or usage, are joint in a estate or possession or residence and the other was 'family unit' which according to its definition in Section 2(11A) read with Section 2, meant a person and his spouse and their minor sons and minor unmarried daughters. The impugned legislation created an artificial concept of a 'family unit' for the purpose of applicability of the ceiling and provided that all lands held by each member of the family unit whether jointly or separately shall be aggregated together and by a fiction of law deemed to be held by the family unit. There were also certain provisions in the impugned legislation which prohibited transfers and acquisitions of

agricultural land with a view to effectuating the social policy and economic mission of the law. The impugned legislation also contained provisions prescribing the machinery for implementation of its substantive provisions. Now plainly and unquestionably this was a piece of legislation relating to agrarian reform and was immunised against challenge under Articles 14, 19 and 31 by the protective cloak of Article 31A but even so, by way of abundant caution, it was given additional protection of Article 31B by including the Principal Act and the subsequent amending Acts in the 9th Schedule: vide the Constitution (Seventeenth Amendment) Act 1964 and the Constitution (fortieth Amendment) Act, 1976. The drastic effect of the impugned legislation was to deprive many landholders of large areas of agricultural lands held by them. Some of them, therefore, preferred writ petitions in the High Court of Bombay at Nagpur challenging the constitutional validity of the impugned legislation and on the challenge being negatived by the High Court, they preferred appeals in this Court. The only contention advanced on behalf of the landholders in support of the appeals was that the impugned legislation in so far as it introduced an artificial concept of a 'family unit' and fixed ceiling on holding of land by such family unit was violative of the second proviso to Clause (1) of Article 31A and was not saved from invalidation by the protective armour of Article 31B. This contention was negatived by the Constitution Bench and it was held that the impugned legislation did not, by creating an artificial concept of a family unit and fixing ceiling on holding of land by such family unit, conflict with the second proviso to Clause (1) of Article 31A and even if it did contravene that proviso, it was protected by Article 31B since the principal Act as well as the subsequent amending Acts were included in the 9th Schedule vide Dattatraya Govind Mahajan v. State of Maharashtra MANU/SC/0381/1977 : [1977]2SCR790 . Now at the time when this batch of cases was argued before the Court, the emergency was in operation and hence it was not possible for the landholders to raise many of the contentions which they could otherwise have raised and, therefore, as soon as the emergency was revoked, the landholders filed review petitions in this Court against the decision in Dattatraya Govind Mahajan case and also preferred direct writ petitions in this Court challenging once again the constitutional validity of the impugned legislation. Now concededly. Article 31A provided complete immunity to the impugned legislation against violation of Articles 14, 19 and 31 and Article 31B read with the 9th Schedule protected the impugned legislation not only against violation of Articles 14, 19 and 31 but also against infraction of the second proviso to Clause (1) of Article 31A. Moreover, the impugned legislation being manifestly one for giving effect to the Directive Principles contained in Article 39 Clause (b) and (c), it was also protected against invalidation by Article 31C. The petitioners could not therefore successfully assail the constitutional validity of the impugned legislation unless they first pierced the protective armour of Articles 31A, 31B and 31C. The petitioners sought to get Articles 31A, 31B and 31C out of the way by contending that they offended against the basic structure of the Constitution and were, therefore, outside the constituent power of Parliament under Article 368 and hence unconstitutional and void. The argument of the petitioners was that these constitutional amendments in the shape of Articles 31A, 31B and 31C being invalid, the impugned legislation was required to meet the challenge of Articles 14, 19(1)(f), 31 and 31A and tested on the touchstone of these constitutional guarantees, the impugned legislation was null and void. The first and principal question which, therefore, arose for consideration in these cases was whether Articles 31A, 31B and 31C are ultra vires and void as damaging or destroying the basic structure of the Constitution. We may point out here that we were concerned in these cases with the constitutional validity of Article 31C as it stood prior to its amendment by the Constitution (Forty-Second Amendment) Act, 1976, because it was the unamended Article 31C which was in force at the dates when the amending Acts were passed by

the legislature amending the principal Act. These cases were heard at great length with arguments ranging over large areas, and lasting for over five weeks and we reserved judgment on 8th March 1979. Unfortunately, we could not be ready with our judgment and hence on 9th May 1980 being the last working day of the Court before the summer vacation we made an order expressing our conclusion but stating that we would give our reasons later. By this order we held that Article 31A does not damage any of the basic or essential features of the Constitution or its basic structure and is therefore valid and constitutional and so is Article 31C as it stood prior to its amendment by the Constitution (Forty-Second Amendment) Act, 1978 valid to the extent its constitutionality was upheld in Kesavananda Bharati's case. MANU/SC/0445/1973 : AIR1973SC1461 So far as Article 31B is concerned, we said that Article 31B as originally introduced was valid and so also are all subsequent amendments including various Acts and Regulations in the 9th Schedule from time to time up to 24th April 1973 when Kesavananda Bharati's case was decided. We did not express any final opinion on the constitutional validity of the amendments made in the 9th Schedule on or after 24th April 1973 but we made it clear that these amendments would be open to challenge on the ground that they or any one or more of them damage the basic or essential features of the Constitution or its basic structure, and are therefore, outside the constituent power of Parliament. This was the Order made by us on 9th May, 1980 and for reasons which I shall mention presently, I propose to set out in this judgment my reasons for subscribing to this Order.

83. So far as Minerva Mills Case is concerned, the challenge of the petitioners was directed primarily against an order dated 19th October, 1971 by which the Government of India, in exercise of the power conferred under Section 18A of the Industries (Development and Regulation) Act, 1951, authorised the taking over of the management of the industrial undertaking of the petitioners by the National Textile Corporation and the Sick Textile Undertakings (Nationalisation) Act 1974 (hereinafter referred to as the Nationalisation Act) by which the entire Industrial undertaking and the right, title and interest of the petitioners in it stood transferred to and vested in the Central Government on the appointed date. We are not concerned for the purpose of the present opinion with the challenge against the validity of the Order dated 19th October, 1971, for the question which has been argued before us arises only out of the attack against the constitutionality of the Nationalisation Act. The petitioners challenged the constitutional validity of the Nationalisation Act inter alia on the ground of infraction of Articles 14, 19(1)(f) and (g) and 31 Clause (2), but since the Nationalisation Act has been included in the 9th Schedule by the Constitution (Thirty-ninth Amendment) Act, 1975, the petitioners also attacked the constitutionality of the Constitution (Thirty-ninth Amendment) Act, 1975, for it is only if they could get the Nationalisation Act out from the protective wing of Article 31B by persuading the Court to strike down the Constitution (Thirty-ninth Amendment) Act, 1975, that they could proceed with their challenge against the constitutional validity of the Nationalisation Act. Now Clauses (4) and (5) which were introduced in Article 368 by Section 55 of the Constitution (Forty-second Amendment) Act, 1976 and which were in force at the date of the filing of the writ petitions provided that no amendment of the Constitution made or purported to have been made whether Before or after the commencement of that section shall be called in question in any Court on any ground and barred judicial review of the validity of a constitutional amendment. Obviously, if these two Clauses were validly included in Article 338, they would stand in the way of the petitioners challenging the constitutional validity of the Constitution (Thirty-ninth Amendment) Act, 1975. The petitioners were, therefore, compelled to go further and impugn the constitutional validity of Section 55 of the Constitution (Forty-second Amendment) Act, 1976. This much challenge, as I shall presently point out, would

have been sufficient to clear the path for the petitioners in assailing the constitutional validity of the Nationalisation Act, but the petitioners, not resting content with what was strictly necessary, proceeded also to challenge Section 4 of the Constitution (Forty-second Amendment) Act, 1976 which amended Article 31C. There were several grounds on which the constitutional validity of the Constitution (Forty-second Amendment) Act, 1976 was impugned in the writ petitions and I shall refer to them when I deal with the arguments advanced on behalf of the parties. Suffice it to state for the present, and this is extremely important to point out, that when the writ petitions reached hearing before us, Mr. Palkhiwala, learned Counsel appearing on behalf of the petitioners requested the Court to examine only one question, namely, whether the amendments made in Article 31C and Article 368 by Sections 4 and 55 of the Constitution (Forty-second Amendment) Act, 1976 were constitutional and valid and submitted that if these constitutional amendments were held invalid, then the other contentions might be examined by the Court at a later date. He conceded before us, in the course of the arguments, that he was accepting the constitutional validity of Articles 31A, 31B and the unamended Article 31C and his only contention vis-a-vis Article 31C was that it was the amendment made in Article 31C which had the effect of damaging or destroying the basic structure of the Constitution and that amendment was, therefore, beyond the constituent power of Parliament. The learned Attorney General on behalf of the Union of India opposed this plea of Mr. Palkhiwala and urged by way of preliminary objection that though the question of constitutional validity of Clause (4) and (5) of Article 368 introduced by way of amendment by Section 55 of the Constitution (Forty-second Amendment) Act, 1976 undoubtedly arose before the Court and it was necessary for the Court to pronounce upon it, the other question in regard to the constitutional validity of the amendment made in Article 31C did not arise on the writ petitions and the counter-affidavits and it was wholly academic and superfluous to decide it. This preliminary objection raised by the learned Attorney General was in my opinion well founded and deserved to be sustained. Once Mr. Palkhiwala conceded that he was not challenging the constitutionality of Article 31C Article 31B and the unamended Article 31C and was prepared to accept them as constitutionally valid, it became wholly unnecessary to rely on the amended Article 31C in support of the validity of the Nationalisation Act, because Article 31B would, in any event, save it from invalidation on the ground of infraction of any of the Fundamental Rights. In fact, if we look at the counter-affidavit filed by Mr. T. S. Sahani, Deputy Secretary, Government of India in reply to the writ petitions, we find that no reliance has been placed on behalf of the Government on the amended Article 31C. The case of the Union of India is and that is supported by the legislative declaration contained in Section 39 of the Nationalisation Act, that this Act was enacted for giving effect to the policy of the State towards securing the principles specified in Clause (b) of Article 39 of the Constitution. Neither the Union of India in its counter-affidavit nor the learned Attorney General in the course of his arguments relied on any other Directive Principle except that contained in Article 39 Clause (b). Mr. Palkhiwala also did not make any attempt to relate the Nationalisation Act to any other Directive Principle of State Policy. Now either the Nationalisation Act was really and truly a law for giving effect to the Directive Principle set out in Article 39 Clause (b) as declared in Section 39 or it was not such a law and the legislative declaration contained in Section 39 was a colourable device. If it was the former, then the unamended Article 31C would be sufficient to protect the Nationalisation Act from attack on the ground of violation of Articles 14, 19 and 31 and it would be unnecessary to invoke the amended Article 31C and if it was the latter, then neither the unamended nor the amended Article 310 would have any application. Thus, in either event, the amended Article 31C would have no relevance at all in adjudicating upon the constitutional validity of the Nationalisation Act. It is difficult to see how,

in these circumstances, the Court could be called upon to examine the constitutionality of the amendment made in Article 31C that question just did not arise for consideration and it was wholly unnecessary to decide it. Mr. Palkhiwala could reach the battle front for challenging the constitutional validity of the Nationalisation Act as soon as he cleared the road blocks created by the unamended Article 31C and the Constitution (Thirty-ninth Amendment) Act 1975 bringing the Nationalisation Act within the protective wing of Article 31B and it was not necessary for him to put the amendment in Article 31C out of the way as it did not block his challenge against the validity of the Nationalisation Act. I am, therefore, of the view that the entire argument of Mr. Palkhiwala raising the question of constitutionality of the amendment in Article 31C was academic and the Court could have very well declined to be drawn into it, but since the Court did, at the invitation of Mr. Palkhiwala, embark upon this academic exercise and spent considerable time over it, and the issues raised are also of the gravest significance to the future of the nation, I think, I will be failing in my duty if I do not proceed to examine this question on merits.

84. I may point out at this stage that the arguments on this question were spread over a period of about three weeks and considerable learning and scholarship were brought to bear on this question on both sides. The hearing of the arguments commenced on 22nd October 1979 and it ended on 16th November 1979. I hoped that after the completion of the argument! on questions of such momentous significance, there would be a 'free and frank exchange of thoughts' in a judicial conference either before or after the draft judgment was circulated by My Lord the Chief Justice and I would either be able to share the views of my colleagues or if that was not possible, at least try to persuade them to agree with my point of view. But, I find myself in the same predicament in which the learned Chief Justice found himself in Kesavanand Bharati v. State of Kerala MANU/SC/0445/1973 : AIR1973SC1461 . The learned Chief Justice started his judgment in that case by observing.

"I wanted to avoid writing a separate judgment of my own but such a choice seems no longer open. We sat in full strength of 13 to hear the case and I hoped that after a free and frank exchange of thoughts, I would be able to share the views of some one or the other of my esteemed brothers, but we were overtaken by adventitious circumstances," namely, so much time was taken up by counsel to explain their respective points of view that very little time was left to the Judges "after the conclusion of the arguments, for exchange of draft judgments" . Here also, I am compelled by similar circumstances, though not adventitious, to hand down a separate opinion without having had an opportunity to discuss with my colleagues the reasons which weighed with them in striking down the impugned constitutional amendments. Somehow or other, perhaps owing to extraordinary pressure of work with which this Court is overburdened, no judicial conference or discussion was held nor was any draft judgment circulated which could form the basis of discussion, though, as pointed out above, the hearing of the arguments concluded as far back as 16th November, 1979. It was only on 7th May, 1980, just two days before the closing of the Court for summer vacation, that I was informed by the learned Chief Justice that he and the other three learned Judges, who had heard this case alone with me, had decided, to pass an Order declaring the impugned constitutional amendments ultra vires and void on the ground that they violated the basic features of the Constitution and that the reasons for this Order would be given by them later. I found it difficult to persuade myself to adopt this procedure, because there had been no judicial conference or discussion amongst the Judges where there could be free and frank exchange of views nor was any draft judgment circulated and hence I did not have the benefit of knowing the

reasons why the learned Chief Justice and the other three learned judges were inclined to strike down the constitutional amendments. If there had been a judicial conference or discussion or the draft judgment setting out the reasons for holding the impugned constitutional amendments ultra vires and void had been circulated, it would have been possible for me as a result of full and frank discussion or after considering the reasons given in the draft judgment, either to agree with the view taken by My Lord the Chief Justice and the other three learned judges or if I was not inclined so to agree, then persuade them to change their view and agree with mine. That is the essence of judicial collectivism. It is, to my mind, essential that a judgment of a Court should be the result of collective deliberation of the judges composing the Court and it would, in my humble opinion, not be in consonance with collective decision making, if one or more of the judges constituting the Bench proceed to say that they will express their individual opinion, ignoring their colleagues and without discussing the reasons with them and even without circulating their draft judgement so that the colleagues have no opportunity of participating in the collective decision making process. This would introduce a chaotic situation in the judicial process and it would be an unhealthy precedent which this Court as the highest Court in the land--as a model judicial institution which is expected to set the tone for the entire judiciary in the country -- should not encourage. Moreover, I felt that it was not right to pronounce an Order striking down a constitutional amendment without giving a reasoned judgment. Ordinarily, a case can be disposed of only by a reasoned judgment and the Order must follow upon the judgment. It is true that sometimes where the case involves the liberty of the citizen or the execution of a death sentence or where the time taken in preparing a reasoned judgment might prejudicially affect the winning party, this Court, does, in the larger interests of justice pronounce an order and give reasons later, but these are exceptional cases where the requirements of justice induce the Court to depart from the legally sanctioned course. But, there the court had in fact waited for about 5 1/2 months after the conclusion of the arguments and there was clearly no urgency which required that an order should be made though reasons were not ready; the delay of about 2 1/2 months in making the order was not going to injure the interests of any party, since the order was not going to dispose of the writ petition and many issues would still remain to be decided which could be dealt only after the Summer Vacation. Thus there would have been no prejudice to the interests of justice if the order had been made on the reopening of the Court after the summer vacation supported by a reasoned judgment. These were the reasons which compelled me to make my Order dated 9th May, 1980 declining to pass an unreasoned order pronouncing on the validity of the impugned constitutional amendments and stating that I would "prefer to pass a final order in this case when I deliver my reasoned judgment". This order unfortunately led to considerable misunderstanding of my position and that is the reason why I have thought it necessary to explain briefly why I acted in the manner I did.

85. There is also one other predicament from which I suffer in the preparation of this opinion. It is obvious that the decision of the questions arising in Wamanrao's case is closely and integrally connected with the decision of the questions in Minerva Mills case and therefore, logically as also from the point of view of aesthetics and practical pragmatics, there should be one opinion dealing with the questions in both the cases. But the Minerva Mills case was heard by a Bench of five Judges different from the Bench which heard Wamanrao's case- Wamanrao's case was heard by a Bench consisting of the learned Chief Justice, myself , Krishna Iyer, J., Tulzupurkar. J., and A. P. Sen, J. while Krishna Iyer J., Tulzapurkar, J., and A P Sen, J., were not members of the Bench which heard the Minerva Mills case. Since two different Benches heard these cases, there would ordinarily have to be two opinions, one in each case. I however, propose to write a single opinion

dealing with the questions arising in both cases, since that is the only way in which I think I can present an integrated argument in support of my view, without becoming unduly and unnecessarily repetitive.

86. The principal question that arises for consideration in these two cases is whether Article 31A, Article 31B read with the 9th Schedule as amended from time to time and particularly by the Constitution (Seventeenth Amendment) Act, 1964 and the Constitution (Fortieth Amendment) Act, 1976, Article 31C as it stood prior to its amendment by the Constitution (Forty-second Amendment) Act, 1976 and the amended Article 31C are constitutionally valid; do they fall within the scope of the amending power of Parliament under Article 368. The determination of this question depends on the answer to the larger question as to whether there are any limits on the amending power of Parliament under Article 368 and if so, what are the limits. This question came up for consideration before a Bench of 13 Judges of this Court the largest Bench that ever sat -- and after a hearing which lasted for 68 days--the longest hearing that ever took place--eleven judgments were delivered which are reported in Kesavananda Bharati v. State of Kerala MANU/SC/0445/1973 : AIR1973SC1461 (supra). The earlier decision of this Court in I. C. Golaknath v. State of Punjab MANU/SC/0029/1967 : [1967]2SCR762 where by a majority of six against five, the fundamental rights were held to be unamendable by Parliament under Article 368, was overruled as a result of the decision in Kesavananda Bharati's case. But, six out of the thirteen learned Judges (Sikri, C. J. Shelat, Grover, Hegde, Reddy and Mukherjea, JJ.) accepted the contention of the petitioners that though Article 368 conferred power to amend the Constitution, there were inherent or implied limitations on the power of amendment and therefore Article 368 did not confer power on Parliament to amend the Constitution so as to destroy or emasculate the essential or basic elements of features of the Constitution. The fundamental rights according to the view taken by these six learned Judges, constituted basic or essential features of the Constitution and they could not be, therefore, abrogated or emasculated in the exercise of the amending power conferred by Article 368. though a reasonable abridgment of those rights could be effected in the public interest. Khanna, J. found it difficult in the face of the clear words of Article 368 to exclude from their operation Articles relating to fundamental rights and he held that:

The word 'amendment' in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution.

But proceeding to consider the meaning of the word 'amendment', the learned Judge held that the power to amend does not include the power to abrogate the Constitution, that the word 'amendment' postulates that the existing Constitution must survive without loss of identity, that it must be retained though in an amended form, and therefore, the power of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution. The remaining six Judges took the view that there were no limitations of any kind on the power of amendment, though three of them seemed willing to foresee the limitation that the entire Constitution could not be abrogated, leaving behind a state without a Constitution. Now some scholars have expressed the view that from the welter of confusion created by eleven judgments mining over a thousand pages, it is not possible to extract any ratio decidendi which could be said to be the law declared by the Supreme Court. It is no doubt true that the six Judges led by Sikri, C. J., have read a limitation on the amending power of Parliament under Article 368 and so has Khanna, J., but

according to these scholars, the six Judges led by Sikri. C. J. have employed the formulations "basic features" and "essential elements" while Khanna. J. has employed the formulation "basic structure and framework" to indicate what in each view is immune from the amendatory process and it is argued that "basic features" and 'essential elements' cannot be regarded as synonymous with "basic structure and framework". These scholars have sought to draw support for their view from the following observation of Khanna, J. at p. 706 of the Report:

It is then argued on behalf of the petitioners that essential features of the Constitution cannot be changed as a result of amendment. So far as the expression "essential features" means the basic structure or framework of the Constitution, I have already dealt with the question as to whether the power to amend the Constitution would include within itself the power to change the basic structure or framework of the Constitution. Apart from that, all provisions of the Constitution are subject to amendatory process and cannot claim exemption from that process by being described essential features.

Whatever be the justification for this view on merits, I do not think that this observation can be read as meaning that in the opinion of Khanna, J. "basic structure or framework" as contemplated by him was different from "basic features" or "essential elements" spoken of by the other six learned Judges. It was in the context of an argument urged on behalf of the petitioners that the "essential features" of the Constitution cannot be changed that this observation was made by Khanna, J., clarifying that if the "essential features" meant the "basic structure or framework" of the Constitution, the argument of the petitioners would be acceptable, but if the "essential features" did not form part of the "basic structure or framework" and went beyond it, then they would not be immune from the amendatory process. But it does appear from this observation that the six Judges led by Sikri. C. J. on the one hand and Khanna, J. on the other were not completely ad idem as regards the precise scope of the limitation on the amendatory power of Parliament. This might have raised a serious argument as to whether there, any ratio decidendi at all can be culled out from the judgments in this case in so far as the scope and ambit of the amendatory power of Parliament is concerned. A debatable question would have arisen whether "basic and essential features" can be equated with "basic structure or framework" of the Constitution and if they cannot be, then can the narrower of these two formulations be taken to represent the common ratio. But it is not necessary to examine this rather difficult and troublesome question, because, I find that in Smt. Indira Gandhi v. Raj Narain MANU/SC/0304/1975 : [1976]2SCR347 a Bench of five Judges of this Court accepted the majority view in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 to be that the amending power conferred under Article 368, though wide in its sweep and reaching every provision of the Constitution, does not enable Parliament to alter the basic structure or framework of the Constitution. Since this is how the judgments in Kesavananda Bharati's case have been read and a common ratio extracted by a Bench of five Judges of this Court, it is binding upon me and hence I must proceed to decide the questions arising in these cases in the light of the principle emerging from the majority decision that Article 368 does not confer power on Parliament to alter the basic structure or framework of the Constitution. I may mention in the passing that the summary of the judgments given by nine out of the thirteen Judges after the delivery of the judgments also states the majority view to be that "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". Of course, in my view this summary signed by nine Judges has no legal effect at all and cannot be regarded as law declared by the Supreme Court under Article 141. It is difficult to appreciate what jurisdiction or

power these nine Judges had to give a summary setting out the legal effect of the eleven judgments delivered in the case. Once the judgments were delivered these nine Judges as also the remaining four became functus officio and thereafter they had no authority to cull out the ratio of the judgments or to state what, on a proper analysis of the judgments, was the view of the majority. What was the law laid down was to be found in the judgments and that task would have to be performed by the Court before whom the question would arise as to what is the law laid down in Kesavananda Bharati's case. The Court would then hear the arguments and dissect the judgments as was done in Smt. Indira Gandhi's case (supra) and then decide as to what is the true ratio emerging from the judgments which is binding upon the Court as law laid down under Article 141. But here it seems that the nine Judges set out in the summary what according to them was the majority view without hearing any arguments. This was a rather unusual exercise, though well-intentioned. But quite apart from the validity of this exercise embarked upon by the nine Judges, it is a little difficult to understand how a proper and accurate summary could be prepared by these judges when there was not enough time, after the conclusion of the arguments, for an exchange of draft judgments amongst the Judges and many of them did not even have the benefit of knowing fully the views of others. I may, therefore, make it clear that I am not relying on the statement of the majority view contained in the summary given at the end of the judgments in Kesavananda Bharati's case, but I am proceeding on the basis of the view taken in Smt. Indira Gandhi's case as regards the ratio of the majority decision in Kesavananda Bharati's case.

87. I may also at this stage refer to an argument advanced before us on the basis of certain observations in the judgment of Khanna. J. that he regarded fundamental rights as not forming part of the basic structure of the Constitution and therefore, according to him, they could be abrogated or taken away by Parliament by an amendment made under Article 368. If this argument were correct, the majority holding in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 would have to be taken to be that the fundamental right could be abrogated or destroyed in exercise of the power of amendment, because Ray, J. Palekar, J., Mathew, J., Beg, J., Dwivedi, J., and Chandrachud, J., took the view that the power of amendment being unlimited, it was competent to Parliament in exercise of this power to abrogate or emasculate the Fundamental Rights and adding the view of Khanna. J., there would be 7 Judges as against 6 in holding that the Fundamental Rights could be abrogated or taken away by Parliament by a constitutional amendment. But we do not think that this submission urged on behalf of the respondents is well founded. It is undoubtedly true that there are certain observations in the Judgment of Khanna, J. at the bottom of page 688 of the Report which seem to suggest that according to the learned Judge, the fundamental rights could be abridged or taken away by an amendment under Article 368. For example, he says:

"No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach in my opinion should hold good when we deal with amendment relating to Fundamental Rights contained in Part III of the Constitution. It would be impermissible to differentiate between the scope and width of the power of amendment when it deals with Fundamental Rights and the scope and width of that power when it deals with provisions out concerned with Fundamental Rights.

Then again at page 707 of the Report, the learned Judge rejects the argument that the core and essence of a Fundamental Right is immune from the amendatory process. These observations might at first blush appear to support the view that, according to Khanna. J., the amendatory power under Article 368 was sufficiently wide to comprehend not only addition or alteration but also repeal of a Fundamental Right resulting in its total abrogation. But if we look at the judgment of Khanna, J. as a whole, we do not think this argument can be sustained. It is clear that these observations were made by the learned Judge with a view to explaining the scope and width of the power of amendment under Article 368. The learned Judge held that the amendatory power of Parliament was wide enough to reach every provision of the Constitution including the Fundamental Rights in Part III of the Constitution, but while so holding, he proceeded to make it clear that despite all this width, the amendatory power was subject to an overriding limitation, namely, that it could not be exercised so as to alter the basic structure or framework of the Constitution. The learned Judge stated in so many words at page 688 of the Report that though "the power of amendment is plenary and would include within itself, the power to add, alter or repeal the various articles including those relating to fundamental rights", it is "subject to the retention of the basic structure or framework of the Constitution." The same reservation was repeated by the learned Judge in Clause (vii) of the summary of his conclusions given at the end of his judgment. It will, therefore, be seen that according to Khanna, J. the power of amendment can be exercised by Parliament so as even to abrogate or take away a fundamental right, so long as it does not alter the basic structure or framework of the Constitution. But if the effect of abrogating or taking away such fundamental right is to alter or affect the basic structure or framework of the Constitution, the amendment would be void as being outside the amending power of Parliament. It is precisely for this reason that the learned Judge proceeded to consider whether the right to property could be said to appertain to the basic structure or framework of the Constitution. If the view of Khanna, J, were that no fundamental right forms part of the basic structure or framework of the Constitution and it can therefore be abrogated or taken away in exercise of the amendatory power under Article 368, it was totally unnecessary for the learned Judge to consider whether the right to property could be said to appertain to the basic structure or framework of the Constitution. The very fact that Khanna, J. proceeded to consider this question shows beyond doubt that he did not hold that fundamental rights were not a part of the basic structure. The only limited conclusion reached by him was that the right to property did not form part of the basic structure, but so far as the other fundamental rights were concerned, he left the question open. therefore, it was that he took pains to clarify in his judgment in Smt. Indira Gandhi's case MANU/SC/0304/1975 : [1976]2SCR347 (supra) that what he laid down in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 was "that no Article of the Constitution is immune from the amendatory process because of the fact that it relates to fundamental right and is contained in Part III of the Constitution," and that he did not hold in that case that "fundamental rights are not a part of the basic structure of the Constitution". Now if this be so, it is difficult to understand how he could hold the Constitution (Twenty-ninth Amendment) Act, 1972 unconditionally valid. Consistently with his view, he should have held that the Constitution (Twenty-ninth Amendment) Act, 1972 would be valid only if the protection afforded by it to the Kerala Acts included in the 9th Schedule was not violative of the basic structure or framework of the Constitution. But merely because the learned Judge wrongly held the Constitution (Twenty-ninth Amendment) Act, 1972 to be unconditionally valid and did not uphold its validity subject to the scrutiny of the Kerala Acts added in the 9th Schedule, it cannot follow that he regarded the fundamental rights as not forming part of the basic structure of the Constitution. If the law was

correctly laid down by him, it did not become incorrect by being wrongly applied. It is not customary to quote from the writing of a living author, but departing from that practice which, I believe, is no longer strictly adhered to or followed, I may point out that what I have said above finds support from the comment made by Mr. Seervai in the 3rd Volume of his book on Constitutional Law, where the learned author says:

The conflict between Khanna, J.'s views on the amending power and on the unconditional validity of the Twenty-ninth Amendment is resolved by saying that he laid down the scope of the amending power correctly, but misapplied that law in holding Article 31B and Schedule 9 unconditionally valid.

I entirely agree with this perceptive remark of the learned author.

88. The true ratio emerging from the majority decision in Kesavananda Bharati's case being that the Parliament cannot in the exercise of its amendatory power under Article 368 alter the basic structure or framework of the Constitution, I must proceed to consider whether Article 31A, Article 31B read with 9th Schedule, Article 31C as it stood prior to its amendment and the amended Article 31C are violative of the basic structure or framework of the Constitution, for if they are they would be unconstitutional and void. Now what are the features or elements which constitute the basic structure or framework of the Constitution or which, if damaged or destroyed, would rob the Constitution of its identity so that it would cease to be the existing Constitution but would become a different Constitution. The majority decision in Kesavananda Bharati's case no doubt evolved the doctrine of basic structure or framework but it did not lay down that any particular named features of the Constitution formed part of its basic structure or framework. Sikri, C. J. mentioned supremacy of the Constitution, republican and democratic form of Government, secular character of the Constitution, separation of powers among the legislators, executive and judiciary, federalism and dignity and freedom of the individual as essential features of the Constitution, Shelat and Grover. JJ. added to the list two other features; justice --social, economic and political and unity and integrity of the Nation. Hegde and Mukherjea, JJ., added sovereignty of India as a basic feature of the Constitution. Reddy, J., thought that sovereign democratic republic, parliamentary form of democracy and the three organs of the State formed the basic structure of the Constitution. Khanna, J. held that basic structure indicated the broad contours and outlines of the Constitution and since the right to property was a matter of detail, it was not a part of that structure. But he appeared to be of the view that the democratic form of government, the secular character of the State and judicial review formed part of the basic structure. It is obvious that these were merely illustrations of what each of the six learned Judges led by Sikri, C. J. thought to be the essential features of the Constitution and they were not intended to be exhaustive. Shelat and Grover, JJ. Hedge and Mukherjea, JJ. and Reddy, J. in fact said in their judgments that their list of essential features which form the basic structure of the Constitution was illustrative or incomplete. This enumeration of the essential features by the six learned Judges had obviously no binding authority; first, because the Judges were not required to decide as to what features or elements constituted the basic structure or framework of the Constitution and what each of them said in this connection was in the nature of obiter and could have only persuasive value; secondly, because the enumeration was merely by way of illustration and thirdly, because the opinion of six Judges that certain specified features formed part of the basic structure of the Constitution did not represent the majority opinion and hence could not be regarded as law declared by this Court under Article 141. therefore, in every

case where the question arises as to whether a particular feature of the Constitution is a part of its basic structure, it would have to be determined on a consideration of various factors such as the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of country's governance. Vide the observations of Chandrachud, J. (as he then was) in Smt. Indira Gandhis case at p. 658 of the Report.

89. This exercise of determining whether certain particular features formed part of the basic structure of the Constitution had to be undertaken by this Court in Smt. Indira Gandhi's case MANU/SC/0304/1975 : [1976]2SCR347 (supra) which came up for consideration within a short period of four years after the delivery of the judgments in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 . The constitutional amendment which was challenged in that case was the Constitution (Thirty-ninth Amendment) Act, 1975, which introduced Article 329A and the argument was that Clause (4) of this newly added article was constitutionally invalid on the ground that it violated the basic structure or framework of the Constitution. This challenge was unanimously upheld by a Constitution Bench which consisted of the Chief Justice and four senior most Judges of this Court. It is not necessary for our purpose to analyse the judgments given by the five Judges in this case as they deal with various matters which are not relevant to the questions which arise before us. But it may be pointed out that two of the learned Judges, namely, Khanna and Mathew. JJ. held that democracy was an essential feature forming part of the basic structure and struck down Clause (4) of Article 329A on the ground that it damaged the democratic structure of the Constitution. Chandrachud, J. (as he then was) emphatically asserted that, in his opinion, there were four unamendable features which formed part of the basic structure, namely, "(i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and (iv) The nation shall be governed by a government of laws, not of men." These, according to him, were "the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution." He then proceeded to hold that Clause (4) of Article 329A was "an Outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our Constitution" and on that account declared it to be unconstitutional and void. Mathew, J. however, expressed his dissent from the view taken by Chandrachud, J. as regards the right of equality conferred by Article 14 being an essential feature of the Constitution and stated inter alia the following reason:

The majority in Bharati's case did not hold that Article 14 pertains to the basic structure of the Constitution. The majority upheld the validity of the first part of Article 31C; this would show that a constitutional amendment which takes away or abridges the right to challenge the validity of an ordinary law for violating the fundamental right under that Article would not destroy or damage the basic structure. The only logical basis for supporting the validity of Articles 31A, 31B and the first part of 31C is that Article 14 is not a basic structure.

I shall have occasion to discuss later the concept of equality under the Constitution and whether it forms part of the basic structure. But, one position of a basic and fundamental nature I may make clear at this stage, and there I agree with Mathew, J., that whether a particular feature forms part of the basic structure has necessarily to be determined on the basis of the specific provisions of the

Constitution. To quote the words of Mathew, J., in Smt. Indira Gandhi's case (supra) "To be a basic structure it must be a terrestrial concept having its habitat within the four corners of the Constitution." What constitutes basic structure is not like "a twinkling star up above the Constitution." It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven. Mathew, J. in Smt. Indira Gandhi v. Raj Narain MANU/SC/0304/1975 : [1976]2SCR347

90. Now, in Wamanrao's case the broad argument of Mr. Phadke on behalf of the petitioners founded on the doctrine of basic structure was, and this argument was supported by a large number of other counsel appearing in the allied petitions, that the fundamental rights, enshrined in Articles 14 and 19 form part of the basic structure of the Constitution and therefore Article 31A, Article 31B, read with 9th Schedule and the unamended Article 31C in so far as they exclude the applicability of Articles 14 and 19 to certain kinds of legislation emasculate those fundamental rights and thereby damage the basic structure of the Constitution and they must accordingly be held to be outside the amending power of Parliament and hence unconstitutional and void. I have not made any reference here to Article 31 and treated the argument of Mr. Phadke as confined only to Articles 14 and 19, because, though Article 31 was very much in the Constitution when the arguments in Wamanrao's case were heard, it has subsequently been deleted by the Constitution (Forty-Fourth Amendment) Act 1978 and reference to it has also been omitted in Articles 31A, 31B and 31C and we are therefore concerned with the constitutional validity of these Articles only in so far as they grant immunity against challenge on the ground of infraction of Articles 14 and 19. Mr. Phadke on behalf of the petitioners also challenged the constitutional validity of the Constitution (Fortieth Amendment) Act, 1976 which included the amending Acts 21 of 1975, 41 of 1975 and 2 of 1976 in the 9th Schedule, on the ground that the Lok Sabha was not in existence at the date when it was enacted. But obviously, in view of Clauses (4) and (5) introduced in Article 368 by Section 55 of the Constitution (Forty-second Amendment) Act, 1976, it was not possible for Mr. Phadke on behalf of the petitioners to assail the constitutional validity of Article 31A, Article 31B read with the 9th Schedule as amended by the Constitution (Fortieth Amendment) Act, 1976 and the unamended Article 31C, since these two Clauses of Article 368 barred challenge to the validity of a constitutional amendment on any ground whatsoever and declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal, any provision of the Constitution. He therefore, as a preliminary step in his argument challenged the constitutional validity of Clause (4) and (5) of Article 368 on the ground that these Clauses damaged the basic structure of the Constitution and were outside the amending power of Parliament. The argument of Mr. Palkhiwala on behalf of the petitioners in the

Minerva Mills case was a little different. He too attacked the vires of Clause (4) and (5) of Article 368 since they barred at the threshold any challenge against the constitutional validity of the amendment made in Article 31C, but so far as Article 31A, Article 31B and the unamended Article 31C were concerned, he did not dispute their validity and, as pointed out by us earlier, he conceded and in fact gave cogent reasons showing that they were constitutionally valid. His only attack was against the validity of the amendment made in Article 31C by Section 4 of the Constitution (Forty-second Amendment) Act, 1976 and he contended that this amendment, by making the Directive Principles supreme over the fundamental rights, damaged or destroyed the basic structure of the Constitution. He urged that the basic structure of the Constitution rests on the foundation that while the Directive Principles are the mandatory ends of government, those ends have to be achieved only through the permissible means set out in the Chapter on fundamental rights and this balance and harmony between the fundamental rights and the Directive Principles was destroyed by the amendment in Article 31C by making the fundamental rights subservient to the Directive Principles and in consequence, the basic structure of the Constitution was emasculated. A passionate plea was made by Mr. Palkhiwala with deep emotion and feeling that if Article 31C as amended was allowed to stand, it would be an open licence to the legislature and the executive both at the center and in the States, to destroy democracy and establish an authoritarian or totalitarian regime, since almost every legislation could be related, directly or indirectly, to some Directive Principle and would thus be able to earn immunity from the challenge of Articles 14 and 19 and the fundamental rights enshrined in these two Articles would be rendered meaningless and futile and would become mere rope of sand. Mr. Palkhiwala vehemently urged that Justice, liberty and equality were the three pillars of the Constitution and they were embodied in Articles 14 and 19 and therefore if the supremacy of the fundamental rights enshrined in these Articles was destroyed and they were made subservient to the Directive Principles, it would result in the personality of the Constitution being changed beyond recognition and such a change in the personality would be outside the amending power of Parliament. Mr. Palkhiwala likened the situation to a permanent state of emergency and pointed out by way of contrast that whereas under an emergency the people may be precluded from enforcing their fundamental rights under Articles 14 and 19 for the duration of the emergency, here the people were prevented from moving the court for enforcement of these fundamental rights for all time to come even without any emergency where a law was passed purporting to give effect to any of the Directive Principles. The amendment in Article 31C was thus, according to Mr. Palkhiwala, outside the amending power of Parliament and was liable to be struck down as unconstitutional and void.

91. Logically I must first consider the challenge against the constitutional validity of Clause (4) and (5) of Article 368, because it is only if they can be put out of the way that Mr. Phadke and Mr. Palkhiwala can proceed further with their respective challenges against the validity of the other constitutional provisions impugned by them. Both these Clauses were inserted in Article 368 by Section 55 of the Constitution (Forty-second Amendment) Act, 1976 with a view to overcoming the effect of the majority decision in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 . Clause (4) enacted that no amendment of the Constitution "made or purporting to have been made under this Article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground" while Clause (5), which begins with the words "For the removal of doubts", declared that "there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article." The

question is whether these two Clauses transgress the limitations on the amending power of Parliament and are therefore void. I will first take up for consideration Clause (4) which seeks to throw a cloak of protection on an amendment made or purporting to have been made in the Constitution and makes it unchallengeable on any ground. It is rather curious in its wording and betrays lack of proper care and attention in drafting. It protects every amendment made or purporting to have been made "whether before or after the commencement of Section 5 of the Constitution (Forty-second Amendment) Act,1976. " But would an amendment made by any other section of the Constitution (Forty-second Amendment) Act, 1976 such as Section 4, which would be neither before nor after the commencement of Section 55, but simultaneous with it, be covered by this protective provision? This is purely a problem of verbal semantics which arises because of slovenliness in drafting that is becoming rather common these days and I need not dwell on it, for there are more important questions which arise out of the challenge to the constitutional validity of Clause (4) and they require serious consideration. I will proceed on the basis that the protection sought to be given by Clause (4) extends to every amendment whatsoever and that the parenthetical words "whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act. 1976" were introduced merely by way of abundant caution with a view to indicating that this protection was intended to cover even amendments made or purporting to have been made before the enactment of the Constitution (Fourty-second Amendment) Act, 1978. Now even a cursory look at the language of Clause (4) is sufficient to demonstrate that this is a case of zeal overrunning discretion. Clause (4) provides that no amendment to the Constitution made or purporting to have been made under Article 368 shall be called in question in any court on any ground. The words "on any ground" are of the widest amplitude and they would obviously cover even a ground that the procedure prescribed in Clause (2) and its proviso has not been followed. The result is that even if an amendment is purported to have been made without complying with the procedure prescribed in Sub-Clause (2) including its proviso, and is therefore unconstitutional, it would still be immune from challenge. It was undisputed common ground both at the bar and on the Bench, in Kesavananda Bharati's case that any amendment of the Constitution which did not conform to the procedure prescribed by Sub-Clause (2) and its proviso was no amendment at all and a court would declare it invalid. Thus if an amendment were passed by a simple majority in the House of the People and the Council of States and the President assented to the amendment, it would in law be no amendment at all because the requirement of Clause (2) is that it should be passed by a majority of each of the two Houses separately and by not less than two-thirds of the members present and voting. But if Clause (4) were valid, it would become difficult to challenge the validity of such an amendment and it would prevail though made in defiance of a mandatory constitutional requirement. Clause (2) including its proviso would be rendered completely superfluous and meaningless and its prescription would become merely a paper requirement. Moreover, apart from nullifying the requirement of Clause (2) and its proviso, Clause (4) has also the effect of rendering an amendment immune from challenge even if it damages or destroys the basic structure of the Constitution and is therefore outside the amending power of Parliament.

So long as Clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in Kesavananda Bharati's case, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending

power of Parliament would stand enlarged, contrary to the decision of this Court in Kesavananda Bharati's case. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers. I shall immediately proceed to state the reasons why I think that these two features form part of the basic structure of the Constitution.

92. It is clear from the majority decision in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 that our Constitution is a controlled Constitution which confers powers on the various authorities created and recognised by it and defines the limits of those powers. The Constitution is suprema lex, the paramount law of the land and there is no authority, no department or branch of the State, which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority. Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity. It will therefore be seen that the limited amending power of Parliament is Itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment were enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks, directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and hence outside the amendatory power of Parliament.

93. It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that
every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power.
But then
the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded.
Now there are three main departments of the State amongst which the powers of Government are divided; the Executive, the legislature and the Judiciary.
Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental

functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J. (as he then was) in Smt. Indira Gandhi's case MANU/SC/0304/1975 : [1976]2SCR347 (supra) "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged."<mpara>

Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature.

The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution. Speaking about draft Article 25, corresponding to present Article 32 of the Constitution, Dr. Ambedkar, the principal architect of our Constitution, said in the Constituent Assembly on 9th December, 1948:

"If I was asked to name any particular article in this Constitution as the most important--an article without which this Constitution would be a nullity--I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance." (C. A. debates, Vol. VII, p. 953) It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether It is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.

"The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality.

I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional

mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review
and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole Judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that Clause (4) of Article 368 is unconstitutional and void as damaging the basic structure of the Constitution.

94. That takes us to Clause (5) of Article 368. This Clause opens with the words "For the removal of doubts" and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament under Article 368, It is difficult to appreciate the meaning of the opening words "For the removal of doubts" because the majority decision in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 clearly laid down and left no doubt that the basic structure of the Constitution was outside the competence of the amendatory power of Parliament and in Smt. Indira Gandhi's case MANU/SC/0304/1975 : [1976]2SCR347 all the Judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329A(4) was to be judged. Therefore, after the decisions in Kesavananda Bharati's case and Smt. Indira Gandhi's case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and Clause (5) could not remove the doubt which did not exist. What Clause (5), really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part or Parliament. I fail to see how Parliament which has only a limited power or amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basis structure. That would clearly be in excess of the limited amending power possessed by Parliament. The Constitution has conferred only a limited amending power on Parliament so that it cannot damage or destroy the basic structure of the Constitution and Parliament cannot by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. It is difficult to appreciate how Parliament having a limited power of amendment can get rid of the limitation by exercising that very power and convert it into an absolute power. Clause (5) of Article 368 which sought to remove the limitation on the amending power of Parliament by making it absolute must therefore be held to be outside the amending power of Parliament. There is also another ground on which

the validity of this Clause can be successfully assailed. This Clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure. I would in the circumstances hold Clause (5) of Article 368, to be unconstitutional and void.

95. With Clauses (4) and (5) of Article 368 out of the way, I must now proceed to examine the challenge against the constitutional validity of Article 31A. Article 31B read with the 9th Schedule and the unamended Article 31C, So far as Article 31A is concerned, Mr. Phadke appearing on behalf of the petitioners contended that, tested by the doctrine of basic structure, Article 31A was unconstitutional and void, since it had the effect of abrogating Articles 14 and 19 in reference to legislation falling within the categories specified in the various Clauses of that Article. He argued that the Fundamental Rights enshrined in Articles 14 and 19 were part of the basic structure of the Constitution and any constitutional amendment which had the effect of abrogating or damaging these Fundamental Rights was outside the amendatory power of Parliament. While considering this argument, I may make it clear that I am concerned here only with constitutional validity of Clause (a) of Article 31A since the protection of Article 31A has been claimed in respect of Maharashtra Land Ceiling Acts only under Clause (a) of that Article and I need not enter upon a discussion of the constitutional validity of Clauses (b) to (e) of Article 31A. I do not think that the argument of Mr. Phadke challenging the constitutional validity of Clause (a) of Article 31A is well-founded. I shall have occasion to point out in a later part of this judgment that where any law is enacted for giving effect to a Directive Principle with a view to furthering the constitutional goal of social and economic justice, there would be no violation of the basic structure, even if it infringes formal equality before the law under Article 14 or any Fundamental Right under Article 19. Here Clause (a) of Article 31A protects a law of agrarian reform which is clearly, in the context of the socio-economic conditions prevailing in India, a 'basic requirement of social and economic justice and is covered by the Directive Principles set out in Clauses (b) and (c) of Article 39 and it is difficult to see how it can possibly be regarded as violating the basic structure of the Constitution, on the contrary, agrarian reform leading to social and economic justice to the rural population is an objective which strengthens the basic structure of the Constitution. Clause (a) of Article 31A must therefore be held to be constitutionally valid even on the application of the basic structure test.

96. But, apart from this reasoning on principle which in our opinion clearly sustains the constitutional validity of Clause (a) of Article 31A, we think that even on the basis of the doctrine of stare decisis Article 31A, must be upheld as constitutionally valid. The question as to the constitutional validity of Article 31A first came up for consideration before this Court in Shankari Prasad v. Union of India MANU/SC/0013/1951 : [1952]1SCR89 : AIR 1951 SC 458 There was a direct challenge leveled against the constitutionality of Article 31A in this case on various grounds and this challenge was rejected by a Constitution Bench of this Court. The principal ground on which the challenge was based was that if a constitutional amendment takes away or abridges any of the Fundamental Rights conferred by Part III of the Constitution, it would fall within the prohibition of Article 13(2) and would therefore be void. Patanjali Shastri, J., speaking on behalf of the Court, did not accept this contention and taking the view that in the context of Article 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power he held that Article

13(2) does not affect constitutional amendments. This view in regard to the interpretation of the word 'law' in Article 13(2) has now been affirmed by this Court sitting as a full Court of 13 Judges in Kesavananda Bharati's case and it is no longer possible to argue the contrary proposition. It is true that in this case, the constitutional validity of Article 31A was not assailed on the ground of infraction of the basic feature since that was a doctrine which came to be evolved only in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 , but the fact remains that whatever be the arguments advanced or omitted to be advanced, Article 31A was held to be constitutionally valid by this Court. Nearly 13 years after this decision was given in Shankari Prasad's case, a strong plea was made before this Court in Sajjan Singh v. State of Rajasthan MANU/SC/0052/1964 : [1965]1SCR933 that Shankari Prasad's case should be reconsidered, but after a detailed discussion of the various arguments involved in the case, the Constitution Bench of this Court expressed concurrence with the view expressed in Shankari Prasad's case and in the result, upheld the constitutional validity of Article 31A, though the question which arose for consideration was a little different and did not directly involve the constitutional validity of Article 31A. Thereafter, came the famous decision of this Court in Golak Nath's case MANU/SC/0029/1967 : [1967]2SCR762 where a full Court of 11 Judges, while holding that the Constitution (First Amendment) Act exceeded the constituent power of Parliament, still categorically declared on the basis of the doctrine prospective overruling that the said amendment, and a few other like amendments subsequently made, should not be disturbed and must be held to be valid. The result was that even the decision in Golak Nath's case accepted the constitutional validity of Article 31A. The view taken in Golak Nath's case as regards the amending power of Parliament was reversed in Kesavananda Bharati's case where the entire question as to the nature and extent of the constituent power of Parliament to amend the Constitution was discussed in all its dimensions and aspects uninhibited by any previous decisions, but the only constitutional amendments which were directly challenged in that case were the Twenty fourth, Twenty fifth and Twenty-ninth Amendments. The constitutional validity of Article 31A was not put in issue in Kesavananda Bharati's case and the learned Judges who decided that case were not called upon to pronounce on it and it cannot therefore be said that this Court upheld the vires of Article 31A in that case. It is no doubt true that Khanna, J. held Article 31A to be valid on the principle of stare decisis, but that was only for the purpose of upholding the validity of Article 31C, because he took the view that Article 31C was merely an extension of the principle accepted in Article 31A and "the ground which sustained the validity of Clause (1) of Article 31A, would equally sustain the validity of the first part of Article 31C".

So far as the other learned Judges were concerned, they did not express any view specifically on the constitutional validity of Article 31A, since that was not in issue before them. Ray, J. Palekar, J. Mathew, J., Bee, J. Dwiwedi, J. and Chandrachud, J., held Article 31C to be valid and if that view be correct, Article 31A must a fortiorari be held to be valid. But it must be said that there is no decision of the Court in Kesavananda Bharati's case holding Article 31A as constitutionally valid, and logically, therefore, it should be open to the petitioners in the present case to contend that, tested by the basic structure doctrine, Article 31A is unconstitutional. We have already pointed out that on merits this argument has no substance and even on an application of the basic structure doctrine, Article 31A cannot be condemned as invalid. But in any event, I do not think that it would be proper to reopen the question of constitutional validity of Article 31A which has already been decided and silenced by the decisions of this Court in Shankari Prasad's case, Sajjan Singh's case and Golak Nath's case. Now for over 28 years, since the decision in Shankari Prasad's

case Article 31A has been recognised as valid and on this view, laws of several States relating to agrarian reform have been held to be valid and as pointed out by Khanna, in Kesavananda Bharati's case "millions of acres of land have changed hands and millions of new titles in agricultural lands have been created." If the question of validity of Article 31A were reopened and the earlier decisions upholding its validity were reconsidered in the light of the basic structure doctrine, these various agrarian reform laws which have brought about a near socio-economic revolution in the agrarian sector might be exposed to jeopardy and that might put the clock back by setting at naught all changes that have been brought about in agrarian relationships during these years and create chaos in the lives of millions of people who have benefited by these laws. It is no doubt true that this Court has power to review its earlier decisions or even depart from them and the doctrine of stare decisis cannot be permitted to perpetuate erroneous decisions of this Court to the detriment of the general welfare of the public. There is indeed a school of thought which believes with Cardozo that "the precedents have turned upon us and they are engulfing and annihilating us, engulfing and annihilating the very devotees that worshipped at their shrine" and that the Court should not be troubled unduly if it has to break away from precedents in order to modify old rules and if need be to fashion new ones to meet the challenges and problems thrown upon by a dynamic society. But at the same time, it must be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in applicability of law would be considerably eroded and suffer a serious set-back if the highest court in the land were readily to overrule the view expressed by it in earlier decisions even though that view has held the field for a number of years. It is obvious that when constitutional problems are brought before this Court for its decision, complex and difficult questions are bound to arise and since the decision on many of such questions may depend upon choice between competing values, two views may be possible depending upon the value judgment or the choice of values made by the individual Judge. therefore, if one view has been taken by the Court after mature deliberation, the fact that another Bench is inclined to take another view would not justify the Court in reconsidering the earlier decision and overruling it. The law laid down by this Court is binding on all Courts in the country and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the decision given by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the faith of which numerous cases have been decided and many transactions have taken place is held to be not the correct law after a number of years. The doctrine of stare decisis has evolved from the maxim "stare decisis et non movere quieta" meaning "adhere to the decision and do not unsettle things which are established," and it is a useful doctrine intended to bring about certainty and uniformity in the law. But when I say this, let me make it clear that I do not regard the "doctrine of stare decisis as a rigid and inevitable doctrine which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. "Stare decisis" as pointed out by Brandeis "is always a desideratum, even in these constitutional cases, but in them, it is never a command". The Court may in an appropriate case overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. The power of review must be exercised with due care and caution and only for advancing the public well-being and not merely because it may appear that the previous decision was based on an erroneous view of the law. It is only where the perpetuation of the earlier decision would be productive of mischief or inconvenience or would have the effect of deflecting the nation from the course which has been set by the Constitution makers or to use the words of Krishna Iyer, J. in Ambika Prasad Misra v. State of U.P. WP Nos. 1543 etc. of 1977 (Reported in

: [1980]3SCR1159). "where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake or the basic direction of the nation itself is in peril of a shake-up" that the Court would be justified in reconsidering its earlier decision and departing from it. It is fundamental that the nation's Constitution should not be kept in constant uncertainty by judicial review every now and then, because otherwise it would paralyse by perennial suspense all legislative and administrative action on vital issues. The Court should not indulge in judicial destabilisation of State action and a view which has been accepted for a long period of time in a series of decisions and on the faith of which millions of people have acted and a large number of transactions have been effected, should not be disturbed. Let us not forget the words of Justice Roberts of the United States Supreme Court--words which are equally applicable to the decision making process in this Court:

The reason for my concern is that the instant decision overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted rail road ticket good for this day and train only. . . . . It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability our institutions.

Here the view that Article 31A is constitutionally valid has been taken in at-least three decisions of this Court, namely, Shankari Prasad's case AIR 1951 SC 458 Sajjan Singh's case MANU/SC/0052/1964 : [1965]1SCR933 and Golak Nath's case MANU/SC/0029/1967 : [1967]2SCR762 and it has held the field for over 28 years and on the faith of its correctness, millions of acres of agricultural land have changed hands and new agrarian relations have come into being, transforming the entire rural economy. Even though the constitutional validity of Article 31A was not tested in these decisions by reference to the basic structure doctrine, I do not think the Court would be justified in allowing the earlier decisions to be reconsidered and the question of constitutional validity of Article 31A re-opened. These decisions have given a quietus to the constitutional challenge against the validity of Article 31A and this quietus should not now be allowed to be disturbed. I may point out that this view which I am taking is supported by the decision of this Court in Ambika Prasad Misra v. State of U. P. (supra).

97. I may now turn to consider the constitutional challenge against the validity of Article 31B read with the 9th Schedule. This Article was introduced in the Constitution along with Article 31A by the Constitution (First Amendment) Act, 1951. Article 31A as originally introduced was confined only to legislation for acquisition of an estate or extinguishment or modification of any rights in an estate and it saved such legislation from attack under Articles 14, 19 and 31. Now once legislation falling within this category was protected by Article 31A, it was not necessary to enact another saving provision in regard to the same kind of legislation. But, presumably, having regard to the fact that the constitutional law was still in the stage of evolution and it was not clear whether a law, invalid when enacted, could be revived without being re-enacted, Parliament thought that Article 31A. even if retrospectively enacted, may not be sufficient to ensure the validity of a legislation which was already declared void by the courts as in Kameshwar Singh's case MANU/SC/0020/1952 : [1952]1SCR1020 , and therefore considered it advisable to have a further provision in Article 31B to specifically by-pass judgments striking down such legislation. That

seems to be the reason why Article 31B was enacted and statutes falling within Article 31A were included in the 9th Schedule. Article 31B was conceived together with Article 31A as part of the same design adopted to give protection to legislation providing for acquisition of an estate or extinguishment or modification of any rights in an estate. The 9th Schedule of Article 31B was not intended to include laws other than those covered by Article 31A. That becomes clear from the speeches of the Law Minister and the Prime Minister during the discussion on the Constitution (First Amendment) Act, 1961. Dr. Ambedkar admitted of the 9th Schedule that prima facie "it is an unusual procedure" but he went on to add that "all the laws that have been saved by this Schedule are laws that fall under Article 31A". Jawaharlal Nehru also told Parliament.

"It is not with any great satisfaction or pleasure that we have produced this long Schedule. We do not wish to add to it for two reasons. One is that the Schedule consists of a particular type of legislation, generally speaking, and another type should not come ...." (emphasis supplied]. Articles 31A and Clause 31B were thus intended to serve the same purpose of protecting legislation falling within a certain category. It was a double barreled protection which was intended to be provided to this category of legislation, since it was designed to carry out agrarian reform which was so essential for bringing about a revolution in the socio-economic structure of the country. This was followed by the Constitution (Fourth Amendment) Act, 1955 by which the categories of legislation covered by Article 31A were sought to be expanded by adding certain new Clauses after Clause (a). Originally, in the draft bill in addition to these Clauses, there was one more Clause , namely, Clause (d) which sought to give protection to a law providing for the acquisition or requisitioning of any immovable property for the rehabilitation of displaced persons and, as a corollary to the proposed amendment of Article 31A it was proposed in Clause (5) of the Bill to add In the 9th Schedule two more State Acts and four Central Acts which fell within the scope of Clause (d) and (f) of the revised Article 31A. Vide Clause (4) of the Statement of Objects and Reasons. The two State Acts which were proposed to be included in the 9th Schedule were the Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 and the United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 the West Bengal Land Development and Planning Act, 1948, which was struck down by this Court in State of West Bengal v. Bela Banerjee MANU/SC/0017/1953 : [1954]1SCR558 and the invalidity of which really started the entire exercise of the Constitution (Fourth Amendment) Act, 1955, was however, left-out of the 9th Schedule in the draft Bill because it included certain purposes of acquisition which fell outside the proposed Clause (d) of Article 31A. But while the Constitution (Fourth Amendment) Act, 1955 was being debated, an Ordinance was issued by the Governor of West Bengal omitting with retrospective effect all the items in the definition of "public purpose" except the settlement of displaced persons who had migrated into the State of West Bengal, with the result that the West Bengal Act as amended by the Ordinance came within the category of legislation specified in the proposed Clause (d) of Article 31A, In view of this amendment, the West Bengal Act was included to the 9th Schedule by way of amendment of the draft Bill. It is significant to note that a similar Orissa Statute which provided for acquisition of land for purposes going beyond the proposed Clause, (d) of Article 31A and which was not amended in the same manner as the West Bengal Act, was not included in the 9th Schedule. A Central Act, namely, the Resettlement of Displaced Persons (Land Acquisition) Act, 1948 fell within the proposed Clause (d) of Article 31A and it was therefore included in the 9th Schedule in the draft Bill. The link between Articles 31A and 31B was thus maintained in the draft Bill, but when the draft Bill went before the Joint Committee, the proposed Clause (d) of Article 31A was deleted and the Bihar, U. P. and West Bengal Acts as

also the above-mentioned Central Act which were originally intended to be within the scope and ambit of Article 31A, became unrelated to that Article. Even so, barring these four Acts, all the other statutes included in the 9th Schedule fell within one or the other Clause of the amended Article 31A. Subsequent to this amendment, several other statutes dealing with agrarian reform were included in the 9th Schedule by the Constitution (Seventeenth Amendment) Act, 1964 and no complaint can be made in regard to such addition, because all these statutes partook of the character of agrarian reform legislation and were covered by Clause (a) of Article 31A in view of the extended definition of "estate" substituted by the same amending Act. The validity of the Constitution (Seventeenth Amendment) Act, 1964 was challenged before this Court in Golak Nath's case (supra) and though the Court by a majority of six against five took the view that Parliament has no power to amend any fundamental right, it held that this decision would not affect the validity of the Constitution (Seventeenth Amendment) Act, 1964 and other earlier amendments to the Constitution and thus recognised the validity of the various constitutional amendments which included statutes in the 9th Schedule from time to time up to that date. Then came the Constitution (Twenty-ninth Amendment) Act 1972 by which two Kerala agrarian reform statutes were included in the 9th Schedule. The validity of the Twenty-ninth Amendment Act was challenged in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 but by a majority consisting of Khanna, J. and the six learned Judges led by Ray, C. J., it was held to be valid. Since all the earlier constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in Shankari Prasad's case and Sajian Singh's case and were accepted as valid in Golak Nath's case and the Twenty Ninth Amendment Act was also held valid in Kesavananda Bharati's case, though not on the application of the basic structure test, and these constitutional amendments have been recognised as valid over a number of years and moreover, the statutes intended to be protected by them are all falling within Article 31A with the possible exception of only four Acts referred to above, I do not think, we would be justified in re-opening the question of validity of these constitutional amendments and hence we hold them to be valid. But, all constitutional amendments made after the decision in Kesavananda Bharati's case would have to be tested by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not know the limitation on its amending power. It may be pointed out that quite a large number of statutes have been included in the 9th Schedule by the subsequent constitutional amendments and strangely enough, we find for the first time that statutes have been included which have no connection at all with Article 31A or 31C and this device of Article 31B which was originally adopted only as a means of giving a more definite and assured protection to legislation already protected under Article 31A, has been utilised for the totally different purpose of excluding the applicability of Fundamental Rights to all kinds of statutes which have nothing to do with agrarian reform or Directive Principles. This is rather a disturbing phenomenon. Now out of the statutes which are or may in future be included in the 9th Schedule by subsequent constitutional amendments, if there are any which fall within a category covered by Article 31A or 31C they would be protected from challenge under Articles 14 and 19 and it would not be necessary to consider whether their inclusion in the 9th Schedule is constitutionally valid, except in those rare cases where protection may be claimed for them against violation of any other fundamental rights. This question would primarily arise only in regard to statutes not covered by Article 31A or 31C and in case of such statutes, the Court would have to consider whether the constitutional amendments including such statutes in the 9th Schedule violate the basic structure of the Constitution in granting them immunity from challenge of the fundamental rights. It is possible that in a given case, even an abridgement of a fundamental right may involve violation of

the basic structure. It would all depend on the nature of the fundamental right, the extent and depth of the infringement, the purpose for which the infringement is made and its impact on the basic value of the Constitution. Take for example, right to life and personal liberty enshrined in Article 21. This stands on an altogether different footing from other fundamental rights. I do not wish to express any definite opinion, but I may point out that if this fundamental right is violated by any legislation, it may be difficult to sustain a constitutional amendment which seeks to protect such legislation against challenge under Article 21. So also where a legislation which has nothing to do with agrarian reform or any Directive Principles infringes the equality Clause contained in Article 14 and such legislation is sought to be protected by a constitutional amendment by including it in the 9th Schedule, it may be possible to contend that such constitutional amendment is violative of the egalitarian principle which forms part of the basic structure. But these are only examples which I am giving by way of illustration, for other situations may arise where infraction of a fundamental right by a statute, if sought to be constitutionally protected, might affect the basic structure of the Constitution. In every case, therefore, where a constitutional amendment includes a statute or statutes in the 9th Schedule, its constitutional validity would have to be considered by reference to the basic structure doctrine and such constitutional amendment would be liable to be declared invalid to the extent to which it damages or destroys the basic structure of the Constitution by according protection against violation of any particular fundamental right.

98. I will now turn to consider the challenge against the constitutional validity of the unamended Article 31C. This article was introduced in the Constitution by the Constitution (Twenty-fifth Amendment) Act, 1971 and it provided in its first part that "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article. 31" It is not necessary to reproduce here the second part of the unamended Article 31C because that was declared unconstitutional by the majority decision in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 and must consequently be treated as non est . The argument of Mr. Phadke against the constitutional validity of the unamended Article 31C was the same as in case of Article 31A, namely, that it emasculated the fundamental rights in Articles 14 and 19 and was, therefore, destructive of the basic structure of the Constitution. I shall presently examine this arguments on merits and demonstrate that it is unsustainable, but before I do so, I may point out at the outset that it is wholly unnecessary to embark upon a discussion of the merits of this argument, because the first part of the unamended Article 31C was held to be constitutionally valid by the majority decision in Kesavananda Bharati's case and that decision being binding upon us, it is not open to Mr. Phadke to reagitate this question. Out of the thirteen Judges who sat on the Bench in Kesavananda Bharati's case, Ray, J., as he then was, Palekar, J., Dwivedi, J., Khanna, J., Mathew, J., Beg J. and Chandrachud, J., as he then was, took the view that the first part of the unamended Article 31C was constitutionally valid, because the amending power of Parliament was absolute and unlimited. Khanna, J. did not subscribe to the theory that Parliament had an absolute and unlimited right to amend the Constitution and his view was that the power of amendment conferred on Parliament was a limited power restricting Parliament from so amending the Constitution as to alter its basic structure, but even on the basis of this limited power, he upheld the constitutional validity of the first part of the unamended Article 31C. There were thus seven out of thirteen Judges who held that the first part of the unamended Article 31C was constitutionally valid, though the reasons which prevailed with Khanna, J. for taking this view

were different from those which prevailed with the other six learned Judges. The issue as regards the constitutionational validity of the first part of the unamended Article 31C which directly arose for consideration before the Court was accordingly answered in favour of the Government and the law laid down by the majority decision was that the first part of the unamended Article 31C was constitutional and valid and this declaration of the law must be regarded as binding on the court in the present writ petitions. Mr. Phadke, however, disputed the correctness of this proposition and contended that what was binding on the court was merely the ratio decidendi of Kesavananda Bharati's case and not the conclusion that the first part of the unamended Article 31C was valid. The ratio decidendi of Kesavananda Bharati case MANU/SC/0445/1973 : AIR1973SC1461 , according to Mr. Phadke, was that the amendatory power of Parliament is limited and it cannot be exercised so as to alter the basic structure of the Constitution and it was this ratio decidendi which was binding upon us and which we must apply for the purpose of determining whether the first part of the unamended Article 31C was constitutionally valid. It is no doubt true, conceded Mr. Phadke, that the six learned Judges headed by Ray, J. (as he then was) held the first part of the unamended Article 31C to be constitutionally valid but that was on the basis that Parliament had absolute and unrestricted power to amend the Constitution, which basis was, according to the majority decision, incorrect. It was impossible to say, argued Mr. Phadke , what would have been the decision of the six learned Judges headed by Ray, J. (as he then was) if they had applied the correct test and examined the constitutional validity of the first part of the unamended Article 31C by reference to the yardstick of the limited power of amendment, and their conclusion upholding the validity of the first part of the unamended Article 31C by applying the wrong test could not therefore be said to be binding on the Court in the present writ petitions. This argument of Mr. Phadke is, in my opinion, not well founded and cannot be accepted. I agree with Mr. Phadke that the ratio decidendi of Kesavananda Bharati's case was that the amending power of Parliament is limited and Parliament cannot in exercise of the power of amendment alter the basic structure of the Constitution and the validity of every constitutional amendment has therefore to be judged by applying the test whether or not it alters the basic structure of the Constitution and this test was not applied by the six learned Judges headed by Ray, J. (as he then was), But there my agreement ends and I cannot accept the further argument of Mr. Phadke that for this reason, the conclusion reached by the six learned Judges and Khanna, J., as regards the constitutionality of the first part of the unamended Article 31C has no validity. The issue before the court in Kesavananda Bharati's case was whether the first part of the unamended Article 31C was constitutionally valid and this issue was answered in favour of the Government by a majority of seven against six. It is not material as to what were the reasons which weighed with each one of the Judges who upheld the validity of the first part of the unamended Article 31C. The reasons for reaching this conclusion would certainly have a bearing on the determination of the ratio decidendi of the case and the ratio decidendi would certainly be important for the decision of future cases where the validity of some other constitutional amendment may come to be challenged, but so far as the question of validity of the first part of the unamended Article 31C is concerned, it was in so many terms determined by the majority decision in Kesavananda Bharati's case and that decision must be held binding upon us. Mr. Phadke cannot therefore be allowed to reopen this question and I must refuse to entertain the challenge against the constitutional validity of the unamended Article 31C preferred by Mr. Phadke.

99. But even if it were open to Mr. Phadke to dispute the decision in Kesavananda Bharati case MANU/SC/0445/1973 : AIR1973SC1461 and to raise a challenge, against the constitutional

validity of the first part of the unamended Article 31C, I do not think the challenge can succeed. What the first part of the unamended Article 31C does is merely to abridge the Fundamental Rights in Articles 14 and 19 by excluding their applicability to legislation giving effect to the policy towards securing the principles specified in Clauses (b) and (c) of Article 39. The first part of the unamended Article 31C is basically of the same genre as Article 31A with only this difference that whereas Article 31A protects laws relating to certain subjects, the first part of the unamended Article 31C deals with laws having certain objectives. There is no qualitative difference between Article 31A and the first part of the unamended Article 31C in so far, as the exclusion of article 14 and 19 is concerned. The fact that the provisions of the first part of the unamended Article 31C are more comprehensive and have greater width compared to those of Article 31A does not make any difference in principle. If Article 31A is constitutionally valid, it is indeed difficult to see how the first part of the unamended Article 31C can be held to be unconstitutional. It may be pointed out that the first part of the unamended Article 31C in fact stands on a more secure footing because it accords protection against infraction of Articles 14 and 19 to legislation enacted for giving effect to the Directive Principles set out in Clauses (b) and (c) of Article 39. The legislature in enacting such legislation acts upon the constitutional mandate contained in Article 37 according to which the Directive Principles are fundamental in the governance of the country and it is the duty of the State to apply those principles in making laws. It is for the purpose of giving effect to the Directive Principles set out in Clauses (b) and (c) of Article 39 in discharge of the constitutional obligation laid upon the State under Article 37 that Fundamental Rights in Articles 14 and 19 are allowed to be abridged and I fail to see how a constitutional amendment making such a provision can be condemned as violative of the basic structure of the Constitution. Therefore even on first principle, I would be inclined to hold that the first part of the unamended Article 31C a constitutionally valid.

100. That takes us to the next ground of challenge against the constitutional validity of the Constitution (Fortieth Amendment) Act, 1976 in so far as it included the amending Acts 21 of 1975, 41 of 1975 and 2 of 1976 in the 9th Schedule and the Constitution (Forty-second Amendment) Act, 1976 in so far as it introduced Clause s. (4) and (5) in Article 368. The petitioners contended under this head of challenge that the Constitution (Fortieth Amendment) Act, 1976 was passed by the Lok Sabha on 2nd April, 1976 and the Constitution (Forty-second Amendment) Act, 1976 sometime in November, 1976, but on these dates the Lok Sabha was not validly in existence because it automatically dissolved on 18th March, 1976 on the expiration of its term of 5 years. It is no doubt true that the House of People (Extension of Duration) Act, 1976 was enacted by Parliament under the Proviso to Article 83(2) extending the duration of the Lok Sabha for a period of one year but the argument of the petitioners was that this Act was ultra vires and void, because the duration of the Lok Sabha could be extended under the proviso to Article 83(2) only during the operation of a Proclamation of an Emergency and, in the submission of the petitioners, there was no Proclamation of Emergency in operation at the time when the House of People (Extension of Duration) Act, 1976 was passed. It may be conceded straightway that, strictly speaking, it is superfluous and unnecessary to consider this argument because, even if the Constitution (Fortieth Amendment) Act, 1976 is unconstitutional and void and the Amending Acts 21 of 1975, 41 of 1975 and 2 of 1976 have not been validly included in the 9th Schedule so as to earn the protection of Article 31B, they are still, as pointed out earlier, saved from invalidation by Article 31A and so far as the Constitution (Forty-second Amendment) Act 1976 is concerned, we have already held that it is outside the constituent power of Parliament in so far as it seeks to

include Clauses (4) and (5) in Article 368. But since a long argument was addressed to us seriously pressing this ground of challenge, I do not think I would be unjustified in dealing briefly with it

101. It is clear on a plain natural construction of its language that under the Proviso to Article 83(2), the duration of the Lok Sabha could be extended only during the operation of a Proclamation of Emergency and if, therefore, no Proclamation of Emergency was in operation at the relevant time, the House of People (Extension of Duration) Act, 1976 would be outside the competence of Parliament under the Proviso to Article 83(2). The question which thus requires to be considered is whether there was a Proclamation of Emergency in operation at the date when the House of People (Extension of Duration) Act, 1976 was enacted. The learned Solicitor General appearing on behalf of the Union of India contended that not one but two Proclamations of Emergency were in operation at the material date; one Proclamation issued by the President on 3rd December, 1971 and the other Proclamation issued on 25th June, 1976. By the first Proclamation, the President in exercise of the powers conferred under cl. (1) of Article 352 declared that a grave emergency existed whereby the security of India was threatened by external aggression. This Proclamation was approved by Resolutions of both the Houses of Parliament on 4th December, 1971 as contemplated under Clause 2 (o) of Article 352 and it continued in operation until 21st March, 1977 when it was revoked by a Proclamation issued by the President under Clause 2 (a) of Article 352. The first Proclamation of Emergency was thus in operation at the date when the House of People (Extension of Duration) Act, 1976 was enacted by Parliament. The second Proclamation of Emergency was issued by the President under Article 352, Clause (1) and by this Proclamation, the President declared that a grave emergency existed whereby the security of India was threatened by internal disturbance. This Proclamation was also in operation at the date of enactment of the House of People (Extension of Duration) Act, 1976 since it was not revoked by another Proclamation issued under Clause 2 (a) of Article 352 until 21st March, 1977. The argument of the petitioners however, was that, though the first Proclamation of Emergency was validly issued by the President on account of external aggression committed by Pakistan against India, the circumstances changed soon thereafter and the emergency which Justified the issue of the Proclamation ceased to exist and consequently the continuance of the Proclamation was mala fide and colourable and hence the Proclamation, though not revoked until 21st March, 1977, ceased in law to continue in force and could not be said to be in operation at the material date, namely, 16th February, 1976. So far as the second Proclamation of Emergency is concerned, the petitioners contended that it was illegal and void on three grounds, namely; (1) whilst the first Proclamation of Emergency was in operation, it was not competent to the President under Article 352 Clause (1) to issue another Proclamation of Emergency; (2) the second Proclamation of Emergency was issued by the President on the advice of the Prime Minister and since this advice was given by the Prime Minister without consulting the Council of Ministers, which alone was competent under the Government of India (Transaction of Business) Rules, 1961 to deal with the question of issue of a Proclamation of Emergency, the second Proclamation of Emergency could not be said to have been validly issued by the President; and (3) there was no threat to the security of India on account of internal disturbance, which could justify the issue of a Proclamation of Emergency and the second Proclamation was issued, not for a legitimate purpose sanctioned by Clause (1) of Article 352 but with a view to perpetuating the Prime Minister in power and it was clearly mala fide and for collateral purpose and hence outside the power of the President under Article 352 Clause (1). The petitioners had to attack the validity of both the Proclamations of Emergency, the continuance of one and the issuance of another, because even if one Proclamation of Emergency was in

operation at the relevant time, it would be sufficient to invest Parliament with power to enact the House of People (Extension of Duration) Act, 1976. Obviously, therefore, if the first Proclamation of Emergency was found to continue in operation at the date of enactment of the House of People (Extension of Duration) Act. 1976, it would be unnecessary to consider whether the second Proclamation of Emergency was validly issued by the President, I will accordingly first proceed to examine whether the first Proclamation of Emergency which was validly issued by the President ceased to be in force by reason of the alleged change in circumstances and was not operative at the relevant time. It is only if this question is answered in favour of the petitioners then it would become necessary to consider the question of validity of the second Proclamation of Emergency.

102. I think it is necessary to emphasise even at the cost of repetition that it was not the case of the petitioners that the first Proclamation of Emergency when issued, was invalid. It is a historical fact which cannot be disputed that Pakistan committed aggression against India on 3rd December, 1971 and a grave threat to the security of India arose on account of this external aggression. The President was, therefore, clearly justified in issuing the first Proclamation of Emergency under Clause (1) of Article 352. The petitioners, however, contended that the circumstances which warranted the issue of the first Proclamation of Emergency ceased to exist and put forward various facts such as the termination of hostilities with Pakistan on 16th December, 1971, the signing of the Simla Pact on 2nd June, 1972, the resumption of postal and telecommunication links on 4th November, 1974 and the conclusion of trade agreement between India and Pakistan on 24th November, 1974 as also several statements made by the Prime Minister and other Ministers from time to time to show that the threat to the security of India on account of external aggression ceased long before 1975 and there was absolutely no justification whatsoever to continue the Proclamation and hence the continuance of the Proclamation was mala fide and in colourable exercise of power and it was liable to be declared as unconstitutional and void. I do not think this contention of the petitioners can be sustained on a proper interpretation of the provisions of Article 352. This Article originally consisted of three Clauses, but by Section 5 of the Constitution (Thirty-eighth Amendment) Act, 1975, Clauses (4) and (5) were added in this Article and thereafter, by a further amendment made by Section 48 of the Constitution (Forty-second Amendment) Act, 1976, another Clause (2A) was introduced after Clause (2). The whole of this Article is not relevant for our purpose but I shall set out only the material provisions there of which have a bearing on the controversy between the parties;

352 (1). If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory there of is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect (in respect of the whole of India or of such part of the territory there of as may be specified in the Proclamation).

(2) A Proclamation issued under Clause (1)--

(a) may be revoked (or varied) by a subsequent Proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

(2A) ...

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory there of is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger there of .

(4) The power conferred on the President by this article shall include the power to issue different Proclamations on different grounds, being war or external aggression or internal disturbance or imminent danger of war or external aggression or internal disturbance, whether or not there is a Proclamation already issued by the President under Clause (1) and such Proclamation is in operation.

(5) Notwithstanding anything in this Constitution:

(a) the satisfaction of the President mentioned in Clause (1) and (3) shall be find and conclusive and shall not be questioned in any Court on any ground;

(b) subject to the provisions of Clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of --

(i) a declaration made by Proclamation by the President to the effect stated in Clause (1); or

(ii) the continued operation of such Proclamation.

Now it is obvious on a plain natural construction of the language of Clause (1) of Article 352 that the President can take action under this Clause only if he is satisfied that a grave emergency exists whereby the security of India or any part of the territory there of is threatened, whether by war or external aggression or internal disturbance. The satisfaction of the President "that a grave emergency exists whereby the security of India, ...is threatened whether by war or external aggression or internal disturbance" is a condition precedent which must be fulfilled before the President can issue a Proclamation under Article 352 Clause (1). When this condition precedent is satisfied, the President may exercise the power under Clause (1) of Article 352 and issue a Proclamation of Emergency. The constitutional implications of a declaration of emergency under Article 352 Clause (1) are vast and they are provided in Articles 83(2), 250, 353, 354, 358 and 359. The emergency being an exceptional situation arising out of a national crisis certain wide and sweeping powers have been conferred on the Central Government and Parliament with a view to combat the situation and restore normal conditions. One such power is that given by Article 83(2), which provides that while a Proclamation of Emergency is in operation, Parliament may by law extend its duration for a period not exceeding one year at a time. Then another power conferred is that under Article 250 which says that, while a Proclamation of Emergency is in operation, Parliament shall have the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List. The effect of this provision is that the federal structure based on separation of powers is put out of action for the time being. Another power of a similar kind is given by Article 353 which provides that during the time when a Proclamation of Emergency is in force, the executive powers of the Union shall extend to the

giving of directions to any State as to the manner in which the executive power there of is to be exercised. This provision also derogates from the federal principle which forms the basis of the Constitution. Then we come to Article 354 which confers power on the President, during the operation of a Proclamation of Emergency, to direct that the provisions relating to distribution of revenues under Articles 268 to 270 shall have effect subject to such modifications or exceptions as he thinks fit. Another drastic consequence of the Proclamation of Emergency is that provided in Article 358 which suspends the operation of the Fundamental Rights guaranteed under Article 19 while a Proclamation of Emergency is in operation. Article 359 Clause (1) empowers the President during the operation of a Proclamation of Emergency to make an Order suspending the enforcement of any of the Fundamental Rights conferred by Part III and Clause (1A) introduced by the Constitution (Thirty Eight Amendment) Act, 1975 suspends the operation of those Fundamental Rights of which the enforcement has been suspended by the President by an Order made under Clause (1). These are the drastic consequences which ensue upon the making of a declaration of emergency. The issue of a Proclamation of Emergency makes serious inroads into the principle of federalism and emasculates the operation and efficacy of the Fundamental Rights. The power of declaring an emergency is therefore a power fraught with grave consequences and it has the effect of disturbing the entire power structure under the Constitution. But it is a necessary power given to the Central Government with a view to arming it adequately to meet an exceptional situation arising out of threat to the security of the country on account of war or external aggression or internal disturbance or imminent danger of any such calamity. It is therefore a power which has to be exercised with the greatest care and caution and utmost responsibility.

103. It will be convenient at this stage to consider the question as to whether and if so to what extent, the Court can review the constitutionality of a Proclamation of Emergency issued under Article 352 Clause (1). There were two objections put forward on behalf of the respondents against the competence of the Court to examine the question of validity of a Proclamation of Emergency. One objection was that the question whether a grave emergency exists whereby the security of India or any part there of is threatened by war or external aggression or internal disturbance is essentially a political question entrusted by the Constitution to the Union Executive and on that account, it is not justiciable before the court. It was urged that having regard to the political nature of the problem, it was not amenable to judicial determination and hence the court must refrain from inquiring into it. The other objection was that in any event by reason of Clause (4) and (5) of Article 352, the Court had no jurisdiction to question the satisfaction of the President leading to the issue of a Proclamation of Emergency or to entertain any question regarding the validity of the Proclamation of Emergency or its continued operation. Both these objections are in my view unfounded and they do not bar judicial review of the validity of the Proclamation of Emergency issued by the President under Article 352 Clause (1). My reasons for saying so are as follows.

104. It is axiomatic that if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the court should shrink from performing its duty under the Constitution, if it raises an issue of constitutional determination. There are a large number of decisions in the United States where Supreme Court has entertained actions having a political complexion because they raised constitutional issues. Vide Gomellion v. Lightfoot (1960) 364 US 339 and Baker v. Carr (1961) 369 US 186 The

controversy before the court may be political in character, but so long as it involves determination of a constitutional question, the court cannot decline to entertain it. This is also the view taken by Gupta. J. and myself in State of Rajasthan v. Union of India MANU/SC/0370/1977 : [1978]1SCR1 . I pointed out in my judgment in that case and I still stand by it, that merely because a question has a political colour, the court cannot fold its hands in despair and declare "Judicial hands off". So long as the question is whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. I have said before, I repeat again, that the Constitution is suprema lex, the paramount, law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority and whether it has done so or not is for the Court to decide. The Court is the ultimate interpreter of the Constitution and when there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the Court to intervene. Let it not be forgotten, that to this Court as much as to other branches of government, is committed the conservation and furtherance of constitutional values. The Court's task is to identify those values in the constitutional plan and to work them into life in the cases that reach the court. "Tact and wise restraint ought to temper any power but courage and the acceptance of responsibility have their place too." The Court cannot and should not shirk this responsibility, because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this country. It would not therefore, be right for the Court to decline to examine whether in a given case there is any constitutional violation involved in the President issuing a Proclamation of Emergency under Clause (1) of Article 352.

105. But when I say this, I must make it clear that the constitutional jurisdiction of this Court does not extend further than saying whether the limits on the power conferred by the Constitution on the President have been observed or there is transgression of such limits. Here the only limit on the power of the President under Article 352 Clause (1) is that the President should be satisfied that a grave emergency exists whereby the security of India or any part there of is threatened whether by war or external aggression or internal disturbance. The satisfaction of the President is a subjective one and cannot be decided by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the Executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether there is a situation of grave emergency by reason of the security of the country being threatened by war or external aggression or internal disturbance. It is not a decision which can be based on what the Supreme Court of the United States has described as "judicially discoverable and manageable standards". It would largely be a political judgment based on assessment of diverse and varied factors, fast-changing situations, potential consequences and a host of other imponderables. It cannot therefore, by its very nature, be a fit subject matter for adjudication by judicial methods and materials and hence it is left to the subjective satisfaction of the Central Government which is best in a position to decide it. The court cannot go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. That would be a dangerous exercise for the Court, both because it is not a fit instrument for determining a question of this kind and also because the court would thereby usurp the function of the executive and in doing so, enter the "political thicket" which it must avoid, if it is to retain its legitimacy with the people. But one thing is certain that if

the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 352 Clause (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. It is true that by reason of Clause (5) (a) of Article 352, the satisfaction of the President is made final and conclusive, and cannot be assailed on any ground, but as I shall presently point out, the power of judicial review is a part of the basic structure of the Constitution and hence this provision debarring judicial review would be open to attack on the ground that it is unconstitutional and void as damaging or destroying the basic structure. This attack against constitutionality can, however, be averted by reading the provision to mean - and that is how I think it must be read--that the immunity from challenge granted by it does not apply where the challenge is not that the satisfaction is improper or unjustified but that there is no satisfaction at all. In such a case, it is not the satisfaction arrived at by the President which is challenged but the existence of the satisfaction itself. Where therefore the satisfaction is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground, it would be no satisfaction at all and it would be liable to be challenged before a Court, notwithstanding Clause (5) (a) of Article 352. It must of course, be conceded that in most cases it would be difficult if not impossible, to challenge the exercise of power under Article 352 Clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on a wholly extraneous or irrelevant ground.

106. It is true that so far there is no decision of this Court taking the view that the validity of a Proclamation of Emergency can be examined by the court though within these narrow limits. But merely because there has been no occasion for this Court to pronounce on the question of justifiability of a Proclamation of Emergency no inference can be drawn that a Proclamation of Emergency is immune from judicial scrutiny. The question whether or not a Proclamation of Emergency can be judicially reviewed on the ground that it is mala fide or an abuse of power of the President did arise before this Court in Ghulam Sarwar v. Union of India MANU/SC/0062/1966 : 1967CriLJ1204 , but the court declined to express any opinion on this question since no material was placed before the Court making out a case of mala fides or abuse of power. Undoubtedly, in the subsequent decision of this Court in Bhutnath Mete v. State of West Bengal MANU/SC/0412/1974 : 1974CriLJ690 there are one or two observations which might seem to suggest at first blush that a Proclamation of Emergency being a political matter is "dehors our ken", but if one looks closely at the judgment of Krishna Iyer, J. in that case, it will be apparent that he does not lay down that a Proclamation of Emergency cannot be reviewed by the judiciary even on a limited ground and leaves that question open and rejects the contention of the petitioner challenging the continuance of Emergency only on the ground that : "the onus of establishing the continuation of Emergency and absence of any ground whatever for the subjective satisfaction of the President, heavy as it is, has hardly been discharged," and consequently it would be an academic exercise in constitutional law to pronounce on the question of judicial reviewability of a Proclamation of Emergency. There is thus no decision of this Court holding that a Proclamation of Emergency is beyond the judicial ken and I am not fettered by any such decision compelling me to take a view different from the one which I have expounded in the preceding paragraph of this opinion. In fact, the judgment of Gupta, J. and Myself in State of Rajasthan v. Union of India

MANU/SC/0370/1977 : [1978]1SCR1 (supra) completely support me in the view I am taking. A Proclamation of Emergency is undoubtedly amenable to judicial review though on the limited ground that no satisfaction as required by Article 352 was arrived at by the President in law or that the satisfaction was absurd or perverse or mala fide or based on an extraneous or irrelevant ground.

107. Now the question arises whether the continuance of a Proclamation of Emergency valid when issued can be challenged before the court on the ground that the circumstances which necessitated or justified its issuance have ceased to exist. Can the court be asked to declare that the Proclamation of Emergency has ceased to exist and is no longer in force or does the Proclamation continue to be in force until it is revoked by another Proclamation under Clause (2) (a) of Article 352. The answer to this question depends on the interpretation of Clause (2) of Article 352. That Clause says in Sub-Clause (a) that a Proclamation of Emergency issued under Clause (1) may i.e. revoked by a subsequent Proclamation. Sub-Clause (b) of that Clause requires that a Proclamation issued under Clause (1) shall be laid before each House of Parliament and under Sub-Clause (c) such a Proclamation ceases to operate at the expiration of two months, unless it has been approved by both Houses of Parliament before the expiration of two months. It is clear from this provision that a Proclamation of Emergency validly issued under Clause (1) would continue to operate at least for a period of two months and if before the expiration of that period, it has been approved by resolutions of both Houses of Parliament, it would continue to operate further even beyond the period of two months, and the only way in which it can be brought to an end is by revoking it by another Proclamation issued under Clause (2) (a). There is to other way in which it can cease to operate. Neither Article 352 nor any other Article of the Constitution contains any provision saying that a Proclamation of Emergency validly issued under Clause (1) shall cease to operate as soon as, the circumstances warranting its issuance have ceased to exist. It is, therefore, clear on a plain natural interpretation of the language of Sub- Clauses (a) to (c) of Clause (2) that so long as the Proclamation of Emergency is not revoked by another Proclamation under Sub-Clause (2) (a), it would continue to be in operation irrespective of change of circumstances. It may be pointed out that it is interpretation of the provision of Clause (2) of Article 352 is supported by the decision of this Court in Lakhan Pal v. Union of India MANU/SC/0049/1966 : 1967CriLJ282 where dealing with a similar contention urged on behalf of the petitioner that the continuance of the emergency which was declared on 26th October 1962 was a fraud on the Constitution, this Court speaking through Sarkar, C. J. pointed out that "the only way a Proclamation ceases to have effect is by one of the events mentioned in this Clause" and since neither had happened, the Proclamation must be held to have continued in operation. The petitioner urged in that case that armed aggression which justified the issue of the Proclamation of Emergency had come to an end and the continuance of the Proclamation was therefore unjustified. But this contention was negatived on the ground that the Proclamation having been approved by the two Houses of Parliament within a period of two months of its issuance, it could cease to have effect only if revoked by another Proclamation and that not having happened, the Proclamation continued to be in force. It is true that the power to revoke a Proclamation of Emergency is vested only in the Central Government and it is possible that the Central Government may abuse this power by refusing to revoke a Proclamation of Emergency even though the circumstances justifying the issue of Proclamation have ceased to exist and thus prolong baselessly the state of emergency obliterating the Fundamental Rights and this may encourage a totalitarian trend. But the primary and real safeguard of the citizen against such abuse of power lies in "the good sense of the people and in the system of representative and responsible Government" which is provided in the Constitution. Additionally, it may be possible

for the citizen in a given case to move the court for issuing a writ of mandamus for revoking the Proclamation of Emergency if he is able to show by placing clear and cogent material before the court that there is no justification at all for the continuance of the Proclamation of Emergency. But this would be a very heavy onus because it would be entirely for the executive Government to be satisfied whether a situation has arisen where the Proclamation of Emergency can be revoked. There would be so many facts and circumstances and such diverse considerations to be taken into account by the executive Government before it can be satisfied that there is no longer any grave emergency whereby the security of India is threatened by war or external aggression or internal disturbance. This is not a matter which is a fit subject matter for judicial determination and the court would not interfere with the satisfaction of the executive Government in this regard unless it is clear on the material on record that there is absolutely no justification for the continuance of the Proclamation of Emergency and the Proclamation is being continued mala fide or for a collateral purpose. The court may in such a case, if satisfied beyond doubt, grant a writ of mandamus directing the Central Government to revoke the Proclamation of Emergency. But until that is done, the Proclamation of Emergency would continue in operation and it cannot be said that, though not revoked by another Proclamation, it has still ceased to be in force. Here, in the present case it was common ground that the first Proclamation of Emergency issued on 3rd December 1971 was not revoked by another Proclamation under Clause (2) (a) of Article 352 until 21st March 1977 and hence at the material time when the House of People (Extension of Duration) Act, 1976 was passed, the first Proclamation of Emergency was in operation.

108. Now if the first Proclamation of Emergency was in operation at the relevant time, it would be sufficient compliance with the requirement of the proviso to Clause (2) of Article 83 and it would be unnecessary to consider whether the second Proclamation of Emergency was validly issued by the President. But, contended the petitioners, the House of People (Extension of Duration) Act, 1976 on a proper interpretation of Section 2 postulated the operational existence of both the Proclamations of Emergency and if either of them was not in existence at the material date, the Act would be inoperative and would not have the effect of extending the duration of the Lok Sabha. It was therefore not enough for the respondents to establish that the first Proclamation of Emergency was in operation at the relevant date, but it was further necessary to show that the second Proclamation of Emergency was also in operation and hence it was necessary to consider whether the second Proclamation of emergency was validly issued by the President. The respondents sought to answer this contention of the petitioners by saying that on a proper construction of the language of Section 2, it was not a condition precedent to the operation of the House of People (Extension of Duration) Act, 1976 that both the Proclamations of Emergency should be in operation at the date when the Act was enacted. The House of People (Extension of Duration) Act, 1976 no doubt referred to both the Proclamations of Emergency being in operation but that was merely, said the respondents, by way of recital and it was immaterial whether this recital was correct or incorrect, because so long as it could be objectively established that one Proclamation of Emergency at least was in operation, the requirement of the proviso to Article 83 Clause (2) would be satisfied and the Act would be within the competence of Parliament to enact. These rival contentions raised a question of construction of Section 2 of the House of People (Extension of Duration) Act, 1976. It is a simple question which does not admit of much doubt or debate and a plain grammatical reading of Section 2 is sufficient to answer it. It would be convenient to reproduce Section 2 which coincidentally happens to be the only operative section of the Act:

Section 2: The period of five years (being the period for which the House of the People may, under Clause (2) of Article 83 of the Constitution, continue from the date appointed for its first meeting) in relation to the present House of the People shall, while the Proclamations of Emergency issued on the 3rd day of December, 1971 and on the 25th day of June, 1975, are both in operation, be extended for a period of one year:

Provided that if both or either of the said Proclamations cease or ceases to operate before the expiration of the said period of one year, the present House of the People shall, unless previously dissolved under Clause (2) of Article 83 of the Constitution, continue until six months after the cesser of operation of the said Proclamations or Proclamation but not beyond the said period of one year.

While interpreting the language of this section, it is necessary to bear in mind that the House of People (Extension of Duration) Act, 1976 was enacted under the proviso to Clause (2) of Article 83 for the purpose of extending the duration of the Lok Sabha and it was a condition precedent to the exercise of this power by Parliament that there should be a Proclamation of Emergency in operation at the date when the Act was enacted. Now according to Parliament there were two Proclamations of Emergency which were in operation at the material date, one issued on 3rd December 1971 and the other on 25th June 1975 and the condition precedent for the exercise of the power under the proviso to Clause (2) of Article 83 to enact the House of People (Extension of Duration) Act, 1976 was satisfied. It was, from the point of view of legislative drafting, not necessary to recite the fulfilment of this condition precedent, but the draftsman of the Act, it seems, thought it advisable to insert a recital that this condition precedent was satisfied and he, therefore, introduced the words "while the Proclamations of Emergency issued on the 3rd day of December, 1971 and on the 25th day of June, 1975 are both in operation" before the operative part in Section 2 of the Act. These words were introduced merely by way of recital of the satisfaction of the condition precedent for justifying the exercise of the power under the proviso to Clause (2) of Article 83 and they were not intended to lay down a condition for the operation of Section 2 of the Act. Section 2 clearly and in so many terms extended the duration of the Lok Sabha for a period of one year and this extension was not made dependent on both the Proclamations of Emergency being in operation at the date of the enactment of the Act. It was for a definite period of one year that the extension was effected and it was not co-extensive with the operation of both the Proclamations of Emergency. The extension for a period of one year was made once and for all by the enactment of Section 2 and the reference to both the Proclamations of Emergency being in operation was merely for the purpose of indicating that both the Proclamations of Emergency being in operation, Parliament had competence to make the extension. It was therefore not at all necessary for the efficacy of the extension that both the Proclamations of Emergency should be in operation at the date of enactment of the Act. Even if one Proclamation of Emergency was in operation at the material date, it would be sufficient to attract the power of Parliament under the proviso to Article 83 Clause (2) to enact the Act extending the duration of the Lok Sabha. Of course, it must be conceded that Parliament proceeded on the assumption that both the Proclamations of Emergency were in force at the relevant date and they invested Parliament with power to enact the Act, but even if this legislative assumption were unfounded, it would not make any difference to the validity of the exercise of the power, so long as there was one Proclamation of Emergency in operation which authorised Parliament to extend the duration of the Lok Sabha under the proviso to Clause (2) of Article 83. It is true that the proviso to Section 2 enacted that if

both or either of the Proclamations of Emergency cease or ceases to operate before the expiration of the extended period of one year, the Lok Sabha shall continue until six months after the cesser of operation of the said Proclamations or Proclamation, not going beyond the period of one year, but the opening part of this proviso can have application only in relation to a Proclamation of Emergency which was in operation at the date of enactment of the Act. If such a Proclamation of Emergency which was in operation at the material date ceased to operate before the expiration of the extended period of one year, then the term of the Lok Sabha would not immediately come to an end, but it would continue for a further period of six months but not so as to exceed the extended period of one year. This provision obviously could have no application in relation to the second Proclamation of Emergency if it was void when issued. In such a case, the second Proclamation not being valid at all at the date of issue would not be in operation at all and it could not cease to operate after the date of enactment of the Act. The proviso would in that event have to be read as relating only to the first Proclamation of Emergency, and since that Proclamation of Emergency continued until it was revoked on 21st March, 1977, the duration of the Lok Sabha was validly extended for a period of one year from 18th March, 1976 and hence there was a validly constituted Lok Sabha on the dates when the Constitution (Fortieth Amendment) Act, 1976 and the Constitution (Forty-second Amendment) Act, 1976 were passed by Parliament. On this view it is not at all necessary to consider whether the second Proclamation of Emergency was validly issued by the President. It is the settled practice of this Court not to say more than is necessary to get a safe resting place for the decision and I do not think that any useful purpose will be served by examining the various grounds of challenge urged against the validity of the second Proclamation of Emergency, particularly since Clause (3) has been introduced in Article 332 by the Constitution (Forty-fourth Amendment) Act, 1978 requiring that a Proclamation of Emergency shall not be issued by the President unless the decision of the Union Cabinet recommending the issue of such Proclamation has been communicated to him in writing and Clause (9) of Article 352 introduced by the Constitution (Thirty-eighth Amendment) Act, 1975 and renumbered by the Constitution (Forty-fourth Amendment) Act, 1978 empowered the President to issue different Proclamations on different grounds. I would, therefore, reject the, challenge against the validity of the Constitution (Fortieth Amendment) Act. 1976 and the Constitution (Forty-second Amendment) Act, 1976 based on the ground that on the dates when these Constitution Amending Acts were enacted, the Lok Sabha was not validly in existence.

109. That takes me to the challenge against the constitutional validity of the amendment made in Article 31C by Section 4 of the Constitution (Forty-second Amendment) Act, 1976. This amendment substitutes the words "all or any of the principles laid down in Part IV" for the words the principles specified in Clause (b) or Clause (c) of Article 39" and so amended, Article 31C provides that "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19". The amended Article 31C gives primacy to Directive Principles over Fundamental Rights in case of conflict between them and the question is whether this amendment is in any way destructive of the basic structure of the Constitution. To answer this question satisfactorily, it is necessary to appreciate the inter-relationship between Fundamental Rights and Directive Principles and for this purpose it would be useful to trace briefly the history of their enactment in the Constitution. The genesis of Fundamental Rights and Directive Principles is to be found in the freedom struggle which the people of India waged against the British rule

under the aegis of the Indian National Congress led by Mahatma Gandhi, Jawaharlal Nehru and other national leaders. These great leaders realised the supreme importance of the political and civil rights of the individual, because they knew from their experience of the repression under the British rule as also from the recent events of history including the two World Wars that these rights are absolutely essential for the dignity of man and development of his full personality. But, at the same time, they were painfully conscious that in the socio-economic conditions that prevailed in the country, only an infinitesimal fraction of the people would be able to enjoy these civil and political rights. There were millions of people in the country who were steeped in poverty and destitution and for them, these civil and political rights had no meaning. It was realised that to the large majority of people who are living an almost subhuman existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberty, though representing some of the most cherished values of free society, would sound as empty words bandied about only in the drawing rooms of the rich and well-to-do and the only solution for making these rights meaningful to them was to re-make the material conditions and usher in a new social order where socio-economic notice will inform all institutions of public life so that the pre-conditions of fundamental liberties for all may be secured. It was necessary to create socio-economic conditions in which every citizen of the country would be able to exercise civil and political rights and they will not remain the preserve of only a fortunate few. The national leaders, therefore, laid the greatest stress on the necessity of bringing about socio-economic regeneration and ensuring social and economic justice. Mahatma Gandhi, the father of the nation, said in his inimitable style in words, full of poignancy:

Economic equality is the master key to non-violent independence. A non-violent system of Government is an impossibility so long as the wide gulf between the rich and the hungry millions persists. The contrast between the palaces of New Delhi and the miserable hovels of the poor labouring class cannot last one day in a free India in which the poor will enjoy the same power as the rich in the land. A violent and bloody revolution is a certainty one day, unless there is voluntary abdication of riches and the power that riches give and sharing them for common good.

Jawaharlal Nehru also said in the course of his presidential address to the Lahore Congress Session of 1929:

The philosophy of socialism has gradually permeated the entire structure of the society, the world over and almost the only point in dispute is the phase and methods of advance to its full realisation. India will have to go that way too if she seeks to end huge poverty and inequality, though she may evolve her own methods and may adapt the ideal to the genins of her race.

Then again, emphasising the intimate and inseverable connection between political independence and social and economic freedom, he, said:

If an indigenous Government took the place of the foreign Government and kept all the vested interests intact, this would not be even the shadow of freedom.... India's immediate goal can only be considered in terms of the ending of the exploitation of her people. Politically, it must mean independence and cession of the British connection; economically and socially, it must mean the ending of all special class privilege and vested interests.

The Congress Resolution of 1929 also emphasised the same theme of socio-economic reconstruction when it declared:

The great poverty and misery of the Indian people are due, not only to foreign exploitation in India, but also to the economic structure of society, which the alien rulers support so that their exploitation may continue. In order therefore to remove this poverty and misery and to ameliorate the condition of the Indian masses, it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities.

110. The Resolution passed by the Congress in 1931 proceeded to declare that in order to end the exploitation of masses, political freedom must include social and economic freedom of the starving millions. The Congress Election Manifesto of 1945 also reiterated the same thesis when it said that "the most vital and urgent of India's problems is how to remove the curse of poverty and raise the standard of masses" and for that purpose it is necessary...to prevent the concentration of wealth and power in the hands of individuals and groups and to prevent vested interests inimical to society from "growing". This was the socio-economic philosophy which inspired the framers of the Constitution to believe that the guarantee of individual freedom was no doubt necessary to be included in the Constitution, but it was also essential to make provisions for restructuring the socio-economic order and ensuring social and economic justice to the people. This was emphasized by Jawaharlal Nehru when, speaking on the resolution regarding the aims and objectives before the Constituent Assembly, he said:

The first task of this Assembly is to free India through a new Constitution, to feed the starving people and clothe the naked masses and give every Indian fullest opportunity to develop himself according to his capacity.

In fact, as pointed out by K. Santhanan, a prominent southern member of the Constituent Assembly, there were three revolutions running parallel in India since the end of the first World War. The political revolution came to an end on 15th August, 1947 when India became independent but clearly political freedom cannot be an end in itself it can only be a means to an end, "that end being" as eloquently expressed by Jawaharlal Nehru "the raising of the people... to higher levels and hence the general advancement of humanity." It was therefore necessary to carry forward and accomplish the social and economic revolutions The social revolution was meant to get India "out of the medievalism based on birth, religion, custom and community and reconstruct her social structure on modern foundations of law, individual merit and secular education," while the economic revolution was intended to bring about "transition from primitive rural economy to scientific and planned agriculture and industry," Dr. Radhakrishnan who was a member of the Constituent Assembly and who later became the President of India also emphasized that India must have a socio-economic revolution designed not only to bring about the real satisfaction of the fundamental needs of the common man but to go much deeper and bring about "a fundamental change in the structure of Indian society." It was clearly realised by the framers of the Constitution that on the achievement of this great social and economic change depended the survival of India. "If we cannot solve this problem soon", Jawaharlal Nehru warned the Constituent Assembly "all our paper Constitutions will become useless and purposeless." The Objectives Resolution which set out the Aims and Objectives before the Constituent Assembly in framing the Constitution and which was passed by the Constituent Assembly in January 1947 before embarking upon the actual

task of Constitution making, therefore, expressed the resolve of the Constituent Assembly to frame a Constitution wherein shall be guaranteed and secured to all the people of India justice - social, economic and political, equality of status and of opportunity before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality and wherein adequate safeguards shall be provided for minority, backward and tribal areas and depressed and other backward classes. These objectives were incorporated by the Constitution makers in the Preamble of the Constitution and they were sought to be secured by enacting Fundamental Rights in Part III and Directive Principles in Part IV.

111. It is not possible to fit Fundamental Rights and Directive Principles in two distinct and strictly defined categories, but it may be stated broadly that Fundamental Rights represent civil and political rights while Directive Principles embody social and economic rights. Both are clearly part of the broad spectrum of human rights. If we look at the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 18th December, 1948, we find that it contains not only rights protecting individual freedom (See Articles 1 to 21) but also social and economic rights intended to ensure socio-economic justice to every one (See Articles 22 to 29). There are also two International Covenants adopted by the General Assembly for securing human rights, one is the International Covenant on civil and Political Rights and the other is the International Covenant on Economic, Social and Cultural Rights. Both are international instruments relating to human rights. It is therefore not correct to say that Fundamental Rights alone are based on human rights while Directive Principles fall in some category other than human rights. The socio-economic rights embodied in the Directive Principles are as much a part of human rights as the Fundamental Rights. Hegde and Mukherjea, JJ, were, to my mind, right in saving in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 of the Report that "the Directive Principles and the Fundamental Rights mainly proceed on the basis of human rights." Together, they are intended to carry out the objective set out in the Preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice and ensuring dignity of the individual not only to a few privileged persons but to the entire people of the country including the have-nots and the handicapped, the lowliest and the lost.

112. Now it is interesting to note that although Fundamental Rights and Directive Principles appear in the Constitution as distinct entities, there was no such demarcation made between them during the period prior to the framing of the Constitution. If we may quote the words of Granville Austin in his book; "both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself". They were both placed on the same pedestal and treated as falling within the same category compendiously described as "Fundamental Rights". The Sapru Committee in its Constitutional Proposals made in 1945, recommended that the declaration of Fundamental Rights in its wider sense was absolutely necessary and envisaged these rights as falling in two classes; one justiciable and the other non-justiciable -- the former being enforceable in Courts of law and the latter, not. The Committee however, felt difficulty in dividing the Fundamental Rights into these two classes and, left the whole issue to be settled by the Constitution making body with the observation that though the task was difficult, it was by no means impossible. This suggestion of the Sapru Committee perhaps drew its inspiration from the Irish Constitution of 1937, which made a distinction between justiciable and non-justiciable rights and designated the former as Fundamental Rights and the latter as Directive Principles of Social Policy. Dr. Lauterpacht also

made a similar distinction between justiciable and non-justiciable rights in his "International Bill of the Rights of Men". The substantial provisions of this Bill were in two parts; Part I dealt with personal or individual rights enforceable in Courts of Law while Part II set out social and economic rights incapable of or unsuitable for such enforcement. Sir B.N. Rau, who was the Constitutional Adviser to the Government of India, was considerably impressed by these ideas and he suggested that the best way of giving effect to the objectives set out in the Objectives Resolution was to split-up the objectives into Fundamental Rights and Fundamental Principles of State Policy, the former relating to personal and political rights enforceable in Courts of Law and the latter relating to social and economic rights and other matters, not so enforceable and proposed that the Chapter on Fundamental Rights may be split-up into two parts; Part A dealing with the latter kind of rights under the heading "Fundamental Principles of Social Policy" and Part B dealing with the former under the heading "Fundamental Rights". The Fundamental Rights Sub-Committee also recommended that "the list of fundamental rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the second consisting of Directive Principles of Social Policy." A week later, while moving for consideration, the Interim Report on Fundamental Rights, Sardar Vallabhbhai Patel said:

This is a preliminary report or an interim report because the Committee when it sat down to consider the question of fixing the fundamental rights and its incorporation into the Constitution, came to the conclusion that the Fundamental Rights should be divided into two parts--the first part justiciable and the other non-justiciable.

This position was reiterated by Sardar Vallabhbhai Patel when he said while presenting the Supplementary Report:

There were two parts of the Report; one contained Fundamental Rights which were justiciable and the other part of the Report referred to Fundamental Rights which were not justiciable but were directives....

It will, therefore, be seen that from the point of view of importance and significance, no distinction was drawn between justiciable and non-justiciable rights and both were treated as forming part of the rubric of Fundamental Rights, the only difference being that whereas the former were to be enforceable in Courts of Law, the latter were not to be so enforceable. This proposal of dividing the fundamental rights into two parts, one part justiciable and the other non-justiciable, was however not easy of adoption because it was a difficult task to decide in which category a particular fundamental right should be included. The difficulty may be illustrated by pointing out that at one time the right to primary education was included in the draft list of Fundamental Rights, while the equality clause figured in the draft fast of Fundamental Principles of Social Policy. But ultimately a division of the Fundamental Rights into justiciable and non-justiciable rights was agreed upon by the Constituent Assembly and the former were designated as "Fundamental Rights" and the latter as "Directive Principles of State Policy". It has sometimes been said that the Fundamental Rights deal with negative obligations of the State not to encroach on individual freedom, while the Directive Principles impose positive obligations on the State to take certain kind of action. But, I find it difficult to subscribe to this proposition because, though the latter part may be true that the Directive Principles require positive action to be taken by the State, it is not wholly correct to say that the Fundamental Rights impose only negative obligations on the State. There are a few

fundamental rights which have also a positive content and that has been, to some extent, unfolded by the recent decisions of this Court in Hussainara Khatoon v. State of Bihar MANU/SC/0119/1979 : 1979CriLJ1036 , Madhav Hayawadanrao Hoskot v. State of Maharashtra MANU/SC/0119/1978 : 1978CriLJ1678 and Sunil Batra v. Delhi Administration MANU/SC/0184/1978 : 1978CriLJ1741 . There are new dimensions of the Fundamental Rights which are being opened up by this Court and the entire jurisprudence of Fundamental Rights is in a state of resurgent evolution. Moreover, there are three articles, namely, Article 15(2), Article 17 and Article 23 within the category of Fundamental Rights which are designed to protect the individual against the action of other private citizens and seem to impose positive obligations on the State to ensure this protection to the individual. I would not, therefore, limit the potential of the Fundamental Rights by subscribing to the theory that they are merely iterative obligations requiring the State to abstain as distinct from taking positive action. The only distinguishing feature, to my mind, between Fundamental Rights and Directive Principles is that whereas the former are enforceable in a Court of Law, the latter, are not. And the reason for this is obvious. It has been expressed succinctly by the Planning Commission in the following words:

The non-justiciability clause only provides that the infant State shall not be immediately called upon to account for not fulfilling the new obligations laid upon it. A State just awakened to freedom with its many pre-occupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them.

The social and economic rights and other matters dealt with in the Directive Principles are by their very nature incapable of judicial enforcement and moreover, the implementation of many of those rights would depend on the state of economic development in the country, the availability of necessary finances and the Government's assessment of priority of objectives and values and that is why they are made non-justiciable. But merely because the Directive Principles are non-justiciable, it does not follow that they are in any way subservient or inferior to the Fundamental Rights.

113. The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, says Granville Austin, "the core of the commitment to the social revolution lies...in the Fundamental Rights and the Directive Principles of State Policy." (Granville Austin; "The Indian Constitution, Cornerstone of a Nation, p. 50). Those are the conscience of the Constitution and, according to Granville Austin, they are designed to be the Chief instruments in bringing about the great reforms of the socio-economic revolution and realising the constitutional goals of social, economic and political justice for all. The Fundamental Rights undoubtedly provide for political justice by conferring various freedoms on the individual, and also make a significant contribution to the fostering of the social revolution by aiming at a society which will be egalitarian in texture and where the rights of minority groups will be protected? But it is in the Directive Principles that we find the clearest statement of the socio-economic revolution. The Directive Principles aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from

fulfilling their best salves (Granville Austin; "The Indian Constitution, Cornerstone of a Nation, page 51).

The Fundamental Rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic Justice to everyone, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of our democracy, provide strength and vigour, to it and attempt to make it a real participatory democracy which does not remain merely a political democracy but also becomes social and economic democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.

114. The Directive Principles are set out in Part IV of the Constitution and this Part starts with Article 37 which, to my mind, is an Article of crucial importance: It says: "The provisions contained in this Part shall not be enforceable in any court but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." It is necessary, in order to appreciate the full implications of this Article, to compare it with the corresponding provision in the Irish Constitution which, as pointed out above, provided to some extent the inspiration for introducing Directive Principles in the Constitution. Article 45 of the Irish Constitution provides:

The principles of social policy set forth in this Article are intended for the general guidance of the Direchtas. The application of those principles in the making of laws shall be the care of the Direchtas exclusively and shall not be cognizable for any court under any of the provisions of this Constitution.

It is interesting to note that our Article 37 makes three significant departures from the language of Article 45; first whereas Article 45 provides that the application of the principles of social policy shall not be cognizable by any court, Article 37 says that the Directive Principles shall not be enforceable by any court; secondly whereas Article 45 provides that the principles of social policy are intended for the general guidance of the Direchtas, Article 37 makes the Directive Principles fundamental in the governance of the country and lastly, whereas Article 45 declares that the application of principles of social policy in the making of laws shall be the care of the Direchtas exclusively, Article 37 enacts that it shall be the duty of the State to apply the Directive Principles in making laws. The changes made by the framers of the Constitution are vital and they have the effect of bringing about a total transformation or metamorphosis of this provision, fundamentally altering its significance and efficacy.

115. It will be noticed that the Directive Principles are not excluded from the cognizance of the court, as under the Irish Constitution; they are merely made non-enforceable by a court of law for reasons already discussed. But merely because they are not enforceable by the judicial process does not mean that they are of subordinate importance to any other part of the Constitution. I have already said this before, but I am emphasizing it again, even at the cost of repetition, because at one time a view was taken by this Court in State of Madras v. Champakam Dorairajan MANU/SC/0007/1951 : [1951]2SCR525 that because Fundamental Rights are made enforceable in a court of law and Directive Principles are not, "the Directive Principles have to conform to and run as subsidiary to the Chapter on Fundamental rights." This view was patently wrong and within a few years, an opportunity was found by this Court in Re Kerala Education Bill MANU/SC/0029/1958 : [1959]1SCR995 to introduce a qualification by stating that: "Nevertheless in determining the scope and ambit of the fundamental Rights relied on by or on behalf of any person or body, the court may not entirely ignore these Directive Principles of State Policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible." But even this observation seemed to give greater importance to Fundamental Rights as against Directive Principles and that was primarily because the Fundamental Rights are enforceable by the Judicial process while the Directive Principles are expressly made non-enforceable. I am however, of the opinion, and on this point I agree entirely with the observation of Hegde, J. in his highly illuminating Lectures on the "Directive Principles of State Policy" that:

Whether or not a particular mandate of the Constitution is enforceable by court, has no bearing on the importance of that mandate. The Constitution contains many important mandates which may not be enforceable by the courts of law. That does not mean that those Articles must render subsidiary to the Chapter on Fundamental Rights... it would be wrong to say that those positive mandates", that is the positive mandates contained in the Directive Principles, "are of lesser significance than the mandates under Part III

Hegde, J. in fact pointed out at another place in his Lectures that:

Unfortunately an impression has gained ground in the organs of the State not excluding judiciary that because the Directive Principles set out in Part IV are expressly made by Article 37 non-enforceable by courts, these directives are mere pious hopes not deserving immediate attention. I emphasize again that no part of the Constitution is more important than Part IV.... To ignore. Part

IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the nation and the very ideals on which our Constitution is built up.

(Emphasis supplied)

I wholly endorse this view set forth by Hegde, J. and express my full concurrence with it.

116. I may also point out that simply because the Directive Principles do not create rights enforceable in a court of law, it does not follow that they do not create any obligations on the State. We are so much obsessed by the Hohfeldian Classification that we tend to think of rights, liberties, powers and privileges as being invariably linked with the corresponding concept of duty, no right, liability and immunity. We find it difficult to conceive of obligations or duties which do not create corresponding rights in others. But the Hohfeldian concept does not provide a satisfactory analysis in all kinds of jural relationships and breaks down in some cases where it is not possible to say that the duty in one creates an enforceable right in another. There may be a rule which imposes an obligation on an individual or authority and yet it may not be enforceable in a court of law and therefore not give rise to a corresponding enforceable right in another person. But it would still be a legal rule because it prescribes a norm of conduct to be followed by such individual or authority. The law may provide a mechanism for enforcement of this obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of the mechanism of enforcement. A rule imposing an obligation or duty would not therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite of any problem relating to its enforcement. Otherwise the conventions of the Constitution and even rules of International law would no longer be liable to be regarded as rules of law. This view is clearly supported by the opinion of Professor A.L. Goedhart who, while commenting upon this point, says:

I have always argued that if a principle is recognised as binding on the legislature, then it can be correctly described as a legal rule even if there is no court that can enforce it. Thus most of Dicey's book on the British Constitution is concerned with certain general principles which Parliament recognises as binding on it.

It is therefore, to my mind, clear beyond doubt that merely because the Directive Principles are not enforceable in a court of law, it does not mean that they cannot create obligations or duties binding on the State. The crucial test which has to be applied is whether the Directive Principles impose any obligations or duties on the State; if they do, the State would be bound by a constitutional mandate to carry out such obligations or duties, even though no corresponding right is created in any one which can be enforced in a court of law.

117. Now on this question Article 37 is emphatic and makes the point in no uncertain terms. It says that the Directive Principles are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws." There could not have been more explicit language used by the Constitution makers to make the Directive Principles binding on the State and there can be no doubt that the State is under a constitutional obligation to carry out this mandate contained in Article 37. In fact, non-compliance with the Directive Principles would be unconstitutional on the part of the State and it would not only constitute a

breach of faith with the people who imposed this constitutional obligation on the State but it would also render a vital part of the Constitution meaningless and futile. Now it is significant to note that for the purpose of the Directive Principles, the "State" has the same meaning as given to it under Article 13 for the purpose of the Fundamental Rights. This would mean that the same State which is injuncted from taking any action in infringement of the fundamental Rights is told in no uncertain terms that it must regard the Directive Principles as fundamental in the governance of the country and is positively mandated to apply them in making laws. This gives rise to a paradoxical situation and its implications are far-reaching. The State is on the one hand, prohibited by the constitutional injunction in Article 13 from making any law or taking any executive action which would infringe any Fundamental Right and at the same time it is directed by the constitutional mandate in Article 37 to apply the Directive Principles in the governance of the country and to make laws for giving effect to the Directive Principles. Both are constitutional obligations of the State and the question is, as to which must prevail when there is a conflict between the two. When the State makes a law for giving effect to a Directive Principle, it is carrying out a constitutional obligation under Article 37 and if it were to be said that the State cannot make such law because it comes into conflict with a fundamental Right, it can only be on the basis that fundamental Rights stand on a higher pedestal and have precedence over Directive Principles. But, as we have pointed out above, it is not correct to say that under our constitutional scheme, fundamental Rights are superior to Directive Principles or that Directive Principles must yield to Fundamental Rights. Both are in fact equally fundamental and the courts have therefore in recent times, tried to harmonise them by importing the Directive Principles in the construction of the Fundamental Rights. It has been laid down in recent decisions of this Court that for the purpose of determining the reasonableness of the restriction imposed on Fundamental Rights, the Court may legitimately take into account the Directive Principles and where executive action is taken or legislation enacted for the purpose of giving effect to a Directive Principle, the restriction imposed by it on a Fundamental Right may be presumed to be reasonable. I do not propose to burden this opinion with reference to all the decided cases where this principle has been followed by the Court, but I may refer only to one decision which, I believe, is the latest on the point, namely, Pathumma v. State of Kerala MANU/SC/0315/1978 : [1978]2SCR537 , where Fazal Ali, J. summarised the law in the following words:

"One of the tests laid down by the Court is that in judging the reasonableness of the restrictions imposed by Clause (5) of Article 19, the Court has to bear in mind the Directive Principles of State Policy." So also in the State of Bihar v. Kameshwar Singh MANU/SC/0020/1952 : [1952]1SCR1020 , this Court relied upon the Directive Principle contained in Article 39 in arriving at its decision that the purpose for which the Bihar Zamindary Abolition legislation had been passed was a public purpose. The principle accepted by this Court was that if a purpose is one falling within the Directive Principles, it would definitely be a public purpose. It may also be pointed out that in a recent decision given by this Court in Kasturi Lal Lakshmi Ready v. State of Jammu and Kashmir (W. P. Nos. 481-482 of 1979, judgment delivered on 9th May, 1980), it has been held that every executive action of the Government, whether in pursuance of law or otherwise, must be reasonable and informed with public interest and the yardstick for determining both reasonableness and public interest is to be found in the Directive Principles and therefore, if any executive action is taken by the Government for giving effect to a Directive Principle, it would prima facie be reasonable and in public interest. It will, therefore, be seen that if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a

fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic Justice. The dynamic principle of egalitarianism fertilises the concept of social and economic justice, it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle. If, therefore, there is a law enacted by the legislature which is really and genuinely for giving effect to a Directive Principle with a view to promoting social and economic justice, it would be difficult to say that such law violates the principle of egalitarianism and is not in accord with the principle of equality before the law as understood not in its strict and formalistic sense, but in its dynamic and activist magnitude. In the circumstances, the Court would not be unjustified in making the presumption that a law enacted really and genuinely for giving effect to a Directive Principle in furtherance of the cause of social and economic justice, would not infringe any Fundamental Right under Articles 14 and 19. Mr. C.H. Alexandrowick, an eminent jurist, in fact, says: "Legislation implementing Part IV must be regarded as permitted restrictions on Part III". Dr. Ambedkar, one of the chief architects of the Constitution, also made it clear while intervening during the discussion on the Constitution (First Amendment) Bill in the Lok Sabha on 18th May 1951 that in his view "So far as the doctrine of implied powers is concerned, there is ample authority in the Constitution itself, namely, in the Directive Principles "to permit Parliament to make legislation, although it will not be specifically covered by the provisions contained in the part on Fundamental Rights." If this be the correct interpretation of the constitutional provisions, as I think it is, the amended Article 31C does no more than codify the existing position under the constitutional scheme by providing immunity to a law enacted really and genuinely for giving effect to a Directive Principle, so that needlessly futile and time-consuming controversy whether such law contravenes Article 14 or 19 is eliminated. The amended Article 31C cannot in the circumstances be regarded as violative of the basic structure of the Constitution.

118. But I may in the alternative, for the purpose of argument, assume that there may be a few cases where it may be found by the court, perhaps on a narrow and doctrinaire view of the scope and applicability of a Fundamental Right as in Karimbil Kunhikoman v. State of Kerala MANU/SC/0095/1961 : AIR1962SC723 , where a law awarding compensation at a lower rate to holders of larger blocks of land and at higher rate to holders of smaller blocks of land was struck down by this Court as violative of the equality clause, that a law enacted really and genuinely for giving effect to a Directive Principle is violative of a Fundamental Right under Article 14 or 19. Would such a law enacted in discharge of the constitutional obligation laid upon the State under Article 37 be invalid, because it infringes a Fundamental Right? If the court takes the view that it is invalid, would it not be placing Fundamental Rights above Directive Principles, a position not supported at all by the history of their enactment as also by the constitutional scheme already discussed by me? The two constitutional obligations, one in regard to Fundamental Rights and the other in regard to Directive Principles, are of equal strength and merit and were is no reason why, in case of conflict, the former should be given precedence over the latter. I have already pointed

out that whether or not a particular mandate of the Constitution is justiciable has no bearing at all on its importance and significance and justiciability by itself can never be a ground for placing one constitutional mandate on a higher pedestal than the other. The effect of giving greater weightage to the constitutional mandate in regard to Fundamental Rights would be to relegate the Directive Principles to a secondary position and emasculate the constitutional command that the Directive Principles shall be fundamental in the governance of the country and it shall be the duty of the State to apply them in making laws. It would amount to refusal to give effect to the words "fundamental in the governance of the country" and a constitutional command which has been declared by the Constitution to be fundamental would be rendered non-fundamental. The result would be that a positive mandate of the Constitution commanding the State to make a law would be defeated by a negative constitutional obligation not to encroach upon a Fundamental Right and the law made by the legislature pursuant to a positive constitutional command would be delegitimised and declared unconstitutional. This plainly would be contrary to the constitutional scheme because, as already pointed out by me, the Constitution does not accord a higher place to the constitutional obligation in regard to Fundamental Rights over the constitutional obligation in regard to Directive Principles and does not say that the implementation of the Directive Principles shall only be within the permissible limits laid down in the Chapter on Fundamental Rights. The main thrust of the argument of Mr. Palkhiwala was that by reason of the amendment of Article 31C, the harmony and balance between Fundamental Rights and Directive Principles are disturbed, because Fundamental Rights which had, prior to the amendment, precedence over Directive Principles are now, as a result of the amendment, made subservient to Directive Principles. Mr. Palkhiwala picturesquely described the position emerging as a result of the amendment by saying that the Constitution is now made to stand on its head instead of its legs. But in my view the entire premises on which this argument of Mr. Palkhiwala is based is fallacious because it is not correct to say, and I have in the preceding portions of this opinion, given cogent reasons for this view, that prior to the amendments Fundamental Rights had a superior or higher position in the constitutional scheme than Directive Principles and there is accordingly no question at all of any subversion of the constitutional structure by the amendment. There can be no doubt that the intention of the Constitution makers was that the Fundamental Rights should operate within the socio-economic structure or a wider continuum envisaged by the Directive Principles, for then only would the Fundamental Rights become exercisable by all and a proper balance and harmony between Fundamental Rights and Directive Principles secured. The Constitution makers therefore never contemplated that a conflict would arise between the constitutional obligation in regard to Fundamental Rights and the constitutional mandate in regard to Directive Principles. But if a conflict does arise between these two constitutional mandates of equal fundamental character, how is the conflict to be resolved? The Constitution did not provide any answer because such a situation was not anticipated by the Constitution makers and this problem had therefore to be solved by Parliament and some modus operandi had to be evolved in order to eliminate the possibility of conflict howsoever remote it might be. The way was shown in no uncertain terms by Jawaharlal Nehru when he said in the Lok Sabha in the course of discussion on the Constitution (First Amendment) Bill:

The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental Rights represent something static, to preserve certain rights which exist. Both again are right. But somehow and sometime it might so happen that that dynamic movement and that static standstill do not quite fit into each other.

The dynamic movement towards a certain objective necessarily means certain changes taking place: that is the essence of movement. Now it may be that in the process of dynamic movement certain existing relationships are altered, varied or affected. In fact, they are meant to affect those settled relationships and yet if you come back to the Fundamental Rights they are meant to preserve, not indirectly, certain settled relationships. There is a certain conflict in the two approaches, not inherently, because that was not meant, I am quite sure. But there is that slight difficulty and naturally when the courts of the land have to consider these matters they have to lay stress more on the Fundamental Rights than on Directive Principles. The result is that the whole purpose behind the Constitution, which was meant to be a dynamic Constitution leading to a certain goal step by step, is somewhat hampered and hindered by the static element being emphasized a little more than the dynamic element.... If in the protection of individual liberty you protect also individual or group inequality, then you come into conflict with that Directive Principle which wants, according to your own Constitution, a gradual advance, or let us put it in another way, not so gradual but more rapid advance, whenever possible to a State where there is less and less inequality and more and more equality. If any kind of an appeal to individual liberty and freedom is construed to mean as an appeal to the continuation of the existing inequality, then you get into difficulties. Then you become static, unprogressive and cannot change and you cannot realize the ideal of an egalitarian society which I hope most of us aim at.

Parliament took the view that the constitutional obligation in regard to Directive Principles should have precedence over the constitutional obligation in regard to the Fundamental Rights in Articles 14 and 19, because Fundamental Rights though precious and valuable for maintaining the democratic way of life, have absolutely no meaning for the poor, downtrodden and economically backward classes of people who unfortunately constitute the bulk of the people of India and the only way in which Fundamental Rights can be made meaningful for them is by implementing the Directive Principles, for the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and every one, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the Fundamental Rights. Parliament therefore amended Article 31C with a view to providing that in cases of conflict Directive Principles shall have precedence over the Fundamental Rights in Articles 14 and 19 and the latter shall yield place to the former. The positive constitutional command to make laws for giving effect to the Directive Principles shall prevail over the negative constitutional obligation not to encroach on the Fundamental Rights embodied in Articles 14 and 19. Parliament in making this amendment was moved by the noble philosophy eloquently expressed in highly inspiring and evocative words, full of passion and feeling, by Chandrachud, J. (as he then was) in his judgment in Kesavananda Bharati's case MANU/SC/0445/1973 : AIR1973SC1461 of the Report. I may quote here what Chandrachud J. (as he then was) said on that occasion, for it sets out admirably the philosophy which inspired Parliament in enacting the amendment in Article 31C. The learned Judge said:

I have stated in the earlier part of my judgment that the Constitution accords a place of pride to Fundamental Rights and a place of permanence to the Directive Principles. I stand by what I have said. The Preamble of our Constitution recites that the aim of the Constitution is to constitute India into a Sovereign Democratic Republic and to secure to "all its citizens", Justice--Social, economic and political -- liberty and equality. Fundamental Rights which are conferred and guaranteed by

Part III of the Constitution undoubtedly constitute the ark of the Constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that, the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal processes but that distinction does not bear on their relative importance. An equal right of men and women to an adequate means of livelihood, the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of leisure, and raising the level of health and nutrition are not matters for compliance with the Writ of a Court. As I look at the provisions of parts III and IV, I feel no doubt that the basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV. A circumspect use of the freedoms guaranteed by Part III is bound to subserve the common good but voluntary submission to restraints is a philosopher's dream. therefore, Article 37 enjoins the State to apply the Directive Principles in making laws. The freedom of a few have then to be abridged in order to ensure the freedom of all. It is in this sense that Parts III and IV, as said by Granwille Austin[1], together constitute "the conscience of the Constitution". The Nation stands today at the cross-roads of history and exchanging the time honoured place of the phrase, may I say that the Directive Principles of State of Policy should not be permitted to become "a mere rope of sand." If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.

This is precisely what Parliament achieved by amending Article 31C. Parliament made the amendment in Article 31C because it realised that "if the State fails to create conditions in which the fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish" and "in order, therefore, to preserve their freedom, the privileged few must part with a portion of it." I find it difficult to understand how it can at all be said that the basic structure of the Constitution is affected when for evolving a modus vivendi for resolving a possible remote conflict between two constitutional mandates of equally fundamental character, Parliament decides by way of amendment of Article 31C that in case of such conflict the constitutional mandate in regard to Directive Principles shall prevail over the constitutional mandate in regard to the Fundamental Rights under Articles 14 and 19. The amendment in Article 31C far from damaging the basic structure of the Constitution strengthens and re-enforces it by giving fund-mental importance to the rights of the members of the community as against the rights of a few individuals and furthering the objective of the Constitution to build an egalitarian social order where there will be social and economic justice for all and every one including the low visibility areas of humanity in the country will be able to exercise Fundamental Rights and the dignity of the individual and the worth of the human person which are cherished values will not remain merely the exclusive privileges of a few but become a living reality for the many. Additionally, this question may also be looked at from another point of view so far as the protection against violation of Article 14 is concerned. The principle of egalitarianism, as I said before, is an essential element of social and economic justice and, therefore, where a law is enacted for giving effect to a Directive Principle with a view to promoting social and economic justice, it would not run counter to the egalitarian principle and would not therefore be violative of the basic structure, even if it infringes equality before the law in its narrow and formalistic sense. No law which is really and genuinely for giving effect to a Directive Principle can be inconsistent with the

egalitarian principle and therefore the protection granted to it under the amended Article 31C against violation of Article 14 cannot have the effect of damaging the basic structure. I do not therefore see how any violation of the basic structure is involved in the amendment of Article 31C. In fact, once we accept the proposition laid down by the majority decision in Kesavananda Bharati's case AIR 1978 SC 1461 that the unamended Article 31C was constitutionally valid, it could only be on the basis that it did not damage or destroy the basic structure of the Constitution and moreover in the order made in Waman Rao's case on 9th May 1980 this Court expressly held that the unamended Article 31C "does not damage any of the basic or essential features of the Constitution or its basic structure, and if that be so, it is difficult to appreciate how the amended Article 31C can be said to be violative of the basic structure. If the exclusion of the Fundamental Rights embodied in Articles 14 and 19 could be legitimately made for giving effect to the Directive Principles set out in Clauses (b) and (c) of Article 39 without affecting the basic structure. I fail to see why these Fundamental Rights cannot be excluded for giving effect to the other Directive Principles. If the constitutional obligation in regard to the Directive Principles set out in Clauses (b) and (c) of Article 39 could be given precedence over the constitutional obligation in regard to the Fundamental Rights under Articles 14 and 19, there is no reason in principles why such precedence cannot be given to the constitutional obligation in regard to the other Directive Principles which stand on the same footing. It would, to my mind, be incongruous to hold the amended Article 31C invalid when the unamended Article 31C has been held to be valid by the majority decision in Kesavananda Bharati's case and by the Order made on 9th May, 1980 in Waman Rao's case.

119. Mr. Palkhiwala on behalf of the petitioners however contended that there was a vital difference between Article 31C as it stood prior to its amendment and the amended Article 31C, inasmuch as under the unamended Article 31C only certain categories of laws, namely, those enacted for the purpose of giving effect to the Directive Principles set out in Clauses (b) and (c) of Article 39 were protected against challenge under Articles 14 and 19, while the position under the amended Article 31C was that practically every law would be immune from such challenge because it would be referable to one Directive Principle or the other and the result would be that the Fundamental Rights in Articles 14 and 19 would become meaningless and futile and would, for all practical purposes, be dead letter in the Constitution. The effect of giving immunity to laws enacted for the purpose of giving effect to any one or more of the Directive Principles would, according to Mr. Palkhiwala, be in reality and substance to wipe out Articles 14 and 19 from the Constitution and that would affect the basic structure of the Constitution. Mr. Palkhiwala also urged that the laws which were protected by the amended Article 31C were laws for giving effect to the policy of the State towards securing any one or more of the Directive Principles and every law would be comprehended within this description since it would not be competent to the court to enter into questions of policy and determine whether the policy adopted in a particular law is calculated to secure any Directive Principle as claimed by the State. The use of the words "law giving effect to the policy of the State", said Mr. Palkhiwala, introduced considerable uncertainty in the yardstick with which to decide whether a particular law falls within the description in the amended Article 31C and widened the scope and applicability of the amended Article so as to include almost every law claimed by the State to fall within such description. This argument was presented by Mr. Palkhiwala with great force and persuasiveness but it does not appeal to me and I cannot accept it. It is clear from the language of the amended Article 31C that the law which is protected from challenge under Articles 14 and 19 is law giving effect to the policy of the State

towards securing all or any of the Directive Principles. Whenever, therefore, any protection is claimed for a law under the amended Article 31C, it is necessary for the court to examine whether the law has been enacted for giving effect to the policy of the State towards securing any one or more of the Directive Principles and it is only if the court is so satisfied as a result of judicial scrutiny, that the court would accord the protection of the amended Article 31C to such law. Now it is undoubtedly true that the words used in the amended Article are law giving effect to the policy of the State", but the policy of the State which is contemplated there is the policy towards securing one or more of the Directive Principles. It is the constitutional obligation of the State to secure the Directive Principles and that is the policy which the State is required to adopt and when a law is enacted in pursuance of this policy of implementing the Directive Principles and it seeks to give effect to a Directive Principle, it would, both from the point of view of grammar and language, be correct to say that it is made for giving effect to the policy of the State towards securing such Directive Principle. The words "law giving effect to the policy of the State are not so wide as Mr. Palkhiwala would have it, but in the context and collocation in which they occur, they are intended to refer only to a law enacted for the purpose of implementing or giving effect to one or more of the Directive Principles. The Court before which protection for a particular law is claimed under the amended Article 31C would therefore have to examine whether such law is enacted for giving effect to a Directive Principle, for then only it would have the protection of the amended Article 31C. Now the question is what should be the test for determining whether a law is enacted for giving effect to a Directive Principle. One thing is clear that a claim to that effect put forward by the State would have no meaning or value; it is the court which would have to determine the question. Again it is not enough that there may be some connection between a provision of the law and a Directive Principle. The connection has to be between the law and the Directive Principle and it must be a real and substantial connection. To determine whether a law satisfies this test, the court would have to examine the pith and substance, the true nature and character of the law as also its design and the subject matter dealt by it together with its objects and scope. If on such examination, the court finds that the dominant object of the law is to give effect to the Directive Principle, it would accord protection to the law under the amended Article 31C. But if the court finds that the law though passed seemingly for giving effect to a Directive Principle, is, in pith and substance, one for accomplishing an unauthorised purpose -- unauthorised in the sense of not being covered by any Directive Principle such law would not have the protection of the amended Article 31C. To take the illustration given by Khanna, J. in Kesavananda Bharati's case MANU/SC/0114/1972 : 1972CriLJ1526 : AIR 1978 SC 1461 of the Report,

a law might be made that as the old residents in the State are economically backward and those who have not resided in the State for more than three generations have an affluent business in the State or have acquired property in the State, they shall be deprived of their business and property with a view to vest the same in the old residents of the State.

It may be possible, after performing what I may call an archaeological operation, to discover some remote and tenuous connection between such law and some Directive Principle, but the dominant object of such law would be, as pointed out by Mr. H.M. Seervai at page 1559 of the second Volume of his book on "Constitutional Law of India," to implement "the policy of the State to discriminate against citizens who hail from another State, and in a practical sense , to drive them out of it", and such law would not be protected by the amended Article 31C. Many such examples can be given but I do not wish to unnecessarily burden this opinion. The point I wish to emphasize

is that the amended Article 31C does not give protection to a law which has merely some remote or tenuous connection with a Directive Principle. What is necessary is that there must be a real and substantial connection and the dominant object of the law must be to give effect to the Directive Principle, and that is a the matter which the court would have to decide before any claim for protection under the amended Article 31C can be allowed.

120. There is also one other aspect which requires to be considered before protection can be given to a law under the amended Article 31C. Even where the dominant object of a law is to give effect to a Directive Principle, it is not every provision of the law which is entitled to claim protection. The words used in the amended Article 31C are: "Law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV" and these words, on a plain natural construction, do not include all the provisions of the law but only those which give effect to the Directive Principle. But the question is how to identify these provisions giving effect to the Directive Principle in order to accord to them the protection of the amended Article 31C. The answer to this question is analogically provided by the decision of this Court in Akadasi Padhan v. State of Orissa MANU/SC/0089/1962 : AIR1963SC1047 . There the question was as to what was the precise connotation of the expression a law relating to" a State monopoly which occurs in Article 19(6). This Court held that "a law relating to" a State monopoly cannot include all the provisions contained in such law but it must be construed to mean, "the law relating to the monopoly in its absolutely essential features and it is only those provisions of the law "which are basically and essentially necessary for creating the State monopoly" which are protected by Article 19(6). This view was reiterated in several subsequent decisions of this Court which include inter alia Rasbihari, Panda v. State of Orissa MANU/SC/0054/1969 : [1969]3SCR374 , Vrajlal Manilal & Co. v. State of Madhya Pradesh MANU/SC/0045/1969 : [1970]1SCR400 and R.C. Cooper v. Union of India MANU/SC/0011/1970 : [1970]3SCR530 . I would adopt the same approach in the construction of Article 31C and hold that

it is not every provision of statute, which has been enacted with the dominant object of giving effect to a Directive Principle, that is entitled to protection, but only those provisions of the statute which are basically and essentially necessary for giving effect to the Directive Principle are protected under the amended Article 31C.
If there are any other provisions in the statute which do not fall within this category, they would not be entitled to protection and their validity would have to be judged by reference to Articles 14 and 19. Where, therefore, protection is claimed in respect of a statute under the amended Article 31C, the court would have first to determine whether there is real and substantial connection between the law and a Directive Principle and the predominant object of the law is to give effect to such Directive Principle and if the answer to this question is in the affirmative, the court would then have to consider which are the provisions of the law basically and essentially necessary for giving effect to the Directive Principles and give protection of the amended Article 31C only to those provisions. The question whether any particular provision of the law is basically and essentially necessary for giving effect to the Directive Principle, would depend to a large extent, on how closely and integrally such provision is connected with the implementation of the Directive Principle. If the court finds that a particular provision is subsidiary or incidental or not essentially and integrally connected with the implementation of the Directive Principle or is of such a nature that though seemingly a part of the general design of the main provisions of the statute, its dominant object is to achieve an unauthorised purpose, it would not enjoy the protection of the

amended Article 31C and would be liable to be struck down as invalid if it violates Article 14 or 19.

121. These considerations which I have discussed above completely answer some of the difficulties raised by Mr. Palkhiwala. He said that if the amended Article 31C were held to be valid, even provisions like Sections 23(a) and 24(1)(a) of the Bombay Prohibition Act, 1949 which were struck down in State of Bombay v. F.N. Balsara MANU/SC/0009/1951 : [1951]2SCR682 : AIR 1951 SC 318 as violating freedom of speech guaranteed under Article 19(1)(a), would have to be held to be valid. I do not think that freedom and democracy in this country would be imperiled if such provisions were held valid. In fact, after the amendment of Article 19(2) by the Constitution (First Amendment) Act, 1951, it is highly arguable that such provisions would fall within the protection of Article 19(2) and would be valid. And even otherwise, it is difficult to see how any violation of the basic structure is involved if a provision of a law prohibiting a person from commending any intoxicant, the consumption or use of which is forbidden by the law (except under a licence issued by the State Government) is protected against infraction of Article 19(1)(a). The position would perhaps be different if a provision is introduced in the Prohibition Act saying that no one shall speak against the prohibition policy or propagate for the repeal of the Prohibition Act or plead for removal of Article 47 from the Directive Principles. Such a provision may not and perhaps would not be entitled to the protection of the amended Article 31C, even though it finds a place in the Prohibition Act, because its dominant object would not be to give effect to the Directive Principle in Article 47 but to stifle freedom of speech in respect of a particular matter and it may run the risk of being struck down as violative of Article 19(1)(a). If the Court finds that even in a statute enacted for giving effect to a Directive Principle, there is a provision which is not essentially and integrally connected with the implementation of the Directive Principle or the dominant object of which is to achieve an unauthorised purpose, it would be outside the protection of the amended Article 31C and would have to meet the challenge of Articles 14 and 19.

122. Lastly, I must consider the argument of Mr. Palkhiwala that almost any and every law would be within the protection of the amended Article 31C because it would be referable to some Directive Principle or the other. I think this is an argument of despair Articles 39 to 51 contain Directive Principles referring to certain specific objectives and in order that a law should be for giving effect to one of those Directive Principles, there would have to be a real and substantial connection between the law and the specific objective set out in such Directive Principle. Obviously, the objectives set out in these Directive Principles being specific and limited, every law made by a legislature in the country cannot possibly have a real and substantial connection with one or the other of these specific objectives. It is only a limited number of laws which would have a real and substantial connection with one or the other of the specific objectives contained in these Directive Principles and any and every law would not come within this category. Mr. Palkhiwala then contended that in any event, the Directive Principle contained in Article 38 was very wide and it would cover almost any law enacted by a legislature. This contention 1% also not well founded. Article 38 is a general article which stresses the obligation of the State to establish a social order in which justice -- social, economic and political shall inform all the institutions of national life. It, no doubt, talks of the duty of the State to promote the welfare of the people and there can be no doubt that standing by itself this might cover a fairly wide area but it may be noted that the objective set out in the Article is not merely promotion of the welfare of the people, but there is a further requirement that the welfare of the people is to be promoted by the State, not in

any manner it likes, not according to its whim and fancy, but for securing and protecting a particular type of social order and that social order should be such as would ensure social, economic and political justice for all. Social, economic and political justice is the objective set out in the Directive Principle in Article 38 and it is this objective which is made fundamental in the governance of the country and which the State is laid under an obligation to realise. This Directive Principle forms the base on which the entire structure of the Directive Principles is reared and social, economic and political justice is the signature tune of the other Directive Principles, The Directive Principles set out in the subsequent Articles following upon Article 38 merely particularise and set out facets and aspects of the idea of social, economic and political justice articulated in Article 38. Mr. Palkhiwala's complaint was not directed against the use of the words 'political justice' in Article 38 but his contention was that the concept of social and economic justice referred to in that Article was so wide that almost any legislation could come within it. I do not agree. The concept of social and economic justice may not be very easy of definition but its broad contours are to be found in some of the provisions of the Fundamental Rights and in the Directive Principles and whenever a question arises whether a legislation is for giving effect to social and economic justice, it is with reference to these provisions that the question would have to be determined. There is nothing so vague Or indefinite about the concept of social or economic justice that almost any kind of legislation could be Justified under it. Moreover, where a claim for protection is made in respect of a legislation on the ground that it is enacted for giving effect to a Directive Principle, the Directive Principle to which it is claimed to be related would not ordinarily be the general Directive Principle set out in Article 38, but would be one of the specific Directive Principles set out in the succeeding Articles, because as I said before, these latter particularise the concept of social and economic justice referred to in Article 38. I cannot therefore subscribe to the proposition that if the amendment in Article 31C were held valid, it would have the effect of protecting every possible legislation under the sun and that would in effect and substance wipe out Articles 14 and 19 from the Constitution. This is a tall and extreme argument for which I find no justification in the provisions of the Constitution.

123. I would therefore declare Section 55 of the Constitution (Forty-second Amendment) Act, 1976 which inserted Sub-sections (4) and (5) in Article 368 as unconstitutional and void on the ground that it damages the basic structure of the Constitution and goes beyond the amending power of Parliament. But so far as Section 4 of the Constitution (Forty-second Amendment) Act, 1976 is concerned, I hold that, on the interpretation placed on the amended Article 31C by me, it does not damage or destroy the basic structure of the Constitution and is within the amending power of Parliament and I would therefore declare the amended Article 31C to be constitutional and valid.

124. I have also given my reasons in this judgment for subscribing to the Order dated 9th May, 1980 made in Waman Rao's case and this judgment in so far as it sets out those reasons will be formally pronounced by me when Waman Raos case is set down on board for judgment.

Back to Index

MANU/SC/0575/2017

Neutral Citation: 2017/INSC/448

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 607-608 of 2017 (Arising out of SLP (Crl.) Nos. 3119-3120 of 2014) and Criminal Appeal Nos. 609-610 of 2017 (Arising out of SLP (Crl.) Nos. 5027-5028 of 2014)

Decided On: 05.05.2017

Appellants: Mukesh and Ors. **Vs.** Respondent: State for NCT of Delhi and Ors.

Hon'ble Judges/Coram:

Dipak Misra, Ashok Bhushan and R. Banumathi, JJ.

Subject: Criminal

Relevant Section:

INDIAN PENAL CODE, 1860 (IPC) - Section 120B; INDIAN PENAL CODE, 1860 (IPC) - Section 201; INDIAN PENAL CODE, 1860 (IPC) - Section 302; INDIAN PENAL CODE, 1860 (IPC) - Section 307; INDIAN PENAL CODE, 1860 (IPC) - Section 365; INDIAN PENAL CODE, 1860 (IPC) - Section 366; INDIAN PENAL CODE, 1860 (IPC) - Section 376(2)(g); INDIAN PENAL CODE, 1860 (IPC) - Section 377; INDIAN PENAL CODE, 1860 (IPC) - Section 395; INDIAN PENAL CODE, 1860 (IPC) - Section 397; INDIAN PENAL CODE, 1860 (IPC) - Section 412; CODE OF CRIMINAL PROCEDURE, 1973 (CrPC) - Section 235; CODE OF CRIMINAL PROCEDURE, 1973 (CrPC) - Section 354

Prior History / High Court Status:

From the Judgment and Order dated 13.03.2014 of the High Court of Delhi at New Delhi in Criminal Appeal No. 1398 and 1399 of 2013 & death Sentence Reference No. 6 of 2013 (MANU/DE/0649/2014)

Supreme Court Status:

Judgment challenged *vide* MANU/SC/0710/2018 dated: 09.07.2018
Judgment challenged *vide* MANU/SC/0711/2018 dated: 09.07.2018

Authorities Referred:

B. Cardozo, The nature of the Judicial Process 178, 179 (1921)

Case Note:

Criminal - Capital punishment - Gang rape - Rarest of rare category - Sections 120B, 201, 302, 307, 365, 366, 376(2)(g), 377, 395, 397 and 412 of Indian Penal Code, 1860 and Sections 235 and 354 of Code of Criminal Procedure, 1973 - Deceased prosecutrix and informant boarded bus - Accused persons started to abuse informant and assaulted him with iron rods - Robbed their articles - Prosecutrix was raped by them, one after other - Prosecutrix was also subjected to unnatural sex - Her private parts and her internal organs were seriously injured - Accused were exhorting that both victims be not left alive - Threw them out of moving bus - Victims were taken to Hospital - First Information Report was registered - 1st Accused was arrested - Personal search was conducted and his disclosure statement - Investigating Officer seized bus - Arrest of 1st Accused, led to arrest of 4th and 5th Accused - Later on, 2nd Accused was apprehended - Mobile belonging to informant was recovered - In Test Identification Parade, informant identified 2nd Accused - Further recoveries were made - Dying declaration of prosecutrix was recorded - Prosecutrix gave her statement through gestures and writings - Later on, in foreign hospital, prosecutrix died - Charge-sheet came to be filed under provisions of Code, 1860 - Supplementary chargesheet was filed later on - During course of trial, 1st Accused committed suicide - Sessions Judge convicted all Accused persons under Sections 120B, 365, 366, 307, 376(2)(g), 377, 302, 395, 397, 201 and 412 - All Accused were sentenced to death for offence - Punishment of imprisonment was also awarded - Fine was also imposed - High Court affirmed conviction and confirmed death penalty - Hence, present appeals by all Accused/Appellants - Whether Accused persons were guilty of their culpability or there was public pressure, as alleged, to falsely implicate them - Whether Courts below did not follow fundamental norms of sentencing and were not guided by paramount beacons of legislative policy discernible from Sections 354(3) and 235(2) of Code, 1973 - Whether there was violation of mandate of Section 235(2) of Code, 1973 - Whether present case could be one of rarest of rare cases warranting death penalty

Facts:

On 16.12.2012, the prosecution case, as projected, was that the deceased prosecutrix had gone with her friend/the informant/P.W. 1 to watch a movie. After the show was over, they took an auto and reached bus stand wherefrom they boarded a white coloured chartered bus which was bound to Dwarka/Palam Road, as a boy in the bus was calling for commuters for the said destination. As per the version of the informant, the friend of the prosecutrix, the bus had yellow and green lines/stripes and the word "Yadav" was written on it. After both of them had entered the bus, they noticed that six persons were already inside the bus, four in the cabin of the driver and two behind the driver's cabin. The deceased and the informant sat on the left side in the row of two-seaters and paid the fare. The Accused persons did not allow anyone else to board and the bus moved and the lights inside the bus were put off. The lights were put off. A few minutes later, three Accused persons, including a juvenile in conflict with law, came out of the driver's cabin and started to abuse the informant, who raised opposition to the abuse that led to an altercation which invited the other two who were sitting outside the driver's cabin to join. He was assaulted by the Accused persons with the

iron rods that caused injuries to his head, both the legs and other parts of the body and the consequence was that he fell on the floor of the bus. The two Accused persons pinned the informant down and robbed the victims of their mobiles besides robbing the informant of his purse, clothes and other articles. As per the version of the prosecution, the informant was carrying two mobiles and the prosecutrix was carrying only one, and the Accused snatched away all the three mobiles. The Accused persons took the prosecutrix to the rear side of the bus and she was raped by them, one after the other. The prosecutrix was also subjected to unnatural sex. Her private parts and her internal organs were seriously injured. The prosecutrix was carrying a grey colour purse. The Accused persons robbed her of her belongings and stripped her. They also took away the clothes of the informant while beating him with iron rods. The Accused were exhorting that both the victims be not left alive. The Accused then tried to throw both the informant and the prosecutrix out of the moving bus from its rear door but could not open it and so, they brought them to the front door and threw them out of the moving bus at National Highway No. 8, Hotel Delhi 37, Mahipalpur flyover by the side of the road.

The prosecutrix and the informant were noticed by P.W. 72, who heard the voice of the prosecutrix. P.W. 72 saw the informant and the prosecutrix sitting naked having blood all around. Immediately thereafter, P.W. 72 informed P.W. 70, who was in the Control Room, requesting him to call PCR. P.W. 70 dialed 100 No. and even asked his other patrolling staff to reach the spot. P.W. 73/H.C., who was in charge of PCR van Zebra 54, received information about the incident and the lying of victims in a naked condition. P.W. 73 reached the spot and found the victims. He got the crowd dispersed and brought a bottle of water and a bedsheet from the nearby hotel and tore the same into two parts and gave it to both the victims to cover themselves. P.W. 73 took the victims to Safdarjung Hospital. On the way to the hospital, the victims gave their names to him and informed about the incident. While leaving the informant in the casualty where he was examined by P.W. 51 and his MLC/P.W. 51/A, was drawn up, P.W. 73 took the prosecutrix to the Gynae ward and got her admitted there. The MLC of the prosecutrix, P.W. 49/B, was prepared by P.W. 49, who recorded the history of the incident as told to her by the prosecutrix and noted the same in Exhibit P.W. 49/A.

After the victims were rescued, the informant gave his first statement to the police at 3:45 a.m. on 17.12.2012 which culminated into the recording of the FIR at 5:40 a.m. being FIR No. 413/2012 Under Section 120B of Indian Penal Code and Sections 365/366/376(2)(g)/377/307/302 of Indian Penal Code, 1860 and/or Sections 396/395 of Indian Penal Code, 1860 read with Sections 397/201/412 of Indian Penal Code, 1860. It was thereafter handed over to P.W. 80 for investigation. On the same night, i.e., 16/17.12.2012, the prosecutrix underwent first surgery. The prosecutrix was operated by P.W. 50. The second and third surgeries were performed on 19.12.2012 and 23.12.2012 respectively.

On 17.12.2012, supplementary statements of the informant were recorded by P.W. 80. Based on the description of the bus given by the informant, the offending bus was found parked in Ravi Das Jhuggi Camp, R.K. Puram, New Delhi. P.W. 80 along with P.W. 74/SI and P.W. 65/Ct., went to the spot and found 1st Accused sitting in the bus. On seeing the police, 1st Accused got down from the bus and started running. The police intercepted 1st Accused and

he was arrested and interrogated.

Personal search was conducted on 1st Accused and his disclosure statement, Ex. P-74/F, was recorded by P.W. 74 and his team. Based on his disclosure statement, P.W. 74 Investigating Officer seized the bus, Ex. P1, vide Seizure Memo Ex. P.W. 74/K. P.W. 74 seized the seat cover of the bus of red colour and its curtains of yellow colour. On the bus, 'Yadav' was found written on its body with green and yellow stripes on it. The Investigating Officer also seized the key of the bus, Ex. P-74/2, vide Seizure Memo Ex. P.W. 74/J. The documents of the bus were also seized. The disclosure statement of 1st Accused, Ex. P.W. 74/F, led to the recovery of his bloodstained clothes, iron rods and debit card of the mother of the prosecutrix. P.W. 74, Investigating Officer, also recovered ashes and the partly unburnt clothes lying near the bus which was seized vide Memo Exhibit No. P.W. 74/M and Unix Mobile Phone with MTNL Sim, Ex. P-74/5, vide Memo Ex. P/74E. The Investigating Officer prepared the site plan of the place where the bus was parked and from where the ashes were found.

The arrest of 1st Accused also led to the arrest of 4th Accused and 5th Accused. On 18.12.2012, 2nd Accused was apprehended by P.W. 58/SI and was produced before P.W. 80. At the instance of 2nd Accused, a Samsung Galaxy Trend DUOS Blue Black mobile belonging to the informant was recovered. On 23.12.2012, at his instance, P.W. 80 prepared the route chart of the route where 2nd Accused drove the bus at the time of the incident, Ex. P.W. 80/H. Besides that, he got recovered his bloodstained clothes from the garage of his brother. He opted to undergo Test Identification Parade (TIP). In the Test Identification Parade conducted by P.W. 17/Metropolitan Magistrate, the informant identified 2nd Accused. 5th Accused was apprehended and arrested about 1:15 p.m. on 18.12.2012 vide memo Ex. P.W. 60/A; his disclosure, Ex. P.W. 60/G, was recorded and his personal search was conducted vide memo Ex. P.W. 60/C. In his disclosure statement, 5th Accused pointed out Munirka bus stand where the prosecutrix and the informant boarded the bus and memo Ex. P.W. 68/I was prepared. He also pointed at the spot where the informant and the prosecutrix were thrown out of the bus and memo Ex. P.W. 68/J was prepared in this regard.

4th Accused got recovered his bloodstained clothes, the informant's leather shoes and the prosecutrix's mobile phone, Nokia Model 3110 of black grey colour. Further recoveries were made pursuant to his supplementary disclosure. Similarly, 5th Accused got recovered his bloodstained clothes, shoes and also a wrist watch make Sonata and Rs. 1000/- robbed from the informant.

3rd Accused was also arrested from a village of Bihar. His disclosure statement was recorded. He led to his brother's house and got recovered his bloodstained clothes. A ring belonging to the informant, two metro cards and a Nokia phone with SIM of Vodafone Company was also recovered from 3rd Accused. 3rd Accused also opted to undergo TIP and was positively identified by the informant. The mobile phones of the Accused persons were seized and call details records with requisite certificates Under Section 65-B of Indian Evidence Act were obtained by the police. After getting arrested, all the Accused were medically examined. The MLCs of all the Accused persons showed various injuries on their person; viz., in the MLC, Ex. P.W. 2/A, of 1st Accused, P.W. 2 opined that the injuries could possibly be struggle marks.

Similar opinions were received in respect of other Accused persons.

The prosecutrix was re-operated on 23.12.2012 for peritoneal lavage and placement of drain under general anaesthesia and the notes are exhibited as Ex. P.W. 50/E. As the condition of the prosecutrix did not improve much, the prosecution thought it appropriate to record the statements of the prosecutrix. The said statements were conferred the status of dying declaration. P.W. 49 also deposed that certain exhibits were collected for examination such as outer clothes. On 21.12.2012, on being declared fit, the second dying declaration was recorded by P.W. 27/Sub-Divisional Magistrate. This dying declaration was an elaborate one where the prosecutrix described the incident in detail. She also stated that the accused were addressing each other with names. On 25th December, 2012, P.W. 30/Metropolitan Magistrate, went to the hospital to record the dying declaration of the prosecutrix. The attending doctors opined that the prosecutrix was not in a position to speak but she was otherwise conscious and responded by way of gestures. Accordingly, P.W. 30 put questions in such a manner as to enable her to narrate the incident by way of gestures or writing. Her statement, Ex. P.W. 30/D, was recorded by P.W. 30 in the form of dying declaration by putting her questions in the nature of multiple choice questions. The prosecutrix gave her statement/dying declaration through gestures and writings, Exhibit P.W. 30/D.

Since the condition of the prosecutrix was critical, it was decided that she be shifted abroad for further treatment and fostering oasis of hope on 27th December, 2012, she was shifted to a Hospital of Singapore, for her further treatment. The hope and expiration became a visible mirage as the prosecutrix died on 29th December, 2012. P.W. 34/Forensic Pathologist deposed that her exact time of death was 4:45 a.m. on 29th December, 2012. The cause of her death was sepsis with multiple organ failure following multiple injuries. The original post mortem report was Ex. P.W. 34/A and its scanned copy is Ex. P.W. 34/B; the Toxicology Report dated 4th January, 2013 was Exhibit P.W. 34/C. In the post-mortem report, Ex. P.W. 34/A, besides other serious injuries, various bite marks were observed.

The investigating agency went around to collect the electronic evidence. A CCTV footage produced by P.W. 25 in a CD, Ex. P.W. 25/C-1 and P.W. 25/C-2, and the photographs, Ex. P.W. 25/B-1 to Ex. P.W. 25/B-7, were collected to ascertain the presence of the informant and the prosecutrix at the Mall. The certificate Under Section 65-B of the Indian Evidence Act, 1872 with respect to the said footage was proved by P.W. 26 vide Ex. P.W. 26/A. Another important evidence was the CCTV footage of Hotel Delhi 37 situated near the dumping spot. The said footage showed a bus matching the description given by the informant and said bus had the word "Yadav" written on one side. Thereafter, the report of the CFSL was received.

The report, after analysing the DNA profiles generated from the known samples of the prosecutrix, the informant, and each of the Accused, concluded that the samples were authentic and established the identities of the persons beyond reasonable doubt. P.W. 46/Senior Scientific Officer (Finger Prints) submitted his report Ex. P.W. 46/D. In the report, the chance prints of 4th Accused were found to have matched with those on the bus in question. Bite mark analysis was also undertaken by the investigative team to establish the identity and involvement of the Accused persons. P.W. 66 had taken 10 photographs of different parts of the body of the prosecutrix which were marked as Ex. P.W. 66/B (Colly.)

and Ex. P.W. 66/C (Colly.). P.W. 66 also proved in Court the certificate provided by him in terms of Section 65-B of the Evidence Act in respect of the photographs, Ex. P.W. 66/A. Thereafter, P.W. 18 collected the photographs and the dental models from Safdarjung Hospital and duly deposited the same in the malkhana after he, P.W. 18, had handed them over to the S.H.O/P.W. 78. The same were later entrusted to S.I./P.W. 18. P.W. 71 submitted the final report in this regard which is exhibited as Ex. P.W. 71/C. In the said report, he concluded that at least three bite marks were caused by 1st Accused whereas one bite mark was identified to have been most likely caused by 3rd Accused. The chargesheet came to be filed Under Section 365/376(2)(g)/377/307/395/397/302/396/412/201/120/34 of Indian Penal Code, 1860 and supplementary chargesheet was filed later on.

During the course of trial, 1st Accused committed suicide and the proceedings qua him stood abated. Sessions Judge convicted all the Accused persons Under Section 120B Indian Penal Code for the offence of criminal conspiracy; Under Section 365/366 Indian Penal Code read with Section 120B Indian Penal Code for abducting the victims with an intention to force the prosecutrix to illicit intercourse; Under Section 307 Indian Penal Code read with Section 120B Indian Penal Code for attempting to kill the informant; Under Section 376(2)(g) Indian Penal Code for committing gang rape with the prosecutrix in pursuance of their conspiracy; Under Section 377 Indian Penal Code read with Section 120B Indian Penal Code for committing unnatural offence with the prosecutrix; Under Section 302 Indian Penal Code read with Section 120B Indian Penal Code for committing murder of the helpless prosecutrix; Under Section 395 Indian Penal Code for conjointly committing dacoity in pursuance of the aforesaid conspiracy; Under Section 397 Indian Penal Code read with Section 120B Indian Penal Code for the use of iron rods and for attempting to kill the informant at the time of committing robbery; Under Section 201 Indian Penal Code read with Section 120B Indian Penal Code for destroying of evidence and Under Section 412 Indian Penal Code for the offence of being individually found in possession of the stolen property which they all knew was a stolen booty of dacoity committed by them. All the Accused were sentenced to death for offence punishable Under Section 302 Indian Penal Code and for other offences, punishment of imprisonment of different duration was awarded. Fine was also imposed and in default of payment of fine such convict shall undergo simple imprisonment for a period of one month. The sentences Under Sections 120B/365/366/376(2)(g)/377/201/395/397/412 Indian Penal Code were directed to run concurrently and that the benefit Under Section 428 Code of Criminal Procedure would be given wherever applicable.

The High Court affirmed the conviction and confirmed the death penalty imposed upon the Accused by expressing the opinion that under the facts and circumstances of the case, imposition of death penalty awarded by the Trial Court deserved to be confirmed in respect of all the four Accused. As the death penalty was confirmed, the appeals preferred by the Accused were dismissed.

Held, while dismissing the appeals:

Dipak Misra, J.:

(i) There was no delay in the registration of FIR. The sequence of events were natural. After the occurrence, the victim was seriously injured and was in a critical condition and it had to be treated as a natural conduct that giving medical treatment to her was of prime importance. The admission of the informant and the victim in the hospital and the completion of procedure must have taken some time. The informant himself was injured and was admitted to the hospital. No delay could be said to have been caused in examining the informant. It is not expected from a victim to give details of the incident either in the FIR or in the brief history given to the doctors. If any overt act is attributed to a particular accused among the assailants, it must be given greater assurance. The involvement of the Accused persons could not be determined solely on the basis of what was mentioned in the FIR. The informant stated about the presence of four persons sitting in the cabin of the bus and two boys sitting behind the cabin and clearly stated about the overt act. He broadly made reference to the Accused persons and also to the overt acts. There were no indications of fabrication in the statement of the informant. It could not be said that merely because the names of the Accused persons were not mentioned in the FIR, it raised serious doubts about the prosecution case. [51],[55],[61] and[62]

(ii) The contentions assailing the evidence of the informant did not merit acceptance, for at the time when he was first examined his friend/the prosecutrix was critically injured and he was in a shocked mental condition. The evidence of a witness is not to be disbelieved simply because he is a partisan witness or related to the prosecution. It is to be weighed whether he was present or not and whether he is telling the truth or not. The informant clearly spoken about the occurrence and also corroborated his complaint. The injuries found on the person of the informant and the fact that the informant was injured in the same occurrence lent assurance to his testimony that he was present at the time of the occurrence along with the prosecutrix. The evidence of an injured witness is entitled to a greater weight and the testimony of such a witness is considered to be beyond reproach and reliable. Firm, cogent and convincing ground is required to discard the evidence of an injured witness. It is to be kept in mind that the evidentiary value of an injured witness carries great weight. Apart from the injuries sustained, the presence of the informant was further confirmed by the DNA analysis. [77],[78],[79] and[81]

(iii) The evidence of the informant was not to be disbelieved simply because there were certain omissions. The Accused persons were in a group and were also armed with iron rods. The informant was held by them. It would not have been possible for the informant to resist the number of Accused persons and save the prosecutrix. The evidence of the informant could not be doubted on the ground that he had not interfered with the occurrence. The improvements made in the supplementary statement need not necessarily render the informant's evidence untrustworthy more so when the informant had no reason to falsely implicate the Accused. [90] and[92]

(iv) Once it is proved before the Court through the testimony of the experts that the photographs and the CCTV footage are not tampered with, there is no reason or justification to perceive the same with the lens of doubt. It was perceptible that the High Court, in order to satisfy itself, had got the CCTV footage played during the hearing and found the same to be creditworthy and acceptable. There was dearth of space inside the police stations and the

use of Stadium, where the bus was taken to, as parking lot by the Police in the present case did not necessarily mean that there was any mala fide intention on the part of the investigating agency without any specific assertion to advance the said bald allegation. [100] and[104]

(v) The contention of the Accused that the testimony of P.W. 81/the owner of the bus deserved to be totally discarded, was unacceptable. The principal contention was that P.W. 81 was in judicial custody and, therefore, his version in the Court was under tremendous pressure as he was desirous of getting a bail order to enjoy his liberty. However, it was limpid from the deposition of P.W. 81 that he was in judicial custody for a separate offence and, therefore, it was difficult to accede to the argument advanced by the Accused that he was under pressure to support the version of the prosecution. It stood proved that the bus in question was routinely driven by 1st Accused. [106],[108] and[110]

(vi) All the Accused persons were closely associated with each other. It was not permissible to advance an argument that Section 27 of the Evidence Act, 1872 was constantly abused by the prosecution or that it used the said provision as a lethal weapon against anyone it likes. The recoveries made when the Accused persons were in custody were established with certainty. The witnesses who deposed with regard to the recoveries remained absolutely unshaken and, in fact, nothing was elicited from them to disprove their creditworthiness. The recoveries of articles belonging to the informant and the victim from the custody of the Accused persons could not be discarded. No explanation was by the Accused persons explaining as to how they had got into possession of the said articles. [124],[126],[135] and[136]

(vii) 4th Accused and 5th Accused refused to participate in the TIP proceedings without giving any reason whatsoever. The informant identified 2nd Accused and 3rd Accused. Test Identification Proceedings corroborated and lent assurance to the dock identification of 2nd Accused and 3rd Accused by the informant. The informant, apart from identifying the Accused who had made themselves available in the TIP, also identified all of them in Court. The TIP was not dented. [139] and[145]

(viii) A dying declaration is an important piece of evidence which, if found veracious and voluntary by the court, could be the sole basis for conviction. If a dying declaration is found to be voluntary and made in fit mental condition, it can be relied upon even without any corroboration. However, the Court, while admitting a dying declaration, must be vigilant towards the need for 'Compos Mentis Certificate' from a doctor as well as the absence of any kind of tutoring. A mere omission on the part of the prosecutrix to state the entire factual details of the incident in her very first statement did not make her subsequent statements unworthy, especially when her statements were duly corroborated by other prosecution witnesses including the medical evidence. The contention that the third dying declaration made through gestures lacked credibility and that the same ought to have been videographed, was totally sans substance. The dying declaration recorded on the basis of nods and gestures is not only admissible but also possesses evidentiary value, the extent of which shall depend upon who recorded the statement. All the three dying declarations were consistent with each other and well corroborated with other evidence and the Trial Court as

well as the High Court correctly placed reliance upon the dying declarations of the prosecutrix to record the conviction. [173],[180] and[185]

(ix) The dying declaration of the prosecutrix, which is highly reliable, clearly established the horrendous use of iron rods by the Accused persons. The factum of insertion of iron rods in the private parts of the prosecutrix was also fortified by the scientific evidence. Merely because the injuries sustained by the informant were opined to be of simple nature, the use of iron rods could not be doubted. The informant's omission to state the factum of use of iron rods in his complaint or MLC was not fatal to the case of the prosecution. Merely because no injuries to the uterus of the victim were noticed, that did not lead to the conclusion that iron rod was not used. [195],[196] and[198]

(x) In order to establish a clear link between the accused persons and the incident at hand, the prosecution also adduced scientific evidence in the form of DNA, fingerprint and bite mark analysis. If the quality control is maintained, it is treated to be quite accurate and as the same was established. [225] and[230]

(xi) Forensic Odontology has established itself as an important and indispensable science in medico-legal matters and expert evidence through various reports which have been utilized by courts in the administration of justice. In the case at hand, the report was wholly credible because of matching of bite marks with the tooth structure of the Accused persons and there was no reason to view the same with any suspicion. [242]

(xii) There existed contradictions in the statements of the defence witnesses produced on behalf of 5th Accused. It is settled in law that while raising a plea of 'alibi', the burden squarely lies upon the accused person to establish the plea convincingly by adducing cogent evidence. The plea of 'alibi' that 4th Accused and 5th Accused had attended the alleged musical programme in the evening of 16.12.2012 was rightly rejected by the Trial Court which was given the stamp of approval by the High Court. [251] and[266]

(xiii) Conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. Moreover, conspiracy being a continuing offence continues to subsist till it is executed or rescinded or frustrated by the choice of necessity. The presence of P.W. 82 in the bus prior to the boarding of the bus by the informant and the victim and the presence of all the Accused in the bus was established by the prosecution. [283] and[294]

(xiv) The prosecution established that the Accused were associated with each other. The criminal acts done in furtherance of conspiracy was established by the sequence of events and the conduct of the Accused. The chain of events described by the prosecutrix in her dying declarations coupled with the testimonies of the other witnesses established that as soon as the informant and the prosecutrix boarded the bus, the Accused persons formed an agreement to commit heinous offences against the victim. Forcefully having sexual intercourse with the prosecutrix, one after the other, inserting iron rod in her private parts, dragging her by her hair and then throwing her out of the bus all established the common intent of the Accused to rape and murder the prosecutrix. The Trial Court rightly recorded that the prosecutrix's alimentary canal from the level of duodenum upto 5 cm of anal

sphincter was completely damaged. It was beyond repair. Causing of damage to the jejunum was indicative of the fact that the rod was inserted through the vagina and/or anus upto the level of jejunum. Further, septicemia was the direct result of multiple internal injuries. Moreover, the prosecutrix also maintained in her dying declaration that the Accused persons were exhorting that the prosecutrix had died and she be thrown out of the bus. Ultimately, both the prosecutrix as well as the informant were thrown out of the moving bus through the front door by the Accused after having failed to throw them through the rear door. The conduct of the Accused in committing heinous offences with the prosecutrix in concert with each other and thereafter throwing her out of the bus in an unconscious state alongwith the informant unequivocally brought home the charge Under Section 120B in case of each of them. The criminal acts done in furtherance of the conspiracy was evident from the acts and also the words uttered during the commission of the offence. Therefore, the Trial court and the High Court correctly considered the entire case on the touchstone of well-recognised principles for arriving at the conclusion of criminal conspiracy. The relevant evidence on record led to a singular conclusion that the Accused persons were liable for criminal conspiracy and their confessions to counter the same deserved to be repelled. [300] and[303]

(xv) The present Court concluded that the evidence of the informant was unimpeachable and it deserved to be relied upon. The Accused persons alongwith the juvenile in conflict with law were present in the bus when the prosecutrix and her friend got into the bus. There was no reason to disregard the CCTV footage, establishing the description and movement of the bus. The arrest of the Accused persons from various places at different times was proved by the prosecution. The personal search, recoveries and the disclosure leading to recovery were in consonance with law and the assail of the same on the counts of custodial confession made under torture and other pleas were highly specious pleas and they did not remotely create a dent in the said aspects. The contention raised by the Accused persons that the recoveries on the basis of disclosure were a gross manipulation by the investigating agency and deserved to be thrown overboard did not merit acceptance. The relationship between the parties having been clearly established, their arrest gains more credibility and the involvement of each accused gains credence. The dying declarations, three in number, do withstand close scrutiny and they were consistent with each other. The stand that the deceased could not have given any dying declaration because of her health condition has to be repelled because the witnesses who stated about the dying declarations stood embedded to their version and nothing was brought on record to discredit the same. That apart, the dying declaration by gestures was proved beyond reasonable doubt. There was no justification to think that the informant and the deceased would falsely implicate the Accused and leave the real culprits. The dying declarations made by the deceased received corroboration from the oral and documentary evidence and also enormously from the medical evidence. The DNA profiling, which was done after taking due care for quality, proved to the hilt the presence of the Accused in the bus and their involvement in the crime. The submission that certain samples were later on taken from the Accused and planted on the deceased to prove the DNA aspect was noted only to be rejected because it had no legs to stand upon. The argument that the transfusion of blood had the potentiality to give rise to two categories of DNA or two DNAs was farthest from truth and there was no evidence on that score. On the contrary, the evidence in exclusivity points to the matching of the DNA of the deceased with that of the Accused on many aspects. The evidence brought on record with regard to finger prints was

absolutely impeccable and the Trial court and the High Court correctly placed reliance on the same and that there was no reason to disbelieve the same. The scientific evidence relating to odontology showed how far the Accused proceeded and where the bites were found and it was extremely impossible to accept the submission that it had been a manipulation by the investigating agency to rope in the Accused persons. The evidence brought on record as regards criminal conspiracy stands established. The brutal, barbaric and diabolic nature of the crime was evincible from the acts committed by the Accused persons. The aggravating circumstances outweigh the mitigating circumstances now brought on record. Therefore, the High Court correctly confirmed the death penalty. [304],[356] and[357]

R. Banumathi, J. - concurring view:

(xvi) Persisting notion that the testimony of victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood. Ours is a conservative society and not a permissive society. Ordinarily a woman, more so, a young woman will not stake her reputation by levelling a false charge, concerning her chastity. It is well-settled that conviction can be based on the sole testimony of the prosecutrix if it is implicitly reliable and there is a ring of truth in it. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not requirement of law but a guidance of prudence under given circumstances. [375] and[377]

(xvii) In cases where there are more than one dying declarations, the Court should consider whether they are consistent with each other. If there are inconsistencies, the nature of the inconsistencies must be examined as to whether they are material or not. In cases where there are more than one dying declaration, it is the duty of the Court to consider each one of them and satisfy itself as to the voluntariness and reliability of the declarations. Mere fact of recording multiple dying declarations does not take away the importance of each individual declaration. Court has to examine the contents of dying declaration in the light of various surrounding facts and circumstances. [390]

(xviii) When a dying declaration is recorded voluntarily, pursuant to a fitness report of a certified doctor, nothing much remains to be questioned unless, it is proved that the dying declaration was tainted with animosity and a result of tutoring. Though there was time gap between the declarations, all the three dying declarations were consistent with each other and there were no material contradictions. All the three dying declarations depicted truthful version of the incident, particularly the detailed narration of the incident concerning the rape committed on the victim, insertion of iron rod and the injuries caused to her vagina and rectum, unnatural sex committed on the victim and throwing the victim and the informant out of the moving bus. All the three dying declarations being voluntary, consistent and trustworthy, satisfied the test of reliability. The dying declarations were well-corroborated by medical and scientific evidence adduced by the prosecution. Moreover, the same was amply corroborated by the testimony of eye witness-the informant. The dying declaration is amply corroborated by medical evidence. The dying declarations well corroborated by medical and scientific evidence strengthened the case of the prosecution by conclusively connecting the Accused with the crime. [397],[398],[402],[403] and[409]

(xix) The computer generated electronic record in evidence, admissible at a trial is proved in the manner specified in Section 65B of the Evidence Act. Sub-section (1) of Section 65 of the Evidence Act makes electronic records admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in Sub-section (2) of Section 65B of the Evidence Act. When those conditions are satisfied, the electronic record becomes admissible in any proceeding without further proof or production of the original, as evidence of any of the contents of the original or any fact stated therein of which direct evidence is admissible. Secondary evidence of contents of document can also be led Under Section 65 of the Evidence Act. [415]

(xx) Section 25 of the Indian Evidence Act speaks of a confession made to a police officer, which shall not be proved as against a person accused of an offence. Section 26 of the Evidence Act also speaks that no confession made by the person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Sections 25 and 26 of the Evidence Act put a complete bar on the admissibility of a confessional statement made to a police officer or a confession made in absentia of a Magistrate, while in custody. Section 27 of the Evidence Act is by way of a proviso to Sections 25 and 26 of the Evidence Act and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the Accused. [433]

(xxi) DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. Meeting of minds for committing an illegal act is sine qua non of the offence of conspiracy. It is also obvious that meeting of minds, thereby resulting in formation of a consensus between the parties, can be a sudden act, spanning in a fraction of a minute. It is neither necessary that each of the conspirators take active part in the commission of each and every conspiratorial act, nor it is necessary that all the conspirators must know each and every details of the conspiracy. [446] and[453]

(xxii) The most important aspect of the offence of conspiracy is that apart from being a distinct statutory offence, all the parties to the conspiracy are liable for the acts of each other and as an exception to the general law in the case of conspiracy intent i.e. mens rea alone constitutes a crime. There was ample evidence proving the acts, statements and circumstances, establishing firm ground to hold that the Accused who were present in the bus were in prior concert to commit the offence of rape. The prosecution established that the Accused were associated with each other. The criminal acts done in furtherance of conspiracy, was established by the sequence of events and the conduct of the Accused. Existence of conspiracy and its objects could be inferred from the chain of events. The chain of events described by the victim in her dying declarations coupled with the testimony of the informant established that as soon as the informant and the victim boarded the bus, the Accused switched off the lights of the bus. Few Accused pinned down the informant and others committed rape on the victim in the back side of the bus one after the other. The

Accused inserted iron rods in the private parts of the prosecutrix, dragging her holding her hair and then threw her outside the bus. The victim also maintained in her dying declaration that the Accused persons were exhorting that the victim died and she be thrown out of the bus. Ultimately, both the victim and the informant were thrown out of the moving bus through the front door, having failed to throw them through the rear door. The chain of action and the act of finally throwing the victim and the informant out of the bus showed that there was unity of object among the accused to commit rape and destroy the evidence thereon. [455] and[459]

(xxiii) Under Section 235(2) Code of Criminal Procedure, 1973 where the Accused is convicted, save in cases of admonition or release on good conduct, the Judge shall hear the Accused on the question of sentence and then pass sentence in accordance with law. Section 235(2) of Code of Criminal Procedure, 1973 imposes duty on the court to hear the Accused on the question of sentence and then pass sentence on him in accordance with law. The only exception to the said rule is created in case of applicability of Section 360 of Code of Criminal Procedure, 1973 i.e. when the court finds the Accused eligible to be released on probation of good conduct or after admonition. Section 354 of Code of Criminal Procedure, 1973 specifies the language and contents of judgment, while delivering the judgment in a criminal case. Section 354(3) of Code of Criminal Procedure, 1973 deals with judgments where conviction is for an offence punishable with death penalty or in the alternative with imprisonment for life. Section 354(3) of Code of Criminal Procedure, 1973 mandates that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence. [467] and[468]

(xxiv) Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the Courts may do injustice to the society at large. Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang-rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the informant naked in the cold wintery night and trying to run the bus over them. The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflected the threat to which the society would be posed to, in case the Accused are not appropriately punished. There was no scope of reform. The horrific acts reflecting the in-human extent to which the Accused could go to satisfy their lust, being completely oblivious, not only to the norms of the society, but also to the norms of humanity. The acts committed so shook the conscience of the society. The circumstances stated by the Accused were too slender to be treated as mitigating circumstances. Offences against women are not a women's issue alone but, human rights issue. [498],[500] and[507]

JUDGMENT

Dipak Misra, J.

1. The cold evening of Delhi on 16th December, 2012 could not have even remotely planted the feeling in the twenty-three year old lady, a para-medical student, who had gone with her friend to watch a film at PVR Select City Walk Mall, Saket, that in the next few hours, the shattering cold night that was gradually stepping in would bring with it the devastating hour of darkness when she, alongwith her friend, would get into a bus at Munirka bus stand to be dropped at a particular place; and possibly could not have imagined that she would be a prey to the savage lust of a gang of six, face brutal assault and become a playful thing that could be tossed around at their wild whim and her private parts would be ruptured to give vent to their pervert sexual appetite, unthinkable and sadistic pleasure. What the victims had not conceived of, it all happened, as the chronology of events would unroll. The attitude, perception, the beastial proclivity, inconceivable self-obsession and individual centralism of the six made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide. The death took place at a hospital in Singapore where she had been taken to with the hope that her life could be saved.

2. The friend of the girl survived in spite of being thrown outside the bus along with the girl and the attempt of the accused-Appellants to run over them became futile as they, by their slight movement, could escape from being crushed under the bus, and the Appellants left them thinking that they were no more alive. Lying naked, as the clothes were removed from their bodies, they shouted for help and as good fortune would have it, the night patrolling vehicle, a motor cycle, arrived and the said man, Raj Kumar, P.W. 72, gave the shirt to the boy and contacted the control room from which a Bolero patrol van came and they brought a bed sheet and tore it into two parts and gave a piece to each of the victims so that they could cover themselves and feel civil. The PCR van took the victims to the Safdarjung Hospital where treatment commenced.

3. The present case is one where there can be no denial that the narrative is long, the investigation has been cautious and to bring home the charge, modern and progressive scientific methods have been adopted. Mr. Siddharth Luthra, learned Senior Counsel for the Respondent-State, has made indefatigable endeavour to project that the investigation is flawless and exemplary; and Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel for the Appellants, have severely criticized it as faulty on many a score and that it is completely biased; and Mr. Sanjay R. Hegde, learned Senior Counsel, the friend of the Court, in his own way, has highlighted that the investigation is not only flawed but also unreliable which deserves chastisement and warrants rejection. Many facets of the investigation that pertain to recording of dying declaration, recording of statements of witnesses Under Section 161 of the Code of Criminal Procedure, the medical examination, holding of the test identification parade, the manner and method of search and seizure and the procedure of arrest have been seriously commented upon. That apart, criticism is advanced from many a spectrum to strengthen the stance that it does not meet the standard and test determined by law. Needless to say, the factual score and the investigation have to withstand the test of reliability and acceptability. The appreciation of evidence brought on record requires to be appositely scrutinized to adjudge the fact whether the Appellants are guilty of their culpability or there has been public pressure, as alleged, to falsely implicate the Appellants or to treat them as guinea pigs to save others and accept the hypothesis that the prosecution has booked them at the instance of some political executives or to save a situation which a disturbed society perceives as a collective catastrophe on the

paradigm of social stability and to sustain its faith in the investigation to keep the precept of rule of law alive. In essence, the submission is that the whole exercise, namely, investigation and trial, has been carried out with the sole purpose for the survival of the prosecuting agency. We have stated in the beginning that Mr. Sharma and Mr. Singh appearing for the Appellants commenced their submission with all the vehemence and sensitivity at their command to strike at the root of the prosecution branding it as suspicious, absolutely unreliable, apathetic to the concept of individual dignity and engaged in maladroit effort to book the vulnerable and the innocent so as to disguise and cover their inefficiency to catch the real culprits. In the course of our deliberation, we shall dwell upon the same and keenly scrutinize the justifiability of the aforesaid criticism.

The Prosecution Narrative

4. Presently, we shall advert to the exposition of facts. The prosecution case, as projected, is that on 16.12.2012, the deceased, 'Nirbhaya' (not her real name), had gone with her friend, the informant, P.W. 1, to the PVR situated in Select City Walk Mall, Saket to watch a movie. After the show was over, about 8:30 p.m., they took an auto and reached Munirka bus stand wherefrom they boarded a white coloured chartered bus [DL-1P-C-0149, Ext. P1] which was bound to Dwarka/Palam Road, as a boy in the bus was calling for commuters for the said destination. As per the version of the informant, P.W. 1, the friend of the prosecutrix, the bus had yellow and green lines/stripes and the word "Yadav" was written on it. After both of them had entered the bus, they noticed that six persons were already inside the bus, four in the cabin of the driver and two behind the driver's cabin. The deceased and the informant sat on the left side in the row of two-seaters and paid the fare of twenty rupees as demanded. Before they could get the feeling of a safe journey (though not a time-consuming journey), a feeling of lonely suffocation and a sense of danger barged in, for the accused persons did not allow anyone else to board and the bus moved and the lights inside the bus were put off. With the lights being put off, the darkness and the fear of the unexpected darkness ruled. A few minutes later, three persons (who have been identified as accused Ram Singh, Akshay and a young boy, who has been treated as a juvenile in conflict with law) came out of the driver's cabin and started to abuse P.W. 1. The young companion of the deceased raised opposition to the abuse that led to an altercation which invited the other two who were sitting outside the driver's cabin to join. The spirit to oppose and the duty to save the prosecutrix had to die down and perilously succumb to the assault by the accused persons with the iron rods that caused injuries to his head, both the legs and other parts of the body and the consequence was that he fell on the floor of the bus to hear the painful cries of the lady who, he knew, was being treated as an object, an article for experimentation and prey to the pervert proclivity of the six but could do nothing except to hear unbearable cries made in agony and pain. His spirit was dead, and bound to.

5. As the prosecution story further unfurls, the two accused persons, namely, Pawan and Vinay, pinned the young man down and robbed the victims of their mobiles besides robbing the informant of his purse carrying a Citi Bank credit card, ICICI Bank Debit Card, his identity card issued by his employer-company, metro card, a sum of rupees one thousand, his Titan Watch, a golden ring studded with jewels and a silver ring studded with pearl, black colour Hush Puppies shoes, black colour Numero Uno jeans, a grey colour pullover and a brown colour blazer. As per the version of the prosecution, P.W. 1 was carrying two mobiles and the prosecutrix was carrying only one, and the accused snatched away all the three mobiles.

6. The overpowering was not meant to satisfy the avarice. As the accusations proceed, after the informant was overpowered, as it could only have a singular result, the accused persons, namely, Ram Singh, Akshay and the Juvenile in Conflict with Law (JCL) took the prosecutrix to the rear side of the bus and she was raped by them, one after the other.

7. After committing rape, the accused Ram Singh (since deceased), accused Akshay and the JCL came towards the informant, P.W. 1, and nailed him down; then the accused Vinay and accused Pawan went to the rear side of the bus and committed rape on the prosecutrix, one by one. P.W. 1 noticed that earlier the bus was moving at fast speed but after sometime, he felt that the speed of the bus was reduced and he saw that the accused Mukesh, who was driving the bus, came near him and hit him with the rod and he also went to the rear side of the bus and raped the prosecutrix. The prosecutrix was brutally gang raped by the accused one after the other and she was also subjected to unnatural sex. Her private parts and her internal organs were seriously injured by inserting iron rod and hand in the rectal and vaginal region. As per P.W. 1, he had heard the cries of the prosecutrix like "chod do, bachao". P.W. 1 could hear the prosecutrix shouting in a loud oscillating voice. The prosecutrix was carrying a grey colour purse having an Axis Bank ATM card and other belongings. The accused persons robbed her of her belongings and stripped her. They also took away the clothes of the informant while beating him with iron rods. The accused were exhorting that both the victims be not left alive. The accused then tried to throw both the informant and the prosecutrix out of the moving bus from its rear door but could not open it and so, they brought them to the front door and threw them out of the moving bus at National Highway No. 8, Hotel Delhi 37, Mahipalpur flyover by the side of the road.

8. As indicated earlier, the prosecutrix and P.W. 1 were noticed by P.W. 72, Raj Kumar, who heard the voice of 'bachao, bachao' from the left side of the road near a milestone opposite to Hotel Delhi 37. P.W. 72 saw P.W. 1 and the prosecutrix sitting naked having blood all around. Immediately thereafter, P.W. 72, Raj Kumar, informed P.W. 70, Ram Pal, who was in the Control Room, requesting him to call PCR. P.W. 70, Ram Pal, of EGIS Infra Management India (P) Limited, dialed 100 No. and even asked his other patrolling staff to reach the spot.

9. About 10:24 p.m., P.W. 73, H.C. Ram Chander, who was in charge of PCR van Zebra 54, received information about the incident and the lying of victims in a naked condition near the foot of Mahipalpur fly over towards Dhaula Kuan opposite GMR Gate. P.W. 73 reached the spot and found the victims. He got the crowd dispersed and brought a bottle of water and a bedsheet from the nearby hotel and tore the same into two parts and gave it to both the victims to cover themselves.

Travel to the Safdarjung Hospital

10. About 11:00 p.m., P.W. 73 took the victims to Safdarjung Hospital, New Delhi. On the way to the hospital, the victims gave their names to him and informed that they had boarded a bus from Munirka and that after some time the occupants had started misbehaving and had beaten the boy and taken the girl (prosecutrix) to the rear side of the bus and committed rape on her. Thereafter, they had taken off the clothes of the victims and thrown them naked on the road. While leaving the informant, P.W. 1, in the casualty where he was examined by P.W. 51, Dr. Sachin Bajaj, and his MLC, Ext. P.W. 51/A, was drawn up, P.W. 73 took the prosecutrix to the Gynae ward and got

her admitted there. The MLC of the prosecutrix, P.W. 49/B, was prepared by P.W. 49, Dr. Rashmi Ahuja.

11. P.W. 49, Dr. Rashmi Ahuja, recorded the history of the incident as told to her by the prosecutrix and noted the same in Exhibit P.W. 49/A. As per the version narrated by the prosecutrix to her, it was a case of gang rape in a moving bus by 4-5 persons when the prosecutrix was returning after watching a movie with the informant. She was slapped on her face, kicked on her abdomen and bitten over lips, cheek, breast and vulval region. The prosecutrix remembered intercourse two times and rectal penetration also. She was also forced to have unnatural oral sex but she refused. All this continued for half an hour and then she was thrown off from the moving bus along with her friend.

12. The following external injuries were noted by Dr. Rashmi Ahuja in Ex. P.W. 49/A:

a) Bruise over left eye covering whole of the eye

b) Injury mark (abrasion) at right angle of eye

c) Bruise over left nostril involving upper lip

d) Both lips edematous

e) Bleeding from upper lip present

f) Bite mark over right cheek

g) Left angle of mouth injured (small laceration)

h) Bite mark over left cheek

i) Right breast bite marks below areola present

j) Left breast bruise over right lower quadrant, bite mark in inferior left quadrant

Per abdomen:

i) Guarding & rigidity present

Local examination:

a) Cut mark (sharp) over right labia present

b) A tag of vagina (6 cm in length) hanging outside the introitus

c) There was profuse bleeding from vagina

Per vaginal examination:

i) A posterior vaginal wall tear of about 7 to 8 cm

Per rectal examination:

i) Rectal tear of about 4 to 5 cm., communicating with the vaginal tear.

13. As the evidence brought on record would show, 20 samples of the prosecutrix were taken and sealed with the seal of the hospital and handed over to P.W. 59, Inspector Raj Kumari.

Registration of FIR and the progress thereon

14. At this juncture, it is necessary to state that after the victims were rescued, the informant, P.W. 1, Awninder Pratap, gave his first statement to the police at 3:45 a.m. on 17.12.2012 which culminated into the recording of the FIR at 5:40 a.m. being FIR No. 413/2012 dated 17.12.2012, PS Vasant Vihar Under Section 120B Indian Penal Code and Sections 365/366/376(2)(g)/377/307/302 Indian Penal Code and/or Sections 396/395 Indian Penal Code read with Sections 397/201/412 Indian Penal Code. It was thereafter handed over to S.I. Pratibha Sharma, P.W. 80, for investigation.

15. On the same night, i.e., 16/17.12.2012, the prosecutrix underwent first surgery around 4:00 a.m. The prosecutrix was operated by P.W. 50, Dr. Raj Kumar Chejara, Safdarjung Hospital, New Delhi and his surgery team comprised of Dr. Gaurav and Dr. Piyush. OT notes have been exhibited as Ex. P.W. 50/A and Ex. P.W. 50/B. The second and third surgeries were performed on 19.12.2012 and 23.12.2012 respectively.

16. During the period the prosecutrix was undergoing surgeries one after the other, and when all were concerned about her progress of recovery, the prosecution was carrying out its investigation in a manner that it thought systematic. The first and foremost responsibility of the prosecution was to find out, on the basis of the information given, about the accused persons. That is how the prosecution story un-curtains.

17. On 17.12.2012, supplementary statements of P.W. 1 were recorded by P.W. 80, SI Pratibha Sharma. Based on the description of the bus given by P.W. 1, the offending bus bearing No. DL-1PC-0149 was found parked in Ravi Das Jhuggi Camp, R.K. Puram, New Delhi. P.W. 80 along with P.W. 74, SI Subhash Chand, and P.W. 65, Ct. Kripal Singh, went to the spot and found accused Ram Singh sitting in the bus. On seeing the police, Ram Singh got down from the bus and started running. The police intercepted Ram Singh and he was arrested and interrogated.

18. Personal search was conducted on Ram Singh and his disclosure statement, Ex. P-74/F, was recorded by P.W. 74 and his team. Based on his disclosure statement, P.W. 74, Investigating Officer, SI Subhash Chand, seized the bus, Ex. P1, vide Seizure Memo Ex. P.W. 74/K. P.W. 74 seized the seat cover of the bus of red colour and its curtains of yellow colour. On the bus, 'Yadav' was found written on its body with green and yellow stripes on it. The Investigating Officer also seized the key of the bus, Ex. P-74/2, vide Seizure Memo Ex. P.W. 74/J. The documents of the

bus were also seized. The disclosure statement of Ram Singh, Ex. P.W. 74/F, led to the recovery of his bloodstained clothes, iron rods and debit card of Asha Devi, the mother of the prosecutrix. P.W. 74, Investigating Officer, also recovered ashes and the partly unburnt clothes lying near the bus which was seized vide Memo Exhibit No. P.W. 74/M and Unix Mobile Phone with MTNL Sim, Ex. P-74/5, vide Memo Ex. P/74E. The Investigating Officer prepared the site plan of the place where the bus was parked and from where the ashes were found.

The arrest of the accused persons and seizure of articles

19. The arrest of accused, Ram Singh, also led to the arrest of two other accused persons, namely, accused Vinay Sharma and accused Pawan @ Kaalu. On 18.12.2012, accused Mukesh was apprehended from village Karoli by P.W. 58, SI Arvind Kumar, and was produced before P.W. 80, SI Pratibha Sharma. At the instance of accused Mukesh Singh, a Samsung Galaxy Trend DUOS Blue Black mobile belonging to the informant was recovered. On 23.12.2012, at his instance, P.W. 80 prepared the route chart of the route where Mukesh drove the bus at the time of the incident, Ex. P.W. 80/H. Besides that, he got recovered his bloodstained clothes from the garage of his brother at Anupam Apartment, Saidulajab, Saket, New Delhi. He opted to undergo Test Identification Parade. In the Test Identification Parade conducted by P.W. 17, Sandeep Garg, Metropolitan Magistrate, P.W. 1, identified accused-Mukesh.

20. Accused Pawan was apprehended and arrested about 1:15 p.m. on 18.12.2012 vide memo Ex. P.W. 60/A; his disclosure, Ex. P.W. 60/G, was recorded and his personal search was conducted vide memo Ex. P.W. 60/C. In his disclosure statement, Pawan pointed out Munirka bus stand where the prosecutrix and P.W. 1 boarded the bus and memo Ex. P.W. 68/I was prepared. He also pointed at the spot where P.W. 1 and the prosecutrix were thrown out of the bus and memo Ex. P.W. 68/J was prepared in this regard.

21. Accused Vinay Sharma got recovered his bloodstained clothes, P.W. 1's Hush Puppies leather shoes and the prosecutrix's mobile phone, Nokia Model 3110 of black grey colour. Further recoveries were made pursuant to his supplementary disclosure. Similarly, accused Pawan Kumar got recovered from his jhuggi his bloodstained clothes, shoes and also a wrist watch make Sonata and Rs. 1000/- robbed from P.W. 1.

22. On 21.12.2012, accused Akshay was also arrested from Village Karmalahang, P.S. Tandwa, Aurangabad, Bihar. His disclosure statement was recorded. He led to his brother's house in village Naharpur, Gurgaon, Haryana and got recovered his bloodstained clothes. A ring belonging to P.W. 1, two metro cards and a Nokia phone with SIM of Vodafone Company was also recovered from Akshay. Akshay also opted to undergo TIP and was positively identified by P.W. 1. The mobile phones of the accused persons were seized and call details records with requisite certificates Under Section 65-B of Indian Evidence Act were obtained by the police.

23. After getting arrested, all the accused were medically examined. The MLCs of all the accused persons show various injuries on their person; viz., in the MLC, Ex. P.W. 2/A, of accused Ram Singh, P.W. 2, Dr. Akhilesh Raj, has opined that the injuries mentioned at point Q to P-1 could possibly be struggle marks. Similar opinions were received in respect of other accused persons. P.W. 7, Dr. Shashank Pooniya, has opined that the injuries present on the body of accused Akshay

were a week old and were suggestive of struggle as per MLC, Ex. P.W. 7/A. MLC, Ex. P.W. 7/B, pertaining to accused Pawan shows that he had suffered injuries on his body which were simple in nature. The MLC, Ex. P.W. 7/C, of accused Vinay Sharma proved that he too suffered injuries, simple in nature, 2 to 3 days old, though injury No. 8 was claimed to be self inflicted by the accused himself.

Further treatment of the victim and filing of chargesheet

24. While the arrest took place, as indicated earlier, the victim underwent second and third surgeries on 19.12.2012 and 23.12.2012 respectively. The second surgery was performed on the prosecutrix on 19.12.2012 by P.W. 50, Dr. Raj Kumar Chejara, along with his operating team consisting of Prof. Sunil Kumar, Dr. Pintu and Dr. Siddharth. Dr. Aruna Batra and Dr. Rekha Bharti were present along with the anaesthetic team. The clinical notes, Ex. P.W. 50/C, and notes prepared by the Gynaecology team, Ex. P.W. 50/D, can be referred to in this regard. The prosecutrix was re-operated on 23.12.2012 for peritoneal lavage and placement of drain under general anaesthesia and the notes are exhibited as Ex. P.W. 50/E.

25. As the condition of the prosecutrix did not improve much, the prosecution thought it appropriate to record the statements of the prosecutrix. The said statements have been conferred the status of dying declaration. As is noticeable from the evidence, P.W. 49 also deposed that certain exhibits were collected for examination such as outer clothes, i.e., sweater, sheet covering the patient; inner clothes, i.e., Sameej torned; dust; grass present in hairs, dust in clothes; debris from in between fingers; debris from nails; nail clippings; nail scrapings; breast swab; body fluid collection (swab from saliva); combing of pubic hair; matted pubic hair, clipping of pubic hair; cervical mucus collection; vaginal secretions; vaginal culture; washing from vaginal; rectal swab; oral swab; urine and oxalate blood vial; blood samples, etc.

26. On 21.12.2012, on being declared fit, the second dying declaration was recorded by P.W. 27, Smt. Usha Chaturvedi, Sub-Divisional Magistrate. This dying declaration is an elaborate one where the prosecutrix has described the incident in detail including the insertion of rods in her private parts. She also stated that the accused were addressing each other with names like, "Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay".

27. On 25th December, 2012, at 1:00 p.m., P.W. 30, Shri Pawan Kumar, Metropolitan Magistrate, went to the hospital to record the dying declaration of the prosecutrix. The attending doctors opined that the prosecutrix was not in a position to speak but she was otherwise conscious and responded by way of gestures. Accordingly, P.W. 30 put questions in such a manner as to enable her to narrate the incident by way of gestures or writing. Her statement, Ex. P.W. 30/D, was recorded by P.W. 30 in the form of dying declaration by putting her questions in the nature of multiple choice questions. The prosecutrix gave her statement/dying declaration through gestures and writings, Exhibit P.W. 30/D, the contents of which will be discussed later.

28. At this juncture, the cure looked quite distant. The health condition was examined on 26th December 2012 by a team of doctors comprising of Dr. Sandeep Bansal, Cardiologist, Dr. Raj Kumar Chejara, Dr. Sunil Kumar, Dr. Arun Batra and Dr. P.K. Verma and since the condition of the prosecutrix was critical, it was decided that she be shifted abroad for further treatment and

fostering oasis of hope on 27th December, 2012, she was shifted to Mt. Elizabeth Hospital, Singapore, for her further treatment. The hope and expiration became a visible mirage as the prosecutrix died on 29th December, 2012 at Mt. Elizabeth Hospital, Singapore. Dr. Paul Chui, P.W. 34, Forensic Pathologist, Health Sciences Authority, Singapore, deposed that her exact time of death was 4:45 a.m. on 29th December, 2012. The death occurred at Mt. Elizabeth Hospital and the cause of her death was sepsis with multiple organ failure following multiple injuries. The original post mortem report is Ex. P.W. 34/A and its scanned copy is Ex. P.W. 34/B; the Toxicology Report dated 4th January, 2013 is Exhibit P.W. 34/C. In the post-mortem report, Ex. P.W. 34/A, besides other serious injuries, various bite marks have been observed on her face, lips, jaw, rear ear, on the right and left breasts, left upper arm, right lower limb, right upper inner thigh (groin), right lower thigh, left thigh lateral and left leg lower anterior.

29. It is apt to note here that during the course of investigation (keeping in mind that the vehicle was identified), the investigating agency went around to collect the electronic evidence. A CCTV footage produced by P.W. 25, Rajender Singh Bisht, in a CD, Ex. P.W. 25/C-1 and P.W. 25/C-2, and the photographs, Ex. P.W. 25/B-1 to Ex. P.W. 25/B-7, were collected from the Mall, Select City Walk, Saket to ascertain the presence of P.W. 1 and the prosecutrix at the Mall. The certificate Under Section 65-B of the Indian Evidence Act, 1872 (for short, "Evidence Act") with respect to the said footage is proved by P.W. 26, Shri Sandeep Singh, vide Ex. P.W. 26/A. Another important evidence is the CCTV footage of Hotel Delhi 37 situated near the dumping spot. The said footage showed a bus matching the description given by the informant at 9:34 p.m. and again at 9:53 p.m. The said bus had the word "Yadav" written on one side. Its exterior was of white colour having yellow and green stripes and its front tyre on the left side did not have a wheel cap. The description of the bus was affirmed by P.W. 1's statement. The CCTV footage stored in the pen drive, Ex. P-67/1, and the CD, Ex. P-67/2, were seized by the I.O. vide seizure memo Ex. P.W. 67/A from P.W. 67, Pramod Kumar Jha, the owner of Hotel Delhi 37. The same were identified by P.W. 67, Pramod Jha, P.W. 74, SI Subhash, and P.W. 76, Gautam Roy, from CFSL during their examination in Court. P.W. 78, SHO, Inspector Anil Sharma, had testified that the said CCTV footage seized vide seizure memo Ex. P.W. 67/A was sent to the CFSL through S.I. Sushil Sawaria and P.W. 77, the MHC(M). Thereafter, on 01.01.2013, the report of the CFSL was received.

30. As the prosecution story would further undrape, in the course of investigation, the test identification parade was carried out. We shall advert to the same at a later stage.

31. We had indicated in the beginning that the investigating team had taken aid of modern methods to strengthen its case. The process undertaken, the method adopted and the results are severely criticized by the learned Counsel for the Appellants to which we shall later on revert to but presently to the steps taken by the investigating agency during investigation. With the intention to cover the case from all possible spheres and to establish the allegations with the proof of conclusivity and not to give any chance of doubt, the prosecution thought that it was its primary duty to ascertain the identity of the accused persons; and for the said purpose, it carried out DNA analysis and fingerprint and bite mark analysis.

Collection of samples and identity of accused persons

32. The blood sample of the informant was collected by Dr. Kamran Faisal, P.W. 15, Safdarjung Hospital, on 25.12.2012 and was handed over to SI Pratibha Sharma, P.W. 80, vide seizure memo Ex. P.W. 15/A by Constable Suresh Kumar, P.W. 42. Similarly, as mentioned earlier, P.W. 49, Dr. Rashmi Ahuja, had collected certain samples from the person of the prosecutrix which are reflected in Ex. P.W. 49/A from point B to B. All the samples were collected by Inspector Raj Kumari, P.W. 59, vide seizure memo Ex. P.W. 59/A and were handed over to P.W. 80, SI Pratibha Sharma, at Safdarjung Hospital in the morning of 17.12.2012. Also the samples of gangrenous bowels of the prosecutrix were taken on 24.12.2012 and were handed over to SI Gajender Singh, P.W. 55, who seized the same vide seizure memo Ex. P.W. 11/A. All the samples were deposited with the MHC(M) and were not tampered with in any manner. A specimen of scalp hair of the prosecutrix was also taken on 24.12.2012 by Dr. Ranju Gandhi, P.W. 29, and was handed over to P.W. 80, SI Pratibha Sharma, vide seizure memo Ex. P.W. 29/A.

33. The accused were also subjected to medical examination and samples were taken from their person which were sent for DNA analysis.

34. DNA analysis was done at the behest of P.W. 45, Dr. B.K. Mohapatra, Sr. Scientific Officer, Biology, CFSL, CBI, and Biological Examination and DNA profiling reports were prepared which are exhibited as Ex. P.W. 45/A-C. The report, after analysing the DNA profiles generated from the known samples of the prosecutrix, the informant, and each of the accused, concluded that:

An analysis of the above shows that the samples were authentic and established the identities of the persons mentioned above beyond reasonable doubt.

35. On 17.12.2012 and 18.12.2012, a team of experts from the CFSL went to Thyagraj Stadium and lifted chance prints from the bus in question, Ex. P-1. On 28.12.2012, P.W. 78, Inspector Anil Sharma of P.S. Vasant Vihar, the then S.H.O. of Police Station Vasant Vihar, requested the Director, CFSL, for taking digital palm prints and foot prints of all the accused persons vide his letter Ex. P.W. 46/C. Pursuant to the said request made by P.W. 78, Inspector Anil Sharma, the CFSL, on 31.12.2012, took the finger/palm prints and foot prints of the accused persons at Tihar Jail. After comparing the chance prints lifted from the bus with the finger prints/palm prints and foot prints of all the accused persons, P.W. 46, Shri A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI submitted his report Ex. P.W. 46/D. In the report, the chance prints of accused Vinay Sharma were found to have matched with those on the bus in question.

36. Bite mark analysis was also undertaken by the investigative team to establish the identity and involvement of the accused persons. P.W. 66, Asghar Hussain, on the instructions of the I.O., S.I. Pratibha Sharma, had taken 10 photographs of different parts of the body of the prosecutrix at SJ Hospital on 20.12.2012 between 4:30 p.m. and 5:00 p.m. which were marked as Ex. P.W. 66/B (Colly.) [10 photographs of 5" x 7" each] and Ex. P.W. 66/C (Colly.) [10 photographs of 8" x 12" each]. P.W. 66 also proved in Court the certificate provided by him in terms of Section 65-B of the Evidence Act in respect of the photographs, Ex. P.W. 66/A. Thereafter, P.W. 18, SI Vishal Choudhary, collected the photographs and the dental models from Safdarjung Hospital on 01.01.2013 and duly deposited the same in the malkhana after he, P.W. 18, had handed them over to the S.H.O. Anil Sharma, P.W. 78. The same were later entrusted to S.I. Vishal Choudhary, P.W. 18 on 02.01.2013, which is proved vide RC No. 183/21/12 and exhibited as Ex. P.W. 77/V. P.W.

71, Dr. Ashith B. Acharya, submitted the final report in this regard which is exhibited as Ex. P.W. 71/C. In the said report, he has concluded that at least three bite marks were caused by accused Ram Singh whereas one bite mark has been identified to have been most likely caused by accused Akshay.

37. It is seemly to note here that on completion of the investigation, the chargesheet came to be filed on 03.01.2013 Under Section 365/376(2)(g)/377/307/395/397/302/396/412/201/120/34 Indian Penal Code and supplementary chargesheet was filed on 04.02.2013.

Charge and examination of witnesses, conviction and awarding of sentence by the trial court

38. After the case was committed to the Court of Session, all the accused were charged for the following offences:

1. Under Section 120B Indian Penal Code;

2. Under Sections 365/366/307/376(2)(g) Indian Penal Code/377 Indian Penal Code read with Section 120-B Indian Penal Code;

3. Under Section 396 Indian Penal Code read with Section 120-B Indian Penal Code and/or;

4. Under Section 302 Indian Penal Code read with Section 120-B Indian Penal Code;

5. Under Section 395 Indian Penal Code read with Section 397 Indian Penal Code read with 120-B Indian Penal Code;

6. Under Section 201 Indian Penal Code read with Section 120-B Indian Penal Code and;

7. Under Section 412 Indian Penal Code.

During the course of trial, accused Ram Singh committed suicide and the proceedings qua him stood abated vide order dated 12.10.2013.

39. It is worthy to mention here that in order to bring home the charge, the prosecution initially examined 82 witnesses and thereafter, the statements of the accused persons were recorded and they abjured their guilt. Accused Pawan Gupta @ Kaalu examined Lal Chand, DW-1, Heera Lal, DW-2, Ram Charan, DW-3, Gyan Chand, DW-4, and Hari Kishan Sharma, DW-16, in support of his plea. Accused Vinay Sharma examined Smt. Champa Devi, DW-5, Hari Ram Sharma, DW-6, Kishore Kumar Bhat, DW-7, Sri Kant, DW-8, Manu Sharma, DW-9, Ram Babu, DW-10, and Dinesh, DW-17, to establish his stand. Accused Akshay Kumar Singh @ Thakur examined Chavinder, DW-11, Sarju Singh, DW-12, Raj Mohan Singh, DW-13, Punita Devi, DW-14, and Sarita Devi, DW-15. As the factual matrix would reveal, subsequently three more prosecution witnesses were examined and on behalf of the defence, two witnesses were examined.

40. Learned Sessions Judge, vide judgment dated 10.09.2013, convicted all the accused persons, namely, Akshay Kumar Singh @ Thakur, Vinay Sharma, Mukesh and Pawan Gupta @ Kaalu

Under Section 120B Indian Penal Code for the offence of criminal conspiracy; Under Section 365/366 Indian Penal Code read with Section 120B Indian Penal Code for abducting the victims with an intention to force the prosecutrix to illicit intercourse; Under Section 307 Indian Penal Code read with Section 120B Indian Penal Code for attempting to kill P.W. 1, the informant; Under Section 376(2)(g) Indian Penal Code for committing gang rape with the prosecutrix in pursuance of their conspiracy; Under Section 377 Indian Penal Code read with Section 120B Indian Penal Code for committing unnatural offence with the prosecutrix; Under Section 302 Indian Penal Code read with Section 120B Indian Penal Code for committing murder of the helpless prosecutrix; Under Section 395 Indian Penal Code for conjointly committing dacoity in pursuance of the aforesaid conspiracy; Under Section 397 Indian Penal Code read with Section 120B Indian Penal Code for the use of iron rods and for attempting to kill P.W. 1 at the time of committing robbery; Under Section 201 Indian Penal Code read with Section 120B Indian Penal Code for destroying of evidence and Under Section 412 Indian Penal Code for the offence of being individually found in possession of the stolen property which they all knew was a stolen booty of dacoity committed by them.

41. After recording the conviction, as aforesaid, the learned trial Judge imposed the sentence, which we reproduce:

(a) The convicts, namely, convict Akshay Kumar Singh @ Thakur, convict Mukesh, convict Vinay Sharma and convict Pawan Gupta @ Kaalu are sentenced to death for offence punishable Under Section 302 Indian Penal Code. Accordingly, the convicts to be hanged by neck till they are dead. Fine of Rs. 10,000/- to each of the convict is also imposed and in default of payment of fine such convict shall undergo simple imprisonment for a period of one month.

(b) for the offence Under Section 120-B Indian Penal Code I award the punishment of life imprisonment to each of the convict and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(c) for the offence Under Section 365 Indian Penal Code I award the punishment of seven years to each of the convict and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(d) for the offence Under Section 366 Indian Penal Code I award the punishment of seven years to each of the convict person and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(e) for the offence Under Section 376(2)(g) Indian Penal Code I award the punishment of life imprisonment to each of the convict person with fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(f) for the offence Under Section 377 Indian Penal Code I award the punishment of ten years to each of the convict person and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(g) for the offence Under Section 307 Indian Penal Code I award the punishment of seven years to each of the convict person and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(h) for the offence Under Section 201 Indian Penal Code I award the punishment of seven years to each of the convict person and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(i) for the offence Under Section 395 read with Section 397 Indian Penal Code I award the punishment of ten years to each of the convict person and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(j) for the offence Under Section 412 Indian Penal Code I award the punishment of ten years to each of the convict person and fine of Rs. 5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

42. Be it noted, the learned trial Judge directed the sentences Under Sections 120B/365/366/376(2)(g)/377/201/395/397/412 Indian Penal Code to run concurrently and that the benefit Under Section 428 Code of Criminal Procedure would be given wherever applicable. He further recommended that appropriate compensation Under Section 357A Code of Criminal Procedure be awarded to the legal heirs of the prosecutrix and, accordingly, sent a copy of the order to the Secretary, Delhi Legal Services Authority, New Delhi, for deciding the quantum of compensation to be awarded under the scheme referred to in Sub-section (1) of Section 357A Code of Criminal Procedure. That apart, as death penalty was imposed, he referred the matter to the High Court for confirmation Under Section 366 Code of Criminal Procedure.

The view of the High court

43. The High Court, vide judgment dated 13.03.2014, affirmed the conviction and confirmed the death penalty imposed upon the accused by expressing the opinion that under the facts and circumstances of the case, imposition of death penalty awarded by the trial court deserved to be confirmed in respect of all the four convicts. As the death penalty was confirmed, the appeals preferred by the accused faced the inevitable result, that is, dismissal.

Commencement of hearing and delineation of contentions

44. As we had stated earlier, the grievance relating to the lodging of FIR and the manner in which it has been registered has been seriously commented upon and criticized by the learned Counsel for the Appellants. Mr. Sharma, learned Counsel for the Appellants - Mukesh and Pawan Kumar Gupta, and Mr. Singh, learned Counsel for the Appellants - Vinay Sharma and Akshay Kumar Singh, have stressed with all the conviction at their command that when a matter of confirmation of death penalty is assailed before this Court, it is the duty of this Court to see every aspect in detail and not to treat it as an ordinary appeal.

45. As the argument commenced with the said note, we thought it appropriate to grant liberty to the learned Counsel for the Appellants to challenge the conviction and the imposition of death

sentence from all aspects and counts and to dissect the evidence and project the irregularities in arrest and investigation. Learned Counsel for the parties argued the matter for considerable length of time and hence, we shall deal with every aspect in detail.

Delayed registration of FIR

46. The attack commences with the registration of FIR and, therefore, we shall delve into the same in detail. P.W. 57, ASI Kapil Singh, the Duty Officer at P.S. Vasant Vihar, New Delhi, on the intervening night of 16/17.12.2012, received information about the incident. He lodged DD No. 6-A, Ex. P.W. 57/A, and passed on the said DD to P.W. 74, SI Subhash Chand, who was on emergency duty that night at P.S. Vasant Vihar. Immediately thereafter, P.W. 57, ASI Kapil Singh, received yet another information qua admission of the prosecutrix and of the informant in Safdarjung Hospital and he lodged DD No. 7-A, Ex. P.W. 57/B, and also passed on the said DD to SI Subhash Chand.

47. P.W. 74, SI Subhash Chand, then left for Safdarjung Hospital where he met P.W. 59, Inspector Raj Kumari, and P.W. 62, SI Mahesh Bhargava. P.W. 59, Inspector Raj Kumari, handed over to him the MLC and the exhibits concerning the prosecutrix as given to her by the treating doctor and P.W. 62, SI Mahesh Bhargava, handed over to him the MLC of the informant. P.W. 74, SI Subhash Chand, then recorded the statement, Ex. P.W. 1/A, of the informant at 1:30 a.m. on 17.12.2012 and made his endorsement, Ex. P.W. 74/A, on it and he gave the rukka to P.W. 65, Ct. Kripal Singh, for being taken to P.S. Vasant Vihar, New Delhi and to get the FIR registered. P.W. 65, Ct. Kripal Singh, then went to P.S. Vasant Vihar, New Delhi and at 5:40 a.m. and gave the rukka to P.W. 57, ASI Kapil Singh, the Duty Officer, who, in turn, recorded the FIR, Ex. P.W. 57/D, made endorsement, Ex. P.W. 57/E, on the rukka and returned it to P.W. 65, Ct. Kripal Singh, who then handed it to P.W. 80, SI Pratibha Sharma, at P.S. Vasant Vihar to whom the investigation was entrusted.

48. SI Subhash Chand, P.W. 74, deposed that the statement of the informant might have been recorded around 3:45 a.m. although P.W. 1 deposed that his statement was recorded at 5:30 a.m. It was submitted that the original statement was recorded by HC Ram Chander, P.W. 73, and the investigation process had already begun around 1:15 a.m. and the subsequent information from the informant which is stated to be the first information was, in fact, crafted after the investigating agency decided on a course of action. It is submitted by the learned Counsel for the Appellants that the delay in the FIR raises serious doubts.

49. Delay in setting the law into motion by lodging of complaint in court or FIR at police station is normally viewed by courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors. Even a long delay can be condoned if the informant has no motive for implicating the accused.

50. In the present case, after the occurrence, the prosecutrix and P.W. 1 were admitted to the hospital at 11:05 p.m.; the victim was admitted in the Gynaecology Ward and P.W. 1, the informant, in the casualty ward. P.W. 74, SI Subhash Chand, recorded the statement of P.W. 1 at

3:45 a.m. After P.W. 1 and the prosecutrix were taken to the hospital for treatment, the statement of P.W. 1 was recorded by P.W. 74, SI Subhash Chand, at 1:37 a.m. and the same was handed over to P.W. 65, Constable Kripal Singh, to P.W. 57, Kapil Singh. In the initial stages, the intention of all concerned must have been to save the victim by giving her proper medical treatment. Even assuming for the sake of argument that there is delay, the same is in consonance with natural human conduct.

51. In this case, there is no delay in the registration of FIR. The sequence of events are natural and in the present case, after the occurrence, the victim and P.W. 1 were thrown out of the bus at Mahipalpur in semi-naked condition and were rescued by P.W. 72, Raj Kumar, and P.W. 70, Ram Pal, both EGIS Infra Management India (P) Limited employees. The victim was seriously injured and was in a critical condition and it has to be treated as a natural conduct that giving medical treatment to her was of prime importance. The admission of P.W. 1 and the victim in the hospital and the completion of procedure must have taken some time. P.W. 1 himself was injured and was admitted to the hospital at 11:05 p.m. No delay can be said to have been caused in examining P.W. 1, the informant.

52. In the context of belated FIR, we may usefully refer to certain authorities in the field. In ***Ram Jag and Ors. v. State of U.P.*** MANU/SC/0150/1973 : (1974) 4 SCC 201 : AIR 1974 SC 606, it was held as that witnesses cannot be called upon to explain every hour's delay and a commonsense view has to be taken in ascertaining whether the first information report was lodged after an undue delay so as to afford enough scope for manipulating evidence. Whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution.

53. In ***State of Himachal Pradesh v. Rakesh Kumar*** MANU/SC/0901/2009 : (2009) 6 SCC 308, the Court repelled the submission pertaining to delay in lodging of the FIR on the ground that the first endeavour is always to take the person to the hospital immediately so as to provide him medical treatment and only thereafter report the incident to the police. The Court in the said case further held that every minute was precious and, therefore, it is natural that the witnesses accompanying the deceased first tried to take him to the hospital so as to enable him to get immediate medical treatment. Such action was definitely in accordance with normal human conduct and psychology. When their efforts failed and the deceased died they immediately reported the incident to the police. The Court, under the said circumstances ruled that in fact, it was a case of quick reporting to the police.

Judged on the anvil of the aforesaid decisions, we have no hesitation in arriving at the conclusion that there was no delay in lodging of the FIR.

Non-mentioning of assailants in the FIR

54. An argument was advanced assailing the FIR to the effect that the FIR does not contain: (i) the names of the assailants either in the MLC, Ex. P.W. 51/A, or in the complaint, Ex. P.W. 1/A, (ii) the description of the bus and (iii) the use of iron rods.

55. As far as the argument that the FIR does not contain the names of all the accused persons is concerned, it has to be kept in mind that it is settled law that FIR is not an encyclopedia of facts and it is not expected from a victim to give details of the incident either in the FIR or in the brief history given to the doctors. FIR is not an encyclopedia which is expected to contain all the details of the prosecution case; it may be sufficient if the broad facts of the prosecution case alone appear. If any overt act is attributed to a particular accused among the assailants, it must be given greater assurance. In this context, reference to certain authorities would be fruitful.

56. In ***Rattan Singh v. State of H.P.*** MANU/SC/0177/1997 : (1997) 4 SCC 161, the Court, while repelling the submission for accepting the view of the trial court took note of the fact that there had been omission of the details and observed that the criminal courts should not be fastidious with mere omissions in the first information statement since such statements can neither be expected to be a chronicle of every detail of what happened nor expected to contain an exhaustive catalogue of the events which took place. The person who furnishes the first information to the authorities might be fresh with the facts but he need not necessarily have the skill or ability to reproduce details of the entire story without anything missing therefrom. Some may miss even important details in a narration. Quite often, the police officer, who takes down the first information, would record what the informant conveys to him without resorting to any elicitatory exercise. It is voluntary narrative of the informant without interrogation which usually goes into such statement and hence, any omission therein has to be considered along with the other evidence to determine whether the fact so omitted never happened at all. The Court also referred to the principles stated in ***Pedda Narayana v. State of A.P.*** MANU/SC/0182/1975 : (1975) 4 SCC 153; ***Sone Lal v. State of U.P.*** MANU/SC/0170/1978 : (1978) 4 SCC 302; ***Gurnam Kaur v. Bakshish Singh*** MANU/SC/0125/1980 : 1980 Supp SCC 567.

57. In ***State of Uttar Pradesh v. Naresh and Ors.*** MANU/SC/0228/2011 : (2011) 4 SCC 324, reiterating the principle, the Court opined that it is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has been falsely implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from the same. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. For the aforesaid purpose reliance was placed upon ***Rotash v. State of Rajasthan*** MANU/SC/8747/2006 : (2006) 12 SCC 64 and ***Ranjit Singh v. State of M.P.*** MANU/SC/0924/2010 : (2011) 4 SCC 336.

58. In ***Rotash*** (supra) this Court while dealing with the omission of naming an accused in the FIR opined that:

14. ...We, however, although did not intend to ignore the importance of naming of an accused in the first information report, but herein we have seen that he had been named in the earliest possible opportunity. Even assuming that PW 1 did not name him in the first information report, we do not find any reason to disbelieve the statement of Mooli Devi, PW 6. The question is as to whether a person was implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case. PW 6 received as many as four injuries.

59. While dealing with a similar issue in ***Animireddy Venkata Ramana*** **v.** ***Public Prosecutor*** MANU/SC/7294/2008 : (2008) 5 SCC 368, the Court held as under:

13. ...While considering the effect of some omissions in the first information report on the part of the informant, a court cannot fail to take into consideration the probable physical and mental condition of the first informant. One of the important factors which may weigh with the court is as to whether there was a possibility of false implication of the Appellants. Only with a view to test the veracity of the correctness of the contents of the report, the court applies certain well-known principles of caution.

Thus, apart from other aspects what is required to be scrutinized is that there is no attempt for false implication, application of principle of caution and evaluation of the testimonies of the witnesses as regards their trustworthiness.

60. In view of the aforesaid settled position of law, we are not disposed to accept the contention that omission in the first statement of the informant is fatal to the case. We are disposed to think so, for the omission has to be considered in the backdrop of the entire factual scenario, the materials brought on record and objective weighing of the circumstances. The impact of the omission, as is discernible from the authorities, has to be adjudged in the totality of the circumstances and the veracity of the evidence. The involvement of the accused persons cannot be determined solely on the basis of what has been mentioned in the FIR.

61. In his statement recorded in the early hours of 17.12.2012, P.W. 1 stated about going to the Select City Walk Mall, Saket alongwith the prosecutrix and boarding the bus. He has also stated about the presence of four persons sitting in the cabin of the bus and two boys sitting behind the cabin and clearly stated about the overt act. He has broadly made reference to the accused persons and also to the overt acts. There are no indications of fabrication in Ex. P.W. 1/A.

62. The victim and P.W. 1 were thrown out of the bus and after some time they were admitted to the hospital. Both the injuries on P.W. 1's person and the gruesome acts against the victim must have put him in a traumatic condition and it would not have been possible for him to recall and narrate the entire incident to the police at one instance. It cannot be said that merely because the names of the accused persons are not mentioned in the FIR, it raises serious doubts about the prosecution case.

Appreciation of the evidence of P.W. 1

63. Having dealt with the contention of delay in lodging of the FIR and omission of names in the FIR on the basis of the first statement of P.W. 1, we may now proceed to appreciate the evidentiary value to be attached to the testimony of P.W. 1 and the contentions advanced in this regard.

64. As per the evidence of P.W. 1, he alongwith the prosecutrix, on the fateful day about 3:30 p.m., took an auto from Dwarka, New Delhi to Select City Walk Mall, Saket, New Delhi, where they watched a movie till about 8:30 p.m. and, thereafter, left the Mall. As they could not get an auto for Dwarka, they hired an auto for Munirka intending to take a bus (route No. 764) thereon. About 9:00 p.m. when they reached Munirka bus stand they boarded a white colour chartered bus and JCL was calling for commuters to Dwarka/Palam Mod. While boarding the bus, P.W. 1 noted that the bus had "Yadav" written on its side; had yellow and green lines/stripes; the entry gate was ahead of its front left tyre; and its front tyre was without a wheel cover. After boarding, he saw that besides the boy (JCL) who was calling for passengers and the driver, two other persons were sitting in the driver's cabin and two persons were seated inside the bus on either side of the aisle. After the bus left the Munirka bus stand, the lights inside the bus were turned off. Then accused Ram Singh, accused Akshay Thakur and the JCL (all three identified later) came towards P.W. 1 and verbally and physically assaulted him. When P.W. 1 resisted them, accused Vinay and accused Pawan were called along with iron rods and all the accused persons started hitting P.W. 1 with the iron rods. When the prosecutrix attempted to call for help, P.W. 1 and the prosecutrix were robbed of their possessions.

65. P.W. 1 was immobilized by accused Vinay and accused Pawan Kumar; while others, viz., accused Ram Singh, Akshay and the JCL took the prosecutrix to the rear side of the bus whereafter P.W. 1 heard the prosecutrix shout out "chod do, bachao" and her cry. After the above, three accused committed the heinous act of raping the prosecutrix, accused Vinay and Pawan then went to the rear side of the bus while the other three pinned down P.W. 1. Thereafter, accused Mukesh (originally driving the bus) hit P.W. 1 with the rod and went to the rear side of the bus. P.W. 1 also heard one of the accused saying "mar gayee, mar gayee". After the incident, P.W. 1 and the prosecutrix were dragged to the front door (because the rear door was jammed) and were pushed out of the moving bus opposite Hotel Delhi 37. After being thrown outside, the bus was turned in such a manner as to crush both of them but P.W. 1 pulled the prosecutrix and himself out of the reach of the wheels of the bus and saved their lives.

66. The statement of the informant, P.W. 1, was recorded by P.W. 74 in the early hours of 17.12.12 and Ex. P.W. 1/A is the complaint. In his chief examination, P.W. 74 deposes that he had given the complaint (rukka) to Ct. Kripal Singh and sent him to the police station at 5:10 a.m. which thereby leaves the time of recording the informant's statement inconclusive. Even if the version of P.W. 74 was to be relied upon and the informant's statement had been recorded by 5:10 a.m., DD entry which forms Ex. P.W. 57/C records that till 5:30 a.m., no punishable offence has been reported to have occurred and information of well-being had been recorded despite the fact that previous DD entries had been recorded on the basis of telephonic conversations between police officers at the hospital, the scene of crime and the control room (both DD entries 6A and 7A had been recorded on the basis of phone conversations). The first supplementary statement was recorded around 7:30 a.m., on 17.12.2012 specifically with respect to the bus in question. In this statement, Ex. P.W. 80/D1, P.W. 1 merely gives a generic description of the bus. However, unlike in Ex. P.W. 1/A, in his supplementary statement, the informant states that the bus was white in

colour with stripes of yellow and green, that there were 3 x 2 seats and that if he remembered anything else, he would reveal the same. At this time, the investigating agency had neither seized the bus nor arrested the accused; the statement of the informant is, therefore, silent on specific details about the same. PW's second supplementary statement, Ex. P.W. 80/D3, was recorded around noon on 17.12.2012 in which the informant, for the first time since the time of the incident, revealed details about the bus in which the crime allegedly occurred (that there was the word "Yadav" written on the side, that the front wheel cover was missing), and also revealed the names of the accused (Ram Singh, one Thakur, one Mukesh/Ramesh, Vinay and Pawan).

67. The learned amicus curiae, Mr. Hegde, submitted that at every stage, P.W. 1 made improvement in his statements. It was submitted that when P.W. 1 was confronted with the omissions Ex. P.W. 1/A, Ex. P.W. 8/D1 and Ex. P.W. 80/D3, he stated that he was unable to talk at the time of recording of his statement due to injury to the tongue. It was submitted that as per Ex. P.W. 51/A, he sustained only simple injury and it does not state that P.W. 1 suffered injury to his tongue. It was further contended that the process of improving and embellishing the informant's statement did not end with recording his statement Under Section 161 Code of Criminal Procedure. On 19.12.2012, the informant made a statement Under Section 164 Code of Criminal Procedure before the Metropolitan Magistrate, Saket Courts. This statement is the most comprehensive and contains details which had been discovered by the prosecution by then such as the names of all the accused (including the name of the JCL for the first time) and details from inside the bus (colour of the seats and curtains). It was contended that the improved version of P.W. 1 renders his evidence unreliable and merely because he is an injured witness, his evidence cannot be accepted.

68. It is urged by Mr. Hegde, learned amicus curiae, that inconsistencies and omissions amounting to contradiction in the testimony of P.W. 1 make him an untrustworthy and unreliable witness. The inconsistencies pointed out by the learned amicus curiae pertain to the number of assailants, the description of the bus and the identity of the accused. As regards the omission, it is contended by him that the said witness had not mentioned about the alleged use of rod in the FIR. He has further submitted that though he has stated that he had been assaulted by the iron rods as per his subsequent statement, yet the said statement is wholly unacceptable since he had sustained only simple injuries.

69. Mr. Hegde, in his further criticism of the evidence of P.W. 1, has put forth that the effort of the prosecution had been to highlight the consistencies instead of explaining the inconsistencies. That apart, submits Mr. Hegde, that the witness has revealed the story step by step including the gradual recognition of the identity of the accused in tandem with the process of investigation and in such a situation, his testimony has to be looked with suspicion.

70. Mr. Sharma, learned Counsel for the Appellants-Mukesh and Pawan Kumar Gupta, and Mr. Singh, learned Counsel for the Appellants - Vinay Sharma and Akshay Kumar Singh, submit that the omissions in the statement of P.W. 1 amount to contradictions in material particulars and such contradictions go to the root of the case and, in fact, materially affect the trial or the very case of the prosecution. Therefore, they submit that the testimony of P.W. 1, who is treated as a star witness, is liable to be discredited. Reliance has been placed on the authorities in ***State Represented by Inspector of Police v. Saravanan and Anr.*** MANU/SC/8113/2008 : (2008) 17 SCC 587 : AIR 2009 SC 152, ***Arumugam v. State Represented by Inspector of Police, Tamil Nadu***

MANU/SC/8108/2008 : (2008) 15 SCC 590 : AIR 2009 SC 331, ***Mahendra Pratap Singh v. State of Uttar Pradesh*** MANU/SC/0279/2009 : (2009) 11 SCC 334 and ***Sunil Kumar Sambhudayal Gupta (Dr.) and Ors. v. State of Maharashtra*** MANU/SC/0947/2010 : (2010) 13 SCC 657 : JT 2010 (12) SC 287.

71. The authorities that have been commended by Mr. Sharma need to be appositely understood. In ***Arumugam*** (supra), the Court was dealing with the issue of acceptance of the version of interested witnesses. It has referred to ***Dalip Singh v. State of Punjab*** MANU/SC/0031/1953 : AIR 1953 SC 364, ***State of Punjab v. Jagir Singh***, ***Baljit Singh and Karam Singh*** MANU/SC/0193/1973 : (1974) 3 SCC 277, ***Lehna v. State of Haryana*** MANU/SC/0075/2002 : (2002) 3 SCC 76, ***Gangadhar Behera and Ors. v. State of Orissa*** MANU/SC/0875/2002 : (2002) 8 SCC 381 and ***State of Rajasthan v. Kalki and Anr.*** MANU/SC/0254/1981 : (1981) 2 SCC 752 and opined that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

72. In ***Saravanan*** (supra), reiterating the principle, the Court held:

18. ...it has been said time and again by this Court that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies.

73. In ***Mahendra Pratap Singh*** (supra), the Court referred to the authority in ***Inder Singh and Anr. v. State (Delhi Administration)*** MANU/SC/0093/1978 : (1978) 4 SCC 161 wherein it has been held thus:

2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect.

In the circumstance of the case, the Court, analyzing the evidence, opined:

62. From the above discussion of the evidence of the eyewitnesses including injured witnesses, their evidence does not at all inspire confidence and their evidence is running in conflict and contradiction with the medical evidence and ballistic expert's report in regard to the weapon of offence, which was different from the one sealed in the police station. The High Court has, in our opinion, disregarded the rule of judicial prudence in converting the order of acquittal to conviction.

74. In ***Sunil Kumar Sambhudayal Gupta*** (supra), while dealing with the issue of material contradictions, the Court held:

30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially after the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State v. Saravanan*)

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide *State of Rajasthan v. Rajendra Singh* MANU/SC/0446/1998 : (2009) 11 SCC 106.)

32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt." (Vide *Mahendra Pratap Singh v. State of U.P.*)

And again:

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so." (See *Syed Ibrahim* v. *State of A.P.* MANU/SC/8237/2006 : (2006) 10 SCC 601 and *Arumugam v. State*)

75. Mr. Luthra, learned Senior Counsel appearing for the Respondent-State, on the other hand, has disputed the stand of the Appellants as regards the discrepancies in the statement of P.W. 1. According to him, the evidence of P.W. 1 cannot be discarded on grounds which are quite specious. The circumstances in entirety are to be appreciated. He has placed reliance on the appreciation of the trial court and contended that the appreciation and analysis are absolutely impeccable. The relied upon paragraph is as follows:

The complainant P.W. 1 in his deposition had corroborated his complaint Ex. P.W. 1/A; his statement Ex. P.W. 80/D-1 recorded Under Section 161 Code of Criminal Procedure; his supplementary statement Ex. P.W. 80/D-3 and his statement Ex. P.W. 1/B recorded Under Section 164 Code of Criminal Procedure; qua his visit to Select City Mall, Saket; then moving to Munirka in an auto; boarding the bus Ex. P1; the incident; throwing them out of the moving bus and attempt of accused to overrun the victims by their bus.

It was argued by the Ld. Defence Counsel that during his cross examination P.W. 1 was confronted with his statement Ex. P.W. 1/A qua the factum of not disclosing in it the user of iron rods; the description of bus, the name of the assailants either in MLC Ex. P.W. 51/A or in his complaint Ex. P.W. 1/A. However, I do not consider such omissions as fatal as it is a settled law that FIR is not an encyclopedia of facts. The victim is not precluded from explaining the facts in his subsequent statements. It is not expected of a victim to disclose all the finer aspects of the incident in the FIR

or in the brief history given to the doctor; as doctor(s) are more concerned with treatment of the victims. More so the victim who suffers from an incident, obviously, is in a state of shock and it is only when we moves in his comfort zone, he starts recollecting the events one by one and thus to stop the victim from elaborating the facts to describe the finer details, if left out earlier, would be too much.

Thus if P.W. 1 had failed to give the description of the bus or of iron rods to the doctor in his MLC Ex. P.W. 51/A or in his complaint Ex. P.W. 1/A it shall not have any fatal effect on the prosecution case. What is fatal is the material omissions, if any.

76. The evidence of P.W. 1 is assailed contending that he is not a reliable witness. During the cross-examination, his evidence was assailed contending that Ex. P.W. 1/A is replete with contradictions and inconsistencies. Taking us through the evidence, Mr. Singh has submitted that in his first statement, Ex. P.W. 1/A, there were lot of omissions and contradictions and the improvements in his subsequent statements render the evidence wholly untrustworthy. The Appellants, in an attempt to assail the credibility of the testimony of P.W. 1, inter alia, raised the contentions: (i) Non-disclosure of the use of iron rod and (ii) the names of the assailants in the MLC in Ex. P.W. 51/A or in Ex. P.W. 1/A. However, the trial court held these assertions as non-fatal to P.W. 1's testimony:

... It is not expected of a victim to disclose all the finer aspects of the incident in the FIR or in the brief history given to the doctor; as doctor(s) are more concerned with treatment of the victims. More so the victim who suffers from an incident, obviously, is in a state of shock and it is only when we move in his comfort zone, he starts recollecting the events one by one and thus to stop the victim from elaborating the facts to describe the finer details, if left out earlier, would be too much.

77. The contentions assailing the evidence of P.W. 1 does not merit acceptance, for at the time when he was first examined his friend (the prosecutrix) was critically injured and he was in a shocked mental condition. The evidence of a witness is not to be disbelieved simply because he is a partisan witness or related to the prosecution. It is to be weighed whether he was present or not and whether he is telling the truth or not.

78. The informant, P.W. 1, in his deposition, has clearly spoken about the occurrence and also corroborated his complaint, Ex. P.W. 1/A. The evidence of P.W. 1 is unimpeachable in character and the roving cross-examination has not eroded his credibility. It is necessary to mention here that P.W. 1 was admitted in the casualty ward of Safdarjung Hospital. As he was injured, he was medically examined by Dr. Sachin Bajaj, P.W. 51, and as per the evidence, Ext. P.W. 51/A, the following injuries were found on his body:

(a) 1 c.m. X 1 c.m. size clean lacerated wound over the vertex of scalp (head injury);

(b) 0.5 X 1 cm size clean lacerated wound over left upper leg;

(c) 1 X 0.2 cm size abrasion over right knee.

79. The injuries found on the person of P.W. 1 and the fact that P.W. 1 was injured in the same occurrence lends assurance to his testimony that he was present at the time of the occurrence along with the prosecutrix. The evidence of an injured witness is entitled to a greater weight and the testimony of such a witness is considered to be beyond reproach and reliable. Firm, cogent and convincing ground is required to discard the evidence of an injured witness. It is to be kept in mind that the evidentiary value of an injured witness carries great weight. In ***Mano Dutt and Anr. v. State of Uttar Pradesh*** MANU/SC/0159/2012 : (2012) 4 SCC 79, it was held as under:

31. We may merely refer to *Abdul Sayeed* v. *State of M.P.* MANU/SC/0702/2010 : (2010) 10 SCC 259 where this Court held as under:

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness.' [Vide *Ramlagan Singh* v. *State of Bihar* MANU/SC/0216/1972 : (1973) 3 SCC 881, *Malkhan Singh* v. *State of U.P.* MANU/SC/0164/1974 : (1975) 3 SCC 311, *Machhi Singh* v. *State of Punjab* MANU/SC/0211/1983 : (1983) 3 SCC 470, *Appabhai* v. *State of Gujarat* 1988 Supp SCC 241, *Bonkya* v. *State of Maharashtra* MANU/SC/0066/1996 : (1995) 6 SCC 447, *Bhag Singh* v. *State of Punjab* MANU/SC/1308/1997 : (1997) 7 SCC 712, *Mohar* v. *State of U.P.* MANU/SC/0808/2002 : (2002) 7 SCC 606, *Dinesh Kumar* v. *State of Rajasthan* MANU/SC/7910/2008 : (2008) 8 SCC 270, *Vishnu* v. *State of Rajasthan* (2009) 10 SCC 477, *Annareddy Sambasiva Reddy* v. *State of A.P.* MANU/SC/0640/2009 : (2009) 12 SCC 546 and *Balraje* v. *State of Maharashtra* MANU/SC/0352/2010 : (2010) 6 SCC 673.]

29. While deciding this issue, a similar view was taken in *Jarnail Singh* v. *State of Punjab* MANU/SC/1584/2009 : (2009) 9 SCC 719 where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under:

'28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa* v. *State of Karnataka* MANU/SC/0053/1995 : 1994 Supp (3) SCC 235 this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P.* v. *Kishan Chand* MANU/SC/0652/2004 : (2004) 7 SCC 629 a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it

should be relied upon (vide *Krishan* v. *State of Haryana* (2006) 12 SCC 459. Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.'

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

To the similar effect is the judgment of this Court in *Balraje* (supra).

80. As is manifest from the evidence, S.I. Pratibha Sharma, P.W. 80, recorded the First Supplementary Statement Under Section 161 Code of Criminal Procedure of the informant, P.W. 1, Awninder Pratap Singh about 7:30 a.m. on 17.12.2012. Thereafter, P.W. 1, the informant, took P.W. 80, S.I. Pratibha Sharma, to the spot from where he and the prosecutrix had boarded the bus.

81. Apart from the injuries sustained, the presence of P.W. 1 is further confirmed by the DNA analysis of:

1. the bloodstained mulberry leaves and grass that were collected from the spot in Mahipalpur where they were thrown off the bus; (Ex. 74/C)

2. the blood stains on Vinay's jacket (Ex. 68/2) (as per Seizure Memo Ex. 68/3), Pawan's sweater (Ex. P.68/6) (as per Ex. P.W. 68/F) and Akshay's jeans (Ex P.68/6) tying them to the incident; (from the trial court judgment); and

3. the unburnt cloth pieces belonging to P.W. 1 that were recovered alongwith the ashes of the prosecutrix's clothing (Ex. PW 74/M).

82. The trial court judgment was fortified by the decisions of this Court in ***Pudhu Raja and Anr. v. State Represented by Inspector of Police*** MANU/SC/0761/2012 : (2012) 11 SCC 196, ***Jaswant Singh v. State of Haryana*** MANU/SC/0236/2000 : (2000) 4 SCC 484 and ***Akhtar and Ors. v. State of Uttaranchal*** MANU/SC/0556/2009 : (2009) 13 SCC 722 on the law of material omissions and contradictions. Concurringly, the High Court too observed that the defence had failed to demonstrate from the informant's testimony such discrepancies, omissions and improvements that would have caused the High Court to reject such testimony after testing it on the anvil of the law laid down by this Court:

325. ...Their throbbing injuries and the rigors of the weather coupled with the state of their minds must have at that point of time brought forth their instinct of survival and self preservation. The desire to have apprehended their assailants and to mete out just desserts to them could not have been their priority. ...

83. In this context, we may fruitfully reproduce a passage from ***State of U.P. v. M.K. Anthony*** MANU/SC/0123/1984 : (1985) 1 SCC 505:

10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. ...

84. In ***Harijana Thirupala v. Public Prosecutor, High Court of A.P.*** MANU/SC/0629/2002 : (2002) 6 SCC 470, it has been ruled that:

11. ...In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses.

85. In ***Ugar Ahir v. State of Bihar*** MANU/SC/0333/1964 : AIR 1965 SC 277, a three-Judge Bench held:

7. The maxim falsus in uno, *falsu in omnibus* (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest.

86. In ***Krishna Mochi v. State of Bihar*** MANU/SC/0327/2002 : (2002) 6 SCC 81, the Court ruled that:

32. ...The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming

large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find that this Court in recent times has conscientiously taken notice of these facts from time to time".

87. In ***Inder Singh*** (supra), Krishna Iyer, J. laid down that:

Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes.

88. In the case of ***State of U.P. v. Anil Singh*** MANU/SC/0503/1988 : 1988 (Supp.) SCC 686, it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.

89. In ***Mohan Singh and Anr. v. State of M.P.*** MANU/SC/0035/1999 : (1999) 2 SCC 428, this Court has held:

11. The question is how to test the veracity of the prosecution story especially when it is with some variance with the medical evidence. Mere variance of the prosecution story with the medical evidence, in all cases, should not lead to the conclusion, inevitably to reject the prosecution story. Efforts should be made to find the truth, this is the very object for which courts are created. To search it out, the courts have been removing the chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit, to find out the truth. It means on one hand, no innocent man should be punished but on the other hand, to see no person committing an offence should get scot-free. If in spite of such effort, suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. For this, one has to comprehend the totality of the facts and the circumstances as spelled out through the evidence, depending on the facts of each case by testing the credibility of eyewitnesses including the medical evidence, of course, after excluding those parts of the evidence which are vague and uncertain. There is no mathematical formula through which the truthfulness of a prosecution or a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demeans (sic), clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So courts have to proceed further and make genuine efforts within the judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt.

90. Keeping the aforesaid aspects in view, we shall now proceed to test the submission of the learned Counsel for the Appellants and the learned amicus curiae on the issue whether the testimony of P.W. 1 deserves acceptance being reliable or not. It is no doubt true that in the earlier statement of P.W. 1, that is, Ex. P.W. 1/A, there are certain omissions; but the main thing to be

seen is whether the omissions go to the root of the matter or pertain to insignificant aspects. The evidence of P.W. 1 is not to be disbelieved simply because there were certain omissions. The trial Court as well as the High Court found his evidence credible and trustworthy and we find no reason to take a different view.

91. The case of the prosecution is attacked contending that P.W. 1 is a planted witness and that he keeps on improving his version. It is submitted that P.W. 1 is not reliable as had he been present at the time of occurrence, he would have endeavoured to save the victim and the nature of injuries as mentioned in Ex. P.W. 51/A on the person of P.W. 1 raises serious doubt about his presence at the time of occurrence.

92. The prosecutrix and P.W. 1 were surrounded and attacked by at least six accused persons. As narrated by P.W. 1, he was pinned down by two of the assailants while the others committed rape on the prosecutrix on the rear side of the bus. The accused persons were in a group and were also armed with iron rods. P.W. 1 was held by them. It would not have been possible for P.W. 1 to resist the number of accused persons and save the prosecutrix. The evidence of P.W. 1 cannot be doubted on the ground that he had not interfered with the occurrence. The improvements made in the supplementary statement need not necessarily render P.W. 1's evidence untrustworthy more so when P.W. 1 has no reason to falsely implicate the accused.

93. Learned Counsel for the State has highlighted that the version of P.W. 1 is absolutely consistent and the trial court as well as the High Court has correctly relied upon his testimony. He has drawn our attention to the version of P.W. 1 in the FIR, the statement recorded Under Section 164 Code of Criminal Procedure and his testimony before the trial court. We have given anxious consideration and perused the FIR, supplementary statements recorded Under Section 164 Code of Criminal Procedure and appreciated the evidence in court and we find that there is no justification or warrant to treat the version of the witness as inconsistent. The consistency is writ large and the witness, as we perceive, is credible.

94. Mr. Luthra, learned Senior Counsel, further contested the argument advanced on behalf of the Appellants as regards the discrepancies so far as P.W. 1 is concerned. As regards the items stolen, it is recorded in the FIR that the accused persons stole the informant's Samsung Galaxy Mobile phone bearing 7827917720 and 9540034561 and his wallet containing Rs. 1000, ICICI debit card, Citi Bank Credit Card, ID Card, one silver ring, one gold ring and took off all his clothes, i.e., khakhi coloured blazer, grey sweater, black jeans, black Hush Puppies shoes and they also stole the prosecutrix's mobile phone with number 9818358144. His statement recorded Under Section 164 Code of Criminal Procedure states that the accused snatched the Samsung Galaxy S-Duos Mobile, one more mobile phone of Samsung, one purse with Rs. 1000, one Citibank credit card, ICICI Debit Card, Company I-Card, Delhi Metro Card and also snatched black jeans, one silver ring, one gold ring, Hush Puppies shoes. They also snatched the prosecutrix's Nokia mobile phone and grey colour purse and both the wrist watches. Before the trial court, he deposed that they snatched both the rings, shoes, purse containing cards and cash, socks and belt; they took off all his clothes and left him in an underwear; the accused had also taken off all the prosecutrix's clothes and snatched all her belongings including grey purse containing Axis bank card. P.W. 1 also identified Hush Puppies shoes, Ex. P-2, Sonata watch, Ex. P-3, metro card, Ex. P-5, Samsung Galaxy Duos, Ex. P-6, and currency notes, Ex. P-7. As regards the weapon of assault, in the FIR

and in the Section 164 statement, "rod" was recorded as weapon of assault and in his testimony before the trial court, P.W. 1 deposed that the weapon of assault was "iron rods". So far as throwing from the bus is concerned, it is recorded in the FIR that the other accused persons told the driver to drive the bus at a fast speed and then tried to throw the informant from the back door of the bus, however, the back door of the bus did not open. Then they threw both the informant and the prosecutrix from the moving bus near NH 8 Mahipalpur on the side of the road. His statement recorded Under Section 164 Code of Criminal Procedure states that the bus driver was driving the bus at a fast speed on being told by the other accused and he heard them saying that the girl had died and to throw her off the bus. They then took the informant and the prosecutrix to the rear door of the bus but could not open the door and, therefore, dragged them to the front door of the bus and threw them out. The bus driver turned the bus in such a manner after throwing them, that if the informant had not pulled the prosecutrix, then the bus would have run over her. P.W. 1 has deposed before the trial court that he heard one of the accused saying "mar gayee, mar gayee"; the accused were exhorting that the informant and the prosecutrix should not be left alive; the accused persons pulled the informant near the rear door and put the prosecutrix on him. The rear door was closed, so they dragged both the informant and the prosecutrix to the front door; they were thrown off opposite Hotel Delhi 37; after they were thrown, the accused persons turned the bus and tried to crush them under the wheels. As regards the naming/description of the accused, the FIR recorded that the accused were aged between 25-30 years; one of them had a flat nose and was the youngest; one of them wore a red banian and they were wearing pant and shirt; and the accused were named as Ram Singh, Thakur, Mukesh, Vinay and Pawan. In the statement, it was recorded that he saw a dark coloured man who was being called "Mukesh, Mukesh"; he over-heard them calling each other as Ram Singh, Thakur; and the other three were addressing each other Pawan and Vinay and taking the name of JCL. In his testimony, it is recorded that he identified A-2, Mukesh, as Driver, A-1, Ram Singh, and A-3, Akshay, as persons sitting in the driver's cabin and identified A-4, Vinay, and A-5, Pawan, as persons sitting in the bus.

95. As regards the minor contradictions/omissions, the trial court has placed reliance upon ***Pudhu Raja*** (supra) and ***Jaswant Singh*** (supra) and treated the version of P.W. 1 as reliable. The testimony of P.W. 1 has been placed reliance upon by both the Courts and on an anxious and careful scrutiny of the same, we do not perceive any reason to differ with the said view.

96. As we find, the trial court has come to the conclusion that the incident has been aptly described by P.W. 1, the injured. The injuries on his person do show that he was present in the bus at the time of the incident. His presence is further confirmed by the DNA analysis. Suffice it to say for the present, the contradictions in the statement, Ex. P.W. 1/A, are not material enough to destroy the substratum of the prosecution case. From the studied analysis of the evidence of P.W. 1, it is the only inevitable conclusion because the appreciation is founded on yardstick of consideration of totality of evidence and its intrinsic value on proper assessment.

Recovery of the bus and the CCTV footage

97. The endeavour of the prosecution was to first check the route and get a clue of the bus. For the aforesaid purpose, the CCTV footage becomes quite relevant. The story starts from the Select City Walk Mall, Saket and hence, we have to start from there. As per the case of the prosecution, the informant and the prosecutrix had gone to Select City Walk Mall, Saket to see a film. The CCTV

footage produced by P.W. 25, Rajender Singh Bisht, in a CD, Ex. P.W. 25/C-1 and P.W. 25/C-2, and the photographs, Ex. P.W. 25/B-1 to Ex. P.W. 25/B-7, are evident of the fact that the informant and the prosecutrix were present at Saket till 8:57 p.m. The certificate Under Section 65B of the Evidence Act with respect to the said footage is proved by P.W. 26, Shri Sandeep Singh, vide Ex. P.W. 26/A. The informant as well as the prosecutrix gave brief description of the entire incident in their MLCs which led the investigating team to the Hotel near Delhi Airport where the prosecutrix and the informant were dumped after the incident. P.W. 67, Pramod Kumar Jha, the owner of the Hotel at Delhi Airport, was examined by the investigating officers regarding the present incident. He handed over the pen drive containing the CCTV footage, Ex. P-67/1, and the CD, Ex. P-67/2 to the I.O. which were seized vide seizure memo Ex. P.W. 67/A. The CCTV footage and the photographs were identified by P.W. 67, Pramod Jha, P.W. 74. SI Subhash Chand, and Gautam Roy, P.W. 76, from CFSL during their examination in Court. The CCTV footage twice showed a white coloured bus having yellow and green stripes at 9:34 p.m. and again at 9:53 p.m. The bus exactly matched the description of the offending bus given by the informant. It had the word "Yadav" written on one of its sides and its front tyre on the left side did not have a wheel cap. P.W. 78, the S.H.O., Inspector Anil Sharma, has further deposed that the said CCTV footage seized vide seizure memo Ex. P.W. 67/A was sent to the CFSL through SI Sushil Sawariya, P.W. 54, on 02.01.2013, and this part of the testimony of P.W. 78 is corroborated by the testimony of P.W. 54, SI Sushil Sawaria, and P.W. 77, the MHC(M). Thereafter, on 03.01.2013, the report of the CFSL was received. In fact, the trial court had assured itself of the correct identification of the bus by playing the said CCTV footage shown in the pen drive, Ex. P.W. 67/1, and the CD, Ex. P.W. 67/2, during the cross-examination of P.W. 67, Pramod Jha.

98. Learned Counsel Mr. Singh has asserted that bus, Ex. P-1, has been falsely implicated in the present case as is evidenced from the recovery of the CCTV footage. In an attempt to discredit the CCTV footage, he pointed out that only the CCTV recording alleged to be of this bus was recorded and not of all other white buses that had 'Yadav' written on them. The learned Counsel for the defence subsequently maintained that the CCTV footage cannot be relied upon as the same has been tampered with by the investigating officers.

99. P.W. 76, Gautam Roy, HOD, Computer Cell, Forensic Division, has testified that on 02.01.2013, he had received two sealed parcels sealed with the seal of PS and the seals tallied with the specimen seals provided. He marked the blue coloured pen drive found in parcel No. 1 as Ex. 1 and the Moser Baer CD found in the second parcel as Ex. 2. He further testified that both the exhibits were played by him in the computer and the bus was seen twice, at 9:34 p.m. and 9:54 p.m. He had photographed all these three by freezing the pen drive and the CD and these photographs were compared by him with the photographs taken by the photographer, P.W. 79, P.K. Gottam, which he had summoned. The witness testified that he had prepared the three comparison charts in this regard as Ex. P.W. 76/B, P.W. 76/C and P.W. 76/D, and his detailed report as Ex. P.W. 76/E. The footage taken in a CD and pen drive was sealed in P.W. 67's presence and as the recording was automatic data being fed on regular basis into the hard disk, the question of tampering with the same could not arise. P.W. 79, P.K. Gottam, from CFSL, CBI, has stated in his examination that he took photographs of the bus bearing No. DL-1P-C-0149 parked at Thyagraj Stadium, INA, New Delhi from different angles on 17.12.2012 and 18.12.2012 and handed over the same to P.W. 76. The said photographs were marked as B1 in Ex. P.W. 76/B; as C1 and C2 in

Ex. P.W. 76/C; and as D1 in Ex. P.W. 76/D. He has deposed as to the genuineness of the photographs by deposing that the software used for developing the photographs was tamper proof.

100. Once it is proved before the court through the testimony of the experts that the photographs and the CCTV footage are not tampered with, there is no reason or justification to perceive the same with the lens of doubt. The opinion of the CFSL expert contained in the CFSL report marked as Ex. P.W. 76/E authenticates that there was no tampering or editing in both the exhibits, Ex. P-67/1 and Ex. P-67/2, and that a bus having identical patterns as the one parked at Thyagraj Stadium is seen in the CCTV footage, which includes the word "Yadav" written on one side, "back side dent (left)" and absence of wheel cover on the front left side. The contents of the report is also admitted to be true by its author, P.W. 76, Gautam Roy. Quite apart from that, it is perceptible that the High Court, in order to satisfy itself, had got the CCTV footage played during the hearing and found the same to be creditworthy and acceptable.

101. As the narrative proceeds, the next step was to find out the bus. The identity of the bus in the CCTV footage was known and the said knowledge could propel the prosecution to move for recovery. We may start from the beginning. The bus, Ex. P-1, bearing registration No. DL-1P-C-0149, is the vehicle alleged to have been involved in the incident. P.W. 74, SI Subhash Chand, on 17.12.2012, along with P.W. 1, the informant, and P.W. 80, WSI Pratibha Singh, went to Munirka bus stand from where the victims had boarded the alleged bus, Ex. P-1, and then to Mahipalpur to the spot where both the victims were thrown off the bus on 16.12.2012. After the collection of exhibits from the spot, P.W. 74 and P.W. 80 went to the hotels opposite the spot having CCTV cameras installed and amongst those was Hotel Delhi 37. At the said hotel, the informant/P.W. 1 identified the bus they had boarded in the CCTV footage of the road and the relevant footage of the recording was taken in a pen drive and CD and was handed over to the Investigating Officer as Ex. P.W. 67/A. Later in the day, secret information was received by P.W. 80 that the alleged bus was parked at Sector 3, R.K. Puram. P.W. 74 accompanied P.W. 80 and P.W. 65, Ct. Kripal Singh, to Ravidass Camp where a bus matching the description given by P.W. 1 was parked near the Gurudwara. It was white in colour with 'Yadav' written on the side. When the police approached the bus, A-1, Ram Singh, got down from it and started to run; he was later apprehended in a chase by P.W. 74 and P.W. 65. From A-1, the fitness certificate, PUC and other documents regarding the registration of the vehicle DL-1PC-0149 were seized as Ex. P.W. 74/I, P.W. 74/J and P.W. 74/K. The entry door of the bus was ahead of the front wheel and the wheel cap was missing from the front tyre. After recovery of the burnt clothes at the behest of A1, he was sent to the police station with P.W. 65. P.W. 42, Ct. Suresh Kumar, was called to the spot and he drove the bus to Thyagraj Stadium around 5:45 p.m. on the same day. An inspection of the bus was conducted inside the stadium and the CFSL team lifted Ex. P.W. 74/P. Thereafter, P.W. 32, SI Vishal Chaudhary, and P.W. 33, SI Vikas Rana, were called from police station Kotla Mubarakpur to guard the bus.

102. Mr. Singh has raised the following issues with respect to the identification and recovery of the alleged bus:

1. CCTV footage was not properly examined to check all possible buses plying on the said route;

2. The bus was taken to Thyagraj Stadium instead of the Police Station to avoid the media and to better facilitate the planting of evidence; and

3. P.W. 81, Dinesh Yadav, owner of the Bus was in judicial custody for 6 months before his examination in the Court and he was so detained in custody to bring pressure upon him.

103. Mr. Singh has made bald allegation that the bus, Ex. P-1, was falsely implicated and that all the DNA evidence recovered therefrom was actually planted. He contends that the bus, Ex. P-1, was sent to Thyagraj Stadium instead of the concerned Police Station, PS Vasant Vihar, with the deliberate intention of avoiding the media attention so that the evidence could be planted easily. This argument is in furtherance of his false implication theory. He has, however, provided no further specific assertions to cast a doubt in our mind that the police has planted the evidence in the bus.

104. Mr. Luthra, in his turn, relying on the decision of the Delhi High Court in ***Manjit Singh v. State*** MANU/DE/2131/2014 : 214 (2014) DLT 646, has placed statistics before us pointing to the paucity of physical space in police stations across the city. In ***Manjit Singh*** (supra), the High Court had ordered the Delhi Police to furnish data regarding case properties with the Police. The High Court noted that there was an accumulation of "2,86,741 case properties including 25,547 vehicles, out of which as many as 2,479 properties are lying in public places outside the police stations". Given the state of affairs, the submission put forth by Mr. Luthra is acceptable. There is dearth of space inside the police stations in Delhi and the use of Thyagraj Stadium as parking lot in the present case does not necessarily mean that there was any mala fide intention on the part of the investigating agency without any specific assertion to advance the said bald allegation.

105. It may also be noted that on 17.12.2012, P.W. 42, Ct. Suresh Kumar, drove the bus from Ravidass Camp to Thyagraj Stadium around 5:45 p.m. along with P.W. 74 and P.W. 80. About 6:15 p.m., P.W. 32, SI Vishal Chaudhary, along with Ct. Amit, both of PS Kotla Mubarakpur, were sent to Thyagraj Stadium where on the instructions of P.W. 80, SI Pratibha, P.W. 32, guarded the bus till 8:00 a.m. the next day. On 18.12.2012, he handed over the charge of guarding the bus to P.W. 33, SI Vikas Rana, PS Kotla Mubarakpur, and he guarded the bus till 8:30 p.m., until after the CFSL team left. Thus, the criticism as regards the parking of the bus at Thyagraj Stadium and not at the Police Station pales into insignificance.

Reliability of the testimony of P.W. 81 (the owner of the bus)

106. Having dealt with the recovery of the bus, it is necessary to dwell upon the contention put forth by the learned Counsel for the Appellants which pertains to the acceptability and reliability of the testimony of P.W. 81, Dinesh Yadav. The principal contention in this regard is that P.W. 81, Dinesh Yadav, the owner of the bus, was in judicial custody and, therefore, his version in the court is under tremendous pressure as he was desirous of getting a bail order to enjoy his liberty. Highlighting this aspect, it is urged by Mr. Sharma and Mr. Singh, learned Counsel for the Appellants, that the testimony of the said witness deserves to be totally discarded.

107. P.W. 81, Dinesh Yadav, is a transporter and owns 8 to 10 buses including Ex. P-1. He runs the buses under the name 'Yadav Travels'. He was examined by the prosecution to prove that A-1,

A-2 and A-3 are connected with the bus, Ex. P-1. In his examination, P.W. 81 admitted that the word 'Yadav' is written across Ex. P-1 and that it is white in colour with yellow stripes. P.W. 81 stated that A-1, Ram Singh (since deceased), was the driver of the said bus in December 2012, A-3, Akshay Kumar Singh, was his helper and the bus was usually parked by A-1, Ram Singh, in R.K. Puram, near his residence. The bus was attached to Birla Vidya Niketan School, Pushp Vihar, New Delhi to ferry students in the morning and also to a Company, M/s. Net Ambit, Sector 132, Noida, to take its employees from Delhi to Noida. On 17.12.2012, the bus went from Delhi to Sector 132, Noida to take the staff of M/s. Net Ambit to their office and P.W. 81 was informed by A-1, Ram Singh, or A-2, Mukesh, that the bus was checked at the DND toll plaza on their route to Noida.

108. Learned Counsel Mr. Singh has asserted that P.W. 81 was kept in judicial custody to obtain a statement favourable to the prosecution in the present case. In this aspect, it is noted that P.W. 81 also stated that he was kept in judicial custody. The arrest was, however, not made in the present case; it was in connection with another case in relation to providing incorrect address to the Transport Authority. He was lodged in jail in case FIR No. 02/2013 of PS Civil Lines Under Sections 420, 468, 471 Indian Penal Code. P.W. 81 had provided his friend's address as his own at the time of registration and was arrested on a complaint made by the Transport Authority. He was named in the charge-sheet in the present case and was cited as a witness at serial No. 36 but was dropped by the prosecution on 28.05.2013. Later on, his examination was sought by way of an application Under Section 311 Code of Criminal Procedure. The application was allowed by the trial court order dated 03.07.2013 on the ground that he was the owner of the bus and his examination was necessary to prove as to whom he had handed over the custody of the bus on the night of the incident, i.e., 16.12.2012. It is limpid from the deposition of P.W. 81 that he was in judicial custody for a separate offence and, therefore, it is difficult to accede to the argument advanced by Mr. Singh that he was under pressure to support the version of the prosecution.

109. Apart from the above, the prosecution, in order to place A-1 as the driver of the bus, Ex. P-1, has examined P.W. 16, Rajeev Jakhmola. P.W. 16, Manager (Admn) of Birla Vidya Niketan School, Pushp Vihar, handled their transport. In his examination, he stated that P.W. 81, Dinesh Yadav, had provided the school with 7 buses on contract basis including Ex. P-1 and that A-1, Ram Singh, was its driver. He also submitted a copy of Ram Singh's Driving Licence to the Police along with the copy of the agreement of the school with the owner of the bus, copy of the RC, copy of the fitness certificate, certificate of third party technical inspection, pollution certificate, two copies of certificate-cum-policy schedule (Insurance), copy of certificate of training undergone by accused Ram Singh, copy of permit and list of the transporters, collectively as Ex. P.W. 16/A.

110. Thus, according to the prosecution, from the evidence of P.W. 16, Rajeev Jakhmola, and P.W. 81, Dinesh Yadav, it stands proved that the bus in question was routinely driven by Ram Singh. When an argument was raised before the High Court over the veracity of P.W. 81's testimony, it recorded as under:

270. We are constrained to say that there is no substance in the aforesaid contention of Mr. Sharma for the reason that P.W. 81 Dinesh Yadav, the owner of the bus bearing registration No. DL1PC-0149, in which the offence was committed, has categorically stated in his cross-examination that

bus Ex. P-1 was being used for ferrying the students in the morning and thereafter as a chartered bus for taking the officials of M/s. Net Ambit from Delhi to Noida. He further stated in cross-examination that on 17.12.2012, the bus took the staff of M/s. Net Ambit from Delhi to Sector 132, Noida, UP. Quite apparently, therefore, accused Ram Singh as disclosed by him had thrown the SIM card near about the bus stand of Sector 37, where according to P.W. 44 Mohd. Zeeshan, it was found at the noon hour. Since it is not in dispute that accused Ram Singh was the driver of the bus and this fact stands fully established by the evidence on record, Noida was possibly found by him to be the safest destination to dispose of the SIM card.

111. The aforesaid analysis commends our approval because we, having analysed the said aspect on our own, have arrived at the same conclusion. There is no trace of doubt that the testimony of the said witness withstands close scrutiny and there is no reason to treat it with any kind of disapproval. That apart, the evidence of P.W. 16 corroborates the testimony of the owner of the bus.

Personal search and statements of disclosure leading to recovery

112. Learned Counsel for the Appellants have seriously questioned the arrest of the accused persons and the recoveries made pursuant to the said arrest. It is the stand of the prosecution that pursuant to the arrest of all the accused A-1 to A-5, there were disclosure statements recorded Under Section 27 of the Evidence Act which led to recoveries of incriminating articles such as objects belonging to the victims as also objects which have been linked orally or scientifically (such as through DNA profiling) to the prosecutrix and P.W. 1. These material objects recovered are used to link the convicts with the crime and corroborate the version of the eye witness P.W. 1 and the dying declaration of the deceased victim.

113. First, we shall refer to the arrest of Ram Singh and the recoveries made at his instance. As already stated, on 17.12.2012, P.W. 80, SI Pratibha Sharma, had spotted accused Ram Singh sitting in the offending bus, Ex. P1, which was parked at Ravidass Camp, R.K. Puram, New Delhi. On seeing the police, Ram Singh got down from the bus and started running. He was chased and instantly arrested at 4:15 p.m. vide memo Ex. P.W. 74/D and subsequently, his personal search was conducted vide memo Ex. P.W. 74/E and his disclosure Ex. P.W. 74/F was recorded. Notably, Ram Singh has led to several important discoveries and seizures from inside the bus.

114. Accused Mukesh was apprehended on 18.12.2012 from village Karoli, Rajasthan, by a team headed by P.W. 58, SI Arvind. He produced accused Mukesh before P.W. 80, SI Pratibha Sharma, the Investigating Officer, at Safdarjung Hospital in muffled face alongwith a mobile, Samsung Galaxy Duos, Ex. P-6, seized by her vide memo Ex. P.W. 58/A. The accused was arrested at 6:30 p.m. on 18-12-2012 by her vide memo Ex. P.W. 58/B and his personal search was conducted vide memo Ex. P.W. 58/C. The accused pointed the Munirka bus stand vide memo Ex. P.W. 68/K and the dumping spot vide memo Ex. P.W. 68/L. This Samsung Galaxy phone was identified to be that of P.W. 1, the informant.

115. On 23.12.2012, accused Mukesh led the police to Anupam Apartment, garage No. 2, Saidulajab, Saket, New Delhi, and got recovered a green colour T-shirt, Ex. P-48/1, on which the word "play boy" was printed; a grey colour pant, Ex. P-48/2, and a jacket, Ex. P-48/3, of bluish

grey colour, all seized vide memo Ex. P.W. 48/B. The Investigating Officer also prepared the site plan, Ex. P.W. 80/I, of the place of recovery. On 24.12.2012, accused Mukesh also got prepared a route chart Ex. P.W. 80/H.

116. On 18.12.2012, accused Ram Singh led the Investigating Officer to Ravidass Camp and pointed towards his associates, namely, accused Vinay and accused Pawan. Accused Pawan was apprehended and arrested about 1:15 p.m. vide memo Ex. P.W. 60/A; his disclosure, Ex. P.W. 60/G, was recorded and his personal search was conducted vide memo Ex. P.W. 60/C. Accused Pawan Gupta pointed out the Munirka bus stand and a pointing out memo Ex. P.W. 68/I was prepared. He also pointed the dumping spot and memo Ex. P.W. 68/J was prepared in this regard.

117. On 19.12.2012, from accused Pawan Gupta, P.W. 80, got effected the following recoveries:

(a) Wrist watch Ex. P3 seized vide memo Ex. P.W. 68/G;

(b) Two currency notes of denomination of Rs. 500/- Ex. P-7 colly were seized vide memo Ex. P.W. 68/G;

(c) Clothes worn by the accused at the time of the incident seized vide memo Ex. P.W. 68/F; and

(d) Black coloured sweater having grey stripes with label Abercrombie and Fitch Ex. P-68/6 and a pair of coca-cola colour pants Ex. P-68/7 colly; underwear having elastic labeled Redzone Ex. P-68/8 and a pair of sports shoes with Columbus inscribed on them as Ex. P-68/9.

It may be stated here that Sonata wrist watch, Ex. P3, was identified as that of P.W. 1.

118. On 18.12.2012, about 1:30 p.m., accused Vinay Sharma was arrested in front of Ravidass Mandir, Main Road, Sector-3, R.K. Puram, New Delhi vide arrest memo Ex. P.W. 60/B; and his disclosure Ex. P.W. 60/H was also recorded. He pointed out the Munirka bus stand from where the victims were picked up vide memo Ex. P.W. 68/I and he also pointed out Mahipalpur Flyover, the place where the victims were thrown out of the moving bus vide pointing out memo Ex. P.W. 68/J. On 19.12.2012, he led to the following recoveries:

(a) Hush Puppies shoes Ex. P-2 seized vide memo Ex. P.W. 68/C; and

(b) Nokia mobile phone Ex. P-68/5 of the prosecutrix seized vide memo Ex. P.W. 68/D.

Hush Puppies shoes, Ex. P2, were identified to be that of P.W. 1, the informant. Nokia Mobile Phone, Ex. P-68/5, was identified to be that of the prosecutrix.

119. On 19.12.2012, pursuant to his supplementary disclosure statement Ex. P.W. 68/A, the following recoveries were made by the accused vide seizure memo Ex. P.W. 68/B:

(a) One blue coloured jeans having monogram of Expert Ex. P-68/1;

(b) A black coloured sports jacket with white stripes and a monogram of moments as Ex. P-68/3 and a pair of rubber slippers as Ex. P-68/4.

120. During the personal search of Vinay Sharma, the following article was recovered:

(a) Nokia mobile phone with IMEI No. 35413805830821418 belonging to the accused, which was returned to him on superdari vide order dated 4-4-2013

121. On 21.12.2012, about 9:15 p.m., accused Akshay Kumar Singh @ Thakur was arrested from village Karmalahang, P.S. Tandwa, District Aurangabad, Bihar vide memo Ex. P.W. 53/A and on 21.12.2012 and 22.12.2012, his disclosures, Ex. P.W. 53/I and Ex. P.W. 53/D, respectively were recorded. On 22.12.2012, he got effected the following recoveries from the residence of his brother, Abhay, from the rented house of one Tara Chand, village Naharpur, Gurgaon, viz;

i. Blood stained jeans (Ex. P-53/3) worn by the accused at the time of the incident, recovered from a black bag (Ex. P-53/2)

ii. A blue black coloured Nokia mobile phone (Ex. P-53/1)

iii. Blood-stained red coloured banian (vest).

122. On 27.12.2012, he got recovered the informant's Metro card Ex. P-5 and the informant's silver ring, Ex. P-4, from House No. 1943, 3rd Floor, Gali No. 3, Rajiv Nagar, Sector-14, Gurgaon, Haryana.

123. Learned Counsel for the Appellants and learned amicus, Mr. Hegde, have vehemently criticized the arrest and recoveries that have been made or effected. It is urged by Mr. Sharma that the Appellant Mukesh was not in custody when the recovery took place and additionally, he was not produced before the nearest Magistrate within twenty-four hours from the time of detention. Mr. Luthra, in his turn, would submit that the said accused was formally arrested at Delhi and, thereafter, the recovery on the basis of his disclosure took place. Mr. Singh, learned Counsel, contended that the disclosure statements which have been recorded by the police do tantamount to confessional statements relating to the involvement and commission of the crime. This argument requires to be squarely dealt with. For appreciating the said submission, it is necessary to appreciate the inter-se relationship between the accused persons and thereafter dwell upon the process of the arrest and judge the acceptability on the anvil of the precedents in the field.

124. As the evidence brought on record would show, the accused persons were known to each other. Mukesh, A-2, and deceased Ram Singh, A-1, were brothers. According to the testimony of Dinesh Yadav, P.W. 81, Ram Singh was the driver of the bus and A-3, Akshay, was working as a helper in the bus. The same is manifest from the Attendance Register, Ex. P-81/2, seized vide Ex. P.W. 80/K and the Driving License of A-1, Ram Singh, Ex. P-74/4, seized vide Ex. P.W. 74/1. From the testimony of P.W. 13, Brijesh Gupta, and P.W. 14, Jiwant Shah, it is evident that Ram Singh and Mukesh were brothers. From the evidence of Champa Devi, DW-5, mother of Vinay, A-4, it is quite clear that Vinay, Pawan, A-5, and Ram Singh, A-1, were known to each other. Mukesh, in his statement Under Section 313 Code of Criminal Procedure, has admitted that he and

Ram Singh are brothers. A-3, Akshay, in his statement Under Section 313 Code of Criminal Procedure, has admitted that he was working with Ram Singh in the bus, Ex. P-1, as a helper. He has also admitted that he knew Ram Singh and there had been altercation on 16.12.2012 with A-1, Ram Singh. A-5, Pawan, in his statement Under Section 313 Code of Criminal Procedure, admitted that he was a witness to the quarrel between A-4, Vinay, and A-1, Ram Singh. From the aforesaid evidence, it is luminous that all the accused persons were closely associated with each other.

125. Having dealt with this facet, we shall now proceed to meet the criticism advanced by the learned Counsel for the Appellants with regard to the recoveries and the disclosure statements that led to the discoveries.

126. Assailing the acceptability of the arrest and the disclosure statements leading to the recoveries, Mr. Sharma and Mr. Singh have contended that the materials brought on record cannot be taken aid of for any purpose since the items seized have been planted at the places of recovery and a contrived version has been projected in court. That apart, it is submitted that the recoveries are gravely doubtful inasmuch as the prosecution has not seized all the articles from one accused on one occasion but on various dates. We have cleared the maze as regards the arrest and copiously noted the manner of arrest of the accused persons and their leading to recoveries. Be it noted, recovery is a part of investigation and permissible Under Section 27 of the Evidence Act. However, Mr. Sharma has raised a contention that this Court should take note of the fact that Section 27 of the Evidence Act has become a powerful weapon in the hands of the prosecution to rope in any citizen. The said submission, as we perceive, is quite broad and specious. It is open to the defence to find fault with recovery and the manner in which it is done and its relevance. It is not permissible to advance an argument that Section 27 of the Evidence Act is constantly abused by the prosecution or that it uses the said provision as a lethal weapon against anyone it likes. In the instant case, we have noted how the recoveries have been made and how they have been proved by the unimpeachable testimony of the prosecution witnesses.

127. Mr. Luthra, learned Senior Counsel appearing for the State, would submit that in the present case, the material objects recovered serve as links to corroborate and they have been used as the law permits. In this regard, he has filed a chart which we think it appropriate to reproduce for better appreciation of the said aspect. It is as follows:

"S. No.	Accused	Time of Arrest	Place of Arrest	Voluntary Disclosure	Personal Items Recovered	Recovery of Items belonging to PW1	Recovery of Items belonging to Prosecut-rix
1	Ram Singh	4.15 P.M., 17.12.12	Ravi Dass Camp	Ex. PW 74/F	T-Shirt-DNA and brown colour chappal-DNA **(Ex. PW-74/L)** UNIX mobile phone with MTNL Sim	Partly unburnt clothes (the DNA profile of the Complainant was found to match those found on these clothes.) **(Ex. PW-74/M)**	Debit Card in the name of Asha Devi **(Ex. PW-74/H)**
				Pursuant to the disclosure statement - rod	Iron Rods **(Ex. PW-74/G)** Documents of Bus **(Ex.PW 74/I)** Bus Keys **(Ex. PW-75/J)** Bus **(Ex. PW-74/K)**		
2	Mukesh	6.30 P.M., 18.12.12	Apprehended in Karoli, Rajasthan formally arrested at Safdarjung Hospital	Ex.PW-60/I	A green T-shirt-DNA, a grey pant and a bluish-grey jacket **(Ex.PW-48/B)**	Samsung Galaxy Duos **(Ex.PW-58/A)**	Samsung Galaxy identified as that of PW-1
3	Akshay	9:15 P.M., 21.12.12	Karmala-hang, Tandwa, Aurangabad	Ex.PW53/I AND Ex.PW53/D	Blood-Stained Jeans and Black Bag Blue Black coloured Nokia mobile phone	Metro Card Silver Ring	
4	Vinay	1:15 P.M. 18.12.12	In front of Ravidass Mandir	Ex. PW 60/H Ex.PW 68/A	Blue jeans, Black Sports jacket with white stripes, rubber slippers, black full-sleeved t-shirt **(Ex. PW-68/B)** Nokia mobile phone	Hush Puppies Shoes **(Ex. PW-68/C)** Nokia mobile phone **(Ex.PW-68/D)**	Hush-Puppies shoes identified as that of PW-1, Nokia mobile phone identified as that of prosecutrix
5	Pawan	1:30 P.M., 18.12.12	In front of Ravidas Mandir	Ex. PW 60/G	Black sweater having grey stripes, Coca-cola colour pants, under- wear having elastic labeled Redzone, A pair of sports shoes **(Ex. PW-68/F)**	Wrist watch **(Ex. PW-68/G)**, Two currency notes of denomination of Rs.500/- (says in disclosure that he got Rs.1000 as a part of the loot) **(Ex. PW-68/G)**	Sonata wrist watch identified byPW-1 as belonging to him

128. Having reproduced the chart, now we shall refer to certain authorities on how a statement of disclosure is to be appreciated. In ***Pulukuri Kottaya v. Emperor*** MANU/PR/0049/1946 : AIR 1947 PC 67, it has been observed:

It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

129. In ***Delhi Administration v. Bal Krishan and Ors.*** MANU/SC/0093/1971 : (1972) 4 SCC 659, the Court, analyzing the concept, use and evidentiary value of recovered articles, expressed thus:

7. ... Section 27 of the Evidence Act permits proof of so much of the information which is given by persons accused of an offence when in the custody of a police officer as relates distinctly to the fact thereby discovered, irrespective of whether such information amounts to a confession or not. Under Sections 25 and 26 of the Evidence Act, no confession made to a police officer whether in custody or not can be proved as against the accused. But Section 27 is by way of a proviso to these sections and a statement, even by way of confession, which distinctly relates to the fact discovered is admissible as evidence against the accused in the circumstances stated in Section 27....

130. In ***Mohd. Inayatullah v. State of Maharashtra*** MANU/SC/0166/1975 : (1976) 1 SCC 828, dealing with the scope and object of Section 27 of the Evidence Act, the Court held:

12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the *first* condition necessary for bringing this section into operation is the *discovery of a fact*, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The *third* is that at the time of the receipt of the information the accused must be in police custody. The *last* but the most important condition is that only "so much of the information" as relates *distinctly* to the fact *thereby* discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the *direct* and *immediate* cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan v. Crown MANU/LA/0128/1929 : AIR 1929 Lah 344; Rex v. Ganee AIR 1932 Bom 286). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Palukuri Kotayya* v. *Emperor*; *Udai Bhan* v. *State of Uttar Pradesh* MANU/SC/0144/1962 : AIR 1962 SC 1116).

131. Analysing the earlier decisions, in ***Anter Singh v. State of Rajasthan*** MANU/SC/0096/2004 : (2004) 10 SCC 657, the Court summed up the various requirements of Section 27 as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

132. In ***State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*** MANU/SC/0465/2005 : (2005) 11 SCC 600, the Court referred to the initial prevalence of divergent views and approaches and the same being put to rest in ***Pulukuri Kottaya*** case (supra) which has been described as locus classicus, relying on the said authority, observed:

120. To a great extent the legal position has got crystallised with the rendering of this decision. The authority of the Privy Council's decision has not been questioned in any of the decisions of the highest court either in the pre-or post-independence era. Right from the 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted and reiterated by the Judges of this Apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State.

133. Explaining the said facet, the Court proceeded to state thus:

121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates *distinctly to the fact thereby discovered* that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in *Kottaya case*:

clearly the extent of the information admissible must depend on the exact nature of the fact discovered

and the information must distinctly relate to that fact.

Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said:

Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.

134. Expatriating the idea further, the Court proceeded to lay down:

121. ...We have emphasised the word "normally" because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words:

If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect.

Then, Their Lordships proceeded to give a lucid exposition of the expression "fact discovered" in the following passage, which is quoted time and again by this Court:

In Their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. *It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge,* and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

(Emphasis supplied)

122. The approach of the Privy Council in the light of the above exposition of law can best be understood by referring to the statement made by one of the accused to the police officer. It reads thus:

...About 14 days ago, I, Kottaya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kottaya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kottaya.

The Privy Council held that:

14. The whole of that statement except the passage 'I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come' is inadmissible.

(Emphasis supplied)

There is another important observation at para 11 which needs to be noticed. The Privy Council explained the probative force of the information made admissible Under Section 27 in the following words:

Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

135. In the instant case, the recoveries made when the accused persons were in custody have been established with certainty. The witnesses who have deposed with regard to the recoveries have

remained absolutely unshaken and, in fact, nothing has been elicited from them to disprove their creditworthiness. Mr. Luthra, learned Senior Counsel for the State, has not placed reliance on any kind of confessional statement made by the accused persons. He has only taken us through the statement to show how the recoveries have taken place and how they are connected or linked with the further investigation which matches the investigation as is reflected from the DNA profiling and other scientific evidence. The High Court, while analyzing the facet of Section 27 of the Evidence Act, upheld the argument of the prosecution relying on ***State, Govt. of NCT of Delhi v. Sunil and Anr.*** MANU/SC/0735/2000 : (2001) 1 SCC 652, ***Sunil Clifford Daniel v. State of Punjab*** MANU/SC/0740/2012 : (2012) 11 SCC 205, ***Ashok Kumar Chaudhary and Ors. v. State of Bihar*** MANU/SC/7611/2008 : (2008) 12 SCC 173, and ***Pramod Kumar v. State (Government of NCT of Delhi)*** MANU/SC/0624/2013 : (2013) 6 SCC 588.

136. On a studied scrutiny of the arrest memo, statements recorded Under Section 27 and the disclosure made in pursuance thereof, we find that the recoveries of articles belonging to the informant and the victim from the custody of the accused persons cannot be discarded. The recovery is founded on the statements of disclosure. The items that have been seized and the places from where they have been seized, as is limpid, are within the special knowledge of the accused persons. No explanation has come on record from the accused persons explaining as to how they had got into possession of the said articles. What is argued before us is that the said recoveries have really not been made from the accused persons but have been planted by the investigating agency with them. On a reading of the evidence of the witnesses who constituted the investigating team, we do not notice anything in this regard. The submission, if we allow ourselves to say so, is wholly untenable and a futile attempt to avoid the incriminating circumstance that is against the accused persons.

Test Identification Parade and the identification in Court

137. Now, we shall deal with the various facets of test identification parade. Upon application moved by P.W. 80, SI Pratibha Sharma, Investigating Officer, P.W. 17, Sandeep Garg, Metropolitan Magistrate, conducted the Test Identification Parade (TIP) for the accused Ram Singh (since deceased), who refused to participate in the TIP proceedings on the ground that he was shown to the witnesses in the police station. Since accused Ram Singh died during the trial, neither the trial court nor the High Court delved into this aspect regarding the refusal of accused Ram Singh to participate in the TIP proceedings.

138. On 19.12.2012, P.W. 17, Sandeep Garg, Metropolitan Magistrate initiated TIP proceedings for accused Vinay and Pawan, but they refused to participate in the TIP. In the TIP proceedings, the Metropolitan Magistrate has recorded the following:

.....accused Pawan Kumar @ Kalu and accused Vinay, both refused to participate in the TIP proceedings and stated that they had committed a horrible crime. I recorded their refusal and gave certificate.

139. Vinay and Pawan refused to participate in the TIP proceedings without giving any reason whatsoever. TIP of accused Mukesh was conducted on 20.12.2012 at Tihar Jail by P.W. 17, Sandeep Garg, in which P.W. 1, Awninder Pratap, identified accused Mukesh. In his testimony,

the informant, P.W. 1, has identified his signature at point 'A' in TIP proceedings with respect to the accused Mukesh, Ex. P.W. 1/E. The High Court has pointed out that there was no serious challenge to the TIP proceedings of accused Mukesh in the cross-examination of the Metropolitan Magistrate, P.W. 17, or even the Investigating Officer, P.W. 80. TIP of accused Akshay was conducted on 26.12.2012 at Central Jail No. 4, Tihar Jail, where the informant, P.W. 1, identified accused Akshay. P.W. 1 identified his signature at point 'A' in the TIP proceedings of accused Akshay marked as Ex. P.W. 1/F. The accused Mukesh and Akshay were already identified in the TIP proceedings by the informant. Test Identification Proceedings corroborate and lend assurance to the dock identification of accused Mukesh and Akshay by the informant, P.W. 1.

140. Criticizing the TIP, it is urged by the learned Counsel for the Appellants and Mr. Hegde, learned amicus curiae, that refusal to participate may be considered as circumstance but it cannot by itself lead to an inference of guilt. It is also argued that there is material on record to show that the informant had the opportunity to see the accused persons after they were arrested. It is necessary to state here that TIP does not constitute substantive evidence. It has been held in ***Matru alias Girish Chandra v. State of Uttar Pradesh*** MANU/SC/0141/1971 : (1971) 2 SCC 75 that identification test is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation of an offence is proceeding on the right lines.

141. In ***Santokh Singh v. Izhar Hussain and Anr.*** MANU/SC/0165/1973 : (1973) 2 SCC 406, it has been observed that the identification can only be used as corroborative of the statement in court.

142. In ***Malkhansingh v. State of M.P.*** MANU/SC/0445/2003 : (2003) 5 SCC 746, it has been held thus:

7. ...The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. ...

And again:

16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. ...

143. In this context, reference to a passage from ***Visveswaran v. State represented by S.D.M.*** MANU/SC/0352/2003 : (2003) 6 SCC 73 would be apt. It is as follows:

11. ...The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time,

crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. ...

144. In ***Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)*** MANU/SC/0268/2010 : (2010) 6 SCC 1, the Court, after referring to ***Munshi Singh Gautam v. State of M.P.*** MANU/SC/0964/2004 : (2005) 9 SCC 631, ***Harbhajan Singh v. State of J & K*** MANU/SC/0127/1975 : (1975) 4 SCC 480 and ***Malkhansingh*** (supra), came to hold that the proposition of law is quite clear that even if there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive.

145. In the case at hand, the informant, apart from identifying the accused who had made themselves available in the TIP, has also identified all of them in Court. On a careful scrutiny of the evidence on record, we are of the convinced opinion that it deserves acceptance. Therefore, we hold that TIP is not dented.

Admissibility and acceptability of the dying declaration of the prosecutrix:

146. At this stage, it would be immensely seemly to appreciate the acceptability and reliability of the dying declaration made by the prosecutrix.

147. The circumstances in this case, as is noticeable, makes the prosecution bring in three dying declarations. Mr. Sharma and Mr. Singh have been extremely critical about the manner in which they have been recorded and have highlighted the irreconcilable facets. In quintessence, their submission is that the three dying declarations have been contrived and deserve to be kept out of consideration. Mr. Hegde, learned friend of the Court, contends that the dying declarations do not inspire confidence, for variations in them relate to the number of assailants, the description of the bus, the identity of the accused and the overt acts committed by them. It is contended that the three dying declarations made by the prosecutrix vary from each other and the said variations clearly reveal the inconsistencies and the improvements in the dying declarations mirror the improvements that are brought about in P.W. 1's statements and the progress of the investigation.

148. The sudden appearance of the name 'Vipin' in the third dying declaration after the recording of Akshay's disclosure statement where he mentions a person named Vipin is alleged to be indicative of the fact that the dying declaration is, in fact, doubtful. It is contended that the prosecution has failed to explain 'Vipin', his connection with the crime and his elimination from the case. The vapourisation of Vipin has to be considered against the backdrop of repeated assertions by the prosecution that every word of the three dying declarations is correct, consciously made and worthy of implicit belief. Learned Senior Counsel has also submitted that apart from the inconsistencies, the numerous procedural irregularities in the recording of the declarations make it suspicious. In this regard, lack of an independent assessment of the mental fitness of the prosecutrix, while recording the second dying declaration, has been highlighted. The multiple choice questions in the third and final dying declaration are being nomenclatured as leading questions and it is asserted that they have not been satisfactorily explained by the prosecution. Further, the evidence by the doctors does not cure the impropriety of lack of an independent assessment by the SDM while recording her second dying declaration.

149. It is submitted that if at all any dying declaration is to be relied on, it should only be the first dying declaration made on 16.12.2012 and recorded by P.W. 49, Dr. Rashmi Ahuja, and the said dying declaration only states that there were 4 to 5 persons on the bus. It is further stated that the prosecutrix was raped by a minimum of 2 men and that she does not remember intercourse after that. It is, therefore, unsafe to proceed on the assumption that all six persons on the bus committed rape upon the prosecutrix within a span of 21 minutes.

150. Keeping the aforesaid criticism in view, we proceed to analyse the acceptability and reliability of the dying declarations. Firstly, when the prosecutrix was brought to the Gynae Casualty about 11:15 p.m., she gave a brief account of the incident to P.W. 49, Dr. Rashmi Ahuja, in her MLC on 16.12.2012. P.W. 49, Dr. Rashmi Ahuja, has deposed that on the night of 16.12.2012 about 11:15 p.m., the prosecutrix was brought to the casualty by a PCR constable and that she gave a brief history of the incident. P.W. 49, Dr. Rashmi Ahuja, recorded the same in her writing in the Casualty/GRR paper, i.e., Ex. P.W. 49/A.

151. In the instant case, as per the history told by the prosecutrix to Dr. Rashmi Ahuja, it was a case of gang rape in a moving bus by 4-5 persons when the prosecutrix was returning after watching a film with her friend. She was slapped on her face, kicked on her abdomen and bitten over lips, cheek, breast and vulval region. She remembers intercourse two times and rectal penetration also. She was also forced to suck their penis but she refused. All this continued for half an hour and then she was thrown off from the moving bus with her friend. We have already stated about the injuries which were noted by Dr. Rashmi Ahuja in Ex. P.W. 49/A.

152. The relevant statement of the prosecutrix in the Medico Legal Expert, Ex. P.W. 49/A, reads as under:

...she went to watch movie with her boyfriend, Awnidra: she left the movie at 8:45 PM and was waiting for bus at Munirka Bus stop where a bus going to Bahadurgarh, stopped and both climbed the bus at around 9 PM. At around 9:05-9:10 PM, around 4-5 people in the bus started misbehaving with the girl, took her to the rear side of bus while her boyfriend was taken to the front of bus, where both were beaten up badly. Her clothes were torn over and she was beaten up, slapped repeatedly over her face, bitten over lips, cheeks, breast and Mons veneris. She was also kicked over her abdomen again and again. She was raped by at least minimum of two men, she does not remember intercourse after that. She had rectal penetration. They also forced their penis into her mouth and forced her to suck which she refused and was beaten up instead. This continued for half hour and she was then thrown away from the moving bus with her boyfriend. She was taken up by PCR Van and brought to GRR. She has history of intercourse with her boyfriend about two months back. (willfully)

153. P.W. 49, Dr. Rashmi Ahuja, had noticed number of injuries on the person of the prosecutrix and the same were noted in Ex. P.W. 49/B as under:

"Responding to verbal commands	bruise over Rt eye covering whole of the abrasion at Rt angle of eye
Hairs had grasses in her hairs	bruise over left nostril involving upper lip
Her wrapping sheet soaked in blood	Both lips edematous bleeding from upper lip present
	Bite mark over right chick & left chick present
P-116/min radial feeble	Left angle of mouth injured (laceration)
BP 100/60 mmhg, RR 18/min	Both ears unremarkable
Both upper limbs unremarkable	Rt breast-bite mark below areola present
Left breast-bruise over Rt lower introits	A tag torn vagina hanging outside
Quadrant bite mark in inferior	P/S bleeding P/V ++
	P/V posterior vagina wall
Quadrant P/A Guarding present L/E cut mark (sharp) over Rt labia	tear of about 7-8 cms.
L/E cut mark (sharp) over rt. Labia present rest labia major aid uninora	P/R Rectal tear of about 4 cm communicating with Vagina"

154. P.W. 50, Dr. Raj Kumar Chejara, and the surgery team operated the prosecutrix in the intervening night of 16/17.12.2012 and the operative findings have also been earlier noted.

155. P.W. 50, Dr. Raj Kumar Chejara, has proved the OT notes as Ex. P.W. 50/A bearing the signature of Dr. Gaurav and his own note in this regard is Ex. P.W. 50/B. As per his opinion, the condition of the small and large bowels were extremely bad for any definitive repair. After performing the operation, the patient was shifted to ICU. The first surgery was damage control surgery and it was expected that unhealthy bowel would be there.

156. The second surgery was performed on 19.12.2012 by him along with his operating team consisting of Prof. Sunil Kumar, Dr. Pintu and Dr. Siddharth. From the gynaecological side, Dr. Aruna Batra and Dr. Rekha Bharti were present along with anaesthetic team. The findings were as under:

Abdominal findings:

1. Rectum was longtitudinally torn on anterior aspect in continuation with perineal tear. This tear was continuing upward involving sigmoid colon, descending colon which was splayed open. The margin were edematous. There were multiple longitudinal tear in the mucosa of recto sigmoid area. Transverse colon was also torn and gangrenous. Hepatic flexure , ascending colon & caecum were gangrenous with multiple perforations at many places. Terminal ileum approximately one and a half feet loosely hanging in the abdominal cavity, it was avulsed from its mesentery and was non-viable. Rest of the small bowel was non-existent with only patches of mucosa at places and borders of the mesentery was contused. The contused mesentery borders initially appeared (during 1st surgery) as contused small bowel.

2. Jejunostomy stoma was gangrenous for approximately 2cm.

3. Stomach and duodenum was distended but healthy.

157. Dying Declaration was recorded by SDM, Smt. Usha Chaturvedi, P.W. 27, on 21.12.2012. The medical record of the prosecutrix shows that the prosecutrix was not found fit for recording of her statement until 21st December, 2012 about 6:00 p.m. when the prosecutrix was declared fit for recording statement by P.W. 52, Dr. P.K. Verma. P.W. 52 had examined the prosecutrix and found her to be fit, conscious, oriented and meaningfully communicative for making statement vide his endorsement at point 'A' on application, Ex. P.W. 27/DB. The second dying declaration, Ex. P.W. 27/A, was recorded by P.W. 27, Smt. Usha Chaturvedi, SDM. This dying declaration is an elaborate one where the prosecutrix has described the incident in detail including the act of insertion of rod in her private parts. She also stated that the accused were addressing each other with names like, "Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay".

158. The relevant portion of the dying declaration Ex. P.W. 27/A recorded by P.W. 27, SDM, is extracted below:

Q.1. What is your name, your father's name and your residential address?

Ans. My name is prosecutrix and my father name is Sh. ..... and we reside at .....

Q.2 Do you study or work somewhere?

Ans. I have completed my BPT (Bachelor of Physiotherapy).

Q.3 On which date and place, the incident occurred?

Ans. This happened on 16.12.12 in the midst of at about 9:00-9:15 p.m.

Q.4 Where had you gone on that day and how did you reach the place of occurrence?

Ans. I had gone to watch the movie i.e. "Life of Pi" 6.40-8.30 p.m. to Select City Mall, Saket on the day of incident along with my friend Sh. Awninder S/o. Sh. Bhanu Pratap, R/o House No. 14, Bair Sarai, New Delhi-16. We took an Auto Rikshaw from there and reached Munirka.

Q.5 How did you go further?

Ans. After that, I saw white colored bus whose conductor had been calling the passengers of Palam Mor and Dwarka. I had to go to Dwarka, Sec-1. That is why both of us, I and my friend boarded the bus and gave twenty rupees (Rs. 20/-) at the fare of Rs. 10/- per passenger.

Q.6. Were there passengers inside the bus?

Ans. When I entered the bus there were 6-7 passengers. Assuming them to be passenger, we sat outside the cabin of the bus.

Q.7 Provide the detailed information about the bus?

Ans. The bus was of the white colour and the seats were of the red colour. Yellow coloured curtains were fixed. The glasses of the bus were black and were closed. I could see outside from inside but nothing could be seen inside from outside. In one row of the bus there were two seats and in the other row, there were three seats.

Q.8 After entering the bus, did you suspect anything seeing the people occupying the seats there?

Ans. I had suspected (something amiss) but the conductor had already taken the (fare) money and the bus had started. So, I kept sitting there.

Q.9 What did happen afterwards? Please inform in detail.

Ans. After five minutes when the bus climbed the bridge of Malai Mandir, the Conductor closed the door of the bus and switched off the light inside the bus. And they came to my friend and started hitting and beating him. Three four (3-4) people caught hold of him and the remaining people dragged me to the rear portion of the bus and tore off my clothes and took turns to rape me. They hit me on my stomach with an iron rod and bit me on my whole body. Prior to that, they snatched from me and my friend all our articles i.e. mobile phone, purse, credit card, debit card, watches, etc. All six of the persons committed oral, vaginal, anal rape on me. These people inserted the iron rod into my body through my vagina and rectum and also pulled it out. They extracted the internal private part of my body through inserting hand and iron rod into my private parts and caused hurt to me. Six persons kept committing rape on me for approximately one hour by turns. The drivers kept changing in the moving bus so that they can rape me. .....

P.W. 27 Usha Chaturvedi, SDM, when examined and recorded the dying declaration of prosecutrix come off in her dying declaration she state as under:

159. The clinical notes, Ex. P.W. 50/C, and notes prepared by the gynaecology team were proved as Ex. P.W. 50/D. The gynaecological notes were prepared on actual examination of the patient on the operation table during the surgery. P.W. 50 further operated the prosecutrix on 23.12.2012 for peritoneal lavage and placement of drain under general anaesthesia and his notes are Ex. P.W. 50/E.

160. Statement of the prosecutrix was recorded by P.W. 30, Pawan Kumar, Metropolitan Magistrate, vide Ex. P.W. 30/D. On 24.12.2012, an application for recording the statement of the prosecutrix Under Section 164 Code of Criminal Procedure was moved by the Investigating Officer, which is exhibited as Ex. P.W. 30/A and, thereafter, the learned Metropolitan Magistrate fixed the date for recording of the statement as 25.12.2012 at 9:00 a.m. at Safdarjung Hospital vide his endorsement at Point "P" to "P-1" on Ex. P.W. 30/A. On 25.12.2012, P.W. 28, Dr. Rajesh Rastogi, at 12:40 p.m., declared the prosecutrix fit for recording statement through gestures. She was found conscious, oriented, co-operative, comfortable and meaningfully communicative to make a statement through non-verbal gestures.

161. On 25.12.2012, the prosecutrix's statement, Ex. P.W. 30/D, Under Section 164 Code of Criminal Procedure was recorded by P.W. 30, Pawan Kumar, Metropolitan Magistrate, in the form of questions by putting her multiple choice questions. This statement was made through gestures and writings. The statement recorded by P.W. 30 which ultimately became another dying declaration reads as under:

25/12/2012 at 01.00 p.m. at ICU Safdarjung Hospital. Statement of Prosecutrix (Name and Particulars withheld) As opined by the attending doctors the Prosecutrix is not in position to speak but she is otherwise conscious and oriented and responding by way of gestures, so I am putting question in such a manner so as to enable to narrate the incident by way of gesture or writing.

Ques. : When and at what time the incident happened?

1. 20/12/2012 2. 13/12/2012 3. 16/12/2012

Ans : 16/12/12 (by writing after taking time)

Ques.: Have you seen the staff of the bus? 1. Yes 2. No

Ans.: 1 yes by gesture (nodding her head)

Ques.: Have you seen those people at that time? 1. Yes 2. No

Ans.: 1

Ques.: By which article they have given beatings? (answer by writing)

Ans.: By iron rod which was long.

Ques.: What happened of your belongings means mobile etc.?

1. Fell down 2. Snatched by them 3. Don't know

Ans.: 2

Ques.: Besides rape where and how did you get the injuries? (tried to answer by writing)

Ans.: Head, face, back, whole body including genital parts (by gesture indication)

Ques.: By which names they were addressing to each other? (tried answer by writing)

Ans.: 1. Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju.

Ques.: What did they do after rape? 1. Left at home 2. Threw at unknown place 3. Got down at some other bus stop.

Ans: 2

As per Ex. P.W. 30/D, this answer was written by the prosecutrix in her own hand.

162. On 26.12.2012, the condition of the prosecutrix was examined and it was decided to shift her abroad for further treatment. Notes in this regard are Ex. P.W. 50/F bearing the signatures of Dr. Raj Kumar, Dr. Sunil Kumar, Dr. Aruna Batra and Dr. P.K. Verma.

163. The prosecutrix died at Mount Elizabeth Hospital, Singapore on 29.12.2012 at 4:45 a.m. The cause of death is stated as sepsis with multi organ failure following multiple injuries, as is evincible from Ex. P.W. 34/A.

164. Learned Counsel for the Appellants have objected to the admissibility of the dying declarations available on record mainly on the ground that they are not voluntary but tutored. It is argued that the second and third dying declarations are nothing but a product of tutoring and are non-voluntary and the only statement recorded is the MLC, Ex. P.W. 49/A and Ex. P.W. 49/B, prepared immediately after the incident, wherein the prosecutrix has neither named any of the accused nor mentioned the factum of iron rod being used by the accused persons and the act of the accused in committing unnatural offence. It is further alleged that the prosecutrix could not have given such a lengthy dying declaration running upto four pages on 21.12.2012 as she was on oxygen support. P.W. 27 has deposed that the prosecutrix was on oxygen support at the time of recording the second dying declaration. It is further contended that it must be taken into account that ever since the prosecutrix was admitted to the hospital, she was continuously on morphine and, thus, she could not have gained consciousness. The second dying declaration has been further assailed on the ground of being recorded at the behest of SDM, P.W. 27, instead of a Magistrate and that too after a delay of nearly four days. The third dying declaration, Ex. P.W. 30/D, recorded by the Metropolitan Magistrate, P.W. 30, on 25.12.2012 through gestures and writings is controverted by putting forth the allegations of false medical fitness certificate and absence of videography.

165. Another argument advanced by the learned Counsel raising suspicion on the genuineness of the second and third dying declarations is that the dates on which the dying declarations were recorded have been manipulated. The counsel asseverated that the second dying declaration, i.e., Ex. P.W. 27/A, purported to have been recorded by P.W. 27 on 21.12.2012 was, in fact, recorded on the previous day as evidenced from the overwriting of the date in Ex. P.W. 27/B. The counsel also pointed to the overwriting of the date in the third dying declaration, i.e., Ex. P.W. 30/C, recorded by P.W. 30. It is propounded by them that the date was modified thrice in order to fit in the fake chain of circumstances contrived by the prosecution.

166. Resisting the said submissions, Mr. Luthra, learned Senior Counsel for the State, astutely contended that all the three dying declarations recorded at the instance of the prosecutrix are consistent and well corroborated by medical evidence as well as by P.W. 1's testimony, and other scientific evidence. The prosecutrix's first statement, Ex. P.W. 49/A, given to P.W. 49 was only a brief account of the heinous act committed on her and in that state of shock, nothing more could be legitimately expected of her. Only after receiving medical attention, she was declared fit to record statement and on 21.12.2012, P.W. 52 had examined the prosecutrix and found her to be fit, conscious, oriented and meaningfully communicative for making statement vide his endorsement at point 'A' on application Ex. P.W. 27/DB. P.W. 27, Smt. Usha Chaturvedi, SDM, recorded her statement in which the prosecutrix described the incident in detail and also named the accused persons. In fact, P.W. 27 has also deposed before the court that the prosecutrix was in a fit mental condition to give the statement on 21.12.2012. Moreover, the prosecutrix's third statement, Ex. P.W. 30/D, which was recorded in question-answer form through gestures and writings by P.W. 30, Pawan Kumar, Metropolitan Magistrate, is consistent with the earlier two dying declarations and that adds to the credibility and conclusively establishes reliability.

167. In the first dying declaration made to P.W. 49, Dr. Rashmi Ahuja, recorded in Ex. P.W. 49/A and in MLC, Ex. P.W. 49/B, due to her medical condition, though the prosecutrix broadly described the incident of gang rape committed on her and injuries caused to her and P.W. 1, yet she failed to vividly describe the incident of inserting iron rod, etc. As soon as the prosecutrix was brought to the hospital, she gave a brief description of the incident to P.W. 49, Dr. Rashmi Ahuja. As it appears from the record, the prosecutrix had lost sufficient quantity of blood due to which she was drowsy and could only give a brief account of the incident and injuries caused to her and the informant. Even though the prosecutrix has given only a brief account of the occurrence, yet she was responding to verbal command and hence, the same is natural and trustworthy and furthermore, Ex. P.W. 49/A is also consistent with the other dying declarations.

168. By virtue of the second dying declaration recorded as Ex. P.W. 27/A on 21.12.2012 about 9:10 p.m. by the SDM, Smt. Usha Chaturvedi, the exact details of the incident and the injuries caused to the prosecutrix have come on record. The learned SDM has satisfied herself that the prosecutrix was fit to make the statement. While recording the dying declaration of the prosecutrix, Ex. P.W. 27/A, Dr. P.K. Verma, P.W. 52, had found her conscious, oriented and meaningfully communicative vide his endorsement at point 'A' on the application, Ex. P.W. 27/DB. It was only thereafter that P.W. 27, Smt. Usha Chaturvedi, SDM, recorded the statement, Ex. P.W. 27/A, of the prosecutrix. The prosecutrix not only signed it but even wrote the date and time in this statement. She narrated the entire incident specifying the role of each accused; gang rape/unnatural sex committed upon her; the injuries caused in her vagina and rectum by use of iron rod and by

inserting of hands by the accused; description of the bus, robbery and lastly throwing of both the victims out of the moving bus, Ex. P1, in naked condition at the footfall of Mahipalpur flyover.

169. As it appears from the record, P.W. 27, after recording the statement of the prosecutrix, as contained in Ex. P.W. 27/A, forwarded the statement alongwith the forwarding letter, Ex. P.W. 27/B, to the ACP, Vasant Vihar undersigned by herself. Ex. P.W. 27/A, which contains the statement of the prosecutrix, is duly signed by the prosecutrix on all the pages and also signed by P.W. 27, SDM. P.W. 27 has certified in Ex. P.W. 27/A that the signature of the prosecutrix was obtained in her presence at 9:00 p.m. on 21.12.2012 after which she has signed the same. No overwriting of date is evidenced in Ex. P.W. 27/A. However, so far as the forwarding letter, i.e., Ex. P.W. 27/B, is concerned, the date mentioned by P.W. 27 after putting her signature is overwritten as 21.12.2012. When cross-examined on this aspect, P.W. 27 has stated that she had herself overwritten the date and, thus, overruled the possibility of any falsification of the document at the behest of the investigating team. P.W. 27 explained the overwriting of date as a 'human error' and the same has been rightly construed by the trial court and accepted by the High Court as a complete explanation. The relevant statement of P.W. 27 is as under:

It is correct that in Ex. P.W. 27/B there is an over writing on the date under my signature. VOL: It was a human error. The statement was recorded on 21-12-2012, so for all purpose this date will be 21-12-2012.

170. Agian on 25.12.2012 on an application, Ex. P.W. 28/A, though Dr. P.K. Verma, P.W. 52, opined that the prosecutrix was unable to speak as she was having endotracheal tube, i.e., in larynx and trachea and was on ventilator, yet P.W. 28, Dr. Rajesh Rastogi, declared her to be conscious, oriented and meaningfully communicative through non-verbal gestures and fit to give statement. P.W. 30, Pawan Kumar, Metropolitan Magistrate, also satisfied himself qua fitness and ability of the prosecutrix to give rational answers by gestures to his multiple choice questions. The opinion of the doctors obtained prior to recording of the statements, Ex. P.W. 27/A and Ex. P.W. 30/D-1, as also the observations made by the SDM and Metropolitan Magistrate qua her fitness cannot be disregarded completely on the basis of surmises of the learned Counsel for the Appellants.

171. Adverting to the third dying declaration, Ex. P.W. 30/C, we are able to appreciate that P.W. 30, after recording the statement of the prosecutrix, has signed the document. The date mentioned therein is overwritten as 25.12.2012. However, in the forwarding note to the investigating officer which is contained in continuation of the prosecutrix's statement annexed as Ex. P.W. 30/C, the signature and date mentioned by P.W. 30 is very clear and no overwriting is visible. Be it noted, P.W. 30 was never cross-examined on the aspect of overwriting of the date in Ex. P.W. 30/C. The learned Counsel has, for the first time, raised this issue before us merely to substantiate his suspicion of manipulation on the part of the prosecution. We hold that pointing at insignificant errors is inconsequential so far as cogent evidence produced by the prosecution stand on a terra firma. It is beyond human prudence to discard the detailed and well signed statements of the prosecutrix, in spite of clear date put by herself, merely because P.W. 30 erred at one point of time in correctly recording the date. Moreover, the testimony of P.W. 52, Dr. P.K. Verma, who was incharge of the ICU and in whose supervision the entire treatment and recording of statements by the prosecutrix was done, cannot be discarded on account of meagre technical errors.

172. Another line of argument developed by the learned Counsel is that there has been failure on the part of the prosecutrix to disclose the names of any of the accused persons in the brief history given by her to the doctor in MLC, Ex. P.W. 49/A, and so, her dying declarations, Ex. P.W. 27/A and Ex. P.W. 30/D-1, where she had given the names of the accused persons, are tutored versions and cannot form the basis of conviction. This argument, however, is completely unjustified in the light of the medical condition of the prosecutrix when she was brought to the hospital. As per the records, the prosecutrix was brought to the hospital in a state of sub-consciousness and sheer trauma. In her MLC, Ex. P.W. 49/B, her condition is described as drowsy responding only to verbal commands and hence, not completely alert due to the shock and excessive loss of blood. The prosecutrix was declared fit to make statements, Ex. P.W. 27/A and Ex. P.W. 30/D-1, only when she was operated thrice. Her dying declarations, Ex. P.W. 27/A and Ex. P.W. 30/D-1, also stand corroborated by the medical evidence as well as the testimony of P.W. 1.

173. A dying declaration is an important piece of evidence which, if found veracious and voluntary by the court, could be the sole basis for conviction. If a dying declaration is found to be voluntary and made in fit mental condition, it can be relied upon even without any corroboration. However, the court, while admitting a dying declaration, must be vigilant towards the need for 'Compos Mentis Certificate' from a doctor as well as the absence of any kind of tutoring. In ***Laxman v. State of Maharashtra*** MANU/SC/0707/2002 : (2002) 6 SCC 710, the law relating to dying declaration was succinctly put in the following words:

3. ... A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

174. The legal position regarding the admissibility of a dying declaration is settled by this Court in several judgments. This Court, in ***Atbir v. Government of NCT of Delhi*** MANU/SC/0576/2010 : (2010) 9 SCC 1, taking into consideration the earlier judgment of this Court in ***Paniben v. State of Gujarat*** MANU/SC/0346/1992 : (1992) 2 SCC 474 and another judgment of this Court in ***Panneerselvam v. State of Tamil Nadu*** MANU/SC/7726/2008 : (2008) 17 SCC 190, has exhaustively laid down the following guidelines with respect to the admissibility of dying declaration:

22. (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.

175. It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various other tests. In a case where there are more than one dying declaration, if some inconsistencies are noticed between one and the other, the court has to examine the nature of inconsistencies as to whether they are material or not. The court has to examine the contents of the dying declarations in the light of the various surrounding facts and circumstances. In ***Shudhakar v. State of Madhya Pradesh*** MANU/SC/0590/2012 : (2012) 7 SCC 569, this Court, after referring to the landmark decisions in ***Laxman*** (supra) and ***Chirra Shivraj v. State of Andhra Pradesh*** MANU/SC/0992/2010 : (2010) 14 SCC 444, has dealt with the issues arising out of multiple dying declarations and has gone to the extent of declining the first dying declaration and accepting the subsequent dying declarations. The Court found that the first dying declaration was not voluntary and not made by free will of the deceased; and the second and third dying declarations were voluntary and duly corroborated by other prosecution witnesses and medical evidence. In the said case, the accused was married to the deceased whom he set ablaze by pouring kerosene in the matrimonial house itself. The smoke arising from the house attracted the neighbours who rushed the victim to the hospital where she recorded three statements before

dying. In her first statement given to the Naib Tehsildar, she did not implicate her husband, but in the second and third statements, which were also recorded on the same day, she clearly stated that the accused poured kerosene on her and set her on fire. The accused was convicted Under Section 302 Indian Penal Code. In this regard, the Court made the following observations:

21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the court in such matters.

176. Recently, a two-Judge Bench of this Court in ***Sandeep and Anr. v. State of Haryana*** MANU/SC/0654/2015 : (2015) 11 SCC 154 : (2015) 2 SCR 1999 SC was faced with a similar situation where the first dying declaration given to a police officer was more elaborate and the subsequent dying declaration recorded by the Judicial Magistrate lacked certain information given earlier. After referring to the two dying declarations, this Court examined whether there was any inconsistency between the two dying declarations. After examining the contents of the two dying declarations, this Court held that there was no inconsistency between the two dying declarations and non-mention of certain features in the dying declaration recorded by the Judicial Magistrate does not make both the dying declarations incompatible.

177. In this regard, it will be useful to reproduce a passage from ***Babulal and Ors. v. State of M.P.*** MANU/SC/0855/2003 : (2003) 12 SCC 490 wherein the value of dying declaration in evidence has been stated:

7. ... A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in his mouth" (*nemo moriturus praesumitur mentire*). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. ...

178. Dealing with oral dying declaration, a two-Judge Bench in ***Prakash and Anr. v. State of Madhya Pradesh*** MANU/SC/0005/1993 : (1992) 4 SCC 225 has ruled thus:

11. ... In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with. ...

179. In ***Vijay Pal v. State (Government of NCT of Delhi)*** MANU/SC/0230/2015 : (2015) 4 SCC 749, after referring to the Constitution Bench decision in ***Laxman*** (supra) and the two-Judge Bench decisions in ***Babulal*** (supra) and ***Prakash*** (supra), the Court held:

22. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW 1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosene on her. The plea taken by the Appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect.

23. It is contended by the learned Counsel for the Appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in *Mafabhai Nagarbhai Raval* v. *State of Gujarat* MANU/SC/0425/1992 : (1992) 4 SCC 69 wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

24. In *State of M.P.* v. *Dal Singh* MANU/SC/0550/2013 : (2013) 14 SCC 159, a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible.

180. In the case at hand, the first statement of the prosecutrix was recorded by P.W. 49, Dr. Rashmi Ahuja, on the night of 16.12.2012 and the second statement was recorded by the SDM on 21.12.2012 after a delay of five days. In the present facts and circumstances of the case, we do not find that there is any inconsistency in the dying declarations to raise suspicion as to the genuinity and voluntariness of the subsequent dying declarations. The prosecutrix had been under constant medical attention and was reported to be fit for giving a statement on 21.12.2012 only. On the night of the incident itself, she underwent first surgery conducted by P.W. 50, Dr. Raj Kumar Chejara, Surgical Specialist, Department of Surgery, Safdarjung Hospital, New Delhi and his surgery team comprising of himself, Dr. Gaurav and Dr. Piyush, and the prosecutrix was shifted to ICU. The second surgery was performed on her on 19.12.2012. Ex. P.W. 50/C, OT notes dated 19.12.2012 show that the prosecutrix was put on ventilation after the surgery. Considering the facts

and circumstances and the law laid down above, a mere omission on the part of the prosecutrix to state the entire factual details of the incident in her very first statement does not make her subsequent statements unworthy, especially when her statements are duly corroborated by other prosecution witnesses including the medical evidence.

181. The contention that no dying declaration could have been recorded on 21.12.2012 as the prosecutrix was administered morphine does not hold good as P.W. 52, Dr. P.K. Verma, has deposed that morphine was injected at 6:00 p.m. on 20.12.2012 and its effect would have lasted for only 3-4 hours. P.W. 52 has denied that the prosecutrix was unconscious and had difficulty in breathing at the time when she made the statement to P.W. 27, SDM, on 21.12.2012.

182. Yet another objection raised by the learned Counsel for the Appellants concerning the medical fitness of the prosecutrix, while recording the third dying declaration is that when P.W. 30, Metropolitan Magistrate, Pawan Kumar, recorded the dying declaration of the prosecutrix, she was not in a position to speak as per the endorsement made by P.W. 52, Dr. P.K. Verma, and, therefore, no weight could be attached to the dying declaration recorded by P.W. 30. In this regard, reliance is placed upon Ex. P.W. 30/B1. This contention was raised before the High Court as well as the trial court and while considering the contention, we find that:

On 25.12.2012, application [Ex. P.W. 30/B] moved by P.W. 80 S.I. Pratibha Sharma between 9:30 a.m. to 10:00 a.m. seeking opinion regarding fitness of prosecutrix to get statement recorded. P.W. 52 Dr. P.K. Verma examined the prosecutrix and opined at 12:35 p.m. that "patient has endotracheal tube in place (i.e. in her larynx and trachea) and was on ventilator and hence she could not speak.

183. P.W. 28, Dr. Rajesh Rastogi, opined vide Ex. P.W. 28/A at 12:40 p.m. on 25.12.2012 that the prosecutrix was conscious, cooperative, meaningfully communicative through non-verbal gestures, oriented and fit to give statement. P.W. 28, Dr. Rajesh Rastogi, examined the prosecutrix around 12 noon and finished it by 12:00-12:30 p.m. On 25.12.2012 at 12:35 p.m., Dr. P.K. Verma had endorsed on the document Exhibit P.W. 30/B that the victim could not speak as she had endotracheal tube in place (that is, in larynx and trachea) and was on ventilator. However, subsequently, at 12:40 p.m. on the same day, P.W. 28, Dr. Rajesh Rastogi, had endorsed on the said document, Ex. P.W. 30/B, to the effect that the victim was conscious, cooperative, meaningfully communicative, oriented, responding through non-verbal gestures and fit to give statement. The learned Counsel contended that it is inconceivable that the prosecutrix who was on life support system at 12:35 p.m. could be opined to be conscious, cooperative and fit to give statement within five minutes, i.e., at 12:40 p.m.

184. The said contention, as we find, has been appropriately dealt with by both courts below by adverting to the depositions of P.W. 52, Dr. P.K. Verma, and P.W. 28, Dr. Rajesh Rastogi. Regarding the fit mental condition of the prosecutrix and as to the different endorsements made by P.W. 52, Dr. P.K. Verma, and P.W. 28, Rajesh Rastogi, P.W. 52 was questioned suggesting that the prosecutrix was not in a fit mental condition to give the dying declaration. P.W. 52 has clearly deposed in his cross-examination that he had never endorsed that the victim was unfit to give statement at 12:35 p.m., rather he had said that she was on ventilator and hence, could not speak. The aforesaid explanation of P.W. 52, Dr. P.K. Verma, who was incharge of the ICU in

Safdarjung Hospital at the relevant time makes it limpid that even though the prosecutrix was not able to speak, yet she was conscious and oriented and was in a position to make the statement by gestures.

185. The contention that the third dying declaration made through gestures lacks credibility and that the same ought to have been videographed, in our view, is totally sans substance. The dying declaration recorded on the basis of nods and gestures is not only admissible but also possesses evidentiary value, the extent of which shall depend upon who recorded the statement. In the instant case, the dying declaration was recorded by P.W. 30, Mr. Pawan Kumar, Metropolitan Magistrate. A perusal of the questions and the simple answers by way of multiple choice put to the prosecutrix is manifest of the fact that those questions and answers were absolutely simple, effective and indispensable. The dying declaration recorded by P.W. 30, Ex. P.W. 30/D, though by nods and gestures and writings, inspires confidence and has been rightly relied upon by the trial Court as well as the High Court. Videography of the dying declaration is only a measure of caution and in case it is not taken care of, the effect of it would not be fatal for the case and does not, in any circumstance, compel the court to completely discard that particular dying declaration.

186. In ***Meesala Ramakrishan v. State of A.P.*** MANU/SC/0709/1994 : (1994) 4 SCC 182, this Court, while admitting the dying declaration made through gestures, made the following observations:

20. ... that dying declaration recorded on the basis of nods and gestures is not only admissible but possesses evidentiary value, the extent of which shall depend upon who recorded the statement, what is his educational attainment, what gestures and nods were made, what were the questions asked -- whether they were simple or complicated -- and how effective or understandable the nods and gestures were.

187. In ***B. Shashikala v. State of A.P.*** MANU/SC/0052/2004 : (2004) 13 SCC 249, it was observed that:

13. The evidence of PW 8 is absolutely clear and unambiguous as regards the manner in which he recorded the statement of the deceased with the help of PW 4. It is also evident that he also has knowledge of Hindi although he may not be able to read and write or speak in the said language. His evidence also shows that he has taken all precautions and care while recording the statement. Furthermore, he had the opportunity of recording the statement of the deceased upon noticing her gesture. The court in a situation of this nature is also entitled to take into consideration the circumstances which were prevailing at the time of recording the statement of the deceased.

188. Appreciating the third dying declaration recorded on the basis of gestures, nods and writings on the base of aforesaid pronouncements, we have no hesitation in holding that the dying declaration made through signs, gestures or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the court ought to take is that the person recording the dying declaration is able to notice correctly as to what the declarant means by answering by gestures or nods. In the present case, this caution was aptly taken, as the person who recorded the prosecutrix's dying declaration was the Metropolitan Magistrate and he was

satisfied himself as regards the mental alertness and fitness of the prosecutrix, and recorded the dying declaration of the prosecutrix by noticing her gestures and by her own writings.

189. Considering the facts and circumstances of the present case and upon appreciation of the evidence and the material on record, in our view, all the three dying declarations are consistent with each other and well corroborated with other evidence and the trial court as well as the High Court has correctly placed reliance upon the dying declarations of the prosecutrix to record the conviction.

Insertion of the iron rod:

190. Presently, we shall advert to the contentions raised as regards the use of iron rod for causing recto-vaginal injury. The case of the prosecution is that the accused, in most inhumane and unfeeling manner, inserted iron rod in the rectum and vagina of the prosecutrix and took out the internal organs of the prosecutrix from the vaginal and anal opening while pulling out the said iron rod. They also took out the internal organs of the prosecutrix by inserting iron rod in the vagina of the prosecutrix thereby causing dangerous injuries. Two iron rods, Ex. P-49/1 and Ex. P-49/2, were recovered vide seizure memo Ex. P.W. 74/G by the Investigating Officer, P.W. 80, at the instance of accused Ram Singh (since deceased). As per Ex. P.W. 49/A, the internal injuries sustained by the victim were like vaginal tear, profused bleeding from vagina, rectal tear communicating with vaginal tear and other injuries.

191. P.W. 50, Dr. Raj Kumar Chejara, and the surgery team operated the prosecutrix in the intervening night of 16/17.12.2012 and the operative findings are as under:

a. collection of around 500ml of blood in peritoneal cavity

b. stomach pale,

c. duodenum contused

d. jejunum contused & bruised at whole of the length and lacerated & transected at many places. First transaction was 5cm away from DJ junction. Second one was 2 feet from the DJ, after that there was transaction and laceration at many places. Jejunal loop was of doubtful viability. Lieum - whole lieum was totally contused and it was of doubtful viability. Distal ileum was completely detached from the mesentery till ICJ (ileocaecal junction). It was completely devascularized.

e. Large bowel was also contused, bruised and of doubtful viability. Descending colon was lacerated vertically downward in such a manner that it was completely opened.

f. Sigmoid colon & rectum was lacerated at many places. Linearlyu, mucosa was detached completely at places, a portion of it around 10cm was prolapsing through perineal wound.

g. Liver and spleen was normal.

h. Both sides retro peritoneal (posterior wall of the abdomen) haematoma present.

i. Mesentery and omentum was totally contused and bruised.

j. Vaginal tear present, recto vaginal septum was completely torn.

192. P.W. 80, SI Pratibha Sharma, the Investigating Officer, deposed before the trial court that accused Ram Singh had led her inside the bus, Ex. P1 and had taken out two iron rods from the shelf of the driver's cabin. One of the rods, 59 cm in length, was primarily used for changing punctured tyres; it was hooked from one end and chiseled from the other. It also had multiple serrations on both the ends. The other rod was of silver colour, hollow and 70 cm long. This rod formed part of a hydraulic jack and was used as its lever, Ex. P.W. 49/G. The rods were blood stained and the recovered rods were sealed with the seal of PS and were deposited in the Malkhana. On 24.12.2012, the said iron rods along with the sample seal were sent to CFSL, CBI for examination through SI Subhash, P.W. 74, vide RC No. 178/21/12, proved as Ex. P.W. 77/R. The DNA report prepared by Dr. B.K. Mohapatra, P.W. 45, suggests that the DNA profile developed from the bloodstains from both the iron rods is consistent with the DNA profile of the prosecutrix.

193. Mr. Sharma, learned Counsel for the Appellants, has countered the prosecution case on the use of iron rods. He has drawn support from the medical records and the testimony of the witnesses as also the prosecutrix to assert the aforesaid submission. He submits that the prosecution has fabricated the story as regards the use of iron rods only to falsely implicate all the accused in the death of the prosecutrix. The defence has refuted the use of iron rods by the accused on the ground that the informant as well as the prosecutrix did not mention about the use of iron rods in their first statements. The main contention of the accused is that the prosecutrix herself, in her first statement given to Dr. Rashmi Ahuja, P.W. 49, Ex. P.W. 49/A, failed to disclose the use of iron rods. He relies on the absence of the words 'iron rods' in Ex. P.W. 49/A to fortify this submission. He contends that as recorded by P.W. 49, the prosecutrix was in a fit state of mind for she even gave her residential address after undergoing the traumatic experience, but she failed to mention that the accused persons also used the iron rods on her, a fact that would have had a bearing on her treatment.

194. The aforesaid proponement is not sustainable as MLC, Ex. P.W. 49/A, of the prosecutrix suggests that she was brought to the hospital in a traumatized state with grievous injuries and she was cold and clammy, i.e., whitish (due to vasoconstriction) and had lost a lot of blood. As per Ex. P.W. 49/A, the prosecutrix was sure of intercourse to have been committed twice along with rectal penetration whereafter she did not remember intercourse. It is worthy to note that she was oscillating between consciousness and unconsciousness at the time of the incident and there was loss of lot of blood by the time she had reached the hospital which is evident from Ex. P.W. 49/B-MLC. A victim who has just suffered a ghastly and extremely frightening incident cannot be expected to immediately come out of the state of shock and state the finest details of the incident. The subsequent dying declarations of the prosecutrix corroborated by the medical evidence cannot be disregarded merely on the ground that the use of iron rods is not substantiated by the prosecutrix's first statement.

195. The gravity and hideousness of the injuries caused to the prosecutrix, as has already been discussed above, clearly shows the use of iron rods by the accused. The injuries caused to the prosecutrix by incessantly and abominably injuring her private parts using the concerned iron rods

were so grave that death was the inevitable consequence. As already noted, both the iron rods, Ex. P-49/1 and Ex. P-49/2, were recovered at the instance of accused Ram Singh from inside the concerned bus. The DNA profile developed from the blood stains obtained from the iron rods is also consistent with the DNA profile of the prosecutrix. In such circumstances, merely because the finger prints of the accused were not obtained from the iron rods, it cannot be concluded that the accused were not linked with the concerned iron rods. Accused Ram Singh himself had the iron rods recovered to the Investigating Officer. Furthermore, the dying declaration of the prosecutrix, which is highly reliable, clearly establishes the horrendous use of iron rods by the accused persons.

196. The iron rods were sent for forensic examination to the CFSL. The DNA profile developed from the blood stains obtained from the iron rods recovered at the instance of accused Ram Singh was found to be of female origin and were found to be consistent with the DNA profile of the prosecutrix. Hence, the factum of insertion of iron rods in the private parts of the prosecutrix is also fortified by the scientific evidence.

197. P.W. 1, in his chief examination, deposed that he was severely assaulted by the accused with iron rods on his head and the rest of his body. It is submitted that as per MLC of P.W. 1, Ex. P.W. 51/A, the nature of injuries sustained by P.W. 1 were simple. It is contended that if P.W. 1 was beaten with the iron rod in the manner alleged by him, he would have sustained more serious injuries. It is canvassed that P.W. 1 sustained only simple injuries which leads to an inference that the iron rod was not used in the manner stated by the prosecution. Of course, as per Ex. P.W. 51/A, P.W. 1 sustained simple injuries but as seen from Ex. P.W. 51/A, there was also nasal bleeding from his nose and P.W. 1 was also vomiting. Merely because the injuries sustained by P.W. 1 were opined to be of simple nature, the use of iron rods cannot be doubted.

198. Learned Counsel for the Appellants further stressed on the point that P.W. 1 neither in his MLC, Ex. P.W. 51/A, nor in his complaint, Ex. P.W. 1/A, mentioned the use of iron rod; the description of bus or the names of the accused. In this regard, it has to be kept in mind that the purpose of FIR is mainly to set the criminal law in motion and not to lay down every minute detail and the entire gamut of the evidence relating to the case and, therefore, non-mention of use of iron rods in the FIR does not remotely create a dent in the case of the prosecution. When the subsequent statements of the prosecutrix well corroborated by the medical evidence are available, it is completely immaterial that the statement of P.W. 1 does not mention the use of iron rods. Thus, P.W. 1's omission to state the factum of use of iron rods in his complaint or MLC is not fatal to the case of the prosecution.

199. It is apposite to state here that non-mention of the use of iron rods in P.W. 1's statement has been a ground for giving rise to suspicion of his testimony. We find it difficult to comprehend as to how P.W. 1 could have been aware of any use of iron rods against the prosecutrix. P.W. 1 was being held by the accused towards the front of the bus, while the prosecutrix was being raped at the rear side of the bus and the lights of the bus also had been turned off. His statement in his complaint, Ex. P.W. 1/A, that he heard the prosecutrix shouting and crying and that her voice was oscillating is consistent with the narration of facts as also the medical records.

200. The second statement of the prosecutrix recorded in Ex. P.W. 27/A by P.W. 27, Smt. Usha Chaturvedi, has detailed the account of the entire incident specifying the role of each accused;

gang rape/unnatural sex committed upon her; and the injuries caused in her vagina and rectum by use of iron rod and by inserting of hands by the accused are mentioned. This statement, in fact, bears the date and signature of the prosecutrix and records that the accused committed gang rape on her, inserted iron rod in the vagina and through anal opening causing injuries to the internal organs of the prosecutrix. The subsequent statement of the prosecutrix also affirms the above facts. That apart, as per the medical opinion Ex. P.W. 49/G given by P.W. 49, the recto-vaginal injury of the prosecutrix could be caused by the rods recovered from the bus.

Anatomy argument

201. Learned Counsel for the Appellants also submitted that if the rods purported to be used had actually been inserted through the vagina, it would have first destroyed the uterus before the intestines were pulled out. It was submitted that there were no rods related injuries in her uterus and medical science too does not assist the prosecution in their claim that the iron rods were used as a weapon for penetration. Mr. Sharma placed reliance on:

1. the first OT notes, Ex. P.W. 50/A that were made following the first operation of the prosecutrix on 17.12.2012 and where the following was recorded:

uterus, B/L tubes and ovaries seen and healthy

2. the case sheet of the operation conducted on 19.12.2012, presented as Ex. P.W. 50/D, wherein the following was recorded:

Gynae findings

... Cx, vaginal vault and ant vaginal wall (H)...

3. the post-mortem report, Ex. P.W. 34/A, that was prepared in Mount Elizabeth Hospital, Health Science Authority, Singapore, by the Autopsy doctor, Dr. Paul Chui on 29.12.2012 and where the following was recorded:

Uterus, Tubes and Ovaries

Uterus, tubes and ovaries were present in their normal anatomical positions. The uterus measured 8 cm x 5 cm x 3.5 cm. Thin fibrinopurulent adhesions were present on the serosal surfaces of the uterus and the adnexae. Cervix appeared normal and the os was closed. There were no cervical erosions and no haemorrhages on the intra-vaginal aspect of the cervix. Cut sections showed thin endometrium and normal myometrium. Tubes were normal. Both ovaries were normal in size. Cut sections of both ovaries showed corpus lutea, the largest of which was present in the right ovary.

The learned Counsel for the Appellants submit that that if the doctors in the surgery team did not find the uterus damaged, then it cannot be claimed that the rod was inserted in her private parts and intestines were pulled out.

202. The aforesaid submission can be singularly rejected without much discussion on the foundation that a question to that effect was not put to the doctors in their respective cross-examinations. However, instead of summary rejection, we shall deal with it for the sake of our satisfaction and also to meet the contention. While it may be so that the uterus, tubes and the cervix were not damaged, that does not mean that the intestines could not have been damaged as they have been. It stands to reason based on common understanding and medical science to allay this contention. First, it is nowhere the stance that the rod was inserted only through the vagina. The prosecutrix herself had stated in her dying declarations that she was raped through the vagina as also the anus, Ex. P.W. 27/A. The anus is directly connected to the intestines via the rectum and, thus, deep penetration by use of a rod or other long object could have caused injuries to the bowels/intestines.

203. To appreciate the above contention, it is necessary to understand the anatomy and position of the uterus. We may profitably refer to the following excerpts from ***'Gray's Anatomy: Descriptive and Applied', 34th Edn. [Orient Longman Publication]*** at pages 1572 and 1579:

THE UTERUS: The uterus, or womb, is a hollow, thick-walled, muscular organ situated in the lesser pelvis between the urinary bladder in front and the rectum behind. Into its upper part the uterine tubes open one on each side, while below, its cavity communicates with that of the vagina. When the ova are discharged from the ovaries, they are carried to the uterine cavity through the uterine tubes. If an ovum be fertilized it embeds itself in the uterine wall and is normally retained in the uterus until prenatal development is completed, the uterus undergoing changes in size and structure to accommodate itself to the needs of the growing embryo. After parturition the uterus returns almost to its former condition, though it is somewhat larger than in the virgin state. For general descriptive purposes the adult virgin uterus is taken as the type form.

In the virgin state the uterus is flattened from before backwards and is pear-shaped, with the narrow end directed downwards and backwards. It lies between the bladder below and in front, and the sigmoid colon and rectum above and behind, and is completely below the level of the pelvic inlet.

The long axis of the uterus usually lies approximately in the axis of the pelvic inlet (p. 440), but as the organ is freely movable its position varies with the state of distension of the bladder and rectum. Except when much displaced by a distended bladder, it forms almost a right angle with the vagina, since the axis of the vagina correspond to the axes of the cavity and outlet of the lesser pelvis (p. 440)" (at page 1572)

THE VAGINA: The vagina is a canal which extends from the vestibule, or cleft between the labia minora, to the uterus, and is situated, behind the bladder and urethra, and in front of the rectum and anal canal; it is directed upwards and backwards, its axis forming with that of the uterus an angle of over ninety degrees, opening forwards..." (at page 1579)

And 'A Fascimile: Gray's Anatomy' (at page 723) [Black Rose Publications]

THE VAGINA

.....

Relations: Its anterior surface is concave, and in relation with the base of the bladder, and with the urethra. Its posterior surface is convex, and connected to the anterior wall of the rectum, for the lower three-fourths of its extent....

The aforesaid excerpts establish that the vagina and uterus are almost at right angles to each other and the rectum is only separated by a wall of tissue. The pelvic cavity as set forth in the diagram in the book supports the same.

204. The exhibits relating to injuries may be noted. OT notes from 17.12.2012 and 19.12.2012 read as under:

OT Notes:

PW 50/B: Call received from Dr. Gaurav and Dr. Piyush at approx. 4.00 a.m. from noty OT.

Immediately reached OT and reviewed the details of internal injury (as mentioned in OT notes) the condition of the small and large bowel extremely bad for any definitive repair. The condition explained to the mother of the patient and the police officials present. Case discussed with Dr. S.K. Jain. Int. I/C telephonically.

205. The operative findings which are seen from the examination done by the Gynaecologist and the Surgeons are:

Perineal

• Abdominal findings: Rectum is longitudinally torn on anterior aspect in continuation with tear. This tear is continuing upward involving sigmoid colon descending colon which is splayed open. The margins are edematous.

• There are multiple longitudinal tear in the mucosa of rectosigmoid area.

• Transverse colon was also torn and gangrenous.

• Hepatic flexure ascending colon and caecum were gangrenous and multiple perforation at many places.

• Terminal item approximately 1 1/2 feet loosely hanging in the abdominal cavity. It was avulsed from its mesentery and was nonviable.

• Rest of small bowel was nonenlistend with only patens of mucosa at places and border of the mesentery was contused. This contused mesentery border initially appeared (during first surgery) as contused small bowel.

• Jejunostomy stoma was gangrenous for approximately 2 cm.

• Stomach and duodenum was distended but healthy.

Surgical Procedure:

• Resection of gangrenous terminal ileum, caecum, appendix, ascending colon, hepatic flexure and transverse colon was done.

• Resection of necrotic jejunal stoma with closure of duodenojejunal flexure in two layers by 3-0 viaeny.

• Diverting lateral tube dudoenostomy (with 18F Folley's catheter) brought through right flank.

• Tube gastrostomy was added as another decompressive measures (28 size apotere tube was used) Tube gastrostomy was brought and from previous jejunostomy site.

• Abdominal drain placed in pelvis.

• Rectal sheath closed by using No. 1 prolene interrupted sutures.

• Skin closed by using 1-0 nylon.

• Perineal wound packed with Betadine soaked gauze piece.

• T-Bandage applied

• ASD done for abdominal wound.

• Patient tolerated procedure and was shifted back to ICU-I.

Post OP Advise

1. NPO

2. CRTA

3. IVF as per CVP and output by ICU team.

4. Injection menopenum Limezolid to be continued as before.

5. Injection metronidazole 100ml IV TDS.

6. Injection Pantoprozole 20 mg IV OD

7. Strict I/O charting.

8. Rest of the treatment as advised by ICU team.

206. From the nature of the injuries noted in the OT Notes, the rectum was longitudinally torn and transverse colon was torn. From the Post-Mortem Certificate, the uterus was found in position (no injuries to uterus). If the rod was inserted in the vagina, having regard to the fact that the injury within the vagina was only in the posterior surface, it indicates that the rod was pushed inside with a downward force and not upward (which could have resulted in injury to the uterus) and it perhaps tunneled its way through the vagina into the rectal cavity and the bowels. Therefore, merely because no injuries to the uterus of the victim were noticed, that does not lead to the conclusion that iron rod was not used. Thus, the submission that has been raised with immense enthusiasm and ambition to create a concavity in the case of the prosecution on this score deserves to be repelled and we do so.

Analysis of evidence pertaining to DNA

207. Having dealt with the aspect pertaining to insertion of rod, it is apposite to advert to the medical evidence and post mortem report. We have, while dealing with other aspects, referred to certain aspects including DNA analysis of medical evidence but the same requires to be critically dealt with as the prosecution has placed heavy reliance upon it.

208. DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behavior and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person's DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule. It has a double helix structure which can be compared with a twisted rope 'ladder'.

209. The nature and characteristics of DNA had been succinctly explained by Lord Justice Phillips in ***Regina v. Alan James Doheny & Gary Adams*** 1997 (1) Criminal Appeal Reports 369. In the above case, the accused were convicted relying on results obtained by comparing DNA profiles obtained from a stain left at the scene of the crime with DNA profiles obtained from a sample of blood provided by the Appellant. In the above context, with regard to DNA, the following was stated by Lord Justice Phillips:

Deoxyribonucleic acid, or DNA, consists of long ribbon-like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes - 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succinctly than did Lord Taylor C.J. in the case of Deen (transcript:December 21, 1993), so we shall gratefully adopt his description.

The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track

through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not.

210. In the United States, in an early case ***Frye v. United States*** 54 App. D.C. 46 (1923), it was laid down that scientific evidence is admissible only if the principle on which it is based is substantially established to have general acceptance in the field to which it belonged. The US Supreme Court reversed the above formulation in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*** MANU/USSC/0103/1993 : 113 S.CT. 2786 (1993) stating thus:

11. Although the Frye decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed. Rule Evid. 201.

13. This is not to say that judicial interpretation, as opposed to adjudicative fact finding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral... In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B. Cardozo, The nature of the Judicial Process 178, 179 (1921).

211. The principle was summarized by Blackmun, J., as follows:

To summarize: "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence--especially Rule 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

212. After the above judgment, the DNA Test has been frequently applied in the United States of America. In ***District Attorney's Office for the Third Judicial District et al. v. William G. Osborne*** 129 Supreme Court Reporter 2308, Chief Justice Roberts of the Supreme Court of United States, while referring to the DNA Test, stated as follows:

DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure-usually but not always through legislation.

... ...

Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue.

213. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice.

In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Code of Criminal Procedure by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.

214. Similarly, Under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must.

Section 53A Sub-section (2) as well as Section 164(A) Sub-section (2) are to the following effect:

Section 53A. Examination of person accused of rape by Medical Practitioner.-

(1)... ... ...

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

Section 164A. Medical Examination of the victim of rape.-

(1)... ... ...

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

215. This Court had the occasion to consider various aspects of DNA profiling and DNA reports. K.T. Thomas, J. in ***Kamti Devi (Smt.) and Anr. v. Poshi Ram*** MANU/SC/0335/2001 : (2001) 5 SCC 311, observed:

10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. ...

216. In ***Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh*** MANU/SC/1306/2009 : (2009) 14 SCC 607, a two-Judge Bench had explained as to what is DNA in the following manner:

41. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine.

There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain

distinct bands with appropriate control. (See article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken.

42. Indisputably, the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. In cross-examination, PW 46 had stated as under:

If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population.

217. In ***Santosh Kumar Singh v. State Through CBI*** MANU/SC/0801/2010 : (2010) 9 SCC 747, which was a case of a young girl who was raped and murdered, the DNA reports were relied upon by the High Court which were approved by this Court and it was held thus:

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in *Kamti Devi v. Poshi Ram* (supra). In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the Appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9.

218. In ***Inspector of Police, Tamil Nadu v. John David*** MANU/SC/0461/2011 : (2011) 5 SCC 509, a young boy studying in MBBS Course was brutally murdered by his senior. The torso and head were recovered from different places which were identified by the father of the deceased. For confirming the said facts, the blood samples of the father and mother of the deceased were taken which were subject to DNA test. From the DNA, the identification of the deceased was proved. Paragraph 60 of the decision is reproduced below:

60. ... The said fact was also proved from the DNA test conducted by PW 77. PW 77 had compared the tissues taken from the severed head, torso and limbs and on scientific analysis he has found that the same gene found in the blood of P.W. 1 and Baby Ponnusamy was found in the recovered parts of the body and that therefore they should belong to the only missing son of PW 1.

219. In ***Krishan Kumar Malik v. State of Haryana*** MANU/SC/0718/2011 : (2011) 7 SCC 130, in a gang rape case when the prosecution did not conduct DNA test or analysis and matching of semen of the Appellant-accused with that found on the undergarments of the prosecutrix, this Court held that after the incorporation of Section 53-A in Code of Criminal Procedure, it has become necessary for the prosecution to go in for DNA test in such type of cases. The relevant paragraph is reproduced below:

44. Now, after the incorporation of Section 53-A in the Code of Criminal Procedure w.e.f. 23.06.2006, brought to our notice by the learned Counsel for the Respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the

prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Code of Criminal Procedure the prosecution could have still restored to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.

220. In ***Surendra Koli v. State of Uttar Pradesh and Ors.*** MANU/SC/0119/2011 : (2011) 4 SCC 80, the Appellant, a serial killer, was awarded death sentence which was confirmed by the High Court. While confirming the death sentence, this Court relied on the result of the DNA test conducted on the part of the body of the deceased girl. Para 12 is reproduced below:

12. The DNA test of Rimpa by CDFD, a pioneer institute in Hyderabad matched with that of blood of her parents and brother. The doctors at AIIMS have put the parts of the deceased girls which have been recovered by the doctors of AIIMS together. These bodies have been recovered in the presence of the doctors of AIIMS at the pointing out by the accused Surendra Koli. Thus, recovery is admissible Under Section 27 of the Evidence Act.

221. In ***Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra*** MANU/SC/0681/2012 : (2012) 9 SCC 1, the accused was awarded death sentence on charges of killing large number of innocent persons on 26th November, 2008 at Bombay. The accused with others had come from Pakistan using a boat 'Kuber' and several articles were recovered from 'Kuber'. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA test and the DNA test matched with several accused. The Court observed:

333. It is seen above that among the articles recovered from *Kuber* were a number of blankets, shawls and many other items of clothing. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA profiling and, excepting Imran Babar (deceased Accused 2), Abdul Rahman Bada (deceased Accused 5), Fahadullah (deceased Accused 7) and Shoaib (deceased Accused 9), the rest of six accused were connected with various articles found and recovered from the *Kuber*. The Appellant's DNA matched the DNA profile from a sweat stain detected on one of the jackets. A chart showing the matching of the DNA of the different accused with DNA profiles from stains on different articles found and recovered from the *Kuber* is annexed at the end of the judgment as Schedule III.

222. In ***Sandeep v. State of Uttar Pradesh*** MANU/SC/0422/2012 : (2012) 6 SCC 107, the facts related to the murder of pregnant paramour/girlfriend and unborn child of the accused. The DNA report confirmed that the Appellant was the father of the unborn child. The Court, relying on the DNA report, stated as follows:

67. In the light of the said expert evidence of the Junior Scientific Officer it is too late in the day for the Appellant Sandeep to contend that improper preservation of the foetus would have resulted in a wrong report to the effect that the accused Sandeep was found to be the biological father of the foetus received from the deceased Jyoti. As the said submission is not supported by any relevant material on record and as the Appellant was not able to substantiate the said argument with any other supporting material, we do not find any substance in the said submission. The circumstance, namely, the report of DNA in having concluded that accused Sandeep was the

biological father of the recovered foetus of Jyoti was one other relevant circumstance to prove the guilt of the said accused.

223. In ***Rajkumar v. State of Madhya Pradesh*** MANU/SC/0136/2014 : (2014) 5 SCC 353, the Court was dealing with a case of rape and murder of a 14 year old girl. The DNA report established the presence of semen of the Appellant in the vaginal swab of the prosecutrix. The conviction was recorded relying on the DNA report. In the said context, the following was stated:

8. The deceased was 14 years of age and a student in VIth standard which was proved from the school register and the statement of her father Iknis Jojo (P.W. 1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the Appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having Appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the Appellant.

224. In ***Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Anr.*** MANU/SC/0006/2014 : (2014) 2 SCC 576, the Appellant, father of the child born to his wife, questioned the paternity of the child on the ground that she did not stay with him for the last two years. The Court directed for DNA test. The DNA result opined that the Appellant was not the biological father of the child. The Court also had the occasion to consider Section 112 of the Evidence Act which raises a presumption that birth during marriage is conclusive proof of legitimacy. The Court relied on the DNA test holding the DNA test to be scientifically accurate. The pertinent observations are extracted below:

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the Appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.

20. As regards the authority of this Court in *Kamti Devi*, this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband to the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act." The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court confronted with a situation in which a DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child Under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the Respondents.

From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been

no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.

225. In order to establish a clear link between the accused persons and the incident at hand, the prosecution has also adduced scientific evidence in the form of DNA, fingerprint and bite mark analysis.

226. Various samples, for the purpose of DNA profiling, were lifted from the person of the prosecutrix; the informant; the accused, their clothes/articles; the dumping spot; the iron rods; the ashes of partly burnt clothes; as well as from the offending bus. P.W. 45, Dr. B.K. Mohapatra, analysed the said DNA profiles and submitted his report thereof. In his report, he concluded that the samples were authentic and capable of establishing the identities of the persons concerned beyond reasonable doubt.

227. After establishing the identities of each of the accused persons, the informant and the prosecutrix through DNA analysis, the DNA profiles generated from the remaining samples, where the identity of biological material found thereon needed to be ascertained, were matched with the DNA profiles of the prosecutrix, the informant and the accused, generated earlier from known samples. Such an analysis cogently linked each of the accused with the victims as also with the crime scene. A summary of the findings in the report submitted by P.W. 45, Dr. B.K. Mohapatra, is as under:

"S.No.	Accused	DNA EVIDENCE
1	Ram Singh	Rectal swab from the prosecutrix contained DNA of male origin, which was found consistent with the DNA developed from the blood sample of this accused. DNA profile developed from the blood stains from the underwear, T-shirt and slippers of this accused was found consistent with the DNA of the prosecutrix.
2	Mukesh	DNA profile developed from the blood stains from the pants, T-shirt and jacket of this accused was found consistent with the DNA of the prosecutrix.
3	Akshay	Breast swab of the prosecutrix contained DNA of male origin which was found consistent with the DNA of this accused. DNA profile developed from the blood stains from the jeans of this accused was found consistent with the DNA of the prosecutrix.
4	Vinay	DNA profile developed from the blood stains from the underwear, jacket and slippers of this accused was found consistent with the DNA of the prosecutrix.
5	Pawan	DNA profile developed from the blood stains from the sweater and shoes and slippers of this accused was found consistent with the DNA of the prosecutrix."

228. Further, a summary of the DNA analysis of the biological samples lifted from the material objects such as the bus, the iron rods, and the ash and unburnt pieces of clothes is also worth producing here:

"Serial No.	Identity of the victim	Findings of DNA Analysis
1.	Informant	i. The DNA profile developed from burnt clothes pieces was found to be of male origin and was consistent with the DNA profile of complainant. ii. The bunch of DNA profile developed from hair and blood stained pieces of paper recovered from the bus was found consistent with the DNA profile of complainant. iii. The DNA profile developed from blood stained dried leaves collected from the place where both the victims were thrown matched with the DNA profile of complainant.
2.	Prosecutrix	i. The DNA profile developed from blood stains from both the iron rods recovered at the instance of accused Ram Singh from bus was of female origin and was consistent with the DNA profile of prosecutrix. ii. The DNA profile developed from blood stains from curtains of the bus matched with the DNA profile of prosecutrix. iii. The DNA profile developed from blood stains from seat covers was found consistent with the DNA profile of prosecutrix. iv. DNA profile developed from blood stains from the bunch of the hair recovered from floor of the bus below sixth row seat, blood stains prepared from the roof of the bus near back gate, blood stains prepared from the floor of the bus near back gate, blood stains taken from side of back stairs of the bus, and blood stains taken from the inner side of the back door of the bus was found consistent with the DNA profile of prosecutrix.

229. P.W. 45, Dr. B.K. Mohapatra, has clearly testified in his cross-examination that all the experiments conducted by him confirmed to the guidelines and methodology documented in the Working Procedure Manuals of the laboratory which have been validated and recommended for use in the laboratory. He further added that once a DNA profile is generated, its accuracy is 100%. The trial court and the High Court have consistently noted that the counsel for the defence did not raise any substantial ground to challenge the DNA report during the cross-examination of P.W. 45. In such circumstances, there is no reason to declare the DNA report as inaccurate, especially when it clearly links the accused persons with the incident.

230. Mr. Sharma, learned Counsel appearing for Appellants - Mukesh and Pawan Kumar Gupta, submitted that in the instant case, the DNA test cannot be treated to be accurate, for there was blood transfusion as the prosecutrix required blood and when there is mixing of blood, the DNA profiling is likely to differ. It is seemly to note, nothing had been put to the expert in his cross-examination in this regard. As the authorities relating to DNA would show, if the quality control is maintained, it is treated to be quite accurate and as the same has been established, we are compelled to repel the said submission of Mr. Sharma.

The evidence relating to finger print analysis:

231. Next aspect that is required to be adverted is the evidence of fingerprint analysis adduced by the prosecution to establish the identity of the accused persons. By virtue of the finger print analysis, the prosecution has tried mainly to establish the presence of the accused in the offending bus. On 17.12.2012 and 18.12.2012, a team of experts from the CFSL had lifted chance finger prints from the concerned bus, Ex. P-1, at Thyagraj Stadium. On 28.12.2012, P.W. 78, Inspector Anil Sharma of P.S. Vasant Vihar, the then S.H.O. of Police Station Vasant Vihar, requested the Director, CFSL for taking digital palm prints and foot prints of all the accused persons vide his letter Ex. P.W. 46/C. Pursuant to the said request made by P.W. 78, Inspector Anil Sharma, the CFSL on 31.12.2012 took the finger/palm prints and foot prints of the accused persons at Tihar Jail. After comparing the chance prints lifted from the bus with the finger prints/palm prints and foot prints of all the accused persons, P.W. 46, Shri A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI, submitted his report, Ex. P.W. 46/D.

232. As per the report, Ex. P.W. 46/D, the result of the aforesaid examination of the Finger Print Division of the CFSL, CBI, New Delhi was that the chance prints of accused Vinay Sharma were found on the bus in question. The relevant portion of the report is as under:

RESULT OF EXAMINATION:

I. The chance print marked as Q.1 is identical with left palmprint specimen of Vinay Sharma S/o. Sh. Hari Ram Sharma marked here as LPS-28 on the slip marked here as S.28 (Matching ridge characteristics have been found in their relative positions in the chance palmprint and specimen palm print. This forms the basis of the opinion that these prints are identical. Eight of them have been marked with projected red lines with their detailed description are placed at Annexure-1)

II. The chance print marked as Q.4 is identical with right thumb impression of Vinay Sharma S/o. Sh. Hari Ram Sharma marked here as RTS-23 on the slip marked here as S.23 (Matching ridge characteristics have been found in their relative positions in the chance print and specimen finger print. This forms the basis of the opinion that these prints are identical. Eight of them have been marked with projected red lines with their detailed description are placed at Annexure-2).

The above report incontrovertibly proves that accused Vinay was present in the bus at the time of the incident. Be it noted, the other chance prints were found to be unfit for comparison or different from specimen print.

The Odontology report

233. Now, we shall analyse the Odontology report. In today's world, Odontology is a branch of forensic science in which dental knowledge is applied to assist the criminal justice delivery system. S. Keiser-Nielsen, an authority on Forensic Odontology defines the basic concept of Forensic Odontology in the following words:

A. Forensic odontology is that branch of odontology which in the interests of justice deals with the proper handling and examination of dental evidence and with the proper evaluation and presentation of dental findings. Only a dentist can handle and examine dental evidence with any degree of accuracy; therefore, this field is above all a dental field.

234. Professor Neilsen, elaborating on Forensic Odontology, further states:

B. There are three reasons for considering forensic odontology a well-defined and more or less independent subject:1) it has objectives different from those at which conventional dental education aims; 2) forensic dental work requires investigations and considerations different from those required in ordinary dental practice; and 3) forensic dental reports and statements have to be presented in accordance with certain legal formalities in order to be of value to those requesting aid.

The area of forensic odontology consists of three major fields of activity: 1) the examination and evaluation of injuries to teeth, jaws, and oral tissues from various causes: 2) the examination of bite marks with a view to the subsequent elimination or possible identification of a suspect as the originator; and 3) the examination of dental remains (whether fragmentary or complete, and including all types of dental restoration) from unknown persons or bodies for the purpose of identification.

235. In the instant case, the prosecution has relied upon the odontology report, i.e., bite mark analysis report prepared by P.W. 71, Dr. Ashith B. Acharya, to link the incident with the accused persons. The Odontology report links accused Ram Singh and accused Akshay with the crime in question.

236. Dr. K.S. Narayan Reddy, in his book, Medical Jurisprudence and Toxicology (Law, Practice and Procedure), Third Edition, 2010, Chapter VIII page 268, has extensively dealt with human bites, their patterns, the manner in which they should be lifted with a swab and moistened with

sterile water and the manner in which such swabs need to be handled is delineated along with their usefulness in identification. The High Court has also referred to the same. It is as follows:

They are useful in identification because the alignment of teeth is peculiar to the individual. Bite marks may be found in materials left at the place of crime e.g., foodstuffs, such as cheese, bread, butter, fruit, or in humans involved in assaults, when either the victim or the accused may show the marks, usually on the hands, fingers, forearms, nose and ears.

237. After making the aforesaid observations, the author dwells upon the various methods used for bite mark analysis including the photographic method, which method was utilized in the instant case. The photographic method is described as under:

Photographic method: The bite mark is fully photographed with two scales at right angle to one another in the horizontal plane. Photographs of the teeth are taken by using special mirrors which allow the inclusion of all the teeth in the upper or lower jaws in one photograph. The photographs of the teeth are matched with photographs or tracings of the teeth. Tracings can be made from positive casts of a bite impression, inking the cutting edges of the front teeth. These are transferred to transparent sheets, and superimposed over the photographs, or a negative photograph of the teeth is superimposed over the positive photograph of the bite. Exclusion is easier than positive matching.

238. In the present case, the photographs of bite marks taken by P.W. 66, Shri Asghar Hussein, of different parts of the body of the prosecutrix were examined by P.W. 71, Dr. Ashith B. Acharya. The photographs depicted the bite marks on the body of the prosecutrix. The said bite marks found on the body of the victim were compared with the dental models of the suspects. The analysis showed that at least three bite marks were caused by accused Ram Singh, whereas one bite mark has been identified to have been most likely caused by accused Akshay. An excerpt from the report, Ex. P.W. 71/C, of P.W. 71, Dr. Ashith B. Acharya, has been extracted by the High Court. It reads thus:

..... There is absence of any unexplainable discrepancies between the bite marks on Photograph No. 4 and the biting surfaces of one of the accused person's teeth, namely Ram Singh. Therefore, there is reasonable medical certainty that the teeth on the dental models of the accused person named Ram Singh caused the bite marks visible on Photograph No. 4; also the bite marks on Photograph Nos. 1 and 2 show some degree of specificity to this accused person's teeth by virtue of a sufficient number of concordant points, including some corresponding unconventional/individual characteristics. Therefore, the teeth on the dental models of the accused person with the name Ram Singh probably also caused the bite marks visible on Photograph Nos. 1 and 2.....

x x x x x The comparison also shows that there is a concordance in terms of general alignment and angulation of the biting surfaces of the teeth of the lower jaw on the dental models of the accused person with the name Akshay and the corresponding bite marks visible on Photograph No. 5. In particular, the comparison revealed concordance between the biting surface of the teeth on the lower jaw of the dental models of the accused person with the name Akshay and the bite mark visible on Photograph No. 5 in relation to the rotated left first incisor whose mesial surface pointed

towards the tongue. Overall, the bite mark shows some degree of specificity to the accused person's teeth by virtue of a number of concordant points, including one corresponding unconventional/individual characteristic. There is an absence of any unexplainable discrepancies between the bite mark and the biting surfaces of this accused person's teeth. Therefore, the teeth on the dental models of the accused person with the name Akshay probably caused the bite marks visible on Photograph No. 5.

239. Be it noted, the present is a case where the victim's body contained various white bite marks. Bite mark analysis play an important role in the criminal justice system. Advanced development of technology such as laser scanning, scanning electron microscopy or cone beam computed tomography in forensic odontology is utilized to identify more details in bite marks and in the individual teeth of the bite. Unlike fingerprints and DNA, bite marks lack the specificity and durability as the human teeth may change over time. However, bite mark evidence has other advantages in the criminal justice system that links a specific individual to the crime or victim. For a bite mark analysis, it must contain abundant information and the tooth that made the mark must be quite distinctive.

240. Bite marks in skin are photographed in cases where the suspect is apprehended. A thorough dental combination is administered after dental examination of the suspect. Final comparison of the details of the original mark with the dentation of the suspect is done by experts.

241. The bite marks generally include only a limited number of teeth. The teeth and oral structure of the accused are examined by experts and, thereafter, bite marks are compared and reports are submitted. Forensic Odontology is a science and the most common application of Forensic Odontology is for the purpose of identification of persons from their tooth structure.

242. Forensic Odontology has established itself as an important and indispensable science in medico-legal matters and expert evidence through various reports which have been utilized by courts in the administration of justice. In the case at hand, the report is wholly credible because of matching of bite marks with the tooth structure of the accused persons and there is no reason to view the same with any suspicion. Learned Counsel for the Appellants would only contend that the whole thing has been stage-managed. We are not impressed by the said submission, for the evidence brought on record cogently establish the injuries sustained by the prosecutrix and there is consistency between the injuries and the report. We are not inclined to accept the hypothesis that bite marks have been managed.

Acceptability of the plea of alibi

243. Presently, we shall deal with the plea of alibi as the same has been advanced with immense conviction. It is well settled in law that when a plea of alibi is taken by an accused, the burden is upon him to establish the same by positive evidence after the onus as regards the presence on the spot is established by the prosecution. In this context, we may usefully reproduce a few paragraphs from ***Binay Kumar Singh v. State of Bihar*** MANU/SC/0088/1997 : (1997) 1 SCC 283:

22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code, 1860 or any other law. It is only a rule of evidence recognised in Section 11 of

the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

The question is whether A committed a crime at Calcutta on a certain date. The fact that, on that date, A was at Lahore is relevant.

23. The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. ...

[underlining is ours]

244. The said principle has been reiterated in ***Gurpreet Singh v. State of Haryana*** MANU/SC/0770/2002 : (2002) 8 SCC 18, ***Shaikh Sattar v. State of Maharashtra*** MANU/SC/0649/2010 : (2010) 8 SCC 430, ***Jitender Kumar v. State of Haryana*** MANU/SC/0532/2012 : (2012) 6 SCC 204 and ***Vijay Pal*** (supra).

245. We had earlier indicated that in their Section 313 Code of Criminal Procedure statements, the accused have advanced the plea of alibi. Accused Pawan Kumar Gupta @ Kaalu has taken the plea of alibi stating, inter alia, that throughout the evening of 16.12.2012 till late night, he was in the DDA District Park, Hauz Khas, Opposite IIT Gate, New Delhi, watching a musical event organised in connection with Christmas Celebration and that he was never in the bus, Ex. P1, and had not committed any offence with the prosecutrix or with the informant.

246. Before coming to the defence evidence led by him, we may refer to the answers given by him in response to the questions put to him in his statement Under Section 313 Code of Criminal Procedure wherein he has admitted that mobile No. 9711927157 belongs to him. He further stated that he had consumed liquor in the evening of 16.12.2012 and had accompanied accused Vinay Sharma to the musical event at DDA District Park where he took more liquor and fell unconscious and was later brought to his house by his father and uncle. He stated that he went out in the evening

of 16.12.2012 and saw a quarrel between accused Vinay Sharma and accused Ram Singh (since deceased). Then he returned to his jhuggi. After sometime, he came out of his jhuggi and saw accused Vinay Sharma, his sister, mother and others going to a musical party and so, he also went with them and took more liquor in the party and even lost his mobile phone. Strangely enough, in his supplementary statement recorded on 16.08.2013 Under Section 313 Code of Criminal Procedure, he stated that he was present in the said party with his family members and friends and that a video clip was prepared by one Ram Babu, DW-13, and that he does not remember if he had accompanied accused Vinay Sharma to the said park on that evening. It is in contradiction to the stand taken by him in his earlier statement recorded Under Section 313 Code of Criminal Procedure.

247. Accused Pawan examined his father, DW-2, Shri Hira Lal Ram, who deposed that on 16.12.2012 about 7:15 p.m., when he came to his house, he was informed by his daughter that accused Pawan had gone to DDA District Park, Hauz Khas. It is in contradiction to the deposition made by the other defence witnesses who have said that accused Vinay Sharma and his family members had left Ravi Dass Camp, Sector-3, R.K. Puram, New Delhi, about 8:00/8:30 p.m. and that accused Pawan had accompanied them. Accused Pawan also said so in his initial statement Under Section 313 Code of Criminal Procedure.

248. DW-4, Shri Gyan Chand, the maternal uncle of accused Pawan, deposed that he brought accused Pawan Gupta @ Kaalu to the jhuggi from the DDA District Park and saw one Ram Charan warming his hands on a bonfire just outside his jhuggi who came and asked him about the well-being of accused Pawan. Ram Charan, DW-3, however, deposed that about 8:30/9:00 p.m., he was sitting inside his jhuggi with its door open and he saw accused Pawan being brought by his uncle in drunken state. This is yet again in contradiction to what has been deposed by the other defence witnesses who said that accused Pawan Gupta and accused Vinay Sharma had rather left Ravi Dass Camp, Sector-3, R.K. Puram, New Delhi about 8:00/8:30 p.m. for the DDA District Park.

249. DW-16, a shopkeeper of the locality, had deposed that he had seen the vehicle of Shri Gyan Chand about 9:00/9:30 p.m. on 16.12.2012 when accused Pawan Gupta was brought in drunken condition and was taken to his jhuggi. Initially, he failed to mention if Shri Hira Ram was accompanying Shri Gyan Chand.

250. Though the witnesses have also deposed about the taking away of accused Pawan by 3/4 persons on 17.12.2012, yet that plea too is in contradiction to the arrest memo Ex. P.W. 60/A wherein the accused is stated to have been arrested on 18.12.2012 about 1:15 p.m. at the instance of accused Ram Singh (since deceased).

251. Hence, there exist contradictions in the statements of the defence witnesses produced on behalf of accused Pawan Gupta (a): qua the timing when the accused had left his jhuggi at Ravi Dass Camp on the fateful night of 16.12.2012 inasmuch as some of the witnesses deposed that accused Pawan left for DDA District Park at 8:00/8:30 p.m. and some others deposed that they saw him being brought to his jhuggi about 8:30/9:00 p.m.; (b) qua the fact if DW-2 had gone with DW-1 to the park to fetch his son; and (c) qua the fact if accused Pawan went to the park with accused Vinay Sharma or not.

252. Accused Akshay Kumar Singh @ Thakur, in his statement Under Section 313 Code of Criminal Procedure, stated that he was not in Delhi on the fateful night and that on 15.12.2012, he had left Delhi for his village in Mahabodhi Express on the ticket of his brother, Abhay, along with his brother's wife and nephew. He produced certain witnesses in his defence. DW-11, Shri Chavinder, an auto driver from his village, deposed that he had brought accused Akshay Kumar Singh @ Thakur and his family members from Anugrah Narayan Railway Station, District Aurangabad, Bihar to his native village Karmalahang, P.S. Tandwa, in his own auto on 16.12.2012 at 10:00 a.m. It is interesting to note that he does not remember about any other passenger/native who shared his auto on that day. DW-13, Sh. Raj Mohan Singh, the father-in-law of the accused, deposed that when he reached accused Akshay's house, he found his son-in-law being implicated in a rape case allegedly committed on 16.12.2012. It probably shows that DW-13 had gone to meet Akshay Kumar Singh @ Thakur only when he had come to know about his implication in the rape case and when accused Akshay Kumar Singh @ Thakur was on the run. It is an admitted fact that the Chowkidar of P.S. Tandwa had met father-in-law of the accused on 20.12.2012 and had informed him about the implication of accused Akshay for the first time. If it was so, then DW-13, Shri Raj Mohan, must have visited the house of accused Akshay Kumar Singh @ Thakur either on 20.12.2012 or on 21.12.2012.

253. DW-12, DW-14 and DW-15 are all relatives of accused Akshay Kumar Singh @ Thakur and, as observed by both the courts, they tried to wriggle him out of the messy situation, as is the natural instinct of the family members. However, it is to be seen that during the evidence of DW-14, wife of accused Akshay Kumar Singh @ Thakur, she was interrupted from answering by accused Akshay from behind on more than one occasion. Similarly, DW-15, the sister-in-law of the accused, who had allegedly accompanied the accused to her native village, mysteriously, was not aware as to why her husband Abhay who was to accompany her on 15.12.2012 to the native village did not accompany her. She was not aware of the reason which made her husband stay behind in Delhi. Being the wife, she was expected to know this, at least.

254. While weighing the plea of '*alibi*', the same has to be weighed against the positive evidence led by the prosecution, i.e., not only the substantive evidence of P.W. 1 and the dying declarations, Ex. P.W. 27/A and Ex. P.W. 30/D-1, but also against the scientific evidence, viz., the DNA analysis, finger print analysis and bite marks analysis, the accuracy of which is scientifically acclaimed. Considering the inconsistent and contradictory nature of the evidence of '*alibi*' led by the accused against the positive evidence of the prosecution, including the scientific one, we hold that the accused have miserably failed to discharge their burden of absolute certainty qua their plea of '*alibi*'. The plea taken by them appears to be an afterthought and rather may be read as an additional circumstance against them.

255. In response to the questions put to him in his statement Under Section 313 Code of Criminal Procedure, accused Vinay had admitted that mobile No. 8285947545, Ex. D.W. 10/1, belongs to his mother and its SIM was lost prior to 16.12.2012 and that on 16.12.2012, at 9:30 p.m., his friend Vipin had taken his phone to the DDA District Park and had returned it the next morning without SIM card and memory card.

256. In response to question No. 221, he stated that about 8:00/8:30 p.m., he went to see accused Ram Singh and he had a scuffle/exchange of fist blow and then he returned to his jhuggi.

Thereafter, he left for musical party with his sister, mother and others. He did not say if his father had accompanied them. He also told that about 11:30 p.m., he had returned to his jhuggi.

257. It is worthy to note that the prosecution had proved the Call Detail Record, Ex. P.W. 22/B, of the phone of accused Vinay Sharma, having SIM No. 8285947545, admittedly in the name of his mother, Smt. Champa Devi, but in the possession of accused Vinay Sharma in the evening of 16.12.2012 and allegedly snatched by one Vipin in the said music party and returned to him in the morning of 17.12.2012 without SIM card and memory card. The Call Detail Record Ex. P.W. 22/B does show that the accused had been making calls to one particular number, viz., 8601274533 from 15.12.2012 till 20:19:37 of 17.12.2012. The authenticity of the CDR is proved Under Section 65-B of the Indian Evidence Act. If the accused was not having a SIM card in his phone No. 8285947545, then how could he have called from this SIM on 15.12.2012, then on 16.12.2012 and in the morning of 17.12.2012 till about 8:23:42 p.m.

258. The accused rather said that his SIM and memory card were not in his phone when it was returned by his friend Vipin and that the phone was not with him at 9:55:21 when it registered a call for 58 seconds and when his location was found near IGI Airport, i.e., the road covered by the Route Map, Ex. P.W. 80/H, where the bus, Ex. P1, was moving on that night. Further, if as per accused Vinay Sharma he had no memory card and SIM card in his mobile phone, then the question of making of a video clip from his mobile phone by his friend DW-10, Shri Ram Babu, does not arise. Even his personal search memo Ex. P.W. 60/D does not show that the said mobile phone, when seized, had any memory card in it. The intention of the accused appears to be to wriggle himself out of explaining the receipt of call on his mobile at 9:55 p.m. on 16.12.2012.

259. After referring to the decision in ***Ram Singh and Ors. v. Col. Ram Singh*** MANU/SC/0176/1985 : 1985 (Supp.) SCC 611, the trial Court has held that accused Vinay had miserably failed to prove the authenticity of the video clip in terms of the above judgment. The accused had failed to show if DW-10, Ram Babu, aged 15 years, was ever competent to record the clip and how such device was preserved. Admittedly by him, the memory card was not in the phone when returned to him by his friend, Vipin. It is also not shown in the seizure memo Ex. P.W. 60/D that the mobile, Ex. DW-10/1, was seized along with memory card. Thus, it raises a doubt as to how and by whom this memory card was later inserted in his phone, Ex. DW-10/1, and how and when the video clip was taken and whether there was any tampering, etc. and thus, the compliance of Section 65-B of the Indian Evidence Act was mandatory in these circumstances to ensure the purity of the evidence and in its absence, it would be difficult to rely upon such evidence.

260. Even otherwise, in the alternative, the properties of mobile Ex. DW-10/1 show the timing of the video clip as 8:16 p.m. of 16.12.2012 which is patently false because as per the defence witnesses, accused Vinay Sharma with his family had left Ravi Dass Camp at 8:00/8:30 p.m. and as per Smt. Champa Devi, DW-5, it takes about one hour on foot to reach the DDA District Park and, thus, even if we believe their theory, then also accused Vinay Sharma and accused Pawan Gupta @ Kaalu were not in the park at 8:16 p.m. on 16.12.2012.

261. Vinay Sharma's mother, Smt. Champa Devi, DW-5, deposed that her son, accused Vinay Sharma, had gone to meet accused Ram Singh (since deceased), about 8:00 p.m. on 16.12.2012 and he had a quarrel with Ram Singh, he was beaten and then the accused returned to his jhuggi.

Thereafter, accused Vinay Sharma accompanied her to DDA District Park, Hauz Khas, Opposite IIT Gate, New Delhi to watch a musical programme and stayed in the park till late in the night. His mother does not speak if her husband had also accompanied her to the said DDA District Park but DW-6 deposed that his son had returned about 8:00 p.m. after the quarrel and then they had gone to the said DDA District Park. DW-7, Shri Kishore Kumar Bhat, also deposed that about 8:00/8:30 p.m., he was in his jhuggi when the father of accused Vinay Sharma with his children came to his jhuggi and they all went to DDA District Park. He has also stated that a musical programme was organized by St. Thomas Church, Sector-2, R.K. Puram, New Delhi, in the said DDA District Park, Hauz Khas, on that night.

262. DW-9, Shri Manu Sharma, deposed that he went with accused Vinay Sharma to reason with accused Ram Singh (since deceased) but accused Vinay Sharma had stated that his brother had accompanied him to meet accused Ram Singh (since deceased). Further, DW-9, Manu Sharma, stated that he had accompanied accused Vinay Sharma to the musical event but accused Vinay Sharma did not say so.

263. Hence, as per the statement of accused Vinay Sharma (Under Section 313 Code of Criminal Procedure) and as per the statements of the defence witnesses, accused Vinay Sharma and his family with accused Pawan Gupta @ Kaalu had left Ravi Dass Camp about 8:15 p.m. to 8:30 p.m. and as per DW-5, Smt. Champa Devi, it takes about an hour to reach the DDA District Park, Hauz Khas, on foot, so even according to them, they allegedly reached the park about 9:15 p.m. or 9:30 p.m. Thus, from this angle too, the video clip showing the accused in the park on 16.12.2012 about 8:16 p.m. appears to have been tampered.

264. P.W. 83, Shri Angad Singh, the Deputy Director (Horticulture), DDA, had deposed that no such permission was ever granted by any authority to organize any such function in the evening of 16.12.2012 in the said DDA District Park, Hauz Khas, New Delhi and that no function was ever organized in the park on 16.12.2012 by anyone. P.W. 84, Father George Manimala of St. Thomas Church, as also P.W. 85, Brother R.P. Samual, Secretary, Ebenezer Assembly Church, deposed that their Church(es) never organized any musical programme/event in the DDA District Park, Hauz Khas, in the evening of Sunday, i.e., on 16.12.2012. Rather, they deposed that on Sundays, there is always a mass prayer in the church and there is no question of organizing any programme outside the Church premises and that even otherwise, they have their own space/lawn within the Church premises where they can hold such type of programmes/functions.

265. Though Shri Singh, learned Counsel for the respective Appellants, tried to press upon a document, Ex. P.W. 84/B, a programme pamphlet of St. Thomas Church wherein it was mentioned that the Church was holding programmes of "Carol Singing" from 10.12.2012 to 23.12.2012 at 7:00 p.m. at public places, yet in view of the categorical denial by P.W. 84 and P.W. 85 that any such programme was organized by the Church on 16.12.2012 in the DDA District Park, opposite IIT Gate, Hauz Khas, New Delhi, the plea has no substance.

266. It is settled in law that while raising a plea of 'alibi', the burden squarely lies upon the accused person to establish the plea convincingly by adducing cogent evidence. The plea of 'alibi' that accused Vinay Sharma and accused Pawan Gupta @ Kaalu had attended the alleged musical programme in the evening of 16.12.2012 in the DDA District Park, Hauz Khas, opposite IIT Gate,

New Delhi, has been rightly rejected by the trial court which has been given the stamp of approval by the High Court.

Criminal conspiracy

267. The next aspect that we intend to address pertains to criminal conspiracy. The accused persons before us were charge-sheeted for the offence of criminal conspiracy within the meaning of Section 120A Indian Penal Code apart from other offences. The trial court found all the accused guilty of the offence Under Section 120B Indian Penal Code and awarded life imprisonment alongwith a fine of Rs. 5,000/- to each of the convicts. The High Court has also affirmed their conviction Under Section 120B after recording concurrent findings.

268. Before analysing the present facts with reference to Section 120A Indian Penal Code in order to find out whether the charge of criminal conspiracy is proved in respect of each of the accused, it is pertinent to note the actual nature and purport of Section 120A Indian Penal Code and allied provisions. Section 120A Indian Penal Code as contained in Chapter V-A defines the offence of criminal conspiracy. The provision was inserted in the Indian Penal Code by virtue of Criminal Law (Amendment) Act, 1913. Section 120A Indian Penal Code reads as under:

120A. Definition of criminal conspiracy: When two or more persons agree to do, or cause to be done,- (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation-It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

269. Section 120B being pertinent is reproduced below:

120B. Punishment of criminal conspiracy- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

270. The underlying purpose for the insertion of Sections 120A and 120B Indian Penal Code was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means punishable under law. The criminal thoughts in the mind when take concrete shape of an agreement to do or cause to be done an illegal act or an act which is not illegal by illegal means than even if nothing further is done an agreement is designated as a criminal conspiracy. The proviso to Section 120A engrafts a limitation that no agreement except an agreement to commit an offence shall

amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

271. By insertion of Chapter V-A in Indian Penal Code, the understanding of criminal conspiracy in the Indian context has become akin to that in England. The illegal act may or may not be done in pursuance of an agreement but the mere formation of an agreement is an offence and is punishable. The law relating to conspiracy in England has been put forth in ***Halsbury's Laws of England (vide 5th Ed. Vol. 25, page 73)*** as under:

73. Matters common to all conspiracies. There are statutory common law offences of conspiracy. The essence of the offences of both statutory and common law conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.

272. The English law on 'conspiracy' has been succinctly explained by Russell on Crimes (12th Ed. Vol. 1 page 202) in the following passage:

The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough.

273. Coleridge J. in ***R. v. Murphy*** (1837) 173 ER 508 explained 'conspiracy' in the following words:

... I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so to carry it into execution. This is not necessary, because in any cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'had they this common design, and did they pursue it by these common means the design being unlawful?

274. Lord Brampton of the House of Lords in ***Quinn v. Leatham*** (1901) AC 495 had aptly defined conspiracy which definition was engrafted in Sections 120A and 120B Indian Penal Code. Following was stated by the House of Lords:

'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; and punishable if for a criminal object, or for the use of criminal means'.

275. A perusal of the above shows that in order to constitute an offence of criminal conspiracy, two or more persons must agree to do an illegal act or an act which if not illegal by illegal means. This Court on several occasions has explained and elaborated the element of conspiracy as contained in our penal law. In ***Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra*** MANU/SC/0157/1970 : AIR 1971 SC 885, this Court has observed:

Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107, Indian Penal Code. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested, quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence.

276. In ***E.G. Barsay v. State of Bombay*** MANU/SC/0123/1961 : AIR 1961 SC 1762, the following was stated:

.....The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.

277. A three-Judge Bench in ***Yash Pal Mittal v. State of Punjab*** MANU/SC/0169/1977 : (1977) 4 SCC 540 had noted the ingredients of the offence of criminal conspiracy and held:

10. The main object of the criminal conspiracy in the first charge is undoubtedly cheating by personation. The other means adopted, inter alia, are preparation or causing to be prepared spurious

passports; forging or causing to be forged entries and endorsements in that connection; and use of or causing to be used forged passports as genuine in order to facilitate travel of persons abroad. The final object of the conspiracy in the first charge being the offence of cheating by personation, as we find, the other offences described therein are steps, albeit, offences themselves, in aid of the ultimate crime. The charge does not connote plurality of objects of the conspiracy. That the Appellant himself is not charged with the ultimate offence, which is the object of the criminal conspiracy, is beside the point in a charge Under Section 120-B Indian Penal Code as long as he is a party to the conspiracy with the end in view. Whether the charges will be ultimately established against the accused is a completely different matter within the domain of the trial court.

11. The principal object of the criminal conspiracy in the first charge is thus "cheating by personation", and without achieving that goal other acts would be of no material use in which any person could be necessarily interested. That the Appellant himself does not personate another person is beside the point when he is alleged to be a collaborator of the conspiracy with that object. We have seen that some persons have been individually and specifically charged with cheating by personation Under Section 419 Indian Penal Code. They were also charged along with the Appellant Under Section 120-B Indian Penal Code. The object of criminal conspiracy is absolutely clear and there is no substance in the argument that the object is merely to cheat simpliciter Under Section 417, Indian Penal Code.

278. Certainly, entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is essential to the offence of criminal conspiracy as has been rightly emphasized by this Court in ***Kehar Singh and Ors. v. State (Delhi Administration)*** MANU/SC/0241/1988 : (1988) 3 SCC 609. In the said case, the court further stressed upon the relevance of circumstantial evidence in proving conspiracy as direct evidence in such cases is almost impossible to adduce.

279. In the said case, K. Jagannatha Shetty, J., in his concurring opinion, has also elaborated the concept of conspiracy to the following effect:

274. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120-A and 120-B Indian Penal Code would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful

design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand explains the limited nature of this proposition:

Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties 'actually came together and agreed in terms' to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was 'a tacit understanding between conspirators as to what should be done'.

276. I share this opinion, but hasten to add that the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must thus be strictly on our guard.

280. In ***Saju v. State of Kerala*** MANU/SC/0688/2000 : (2001) 1 SCC 378, explaining the concept of conspiracy, this Court stated the following:

7. To prove the charge of criminal conspiracy the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not legal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such crime or is merely incidental to that object. To attract the applicability of Section 120-B it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secrecy for which direct evidence would rarely be available...

10. It has thus to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew was leading to the commission of a crime by one or more persons to the agreement, of that offence. Besides the fact of agreement the necessary mens rea of the crime is also required to be established.

281. In ***Mir Nagvi Askari v. Central Bureau of Investigation*** MANU/SC/1412/2009 : (2009) 15 SCC 643, this Court reiterated the various facets of 'criminal conspiracy' and laid down as follows:

60. Criminal conspiracy, it must be noted in this regard, is an independent offence. It is punishable separately. A criminal conspiracy must be put to action; for so long as a crime is generated in the mind of the accused, the same does not become punishable. Thoughts even criminal in character, often involuntary, are not crimes but when they take a concrete shape of an agreement to do or caused to be done an illegal act or an act which is not illegal, by illegal means then even if nothing further is done, the agreement would give rise to a criminal conspiracy.

61. The ingredients of the offence of criminal conspiracy are:

(*i*) an agreement between two or more persons;

(*ii*) an agreement must relate to doing or causing to be done either (*a*) an illegal act; (*b*) an act which is not illegal in itself but is done by illegal means.

Condition precedent for holding the accused persons to be guilty of a charge of criminal conspiracy must, therefore, be considered on the anvil of the fact which must be established by the prosecution viz. meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means.

62. The courts, however, while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not, must always bear in mind that a conspiracy is hatched in secrecy and it is difficult, if not impossible, to obtain direct evidence to establish the same. The manner and circumstances in which the offences have been committed and the accused persons took part are relevant. For the said purpose, it is necessary to prove that the propounders had expressly agreed to it or caused it to be done, and it may also be proved by adduction of circumstantial evidence and/or by necessary implication. (See *Mohd. Usman Mohammad Hussain Maniyar* v. *State of Maharashtra* MANU/SC/0180/1981 : (1981) 2 SCC 443.)

282. In ***Pratapbhai Hamirbhai Solanki v. State of Gujrat and Anr.*** MANU/SC/0854/2012 : (2013) 1 SCC 613, this Court explained the ingredients of 'criminal conspiracy' as under:

21. At this stage, it is useful to recapitulate the view this Court has expressed pertaining to criminal conspiracy. In *Damodar* v. *State of Rajasthan* MANU/SC/0726/2003 : (2004) 12 SCC 336, a two-Judge Bench after referring to the decision in *Kehar Singh* v. *State (Delhi Admn.)* and *State of Maharashtra* v. *Som Nath Thapa* MANU/SC/0451/1996 : (1996) 4 SCC 659, has stated thus:

15. ... The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not (*sic**-) sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or a series of acts, he would be held guilty Under Section 120-B of the Penal Code, 1860.

22. In *Ram Narayan Popli* v. *CBI* MANU/SC/0017/2003 : (2003) 3 SCC 641 while dealing with the conspiracy the majority opinion laid down that:

342. ... The elements of a criminal conspiracy have been stated to be: (*a*) an object to be accomplished, (*b*) a plan or scheme embodying means to accomplish that object, (*c*) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (*d*) in the jurisdiction where the statute required an overt act.

It has been further opined that:

342. ... The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. ... no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.

The two-Judge Bench proceeded to state that:

342. ... For an offence punishable Under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means.

23. In the said case it has been highlighted that in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

283. As already stated, in a criminal conspiracy, meeting of minds of two or more persons for doing an illegal act is the sine qua non but proving this by direct proof is not possible. Hence, conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. Moreover, it is also relevant to note that conspiracy being a continuing offence continues to subsist till it is executed or rescinded or frustrated by the choice of necessity. In ***K.R. Purushothaman v. State of Kerala*** MANU/SC/1518/2005 : (2005) 12 SCC 631, the Court has made the following observations with regard to the formation and rescission of an agreement constituting criminal conspiracy:

To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of

the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement.

284. After referring to a catena of judicial pronouncements and authorities, a three-Judge Bench of this Court in ***State through Superintendent of Police, CBI/SIT v. Nalini and Ors.*** MANU/SC/0945/1999 : (1999) 5 SCC 253 summarised the principles relating to criminal conspiracy as under:

Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

1. Under Section 120A Indian Penal Code offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may, for example, be enrolled in a chain - A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrollment, where a single person at the center doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be

present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the graham of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is in contemplation of law, the act of each of them and they are jointly responsible therefore. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original

agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

285. The rationale of conspiracy is that the required objective manifestation of disposition of criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interest of security, a person may carry out his part of a conspiracy without even being informed of the identity of his co-conspirators. An agreement of this kind can rarely be shown by direct proof; it must be inferred from the circumstantial evidence of co-operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed with others that they would together accomplish the unlawful object of the conspiracy. [See: ***Firozuddin Basheeruddin and Ors. v. State of Kerala*** MANU/SC/0471/2001 : (2001) 7 SCC 596]

286. In ***Suresh Chandra Bahri v. State of Bihar*** MANU/SC/0500/1994 : 1995 Supp (1) SCC 80, this Court reiterated that the essential ingredient of criminal conspiracy is the agreement to commit an offence. After referring to the judgments in ***Noor Mohd. Mohd. Yusuf Momi*** (supra) and ***V.C. Shukla v. State (Delhi Admn.)*** MANU/SC/0545/1980 : (1980) 2 SCC 665, it was held in ***S.C. Bahri*** (supra) as under:

[A] cursory look to the provisions contained in Section 120-A reveals that a criminal conspiracy envisages an agreement between two or more persons to commit an illegal act or an act which by itself may not be illegal but the same is done or executed by illegal means. Thus the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a fact-situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to Sub-section (2) of Section 120-A Indian Penal Code, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction Under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions in such a situation do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions contained in Section 120-B

since from its very nature a conspiracy must be conceived and hatched in complete secrecy, because otherwise the whole purpose may be frustrated and it is common experience and goes without saying that only in very rare cases one may come across direct evidence of a criminal conspiracy to commit any crime and in most of the cases it is only the circumstantial evidence which is available from which an inference giving rise to the conclusion of an agreement between two or more persons to commit an offence may be legitimately drawn.

287. From the law discussed above, it becomes clear that the prosecution must adduce evidence to prove that:

(i) the accused agreed to do or caused to be done an act;

(ii) such an act was illegal or was to be done by illegal means within the meaning of Indian Penal Code;

(iii) irrespective of whether some overt act was done by one of the accused in pursuance of the agreement.

288. In the case at hand, the prosecution has examined P.W. 82 to prove the charges of conspiracy and for further identification of all the accused persons in the bus on the date of the incident. He has also been presented to support the prosecution case that immediately preceding the fateful incident, all the accused persons had, in execution of their conspiracy, been robbing/merry-making with passengers on the road.

289. The defence has controverted the testimony of P.W. 82 on several aspects which has already been discussed before. It has been alleged that Ram Adhar, P.W. 82, is a planted witness who was brought in by the investigators to fill the lacunae, if any, in their investigation and to further make a strong case against the accused persons. The defence has further denied the presence of accused Mukesh at the scene of the crime. Accused Vinay and accused Akshay have also raised the plea of alibi which has been dealt with separately by us. Regardless of the fact that we have found the testimony of P.W. 82 to be creditworthy, even if the same is not taken into account for the purpose of establishing that the accused acted in concert with each other to commit heinous offences against the victim, the testimony of P.W. 1 coupled with the dying declarations of the prosecutrix irrefragably establish the charge Under Section 120B against all the accused persons.

290. First of all, in order to prove the presence of all the accused on board the bus where the entire incident took place, the prosecution has relied upon the testimony of P.W. 1, P.W. 82, P.W. 16 and, most importantly, the dying declarations of the prosecutrix.

291. As per the records, P.W. 82 has testified to the effect that on the date of the incident, about 8:30 p.m., he had boarded the concerned bus from Munirka Bus Stand, New Delhi, on noticing that the conductor of the bus sought commuters for Khanpur. However, he was later informed that he would be dropped at Nehru Place instead of Khanpur. When P.W. 82 tried to get down the bus, he was wrongfully confined, attacked by the persons inside the bus who robbed him of his belongings, viz., Rs. 1500/- in cash and a mobile phone, and he was then thrown out of the moving bus. During the trial, P.W. 82 has identified all the four accused persons, viz., Akshay Kumar

Singh @ Thakur, Pawan Gupta, Vinay Sharma and accused Mukesh, present in the concerned bus at the time of the incident. P.W. 82 had lodged the complaint on 18.12.2012 on the basis of which FIR No. 414 of 2012 was registered at P.S. Vasant Vihar, New Delhi Under Sections 365, 397, 342 Indian Penal Code.

292. Learned Senior Counsel for the State, Mr. Luthra, has submitted that P.W. 82 had been examined to establish the conduct of the accused on the aspect of conspiracy and also to establish the identity of the accused persons before the trial court. It was further submitted that P.W. 82, Ram Adhar, identified all the four accused in the court, namely, Akshay Kumar Singh @ Thakur, Pawan Gupta, Vinay Sharma and Mukesh besides two others present inside the bus and also identified Mukesh as driving the bus and stated that others took him inside the bus and robbed him and attacked him.

293. The contention of the Appellants is that the testimony of P.W. 82 is not bereft of doubt for several reasons, namely, a) delay in lodging FIR, b) non-examination of Sanjiv Bhai as a witness, c) he has stated that he heard the person with the burnt hand say "Mukesh, tez chalao", d) apart from that, he does not mention that he heard the names of any of the accused, and e) he had not visited a doctor/hospital despite stating that he had injuries on his face which prevented him from registering an FIR.

294. Regarding the alleged incident of attack on P.W. 82 by the accused, it was submitted that the said case against the accused ended in conviction and the same is pending in appeal. In respect of the credibility of the testimony of P.W. 82 as to the commission of the offence, we are not inclined to take into account the evidence of P.W. 82 except on one limited aspect, that is, the presence of the accused in the bus, Ex. P1, on the night of 16.12.2012 since P.W. 82's presence in the bus on the night of 16.12.2012 is admitted. In his statement Under Section 313 Code of Criminal Procedure, Mukesh-A2 admitted that P.W. 82 had boarded the offending bus prior to the boarding of the bus by the informant and the victim. The relevant portion of his statement is extracted as under:

Q.211: It is in evidence against you that P.W. 82 Shri Ram Adhar deposed that on 16.12.2012 after finishing his carpenter's work at a shop at Munirka till about 8:30 PM, he boarded a white colour bus from sabji Market across the road of my work place. The helper of the bus was calling the passenger by saying "khanpur-khanpur". As P.W. 82 boarded the bus, one of the occupants told him that the bus is going to Nehru Place. As P.W. 82 tried to get down, one person whose one limb was having burn injuries, gave beating to him. The other person pulled him inside the bus towards the back side and they all gave beating to him and removed his belongings i.e. one mobile with two sims and Rs. 1500/-. The sim card numbers were 9999095739 and 9971612554. What do you have to say?

Ans: It is correct that P.W. 82 Shri Ram Adhar had boarded the bus Ex. P1 on 16.12.2012 prior to the boarding of the bus Ex. P1 by the complainant and the victim. He boarded the bus from Sabji Mandi at Sector-4 on the main road. He went on the back side of the bus but after sometime he was made to deboard the bus at IIT flyover by accused Akshay as he had no money to pay the fare. At that time accused Akshay, accused Ram Singh, since deceased, accused Vinay accused Pawan along with JCL were present in the bus and I was driving it.

[underlining added]

The presence of P.W. 82 in Ex. P1 bus prior to the boarding of the bus by the informant, P.W. 1, and the victim and the presence of all the accused in the bus is, thus, established by the prosecution.

295. The evidence of P.W. 81, Dinesh Yadav, the owner of the offending bus, indicates accused Ram Singh, A-1, (since deceased) as the driver of the bus and Akshay Kumar as the cleaner of the bus which is further shown in the attendance register of the bus exhibited as Ex. P.W. 80/K. The evidence of P.W. 81, Dinesh Yadav, is corroborated by the entries made in the attendance register where in the driver's page at Sl. No. 5, the name of accused Ram Singh (since deceased) is written against bus No. 0149 and at Sl. No. 15, the name of Akshay is written as helper against bus No. 0149. As stated earlier, the bus bearing Registration No. DL-1PC-0149 was one of the buses hired by Birla Vidya Niketan School, Pushp Vihar, New Delhi and the fact that the driver of the bus at the relevant time was Ram Singh is sought to be proved by the prosecution through the testimony of P.W. 16, Rajeev Jakhmola, Manager (Administration) of the said school. The said witness has testified that one Dinesh Yadav, P.W. 81, had provided seven buses to the school including bus bearing No. DL-1PC-0149 for the purpose of ferrying the children of the school. The driver of this bus was one Ram Singh, son of Mange Lal. The documents relating to the bus including the photocopies of the agreement between the school and the bus contractor, copy of the driving licence of Ram Singh, A-1, and the letter of termination dated 18.12.2012 with "Yadav Travels" were furnished to the Investigating Officer, SI Pratibha Sharma, vide his letter dated 25.12.2012, exhibited as Ex. P.W. 16/A (colly.). From the evidence of P.W. 16, Rajeev Jakhmola, it stands proved that the bus in question was routinely driven by Ram Singh (since deceased). The statement of P.W. 16, Rajeev Jakhmola, is corroborated by the testimony of P.W. 81, Dinesh Yadav. Significantly, P.W. 81, Dinesh Yadav, further testified:

This bus was being parked by accused Ram Singh near his house because this bus was attached with the school and also with an office as a chartered bus and that the accused used to pick up the students early in the morning.

296. The testimony of P.W. 13, Brijesh Gupta, who was an auto driver and also resident of jhuggi at Ravi Dass Camp from where the offending bus was seized is also relevant to prove the presence of the accused in the bus. He stated in his evidence that A-1, Ram Singh (since deceased), is the brother of A-2, Mukesh, and that both resided in the jhuggi at Ravi Dass camp and that Ram Singh used to drive the said bus and park it in the night near his jhuggi. P.W. 13, in his evidence, deposed that on the night of 16.12.2012, about 11:30 p.m., when he returned to his jhuggi after plying his auto, he saw accused Mukesh, A-2, taking water in some can inside a white colour bus and washing it from inside. He also noticed some clothes and pieces of curtains being burnt in the fire.

297. In his questioning Under Section 313 Code of Criminal Procedure, Mukesh, A-2, has admitted that he and A-1, Ram Singh (since deceased), are brothers. He has also admitted that on the night of 16.12.2012, he was driving the bus and that accused Pawan and Vinay Sharma were seated on the backside of the driver's seat, whereas Akshay and Ram Singh were sitting in the driver's cabin. The relevant portion of his statement Under Section 313 Code of Criminal Procedure reads as under:

Q2. It is in evidence against you that P.W. 1 further deposed that they inquired from 4-5 auto rickshaw-walas to take them to Dwarka, but they all refused. At about 9 PM they reached at Munirka bus stand and found a white colour bus on which "Yadav" was written. A boy in the bus was calling for commuters for Dwarka/Palam Mod. P.W. 1 noticed yellow and green line/strips on the bus and that the entry gate of the bus was ahead of its front tyre, as in luxury buses and that the front tyre was not having a wheel cover. What do you have to say?

Ans: I was driving the bus while my brother Ram Singh, since deceased and JCL, Raju was calling for passengers by saying "Palam/Dwarka Mod".

Q4: It is in evidence against you that during the course of his deposition, complainant, P.W. 1 has identified you accused Mukesh to be the person who was sitting on the driver's seat and was driving the bus; P.W. 1 further identified your co-accused Ram Singh (since deceased), and Akshay Kumar to be the person who were sitting in the driver's cabin alongwith the driver; P.W. 1 had also identified your co-accused Pawan Kumar who was sitting in front of him in two seats row of the bus; P.W. 1 had also identified your co-accused Vinay Sharma to be the person who was sitting in three seats row just behind the Driver's cabin, when P.W. 1 entered the bus; P.W. 1 has also deposed before the court that the conductor who was calling him and his friend/prosecutrix to board the bus Ex. P1 was not among the accused person being tried in this Court.

Ans: Accused Pawan and accused Vinay Sharma were sitting on my back side of the driver's seat and whereas accused Akshay was sitting in the driver's cabin while my brother Ram Singh, since deceased was asking for passengers.

Q5: It is in evidence against you that after entering the bus P.W. 1 noticed that seats cover of the bus were of red colour and it had yellow colour curtains and the windows of the bus had black film on it. The windows were at quite a height as in luxury buses. As P.W. 1 sat down inside the bus, he noticed that two of you accused were sitting in the driver's cabin were coming and returning to the driver's cabin. P.W. 1 paid an amount of Rs. 20/- as bus fare to the conductor i.e. Rs. 10/- per head. What do you have to say?

Ans: It is correct that the windows of the bus Ex. P1 were having black film on it but I cannot say if the seats of the bus were having red covers or that the curtains were of yellow colour as my brother Ram Singh, since deceased, only used to drive the bus daily and that on that day since he was drunk heavily so I had gone to Munirka to bring him to my house and hence, I was driving the bus on that day. I had gone to Munirka with my nephew on my cycle to fetch Ram Singh since deceased and that the other boys alongwith Ram Singh had already taken the bus from R.K. Puram. I was called by Ram Singh on phone to come at Munirka.

298. A-3, Akshay @ Thakur, in his statement Under Section 313 Code of Criminal Procedure, has admitted that he was working with A-1, Ram Singh (since deceased), in the offending bus, Ex. P1, as a helper. He has also admitted therein that he had joined A-1, Ram Singh (since deceased), on 03.11.2012. The relevant portion of his statement Under Section 313 Code of Criminal Procedure is extracted hereunder:

Q.210: It is in evidence against you that P.W. 81 Shri Dinesh Yadav is the owner of the bus Ex. P1 and that he has employed accused Ram Singh, since deceased, as the driver of the bus in the month of December, 2012 and you accused Akshay was working as helper in the said bus. Further, he deposed that on 25.12.2012 he had handed over the documents relating to the bus to the investigating officer, seized vide memo Ex. P.W. 80/K. The copy of the challan and copy of the notice are collectively Ex. P-81/1 and the register on which "Yadav Travels 2012" is written is Ex. P-81/2. He also identified the driving license Ex. P-74/1 of his driver, accused Ram Singh, since deceased. He further deposed that the bus Ex. P1 used to ply in Birla Vidya Niketan as well as chartered bus and used to take the office-goers from Delhi and drop them at Noida every morning and evening. What do you have to say?

Ans: It is correct that I was working as a helper in the bus Ex. P1. I joined Ram Singh, since deceased as helper on 3.11.2012 but I left the company of Ram Singh on 15.12.2012 at about 10.30 AM and I left for my village at 11:30 am and I went to New Delhi Railway Station and I left Delhi in the train at about 2:30 P.M.

299. DW-5, Smt. Champa Devi, is the mother of Vinay Sharma, A-4. She has stated in her evidence that her son, Vinay Sharma, A-4, who returned home at 4:00 p.m. on 16.12.2012, went in search of A-1 on hearing about the misbehaviour of A-1, Ram Singh (since deceased), with his sister and was able to trace him by 8:00 p.m. and that her son Vinay Sharma, A-4, had quarreled with Ram Singh, A-1. She has deposed in her evidence that her son Vinay Sharma returned bleeding from his mouth and after some time they had left to the DDA District Park to attend a musical programme where they had met A-5, Pawan alias Kaalu, alongwith two others.

300. The prosecution has, thus, established that the accused were associated with each other. The criminal acts done in furtherance of conspiracy is established by the sequence of events and the conduct of the accused. An important facet of the law of conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of the conspiracy. Section 10 of the Indian Evidence Act which reads as under is relevant in this context:

10. Things said or done by conspirator in reference to common design.- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

301. Section 10 of the Indian Evidence Act begins with the phrase "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence" which implies that if *prima facie* evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common intention is admissible against all. In the facts of the present case, the prima facie evidence of the existence of conspiracy is well established.

302. The informant, P.W. 1, has also deposed as to the clarity of the entire incident. He has identified all the accused to be present in the bus when he had boarded the same with the prosecutrix. He has maintained that he saw three persons sitting in the driver's cabin who were moving in and out of the cabin. Both the informant and the prosecutrix had sensed some sort of hostility and strangeness in the behavior of the accused. But, as they had paid for the ticket, they quietly kept sitting. Soon they found that the lights in the bus were put off and the accused Ram Singh (since deceased) and accused Akshay came near them to ask where P.W. 1 was heading with the prosecutrix at that odd time of the evening. P.W. 1, on objecting to such a query, was beaten and pinned down by the accused. Thereafter, all the accused, one after the other, committed rape and unnatural sex on the prosecutrix using iron rods which has been explicitly described by the prosecutrix herself in her dying declarations recorded by P.W. 27, Sub-Divisional Magistrate, and P.W. 30, Metropolitan Magistrate. The relevant portion of the second dying declaration of the prosecutrix as contained in Ex. P.W. 27/A is as under:

Q.09 Iske baad kya hua? Kripya vistaar se bataiye.

Ans. 09 Paanch minute baad jab bus Malai Mandir ke pul par chadi toh conductor ne bus ke darwaze bandh kar diye aur andar ki batiya bujha di aur mere dost ke paas akar galiyan dene lage aur marne lage. Usko 3-4 logo ne pakad liya aur mujh ko baki log mujhe bus ke peechey hisey mein le gaye aur mere kapde faad diye aur bari-2 se rape kiya. Lohey ki rod se mujhe mere paet par maara aur poore shareer par danto se kata. Is se pehle mere dost ka saman - mobile phone, purse, credit card & debit card, ghadi aadi cheen liye. But total chhey (6) log the jinhoney bari-bari se oral (oral) vaginal (through vagina) aur pichhey se (anal) balatkar kiya. In logo ne lohe ki rod ko mere shareer ke andar vaginal/guptang aur guda (pichhey se) (through rectum) dala aur phir bahar bhi nikala. Aur mere guptango haath aur lohe ki rod dal kar mere shareer ke andruni hisson ko bahar nikala aur chot pahunchayi. Chhey logo ne bari-bari se mere saath kareeb ek ghante tak balatkar kiya. Chalti huyi bus mein he driver badalta raha taaki woh bhi balatkar kar sake.

303. The chain of events described by the prosecutrix in her dying declarations coupled with the testimonies of the other witnesses clearly establish that as soon as the informant and the prosecutrix boarded the bus, the accused persons formed an agreement to commit heinous offences against the victim. Forcefully having sexual intercourse with the prosecutrix, one after the other, inserting iron rod in her private parts, dragging her by her hair and then throwing her out of the bus all establish the common intent of the accused to rape and murder the prosecutrix. The trial court has rightly recorded that the prosecutrix's alimentary canal from the level of duodenum upto 5 cm of anal sphincter was completely damaged. It was beyond repair. Causing of damage to the jejunum is indicative of the fact that the rod was inserted through the vagina and/or anus upto the level of jejunum. Further, septicemia was the direct result of multiple internal injuries. Moreover, the prosecutrix has also maintained in her dying declaration that the accused persons were exhorting that the prosecutrix had died and she be thrown out of the bus. Ultimately, both the prosecutrix as well as the informant were thrown out of the moving bus through the front door by the accused after having failed to throw them through the rear door. The conduct of the accused in committing heinous offences with the prosecutrix in concert with each other and thereafter throwing her out of the bus in an unconscious state alongwith P.W. 1 unequivocally bring home the charge Under Section 120B in case of each of them. The criminal acts done in furtherance of the conspiracy is evident from the acts and also the words uttered during the commission of the offence. Therefore,

we do not have the slightest hesitation in holding that the trial court and the High Court have correctly considered the entire case on the touchstone of well-recognised principles for arriving at the conclusion of criminal conspiracy. The prosecution has been able to unfurl the case relating to criminal conspiracy by placing the materials on record and connecting the chain of circumstances. The relevant evidence on record lead to a singular conclusion that the accused persons are liable for criminal conspiracy and their confessions to counter the same deserve to be repelled.

Summary of conclusions:

304. From the critical analysis, keen appreciation of the evidence and studied scrutiny of the oral evidence and other materials, we arrive at the following conclusions:

i. The evidence of P.W. 1 is unimpeachable and it deserves to be relied upon.

ii. The accused persons alongwith the juvenile in conflict with law were present in the bus when the prosecutrix and her friend got into the bus.

iii. There is no reason or justification to disregard the CCTV footage, for the same has been duly proved and it clearly establishes the description and movement of the bus.

iv. The arrest of the accused persons from various places at different times has been clearly proven by the prosecution.

v. The personal search, recoveries and the disclosure leading to recovery are in consonance with law and the assail of the same on the counts of custodial confession made under torture and other pleas are highly specious pleas and they do not remotely create a dent in the said aspects.

vi. The contention raised by the accused persons that the recoveries on the basis of disclosure were a gross manipulation by the investigating agency and deserve to be thrown overboard does not merit acceptance.

vii. The relationship between the parties having been clearly established, their arrest gains more credibility and the involvement of each accused gains credence.

viii. The dying declarations, three in number, do withstand close scrutiny and they are consistent with each other.

ix. The stand that the deceased could not have given any dying declaration because of her health condition has to be repelled because the witnesses who have stated about the dying declarations have stood embedded to their version and nothing has been brought on record to discredit the same. That apart, the dying declaration by gestures has been proved beyond reasonable doubt.

x. There is no justification in any manner whatsoever to think that P.W. 1 and the deceased would falsely implicate the accused-Appellants and leave the real culprits.

xi. The dying declarations made by the deceased have received corroboration from the oral and documentary evidence and also enormously from the medical evidence.

xii. The DNA profiling, which has been done after taking due care for quality, proves to the hilt the presence of the accused persons in the bus and their involvement in the crime. The submission that certain samples were later on taken from the accused and planted on the deceased to prove the DNA aspect is noted only to be rejected because it has no legs to stand upon.

xiii. The argument that the transfusion of blood has the potentiality to give rise to two categories of DNA or two DNAs is farthest from truth and there is no evidence on that score. On the contrary, the evidence in exclusivity points to the matching of the DNA of the deceased with that of the accused on many aspects. The evidence brought on record with regard to finger prints is absolutely impeccable and the trial court and the High Court have correctly placed reliance on the same and we, in our analysis, have found that there is no reason to disbelieve the same.

xiv. The scientific evidence relating to odontology shows how far the accused have proceeded and where the bites have been found and definitely, it is extremely impossible to accept the submission that it has been a manipulation by the investigating agency to rope in the accused persons.

xv. The evidence brought on record as regards criminal conspiracy stands established.

In view of the aforesaid summation, the inevitable conclusion is that the prosecution has proved the charges leveled against the Appellants beyond reasonable doubt.

Sentencing procedure and compliance of Section 235(2) Code of Criminal Procedure:

305. Now we shall proceed to sentencing. A submission was raised that provisions of Section 235(2) Code of Criminal Procedure was not complied with. The said provision reads as follows:

235. Judgment of acquittal or conviction

(1) .....

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

306. While discussing Section 235(2) Code of Criminal Procedure, this Court, in ***Santa Singh v. State of Punjab*** MANU/SC/0167/1976 : (1976) 4 SCC 190, observed as follows:

4. .... the hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same.

307. A three-Judge Bench in ***Dagdu and Ors. v. State of Maharashtra*** MANU/SC/0086/1977 : (1977) 3 SCC 68 considered the object and scope of Section 235(2) Code of Criminal Procedure and held that:

79. But we are unable to read the judgment in *Santa Singh* as laying down that the failure on the part of the Court, which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the accused an opportunity to be heard on the question us sentence. The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.

80. Bhagwati, J. has observed in his judgment that care ought to be taken to ensure that the opportunity of a hearing on the question of sentence is nut abused and turned into an instrument for unduly protracting the proceedings. The material on which the accused proposes to rely may therefore, according to the learned Judge, be placed before the Court by means of an affidavit. Fazal Ali, J., also observes that the courts must be vigilant to exercise proper control over their proceedings, that the accused must not be permitted to adopt dilatory tactics under the cover of the new right and that what Section 235(2) contemplates is a short and simple opportunity to place the necessary material before the Court. These observations show that for a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction. The fact that in *Santa Singh* this Court remanded the matter to the Sessions Court does not spell out the ratio of the judgment to be that in every such case there has to be a remand. Remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases.

308. Mr. Raju Ramachandran, learned amicus curiae, submitted that the sentence passed by the trial court that has been confirmed by the High Court ought to be set aside as they have not followed the fundamental norms of sentencing and have not been guided by the paramount beacons of legislative policy discernible from Section 354(3) and Section 235(2) Code of Criminal Procedure. It is urged by him that the import of Section 235 Code of Criminal Procedure is not only to hear the submissions orally but also to afford an opportunity to the prosecution and the defence to place the relevant material having bearing on the question of sentence. Learned amicus curiae would submit that the trial court as well as the High Court has failed to put any of the accused persons to notice on the question of imposition of death sentence; that sufficient time was not granted to reflect on the question of death penalty; that none of the accused persons were heard in person; that the learned trial Judge has failed to elicit those circumstances of the accused which would have a bearing on the question of sentence, especially the mitigating factors in a case where death

penalty is imposed; that no separate reasons were ascribed for the imposition of death penalty on each of the accused; and that it was obligatory on the part of the learned trial Judge to individually afford an opportunity to the accused persons. Learned amicus curiae would submit that the learned trial Judge has pronounced the sentence in a routine manner which vitiates the sentence inasmuch as the solemn duty of the sentencing court has not been kept in view. Mr. Ramachandran had emphatically put forth that denial of an individualized sentencing process results in the denial of Articles 14 and 21 of the Constitution of India. Mr. Luthra, learned Senior Counsel for the Respondent-State, submitted that the learned trial Judge had heard the accused persons and there has been compliance with Section 235(2) Code of Criminal Procedure and the High Court has appositely concurred with the same.

309. Be it stated, after hearing the learned Counsel for the both sides and the learned amicus curiae, the Court, on 03.02.2017, passed the following order:

After the argument for the accused persons by Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel were advanced, we thought it appropriate to hear the learned friends of the Court and, accordingly, we have heard Mr. Raju Ramachandran and Mr. Sanjay R. Hegde, learned Senior Counsel. It is worthy to note here that Mr. Hegde, learned Senior Counsel argued on the sustainability of the conviction on many a ground and submitted a written note of submission. Mr. Ramachandran, learned Senior Counsel, inter alia, emphasized on the aspect of sentence imposed by the trial court which has been confirmed Under Section 366 Code of Criminal Procedure. While arguing with regard to the imposition of the capital punishment on the accused persons, one of the main submissions of Mr. Ramachandran was that neither the trial court nor the High Court has followed the mandate enshrined Under Section 235(2) of the Code of Criminal Procedure. Section 235(2) Code of Criminal Procedure reads as follows:

235. Judgment of acquittal or conviction.-(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case. (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

Referring to the procedure adopted by the trial court, it was urged by Mr. Ramachandran that the learned trial Judge had not considered the aggravating and mitigating circumstances, as are required to be considered in view of the Constitution Bench decision in *Bachan Singh v. State of Punjab* MANU/SC/0055/1982 : (1980) 2 SCC 684, and further there has been a failure of the substantive law, inasmuch as there has been weighing of the mitigating or the aggravating circumstances in respect of each individual accused. Learned Senior Counsel contended that Section 235(2) Code of Criminal Procedure is not a mere formality and in a case when there are more than one accused, it is obligatory on the part of the learned trial Judge to hear the accused individually on the question of sentence and deal with him. As put forth by Mr. Ramachandran, the High Court has also failed to take pains in that regard. To bolster his submission, he has commended us to the authority in *Santa Singh v. The State of Punjab*. In the said case, Bhagwati, J. dealt with the anatomy of Section 235 Code of Criminal Procedure, the purpose and purport behind it and, eventually, came to hold that:

Law strives to give them social and economic justice and it has, therefore, necessarily to be weighted in favour of the weak and the exposed. This is the new law which judges are now called upon to administer and it is, therefore, essential that they should receive proper training which would bring about an orientation in their approach and outlook, stimulate sympathies in them for the vulnerable sections of the community and inject a new awareness and sense of public commitment in them. They should also be educated in the new trends in penology and sentencing procedures so that they may learn to use penal law as a tool for reforming and rehabilitating criminals and smoothening out the uneven texture of the social fabric and not as a weapon, fashioned by law, for protecting and perpetuating the hegemony of one class over the other. Be that as it may, it is clear that the learned Sessions Judge was not aware of the provision in Section 235(2) and so also was the lawyer of the Appellant in the High Court unaware of it. No inference can, therefore, be drawn from the omission of the Appellant to raise this point, that he had nothing to Say in regard to the sentence and that consequently no prejudice was caused to him.

Thereafter, the learned Judge opined that non-compliance goes to the very root of the matter and it results in vitiating the sentence imposed. Eventually, Bhagwati, J. set aside the sentence of death and remanded the case to the court of session with a direction to pass appropriate sentence after giving an opportunity to the Appellant therein to be heard in regard to the question of sentence in accordance with the provision contained in Section 235(2) Code of Criminal Procedure as interpreted by him.

In the concurring opinion, Fazal Ali, J., ruled thus:

The last point to be considered is the extent and import of the word "hear" used in Section 235(2) of the 1973 Code. Does it indicate, that the accused should enter into a fresh trial by producing oral and documentary evidence on the question of the sentence which naturally will result in further delay of the trial? The Parliament does not appear to have intended that the accused should adopt dilatory tactics under the cover of this new provision but contemplated that a short and simple opportunity has to be given to the accused to place materials if necessary by leading evidence before the Court bearing on the question of sentence and a consequent opportunity to the prosecution to rebut those materials. The Law Commission was fully aware of this anomaly and it accordingly suggested thus:

We are aware that a provision for an opportunity to give evidence in this respect may necessitate an adjournment; and to avoid delay adjournment, for the purpose should, ordinarily be for not more than 14 days. It may be so provided in the relevant clause. It may not be practicable to keep up to the time-limit suggested by the Law Commission with mathematical accuracy but the Courts must be vigilant to exercise proper control over the proceedings so that the trial is not unavoidably or unnecessarily delayed.

The said decision was considered by a three-Judge Bench in ***Dagdu and Ors. v. State of Maharashtra*** MANU/SC/0086/1977 : (1977) 3 SCC 68. The three-Judge Bench referred to the law laid down in *Santa Singh* (supra) and opined that the mandate of Section 235(2) Code of Criminal Procedure has to be obeyed in letter and spirit. However, the larger Bench thought that Santa Singh (supra) does not lay down as a principle that failure on the part of the Court which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to

that Court in order to afford the accused an opportunity to be heard on the question of sentence. Chandrachud, J. (as His Lordship then was) speaking for the Bench ruled thus:

The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.

It is seemly to note here that Mr. Ramachandran has also commended us to a three-Judge Bench decision in *Malkiat Singh and Ors. v. State of Punjab* MANU/SC/0622/1991 : (1991) 4 SCC 341, wherein the three-Judge Bench ruled that sufficient time has to be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be.

Learned Senior Counsel has also drawn our attention to a two-Judge Bench decision in *Ajay Pandit alias Jagdish Dayabhai Patel and Anr. v. State of Maharashtra* MANU/SC/0562/2012 : (2012) 8 SCC 43, wherein the matter was remanded to the High Court. Mr. Ramachandran has drawn our attention to paragraph 47 of the said authority. It reads as follows:

Awarding death sentence is an exception, nor the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) Code of Criminal Procedure.

Having considered all the authorities, we find that there are two modes, one is to remand the matter or to direct the accused persons to produce necessary data and advance the contention on the question of sentence. Regard being had to the nature of the case, we think it appropriate to adopt the second mode. To elaborate, we would like to give opportunity before conclusion of the hearing to the accused persons to file affidavits along with documents stating about the mitigating circumstances. Needless to say, for the said purpose, it is necessary that the learned Counsel, Mr. M.L. Sharma and his associate Ms. Suman and Mr. A.P. Singh and his associate Mr. V.P. Singh should be allowed to visit the jail and communicate with the accused persons and file the requisite affidavits and materials.

At this juncture, Mr. M.L. Sharma, learned Counsel has submitted that on many a occasion, he has faced difficulty as he had to wait in the jail to have a dialogue with his clients. Mr. Sidharth Luthra, learned Senior Counsel has submitted that if this Court directs, Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel and their associate Advocates can visit the jail at 2.45 p.m. each day and they shall be allowed to enter the jail between 3.00 p.m. to 3.15 p.m. and can spend time till 5.00 p.m. Needless to say, they can commence their visits from 7th February, 2017, and file the necessary separate affidavits and documents. After the affidavits are made ready by the learned Counsel for the accused persons, they can intimate about the same to Mr. Luthra, who in his turn, shall intimate the same to the Superintendent of Jail, who shall make arrangement for a Notary so that affidavits can be notarized, treating this as a direction of this Court. Needless to say, while the learned Counsel will be discussing with the accused persons, the meeting shall be held in separate rooms inside the jail premises so that they can have a free discussion with the accused persons. Needless to say, they can reproduce in verbatim what the accused persons tell them in the affidavit. The affidavits shall be filed by 23rd February, 2017.

We may hasten to add that after the affidavits come on record, a date shall be fixed for hearing of the affidavits and pertaining to quantum of sentence if, eventually, the conviction is affirmed. The learned Counsel for the prosecution, needless to say, is entitled to file necessary affidavits with regard to the circumstances or reasons for sustenance of the sentence. Additionally, the prosecution is given liberty to put forth in the affidavit any refutation, after the copies of the affidavits by the learned Counsel for the accused persons are served on him. For the said purpose, a week's time is granted. Needless to say, the matter shall be heard on sentence, after affidavits from both the sides are brought on record. The date shall be given at 2.00 p.m. on 6th February, 2017. For the present, the matter stands adjourned to 4th February, 2017, for hearing.

Let a copy of the order be handed over to Mr. Sidharth Luthra by 4th February, 2017, who shall get it translated in Hindi and give it to the Superintendent of Jail, who in his turn, shall hand over it to the accused persons and, simultaneously, explain the purport and effect of the order.

The Superintendent of Jail is also directed to submit a report with regard to the conduct of the accused persons while they are in custody.

310. After passing of the said order, the hearing continued and on 13.02.2017, the following order was passed:

Mr. A.P. Singh, learned Counsel has concluded his arguments. After his conclusion of the arguments, as per our order, dated 3.2.2017, affidavits are required to be filed by 23.2.2017. Let the affidavits be filed by that date. Mr. Siddharth Luthra, learned Senior Counsel appearing for the State shall file the affidavit by 2nd March, 2017. Registry is directed to hand over copies of the affidavits to Mr. K. Parameshwar, learned Counsel assisting Mr. Raju Ramachandran, learned Senior Counsel and Mr. Anil Kumar Mishra-I, learned Counsel assisting Mr. Sanjay Kumar Hegde, learned Senior Counsel (Amicus Curiae).

Mr. Luthra, learned Senior Counsel shall make arrangements for visit of Mr. A.P. Singh and Mr. Manohar Lal Sharma, learned Counsel for the Petitioners even on Saturday and sunday. He shall

intimate our order to the jail authorities so that they can arrange the visit of Mr. A.P. Singh and Mr. Manohar Lal Sharma on Saturday and Sunday.

Let the matter be listed on 3.3.2017 for hearing on the question of sentence, aggravating and mitigating circumstances on the basis of the materials brought on record by learned Counsel for the parties.

311. In pursuance of the aforesaid order, affidavits on behalf of the Appellants have been filed. It is necessary to note that the learned Counsel for the Appellants addressed the Court on the basis of affidavits on 06.03.2017 and the order passed on that date is extracted hereunder:

Mr. A.P. Singh, learned Counsel has filed affidavits on behalf of the three accused persons, namely, Pawan Kumar Gupta, Vinay Sharma and Akshay Kumar Singh and Mr. M.L. Sharma, learned Counsel has filed the affidavit on behalf of Mukesh. Be it noted, Mr. A.P. Singh, learned Counsel has filed the translated version of the affidavits and Mr. Manohar Lal Sharma, learned Counsel has filed the original version in Hindi as well as the translated one.

At this juncture, Mr. Raju Ramachandran, learned Senior Counsel who has been appointed as Amicus Curiae to assist the Court, submitted that two aspects are required to be further probed to comply with the order dated 3.2.2017 inasmuch as this Court has taken the burden on itself for compliance of Section 235(2) of the Code of Criminal Procedure. Learned Senior Counsel would point out that the affidavit filed by Mukesh does not cover many aspects, namely, socio-economic background, criminal antecedents, family particulars, personal habits, education, vocational skills, physical health and his conduct in the prison.

Mr. Manohar Lal Sharma, learned Counsel submits that a report was asked for from the Superintendent of Jail with regard to the conduct of the accused persons while they are in custody, but the same has not directly been filed by the Superintendent of Jail.

Mr. Siddharth Luthra, learned Senior Counsel for the Respondent-State, would, per contra, contend that he has filed the affidavit and the affidavit contains the report of the Superintendent of Jail.

In our considered opinion, the Superintendent of Jail should have filed the report with regard to the conduct of the accused persons since they are in custody for almost four years. That would have thrown light on their conduct. Let the report with regard to their conduct be filed by the Superintendent of Jail in a sealed cover in the Court on the next date of hearing.

As far as the affidavit filed by Mukesh is concerned, Mr. Sharma, learned Counsel stated that he will keep the aspects which are required to be highlighted in mind and file a further affidavit within a week hence.

The direction issued on the earlier occasion with regard to the visit of jail by the learned Counsel for the parties shall remain in force till the next date of hearing.

Let the matter be listed at 2.00 p.m. on 20.3.2017. The report of the Superintendent of Jail, as directed hereinabove, shall be filed in Court on that date.

312. Thereafter, the matter was heard on 20.03.2017 and the following order came to be passed:

Mr. M.L. Sharma, learned Counsel has filed an additional affidavit of the Petitioner, Mukesh and Mr. A.P. Singh, learned Counsel has filed affidavits for the Petitioners, Pawan Kumar Gupta, Vinay Kumar Sharma, and Akshay Kumar Singh.

Mr. Siddharth Luthra, learned Senior Counsel has produced two sealed covers containing the reports submitted by Superintendent of the Central Jail No. 2 and the Superintendent of Central Jail No. 4 in respect of the Petitioners who are in the respective jails. Two sealed covers are opened in presence of the learned Counsel for the parties. They be kept on record.

Registry is directed to supply a copy of the aforesaid reports to Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel for the Petitioners. Registry shall also supply a copy thereof to Mr. K. Parameshwar, learned Counsel assisting Mr. Raju Ramachandran, learned Amicus Curiae and Mr. Anil Kumar Mishra-I, learned Counsel assisting Mr. Sanjay R. Hegde, learned Amicus Curiae. A copy of the report shall also be handed over to Ms. Supriya Juneja, learned Counsel assisting Mr. Siddharth Luthra, learned Senior Counsel, for he does not have a copy as the reports have been produced before us in the sealed covers.

Mr. Siddharth Luthra, learned Senior Counsel prays for and is granted three days time to file a status report and argue the matter.

Delineation as regards the imposition of sentence

313. Be it noted, we have heard the learned Counsel appearing for the parties, Mr. Luthra, learned Senior Counsel for the Respondent-State, Mr. Ramachandran and Mr. Hegde on the question of sentence. Before we advert to the principles for imposition of sentence, we think it appropriate to deal with the affidavits filed by the accused. For the sake of convenience, it is necessary to make a summary of the affidavits.

314. Accused Mukesh, A-2, filed his statement, written in his own hand-writing in Hindi, denying his involvement in the occurrence and pleading innocence. He stated that on 17.12.2012, he was picked up from his house at Karoli, Rajasthan and brought to Delhi where the police tortured him and threatened to kill him. Therefore, he acted as per the direction of the police and V.K. Anand, Advocate. He further stated that he is uneducated and poor, but not a criminal and if he is acquitted, he would go back to Karoli, Rajasthan and would take care of his parents.

315. Accused Akshay Kumar Singh, A-3, has stated that he hails from a naxal affected area in District Aurangabad, Bihar and due to poverty, he could not continue his studies beyond 9th class. He has stated that his aged father Shri Saryu Singh and mother, Smt. Malti Devi, are dependent on him. He has further stated that he is married to Punita Devi since 2010 and they have a son, now aged about six years. He further stated that due to poverty and lack of adequate opportunity in home town, he came to Delhi in the month of November 2012 to earn his livelihood. To maintain his dependants which include his parents, wife and child, he started working as a cleaner in the concerned bus at a wage of Rs. 50/- per day. He reiterated his plea of alibi asserting that he had left Delhi on 15.12.2012 in Mahabodhi Express accompanied by his sister-in-law, Sarita Devi, and

went to his native place Karmalahang where he was arrested. He further stated that after his confinement in Tihar Jail, he has been maintaining good behavior and is working hard as a labourer in the prison to maintain his family.

316. Accused Vinay Sharma, A-4, in his affidavit stated that he was born in Kapiya Kalan, Tehsil Rudra Nagar, District Basti, Uttar Pradesh and that his parents used to work as labourers and that his family is very poor. The accused stated that he used to take care of his grandfather who was a religious saint and up to July, 2012, he was studying at his native place in Uttar Pradesh and only after July, 2012, he came to Delhi to pursue his further studies. He has stated that he got himself admitted to the University of Delhi, School of Open Learning, Delhi and to earn his livelihood, he worked as a part-time instructor in gym and also as a seasonal waiter in hotels and marriage ceremonies at night. Accused Vinay Sharma further stated that he has to take care of his ailing parents and also his younger sisters and younger brother, who are totally dependent on him. In his affidavit, he reiterated his plea of alibi asserting that on the fateful day, he had participated in the Christmas celebration and was enjoying there with his family. The accused has further stated that he has no criminal antecedents and after his confinement in Tihar Jail, he has maintained good behavior and has also organized various musical programmes and his paintings are displayed in Tihar Jail.

317. Accused Pawan Gupta, A-5, filed his affidavit stating that he comes from a very poor family where his father used to sell fruits on the road for their living. He further stated that he is a resident of Cluster Jhuggi Basti and was assisting his father in selling fruits on a cart. The accused also illustrated the ailing condition of his family stating that his parents are heart patients and his mother is a handicapped person suffering from BP and thyroid. He also stated that his younger sister, Dimple Gupta, was under depression on account of the false implication of her brother in the present case and could not tolerate humiliation by the society and she has committed suicide on 09.02.2013. Apart from that, he has to look after his dependant parents and two other sisters, one married and the other unmarried and aged 17 years, and one younger brother. On behalf of accused Pawan Gupta, fervent plea was made that he has no prior criminal antecedent and after being confined to Central Jail, Tihar, he is trying to reform himself into a better person.

318. Mr. Ramachandran, learned amicus curiae, criticized the sentence, placed reliance on ***Bachan Singh v. State of Punjab*** MANU/SC/0055/1982 : (1980) 2 SCC 684 and submitted that the trial court and the High Court have committed the error of not applying the doctrine of equality which prescribes similar treatment to similar persons and stated that the Court in ***Bachan Singh*** (supra) has categorically held that the extreme penalty can be inflicted only in gravest cases of extreme culpability; in making the choice of sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also; and that the mitigating circumstances referred therein are undoubtedly relevant and must be given great weight in the determination of sentence. Further placing reliance on ***Machhi Singh v. State of Punjab*** MANU/SC/0211/1983 : (1983) 3 SCC 470, it is submitted by learned amicus curiae that in the said case, the Court held that a balance sheet of the aggravating and mitigating circumstances should be drawn up and the mitigating circumstances should be accorded full weightage and a just balance should be struck between the aggravating and mitigating circumstances. He further pointed out number of decisions wherein this Court has given considerable weight to the circumstances of the criminal and commuted the sentence to life imprisonment.

319. Mr. Ramachandran further urged that in the present case, the decision in ***Bachan Singh*** (supra) was completely disregarded and the trial court, while sentencing the accused, only placed emphasis on the brutal and heinous nature of the crime and the mitigating factors including the possibility of reform and rehabilitation were ruled out on the basis of the nature of the crime and not on its own merits. It is further contended by him that in ***Sangeet and Anr. v. State of Haryana*** MANU/SC/0989/2012 : (2013) 2 SCC 452 and ***Shankar Kisanrao Khade v. State of Maharashtra*** MANU/SC/0476/2013 : (2013) 5 SCC 546, the decisions, i.e., ***Shiv v. High Court of Karnataka*** MANU/SC/7103/2007 : (2007) 4 SCC 713, ***B.A. Umesh v. Registrar General, High Court of Karnataka*** MANU/SC/0082/2011 : (2011) 3 SCC 85 and ***Dhananjoy Chaterjee v. State of West Bengal*** MANU/SC/0626/1994 : (1994) 2 SCC 220, relied upon by the Special Public Prosecutor and the High Court, have been doubted by this Court.

320. Learned amicus curiae has further propounded that sentencing and non-consideration of the mitigating circumstances are violative of Articles 14 and 21 of the Constitution. It is his submission that the prosecution's argument on aggravating circumstances gets buttressed by the material on record while the plea of mitigating circumstances rests solely on arguments and this imbalance is a serious violation of the doctrine of fairness and reasonableness enshrined in Article 14 of the Constitution; that there should be a fair and principle-based sentencing process in death penalty cases by which a genuine and conscious attempt is made to investigate and evaluate the circumstances of the criminal; that the fair and principled approaches are facets of Article 14; and that if the enumeration and evaluation of mitigating factors are left only to the accused or his counsel and the Court does not accord a principle-based treatment, the imposition of death penalty will be rendered the norm and not the exception, which is an inversion of the ***Bachan Singh*** (supra) logic and a serious violation of Article 21 of the Constitution.

321. Mr. Ramachandran submitted that the trial court and the High Court failed to pay due regard to the mitigating factors; that the courts have committed the mistake of rejecting the mitigating factors by reasoning that it may not be sufficient for awarding life sentence; and that the courts have not considered all the mitigating factors cumulatively to arrive at the conclusion whether the case fell within the rarest of rare category. He has referred to the Constitution Bench decision in ***Triveniben v. State of Gujarat*** MANU/SC/0520/1989 : (1989) 1 SCC 678 wherein Shetty, J. in his concurring opinion, opined that death sentence cannot be given if there is any one mitigating circumstance in favour of the accused and all circumstances of the case should be aggravating and submitted that this line of judicial thought has been completely ignored by the High Court and the trial court.

322. Learned amicus curiae further contended that the attribution of individual role with respect to the iron rod, which was a crucial consideration in convicting the accused Under Section 302 Indian Penal Code, was not considered by the trial court or the High Court in the sentencing process and stressed that when life imprisonment is the norm and death penalty the exception, the lack of individual role has to be regarded as a major mitigating circumstance. In this regard, reliance has been placed by him on ***Karnesh Singh v. State of U.P.*** MANU/SC/0051/1968 : AIR 1968 SC 1402, ***Ronny v. State of Maharashtra*** MANU/SC/0199/1998 : (1998) 3 SCC 625, ***Nirmal Singh v. State of Haryana*** MANU/SC/0178/1999 : (1999) 3 SCC 670 and ***Sahdeo v. State of U.P.*** MANU/SC/0423/2004 : (2004) 10 SCC 682.

323. Mr. Ramachandran has also contended that subsequent to the pronouncement in ***Machhi Singh*** (supra), there are series of decisions by this Court where the Court has given considerable weight to the concept of reformation and rehabilitation and commuted the sentence to life imprisonment. According to him, young age is a mitigating factor and this Court has taken note of the same in ***Raghubir Singh v. State of Haryana*** MANU/SC/0185/1974 : (1975) 3 SCC 37, ***Harnam Singh v. State of Uttar Pradesh*** MANU/SC/0129/1975 : (1976) 1 SCC 163, ***Amit v. State of Maharashtra*** MANU/SC/0567/2003 : (2003) 8 SCC 93, ***Rahul v. State of Maharashtra*** (2005) 10 SCC 322, ***Rameshbhai Chandubhai Rathod v. State of Gujarat*** MANU/SC/0663/2009 : (2009) 5 SCC 740, ***Santosh Kumar Bariyar v. State of Maharashtra*** MANU/SC/0801/2009 : (2009) 6 SCC 498, ***Sebastian v. State of Kerala*** MANU/SC/1717/2009 : (2010) 1 SCC 58, ***Santosh Kumar Singh*** (supra), ***Rameshbhai Chandubhai Rathod II v. State of Gujarat*** MANU/SC/0075/2011 : (2011) 2 SCC 764, ***Amit v. State of Uttar Pradesh*** MANU/SC/0133/2012 : (2012) 4 SCC 107 and ***Lalit Kumar Yadav v. State of Uttar Pradesh*** MANU/SC/0368/2014 : (2014) 11 SCC 129. That apart, it is urged by him that when the crime is not pre-meditated, the same becomes a mitigating factor and that has been taken note of by this Court in the authorities in ***Akhtar v. State of Uttar Pradesh*** MANU/SC/1008/1999 : (1999) 6 SCC 60, ***Raju v. State of Haryana*** MANU/SC/0324/2001 : (2001) 9 SCC 50 and ***Amrit Singh v. State of Punjab*** MANU/SC/8642/2006 : (2006) 12 SCC 79.

324. Learned amicus curiae would further urge that when the criminal antecedents are lacking and the prosecution has not been able to say about that the Appellants deserve imposition of lesser sentence. For the said purpose, he has commended us to the authorities in ***Nirmal Singh*** (supra), ***Raju v. State of Haryana*** (supra), ***Amit v. State of Maharashtra*** (supra), ***Surender Pal v. State of Gujarat*** MANU/SC/0794/2004 : (2005) 3 SCC 127, ***Rameshbhai Chandubhai Rathod II*** (supra), ***Amit v. State of Uttar Pradesh*** (supra), ***Anil v. State of Maharashtra*** MANU/SC/0124/2014 : (2014) 4 SCC 69 and ***Lalit Kumar Yadav v. State of Uttar Pradesh*** MANU/SC/0368/2014 : (2014) 11 SCC 129.

325. Learned Senior Counsel has emphasized on the reform, rehabilitation and absence of any continuing threat to the collective which are factors to be taken into consideration for the purpose of commutation of death penalty to life imprisonment. In this regard, learned Senior Counsel has drawn inspiration from the decisions in ***Ronny*** (supra), ***Nirmal Singh*** (supra), ***Bantu v. State of Madhya Pradesh*** MANU/SC/0684/2001 : (2001) 9 SCC 615, ***Lehna*** (supra), ***Rahul*** (supra), ***Santosh Kumar Bariyar*** (supra), ***Santosh Kumar Singh*** (supra), ***Rajesh Kumar v. State*** MANU/SC/1130/2011 : (2011) 13 SCC 706, ***Amit v. State of Uttar Pradesh*** (supra), ***Ramnaresh v. State of Chhattisgarh*** MANU/SC/0163/2012 : (2012) 4 SCC 257, ***Sandesh v. State of Maharashtra*** MANU/SC/1128/2012 : (2013) 2 SCC 479 and ***Lalit Kumar Yadav*** (supra).

326. Mr. Ramachandran has also submitted that the present case should be treated as a special category as has been held in ***Swamy Shradhananda (2) v. State of Karnataka*** MANU/SC/3096/2008 : (2008) 13 SCC 767 and the recent Constitution Bench decision in ***Union of India v. Sriharan*** MANU/SC/1377/2015 : (2016) 7 SCC 1. It is urged by him that in many a case, this Court has exercised the said discretion. Learned Senior Counsel in that regard has drawn our attention to the pronouncements in ***Rameshbhai Chandubhai Rathod*** (supra), ***Neel Kumar v. State of Haryana*** MANU/SC/0416/2012 : (2012) 5 SCC 766, ***Ram Deo Prasad v. State of Bihar*** MANU/SC/0360/2013 : (2013) 7 SCC 725, ***Chhote Lal v. State of Madhya Pradesh***

MANU/SC/0935/2011 : (2013) 9 SCC 795, ***Anil v. State of Maharashtra*** (supra), ***Rajkumar*** (supra) and ***Selvam v. State*** MANU/SC/0401/2014 : (2014) 12 SCC 274.

327. Mr. Hegde, learned friend of the Court, canvassed that the theory of reformation cannot be ignored entirely in the obtaining factual matrix in view of the materials brought on record. Learned Senior Counsel would contend that imposition of death penalty would be extremely harsh and totally unwarranted inasmuch as the case at hand does not fall in the category of rarest of rare case. That apart, it is contended by him that the entire incident has to be viewed from a different perspective, that is, the accused persons had the bus in their control, they were drunk, and situation emerged where the poverty-stricken persons felt empowered as a consequence of which the incident took place and considering the said aspect, they may be imposed substantive custodial sentence for specific years but not death penalty. Additionally, it is submitted by him that in the absence of pre-meditation to commit a crime of the present nature, it would not invite the harshest punishment.

328. Mr. Luthra, learned Senior Counsel, has referred to the reports of the Superintendent of Jail that the conduct of the accused persons in the jail has been absolutely non-satisfactory and non-cooperative and the diabolic nature of the crime has shaken the collective conscience. According to him, the diabolic nature of the crime has nothing to do with poverty, for it was not committed for alleviation of poverty but to satiate their sexual appetite and enormous perversity. He would submit that this would come in the category of rarest of the rare cases in view of the law laid down in ***Sevaka Perumal v. State of Tamil Nadu*** MANU/SC/0338/1991 : (1991) 3 SCC 471, ***Kamta Tiwari v. State of Madhya Pradesh*** MANU/SC/0722/1996 : (1996) 6 SCC 250, ***State of U.P. v. Satish*** MANU/SC/0090/2005 : (2005) 3 SCC 114, ***Holiram Bordoloi v. State of Assam*** MANU/SC/0271/2005 : (2005) 3 SCC 793, ***Ankush Maruti Shinde v. State of Maharashtra*** MANU/SC/0700/2009 : (2009) 6 SCC 667, ***Sundar v. State*** MANU/SC/0105/2013 : (2013) 3 SCC 215 and ***Mohfil Khan v. State of Jharkhand*** MANU/SC/0915/2014 : (2015) 1 SCC 67.

329. It is also submitted by Mr. Luthra that mitigating circumstances are required to be considered in the light of the offence and not alone on the backdrop of age and family background. For this purpose, he has relied upon ***Deepak Rai v. State of Bihar*** MANU/SC/0965/2013 : (2013) 10 SCC 421 and ***Purshottam Dashrath Borate v. State of Maharashtra*** MANU/SC/0583/2015 : (2015) 6 SCC 652.

330. Mr. Sharma and Mr. Singh, learned Counsel for the Appellants, would submit that the conduct of the accused persons shows reformation as there are engaged in educating themselves and also they have been participating in affirmative and constructive activities adopted in jail and so, death penalty should not be affirmed and should be commuted. Mr. Sharma, learned Counsel appearing for the accused Mukesh, submits that he is not connected with the crime in question. It is put forth that the case at hand cannot be regarded as rarest of the rare cases and, therefore, the maximum punishment that can be given should be for a specific period.

331. Presently, we shall proceed to analyse the aforesaid aspect. In ***Bachan Singh*** (supra), the Court held thus:

(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder Under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

332. In the said case, the Court, after referring to the authority in ***Furman v. Georgia*** MANU/USSC/0008/1972 : 33 L Ed 2d 346 : 408 US 238 (1972), noted the suggestion given by the learned Counsel about the aggravating and the mitigating circumstances. The aggravating circumstances suggested by the counsel read as follows:

Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(*a*) if the murder has been committed after previous planning and involves extreme brutality; or

(*b*) if the murder involves exceptional depravity; or

(*c*) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed--

(*i*) while such member or public servant was on duty; or

(*ii*) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(*d*) if the murder is of a person who had acted in the lawful discharge of his duty Under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance Under Section 37 and Section 129 of the said Code.

After reproducing the same, the Court opined:

Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

333. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances:

Mitigating circumstances.-In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

The Court then observed:

We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

334. In the said case, the Court has also held thus:

It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.<mpara>

335. In ***Machhi Singh*** (supra), a three-Judge Bench has explained the concept of 'rarest of the rare cases' by observing thus:

The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the

protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection.

336. Thereafter, the Court has adverted to the aspects of the feeling of the community and its desire for self-preservation and opined that the community may well withdraw the protection by sanctioning the death penalty. What has been ruled in this regard is worth reproducing:

But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.

337. It is apt to state here that in the said case, stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder.

338. After so enumerating, the propositions that emerged from ***Bachan Singh*** (supra) were culled out which are as follows:

The following propositions emerge from Bachan Singh case:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

339. The three-Judge Bench further opined that to apply the said guidelines, the following questions are required to be answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

340. The Court in ***Haresh Mohandas Rajput v. State of Maharashtra*** MANU/SC/1099/2011 : (2011) 12 SCC 56, while dealing with the situation where the death sentence is warranted, referred to the guidelines laid down in ***Bachan Singh*** (supra) and the principles culled out in ***Machhi Singh*** (supra) and opined as follows:

19. In *Machhi Singh* v. *State of Punjab* this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating and the mitigating circumstances.

After so stating, the Court ruled thus:

20. The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. (See *C. Muniappan* v. *State of T.N.* MANU/SC/0655/2010 : (2010) 9 SCC 567, *Dara Singh* v. *Republic of India* MANU/SC/0062/2011 : (2011) 2 SCC 490, *Surendra Koli* v. *State of U.P.* Ibid, *Mohd. Mannan* MANU/SC/0460/2011 : (2011) 5 SCC 317 and *Sudam* v. *State of Maharashtra* MANU/SC/0850/2011 : (2011) 7 SCC 125s.)

21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether the death sentence should be awarded, would depend upon the factual scenario of the case in hand.

341. This Court, while dealing with the murder of a young girl of about 18 years in ***Dhananjoy Chatterjee*** (supra), took note of the fact that the accused was a married man of 27 years of age, the principles stated in ***Bachan Singh's*** case and further took note of the rise of violent crimes against women in recent years and, thereafter, on consideration of the aggravating factors and mitigating circumstances, opined that:

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

342. After so stating, the Court took note of the fact that the deceased was a school-going girl and it was the sacred duty of the Appellant, being a security guard, to ensure the safety of the inhabitants of the flats in the apartment but to gratify his lust, he had raped and murdered the girl in retaliation which made the crime more heinous. Appreciating the manner in which the barbaric crime was committed on a helpless and defenceless school-going girl of 18 years, the Court came to hold that the case fell in the category of rarest of the rare cases and, accordingly, affirmed the capital punishment imposed by the High Court.

343. In ***Laxman Naik v. State of Orissa*** MANU/SC/0264/1995 : (1994) 3 SCC 381, the Court commenced the judgment with the following passage:

The present case before us reveals a sordid story which took place sometime in the afternoon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of abhorrent nature is said to have been committed by the Appellant herein who is none else but an agnate and paternal uncle of the deceased victim Nitma, a girl of the tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large.

344. It is worthy to note that in the said case, the High Court had dismissed the Appellant's appeal and confirmed the death sentence awarded to him. While discussing as regards the justifiability of the sentence, the Court referred to the decision in ***Bachan Singh's case*** and opined that there were absolutely no mitigating circumstances and, on the contrary, the facts of the case disclosed only aggravating circumstances against the Appellant. Elaborating further, the Court held thus:

The hard facts of the present case are that the Appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the Appellant and while reposing such faith and confidence in the Appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the Appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the Appellant. The victim was a totally helpless child there being no one to protect her

in the desert where she was taken by the Appellant misusing her confidence to fulfill his lust. It appears that the Appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act.

After so stating, the Court, while affirming the death sentence, opined that:

.....The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The Appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the Appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the Appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the Appellant for the offence Under Section 302 of the Penal Code.

345. ***Kamta Tiwari*** (supra) is a case where the Appellant was convicted for the offences punishable Under Sections 363, 376, 302 and 201 of Indian Penal Code and sentenced to death by the learned trial Judge and the same was affirmed by the High Court. In appeal, the two-Judge Bench referred to the propositions culled out in ***Machhi Singh*** (supra) and expressed thus:

Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances - but found aggravating circumstances aplenty. The evidence on record clearly establishes that the Appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him Tiwari Uncle'. Obviously her closeness with the Appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The Appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder -- as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes.

346. In ***Bantu v. State of Uttar Pradesh*** MANU/SC/7863/2008 : (2008) 11 SCC 113, a five year old minor girl was raped and murdered and the Appellant was awarded death sentence by the trial Court which was affirmed by the High Court. This Court found the Appellant guilty of the crime and, thereafter, referred to the principles stated in ***Bachan Singh***, ***Machhi Singh*** (supra) and ***Devender Pal Singh v. State of A.P.*** MANU/SC/0217/2002 : (2002) 5 SCC 234 and eventually

came to hold that the said case fell in the rarest of the rare category and the capital punishment was warranted. Being of this view, the Court declined to interfere with the sentence.

347. In ***Rajendra Pralhadrao Wasnik v. State of Maharashtra*** MANU/SC/0160/2012 : (2012) 4 SCC 37, the Appellant was awarded sentence of death by the learned trial Judge which was confirmed by the High Court, for he was found guilty of the offences punishable Under Sections 376(2)(f), 377 and 302 Indian Penal Code. In the said case, the prosecution had proven that the Appellant had lured a three year old minor girl child on the pretext of buying her biscuits and then raped her and eventually, being apprehensive of being identified, killed her. In that context, while dismissing the appeal, the Court ruled thus:

37. When the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.

38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief" and "confidence", in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self.

348. At this stage, it is fruitful to refer to some authorities where in cases of rape and murder, the death penalty was not awarded. In ***State of T.N. v. Suresh and Anr.*** MANU/SC/0939/1998 : (1998) 2 SCC 372, the Court, while unsettling the judgment of acquittal recorded by the High Court and finding that the accused was guilty of rape of a pregnant woman and also murder, awarded the sentence of life imprisonment by observing:

The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A-2 and A-3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A-2 and A-3, though we are not inclined, at this distance of time, to restore the sentence of death passed by the trial court on those two accused.

From the aforesaid authority, it is seen that the Court did not think it appropriate to restore the death sentence passed by the trial court regard being had to the passage of time.

349. In ***Akhtar v. State of U.P.*** (supra), the Appellant was found guilty of murder of a young girl after committing rape on her and was sentenced to death by the learned Sessions Judge and the said sentence was confirmed by the High Court. The two-Judge Bench referred to the decisions in

Laxman Naik (supra) and ***Kamta Tiwari*** (supra) and addressed itself whether the case in hand was one of the rarest of the rare case for which punishment of death could be awarded. The Court distinguished the two decisions which have been referred to hereinabove and ruled:

In the case in hand on examining the evidence of the three witnesses it appears to us that the accused-Appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused-Appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death.

350. In ***State of Maharashtra v. Barat Fakira Dhiwar*** MANU/SC/0700/2001 : (2002) 1 SCC 622, a three-year old girl was raped and murdered by the accused. The learned trial Judge convicted the accused and awarded the death sentence. The High Court had set aside the order of conviction and acquitted him for the offences. This Court, on scrutiny of the evidence, found the accused guilty of rape and murder. Thereafter, the Court proceeded to deal with the sentence and, in that context, observed:

Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases", as envisaged by the Constitution Bench in *Bachan Singh* v. *State of Punjab*. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence Under Section 302 Indian Penal Code, to imprisonment for life.

351. Keeping in view the aforesaid authorities, the Court, in *Vasanta Sampat Dupare v. State of Maharashtra* MANU/SC/1098/2014 : (2015) 1 SCC 253, proceeded to adumbrate what is the duty of the Court when the collective conscience is shocked because of the crime committed and observed:

... When the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience, cry of the community for justice and the intense indignation the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away with any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents relating to rarest of the rare case. We are also required to pose two questions that has been stated in ***Machhi Singh's*** case.

352. In the said case, the Court dwelt upon the manner in which the crime was committed and how a minor girl had become a prey of the sexual depravity and was injured by the despicable act of the accused to silence the voice so that there would be no evidence. Dealing with the same, the Court referred to earlier judgments and held:

58. Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the Appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had an insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the Appellant. After the savage act was over, the coolness of the Appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life-spark. The barbaric act of the Appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the Appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.

59. In this context, we may fruitfully refer to a passage from *Shyam Narain* v. *State (NCT of Delhi)* MANU/SC/0543/2013 : (2013) 7 SCC 77, wherein it has been observed as follows:

1. The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the Appellant to commit a crime which can bring in a 'tsunami' of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of sensitive polity.

In the said case, while describing the rape on an eight-year-old girl, the Court observed: (*Shyam Narain* case, SCC p. 88, para 26)

26. ... Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight-year-old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that 'child is a gift of the providence' enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers.

Elucidating further, the Court held:

60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned Counsel for the Appellant pointing out the mitigating circumstances would submit that the Appellant is in his mid-fifties and there is possibility of his reformation. Be it noted, the Appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the Appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned Counsel would submit that the Appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.

62. As we perceive, this case deserves to fall in the category of the rarest of rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven makes a four-year minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the Appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of the rarest of the rare case and we unhesitatingly so hold.

353. In the said case, a review petition bearing Review Petition (Criminal) Nos. 637-638 of 2015 was filed which has been recently dismissed. U.U. Lalit, J., authoring the judgment, has held:

19. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the

Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition.

20. The material placed on record shows that after the Judgment under review, the Petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the Petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in Bachan Singh but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the Petitioner are after the judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present Review Petition.

354. The mitigating factors which have been highlighted before us on the basis of the affidavits filed by the Appellants pertain to the strata to which they belong, the aged parents, marital status and the young children and the suffering they would go through and the calamities they would face in case of affirmation of sentence, their conduct while they are in custody and the reformative path they have chosen and their transformation and the possibility of reformation. That apart, emphasis has been laid on their young age and rehabilitation.

355. Now, we shall focus on the nature of the crime and manner in which it has been committed. The submission of Mr. Luthra, learned Senior Counsel, is that the present case amounts to devastation of social trust and completely destroys the collective balance and invites the indignation of the society. It is submitted by him that that a crime of this nature creates a fear psychosis and definitely falls in the category of rarest of the rare cases.

356. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, viz., the assault on the informant, P.W. 1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the Appellants; their brutish behavior in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, *inter alia*, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ex. P.W. 50/A and Ex. P.W. 50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the Appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which

were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the Appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, inter alia, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her alongwith her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the Appellants to commit a crime which can summon with immediacy "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.

357. When we cautiously, consciously and anxiously weigh the aggravating circumstances and the mitigating factors, we are compelled to arrive at the singular conclusion that the aggravating circumstances outweigh the mitigating circumstances now brought on record. Therefore, we conclude and hold that the High Court has correctly confirmed the death penalty and we see no reason to differ with the same.

358. Before we part with the case, we are obligated to record our unreserved appreciation for the assistance rendered by Mr. Raju Ramachandran and Mr. Sanjay R. Hegde, learned amicus curiae appointed by the Court. We must also record our uninhibited appreciation for Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel for the Appellants, for they, keeping the tradition of the Bar, defended the Appellants at every stage.

359. In view of our preceding analysis, the appeals are bound to pave the path of dismissal, and accordingly, we so direct.

R. Banumathi, J.

360. I have gone through the judgment of my esteemed Brother Justice Dipak Misra. I entirely agree with the reasoning adopted by him and the conclusions arrived at. However, in view of the significant issues involved in the matter, in the light of settled norms of appreciation of evidence in rape cases and the role of Judiciary in addressing crime against women, I would prefer to give my additional reasoning for concurrence.

361. Honesty, pride, and self-esteem are crucial to the personal freedom of a woman. Social progress depends on the progress of everyone. Following words of the father of our nation must be noted at all times:

To call woman the weaker sex is a libel; it is man's injustice to woman. If by strength is meant moral power, then woman is immeasurably man's superior. Has she not greater intuition, is she not more self-sacrificing, has she not greater powers of endurance, has she not greater courage? Without her, man could not be. If non-violence is the law of our being, the future is with woman. Who can make a more effective appeal to the heart than woman?

362. **Crimes against women - an area of concern:** Over the past few decades, legal advancements and policy reforms have done much to protect women from all sources of violence and also to sensitize the public on the issue of protection of women and gender justice. Still, the crimes against women are on the increase. As per the annual report of National Crime Records Bureau titled, 'Crime in India 2015' available at ***http://ncrb.nic.in/StatePublications/CII/CII2015/FILES/Compendium-15.11.16.pdf***, a total of 3,27,394 cases of crime against women were reported in the year 2015, which shows an increase of over 43% in crime against women since 2011, when 2,28,650 cases were reported. A percentage change of 110.5% in the cases of crime against women has been witnessed over the past decade (2005 to 2015), meaning thereby that crime against women has more than doubled in a decade. An overall crime rate under the head, 'crime against women' was reported as 53.9% in 2015, with Delhi UT at the top spot.

363. As per the National Crime Records Bureau, a total of 34,651 cases of rape Under Section 376 Indian Penal Code were registered during 2015 (excluding cases under the Protection of Children from Sexual Offences Act, 2012). An increasing trend in the incidence of rape has been observed during the period 2011-2014. These cases have shown an increase of 9.2% in the year 2011 (24,206 cases) over the year 2010 (22,172 cases), an increase of 3.0% in the year 2012 (24,923 cases) over 2011, with further increase of 35.2% in the year 2013 (33,707 cases) over 2012 and 9.0% in 2014 (36,735 cases) over 2013. A decrease of 5.7% was reported in 2015 (34,651 cases) over 2014 (36,735 cases). 12.7% (4,391 out of 34,651 cases) of total reported rape cases in 2015 were reported in Madhya Pradesh followed by Maharashtra (4,144 cases), Rajasthan (3,644 cases), Uttar Pradesh (3,025 cases) and Odisha (2,251 cases) accounting for 11.9%, 10.5%, 8.7% and 6.5% of total cases respectively. NCT of Delhi reported highest crime rate of 23.7% followed by Andaman & Nicobar Islands at 13.5% as compared to national average of 5.7%. In order to combat increasing crime against women, as depicted in the statistics of National Crime Records Bureau, the root of the problem must be studied in depth and the same be remedied through stringent legislation and other steps. In order to secure social order and security, it is imperative to address issues concerning women, in particular crimes against women on priority basis.

364. Stringent legislation and punishments alone may not be sufficient for fighting increasing crimes against women. In our tradition bound society, certain attitudinal change and change in the mind-set is needed to respect women and to ensure gender justice. Right from childhood years' children ought to be sensitized to respect women. A child should be taught to respect women in the society in the same way as he is taught to respect men. Gender equality should be made a part of the school curriculum. The school teachers and parents should be trained, not only to conduct

regular personality building and skill enhancing exercise, but also to keep a watch on the actual behavioral pattern of the children so as to make them gender sensitized. The educational institutions, Government institutions, the employers and all concerned must take steps to create awareness with regard to gender sensitization and to respect women. Sensitization of the public on gender justice through TV, media and press should be welcomed. On the practical side, few of the suggestions are worthwhile to be considered. Banners and placards in the public transport vehicles like autos, taxis and buses etc. must be ensured. Use of street lights, illuminated bus stops and extra police patrol during odd hours must be ensured. Police/security guards must be posted at dark and lonely places like parks, streets etc. Mobile apps for immediate assistance of women should be introduced and effectively maintained. Apart from effective implementation of the various legislation protecting women, change in the mind set of the society at large and creating awareness in the public on gender justice, would go a long way to combat violence against women.

365. **Factual Matrix:** The entire factual matrix of the concerned horrendous incident has already been fairly set out in the judgment of my esteemed brother Justice Dipak Misra, the High Court and the trial Court. Suffice only to briefly recapitulate the facts, for my reference purpose and for completion.

366. In the wintry night of 16.12.2012, when the entire Delhi was busy in its day-to-day affair, embracing the joy of year-end, two youths were bravely struggling to save their dignity and life. It is a case of barbaric sexual violence against women, in fact against the society at large, where the accused and juvenile in conflict with law picked up a 23 year old physiotherapy student and her male friend (P.W. 1) accompanying her, from a busy place in Delhi-Munirka Bus stop and subjected them to heinous offences. The accused gang-raped the prosecutrix in the moving bus and completely ravished her in front of her helpless friend, Awninder Pratap (P.W. 1). The accused, on satisfaction of their lust, threw both the victims, half naked, outside the bus, in December cold near Mahipalpur flyover. The prosecutrix and P.W. 1 were noticed in miserable condition near Mahipalpur flyover, where they were thrown, by P.W. 72 Raj Kumar, who was on patrolling duty that night in the area and P.W. 73 Ram Chandar, Head Constable, rushed the prosecutrix and P.W. 1 to Safdarjung Hospital owing to the need of immediate medical attention. Law was set in motion by the statement of P.W. 1, which was recorded after giving primary medical treatment to him. Statement/Dying declaration of the prosecutrix was also recorded by P.W. 49 Doctor, P.W. 27 Sub-Divisional Magistrate and P.W. 30 Metropolitan Magistrate. After intensive care and treatment in ICU in Delhi, the victim was airlifted to a hospital in Singapore by an air-ambulance where she succumbed to her injuries on 29.12.2012.

367. The incident shocked the nation and generated public rage. A Committee headed by Justice J.S. Verma, Former Chief Justice of India was constituted to suggest amendments to deal with sexual offences more sternly and effectively in future. The suggestions of the Committee led to the enactment of Criminal Law (Amendment) Act, 2013 which, *inter alia*, brought in substantive as well as procedural reforms in the core areas of rape law. The changes brought in, inter alia, can broadly be titled as under: (i) Extension of the definition of the offence of rape in Section 375 Indian Penal Code; (ii) Adoption of a more pragmatic approach while dealing with the issue of consent in the offence of rape; and (iii) Introduction of harsher penalty commensurating with the gravity of offence. These subsequent events though not relevant for the purpose of this judgment, I have referred to it for the sake of factual completion.

368. Both the courts below, by recording concurrent findings, have found all the accused guilty of the offences they were charged with and owing to the gravity and manner of committing the heinous offences held that the acts of the accused *shake the conscience of the society falling within the category of rarest of rare cases* and awarded death penalty. Briefly put, the courts below have found that the prosecution has established the guilt of the accused inter alia on the following:

1. Three dying declarations of the prosecutrix, complementing each other, corroborated by medical evidence and other direct as well as circumstantial evidence.

2. Testimony of eye witness - P.W. 1, corroborated by circumstantial evidence as well as scientific evidence.

3. Recovery of the bus in which incident took place and recovery of the concerned iron rod therefrom, completing the chain of circumstantial evidence, by proof of scientific evidence like DNA analysis, finger print analysis etc.

4. Arrest of the accused and their identification by P.W. 1, recovery of articles belonging to the prosecutrix and P.W. 1 from the accused, pursuant to their disclosure statement, substantiated by proof of DNA analysis.

5. Conspiracy of the accused in the commission of offence.

369. While concurring with the majority, I have recorded my reasoning by considering the evidence on record in the light of settled legal principles and also analysed the justifiability of the punishment awarded to the accused. For proper appreciation of evidence, it is apposite to first refer to the settled principles and norms of appreciation of evidence of prosecutrix and other evidence in a rape case.

370. **Duty of court in appreciation of evidence while dealing with cases of rape:** Crime against women is an unlawful intrusion of her right to privacy, which offends her self-esteem and dignity. Expressing concern over the increasing crime against women, in ***State of Punjab v. Gurmit Singh and Ors.*** MANU/SC/0366/1996 : (1996) 2 SCC 384, this Court held as under:

21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. **The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case**.....

[Emphasis supplied]

371. The above principle of law, declared in ***Gurmeet Singh's*** case is reiterated in various cases viz., ***State of Rajasthan v. N.K. The Accused*** MANU/SC/0218/2000 : (2000) 5 SCC 30; ***State of H.P. v. Lekh Raj and Anr.*** MANU/SC/0714/1999 : (2000) 1 SCC 247; ***State of H.P. v. Asha Ram*** MANU/SC/1902/2005 : (2005) 13 SCC 766.

372. Clause (g) of Sub-section (2) of Section 376 Indian Penal Code (prior to 2013 Amendment Act 13 of 2013) deals with cases of gang rape. In order to establish an offence Under Section 376(2)(g) Indian Penal Code, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape is committed by even one, all the accused are guilty, irrespective of the fact that only one or more of them had actually committed the act. Section 376(2)(g) read with Explanation I thus embodies a principle of joint liability. But so far as appreciation of evidence is concerned, the principles concerning the cases falling under Sub-section (1) of Section 376 Indian Penal Code apply.

373. In a case of rape, like other criminal cases, onus is always on the prosecution to prove affirmatively each ingredients of the offence. The prosecution must discharge this burden of proof to bring home the guilt of the accused and this onus never shifts. In ***Narender Kumar v. State (NCT of Delhi)*** MANU/SC/0481/2012 : (2012) 7 SCC 171, it was held as under:

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. .....
There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

374. At the same time while dealing with cases of rape, the Court must act with utmost sensitivity and appreciate the evidence of prosecutrix in lieu of settled legal principles. Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the witnesses which are not of a substantial character. It is now well-settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence such as the report of chemical examination, scientific examination etc., if the same is found natural and trustworthy.

375. Persisting notion that the testimony of victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood. Ours is a conservative society and not a permissive society. Ordinarily a woman, more so, a young woman will not stake her reputation by levelling a false charge, concerning her chastity. In ***State of Karnataka v. Krishnappa*** MANU/SC/0210/2000 : (2000) 4 SCC 75, it was held as under:

15. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity -- it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. .....

16. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

[emphasis supplied]

376. There is no legal compulsion to look for corroboration of the prosecutrix's testimony unless the evidence of the victim suffers from serious infirmities, thereby seeking corroboration. In ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*** MANU/SC/0090/1983 : (1983) 3 SCC 217, it was held as under:

9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. .....

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) .....

11. ..... On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eyewitness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. .....

[emphasis supplied]

It was further held in ***Bharwada Bhoginbhai Hirjibhai (supra)*** that if the evidence of the victim does not suffer from any basic infirmity and the "probabilities-factor" does not render it unworthy of credence, there is no reason to insist on corroboration except corroboration by the medical evidence. The same view was taken in ***Krishan Lal v. State of Haryana*** MANU/SC/0147/1980 : (1980) 3 SCC 159.

377. It is well-settled that conviction can be based on the sole testimony of the prosecutrix if it is implicitly reliable and there is a ring of truth in it. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not requirement of law but a guidance of prudence under given circumstances. In ***Rajinder alias Raju v. State of Himachal Pradesh*** MANU/SC/1122/2009 : (2009) 16 SCC 69, it was held as under:

19. In the context of Indian culture, a woman--victim of sexual aggression--would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.

378. In ***Raju and Ors. v. State of Madhya Pradesh*** MANU/SC/8353/2008 : (2008) 15 SCC 133, it was held as under:

10. .....that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. .....

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that

the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

379. In ***State of H.P. v. Asha Ram*** MANU/SC/1902/2005 : (2005) 13 SCC 766, this Court highlighted the importance of, and the weight to be attached to, the testimony of the prosecutrix. In para (5), it was held as under:

5. ..... It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

380. As held in the case of ***State of Punjab v. Ramdev Singh*** MANU/SC/1063/2003 : (2004) 1 SCC 421, there is no rule of law that the testimony of the prosecutrix cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. The above judgment of ***Ramdev Singh*** (supra) has been approvingly quoted in ***State of U.P. v. Munshi*** MANU/SC/7982/2008 : (2008) 9 SCC 390.

381. In a catena of decisions, this Court has held that conviction can be based on the sole testimony of the prosecutrix, provided it is natural, trustworthy and worth being relied upon vide ***State of H.P. v. Gian Chand*** MANU/SC/0312/2001 : (2001) 6 SCC 71, ***State of Rajasthan v. N.K. The Accused*** MANU/SC/0218/2000 : (2000) 5 SCC 30; ***State of H.P. v. Lekh Raj and Anr.*** MANU/SC/0714/1999 : (2000) 1 SCC 247, ***Wahid Khan v. State of Madhya Pradesh*** MANU/SC/1850/2009 : (2010) 2 SCC 9, ***Dinesh Jaiswal v. State of Madhya Pradesh*** MANU/SC/0104/2010 : (2010) 3 SCC 232; ***Om Prakash v. State of Haryana*** MANU/SC/0756/2011 : (2011) 14 SCC 309.

382. Observing that once the statement of the prosecutrix inspires confidence, conviction can be based on the solitary evidence of the prosecutrix and that corroboration of testimony of a prosecutrix is not a requirement of law but only a rule of prudence, in ***Narender Kumar's case (supra)***, this Court held as under:

20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which

necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (*sic* circumstantial), which may lend assurance to her testimony. (Vide *Vimal Suresh Kamble* v. *Chaluverapinake Apal S.P.* MANU/SC/0015/2003 : (2003) 3 SCC 175 and *Vishnu* v. *State of Maharashtra* MANU/SC/2156/2005 : (2006) 1 SCC 283.)

383. Courts should not attach undue importance to discrepancies, where the contradictions sought to be brought up from the evidence of the prosecutrix are immaterial and of no consequence. Minor variations in the testimony of the witnesses are often the hallmark of truth of the testimony. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Due to efflux of time, there are bound to be minor contradictions/discrepancies in the statement of the prosecutrix but such minor discrepancies and inconsistencies are only natural since when truth is sought to be projected through human, there are bound to be certain inherent contradictions. But as held in ***Om Prakash v. State of U.P.*** MANU/SC/8150/2006 : (2006) 9 SCC 787, the Court should examine the broader probabilities of a case.

384. There is no quarrel over the proposition that the evidence of the prosecutrix is to be believed by examining the broader probabilities of a case. But where there are serious infirmities and inherent inconsistencies in evidence; the prosecutrix making deliberate improvement on material point with a view to rule out consent on her part, no reliance can be placed upon the testimony of the prosecutrix. In ***Tameezuddin v. State (NCT of Delhi)*** MANU/SC/1621/2009 : (2009) 15 SCC 566, it was held as under:

9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable.

The same view was taken in ***Suresh N. Bhusare v. State of Maharashtra*** MANU/SC/0529/1998 : (1999) 1 SCC 220 and ***Jai Krishna Mandal v. State of Jharkhand*** MANU/SC/1347/2010 : (2010) 14 SCC 534.

385. On the anvil of the above principles, let us test the case of prosecution and version of the prosecutrix as depicted in her dying declaration.

386. **Dying Declaration**: Prosecution relies upon three dying declarations of the victim: (i) Statement of victim recorded by P.W. 49 Dr. Rashmi Ahuja (Ex. P.W. 49/A) when the victim was brought to Safdarjung Hospital and admitted in the Gynae casualty at about 11:15 p.m. on

16.12.2012 - the victim gave a brief account of the incident stating that she went to a movie with her friend Awnindra (P.W. 1) and that after the movie, they together boarded the bus from Munirka bus stop in which she was gang-raped and that she was thrown away from the moving bus thereafter, along with her friend; (ii) Second dying declaration recorded by P.W. 27 Usha Chaturvedi, SDM (Ex. P.W. 27/A) on 21.12.2012 at about 09:00 p.m. - the victim gave the details of the entire incident specifying the role of each accused: gang-rape, unnatural sex committed on her, the injuries inflicted by accused on her vagina and rectum, by use of iron rod and by insertion of hands in her private parts; description of the bus, robbery and lastly throwing both the victim and also her boyfriend out of the moving bus in naked condition near Mahipalpur flyover; (iii) Third dying declaration recorded by P.W. 30 Pawan Kumar, Metropolitan Magistrate (Ex. P.W. 30/D) on 25.12.2012 at 1:00 PM at ICU, Safdarjung Hospital by putting questions in multiple choice and recording answers through such questions by gestures or writings - the victim wrote the names of the accused in the third dying declaration. Evidence of P.W. 28 Dr. Rajesh Rastogi and the certificate (Ex. P.W. 28/A) given by him establishes that the victim was in a fit mental condition to give the statement through gestures. Furthermore, P.W. 75 Asha Devi, mother of the victim in her cross-examination also deposed that she had a talk with her daughter on the night of 25.12.2012, which shows that the victim was conscious, communicative and oriented. Contentions urged, assailing the fit mental condition of the victim have no merit.

387. With regard to the contention that there were improvements in the dying declarations, I am of he view, the victim was gang-raped and iron rod was inserted in her private parts in the incident and the victim must have been pushed to deep emotional crisis. Rape deeply affects the entire psychology of the woman and humiliates her, apart from leaving her in a trauma. The testimony of the rape victim must be appreciated in the background of the entire case and the trauma which the victim had undergone. As a matter of record, P.W. 49 Dr. Rashmi Ahuja, at around 11:15 p.m. on the night of 16.12.2012, had attended to the prosecutrix as soon as she was brought to the hospital and had prepared casualty/OPD Card of the prosecutrix (Ex. P.W. 49/A), as well as her MLC (Ex. P.W. 49/B). At that time, P.W. 49 had found her cold and clammy due to vaso-constriction. The prosecutrix was found shivering, for which she was administered IV line and warm saline in order to stabilize her pulse and BP. When the victim was in such a condition, the victim cannot be expected to give minute details of the occurrence like overt act played by the accused, insertion of iron rod etc. There is no justification for blowing up such omission out of proportion in the statement recorded by P.W. 49 Dr. Rashmi Ahuja and doubt the same. In the occurrence, physical and emotional balance of the victim must have been greatly disturbed. Startled by the incident, whatever the victim was able to momentarily recollect, she narrated to P.W. 49 and placed in that position non-mention of minute details in Ex. P.W. 49/A cannot be termed as a material omission.

388. Dying declaration is a substantial piece of evidence provided it is not tainted with malice and is not made in an unfit mental state. Each case of dying declaration has to be considered in its own facts and circumstances in which it is made. However, there are some well-known tests to ascertain as to whether the statement was made in reference to cause of death of its maker and whether the same could be relied upon or not. The Court also has to satisfy as to whether the deceased was in a fit mental state to make the statement. The Court must scrutinize the dying declaration carefully and ensure that the declaration is not the result of tutoring, prompting or imagination. Once the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any

further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. That the deceased had the opportunity to observe and identify the assailants and was in a fit state to make the declaration. [***K. Ramachandra Reddy and Anr. v. Public Prosecutor*** MANU/SC/0127/1976 : (1976) 3 SCC 618]

389. The principles governing dying declarations have been exhaustively laid down in several judicial pronouncements. In ***Paniben (Smt.) v. State of Gujarat*** MANU/SC/0346/1992 : (1992) 2 SCC 474, this Court referred to a number of judgments laying down the principles governing dying declaration. In this regard, I find it apposite to quote the following from ***Paniben (supra)*** as under:

18. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(*i*) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*Munnu Raja* v. *State of M.P.* MANU/SC/0174/1975 : (1976) 3 SCC 104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (*State of U.P.* v. *Ram Sagar Yadav* MANU/SC/0118/1985 : (1985) 1 SCC 522; *Ramawati Devi* v. *State of Bihar* MANU/SC/0135/1983 : (1983) 1 SCC 211).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (*K. Ramachandra Reddy* v. *Public Prosecutor* MANU/SC/0127/1976 : (1976) 3 SCC 618).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (*Rasheed Beg* v. *State of M.P.* MANU/SC/0160/1973 : (1974) 4 SCC 264)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (*Kake Singh* v. *State of M.P.* (1981) Supp. SCC 25)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (*Ram Manorath* v. *State of U.P.* MANU/SC/0207/1981 : (1981) 2 SCC 654)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (*State of Maharashtra* v. *Krishnamurti Laxmipati Naidu* (1980) Supp. SCC 455)

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. *Surajdeo Oza* v. *State of Bihar* MANU/SC/0269/1979 : (1980) Supp. SCC 769)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (*Nanahau Ram* v. *State of M.P.* MANU/SC/0334/1988 : (1988) Supp. SCC 152)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (*State of U.P.* v. *Madan Mohan* MANU/SC/0565/1989 : (1989) 3 SCC 390)

The above well-settled tests relating to dying declarations and the principles have been elaborately considered in a number of judgments. [Vide ***Khushal Rao*** v. ***State of Bombay*** MANU/SC/0107/1957 : AIR 1958 SC 22; ***State of Uttar Pradesh*** v. ***Ram Sagar Yadav*** MANU/SC/0118/1985 : (1985) 1 SCC 552; ***State of Orissa v. Bansidhar Singh*** MANU/SC/0248/1996 : (1996) 2 SCC 194; ***Panneerselvam v. State of Tamil Nadu*** MANU/SC/7726/2008 : (2008) 17 SCC 190; ***Atbir v. Govt. of NCT of Delhi*** MANU/SC/0576/2010 : (2010) 9 SCC 1 and ***Umakant and Anr. v. State of Chhattisgarh*** MANU/SC/0574/2014 : (2014) 7 SCC 405].

390. **Multiple Dying Declarations:** In cases where there are more than one dying declarations, the Court should consider whether they are consistent with each other. If there are inconsistencies, the nature of the inconsistencies must be examined as to whether they are material or not. In cases where there are more than one dying declaration, it is the duty of the Court to consider each one of them and satisfy itself as to the voluntariness and reliability of the declarations. Mere fact of recording multiple dying declarations does not take away the importance of each individual declaration. Court has to examine the contents of dying declaration in the light of various surrounding facts and circumstances. This Court in a number of cases, where there were multiple dying declarations, consistent in material particulars not being contradictory to each other, has affirmed the conviction. [Vide ***Vithal v. State of Maharashtra*** MANU/SC/8618/2006 : (2006) 13 SCC 54].

391. In ***Amol Singh v. State of Madhya Pradesh*** MANU/SC/7724/2008 : (2008) 5 SCC 468, while discarding the two inconsistent dying declarations, laid down the principles for consideration of multiple dying declarations as under:

13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying

declarations, that is to say, if there are more than one dying declaration they should be consistent. (See *Kundula Bala Subrahmanyam* v. *State of A.P.* MANU/SC/0508/1993 : (1993) 2 SCC 684) However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

392. In ***Ganpat Mahadeo Mane v. State of Maharashtra*** MANU/SC/0167/1993 : (1993) Supp. (2) SCC 242, there were three dying declarations. One recorded by the doctor; the second recorded by the police constable and also attested by the doctor and the third dying declaration recorded by the Executive Magistrate which was endorsed by the doctor. Considering the third dying declaration, this Court held that all the three dying declarations were consistent and corroborated by medical evidence and other circumstantial evidence and that they did not suffer from any infirmity.

393. In ***Lakhan v. State of M.P.*** MANU/SC/0577/2010 : (2010) 8 SCC 514, this Court considered a similar situation where in the first dying declaration given to a police officer was more elaborate and the subsequent dying declaration recorded by the Judicial Magistrate lacked certain information given earlier. After examining the contents of the two dying declarations, this Court held that there was no inconsistency between two dying declarations and non-mention of certain features in the dying declarations recorded by the Judicial Magistrate does not make both the dying declarations inconsistent.

394. In the light of the above principles, I now advert to analyze the facts of the present case. The victim made three dying declarations: (i) statement recorded by P.W. 49 Dr. Rashmi Ahuja immediately after the victim was admitted to the hospital; (ii) Dying declaration (Ex. P.W. 27/A) recorded by P.W. 27 SDM Usha Chaturvedi on 21.12.2012; and (iii) dying declaration (Ex. P.W. 30/D) recorded by P.W. 30 Pawan Kumar, Metropolitan Magistrate on 25.12.2012 at 1:00 P.M. by multiple choice questions and recording answers by gestures and writing. In the first dying declaration (Ex. P.W. 49/A), the prosecutrix has stated that more than two men committed rape on her, bit her on lips, cheeks and breast and also subjected her to unnatural sex. In the second dying declaration (Ex. P.W. 27/A) recorded by P.W. 27, the victim has narrated the entire incident in great detail, specifying the role of each accused, rape committed by number of persons, insertion of iron rod in her private parts, description of the bus, robbery committed and throwing of both the victims out of the moving bus in naked condition. In the second dying declaration, she has also stated that the accused were addressing each other with the names like, "***Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay***". In the second dying declaration, though there are improvements in giving details of the incident, names of the accused etc., there are no material contradictions between the first and second dying declaration (Ex. P.W. 49/A and Ex. P.W. 27/A).

395. On 25.12.2012 at 1:00 P.M., P.W. 30 Pawan Kumar, Metropolitan Magistrate recorded the statement by putting multiple choice questions to the victim and by getting answers through gestures and writing. The third dying declaration (Ex. P.W. 30/D) is found consistent with the earlier two declarations. It conclusively establishes that the victim was brutally gang-raped, beaten by iron rod, subjected to other harsh atrocities and was finally dumped at an unknown place. While

making the third declaration, the victim also tried to reveal the names of the accused by writing in her own handwriting viz. Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju.

396. As per the settled law governing dying declarations, even if there are minor discrepancies in the dying declarations, in the facts and circumstances of the case, the Court can disregard the same as insignificant. A three-Judge Bench of this Court in ***Abrar v. State of Uttar Pradesh*** MANU/SC/1062/2010 : (2011) 2 SCC 750, held that it is practical that minor discrepancies in recording dying declarations may occur due to pain and suffering of the victim, in case the declaration is recorded at multiple intervals and thus, such discrepancies need not be given much emphasis.

12. It is true that there are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. To our mind, however, these are so insignificant that they call for no discussion. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter se the three dying declarations, they were to be accepted as something normal. The trial court was thus clearly wrong in rendering a judgment of acquittal solely on this specious ground. We, particularly, notice that the dying declaration had been recorded by the Tahsildar after the doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar. We are, therefore, of the opinion, that no fault whatsoever could be found in the dying declarations.

397. When a dying declaration is recorded voluntarily, pursuant to a fitness report of a certified doctor, nothing much remains to be questioned unless, it is proved that the dying declaration was tainted with animosity and a result of tutoring. Especially, when there are multiple dying declarations minor variations does not affect the evidentiary value of other dying declarations whether recorded prior or subsequent thereto. In ***Ashabai and Anr. v. State of Maharashtra*** MANU/SC/0011/2013 : (2013) 2 SCC 224, it was held as under:

15. ....As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assess independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other.

398. Considering the present case on the anvil of the above principles, I find that though there was time gap between the declarations, all the three dying declarations are consistent with each other and there are no material contradictions. All the three dying declarations depict truthful version of the incident, particularly the detailed narration of the incident concerning the rape committed on the victim, insertion of iron rod and the injuries caused to her vagina and rectum, unnatural sex committed on the victim and throwing the victim and P.W. 1 out of the moving bus. All the three dying declarations being voluntary, consistent and trustworthy, satisfy the test of reliability.

399. **Dying Declaration by gestures and nods:** Adverting to the contention that the third dying declaration made through gestures lacks credibility, it is seen that the multiple choice questions put to the prosecutrix by P.W. 30 Pawan Kumar, Metropolitan Magistrate, were simple and easily answerable through nods and gestures. That apart, before recording the dying declaration, P.W. 30 Pawan Kumar, Metropolitan Magistrate had satisfied himself about fit mental state of the victim to record dying declaration through nods and gestures. There is nothing proved on record to show that the mental capacity of the victim was impaired, so as to doubt the third dying declaration. As the victim was conscious, oriented and meaningfully communicative, it is natural that the victim was in a position to write the names of the accused persons and also about the use of long iron rod. The third dying declaration recorded through nods and gestures and also by the victim's own writing, writing the names of the accused inspires confidence in the Court; the same was rightly relied upon by the trial Court as well as the High Court.

400. Dying declaration made through signs, gesture or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the Court ought to take is to ensure that the person recording the dying declaration was able to correctly notice and interpret the gestures or nods of the declarant. While recording the third dying declaration, signs/gestures made by the victim, in response to the multiple choice questions put to the prosecutrix are admissible in evidence.

401. A dying declaration need not necessarily be by words or in writing. It can be by gesture or by nod. In ***Meesala Ramakrishan v. State of A.P.*** MANU/SC/0709/1994 : (1994) 4 SCC 182, this Court held as under:

20. .....that dying declaration recorded on the basis of nods and gestures is not only admissible but possesses evidentiary value, the extent of which shall depend upon who recorded the statement, what is his educational attainment, what gestures and nods were made, what were the questions asked -- whether they were simple or complicated -- and how effective or understandable the nods and gestures were.

The same view was reiterated in ***B. Shashikala v. State of A.P.*** MANU/SC/0052/2004 : (2004) 13 SCC 249.

402. In the case of rape and sexual assault, the evidence of prosecutrix is very crucial and if it inspires confidence of the court, there is no requirement of law to insist upon corroboration of the same for convicting the accused on the basis of it. Courts are expected to act with sensitivity and appreciate the evidence of the prosecutrix in the background of the entire facts of the case and not in isolation. In the facts and circumstances of the present case as the statements of the prosecutrix in the form of three dying declarations are consistent with each other and there are no material contradiction, they can be completely relied upon without corroboration. In the present case, the prosecutrix has made a truthful statement and the prosecution has established the case against the Respondents beyond reasonable doubt. The victim also wrote the names of the accused persons in her own hand-writing in the dying declaration recorded by P.W. 30 (Ex. P.W. 30/D). Considering the facts and circumstances of the present case and upon appreciation of the evidence and material on record, I find all the three dying declarations consistent, true and voluntary, satisfying the test of probabilities factor. That apart, the dying declarations are well-corroborated by medical and

scientific evidence adduced by the prosecution. Moreover, the same has been amply corroborated by the testimony of eye witness-P.W. 1.

403. **Corroboration of Dying declaration by Medical Evidence:** The dying declaration is amply corroborated by medical evidence depicting injuries to vagina and internal injuries to rectum and recto-vaginal septum as noted by P.W. 49 Dr. Rashmi Ahuja and P.W. 50 Dr, Raj Kumar Chejara. On the night of 16.12.2012, the prosecutrix was medically examined by P.W. 49 who recorded her injuries and statement in the MLC (Ex. P.W. 49/B). On local examination, a sharp cut over right labia and a 6 cm long tag of vagina was found hanging outside the introitus. Vaginal examination showed bleeding and about 7 to 8 cm long posterior vaginal wall tear. A rectal tear of about 4 to 5 cm was also noticed communicating with the vaginal tear. Apart from the said injuries to the private parts of the prosecutrix, guarding and rigidity was also found in her abdomen and several bruises and marks on face were noticed. Bruises and abrasions around both the eyes and nostrils were also found. Lips were found edematous and left side of the mouth was injured by a small laceration. Bite marks over cheeks and breast, below areola, were also present. Bruises over the left breast and bite mark in interior left quadrant were prominent.

404. During surgery, conducted on 16/17.12.2012 P.W. 50 Dr. Raj Kumar Chejara (Ex. P.W. 50/A and Ex. P.W. 50/B) noted contusion and bruising of jejunum, large bowel, vaginal tear, and completely torn recto-vaginal septum. Small and large bowels were affected and were extremely bad for any definitive repair. It was also noted that rectum was longitudinally torn and the tear was continuing upward involving sigmoid colon, descending colon which was splayed open. There were multiple perforations at many places of ascending colon and calcum. Terminal ileum approximately one and a half feet loosely hanging in the abdominal cavity avulsed from its mesentery. Rest of the small bowel was non-existent with only patches of mucosa at places and borders of the mesentery were contused. While performing second surgery on 19th December, 2012, surgery team also recorded findings that rectum was longitudinally torn on anterior aspect in continuation with peritorial tear and other internal injuries. On 26-12-2012 the condition of the prosecutrix was examined and it was decided to shift her abroad for further treatment and she was shifted by an air-ambulance to Singapore Mount Elizabeth Hospital. The prosecutrix died at Mount Elizabeth Hospital, Singapore on 29-12-2012 at 04:45 AM. Cause of death is stated as sepsis with multi organ failure following multiple injuries. (Ex. P.W. 34/A)

405. Injuries to vagina, rectum and recto-vaginal septum as noted by P.W. 49 Dr. Rashmi Ahuja and P.W. 50 Dr. Raj Kumar Chejara; and the injuries as depicted in the post-mortem certificate, including the other external injuries which are evidently marks of violence during the incident, exhibit the cruel nature of gang rape committed on the victim. The profused bleeding from vagina and tag of vagina hanging outside; completely recto-vaginal septum clearly demonstrate the violent act of gang rape committed on the victim. The medical reports including the operation theatre notes (Ex. P.W. 50/A and 50/B) and the injuries thereon indicates the pain and suffering which the victim had undergone due to multiple organ failure and other injuries caused by insertion of iron rod.

406. If considered on the anvil of settled legal principles, injuries on the person of a rape victim is not even a sine qua non for proving the charge of rape, as held in ***Joseph v. State of Kerala*** MANU/SC/0313/2000 : (2000) 5 SCC 197. The same principle was reiterated in ***State of***

Maharashtra v. Suresh MANU/SC/0765/1999 : (2000) 1 SCC 471. As rightly held in ***State of Rajasthan v. N.K., The Accused*** MANU/SC/0218/2000 : (2000) 5 SCC 30, absence of injury on the person of the victim is not necessarily an evidence of falsity of the allegations of rape or evidence of consent on the part of the prosecutrix. In the present case, the extensive injuries found on the vagina/private parts of the body of the victim and injuries caused to the internal organs and all over the body, clearly show that the victim was ravished.

407. Corroboration of dying declaration by scientific evidence: The DNA profile generated from blood-stained pants, t-shirts and jackets recovered at the behest of A-2 Mukesh matched with the DNA profile of the victim. Likewise, the DNA profile generated from the blood-stained jeans and banian recovered at the behest of A-3 Akshay matched with the DNA profile of the victim. DNA profile generated from the blood-stained underwear, chappal and jacket recovered at the behest of A-4 Vinay matched with the DNA profile of the victim. DNA profiles generated from the clothes of the accused recovered at their behest consistent with that of the victim is an unimpeachable evidence incriminating the accused in the occurrence. As submitted by the prosecution, there is no plausible explanation from the accused as to the matching of DNA profile of the victim with that of the DNA profile generated from the clothes of the accused. The courts below rightly took note of the DNA analysis report in finding the accused guilty.

408. **Bite marks on the chest of the victim and Odontology Report:** It is also to be noted that the photographs of bite marks found on the body of the victim, lifted by P.W. 66 Shri Asghar Hussain were examined by P.W. 71 Dr. Ashith B. Acharya. The analysis shows that at least three bite marks were caused by accused Ram Singh whereas one bite mark has been identified to have been most likely caused by accused Akshay. This aspect of Odontology Report has been elaborately discussed by the High Court in paragraphs (91) to (94) of its judgment. Odontology Report which links accused Ram Singh and accused Akshay, with the case, strengthens the prosecution case as to their involvement.

409. Going by the version of the prosecutrix, as per the dying declaration and the evidence adduced, in particular medical evidence and scientific evidence, I find the evidence of the prosecutrix being amply corroborated. As discussed earlier, in rape cases, Court should examine the broader probabilities of a case and not get swayed by discrepancies. The conviction can be based even on the sole testimony of the prosecutrix. However, in this case, dying declarations recorded from the prosecutrix are corroborated in material particulars by: (i) medical evidence; (ii) evidence of injured witness P.W. 1; (iii) matching of DNA profiles, generated from blood-stained clothes of the accused, iron rod recovered at the behest of deceased accused Ram Singh and various articles recovered from the bus with the DNA profile of the victim; (iv) recovery of belongings of the victim at the behest of the accused, viz. debit card recovered from A-1 Ram Singh and Nokia mobile from A-4 Vinay. The dying declarations well corroborated by medical and scientific evidence strengthen the case of the prosecution by conclusively connecting the accused with the crime.

410. **Use of Iron Rod and death of the victim:** Case of the prosecution is that the accused brutally inserted iron rod in the vagina of the prosecutrix and pulled out internal organs of the prosecutrix. The defence refuted the use of iron rod by the accused on the ground that the complainant as well as the victim did not mention the use of iron rods in their first statements. Contention of the

Appellants is that when the victim had given details of the entire incident to P.W. 49 Dr. Rashmi Ahuja, if iron rod had been used, she would not have omitted to mention the use of iron rods in the incident. We do not find force in such a contention, as ample reliable evidence are proved on record which lead to the irresistible conclusion that iron rod was used and it was not a mere piece of concoction.

411. Use of iron rods and insertion of the same in the private parts of the victim is established by the second dying declaration recorded by SDM P.W. 27 Usha Chaturvedi, where the victim has given a detailed account of the incident, role of the accused, gang rape committed on her and other offences including the use of iron rods. The brutality with which the accused persons inserted iron rod in the rectum and vagina of the victim and took out her internal organs from the vaginal and anal opening is reflected in Ex. P.W. 49/A. Further, medical opinion of P.W. 49 (Ex. P.W. 49/G) stating that the recto-vaginal injury could be caused by the rods recovered from the bus, strengthens the statement of the victim and the prosecution version. When the second and third dying declarations of the prosecutrix are well corroborated by the medical evidence, non-mention of use of iron rods in prosecutrix's statement to P.W. 49 Dr. Rashmi Ahuja (Ex. P.W. 49/A), does not materially affect the credibility of the dying declaration. Insertion of iron rod in the private parts of the prosecutrix is amply established by the nature of multiple injuries caused to jejunum and rectum which was longitudinally torn, tag of vagina hanging out; and completely torn recto-vaginal septum.

412. At the behest of accused Ram Singh two iron rods (**Ex. P-49/1 and Ex. P-49/2**) were recovered from the shelf of the driver's cabin vide seizure Memo Ex. P.W. 74/G. The blood-stained rods deposited in the Malkhana were thereafter sent for chemical analysis. The DNA report prepared by P.W. 45 Dr. B.K. Mohapatra, indicates that the DNA profile developed from the blood-stained iron rods is consistent with the DNA profile of the victim. Presence of blood on the iron rods and the DNA profile of which is consistent with the DNA profile of the victim establishes the prosecution case as to the alleged use of iron rods in the incident.

413. **Evidence of P.W. 1:** In his first statement made on 16.12.2012, eye witness P.W. 1 stated that he accompanied the prosecutrix to Select City Mall, Saket, New Delhi in an auto from Dwarka, New Delhi where they watched a movie till about 08:30 p.m. After leaving the Mall, P.W. 1 and the victim took an auto to Munirka from where they boarded the fateful bus. After the prosecutrix and P.W. 1 boarded the bus, the accused surrounded P.W. 1 and pinned him down in front side of the bus. While the accused Vinay and Pawan held P.W. 1, the other three accused committed rape on the victim on the rear side of the bus. Thereafter, other accused held P.W. 1, while Vinay and Pawan committed rape on the victim. Later accused Mukesh who was earlier driving the bus, committed rape on the victim. After the incident, P.W. 1 and the prosecutrix were thrown out of the moving bus, near Mahipalpur flyover. In the incident, P.W. 1 himself sustained injuries which lends assurance to his credibility.

414. That P.W. 1 accompanied the victim to Select City Mall and that he was with the victim till the end, is proved by ample evidence. As per the case of the prosecution, on the fateful day, the complainant and the prosecutrix had gone to Saket Mall to see a movie. CCTV footage produced by P.W. 25 Rajender Singh Bisht in two CDs (Ex. P.W. 25/C-1 and P.W. 25/C-2) and seven photographs (Ex. P.W. 25/B-1 to Ex. P.W. 25/B-7) corroborate the version of P.W. 1 that the

complainant and the victim were present at Saket Mall till 8:57 p.m. The certificate Under Section 65-B of the Indian Evidence Act, 1872 with respect to the said footage is proved by P.W. 26 Shri Sandeep Singh (Ex. P.W. 26/A) who is the CCTV operator at Select City Mall.

415. The computer generated electronic record in evidence, admissible at a trial is proved in the manner specified in Section 65-B of the Evidence Act. Sub-section (1) of Section 65 of the Evidence Act makes electronic records admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in Sub-section (2) of Section 65-B of the Evidence Act. When those conditions are satisfied, the electronic record becomes admissible in any proceeding without further proof or production of the original, as evidence of any of the contents of the original or any fact stated therein of which direct evidence is admissible. Secondary evidence of contents of document can also be led Under Section 65 of the Evidence Act.

416. Having carefully gone through the deposition of P.W. 1, I find that his evidence, even after lengthy cross examination, remains unshaken. The evidence of a witness is not to be disbelieved simply because of minor discrepancies. It is to be examined whether he was present or not at the crime scene and whether he is telling the truth or not. P.W. 1 has clearly explained as to how he happened to be with the victim and considering the cogent evidence adduced by the prosecution, presence of P.W. 1 cannot be doubted in any manner. P.W. 1 himself was injured in the incident and he was admitted in the Casualty Ward, where P.W. 51 Dr. Sachin Bajaj examined him. As per Ex. P.W. 51/A, lacerated wound over the vertex of scalp, lacerated wound over left upper lip and abrasion over right knee were found on the person of P.W. 1. Testimony of P.W. 1 being testimony of an injured witness lends credibility to his evidence and prosecution's case. As rightly pointed out by the Courts below, no convincing grounds exist to discard the evidence of P.W. 1, an injured witness.

417. The question of the weight to be attached to the evidence of an injured witness has been extensively discussed by this Court in ***Mano Dutt and Anr. v. State of Uttar Pradesh*** MANU/SC/0159/2012 : (2012) 4 SCC 79. After exhaustively referring to various judgments on this point, this Court held as under:

31. We may merely refer to *Abdul Sayeed* v. *State of M.P.* MANU/SC/0702/2010 : (2010) 10 SCC 259 where this Court held as under: (SCC pp. 271-72, paras 28-30)

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness.' [Vide *Ramlagan Singh* v. *State of Bihar* MANU/SC/0216/1972 : (1973) 3 SCC 881, *Malkhan Singh* v. *State of U.P.* MANU/SC/0164/1974 : (1975) 3 SCC 311, *Machhi Singh* v. *State of Punjab* MANU/SC/0211/1983 : (1983) 3 SCC 470, *Appabhai* v. *State of Gujarat* 1988 Supp SCC 241, *Bonkya* v. *State of Maharashtra* MANU/SC/0066/1996 : (1995) 6 SCC 447, *Bhag Singh* v. *State of Punjab* MANU/SC/1308/1997 : (1997) 7 SCC 712, *Mohar* v. *State of U.P.*

MANU/SC/0808/2002 : (2002) 7 SCC 606 (SCC p. 606b-c), *Dinesh Kumar* v. *State of Rajasthan* MANU/SC/7910/2008 : (2008) 8 SCC 270, *Vishnu* v. *State of Rajasthan* (2009) 10 SCC 477, *Annareddy Sambasiva Reddy* v. *State of A.P.* MANU/SC/0640/2009 : (2009) 12 SCC 546 and *Balraje* v. *State of Maharashtra* MANU/SC/0352/2010 : (2010) 6 SCC 673.]

29. While deciding this issue, a similar view was taken in *Jarnail Singh* v. *State of Punjab* MANU/SC/1584/2009 : (2009) 9 SCC 719 where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

'*28.* Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa* v. *State of Karnataka* MANU/SC/0053/1995 : 1994 Supp (3) SCC 235 this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P.* v. *Kishan Chand* MANU/SC/0652/2004 : (2004) 7 SCC 629 a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan* v. *State of Haryana* (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.'

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

418. After the accused were arrested, they made disclosure statements. Pursuant to the said disclosure statements, recoveries of various articles were effected which included clothes of the accused and articles belonging to P.W. 1 and the prosecutrix. The *Samsung Galaxy Duos* mobile phone recovered from A-2 was identified by the complainant in the court as belonging to him and testimony of the complainant was further fortified by the testimony of P.W. 56 Sandeep Dabral, Manager, Spice Mobile Shop, who stated that the said Samsung Mobile bearing the respective IMEI number was sold in the name of the complainant. Also, the *metro card* and *silver ring* recovered at the behest of A-3 Akshay were identified by P.W. 1 in court as belonging to him. The silver ring was also identified by the complainant in the TIP proceedings conducted on 28.12.2012. Likewise, the *Hush-Puppies* shoes recovered at the behest of A-4 Vinay and wrist watch of Sonata

make recovered at the behest of A-5 Pawan were identified by P.W. 1 in TIP proceedings as belonging to him. Recoveries of articles of P.W. 1 and other scientific evidence, irrebutably establish the presence of P.W. 1 at the crime scene and strengthens the credibility of P.W. 1's testimony.

419. Apart from the recoveries made at the behest of the accused, presence of P.W. 1 is also confirmed by DNA profile generated from the blood-stained mulberry leaves and grass collected from Mahipalpur (seized vide Memo Ex. P.W. 74/C) where both the victims were thrown after the incident. As per the Chemical Analysis Report, DNA profile generated from the blood-stained murberry leaves collected from the Mahipalpur flyover were found to be of male origin and consistent with the DNA profile of P.W. 1. This proves that P.W. 1 was present with the victim at the time of the incident and both of them were together thrown out of the bus at Mahipalpur.

420. Further, as discussed infra, pursuant to the disclosure statement of the accused, clothes of accused, some of which were blood-stained and other incriminating articles were recovered. P.W. 45 Dr. B.K. Mohapatra matched the DNA profiles of the blood detected on the clothes of the accused with that of the complainant and the victim. One set of DNA profile generated from jeans-pant of the accused Akshay (A-3) matched the DNA profile of P.W. 1. Likewise, one set of DNA profile generated from the sports jacket of accused Vinay (A-4) was found consistent with the DNA profile of P.W. 1. Also, one set of DNA profile generated from black coloured sweater of Accused Pawan Gupta (A-5) was found consistent with the DNA profile of P.W. 1. Result of DNA analysis further corroborates the version of P.W. 1 and strengthens the prosecution case. DNA Analysis Report, as provided by P.W. 45 is a vital piece of evidence connecting the accused with the crime.

421. Matching of DNA profile generated from the bunch of hair recovered from the floor of the bus near the second row seat on the left side, with DNA profile of the complainant is yet another piece of evidence corroborating the version of P.W. 1 [vide Ex. P.W. 45/B]. Further, DNA profile developed from burnt cloth pieces, recovered from near the rear side entry of the bus was found consistent with DNA profile of P.W. 1; and this again fortifies the presence of P.W. 1 with the victim in the bus.

422. Contention of the Appellants is that there are vital contradictions in the statements of P.W. 1. It is contended that initially P.W. 1 did not give the names of the accused in the FIR and that he kept on improving his version, in particular, in the second supplementary statement recorded on 17.12.2012 in which he gave the details of the bus involved. To contend that testimony of P.W. 1 is not trustworthy, reliance is placed on ***Kathi Bharat Vajsur and Anr. v. State of Gujarat*** MANU/SC/0413/2012 : (2012) 5 SCC 724. In ***Kathi Bharat Vajsur's case***, this Court has observed that when there are inconsistencies or contradictions in oral evidence and the same is found to be in contradiction with other evidence then it cannot be held that the prosecution has proved the case beyond reasonable doubt.

423. While appreciating the evidence of a witness, the approach must be to consider the entire evidence and analyze whether the evidence as a whole gives a complete chain of facts depicting truth. Once that impression is formed, it is necessary for the court to scrutinize evidence particularly keeping in view the prosecution case. Any minor discrepancies or improvements not

touching the core of the prosecution case and not going to the root of the matter, does not affect the trustworthiness of the witness. Insofar as the contention that P.W. 1 kept on improving his version in his statement recorded at various point of time, it is noted that there are indeed some improvements in his version but, the core of his version as to the occurrence remains consistent. More so, when P.W. 1 and the victim faced such a traumatic experience, immediately after the incident, they cannot be expected to give minute details of the incident. It would have taken some time for them to come out of the shock and recollect the incident and give a detailed version of the incident. It is to be noted that in the present case, the statements of P.W. 1 recorded on various dates are not contradictory to each other. The subsequent statements though are more detailed as compared to the former ones, in the circumstances of the case, it cannot be said to be unnatural affecting the trustworthiness of P.W. 1's testimony. There is hardly any justification for doubting the evidence of P.W. 1, especially when it is corroborated by recovery of P.W. 1's articles from the accused and scientific evidence.

424. The trial Court as well as the High Court found P.W. 1's evidence credible and trustworthy and I find no reason to take a different view. The view of the High Court and the trial court is fortified by the decisions of this Court in ***Pudhu Raja and Anr. v. State Rep. by Inspector of Police*** MANU/SC/0761/2012 : (2012) 11 SCC 196, ***Jaswant Singh v. State of Haryana*** MANU/SC/0236/2000 : (2000) 4 SCC 484 and ***Akhtar and Ors. v. State of Uttaranchal*** MANU/SC/0556/2009 : (2009) 13 SCC 722. Further, the evidence of P.W. 1 is amply strengthened by scientific evidence and recovery of the incriminating articles from the accused. The alleged omissions and improvements in the evidence of P.W. 1 pointed out by the defence do not materially affect the evidence of P.W. 1.

425. **Recovery of the bus and its Involvement in the incident:** Description of the entire incident by P.W. 1 and the victim led the investigating team to the Hotel named "Hotel Delhi Airport", where P.W. 1 and the victim were dumped after the incident. P.W. 67 P.K. Jha, owner of Hotel Delhi Airport handed over the pen drive containing CCTV footage (Ex. P-67/1) and CD (Ex. P-67/2) to the Investigating Officer which were seized. From the CCTV footage, the offending bus bearing registration No. DL-1PC-0149 was identified by P.W. 1. The bus was seized from Ravi Dass Camp and Ram Singh (A-1) was also arrested.

426. P.W. 81 Dinesh Yadav is the owner of the bus bearing Registration No. DL-1PC-0149 (Ex. P-1). P.W. 81 runs buses under the name and style "Yadav Travels". On interrogation, P.W. 81 Dinesh Yadav stated that A-1 Ram Singh was the driver of the bus No. DL-1PC-0149 in December, 2012 and A-3 Akshay Kumar Singh was his helper in the bus. P.W. 81 also informed the police that the bus was attached to Birla Vidya Niketan School, Pushp Vihar, New Delhi to ferry students to the school in the morning and that it was also engaged by a Company named M/s. Net Ambit in Noida, to take its employees from Delhi to Noida. P.W. 81 also informed the police that after daily routine trip, A-1 Ram Singh used to park the bus at Ravi Dass Camp, R.K. Puram, near his residence. P.W. 81 further informed that on 17.12.2012, the bus as usual went from Delhi to Noida to take the Staff of M/s. Net Ambit to their office. The recovery of the bus (Ex. P-1) and evidence of P.W. 81 led to a breakthrough in the investigation that A-1 Ram Singh was the driver of the bus and A-3 Akshay was the cleaner of the bus.

427. Furthermore, in order to prove that A1 Ram Singh (Dead) was the driver of the bus No. DL-1PC-0149 (Ex. P-1), P.W. 16 Rajeev Jakhmola, Manager (Administration) of Birla Vidya Niketan School, Pushp Vihar, New Delhi was examined. In his evidence, P.W. 16 stated that P.W. 81, Dinesh Yadav had provided the school with seven buses on contract basis including the bus No. DL-1PC-0149 (Ex. P-1) and that A-1 Ram Singh was its driver. In his interrogation by the police, P.W. 16 had also handed over Ram Singh's driving licence alongwith copy of agreement of the school with the owner of the bus and other documents. By adducing the evidence of P.W. 81 Dinesh Yadav and P.W. 16 Rajeev Jakhmola, the prosecution has established that the bus in question was routinely driven by A-1 Ram Singh (Dead) and A-3 Akshay Kumar was the helper in the bus.

428. On 17.12.2012, a team of experts from CFSL comprising P.W. 45 Dr. B.K. Mohapatra, P.W. 46 A.D. Shah, P.W. 79 P.K. Gottam and others, went to the Thyagraj Stadium and inspected the **bus Ex. P1.** On inspection, certain articles were seized from the said bus *vide* seizure memo Ex. P.W. 74/P. It is brought on record that the samples were diligently collected and taken to CFSL, CBI by SI Subhash (P.W. 74) *vide* RC No. 178/21/12 for examination. The DNA profile of material objects lifted from the bus bearing No. DL-1PC-0149 were found consistent with that of the victim and the complainant. Matching of the DNA profile developed from the articles seized from the bus DL-1PC-0149 like hair recovered from the third row of the bus on the left side with the DNA profile of P.W. 1, strengthens the prosecution case as to the involvement of the offending bus bearing registration No. DL-1PC-0149. DNA profile developed from the blood-stained curtains of the bus and blood-stained seat covers of bus and the bunch of hair recovered from the floor of the bus below sixth row matched with the DNA profile of the victim. The evidence of DNA analysis is an unimpeachable evidence as to the involvement of the offending bus in the commission of offence and also strong unimpeachable evidence connecting the accused with the crime.

429. The accused neither rebutted this evidence nor offered any convincing explanation except making feeble attempt by stating that everything was concocted. P.W. 46, A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI examined the chance prints lifted from the bus. Chance print marked as 'Q.1' lifted from the bus (Ex. P-1) was found identical with the left palm print of accused Vinay Sharma. Further chance print marked as 'Q.4' was found identical with right thumb impression of accused Vinay Sharma. A finger print expert report (Ex. P.W. 46/D) states that the chance print lifted from the bus being identical with the finger print of accused Vinay Sharma, establishes the presence of accused Vinay Sharma in the bus, thereby strengthening prosecution case.

430. **Arrest and Recovery Under Section 27 of the Indian Evidence Act:** Prosecution very much relies upon disclosure statements of the accused, pursuant to which articles of the victim and also of P.W. 1 were recovered. Accused being in possession of the articles of the victim and that of P.W. 1, is a militating circumstance against the accused and it is for the accused to explain as to how they came in possession of these articles. Details of arrest of accused and articles recovered from the accused are as under:

ACCUSED RAM SINGH (A-1) (Dead)			
ARREST (WHEN+ WHERE+ BY WHOM)	ARTICLES RECOVERED FROM ACCUSED		
	Details of articles recovered from the person of the accused	Details of articles recovered pursuant to disclosure statement	Items identified as that of PW-1 Awninder Pratap Singh/Prosecutrix
(1)	(2)	(3)	(4)
On 17.12.2012, PW-80 Pratibha Sharma alongwith PW-74 Subhash Chand SI and PW-65 Ct. Kirpal Singh arrested A-1 at 4:15 PM (Arrest Memo: Ex.PW-74/D) from Ravi Das Camp, R.K. Puram, Delhi.	(1) One Unix Mobile Phone with MTNL Sim [Ex.PW-74/5]; (2) Photocopy of Election Card and Pan Card; (3) Rs. 207/- in cash [personal search Memo Ex.PW-74/E]	(1) Bus (Ex.P-1) DL-1PC-0149 (2) Keys of Bus, (Ex P-74/2) (3)Driving License, Fitness Certificate, Permit Pollution Certificate and other documents of bus bearing registration no. DL-1PC-0149 (Ex.P-74/4) (4) Two blood-stained rods (Ex.P49/1 and Ex.49/2) (5) Indian Bank Debit Card(Ex.P74/3) (6) Blood-stained green and black coloured T-Shirt (Ex.74/6) and blood-stained brown coloured chappal (Ex.74/7). (7) Some ashes and partly burnt clothes (seizure memo Ex. PW-74/M.)	•Debit Card, marked as Ex. PW-74/3 belongs to the prosecutrix as deposed by PW-75- Asha Devi, mother of prosecutrix.

ACCUSED MUKESH (A-2)			
ARREST (WHEN+ WHERE+BY WHOM)	ARTICLES RECOVERED FROM ACCUSED		
	Details of articles recovered from the person of the accused	Details of articles recovered pursuant to disclosure statement	Items identified as that of PW-1 Awninder Pratap Singh/Prosecutrix
(1)	(2)	(3)	(4)
A-2 was traced at Karoli District, Rajasthan by PW-58 SI Arvind Kumar alongwith staff ASI Anand Prakash, HC Randhawa, HC Mukesh, HC Sachin and Ct. Umesh, pursuant to A-1's disclosure. He was formally arrested on 18.12.2012 at 6.30 p.m. by PW80 SI. (Arrest Memo Ex.PW-58/B)	(1) Rs. 226/- in cash (2) Key (3) one black and brown colour purse containing PAN Card, Visiting cards and voter card and (4)Nokia Mobile phone bearing IMEI No.351863010659247 (5) Samsung Galaxy Duos Mobile with IMEI No.354098053454886 and No.354099053454884 (Ex. P/6)	Disclosure statement recorded on 18.12.2012 by PW-60 HC Mahabir (Ex.PW-60/I) Following items recovered: 1. one blood-stained green T-shirt 2. one blood-stained grey colour pants. 3. blood-stained bluish grey colour jacket.	• In the TIP proceedings held on 20.12.2012, PW-1 identified the Samsung Galaxy Duos (recovered from accused Mukesh) as belonging to him.

ACCUSED AKSHAY (A-3)			
ARREST (WHEN+ WHERE+BY WHOM)	ARTICLES RECOVERED FROM ACCUSED		
	Details of articles recovered from the person of the accused	Details of articles recovered pursuant to disclosure statement	Items identified as that of PW-1 Awninder Pratap Singh/Prosecutrix
(1)	(2)	(3)	(4)
On 21.12.2012 at 9:15 p.m., pursuant to the disclosure of A-1, PW-53 SI Upender alongwith team comprising Insp. Ritu Raj, PW-61 SI Jeet Singh and ASI Ashok Kumar arrested him from his house at Karmalahang (Arrest Memo: Ex.PW53/A)	No personal articles recovered from the accused at his residence, Karmalahang	(1) One black bag containing blood-stained blue jeans (2) Blue black Nokia mobile phone with IMEI No.359286040159081 (3) Blood-stained red coloured banian. (4) One silver ring (5) Two metro cards	•In the TIP proceedings held on 26.12.2012, PW-1 identified the Silver ring (recovered from accused Akshay) as belonging to PW-1 Complainant.

ACCUSED VINAY (A-4)			
ARREST (WHEN+ WHERE+ BY WHOM)	ARTICLES RECOVERED FROM ACCUSED		
	Details of articles recovered from the person of the accused	Details of articles recovered pursuant to disclosure statement	Items identified as that of PW-1 Awninder Pratap Singh/Prosecutrix
(1)	(2)	(3)	(4)
On 18.12.2012 at 1.30 p.m., on disclosure of A-1, PW-80 SI Pratibha Sharma alongwith PW-60 HC Mahabir and Manphool arrested him	(1) One black coloured Nokia mobile phone bearing IMEI no.354138058308214 18 (Ex.PW-60/D)	1. Blood-stained blue coloured jeans (Ex.P-68/1) 2. Blood-stained black coloured jacket (Ex.P-68/2)	• PW-1 identified hush puppy shoes (recovered from accused Vinay) as belonging to him. • Nokia mobile phone

from Ravi Das Camp, R.K. Puram, Delhi in the presence of A-1. (Arrest Memo: Ex.PW-60/B). Supplementary disclosure recorded on 19.12.2012 by PW-68 SI Mandeep (Ex.PW-68/A)		3. Blood-stained full sleeved black coloured T-shirt (Ex.P-68/3) 4. Blue coloured chappals (Ex.P-68/4) 5. Hush puppy shoes (Ex.P2 under Ex.PW-68/C) 6. Black coloured Nokia mobile phone with IMEI No.353183039047391 (Ex.P-68/5) – seizure Memo Ex.PW-68/D	bearing IMEI No.353183039047391 was identified as the mobile phone of the prosecutrix.

ACCUSED PAWAN GUPTA @ KALU (A-5)			
ARREST (WHEN+ WHERE+ BY WHOM)	ARTICLES RECOVERED FROM ACCUSED		
	Details of articles recovered from the person of the accused	Details of articles recovered pursuant to disclosure statement	Items identified as that of PW-1 Awnindra Pratap Singh/ Prosecutrix
(1)	(2)	(3)	(4)
On 18.12.2012, on disclosure of A-1, PW-80 S.I. Pratibha Sharma alongwith PW-60 HC Mahabir and Manphool went to Ravi Das Camp at 1:15 p.m. to arrest him. (Arrest Memo:Ex.PW-60/A)	(1) One black purse containing some visiting cards (2) Rs.8,200 in cash (3)One silver coloured ring with green nug (Personal Search Memo: Ex.PW-60/C).	(1)one blood-stained black coloured sweater (Ex. P-68/6) (2)blood-stained coca cola (colour) pants. (Ex.68/7) (3)Blood-stained brown coloured underwear (Ex.P-68/8) (4)Brown coloured sports. shoes (Ex.P-68/9) (5)One wristwatch of Sonata make (Ex.P-3) (6)Two currency notes of Rs.500/- each (Ex.P-7)	• In the TIP proceedings conducted on 25.12.2012, Sonata wrist watch identified by PW-1 (recovered from accused Pawan) as belonging to him.

431. As noted in the above tabular form, various articles of the complainant and the victim were recovered from the accused viz., Samsung Galaxy Phone (recovered at the behest of A-2 Mukesh); silver ring (recovered at the behest of A-3 Akshay); Hush Puppies shoes (recovered at the behest of A-4 Vinay) and Sonata Wrist Watch (recovered at the behest of A-5 Pawan). Recovery of belongings of P.W. 1 and that of the victim, at the instance of the accused is a relevant fact duly proved by the prosecution. Notably the articles recovered from the accused thereto have been duly identified by the complainant in test identification proceedings. Recovery of articles of complainant (P.W. 1) and that of the victim at the behest of accused is a strong incriminating circumstance implicating the accused. As rightly pointed out by the Courts below, the accused have not offered any cogent or plausible explanation as to how they came in possession of those articles.

432. Similarly, the Indian bank debit card (Ex. P.W. 74/3) recovered at the behest of A-1 Ram Singh and black coloured Nokia mobile phone (Ex. P.W. 68/5) recovered at the behest of A-4 Vinay have been proved to be used by the prosecutrix. P.W. 75 Asha Devi mother of the victim in her testimony stated that the Debit card belonged to her P.W. 75 Asha Devi and that the same was in the possession of her daughter. Nokia mobile phone (Ex. P.W. 68/5) is stated to be the mobile used by the victim. Notably, the articles of the prosecutrix recovered from the accused were proved by the evidence of P.W. 75 Asha Devi (mother of the victim) and the same was not controverted by the defence.

433. Section 25 of the Indian Evidence Act (for short 'the Evidence Act') speaks of a confession made to a police officer, which shall not be proved as against a person accused of an offence. Section 26 of the Evidence Act also speaks that no confession made by the person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Sections 25 and 26 of the Evidence Act put a complete bar on the admissibility of a confessional statement made to a police officer or a confession made in absentia of a Magistrate, while in custody. Section 27 of the Evidence Act is by way of a proviso to Sections 25 and 26 of the Evidence Act and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. Section 27 of the Evidence Act reads as under:

27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Section 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true and is a relevant fact and accordingly it can be safely allowed to be given in evidence.

434. Section 27 has prescribed two limitations for determining how much of the information received from the accused can be proved against him: (i) The information must be such as the accused has caused discovery of the fact, i.e. the fact must be the consequence, and the information the cause of its discovery; (ii) The information must 'relate distinctly' to the fact discovered. Both the conditions must be satisfied. Various requirements of Section 27 of the Evidence Act are succinctly summed up in ***Anter Singh v. State of Rajasthan*** MANU/SC/0096/2004 : (2004) 10 SCC 657:

16. The various requirements of the section can be summed up as follows:

(*1*) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(*2*) The fact must have been discovered.

(*3*) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(*4*) The person giving the information must be accused of any offence.

(*5*) He must be in the custody of a police officer.

(*6*) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(*7*) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

435. Appending a note of caution to prevent the misuse of the provision of Section 27 of the Evidence Act, this Court in ***Geejaganda Somaiah v. State of Karnataka*** MANU/SC/7211/2007 : (2007) 9 SCC 315, observed that the courts need to be vigilant about application of Section 27 of the Evidence Act. Relevant extract from the judgment is as under:

22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act.

436. Even though, the arrest and recovery Under Section 27 of the Evidence Act is often sought to be misused, the courts cannot be expected to completely ignore how crucial are the recoveries made Under Section 27 in an investigation. The legislature while incorporating Section 27, as an exception to Sections 24, 25 and 26 of the Evidence Act, was convinced of the quintessential purpose Section 27 would serve in an investigation process. The recovery made Under Section 27 of the Evidence Act not only acts as the foundation stone for proceeding with an investigation, but also completes the chain of circumstances. Once the recovery is proved by the prosecution, burden of proof on the defence to rebut the same is very strict, which cannot be discharged merely by pointing at procedural irregularities in making the recoveries, especially when the recovery is corroborated by direct as well as circumstantial evidence, especially when the investigating officer assures that failure in examining independent witness while making the recoveries was not a deliberate or mala fide, rather it was on account of exceptional circumstances attending the investigation process.

437. While the prosecution has been able to prove the recoveries made at the behest of the accused, the defence counsel repeatedly argued in favour of discarding the recoveries made, on the ground that no independent witnesses were examined while effecting such recoveries and preparing seizure memos.

438. The above contention of the defence counsel urges one to look into the specifics of Section 27 of the Evidence Act. As a matter of fact, need of examining independent witnesses, while making recoveries pursuant to the disclosure statement of the accused is a rule of caution evolved by the Judiciary, which aims at protecting the right of the accused by ensuring transparency and credibility in the investigation of a criminal case. In the present case, P.W. 80 SI Pratibha Sharma has deposed in her cross-examination that no independent person had agreed to become a witness and in the light of such a statement, there is no reason for the courts to doubt the version of the police and the recoveries made.

439. When recovery is made pursuant to the statement of accused, seizure memo prepared by the Investigating Officer need not mandatorily be attested by independent witnesses. In ***State Govt. of***

NCT of Delhi v. Sunil and Anr. MANU/SC/0735/2000 : (2001) 1 SCC 652, it was held that non-attestation of seizure memo by independent witnesses cannot be a ground to disbelieve recovery of articles' list consequent upon the statement of the accused. It was further held that there was no requirement, either Under Section 27 of the Evidence Act or Under Section 161 Code of Criminal Procedure to obtain signature of independent witnesses. If the version of the police is not shown to be unreliable, there is no reason to doubt the version of the police regarding arrest and contents of the seizure memos.

440. In the landmark case of ***Pulukuri Kottaya v. King-Emperor*** MANU/PR/0049/1946 : AIR 1947 PC 67, the Privy Council has laid down the relevance of information received from the accused for the purpose of Section 27 of the Evidence Act. Relevant extracts from the judgment are as under:

10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

The test laid down in ***Pulukuri Kottaya's case*** was reiterated in several subsequent judgments of this Court including ***State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*** MANU/SC/0465/2005 : (2005) 11 SCC 600.

441. In the light of above discussion, it is held that recoveries made pursuant to disclosure statement of the accused are duly proved by the prosecution and there is no substantial reason to discard the same. Recovery of articles of P.W. 1 and also that of victim at the instance of the accused is a strong incriminating evidence against accused, especially when no plausible explanation is forthcoming from the accused. Further, as discussed infra, the scientific examination of the articles recovered completely place them in line with the chain of events described by the prosecution.

442. **DNA Analysis:** In order to establish a clear link between the accused persons and the incident at hand, the prosecution has also adduced scientific evidence in the form of DNA analysis. For the purpose of DNA profiling, various samples were taken from the person of the prosecutrix; the complainant; the accused, their clothes/articles; the dumping spot; the iron rods; the ashes of burnt clothes; as well as from the offending bus. P.W. 45 Dr. B.K. Mohapatra analysed the said DNA profiles and submitted his report thereof. In his report, he concluded that the samples were authentic and capable of establishing the identities of the persons concerned beyond reasonable doubt. Prosecution relies upon the biological examination of various articles including the samples collected from the accused and the DNA profiles generated from the blood-stained clothes of the accused. The DNA profile generated from the samples collected, when compared with the DNA

profile generated from the blood samples of the victim and P.W. 1 Awninder Pratab Singh, were found consistent.

443. For easy reference and for completion of narration of events, I choose to refer to the articles recovered from the accused pursuant to their disclosure statements and other articles like blood-stained clothes; samples of personal fluids like blood, saliva with control swab; other samples like nail clippings, penil swab, stray hair etc. Details of the DNA analysis is contained in the reports of biological examination and DNA profiling (Ex. P.W. 45/A to Ex. P.W. 45/C), furnished by P.W. 45 Dr. B.K. Mohapatra.

ACCUSED RAM SINGH (A-1) (Dead)				
ARTICLES RECOVERED FROM ACCUSED		Findings of DNA generated from clothes		DNA profile generated from other articles, swab etc.
Recovery pursuant to disclosure statement	Samples collected from the person of the accused	Items matching DNA profile of PW1	Items matching DNA profile of Victim.	Findings (Ex.Pw45/B)
(1)	(2)	(3)	(4)	(5)
(1) Bus (Ex.P-1) DL-1PC-0149 (2) Keys of Bus, (Ex.P-74/2) (3)Driving License, Fitness Certificate, Permit Pollution Certificate and other documents of bus bearing registration no. DL-1PC-0149 (Ex.P-74/4) (4) Two blood-stained rods (Ex.P49/1 and Ex.49/2) (5) Indian Bank Debit Card(Ex.P74/3) (6) Blood-stained green and black coloured T-Shirt (Ex.74/6) and blood-stained brown coloured chappal (Ex.74/7). (7) Some ashes and partly burnt clothes (seizure memo Ex. PW-74/M.)	(1)Penile swab (2) Saliva (3)Nail clippings (4)Control swab (5)Blood in gauze (6) Underwear	-NA-	(1) DNA profile generated from Partially torn green and black colored striped half sleeve t-shirt found to be female in origin and consistent with the DNA profile of victim (1q) [8.7.3 @ Ex. PW 45/B]. (2) DNA profile generated from brown colored plastic chappal found to be female in origin and consistent with the DNA profile of victim (1q) [8.7.3 @ Ex. PW 45/B]	(1) DNA profile generated from Blood detected in gauze of accused matched the DNA profile generated from rectal swab of the victim. (2) Blood as well as human spermatozoa was detected in the underwear of the accused and the DNA profile generated there-from was found to be female in origin, consistent with that of the victim. (3) The DNA profile developed from blood stains from both the iron rods, recovered at the instance of accused Ram Singh from bus, is of female origin and consistent with the DNA profile of prosecutrix. (4) The DNA profile developed from burnt clothes pieces was found to be of male origin and consistent with the DNA profile of the complainant.

ACCUSED MUKESH (A-2)				
ARTICLES RECOVERED FROM ACCUSED		**Findings of DNA generated from clothes**		**DNA profile generated from other articles, swab etc.**
Recovery pursuant to disclosure statement	**Samples collected from the person of the accused**	**Items matching DNA profile of PW1**	**Items matching DNA profile of Victim**	**FINDINGS (Ex.PW45/B)**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
Disclosure statement recorded on 18.12.2012 by PW-60 HC Mahabir (Ex.PW-60/I) Following items recovered: 1. one blood-stained green T-shirt 2. one blood-stained grey colour pants. 3. blood-stained bluish grey colour jacket.	(1) Blood in gauze (2)Nail clippings (3) Urethral swab (4)Glans swab (5)Cut of pubic hair (6) Saliva (7) Stray hair (8) Underwear.	-NA-	• The DNA profile generated from blood-stained pants, t-shirts and jackets recovered at the behest of accused matched the DNA profile of the victim.	(1) Blood was detected in gauze and nail clippings but it did not yield female fraction DNA for analysis. (2)Human Spermatazoa was detected in urethral swab, glans swab and underwear but the same did not yield female fraction DNA for analysis.

ACCUSED AKSHAY (A-3)				
(1)	**(2)**	**(3)**	**(4)**	**(5)**
(1) One black bag containing blood-stained blue jeans (2) Blue black Nokia mobile phone bearing IMEI No.35928604015 (3) Blood-stained red coloured banian. (4) One silver ring (5) Two metro cards	(1) Blood in gauze (2) Saliva (3) Control gauze (4) Penile Swab (5)Nail clippings (6) Underwear (7) Scalp hair and Pubic hair (8) Red colour banian	• One set of the DNA profile generated from jeans pant of the accused matched the DNA profile of PW1.	• The DNA profile generated from blood-stained red coloured banian recovered at the behest of accused matched the DNA profile of the victim.	• DNA profile generated from breast swab of the victim was found consistent with the DNA profile of the blood of the accused Akshay.

ACCUSED VINAY (A-4)				
ARTICLES RECOVERED FROM ACCUSED		Findings of DNA generated from clothes		DNA generated from other articles, swab etc.
Recovery pursuant to disclosure statement	Samples collected from the person of the accused	Items matching DNA profile of PW1	Items matching DNA profile of Victim.	FINDINGS (Ex.PW45/B)
(1)	(2)	(3)	(4)	(5)
1.Blood-stained blue coloured jeans (Ex.P-68/1) 2.Blood-stained black coloured jacket (Ex.P-68/2) 3.blood-stained full sleeved black coloured T-shirt (Ex.P-68/3) 4.blue coloured chappals (Ex.P-68/4) 5. Hush Puppy shoes(Ex.P2 under Ex. PW-68/C) 6. Black coloured Nokia mobile phone with IMEI No.353183039047391 (Ex.P-68/5)	(1) Blood in gauze (2)Nail clippings (3) Urethral swab (4)Glans swab (5)Cut of pubic hair (6) Saliva (7) Stray hair (8) Underwear (9)Mons Pubis	• One set of the DNA profile generated from sports jacket of the accused matched the DNA profile of PW1.	• The DNA profile generated from blood-stained underwear, chappal and jacket recovered at the behest of accused matched the DNA profile of the victim.	(1) Blood was detected only in gauze, nail clipping and pubic hair of the accused but the same did not yield female fraction DNA for analysis.

ACCUSED PAWAN GUPTA @ KALU (A-5)				
(1)	(2)	(3)	(4)	(5)
Disclosure statement recorded by PW-60 HC Mahabir. Following items recovered on 19.12.2012: (1)one blood-stained black coloured sweater (Ex. P-68/6) (2)blood-stained coca cola (colour) pants. (Ex.68/7) (3)Blood-stained brown coloured underwear (Ex.P-68/8) (4)Brown coloured sports shoes (Ex.P-68/9) (5)One wristwatch of Sonata make (Ex.P-3) (6)Two currency notes of Rs.500/- each (Ex.P-7) Site plan of the spot from where the said articles are recovered and seized (Ex. PW-68).	(1) Blood in gauze (2)Nail clippings (3)Urethral swab (4)Glans swab (5) Cut of pubic hair (6) Saliva (7) Stray hair	•One set of the DNA profile generated from black coloured sweater of the accused matched the DNA profile of PW-1.	(1) Another set of DNA profile generated from sweater recovered at the behest of the accused matched the DNA profile of the victim. (2) DNA profile generated from sports shoes of the accused matched with the DNA profile of the prosecutrix	(1) Blood was detected only in gauze and nail clipping of the accused but the same did not yield female fraction DNA for analysis.

444. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. **DNA - *De-oxy-ribonucleic acid***, which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA.

DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating

DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders.
Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.

445. We may usefully refer to ***Advanced Law Lexicon, 3rd Edition Reprint 2009 by P. Ramanatha Aiyar*** which explains DNA as under:

DNA.- De-oxy-ribonucleic *acid, the nucleoprotein of chromosomes.*

The double-helix structure in cell nuclei that carries the genetic information of most living organisms.

The material in a cell that makes up the genes and controls the cell. (Biological Term)

DNA finger printing. A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)

In the same Law Lexicon, learned author refers to DNA identification as under:

DNA identification. *A method of comparing a person's deoxyribonucleic acid (DNA) - a patterned chemical structure of genetic information - with the DNA in a biological specimen (such as blood, tissue, or hair) to determine if the person is the source of the specimen. - Also termed DNA finger printing; genetic finger printing (Black, 7th Edition, 1999)*

446. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results. Section 53A Code of Criminal Procedure is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.

447. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in ***Santosh Kumar Singh v. State through CBI*** MANU/SC/0801/2010 : (2010) 9 SCC 747, the Court held as under:

65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the Appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.

66. Dr. Lalji Singh in his examination-in-chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognised by this Court in *Kamalanantha* v. *State of T.N.* MANU/SC/0259/2005 : (2005) 5 SCC 194. We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.

67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the Appellant was from a single source and that source was the Appellant.

68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In *Bhagwan Das* v. *State of Rajasthan* MANU/SC/0037/1957 : AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in *Kamti Devi* v. *Poshi Ram* MANU/SC/0335/2001 : (2001) 5 SCC 311. In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the Appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9.

[emphasis added].

448. From the evidence of P.W. 45 and the details given in the above tabular form, it is seen that the DNA profile generated from blood-stained clothes of the accused namely, A-1 Ram Singh (dead); A-2 Mukesh; A-3 Akshay; A-4 Vinay; and A-5 Pawan Gupta @ Kalu are found consistent with the DNA profile of the prosecutrix. Also as noted above, two sets of DNA profile were generated from the black colour sweater of the accused Pawan. One set of DNA profile found to be female in origin, consistent with the DNA profile of the prosecutrix; other set found to be male in origin, consistent with the DNA profile of P.W. 1. Likewise, two sets of DNA profile were

generated from the black colour sports jacket of accused Vinay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of P.W. 1. Likewise, two sets of DNA profile were generated from the jeans pant of accused Akshay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of P.W. 1. The result of DNA analysis and that of the DNA profile generated from blood-stained clothes of the accused found consistent with that of the victim is a strong piece of evidence incriminating the accused in the offence.

449. DNA profile generated from the blood samples of accused Ram Singh matched with the DNA profile generated from the rectal swab of the victim. Blood as well as human spermatozoa was detected in the underwear of the accused Ram Singh (dead) and DNA profile generated therefrom was found to be female in origin, consistent with that of the victim. Likewise, the DNA profile generated from the breast swab of the victim was found consistent with the DNA profile of the accused Akshay.

450. As discussed earlier, identification by DNA genetic finger print is almost hundred per cent precise and accurate. The DNA profile generated from the blood-stained clothes of the accused and other articles are found consistent with the DNA profile of the victim and DNA profile of P.W. 1; this is a strong piece of evidence against the accused. In his evidence, P.W. 45 Dr. B.K. Mohapatra has stated that once DNA profile is generated and found consistent with another DNA profile, the accuracy is hundred per cent and we find no reason to doubt his evidence. As pointed out by the Courts below, the counsel for the defence did not raise any substantive ground to rebut the findings of DNA analysis and the findings through the examination of P.W. 45. The DNA report and the findings thereon, being scientifically accurate clearly establish the link involving the accused persons in the incident.

451. **Conspiracy:** The accused have been charged with the offence of "conspiracy" to commit the offence of abduction, robbery/dacoity, gang rape and unnatural sex, in pursuance of which the accused are alleged to have picked up the prosecutrix and P.W. 1. The charge sheet also states that in furtherance of conspiracy, the accused while committing the offence of gang rape on the prosecutrix intentionally inflicted bodily injury with iron rod and inserted the iron rod in the vital parts of her body with the common intention to cause her death.

452. The learned amicus Mr. Sanjay Hegde submitted that there is no specific evidence to prove that there was prior meeting of minds of the accused and that they had conspired together to commit grave offence by use of iron rod, resulting in the death of the victim and, therefore, insertion/use of iron rod by any one of the accused cannot be attributed to all the accused in order to hold them guilty of the offence of murder.

453. The essentials of the offence of conspiracy and the manner in which it can be proved has been laid down by this Court through a catena of judicial pronouncements and I choose to briefly recapitulate the law on the point, so as to determine whether the offence is made out in this case or not. Meeting of minds for committing an illegal act is sine qua non of the offence of conspiracy. It is also obvious that meeting of minds, thereby resulting in formation of a consensus between the parties, can be a sudden act, spanning in a fraction of a minute. It is neither necessary that each of the conspirators take active part in the commission of each and every conspiratorial act, nor it is

necessary that all the conspirators must know each and every details of the conspiracy. Essence of the offence of conspiracy is in agreement to break the law as aptly observed by this Court in ***Major E.G. Barsay v. State of Bombay*** MANU/SC/0123/1961 : (1962) 2 SCR 195.

454. So far as the English law on conspiracy is concerned, which is the source of Indian law, KENNY has succinctly stated that in modern times conspiracy is defined as an agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. Stressing on the need of formation of an agreement, he has cautioned that conspiracy should not be misunderstood as a purely mental crime, comprising the concurrence of the intentions of the parties. The meaning of an 'agreement', he has explained by quoting following words of Lord Chelmsford:

Agreement is an act in advancement of the intention which each person has conceived in his mind.

KENNY has further said that it is not mere intention, but the announcement and acceptance of intentions. However, it is not necessary that an overt act is done; the offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. [**Refer KENNY on Outlines of Criminal Law, 19th Edn., pp. 426-427**]

455. The most important aspect of the offence of conspiracy is that apart from being a distinct statutory offence, all the parties to the conspiracy are liable for the acts of each other and as an exception to the general law in the case of conspiracy intent i.e. mens rea alone constitutes a crime. As per Section 10 of the Evidence Act, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then, anything done by any one of them in reference to their common intention, is admissible against the others. As held in ***State of Maharashtra v. Damu and Ors.*** MANU/SC/0299/2000 : (2000) 6 SCC 269, the only condition for the application of the rule in Section 10 of the Evidence Act is that there must be reasonable ground to believe that two or more persons have conspired together to commit an offence.

456. The principles relating to the offence of criminal conspiracy and the standard of proof for establishing offence of conspiracy and the joint liability of the conspirators have been elaborately laid down in ***Shivnarayan Laxminarayan Joshi and Ors. v. State of Maharashtra*** MANU/SC/0241/1979 : (1980) 2 SCC 465; ***Mohammad Usman Mohammad Hussain Maniyar and Ors. v. State of Maharashtra*** MANU/SC/0180/1981 : (1981) 2 SCC 443; ***Kehar Singh and Ors. v. State (Delhi Administration)*** MANU/SC/0241/1988 : (1988) 3 SCC 609; ***State of Maharashtra and Ors. v. Som Nath Thapa and Ors.*** MANU/SC/0451/1996 : (1996) 4 SCC 659; ***State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru*** MANU/SC/0465/2005 : (2005) 11 SCC 600; ***State Through Superintendent of Police, CBI/SIT v. Nalini and Ors.*** MANU/SC/0945/1999 : (1999) 5 SCC 253; ***Yakub Abdul Razak Menon v. The State of Maharashtra, through CBI, Bombay*** MANU/SC/0268/2013 : (2013) 13 SCC 1.

457. Another significant aspect of the offence of criminal conspiracy is that it is very rare to find direct proof of it, because of the very fact that it is hatched in secrecy. Unlike other offences, criminal conspiracy in most of the cases is proved by circumstantial evidence only. It is extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested,

quarters or from utter strangers. Conspiracy is a matter of inference, deduced from words uttered, criminal acts of the accused done in furtherance of conspiracy. (Vide ***Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra*** MANU/SC/0157/1970 : (1970) 1 SCC 696; ***Firozuddin Basheeruddin and Ors. v. State of Kerala*** MANU/SC/0471/2001 : (2001) 7 SCC 596; ***Ram Narain Poply v. Central Bureau of Investigation and Ors.*** MANU/SC/0017/2003 : (2003) 3 SCC 641; ***Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra*** MANU/SC/7528/2008 : (2008) 10 SCC 394; ***Pratapbhai Hamirbhai Solanki v. State of Gujarat and Anr.*** MANU/SC/0854/2012 : (2013) 1 SCC 613; ***Chandra Prakash v. State of Rajasthan*** MANU/SC/0457/2014 : (2014) 8 SCC 340 etc.)

458. In ***Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra*** MANU/SC/7528/2008 : (2008) 10 SCC 394, this Court, after referring to the law laid down in several pronouncements, summarised the core principles of law of conspiracy in the following words:

23. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.

459. In the present case, there is ample evidence proving the acts, statements and circumstances, establishing firm ground to hold that the accused who were present in the bus were in prior concert to commit the offence of rape. The prosecution has established that the accused were associated with each other. The criminal acts done in furtherance of conspiracy, is established by the sequence of events and the conduct of the accused. Existence of conspiracy and its objects could be inferred from the chain of events. The chain of events described by the victim in her dying declarations coupled with the testimony of P.W. 1 clearly establish that as soon as the complainant and the victim boarded the bus, the accused switched off the lights of the bus. Few accused pinned down P.W. 1 and others committed rape on the victim in the back side of the bus one after the other. The accused inserted iron rods in the private parts of the prosecutrix, dragging her holding her hair and then threw her outside the bus. The victim has also maintained in her dying declaration that the accused persons were exhorting that the victim has died and she be thrown out of the bus. Ultimately, both the victim and the complainant were thrown out of the moving bus through the front door, having failed to throw them through the rear door. The chain of action and the act of finally throwing the victim and P.W. 1 out of the bus show that there was unity of object among the accused to commit rape and destroy the evidence thereon.

460. In this case, the existence of conspiracy is sought to be drawn by an inference from the circumstances: (i) the accused did not allow any other passenger to board the bus after P.W. 1 and the prosecutrix boarded the bus; (ii) switching off the lights; pinning P.W. 1 down by some while others commit rape/unnatural sex with the prosecutrix at the rear side of the bus; (iii) exhortation by some of the accused that the victim be not left alive; and (iv) their act of throwing the victim and P.W. 1 out of the running bus without clothes in the wintery night of December. Existence of

conspiracy and its objects is inferred from the above circumstances and the words uttered. In my view, the courts below have rightly drawn an inference that there was prior meeting of minds among the accused and they have rightly held that the prosecution has proved the existence of conspiracy to commit gang rape and other offences.

461. As already stated in the beginning, in achieving the goal of the conspiracy, several offences committed by some of the conspirators may not be known to others, still all the accused will be held guilty of the offence of criminal conspiracy. The trial court has recorded that the victim's *complete alimentary canal from the level of duodenum upto 5 cm from anal sphincter was completely damaged. It was beyond repair. Causing of damage to jejunum is indicative of the fact that the rods were inserted through vagina and/or anus upto the level of jejunum." Further "the septicemia was the direct result of internal multiple injuries"*. Use of iron rod by one or more of the accused is sufficient to inculpate all the accused for the same. In the present case, gang rape and use of iron rod caused grave injuries to victim's vagina and intestines; throwing her out of the bus in that vegetative state in chilled weather led to her death; all this taking place in the course of same transaction and with the active involvement of all the accused is more than sufficient evidence to find the accused guilty of criminal conspiracy. I, thus, affirm the findings of the courts below with regard to conviction of all the accused Under Section 120-B Indian Penal Code and Section 302 read with Section 120-B Indian Penal Code.

462. Apart from considering the principles of law of conspiracy distinctly, if we consider it in the context of 'conspiracy to commit the offence of gang rape, unnatural sex etc., as is specifically relevant in the present case, we find that existence of common intent and joint liability is already implicit in the offence of gang rape. Gang rape is dealt with in Clause (g) of Sub-section (2) of Section 376 Indian Penal Code read with Explanation 1. As per Explanation 1 to Section 376 Indian Penal Code, "where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape" and all of them shall be liable to be punished under Sub-section (2) of Section 376 Indian Penal Code. As per Explanation 1, by operation of deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the groups has committed rape in furtherance of the common intention.

463. While considering the scope of Section 376(2)(g) Indian Penal Code read with Explanation, in ***Ashok Kumar v. State of Haryana*** MANU/SC/1176/2002 : (2003) 2 SCC 143, this Court held as under:

8. Charge against the Appellant is Under Section 376(2)(g) Indian Penal Code. In order to establish an offence Under Section 376(2)(g) Indian Penal Code, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention

independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.

[Emphasis added]

So far as the offence Under Section 376 (2)(g) Indian Penal Code, the sharing of common intention and the jointness in commission of rape is concerned, the same is established by the presence of all the accused in the bus; their action in concert as established by the dying declaration of the prosecutrix and the evidence of P.W. 1, presence of blood in the clothes of all the accused, DNA profile generated thereon being consistent with the DNA profile of the victim.

464. The prosecution has established the presence of the accused in the bus and the heinous act of gang rape committed on the prosecutrix by the accused by the ample evidence - by the multiple dying declaration of the victim and also by the evidence of P.W. 1 and medical evidence and also by arrest and recovery of incriminating articles of the victim and that of P.W. 1 complainant. The scientific evidence in particular DNA analysis report clearly brings home the guilt of the accused.

465. **Section 235(2), Code of Criminal Procedure:** Once the conviction of the accused persons is affirmed, what remains to be decided is the question of appropriate punishment imposed on them. On the aspect of sentencing, we were very effectively assisted by the learned Amicus Curiae. Accused were convicted ***vide*** **judgment and order dated 10.09.2013 and on the very next day of judgment i.e. on 11.09.2013, the arguments on sentencing were concluded. Thereafter, a separate order on sentence was pronounced on 13.09.2013.**

466. Counsel for the Appellants as well as the learned amicus Mr. Raju Ramachandran contended that no effective opportunity was given to the Appellants to lead their defence on the point of sentencing as mandated Under Section 235(2) Code of Criminal Procedure and each of the accused were not individually heard in person on the question of sentence. Learned *Amicus Curiae*, Mr. Raju Ramachandran submitted only the counsel for the accused were heard and all the accused were treated alike irrespective of their individual background and were sentenced to death, which is in clear violation of the mandate of Section 235(2) Code of Criminal Procedure. It was submitted that Section 235(2) Code of Criminal Procedure is intended to give an opportunity to the accused to place before the Court all the relevant facts and material having a bearing on the question of sentence and, therefore, salutary provision should not have been treated as a mere formality by the trial court. In support of his contention, the learned Amicus has placed reliance upon a number of judgments viz. - (i) ***Dagdu and Ors. v. State of Maharashtra*** MANU/SC/0086/1977 : (1977) 3 SCC 68; (ii) ***Malkiat Singh and Ors. v. State of Punjab*** MANU/SC/0622/1991 : (1991) 4 SCC 341; and (iii) Ajay Pandit alias Jagdish Dayabhai Patel and Anr. v. State of Maharashtra MANU/SC/0562/2012 : (2012) 8 SCC 43.

467. Section 235 Code of Criminal Procedure deals with the judgments of acquittal or conviction. Under Section 235(2) Code of Criminal Procedure, where the accused is convicted, save in cases of admonition or release on good conduct, the Judge shall hear the accused on the question of sentence and then pass sentence in accordance with law. **Section 235(2) Code of Criminal Procedure** imposes duty on the court to hear the accused on the question of sentence and then pass sentence on him in accordance with law. The only exception to the said rule is created in case of

applicability of Section 360 Code of Criminal Procedure i.e. when the court finds the accused eligible to be released on probation of good conduct or after admonition.

468. Section 354 Code of Criminal Procedure specifies the language and contents of judgment, while delivering the judgment in a criminal case. Section 354(3) Code of Criminal Procedure deals with judgments where conviction is for an offence punishable with death penalty or in the alternative with imprisonment for life. **Section 354(3) Code of Criminal Procedure** mandates that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

469. The statutory duty to state special reasons Under Section 354(3) Code of Criminal Procedure can be meaningfully carried out only if the hearing on sentence Under Section 235(2) Code of Criminal Procedure is effective and procedurally fair. To afford an effective opportunity to the accused, the Court must hear on the question of sentence to know about (i) age of the accused; (ii) background of the accused; (iii) prior criminal antecedents, if any; (iv) possibility of reformation, if any; and (v) such other relevant factors. The major deficiency in the complex criminal justice system is that important factors which have a bearing on sentence are not placed before the Court. Resultantly, the Courts are constantly faced with the dilemma to impose an appropriate sentence. In this context, hearing of the accused Under Section 235(2) Code of Criminal Procedure on the question of sentencing is a crucial exercise which is intended to enable the accused to place before the Court all the mitigating circumstances in his favour viz. his social and economic backwardness, young age etc. The mandate of Section 235(2) Code of Criminal Procedure becomes more crucial when the accused is found guilty of an offence punishable with death penalty or with the life imprisonment.

470. It is well-settled that Section 235(2) Code of Criminal Procedure is intended to give an opportunity of hearing to the prosecution as well as the accused on the question of sentence. The Court while awarding the sentence has to take into consideration various factors having a bearing on the question of sentence. In case, Section 235(2) Code of Criminal Procedure is not complied with, as held in ***Dagdu's case***, the appellate Court can either send back the case to the Sessions Court for complying with Section 235(2) Code of Criminal Procedure so as to enable the accused to adduce materials; or, in order to avoid delay, the appellate Court may by itself give an opportunity to the parties in terms of Section 235(2) Code of Criminal Procedure to produce the materials they wish to adduce instead of sending the matter back to the trial Court for hearing on sentence. In the present case, we felt it appropriate to adopt the latter course and accordingly asked the counsel appearing for the Appellants to file affidavits/materials on the question of sentence. Consequently, vide order dated 03.02.2017, we directed the learned Counsel for the accused to place in writing, before this Court, their submissions, whatever they desired to place on the question of sentence. In compliance with the order, Mr. M.L. Sharma, learned Counsel on behalf of the accused A-2 Mukesh and A-5 Pawan and Mr. A.P. Singh, learned Counsel on behalf of the accused Akshay Kumar Singh, Vinay Sharma and Pawan Gupta filed the individual affidavits of the accused.

471. Accused Mukesh (A-2) in his affidavit has stated that he was picked up from his house at Karoli, Rajasthan and brought to Delhi and reiterated that he is innocent and he denied his

involvement in the occurrence. In their affidavits, accused Akshay Kumar Singh (A-3), accused Vinay Sharma (A-4) and accused Pawan Gupta (A-5) submitted in their individual affidavits have stated that they hail from an ordinary/poor background and are not much educated. They have also stated that they have aged parents and other family members who are dependent on them and they are to be supported by them. Accused have also stated that they have no criminal antecedents and that after their confinement in Tihar Jail they have maintained good behavior.

472. Learned Counsel Mr. M.L. Sharma submitted that accused Mukesh (A-2) is innocent and he has been falsely implicated only because he is the brother of accused Ram Singh.

473. Taking us through the affidavits filed by the accused, learned Counsel Mr. A.P. Singh submitted that the accused namely Akshay Kumar Singh, Pawan Gupta and Vinay Sharma hail from very poor background; and have got large families to support; and have no criminal antecedents. It has been contended that having regard to the fact that the three accused have no prior criminal antecedents and are not hardened criminals, the case will not fall under "rarest of rare cases" to affirm the death sentence.

474. Supplementing the affidavits filed by the accused, the learned amicus and senior Counsel Mr. Raju Ramachandran and Mr. Sanjay Hegde submitted that assuming that the conviction of the Appellants are confirmed, the accused who hail from very ordinary poor background and having no criminal antecedents, the death sentence be commuted to life imprisonment.

475. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

476. In ***State of M.P. v. Munna Choubey and Anr.*** MANU/SC/0055/2005 : (2005) 2 SCC 710, it was observed as under:

10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Naidu MANU/SC/0338/1991 : (1991) 3 SCC 471.

477. In ***Jashubha Bharatsinh Gohil and Ors. v. State of Gujarat*** MANU/SC/1561/1994 : (1994) 4 SCC 353, while upholding the award of death sentence, this Court held that sentencing process has to be stern where the circumstances demand so. Relevant extract is as under:

12......The courts are constantly faced with the situation where they are required to answer to new challenges and mould the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing system as to impose such sentence which reflects the social conscience of the society. The sentencing process has to be stern where it should be.

478. **Whether the Case falls under rarest of rare cases:** Law relating to award of death sentence in India has evolved through massive policy reforms-nationally as well as internationally and through a catena of judicial pronouncements, showcasing distinct phases of our view towards imposition of death penalty. Undoubtedly, continuing prominence of reformative approach in sentencing and India's international obligations have been majorly instrumental in facilitating a visible shift in court's view towards restricting imposition of death sentence. While closing the shutter of deterrent approach of sentencing in India, the small window of 'award of death sentence' was left open in the category of 'rarest of rare case' in ***Bachan Singh v. State of Punjab*** MANU/SC/0055/1982 : (1980) 2 SCC 684, by a Constitution Bench of this Court.

479. In ***Bachan Singh (supra)***, while upholding the constitutional validity of capital sentence, this Court revisited the law relating to death sentence at that point of time, by thoroughly discussing the law laid down in ***Jagmohan Singh v. State of U.P.*** MANU/SC/0139/1972 : (1973) 1 SCC 20; ***Rajendra Prasad v. State of U.P.*** MANU/SC/0212/1979 : (1979) 3 SCR 646 and other cases. The principles laid down in ***Bachan Singh's*** case is that, normal rule is awarding of 'life sentence', imposition of death sentence being justified, only in rarest of rare case, when the option of awarding sentence of life imprisonment is unquestionably foreclosed'. By virtue of ***Bachan Singh (supra)***, 'life imprisonment' became the rule and 'death sentence' an exception. The focus was shifted from 'crime' to the 'crime and criminal' i.e. now the nature and gravity of the crime needs to be analysed juxtaposed to the peculiar circumstances attending the societal existence of the criminal. The principles laid down in **Bachan Singh's** case were considered in ***Machhi Singh and Ors. v. State of Punjab*** MANU/SC/0211/1983 : (1983) 3 SCC 470 and was summarised as under:

38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case (supra):

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the

option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

480. In ***Machhi Singh's*** case, this Court took the view that in every case where death penalty is a question, a balance sheet of aggravating and mitigating circumstances must be drawn up before arriving at the decision. The Court held that for practical application of the doctrine of 'rarest of rare case', it must be understood broadly in the background of five categories of cases crafted thereon that is 'Manner of commission of crime', 'Motive', 'Anti-social or socially abhorrent nature of the crime', 'Magnitude of crime', and 'Personality of victim of murder'. These five categories are elaborated in para Nos. 32 to 37 as under:

32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. *Manner of commission of murder*

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. *Motive for commission of murder*

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. *Anti-social or socially abhorrent nature of the crime*

35. (*a*) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. *Magnitude of crime*

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. *Personality of victim of murder*

37. When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (*b*) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

481. The principle laid down in ***Bachan Singh (supra)*** and ***Machhi Singh (supra)*** came to be discussed and applied in all the cases relating to imposition of death penalty for committing heinous offences. However, lately, it was felt that the courts have not correctly applied the law laid down in ***Bachan Singh (supra)*** and ***Machhi Singh (supra)***, which has led to inconsistency in sentencing process in India; also it was observed that the list of categories of murder crafted in Machhi Singh (supra), in which death sentence ought to be awarded are not exhaustive and needs to be given even more expansive adherence owing to changed legal scenario. In ***Swamy Shradhananda alias Murali Manohar Mishra (2) v. State of Karnataka*** MANU/SC/3096/2008 : (2008) 13 SCC 767; a three-Judge Bench of this Court, observed as under in this regard:

43. In Machhi Singh the Court crafted the categories of murder in which 'the Community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20 July, 1983, nearly twenty five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself.

482. A milestone in the sentencing policy is the concept of 'life imprisonment till the remainder of life' evolved in ***Swamy Shradhananda (2)(supra)***. In this case, a man committed murder of his wife for usurping her property in a cold-blooded, calculated and diabolic manner. The trial court convicted the accused and death penalty was imposed on him which was affirmed by the High Court. Though the conviction was affirmed by this Court also on the point of sentencing, the views of a two-Judge Bench of this Court, in ***Swamy Shradhananda v. State of Karnataka*** (2007) 12 SCC 282 differed, and consequently, the matter was listed before a three-Judge Bench, wherein a mid way was carved. The three-Judge Bench, was of the view that even though the murder was diabolic, presence of certain circumstances in favour of the accused, viz. no mental or physical pain being inflicted on the victim, confession of the accused before the High Court etc., made them reluctant to award death sentence. However, the Court also realised that award of life imprisonment, which euphemistically means imprisonment for a term of 14 years (consequent to exercise of power of commutation by the executive), would be equally disproportionate punishment to the crime committed. Hence, in ***Swamy Shradhananda (2) (supra)*** the Court directed that the accused shall not be released from the prison till the rest of his life. Relevant extract from the judgment reads as under:

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an Appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for

all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.

483. After referring to a catena of judicial pronouncements post ***Bachan Singh (supra)*** and ***Machhi Singh (supra)***, in the case of Ramnaresh and Ors. v. State of Chhattisgarh MANU/SC/0163/2012 : (2012) 4 SCC 257, this Court, tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances. It would be apposite to refer to the same here:

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold-blooded murder without provocation.

(11) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

484. Similarly, this Court in ***Sangeet and Anr. v. State of Haryana*** MANU/SC/0989/2012 : (2013) 2 SCC 452, extensively analysed the evolution of sentencing policy in India and stressed on the need for further evolution. In para (77), this Court emphasized on making the sentencing process a principled one, rather than Judge-centric one and held that a re-look is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court.

485. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded. Reference may be

made to ***Holiram Bordoloi v. State of Assam*** MANU/SC/0271/2005 : (2005) 3 SCC 793 [Para 15-17], ***Ankush Maruti Shinde and Ors. v. State of Maharashtra*** MANU/SC/0700/2009 : (2009) 6 SCC 667 (para 31-34), ***Kamta Tiwari v. State of Madhya Pradesh*** MANU/SC/0722/1996 : (1996) 6 SCC 250 (para 7-8), ***State of U.P. v. Satish*** MANU/SC/0090/2005 : (2005) 3 SCC 114 (para 24-31), ***Sundar alias Sundarajan v. State by Inspector of Police and Anr.*** MANU/SC/0105/2013 : (2013) 3 SCC 215 (para 36-38, 42-42.7, 43), ***Sevaka Perumal and Anr. v. State of Tamil Nadu*** MANU/SC/0338/1991 : (1991) 3 SCC 471 (para 8-10, 12), ***Mohfil Khan and Anr. v. State of Jharkhand*** MANU/SC/0915/2014 : (2015) 1 SCC 67 (para 63-65).

486. Even the young age of the accused is not a mitigating circumstance for commutation to life, as has been held in the case of ***Bhagwan Swarup v. State of U.P.*** MANU/SC/0094/1970 : (1971) 3 SCC 759 (para 5), ***Deepak Rai v. State of Bihar*** MANU/SC/0965/2013 : (2013) 10 SCC 421 (para 91-100) and ***Shabhnam v. State of Uttar Pradesh*** MANU/SC/0649/2015 : (2015) 6 SCC 632 (para 36).

487. Let me now refer to a few cases of rape and murder where this Court has confirmed the sentence of death. In ***Molai & Anr. v. State of M.P.*** MANU/SC/0680/1999 : (1999) 9 SCC 581, death sentence awarded to both the accused for committing offences Under Sections 376(2)(g) Indian Penal Code, 302 read with Section 34 Indian Penal Code and 201 Indian Penal Code, was confirmed by this Court. The accused had committed gang rape on the victim, strangulated her thereafter and threw away her body into the septic tank with the cycle, after causing stab injuries. It was held as under:

36......It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under-garment and thereafter took her to the septic tank alongwith the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (Appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below.

488. In ***Bantu v. State of Uttar Pradesh*** MANU/SC/7863/2008 : (2008) 11 SCC 113, the victim aged about five years was not only raped, but was murdered in a diabolic manner. The Court awarded extreme punishment of death, holding that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed must be delicately balanced by the Court in a dispassionate manner.

489. In ***Ankush Maruti Shinde and Ors. v. State of Maharashtra*** MANU/SC/0700/2009 : (2009) 6 SCC 667, concerned accused were found guilty of offences Under Sections 307 Indian Penal Code, 376(2)(g) Indian Penal Code and 397 read with 395 and 396 of Indian Penal Code. This Court declined to interfere with the concurrent findings of the courts below and upheld death penalty awarded to the accused, taking into account the brutality of the incident, tender age of the

deceased, and the fact of a minor girl being mercilessly gang raped and then put to death. The court also noted that there was no provocation from the deceased's side and the two surviving eye witnesses had fully corroborated the case of the prosecution.

490. In ***Mehboob Batcha and Ors. v. State rep. by Supdt. of Police*** MANU/SC/0260/2011 : (2011) 7 SCC 45, accused were policemen who had wrongfully confined one Nandagopal in police custody in Police Station Annamalai Nagar on suspicion of theft from 30.05.1992 till 02.06.1992 and had beaten him to death there with lathis, and had also gang raped his wife Padmini in a barbaric manner. This Court could not award death penalty due to omission of the courts below in framing charge Under Section 302, Indian Penal Code. However, the observations made by this Court are worth quoting here:

Bane hain ahal-e-hawas muddai bhi munsif bhi Kise vakeel karein kisse munsifi chaahen -- Faiz Ahmed Faiz

1. If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge Under Section 302 Indian Penal Code was framed against the accused by the Courts below.

.....

9. We have held in ***Satya Narain Tiwari @ Jolly and Anr. v. State of U.P.*** MANU/SC/0910/2010 : (2010) 13 SCC 689 and in Sukhdev Singh v. State of Punjab MANU/SC/1355/2010 : (2010) 13 SCC 656 that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment.....

491. In ***Mohd. Mannan @ Abdul Mannan v. State of Bihar*** MANU/SC/0460/2011 : (2011) 5 SCC 317, this Court upheld award of death sentence to a 43 year old accused who brutally raped and murdered a minor girl, while holding a position of trust. Relevant considerations of the Court while affirming the death sentence are extracted as under:

26....The postmortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The Appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenseless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. We are of the opinion that Appellant is a menace to the society and shall continue to be so and he cannot be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court.

In Shivaji ***@ Dadya Shankar Alhat v. State of Maharashtra*** MANU/SC/8019/2008 : (2008) 15 SCC 269; ***Rajendra Pralhadrao Wasnik v. The State of Maharashtra*** MANU/SC/0160/2012 :

(2012) 4 SCC 37 award of death penalty in case of rape and murder was upheld, finding the incident brutal and accused a menace for the society.

492. In ***Dhananjoy Chatterjee alias Dhana v. State of W.B.*** MANU/SC/0626/1994 : (1994) 2 SCC 220, a security guard who was entrusted with the security of a residential apartment had raped and murdered an eighteen year old inhabitant of one of the flats in the said apartment, between 5.30 p.m. and 5.45 p.m. The entire case of the prosecution was based on circumstantial evidence. However, Court found that it was a fit case for imposing death penalty. Following observation of the Court while imposing death penalty is worth quoting:

14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

(Emphasis added)

493. In a landmark judgment ***Shankar Kisanrao Khade v. State of Maharashtra*** MANU/SC/0476/2013 : (2013) 5 SCC 546, Justice Madan B. Lokur (Concurring) after analysing various cases of rape and murder, wherein death sentence was confirmed by this Court, in para (122) briefly laid down the grounds which weighed with the Court in confirming the death penalty and the same read as under:

122. *The principal reasons for confirming the death penalty in the above cases include:*

*(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (**Jumman Khan v. State of U.P.*** MANU/SC/0081/1991 : (1991) 1 SCC 752, ***Dhananjoy Chatterjee v. State of W.B.*** MANU/SC/0626/1994 : (1994) 2 SCC 220, ***Laxman Naik v. State of Orissa*** MANU/SC/0264/1995 : (1994) 3 SCC 381, ***Kamta Tewari v. State of M.P.*** MANU/SC/0722/1996 : (1996) 6 SCC 250, ***Nirmal Singh v. State of Haryana*** MANU/SC/0178/1999 : (1999) 3 SCC

670, ***Jai Kumar v. State of M.P.*** MANU/SC/0360/1999 : (1999) 5 SCC 1, ***State of U.P. v. Satish*** MANU/SC/0090/2005 : (2005) 3 SCC 114, ***Bantu v. State of U.P.*** MANU/SC/7863/2008 : (2008) 11 SCC 113, ***Ankush Maruti Shinde v. State of Maharashtra*** MANU/SC/0700/2009 : (2009) 6 SCC 667, ***B.A. Umesh v. State of Karnataka*** MANU/SC/0082/2011 : (2011) 3 SCC 85, ***Mohd. Mannan v. State of Bihar*** MANU/SC/0460/2011 : (2011) 5 SCC 317 and ***Rajendra Pralhadrao Wasnik v. State of Maharashtra*** MANU/SC/0160/2012 : (2012) 4 SCC 37);

*(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (**Dhananjoy Chatterjee*** MANU/SC/0626/1994 : (1994) 2 SCC 220, ***Jai Kumar*** MANU/SC/0360/1999 : (1999) 5 SCC 1, ***Ankush Maruti Shinde*** MANU/SC/0700/2009 : (2009) 6 SCC 667 and ***Mohd. Mannan*** MANU/SC/0460/2011 : (2011) 5 SCC 317);

*(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (**Jai Kumar*** MANU/SC/0360/1999 : (1999) 5 SCC 1, ***B.A. Umesh*** MANU/SC/0082/2011 : (2011) 3 SCC 85 and ***Mohd. Mannan*** MANU/SC/0460/2011 : (2011) 5 SCC 317);

*(4) the victims were defenceless (**Dhananjoy Chatterjee*** MANU/SC/0626/1994 : (1994) 2 SCC 220, ***Laxman Naik*** MANU/SC/0264/1995 : (1994) 3 SCC 381, ***Kamta Tewari*** MANU/SC/0722/1996 : (1996) 6 SCC 250, ***Ankush Maruti Shinde*** MANU/SC/0700/2009 : (2009) 6 SCC 667, ***Mohd. Mannan*** MANU/SC/0460/2011 : (2011) 5 SCC 317 and ***Rajendra Pralhadrao Wasnik*** MANU/SC/0160/2012 : (2012) 4 SCC 37);

*(5) the crime was either unprovoked or that it was premeditated (**Dhananjoy Chatterjee*** MANU/SC/0626/1994 : (1994) 2 SCC 220, ***Laxman Naik*** MANU/SC/0264/1995 : (1994) 3 SCC 381, ***Kamta Tewari*** MANU/SC/0722/1996 : (1996) 6 SCC 250, ***Nirmal Singh*** MANU/SC/0178/1999 : (1999) 3 SCC 670, ***Jai Kumar*** MANU/SC/0360/1999 : (1999) 5 SCC 1, ***Ankush Maruti Shinde*** MANU/SC/0700/2009 : (2009) 6 SCC 667, ***B.A. Umesh*** MANU/SC/0082/2011 : (2011) 3 SCC 85 and ***Mohd. Mannan*** MANU/SC/0460/2011 : (2011) 5 SCC 317) *and in three cases the antecedents or the prior history of the convict was taken into consideration (**Shivu v. High Court of Karnataka*** MANU/SC/7103/2007 : (2007) 4 SCC 713, ***B.A. Umesh*** MANU/SC/0082/2011 : (2011) 3 SCC 85 and ***Rajendra Pralhadrao Wasnik*** MANU/SC/0160/2012 : (2012) 4 SCC 37).

494. We also refer to para (106) of ***Shankar Kisanrao Khade's case*** where **Justice Madan B. Lokur (Concurring)** has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in such commutation. Para (106) reads as under:

106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

(1) the young age of the accused [***Amit*** v. ***State of Maharashtra*** MANU/SC/0567/2003 : (2003) 8 SCC 93 aged 20 years, ***Rahul v. State of Maharashtra*** (2005) 10 SCC 322 aged 24 years, ***Santosh Kumar Singh v. State*** MANU/SC/0801/2010 : (2010) 9 SCC 747 aged 24 years, Rameshbhai

Chandubhai Rathod (2) MANU/SC/0075/2011 : (2011) 2 SCC 764 aged 28 years and ***Amit*** v. ***State of U.P.*** MANU/SC/0133/2012 : (2012) 4 SCC 107 aged 28 years];

(2) the possibility of reforming and rehabilitating the accused (in ***Santosh Kumar Singh*** MANU/SC/0801/2010 : (2010) 9 SCC 747 and ***Amit*** v. ***State of U.P.*** MANU/SC/0133/2012 : (2012) 4 SCC 107 the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (***Nirmal Singh*** MANU/SC/0178/1999 : (1999) 3 SCC 670, ***Raju*** MANU/SC/0324/2001 : (2001) 9 SCC 50, ***Bantu*** MANU/SC/0684/2001 : (2001) 9 SCC 615, ***Amit*** v. ***State of Maharashtra*** MANU/SC/0567/2003 : (2003) 8 SCC 93, ***Surendra Pal Shivbalakpal*** MANU/SC/0794/2004 : (2005) 3 SCC 127, Rahul (2005) 10 SCC 322 and ***Amit*** v. ***State of U.P.*** MANU/SC/0133/2012 : (2012) 4 SCC 107);

(4) the accused was not likely to be a menace or threat or danger to society or the community (***Nirmal Singh*** MANU/SC/0178/1999 : (1999) 3 SCC 670, ***Mohd. Chaman*** MANU/SC/0781/2000 : (2001) 2 SCC 28, ***Raju*** MANU/SC/0324/2001 : (2001) 9 SCC 50, ***Bantu*** MANU/SC/0684/2001 : (2001) 9 SCC 615, ***Surendra Pal Shivbalakpal*** MANU/SC/0794/2004 : (2005) 3 SCC 127, ***Rahul*** (2005) 10 SCC 322 and ***Amit*** v. ***State of U.P.*** MANU/SC/0133/2012 : (2012) 4 SCC 107).

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts (***State of T.N.*** v. ***Suresh*** MANU/SC/0939/1998 : (1998) 2 SCC 372, ***State of Maharashtra*** v. ***Suresh*** MANU/SC/0765/1999 : (2000) 1 SCC 471, ***State of Maharashtra v. Bharat Fakira Dhiwar*** MANU/SC/0700/2001 : (2002) 1 SCC 622, ***State of Maharashtra v. Mansingh*** MANU/SC/1159/2004 : (2005) 3 SCC 131 and ***Santosh Kumar Singh*** MANU/SC/0801/2010 : (2010) 9 SCC 747);

(6) the crime was not premeditated (***Kumudi Lal v. State of U.P.*** MANU/SC/0275/1999 : (1999) 4 SCC 108, ***Akhtar v. State of U.P.*** MANU/SC/1008/1999 : (1999) 6 SCC 60, ***Raju v. State of Haryana*** MANU/SC/0324/2001 : (2001) 9 SCC 50 and ***Amrit Singh v. State of Punjab*** MANU/SC/8642/2006 : (2006) 12 SCC 79);

(7) the case was one of circumstantial evidence (***Mansingh*** MANU/SC/1159/2004 : (2005) 3 SCC 131 and ***Bishnu Prasad Sinha*** MANU/SC/7022/2007 : (2007) 11 SCC 467).

In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (***Kumudi Lal*** MANU/SC/0275/1999 : (1999) 4 SCC 108) and in another case because the trial court had awarded life sentence but the High Court enhanced it to death (***Haresh Mohandas Rajput*** MANU/SC/1099/2011 : (2011) 12 SCC 56).

495. In the same judgment in ***Shankar Kisanrao Khade v. State of Maharashtra*** MANU/SC/0476/2013 : (2013) 5 SCC 546, **Justice *Madan B. Lokur (concurring)*** while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and murder of a minor, discussed the sentencing policy of India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the prima facie difference in the standard of yardsticks adopted by two organs of the

government viz. Judiciary and the Executive in treating the life of convicts convicted of an offence punishable with death and recommended consideration of Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under:

148. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.

In ***Shankar Kisanrao's case***, it was observed by **Justice Madan B. Lokur** that ***Dhananjay Chatterjee's case*** was perhaps the only case where death sentence imposed on the accused, who was convicted for rape was executed.

496. Another significant development in the sentencing policy of India is the 'victim-centric' approach, clearly recognised in ***Machhi Singh (Supra)*** and re-emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: ***Gurvail Singh @ Gala and Anr. v. State of Punjab*** MANU/SC/0111/2013 : (2013) 2 SCC 713; ***Mohfil Khan and Anr. v. State of Jharkhand*** MANU/SC/0915/2014 : (2015) 1 SCC 67; ***Purushottam Dashrath Borate and Anr. v. State of Maharashtra*** MANU/SC/0583/2015 : (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In ***Mohfil Khan*** (supra), this Court specifically observed that '***it would be the paramount duty of the Court to provide justice to the incidental victims of the crime - the family members of the deceased persons.***

497. The law laid down above, clearly sets forth the sentencing policy evolved over a period of time. I now proceed to analyse the facts and circumstances of the present case on the anvil of above-stated principles. To be very precise, the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim's family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case- ***'death sentence', life sentence commutable to 14 years' or 'life imprisonment for the rest of the life'.***

498. The question would be whether the present case could be one of the rarest of rare cases warranting death penalty. Before the court proceed to make a choice whether to award death sentence or life imprisonment, the court is to draw up a balance-sheet of aggravating and mitigating

circumstances attending to the commission of the offence and then strike a balance between those aggravating and mitigating circumstances. Two questions are to be asked and answered: (i) Is there something uncommon about the crimes which regard sentence of imprisonment for life inadequate; (ii) Whether there is no alternative punishment suitable except death sentence. Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large.

499. We are here concerned with the award of an appropriate sentence in case of brutal gang-rape and murder of a young lady, involving most gruesome and barbaric act of inserting iron rods in the private parts of the victim. The act was committed in connivance and collusion of six who were on a notorious spree running a bus, showcasing as a public transport, with the intent of attracting passengers and committing crime with them. The victim and her friend were picked up from the Munirka bus stand with the mala fide intent of ravishing and torturing her. The accused not only abducted the victim, but gang-raped her, committed unnatural offence by compelling her for oral sex, bit her lips, cheeks, breast and caused horrifying injuries to her private parts by inserting iron rod which ruptured the vaginal rectum, jejunum and rectum. The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half naked in the wintery night, with grievous injuries.

500. If we look at the aggravating circumstances in the present case, following factors would emerge:

• Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang-rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the complainant (P.W. 1) naked in the cold wintery night and trying to run the bus over them.

• The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflects the threat to which the society would be posed to, in case the accused are not appropriately punished. More so, it reflects that there is no scope of reform.

• The horrific acts reflecting the in-human extent to which the accused could go to satisfy their lust, being completely oblivious, not only to the norms of the society, but also to the norms of humanity.

• The acts committed so shook the conscience of the society.

501. As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/Appellants namely A-3 Akshay, A-4 Vinay and A-5 Pawan

placed on record, through their individual affidavits dated 23.03.2017, following mitigating circumstances:

(a) Family circumstances such as poverty and rural background,

(b) Young age,

(c) Current family situation including age of parents, ill health of family members and their responsibilities towards their parents and other family members,

(d) Absence of criminal antecedents,

(e) Conduct in jail, and

(f) Likelihood of reformation.

In his affidavit, accused Mukesh reiterated his innocence and only pleaded that he is falsely implicated in the case.

502. In ***Purushottam Dashrath Borate and Anr. v. State of Maharashtra*** MANU/SC/0583/2015 : (2015) 6 SCC 652, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

503. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in ***Om Prakash v. State of Haryana*** MANU/SC/0129/1999 : (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

504. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "rarest of rare cases". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

505. In the present case, there is not even a hint of hesitation in my mind with respect to the aggravating circumstances outweighing the mitigating circumstances and I do not find any justification to convert the death sentence imposed by the courts below to 'life imprisonment for the rest of the life'. The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang-rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of '**rarest of rare case**' where the question of any other punishment is 'unquestionably foreclosed'. If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang-rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the '*rarest of rare category*', then one may wonder what else would fall in that category. On these reasoning recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons.

506. The incident of gang-rape on the night of 16.12.2012 in the capital sparked public protest not only in Delhi but nation-wide. We live in a civilized society where law and order is supreme and the citizens enjoy inviolable fundamental human rights. But when the incident of gang-rape like the present one surfaces, it causes ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom which they should have felt in the ordinary course of a civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively.

507. The statistics of National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper.

508. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "the best thermometer to the progress of a nation is its treatment of its women." Crime against women not only affects women's self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye-opener for a mass movement "**to end violence against women" and "respect for women and her dignity**" and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can

be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same.

Back to Index

MANU/SC/0293/2018

Neutral Citation: 2018/INSC/268

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 3330 of 2018 (Arising out of SLP (C) No. 11967 of 2016), Civil Appeal No. 3331 of 2018 (Arising out of SLP (C) No. 17201 of 2016) and Civil Appeal No. 3332 of 2018 (Arising out of SLP (C) No. 30776 of 2016)

Decided On: 27.03.2018

Appellants: Municipal Corporation, Ujjain and Ors. **Vs.** Respondent: BVG India Limited and Ors.

Hon'ble Judges/Coram:

Ranjan Gogoi and R. Banumathi and Mohan M. Shantanagoudar, JJ.

Subject: Commercial

Prior History / High Court Status:

From the Impugned Judgment and order dated 07.04.2016 of the High Court of Madhya Pradesh, Jabalpur Bench at Indore in Writ Petition No. 4676 of 2015 (MANU/MP/1113/2016)

Case Category:

MATTERS RELATING TO LEASES, GOVT. CONTRACTS AND CONTRACTS BY LOCAL BODIES - TENDERS INVITED OR CONTRACTS AWARDED/LEASES GRANTED OR DETERMINED BY LOCAL BODIES

Case Note:

Commercial - Tender - Validity thereof - Appellant had issued notice inviting tender for appointment of agency to carry out work related to solid waste management - Present appeal filed against order whereby First Respondent was awarded contract despite issuance of show cause notices by technical expert against him - Whether under scope of judicial review, High Court could ordinarily question judgment of expert consultant on issue of technical qualifications of bidder - Whether High Court was justified in independently evaluating technical bids and financial bids of parties, as appellate authority, for coming to conclusion

Facts:

Appellant had issued notice inviting tender for appointment of agency to carry out "Municipal Solid Waste Door to Door Collection and Transportation". Tender was to be awarded based on final score arrived at by taking total of weighted scores of technical and financial evaluations. First Respondent scored low on technical evaluation whereas Third Respondent got more score than First Respondent. On final analysis based on technical and financial weighted scores Third Respondent was awarded contract. Such award of contract was questioned by First Respondent before High Court which was allowed. During pendency Court granted interim order staying operation of impugned order of High Court, consequent upon which successful bidder was awarded contract. Hence, present appeal filed by Appellants.

Held, while allowing the appeals:

(i) First Respondent had submitted its bid as individual bidder and not as consortium and hence certificate of third party could not be considered for benefit of meeting technical qualification of First Respondent. First Respondent had suppressed 73 show cause notices issued against it in respect of work relating to solid waste management. Despite suppression by First Respondent, technical expert from its own sources gathered information and found that 73 show cause notices were issued against First Respondent which reveal that First Respondent had not shown due diligence in work of door to door collection of solid waste. Hence, conclusion reached by High Court that it was not open for technical committee to *suo motu* take into consideration show cause notices while evaluating technical bid was not correct. The due diligence and experience of the expert consultant ought to have been appreciated by High Court keeping in mind the object to which bids were invited. First Respondent did not have good track record and therefore such notices were necessarily taken into consideration by technical expert. In all fairness, First Respondent ought to have disclosed these factors in its bid. [44]

(ii) If bidder had faced number of show-cause notices from various municipal corporations in matter of non-performance of door to door collection of garbage, Court could not compel authority to choose such undeserving company to carry out work. Public interest must be safeguarded. Since public was directly interested and would be affected if work entrusted was not carried out appropriately, and as technical expert had found that First Respondent would not be suitable company to be entrusted work inasmuch as it had faced show-cause notices from different Municipal Corporations, High Court could not have interfered with decision taken by authority. Impugned order of High Court was set aside. [48]

Disposition:
Appeal Allowed

JUDGMENT

Mohan M. Shantanagoudar, J.

1. Leave granted.

2. The Order dated 07.04.2016 passed by the High Court of Madhya Pradesh, Bench at Indore, allowing the Writ Petition No. 4676 of 2015 filed by B.V.G. India Limited, Pune (Respondent No. 1 in the civil appeal arising out of SLP(C) No. 11967 of 2016), consequently setting aside the contract awarded in favour of Global Waste Management Cell Private Limited (Respondent No. 3 in the civil appeal arising out of SLP(C) No. 11967 of 2016) by Ujjain Municipal Corporation for door to door collection and transportation of Municipal Solid Waste, is the subject matter of these appeals.

3. Heard Shri Vikas Singh, learned senior Counsel appearing for Municipal Corporation, Shri Shyam Divan and Shri Guru Krishnakumar, learned senior Counsel representing Global Waste Management Cell Private Limited, Shri Kailash Vasdev, learned senior Counsel for M/s. Eco Save Systems Private Limited (Technical Expert) and Shri Gourab Banerji, learned senior Counsel for BVG India Limited.

4. Brief facts leading to these appeals are as under:

Ujjain Municipal Corporation (Appellant in civil appeal arising out of SLP(C) No. 11967 of 2016) had issued Notice Inviting Tender (for short, "NIT") dated 01.05.2015 for the appointment of an agency to carry out "Municipal Solid Waste Door to Door Collection and Transportation" for a period of 10 years in the city of Ujjain. The tender notice was for inviting online bids from the eligible bidders following a two envelope system i.e. one for technical bid and Anr. for financial bid. The Municipal Corporation had appointed a technical expert in Waste Management Solution viz. M/s. Eco Save System Pvt. Ltd. (Respondent No. 2 in the civil appeal arising out of SLP(C) No. 11967 of 2016) for scrutinising and evaluating the technical & financial bids. The last date of submission of tender was 21.05.2015. However, a corrigendum was issued and the date of submitting online tenders was extended up to 01.06.2015. The opening of the technical bid was fixed for 02.06.2015 and the opening of the financial bid on 04.06.2015. Three bidders remained for consideration of the award of tender by the Municipal Corporation. The technical bids of the parties were analysed thoroughly by the technical expert and marks were awarded as per the specifications of the NIT.

Clause 1 of the eligibility criteria of the NIT provided that the company must have been registered five years prior to 01.05.2010. Clause 9 of the eligibility criteria of the NIT permitted a consortium of two members, but with the distinct experience requirement on the subject matter. Article III of the NIT specified that technical eligibility would have a weightage of 80% and weightage for financial score was 20%. The marks obtained in the technical evaluation would contribute to 80% and financial evaluation would contribute to 20% of the final marks for deciding the L1 bidder. The technical parameters which were required to be measured were also indicated in Article III of the NIT. The financial bids of only those bidders who secured at least 60% marks in the technical evaluations would be opened.

The tender was to be awarded based on the final score arrived at by taking the total of the weighted scores of technical and financial evaluations as per the criteria mentioned in the NIT at Article III. Respondent No. 1 scored low on technical evaluation inasmuch as it got 58.94 in the weighted score, whereas the successful bidder i.e. Respondent No. 3 got a weighted technical score of 67.36. On a final analysis based on technical and financial weighted scores, Global Waste Management

Cell Pvt. Ltd. got first rank (L1 bidder) amongst the three bidders by getting the highest score. Hence, it was awarded the contract. Such award of contract was questioned by the unsuccessful bidder (B.V.G. India Limited, L2 bidder) before the High Court by filing the Writ Petition, which came to be allowed by the impugned judgment.

During the pendency of these matters, on 26.04.2016, this Court granted an interim order in favour of the successful bidder, namely Respondent No. 3, staying the operation of the impugned order of the High Court, consequent upon which the successful bidder was awarded the contract and is discharging the duties assigned.

5. The questions involved in these appeals are:

a Whether under the scope of judicial review, the High Court could ordinarily question the judgment of the expert consultant on the issue of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

b Whether a bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture can rely upon the technical qualifications of any third party for its qualification;

c Whether the High Court is justified in independently evaluating the technical bids and financial bids of the parties, as an appellate authority, for coming to the conclusion?

6. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by this Court in ***Tata Cellular*** v. ***Union of India***, MANU/SC/0002/1996 : (1994) 6 SCC 651, wherein this Court observed that

the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down.

7. The modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or a quasi-administrative sphere. However, the decision must not only be tested by the

application of the Wednesbury principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by *mala fides*. (See the judgment in the case of ***Master Merin Services (P) Ltd.*** v. ***Metcalfe & Hodgkinson*** MANU/SC/0300/2005 : (2005) 6 SCC 138).

8. In ***Sterling Computers Ltd.*** v. ***M & N Publications Ltd.*** MANU/SC/0439/1993 : (1993) 1 SCC 445, this Court held as under:

18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of Chief Constable of the *North Wales Police* v. *Evans* [MANU/UKHL/0007/1982 : (1982) 3 All ER 141] where it was said that: (p. 144a)

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, *Chief Constable of the North Wales Police* v. *Evans* [MANU/UKHL/0007/1982 : (1982) 3 All ER 141] the courts can certainly examine whether "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision.

9. In ***Raunaq International Limited*** v. ***I.V.R. Construction Limited***, MANU/SC/0770/1998 : (1999) 1 SCC 492, this Court dealt with the matter in some detail and held in (para 9) as under:

9. .....In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or

requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Whenever the State or public body or the Agency of the State enters into such contract, an element of public law or public interest may be involved even in such a commercial transaction. In that very judgment, i.e., ***Raunaq International Limited*** (supra), the elements of public interest are also noted. It is held thus:

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work-thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene Under Article 226 in disputes between two rival tenderers.

10. The judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or

decision made by the authority is not *mala fide* and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision; and if the public interest is not affected, there should be no interference Under Article 226.

11. It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, *inter alia*, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. The State, its corporations, instrumentalities and agencies have a public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary power Under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere. (See the judgment in the case of ***Air India Limited*** v. ***Cochin International Airport Limited*** MANU/SC/0055/2000 : (2000) 2 SCC 617).

12. In ***U.P. Financial Corporation.*** v. ***Naini Oxygen & Acetylene Gas Ltd.*** MANU/SC/0638/1995 : (1995) 2 SCC 754, this Court held that it was not a matter for the courts to decide as to whether the Financial Corporation should invest in the defaulting unit, to revive or to rehabilitate it and whether even after such investment the unit would be viable or whether the Financial Corporation should realise its loan from the sale of the assets of the Company. The Court observed that a Corporation being an independent autonomous statutory body having its own constitution and Rules to abide by, and functions and obligations to discharge, it is free to act according to its own right in the discharge of its functions. The views it forms and the decisions it takes would be on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. In such a situation, more so in commercial matters, the Courts should not risk their judgment for the judgments of the bodies to which that task is assigned. The Court further held that:

Unless its action is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable.

13. In ***U.P. Financial Corporation*** v. ***Gem Cap (India) Pvt. Ltd. and Ors.*** MANU/SC/0481/1993 : (1993) 2 SCC 299, it was observed that the High Court while exercising its jurisdiction Under Article 226 of the Constitution cannot sit as an appellate authority over the acts and deeds of the corporation and seek to correct them, and that the doctrine of fairness, evolved in administrative

law, was not supposed to convert the writ Courts into appellate authorities over administrative authorities. It is further observed by this Court that fairness is not a one way street, and fairness required of the corporation cannot be carried to the extent of disabling it from recovering what is due to it.

14. In ***Karnataka State Financial Corporation*** v. ***Micro Cast Rubber & Allied Products (P) Ltd. and Ors.*** MANU/SC/1221/1996 : (1996) 5 SCC 65 the issue was whether the financial corporation was wrong in rejecting the offer given by the borrower which, after proper evaluation, was considered lower than the offer made by the purchasers. This Court, while upholding the action of the financial corporation, held that the action of the said financial corporation should not be interfered with if it has acted broadly in consonance with the guidelines.

15. In ***Karnataka State Industrial Investment & Development Corporation Limited v. Cavalet India Ltd. and Ors.*** MANU/SC/0234/2005 : (2005) 4 SCC 456, this Court after taking into consideration various questions on various subjects laid down the following legal principles, viz.-

(*i*) The High Court while exercising its jurisdiction Under Article 226 of the Constitution does not sit as an appellate authority over the acts and deeds of the Financial Corporation and seek to correct them. The doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities.

(*ii*) In a matter between the Corporation and its debtor, a writ court has no say except in two situations:

a. There is a statutory violation on the part of the Corporation, or

b. Where the Corporation acts unfairly i.e. unreasonably.

(*iii*) In commercial matters, the courts should not risk their judgments for the judgments of the bodies to which that task is assigned.

(*iv*) Unless the action of the Financial Corporation is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however, more prudent, commercial or businesslike it may be, for the decision of the Financial Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable.

(*v*) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

(*vi*) Public auction is not the only mode to secure the best price by inviting maximum public participation, tender and negotiation could also be adopted.

(*vii*) The Financial Corporation is always expected to try and realise the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity,

wherever possible and if any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action Under Section 29 of the Act is called for. Thereafter, the modalities for disposal of the seized unit have to be worked out.

(*viii*) Fairness cannot be a one-way street. The fairness required of the Financial Corporations cannot be carried to the extent of disabling them from recovering what is due to them. While not insisting upon the borrower to honour the commitments undertaken by him, the Financial Corporation alone cannot be shackled hand and foot in the name of fairness.

(*ix*) Reasonableness is to be tested against the dominant consideration to secure the best price.

16. Likewise, in ***B.S.N. Joshi and Sons Ltd.*** v. ***Nair Coal Services Ltd.*** MANU/SC/8598/2006 : (2006) 11 SCC 548, this Court while summarising the scope of judicial review and the interference of superior courts in the matter of award of contracts, observed thus:

65. We are not oblivious of the expansive role of the superior courts in judicial review.

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(*i*) if there are essential conditions, the same must be adhered to;

(*ii*) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(*iii*) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(*iv*) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(*v*) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(*vi*) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(*vii*) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

17. In ***Tata Cellular*** (supra), this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, by observing in para 94 thus:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiation through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

In that very judgment, this Court proceeded to observe that there are inherent limitations in the exercise of the power of judicial review of contractual powers. This Court observed that the duty to act fairly will vary in extent, depending upon the nature of the cases to which the said principle is sought to be applied. The State has the right to refuse the lowest or any other tender, provided that it tries to get the best person or the best quotation.

18. This Court in ***Delhi Science Forum*** v. ***Union of India*** MANU/SC/0360/1996 : (1996) 2 SCC 405 observed in para 13 as follows:

13.....While exercising the power of judicial review even in respect of contracts entered on behalf of the Government or authority, which can be held to be State within meaning of Article 12 of the Constitution courts, have to address while examining the grievance of any Petitioner as to whether the decision has been vitiated on one ground or the other. It is well-settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the person who questions the validity thereof. This onus is not discharged only by raising a doubt in

the mind of the court, but by satisfying the court that the authority or the body which had been vested with the power to take decision has adopted a procedure which does not satisfy the test of Article 14 of the Constitution or which is against the provisions of the statute in question or has acted with oblique motive or has failed in its function to examine each claim on its own merit on relevant considerations. Under the changed scenarios and circumstances prevailing in the society, courts are not following the Rule of judicial self-restraint. But at the same time all decisions which are to be taken by an authority vested with such power cannot be tested and examined by the court. The situation is all the more difficult so far as the commercial contracts are concerned. Parliament has adopted and resolved a national policy towards liberalisation and opening of the national gates for foreign investors.....

19. In ***Central Coalfields Ltd.*** v. ***SLL-SML (Joint Venture Consortium)*** MANU/SC/0919/2016 : (2016) 8 SCC 622, it was observed as follows:

38. In G.J. Fernandez v. State of Karnataka [MANU/SC/0175/1990 : (1990) 2 SCC 488] both the principles laid down in Ramana Dayaram Shetty MANU/SC/0048/1979 : (1979) 3 SCC 489 were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable". Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in Ramana Dayaram Shetty sense.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber."

20. This Court also made an observation on judicial interference in ***Afcons Infrastructure Ltd.*** v. ***Nagpur Metro Rail Corporation Ltd. and Ors.*** MANU/SC/1003/2016 : (2016) 16 SCC 818, as hereunder:

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give

an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

Similar observations were made in the cases of ***Jagdish Mandal*** v. ***State of Orissa and Ors.*** MANU/SC/0090/2007 : (2007) 14 SCC 517, and ***Meerut Development Authority*** v. ***Assn. of Management Studies*** MANU/SC/0616/2009 : (2009) 6 SCC 171.

21. Thus, only when a decision making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decisions, power of judicial review can be exercised. However, if it is *bona fide* and in public interest, the Court will not interfere in the exercise of power of judicial review even if there is a procedural lacuna. The principles of equity and natural justice do not operate in the field of commercial transactions. Wherever a decision has been taken appropriately in public interest, the Court ordinarily should exercise judicial restraint. When a decision is taken by the concerned authority upon due consideration of the tender document submitted by all tenderers on their own merits and it is ultimately found that the successful bidder had in fact substantially complied with the purpose and object for which the essential conditions were laid down, the same may not ordinarily be interfered with.

22. As mentioned *supra*, the Ujjain Municipal Corporation with the object of keeping Ujjain city clean wanted to appoint a suitable agency for "municipal solid waste door to door collection and transportation". In that regard, NIT was issued. There cannot be any dispute that urbanization contributes to enhanced municipal solid waste generation; unscientific handling of municipal solid waste degrades the urban environment and causes health hazards. Various studies have been conducted in respect of municipal solid waste management in urban India, and reports have been filed. Despite the same, municipalities are finding it difficult for proper management of municipal solid waste. Municipal solid waste management, a critical element towards sustainable metropolitan development, comprises segregation, storage, collection, relocation, carriage, processing and disposal of solid waste to minimize its adverse impact on the environment. Unmanaged, municipal solid waste becomes a factor for the propagation of innumerable ailments. Each of the leading municipal corporations/municipalities in India is trying its best to minimize the adverse impact on the environment through planning of its own to manage the solid waste. Certain cities started door to door collection of solid waste through agencies appointed by them. The studies made so far disclose that most cities in India cannot claim 100% segregation of waste at the dwelling unit and on an average only 70% waste collection is observed, while the remaining 30% is again mixed up and lost in the urban environment. Be that as it may, the waste collected will have to be scientifically processed. Environment friendliness, cost effectiveness, and acceptability to the local community are major attributes to achieve an efficient solid waste management system. Waste produced by houses is usually transferred into communal bins. Street sweepings also find their way to community bins. These community waste bins are also used by other essential commercial sectors in the vicinity of disposal bins along with household wastes except where some commercial complexes or industrial units engage municipal authorities for the transfer of their waste to disposal sites on payment. Keeping in mind the adverse impact of health hazards in case the municipal solid waste is not managed properly, the municipal corporation might plan to float tenders to appoint an agency for municipal solid waste door to door collection and transportation. Necessarily, while choosing the appropriate agency, the afore-mentioned object has

to be kept in mind by the municipal corporation. So also, it is the duty of the Courts to keep such factors in mind while deciding the subject matter of allocation of contract by the municipal corporation.

The Solid Waste Management Rules, 2016 (hereinafter referred to as the '2016 Rules') apply to every urban local body etc., and the areas under the control of Indian Railways, airports, airbases, ports, harbours etc. They are also applicable to the notified industrial townships, places of pilgrims, religious and historical importance as may be notified by respective State Governments from time to time. Rule 22 of the 2016 Rules mandate the time frame for implementation. It is specified under Rule 22 of the 2016 Rules that necessary infrastructure for implementation of these Rules shall be created by the local bodies and other concerned authorities by directly or engaging agencies within the time frame specified in the said rules. The Rule further mandates that the local bodies and other concerned authorities shall ensure door to door collection of segregated waste and its transportation in covered vehicles to processing or disposal facilities. This task has to be completed within two years from the date of coming into force of the Rules. Prior to these Rules, Schedule II to the Municipal Solid Waste (Management and Handling) Rules, 2000 provided that the municipality shall undertake the house-to-house collection of municipal solid wastes through community bin collection, house-to-house collection, or collection on regular pre-informed timings and scheduling by using the bell-ringing of a musical vehicle without exceeding the permissible noise levels.

23. Shri Vikas Singh, representing the Municipal Corporation contends, that the High Court has erred on four points, (i) Pimpri Chinchwad Municipal Corporation (PCMC) Certificate submitted by BVG India Limited (Appellant before the High Court) has been relied upon by the High Court erroneously inasmuch as the purported experience certificate is not that of BVG India Limited but the same was of BVG Kshitij Waste Management Services Private Limited and no information whatsoever was given of the relationship/linkage of BVG Kshitij Waste Management Services Private Limited with BVG India Limited; (ii) the High Court itself has acted as an appellate authority in evaluating the tenders and has erred in increasing the marks for responsiveness from 5 to 10; (iii) method and formulae for evaluation of financial bid has been wrongly applied by the High Court; and (iv) The High Court has wrongly recorded that the Mira Bhayander certificate produced by the successful bidder, namely, Global Waste Management Cell Private Limited, was subsequent to technical evaluation. Shri Shyam Divan and Shri Guru Krishnakumar, appearing on behalf of the Appellants, while supporting the arguments of Shri Vikas Singh, vehemently contended that the High Court practically has stepped into the shoes of the technical expert for coming to a different conclusion by allotting marks inconsistent with the spirit of the tender document and the established principle followed by the experts in the field in such matters.

24. *Per contra*, Shri Gourab Banerji, learned senior Counsel argued in support of the judgment of the High Court and contended that the High Court is justified in correcting the errors committed by the technical expert while rejecting the bid of BVG India Limited.

Shri Gourab Banerji, relying upon the financial bid submitted by BVG India Limited, which is the lowest one, contends that the bid of BVG India Limited should have been accepted by the committee inasmuch as the said bid if accepted would safeguard the financial interest of the

corporation. In other words, he submits that the work to be carried out, if assigned to BVG, India Limited would be carried out at cheaper rates as compared to the successful bidder.

25. Shri Kailash Vasdev, arguing on behalf of technical expert, contends that the expert has acted in fairest of fair manner and has kept in mind the public interest; one of the Directors of Respondent No. 2 is an Agro-Environment Scientist and has 22 years of experience in the field of Municipal Solid Waste Management Projects. The technical expert provides Technical Consultancy to various Municipal Corporations all over India, State Governments, Nodal Agencies etc. The technical expert has already successfully commissioned over 77 Municipal Solid Waste Management assignments. The Respondent has duly applied its mind while evaluating the technical bids and financial bids. It has meticulously and carefully considered all relevant aspects and given a report. There are no allegations of *mala fides* or bias against the expert wherever it has carried on its work as an expert. In the matter on hand also, the expert has acted true to the office it held and has not acted contrary to the confidence reposed on it by the corporation and by parties.

26. The contentions of Shri Banerji cannot be accepted, because the bid should be accepted not only based on the outcome of the financial bid, but also based on the evaluation of the technical bid. Moreover, in the matter on hand, the technical bid will have 80% marks whereas the financial bid will have 20% marks. This clearly shows that the municipal corporation has given due importance to the quality and not the financial aspect, keeping in mind the object for which bids are invited. A Constitution Bench of this Court in ***Trilochan Mishra Etc*** v. ***State of Orissa and Ors.*** MANU/SC/0058/1971 : (1971) 3 SCC 153 held that the Government most certainly has a right to enter into a contract with a person well known to it, and especially one who has faithfully performed its contracts in the past in preference to an undesirable or unsuitable or untried person.

27. In ***Ramana Dayaram Shetty*** v. ***International Airport Authority of India*** MANU/SC/0048/1979 : (1979) 3 SCC 489, this Court spoke of the interpretation of essential conditions in a tender as follows:

7...It is a well settled Rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary Rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable....

28. It may also be pertinent to note the judgment of this Court in ***Delhi Science Forum*** (*supra*), where it observed as follows:

13.....The question of awarding licences and contracts does not depend merely on the competitive rates offered; several factors have to be taken into consideration by an expert body which is more familiar with the intricacies of that particular trade. While granting licences a statutory authority or the body so constituted, should have latitude to select the best offers on terms and conditions to

be prescribed taking into account the economic and social interest of the nation. Unless any party aggrieved satisfies the court that the ultimate decision in respect of the selection has been vitiated, normally courts should be reluctant to interfere with the same.

29. In ***Montecarlo Ltd.*** v. ***NTPC Ltd.*** MANU/SC/1313/2016 : (2016) 15 SCC 272, this Court highlighted the freedom of the owner to decide in matters of tenders as follows:

26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly, in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

30. In ***Central Coalfields*** (*supra*), the Court held that the employer can decide to even deviate from the NIT:

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

31. The reason for allowing public authorities such wide leeway in matters of contracts and tenders was elucidated in ***Sterling Computers*** (*supra*). Therein, the Court observed as follows:

12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

32. That the authorities should be given latitude in making a decision on the offers was also observed in ***Sterling Computers*** (*supra*). Therein, the Court observed that any judicial interference amounts to encroachment on the exclusive right of the executive to take a decision.

33. In the matter on hand, admittedly, the successful bidder was more technically qualified and it got more marks. Normally, the contract could be awarded to the lowest bidder if it is in the public interest. Merely because the financial bid of BVG India Ltd. is the lowest, the requirement of compliance with the Rules and conditions cannot be ignored.

34. As rightly contended by Respondent No. 3, a statutory authority granting licences should have the latitude to select the best offer on the terms and conditions prescribed. The technical expert in his report categorically stated that, "All the above aspects demand high level of Technicalities and Expertise rather than just depending on lowest financial price quote for a material transport." As clarified earlier, the power of judicial review can be exercised only if there is unreasonableness, irrationality or arbitrariness and in order to avoid bias and *mala fides*. This Court in ***Afcons Infrastructure*** (*supra*) held the same in the following manner:

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

35. Evaluating tenders and awarding contracts are essentially commercial transactions/contracts. If the decision relating to award of contract is in public interest, the Courts will not, in exercise of

the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest. Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with firmness. The exercise of the power of judicial review should be avoided if there is no irrationality or arbitrariness. In the matter on hand, we do not find any illegality, arbitrariness, irrationality or unreasonableness on the part of the expert body while in action. So also, we do not find any bias or *mala fides* either on the part of the corporation or on the part of the technical expert while taking the decision. Moreover, the decision is taken keeping in mind the public interest and the work experience of the successful bidder.

36. As held in ***Tata Cellular*** (*supra*), the terms of the tender are not open to judicial scrutiny as the invitation to tender is a matter of contract. Decisions on the contract are made qualitatively by experts. M/s. Eco Save Systems Private Limited [Respondent No. 2 in Civil Appeal arising from SLP (C) No. 11967/2016] is a project consultant and technical advisor of the Ujjain Municipal Corporation. It provides technical consultancy and advisory services. The documents produced along with the counter affidavit filed by Respondent No. 2 would show that Respondent No. 2 is an expert in municipal solid waste management. It is brought to our notice that Respondent No. 2 has developed a Detailed Project Report (DPR) cum Master Plan of Ujjain City for up-gradation, systematization and abidance of the Municipal Solid Waste Rules, 2000 for the period 2012 to 2042, and the Jawaharlal Nehru National Urban Renewal Mission is stated to have sanctioned 35.88 crores for the purpose. There is no dispute by any of the parties that Respondent No. 2 is an expert in municipal solid waste management. We also hasten to add that there are no allegations of bias or *mala fides* against the technical committee, though grounds are taken by BVG India Limited before the High Court that the decision of the expert committee is not proper.

37. In the subject NIT, out of the 9 eligibility criteria governing capability, expertise and efficiency of tenderers, criteria 1 to 5 have a graded marking system based on unit-measurement of municipal solid waste quantities handled and the time period of such work, duly supported by certificates mentioned in Annexure-7 of the tender document. All the participants in the tender process have followed the said procedure for technical eligibility evaluation. The eligibility parameters for the participants are prescribed in Article III of NIT and criteria 6 and 7 mentioned therein are based on the submission of relevant information, required data, write ups and disclosures proving the tenderer's expertise, experiences and responsiveness to the NIT. The eligibility criteria is based on "track record of good performance, responsiveness for SWM tender obligations and free of backouts/defaults during last 3 years", for which details have to be furnished by the participants in the process as per Annexures 12 and 13. Furthermore, Annexure 13 is very specific regarding information on litigations, show-cause notices, delays, work suspension etc., and is required in the form of an undertaking duly stamped on a Non-Judicial Stamp Paper of Rs. 100/-.

38. Records reveal that the evaluation of technical eligibility was completed by the technical expert between 3.6.2015 and 6.6.2015 and copies were submitted to the Executive Engineer, Ujjain Municipal Corporation. Thereafter, financial bids of all the three technical qualified bidders were opened on 16.06.2015 and financial results were communicated to the project consultant for further analysis. The final scores dated 18.06.2015 arrived at by the technical expert of all the three bidders are as under:

1. Evaluation of Technical Bid:

Sl.No.	Name of Tenderer	Marks obtained out of 95	On 100% basis	After weightage Factor of 80%	Rating as Technical score TL
1.	M/s Global Waste Mgt.	80.00	84.21	67.36	TL1
2.	M/s BVG India Ltd.	70.00	73.68	58.94	TL2
3.	M/s Earth Connect Transway	65.00	68.42	54.73	TL3

Evaluation of financial bid:

Sl.No.	Parameters	Tenderer: M/s Global Waste Mgt.	Tendererer: M/s BVG India Ltd.	Tendererer: M/s Earth Connect Transway
1.	Price quote Rs./NT of MSW	1710.00	1454.00	1978.00
2.	Marks obtained in out of 20 max	17.00	20.00	14.67

2. Combined overall score:

Sl.No.	Parameters	Tenderer: M/s Global Waste Mgt.	Tendererer: M/s BVG India Ltd.	Tendererer: M/s Earth Connect Transway
5.	Combined	84.36	78.94	69.40
	overall score (Tech + Fin)			
6.	Highest marks = L1	L1	L2	L3

39. Since Global Waste Management Cell Private Limited, i.e., Appellant in Civil Appeal arising from SLP (C) No. 11967 of 2016 secured the highest score, i.e., 84.36, it emerged as the overall eligible bidder for awarding the project as per the terms of NIT. Global Waste Management Cell Private Limited has experience of 10 years and has demonstrated an ability for good

responsiveness to tender. Consequently, it was declared L 1 as per the terms of the NIT. As a decision was qualitatively arrived at by the technical expert Respondent No. 2, the High Court need not have gone into the merits of such decision as an appellate authority, especially when there was no bias or *mala fide*.

40. It is necessary to note that in Annexure 1 to the NIT at serial No. 11, the bidder was required to set out details of any other company/firm involved as a consortium member to which Respondent No. 1-BVG India Limited replied in the negative, which means no other company/firm was involved as a consortium member with BVG India Limited in the process in question. In other words, BVG India Limited submitted the bid on its own unaccompanied by any of the consortium member. Despite the same, BVG India Limited (Respondent No. 1) furnished the experience certificate of BVG Kshitij Waste Management Services Private Limited. No information whatsoever was given of the relationship/linkage of BVG Kshitij and Respondent No. 1-BVG India Limited. Therefore, reliance placed by the Respondent No. 1 on the purported experience certificate issued in the name of BVG Kshitij Waste Management Services Pvt. Limited would not come to the help of the Respondent No. 1 to show its work experience. The Pimpri Chinchwad Municipal Corporation (PCMC) Certificate dated 24.10.2013 is in Marathi and the same discloses that the work order was issued on 2.3.2012. The PCMC Certificate thus neither shows three years' experience of BVG India Limited nor that BVG India Limited was carrying out garbage/waste collection of more than 300 MT per day. Since Respondent No. 1 has categorically mentioned in its bid under the column "basic information about tenderer" that no other company (either joint venture or consortium) is involved with BVG India Limited, Respondent No. 1-BVG India Limited could not have relied upon the purported experience certificate issued in the name of BVG Kshitij Waste Management Services Pvt. Ltd.

Other certificates submitted by the Respondent No. 1 also did not satisfy the eligibility requirement.

41. Moreover, the certificate dated 21.4.2015 relied upon by the High Court in paragraph 16 of the impugned judgment was not part of the original bid document submitted by BVG India Limited and it was submitted before the High Court for the first time as per annexure P6 of the writ petition. Since such certificate was not part of the original bid document, the High Court was not correct in relying upon such certificate produced by BVG India Limited for the first time before it. The Courts will not permit any of the participants in the tender process to alter or supplement the bid document. In the absence of any document evidencing the experience in the field in question in favour of BVG India Ltd., the Appellants are justified in contending that the High Court is not correct in increasing the marks from 5 to 7 under the head of number of years of experience and expertise. So also, the High Court was not correct in increasing the marks from 10 to 15 so far as the quantity of municipal solid waste handled per day through door to door collection is concerned. In para 26 of the impugned order, the High Court has evaluated technical eligibility on its own as if the appellate authority and has increased the marks of Respondent No. 1 for experience from 5 to 7 and for quantity handled per day from 10 to 15, as mentioned *supra*. The High Court's observation in para 18 that the certificate issued by PCMC ought to have been considered because it shows the collection of 335 MT per day of municipal solid waste, appears to be incorrect in the light of our discussion made in the afore-mentioned paragraphs. So far as the three documents

relied upon by Respondent No. 1 in respect of CIDCO are concerned, those documents do not state that BVG India Limited was handling 300 MT per day municipal solid waste on door to door basis.

42. The High Court was also not justified in increasing the marks for responsiveness from 5 to 10. The High Court relied upon the documents pertaining to BBMP and PCMC and has increased the marks from 5 to 10. In our considered opinion, the High Court could not have increased the marks for responsiveness as BVG India Limited had suppressed the fact that it had received show cause notices from BBMP and other corporations. The format of Annexure-13 on page 26 of the NIT indicates that the fourth column is reserved for "nature of litigation" that the tenderer is or has been involved in. Point 4-of the same Annexure-13 states as follows, "In how many of your MSW handling/processing projects, show cause notices have been issued for breach of contract:" BVG India Limited, while submitting Annexure-13, left the litigation column blank, despite the fact that admittedly, 73 show-cause notices were issued to it by the BBMP. The fact that these notices were issued is not disputed by BVG India Limited. It instead claimed that the issuance of show-cause notices does not form part of the litigation.

43. The technical expert, after an objective evaluation of the tender submitted by BVG India Limited, observed that BVG India Limited fell under the "average category". It noted thus:

vi) Responsiveness to tender and submissions:

The Tender submission by M/s. BVG India is very poor, leaving many annexures unfilled up and referring as "information given separately". Not filling up even statutory and financial information in the prescribed formats.

Suppression of information regarding litigations (Annex-13) and track record of Performance (Annex 12). Casualness in description of Approach and Methodology. In view of the above, the tender gets marks for Average category i.e. **5.00 Marks**.

44. It was clearly stated in the NIT that the tenderer was required to reveal the show-cause notices against it. Despite the specific column pertaining to the same in the bid document, Respondent No. 1 had left the said column blank. Once there is a specific Clause requiring the mentioning of the show-cause notices for the breach of contract, it was incumbent upon the tenderer to provide accurate information. As Respondent No. 1 has not done so, and has suppressed vital information, Respondent No. 2 has rightly allotted it 5 marks for the same. As mentioned supra, Respondent No. 1 submitted an experience certificate issued by the PCMC in favour of one M/s. BVG Kshitij Waste Management Services Pvt. Ltd. No material is produced before the Court to show that M/s. BVG Kshitij Waste Management Services Pvt. Ltd. is the same as BVG India Limited or that it is a consortium member. In light of specific averment in the bid document by Respondent No. 1 that there is no other consortium member which has participated in the tender process along with BVG India Limited, the experience certificate issued in favour of BVG Kshitij Waste Management Services Pvt. Ltd. cannot be relied upon to fulfil the eligibility criteria by the BVG India Limited. Respondent No. 1 has submitted its bid as an individual bidder and not as a consortium and hence the certificate of a third party could not be considered for the benefit of meeting the technical qualification of Respondent No. 1. In addition to the same, the Respondent No. 1 had suppressed 73 show cause notices issued against it by BBMP and District Panchayat, Dadra and Nagar Haveli,

Silvasa in respect of the work relating to solid waste management. Despite suppression by the Respondent No. 1, the technical expert from its own sources gathered information and found that 73 show cause notices were issued by the BBMP and others against Respondent No. 1, which reveal that Respondent No. 1 had not shown due diligence in the work of door to door collection of solid waste. Hence, the conclusion reached by the High Court that it was not open for the technical committee to suo motu take into consideration the afore-mentioned 73 show cause notices issued against the Respondent No. 1 while evaluating the technical bid is not correct. The due diligence and experience of the expert consultant ought to have been appreciated by the High Court keeping in mind the object to which bids were invited. 73 show cause notices issued to Respondent No. 1 establish that Respondent No. 1 did not have a good track record and therefore such notices were necessarily taken into consideration by the technical expert. In all fairness, Respondent No. 1 ought to have disclosed these factors in its bid. In view of the same, in our considered opinion, the High Court was not justified in increasing the marks for responsiveness from 5 to 10.

2. Evaluation of financial bid:

45. The method for evaluation of the financial bid as applied by the High Court is also not proper, and is illogical. As mentioned supra, the technical expert, in our considered opinion, has rightly applied the following formula in respect of the bidders so far as financial bids are concerned:

$$\frac{FL1}{FL2/FL3/FL4} \times 20$$

On the other hand, the High Court has redone the evaluating formula in which multiplication of 20 is not adopted:

$$\frac{FL1}{FL2/FL3/FL4}$$

Since the multiplication of 20 is not adopted by the High Court (the same rightly adopted by the technical expert in respect of the bidders), the same has led to unreasonableness and a travesty of justice. The formula adopted by the High Court does not stand to reason at all. The NIT has prescribed the method of calculation of marks for the financial bid. The lowest bid, i.e., FL1 will be granted 20 marks. Other parties will thereafter be given scores by the formula (prescribed in Clause 3.1.3 of Article III of the NIT), i.e., FL1/FL2 x 20 = FL2's financial score. In the matter on hand, FL1 of BVG India Limited was 1454, whereas FL2 was 1710, which was of the successful bidder, i.e., Global Waste Management Cell Pvt. Ltd. Thus, 1454 (FL1) divided by 1710(FL2), multiplied by 20 marks, gives 17 marks to Global Waste Management Cell Pvt. Ltd., so far as the financial bid is concerned. *Per contra*, the High Court has failed to multiply the ratio of financial bids with marks of 20 and thus has erroneously arrived at the score of 0.85 marks instead of 17 marks.

46. The High Court observed in para 25 of the impugned judgment that the technical consultant had wrongly relied upon the certificate dated 16.07.2015 issued by Mira Bhayandar to qualify the

successful bidder as the technical expert had prepared the technical evaluation report on 6.6.2015. The observation of the High Court was that, on the date of technical evaluation, the certificate issued by Mira Bhayandar was not in existence. Records reveal that the technical expert had not relied upon the certificate dated 16.07.2015. The said certificate was an additional document submitted for the first time before the High Court along with the reply affidavit as per annexures R4 to R6. Whereas, the document submitted in respect of Mira Bhayandar by the successful bidder was a certificate dated 15.1.2015, which was much prior to the technical evaluation report dated 6.6.2015. The same is clear from Annexure R-21 of the counter affidavit filed on behalf of the successful bidder. Therefore, the observations and the findings of the High Court in respect of the certificate issued by Mira Bhayandar are not correct.

47. In the matter on hand, we do not find either the decision-making process or the decision to be arbitrary or irrational.

48. The authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. If a bidder had faced a number of show-cause notices from various municipal corporations in the matter of non-performance of door to door collection of garbage etc., the Court cannot compel the authority to choose such undeserving person/company to carry out the work. Ultimately, the public interest must be safeguarded. The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously and effectively. The public would also be interested in the quality of work undertaken. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work. Lethargy or tardiness in collecting door to door garbage on a day-to-day basis would definitely lead to increase collection of garbage on the roads and public properties, which leads to health hazards and also reduces the cleanliness of the city. Since the public is directly interested and would be affected if the work entrusted is not carried out appropriately, and as the technical expert has found that Respondent No. 1 would not be a suitable company to be entrusted the work inasmuch as it had faced 73 show-cause notices from different Municipal Corporations, the High Court could not have interfered with the decision taken by the authority. In our considered opinion, the High Court has ignored the element of public interest involved in the matter.

49. As aforementioned, unless the Court concludes that the decision making process or the decision taken by the authority bristles with *mala fides*, arbitrariness, or perversity, or that the authority has intended to favour someone, the Constitutional Court will not interfere with the decision-making process or the decision.

50. Thus, the questions to be decided in this appeal are answered as follows:

(a) Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

(b) A bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any 3rd Party for its qualification.

(c) It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of *mala fides*, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the Court ordinarily should exercise judicial restraint.

51. In view of the above, the impugned judgment and order of the High Court cannot be sustained and the same is set aside.

52. The instant appeals are allowed. There shall be no order as to costs.

Back to Index

MANU/SC/0309/2014

Neutral Citation: 2014/INSC/275

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 400 of 2012 and 604 of 2013 (Under Article 32 of The Constitution of India)

Decided On: 15.04.2014

Appellants: National Legal Services Authority **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

K.S. Panicker Radhakrishnan and A.K. Sikri, JJ.

Subject: Constitution

Relevant Section:

Constitution of India - Article 19(1); Indian Penal Code, 1860 (IPC) - Section 377

Case Category:

LETTER PETITION AND PIL MATTER

Case Note:

Constitution of India - Article 14, 15, 16, 19 and 14--Gender identity--Recognition of gender identity--Transgender community--Issue pertaining to constitutional and other legal rights of transgender community and their gender identity and sexual orientation--Transgender community as "third gender" for purpose of safeguarding and enforcing appropriating their rights guaranteed under Constitution--Non-recognition of identity of Transgenders/Hijras in various legislations denies them equal protection of law and they face wide-spread discrimination--By recognition Transgenders as "third gender" they would be able to enjoy their human rights to which they are largely deprived for want of recognition--Directions issued to safeguard constitutional rights of members of Transgender community.

By recognizing such T.Gs. as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition. The issue of transgender is not merely a social or medical issue but there is a need to adopt human right approach towards transgenders which may focus on functioning as an interaction between a person

and their environment highlighting the role of society and changing the stigma attached to them. T.Gs. face many disadvantages due to various reasons, particularly for gender abnormality which in certain level needs to physical and mental disability. Up till recently they were subjected to cruelty, pity or charity. Fortunately, there is a paradigm shift in thinking from the aforesaid approach to a rights based approach. Though, this may be the thinking of human rights activist, the society has not kept pace with this shift. There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely.

Gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz., the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's licence, the right to education, employment, health so on.

Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity. Right to Privacy and freedom of expression. Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgenders. Now it's time for us to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender people. All this can be achieved if the beginning is made with the recognition that T.G. as third gender.

The Supreme Court declares:

(1) Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(3) The Supreme Court directs the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

(4) Centre and State Governments are directed to operate separate H.I.V. Sero-survellance Centres since Hijras/Transgenders face several sexual health issues.

(5) Centre and State Governments should seriously address the problems being faced by

Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for S.R.S. for declaring one's gender is immoral and illegal

(6) Centre and State Governments should take proper measures to provide medical care to T.Gs. in the hospitals and also provide them separate public toilets and other facilities.

(7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(8) Centre and State Governments should take steps to create public awareness so that T.Gs. will feel that they are also part and parcel of the social life and be not treated as untouchables.

(9) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

Disposition:
Petition Allowed

JUDGMENT

K.S. Panicker Radhakrishnan, J.

1. Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.

2. We are, in this case, concerned with the grievances of the members of Transgender Community (for short 'TG community') who seek a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth and their prayer is that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection.

3. The National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide free legal services to the weaker and other marginalized sections of the society, has come forward to advocate their cause, by filing Writ Petition No. 400 of 2012. Poojaya Mata Nasib Kaur Ji Women Welfare Society, a registered association, has also preferred Writ Petition No. 604 of 2013, seeking similar reliefs in respect of Kinnar community, a TG community.

4. Laxmi Narayan Tripathy, claimed to be a Hijra, has also got impleaded so as to effectively put across the cause of the members of the transgender community and Tripathy's life experiences also for recognition of their identity as a third gender, over and above male and female. Tripathy says that non-recognition of the identity of Hijras, a TG community, as a third gender, denies them the right of equality before the law and equal protection of law guaranteed Under Article 14 of the Constitution and violates the rights guaranteed to them Under Article 21 of the Constitution of India.

5. Shri Raju Ramachandran, learned senior Counsel appearing for the Petitioner-the National Legal Services Authority, highlighted the traumatic experiences faced by the members of the TG community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their identity. Learned senior counsel has submitted that since the TGs are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country. TGs are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Further, it was also pointed out that the community also faces discrimination to contest election, right to vote, employment, to get licences etc. and, in effect, treated as an outcast and untouchable. Learned senior counsel also submitted that the State cannot discriminate them on the ground of gender, violating Articles 14 to 16 and 21 of the Constitution of India.

6. Shri Anand Grover, learned senior Counsel appearing for the Intervener, traced the historical background of the third gender identity in India and the position accorded to them in the Hindu Mythology, Vedic and Puranic literatures, and the prominent role played by them in the royal courts of the Islamic world etc. Reference was also made to the repealed Criminal Tribes Act, 1871 and explained the inhuman manner by which they were treated at the time of the British Colonial rule. Learned senior counsel also submitted that various International Forums and U.N. Bodies have recognized their gender identity and referred to the Yogyakarta Principles and pointed out that those principles have been recognized by various countries around the world. Reference was also made to few legislations giving recognition to the transsexual persons in other countries. Learned senior counsel also submitted that non-recognition of gender identity of the transgender community violates the fundamental rights guaranteed to them, who are citizens of this country.

7. Shri T. Srinivasa Murthy, learned Counsel appearing in I.A. No. 2 of 2013, submitted that transgender persons have to be declared as a socially and educationally backward classes of citizens and must be accorded all benefits available to that class of persons, which are being extended to male and female genders. Learned Counsel also submitted that the right to choose one's gender identity is integral to the right to lead a life with dignity, which is undoubtedly guaranteed by Article 21 of the Constitution of India. Learned Counsel, therefore, submitted that, subject to such rules/Regulations/protocols, transgender persons may be afforded the right of choice to determine whether to opt for male, female or transgender classification.

8. Shri Sanjeev Bhatnagar, learned Counsel appearing for the Petitioner in Writ Petition No. 604 of 2013, highlighted the cause of the Kinnar community and submitted that they are the most deprived group of transgenders and calls for constitutional as well as legal protection for their

identity and for other socio-economic benefits, which are otherwise extended to the members of the male and female genders in the community.

9. Shri Rakesh K. Khanna, learned Additional Solicitor General, appearing for the Union of India, submitted that the problems highlighted by the transgender community is a sensitive human issue, which calls for serious attention. Learned ASG pointed out that, under the aegis of the Ministry of Social Justice and Empowerment (for short "MOSJE"), a Committee, called "Expert Committee on Issues relating to Transgender", has been constituted to conduct an in-depth study of the problems relating to transgender persons to make appropriate recommendations to MOSJE. Shri Khanna also submitted that due representation would also be given to the applicants, appeared before this Court in the Committee, so that their views also could be heard.

10. We also heard learned Counsel appearing for various States and Union Territories who have explained the steps they have taken to improve the conditions and status of the members of TG community in their respective States and Union Territories. Laxmi Narayan Tripathy, a Hijra, through a petition supported by an affidavit, highlighted the trauma undergone by Tripathy from Tripathy's birth. Rather than explaining the same by us, it would be appropriate to quote in Tripathy's own words:

That the Applicant has born as a male. Growing up as a child, she felt different from the boys of her age and was feminine in her ways. On account of her femininity, from an early age, she faced repeated sexual harassment, molestation and sexual abuse, both within and outside the family. Due to her being different, she was isolated and had no one to talk to or express her feelings while she was coming to terms with her identity. She was constantly abused by everyone as a *'chakka'* and *'hijra'*. Though she felt that there was no place for her in society, she did not succumb to the prejudice. She started to dress and appear in public in women's clothing in her late teens but she did not identify as a woman. Later, she joined the *Hijra* community in Mumbai as she identified with the other *hijras* and for the first time in her life, she felt at home.

That being a *hijra*, the Applicant has faced serious discrimination throughout her life because of her gender identity. It has been clear to the Applicant that the complete non-recognition of the identity of *hijras*/transgender persons by the State has resulted in the violation of most of the fundamental rights guaranteed to them under the Constitution of India....

Siddarth Narrain, eunuch, highlights Narrain's feeling, as follows:

Ever since I can remember, I have always identified myself as a woman. I lived in Namakkal, a small town in Tamil Nadu. When I was in the 10th standard I realized that the only way for me to be comfortable was to join the hijra community. It was then that my family found out that I frequently met hijras who lived in the city. One day, when my father was away, my brother, encouraged by my mother, started beating me with a cricket bat. I locked myself in a room to escape from the beatings. My mother and brother then tried to break into the room to beat me up further. Some of my relatives intervened and brought me out of the room. I related my ordeal to an uncle of mine who gave me Rs. 50 and asked me to go home. Instead, I took the money and went to live with a group of hijras in Erode.

Sachin, a TG, expressed his experiences as follows:

My name is Sachin and I am 23 years old. As a child I always enjoyed putting make-up like 'vibhuti' or 'kum kum' and my parents always saw me as a girl. I am male but I only have female feelings. I used to help my mother in all the housework like cooking, washing and cleaning. Over the years, I started assuming more of the domestic responsibilities at home. The neighbours starting teasing me. They would call out to me and ask: 'Why don't you go out and work like a man?' or 'Why are you staying at home like a girl?' But I liked being a girl. I felt shy about going out and working. Relatives would also mock and scold me on this score. Every day I would go out of the house to bring water. And as I walked back with the water I would always be teased. I felt very ashamed. I even felt suicidal. How could I live like that? But my parents never protested. They were helpless.

We have been told and informed of similar life experiences faced by various others who belong to the TG community.

11. Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. TG may also takes in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who, in this writ petition, describe themselves as "third gender" and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional "third gender". Among Hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo Sex Re-Assignment Surgery **(*SRS*)** or have undergone ***SRS*** to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of opposite gender, i.e. transvestites. Resultantly, the term "transgender", in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female.

HISTORICAL BACKGROUND OF TRANSGENDERS IN INDIA:

12. TG Community comprises of *Hijras*, eunuchs, *Kothis, Aravanis, Jogappas, Shiv-Shakthis* etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts. The Concept of tritiya prakrti or napunsaka has also been an integral part of vedic and puranic literatures. The word 'napunsaka' has been used to denote absence of procreative capability.

13. Lord Rama, in the epic Ramayana, was leaving for the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions

which, it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings.

14. Aravan, the son of Arjuna and Nagakanya in Mahabharata, offers to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in matrimony. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis.

15. Jain Texts also make a detailed reference to TG which mentions the concept of 'psychological sex'. Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottaman empires and the Mughal rule in the Medieval India. A detailed analysis of the historical background of the same finds a place in the book of Gayatri Reddy, "With Respect to Sex: Negotiating *Hijra* Identity in South India"-Yoda Press (2006).

16. We notice that even though historically, Hijras/transgender persons had played a prominent role, with the onset of colonial rule from the 18th century onwards, the situation had changed drastically. During the British rule, a legislation was enacted to supervise the deeds of *Hijras*/TG community, called the Criminal Tribes Act, 1871, which deemed the entire community of *Hijras* persons as innately 'criminal' and 'addicted to the systematic commission of non-bailable offences'. The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the local government had to register the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences Under Section 377 of the Indian Penal Code, or of abetting the commission of any of the said offences. Under the Act, the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son. Act has, however, been repealed in August 1949.

17. Section 377 of the Indian Penal Code found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. Reference may be made to the judgment of the Allahabad High Court in ***Queen Empress v. Khairati*** (1884) ILR 6 All 204, wherein a transgender person was arrested and prosecuted Under Section 377 on the suspicion that he was a 'habitual sodomite' and was later acquitted on appeal. In that case, while acquitting him, the Sessions Judge stated as follows:

This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the

literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite-the distortion of the orifice of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.

18. Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including *Hijras* and was used as an instrument of harassment and physical abuse against *Hijras* and transgender persons.

A Division Bench of this Court in ***Suresh Kumar Koushal and Anr.*** v. ***Naz Foundation and Ors.*** [MANU/SC/1278/2013 : (2014) 1 SCC 1] has already spoken on the constitutionality of Section 377 Indian Penal Code and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.

GENDER IDENTITY AND SEXUAL ORIENTATION

19. Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

20. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom

and no one shall be forced to undergo medical procedures, including ***SRS***, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

UNITED NATIONS AND OTHER HUMAN RIGHTS BODIES-ON GENDER IDENTITY AND SEXUAL ORIENTATION

21. United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Reference to few Yogyakarta Principles would be useful.

YOGYAKARTA PRINCIPLES:

22. Principle 1 which deals with the right to the universal enjoyment of human rights, reads as follows:

1. THE RIGHT TO THE UNIVERSAL ENJOYMENT of HUMAN RIGHTS

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

A. Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

B. Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

C. Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

D. Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

2. THE RIGHTS TO EQUALITY AND NON-DISCRIMINATION

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

A. Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

B. Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different- sex sexual activity;

C. Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

D. Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

E. In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

F. Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

3. THE RIGHT TO RECOGNITION BEFORE THE LAW

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

A. Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

B. Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

C. Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex -- including birth certificates, passports, electoral records and other documents -- reflect the person's profound self-defined gender identity;

D. Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

E. Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

F. Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

4. THE RIGHT TO LIFE

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed

on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

A. Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

B. Remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

C. Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

6. THE RIGHT TO PRIVACY

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

B. Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

C. Ensure that criminal and other legal provisions of general application are not applied to de facto criminalise consensual sexual activity among persons of the same sex who are over the age of consent;

D. Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

E. Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;

F. Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others

9. THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

B. Provide adequate access to medical care and counseling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;

C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;

F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;

G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

18. PROTECTION FROM MEDICAL ABUSES

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

B. Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

C. Establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

D. Ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

E. Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

F. Ensure that any medical or psychological treatment or counseling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

19. THE RIGHT TO FREEDOM of OPINION AND EXPRESSION

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

B. Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

C. Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

D. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

E. Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

F. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

23. UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity. United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:

Sexual orientation and gender identity 'Other status' as recognized in Article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace.

24. In this respect, reference may also be made to the General Comment No. 2 of the Committee on Torture and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2008 and also the General Comment No. 20 of the Committee on Elimination of Discrimination against Woman, responsible for the implementation of the Convention on the Elimination of All Forms of Discrimination against Woman, 1979 and 2010 report.

SRS and Foreign Judgments

25. Various countries have given recognition to the gender identity of such persons, mostly, in cases where transsexual persons started asserting their rights after undergoing ***SRS*** of their re-assigned sex. In ***Corbett v. Corbett*** (1970) 2 All ER 33, the Court in England was concerned with the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod, J. in that case took the view that the law should adopt the chromosomal, gonadal and genital tests and if all three are congruent, that should determine a person's sex for the purpose of marriage. Learned Judge expressed the view that any operative intervention should be ignored and the biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means. Later, in ***R v. Tan*** (1983) QB 1053, 1063-1064, the Court of Appeal applied ***Corbett*** approach in the context of criminal law. The Court upheld convictions which were imposed on Gloria Greaves, a postoperative male to female transsexual, still being in law, a man.

26. ***Corbett*** principle was not found favour by various other countries, like New Zealand, Australia etc. and also attracted much criticism, from the medical profession. It was felt that the application of the ***Corbett*** approach would lead to a substantial different outcome in cases of a post operative inter-sexual person and a post operative transsexual person. In New Zealand in ***Attorney-General v. Otahuhu Family Court*** (1995) 1 NZLR 603, Justice Ellis noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex. It was held that there is no social advantage in the law for not recognizing the validity of the marriage of a transsexual in the sex of reassignment. The Court held that an adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex. In ***Re Kevin (Validity of Marriage of Transsexual)*** (2001) Fam CA 1074, in an Australian case, Chisholm J., held that there is no 'formulaic solution' to determine the sex of an individual for the purpose of the law of marriage. It was held that all relevant matters need to be considered, including the person's life experiences and self-perception. Full Court of the Federal Family Court in the year 2003 approved the above-mentioned judgment holding that in the relevant Commonwealth marriage statute the words 'man' and 'woman' should be given their ordinary, everyday contemporary meaning and that the word 'man' includes a post operative female to male transsexual person. The Full Court also held that there was a biological basis for transsexualism and that there was no reason to exclude the psyche as one of the relevant factors in determining sex and gender. The judgment ***Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission*** is reported in (2003) Fam CA 94.

27. Lockhart, J. in ***Secretary, Department of Social Security v. "SRA"*** (1993) 43 FCR 299 and Mathews, J. in ***R v. Harris and McGuiness*** (1988) 17 NSWLR 158, made an exhaustive review of the various decisions with regard to the question of recognition to be accorded by Courts to the gender of a transsexual person who had undertaken a surgical procedure. The Courts generally in New Zealand held that the decision in ***Corbett v. Corbett*** (supra) and ***R v. Tan*** (supra) which applied a purely biological test, should not be followed. In fact, Lockhart. J. in ***SRA*** observed that the development in surgical and medical techniques in the field of sexual reassignment, together with indications of changing social attitudes towards transsexuals, would indicate that generally

they should not be regarded merely as a matter of chromosomes, which is purely a psychological question, one of self-perception, and partly a social question, how society perceives the individual.

28. ***A.B. v. Western Australia*** (2011) HCA 42 was a case concerned with the Gender Reassignment Act, 2000. In that Act, a person who had undergone a reassignment procedure could apply to Gender Reassignment Board for the issue of a recognition certificate. Under Section 15 of that Act, before issuing the certificate, the Board had to be satisfied, inter alia, that the applicant believed his or her true gender was the person's reassigned gender and had adopted the lifestyle and gender characteristics of that gender. Majority of Judges agreed with Lockhart, J. in ***SRA*** that gender should not be regarded merely as a matter of chromosomes, but partly a psychological question, one of self-perception, and partly a social question, how society perceives the individual.

29. The House of Lords in ***Bellinger v. Bellinger*** (2003) 2 All ER 593 was dealing with the question of a transsexual. In that case, Mrs. Bellinger was born on 7th September, 1946. At birth, she was correctly classified and registered as male. However, she felt more inclined to be a female. Despite her inclinations, and under some pressure, in 1967 she married a woman and at that time she was 21 years old. Marriage broke down and parties separated in 1971 and got divorce in the year 1975. Mrs. Bellinger dressed and lived like a woman and when she married Mr. Bellinger, he was fully aware of her background and throughout had been supportive to her. Mr. and Mrs. Bellinger since marriage lived happily as husband and wife and presented themselves in that fashion to the outside world. Mrs. Bellinger's primary claim was for a declaration Under Section 55 of the Family Law Act, 1986 that her marriage to Mr. Bellinger in 1981 was "at its inception valid marriage". The House of Lords rejected the claim and dismissed the appeal. Certainly, the "psychological factor" has not been given much prominence in determination of the claim of Mrs. Bellinger.

30. The High Court of Kuala Lumpur in ***Re JG, JG v. Pengarah Jabatan Pendaftaran Negara*** (2006) 1 MLJ 90, was considering the question as to whether an application to amend or correct gender status stated in National Registration Identity Card could be allowed after a person has undergone ***SRS***. It was a case where the Plaintiff was born as a male, but felt more inclined to be a woman. In 1996 at Hospital Siroros she underwent a gender reassignment and got the surgery done for changing the sex from male to female and then she lived like a woman. She applied to authorities to change her name and also for a declaration of her gender as female, but her request was not favourably considered, but still treated as a male. She sought a declaration from the Court that she be declared as a female and that the Registration Department be directed to change the last digit of her identity card to a digit that reflects a female gender. The Malaysian Court basically applied the principle laid down in ***Corbett*** (supra), however, both the prayers sought for were granted, after noticing that the medical men have spoken that the Plaintiff is a female and they have considered the sex change of the Plaintiff as well as her "psychological aspect". The Court noticed that she feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her "psychological thinking" is that of a woman.

31. The Court of Appeal, New South Wales was called upon to decide the question whether the Registrar of Births, Deaths and Marriages has the power under the Births, Deaths and Marriages Act, 1995 to register a change of sex of a person and the sex recorded on the register to "non-specific" or "non-specified". The appeal was allowed and the matter was remitted back to the

Tribunal for a fresh consideration in accordance with law, after laying down the law on the subject. The judgment is reported as ***Norrie v. NSW Registrar of Births, Deaths and Marriages*** (2013) NSWCA 145. While disposing of the appeal, the Court held as follows:

The consequence is that the Appeal Panel (and the Tribunal and the Registrar) were in error in construing the power in Section 32DC(1) as limiting the Registrar to registering a person's change of sex as only male or female. An error in the construction of the statutory provision granting the power to register a person's change of sex is an error on a question of law. Collector of Customs v. Pozzolanic Enterprises Pty. Ltd. [1993] FCA 322 : (1993) 43 FCR 280 at 287. This is so notwithstanding that the determination of the common understanding of a general word used in the statutory provision is a question of fact. The Appeal Panel (and the Tribunal and the Registrar) erred in determining that the current ordinary meaning of the word "sex" is limited to the character of being either male or female. That involved an error on a question of fact. But the Appeal Panel's error in arriving at the common understanding of the word "sex" was associated with its error in construction of the effect of the statutory provision of Section 32DC (and also of Section 32DA), and accordingly is of law: Hope v. Bathurst City Council [1980] HCA 16 : (1980) 144 CLR 1 at 10.

32. In ***Christine Goodwin v. United Kingdom*** (Application No. 28957/95 - Judgment dated 11th July, 2002), the European Court of Human Rights examined an application alleging violation of Articles 8, 12, 13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1997 in respect of the legal status of transsexuals in UK and particularly their treatment in the sphere of employment, social security, pensions and marriage. Applicant in that case had a tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid-1960s she was diagnosed as a transsexual. Though she married a woman and they had four children, her inclination was that her "brain sex" did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January, 1985, the applicant began treatment at the Gender Identity Clinic. In October, 1986, she underwent surgery to shorten her vocal chords. In August, 1987, she was accepted on the waiting list for gender re-assignment surgery and later underwent that surgery at a National Health Service hospital. The applicant later divorced her former wife. She claimed between 1990 and 1992 she was sexually harassed by colleagues at work, followed by other human rights violations. The Court after referring to various provisions and Conventions held as follows:

Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individuals, including the right to establish details of their identity as individual human beings (see, *inter alia, Pretty v. the United Kingdom* No. 2346/02, judgment of 29 April 2002, 62, and *Mikulic v. Croatia* No. 53176/99, judgment of 7 February 2002, 53, both to be published in ECHR 2002...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.

33. The European Court of Human Rights in the case of ***Van Kuck v. Germany*** (Application No. 35968/97-Judgment dated 12.9.2003) dealt with the application alleging that German Court's decisions refusing the applicant's claim for reimbursement of gender reassignment measures and the related proceedings were in breach of her rights to a fair trial and of her right to respect for her private life and that they amounted to discrimination on the ground of her particular "psychological situation". Reliance was placed on Articles 6, 8, 13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1997. The Court held that the concept of "private life" covers the physical and psychological integrity of a person, which can sometimes embrace aspects of an individual's physical and social identity. For example, gender identifications, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. The Court also held that the notion of personal identity is an important principle underlying the interpretation of various guaranteed rights and the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security.

34. Judgments referred to above are mainly related to transsexuals, who, whilst belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operations to adapt their physical characteristic to their psychological nature. When we examine the rights of transsexual persons, who have undergone ***SRS***, the test to be applied is not the "Biological test", but the "Psychological test", because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo "Gender Dysphoria' which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity. Before addressing those aspects further, we may also refer to few legislations enacted in other countries recognizing their rights.

LEGISLATIONS IN OTHER COUNTRIES ON TGs

35. We notice, following the trend, in the international human rights law, many countries have enacted laws for recognizing rights of transsexual persons, who have undergone either partial/complete SRS, including United Kingdom, Netherlands, Germany, Australia, Canada, Argentina, etc. United Kingdom has passed the General Recommendation Act, 2004, following the judgment in ***Christine Goodwin*** (supra) passed by the European Courts of Human Rights. The Act is all encompassing as not only does it provide legal recognition to the acquired gender of a person, but it also lays down provisions highlighting the consequences of the newly acquired gender status on their legal rights and entitlements in various aspects such as marriage, parentage, succession, social security and pensions etc. One of the notable features of the Act is that it is not necessary that a person needs to have undergone or in the process of undergoing a ***SRS*** to apply under the Act. Reference in this connection may be made to the Equality Act, 2010 (UK) which has consolidated, repealed and replaced around nine different anti-discrimination legislations including the Sex Discrimination Act, 1986. The Act defines certain characteristics to be "protected characteristics" and no one shall be discriminated or treated less favourably on grounds

that the person possesses one or more of the "protected characteristics". The Act also imposes duties on Public Bodies to eliminate all kinds of discrimination, harassment and victimization. Gender reassignment has been declared as one of the protected characteristics under the Act, of course, only the transsexuals i.e. those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act.

36. In Australia, there are two Acts dealing with the gender identity, (1) Sex Discrimination Act, 1984; and (ii) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 (Act 2013). Act 2013 amends the Sex Discrimination Act, 1984. Act 2013 defines gender identity as the appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person's designated sex at birth.

Sections 5(A), (B) and (C) of the 2013 Act have some relevance and the same are extracted hereinbelow:

5A Discrimination on the ground of sexual orientation

(1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's sexual orientation if, by reason of:

(a) the aggrieved person's sexual orientation; or

(b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or

(c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.

(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.

(3) This section has effect subject to Sections 7B and 7D.

5B Discrimination on the ground of gender identity

(1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identity if, by reason of:

(a) the aggrieved person's gender identity; or

(b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or

(c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person; the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.

(3) This section has effect subject to Sections 7B and 7D.

5C Discrimination on the ground of intersex status

(1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's intersex status if, by reason of:

(a) the aggrieved person's intersex status; or

(b) a characteristic that appertains generally to persons of intersex status; or

(c) a characteristic that is generally imputed to persons of intersex status; the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of intersex status.

(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's intersex status if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of intersex status.

(3) This section has effect subject to Sections 7B and 7D.

Various other precautions have also been provided under the Act.

37. We may in this respect also refer to the European Union Legislations on transsexuals. Recital 3 of the Preamble to the Directive 2006/54/EC of European Parliament and the Council of 5 July 2006 makes an explicit reference to discrimination based on gender reassignment for the first time in European Union Law. Recital 3 reads as under:

The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or

other sex. In view of this purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

38. European Parliament also adopted a resolution on discrimination against transsexuals on 12th September, 1989 and called upon the Member States to take steps for the protection of transsexual persons and to pass legislation to further that end. Following that Hungary has enacted Equal Treatment and the Promotion of Equal Opportunities Act, 2003, which includes sexual identity as one of the grounds of discrimination. 2010 paper on 'Transgender Persons' Rights in the EU Member States prepared by the Policy Department of the European Parliament presents the specific situation of transgender people in 27 Member States of the European Union. In the United States of America some of the laws enacted by the States are inconsistent with each other. The Federal Law which provides protection to transgenders is The Matthew Shepard and James Byrd. Jr. Hate Crimes Prevention Act, 2009, which expands the scope of the 1969 United States Federal Hate-crime Law by including offences motivated by actual or perceived gender identity. Around 15 States and District of Colombia in the United States have legislations which prohibit discrimination on grounds of gender identity and expression. Few States have issued executive orders prohibiting discrimination.

39. The Parliament of South Africa in the year 2003, enacted Alteration of Sex Description and Sex Status Act, 2003, which permits transgender persons who have undergone gender reassignment or people whose sexual characteristics have evolved naturally or an intersexed person to apply to the Director General of the National Department of Home Affairs for alteration of his/her sex description in the birth register, though the legislation does not contemplate a more inclusive definition of transgenders.

40. The Senate of Argentina in the year 2012 passed a law on Gender Identity that recognizes right by all persons to the recognition of their gender identity as well as free development of their person according to their gender identity and can also request that their recorded sex be amended along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity. Not necessary that they seemed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment had taken place. Article 12 deals with dignified treatment, respecting the gender identity adopted by the individual, even though the first name is different from the one recorded in their national identity documents. Further laws also provide that whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.

41. In Germany, a new law has come into force on 5th November, 2013, which allows the parents to register the sex of the children as 'not specified' in the case of children with intersex variation. According to Article 22, Section 3 of the German Civil Statutes Act reads as follows:

If a child can be assigned to neither the female nor the male sex then the child has to be named without a specification

42. The law has also added a category of X, apart from "M" and "F" under the classification of gender in the passports.

Indian Scenario

43. We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of "sex identity gender" of persons, and "guarantee to equality and non-discrimination" on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well.

44. Historical background of Transgenders in India has already been dealt in the earlier part of this judgment indicating that they were once treated with great respect, at least in the past, though not in the present. We can perceive a wide range of transgender related identities, cultures or experiences which are generally as follows:

Hijras: Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not-men", or "in-between man and woman", or "neither man nor woman". Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but Hijras have a long tradition/culture and have strong social ties formalized through a ritual called "reet" (becoming a member of Hijra community). There are regional variations in the use of terms referred to Hijras. For example, Kinnars (Delhi) and Aravanis (Tamil Nadu). Hijras may earn through their traditional work: 'Badhai' (clapping their hands and asking for alms), blessing new-born babies, or dancing in ceremonies. Some proportion of Hijras engage in sex work for lack of other job opportunities, while some may be self-employed or work for non-governmental organisations." (See UNDP India Report (December, 2010).

Eunuch: Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intesexexd-as a Hijra.

"Aravanis and 'Thirunangi' -Hijras in Tamil Nadu identify as "Aravani". Tamil Nadu Aravanigal Welfare Board, a state government's initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male's body. Some Aravani activists want the public and media to use the term 'Thirunangi' to refer to Aravanis.

Kothi- Kothis are a heterogeneous group. 'Kothis' can be described as biological males who show varying degrees of 'femininity'-which may be situational. Some proportion of Kothis have bisexual behavior and get married to a woman. Kothis are generally of lower socioeconomic status and some engage in sex work for survival. Some proportion of Hijra-identified people may also identify themselves as 'Kothis'. But not all Kothi identified people identify themselves as transgender or Hijras.

Jogtas/Jogappas: Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. 'Jogta' refers to male servant of that Goddess and 'Jogti' refers to female servant (who is also sometimes referred to as 'Devadasi'). One can become a 'Jogta' (or Jogti) if it is part of their family tradition or if one finds a 'Guru' (or 'Pujari') who accepts him/her as a 'Chela' or 'Shishya' (disciple). Sometimes, the term 'Jogti Hijras' is used to denote those male-to-female transgender persons who

are devotees/servants of Goddess Renukha Devi and who are also in the Hijra communities. This term is used to differentiate them from 'Jogtas' who are heterosexuals and who may or may not dress in woman's attire when they worship the Goddess. Also, that term differentiates them from 'Jogtis' who are biological females dedicated to the Goddess. However, 'Jogti Hijras' may refer to themselves as 'Jogti' (female pronoun) or Hijras, and even sometimes as 'Jogtas'.

Shiv-Shakthis: Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv-Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv-Shakthis are married to a sword that represents male power or Shiva (deity). Shiv-Shakthis thus become the bride of the sword. Occasionally, Shiv-Shakthis cross-dress and use accessories and ornaments that are generally/socially meant for women. Most people in this community belong to lower socio-economic status and earn for their living as astrologers, soothsayers, and spiritual healers; some also seek alms." (**See Serena Nanda, Wadsworth Publishing Company, Second Edition (1999)**

45. Transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in the field of health care, employment, education, leave aside social exclusion. A detailed study was conducted by the United Nations Development Programme (UNDP-India) and submitted a report in December, 2010 on Hijras/transgenders in India: "HIV Human Rights and Social Exclusion". The Report states that the HIV Human Immunodeficiency Virus and Sexually Transmitted Infections (STI) is now increasingly seen in Hijras/transgenders population. The estimated size of men who have sex with men (MSM) and male sex workers population in India (latter presumably includes Hijras/TG communities) is 2,352,133 and 235,213 respectively. It was stated that no reliable estimates are available for Hijras/TG women. HIV prevalence among MSM population was 7.4% against the overall adult HIV prevalence of 0.36%. It was stated recently Hijras/TG people were included under the category of MSM in HIV sentinel Sero Surveillance. It is also reported in recent studies that Hijras/TG women have indicated a very high HIV prevalence (17.5% to 41%) among them. Study conducted by NACO also highlights a pathetic situation. Report submitted by NACI, NACP IV Working Group Hijras TG dated 5.5.2011 would indicate that transgenders are extremely vulnerable to HIV. Both the reports highlight the extreme necessity of taking emergent steps to improve their sexual health, mental health and also address the issue of social exclusion. The UNDP in its report has made the following recommendations, which are as under:

Multiple problems are faced by Hijras/TG, which necessitate a variety of solutions and actions. While some actions require immediate implementation such as introducing Hijra/TG-specific social welfare schemes, some actions need to be taken on a long-term basis changing the negative attitude of the general public and increasing accurate knowledge about Hijra/TG communities. The required changes need to be reflected in policies and laws; attitude of the government, general public and health care providers; and health care systems and practice. Key recommendations include the following:

1. Address the gape in NACP-III: establish HIV sentinel serosurveillance sites for Hijras/TG at strategic locations; conduct operations research to design and fine-tune culturally-relevant package of HIV prevention and care interventions for Hijras/TG; provide financial support for the

formation of CBOs run by Hijras/TG; and build the capacity of CBOs to implement effective programmes.

2. Move beyond focusing on individual-level HIV prevention activities to **address the structural determinants of risks and mitigate the impact of risks.** For example, mental health counseling, crisis intervention (crisis in relation to suicidal tendencies, police harassment and arrests, support following sexual and physical violence), addressing alcohol and drug abuse, and connecting to livelihood programs all need to be part of the HIV interventions.

3. Train health care providers to be competent and sensitive in providing health care services (including STI and HIV-related services) to Hijras/TG as well as develop and monitor implementation of guidelines related to gender transition and sex reassignment surgery (SRS).

4. Clarify the ambiguous legal status of sex reassignment surgery and provide **gender transition and SRS services** (with proper pre-and post-operation/transition counseling) for free in public hospitals in various parts in India.

5. Implement **stigma and discrimination reduction measures** at various settings through a variety of ways: mass media awareness for the general public to focused training and sensitization for police and health care providers.

6. Develop action steps toward taking a position on **legal recognition of gender identity of Hijras/TG** need to be taken in consultation with Hijras/TG and other key stakeholders. Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to Hijras/TGs are required as they are connected to basic civil rights such as access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption.

7. Open up the existing **Social Welfare Schemes** for needy Hijras/TG and create specific welfare schemes to address the basic needs of Hijras/TG including housing and employment needs.

8. Ensure **greater involvement of vulnerable communities including Hijras/TG** women in policy formulation and program development.

46. Social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender (male/female) does prevail in India. Discussion on gender identity including self-identification of gender of male/female or as transgender mostly focuses on those persons who are assigned male sex at birth, whether one talks of Hijra transgender, woman or male or male to female transgender persons, while concern voiced by those who are identified as female to male trans-sexual persons often not properly addressed. Female to male unlike Hijra/transgender persons are not quite visible in public unlike Hijra/transgender persons. Many of them, however, do experience violence and discrimination because of their sexual orientation or gender identity.

INDIA TO FOLLOW INTERNATIONAL CONVENTIONS

47. International Conventions and norms are significant for the purpose of interpretation of gender equality. Article 1 of the Universal declaration on Human Rights, 1948, states that all human-beings are born free and equal in dignity and rights. Article 3 of the Universal Declaration of Human Rights states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 affirms that every human-being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights provide that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment. United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (dated 24th January, 2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para 21 of the Convention states that States are obliged to protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contests of State custody or control. Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights state that no one shall be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence".

48. Above-mentioned International Human Rights instruments which are being followed by various countries in the world are aimed to protect the human rights of transgender people since it has been noticed that transgenders/transsexuals often face serious human rights violations, such as harassment in work place, hospitals, places of public conveniences, market places, theaters, railway stations, bus stands, and so on.

49. Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. We have exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta principles. Reference was also made to legislations enacted in other countries dealing with rights of persons of transgender community. Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature. Article 21 has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance.

50. Article 253 of the Constitution of India states that the Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention. Generally, therefore, a legislation is required for implementing the international conventions, unlike the position in the United States of America where the rules of international

law are applied by the municipal courts on the theory of their implied adoption by the State, as a part of its own municipal law. Article VI, Clause (2) of the U.S. Constitution reads as follows:

...all treaties made, or which shall be made, under the authority of the united States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, *anything in the Constitution or laws of any State to the contrary not-withstanding.*

51. In the United States, however, it is open to the courts to supersede or modify international law in its application or it may be controlled by the treaties entered into by the United States. But, till an Act of Congress is passed, the Court is bound by the law of nations, which is part of the law of the land. Such a 'supremacy clause' is absent in our Constitution. Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law. See: ***Gramophone Company of India Ltd. v. Birendra Bahadur Pandey*** MANU/SC/0187/1984 : (1984) 2 SCC 534 and ***Tractor Export v. Tarapore and Co.*** MANU/SC/0003/1969 : (1969) 3 SCC 562, ***Mirza Ali Akbar Kashani v. United Arab Republic*** MANU/SC/0050/1965 : (1966) 1 SCR 391. In the case of ***Jolly George Varghese v. Bank of Cochin*** MANU/SC/0014/1980 : (1980) 2 SCC 360, the Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights. India has ratified the above mentioned covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions. The Interpretation of International Conventions is governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

52. Article 51 of the Directive Principles of State Policy, which falls under Part IV of the Indian Constitution, reads as under:

Article 51. The State shall endeavour to-

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

(c) Foster respect for international law and treaty obligation in the dealings of organised peoples with one another; and

(d) Encourage settlement of international disputes by arbitration.

53. Article 51, as already indicated, has to be read along with Article 253 of the Constitution. If the parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian Law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law. In ***His Holiness Kesavananda Bharati Sripadavalvaru v. State of Kerala*** MANU/SC/0445/1973 : (1973) 4 SCC 225, it was stated that in view of Article 51 of the

Constitution, the Court must interpret language of the Constitution, if not intractable, in the light of United Nations Charter and the solemn declaration subscribed to it by India. In ***Apparel Export Promotion Council v. A.K. Chopra*** MANU/SC/0014/1999 : (1999) 1 SCC 759, it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. Reference may also be made to the Judgments of this Court in ***Githa Hariharan (Ms) and Anr.*** v. ***Reserve Bank of India and Anr.*** MANU/SC/0117/1999 : (1999) 2 SCC 228, ***R.D. Upadhyay*** v. ***State of Andhra Pradesh and Ors.*** MANU/SC/2061/2006 : (2007) 15 SCC 337 and ***People's Union for Civil Liberties*** v. ***Union of India and Anr.*** MANU/SC/0039/2005 : (2005) 2 SCC 436. In ***Vishaka and Ors. v. State of Rajasthan and Ors.*** MANU/SC/0786/1997 : (1997) 6 SCC 241, this Court Under Article 141 laid down various guidelines to prevent sexual harassment of women in working places, and to enable gender equality relying on Articles 11, 24 and general recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee.

Principles discussed hereinbefore on TGs and the International Conventions, including *Yogyakarta principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.

ARTICLE 14 AND TRANSGENDERS

54. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression 'person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

55. Petitioners have asserted as well as demonstrated on facts and figures supported by relevant materials that despite constitutional guarantee of equality, Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras/transgender persons results in them

facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

ARTICLES 15 & 16 AND TRANSGENDERS

56. Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias and gender based discrimination.

57. Article 15 states that the State shall not discriminate against any citizen, inter alia, on the ground of sex, with regard to

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The requirement of taking affirmative action for the advancement of any socially and educationally backward classes of citizens is also provided in this Article.

58. Article 16 states that there shall be equality of opportunities for all the citizens in matters relating to employment or appointment to any office under the State. Article 16(2) of the Constitution of India reads as follows:

16(2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.

Article 16 not only prohibits discrimination on the ground of sex in public employment, but also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State.

59. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.
Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual

identity and character. The discrimination on the ground of 'sex' Under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity.
The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.

60. TGs have been systematically denied the rights Under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged Under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights Under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged Under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services.

61. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

ARTICLE 19(1)(a) AND TRANSGENDERS

62. Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

63. We may, in this connection, refer to few judgments of the US Supreme Courts on the rights of TG's freedom of expression. The Supreme Court of the State of Illinois in the ***City of Chicago v. Wilson et al.*** 75 III. 2d 525 (1978) struck down the municipal law prohibiting cross-dressing, and held as follows-

the notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with "values of privacy, self-identity, autonomy and personal integrity that... the Constitution was designed to protect.

64. In ***Doe v. Yunits et al.*** 2000 WL 33162199 (Mass. Super.), the Superior Court of Massachusetts, upheld the right of a person to wear school dress that matches her gender identity as part of protected speech and expression and observed as follows:

by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, Plaintiff's ability to express herself and her gender identity through dress is important for her health and well-being. Therefore, Plaintiff's expression is not merely a personal preference but a necessary symbol of her identity.

65. Principles referred to above clearly indicate that the freedom of expression guaranteed Under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.

66. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected Under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community Under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

ARTICLE 21 AND THE TRANSGENDERS

67. Article 21 of the Constitution of India reads as follows:

21. Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi*** MANU/SC/0517/1981 : (1981) 1 SCC 608 (paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings".

68. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

69. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In ***Anuj Garg v. Hotel Association of India*** MANU/SC/8173/2007 : (2008) 3 SCC 1 (paragraphs 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed Under Article 21 of the Constitution of India.<mpara>

LEGAL RECOGNITION OF THIRD/TRANSGENDER IDENTITY

70. Self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example Hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a "third gender". Hijras, therefore, belong to a distinct socio-religious and cultural group and have, therefore, to be considered as a "third gender", apart from male and female. State of Punjab has treated all TGs as male which is not legally sustainable. State of Tamil Nadu has taken lot of welfare measures to safeguard the rights of TGs, which we have to acknowledge. Few States like Kerala, Tripura, Bihar have referred TGs as "third gender or sex". Certain States recognize them as "third category". Few benefits have also been extended by certain other States. Our neighbouring countries have also upheld their fundamental rights and right to live with dignity.

71. The Supreme Court of Nepal in ***Sunil Babu Pant and Ors. v. Nepal Government*** (Writ Petition No. 917 of 2007 decided on 21st December, 2007), spoke on the rights of Transgenders as follows:

the fundamental rights comprised under Part II of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the State. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well.... Thus, the people other than 'men' and 'women', including the people of 'third gender' cannot be discriminated. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution.

72. The Supreme Court of Pakistan in ***Dr. Mohammad Aslam Khaki and Anr. v. Senior Superintendent of Police (Operation) Rawalpindi and Ors.*** (Constitution Petition No. 43 of 2009) decided on 22nd March, 2011, had occasion to consider the rights of eunuchs and held as follows:

Needless to observe that eunuchs in their rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at

federal and provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in case of other citizens.

73. We may remind ourselves of the historical presence of the third gender in this country as well as in the neighbouring countries.

74. Article 21, as already indicated, protects one's right of self-determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination". Hijras/Eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws.

75. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett principle of "Biological Test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "Psychological Test" instead of "Biological Test". Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.

76. Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

77. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

A.K. Sikri, J.

78. I have carefully, and with lot of interest, gone through the perspicuous opinion of my brother Radhakrishnan, J. I am entirely in agreement with the discussion contained in the said judgment on all the cardinal issues that have arisen for consideration in these proceedings. At the same time, having regard to the fact that the issues involved are of seminal importance, I am also inclined to pen down my thoughts.

79. As is clear, these petitions essentially raise an issue of "Gender Identity", which is the core issue. It has two facets, viz.:

(a) Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself to be recognized as a female as per his choice moreso, when such a person after having undergone operational procedure, changes his/her sex as well;

(b) Whether transgender (TG), who are neither males nor females, have a right to be identified and categorized as a "third gender"?

80. We would hasten to add that it is the second issue with which we are primarily concerned in these petitions though in the process of discussion, first issue which is somewhat inter-related, has also popped up.

81. Indubitably, the issue of choice of gender identify has all the trappings of a human rights. That apart, as it becomes clear from the reading of the judgment of my esteemed Brother Radhakrishnan, J., the issue is not limited to the exercise of choice of gender/sex. Many rights which flow from this choice also come into play, inasmuch not giving them the status of a third gender results in depriving the community of TGs of many of their valuable rights and privileges which other persons enjoy as citizens of this Country. There is also deprivation of social and cultural participation which results into eclipsing their access to education and health services. Radhakrishnan, J. has exhaustively described the term Transgender' as an umbrella term which embraces within itself a wide range of identities and experiences including but not limited to pre-operative/post-operative trans sexual people who strongly identify with the gender opposite to their biological sex i.e. male/female. Therein, the history of transgenders in India is also traced and while doing so, there is mention of upon the draconian legislation enacted during the British Rule, known as Criminal Tribes Act, 1871 which treated, per se, the entire community of Hizra persons as innately 'criminals', 'addicted to the systematic commission of non-bailable offences'.

82. With these introductory remarks, I revert to the two facets of pivotal importance mentioned above. Before embarking on the discussion, I may clarify that my endeavour would be not to repeat the discussion contained in the judgment of my Brother Radhakrishnan, J., as I agree with every word written therein. However, at times, if some of the observations are re-narrated, that would be only with a view to bring continuity in the thought process.

(1) Re: Right of a person to have the gender of his/her choice.

When a child is born, at the time of birth itself, sex is assigned to him/her. A child would be treated with that sex thereafter, i.e. either a male or a female. However, as explained in detail in the accompanying judgment, some persons, though relatively very small in number, may born with bodies which incorporate both or certain aspects of both male or female physiology. It may also happen that though a person is born as a male, because of some genital anatomy problems his innate perception may be that of a female and all his actions would be female oriented. The position may be exactly the opposite wherein a person born as female may behave like a male person.

83. In earlier times though one could observe such characteristics, at the same time the underlying rationale or reason behind such a behavior was not known. Over a period of time, with in depth study and research of such physical and psychological factors behaviour, the causes of this behaviour have become discernable which in turn, has led to some changes in societal norms. Society has starting accepting, though slowly, these have accepted the behavioral norms of such persons without treating it as abnormal. Further, medical science has leaped forward to such an extent that even physiology appearance of a person can be changed through surgical procedures, from male to female and vice-versa. In this way, such persons are able to acquire the body which is in conformity with the perception of their gender/gender characteristics. In order to ensure that law also keeps pace with the aforesaid progress in medical science, various countries have come out with Legislation conferring rights on such persons to recognize their gender identity based on reassigned sex after undergoing Sex Re-Assignment Surgery (SRS). Law and judgments given by the courts in other countries have been exhaustively and grandiloquently traversed by my learned Brother in his judgment, discussing amongst others, the Yogyakarta principles, the relevant provisions of the Universal Declaration of Human Rights 1948 and highlighting the statutory framework operating in those countries.

84. The genesis of this recognition lies in the acknowledgment of another fundamental and universal principal viz. "right of choice" given to an individual which is the inseparable part of human rights. It is a matter of historical significance that the 20th Century is often described as "the age of rights".

85. The most important lesson which was learnt as a result of Second World War was the realization by the Governments of various countries about the human dignity which needed to be cherished and protected. It is for this reason that in the U.N. Charter, 1945, adopted immediately after the Second World War, dignity of the individuals was mentioned as of core value. The almost contemporaneous Universal Declaration of Human Rights (1948) echoed same sentiments.

86. The underlined message in the aforesaid documents is the acknowledgment that human rights are individual and have a definite linkage of human development, both sharing common vision and with a common purpose. Respect for human rights is the root for human development and realization of full potential of each individual, which in turn leads to the augmentation of human resources with progress of the nation. Empowerment of the people through human development is the aim of human rights.

87. There is thus a universal recognition that human rights are rights that "belong" to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right-grantor. Moreover, human rights exist irrespective of the question whether they are granted or recognized by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-legal rights. They are not granted by people nor can they be taken away by them.

88. In international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of nondiscrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs

due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti- discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.

89. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. Moreover, the requirement contained in Article 2 of the Covenant that the rights enunciated will be exercised without discrimination of any kind based on certain specified grounds or other status clearly applies to cover persons with disabilities.

90. India attained independence within two years of adoption of the aforesaid U.N. Charter and it was but natural that such a Bill of Rights would assume prime importance insofar as thinking of the members of the Constituent Assembly goes. It in fact did and we found chapter on fundamental rights in Part-Ill of the Constitution. It is not necessary for me, keeping in view the topic of today's discussion, to embark on detailed discussion on Chapter-III. Some of the provisions relevant for our purposes would be Article 14, 15, 16 and 21 of the Constitution which have already been adverted to in detail in the accompanying judgment. At this juncture it also needs to be emphasized simultaneously is that in addition to the fundamental rights, Constitution makers also deemed it proper to impose certain obligations on the State in the form of "Directive Principles of State Policy" (Part-IV) as a mark of good governance. It is this part which provides an ideal and purpose to our Constitution and delineates certain principles which are fundamental in the governance of the country. Dr. Ambedkar had explained the purpose of these Directive Principles in the following manner (See Constituent Assembly debates):

The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and the Governors of Colonies, and to those of India by the British Government under the 1935 Government of India Act. What is called "Directive Principles" is merely another name for the Instrument of Instructions. The only difference is that they are instructions to the legislature and the executive. Whoever capture power will not be free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called Directive Principles.

91. The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Granville Austin while analyzing the functioning of Indian Constitution in first 50 years has described three distinguished strands of Indian Constitution: (i)protecting national unity and integrity, (ii)establishing the institution and spirit of democracy; and (iii) fostering social reforms. The Strands are mutually dependent, and inextricably intertwined in what he elegantly describes as "a seamless web". And there cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given

by the people to themselves as expressed in the opening words "We the People". What is the most important gift to the common person given by this Constitution is "fundamental rights" which may be called Human Rights as well.

92. The concept of equality in Article 14 so also the meaning of the words 'life', 'liberty' and 'law' in Article 21 have been considerably enlarged by judicial decisions. Anything which is not 'reasonable, just and fair' is not treated to be equal and is, therefore, violative of Article 14.

93. Speaking for the vision of our founding fathers, in ***State of Karnataka*** v. ***Rangnatha Reddy*** (MANU/SC/0062/1977 : AIR 1978 SC 215), this Court speaking through Justice Krishna Iyer observed:

The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril....
Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties.

94. While interpreting Article 21, this Court has comprehended such diverse aspects as children in jail entitled to special treatment {***Sheela Barse*** v. ***Union of India*** [MANU/SC/0116/1986 : (1986) 3 SCC 596], health hazard due to pollution (***Mehta M.C.*** v. ***Union of India*** [MANU/SC/0396/1987 : (1987) 4 SCC 463], beggars interest in housing (***Kalidas*** v. ***State of J and K*** [(1987) 3 SCC 430] health hazard from harmful drugs (***Vincent Panikurlangara*** v. ***Union of India*** MANU/SC/0985/1987 : AIR 1987 SC 990), right of speedy trial (***Reghubir Singh*** v. ***State of Bihar*** MANU/SC/0199/1986 : AIR 1987 SC 149), handcuffing of prisoners (***Aeltemesh Rein*** v. ***Union of India*** MANU/SC/0009/1988 : AIR 1988 SC 1768), delay in execution of death sentence, immediate medical aid to injured persons (***Parmanand Katara*** v. ***Union of India*** MANU/SC/0423/1989 : AIR 1989 SC 2039), starvation deaths (***Kishen v. State of Orissa*** MANU/SC/0271/1989 : AIR 1989 SC 677), the right to know (***Reliance Petrochemicals Ltd.*** v. ***Indian Express Newspapers Bombay Pvt. Ltd.*** MANU/SC/0412/1988 : AIR 1989 SC 190), right to open trial (***Kehar Singh*** v. ***State (Delhi Admn.***) MANU/SC/0241/1988 : AIR 1988 SC 1883), inhuman conditions an after-care home (***Vikram Deo Singh Tomar*** v. ***State of Bihar*** MANU/SC/0572/1988 : AIR 1988 SC 1782).

95. A most remarkable feature of this expansion of Article 21 is that many of the non-justiciable Directive Principles embodied in Part IV of the Constitution have now been resurrected as enforceable fundamental rights by the magic wand of judicial activism, playing on Article 21 e.g.

(a) Right to pollution-free water and air (***Subhash Kumar*** v. ***State of Bihar*** MANU/SC/0106/1991 : AIR 1991 SC 420).

(b) Right to a reasonable residence (***Shantistar Builders*** v. ***Narayan Khimalal Totame*** MANU/SC/0115/1990 : AIR 1990 SC 630).

(c) Right to food (Supra note 14), clothing, decent environment (supra note 20) and even protection of cultural heritage (***Ram Sharan Autyanuprasi*** v. ***UOI*** MANU/SC/0406/1988 : AIR 1989 SC 549).

(d) Right of every child to a full development (***Shantistar Builders*** v. ***Narayan Khimalal Totame*** MANU/SC/0115/1990 : AIR 1990 SC 630).

(e) Right of residents of hilly-areas to access to roads (***State of H.P.*** v. ***Umed Ram Sharma*** MANU/SC/0125/1986 : AIR 1986 SC 847).

(f) Right to education (***Mohini Jain*** v. ***State of Karnataka*** MANU/SC/0357/1992 : AIR 1992 SC 1858), but not for a professional degree (***Unni Krishnan J.P.*** v. ***State of A.P.*** MANU/SC/0333/1993 : AIR 1993 SC 2178).

96. A corollary of this development is that while so long the negative language of Article 21 and use of the word 'deprived' was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual without the sanction of law, the width and amplitude of this provision has now imposed a positive obligation (***Vincent Panikurlangara*** v. ***UOI*** MANU/SC/0985/1987 : AIR 1987 SC 990) upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity, e.g.-

(i) Maintenance and improvement of public health (***Vincent Panikurlangara*** v. ***UOI*** MANU/SC/0985/1987 : AIR 1987 SC 990).

(ii) Elimination of water and air pollution (***Mehta M.C.*** v. ***UOI*** MANU/SC/0396/1987 : (1987) 4 SCC 463).

(iii) Improvement of means of communication (***State of H.P.*** v. ***Umed Ram Sharma*** MANU/SC/0125/1986 : AIR 1986 SC 847).

(iv) Rehabilitation of bonded labourers (***Bandhuva Mukti Morcha*** v. ***UOI*** MANU/SC/0051/1983 : AIR 1984 SC 802).

(v) Providing human conditions if prisons (***Sher Singh*** v. ***State of Punjab*** MANU/SC/0147/1983 : AIR 1983 SC 465) and protective homes (***Sheela Barse*** v. ***UOI*** MANU/SC/0116/1986 : (1986) 3 SCC 596).

(vi) Providing hygienic condition in a slaughter-house (***Buffalo Traders Welfare Ass.*** v. ***Maneka Gandhi*** MANU/SC/1197/1994 : (1994) Suppl (3) SCC 448).

97. The common golden thread which passes through all these pronouncements is that Article 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing this human rights in terms of human development.

98. The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognize the right of one and all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential.

99. Thus, the emphasis is on the development of an individual in all respects.

The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact,
there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.

100. More than 225 years ago, Immanuel Kant propounded the doctrine of free will, namely the free willing individual as a natural law ideal. Without going into the detail analysis of his aforesaid theory of justice (as we are not concerned with the analysis of his jurisprudence) what we want to point out is his emphasis on the "freedom" of human volition. The concepts of volition and freedom are "pure", that is not drawn from experience. They are independent of any particular body of moral or legal rules. They are presuppositions of all such rules, valid and necessary for all of them.

101. Over a period of time, two divergent interpretations of the Kantian criterion of justice came to be discussed. One trend was an increasing stress on the maximum of individual freedom of action as the end of law. This may not be accepted and was criticized by the protagonist of 'hedonist utilitarianism', notably Benthem. This school of thoughts laid emphasis on the welfare of the society rather than an individual by propounding the principle of maximum of happiness to most of the people. Fortunately, in the instant case, there is no such dichotomy between the individual freedom/liberty we are discussing, as against public good. On the contrary, granting the right to choose gender leads to public good. The second tendency of Kantian criterion of justice was found in re-interpreting "freedom" in terms not merely of absence of restraint but in terms of attainment of individual perfection. It is this latter trend with which we are concerned in the present case and this holds good even today. As pointed out above, after the Second World War, in the form of U.N. Charter and thereafter there is more emphasis on the attainment of individual perfection. In that united sense at least there is a revival of natural law theory of justice. Blackstone, in the opening pages in his 'Vattelian Fashion' said that the principal aim of society "is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature..."

102. In fact, the recognition that every individual has fundamental right to achieve the fullest potential, is founded on the principle that all round growth of an individual leads to common public

good. After all, human beings are also valuable asset of any country who contribute to the growth and welfare of their nation and the society. A person who is born with a particular sex and his forced to grow up identifying with that sex, and not a sex that his/her psychological behavior identifies with, faces innumerable obstacles in growing up. In an article appeared in the magazine "Eye" of the Sunday Indian Express (March 9-15, 2014) a person born as a boy but with trappings of female (who is now a female after SRS) has narrated these difficulties in the following manner:

The other children treated me as a boy, but I preferred playing with girls. Unfortunately, grown-ups consider that okay only as long as you are a small child. The constant inner conflict made things difficult for me and, as I grew up, I began to dread social interactions.

103. Such a person, carrying dual entity simultaneously, would encounter mental and psychological difficulties which would hinder his/her normal mental and even physical growth. It is not even easy for such a person to take a decision to undergo SRS procedure which requires strong mental state of affairs. However, once that is decided and the sex is changed in tune with psychological behavior, it facilitates spending the life smoothly. Even the process of transition is not smooth. The transition from a man to a woman is not an overnight process. It is a "painfully" long procedure that requires a lot of patience. A person must first undergo hormone therapy and, if possible, live as a member of the desired sex for a while. To be eligible for hormone therapy, the person needs at least two psychiatrists to certify that he or she is mentally sound, and schizophrenia, depression and transvestism have to be ruled out first. The psychiatric evaluation involved a serious a questions on how Sunaina felt, when she got to know of her confusion and need for sex change, whether she is a recluse, her socio-economic condition, among other things.

104. In the same article appearing in the "Eye" referred to above, the person who had undergone the operation and became a complete girl, Sunaina (name changed) narrates the benefit which ensued because of change in sex, in harmony with her emotional and psychological character, as is clear from the following passage in that article:

"Like many other single people in the city, she can spend hours watching Friends, and reading thrillers and Harry Potter. A new happiness has taken seed in her and she says it does not feel that she ever had a male body. "I am a person who likes to laugh. Till my surgery, behind every smile of mine, there was a struggle. Now it's about time that I laughed for real. I have never had a relationship in my life, because somewhere, I always wanted to be treated as a girl. Now, that I am a woman, I am open to a new life, new relationships. I don't have to hide anymore, I don't feel trapped anymore. I love coding and my job. I love cooking. I am learning French and when my left foot recovers fully, I plan to learn dancing. And, for the first time this year, I will vote with my new name. I am looking forward to that," she says.

105. If a person has changed his/her sex in tune with his/her gender characteristics and perception, which has become possible because of the advancement in medical science, and when that is permitted by in medical ethics with no legal embargo, we do not find any impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassign sex after undergoing SRS.

106. For these reasons, we are of the opinion that even in the absence of any statutory regime in this country, a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well.

(2) Re: Right of TG to be identified and categorized as "third gender".

107. At the outset, it may be clarified that the term 'transgender' is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor 'transgender'. Etymologically, the term 'transgender' is derived from two words, namely 'trans' and 'gender'. Former is a Latin word which means 'across' or 'beyond'. The grammatical meaning of 'transgender', therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender.

108. It is to be emphasized that Transgender in India have assumed distinct and separate class/category which is not prevalent in other parts of the World except in some neighbouring countries. In this country, TG community comprise of Hijras, enunch, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. In Indian community transgender are referred as Hizra or the third gendered people. There exists wide range of transgender-related identities, cultures, or experience-including Hijras, Aravanis, Kothis, jogtas/Jogappas, and Shiv-Shakthis (Hijras: They are biological males who reject their masculinity identity in due course of time to identify either as women, or 'not men'. Aravanis: Hijras in Tamil Nadu identify as 'Aravani'. Kothi: Kothis are heterogeneous group. Kothis can be described as biological males who show varying degrees of 'femininity'. Jogtas/Jogappas: They are those who are dedicated to serve as servant of Goddess Renukha Devi whose temples are present in Maharashtra and Karnataka. Sometimes, Jogti Hijras are used to denote such male-to-female transgender persons who are devotees of Goddess Renukha and are also from the Hijra community. Shiv-Shakthis: They are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression). The way they behave and acts differs from the normative gender role of a men and women. For them, furthering life is far more difficult since such people are neither categorized as men nor women and this deviation is unacceptable to society's vast majority. Endeavour to live a life with dignity is even worse. Obviously transvestites, the hijra beg from merchants who quickly, under threat of obscene abuse, respond to the silent demands of such detested individuals. On occasion, especially festival days, they press their claims with boisterous and ribald singing and dancing.(A Right to Exist: Eunuchs and the State in Nineteenth-Century India Laurence W. Preston Modern Asian Studies, Vol. 21, No. 2 (1987), pp. 371-387).

109. Therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to TG community i.e. hijra etc., as explained above.

110. Their historical background and individual scenario has been stated in detail in the accompanying judgment rendered by my learned Brother. Few things which follow from this discussion are summed up below:

(a) Though in the past TG in India was treated with great respect, that does not remain the scenario any longer. Attrition in their status was triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of Hijara persons as innately 'criminal' and 'adapted to the systematic commission of non-bailable offences'. This dogmatism and indoctrination of Indian people with aforesaid presumption, was totally capricious and nefarious. There could not have been more harm caused to this community with the passing of the aforesaid brutal Legislation during British Regime with the vicious and savage this mind set. To add insult to the irreparable injury caused, Section 377 of the Indian Penal Code was misused and abused as there was a tendency, in British period, to arrest and prosecute TG persons Under Section 377 merely on suspicion. To undergo this sordid historical harm caused to TGs of India, there is a need for incessant efforts with effervescence.

(b) There may have been marginal improvement in the social and economic condition of TGs in India. It is still far from satisfactory and these TGs continue to face different kinds of economic blockade and social degradation. They still face multiple forms of oppression in this country. Discrimination qua them is clearly discernable in various fields including health care, employment, education, social cohesion etc.

(c) The TGs are also citizens of this country. They also have equal right to achieve their full potential as human beings. For this purpose, not only they are entitled to proper education, social assimilation, access to public and other places but employment opportunities as well. The discussion above while dealing with the first issue, therefore, equally applies to this issue as well.

111. We are of the firm opinion that by recognizing such TGs as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition. As mentioned above, the issue of transgender is not merely a social or medical issue but there is a need to adopt human right approach towards transgenders which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them. TGs face many disadvantages due to various reasons, particularly for gender abnormality which in certain level needs to physical and mental disability. Up till recently they were subjected to cruelty, pity or charity. Fortunately, there is a paradigm shift in thinking from the aforesaid approach to a rights based approach. Though, this may be the thinking of human rights activist, the society has not kept pace with this shift. There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely.(See, Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion, UNDP report on India Issue: December, 2010).

112. Some of the common and reported problem that transgender most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places et. al. The other major problems that the transgender people face in their daily life are discrimination, lack of educational facilities, lack of medical facilities, homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption. In spite of the adoption of Universal Declaration of

Human Rights (UDHR) in the year 1948, the inherent dignity, equality, respect and rights of all human beings throughout the world, the transgender are denied basic human rights. This denial is premised on a prevalent juridical assumption that the law should target discrimination based on sex (i.e., whether a person is anatomically male or female), rather than gender (i.e., whether a person has qualities that society consider masculine or feminine (Katherine M. Franke, The Central Mistake of Sex Discrimination Law: the Disaggregation of Sex from Gender, 144 U. Pa.Rev. 1, 3 (1995) (arguing that by defining sex in biological terms, the law has failed to distinguish sex from gender, and sexual differentiation from sex discrimination). Transgender people are generally excluded from the society and people think transgenderism as a medical disease. Much like the disability, which in earlier times was considered as an illness but later on looked upon as a right based approach. The question whether transgenderism is a disease is hotly debated in both the transgender and medical-psychiatric communities. But a prevalent view regarding this is that transgenderism is not a disease at all, but a benign normal variant of the human experience akin to left-handedness.

113. Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on.

114. Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgenders. Now it's time for us to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender people. All this can be achieved if the beginning is made with the recognition that TG as third gender.

115. In order to translate the aforesaid rights of TGs into reality, it becomes imperative to first assign them their proper 'sex'. As is stated earlier, at the time of birth of a child itself, sex is assigned. However, it is either male or female. In the process, the society as well as law, has completely ignored the basic human right of TGs to give them their appropriate sex categorization. Up to now, they have either been treated as male or female. This is not only improper as it is far from truth, but in dignified to these TGs and violates their human rights.

116. Though there may not be any statutory regime recognizing 'third gender' for these TGs. However, we find enough justification to recognize this right of theirs in natural law sphere. Further, such a justification can be traced to the various provisions contained in Part III of the Constitution relating to 'Fundamental Rights'. In addition to the powerful justification accomplished in the accompanying opinion of my esteemed Brother, additional raison d'etre for this conclusion is stated hereinafter.

117. We are in the age of democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representatives' namely formal democracy.

It also has other percepts like Rule of Law, human rights, independence of judiciary, separation of powers etc.

118. There is a recognition to the hard realty that without protection for human rights there can be no democracy and no justification for democracy. In this scenario, while working within the realm of separation of powers (which is also fundamental to the substantive democracy), the judicial role is not only to decide the dispute before the Court, but to uphold the rule of law and ensure access to justice to the marginalized section of the society. It cannot be denied that TGs belong to the unprivileged class which is a marginalized section.

119. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social realty that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social realty. When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, law has to play more pre-dominant role. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.

120. In ***Dattatraya Govind Mahajan*** v. ***State of Maharashtra*** (MANU/SC/0381/1977 : AIR 1977 SC 915) this Court observed:

Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words 'Justice-social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of chose high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation.....
Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice.

121. Oliver Wendell Holmes said: "the life of law has been logical; it has been experience". It may be added that 'the life of law is not just logic or experience. The life of law is renewable based on experience and logic, which adapted law to the new social realty'. Recognizing this fact, the aforesaid provisions of the Constitution are required to be given new and dynamic meaning with the inclusion of rights of TGs as well. In this process, the first and foremost right is to recognize TGs as 'third gender' in law as well. This is a recognition of their right of equality enshrined in Article 14 as well as their human right to life with dignity, which is the mandate of the Article 21 of the Constitution. This interpretation is in consonance with new social needs. By doing so, this Court is only bridging the gap between the law and life and that is the primary role of the Court in a democracy. It only amounts to giving purposive interpretation to the aforesaid provisions of the

Constitution so that it can adapt to the changes in realty. Law without purpose has no raison d'etre. The purpose of law is the evolution of a happy society. As Justice Iyer has aptly put:

The purpose of law is the establishment of the welfare of society "and a society whose members enjoy welfare and happiness may be described as a just society. It is a negation of justice to say that some members, some groups, some minorities, some individuals do not have welfare: on the other hand they suffer from ill-fare. So it is axiomatic that law, if it is to fulfil itself, must produce a contented, dynamic society which is at once meting out justice to its members.

122. It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern realty. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.

123. As we have pointed out above, our Constitution inheres liberal and substantive democracy with rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.

124. In National Human Rights Commission v. State of Arunachal Pradesh (MANU/SC/1047/1996 : AIR 1996 SC 1234), This Court observed:

We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.

125. The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to life in dignity and development himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual." This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.

126. By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive

Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the TGs which legitimately belongs to them.

127. Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today's context as it is perceived that the bias of their perspective is all too obvious to us. In post-traditional liberal democratic theories of justice, the background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as 'Reflective Equilibrium'. The method of Reflective Equilibrium was first introduced by Nelson Goodman in 'Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the conception of 'Justice as Fairness'. In his 'Theory of Justice', Rawls has proposed a model of just institutions for democratic societies. Herein he draws on certain pre-theoretical elementary moral beliefs ('considered judgments'), which he assumes most members of democratic societies would accept. "[Justice as fairness [....] tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretations. Justice as fairness is a political conception in part because it starts from within a certain political tradition. Based on this preliminary understanding of just institutions in a democratic society, Rawls aims at a set of universalistic rules with the help of which the justice of present formal and informal institutions can be assessed. The ensuing conception of justice is called 'justice as fairness'. When we combine Rawls's notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted that the TGs are also part of vulnerable groups and marginalized section of the society, we are only bringing them within the fold of aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave way for fast tracking the realization of their human rights.

128. The aforesaid, thus, are my reasons for treating TGs as 'third gender' for the purposes of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. These are my reasons in support of our Constitution to the two issues in these petitions.

129. We, therefore, declare:

(1) Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

(4) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.

(5) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

(6) Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

(7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(8) Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

(9) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

130. We are informed an Expert Committee has already been constituted to make an in-depth study of the problems faced by the Transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this judgment and implemented within six months.

131. Writ Petitions are, accordingly, allowed, as above.

Back to Index

MANU/SC/0947/2018

Neutral Citation: 2018/INSC/790

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 76 of 2016, Writ Petition (Civil) No. 572 of 2016, Writ Petition (Criminal) Nos. 88, 100, 101 and 121 of 2018 (Under Article 32 of the Constitution of India)

Decided On: 06.09.2018

Appellants: Navtej Singh Johar and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Dipak Misra, C.J.I., A.M. Khanwilkar, Rohinton Fali Nariman, Dr. D.Y. Chandrachud and Indu Malhotra, JJ.

Subject: Criminal

Subject: Constitution

Relevant Section:

INDIAN PENAL CODE, 1860 (IPC) - Section 377

Authorities Referred:

Concise Oxford Dictionary; Stroud's, Judicial Dictionary, 3rd Edition; Webster's New 20th Century Dictionary; unabridged, 2nd Edition; Black's Law Dictionary

Cases Overruled/Partly Overruled:

Suresh Kumar Koushal and Ors. vs. NAZ Foundation and Ors. MANU/SC/1278/2013

Case Note:

Constitution - Validity of provision - Section 377 of Indian Penal Code, 1860 (IPC) and Articles 14, 15, 19, and 21 of Constitution of India, 1950 - Writ Petition was filed for declaring "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed Under Article 21 of Constitution of India and further to declare Section 377 of IPC to be unconstitutional - Whether Section 377 of IPC as it

criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who were competent to consent) in private, was violative of Articles 14, 15, 19, and 21 of Constitution.

Facts

Writ Petition was filed for declaring "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed under Article 21 of the Constitution of India and further to declare Section 377 of IPC to be unconstitutional. It is urged by the learned Counsel for the Petitioners that individuals belonging to the LGBT group suffer discrimination and abuse throughout their lives due to the existence of Section 377 of IPC which is nothing but a manifestation of a mindset of societal values prevalent during the Victorian era where sexual activities were considered mainly for procreation. The said community remains in a constant state of fear which is not conducive for their growth. It is contended that they suffer at the hands of law and are also deprived of the citizenry rights which are protected under the Constitution. Petitioners face a violation of their fundamental rights to an extent which is manifestly clear and it is a violation which strikes at the very root or substratum of their existence. The discrimination suffered at the hands of the majority, the onslaught to their dignity and invasion on the right to privacy is demonstrably visible and permeates every nook and corner of the society. It is the argument of the Petitioners that Section 377, if retained in its present form, would involve the violation of, not one but, several fundamental rights of the LGBTs, namely, right to privacy, right to dignity, equality, liberty and right to freedom of expression. The Petitioners contend that sexual orientation which is a natural corollary of gender identity is protected under Article 21 of the Constitution and any discrimination meted out to the LGBT community on the basis of sexual orientation would run counter to the mandate provided under the Constitution and the said view has also gained approval of this Court in the NALSA case.

Held, while allowing the petitions

1. Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. [500]

2. The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain. [501]

3. Sexual and gender based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct,

the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices. [502]

4. The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation. [503]

5. Present case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks-as well-to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. [505]

6. A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution. [506]

7. The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored. [507]

8. Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Such procedure established by law must be fair, just and reasonable. The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination. The right to privacy has now been recognised to be an intrinsic part of the right to life and personal liberty Under Article 21. Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of Fundamental Rights guaranteed by Articles 14, 15, and 21. The right to privacy is broad-based and pervasive under our Constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and preserves the sanctity of the private sphere of an individual.314 The right to privacy is not simply the "right to be let alone", and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice.315 It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference. Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their

sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence. [524]

9. The right to health, and access to healthcare are also crucial facets of the right to life guaranteed Under Article 21 of the Constitution.317 LGBT persons being a sexual minority have been subjected to societal prejudice, discrimination and violence on account of their sexual orientation. Since Section 377 criminalises "carnal intercourse against the order of nature" it compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access to health-care facilities. This results in serious health issues, including depression and suicidal tendencies amongst members of this community.318 LGBT persons, and more specifically the MSM, and transgender persons are at a higher risk of contracting HIV as they lack safe spaces to engage in safe-sex practices. They are inhibited from seeking medical help for testing, treatment and supportive care on account of the threat of being 'exposed' and the resultant prosecution. Higher rates of prevalence of HIV-AIDS in MSM, who are in turn married to other people of the opposite sex, coupled with the difficulty in detection and treatment, makes them highly susceptible to contraction and further transmission of the virus. [524.3]

10. Article 19(1)(a) guarantees freedom of expression to all citizens. However, reasonable restrictions can be imposed on the exercise of this right on the grounds specified in Article 19(2). LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed Under Section 377. Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay 'in the closet'. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence. It also has an impact on their mental well-being. [525.1]

11. History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination Under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'. [528]

12. It is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution. It is, however, clarified that, such consent must

be free consent, which is completely voluntary in nature, and devoid of any duress or coercion. The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the reopening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of beastiality. The judgment in Suresh K. Koushal and Anr. v. Naz Foundation and Ors. is hereby overruled. The Reference is answered accordingly. Writ Petitions are allowed. [529]

Disposition:
In Favour of Accused

JUDGMENT

Dipak Misra, C.J.I. (for himself and A.M. Khanwilkar, J.)

CONTENTS

Q.	Conclusions

A. Introduction

1. Not for nothing, the great German thinker, Johann Wolfgang von Goethe, had said, "*I am what I am, so take me as I am*" and similarly, Arthur Schopenhauer had pronounced, "*No one can escape from their individuality*". In this regard, it is profitable to quote a few lines from John Stuart Mill:

But society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency of personal impulses and preferences.

The emphasis on the unique being of an individual is the salt oaf his/her life. Denial of self-expression is inviting death. Irreplaceability of individuality and identity is grant of respect to self. This realization is one's signature and self-determined design. One defines oneself. That is the glorious form of individuality. In the present case, our deliberation and focus on the said concept shall be from various spectrums.

2. Shakespeare through one of his characters in a play says "What's in a name? That which we call a rose by any other name would smell as sweet". The said phrase, in its basic sense, conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called. Getting further deeper into the meaning, it is understood that the name may be a convenient concept for identification but the essence behind the same is the core of identity. Sans identity, the name only remains a denotative term. Therefore, the identity is pivotal to one's being. Life bestows honour on it and freedom of living, as a facet of life, expresses genuine desire to have it. The said desire, one is inclined to think, is satisfied by the conception of constitutional recognition, and hence, emphasis is laid on the identity of an individual which is conceived under the Constitution. And the sustenance of identity is the filament of life. It is equivalent to authoring one's own life script where freedom broadens everyday. Identity is equivalent to divinity.

3. The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights that has eluded certain Sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindset and bigoted perceptions. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards full development of his/her personality that we can call ourselves a truly free society. The first step on the long path to acceptance of the diversity and variegated hues that nature has created has to be taken now by vanquishing the enemies of prejudice and injustice and undoing the wrongs done so as to make way for a progressive and inclusive realisation of social and economic rights embracing all and to begin a dialogue for ensuring equal rights and opportunities for the "less than equal" Sections of the society. We have to bid adieu to the perceptions, stereotypes and prejudices deeply ingrained in the societal mindset so as to usher in inclusivity in all spheres and empower all citizens alike without any kind of alienation and discrimination.

4. The natural identity of an individual should be treated to be absolutely essential to his being. What nature gives is natural. That is called nature within. Thus, that part of the personality of a person has to be respected and not despised or looked down upon. The said inherent nature and the associated natural impulses in that regard are to be accepted. Non-acceptance of it by any societal norm or notion and punishment by law on some obsolete idea and idealism affects the kernel of the identity of an individual. Destruction of individual identity would tantamount to crushing of intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions. It can be viewed from another angle. An individual in exercise of his choice may feel that he/she should be left alone but no one, and we mean, no one, should impose solitude on him/her.

5. The eminence of identity has been luculently stated in ***National Legal Services Authority v. Union of India and Ors.*** MANU/SC/0309/2014 : (2014) 5 SCC 438, popularly known as ***NALSA*** case, wherein the Court was dwelling upon the status of identity of the transgenders. Radhakrishnan, J., after referring to catena of judgments and certain International Covenants, opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. The learned Judge further observed that at times, genital anatomy problems may arise in certain persons in the sense that their innate perception of themselves is not in conformity with the sex assigned to them at birth and may include pre-and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Elaborating further, he said:

Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

6. Adverting to the concept of discrimination, he stated:

The discrimination on the ground of "sex" Under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.

7. Dealing with the legality of transgender identity, Radhakrishnan, J. ruled:

The self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example hijras do not identify as female because of their lack of female genitalia or lack of reproductive

capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a "third gender".

8. Sikri, J., in his concurring opinion, dwelling upon the rights of transgenders, laid down that gender identification is an essential component which is required for enjoying civil rights by the community. It is only with this recognition that many rights attached to the sexual recognition as "third gender" would be available to the said community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's licence, the right to education, employment, health and so on. Emphasising on the aspect of human rights, he observed:

...there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The Constitution has fulfilled its duty of providing rights to transgenders. Now it is time for us to recognise this and to extend and interpret the Constitution in such a manner to ensure a dignified life for transgender people. All this can be achieved if the beginning is made with the recognition of TG as third gender.

The aforesaid judgment, as is manifest, lays focus on inalienable "gender identity" and correctly connects with human rights and the constitutionally guaranteed right to life and liberty with dignity. It lays stress on the judicial recognition of such rights as an inextricable component of Article 21 of the Constitution and decries any discrimination as that would offend Article 14, the "fon juris" of our Constitution.

9. It has to be borne in mind that search for identity as a basic human ideal has reigned the mind of every individual in many a sphere like success, fame, economic prowess, political assertion, celebrity status and social superiority, etc. But search for identity, in order to have apposite space in law, sans stigmas and sans fear has to have the freedom of expression about his/her being which is keenly associated with the constitutional concept of "identity with dignity". When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one's orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a narrow perception may initially sound to subserve the purpose of justice but on a studied scrutiny, it is soon realized that the limited recognition keeps the individual choice at bay. The question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another's choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy, as a seminal facet of Article 21, is not dented. At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, "constitutionally permissible". As long as it is lawful, one is entitled to determine and follow his/her pattern of life. And that is where the distinction between constitutional morality and social morality or ethicality assumes a distinguished podium, a different objective. Non-recognition in the fullest sense and denial of expression of choice by a statutory penal provision and giving of stamp of approval by a two-Judge Bench of this Court to the said penal provision, that is, Section 377 of the Indian Penal

Code, in ***Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*** MANU/SC/1278/2013 : (2014) 1 SCC 1 overturning the judgment of the Delhi High Court in ***Naz Foundation v. Government of NCT of Delhi and Ors.*** MANU/DE/0869/2009 : (2009) 111 DRJ 1, is the central issue involved in the present controversy.

B. <u>The Reference</u>

10. Writ Petition (Criminal) No. 76 of 2016 was filed for declaring "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed Under Article 21 of the Constitution of India and further to declare Section 377 of the Indian Penal Code (for short, "IPC") to be unconstitutional. When the said Writ Petition was listed before a three-Judge Bench on 08.01.2018, the Court referred to a two-Judge Bench decision rendered in ***Suresh Koushal*** (supra) wherein this Court had overturned the decision rendered by the Division Bench of the Delhi High Court in ***Naz Foundation*** (supra). It was submitted by Mr. Arvind Datar, learned senior Counsel appearing for the writ Petitioners, on the said occasion that the two-Judge Bench in ***Suresh Koushal*** (supra) had been guided by social morality leaning on majoritarian perception whereas the issue, in actuality, needed to be debated upon in the backdrop of constitutional morality. A contention was also advanced that the interpretation placed in ***Suresh Kumar*** (supra) upon Article 21 of the Constitution is extremely narrow and, in fact, the Court has been basically guided by Article 14 of the Constitution. Reliance was placed on the pronouncement in ***NALSA*** case wherein this Court had emphasized on "gender identity and sexual orientation". Attention of this Court was also invited to a nine-Judge Bench decision in ***K.S. Puttaswamy and Anr. v. Union of India and Ors.*** MANU/SC/1044/2017 : (2017) 10 SCC 1 wherein the majority, speaking through Chandrachud, J., has opined that sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favour or acceptance. Kaul, J, in his concurring opinion, referred to the decision in ***Mosley v. News Group Newspapers Ltd.*** MANU/UKWQ/0046/2008 : [2008] EWHC 1777 (QB) to highlight that the emphasis for individual's freedom to conduct his sex life and personal relationships as he wishes, subject to the permitted exceptions, countervails public interest.

11. The further submission that was advanced by Mr. Datar was that privacy of the individual having been put on such a high pedestal and sexual orientation having been emphasized in the ***NALSA*** case, Section 377 Indian Penal Code cannot be construed as a reasonable restriction as that would have the potentiality to destroy the individual autonomy and sexual orientation. It is an accepted principle of interpretation of statutes that a provision does not become unconstitutional merely because there can be abuse of the same. Similarly, though a provision on the statute book is not invoked on many occasions, yet it does not fall into the sphere of the doctrine of desuetude. However, ***Suresh Koushal's*** case has been guided by the aforesaid doctrine of desuetude.

12. Appreciating the said submissions, the three-Judge Bench stated that:

Certain other aspects need to be noted. Section 377 Indian Penal Code uses the phraseology "carnal intercourse against the order of nature". The determination of order of nature is not a constant phenomenon. Social morality also changes from age to age. The law copes with life and accordingly change takes place. The morality that public perceives, the Constitution may not conceive of. The individual autonomy and also individual orientation cannot be atrophied unless

the restriction is regarded as reasonable to yield to the morality of the Constitution. What is natural to one may not be natural to the other but the said natural orientation and choice cannot be allowed to cross the boundaries of law and as the confines of law cannot tamper or curtail the inherent right embedded in an individual Under Article 21 of the Constitution. A Section of people or individuals who exercise their choice should never remain in a state of fear. When we say so, we may not be understood to have stated that there should not be fear of law because fear of law builds civilised society. But that law must have the acceptability of the Constitutional parameters. That is the litmus test.

It is necessary to note, in the course of hearing on a query being made and Mr. Datar very fairly stated that he does not intend to challenge that part of Section 377 which relates to carnal intercourse with animals and that apart, he confines to consenting acts between two adults. As far as the first aspect is concerned, that is absolutely beyond debate. As far as the second aspect is concerned, that needs to be debated. The consent between two adults has to be the primary pre-condition. Otherwise the children would become prey, and protection of the children in all spheres has to be guarded and protected. Taking all the aspects in a cumulative manner, we are of the view, the decision in Suresh Kumar Koushal's case (supra) requires re-consideration.

The three-Judge Bench expressed the opinion that the issues raised should be answered by a larger Bench and, accordingly, referred the matter to the larger Bench. That is how the matter has been placed before us.

C. <u>Submissions on behalf of the Petitioners</u>

13. We have heard Mr. Mukul Rohatgi, learned senior Counsel assisted by Mr. Saurabh Kirpal, learned Counsel appearing for the Petitioners in Writ Petition (Criminal) No. 76 of 2016, Ms. Jayna Kothari, learned Counsel for the Petitioner in Writ Petition (Civil) No. 572 of 2016, Mr. Arvind P. Datar, learned senior Counsel for the Petitioner in Writ Petition (Criminal) No. 88 of 2018, Mr. Anand Grover, learned senior Counsel for the Petitioners in Writ Petition (Criminal) Nos. 100 of 2018 and 101 of 2018 and Dr. Menaka Guruswamy, learned Counsel for the Petitioner in Writ Petition (Criminal) No. 121 of 2018. We have also heard Mr. Ashok Desai, Mr. Chander Uday Singh, Mr. Shyam Divan and Mr. Krishnan Venugopal, learned senior Counsel appearing for various intervenors in the matter. A compilation of written submissions has been filed by the Petitioners as well as the intervenors.

14. We have heard Mr. Tushar Mehta, learned Additional Solicitor General for the Union of India, Mr. K. Radhakrishnan, learned senior Counsel appearing in Interlocutory Application No. 94284 of 2018 in Writ Petition (Criminal) No. 76 of 2016, Mr. Mahesh Jethmalani, learned senior Counsel appearing in Interlocutory Application No. 91147 in Writ Petition (Criminal) No. 76 of 2016, Mr. Soumya Chakraborty, learned senior Counsel appearing in Interlocutory Application No. 94348 of 2018 in Writ Petition (Criminal) No. 76 of 2016, Mr. Manoj V. George, learned Counsel appearing for Apostolic Alliance of Churches & Utkal Christian Council and Dr. Harshvir Pratap Sharma, learned Counsel appearing in Interlocutory Application No. 93411 of 2018 in Writ Petition (Criminal) No. 76 of 2016.

15. It is submitted on behalf of the Petitioners and the intervenors that homosexuality, bisexuality and other sexual orientations are equally natural and reflective of expression of choice and inclination founded on consent of two persons who are eligible in law to express such consent and it is neither a physical nor a mental illness, rather they are natural variations of expression and free thinking process and to make it a criminal offence is offensive of the well established principles pertaining to individual dignity and decisional autonomy inherent in the personality of a person, a great discomfort to gender identity, destruction of the right to privacy which is a pivotal facet of Article 21 of the Constitution, unpalatable to the highly cherished idea of freedom and a trauma to the conception of expression of biological desire which revolves around the pattern of mosaic of true manifestation of identity. That apart, the phrase "order of nature" is limited to the procreative concept that may have been conceived as natural by a systemic conservative approach and such limitations do not really take note of inborn traits or developed orientations or, for that matter, consensual acts which relate to responses to series of free exercise of assertions of one's bodily autonomy. It is further argued that their growth of personality, relation building endeavour to enter into a live-in relationship or to form an association with a sense of commonality have become a mirage and the essential desires are crippled which violates Article 19(1)(a) of the Constitution. It is urged that the American Psychological Association has opined that sexual orientation is a natural condition and attraction towards the same sex or opposite sex are both naturally equal, the only difference being that the same sex attraction arises in far lesser numbers.

16. The Petitioners have highlighted that the rights of the lesbian, gay, bisexual and transgender (LGBT) community, who comprise 7-8% of the total Indian population, need to be recognized and protected, for sexual orientation is an integral and innate facet of every individual's identity. A person belonging to the said community does not become an alien to the concept of individual and his individualism cannot be viewed with a stigma. The impact of sexual orientation on an individual's life is not limited to their intimate lives but also impacts their family, professional, social and educational life. As per the Petitioners, such individuals (sexual minorities in societies) need protection more than the heterosexuals so as to enable them to achieve their full potential and to live freely without fear, apprehension or trepidation in such a manner that they are not discriminated against by the society openly or insidiously or by the State in multifarious ways in matters such as employment, choice of partner, testamentary rights, insurability, medical treatment in hospitals and other similar rights arising from live-in relationships which, after the decision in ***Indra Sarma v. V.K.V. Sarma*** MANU/SC/1230/2013 : (2013) 15 SCC 755, is recognized even by the "Protection of Women from Domestic Violence Act, 2005" for various kinds of live-in relationships. The same protection, as per the Petitioners, must be accorded to same sex relationships.

17. It is urged by the learned Counsel for the Petitioners that individuals belonging to the LGBT group suffer discrimination and abuse throughout their lives due to the existence of Section 377 Indian Penal Code which is nothing but a manifestation of a mindset of societal values prevalent during the Victorian era where sexual activities were considered mainly for procreation. The said community remains in a constant state of fear which is not conducive for their growth. It is contended that they suffer at the hands of law and are also deprived of the citizenry rights which are protected under the Constitution. The law should have treated them as natural victims and sensitized the society towards their plight and laid stress on such victimisation, however, the reverse is being done due to which a sense of estrangement and alienation has developed and

continues to prevail amongst the members belonging to the LGBT group. Compulsory alienation due to stigma and threat is contrary to the fundamental principle of liberty.

18. The Petitioners have referred to the decision of this Court in ***NALSA*** case wherein transgenders have been recognized as a third gender apart from male and female and have been given certain rights. Yet, in view of the existence of Section 377 in the Indian Penal Code, consensual activities amongst transgenders would continue to constitute an offence. Drawing inspiration from the ***NALSA*** case, the Petitioners submit that the rights of the LGBT group are not fully realized and they remain incomplete citizens because their expression as regards sexuality is not allowed to be pronounced owing to the criminality attached to the sexual acts between these persons which deserves to be given a burial and, therefore, the rights of the LGBT community also need equal, if not more, constitutional protection. Accordingly, the Petitioners are of the view that Section 377 of the Indian Penal Code be read down qua the LGBT community so as to confine it only to the offence of bestiality and non-consensual acts in view of the fact that with the coming into force of the Criminal Law (Amendment) Act, 2013 and the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), the scope of sexual assault has been widened to include non peno-vaginal sexual assault and also criminalize non-consensual sexual acts between children thereby plugging important gaps in the law governing sexual violence in India.

19. The Petitioners have also submitted that Section 377, despite being a pre-constitutional law, was retained post the Constitution coming into effect by virtue of Article 372 of the Constitution, but it must be noted that the presumption of constitutionality is merely an evidentiary burden initially on the person seeking to challenge the vires of a statute and once any violation of fundamental rights or suspect classification is prima facie shown, then such presumption has no role. In the case at hand, the Petitioners face a violation of their fundamental rights to an extent which is manifestly clear and it is a violation which strikes at the very root or substratum of their existence. The discrimination suffered at the hands of the majority, the onslaught to their dignity and invasion on the right to privacy is demonstrably visible and permeates every nook and corner of the society.

20. It is the argument of the Petitioners that Section 377, if retained in its present form, would involve the violation of, not one but, several fundamental rights of the LGBTs, namely, right to privacy, right to dignity, equality, liberty and right to freedom of expression. The Petitioners contend that sexual orientation which is a natural corollary of gender identity is protected Under Article 21 of the Constitution and any discrimination meted out to the LGBT community on the basis of sexual orientation would run counter to the mandate provided under the Constitution and the said view has also gained approval of this Court in the ***NALSA*** case.

21. The Petitioners have also relied upon the view in ***K.S. Puttaswamy*** (supra) to advance their argument that sexual orientation is also an essential attribute of privacy. Therefore, protection of both sexual orientation and right to privacy of an individual is extremely important, for without the enjoyment of these basic and fundamental rights, individual identity may lose significance, a sense of trepidation may take over and their existence would be reduced to mere survival. It is further urged that sexual orientation and privacy lie at the core of the fundamental rights which are guaranteed Under Articles 14, 19 and 21 of the Constitution and in the light of the decision in ***Puttaswamy*** (supra), it has become imperative that Section 377 be struck down. It is contended

that the right to privacy has to take within its ambit and sweep the right of every individual, including LGBTs, to make decisions as per their choice without the fear that they may be subjected to humiliation or shunned by the society merely because of a certain choice or manner of living.

22. Having canvassed with vehemence that sexual orientation is an important facet of the right to privacy which has been raised to the pedestal of a cherished right, the learned Counsel for the Petitioners have vigorously propounded that sexual autonomy and the right to choose a partner of one's choice is an inherent aspect of the right to life and right to autonomy. In furtherance of the said view, they have relied upon the authorities in ***Shakti Vahini v. Union of India and Ors.*** MANU/SC/0291/2018 : (2018) 7 SCC 192 and ***Shafin Jahan v. Asokan K.M.*** MANU/SC/0340/2018 : AIR 2018 SC 1933: 2018 (5) SCALE 422 wherein it has been clearly recognized that an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected Under Articles 19 and 21 of the Constitution.

23. According to the Petitioners, there is no difference between persons who defy social conventions to enter into inter-religious and inter-caste marriages and those who choose a same sex partner in the sense that the society may disapprove of inter-caste or inter-religious marriages but this Court is for enforcing constitutional rights. Similarly, as per the Petitioners, even if there is disapproval by the majority of the sexual orientation or exercise of choice by the LGBT persons, the Court as the final arbiter of the constitutional rights, should disregard social morality and uphold and protect constitutional morality which has been adverted to by this Court in several cases, including ***Manoj Narula v. Union of India*** MANU/SC/0736/2014 : (2014) 9 SCC 1, for that is the governing rule. It is argued that the Delhi High Court in ***Naz Foundation*** (supra) has referred to and analysed the concept of constitutional morality and ultimately struck down Section 377 Indian Penal Code clearly stating that carnal intercourse between homosexuals and heterosexuals with consent cannot be an offence.

24. The LGBT persons cannot, according to the Petitioners, be penalized simply for choosing a same sex partner, for the constitutional guarantee of choice of partner extends to the LGBT persons as well. Learned Counsel for the Petitioners and the supporting intervenors have submitted that sexual orientation, being an innate facet of individual identity, is protected under the right to dignity. To bolster the said argument, reliance has been placed upon ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.*** MANU/SC/0517/1981 : (1981) 1 SCC 608 and ***Common Cause (A Registered Society) v. Union of India and Anr.*** MANU/SC/0232/2018 : (2018) 5 SCC 1 wherein it was held that the right to life and liberty, as envisaged Under Article 21, is meaningless unless it encompasses within its sphere individual dignity and right to dignity includes the right to carry such functions and activities as would constitute the meaningful expression of the human self.

25. It is submitted that Section 377 is an anathema to the concept of fraternity as enshrined in the Preamble to our Constitution and the Indian Constitution mandates that we must promote fraternity amongst the citizens sans which unity shall remain a distant dream.

26. The Petitioners have further contended that Section 377 is violative of Article 14 of the Constitution as the said Section is vague in the sense that carnal intercourse against the order of nature is neither defined in the Section nor in the Indian Penal Code or, for that matter, any other

law. There is, as per the Petitioners, no intelligible differentia or reasonable classification between natural and unnatural sex as long as it is consensual in view of the decision of this Court in ***Anuj Garg and Ors. v. Hotel Association of India and Ors.*** MANU/SC/8173/2007 : (2008) 3 SCC 1 which lays down the principle that classification which may have been treated as valid at the time of its adoption may cease to be so on account of changing social norms.

27. Section 377, as argued by the Petitioners, is manifestly arbitrary and over-broad and for the said purpose, immense inspiration has been drawn from the principles stated in ***Shayara Bano v. Union of India and Ors.*** MANU/SC/1031/2017 : (2017) 9 SCC 1, for making consensual relationship a crime on the ground that it is against the order of nature suffers from manifest arbitrariness at the fulcrum.

28. It is the case of the Petitioners that Section 377 violates Article 15 of the Constitution since there is discrimination inherent in it based on the sex of a person's sexual partner as Under Section 376(c) to (e), a person can be prosecuted for acts done with an opposite sex partner without her consent, whereas the same acts if done with a same-sex partner are criminalized even if the partner consents. The Petitioners have drawn the attention of this Court to the Justice J.S. Verma Committee on Amendments to Criminal Law which had observed that 'sex' occurring in Article 15 includes sexual orientation and, thus, as per the Petitioners, Section 377 is also violative of Article 15 of the Constitution on this count.

29. It is argued with astuteness that Section 377 has a chilling effect on Article 19(1)(a) of the Constitution which protects the fundamental right of freedom of expression including that of LGBT persons to express their sexual identity and orientation, through speech, choice of romantic/sexual partner, expression of romantic/sexual desire, acknowledgment of relationships or any other means and that Section 377 constitutes an unreasonable exception and is thereby not covered Under Article 19(2) of the Constitution. To buttress the said stance, reliance is placed upon the decision in ***S. Khushboo v. Kanniammal and Anr.*** MANU/SC/0310/2010 : (2010) 5 SCC 600 wherein it has been held that law should not be used in such a manner that it has a chilling effect on the freedom of speech and expression. Additionally, the view in ***NALSA*** case has also been strongly pressed into service to emphasize that the said decision clearly spells out that the right Under Article 19(1)(a) includes one's right to expression of his/her self-identified gender which can be expressed through words, action, behaviour or any other form.

30. The Petitioners have also contended that Section 377 violates the rights of LGBT persons Under Article 19(1)(c) and denies them the right to form associations. Similarly, such persons are hesitant to register companies to provide benefits to sexual minorities due to the fear of state action and social stigma. Further, a conviction Under Section 377 Indian Penal Code renders such persons ineligible for appointment as a director of a company.

31. It is averred that Section 377 Indian Penal Code, by creating a taint of criminality, deprives the LGBT persons of their right to reputation which is a facet of the right to life and liberty of a citizen Under Article 21 of the Constitution as observed by this Court in ***Kishore Samrite v. State of U.P. and Ors.*** MANU/SC/0892/2012 : (2013) 2 SCC 398 and ***Umesh Kumar v. State of Andhra Pradesh and Anr.*** MANU/SC/0904/2013 : (2013) 10 SCC 591 to the effect that reputation is an element of personal security and protected by the Constitution with the right to enjoyment of life

and liberty. This right, as per the Petitioners, is being denied to the LGBT persons because of Section 377 Indian Penal Code as it makes them apprehensive to speak openly about their sexual orientation and makes them vulnerable to extortion, blackmail and denial of State machinery for either protection or for enjoyment of other rights and amenities and on certain occasions, the other concomitant rights are affected.

32. The Petitioners have advanced their argument that Section 377 Indian Penal Code impedes the ability of the LGBTs to realize the constitutionally guaranteed right to shelter. To illustrate the same, the Petitioners have drawn the attention of the Court to the fact that LGBTs seek assistance of private resources such as Gay Housing Assistance Resources (GHAR) in order to access safe and suitable shelter and this is an indication that the members of this community are in need of immediate care and protection of the State.

33. The decision in ***Suresh Koushal*** (supra), as per the Petitioners, is per incuriam as the view observed therein has failed to take into account the amendment to Section 375 Indian Penal Code which has rendered sexual 'carnal intercourse against the order of nature' between man and woman as permissible. Section 377, on the other hand, has continued to render same sex carnal intercourse as an offence, even if it is consensual. Further, the Petitioners have assailed the decision of this Court in ***Suresh Koushal's*** case on the ground that the view in the said decision on classification is contrary to the 'impact or effect test', for the result, in ultimate eventuality, leads to discrimination. Thus, the Petitioners have contended that after ***Puttaswamy*** (supra), the view in ***Suresh Koushal*** (supra) needs to be overruled and the proper test would be whether Section 377 Indian Penal Code can be enacted by the Parliament today after the decisions of this Court in ***NALSA*** (supra) and ***Puttaswamy*** (supra) and other authorities laying immense emphasis on individual choice.

34. It is further contended that LGBT persons are deprived of their rights due to the presence of Section 377 as they fear prosecution and persecution upon revealing their sexual identities and, therefore, this class of persons never approached this Court as Petitioners, rather they have always relied upon their teachers, parents, mental health professionals and other organizations such as NGOs to speak on their behalf. It is urged that the Appellants in ***Suresh Koushal*** (supra) led this Court to assume that LGBT persons constitute only a minuscule fraction whereas most of the studies indicate that they constitute at least 7-8% of the population and that apart, rights are not determined on the basis of percentage of populace but on a real scrutiny of the existence of right and denial of the same. It is the stand of the Petitioners that majority perception or view cannot be the guiding factor for sustaining the constitutionality of a provision or to declare a provision as unconstitutional.

D. <u>Submissions on behalf of the Respondents and other intervenors</u>

35. The Respondent, Union of India, has, vide affidavit dated 11th July, 2018, submitted that the matter at hand was referred to a Constitution Bench to decide as to whether the law laid down in ***Suresh Koushal*** (supra) is correct or not and the only question referred to this Bench is the question of the constitutional validity of criminalizing 'consensual acts of adults in private' falling Under Section 377 Indian Penal Code.

36. Further, the Union has submitted that so far as the constitutional validity of Section 377 Indian Penal Code, to the extent it applies to 'consensual acts of adults in private', is concerned, the Respondent leaves the same to the wisdom of this Court.

37. The Respondent has also contended that in the event Section 377 Indian Penal Code so far as 'consensual acts of adults in private' is declared unconstitutional, other ancillary issues or rights which have not been referred to this Bench for adjudication may not be dealt with by this Bench as in that case, the Union of India expresses the wish to file detailed affidavit in reply, for consideration of other issues and rights would have far reaching and wide ramifications under various other laws and will also have consequences which are neither contemplated in the reference nor required to be answered by this Hon'ble Bench.

38. The Respondent has submitted that allowing any other issue (other than the constitutional validity of Section 377 Indian Penal Code) to be argued and adjudicating the same without giving an opportunity to the Union of India to file a counter affidavit may not be in the interest of justice and would be violative of the principles of natural justice.

39. Another set of written submissions has been filed by Shri K. Radhakrishnan, senior counsel, on behalf of intervenor-NGO, Trust God Ministries. The said intervenor has submitted that the observations of this Court in ***Puttaswamy*** (supra), particularly in Para 146, virtually pre-empt and forestall the aforesaid NGO from raising substantial contentions to the effect that there is no uncanalised and unbridled right to privacy and the said right cannot be abused. Further, the intervenor has contended that there is no personal liberty to abuse one's organs and that the offensive acts proscribed by Section 377 Indian Penal Code are committed by abusing the organs. Such acts, as per the intervenor, are undignified and derogatory to the constitutional concept of dignity and if any infraction is caused to the concept of dignity, then it would amount to constitutional wrong and constitutional immorality.

40. It is also the case of the intervenor that issues pertaining to the constitutional and other legal rights of the transgender community, their gender identity and sexual orientation have been exhaustively considered in the light of the various provisions of the Constitution and, accordingly, reliefs have been granted by this Court in ***NALSA*** (supra). It is contended by the intervenor that no further reliefs can be granted to them and the prayers made by them is only to abuse privacy and personal liberty by transgressing the concepts of dignity and public morality.

41. As per the intervenor, Section 377 rightly makes the acts stated therein punishable as Section 377 has been incorporated after taking note of the legal systems and principles which prevailed in ancient India and now in 2018, the said Section is more relevant legally, medically, morally and constitutionally.

42. To illustrate this, the intervenor has drawn the attention of this Court to W. Friedmann from '*Law in a Changing Society*' wherein he has observed that to prohibit a type of conduct which a particular society considers worthy of condemnation by criminal sanctions is deeply influenced by the values governing that society and it, therefore, varies from one country to another and one period of history to another.

43. Further, it has been contended by the intervenor that persons indulging in unnatural sexual acts which have been made punishable Under Section 377 Indian Penal Code are more susceptible and vulnerable to contracting HIV/AIDS and the percentage of prevalence of AIDS in homosexuals is much greater than heterosexuals and that the right to privacy may not be extended in order to enable people to indulge in unnatural offences and thereby contact AIDS.

44. It is also the case of the intervenor that if Section 377 is declared unconstitutional, then the family system which is the bulwark of social culture will be in shambles, the institution of marriage will be detrimentally affected and rampant homosexual activities for money would tempt and corrupt young Indians into this trade.

45. Written submissions have also been filed on behalf of Mr. Suresh Kumar Koushal, intervenor, submitting therein that the argument of the Petitioners that consensual acts of adults in private have been decriminalized in many parts of the world and, therefore, it deserves to be decriminalized in India as well does not hold good for several reasons inasmuch as the political, economic and cultural heritage of those countries are very different from India which is a multicultural and multi-linguistic country.

46. The intervenor has contended that since fundamental rights are not absolute, there is no unreasonableness in Section 377 Indian Penal Code and decriminalizing the same would run foul to all religions practised in the country, and, while deciding the ambit and scope of constitutional morality, Article 25 also deserves to be given due consideration.

47. Another application for intervention, being I.A. No. 91250 of 2018, was filed and the same was allowed. It has been contended by the said intervenor that in the attempt that Section 377 is struck down, it would render the victims complaining of forced acts covered under the existing Section 377 Indian Penal Code remediless as the said Section not only impinges on carnal intercourse against the order of nature between two consenting adults but also applies to forced penile non-vaginal sexual intercourse between adults. This, as per the intervenor, would be contrary to the decision of this Court in ***Iqbal Singh Marwah and Anr. v. Meenakshi Marwah and Anr.*** MANU/SC/0197/2005 : (2005) 4 SCC 370.

48. The applicant has also submitted that in the event consenting acts between two same sex adults are excluded from the ambit of Section 377 Indian Penal Code, then a married woman would be rendered remediless under the Indian Penal Code against her bi-sexual husband and his consenting male partner indulging in any sexual acts.

49. The intervenor has suggested that the alleged misuse of Section 377 Indian Penal Code as highlighted by the Petitioners can be curbed by adding an explanation to Section 377 Indian Penal Code defining 'aggrieved person' which shall include only non-consenting partner or aggrieved person or wife or husband or any person on their behalf on the lines of Section 198(1) of Code of Criminal Procedure, 1973. This, as per the applicant, would curb any mala fide complaint lodged by authorities and vindictive or mischievous persons when the act complained of is 'consenting act' between two persons. Further, the applicant has submitted that this Court may be pleased to identify that the courts shall take cognizance of an offence Under Section 377 Indian Penal Code only on a complaint made by an aggrieved person. Such an approach, as per the applicant,

inherently respects consent and also protects from interference and safeguards the privacy and dignity of an individual Under Article 21 of the Constitution.

50. The applicant has also contended that the constitutionality of any legislation is always to be presumed and if there is any vagueness in the definition of any section, the courts have to give such a definition which advances the purpose of the legislation and that the courts must make every effort to uphold the constitutional validity of a statute if that requires giving a stretched construction in view of the decisions of this Court in ***K.A. Abbas v. Union of India and Anr.*** MANU/SC/0053/1970 : (1970) 2 SCC 780 and ***Rt. Rev. Msgr. Mark Netto v. State of Kerala and Ors.*** MANU/SC/0044/1978 : (1979) 1 SCC 23.

51. The applicant, through his learned Counsel Mr. Harvinder Chowdhury, submits that if the right to privacy as recognized in ***Puttaswamy*** (supra) is allowed its full scope and swing, then that itself would Rule out prosecution in all cases of consensual unnatural sex between all couples, whether heterosexual or homosexual, and without having to engage in reading down, much less striking down of, the provisions of Section 377 Indian Penal Code in its present form. This is so because the State cannot compel individuals engaging in consensual sexual acts from testifying against one another as it involves a breach of privacy unless the consent itself is under challenge and one cannot be a consenting victim of a crime so long as the consent is legally valid.

52. Submissions have also been advanced on behalf of Raza Academy, intervenor, through its learned Counsel Mr. R.R. Kishore, who has contended that homosexuality is against the order of nature and Section 377 rightly forbids it. Prohibition against carnal intercourse involving penetration into non-sexual parts of the body does not constitute discrimination as laws based on biological reality can never be unconstitutional, for if a male is treated as a male, a female as a female and a transgender as a transgender, it does not amount to discrimination.

53. The applicant has submitted that the purpose of criminal law is to protect the citizens from something that is injurious and since carnal intercourse between two persons is offensive and injurious, it is well within the State's jurisdiction to put reasonable restrictions to forbid such aberrant human behaviour by means of legislation, for it is the duty of the State that people with abnormal conduct are prohibited from imperiling the life, health and security of the community. Unrestrained pleasure, and that too of a lascivious nature, is not conducive for the growth of a civilized society, such inordinate gratification needs to be curbed and, thus, prohibition against carnal intercourse as defined in Section 377 Indian Penal Code does not violate the constitutional rights of a person.

54. Another application for intervention, being I.A. No. 9341 of 2011, was filed and allowed. The applicant, in his written submissions, after delineating the concept of immorality, has submitted that the doctrine of manifest arbitrariness is of no application to the present case as the law is not manifestly or otherwise arbitrary, for Section 377 criminalizes an act irrespective of gender or sexual orientation of the persons involved. The universal application of the said provision without any gender bias is the touchstone of Part III of the Constitution and is not arbitrary as there is no intentional or unreasonable discrimination in the provision.

55. The applicant has drawn the attention of this Court to the case of ***Fazal Rab Choudhary v. State of Bihar*** MANU/SC/0064/1982 : (1982) 3 SCC 9 wherein this Court held that the offence Under Section 377 Indian Penal Code implies sexual perversity. Further, it is the case of the applicant that there should not be identical transplantation of Western ideology in our country which has also been a matter of concern for this Court in ***Jagmohan Singh v. State of U.P.*** MANU/SC/0139/1972 : (1973) 1 SCC 20.

56. The applicant, after citing the case of ***State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors.*** MANU/SC/1352/2005 : (2005) 8 SCC 534, has stressed upon the fact that the interest of a citizen or a Section of the society, howsoever important, is secondary to the interest of the country or community as a whole and while judging the reasonability of restrictions imposed on fundamental rights, due consideration must also be given to the Directive Principles stated in Part IV. In view of these aforesaid submissions, the applicant has submitted that fundamental rights may not be overstretched and the Directive Principles of State Policy which are fundamental in the governance of the country cannot be neglected, for they are not less significant than what is fundamental in the life of an individual as held in ***Kesavananda Bharati v. Union of India*** MANU/SC/0445/1973 : (1973) 4 SCC 225.

57. Another application for intervention, being I.A. No. 76790 of 2018, has been filed by Apostolic Alliance of Churches and the Utkal Christian Council. The applicants have submitted that the Court, while interpreting Section 377 Indian Penal Code, has to keep in mind that there can be situations where consent is obtained by putting a person in fear of death or hurt or consent can also be obtained under some misconception or due to unsoundness of mind, intoxication or inability to understand the nature and the consequences of the acts prohibited by Section 377 Indian Penal Code.

58. The applicant has also advanced the argument that Section 377 Indian Penal Code in its present form does not violate Article 14 of the Constitution as it merely defines a particular offence and its punishment and it is well within the power of the State to determine who should be regarded as a class for the purpose of a legislation and this, as per the applicant, is reasonable classification in the context of Section 377 Indian Penal Code.

59. Further, the applicant has contended that Section 377 Indian Penal Code is not violative of Article 15 of the Constitution as the said Article prohibits discrimination on the grounds of only religion, race, caste, sex, place of birth or any of them but not sexual orientation. The word 'sexual orientation', as per the applicant, is alien to our Constitution and the same cannot be imported within it for testing the constitutional validity of a provision or legislation. As per the applicant, if the word 'sex' has to be replaced by 'sexual orientation', it would require a constitutional amendment.

60. It is also the case of the applicant that the Yogyakarta principles which have been heavily relied upon by the Petitioners to bolster their stand have limited sanctity inasmuch as they do not amount to an international treaty binding on the State parties and there are no inter-governmentally negotiated international instruments or agreed human rights treaties on the issue of LGBTs.

61. Further, the applicant has submitted that there is no requirement to reconsider the decision of this Court in ***Suresh Koushal*** (supra) wherein it was held that there is a presumption of constitutionality of a legislation and the Court must adopt self-restraint and thereby refrain from giving birth to judicial legislation. In the applicant's view, the legislative wisdom of the Parliament must be respected and it must be left to the Parliament to amend Section 377 Indian Penal Code, if so desired.

62. The applicant has contended that if the prayers of the Petitioners herein are allowed, it would amount to judicial legislation, for the Courts cannot add or delete words into a statute. It is stated that the words 'consent' and/or 'without consent' are not mentioned in Section 377 Indian Penal Code and, therefore, the Courts cannot make such an artificial distinction. To buttress this stand, the applicant has relied upon the decision of this Court in ***Sakshi v. Union of India and Ors.*** MANU/SC/0523/2004 : (2004) 5 SCC 518 wherein it was observed that the attention of the Court should be on what has been said and also on what has not been said while interpreting the statute and that it would be wrong and dangerous for the Court to proceed by substituting some other words in a statute since it is well settled that a statute enacting an offence or imposing a penalty has to be strictly construed.

63. The applicant has also drawn the attention of this Court to the decision in ***Union of India and Anr. v. Deoki Nandan Aggarwal*** MANU/SC/0013/1992 : 1992 Supp. (1) SCC 323 wherein it was observed that the Court cannot rewrite, recast or re-frame the legislation for the good reason that it has no power to legislate since the power to legislate has not been conferred upon the Court and, therefore, the Courts cannot add words to a statute or read words into it which are not there. The Courts are to decide what the law is and not what it should be.

64. It is also the case of the applicant that the decriminalization of Section 377 Indian Penal Code will open a floodgate of social issues which the legislative domain is not capable of accommodating as same sex marriages would become social experiments with unpredictable outcome.

65. Further, it is the contention of the applicant that decriminalization of Section 377 Indian Penal Code will have cascading effect on existing laws such as Section 32(d) of the Parsi Marriage and Divorce Act, 1936; Section 27(7)(1A) A of the Special Marriage Act, 1954 which permits a wife to present a petition for divorce to the district court on the ground,--(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; Section 10(2) of the Indian Divorce Act, 1869 and Section 13(2) of the Hindu Marriage Act, 1955.

E. <u>Decisions in Naz Foundation and Suresh Koushal</u>

66. We shall now advert to what had been stated by the Delhi High Court in ***Naz Foundation*** and thereafter advert to the legal base of the decision in ***Suresh Koushal'***s case. The Delhi High Court had taken the view that Article 15 of the Constitution prohibits discrimination on several enumerated grounds including sex. The High Court preferred an expansive interpretation of 'sex' so as to include prohibition of discrimination on the ground of 'sexual orientation' and that sex-discrimination cannot be read as applying to gender simpliciter. Discrimination, as per the High

Court's view, on the basis of sexual orientation is grounded in stereotypical judgments and generalization about the conduct of either sex.

67. Another facet of the Indian Constitution that the High Court delineated was that of inclusiveness as the Indian Constitution reflects this value of inclusiveness deeply ingrained in the Indian society and nurtured over several generations. The High Court categorically said that those who are perceived by the majority as deviants or different are not to be, on that score, excluded or ostracised. In the High Court's view, where a society displays inclusiveness and understanding, the LGBT persons can be assured of a life of dignity and non-discrimination.

68. It has been further opined by the High Court that the Constitution does not permit any statutory criminal law to be held captive of the popular misconceptions of who the LGBTs are, as it cannot be forgotten that discrimination is the antithesis of equality and recognition of equality in its truest sense will foster the dignity of every individual. That apart, the High Court had taken the view that social morality has to succumb to the concept of constitutional morality.

69. On the basis of the aforesaid reasons, the High Court declared Section 377 Indian Penal Code violative of Articles 14, 15 and 21 of the Constitution in so far as it criminalises consensual sexual acts of adults in private, whereas for non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors, the High Court ruled that Section 377 Indian Penal Code was valid.

70. The Delhi High Court judgment was challenged in ***Suresh Koushal*** (supra) wherein this Court opined that acts which fall within the ambit of Section 377 Indian Penal Code can only be determined with reference to the act itself and to the circumstances in which it is executed. While so opining, the Court held that Section 377 Indian Penal Code would apply irrespective of age and consent, for Section 377 Indian Penal Code does not criminalize a particular people or identity or orientation and only identifies certain acts which, when committed, would constitute an offence. Such a prohibition, in the Court's view in ***Suresh Koushal*** (supra), regulates sexual conduct regardless of gender identity and orientation.

71. The Court further observed that those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 Indian Penal Code suffers from the vice of arbitrariness and irrational classification. The Court further observed that while reading down Section 377 of the Indian Penal Code, it cannot be overlooked that only a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in last more than 150 years, less than 200 persons have been prosecuted Under Section 377 of the Indian Penal Code which cannot, therefore, be made a sound basis for declaring Section 377 Indian Penal Code *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution.

72. The submission advanced by the Respondents therein to the effect that the provision had become a pernicious tool for perpetrating harassment, blackmail and torture on those belonging to the LGBT community was repelled by stating that such treatment is neither mandated by the Section nor condoned by it and the mere fact that the Section is misused by police authorities and Ors. is not a reflection of the *vires* of the Section, though it might be a relevant factor for the

Legislature to consider while judging the desirability of amending Section 377 of the Indian Penal Code.

F. <u>Other judicial pronouncements on Section 377 Indian Penal Code</u>

73. Presently, we may refer to some of the judgments and the views taken therein by this Court as well as by the High Courts on Section 377 Indian Penal Code so as to have a holistic perspective.

74. While interpreting the said provision, the Courts have held that the provision stipulates certain acts, which when committed, would constitute a criminal offence. In ***Childline India Foundation and Anr. v. Allan John Waters and Ors.*** MANU/SC/0254/2011 : (2011) 6 SCC 261, the Court was dealing with carnal intercourse against the order of nature when the material on record showed that the Accused Nos. 2 and 3 used to have sex and fellatio with PWs 1 and 4. The Court opined that the ingredients of Section 377 Indian Penal Code were proved and, accordingly, restored the conviction and sentence of 6 years' rigorous imprisonment and confirmed the imposition of fine. In ***Fazal Rab Choudhary*** (supra), although the Court convicted the Accused Under Section 377 Indian Penal Code, yet it took note of the absence of any force in the commission of the act. The Court also took into account the prevalent notions of permissive society and the fact that homosexuality has been legalized in some countries. In view of the same, the Court reduced the sentence of 3 years imposed on the Accused to 6 months opining that the aforesaid aspects must also be kept in view as they have a bearing on the question of offence and quantum of sentence.

75. A reference may be made to ***Khanu v. Emperor*** AIR 1925 Sind 286 which was also alluded to in ***Suresh Koushal's*** case. We deem it appropriate to reproduce a part of ***Khanu's*** decision to understand how the courts in India had understood the word "carnal intercourse against the order of nature". The said passage reads thus:

The principal point in this case is: whether the Accused (who is clearly guilty of having committed the sin of Gomorrah coitus per os) with a certain little child, the innocent accomplice of his abomination, has thereby committed an offence Under Section 377 of the Penal Code.

Section 377 punishes certain persons who have carnal intercourse against the order of nature with inter alia human beings. Is the act here committed one of carnal intercourse? If so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings which in the case of coitus per os is impossible. Intercourse may be defined as mutual frequent action by members of independent organisation. Commercial intercourse [is thereafter referred to; emphasis is made on the reciprocity].

By a metaphor the word intercourse like the word commerce is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that sin of Gomorrah is no less carnal intercourse than the sin of sodomy. ....

It is to be remembered that the Penal Code does not, except in Section 377, render abnormal sexual vice punishable at all. In England indecent assaults are punishable very severely. It is possible that under the Penal Code, some cases might be met by prosecuting the offender for simple assault, but that is a compoundable offence and in any case the patient could in no way be punished. It is to be supposed that the legislature intended that a Tigellinus should carry on his nefarious profession perhaps vitiating and depraving hundreds of children with perfect immunity?

I doubt not, therefore, that coitus per os is punishable Under Section 377 of the Penal Code.

76. In ***Suresh Koushal's*** case, there has also been a reference to the decision of the Gujarat High Court in ***Lohana Vasantlal Devchand v. State*** MANU/GJ/0076/1968 : AIR 1968 Guj 252 wherein the issue presented before the High Court was whether an offence Under Section 377 read with Section 511 Indian Penal Code had been committed on account of the convict putting his male organ in the mouth of the victim, if the act was done voluntarily by him. A contention was raised that there was no penetration and, therefore, there could not have been any carnal intercourse. The High Court referred to a passage from the book 'Pyschology of Sex'[1] authored by Mr. Havelock Ellis which reads thus:

While the kiss may be regarded as the typical and normal erogenic method of contrectation for the end of attaining tumescene, there are others only less important. Any orifical contact 'between persons of opposite sex' is sometimes almost equally as effective as the kiss in stimulating tumescene; all such contacts, indeed, belong to the group of which the kiss is the type, Cunnilinctus (often incorrectly termed cunnilingus) and fellatio cannot be regarded as unnatural for they have their prototypic forms among animals, and they are found among various savage races. As forms of contrection and aides to tumescene they are thus natural and are sometimes regarded by both sexes as quintessential forms of sexual pleasure, though they may not be considered aesthetic. They become deviations, however, and this liable to be termed "perversions", when they replace the desire of coitus.

77. After referring to the definition of sodomy, the pronouncement in ***Khanu*** (supra), Stroud's Judicial Dictionary, 3rd Edition and Webster's New 20th Century Dictionary, unabridged, 2nd Edition, the Gujarat High Court opined thus:

In the instant case, there was an entry of a male penis in the orifice of the mouth of the victim. There was the enveloping of a visiting member by the visited organism. There was thus reciprocity; intercourse connotes reciprocity. It could, therefore, be said without any doubt in my mind that the act in question will amount to an offence, punishable Under Section 337 of the Indian Penal Code.

78. The decision in ***State of Kerala v. Kundumkara Govindan and Anr.*** MANU/KE/0137/1968 : 1969 Cri. LJ 818 (Ker) has also been reproduced in ***Suresh Koushal'***s case. The High Court of Kerala held thus:

18. Even if I am to hold that there was no penetration into the vagina and the sexual acts were committed only between the thighs, I do not think that the Respondents can escape conviction Under Section 377 of the Penal Code. The counsel of the Respondents contends (in this argument the Public Prosecutor also supports him) that sexual act between the thighs is not intercourse. The

argument is that for intercourse there must be encirclement of the male organ by the organ visited; and that in the case of sexual act between the thighs, there is no possibility of penetration.

19. The word 'intercourse' means 'sexual connection' (*Concise Oxford Dictionary*). In *Khanu* v. *Emperor* the meaning of the word 'intercourse' has been considered: (AIR p. 286)

'Intercourse may be defined as mutual frequent action by members of independent organisation.'

Then commercial intercourse, social intercourse, etc. have been considered; and then appears:

By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.' Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs: the thighs are kept together and tight.

20. Then about penetration. The word 'penetrate' means in the *Concise Oxford Dictionary* 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place, fit, thrust.' Therefore, if the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.

21. Unnatural offence is defined in Section 377 of the Penal Code; whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits unnatural offence. The act of committing intercourse between the thighs is carnal intercourse against the order of nature. Therefore committing intercourse by inserting the male organ between the thighs of another is an unnatural offence. In this connection, it may be noted that the act in Section 376 is 'sexual intercourse' and the act in Section 377 is 'carnal intercourse against the order of nature'.

22. The position in English law on this question has been brought to my notice. The old decision of *R.* v. *Samuel Jacobs* 1817 Russ & Ry 331: 168 ER 830 (CCR) lays down that penetration through the mouth does not amount to the offence of sodomy under English law. The counsel therefore argues that sexual intercourse between the thighs cannot also be an offence Under Section 377 of the Penal Code. In *Sirkar* v. *Gula Mythien Pillai Chaithu Maho Mathu* (1908) 14 TLR Appendix 43 (Ker) a Full Bench of the Travancore High Court held that having connection with a person in the mouth was an offence Under Section 377 of the Penal Code. In a short judgment, the learned Judges held that it was unnecessary to refer to English Statute Law and English text books which proceeded upon an interpretation of the words sodomy, buggery and bestiality; and that the words used in the Penal Code were very simple and wide enough to include all acts against the order of nature. My view on the question is also that the words of Section 377 are simple and wide

enough to include any carnal intercourse against the order of nature within its ambit. Committing intercourse between the thighs of another is carnal intercourse against the order of nature.

79. In ***Calvin Francis v. State of Orissa*** MANU/OR/0212/1992 : 1992 (1) OLR 316, the Orissa High Court had reproduced certain passages from Corpus Juris Secundum, Vol. 81, pp. 368-70. We may reproduce the same:

A statute providing that any person who shall commit any act or practice of sexual perversity, either with mankind or beast, on conviction shall be punished, is not limited to instances involving carnal copulation, but is restricted to cases involving the sex organ of at least one of the parties. The term 'sexual perversity' does not refer to every physical contact by a male with the body of the female with intent to cause sexual satisfaction to the actor, but the condemnation of the statute is limited to unnatural conduct performed for the purpose of accomplishing abnormal sexual satisfaction for the actor. Under a statute providing that any person participating in the act or copulating the mouth of one person with the sexual organ of another is guilty of the offence a person is guilty of violating the statute when he has placed his mouth on the genital organ of another, and the offence may be committed by two persons of opposite sex.

80. Referring to the said decision, the two-Judge Bench in ***Suresh Koushal'***s case has opined:

60. However, from these cases no uniform test can be culled out to classify acts as "carnal intercourse against the order of nature". In our opinion the acts which fall within the ambit of Section 377 Indian Penal Code can only be determined with reference to the act itself and the circumstances in which it is executed. All the aforementioned cases refer to non-consensual and markedly coercive situations and the keenness of the Court in bringing justice to the victims who were either women or children cannot be discounted while analysing the manner in which the Section has been interpreted. We are apprehensive of whether the court would Rule similarly in a case of proved consensual intercourse between adults.....

81. From the aforesaid analysis, it is perceptible that the two-Judge Bench has drawn a distinction between the "class" and the "act" that has been treated as an offence. On a plain reading of the provision, it is noticeable that the "act" covers all categories of persons if the offence is committed. Thus, the seminal issue that emerges for consideration, as has been understood by various High Courts and this Court, is whether the act can be treated as a criminal offence if it violates Articles 19(1)(a) and 21 of the Constitution. Therefore, the provision has to be tested on the anvil of the said constitutional provisions. Additionally, it is also to be tested on the touchstone of Article 14 especially under the scanner of its second limb, that is, manifest arbitrariness. For adjudging the aforesaid facets, certain fundamental concepts which are intrinsically and integrally associated with the expression of a person who enjoys certain inalienable natural rights which also have been recognized under the Constitution are required to be addressed. In this context, the individuality of a person and the acceptance of identity invite advertence to some necessary concepts which eventually recognize the constitutional status of an individual that resultantly brushes aside the "act" and respects the dignity and choice of the individual.

G. <u>The Constitution - an organic charter of progressive rights</u>

82. A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society. It was highlighted by this Court in the case of ***Chief Justice of Andhra Pradesh and Ors. v. L.V.A. Dixitulu and Ors.*** MANU/SC/0416/1978 : (1979) 2 SCC 34 that the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs.

83. In the case of ***Saurabh Chaudri and Ors. v. Union of India and Ors.*** MANU/SC/0879/2003 : (2003) 11 SCC 146, it was observed:

Our Constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding.

84. Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the Constitution. The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters. The following observations made in the case of ***Ashok Kumar Gupta and Anr. v. State of U.P. and Ors.*** MANU/SC/1176/1997 : (1997) 5 SCC 201 further throws light on this role of the courts:

Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally.

85. The rights that are guaranteed as Fundamental Rights under our Constitution are the dynamic and timeless rights of 'liberty' and 'equality' and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature. The argument does not lie in the fact that the concepts underlying these rights change with the changing times but the changing times illustrate and illuminate the concepts underlying the said rights. In this regard, the observations in ***Video Electronics Pvt. Ltd. and Anr. v. State of Punjab and Anr.*** MANU/SC/0644/1989 : (1990) 3 SCC 87 are quite instructive:

Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expressions used. The connotation of the expressions used takes its shape and colour in evolving dynamic situations.

86. Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual. This guarantee of recognition of individuality runs through the entire length and

breadth of this dynamic instrument. The Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable'. It is the duty of the courts to realize the constitutional vision of equal rights in consonance with the current demands and situations and not to read and interpret the same as per the standards of equality that existed decades ago. The judiciary cannot remain oblivious to the fact that the society is constantly evolving and many a variation may emerge with the changing times. There is a constant need to transform the constitutional idealism into reality by fostering respect for human rights, promoting inclusion of pluralism, bringing harmony, that is, unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny.

87. In ***Ashok Kumar Gupta*** (supra), the Court had observed that common sense has always served in the court's ceaseless striving as a voice of reason to maintain the blend of change and continuity of order which are *sine qua non* for stability in the process of change in a parliamentary democracy. The Court ruled that it is not bound to accept an interpretation which retards the progress or impedes social integration. The Court further observed that it is required to adopt such interpretation which would give the ideals set out in the Preamble to the Constitution aided by Part III and Part IV a meaningful and living reality for all Sections of the society.

88. It is through this armoury of expansive dynamism that the courts have been able to give an all-inclusive interpretation to the fundamental rights enshrined in Part III of our Constitution. This is borne testimony by the decisions of the constitutional courts which have evolved views for extending the protection of fundamental rights to those who have been deprived of the enjoyment of the same. If not for such an approach adopted by the courts, our Constitution and its progressive principles would have been rendered ineffective and the dynamic charter would be reduced to a mere ornate document without any purpose or object.

89. The Court, as the final arbiter of the Constitution, has to keep in view the necessities of the needy and the weaker sections. The role of the Court assumes further importance when the class or community whose rights are in question are those who have been the object of humiliation, discrimination, separation and violence by not only the State and the society at large but also at the hands of their very own family members. The development of law cannot be a mute spectator to the struggle for the realisation and attainment of the rights of such members of the society.

90. The authority in ***NALSA*** is one such recent illustration where the rights of transgenders as a third sex was recognized which had been long due in a democracy like ours. This Court ruled:

It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern realty. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.

As we have pointed out above, our Constitution inheres liberal and substantive democracy with Rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of law demands protection of individual human rights. Such

rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.

The 'living document' concept finds place in several international authorities as well. The courts in other jurisdictions have endorsed the view that the Constitution is forever evolving in nature and that a progressive approach is mandated by the principles inherent in the Constitution itself.

91. The Supreme Court of Canada, while giving an expansive interpretation to marriage by including same-sex unions within its encompass, in ***Re: Same Sex Marriage*** MANU/SCCN/0076/2004 : [2004] 3 S.C.R. 698, has observed:

The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.

92. As early as the 1920s, the Supreme Court of the United States in the case of ***State of Missouri v. Holland*** MANU/USSC/0055/1920 : 252 U.S. 416 (1920), while making a comparison between the 'instrument in dispute' and the 'Constitution', had made the following observations with regard to the nature of the Constitution:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

93. In one of his celebrated works, Judge Richard Posner made certain observations which would be relevant to be reproduced here:

A constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian law [as the Connecticut law banning contraceptives] would stand revealed as containing major gaps. Maybe that is the nature of our, or perhaps any, written Constitution; but yet, perhaps the courts are authorized to plug at least the most glaring gaps. Does anyone really believe, in his heart of hearts, that the Constitution should be interpreted so literally as to authorize every conceivable law that would not violate a specific constitutional clause? This would mean that a state could require everyone to marry, or to have intercourse at least once a month, or it could take away every couple's second child and place it in a foster home.... We find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by framers of the Constitution.[2]

94. Thus, it is demonstrable that expansive growth of constitutional idealism is embedded in the theory of progress, abandonment of status quoist attitude, expansion of the concept of inclusiveness and constant remembrance of the principle of fitting into the norm of change with a constitutional philosophy.

H. <u>Transformative constitutionalism and the rights of LGBT community</u>

95. For understanding the need of having a constitutional democracy and for solving the million dollar question as to why we adopted the Constitution, we perhaps need to understand the concept of transformative constitutionalism with some degree of definiteness. In this quest of ours, the ideals enshrined in the Preamble to our Constitution would be a guiding laser beam. The ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution. The Court in ***State of Kerala and Anr. v. N.M. Thomas and Ors.*** MANU/SC/0479/1975 : AIR 1976 SC 490 observed that the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism. The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.

96. The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times.

97. It is this ability of a Constitution to transform which gives it the character of a living and organic document. A Constitution continuously shapes the lives of citizens in particular and societies in general. Its exposition and energetic appreciation by constitutional courts constitute the lifeblood of progressive societies. The Constitution would become a stale and dead testament without dynamic, vibrant and pragmatic interpretation. Constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments of the society. That is the raison d'etre for the Constitution.

98. The Supreme Court as well as other constitutional courts have time and again realized that in a society undergoing fast social and economic change, static judicial interpretation of the Constitution would stultify the spirit of the Constitution. Accordingly, the constitutional courts, while viewing the Constitution as a transformative document, have ardently fulfilled their obligation to act as the sentinel on qui vive for guarding the rights of all individuals irrespective of their sex, choice and sexual orientation.

99. The purpose of transformative constitutionalism has been aptly described in the case of ***Road Accident Fund and Anr. v. Mdeyide*** MANU/SACC/0025/2007 : 2008 (1) SA 535 (CC) wherein the Constitutional Court of South Africa, speaking in the context of the transformative role of the Constitution of South Africa, had observed:

Our Constitution has often been described as "transformative". One of the most important purposes of this transformation is to ensure that, by the realisation of fundamental socio-economic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy.

100. In ***Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism and Ors.*** MANU/SACC/0007/2004 : [2004] ZACC 15, the Constitutional Court of South Africa opined:

The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one "in which there is equality between men and women and people of all races". In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.

101. ***Davies***[3] understands transformation as follows:

Transformation which is based on the continuing evaluation and modification of a complex material and ideological environment cannot be reduced to a scientific theory of change, like those of evolution or the half life of radioactive substances... practical change occurs within a climate of serious reflection, and diversity of opinion is in my view absolutely essential as a stimulus to theory.

102. ***A J Van der Walt***[4] has metaphorically, by comparing 'constitutional transformation' to 'dancing', described the art of constitutional transformation to be continually progressive where one does not stop from daring to imagine alternatives and that the society could be different and a better place where the rights of every individual are given due recognition:

However, even when we trade the static imagery of position, standing, for the more complex imagery of dancing, we still have to resist the temptation to see transformation as linear movement or progress - from authoritarianism to justification, from one dancing code to another, or from volkspele jurisprudence to toyitoyi jurisprudence... I suggest that we should not only switch to a more complex metaphorical code such as dancing when discussing transformation, but that we should also deconstruct the codes we dance to; pause to reflect upon the language in terms of which we think and talk and reason about constitutionalism, about rights, and about transformation, and recognize the liberating and the captivating potential of the codes shaping and shaped by that language.

103. Again, the Supreme Court of South Africa in ***President of the Republic of South Africa v. Hugo*** MANU/SACC/0014/1997 : (1997) 6 B.C.L.R. 708 (CC) observed that the prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups but also that at the heart of the prohibition of

unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect, regardless of their membership of particular groups.

104. Equality does not only imply recognition of individual dignity but also includes within its sphere ensuring of equal opportunity to advance and develop their human potential and social, economic and legal interests of every individual and the process of transformative constitutionalism is dedicated to this purpose. It has been observed by ***Albertyn & Goldblatt***[5]:

The challenge of achieving equality within this transformation project involves the eradication of systemic forms of discrimination and material disadvantage based on race, gender, class and other forms of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.

105. In ***Investigating Directorate: Serious Economic Offences and Ors. v. Hyundai Motor Distributors (Pty) Ltd. and Ors.: In Re Hyundai Motor Distributors (Pty) Ltd. and Ors. v. Smit NO and Ors.*** MANU/SACC/0008/2000 : 2001 (1) SA 545 (CC), the Constitutional Court of South Africa observed:

The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

... The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

106. The society has changed much now, not just from the year 1860 when the Indian Penal Code was brought into force but there has also been continuous progressive change. In many spheres, the sexual minorities have been accepted. They have been given space after the ***NALSA*** judgment but the offence punishable Under Section 377 Indian Penal Code, as submitted, creates a chilling effect. The freedom that is required to be attached to sexuality still remains in the pavilion with no nerves to move. The immobility due to fear corrodes the desire to express one's own sexual orientation as a consequence of which the body with flesh and bones feels itself caged and a sense of fear gradually converts itself into a skeleton sans spirit.

107. The question of freedom of choosing a partner is reflective from a catena of recent judgments of this Court such as ***Shafin Jahan*** (supra) wherein the Court held that a person who has come of age and has the capability to think on his/her own has a right to choose his/her life partner. It is apposite to reproduce some of the observations made by the Court which are to the following effect:

It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible.

108. Recently, in ***Shakti Vahini*** (supra), the Court has ruled that the right to choose a life partner is a facet of individual liberty and the Court, for the protection of this right, issued preventive, remedial and punitive measures to curb the menace of honour killings. The Court observed:

When the ability to choose is crushed in the name of class honour and the person's physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large.

109. An argument is sometimes advanced that what is permissible between two adults engaged in acceptable sexual activity is different in the case of two individuals of the same sex, be it homosexuals or lesbians, and the ground of difference is supported by social standardization. Such an argument ignores the individual orientation, which is naturally natural, and disrobes the individual of his/her identity and the inherent dignity and choice attached to his/her being.

110. The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights. It ought to be remembered that the Constitution is not a mere parchment; it derives its strength from the ideals and values enshrined in it. However, it is only when we adhere to constitutionalism as the supreme creed and faith and develop a constitutional culture to protect the fundamental rights of an individual that we can preserve and strengthen the values of our compassionate Constitution.

I. <u>Constitutional morality and Section 377 Indian Penal Code</u>

111. The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State.

112. In one of the Constituent Assembly Debates, Dr. Ambedkar, explaining the concept of constitutional morality by quoting the Greek historian, George Grote, said:

By constitutional morality, Grote meant... a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution wall not be less sacred in the eyes of his opponents than his own.[6]

113. Our Constitution was visualized with the aim of securing to the citizens of our country inalienable rights which were essential for fostering a spirit of growth and development and at the same time ensuring that the three organs of the State working under the aegis of the Constitution and deriving their authority from the supreme document, that is, the Constitution, practise constitutional morality. The Executive, the Legislature and the Judiciary all have to stay alive to the concept of constitutional morality.

114. In the same speech[7], Dr. Ambedkar had quoted George Grote who had observed:

The diffusion of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves.[8]

This statement of Dr. Ambedkar underscores that constitutional morality is not a natural forte for our country for the simple reason that our country had attained freedom after a long period of colonial Rule and, therefore, constitutional morality at the time when the Constituent Assembly was set up was an alien notion. However, the strengthening of constitutional morality in contemporary India remains a duty of the organs of the State including the Judiciary.

115. The society as a whole or even a minuscule part of the society may aspire and prefer different things for themselves. They are perfectly competent to have such a freedom to be different, like different things, so on and so forth, provided that their different tastes and liking remain within their legal framework and neither violates any statute nor results in the abridgement of fundamental rights of any other citizen. The Preambular goals of our Constitution which contain the noble objectives of Justice, Liberty, Equality and Fraternity can only be achieved through the commitment and loyalty of the organs of the State to the principle of constitutional morality.<mpara>

116. It is the concept of constitutional morality which strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time.

117. Any asymmetrical attitude in the society, so long as it is within the legal and constitutional framework, must at least be provided an environment in which it could be sustained, if not fostered. It is only when such an approach is adopted that the freedom of expression including that of choice would be allowed to prosper and flourish and if that is achieved, freedom and liberty, which is the quintessence of constitutional morality, will be allowed to survive.

118. In ***Government of NCT of Delhi v. Union of India and Ors.*** MANU/SC/0680/2018 : 2018 (8) SCALE 72, one of us (Dipak Misra, CJI) observed:

Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity.

119. The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality.

120. We may hasten to add here that in the context of the issue at hand, when a penal provision is challenged as being violative of the fundamental rights of a Section of the society, notwithstanding the fact whether the said Section of the society is a minority or a majority, the magna cum laude and creditable principle of constitutional morality, in a constitutional democracy like ours where the Rule of law prevails, must not be allowed to be trampled by obscure notions of social morality which have no legal tenability. The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, howsoever small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number.

121. In this regard, we have to telescopically analyse social morality vis-à-vis constitutional morality. It needs no special emphasis to state that whenever the constitutional courts come across a situation of transgression or dereliction in the sphere of fundamental rights, which are also the basic human rights of a section, howsoever small part of the society, then it is for the constitutional courts to ensure, with the aid of judicial engagement and creativity, that constitutional morality prevails over social morality.

122. In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are

under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher.

123. We must not forget that the founding fathers adopted an inclusive Constitution with provisions that not only allowed the State, but also, at times, directed the State, to undertake affirmative action to eradicate the systematic discrimination against the backward Sections of the society and the expulsion and censure of the vulnerable communities by the so-called upper caste/sections of the society that existed on a massive scale prior to coming into existence of the Constituent Assembly. These were nothing but facets of the majoritarian social morality which were sought to be rectified by bringing into force the Constitution of India. Thus, the adoption of the Constitution, was, in a way, an instrument or agency for achieving constitutional morality and means to discourage the prevalent social morality at that time. A country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness.

124. While testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then the said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exist to uphold the Constitution.

J. <u>Perspective of human dignity</u>

125. While discussing about the role of human dignity in gay rights adjudication and legislation, Michele Finck[9] observes:

As a concept devoid of a precise legal meaning, yet widely appealing at an intuitive level, dignity- can be easily manipulated and transposed into a number of legal contexts. With regard to the rights of lesbian and gay individuals, dignity captures what Nussbaum described as the transition from "disgust" to "humanity." Once looked at with disgust and considered unworthy of some rights, there is increasing consensus that homosexuals should no longer be deprived of the benefits of citizenship that are available to heterosexuals, such as the ability to contract marriage, on the sole ground of their sexual orientation. Homosexuals are increasingly considered as "full humans" disposing of equal rights, and dignity functions as the vocabulary that translates such socio-cultural change into legal change.

126. The Universal Declaration of Human Rights, 1948 became the Magna Carta of people all over the world. The first Article of the UDHR was uncompromising in its generality of application: All human beings are born free and equal in dignity and rights. Justice Kirby succinctly observed:

This language embraced every individual in our world. It did not apply only to citizens. It did not apply only to 'white' people. It did not apply only to good people. Prisoners, murderers and even traitors were to be entitled to the freedoms that were declared. There were no exceptions to the principles of equality.[10]

127. The fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life Under Article 21 of the Constitution. In the international sphere, the right to live with dignity had been identified as a

human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The constitutional courts of our country have solemnly dealt with the task of assuring and preserving the right to dignity of each and every individual whenever the occasion arises, for without the right to live with dignity, all other fundamental rights may not realise their complete meaning.

128. To understand a person's dignity, one has to appreciate how the dignity of another is to be perceived. Alexis de Tocqueville tells us[11]:

Whenever I find myself in the presence of another human being, of whatever station, my dominant feeling is not so much to serve him or please him as not to offend his dignity.

129. Every individual has many possessions which assume the position of his/her definitive characteristics. There may not be any obsession with them but he/she may abhor to be denuded of them, for they are sacred to him/her and so inseparably associated that he/she may not conceive of any dissolution. He/she would like others to respect the said attributes with a singular acceptable condition that there is mutual respect. Mutual respect abandons outside interference and is averse to any kind of interdiction. It is based on the precept that the individuality of an individual is recognized, accepted and respected. Such respect for the conception of dignity has become a fundamental right Under Article 21 of the Constitution and that ushers in the right of liberty of expression. Dignity and liberty as a twin concept in a society that cares for both, apart from painting a grand picture of humanity, also smoothens the atmosphere by promoting peaceful co-existence and thereby makes the administration of justice easy. In such a society, everyone becomes a part of the social engineering process where rights as inviolable and sacrosanct principles are adhered to; individual choice is not an exception and each one gets his/her space. Though no tower is built, yet the tower of individual rights with peaceful co-existence is visible.

130. In ***Common Cause (A Regd. Society)*** (supra), one of us has observed that human dignity is beyond definition and it may, at times, defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism, but what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling.

131. In ***Maneka Gandhi v. Union of India and Anr.*** MANU/SC/0133/1978 : (1978) 1 SCC 248, Krishna Iyer, J. observed that life is a terrestrial opportunity for unfolding personality and when any aspect of Article 21 is viewed in a truncated manner, several other freedoms fade out automatically. It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.

132. Dignity is that component of one's being without which sustenance of his/her being to the fullest or completest is inconceivable. In the theatre of life, without possession of the attribute of identity with dignity, the entity may be allowed entry to the centre stage but would be characterized as a spineless entity or, for that matter, projected as a ruling king without the sceptre. The purpose of saying so is that the identity of every individual attains the quality of an "individual being" only if he/she has the dignity. Dignity while expressive of choice is averse to creation of any dent. When

biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented. Such a situation urges the conscience of the final constitutional arbiter to demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals. This is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary pre-requisite that consent is the real fulcrum of any sexual relationship.

133. In this context, we may travel a little abroad. In ***Law v. Canada (Minister of Employment and Immigration)*** MANU/SCCN/0040/1999 : 1999 1 S.C.R. 497 capturing the essence of dignity, the Supreme Court of Canada has made the following observations:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.

134. It is not only the duty of the State and the Judiciary to protect this basic right to dignity, but the collective at large also owes a responsibility to respect one another's dignity, for showing respect for the dignity of another is a constitutional duty. It is an expression of the component of constitutional fraternity.

135. The concept of dignity gains importance in the present scenario, for a challenge has been raised to a provision of law which encroaches upon this essential right of a severely deprived Section of our society. An individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age old social perception. To harness such an essential decision, which defines the individualism of a person, by tainting it with criminality would violate the individual's right to dignity by reducing it to mere letters without any spirit.

136. The European Court of Justice in ***P v. S***[12] in the context of rights of individuals who intend to or have undergone sex reassignment has observed that where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.

137. In ***Planned Parenthood of Southeastern Pa. v. Casey*** MANU/USSC/0099/1992 : 505 U.S. 833 (1992), the United States Supreme Court had opined that such matters which involve the most

intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

138. From the aforesaid pronouncements, some in different spheres but some also in the sphere of sexual orientation, the constitutional courts have laid emphasis on individual inclination, expression of both emotional and physical behaviour and freedom of choice, of course, subject to the consent of the other. A biological engagement, in contradistinction to going to a restaurant or going to a theatre to see a film or a play, is founded on company wherein both the parties have consented for the act. The inclination is an expression of choice that defines the personality to cumulatively build up the elevated paradigm of dignity. Be it clarified that expression of choice, apart from being a facet of dignity, is also an essential component of liberty. Liberty as a concept has to be given its due place in the realm of dignity, for both are connected with the life and living of a persona.

K. <u>Sexual orientation</u>

139. After stating about the value of dignity, we would have proceeded to deal with the cherished idea of privacy which has recently received concrete clarity in ***Puttaswamy***'s case. Prior to that, we are advised to devote some space to sexual orientation and the instructive definition of LGBT by Michael Kirby, former Judge of the High Court of Australia:

Homosexual: People of either gender who are attracted, sexually, emotionally and in relationships, to persons of the same sex.

Bisexual: Women who are attracted to both sexes; men who are attracted to both sexes.

Lesbian: Women who are attracted to women.

Gay: Men who are attracted to men, although this term is sometimes also used generically for all same-sex attracted persons.

Gender identity: A phenomenon distinct from sexual orientation which refers to whether a person identifies as male or female. This identity' may exist whether there is "conformity or non-conformity" between their physical or biological or birth sex and their psychological sex and the way they express it through physical characteristics, appearance and conduct. It applies whether, in the Indian sub-continent, they identify as hijra or kothi or by another name.

Intersex: Persons who are born with a chromosomal pattern or physical characteristics that do not clearly fall on one side or the other of a binary malefemale line.

LGBT or LGBTIQ: Lesbian, Gay, Bisexual, Transsexual, Intersex and Queer minorities. The word 'Queer' is sometimes used generically, usually by younger people, to include the members of all of the sexual minorities. I usually avoid this expression because of its pejorative overtones within an audience unfamiliar with the expression. However, it is spreading and, amongst the young, is often seen as an instance of taking possession of a pejorative word in order to remove its sting.

MSM: Men who have sex with men. This expression is common in United Nations circles. It refers solely to physical, sexual activity by men with men. The expression is used on the basis that in some countries - including India - some men may engage in sexual acts with their own sex although not identifying as homosexual or even accepting a romantic or relationship emotion.[13]

140. Presently, we shall focus on the aspect of sexual orientation. Every human being has certain basic biological characteristics and acquires or develops some facets under certain circumstances. The first can generally be termed as inherent orientation that is natural to his/her being. The second can be described as a demonstration of his/her choice which gradually becomes an inseparable quality of his/her being, for the individual also leans on a different expression because of the inclination to derive satisfaction. The third one has the proclivity which he/she maintains and does not express any other inclination. The first one is homosexuality, the second, bisexuality and third, heterosexuality. The third one is regarded as natural and the first one, by the same standard, is treated to be unnatural. When the second category exercises his/her choice of homosexuality and involves in such an act, the same is also not accepted. In sum, the 'act' is treated either in accord with nature or against the order of nature in terms of societal perception.

141. The Yogyakarta Principles define the expression "sexual orientation" thus:

Sexual Orientation" is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

142. In its study, the American Psychological Association has attempted to define "sexual orientation" in the following manner:

Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men. women or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions. Research over several decades has demonstrated that sexual orientation ranges along a continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex.[14]

143. From the aforesaid, it has to be appreciated that homosexuality is something that is based on sense of identity. It is the reflection of a sense of emotion and expression of eagerness to establish intimacy. It is just as much ingrained, inherent and innate as heterosexuality. Sexual orientation, as a concept, fundamentally implies a pattern of sexual attraction. It is as natural a phenomenon as other natural biological phenomena. What the science of sexuality has led to is that an individual has the tendency to feel sexually attracted towards the same sex, for the decision is one that is controlled by neurological and biological factors. That is why it is his/her natural orientation which is innate and constitutes the core of his/her being and identity. That apart, on occasions, due to a sense of mutuality of release of passion, two adults may agree to express themselves in a different sexual behaviour which may include both the genders. To this, one can attribute a bisexual orientation which does not follow the rigidity but allows room for flexibility.

144. The society cannot remain unmindful to the theory which several researches, conducted both in the field of biological and psychological science, have proven and reaffirmed time and again.

To compel a person having a certain sexual orientation to proselytize to another is like asking a body part to perform a function it was never designed to perform in the first place. It is pure science, a certain manner in which the brain and genitals of an individual function and react. Whether one's sexual orientation is determined by genetic, hormonal, developmental, social and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation.[15]

145. The statement of the American Psychological Association on homosexuality which was released in July 1994 reiterates this position in the following observations:

The research on homosexuality is very clear. Homosexuality is neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality. Study after study documents the mental health of gay men and lesbians. Studies of judgment, stability, reliability, and social and vocational adaptiveness all show that gay men and lesbians function every bit as well as heterosexuals. Nor is homosexuality a matter of individual choice. Research suggests that the homosexual orientation is in place very early in the life cycle, possibly even before birth. It is found in about ten percent of the population, a figure which is surprisingly constant across cultures, irrespective of the different moral values and standards of a particular culture. Contrary to what some imply, the incidence of homosexuality in a population does not appear to change with new moral codes or social mores. Research findings suggest that efforts to repair homosexuals are nothing more than social prejudice garbed in psychological accouterments.

146. In the said context, the observations made by Leonard Sax to the following effect are relevant and are reproduced below:

Biologically, the difference between a gay man and a straight man is something like the difference between a left-handed person and a right-handed person. Being left-handed isn't just a phase. A left-handed person won't someday magically turn into a right-handed person.... Some children are destined at birth to be left-handed, and some boys are destined at birth to grow up to be gay.

147. The Supreme Court of Canada in the case of ***James Egan and John Norris Nesbit v. Her Majesty The Queen in Right of Canada and Anr.*** [1995] 2 SCR 513, while holding that sexual orientation is one of the grounds for claiming the benefit Under Section 15(1) as it is analogous to the grounds already set out in the list in Section 15(1) and the said list not being finite and exhaustive can be extended to LGBTs on account of the historical, social, political and economic disadvantage suffered by LGBTs, has observed:

Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of Section 15 protection as being analogous to the enumerated grounds.

148. It is worth noting that scientific study has, by way of keen analysis, arrived at the conclusion as regards the individual's inherent orientation. Apart from orientation, as stated earlier, there can be situations which influence the emotional behaviour of an individual to seek intimacy in the same gender that may bring two persons together in a biological pattern. It has to be treated as consensual activity and reflective of consensual choice.

L. <u>Privacy and its concomitant aspects</u>

149. While testing the constitutional validity of Section 377 Indian Penal Code, due regard must be given to the elevated right to privacy as has been recently proclaimed in ***Puttaswamy*** (supra). We shall not delve in detail upon the concept of the right to privacy as the same has been delineated at length in ***Puttaswamy*** (supra). In the case at hand, our focus is limited to dealing with the right to privacy vis-à-vis Section 377 Indian Penal Code and other facets such as right to choice as part of the freedom of expression and sexual orientation. That apart, within the compartment of privacy, individual autonomy has a significant space. Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such an orientation or choice that reflects an individual's autonomy is innate to him/her. It is an inalienable part of his/her identity. The said identity under the constitutional scheme does not accept any interference as long as its expression is not against decency or morality. And the morality that is conceived of under the Constitution is constitutional morality. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society. Non-acceptance of the same would tantamount to denial of human rights to people and one cannot be oblivious of the saying of Nelson Mandela -- "to deny people their human rights is to challenge their very humanity."

150. Article 12 of the Universal Declaration of Human Rights, (1948) makes a reference to privacy by stating:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

151. Similarly, Article 17 of the International Covenant of Civil and Political Rights, to which India is a party, talks about privacy thus:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.

152. The European Convention on Human Rights also seeks to protect the right to privacy by stating:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others.

153. In the case of ***Dudgeon v. United Kingdom*** [1981] 4 EHRR 149, privacy has been defined as under:

Perhaps the best and most succinct legal definition of privacy is that given by Warren and Brandeis - it is "the right to be let alone".

154. In ***R. Rajagopal v. State of Tamil Nadu and Ors.*** MANU/SC/0056/1995 : (1994) 6 SCC 632, while discussing the concept of right to privacy, it has been observed that

the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 and it is a "right to be let alone", for a citizen has a right to safeguard the privacy of his/her own, his/her family, marriage, procreation, motherhood, child-bearing and education, among other matters.

155. The above authorities capture the essence of the right to privacy. There can be no doubt that an individual also has a right to a union Under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others.

156. Justice Blackmun, in his vigorous dissent, in the case of ***Bowers, Attorney General of Georgia v. Hardwick et al.***[16], regarding the "right to be let alone", referred to ***Paris Adult Theatre I v. Slaton*** MANU/USSC/0241/1973 : 413 U.S. 49 (1973) wherein he observed that only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality. Justice Blackmun went on to observe:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.... In a variety of circumstances, we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.

157. In ***A.R. Coeriel and M.A.R. Aurik v. The Netherlands***[17], the Human Rights Committee observed that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee was of the view that a person's surname constitutes an important component of one's

identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.

158. We may also usefully refer to the views of the Human Rights Committee in ***Toonen v. Australia***[18] to the effect that the introduction of the concept of arbitrariness is intended to guarantee that every interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances. The requirement of reasonableness implies that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

159. The South African Constitutional Court in ***National Coalition for Gay and Lesbian Equality and Anr. v. Minister of Justice and Ors.*** MANU/SACC/0007/1998 : 1998 (12) BCLR 1517 (CC) has arrived at a theory of privacy in sexuality that includes both decisional and relational elements. It lays down that privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. The Court admitted that the society had a poor record of seeking to regulate the sexual expression of South Africans. It observed that in some cases, as in this one, the reason for the Regulation was discriminatory; the law, for example, outlawed sexual relationships among people of different races. The fact that a law prohibiting forms of sexual conduct is discriminatory does not, however, prevent it at the same time from being an improper invasion of the intimate sphere of human life to which protection is given by the Constitution in Section 14. The Court emphasized that the importance of a right to privacy in the new constitutional order should not be denied even while acknowledging the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case constitutes, at the same time and independently, a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair.

160. At home, the view as to the right to privacy underwent a sea-change when a nine-Judge Bench of this Court in ***Puttaswamy*** (supra) elevated the right to privacy to the stature of fundamental right Under Article 21 of the Constitution. One of us, Chandrachud, J., speaking for the majority, regarded the judgment in ***Suresh Koushal*** as a discordant note and opined that the reasons stated therein cannot be regarded as a valid constitutional basis for disregarding a claim based on privacy Under Article 21 of the Constitution. Further, he observed that the reasoning in ***Suresh Koushal***'s decision to the effect that "a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" is not a sustainable basis to deny the right to privacy.

161. It was further observed that the purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular, and the guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.

162. The test of popular acceptance, in view of the majority opinion, was not at all a valid basis to disregard rights which have been conferred with the sanctity of constitutional protection. The Court noted that the discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream', but in a democratic Constitution founded on the Rule of Law, it does not mean that their rights are any less sacred than those conferred on other citizens.

163. As far as the aspect of sexual orientation is concerned, the Court opined that it is an essential attribute of privacy and discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Court was of the view that equality demands that the sexual orientation of each individual in the society must be protected on an even platform, for the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

164. Regarding the view in ***Suresh Koushal***'s case to the effect that the Delhi High Court in ***Naz Foundation*** case had erroneously relied upon international precedents in its anxiety to protect the so-called rights of LGBT persons, the nine-Judge Bench was of the opinion that the aforesaid view in ***Suresh Koushal*** (supra) was unsustainable. The rights of the lesbian, gay, bisexual and transgender population, as per the decision in ***Puttaswamy*** (supra), cannot be construed to be "so-called rights" as the expression "so-called" seems to suggest the exercise of liberty in the garb of a right which is illusory.

165. The Court regarded such a construction in ***Suresh Koushal***'s case as inappropriate of the privacy based claims of the LGBT population, for their rights are not at all "so-called" but are real rights founded on sound constitutional doctrine. The Court went on to observe that the rights of the LGBT community inhere in the right to life, dwell in privacy and dignity and they constitute the essence of liberty and freedom. Further, the Court observed that sexual orientation being an essential component of identity, equal protection demands equal protection of the identity of every individual without discrimination.

166. Speaking in the same tone and tenor, Kaul, J., while concurring with the view of Chandrachud, J., observed that the right to privacy cannot be denied even if there is a minuscule fraction of the population which is affected. He was of the view that the majoritarian concept does not apply to constitutional rights and the Courts are often called upon to take what may be categorized as a non-majoritarian view.

167. Kaul, J. went on to opine that one's sexual orientation is undoubtedly an attribute of privacy and in support of this view, he referred to the observations made in ***Mosley*** (supra) which read thus:

130... It is not simply a matter of personal privacy v. the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.

131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say. because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in *Von Hannover* at (60) and (76), would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.

168. After the nine-Judge bench decision in ***Puttaswamy*** (supra), the challenge to the *vires* of Section 377 Indian Penal Code has been stronger than ever. It needs to be underscored that in the said decision, the nine-Judge Bench has held that sexual orientation is also a facet of a person's privacy and that the right to privacy is a fundamental right under the Constitution of India.

169. The observation made in ***Suresh Koushal*** (supra) that gays, lesbians, bisexuals and transgenders constitute a very minuscule part of the population is perverse due to the very reason that such an approach would be violative of the equality principle enshrined Under Article 14 of the Constitution. The mere fact that the percentage of population whose fundamental right to privacy is being abridged by the existence of Section 377 in its present form is low does not impose a limitation upon this Court from protecting the fundamental rights of those who are so affected by the present Section 377 Indian Penal Code.

170. The constitutional framers could have never intended that the protection of fundamental rights was only for the majority population. If such had been the intention, then all provisions in Part III of the Constitution would have contained qualifying words such as 'majority persons' or 'majority citizens'. Instead, the provisions have employed the words 'any person' and 'any citizen' making it manifest that the constitutional courts are under an obligation to protect the fundamental rights of every single citizen without waiting for the catastrophic situation when the fundamental rights of the majority of citizens get violated.

171. Such a view is well supported on two counts, namely, one that the constitutional courts have to embody in their approach a telescopic vision wherein they inculcate the ability to be futuristic and do not procrastinate till the day when the number of citizens whose fundamental rights are affected and violated grow in figures. In the case at hand, whatever be the percentage of gays, lesbians, bisexuals and transgenders, this Court is not concerned with the number of persons belonging to the LGBT community. What matters is whether this community is entitled to certain fundamental rights which they claim and whether such fundamental rights are being violated due to the presence of a law in the statute book. If the answer to both these questions is in the affirmative, then the constitutional courts must not display an iota of doubt and must not hesitate

in striking down such provision of law on the account of it being violative of the fundamental rights of certain citizens, however minuscule their percentage may be.

172. A second count on which the view in ***Suresh Koushal*** (supra) becomes highly unsustainable is that the language of both Articles 32 and 226 of the Constitution is not reflective of such an intention. A cursory reading of both the Articles divulges that the right to move the Supreme Court and the High Courts Under Articles 32 and 226 respectively is not limited to a situation when there is violation of the fundamental rights of a large chunk of populace.

173. Such a view is also fortified by several landmark judgments of the Supreme Court such as ***D.K. Basu v. State of W.B.*** MANU/SC/0157/1997 : (1997) 1 SCC 416 wherein the Court was concerned with the fundamental rights of only those persons who were put under arrest and which again formed a minuscule fraction of the total populace. Another recent case wherein the Supreme Court while discharging its constitutional duty did not hesitate to protect the fundamental right to die with dignity is ***Common Cause (A Regd. Society)*** (supra) wherein the Supreme Court stepped in to protect the said fundamental right of those who may have slipped into permanent vegetative state, who again form a very minuscule part of the society.

174. Such an approach reflects the idea as also mooted by Martin Luther King Jr. who said, "Injustice anywhere is a threat to justice everywhere". While propounding this view, we are absolutely conscious of the concept of reasonable classification and the fact that even single person legislation could be valid as held in ***Chiranjit Lal Chowdhury v. Union of India*** MANU/SC/0009/1950 : [1950] 1 SCR 869, which regarded the classification to be reasonable from both procedural and substantive points of view.

175. We are aware that the legislature is fully competent to enact laws which are applicable only to a particular class or group. But, for the classification to be valid, it must be founded on an intelligible differentia and the differentia must have a rational nexus with the object sought to be achieved by a particular provision of law.

176. That apart, since it is alleged that Section 377 Indian Penal Code in its present form violates a fundamental right protected by Article 21 of the Constitution, that is, the right to personal liberty, it has to not only stand the test of Article 21 but it must also stand the test of Article 19 which is to say that the restriction imposed by it has to be reasonable and also that of Article 14 which is to say that Section 377 must not be arbitrary.

177. Whether Section 377 stands the trinity test of Articles 14, 19 and 21 as propounded in the case of ***Maneka Gandhi*** (supra) will be ascertained and determined at a later stage of this judgment when we get into the interpretative dissection of Section 377 Indian Penal Code.

M. <u>Doctrine of progressive realization of rights</u>

178. When we talk about the rights guaranteed under the Constitution and the protection of these rights, we observe and comprehend a manifest ascendance and triumphant march of such rights which, in turn, paves the way for the doctrine of progressive realization of the rights under the Constitution. This doctrine invariably reminds us about the living and dynamic nature of a

Constitution. Edmund Burke, delineating upon the progressive and the perpetual growing nature of a Constitution, had said that a Constitution is ever-growing and it is perpetually continuous as it embodies the spirit of a nation. It is enriched at the present by the past experiences and influences and makes the future richer than the present.

179. In ***N.M. Thomas*** (supra), Krishna Iyer, J., in his concurring opinion, observed thus:

Law, including constitutional law, can no longer go it alone' but must be illumined in the interpretative process by sociology and allied fields of knowledge. Indeed, the term 'constitutional law' symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think. So much so, a wider perspective is needed to resolve issues of constitutional law.

And again:

An overview of the decided cases suggests the need to re-interpret the dynamic import of the 'equality clauses' and, to stress again, beyond reasonable doubt, that the paramount law. which is organic and regulates our nation's growing life, must take in its sweep ethics, economics, politics and sociology'.

The learned Judge, expanding the horizon of his concern, reproduced the lament of Friedman:

It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society.

The main assumptions which Friedman makes are:

first, the law is, in Holmes' phrase, not a brooding omnipotence in the sky', but a flexible instrument of social order, dependent on the political values of the society which it purports to regulate....

Naturally surges the interrogation, what are the challenges of changing values to which the guarantee of equality must respond and how?

180. Further, Krishna Iyer, J. referred to the classic statement made by Chief Justice Marshall in ***McCulloch v. Maryland*** (1816) 17 US 316 which was also followed by Justice Brennan in ***Kazenbach v. Morgan*** MANU/USSC/0147/1966 : (1966) 384 US 641. The said observation reads thus:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

181. In ***Manoj Narula*** (supra), the Court recognized the dynamic nature of the Indian Constitution and observed that it is a living document with capabilities of enormous dynamism. It is a

Constitution made for a progressive society and the working of such a Constitution depends upon the prevalent atmosphere and conditions.

182. In ***Government of NCT of Delhi*** (supra), the Court, while contemplating on what is it that makes a Constitution a dynamic and a living document, observed that it is the philosophy of 'constitutional culture' which, as a set of norms and practices, breathes life into the words of the great document and it constantly enables the words to keep stride with the rapid and swift changes occurring in the society and the responsibility of fostering a constitutional culture rests upon the shoulders of the State. Thereafter, the Court went on to observe:

The Constitutional Courts, while interpreting the constitutional provisions, have to take into account the constitutional culture, bearing in mind its flexible and evolving nature, so that the provisions are given a meaning which reflect the object and purpose of the Constitution.

And again, it proceeded to reproduce the wise words of Justice Brennan:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.

183. We have discussed, in brief, the dynamic and progressive nature of the Constitution to accentuate that rights under the Constitution are also dynamic and progressive, for they evolve with the evolution of a society and with the passage of time. The rationale behind the doctrine of progressive realization of rights is the dynamic and ever growing nature of the Constitution under which the rights have been conferred to the citizenry.

184. The constitutional courts have to recognize that the constitutional rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. Therefore, it is necessary for the constitutional courts to inculcate in their judicial interpretation and decision making a sense of engagement and a sense of constitutional morality so that they, with the aid of judicial creativity, are able to fulfill their foremost constitutional obligation, that is, to protect the rights bestowed upon the citizens of our country by the Constitution.

185. Here, it is also apposite to refer to the words of Lord Roskill in his presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject 'Law Lords, Reactionaries or Reformers'[19] which read as follows:

Legal policy now stands enthroned and will I hope remain one of the foremost considerations governing the development by the House of Lords of the common law. What direction should this development now take? I can think of several occasions upon which we have all said to ourselves:

this case requires a policy decision what is the right policy decision?" The answer is, and I hope will hereafter be, to follow that route which is most consonant with the current needs of the society, and which will be seen to be sensible and will pragmatically thereafter be easy to apply. No doubt the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all criminal law, distasteful as it may be to some to have to acknowledge it. is a blunt instrument by means of which human beings, whether they like it or not, are governed and subject to which they are required to live, and blunt instruments are rarely perfect intellectually or otherwise. By definition they operate bluntly and not sharply.

186. What the words of Lord Roskill suggest is that it is not only the interpretation of the Constitution which needs to be pragmatic, due to the dynamic nature of a Constitution, but also the legal policy of a particular epoch must be in consonance with the current and the present needs of the society, which are sensible in the prevalent times and at the same time easy to apply.

187. This also gives birth to an equally important role of the State to implement the constitutional rights effectively. And of course, when we say State, it includes all the three organs, that is, the legislature, the executive as well as the judiciary. The State has to show concerned commitment which would result in concrete action. The State has an obligation to take appropriate measures for the progressive realization of economic, social and cultural rights.

188. The doctrine of progressive realization of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead.

189. The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.

190. The aforesaid two doctrines lead us to the irresistible conclusion that if we were to accept the law enunciated in ***Suresh Koushal's*** case, it would definitely tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights. It is because ***Suresh Koushal's*** view gets wrongly embedded with the minuscule facet and assumes criminality on the bedrock being guided by a sense of social morality. It discusses about health which is no more a phobia and is further moved by the popular morality while totally ignoring the concepts of privacy, individual choice and the orientation. Orientation, in certain senses, does get the neuro-impulse to express while seeing the other gender. That apart, swayed by data, ***Suresh Koushal*** fails to appreciate that the sustenance of fundamental rights does not require majoritarian sanction. Thus, the ruling becomes sensitively susceptible.

N. International perspective

(i) **United States**

191. The Supreme Court of the United States in ***Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al.*** 576 US (2015), highlighting the plight of homosexuals, observed that until the mid-20th century, same-sex intimacy had long been condemned as immoral by the State itself in most Western nations and a belief was often embodied in the criminal law and for this reason, homosexuals, among others, were not deemed to have dignity in their own distinct identity. The Court further noted that truthful declaration by same-sex couples of what was in their hearts had to remain unspoken and even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. The Court also observed that same-sex intimacy remained a crime in many States and that gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by the police and burdened in their rights to associate.

192. The Court further observed that what the statutes in question seek to control is a personal relationship, whether or not entitled to formal recognition in the law, that is within the liberty of persons to choose without being punished as criminals. Further, the Court acknowledged that adults may choose to enter upon a relationship in the confines of their homes and their own private lives and still retain their dignity as free persons and that when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The Court held that such liberty protected by the Constitution allows homosexual persons the right to make this choice.

193. In the case of ***Price Waterhouse v. Hopkins*** MANU/USSC/0003/1989 : 490 U.S. 228 (1989), the Supreme Court of the United States, while evaluating the legal relevance of sex stereotyping, observed thus:

...we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

194. In the case of ***Kimberly Hively v. Ivy Tech Community College of Indiana*** MANU/FEVT/0374/2016 : 830 F.3d 698 (7th Cir. 2016), while holding that discrimination amongst employees based on their sexual orientation amounts to discrimination based on sex, the Court observed as under:

We would be remiss not to consider the EEOC's recent decision in which it concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015). The EEOC, the body charged with enforcing Title VII, came to this conclusion for three primary reasons. First, it concluded that "sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." Id. at *5 (proffering the example of a woman who is suspended for placing a photo of her female spouse on her desk, and a man who faces no consequences for the same act). Second, it explained that "sexual orientation discrimination is also sex discrimination because it is associational discrimination on

the basis of sex," in which an employer discriminates against lesbian, gay, or bisexual employees based on who they date or marry. Id. at *6-7. Finally, the EEOC described sexual orientation discrimination as a form of discrimination based on gender stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances. Id. In coming to these conclusions, the EEOC noted critically that "courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the "borders [between the two classes] are imprecise." Id. at *8 (quoting Simonton, 232 F.3d at 35).

195. In the case of ***Lawrence v. Texas*** MANU/USSC/0070/2003 : 539 U.S. 558 (2003), while dealing with the issue of decriminalization of sexual conduct between homosexuals, the U.S. Supreme Court observed that the said issue neither involved minors nor persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused nor did it involve public conduct or prostitution nor the question whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The Court further observed that the issue related to two adults who, with full and mutual consent of each other, engaged in sexual practices common to a homosexual lifestyle. The Court declared that the Petitioners were entitled to respect for their private lives and that the State could not demean their existence or control their destiny by making their private sexual conduct a crime, for their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the State.

196. In ***Roberts v. United States Jaycees*** MANU/USSC/0190/1984 : 468 U.S. 609 (1984), the Supreme Court of the United States observed:

Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. The intrinsic and instrumental features of constitutionally protected association may, of course, coincide.

(ii) **Canada**

197. The Supreme Court of Canada, in ***Delwin Vriend and Ors. v. Her Majesty the Queen in Right of Alberta and Ors.*** [1998] 1 SCR 493, while interpreting a breach of Section 15(1) of the Canadian Charter of Rights and Freedoms, arrived at the conclusion that 'sex' includes sexual orientation. Section 15(1) of the Charter reads thus:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability.

198. In ***Delwin Vriend***, the Supreme Court of Canada, relying on the reasoning adopted by it in ***Egan v. Canada*** (supra), applied its well-known test of grounds analogous to those specified textually. The ***Egan*** test is:

In ***Egan***, it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, "whether the equality right was denied on the basis of a personal characteristic which is either enumerated in Section 15(1) or which is analogous to those enumerated". Second "whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others" (para. 131).

A discriminatory distinction was also described as one which is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration" (Egan, at para. 56, per L'Heureux - Dube J.). It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics" (Miron, at para. 128, per McLachlin J.)

In ***Egan***, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in Section 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). It is analogous to the other personal characteristics enumerated in Section 15(1); and therefore this step of the test is satisfied.

199. Thereafter, the Court in ***Delwin Vriend*** (supra) observed that perhaps the most important outcome is the psychological harm which may ensue from the state of affairs as the fear of discrimination (by LGBT) would logically lead them to concealment of true identity and this is harmful to their personal confidence and self-esteem. The Court held that this is a clear example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society and the potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

(iii) <u>South Africa</u>

200. The Constitutional Court of South Africa in ***National Coalition for Gay & Lesbian Equality*** (supra) made the following relevant observations:

Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm

imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of Section 10 of the Constitution.

(iv) United Kingdom

201. In Euan Sutherland v. United Kingdom 2001 ECHR 234, the issue before the European Commission of Human Rights was whether the difference in age limit for consent for sexual activities for homosexuals and heterosexuals, the age limit being 16 years in the case of heterosexuals and 18 years in the case of homosexuals, is justified. While considering the same, the Commission observed that no objective and reasonable justification exists for the maintenance of a higher minimum age of consent in case of male homosexuals as compared to heterosexuals and that the application discloses discriminatory treatment in the exercise of the applicant's right to respect for private life Under Article 8 of the Convention. The Commission further observed that sexual orientation was usually established before the age of puberty in both boys and girls and referred to evidence that reducing the age of consent would unlikely affect the majority of men engaging in homosexual activity, either in general or within specific age groups. The Council of the British Medical Association (BMA) concluded in its Report that the age of consent for homosexual men should be set at 16 since the then existing law might inhibit efforts to improve the sexual health of young homosexual and bisexual men. An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organizations concerned with health and social welfare. It is further noted that equality of treatment in respect of the age of consent is now recognized by the great majority of Member States of the Council of Europe.

(v) Other Courts/Jurisdictions

202. In ***Ang Ladlad LGBT Party v. Commission of Elections***[17], the Supreme Court of the Republic of the Philippines observed:

Freedom of expression constitutes one of the essential foundations of a democratic society, and this freedom applies not only to those that are favorably received but also to those that offend, shock, or disturb. Any restriction imposed in this sphere must be proportionate to the legitimate aim pursued. Absent any compelling state interest, it is not for the COMELEC or this Court to impose its views on the populace.

Elaborating further, the Court held:

It follows that both expressions concerning one's homosexuality and the activity of forming a political association that supports LGBT individuals are protected as well.

The Court navigated through European and United Nations Judicial decisions and held:

In the area of freedom of expression, for instance, United States courts have ruled that existing free speech doctrines protect gay and lesbian rights to expressive conduct. In order to justify the prohibition of a particular expression of opinion, public institutions must show that their actions were caused by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

203. Further, in ***Toonen'***s case, the Human Rights Committee made the following relevant observations:

I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating Under Sections 122(a), (c) and 123 of the Tasmanian Code of Criminal Procedure must be considered incompatible with Article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Code of Criminal Procedure prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates Article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time: the designated behaviour none the less remains a criminal offence.

204. In ***Dudgeon*** (supra), the European Court of Human Rights made the following observations with respect to homosexuality:

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable Sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

O. Comparative analysis of Section 375 and Section 377 Indian Penal Code

205. Let us, in the obtaining situation, conduct a comparative analysis of the offence of rape and unnatural offences as defined Under Section 375 and Section 377 of the Indian Penal Code respectively. Section 375 Indian Penal Code defines the offence of rape and reads as under:

Section 375. Rape-A man is said to commit "rape" if he --

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions: --

First. --Against her will.

Secondly. --Without her consent.

Thirdly. --With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. --With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. --With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. --With or without her consent, when she is under eighteen years of age.

Seventhly. --When she is unable to communicate consent.

Explanation I.--For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. -- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.--A medical procedure or intervention shall not constitute rape.

Exception 2. --Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'.

206. A cursory reading of Section 375 Indian Penal Code divulges that it is a gender specific provision for the protection of women as only a man can commit the offence of rape. The Section has been divided into two parts. The former part, comprising of Clauses (a) to (d), simply describes what acts committed by a man with a woman would amount to rape provided that the said acts are committed in the circumstances falling under any of the seven descriptions as stipulated by the latter part of the Section.

207. It is in this way that the latter part of Section 375 Indian Penal Code becomes important as it lays down the circumstances, either of which must be present, for an act committed by a man with a woman to come within the sweep of the offence of rape. To put it differently, for completing the offence of rape, any of the circumstances described in the latter part of Section 375 must be present. Let us now dissect each of the seven descriptions appended to Section 375 Indian Penal Code which specify the absence of a willful and informed consent for constituting the offence of rape.

208. The first description provides that any of the acts described in the former part of Section 375 Indian Penal Code would amount to rape if such acts are committed against the will of the woman. The second description stipulates that the acts described in the former part would amount to rape if such acts are committed without the consent of the woman. As per the third description, the acts would amount to rape even if the woman has given her consent but the said consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. As per the fourth description, the acts would amount to rape when the woman has given her consent but the same was given by her under the belief that she is or believes herself to be lawfully married to the man committing the acts stated in the former part of the Section. The fifth description provides that the acts described in the former part would amount to rape if the woman gives her consent but at the time of giving such consent, she is unable to understand the nature and consequences of the acts to which she consents due to the reason of unsoundness of mind or intoxication or the administration of any stupefying or unwholesome substance either by the man who commits the acts or through another third person. The sixth description is plain and simple as it stipulates that the acts described in the former part of the Section would amount to rape, irrespective of the fact whether the woman has given her consent or not, if, at the time when the acts were committed, the woman was below the age of eighteen years. Coming to the seventh and the last description, it provides that the acts prescribed in the former part would amount to rape if the woman is unable to communicate her consent.

209. Explanation 2 to Section 375 Indian Penal Code gives the definition of consent for the purpose of Section 375 to the effect that consent means an unequivocal voluntary agreement by the woman through words, gestures or any form of verbal or non-verbal communication whereby she communicates her willingness to participate in any of the sexual acts described in the former part of Section 375 Indian Penal Code.

210. We have scrutinized the anatomy of the seven descriptions contained in the latter part of Section 375 Indian Penal Code along with Explanation 2 to Section 375 Indian Penal Code to emphasize and accentuate that the element of absence of consent is firmly ingrained in all the descriptions contained in the latter part of Section 375 Indian Penal Code and the absence of a willful and informed consent is *sine qua non* to designate the acts contained in the former part of Section 375 Indian Penal Code as rape.

211. Presently, we proceed to scan the anatomy of Section 377 of Indian Penal Code and x-ray the provision to study its real nature and content. It reads thus:

Section 377. Unnatural offences.--Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

212. Section 377 Indian Penal Code, unlike Section 375, is a gender-neutral provision as it uses the word 'whoever'. The word 'carnal', as per the Black's Law Dictionary[21], means of the body, relating to the body, fleshy or sexual. 'Sexual intercourse' has been defined in Black's Law Dictionary as a contact between a male and a female's organ.

213. Another expression which has been employed in Section 377 is 'against the order of nature'. The phrase 'against the order of nature' has neither been defined in Section 377 Indian Penal Code nor in any other provision of the Indian Penal Code. The foundation on which Section 377 Indian Penal Code makes carnal intercourse an offence is the precept that such carnal intercourse is against the order of nature. This brings us to the important question as to what is 'against the order of nature'?

214. In ***Khanu*** (supra), where the question before the Court was whether *coitus per os* (mouth contact with the male genitals) amounts to carnal intercourse against the order of nature, the Court ruled in the affirmative observing that the natural object of intercourse is that there should be the possibility of conception of human beings which in the case of *coitus per os* is impossible. Thus, the most common argument against homosexuality and criminalization of carnal intercourse even between consenting adults of opposite sex is that traditionally, the essential purpose of sex is to procreate.

215. With the passage of time and evolution of the society, procreation is not the only reason for which people choose to come together, have live-in relationships, perform coitus or even marry. They do so for a whole lot of reasons including emotional companionship. Homer Clark writes:

But the fact is that the most significant function of marriage today seems to be that it furnishes emotional satisfactions to be found in no other relationships. For many people it is the refuge from the coldness and impersonality of contemporary existence.

216. In the contemporary world where even marriage is now not equated to procreation of children, the question that would arise is whether homosexuality and carnal intercourse between consenting adults of opposite sex can be tagged as 'against the order of nature'. It is the freedom of choice of two consenting adults to perform sex for procreation or otherwise and if their choice is that of the latter, it cannot be said to be against the order of nature. Therefore, sex, if performed differently, as per the choice of the consenting adults, does not *per se* make it against the order of nature.

217. Section 377 criminalises even voluntary carnal intercourse not only between homosexuals but also between heterosexuals. The major difference between the language of Section 377 and Section 375 is that of the element of absence consent which has been elaborately incorporated in the seven descriptions contained in the latter part of Section 375 Indian Penal Code. It is the absence of willful and informed consent embodied in the seven descriptions to Section 375 which makes the offence of rape criminal.

218. On the other hand, Section 377 Indian Penal Code contains no such descriptions/exceptions embodying the absence of willful and informed consent and criminalises even voluntary carnal intercourse both between homosexuals as well as between heterosexuals. While saying so, we gain strength and support from the fact that the legislature, in its wisdom, while enacting Section 375 Indian Penal Code in its amended form after the Criminal Law (Amendment) Act, 2013, has not employed the words "subject to any other provision of the Indian Penal Code". The implication of the absence of these words simply indicates that Section 375 Indian Penal Code which does not criminalize consensual carnal intercourse between heterosexuals is not subject to Section 377 Indian Penal Code.

219. Section 377, so far as it criminalises carnal intercourse between heterosexuals is legally unsustainable in its present form for the simple reason that Section 375 Indian Penal Code clearly stipulates that carnal intercourse between a man and a woman with the willful and informed consent of the woman does not amount to rape and is not penal.

220. Despite the Criminal Law (Amendment) Act, 2013 coming into force, by virtue of which Section 375 was amended, whereby the words 'sexual intercourse' in Section 375 were replaced by four elaborate clauses from (a) to (d) giving a wide definition to the offence of rape, Section 377 Indian Penal Code still remains in the statute book in the same form. Such an anomaly, if allowed to persist, may result in a situation wherein a heterosexual couple who indulges in carnal intercourse with the willful and informed consent of each other may be held liable for the offence of unnatural sex Under Section 377 Indian Penal Code, despite the fact that such an act would not be rape within the definition as provided Under Section 375 Indian Penal Code.

221. Drawing an analogy, if consensual carnal intercourse between a heterosexual couple does not amount to rape, it definitely should not be labelled and designated as unnatural offence Under Section 377 Indian Penal Code. If any proclivity amongst the heterosexual population towards consensual carnal intercourse has been allowed due to the Criminal Law (Amendment) Act, 2013, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their most private and intimate spaces.

222. There is another aspect which needs to be discussed, which is whether criminalisation of carnal intercourse Under Section 377 serves any useful purpose under the prevalent criminal law. Delineating on this aspect, the European Commission of Human Rights in ***Dudgeon*** (supra) opined thus:

The 1967 Act, which was introduced into Parliament as a Private Member's Bill, was passed to give effect to the recommendations concerning homosexuality made in 1957 in the report of the

Departmental Committee on Homosexual Offences and Prostitution established under the chairman ship of Sir John Wolfenden (the "Wolfenden Committee" and "Wolfenden report"). The Wolfenden Committee regarded the function of the criminal law in this field as:

to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence,

but not

to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.

The Wolfenden Committee concluded that homosexual behaviour between consenting adults in private was part of the "realm of private morality and immorality which is, in brief and crude terms, not the law's business" and should no longer be criminal.

223. At the very least, it can be said that criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals or transgenders, hardly serves any legitimate public purpose or interest. Per contra, we are inclined to believe that if Section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of majoritarian perception.

P. The litmus test for survival of Section 377 Indian Penal Code

224. Having discussed the various principles and concepts and bearing in mind the sacrosanctity of the fundamental rights which guides the constitutional courts, we shall now proceed to deal with the constitutionality of Section 377 Indian Penal Code on the bedrock of the principles enunciated in Articles 14, 19 and 21 of the Constitution.

225. It is axiomatic that the expression 'life or personal liberty' in Article 21 embodies within itself a variety of rights. In ***Maneka Gandhi*** (supra), Bhagwati, J. (as he then was) observed:

The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection Under Article 19....

226. In ***Anuj Garg*** (supra), while dealing with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman", the Court, holding it ultra vires, ruled thus:

31.... It is their life; subject to constitutional, statutory and social interdicts--a citizen of India should be allowed to live her life on her own terms.

And again:

35. Privacy rights prescribe autonomy to choose profession whereas *security concerns* texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship.

227. In ***Common Cause (A Regd. Society)*** (supra), the Court, in the context of right to dignity, observed:

Right to life and liberty as envisaged Under Article 21 is meaningless unless it encompasses within its sphere individual dignity
and right to dignity includes the right to carry such functions and activities as would constitute the meaningful expression of the human self.

228. In ***Puttaswamy*** (supra), the right to privacy has been declared to be a fundamental right by this Court as being a facet of life and personal liberty protected Under Article 21 of the Constitution.

229. In view of the above authorities, we have no hesitation to say that Section 377 Indian Penal Code, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.

230. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.

231. While saying so, we are absolutely conscious of the fact that the citizenry may be deprived of their right to life and personal liberty if the conditions laid down in Article 21 are fulfilled and if, at the same time, the procedure established by law as laid down in ***Maneka Gandhi*** (supra) is satisfied. Article 21 requires that for depriving a person of his right to life and personal liberty, there has to be a law and the said law must prescribe a fair procedure. The seminal point is to see whether Section 377 withstands the sanctity of dignity of an individual, expression of choice, paramount concept of life and whether it allows an individual to lead to a life that one's natural orientation commands. That apart, more importantly, the question is whether such a gender-neutral offence, with the efflux of time, should be allowed to remain in the statute book especially when there is consent and such consent elevates the status of bodily autonomy. Hence, the provision has to be tested on the principles evolved Under Articles 14, 19 and 21 of the Constitution.

232. In ***Sunil Batra v. Delhi Administration and Ors.*** MANU/SC/0184/1978 : AIR 1978 SC 1675 : (1978) 4 SCC 494, Krishna Iyer, J. opined that

what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.

233. We, first, must test the validity of Section 377 Indian Penal Code on the anvil of Article 14 of the Constitution. What Article 14 propounds is that 'all like should be treated alike'. In other words, it implies equal treatment for all equals. Though the legislature is fully empowered to enact laws applicable to a particular class, as in the case at hand in which Section 377 applies to citizens who indulge in carnal intercourse, yet the classification, including the one made Under Section 377 Indian Penal Code, has to satisfy the twin conditions to the effect that the classification must be founded on an intelligible differentia and the said differentia must have a rational nexus with the object sought to be achieved by the provision, that is, Section 377 Indian Penal Code.

234. In ***M. Nagaraj and Ors. v. Union of India and Ors.*** MANU/SC/4560/2006 : AIR 2007 SC 71 : (2006) 8 SCC 212, it has been held:

The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment Under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances.

235. In ***E.P. Royappa v. State of Tamil Nadu and Anr.*** MANU/SC/0380/1973 : AIR 1974 SC 555: (1974) 4 SCC 3, this Court observed that equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. It was further held that equality is antithetic to arbitrariness, for equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch.

236. In ***Budhan Choudhry v. The State of Bihar*** MANU/SC/0047/1954 : AIR 1955 SC 191, while delineating on the concept of reasonable classification, the Court observed thus:

It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

237. A perusal of Section 377 Indian Penal Code reveals that it classifies and penalizes persons who indulge in carnal intercourse with the object to protect women and children from being subjected to carnal intercourse. That being so, now it is to be ascertained whether this classification has a reasonable nexus with the object sought to be achieved. The answer is in the negative as the non-consensual acts which have been criminalized by virtue of Section 377 Indian Penal Code have already been designated as penal offences Under Section 375 Indian Penal Code and under the POCSO Act. Per contra, the presence of this Section in its present form has resulted in a distasteful and objectionable collateral effect whereby even 'consensual acts', which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, have been woefully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution.

238. In ***Shayara Bano*** (supra), the Court observed that manifest arbitrariness of a provision of law can also be a ground for declaring a law as unconstitutional. Opining so, the Court observed thus:

The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.

239. In view of the law laid down in ***Shayara Bano*** (supra) and given the fact that Section 377 criminalises even consensual sexual acts between adults, it fails to make a distinction between consensual and non-consensual sexual acts between competent adults. Further, Section 377 Indian Penal Code fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to the society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction. Needless to say, the Section also interferes with consensual acts of competent adults in private space. Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation. This being the case, Section 377 Indian Penal Code, so long as it criminalises consensual sexual acts of whatever nature between competent adults, is manifestly arbitrary.

240. The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse Under Section 377 Indian Penal Code is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm

of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.

241. In the adverting situation, we must also examine whether Section 377, in its present form, stands the test of Article 19 of the Constitution in the sense of whether it is unreasonable and, therefore, violative of Article 19. In ***Chintaman Rao v. State of Madhya Pradesh*** MANU/SC/0008/1950 : AIR 1951 SC 118, this Court, in the context of reasonable restrictions Under Article 19, opined thus:

The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality.

242. In ***S. Rangarajan v. P. Jagjivan Ram and Ors.*** MANU/SC/0475/1989 : (1989) 2 SCC 574, the Court observed, though in a different context, thus:

... Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.

243. In ***S. Khushboo*** (supra), this Court, while observing that 'morality and decency' on the basis of which reasonable restrictions can be imposed on the rights guaranteed Under Article 19 should not be amplified beyond a rational and logical limit, ruled that even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as 'decency and morality' among others, yet it is necessary to tolerate unpopular views in the socio-cultural space.

244. In the case of ***Shreya Singhal v. Union of India*** MANU/SC/0329/2015 : (2015) 5 SCC 1 this Court, while striking down Section 66A of the Information Technology Act, 2000, had observed that when a provision is vague and overboard in the sense that it criminalises protected speech and speech of innocent nature, resultantly, it has a chilling effect and is liable to be struck down. The Court opined:

We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

245. In the obtaining situation, we need to check whether public order, decency and morality as grounds to limit the fundamental right of expression including choice can be accepted as reasonable restrictions to uphold the validity of Section 377 Indian Penal Code. We are of the

conscious view that Section 377 Indian Penal Code takes within its fold private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality. The law is *et domus sua cuique est tutissimum refugium* - A man's house is his castle. Sir Edward Coke[22] said:

The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.

246. That apart, any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception. Section 377 Indian Penal Code amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence which is manifestly not only overboard and vague but also has a chilling effect on an individual's freedom of choice.

247. In view of the test laid down in the aforesaid authorities, Section 377 Indian Penal Code does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner. Section 377 Indian Penal Code also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved.

248. Bigoted and homophobic attitudes dehumanize the transgenders by denying them their dignity, personhood and above all, their basic human rights. It is important to realize that identity and sexual orientation cannot be silenced by oppression. Liberty, as the linchpin of our constitutional values, enables individuals to define and express their identity and individual identity has to be acknowledged and respected.

249. The very existence of Section 377 Indian Penal Code criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream.

250. We must realize that different hues and colours together make the painting of humanity beautiful and this beauty is the essence of humanity. We need to respect the strength of our diversity so as to sustain our unity as a cohesive unit of free citizens by fostering tolerance and respect for each others' rights thereby progressing towards harmonious and peaceful co-existence

in the supreme bond of humanity. Attitudes and mentality have to change to accept the distinct identity of individuals and respect them for who they are rather than compelling them to 'become' who they are not. All human beings possess the equal right to be themselves instead of transitioning or conditioning themselves as per the perceived dogmatic notions of a group of people. To change the societal bias and root out the weed, it is the foremost duty of each one of us to "stand up and speak up" against the slightest form of discrimination against transgenders that we come across. Let us move from darkness to light, from bigotry to tolerance and from the winter of mere survival to the spring of life -- as the herald of a New India -- to a more inclusive society.

251. It is through times of grave disappointment, denunciation, adversity, grief, injustice and despair that the transgenders have stood firm with their formidable spirit, inspired commitment, strong determination and infinite hope and belief that has made them look for the rainbow in every cloud and lead the way to a future that would be the harbinger of liberation and emancipation from a certain bondage indescribable in words - towards the basic recognition of dignity and humanity of all and towards leading a life without pretence eschewing duality and ambivalence. It is their momentous "walk to freedom" and journey to a constitutional ethos of dignity, equality and liberty and this freedom can only be fulfilled in its truest sense when each of us realize that the LGBT community possess equal rights as any other citizen in the country under the magnificent charter of rights - our Constitution.

252. Thus analysed, Section 377 Indian Penal Code, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 Indian Penal Code is constitutional and it shall remain a penal offence Under Section 377 Indian Penal Code. Any act of the description covered Under Section 377 Indian Penal Code done between the individuals without the consent of any one of them would invite penal liability Under Section 377 Indian Penal Code.

Q. <u>Conclusions</u>

253. In view of the aforesaid analysis, we record our conclusions in seriatim:

(i) The eminence of identity which has been luculently stated in the ***NALSA*** case very aptly connects human rights and the constitutional guarantee of right to life and liberty with dignity. With the same spirit, we must recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one's orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, "constitutionally permissible".

(ii) In ***Suresh Koushal*** (supra), this Court overturned the decision of the Delhi High Court in ***Naz Foundation*** (supra) thereby upholding the constitutionality of Section 377 Indian Penal Code and stating a ground that the LGBT community comprised only a minuscule fraction of the total

population and that the mere fact that the said Section was being misused is not a reflection of the vires of the Section. Such a view is constitutionally impermissible.

(iii) Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.

(iv) The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.

(v) Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule Section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

(vi) The right to live with dignity has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments so as to enable an individual to fully realize his/her fundamental right to live with dignity.

(vii) Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any

discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.

(viii) After the privacy judgment in ***Puttaswamy*** (supra), the right to privacy has been raised to the pedestal of a fundamental right. The reasoning in ***Suresh Koushal*** (supra), that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 Indian Penal Code abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note. The said reasoning in ***Suresh Koushal*** (supra), in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view would be completely against the constitutional ethos, for the language employed in Part III of the Constitution as well as the intention of the framers of our Constitution mandates that the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.

(ix) There is a manifest ascendance of rights under the Constitution which paves the way for the doctrine of progressive realization of rights as such rights evolve with the evolution of the society. This doctrine, as a natural corollary, gives birth to the doctrine of non-retrogression, as per which there must not be atavism of constitutional rights. In the light of the same, if we were to accept the view in ***Suresh Koushal*** (supra), it would tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.

(x) Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.

(xi) A cursory reading of both Sections 375 Indian Penal Code and 377 Indian Penal Code reveals that although the former Section gives due recognition to the absence of 'wilful and informed consent' for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of 'wilful and informed consent' to criminalize carnal intercourse which consequently results in criminalizing even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 Indian Penal Code, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words 'subject to any other provision of the Indian Penal Code. This indicates that Section 375 Indian Penal Code is not subject to Section 377 Indian Penal Code.

(xii) The expression 'against the order of nature' has neither been defined in Section 377 Indian Penal Code nor in any other provision of the Indian Penal Code. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it 'against the order of nature'.

(xiii) Section 377 Indian Penal Code, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in ***Maneka Gandhi*** (supra) and other later authorities.

(xiv) An examination of Section 377 Indian Penal Code on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said Section has no reasonable nexus with its object as other penal provisions such as Section 375 Indian Penal Code and the POCSO Act already penalize non-consensual carnal intercourse. Per contra, Section 377 Indian Penal Code in its present form has resulted in an unwanted collateral effect whereby even 'consensual sexual acts', which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.

(xv) Section 377 Indian Penal Code, so far as it criminalises even consensual sexual acts between competent adults, fails to make a distinction between non-consensual and consensual sexual acts of competent adults in private space which are neither harmful nor contagious to the society. Section 377 Indian Penal Code subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down in ***Shayara Bano*** (supra), Section 377 Indian Penal Code is liable to be partially struck down for being violative of Article 14 of the Constitution.

(xvi) An examination of Section 377 Indian Penal Code on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 Indian Penal Code in its present form violates Article 19(1)(a) of the Constitution.

(xvii) Ergo, Section 377 Indian Penal Code, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence Under Section 377 Indian Penal Code. Any act of the description covered Under Section 377 Indian Penal Code done between two individuals without the consent of any one of them would invite penal liability Under Section 377 Indian Penal Code.

(xviii) The decision in ***Suresh Koushal*** (supra), not being in consonance with what we have stated hereinabove, is overruled.

254. The Writ Petitions are, accordingly, disposed of. There shall be no order as to costs.

Rohinton Fali Nariman, J.

255. *"The love that dare not speak its name"* is how the love that exists between same-sex couples was described by Lord Alfred Douglas, the lover of Oscar Wilde, in his poem Two Loves published in 1894 in Victorian England.

256. The word "homosexual" is not derived from "homo" meaning man, but from "homo" meaning same.[23] The word "lesbian" is derived from the name of the Greek island of Lesbos, where it was rumored that female same-sex couples proliferated. What we have before us is a relook at the constitutional validity of Section 377 of the Indian Penal Code which was enacted in the year 1860 (over 150 years ago) insofar as it criminalises consensual sex between adult same-sex couples.

257. These cases have had a chequered history. Writ petitions were filed before the Delhi High Court challenging the constitutional validity of Section 377 of the Penal Code insofar as it criminalizes consensual sex between adult same-sex couples within the confines of their homes or other private places. A Division Bench of the Delhi High Court in ***Naz Foundation v. Government of NCT of Delhi ("Naz Foundation")***, MANU/DE/0869/2009 : 111 DRJ 1 (2009), after considering wide-ranging arguments on both sides, finally upheld the plea of the Petitioners in the following words:

132. We declare that Section 377 Indian Penal Code, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 Indian Penal Code will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 Indian Penal Code that have already attained finality.

We allow the writ petition in the above terms.

258. Despite the fact that no appeal was filed by the Union of India, in appeals filed by private individuals and groups, the Supreme Court in **Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors. ("Suresh Kumar Koushal")**, MANU/SC/1278/2013 : (2014) 1 SCC 1, reversed the judgment of the High Court. Reviews that were filed against the aforesaid judgment, including by the Union of India, were dismissed by this Court.

259. Meanwhile, the Supreme Court delivered an important judgment reported as **National Legal Services Authority v. Union of India ("NALSA")**, MANU/SC/0309/2014 : (2014) 5 SCC 438, which construed Articles 15 and 21 of the Constitution of India as including the right to gender identity and sexual orientation, and held that just like men and women, transgenders could enjoy all the fundamental rights that other citizens of India could enjoy. Thereafter, in **Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. ("Puttaswamy")**, MANU/SC/1044/2017 : (2017) 10 SCC 1, a nine-Judge Bench of this Court unanimously declared that there is a fundamental right of privacy which enured in favour of all persons, the concomitant of which was that the right to make choices that were fundamental to a person's way of living could

not be interfered with by the State without compelling necessity and/or harm caused to other individuals.

260. The impetus of this decision is what led to a three-Judge Bench order of 08.01.2018, which referred to the judgment of **Puttaswamy** (supra) and other arguments made by Shri Datar, to refer the correctness of **Suresh Kumar Koushal's** case (supra) to a larger Bench. This is how the matter has come to us.

History of Section 377

261. In the western world, given the fact that both Judaism and Christianity outlawed sexual intercourse by same-sex couples, offences relating thereto were decided by ecclesiastical courts. It is only as a result of Henry VIII of England breaking with the Roman Catholic Church that legislation in his reign, namely the Buggery Act of 1533, prohibited "the detestable and abominable offence" of buggery committed with mankind or beast.

262. Between 1806, when reliable figures begin, and 1900, 8,921 men were indicted for sodomy, gross indecency or other 'unnatural misdemeanours' in England and Wales. Ninety men per year were, on average, indicted for homosexual offences in this period. About a third as many were arrested and their case considered by magistrates. Most of the men convicted were imprisoned, but between 1806 and 1861, when the death penalty for sodomy was finally abolished, 404 men were sentenced to death. Fifty-six were executed, and the remainder were either imprisoned or transported to Australia for life. Two such men, James Pratt and John Smith, were the last to be executed in Britain for sodomy on 27 November, 1835.

263. During the reign of the East India Company in India, Parliament established what was called the Indian Law Commission. In 1833, Thomas Babington Macaulay was appointed to chair the Commission.[24]

264. The Indian Law Commission, with Macaulay as its head, submitted the Draft Penal Code to the Government of India on 14.10.1837. This draft consisted of 488 clauses. After the First Report submitted on 23.07.1846, the Second Report of Her Majesty's Commissioners for revising and consolidating the law was submitted by C.H. Cameron and D. Eliott on 24.06.1847. These Commissioners concluded that the Draft Penal Code was sufficiently complete, and, with slight modifications, fit to be acted upon. The revised edition of the Penal Code was then forwarded to the Judges of the Supreme Court at Calcutta on 30.05.1851, and also to the Judges of the Sudder Court at Calcutta.

265. The revised edition of the Penal Code as prepared by Mr. Bethune, the Legislative member of the Legislative Council of India, together with the views of the Chief Justice and Mr. Justice Buller of the Supreme Court at Calcutta, as well as those of Mr. Justice Colvile were sent to the Company in London. The Court of Directors in London were anxious to see the Penal Code enacted as early as possible. They, therefore, constituted a Council in which Sir Barnes Peacock was made the fourth member.

266. This Council or Committee prepared a revised Penal Code which was then referred to a Select Committee in 1857. Given the Indian Mutiny of 1857, the Code was passed soon thereafter in October, 1860 and brought into force on 01.01.1862. Sir James Fitzjames Stephen proclaimed that:

The Indian Penal Code is to the English criminal law what a manufactured Article ready for use is to the materials out of which it is made. It is to the French Penal Code and, I may add, to the North Germany Code of 1871, what a finished picture is to a sketch. It is far simpler, and much better expressed, than Livingston's Code for Louisiana; and its practical success has been complete.

267. He further described the Penal Code as:

the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few), to suit circumstances of British India.

268. According to Lord Macaulay, a good Code should have the qualities of precision and comprehensibility. In a letter to Lord Auckland, the Governor General of India in Council, which accompanied his draft Penal Code, he stated:

There are two things which a legislator should always have in view while he is framing laws: the one is that they should be as far as possible precise; the other that they should be easily understood. That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making law to the Courts of Justice.

269. Stung to the quick, when criticized as to the delay in bringing out the Code, he observed in a Minute to Lord Auckland as follows:

...when I remember the slow progress of law reforms at home and when I consider that our Code decides hundreds of questions... every one of which if stirred in England would give occasion to voluminous controversy and to many animated debates, I must acknowledge that I am inclined to fear that we have been guilty rather of precipitation than of delay.

270. Earlier, he had described the core objective of his project in his 04.06.1835 Minute to the Council which could be paraphrased as follows:

It should be more than a mere digest of existing laws, covering all contingencies, and 'nothing that is not in the Code ought to be law'.

It should suppress crime with the least infliction of suffering and allow for the ascertaining of the truth at the smallest possible cost of time and money.

Its language should be clear, unequivocal and concise. Every criminal act should be separately defined, its language followed precisely in indictment and conduct found to fall clearly within the definition.

Uniformity was to be the chief end and special definitions, procedures or other exceptions to account for different races or sects should not be included without clear and strong reasons.

271. It is interesting to note that Lord Macaulay's Draft was substantially different from what was enacted as Section 377. Macaulay's original draft read:

361. Whoever, intending to gratify unnatural lust, touches for that purpose any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall be liable to fine.

362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.

272. What is remarkable for the time in which he lived is the fact that Lord Macaulay would punish touching another person for the purpose of gratifying "unnatural lust" without their "free and intelligent consent" with a term of imprisonment extendable to life (but not less than seven years) while the penalty for the same offence, when consensual, would be imprisonment for a maximum term of fourteen years (but not less than two years). Even in this most prudish of all periods of English history, Lord Macaulay recognized a lesser sentence for the crime of "unnatural lust", if performed with consent. Living in the era in which he lived, he clearly eschewed public discussion on this subject, stating:

Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. We leave, without comment, to the judgment of his Lordship in Council the two clauses which we have provided for these offences. We are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.

273. At what stage of the proceedings before the various persons and committees after 1837, Section 377 finally took shape, is not clear. What is clear is that it is the Committee of Sir Barnes Peacock which finally sent the draft equivalent of Section 377 for enactment.

274. The Indian Penal Code, given its long life of over 150 years, has had surprisingly few amendments made to it. The 42nd Law Commission Report, early in this country's history, did not recommend the amendment or deletion of Section 377. But B.P. Jeevan Reddy, J.'s Law Commission Report of the year 2000 (the 172nd Report) recommended its deletion consequent to changes made in the preceding sections, which made it clear that anal sex between consenting adults, whether same-sex or otherwise, would not be penalized.

Law in the United Kingdom

275. As has been mentioned earlier in this judgment, the first enactment prohibiting same-sex intercourse was passed in the year 1533 in the reign of Henry VIII. The death penalty was prescribed even for consenting adults who indulged in this "abomination". The trial of persons such as Oscar Wilde is what led to law reform in the U.K., albeit 60 years later.

276. The Marquess of Queensberry's son, Lord Alfred Douglas, was having an affair with Oscar Wilde, which the Marquess discovered. At Oscar Wilde's club, the Marquess left a note describing Oscar Wilde as a "somdomite" which led to one of the most celebrated defamation actions in England. In the course of his cross-examination of Oscar Wilde, Sir Edward Carson was able to draw from his famous witness the fact that boys could be plain or ugly, which would have led to the truth of establishing the charge against Oscar Wilde. Rather than go on with the trial, Oscar Wilde hastily withdrew his action for defamation. But that was not the end. A prosecution under the Criminal Law Amendment Act of 1885 followed, in which Oscar Wilde was convicted and sent to jail for a period of two years. He never quite recovered, for after his jail sentence was served out, he died a broken and impoverished man in Paris at the early age of 46.[25]

277. The winds of change slowly blew over the British Isles and finally, post the Second World War, what is known as the Wolfenden Committee was appointed on 24.08.1954, inter alia to consider the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts. The Committee Report, even though it is of a vintage of September 1957, makes interesting reading. In paragraphs 31 and 32 of the Report, the Committee opined:

31. Even if it could be established that homosexuality were a disease, it is clear that many individuals, however their state is reached, present social rather than medical problems and must be dealt with by social, including penological, methods. This is especially relevant when the claim that homosexuality is an illness is taken to imply that its treatment should be a medical responsibility. Much more important than the academic question whether homosexuality is a disease is the practical question whether a doctor should carry out any part or all of the treatment. Psychiatrists deal regularly with problems of personality which are not regarded as diseases, and conversely the treatment of cases of recognized psychiatric illness may not be strictly medical but may best be carried out by non-medical supervision or environmental change. Examples would be certain cases of senile dementia or chronic schizophrenia which can best be managed at home. In fact, the treatment of behavior disorders, even when medically supervised, is rarely confined to psychotherapy or to treatment of a strictly medical kind. This is not to deny that expert advice should be sought in very many homosexual cases. We shall have something more to say on these matters in connection with the treatment of offenders.

32. The claim that homosexuality is an illness carries the further implication that the sufferer cannot help it and therefore carries a diminished responsibility for his actions. Even if it were accepted that homosexuality could properly be described as a "disease", we should not accept this corollary. There are no *prima facie* grounds for supposing that because a particular person's sexual propensity happens to lie in the direction of persons of his or her own sex it is any less controllable than that of those whose propensity is for persons of the opposite sex. We are informed that patients in mental hospitals, with few exceptions, show clearly by their behavior that they can and do exercise a high degree of responsibility and self-control; for example, only a small minority need

to be kept in locked wards. The existence of varying degrees of self-control is a matter of daily experience - the extent to which coughing can be controlled is an example - and the capacity for self-control can vary with the personality structure or with temporary physical or emotional conditions. The question which is important for us here is whether the individual suffers from a condition which causes diminished responsibility. This is a different question from the question whether he was responsible in the past for the causes or origins of his present condition. That is an interesting enquiry and may be of relevance in other connections; but our concern is with the behavior which flows from the individual's present condition and with the extent to which he is responsible for that behavior, whatever may have been the causes of the condition from which it springs. Just as expert opinion can give valuable assistance in deciding on the appropriate ways of dealing with a convicted person, so can it help in assessing the additional factors that may affect his present responsibility?

278. It then went on to note in paragraph 36 that the evidence before them showed that homosexuality existed in all levels of society and was prevalent in all trades and professions. In paragraph 53, the main arguments for retention of the existing law were set out. Insofar as societal health was concerned, the Committee rejected this for lack of evidence. It went on to state:

54. As regards the first of these arguments, it is held that conduct of this kind is a cause of the demoralization and decay of civilisations, and that therefore, unless we wish to see our nation degenerate and decay, such conduct must be stopped, by every possible means. We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own. In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. <u>But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind</u>. It is held also that if such men are employed in certain professions or certain branches of the public service their private habits may render them liable to threats of blackmail or to other pressures which may make them "bad security risks." If this is true, it is true also of some other categories of persons: for example, drunkards, gamblers and those who become involved in compromising situations of a heterosexual kind; and while it may be a valid ground for excluding from certain forms of employment men who indulge in homosexual behaviour, it does not, in our view, constitute a sufficient reason for making their private sexual behaviour an offence in itself.

279. Insofar as the damaging effects on family life were concerned, this was rejected by stating:

55. The second contention, that homosexual behaviour between males has a damaging effect on family life, may well be true. Indeed, we have had evidence, that it often is; cases in which homosexual behaviour on the part of the husband has broken up a marriage are by no means rare, and there are also cases in which a man in whom the homosexual component is relatively weak nevertheless derives such satisfaction from homosexual outlets that he does not enter upon a marriage which might have been successfully and happily consummated. We deplore this damage to what we regard as the basic unit of society; but cases are also frequently encountered in which

a marriage has been broken up by homosexual behaviour on the part of the wife, and no doubt some women, too, derive sufficient satisfaction from homosexual outlets to prevent their marrying. We have had no reasons shown to us which would lead us to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behaviour alone among them should be a criminal offence. This argument is not to be taken as saying that society should condone or approve male homosexual behaviour. But where adultery, fornication and lesbian behaviour are not criminal offences there seems to us to be no valid ground, on the basis of damage to the family, for so regarding homosexual behaviour between men. Moreover, it has to be recognized that the mere existence of the condition of homosexuality in one of the partners can result in an unsatisfactory marriage, so that for a homosexual to marry simply for the sake of conformity with the accepted structure of society or in the hope of curing his condition may result in disaster.

280. And in rejecting the allegation that men indulging in such practices with other men may turn their attention to boys, the Committee said:

56. We have given anxious consideration to the third argument, that an adult male who has sought as his partner another adult male may turn from such a relationship and seek as his partner a boy or succession of boys. We should certainly not wish to countenance any proposal which might tend to increase offences against minors. Indeed, if we thought that any recommendation for a change in the law would increase the danger to minors, we should not make it. But in this matter, we have been much influenced by our expert witnesses. They are in no doubt that whatever may be the origins of the homosexual condition, there are two recognisably different categories among adult male homosexuals. There are those who seek as partners other adult males, and there are paedophiliacs, that is to say men who seek as partners boys who have not reached puberty.

57. We are authoritatively informed that a man who has homosexual relations with an adult partner seldom turns to boys, and *vice-versa*, though it is apparent from the police reports we have seen and from other evidence submitted to us that such cases do happen.

281. Finally, the Committee stated:

60. We recognise that a proposal to change a law which has operated for many years so as to make legally permissible acts which were formerly unlawful, is open to criticisms which might not be made in relation to a proposal to omit, from a code of laws being formulated *de novo*, any provision making these acts illegal. To reverse a longstanding tradition is a serious matter and not to be suggested lightly. But the task entrusted to us, as we conceive it, is to state what we regard as a just and equitable law. We therefore do not think it appropriate that consideration of this question should be unduly influenced by a regard for the present law, much of which derives from traditions whose origins are obscure.

61. Further, we feel bound to say this. We have outlined the arguments against a change in the law, and we recognise their weight. We believe, however, that they have been met by the counterarguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give

to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.

62. We accordingly recommend that homosexual behaviour between consenting adults in private should no longer be a criminal offence.

282. Change came slowly. It was only in 1967 that the Wolfenden Committee Report was acted upon by the British Parliament by enacting the Sexual Offences Act, 1967, which abolished penal offences involving consenting same-sex adults.

283. In 2017, the United Kingdom passed the Policing and Crimes Act which served as an amnesty law to pardon persons who were cautioned or convicted under legislations that outlawed homosexual acts.[26]

The Law in the United States

284. At the time that the United States achieved independence in 1776, the law in all the States insofar as same-sex offences were concerned, was the English law. This state of affairs continued until challenges were made in the last century to state statutes which criminalized sodomy. One such case, namely, **Bowers v. Hardwick ("Bowers")**, MANU/USSC/0151/1986 : 92 L. Ed. 2d 140 (1986), reached the United States Supreme Court in the year 1986. By a 5:4 decision, the United States Supreme Court upheld a Georgia statute criminalizing sodomy and its applicability to the commission of that act with another adult male in the bedroom of the Respondent's home. Justice White, who spoke for the majority of the Court, did this on several grounds.

285. First and foremost, he stated that there was no right to privacy that extended to homosexual sodomy. No connection between family, marriage, or procreation and homosexuality had been demonstrated to the court. The next ground for upholding such law was that proscriptions against such conduct had ancient roots. **Stanley v. Georgia ("Stanley")**, MANU/USSC/0193/1969 : 22 L. Ed. 2d 542 (1969), where the Court held that the First Amendment prohibits conviction for possessing and reading obscene material in the privacy of one's home, was brushed aside stating that **Stanley** itself recognized that its holding offered no protection for possession of drugs, firearms or stolen goods in the home. Therefore, such a claimed fundamental right could not possibly exist when adultery, incest and other sexual crimes are punished, even though they may be committed in the home. Another important rationale was that the Georgia law was based on a notion of morality, which is a choice that could legitimately be exercised by a State Legislature. Chief Justice Burger, concurring, again relied heavily on 'ancient roots', stating that throughout the history of western civilization, homosexual sodomy was outlawed in the Judeo-Christian tradition, which the Georgia legislature could well follow. Justice Powell, concurring with the majority, found that to imprison a person upto 20 years for a single, private, consensual act of sodomy within the home would be a cruel and unusual punishment within the meaning of the Eighth Amendment.

However, since no trial had taken place on the facts, and since the Respondent did not raise any such Eighth Amendment issue, Justice Powell concurred with the majority.

286. The dissenting opinion of four Justices makes interesting reading. Justice Blackmun, who spoke for four dissenters, began with the classical definition of the old privacy right which is the "right to be let alone", and quoted from Justice Holmes' Article *The Path of the Law*, stating:

[I]t is revolting to have no better reason for a Rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the Rule simply persists from blind imitation of the past.

287. So much, then, for history and its "ancient roots". Justice Blackmun's dissent then went on to consider the famous judgment in **Wisconsin v. Yoder**, MANU/USSC/0244/1972 : 32 L. Ed. 2d 15 (1972), in which the Court had upheld the fundamental right of the Amish community not to send their children to schools, stating that a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different. Referring to Judeo-Christian values, the Court said that the fact that certain religious groups condemn the behavior of sodomy gives the State no licence to impose their moral judgment on the entire citizenry of the United States. Ending with a John Stuart Mill type of analysis, the dissent stated:

44. This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. Diamond v. Charles, MANU/USSC/0063/1986 : 476 U.S. 54, 65-66, 106 S. Ct. 1697, 1705, 90 L. Ed. 2d 48 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

288. Justice Stevens, also in a powerfully worded dissent, specifically stated that the protection of privacy extends to intimate choices made by unmarried as well as married persons.

289. It took the United States 17 years to set aside this view of the law and to accept the dissenting judgments in **Bowers** (supra).

290. In **Lawrence v. Texas**, MANU/USSC/0070/2003 : 539 U.S. 558 (2003), by a majority of 6:3, Justice Anthony Kennedy, speaking for the majority, set aside the judgment in **Bowers** (supra), accepting that the dissenting judgments in that case were correct. In a tilt at the history analysis of the majority judgment in **Bowers** (supra), the Court found that earlier sodomy laws were not directed at homosexuals at large, but instead sought to prohibit non-procreative sexual activity more generally, and were not enforced against consenting adults acting in private. After citing from **Planned Parenthood of Southeastern Pa. v. Casey ("Casey"),** MANU/USSC/0099/1992 : 505 U.S. 833 (1992), the majority held - "our obligation is to define the liberty of all, not to mandate our own moral code." The majority judgment then referred to a Model Penal Code that the American Law Institute took out in 1955, making it clear that it did not provide for criminal penalties for consensual same-sex relationships conducted in private. The judgment then went on to refer to the Wolfenden Committee Report and the Sexual Offences Act, 1967 in the United Kingdom and referred to the European Court's decision in **Dudgeon v. United Kingdom,** 45 Eur. Ct. H.R. (1981). It then referred to **Romer v. Evans ("Romer"),** MANU/USSC/0042/1996 : 517

U.S. 620 (1996), where the Court struck down a class-based legislation which deprived homosexuals of State anti-discrimination laws as a violation of the Equal Protection Clause. The majority then found that the 1986 decision of **Bowers** (supra), had "sustained serious erosion" through their recent decisions in **Casey** (supra) and **Romer** (supra), and had, therefore, to be revisited.[27] Justice O'Connor concurred in the judgment but side-stepped rather than overruled **Bowers** (supra). Justice Scalia, with whom the Chief Justice and Justice Thomas joined, found no reason to undo the **Bowers** (supra) verdict stating that stare decisis should carry the day. An interesting passage in Justice Scalia's judgment reads as follows:

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts--or, for that matter, display any moral disapprobation of them--than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," [ante, at 579]; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

291. Before coming to our own judgments, we may quickly survey some of the judgments of the courts of other democratic nations. The European Community decisions, beginning with **Dudgeon v. United Kingdom** (supra) and continuing with **Norris v. Ireland**, Application No. 10581/83, and **Modinos v. Cyprus**, 16 EHRR 485 (1993), have all found provisions similar to Section 377 to be violative of Article 8 of the European Human Rights Convention, 1948 in which everyone has the right to respect for his private and family life, his home and his correspondence, and no interference can be made with these rights unless the law is necessary in a democratic society inter alia for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

292. In **El-Al Israel Airlines Ltd. v. Jonathan Danielwitz**, H.C.J. 721/94, the Supreme Court of Israel, speaking through Barak, J., recognized a same-sex relationship so that a male companion could be treated as being a companion for the receipt of a free or discounted aeroplane ticket. The Court held:

14. ... The principle of equality demands that the existence of a Rule that treats people differently is justified by the nature and substance of the issue. The principle of equality therefore presumes the existence of objective reasons that justify a difference (a distinction, dissimilarity). Discrimination -- which is the opposite of equality -- exists therefore in those situations where a different law for people who are (de facto) different from one another is based on reasons that are insufficient to justify a distinction between them in a free and democratic society. In Justice Or's

words, discrimination is 'different treatment without an objective justification' (Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority, at p. 360). President Agranat discussed this and pointed out:

The principle of equality, which is merely the opposite of discrimination and which, for reasons of justice and fairness, the law of every democratic country aspires to achieve, means that people must be treated equally for a particular purpose, when no real differences that are relevant to this purpose exist between them. If they are not treated equally, we have a case of discrimination. However, if the difference or differences between different people are relevant for the purpose under discussion, it is a permitted distinction to treat them differently for that purpose, provided that those differences justify this. In this context, the concept of "equality" therefore means "relevant equality", and it requires, with regard to the purpose under discussion, "equality of treatment" for those persons in this state. By contrast, it will be a permitted distinction if the different treatment of different persons derives from their being for the purpose of the treatment, in a state of relevant inequality, just as it will be discrimination if it derives from their being in a state of inequality that is not relevant to the purpose of the treatment' (FH 10/69 Boronovski v. Chief Rabbis, at p. 35).

Therefore, a particular law will create discrimination when two individuals, who are different from one another (factual inequality), are treated differently by the law, even though the factual difference between them does not justify different treatment in the circumstances. Discrimination is therefore based on the factors of arbitrariness, injustice and unreasonableness.

XXX

17. We have seen, therefore, that giving a benefit to a (permanent) employee for a spouse or recognized companion of the opposite sex and not giving the same benefit for a same-sex companion amounts to a violation of equality. What is the nature of this discrimination? Indeed, all discrimination is prohibited, but among the different kinds of discrimination, there are varying degrees. The severity of the discrimination is determined by the severity of the violation of the principle of equality. Thus, for example, we consider discrimination on the basis of race, religion, nationality, language, ethnic group and age to be particularly serious. In this framework, the Israeli legal system attaches great importance to the need to guarantee equality between the sexes and to prevent discrimination on the basis of sex (see HCJ 153/87 Shakdiel v. Minister of Religious Affairs; Poraz v. Mayor of Tel Aviv-Jaffa).

293. An instructive recent judgment from Trinidad and Tobago in **Jason Jones v. Attorney General of Trinidad and Tobago**, Claim No. CV 2017-00720, followed our judgment in **Puttaswamy** (supra) in order to strike down Section 13 of the Sexual Offences Act, 1986 on the ground that the State cannot criminalise sexual relations of the same sex between consenting adults. The court concluded:

168. Having regard to the evidence and submissions before this Court on all sides, there is no cogent evidence that the legislative objective is sufficiently important to justify limiting the claimant's rights. Mr. Hosein's stated objectives of:

168.1. Maintaining traditional family and values that represent society;

168.2. Preserving the legislation as it is and clarifying the law; and

168.3. Extending the offence in Section 16 to women and reduce it to serious indecency from gross indecency;

do not counterbalance the claimant's limit of his fundamental right of which he has given evidence. Instead, the court accepts the claimant's position that the law as it stands is not sufficiently important to justify limiting his fundamental rights and that he has proven it on a balance of probabilities.

294. To similar effect is the judgment of the High Court of Fiji in **Dhirendra Nadan v. State**, Case No. HAA0085 of 2005, where a Section similar to Section 377 was held to be inconsistent with the constitutional right of privacy and invalid to the extent that the law criminalises acts constituting private consensual sexual conduct "against the course of nature" between adults.

295. The South African Supreme Court, by a decision of 1999 in **The National Coalition for Gay and Lesbian Equality v. The Minister of Home Affairs**, Case CCT 10/99, after referring to various judgments of other courts, also found a similar Section to be inconsistent with the fundamental rights under its Constitution.

296. Another important decision is that of the United Nations Human Rights Committee in **Toonen v. Australia**, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), dated 31.03.1994. The Committee was called upon to determine whether Mr. Nicholas Toonen, who resided in the state of Tasmania, had been the victim of arbitrary interference with his privacy, and whether he had been discriminated against on the basis of his sexual orientation of being a homosexual. The Committee found:

8.2 Inasmuch as Article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that Sections 122 (a), (c) and 123 of the Tasmanian Code of Criminal Procedure "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, Sections 122 and 123 of the Tasmanian Code of Criminal Procedure. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16 on Article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the

Covenant and should be, in any event, reasonable in the circumstances". (4) The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

XXX

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

XXX

8.7 The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of Article 26. The same issue could arise Under Article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

XXX

10. Under Article 2(3)(a) of the Covenant, the author, victim of a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of Sections 122(a), (c) and 123 of the Tasmanian Code of Criminal Procedure.

297. As a result of these findings, the Australian Parliament, on 19.12.1994, passed the Human Rights (Sexual Conduct) Act, 1994, Section 4 of which reads as under:

4. Arbitrary interferences with privacy

(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

(2) For the purposes of this section, an adult is a person who is 18 years old or more.

Recent Judgments of this Court

298. **Anuj Garg and Ors. v. Hotel Association of India and Ors.,** MANU/SC/8173/2007 : (2008) 3 SCC 1, is an important decision of this Court, which dealt with the constitutional validity of another pre-constitution enactment, namely, Section 30 of the Punjab Excise Act of 1914, which prohibited employment of any woman in any part of premises in which liquor is consumed by the public. Sinha, J. adverted to the fact that when the original Act was enacted, the concept of equality between the two sexes was unknown. The Constitution changed all that when it enacted Articles 14 and 15. What is of importance is that when discrimination is made between two sets of persons, the classification must be founded on some rational criteria having regard to the societal conditions as they exist presently, and not as they existed in the early 20th century or even earlier. This was felicitously stated by the learned Judge as follows:

7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid.

8. In *John Vallamattom* v. *Union of India*, MANU/SC/0480/2003 : (2003) 6 SCC 611, this Court, while referring to an amendment made in UK in relation to a provision which was in pari materia with Section 118 of Indian Succession Act, observed (SCC p. 624, para 28):

*28...*The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time.

Referring to the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights as also Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, it was held (*John Vallamattom case*, SCC p. 625, para 33):

33. It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.

XXX

26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grass root democracy. They are now employed as drivers of heavy transport vehicles, conductors

of service carriages, pilots, et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a Multinational Company. They are now widely accepted both in police as also army services.

299. The Court went on to hold that "proportionality" should be a standard capable of being called reasonable in a modern democratic society (*See* paragraph 36).

In a significant paragraph, the learned Judge held:

43. Instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other *policy inference* (such as the one embodied Under Section 30) from societal conditions would be oppressive on the women and against the *privacy rights*.

300. The learned Judge then went on to further hold that the standard of judicial scrutiny of legislations, which on their face effect discrimination, is as follows:

46. It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.

47. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a *compelling State purpose*. Heightened level of scrutiny is the normative threshold for judicial review in such cases.

301. Finally, the Court held:

50. The test to review such a protective discrimination statute would entail a two-pronged scrutiny:

(*a*) the legislative interference (induced by sex discriminatory legislation in the instant case) should be justified in principle,

(*b*) the same should be proportionate in measure.

51. The Court's task is to determine whether the measures furthered by the State in the form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy, et al. The bottomline in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without

discriminating on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued.

302. The Section which had been struck down by the High Court was held to be arbitrary and unreasonable by this Court as well.

303. Close on the heels of this Court's judgment in **Suresh Kumar Koushal** (supra) is this Court's judgment in **NALSA** (supra). In this case, the Court had to grapple with the trauma, agony and pain of the members of the transgender community. The Court referred to Section 377 in the following words:

19. Section 377 Indian Penal Code found a place in the Penal Code, 1860, prior to the enactment of the Criminal Tribes Act that criminalised all penile non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the proscribed sexual practices. Reference may be made to the judgment of the Allahabad High Court in *Queen Empress* v. *Khairati*, ILR (1884) 6 All 204, wherein a transgender person was arrested and prosecuted Under Section 377 on the suspicion that he was a "habitual sodomite" and was later acquitted on appeal. In that case, while acquitting him, the Sessions Judge stated as follows: (ILR pp. 204-05)

... This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite--the distortion of the orifice of the anus into the shape of a trumpet-- and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.

Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including *hijras* and was used as an instrument of harassment and physical abuse against *hijras* and transgender persons.

304. The Court went on to explain the concepts of gender identity and sexual orientation, and relied heavily upon *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.* The Court then went on to hold:

60. The principles discussed hereinbefore on TGs and the international conventions, including *Yogyakarta Principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognised and followed, which has sufficient legal and historical justification in our country.

305. Insofar as Articles 15 and 16 of the Constitution were concerned, the Court held:

66. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be

gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders.

Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" Under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.

306. Insofar as Article 19(1)(a) of the Constitution and transgenders were concerned, the Court held:

72. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected Under Article 19(1)(*a*) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community Under Article 19(1)(*a*) of the Constitution of India and the State is bound to protect and recognise those rights.

307. In a significant paragraph relating to the personal autonomy of an individual, this Court held:

75. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg* v. *Hotel Assn. of India* [MANU/SC/8173/2007 : (2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed Under Article 21 of the Constitution of India.

308. The conclusion therefore was:

83. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

309. Dr. A.K. Sikri, J., in a separate concurring judgment, spoke of the fundamental and universal principle of the right of choice given to every individual, which is an inseparable part of human rights. He then went on to hold:

116.1. Though in the past TGs in India were treated with great respect, that does not remain the scenario any longer. Attrition in their status was triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of hijra persons as innately "criminal" and "adapted to the systematic commission of non-bailable offences". This dogmatism and indoctrination of the Indian people with aforesaid presumption, was totally capricious and nefarious. There could not have been more harm caused to this community with the passing of the aforesaid brutal legislation during the British Regime with the vicious and savage mindset. To add insult to the irreparable injury caused, Section 377 of the Penal Code was misused and abused as there was a tendency, in the British period, to arrest and prosecute TG persons Under Section 377 merely on suspicion. To undergo this sordid historical harm caused to TGs of India, there is a need for incessant efforts with effervescence.

310. And in paragraphs 125 and 129, he outlined the role of our Court as follows:

125. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, the law has to play more predominant role. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.

XXX

129. As we have pointed out above, our Constitution inheres liberal and substantive democracy with the Rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. The Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.

311. In an unusual final order, the Court declared:

135. We, therefore, declare:

135.1. Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

135.2. Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

135.3. We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

135.4. The Centre and State Governments are directed to operate separate HIV serosurveillance centres since hijras/transgenders face several sexual health issues.

135.5. The Centre and State Governments should seriously address the problems being faced by hijras/transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

135.6. The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

135.7. The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

135.8. The Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

135.9. The Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

312. **Puttaswamy** (supra) is the next important nail in the coffin of Section 377 insofar as it pertains to consensual sex between same-sex adults. In this judgment, Chandrachud, J. referred approvingly to the **NALSA** (supra) judgment in paragraph 96 and went on to hold that privacy is intrinsic to freedom and liberty. In referring to **Suresh Kumar Koushal** (supra), Chandrachud, J. referred to the judgment as "another discordant note" which directly bears upon the evolution of constitutional jurisprudence on the right to privacy. Chandrachud, J. went on to castigate the judgment in **Suresh Kumar Koushal** (supra), and held:

144. Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy Under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the "mainstream". Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality

demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

145. The view in *Koushal* [Suresh Kumar Koushal v. Naz Foundation, MANU/SC/1278/2013 : (2014) 1 SCC 1: (2013) 4 SCC (Cri.) 1] that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy-based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.

146. The decision in *Koushal* [Suresh Kumar Koushal v. Naz Foundation, MANU/SC/1278/2013 : (2014) 1 SCC 1: (2013) 4 SCC (Cri.) 1] presents a *de minimis* rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The *de minimis* hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the *Koushal* [Suresh Kumar Koushal v. Naz Foundation, MANU/SC/1278/2013 : (2014) 1 SCC 1: (2013) 4 SCC (Cri.) 1] rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which *Koushal* [Suresh Kumar Koushal v. Naz Foundation, MANU/SC/1278/2013 : (2014) 1 SCC 1: (2013) 4 SCC (Cri.) 1] has dealt with the privacy-dignity based claims of LGBT persons on this aspect.

147. Since the challenge to Section 377 is pending consideration before a larger Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding.

313. In an important paragraph, the learned Judge finally held:

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone

and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

314. Nariman, J., in his judgment, which was concurred in by three other learned Judges, recognized the privacy of choice which protects an individual's autonomy over fundamental personal choices as follows:

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

• Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

• Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

• The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(*d*) and (*e*) read with Article 21; ground personal information privacy Under Article 21; and the privacy of choice in Articles 19(1)(*a*) to (*c*), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

315. Kaul, J., in a separate judgment, also joined Chandrachud, J. in castigating **Suresh Kumar Koushal's** judgment as follows:

647. There are two aspects of the opinion of Dr D.Y. Chandrachud, J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of constitutional jurisprudence on the right to privacy he has referred to the judgment in *Suresh Kumar Koushal* v. *Naz Foundation* [Suresh Kumar Koushal v. Naz Foundation, MANU/SC/1278/2013 : (2014) 1 SCC 1: (2013) 4 SCC (Cri.) 1]. In the challenge laid to Section 377 of the Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, *inter alia*, observed [Naz Foundation v. Govt. (NCT of Delhi), MANU/DE/0869/2009 : 2010 Cri. LJ 94] that the right to live with dignity and the right to privacy both are recognised as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section ultra vires of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr D.Y. Chandrachud, J.,

who in paras 144 to 146 of his judgment, states that the right to privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to constitutional rights and the courts are often called up on to take what may be categorised as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy. The observations made in *Mosley* v. *News Group Papers Ltd.* [Mosley v. News Group Papers Ltd., MANU/UKWQ/0046/2008 : 2008 EWHC 1777 (QB)], in a broader concept may be usefully referred to:

130. ... It is not simply a matter of personal privacy v. the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well-recognised criteria.

131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg Court in *Von Hannover* [Von Hannover v. Germany, (2004) 40 EHRR 1] at pp. 60 and 76, would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.

316. Close upon the heels of these three judgments are three other important recent decisions. In **Common Cause v. Union of India**, MANU/SC/0232/2018 : 2018 5 SCC 1, a case dealing with euthanasia, Dipak Misra, C.J., states as under:

166. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognise such dynamism. The Constitution Bench in *Gian Kaur* [Gian Kaur v. State of Punjab, MANU/SC/0335/1996 : (1996) 2 SCC 648: 1996 SCC (Cri.) 374], as stated earlier, distinguishes attempt to suicide and abetment of suicide from acceleration of the process of natural death which has commenced. The authorities, we have noted from other jurisdictions, have observed the distinctions between the administration of lethal injection or certain medicines to cause painless death and non-administration of certain treatment which can

prolong the life in cases where the process of dying that has commenced is not reversible or withdrawal of the treatment that has been given to the patient because of the absolute absence of possibility of saving the life. To explicate, the first part relates to an overt act whereas the second one would come within the sphere of informed consent and authorised omission. The omission of such a nature will not invite any criminal liability if such action is guided by certain safeguards. The concept is based on non-prolongation of life where there is no cure for the state the patient is in and he, under no circumstances, would have liked to have such a degrading state. The words "no cure" have to be understood to convey that the patient remains in the same state of pain and suffering or the dying process is delayed by means of taking recourse to modern medical technology. It is a state where the treating physicians and the family members know fully well that the treatment is administered only to procrastinate the continuum of breath of the individual and the patient is not even aware that he is breathing. Life is measured by artificial heartbeats and the patient has to go through this undignified state which is imposed on him. The dignity of life is denied to him as there is no other choice but to suffer an avoidable protracted treatment thereby thus indubitably casting a cloud and creating a dent in his right to live with dignity and face death with dignity, which is a preserved concept of bodily autonomy and right to privacy. In such a stage, he has no old memories or any future hopes but he is in a state of misery which nobody ever desires to have. Some may also silently think that death, the inevitable factum of life, cannot be invited. To meet such situations, the Court has a duty to interpret Article 21 in a further dynamic manner and it has to be stated without any trace of doubt that the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying. Here, the issue of choice also comes in. Thus analysed, we are disposed to think that such a right would come within the ambit of Article 21 of the Constitution.

L. *Right of self-determination and individual autonomy*

167. Having dealt with the right to acceleration of the process of dying a natural death which is arrested with the aid of modern innovative technology as a part of Article 21 of the Constitution, it is necessary to address the issues of right of self-determination and individual autonomy.

168. John Rawls says that the liberal concept of autonomy focuses on choice and likewise, self-determination is understood as exercised through the process of choosing [Rawls, John, *Political Liberalism*, 32, 33 (New York: Columbia University Press, 1993)]. The respect for an individual human being and in particular for his right to choose how he should live his own life is individual autonomy or the right of self-determination. It is the right against noninterference by others, which gives a competent person who has come of age the right to make decisions concerning his or her own life and body without any control or interference of others. Lord Hoffman, in *Reeves* v. *Commr. of Police of the Metropolis* [Reeves v. Commr. of Police of the Metropolis, (2000) 1 AC 360: (1993) 3 WLR 363 (HL)] has stated: (AC p. 369 B)

... Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death.

XXX

202.8. An inquiry into Common Law jurisdictions reveals that all adults with capacity to consent have the right of self-determination and autonomy. The said rights pave the way for the right to refuse medical treatment which has acclaimed universal recognition. A competent person who has come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death. The "Emergency Principle" or the "Principle of Necessity" has to be given effect to only when it is not practicable to obtain the patient's consent for treatment and his/her life is in danger. But where a patient has already made a valid Advance Directive which is free from reasonable doubt and specifying that he/she does not wish to be treated, then such directive has to be given effect to.

317. In the same case, Chandrachud J. went on to hold:

437. Under our Constitution, the inherent value which sanctifies life is the dignity of existence. Recognising human dignity is intrinsic to preserving the sanctity of life. Life is truly sanctified when it is lived with dignity. There exists a close relationship between dignity and the quality of life. For, it is only when life can be lived with a true sense of quality that the dignity of human existence is fully realised. Hence, there should be no antagonism between the sanctity of human life on the one hand and the dignity and quality of life on the other hand. Quality of life ensures dignity of living and dignity is but a process in realising the sanctity of life.

438. Human dignity is an essential element of a meaningful existence. A life of dignity comprehends all stages of living including the final stage which leads to the end of life. Liberty and autonomy are essential attributes of a life of substance. It is liberty which enables an individual to decide upon those matters which are central to the pursuit of a meaningful existence. The expectation that the individual should not be deprived of his or her dignity in the final stage of life gives expression to the central expectation of a fading life: control over pain and suffering and the ability to determine the treatment which the individual should receive. When society assures to each individual a protection against being subjected to degrading treatment in the process of dying, it seeks to assure basic human dignity. Dignity ensures the sanctity of life. The recognition afforded to the autonomy of the individual in matters relating to end-of-life decisions is ultimately a step towards ensuring that life does not despair of dignity as it ebbs away.

XXX

441. The protective mantle of privacy covers certain decisions that fundamentally affect the human life cycle. [Richard Delgado, "Euthanasia Reconsidered--The Choice of Death as an Aspect of the Right of Privacy", Arizona Law Review (1975), Vol. 17, at p. 474.] It protects the most personal and intimate decisions of individuals that affect their life and development. [Ibid.] Thus, choices and decisions on matters such as procreation, contraception and marriage have been held to be protected. While death is an inevitable end in the trajectory of the cycle of human life of individuals are often faced with choices and decisions relating to death. Decisions relating to death, like those relating to birth, sex, and marriage, are protected by the Constitution by virtue of the right of privacy. The right to privacy resides in the right to liberty and in the respect of autonomy. [T.L. Beauchamp, "The Right to Privacy and the Right to Die", *Social Philosophy and Policy* (2000), Vol. 17, at p. 276.] The right to privacy protects autonomy in making decisions related to the intimate domain of death as well as bodily integrity. Few moments could be of as much importance

as the intimate and private decisions that we are faced regarding death. [Ibid.] Continuing treatment against the wishes of a patient is not only a violation of the principle of informed consent, but also of bodily privacy and bodily integrity that have been recognised as a facet of privacy by this Court.

318. Similarly, in **Shafin Jahan v. Asokan K.M.**, MANU/SC/0340/2018, this Court was concerned with the right of an adult citizen to make her own marital choice. The learned Chief Justice referred to Articles 19 and 21 of the Constitution of India as follows:

28. Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detenue is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right Under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.

XXX

54. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.

319. In another recent judgment of a three-Judge Bench, in **Shakti Vahini v. Union of India**, MANU/SC/0291/2018, which dealt with honour killings, this Court held:

44. Honour killing guillotines individual liberty, freedom of choice and one's own perception of choice. It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized Under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.

45. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

46. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law.

Mental Healthcare Act, 2017

320. Parliament is also alive to privacy interests and the fact that persons of the same-sex who cohabit with each other are entitled to equal treatment.

321. A recent enactment, namely the Mental Healthcare Act, 2017, throws a great deal of light on recent parliamentary legislative understanding and acceptance of constitutional values as reflected by this Court's judgments. Section 2(s) of the Act defines mental illness, which reads as under:

2(s) **"mental illness"** means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;

322. This definition throws to the winds all earlier misconceptions of mental illness including the fact that same-sex couples who indulge in anal sex are persons with mental illness. At one point

of time, the thinking in Victorian England and early on in America was that homosexuality was to be considered as a mental disorder. The amicus curiae brief of the American Psychiatric Association in support of the Petitioners in **Lawrence v. Texas** (supra) has put paid to this notion. This brief set out the research that has been done in this area as follows:

D. The Recognition That Homosexuality Is Not A "Mental Disorder"

The American mental health professions concluded more than a quarter-century ago that homosexuality is not a mental disorder. That conclusion was reached after decades of study of homosexuality by independent researchers, as well as numerous attempts by practitioners in the mental-health professions to effectuate a change in individuals' sexual orientation. During the first half of the 20th century, many mental health professionals regarded homosexuality as a pathological condition, but that perspective reflected untested assumptions supported largely by clinical impressions of patients seeking therapy and individuals whose conduct brought them into the criminal justice system. See J.C. Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public Policy 115 (J.C. Gonsiorek & J.D. Weinrich eds., 1991). Those assumptions were not subjected to rigorous scientific scrutiny with nonclinical, nonincarcerated samples until the latter half of the century. Once the notion that homosexuality is linked to mental illness was empirically tested, it proved to be based on untenable assumptions and value judgments.

In one of the first rigorous examinations of the mental health status of homosexuality, Dr. Evelyn Hooker administered a battery of standard psychological tests to homosexual and heterosexual men who were matched for age, IQ, and education. See Evelyn Hooker, The Adjustment of the Male Overt Homosexual, 21 J. Projective Techniques 17-31 (1957). None of the men was in therapy at the time of the study. Based on the ratings of expert judges who were kept unaware of the men's sexual orientation, Hooker determined that homosexual and heterosexual men could not be distinguished from one another on the basis of the psychological testing, and that a similar majority of the two groups appeared to be free of psychopathology. She concluded from her data that homosexuality is not inherently associated with psychopathology and that "homosexuality as a clinical entity does not exist." Id. at 18-19. Hooker's findings were followed over the next two decades by numerous studies, using a variety of research techniques, which similarly concluded that homosexuality is not related to psychopathology or social maladjustment.

In 1973, in recognition that scientific data do not indicate that a homosexual orientation is inherently associated with psychopathology, amicus American Psychiatric Association's Board of Trustees voted to remove homosexuality from the Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. That resolution stated that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, Position Statement on Homosexuality and Civil Rights (Dec. 15, 1973), printed in 131 Am. J. Psychiatry 497 (1974). That decision was upheld by a vote of the Psychiatric Association's membership the following year. After a thorough review of the scientific evidence, amicus American Psychological Association adopted the same position in 1975, and urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation. See Am. Psychol. Ass'n, Minutes of the Annual Meeting of the Council of Representatives, 30 Am. Psychologist 620, 633 (1975). Amicus National Association

of Social Workers (NASW) has adopted a similar policy. See NASW, Policy Statement on Lesbian and Gay Issues (Aug. 1993) (approved by NASW Delegate Assembly), reprinted in NASW, Social Work Speaks: NASW Policy Statements 162 (3d ed. 1994).

Of course, as is the case for heterosexuals, some homosexuals have mental illnesses, psychological disturbances, or poor social adjustment. Gay men, lesbians, and bisexuals also may be at somewhat greater risk for some kinds of psychological problems because of stresses associated with the experiences of social stigma and prejudice (see pp. 23-27, infra). But research conducted over four decades has established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment." The efforts to "cure" homosexuality that were prevalent in earlier generations--which included hypnosis, administration of hormones, aversive conditioning with electric shock or nausea-inducing drugs, lobotomy, electroshock, and castration--are now regarded by the mental-health professions as regrettable.

323. It also outlined the prejudice, discrimination and violence that has been encountered by gay people, as follows:

A. Discrimination, Prejudice, And Violence Encountered By Gay People

Lesbians and gay men in the United States encounter extensive prejudice, discrimination, and violence because of their sexual orientation. Intense prejudice against gay men and lesbians was widespread throughout much of the 20th century; public opinion studies routinely showed that, among large segments of the public, gay people were the target of strong antipathy. Although a shift in public opinion concerning homosexuality occurred in the 1990s, hostility toward gay men and lesbians remains common in contemporary American society. Prejudice against bisexuals appears to exist at comparable levels. Discrimination against gay people in employment and housing also appears to remain widespread.

The severity of this anti-gay prejudice is reflected in the consistently high rate of anti-gay harassment and violence in American society. Numerous surveys indicate that verbal harassment and abuse are nearly universal experiences of gay people. Although physical violence is less common, substantial numbers of gay people report having experienced crimes against their person or property because of their sexual orientation. In 2001, the most recent year for which FBI statistics are available, there were 1,375 reported bias motivated incidents against gay men, lesbians, and bisexuals. That figure likely represents only a fraction of such crimes, because reporting of hate crimes by law enforcement agencies is voluntary, the thoroughness of police statistics differs widely among jurisdictions, and many victims do not report their experiences to police because they fear further harassment or lack confidence that the assailants will be caught.

Although homosexuality is not a mental disorder, this societal prejudice against gay men and lesbians can cause them real and substantial psychological harm. Research indicates that experiencing rejection, discrimination, and violence is associated with heightened psychological distress among gay men and lesbians. These problems are exacerbated by the fact that, because of anti-gay stigma, gay men and lesbians have less access to social support and other resources that assist heterosexuals in coping with stress. Although many gay men and lesbians learn to cope with the social stigma against homosexuality, efforts to avoid that social stigma through attempts to

conceal or dissimulate sexual orientation can be seriously damaging to the psychological well-being of gay people. Lesbians and gay men have been found to manifest better mental health to the extent that they feel positively about their sexual orientation and have integrated it into their lives through "coming out" and participating in the gay community. Being able to disclose one's sexual orientation to others also increases the availability of social support, which is crucial to mental health.

324. Expressing its approval of the position taken by the American Psychiatric Association, the Indian Psychiatric Society in its recent Position Statement on Homosexuality dated 02.07.2018 has stated:

In the opinion of the Indian Psychiatric Society (IPS) homosexuality is not a psychiatric disorder.

This is in line with the position of American Psychiatric Association and The International Classification of Diseases of the World health Organization which removed homosexuality from the list of psychiatric disorders in 1973 and 1992 respectively.

The I.P.S. recognizes same-sex sexuality as a normal variant of human sexuality much like heterosexuality and bisexuality. There is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person.

The Indian Psychiatric Society further supports decriminalization of homosexual behavior.

325. The US Supreme Court, in its decision in **Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.,** 576 US (2015), also took note of the enormous sufferings of homosexual persons in the time gap between **Bowers** (supra) and **Lawrence v. Texas** (supra), in the following words:

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U.S., at 186, 190-195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); id., at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U.S., at 578. Although Bowers was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after Bowers was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

326. The present definition of mental illness in the 2017 Parliamentary statute makes it clear that homosexuality is not considered to be a mental illness. This is a major advance in our law which

has been recognized by the Parliament itself. Further, this is buttressed by Section 3 of the Act which reads as follows:

3. Determination of Mental Illness. (1) Mental illness shall be determined in accordance with such nationally or internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organisation) as may be notified by the Central Government.

(2) No person or authority shall classify a person as a person with mental illness, except for purposes directly relating to the treatment of the mental illness or in other matters as covered under this Act or any other law for the time being in force.

(3) Mental illness of a person shall not be determined on the basis of--

(a) political, economic or social status or membership of a cultural, racial or religious group, or for any other reason not directly relevant to mental health status of the person;

(b) non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community.

(4) Past treatment or hospitalisation in a mental health establishment though relevant, shall not by itself justify any present or future determination of the person's mental illness.

(5) The determination of a person's mental illness shall alone not imply or be taken to mean that the person is of unsound mind unless he has been declared as such by a competent court.

327. Mental illness in our statute has to keep pace with international notions and accepted medical standards including the latest edition of the International Classification of Diseases of the World Health Organization Under Section 3(1) of the Act. Under Section 3(3), mental illness shall not be determined on the basis of social status or membership of a cultural group or for any other reason not directly relevant to the mental health of the person. More importantly, mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community. It is thus clear that Parliament has unequivocally declared that the earlier stigma attached to same-sex couples, as persons who are regarded as mentally ill, has gone for good. This is another very important step forward taken by the legislature itself which has undermined one of the basic underpinnings of the judgment in **Suresh Kumar Koushal** (supra).

Section 21(1)(a) is important and set out hereinbelow:

21. Right to equality and non-discrimination. (1) Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:

(a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability;

328. This Section is parliamentary recognition of the fact that gay persons together with other persons are liable to be affected with mental illness, and shall be treated as equal to the other persons with such illness as there is to be no discrimination on the basis of sexual orientation. Section 30 is extremely important and reads as under:

30. Creating awareness about mental health and illness and reducing stigma associated with mental illness.

The appropriate Government shall take all measures to ensure that,--

(a) the provisions of this Act are given wide publicity through public media, including television, radio, print and online media at regular intervals;

(b) the programmes to reduce stigma associated with mental illness are planned, designed, funded and implemented in an effective manner;

(c) the appropriate Government officials including police officers and other officers of the appropriate Government are given periodic sensitisation and awareness training on the issues under this Act.

329. Section 115 largely does away with one other outmoded Section of the Indian Penal Code, namely, Section 309. This Section reads as follows.

115. Presumption of severe stress in case of attempt to commit suicide. (1) Notwithstanding anything contained in Section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.

(2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.

330. Instead of the inhumane Section 309 which has remained on the statute book for over 150 years, Section 115 makes it clear that Section 309 is rendered largely ineffective, and on the contrary, instead of committing a criminal offence, any person who attempts to commit suicide shall be presumed to have severe stress and shall not be tried and punished Under Section 309 of the Indian Penal Code. More importantly, the Government has an affirmative duty to provide care, treatment and rehabilitation to such a person to reduce the risk of recurrence of that person's attempt to commit suicide. This parliamentary declaration Under Section 115 again is in keeping with the present constitutional values, making it clear that humane measures are to be taken by the Government in respect of a person who attempts to commit suicide instead of prosecuting him for the offence of attempt to commit suicide.

331. And finally, Section 120 of the Act reads as under:

120. Act to have overriding effect. The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

332. The Latin maxim *cessant ratione legis*, cessat ipsa lex, meaning when the reason for a law ceases, the law itself ceases, is a Rule of law which has been recognized by this Court in **H.H. Shri Swamiji of Shri Amar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Dept.,** MANU/SC/0509/1979 : 1979 4 SCC 642 at paragraph 29, and **State of Punjab v. Devans Modern Breweries Ltd.,** MANU/SC/0961/2003 : (2004) 11 SCC 26 at paragraph 335. It must not be forgotten that Section 377 was the product of the Victorian era, with its attendant puritanical moral values. Victorian morality must give way to constitutional morality as has been recognized in many of our judgments. Constitutional morality is the soul of the Constitution, which is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in Part III of the Constitution, particularly with respect to those provisions which assure the dignity of the individual. The rationale for Section 377, namely Victorian morality, has long gone and there is no reason to continue with - as Justice Holmes said in the lines quoted above in this judgment - a law merely for the sake of continuing with the law when the rationale of such law has long since disappeared.

333. Given our judgment in **Puttaswamy** (supra), in particular, the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21, it is clear that Section 377, insofar as it applies to same-sex consenting adults, demeans them by having them prosecuted instead of understanding their sexual orientation and attempting to correct centuries of the stigma associated with such persons.

334. The Union of India, seeing the writing on the wall, has filed an affidavit in which it has not opposed the Petitioners but left the matter to be considered by the wisdom of this Court. Some of the intervenors have argued in favour of the retention of Section 377 qua consenting adults on the grounds that homosexual acts are not by themselves proscribed by Section 377. Unless there is penetration in the manner pointed out by the explanation to the Section, no offence takes place. They have also added that the Section needs to be retained given the fact that it is only a parliamentary reflection of the prevailing social mores of today in large segments of society. According to them, this furthers a compelling state interest to reinforce morals in public life which is not disproportionate in nature. We are afraid that, given the march of events in constitutional law by this Court, and parliamentary recognition of the plight of such persons in certain provisions of the Mental Healthcare Act, 2017, it will not be open for a constitutional court to substitute societal morality with constitutional morality, as has been stated by us hereinabove. Further, as stated in **S. Khushboo v. Kanniammal and Anr.**, MANU/SC/0310/2010 : (2010) 5 SCC 600, at paragraphs 46 and 50, this Court made it clear that

notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive-sin

is not punishable on earth by Courts set up by the State but elsewhere; crime alone is punishable on earth. To confuse the one with the other is what causes the death knell of Section 377, insofar as it applies to consenting homosexual adults.

335. Another argument raised on behalf of the intervenors is that change in society, if any, can be reflected by amending laws by the elected representatives of the people. Thus, it would be open to the Parliament to carve out an exception from Section 377, but this Court should not indulge in taking upon itself the guardianship of changing societal mores. Such an argument must be emphatically rejected. The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities.[28] One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens. These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism in India.[29] Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes.

336. Insofar as Article 14 is concerned, this Court in **Shayara Bano v. Union of India,** MANU/SC/1031/2017 : (2017) 9 SCC 1, has stated, in paragraph 101, that a statutory provision can be struck down on the ground of manifest arbitrariness, when the provision is capricious, irrational and/or without adequate determining principle, as also if it is excessive or disproportionate. We find that Section 377, in penalizing consensual gay sex, is manifestly arbitrary. Given modern psychiatric studies and legislation which recognizes that gay persons and transgenders are not persons suffering from mental disorder and cannot therefore be penalized, the Section must be held to be a provision which is capricious and irrational. Also, roping in such persons with sentences going upto life imprisonment is clearly excessive and disproportionate, as a result of which, when applied to such persons, Articles 14 and 21 of the Constitution would clearly be violated. The object sought to be achieved by the provision, namely to enforce Victorian mores upon the citizenry of India, would be out of tune with the march of constitutional events that has since taken place, rendering the said object itself discriminatory when it seeks to single out same-sex couples and transgenders for punishment.

337. As has been stated in the judgment of Nariman, J. in **Shreya Singhal v. Union of India**, MANU/SC/0329/2015 : (2015) 5 SCC 1, the chilling effect caused by such a provision would also violate a privacy right Under Article 19(1)(a), which can by no stretch of imagination be said to be a reasonable restriction in the interest of decency or morality (See paragraphs 87 to 94).

338. We may hasten to add, that the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* discussed below, which were also referred to by Radhakrishnan, J. in **NALSA** (supra), conform to our constitutional view of the fundamental rights of the citizens of India and persons who come to this Court.

339. The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, had undertaken a project to develop a set of

international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations.

340. A distinguished group of human rights experts drafted, developed, discussed and refined these Principles. Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6th to 9th November, 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.*

341. A few relevant extracts from the Yogyakarta Principles and its Preamble are as follows:

Preamble

We, the International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity,

XX

XX

Understanding 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

XX

XX

Following an Experts' Meeting held in Yogyakarta, Indonesia from 6 to 9 November 2006, hereby adopt these principles:

1. ***The right to the universal enjoyment of human rights.***--All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

(a) embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

(b) amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

(c) undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

(d) integrate within State policy and decision making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

2. *The rights to equality and non-discrimination.*--Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

(a) embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

(b) repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same-sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(c) adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

(d) take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

(e) in all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

(f) take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related

to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

3. *The right to recognition before the law.*-- Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

(a) ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

(b) take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

(c) take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex--including birth certificates, passports, electoral records and other documents--reflect the person's profound self-defined gender identity;

(d) ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

(e) ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

(f) undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

XXX

4. *The right to life.*--Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

(a) repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same-sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

(b) remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

(c) cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

XXX

6. ***The right to privacy.***--Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

(b) repeal all laws that criminalise consensual sexual activity among persons of the same-sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(c) ensure that criminal and other legal provisions of general application are not applied de facto to criminalise consensual sexual activity among persons of the same-sex who are over the age of consent;

(d) repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

(e) release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;

(f) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

XXX

18. ***Protection from medical abuses.***--No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

(b) take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

(c) establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

(d) ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

(e) review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

(f) ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

19. ***The right to freedom of opinion and expression.***-- Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

(b) ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

(c) take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

(d) ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

(e) ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

(f) ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

342. These principles give further content to the fundamental rights contained in Articles 14, 15, 19 and 21, and viewed in the light of these principles also, Section 377 will have to be declared to be unconstitutional.

343. Given the aforesaid, it has now to be decided as to whether the judgment in **Suresh Kumar Koushal** (supra) is correct. **Suresh Kumar Koushal's** judgment (supra) first begins with the presumption of constitutionality attaching to pre-constitutional laws, such as the Indian Penal Code. The judgment goes on to state that pre-constitutional laws, which have been adopted by Parliament and used with or without amendment, being manifestations of the will of the people of India through Parliament, are presumed to be constitutional. We are afraid that we cannot agree.

344. Article 372 of the Constitution of India continues laws in force in the territory of India immediately before the commencement of the Constitution. That the Indian Penal Code is a law in force in the territory of India immediately before the commencement of this Constitution is beyond cavil. Under Article 372(2), the President may, by order, make such adaptations and modifications of an existing law as may be necessary or expedient to bring such law in accord with the provisions of the Constitution. The fact that the President has not made any adaptation or modification as mentioned in Article 372(2) does not take the matter very much further. The

presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is aware of its limitations in enacting laws-it can only enact laws which do not fall within List II of Schedule VII of the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Indian Penal Code. In fact, in the majority judgment of B.P. Jeevan Reddy, J. in **New Delhi Municipal Council v. State of Punjab and Ors.**, MANU/SC/0760/1997 : (1997) 7 SCC 339, the Punjab Municipal Act of 1911 was deemed to be a post-constitutional law inasmuch as it was extended to Delhi only in 1950, as a result of which the presumption of constitutionality was raised. Ahmadi, C.J.'s dissenting opinion correctly states that if a pre-constitutional law is challenged, the presumption of constitutional validity would not obtain. The relevant paragraph is extracted below:

119. Reddy, J. has taken the view that the Doctrine of Presumption of Constitutionality of Legislations requires the saving of the taxes which these Acts impose upon the commercial activities of State Governments. The Act is a pre-constitutional enactment. The basis of this doctrine is the assumed intention of the legislators not to transgress constitutional boundaries. It is difficult to appreciate how that intention can be assumed when, at the time that the law was passed, there was no such barrier and the limitation was brought in by a Constitution long after the enactment of the law. (This Court has in a Constitution Bench decision, *Gulabbhai Vallabbhai Desai* v. *Union of India* [MANU/SC/0216/1966 : AIR 1967 SC 1110: (1967) 1 SCR 602], (AIR at p. 1117 raised doubts along similar lines). The Framers obviously wanted the law Under Article 289(2) to be of a very high standard. Can these laws, which are silent on the most important aspect required by Article 289(2), i.e., the specification of the trading activities of State Governments which would be liable to Union taxation, be said to meet with that standard?

345. It is a little difficult to subscribe to the view of the Division Bench that the presumption of constitutionality of Section 377 would therefore attach.

346. The fact that the legislature has chosen not to amend the law, despite the 172nd Law Commission Report specifically recommending deletion of Section 377, may indicate that Parliament has not thought it proper to delete the aforesaid provision, is one more reason for not invalidating Section 377, according to **Suresh Kumar Koushal** (supra). This is a little difficult to appreciate when the Union of India admittedly did not challenge the Delhi High Court judgment striking down the provision in part. Secondly, the fact that Parliament may or may not have chosen to follow a Law Commission Report does not guide the Court's understanding of its character, scope, ambit and import as has been stated in **Suresh Kumar Koushal** (supra). It is a neutral fact which need not be taken into account at all. All that the Court has to see is whether constitutional provisions have been transgressed and if so, as a natural corollary, the death knell of the challenged provision must follow.

347. It is a little difficult to appreciate the Court stating that the ambit of Section 377 Indian Penal Code is only determined with reference to the sexual act itself and the circumstances in which it is

executed. It is also a little difficult to appreciate that Section 377 regulates sexual conduct regardless of gender identity and orientation.

348. After 2013, when Section 375 was amended so as to include anal and certain other kinds of sexual intercourse between a man and a woman, which would not be criminalized as rape if it was between consenting adults, it is clear that if Section 377 continues to penalize such sexual intercourse, an anomalous position would result. A man indulging in such sexual intercourse would not be liable to be prosecuted for rape but would be liable to be prosecuted Under Section 377. Further, a woman who could, at no point of time, have been prosecuted for rape would, despite her consent, be prosecuted for indulging in anal or such other sexual intercourse with a man in private Under Section 377. This would render Section 377, as applied to such consenting adults, as manifestly arbitrary as it would be wholly excessive and disproportionate to prosecute such persons Under Section 377 when the legislature has amended one portion of the law in 2013, making it clear that consensual sex, as described in the amended provision, between two consenting adults, one a man and one a woman, would not be liable for prosecution. If, by having regard to what has been said above, Section 377 has to be read down as not applying to anal and such other sex by a male-female couple, then the Section will continue to apply only to homosexual sex. If this be the case, the Section will offend Article 14 as it will discriminate between heterosexual and homosexual adults which is a distinction which has no rational relation to the object sought to be achieved by the Section-namely, the criminalization of all carnal sex between homosexual and/or heterosexual adults as being against the order of nature.[30] Viewed either way, the Section falls foul of Article 14.

349. The fact that only a minuscule fraction of the country's population constitutes lesbians and gays or transgenders, and that in the last 150 years less than 200 persons have been prosecuted for committing the offence Under Section 377, is neither here nor there. When it is found that privacy interests come in and the State has no compelling reason to continue an existing law which penalizes same-sex couples who cause no harm to others, on an application of the recent judgments delivered by this Court after **Suresh Kumar Koushal** (supra), it is clear that Articles 14, 15, 19 and 21 have all been transgressed without any legitimate state rationale to uphold such provision.

350. For all these reasons therefore, we are of the view that, **Suresh Kumar Koushal** (supra) needs to be, and is hereby, overruled.

351. We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional value of fraternity that has been discussed in some of our judgments (*See* (1) *Nandini Sundar v. State of Chhattisgarh*, MANU/SC/0724/2011 : (2011) 7 SCC 547 at paragraphs 16, 25 and 52; and (2) *Subramaniam Swamy v. Union of India* MANU/SC/0621/2016 : (2016) 7 SCC 221 at paragraphs 153 to 156). We further declare that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further declare that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.

352. We are also of the view that the Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print

and online media at regular intervals, and initiate programs to reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment.

Dr. D.Y. Chandrachud, J.

Index to the judgment

A From denial to freedom

What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization, or worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter.[31]

353. The lethargy of the law is manifest yet again.

354. A hundred and fifty eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfillment in love. The law deprived them of the simple right as human beings to live, love and partner as nature made them. The human instinct to love was caged by constraining the physical manifestation of their sexuality. Gays and lesbians[32] were made subordinate to the authority of a coercive state. A charter of morality made their relationships hateful. The criminal law became a willing instrument of repression. To engage in 'carnal intercourse' against 'the order of nature' risked being tucked away for ten years in a jail. The offence would be investigated by searching the most intimate of spaces to find tell-tale signs of intercourse. Civilisation has been brutal.

355. Eighty seven years after the law was made, India gained her liberation from a colonial past. But Macaulay's legacy-the offence Under Section 377 of the Penal Code-has continued to exist for nearly sixty eight years after we gave ourselves a liberal Constitution. Gays and lesbians, transgenders and bisexuals continue to be denied a truly equal citizenship seven decades after Independence. The law has imposed upon them a morality which is an anachronism. Their entitlement should be as equal participants in a society governed by the morality of the Constitution. That in essence is what Section 377 denies to them. The shadows of a receding past confront their quest for fulfillment.

356. Section 377 exacts conformity backed by the fear of penal reprisal. There is an unbridgeable divide between the moral values on which it is based and the values of the Constitution. What separates them is liberty and dignity. We must, as a society, ask searching questions to the forms and symbols of injustice. Unless we do that, we risk becoming the cause and not just the inheritors of an unjust society. Does the Constitution allow a quiver of fear to become the quilt around the bodies of her citizens, in the intimacies which define their identities? If there is only one answer to this question, as I believe there is, the tragedy and anguish which Section 377 inflicts must be remedied.

357. The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril.

Section 377 provides for Rule by the law instead of the Rule of law. The Rule of law requires a just law which facilitates equality, liberty and dignity in all its facets. Rule by the law provides legitimacy to arbitrary state behaviour.

358. Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has lent the authority of the state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgenders have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a

networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.

359. It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations. Sexual orientation is recognised and protected by the Constitution. Section 377 of the Penal Code is unconstitutional in so far as it penalises a consensual relationship between adults of the same gender. The constitutional values of liberty and dignity can accept nothing less.

B "To the wisdom of the Court"

Union Government before the Court

360. After the hearing commenced, the Additional Solicitor General tendered an affidavit. The Union government states that it leaves a decision on the validity of Section 377 'to the wisdom of this Court'. Implicit in this is that the government has no view of its own on the subject and rests content to abide by the decision of this Court. During the parleys in Court, the ASG however submitted that the court should confine itself to the reference by ruling upon the correctness of **Suresh Kumar Koushal** v. **Naz Foundation** MANU/SC/1278/2013 : (2014) 1 SCC 1 ("Koushal").

361. We would have appreciated a categorical statement of position by the government, setting out its views on the validity of Section 377 and on the correctness of **Koushal**. The ambivalence of the government does not obviate the necessity for a judgment on the issues raised. The challenge to the constitutional validity of Section 377 must squarely be addressed in this proceeding. That is plainly the duty of the Court. Constitutional issues are not decided on concession. The statement of the Union government does not concede to the contention of the Petitioners that the statutory provision is invalid. Even if a concession were to be made, that would not conclude the matter for this Court. All that the stand of the government indicates is that it is to the 'wisdom' of this Court that the matter is left. In reflecting upon this appeal to our wisdom, it is just as well that we as judges remind ourselves of a truth which can unwittingly be forgotten: flattery is a graveyard for the gullible.

362. Bereft of a submission on behalf of the Union government on a matter of constitutional principle these proceedings must be dealt with in the only manner known to the constitutional court: through an adjudication which fulfills constitutional values and principles.

363. The ASG made a fair submission when he urged that the court should deal with the matter in reference. The submission, to its credit, would have the court follow a path of prudence. Prudence requires, after all, that the Court should address itself to the controversy in the reference without pursuing an uncharted course beyond it. While accepting the wisdom of the approach suggested by the ASG, it is nonetheless necessary to make some prefatory observations on the scope of the reference.

364. The correctness of the decision in **Koushal** is in question. **Koushal** [as indeed the decision of the Delhi High Court in **Naz Foundation** v. **Government of NCT of Delhi** MANU/DE/0869/2009 : (2010) Cri. LJ 94 (**"Naz"**)] dealt with the validity of Section 377 which criminalizes even a consensual relationship between adults of the same gender who engage in sexual conduct ('carnal intercourse against the order of nature'). In dealing with the validity of the provision, it is necessary to understand the nature of the constitutional right which LGBT individuals claim. According to them, the right to be in a relationship with a consenting adult of the same gender emanates from the right to life, as a protected value under the Constitution. They ground their right on the basis of an identity resting in their sexual orientation. According to them, their liberty and dignity require both an acknowledgement as well as a protection under the law, of their sexual orientation. Representing their identity, based on sexual orientation, to the world at large and asserting it in their relationship with the community and the state is stated to be intrinsic to the free exercise of speech and expression guaranteed by the Constitution. Sexual orientation is claimed to be intrinsic to the guarantee against discrimination on the ground of sex. The statutory provision, it has been asserted, also violates the fundamental guarantee against arbitrariness because it unequally targets gay men whose sexual expression falls in the area prohibited by Section 377.

365. In answering the dispute in regard to the validity of Section 377, the court must of necessity understand and explain in a constitutional perspective, the nature of the right which is claimed. The challenge to Section 377 has to be understood from the perspective of a rights discourse. While doing so, it becomes necessary to understand the constitutional source from which the claim emerges. When a right is claimed to be constitutionally protected, it is but necessary for the court to analyze the basis of that assertion. Hence, in answering the reference, it is crucial for the court to place the entitlement of the LGBT population in a constitutional framework. We have approached the matter thus far from the perspective of constitutional analysis. But there is a more simple line of reasoning as well, grounded as we believe, in common-sense. Sexual acts between consenting adults of the same gender constitute one facet-albeit an important aspect-of the right asserted by gay men to lead fulfilling lives. Gay and lesbian relationships are sustained and nurtured in every aspect which makes for a meaningful life. In understanding the true nature of those relationships and the protection which the Constitution affords to them, it is necessary to adopt a perspective which leads to their acceptance as equal members of a humane and compassionate society. Forming a holistic perspective requires the court to dwell on, but not confine itself, to sexuality. Sexual orientation creates an identity on which there is a constitutional claim to the entitlement of a dignified life. It is from that broad perspective that the constitutional right needs to be adjudicated.

C From "The Ashes of the Gay"

Democracy
It's coming through a hole in the air,
...
It's coming from the feel that this ain't exactly real,
or it's real, but it ain't exactly there.
From the wars against disorder,
from the sirens night and day,

from the fires of the homeless,
from the ashes of the gay:
Democracy is coming....[33]

366. Section 377 of the Indian Penal Code, 1860 ("IPC") has made 'carnal intercourse against the order of nature' an offence. This provision, understood as prohibiting non-peno vaginal intercourse, reflects the imposition of a particular set of morals by a colonial power at a particular point in history. A supposedly alien law,[34] Section 377 has managed to survive for over 158 years, impervious to both the anticolonial struggle as well as the formation of a democratic India, which guarantees fundamental rights to all its citizens. An inquiry into the colonial origins of Section 377 and its postulations about sexuality is useful in assessing the relevance of the provision in contemporary times.[35]

367. Lord Thomas Babington Macaulay, Chairman of the First Law Commission of India and principal architect of the Indian Penal Code, cited two main sources from which he drew in drafting the Code: the French (Napoleonic) Penal Code, 1810 and Edward Livingston's Louisiana Code.[36] Lord Macaulay also drew inspiration from the English common law and the British Royal Commission's 1843 Draft Code.[37] Tracing that origin, English jurist Fitzjames Stephen observes:

The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India.[38]

In order to understand the colonial origins of Section 377, it is necessary to go further back to modern English law's conception of anal and oral intercourse, which was firmly rooted in Judeo-Christian morality and condemned non-procreative sex.[39] Though Jesus himself does not reference homosexuality or homosexual sex,[40] the "Holiness Code"[41] found in Leviticus provides thus:

You shall not lie with a male as with a woman. It is an abomination. [18:22]

If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them. [19:13]

If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them. [20:13]

Another Judeo-Christian religious interpretation refers to "sodomy", a term used for anal intercourse that is derived from an interpretation of Genesis 18:20 of the Old Testament,[40] known as the story of Sodom and Gomorrah. Briefly, when two angels took refuge in the home of Lot, the men of the town of Sodom surrounded the house and demanded that the angels be sent out so that the men may "know" them (in this interpretation, with sexual connotations). When Lot offered them his two virgin daughters instead, the men of Sodom responded by threatening Lot. The angels then blinded the "Sodomites."[42] The use of the term "sodomites" to describe those who engaged in anal intercourse emerged in the 13th Century, and the term "sodomy" was used as a euphemism for a number of sexual 'sins' two centuries earlier.[43]

368. The preservation of the Judeo-Christian condemnation of homosexuality is also attributed to the Jewish theologian, Philo of Alexandria, who is regarded as the father of the Church Fathers and who reviled homosexuals and called for their execution.[44] The condemnation of homosexuality can also be traced to Roman law. Emperor Justinian's Code of 529, for instance, stated that persons who engaged in homosexual sex were to be executed.[45] From Rome, the condemnation of homosexuality spread across Europe, where it manifested itself in ecclesiastical law.[46] During the Protestant Reformation, these laws shifted from the ecclesiastical to the criminal domain, beginning with Germany in 1532.[47]

While ecclesiastical laws against homosexual intercourse were well established in England by the 1500s,[41] England's first criminal (non-ecclesiastical) law was the Buggery Act of 1533, which condemned "the detestable and abominable vice of buggeri committed with mankind or beest."[48] "Buggery" is derived from the old French word for heretic, "bougre", and was taken to mean anal intercourse.[49]

369. The Buggery Act, 1533, which was enacted by Henry VIII, made the offence of buggery punishable by death, and continued to exist for nearly 300 years before it was repealed and replaced by the Offences against the Person Act, 1828. Buggery, however, remained a capital offence in England until 1861, one year after the enactment of the Indian Penal Code. The language of Section 377 has antecedents in the definition of buggery found in Sir Edward Coke's late 17th Century compilation of English law:[50]

...Committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.[51]

370. The Criminal Law Amendment Act, 1885 made "gross indecency" a crime in the United Kingdom, and was used to prosecute homosexuals where sodomy could not be proven. In 1895, Oscar Wilde was arrested under the Act for 'committing acts of gross indecency with male persons'.[52] During Wilde's trial, the Prosecutor, referring to homosexual love, asked him, "What is 'the love that dare not speak its name'?" Wilde responded:

The love that dare not speak its name" in this century is such a great affection of an elder for a younger man as there was between David and Jonathan, such as Plato made the very basis of his philosophy, and such as you find in the sonnets of Michelangelo and Shakespeare. It is that deep spiritual affection that is as pure as it is perfect. It dictates and pervades great works of art, like those of Shakespeare and Michelangelo, and those two letters of mine, such as they are. It is in this century misunderstood, so much misunderstood that it may be described as "the love that dare not speak its name," and on that account of it I am placed where I am now. It is beautiful, it is fine, it is the noblest form of affection. There is nothing unnatural about it. It is intellectual, and it repeatedly exists between an older and a younger man, when the older man has intellect, and the younger man has all the joy, hope and glamour of life before him. That it should be so, the world does not understand. The world mocks at it, and sometimes puts one in the pillory for it.[53]

Wilde was held guilty and was sentenced to two years' hard labour and subsequently incarcerated.

Following World War II, arrests and prosecutions of homosexuals increased. Alan Turing, the renowned mathematician and cryptographer who was responsible for breaking the Nazi Enigma code during World War II, was convicted of 'gross indecency' in 1952. In order to avoid a prison sentence, Turing was forced to agree to chemical castration. He was injected with synthetic female hormones. Less than two years after he began the hormone treatment, Turing committed suicide. The Amendment Act (also known as the Labouchere Amendment) remained in English law until 1967. Turing was posthumously pardoned in 2013, and in 2017, the UK introduced the Policing and Crime Bill, also called the "Turing Law," posthumously pardoning 50,000 homosexual men and providing pardons for the living.

In the wake of several court cases in which homosexuality had been featured, the British Parliament in 1954 set up the Wolfenden Committee, headed by John Wolfenden, to "consider...the law and practice relating to homosexual offenses and the treatment of persons convicted of such offenses by the courts", as well as the laws relevant to prostitution and solicitation. The Wolfenden Report of 1957, which was supported by the Church of England,[54] proposed that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business' and recommended that homosexual acts between two consenting adults should no longer be a criminal offence.[55]

371. The success of the report led England and Wales to enact The Sexual Offences Act, 1967, which decriminalized private homosexual sex between two men over the age of twenty-one. Britain continued to introduce and amend laws governing same-sex intercourse to make them more equal, including the lowering of the age of consent for gay/bisexual men to sixteen in 2001.[56] In May 2007, in a statement to the UN Human Rights Council, the UK, which imposed criminal prohibitions against same-sex intercourse in its former colonies across the world, committed itself to the cause of worldwide decriminalization of homosexuality.[57] Today, India continues to enforce a law imposed by an erstwhile colonial government, a law that has been long done away with by the same government in its own jurisdiction.

C.I. "Arc of the moral universe"

372. Lord Macaulay was greatly influenced by English philosopher and jurist Jeremy Bentham, who coined the term codification and argued for replacing existing laws with clear, concise, and understandable provisions that could be universally applied across the Empire.[58] Ironically, in a 1785 essay, Bentham himself wrote one of the earliest known defences of homosexuality in the English language, arguing against the criminalization of homosexuality. However, this essay was only discovered 200 years after his death.[59]

373. The Law Commission's 1837 draft of the Penal Code (prepared by Lord Macaulay) contained two Sections (Clauses 361 and 362), which are considered the immediate precursors to Section 377:

OF UNNATURAL OFFENCES

361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural

lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.

Both the draft clauses are vague in their description of the acts they seek to criminalize. Lord Macaulay also omitted an explanation to the Clauses. In a note presented with the 1837 draft, Lord Macaulay elaborated:

Clauses 361 and 362 relate to an odious class of offences respecting which **it is desirable that as little as possible be said.** We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. **We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community** by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.[60]

So abominable did Macaulay consider these offences that he banished the thought of providing a rationale for their being made culpable. The prospect of a public discussion was revolting.

After twenty-five years of revision, the Indian Penal Code entered into force on 1 January 1862, two years after Lord Macaulay's death. The Indian Penal Code was the first codified criminal code in the British Empire. Section 377 of the revised code read as follows:

Of Unnatural Offences

377. Unnatural Offences.-Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life][61], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

374. The Explanation is unique in that it requires proof of penetration-something that British Law did not. The two clauses in the Draft Code fell somewhere in between, requiring proof of "touch".[62]

By the time India gained independence in 1947, Britain had introduced Penal Codes similar to the Indian Penal Code in other former colonies, including Zanzibar (Tanzania) in 1867, Singapore, Malaysia, and Brunei in 1871, Ceylon (Sri Lanka) in 1885, Burma (Myanmar) in 1886,[63] East Africa Protectorate (Kenya) in 1897, Sudan in 1889, Uganda in 1902, and Tanganyika (Tanzania) in 1920.[64] Under Article 372(1) of the Indian Constitution, which provides that all laws in force prior to the commencement of the Constitution shall continue to be in force until altered or

repealed, the Indian Penal Code and many other pre-Independence laws were "saved" and allowed to operate in Independent India.

375. While Section 377 has been used to prosecute non-consensual sexual acts, it has also been used to prosecute consensual sexual acts. In **(Meharban) Nowshirwan Irani** v. **Emperor** MANU/SN/0051/1934 : AIR 1934 Sind. 206, for instance, a police officer observed Nowshirwan, a young shopkeeper, engaged in homosexual acts with a young man, Ratansi, through a keyhole in Nowshirwan's house. The Prosecution argued that the acts were non-consensual, but could not prove coercion.[65] The High Court of Sindh ultimately set aside the conviction based on insufficient evidence. Nevertheless, what should have been an intimate act between two consenting parties in their bedroom became a public scandal and the subject of judicial scrutiny.[66]

In **D.P. Minwalla** v. **Emperor** MANU/SN/0081/1934 : AIR 1935 Sind. 78., Minawalla and Tajmahomed, were seen having anal intercourse in a lorry and were arrested, charged, and found guilty Under Section 377. Tajmahomed was sentenced to four months rigorous imprisonment, and Minawalla, who was charged with abetment, was sentenced to a fine of Rs. 100 and imprisonment until the rising of the Bench. Minawalla appealed the decision on the grounds that he was not a consenting partner, and submitted himself to a medical exam. The judge was unconvinced, however, and Minawalla's original sentence was upheld. The Court, convinced that the acts were consensual, found the men guilty Under Section 377.[67]

In **Ratan Mia** v. **State of Assam** MANU/GH/0030/1987 : (1988) Cr. L.J. 980, the Court convicted two men (one aged fifteen and a half, the other twenty) Under Section 377 and treated them as equally culpable, as he was unable to cast one of them as the perpetrator and the other as the victim or abettor. Both men were originally sentenced to imprisonment for six months and a fine of Rs. 100. After Nur had spent six years in prison and appealed three times,[68] both men's sentences were reduced to seven days rigorous imprisonment, in view of the fact that they were first time offenders under the age of twenty-one.[59]

Even though the government is not proactively enforcing a law that governs private activities, the psychological impact for homosexuals who are, for all practical purposes, felons in waiting, is damaging in its own right:

...The true impact of Section 377 on queer lives is felt outside the courtroom and must not be measured in terms of legal cases. Numerous studies, including both documented and anecdotal evidence, tell us that Section 377 is the basis for routine and continuous violence against sexual minorities by the police, the medical establishment, and the state. There are innumerable stories that can be cited-from the everyday violence faced by hijras [a distinct transgender category] and kothis [effeminate males] on the streets of Indian cities to the refusal of the National Human Rights Commission to hear the case of a young man who had been given electro-shock therapy for nearly two years. A recent report by the People's Union for Civil Liberties (Karnataka), showed that Section 377 was used by the police to justify practices such as illegal detention, sexual abuse and harassment, extortion and outing of queer people to their families.[69]

Before the end of the 19th century, gay rights movements were few and far between. Indeed, when Alfred Douglas, Oscar Wilde's lover, wrote in his 1890s poem entitled "Two Loves" of "the love

that dare not speak its name", he was alluding to society's moral disapprobation of homosexuality.[70] The 20th century, however, saw the LGBTIQ community emerge from the shadows worldwide, poised to agitate and demand equal civil rights. LGBTIQ movements focused on issues of intersectionality, the interplay of oppressions arising from being both queer and lower class, coloured, disabled, and so on. Despite the movement making numerous strides forward in the fight for equal rights, incidents of homosexual arrests were nevertheless extant at the turn of the 21st century.

In many cases of unfulfilled civil rights, there is a tendency to operate under the philosophy articulated by Dr. Martin Luther King, that "the arc of the moral universe is long, but it bends towards justice." It is likely that those who subscribe to this philosophy believe that homosexuals should practice the virtue of patience, and wait for society to understand and accept their way of life. What those who purport this philosophy fail to recognize is that Dr King himself argued against the doctrine of "wait":

For years now I have heard the word "wait." It rings in the ear of every Negro with a piercing familiarity. This "wait" has almost always meant "never." It has been a tranquilizing thalidomide, relieving the emotional stress for a moment, only to give birth to an ill-formed infant of frustration. We must come to see with the distinguished jurist of yesterday that "justice too long delayed is justice denied." We have waited for more than three hundred and forty years for our God-given and constitutional rights... when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never knowing what to expect next, and plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of "nobodyness"--then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair. I hope, sirs, you can understand our legitimate and unavoidable impatience." (Letter from a Birmingham Jail)[71]

376. Indian citizens belonging to sexual minorities have waited. They have waited and watched as their fellow citizens were freed from the British yoke while their fundamental freedoms remained restrained under an antiquated and anachronistic colonial-era law-forcing them to live in hiding, in fear, and as second-class citizens. In seeking an adjudication of the validity of Section 377, these citizens urge that the acts which the provision makes culpable should be decriminalised. But this case involves much more than merely decriminalising certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right which every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship. Above all, our decision will speak to the transformative power of the Constitution. For it is in the transformation of society that the Constitution seeks to assure the values of a just, humane and compassionate existence to all her citizens.

D An equal love

Through Love's Great Power

Through love's great power to be made whole
In mind and body, heart and soul-

Through freedom to find joy, or be
By dint of joy itself set free
In love and in companionhood:
This is the true and natural good.
To undo justice, and to seek
To quash the rights that guard the weak-
To sneer at love, and wrench apart
The bonds of body, mind and heart
With specious reason and no rhyme:
This is the true unnatural crime.[72]

Article 14 is our fundamental charter of equality:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

377. In **Naz**, the Delhi High Court held that Section 377 violates Article 14 of the Constitution since the classification on which it is based does not bear any nexus to the object which the provision seeks to achieve.[73] In **Koushal**, this Court rejected the **Naz** formulation on the ground that "those who indulge in carnal intercourse in the ordinary course and those who... [do so] against the order of nature constitute different classes."[74] **Koushal** held on that logic that Section 377 does not suffer from arbitrariness or from an irrational classification.

378. A litany of our decisions-to refer to them individually would be a parade of the familiar-indicates that to be a reasonable classification Under Article 14 of the Constitution, two criteria must be met: (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation.[75] There must, in other words, be a causal connection between the basis of classification and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable.[76]

379. Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere *mantra*. What it ignores is that Article 14 contains a powerful statement of values-of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in state action. As our constitutional jurisprudence has evolved towards recognizing the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that *avatar*, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavor and in every facet of human existence.

In **E.P. Royappa** v. **State of Tamil Nadu** MANU/SC/0380/1973 : (1974) 4 SCC 3, the validity of state action was made subject to the test of arbitrariness:

Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14....

Four decades later, the test has been refined in **Shayara Bano** v. **Union of India** MANU/SC/1031/2017 : (2017) 9 SCC 1:

The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

380. The wording of Section 377 does not precisely map on to a distinction between homosexuals and heterosexuals but a precise interpretation would mean that it penalizes some forms of sexual expression among heterosexuals while necessarily criminalizing every form of sexual expression and intimacy between homosexuals.[77] For Section 377 to withstand the scrutiny of Article 14, it was necessary for the Court in **Koushal** to establish the difference between 'ordinary intercourse' and 'intercourse against the order of nature', the legitimate objective being pursued and the rational nexus between the goal and the classification. However, the **Koushal** approach has been criticised on the ground that while dealing with Article 14, it fell "short of the minimum standards of judicial reasoning that may be expected from the Supreme Court."[78] On a review of the prosecutions Under Section 377, **Koushal** conceded that "no uniform test [could] be culled out to classify acts as 'carnal intercourse against the order of nature.'"[79] Yet **Koushal** upheld the classification of sexual acts in Section 377 without explaining the difference between the classes, or the justification for treating the classes differently.

This lack of reasoning and analysis by the Court has been critiqued in scholarly research on the subject. The following extract sums up the criticism with telling effect:

The Court says-without an iota of evidence-that there are two classes of persons-those who engage in sexual intercourse in the "ordinary course", and those who don't. What is ordinary course? Presumably, heterosexuality. Why is this ordinary course? Perhaps because there are more heterosexuals than homosexuals around, although the Court gives no evidence for that. Well, there are also more black-haired people in India than brown-haired people. Is sex with a brown-haired person against the order of nature because it happens less often?... *Where is the rational nexus? What is the legitimate governmental objective?* Even if we accept that there is an intelligible differentia here, *on what basis do you criminalize-and thus deny equal protection of laws-to one class of persons?* The Court gives no answer. Alternatively, "ordinary sex" is penal-vaginal, and every other kind of sex is "against the ordinary course of nature". Again, no evidence to back *that* claim up apart from the say-so of the judge.[80]

At the very outset, we must understand the problem with the usage of the term 'order of nature'. What is 'natural' and what is 'unnatural'? And who decides the categorization into these two ostensibly distinct and water-tight compartments? Do we allow the state to draw the boundaries between permissible and impermissible intimacies between consenting adults? Homosexuality has been documented in almost 1500 species, who "unfortunately are not blessed with rational capabilities (and the propensity to 'nurture' same sex thoughts) as are found in mankind."[81] An interesting Article in this regard notes that, "no species has been found in which homosexual behaviour has not been shown to exist, with the exception of species that never have sex at all, such as sea urchins and aphis."[82]

381. In an incisive article,[83] Ambrosino discusses the shift from reproductive instinct to erotic desire and how crucial this shift is to understanding modern notions of sexuality. He analyses how the lines between homosexuality and heterosexuality are blurred, and perhaps even an outdated myth or invention when we understand the fluidity of sexual identities today:[59]

No one knows exactly why heterosexuals and homosexuals ought to be different," wrote Wendell Ricketts, author of the 1984 study Biological Research on Homosexuality. The best answer we've got is something of a tautology: "heterosexuals and homosexuals are considered different because they can be divided into two groups on the basis of the belief that they can be divided into two groups.

Though the hetero/homo divide seems like an eternal, indestructible fact of nature, it simply isn't. It's merely one recent grammar humans have invented to talk about what sex means to us.

He questions the elevated status of 'normalcy' in the following words:

"Normal" is a loaded word, of course, and it has been misused throughout history. Hierarchical ordering leading to slavery was at one time accepted as normal, as was a geocentric cosmology. It was only by questioning the foundations of the consensus view that "normal" phenomena were dethroned from their privileged positions.

There are obvious shortcomings of the human element in the judgment of natural and unnatural:

Why judge what is natural and ethical to a human being by his or her animal nature? Many of the things human beings value, such as medicine and art, are egregiously unnatural. At the same time, humans detest many things that actually are eminently natural, like disease and death. If we consider some naturally occurring phenomena ethical and Ors. unethical, that means our minds (the things looking) are determining what to make of nature (the things being looked at). Nature doesn't exist somewhere "out there," independently of us-we're always already interpreting it from the inside.

It has been argued that "the 'naturalness' and omnipresence of heterosexuality is manufactured by an elimination of historical specificities about the organisation, Regulation and deployment of sexuality across time and space."[84] It is thus this "closeting of history" that produces the "hegemonic heterosexual"-the ideological construction of a particular alignment of sex, gender and desire that posits itself as natural, inevitable and eternal.[59] Heterosexuality becomes the site

where the male sexed masculine man's desire for the female sexed feminine woman is privileged over all other forms of sexual desire and becomes a pervasive norm that structures all societal structures.[59]

The expression 'carnal' is susceptible to a wide range of meanings. Among them are:

sexual, sensual, erotic, lustful, lascivious, libidinous, lecherous, licentious, lewd, prurient, salacious, coarse, gross, lubricious, venereal.

That's not all. The word incorporates meanings such as: "physical, bodily, corporeal and of the flesh." The late Middle English origin of 'carnal' derives from Christian Latin 'carnalis', from caro, carn-'flesh'. At one end of the spectrum 'carnal' embodies something which relates to the physical feelings and desires of the body. In another sense, the word implies 'a relation to the body or flesh as the state of basic physical appetites'. In a pejorative sense, it conveys grossness or lewdness. The simple question which we need to ask ourselves is whether liberty and equality can be made to depend on such vagueness of expression and indeterminacy of content. Section 377 is based on a moral notion that intercourse which is **lustful** is to be frowned upon. It finds the sole purpose of intercourse in procreation. In doing so, it imposes criminal sanctions upon basic human urges, by targeting some of them as against the order of nature. It does so, on the basis of a social hypocrisy which the law embraces as its own. It would have human beings lead sanitized lives, in which physical relationships are conditioned by a moral notion of what nature does or does not ordain. It would have human beings accept a way of life in which sexual contact without procreation is an aberration and worse still, penal. It would ask of a Section of our citizens that while love, they may, the physical manifestation of their love is criminal. This is manifest arbitrariness writ large.

If it is difficult to locate any intelligible differentia between indeterminate terms such as 'natural' and 'unnatural', then it is even more problematic to say that a classification between individuals who supposedly engage in 'natural' intercourse and those who engage in 'carnal intercourse against the order of nature' can be legally valid.

In addition to the problem regarding the indeterminacy of the terms, there is a logical fallacy in ascribing legality or illegality to the ostensibly universal meanings of 'natural' and 'unnatural' as is pointed out in a scholarly article.[85] Basheer, *et al* make this point effectively:

From the fact that something occurs naturally, it does not necessarily follow that it is socially desirable. Similarly, acts that are commonly perceived to be 'unnatural' may not necessarily deserve legal sanction. Illustratively, consider a person who walks on his hands all the time. Although this may be unnatural, it is certainly not deserving of legal censure.

...In fact, several activities that might be seen to contravene the order of nature (heart transplants, for example) are beneficial and desirable. Even if an unnatural act is harmful to the extent that it justifies criminal sanctions being imposed against it, the reason for proscribing such an act would be that the act is harmful, and not that it is unnatural.

Indeed, there is no cogent reasoning to support the idea that behaviour that may be uncommon on the basis of mere statistical probability is necessarily abnormal and must be deemed ethically or

morally wrong.[86] Even behaviour that may be considered wrong or unnatural cannot be criminalised without sufficient justification given the penal consequences that follow. Section 377 becomes a blanket offence that covers supposedly all types of non-procreative 'natural' sexual activity without any consideration given to the notions of consent and harm.

382. The meaning of 'natural' as understood in cases such as **Khanu** v. **Emperor** AIR (1925) Sind. 286, which interpreted natural sex to mean only sex that would lead to procreation, would lead to absurd consequences. Some of the consequences have been pointed out thus:

The position of the court was thus that 'natural' sexual intercourse is restricted not only to heterosexual coitus, but further only to acts that might possibly result in conception. Such a formulation of the concept of 'natural' sex excludes not only the use of contraception, which is likely to have fallen outside the hegemonic view of normative sexuality at the time, but also heterosexual coitus where one or both partners are infertile, or during the 'safe' period of a woman's menstrual cycle. It is perhaps unnecessary to state that the formulation also excludes oral sex between heterosexual partners and any homosexual act whatsoever.[87]

The indeterminacy and vagueness of the terms 'carnal intercourse' and 'order of nature' renders Section 377 constitutionally infirm as violating the equality Clause in Article 14.

While it is evident that the classification is invalid, it is useful to understand its purported goal by looking at the legislative history of Section 377. In Macaulay's first draft of the Penal Code, the predecessor to present day Section 377 was Clause 361[88] which provided a severe punishment for touching another for the purpose of 'unnatural' lust. Macaulay abhorred the idea of any debate or discussion on this 'heinous crime'. India's anti-sodomy law was conceived, legislated and enforced by the British without any kind of public discussion.[89] So abhorrent was homosexuality to the moral notions which he espoused, that Macaulay believed that the idea of a discussion was repulsive. Section 377 reveals only the hatred, revulsion and disgust of the draftsmen towards certain intimate choices of fellow human beings. The criminalization of acts in Section 377 is not based on a legally valid distinction, "but on broad moral proclamations that certain kinds of people, singled out by their private choices, are less than citizens-or less than human."[90]

383. The **Naz** judgment has been criticised on the ground that even though it removed private acts between consenting adults from the purview of Section 377, it still retained the Section along with its problematic terminology regarding the 'order of nature':[91]

...even though the acts would not be criminal, they would still be categorized as "unnatural" in the law. This is not an idle terminological issue. As Durkheim noted over a hundred years ago, the law also works as a tool that expresses social relations.[92] Hence, this expression itself is problematic from a dignitarian standpoint, otherwise so eloquently referred to by the judgment.

At this point, we look at some of the legislative changes that have taken place in India's criminal law since the enactment of the Penal Code. The Criminal Law (Amendment) Act 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of rape in Section 375 of the Indian Penal Code, which now goes beyond penile-vaginal penetrative intercourse.[93] It has been argued that if 'sexual intercourse' now includes many acts which were

covered Under Section 377, those acts are clearly not 'against the order of nature' anymore. They are, in fact, part of the changed meaning of sexual intercourse itself. This means that much of Section 377 has not only been rendered redundant but that the very word 'unnatural' cannot have the meaning that was attributed to it before the 2013 amendment.[94] Section 375 defines the expression rape in an expansive sense, to include any one of several acts committed by a man in relation to a woman. The offence of rape is established if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the 'order of nature', in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14.

Nivedita Menon opposes the idea that 'normal' sexuality springs from nature and argues that this idea of 'normal' sexuality is a cultural and social construct:[95]

Consider the possibility that Rules of sexual conduct are as arbitrary as traffic rules, created by human societies to maintain a certain sort of order, and which could differ from place to place--for example, you drive on the left in India and on the right in the USA. Further, let us say you question the sort of social order that traffic Rules keep in place. Say you believe that traffic Rules in Delhi are the product of a model of urban planning that privileges the rich and penalizes the poor, that this order encourages petrol-consuming private vehicles and discourages forms of transport that are energy-saving--cycles, public transport, pedestrians. You would then question that model of the city that forces large numbers of inhabitants to travel long distances every day simply to get to school and work. You could debate the merits of traffic Rules and urban planning on the grounds of convenience, equity and sustainability of natural resources--at least, nobody could seriously argue that any set of traffic Rules is natural.

384. The struggle of citizens belonging to sexual minorities is located within the larger history of the struggles against various forms of social subordination in India. The order of nature that Section 377 speaks of is not just about non-procreative sex but is about forms of intimacy which the social order finds "disturbing".[96] This includes various forms of transgression such as inter-caste and inter-community relationships which are sought to be curbed by society. What links LGBT individuals to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority.[59] Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes the right to love not just a separate battle for LGBT individuals, but a battle for all.[96]

E Beyond physicality: sex, identity and stereotypes

Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant

Section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.[97]

385. The Petitioners contend that (i) Section 377 discriminates on the basis of sex and violates Articles 15 and 16; and (ii) Discrimination on the ground of sexual orientation is in fact, discrimination on the ground of sex. The intervenors argue that (i) Section 377 criminalizes acts and not people; (ii) It is not discriminatory because the prohibition on anal and oral sex applies equally to both heterosexual and homosexual couples; and (iii) Article 15 prohibits discrimination on the ground of 'sex' which cannot be interpreted so broadly as to include 'sexual orientation'.

386. When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the Constitution, what is determinative is its effect on the infringement of fundamental rights.[98] This affords the guaranteed freedoms their true potential against a claim by the state that the infringement of the right was not the object of the provision. It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights.

Article 15 of the Constitution reads thus:

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Article 15 prohibits the State from discriminating on grounds only of sex. Early judicial pronouncements adjudged whether discrimination aimed only at sex is covered by Article 15 or whether the guarantee is attracted even to a discrimination on the basis of sex and some other grounds ('Sex plus'). The argument was that since Article 15 prohibited discrimination on only specified grounds, discrimination resulting from a specified ground coupled with other considerations is not prohibited. The view was that if the discrimination is justified on the grounds of sex and Anr. factor, it would not be covered by the prohibition in Article 15.

387. One of the earliest cases decided in 1951 was by the Calcutta High Court in **Sri. Sri. Mahadev Jiew** v. **Dr. B.B. Sen** MANU/WB/0113/1951 : AIR (1951) Cal. 563. Under Order XXV, Rule 1 of the Code of Civil Procedure, men could be made liable for paying a security cost if they did not possess sufficient movable property in India only if they were residing outside India. However, women were responsible for paying such security, regardless of whether or not they were residing in India. In other words, the law drew a distinction between resident males who did not have sufficient immovable property, and resident females who did not have sufficient immovable property. Upholding the provision, the Calcutta High Court held:

31. Article 15(1) of the Constitution pro-vides, inter alia,--The State shall not discriminate against any citizen on grounds only of sex. The word 'only' in this Article is of great importance and significance which should not be missed. The impugned law must be shown to discriminate

because of sex alone. **If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not, in my judgment, come within the provision of Article 15(1) of the Constitution.**

This interpretation was upheld by this Court in **Air India** v. **Nergesh Meerza** ("Nergesh Meerza"). MANU/SC/0688/1981 : (1981) 4 SCC 335 Regulations 46 and 47 of the Air India Employees' Service Regulations were challenged for causing a disparity between the pay and promotional opportunities of men and women in-flight cabin crew. Under Regulation 46, while the retirement age for male Flight Pursers was fifty eight, Air Hostesses were required to retire at thirty five, or on marriage (if they married within four years of joining service), or on their first pregnancy, whichever occurred earlier. This period could be extended in the absolute discretion of the Managing Director. Even though the two cadres were constituted on the grounds of sex, the Court upheld the Regulations in part and opined:

68. **Even otherwise, what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations.**

388. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and Anr. ground ('Sex plus') and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a Rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics.

389. A divergent note was struck by this Court in **Anuj Garg** v. **Hotel Association of India** MANU/SC/8173/2007 : (2008) 3 SCC 1. Section 30 of the Punjab Excise Act, 1914 prohibited the employment of women (and men under 25 years) in premises where liquor or other intoxicating drugs were consumed by the public. Striking down the law as suffering from "incurable fixations of stereotype morality and conception of sexual role", the Court held:

42... **one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart...**

43...It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow.

Any other policy inference (such as the one embodied Under Section 30) from societal conditions would be oppressive on the women and against the privacy rights.

The Court recognized that traditional cultural norms stereotype gender roles. These stereotypes are premised on assumptions about socially ascribed roles of gender which discriminate against women. The Court held that "insofar as governmental policy is based on the aforesaid cultural norms, it is constitutionally invalid." In the same line, the Court also cited with approval, the judgments of the US Supreme Court in **Frontiero** v. **Richardson** MANU/USSC/0123/1973 : 411 U.S. 677 (1973)[99], and **United States** v. **Virginia** MANU/USSC/0073/1996 : 518 U.S. 515 (1996)[100], and **Justice Marshall's dissent in Dothard** v. **Rawlinson** MANU/USSC/0081/1977 : 433 U.S. 321 (1977)[101], The Court grounded the anti-stereotyping principle as firmly rooted in the prohibition Under Article 15.

In **National Legal Services Authority** v. **Union of India** ("NALSA") MANU/SC/0309/2014 : (2014) 5 SCC 438, while dealing with the rights of transgender persons under the Constitution, this Court opined:

66. **Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.** Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' Under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity.

This approach, in my view, is correct.

In **Nergesh Meerza**, this Court held that where persons of a particular class, in view of the "special attributes, qualities" are treated differently in 'public interest', such a classification would not be discriminatory. The Court opined that since the modes of recruitment, promotional avenues and other matters were different for Air Hostesses, they constituted a class separate from male Flight Pursers. This, despite noting that "a perusal of the job functions which have been detailed in the affidavit, clearly shows that the functions of the two, though obviously different overlap on some points but the difference, if any, is one of degree rather than of kind."

390. The Court did not embark on the preliminary enquiry as to whether the initial classification between the two cadres, being grounded in sex, was violative of the constitutional guarantee against discrimination. Referring specifically to the three significant disabilities that the Regulations imposed on Air Hostesses, the Court held that "there can be no doubt that these peculiar conditions do form part of the Regulations governing Air Hostesses but once we have held that Air Hostesses form a separate category with different and separate incidents the circumstances pointed out by the Petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground."

391. The basis of the classification was that only men could become male Flight Pursers and only women could become Air Hostesses. The very constitution of the cadre was based on sex. What this meant was, that to pass the non-discrimination test found in Article 15, the State merely had to create two separate classes based on sex and constitute two separate cadres. That would not be discriminatory.

The Court went a step ahead and opined:

80...Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. **Apart from improving the health of the employee, it helps a good in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan.**

392. A strong stereotype underlines the judgment. The Court did not recognize that men were not subject to the same standards with respect to marriage. It holds that the burdens of health and family planning rest solely on women. This perpetuates the notion that the obligations of raising family are those solely of the woman. In dealing with the provision for termination of service on the first pregnancy, the Court opined that a substituted provision for termination on the third pregnancy would be in the "larger interest of the health of the Air Hostesses concerned as also for the good upbringing of the children." Here again, the Court's view rested on a stereotype. The patronizing attitude towards the role of women compounds the difficulty in accepting the logic of **Nergesh Meerza**. This approach, in my view, is patently incorrect.

393. A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.

The approach adopted the Court in **Nergesh Meerza**, is incorrect.

A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds only of sex Under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the

effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.

E.I Facial neutrality: through the looking glass

394. The moral belief which underlies Section 377 is that sexual activities which do not result in procreation are against the 'order of nature' and ought to be criminalized Under Section 377. The intervenors submit that Section 377, criminalizes anal and oral sex by heterosexual couples as well. Hence, it is urged that Section 377 applies equally to all conduct against the 'order of nature', irrespective of sexual orientation. This submission is incorrect. In **NALSA** this Court held that Section 377, though associated with specific sexual acts, highlights certain identities. In **Naz**, the Delhi High Court demonstrated effectively how Section 377 though facially neutral in its application to certain acts, targets specific communities in terms of its impact:

Section 377 Indian Penal Code is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class. Section 377 Indian Penal Code has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. **They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalised and turned in on itself**.[102]

To this end, it chronicled the experiences of the victims of Section 377, relying on the extensive records and affidavits submitted by the Petitioners that brought to fore instances of custodial rape and torture, social boycott, degrading and inhuman treatment and incarceration. The court concluded that while Section 377 criminalized conduct, it created a systemic pattern of disadvantage, exclusion and indignity for the LGBT community, and for individuals who indulge in non-heterosexual conduct.

395. Jurisprudence across national frontiers supports the principle that facially neutral action by the State may have a disproportionate impact upon a particular class. In Europe, **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006** defines 'indirect discrimination' as: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."

In **Griggs** v. **Duke Power Co.** MANU/USSC/0066/1971 : 401 U.S. 424 (1971), the US Supreme Court, whilst recognizing that African-Americans received sub-standard education due to segregated schools, opined that the requirement of an aptitude/intelligence test disproportionately

affected African-American candidates. The Court held that "The Civil Rights Act" proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

In Bilka-Kaufhaus GmbH v. Karin Weber von Hartz (1986) ECR 1607, the European Court of Justice held that denying pensions to part-time employees is more likely to affect women, as women were more likely to take up part-time jobs. The Court noted:

Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, **where that exclusion affects a far greater number of women than men**, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

The Canadian Supreme Court endorsed the notion of a disparate impact where an action has a disproportionate impact on a class of persons. In Andrews v. Law Society of British Columbia MANU/SCCN/0036/1989 : (1989) 1 SCR 143, the Court noted:

Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. **Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination**, while those based on an individual's merits and capacities will rarely be so classed.

Thus, when an action has "the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society",[59] it would be suspect.

In **City Council of Pretoria** v. **Walker** MANU/SACC/0001/1998 : (1998) 3 BCLR 257, the Constitutional Court of South Africa observed:

The concept of indirect discrimination, ... was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.

In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken.

E.2 Deconstructing the polarities of binary genders

396. Section 377 criminalizes behaviour that does not conform to the heterosexual expectations of society. In doing so it perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles.

The notion that the nature of relationships is fixed and within the 'order of nature' is perpetuated by gender roles, thus excluding homosexuality from the narrative. The effect is described as follows:

Cultural homophobia thus discourages social behavior that appears to threaten the stability of heterosexual gender roles. These dual normative standards of social and sexual behavior construct the image of a gay man as abnormal because he deviates from the masculine gender role by subjecting himself in the sexual act to another man.[103]

If individuals as well as society hold strong beliefs about gender roles-that men (to be characteristically reductive) are unemotional, socially dominant, breadwinners that are attracted to women and women are emotional, socially submissive, caretakers that are attracted to men-it is unlikely that such persons or society at large will accept that the idea that two men or two women could maintain a relationship. If such a denial is further grounded in a law, such as Article 377 the effect is to entrench the belief that homosexuality is an aberration that falls outside the 'normal way of life.'

397. An instructive Article by Zachary A. Kramer,[104] notes that a heterosexist society both expects and requires men and women to engage in only opposite-sex sexual relationships. The existence of same-sex relationships is, therefore, repugnant to heterosexist societal expectations. Kramer argues that:

Discrimination against gays and lesbians reinforces traditional sex roles. The primary thrust of such discrimination is the gender-based stigmatization of gays and lesbians, deriving from the idea that homosexuality departs from traditional gender roles and that "real" men and women should not be attracted to a member of the same sex. This portrayal relies heavily on what Bennett Capers calls the "binary gender system.[59]

398. Bennett Capers defines the binary gender system as based in "heterosexism," which he defines as the "institutionalized valorization of heterosexual activity." Capers, in fact suggests that:

The sanctioning of discrimination based on sexual orientation perpetuates the subordination not only of lesbians and gays but of women as well.

Heterosexism, then, in its reliance on a bipolar system of sex and gender, reinforces sexism in two ways. First, by penalizing persons who do not conform to a bipolar gender system and rewarding men and women who do, the heterosexist hegemony perpetuates a schema that valorizes passive, dependent women, thus contributing to sexism. Second, heterosexism reinforces sexism because it subordinates the female sex through its hierarchical polarity. Because heterosexism perpetuates sexism, the extension of substantial rights to lesbians and gays, who by definition challenge heterosexism and the concept of a binary gender system, would result in a challenge to sexism and to male power.[105]

In other words, one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles. Taking this further, Andrew Koppelman argues that:

Similarly, sodomy laws discriminate on the basis of sex-for example, permitting men, but not women, to have sex with women-in order to impose traditional sex roles. The Court has deemed this purpose impermissible in other contexts because it perpetuates the subordination of women. The same concern applies with special force to the sodomy laws, because their function is to maintain the polarities of gender on which the subordination of women depends.[106]

Koppelman thus suggests that the taboo against homosexuals "polices the boundaries that separate the dominant from the dominated in a social hierarchy."[107] He expands on this idea, using the analogy of miscegenation, or the interbreeding of races:

Do statutes that outlaw homosexual sex impose traditional sex roles? One possible answer is that of McLaughlin [*McLaughlin* v. *Florida*]: The crime is by definition one of engaging in activity inappropriate to one's sex. But these statutes' inconsistency with the Constitution's command of equality is deeper. Like the miscegenation statutes, the sodomy statutes reflect and reinforce the morality of a hierarchy based on birth. Just as the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, so the prohibition of sodomy preserves the polarities of gender on which rests the subordination of women.[108]

Statutes like Section 377 give people ammunition to say "this is what a man is" by giving them a law which says "this is what a man is not." Thus, laws that affect non-heterosexuals rest upon a normative stereotype: "the bald conviction that certain behavior-for example, sex with women-is appropriate for members of one sex, but not for members of the other sex."[59]

What this shows us is that LGBT individuals as well as those who do not conform to societal expectations of sexual behaviour defy gender stereotypes.

The construction of gender stereotypes ultimately rests on the assumption that there are two opposite and mutually exclusive biological sexes. The assumption of heterosexuality is central to this gender binary. In a patriarchal context, some of the most serious transgressors are thus: a woman who renounces a man sexual partner or an individual assigned female at birth who renounces womanhood, thereby rejecting the patriarchal system and all other forms of male supervision and control, and an individual assigned male at birth who embraces womanhood, thereby abandoning privilege in favor of that which is deemed subservient, femininity.[109]

Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender. The case for gay rights undoubtedly seeks justice for gays. But it goes well beyond the concern for the gay community. The effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes.

To be a lesbian is to be perceived (labelled) as someone who has stepped out of line, who has moved out of sexual/economic dependence on a male, who is woman-identified. A lesbian is perceived as someone who can live without a man, and who is therefore (however illogically) against men. A lesbian is perceived as being outside the acceptable, routinized order of things. She is seen as someone who has no societal institutions to protect her and who is not privileged to the protection of individual males. A lesbian is perceived as a threat to the nuclear family, to male dominance and control, to the very heart of sexism.[110]

Commenting on its link with the essence of Article 15, Tarunabh Khaitan writes:

But the salience of a case on discrimination against a politically disempowered minority, based purely on the prejudices of a majority, goes beyond the issue of LGBTQ rights. Indian constitutional democracy is at a crossroads...Inclusiveness and pluralism lie at the heart of Article 15, which can be our surest vehicle for the Court to lend its institutional authority to the salience of these ideas in our constitutional identity.[111]

399. Relationships that tend to undermine the male/female divide are inherently required for the maintenance of a socially imposed gender inequality. Relationships which question the divide are picked up for target and abuse. Section 377 allows this. By attacking these gender roles, members of the affected community, in their move to build communities and relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchical sexual roles in order to function. For members of the community, hostility and exclusion aimed at them, drive them into hiding, away from public expression and view. It is this discrimination faced by the members of the community, which results in silence, and consequently invisibility, creating barriers, systemic and deliberate, that effect their participation in the work force and thus undermines substantive equality. In the sense that the prohibition of miscegenation was aimed to preserve and perpetuate the polarities of race to protect white supremacy, the prohibition of homosexuality serves to ensure a larger system of social control based on gender and sex.

400. A report prepared by the International Commission of Jurists[112] has documented the persecution faced by the affected community due to the operation of Section 377. The report documents numerous violations inflicted on people under the authority of Section 377. According to the National Crime Records Bureau, 1279 persons in 2014 and 1491 in 2015 were arrested Under Section 377.[113]

The report documents instances of abuse from law enforcement agencies and how the possibility of persecution Under Section 377 prevents redress.[114] Even though acts such as blackmail, assault, and bodily crimes are punishable under penal laws, such methods of seeking redressal are not accessed by those communities given the fear of retaliation or prosecution.

401. The Petitioners in the present batch of cases have real life narrations of suffering discrimination, prejudice and hate. In **Anwesh Pokkuluri** v. **UOI**[115], with which this case is connected, the Petitioners are a group of persons belonging to the LGBTQ community, each of whom has excelled in their fields but suffer immensely due to the operation of Section 377. To cope with the growing isolation among the community, these Petitioners, all alumni of Indian

Institutes of Technology across the country, created a closed group called "Pravritti". The group consists of persons from the LGBTQ community. They are faculty members, students, alumni and anyone who has ever stayed on the campus of any IIT in the country. The group was formed in 2012 to help members cope with loneliness and difficulties faced while accepting their identity along with holding open discussions on awareness.

402. Out of twenty Petitioners, sixteen are gay, two are bisexual women and one is a bisexual man. One among the Petitioners is a transwoman. Three of the Petitioners explain that they suffered immense mental agony due to which they were on the verge of committing suicide. Another two stated that speaking about their sexual identity has been difficult, especially since they did not have the support of their families, who, upon learning of their sexual orientation, took them for psychiatric treatment to cure the so-called "disease." The families of three Petitioners ignored their sexual identity. One of them qualified to become an Indian Administrative Services officer in an examination which more than 4,00,000 people write each year. But he chose to forgo his dream because of the fear that he would be discriminated against on the ground of his sexuality. Some of them have experienced depression; others faced problems focusing on their studies while growing up; one among them was forced to drop out of high school as she was residing in a girl's hostel where the authorities questioned her identity. The parents of one of them brushed his sexuality under the carpet and suggested that he marry a woman. Some doubted whether or not they should continue their relationships given the atmosphere created by Section 377. Several work in organisations that have policies protecting the LGBT community in place. Having faced so much pain in their personal lives, the Petitioners submit that with the continued operation of Section 377, such treatment will be unabated.

403. In **Navtej Johar** v. **Union of India**[116], with which this case is concerned, the Petitioners have set out multiple instances of discrimination and expulsion. The following is a realistic account:

While society, friends and family are accepting of my sexuality, I cannot be fully open about my identity and my relationships because I constantly fear arrest and violence by the police...Without the existence of this section, the social prejudice and shame that I have faced would have been considerably lessened...the fact that gay people, like me, are recognized only as criminals is deeply upsetting and denies me the dignity and respect that I feel I deserve.[117]

Apart from the visible social manifestations of Section 377, the retention of the provision perpetuates a certain culture. The stereotypes fostered by Section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship. Referring to the effect of Foucault's panopticon in inducing "a state of conscious and permanent visibility that assures the automatic functioning of power",[118] Ryan Goodman writes:

The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs a similar, yet dispersed, structure of observation and surveillance. **The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants. Admittedly certain individuals, namely those who are certified with various levels of state authority, are more directly linked to the extension of law's power. Yet the social effects of sodomy laws are not tied to these specialized agents alone. On the ground level, private individuals also perform roles of policing and controlling lesbian and gay lives in a mimetic relation to the modes of justice itself.**[119]

The effect of Section 377, thus, is not merely to criminalize an act, but to criminalize a specific set of identities. Though facially neutral, the effect of the provision is to efface specific identities. These identities are the soul of the LGBT community.

404. The Constitution envisaged a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law, the constitutional commitment to egalitarianism and an anti-discriminatory ethos permeates and infuses these relations. In **K.S. Puttaswamy** v. **Union of India** ("Puttaswamy") MANU/SC/1044/2017 : (2017) 10 SCC 1, this Court affirmed the individual as the bearer of the constitutional guarantee of rights. Such rights are devoid of their guarantee when despite legal recognition, the social, economic and political context enables an atmosphere of continued discrimination. The Constitution enjoins upon every individual a commitment to a constitutional democracy characterized by the principles of equality and inclusion. In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values.

By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community. Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the 'order of nature.' A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1)

405. History has been witness to a systematic stigmatization and exclusion of those who do not conform to societal standards of what is expected of them. Section 377 rests on deep rooted gender stereotypes. In the quest to assert their liberties, people criminalized by the operation of the provision, challenge not only its existence, but also a gamut of beliefs that are strongly rooted in majoritarian standards of what is 'normal'. In this quest, the attack on the validity of Section 377 is a challenge to a long history of societal discrimination and persecution of people based on their identities. They have been subjugated to a culture of silence and into leading their lives in closeted invisibility. There must come a time when the constitutional guarantee of equality and inclusion will end the decades of discrimination practiced, based on a majoritarian impulse of ascribed gender roles. That time is now.

F Confronting the closet

406. The right to privacy is intrinsic to liberty, central to human dignity and the core of autonomy. These values are integral to the right to life Under Article 21 of the Constitution. A meaningful life is a life of freedom and self-respect and nurtured in the ability to decide the course of living. In the nine judge Bench decision in **Puttaswamy**, this Court conceived of the right to privacy as natural and inalienable. The judgment delivered on behalf of four judges holds:

Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights....
120

Justice Bobde, in his exposition on the form of the 'right to privacy' held thus:

Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man.
121

Justice Nariman has written about the inalienable nature of the right to privacy:

...Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights that the citizens of this country may enjoy despite the governments that they may elect. This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being. The recognition of such right in the fundamental rights chapter of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments....
122

Justice Sapre, in his opinion, has also sanctified 'privacy' as a natural right:

In my considered opinion, "right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth...

It is indeed inseparable and inalienable...
it is born with the human being....
123

These opinions establish that the right to privacy is a natural right. The judgment of four judges in **Puttaswamy** held that the right to sexual orientation is an intrinsic part of the right to privacy. To define the scope of the right, it is useful to examine the discussion on the right to sexual orientation in judicial precedents of this Court.

407. Speaking for a two judge Bench in **NALSA**, Justice K.S. Radhakrishnan elucidated upon the term 'sexual orientation' as differentiable from an individual's 'gender identity', noting that:

Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom....
124

Puttaswamy rejected the "test of popular acceptance" employed by this Court in **Koushal** and affirmed that sexual orientation is a constitutionally guaranteed freedom:

...The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life do not accord with the 'mainstream'. Yet in a democratic Constitution founded on the Rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.
125

Rejecting the notion that the rights of the LGBT community can be construed as illusory, the court held that the right to privacy claimed by sexual minorities is a constitutionally entrenched right:

...The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.
126

Justice Kaul, concurring with the recognition of sexual orientation as an aspect of privacy, noted that:

...The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 144 to 146 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view,

in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy...
[127]

With these observations by five of the nine judges in **Puttaswamy**, the basis on which **Koushal** upheld the validity of Section 377 stands eroded and even disapproved.

408. We must now consider the impact of Section 377 on the exercise of the right to privacy by sexual minorities. Legislation does not exist in a vacuum. The social ramifications of Section 377 are enormous. While facially Section 377 only criminalizes certain "acts", and not relationships, it alters the prism through which a member of the LGBTQ is viewed. Conduct and identity are conflated.[128] The impact of criminalising non-conforming sexual relations is that individuals who fall outside the spectrum of heteronormative[129] sexual identity are perceived as criminals.[130]

409. World over, sexual minorities have struggled to find acceptance in the heteronormative structure that is imposed by society. In her book titled 'Epistemology of the Closet',[131] Eve Sedgwick states that "the closet is the defining structure for gay oppression in this century." The closet is symbolic of the exclusion faced by them:

Closets exist and they hide social information. They hide certain socially proscribed sexual desires, certain unnamable sexual acts deemed 'unnatural' by the cultural context and law, certain identities which dare not speak their name and certain forms of behaviour which can make an individual susceptible to stigma and oppression. The closet does not simply hide this susceptibility; it hides stigma and oppression itself. It marks the silencing of different voices, a silence which is achieved by a gross violation of lives that inhabit the closet, through both violence and pain inflicted by significant others both within and without the closet and instances of self-inflicted pain and violence. The closet also hides pleasure, myriad sexual expressions and furtive encounters that gratify the self. The closet also conceals the possibility of disease and death.[132]

The existing heteronormative framework-which recognises only sexual relations that conform to social norms-is legitimized by the taint of 'unnaturalness' that Section 377 lends to sexual relations outside this framework. The notion of 'unnatural acts', viewed in myopic terms of a "fixed procreational model of sexual functioning", is improperly applied to sexual relations between consenting adults.[133] Sexual activity between adults and based on consent must be viewed as a "natural expression" of human sexual competences and sensitivities.[59] The refusal to accept these acts amounts to a denial of the distinctive human capacities for sensual experience outside of the realm of procreative sex.[59]

410. To deny the members of the LGBT community the full expression of the right to sexual orientation is to deprive them of their entitlement to full citizenship under the Constitution. The denial of the right to sexual orientation is also a denial of the right to privacy. The application of Section 377 causes a deprivation of the fundamental right to privacy which inheres in every citizen. This Court is entrusted with the duty to act as a safeguard against such violations of human rights. Justice Chelameswar, in his judgment in **Puttaswamy**, held that:

To sanctify an argument that whatever is not found in the text of the Constitution cannot become a part of the Constitution would be too primitive an understanding of the Constitution and contrary to settled cannons of constitutional interpretation. Such an approach regarding the rights and liberties of citizens would be an affront to the collective wisdom of our people and the wisdom of the members of the Constituent Assembly....
134

411. The exercise of the natural and inalienable right to privacy entails allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to 'sexual privacy' to protect the rights of sexual minorities. Emanating from the inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right, and be protected under the Constitution as fundamental to liberty and as a soulmate of dignity.

412. Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation. In order to ensure to sexual and gender minorities the fulfilment of their fundamental rights, it is imperative to 'confront the closet' and, as a necessary consequence, confront 'compulsory heterosexuality.'[135] Confronting the closet would entail "reclaiming markers of all desires, identities and acts which challenge it."[59] It would also entail ensuring that individuals belonging to sexual minorities, have the freedom to fully participate in public life, breaking the invisible barrier that heterosexuality imposes upon them. The choice of sexuality is at the core of privacy. But equally, our constitutional jurisprudence must recognise that the public assertion of identity founded in sexual orientation is crucial to the exercise of freedoms.

413. In conceptualising a right to sexual privacy, it is important to consider how the delineation of 'public' and 'private' spaces affects the lives of the LGBTIQ community. Members of the community have argued that to base their claims on a right to privacy is of no utility to individuals who do not possess the privilege of a private space.[136] In fact, even for individuals who have access to private spaces the conflation of 'private' with home and family may be misplaced.[137] The home is often reduced to a public space as heteronormativity within the family can force the individual to remain inside the closet.[59] Thus, even the conception of a private space for certain individuals is utopian.[59]

414. Privacy creates "tiers of 'reputable' and 'disreputable' sex", only granting protection to acts behind closed doors. [138] Thus, it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance.[139] If one accepts the proposition that public places are heteronormative, and same-sex sexual acts partially closeted, relegating 'homosexual' acts into the private sphere, would in effect reiterate the "ambient heterosexism of the public space."[140] It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public spaces.[141] The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.

F.I. Sexual privacy and autonomy-deconstructing the heteronormative framework

415. In the absence of a protected zone of privacy, individuals are forced to conform to societal stereotypes. **Puttaswamy** has characterised the right to privacy as a shield against forced homogeneity and as an essential attribute to achieve personhood:

...Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated.
142

This Court has recognized the right of an individual to break free from the demands of society and the need to foster a plural and inclusive culture. The judgment of four judges in **Puttaswamy**, for instance, held that:

Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.
142

416. In **Santosh Singh** v. **Union of India** MANU/SC/0809/2016 : (2016) 8 SCC 253, a two-judge Bench of this Court dismissed a petition Under Article 32 seeking a direction to the Central Board of Secondary Education to include moral science as a compulsory subject in the school syllabus in order to inculcate moral values. One of us (Chandrachud J) underscored the importance of accepting a plurality of ideas and tolerance of radically different views:

Morality is one and, however important it may sound to some, it still is only one element in the composition of values that a just society must pursue. There are other equally significant values which a democratic society may wish for education to impart to its young. Among those is the acceptance of a plurality and diversity of ideas, images and faiths which unfortunately faces global threats. Then again, equally important is the need to foster tolerance of those who hold radically differing views, empathy for those whom the economic and social milieu has cast away to the margins, a sense of compassion and a realisation of the innate humanity which dwells in each human being. Value based education must enable our young to be aware of the horrible consequences of prejudice, hate and discrimination that continue to threaten people and societies the world over...[143]

The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an

acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them.[144] As noted by Richards, this moral right emerges from the autonomy to which the individual is entitled:

Autonomy, in the sense fundamental to the theory of human rights, is an empirical assumption that persons as such have a range of capacities that enables them to develop, and act upon plans of action that take as their object one's life and the way it is lived. The consequence of these capacities of autonomy is that humans can make independent decisions regarding what their life shall be, self-critically reflecting, as a separate being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with whom one will or will not identify, or what one will define and pursue as needs and aspirations. In brief, autonomy gives to persons the capacity to call their life their own. The development of these capacities for separation and individuation is, from birth, the central developmental task of becoming a person.[145]

417. In **Common Cause (A Registered Society)** v. **Union of India ("Common Cause")** MANU/SC/0232/2018 : (2018) 5 SCC 1, a Constitution Bench of this Court held that the right to die with dignity is integral to the right to life recognised by the Constitution and an individual possessing competent mental faculties is entitled to express his or her autonomy by the issuance of an advance medical directive:

The protective mantle of privacy covers certain decisions that fundamentally affect the human life cycle. It protects the most personal and intimate decisions of individuals that affect their life and development. Thus, choices and decisions on matters such as procreation, contraception and marriage have been held to be protected. While death is an inevitable end in the trajectory of the cycle of human life individuals are often faced with choices and decisions relating to death. Decisions relating to death, like those relating to birth, sex, and marriage, are protected by the Constitution by virtue of the right of privacy....
[146]

Autonomy and privacy are inextricably linked. Each requires the other for its full realization. Their interrelationship has been recognised in **Puttaswamy**:

...Privacy postulates the reservation of a private space for the individual, described as the right to be left alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy....
[147]

In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the 'Original Position' serves as a constructive model to illustrate the notion of choice behind a "partial veil of ignorance."[148]

Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society.[148] The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of 'good' might be.[148] These neutrally desirable goods are described by Rawls as 'primary social goods' and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect.[148] Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy.[149] Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner.[150]

418. An individual's sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her own desires and proclivities. The self-determination of sexual orientation is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual.[151] Such an interpretation of autonomy has implications for the widening application of human rights to sexuality.[59] Sexuality cannot be construed as something that the State has the prerogative to legitimize only in the form of rigid, marital procreational sex.[59] Sexuality must be construed as a fundamental experience through which individuals define the meaning of their lives.[59] Human sexuality cannot be reduced to a binary formulation. Nor can it be defined narrowly in terms of its function as a means to procreation. To confine it to closed categories would result in denuding human liberty of its full content as a constitutional right. The Constitution protects the fluidities of sexual experience. It leaves it to consenting adults to find fulfilment in their relationships, in a diversity of cultures, among plural ways of life and in infinite shades of love and longing.

F.2 A right to intimacy-celebration of sexual agency

419. By criminalising consensual acts between individuals who wish to exercise their constitutionally-protected right to sexual orientation, the State is denying its citizens the right to intimacy. The right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue.

In **Shakti Vahini** v. **Union of India** MANU/SC/0291/2018, a three judge Bench of this Court issued directives to prevent honour killings at the behest of Khap Panchayats and protect persons who enter into marriages that do not have the approval of the Panchayats. The Court recognised the right to choose a life partner as a fundamental right Under Articles 19 and 21 of the Constitution. The learned Chief Justice held:

...when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized Under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.
[152]

In **Shafin Jahan** v. **Asokan** MANU/SC/0340/2018, this Court set aside a Kerala High Court judgment which annulled the marriage of a twenty-four year old woman with a man of her choice in a habeas corpus petition instituted by her father. The Court upheld her right to choose of a life partner as well as her autonomy in the sphere of "intimate personal decisions." The Chief Justice held thus:

...expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. **The social values and morals have their space but they are not above the constitutionally guaranteed freedom** ....[153]

One of us (Chandrachud J) recognised the right to choose a partner as an important facet of autonomy:

...The choice of a partner whether **within or outside marriage** lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith...
Social approval for intimate personal decisions is not the basis for recognising them...
[154]

The judgment in **Shafin Jahan** delineates a space where an individual enjoys the autonomy of making intimate personal decisions:

The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.
[155]

In furtherance of the Rawlsian notion of self-respect as a primary good, individuals must not be denied the freedom to form relationships based on sexual intimacy. Consensual sexual relationships between adults, based on the human propensity to experience desire must be treated with respect. In addition to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner. This "institutionalized expression to love" must be considered an important element in the full actualisation of the ideal of self-respect.[156]

Social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships.[157] The law provides the legitimacy for social institutions. In a democratic framework governed by the Rule of law, the law must be consistent with the constitutional values of liberty, dignity and autonomy.
It cannot be allowed to become a yoke on the full expression of the human personality. By penalising sexual conduct between consenting adults, Section 377 imposes moral notions which are anachronistic to a constitutional order. While ostensibly penalising 'acts', it impacts upon the

identity of the LGBT community and denies them the benefits of a full and equal citizenship. Section 377 is based on a stereotype about sex. Our Constitution which protects sexual orientation must outlaw any law which lends the authority of the state to obstructing its fulfilment.

G Section 377 and the right to health

Should medicine ever fulfil its great ends, it must enter into the larger political and social life of our time; it must indicate the barriers which obstruct the normal completion of the life cycle and remove them.

-Virchow Rudolf

420. In the evolution of its jurisprudence on the constitutional right to life Under Article 21, this Court has consistently held that the right to life is meaningless unless accompanied by the guarantee of certain concomitant rights including, but not limited to, the right to health.[158] The right to health is understood to be indispensable to a life of dignity and well-being, and includes, for instance, the right to emergency medical care and the right to the maintenance and improvement of public health.[159]

It would be useful to refer to judgments of this Court which have recognised the right to health.

In **Bandhua Mukti Morcha** v. **Union of India** MANU/SC/0051/1983 : (1984) 3 SCC 161, a three-judge Bench identified the right to health within the right to life and dignity. In doing so, this Court drew on the Directive Principles of State Policy:

It is the fundamental right of every one in this country ...
to live with human dignity, free from exploitation. **This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.** These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials.

In **Consumer Education & Research Centre** v. **Union of India** ("CERC") MANU/SC/0175/1995 : (1995) 3 SCC 42, a Bench of three judges dealt with the right to health of workers in asbestos industries. While laying down mandatory guidelines to be followed for the well-being of workers, the Court held that:

The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood...

Therefore, it must be held that the right to health and medical care is a fundamental right Under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and makes the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity.

In a dissenting judgment in **C.E.S.C. Limited** v. **Subhash Chandra Bose** MANU/SC/0466/1992 : (1992) 1 SCC 441, K Ramaswamy J observed that:

Health is thus a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. In the light of Articles. 22 to 25 of the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights, and in the light of socio-economic justice assured in our constitution, right to health is a fundamental human right to workmen. The maintenance of health is a most imperative constitutional goal whose realisation requires interaction by many social and economic factors

In **Kirloskar Brothers Ltd.** v. **Employees' State Insurance Corporation** MANU/SC/0873/1996 : (1996) 2 SCC 682, a three-judge Bench of this Court considered the applicability of the Employees' State Insurance Act, 1948 to the regional offices of the Appellant, observing that:

Health is thus a state of complete physical, mental and social well-being. Right to health, therefore, is a fundamental and human right to the workmen. The maintenance of health is the most imperative constitutional goal whose realisation requires interaction of many social and economic factors.

In **State of Punjab** v. **Ram Lubhaya Bagga** MANU/SC/0156/1998 : (1998) 4 SCC 117, a three-judge Bench of this Court considered a challenge to the State of Punjab's medical reimbursement policy. A.P. Mishra J, speaking for the Bench, observed that:

Pith and substance of life is the health, which is the nucleus of all activities of life including that of an employee or other viz. the physical, social, spiritual or any conceivable human activities. If this is denied, it is said everything crumbles.

This Court has time and again emphasised to the Government and other authorities for focussing and giving priority and other authorities for focussing and giving priority to the health of its, citizen, which not only makes one's life meaningful, improves one's efficiency, but in turn gives optimum out put.

In **Smt. M Vijaya** v. **The Chairman and Managing Director Singareni Collieries Co. Ltd.** MANU/AP/0574/2001 : (2001) 5 ALD 522, a five judge Bench of the Andhra Pradesh High Court considered a case where a girl was infected with HIV due to the negligence of hospital authorities. The Court observed that:

Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. By reason of numerous

judgments of the Apex Court the horizons of Article 21 of the Constitution have been expanded recognising various rights of the citizens i.e...right to health...

It is well settled that right to life guaranteed Under Article 21 is not mere animal existence. It is a right to enjoy all faculties of life. As a necessary corollary, right to life includes right to healthy life.

In **Devika Biswas** v. **Union of India** MANU/SC/0999/2016 : (2016) 10 SCC 726, while hearing a public interest petition concerning several deaths that had taken place due to unsanitary conditions in sterilization camps across the country, a two judge Bench of this Court held that:

It is well established that the right to life Under Article 21 of the Constitution includes the right to lead a dignified and meaningful life and the right to health is an integral facet of this right...That the right to health is an integral part of the right to life does not need any repetition.

In his concurring judgment in **Common Cause** v. **Union of India**, Sikri J, noted the inextricable link between the right to health and dignity:

There is a related, but interesting, aspect of this dignity which needs to be emphasised. **Right to health is a part of Article 21 of the Constitution.** At the same time, it is also a harsh reality that everybody is not able to enjoy that right because of poverty etc. The State is not in a position to translate into reality this right to health for all citizens. Thus, when citizens are not guaranteed the right to health, can they be denied right to die in dignity?

In addition to the constitutional recognition granted to the right to health, the right to health is also recognised in international treaties, covenants, and agreements which India has ratified, including the International Covenant on Economic, Social and Cultural Rights, 1966 ("ICESCR") and the Universal Declaration of Human Rights, 1948 ("UDHR"). Article 25 of the UDHR recognizes the right to health:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.

421. Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") recognizes the right of all persons to the enjoyment of the highest attainable standard of physical and mental health:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Article 12.2 requires States Parties to take specific steps to improve the health of their citizens, including creating conditions to ensure equal and timely access to medical services. In its General Comment No. 14,[160] the UN Economic and Social Council stated that States must take measures to respect, protect and fulfil the health of all persons. States are obliged to ensure the availability and accessibility of health-related information, education, facilities, goods and services, without discrimination, especially for vulnerable and marginalized populations.

Pursuant to General Comment No. 14, India is required to provide marginalized populations, including members of the LGBTIQ community, goods and services that are available (in sufficient quantity), accessible (physically, geographically, economically and in a non-discriminatory manner), acceptable (respectful of culture and medical ethics) and of quality (scientifically and medically appropriate and of good quality).

422. As early as 1948, the World Health Organization ("WHO") defined the term 'health' broadly to mean "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[161] Even today, for a significant number of Indian citizens this standard of health remains an elusive aspiration. Of relevance to the present case, a particular class of citizens is denied the benefits of this constitutional enunciation of the right to health because of their most intimate sexual choices.

423. Sexuality is a natural and precious aspect of life, an essential and fundamental part of our humanity.[162] Sexual rights are entitlements related to sexuality and emanate from the rights to freedom, equality, privacy, autonomy, and dignity of all people.[59] For people to attain the highest standard of health, they must also have the right to exercise choice in their sexual lives and feel safe in expressing their sexual identity. However, for some citizens, discrimination, stigma, fear and violence prevent them from attaining basic sexual rights and health.

424. Individuals belonging to sexual and gender minorities experience discrimination, stigmatization, and, in some cases, denial of care on account of their sexual orientation and gender identity.[163] However, it is important to note that 'sexual and gender minorities' do not constitute a homogenous group, and experiences of social exclusion, marginalization, and discrimination, as well as specific health needs, vary considerably.[164] Nevertheless, these individuals are united by one factor-that their exclusion, discrimination and marginalization is rooted in societal heteronormativity and society's pervasive bias towards gender binary and opposite-gender relationships, which marginalizes and excludes all non-heteronormative sexual and gender identities.[165] This, in turn, has important implications for individuals' health-seeking behaviour, how health services are provided, and the extent to which sexual health can be achieved.[59]

425. The term 'sexual health' was first defined in a 1975 WHO Technical Report series as "the integration of the somatic, emotional, intellectual and social aspects of sexual being, in ways that are positively enriching and that enhance personality, communication and love."[166] The WHO's current working definition of sexual health is as follows:

...a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.

The WHO further states that "sexual health cannot be defined, understood or made operational without a broad consideration of sexuality, which underlies important behaviours and outcomes related to sexual health." It defines sexuality thus:

...a central aspect of being human throughout life encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors.

426. A report entitled "Sexual Health, Human Rights and the Law",[167] published by the WHO in 2015 explores the relationship between these concepts. The report notes that "human sexuality includes many different forms of behaviour and expression, and that the recognition of the diversity of sexual behaviour and expression contributes to people's overall sense of health and well-being."[59] It emphasizes the importance of sexual health by stating that not only is it essential to the physical and emotional well-being of individuals, couples and families, but it is also fundamental to the social and economic development of communities and countries.[59] The ability of individuals to progress towards sexual health and well-being depends on various factors, including "access to comprehensive information about sexuality, knowledge about the risks they face and their vulnerability to the adverse consequences of sexual activity; access to good quality sexual health care, and an environment that affirms and promotes sexual health."

427. The International Women's Health Coalition has located the right to sexual health within 'sexual rights', defined as follows:[168]

Sexual rights embrace certain human rights that are already recognized in national laws, international human rights documents, and other consensus documents. They rest on the recognition that all individuals have the right--free of coercion, violence, and discrimination of any kind--to the highest attainable standard of sexual health; to pursue a satisfying, safe, and pleasurable sexual life; to have control over and decide freely, and with due regard for the rights of others, on matters related to their sexuality, reproduction, sexual orientation, bodily integrity, choice of partner, and gender identity; and to the services, education, and information, including comprehensive sexuality education, necessary to do so.

The discussion of 'sexual rights' (as they pertain to sexuality and sexual orientation) within the framework of the right to health is a relatively new phenomenon:[165]

...Before the 1993 World Conference on Human Rights in Vienna, and the subsequent 1994 International Conference on Population and Development in Cairo, sexuality, sexual rights, and sexual diversity had not formed part of the international health and human rights discourse. **These newly emerged "sexual rights" were founded on the principles of bodily integrity, personhood, equality, and diversity.**[165]

428. The operation of Section 377 denies consenting adults the full realization of their right to health, as well as their sexual rights. It forces consensual sex between adults into a realm of fear and shame, as persons who engage in anal and oral intercourse risk criminal sanctions if they seek health advice. This lowers the standard of health enjoyed by them and particularly by members of sexual and gender minorities, in relation to the rest of society.

429. The right to health is not simply the right not to be unwell, but rather the right to be well. It encompasses not just the absence of disease or infirmity, but "complete physical, mental and social well being",[169] and includes both freedoms such as the right to control one's health and body and to be free from interference (for instance, from non-consensual medical treatment and experimentation), and entitlements such as the right to a system of healthcare that gives everyone an equal opportunity to enjoy the highest attainable level of health.

430. The jurisprudence of this Court, in recognizing the right to health and access to medical care, demonstrates the crucial distinction between negative and positive obligations. Article 21 does not impose upon the State only negative obligations not to act in such a way as to interfere with the right to health. This Court also has the power to impose positive obligations upon the State to take measures to provide adequate resources or access to treatment facilities to secure effective enjoyment of the right to health.[170]

431. A study of sexuality and its relationship to the right to health in South Africa points to several other studies that suggest a negative correlation between sexual orientation-based discrimination and the right to health:

For example, in a Canadian study, Brotman and colleagues found that being open about their sexual orientation in health care settings contributed to experiences of discrimination for lesbian, gay, and bisexual people.[165]

Lane and colleagues interviewed men who have sex with men in Soweto, and revealed that all men who disclosed their sexual orientation at public health facilities had experienced some form of discrimination. Such discrimination ['ranging from verbal abuse to denial of care'[59]], and also the anticipation thereof, leads to delays when seeking sexual health services such as HIV counseling and testing.[59]

432. Alexandra Muller describes the story of two individuals who experienced such discrimination. T, a gay man, broke both his arms while fleeing from a group of people that attacked him because of his sexuality. At the hospital, the staff learned about T's sexual orientation, and pejoratively discussed it in his presence. He also had to endure "a local prayer group that visited the ward daily to provide spiritual support to patients" which "prayed at his bedside to rectify his "devious" sexuality. When he requested that they leave, or that he be transferred to another ward, the nurses did not intervene, and the prayer group visited regularly to continue to recite their homophobic prayers. T did not file an official complaint, fearing future ramifications in accessing care. Following his discharge, he decided not to return for follow up appointments and had his casts removed at another facility.[59]

Another woman, P, who had been with her female partner for three years, wanted to get tested for HIV. The nurse at the hospital asked certain questions to discern potential risk behaviours. When asked why she did not use condoms or contraception, P revealed that she did not need to on account of her sexuality. The nurse immediately exclaimed that P was not at risk for HIV, and that she should "go home and not waste her time any longer." P has not attempted to have another HIV test since.[59]

These examples are illustrative of a wider issue: individuals across the world are denied access to equal healthcare on the basis of their sexual orientation. That people are intimidated or blatantly denied healthcare access on a discriminatory basis around the world proves that this issue is not simply an ideological tussle playing out in classrooms and courtrooms, but an issue detrimentally affecting individuals on the ground level and violating their rights including the right to health.

433. The right to health is one of the major rights at stake in the struggle for equality amongst gender and sexual minorities:[171]

The right to physical and mental health is at conflict with discriminatory policies and practices, some physicians' homophobia, the lack of adequate training for health care personnel regarding sexual orientation issues or the general assumption that patients are heterosexuals.[59]

While the enumeration of the right to equal healthcare is crucial, an individual's sexual health is also equally significant to holistic well-being. A healthy sex life is integral to an individual's physical and mental health, regardless of whom an individual is attracted to. Criminalising certain sexual acts, thereby shunning them from the mainstream discourse, would invariably lead to situations of unsafe sex, coercion, and a lack of sound medical advice and sexual education, if any at all.

434. A report by the Francois-Xavier Bagnoud Center for Health and Human Rights at Harvard School of Public Health defines the term 'sexual health' as follows:

A state of physical, emotional, mental, and social well-being in relation to sexuality. Like health generally, it is not merely the absence of disease, but encompasses positive and complex experiences of sexuality as well as freedom to determine sexual relationships, as well as the possibility of having pleasurable sexual experiences, free of coercion, discrimination and violence.[172]

435. Laws that criminalize same-sex intercourse create social barriers to accessing healthcare, and curb the effective prevention and treatment of HIV/AIDS.[173] Criminal laws are the strongest expression of the State's power to punish certain acts and behaviour, and it is therefore incumbent upon the State to ensure full protection for all persons, including the specific needs of sexual minorities. The equal protection of law mandates the state to fulfill this constitutional obligation. Indeed, the state is duty bound to revisit its laws and executive decisions to ensure that they do not deny equality before the law and the equal protection of laws. That the law must not discriminate is one aspect of equality. But there is more. The law must take affirmative steps to achieve equal protection of law to all its citizens, irrespective of sexual orientation.

In regard to sexuality and health, it is important to distinguish between behaviour that is harmful to others, such as rape and coerced sex, and that which is not, such as consensual same-sex conduct between adults, conduct related to gender-expression such as cross-dressing, as well as seeking or providing sexual and reproductive health information and services. The use of criminal laws in relation to an expanding range of otherwise consensual sexual conduct has been found to be discriminatory by international and domestic courts, often together with violations of other human rights, such as the rights to privacy, self-determination, human dignity and health.[174]

G.I Section 377 and HIV prevention efforts

436. Section 377 has a significant detrimental impact on the right to health of those persons who are susceptible to contracting HIV-men who have sex with men ("MSM")[175] and transgender persons.[176] The Global Commission on HIV and the Law has noted the impact of Section 377 on the right of health of persons afflicted with or vulnerable to contracting HIV:

The law and its institutions can protect the dignity of all people living with HIV, and in so doing fortify those most vulnerable to HIV, so-called "key populations", such as sex workers, MSM, transgender people, prisoners and migrants. The law can open the doors to justice when these people's rights are trampled.... But the law can also do grave harm to the bodies and spirits of people living with HIV. It can perpetuate discrimination and isolate the people most vulnerable to HIV from the programmes that would help them to avoid or cope with the virus. By dividing people into criminals and victims or sinful and innocent, the legal environment can destroy the social, political, and economic solidarity that is necessary to overcome this global epidemic.[177]

437. Mr. Anand Grover, learned Senior Counsel in his submissions, highlighted the vulnerability of MSM and transgender persons. According to a study published by the Global Commission on HIV and the Law, MSM were found to be 19 times more susceptible to be infected with HIV than other adult men.[178]

438. The UN Human Rights Committee has recognized the impact of the criminalization of homosexuality on the spread of HIV/AIDS. In **Toonen** v. **Australia**[179], a homosexual man from Tasmania, where homosexual sex was criminalized, argued that criminalization of same-sex activities between consenting adults was an infringement of his right to privacy Under Article 17 of the International Covenant on Civil and Political Rights ("ICCPR"). The Committee rejected the argument of the Tasmanian authorities that the law was justified on grounds of public health and morality as it was enacted to prevent the spread of HIV/AIDS in Tasmania. The Committee observed that:

... the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV ...

Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

In response to the Committee's decision, a law was enacted to overcome the Tasmanian law criminalizing homosexual sex.

439. Section 377 has had far-reaching consequences for this "key population", pushing them out of the public health system. MSM and transgender persons may not approach State health care providers for fear of being prosecuted for engaging in criminalized intercourse. Studies show that it is the stigma attached to these individuals that contributes to increased sexual risk behaviour and/or decreased use of HIV prevention services.[180]

440. The silence and secrecy that accompanies institutional discrimination may foster conditions which encourage escalation of the incidence of HIV/AIDS.[59] The key population is stigmatized by health providers, employers and other service providers. [59] As a result, there exist serious obstacles to effective HIV prevention and treatment as discrimination and harassment can hinder access to HIV and sexual health services and prevention programmes.
[59]

441. An incisive article, based on extensive empirical research carried out in various countries, has concluded that there is a demonstrable relationship between "laws which criminalize same-sex conduct and adverse health effects on HIV-AIDs rates as well as other health indicators for the MSM community" due to poor access to key HIV prevention tools and outreach programmes.[181] According to a report published by the Joint United Nations Programme on HIV/AIDS ("UNAIDS"), in Caribbean countries where same-sex relations are criminalised, almost one in four MSMs is infected with HIV.[182] In the absence of such criminal provisions, the prevalence of HIV is one in fifteen among MSMs.[59]

442. Closer to home, the UNAIDS project found that in the four years following the judgment in **Naz**, there had been an increase of more than 50% in the number of healthcare centers providing HIV services to MSM and transgender persons in India.[183] If same-sex relations remain criminalised, it is likely that HIV interventions for MSMs will continue to be inadequate, MSMs will continue to be marginalised from health services, and the prevalence of HIV will exacerbate.[184]

443. To safeguard the health of persons who are at the greatest risk of HIV infection, it is imperative that access is granted to effective HIV prevention and treatment services and commodities such as clean needles, syringes, condoms and lubricants.[185] A needle or a condom can only be considered a concrete representation of the entitlements of vulnerable groups: the fundamental human rights of dignity, autonomy and freedom from ill-treatment, along with the right to the highest attainable standard of physical and mental health, without regard to sexuality or legal status.[186] This is the mandate of the Directive Principles contained in Part IV of the Constitution.

444. In 2017, Parliament enacted the HIV (Prevention and Control) Act, to provide for the prevention and control of the spread of HIV/AIDS and for the protection of the human rights of persons affected. Parliament recognized the importance of prevention interventions for vulnerable groups including MSMs. Section 22 of this Act provides for protection against criminal sanctions as well as any civil liability arising out of promoting actions or practices or "any strategy or mechanism or technique" undertaken for reducing the risk of HIV transmission. Illustrations (a) and (b) to Section 22 read as follows:

(a) A supplies condoms to B who is a sex worker or to C, who is a client of B. Neither A nor B nor C can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the strategy.

(b) M carries on an intervention project on HIV or AIDS and sexual health information, education and counselling for men, who have sex with men, provides safer sex information, material and

condoms to N, who has sex with other men. Neither M nor N can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention.

Persons who engage in anal or oral intercourse face significant sexual health risks due to the operation of Section 377. Prevalence rates of HIV are high, particularly among men who have sex with men. Discrimination, stigma and a lack of knowledge on the part of many healthcare providers means that these individuals often cannot and do not access the health care they need. In order to promote sexual health and reduce HIV transmission among LGBT individuals, it is imperative that the availability, effectiveness, and quality of health services to the LGBT community be significantly improved.

Under our constitutional scheme, no minority group must suffer deprivation of a constitutional right because they do not adhere to the majoritarian way of life. By the application of Section 377 of the Indian Penal Code, MSM and transgender persons are excluded from access to healthcare due to the societal stigma attached to their sexual identity. Being particularly vulnerable to contraction of HIV, this deprivation can only be described as cruel and debilitating. The indignity suffered by the sexual minority cannot, by any means, stand the test of constitutional validity.

G.2 Mental health

445. The treatment of homosexuality as a disorder has serious consequences on the mental health and well-being of LGBT persons. The mental health of citizens "growing up in a culture that devalues and silences same-sex desire" is severely impacted.[187] Global psychiatric expert Dinesh Bhugra has emphasised that radical solutions are needed to combat the high levels of mental illness among the LGBT population stating there is a "clear correlation between political and social environments" and how persecutory laws against LGBT individuals are leading to greater levels of depression, anxiety, self-harm, and suicide. Even in Britain, gay people are at greater risk of a range of mental health problems, and, it is believed, are more likely to take their own lives.

A number of studies this year have highlighted the disproportionate levels of mental illness among LGBT people. In Britain, one of the world's most legally equal countries for this community, research in the last few months has revealed that LGBT people are nearly **twice as likely** to have attempted suicide or harmed themselves, gay men are more than **twice as likely** to have a mental illness than heterosexual men, and 4 in 5 **transgender people** have suffered depression in the last five years.[188]

He discusses studies from various countries which indicate that in countries where laws continue to discriminate against LGBT individuals, there are high rates of mental illness. Similarly he states that there have been a series of studies showing that in America, rates of psychiatric disorders have dropped when state policies have recognised the equal rights of LGBT individuals.

446. Mr. Chander Uday Singh, learned Senior Counsel appearing on behalf of an intervenor, a psychiatrist, has brought to our notice how even the mental health sector has often reflected the societal prejudice regarding homosexuality as a pathological condition.

447. Medical and scientific authority has now established that consensual same sex conduct is not against the order of nature and that homosexuality is natural and a normal variant of sexuality. Parliament has provided legislative acknowledgment of this global consensus through the enactment of the Mental Healthcare Act, 2017. Section 3 of the Act mandates that mental illness is to be determined in accordance with 'nationally' or 'internationally' accepted medical standards. The International Classification of Diseases (ICD-10) by the World Health Organisation is listed as an internationally accepted medical standard and does not consider non-peno-vaginal sex between consenting adults either a mental disorder or an illness. The Act through Section 18(2)[189] and Section 21[190] provides for protection against discrimination on the grounds of sexual orientation.

The repercussions of prejudice, stigma and discrimination continue to impact the psychological well-being of individuals impacted by Section 377. Mental health professionals can take this change in the law as an opportunity to re-examine their own views of homosexuality.

448. Counselling practices will have to focus on providing support to homosexual clients to become comfortable with who they are and get on with their lives, rather than motivating them for change. Instead of trying to cure something that isn't even a disease or illness, the counsellors have to adopt a more progressive view that reflects the changed medical position and changing societal values. There is not only a need for special skills of counsellors but also heightened sensitivity and understanding of LGBT lives. The medical practice must share the responsibility to help individuals, families, workplaces and educational and other institutions to understand sexuality completely in order to facilitate the creation of a society free from discrimination[191] where LGBT individuals like all other citizens are treated with equal standards of respect and value for human rights.

H Judicial review

449. The Constitution entrusts the function of making laws to Parliament and the State Legislatures Under Articles 245 and 246 of the Constitution. Parliament and the State Legislatures are empowered to create offences against laws with respect to the heads of legislation, falling within the purview of their legislative authority. (See Entry 93 of List I and Entry 64 of List II of the Seventh Schedule). Criminal law is a subject which falls within the Concurrent List. Entry I of List III provides thus:

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

The power to enact legislation in the field of criminal law has been entrusted to Parliament and, subject to its authority, to the State Legislatures. Both Parliament and the State Legislatures can enact laws providing for offences arising out of legislation falling within their legislative domains. The authority to enact law, however, is subject to the validity of the law being scrutinised on the touchstone of constitutional safeguards. A citizen, or, as in the present case, a community of citizens, having addressed a challenge to the validity of a law which creates an offence, the

authority to determine that question is entrusted to the judicial branch in the exercise of the power of judicial review. The Court will not, as it does not, in the exercise of judicial review, second guess a value judgment made by the legislature on the need for or the efficacy of legislation. But where a law creating an offence is found to be offensive to fundamental rights, such a law is not immune to challenge. The constitutional authority which is entrusted to the legislatures to create offences is subject to the mandate of a written Constitution. Where the validity of the law is called into question, judicial review will extend to scrutinising whether the law is manifestly arbitrary in its encroachment on fundamental liberties. If a law discriminates against a group or a community of citizens by denying them full and equal participation as citizens, in the rights and liberties granted by the Constitution, it would be for the Court to adjudicate upon validity of such a law.

I India's commitments at International Law

450. International human rights treaties and jurisprudence impose obligations upon States to protect all individuals from violations of their human rights, including on the basis of their sexual orientation.[192] Nevertheless, laws criminalizing same-sex relations between consenting adults remain on the statute books in more than seventy countries. Many of them, including so-called "sodomy laws", are vestiges of colonial-era legislation that prohibits either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex.[193] In some cases, the language used refers to vague and indeterminate concepts, such as 'crimes against the order of nature', 'morality', or 'debauchery'.[194] There is a familiar ring to it in India, both in terms of history and text.

451. International law today has evolved towards establishing that the criminalization of consensual sexual acts between same-sex adults in private contravenes the rights to equality, privacy, and freedom from discrimination. These rights are recognised in international treaties, covenants, and agreements which India has ratified, including the UDHR, ICCPR, and the ICESCR. India has a constitutional duty to honour these internationally recognized Rules and principles.[195] Article 51 of the Constitution, which forms part of the Directive Principles of State Policy, requires the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another."

452. The human rights treaties that India has ratified require States Parties to guarantee the rights to equality before the law, equal protection of the law and freedom from discrimination. For example, Article 2 of the ICESCR requires states to ensure that:

The rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

453. The Committee on Economic, Social and Cultural Rights-the body mandated by the ICESCR to monitor States Parties' implementation of the treaty-has stated that "other status" in Article 2 (2) includes sexual orientation, and reaffirmed that "gender identity is recognized as among the prohibited grounds of discrimination", as "persons who are transgender, transsexual or intersex often face serious human rights violations."[196]

454. The prohibition against discrimination in the ICCPR is contained in Article 26, which guarantees equality before the law:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

India is also required to protect the right to privacy, which includes within its ambit the right to engage in consensual same-sex sexual relations.[197] Article 12 of the UDHR recognises the right to privacy:

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Similarly, Article 17 of the ICCPR, which India ratified on 11 December 1977, provides that:

The obligations imposed by this Article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right.

In its General Comment No. 16, the Human Rights Committee confirmed that any interference with privacy, even if provided for by law, "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[198]

In their general comments, concluding observations and views on communications, human rights treaty bodies have affirmed that States are obliged to protect individuals from discrimination on grounds of sexual orientation and/or gender identity, as these factors do not limit an individual's entitlement to enjoy the full range of human rights to which they are entitled.[59]

455. In **NALSA**, while dealing with the rights of transgender persons, this Court recognized the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity'-which outline the rights that sexual minorities enjoy as human persons under the protection of international law-and held that they should be applied as a part of Indian law. Principle 33 provides thus:

Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

While the Yogyakarta Principles are not legally binding, **NALSA** nevertheless signifies an affirmation of the right to non-discrimination on the grounds of gender identity, as well as the relevance of international human rights norms in addressing violations of these rights.

456. There is a contradiction between India's international obligations and Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts between same-sex adults in private. In adjudicating the validity of this provision, the Indian Penal Code must be brought into conformity with both the Indian Constitution and the Rules and principles of international law that India has recognized. Both make a crucial contribution towards recognizing the human rights of sexual and gender minorities.

J Transcending borders-comparative law

457. Over the past several decades, international and domestic courts have developed a strong body of jurisprudence against discrimination based on sexual orientation. This Section analyses the evolution of the perspective of the law towards sexual orientation from a comparative law perspective, and looks at how sodomy laws have been construed in various jurisdictions based on their histories.

458. In 1967, England and Wales decriminalized same-sex intercourse between consenting adult males in private, and in 1980, Scotland followed suit. The law in Northern Ireland only changed in 1982 with the decision of the ECtHR in **Dudgeon** v. **The United Kingdom** ("Dudgeon").[199] The Petitioners challenged the Offences against the Person Act, 1861, the Criminal Law Amendment Act, 1885 and a sodomy law that made buggery and "gross indecency" a criminal offense, irrespective of consent. Although the law did not specifically define these terms, the Court interpreted 'buggery' to mean anal intercourse by a man with a man or woman and gross indecency to mean any act "involving sexual indecency between male persons." Regarding acts prohibited by these provisions, the ECtHR observed that:

Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery, there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation.

The ECtHR concluded that Dudgeon had suffered and continued to suffer an unjustified interference with his right to respect for his private life. Hence, the Court struck down the laws under challenge as violative of Article 8 of the European Convention on Human Rights, in so far as they criminalised "private homosexual relations between adult males capable of valid consent." In observing that these laws were not proportionate to their purported need, the Court observed:

On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.[200]

The ECtHR thus concluded:

To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.[201]

Later, in **Norris** v. **Ireland**[202], the Applicant challenged Ireland's criminalization of certain homosexual acts between consenting adult men as being violative of Article 8 of the European Convention on Human Rights, which protected the right to respect for private and family life. The ECtHR held that the law violated Article 8, regardless of whether it was actively enforced:

A law which remains on the statute books even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example, there is a change of policy. The applicant can therefore be said to 'run the risk of being directly affected' by the legislation in question.

This decision was affirmed in **Modinos** v. **Cyprus**[203], where the Code of Criminal Procedure of Cyprus, which penalized homosexual conduct, was alleged to constitute an unjustified interference with the Applicant's private life.

459. Five years after **Dudgeon**, the United States Supreme Court, in **Bowers** v. **Hardwick** ("Bowers") MANU/USSC/0151/1986 : 478 U.S. 186 (1986), held that "sodomy" laws had been a significant part of American history and did not violate the Constitution. The Supreme Court's reasoning in **Bowers** is a clear departure from that of the ECtHR in **Dudgeon**. In **Bowers**, the Supreme Court declined to accept that the question concerned the right to privacy. Instead, it stated that the issue was about "a fundamental right upon homosexuals to engage in sodomy",[204] which was held not to be protected by the US Constitution.

Seventeen years later, the United States Supreme Court laid the constitutional foundation for LGBT rights in the country with its judgment in **Lawrence** v. **Texas** ("Lawrence"). MANU/USSC/0070/2003 : 539 U.S. 558 (2003). In **Lawrence**, the Petitioner had been arrested under a Texas statute, which prohibited same-sex persons from engaging in sexual conduct, regardless of consent. The validity of the statute was considered.

Relying on **Dudgeon**, the U.S. Supreme Court struck down the statute as violative of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Overruling the judgment in **Bowers**, Justice Kennedy, writing for the majority, upheld Justice Stevens' dissent in **Bowers**-who was also part of the majority in **Lawrence**-to note that:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[205]

He also noted that the case concerned the private, personal relationships of consenting adults, and that the laws challenged did not further any legitimate state interest:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter [e.g., a right to marry or to register a 'civil union']. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The Petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual....

460. Justice Kennedy also identified the harm caused by the operation of the criminal law:

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

The Court thus struck down the Texas law banning "deviate sexual intercourse" between persons of the same sex (and similar laws in 13 other US states and Puerto Rico), holding that:

The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. **Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.** The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

461. In **Toonen**, the UN Human Rights Committee held that laws used to criminalize private, adult, consensual same-sex sexual relations violate the right to privacy and the right to non-discrimination. Mr. Toonen-a member of the Tasmanian Gay Law Reform Group-had complained to the Committee about a Tasmanian law that criminalized 'unnatural sexual intercourse', 'intercourse against nature' and 'indecent practice between male persons'. The law allowed police officers to investigate intimate aspects of his private life and to detain him if they had reason to believe that he was involved in sexual activities with his long-term partner in the privacy of their home. Mr. Toonen challenged these laws as violative of Article 2(1)[206], Article 17[207] and Article 26[208] of the ICCPR, on the ground that:

[The provisions] have created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.[209]

The Committee rejected the argument that criminalization may be justified as "reasonable" on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor proportionate:[210]

As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.

The Court concluded that the legislation was violative of Article 7 of the ICCPR, holding that:

... It is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws.[211]

462. In **X** v. **Colombia**[212], the Committee clarified that there is no "Global South exception" to **Toonen**.[213] The Egyptian and Tunisian members of the Committee, who dissented from the majority's decision requiring equal treatment of unmarried same-sex and different-sex couples, concurred with the principle laid down in **Toonen**:

[T]here is no doubt that [A]rticle 17...is violated by discrimination on grounds of sexual orientation. The Committee...has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults.

463. The Constitutional Tribunal of Ecuador was the first Constitutional Court in the Global South to decriminalise sodomy laws.[214] The constitutionality of Article 516 of the Penal Code, which penalised "cases of homosexualism, that do not constitute rape", was challenged before the Tribunal. The Tribunal's reasoning was that "this abnormal behaviour should be the object of medical treatment... imprisonment in jails, creates a suitable environment for the development of this dysfunction." The Tribunal's line of reasoning-referring to homosexual activity as 'abnormal behaviour', requiring medical treatment-is seriously problematic.[215] That assumption is unfounded in fact and is an incorrect doctrine for a constitutional court which protects liberty and dignity. However ultimately, the Tribunal struck down the first paragraph of Article 516 of the Penal Code, holding that:

Homosexuals are above all holders of all the rights of the human person and therefore, have the right to exercise them in conditions of full equality... that is to say that their rights enjoy legal protection, as long as in the exteriorisation of their behaviour they do not harm the rights of others, as is the case with all other persons.

464. The adverse impact of sodomy laws on the lives of homosexual adults was also considered by the Constitutional Court of South Africa in **National Coalition for Gay and Lesbian Equality** v. **Minister of Justice** ("National Coalition") MANU/SACC/0007/1998 : 1999 (1) SA 6 (CC), in which the constitutionality of the common law offence of sodomy and other legislations which penalised unnatural sexual acts between men was at issue. The Constitutional Court unanimously found that the sodomy laws, all of which purported to proscribe sexual intimacy between

homosexual adult men, violated their right to equality and discriminated against them on the basis of their sexual orientation.

Justice Ackerman, concurring with the ECtHR's observation in **Norris**, noted that:

The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives.[216]

Justice Ackerman quoted from Edwin Cameron's "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 SALJ 450:

Even when these provisions are not enforced, they reduce gay men... to what one author has referred to as **'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation.**[216]

Commenting on the violation of individuals' rights to privacy and dignity, the Court held that:

Gay people are a vulnerable minority group in our society. Sodomy laws criminalise their most intimate relationships. This devalues and degrades gay men and therefore constitutes a violation of their fundamental right to dignity. Furthermore, the offences criminalise private conduct between consenting adults which causes no harm to anyone else. This intrusion on the innermost sphere of human life violates the constitutional right to privacy. The fact that the offences, which lie at the heart of the discrimination, also violate the rights to privacy and dignity strengthens the conclusion that the discrimination against gay men is unfair.

In its conclusion, the Court held that all persons have a right to a "sphere of private intimacy and autonomy that allows [them] to establish and nurture human relationships without interference from the outside community."[217]

465. In 2005, the High Court of Fiji, in **Dhirendra Nadan Thomas McCoskar** v. **State** [2005] FJHC 500, struck down provisions of the Fijian Penal Code, which punished any person who permits a male person to have "carnal knowledge" of him, as well as acts of "gross indecency" between male persons. The High Court read down the provisions to the extent that they were inconsistent with the Constitution of Fiji, drawing a clear distinction between consensual and non-consensual sexual behavior:

What the constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality...**A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator.**

In recent years, the Caribbean States of Belize and Trinidad and Tobago have also decriminalized consensual sexual acts between adults in private. In **Caleb Orozco** v. **The Attorney General of Belize** ("Caleb Orozco")262, provisions of the Belize Code of Criminal Procedure which penalized "every person who has intercourse against the order of nature with any person..." were challenged before the Supreme Court. Commenting on the concept of dignity, Justice Benjamin borrowed from the Canadian Supreme Court's observations and noted that:[218]

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. **Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to the individual needs, capacities or merits.** It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying the differences.

Relying on the judgments in **Dudgeons, National Coalition, McCoskar, Toonen**, and **Lawrence**, the Supreme Court struck down the provision as violative of the claimant's constitutional rights to privacy, dignity, and equality. Justice Benjamin held thus:

However, from the perspective of legal principle, the Court cannot act upon prevailing majority views or what is popularly accepted as moral...There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated. No evidence has been presented as to the real likelihood of such harm. The duty of the Court is to apply the provisions of the Constitution.[219]

466. In **Jason Jones** v. **The Attorney General of Trinidad and Tobago** ("Jones")[220], an expatriate gay rights activist living in the United Kingdom challenged the provisions of Trinidad and Tobago's Sexual Offences Act, which criminalized 'buggery' and 'serious indecency' before the High Court of Justice at Trinidad and Tobago. The central issue before the Court was whether the provisions were 'saved' Under Section 6 of the Constitution, which protects laws that were in existence before the Constitution came into force and were only marginally changed since, from being struck down for breach of fundamental rights.

The High Court struck down the provisions as unconstitutional, observing that the right to choose a partner and to have a family is intrinsic to an individual's personal autonomy and dignity:

To this Court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with who to make a family.[221]

The High Court also held that the existence of such laws deliberately undermined the lives of homosexuals:

A citizen should not have to live under the constant threat, the proverbial "Sword of Damocles," that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present.

It is a threat that is sanctioned by the State and that sanction is an important sanction because it justifies in the mind of others in society who are differently minded, that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed to be of a lesser value than anyone else...The Parliament has taken the deliberate decision to criminalise the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallised in an act which is statutorily unlawful, whether or not enforced.[222]

The High Court compared the impugned provisions to racial segregation, the Holocaust, and apartheid, observing that:

To now deny a perceived minority their right to humanity and human dignity would be to continue this type of thinking, this type of perceived superiority, based on the genuinely held beliefs of some.[223]

467. In **Leung TC William Roy** v. **Secretary for Justice**[224], the High Court of Hong Kong considered the constitutional validity of provisions that prescribed different ages of consent for buggery and regular sexual intercourse. The court held that these provisions violated the Petitioner's rights to privacy and equality:

Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation.[225]

The Court concluded that the difference in the ages of consent was unjustifiable, noting that:

No evidence has been placed before us to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument.[226]

Courts around the world have not stopped at decriminalizing sodomy laws; they have gone a step further and developed a catena of broader rights and protections for homosexuals. These rights go beyond the mere freedom to engage in consensual sexual activity in private, and include the right to full citizenship, the right to form unions and the right to family life.

468. Israel was one of the first countries to recognize the rights of homosexuals against discrimination in matters of employment. In **El-Al Israel Airlines Ltd.** v. **Jonathan Danielwitz** ("El-Al Israel Airlines")[227], the Supreme Court of Israel considered an airline company's policy of giving discounted tickets to their employees and a 'companion recognized as the husband/wife of the employee'. This benefit was also given to a partner with whom the employee was living together like husband and wife, but not married. However, the airline refused to give the discounted tickets to the Respondent and his male partner.

The Supreme Court of Israel observed thus:

The principle of equality demands that the existence of a Rule that treats people differently is justified by the nature and substance of the issue...therefore, a particular law will create discrimination when two individuals who are different from one another (factual inequality), are treated differently by the law, **even though the factual difference between them does not justify different treatment in the circumstances.**[228]

The Supreme Court held that giving a benefit to an employee who has a spouse of the opposite sex and denying the same benefit to an employee whose spouse is of the same sex amounts to discrimination based on sexual orientation. This violated the Petitioner's right to equality and created an unjustifiable distinction in the context of employee benefits.

469. In **Vriend** v. **Alberta** MANU/SCCN/0057/1998 : (1998) 1 S.C.R. 493, the Appellant, a homosexual college employee, was terminated from his job. He alleged that his employer had discriminated against him because of his sexual orientation, but that he could not make a complaint under Canada's anti-discrimination statute-the Individual's Rights Protection Act ("IRPA")-because it did not include sexual orientation as a protected ground. The Supreme Court of Canada held that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of the right to equality under the Canadian Charter of Rights and Freedoms.

470. The Supreme Court held that the State had failed to provide a rational justification for the omission of sexual orientation as a protected ground under the IRPA. Commenting on the domino effect that such discriminatory measures have on the lives of homosexuals, the Supreme Court noted thus:

Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

The next breakthrough for LGBTQ rights came from the Supreme Court of Nepal, in **Sunil Babu Pant** v. **Nepal Government**[229]. Sunil Pant-the first openly gay Asian national leader-filed a PIL before the Supreme Court of Nepal praying for the recognition of the rights of lesbians, gays, and third gender persons. The Supreme Court located the rights of LGBTQ persons to their sexuality within the right to privacy, holding that:

The right to privacy is a fundamental right of any individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural.

The Court held that all individuals have an inherent right to marriage, regardless of their sexual orientation:

Looking at the issue of same sex marriage, we hold that it is an inherent right of an adult to have marital relation with another adult with his/her free consent and according to her/his will.

In concluding, the Court directed the Nepalese government to enact new legislation or amend existing legislation to ensure that persons of all sexual orientations and gender identities could enjoy equal rights.

471. In 2015, in **Oliari** v. **Italy** ("Oliari") [2015] ECHR 716, the Applicants before the ECtHR argued that the absence of legislation in Italy permitting same-sex marriage or any other type of civil union constituted discrimination on the basis of sexual orientation, in violation of Articles 8, 12, and 14 of the European Convention on Human Rights. In line with its previous case law, the Court affirmed that same-sex couples "are in need of legal recognition and protection of their relationship."[230] The ECtHR concluded that gay couples are equally capable of entering into stable and committed relationships in the same way as heterosexual couples.[59]

472. The ECtHR examined the domestic context in Italy, and noted a clear gap between the "social reality of the applicants",[231] who openly live their relationship, and the law, which fails to formally recognize same-sex partnerships. The Court held that in the absence of any evidence of a prevailing community interest in preventing legal recognition of same-sex partnerships, Italian authorities "have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."[232]

473. In 2013, in **United States** v. **Windsor** 570 U.S. 744 (2013), US Supreme Court considered the constitutionality of the Defense of Marriage Act ("DOMA") which states that, for the purposes of federal law, the words 'marriage' and 'spouse' refer to legal unions between one man and one woman. Windsor, who had inherited the estate of her same-sex partner, was barred from claiming the federal estate tax exemption for surviving spouses since her marriage was not recognized by federal law.[233] Justice Kennedy writing for the majority, held that restricting the federal interpretation of 'marriage' and 'spouse' to apply only to opposite-sex unions was unconstitutional under the Due Process Clause of the Fifth Amendment:

Its [the DOMA's] unusual deviation from the tradition of recognizing and accepting state definitions of marriage operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

Two years later, in **Obergefell** v. **Hodges** ("Obergefell"), 576 U.S. ___ (2015) while analysing precedent and decisions of other US courts recognizing same-sex marriage, Justice Kennedy observed that:

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy... Like choices concerning

contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.[234]

474. Justice Kennedy expressed the need to go beyond the narrow holding in **Lawrence**, towards a more expansive view of the rights of homosexuals:

Lawrence invalidated laws that made same-sex intimacy a criminal act... **But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.**

By a 5-4 majority, the US Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution. Commenting on the right to marriage, Justice Kennedy noted:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. ... It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

475. The recent case of **Masterpiece Cakeshop** v. **Colorado Civil Rights Commission ("Masterpiece Cakeshop")** 584 U.S. ____ (2018) concerned a Christian baker who was Accused of violating an anti-discrimination ordinance for refusing to make a wedding cake for a same-sex couple based on his religious beliefs. The Colorado Civil Rights Commission ("CCRC") decided against the baker, and, on appeal, the Supreme Court ruled 7-2 that the CCRC violated the baker's rights under the First Amendment, which guarantees freedom of expression.

Writing for the majority, Justice Kennedy said the CCRC showed "hostility" to the baker's religious beliefs:

It must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments--comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order--were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

The majority held that while the Constitution allows gay persons to exercise their civil rights, "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." The Supreme Court found merit in the baker's First Amendment claim, noting that his dilemma was understandable, especially given that the cause of action arose

in 2012, before the enactment of Colorado's anti-discrimination law and the **Obergefell** judgment that legalised same-sex marriage.

The court buttressed its position by noting that in several other cases, bakers had declined to decorate cakes with messages that were derogatory towards gay persons and the State Civil Rights Division had held that the bakers were within their rights to have done so. According to the majority in **Masterpiece Cakeshop**, the owner was similarly entitled to decline the order, and his case should have been treated no differently.

476. Justice Ginsburg's dissenting opinion, which was supported by Justice Sotomayor, distinguished the baker in **Masterpiece Cakeshop** from the other three bakers. Justice Ginsburg noted that while the other bakers would have refused the said cake decorations to all customers, Phillips refused to bake a wedding cake (which he baked for other customers), specifically for the couple. She observed that:

Phillips declined to make a cake he found offensive where the **offensiveness of the product was determined solely by the identity of the customer requesting it.** The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display.

When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding--not a cake celebrating heterosexual weddings or same-sex weddings--and that is the service Craig and Mullins were denied.

Justice Ginsburg concluded that a proper application of the Colorado Anti-Discrimination Act would require upholding the lower courts' rulings.

477. **Masterpiece Cakeshop** is also distinguishable from a similar case, **Lee** v. **Ashers Bakery Co. Ltd.** [2015] NICty 2, which is currently on appeal to the United Kingdom Supreme Court. In that case, a bakery in Northern Ireland offered a service whereby customers could provide messages, pictures or graphics that would be iced on a cake. Lee-a member of an LGBT organisation-ordered a cake with the words "support gay marriage" on it. The Christian owners refused, stating that preparing such an order would conflict with their religious beliefs. Lee claimed that in refusing his order, the bakery discriminated against him on grounds of sexual orientation. Both the County Court and the Court of Appeal ruled in favour of Lee, on the ground that the Respondent's refusal on the ground of his religious beliefs was contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Fair Employment and Treatment Order 1998.

From an analysis of comparative jurisprudence from across the world, the following principles emerge:

1. Sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality;

2. Intimacy between consenting adults of the same-sex is beyond the legitimate interests of the state;

3. Sodomy laws violate equality by targeting a segment of the population for their sexual orientation;

4. Such a law perpetrates stereotypes, lends authority of the state to societal stereotypes and has a chilling effect on the exercise of freedom;

5. The right to love and to a partner, to find fulfillment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights;

6. Sexual orientation implicates negative and positive obligations on the state. It not only requires the state not to discriminate, but also calls for the state to recognise rights which bring true fulfillment to same-sex relationships; and

7. The constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection.

The past two decades have witnessed several decisions by constitutional and international courts, recognizing both the decriminalization of same-sex intercourse in private, as well as broader rights recognizing sexual orientation equality. In 1996, South Africa became the first country in the world to constitutionally prohibit discrimination based on sexual orientation.[235] As on the date of this judgment, ten countries constitutionally prohibit discrimination on grounds of sexual orientation.[236] The United Kingdom, Bolivia, Ecuador, Fiji, and Malta specifically prohibit discrimination on the basis of gender identity, either constitutionally or through enacted laws.[59] According the International Lesbian, Gay, Bisexual, Trans and Intersex Association, 74 countries (including India) criminalize same-sex sexual conduct, as of 2017.[237] Most of these countries lie in the Sub-Saharan and Middle East region. Some of them prescribe death penalty for homosexuality.[59]

478. We are aware that socio-historical contexts differ from one jurisdiction to another and that we must therefore look at comparative law-making allowances for them. However, the overwhelming weight of international opinion and the dramatic increase in the pace of recognition of fundamental rights for same-sex couples reflects a growing consensus towards sexual orientation equality. We feel inclined to concur with the accumulated wisdom reflected in these judgments, not to determine the meaning of the guarantees contained within the Indian Constitution, but to provide a sound and appreciable confirmation of our conclusions about those guarantees.

This evolution has enabled societies governed by liberal constitutional values-such as liberty, dignity, privacy, equality and individual autonomy-to move beyond decriminalisation of offences involving consensual same-sex relationships. Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is

a first step. The constitutional principles on which it is based have application to a broader range of entitlements. The Indian Constitution is based on an abiding faith in those constitutional values. In the march of civilizations across the spectrum of a compassionate global order, India cannot be left behind.

K Crime, morality and the Constitution

479. The question of what qualifies as a punishable offence under the law has played a central role in legal theory. Attempts have been made by legal scholars and jurists alike, to define a crime. **Halsbury's Laws of England** defines a crime as "an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment."[238] As Glanville Williams observes:

A crime is an act capable of being followed by criminal proceedings, having a criminal outcome...criminal law is that branch of law which deals with conduct...by prosecution in the criminal courts.[239]

Henry Hart, in his essay titled "The Aims of Criminal Law", [240] comments on the difficulty of a definition in this branch of law. A crime is a crime because it is called a crime:

If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is called a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name.[59]

However, Hart confesses that such a simplistic definition would be "a betrayal of intellectual bankruptcy."[59] Roscoe Pound articulates the dilemma in defining what constitutes an offence:

A final answer to the question 'what is a crime?', is impossible, because law is a living, changing thing, which may at one time be uniform, and at another time give much room for judicial discretion, which may at one time be more specific in its prescription and at another time much more general.[241]

Early philosophers sought to define crime by distinguishing it from a civil wrong. In his study of rhetoric, Aristotle observed that:

Justice in relation to the person is defined in two ways. For it is defined either in relation to the community or to one of its members what one should or should not do. Accordingly, it is possible to perform just and unjust acts in two ways, either towards a defined individual or towards the community.[242]

Kant, in the Metaphysics of Morals,[243] observed that:

A transgression of public law that makes someone who commits it unfit to be a citizen is called a crime simply (crimen) but is also called a public crime (crimen publicum); so the first (private crime) is brought before a civil court, the latter before a criminal court.[244]

Another method of defining crime is from the nature of injury caused, "of being public, as opposed to private, wrongs."[245] This distinction was brought out by Blackstone and later by Duff, in their theories on criminal law. Blackstone, in his "Commentaries on the Laws of England" put forth the idea that only actions which constitute a 'public wrong' will be classified as a crime.[246] He characterised public wrongs as "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."[59] Duff adds to the idea of public wrong by arguing that "[w]e should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, i.e. the polity as a whole."[247]

Nozick and Becker also support the theory that crime is conduct that harms the public. Nozick argues that the harm caused by a crime, unlike other private law wrongs, extends beyond the immediate victim to all those who view themselves as potential victims of the crime.[248] When such an act is done on purpose, it spreads fear in the general community, and it is *due to this additional harm to the community* [of causing fear and insecurity], that such actions are classified as crimes and pursued by the state.[249] Becker preferred to describe crime as something which disrupts social stability and has "the potential for destructive disturbance of fundamental social structures."[250]

However, Hart questioned the theory of simply defining crime as a public wrong, for all wrongs affect society in some way or the other:

"Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfilment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation." [251]

480. Hart preferred to define crime in terms of the methodology of criminal law and the characteristics of this method. He described criminal law as possessing the following features:

1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do...

2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words...

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce...

4. **What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.**[59]

According to Hart, the first three characteristics above are common to both civil and criminal law.[59] However, the key differentiating factor between criminal and civil law, he observed, is the "community condemnation." [59] Thus, he attempted to define crime as:

Conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.[59]

Perhaps it is difficult to carve out a single definition of crime due to the multidimensional nature of criminal law. The process of deconstructing the criminalisation of consensual sexual acts by adults will be facilitated by examining some criminal theories and their interplay with Section 377.

Criminal Law Theories

Bentham's Utilitarian Theory

481. Utilitarianism has provided some of the most powerful critiques of existing laws. Bentham was one of the earliest supporters for reform in sodomy laws. In his essay, "Offences Against One's Self",[252] Bentham rebutted all the justifications given by the state for enacting laws on sodomy.[59] According to Bentham, homosexuality, if viewed outside the realms of morality and religion, is neutral behaviour which gives the participants pleasure and does not cause pain to anyone else.[59] Therefore, he concluded that such an act cannot constitute an offence, and there is "no reason for punishing it at all."[59]

482. Bentham tested sodomy laws on three main principles: (i) whether they produce any primary mischief, i.e., direct harm to another person; (ii) whether they produce any secondary mischief, i.e., harm to the stability and security of society; and (iii) whether they cause any danger to society.[59] He argued that sodomy laws do not satisfy any of the above tests, and hence, should be repealed. On the first principle of primary mischief, Bentham said:

As to any primary mischief, it is evident that it produces no pain in anyone. On the contrary it produces pleasure, and that a pleasure which, by their perverted taste, is by this supposition preferred to that pleasure which is in general reputed the greatest. The partners are both willing. If either of them be unwilling, the act is not that which we have here in view: it is an offence totally different in its nature of effects: it is a personal injury; it is a kind of rape.[59]

Thus, Bentham argued that consensual homosexual acts do not harm anyone else. Instead, they are a source of pleasure to adults who choose to engage in them. Bentham was clear about the distinction between 'willing' partners and 'unwilling' partners, and the latter according to him, would not fall under his defence.

Bentham's second argument was that there was no secondary mischief, which he described as something which may "produce any alarm in the community." On this, Bentham argued:

As to any secondary mischief, it produces not any pain of apprehension. For what is there in it for any body to be afraid of? By the supposition, those only are the objects of it who choose to be so, who find a pleasure, for so it seems they do, in being so.[59]

Bentham's explanation was that only those adults who choose will be the objects of homosexual sexual acts. It does not involve any activity which will create anxiety among the rest of the society. Therefore, homosexuality does not cause secondary harm either.

Lastly, Bentham tested sodomy laws on whether they cause danger to society. The only danger that Bentham could apprehend was the supposed danger of encouraging others to engage in homosexual practices. However, Bentham argues that since homosexual activities in themselves do not cause any harm, there is no danger even if they have a domino effect on other individuals:

As to any danger exclusive of pain, the danger, if any, must consist in the tendency of the example. But what is the tendency of this example? To dispose others to engage in the same practises: but this practise for anything that has yet appeared produces not pain of any kind to anyone.[59]

Thus, according to Bentham, sodomy laws fail on all three grounds-they neither cause primary mischief, nor secondary mischief, nor any danger to society.

Bentham also critiqued criminal laws by analysing the utility of the punishment prescribed by them. He succinctly described the objective of law through the principles of utility-"The general object which all laws have, or ought to have...is to augment the total happiness of the community; [and] to exclude...everything that tends to subtract from that happiness."[59] According to Bentham, "all punishment in itself is evil"[59] because it reduces the level of happiness in society, and should be prescribed only if it "excludes some greater evil."[59] Bentham stipulated four kinds of situations where it is not utilitarian to inflict punishment:

1. Where it is *groundless*: where there is no mischief for it to prevent; the act not being mischievous upon the whole.

2. Where it must be *inefficacious*: where it cannot act so as to prevent the mischief.

3. Where it is *unprofitable*, or too expensive: where the mischief it would produce would be greater than what it prevented.

4. Where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.[253]

The Harm Principle

483. John Stuart Mill, in his treatise "On Liberty," makes a powerful case to preclude governments from interfering in those areas of an individual's life which are private. Mill's theory, which came to be called the "harm principle", suggests that the state can intrude into private life by way of sanction only if harm is caused to others or if the conduct is "other-affecting."[254] In Mill's words:

The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. **Over himself, over his own body and mind, the individual is sovereign.** [59]

Mill created a dichotomy between "self-regarding" actions (those which affect the individual himself and have no significant effect on society at large) and "other-regarding" actions (those which affect the society).[59] He was aware that in a way, all actions of an individual are likely to affect "those nearly connected with him and, in a minor degree, society at large."[59] However, he argued that as long as an action does not "violate a distinct and assignable obligation to any other person or persons", it may not be taken out of the self-regarding class of actions.[59] Thus, Mill proposed that "all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation" should be free from state interference.[59] He further added that the state and society are not justified in interfering in the self-regarding sphere, merely because they believe certain conduct to be "foolish, perverse, or wrong."[59]

Essentially, Mill created a taxonomy on types of conduct-(a) self-regarding actions should not be the subject of sanctions either from the state or society; (b) actions which may hurt others but do not violate any legal rights may only be the subject of public condemnation but not state sanction; (c) only action which violate the legal rights of others should be the subject of legal sanction (and public condemnation).[255] The harm principle thus, operated as a negative or limiting principle, with the main objective of restricting criminal law from penalising conduct merely on the basis of its perceived immorality or unacceptability when the same is not harmful.[256]

While Mill's theory was not propounded in relation to LGBTQ rights, his understanding of criminal law is well-suited to argue that sodomy laws criminalise 'self-regarding' actions which fall under the first category of conduct, and should not be subjected to sanctions either by the state or the society.

484. A jurisprudential debate on the interplay between criminal law and morality was set off when Lord Devlin delivered the 1959 Maccabean Lecture, titled "The Enforcement of Morals."[257] Lord Devlin's lecture was an attack against the Report of the Wolfenden Committee on Homosexual Offences and Prostitution ("Wolfenden Report"), which had recommended the decriminalisation of sodomy laws in England.[258] The Wolfenden Committee, headed by Sir John Wolfenden, Vice-Chancellor of Reading University, was set up in 1954 to consider the criminalisation of homosexuality and prostitution, in the wake of increased arrests and convictions in the UK for homosexuality between men.[59] Among those prosecuted for 'gross indecency' under the Buggery Act of 1553 and Sexual Offences Act of 1967 were eminent persons like Oscar Wilde, Alan Turing and Lord Montagu of Beaulieu.[59] After conducting a three-year long inquiry, carrying out empirical research, and interviewing three gay men, the Wolfenden Committee released its Report in 1957.[59] The Wolfenden Report recommended that:

Homosexual behaviour between consenting adults should no longer be a criminal offence... Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[259]

The Wolfenden Report stated that "it is not the purpose of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour..."[260] The Wolfenden Report acknowledged that the law and public opinion have a close relationship with each other-the law

ought to "follow behind public opinion" so that it garners the community support, while at the same time, the law must also fortify and lead public opinion.[261] However, it made out a strong case for divorcing morality from criminal law and stated that-"moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind."[153] Stating that homosexuality is not a mental illness, the Wolfenden Report clarified that homosexuality is "a sexual propensity for persons of one's own sex...[it] is a state or condition, and as such does not, and cannot, come within the purview of criminal law.[262]

485. Lord Devlin, perturbed by the Wolfenden Report's line of reasoning, framed questions on the issue of criminal law and morality:

1. Has society the right to pass judgments on all matters of morals?

2. If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?[263]

Devlin believed that society depends upon a common morality for its stability and existence.[264] On the basis of this belief, Devlin answered the above questions in the affirmative, stating that-society has the right to pass judgments on all matters of morality and also the right to use law to enforce such morality.[265] Devlin reasoned that society would disintegrate if a common morality was not observed. Therefore, society is justified in taking steps to preserve its morality as much as it preserves the government.[266] Devlin proposed that the common morality or "collective judgment of the society" should be ascertained taking into consideration the "reasonable man."[59] According to him, a reasonable man is an ordinary man whose judgment "may largely be a matter of feeling."[59] He added that if the reasonable man believed a practice to be immoral, and held this belief honestly and dispassionately, then for the purpose of law such practice should be considered immoral.[59]

486. Countering Devlin's theory, Hart argued that society is not held together by a common morality, for, after all, it is not a hive mind or a monolith, governed by a singular set of morals and principles.[267] Hart rebutted Devlin's argument in the following way:

...apart from one vague reference to 'history' showing the 'the loosening of moral bonds is often the first stage of disintegration,' no evidence is produced to show that deviation from accepted sexual morality, even by adults in private is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it...Lord Devlin's belief in it [that homosexuality is a cause of societal disintegration], and his apparent indifference to the question of evidence, are at points traceable to an undiscussed assumption. This is that all morality-sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty--forms a single seamless web, so that those who deviate from any part are likely to perhaps bound to deviate from the whole. It is of course clear (and one of the oldest insights of political theory) that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others. But there is again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society.[268]

Despite countering Devlin, Hart was not completely opposed to a relationship between law and morality, and in fact, he emphasised that the two are closely related:

The law of every modem state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process...The further ways in which law mirrors morality are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fairness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility.[269]

However, unlike Devlin, Hart did not propose that morality is a necessary condition for the validity of law.[270] Hart argued, in summary, that "law is morally relevant," but "not morally conclusive."[59] Hart vehemently disagreed with Devlin's view that if laws are not based on some collective morality and enacted to buttress that morality, society will disintegrate.[271] Hart draws this distinction by conceding that certain sexual acts (including homosexual acts) were considered 'immoral' by mainstream Western society but adding that private sexual acts are an issue of "private morality" over which society has no interest and the law, no control.[272]

Hart further expounded his warning about the imposition of majoritarian morals, propounding that "[I]t is fatally easy to confuse the democratic principle that power should be in the hands of the majority with the utterly different claim that the majority, with power in their hands, need respect no limits"[273]:

Whatever other arguments there may be for the enforcement of morality, no one should think even when popular morality is supported by an "overwhelming majority" or marked by widespread "intolerance, indignation, and disgust" that loyalty to democratic principles requires him to admit that its imposition on a minority is justified.[274]

In this way, Hart avoided the specious generalization that the law must be severely quarantined from morality but still made it clear that laws like Section 377, which impose a majoritarian view of right and wrong upon a minority in order to protect societal cohesion, are jurisprudentially and democratically impermissible.

Bentham had a different view on morality and weighed morality against utilitarian principles. Bentham argued that if the punishment is not utilitarian (i.e. does not serve as a deterrent, is unprofitable, or unnecessary), the 'immoral' action would have to go unpunished.[275] He opined that legislators should not be overly swayed by the society's morality:

The strength of their prejudice is the measure of the indulgence which should be granted to it...The legislator ought to yield to the violence of a current which carries away everything that obstructs it.

But ought the legislator to be a slave to the fancies of those whom he governs? No. Between an imprudent opposition and a servile compliance, there is a middle path, honourable and safe.[59]

In other words, it appears that Bentham argued that the morality of the people ought not be ignored in creating laws but also must not become their unchecked fount. And if prejudicial moralities arise from the people, they should not be unthinkingly and permanently cemented into the law, but rather addressed and conquered.

John Stuart Mill also made a strong argument against popular morality being codified into laws. He argued that 'disgust' cannot be classified as harm, and those "who consider as an injury to themselves any conduct which they have a distaste for", cannot dictate the actions of others merely because such actions contradict their own beliefs or views.[276] Mill believed that society is not the right judge when dealing with the question of when to interfere in conduct that is purely personal, and that when society does interfere, "the odds are that it interferes wrongly and in the wrong place.[59]

487. Christopher R Leslie points out the dangers of letting morality creep into law:

Current generations enshrine their morality by passing laws and perpetuate their prejudices by handing these laws down to their children. Soon, statutes take on lives of their own, and their very existence justifies their premises and consequent implications. The underlying premises of ancient laws are rarely discussed, let alone scrutinized.[277]

Leslie further adds that "sodomy laws do not merely express societal disapproval; they go much further by creating a criminal class"[278]:

Sodomy laws are kept on the books, even though state governments do not intend to actively enforce them, because the laws send a message to society that homosexuality is unacceptable. Even without actual criminal prosecution, the laws carry meaning... In short, the primary importance of sodomy laws today is the government's message to diminish the societal status of gay men and lesbians.[59]

488. A broad analysis of criminal theory points to the general conclusion that criminologists and legal philosophers have long been in agreement about one basic characteristic of crime: that it should injure a third person or the society. An element of larger public interest emerges as the crux of crime. The conduct which Section 377 criminalises voluntary 'carnal intercourse against the order of nature' with a man or woman, *inter alia*-pertains solely to acts between consenting adults. Such conduct is purely private, or as Mill would call it, "self-regarding," and is neither capable of causing injury to someone else nor does it pose a threat to the stability and security of society. Once the factor of consent is established, the question of such conduct causing any injury, does not arise.

Although Section 377 prima facie appears to criminalise certain acts or conduct, it creates a class of criminals, consisting of individuals who engage in consensual sexual activity. It typecasts LGBTQ individuals as sex-offenders, categorising their consensual conduct on par with sexual offences like rape and child molestation. Section 377 not only criminalises acts (consensual sexual conduct between adults) which should not constitute crime, but also stigmatises and condemns LGBTQ individuals in society.

489. We are aware of the perils of allowing morality to dictate the terms of criminal law. If a single, homogenous morality is carved out for a society, it will undoubtedly have the effect of hegemonizing or 'othering' the morality of minorities. The LGBTQ community has been a victim of the pre-dominant (Victorian) morality which prevailed at the time when the Indian Penal Code was drafted and enacted. Therefore, we are inclined to observe that it is constitutional morality, and not mainstream views about sexual morality, which should be the driving factor in determining the validity of Section 377.

L Constitutional morality

490. With the attainment of independence on 15 August 1947, Indians were finally free to shape their own destiny.[279] The destiny was to be shaped through a written Constitution. Constitutions are scripts in which people inscribe the text of their professed collective destiny. They write down who they think they are, what they want to be, and the principles that will guide their interacting along that path in the future.[280] The Constitution of India was burdened with the challenge of "drawing a curtain on the past"[113] of social inequality and prejudices. Those who led India to freedom established into the Constitution the ideals and vision of a vibrant equitable society. The framing of India's Constitution was a medium of liberating the society by initiating the process of establishing and promoting the shared values of liberty, equality and fraternity. Throughout history, socio-cultural revolts, anti-discrimination assertions, movements, literature and leaders have worked at socializing people away from supremacist thought and towards an egalitarian existence. The Indian Constitution is an expression of these assertions. It was an attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society. All citizens were to be free from coercion or restriction by the state, or by society privately.[282] Liberty was no longer to remain the privilege of the few. The judgment in **Puttaswamy** highlights the commitment of the constitution makers, thus:

The vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere.

491. Understanding the vision of India at a time when there was little else older than that vision, is of paramount importance for the reason that though the people may not have played any role in the actual framing of the Constitution, the Preamble professes that the Constitution has been adopted by the people themselves. Constitutional historian Granville Austin has said that the Indian Constitution is essentially a social document.[283] The Indian Constitution does not provide merely a framework of governance. It embodies a vision. It is goal-oriented and its purpose is to bring about a social transformation in the country. It represents the aspirations of its framers. The democratic Constitution of India embodies provisions which are value-based.

492. During the framing of the Constitution, it was realized by the members of the Constituent Assembly that there was a wide gap between constitutional precept and reality. The draftspersons were clear that the imbibing of new constitutional values by the population at large would take some time. Society was not going to change overnight. Dr Ambedkar remarked in the Constituent Assembly:

Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.

493. The values of a democracy require years of practice, effort, and experience to make the society work with those values. Similar is the position of non-discrimination, equality, fraternity and secularism. While the Constitution guarantees equality before the law and equal protection of the law, it was felt that the realization of the constitutional vision requires the existence of a commitment to that vision. Dr Ambedkar described this commitment to be the presence of constitutional morality among the members of the society. The conception of constitutional morality is different from that of public or societal morality. Under a regime of public morality, the conduct of society is determined by popular perceptions existent in society. The continuance of certain symbols, labels, names or body shapes determine the notions, sentiments and mental attitudes of the people towards individuals and things.[284] Constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society. It assumes that citizens would respect the vision of the framers of the Constitution and would conduct themselves in a way which furthers that vision. Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance. It builds and protects the foundations of a democracy, without which any nation will crack under its fissures. For this reason, constitutional morality has to be imbibed by the citizens consistently and continuously. Society must always bear in mind what Dr Ambedkar observed before the Constituent Assembly:

Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it.

494. In the decision in **Government of NCT of Delhi** v. **Union of India** MANU/SC/0680/2018 : 2018 (8) SCALE 72, the Constitution Bench of this Court dealt with the constitutive elements of constitutional morality which govern the working of a democratic system and representative form of government. Constitutional morality was described as founded on a "constitutional culture", which requires the "existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain." This Court held thus:

If the moral values of our. Constitution were not upheld at every stage, the text of the Constitution may not be enough to protect its democratic values.

This Court held that constitutional morality acts a check against the "tyranny of the majority" and as a "threshold against an upsurge in mob rule." It was held to be a balance against popular public morality.

495. Constitutional morality requires in a democracy the assurance of certain minimum rights, which are essential for free existence to every member of society. The Preamble to the Constitution recognises these rights as "Liberty of thought, expression, belief, faith and worship" and "Equality of status and of opportunity." Constitutional morality is the guarantee which seeks that all inequality is eliminated from the social structure and each individual is assured of the means for the enforcement of the rights guaranteed. Constitutional morality leans towards making Indian democracy vibrant by infusing a spirit of brotherhood amongst a heterogeneous population, belonging to different classes, races, religions, cultures, castes and sections. Constitutional morality cannot, however, be nurtured unless, as recognised by the Preamble, there exists

fraternity, which assures and maintains the dignity of each individual. In his famous, yet undelivered speech titled "Annihilation of Caste" (which has been later published as a book), Dr Ambedkar described 'fraternity' as "primarily a mode of associated living, of conjoint communicated experience" and "essentially an attitude of respect and reverence towards fellow men."[284] He remarked:

An ideal society should be mobile, should be full of channels for conveying a change taking place in one part to other parts. In an ideal society there should be many interests consciously communicated and shared. There should be varied and free points of contact with other modes of association. In other words there must be social endosmosis. This is fraternity, which is only another name for democracy.

In his last address to the Constituent Assembly, he defined fraternity as "a sense of common brotherhood of all Indians." As on the social and economic plane, Indian society was based on graded inequality, Dr Ambedkar had warned in clear terms:

Without fraternity, liberty [and] equality could not become a natural course of things. It would require a constable to enforce them... Without fraternity equality and liberty will be no deeper than coats of paint.[285]

496. Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which, above all, the Constitution seeks to achieve. This acknowledgement carries a necessary implication: the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so. Hence, constitutional courts are entrusted with the duty to act as external facilitators and to be a vigilant safeguard against excesses of state power and democratic concentration of power. This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish. Popular public morality cannot affect the decisions of this Court. Lord Neuberger (of the UK Supreme Court) has aptly observed:

We must always remember that Parliament has democratic legitimacy-but that has disadvantages as well as advantages. The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an independent body of people who do not have to worry about short term popularity.[286]

The flourishing of a constitutional order requires not only the institutional leadership of constitutional courts, but also the responsive participation of the citizenry.[287] Constitutional morality is a pursuit of this responsive participation. The Supreme Court cannot afford to denude itself of its leadership as an institution in expounding constitutional values. Any loss of its authority will imperil democracy itself.

497. The question of morality has been central to the concerns around homosexuality and the rights of LGBT individuals. Opponents-including those of the intervenors who launched a diatribe in the course of hearing-claim that homosexuality is against popular culture and is thus unacceptable in

Indian society. While dealing with the constitutionality of Section 377 of the Indian Penal Code, the Delhi High Court in **Naz Foundation** had held:

Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights Under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality... In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.

The invocation of constitutional morality must be seen as an extension of Dr. Ambedkar's formulation of social reform and constitutional transformation. Highlighting the significance of individual rights in social transformation, he had observed:

The assertion by the individual of his own opinions and beliefs, his own independence and interest--over and against group standards, group authority, and group interests--is the beginning of all reform. But whether the reform will continue depends upon what scope the group affords for such individual assertion.[288]

After the enactment of the Constitution, every individual assertion of rights is to be governed by the principles of the Constitution, by its text and spirit. The Constitution assures to every individual the right to lead a dignified life. It prohibits discrimination within society. It is for this reason that constitutional morality requires this Court to issue a declaration-which we now do-that LGBT individuals are equal citizens of India, that they cannot be discriminated against and that they have a right to express themselves through their intimate choices. In upholding constitutional morality, we affirm that the protection of the rights of LGBT individuals are not only about guaranteeing a minority their rightful place in the constitutional scheme, but that we equally speak of the vision of the kind of country we want to live in and of what it means for the majority.[289] The nine-judge Bench of this Court in **Puttaswamy** had held in clear terms that discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Bench held:

The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the Rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties.

Constitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. After the Constitution came into force, no law can be divorced from constitutional morality. Society cannot dictate the expression of sexuality between

consenting adults. That is a private affair. Constitutional morality will supersede any culture or tradition.

The interpretation of a right in a matter of decriminalisation and beyond must be determined by the norms of the Constitution.

498. LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. Constitutional morality requires that this Court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.[59] Constitutional morality must turn into a habit of citizens. By respecting the dignity of LGBT individuals, this Court is only fulfilling the foundational promises of our Constitution.

M In summation: transformative constitutionalism

499. This case has required a decision on whether Section 377 of the Penal Code fulfills constitutional standards in penalising consensual sexual conduct between adults of the same sex. We hold and declare that in penalising such sexual conduct, the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their constitutional right to lead fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law.

500. Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.

501. The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.

502. Sexual and gender based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.

503. The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to

intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.

504. This reference to the Constitution Bench is about the validity of Section 377 in its application to consensual sexual conduct between adults of the same sex. The constitutional principles which we have invoked to determine the outcome address the origins of the rights claimed and the source of their protection. In their range and content, those principles address issues broader than the acts which the statute penalises. Resilient and universal as they are, these constitutional values must enure with a mark of permanence.

505. Above all, this case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks-as well-to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binarities of gender. In dealing with these issues we confront much that polarises our society. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.

506. A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution.

507. The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored.

508. We hold and declare that:

(i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;

(ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;

(iii) The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;

(iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and

(v) The decision in **Koushal** stands overruled.

Acknowledgment

Before concluding, I acknowledge the efforts of counsel for the Petitioners and intervenors who appeared in this case-Mr. Mukul Rohatgi, Mr. Arvind Datar, Mr. Ashok Desai, Mr. Anand Grover, Mr. Shyam Divan, Mr. CU Singh and Mr. Krishnan Venugopal, Senior Counsel; and Mr. Saurabh Kirpal, Dr Menaka Guruswamy and Ms. Arundhati Katju, and Ms. Jayna Kothari, learned Counsel. Their erudition has enabled us to absorb, as we reflected and wrote. Mr. Tushar Mehta, learned Additional Solicitor General appeared for the Union of India. We acknowledge the assistance rendered by the counsel for the intervenors who opposed the Petitioners.

Indu Malhotra, J.

509. I have had the advantage of reading the opinions prepared by the Hon'ble Chief Justice, and my brother Judges Justice Nariman and Justice Chandrachud. The Judgments have dealt in-depth with the various issues that are required to be examined by this Bench, to answer the reference.

510. The present batch of Writ Petitions have been filed to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 ("**IPC**") on the specific ground that it criminalises consensual sexual intercourse between adult persons belonging to the same sex in private.

511. The issue as to whether the decision in *Suresh Kumar Koushal* v. *Naz Foundation and Ors.* MANU/SC/1278/2013 : (2014) 1 SCC 1 requires re-consideration was referred to the Constitution Bench vide Order dated 8th January, 2018.

512. The Petitioners have *inter alia* submitted that sexual expression and intimacy between consenting adults of the same sex in private ought to receive protection under Part III of the Constitution, as sexuality lies at the core of a human being's innate identity. Section 377 inasmuch as it criminalises consensual relationships between same sex couples is violative of the fundamental rights guaranteed by Articles 21, 19 and 14, in Part III of the Constitution.

The principal contentions raised by the Petitioners during the course of hearing are:

i. Fundamental rights are available to LGBT persons regardless of the fact that they constitute a minority.

ii. Section 377 is violative of Article 14 being wholly arbitrary, vague, and has an unlawful objective.

iii. Section 377 penalises a person on the basis of their sexual orientation, and is hence discriminatory Under Article 15.

iv. Section 377 violates the right to life and liberty guaranteed by Article 21 which encompasses all aspects of the right to live with dignity, the right to privacy, and the right to autonomy and self-determination with respect to the most intimate decisions of a human being.

513. During the course of hearing, the Union of India tendered an Affidavit dated 11th July, 2018 wherein it was submitted that with respect to the Constitutional validity of Section 377 insofar as it applies to consensual acts of adults in private, the Union of India would leave the said question to the wisdom of this Hon'ble Court.

However, if the Court is to decide and examine any issue other than the Constitutional validity of Section 377, or construe any other right in favour of the LGBT community, the Union of India would like to file a detailed Affidavit as that would have far-reaching and wide ramifications, not contemplated by the reference.

514. Legislative Background

514.1. The legal treatises Fleta and Britton, which date back to 1290 and 1300 respectively, documented prevailing laws in England at the time. These treatises made references to sodomy as a crime.[290]

514.2. The Buggery Act, 1533 was re-enacted in 1563 during the regime of Queen Elizabeth I, which penalized acts of sodomy by hanging.

In 1861, death penalty for buggery was abolished in England and Wales. However, it remained a crime "not to be mentioned by Christians".

514.3. The 1861 Act became the charter for enactments framed in the colonies of Great Britain.

514.4. The Marginal Note of Section 377, refers to "Unnatural Offences". Section 377 reads as under:

377. Unnatural offences.-- *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Explanation.--Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

514.5. Section 377 does not define "carnal intercourse against the order of nature". Even though the provision is facially neutral, the Petitioners submit that the thrust of this provision has been to target the LGBT community in light of the colonial history of anti-sodomy laws, and penalise what was perceived to be 'deviant' or 'perverse' sexual behaviour.

515. In the early 20th century, there were many psychiatric theories which regarded homosexuality as a form of psychopathology or developmental arrest.[291] It was believed that normal development

resulted in a child growing up to be a heterosexual adult, and that homosexuality was but a state of arrested development.[292] Homosexuality was treated as a disorder or mental illness, which was meted out with social ostracism and revulsion.

516. Towards the end of the 20th century, this notion began to change, and the earlier theories gave way to a more enlightened perspective that characterized homosexuality as a normal and natural variant of human sexuality. Scientific studies indicated that human sexuality is complex and inherent.[293]

Kurt Hiller in his speech delivered at the Second International Congress for Sexual Reform held at Copenhagen in 1928[294], stated:

Same-sex love is not a mockery of nature, but rather nature at play...As Nietzsche expressed it in Daybreak, Procreation is a frequently occurring accidental result of one way of satisfying the sexual drive-it is neither its goal nor its necessary consequence. The theory which would make procreation the goal of sexuality is exposed as hasty, simplistic and false by the phenomenon of same-sex love alone. Nature's laws, unlike the laws formulated by the human mind, cannot be violated. The assertion that a specific phenomenon of nature could somehow be "contrary to nature" amounts to pure absurdity...To belong, not to the rule, not to the norm, but rather to the exception, to the minority, to the variety, is neither a symptom of degeneration nor of pathology.

517. In 1957, the United Kingdom published the Wolfenden Committee Report (supra) which recognised how the anti-sodomy laws had created an atmosphere for blackmail, harassment and violence against homosexuals. An extract of the findings of this Committee reads as under:

We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with attendant legal consequences, or the threat of disclosure to the victim's relatives, employers or friends, with attendant social consequences. It may well be that the latter is the more effective weapon, but it may yet be true that it would lose much of its edge if the social consequences were not associated with the present legal position.

Pursuant to this Report, the House of Lords initiated legislation to de-criminalise homosexual acts done in private by consenting parties. The Sexual Offences Act, 1967 came to be passed in England which de-criminalised homosexual acts done in private, provided the parties had consented to it, and were above the age of 21.

518. The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognised to be violative of human rights. In 2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report[295] that 124 countries no longer penalise homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments.

Relationships between same-sex couples have been increasingly accorded protection by States across the world. As per the aforesaid Report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognise partnerships between same-sex couples. Several

countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children.[293] For instance, the United Kingdom now outlaws discrimination in employment, education, social protection and housing on the ground of sexual orientation. Marriage between same-sex couples have been recognised in England and Wales.

The British Prime Minister Theresa May in her speech at the Commonwealth Joint Forum on April 17, 2018 urged Commonwealth Nations to overhaul "outdated" anti-gay laws, and expressed regret regarding Britain's role in introducing such laws.[296] The relevant excerpt of her speech is extracted hereinbelow:

Across the world, discriminatory laws made many years ago continue to affect the lives of many people, criminalising same-sex relations and failing to protect women and girls.

I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today.

519. Section 377 has, however, remained in its original form in the Indian Penal Code to date.

520. Judicial Interpretation

520.1. The essential ingredient required to constitute an offence Under Section 377 is "carnal intercourse against the order of nature", which is punishable with life imprisonment, or imprisonment of either description up to ten years. Section 377 applies irrespective of gender, age, or consent.

520.2. The expression 'carnal intercourse' used in Section 377 is distinct from 'sexual intercourse' which appears in Sections 375 and 497 of the Indian Penal Code. The phrase "carnal intercourse against the order of nature" is not defined by Section 377, or in the Code.

520.3. The term 'carnal' has been the subject matter of judicial interpretation in various decisions. According to the New International Webster's Comprehensive Dictionary of the English Language[297], 'carnal' means:

1. Pertaining to the fleshly nature or to bodily appetites.

2. Sensual; sexual.

3. Pertaining to the flesh or to the body; not spiritual; hence worldly.

520.4. The courts had earlier interpreted the term "carnal" to refer to acts which fall outside penile-vaginal intercourse, and were not for the purposes of procreation.

In *Khanu* v. *Emperor* AIR 1925 Sind 286, the Sindh High Court was dealing with a case where the Accused was found guilty of having committed Gomorrah *coitus per os* with a little child, and

was convicted Under Section 377. The Court held that the act of carnal intercourse was clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible.

The Lahore High Court in *Khandu* v. *Emperor* MANU/LA/0185/1933 : AIR 1934 Lah 261: 1934 Cri. LJ 1096 was dealing with a case wherein the Accused had penetrated the nostril of a bullock with his penis. The Court, while relying on the decision of the Sindh High Court in *Khanu* v. *Emperor* (supra) held that the acts of the Accused constituted *coitus per os*, were punishable Under Section 377.

In *Lohana Vasantlal Devchand and Ors.* v. *State* MANU/GJ/0076/1968 : AIR 1968 Guj 252 the Gujarat High Court convicted two Accused Under Section 377 read with Section 511 of the Indian Penal Code, on account of having carnal intercourse per anus, and inserting the penis in the mouth of a young boy. It was held that:

...words used (in Section 377) are quite comprehensive and in my opinion, an act like the present act (oral sex), which was an imitative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act punishable Under Section 377 of the Indian Penal Code.

Later this Court in *Fazal Rab Choudhary* v. *State of Bihar* MANU/SC/0064/1982 : (1982) 3 SCC 9 while reducing the sentence of the Appellant who was convicted for having committed an offence on a young boy Under Section 377 Indian Penal Code, held that:

...The offence is one Under Section 377 Indian Penal Code, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.

The test for attracting penal provisions Under Section 377 changed over the years from non-procreative sexual acts in *Khanu* v. *Emperor* (supra), to imitative sexual intercourse like oral sex in *Lohana Vasantlal Devchand* v. *State* (supra), to sexual perversity in *Fazal Rab* v. *State of Bihar* (supra). These cases referred to nonconsensual sexual intercourse by coercion.

521. Homosexuality-Not an aberration but a variation of sexuality

521.1. Whilst a great deal of scientific research has examined possible genetic, hormonal, developmental, psychological, social and cultural influences on sexual orientation, no findings have conclusively linked sexual orientation to any one particular factor or factors. It is believed that one's sexuality is the result of a complex interplay between nature and nurture.

Sexual orientation is an innate attribute of one's identity, and cannot be altered. Sexual orientation is not a matter of choice. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality.

The U.S. Supreme Court in Lawrence v. Texas MANU/USSC/0070/2003 : 539 U.S. 558(2003) relied upon the Brief of the Amici Curiae[298] which stated:

Heterosexual and homosexual behavior are both normal aspects of human sexuality. Both have been documented in many different human cultures and historical eras, and in a wide variety of animal species. There is no consensus among scientists about the exact reasons why an individual develops a heterosexual, bisexual, or homosexual orientation. According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience. Most or many gay men and lesbians experience little or no choice about their sexual orientation.

521.2. An Article by K.K. Gulia and H.N. Mallick titled

Homosexuality: A Dilemma in Discourse"[299] states:

In general, homosexuality as a sexual orientation refers to an enduring pattern or disposition to experience sexual, affectional, or romantic attractions primarily to people of the same sex. It also refers to an individual's sense of personal and social identity based on those attractions, behaviours, expressing them, and membership in a community of others who share them. It is a condition in which one is attracted and drawn to his/her own gender, which is evidenced by the erotic and emotional involvement with members of his/her own sex... ...In the course of the 20th century, homosexuality became a subject of considerable study and debate in western societies. It was predominantly viewed as a disorder or mental illness. At that time, emerged two major pioneering studies on homosexuality carried out by Alfred Charles Kinsey (1930) and Evelyn Hooker (1957)...This empirical study of sexual behavior among American adults revealed that a significant number of participants were homosexuals. In this study when people were asked directly if they had engaged in homosexual relations, the percentage of positive responses nearly doubled. The result of this study became the widely popularized Kinsey Scale of Sexuality. This scales rates all individuals on a spectrum of sexuality, ranging from 100% heterosexual to 100% homosexual...

521.3. The American Psychiatric Association in December 1973 removed 'homosexuality' from the Diagnostic and Statistical Manual of Psychological Disorders, and opined that the manifestation of sexual attraction towards persons of the opposite sex, or same sex, is a natural condition.[300]

521.4. The World Health Organization removed homosexuality from the list of diseases in the International Classification of Diseases in the publication of ICD-10 in 1992.[301]

521.5. In India, the Indian Psychiatric Society has also opined that sexual orientation is not a psychiatric disorder. It was noted that:

...there is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person.[302]

521.6. It is relevant to note that Under Section 3 of the Mental Healthcare Act, 2017, determination of what constitutes a "mental illness" has to be done in accordance with nationally and

internationally accepted medical standards, including the latest edition of the International Classification of Disease of the World Health Organisation.

522. Section 377 if applied to consenting adults is violative of Article 14

522.1. One of the main contentions raised by the Petitioners to challenge the Constitutional validity of Section 377 is founded on Article 14 of the Constitution. Article 14 enshrines the principle of equality as a fundamental right, and mandates that the State shall not deny to any person equality before the law, or the equal protection of the laws within the territory of India. It recognizes and guarantees the right of equal treatment to all persons in this country.

It is contended that Section 377 discriminates against adults of the same gender, from having a consensual sexual relationship in private, by treating it as a penal offence, and hence is violative of Article 14.

522.2. The twin-test of classification Under Article 14 provides that:

(i) there should be a reasonable classification based on intelligible differentia; and,

(ii) this classification should have a rational nexus with the objective sought to be achieved.

522.3. Section 377 operates in a vastly different manner for two classes of persons based on their "sexual orientation" i.e. the LGBT persons and heterosexual persons. Section 377 penalises all forms of non penile-vaginal intercourse. In effect, voluntary consensual relationships between LGBT persons are criminalised in totality.

The import and effect of Section 377 is that while a consensual heterosexual relationship is permissible, a consensual relationship between LGBT persons is considered to be 'carnal', and against the order of nature.

Section 377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.

522.4. In *National Legal Services Authority* v. *Union of India and Ors.* MANU/SC/0309/2014 : (2014) 5 SCC 438 this Court granted equal protection of laws to transgender persons. There is therefore no justification to deny the same to LGBT persons.

522.5. A person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.

522.6. In contemporary civilised jurisprudence, with States increasingly recognising the status of same-sex relationships, it would be retrograde to describe such relationships as being 'perverse', 'deviant', or 'unnatural'.

522.7. Section 375 defines the offence of rape. It provides for penetrative acts which if performed by a man against a woman without her consent, or by obtaining her consent under duress, would amount to rape. Penetrative acts (after the 2013 Amendment) include anal and oral sex.

The necessary implication which can be drawn from the amended provision is that if such penetrative acts are done with the consent of the woman they are not punishable Under Section 375.

While Section 375 permits consensual penetrative acts (the definition of 'penetration' includes oral and anal sex), Section 377 makes the same acts of penetration punishable irrespective of consent. This creates a dichotomy in the law.

522.8. The proscription of a consensual sexual relationship Under Section 377 is not founded on any known or rational criteria. Sexual expression and intimacy of a consensual nature, between adults in private, cannot be treated as "carnal intercourse against the order of nature".

522.9. Emphasising on the second part of Article 14 which enjoins the State to provide equal protection of laws to all persons, Nariman, J. in his concurring opinion in *Shayara Bano* v. *Union of India and Ors.* MANU/SC/1031/2017 : (2017) 9 SCC 1 elucidated on the doctrine of manifest arbitrariness as a facet of Article 14. Apart from the conventional twin-tests of classification discussed in the preceding paragraphs, a legislation, or part thereof, can also be struck down Under Article 14 on the ground that it is manifestly arbitrary. It would be instructive to refer to the following passage from the judgment of this Court in *Shayara Bano* v. *Union of India and Ors.* (supra):

101. ...Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.

Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle, since the basis of criminalisation is the "sexual orientation" of a person, over which one has "little or no choice".

Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community.

Thus, apart from not satisfying the twin-test Under Article 14, Section 377 is also manifestly arbitrary, and hence violative of Article 14 of the Constitution.

523. Section 377 is violative of Article 15

Article 15 prohibits the State from discrimination against any citizen on the grounds of religion, race, caste, sex, or place of birth. The object of this provision was to guarantee protection to those citizens who had suffered historical disadvantage, whether it be of a political, social, or economic nature.

523.1. The term 'sex', as it occurs in Article 15 has been given an expansive interpretation by this Court in *National Legal Services Authority* v. *Union of India* (referred to as the NALSA judgment) to include sexual identity. Paragraph 66 of the judgment reads thus:

66. ...Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes includes one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex Under Article 15 and 16, therefore includes discrimination on the ground of gender identity. The expression sex used in Articles 15 and 16 is not just limited to biological sex of male and female, but intended to include people who consider themselves neither male nor female.

Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their "sexual identity and character".

The J.S. Verma Committee[303] had recommended that 'sex' Under Article 15 must include 'sexual orientation':

65. We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further, we are clear that Article 15(c) of the constitution of 52 India uses the word "sex" as including sexual orientation.

The prohibition against discrimination Under Article 15 on the ground of 'sex' should therefore encompass instances where such discrimination takes place on the basis of one's sexual orientation.

In this regard, the view taken by the Human Rights Committee of the United Nations in *Nicholas Toonen* v. *Australia*[304] is relevant to cite, wherein the Committee noted that the reference to 'sex' in Article 2, Paragraph 1 and Article 26 of the International Covenant on Civil and Political Rights would include 'sexual orientation'.

523.2. In an Article titled "*Reading Swaraj into Article 15: A New Deal For All Minorities*"[305], Tarunabh Khaitan notes that the underlying commonality between the grounds specified in Article 15 is based on the ideas of 'immutable status' and 'fundamental choice'. He refers to the following quote by John Gardener to provide context to the aforesaid commonality:

Discrimination on the basis of our immutable status tends to deny us [an autonomous] life. Its result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them..... And discrimination on the ground of fundamental choices can be wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that life.... there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others.[306]

Race, caste, sex, and place of birth are aspects over which a person has no control, *ergo* they are immutable. On the other hand, religion is a fundamental choice of a person.[307] Discrimination based on any of these grounds would undermine an individual's personal autonomy.

The Supreme Court of Canada in its decisions in the cases of *Egan* v. *Canada* MANU/SCCN/0107/1995 : [1995] SCC 98, and Vriend v. Alberta MANU/SCCN/0057/1998 : [1998] SCC 816, interpreted Section 15(1)[308] of the Canadian Charter of Rights and Freedoms which is *pari materia* to Article 15 of the Indian Constitution.

Section 15(1), of the Canadian Charter like Article 15 of our Constitution, does not include "sexual orientation" as a prohibited ground of discrimination. Notwithstanding that, the Canadian Supreme Court in the aforesaid decisions has held that sexual orientation is a "ground analogous" to the other grounds specified Under Section 15(1). Discrimination based on any of these grounds has adverse impact on an individual's personal autonomy, and is undermining of his personality.

A similar conclusion can be reached in the Indian context as well in light of the underlying aspects of immutability and fundamental choice.

The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.

524. Section 377 violates the right to life and liberty guaranteed by Article 21

Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Such procedure established by law must be fair, just and reasonable.[309]

The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination.

524.1. Right to Live with Dignity

This Court has expansively interpreted the terms "life" and "personal liberty" to recognise a panoply of rights Under Article 21 of the Constitution, so as to comprehend the true scope and

contours of the right to life Under Article 21. Article 21 is *"the most precious human right and forms the ark of all other rights"* as held in *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi and Ors.*, MANU/SC/0517/1981 : (1981) 1 SCC 608 wherein it was noted that the right to life could not be restricted to a mere animal existence, and provided for much more than only physical survival. MANU/SC/0517/1981 : (1981) 1 SCC 608 at paragraph 7. Bhagwati J. observed as under:

8...We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings...it must in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.

This was re-affirmed by the Constitution bench decision in *K.S. Puttaswamy and Anr.* v. *Union of India and Ors.* MANU/SC/1044/2017 : (2017) 10 SCC 1 and *Common Cause (A Registered Society)* v. *Union of India and Anr.* MANU/SC/0232/2018 : (2018) 5 SCC 1 at paragraphs 156, 437, 438, 488 & 516.

Although dignity is an amorphous concept which is incapable of being defined, it is a core intrinsic value of every human being. Dignity is considered essential for a meaningful existence.[310]

In *National Legal Services Authority* v. *Union of India and Ors.* (supra), this Court recognised the right of transgender persons to decide their self-identified gender. In the context of the legal rights of transgender persons, this Court held that sexual orientation and gender identity is an integral part of their personality.

The relevant excerpt from Radhakrishnan, J.'s view is extracted hereinbelow:

22. ...Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom....

Sexual orientation is innate to a human being. It is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality. LGBT persons have little or no choice over their sexual orientation. LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected Under Article 21. The right to life and liberty would encompass the right to sexual autonomy, and freedom of expression.

The following excerpt from the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Anr.* v. *Minister of Justice and Ors.* MANU/SACC/0007/1998 : [1998] ZACC 15 is also instructive in this regard:

While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or arrange the choice of partner, but for the partners to choose themselves.

Section 377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21. It inhibits them from entering and nurturing enduring relationships. As a result, LGBT individuals are forced to either lead a life of solitary existence without a companion, or lead a closeted life as "unapprehended felons".[311]

Section 377 criminalises the entire class of LGBT persons since sexual intercourse between such persons, is considered to be carnal and "against the order of nature". Section 377 prohibits LGBT persons from engaging in intimate sexual relations in private.

The social ostracism against LGBT persons prevents them from partaking in all activities as full citizens, and in turn impedes them from realising their fullest potential as human beings.

On the issue of criminalisation of homosexuality, the dissenting opinion of Blackmun J. of the U.S. Supreme Court in *Bowers* v. *Hardwick* MANU/USSC/0151/1986 : 478 U.S. 186 (1986) is instructive, which cites a previous decision in Paris Adult Theatre I v. Slaton MANU/USSC/0241/1973 : 413 U.S. 49 (1973) and noted as follows:

Only the most wilful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality. 478 US 186 (1986).

The U.S. Supreme Court over-ruled *Bowers* v. *Hardwick* (supra) in Lawrence et al. v. Texas. (supra) and declared that a statute proscribing homosexuals from engaging in intimate sexual conduct as invalid on the ground that it violated the right to privacy, and dignity of homosexual persons. Kennedy, J. in his majority opinion observed as under:

To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse...

...It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution

allows homosexual persons the right to make this choice...This stigma this criminal statute imposes, moreover, is not trivial. The offence, to be sure, is but a class C misdemeanour, a minor offence in the Texas legal system. Still, it remains a criminal offence with all that imports for the dignity of the persons charged. The Petitioners will bear on their record the history of criminal convictions....

...The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexuals persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engage in sexual practices, common to a homosexual lifestyle. The Petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. The right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. Casey, supra at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Thus, Section 377 prevents LGBT persons from leading a dignified life as guaranteed by Article 21.

524.2. Right to Privacy

The right to privacy has now been recognised to be an intrinsic part of the right to life and personal liberty Under Article 21.[312]

Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of Fundamental Rights guaranteed by Articles 14, 15, and 21.[313]

The right to privacy is broad-based and pervasive under our Constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and preserves the sanctity of the private sphere of an individual.[314]

The right to privacy is not simply the "right to be let alone", and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice.[315] It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.

Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence.

The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Anr.* v. *Minister of Justice and Ors.* (supra) noted as under:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

Just like other fundamental rights, the right to privacy is not an absolute right and is subject to reasonable restrictions. Any restriction on the right to privacy must adhere to the requirements of legality, existence of a legitimate state interest, and proportionality.[316]

A subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest.

The theme of inclusiveness permeates through Part III of the Constitution. Apart from the equality code of the Constitution comprised in Articles 14, 15(1), 16, and other provisions in the form of Article 17 (Abolition of Untouchability), Article 21A (Right to Education), Article 25 (Freedom of Conscience and Free Profession, Practice and Propagation of Religion), Article 26 (Freedom to Manage Religious Affairs), Article 29 (Protection of Interest of Minorities), Article 30 (Right of Minorities to Establish and Administer Educational Institutions) are aimed at creating an inclusive society where rights are guaranteed to all, regardless of their status as a minority.

524.3. Right to health

The right to health, and access to healthcare are also crucial facets of the right to life guaranteed Under Article 21 of the Constitution.[317]

LGBT persons being a sexual minority have been subjected to societal prejudice, discrimination and violence on account of their sexual orientation. Since Section 377 criminalises "carnal intercourse against the order of nature" it compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access to health-care facilities. This results in serious health issues, including depression and suicidal tendencies amongst members of this community.[318]

LGBT persons, and more specifically the MSM, and transgender persons are at a higher risk of contracting HIV as they lack safe spaces to engage in safe-sex practices. They are inhibited from seeking medical help for testing, treatment and supportive care on account of the threat of being 'exposed' and the resultant prosecution.[319] Higher rates of prevalence of HIV-AIDS in MSM, who are in turn married to other people of the opposite sex, coupled with the difficulty in detection and treatment, makes them highly susceptible to contraction and further transmission of the virus.

It is instructive to refer to the findings of the Human Rights Committee of the United Nations in *Nicholas Toonen* v. *Australia* (supra):

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes by driving underground many of the people at the risk of infection. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

The American Psychological Association, American Psychiatric Association, National Association of Social Workers and the Texas Chapter of the National Association of Social Workers in their Amicus Brief in *Lawrence, et al.* v. *Texas* (supra) stated as follows:

III. Texas Penal Code Section 21.06 reinforces prejudice, discrimination, and violence against gay men and lesbians...Although many gay men and lesbians learn to cope with the social stigma against homosexuality, this pattern of prejudice can cause gay people serious psychological distress, especially if they attempt to conceal or deny their sexual orientation....[320]

It is pertinent to mention that in India the Mental Healthcare Act, 2017 came into force on July 7, 2018. Sections 18(1) and (2) read with 21(1)(a) of the Mental Healthcare Act, 2017 provide for the right to access mental healthcare and equal treatment of people with physical and mental illnesses without discrimination, *inter alia,* on the basis of *"sexual orientation"*.

This gives rise to a paradoxical situation since Section 377 criminalises LGBT persons, which inhibits them from accessing health-care facilities, while the Mental Healthcare Act, 2017 provides a right to access mental healthcare without discrimination, even on the ground of 'sexual orientation'.

525. Section 377 violates the right to freedom of expression of LGBT persons

525.1. Article 19(1)(a) guarantees freedom of expression to all citizens. However, reasonable restrictions can be imposed on the exercise of this right on the grounds specified in Article 19(2).

LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed Under Section 377.[321] Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay 'in the closet'. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence. It also has an impact on their mental well-being.

525.2. In *National Legal Services Authority* v. *Union of India and Ors.* (supra), this Court noted that gender identity is an important aspect of personal identity and is inherent to a person. It was held that transgender persons have the right to express their self-identified gender by way of

speech, mannerism, behaviour, presentation and clothing, *etc.* MANU/SC/0309/2014 : (2014) 5 SCC 438, at paragraphs 69-72.

The Court also noted that like gender identity, sexual orientation is integral to one's personality, and is a basic aspect of self-determination, dignity and freedom. MANU/SC/0309/2014 : (2014) 5 SCC 438, at paragraph 22. The proposition that sexual orientation is integral to one's personality and identity was affirmed by the Constitution Bench in *K.S. Puttaswamy and Anr.* v. *Union of India and Ors.* MANU/SC/1044/2017 : (2017) 10 SCC 1, at paragraphs 144, 145, 647.

In this regard, it is instructive to refer to the decision of this Court in *S. Khushboo* v. *Kanniammal and Anr.* MANU/SC/0310/2010 : (2010) 5 SCC 600 wherein the following observation was made in the context of the phrase "decency and morality" as it occurs in Article 19(2):

45. Even though the constitutional freedom *of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as "decency and morality" among others, we must lay stress on the need to tolerate unpopular views in the sociocultural space. The Framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes.*

46. ...Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not coextensive.

Therefore, Section 377 cannot be justified as a reasonable restriction Under Article 19(2) on the basis of public or societal morality, since it is inherently subjective.

526. Suresh Kumar Koushal Overruled

The two-Judge bench of this Court in *Suresh Kumar Koushal and Anr.* v. *Naz Foundation and Ors.* (supra) over-ruled the decision of the Delhi High Court in *Naz Foundation* v. *Government of NCT of Delhi and Ors.* (supra)

which had declared Section 377 insofar as it criminalised consensual sexual acts of adults in private to be violative of Articles 14, 15 and 21 of the Constitution.

The grounds on which the two-judge bench of this Court over-ruled the judgment in Naz Foundation was that:

i. Section 377 does not criminalise particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct, regardless of gender identity and orientation.

Those who indulge in carnal intercourse in the ordinary course, and those who indulge in carnal intercourse against the order of nature, constitute different classes. Persons falling in the latter

category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. Section 377 merely defines a particular offence, and prescribes a punishment for the same.

ii. LGBT persons constitute a "miniscule fraction" of the country's population, and there have been very few prosecutions under this Section. Hence, it could not have been made a sound basis for declaring Section 377 to be ultra-vires Articles 14, 15, and 21.

iii. It was held that merely because Section 377, Indian Penal Code has been used to perpetrate harassment, blackmail and torture to persons belonging to the LGBT community, cannot be a ground for challenging the vires of the Section.

iv. After noting that Section 377 was intra vires, this Court observed that the legislature was free to repeal or amend Section 377.

527. The fallacy in the judgment of *Suresh Kumar Koushal* (supra) is that:

i. The offence of "carnal intercourse against the order of nature" has not been defined in Section 377. It is too wide, and open-ended, and would take within its sweep, and criminalise even sexual acts of consenting adults in private.

In this context, it would be instructive to refer to the decision of a Constitution Bench of this Court in *A.K. Roy* v. *Union of India* MANU/SC/0051/1981 : (1982) 1 SCC 271 wherein it was held that:

62. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding....

The judgment does not advert to the distinction between consenting adults engaging in sexual intercourse, and sexual acts which are without the will, or consent of the other party. A distinction has to be made between consensual relationships of adults in private, whether they are heterosexual or homosexual in nature.

Furthermore, consensual relationships between adults cannot be classified along with offences of bestiality, sodomy and non-consensual relationships.

Sexual orientation is immutable, since it is an innate feature of one's identity, and cannot be changed at will. The choice of LGBT persons to enter into intimate sexual relations with persons

of the same sex is an exercise of their personal choice, and an expression of their autonomy and self-determination.

Section 377 insofar as it criminalises voluntary sexual relations between LGBT persons of the same sex in private, discriminates against them on the basis of their "sexual orientation" which is violative of their fundamental rights guaranteed by Articles 14, 19, and 21 of the Constitution.

ii. The mere fact that the LGBT persons constitute a "miniscule fraction" of the country's population cannot be a ground to deprive them of their Fundamental Rights guaranteed by Part III of the Constitution. Even though the LGBT constitute a sexual minority, members of the LGBT community are citizens of this country who are equally entitled to the enforcement of their Fundamental Rights guaranteed by Articles 14, 15, 19, and 21.

Fundamental Rights are guaranteed to all citizens alike, irrespective of whether they are a numerical minority. Modern democracies are based on the twin principles of majority rule, and protection of fundamental rights guaranteed under Part III of the Constitution. Under the Constitutional scheme, while the majority is entitled to govern; the minorities like all other citizens are protected by the solemn guarantees of rights and freedoms under Part III.

The J.S. Verma Committee, in this regard, in paragraph 77 of its Report (supra) states that:

77. We need to remember that the founding fathers of our Constitution never thought that the Constitution is 'mirror of perverse social discrimination'. On the contrary, it promised the mirror in which equality will be reflected brightly. Thus, all the sexual identities, including sexual minorities, including transgender communities are entitled to be totally protected. The Constitution enables change of beliefs, greater understanding and is also an equally guaranteed instrument to secure the rights of sexually despised minorities.

iii. Even though Section 377 is facially neutral, it has been misused by subjecting members of the LGBT community to hostile discrimination, making them vulnerable and living in fear of the ever-present threat of prosecution on account of their sexual orientation.

The criminalisation of "*carnal intercourse against the order of nature*" has the effect of criminalising the entire class of LGBT persons since any kind of sexual intercourse in the case of such persons would be considered to be against the "*order of nature*", as per the existing interpretation.

iv. The conclusion in *Suresh Kumar Koushal's* case to await legislative amendments to this provision may not be necessary. Once it is brought to the notice of the Court of any violation of the Fundamental Rights of a citizen, or a group of citizens the Court will not remain a mute spectator, and wait for a majoritarian government to bring about such a change.

Given the role of this Court as the sentinel on the *qui vive*, it is the Constitutional duty of this Court to review the provisions of the impugned Section, and read it down to the extent of its inconsistency with the Constitution.

In the present case, reading down Section 377 is necessary to exclude consensual sexual relationships between adults, whether of the same sex or otherwise, in private, so as to remove the vagueness of the provision to the extent it is inconsistent with Part III of the Constitution.

528. History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination Under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'.

529. Conclusion

i. In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution.

It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.

ii. The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the reopening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

iii. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of beastiality.

iv. The judgment in *Suresh K. Koushal and Anr.* v. *Naz Foundation and Ors.* MANU/SC/1278/2013 : (2014) 1 SCC 1 is hereby overruled for the reasons stated in paragraph 18.

The Reference is answered accordingly.

In view of the above findings, the Writ Petitions are allowed.

---

[1]'Psychology of Sex' Twelfth Impression, 1948, London
[2]Posner, Richard: (1992) Sex and Reason, Harvard University Press, pg. 328. ISBN 0-674-80280-2

[3]Asking the Law Question: The Dissolution of Legal Theory 205 (2002), Margaret Davies.
[4]Van der Walt, Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state, 118 (2) J.S. APR.L. 258 (2001)
[5]Albertyn & Goldblatt, Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality, 14 S. AFR.J. HUM. RTS. 248 (1998)
[6]Constituent Assembly Debates, Vol. 7 (4th November 1948)
[7]Ibid
[8]Grote, A History of Greece. Routledge, London, 2000, p. 93.
[9]The role of human dignity in gay rights adjudication and legislation: A comparative perspective, Michele Finck, International Journal of Constitutional Law, Volume 14, Jan 2016, page No. 26 to 53
[10]Human Rights Gay Rights by Michael Kirby, Published in 'Humane Rights' in 2016 by Future Leaders
[11]56, New York State Bar Journal (No 3. April, 1984), p.50
[12]Judgment of 30 April 1996. P v. S and Cornwall County Council Case C-13/94. paras. 21-22.
[13]Sexual Orientation & Gender Identity - A New Province of Law for India, J. Michael D. Kirby, Tagore Lectures, 2013
[14]American Psychological Association, "Answers to Your Questions for a Better Understanding of Sexual Orientation & Homosexuality," 2008
[15]UNHCR GUIDELINES ON INTERNATIONAL PROTECTION No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees
[16]*Bowers v. Hardwick*, MANU/USSC/0151/1986 : 478 U.S. 186 (1986)
[17]Communication No. 453/1991, para. 10.2
[18]Communication No. 488/1992, U.C. Doc CCPR/C/50/D 488/1992, March 31, 1994, para. 8.3
[19]Lord Roskill, "Law Lords, Reactionaries or Reformers", Current Legal Problems (1984)
[20]G.R. No. 190582, Supreme Court of Philippines (2010)
[21]Black's Law Dictionary, 2nd edn.
[22]Semayne's Case, 77 Eng. Rep. 194, 195; 5 Co. Rep. 91, 195 (K.B. 1604)
[23]*Homo* in Greek means 'same' - the Nicene creed that was accepted by the Catholic Church after the Council at Nicaea, held by Emperor Constantine in 325 AD, was formulated with the word '*homo*' at the forefront. When coupled with '*sios*' it means same substance, meaning thereby that Jesus Christ was divine as he was of the same substance as God.
[24]Thomas Babington Macaulay was a Whig liberal who was a precocious genius. Apart from having a photographic memory with which he astounded persons around him, one incident which took place when Macaulay was only 5 years old told the world what was in store for it when Macaulay would reach adulthood. A lady dropped some hot coffee on the five-year old child and expressed great sorrow for doing so. The child riposted, after letting out a scream, "Madam, the agony has abated".
[25]Much more could have come from the pen of this genius. In fact, when crossing the U.S. Customs and being asked whether he had anything to declare, his famous answer was said to have been, "I have nothing to declare except my genius." But even unjust jail sentences can produce remarkable things - *The Ballad of Reading Gaol* is a masterpiece of English poetry which the world would never have received had he not been incarcerated in Reading Gaol.
[26]The impetus for this law was the prosecution of Alan Turing in 1952. Alan Turing was instrumental in cracking intercepted code messages that enabled the Allies to defeat Germany in

many crucial engagements in the War. Turing accepted chemical castration treatment as an alternative to prison upon conviction, but committed suicide just before his 42nd birthday in 1954.

[27]The majority's decision echoes what had happened earlier in what is referred to as the celebrated flag salute case, namely, **West Virginia State Board of Education v. Barnette,** MANU/USSC/0148/1943 : 319 U.S. 624 (1943). The U.S. Supreme Court had overruled its recent judgment in **Minersville School District v. Gobitis**, MANU/USSC/0138/1940 : 310 U.S. 586 (1940). Justice Jackson speaking for the majority of the Court found:

"The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly."

The learned Judge then went on to find:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

And finally, it was held:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

[28]This phrase occurs in one of the most celebrated footnotes in the US Supreme Court's constitutional history-namely, Footnote 4 of United **States v. Carolene Products Co.,** MANU/USSC/0118/1938 : 304 U.S. 144 (1938).

[29]In William Shakespeare's *Julius Caesar* (Act III, Scene 1), Caesar tells Cassius-

"I could be well moved, if I were as you;
If I could pray to move, prayers would move me:
But I am constant as the Northern Star,
Of whose true-fixed and resting quality
There is no fellow in the firmament."

[30]An argument was made by the Petitioners that Section 377, being vague and unintelligible, should be struck down on this ground as it is not clear as to what is meant by "against the order of nature". Since Section 377 applies down the line to carnal sex between human beings and animals as well, which is not the subject matter of challenge here, it is unnecessary to go into this ground as the Petitioners have succeeded on other grounds raised by them.

[31]Justice Leila Seth, "A mother and a judge speaks out on Section 377", The Times of India, 26 January, 2014.

[32]These terms as well as terms such as "LGBT" and "LGBTIQ" used in the judgment are to be construed in an inclusive sense to include members of all gender and sexual minorities, whose sexual activity is criminalized by the application of Section 377 of the Indian Penal Code, 1860.

[33]Lyrics from Leonard Cohen's song "Democracy" (1992).

[34]See Same-Sex Love in India: A Literary History (Ruth Vanita and Saleem Kidwai, eds.), Penguin India (2008) for writings spanning over more than 2,000 years of Indian literature which

demonstrate that same-sex love has flourished, evolved and been embraced in various forms since ancient times.
[35]Law like Love: Queer Perspectives on Law (Arvind Narrain and Alok Gupta, eds.), Yoda Press (2011).
[36]K.N. Chandrasekharan Pillai and Shabistan Aquil, "Historical Introduction to the Indian Penal Code", in Essays on the Indian Penal Code, New Delhi, Indian Law Institute (2005); Siyuan Chen, "Codification, Macaulay and the Indian Penal Code [Book Review], Singapore Journal of Legal Studies, National University of Singapore, Faculty of Law (2011), at pages 581-584.
[37]Douglas E. Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia", Asian Journal of Comparative Law, Vol. 4 (2009), at page 11 ("Douglas"); David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century", Modern Asian Studies, Vol. 32 (1998), at pages 513-557.
[38]Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles", Carleton University (2011).
[39]Michael Kirby, "The Sodomy Offence: England's Least Lovely Law Export?" Journal of Commonwealth Criminal Law, Inaugural Issue (2011).
[40]Douglas, supra note 9, at page 4.
[41]Ibid at page 2.
[42]Jessica Cecil, "The Destruction of Sodom and Gomorrah", British Broadcasting Company, 11 February 2017.
[43]Douglas, supra note 9, at page 4; KSN Murthy's Criminal Law: Indian Penal Code (KVS Sarma ed), Lexis Nexis (2016).
[44]Philo, translated by F.H. Colson and G.H. Whitaker, 10 Volumes, (Cambridge: Harvard University Press, 1929-1962).
[45]David F. Greenberg and Marcia H. Bystryn, "Christian Intolerance of Homosexuality", American Journal of Sociology, Vol. 88 (1982), at pages 515-548.
[46]Douglas, supra note 9, at pages 5 and 8.
[47]Ibid at page 5.
[48]The Buggery Act, 1533.
[49]Douglas, supra note 9, at page 2.
[50]Ibid at 7.
[51]Human Rights Watch. This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism (2008).
[52]Douglas, supra note 9, at page 15.
[53]H. Montgomery Hyde, John O'Connor, and Merlin Holland, The Trials of Oscar Wilde (2014), at page 201.
[54]Ibid at 25.
[55]Report of the Departmental Committee on Homosexual Offences and Prostitution (1957) ("Wolfenden Report").
[56]Sexual Offences (Amendment) Act 2000, Parliament of the United Kingdom.
[57]Douglas, supra note 9, at page 29.
[58]Douglas, supra note 9, at page 9.
[59]Ibid.
[60]Enze Han, Joseph O'Mahoney, "British Colonialism and the Criminalization of Homosexuality: Queens, Crime and Empire", Routledge (2018).

[61]Changed from "transportation for life" by Act 26 of 1955.
[62]Douglas, supra note 9, at page 16.
[63]Nang Yin Kham, "An Introduction to the Law and Judicial System of Myanmar", Centre for Asia Legal Studies Faculty of Law, National University of Singapore, Working Paper 14/02, (2014).
[64]Supra note 34.
[65]Arvind Narrain, "'That Despicable Specimen of Humanity': Policing of Homosexuality in India", in Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India (Kalpana Kannabiran and Ranbir Singh eds.), Sage (2008).
[66]Arvind Narrain, "A New Language of Morality: From the Trial of Nowshirwan to the judgment in Naz Foundation", The Indian Journal of Constitutional Law, Vol. 4 (2010).
[67]Supra note 40.
[68]Suparna Bhaskaran, "The Politics of Penetration: Section 377 of the Indian Penal Code" in Queering India: Same-Sex Love and Eroticism in Indian Culture and Society (Ruth Vanita ed.), Routledge (2002).
[69]Douglas, supra note 9, at page 21; "Introduction" to Because I Have a Voice: Queer Politics in India, (Gautam Bhan and Arvind Narrain eds), Yoda Press (2005) at pages 7, 8.
[70]Melba Cuddy-Keane, Adam Hammond and Alexandra Peat, "Q" in Modernism: Keywords, Wiley-Blackwell (2014).
[71]Martin Luther King Jr., "Letter from a Birmingham Jail" (1963).
[72]Vikram Seth wrote this poem the morning after the Supreme Court refused to review its decision in Koushal.
[73]Naz Foundation, at para 91.
[74]Koushal, at para 65.
[75]State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : AIR (1952) SC 75.
[76]Deepak Sibal v. Punjab University, MANU/SC/0157/1989 : (1989) 2 SCC 145.
[77]Gautam Bhatia, "Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution", Indian Law Review, Vol. 1 (2017), at pages 115-144.
[78]Shubhankar Dam, "Suresh Kumar Koushal and Anr. v. NAZ Foundation and Ors. (Civil Appeal No. 10972 of 2013)" Public Law, International Survey Section (2014).
[79]Koushal, at para 60.
[80]Gautam Bhatia, "The Unbearable Wrongness of Koushal v. Naz Foundation", Indian Constitutional Law and Philosophy (2013).
[81]Shamnad Basheer, Sroyon Mukherjee and Karthy Nair, "Section 377 and the 'Order of Nature': Nurturing 'Indeterminacy' in the Law", NUJS Law Review, Vol, 2 (2009).
[82]Bruce Bagemihl, Biological Exuberance: Animal Homosexuality and Natural Diversity, Stonewall Inn Editions (2000).
[83]Brandon Ambrosino, "The Invention of Heterosexuality", British Broadcasting Company, 26 March, 2017.
[84]Zaid Al Baset, "Section 377 and the Myth of Heterosexuality", Jindal Global Law Review, Vol. 4 (2012).
[85]Supra note 61.
[86]Sex, Morality and the Law, (Lori Gruen and George Panichas eds.), Routledge (1996).
[87]Andrew Davis, "The Framing of Sex: Evaluating Judicial Discourse on the 'Unnatural Offences'", Alternative Law Journal, Vol. 5 (2006).
[88]Clause 361 stated "Whoever, intending to gratify unnatural lust, touches, for that purpose, any

person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine."

[89]Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals" The Economic and Political Weekly, Vol. 41 (2006).

[90]Supra note 25.

[91]John Sebastian, "The opposite of unnatural intercourse: understanding Section 377 through Section 375, Indian Law Review, Vol. 1 (2018).

[92]Emile Durkheim, The Division of Labour in Society, Macmillan (1984).

[93]375. A man is said to commit "rape" if he-(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:- First.--Against her will. Secondly.--Without her consent. Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.--With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.--With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent Sixthly.--With or without her consent, when she is under eighteen years of age. Seventhly.--When she is unable to communicate consent. Explanation 1.--For the purposes of this section, "vagina" shall also include labia majora. Explanation 2.--Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exception 1.--A medical procedure or intervention shall not constitute rape. Exception 2.--Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

[94]Supra note 75, at pages 232-249.

[95]Nivedita Menon, "How Natural is Normal? Feminism and Compulsory Heterosexuality", In Because I have a Voice, Queer Politics in India, (Narrain and Bhan eds.) Yoda Press (2005).

[96]Supra note 7.

[97]The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, MANU/SACC/0007/1998 : 1999 (1) SA 6 (CC), Sachs J., concurring.

[98]Re. the Kerala Education Bill MANU/SC/0029/1958 : AIR 1958 SC 956 at para 26; Sakal Papers v. Union of India MANU/SC/0090/1961 : AIR 1962 SC 305 at para 42; R.C. Cooper v. Union of India, MANU/SC/0011/1970 : (1970) 1 SCC 248 at paras 43, 49; Bennett Coleman v. Union of India MANU/SC/0038/1972 : AIR (1972) 2 SCC 788 at para 39; Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : (1978) 1 SCC 248 at para 19.

[99]The case concerned a statute that allowed service-members to claim additional benefits if their spouse was dependent on them. A male claimant would automatically be entitled to such benefits while a female claimant would have to prove that her spouse was dependent on her for more than half his support. The Court struck down this statute stating that the legislation violated the equal protection Clause of the American Constitution.
[100]The case concerned the Virginia Military Institute (VMI), which had a stated objected of producing "citizen-soldiers." However, it did not admit women. The Court held that such a provision was unconstitutional and that there were no "fixed notions concerning the roles and abilities of males and females."
[101]The case concerned an effective bar on females for the position of guards or correctional counsellors in the Alabama State Penitentiary system. Justice Marshall's dissent held that prohibition of women in 'contact positions' violated the Title VII guarantee.
[102]Naz, at para 94.
[103]Elvia R. Arriola, "Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory", Berkeley Women's Law Journal, Vol. 9 (1994), at pages 103-143.
[104]Zachary A. Kramer, "The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII", University of Illinois Law Review (2004), at page 490.
[105]Bennett Capers, "Note, Sexual Orientation and Title VII", Columbia Law Review (1991), at pages 1159, 1160, 1163.
[106]Andrew Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination", Yale Law Journal, Vol. 98 (1988), at page 147.
[107]Andrew Koppelman, "Why Discrimination against Lesbians and Gay Men is Sex Discrimination", New York University Law Review, Vol. 69 (1994).
[108]Supra note 102, at page 148.
[109]The Relationship between Homophobia, Transphobia, and Women's Access to Justice for the Forthcoming CEDAW General Recommendation on Women's Access to Justice. Submitted to the United Nations Committee for the Elimination of All Forms of Discrimination against Women (2013).
[110]Suzanne Pharr, Homophobia: A weapon of Sexism, Chardon Press (1988), at page 18.
[111]Tarunabh Khaitan, "Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are", Indian Constitutional Law and Philosophy (2018).
[112]International Commission of Jurists, "Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (2017).
[113]Ibid, at page 16.
[114]Ibid, at pages 16-18.
[115]Writ Petition (Criminal) No. 121 of 2018.
[116]Writ Petition (Criminal) No. 76 of 2016.
[117]Written Submission on Behalf of the Voices Against 377, in W.P. (CRL.) No. 76/2016 at page 18.
[118]Michel Foucault, Discipline And Punish: the Birth of the Prison, Pantheon Books (1977) at page 201.
[119]Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics", California Law Review, Vol. 89 (2001), at page 688.
[120]Puttaswamy, at para 42.
[121]Puttaswamy, at para 392.

[122]Puttaswamy, at para 490.
[123]Puttaswamy at para 557.
[124]NALSA, at para 22.
[125]Puttaswamy, at para 144.
[126]Puttaswamy, at para 145.
[127]Puttaswamy, at para 647.
[128]Supra note 116, at page 689.
[129]The expression heteronormative is used to denote or relate to a world view that promotes heterosexuality as the normal or preferred sexual orientation.
[130]Supra note 116, at page 689.
[131]Eve Kosofsky Sedgwick, Epistemology of the Closet, University of California Press (1990).
[132]Supra note 65, at page 102.
[133]David A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution", Hastings Law Journal, Vol. 30, at page 786.
[134]Puttaswamy, at Para 350.
[135]Supra note 65, at page 103.
[136]Danish Sheikh, "Queer Rights and the Puttaswamy Judgment", Economic and Political Weekly, Vol. 52 (2017), at page 51.
[137]Supra note 65, at page 101.
[138]Supra note 137, at page 51.
[139]Saptarshi Mandal, "'Right To Privacy' In Naz Foundation: A Counter-Heteronormative Critique", NUJS Law Review, Vol. 2 (2009), at page 533.
[140]Supra note 65, at page 100.
[141]Supra note 137, at page 53.
[142]Puttaswamy, at para 297.
[143]Ibid at para 22.
[144]Supra note 131, at pages 1000-1001.
[145]Supra note 131, at pages 964-965; M. Mahler, "The Psychological Birth of The Human Infant: Symbiosis And Individuation" (1975); L. Kaplan, Oneness And Separateness: From Infant To Individual (1978).
[146]Ibid, at para 441.
[147]Thomas M. Jr. Scanlon, Rawls' Theory of Justice, University of Pennsylvania Law Review (1973) at 1022.
[148]Ibid at 1023.
[149]Supra note 131, at page 971.
[150]Ibid at page 972.
[151]Supra note 131, at page 1003.
[152]Ibid, at para 44.
[153]Ibid, at para 54.
[154]Ibid, at para 88.
[155]Ibid, at para 93.
[156]David A.J. Richards, "Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory", Fordham Law Review, Vol. 45 (1977), at pages 1130-1311.
[157]Ibid at 1311.
[158]Dipika Jain and Kimberly Rhoten, "The Heteronormative State and the Right to Health in

India", NUJS Law Review, Vol. 6 (2013).
[159]C.E.S.C. Limited v. Subhash Chandra Bose, MANU/SC/0466/1992 : (1992) 1 SCC 441; Consumer Education and Research Centre v. UOI, MANU/SC/0175/1995 : (1995) 3 SCC 42; Paschim Banga Khet Mazdoor Samity v. State of West Bengal, MANU/SC/0611/1996 : (1996) 4 SCC 37; Society for Unaided Private Schools of Rajasthan v. Union of India, MANU/SC/0311/2012 : (2012) 6 SCC 1; Devika Biswas v. Union of India and Ors., MANU/SC/0999/2016 : (2016) 10 SCC 726; Common Cause v. Union of India and Ors., MANU/SC/0232/2018 : (2018) 5 SCC 1.
[160]UN Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2004 (2000).
[161]Definition contained in the Preamble to the WHO Constitution (1948).
[162]Sexual Rights, International Planned Parenthood Federation (2008).
[163]Alexandra Muller, "Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa", Health and Human Rights (2016) at pages 195-208.
[164]Institute of Medicine, "The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding", National Academies Press (2011).
[165]Supra note 185, at pages 195-208.
[166]World Health Organization, "Gender and human rights: Defining sexual health", (2002).
[167]World Health Organisation, "Sexual Health, Human Rights and the Law" (2015).
[168]International Women's Health Coalition, "Sexual Rights are Human Rights" (2014).
[169]Preamble to the Constitution of the World Health Organisation.
[170]Jayna Kothari, "Social Rights and the Indian Constitution", Law, Social Justice and Global Development Journal (2004).
[171]Study Guide: Sexual Orientation and Human Rights, University of Minnesota Human Rights Library (2003).
[172]Center for Health and Human Rights and Open Society Foundations. "Health and Human Rights Resource Guide (2013).
[173]Supra note 172.
[174]Eszter Kismodi, Jane Cottingham, Sofia Gruskin & Alice M. Miller, "Advancing sexual health through human rights: The role of the law", Taylor and Francis, (2015), at pages 252-267.
[175]The term "men who have sex with men" (MSM) denotes all men who have sex with men, regardless of their sexual identity, sexual orientation and whether or not they also have sex with females. MSM is an epidemiological term which focuses on sexual behaviours for the purpose of HIV and STI surveillance. The assumption is that behaviour, not sexual identity, places people at risk for HIV. See Regional Office for South-East Asia, World Health Organization, "HIV/AIDS among men who have sex with men and transgender populations in South-East Asia: the current situation and national responses" (2010).
[176]Transgender people continue to be included under the umbrella term "MSM". However, it has increasingly been recognized that Transgender people have unique needs and concerns, and it would be more useful to view them as a separate group. See Regional Office for South-East Asia, World Health Organization, "HIV/AIDS among men who have sex with men and transgender populations in South-East Asia: the current situation and national responses" (2010).
[177]United Nations Development Programme, "Global Commission on HIV and the Law: Risks, Rights and Health" (2012), at pages 11-12.

[178]Ibid at page 45; HIV prevalence amongst MSM is 4.3% and amongst transgender persons it is 7.5% as opposed to the overall adult HIV prevalence of 0.26%.
[179]Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), decision dated 31/03/1994.
[180]Beena Thomas, Matthew J. Mimiaga, Senthil Kumar, Soumya Swaminathan, Steven A. Safren, and Kenneth H. Mayer, "HIV in Indian MSM: Reasons for a concentrated epidemic & strategies for prevention", Indian Journal Medical Research (2011), at pages 920-929.
[181]Supra note 172, at page 636.
[182]Supra note 210, at page 45.
[183]UNAIDS, "UNAIDS Calls on India and All Countries to Repeal Laws That Criminalize Adult Consensual Same Sex Sexual Conduct" (2013).
[184]UNAIDS, "Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law" (2013) at page 165.
[185]Supra note 210, at page 26.
[186]Ibid, at page 26.
[187]Ketki Ranade, "Process of Sexual Identity Development for Young People with Same Sex Desires: Experiences of Exclusion", Psychological Foundations-The Journal (2008).
[188]Dinesh Bhugra, globally renowned psychiatrist (article annexed in compilation provided by Mr. Chander Uday Singh, learned Senior Counsel).
[189]Section 18. **Right to access mental healthcare**.--(1) Every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government. (2) The right to access mental healthcare and treatment shall mean mental health services of affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.
[190]Section 21. **Right to equality and non-discrimination.**--(1) Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:
(a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability.
[191]Vinay Chandran, "From judgment to practice: Section 377 and the medical sector", Indian Journal of Medical Ethics, Vol. 4 (2009).
[192]Dominic McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law", Human Rights Law Review, Vol. 16 (2016).
[193]UN Human Rights Council, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (2011).
[194]UN Human Rights Council, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development" (2008).
[195]Vishaka v. State of Rajasthan, MANU/SC/0786/1997 : (1997) 6 SCC 241.
[196]Committee on Economic, Social and Cultural Rights, "General Comment 20: Non-discrimination in economic, social and cultural rights" (2009), at para 32.
[197]Toonen.
[198]Supra note 230, at page 6.
[199]App No. 7525/76, (1981) ECHR 5.
[200]Ibid, at para 60.

[201]Ibid, at para 61.
[202]Application No. 10581/83, (1988) ECHR 22.
[203]Application No. 15070/89, 16 EHRR 485.
[204]Bowers, at para 190.
[205]Bowers, at para 216.
[206]Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[207]Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
[208]Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[209]Toonen, at para 2.4.
[210]Toonen, at para. 8.5.
[211]Toonen, at para 8.2.
[212]Communication No. 1361/2005.
[213]Robert Wintemute, "Same-Sex Love and Indian Penal Code _377: An Important Human Rights Issue for India" National University of Juridical Sciences Law Review, (2011).
[214]Case No. 111-97-TC (27 November 1997).
[215]The Tribunal's decision was criticized by LGBT rights activists for its description of homosexuality as "abnormal conduct." However, a year after this decision, Ecuador became the third country in the world to include sexual orientation as a constitutionally protected category against discrimination.
[216]National Coalition, at para 23.
[217]National Coalition, at para 32.
[218]Claim No. 668 of 2010.
[219]Law v. Canada (Minister of Employment and Immigration) MANU/SCCN/0040/1999 : [1999] 1 S.C.R. 497.
[220]Caleb Orozco, at para 81.
[221]Claim No. CV2017-00720.
[222]Jones, at para 91.
[223]Jones, at para 171.
[224]Civil Appeal No. 317 of 2005.
[225]Ibid, at para 48.
[226]Ibid, at para 51.
[227]HCJ 721/94.
[228]El-A Israel Airlines, at para 14.
[229]Writ Petition No. 917 of 2007.
[230]Oliari, at para 165.
[231]Oliari, at para. 173.
[232]Oliari, at para 185.
[233]Section 3, Defense of Marriage Act.

[234]Obergefell, at page 12.
[235]Amy Raub, "Protections Of Equal Rights Across Sexual Orientation And Gender Identity: An Analysis Of 193 National Constitutions", Yale Journal of Law and Feminism, Vol. 28 (2017).
[236]Ibid. Of these, three are in the Americas (Bolivia, Ecuador, and Mexico), four are in Europe and Central Asia (Malta, Portugal, Sweden, and the United Kingdom), two are in East Asia and the Pacific (Fiji and New Zealand), and one is in Sub-Saharan Africa (South Africa).
[237]The International Lesbian, Gay, Bisexual, Trans And Intersex Association, "Sexual Orientation Laws of the World", (2017).
[238]Halsbury's Laws of England. 3rd edition, Vol. 3, Butterworths (1953) at page. 271.
[239]Glanville Williams, 'The Definition of Crime', Current Legal Problems, Vol. 8 (1955).
[240]Henry M. Hart, "The Aims of the Criminal Law", Law and Contemporary Problems, Vol. 23 (1958), at pages 401-441.
[241]Roscoe Pound, Interpretation of Legal History, Harvard University Press (1946).
[242]H.C. Lawson-Tancred, The Art of Rhetoric/Aristotle, Penguin (2004).
[243]Immanuel Kant: The Metaphysics of Morals (Mary Gregor ed.), Cambridge University Press (1996).
[244]Ibid, at pages 353, 331.
[245]Grant Lamond, "What is a Crime?", Oxford Journal of Legal Studies, Vol. 27 (2007).
[246]Sir William Blackstone, Commentaries on the Laws of England, Book IV, Ch. 1 & 2.
[247]Antony Duff and Sandra Marshall, "Criminalization and Sharing Wrongs", Canadian Journal of Law and Jurisprudence, Vol. 11, (1998) at pages 7-22.
[248]Robert Nozick, Anarchy, State and Utopia, Basic Books (1974), at page 65.
[249]Supra note 301.
[250]Lawrence C. Becker, "Criminal Attempts and the Theory of the Law of Crimes", Philosophy & Public Affairs, Vol 3 (1974), at page 273.
[251]Supra note 294.
[252]Jeremy Bentham, "Offences Against One's Self" (Louis Crompton Ed.), Columbia University.
[253]Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, The Library of Economics and Liberty (1823).
[254]John Stuart Mill, On Liberty, (Elizabeth Rapaport ed), Hackett Publishing Co, Inc (1978).
[255]Mark Strasser, "Lawrence, Mill, and Same Sex Relationships: On Values, Valuing and the Constitution", Southern California Interdisciplinary Law Journal, Vol. 15 (2006).
[256]Joseph Raz, 'Autonomy, Toleration and the Harm Principle', in Issues in Contemporary Legal Philosophy: The Influence of HLA Hart (R. Gavison ed.), Oxford University Press (1987).
[257]Graham Hughes, "Morals and the Criminal Law", The Yale Law Journal, Vol. 71 (1962).
[258]Supra note 29.
[259]Supra note 29, at paras 61 and 62.
[260]Ibid, at para 14.
[261]Ibid, at para 16.
[262]Ibid, at para 18.
[263]Sir Patrick Arthur Devlin, "The Enforcement Of Morals" Oxford University Press (1959) at page 9.
[264]Supra note 334, at page 662.
[265]Animesh Sharma, "Section 377: No Jurisprudential Basis." Economic and Political Weekly, Vol. 43 (2008) at pages 12-14.
[266]Supra note 344.

[267]Supra note 346, at pages 12-14.
[268]Hart, H.L.A, "The Changing Sense of Morality" In Political Thought (Michael Rosen and Jonathan Wolff eds.), Oxford University Press (1999) at pages 140-141.
[269]H.L.A. Hart, Law, Liberty And Morality (1979).
[270]William Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy", Marquette Law Review, Vol. 67 (1984).
[271]Supra note 352.
[272]Peter August Bittlinger, "Government enforcement of morality: a critical analysis of the Devlin-Hart controversy", Doctoral Dissertations 1896-February 2014 (1975) at pages 69-70.
[273]Ibid at page 91.
[274]Ibid at page 93.
[275]Supra note 334.
[276]Supra note 325.
[277]Christopher. R. Leslie, "Creating criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws", Harvard Civil Rights and Civil Liberties Law Review, Vol. 35 (2000).
[278]Ibid, at pages 103-181.
[279]Jawaharlal Nehru, "Tryst with Destiny", address to the Constituent Assembly of India, delivered on 14-15 August 1947.
[280]Uday S. Mehta, "Constitutionalism", In The Oxford Companion to Politics in India (Niraja Gopal Jayal and Pratap Bhanu Mehta eds.), Oxford University Press (2010), at page 15.
[281]Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at page 65.
[282]Ibid, at page 63.
[283]Babasaheb. R. Ambedkar, Annihilation of Caste, Navayana Publishing (2014); See also Martha C. Nussbaum, "Disgust or Equality? Sexual Orientation and Indian Law", Journal of Indian Law and Society, Vol. 6 (2010).
[284]Supra note 372, at para 14.2.
[285]Constituent Assembly Debates (25 November 1949).
[286]Lord Neuberger, "UK Supreme Court decisions on private and commercial law: The role of public policy and public interest", Centre for Commercial Law Studies Conference (2015).
[287]Marc Galanter, "Fifty Years on", in BN Kirpal et al, Supreme but Not Infallible: Essays in Honour of the Supreme Court of India, Oxford University Press (2000), at page 57.
[288]Supra note 373, at para 12.1.
[289]Supra note 41.
[290]John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, 292 (University of Chicago Press, 1980).
[291]*Report of the Committee on Homosexual Offences and Prostitution*, 1957, at para 30.
[292]Benjamin J. Sadock *et al., Kaplan and Sadock's Comprehensive Textbook of Psychiatry* (9th ed., 2009), at pp. 2060-89.
[293]*Id.*
[294]Great Speeches on Gay Rights (James Daley ed.; Dover Publications, 2010), at pp. 24-30.
[295]Aengus Carroll And Lucas Ramon Mendos, *Ilga Annual State Sponsored Homophobia Report 2017: A World Survey Of Sexual Orientation Laws: Criminalisation, Protection And Recognition*, 12th Edition, 2017, pp. 26-36.
[296]Theresa May's Speech at the Commonwealth Joint Forum Plenary *available at*

https://www.gov.uk/government/speeches/pm-speaks-at-the-commonwealth-joint-forum-plenary-17-april-2018.
[297]*The New International Webster's Comprehensive Dictionary of the English Language* (Deluxe Encyclopedic Edition, 1996).
[298]Brief for the Amici Curiae American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Texas Chapter of the National Association of Social Workers in Lawrence v. Texas MANU/USSC/0070/2003 : 539 U.S. 558(2003), available at http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf.
[299]KK Gulia and HN Mallick, *Homosexuality: a dilemma in discourse*, 54 Indian Journal of Physiology and Pharmacology (2010), at pp. 5, 6 and 8.
[300]Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5(4) Behavioral Sciences (2015), at p. 565.
[301]*The ICD-10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines*, World Health Organization, Geneva, 1992 *available at* http://www.who.int/classifications/icd/en/bluebook.pdf.
[302]Indian Psychiatry Society: "Position statement on Homosexuality", IPS/Statement/02/07/2018 available at http://www.indianpsychiatricsociety.org/upload_images/imp_download_files/1531125054 _1.pdf.
[303]Report of the Committee on Amendments to Criminal Law (2013).
[304]Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).
[305]Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal For All Minorities*, 2 NUJS Law Review, 419 (2009)
[306]John Gardner, *On the Ground of Her Sex (uality)*, 18(2) Oxford Journal of Legal Studies, 167 (1998).
[307]*Supra* note 30
[308]*"15. Equality before and under law and equal protection and benefit of law*
(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability..."
Article 15(1), Canadian Charter of Rights and Freedoms.
[309]*Maneka Gandhi* v. *Union of India and Anr.*, MANU/SC/0133/1978 : (1978) 1 SCC 248, at paragraph 48.
[310]*Common Cause (A Registered Society)* v. *Union of India and Anr.*, MANU/SC/0232/2018 : (2018) 5 SCC 1, at paragraphs 437 and 438.
[311]According to Professor Edwin Cameron, LGBT persons are reduced to the status of "*unapprehended felons*" owing to the ever-so-present threat of prosecution.
Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights,* 110 South African Law Journal (1993), at page 450.
[312]*K.S. Puttaswamy and Anr.* v. *Union of India and Ors.*, MANU/SC/1044/2017 : (2017) 10 SCC 1
[313]*K.S. Puttaswamy and Anr.* v. *Union of India and Ors.*, MANU/SC/1044/2017 : (2017) 10 SCC 1, at paragraphs 144, 145, 479 and 647
[314]*K.S. Puttaswamy and Anr.* v. *Union of India and Ors.*, MANU/SC/1044/2017 : (2017) 10 SCC 1, at paragraph 248, 250, 371 and 403

[315]*K.S. Puttaswamy and Anr.* v. *Union of India and Ors.*, MANU/SC/1044/2017 : (2017) 10 SCC 1, at paragraphs 248, 249, 371 and 521
[316]*K.S. Puttaswamy and Anr.* v. *Union of India and Ors.*, MANU/SC/1044/2017 : (2017) 10 SCC 1, at paragraphs 325, 638 and 645
[317]*Common Cause (A Registered Society)* v. *Union of India and Anr.*, MANU/SC/0232/2018 : (2018) 5 SCC 1, at paragraph 304; *C.E.S.C. Limited and Ors.* v. *Subhash Chandra Bose and Ors.*, MANU/SC/0466/1992 : (1992) 1 SCC 441, at paragraph 32; *Union of India* v. *Mool Chand Khairati Ram Trust*, MANU/SC/0716/2018, at paragraph 66; and, *Centre for Public Interest Litigation* v. *Union of India and Ors.*, MANU/SC/1094/2013 : (2013) 16 SCC 279, at paragraph 25.
[318]M.V. Lee Badgett, *The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India*, World Bank Group (2014) *available at* http://documents.worldbank.org/curated/en/527261468035379692/The-economic-cost-of-stigma-and-the-exclusion-of-LGBT-people-a-case-study-of-India (Last accessed on August 11, 2018).
[319]Govindasamy Agoramoorthy and Minna J Hsu, *India's homosexual discrimination and health consequences*, 41(4) Rev Saude Publica (2007), at pages 567-660 *available at* http://www.scielo.br/pdf/rsp/v41n4/6380. pdf (Last accessed on August 4, 2018).
[320]*Supra* note 19, at page 3.
[321]*Lawrence, et al. v. Texas*, MANU/USSC/0070/2003 : 539 U.S. 558 (2003); and *National Coalition for Gay and Lesbian Equality and Anr.* v. *Minister of Justice and Ors.*, MANU/SACC/0007/1998 : [1998] ZACC 15

Back to Index

MANU/SC/0281/2013

Neutral Citation: 2013/INSC/198

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 2706-2716 of 2013 (Arising out of SLP (C) Nos. 20539-20549 of 2009)

Decided On: 01.04.2013

Appellants: Novartis AG **Vs.** Respondent: Union of India (UOI) and Ors.
[Alongwith Civil Appeal No. 2728 of 2013 (Arising out of SLP (C) No. 32706 of 2009) and Civil Appeal Nos. 2717-2727 of 2013 (Arising out of SLP (C) Nos. 12984-12994 of 2013) SLP (C)…/2011 CC Nos. 6667-6677]

Hon'ble Judges/Coram:

Aftab Alam and Ranjana Prakash Desai, JJ.

Subject: Intellectual Property Rights

Relevant Section:

Patents Act, 1970 - Section 2(1)(1); Patents Act, 1970 - Section 3(b); Patents Act, 1970 - Section 3(d)

Prior History / High Court Status:

From the Judgment and Order dated 26/06/2009 in MP No. 1/2007, TA No. 1/2007, MP No. 2/2007, TA No. 2/2007, MP No. 3/2007, TA No. 3/2007, MP No. 4/2007, TA No. 4/2007, MP No. 5/2007, TA No. 5/2007, MP No. 33/2008 of the Intellectual Property Appellate Board (MANU/IC/0034/2009)

Authorities Referred:

The New Oxford Dictionary of English, Edition 1998; Terrell on Law of Patents 16th edition, page No. 51, para 3.2/7;IUPAC Glossary of Terms used in Medicinal Chemistry, 1998 in CPAA volume 9, at page 7; Goodman and Gilman in CPAA compilation, volume 9, at page 22; LHC, Dorland's Medical dictionary in Novartis' volume P, at page 19;Goodman and Gilman in CPAA compilation, volume..., internal page 4;Dorland's Medical Dictionary in Novartis' volume B, at page 65; "Patent Law and Policy: Cases and Materials" (Fifth Edition) by Robert Patrick Merges and John Fitzgerald Duffy...at pg. 298- 300

Disposition:
Appeal Dismissed

Case Note:

Patents Act, 1970 - Sections 2(1), Clauses (j) and (ja) and 3(d)--Patent for beta crystalline form of chemical compound called Imatinib Mesylate which is therapeutic drug for chronic myeloid leukemia and certain kind of tumours--Claim for patent for beta crystalline form of Imatinib Mesylate is attempt to obtain patent for Imatinib Mesylate, which is otherwise not permissible in this country--Patent product beta crystalline form of Imatinib Mesylate, fails both test of invention and patentability as provided under Clauses (j), (ja) of Section 2(1) and Section 3(d) respectively.

In case the appellant's product satisfies the tests and thus qualifies as "invention" within the meaning of Clauses (j) and (ja) of Section 2(1), can its patentability still be questioned and denied on the ground that Section 3(d) puts it out of the category of "invention"? On the answer to these questions depends whether the appellant is entitled to get the patent for the beta crystalline form of a chemical compound called Imatinib Mesylate which is a therapeutic drug for chronic myeloid leukemia and certain kinds of tumours and is marketed under the names "Glivec" or "Gleevec".

These questions were debated at the bar intensely and at great length. The debate took place within a very broad framework. The Court was urged to strike a balance between the need to promote research and development in science and technology and to keep private monopoly (called an 'aberration' under our Constitutional scheme) at the minimum. Arguments were made about India's obligation to faithfully comply with its commitments under international treaties and counter arguments were made to protect India's status as "the pharmacy of the world". The Court was reminded of its duty to uphold the rights granted by the statute, and the Court was also reminded that an error of judgment by it will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but in many developing and underdeveloped countries, dependent on generic drugs from India.

In 1997, when the appellant filed its application for patent, the law in India with regard to product patent was in a transitional stage and the appellant's application lay dormant under an arrangement called "the mailbox procedure". Before the application for patent was taken up for consideration, the appellant made an application (Application No. E.M.R./01/2002) on March 27, 2002, for grant of exclusive marketing rights (E.M.R.) for the subject product under Section 24A of the Act, which was at that time on the statute book and which now stands deleted. The Patent Office granted E.M.R. to the appellant by order dated November 10, 2003.

The appellant's application for patent was taken out of the "mailbox" for consideration only after amendments were made in the Patents Act, with effect from January 1, 2005. But before it was taken up for consideration, the patent application had attracted five (5) pre-grant oppositions[1] in terms of Section 25(1) of the Act. And it was in response to the pre-grant oppositions that the appellant had filed the affidavits on the issue of bioavailability of Imatinib Mesylate in beta crystalline form.

The Assistant Controller of Patents and Designs heard all the parties on December 15, 2005, as provided under Rule 55 of the Patent Rules, 2003, and rejected the appellant's application for grant of patent to the subject product by 5 (five) separate, though similar, orders passed on January 25, 2006 on the 5 (five) opposition petitions. The Assistant Controller held that the invention claimed by the appellant was anticipated by prior publication, i.e., the Zimmermann patent; that the invention claimed by the appellant was obvious to a person skilled in the art in view of the disclosure provided in the Zimmermann patent specifications; and further that the patentability of the alleged invention was disallowed by Section 3(d) of the Act; and also that July 18, 1997, the Swiss priority date, was wrongly claimed as the priority date for the application in India and hence, the alleged invention was also anticipated by the specification made in the application submitted in Switzerland.

In whichever way Section 3(d) may be viewed, whether as setting up the standards of "patentability" or as an extension of the definition of "invention", it must be held that on the basis of the materials brought before the Supreme Court, the subject product, that is, the beta crystalline form of Imatinib Mesylate, Jails the test of Section 3(a), too, of the Act.

The subject product, the beta crystalline form of Imatinib Mesylate, does not qualify the test of Section 3(d) of the Act but that is not to say that Section 3(d) bars patent protection for all incremental inventions of chemical and pharmaceutical substances. It will be a grave mistake to read this judgment to mean that Section 3(d) was amended with the intent to undo the fundamental change brought in the patent regime by deletion of Section 5 from the Parent Act. That is not said in this judgment.

Section 2(1)(j) defines "invention" to mean, "a new product or...", but the new product in chemicals and especially pharmaceuticals may not necessarily mean something altogether new or completely unfamiliar or strange or not existing before. It may mean something "different from a recent previous" or "one regarded as better than what went before" or "in addition to another or others of the same kind"[2]. However, in case of chemicals and especially pharmaceuticals if the product for which patent protection is claimed is a new form of a known substance with known efficacy, then the subject product must pass, in addition to Clauses (j) and (ja) of Section 2(1), the test of enhanced efficacy as provided in Section 3(d) read with its explanation.

Coming back to the case of the appellant, there is yet another angle to the matter. It is seen above that in the U.S. the drug Gleevec came to the market in 2001. It is beyond doubt that what was marketed then was Imatinib Mesylate and not the subject product, Imatinib Mesylate in beta crystal form. It is also seen above that even while the appellant's

application for grant of patent lay in the "mailbox" awaiting amendments in the law of patent in India, the appellant was granted Exclusive Marketing Rights on November 10, 2003, following which Gleevec was marketed in India as well. On its package[3], the drug was described as "Imatinib Mesylate Tablets 100 mg." and it was further stated that "each film coated tablet contains: 100 mg. Imatinib (as Mesylate)". On the package there is no reference at all to Imatinib Mesylate in beta crystalline form. What appears, therefore, is that what was sold as Gleevec was Imatinib Mesylate and not the subject product, the beta crystalline form of Imatinib Mesylate.

If that be so, then the case of the appellant appears in rather poor light and the claim for patent for beta crystalline form of Imatinib Mesylate would only appear as an attempt to obtain patent for Imatinib Mesylate, which would otherwise not be permissible in this country.

In view of the findings that the patent product, the beta crystalline form of Imatinib Mesylate, fails in both the tests of invention and patentability as provided under Clauses (j), (ja) of Section 2(1) and Section 3(d) respectively.

Case Category:

MERCANTILE LAWS, COMMERCIAL TRANSACTIONS INCLUDING BANKING - TRADE MARKS/COPY RIGHTS/PATENTS/DESIGN ACT

JUDGMENT

Aftab Alam, J.

1. Delay condoned.

2. Leave granted in all the special leave petitions.

3. What is the true import of Section 3(d) of the Patents Act, 1970? How does it interplay with Clauses (j) and (ja) of Section 2(1)? Does the product for which the Appellant claims patent qualify as a "new product" which comes by through an invention that has a *feature* that *involves technical advance over the existing knowledge and that makes the invention "not obvious" to a person skilled in the art*? In case the Appellant's product satisfies the tests and thus qualifies as "invention" within the meaning of Clauses (j) and (ja) of Section 2(1), can its patentability still be questioned and denied on the ground that Section 3(d) puts it out of the category of "invention"? On the answer to these questions depends whether the Appellant is entitled to get the patent for the beta crystalline form of a chemical compound called Imatinib Mesylate which is a therapeutic drug for chronic myeloid leukemia and certain kinds of tumours and is marketed under the names "Glivec" or "Gleevec".

4. These questions were debated at the bar intensely and at great length. The debate took place within a very broad framework. The Court was urged to strike a balance between the need to promote research and development in science and technology and to keep private monopoly (called

an 'aberration' under our Constitutional scheme) at the minimum. Arguments were made about India's obligation to faithfully comply with its commitments under international treaties and counter arguments were made to protect India's status as "the pharmacy of the world". The Court was reminded of its duty to uphold the rights granted by the statute, and the Court was also reminded that an error of judgment by it will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but in many developing and under-developed countries, dependent on generic drugs from India. We will advert to these and a number of other arguments at their proper place but we must first take note of the facts that give rise to the above questions and provide the context for the debate.

5. *Jürg Zimmermann* invented a number of derivatives of N-phenyl-2-pyrimidine-amine, one of which is CGP 57148[1] in free base form (later given the International Nonproprietary Name 'Imatinib' by the World Health Organisation). These derivatives, including Imatinib[2], are capable of inhibiting certain protein kinases, especially protein kinase C and PDGF (platelet-derived growth factor)-receptor tyrosine kinase and thus have valuable anti-tumour properties and can be used in the preparation of pharmaceutical compositions for the treatment of warm-blooded animals, for example, as anti-tumoral drugs and as drugs against atherosclerosis. The N-phenyl-2-pyrimidine-amine derivatives, including Imatinib, were submitted for patent in the US. The application was made on April 28, 1994 and patent was granted on May 28, 1996 under US Patent No. 5,521,184 (hereinafter referred to as 'the Zimmermann Patent'). The Zimmermann compounds (i.e., derivatives of N-phenyl-2-pyrimidine-amine) were also granted a European patent under Patent No. EP-A-0 564 409.

6. The Appellant claims that beginning with Imatinib[3] in free base form (as the 'e-duct'), in a two-stage invention they first produced its methanesulfonic acid addition salt, Imatinib Mesylate, and then proceeded to develop the beta crystalline form of the salt of Imatinib. According to the Appellant, starting from Imatinib free base they could reach to the beta crystal form of Imatinib Mesylate in two ways: one "by *digesting* another crystal form, especially the alpha crystal form, or an amorphous starting material of the methanesulfonic acid addition salt of compound of formula I ..."; and second "by *digesting* another crystal form, especially the alpha crystal form, or an amorphous starting material of the methanesulfonic acid addition salt of compound of formula I...". Describing the different processes, step by step, for producing Imatinib Mesylate starting from Imatinib, it is stated that in the first process they would first arrive at Imatinib Mesylate in amorphous form, as the intermediate stage, and thereafter, following further processes, reach the beta crystal form of Imatinib Mesylate. Following the second process, they would reach the beta crystal form of Imatinib Mesylate directly, skipping the intermediate stage in which Imatinib Mesylate first appears in amorphous form. In the third process, they would start with the alpha crystal form of Imatinib Mesylate and arrive at its beta crystal form.

7. It was stated in course of submissions, however, that for practical purposes, the best way to produce the beta form is by proceeding directly from the free base form to the beta form, as in examples 2 and 3 given below, by introducing a specified amount of the beta crystals at the step specified. The three processes are described by the Appellant under the following three examples:

EXAMPLE-1[4]

Step 1- 98.6 gms of Imatinib free base is added to 1.4 liters of ethanol.

Step 2- To the above, 19.2 gms of methanesulfonic acid is added drop wise for over 20 minutes.

Step 3- Solution obtained in Step 2 is heated under reflux (i.e. boiling). It is heated in a manner to preserve the solution from escaping as a gas, so the gas is captured, condensed and obtained as a liquid. This solution is heated for 20 minutes.

Step 4- Filtering the solution-the filtrate (which is obtained after filtering the resulting liquid) is evaporated down to 50%. In other words, half of the filtrate is allowed to vaporize.

Step 5- Residue is again filtered at 25 degrees Celsius.

Step 6- Mother liquor (the liquid filtrate of step 5) is evaporated to dryness.

Step 7- Residue obtained after Step 6, and residue obtained after Step 5 are suspended in 2.21 ethanol.

Step 8- The suspension obtained after Step 7 is dissolved under reflux and it becomes clear upon heating. Thereafter, 30 ml water is added to it.

Step 9- Substance is cooled overnight to 25 degrees Celsius, filtered and dried at 65 degrees Celsius, until weight is constant. This results in alpha crystalline form.

Step 10- Alpha form is stirred in methanol for two days at about 25 degrees Celsius. Then the crystals are isolated by filtration and dried overnight at room temperature. This results in beta crystalline form.

EXAMPLE-2

Step 1- 50 gms of Imatinib free base is added to 480 liters (sic milliliters!) of methanol.

Step 2- To the above, 9.71 gms of methanesulfonic acid and 20 ml methanol is added. This mixture (sic is heated) at 50 degrees Celsius.

Step 3- To the solution obtained from Step 2, 5 gms of activated carbon is added and the mixture is boiled for 30 minutes under reflux, filtered and evaporated.

Step 4- The residue obtained from Step 2 (sic 3) is dissolved in 150 ml methanol and inoculated (introduced) with a few mgms (sic mg) of beta form of imatinib mesylate leading to crystallization of the product.

Step 5- The product is dried at 50 megabars (unit to measure pressure) and at 60 degrees Celsius. This leads to crystallization of beta form of imatinib mesylate.

Step 6- The retention values (distance traveled by each chemical component in relation to the distance the solution front moves) obtained are as follows;

Methylene chloride: ethyl acetate: Methanol: concentrated aqueous ammonium hydroxide solution = 6:10:30:2 (sic 60:10:30:2)

Step 7- To the above, High Pressure Chromatography (technique for separation of mixtures) is applied for 10.2 minutes.

EXAMPLE-3

Step 1- 670 gms of alpha form of imatinib mesylate is heated in 1680 ml of methanol.

Step 2- The solution obtained from Step 1 is then inoculated at 60 degrees Celsius with 55 (sic mg of) beta form of imatinib mesylate. Upon this, the product starts to crystallize.

Step 3- Thereafter, the crystals are dried at 50 megabars and at 100 degrees Celsius. This leads to crystallization of beta form of imatinib mesylate.

Step 4- The retention values (distance traveled by each chemical component in relation to the distance the solution front moves) obtained are as follows;

Methylene chloride: ethyl acetate: Methanol: concentrated aqueous ammonium hydroxide solution = 6:10:30:2 (sic 60:10:30:2)

Step 5- To the above, High Pressure Chromatography is applied for 10.2 minutes.

[Examples are also given for preparation of 100 mg tablets and 100 mg capsules of Imatinib Mesylate but there is no need to go into that at this stage.]

8. The Appellant filed the application (Application No. 1602/MAS/1998)[5] for grant of patent for Imatinib Mesylate in beta crystalline form at the Chennai Patent Office on July 17, 1998. In the application it claimed that the invented product, the beta crystal form of Imatinib Mesylate, has (i) more beneficial flow properties: (ii) better thermodynamic stability; and (iii) lower hygroscopicity than the alpha crystal form of Imatinib Mesylate. It further claimed that the aforesaid properties makes the invented product "new" (and superior!) as it "stores better and is easier to process"; has "better processability of the methanesulfonic acid addition salt of a compound of formula I", and has a "further advantage for processing and storing".

9. It is significant to note that the comparison of the aforesaid properties of the beta crystal form of Imatinib Mesylate was made with its alpha crystal form. In the patent application, there is no claim of superiority of the beta crystal form of Imatinib Mesylate in regard to the aforesaid three properties, or any other property, over the starting material Imatinib, or even over Imatinib Mesylate in amorphous form or any form other than the alpha crystal form. On the contrary, insofar as Imatinib in free base form is concerned, it was unambiguously stated in the patent application as under:

It goes without saying that **all the indicated inhibitory and pharmacological effects are also found with the free base**, 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl) pyrimidin-2-ylamino)phenyl] benzamide, **or other cells thereof**. The present invention relates especially to the β-crystal form of the methanesulfonic acid addition salt of a compound of formula I in the treatment of one of the said diseases or in the preparation of a pharmacological agent for the treatment thereto.

(Emphasis added)

10. In fairness to the Appellant, however, it should be stated that the application was made at the time when there was a different patent regime. After the application was made and before it was taken up for consideration, a number of amendments were introduced in the Indian Patents Act, 1970, which brought about fundamental changes in the patent law of the country. The Appellant was, however, fully aware of these changes in the law and, in order to reinforce its claim for patent for the subject product and to bring its claim within the four corners of the changed law, it filed four (4) affidavits of certain experts, two of which stated that the beta crystal form of Imatinib Mesylate has much higher bioavailability as compared to Imatinib in free base form. In due course, we shall examine how far the properties attributed to the subject product in the patent application and the affidavits make it "new" and entitled to grant of patent, but for the moment we may note how the case has come to the present stage.

11. As noted above the patent application was made on July 17, 1998, giving July 18, 1997, the date on which the Appellant had applied for grant of patent for the subject product in Switzerland, as the "priority date". On July 18, 1997, Switzerland was not one of the "Convention Countries" as defined under Section 2(1)(d) read with Section 133 of the Act and it was notified as a convention country as per Section 133 of the Act on November 30, 1998.

12. In 1997, when the Appellant filed its application for patent, the law in India with regard to product patent was in a transitional stage and the Appellant's application lay dormant under an arrangement called "the mailbox procedure". Before the application for patent was taken up for consideration, the Appellant made an application (Application No. EMR/01/2002) on March 27, 2002, for grant of exclusive marketing rights (EMR) for the subject product under Section 24A of the Act, which was at that time on the statute book and which now stands deleted. The Patent Office granted EMR to the Appellant by order dated November 10, 2003.

13. The Appellant's application for patent was taken out of the "mailbox" for consideration only after amendments were made in the Patents Act, with effect from January 1, 2005. But before it was taken up for consideration, the patent application had attracted five (5) pre-grant oppositions[6] in terms of Section 25(1) of the Act. and it was in response to the pre-grant oppositions that the Appellant had filed the affidavits on the issue of bioavailability of Imatinib Mesylate in beta crystalline form.

14. The Assistant Controller of Patents and Designs heard all the parties on December 15, 2005, as provided under Rule 55 of the Patent Rules, 2003, and rejected the Appellant's application for grant of patent to the subject product by 5 (five) separate, though similar, orders passed on January 25, 2006 on the 5 (five) opposition petitions. The Assistant Controller held that the invention

claimed by the Appellant was anticipated by prior publication, i.e., the Zimmermann patent; that the invention claimed by the Appellant was obvious to a person skilled in the art in view of the disclosure provided in the Zimmermann patent specifications; and further that the patentability of the alleged invention was disallowed by Section 3(d) of the Act; and also that July 18, 1997, the Swiss priority date, was wrongly claimed as the priority date for the application in India and hence, the alleged invention was also anticipated by the specification made in the application submitted in Switzerland.

15. At that time, the appellate authority under the Act had yet to become functional. The Appellant, therefore, challenged the orders passed by the Assistant Controller in writ petitions filed directly before the Madras High Court. Apart from challenging the orders of the Assistant Controller, the Appellant also filed two writ petitions (one by the Appellant and the other by its Indian power of attorney holder) seeking a declaration that Section 3(d) of the Act is unconstitutional because it not only violates Article 14 of the Constitution of India but is also not in compliance with "TRIPS". After the formation of the Intellectual Property Appellate Board, the five writ petitions challenging the five orders of the Assistant Controller were transferred from the High Court to IPAB by order dated April 4, 2007, where these cases were registered as appeals and were numbered as TA/1 to 5/2007/PT/CH. The other two writ petitions assailing Section 3(d) of the Act were finally heard by a Division Bench of the High Court and dismissed by the judgment and order dated August 6, 2007. The Appellant did not take that matter any further.

16. The Appellant's appeals against the orders passed by the Assistant Controller were finally heard and dismissed by the IPAB by a long and detailed judgment dated June 26, 2009.

17. The IPAB reversed the findings of the Assistant Controller on the issues of anticipation and obviousness. It held that the Appellant's invention satisfied the tests of novelty and non-obviousness, and further that in view of the amended Section 133, the Appellant was fully entitled to get July 18, 1997, the date on which the patent application was made in Switzerland, as the priority date for his application in India. The IPAB, however, held that the patentability of the subject product was hit by Section 3(d) of the Act. Referring to Section 3(d) the IPAB observed:

Since India is having a requirement of higher standard of inventive step by introducing the amended Section 3(d) of the Act, what is patentable in other countries will not be patentable in India. As we see, the object of amended Section 3(d) of the Act is nothing but a requirement of higher standard of inventive step in the law particularly for the drug/pharmaceutical substances.

18. The IPAB also referred to the judgment of the Madras High Court, dismissing the Appellant's writ petitions challenging the constitutional validity of Section 3(d) where the High Court had observed:

We have borne in mind the object which the amending Act wanted to achieve namely, to prevent evergreening; to provide easy access to the citizens of the country to life saving drugs and to discharge their constitutional obligation of providing good health care to its citizens.

19. In light of the High Court's observation, the IPAB also referred to the pricing of the drug Gleevec by the Appellant while it enjoyed EMR over it, and held that the patentability of the

subject product would also be barred by Section 3(b) of the Act and in this regard observed as follows:

We are fully conscious of the Appellant's benevolent GIPAP program for free distribution of GLEEVEC to certain cancer patients. But as per information furnished in its written counter-argument by Rule 3 that when the Appellant was holding the right as EMR on GLEEVEC it used to charge Rs. 1,20,000/- per month for a required dose of the drug from a cancer patient, not disputed by the Appellant, which in our view is too unaffordable to the poor cancer patients in India. Thus, we also observe that a grant of product patent on this application can create a havoc to the lives of poor people and their families affected with the cancer for which this drug is effective. This will have disastrous effect on the society as well. Considering all the circumstances of the appeals before us, we observe that the Appellant's alleged invention won't be worthy of a reward of any product patent on the basis of its impugned application for not only for not satisfying the requirement of Section 3(d) of the Act, but also for its possible disastrous consequences on such grant as stated above, which also is being attracted by the provisions of Section 3(b) of the Act which prohibits grant of patent on inventions, exploitation of which could create public disorder among other things (Sic.) We, therefore, uphold the decision of Rule 8 on Section 3(d) of the Act to the extent that product patent cannot be made available to the Appellant...

20. Though agreeing with the Assistant Controller that no product patent for the subject patent could be allowed in favour of the Appellant, the IPAB held that the Appellant could not be denied the process patent for preparation of Imatinib Mesylate in beta crystal form. The IPAB ordered accordingly.

21. Against the order of the IPAB the Appellant came directly to this Court in a petition under Article 136 of the Constitution. When the matter was first taken up before this Bench, we first thought of dismissing the SLPs at the threshold as the Appellant had an alternative remedy to challenge the judgment and order of the IPAB before the Madras High Court. However, Mr. Gopal Subramanium, the senior advocate appearing for the Appellant, submitted that the SLPs were filed on August 11, 2009, and the Court issued notice to the Respondents on September 11, 2009. Further, before coming to this Bench, the matter was listed before another Bench, where it was heard on merits on different dates from August 9, 2011 to September 6, 2011. Mr. Subramanium further submitted that relegating the Appellant to the High Court might render the matter infructuous in as much as the period for the patent applied for would come to end after 20 years from the date of the application, i.e. in July 2018. He submitted that the High Court would take at least 2-3 years before a final decision would be rendered and then, whatever be the High Court's decision, the matter was bound to come to this Court. In this to and fro whatever remains of the patent period would also lapse. Mr. Subramanium further submitted that the case involved a number of seminal issues and it was in the larger interest that an authoritative pronouncement on those issues be made by this Court.

22. Initially some of the Respondents strongly opposed the maintainability of the petitions made directly to this Court by-passing the High Court, but in the end all agreed that given the importance of the matter, this Court may itself decide the appeals instead of directing the Appellant to move the High Court. It is in such circumstances that we agreed to hear the parties and decide the appeals on merits. However, we, wish to make it clear that any attempt to challenge the IPAB order directly

before this Court, side-stepping the High Court, needs to be strongly discouraged and this case is certainly not to be treated as a precedent in that regard.

23. As this Court now proceeds to decide the case on merits, it needs to be noted that after notice was issued in the SLPs filed by Novartis AG, all the five parties who had filed pre-grant oppositions before the Controller (hereinafter referred to as the Objectors) filed their respective counter-affidavits. Two of the Objectors, namely NATCO Pharma Ltd. and M/s. Cancer Patients Aid Association, additionally filed Special Leave Petition, challenging the findings recorded by the IPAB in favour of Novartis AG. Leave to appeal has also been granted in all those SLPs, and hence, all the issues are open before this Court and this Court is deciding the case unbound by any findings of the authority or the tribunal below.

24. In connection with the case of the Appellant, the first and foremost thing that needs to be kept in mind is that it falls in the transitional period between two fundamentally different patent regimes. In 1998, when the application was made on behalf of the Appellant, the Patents Act, 1970, had a provision in Section 5 with the marginal heading, *"Inventions where only methods or processes of manufacture patentable"* that barred grant of patent to **substances** intended for use, or capable of being used, as food or medicine or drug, or prepared or produced by chemical processes. The application was then put in the "mailbox" and was taken out for consideration when many changes had been made in the Patents Act, 1970, with effect from January 1, 2005, to make the patent law in the country compliant with the terms of an international agreement entered into by the Government of India. Following the international agreement, the Patents Act, 1970, was subjected to large scale changes in three stages; and finally, by the Patents (Amendment) Act, 2005, Section 5 was altogether deleted from the Parent Act (Patents Act, 1970). Between January 1, 1995 and January 1, 2005, the Patents Act, 1970, underwent wide ranging changes, but if we are asked to identify the single most important change brought about in the law of patent in India as a result of the country's obligations under the international agreement, we would unhesitatingly say the deletion of Section 5 from the Patents Act, which opened the doors to product patents in the country. It is, however, important to note that the removal of Section 5 from the statute book was accompanied by amendments in Clauses (j) and (ja) of Section 2(1), apart from some other ancillary clauses of Section 2(1), as well as amendments in Section 3, which redefined the concepts of invention and patentability.

25. Some important provisions of the Patents Act, 1970, as they stand after the amendment of the Act in 2005, and with which we are especially concerned in this case, indeed present a problem of interpretation. Why was Section 5, which, in one sense, was the distinctive feature of the patent law in India, taken off the statute book? What does the legislature wish to say through Clauses (j) and (ja) of Section 2(1), Section 3 and several other sections? How is it that some of the provisions of the Act apparently seem to be of no use or purpose, e.g., Sections 2(1)(l) and 2(1)(ta)? Why is it that some of the crucial provisions in the Act appear to be wanting in precision and clarity?

26. It is easy to know why Section 5 was deleted but to understand the import of the amendments in Clauses (j) and (ja) of Section 2(1) and the amendments in Section 3 it is necessary to find out the concerns of Parliament, based on the history of the patent law in the country, when it made such basic changes in the Patents Act. What were the issues the legislature was trying to address?

What was the mischief Parliament wanted to check and what were the objects it intended to achieve through these amendments?

27. The best way to understand a law is to know the reason for it. In *Utkal Contractors and Joinery Pvt. Ltd. and Ors. v. State of Orissa and Ors.* MANU/SC/0077/1987 : (1987) 3 SCC 279, Justice Chinnappa Reddy, speaking for the Court, said:

9. ... **A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation**. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are statement of Objects and Reasons when the Bill is presented to Parliament, the reports of committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead...

(Emphasis added)

28. Again in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors.* MANU/SC/0073/1987 : (1987) 1 SCC 424 Justice Reddy said:

33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. **A statute is best interpreted when we know why it was enacted.** With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. **If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context.** With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression 'Prize Chit' in *Srinivasa* and we find no reason to depart from the Court's construction.

(Emphasis added)

29. In order to understand what the law really is, it is essential to know the "why" and "how" of the law. Why the law is what it is and how it came to its present form? The adage is more true in case of the law of patents in India than perhaps any other law.

30. Therefore, in order to correctly understand the present law it would be necessary to briefly delve into the legislative history of the law of patents in the country.

31. At the time of Independence, India's patent regime was governed by the Patents and Designs Act, 1911, which had provisions both for product and process patents[7]. It was, however, generally felt that the patent law had done little good to the people of the country. The way the Act was designed benefited foreigners far more than Indians. It did not help at all in the promotion of scientific research and industrialization in the country, and it curbed the innovativeness and inventiveness of Indians.

32. Shortly after Independence, therefore, in 1949, a committee was constituted under the chairmanship of Justice (Dr.) Bakshi Tek Chand, a retired judge of the Lahore High Court, to undertake a comprehensive review of the working of the 1911 Act.

33. The Committee submitted its interim report on August 4, 1949 and the final report in 1950 making recommendations for prevention of misuse or abuse of patent rights in India. It also observed that the Patent Act should contain a clear indication that food and medicine and surgical and curative devices were to be made available to the public at the cheapest price commensurate with giving reasonable compensation to the patentee. Based on the committee's recommendations, the 1911 Act was amended in 1950 (by Act XXXII of 1950) in relation to working of inventions, including compulsory licensing and revocation of patents. In 1952, a further amendment was made (by Act LXX of 1952) to provide for compulsory license in respect of food and medicines, insecticide, germicide or fungicide, and a process for producing substance or any invention relating to surgical or curative devices. The committee's recommendation prompted the Government to introduce a bill (Bill No. 59 of 1953) in Parliament, but the bill was not pressed and it was allowed to lapse.

34. In 1957, another committee came to be appointed under the chairmanship of Justice N. Rajagopala Ayyangar to take a fresh look at the law of patent and to completely revamp and recast it to best sub-serve the (contemporary) needs of the country[8].

35. Justice Ayyangar painstakingly collected valuable data (taking the figures for the years 1930 to 1939 from the Bakshi Tek Chand report) and, compiling them into a number of tables,[9] showed the share of Indians in the field of patents. He analyzed the figures in the tables and pointed out that during the period 1930-37, the grant of patents to Indians and foreigners was roughly in the ratio of 1:9. Even after Independence, though a number of institutions for post-graduate training were set up and several national laboratories were established to encourage a rapid growth of scientific education, the proportion of Indian and the foreign patents remained substantially the same, at roughly 1:9. Justice Ayyangar further pointed out that this ratio does not take into account the economic or industrial or scientific importance of the inventions. If these factors are taken into account, Indians would appear to be lagging even further behind. Further, taking into reckoning the number of inventions for which renewal fees were paid beyond the 6th year, which would give a rough idea of the value attached to the invention by the patentee, the patents taken by Indians would appear to be of little worth as compared with patents held by foreign nationals.

36. Justice Ayyangar examined the nature of the patent right and considered the arguments advanced as justifications/rationalizations for grant of patents. He described the patent law, in his report, as an instrument for managing the political economy of the country. He observed:

It would not be an exaggeration to say that the industrial progress of a country is considerably stimulated or retarded by its patent system according as to whether the system is suited to it or not. (p. 9, para 16)

He also quoted from Michel[10] with approval as under:

* * * Patent systems are not created in the interest of the inventor but in the interest of national economy. The rules and Regulations of the patent systems are not governed by civil or common law but by political economy.

37. Observing that industrial countries and under-developed countries had different demands and requirements, Justice Ayyangar pointed out that the same patent law would operate differently in two countries at two different levels of technological and economic development, and hence the need to regulate the patent law in accordance with the need of the country. Commenting upon the Patents and Designs Act, 1911, (even after its post-Independence amendments) Justice Ayyangar said:

It is further obvious however that the system would not yield the same results when applied to under-developed countries. I entirely agree with the views of the Patents Enquiry Committee that "the Indian Patent system has failed in its main purpose, namely, to stimulate invention among Indians and to encourage the development and exploitation of new inventions for industrial purposes in the country so as to secure the benefits thereof to the largest section of the public. (Interim Report, p. 165).

38. Justice Ayyangar observed that the provisions of the Patent law have to be designed, with special reference to the economic conditions of the country, the state of its scientific and technological advancement, its future needs and other relevant factors, and *so as to minimize, if not to eliminate, the abuses to which a system of patent monopoly is capable of being put.* Bearing in view the matters set above, he recommended retaining the patent system, but with a number of improvements.

39. One of the improvements suggested was to define, with precision, those inventions which should be patentable *and equally clearly identify certain inventions, the grant of patents to which would retard research, or industrial progress, or be detrimental to the national health or well-being, and to make those inventions non-patentable*.

40. Justice Ayyangar's report specially discussed (a) patents for chemical inventions; and (b) patents for inventions relating to food and medicine.

41. In regard to patents for chemical substances, he examined the history of the law in other countries and pointed out that Germany was the first to adopt the system of confining the patentability of inventions relating to chemical products or substances to process claims. The law was then followed in many other countries in the world, for instance Austria, Brazil, Czechoslovakia, Holland, Hungary, Japan, Mexico, Norway, Poland and the U.S.S.R. Products produced by chemical process were not patentable though processes for making such products

were patentable, if, of course, they satisfied the other tests of patentability, e.g. novelty, subject matter, etc. In light of the experience of the other countries, Justice Ayyangar recommended:

I have considered the matter with the utmost care and have reached the conclusion that the chemical and pharmaceutical industry of this country would be advanced and the tempo of research in that field would be promoted if the German system of permitting only process claims were adopted.

42. Coming next to the patents for inventions relating to food and medicine, Justice Ayyangar pointed out that barring the US, there was hardly any country that allowed unrestricted grant of patents in respect of articles of food and medicines, or as to the licensing and working of patents in this class. In none of the countries of Europe were patents granted for product claims for articles of food or medicine, and in a few (Denmark for articles of food; and Italy, under the law of 1957, for medicinal products) even claims for processes for producing them were non-patentable. He explained that the reason for this state of law is stated to be that the denial of product claims is necessary in order that important articles of daily use such as medicine or food, which are vital to the health of the community, should be made available to everyone at reasonable prices and that no monopoly should be granted in respect of such articles. It is considered that the refusal of product patents would enlarge the area of competition and thus result in the production of these articles in sufficient quantity and at the lowest possible cost to the public.

43. Justice Ayyangar submitted a comprehensive Report on Patent Law Revision in September 1959 and the new law of patent, namely, the Patents Act, 1970, came to be enacted mainly based on the recommendations of the report, and came into force on April 20, 1972, replacing the Patents and Designs Act, 1911.

44. Section 1 of the new Act gave it its name and territorial extent and provided that it would come into effect on such date as the Central Government may appoint, by notification in the official gazette. Section 2 contained the definition and interpretation clauses; it defined the terms "invention" and "medicine" in Clauses (j) and (l) respectively as under[11]:

Section 2(1)(j) "invention" means any new and useful-

(i) art, process, method or manner of manufacture;

(ii) machine, apparatus or other article;

(iii) substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention.

Section 2(1)(l) "medicine or drug" includes-

(i) all medicines for internal or external use of human beings or animals,

(ii) all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals,

(iii) all substances intended to be used for or in the maintenance of public health, or the prevention or control of any epidemic disease among human beings or animals,

(iv) insecticides, germicides, fungicides, weedicides and all other substances intended to be used for the protection or preservation of plants;

(v) all chemical substances which are ordinarily used as intermediates in the preparation or manufacture of any of the medicines or substances above referred to.

45. Sections 1 and 2 comprised Chapter I, following which Chapter II was headed "Inventions not patentable". Chapter II had three sections which, as originally framed, are as under:

Section 3. What are not inventions.- The following are not inventions within the meaning of this Act,-

(a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;

(b) an invention the primary or intended use of which would be contrary to law or morality or injurious to public health;

(c) the mere discovery of a scientific principle or the formulation of an abstract theory;

(d) the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;

(e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;

(f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;

(g) a method or process of testing applicable during the process of manufacture for rendering the machine, apparatus or other equipment more efficient or for the improvement or restoration of the existing machine, apparatus or other equipment or for the improvement or control of manufacture;

(h) a method of agriculture or horticulture;

(i) any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products.

Section 4. Inventions relating to atomic energy not patentable.- No patent shall be granted in respect of an invention relating to atomic energy falling within Sub-section (1) of Section 20 of the Atomic Energy Act, 1962 (33 of 1962).

Section 5. Inventions where only methods or processes of manufacture patentable.-In the case of inventions-

(a) claiming substances intended for the use, or capable of being used, as food or as medicine or drug, or

(b) relating to substances prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds), no patent shall be granted in respect of claims for the substances themselves, but claims for the methods of processes of manufacture shall be patentable.

46. It is significant to note that Section 5 in chapter II of the Act expressly excluded product patents for substances intended for use and capable of being used as food or as medicine or drug, and substances prepared or produced by chemical process, and made these substances non-patentable. Section 4 similarly prohibited grant of patent in respect of an invention relating to atomic energy. The Act thus clearly recognized and maintained the distinction between invention and patentability.

47. We have briefly examined some aspects of the legislative history of the patent law in India. We may now take a look at how the Patent and Designs Act, 1911, and the Patents Act, 1970, impacted the pharmaceutical industry and the availability of drugs in the country.

48. Sudip Chaudhuri in his book *titled, The WTO and India's Pharmaceuticals Industry*[12] describes the market shares of multi-national companies and Indian companies in India by means of a table as under:

Market Shares of MNCs & Indian Companies in the Pharmaceutical Industry in India

Year	MNCs (%)	Indian Companies
1952	38	62
1970	68	32
1978	60	40
1980	50	50
1991	40	60
1998	32	68
2004	23	77

Sources: For 1952, Pharmaceutical Enquiry Committee 1954, pp. 20-1, 61-6;

For 1970, Ministry of Petroleum & Chemicals 1971, p. 1;

For 1978, Chaudhuri 1984, p. 176 (based on ORG 1978);

For 1980, 1991, and 1998, Kaleskar 2003;

49. The fall and rise of the Indian pharmaceutical industry is explained as the result of certain factors, not the least important of which was the change in the patent law in the country, which made medicines and drugs and chemical substances non-patentable. Chaudhuri explains that before the introduction of sulfa drugs (1930s) and penicillin (1940) that brought about the therapeutic revolution, drugs of natural origin were more important than synthetic ones. Also, medicinal plants (that is, raw materials) for about three-fourths of the drugs mentioned in British and other pharmacopoeias actually grew in India.

50. By the time the Second World War started (1939), several indigenous firms were engaged in manufacturing drugs, and indigenous producers met 13 per cent of the medicinal requirements of the country. They still had a long way to go to attain self-sufficiency but in terms of the range of operations they were already manufacturing all types of drugs. By the early 1950s, because of the spread of manufacturing activities, the indigenous sector dominated the pharmaceutical industry in India. It accounted for about 62 per cent of the market in 1952 (the table above). However, the rise and growth of multinational corporations (MNCs) worldwide in the post-Second World War period, as well as the therapeutic revolution changed these dynamics. The MNCs started research for developing new drugs in the 1930s-40s. As a result, in the late 1940s and during the 1950s and even after that at a slower rate, new drugs discovered by the MNCs began to be available for medical use. The indigenous sector was not equipped for research for developing new drugs, that is, for developing a new chemical entity. With the introduction of new drug at a rapid rate by the MNCs, the role of patents became important. Because of the patent regime under the 1911 Act and the unsupportive industrial policy, the indigenous sector lost its status in the 1950s and the 1960s. In contrast to 62 per cent of the market in the early 1950s, the market share of the indigenous sector declined to 32 per cent by 1970. In contrast, the market share of the MNCs increased from 38 per cent in 1952 to 68 per cent in 1970 (the table above).

51. However, according to Chaudhuri, the situation changed in the 1970s. Several official initiatives were taken in the 1970s, of which the most important one was the enactment of the Patents Act, 1970, which changed the environment in favour of the indigenous sector.

52. In regard to the Patents Act, 1970, Chaudhuri maintains that Patent "reforms" contributed directly to the transformation of the pharmaceutical industry. He points out that under the Patents Act, 1970, articles of food, medicines and drugs and chemical substances could be patented only for a new method or process of manufacture, not for the products as such (Section 5 of the 1970 Act). Further, unlike in the previous patent regime, for each particular drug only one method or process-the best known to the applicant-could be patented (Sections 5 and 10 of the 1970 Act). Also, even in case of a process patent for an article of food, medicine or drug, the term of the patent was brought down from fourteen (14) years to five (5) years from the date of sealing of the patent, or seven (7) years from the date of patent whichever was earlier.

53. He then examines the growth of the Indian pharmaceutical industry driven by the new patent regime in three phases:

• Till the early 1970s;

• The late 1970s and the 1980s; and

• Since the 1990s

54. Till the early 1970s the industry was dominated by MNCs who commanded 68% of the market share. India was dependent on imports for many essential bulk drugs. This import dependence constricted consumption in a country deficient in foreign exchange, and inhibited the growth of the industry. Drug prices in India were very high.

55. In the late 1970s and 1980s, Indian companies started large-scale production of bulk drugs. The development of the bulk drugs sector is actually the most important achievement of the pharmaceutical industry in India. This led to the transformation of the industry.

56. The most rapid growth of the Indian pharmaceutical industry took place from the 1990s onwards. Both production and exports grew remarkably fast. The production of both bulk drugs and formulations started increasing sharply and steadily. From Rs. 6,400 million in 1989-90, bulk drugs production increased to Rs. 77,790 million in 2003-04; and from Rs. 34,200 million in 1989-90, formulation productions increased to Rs. 276,920 million in 2003-04. The growth was most remarkable from 2000 to 2005, when production increased much more than it had in the last two decades. Indian companies further consolidated their domination in the domestic market. Their market share increased from 60 per cent in 1991 to 68 per cent in 1998 and 77 per cent in 2003.

57. The growth was also very fast in the export markets. India became a net exporter by 1988-89, and since then there has only been an increase in the Indian exports. As a result, net exports as a percentage of exports have increased from 4.4 per cent in 1988-9 to about 50 per cent in the early 1990s and more than 75 per cent in the early 2000s. More than three-fourths of bulk drug production and almost one-fourth of the formulations production are exported. The USA, which has the toughest regulatory requirements, has emerged as India's largest export partner in pharmaceuticals.

58. Dealing with the growth of the Indian pharmaceutical industry after the change in the patent law, Chaudhuri writes:

Because of the rapid growth and structural transformation in the last three decades or so, India now occupies an important position in the international pharmaceutical industry... India has received worldwide recognition as a low cost producer of high quality bulk drugs and formulations. India produces about 350 bulk drugs ranging from simple pain killers to sophisticated antibiotics and complex cardiac products. Most of the bulk drugs are produced from basic stages, involving complex multi-stage synthesis, fermentation and extractions. For more than 25 bulk drugs, India accounts for more than 50 per cent of the international trade. India is a major force to reckon with in the western markets for such drugs as ibuprofen, sulphamethoxasole...

59. Even as the country's pharmaceutical industry, helped by the basic changes made in the patent system by the Patent Act, 1970, was going from strength to strength, certain developments were taking place at the international level that would deeply impact the Patent system in the country. Following the Uruguay round of multilateral negotiations under the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade-Related Aspects of Intellectual Property Rights (The TRIPS) was arrived at and it came into force on January I, 1995. The TRIPS Agreement is the

most comprehensive multilateral agreement to set detailed minimum standards for the protection and enforcement of intellectual property rights, and aims at harmonizing national intellectual property systems. All members of the World Trade Organisation (WTO) are bound by the obligations under the TRIPS Agreement. India is one of the founding members of the GATT and thus a member of the WTO from its inception from January 1, 1995, and is bound by the obligations under TRIPS Agreement like all other members of the WTO. Some of the Articles of the Agreement, which have a bearing on our discussion, are reproduced below.

Article 1
Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. xxx

Article 3
National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection[13] of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and Regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Article 7
Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8
Principles

1. Members may, in formulating or amending their laws and Regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

PART II
Section 5: Patents

Article 27
Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[14] Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *order public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Article 28
Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing[15] for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

PART V
Dispute Prevention and Settlement

Article 63
Transparency

1. Laws and Regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and Regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and Regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and Regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 64
Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

Article 65
Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and Regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, Regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Article 70
Protection of Existing Subject Matter

1. to 6 xxx

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

60. The Agreement (vide. Part V: Article 64) provides for a mechanism for resolution of disputes between the members of the WTO. In case of a dispute, a panel of specially appointed trade experts interprets the provisions of the Agreement and issues a report. The panel's decision may be subjected to appeal before the WTO Appellate Body. If a party to the decision fails to abide by a decision, the other party can impose trade sanctions on the member in breach, upon authorization by the Dispute Settlement Body. The dispute resolution mechanism in the TRIPS is strong and effective as was proved in the case of India herself.

61. Article 65 (Sub-articles 1 and 2) allowed India to delay the application of the provisions of the Agreement for a period of 5 years, that is, till January 1, 2000; Sub-article 4 allowed India to delay for a further period of five years, that is, till January 1, 2005, the application of the provision relating to product patent, in respect of all articles excluded by the Patent Act, 1970[16], which included pharmaceuticals and agricultural chemical products. But, Article 70 (Sub-articles 8 and 9) enjoined that in the meanwhile it should provide for a means by which applications for patents for inventions in respect of pharmaceutical and agricultural chemical products could be filed and also for the grant of "exclusive marketing rights" for such products. In discharge of its obligations under the Agreement, the Government of India promulgated the Patents (Amendment) Ordinance, 1994 (Ordinance No. 13 of 1994), on December 31, 1994, amending the Patents Act, 1970. The Ordinance provided for making "a claim for patent of an invention for **a substance itself intended for use, or capable of being used, as medicine or drug"** (as required by sub-paragraph (a) of Article 70.8 of the TRIPS Agreement) and for the grant of exclusive marketing rights with respect to the product that is the subject matter of such a patent claim (as required by Article 70.9 of the Agreement). The Ordinance, however, lapsed on March 26, 1995, on expiration of six weeks from the commencement of the next session of the Parliament, without being replaced by any corresponding Act[17]. The Patents (Amendment) Bill, 1995, which was intended to give permanent legislative effect to the provisions of the Ordinance, was introduced in the Lok Sabha in March 1995. The Bill was passed by the Lok Sabha and it was then introduced in the Rajya Sabha where it was referred to a Select Committee of the House for examination and report. The Select Committee was unable to give its report before the dissolution of the Lok Sabha on May 10, 1996. The Patents (Amendment) Bill, 1995, lapsed with the dissolution of the 10th Lok Sabha.

62. In this state of the patent law in the country, India was twice taken to the WTO panel, first on a complaint by the USA (WT/DS50/AB/R, dated December 19, 1997) and the second time on a complaint filed by the European Communities (WT/DS79/R, dated August 24, 1998). The complaint by the USA was in regard to the absence, in India, of either patent protection for pharmaceutical and agricultural chemical products under Article 27 of the TRIPS Agreement, or of a means for the filing of patent applications for pharmaceutical and agricultural chemical products pursuant to Article 70.8 of the TRIPS Agreement and of the legal authority for the grant of exclusive marketing rights for such products pursuant to Article 70.9 of the TRIPS Agreement. The WTO panel returned the finding that India had not complied with its obligations under Article 70.8 (a) and, in the alternative, paragraphs 1 and 2 of Article 63 and also 70.9 of the TRIPS Agreement. India took the matter in appeal. By a decision dated December 19, 1997, the Appellate Body affirmed the panel's findings that India had not complied with its obligations under Article 70.8(a) and Article 70.9 of the TRIPS Agreement, but set aside the panel's finding relating to the alternative claim by the United States under Article 63 of TRIPS Agreement. In conclusion, the Appellate Body recommended "that the Dispute Settlement Body request India to bring its legal regime for patent protection of pharmaceutical and agricultural chemical products into conformity with India's obligations under Article 70.8 and 70.9 of the TRIPS Agreement".

63. In the proceedings arising from the complaint filed by the United States, the European Communities were added as the Third Party before the panel and as the Third Participant before the Appellate Body. Nonetheless, the European Communities and their members filed a similar but separate complaint against India (WT/DS79/R, dated August 24, 1998). The WTO panel, accepting the complainant's request, extended the findings in the earlier dispute (WT/DS50), as

modified by the Appellate Body, to the complaint filed by the European Communities and their member States as well. This matter did not go to the WTO Appellate Body.

64. The TRIPS Agreement also provides for a built-in mechanism for review through the biennial Ministerial Conference (vide Article 71). The Ministerial Conference is the highest decision-making body of the WTO and it can make decisions on all matters under any of the WTO agreements, including the TRIPS Agreement. The fourth WTO Ministerial Conference in Doha on November 14, 2001, adopted the Doha Declaration on the TRIPS and Public Health. The Doha Declaration is as follows:

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

c. Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

6. We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

7. We reaffirm the commitment of developed-country members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country members pursuant to Article 66.2. We also agree that the least-developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

65. In the course of the hearing, we were told that the Doha Declaration effectively reflected and addressed the deep disquiet of the developing and the least-developed countries regarding their obligation under TRIPS to grant patent protection for pharmaceutical and agricultural chemical products and the likelihood of its highly adverse consequence on public-health. Dr. Dhawan, appearing for Cipla (one of the Objectors), was particularly severe in his criticism of the TRIPS Agreement and called it a "predatory and coercive" agreement. The other counsel, though, appearing for the different Objectors, were more muted in their criticism of the TRIPS Agreement. Mr. Kuhad, the learned Additional Solicitor General appearing for the Union of India, and Mr. Grover, Senior Advocate, appearing on behalf of the M/s. Cancer Patients Aid Association (one of the Objectors), especially adapted their submissions, taking the TRIPS Agreement as a fact that cannot be simply wished away. However, all the counsel representing the Union of India and the different Objectors unanimously took the stand that the TRIPS Agreement has sufficient flexibility (vide Articles 7, 8 and 27), which was further reaffirmed by the Doha Declaration (in paragraphs 4 to 6), to enable the member States to control the patent rights in a manner as to avoid any adverse impact on public-health. It was contended on behalf of the Union of India and the Objectors that the TRIPS Agreement coupled with the Doha Declaration leaves it open to the member States to adjust their respective patent systems by regulating the grant of patents and to set up higher standards for patent protection for pharmaceutical and agricultural chemical products. The Union of India and all the Objectors maintained that the patent law in India, as it stands to-day after major changes were brought about in the Patents Act, 1970 in 2005, is fully TRIPS compliant. But they insisted that the Indian law must be judged and interpreted on its own terms, and not on the basis of standards of patentability prescribed in some countries of the western world.

66. We have referred to the TRIPS Agreement and certain developments arising from it not to comment upon the fairness or otherwise of the Agreement nor to examine the correctness and wisdom of the decision of the Government of India to subscribe to the Agreement. That is farthest

from our mind. We have referred to the Agreement as being the main reason behind the basic changes brought about in the patent law of the country by legislative action. We have also referred to the Agreement as being the cause of a good deal of concern not only in this country but also (as we shall see presently) in other parts of the world; the concern being that patent protection to pharmaceutical and agricultural chemical products might have the effect of putting life-saving medicines beyond the reach of a very large section of people. In the following lines we shall see how the Indian legislature addressed this concern and, while harmonizing the patent law in the country with the provisions of the TRIPS Agreement, strove to balance its obligations under the international treaty and its commitment to protect and promote public health considerations, not only of its own people but in many other parts of the world (particularly in the Developing Countries and the Least Developed Countries).

67. We have seen above that, simultaneously with the TRIPS coming into force, the Government of India had brought an Ordinance to comply with the provisions of Article 70 (8) and (9), but the Ordinance lapsed without being replaced by any enactment. Complaints were then filed on which pronouncements were made against India. On the complaint filed by the USA, the decision of the Appellate Body was rendered on December 19, 1997; and on the complaint filed by the European Communities, the report of the Panel came on August 24, 1998. Thus faced with the threat of trade sanctions, Parliament passed the Patents (Amendment) Act 1999 (Act No. 17 of 1999) on March 26, 1999, which amended the provisions of the Patents Act 1970 retrospectively, with effect from January 1, 1995, the date when the TRIPS Agreement came into force. By the Amendment Act of 1999, Section 5 of the Parent Act was amended to provide for making "a claim for patent of an invention for **a substance itself intended for use or capable of being used, as medicine or drug"**[18]. The Amendment Act further incorporated in the Parent Act, Chapter IVA, which contained provisions for grant of exclusive marketing rights in respect of pharmaceutical substances for which a claim for patent was made under Section 5 of the Act. The Amendment Act of 1999 thus complied with Article 70(8) and (9) of the TRIPS Agreement.

68. Three years later the Patents (Amendment) Act, 2002 (Act No. 38 of 2002) came to be enacted on June 25, 2002. It brought large scale amendments in the Patents Act, 1970. The Statement of Objects and Reasons for the Amendment Act of 2002 is stated as under:

Amendment Act 38 of 2002-Statement of Objects and Reasons.-The law relating to patents is contained in the Patents Act, 1970 which came into force on the 20th April, 1972. **The Act was last amended in March, 1999 to meet India's obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)** which forms part of the Agreement establishing the World Trade Organisation (WTO)....Development of technological capability in India, coupled with the need for integrating the intellectual property system with international practices and intellectual property regimes, requires that the Act be modified into a modern, harmonised and user-friendly legislation to **adequately protect national and public interests while simultaneously meeting India's international obligations under the TRIPS Agreement which are to be fulfilled by 31st December, 1999.**

2. xxx

3. While considering amendment to the Act, **efforts have been made to make the law not only TRIPS complaint (sic) but also to provide therein necessary and adequate safeguards for protection of public interest, national security, bio-diversity, traditional knowledge, etc.** Opportunity is also proposed to be availed of for harmonising the procedure for grant of patents in accordance with international practices and to make the system more user friendly.

4. Some of the salient features of the Bill are as under:

(a) to define the term "invention" in consonance with international practices and consistent with TRIPS Agreement;

(b) to modify Section 3 of the present Act **to include exclusions permitted by TRIPS Agreement** and also subject-matters like discovery of any living or non-living substances occurring in nature in the list of exclusions which in general do not constitute patentable invention;

(c) to align rights of patentee as per Article 28 of the TRIPS Agreement;

(d) to (k) xxx;

(l) to amend several provisions of the Act with a view to simplifying and rationalising the procedures aimed at benefiting users.

(Emphasis added)

69. The Amendment Act of 2002 greatly expanded the definition clause in Section 2 of the Parent Act by including a number of new expressions and terms and redefining some earlier terms.

70. "Invention" was defined in the Parent Act as under:

Section 2(1)(j) "Invention" means any new and useful-

(i) art, process, method or manner of manufacture;

(ii) machine, apparatus or other article;

(iii) substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention.

71. "Invention" was re-defined by the Amendment Act of 2002 as under:

Section 2(1)(j) "invention" means a new product or process involving an inventive step and capable of industrial application.

72. The expressions "capable of industrial application" and "inventive step" were separately defined in Clauses (ac) and (ja) respectively which are as under:

Section 2(1)(ac) "capable of industrial application", in relation to an invention, means that the invention is capable of being made or used in an industry.

Section 2(1)(ja) "inventive step" means a feature that makes the invention not obvious to a person skilled in the Art.

73. Section 3 of the Parent Act, which provided for exclusions from patentability, was recast. In Section 5 of the Parent Act, an Explanation was added after Sub-section (2). Chapter XVI was substituted with the Chapter Heading "Working of Patents, Compulsory Licenses and Revocation". Section 83 in this Chapter laid down the general principles applicable to working of patented inventions; Section 84 provided for compulsory licenses; and Section 85 for revocation of patents for non-working. Here, it may not be out of place to take note of Section 83 which provided as under:

Section 83: General principles applicable to working of patented inventions.- Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely:

(a) that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;

(b) that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;

(c) that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;

(d)that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio- economic and technological development of India;

(e) that patents granted do not in any way prohibit Central Government in taking measures to protect public health;

(f) that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and

(g)that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.

74. The many amendments to and enlargement of the Parent Act by the Amendment Act of 2002 laid most of the ground-work, but India was yet to take the one final step to make its patent law compliant with the mandate of TRIPS. and that was to amend the Act to allow for grant of product patents for pharmaceutical and agricultural chemical substances. Steps were taken to finally amend the Patents Act, 1970, but the draft Bill lapsed in February 2004. Further efforts were made but the legislature was unable to bring an enactment to make that final amendment in the Act by December 2004; thus, the Government of India had no option but to amend the law through an Ordinance. Therefore, in order not to default on its obligations under the TRIPS Agreement, the Government brought the Patents (Amendment) Ordinance, 2004 (Ordinance No. 7 of 2004) with effect from January 1, 2005. By this Ordinance, Section 5 of the Patents Act, 1970, which barred the grant of patent for substances intended for use or capable of being used as food or as medicine or drugs or substances prepared or produced by chemical processes was done away with, opening the doors for grant of patents to, amongst others, pharmaceutical products.

75. But the troubles were far from over, because the Ordinance was to lapse on March 31, 2005. Hence, it was imperative for Parliament to pass an enactment, replacing the Ordinance before it lapsed on March 31, 2005. The pressure of time under which Parliament was obliged to deal with the matter and pass the Act, replacing Ordinance No. 7 of 2004 and amending the Patents Act, 1970, is best stated in the *Statement of Objects and Reasons* for the Patents (Amendment) Act, 2005 (Act 15 of 2005). In paragraph 5 of the *Statement of Objects and reasons* it is stated as under:

Amendment Act 15 of 2005-Statement of Objects and Reasons.-

5. The time-frame for this set of amendments was most crucial as any slippage in meeting the January 01, 2005 deadline had the potential of inviting retaliatory action under the WTO disputes mechanism. Having availed of the entire ten-year transition period provided under the TRIPS Agreement, India had no legal basis to defend its default on the deadline. The past record of delayed implementation would also not have helped the Indian case. This default would also have created a legal vacuum for the "mailbox" applications, as there would not be any mechanism to deal with them from January 01, 2005. This would have amounted to a specific default on the international commitment to examine and dispose of these cases, and might have again provided an opportunity to WTO member countries to raise a dispute against India in the WTO. There would also have been a legal vacuum in respect of fresh applications after January 01, 2005, as the law was salient on whether the "mailbox" provision would subsist or whether it would have ceased. Finally, there would have been an erosion of India's credibility in the international field. In the circumstances it was considered necessary to bring in the required amendments in time and as Parliament was not in session, the President promulgated the Patents (Amendment) Ordinance, 2005 (Ord. 7 of 2004) on the 26th December, 2004.

76. Parliament had an absolutely unenviable task on its hands. It was required to forge, within a very limited time, an Act that would be TRIPS compliant without, in any way, compromising on public health considerations. It is seen above that the TRIPS Agreement had aroused grave concerns about its impact on public health. India had learnt from experience the inverse relationship between product patents and the indigenous pharmaceutical industry, and its effects on the availability of essential drugs at affordable prices. It is also seen above that after the patent system in India barred the grant of patents for pharmaceutical and chemical substances, the

pharmaceutical industry in the country scaled great heights and became the major supplier of drugs at cheap prices to a number of developing and under developed countries. Hence, the reintroduction of product patents in the Indian patent system through the TRIPS Agreement became a cause of alarm not only in this country but also for some international agencies. Our attention was invited to a letter of the HIV/AIDS Director of the WHO, dated December 17, 2004, to the Minister of Health and Family Welfare, Government of India. The letter deserves to be noted in full.

17 December 2004

Dr. A. Ramadoss
Minister of Health and Family Welfare
Government of India
Nirman Bhawan, Maulana Azad Road
New Delhi-110001
India

Dear Dr. Ramadoss,

We would like to bring to your attention that several of our Member States have expressed their concern that in the future, generic antiretroviral drugs from India may no longer be available to them. Among other places, these concerns were expressed by the delegations of Ghana, Lesotho, Malawi, and Namibia at our recent Procurement & Supply Management (PSM) Workshop in Nairobi, Kenya (2-9 December, 2004), and by Bangladesh, Cambodia, China, Indonesia, Korea, Laos, Thailand, Papua New Guinea, and Vietnam at the Asian Regional Workshop on the WTO/TRIPS Agreement and Access to Medicines held in Kuala Lumpur, Malaysia (28-30 November 2004).

As you are aware, WHO has been actively monitoring the implications of trade agreements on public health. One key issue is the impact of the end of the transition period at 1 January 2005 allowed under the TRIPS Agreement, which delayed the application of product patents, on the local production and supply of generic antiretroviral agents.

The WTO Ministerial Declaration on the TRIPS Agreement and Public Health adopted in Doha, 2001 affirmed that "the TRIPS Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all." In line with this, recent resolutions of the World health Assembly have also urged that national legislation should be adapted in order to use to the full the flexibilities contained in the TRIPS Agreement (WHA 56.27, May 2003 and 57.14, May 2004). In accordance with its mandate, WHO will therefore seek to provide technical assistance and support to Member States to promote implementation of the TRIPS Agreement consistent with the public health objective of ensuring access to medicines.

As India is the leader in the global supply of affordable antiretroviral drugs and other essential medicines, we hope that the Indian government will take the necessary steps to continue to account for the needs of the poorest nations that urgently need access to

antiretrovirals, without adopting unnecessary restrictions that are not required under the TRIPS Agreement and that would impede access to medicines.

We thank you for your attention to this issue and send our best regards.

Sincerely,

Dr. Jim Yong Kim
Director
Department of HIV/AIDS

(Emphasis added)

77. We were also shown another letter dated February 23, 2005, from the Director of Advocacy, Communication and Leadership for UNAIDS, to the Minister of Commerce and Industry, Government of India. This letter is also useful as reflecting the concern of the international community over the impending change in the patent system in India. This letter is as under:

Honourable Minister
Mr. Kamal Nath
Ministry of Commerce and Industry
Udyog Bahavan
New Delhi 110001
India

23 February 2005

Reference: ACL/AD/1p

Excellency,

I have the honour to refer to India's leadership in promoting access to and supplying affordable essential generic HIV medicines to those most in need in developing countries, which has long been recognized and applauded by the international community. India can rightly take pride in the fact that it has significantly supported the response to the global AIDS emergency through helping to ensure AIDS medicines are more affordable and accessible.

Affordable HIV medications from India have so far saved thousands of lives yet more than 8, 000 people around the world continue to die every day because they have no access to treatment. Despite concerted efforts across the world, only about one in ten people in urgent need of HIV antiretroviral treatment in low- and middle-income countries has access to existing medicines.

Current legislative proposals intended to take the 1970 Indian Patents Act beyond the commitments agreed in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) threaten to undermine India's leadership in providing affordable medicines. For example, the requirement that countries wishing to import from India

under the WTO 30 August 2003 Decision must issue a compulsory license in every case goes far beyond the WTO Decision. This requirement in the Indian Ordinance places a cumbersome and often unnecessary administrative burden on the importing country. Often, there will be no patent in the importing country and compulsory licenses are only required where a valid patent has been issued. Under the WTO Declaration on TRIPS and Public Health (the Doha Declaration) of November 2001, Least Developed Countries are not even required to issue patents in the pharmaceutical sector until 2016. In addition, the limitations under the Ordinance of the pre-grant opposition rule contained in the previous law removes an important opportunity for People Living with HIV and other members of civil society to participate in an open and transparent process.

The implications of the current Ordinance are potentially devastating: the vast majority of countries hardest hit by AIDS do not have sufficient manufacturing capacity in the pharmaceutical sector and must rely upon imports from major producing countries such as India if they are to succeed in scaling up access to HIV treatment to the millions of their people in need.

UNAIDS strongly supports the rights of governments to avail themselves of the flexibilities in TRIPS in promoting the widest possible access to affordable medicines and technologies.

Therefore, we would respectfully urge you to consider all appropriate legal means to protect and scale up access to essential affordable medicines. The Doha Declaration, in which India played an important role, makes clear that the interests of public health and equitable access to medicines for all should be primary concerns in the application of the TRIPS Agreement and related trade and intellectual property rules.

UNAIDS has learnt that a Global Day of Action is planned for 26 February 2005 against the Indian Patent Ordinance. Civil society, organizations of people living with HIV and AIDS and the media will be watching closely. This day presents an opportunity for India to send out a strong message in support of both research innovation and access to affordable HIV-related pharmaceuticals and other essential medicines, while fully complying with the applicable multilateral trade and intellectual property agreements.

Please accept, Excellency, the assurance of my highest consideration.

Achmat Dangor
Director
Advocacy, Communication and Leadership

cc: Dr. Prasada Rao, UNAIDS Regional Director, Regional Support Team, Bangkok
Permanent Mission of India to the United Nations and other International Organizations in Geneva

78. It was thus under the twin pressure of time and anxiety to safeguard the public health objectives that Parliament was called upon to deliberate over the amendments required to be made in the patent law to make it fully compliant with the TRIPS Agreement.

79. On December 18, 2004, the Bill to further amend the Patents Act, 1970, which was materially the same as Ordinance No. 7 of 2004, was introduced in Parliament. The Bill evoked a highly insightful and informed debate on the subject. To anyone going through the debate on the Bill, Parliament would appear keenly alive to national interests, human-rights considerations and the role of India as the producer and supplier of drugs to different parts of the world where impoverished humanity is critically in need of those drugs at cheap and affordable prices. Cutting across party lines, member after member from the Opposition benches highlighted the grave risk in creating private monopolies in an area like pharmaceuticals, the abuses to which product patents in pharmaceutical products were vulnerable, and the ploys used by big companies to artificially extend the period of patent to keep competitors out and keep the prices of the patented product high. It was strongly argued that, while fulfilling its commitment under the TRIPS agreement, the Government must not bring in a patent regime where all the gains achieved by the Indian pharmaceutical industry are dissipated and large sections of Indians and people in other parts of the world are left at the mercy of giant multinational pharmaceutical companies.

80. One of the members from the Opposition benches said:

Sir, even if this were a Bill, which affects only India, still it would be an extremely important one. But it is a Bill, which affects most parts of the world. We are supplying 50 per cent of the cheapest drugs in the world to places like Papua New Guinea, Laos, Kenya, Africa, etc. All these countries have complained to the WHO about this Bill.

The two biggest international health organizations in the world, namely WHO, and Medicines Sans Frontiers have written to the Government saying that this is a very very serious matter. This has been the subject of editorials all over the world right from America onwards to every country from Bangladesh, Cambodia, China, Indonesia, Nairobi, Korea, Laos, Thailand, Vietnam, etc. All of them have complained about our Bill. It is a Bill that affects so many parts of the world. Do you not think that we should have a slightly more serious discussion on it, rather than attempting to pass it through?

The same member speaking at a later stage in the debate said:

India has benefited from the low cost generic industry to dominate 30 per cent of the low cost drugs in the world....

Secondly, it (the bill) is vague about the evergreening effect in which companies extend their patent rights by switching from capsules to tablets, for instance. This extends monopolies. Parliament must make sure that it protects the rights of India to make these generic drugs. We should remove the provision that allows this evergreening. ... What should and what should not be patentable has also been left open to interpretation. Earlier, the new use for a substance could not be patented. Now this has been qualified to allow it by putting "mere new use" instead of "new use".

xxx

Sir, I am going to limit my speech to six points only. This is what we need:

1. We need to limit the scope of patentability to only new chemical entities.

2. No patents for new usage and dosage of known drugs.

3. Retain pre-grant opposition in its original form.

4. Simple procedures with a time limit for grant of compulsory licences.

5. Immunity for generic drugs which are already available in the market.

6. Introduction of ceiling on royalty to pharmaceutical companies

81. Another member, also from one of the parties in the Opposition, had this to say:

Sir, a lot of things have been said for and against the Bill. Certain basic positions have to be re-stated even now. That is, in India, we had legislation in 1891 on the Patents and Designs. That was product regime, under which it had been told that in India, in relation to medicines, at that time, 85 per cent of our medicinal requirements was met by import of medicines from abroad. In those days, probably, the transnational corporations were not as big as they are today. But even then, with the product regime that was there upto 1911, the situation in this country was such that we had to depend upon imports for the 85 per cent of our medicinal requirements.

After 1970, when India adopted a new Patents legislation, where we had adopted a process regime, the situation was reversed. This 85 per cent of our country's medicinal requirement was met by our own products. That was a remarkable achievement. Not only that, we started exporting to countries which does not have the facility of infrastructure to produce their own medicines. We supplied medicine to meet their requirements. But will the Minister now assure that we will be able to meet our own requirements at a cheaper rate after adopting this product regime? Can it be assured that we would be able to meet the requirements of medicine of our people? Because, that was not our experience in the past....

82. It is interesting to note that in the Parliamentary debate, the names of the Appellant company (Novartis) and the drug (Gleevec) being the subject matter of this case were repeatedly mentioned, and the excessively high price fixed for the drug after the grant of "exclusive marketing rights" to the Appellant was expressly cited as the likely result of bringing in the product patent regime in pharmaceuticals. One of the members said:

Sir, a company which obtains a patent by changing their chemicals, before the expiry of the patent, they will again apply for a patent and again get a patent. So, in this way, they will continue to get a patent for the same medicine. For example, the drug called 'Glevic' (sic Gleevec/Glivec), is used for the treatment of Leukaemia. It is patented by Novartis. This was originally patented in 1993. The cost of the drug for the treatment of this disease comes to about Rs. 1,20,000 per month[19] in India. At the same time, the generic versions are available in the country which cost only Rs. 8,000 to Rs. 10,000.

83. As the deliberations were going on in Parliament, negotiations were also held between the ruling party and some of the opposition parties, in course of which certain amendments were suggested in the Bill. and in order to allay the apprehensions and fears voiced by the Opposition, one of the members from the Government said:

Madam, I am concluding. I would only like to refer to the amendment which is being incorporated in Clause 3 which talks of the known inventions, the products which are not considered to be inventions and therefore cannot be covered by the patent and patents cannot be sought for them. A good amendment is being introduced to that effect in Clause 3 of the Bill which says:

The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance of (sic or) the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

The explanation to that should completely allay the fears of our friends on the other side. I hope they would accept that.

84. Speaking at the conclusion of the debate, the minister who had sponsored the Bill also referred to the amendment proposed in Section Pare. He said:

There are so many provisions here. In regard to evergreening, I just want to read out Section Pare which says that a mere discovery of a new property or a new use for a known substance or the mere use of known process in a new product - these are exceptions, these will not be granted any patent - and substances obtained by a mere admixture resulting only in aggregation of properties of the components thereof or, processes of producing such substances will not be given patents....

85. Finally, after three days of debate (March 18, 21 and 22) the Bill, along with the amendments proposed by the minister, was passed by the Lok Sabha on March 22, 2005. Some of the very important amendments that were incorporated in the Bill related to Section 2(1)(ja) and Section Pare, and the insertion of the provision for pre-grant opposition to grant of patent. After being passed by the Lok Sabha, the Bill was presented in the Rajya Sabha where it was passed on March 23, 2005. It received the assent of the President on April 4, 2005, and was published in the official gazette of April 5, 2005.

86. Thus, after deliberations that took place for just four days, the Patents Act, 1970, came in a completely new *avatar*. The haste with which the Government was constrained to rush the Bill through Parliament to make the law compatible with the TRIPS Agreement perhaps explains the somewhat unclear drafting of some very important provisions, which called for much greater clarity; the presence of some terms and expressions in the definition section[20] that are nowhere used in the Act; and a few loose ends that could have been properly tied up if more time and attention was given to the drafting.

87. We have seen in some detail the "why" and the "how" of the law. Let us now examine what the law is in light of its "why" and "how". In order to understand the meaning of "invention" under

the Patents Act, 1970, as it stands today after its amendment by the amending Act of 2005, we must refer to Clauses (ac), (j) and (ja) of Section 2(1) of the Act[21]:

Section 2. Definitions and interpretation. - (1) In this Act, unless the context otherwise requires,-

(ac) "capable of industrial application", in relation to an invention, means that the invention is capable of being made or used in an industry;

(j) "invention" means a new product or process involving an inventive step and capable of industrial application;

(ja) "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;

88. Section 2(1)(j) requires a product to satisfy three conditions to qualify as an invention.

(i) It must be "new", that is to say it must not have been *anticipated*;

(ii) Its coming into being must involve an *"inventive step"*; and

(iii) It must be "capable of industrial application", that is to say it must be capable of being made or used in an industry [Section 2(1)(ac)].

89. "Inventive step" is separately defined in Section 2(ja) to mean a feature of an invention that involves technical advance as compared to the existing knowledge, or having economic significance or both and that makes the invention *not obvious* to a person skilled in the Article To paraphrase, the invention that creates the product must have a feature that involves technical[22] advance as compared to the existing knowledge or having economic significance or both and this feature should be such as to make the invention not obvious to a person skilled in the Article

90. On a combined reading of causes (j), (ac) and (ja) of Section 2(1), in order to qualify as "invention", a product must, therefore, satisfy the following tests:

(i) It must be "new";

(ii) It must be "capable of being made or used in an industry"

(iii) It must come into being as a result of an invention which has a feature that:

(a) entails technical advance over existing knowledge;

Or

(b) has an economic significance

And

(c) makes the invention not obvious to a person skilled in the Article

91. We have seen the meaning of "invention"; we have also seen earlier that the Patents Act, 1970, dealt with "invention" and "patentability" as two distinctly separate concepts. The duality of the two concepts is best illustrated by Section 4 of the Act, which prohibits the grant of patent (either process or product) "in respect of inventions relating to atomic energy falling within Sub-section (1) of Section 20 of the Atomic Energy Act, 1962", and which has not undergone any change since inception. It is, therefore, fundamental that for grant of patent the subject must satisfy the twin tests of "invention" and "patentability". Something may be an "invention" as the term is generally understood and yet it may not qualify as an "invention" for the purposes of the Act. Further, something may even qualify as an "invention" as defined under the Act and yet may be denied patent for other larger considerations as may be stipulated in the Act. Having, therefore, seen the meaning of "invention", we may now advert to Section 3 as it stands after the amendment of the Act in

92. Section 3 is in Chapter II of the Act, which initially contained Sections 3, 4 and 5, but after the deletion of Section 5 with effect from January 1, 2005, Chapter II has only two sections: Sections 3 and 4. The Chapter has the Heading "Inventions Not Patentable" and Section 3 has the marginal heading "What are not inventions." As suggested by the Chapter heading and the marginal heading of Section 3, and as may be seen simply by going through Section 3, it puts at one place provisions of two different kinds: one that declares that certain things shall not be deemed to be "inventions" [for instance Clauses (d) & (e)]; and the other that provides that, though resulting from invention, something may yet not be granted patent for other considerations [for instance Clause (b)].

93. For the purpose of these appeals, however, we need only to focus on Clause (d) of Section 3.

94. We have seen earlier that, in course of the debate in Parliament, an amendment (by way of addition) in Clause (d) of Section 3 was proposed by the Government in order to allay the fears of the members from the Opposition concerning the introduction of product patents for pharmaceuticals and agricultural chemicals, and it was on the Government's assurance that the proposed amendment in Section 3(d) (besides some other changes in the Act) would take care of the apprehensions about the abuse of product patent in medicines and agricultural chemical substances that the Bill was passed by Parliament. We once again examine here what was the amendment introduced in Section Atomic En by the amending Act of 2005. Immediately before its amendment in 2005, Section Atomic En was, in the Patents (Amendment) Ordinance, 2004 (Ordinance No. 7 of 2004), as under:-

Section 3. What are not inventions.- The following are not inventions within the meaning of this Act,-

(d) the mere discovery of any new property or mere new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

95. After the amendment with effect from Jan 1, 2005, Section Atomic En stands as under:

Section 3. What are not inventions.- The following are not inventions within the meaning of this Act,-

(d) **the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or** of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

Explanation.-For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

96. As may be seen, the amendment (i) adds the words "the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or" at the beginning of the provision; (ii) deletes the word "mere" before "new use"; and (iii) adds an explanation at the end of the clause.

97. A perusal of the Parliamentary debate would further reveal that the whole debate centered on medicines and drugs. It would not be an exaggeration to say that eighty per cent of the debate was focused on medicines and drugs and the remaining twenty per cent on agricultural chemicals. In the entire debate, no substance of any other kind came under discussion.

98. The aforementioned amendment in Section Atomic En is one of the most crucial amendments that saw the Bill through Parliament and, as noted, the amendment is primarily in respect of medicines and drugs and, to some extent, agricultural chemical substances.

99. In regard to Section Atomic En both Mr. Andhyarujina and Mr. Subramanium, learned Counsel appearing for the Appellant, strenuously argued that Section Atomic En is not meant to be an exception to Clauses (j) and (ja) of Section 2(1) of the Act. Both the learned Counsel insisted that Section Atomic En has no application to the case of the subject product. The subject product, having satisfied the tests of invention as provided in Clauses (j) and (ja) of Section 2(1), cannot be denied patent for allegedly failing to satisfy the tests under Section Atomic En. Mr. Andhyarujina submitted that Section Atomic En is a provision put in *ex abundanti cautela non nocet*[23] to remove all doubts.

100. Mr. Subramanium submitted that Section Atomic En is *ex majore Cautela*[24]. The learned Counsel submitted that the primary purpose of Section Atomic En, as is evidenced from the legislative history, is to prevent "evergreening" and yet to encourage incremental inventions. "Evergreening" is a term used to label practices that have developed in certain jurisdictions wherein a trifling change is made to an existing product, and claimed as a new invention. The coverage/protection afforded by the alleged new invention is then used to extend the patentee's exclusive rights over the product, preventing competition. Mr. Subramanium submitted that, by definition, a trifling change, or in the words of the section "a mere discovery of a new form of a

known substance", can never ordinarily meet the threshold of novelty and inventive step under Clauses (j) and (ja) of Section 2(1). An invention cannot be characterized by the word "mere". The word "invention" is distinct from the word "discovery". He, therefore, submitted that Section Atomic En operates only as *ex majore cautela*, ensuring that mere discoveries can never, by an effort at interpretation of Clauses (j) and (ja) of Section 2(1), be considered inventions.

101. In regard to the concerns about public health issues and the flexibility of the TRIPS Agreement coupled with the Doha Declaration, allowing the scope to address the issues of public health, Mr. Subramanium submitted that those concerns are addressed in the Act, in provisions relating to compulsory licensing[25], revocation of patents[26], and the multiple stages for opposition to the grant of patent[27].

102. The submission may appear plausible if the scrutiny of the law is confined only to the Act as it stands today after undergoing the amendments in 2005. But examined in the larger perspective of the development of the law of patent over the past 100 years and especially keeping in mind the debates in the Parliament preceding the 2005 amendment, it would appear completely unacceptable. We find no force in this submission that Section Atomic En is a provision *ex majore cautela.* To our mind, the submission completely misses the vital distinction between the concepts of invention and patentability - a distinction that was at the heart of the Patents Act as it was framed in 1970, and which is reinforced by the 2005 amendment in Section Atomic En.

103. We are clearly of the view that the importance of the amendment made in Section Atomic En, that is, the addition of the opening words in the substantive provision and the insertion of explanation to the substantive provision, cannot be under-estimated. It is seen above that, in course of the Parliamentary debates, the amendment in Section Atomic En was the only provision cited by the Government to allay the fears of the Opposition members concerning the abuses to which a product patent in medicines may be vulnerable. We have, therefore, no doubt that the amendment/addition made in Section Atomic En is meant especially to deal with chemical substances, and more particularly pharmaceutical products. The amended portion of Section Atomic En clearly sets up a second tier of qualifying standards for chemical substances/pharmaceutical products in order to leave the door open for true and genuine inventions but, at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious grounds.

104. We have so far seen Section Atomic En as representing "patentability", a concept distinct and separate from "invention". But if Clause (d) is isolated from the rest of Section 3, and the legislative history behind the incorporation of Chapter II in the Patents act, 1970, is disregarded, then it is possible to see Section Atomic En as an extension of the definition of "invention" and to link Section Atomic En with Clauses (j) and (ja) of Section 2(1). In that case, on reading Clauses (j) and (ja) of Section 2(1) with Section Atomic En it would appear that the Act sets different standards for qualifying as "inventions" things belonging to different classes, and for medicines and drugs and other chemical substances, the Act sets the invention threshold further higher, by virtue of the amendments made in Section Atomic En in the year 2005.

105. Admittedly, the genesis of this patent application lies in one of the derivatives of N-phenyl-2- pyrimidine-amine in free base called Imatinib[28], vide example 21 of the Zimmermann patent.

According to the Appellant, beginning with Imatinib, the subject product, i.e., Imatinib Mesylate in beta crystalline form, was brought to being by not one but two inventions.

106. The first invention lies in selecting example 21 out of the 37 examples given in the Zimmermann patent and then choosing methanesulfonic acid to produce the methanesulfonic acid addition salt of the free base Imatinib, called Imatinib Mesylate. It was emphasized by both Mr. Gopal Subramanium and Mr. Andhyarujina, Senior Advocates appearing for the Appellant, that the Zimmermann patent did not teach or suggest to a person skilled in the art to select example 21 in preference to other compounds of which examples were given in the Zimmermann patent. Further, even if example 21 was selected, the Zimmermann patent did not teach a person to select one particular salt. The Zimmermann patent did not teach a person how to prepare Mesylate salt of example 21. Hence, the coming into being of Imatinib Mesylate from Imatinib in free base was the result of an invention that involved technical advance as compared to the existing knowledge and brought into existence a new substance.

107. In the second invention, the Appellant arrived at the beta crystal form of methanesulfonic acid addition salt of Imatinib. It was contended on behalf of the Appellant that once the salt form of Imatinib was arrived at, the inventors had to further research to be able to ensure that that particular salt form of Imatinib is suitable for administration in a solid oral dosage form. This research further required defining the process parameters that brought into being the beta crystalline form of Imatinib Mesylate. It was argued on behalf of the Appellant that there is certainly no mention of polymorphism or crystalline structure in the Zimmermann patent. The relevant crystalline form of the salt that was synthesized needed to be invented. There was no way of predicting that the beta crystalline form of Imatinib Mesylate would possess the characteristics that would make it orally administrable to humans without going through the inventive steps. It was further argued that the Zimmermann patent only described, at most, how to prepare Imatinib free base, and that this free base would have anti-tumour properties with respect to the BCR ABL kinase. Thus, arriving at the beta-crystalline form of Imatinib Mesylate for a viable treatment of Chronic Myeloid Leukemia required further invention - not one but two, starting from Imatinib in free base form, as stated above.

108. The subject product admittedly emerges from the Zimmermann patent. Hence, in order to test the correctness of the claim made on behalf of the Appellant, that the subject product is brought into being through inventive research, we need to examine in some detail the Zimmermann patent and certain developments that took place on that basis

109. An application for grant of patent for the Zimmermann invention (Pyrimidine Derivatives and Processes for the Preparation thereof) was filed in the United States of America on April 2, 1993, by Ciba Geigy[29] (US Patent Application No. 08/042, 322). This application was abandoned and another continuation-in-part application was then filed on April 28, 1994 (US Patent Application No. 5, 521, 184). The Zimmermann invention[30] related to N-phenyl-2-pyrimidine-amine derivatives (called, "formula I" in the patent application), and the compounds thereof, the process for their preparation, and to their therapeutic uses. In the patent application, it was expressly stated that the compounds of formula I included their respective salts:

Salt-forming groups in a compound of formula I are groups or radicals having basic or acidic properties. Compounds having at least one basic group or at least one basic radical, for example a free amino group, a pyrazinyl radical or a pyridyl radical, **may form acid addition salts, for example with inorganic acids, such as hydrochloric acid, sulfuric acid or a phosphoric acid, or with suitable organic carboxylic or sulfonic acids**....

Further:

Owing to the close relationship between the novel compounds in free form and in the form of their salts, including those salts that can be used as intermediates, for example in the purification of the novel compounds or for the identification thereof, hereinbefore and hereinafter **any reference to the free compounds should be understood as including the corresponding salts, where appropriate and expedient.**

(Emphasis added)

110. As regards the pharmacological properties of the compounds of formula I it was stated in the application:

The compounds of formula I have valuable pharmacological properties and can be used, for example, as anti-tumoral drugs and as drags (sic drugs) against atherosclerosis.

111. The application also described the tests undertaken for determining the protein kinase C-inhibiting activities of compounds of formula I and their pharmaceutically acceptable salts as follows:

To determine protein kinase C-inhibiting activity, protein kinase C from pig brain purified in accordance with the procedure described by T. Uchida and C.R. Filburn in J. Biol. Chem. 259, 12311-4 (1984) is used. The protein kinase C-inhibiting activity of the compounds of formula I is determined by the method of D. Fabbro et at., Arch. Biochem. Biophys. 239, 102-111 (1985). In that test the compounds of formula I inhibit protein kinase C at a concentration IC50 of as low as approximately from 0.1 to 10 æmol/liter, especially approximately from 0.05 to 5 æmol/liter. On the other hand, the compounds of formula I inhibit other enzymes, for example protein kinase A, phosphorylase protein kinase and certain types of tyrosine protein kinase, for example the tyrosine protein kinase of EGF (epidermal growth factor) receptors, only at a far higher concentration, for example 100 times higher. That is an indication of the selectivity of the compounds of formula I. With a view to reducing undesired side effects, it is important for the protein kinase C-inhibitors to be as selective as possible, i.e. inter alia to have as little effect as possible on other enzymes, especially when the effect of the activity of those other enzymes has no equivalent or synergistic effect on the disease to be treated.

xxx

As might already be expected on the basis of the inhibiting action on protein kinase C described above, the compounds of formula I wherein R4 and R8 are hydrogen, and their pharmaceutically acceptable salts, have anti-proliferative properties which can be demonstrated directly in the

following, different test. In that test the inhibiting action of compounds of formula I on the growth of human T24 bladder carcinoma cells is determined....

It was also stated:

The tumour-inhibiting activity of the compounds of formula I can also be demonstrated in vivo.

The tumour-inhibiting activity is determined using female Balb/c nude mice in which human T24 bladder carcinoma has been transplanted....

The application further claimed:

Owing to the properties described, compounds of formula I can be used not only as tumour-inhibiting active ingredients but also as drugs against non-malignant proliferative diseases, e.g. atherosclerosis, thrombosis, psoriasis, sclerodermitis and fibrosis. They are also suitable for the further applications mentioned above for protein kinase C-modulators and can be used especially in the treatment of diseases that respond to the inhibition of PDGF-receptor kinase.

Some of the compounds of formula I, e.g. N-[3-(1, 1, 2, 2-tetrafluoroethoxy)phenyl]-4-(3-indolyl)-2-pyrimidine-amine, furthermore inhibit the tyrosine kinase activity of the receptor for the epidermal growth factor (EGF). This receptor-specific enzyme activity is a key factor in the signal transmission in a host of mammalian cells, including human cells, especially epithelial cells, cells of the immune system and cells of the central and peripheral nervous system.

It was also said in the application:

These compounds of formula I, which inhibit the tyrosine kinase activity of the receptor for the epidermal growth factor (EGF) are therefore useful, inter alia, for the treatment of benign or malignant tumours. They are able to effect tumour regression and to prevent metastasic spread and the growth of micrometastases. In particular, they can be used for treating epidermal hyperproliferation (psoriasis), for treating neoplasms of epithelial character, e.g. mastocarcinomas, and leucemias. In addition, the compounds of formula I are useful for treating diseases of the immune system and inflammations, subject to the involvement of protein kinases. These compounds of formula I can also be used for treating diseases of the central or peripheral nervous system, subject to the involvement of signal transmission by protein kinases.

It was further stated in the application:

Acid addition salts can be convened into the free compounds in customary manner, for example by treatment with a suitable basic agent.

xxx

The processes described above, including the processes for removing protecting groups and the additional process steps, are, unless otherwise indicated, carried out **in a manner known per se**,

for example in the presence or absence of preferably inert solvents and diluents, if necessary in the presence of condensation agents or catalysts....

It was also affirmed in the application:

The invention relates also to a method of treating warm-blooded animals suffering from a tumoral disease, **which comprises administering to warm-blooded animals requiring such treatment an effective, tumour-inhibiting amount of a compound of formula I or of a pharmaceutically acceptable salt thereof...** Effective doses, for example daily doses of approximately from 1 to 1000 mg, especially from 50 to 500 mg, are administered to a warm-blooded animal of approximately 70 kg body weight according to species, age, individual condition, mode of administration and the individual syndrome.

The invention relates also to pharmaceutical compositions comprising an effective amount, especially an amount effective in the prevention or therapy of one of the above-mentioned diseases, **of the active ingredient together with pharmaceutically acceptable carriers that are suitable for topical, enteral, for example oral or rectal, or parenteral administration, and may be inorganic or organic, solid or liquid. For oral administration there are used especially tablets or gelatin capsules comprising the active ingredient together with diluents, for example lactose, dextrose, sucrose, mannitol, sorbitol, cellulose and/or glycerol... Tablets may also comprise binders**, for example magnesium aluminium silicate, starches, such as corn, wheat or rice starch, gelatin, methylcellulose, sodium carboxymethylcellulose and/or polyvinylpyrrolidone, and, if desired, disintegrators, for example starches, agar, alginic acid or a salt thereof, such as sodium alginate, and/or effervescent mixtures, or adsorbents, dyes, flavourings and sweeteners.

112. The application gave examples to illustrate the invention, making it clear at the same time that those illustrations did not limit the invention in any way. Example 21, which admittedly relates to Imatinib, the "e-duct" for the subject product, is as under:

EXAMPLE 21

Analogously to Example 20, N-{5-[4-(4-methyl-piperazinomethyl)-benzoylamido]-2-methylphenyl}-4-(3-pyridyl)-2-pyrimidine-amine is prepared from 10.68 g (32.8 mmol) of 4-(4-methyl-piperazinomethyl)-benzoyl chloride; m.p. 211§-213§, Rf =0.33 (methylene chloride: methanol: 25% aqueous ammonia solution=95:5:1).

Examples 35 to 37 were in respect of tablets in different doses.

113. In the claim at the end of the application under serial No. 23, it was stated as follows:

The compound according to claim 1 of the formula I, said compound being N-{5-[4-(4-Methyl-piperazino-methyl)-benzoylamido]-2-methyl-phenyl}-4-(3-pyridyl)-2-pyrimidine-amine **or a pharmaceutically acceptable salt thereof.**

(Emphasis added)

114. The US Patent No. 5, 521, 184 (the Zimmermann patent) was granted on May 28, 1996.

115. Later, the Appellant made the application for patent for beta crystalline form of Imatinib Mesylate (the subject of the present appeals) in the US on January 18, 2000. The US patent for beta crystalline form of Imatinib Mesylate was granted to the Appellant about five and a half years later on May 17, 2005 following the order of the US Appellate Court dated November 23, 2003. It is, however, interesting to note that Gleevec, the drug was launched much earlier in the market, on the basis of the Zimmermann patent itself.

116. On April 9, 1998, the Appellant filed the Investigational New Drug Application (IND # 55, 666) for Gleevec and on February 27, 2001, the original New Drug Application (NDA # 21-335) before the Food and Drug Administration (FDA), USA, for Imatinib Mesylate, formerly STI571, CGP57148B (capsules) for the treatment of patients with Chronic Myeloid Leukemia. The application contained results of extensive preclinical, technical and clinical research, and it stated as under:

The clinical studies discussed in this NDA include one multiple dose tolerability/dose-finding study (phase I) and three large open, uncontrolled efficacy and safety studies (phase II), as an accelerated development to allow early registration in CML patients. A total of 1234 patients with CML and other Ph+ leukemias have been enrolled in these trials. The results of the Glivec studies are discussed in the perspective of the current state of knowledge in the treatment of CML as described with a comprehensive review of the literature for each target population (Appendix 4-6 of the Integrated Summary of Efficacy).

117. In the patent information furnished in connection with the NDA as required under (US Code) 21 C.F.R. _ 314.53, the active ingredient of the drug was stated as Imatinib Mesylate. The Drug Substance[31] (active ingredient), Drug Product[32] (composition/formulation) and method of use were declared to be covered by US Patent No. 5, 521, 184 (i.e. the Zimmermann patent). It was further declared that the United States Patent No. 5, 521, 184 covered the composition, formulation, and/or method of use of Imatinib Mesylate (STI571).

118. In the chemistry review(s) of the NDA # 21-335 (drug approval for capsules) made on March 27, 2001, there was again a reference to US Patent # 5, 521, 184 (expiration date - 5/28/2013).

119. The FDA approval for the drug Gleevec (Imatinib Mesylate) 50 mg and 100 mg capsules was granted vide Letter dated May 10, 2001.[33] Following this, the drug was commercially launched in the market long before the grant of patent for beta crystalline form of Imatinib Mesylate.

120. In the package insert of Gleevec(tm) (Imatinib Mesylate capsules) the description of the drug was stated as follows:

GLEEVEC(tm) capsules contain Imatinib Mesylate equivalent to 100 mg of Imatinib free base. Imatinib mesylate is designed chemically as 4-[(4-Methyl-1-piperazinyl)methyl]-N-[4-methyl-3-[[4-(3-pyridinyl)-2-pyrimidinyl]amino]-phenyl]benzamide methanesulfonate....

121. After the grant of drug approval for Gleevec, on July 3, 2001, the Appellant made a Patent Term Extension Application for the Zimmermann patent (US Patent No. 5, 521, 184) under 35 USC _ 156(g)(1)(B), for extending the term of the patent for the time taken in the regulatory review for Gleevec. This application leaves no room for doubt that Imatinib Mesylate, marketed under the name Gleevec, was submitted for drug approval as covered by the Zimmermann patent. In column 4 of the application, it was stated that the sole active ingredient in Gleevec is Imatinib Mesylate. Further, it was stated that Imatinib, or any salt thereof, including Imatinib Mesylate, had not previously been approved for commercial marketing under the Federal Food, Drug and Cosmetic Act prior to the approval of NDA # 21-235. In column 9 of the application, it was stated as under:

(9) Statement Showing How the Claims of the Patent for Which Extension is Sought Cover the Approved Product:

The operative claims in question are Claims 1-5, 10-13, and 21-23. Each of claims 1-5, 10-13 and 23 claim a compound or compounds which include the approved product, imatinib mesylate. Claim 21 claims a composition containing a compound or compounds which include the approved product, imatinib mesylate. Claim 22 claims a method of treating tumors in warm-blooded animals with a compound or compounds which include the approved product, imatinib mesylate.

122. The application was accepted and the term of the patent, which was due to expire on May 28, 2013, was extended for the period of 586 days.

123. It is noted above that the Appellant had made an application No. 09/463, 097 in the USA for grant of patent for beta crystalline form of Imatinib Mesylate. The application was rejected by the examiner and, against the examiner's decision, the Appellant preferred an appeal (that is, appeal No. 2003-0919) before the Board of Patent Appeals and Interferences. The Board of Patent Appeals, by its judgment and order dated November 23, 2003, allowed the Appellant's appeal and reversed the examiner's decision, rejecting claims 1 through 8, 10, and 13 through 16. Dealing with the examiner's rejection of Appellant's claim 14 under 35 USC § 112, the Board of Patent Appeals referred to claims 21 and 22 of the Zimmermann patent. With reference to those claims in the Zimmermann patent, the Board of Patent Appeals observed and held as under:

Under the provisions 35 U.S.C. § 282, a patent shall be presumed valid; and each claim of a patent shall be presumed valid independently of the validity of other claims.

Accordingly, claims 21 and 22 of the U.S. Patent No. 5, 521, 184 (the Zimmermann patent), shall be presumed valid. **We may presume, therefore, that claims 21 and 22 are based on an enabling disclosure; and that the specification of the Zimmermann patent teaches any person skilled in the art how to use a compound of formula I, or a pharmaceutically acceptable salt thereof, in a pharmaceutical composition for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. In claim 23, Zimmermann recites imatinib, a specific compound within the scope of formula I, or a pharmaceutically acceptable salt thereof. In light of 35 U.S.C. § 282, therefore, we may presume that the specification of the Zimmermann patent teaches any person skilled in the art how to use imatinib, or a pharmaceutically acceptable salt thereof, in a pharmaceutical composition for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral**

disease. On these facts, we disagree that the examiner has set forth adequate reasons or evidence to doubt the objective truth of statements in applicants' specification that an effective amount of the β-crystal form of imatinib mesylate may be administered to a patient as the manipulative step in a method for treating tumour disease in a patient.

The rejection under 35 U.S.C. § 112, first paragraph, is reversed.

(Emphasis added)

124. From the above passage from the judgment, it is evident that, according to the Board of Patent Appeals, the Zimmermann patent teaches any person skilled in the art how to use Imatinib, a compound of formula I, or a pharmaceutically acceptable salt thereof, in a pharmaceutical composition for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. However, the Board of Patent Appeals held that the teaching in the Zimmermann patent did not go beyond Imatinib Mesylate and did not extend to beta crystalline form of Imatinib Mesylate, which represented a *manipulative step*[36] in a method of treating tumor disease in a patient.

125. Further, NATCO Pharma Ltd., one of the Objectors to the grant of patent to the Appellant in this country, had marketed a drug called VEENAT 100 (capsules) in the UK. A legal notice on behalf of the Appellant was given to NATCO Pharma Ltd. on February 13, 2004. The notice stated that the Appellant was the proprietor of European patent EP-A-0 564 409 (the Zimmermann patent) and that this patent claimed, among other things, the compound Imatinib and acid addition salts of that compound such as the Mesylate salt. In the notice it was pointed out that NATCO Pharma Ltd. was selling, in the UK market, VEENAT 100 capsules, the active pharmaceutical ingredient of which was Imatinib Mesylate as claimed in the Zimmermann patent. The importation, sale and offer to sell VEENAT 100 capsules in the UK market infringed the Zimmermann patent and NATCO Pharma Ltd. was therefore warned to immediately cease the importation, sale and promotion of VEENAT 100 capsules and other pharmaceutically substances containing "Imatinib". The matter was finally settled out of court, we are told, at considerable expense to NATCO Pharma Ltd. which of course had to stop marketing its drug VEENAT 100 capsules in the UK.

126. From the above discussion it would be clear that the drug Gleevec directly emanates from the Zimmermann patent and comes to the market for commercial sale. Since the grant of the Zimmermann patent, the Appellant has maintained that Gleevec (that is, Imatinib Mesylate) is part of the Zimmermann patent. It obtained drug approval for Gleevec on that basis. It claimed extension of the term of the Zimmermann patent for the period of regulatory review for Gleevec, and it successfully stopped NATCO Pharma Ltd. from marketing its drug in the UK on the basis of the Zimmermann patent. Not only the Appellant but the US Board of Patent Appeals, in its judgment granting patent for beta crystalline form of Imatinib Mesylate, proceeded on the basis that though the beta crystal form might not have been covered by the Zimmermann patent, the Zimmermann patent had the teaching for the making of Imatinib Mesylate from Imatinib, and for its use in a pharmacological compositions for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. This finding was recorded by the US Board of Patent Appeals, in the case of the Appellant itself, on the very same issue that is now under

consideration. The Appellant is, therefore, fully bound by the finding and cannot be heard to take any contrary plea.

127. We have looked, so far, at the Zimmermann patent and the developments that have taken place on its basis. We now propose to take a look at certain publications. A journal called Cancer Research, in its issue of January 1996, published an article under the title "Inhibition of the Abl Protein-Tyrosine Kinase in Vitro and in Vivo by a 2-Phenylaminopyrimidine Derivative". This article was authored by several people, including JÜrg Zimmermann. In this article there is a detailed discussion about the anti-tumoral properties of Imatinib and its methanesulfonate salt, i.e., Imatinib Mesylate. In the abstract at the beginning of the article, it is stated as under:

ABSTRACT

Oncogenic activation of Abl proteins due to structural modifications can occur as a result of viral transduction or chromosomal translocation. The tyrosine protein kinase activity of oncogenic Abl proteins is known to be essential for their transforming activity. Therefore, we have attempted to identify selective inhibitors of the Abl tyrosine protein kinase. **Herein we describe an inhibitor (CGP 57148[35]) of the Abl and platelet-derived growth factor (PDGF) receptor protein-tyrosine kinases from the 2-phenylaminopyrimidine class, which is highly active *in vitro* and *in vivo*.** Submicromolar concentrations of the compound inhibited both v-Abl and PDGF receptor autophosphorylation and PDGF-induced *c-fos* mRNA expression selectively in intact cells.... Furthermore, anchorage-independent growth of *v-abl*- and *v-sis*-transformed BALB/c 3T3 cells was inhibited potently by CGP 57148. When tested *in vivo*, CGP 57148 showed antitumor activity at tolerated doses against tumorigenic *v-abl*- and *v-sis*- transformed BALB/c 3T3 cells. In contrast, CGP 57148 had no antitumor activity when tested using *src*-transformed BALB/c 3T3 cells. These findings suggest that CGP 57148 may have therapeutic potential for the treatment of diseases that involve abnormal cellular proliferation induced by Abl protein-tyrosine kinase deRegulation or PDGF receptor activation.

(Emphasis added)

128. Under the heading "MATERIALS and METHODS", it is stated as under:

Materials. CGP 57148 **and its methane sulfonate salt (CGP 57148B[36])** were synthesized by CIBA Pharmaceuticals Division, as will be described elsewhere. For in vitro and cellular assays, a stock concentration of 10 mM CGP 57148 was prepared in Me2SO and stored at - 20§C. No significant difference in results could be seen between the two forms of CGP 57148. The form used in vitro experiments is indicated in the text and legends. All in vivo experiments were performed using CGP 57148B....

129. The article goes on to discuss the in vivo experiments and the in vitro selectivity of CGP 57148 for inhibition of protein kinases: Identification of CGP 57148 as an inhibitor of v-Abl kinase. The article also discussed the in vivo anti-tumour activity of CGP 57148B and it states as follows:

***In Vivo* Antitumor Activity.**

The maximally tolerated dose for a single p.o. or i.p. administration of CGP 57148B in BALB/c mice was >500 mg/kg. BALB/c AMuLV and BALB/c 3T3 v-sis cells, which were sensitive in the colony-forming assay, were used to test CGP 57148B for antitumor activity in female BALB/c nude mice. Once daily i.p. applications of 50, 12.5, or 3.13 mg/kg CGP 57148B given for 30 consecutive days resulted in a strong antitumor effect against AMuLV-transformed BALB/c 3T3 tumors (Fig. 5A). Similarly, anti-tumor experiments using v-sis- transformed BALB/c 3T3 cells revealed dose-dependent antitumor activity (Fig. 5B). Maximal T/C (X100%) values of 4% (AMuLV tumors) and 11% (v-sis tumors) were obtained when CGP 57148B was administered at 50 mg/kg body weight. In contrast, CGP 57148B showed no antitumor activity against tumors derived from NIH-527 src cells when 50 mg/kg were administered p.o. once daily for 30 days (T/C, 102%). Using the same route of application, T/C values of 7 and 22% against AMuLV and v-sis tumors, respectively, were obtained when 50 mg/kg CGP 57148B were given.

It is further stated in the article:

CGP 57148 selectively inhibited the in vitro activity of the v-Abl protein-tyrosine kinase and showed preferential inhibition of v-Abl autophosphorylation in cells. We have examined the specificity of CGP 57148 by analyzing its effects on signal transduction via different tyrosine kinase receptor-mediated pathways. Although the ligand-induced activation of the EGF, bFGF, insulin, and IGF-1 receptor tyrosine kinases were not affected by CGP 57148, the PDGF pathway was sensitive to inhibition by the compound. The antiproliferative activity of CGP 57148 against both v-abl- and v-sis-transformed BALB/c 3T3 support the selectivity profile of CGP 57148 further.

The article concludes by observing as follows:

The reported findings with CGP 57148 suggest that it may be a development candidate for use in the treatment of Philadelphia chromosome-positive leukemias. Additional potential applications for CGP 57148 may include proliferative diseases that involve abnormal PDGF receptor activation.

130. Another article was published in *Nature Medicine* magazine of the year 1996 under the title "Effects of a selective inhibitor of the Abl tyrosine kinase on the growth of Bcr-Abl positive cells". This article, too, was authored by several people, including JÜrg Zimmermann. In this article also, there is a discussion about Imatinib as a compound designed to inhibit Abl protein tyrosine kinase.

131. In the face of the materials referred to above, we are completely unable to see how Imatinib Mesylate can be said to be a new product, having come into being through an "invention" that has a feature that involves technical advance over the existing knowledge and that would make the invention not obvious to a person skilled in the Article Imatinib Mesylate is all there in the Zimmermann patent. It is a known substance from the Zimmermann patent.

132. That Imatinib Mesylate is fully part of the Zimmermann patent is also borne out from another circumstance. It may be noted that after the Zimmermann patent, the Appellant applied for, and in several cases obtained, patent in the US not only for the beta and alpha crystalline forms of Imatinib Mesylate, but also for Imatinib in a number of different forms. The Appellant, however, never

asked for any patent for Imatinib Mesylate in non-crystalline form, for the simple reason that it had always maintained that Imatinib Mesylate is fully a part of the Zimmermann patent and does not call for any separate patent.

133. We thus find no force in the submission that the development of Imatinib Mesylate from Imatinib is outside the Zimmermann patent and constitutes an invention as understood in the law of patent in India.

134. Mr. Andhyarujina and Mr. Gopal Subramanium, learned Senior Advocates appearing for the Appellant, strenuously argued that the patent information furnished by the Appellant before the US FDA, or its Patent Term Extension Application, or the legal notice given at its behest to NATCO Pharma Ltd. should not be construed to mean that Imatinib Mesylate was anticipated in the Zimmermann patent. Mr. Andhyarujina submitted that the Zimmermann patent did not disclose Imatinib Mesylate. The Zimmermann patent did not describe any working method for converting Imatinib to Imatinib Mesylate. It only stated that a salt may be formed by acid without disclosing any method, but simply calling the method to be *"per se"*. The Zimmermann patent mentioned multiple choices of compounds including Imatinib free base but not any salt of any compound, much less Imatinib Mesylate. Mr. Andhyarujina further submitted that it is well settled that the *disclosure* of an invention must be in a manner clear enough and complete enough for the invention to be performed by a person skilled in the art (Terrell on Law of Patents 16th edition, page No. 51, para 3.2/7). The learned Counsel further submitted that there was a difference between that which is *covered* and that which is *disclosed.* Imatinib Mesylate is *covered* by the Zimmermann patent but not *disclosed* therein. He further submitted that, in any case, in patent law subsequent conduct of the patentee is irrelevant in construing the patent (Terrell on Law of Patent 16th edition, page No. 192 citing *Glaverbel v. British* (1993) RPC 80). Referring to the two articles in *Cancer Research* and *Nature Medicine*, Mr. Andhyarujina submitted that though in the first article there was a reference to Imatinib Mesylate, there was no teaching as to how it is to be prepared. In the *Nature Medicine* article there was no reference to Imatinib Mesylate but only to Imatinib.

135. Mr. Gopal Subramanium submitted that the Zimmermann patent is a patent for "Pyrimidine Derivatives and Processes for the Preparation thereof". The patent is related to a genus of compounds, and each of the compounds within the genus shares a common chemical structure (Markush structure) and common properties with respect to the inhibition of certain tyrosine kinases (there being a total of 518 kinases in existence). Mr. Subramanium further submitted that the Appellant in its application before the US Food and Drug Administration Authority had made a reasonable assertion that the Zimmermann patent *covers* the product that was made out of the beta crystalline form of Imatinib Mesylate, i.e., Gleevec[37]. Further, on the basis of the US FDA approval, the Appellant obtained an extension of the period of protection under the Zimmermann patent with respect to Gleevec.

136. Mr. Subramanium further submitted that the scope of *coverage* is distinct from the scope of *disclosure* in a patent. Imatinib Mesylate could be said to be not new and known from the Zimmermann patent only in case there was a complete *disclosure* of the method of its preparation in the Zimmermann patent. The learned Counsel strongly contended that *coverage* under a patent of the Markush kind cannot lead to any presumption of disclosure, much less any *enabling disclosure* of all the compounds within the genus. The learned Counsel further contended that

coverage that is granted in respect of a patent is not always coextensive with what is disclosed in that patent. In certain circumstances, where it is a pioneering invention (as in the case of the Zimmermann invention), the patent may be entitled to larger coverage than what is specifically *disclosed* in it. The learned Counsel argued that coverage cannot be used to presume an enabling disclosure of the beta crystalline form of Imatinib Mesylate in the Zimmermann patent. *Disclosure* in a specification can never be presumed, and that is a question of the clear teaching contained in the specification. The teaching of a patent lies in the *disclosure/specification* that supports the claim. The *disclosure* describes the invention. The claim defines through language the various ways the invention could be used, i.e., possible but not actualized products. This is the scope of protection granted under the patent. For the purpose of *prior art*, it is the *disclosure* in the *specification* supporting the claim and not the written description or the claims themselves, that must be assessed. The claim can never be the teaching. He further contended that it would be wrong to say that the Appellant's claims for beta crystalline form of Imatinib Mesylate is a case of double or repeat patenting, that is, the same invention is being sought to be patented twice. The claim for patent for beta crystalline form of Imatinib Mesylate relates to a second and different invention. Though the invention in the first part (Imatinib) may be necessary to arrive at the invention in the second part, the final product does not come into existence without inventions. The principle is that if a product is covered, it means that it infringes a patent. Whether the patent infringed disclosed every aspect of the product in its specification is a separate inquiry.

137. Mr. Subramanium maintained that the boundary of the Zimmermann patent was extended up to Imatinib Mesylate but the enablement or disclosure made therein ended at Imatinib. He submitted that it was possible for Zimmermann himself, or for anyone else, to invent Imatinib Mesylate starting from Imatinib. The inventor of Imatinib Mesylate, be it Zimmermann or anyone else, would also be entitled to get patent for Imatinib Mesylate, but in case the inventor was anyone other than Zimmermann, he would require Zimmermann's permission for marketing Imatinib Mesylate, since Imatinib had the protection of the Zimmermann patent[38].

138. The submissions of Mr. Andhyarujina and Mr. Subramanium are based on making a distinction between the *coverage* or claim in a patent and the *disclosure* made therein. The submissions on behalf of the Appellant can be summed up by saying that the boundary laid out by the claim for coverage is permissible to be much wider than the *disclosure/enablement/teaching* in a patent.

139. The dichotomy that is sought to be drawn between coverage or claim on the one hand and *disclosure* or *enablement* or *teaching* in a patent on the other hand, seems to strike at the very root of the rationale of the law of patent. Under the scheme of patent, a monopoly is granted to a private individual in exchange of the invention being made public so that, at the end of the patent term, the invention may belong to the people at large who may be benefited by it. To say that the *coverage* in a patent might go much beyond the *disclosure* thus seem to negate the fundamental rule underlying the grant of patents.

140. In India, Section 10(4) of the Patents Act, 1970 mandates:

Section 10. Contents of specifications.- (4) Every Complete specification shall -

(a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed;

(b) disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection; and

(c) end with a claim or claims defining the scope of the invention for which protection is claimed;

(d) be accompanied by an abstract to provide technical information on the invention:

Provided that -

(i) the Controller may amend the abstract for providing better information to third parties;....

And, Section 10(5) provides as under:

(5) The claim or claims of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept, shall be clear and succinct and shall be fairly based on the matter disclosed in the specification.

141. The UK Patents Act, 1977, in Sub-sections (2), (3), and (5) of Section 14, provides as under:

Making of an application

14. - (2) Every application for a patent shall contain -

(a) a request for the grant of a patent;

(b) a specification containing a description of the invention, a claim or claims and any drawing referred to in the description or any claim; and

(c) an abstract;

but the foregoing provision shall not prevent an application being initiated by documents complying with Section 15(1) below.

(3) The specification of an application shall disclose the invention in a manner which is clear enough and complete enough for the invention to be performed by a person skilled in the Article

(5) The claim or claims shall -

(a) define the matter for which the applicant seeks protection;

(b) be clear and concise;

(c) be supported by the description; and

(d) relate to one invention or to a group of inventions which are so linked as to form a single inventive concept.

142. Further, Section 112(a) of the Title 35 of US Code provides as under:

35 U.S.C. § 112[39]

(a) IN GENERAL.- The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.

143. Terrell on the *Law of Patents* (Seventeenth Edition, 2011) in Chapter 9: "Construction of the Specification and Claims", under the heading "Principles equally applicable to infringement and validity" states:

9.05 - Section 125(1) defines an "invention" as (unless the context otherwise requires) that specified in a claim of the specification, and both validity (see Sections 1 to 4 and 72 of the Act) and infringement (see Section 60) are to be tested by reference to the "invention". It is, of course, a fundamental principle that the construction of a claim is the same whether validity or infringement is to be considered; **no patentee is entitled to the luxury of an "elastic" claim which has a narrow meaning in the former case but a wide meaning in the latter.** Under English procedure, infringement and validity are normally litigated at the same time and therefore the court is astute to avoid such a result....

(Emphasis added)

144. Chisum on Patents: *A Treatise on the Law of Patentability, Validity, and Infringement* (Vol. 3, June 2007) in Chapter: "Adequate Disclosure" notes:

§ 7.03 - The Enablement Requirement

Since 1790, the patent laws have required that the inventor set forth in a patent specification sufficient information to enable a person skilled in the relevant art to make and use the invention.

The "invention" that must be enabled is that defined by the particular claim or claims of the patent or patent application. This is consistent with the general principle of patent law that the claim defines the invention for purposes of both patentability and infringement.

145. Nevertheless, both Mr. Andhyarujina and Mr. Subramanium strenuously argued that the coverage or the claim, and the *disclosure* or the teaching, have different parameters in a patent, and that the former may have an extended boundary within which *disclosure* or teaching may be confined to a narrower extent. In support of the submission, Mr. Andhyarujina relied upon a decision of the Court of Appeal in *A.C. Edwards Ltd. v. Acme Signs and Displays Ltd.* (1992)

R.P.C. 131 and Anr. of the High Court of Justice Chancery Divisions Patent Court in *Astellas Pharma Inc v. Comptroller-General of Patents* (2009) EWHC 1916 (Pat).

146. Mr. Gopal Subramanium strongly relied upon the decision of United States Court of Customs and Patent Appeals in *In re Hogan* 559 F. 2d 595 in support of his contention.

147. *In Hogan*, the Court of Customs and Patent Appeals held that a patent application that disclosed and enabled a method of making the crystalline form of polymer was entitled to a claim for the method of making a solid polymer, because the only known method for making a solid polymer at the time was the applicants' method of making the crystalline form.

148. The Hogan decision was rendered in a jurisdiction that has the historical background of Blocking Patents. Further, *Hogan* that relates to the saga of acrimonious litigation over the claim of priority of invention for crystalline polypropylene among five competing companies was a rather unusual decision even in the US.

149. *In Hogan*,[40] the Court of Custom and Patent Appeals had before it an appeal from the decision of the Board of Appeals, affirming the rejections by the Patent and Trademark Office (PTO) of the applicant's claims 13-15 for "Solid Polymers of Olefins" under 35 USC § 102, 103, 112 (first paragraph) and 132.

150. The application, though filed in 1971, was in continuation of the first application filed on January 27, 1953. One of the main issues involved in the case was whether a "later state of the art" could be taken as evidence to support a rejection of the patent claim.

151. Among the reasons given by the Board for rejecting the claim of the applicant was that the disclosure in the original 1953 Hogan and Banks' application was not enabling, because the disclosure was limited to making crystalline polymers. But the claims which the Board rejected included an amorphous polymer as well, which was manifestly outside the scope of the enabling teaching present in the case. The Court of Customs and Patent Appeals reversed the decision of the Board of Patent Appeals, observing and holding as under:

The PTO has not challenged Appellants' assertion that their 1953 application enabled those skilled in the art in 1953 to make and use "a solid polymer" as described in claim 13. Appellants disclosed, as the only then existing way to make such a polymer, a method of making the crystalline form. To now say that Appellants should have disclosed in 1953 the amorphous form which on this record did not exist until 1962, would be to impose an impossible burden on inventors and thus on the patent system. There cannot, in an effective patent system, be such a burden placed on the right to broad claims, To restrict Appellants to the crystalline form disclosed, under such circumstances, would be a poor way to stimulate invention, and particularly to encourage its early disclosure. To demand such restriction is merely to state a policy against broad protection for pioneer inventions, a policy both shortsighted and unsound from the standpoint of promoting progress in the useful arts, the constitutional purpose of the patent laws.

152. The Court seems to have taken the view that the amorphous form did not exist at the time of the patent application and therefore, that the patentee could not have been expected to claim the

amorphous form at that time. The Court further took the view that the broad claim for a solid polymer would satisfy the enablement requirement under the state of the art, as that was known at the time of the filling of the patent application, because the amorphous form was not known at that time. The Court observed:

Consideration of a later existing state of the art in testing for compliance with § 112, first paragraph, would not only preclude the grant of broad claims, but would wreak havoc in other ways as well. The use of a subsequently-existing improvement to show lack of enablement in an earlier-filed application on the basic invention would preclude issuance of a patent to the inventor of the thing improved, and in the case of issued patents, would invalidate all claims (even some "picture claims") therein. Patents are and should be granted to later inventors upon unobvious improvements. Indeed, encouragement of improvements on prior inventions is a major contribution of the patent system and the vast majority of patents are issued on improvements. It is quite another thing, however, to utilize the patenting or publication of later existing improvements to "reach back" and preclude or invalidate a patent on the underlying invention.

153. The polypropylene case in the US gave rise to an extraordinary legal precedent for the enablement requirement, according to which a patentee is free to claim a genus that includes unknown species that may be discovered in the future, if the specification describes and enables all the species that are known at the time of filing the patent application. The rationale on which the decision is based is described by Professors Merges and Duffy as the *"temporal paradox"*[41]. The professors explain that, approached in this way, the description and enablement requirements for the genus are determined as of the date of filling the patent, and the patentee gets the benefit of any addition to the genus discovered later.

154. It needs to be noted here that even in the US, Hogan represents a decision given in the context of the special set of facts and circumstances of the litigation over polypropylene. In later decisions, the Federal Circuit appears to have drastically narrowed *Hogan's* scope as a precedent. In Plant Genetics System, *N.V. v. DeKalb Genetics Corporation* 315 F. 3d 1335 : 1341 (Fed. Cir. 2003) the effect of Hogan was considerably constricted and its effect is virtually eliminated in *Chiron Corporation v. Genentech, Inc* 363 F. 3d 1247 : 1257 (Fed. Cir. 2004). Since *Chiron*, the Federal Circuit has not referred to *Hogan* in any of its cases that involve claims to a genus where a single species was enabled.

155. Mr. Subramanium refers to the *Hogan* decision in order to support his contention that the Zimmermann patent is a patent covering a genus with certain known species, and many other species that were unknown at that time, but which are equally covered by the patent, even though there is no enabling disclosure in the patent in respect thereof. But it is already found and held earlier that Imatinib Mesylate is a known substance from the Zimmermann patent. The finding that Imatinib Mesylate is a known substance from the Zimmermann patent is not based on the conduct of the Appellant alone, as objected to by Mr. Andhyarujina, but the finding has been arrived at on an objective consideration of all the material facts and circumstances. In view of that finding, we fail to see any application of the *Hogan* decision to the facts of the case. We have also considered the two decisions relied upon by Mr. Andhyarujina. Those two decisions also have no application to the facts of the present case, for the same reason as in case of *Hogan*.

156. However, before leaving *Hogan* and proceeding further, we would like to say that in this country the law of patent, after the introduction of product patent for all kinds of substances in the patent regime, is in its infancy. We certainly do not wish the law of patent in this country to develop on lines where there may be a vast gap between the coverage and the *disclosure* under the patent; where the scope of the patent is determined not on the intrinsic worth of the invention but by the artful drafting of its claims by skillful lawyers, and where patents are traded as a commodity not for production and marketing of the patented products but to search for someone who may be sued for infringement of the patent.

157. In light of the discussions made above, we firmly reject the Appellant's case that Imatinib Mesylate is a new product and the outcome of an invention beyond the Zimmermann patent. We hold and find that Imatinib Mesylate is a known substance from the Zimmermann patent itself. Not only is Imatinib Mesylate known as a substance in the Zimmermann patent, but its pharmacological properties are also known in the Zimmermann patent and in the article published in the *Cancer Research* journal referred to above. The consequential finding, therefore, is that Imatinib Mesylate does not qualify the test of "invention" as laid down in Section 2(1)(j) and Section 2(1)(ja) of the Patents Act, 1970.

158. This leaves us with the beta crystal form of Imatinib Mesylate, which, for the sake of argument, may be accepted to be new, in the sense that it is not known from the Zimmermann patent. (Whether or not it involves an "inventive step" is another matter, and there is no need to go into that aspect of the matter now). Now, the beta crystalline form of Imatinib Mesylate being a pharmaceutical substance and moreover a polymorph of Imatinib Mesylate, it directly runs into Section 3(d) of the Act with the explanation appended to the provision. Mr. Subramanium, however, contended that Section Atomic En has no application in this case. The main ground on which he denied the applicability of Section Atomic En to decide the question of grant of patent to the beta crystalline form of the Imatinib Mesylate is earlier held to be untenable. He, however, questioned the applicability of Section Atomic En on another ground. Mr. Subramanium submitted that in order to attract Section Atomic En, the subject product must be a new form of a *known* substance having *known* efficacy. The learned Counsel laid some stress on the expression "known" that equally qualifies the substance of which the subject product may be another form, and the efficacy of that substance. The learned Counsel submitted that a "conceivable" substance is not a "known substance" within the meaning of the provision. He contended that the word "known" here connotes proven and well-established; "known efficacy" implies efficacy established empirically and proven beyond doubt. He further contended that neither Imatinib nor Imatinib Mesylate had any known efficacy and that, therefore, there was no question of showing that the beta crystalline form of Imatinib Mesylate had any enhanced efficacy over Imatinib or Imatinib Mesylate.

159. There is no sanction to construe the expression "known" in Section Atomic En in the manner suggested by Mr. Subramanium, and the submission is unacceptable both in law and on facts. It may be noted here that Clauses (e) and (f) of Section 64(1) of the Act, which contain two of the grounds for revocation of patents, also use the expression "publicly known". The expression "publicly known" may normally be construed more widely than "known", and in that sense it is closer to the submission made by Mr. Subramanium. But even the expression "publicly known" received quite the opposite interpretation by this Court in *Monsanto Co. v. Coramandal Indag*

Products (P) Ltd. MANU/SC/0317/1986 : (1986) 1 SCC 642. In paragraph 6 of the judgment, Justice Chinnappa Reddy, speaking for the Court, held and observed as under:
...To satisfy the requirement of being publicly known as used in Clauses (e) and (f) of Section 64(1), it is not necessary that it should be widely used to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of knowledge of the patented product or process either as men of science or men of commerce or consumers. The section of the public, who, as men of science or men of commerce, were interested in knowing about Herbicides which would destroy weeds but not rice, must have been aware of the discovery of Butachlor. There was no secret about the active agent Butachlor as claimed by the Plaintiff's since there was no patent for Butachlor, as admitted by the Plaintiff's. Emulsification was the well-known and common process by which any herbicide could be used. Neither Butachlor nor the process of emulsification was capable of being claimed by the Plaintiff as their exclusive property. The solvent and the emulsifier were not secrets and they were admittedly not secrets and they were ordinary market products. From the beginning to the end, there was no secret and there was no invention by the Plaintiff's. The ingredients, the active ingredients the solvent and the emulsifier, were known; the process was known, the product was known and the use was known. The Plaintiff's were merely camouflaging a substance whose discovery was known through out the world and trying to enfold it in their specification relating to Patent Number 125381. The patent is, therefore, liable to be revoked....

160. On facts also we are unable to accept that Imatinib Mesylate or even Imatinib was not a known substance with known efficacy. It is seen above that Imatinib Mesylate was a known substance from the Zimmermann patent. In the NDA submitted by the Appellant before the US FDA, it was clearly stated that the drug had undergone extensive preclinical, technical and clinical research. The clinical studies included one multiple dose tolerability/dose-finding study (Phase I) and three large open, uncontrolled efficacy and safety studies (Phase II); and a total of 1,234 patients with CML and other Ph+ leukemias were enrolled in the studies. The efficacy of Imatinib was equally known, as is evident from the Zimmermann patent itself, besides the two articles referred to above.

161. The subject product, that is, beta crystalline form of Imatinib Mesylate, is thus clearly a new form of a known substance, i.e., Imatinib Mesylate, of which the efficacy was well known. It, therefore, fully attracts Section Atomic En and must be shown to satisfy the substantive provision and the explanation appended to it.

162. We now proceed to examine how far the beta crystalline form of Imatinib Mesylate stands up to the test of Section Atomic En of the Act. It is noted, in the earlier part of judgment, that the patent application submitted by the Appellant contains a clear and unambiguous averment that all the therapeutic qualities of beta crystalline form of Imatinib Mesylate are also possessed by Imatinib in free base. The relevant extract from the patent application is once again reproduced here:

It goes without saying that **all the indicated inhibitory and pharmacological effects are also found with the free base**, 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl) pyrimidin-2-ylamino)phenyl] benzamide, **or other cells thereof.** The present invention relates especially to the β-crystal form of the methanesulfonic acid addition salt of a compound of formula

I in the treatment of one of the said diseases or in the preparation of a pharmacological agent for the treatment thereto.

(Emphasis added)

163. Now, when all the pharmacological properties of beta crystalline form of Imatinib Mesylate are equally possessed by Imatinib in free base form or its salt, where is the question of the subject product having any enhanced efficacy over the known substance of which it is a new form?

164. It may also be stated here that while going through the Zimmermann patent one cannot but feel that it relates to some very serious, important and valuable researches. The subject patent application, on the other hand, appears to be a loosely assembled, cut-and-paste job, drawing heavily upon the Zimmermann patent. As a matter of fact, Mr. Kuhad, learned Additional Solicitor General, submitted before us a tabular chart showing over a dozen statements and averments made in the subject application that are either lifted from the Zimmermann patent or are very similar to corresponding statements in the Zimmermann patent. The aforesaid chart is appended at the end of the judgment as Appendix II.

165. It further needs to be noted that, on the issue of Section Atomic En, there appears to be a major weakness in the case of the Appellant. There is no clarity at all as to what is the substance immediately preceding the subject product, the beta crystalline form of Imatinib Mesylate. In course of the hearing, the counsel appearing for the Appellant greatly stressed that, in terms of invention, the beta crystalline form of Imatinib Mesylate is two stages removed from Imatinib in free base form. The same is said in the written notes of submissions filed on behalf of the Appellant. But this position is not reflected in the subject application, in which all the references are only to Imatinib in free base form (or to the alpha crystalline form of Imatinib Mesylate in respect of flow properties, thermodynamic stability and lower hygroscopicity). On going through the subject application, the impression one gets is that the beta crystalline form of Imatinib Mesylate is derived directly from Imatinib free base. This may, perhaps, be because once the beta crystalline form of the methanesulfonic acid salt of Imatinib came into being, the Imatinib free base got seeded with the nuclei of Imatinib Mesylate beta crystalline form and, as a result, starting from Imatinib one would inevitably arrive directly at the beta crystalline form of Imatinib Mesylate. But all this is nowhere said in the subject application.

166. Apart from the subject application, the Appellant filed four affidavits before the Controller. Two of the affidavits are meant to explain and refute the results of the experiments conducted by the IICT at the instance of one of the objectors, NATCO Pharma Ltd. But the other two, one by Paul William Manley, dated July 22, 2005, and the other by Giorgio Pietro Massimini, dated __September 2005, were filed to meet the requirements of Section Atomic En, which was amended while the application lay in the "mailbox".

167. Massimini, in paragraph 8 of the affidavit, explained that it was being filed to meet the conditions under Section Atomic En of the Act. He stated that the proviso to Section Atomic En was unique to India and there was no analogous provision in any other country of the world. The Appellant was, therefore, never called upon to satisfy the tests laid down in Section Atomic En of the Act to establish the patentability of the patent subject. He further stated that since no occasion

to do so had arisen earlier, no study relating to the efficacy of the free base was carried out in the past. Upon coming to know the requirement of Section Atomic En, the deponent, asked by the Appellant, immediately commenced such a study, ensuring that accuracy and universally accepted scientific and ethical guidelines were not sacrificed.

168. Manley, in paragraph 8 of his affidavit, stated:

The **physical properties** of the Free Base and imatinib mesylate differ in that the Free Base is only very slightly soluble in water (0.001 g/100 ml) while imatinib mesylate is very soluble in water (beta crystalline form: 130 g/100 ml). Other physical characteristics of the subject compound are described at pages 2 - 3 of the specification. The attendant advantages because of these properties are also simultaneously described therein. These characteristics and hence the attendant properties/advantages are not shared by the Free Base. Furthermore, the Beta form significantly differs from the alpha form:

Physical attributes:

(a) The beta crystal form has substantially more beneficial flow properties and thus results in better processability than the alpha crystal form.

(b) The beta-crystal form of the methanesulfonic acid addition salt is the thermodynamically more stable form at room temperature. Greater stability is thus to be expected.

(c) The beta-crystal form is less hygroscopic than the alpha-crystal form of the methanesulfonic acid addition salt of a compound of formula I.

(d) The lower hygroscopicity is a further advantage for processing and storing the acid addition salt in the beta-crystal form.

(Emphasis added)

169. Massimini, in paragraph 9 of his affidavit stated:

A study conducted in rats provided statistical evidence for a difference in the relative bioavailability of the Free Base and Imatinib mesylate in the beta crystalline form. In such study, a mean AUC (0-48h) value of 264.000 h*ng/mL was found for the Free Base compared with a mean AUC (0-48h) value of 344000 h*ng/mL for Imatinib mesylate having the beta crystal form. In other words, an about 30% improvement in bioavailability was observed for the beta crystalline for of Imatinib mesylate compared to the Free Base. The test results are attached herewith as Annexure "A".

170. It is to be noted that the higher solubility of the beta crystalline form of Imatinib Mesylate is being compared not to Imatinib Mesylate but, once again, to Imatinib in free base form. The whole case of the Appellant, as made out in the subject application and the affidavits, is that the subject product, the beta crystalline form of Imatinib Mesylate, is derived from Imatinib, and that the substance immediately preceding the beta crystalline form is not Imatinib Mesylate but Imatinib

in free base form. This position is sought to be canvassed in the subject application and the affidavits on the premise that the Zimmermann patent ended at Imatinib in free base and did not go beyond to Imatinib Mesylate. Not only is this premise unfounded as shown earlier, but the Appellant itself appears to take a somewhat different stand, as before this Court it was contended that the subject product, in terms of invention, is two stages removed from Imatinib in free base, and the substance immediately preceding the subject product is Imatinib Mesylate (non-crystalline).

171. That being the position, the Appellant was obliged to show the enhanced efficacy of the beta crystalline form of Imatinib Mesylate over Imatinib Mesylate (non-crystalline). There is, however, no material in the subject application or in the supporting affidavits to make any comparison of efficacy, or even solubility, between the beta crystalline form of Imatinib Mesylate and Imatinib Mesylate (non-crystalline).

172. As regards the averments made in the two affidavits, for all one knows the higher solubility that is attributed to the beta crystalline form of Imatinib Mesylate may actually be a property of Imatinib Mesylate itself. One does not have to be an expert in chemistry to know that salts normally have much better solubility than compounds in free base form. If that be so, the additional properties that may be attributed to the beta crystalline form of Imatinib Mesylate would be limited to the following:

i. More beneficial flow properties,

ii. Better thermodynamic stability, and

iii. Lower hygroscopicity

173. The aforesaid properties, ("physical attributes" according to Manley), would give the subject product improved processability and better and longer storability but, as we shall see presently, on the basis of those properties alone, the beta crystalline form of Imatinib Mesylate certainly cannot be said to possess enhanced *efficacy* over Imatinib Mesylate, the known substance immediately preceding it, within the meaning of Section Atomic En of the Act.

174. We have so far considered the issue of enhanced efficacy of the subject product in light of the finding recorded earlier in this judgment that Imatinib Mesylate (non-crystalline) is a known substance from the Zimmermann patent and is also the substance immediately preceding the patent product, that is, Imatinib Mesylate in beta crystalline form.

175. Let us now consider the case of the Appellant as made out in the subject application and the supporting affidavits, and examine the issue of enhanced efficacy of the beta crystalline form of Imatinib Mesylate vis-à-vis Imatinib in free base form. It is seen above that all the pharmacological effects of Imatinib Mesylate in beta crystalline form are equally possessed by Imatinib in free base form. The position is not only admitted but repeatedly reiterated in the patent application. Mr. Subramanium, with his usual fairness and candour, explained the position by stating that Imatinib free base is *actually* the active therapeutic ingredient, but in free base form Imatinib has very little or no solubility. It is, therefore, not capable of being administered as a drug to human beings. In

the words of Mr. Subramanium, if given in solid dosage form, Imatinib free base would sit in the stomach like a brick and would pass out with no therapeutic effect. The invention of methanesulfonic acid addition salt of Imatinib makes the therapeutic ingredient (that continues to be the same) highly soluble, and therefore very suitable for being administered as a drug to humans. The further invention of the beta crystalline form of Imatinib Mesylate adds to its properties and makes it an even better drug than Imatinib Mesylate. The subject product, that is, the beta crystalline form of Imatinib Mesylate, thus demonstrates a definite and tangible enhancement of efficacy over Imatinib in free base form.

176. The way in which the case is presented by Mr. Subramanium is an entirely new case made before this Court for the first time. Nevertheless, let us consider the case of the Appellant as presented by Mr. Subramanium.

177. The portion added in Section Atomic En by the 2005 amendment reads as under:

The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance... [is not inventions within the meaning of the Act].

178. The *Explanation* to Section Atomic En also added by the 2005 amendment provides as under:

Explanation.--For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

179. It may be seen that the word "efficacy" is used both in the text added to the substantive provision as also in the explanation added to the provision.

180. What is "efficacy"? Efficacy means[42] "the ability to produce a desired or intended result". Hence, the test of efficacy in the context of Section Atomic En would be different, depending upon the result the product under consideration is desired or intended to produce. In other words, the test of efficacy would depend upon the function, utility or the purpose of the product under consideration. Therefore, in the case of a medicine that claims to cure a disease, the test of efficacy can only be "therapeutic efficacy". The question then arises, what would be the parameter of therapeutic efficacy and what are the advantages and benefits that may be taken into account for determining the enhancement of therapeutic efficacy? With regard to the genesis of Section Atomic En, and more particularly the circumstances in which Section Atomic En was amended to make it even more constrictive than before, we have no doubt that the "therapeutic efficacy" of a medicine must be judged strictly and narrowly. Our inference that the test of enhanced efficacy in case of chemical substances, especially medicine, should receive a narrow and strict interpretation is based not only on external factors but there are sufficient internal evidence that leads to the same view. It may be noted that the text added to Section Atomic En by the 2005 amendment lays down the condition of "enhancement of the known efficacy". Further, the explanation requires the derivative to "differ significantly in properties **with regard to efficacy**". What is evident, therefore, is that not all advantageous or beneficial properties are relevant, but only such properties that directly relate to efficacy, which in case of medicine, as seen above, is its therapeutic efficacy.

181. While dealing with the explanation it must also be kept in mind that each of the different forms mentioned in the explanation have some properties inherent to that form, e.g., solubility to a salt and hygroscopicity to a polymorph. These forms, unless they differ significantly in property with regard to efficacy, are expressly excluded from the definition of "invention". Hence, the mere change of form with properties inherent to that form would not qualify as "enhancement of efficacy" of a known substance. In other words, the explanation is meant to indicate what is not to be considered as therapeutic efficacy.

182. We have just noted that the test of enhanced therapeutic efficacy must be applied strictly, but the question needs to be considered with greater precision. In this connection, we take note of two slightly diverging points of view urged before this Court.

183. Mr. Anand Grover, learned Counsel appearing for one of the Objectors, Cancer Patients Aid Association, took a somewhat rigid position. The learned Counsel submitted that in the pharmaceutical field, drug action is explained by "pharmacokinetics" (effect of the body on the drug) and "pharmacodynamics" (effect of the drug on the body). He further submitted that efficacy is a pharmacodynamic property, and contended that, in the field of pharmaceuticals, efficacy has a well-known meaning. Efficacy is the capacity of a drug to produce an effect. The IUPAC describes efficacy as "the property that enables drugs to produce responses". It is that property of a drug which produces stimulus. When comparing the efficacy of two substances, efficacy describes "the relative intensity with which agonists vary in the response they produce even when they occupy the same number of receptors". [IUPAC Glossary of Terms used in Medicinal Chemistry, 1998 in CPAA volume 9, at page 7]. In the words of Goodman and Gilman, "the generation of response from the drug receptor complex is governed by a property described as efficacy". They further clarify that "efficacy is that property intrinsic to a particular drug that determines how good an agonist the drug is" [Goodman and Gilman in CPAA compilation, volume 9, at page 22, LHC]. Another source describes efficacy as "the ability of the drug to produce the desired therapeutic effect" [Dorland's Medical dictionary in Novartis' volume P, at page 19].

184. Mr. Grover further submitted that in pharmacology, efficacy is distinct from affinity, potency and bioavailability. Affinity, a pharmacodynamics property, "is the tendency of a molecule to associate with another". The affinity of a drug is its ability to bind to its biological target (receptor, enzyme, transport system, etc.). Potency is "the dose of drug required to produce a specific effect of given intensity as compared to a standard reference". Bioavailability, on the other hand, is a pharmacokinetic property. It "is the term used to indicate the fraction extent to which a dose of drug reaches its site of action or a biological fluid from which the drug has access to its site of action" [Goodman and Gilman in CPAA compilation, volume..., internal page 4]; or "the degree to which a drug or other substance becomes available to the target tissue after administration" [Dorland's Medical Dictionary in Novartis' volume B, at page 65]. A demonstration of increase in bioavailability is not a demonstration of enhanced efficacy.

185. Prof. Basheer, who appeared before this Court purely in academic interest as an intervenor-cum-amicus, agreed that not all advantageous properties of a new form (such as improved processability or flow characteristics, storage potential, etc.) ought to qualify under Section Atomic En, but only those properties that have some bearing on efficacy. However, taking a less rigid position than Mr. Grover, Prof. Basheer argued that safety or significantly reduced toxicity should

also be taken into consideration to judge enhanced therapeutic efficacy of a pharmaceutical product in terms of Section Atomic En.[43]

186. We have taken note of the submissions made by Mr. Grover and Prof. Basheer in deference to the importance of the issue and the commitment of the counsel to the cause. However, we do not propose to make any pronouncement on the issues raised by them, as this case can be finally and effectively decided without adverting to the different points of view noted above.

187. In whatever way therapeutic efficacy may be interpreted, this much is absolutely clear: that the physico-chemical properties of beta crystalline form of Imatinib Mesylate, namely (i) more beneficial flow properties, (ii) better thermodynamic stability, and (iii) lower hygroscopicity, may be otherwise beneficial but these properties cannot even be taken into account for the purpose of the test of Section Atomic En of the Act, since these properties have nothing to do with therapeutic efficacy.

188. This leaves us to consider the issue of increased bioavailability. It is the case of the Appellant that the beta crystalline form of Imatinib Mesylate has 30 per cent increased bioavailability as compared to Imatinib in free base form. If the submission of Mr. Grover is to be accepted, then bioavailability also falls outside the area of efficacy in case of a medicine. Leaving aside the submission of Mr. Grover on the issue, however, the question is, can a bald assertion in regard to increased bioavailability lead to an inference of enhanced therapeutic efficacy? Prof. Basheer quoted from a commentator[44] on the issue of bioavailability as under:

It is not the intent of a bio-availability study to demonstrate effectiveness, but to determine the rate and extent of absorption. If a drug product is not bio-available, it cannot be regarded as effective. **However a determination that a drug product is bio-available is not in itself a determination of effectiveness.**

(Emphasis added)

189. Thus, even if Mr. Grover's submission is not taken into consideration on the question of bioavailability, the position that emerges is that just increased bioavailability alone may not necessarily lead to an enhancement of therapeutic efficacy. Whether or not an increase in bioavailability leads to an enhancement of therapeutic efficacy in any given case must be specifically claimed and established by research data. In this case, there is absolutely nothing on this score apart from the adroit submissions of the counsel. No material has been offered to indicate that the beta crystalline form of Imatinib Mesylate will produce an enhanced or superior efficacy (therapeutic) on molecular basis than what could be achieved with Imatinib free base in vivo animal model.

190. Thus, in whichever way Section Atomic En may be viewed, whether as setting up the standards of "patentability" or as an extension of the definition of "invention", it must be held that on the basis of the materials brought before this Court, the subject product, that is, the beta crystalline form of Imatinib Mesylate, fails the test of Section Atomic En, too, of the Act.

191. We have held that the subject product, the beta crystalline form of Imatinib Mesylate, does not qualify the test of Section Atomic En of the Act but that is not to say that Section Atomic En bars patent protection for all incremental inventions of chemical and pharmaceutical substances. It will be a grave mistake to read this judgment to mean that Section Atomic En was amended with the intent to undo the fundamental change brought in the patent regime by deletion of Section 5 from the Parent Act. That is not said in this judgment.

192. Section 2(1)(j) defines "invention" to mean, "a new product or ...", but the new product in chemicals and especially pharmaceuticals may not necessarily mean something altogether new or completely unfamiliar or strange or not existing before. It may mean something "different from a recent previous" or "one regarded as better than what went before" or "in addition to another or others of the same kind"[45]. However, in case of chemicals and especially pharmaceuticals if the product for which patent protection is claimed is a new form of a known substance with known efficacy, then the subject product must pass, in addition to Clauses (j) and (ja) of Section 2(1), the test of enhanced efficacy as provided in Section Atomic En read with its explanation.

193. Coming back to the case of the Appellant, there is yet another angle to the matter. It is seen above that in the US the drug Gleevec came to the market in 2001. It is beyond doubt that what was marketed then was Imatinib Mesylate and not the subject product, Imatinib Mesylate in beta crystal form. It is also seen above that even while the Appellant's application for grant of patent lay in the "mailbox" awaiting amendments in the law of patent in India, the Appellant was granted Exclusive Marketing Rights on November 10, 2003, following which Gleevec was marketed in India as well. On its package[46], the drug was described as "Imatinib Mesylate Tablets 100 mg" and it was further stated that "each film coated tablet contains: 100 mg Imatinib (as Mesylate)". On the package there is no reference at all to Imatinib Mesylate in beta crystalline form. What appears, therefore, is that what was sold as Gleevec was Imatinib Mesylate and not the subject product, the beta crystalline form of Imatinib Mesylate.

194. If that be so, then the case of the Appellant appears in rather poor light and the claim for patent for beta crystalline form of Imatinib Mesylate would only appear as an attempt to obtain patent for Imatinib Mesylate, which would otherwise not be permissible in this country.

195. In view of the findings that the patent product, the beta crystalline form of Imatinib Mesylate, fails in both the tests of invention and patentability as provided under Clauses (j), (ja) of Section 2(1) and Section Atomic En respectively, the appeals filed by Novartis AG fail and are dismissed with cost. The other two appeals are allowed.

196. Before putting down the records of this case, we would like to express our deep appreciation for the way the hearing of the case took place before the Court. Every counsel presented the issues under consideration from a different angle and every counsel who addressed the Court had something important and valuable to contribute to the debate. It was also acknowledged that the illuminating addresses of the counsel were the result of the hard work and painstaking research by the respective teams of young advocates working for each senior advocate. The presence of those bright young ladies and gentlemen in the court room added vibrancy to the proceedings and was a source of constant delight to us.

APPENDIX I

Table (1)

Comparative Table of Applications for Patents in India during the periods (a) 1930-38: (b) 1949-58

1930-1938				1949-58			
Year	**Total number of applications filed**	**By Indians**	**By other than Indian**	**Year**	**Total number of applications filed**	**By Indians**	**By other than Indians**
1930	1, 099	114	985	1949	1,725	345	1,380
1931	940	109	831	1950	1,851	352	1,499
1932	928	162	766	1951	2,108	422	1,686
1933	954	199	755	1952	2,272	473	1,799
1934	1,007	203	804	1953	2,235	406	1,829
1935	980	156	824	1954	2,497	403	2,094
1936	1,068	199	869	1955	2,736	403	2,333
1937	1,246	202	1,044	1956	3,067	482	2,585
1938	1,243	220	1,023	1957	3,456	527	2,929
1939	1,060	238	822	1958	3,572	529	3,043
	10,525	1,802 (17%)	8,723		25,519	4,342 (17%)	21,177

Table (2)

Patents Granted From 1950-57- analysed according to the subject of the inventions

	Food				
Year	**Indian**		**Foreign**		**Total**
	No.	Percentage	No.	Percentage	
1950	22	16.5	111	83.5	133
1951	35	28.6	87	71.4	122
1952	18	18.9	77	81.1	95
1953	30	18.8	129	81.2	159
1954	31	8.3	341	91.7	372
1955	48	10.0	430	90.0	478
1956	30	7.0	402	93.0	432
1957	8	13.5	51	86.5	59
Total	222		1628		1850
Chemical					
1950	13	4.5	271	95.4	284
1951	33	8.7	378	91.3	411
1952	36	8.0	414	92.0	450
1953	27	7.1	351	92.9	378
1954	44	9.7	409	90.3	453
1955	56	12.5	448	87.5	504
1956	34	6.6	479	93.4	513
1957	68	9.3	656	90.7	727
Total	311		3406		3717

Table (3)

Applications for Patents relating to Drugs and Pharmaceuticals

Pharmaceuticals					
Year	**Indian**		**Foreign**		
	No.	Percentage	No.	Percentage	
1947	12	7.7 (sic 17.7)	143	72.3	155
1948	7	5.5	121	94.5	128
1949	5	3.5	139	96.5	144
1950	8	5.0	151	95.0	159
1951	17	7.7	203	92.3	220
1952	18	6.2	224	93.8	242
1953	18	6.3	267	93.7	285
1954	13	4.1	300	95.9	312
1955	7	2.1	325	97.9	332
1956	13	2.6	476	97.4	489
1957	25	5.3	543	94.7	568
Total	143		2892		3035

Table (5)

Number of Patents in force on the 1st January, 1958

Total Number	13.774
Owned by Indians	1.157
Owned by Indians and Foreigners jointly	21
Owned by Foreigners	12.596

APPENDIX II

Comparative Chart of Zimmermann Patent & Application for Beta-Crystalline form of Imatinib Mesylate in India

	Zimmermann Patent (Vol. C-4)	**Beta-crystal Application in India (Vol. C-4)**
1.	Column 4: The compounds of formula I have valuable pharmacological properties and can be used, for example, as anti-tumoral drugs and as drags (sic drugs) against atherosclerosis.	Page No. 60: The methanesulfonic acid addition salt of a compound of formula I, which is preferably used in the β-crystal form…possesses valuable pharmacological properties and may, for example, be used as an anti-tumour agent, as an agent to treat atherosclerosis.
2.	Column 5: "…and anti-bacterial active ingredients.."	Page No. 60: "…preventing the invasion of warm-blooded animal cells by certain bacteria, such as Porphyromonas gingivalis."
3.	Column 4: The phosphorylation of proteins has	Page No. 60: The phosphorylation of proteins has

	long been known as an important step in the differentiation and proliferation of cells. The phosphorylation is catalysed by protein kinases which are divided into serine/threonine kinases and tyrosine kinases. The serine/threonine kinases include protein kinase C and the tyrosine kinases the PDGF (platelet-derived growth factor)-receptor tyrosine kinase.	long been known as an essential step in the differentiation and division of cells. Phosphorylation is catalysed by protein kinases subdivided into serine/threonine and tyrosine kinases. The tyrosine kinases include PDGF (Platelet-derived Growth Factor) receptor tyrosine kinase.
4.	Column 7: PDGF (platelet-derived growth factor) is a very frequently occurring growth factor which plays an important role both in normal growth and in pathological cell proliferation, such as in carcinogenesis and disorders of the smooth muscle cells of blood	Page No. 60: PDGF (Platelet-derived Growth Factor) is a very commonly occurring growth factor, which plays an important role both in normal growth and also in pathological cell proliferation, such as is seen in carcinogenesis and in diseases of the smooth-muscle cells of blood

	vessels, for example in atherosclerosis and thrombosis.	vessels, for example in atherosclerosis and thrombosis.
5.	Column 7: The inhibition of PDGF-stimulated receptor tyrosine kinase activity in vitro is measured in PDGF receptor immunocomplexes of BALB/c 3T3 cells, analogously to the method described by E. Andrejauskas-Buchdunger and U. Regenass in Cancer Research 52, 5353-5358 (1992). The compounds of formula I described in detail above inhibit PDGF-dependent cell-free receptor phosphorylation at concentrations of from 0.005 to 5 µmol/liter, especially from 0.01 to 1.0, more especially from 0.01 to 0.1µmol/liter. The inhibition of PDGF-receptor tyrosine kinase in the intact cell is detected by means	Page No. 60: The inhibition of PDGF-stimulated receptor tyrosine kinase activity in vitro is measured in PDGF receptor immune complexes of BALB/c 3T3 cells, as described by E. Andrejauskas-Buchdunger and U. Regenass in Cancer Research 52, 5353-5358 (1992). A compound of formula I described in more detail hereinbefore, such as especially its β-crystal form, inhibits PDGF-dependent acellular receptor phosphorylation.

	of Western Blot Analysis, likewise analogously to the method described by E. Andrejauskas-Buchdunger and U. Regenass in Cancer Research 52, 5353-5358 (1992). In that test the inhibition of ligand-stimulated PDGF-receptor autophosphorylation in BALB/c mouse cells is measured with the aid of anti-phosphotyrosine antibodies. The compounds of formula I described in detail above inhibit the tyrosine kinase activity of the PDGF receptor at concentrations of from 0.005 to 5 µmol/liter, especially from 0.01 to 1.0 and more especially from 0.01 to 0.1 µmol/liter. At concentrations below 1.0 µmol/liter, those compounds also inhibit the cell growth of a PDGF-dependent cell line, namely BALB/c 3T3 mouse fibroblasts.		

6.	Column 8: The compounds of this invention inhibit enzyme activity by 50% (IC_{50}) typically in a concentration of 0.1 to 10 µm.	Page No. 61: "...the corresponding methanesulfonate salt inhibit the tyrosine kinase activity of the PDGF receptor at an IC_{50} (concentration at which activity is inhibited by 50% compared with the control) of about 120 nM and about 100 nM, respectively."
7	Column 7: Owing to the properties described, compounds of formula I can be used not only as tumour-inhibiting active ingredients but also as drugs against non-malignant proliferative diseases, e.g. atherosclerosis, thrombosis, psoriasis, sclerodermitis and fibrosis. They are also suitable for the further applications mentioned above for	Page No. 61: On the basis of the described properties, the methanesulfonic acid addition salt of a compound of formula I, such as especially the β-crystal form thereof, may be used not only as a tumour-inhibiting substance, for example in small cell lung cancer, but also as an agent to treat non-malignant proliferative disorders, such as atherosclerosis, thrombosis, psoriasis, scleroderma,

	protein kinase C- modulators and can be used especially in the treatment of diseases that respond to the inhibition of PDGF-receptor kinase.	and fibrosis… It may especially be used for the treatment of diseases which respond to an inhibition of the PDGF receptor kinase.
8.	Column 9: In addition, the compounds of formula I prevent the development of resistance (multi-drug resistance) in cancer treatment with other chemotherapeutic drugs or remove existing resistance to other chemotherapeutic drugs.	Page No. 62: In addition, the methanesulfonic acid addition salt of a compound of formula I, such as especially its β-crystal form C, prevents the development of multidrug resistance in cancer therapy with other chemotherapeutic agents or

		abolishes a pre-existing resistance to other chemotherapeutic agents.
9.	Column 6: Some of the compounds of formula I wherein R_4 and R_5 are hydrogen inhibit not only protein kinase C but, at a concentration IC_{50} as low as approximately from 0.01 to 5 µmol/liter, especially approximately from 0.05 to 1 µmol/liter, also certain tyrosine kinases, such as especially PDGF-receptor kinase or abl-kinase, for example v-abl-kinase.	Page No. 62: Also abl kinase, especially v-abl kinase, is inhibited by 4-(4-methylpiperazin-1-ylmethyl) –N-(4-methyl-3-(4-pyridin-3-yl)pyrimidin-2-ylamino) phenyl] benzamide and its methanesulfonate salt.
10.	Column 7: The above-mentioned inhibition of v-abl-tyrosine kinase is determined in accordance with the methods of N. Lydon et at., Oncogene Research 5, 161 – 173 (1990) and J.F. Geissler et al., Cancer Research 52,	Page No. 62: The inhibition of v-abl tyrosine kinase is determined by the methods of N. Lydon et at. Oncogene Research 5, 161 – 173 (1990) and J.F. Geissler et al., Cancer Research 52, 4492-8 (1992). In those methods

	4492-4498 (1992). In those methods [Val^5]-angiotensin II and [γ-^{32}P]-ATP are used as substrates.	[Val^5]-angiotensinII and [γ-^{32}P]-ATP are used as substrates.
11.	Column 20:	Page No.68:
	The invention relates also to a method of treating warm-blooded animals suffering from a tumoral disease, which comprises administering to warm-blooded animals requiring such treatment an effective, tumour-inhibiting amount of a compound of formula I or of a pharmaceutically acceptable salt thereof.	The invention relates also to a process for the treatment of warm-blooded animals suffering from said diseases, especially a tumour disease, ...is administered to warm-blooded animals in need of such treatment.
12.	Column 20: The invention relates further to the use of a compound of formula I or of a pharmaceutically acceptable salt thereof for inhibiting PDGF-receptor kinase or to the use of a compound of formula I wherein R_4,	Page No.68 : The invention relates moreover to the use of the β-crystal form of the methanesulfonic acid addition salt of a compound of formula I for the inhibition of the above-mentioned tyrosine kinases, especially PDGF

	and R_8 are each hydrogen, or of a pharmaceutically acceptable salt thereof, for inhibiting protein kinase C in warm-blooded animals or for preparing pharmaceutical compositions for use in the therapeutic treatment of the human or animal body.	receptor kinase, v-abl kinase, and/or c-kit receptor kinase, or for the preparation of pharmaceutical compositions for use in treating the human or animal body.
13.	Column 20: Effective doses, for example daily doses of approximately from 1 to 1000 mg, especially from 50 to 500 mg, are administered to a warm-blooded animal of approximately 70 kg body weight according to species, age, individual condition, mode of administration and the individual syndrome.	Page No. 68: Depending on species, age, individual condition, mode of administration, and the clinical picture in question, effective doses, for example daily doses of about 1-2500 mg, preferably 1-1000 mg, especially 5-500 mg, are administered to warm-blooded animals of about 70 kg bodyweight.
14.	Column 20: The invention relates also to pharmaceutical compositions comprising an effective amount,	Page No. 68: The invention relates also to pharmaceutical preparations which contain an effective amount,

	especially an amount effective in the prevention or therapy of one of the above-mentioned diseases, of the active ingredient together with pharmaceutically acceptable carriers that are suitable for topical, enteral, for example oral or rectal, or parenteral administration, and may be inorganic or organic, solid or	especially an effective amount for prevention or treatment of one of the said diseases, of the methanesulfonic acid addition salt of a compound of formula I in the –crystal (sic β-crystal) form, together with pharmaceutically acceptable carriers which are suitable for topical, enteral for example oral or rectal, or
	liquid. For oral administration there are used especially tablets or gelatin capsules comprising the active ingredient together with diluents, for example lactose, dextrose, sucrose, mannitol, sorbitol, cellulose and/or glycerol, and/or lubricants, for example silicic acid, talc, stearic acid or salts thereof, such as magnesium or calcium stearate, and/or polyethylene glycol. Tablets may also comprise binders, for	parenteral administration and may be inorganic or organic and solid or liquid. Especially tablets or gelatin capsules containing the active substance together with diluents, for example lactose, dextrose, sucrose, mannitol, sorbitol, cellulose and/or glycerin, and/or lubricants, for example silicic, talc, stearic acid, or salts thereof, typically magnesium or calcium stearate, and/or polyethylene glycol, are used for

example magnesium aluminium silicate, starches, such as corn, wheat or rice starch, gelatin, methylcellulose, sodium carboxymethylcellulose and/or polyvinylpyrrolidone, and, if desired, disintegrators, for example starches, agar, alginic acid or a salt thereof, such as sodium alginate, and/or effervescent mixtures, or adsorbents, dyes, flavourings and sweeteners. The pharmacologically active compounds of the present invention can also be used in the form of parenterally administrable compositions or in the form of infusion solutions. Such solutions are preferably isotonic aqueous solutions or suspensions, which, for example in the case of lyophilised compositions that comprise the	oral administration. Tablets may likewise contain binders, for example magnesium aluminium silicate, starches, typically corn, wheat or rice starch, gelatin, methylcellulose, sodium carboxymethylcellulose and/or polyvinylpyrrolidone, and, if so desired, disintegrants, for example starches, agar, alginic acid or a salt thereof, typically sodium alginate, and/or effervescent mixtures, or adsorbents, colouring agents, flavours, and sweetening agents. The pharmacologically active compounds of the present invention may further be used in the form of preparations for parenteral administration or infusion solutions. Such solutions are preferably isotonic aqueous solutions or

	active ingredient alone or together with a carder, for example mannitol, can be prepared before use. The pharmaceutical compositions may be sterilised and/or may comprise excipients, for example preservatives, stabilisers, wetting agents and/or emulsifiers, solubilisers, salts for regulating the osmotic pressure and/or buffers. The present pharmaceutical compositions which, if desired, may comprise further pharmacologically	suspensions, these possibly being prepared before use, for example in the case of lyophilised preparations containing the active substance either alone or together with a carrier, for example mannitol. The pharmaceutical substances may be sterilised and/or may comprise excipients, for example preservatives, stabilisers, wetting agents and/or emulsifiers, solubilisers, salts for regulation of the osmotic pressure, and/or buffers.

	active substances, such as antibiotics, are prepared in a manner known per se, for example by means of conventional mixing, granulating, confectioning, dissolving or lyophilising processes, and comprise approximately from 1% to 100%, especially from approximately 1% to approximately 20%, active ingredient(s).	The present pharmaceutical preparations which, if so desired, may contain further pharmacologically active substances, such as antibiotics, are prepared in a manner known per se, for example by means of conventional mixing, granulating, coating, dissolving or lyophilising processes, and contain from about 1% to 100%, especially from about 1% to about 20%, of the active substance or substances.
15.	Column 21: The following Examples illustrate the invention but do not limit the invention in any way. The R_f values are determined on silica gel thin-layer plates (Merck, Darmstadt, Germany). The ratio to one another of the eluants in the eluant mixtures used is given in proportions by volume (v/v), and temperatures are given in degrees Celsius.	Page No. 69: The following Examples illustrate the invention without limiting the scope thereof. R_1 – values are determined on TLC plates coated with silica gel (Merck, Darmstadt, Germany). The ratio of the solvents to one another in the solvent systems used is indicated by volume (v/v), and temperatures are given in degrees Celsius (°C).

APPENDIX III

---

[1] 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl)pyrimidin-2-ylamino)phenyl] benzamide.

[2] Ibid

[3] Ibid

[4] Examples 1 to 3 stated below are reproduced from the written notes titled "Novartis Document-XIV: Examples in 1602/MAS/1998 (Subject Patent Specification), submitted by Mr. Subramanium, Senior Advocate appearing for the Appellant in course of hearing on September 20, 2012.

[5] The initial application that was filed was for "Crystal modification of a N-phenyl-2-pyrimidineamine derivative, processes for its manufacture and its use". This application included both the alpha and beta crystalline forms. Later on during the course of prosecution of the patent application, the claims of the original application were restricted only to the beta form of Imatinib Mesylate and a separate divisional application No. 799/CHE/04 was filed for the alpha form in 2004.

[6] The oppositions were made by M/s. Cancer Patients Aid Association (Respondent No. 4), NATCO Pharma Ltd. (Respondent No. 5), CIPLA Ltd. (Respondent No. 6), Ranbaxy Laboratories Ltd. (Respondent No. 7), Hetro Drugs Ltd. (Respondent No. 8).

[7] Section 2(8) "Invention" means any manner of new manufacture and includes an improvement and an alleged invention

Section 2(10) "Manufacture" includes any art, process or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture.

Section 14 - Term of Patent. (1)The term limited in every patent for the duration thereof shall, save as otherwise expressly provided by this Act, be sixteen years from its date.

[8] The Bakshi Tek Chand Committee's (also called Patents Enquiry Committee I) report and the Ayyangar Committee's report are important milestones in the development of the patent law in the country.

[9] The different tables compiled in the Justice Ayyangar's report are put together at one place at the end of this judgment in Appendix I.

[10] Michel on Principal National Patent Systems, Vol. I, P.15

[11] The provisions quoted here are as those were enacted in the 1970 Act and before those provisions underwent the amendments with effect from January 1, 2005.

[12] Chaudhuri, Sudip, The WTO and India's Pharmaceuticals Industry (Patent Protection, TRIPS, and Developing Countries) (Oxford University Press, 2005).

[13] For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

[14] For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

[15] This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

[16] Section 5 of the Act as before it was amended:

Section 5. Inventions where only methods or processes of manufacture patentable.-In the case of inventions-

(a) claiming substances intended for the use, or capable of being used, as food or as medicine or drug, or

(b) relating to substances prepared or produced by chemical processes (including alloys, optical glass, semiconductors and inter-metallic compounds), no patent shall be granted in respect of claims for the substances themselves, but claims for the methods of processes of manufacture shall be patentable.

[17] During this brief period, 125 applications for product patents were received and filed.

[18] Excepting all chemical substances which are ordinarily used as intermediates in the preparation or manufacture of any of the medicines or substances referred to in Sub-clauses (i) to (iv) of Section 2(1)(l) of the Parent Act.

[19] Here it will be unfair not to state that in course of hearing of the case when the Court expressed its bewilderment over the price of the drug, it was strenuously stated on behalf of the Appellant that they also ran a huge charitable programme under which the drug was supplied free to the needy persons. However, to the question by the Court why the Appellant could not abolish the charitable programme and at the same time bring down the price of the drug so as the total revenue from the sale of the drug remains the same as it is with the abnormally high price and the charitable programme, no satisfactory answer was provided on behalf of the Appellant.

20. Section 2(1)(1): "New Invention", Section 2(1)(ta) "Pharmaceutical substance"

[21] Clauses (1) and (ta) of Section 2(1) are also on the issue of "invention" but as noted above those provisions, though defined in Section 2 are not used anywhere else in the Act and, therefore, we do not take those provisions in consideration for construing the meaning of "invention".

[22] "Adjective: 1. of or relating to a particular subject, art, or craft or its techniques. 2. of, involving, or concerned with applied or industrial sciences": The New Oxford Dictionary of English, Edition 1998.

[23] Abundant caution does no harm.

[24] Out of abundant caution.

[25] See Chapter XVI: "Working of Patents, Compulsory Licences and Revocation" in the Patents Act, 1970.

[26] See Sections 63, 64, and 65 of the Patents Act, 1970.

[27] See Section 25 of the Patents Act, 1970.

[28] 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl)pyrimidin-2-ylamino)phenyl] benzamide.

[29] In 1996, CIBA Geigy merged with Sandoz to form Novartis, the present Appellant.

[30] The invention relates to N-phenyl-2-pyrimidine-amine derivatives, to processes for the preparation thereof, to medicaments comprising those compounds, and to the use thereof in the preparation of pharmaceutical compositions for the therapeutic treatment of warm-blooded animals.

The invention relates to N-phenyl-2-pyrimidine-amine derivatives of formula I

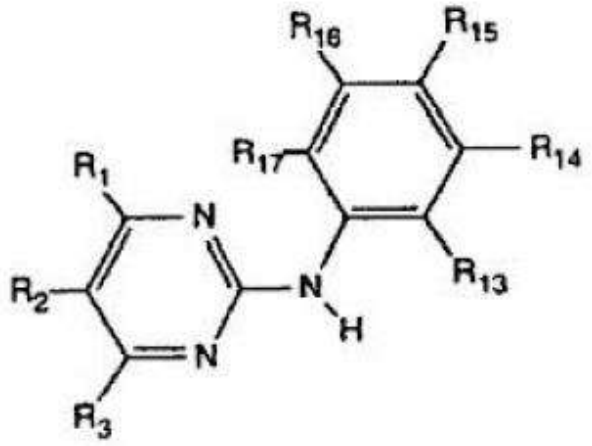

wherein

R1 is 4-pyrazinyl, 1-methyl-1H-pyrrolyl, amino- or amino-lower alkyl-substituted phenyl wherein the amino group in each case is free, alkylated or acylated, 1H-indolyl or 1H-imidazolyl bonded at a five-membered ring carbon atom, or unsubstituted or lower alkyl-substituted pyridyl bonded at a ring carbon atom and unsubstituted or substituted at the nitrogen atom by oxygen,

R2 and R3 are each independently of the other hydrogen or lower alkyl,

one or two of the radicals R4, R5, R6, R7 and R8 are each nitro, fluoro-substituted lower alkoxy or a radical of formula II

$$-N(R_9)-C(=X)-(Y)_n-R_{10}$$

wherein

R9 is hydrogen or lower alkyl,

X is oxo, thio, imino, N-lower alkyl-imino, hydroximino or O-lower alkyl-hydroximino,

Y is oxygen or the group NH,

n is 0 or 1 and

R10 is an aliphatic radical having at least 5 carbon atoms, or an aromatic, aromatic-aliphatic, cycloaliphatic, cycloaliphatic-aliphatic, heterocyclic or heterocyclic-aliphatic radical,

and the remaining radicals R4, R5, R6, R7 and R8 are each independently of the others hydrogen, lower alkyl that is unsubstituted or substituted by free or alkylated amino, piperazinyl, piperidinyl, pyrrolidinyl or by morpholinyl, or lower alkanoyl, trifluoromethyl, free, etherified or esterifed hydroxy, free, alkylated or acylated amino or free or esterified carboxy,

and to salts of such compounds having at least one salt-forming group.

[31] 21 Code of Federal Regulations s. 314.3: Drug substance means an active ingredient that is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease or to affect the structure or any function of the human body, but does not include intermediates use in the synthesis of such ingredient.

[32] 21 Code of Federal Regulations s. 314.3: Drug product means a finished dosage form, for example, tablet, capsule, or solution, that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients.

[33] Later on the Appellant also got the drug approval vide letter dated April 18, 2003 in NDA # 21-588 granting approval to commercially market Gleevec (Imatinib Mesylate) Tablets, 100 mg and 400 mg. Needless to say that in regard to the tablet as well the reference is to the Zimmermann patent.

[34] Not an "inventive step"! A "manipulative step" may or may not be an "inventive step", which is the requirement under Indian law.

[35] Imatinib.

[36] Imatinib Mesylate.

[37] There is a factual error in the submission in as much as in the Drug Approval application before the US FDA the drug Gleevec is represented as Imatinib Mesylate. Before the US FDA there is no reference to the beta crystalline form of Imatinib Mesylate.

[38] Blocking Patents!

[39] Recall that it is on the basis of this provision that the U.S. Board of Patent Appeals had held in the case regarding the Appellant's claim for patent for beta crystalline form of Imatinib Mesylate that "in light of 35 U.S.C. § 282, therefore, we may presume that the specification of the Zimmermann patent teaches any person skilled in the art how to use Imatinib, or a pharmaceutically acceptable salt thereof,...".

[40] The following discussion on the *Hogan* decision is partially based on the article "Allocating Patent Rights Between Earlier and Later Inventions" by Charles W Adams, Professor of Law at

the University of Tulsa College of Law, published in the Saint Louis University Law Journal (Vol. 54-55, 2009, pp 56-112).

[41] Apart from the *Hogan* Decision, Mr. Subramanium also relied upon the relevant passage under the heading "Enablement and the Temporal Paradox" from the book "Patent Law and Policy: Cases and Materials" (Fifth Edition) by Robert Patrick Merges and John Fitzgerald Duffy...at pg. 298-300

[42] The New Oxford Dictionary of English, Edition 1998.

[43] Prof. Basheer traced the origins of the amended part of Section Atomic En in Article 10(2)(b) of European Drug Regulatory Directive, 2004 which defines a "generic medicinal product" as:

"a medicinal product which has the same qualitative and quantitative composition in active substances and the same pharmaceutical form as the reference medicinal product, and whose bioequivalence with the reference medicinal product has been demonstrated by appropriate bioavailability studies. The different salts, esters, isomers, mixtures of isomers, complexes or derivatives of an active substance shall be considered to be the same active substance, unless they differ significantly in properties with regard to safety and/or efficacy. In such cases, additional information providing proof of the safety and/or efficacy of the various salts, esters or derivatives of a authorized active substance must be supplied by the applicant."

He pointed out that the expressions used in a different context in the European Drug Regulatory Directive were incorporated in the Patents Act for an altogether different purpose and raised some important and interesting points for interpretation of Section Atomic En but in this case we see no reason to go into those aspects of the matter.

[44] 42 FR 1640 (1977). Cf. Moffitt, Jane, Appropriateness of Bioavailability and Bioequivalency as Pre-Market Clearance Considerations, 34 Food Drug Cosm. L.J. 640 (1979)

[45] The New Oxford Dictionary of English Edition 1998

[46] A copy of the package is enclosed at the end of the judgment as appendix III.

Back to Index

MANU/SC/0482/2005

Neutral Citation: 2005/INSC/358

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 5041 of 2005 (Arising out of SLP (C) No. 9932 of 2004), Civil Appeal No. 5042 of 2005 (Arising out of SLP (C) No. 9935/2004), Civil Appeal No. 5043 of 2005 (Arising out of SLP (C) No. 9936/2004), Writ Petition (Civil) No. 276/2004, Writ Petition (Civil) No. 330/2004; Writ Petition (Civil) No. 357/2004, IA Nos. 26, 27, 30, 31 and 33 in Writ Petition (Civil) No. 350/1993, Civil Appeal No. 5035 of 2005 (Arising out of SLP (C) No. 11244/2004), Writ Petition (Civil) No. 302/204, Writ Petition (Civil) No. 347/2004, Writ Petition (Civil) No. 349/2004, Writ Petition (Civil) No. 350/2004, Writ Petition (Civil) No. 387/2004, Writ Petition (Civil) No. 423/2004, Writ Petition (Civil) No. 480/2004, Writ Petition (Civil) No. 19/2005, Writ Petition (Civil) No. 261/2004, Writ Petition (Civil) No. 265/2004; Writ Petition (Civil) No. 380/2004, Writ Petition (Civil) No. 358/2004, Writ Petition (Civil) No. 359/2004, Writ Petition (Civil) No. 360/2004, Writ Petition (Civil) No. 361/2004, Writ Petition (Civil) No. 362/2004, Writ Petition (Civil) No. 363/2004, Civil Appeal Nos. 5257-5258/2004, Civil Appeal No. 5259/2004, Civil Appeal Nos. 5260-5261/2004, Civil Appeal Nos. 5262-5263/2004, Civil Appeal No. 5996/2004, Civil Appeal No. 5992/2004, Civil Appeal Nos. 5997-5998/2004, Civil Appeal Nos. 7969-7971/2004, Civil Appeal No. 7972/2004, Civil Appeal No. 7973/2004, Civil Appeal No. 7974/2004, Civil Appeal No. 7975/2004, Writ Petition (Civil) No. 371/2004, Writ Petition (Civil) No. 368/2004, Civil Appeal Nos. 7117-7119/2004, Civil Appeal Nos. 7124-7126/2004, Contempt Petition (Civil) Nos. 561-563/2004 in Civil Appeal Nos. 7117-7119/2004, Contempt Petition (Civil) Nos. 564-566/2004 in Civil Appeal Nos. 7124-7126/2004, Writ Petition (Civil) No. 251/2004, Civil Appeal No. 5036 of 2005 (Arising out of SLP (C) No. 17464/2004), Civil Appeal No. 5037 of 2005 (Arising out of SLP (C) No. 17549/2004), Writ Petition (Civil) No. 318/2004, Civil Appeal No. 5038 of 2005 (Arising out of SLP (C) No. 17930/2004), Civil Appeal No. 5039 of 2005 (Arising out of SLP (C) No. 17931/2004), Civil Appeal No. 5040 of 2005 (Arising out of SLP (C) No. 17326/2003), Writ Petition (Civil) No. 386/2004, Writ Petition (Civil) No. 397/2004

Decided On: 12.08.2005

Appellants: P.A. Inamdar and Ors. **Vs.** Respondent: State of Maharashtra and Ors.

Hon'ble Judges/Coram:

R.C. Lahoti, C.J., Y.K. Sabharwal, D.M. Dharmadhikari, Arun Kumar, G.P. Mathur, Tarun Chatterjee and P.K. Balasubramanyan, JJ.

Subject: Constitution

Subject: Education

Relevant Section:

CONSTITUTION OF INDIA - Article 19(1)(g)

Authorities Referred:

Chambers Dictionary; Advanced Law Lexicon (P. Ramanatha Aiyar, 3rd Edition, 2005, Vol.2); Eternal Values for A Changing Society, Vol. III Education for Human Excellence, published by Bharatiya Vidya Bhavan, Bombay

Cases Overruled/Partly Overruled:

Islamic Academy of Education and Anr. vs. State of Karnataka and Ors. (MANU/SC/0580/2003)

Case Note:

(1) Constitution of India - Articles 19 (1) (g), 29 (2) and 30 (1)--Educational Institutions--Unaided minority or non-minority institutions --Certain controversies resolved in 11-Judge Bench in T.M.A. Pai Foundation v. State of Karnataka, 2002 (4) AWC 3297 (SC) : (2002) 8 SCC 481 (Pai Foundation), as explained and clarified in 5-Judge Bench in Islamic Academy of Education v. State of Karnataka, 2003 (4) AWC 3119 (SC) : 2004 (1) SCCD 125 : (2003) 6 SCC 697 (Islamic Academy)--As follow-up certain controversies cropped up which have been resolved as under :

(A) Extent to which State can regulate admissions made by unaided minority or non-minority educational institutions--Whether State can enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions?--Held, "no"--Reservation of 15% seats for Non-Resident Indians (NRIs) permissible.

States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e., on any criterion except merit.

Neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill, (1958) SCR 995, which was approved by Pai Foundation, there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats, which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional

educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30 (1) or a reasonable restriction within the meaning of Article 19 (6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

Observation in para 68 of Pai Foundation merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat sharing with the State or adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give free-ships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of weaker and poorer sections of the society. Nowhere in Pai Foundation, either in the majority or in the minority opinion, have we found any justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

The observations in Pai Foundation in paragraph 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State. In Pai Foundation, it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees. For the aforesaid reasons, we cannot approve of the scheme evolved in Islamic Academy to the extent it allows States to fix quota for seat sharing between management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. That part of the judgment in Islamic Academy, does not lay down the correct law and runs counter to Pai Foundation.

Therefore, neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30 (1) of the Constitution of India.

A limited reservation of seats, not exceeding 15% may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well-defined criteria, the educational institution may admit on

subsidized payment of their fee. To prevent misutilisation of such quota or any mal-practice referable to NRI quota seats, suitable legislation or regulation needs to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to Islamic Academy's direction to regulate.

Observation in Islamic Academy contained in later part of para 19 of judgment on quota and fixation of percentage by State Government, overruled.

(B) Admission procedure of unaided educational institutions--Common entrance test to be held--State can also provide procedure of holding common entrance test in interest of securing fair and merit-based admissions and preventing mal-administration.

So far as the minority unaided institutions are concerned, to admit students being one of the components of "right to establish and administer an institution", the State cannot interfere therewith. Upto the level of undergraduate education, the minority unaided educational institutions enjoy total freedom.

However, different considerations would apply for graduate and post-graduate level of education, as also for technical and professional educational institutions. Such education cannot be imparted by any institution unless recognised by or affiliated with any competent authority created by law, such as a University, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at this level are a must. To fulfil these objectives, the State can and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.

Pai Foundation has already held that the minority status of educational institutions is to be determined by treating the States as units. Students of that community residing in other States where they are not in minority, shall not be considered to be minority in that particular State and hence their admission would be at par with other non-minority students of that State. Such admissions will be only to a limited extent, that is, like a 'sprinkling' of such admissions, the term we have used earlier borrowed from Kerala Education Bill, 1957. In minority educational institutions, aided or unaided, admissions shall be at the State level. Transparency and merit shall have to be assured.

Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list, the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, the number of seats, the kind of minority to which the

institution belongs and other relevant factors. Such an agency conducting Common Entrance Test (CET, for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfilment of twin objects of transparency and merit. CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralised counselling or, in other words, single window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of list of successful candidates prepared at the CET without altering the order of merit inter se of the students so chosen.

Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admissions and the procedure therefor subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple test. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration. The admission procedure so adopted by private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure.

It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb mal-practices, it would be permissible to regulate admissions by providing a centralised and single window procedure. Such a procedure, to a large extent, can secure grant of merit based admissions on a transparent basis. Till regulations are framed, the admission committees can oversee admissions so as to ensure that merit is not the casualty.

(C) Fee chargeable--Capitation fee for professional courses cannot be charged--Permissible to regulate admission and fee structure.

To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30 (1) of the Constitution, as per the law declared in Pai Foundation. Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paras 56 to 58 and 161 (Answer to Q. 5 (c)) of Pai Foundation are relevant in this regard).

Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. 'Profession' has to be distinguished from 'business' or a mere 'occupation'. While in business, and to a certain extent, in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as professional, is likely to aim more at earning rather than serving and that becomes a bane to the society. The

charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, the Supreme Court cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.

(D) Committees formed pursuant to Islamic Academy--Permissive as regulatory measures--Scheme evolved of setting up two committees for regulating admissions and determining fee structure cannot be faulted with for alleged infringement of Articles 19 (1) (g) and 30 (1).

The two committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy, are, permissive as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Article 30 (1) of the Constitution of India or the right of minorities and non-minorities under Article 19 (1)(g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30 (1) and in the interest of general public under Article 19 (6) of the Constitution. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb. Non-minority unaided institutions can also be subjected to similar restrictions which are found reasonable and in the interest of student community. Professional education should be made accessible on the criterion of merit and on non-exploitative terms to all eligible students on an uniform basis. Minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty to maintain requisite standards of professional education by giving admissions based on merit and making education equally accessible to eligible students through a fair and transparent admission procedure and on a reasonable fee-structure.

On the basis of judgment in Pai Foundation and various previous judgments of the Supreme Court, which have been taken into consideration in that case, the scheme evolved of setting up the two Committees for regulating admissions and determining fee structure by the judgment in Islamic Academy cannot be faulted either on the ground of alleged infringement of Article 19 (1) (g) in case of unaided professional educational institutions of both categories and Article 19 (1) (g) read with Article 30 in case of unaided professional institutions of minorities. There is no impediment to the constitution of the Committees as a stopgap or ad hoc arrangement made in exercise of the power conferred on the Supreme Court by Article 142 of the Constitution until a suitable legislation or regulation framed by the State steps in. Such Committees cannot be equated with Unni Krishnan Committees which were supposed to be permanent in nature.

Retired High Court Judges heading the Committees are assisted by experts in accounts and

management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalising fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

In case of any individual institution, if any of the Committees is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review.

(2) Constitution of India--Article 30 (1)--Scope of Article 30 (1)--It is protective measure only and implies certain privilege--It is protection and/or privilege of minority rather than abstract right.

(3) Constitution of India--Articles 29 (2) and 30 (1)--Minority educational institution--Admission of students--Whether linguistic students of adjoining State in which they are in majority can be admitted?--Held, "no".

What would happen if a minority belonging to a particular State establishes an educational institution in that State and administers it but for the benefit of members belonging to that minority domiciled in the neighbouring State where that community is in majority? The question need not detain the Court for long as it stands answered in no uncertain terms in Pai Foundation. Emphasising the need for preserving its minority character so as to enjoy the privilege of protection under Article 30 (1), it is necessary that the objective of establishing the institution was not defeated. "If so, such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that State is concerned. In other words, the predominance of linguistic students hailing from the State in which the minority educational institution is established should be present. The management bodies of such institutions cannot resort to the device of admitting the linguistic students of the adjoining State in which they are in a majority, under the facade of the protection given under Article 30 (1)." The same principle applies to religious minority. If any other view was to be taken, the very objective of conferring the preferential right of admission by harmoniously constructing Articles 30 (1) and 29 (2), may be distorted. It necessarily follows from the law laid down in Pai Foundation that to establish a minority institution, the institution must primarily cater to the requirements of that minority of that State, else its character of minority institution is lost. However, to borrow the words of Chief Justice S. R. Das (in Kerala Education Bill) a 'sprinkling' of that minority from other State on the same footing as a sprinkling of non-minority students, would be permissible and would not deprive the institution of its essential character of being a minority institution determined by reference to that State as a unit.

(4) Words and phrases--Education--What cannotes and embraces?--It is occupation and not trade or business.

Education is ".....continual growth of personality, steady development of character, and the qualitative improvement of life. A trained mind has the capacity to draw spiritual nourishment from every experience, be it defeat or victory, sorrow or joy. Education is training the mind and not stuffing the brain."

Education, accepted as a useful activity, whether for charity or for profit, is an occupation. Nevertheless, it does not cease to be a service to the society. And even though an occupation, it cannot be equated to a trade or a business. In short, education is national wealth essential for the nation's progress and prosperity.

(5) Words and phrases--Minority--Not defined in Constitution of India--Minority, whether linguistic or religious, determinable only by reference to demography of a State--And not by taking into consideration population of country as a whole.

(6) Minority educational institution--Effect of State aid--Autonomy conferred by Article 30 (1) of Constitution diluted--Regulatory measure permissible--Non-minority students cannot be forced upon it.

Merely because Article 30 (1) of the Constitution of India has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30 (1) on the minority educational institution is diluted as provisions of Article 29 (2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid.

The employment of expressions 'right to establish and administer' and 'educational institution of their choice' in Article 30 (1) of the Constitution of India gives the right a very wide amplitude. Therefore, a minority educational institution has a right to admit students of its own choice, it can, as a matter of its own freewill, admit students of non-minority community. However, non-minority students cannot be forced upon it. The only restriction on the freewill of the minority educational institution admitting students belonging to non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admissions should not be violative of the minority character of the institution.

Case Category:

ADMISSION/TRANSFER TO ENGINEERING AND MEDICAL COLLEGES

JUDGMENT

R.C. Lahoti, C.J.

Preliminary

1. Leave granted in all SLPs.

2. A Coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide ***T.M.A. Pai Foundation*** *v.* ***State of Karnataka*** MANU/SC/0905/2002 : AIR 2003 SC 355, (hereinafter '***Pai Foundation***', for short). It was expected that the authoritative pronouncement by a Bench of such strength on the issues arising before it would draw a final curtain on those controversies. The subsequent events tell a different story. A learned academician observes that the 11-Judge Bench decision in ***Pai Foundation*** is a partial response to some of the challenges posed by the impact of Liberalisation, Privatisation and Globalization (LPG); but the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that 'the decision raises more questions than it has answered' (see : Annual Survey of Indian Law, 2002 at p.251, 254). The Survey goes on to observe "the principles laid down by the majority in ***Pai Foundation*** are so broadly formulated that they provide sufficient leeway to subsequent courts in applying those principles while the lack of clarity in the judgment allows judicial creativity ..." (ibid at p.256).

3. The prophecy has come true and while the ink on the opinions in ***Pai Foundation*** was yet to dry, the High Courts were flooded with writ petitions, calling for settlements of several issues which were not yet resolved or which cropped on floor, post ***Pai Foundation***. A number of Special Leave Petitions against interim orders passed by High Courts and a few writ petitions came to be filed directly in this Court. A Constitution Bench sat to interpret the 11-Judge Bench decision in ***Pai Foundation*** which it did vide its judgment dated 14.8.2003 (reported as - ***Islamic Academy of Education and Anr.*** *v.* ***State of Karnataka and Ors***., MANU/SC/0580/2003 : AIR 2003 SC 3724 ; "***Islamic Academy***" for short). The 11 learned Judges constituting the Bench in ***Pai Foundation*** delivered five opinions. The majority opinion on behalf of 6 Judges was delivered by B.N. Kirpal, CJ. Khare, J (as His Lordship then was) delivered a separate but concurring opinion, supporting the majority. Quadri, J, Ruma Pal, J and Variava, J (for himself and Bhan, J) delivered three separate opinions partly dissenting from the majority. ***Islamic Academy*** too handed over two opinions. The majority opinion for 4 learned Judges has been delivered by V.N. Khare, CJ. S.B. Sinha, J, has delivered a separate opinion.

4. The events following ***Islamic Academy*** judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in ***Islamic Academy*** in clarification of the **11-Judge** Bench decision in ***Pai Foundation***. A few of those unsettled questions as also some aspects of clarification are before us calling for settlement by this Bench of 7 Judges which we hopefully propose to do.

5. ***Pai Foundation*** and ***Islamic Academy*** have set out the factual backdrop of the issues leading to the constitution of 11- Judge and 5-Judge Benches respectively. For details thereof a reference may be made to the reported decisions. A brief summary of the past events, highlighting the issues as they have travelled in search of resolution would be apposite.

II
BACKDROP

6. Education used to be charity or philanthropy in good old times. Gradually it became an 'occupation'. Some of the Judicial dicta go on to hold it as an 'industry'. Whether, to receive education, is a fundamental right or not has been debated for quite some time. But it is settled that establishing and administering of an educational institution for imparting knowledge to the students is an occupation, protected by Article 19(1)(g) and additionally by Article 26(a), if there is no element of profit generation. As of now, imparting education has come to be a means of livelihood for some professionals and a mission in life for some altruists.

7. Education has since long been a matter of litigation. Law reports are replete with rulings touching and centering around education in its several aspects. Until ***Pai Foundation***, there were four oft quoted leading cases holding the field of education. They were ***Unni Krishnan*** *v.* ***State of Andhra Pradesh*** MANU/SC/0333/1993 : [1993] 1 SCR 594, ***St. Stephen's College*** *v.* ***University of Delhi*** MANU/SC/0319/1992 : AIR 1992 SC 1630, ***Ahmedabad St. Xavier's College Society*** *v.* ***State of Gujarat*** MANU/SC/0088/1974 : [1975] 1 SCR 173 and ***In Re: Kerala Education Bill, 1957***, (1958) SCR 995. For convenience sake, these cases will be referred to as ***Unni Krishnan, St. Stephen's, St. Xavier's*** and ***Kerala Education Bill*** respectively. All these cases amongst others came up for the consideration of this Court in ***Pai Foundation***.

8. Correctness of the decision in ***St. Stephen's*** was doubted during the course of hearing of Writ Petition No. 350 of 1993 filed by ***Islamic Academy***. As ***St. Stephen's*** is a pronouncement of **5-Judge** Bench, the matter was directed to be placed before **7-Judge** Bench.

9. An event of constitutional significance which had already happened, was taken note of by the Constitution Bench. "Education" was a State Subject in view of the following Entry 11 placed in List II - State List:-

"11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III."

10. By the Constitution (42nd Amendment) Act 1976, the abovesaid Entry was directed to be deleted and instead Entry 25 in List III - Concurrent List, was directed to be suitably amended so as to read as under:-

"25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

11. The **7-Judge** Bench felt that the matter called for hearing by a **11-Judge** Bench. The **11-Judge** Bench felt that it was not bound by the ratio propounded in ***Kerala Education Bill*** and ***St. Xavier's*** and was free to hear the case in wider perspective so as to discern the true scope and interpretation of Article 30(1) of the Constitution and make an authoritative pronouncement.

Eleven Questions and Five Heads of Issues in Pai Foundation

12. In ***Pai Foundation***, 11 questions were framed for being answered. Detailed submissions were made centering around the 11 questions. The Court dealt with the questions by classifying the discussion under the following five heads:

1. Is there a fundamental right to set up educational institutions and if so, under which provision?

2. Does ***Unni Krishnan*** require reconsideration?

3. In case of private institutions, can there be government regulations and, if so, to what extent?

4. In order to determine the existence of a religious or linguistic minority in relation to Article 30, what is to be the unit - the State or the country as a whole?

5. To what extent can the rights of aided private minority institutions to administer be regulated?

13. Having dealt with each of the abovesaid heads, the Court through the majority opinion expressed by B.N. Kirpal, CJ, recorded answers to the 11 questions as they were framed and posed for resolution. The questions and the answers as given by the majority are set out hereunder:

"***Q.1.*** What is the meaning and content of the expression "minorities" in Article 30 of the Constitution of India?

A. Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution. Since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered Statewise.

Q.2. What is meant by the expression "religion" in Article 30(1)? Can the followers of a sect or denomination of a particular religion claim protection under Article 30(1) on the basis that they constitute a minority in the State, even though the followers of that religion are in majority in that State?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.3 (a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.3(b) To what extent can professional education be treated as a matter coming under minorities' rights under Article 30?

A. Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

Q.4. Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the university to which the institution is affiliated?

A. Admission of students to unaided minority educational institutions viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or university concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.

[emphasis by us]

The right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more so in the matter of admissions to professional institutions.

[emphasis by us]

A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of non-minority students, so that the rights under Article 30(1) are not substantially impaired and further the citizens' rights under Article 29(2) are not infringed. What would be a reasonable extent, would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The State Government concerned has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of *inter se* merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the State agency followed by counselling wherever it exists.

Q.5(a) Whether the minorities' rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?

A. A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted

or selection made should not be tantamount to mal-administration. Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.

Q.5(b) Whether the minority institutions' right of admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of State aid?

A. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe bye - rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State qua non-minority students. The merit may be determined either through a common entrance test conducted by the university or the Government concerned followed by counselling, or on the basis of an entrance test conducted by the individual institutions the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the university to provide that consideration should be shown to the weaker sections of the society.

Q.5(c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.

Q.6(a) Where can a minority institution be operationally located? Where a religious or linguistic minority in State A establishes an educational institution in the said State, can such educational institution grant preferential admission/reservations and other benefits to members of the religious/linguistic group from other States where they are non-minorities?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q. 6. (b) Whether it would be correct to say that only the members of that minority residing in State A will be treated as the members of the minority vis-à-vis such institution?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.7. Whether the member of a linguistic non-minority in one State can establish a trust/society in another State and claim minority status in that State?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.8. Whether the ratio laid down by this Court in St. Stephen's case (***St. Stephen's College*** *v.* ***University of Delhi***, MANU/SC/0319/1992 : AIR 1992 SC 1630 is correct? If no, what order?

A. The basic ratio laid down by this Court in *St. Stephen's College case* (supra) is correct, as indicated in this judgment. However, rigid percentage cannot be stipulated. It has to be left to authorities to prescribe a reasonable percentage having regard to the type of institution, population and educational needs of minorities.

Q.9. Whether the decision of this Court in ***Unni Krishnan, J.P.*** *v.* ***State of A.P***., MANU/SC/0333/1993 : [1993] 1 SCR 594 (except where it holds that primary education is a fundamental right) and the scheme framed thereunder require reconsideration/modification and if yes, what?

A. The scheme framed by this Court in ***Unni Krishnan*** case (supra) and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

Q. 10. Whether the non-minorities have the right to establish and administer educational institution under Articles 21 and 29(1) read with Articles 14 and 15(1), in the same manner and to the same extent as minority institutions?

and

Q. 11. What is the meaning of the expressions "education" and "educational institutions" in various provisions of the Constitution? Is the right to establish and administer educational institutions guaranteed under the Constitution?

A. The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30.

All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment."

14. The majority led by Kirpal, CJ, in ***Pai Foundation*** did say that the expression "minorities" in Article 30 of the Constitution of India, whether linguistic or religious, has to be determined by treating the State and not the whole of India as unit. Questions such as: (i) what is religion, (ii) what is the indicia for determining if an educational institution is a minority institution, (iii) whether a minority institution can operate extra-territorially extending its activities into such states where the minority establishing and administering the institution does not enjoy minority status, (iv) the content and contour of minority by reference to territories, were not answered in ***Pai Foundation*** and were left to be determined by the regular Benches in individual cases to be heard after the decision in ***Pai Foundation***. We also do not propose to involve ourselves by dealing with these questions except to the extent it may become necessary to do so for the purpose of answering the questions posed before us.

Pai Foundation explained in Islamic Academy

15. ***Pai Foundation*** Judgment was delivered on 31.10.2002. The Union of India, various State Governments and the Educational Institutions, each understood the majority judgment in its own way. The State Governments embarked upon enacting laws and framing the regulations, governing the educational institutions in consonance with their own understanding of ***Pai Foundation***. This led to litigation in several Courts. Interim orders passed therein by High Courts came to be challenged before this Court. At the hearing, again the parties through their learned counsel tried to interpret the majority decision in ***Pai Foundation*** in different ways as it suited them. The parties agreed that there were certain anomalies and doubts, calling for clarification. The persons seeking such clarifications were unaided professional educational institutions, both minority and non-minority. The Court formulated four questions as arising for consideration in view of the rival submissions made before the Court in ***Islamic Academy***:

"(1) whether the educational institutions are entitled to fix their own fee structure;

(2) whether minority and non-minority educational institutions stand on the same footing and have the same rights;

(3) whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not, to what extent; and

(4) whether private unaided professional colleges are entitled to admit students by evolving their own method of admission."

16. We could attempt at formulating the gist of the answers given by the Constitution Bench of the Court as under:

(1) Each minority institution is entitled to have its own fee structure subject to the condition that there can be no profiteering and capitation fees cannot be charged. A provision for reasonable surplus can be made to enable future expansion. The relevant factors which would go into determining the reasonability of a fee structure, in the opinion of majority, are: (i) the infrastructure and facilities available, (ii) the investments made, (iii) salaries paid to the teachers and staff, (iv) future plans for expansion and betterment of the institution etc.

S.B. Sinha, J, defined what is 'capitation' and 'profiteering' and also said that reasonable surplus should ordinarily vary from 6 per cent to 15 per cent for utilization in expansion of the system and development of education.

(2) In the opinion of the majority, minority institutions stand on a better footing than non-minority institutions. Minority educational institutions have a guarantee or assurance to establish and administer educational institutions of their choice. State Legislation, primary or delegated, cannot favour non- minority institution over minority institution. The difference arises because of Article 30, the protection whereunder is available to minority educational institutions only. The majority opinion called it a "special right" given under Article 30.

In the opinion of S.B. Sinha, J, minority educational institutions do not have a higher right in terms of Article 30(1); the rights of minorities and non-minorities are equal. What is conferred by Article 30(1) of the Constitution is "certain additional protection" with the object of bringing the minorities on the same platform as that of non-minorities, so that the minorities are protected by establishing and administering educational institutions for the benefit of their own community, whether based on religion or language.

It is clear that as between minority and non-minority educational institutions, the distinction made by Article 30(1) in the fundamental rights conferred by Article 19(1)(g) has been termed by the majority as "special right" while in the opinion of S.B.Sinha, J, it is not a right but an "additional protection". What difference it makes, we shall see a little later.

(3)&(4). Questions 3 and 4 have been taken up for consideration together. A reading of the opinion recorded in ***Islamic Academy*** shows that paras 58, 59 and 68 of ***Pai Foundation*** were considered and sought to be explained. It was not very clear as to what types of institutions were being dealt with in the above referred to paragraphs by the majority in ***Pai Foundation***. Certainly, distinction

was being sought to be drawn between professional colleges and other educational institutions (both minority and unaided). Reference is also found to have been made to minority and non-minority institutions. At some places, observations have been made regarding institutions divided into groups only by reference to aid, that is whether they are aided or unaided educational institutions without regard to the fact whether they were minority or non- minority institutions. It appears that there are a few passages/sentences wherein it is not clear which type of institutions the majority opinion in ***Pai Foundation*** was referring to thereat. However, the majority opinion in ***Islamic Academy*** has by explaining ***Pai Foundation*** held as under:

(1) In professional institutions, as they are unaided, there will be full autonomy in their administration, but the principle of merit cannot be sacrificed, as excellence in profession is in national interest.

(2) Without interfering with the autonomy of unaided institutions, the object of merit based admissions can be secured by insisting on it as a condition to the grant of recognition and subject to the recognition of merit, the management can be given certain discretion in admitting students.

(3) The management can have quota for admitting students at its discretion but subject to satisfying the test of merit based admissions, which can be achieved by allowing management to pick up students of their own choice from out of those who have passed the common entrance test conducted by a centralized mechanism. Such common entrance test can be conducted by the State or by an association of similarly placed institutions in the State.

(4) The State can provide for reservation in favour of financially or socially backward sections of the society.

(5) The prescription for percentage of seats, that is allotment of different quotas such as management seats, State's quota, appropriated by the State for allotment to reserved categories etc., has to be done by the State in accordance with the "local needs" and the interests/needs of that minority community in the State, both deserving paramount consideration. The exact concept of "local needs" is not clarified. The plea that each minority unaided educational institution can hold its own admission test was expressly overruled. The principal consideration which prevailed with the majority in ***Islamic Academy*** for holding in favour of common entrance test was to avoid great hardship and incurring of huge cost by the hapless students in appearing for individual tests of various colleges.

17. The majority opinion carved out an exception in favour of those minority educational professional institutions which were established and were having their own admission procedure for at least 25 years from the requirement of joining any common entrance test, and such institutions were permitted to have their own admission procedure. The State Governments were directed to appoint a permanent Committee to ensure that the tests conducted by the association of colleges is fair and transparent.

18. S.B. Sinha, J, in his separate opinion, agreed with the majority that the merit and merit alone should be the basis of selection for the candidates. He also agreed that one single standard for all the institutions was necessary to achieve the object of selection being made on merit by

maintaining uniformity of standard, which could not be left to any individual institution in the matter of professional courses of study. However, the merit criterion in the opinion of Sinha, J, was required to be associated with the level of education. To quote his words: "the merit criterion would have to be judged like a pyramid. At the kindergarten, primary, secondary levels, minorities may have 100% quota. At this level the merit may not have much relevance at all but at the level of higher education and in particular, professional education and postgraduate-level education, merit indisputably should be a relevant criterion. At the post graduation level, where there may be a few seats, the minority institutions may not have much say in the matter. Services of doctors, engineers and other professionals coming out from the institutions of professional excellence must be made available to the entire country and not to any particular class or group of people. All citizens including the minorities have also a fundamental duty in this behalf."

19. Before we part with the task of summing up the answers given to the four questions in ***Islamic Academy***, we would like to make a few observations of ours in this regard. First, the majority opinion spread over 30 printed pages, and the minority opinion spread over 60 printed pages, both though illuminating and instructive, have nonetheless not summed up or pointedly answered the questions. We have endeavoured to cull out and summarize the answers, noted above, as best and as briefly as we could from the two opinions. We would, therefore, hasten to add that in order to fully appreciate the ratio of the two opinions, they have to be read in detail and our attempt at finding out and placing in a few chosen words the ratio decidendi of the two separately recorded opinions, is subject to this limitation. However, we shall make a reference to relevant passages from the two opinions as and when it becomes necessary. A point of significance which we would like to briefly note here itself, a detailed discussion being relegated to a later part of this judgment, is that the opinion of S.B. Sinha, J, has examined in detail, the scope of protection conferred on minority institutions by reference to their right to seek recognition or affiliation, an aspect of wider significance which does not seem to have received consideration with that emphasis either in ***Pai Foundation*** or in the majority opinion in ***Islamic Academy***. We shall revert to this aspect a little later.

III
Issues herein

A Few Preliminary observations

20. Before we embark upon dealing with the issues posed before us for resolution, we would like to make a few preliminary observations as a preface to our judgment inasmuch as that would outline the scope of the controversy with which we are actually dealing here. At the very outset, we may state that our task is not to pronounce our own independent opinion on the several issues which arose for consideration in ***Pai Foundation***. Even if we are inclined to disagree with any of the findings amounting to declaration of law by the majority in ***Pai Foundation***, we cannot; that being a pronouncement by 11- Judge Bench, we are bound by it. We cannot express a dissent or disagreement howsoever we may be inclined to do so on any of the issues. The real task before us is to cull out the ratio decidendi of ***Pai Foundation*** and to examine if the explanation or clarification given in ***Islamic Academy*** runs counter to ***Pai Foundation*** and if so, to what extent. If we find anything said or held in ***Islamic Academy*** in conflict with ***Pai Foundation***, we shall say so as being a departure from the law laid down by ***Pai Foundation*** and on the principle of binding

efficacy of precedents, over-rule to that extent the opinion of the Constitution Bench in ***Islamic Academy***.

21. It is pertinent to note, vide paras 2, 3 and 35 of ***Islamic Academy***, that most of the petitioners/applicants therein were unaided professional educational institutions (both minority and non-minority). The purpose of constituting the Constitution Bench, as noted at the end of para 1, was "so that doubts/anomalies, if any, could be clarified." Having answered the questions, the Constitution Bench treated all interlocutory applications as regards interim matters as disposed of (see para 23). All the main matters (writ petitions, transfer petitions and special leave petitions) were directed to be placed before the regular Benches for disposal on merits.

22. ***Islamic Academy*** in addition to giving clarifications on Interlocutory Applications, directed setting up of two committees in each State: one committee "to give effect to the judgment in Pai Foundation" and to approve the fee structure or to propose some other fee which can be charged by minority institutions (vide para 7), and the other committee - to oversee the tests to be conducted by the association of institutions (vide para 19).

23. Since the direction made in ***Islamic Academy*** for appointment of the Committees has been vehemently assailed during the course of hearing before us, we would extract from the judgment in ***Islamic Academy*** the following two passages wherein, in the words of Khare, CJ, the purpose and the constitution of the Committees, the powers conferred on and the functions enjoined upon them are given:

"...we direct that in order to give effect to the judgment in ***T.M.A. Pai*** case the respective State Governments/concerned authority shall set up, in each State, a committee headed by a retired High Court Judge who shall be nominated by the Chief Justice of that State. The other member, who shall be nominated by the Judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India (in short "MCI") or the All India Council for Technical Education (in short "AICTE"), depending on the type of institution, shall also be a member. The Secretary of the State Government in charge of Medical Education or Technical Education, as the case may be, shall be a member and Secretary of the Committee. The Committee should be free to nominate/co-opt another independent person of repute, so that the total number of members of the Committee shall not exceed five. Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee. The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalised and also face the prospect of losing its recognition/affiliation. (para 7)

We now direct that the respective State Governments do appoint a permanent Committee which will ensure that the tests conducted by the association of colleges is fair and transparent. For each State a separate Committee shall be formed. The Committee would be headed by a retired Judge of the High Court. The Judge is to be nominated by the Chief Justice of that State. The other member, to be nominated by the Judge, would be a doctor or an engineer of eminence (depending on whether the institution is medical or engineering/technical). The Secretary of the State in charge of Medical or Technical Education, as the case may be, shall also be a member and act as the Secretary of the Committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice-Chancellors of the University in that State so that the total number of persons on the Committee do not exceed five. The Committee shall have powers to oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper(s), to know the names of the paper-setters and examiners and to check the method adopted to ensure papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have the powers to permit an institution, which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government. Before exempting any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the Committee. It is clarified that different percentage of quota for students to be admitted by the management in each minority or non-minority unaided professional college(s) shall be separately fixed on the basis of their need by the respective State Governments and in case of any dispute as regards fixation of percentage of quota, it will be open to the management to approach the Committee. It is also clarified that no institute, which has not been established and which has not followed its own admission procedure for the last, at least, 25 years, shall be permitted to apply for or be granted exemption from admitting students in the manner set out hereinabove. (para 19)"

24. Sinha, J. has not specifically spoken of the Committees. Nevertheless he made a reference to these Committees in his opinion and thus impliedly recorded his concurrence with the constitution of these Committees.

25. Vide para 20, the Constitution Bench has made it clear that the setting up of two sets of Committees in the States has been directed in exercise of the power conferred on this Court by Article 142 of the Constitution and such Committees "shall remain in force till appropriate legislation is enacted by Parliament". Although the term 'permanent' has been used, but it appears to us that these Committees are intended to be transitory in nature.

Reference for constituting a Bench of a coram higher than Constitution Bench.

26. These matters have been directed to be placed for hearing before a Bench of seven Judges under Orders of the Chief Justice of India pursuant to Order dated July 15, 2004 in ***P.A. Inamdar and Ors.*** *v.* ***State of Maharashtra and Ors.***, MANU/SC/0482/2005 : AIR 2005 SC 3226 and Order dated July 29, 2004 in ***Pushpagiri Medical Society*** *v.* ***State of Kerala and Ors.***, . The aggrieved persons before us are again classifiable in one class, that is, unaided minority and non-minority

institutions imparting professional education. The issues arising for decision before us are only three:

(i) the fixation of 'quota' of admissions/students in respect of unaided professional institutions;

(ii) the holding of examinations for admissions to such colleges, that is, who will hold the entrance tests; and

(iii) the fee structure.

The questions spelled out by Orders of Reference

27. In the light of the two orders of reference, referred to hereinabove, we propose to confine our discussion to the questions set out hereunder which, according to us, arise for decision:-

(1) To what extent the State can regulate the admissions made by unaided (minority or non-minority) educational institutions? Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions?

(2) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether direction made in ***Islamic Academy*** for compulsorily holding entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in light of the law laid down in ***Pai Foundation***?

(3) Whether ***Islamic Academy*** could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?

(4) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by ***Islamic Academy***?

28. The issues posed before us are referable to headings 3 and 5 out of 'five headings' formulated by Kirpal, CJ in ***Pai Foundation***. So also speaking by reference to the 11 questions framed in ***Pai Foundation***, the questions and answers relevant for us would be referable to question Nos. 3 (b), 4, 5 (a) (b) (c) and (9).

IV
Submissions made

29. A number of learned counsel addressed the Court at the time of hearing raising very many issues and canvassing different view-points of law referable to those issues. We propose to place on record, as briefly as we can, the principal submissions made confined to the issues arising for decision before us.

30. The arguments on behalf of the petitioners were led by senior counsel Shri Harish Salve. Extensively reading various relevant paragraphs and observations in different opinions in ***Pai Foundation***, learned counsel contends that the directions for setting up permanent committees for

regulating admissions and fixing fee structure in **unaided minority and non-minority institutions** issued in the case of Islamic Academy are contrary to the ratio of judgment in ***Pai Foundation***. According to learned counsel, the directions clearly run counter to all earlier Constitution Bench decisions of this Court in ***St. Stephen's, St. Xavier's*** and ***Kerala Education Bill.***

31. It is argued that in the judgment of the eleven judges in ***Pai Foundation*** which deals with several diverse issues of considerable complexity, every observation has to be understood in its context. Paragraph 68 in ***Pai Foundation*** has wrongly been read as the ratio of the judgement by the Bench of five judges in the case of Islamic Academy. It is submitted that paragraph 68 in the majority opinion in ***Pai Foundation*** has to be read and understood in the context of the constitutional interpretation placed on Articles 29 & 30 of the Constitution. Reading thus, the directions for setting up permanent committees, for fixing quota and fee structure seriously impinge on the constitutional guarantee of autonomy to minority institutions under Article 30 and to unaided non-minority institutions under Article 19(1)(g). It is submitted that taking over the right to regulate admission and fee structure of unaided professional institutions is not a 'reasonable restriction' within the meaning of Article 19(6) of the Constitution. Such restriction is virtual negation of the constitutional protection of autonomy to minorities in running educational institutions 'of their choice' as provided in Article 30 of the Constitution.

32. Elaborating his legal propositions, learned senior counsel Shri Salve argued that establishing and running an educational institution is a guaranteed fundamental right of 'occupation' under Article 19(1)(g) of the Constitution. Article 19(6) permits State to make regulations and place reasonable restrictions in public interest upon the rights enjoyed by citizens under Article 19(1)(g) of the Constitution. Any imposition of a system of selection of students for admission would be unreasonable if it deprives the private unaided institutions of the right of rational selection which it has devised for itself. Subject to the minimum qualifications that may be prescribed and to some system of computing the equivalence between different kinds of qualifications like a common entrance test, it can evolve a system of selection involving both written and oral tests based on principle of fairness. Reference is made to paragraph 40 of the judgment in ***Pai Foundation***.

33. It is submitted that the State can prescribe minimum qualifications and may prescribe systems of computing equivalence in ascertaining merit; however, the right of rational selection, which would necessarily involve the right to decide upon the method by which a particular institution computes such equivalence, is protected by Article 19 and infringement of this right constitutes an unreasonable encroachment upon the constitutionally guaranteed autonomy of such institutions.

34. It is further argued that where States take over the right of the institution to grant admission and/or to fix the fees, it constitutes nationalization of educational institutions. Such nationalization of education is an unreasonable restriction on the right conferred under Article 19. Reliance is placed on paragraph 38 of the judgment in ***Pai Foundation***.

35. Learned counsel further argues that schemes framed relating to grant of admission and fixing of fees in ***Unni Krishnan*** has been held to be unconstitutional by the **11-Judge** Bench in ***Pai Foundation***. [Reference is made to paragraph 45 of the judgment in ***Pai Foundation***] It is submitted that the directions to set up committees for regulation of admission and fee structure in

Islamic Academy virtually do the same exercise as was done in ***Unni Krishnan*** and disapproved in the larger Bench decision in ***Pai Foundation***. The submission in substance made is that ***Unni Krishnan*** was disapproved in ***Pai Foundation*** and has wrongly been re-introduced in ***Islamic Academy***.

36. It is argued that State necessity cannot be a ground to curtail the right of a citizen conferred under Article 19(1)(g) of the Constitution. The Constitution casts a duty upon the States to provide educational facilities. The State is obliged to carry out this duty from revenue raised by the State. The shortfall in the efforts of the State is met by the private enterprise, that however, does not entitle the State to nationalize, whether in the whole or in part, such private enterprise. This, it is submitted, is the true ratio of the ***Pai Foundation*** in so far as Article 19 of the Constitution is concerned.

37. It is next argued that as held in ***St. Xavier's*** and re- affirmed in ***Pai Foundation*** the right to establish and administer educational institutions by minorities under Article 30 of the Constitution is not an absolute right meaning thereby that it is subject to such regulations that satisfy a dual test that is : the test of 'reasonableness' and 'any regulation regulating the educational character of the institutions so that it is conducive to making the institution an effective vehicle of education for the minority community and for the others who resort to it'. Any regulation which impinges upon the minority character of the institutions is constitutionally impermissible. It is submitted that between the right of minorities to establish and administer the educational institutions and the right of the State to regulate educational activities for maintaining standard of education, a balance has to be struck. The regulation in relation to recognition/affiliation operates in the area of standard of excellence and are unquestionable if they do not seriously curtail or destroy the right of minorities to administer their educational institutions. Only in maintaining standards of education, State can insist by framing regulations that they be followed but in all other areas the rights of minority must be protected. It is conceded that mal-administration is not protected by Article 30 of the Constitution. Similarly, secular laws with secular object that do not directly impinge upon the right of minority institutions and operate generally upon all citizens do not impinge upon Article 30 of the Constitution. This has been the constitutional interpretation of Article 30 not because Article 30 admits no exception like Article 19(6) but because the right conferred under Article 30 does not extend to these areas. The laws that serve national interest do not impinge upon Article 30.

38. Learned counsel in elaborating his argument tried to make a distinction between the rights of aided institutions and unaided institutions. Article 29(2) places a limitation on the right of an aided institution by providing that if State aid is obtained, 'no citizen shall be denied admission on grounds only of religion, race, caste, language or any of them'. It is submitted that as a necessary corollary, no such limitation can be placed while regulating admission in an unaided minority institution which may prefer to admit students of minority community. So far as unaided minority educational institutions are concerned, the submission made is that government has no right or power, much less duty, to decide as to which method of selection of students is to be adopted by minority institutions. The role of the government is confined to ensuring that there is no mal-administration in the name of selection of students or in the fixation of fees. No doubt, the State is under a duty to prevent mal-administration, that is to control charging of capitation fees for the seats regardless of merit and commercializing education resulting in exploitation of students, but to prevent mal- administration of the above nature or on the ground that there is likelihood of such

mal-administration, the State cannot take over the administration of the institutions themselves into its own hands. The likelihood of an abuse of a constitutional right cannot ever furnish justification for a denial of that right. An apprehension that a citizen may abuse his liberty does not provide justification for imposing restraints on the liberty of citizens. Similarly, the apprehension that the minorities may abuse their educational rights under Article 30 of the Constitution cannot constitute a valid basis for the State to take over those rights.

39. Learned senior counsel Shri Ashok Desai appearing on behalf of unaided Karnataka Private Medical Colleges (through its Association) of both categories of minority and non-minority has questioned the correctness of the directions in the case of ***Islamic Academy*** for setting up permanent committees for fixation of quota and determination of fees. According to him, as held in ***Pai Foundation***, in the name of controlling capitation, there cannot be indirect nationalization and complete State control of unaided professional institutes. In the case of ***Islamic Academy***, the ratio of ***Pai Foundation*** that autonomy of unaided non-minority institutions is an important facet of their right under Article 19(1)(g) and in case of minority under Article 19(1)(g) read with Article 30 of the Constitution has been ignored.

40. On behalf of unaided private professional colleges, learned counsel further submitted that there are many private educational institutes which have been set up by people belonging to a region or a community or a class in order to promote their own groups. As long as these groups form an unaided minority institution, they are entitled to have transparent criteria to admit students belonging to their group. For instance, scheduled castes and scheduled tribes have started Ambedkar Medical College; Lingayaths have started KLE Medical College in Belgaun and people belonging to Vokalliga community have started Kempegowda Medical College. Similarly, Edava community in Kerala has started its own colleges. Sugar cooperatives in Maharashtra have started their own colleges. Learned counsel also highlighted an instance of a college opened in Tamil Nadu by State Transport Workers for the education of their children on the engineering side. He submitted that if the State is allowed to interfere in the admission procedure in these private institutions set up with the object of providing educational facilities to their own group, community or poorer sections, the very purpose and object of setting up a private medical college by a group or community for their own people would be defeated.

41. According to learned counsel, the State control in unaided private professional colleges can only be to the extent of monitoring or overseeing its working so that they do not indulge in profiteering by charging capitation fees and sacrifice merit. According to the learned counsel, in the directions contained in ***Islamic Academy***, the main ratio of ***Pai Foundation*** that the unaided institutions should have autonomy in the matter of admission and fees structure has been totally forgotten. The learned counsel raised very serious objections to the manner in which the various permanent committees set up in several States on the directions of ***Islamic Academy*** are conducting themselves and forcing their decisions on private institutions. The proposed fee structure is required to be placed before the Committee in advance of the academic year by the institute. It is the Committee which has to decide whether the fees proposed by the institute are justified and do not amount to profiteering or charging of capitation fees. The Committee has been given liberty to approve the fee structure of the institute or to propose a different fee structure. The fee fixed by the Committee is binding for a period of three years and at the end of the said period the institute would be at liberty to apply for revision. Learned counsel gave in writing certain

illustrations of decisions of the Fee Committee in few unaided colleges in the State of Karnataka and pointed out that without proper financial expertise and without studying the relevant documents and accounts, the Committee determined the fee structure by only taking into account the affordability of the parents of the students with no regard whatsoever to the viability of the institute on the basis of finances so generated. It is argued as to why private professional institutes should not be allowed to modernize its facilities and provide better professional education than government institutes. It is pointed out that in the case of non-minority unaided M.S. Ramaiaya Medical College, Bangalore, the Fee Committee initially fixed annual fee at Rs.2.55 lacs for MBBS course as against the justification shown by the institute for demanding Rs. 3.90 lacs. The decision of the Fee Committee led to the filing of writ petition by the institute in the High Court of Karnataka and agitation and demonstrations by the students' union. The Committee under the pressure of the student community reduced the annual fee to Rs.1.6 lacs which was re- affirmed after the High Court directed that the management of the unaided college should be heard before reducing the annual fee.

42. Thus the learned counsel on behalf of the Karnataka Private Medical College Association questioned the correctness of the directions of the Bench in ***Islamic Academy***. It is submitted that as decided in ***Pai Foundation*** by a larger Bench, the essence of private educational institutions is the autonomy that the institution must have in its management and administration. The 'right to establish and administer' particularly comprises the right a) to admit students and b) to set up reasonable fee structure. The autonomy of the institution, therefore, predicates that all seats would be filled by the management and there can be no reservations or quotas in favour of the State. In ***Pai Foundation***, the only observations made were that some colleges may be required to admit a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships. It is conceded that autonomy of a private educational institution to admit students of its choice does not mean that there can be no insistence on transparency in the admission procedure and on merit being the criterion for admission. It is submitted that autonomy of a private educational institution could mean that they can, according to the objects and purposes of their institutions, give preference to a particular class or group of students like SC/ST in Ambedkar Medical College, students from backward area in Bijapur college and transport employees' children in Madras State Corporation Employees' College or the children of employees of Larson & Turbo Company in a college established by that company. The right to charge fees so as to run the college and to generate sufficient funds for its betterment and growth cannot be controlled by the State. That would seriously encroach upon the autonomy of the private unaided institution. It is submitted, by quoting Dr. S. Radhakrishnan, the then Chairman of the University Education Commission, that interests of democracy lie with the resistance of the trend towards governmental domination of the educational process. In conclusion, learned counsel representing Association of private unaided colleges in Karnataka submits that the decision in ***Islamic Academy*** and the directions made therein go far beyond the law laid down by the larger Bench in ***Pai Foundation***. The Bench in ***Islamic Academy*** virtually reviewed the larger Bench decision in ***Pai Foundation*** in guise of implementation of the said decision and on the basis of later developments. In ***Islamic Academy***, the Bench accepted that there could be no rigid fee structure fixed by the government for private institutions. An institute should have the freedom to fix its own fee structure for day-to-day running of the institute and to generate funds for its further growth. Only capitation and diversion of profits and surplus of the institute to any other business or enterprise was prohibited. It is submitted that ***Islamic Academy*** contrary to the legal position explained in ***Pai Foundation***,

could not set up in each State permanent committees headed by retired High Court Judges with the power to decide on the justification of the fee proposed by the institute and propose any other fees. It could also not make the fee fixed by the Committee binding for a period of three years. Learned counsel submits that once the college infrastructure and hospital facilities attached to the medical college have been approved by the Medical Counsel of India in accordance with its regulations, the total expenses of college and hospital could be taken into account by the institute to decide upon its own fee structure. Learned counsel, in criticizing the directions in ***Islamic Academy***, submitted that although the scheme formulated in ***Unni Krishnan*** has been expressly overruled in ***Pai Foundation*** on the ground that it virtually nationalized education and resulted in surrendering total process of selection to the State, the Bench in ***Islamic Academy's*** case, in an attempt to take up preventive measures to ensure merit and check profiteering in private unaided professional institutions, cannot re-introduce quota system for the management and the State and thus infringe upon the autonomy of the institute. Such an attempt, learned counsel contends, would be unconstitutional and violative of Article 19(1)(g) of the Constitution in the case of non-minority unaided institutions and also violative of Article 30 in the case of minority unaided professional institutions. Learned counsel argued that constitutionally, as held in ***Pai Foundation***, it is not permissible for the State to impose a Government quota, its own reservation policy, a lower scale of fees etc. on a private unaided non- minority and unaided minority professional institutions, only by taking into consideration the interests of students. In the State of Karnataka for the academic year 2004-2005, by illustration, it is shown that 75% of the intake capacity is the Government quota in which are included 5% quota for sports, defence and NCC; 50% quota for Scheduled Castes/Economically backward classes/Scheduled Tribes/OBC, there is **total 55% reservation quota** in 75% of the government quota. The remaining 25% quota left for the management is also to be taken over by the Government insisting on admitting students from the select list prepared on the common entrance test conducted by the State.

43. Learned senior counsel Shri F. S. Nariman also supported the submissions made by other counsel on behalf of the unaided professional institutions and added that the observations of the Bench in ***Islamic Academy*** clearly go far beyond anything said by eleven judges in ***Pai Foundation***. It is submitted that the question of quota 50:50 for State and management as referred to in ***St. Stephen's*** was in respect of aided minority educational institutions and in ***Pai Foundation***, the Bench never suggested fixation of quota for State and management in case of unaided professional institutions. Learned senior counsel particularly pointed out that in ***Islamic Academy***, the observations that different percentage of quota for students to be admitted by the management in each minority and non-minority unaided professional institutions shall be separately fixed on the basis of their need by the respective State Government, was a totally new direction, nowhere to be found or supported by any of the observations in any of the opinions of the **11-Judge** Bench in ***Pai Foundation***. With regard to the most controversial observations contained in paragraph 68 of the opinion prepared by Justice Kirpal (the then CJI) in ***Pai Foundation***, learned counsel contended that the decision in ***Unni Krishnan*** having been overruled by **11-Judge** Bench in ***Pai Foundation***, the observations in paragraph 68 which are more in tune with ***Unni Krishnan*** should not be read as the ratio of the case. Senior counsel was also critical of all the observations in fixing quota for the State in unaided institutions on the **basis of local needs** and not the **needs of the community** for which the institution was set up. Learned counsel also criticized the directions in ***Islamic Academy*** which according to him are contrary to the findings in ***Pai Foundation*** that certain unaided private educational institutions which had been adopting its own admission

procedure for the last 25 years be allowed to continue to do so. It is submitted that as a part of autonomy of the private unaided institution, the quantum of fees to be charged must be left to the institution and except for checking profiteering and capitation fees, the State can have no say in fixation of fees. The scheme of setting up permanent committees for even unaided minority and non-minority institutions was not at all envisaged in ***Pai Foundation***. The ***Islamic Academy*** which was the case before a smaller Bench could not do anything beyond and contrary to what has been stated in ***Pai Foundation***.

44. Learned senior counsel Shri R.F. Nariman in supporting the argument advanced against the directions in ***Islamic Academy*** submitted that any interference with the autonomy of the institution, other than to prevent mal-administration, would not be saved by Article 19(6) of the Constitution. The concept of administration includes choice in admitting students and fixing a reasonable fee structure. In the matter of admission, if objective criteria are adopted so as to reflect the merit, it would be unexceptionable. So far as fee structure is concerned, no institution can be allowed to charge capitation fees which only means something taken over and above what the institution needs by way of revenue and capital expenditure plus a reasonable surplus. Once ***Unni Krishnan*** was overruled, private education cannot be allowed to be nationalized. It is submitted that it may be possible for the State to scrutinize the expenditure of revenue and capital expenditure of an aided and unaided institution to ensure good administration but the State cannot devise its own admission procedure and determine in advance a fee structure for the unaided private institutions. On the question of deducing ratio in ***Pai Foundation***, learned counsel referred to Halsbury Laws of England Vol. 37 page 378 in which the meaning of *ratio decidendi* has been explained. It is submitted that it is only the essence of the reason or principle upon which the question before a court has been decided which is alone binding as a precedent. It is dangerous to take one or two observations out of a long judgment and to treat them as if they give the ratio decidendi of the case.

45. Dr. Rajiv Dhawan, learned senior counsel in assailing directions issued in ***Islamic Academy*** for setting up permanent committees to fix quota and fee structure highlighted that the State of Maharashtra has encroached upon the rights of unaided institutions by directing in one of its Government Memoranda dated 13.02.2003 that even in the quota of seats fixed for management, the unaided non-minority institutions should implement the rule of reservation (communal reservation) of the State Government.

46. Learned senior counsel contends that the net result of such illegal directions is that the reservation policy for schedule castes, schedule tribes and OBCs is to be applied not only for 50% seats of government quota but also for the remaining 50% of management quota of unaided non-minority institutions. Virtually, the management of non-aided institutions has been completely taken over by the state and as a result of communal reservations, the quota of seats fixed for government and quota fixed for the management may be filled by granting admissions to students of non-minority communities .

47. Learned senior counsel contends that in ***Pai Foundation***, maximum autonomy is conceded in favour of unaided institutions. The only insistence is on maintenance of transparency in method of admission and fixation of such fee structure that does not permit charging of capitation fee.

Interpreting provisions of Article 19(6) and Article 30 it is contended that constitutional limitation necessarily would vary in imposing reasonable restriction where the institution is unaided or aided.

48. On the issue of constitutional protection to the unaided minority institutions, the contention advanced that general restrictions permissible under Article 19(6) can also be applied to unaided minority institutions, it is submitted, is misconceived. The submission is that education is a recognized head of charity. The object of establishing educational institution is not to make profit. Imparting education is essentially charitable in nature. The charitable nature of the occupation of establishing and running an educational institution has been recognized in ***Pai Foundation***. Therefore, all restrictions, which are permissible under Article 19(6) in case of other kind of professions and occupations, cannot apply to educational activities. It is submitted that restrictions imposed should satisfy the requirements of Article 30 and not only of Article 19(6).

49. In ***Pai Foundation***, for determining linguistic and religious minorities, the unit to be taken is State. Therefore, when Tamilians, who are in majority in Tamil Nadu, establish an institution for Tamil students in Karnataka, it would be a minority institution in Karnataka. What would be the rights of such an institution of linguistic minority has not been answered either in ***Pai Foundation*** or in ***Islamic Academy***. Therefore, this Bench should decide what are the rights of such cross-border institutions.

50. In short, the submission made by Sr. Counsel Dr. Rajiv Dhawan is that there is nothing in ***Pai Foundation***, which permits fixation of quotas for government seats, fixation of fee structure by the State, imposition of its reservation policy and imposition of candidates on the basis of common entrance test conducted by the State. In ***Pai Foundation***, the State can have some controlling influence on unaided institutions for the purpose of ensuring transparency in admissions and checking the collection of capitation fee. In ***Pai Foundation***, no preemptive action by setting up permanent committees by the State was envisaged or even indirectly approved.

51. The decision in ***Islamic Academy***, it is submitted, is contrary to the decision by the larger Bench in ***Pai Foundation***, and deserves therefore to be so declared by this Bench.

52. Learned senior counsel Shri U.U. Lalit appears for the sole Dental College established by Muslims in the State of Maharashtra. Apart from supporting the contention advanced by other counsel against the scheme of committees evolved in ***Islamic Academy***, learned counsel submitted that the judgment of the Bombay High Court against which they have filed an appeal before this court has resulted in a situation where affluent students are getting admission at lesser fee and poorer students are kept out of college. It was submitted that the petitioner institute being the sole institute set up for Muslim community, their desire to cater to the educational needs of Muslim students from all over cannot be discouraged. Objecting to the fee structure prescribed by the committees in Maharashtra, the suggestion made on behalf of the institute is as under :-

(a) 25% students will be charged five times of the average fee, which was in vogue before TMA Pai's judgment.

(b) 50% students will be charged average fee.

(c) Remaining 25% will be charged 1/4th of the average fee.

53. It is submitted that in the above proposed fee structure, meritorious students coming from all sections of society will be able to take admissions. At the same time, the educational institutions will be able to recover the amount required for running the educational institution in the best possible manner. It is, therefore, prayed that Bombay High Court judgment dated 23.08.2003 prescribing uniform fee structure for all the students be set aside and minority educational institutions be allowed in the exercise of their fundamental right, to prescribe fee under a three-tier system subject to the rider of non-profiteering and not charging capitation fee.

54. In reply, on behalf of the respondents, senior counsel, Shri K.K. Venugopal, who appeared for the States of Kerala led the arguments. It may be noted at this stage that after the decisions in ***Pai Foundation*** and ***Islamic Academy***, in the States of Kerala, Karnataka, Maharashtra and Tamil Nadu, their respective legislatures have passed Acts regulating admissions and charging of fee in both aided and unaided minority and non- minority private educational institutions engaged in imparting education in professional, medical, engineering and allied courses.

55. On behalf of the State of Kerala, it is pointed out that only 25% seats in private professional colleges have been reserved to be filled on the basis of common entrance test and remaining 75% seats are to be filled by the management. It is submitted that the group of paragraphs starting with 67 and ending with 70 in the majority opinion in ***Pai Foundation*** carries the title "Private Unaided Professional Colleges." This heading covers both unaided minority and non-minority professional colleges. Since paragraph 68 in the majority opinion in ***Pai Foundation*** has been differently understood by the High Court of Karnataka and Kerala, an occasion has arisen to resolve the controversy by a Bench of the present combination of seven judges.

56. To justify fixation of quota for seat sharing between State and the private management and fixing a reasonable fee structure to avoid profiteering and capitation, the learned counsel highlighted certain illicit practices, which are being resorted to, by the private institutions to exploit the student community. It is submitted both the judgments in ***Pai Foundation*** and ***Islamic Academy***, profiteering, commercialization of education and the collection of capitation fee have been condemned. This court had expressly held that it would be open to the government to make regulations for the purpose of preventing commercialization of professional education. It is on the line suggested by this court that the Government of Kerala had made regulations both for the purpose of admissions as well as for fixing reasonable fee which will cover not only the expenditure incurred by the institution but also give them a reasonable revenue surplus for further growth and betterment of the institution.

57. The High Court of Kerala by its judgment of **23.08.2003** has fixed rupees 1.50 lacs provisionally per annum as the fee. The Government has fixed 1.76 lacs. What is being disclosed by Pushpagiri Medical College itself is that they had collected rupees 4.38 lacs and rupees 22 lacs from different students. The explanation given is that these collections are for the whole period of five years to prevent the students from leaving the college mid-way. This explanation on the face of it is disingenuous as rupees 22 lacs was not collected uniformly from all the students. Despite the students leaving the course mid- way, the seats would still be filled. It is due to this menace and evil practice of exploiting parents and students that a Committee was required to be set up for

restricting admissions in proportion to the need of the peculiar character of the institution and to check profiteering.

58. It is submitted that if the scheme as evolved in ***Islamic Academy*** of setting up of permanent Committees is not allowed, education which is already commercialized to some extent would be wholly inaccessible to students coming from middle classes, lower-middle classes and poor sections of the society. To provide access to professional education even to weaker sections of the society in fifty percent quota of seats to be filled by the government, the reservation policy of the government has been applied. The fifty-fifty percent quota between government and management fixed by the government has been changed to twenty five-seventy five per cent by the court. Similarly, the court has struck down Regulation 11 framed by the State on the ground that the State cannot foist fee of students on the institution and it would be left to the management to make provisions for poorer sections of the society through free-ships or scholarships.

59. In the above-mentioned background, learned counsel Shri Venugopal submits that this Bench is not considering the correctness of judgment in ***Islamic Academy***. It will not and cannot go into the question of correctness of judgment in ***Pai Foundation*** which is of a larger Bench. This Bench has a limited jurisdiction to examine whether the **5-Judge** Bench decision in ***Islamic Academy*** is in any manner inconsistent with **11-Judge** Bench judgment in ***Pai Foundation***. It is submitted that if there are certain inherent inconsistencies between various paragraphs particularly 59 and 68 of the judgment in ***Pai Foundation***, they have to be resolved and that was exactly what was done by the five judges in ***Islamic Academy***.

60. In ***Pai Foundation***, observation in paragraph 68 under the heading "Private Unaided Professional Colleges" read with para 69 indicates appropriate machinery to be evolved to regulate admissions in both categories of private institutions to check exploiters who are charging capitation fee.

61. It is submitted that if the attempt by the Bench in ***Islamic Academy*** to resolve the apparent inconsistency in the judgment of ***Pai Foundation***, indicated a reasonable and plausible interpretation of the **11-Judge** Bench judgment in ***Pai Foundation***, this court should refrain from substituting another interpretation.

62. It is for the first time in ***Pai Foundation*** that the question of application of Article 30 to minority professional colleges arose. All earlier judgments of this court were only concerning education in schools and colleges other than those imparting professional education. For the first time in ***Pai Foundation***, the court held that running an educational institution is an 'occupation' and Article 19(1) (g) guarantees it as a fundamental right.

63. It is submitted that regulation of non-minority unaided professional institution is permissible under Article 19(6) of the Constitution to prevent profiteering, levy of capitation fee and selection of non-meritorious candidates. Such regulation also does not violate right of minority professional institutions under Article 30, which this Court has repeatedly held, is not an absolute right but is merely a protection extended to minorities against oppression by the majority.

64. The issue relating to reservation of seats for schedule castes, schedule tribes or OBCs, either in management quota or in Government quota did not come up for consideration either in ***Pai Foundation*** or ***Islamic Academy***. This has to be separately dealt with by the present Bench

65. Similarly, it is submitted that right of minority institutions to admit students from all over the country, irrespective of their religion and community and also from abroad such as NRIs never arose directly for consideration either in ***Pai Foundation*** or ***Islamic Academy***. In this respect, it is submitted that the status of minority both religious and linguistic is to be determined at the state level. The minority institutions cannot claim a right to cater to the educational needs of their community from all over the country and even from abroad.

66. In paragraph 68 of the judgment in ***Pai Foundation*** the use of the phrase 'certain percentage based on local needs' and further phrase 'different percentages can be fixed' for minority unaided and non-minority unaided professional colleges' clearly convey that quotas can be fixed based on **local needs for management** and **for the Government.** Meritorious students from weaker sections are not to be sidelined from higher and professional education. It is argued that the phrase 'local need' as used in paragraph 68 in the judgment of ***Pai Foundation*** cannot be read to mean the **needs of the institution** concerned. So far as the selection based on merit is concerned, **common entrance test** has been suggested both for aided and non-aided professional colleges. When there is no common entrance test, merit becomes the casualty and the rich and the affluent corner the seats.

67. So far as the right to fix a **fee structure** for unaided minority or non-minority colleges or institutes is concerned, the argument that pre-fixation of fee is a serious encroachment on the rights of minority and non-minority, it is submitted, is not valid as full discretion is given to the management in fixing their fee structure. However, they would not be allowed to fix such high fee as would deny many meritorious students a chance of admission only because they come from economically weaker sections. It would be of no consolation to them to find that after admissions are over and classes have started, the fee has been lowered by the monitoring committee. If the committee is allowed to scrutinize the justification of fee fixation after the admissions and the fee is lowered, it would not be possible for the meritorious students to again seek admission. Through the Committees set up in ***Islamic Academy***, the fee structure would be known before hand and would serve the interest of the institution as also the students seeking admission. The Committee has to fix fee for each college depending upon its peculiar conditions and its assets and availability of funds. Coming to the question of cross subsidy, it is submitted that in ***Pai Foundation***, cross-subsidizing the weaker sections by the more affluent ones has not been held to be impermissible. The Bench in ***Pai Foundation*** overruled the judgment in ***Unni Krishnan***. The latter provided for "marginally less merited rural or poor students bearing the burden of rich and urban students." The learned counsel suggests that solution can be to set apart fifteen percent of total seats in a local college to be filled by NRI/ person of independent origin/ foreign students who would volunteer to fill up the allotted seats on the management quota but on *inter se* merit. Each NRI student would subsidize two other students belonging to the economically and socially weaker sections based on an annual income of say less than rupees 2.5 lacs. This would cater to the financial needs of at least 30 out of 50 students selected on merit forming part of the Government quota and this would be a constitutionally permissible solution.

68. To streamline and further improve the admission procedure and fixation of fee structure, learned counsel has made the following proposals in writing submitting that they may be of practical value to the Committees directed to be set up by ***Islamic Academy***:-

A. ADMISSION:

Six months prior to the commencement of the academic year, the Government would fix the percentage of students to be admitted by a minority (religious/linguistic) professional college (other than engineering), taking into account the local needs of the State, the region as well as that of the minority- community. It would be a huge and cumbersome exercise in practice, to fix a percentage for each one of the institutions separately and it would be a pragmatic approach to have a fixed percentage for all the minority institutions which is fair and reasonable. A practical approach to the problem would require a very definite percentage to be fixed for minority institutions, say, 50% so that even if candidates of their choice, belonging to the minority institutions, are only 25% they would still have the right to select non-minority students to make up the 50%, of course, from the CET held by the Government.

1. The CET held by Government would ensure that the various devices adopted by professional colleges to secretly demand capitation fees and take the same in black money, thus resulting in merit being the casualty, would not take place. No prejudice will be caused to the management of the professional colleges as they could select the minority students based on inter se merit in the CET held by the Government.

2. There would equally be no disadvantage to any particular section or to Government if the same 50% rule is applied even to unaided non-minority professional colleges as well.

3. The result of following this procedure is that a consortium holding the tests for admissions is done away with and a monitoring committee, preferably headed by a retired High Court or Supreme Court judge would ensure fairness and transparency both in the minority and non-minority professional institutions.

4. ...

5. ...

B. FEES:

The Committee suggested by Islamic Academy and the procedure mentioned therein, appears to be the only safe method of ensuring that extortionate fees are not charged by the medical colleges. At the same time, it would be wrong to deny expenditure which the institution undertakes for ensuring excellence in education. Equally, a reasonable surplus should be permitted so that the fees charged cover the entire revenue expenditure and in addition leaves a reasonable surplus for future expansion. This alone would prevent the clandestine collection of capitation fees and would result in entrepreneurs investing in new medical colleges.

The Committee suggested by Islamic Academy appears to be the ideal one consisting of a chartered accountant, a representative of the MCI or AICTE as the case may be, with a retired judge of the High Court or the Supreme Court as the head.

The fee is to be fixed on the proposal of the institution supported by documents and the procedure of fee finalization should commence at least 6 months in advance of the commencement of the academic year.

These proposals should all be by way of an interim arrangement as held by Islamic Academy in para 20 with the Parliament bringing in a law, as suggested by Islamic Academy without dragging its feet any longer."

69. With regard to the ambit of the constitutional guarantee of protection of educational rights of minorities under Article 30, learned counsel submits that both religious and linguistic minority, as held in ***Pai Foundation***, are to be determined at the State level. On this understanding of the concept of 'minority', Article 30 has to be harmoniously construed with Article 19(1)(g) and in the light of the Directive Principles of the State Policy contained in the Articles 38, 41 and 46. Rights of minorities cannot be placed higher than the general welfare of the students and their right to take up professional education on the basis of their merit.

70. The real purpose of Article 30 is to prevent discrimination against members of the minority community and to place them on an equal footing with non-minority. Reverse discrimination was not the intention of Article 30. If running of educational institutions cannot be said to be at a higher plane than the right to carry on any other business, reasonable restriction similar to those placed on the right to carry on business can be placed on educational institutions conducting professional courses. For the purpose of these restrictions both minorities and non-minorities can be treated at par and there would not be any violation of Article 30(1), which guarantees only protection against oppression and discrimination of the minority from the majority. Activities of education being essentially charitable in nature, the educational institutions both of non-minority and minority character can be regulated and controlled so that they do not indulge in selling seats of learning to make money. They can be allowed to generate such funds as would be reasonably required to run the institute and for its further growth.

71. On behalf of the State of Karnataka, learned senior counsel Shri T.R. Andhyarujuna supported the judgment in ***Islamic Academy*** of setting up permanent Committees for regulating admission and fee structure. Learned senior counsel submitted that relevant parts of paragraphs 58, 59 and 68 and answer to question no. 4 in ***Pai Foundation*** have to be read and reconciled. They cannot be ignored simply as obiter. A combined reading of the relevant paragraphs and the answer to question no. 4 makes it clear that regulations can be made by the State for admission in minority and non-minority private educational institutions and more so in professional institutions. The merit for admission to professional courses is generally determined by Government agencies. In ***Pai Foundation*** the reservation on certain percentage of seats by the Government to be filled up by counseling by state agency, is held permissible.

72. With regard to the quota fixation, learned counsel submits that paragraph 68 in ***Pai Foundation*** allows reservation of quota for management and for the Government for available seats. It is

submitted that the educational institutions cannot merely read the answer to question no. 4 given by judgment in ***Pai Foundation*** and ignore the other observations in other paragraphs of the judgment.

73. So far as the case of minority and non-minority unaided institutions is concerned, learned counsel submits that the balancing act has been performed in the judgment of ***Pai Foundation*** by regulating the economy of educational institutions moderated by necessary State legislation. Observation in paragraph 68 in ***Pai Foundation*** does not amount to permitting nationalization or takeover of the private institutions which was the main feature found foul in the decision in ***Unni Krishnan*** and was consequently overruled. The observation in ***Pai Foundation*** in paragraph 68 strikes the balance between the academy and education. To read paragraph 68 as merely giving an instance would be to ignore the concern of the Bench in ***Pai Foundation*** of providing reservation to poorer or backward sections of society even in private institutions. The description of percentage of reservation in paragraph 68 is different from reservation policy of the State for State institutions and in State quota.

74. It is submitted that the reservation spoken of in paragraph 68 of ***Pai Foundation*** is to cater to the needs of poorer and weaker sections and also other students depending upon the local needs.

75. So far as the regulation of **fee structure** is concerned, it is submitted that in paragraph 69 in ***Pai Foundation*** there is a mention of "appropriate machinery to be devised by the State or University to ensure that no capitation fee is charged and profiteering is checked." The judgment in ***Islamic Academy*** merely implements the legal position explained by ***Pai Foundation*** by providing a fee determination committee. In reply to the argument that post-fixation audit may be permitted to check profiteering and capitation, the learned counsel answers that if the role of the Committee is limited to supervisory post fixation audit, it would amount to denying credible restriction to the charging of capitation fee. It is chimerical to suggest that the student should first pay the exorbitant fee fixed by the institution and later on complain about it to the post audit machinery to recover the excess through court of law. The controlling of the fee fixing machinery is necessarily to be done before it is charged otherwise it is meaningless to the benefit of the students for whom it is suggested in paragraph 69. The general principle for scrutinizing the fee structure is two-fold; (1) that education is a charity, (2) that educational institutions cannot charge such fee as is not required for the purpose of fulfilling that object which means cost plus reasonable surplus for expansion and growth of the institution. These are the parameters before the Committee whose decisions, in any case, are subject to judicial review.

76. So far as the admissions based on **common entrance test** are concerned, it is submitted that paragraphs 58 and 59 of ***Pai Foundation*** permit regulations to be framed for admission in professional institutions by State agency to ensure admission on merit. In the absence of CET and centralized counseling, private educational institutions would pick and choose candidates ignoring merit, as has been evident from the Karnataka experience. If the private professional educational institutions conceive that merit cannot be ignored in granting admission, direction to make selection based on CET does not in any manner adversely affect the character of the minority institution. The State regulation providing for CET is a reasonable restriction and it will pass the test of Article 19(6) both in respect of aided and unaided non-minority institutions. Private unaided institutions have also to admit students on the basis of merit in a fair and transparent manner in the

interest of student community. Right of private educational institutions to admit students can be regulated. Such regulations if in national and public interest do not in any manner impinge on the right of minority.

77. Learned counsel points out that so far as the State of Karnataka is concerned, no reservation policy is being insisted upon in the seats or quota given to the management.

78. Arguments were also advanced supporting the directions in ***Islamic Academy*** by learned senior counsel Shri P.P. Rao appearing for the State of Tamil Nadu. It is submitted that already a statement had been made in the High Court that the State of Tamil Nadu would not be insisting on communal reservation based on State policy in the minority institution.

79. Learned counsel pressed into service Article 51A(j) providing for Fundamental Duties in the Constitution. It is submitted that fundamental duty is enjoined on citizens to so direct their individual and collective activities that the nation constantly rises to higher levels of endeavour and achievement. This duty implies that the State on its part is to facilitate discharge of duties by the citizen in relation to the professional education. The State is bound to ensure admission to colleges that are made purely on relative merit to be objectively assessed by a responsible agency. The decisions of this court rendered from time to time consistently and unanimously held that regulation could be made for achieving standards of excellence in education. Reliance is placed on ***Dr. Prithvi*** *v.* ***State of MP*** MANU/SC/1021/1999 : AIR 1999 SC 2894 ; ***Professor Yashpal*** *v.* ***State of Chhattisgarh*** (2005) 2 SCC 61 .

V
A few concepts

80. There are a few concepts which should be very clear in our minds at the very outset, as these are the concepts which flow as undercurrents in the sea of issues surfacing for resolution in all educational cases. These concepts are referable to : (i) What is 'education'? (ii) What is the inter-relationship of Articles 19(1)(g), 29 and 30 of the Constitution? (iii) In the context of minority educational institutions, what difference does it make if they are aided or unaided or if they seek recognition or affiliation or do not do so? (iv) Would it make any difference if the instructions imparted in such educational institutions relate to professional or non-professional courses of study?

Education

81. 'Education' according to Chambers Dictionary is "bringing up or training; strengthening of the powers of body or mind; culture."

82. In Advanced Law Lexicon (P. Ramanatha Aiyar, 3rd Edition, 2005, Vol.2) 'education' is defined in very wide terms. It is stated : "Education is the bringing up; the process of developing and training the powers and capabilities of human beings. In its broadest sense the word comprehends not merely the instruction received at school, or college but the whole course of training moral, intellectual and physical; is not limited to the ordinary instruction of the child in the pursuits of

literature. It also comprehends a proper attention to the moral and religious sentiments of the child. And it is sometimes used as synonymous with 'learning'."

83. In ***The Sole Trustee, Lok Shikshana Trust*** v. ***C.I.T.***, MANU/SC/0273/1975 : [1975]101 ITR 234 (SC), the term 'education' was held to mean - "the systematic instruction, schooling or training given to the young in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received_. What education connotes is the process of training and developing the knowledge, skill, mind and character of students by formal schooling."

84. In 'India - Vision 2020' published by Planning Commission of India, it is stated (at p.250) - "Education is an important input both for the growth of the society as well as for the individual. Properly planned educational input can contribute to increase in the Gross National Products, cultural richness, build positive attitude towards technology and increase efficiency and effectiveness of the governance. Education opens new horizons for an individual, provides new aspirations and develops new values. It strengthens competencies and develops commitment. Education generates in an individual a critical outlook on social and political realities and sharpens the ability to self- examination, self-monitoring and self-criticism."

85. "The term 'Knowledge Society', 'Information Society' and 'Learning Society' have now become familiar expressions in the educational parlance, communicating emerging global trends with far-reaching implications for growth and development of any society. These are not to be seen as mere chichi or fads but words that are pregnant with unimaginable potentialities. Information revolution, information technologies and knowledge industries, constitute important dimensions of an information society and contribute effectively to the growth of a knowledge society." (ibid, p.246)

86. "Alvin Toffler (1980) has advanced the idea that power at the dawn of civilization resided in the 'muscle'. Power then got associated with money and in 20th century it shifted its focus to 'mind'. Thus the shift from physical power to wealth power to mind power is an evolution in the shifting foundations of economy. This shift supports the observation of Francis Bacon who said 'knowledge itself is power'; stressing the same point and upholding the supremacy of mind power, in his characteristic expression, Winston Churchill said, "the Empires of the future shall be empires of the mind". Thus, he corroborated Bacon and professed the emergence of the knowledge society." (ibid, p.247)

87. Quadri, J. has well put it in his opinion in ***Pai Foundation*** (para 287) ___ "Education plays a cardinal role in transforming a society into a civilised nation. It accelerates the progress of the country in every sphere of national activity. No section of the citizens can be ignored or left behind because it would hamper the progress of the country as a whole. It is the duty of the State to do all it could, to educate every section of citizens who need a helping hand in marching ahead along with others".

88. According to Dr. Zakir Hussain, a great statesman with democratic credentials, a secularist and an educationist, a true democracy is one where each and every citizen is involved in the democratic process and this end cannot be achieved unless we remove the prevailing large-scale illiteracy in our country. Unless universal education is achieved which allows every citizen to participate actively in the processes of democracy, we can never claim to be a true democracy. Dr. Zakir

Hussain sought to ensure that the seeds of knowledge were germinated in the minds of as many citizens as possible, with a view to enabling them to perform their assigned roles on the stage of democracy. [Dr. Zakir Hussain, as quoted by Justice A.M. Ahmadi, the then Chief Justice of India, (1996) 2 SCC (J) 1

89. Under Article 41 of the Constitution, right to education, amongst others, is obligated to be secured by the State by making effective provision therefore.

Fundamental duties recognized by Article 51A include, amongst others, (i) to develop the scientific temper, humanism and the spirit of inquiry and reform; and (ii) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. None can be achieved or ensured except by means of education. It is well accepted by the thinkers, philosophers and academicians that if JUSTICE, LIBERTY, EQUALITY and FRATERNITY, including social, economic and political justice, the golden goals set out in the Preamble to the Constitution of India are to be achieved, the Indian polity has to be educated and educated with excellence. Education is a national wealth which must be distributed equally and widely, as far as possible, in the interest of creating an egalitarian society, to enable the country to rise high and face global competition. 'Tireless striving stretching its arms towards perfection' (to borrow the expression from Rabindranath Tagore) would not be successful unless strengthened by education.

90. Education is "...continual growth of personality, steady development of character, and the qualitative improvement of life. A trained mind has the capacity to draw spiritual nourishment from every experience, be it defeat or victory, sorrow or joy. Education is *training the mind* and not *stuffing the brain*." (See *Eternal Values for A Changing Society*, Vol. III Education for Human Excellence, published by Bharatiya Vidya Bhavan, Bombay, at p. 19)

91. "We want that education by which character is formed, strength of mind is increased, the intellect is expanded, and by which one can stand on one's own feet." "The end of all education, all training, should be man-making. The end and aim of all training is to make the man grow. The training by which the current and expression of will are brought under control and become fruitful is called education." (Swami Vivekanand as quoted in ibid, at p.20)

92. Education, accepted as a useful activity, whether for charity or for profit, is an occupation. Nevertheless, it does not cease to be a service to the society. And even though an occupation, it cannot be equated to a trade or a business.

93. In short, education is national wealth essential for the nation's progress and prosperity.

Articles 19(1)(g), 29(2) and 30(1): inter-relationship between

94. The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1) (g).
Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1)

is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid.

95. As an occupation, right to impart education is a fundamental right under Article 19(1)(g) and, therefore, subject to control by clause (6) of Article 19. This right is available to all citizens without drawing a distinction between minority and non- minority. Such a right is, generally speaking, subject to laws imposing reasonable restrictions in the interest of the general public. In particular, laws may be enacted on the following subjects: (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business; (ii) the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or service whether to the exclusion, complete or partial of citizens or otherwise. Care is taken of minorities, religious or linguistic, by protecting their right to establish and administer educational institutions of their choice under Article 30. To some extent, what may be permissible by way of restriction under Article 19(6) may fall foul of Article 30. This is the additional protection which Article 30(1) grants to the minorities.

96. The employment of expressions 'right to establish and administer' and 'educational institution of their choice' in Article 30(1) gives the right a very wide amplitude. Therefore, a minority educational institution has a right to admit students of its own choice, it can, as a matter of its own freewill, admit students of non-minority community. However, non-minority students cannot be forced upon it. The only restriction on the freewill of the minority educational institution admitting students belonging to non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admissions should not be violative of the minority character of the institution.

97. Aid and affiliation or recognition, both by State, bring in some amount of regulation as a condition of receiving grant or recognition. The scope of such regulations, as spelt out by 6-Judge Bench decision in ***Rev. Sidhrajbhai case*** MANU/SC/0076/1962 : AIR 1963 SC 540 and **9-Judge** Bench case in ***St. Xavier's*** must satisfy the following tests: (a) the regulation is reasonable and rational; (b) it is regulative of the essential character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who

resort to it; (c) it is directed towards maintaining excellence of the education and efficiency of administration so as to prevent it from falling in standards. These tests have met the approval of ***Pai Foundation***. However, ***Rev. Sidhrajbhai's case*** and ***St. Xavier's*** go on to say that no regulation can be cast in 'the interest of the nation' if it does not serve the interest of the minority as well. This proposition (except when it is read in the light of the opinion of Quadri, J.) stands overruled in ***Pai Foundation*** where Kirpal, CJ, speaking for majority has ruled (vide para 107) - "any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf". (Also see, paras 117 to 123 and para 138 of ***Pai Foundation*** where Kirpal, CJ has dealt with ***St. Xavier's*** in details). No right can be absolute. Whether a minority or a non- minority, no community can claim its interest to be above the national interest.

'Minority' And 'Minority Educational Institutions'

98. The term 'minority' is not defined in the Constitution. Chief Justice Kirpal, speaking for the majority in ***Pai Foundation***, took clue from the provisions of the State Reorganisation Act and held that in view of India having been divided into different linguistic States, carved out on the basis of the language of the majority of persons of that region, it is the State, and not the whole of India, that shall have to be taken as the unit for determining linguistic minority viz-a-viz Article 30. Inasmuch as Article 30(1) places on par religions and languages, he held that the minority status, whether by reference to language or by reference to religion, shall have to be determined by treating the State as unit. The principle would remain the same whether it is a Central legislation or a State legislation dealing with linguistic or religious minority. Khare, J. (as His Lordship then was), Quadri, J. and Variava & Bhan, JJ. in their separate concurring opinions agreed with Kirpal, CJ. According to Khare, J., take the population of any State as a unit, find out its demography and calculate if the persons speaking a particular language or following a particular religion are less than 50% of the population, then give them the status of linguistic or religious minority. The population of the entire country is irrelevant for the purpose of determining such status. Quadri, J. opined that the word 'minority' literally means 'a non-dominant' group. Ruma Pal, J. defined the word 'minority' to mean 'numerically less'. However, she refused to take the State as a unit for the purpose of determining minority status as, in her opinion, the question of minority status must be determined with reference to the country as a whole. She assigned reasons for the purpose. Needless to say, her opinion is a lone voice. Thus, with the dictum of ***Pai Foundation***, it cannot be doubted that minority, whether linguistic or religious, is determinable only by reference to the demography of a State and not by taking into consideration the population of the country as a whole.

99. Such definition of minority resolves one issue but gives rise to many a questions when it comes to defining 'minority educational institution'. Whether a minority educational institution, though established by a minority, can cater to the needs of that minority only? Can there be an enquiry to identify the person or persons who have really established the institution? Can a minority institution provide cross-border or inter-State educational facilities and yet retain the character of minority educational institution?

100. In ***Kerala Education Bill***, the scope and ambit of right conferred by Article 30(1) came up for consideration. Article 30(1) does not require that minorities based on religion should establish educational institutions for teaching religion only or that linguistic minority should establish educational institution for teaching its language only. The object underlying Article 30(1) is to see the desire of minorities being fulfilled that their children should be brought up properly and efficiently and acquire eligibility for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering public services, educational institutions imparting higher instructions including general secular education. Thus, the twin objects sought to be achieved by Article 30(1) in the interest of minorities are: (i) to enable such minority to conserve its religion and language, and (ii) to give a thorough, good general education to the children belonging to such minority. So long as the institution retains its minority character by achieving and continuing to achieve the above said two objectives, the institution would remain a minority institution.

101. The learned Judges in ***Kerala Education Bill*** were posed with the issue projected by Article 29(2). What will happen if the institution was receiving aid out of State funds? The apparent conflict was resolved by the Judges employing a beautiful expression. They said, Article 29(2)and 30(1), read together, clearly contemplate a minority institution with a 'sprinkling of outsiders' admitted in it. By admitting a member of non-minority into the minority institution, it does not shed its character and cease to be a minority institution. The learned Judges went on to observe that such 'sprinkling' would enable the distinct language, script and culture of a minority being propagated amongst non-members of a particular minority community and that would indeed better serve the object of conserving the language, religion and culture of that minority.

102. Chief Justice Hidayatullah, speaking for the Constitution Bench in ***State of Kerala, Etc.*** v. ***Very Rev. Mother Provincial, Etc.***, MANU/SC/0065/1970 : [1971] 1 SCR 734, has not used the expression 'sprinkling' but has explained the reason why that was necessary. He said - "It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection". (para 8)

103. Much of controversy can be avoided if only the nature of the right conferred by Articles 29 and 30 is clearly understood. The nature and content of these articles stands more than clarified and reconciled inter se as also with other articles if only we understand that these two articles are intended to confer protection on minorities rather than a right as such. In ***St. Stephen's***, their Lordships clearly held (vide para 28) that Article 30(1) is "a protective measure only" and further said (vide para 59) that Article 30(1) implied certain 'privilege'. Articles 29 and 30 can be better understood and utilized if read as a protection and/or a privilege of minority rather than an abstract right.

104. In this background arises the complex question of trans- border operation of Article 30(1). ***Pai Foundation*** has clearly ruled in favour of the State (or a province) being the unit for the

purpose of deciding minority. By this declaration of law, certain consequences follow. First, every community in India becomes a minority because in one or the other State of the country it will be in minority ___ linguistic or religious. What would happen if a minority belonging to a particular State establishes an educational institution in that State and administers it but for the benefit of members belonging to that minority domiciled in the neighbouring State where that community is in majority? Would it not be a fraud on the Constitution? In ***St. Stephen's***, their Lordships had ruled that Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and "no ill fit or camouflaged institution should get away with the constitutional protection" (para 28). The question need not detain us for long as it stands answered in no uncertain terms in ***Pai Foundation***. Emphasising the need for preserving its minority character so as to enjoy the privilege of protection under Article 30(1), it is necessary that the objective of establishing the institution was not defeated. "If so, such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that State is concerned. In other words, the predominance of linguistic minority students hailing from the State in which the minority educational institution is established should be present. The management bodies of such institutions cannot resort to the device of admitting the linguistic students of the adjoining State in which they are in a majority, under the facade of the protection given under Article 30(1)." (para 153). The same principle applies to religious minority. If any other view was to be taken, the very objective of conferring the preferential right of admission by harmoniously constructing Articles 30(1) and 29(2), may be distorted.

105. It necessarily follows from the law laid down in ***Pai Foundation*** that to establish a minority institution the institution must primarily cater to the requirements of that minority of that State else its character of minority institution is lost. However, to borrow the words of Chief Justice S.R. Das (in ***Kerala Education Bill***) a 'sprinkling' of that minority from other State on the same footing as a sprinkling of non-minority students, would be permissible and would not deprive the institution of its essential character of being a minority institution determined by reference to that State as a unit.

Minority educational institutions: classifiable in three

106. To establish an educational institution is a Fundamental Right. Several educational institutions have come up. In ***Kerala Education Bill***, 'minority educational institutions' came to be classified into three categories, namely, (i) those which do not seek either aid or recognition from the State; (ii) those which want aid; and (iii) those which want only recognition but not aid. It was held that the first category protected by Article 30(1) can "*exercise that right to their hearts' content*" unhampered by restrictions. The second category is most significant. Most of the educational institutions would fall in that category as no educational institution can, in modern times, afford to subsist and efficiently function without some State aid. So is with the third category. An educational institution may survive without aid but would still stand in need of recognition because in the absence of recognition, education imparted therein may not really serve the purpose as for want of recognition the students passing out from such educational institutions may not be entitled to admission in other educational institutions for higher studies and may also not be eligible for securing jobs. Once an educational institution is granted aid or aspires for

recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition. This Court clarified in ***Kerala Educational Bill*** that 'the right to establish and administer educational institutions' conferred by Article 30(1) does not include the right to mal-administer, and that is very obvious. Merely because an educational institution belongs to minority it cannot ask for aid or recognition though running in unhealthy surroundings, without any competent teachers and which does not maintain even a fair standard of teaching or which teaches matters subversive to the welfare of the scholars. Therefore, the State may prescribe reasonable regulations to ensure the excellence of the educational institutions to be granted aid or to be recognized. To wit, it is open to the State to lay down conditions for recognition such as, an institution must have a particular amount of funds or properties or number of students or standard of education and so on. The dividing line is that in the name of laying down conditions for aid or recognition the State cannot directly or indirectly defeat the very protection conferred by Article 30(1) on the minority to establish and administer educational institutions. Dealing with the third category of institutions, which seek only recognition but not aid, their Lordships held that '*the right to establish and administer educational institutions of their choice*' must mean the right to establish real institutions which will effectively serve the needs of the community and scholars who resort to these educational institutions. The dividing line between how far the regulation would remain within the constitutional limits and when the regulations would cross the limits and be vulnerable is fine yet perceptible and has been demonstrated in several judicial pronouncements which can be cited as illustrations. They have been dealt with meticulous precision coupled with brevity by S.B. Sinha, J. in his opinion in ***Islamic Academy***. The considerations for granting recognition to a minority educational institution and casting accompanying regulation would be similar as applicable to a non-minority institution subject to two overriding considerations: (i) the recognition is not denied solely on the ground of the educational institution being one belonging to minority, and (ii) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status.

107. Article 30(1) speaks of 'educational institutions' generally and so does Article 29(2). These Articles do not draw any distinction between an educational institution dispensing theological education or professional or non-professional education. However, the terrain of thought as has developed through successive judicial pronouncements culminating in ***Pai Foundation*** is that looking at the concept of education, in the backdrop of constitutional provisions, the professional educational institutions constitute a class by themselves as distinguished from the educational institutions imparting non- professional education. It is not necessary for us to go deep into this aspect of the issue posed before us inasmuch as ***Pai Foundation*** has clarified that merit and excellence assume special significance in the context of professional studies. Though merit and excellence are not anathema to non-professional education, yet at that level and due to the nature of education which is more general the need for merit and excellence there in is not of the degree as is called for in the context of professional education.

Difference between professional and non-professional education institutions

108. Dealing with unaided minority educational institutions, Pai Foundation holds that Article 30 does not come in the way of the State stepping in for the purpose of securing transparency and recognition of merit in the matter of admissions. Regulatory measures for ensuring educational standards and maintaining excellence thereof are no anathema to the protection conferred by

Article 30(1). However, a distinction is to be drawn between unaided minority educational institution of the level of schools and undergraduate colleges on one side and the institutions of higher education, in particular, those imparting professional education on the other side. In the former, the scope for merit based selection is practically nil and hence may not call for regulation. But in the case of latter, transparency and merit have to be unavoidably taken care of and cannot be compromised. There could be regulatory measures for ensuring educational standards and maintaining excellence thereof. (See para 161, Answer to Q.4, in ***Pai Foundation***). The source of this distinction between two types of educational institutions referred to hereinabove is to be found in the principle that right to administer does not include a right to mal-administer.

109. S.B. Sinha, J. has, in his separate opinion in Islamic Academy, described (in para 199) the situation as a pyramid like situation and suggested the right of minority to be read along with fundamental duty. Higher the level of education, lesser are the seats and higher weighs the consideration for merit. It will, necessarily, call for more State intervention and lesser say for minority.

110. Educational institutions imparting higher education, i.e. graduate level and above and in particular specialized education such as technical or professional, constitutes a separate class. While embarking upon resolving issues of constitutional significance, where the letter of the Constitution is not clear, we have to keep in view the spirit of the Constitution, as spelt out by its entire scheme. Education aimed at imparting professional or technical qualifications stand on a different footing from other educational instruction. Apart from other provisions, Article 19(6) is a clear indicator and so are clauses (h) and (j) of Article 51A. Education upto undergraduate level aims at imparting knowledge just to enrich mind and shape the personality of a student. Graduate level study is a doorway to admissions in educational institutions imparting professional or technical or other higher education and, therefore, at that level, the considerations akin to those relevant for professional or technical educational institutions step in and become relevant. This is in national interest and strengthening the national wealth, education included. Education up to undergraduate level on one hand and education at graduate and post-graduate levels and in professional and technical institutions on the other are to be treated on different levels inviting not identical considerations, is a proposition not open to any more debate after ***Pai Foundation***. A number of legislations occupying the field of education whose constitutional validity has been tested and accepted suggest that while recognition or affiliation may not be a must for education up to undergraduate level or, even if required, may be granted as a matter of routine, recognition or affiliation is a must and subject to rigorous scrutiny when it comes to educational institutions awarding degrees, graduate or post-graduate, post-graduate diplomas and degrees in technical or professional disciplines. Some such legislations are found referred in paras 81 and 82 of S.B. Sinha, J's opinion in ***Islamic Academy.***

111. Having so stated and clarified these principles which would be germane to answering the four questions posed before us, now we take up each of the four questions seriatim and answer the same.

112. And yet, before we do so, let us quote and reproduce paragraphs 68, 69 and 70 from ***Pai Foundation*** to enable easy reference thereto as the core of controversy touching the four questions which we are dealing with seems to have originated therefrom. These paragraphs read as under:

"**68.**(I) It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods.

(II) For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and post graduation non-professional colleges or institutes.

69. In such professional unaided institutions, the management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/university subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers.

70. It is well established all over the world that those who seek professional education must pay for it. The number of seats available in government and government-aided colleges is very small, compared to the number of persons seeking admission to the medical and engineering colleges. All those eligible and deserving candidates who could not be accommodated in government colleges would stand deprived of professional education. This void in the field of medical and technical education has been filled by institutions that are established in different places with the aid of donations and the active part taken by public-minded individuals. The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture. In order that this intention is meaningful, the institution must be recognized. At the school level, the recognition or affiliation has to be sought from the educational authority or the body that conducts the school-leaving examination. It is only on the basis of that examination that a school-leaving certificate is granted, which enables a student to seek admission in further courses of study after school. A college or a professional educational institution has to get recognition from the university concerned, which normally requires certain conditions to be fulfilled before recognition. It has been held that conditions of affiliation or recognition, which pertain to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational courses are valid, and that they do not violate even the provisions of Article 30 of the Constitution; but conditions that are laid down

for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions.

113. In ***Islamic Academy*** the majority has (vide para 12) paraphrased the contents of para 68 by dividing it into seven parts. S.B. Sinha, J has read the same para 68 by paraphrasing it in five parts (vide para 172 of his opinion). However, we have reproduced para 68 by dividing it into two parts. A reading of the majority judgment in ***Pai Foundation*** in its entirety supports the conclusion that while the first part of para 68 is law laid down by the majority, the second part is only by way of illustration, tantamounting to just a suggestion or observation, as to how the State may devise a possible mechanism so as to take care of poor and backward sections of the society. The second part of para 68 cannot be read as law laid down by the Bench. It is only an observation in passing or an illustrative situation which may be reached by consent or agreement or persuasion.

A Comment

114. It was submitted at the Bar that a flourish of language or just a flow of thoughts placed on paper when read in isolation gives an impression as if such is the law laid down though in reality even the author of the judgment had not intended to do so. A mere observation or a reasoning leading to formulation of ultimate opinion on a disputed question of law cannot be read as a ratio of the decision. Such submissions forcefully advanced at the Bar, have been kept in view by us while reading the several opinions in ***Pai Foundation*** and ***Islamic Academy.*** In ***Islamic Academy*** the petitioners-applicants were private unaided institutions (minority and non-minority both) and the petitioners-applicants before us are also private unaided institutions, non-minority and minority (religions and linguistic) both. It was submitted that the majority opinion in ***Islamic Academy*** has, while embarking upon clarifying the law laid down in ***Pai Foundation***, not only reiterated some of the propositions of law laid down in ***Pai Foundation*** but has also added something more which was not said in ***Pai Foundation*** and the two have been so intertwined as to become inseparable and that has been the reason for a spate of litigation post ***Islamic Academy***. S.B. Sinha, J., writing his separate opinion in ***Islamic Academy***, has not himself chosen to say whether his is a concurring opinion or a dissenting one. However, it was pointed out that S.B. Sinha, J's opinion is analytical, clear and more in consonance with the majority opinion of ***Pai Foundation***. It was urged that the task was difficult and unwittingly, for the sake of aiming at brevity, certain omissions have taken place. Illustratively it was pointed out that vide para 59 of ***Pai Foundation*** Kirpal, CJ, has said -

"Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies."

(emphasis by us)

115. In ***Islamic Academy***, vide para 70, sub-para (2)(i)(a), the abovesaid passage has been quoted as under:-

"Admission to professional colleges should be based on merit by a common entrance test conducted by the government agencies".

(emphasis by us)

116. It was pointed out that ***Pai Foundation*** vide para 59 was just making a note of what is 'prevailing as the usual systems' for admitting students but ***Islamic Academy*** vide para 70 gives an impression that the view taken in ***Pai Foundation*** is to confine to common entrance test conducted by the government agencies as the only source of admission to professional colleges.

117. While expressing their appreciation of the task performed in ***Islamic Academy*** of attempting resolution of several issues raised post ***Pai Foundation***, the learned counsel addressing us have tried to put across and demonstrate several such anomalies which ***Islamic Academy*** read in *juxta position* with ***Pai Foundation*** has raised.

118. Having generally dealt with the several legal propositions, relevant for our purpose, now we come to specifically dealing with the questions before us.

Q.1. Unaided educational institutions; appropriation of quota by State and enforcement of reservation policy

119. First, we shall deal with minority unaided institutions.

120. We have in the earlier part of this judgment referred to ***Kerala Education Bill*** and stated the three categories of minority educational institutions as classified and dealt with therein. The ***7-Judge*** Bench decision in ***Kerala Education Bill*** still holds the field and has met the approval of ***11-Judge*** Bench in ***Pai Foundation***. We cull out and state what ***Pai Foundation*** has to say about such category of institutions:-

(i) **Minority educational institution, unaided and unrecognized**

Pai Foundation is unanimous on the view that the right to establish and administer an institution, the phrase as employed in Article 30(1) of the Constitution, comprises of the following rights: (a) to admit students; (b) to set up a reasonable fee structure; (c) to constitute a governing body; (d) to appoint staff (teaching and non-teaching); and (e) to take action if there is dereliction of duty on the part of any of the employees. (para 50)

A minority educational institution may choose not to take any aid from the State and may also not seek any recognition or affiliation. It may be imparting such instructions and may have students learning such knowledge that do not stand in need of any recognition. Such institutions would be those where instructions are imparted for the sake of instructions and learning is only for the sake of learning and acquiring knowledge. Obviously, such institutions would fall in the category of those who would exercise their right under the protection and privilege conferred by Article 30(1) "to their hearts content" unhampered by any restrictions excepting those which are in national interest based on considerations such as public safety, national security and national integrity or are aimed at preventing exploitation of students or teaching community. Such institutions cannot indulge in any activity which is violative of any law of the land.

They are free to admit all students of their own minority community if they so choose to do. (para 145, ***Pai Foundation***)

(ii) **Minority unaided educational institutions asking for affiliation or recognition**

Affiliation or recognition by the State or the Board or the University competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing mal-administration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a pre-requisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated. (para 55, ***Pai Foundation***)

Apart from the generalized position of law that right to administer does not include right to mal-administer, an additional source of power to regulate by enacting condition accompanying affiliation or recognition exists. Balance has to be struck between the two objectives: (i) that of ensuring the standard of excellence of the institution, and (ii) that of preserving the right of the minority to establish and administer its educational institution. Subject to reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests: (i) the test of reasonableness and rationality, (ii) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and (iii) that there is no in-road on the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away. (para 122, ***Pai Foundation***)

(iii) Minority educational institutions receiving State aid

Conditions which can normally be permitted to be imposed on the educational institutions receiving the grant must be related to the proper utilization of the grant and fulfillment of the objectives of the grant without diluting the minority status of the educational institution, as held in ***Pai Foundation*** (See para 143 thereof). As aided institutions are not before us and we are not called upon to deal with their cases, we leave the discussion at that only.

121. So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.

122. As per our understanding, neither in the judgment of ***Pai Foundation*** nor in the Constitution Bench decision in ***Kerala Education Bill***, which was approved by ***Pai Foundation***, there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in ***Pai Foundation***. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

123. The observations in paragraph 68 of the majority opinion in ***Pai Foundation***, on which the learned counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment in ***Pai Foundation***, if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned counsel have made comments and counter comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in ***Pai Foundation***) in our considered opinion, observations in paragraph 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat sharing with the State or adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give free-ships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the state to cater to the educational needs of weaker and poorer sections of the society.

124. Nowhere in ***Pai Foundation***, either in the majority or in the minority opinion, have we found any justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

125. We make it clear that the observations in ***Pai Foundation*** in paragraph 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State.

126. In ***Pai Foundation***, it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees.

127. For the aforesaid reasons, we cannot approve of the scheme evolved in ***Islamic Academy*** to the extent it allows States to fix quota for seat sharing between management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. That part of the judgment in ***Islamic Academy***, in our considered opinion, does not lay down the correct law and runs counter to ***Pai Foundation***.

NRI seats

128. Here itself we are inclined to deal with the question as to seats allocated for Non-Resident Indians ('NRI', for short) or NRI seats. It is common knowledge that some of the institutions grant admissions to certain number of students under such quota by charging a higher amount of fee. In fact, the term 'NRI' in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission. During the course of hearing, it was pointed out that a limited number of such seats should be made available as the money brought by such students admitted against NRI quota enables the educational institutions to strengthen its level of education and also to enlarge its educational activities. It was also pointed out that people of Indian origin, who have migrated to other countries, have a desire to bring back their children to their own country as they not only get education but also get reunited with Indian cultural ethos by virtue of being here. They also wish the money which they would be spending elsewhere on education of their children should rather reach their own motherland. A limited reservation of such seats, not exceeding 15%, in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilisation of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulation needs to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to the direction in ***Islamic Academy*** to regulate.

129. Our answer to the first question is that neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30(1).

Q.2. Admission procedure of unaided educational institutions.

130. So far as the minority unaided institutions are concerned to admit students being one of the components of "right to establish and administer an institution", the State cannot interfere therewith. Upto the level of undergraduate education, the minority unaided educational institutions enjoy total freedom.

131. However, different considerations would apply for graduate and post-graduate level of education, as also for technical and professional educational institutions. Such education cannot be imparted by any institution unless recognized by or affiliated with any competent authority created by law, such as a University, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at this level are a must. To fulfill these objectives, the State can and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.

132. ***Pai Foundation*** has already held that the minority status of educational institutions is to be determined by treating the States as units. Students of that community residing in other States where they are not in minority, shall not be considered to be minority in that particular State and hence their admission would be at par with other non-minority students of that State. Such admissions will be only to a limited extent that is like a 'sprinkling' of such admissions, the term we have used earlier borrowing from ***Kerala Education Bill, 1957***. In minority educational institutions, aided or unaided, admissions shall be at the State level. Transparency and merit shall have to be assured.

133. Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, the number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting Common Entrance Test (CET, for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfillment of twin objects of transparency and merit. CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralized counseling or, in other words, single window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of list of successful candidates prepared at the CET without altering the order of merit inter se of the students so chosen.

134. ***Pai Foundation*** has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admissions and the procedure therefore subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration.

The admission procedure so adopted by private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure.
The second question is answered accordingly.

135. It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb mal-practices, it would be permissible to regulate admissions by providing a centralized and single window procedure. Such a procedure, to a large extent, can secure grant of merit based admissions on a transparent basis. Till regulations are framed, the admission committees can oversee admissions so as to ensure that merit is not the casualty.

Q. 3 Fee, regulation of

136. To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in ***Pai Foundation***. Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paras 56 to 58 and 161 [Answer to Q.5(c)] of ***Pai Foundation*** are relevant in this regard).

Capitation Fees

137. Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. 'Profession' has to be distinguished from 'business' or a mere 'occupation'. While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to the society. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not

exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.

138. Our answer to Question-3 is that every institution is free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged.

Q.4. **Committees formed pursuant to Islamic Academy**

139. Most vehement attack was laid by all the learned counsel appearing for the petitioner-applicants on that part of ***Islamic Academy*** which has directed the constitution of two committees dealing with admissions and fee structure. Attention of the Court was invited to paras 35,37, 38, 45 and 161 (answer to question 9) of ***Pai Foundation*** wherein similar scheme framed in ***Unni Krishnan*** was specifically struck down. Vide para 45, Chief Justice Kirpal has clearly ruled that the decision in ***Unni Krishnan*** insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct and to that extent the said decision and the consequent directions given to UGC, AICTE, MCI, the Central and the State Governments etc. are overruled. Vide para 161, ***Pai Foundation*** upheld ***Unni Krishnan*** to the extent to which it holds the right to primary education as a fundamental right, but the scheme was overruled. However, the principle that there should not be capitation fee or profiteering was upheld. Leverage was allowed to educational institutions to generate reasonable surplus to meet cost of expansion and augmentation of facilities which would not amount to profiteering. It was submitted that Islamic Academy has once again restored such Committees which were done away with by ***Pai Foundation***.

140. The learned senior counsel appearing for different private professional institutions, who have questioned the scheme of permanent Committees set up in the judgment of ***Islamic Academy***, very fairly do not dispute that even ***unaided minority institutions*** can be subjected to regulatory measures with a view to curb commercialization of education, profiteering in it and exploitation of students. Policing is permissible but not nationalization or total take over, submitted Shri Harish Salve, the learned senior counsel. Regulatory measures to ensure fairness and transparency in admission procedures to be based on merit have not been opposed as objectionable though a mechanism other than formation of Committees in terms of ***Islamic Academy*** was insisted on and pressed for. Similarly, it was urged that regulatory measures, to the extent permissible, may form part of conditions of recognition and affiliation by the university concerned and/or MCI and AICTE for maintaining standards of excellence in professional education. Such measures have also not been questioned as violative of the educational rights of either minorities or non-minorities.

141. The two committees for **monitoring admission procedure** and **determining fee structure** in the judgment of ***Islamic Academy***, are in our view, permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Article 30(1)or the right of minorities and non-minorities under Article 19(1)(g). They are

reasonable restrictions in the interest of minority institutions permissible under Article 30(1) and in the interest of general public under Article 19(6) of the Constitution.

142. The suggestion made on behalf of minorities and non-minorities that the same purpose for which Committees have been set up can be achieved by post-audit or checks after the institutions have adopted their own admission procedure and fee structure, is unacceptable for the reasons shown by experience of the educational authorities of various States. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb.

143. Non-minority unaided institutions can also be subjected to similar restrictions which are found reasonable and in the interest of student community. Professional education should be made accessible on the criterion of merit and on non-exploitative terms to all eligible students on an uniform basis. Minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty to maintain requisite standards of professional education by giving admissions based on merit and making education equally accessible to eligible students through a fair and transparent admission procedure and based on a reasonable fee-structure.

144. In our considered view, on the basis of judgment in ***Pai Foundation*** and various previous judgments of this Court which have been taken into consideration in that case, the scheme evolved of setting up the two Committees for regulating admissions and determining fee structure by the judgment in ***Islamic Academy*** cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.

145. A fortiori, we do not see any impediment to the constitution of the Committees as a stopgap or ad hoc arrangement made in exercise of the power conferred on this Court by Article 142 of the Constitution until a suitable legislation or regulation framed by the State steps in. Such Committees cannot be equated with ***Unni Krishnan*** Committees which were supposed to be permanent in nature.

146. However, we would like to sound a note of caution to such Committees. The learned counsel appearing for the petitioners have severely criticised the functioning of some of the Committees so constituted. It was pointed out by citing concrete examples that some of the Committees have indulged in assuming such powers and performing such functions as were never given or intended to be given to them by ***Islamic Academy***. Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which has rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their job and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers against the salary permitted by the Committees. Retired High Court Judges heading the Committees are assisted by experts in accounts and management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for

realities. They should refrain from generalizing fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

147. We make it clear that in case of any individual institution, if any of the Committees is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review.

148. On Question-4, our conclusion, therefore, is that the judgment in ***Islamic Academy***, in so far as it evolves the scheme of two Committees, one each for **admission** and **fee structure**, does not go beyond the law laid down in ***Pai Foundation*** and earlier decisions of this Court, which have been approved in that case. The challenge to setting up of two Committees in accordance with the decision in ***Islamic Academy***, therefore, fails.
However, the observation by way of clarification, contained in the later part of para 19 of ***Islamic Academy*** which speaks of quota and fixation of percentage by State Government is rendered redundant and must go in view of what has been already held by us in the earlier part of this judgment while dealing with Question No. 1.

Epilogue

149. We have answered the four questions formulated by us in the manner indicated hereinabove. All other issues which we leave untouched, may be dealt with by the regular Benches which will take up individual cases for decision.

150. We have placed on record in the earlier part of this judgment and, yet, before parting we would like to reiterate, that certain recitals, certain observations and certain findings in ***Pai Foundation*** are contradictory *inter se* and such conflict can only be resolved by a Bench of a coram larger than ***Pai Foundation***.

There are several questions which have remained unanswered and there are certain questions which have cropped up post ***Pai Foundation*** and ***Islamic Academy***. To the extent the area is left open, the Benches hearing individual cases after this judgment would find the answers.<mpara>
Issues referable to those areas which are already covered by ***Pai Foundation*** and yet open to question shall have to be answered by a Bench of a larger coram than ***Pai Foundation***. We leave those issues to be taken care of by posterity.

151. We are also conscious of the fact that admission process in several professional educational institutions has already commenced. Some admissions have been made or are in the process of being made in consonance with the schemes and procedures as approved by Committees and in some cases pursuant to interim directions made by this Court or by the High Courts. This judgment shall not have the effect of disturbing the admissions already made or with regard to which the process has already commenced. The law, as laid down in this judgment, shall be given effect to from the academic year commencing next after the pronouncement of this judgment.

152. It is for the Central Government, or for the State Governments, in the absence of a Central legislation, to come out with a detailed well thought out legislation on the subject. Such a legislation is long awaited. States must act towards this direction. Judicial wing of the State is called upon to act when the other two wings, the Legislature and the Executive, do not act. Earlier the Union of India and the State Governments act, the better it would be. The Committees regulating admission procedure and fee structure shall continue to exist, but only as a temporary measure and an inevitable passing phase until the Central Government or the State Governments are able to devise a suitable mechanism and appoint competent authority in consonance with the observations made hereinabove. Needless to say, any decision taken by such Committees and by the Central or the State Governments, shall be open to judicial review in accordance with the settled parameters for the exercise of such jurisdiction.

153. Before parting, we would like to place on record our appreciation of the valuable assistance rendered by all the learned senior counsel and other counsel appearing in the case and who have addressed us, highlighting very many aspects of the ticklish issues in the field of professional education which have cropped up for decision in the light of the 11-Judge Bench decision in ***Pai Foundation*** and Constitution Bench decision in ***Islamic Academy***. But for their assistance, the issues would have defied resolution.

154. All the petitions, Civil Appeals and IAs shall now be listed before appropriate Benches for hearing.

Back to Index

MANU/SC/0328/2002

Neutral Citation: 2002/INSC/203

IN THE SUPREME COURT OF INDIA

Appeal (crl.) 535 of 2000

Decided On: 16.04.2002

Appellants: P. Ramachandra Rao **Vs.** Respondent: State of Karnataka

Hon'ble Judges/Coram:

S.P. Bharucha, C.J., S.S.M. Quadri, R.C. Lahoti, N. Santosh Hegde, Doraiswamy Raju, Ruma Pal and Dr. Arijit Pasayat, JJ.

Subject: Criminal

Relevant Section:

Constitution of India - Article 21

Cases Overruled/Partly Overruled:

Raj Deo Sharma vs. The State of Bihar (MANU/SC/0607/1999), Raj Deo Sharma vs. The State of Bihar (MANU/SC/0640/1998), Common Cause, A Registered Society Throough its Director vs. Union of India and others (MANU/SC/0362/1997), Common Cause A Registered Society through its Director vs. Union of India (UOI) and Ors. (MANU/SC/1152/1996), Common Cause A Registered Society v. Union of India MANU/SC/0976/1996

Authorities Referred:

Professor S.P. Sathe, in his recent work (Year 2002) "Judicial Activism in India-Transgressing Borders and Enforcing Limits"; Patrick Devlin in 'The Judge' (1979); Salmond on Principles of Jurisprudence (12th Edition)

Disposition:
In Favour of Accused

Case Note:

Constitution of India - Articles 21, 141 and 142--Criminal trials--Whether Supreme Court can fix time-bars for conclusion or termination of trials in order to effectuate right to

speedy trial flowing from and recognised in Article 21?--Held, (per majority of 6:1) "no"--This would amount to legislation--Held, (per minority, Raju, J.) "yes" but it is neither advisable nor practicable".

Per R. C. Lahoti, J. (For majority of 6 : 1) :

Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may interpret Articles 32, 21, 141 and 142 of the Constitution. The dividing line is fine but perceptible. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the Legislature, Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time limits or chalking out a calendar for proceedings to follow, to redeem the injustice done or for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of Court. This is permissible for judiciary to do. But it may not, like Legislature, enact a provision akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973.

Per Raju, J. (minority view) :

Though this Court does not consider itself to be in imperium in imperio or would function as a despotic branch of 'the State', the fact that the founding fathers of our Constitution designedly and deliberately, perhaps, did not envisage the imposition of any jurisdictional embargo on this Court, except Article 363 of the Constitution of India is significant and sufficient enough, in my view, to identify the depth and width or extent of its powers.

Apparently, in my view, alive to such possibilities only even this Court in A. R. Antulay's case (1992) 1 SCC 225, has chosen to decline the request for fixation of any period of time limit for trial of offences not on any total want or lack of jurisdiction in this Court, but for the reason that it is "neither advisable nor practicable" to fix any such time limit and that non-fixation does not ineffectuate the guarantee of right to speedy trial. The prospects and scope to achieve the desired object of a speedy trial even within the available procedural safeguards and avenues provided for obtaining relief, have also been indicated in the said decision. I am of the firm opinion that this Court should never venture to disown its own jurisdiction on any area or in respect of any matter or over any one authority or person, when the Constitution is found to be at stake and the Fundamental Rights of citizens/persons are under fire, to restore them to their position and uphold the Constitution and the rule of law for which this Court has been established and constituted with due primacy and necessary powers, authority and jurisdiction, both express and implied.

Held by Constitution Bench :

The other reason why the bars of limitation enacted in Common Cause (I), (1996) 4 SCC 32, Common Cause (II), (1996) 6 SCC 775 and Raj Deo Sharma (I), 1999 (1) ACrR 137 (SC) : (1998) 7 SCC 507 and Raj Deo Sharma (II), 1999 (3) ACrR 2110 (SC) : (1999) 7 SCC 604, cannot be sustained is that in these decisions though two or three-Judge Bench decisions run counter to that extent to the dictum of Constitution Bench in A. R. Antulay's case and, therefore, cannot be said to be good law to the extent they are in breach of the doctrine of precedents. The well-settled principle of precedents which has crystalised into a rule of law is that a Bench of lesser strength is bound by the view expressed by a Bench of larger strength and cannot take a view in departure or in conflict therefrom. We have in the earlier part of this judgment extracted and reproduced passages from A. R. Antulay's case. The Constitution Bench turned down the fervent plea of proponents of right to speedy trial for laying down time-limits as bar beyond which a criminal proceeding or trial shall not proceed and expressly ruled that it was neither advisable nor practicable (and hence not judicially feasible) to fix any time-limit for trial of offences. Having placed on record the exposition of law as to right to speedy trial flowing from Article 21 of the Constitution, this Court held that it was necessary to leave the rule as elastic and not to fix it in the frame of defined and rigid rules. It must be left to the judicious discretion of the Court seized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed upto a given point of time amounted to violation of Article 21, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead. The test is whether the proceedings or trial has remained pending for such a length of time that the inordinate delay can legitimately be called oppressive and unwarranted, as suggested in A. R. Antulay. In Kartar Singh's case, (1994) 3 SCC 569, the Constitution Bench while recognising the principle that the denial of an accused's right of speedy trial may result in a decision to dismiss the indictment or in reversing of a conviction, went on to state, "of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon to show the actual prejudice by delay of disposal of cases. On the other hand, the Court has to adopt a balancing approach by taking note of the possible prejudices and disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors (1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay."

For all the foregoing reasons, we are of the opinion that in Common Cause case (I) (as modified in 'Common Cause (II) and Raj Deo Sharma (I) and (II), the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold :

(1) The dictum in A. R. Antulay's case is correct and still holds the field.

(2)The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A. R. Antulay's case, adequately take care of right to speedy trial. We uphold and re-affirm the said propositions.

(3) The guidelines laid down in A. R. Antulay's case are not exhaustive but only illustrative. They are not intended to operate as hard and fast rules or to be applied like a strait-jacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I), Raj Deo Sharma case (I) and (II). At the most, the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to Act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A. R. Antulay's case and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any Court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the Court to terminate the same and acquit or discharge the accused.

(5) The criminal courts should exercise their available powers such as those under Sections 309, 311 and 258 of Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be better protector of such right than any guidelines. In appropriate cases, jurisdiction of High Court under Section 482 of Cr. P.C. and Articles 226 and 227 of Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary-quantitatively and qualitatively - by providing requisite funds, manpower and infrastructure. We hope and trust that the Government shall Act.

JUDGMENT

R.C. Lahoti, J.

1. No person shall be deprived of his life or his personal liberty except according to procedure established by law-declares Article 21 of the Constitution. Life and liberty, the words employed in shaping Article 21, by the Founding Fathers of the Constitution, are not to be read narrowly in the sense drearily dictated by dictionaries, they are organic terms to be construed meaningfully. Embarking upon the interpretation thereof, feeling the heart-throb of the Preamble, deriving strength from the Directive Principles of State Policy and alive to their constitutional obligation, the Courts have allowed Article 21 to stretch its arms as wide as it legitimately can. The mental agony, expense and strain which a person proceeded against in criminal law has to undergo and

which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself have persuaded the constitutional courts of the country in holding the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in Article 21. Speedy trial, again, would encompass within its sweep all its stages including investigation, inquiry, trial, appeal, revision and re-trial - in short everything commencing with an accusation and expiring with the final verdict - the two being respectively the *terminus a quo* and *terminus ad quem* --of the journey which an accused must necessarily undertake once faced with an implication. The constitutional philosophy propounded as right to speedy trial has though grown in age by almost two and a half decades, the goat sought to be achieved is yet a far-off peak. Myriad fact-situations bearing testimony to denial of such fundamental right to the accused persons, on account of failure on the part of prosecuting agencies and executive to act, and their turning an almost blind eye at securing expeditious and speedy trial so as to satisfy the mandate of Article 21 of the Constitution have persuaded this Court in devising solutions which go to the extent of almost enacting by judicial verdict bars of limitation beyond which the trial shall not proceed and the arm of law shall lose its hold. IN its zeal to protect the right to speedy trial of an accused, can the Court devise and almost enact such bars of limitation though the Legislature and the Statutes have not chosen to do so-is a question of far-reaching implication which has led to the constitution of this Bench of seven-Judge strength.<mpara>

2. In Criminal Appeal No. 535/2000 the appellant was working as an Electrical Superintendent in the Mangalore City Corporation. For the check period 1.5.1961 to 25.8.1987 he was found to have amassed assets disproportionate to his known sources of income. Charge-sheet accusing him of offences under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 was filed on 15.31994. Accused appeared before the Special Court and was enlarged on bail on 6.6.1994. Charges were framed on 10.8.1994 and the case proceeded for trial on 8.11.1994. However, the trial did not commence. On 23.2.1999 the learned Special Judge who was seized of the trial directed the accused to be acquitted as the trial had not commenced till then and the period of two years had elapsed which obliged him to acquit the accused in terms of the directions of this court in ***Raj Deo Sharma*** v. ***State of Bihar*** -(MANU/SC/0640/1998 : 1998CriLJ4596 (hereinafter, ***Raj Deo Sharma-I***). The State of Karnataka through the D.S.P. Lokayukta, Mangalore preferred an appeal before the high Court putting in issue the acquittal of the accused. The learned Single Judge of the High Court, vide the impugned order, allowed the appeal, set aside the order of acquittal and remanded the case to the Trial Court, forming an opinion that a case charging an accused with corruption was an exception to the directions made in ***Raj Deo Sharma-I*** as clarified by this Court in ***Raj Deo Sharma (II)*** v. ***State of Bihar*** - MANU/SC/0607/1999 : 1999CriLJ4541 . Strangely enough the High Court not only condoned a delay of 55 days in filing the appeal against acquittal by the State but also allowed the appeal itself-both without even issuing notice to the accused. The aggrieved accused has filed this appeal by special leave. Similar are the facts in all the other appeals. Shorn of details, suffice it to say that in all the appeals the accused persons who were facing corruption charges, were acquitted by the Special Courts for failure of commencement of trial in spite of lapse of two years from the date of framing of the charges and all the State appeals were allowed by the High Court without noticing the respective accused persons.

3. The appeals came up for hearing before a Bench of three learned Judges who noticed the common ground that the appeals in the High Court were allowed by the learned Judge thereat without issuing notice to the accused and upon this ground alone, of want of notice, the appeals

here at could be allowed and the appeals before the High Court restored to file for fresh disposal after notice to the accused but it was felt that a question arose in these appeals which was likely to arise in many more and therefore the appeals should be heard on their merits. In the order dated September 19, 2000, the Bench of three learned Judges stated:

"The question is whether the earlier judgments of this court, principally, in Common Cause v. Union of India MANU/SC/1152/1996 : 1996CriLJ2380 , Common Cause v. Union of India MANU/SC/0976/1996 : AIR1996SC3538 Raj Deo Sharma v. State of Bihar MANU/SC/0640/1998 : 1998CriLJ4596 and Raj Deo Sharma (II) v. State of Bihar MANU/SC/0607/1999 : 1999CriLJ4541 , would apply to prosecution under the Prevention of Corruption Act and other economic offences.

Having perused the judgments afore-mentioned, we are of the view that these appeals should be heard by a Constitution Bench. We take this view because we think that it may be necessary to synthesize the various guidelines and directions issued in these judgments. We are also of the view that a Constitution Bench should consider whether time limits of the nature mentioned in some of these judgments can, under the law, be laid down".

4. On 25th April, 2001 the appeals were heard by the Constitution Bench and during the course of hearing attention of the Constitution Bench was invited to the decision of an earlier Constitution Bench in ***Abdul Rehman Antulay and Ors.*** v. ***R.S. Nayak and Anr.*** - MANU/SC/0326/1992 : 1992CriLJ2717 and the four judgments referred to in the order of reference dated 19th September, 2000 by the Bench of three learned Judges. It appears that the learned Judges of the Constitution Bench were of the opinion that the directions made in the two ***Common Cause*** cases and the two ***Raj Deo Sharma's cases*** ran counter to the Constitution Bench directions in ***Abdul Rehman Antulay's case,*** the latter being five-Judge Bench decision, the appeals deserved to be heard by a Bench of seven learned Judges. The relevant part of the order dated 26th April, 2001 reads as under:-

"The Constitution Bench judgment in A.R. Antulay's case holds that "it is neither advisable nor feasible to draw or prescribe an outer time limit for conclusion of all criminal proceedings". Even so, the four judgments afore-mentioned lay down such time limits. Two of them also lay down to which class of criminal proceedings such time limits should apply and to which class they should not.

We think, in these circumstances, that a Bench of seven learned Judges should consider whether the dictum afore-mentioned in A.R. Antulay's case still holds the field: if not, whether the general directions of the kind given in these judgments are permissible in law and should be upheld.

Having regard to what is to be considered by the Bench of seven learned Judges, notice shall issue to the Attorney General and the Advocates General of the States.

The papers shall be placed before the Hon'ble the Chief Justice for appropriate directions. Having regard to the importance of the matter, the Bench may be constituted at an early date".

5. On 20.2.2002 the Court directed, "Common Cause", the petitioner in the two ***Common Cause cases*** which arose out of writ-petitions under Article 32 of the Constitution, heard and decided by this Court as public interest litigations, to be noticed. "Common Cause" has responded and made appearance through counsel.

6. We have heard Shri Harish Salve, the learned Solicitor General appearing for Attorney General for India, Mr. Ranjit Kumar, Senior Advocate assisted by Ms. Binu Tamta, Advocate for the appellants Mr. Sanjay R. Hegde and Mr. Satya Mitra, Advocates for the respondents. Mr. S. Murlidhar, Advocate for "Common Cause" and such other Advocates General and Standing Counsel who have chosen to appear for the States.

7. We shall briefly refer to the five decision cited in the order of reference as also to a few earlier decisions so as to highlight the issue posed before us.

8. The width of vision cast on Article 21, so as to perceive its broad sweep and content, by seven-Judge Bench of this Court in ***Mrs. Maneka Gandhi*** v. ***Union of India and Anr.,*** MANU/SC/0133/1978 : [1978]2SCR621 , inspired a declaration of law, made on February 12, 1979 in ***Hussainara Khatoon and Ors. (I)*** v. ***Home Secretary, State of Bihar*** - MANU/SC/0119/1979 : 1979CriLJ1036 , that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty, except according to procedure established by law; that such procedure is not some semblance of a procedure but the procedure should be "reasonable, fair and just"; and therefrom flows, without doubt, the right to speedy trial. The Court said - "No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21." Many accused persons tormented by unduly lengthy trial or criminal proceedings, in any forum whatsoever were enabled, by ***Hussainara Khatoon(I)*** statement of law, in successfully maintaining petitions for quashing of charges, criminal proceedings and/or conviction, on making out a case of violation of Article 21 of the Constitution. Right to speedy trial and fair procedure has passed through several milestones on the path of constitutional jurisprudence. In ***Maneka Gandhi (supra)*** , this Court held that the several fundamental rights guaranteed by Part III required to be read as components of one integral whole and not as separate channels. The reasonableness of law and procedure, to withstand the test of Articles 21 19 and 14, must be right and just and fair and not arbitrary, fanciful or oppressive, meaning thereby that speedy trial must be reasonably expeditious trial as an integral and essential part of the fundamental right of life and liberty under Article 21. Several cases marking the trend and development of law applying ***Maneka Gandhi*** and ***Hussainara Khatoon(I)*** **principles to myriad** situations came up for the consideration of this Court by a Constitution Bench in ***Abdul Rehman Antulay and Ors.*** v. ***R.S. Nayan and Ors.*** - MANU/SC/0326/1992 : 1992CriLJ2717 , (A.R. Antulay, for short). The proponents of right to speedy trial strongly urged before this Court for taking one step forward in the direction and prescribing time limits beyond which no criminal proceeding should be allowed to go on, advocating that unless this was done. ***Maneka Gandhi*** and ***Hussainara Khatoon(I)*** exposition of Article 21 would remain a mere illusion and a platitude. Invoking of the constitutional jurisdiction of this Court so as to judicially forge two termini and lay down periods of limitation applicable like a mathematical formula, beyond which a trial or criminal proceeding shall not proceed, was resisted by the opponents submitting that the right to

speedy trial was an amorphous one something less than other fundamental rights guaranteed by the Constitution. The submissions made by proponents included that the right to speedy trial following from Article 21 to be meaningful, enforceable and effective ought to be accompanied by an outer limit beyond which continuance of the proceedings will be violative of Article 21. It was submitted that Section 468 of the Code of Criminal Procedure applied only to minor offences but the Court should extend the same principle to major offences as well. It was also urged that a period of 10 years calculated from the date of registration of crime should be placed as an outer limit wherein shall be counted the time taken by the investigation.

9. The Constitution Bench, in ***A.R. Antulay's case,*** heard elaborate arguments. The Court, it its pronouncement, formulated certain propositions, 11 in number, meant to serve a guidelines. It is not necessary for our purpose to reproduce all those propositions. Suffice it to state that in the opinion of the Constitution Bench (i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily; (ii) right to speedy trial following from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and re-trial; (iii) who is responsible for the delay and what factors have contributed towards delay relevant factors. Attendant circumstances, including nature of the offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on-what is called the systemic delays must be kept in view; (iv) each and every delay does not necessarily prejudice the accused as some delays indeed work to his advantage. Guidelines 8, 9, 10 and 11 are relevant for our purpose and hence are extracted and reproduced hereunder:-

"(8) Ultimately, the court has to balance and weight the several relevant factors-'balancing test' or 'balancing process'-and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order-including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weight all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit in effectuates the guarantee of right to speedy trial.

(11). An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it

should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

10. During the course of its judgment also the Constitution Bench made certain observations which need to be extracted and reproduced:-

"But then speedy trial or other expressions conveying the said concept-are necessarily relative in nature. One may ask-speedy means, how speedy? How long a delay is to long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication and several other circumstances have to be kept in mind". (para 83).

".....it is neither advisable nor feasible to draw or prescribe an outer time-limit for conclusion of all criminal proceedings. It is not necessary to do so for effectuating the right to speedy trial. We are also not satisfied that without such an outer limit, the right becomes illusory". (para 83)

".....even apart from Article 21 courts in this country have been cognizant of undue delays in criminal matters and wherever there was inordinate delay or where the proceedings were pending for too long and any further proceedings were deemed to be oppressive and unwarranted, they were put an end to by making appropriate orders". (para 65)

[emphasis supplied]

11. In 1986, "Common Cause"-a Registered Society, espousing public causes, preferred a petition under Article 32 of the Constitution of India seeking certain directions. By a brief order (" ***Common Cause" A Registered Society through its Director*** v. ***Union of India and Ors.*** -(1996) 4 SCC 32, hereinafter ***Common Cause (I)*** , a two-Judge Bench of this Court issued tow sets of directions: one, regarding bail, and the other, regarding quashing of trial. Depending on the quantum of imprisonment provided for several offences under the Indian Penal Code and the period of time which the accused have already spent in jail, the undertrial accused confined in jails were directed to be released on bail or on personal bond subject to such conditions as the Court may deem fit to impose in the light of Section 437 of Cr.P.C. The other set of directions directed the trial in pending cases to be terminated and the accused to be discharged or acquitted depending on the nature of offence by reference to (i) the maximum sentence inflictable whether fine only or imprisonment, and if imprisonment, then the maximum set out in the law, and (ii) the period for which the case has remained pending in the criminal court.

12. A perusal of the directions made by the Division Bench shows the cases having been divided into two categories: (i) traffic offences, and (ii) cases under IPC or any other law for the time being in force. The Court directed the trial Courts to close such cases on the occurrence of following event and the period of delay:-

Category (i) : **Traffic Offences:**

13. The Court directed the cases to be closed and the accused to be discharged on lapse of more than two years on account of non-serving of summons to the accused or for any other reason whatsoever.

Category (ii) : Cases under IPC or any other law for the time being in force:

14. The Court directed that in the following sub-categories if the trial has not commenced and the period noted against cash sub-category has elapsed then the case shall be closed and the accused shall be discharged or acquitted-

Nature of the cases	Period of delay i.e. trial not commenced for
Cases compoundable with the permission of the Court.	More than two years
Cases pertaining to offences which are non-cognizable and bailable	More than two years
Cases in connection with offences punishable with fine only and are not of recurring nature	More than one year
Cases punishable with imprisonment upto one year, with or without fine	More than one year
Cases pertaining to offences punishable with imprisonment upto three years with or without fine	More than two years

15. The period of pendency was directed to be calculated from the date the accused are summoned to appear in Court. The Division Bench, vide direction 4, specified certain categories of cases to which its directions would not be applicable. Vide direction 5, this court directed the offences covered by direction 4 to be tried on priority basis and observance of this direction being monitored by the High Courts. All the directions were made applicable not only to the cases pending on the day but also to cases which may be instituted thereafter.

16. Abovesaid directions in ***Common Cause-I*** were made on May 1, 1996. Not even a period of 6 months had elapsed, on 15.10.1996, Shri Sheo Raj Purohit a public-spirited advocate addressed a Letter Petition to this Court, inviting its attention to certain consequences flowing from the directions made by this Court in ***Common Cause (I)*** and which were likely to cause injustice to the serious detriment of the society and could result in encouraging dilatory tactics adopted by the accused. A two-Judge Bench of this court, which was the same as had issued directions in ***Common Cause (I),*** made three directions which had the effect of clarifying/modifying the directions in ***Common Cause (I)*** . The first direction clarified that the time spent in criminal proceedings, wholly or partly, attributable to the dilatory tactics or prolonging of trial by action of the accused, or on account of stay of criminal proceedings secured by such accused from higher courts shall be excluded in counting the time-limit regarding pendency of criminal proceedings. Second direction

defined the terminus a quo, i.e. what would be the point of commencement of trial while working out 'pendency of trials' in Sessions Court, warrant cases and summons cases. In the third direction, the list of cases, by reference to nature of offence to which directions in ***Common Cause (I)*** would not apply, was expanded.

17. In ***Raj Deo Sharma (I),*** an accused charged with offences under Sections 5(2) & 5(1)(c) of the Prevention of Corruption Act, 1947 came up to this Court, having failed in High Court, seeking quashing of prosecution against him on the ground of violation of right to speedy trial. Against him the offence was registered in 1982 and chargesheet was submitted in 1985. The accused appeared on 24.4.1987 before the Special Judge. Charges were framed on 4.3.1993. Until 1.6.1995 only 3 out of 40 witnesses were examined. The three-Judge Bench of this Court, which heard the case, set aside the order passed by the High Court and sent the matter back to the Special Judge for passing appropriate orders in the light of its judgment. Vide para 17, the three-Judge Bench issued five further directions purporting to be supplemental to the propositions laid down in ***A.R. Antulay*** . The directions need not be reproduced and suffice it to observe that by dividing the offence into two categories - those punishable with imprisonment for a period not exceeding 7 years and those punishable with imprisonment for a period exceeding 7 years, the Court laid down periods of limitation by reference to which either the prosecution evidence shall be closed or the accused shall be released on bail. So far as the trial for offences is concerned, for the purpose of making directions, the Court categorized the offences and the nature and period of delay into two, which may be set out in a tabular form as under:-

Nature of offence	Nature and period of delay
Offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not	Completion of two years from the date of recording the plea of the accused on the charges framed, whether the prosecution has examined all the witnesses or not within the said period of two years.
Offence punishable with imprisonment for a period exceeding seven years, whether the accused is in jail or not	Completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period

18. The consequence which would follow on completion of two or three years, as abovesaid, is, the Court directed, that the trial Court shall close the prosecution evidence and can proceed to the next step of trial In respect of the second category, the Court added a rider by way of exception stating-"Unless for very exceptional reasons to be recorded and in the interest of justice, the Court considers it necessary to grant further time to the prosecution to adduce evidence beyond the aforesaid time limit" (of three years). The period of inability for completing prosecution evidence attributable to conduct of accused in protracting the trial and the period during which trial remained stayed by orders of the court or by operation of law was directed to be excluded from calculating the period at the end of which the prosecution evidence shall be closed. Further, the Court said that the directions made by it shall be in addition to and without prejudice to the directions issued in ***Common Cause (I)*** as modified in ***Common Cause (II)*** .

19. ***Raj Deo Sharma (I)*** came up once again for consideration of this Court in- ***Raj Deo Sharma*** v. ***State of Bihar*** MANU/SC/0607/1999 : 1999CriLJ4541 , hereinafter ***Raj Deo Sharma (II)*** . This was on an application filed by Central Bureau of Investigation (CBI) for clarification (and also for some modification) in the directions issued. The three-Judge Bench which heard the matter consisted of K.T. Thomas, J. and M. Srinivasan, J. who were also on the Bench issuing directions in ***Raj Deo Sharma (I)*** and M.B. Shah, J. who was not on the Bench in Raj Deo Sharma (I). In the submission of CBI the directions of the Court made in ***Raj Deo Sharma (I)*** ran counter to ***A.R. Antulay*** and did not take into account the time taken by the Court on account of its inability to carry on day to day trial due to pressure of work. The CBI also pleaded for the directions in ***Raj Deo Sharma (I)*** being made prospective only, i.e., period prior to the date of directions in ***Raj Deo Sharma (I)*** being excluded from consideration. All the three learned Judges wrote separate judgments. K.T. Thomas, J. by his judgment, to avert 'possibility of miscarriage of justice', added a rider to the directions made in ***Raj Deo Sharma (I)*** that an additional period of one year can be claimed by the prosecution in respect of prosecutions which were pending on the date of judgment in ***Raj Deo Sharma (I)*** and the Court concerned would be free to grant such extension if it considered it necessary in the interest of administration of criminal justice. M. Srinivasan, J. in his separate judgment, assigning his own reasons, expressed concurrence with the opinion expressed and the only clarification ordered to be made by K.T. Thomas, J. and placed on record his express disagreement with the opinion recorded by M.B. Shah, J.

20. M.B. Shah, J. in his dissenting judgment noted the most usual causes for delay in delivery of criminal justice as discernible from several reported cases travelling upto this Court and held that the remedy for the causes of delay in disposal of criminal cases lies in effective steps being taken by the Judiciary, the Legislature and the State Governments, all the three. The dangers behind constructing time-limit barriers by judicial dictum beyond which a criminal trial or proceedings could not proceed, in the opinion of M.B. Shah, J., are (i) it would affect the smooth functioning of the society in accordance with law and finally the Constitution. The victims left without any remedy would resort to taking revenge by unlawful means resulting in further increase in the crime and criminals. People at large in the society would also feel unsafe and insecure and their confidence in the judicial system would be shaken. Law would lose its deterrent effect on criminals; (ii) with the present strength of Judge and infrastructure available with criminal courts it would be almost impossible for the available criminal courts to dispose of the cases within the prescribed time-limit; (iii) prescribing such time-limits may run counter to the law specifically laid down by Constitution Bench in ***Antulay's case*** . In the fore-quoted thinking of M.B. Shah, J. we hear the echo of what Constitution Bench spoke in ***Kartar Singh*** v. ***State of Punjab*** - MANU/SC/0029/1956 : 1956CriLJ945 , vide para 351, "No doubt, liberty of a citizen must be zealously safeguarded by the courts; nonetheless the courts while dispensing justice in case like the one under the TADA Act, should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution."

21. At the end M.B. Shah, J. opined that order dated 8.10.1998 made in ***Raj Deo Sharma (I)*** requires to be held in abeyance and the State Government and Registrars of the High Courts ought to be directed to come up with specific plans for the setting up of additional courts/special courts (permanente de ad hoc) to cope up with the pending workload on the basis of available figures of

pending cases also by taking into consideration the criteria for disposal of criminal cases prescribed by various High Courts. In conclusion, the Court directed the application filed by the CBI to be disposed of in terms of the majority opinion.

22. A perception of the cause for delay at the trial and in conclusion of criminal proceedings is necessary so as to appreciate whether setting up bars of limitation entailing termination of trial or proceedings can be justified. The root cause for delay in dispensation of justice in our country is poor judge-population-ratio. Law Commission of India in its 120th Report on Manpower Planning in Judiciary (July 1987), based on its survey, regretted that in spite of Article 39A added as a major Directive Principle in the Constitution by 42nd Amendment (1976), obliging the State to secure such operation of legal system as promotes justice and to ensure that opportunities for securing justice are not denied to any citizen several reorganisation proposals in the field of administration of justice in India have been basically patch work, ad hoc and unsystematic solutions to the problem. The judge-population-ratio in India (based on 1971 census) was only 10.5 judges per million population while such ratio was 41.6 in Australia, 50.9 in England, 75.2 in Canada and 107 in United States. The law Commission suggested that India required 107 judges per million of Indian population; however to begin with the judge strength needed to be raised to five-fold, i.e., 50 judges per million population in a period of five years but in any case not going beyond ten years. Touch of sad sarcasm is difficult to hide when the Law Commission observed (in it 10th Report, ibid) that adequate reorganisation of the Indian judiciary is at the one and at the same time everybody's concern and, therefore, nobody's concern.

There are other factors contributing to the delay at the trial. In ***A.R. Antulay's case,*** vide para 83, the Constitution Bench has noted that in spite of having proposed to go on with the trial of a case, five days a week and week after week, it may not be possible to conclude the trial for reasons, viz. (1) non-availability of the counsel, (2) non-availability of the accused, (3) introductory proceedings, and (4) other systemic delays. In addition, the Court noted that in certain cases there may be a large number of witnesses and in some offences, by their very nature, the evidence may be lengthy. In ***Kartar Singh*** v. ***State of Punjab*** MANU/SC/0029/1956 : 1956CriLJ945 : 1956CriLJ945 another Constitution Bench opined that the delay is dependent on the circumstances of each case because reasons for delay will vary, such as (i) delay in investigation on account of the widespread ramifications of crimes and its designed network either nationally or internationally, (ii) the deliberate absence of witness or witnesses, (iii) crowded dockets on the file of the court etc. In ***Raj Deo Sharma (II)*** , in the dissenting opinion of M.B. Shah, J., the reasons for delay have been summarized as, (1) Dilatory proceedings; (2) Absence of effective steps towards radical simplification and streamlining of criminal procedure; (3) Multitier appalls revision applications and diversion to disposal of interlocutory matters; (4) Heavy dockets; mounting arrears delayed service of process; and (5) Judiciary, starved by executive by neglect of basic necessities and amenities, enabling smooth functioning.

23. Several cases coming to our notice while hearing appeals, petitions and miscellaneous petitions (such as for bail and quashing of proceedings) reveal, apart from inadequate judge strength, other factors contributing to the delay at the trial. Generally speaking, these are: (i) absence of or delay in appointment of, public prosecutors proportionate with the number of courts/cases; (ii) absence of or belated service of summons and warrants on the accused/witnesses; (iii) non-production of undertrial prisoners in the Court; (iv) presiding Judge proceeding on leave, though the cases are

fixed for trial; (v) strikes by members of Bar; and (vi) counsel engaged by the accused suddenly declining to appear or seeking an adjournment for personal reasons or personal inconvenience. It is common knowledge that appointments of public prosecutors are politicized. By convention, government advocates and public prosecutors were appointed by the executive on the recommendation of or in consultation with the head of judicial administration at the relevant level but gradually the executive has started bypassing the merit based recommendations of, or process of consultation with, District and Sessions, Judges. For non-service of summons/orders and non-production of under trial prisoners, the usual reasons assigned are shortage of police personnel and police people being busy in VIP duties or law and order duties. These can hardly be valid reasons for not making the requisite police personnel available for assisting the Courts in expediting the trial. The members of the Bar shall also have to realize and remind themselves of their professional obligation-legal and ethical, that having accepted a brief for an accused they have no justification to decline or avoid appearing at the trial when the case is taken up for hearing by the Court. All these factors demonstrate that the goal of speedy justice can be achieved by a combined and result-oriented collective thinking and action on the part of the Legislature, the Judiciary, the Executive and representative bodies of members of Bar.

24. Is it at all necessary to have limitation bars terminating trials and proceedings? is there no effective mechanisms available for achieving he same end? The Criminal Procedure Code, as it stands, incorporates a few provisions to which resort can be had for protecting the interest off the accused and saving him from unreasonable prolixity or laxity at the trial amounting to oppression. Section 309, dealing with power to postpone or adjourn proceedings, provides generally for every inquiry or trial, being proceeded with as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same to be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. Explanation-2 to Section 309 confers power on the Court to impose costs to be paid by the prosecution or the accused, in appropriate cases, and putting the parties on terms while granting an adjournment or postponing of proceedings. This power to impose costs is rarely exercised by the Courts, Section 258, in Chapter XX of Cr.P.C. on Trial of Summons-cases, empowers the Magistrate trying summons cases instituted otherwise than upon complaint, for reasons to be recorded by him, to stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, to pronounce a judgment of acquittal, and in any other case, release the accused, having effect of discharge. This provision is almost never used by the Courts.

In appropriate cases, inherent power of the High Court, under Section 482 can be invoked to make such orders, as may be necessary, to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any Court, or otherwise, to secure the ends of justice. The power is wide and, if judiciously and consciously exercised, a can take care of almost all the situations where interference by the High Court becomes necessary on account of delay in proceedings or for any other reason amounting to oppression or harassment in any trial, inquiry or proceedings. In appropriate cases, the High Courts have exercise their jurisdiction under Section 482 of Cr.P.C. for quashing of first information report and investigation, and terminating criminal proceedings if the case of abuse of process of law was clearly made out. Such power can certainly be exercised on a case being made out of breach of fundamental right conferred by Article 21 of

the Constitution. The Constitution Bench in ***A.R. Antulay's case*** referred to such power, vesting in the High Court (vide paras 62 and 65 of its judgment) and held that it was clear that even apart from Article 21, the Courts can take care of undue or inordinate delays in criminal matters or proceedings if they remain pending for too long and putting to an end, by making appropriate orders, to further proceedings when they are found to be oppressive and unwarranted.

25. Legislation is that source of law which consists in the declaration of legal rules by a competent authority. When judges by judicial decisions lay down a new principle of general application of the nature specifically reserved for legislature they may be said to have legislated, and not merely declared the law. Salmond on Principles of Jurisprudence (12th Edition) goes on to say-

"We must distinguish law-making by legislators from law-making by the courts. Legislators can lay down rules purely for the future and without reference to any actual dispute; the courts, insofar as they create law, can do so only in application to the cases before them and only insofar as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator'(page 115).
It is not difficult to perceive the dividing line between permissible legislation by judicial directives and enacting law-the field exclusively reserved for legislature. We are concerned here to determine whether in prescribing various periods of limitation, adverted to above, the Court transgressed the limit of judicial legislation.

26. Bars of limitation judicially engrafted, are no doubt , meant to provide a solution to the aforementioned problems. But a solution of this nature gives rise to grater problems like scuttling a trial without adjudication, stultifying access to justice and giving easy exit from the portals of justice. Such general remedial measures cannot be said to be apt solutions. For two reasons we hold such bars of limitation uncalled for and impermissible; first, because it tantamount to impermissible legislation- an activity beyond the power which the Constitution confers on judiciary, and secondly, because such bars of limitation fly in the face of law laid down by Constitution Bench in ***A.R. Antulay's case*** and, therefore, run counter to the doctrine of precedents and their binding efficacy.

27. In am monograph "Judicial Activism and Constitutional Democracy in India" commended by Professor Sir William Wade, Q.C. as a "small book devoted to a big subject", the learned author, while recording appreciation of judicial activism, sounds a note of caution-"it is plain that the judiciary is the least competent to function as a legislative or the administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if court have to rely on their own knowledge or research it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts have also no method to reverse their orders if they are found unworkable or requiring modification". Highlighting the difficulties which the courts are likely to encounter if embarking in the fields of legislation or administration, the learned author advises "the Supreme Court could have well left the decision-

making to the other branches of government after directing their attention to the problems rather than itself entering the remedial field".

28. The primary function of judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by Legislation. Patrick Devlin in 'The Judge' (1979) refers to the role of the Judge as lawmaker and states that there is no doubt that historically judges did not make law, at least in the sense of formulating it. Even now when they are against innovation, they have never formally abrogated their powers; their attitude is;" We could if we would but we think it better not' But as a matter of history did the English judges of the golden age make law? They decided case which worked up into principles. The judges, as Lord Wright once put it in an unexpectedly picturesque phrase, proceeded 'from case to case, like the ancient Mediterranean mariners, hugging the coast from point and avoiding the dangers of the open sea of system and science. The golden are judges were not rationalisers and, except in the devising of procedures, they were not innovators. They did not design a new machine capable of speeding ahead; they struggled with the aid of fictions and bits of procedural string to keep the machine on the road.

29. Professor S.P. Sathe, in his recent work (Year 2002) "Judicial Activism in India-Transgressing Borders and Enforcing Limits", touches the topic "Directions: A New Form of Judicial Legislation". Evaluating legitimacy of judicial activism, the learned author has cautioned against Court "legislating" exactly in the way in which a Legislature legislates and he observes by reference to a few case that the guidelines laid down by court, at times, cross the border of judicial law making in the realist sense and trench upon legislating like a Legislature.

"Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court." (p.242). " In a strict sense these are instances of judicial excessive that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law,' of 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law.. thought directions.... is not legitimate judicial function." (p.220).

30. Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may interpret Articles 32 21 141 and 142 of the Constitution. The dividing line in fine but perceptible.

Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time limits or chalking out a calendar for proceedings to follow, to redeem the injustice done or for taking care of rights violated in a given case or set of cases, depending on facts brought to the notice of Court. This is permissible for judiciary to do. But it may not, like legislature, enact a provision akin to or on the liens of Chapter XXXVI of the Code of Criminal Procedure, 1973.

31. The other reason why the bars of limitation enacted in ***Common Cause (I), Common Cause (II)*** and ***Raj Deo Sharma (II)*** and ***Raj Deo Sharma (II)*** cannot be sustained is that these decisions though two or three-judge Bench decisions run counter to that extent to the dictum of Constitution Bench in ***A.R. Antulay's case*** and therefore cannot be said to be good law to the extent they are in breach of the doctrine of precedents. The well settled principle of precedents which has crystalised into a rule of law is that a bench of lesser strength is bound by the view expressed by a bench of larger strength and cannot take a view in departure or in conflict therefore. We have in the earlier part of this judgment extracted and reproduced passages from ***A.R. Antulay's case*** . The Constitution Bench turned down the fervent plea of proponents of right to speedy trial for laying down time-limits as bar beyond which a criminal proceedings or trial shall not proceed and expressly ruled that it was neither advisable nor practicable (and hence not judicially feasible) to fix and time-limit for trial of offences. Having placed on record the exposition of law as to right to speedy trial flowing from Article 21 of the Constitution this Court held that it was necessary to leave the rule as elastic and not to fix it in the frame of defined and rigid rules. It must be left to the judicious discretion of the court seized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed upto a given point of time amounted to violation of Article 21, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead. The test is whether the proceedings or trial has remained. pending for such a length of time that he inordinate delay can legitimately be called oppressive and unwarranted, as suggested in ***A.R. Antulay*** . In ***Kartar Singh's cases*** (supra) the Constitution Bench while recognising the principle that the denial of an accused' right of speedy trial may result, in a decision to dismiss the indictment or in reversing of a conviction, went on to state, "Of course, no length of time is per se too long pass scrutiny under this principle nor the accused is called upon to show the actual prejudice by delay of disposal of cases. On the other hand, the court has to adopt a balancing approach by taking note of the possible prejudices and disadvantages to be suffered by he accused by avoidable delay and to determine whether the accused in a criminal proceedings has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors-(1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused the such delay." (para 92).

32. For all the foregoing reasons, we are of the opinion that in ***Common Cause case (I)*** (as modified in Common Cause (II) and ***Raj Deo Sharma (I) and (II)*** , the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceedings cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:-

(1) The dictum in ***A.R. Antulays' case*** is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in ***A.R. Antulays' case*** , adequately take care of right to speedy trial. We uphold and re-affirm the said propositions.

(3) The guidelines laid down in A.R. Antulay's case are not exhaustive but only illustrative. They are not intended to operate as hard and fast rules or to be applied like a strait-jacket formula. Their applicability would depend on the fact-situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe can outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in ***Common Cause (I), Raj Deo Sharma (I)*** and ***Raj Deo Sharma (II)*** could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made uncommon ***Cause Case (I), Raj Deo Sharma case (I) and (II)*** . At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay's case and decided whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any Court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

(5) The Criminal Courts should exercise their available powers. such as those under Sections 309 311 and 258, of Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial judge can prove to be better protector of such right than any guidelines. In appropriate cases jurisdiction of High Court under Section 482 of Cr.P.C. and Articles 226 and 227 of Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary-quantitatively and qualitatively-by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act.

33 We answer the questions posed in the orders of reference dated September 19, 2000 and April 26,2001 in the abovesaid terms.

34. The appeals are allowed. The impugned judgments of the High Court are set aside. As the High Court not have condoned the delay in filing of he appeals and then allowed the appeals without noticing the respective accused-respondents before the High Court, now the High Court shall hear and decide the appeals afresh after noticing the accused-respondent before it in each of the appeals and consistently with he principles of law laid down hereinabove.

35. Before we may part, we would like to make certain observations ex abundanti cantela:

36. Firstly, we have dealt with the directions made by this Court in ***Common Cause Case I and II*** and ***Raj Deo Sharma Case I and II*** regarding trial of cases. The directions made in those cases regarding enlargement of accused persons on bail are not subject matter of this reference or these appeals and we have consciously abstained from dealing with legality, propriety or otherwise of directions in regard to bail. This is because different considerations arise before the criminal courts while dealing with termination of a trial or proceedings and while dealing with right of accused to be enlarged on bail.

37. Secondly, though we are deleting the directions made respectively by two and three-Judge Benches of this Court in the cases under reference, for reasons which we have already stated, we should not, even for a moment, be considered as having made a departure from the law as to speedy trial and speedy conclusion of criminal proceedings of whatever nature and at whichever stage before any authority or the court. It is the constitutional obligation of the State to dispense speedy justice, more so in the field of criminal law, and paucity of funds or resources is no defence to denial of right to justice emanating from Articles 21 19 and 14 and the Preamble of the Constitution as also from the Directive Principles of State Policy. It is high time that the Union of India and the various States realize their constitutional obligation and do something concrete in the direction of strengthening the justice delivery system. We need to remind all concerned of what was said by this Court in ***Hussainara Khatoon (IV)*** - MANU/SC/0121/1979 : 1979CriLJ1045 : 1979CriLJ1045 , "The State cannot be permitted to deny the constitutional right of speedy trial to the accuse don the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrate and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and is priorities ion expenditure, but, the

law does not permit any government to deprive its citizens of constitutional rights on a plea of poverty's, or administrative inability."

38. Thirdly, we are deleting the bars of limitation on the twin grounds that it amounts to judicial legislation, which is not permissible, and because they run counter to the doctrine of binding precedents. The larger question of powers of the court to pass orders and issue directions in public interest or in social action litigations, specially by reference to Articles 32 141 142 and 144 of the Constitution, is not subject matter of reference before us and this judgment should not be read as an interpretation of those Articles of the Constitution and laying down, defining or limiting the scope of the powers exercisable thereunder by this Court.

39. And lastly, it is clarified that this decision shall not be a ground for re-opening a case or proceedings by setting aside any such acquittal or discharge as is based on the authority of ' ***Common Cause'*** and ' ***Raj Deo Sharma'*** cases and which has already achieved finality and re-open the trial against the accused therein.

Doraiswamy Raju, J.

40. I have had the privilege of going through the judgment of esteemed and learned brother R.C. Lahoti, J., while I am in respectful agreement that the appeals are to be allowed and remitted to

the High Court to be heard and decided afresh, I feel compelled to express my reservation and inability to subscribe to some of the observations contained therein relating to the powers and jurisdiction of this Court.

41. The declaration of law made by the Constitution Bench of five learned Judges of this Court in the decision reported in ***A.R. Antulay's*** case MANU/SC/0326/1992 : 1992CriLJ2717 : 1992CriLJ2717 still holds the field and its binding force and authority has not been undermined or whittled down or altered in any manner by an other decision of a larger Bench. Consequently, the Benches of lesser number of Constitution of Judges which dealt with the cases reported in " ***Common Cause" a Regd. Society through its Director*** v. ***Union of India and Ors.*** MANU/SC/1152/1996 : 1996CriLJ2380 ***"Common Cause" A Regd. Society through its Director*** v. ***Union of India and Ors.*** [(1996) 6 SCC 775]; ***Raj Deo Sharma*** v. ***State of Bihar*** MANU/SC/0640/1998 : 1998CriLJ4596 : 1998CriLJ4596 and ***Raj Deo Sharma (II)*** v. ***State of Bihar*** MANU/SC/0607/1999 : 1999CriLJ4541 could not have laid down any principles in derogation of the ratio laid down in ***A.R. Antulay's*** case (supra) either by way of elaboration, expansion, clarification or in the process of trying to distinguish the same with reference to either the nature of causes considered therein or the consequences which are likely to follow and which, in their view, deserve to be averted. Even where necessities or justification, if any, were found therefor, there could not have been scope for such liberties being taken to transgress the doctrine of binding precedents, which has come to stay firmly in our method of Administration of Justice and what is permissible even under such circumstances being only to have had the matter referred to for reconsideration by a larger Bench of this Court and not to deviate by no other means. The solitary reason would suffice by itself to overrule the above decisions, the correctness of which stand referred to for consideration by this Bench. All the more so when, there is no reason to doubt the correctness of the decision in ***A.R. Antulay's*** case (supra) and this Bench concurs with the principles laid down therein.

42. Though this Court does not consider itself to be an *Imperium in Imperio* or would function as a despotic branch of 'The State', the fact that the founding fathers of our Constitution designedly and deliberately, perhaps, did not envisage the imposition of any jurisdiction embargo on this Court, except in Article 363 of the Constitution of India is significant and sufficient enough, in my view, to identify the depth and width or extent of this powers. The other fetters devised or perceived on its exercise of powers or jurisdiction to entertain/deal with a matter were merely self-imposed for one or the other reason assigned therefore and they could not stand in the way of or deter this Court in any manner from rising up to respond in a given situation as and when necessitated and effectively play its role in accommodating the Constitution to changing circumstances and enduring values as a 'Sentinel on the qui vive' to preserve and safeguard the Constitution, prefect and enforce the fundamental rights and other constitutional mandates - which constitute the inviolable rights of the people as well as those features, which formed its basic structure too and considered to be even beyond the reach of any subsequent constitutional amendment. In substance, this Court, in my view, is the ultimate repository of all judicial powers at National level by virtue of it being the Summit Court at the pyramidal height of Administration of Justice in the country and as the upholder and final interpreter of the Constitution of India and defender of the fundamentals of 'Rule of Law'.

43. It is not only difficult but impossible to foresee and enumerate all possible situations arising, to provide in advance solutions with any hard and fast rules of universal application for all times to come. It is well known that where there is right, there should be a remedy. In what exceptional cases, not normally visualized or anticipated by law, what type of an extra-ordinary remedy must be devised or designed to solve the issue arising would invariably depend upon the gravity of the situation, nature of violation and efficacy as well as utility of the existing machinery and the imperative need or necessity to find a solution even outside the ordinary framework or avenue or remedies to avert any resultant damage beyond repair or redemption, to any person. Apparently, in my view, alive to such possibilities only even this Court in ***A.R. Antulay's case*** (supra) has chosen to decline the request for fixation of any period of time limit for trial of offences not on any total want or lack of jurisdiction in this Court, but for the reason that it is "neither advisable nor practicable" to fix any such time limit and that the non-fixation does not in effectuate the guarantee of right to speedy trial. The prospects and scope to achieve the desired object of a speedy trial even within the available procedural safeguards and avenues provided for obtaining relief, have also been indicated in the said decision as well as in the judgment prepared by learned brother R.C. Lahoti, J. I am of the firm opinion that this Court should never venture to disown its own jurisdiction on any area or in respect of any matter or over any one authority or person, when the Constitution is found to be at stake and the Fundamental Rights of citizens/persons are under fire, to restore them to their position and uphold the Constitution and the Rule of Law-for which this Court has been established and constituted with due primacy and necessary powers authority and jurisdiction, both express and implied.

44. Except dissociating myself from certain observations made expressing doubts about the jurisdiction of this Court, for the reasons stated above, I am in entire agreement with the other reasons and conclusions in the judgment.

Back to Index

MANU/SC/0330/2002

Neutral Citation: 2002/INSC/202

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 992 of 2002

Decided On: 16.04.2002

Appellants: Pradeep Kumar Biswas and Ors. **Vs.** Respondent: Indian Institute of Chemical Biology and Ors.

Hon'ble Judges/Coram:

S.P. Bharucha, C.J., S.S.M. Quadri, R.C. Lahoti, N. Santosh Hegde, Doraiswamy Raju, Ruma Pal and Dr. Arijit Pasayat, JJ.

Subject: Service

Relevant Section:

Constitution of India - Article 14

Disposition:
Appeal Dismissed

Authorities Referred:

Black's Law Dictionary (Seventh Edition); Webster Comprehensive Dictionary (International Edition); Webster's Third New International Dictionary; Law Lexicon by P. Ramnath Iyer

Cases Overruled/Partly Overruled:

Sabhajit Tewari v. Union of India, (1975) 3 SCR 616, (1975) 1 SCC 485, 1975 SCC (L&S) 99, AIR 1975 SC 1329; Chander Mohan Khanna v. National Council of Educational Research and Training and Ors., 1991 (4) SCC 578, 1992 SCC (L&S) 109, (1992) 19 ATC 71

Case Note:

Constitution - Equality - Meaning of State and Authority under article 12 of the Constitution - Council of Scientific and Industrial Research (CSIR) - Stenographers with CSIR filed writ petition under Article 32 claiming parity of remuneration with the newly recruited

stenographers to the CSIR- CSIR whether State or Authority amenable to writ jurisdiction under Article 32- CSIR is financially, functionally and administratively dominated by or under the control Govt., thus well within the range of Article 12 of the Constitution - Notification issued by the Central Govt. in 1986 under Section 14(2) of the Administrative Tribunals Act, 1985 serves in removing any residual doubts about the nature of CSIR - Five judges Bench decision of Supreme Court in Sabhajit Tewari Vs. U.O.I overruled.

[Majority per S.P. Barucha, CJI, S.S.M. Quadri, and Santosh Hegde, Rama Pal and Arijit Pasayat, JJ]

[Minority View per R.C. Lahoti & Doraiswamy Raju, JJ] - Council for Scientific and Industrial Research (CSIR) is not the state within the meaning of Article 12 of the Constitution - Sabhajit Tewari's case was correctly decided and must hold field.

JUDGMENT

Ruma Pal, J.

1. In 1972 Sabhajit Tewary, a Junior Stenographer with the Council of Scientific and Industrial Research (CSIR) filed a write petition under Article 32 of the Constitution claiming parity of remuneration with the stenographers who were newly recruited to the CSIR. His claim was based on Article 14 of the Constitution. A Bench of five judges of this Court denied him the benefit of that Article because they held in **Sabhajit Tewari v. Union of India** that the writ application was not maintainable against CSIR as it was not an "authority" within the meaning of Article 12 of the Constitution. The correctness of the decision is before us for re-consideration.

2. The immediate cause for such re-consideration is a write application filed by the appellant in Calcutta High Court challenging the termination of their services by the respondent No. 1 which is a unit of CSIR. They prayed for an interim order before the learned Single Judge. That was refused by the Court on the prima view that the writ application was itself not maintainable against the respondent No. 1. The appeal was also dismissed in view of the decision of this Court in **Sabhajit Tewary's case.**

3. Challenging the order of the Calcutta High Court, the appellants filed an appeal by way of special leave before this Court. On 5th August, 1986 a Bench of two Judges of this Court referred the matter to a Constitution Bench being of the view that the decision in **Sabhajit Tewary** required re-consideration "having regard to the pronouncement of this Court in several subsequent decisions in respect of several other institutes of similar nature set up by the Union of India".

4. The questions therefore before us are - is the CSIR a State within the meaning of Article 12 of the Constitution and if it is should this Court reverse a decision which has stood for over a quarter of a century?

5. The Constitution has to an extent defined the word 'State' in Article 12 itself as including:

"the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India".

6. That an 'inclusive' definition is generally not exhaustive is a statement of the obvious and as far as Article 12 is concerned,has been so held by this Court. The words 'State' and 'Authority' used in Article 12 therefore remain, to use the words of Cardozo, among "the great generalities of the Constitution "the content of which has been and continues to be supplied by Courts from time to time.

7. It would be a practical impossibility and an unnecessary exercise to note each of the multitude of decisions on the point. It is enough for our present purposes to merely note that the decisions may be categorized broadly into those which express an arrow and those that express a more liberal view and to consider some decisions of this Court as illustrative of this apparent divergence. In the ultimate analysis the difference may perhaps be attributable to different stages in the history of the development of the law by judicial decisions on the subject.

8. But before considering the decisions in must be emphasized that the significance of Article 12 lies in the fact that it occurs in Part III of the Constitution which deals with fundamental rights. The various Articles in Part-III have placed responsibilities and obligations on the 'State' vis-a-vis the individual to ensure constitutional protection of the individual's rights against the state, including the right to equality under Article 14 and equality of opportunity in matters of public employment under Article 16 and most importantly the right to enforce all or any of these fundamental rights against the 'State' as defined in Article 12 either under Article 32 by this Court or under Article 226 by the High Courts by issuance of writs or directions or orders.

9. The range and scope of Article 14 and consequently Article 16 have widened by a process of judicial interpretation so that the right to equality now not only means the right not to be discriminated against but also protection against any arbitrary or irrational act of the State. It has been said that:

"Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment".

10. Keeping pace with this broad approach to the concept of equality under Article 14 and 16, Courts have whenever possible, sought to curb an arbitrary exercise of power against individuals by 'centers of power', and there was correspondingly an expansion in the judicial definition of 'State' in Article 12.

11. Initially the definition of State was treated as exhaustive and confined to the authorities or those which could be read *ejusdem generis* with the authorities mentioned in the definition of Article 12 itself. The next stage was reached when the definition of 'State' came to be understood with reference to the remedies available against it. For example, historically, a writ of mandamus was available for enforcement of statutory duties or duties of a public nature. Thus a statutory corporation, with regulations farmed by such Corporation pursuant to statutory powers was considered a State, and the public duty was limited to those which were created by statute.

12. The decision of the Constitution Bench of this Court in **Rajasthan Electricity Board v. Mohan Lal and Ors. MANU/SC/0360/1967 : (1968)ILLJ257SC** is illustrative of this. The question there was whether the Electricity Board - which was a Corporation constituted under a statute primarily for the purpose of carrying on commercial activities could come within the definition of 'State' in Article 12.After considering earlier decisions, it was said:

"These decisions of the Court support our view that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities".

13. It followed that since a Company incorporated under the Companies Act is not formed statutorily and is not subject to any statutory duty via a vis an individual, it was excluded from the preview of 'State' In **Praga Tools Corporation v. Shri C.A.Imanual and Ors.** where the question was whether an application under Article 226 for issuance of a writ of mandamus would lie impugning an agreement arrived at between a Company and its workmen, the Court held that:

"....there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court,therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company".

14. By 1975 Mathew, J. in **Sukhdev Singh and Ors. v.Bhagatram Sardar Singh Raghuvanshi and Ors.** noted that the concept of "State" in Article 12 had undergone "drastic changes in recent year". The question in that case was whether the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation each of which were public corporations set up by statutes were authorities and therefore within the definition of State in Article 12. The Court affirmed the decision in **Rajasthan State Electricity Board v. MohanLal** (supra) and held that the Court could compel compliance of statutory rules. But the majority view expressed by A.N. Ray, CJ also indicated that the concept would include a public authority which:

"is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making profit for the public benefit".

(emphasis added)

15. The use of the alternative is significant. The Court scrutinised the history of the formation of the three Corporations,the financial support given by the Central Government, the utilization of the finances so provided, the nature of service rendered and noted that despite the fact that each of the Corporations on profits earned by it nevertheless the structure of each of the Corporation showed that the three Corporations represented the 'voice and hands' of the Central Government. The Court came to the conclusion that although the employees of the three Corporations were not servants of the Union or the State,"these statutory bodies are 'authorities' within the meaning of Article 12 of the Constitution".

16. Mathew J. in his concurring judgment went further and propounded a view which presaged the subsequent development sin the law. He said:

"A state is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore,there is nothing strange in the notion of the state acting through a corporation and making it an agency or instrumentality of the State....."

17. For identifying such an agency or instrumentality he propounded four indicia:

(1) "A finding of the state financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as state action."

(2) ..... "Another factor which might be considered is whether the operation is an important public function."

(3) "The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to a governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description then mere addition of state money would not influence the conclusion."

(4) "The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business?"

18. **Sabhajit Tewary** was decided by the same Bench on the same day as **Sukhdev Singh** (supra). The contentions of the employee was the CSIR is an agency of the Central Government on the basis of the CSIR Rules which, it was argued, showed that the Government controlled the functioning of CSIR in all its aspect. The submission was some what cursorily negatived by this Court on the ground that all this

....."will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and Industrial Research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner."

19. Although the Court noted that it was the Government which was taking the "special care" nevertheless the writ petition was dismissed ostensibly because the Court factored into its decision two premises:

i) "The society does not have a statutory character like the Oil and Natural Gas Commission or the Life Insurance Corporation or Industrial Finance Corporation. It is a Society incorporated inaccordance with the provisions of the Society's Registration Act", and

ii) "This Court has held in Praga Tools Corporation v. Shri C.A. Imanual and Ors. MANU/SC/0327/1969 : (1969)IILLJ479SC . Heavy Engineering Mazdoor Union v. The State of Bihar and Ors. MANU/SC/0309/1969 : (1969)IILLJ549SC and in S.L. Agarwal v. General Manager Hindustan Steel Ltd. MANU/SC/0498/1969 : (1970)IILLJ499SC : (1970)IILLJ499SC that the Praga Tools Corporation, Heavy Engineering Mazdoor Union and Hindustan Steel Ltd. are all companies incorporated under the Companies Act and the employees of these companies do not enjoy the protection available to Government servants as contemplated in Article 311. the Companies were held in these cases to have independent existence of the Government and by the law relating to corporations. These could not be held to be departments of the Government".

20. With respect, we are of the view that both the premises were not really relevant and in fact contrary to the 'voice' and 'hands' approach in **Sukhdev Singh** . Besides reliance by the Court on decisions pertaining to Article 311 which is contained in Part XIV of the Constitution was inapposite. What was under consideration was Article 12 which by definition is limited to Part III and by virtue of Article 36 to Part IV of the Constitution. as said by another Constitution Bench later in this context:

"Merely because a juristic entity may be an "authority" and therefore "State" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in Part XIV. The definition of "State" in Article 12 which includes an "authority" within the territory of India or under the control of the Government of India is (sic) in its application only to Part III and by virtue of Article 36, to Part IV: it does note xtend to the other provisions of the Constitution and hence a juristic entity which may be "State" for the purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. This is why the decisions of this Court in *S.L. Aggarwal v. Hindustan Steel Ltd.* , and other cases involving the applicability of Article 311 have no relevance to the issue before us".

21. Normally, a precedent like **Sabhajit Tewary** which has stood for a length of time should not be reversed, however erroneous the reasoning if it has stood unquestioned, without its reasoning being 'distinguished' out of all recognition by subsequent decisions and if the principles enunciated in the earlier decision can stand consistently and be reconciled with subsequent decisions of this Court, same equally authoritative. In our view **Sabhajit Tewary** fulfills both conditions.

22. Side-stepping the majority approach in **Sabhajit Tewary,** the 'drastic changes' in the perception of 'State' heralded in **Sukhdev Singh** by Mathew, J and the tests formulated by him were affirmed and amplified in **Ramana v. International Airport Authority of India** . Although the International Airport Authority of India is a statutory corporation and therefore within the accepted connotation of State, the Bench of three Judges developed the concept of State, The rationale for the approach was the one adopted Mathew J. in **Sukhdev Singh** :

....." In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge

governmental functions, which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the frame work of civil service was not sufficient to handle the new tasks which were often of specialised and highly technical character. The inadequacy of the civil service to deal with these new problems came to be realized and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm on the Government".

23. From this perspective, the logical sequitur is that it really does not matter what guise the State adopts for this purpose, whether by a Corporation established by statute or incorporated under a law such as the Companies Act or formed under the Societies Registration Act, 1860. Neither the form of the Corporation, nor its ostensible autonomy would take away from its character as 'State' and its constitutional accountability under Part III vis-a-vis the individual if it were in fact acting as an instrumentality or agency of Government.

24. As far as **Sabhajit Tewary** was concerned it was 'explained' and distinguished in **Ramana** saying:

"The Court no doubt took the view on the basis of facts relevant to the constitution and functioning of the Council that it was not an 'authority', but we do not find any discussion in this case as to what are the features which must be present before a corporation can be regarded as an 'authority' within the meaning of Article 12. This decision does not lay down any principle or test for the purpose of determining when a corporation can be said to be an 'authority'. If at all any test can be gleaned from the decision, it is whether the Corporation is 'really an agency of the Government'. The Court seemed to hold on the facts that the Council was not an agency of the Government and was, therefore, not an 'authority'".

25. The tests propounded by Mathew, J in **Sukhdev Singh** were elaborated in Ramana and were re-formulated two years later by a Constitution Bench in **Ajay Hasia v. Khalid Mujib Sehravardi** . What may have been technically characterised as 'obiter dicta' in **Sukhdev Singh** and **Ramana** (since in both cases the "authority" in fact involved was a statutory corporation), formed the ratio decidendi of **Ajay Hasia** . The case itself dealt with a challenge under Article 32 to admissions made to a college established and administered by a Society registered under the Jammu & Kashmir Registration of Societies Act 1898. The contention of the Society was that even if there were an arbitrary procedure followed for selecting candidates for admission, and that this may have resulted in denial of equality to the petitioners in the matter of admission in violation of Article 14, nevertheless Article 14 was not available to the petitioners because the Society was nota State within Article 12.

The Court recognised that:

.... " Obviously the Society cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression "other authorities" if it is to fall within the definition of 'State' ".

But it said that:

"The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the government or through the corporate personality of which the government is acting, so as to subject the government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the Fundamental Rights".

26. It was made clear that the genesis of the corporation was immaterial and that:

..... " The concept of instrumentality or agency of the government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the government so as to come within the meaning of the expression "authority" in Article 12".

27. **Ramana** was noted and quoted with approval in extenso and the tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government therein were culled out and summarised as follows:

(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor.....whether the corporation enjoys monopoly status which is State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related a governmental functions it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

28. In dealing with **Sabhajit Tewary** the Court in Ajay Hasia noted that since **Sabhajit Tewary** was a decision given by a Bench of Five Judges of this Court it was undoubtedly binding. The Court read **Sabhajit Tewary** as implicity assenting to the proposition that CSIR could have been

an instrumentality of agency of the Government even though it was a Registered Society and limited the decision to the facts of the case. It held that the Court in **Sabhajit Tewari** :

"did not rest its conclusion on the ground that the council was a society registered under the Societies Registration Act, 1860, but proceeded to consider various other features of the council for arriving at the conclusion that it was not an agency of the government and therefore not an 'authority'".

29. The conclusion was then reached applying the test formulated to the facts that the Society in **Ajay Hasia** was an authority falling within the definition of "State" in Article 12.

30. On the same day that the decision in **Ajay Hasia** was pronounced came the decision of **Som Prakash Rekhi v. Union of India** . Here too, the reasoning in Ramana was followed and Bharat Petroleum Corporation was held to be a 'State' within the "enlarged meaning of Article 12". Sabhajit Tewary was criticised and distinguished as being limited to the facts of the case. It was said:

"The rulings relied on are, unfortunately, in the province of Article 311 and it is clear that a body may be 'State' under Part III but not under Part XIV. Ray, C.J., rejected the argument that merely because the Prime Minister was the Present or that the other members were appointed and removed by Government did not make the Society a 'State'. With great respect, we agree that in the absence of the other features elaborated in Airport Authority case MANU/SC/0048/1979 : (1979)IILLJ217SC : (1979)IILLJ217SC the composition of the Government Body alone may not be decisive. The laconic discussion and the limited ratio in Tewary MANU/SC/0059/1975 : (1975)ILLJ374SC : (1975)ILLJ374SC hardly help either side here."

31. The tests to determine whether a body falls within the definition of 'State' in Article 12 laid down in **Ramana** with the Constitution Bench imprimatur in **Ajay Hasia** form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited.

32. In **P.K. Ramachandra Iyer and Ors. v. Union of India and Ors. MANU/SC/0395/1983 : (1984)ILLJ314SC** , it was held that both the Indian Council of Agricultural Research (ICAR) and its affiliate Indian Veterinary Research Institute were bodies as would be comprehended in the expression 'other authority' in Article 12 of the Constitution. Yet another judicial blow was dealt to the decision in **Sabhajit Tewary** when it was said:

"Much water has flown down the Jamuna since the dicta in **Sabhajit Tewary case** and conceding that it is not specifically overruled in later decision, its ratio is considerably watered down so as to be a decision confined to its own facts."

33. **B.S. Minhas v. Indian Statistical Institute and Ors.** held that the Indian Statistical Institute, a registered Society is an instrumentality of the Central Government and as such is an 'authority' within the meaning of Article 12 of the Constitution. The basis was that the composition of respondent No. 1 is dominated by the representatives appointed by the Central Government. The money required for running the Institute is provided entirely by the Central Government and even

if any other moneys are to be received by the Institute it can be done only with the approval of the Central Government, and the accounts of the Institute have also to be submitted to the Central Government for its scrutiny and satisfaction. The Society has to comply with all such directions as may be issued by the Central Government. It was held that the control of the Central Government is deep and pervasive.

34. The decision in **Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguli** held that the appellant company was covered by Article 12 because it is financed entirely by three Governments and is completely under the control of the Central Government and is managed by the Chairman and Board of Directors appointed by the Central Government and removable by it and also that the activities carried on by the Corporation are of vital national importance.

35. However, the tests propounded in **Ajay Hasia** were not applied in **Tekraj Vasandi alias K.S. Basandhi v. Union of India and Ors. 1988 (1) SCC 237** , where the Institute of Constitutional and Parliamentary Studies (ICPS), a society registered under the Societies Registration Act, 1860 was held not to be an "other authority" within the meaning of Article 12.The reasoning is not very clear. All that was said was:

"Having given our anxious consideration to the facts of this case,we are not in a position to hold that ICPS is either an agency or instrumentality of the State so as to come within the purview of 'other authorities' in Article 12 of the Constitution".

36. However, the Court was careful to say that "ICPS is a case of its type - typical in many ways and the normal tests may perhaps not properly apply to test its character".

37. **All India Sainik Schools Employees' Association v. Defence Minister-cum-Chairman Board of Governors,Sainik Schools Society, New Delhi and Ors. MANU/SC/0014/1988 : 1989 Supp.(1)SCC 205** held applying the tests indicated in **Ajay Hasia** that the Sainik School Society is a 'State'.

38. Perhaps this rather over - enthusiastic application of the broad limits set by **Ajay Hasia** may have persuaded this Court to curb the tendency in **Chander Mohan Khanna v. National Council of Educational Research and Training and Ors. MANU/SC/0010/1992 : (1992)ILLJ331SC** . The Court referred to the tests formulated in **Sukhdev Singh, Ramana, Ajay Hasia, and Som Prakash Rekhi** but striking a note of caution said that "these are merely indicative indicia and are by no means conclusive or clinching in any case". In that case, the question arose whether the National Council of Educational Research (NCERT) was a 'State' as defined under article 12 of the Constitution. The NCERT is a society registered under the Societies Registration Act. After considering the provisions of its Memorandum of Association as well as the rules of NCERT, this Court came to the conclusion that since NCERT was largely an autonomous body and the activities of the NCERT were not wholly related to governmental functions and that the Government control was confined only to the proper utilisation of the grant and since its funding was not entirely from Government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in **Tekraj Vasandi @ K.S. Basandhi v. Union of India** (supra) However, as far as the decision in Sabhajit Tewary v. Union

of India (supra) was concerned, it was noted that "the decision has been distinguished and watered down in the subsequent decisions".

39. Fresh off the judicial anvil is the decision in the **Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers Association MANU/SC/0003/2002 : (2002)ILLJ1088SC** which fairly represents what we have seen as a continuity of thought commencing from the decision in **Rajasthan Electricity Board** in 1967 upto the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government is 'an authority' within the meaning of Article 12.

40. The picture that ultimately emerges is that the tests formulated in **Ajay Hasia** are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12.

The question in each case would be - whether in the light of the cumulative facts as established, the body is financially,functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.<mpara>

41. Coming now to the facts relating to CSIR, we have no doubt that it is well within the range of Article 12, a conclusion which is sustainable when judged according to the tests judicially evolved for the purpose.

The Formation of CSIR

42. On 27th April 1940 the Board of Scientific and Industrial Research and on 1st February 1941, the Industrial Research Utilisation Committee were set up by the Department of Commerce, Government of India with the broad objective of promoting industrial growth in this country. On 14th November 1941, a resolution was passed by the Legislative Assembly and accepted by the Government of India to the following effect:

"This Assembly recommends to the Governor General in Council that a fund called the Industrial Research Fund be constituted, for the purpose of fostering industrial development in this country and that provision be made in the Budget for an annual grant of rupees ten lakhs to the fund for a period of five years."

43. For the purpose of coordinating and exercising administrative control over the working of the two research bodies already set up by the Department of Commerce, and to oversee the proper utilisation of the Industrial Research Fund, by a further resolution dated 26th September 1942, the Government of In dia-decided to set up a Council of Industrial Research on a permanent footing which would be a registered society under the Registration of Societies Act, 1860. Pursuant to the resolution, on 12th March,1942 the CSIR was duly registered. Bye-laws and Rules were framed by the Governing Body of the Society in 1942 which have been subsequently revised and amended.

Unquestionably this shows that the CSIR was 'created' by the Government to carry on in an organized manner what was being done earlier by the Department of Commerce of the Central Government. In fact the two research bodies which were part of the Department of Commerce have since been subsumed in the CSIR.

Objects and Functions:

44. The 26th September 1942 Resolution had provided that the functions of the CSIR would be:

(a) to implement and give effect to the following resolution moved by the Hon'ble Dewan Bahadur Sir A.R.Mudaliar and passed by the Legislative Assembly on the 14th Nov. 1941 and accepted by the Government of India.....(quoted earlier in this Judgment)

(b) the promotion, guidance and co-ordination of scientific and Industrial Research in India including the institution and the financing of specific researches:

(c) the establishment or development and assistance to special institutions or Department of existing institutions for scientific study of problems affecting particular industries and trade;

(d) the establishment and award of research student-ships and fellowships;

(e) the utilisation of the results of the researches conducted under the auspices of the Council towards the development of industrial in the country and the payment of a share of royalties arising out of the development of the results of researches to those who are considered as having contributed towards the pursuit of such researches;

(f) the establishment, maintenance and management of laboratories, workshops, institutes, and organisation to further scientific and industrial research and utilise and exploit for purposes of experiment or otherwise any discovery or invention likely to be of use Indian Industries.

(g) the collection and dissemination or information in regard not only to research but to industrial matters generally;

(h) publication of scientific papers and a journal of industrial research and development, and

(i) any other activities to promote generally the objects of the resolution mentioned in (a) above.

45. These objects which have been incorporated in the Memorandum of Association of CSIR manifestly demonstrate that CSIR was set up in the national interest to further the economic welfare of the society by fostering planned industrial development in the country. That such a function is fundamental to the governance of the country has already been held by a Constitution Bench of this Court as far back as in 1967 in **Rajasthan Electricity Board v. Mohan Lal** (Supra) where it was said:

"The State, as defined in Article 12, as thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people".

46. We are in respectful agreement with this statement of the law. The observations to the contrary in **Calender Mohan Khanna v. NCERT** (supra) relied on by the Learned Attorney General in this context, do not represent the correct legal position.

47. Incidently, the CSIR was and continues to be a non-profit making organization and according to clause (4) of CSIR's Memorandum of Association, all its income and property, however derived shall be applied only 'towards the promotion of those objects subject nevertheless in respect of the expenditure to such limitations as the Government of India may from time to time impose'.

Management and Control:

When the Government of India resolved to set up the CSIR on 26th February, 1942 it also decided that the Governing Body would consist of the following members:

(1) The Honourable Member of the Council of His Excellency the Governor General incharge of the portfolio of Commerce (Ex-officio).

(2) A representative of the Commerce Department of the Government of India, appointed by the Government of India.

(3) A representative of the Finance Department of the Government of India, appointed by the Government of India.

(4) Two members of the Board of Scientific and Industrial Research elected by the said Board.

(5) Two members of the Industrial Research Utilisation committee elected by the said Committee.

(6) The Director of Scientific and Industrial Research.

(7) One or more members to be nominated by the Government of India to represent interests not otherwise represented.

The present Rules and Regulations 1999 of CSIR provide that:

(a) The Prime Minister of India shall be the ex-office President of the Society.

(b) The Minister-in-Charge of the Ministry or Deptt. dealing with the Council of Scientific & Industrial Research shall be the ex-officio Vice President of the Society.

Provided that during any period when the Prime Minister is also such Minister, any person nominated in this behalf by the Prime Minister shall be the Vice-President.

(c) Ministers Incharge of Finance and Industry (ex-officio).

(d) The members of the Governing Body.

(e) Chairman, Advisory Board.

(f) Any other person or persons appointed by the President, CSIR."

The Governing Body of the Society is constituted by the:

(a) Director General,

(b) Member Finance,

(c) Directors of two National Laboratories,

(d) Two eminent Scientists/ Technologists, one of whom shall be from Academia;

(e) Heads of two Scientific Departments/Agencies of the Government of India.

48. The dominant role played by the Government of India in the Governing Body of CSIR is evident. The Director-General who is ex-officio Secretary of the Society is appointed by the Government of India [Rule 2(iii)]. The submission of the learned Attorney General that the Governing Body consisted of members, the majority of whom were non-governmental members is, having regard to the facts on record, unacceptable. Furthermore, the members of the Governing Body who are not there *ex officio* are nominated by the President and the irmembership can also be terminated by him and the Prime Minister is the ex-officio President of CSIR. It was then said that although the Prime Minister was *ex-officio* President of the Society but the power being exercised by the Prime Minister is as President of the Society. This is also the reasoning in **Sabhajit Tewary** . With respect, the reasoning was and the submission is erroneous. An *ex-officio* appointment means that the appointment is by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer, in this case the Prime Minister, which are not specifically conferred upon him, but are necessarily implied in his office (as Prime Minister), these are *ex-officio.*

49. The control of the Government in the CSIR is ubiquitous. The Governing Body is required to administer, direct and control the affairs and funds of the Society and shall, under Rule 43, have authority 'to exercise all the powers of the Society subject nevertheless in respect of expenditure to such limitations as the Government of India may from time to time impose'. The aspect of financial control by the Government is not limited to this and is considered separately. The Governing Body also has the power to frame, amend or repeal the bye-laws or CSIR but only with the sanction of the Government of India. Bye-law 44 of the 1942 Bye-laws had provided 'any alteration in the bye-laws shall require the prior approval of the Governor General in Council'.

50. Rule 41 of the present Rules provide that:

"The President may review/amend/vary any of the decisions of the Governing Body and pass such orders as considered necessary to be communicated to the Chairman of the Governing Body within a month of the decision of the Governing Body and such order shall be binding on the Governing Body . The Chairman may also refer any question which in his opinion is of sufficient importance

to justify such a reference for decision of the President, which shall be binding on the Governing Body."

(emphasis added)

51. Given the fact that the President of CSIR is the Prime Minister, under this Rule the subjugation of the Governing Body to the will of the Central Government is complete.

52. As far as the employees of the CSIR are concerned the Central Civil Services (Classification, Control & Appeal)Rules and the Central Civil Services (Conduct) Rules, for the time being in force, are from the outset applicable to them subject to the modification that references to the President' and 'Government Servant' in the Conduct Rules would be construed as 'President of the Society' and 'Officer & establishments in the service of the Society' respectively. (Bye Law 12). The scales of pay applicable to all the employees of CSIR are those prescribed by the Government of India for similar personnel, save in the case of specialists (Bye Law 14) and in regard to all matter sconcerning service conditions of employees of the CSIR, the Fundamental and Supplementary Rules framed by the Govt. of India and such other rules and orders issued by the Govt. of India from time to time are also, under Bye Law 15 applicable to the employees of the CSIR. Apart from this, the rules/Orders issued by Government of India regarding reservation of posts for SC/ST apply in regard to appointments to posts to be made in CSIR. (Bye Law 19)The CSIR cannot lay down or change the terms and conditions of service of its employees and any alteration in the bye-laws can be carried out only with the approval of Government of India. (Bye Laws 20).

Financial Aid

53. The initial capital of the CSIR was Rs. 10 lakhs, made available pursuant to the Resolution of the Legislative Assembly on 14th November, 1941. Paragraph 5 of the 26th September, 1942 Resolution of the Government of India pursuant to which CSIR was formed reads:

"The Government of India have decided that a fund, viz., the Industrial Research Fund, should be constituted by grants from the Central Revenues to which additions are to be made from time to time as moneys flow in from other sources. These 'other sources' will comprise grants, if any, by Provincial Governments by industrialists for special or general purposes, contributions from Universities or local bodies, donations or benefactions, royalties, etc., received from the development of the results of Industrial Research, and miscellaneous receipts. the Council of Scientific and Industrial Research will exercise full powers in regard to the expenditure to be met out of the Industrial Research Fund subject to its observing the Bye-laws framed by the Governing Body of the Council, from time to time, with the approval of the Governor General-in-Council,and to its annual budget being approved by the Governor General-in-Council."

54. As already noted, the initial capital of Rs. 10 lakhs was made available by the Central Government. According to the statement handed up to the Court on behalf of CSIR the present financial position of CSIR is that at least 70% of the funds of CSIR are available from grants made by the Government of India. For example out of the total funds available to CSIR for the years 1998-99, 1999-2000, 2000-01 of Rs. 1023.68 crores, Rs. 1136.69 crores and Rs. 1219.04crores

respectively, the Government of India has contributed Rs. 713.32 crores, Rs. 798.74 crores and Rs. 877.88 crores. Amaj or portion of the balance of the funds available is generated from charges for rendering research and development works by CSIR for projects such as the Rajiv Gandhi Drinking Water Mission Technology Mission on oilseeds and pulses and maize or grant in aid projects from other Government Departments. Funds are also received by CSIR from sale proceeds of its products, publications,royalties etc. Funds are also received from investments but under Bye-Law 6 of CSIR, funds of the Society may be invested only in such manner as prescribed by the Government of India. Some contributions are made by the state Governments and to a small extent by 'individuals, institutions and other agencies'. The non-governmental contributions are a pittance compared to the massive governmental input.

55. As far as expenditure is concerned, under Bye-law (1) as it stands at present, the budget estimates of the Society are to be prepared by the Governing Body 'keeping in view the instructions issued by the Government of India from time to time in this regard'. Apart from an internal audit, the accounts of the CSIR are required to be audited by the controller and Auditor General and placed before the table of both Houses of Parliament (Rule 69).

56. In the event of dissolution, unlike other registered societies which are governed by Section 14 of the Societies Registration Act, 1860, the members of CSIR have no say in the distribution of its assets and under clause (5) of the Memorandum of Association of CSIR, on the winding up or dissolution of CSIR any property remaining after payment of all debts shall have to be dealt with "in such manner as the Government of India may determine". CSIR is therefore both historically and in its present operation subject to the financial control of the Government of India. The assets and funds of CSIR though nominally owned by the Society are in the ultimate analysis owned by the Government.

57. From whichever perspective the facts are considered there can be no doubt that the conclusion reached in **Sabhajit Tewary** was erroneous. If the decision of **Sabhajit Tewary** had sought to lay down as a legal principle that a society registered under the Societies Act or a company incorporated under the Companies Act is, by that reason alone, excluded from the concept of State under Article 12, it is a principle which has long since been discredited. "Judges have made worthy, if shamefaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow".

58. In the assessment of the facts, the Court had assumed certain principles, and sought precedential support from decisions which were irrelevant and had "followed a groove chased amidst a context which has long since crumbled". Had the facts been closely scrutinised in the proper perspective, it could have led and can only lead to the conclusion that CSIR is a State within the meaning of Article 12.

59. Should **Sabhajit Tewary**

still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the fact sleading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them

and "there
is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public."
Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake.

60. Besides a new fact relating to CSIR has come to light since the decision in **Sabhajit Tewary** which unequivocally vindicates the conclusion reached by us and fortifies us in delivering the *coup de grace* to the already attenuated decision in **Sabhajit Tewary** . On 31st October 1986 in exercise of the powers conferred by Sub-section (2) of Section 14 of the Administrative Tribunals Act, 1985, the Central Government specified 17th November 1986 as the date on and from which the provisions of Sub-section (3) of Section 14 of the 1985 Act would apply to CSIR 'being the Society owned and controlled by Government'.

61. The learned Attorney General contended that the notification was not conclusive of the fact that the CSIR was a State within the meaning of Article 12 and that even if an entity is not a State within the meaning of Article 12, it is open to the Government to issue a notification for the purpose of ensuring the benefits of the provisions of the Act to its employees.

62. We cannot accept this. Reading Article 323(A) of the Const. (sic) Section 14 of the 1985 Act it is clear that no notification under Section 14(2) of the Administrative Tribunals Act could have been issued by the Central Government unless the employees of the CSIR were either appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Once such a notification has been issued in respect of CSIR, the consequence will be that an application would lie at the instance of the appellants at least before the Administrative Tribunal. No new jurisdiction was created in the Administrative Tribunal. The notification which was issued by the Central Government merely served to shift the service disputes of the employees of CSIR from the constitutional jurisdiction of the High Court under Article 226 to the Administrative Tribunals on the factual basis that CSIR was amenable to the writ jurisdiction as a State or other authority under Article 12 of the Constitution.

63. Therefore, the notification issued in 1986 by the Central Government under Article 14(2) of the Administrative Tribunals Act, 1985 serves in removing any residual doubt as to the nature of CSIR and decisively concludes the issues before us against it.

64. **Sabhajit Tewary's** decision must be and is in the circumstances overruled. Accordingly the matter is remitted back to the appropriate Bench to be dealt with in the light of our decision. There will be no order as to costs.

R.C. Lahoti, J.

(For Self and Behalf of Doraiswamy Raju, J.)

65. We have had the advantage of reading the judgment proposed by our learned sister Rama Pal, J. With greatest respect to her, we find ourselves not persuaded to subscribe to her view overruling ***Sabhajit Tewary's*** case and holding Council for Scientific and Industrial Research (CSIR) 'the State' within the meaning of Article 12 of the Constitution. The development of law has travelled through apparently a zig-zag track of judicial pronouncements, rhythmically traced by Rama Pal, J. in her judgment. Of necessity, we shall have to retread the track, for, we find that though the fundamentals and basic principles for determining whether a particular body is 'the State' or not many substantially remain the same but we differ in distributing the emphasis within the principles in their applicability to the facts found. We also feel that a distinction has to be borne in mind between an instrument ality or agency of 'the State' and an authority includible in 'other authorities'. The distinction cannot be obliterated.

66. Article 12 of the Constitution reads as under:

"12. In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

67. This definition is for the purpose of attracting applicability of the provisions contained in Part III of the Constitution dealing with fundamental rights. It is well-settled that the definition of 'the State' in Article 12 has nothing to do with Articles 309, 310 and 311 of the Constitution which find place in Part XIV. Merely because an entity is held to be the State within the meaning of Article 12, its employees do not ipso facto become entitled to protection of Part XIV of the Constitution.

68. Dr. B.R. Ambedkar explaining the scope of Article 12 and reason why this Article was placed in the Chapter on Fundamental Rights so spoke in the Constituent Assembly :

"The object of the fundamental rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly they must be binding upon every authority --I shall presently explain what the word "authority" means -- upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the Fundamental Rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-laws.

If that proposition is accepted - and I do not see anyone who cares for Fundamental Rights can object to such a universal obligation being imposed upon every authority created by law -then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as "the State", as we have done in Article 7; or, to keep on repeating every time, "the Central Government, the Provincial Government the State Government, the Municipality, the Local Board, the Port Trust, or any other authority". It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a

reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words".

(1948 (7) CAD 610
[emphasis supplied]

69. Thus the framers of the Constitution used the word "the State" in a wider sense than what is understood in the ordinary or narrower sense. So far as 'other authorities' are concerned they were included subject to their satisfying the test of being 'within the territory of India' or being 'under the control of the Government of India'. It is settled that the expression 'under the control of the Government of India' in Article 12 does not qualify the word 'territory'; it qualifies 'other authorities'.

70. The terms - 'instrumentality' or 'agency' of the State - are not to be found mentioned in Article 12. It is by the process of judicial interpretation - nay, expansion - keeping in view the sweep of Article 12 that they have been included as falling within the net of Article 12 subject to satisfying certain tests. While defining, the use of 'includes' suggest - what follows is not exhaustive. The definition is expansive of the meaning of the term defined. However, we feel that expanding dimension of 'the State' doctrine through judicial wisdom ought to accompanied by wise limitations else the expansion may go much beyond what even the framers of Article 12 may have thought of.

Instrumentality, Agency, Authority - meaning of

71. It will be useful to understand what the terms - instrumentality, agency and authorities mean before embarking upon a review of judicial decisions dealing with the principal issue which arises for our consideration.

72. Black's Law Dictionary (Seventh Edition) defines 'instrumentality' to mean "a means or agency through which a function of another entity is accomplished, such as a branch of a governing body." 'Agency' is defined as "a fiduciary relationship created by express or implied contract or by law in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." Thus instrumentality and agency are the two terms which to some extent overlap in their meaning; 'instrumentality' includes 'means' also, which 'agency' does not, in its meaning. 'Quasi- governmental agency' is "a government - sponsored enterprise or Corporation (sometimes called a government-controlled corporation)". Authority, as Webster Comprehensive Dictionary (International Edition) defines, is "the person or persons in whom government or command is vested; often in the plural". The applicable meaning of the word "authority" given in Webster's Third New International Dictionary, is 'a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise'. This was quoted with approval by Constitution Bench in **RSEB's case** (infra) wherein the Bench held - "This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the

control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of Constitution".

(emphasisadded)

73. With the pronouncements in ***N. Masthan Sahib*** v. ***The Chief Commissioner, Pondicherry and Anr.,*** - (1962) Supp 1 SCR 981 and ***K.S. Ramamurthy Reddiar*** v. ***Chief Commissioner, Pondicherry and Anr.*** - MANU/SC/0029/1963 : [1964]1SCR656 it is settled that Article 12 of the Constitution has to be so read :

"12. In this part, unless the context otherwise requires, the state' includes

(i) the Government and Parliament of India,

(ii) the Government and the Legislature of each State,

(iii) (A) all local or other authorities within the territory of India,

(b) all local or other authorities under the control of the Government of India."

The definition of the State as contained in Article 12 is inclusive and not conclusive. The net of Article 12 has been expanded by 'progressive' judicial thinking, so as to include within its ken several instrumentalities and agencies performing State function or entrusted with State action. To answer the principal question in the context in which it has arisen, incidental but inseparable issue do arise: Wide expansion but how far wide? Should such wide expansion be not subject to certain wise limitations? True, the width of expansion and the wisdom of limitations both have to be spelled out from Article 12 itself and the fundamentals of constitutional jurisprudence.

74. We now deal with a series of decisions wherein tests were propounded, followed (also expanded) and applied to different entities so as to find out whether they satisfied the test of being "the State'.

A review of judicial opinion

75. Though judge-made law is legend on the issue, we need not peep too much deep in the past unless it becomes necessary to have a glimpse of a few illuminating points thereat. It would serve our purpose to keep ourselves confined, to being with, to discerning the principles laid down in ***Rajasthan State Electricity Board, Jaipur*** v. ***Mohal Lal and Ors.*** - MANU/SC/0360/1967 : (1968)ILLJ257SC , ***Sukhdev Singh and Ors.*** v. ***Bhagatram Sardar Singh Raghuvanshi and Anr.*** - MANU/SC/0667/1975 : (1975)ILLJ399SC , ***Ramana Dayaram Shetty*** v. ***The International Airport Authority of India and Ors.*** - MANU/SC/0048/1979 : (1979)IILLJ217SC , ***Ajay Hasia etc.*** v. ***Khalid Mujib Sehravardi and Ors. etc.*** - MANU/SC/0498/1980 : (1981)ILLJ103SC : (1981)ILLJ103SC and ***Som Prakash Rekhi*** v. ***Union of India and Anr.*** - : : (1981)ILLJ79SC which have come to be known as landmarks on the State conceptualisation. Out of these five decisions, **R.D. Shetty** and **Som Prakash** are three-Judge Bench decisions; the other 3 are each by Constitution Bench of five Judges.

76. The Constitution Bench decision in **Rajasthan State Electricity Board (RSEB)'s case** was delivered by a majority of 4:1. v. Bhargava, J. spoke for himself and K. Subba Rao, C.J. and M. Shelat and G.K. Mitter, JJ. J.C. Shah, J. delivered his dissenting opinion. We will refer to majority opinion only. The Court quoted the interpretation placed by Ayyangar, J. form the pronouncement of seven-Judges Bench of this Court in ***Smt. Ujjam Bai*** v. ***State of Uttar Pradesh and Anr.*** - MANU/SC/0101/1961 : [1963]1SCR778 that the words 'other authorities' employed in Article 12 are of wide amplitude and capable of comprehending every authority created under a statute and though there is no characterisation of the nature of the "authority" in there siduary clause of Article 12 it must include every authority set up under a statue for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duties to make decisions in order to implement those laws. The Court refused to apply the doctrine of *ejusdem generis* for interpretation of the other authorities' in Article 12. "Other authorities" in Article 12 include, held the Court, "all constitutional or statutory authorities on whom powers are conferred by law" without regard to the fact that some of the powers conferred may be for the purpose of carrying on commercial activities or promoting the educational and economic interests of the people. Regard must be had (i) not only to the sweep of fundamental rights over the power of the authority, (ii) but also to the restrictions which may be imposed upon the exercise of certain fundamental rights by the authority. This dual phase of fundamental rights would determine "authority". Applying the test formulated by it to Rajasthan State Electricity Board, the Court found that the Board though it was required to carry on some activities of the nature of trade or commerce under the Electricity Supply Act, yet the statutory powers conferred by the Electricity Supply Act on the Board included power to give directions, the disobedience of which is punishable as a criminal office and therefore the Board was an authority for the purpose of Part III of the Constitution.

77. ***Praga Tools Corporation*** v. ***C.V. Imanual and Ors.*** - MANU/SC/0327/1969 : (1969)IILLJ479SC may not be of much relevance. The question posed before the Court was not one referable to Article 12 of the Constitution. The question was whether a prayer seeking issuance of a mandamus or an order in the nature of mandamus could lie against a company incorporated under the companies Act wherein the Central and the state Governments held respectively 56 and 32 per cent shares. The two Judge Bench of this Court held that the company was a separate legal entity and could not be said to be either a government Corporation or an industry run by or under the authority of the Union Government. A mandamus lies to secure the performance of a public or statutory duty in the performance of which the petitioner has a sufficient legal interest. A mandamus can issue to an official or a society to compel him to carry out the terms of the Statute under or by which the society is constituted or governed and also to companies or Corporation to carry out duties placed on them by the Statute authorizing their undertaking. A mandamus would also lie against a company constituted by a Statute for the purpose of fulfilling public responsibilities. The Court held that the company being a non-statutory body with neither a statutory nor a public duty imposed on it by a Statute, a writ petition for mandamus did not lie against it. The limited value of this decision, relevant for our purpose, is that because a writ of mandamus can issue against a body solely by this test it does not become 'State' within the meaning of Article 12.

78. In ***Sukhdev Singh and Ors.*** v. ***Bhagatram Sardar Singh Raghuvanshi and Anr.*** (supra), question arose whether Oil and Natural Gas Commission, the Industrial Finance Corporation and Life Insurance Corporation are 'authorities' within the meaning of Article 12. The case was decided

by a majority of 4:1. A.N. Ray, CJ speaking for himself and on behalf of Y.V. Chandrachud and A.C. Gupta, JJ. held that all the three were statutory Corporation, i.e., given birth by Statutes. The circumstance that these statutory bodies were required to carry on some activities of the nature of trade or commerce did not make any difference. The Life Insurance Corporation is (i) an agency of the Government (ii) carrying on the exclusive business of Life Insurance (i.e. in monopoly), and (iii) each and every provision of the Statute creating it showed in no uncertain terms that the Corporation is the voice and the hands of the Central Government. The Industrial Financial Corporation is in effect managed and controlled by the Central Government, citizens cannot be its shareholder. ONGC (i) is owned by the Government, (ii) is a statutory body and not a company and (iii) has the exclusive privilege of extracting petroleum. Each of the three, respectively under the three Acts under which they are created, enjoy power to do certain acts and to issue directions obstruction in or breach whereof is punishable as an offence. These distinguish them from a mere company incorporated under the Indian Companies Act. The common features of the three are (i) rules and regulations framed by them have the force of law, (ii) the employees have a statutory status, and (iii) they are entitled to declaration of being in employment when the dismissal or removal is in contravention of statutory provisions. The learned Chief Justice added, by way of abundant caution, that these provisions did not however make the employees as servants of the Union or the state though the three statutory bodies are authorities within the meaning of Article 12 of the Constitution.

79. Mathew, J. recorded his separate concurring opinion. As to ONGC he hastened to arrive at a conclusion that the Commission was invested with sovereign power of the State and could issue binding directions to owners of land and premises, not to prevent employees of the Commission from entering upon their property if the Commission so directs. Disobedience of its direction is punishable under the relevant provisions of the Indian Penal Code as the employees are deemed to be public servants. Hence the Commission is an authority. As to the other two Corporations, viz., LIC and IFC,Mathew, J. entered into a short question and began by observing that in recent years the concept of State has undergone drastic change "Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority". Having reviewed some decisions of United States and English decisions and some other authorities, he laid down certain principles with which we will deal with a little later and at appropriate place. He observed that institutions engaged in matters of high public interest or performing public functions are, by virtue of the nature of the function performed by them, governmental agencies. He noticed the difficulty in separating vital government functions from non-governmental functions in view of the contrast between governmental activities which are private and private activities which are governmental. For holding Life Insurance Corporation "the State" he relied on the following features : (i) the Central Government has contributed the original capital of the Corporation, (ii) part of the profit of the Corporation goes to Central Government, (iii) the Central Government exercises control over the policy of the Corporation, (iv) the Corporation carries on a business having great public importance, and (v) it enjoys a monopoly in the business. As to Industrial Financial Corporation he relied on the circumstances catalogued in the judgment of A.N. Ray, J. The common feature of the two Corporations was that they were instrumentalities or agencies of the state for carrying on business which otherwise would have been run by the State departmentally and if the State had chosen to carry on these businesses through the medium of government departments, there would have been no question that actions of these departments would be "state actions". At the end Mathew, J. made it clear that he was expressing no opinion on the question whether private

Corporation or other like organizations though they exercise power over their employees which might violate their fundamental rights would be the State within the meaning of Article 12. What is 'state action' and how far the concept of 'state action' can be expanded, posing the question, Mathew J. answered - ".....it is against that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy under Article 32 may be available against them. But by the large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State." So also commenting on the relevance of 'state help' and 'state control' as determinative tests, Mathew, J. said -- "It may be stated generally that State financial aid alone does not render the institution receiving such aid a state agency. Financial aid plus some additional factor might lead to a different conclusion. A mere finding of state control also is not determinative of the question, since a state has considerable measure of control under its police power over all types of business operations."

80. Alagiriswami, J. recorded, a dissenting opinion which however we propose to skip over. It is pertinent to note that the dispute in***Sukhdev Singh*** v. ***Bhagat Ram*** was a service dispute and the employees were held entitled to a declaration of being in employment when their dismissal or removal was in contravention of statutory provisions; the rules and regulations framed by corporations or commission were found having the force of law, being delegated legislation and these statutory bodies were held to be 'authorities' within the meaning of Article 12.

81. In **Ramanna Dayaram Shetty** v. **The International Airport Authority of India and Ors.** (supra), the dispute related to trends within the domain of administrative law. A question arose whether International Airport Authority of India (IA. for short) was within the scope of 'other authorities' in Article 12 so as to be amendable to Article 14 of the Constitution. P.N. Bhagwati, J. who delivered the judgment for the three-Judge Bench stated the ratio of ***Rajasthan State Electricity Boards case,*** in these words:

"The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression other authorities', if it i has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulation shaving the force of law".

82. He then referred to what he termed as a 'broad test' laid down by Mathew, J. in ***Sukhdev Singh's case*** and said that judgment by Mathew, J. provided 'one more test and perhaps a more satisfactory one' for determining whether a statutory corporation, body or other authority falls within the definition of 'the State' and the test is--"If a statutory corporation, body or other authority is an instrumentality or agency of government, it would be an authority and therefore 'the state' within the meaning of the expression in Article 12." Having minutely examined the provisions of the International Airport Authority Act, 1971 he found out the following features of IA :- (i)The Chairman and Members are all persons nominated by the Central Government and Central Government has power to terminate the appointment or remove them: (ii) The Central Government is vested with the power to take away the management of any airport from the IA; (iii) The Central Government has power to give binding directions in writing on questions of policy; (iv) The capital

of IA needed for carrying out its functions is wholly provided by Central Government;(v) The balance of net profit made by IA, after making certain necessary provisions, does not remain with the IA and is required to be taken over to the Central Government; (vi) The financial estimates,expenditure and programme of activities can only be such as approved by Central Government; (vii) The Audit Accounts and the Audit Report of IA, forwarded to the Central Government, are required to be laid before both Houses of Parliament; (viii) It was a department of the Central Government along with its properties, assets, debts,obligations, liabilities, contracts, cause of action and pending litigation taken over by the IA; (ix) IA was charged with carrying out the same functions which were being carrying out by the Central Government; (x) The employees and officials of IA are public servants and enjoy immunity for anything done or intended to be done , in good faith, in pursuance of the Act or any rules or regulations made by it; (xi) IA is given (delegated) power to legislate and contravention of certain specified regulations entails penal consequences. Thus, in sum, the IA was held to be an instrumentality or agency of the Central Government falling within the definition of the State both on the narrower view propounded in the judgment of A.N. ray, CJ and broader view propounded by Mathew, J. in ***Sudh dev Singh's case*** .

83. **Ajay Hasia etc.** v. **Khalid Mujib Sehravardi and Ors. etc.** (supra), is a Constitution Bench judgment where in P.N. Bhagwati, J.spoke for the Court. The test which he had laid down in **Ramanna's** case were summarized by him as six in number and as under:

"1. One thing is clear that if the entire share capital of the Corporation is held by Government it would go a lone way towards indicating that the Corporation is an instrumentality or agency of Government.

2. Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

3. It may also be a relevant factor.... whether the corporation enjoys monopoly status which is the State conferred or State protected.

4. Existence of "deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality".

5. If the functions of the Corporation of public importance and closely related to government functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

6. "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government."

The footnote to the tests, as put by him, is -- "if on a consideration of all these relevant factors it is found that the corporation is aninstrumentality or agency of government, it would..... be an authority, and therefore, 'the State' within the meaning of Article 12.Bhagwati, J. placed a prologue

to the above said tests emphasizing the need to use care and caution, "because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realized that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation."

84. In **Ajay Hasia,** the 'authority' under consideration was a society registered under the Jammu & Kashmir Registration of Societies Act, 1898, administering and managing the Regional Engineering College, Srinagar. The College was sponsored by the Government of India. The prominent features of the society indicated complete financing and financial control of the Government, complete administrative control over conducting of the affairs of the society and administration and assets of the College being taken over by the State Government with the prior approval of the Central Government. These are some of the material features. Some of the observations made by the Court during the course of its judgment are pertinent and we proceed to notice them quickly. The society could not be equated with the Government of India or the Government of any State nor could it be said to be 'local authority', and therefore, should have come within the expression of 'other authorities' to be 'the State'.The Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. With the enlargement of governmental activities, specially those in the field of trade and commerce and welfare, corporation is most resourceful legal contrivance resorted to frequently by the Government. Though a distinct juristic entity came into existence because of its certain advantages in the field of functioning over a department of the Government but behind the formal ownership cast in the corporate would, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the Corporation and the juristic veil of corporate personality is worn for the purpose of convenience of management and administration which cannot be allowed to obliterate the true nature of the reality behind which is the Government. Dealing at length with the corporate contrivance, the Court summed up its conclusion by saying that if a Corporation is found to be a mere agency or surrogate of the Government, 3 tests being satisfied viz., (i)in fact, owned by the Government, (ii) in truth, control by the Government, and (iii) in effect , an incarnation of the Government,then the Court would hold the Corporation to be Government, and therefore, subject to constitutional limitations including for enforcement of fundamental rights. The Court went on to say that where a Corporation is an instrumentality or agency of the Government, it must be held to be an 'authority' for Article 12.

85. Here itself we have few comments to offer. Firstly, the distinction between 'instrumentality and agency' on the one hand, and authority (for the purpose of 'other authorities')' on the other, was totally obliterated. In our opinion, it is one thing to say that it an entity veiled or disguised as a Corporation or a society or in any other form is found to be an instrumentality or agency of the State then in that case it will be the State itself in narrower sense acting through it instrumentality or agency and therefore, included in 'the State' in the wider sense for the purpose of Article 12. Having found an entity whether juristic or natural to be an instrumentality or agency of the state, it is not necessary to call it an 'authority'. It would make a substantial difference to find whether an entity is an instrumentality or agency or an authority. Secondly, **Ajay Hasia** was the case of are gistered society; it was not an appropriate occasion for dealing with corporations or entities other than society. On the inferences drawn by reading of the Memorandum of Association of the society

and rules framed thereunder, and subjecting such inferences to the tests laid down in the decision itself, it was found that the society was an instrumentality or agency of the State and on tearing the veil of society what was to be seen was the State itself though in disguise. It was not thereafter necessary to hold the society an 'authority' and proceed to record "that the society is an instrumentality or the agency of the State and the Central Government and it is an 'authority' within the meaning of Article 12", entirely obliterating, the dividing line between 'instrumentality or agency of the State' and 'other authorities'. This has been a source of confusion and misdirection in thought process as we propose to explain a little later. Thirdly, though six tests are laid down but there is no clear indication in the judgment whether in order to hold a legal entity the State, all the tests must be answered positively and it is the cumulative effect of such positive answers which will solve the riddle or positive answer to one or two or more tests would be enough to find out a solution. It appears what the court wished was reaching a final decision on an overall view of the result of the tests. Compare this with what was said by Bhagwati, J. in **Ramanna's case** . We have already noticed that in **Ajay Hasia,** Bhagwati, J. has in his own words summarized the test laid down by him in **Ramanna's case** . In **Ramanna's case** he had said that The question whether a corporation is governmental instrumentality or agency would depend on a variety of factors which defy exhaustive enumeration and moreover even amongst these factors described in **Ramanna's** case "the Court will have to consider the cumulative effect of these various factors and arrive at its decision." "It is the aggregate or cumulative effect of all the relevant factors that is controlling ".

86. Criticism of too broad a view taken of the scope of the State under Article 12 in **Ramanna's case** invited some criticism which was noticed in **Som Prakash Rekhi's case** (infra). It was pointed out that the observations in **Ramanna's case** spill over beyond there quirements of he case and must be dismissed as obiter; that IA is a Corporation created by a statute and there was no occasion to go beyond the narrow needs of the situation and expand the theme of the state in Article 12 vis-a-vis government companies, registered society , and what not; and that there was contradiction between **Sukhdev Singh's case** and **Ramanna's case** .

87. On 13.11.1980, the Constitutional Bench presided over by Y.V.Chandrachud, C.J. and consisting of P.N. Bhagwati, V.R. KrishnaIyer, S. Murtaza Fazal Ali and A.D. Koshal, JJ. delivered the judgment in **Ajay Hasia's case,** speaking through P.N. Bhagwati, J..It is interesting to note that on the same day another three-Judges Bench consisting V.R. Krishna Iyer, O. Chinnappa Reddy and R.S.Pathak, JJ. delivered judgment in **Som Prakash Rekhi** v. **Union of India and another** (supra). V.R. Krishna Iyer, J. speaking for himself and O. Chinnappa Reddy, J. delivered the majority opinion.R.S. Pathak, J. delivered a separate opinion.

88. The Court in **Som Prakash Rekhi** v. **Union of India and another** (supra), was posed with the question - whether Bharat Petroleum Corporation Ltd., a statutory corporation, was an 'authority', and therefore 'the State' under Article 12. Certain observations made by Krishna Iyer, J. are pertinent. To begin with, hesaid, "any authority under control of the Government of India comes within the definition." While dealing with the corporate personality, it has to be remembered that "while the formal ownership is cast in the corporate mould, the reality reaches down to State control". The care fact is that the Central Government chooses to make over for better management , its own property to its own offspring. A Government Company is a mini-incarnation of Government itself, made up of its blood and bones and given corporate shape and status for defined

objectives and not beyond. The device is too obvious for deception. A Government Company though, is but he alter ego of the Central Government and tearing of the juristic veil worn, would bring out the true character of the entity being 'the State'. Krishna Iyer, J. held it to be immaterial whether the Corporation is formed by a statute or under a statute, the true test is functional. "Not how the legal person is born but why it is created." He further held that both the things are essential : (i) discharging functions or doing business as the proxy of the State by wearing the corporate mask, and (ii) an element of ability to effect legal relations by virtue of power vested in it by law. Thesetests, if answered in positive, would entail the Corporation being aninstrumentality or agency of the State. What is an 'authority'? Krishna Iyer, J. defined 'authority' as one which in law belongs to the province of power and the search here must be to see whether the Act vests authority, as agent or instrumentality of the State, to affect the legal relations of oneself or others. He quoted the definition of 'authority' from the Law Lexicon by P. Ramnath Iyer to say "Authority is a body having jurisdiction certain matters of a public nature" and from Salmond's Jurisprudence, to say that the "ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons' must be present ab extra to make a person an 'authority'." He held BPL to be "a limb of Government and agency of the State, a vicarious creature of statute", because of these characteristics , which he found from the provisions of the Act which created it and other circumstances, viz., (i) it has a statutory flavour in its operations and functions, in its powers and duties and in its personality itself,(iii) it is functionally and administratively under the thumb of Government; and (iv) the Company had stepped into the shoes of the executive power of the State and had unique protection, immunity and powers. In conclusion Krishna Iyer, J. held that the case of BPL was a close parallel to the **Airport Authority's case (Ramananna's case)** excepting that Airport Authority is created by a statute while BPL is recognized by and clothed with rights and duties by the statute. Krishna Iyer, J. having called out the several tests from Ramanna's case added a clinching footnote - the finale is reached when the cumulative effect of all the relevant factors above set out is assessed and once the body is found to be an instrumentality or agency of Government, the further conclusion emerges that it is 'the State' and is subject to the same constitutional limitations as Government and it is this divagation which explains the ratio of **Ramanna's case** .

89. The three-Judges Bench in ***The Workmen, Food Corporation of India*** v. ***Food Corporation of India*** , - MANU/SC/0240/1985, held Food Corporation of India to be an instrumentality of the State covered by the expression 'other authority' in Article 12. It was found : (i) FCI was set up under the Food Corporation Act. 1964 (ii)initial capital was provided by Central Government and capital could be increased in such manner as the government may determine; (iii)the Board of Directors in whom the management of the Corporation is to vest shall act according to instructions on question of policy given by the Central Government; (iv) the annual net profit of FCI is to be paid to the Central Government; (v) annual report of its working and affairs is to be laid before the Houses of Parliament; (vi) statutory power conferred to make rules and regulations for giving effect to the provisions of the parent act as also be provide for service matters relating to officers and employees.

90. The Mysore Paper Mills Ltd. has been held by a two-Judges Bench in ***Mysore Paper Mills Ltd.*** v. ***The Mysore Paper Mills Officers Association and Anr.*** - MANU/SC/0003/2002 : (2002)ILLJ1088SC , to be aninstrumentality and agency of the State Government, the physical form of company being a mere cloak or cover for the Government. What is significant in this

decision is that the conclusion whether an independent entity satisfies the test of instrumentality or agency of the Government is not whether it owes its origin to any padicular Statute or Order but really depends upon a combination of one or more of the relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

What is 'Authority' and when includible in 'other authorities', re: Article 12

91. We have, in the earlier part of this judgment, referred to the dictionary meaning of 'authority', often used as plural, as in Article 12 viz. 'other authorities'. Now is the time to find out the meaning to be assigned to the term as used in Article 12 of the Constitution.

92. A reference to Article 13(2) of the Constitutions apposite. It provides - "The State shall not make any law which takes away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention,be void". Clause (3) of Article 13 defines 'law' as including any Ordinance order, bye-law, rule, regulation, notification, custom or uses having in the territory of India the force of law. We have also referred to the speech of Dr. B.R. Ambedkar in Constituent Assembly explaining the purpose sought to be achieved by Article 12. In ***RSEB's case*** , the majority adopted the test that a statutory authority "would be within the meaning of 'other authorities' if it has been invested with statutory power to issue binding directions to the parties, disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law". In ***Sukhdev Singh's case*** , the principal reason which prevailed with A.N. Ray, CJ for holding ONGC, LIC and IFC as authorities and hence 'the State' was that rules and regulations framed by them have the force of law. In Sukhdev Singh's case,Mathew J. held that the test laid down in ***RSEB's*** case was satisfied so far as ONGC is concerned but the same was not satisfied in the case of LIC and IFC and, therefore, he added to the list of tests laid down in ***RSEB's case,*** by observing that though there are no statutory provisions , so far as LIC and IFC are concerned, for issuing binding directions to third parties, the disobedience of which would entail penal consequences, yet these corporations (i) set up under statutes,(ii) to carry on business of public importance or which is fundamental to the life of the people - can be considered as the State within the meaning of Article 12. Thus, tit is the functional test which was devised and utilized by Mathew J. and there he said, "the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. The State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it agency or instrumentality of the State". It is pertinent to note that functional tests became necessary because of the State having chosen to entrust its own functions to an instrumentality or agency in absence whereof that function would have been a State activity on account of its public importance and being fundamental to the life of the people.

93. The philosophy underlying the expansion of Article 12 of the Constitution so as to embrace within its ken such entitles which would not otherwise be the State within the meaning of Article 12 of the Constitution has been pointed out by the eminent jurist H.M.Seervai in Constitutional Law of India (Silver Jubilee Edition, Vol.1)."The Constitution should be so interpreted that the

governing power,wherever located, must be subjected to fundamental constitutional limitations..... Under Article 13(2) it is State action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Article 13(2). For although Article 17, 23 and 24 show that fundamental rights can be violated by private individuals and relief against them would be available under Article 32, still, by the large, Article 13(2) is directed against State action. A public corporation being the creation of the state, is subject to the same constitutional limitations as the State itself. Two conditions are necessary, namely, that the Corporation must be created by the State and it must invade the constitutional rights of individuals" (Para 7.54). "The line of reasoning developed by Mathew J. prevents a large-scale evasion of fundamental rights by transferring work done in Govt. Departments to statutory Corporations, whilst retaining Govt. control. Company legislation in India permits tearing of the corporate veil in certain cases and to look behind the real legal personality. But Mathew J. achieved the same result by a different route, namely, by drawing out the implications of Article 13(2)" (Para 7. 57 ibid).

94. The terms instrumentality or agency of the State are not to be found mentioned in Article 12 of the Constitution. Nevertheless they fall within the ken of Article 12 of the Constitution for the simple reason that if the State chooses to set up an instrumentality or agency and entrusts it with the same power, function or action which would otherwise have been exercised or undertaken by itself, there is no reason why such instrumentality or agency should not be subject to same constitutional and public law limitations as the State would have been. In different judicial pronouncements, some of which we have reviewed, any company, corporation, society or any other (sic)having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having found to be an alter ego, a doubt or a proxy or a limit or an off-spring or a mini-incarnation or a vicarious creature or a surrogate and so on -- by whatever name called -- of the State. In short, the material available must justify holding of the entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise. Then it is an instrumentality or agency of the State.

95. It is this basic and essential distinction between an instrumentality or agency' of the State and 'other authorities' which has to be borne in mind. An authority must be an authority sui juristo fall within the meaning of the expression 'other authorities' under article 12. A juridical entity, though an authority, may also satisfy the test of being an instrumentality or agency of the State in which event such authority may be held to be an instrumentality or agency of the State but not the vice versa.

96. We sum up our conclusions as under:-

(1) Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of 'other authorities' in Article 12, To be anauthority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public. Further the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people --their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of

public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power -- constitutional or statutory and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a even case,depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in ***Ajay Hasia*** enable determination of Governmental ownership or control. Tests 3, 5 and 6 are 'functional' tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between 'instrumentality and agency' of the state and an 'authority' having been lost sight of sub-silentio,unconsciously and un-deliberated. In our opinion, and keeping in view the meaning which 'authority' carries, the question whether an entity is an 'authority' cannot be answered by applying ***Ajay Hasia*** tests.

(2) The tests laid down in ***Ajay Hasia's case*** are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered to positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the Court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the State.

CSIR if 'the State'?

97. Applying the tests formulated hereinabove, we are clearly of the opinion that CSIR is not an 'authority' so as to fall within the meaning of expression 'other authorities' under Article 12. It has no statutory flavour -- neither it owes its birth to a statute nor is there any other statute conferring it with such powers as would enable it being branded an authority. The indicia of power is absent. It does not discharge such functions as are governmental or closely associated therewith or being fundamental to the life of the people.

98. We may now examine the characteristics of CSIR. On a careful examination of the material available consisting of the memorandum of association, rules and regulations and bye-laws of the society and its budget and statement of receipts and outgoings, we proceed to record our conclusions. The Government does not hold the entire share capital of CSIR. It is not owned by the Government. Presently,the Government funding is about 70% and grant by Government of India is one out of five categories of avenues to derive its funds. Receipts from other sources such as research, development,consultation activities, monies received for specific projects and job work, assets of the society, gifts and donations are permissible sources of funding of CSIR without any prior permission/consent/sanction from the Government of India. Financial assistance from the Government does not meet almost all expenditure of the CSIR and apparently it fluctuates too depending upon variation from its ownsources of income. It does not enjoy any monopoly status,

much less conferred or protected by Government. The governing body does not consist entirely of Government nominees. The membership of the Society and the manning of its governing body - both consist substantially of private individuals of eminence and independence who cannot be regarded a hands and voice of the State. There is no provision in the rules or the byelaws that the government can issue such directives as it deems necessary of CSIR and the latter is bound to carry out the same. The functions of the CSIR cannot be regardedas governmental or of essential public importance or as closely related to governmental functions or being fundamental to the life of the people or duties and obligations to public at large. The functions entrusted to CSIR can as well be carried out by any private (sic)organization. Historically it was not a department of government which was transferred to CSIR. There was a Board of Scientific and Industrial Research and an Industrial Research Utilisation Committee. The CSIR was set up as a society registered under the Societies Registration Act, 1860 to coordinate and generally exercise administrative control over the two organizations which would tender their advice only to CSIR. The membership of the society and the Governing body of the counsel may be terminated by the President not by the Government of India. The governing body is headed by the Director General of CSIR and not by the President of Society (i.e. the Prime Minister). Certainly the board and the committee, taken over by CSIR, did not discharge any regal, governmental or sovereign functions. The CSIR is not the offspring or the blood and bones or the voice and hands of the government. The CSIR does not and cannot make law.

99. However, the Prime Minister of India is the President of the Society. Some of the members of the society and of the governing body are persons appointed ex-officio by virtue of their holding some office under the Government also. There is some element of control exercised by the government in matters of expenditure such as on the quantum and extent of expenditure more for the reason that financial assistance is also granted by the Government of India and the later wishes to see that its money is properly used and not misused. The President is empowered to renew, amend and vary any of the decisions of the governing body which is in the nature of residual power for taking corrective measures vesting in the President but then the power is in the President in that capacity and not as Prime Minister of India. On winding up or dissolution of CSIR any remaining property is not available to members but 'shall be dealt with in such manner as Government of India may determine'. There is nothing special about such a provision in Memorandum of Association of CSIR as such a provision is a general one applicable to all societies under Section 14 of the Societies Registration Act, 1860.True that there is some element of control of the government but nota deep and pervasive control. To some extent, it may be said that Government's presence or participation is felt in the society but such presence cannot be called a brooding presence or the overlordship of government. We are satisfied that the tests in ***Ajay Hasia's case*** are not substantially or on essential aspects even satisfied to call CSIR an instrumentality or agency of the State. A mere government at patronage, encouragement, push or recognition would not make an entity 'the State'.

100. On comparison, we find that in substance CSIR stands on a footing almost similar to the Institute of Constitutional and Parliamentary Studies (in ***Tekraj Vasandi @ K.S. Basandhi*** v. ***Union of India and Ors.,*** MANU/SC/0154/1987 : (1988)ILLJ341SC : (1988)ILLJ341SC and National Council of Educational Research and Training (in ***Chander Mohan Khanna*** v. ***NCERT,*** MANU/SC/0010/1992 : (1992)ILLJ331SC : (1992)ILLJ331SC , and those cases were correctly decided.

101. Strong reliance was placed by the learned counsel for the appellants on a notification dated 31.10.1986 issued in exercise of the powers conferred by Sub-section (2) of Section 14 of the Administrative Tribunals Act, 1985 whereby the provisions of Sub-section(3) of Section 14 of the said Act have been made applicable to the Council of Scientific and Industrial Research, "being the society owned or controlled by government". On point of fact we may state that this notification, though of the year 1986, was not relied on or referred to in the pleading of the appellants. We do not find it mentioned anywhere in the proceedings before the High Court and not even in the SLP filed in this Court. Just during the course of hearing this notification was taken out from this brief by the learned counsel and shown to the Court and to opposite counsel. It was almost sprung as a surprise without affording the opposite party an opportunity of giving an explanation. The learned Attorney General pointed out that the notification was issued by Ministry of Personal,Public Grievances and Pensions (Department of personnel and Training) and he appealed to the Court not to overlook the practical side in the working of the government where at times on department does not know what the other department is doing. We do not propose to enter into a deeper scrutiny of the notification. For our purpose, it would suffice to say that Section 14 of the Administration Tribunals Act, 1985, and Articles 323A of the Constitution to which the Act owes its original, do not apparently contemplate a society being brought within the ambit of the Act by a notification of Central Government. Though, we guardedly abstain from expressing any opinion on this issue as the present one cannot be an occasion for entering into that exercise. Moreover, on the material available, we have recorded a positive finding that CSIR is not a society "owned or controlled by Government". We cannot ignore that finding solely by relying on the contents of the notification wherein we find the user of relevant expression having been mechanically copied but factually unsupportable.

102. For the foregoing reasons, we are the opinion that Council for Scientific and Industrial Research (CSIR) is not the State within the meaning of Article 12 of the Constitution. ***Sabhajit Tewary's case*** was correctly decided and must hold the field. The High Court has rightly followed the decision of this Court in ***Sabhajit Tewary*** . The appeal is liable to be dismissed.

Back to Index

MANU/SC/0419/2014

Neutral Citation:2014/INSC/362

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 416 of 2012, 152, 1081 of 2013, 60, 95, 106, 128, 144, 145, 160 and 136 of 2014 (Under Article 32 of the Constitution of India)

Decided On: 06.05.2014

Appellants: Pramati Educational and Cultural Trust ® and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

R.M. Lodha, C.J.I., A.K. Patnaik, S.J. Mukhopadhaya, Dipak Misra and F.M. Ibrahim Kalifulla, JJ.

Subject: Constitution

Subject: Education

Relevant Section:

Constitution of India - Article 15(5); Constitution of India - Article 21A

Disposition:
Disposed of

Industry: Education

Cases Overruled/Partly Overruled:

Society for Unaided Private Schools of Rajasthan v. Union of India and Anr. MANU/SC/0311/2012

Case Note:

Constitution - Validity of Article - Article 15(5) of Constitution (Ninety-third Amendment) Act, 2005 and Article 21A of Constitution (Eighty-Sixth Amendment) Act, 2002 - Present petitions filed for challenging validity of Articles 15(5) of Constitution inserted by Act, 2005

and validity of Article 21A of Constitution inserted by Act, 2002 - Whether insertion of specified Articles in Constitution were constitutionally valid - Held, by Act, 2002, new power was made available to State to make law determining manner for providing free and compulsory education to children of specified age - Act provides that aided school receiving aid and grants, whole or part, of its expenses from appropriate Government or local authority has to provide free and compulsory education to specified proportion - Thus, minority aided school was put under legal obligation to provide free and compulsory elementary education to children who need not be children of members of minority community which established school - Evidently, Act was made applicable to minority schools, aided or unaided, right of minorities under Article 30(1) of Constitution would be abrogated - Therefore, Act insofar was made applicable to minority schools was ultra vires to Constitution - Constitution Amendment Act inserting Articles 15(5) and 21A of Constitution did not alter basic structure of Constitution, thus constitutionally valid - Petitions dismissed. [paras 40, 41, 42, 44 and 46]

JUDGMENT

A.K. Patnaik, J.

1. This is a reference made by a three-Judge Bench of this Court by order dated 06.09.2010 in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* [MANU/SC/0311/2012 : (2012) 6 SCC 102] to a Constitution Bench. As per the aforesaid order dated 06.09.2010, we are called upon to decide on the validity of Clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20.01.2006 and on the validity of Article 21A of the Constitution inserted by the Constitution (Eighty-Sixth Amendment) Act, 2002 with effect from 01.04.2010.

2. Clause (5) of Article 15 of the Constitution reads as follows:

Nothing in this article or in Sub-clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Article 30.

Clause (5) of Article 15 of the Constitution, therefore, enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Article 30 of the Constitution. The constitutional validity of Clause (5) of Article 15 of the Constitution insofar as it enables the State to make special provisions relating to admission to educational institutions of the State and educational institutions aided by the State was considered by a Constitution Bench of this Court in *Ashoka Kumar Thakur v. Union of India and Ors.* [MANU/SC/1397/2008 : (2008) 6 SCC 1] and the Constitution Bench held in the aforesaid case

that Clause (5) of Article 15 is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. In the aforesaid case, however, the Constitution Bench left open the question whether Clause (5) of Article 15 was constitutionally valid or not so far as "private unaided" educational institutions are concerned, as such "private unaided" educational institutions were not before the Court. This batch of writ petitions has been filed by private unaided educational institutions and we are called upon to decide whether Clause (5) of Article 15 of the Constitution so far as it relates to "private unaided" educational institutions is valid and does not violate the basic structure of the Constitution.

3. Article 21A of the Constitution reads as follows:

21A. Right to education.--The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Thus, Article 21A of the Constitution, provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Parliament has made the law contemplated by Article 21A by enacting the Right of Children to Free and Compulsory Education Act, 2009 (for short 'the 2009 Act'). The constitutional validity of the 2009 Act was considered by a three-Judge Bench of the Court in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* [MANU/SC/0311/2012 : (2012) 6 SCC 1]. Two of the three Judges have held the 2009 Act to be constitutionally valid, but they have also held that the 2009 Act is not applicable to unaided minority schools protected Under Article 30(1) of the Constitution. In the aforesaid case, however, the three-Judge Bench did not go into the question whether Clause (5) of Article 15 or Article 21A of the Constitution is valid and does not violate the basic structure of the Constitution. In this batch of the writ petitions filed by private unaided institutions, the constitutional validity of Clause (5) of Article 15 and of Article 21A has to be decided by this Constitution Bench.

4. Both Clause (5) of Article 15 and Article 21A were inserted in the Constitution by Parliament by exercise of its power of amendment Under Article 368 of the Constitution. A Bench of thirteen-Judges of this Court in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* [MANU/SC/0445/1973 : (1973) 4 SCC 225] considered the scope of the amending power of Parliament Under Article 368 of the Constitution and the majority of the Judges held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. Hence, we are called upon to decide in this reference the following two substantial questions of law:

(i) Whether by inserting Clause (5) in Article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2005, Parliament has altered the basic structure or framework of the Constitution.

(ii) Whether by inserting Article 21A of the Constitution by the Constitution (Eighty-Sixth Amendment) Act, 2002, Parliament has altered the basic structure or framework of the Constitution.

Validity of Clause (5) of Article 15 of the Constitution

Contentions of learned Counsel for the Petitioners:

5. Mr. Mukul Rohatgi, learned senior Counsel for the Petitioners in Writ Petition (C) No. 416 of 2012, submitted that in *T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.* [MANU/SC/0905/2002 : (2002) 8 SCC 481] the majority of the Judges of the eleven-Judge Bench speaking through Kirpal C.J. have held that the fundamental right to carry on any occupation Under Article 19(1)(g) of the Constitution includes the right to run and administer a private unaided educational institution. He submitted that in *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* [MANU/SC/0075/1980 : (1980) 3 SCC 625] Chandrachud, C.J., writing the judgment for the majority of the Judges of the Constitution Bench, has held that Articles 14, 19 and 21 of the Constitution constitute the golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual. He submitted that in the aforesaid case, the Constitution Bench held that Section 4 of the Constitution (Forty-second Amendment) Act is beyond the amending power of Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution. Mr. Rohatgi submitted that Article 19(1)(g)of the Constitution is, therefore, a basic feature of the Constitution and this basic feature is destroyed by providing in Clause (5) of Article 15 of the Constitution that nothing in Article 19(1)(g) of the Constitution shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions. Mr. Rohatgi explained that a nine-Judge Bench of this Court in *I.R. Coelho (Dead) by L.Rs. v. State of T.N.* [MANU/SC/0595/2007 : (2007) 2 SCC 1] relying on the aforesaid judgment in *Minerva Mills* case (supra) has similarly held that Articles 14, 19 and 21 of the Constitution stand on altogether a different footing and after the evolution of the basic structure doctrine in *Kesavananda Bharati* (supra), it will not be open to immunize legislation made by Parliament from judicial scrutiny on the ground that these fundamental rights are not part of the basic structure of the Constitution. He submitted that in the aforesaid judgment, this Court, therefore, has also held that the existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including the power of judicial review Under Article 32 is incompatible with the basic structure of the Constitution and, therefore, such an exercise, if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19 of the Constitution. Mr. Rohatgi submitted that Bhandari, J. has taken the view in *Ashoka Kumar Thakur v. Union of India* (supra) that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution and, therefore, the Ninety-third Amendment of the Constitution is *ultra vires* the Constitution.

6. Mr. R.F. Nariman, learned senior Counsel for the Petitioners in Writ Petition (C) No. 128 of 2014, submitted that Clause (5) of Article 15 of the Constitution is violative of Article 14 of the Constitution inasmuch as it treats unequals as equals. He argued that Clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and

treats both aided and unaided alike in the matter of making special provisions for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to such educational institutions. He referred to paragraph 55 of the majority judgment of this Court in *T.M.A. Pai Foundation* (supra) in which the difference in the administration of private unaided institutions and government-aided institutions has been noticed. He argued that Clause (5) of Article 15 of the Constitution as its very language indicates does not apply to minority educational institutions referred to in Clause (1) of Article 30 of the Constitution. He submitted that Article 14 is, thus, violated because aided minority institutions and unaided minority institutions cannot be treated alike. Clause (5) of Article 15 of the Constitution, therefore, is discriminatory and violative of the equality clause in Article 14 of the Constitution, which is a basic feature of the Constitution.

7. Mr. Nariman next submitted that Clause (5) of Article 15 of the Constitution is a clear violation of Article 19(1)(g) of the Constitution, inasmuch as it compels private educational institutions to give up a share of the available seats to the candidates chosen by the State and such appropriation of seats would not be a regulatory measure and not a reasonable restriction on the right Under Article 19(1)(g) of the Constitution within the meaning of Article 19(6) of the Constitution. He referred to the observations of this Court in *P.A. Inamdar and Ors. v. State of Maharashtra and Ors.* [MANU/SC/0482/2005 : (2005) 6 SCC 537] in paragraph 125 at page 601 that private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates and that unaided institutions, as they are not deriving any aid from State funds, should have their own admissions following a fair, transparent and non-exploitative method based on merit. He vehemently submitted that when reservation in favour of the Scheduled Castes and the Scheduled Tribes and other socially and educationally backward classes of citizens is made in admission to private educational institutions and unaided private educational institutions by the State, such private educational institutions will no longer be institutions of excellence. He submitted that in T.M.A. Pai Foundation (supra), the majority of the Judges have held that private unaided educational institutions impart education and that the State cannot take away the choice in matters of selection of students for admission and Clause (5) of Article 15 of the Constitution insofar as it enables the State to take away this choice for admission of students is violative of freedom of private educational institutions Under Article 19(1)(g) of the Constitution.

8. Mr. Nariman next submitted that in *Mohini Jain (Miss) v. State of Karnataka and Ors.* [MANU/SC/0357/1992 : (1992) 3 SCC 666], this Court has held that the "right to life" is a compendious expression with all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life and that the dignity of an individual cannot be assured unless it is accompanied by the right to education. He submitted that Under Article 51A(j) of the Constitution, it is a duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. He argued that every citizen can strive towards excellence through education by studying in educational institutions of excellence. He submitted that Clause (5) of Article 15 of the Constitution in so far as it enables the State to make special provisions relating to admission to private educational institutions for socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes will affect also this right Under Article 21 read with Article 51A(j) of the Constitution.

9. Mr. Nariman submitted that Clause (5) of Article 15 of the Constitution has been brought in by an amendment to achieve the Directive Principles of State Policy in Part IV of the Constitution as well as the goals of social and economic justice set out in the Preamble of the Constitution, but the majority of the Judges speaking through Chandrachud, C.J., have held in Minerva Mills case (supra) that the goals set out in Part IV of the Constitution have to be achieved without the abrogation of the means provided for by Part III of the Constitution. He submitted that in the aforesaid majority judgment in Minerva Mills case (supra) authored by Chandrachud, C.J., it has also been observed that Parts III and IV together constitute the core of our Constitution and anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution. He submitted that Clause (5) of Article 15 of the Constitution inasmuch as it is violative of Articles 14, 19(1)(g) and 21 of the Constitution destroys the basic feature of the Constitution and is, therefore, beyond the amending power of Parliament.

10. Dr. Rajeev Dhavan, learned senior Counsel appearing for the Petitioners in W.P.(C) No. 152 of 2013, submitted that two tests have to be applied for determining whether a constitutional amendment is violative of basic structure in so far as it affects fundamental rights, and these two tests are the 'identity test' and the 'width test'. He submitted that the Court has to see whether the identity of a fundamental right as judicially determined is not destroyed by the width of the power introduced by the amendment of the Constitution and if the conclusion is that the width of the power of the State vested by the constitutional amendment is such as to destroy the essence of the right, the amendment can be held to destroy the basic structure of the Constitution. In support of this proposition he relied on the judgment of this Court in *M. Nagaraj and Ors. v. Union of India and Ors.* [MANU/SC/4560/2006 : (2006) 8 SCC 212].

11. Mr. Dhavan submitted that in *T.M.A. Pai Foundation* case (supra) the majority judgment has determined the content of the right of a private educational institution Under Article 19(1)(g) of the Constitution and the content of this right comprises the (a) charity, (b) autonomy, (c) voluntariness, (d) non-sharing of seats between the State Governments and the private institutions, (e) co-optation and (f) reasonableness principles. He submitted that Clause (5) of Article 15 of the Constitution inserted by Parliament by way of amendment, however, provides that nothing in Article 19(1)(g) of the Constitution shall prevent the State from making any special provision, by law, for admission to private educational institutions of persons belonging to socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. He vehemently argued that by Clause (5) of Article 15 of the Constitution the power that is vested in the State is such that it can destroy the essence of the right of private educational institution Under Article 19(1)(g) of the Constitution as determined by this Court in T.M.A. Pai Foundation case (supra) and therefore the constitutional amendment inserting Clause (5) in Article 15 of the Constitution is destructive of the basic structure of the Constitution.

12. Mr. Anil B. Divan, learned senior Counsel appearing for the Petitioners in W.P.(C) No. 60 of 2014 and W.P.(C) No. 160 of 2014 submitted that in the case of Edward A. Boyd and *George H. Boyd* v. *Unites States* (1884) 116 U.S. 616 Bradley J., has observed that it will be the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights. He submitted that in *Dwarkadas Shrinivas* v. *The Sholapur Spining and Weaving Co. Ltd. and Ors.* (MANU/SC/0019/1953 : AIR 1954 SC 119) Mahajan J.,

has held that in dealing with constitutional matters it is always well to bear in mind these observations of Bradley J. He submitted that while deciding on validity of Clause (5) of Article 15 of the Constitution, we should bear in mind the aforesaid observations of Bradley J. He submitted that Chandrachud, C.J. in *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* (supra) has referred to the observations of Brandies J. that the need to protect liberty is the greatest when the government purposes are beneficent particularly when political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment. He submitted that Clause (5) of Article 15 of the Constitution is an amendment made by Parliament to appease socially and educationally backward classes of citizens and the Scheduled Castes or the Scheduled Tribes for political gains and it is for the Court to protect the fundamental right of private educational institutions Under Article 19(1)(g) of the Constitution as interpreted by this Court in T.M.A. Pai Foundation.

13. Mr. Divan next submitted that Clause (5) of Article 15 of the Constitution as its very language indicates, applies to non-minority private educational institutions but does not apply to minority educational institutions referred to in Clause (1) of Article 30 of the Constitution. He argued that there is absolutely no rationale for exempting the minority educational institutions from the purview of Clause (5) of Article 15 of the Constitution and Clause (5) of Article 15 of the Constitution really gives a favourable treatment to the minority educational institutions and is violative of the equality clause in Article 14 of the Constitution. He relied on the decision of this Court in *The Ahmedabad St. Xavier's College Society and Anr.* v. *State of Gujarat and Anr.* [MANU/SC/0088/1974 : (1974) 1 SCC 717] to submit that the whole object of conferring the right on the minority Under Article 30 of the Constitution is to ensure that there will be an equality between the majority and the minority. He submitted that H.R. Khanna J. in his judgment in the aforesaid case has clarified that the idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. He submitted that Kirpal C.J. speaking for majority in *T.M.A. Pai Foundation* (supra) has similarly held that the essence of Article 30(1) of the Constitution is to ensure equal treatment between the majority and the minority institutions that laws of the land must apply equally to majority institutions as well as to minority institutions and minority institutions must be allowed to do what the non-minority institutions are permitted to do. Mr. Divan submitted that Clause (5) of Article 15 of the Constitution insofar as it excludes minority institutions referred to in Article 30(1) of the Constitution is also violative of secularism which is a basic feature of the Constitution. He referred to the judgment in *Dr. M. Ismail Faruqui and Ors.* v. *Union of India and Ors.* [MANU/SC/0860/1994 : (1994) 6 SCC 360] in which this Court has held that the concept of secularism is one facet of right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.

Contentions of learned Counsel for the Union of India:

14. Mr. Mohan Parasaran, learned Solicitor General, submitted that this Court has held in *Ashoka Kumar Thakur v. Union of India* (supra) that Clause (5) of Article 15 of the Constitution is only an enabling provision empowering the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to

educational institutions including private educational institutions. He submitted that it will be clear from paragraphs 53 and 68 of the judgment of the eleven Judge Bench of this Court in *T.M.A. Pai Foundation* (supra) that reserving a small percentage of seats in private educational institutions, aided or unaided, for weaker, poorer and backward sections of society did not in any way affect the right of private educational institutions under Article 19(1)(g) of the Constitution. He argued that after the judgment of this Court in *T.M.A. Pai Foundation* (supra) a five-Judge Bench of this Court in *Islamic Academy of Education and Anr. v. State of Karnataka and Ors.* [MANU/SC/0580/2003 : (2003) 6 SCC 697 was of the view that as per the judgment in *T.M.A. Pai Foundation* (supra) in case of non-minority professional colleges a percentage of seats could be reserved by the Government for poorer and backward sections. He submitted that this view taken by the five-Judge Bench of this Court in *Islamic Academy of Education and Anr. v. State of Karnataka and Ors.* (supra), however, did not find favour with a seven-Judge Bench of this Court in *P.A. Inamdar* (supra) which held that there is nothing in the judgment of this Court in *T.M.A. Pai Foundation* (supra) allowing the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State or for enforcing the reservation policy of the State. He submitted that, therefore, Parliament introduced Clause (5) in Article 15 of the Constitution by the Constitution (Ninety-Third Amendment) Act, 2005 providing that the State may make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State. He vehemently argued that Clause (5) of Article 15 introduced by the constitutional amendment is consistent with the right to establish and administer the private educational institutions Under Article 19(1)(g) of the Constitution as interpreted by *T.M.A. Pai Foundation* (supra) and, therefore, does not violate the right Under Article 19(1)(g) of the Constitution.

15. Mr. Parasaran next submitted that minority institutions referred to in Article 30 of the Constitution have been excluded from the purview of Clause (5) of Article 15 of the Constitution because the Constitution has given a special status to minority institutions. He submitted that in the case of *Ashoka Kumar Thakur v. Union of India* (supra), this Court has held that exclusion of minority educational institutions from Clause (5) of Article 15 of the Constitution is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions. He submitted that the argument that Clause (5) of Article 15 of the Constitution is violative of equality clause in Article 14 of the Constitution is therefore misconceived.

Opinion of the Court on the validity of Clause (5) of Article 15 of the Constitution:

16. We have considered the submissions of learned Counsel for the parties and we find that the object of Clause (5) of Article 15 is to enable the State to give equal opportunity to socially and educationally backward classes of citizens or to the Scheduled Castes and the Scheduled Tribes to study in all educational institutions other than minority educational institutions referred in Clause (1) of Article 30 of the Constitution. This will be clear from the Statement of Objects and Reasons of the Bill, which after enactment became the Constitution (Ninety-Third Amendment) Act, 2005 extracted hereinbelow:

Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes has been a matter of major concern. At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

2. It is laid down in Article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15.

3. The Bill seeks to achieve the above objects.

Clause (1) of Article 15 of the Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and Clause (2) of Article 15 of the Constitution provides that no citizen shall, on grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. These provisions were made to ensure that every citizen irrespective of his religion, race, caste, sex, place of birth or any of them, is given the equal treatment by the State and he has equal access to public places. Despite these provisions in Article 15 of the Constitution as originally adopted, some classes of citizens, Scheduled Castes and Scheduled Tribes have remained socially and educationally backward and have also not been able to access educational institutions for the purpose of advancement. To amplify the provisions of Article 15 of the Constitution as originally adopted and to provide equal opportunity in educational institutions, Clause (5) has been inserted in Article 15 by the constitutional amendment made by the Parliament by the Ninety-Third Amendment Act, 2005. As the object of Clause (5) of Article 15 of the Constitution is to provide equal opportunity to a large number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to study in educational institutions and equality of opportunity is also the object of Clauses (1) and (2) of Article 15 of the Constitution, we cannot hold that Clause (5) of Article 15 of the Constitution is an exception or a proviso overriding Article 15 of the Constitution, but an enabling provision to make equality of opportunity promised in the Preamble in the Constitution a reality.

17. For this view, we are supported by the majority judgment of this Court in *State of Kerala and Anr. v. N.M. Thomas and Ors.* [MANU/SC/0479/1975 : (1976) 2 SCC 310] in which this Court has held that Clause (4) of Article 16 of the Constitution which has opening words similar to the opening words in Clause (5) of Article 15 is not an exception or a proviso to Article 16, but is a provision intended to give equality of opportunity to backward classes of citizens in matters of public employment. Similarly, in *Indra Sawhney and Ors. v. Union of India and Ors.* [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217], this Court following the majority judgment in

the case of *State of Kerala and Anr. v. N.M. Thomas and Ors.* (supra) held that Clause (4) of Article 16 was not an exception to Clause (1) of Article 16, but is an enabling provision to give effect to the equality of opportunity in matters of public employment. These two authorities have also been cited by K.G. Balakrishnan, C.J., in his judgment in *Ashoka Kumar Thakur v. Union of India* (supra) to hold that Clause (5) of Article 15 of the Constitution is not an exception to Clause (1) of Article 15, but may be taken as an enabling provision to carry out the constitutional mandate of equality of opportunity.

18. We may now consider whether Clause (5) of Article 15 of the Constitution has destroyed the right Under Article 19(1)(g) of the Constitution to establish and administer private educational institutions. It is for the first time that this Court held in *T.M.A. Pai Foundation* (supra) that the establishment and running of an educational institution "is occupation" within the meaning of Article 19(1)(g) of the Constitution. In paragraph 20 of the majority judgment, while dealing with the four components of the rights Under Articles 19 and 26(a) of the Constitution in respect of private unaided non-minority educational institutions, Kirpal, C.J. has held that education is per se regarded as an activity that is charitable in nature. Kirpal, C.J. has further held in paragraphs 53 and 68:

53. With regard to the core components of the rights Under Articles 19 and 26(a), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government....

68. It would be unfair to apply the same rules and Regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

19. Thus, the content of the right Under Article 19(1)(g) of the Constitution to establish and administer private educational institutions, as per the judgment of this Court in *T.M.A. Pai Foundation* (supra), includes the right to admit students of their choice and autonomy of administration, but this Court has made it clear in *T.M.A. Pai Foundation* (supra) that this right

and autonomy will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government. This was the charitable element of the right to establish and administer private educational institutions Under Article 19(1)(g) of the Constitution. Hence, the identity of the right of private educational institutions Under Article 19(1)(g) of the Constitution as interpreted by this Court, was not to be destroyed by admissions from amongst educationally and socially backward classes of citizens as well as the Scheduled Castes and the Scheduled Tribes.

20. In *P.A. Inamdar* (supra), this Court speaking through Lahoti, C.J., was, however, of the view that the judgment in T.M.A. Pai Foundation (supra) held that there was no power vested on the State under Clause (6) of Article 19 to regulate or control admissions in the unaided educational institutions so as to compel them to give up a share of the available seats to the State or to enforce reservation policy of the State on available seats in unaided professional institutions. This will be clear from paragraph 125 of the judgment in P.A. Inamdar (supra), which is extracted hereinbelow:

125. As per our understanding, neither in the judgment of *Pai Foundation* nor in the Constitution Bench decision in *Kerala Education Bill* which was approved by *Pai Foundation* is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to Nationalisation of seats which has been specifically disapproved in *Pai Foundation*. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

21. The reasoning adopted by this Court in *P.A. Inamdar* (supra), therefore, is that the appropriation of seats by the State for enforcing a reservation policy was not a regulatory measure and not reasonable restriction within the meaning of Clause (6) of Article 19 of the Constitution. As there was no provision other than Clause (6) of Article 19 of the Constitution under which the State could in any way restrict the fundamental right Under Article 19(1)(g) of the Constitution, Parliament made the Constitution (Ninety-third Amendment) Act, 2005 to insert Clause (5) in Article 15 of the Constitution to provide that nothing in Article 19(1)(g) of the Constitution shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) in Article 15 of the Constitution, thus, vests a power on the State, independent of and different from, the regulatory power under Clause (6) of Article 19, and we have to examine whether this new power vested in

the State which enables the State to force the charitable element on a private educational institution destroys the right Under Article 19(1)(g) of the Constitution.

22. According to Dr. Dhavan, the right of a private educational institution Under Article 19(1)(g) of the Constitution as laid down by this Court in *T.M.A. Pai Foundation* (supra) has a voluntary element. In fact, this Court in *P.A. Inamdar* (supra) has held in paragraph 126 at page 601 of the SCC that the observations in paragraph 68 of the judgment in *T.M.A. Pai Foundation* (supra) merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State and that there are also observations in *T.M.A. Pai Foundation* (supra) to say that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society. In our view, all freedoms under which Article 19(1) of the Constitution, including the freedom Under Article 19(1)(g), have a voluntary element but this voluntariness in all the freedoms in Article 19(1) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under Clauses (2) to (6) of Article 19 of the Constitution. Hence, the voluntary nature of the right Under Article 19(1)(g) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under Clause (6) of Article 19 of the Constitution. As this Court has held in *T.M.A. Pai Foundation* (supra) and *P.A. Inamdar* (supra) the State can under Clause (6) of Article 19 make regulatory provisions to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of the management. However, as this Court held in the aforesaid two judgments that nominating students for admissions would be an unacceptable restriction in Clause (6) of Article 19 of the Constitution, Parliament has stepped in and in exercise of its amending power Under Article 368 of the Constitution inserted clause (5) in Article 15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of this right Under Article 19(1)(g) of the Constitution. We, therefore, do not find any merit in the submission of learned Counsel for the Petitioners that the identity of the right of unaided private educational institutions Under Article 19(1)(g) of the Constitution has been destroyed by Clause (5) of Article 15 of the Constitution.

23. We may now examine whether the Ninety-Third Amendment satisfies the width test. A plain reading of Clause (5) of Article 15 would show that the power of a State to make a law can only be exercised where it is necessary for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and not for any other purpose. Thus, if a law is made by the State only to appease a class of citizen which is not socially or educationally backward or which is not a Scheduled Caste or Scheduled Tribe, such a law will be beyond the powers of the State under Clause (5) of Article 15 of the Constitution. A plain reading of Clause (5) of Article 15 of the Constitution will further show that such law has to be limited to making a special provision relating to admission to private educational institutions, whether aided or unaided, by the State. Hence, if the State makes a law which is not related to admission in educational institutions and relates to some other aspects affecting the autonomy and rights of private educational institutions as defined by this Court in *T.M.A. Pai Foundation*, such a law would not be within the power of the State under Clause (5) of Article 15 of the Constitution. In

other words, power in Clause (5) of Article 15 of the Constitution is a guided power to be exercised for the limited purposes stated in the clause and as and when a law is made by the State in purported exercise of the power under Clause (5) of Article 15 of the Constitution, the Court will have to examine and find out whether it is for the purposes of advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes and whether the law is confined to admission of such socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to private educational institutions, whether aided or unaided, and if the Court finds that the power has not been exercised for the purposes mentioned in Clause (5) of Article 15 of the Constitution, the Court will have to declare the law as *ultra vires* Article 19(1)(g) of the Constitution. In our opinion, therefore, the width of the power vested on the State under Clause (5) of Article 15 of the Constitution by the constitutional amendment is not such as to destroy the right Under Article 19(1)(g) of the Constitution.

24. We may now examine the contention of Mr. Nariman that Clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and treats both aided and unaided alike in the matter of making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The distinction between a private aided educational institution and a private unaided educational institution is that private educational institutions receive aid from the State, whereas private unaided educational institutions do not receive aid from the State. As and when a law is made by the State under Clause (5) of Article 15 of the Constitution, such a law would have to be examined whether it has taken into account the fact that private unaided educational institutions are not aided by the State and has made provisions in the law to ensure that private unaided educational institutions are compensated for the admissions made in such private unaided educational institutions from amongst socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. In our view, therefore, a law made under Clause (5) of Article 15 of the Constitution by the State on the ground that it treats private aided educational institutions and private unaided educational institutions alike is not immune from a challenge Under Article 14 of the Constitution. Clause (5) of Article 15 of the Constitution only states that nothing in Article 15 or Article 19(1)(g) will prevent the State to make a special provision, by law, for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) of Article 15 of the Constitution does not say that such a law will not comply with the other requirements of equality as provided in Article 14 of the Constitution. Hence, we do not find any merit in the submission of the Mr. Nariman that Clause (5) of Article 15 of the Constitution that insofar as it treats unaided private educational institutions and aided private educational institutions alike it is violative of Article 14 of the Constitution.

25. We may now deal with the contention of Mr. Divan that Clause (5) of Article 15 of the Constitution is violative of Article 14 of the Constitution as it excludes from its purview the minority institutions referred to in Clause (1) of Article 30 of the Constitution and the contention of Mr. Nariman that Clause (5) of Article 15 excludes both unaided minority institutions and aided minority institutions alike and is thus violative of Article 14 of the Constitution. Articles 29(2),

30(1) and 30(2) of the Constitution, which are relevant, for deciding these contentions, are quoted hereinbelow:

29. Protection of interests of minorities-(1)

...

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30. Right of minorities to establish and administer educational institutions-(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) ...

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

On the question whether the right of minority institutions Under Article 30(1) of the Constitution would be affected by admission of students who do not belong to the minority community which has established the institutions, Kirpal C.J. writing the majority judgment in *T.M.A. Pai Foundation* (supra) considered the previous judgments of this Court and then held in paragraph 149 at page 582 and 583 of the SCC:

149. Although the right to administer includes within it a right to grant admission to students of their choice Under Article 30(1), when such a minority institution is granted the facility of receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the right of administration of the minorities would be eroded to some extent. Article 30(2) is an injunction against the state not to discriminate against the minority educational institution and prevent it from receiving aid on the ground that the institution is under the management of a minority. While, therefore, a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29(2) of the Constitution by no stretch of imagination can the rights guaranteed Under Article 30(1) be annihilated. It is this context that some interplay between Article 29(2) and Article 30(1) is required. As observed quite aptly in St. Stephen's case "the fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1)." The word "only" used in Article 29(2) is of considerable significance and has been used for some avowed purpose. Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be only on grounds of religion etc., but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee Under Article 30(1). The best possible way is to hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its

own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any specific percentage. The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with students of the minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted Under Article 29(2) are not subverted. It is for this reason that a variable percentage of admission of minority students depending on the type of institution and education is desirable, and indeed, necessary, to promote the constitutional guarantee enshrined in both Article 29(2) and Article 30.

Thus, the law as laid down by this Court is that the minority character of an aided or unaided minority institution cannot be annihilated by admission of students from communities other than the minority community which has established the institution, and whether such admission to any particular percentage of seats will destroy the minority character of the institution or not will depend on a large number of factors including the type of institution.

26. Clause (5) of Article 15 of the Constitution enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in Clause (1) of Article 30 of the Constitution. In other words, the minority character of the minority educational institutions referred to in Clause (1) of Article 30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under Clause (5) of Article 15 with a view to protect the minority institutions from a law made by the majority. As has been held by the Constitution Bench of this Court in *Ashoka Kumar Thakur v. Union of India* (supra), the minority educational institutions, by themselves, are a separate class and their rights are protected Under Article 30 of the Constitution, and, therefore, the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution.

27. We may now consider the contention of Mr. Divan that Clause (5) of Article 15 of the Constitution is violative of secularism insofar as it excludes religious minority institutions referred to in Article 30(1) of the Constitution from the purview of Clause (5) of Article 15 of the Constitution. In *Dr. M. Ismail Faruqui and Ors.* v. *Union of India and Ors.* (supra), this Court has held that the Preamble of the Constitution read in particular with Articles 15 to 28 emphasis this aspect and indicates that the concept of secularism embodied in the constitutional scheme is a creed adopted by the Indian people. Hence, secularism is no doubt a basic feature of the Constitution, but we fail to appreciate how Clause (5) of Article 15 of the Constitution which excludes religious minority institutions in Clause (1) of Article 30 of the Constitution is in any

way violative of the concept of secularism. On the other hand, this Court has held in T.M.A. Pai Foundation (supra) that the essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs and Articles 29 and 30 seek to preserve such differences and at the same time unite the people of India to form one strong nation. (see paragraph 161 of the majority judgment of Kirpal, C.J., in T.M.A. Pai Foundation at page 587 of the SCC). In our considered opinion, therefore, by excluding the minority institutions referred to in Clause (1) of Article 30 of the Constitution, the secular character of India is maintained and not destroyed.

28. We may now come to the submission of Mr. Nariman that the fundamental right Under Article 21 read with Article 51A(j) of the Constitution is violated by Clause (5) of Article 15 of the Constitution. According to Mr. Nariman, every person has a right Under Article 21 and a duty Under Article 51A(j) to strive towards excellence in all spheres of individual and collective activity, but this will not be possible if private educational institutions in which a person studies for the purpose of achieving excellence are made to admit students from amongst backward classes of citizens and from the Scheduled Castes and the Scheduled Tribes. This contention, in our considered opinion, is not founded on the experience of educational institutions in India. Educational institutions in India such as Kendriya Vidyalayas, Indian Institute of Technology, All India Institute of Medical Sciences and Government Medical Colleges admit students in seats reserved for backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes and yet these Government institutions have produced excellent students who have grown up to be good administrators, academicians, scientists, engineers, doctors and the like. Moreover, the contention that excellence will be compromised by admission from amongst the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes in private educational institutions is contrary to the Preamble of the Constitution which promises to secure to all citizens "fraternity assuring the dignity of the individual and the unity and integrity of the nation". The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the main stream of the nation. We, therefore, find no merit in the submission of Mr. Nariman that Clause (5) of Article 15 of the Constitution violates the right under Article 21 of the Constitution.

29. We accordingly hold that none of the rights Under Articles 14, 19(1)(g) and 21 of the Constitution have been abrogated by Clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in *Ashoka Kumar Thakur v. Union of India* (supra) that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution is not correct. Instead, we hold that the (Ninety-third Amendment) Act, 2005 of the Constitution inserting Clause (5) of Article 15 of the Constitution is valid.

Validity of Article 21A of the Constitution

Contention of the learned Counsel for the Petitioners:

30. The second substantial question of law which we are called upon to decide is whether by inserting Article 21A by the Constitution (Eighty-Sixth Amendment) Act, 2002, the Parliament

has altered the basic structure or framework of the Constitution. Before we refer to the contentions of the learned Counsel for the Petitioners, we must reiterate some facts. Article 21A is titled 'Right to Education' and it provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Accordingly, the 2009 Act was enacted by Parliament to provide free and compulsory education to all children of the age of six to fourteen years. The validity of the 2009 Act was challenged and considered in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (supra) by a three-Judge Bench of this Court. Two learned Judges S.H. Kapadia C.J. and Swatanter Kumar J. held that the 2009 Act is constitutionally valid and shall apply to the following:

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

The two learned Judges, however, held that the 2009 Act, in particular Sections 12(1)(c) and Section 18(3), infringe the fundamental rights guaranteed to unaided minority schools Under Article 30(1) of the Constitution and therefore the 2009 Act shall not apply to such unaided minority schools. Differing from the majority opinion expressed by the two learned Judges, Radhakrishnan J. held that Article 21A casts an obligation on the State and not on unaided non-minority and unaided minority schools to provide free and compulsory education to children of the age of six to fourteen years. After the aforesaid judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (supra), the 2009 Act was amended by the Right of Children to Free and Compulsory Education Act, 2009 (Amendment Act, 2012) and by the amendment, it was provided in Sub-section (4) of Section 1 of the 2009 Act that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the 2009 Act shall apply to conferment of rights on children to free and compulsory education.

31. Mr. Rohatgi, learned senior Counsel for the Petitioners in Writ Petition (C) No. 416 of 2012, submitted that Article 21A of the Constitution creates obligation only upon the State and its instrumentalities as defined in Article 12 of the Constitution and does not cast any obligation on a private unaided educational institution. He submitted that the minority opinion of Radhakrishnan J. in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (supra) is, therefore, a correct interpretation of Article 21A. He submitted that if Article 21A is interpreted to include the private unaided educational institutions within its sweep then it would abrogate the right Under Article 19(1)(g) of the Constitution to establish and administer private educational institutions which is a basic feature of the Constitution.

32. Mr. Nariman, learned senior Counsel for the Petitioners in Writ Petition (C) No. 128 of 2014, submitted that word "State" used in Article 21A of the Constitution would mean the State as defined in Article 12 of the Constitution and therefore would include the Government and

Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. He submitted that this Court has held in *P.D. Shamdasani* v. *The Central Bank of India Ltd.* (MANU/SC/0017/1951 : AIR 1952 SC 1952) that the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms against State action only and hence violation of rights of property by individuals is not within the purview of Article 19 of the Constitution. He submitted that this Court has also held in *Smt. Vidya Verma* v. *Dr. Shiv Narain Verma* (MANU/SC/0072/1955 : AIR 1956 SC 108) that the fundamental right of personal liberty Under Article 21 of the Constitution is available against only the State and not against private individuals. He submitted that, therefore, the word "State" in Article 21A of the Constitution would not include private unaided educational institutions or private individuals.

33. Mr. Nariman submitted that before the Constitution (Eighty-Sixth Amendment) Act, 2002, Article 45 provided that the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, "for" free and compulsory education for all children until they complete the age of fourteen years. He submitted that what Article 45 therefore meant was that the State alone shall endeavour to provide "for" free and compulsory education to all children upto the age of fourteen years. He submitted that by the Constitution (Eighty-Sixth Amendment) Act, 2002, Article 45 was deleted and in its place Article 21A was inserted in the Constitution. He submitted that in Article 21A of the Constitution, the word "for" is missing but this does not mean that the obligation of the State to fund free and compulsory education to all children upto the age of 14 years could be passed on by the State to private unaided educational institutions. He submitted that Article 21A, if construed to mean that the State could by law pass on its obligation Under Article 21A to provide free and compulsory education to all children upto the age of fourteen years to private unaided schools, Article 21A of the Constitution would abrogate the right of private educational schools Under Article 19(1)(g) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation* (supra).

34. Mr. Nariman submitted that the Objects and Reasons of the Bill which became the 2009 Act explicitly stated that the 2009 Act is pursuant to Article 21A of the Constitution but did not make any reference to Clause (5) of Article 15 of the Constitution. He submitted that the validity of the provisions of the 2009 Act will, therefore, have to be tested only by reference to Article 21A of the Constitution and not by reference to Clause (5) of Article 15 of the Constitution. According to both Mr. Rohatgi and Mr. Nariman, Section 12(1)(c) of the 2009 Act insofar as it provides that a private unaided school shall admit in Class I to the extent of at least 25% of the total strength of the class, children belonging to weaker sections and disadvantaged group in the neighborhood and provide free and compulsory education till its completion is violative of the right of private unaided schools Under Article 19(1)(g) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation* (supra) and *P.A. Inamdar* (supra). They submitted that the majority opinion of the three-Judge Bench in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (supra) is, therefore, not correct.

35. Mr. Ajmal Khan, learned senior Counsel appearing for the Petitioners in Writ Petition (C) No. 1081 of 2013 (Muslim Minority Schools Managers' Association) and Mr. T.R. Andhyarujina, learned senior Counsel appearing for intervener in Writ Petition (C) No. 60 of 2014 (La Martineire

Schools) that Under Article 30(1) of the Constitution all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. They submitted that the State while making the law to provide free and compulsory education to all children of the age of six to fourteen years cannot be allowed to encroach on this right of the minority institutions Under Article 30(1) of the Constitution. They referred to the decisions of this Court right from the Kerala Educational Bill case to the *T.M.A. Pai* case (supra) to argue that admitting children other than those of the minority community which establish the school cannot be forced upon the minority institutions, whether aided or unaided. They submitted that 2009 Act, if made applicable to minority schools, aided or unaided, will be *ultra vires* Article 30(1) of the Constitution. They submitted that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (supra), has taken a view that the 2009 Act will not apply to unaided minority schools but will apply to aided minority schools. They submitted that accordingly Sub-section (4) of Section 1 of the 2009 Act provides that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the Act shall apply to conferment of rights on children to free and compulsory education. They submitted that this Sub-section (4) of Section 1 of the 2009 Act should be declared as *ultra vires* Article 30(1) of the Constitution.

Submissions of learned Counsel for the Union of India:

36. In reply, Mr. K.V. Vishwanathan, learned Additional Solicitor General, submitted that the Statement of Objects and Reasons of the Bill, which was enacted as the Constitution (Eighty-Sixth Amendment) Act, 2002, stated that the goal set out in Article 45 of the Constitution of providing free and compulsory education for children upto the age of 14 years could not be achieved even after 50 years of adoption of the provision and in order to fulfill this goal, it was felt that a new provision in the Constitution should be inserted as Article 21A providing that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. He submitted that in accordance with Article 21A of the Constitution, the 2009 Act has been enacted which provides the manner in which such free and compulsory education for children upto the age of 14 years shall be provided by the State and it provides in Section 12(1)(c) that private unaided schools shall admit in Class I from amongst weaker sections of society and from disadvantaged groups at least twenty-five per cent of the strength of the class and provide free and compulsory education.

37. Mr. Vishwanathan submitted that private educational institutions cannot have any grievance in this regard because they are performing a function akin to the function of the State. He submitted that applying the functional test private educational institutions are also State within the meaning of Article 12 of the Constitution and, therefore, the argument of Mr. Nariman that the obligation of providing free and compulsory education to all children of the age of six to fourteen years cannot be passed on by the State to private educational institutions has no substance. Mr. Vishwanathan submitted that in paragraph 53 of the judgment in *T.M.A. Pai Foundation* (supra) this Court has held that while private unaided educational institutions have the right to admit students of their choice, admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government should also be done. He submitted that in paragraph 68 of *T.M.A. Pai Foundation* (supra), this Court has also held that a small percentage of seats may also be filled up to take care of poorer and backward sections of the

society. He submitted that the 2009 Act, therefore, has provided in Section 12(1)(c) that an unaided private school shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion and this provision of the 2009 Act, therefore, is not *ultra vires* Article 19(1)(g) of the Constitution.

38. Regarding minority institutions, Mr. Vishwanathan submitted that Under Article 3(1) of the Constitution they have equal status and accordingly this Court has held in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (supra) the 2009 Act will not apply to unaided minority schools but will apply to aided minority schools. He submitted that accordingly the 2009 Act was amended by the Right of Children to Free and Compulsory Education (Amendment) Act, 2012, so as to provide in Sub-section (4) of Section 1 of the 2009 Act that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the 2009 Act shall apply to conferment of rights on children to free and compulsory education.

Opinion of the Court on Article 21A of the Constitution and on the validity of 2009 Act:

39. We have considered the submissions of learned Counsel for the parties and we find that this is what it is stated in the Statement of Objects and Reasons of the Constitution (Eighty-Third Amendment) Bill, 1997, which ultimately was enacted as the Constitution (Eighty-Sixth Amendment) Act, 2002:

The Constitution of India in a Directive Principle contained in Article 45, has 'made a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution. We could not achieve this goal even after 50 years of adoption of this provision. The task of providing education to all children in this age group gained momentum after the National Policy of Education (NPE) was announced in 1986. The Government of India, in partnership with the State Governments, has made strenuous efforts to fulfil this mandate and, though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remains unfulfilled. In order to fulfil this goal, it is felt that an explicit provision should be made in the Part relating to Fundamental Rights of the Constitution.

2. With a view to making right to free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in Parliament to insert a new article, namely, Article 21A conferring on all children in the age group of 6 to 14 years the right to free and compulsory education. The said Bill was scrutinised by the Parliamentary Standing Committee on Human Resource Development and the subject was also dealt with in its 165th Report by the Law Commission of India.

3. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament, the proposed amendments in Part III, Part IV and Part IVA of the Constitution are being made which are as follows:

(a) to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation would be introduced in Parliament after the Constitution (Ninety-third Amendment) Bill, 2001 is enacted;

(b) to provide in Article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and

(c) to amend Article 51A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

4. The Bill seeks to achieve the above objects.

MURLI MANOHAR JOSHI.

NEW DELHI;
The 16th November, 2001.

It will, thus, be clear from the Statement of Objects and Reasons extracted above that although the Directive Principle in Article 45 contemplated that the State will provide free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution, this goal could not be achieved even after 50 years and, therefore, a constitutional amendment was proposed to insert Article 21A in Part III of the Constitution. Bearing in mind this object of the Constitution (Eight-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution, we may now proceed to consider the submissions of learned Counsel for the parties.

40. Article 21A of the Constitution, as we have noticed, states that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The word 'State' in Article 21A can only mean the 'State' which can make the law. Hence, Mr. Rohatgi and Mr. Nariman are right in their submission that the constitutional obligation Under Article 21A of the Constitution is on the State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions. Article 21A, however, states that the State shall by law determine the "manner" in which it will discharge its constitutional obligation Under Article 21A. Thus, a new power was vested in the State to enable the State to discharge this constitutional obligation by making a law. However, Article 21A has to be harmoniously construed with Article 19(1)(g) and Article 30(1) of the Constitution. As has been held by this Court in *Venkataramana Devaru v. State of Mysore* (MANU/SC/0026/1957 : AIR 1958 SC 255):

The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction.

We do not find anything in Article 21A which conflicts with either the right of private unaided schools Under Article 19(1)(g) or the right of minority schools under Article 30(1) of the Constitution, but the law made Under Article 21A may affect these rights Under Articles 19(1)(g) and 30(1). The law made by the State to provide free and compulsory education to the children of

the age of 6 to 14 years should not, therefore, be such as to abrogate the right of unaided private educational schools Under Article 19(1)(g) of the Constitution or the right of the minority schools, aided or unaided, Under Article 30(1) of the Constitution.

41. While discussing the validity of Clause (5) of Article 15 of the Constitution, we have already noticed that in paragraphs 53 and 68 of the judgment in *T.M.A. Pai Foundation* (supra), this Court has held that admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government and the admission to some of the seats to take care of poorer and backward sections of the society may be permissible and would not be inconsistent with the rights Under Articles 19(1)(g) of the Constitution. In *P.A. Inamdar* (supra), however, this Court explained that there was nothing in this Court's judgment in *T.M.A. Pai Foundation* (supra) to say that such admission of students from amongst weaker, backward and poorer sections of the society in private unaided institutions can be done by the State because the power vested on the State in Clause (6) of Article 19 of the Constitution is to make only regulatory provisions and this power could not be used by the State to force admissions from amongst weaker, backward and poorer sections of the society on private unaided educational institutions. While discussing the validity of Clause (5) of Article 15, we have also held that there is an element of voluntariness of all the freedoms Under Article 19(1) of the Constitution, but the voluntariness in these freedoms can be subjected to law made under the powers available to the State under Clause (2) to (6) of Article 19 of the Constitution.

42. In our considered opinion, therefore, by the Constitution (Eighty-Sixth Amendment) Act, a new power was made available to the State Under Article 21A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the Directive Principles in Article 45 before this constitutional amendment could not be achieved for fifty years. This additional power vested by the Constitution (Eighty-Sixth Amendment) Act, 2002 in the State is independent and different from the power of the State under Clause (6) of Article 19 of the Constitution and has affected the voluntariness of the right Under Article 19(1)(g) of the Constitution. By exercising this additional power, the State can by law impose admissions on private unaided schools and so long as the law made by the State in exercise of this power Under Article 21A of the Constitution is for the purpose of providing free and compulsory education to the children of the age of 6 to 14 years and so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions Under Article 19(1)(g) of the Constitution.

43. To give an idea of the goals Parliament intended to achieve by enacting the 2009 Act, we extract paragraphs 4, 5 and 6 of the Statement of Objects and Reasons of the Bill which was enacted as the 2009 Act hereinbelow:

4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the

responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

5. It is, therefore, expedient and necessary to enact a suitable legislation as envisaged in Article 21A of the Constitution.

6. The Bill seeks to achieve this objective.

It will be clear from the aforesaid extract that the 2009 Act intended to achieve the constitutional goal of equality of opportunity through inclusive elementary education to all and also intended that private schools which did not receive government aid should also take the responsibility of providing free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections.

44. When we examine the 2009 Act, we find that under Section 12(1)(c) read with Section 2(n)(iv) of the Act, an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority is required to admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. We further find that under Section 12(2) of the 2009 Act such a school shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Thus, ultimately it is the State which is funding the expenses of free and compulsory education of the children belonging to weaker sections and several groups in the neighbourhood, which are admitted to a private unaided school. These provisions of the 2009 Act, in our view, are for the purpose of providing free and compulsory education to children between the age group of 6 to 14 years and are consistent with the right Under Article 19(1)(g) of the Constitution, as interpreted by this Court in *T.M.A. Pai Foundation* (supra) and are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. We, therefore, do not find any merit in the submissions made on behalf of the non-minority private schools that Article 21A of the Constitution and the 2009 Act violate their right Under Article 19(1)(g) of the Constitution.

45. Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions. Moreover, in *Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* (supra) Sikri, C.J., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, C.J. in *Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* (supra):

178. The above brief summary of the work of the Advisory Committee and the Minorities Sub-committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities.

Thus, the power Under Article 21A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice.

46. When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n)(iii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of Clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities Under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in Clause (1) of Article 30 of the Constitution is *ultra vires* the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (supra) insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.

47. In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting Clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not *ultra vires* Article 19(1)(g) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under Clause (1) of Article 30 of the Constitution is *ultra vires* the Constitution. Accordingly, Writ Petition (C) No. 1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petition (C) Nos. 416 of 2012, 152 of 2013, 60 of 2014, 95 of 2014, 106 of 2014, 128 of 2014, 144 of 2014, 145 of 2014, 160 of 2014

and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All I.As. stand disposed of. The parties, however, shall bear their own costs.

Back to Index

MANU/SC/0399/2006

Neutral Citation:2006/INSC/42

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 255, 257, 258 and 353 of 2005

Decided On: 24.01.2006

Appellants: Rameshwar Prasad and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Y.K. Sabharwal C.J., B.N. Agrawal Ashok Bhan Dr. Arijit Pasayatand K.G. Balakrishnan, JJ.

Subject: Constitution

Relevant Section:

REPRESENTATION OF THE PEOPLE ACT 1950 - Section 73

Disposition:
Petition Dismissed

Cases Overruled/Partly Overruled:

K A Mathialagan v. Governor of TN, MANU/TN/0197/1973 AIR 1973 Mad 198, State of Rajasthan v. Union of India, 1977 3 SCC 592; Udai Narain Sinha vs. State of Uttar Pradesh and Ors., MANU/UP/0178/1987 AIR 1987 All 203

Authorities Referred:

A constitutional Miscellany; V.R. Krisnha Iyer 2nd Edn., Eastern Book Co. Lucknow, 2003; p.44; Administrative Law; Wade; 9th Edn.; Black's Law Dictionary; Constituent Assembly Debates (Volume IX, Revised Edition); pp. 175-177); Constitution of India; V.N. Shukla 10th edn.; Constitutional Questions in India - The President, Parliament and the States; A.G. Noorani; Oxford University Press, New Delhi; 2000 p.11; Cooley on constitutional Limitations; 8th Edn., Vol.1, p.129; Dr. Ambedkar and Article 356 of the Constitution; T.K. Thope; (1993) 4 SCC (Jour) 1; Griffith and Ryle on "Parliament, Functions, Practice & Procedure" 1989 Edn. P. 119; Harvard Law Review; (Vol.116) 2002-2003; The framing of India India's Constitution - Select Documents (Volume IV), B. Shiva Rao (Ed.); Universal Law Publishing Cp.,New Delhi; 2004; p. 86

Case Note:

Constitution - Constitutional validity of - Dissolution of Assembly - Proclamation - The challenge in the present petitions is to the Constitutional validity of Notification dated 23rd May, 2005 ordering dissolution of the Legislative Assembly of the State of Bihar - Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional - Held, If political party with support of other political party stakes claim to form government and satisfies the Governor about its majority to form stable government, Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that majority was cobbled by illegal and unethical means - Grounds of mal-administration by State Government enjoying majority is not available for invoking power under Article 356 - Hence, impugned proclamation was unconstitutional

Constitution - Dissolution of Legislative Assembly - Article 174(2)(b) of the Constitution - Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place - Held, Court relied on holding in Gujarat Assembly Election Matter, where it was held that the constitution of any Assembly can only be under Section 73 of the RP Act, 1951 and the requirement of Article 188 of Constitution suggests that the Assembly comes into existence even before its first sitting commences

Constitution - Immunity to Governor - Article 361 of the Constitution of India - What is the scope of Article 361 granting immunity to the Governor - Governor enjoys complete immunity - Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties - Immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of mala fides

Constitution - Status quo ante - Restoration of - If the notification dated 23rd May 2005 is declared as invalid, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005 - Held, status quo ante cannot be directed - Reasons are the larger public interest, keeping in view the ground realities and taking a pragmatic view - As a result of the impugned Proclamation, the Election Commission of India had announced election which had reached on an advanced stage - Hence, the court permitted the completion of the ongoing election process with the fond hope that the electorate may again not give fractured verdict and may give a clear majority to one or other political party

JUDGMENT

Y.K. Sabharwal, C.J.

1. The challenge in these petitions is to the constitutional validity of Notification dated 23rd May, 2005 ordering dissolution of the Legislative Assembly of the State of Bihar. It is a unique case. Earlier cases that came up before this Court were those where the dissolutions of Assemblies were ordered on the ground that the parties in power had lost the confidence of the House. The present case is of its own kind where before even the first meeting of the Legislative Assembly, its

dissolution has been ordered on the ground that attempts are being made to cobble a majority by illegal means and lay claim to form the Government in the State and if these attempts continue, it would amount to tampering with constitutional provisions.

2. One of the questions of far reaching consequence that arises is whether the dissolution of Assembly under Article 356(1) of the Constitution of India can be ordered to prevent the staking of claim by a political party on the ground that the majority has been obtained by illegal means. We would first note the circumstances which led to the issue of impugned notification.

Factual Background

3. Election to the State of Bihar was notified by the Election Commission on 17th December, 2004. Polling for the said elections were held in three phases, i.e., 3rd February, 2005, 5th February, 2005 and 13th February, 2005. Counting of votes took place on 27th February, 2005. Results of the said elections were declared by the Election Commission. On 4th March, 2005, Notification was issued by the Election Commission in pursuance of Section 73 of Representation of People Act, 1951 (for short 'the RP Act, 1951') duly notifying the names of the members elected for all the constituencies along with party affiliation.

4. Bihar Legislative Assembly comprises of 243 members and to secure an absolute majority support of 122 Members of Legislative Assembly (in short 'MLAs'), is required. National Democratic Alliance (for short 'NDA'), a political coalition of parties comprising of the Bharatiya Janata Party (for short 'BJP') and the Janata Dal (United) (for short 'JD(U)') was the largest pre-poll combination having the support of 92 MLAs. The party-wise strength in the Assembly was as under:

(1)	NDA	92
(2)	RJD	75
(3)	LJP	29
(4)	Congress (I)	10
(5)	CPI (ML)	07
(6)	Samajwadi Party	04
(7)	NCP	03
(8)	Bahujan Samaj Party	02
(9)	Independents	17
(10)	Others	09

5. Report dated 6th March, 2005 was sent by the Governor to the President, recommending newly constituted Assembly to be kept in suspended animation for the present. It reads as under:

Respected Rashtrapati Jee,

1. The present Bihar Legislative Assembly has come to an end on 6th March, 2005. The Election Commission's notification with reference to the recent elections in regard to constitution of the new Assembly issued vide No. 308/B.R.-L.A./2005 dated 4th March 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005 is enclosed (Annexure-I)

2. Based on the results that have come up, the following is the party-wise position:

1.	R.J.D. :	75
2.	J.D.(U) :	55
3.	B.J.P. :	37
4.	Cong(I) :	10
5.	B.S.P. :	02
6.	L.J.P. :	29
7.	C.P.I. :	03
8.	C.P.I.(M) :	01
9.	C.P.I.(M.L.):	07
10.	N.C.P. :	03
11.	S.P. :	04
12.	Independent:	17
		243

The R.J.D. and its alliance position is as follows:

1.	R.J.D. :	75	
2.	Cong.(I) :	10	
3.	C.P.I. :	03	(support letter not recd.)
4.	C.P.I.(M) :	01	
5.	N.C.P. :	03	
		92	

The N.D.A. alliance position is as follows:

1.	B.J.P. :	37
2.	J.D.(U) :	55
		92

3. The present C.M., Bihar, Smt. Rabri Devi met me on 28.2.2005 and submitted her resignation along with her Council of Ministers. I have accepted the same and asked her to continue till an alternative arrangement is made.

4. A delegation of members of LJP met me in the afternoon of 28.2.2005 and they submitted a letter (Annexure II) signed by Shri Ram Vilas Paswan, President of the Party, stating therein that they will neither support the RJD nor the BJP in the formation of Government. The State President of Congress Party, Shri Ram Jatan Sinha, also met in the evening of 28.2.2005.

5. The State President of BJP, Shri Gopal Narayan Singh along with supporters met me on 1.3.2005. They have submitted a letter (Annexure III) stating that apart from combined alliance

strength of 92 (BJP & JD(U) they have support of another 10 to 12 Independents. The request in the letter is not to allow the RJD to form a Government.

6. Shri Dadan Singh, State President of Samajwadi Party, has sent a letter (Annexure IV) indicating their decision not to support the RJD or NDA in the formation of the Govt. He also met me on 2.3.2005.

7. Shri Ram Naresh Ram, Leader of the CPI (ML-Lib.), Legislature Party along with 4 others met me and submitted a letter (AnnexureV) that they would not support any group in the formation of Government.

8. Shri Ram Vilas Paswan, National President of LJP, along with 15 others met me and submitted another letter (Annexure VI). They have reiterated their earlier stand.

9. The RJD met me on 5.3.2005 in the forenoon and they staked claim to form a Government indicating the support from the following parties:

1.	Cong(I) :	10
2.	NCP :	03
3.	CPI(M) :	01
4.	BSP :	02

(Copy enclosed as Ann.VII)

The RJD with the above will have only 91.

They have further claimed that some of the Independent members may support the RJD. However, it has not been disclosed as to the number of Independent MLAs from whom they expect support nor their names.

Even if we assume the entire Independents totalling 17 to extend support to RJD alliance, which has a combined strength of 91, the total would be 108, which is still short of the minimum requirement of 122 in a House of 243.

10. The NDA delegation led by Shri Sushil Kumar Modi, MP, met me in the evening of 5.3.2005. They have not submitted any further letter. However, they stated that apart from their pre- election alliance of 92, another 10 Independents will also support them and they further stated that they would be submitting letters separately. This has not been received so far. Even assuming that they have support of 10 Independents, their strength will be only 102, which is short of the minimum requirement of 122.

11. Six Independent MLAs met me on 5.3.2005 and submitted a letter in which they have claimed that they may be called to form a Government and they will be able to get support of others (Annexure VIII). They have not submitted any authorization letter supporting their claim.

12. I have also consulted the Legal experts and the case laws particularly the case reported in MANU/SC/0444/1994 : [1994]2SCR644 where the Supreme Court in para 365 of the report summarised the conclusion. The relevant part is para 2, i.e., the recommendation of the Sarkaria Commission do merit serious consideration at the hands of all concerned. Sarkaria Commission in its report has said that Governor while going through the process of selection should select a leader who in his judgment is most likely to command a majority in the Assembly. The Book "Constitution of India" written by Shri V.N. Shukla (10th edition) while dealing with Article 75 and Article 164 of the Constitution of India has dealt with this subject wherein it has quoted the manner of selection by the Governor in the following words:

In normal circumstances the Governor need have no doubt as to who is the proper person to be appointed; it is leader of majority party in the Legislative Assembly, but circumstances can arise when it may be doubtful who that leader is and the Governor may have to exercise his personal judgment in selecting the C.M. Under the Constitutional scheme which envisages that a person who enjoys the confidence of the Legislature should alone be appointed as C.M.

In ***Bommai's case*** referred to above in para 153, S.C. has stated with regard to the position where, I quote:

After the General Elections held, no political party or coalition of parties or group is able to secure absolute majority in the Legislative Assembly and despite the Governor's exploring the alternatives, the situation has arisen in which no political party is able to form stable Government, it would be case of completely demonstrable inability of any political party to form a stable Government commanding the confidence of the majority members of the Legislature. It would be a case of failure of constitutional machinery.

13. I explored all possibilities and from the facts stated above, I am fully satisfied that no political party or coalition of parties or groups is able to substantiate a claim of majority in the Legislative Assembly, and having explored the alternatives with all the political parties and groups and Independents MLAs, a situation has emerged in which no political party or groups appears to be able to form a Government commanding a majority in the House. Thus, it is a case of complete inability of any political party to form a stable Government commanding the confidence of the majority members. This is a case of failure of constitutional machinery.

14. I, as Governor of Bihar, am not able to form a popular Government in Bihar, because of the situation created by the election results mentioned above.

15. I, therefore, recommend that the present newly constituted Assembly be kept in suspended animation for the present, and the President of India is requested to take such appropriate action/decision, as required.

6. Since no political party was in a position to form a Government, a notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's rule over the State of Bihar and the Assembly was kept in suspended animation. Another notification of the same date was also issued, inter alia, stating that the powers exercisable by the President shall, subject to the

superintendence, direction and control of the President be exercisable also by the Governor of Bihar.

7. The object of the proclamation imposing President's rule was to give time and space to the political process to explore the possibility of forming a majority Government in the State through a process of political realignment as is reflected in the speech of Home Minister Shri Shivraj V. Patil in the Rajya Sabha on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was discussed. The Home Minister said:

...But, I would like to make one point very clear. We are not very happy to impose President's Rule on the State of Bihar. Let there be no doubt in the minds of any Members of the House; we are not happy. After the elections we would have been happy if Government would have been formed by the elected representatives. That was not possible and that is why, President's Rule was imposed. But we cannot take pleasure in saying "Look we did this". We are not happy about it. I would ensure that the President's Rule is not continued for a long time. The sooner it disappear, the better it would be for Bihar, for democracy and for the system we are following in our country. But, who is to take steps in this regard? It is the elected representatives who have to take steps in this respect. The Governor can and, I would like to request in this House that elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. Even if it is minority Government with a slight margin, there is no problem....

8. The Home Minister gave a solemn assurance to the nation that the imposition of President's rule was temporary and transient and was intended to explore the possibility of forming a popular Government.

9. According to the petitioners, process of realignment of forces was set in motion and several political parties and independent MLAs re-considered their position in terms of their commitment to provide a majority Government in deference to the popular wishes of the people and announced support to the NDA led by Shri Nitish Kumar. First such announcement was made by the entire group of 17 independent MLAs on 8th April, 2005. The signed declaration was released by these MLAs to the media. With the support of 17 independent MLAs the support base of the NDA rose to 109 MLAs. Later on, it rose to 115 MLAs with the declaration of support by the Samajwadi Party (SP), the Bahujan Samaj Party (BSP) and the Nationalist Congress Party (NCP).

10. Governor of Bihar sent a report on 27th April, 2005 to the President of India, inter alia, stating that the newspaper reports and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received, indicated a trend to gain over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts etc., which was a disturbing feature. According to the said report, the situation was fast approaching a scenario wherein if the trend is not arrested immediately the consequent political instability will further give rise to horse trading being practiced by various political parties/groups trying to allure elected MLAs. That it would not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll. The report is reproduced below in its entirety.

Respected Rashtrapati Jee,

1. I invite a reference to my D.O. No. 33/GB dated the 6th March, 2005 through which a detailed analysis of the results of the Assembly elections were made and a recommendation was also made to keep the newly constituted Assembly (constituted vide Election Commission's notification No. 308/BR- L.A./2005 dated the 4th March, 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005) in a suspended animation and also to issue appropriate direction/decision. In the light of the same, the President was pleased to issue a proclamation under Article 356 of the Constitution of India vide notification No. G.S.R. 162(E), dated 7th March, 2005, and the proclamation has been approved and assented by the Parliament.

2. As none of the parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government wherein they could claim a support of a simple majority of 122 in a House of 243, I had no alternative but to send the above mentioned report with the said recommendation.

3. I am given to understand that serious attempts are being made by JD-U and BJP to cobble a majority and lay claim to form the Government in the State. Contacts in JD-U and BJP have informed that 16-17 LJP MLAs have been won over by various means and attempt is being made to win over others. The JD-U is also targeting Congress for creating a split. It is felt in JD-U circle that in case LJP does not split then it can still form the Government with the support of Independent, NCP, BSP and SP MLAs and two-third of Congress MLAs after it splits from the main Congress party. The JD-U and BJP MLAs are quite convinced that by the end of this month or latest by the first week of May JD-U will be in a position to form the Government. The high pressure moves of JD-U/BJP is also affecting the RJD MLAs who have become restive. According to a report there is a lot of pressure by the RJD MLAs on Lalu Pd. Yadav to either form the Government in Bihar on UPA pattern in the center, with the support of Congress, LJP and others or he should at least ensure the continuance of President's rule in the State.

4. The National Commission to review the working of the Constitution has also noticed that the reasons for increasing instability of elected Governments was attributable to unprincipled and opportunistic political realignment from time to time. A reasonable degree of stability of Government and a strong Government is important. It has also noticed that the changing alignment of the members of political parties so openly really makes a mockery of our democracy.

Under the Constitutional Scheme a political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programmes. The 10th Schedule of the Constitution was introduced on the premise that political propriety and morality demands that if such persons after the elections changes his affiliation, that should be discouraged. This is on the basis that the loyalty to a party is a norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate.

5. Newspaper reports in the recent time and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received by me, indicate a trend to gain over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts etc., which is a disturbing feature. This would affect the constitutional provisions and safeguards built therein. Any such move may also distort the verdict of the people as shown by results of the recent

elections. If these attempts are allowed to continue then it would be amounting to tampering with constitutional provisions.

6. Keeping in view the above mentioned circumstances the present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practiced by various political parties/groups trying to allure elected MLAs. Consequently it may not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll.

7. I am submitting these facts before the Hon'ble President for taking such action as deemed appropriate.

11. According to the petitioners, Lok Janashakti Party (LJP) had contested elections on the plank of opposing the then Government led by Rashtriya Janata Dal (RJD), which again is a constituent of United Progressive Alliance (UPA) in the center. It had a strength of 29 MLAs in the new assembly. The leader of LJP Shri Ram Vilas Paswan had taken the stand that he was opposed to RJD as well as NDA led by the BJP. MLAs belonging to LJP were in a rebellious mood. About 22 MLAs belonging to the LJP assembled on or around 21st May, 2005 and started working towards a major political realignment in the stand of the said party. According to them, 22 LJP members of the Legislative wing supported by members of the original political party reached a consensus subsequently to merge their party with the JD(U). That, with this the depolarization of political forces was complete. According to them the proposed merger between two political formations was in consonance with the principles enumerated in para 4 of the Tenth Schedule to the Constitution. It provides that on a merger of the political party, all the members of the new political party with which the merger has taken place if and only if not less than two-third of the members of the said party have agreed to the said merger. It is their allegation that in order to thwart the formation of a Government led by JD(U) the Governor of Bihar sent another report from its Camp Office in Delhi on 21st May, 2005 to the President of India. It was reiterated in the report that from the information gathered through reports from media, meeting with various political functionaries, as also intelligence reports, a trend was indicated to win over elected representatives of the people. In his view a situation had arisen in the State wherein it would be desirable in the interest of State that assembly which has been kept in suspended animation be dissolved so that the people/electorate could be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course. The report dated 21st May, 2005 is reproduced in its entirety as follows:

Respected Rashtrapati Jee,

I invite a reference to my D.O. letter No. 52/GB dated 27th April, 2005 through which I had given a detailed account of the attempts made by some of the parties notably the JD-U and BJP to cobble a majority and lay a claim to form a Government in the State. I had informed that around 16-17 MLAs belonging to LJP were being wooed by various means so that a split could be effected in the LJP. Attention was also drawn to the fact that the RJD MLAs had also become restive in the light of the above moves made by the JD-U.

As you are aware after the Assembly Elections in February this year, none of the political parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government since they could not claim a support of a simple majority of 122 in a House of 243 and hence the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No. - GSR - 162 (E) dated 7th March, 2005 and the Assembly was kept in suspended animation.

The reports received by me in the recent past through the media and also through meeting with various political functionaries, as also intelligence reports, indicate a trend to win over elected representatives of the people. Report has also been received of one of the LJP MLA, who is General Secretary of the party having resigned today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is very disturbing and alarming feature. Any move by the break away faction to align with any other party to cobble a majority and stake claim to form a Government would positively affect the Constitutional provisions and safeguards built therein and distort the verdict of the people as shown by the results in the recent Elections. If these attempts are allowed it would be amounting to tampering with Constitutional provisions.

Keeping the above mentioned circumstances, I am of the considered view that if the trend is not arrested immediately, it may not be possible to contain the situation. Hence in my view a situation has arisen in the State wherein it would be desirable in the interest of the State that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course.

12. The report of the Governor was received by Union of India on 22nd May, 2005 and on the same day, the Union cabinet met at about 11.00 P.M. and decided to accept the report of the Governor and sent the fax message to the President of India, who had already left for Moscow, recommending the dissolution of the Legislative Assembly of Bihar. This message was received by the President of India at his Camp office in Moscow at 0152 hrs. (IST). President of India accorded his approval and sent the same through the fax message which was received at 0350 hrs. (IST) on 23rd May, 2005. After due process the notification was issued formally at 1430 hrs. (IST) on 23rd May, 2005 dissolving the Bihar Assembly which has been impugned in these writ petitions.

13. Challenging proclamation dated 23rd May, 2005 issued under Article 356 of the Constitution ordering dissolution of Bihar Legislative Assembly, petitioners have also prayed for restoration of Election Commission notification dated 4th May, 2005 issued under Section 73 of the RP Act of 1951.

14. According to the petitioners, the condition precedent for dissolving the assembly is that there must be satisfaction of the President that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution. That this satisfaction has to be based on cogent material. Power of dissolution cannot be used to prevent the staking of claim for the formation of a Government by a political party with support of others. That the assembly was placed under suspended animation with the intention of providing time and space to political parties to explore the possibility of providing a majority Government in the State. No

sooner the process of realignment was complete ensuring that the NDA led by Shri Nitish Kumar had the support of over 135 MLAs, report was sent by the Governor. The midnight meeting of the Cabinet was hurriedly called in order to prevent the formation of a Government. It was incumbent upon the Governor to make a meaningful and real effort for securing the possibility of a majority Government in the State. According to them the intention of the Governor was to prevent the formation of a Government led by Shri Nitish Kumar. That there was no material available or in existence to indicate that any political defection was being attempted through the use of money or muscle power. In the absence of any such material the exercise of power under Article 356 was a clear fraud on the exercise of power.

15. That allegations in the Governor's report of horse trading was factually incorrect and fictional. It was incumbent upon the Governor to verify the facts personally from the MLAs. That under the scheme of the Constitution the decision with regard to mergers and disqualifications on the ground of defection or horse trading is vested in the Speaker. The Governor could not have attempted to act on that basis and arrogated to himself such an authority. Relying heavily on the Nine Judge Bench judgment of this Court in ***S.R. Bommai and Ors. v. Union of India and Ors. MANU/SC/0444/1994 :*** [1994]2SCR644 , it was contended that action of the Governor is mala fide in law; irrational, without any cogent material to support the conclusion arrived at and is based on mere ipse dixit and, thus, was not sustainable in law. It was contended that in exercise of judicial review this Court should quash the impugned notification and as a consequence restore the legislative assembly constituted by the Election Commission notification dated 4th March, 2005.

16. Mr. Soli Sorabjee led the arguments in support of the challenge to the validity of the impugned notification contending that the dissolution of the Assembly when examined in the light of law laid down in ***Bommai's case (supra)*** is clearly unconstitutional and deserves to be set aside and the status quo ante at least as on 7th March, 2005 may be directed.

17. Mr. Viplav Sharma, advocate, appearing in person in writ petition No. 258 of 2005 adopting the arguments of Mr. Sorabjee further contended that before even elected candidates making and subscribing oath or affirmation, as contemplated by Article 188 of the Constitution, even the Assembly could not be placed under suspended animation and status quo as on the date of issue of notification under Section 73 of the RP Act of 1951 deserves to be directed.

18. Mr. Narasimha, appearing in Writ Petition (C) No. 353 for the petitioner, also adopted the arguments of Mr.Sorabjee but at the same time further contended that it is not legally permissible to order the dissolution of Assembly before its meeting even once and the MLAs being administered the oath as contemplated by the Constitution. This was also the submission of Mr. Viplav Sharma. Arguments on behalf of respondent - Union of India were led by learned Attorney General, Mr. Milon Banerjee, followed by learned Solicitor General and Additional Solicitor General, Mr. Gulam Vahanavati and Mr. Gopal Subramaniam respectively. Mr. P.P. Rao, learned senior advocate argued for State of Bihar. We place on record our appreciation for excellent and very able assistance rendered by all the advocates.

19. After hearing arguments on the question of the Governor not being answerable to any Court in view of immunity granted by Article 361(1) of the Constitution, we accepted the submission of the Government in terms of our order dated 8th September, 2005 that notice may not be issued to

the Governor, giving brief reason in order to be followed by detailed reasons later. The said order reads as under:

On the question whether the Governor could be impleaded in his capacity as the Governor and whether notice could be issued to him on the writ petitions in the context of averments made and the prayers contained in the petitions and other aspects highlighted in the order dated 31st August, 2005, we have heard Mr. Soli J. Sorabjee, learned senior counsel appearing in Writ Petition (C) No. 257 of 2005, and Mr. Viplav Sharma, petitioner-in-person in Writ Petition (C) No. 258 of 2005. We have also heard the submissions made by Mr. Milon K. Banerji, Attorney General for India, and Mr. Gopal Subramaniam, learned Additional Solicitor General.

The Constitution of India grants immunity to the Governor as provided in Article 361. Article 361(1), inter alia, provides that the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in exercise and performance of those powers and duties. It is submitted by learned Attorney General and Additional Solicitor General that in view of Article 361(1), this Court may not issue notice to the Governor. While we accept the submission but, at the same time, it is also necessary to note that the immunity granted to the Governor does not affect the power of the Court to judicially scrutinize the attack made to the proclamation issued under Article 356(1) of the Constitution of India on the ground of mala fides or it being ultra vires. It would be for the Government to satisfy the court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of law. Even, the expression "purporting to be done" in Article 361 does not cover acts which are mala fide or ultra vires and, thus, the Government supporting the proclamation under Article 356(1) shall have to meet the challenge. The immunity granted under Article 361 does not mean that in the absence of Governor, the ground of mala fides or proclamation being ultra vires would not be examined by the Court. At this stage, we have not examined the question whether the exercise of power by the Governor was mala fide or ultra vires or not. That is a question still to be argued.

These are our brief reasons. We will give detailed reason later.

20. Under the aforesaid factual background, the points that fall for our determination are:

(1) Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place?

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

(3) If the answer to the aforesaid question is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

(4) What is the scope of Article 361 granting immunity to the Governor?

21. After hearing elaborate arguments, by a brief order dated 7th October, 2005, the notification dated 23rd May, 2005 was held to be unconstitutional but having regard to the facts and

circumstances of the case, relief directing status quo ante to restore the Legislative Assembly as it stood on 7th March, 2005, was declined. The Order dated 7th October reads as under:

The General Elections to the Legislative Assembly of Bihar were held in the month of February 2005. The Election Commission of India, in pursuance of Section 73 of the Representation of the People Act, 1951 in terms of Notification dated 4th March, 2005 notified the names of the elected members.

As no party or coalition of the parties was in a position to secure 122 seats so as to have majority in the Assembly, the Governor of Bihar made a report dated 6th March, 2005 to the President of India, whereupon in terms of Notification G.S.R.162(E) dated 7th March, 2005, issued in exercise of powers under Article 356 of the Constitution of India, the State was brought under President's Rule and the Assembly was kept in suspended animation. By another Notification G.S.R.163(E) of the same date, 7th March, 2005, it was notified that all powers which have been assumed by the President of India, shall, subject to the superintendence direction and control of the President, be exercisable also by the Governor of the State. The Home Minister in a speech made on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was being discussed in the Rajya Sabha said that the Government was not happy to impose President's Rule in Bihar and would have been happy if Government would have been formed by the elected representatives after the election. That was, however, not possible and, therefore, President's Rule was imposed. It was also said that the Government would not like to see that President's Rule is continued for a long time but it is for elected representatives to take steps in this respect; the Governor can ask them and request them and he would also request that the elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. The Presidential Proclamation dated 7th March, 2005 was approved by the Lok Sabha at its sitting held on 19th March, 2005 and Rajya Sabha at its sitting held on 21st March, 2005.

The Governor of Bihar made two reports to the President of India, one dated 27th April, 2005 and the other dated 21st May, 2005. On consideration of these reports, Notification dated 23rd May, 2005 was issued in exercise of the powers conferred by Sub-clause (b) of Clause (2) of Article 174 of the Constitution, read with Clause (a) of the Notification G.S.R.162(E) dated 7th March, 2005 issued under Article 356 of the Constitution and the Legislative Assembly of the State of Bihar was dissolved with immediate effect.

These writ petitions have been filed challenging constitutional validity of the aforesaid Proclamation dated 23rd May, 2005. Mr. Soli J. Sorabjee, Senior Advocate and Mr. P.S. Narasimha, Advocate and Mr. Viplav Sharma, advocate appearing-in-person have made elaborate submissions in support of the challenge to the impugned action of dismissing the assembly.

On the other hand, Mr. Milon K. Banerjee, Attorney-General for India, Mr. Goolam E. Vahanavati, Solicitor General and Mr. Gopal Subramaniam, Additional Solicitor General appearing for Union of India and Mr. P.P. Rao, Senior Advocate appearing for the State of Bihar also made elaborate submissions supporting the impugned Proclamation dated 23rd May, 2005.

Many intricate and important questions of law having far reaching impact have been addressed from both sides. After the conclusion of the hearing of oral arguments, written submissions have also been filed by learned Counsel.

Fresh elections in State of Bihar have been notified. As per press note dated 3rd September, 2005 issued by Election Commission of India, the schedule for general elections to the Legislative Assembly of Bihar has been announced. According to it, the polling is to take place in four phases commencing from 18th October, 2005 and ending with the fourth phase voting on 19th November, 2005. As per the said press note, the date of Notification for first and second phase of poll was 23rd September and 28th September, 2005, date of poll being 18th October, 2005 and 26th October, 2005 respectively. Notifications for third and fourth phases of poll are to be issued on 19th and 26th October, 2005 respectively.

Keeping in view the questions involved, the pronouncement of judgment with detailed reasons is likely to take some time and, therefore, at this stage, we are pronouncing this brief order as the order of the court to be followed by detailed reasons later.

Accordingly, as per majority opinion, this Court orders as under:

1. The Proclamation dated 23rd May, 2005 dissolving the Legislative Assembly of the State of Bihar is unconstitutional.

2. Despite unconstitutionality of the impugned Proclamation, but having regard to the facts and circumstances of the case, the present is not a case where in exercise of discretionary jurisdiction the status quo ante deserves to be ordered to restore the Legislative Assembly as it stood on the date of Proclamation dated 7th March, 2005 whereunder it was kept under suspended animation.

POINT No. 1 - Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place?

22. Article 174 of the Constitution deals with the power of the Governor to summon the House, prorogue the House and dissolve the Legislative Assembly. This Court never had the occasion to consider the question of legality of dissolution of a Legislative Assembly even before its first meeting contemplated under Article 172 of the Constitution. It has been contended on behalf of the petitioners by Mr. Narsimha and Mr. Viplav Sharma, appearing-in-person, that a Legislative Assembly can be dissolved under Article 174(2)(b) only after its first meeting is held as postulated by Article 172 of the Constitution. The argument is that there cannot be any dissolution without even members taking oath and the Legislative Assembly coming into existence. What does not exist, cannot be dissolved, is the submission. In this regard, the question to be considered also is whether the date for first meeting of the Legislative Assembly can be fixed without anyone being in a position to form the Government.

23. Let us first examine the relevant constitutional and statutory provisions.

24. Part VI of the Constitution dealing with the States has six chapters but relevant for our purpose are Chapter II and Chapter III. Chapter II comprising Article 153 to Article 167 relates to the executive, Chapter III comprising Article 168 to Article 212 relates to the State Legislature.

25. The federal structure under our Constitution contemplates that there shall be a Legislature for every State which shall consist of a Governor and one or two Houses, as provided in Article 168. Article 170 prescribes that the Legislative Assembly of each State shall consist of members chosen by direct election from territorial constituencies in the States. Article 170, therefore, brings in the democratic process of election.

26. Article 164 puts into place an executive Government. It enjoins upon the Governor to appoint the Chief Minister and other ministers on the advice of the Chief Minister. The Council of Ministers (Article 163) exercises the executive power of the State as provided under Article 154. Article 164(2) provides that the Council of ministers shall be collectively responsible to the Legislative Assembly of the State.

27. As provided in Article 172, every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly. Article 174(1) provides that the Governor shall from time to time summon the House to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. Article 174(2)(b) provides that the Governor may from time to time dissolve the Legislative Assembly.

28. Every member of the Legislative Assembly of the State shall, before taking his seat, make and subscribe before the Governor, an oath or affirmation, as provided in Article 188 of the Constitution.

29. The contention urged is that the function of the Governor in summoning the House and administering the oath or affirmation to the members of the Legislative Assembly are not the matters of privilege, prerogative or discretion of the Governor but are his primary and fundamental constitutional obligations on which the principles of parliamentary democracy, federalism and even 'separation of power' are dependent. Further contention is that another constitutional obligation of the Governor is to constitute the executive Government.

30. According to Mr. Narasimha, the Governor failed to fulfill these constitutional obligations. Neither the executive Government nor the Legislative Assembly has been constituted by the Governor. On the other hand, the Governor has frustrated the very object of exercise of his constitutional obligation by dissolving the Legislative Assembly under Article 174(2)(b) without the Legislative Assembly being even constituted. When the Legislative Assembly is not even constituted, where is the question of its dissolution, is the contention urged. The submission is that under the scheme of Indian Constitution, it is impermissible to dissolve a Legislative Assembly before its first meeting and members making oath or affirmation as required by Article 188. According to the petitioners, under Indian Constitution, the Legislative Assembly is duly constituted only upon the House being summoned and from the date appointed for its first meeting. Article 172 which provides for duration of State Legislatures reads as under:

172. Duration of State Legislatures - (1) Every Legislative Assembly of every State, unless sooner dissolved shall continue for (five years) from the date appointed for its first meeting and no longer and the expiration of the said period of (five years) shall operate as a dissolution of the Assembly:

Provided that the said period, may while a proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

31. The aforesaid constitutional provision stipulates that five years term of a Legislative Assembly shall be reckoned from the date appointed for its first meeting and on the expiry of five years commencing from the date of the first meeting, the Assembly automatically stands dissolved by afflux of time. The duration of the Legislative Assembly beyond five years is impermissible in view of the mandate of the aforesaid provision that the Legislative Assembly shall continue for five years and 'no longer'. Relying upon these provisions, it is contended that the due constitution of the Legislative Assembly can only be after its first meeting when the members subscribe oath or affirmation under Article 188. The statutory deemed constitution of the Assembly under Section 73 of the R.P. Act, 1951, according to the petitioners, has no relevance for determining due constitution of Legislative Assembly for the purpose of Constitution of India.

32. Reference on behalf of the petitioners has also been made to law existing prior to the enforcement of the Constitution of India contemplating the commencement of the Council of State and Legislative Assembly from the date of its first meeting. It was pointed out that Section 63(d) in the Government of India Act, 1915 which dealt with Indian Legislature provided that every Council of State shall continue for five years and every Legislative Assembly for three years from the date of its first meeting. Likewise, Section 72(b) provided that every Governor's Legislative Council shall continue for three years from its first meeting. The Government of India Act, 1919, repealing 1915 Act, provided in Section 8(1) that every Governor's Legislative Council shall continue for three years from its first meeting and in Section 21 provided that every Council of State shall continue for five years and every Legislative Assembly for three years from its first meeting. Likewise, the Government of India Act, 1935 repealing 1919 Act, had provision identical to Article 172 of the Constitution.

33. Section 73 of the R.P. Act 1951, in so far as relevant for our purposes, is as under:

73. Publication of results of general elections to the House of the People and the State Legislative Assemblies. - Where a general election is held for the purpose of constituting a new House of the People or a new State Legislative Assembly, there shall be notified by [the Election Commission] in the Official Gazette, as soon as may be after [the results of the elections in all the constituencies] [other than these in which the poll could not be taken for any reason on the date originally fixed under Clause (d) of Section 30 or for which the time for completion of the election has been extended under the provisions of Section 153] have been declared by the returning officer

under the provisions of Section 53 or, as the case may be Section 66, the names of the members elected for those constituencies] and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted.

34. In the present case, Notification under Section 73 of the RP Act, 1951 was issued on 4th March, 2005. The deemed constitution of the Legislative Assembly took place under Section 73 on the issue of the said notification. The question is whether this deemed constitution of Legislative Assembly is only for the purpose of the RP Act, 1951 and not for the constitutional provisions so as to invoke power of dissolution under Article 174(2)(b). The stand of the Government is that in view of aforesaid legal fiction, the constitution of the Legislative Assembly takes place for all purposes and, thus, the Legislative Assembly is deemed to have been 'duly constituted' on 4th March, 2005 and, therefore, the Governor could exercise the power of dissolution under Article 174(2)(b).

35. Section 73 of the RP Act, 1951 enjoins upon the Election Commission to issue notification after declaration of results of the elections in all the constituencies. The superintendence, direction and control of elections to Parliament and to the Legislature of every State vests in Election Commission under Article 324 of the Constitution. Article 327 provides that Parliament may make provision with respect to all matters relating to, or in connection with, elections to the Legislative Assembly of a State and all other matters necessary for securing the 'due constitution' of the House of the Legislature. Article 329 bars the interference by courts in electoral matters except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Article 327 read with Section 73 of the RP Act, 1951 provide for as to when the House or Assembly shall be 'duly constituted'. No provision, constitutional or statutory, stipulates that the 'due constitution' is only for the purposes of Articles 324, 327 and 329 and not for the purpose of enabling the Governor to exercise power under Article 174(2)(b) of the Constitution. In so far as the argument based on Article 172 is concerned, it seems clear that the due constitution of the Legislative Assembly is different than its duration which is five years _ to be computed from the date appointed for its first meeting and no longer. There is no restriction under Article 174(2)(b) stipulating that the power to dissolve the Legislative Assembly can be exercised only after its first meeting. Clause (b) of proviso to Section 73 of the RP Act, 1951 also does not limit the deemed constitution of the Assembly for only specific purpose of the said Act or Articles 324, 327 and 329 of the Constitution. The said clause provides that the issue of notification under Section 73 shall not be deemed to affect the duration of the State Legislative Assembly, if any, functioning immediately before the issue of the said notification. In fact, Clause (b) further fortifies the conclusion that the duration of the Legislative Assembly is different than the due constitution thereof. In the present case, we are not concerned with the question of duration of the Assembly but with the question whether the Assembly had been duly constituted or not so as to enable the Governor to exercise the power of dissolution under Article 174(2)(b). The Constitution of India does not postulate one 'due constitution' for the purposes of elections under Part XV and another for the purposes of the executive and the State Legislature under Chapter II and III of Part VI. The aforenoted provisions existing prior to the enforcement of Constitution of India are also of no relevance for determining the effect of deemed constitution of Assembly under Section 73 of the RP Act, 1951 to exercise power of dissolution under Article 274(2)(b) .

36. In ***K.K. Abu v. Union of India and Ors. MANU/KE/0092/1965 :*** AIR1965Ker229 , a learned Single Judge of the High Court rightly came to the conclusion that neither Article 172 nor Article 174 prescribe that dissolution of a State Legislature can only be after commencement of its term or after the date fixed for its first meeting. Once the Assembly is constituted, it becomes capable of dissolution. This decision has been referred to by one of us (Arijit Pasayat, J.) in ***Special Reference No. 1 of 2002 (popularly known as Gujarat Assembly Election matter)*** MANU/SC/0891/2002 : AIR2003SC87 . No provision of the Constitution stipulates that the dissolution can only be after the first meeting of the State Legislature.

37. The acceptance of the contention of the petitioners can also lead to a breakdown of the Constitution. In a given case, none may come forth to stake claim to form the Government, for want of requisite strength to provide a stable Government. If petitioners' contention is accepted, in such an eventuality, the Governor will neither be able to appoint Executive Government nor would he be able to exercise power of dissolution under Article 174(2)(b). The Constitution does not postulate a live Assembly without the Executive Government.

38. On behalf of the petitioners, reliance has, however, been placed upon a decision of a Division Bench of Allahabad High Court in the case of ***Udai Narain Sinha v. State of U.P. and Ors. MANU/UP/0178/1987 :*** AIR1987All203 . Disagreeing with the Kerala High Court, it was held that in the absence of the appointment of a date for the first meeting of the Assembly in accordance with Article 172(1), its life did not commence for the purposes of that article, even though it might have been constituted by virtue of notification under Section 73 of the RP Act, 1951 so as to entitle the Governor to dissolve it by exercising power under Article 174(2). It was held by the Division Bench that Section 73 of the RP Act, 1951 only created a fiction for limited purpose for paving the way for the Governor to appoint a date for first meeting of either House or the Assembly so as to enable them to function after being summoned to meet under Article 174 of the Constitution. We are unable to read any such limitation. In our view, the Assembly, for all intends and purposes, is deemed to be duly constituted on issue of notification under Section 73 and the duration thereof is distinct from its due constitution. The interpretation which may lead to a situation of constitutional breakdown deserves to be avoided, unless the provisions are so clear as not to call for any other interpretation. This case does not fall in the later category.

39. In ***Gujarat Assembly Election Matter***, the issue before the Constitution Bench was whether six months' period contemplated by Article 174(1) applies to a dissolved Legislative Assembly. While dealing with that question and holding that the said provision applies only to subsisting Legislative Assembly and not to a dissolved Legislative Assembly, it was held that the constitution of any Assembly can only be under Section 73 of the RP Act, 1951 and the requirement of Article 188 of Constitution suggests that the Assembly comes into existence even before its first sitting commences.

(Emphasis supplied by us).

40. In view of the above, the first point is answered against the petitioners.

POINT No. 2: Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

41. This point is the heart of the matter. The answer to the constitutional validity of the impugned notification depends upon the scope and extent of judicial review in such matters as determined by a Nine Judge Bench decision in ***Bommai's case***. Learned Counsel appearing for both sides have made elaborate submissions on the question as to what is the ratio decidendi of ***Bommai's case***.

42. According to the petitioners, the notification dissolving the Assembly is illegal as it is based on the reports of the Governor which suffered from serious legal and factual infirmities and are tainted with pervasive mala fides which is evident from the record. It is contended that the object of the reports of the Governor was to prevent political party led by Mr. Nitish Kumar to form the Government. The submission is that such being the object, the consequent notification of dissolution accepting the recommendation deserves to be annulled.

43. Under Article 356 of the Constitution, the dissolution of an Assembly can be ordered on the satisfaction that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. Such a satisfaction can be reached by the President on receipt of report from the Governor of a State or otherwise. It is permissible to arrive at the satisfaction on receipt of the report from Governor and on other material. Such a satisfaction can also be reached only on the report of the Governor. It is also permissible to reach such a conclusion even without the report of the Governor in case the President has other relevant material for reaching the satisfaction contemplated by Article 356. The expression 'or otherwise' is of wide amplitude.

44. In the present case, it is not in dispute that the satisfaction that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution has been arrived at only on the basis of the reports of the Governor. It is not the case of the Union of India that it has relied upon any material other than the reports of the Governor which have been earlier reproduced in extenso.

45. The Governor in the report dated 6th March, 2005 has referred to ***Bommai's case*** as also to the recommendations of Sarkaria Commission. Sarkaria Commission Report in Chapter IV deals extensively with the role of the Governors. Since in this case, the dissolution of the Assembly is based solely on the reports of the Governor and the issue also is as to the role played by the Governor and submissions also having been made on role which is expected from a high constitutional functionary like Governor, it would be useful to first examine that aspect.

Role of Governor

46. The role of the Governor has been a key issue in the matters of Central-State relations. The Constitution of India envisages three tiers of Government _ the Union, State and the Local Self-Government. From the functional standpoint, it is stated that such a Constitution "is not a static format, but a dynamic process" [Report of the Sarkaria Commission on center-State Relations (1988)]. In the context of Union-State relations it has been noted that "the very dynamism of the system with all its checks and balances brings in its wake problems and conflicts in the working of Union-State relations."

47. In the light of a volatile system prevailing today, it is pertinent to recognize the crucial role played by the Governors in the working of the democratic framework. Addressing the Conference

of Governors in June 2005, the President of India Dr. A.P.J. Abdul Kalam stressed the relevance of recommendations of the Sarkaria Commission and observed that "While there are many checks and balances provided by the Constitution, the office of the Governor has been bestowed with the independence to rise above the day-to-day politics and override compulsions either emanating from the central system or the state system." The Prime Minister Dr. Manmohan Singh on the same occasion noted that "you are the representatives of the center in states and hence, you bring a national perspective to state level actions and activities."

48. In ***Hargovind Pant v. Dr. Raghukul Tilak and Ors. MANU/SC/0457/1979 :*** [1979]3SCR972 , observing on the issue as to whether a Governor could be considered as an "employee" of the Government of India, this Court said "it is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of India."

49. Referring to Article 356 of the Constitution, the Court reasoned that "one highly significant role which he (Governor) has to play under the Constitution is of making a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution" and further added that the Governor "is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. He is an independent constitutional office which is not subject to the control of the Government of India.

50. Fortifying the same, Justice V.R. Krishna Iyer has observed that the mode of appointment can never legitimize any form of interference in the working of the Governor, else the concept of "judicial independence" would not be tenable, as even the judges of the High Courts and the Supreme Court are appointed by the President. (V.R. Krisnha Iyer, *A Constitutional Miscellany* (Second Edition, Lucknow:Eastern Book Co., 2003) at p.44).

51. The then Vice-President of India, Shri G.S. Pathak, had remarked in 1970 that "in the sphere which is bound by the advice of the Council of Ministers, for obvious reasons, the Governor must be independent of the center" as there may be cases "where the advice of the center may clash with advice of the State Council of Ministers" and that "in such cases the Governor must ignore the center's "advice" and act on the advice of his Council of Ministers."

52. Relevant for the present controversy, very significant observations were made in ***Bommai's case***, when it was said "He (Governor) is as much bound to exercise this power in a situation contemplated by Article 356 as <u>he is bound not to use it where such a situation has not really arisen</u> (para 272 - Jeevan Reddy, J.)

(Emphasis supplied by us)

53. The role of the Governor has come in for considerable criticism on the ground that some Governors have failed to display the qualities of impartiality expected of them. The Sarkaria Commission Report has noted that "many have traced this mainly to the fact that the Governor is

appointed by, and holds office during the pleasure of the President, i.e., in effect, the Union Council of Ministers.

54. Rejecting the suggestion of an elected Governor, the Constituent Assembly repeatedly stressed on consultation with the Provincial/State Government prior to the appointment of the Governor. Sir Alladi Krishnaswamy Ayyar is quoted to have stated that "a convention of consulting the provincial cabinet might easily grow up" as was said to be the case in Canada (*White Paper on the Office of the Governor*, Government of Karnataka (22nd September, 1983) c.f. V.R. Krishna Iyer, A Constitutional Miscellany (Second Edition, Lucknow: Eastern Book Co., 2003) at p.45). Shri Jawaharlal Nehru had also observed in the debate on the appointment of Governor in the Constituent Assembly that a Governor "must be acceptable to the Province, he must be acceptable to the Government of the Province and yet he must not be known to be a part of the party machine of that province." He was of the opinion that a nominated Governor shall have "far fewer common links with the center."

55. Querying as to what could be an objective and representative body which will fit into our Constitutional framework to facilitate the appointment of Governors on meritorious basis, the Sarkaria Commission has observed that "There is no gainsaying that a procedure must be devised which can ensure objectivity in selection and adherence to the criteria for selection and insulate the system from political pressures. Also, the new procedure must not only be fair but should be seen to be fair." (Chapter IV "Role of the Governor", *Report of the Sarkaria Commission on center-State Relations* (1988) at para 4.6.30). Recommending that the Vice-President of India and the Speaker of the Lok Sabha should be consulted by the Prime Minister in selecting a Governor, the Sarkaria Commission has noted that "such consultation will greatly enhance the credibility of the selection process."

56. The other related issue of debate was regarding the extent of discretionary powers to be allowed to the Governor. Following the decision to have a nominated Governor, references in the various articles of the Draft Constitution relating to the exercise of specified functions by the Governor 'in his discretion' were deleted. (Chapter IV "Role of the Governor", *Report of the Sarkaria Commission on center-State Relations* (1988) at para 4.2.07). Article 163 of the Constitution (then Draft Article 143) generated considerable discussion, and Dr. Ambedkar is stated to have "maintained that vesting the Governor with certain discretionary powers was not contrary to responsible Government." (*Constituent Assembly Debates* (Volume VIII, Revised Edition) at pp.00-502).

57. The expression "required" found in Article 163(1) is stated to signify that the Governor can exercise his discretionary powers only if there is a compelling necessity to do so. It has been reasoned that the expression "by or under the Constitution" means that the necessity to exercise such powers may arise from any express provision of the Constitution or by necessary implication. The Sarkaria Commission Report further adds that such necessity may arise even from rules and orders made "under" the Constitution.

58. Observing that the Governor needs to discharge "dual responsibility" _ to the Union and the State _ the Sarkaria Commission has sought to evaluate the role of the Governors in certain controversial circumstances, such as, in appointing the Chief Minister, in ascertaining the majority,

in dismissal of the Chief Minister, in dissolving the Legislative Assembly, in recommending President's Rule and in reserving Bills for President's consideration.

59. Finding that the position of the Governor is indispensable for the successful working of the Constitutional scheme of governance, the Sarkaria Commission has noted that "most of the safeguards will be such as cannot be reduced to a set of precise rules of procedure or practice. This is so because of the very nature of the office and the role of the Governor. The safeguards have mostly to be in the nature of conventions and practices, to be understood in their proper perspective and faithfully adhered to, not only by the Union and the State Governments but also by the political parties." (Chapter IV "Role of the Governor", Report of the Sarkaria Commission on center-State Relations (1988) at para 4.5.07). It was further added that "the fact that it will be impossible to lay down a concrete set of standards and norms for the functioning of a Governor will make it difficult for a Parliamentary Committee or the Supreme Court to inquire into a specific charge against a Governor."

Instrument of Instructions:

60. The Constituent Assembly, pursuant to the Report of the Provincial Constitution Committee, had decided to insert an Instrument of Instructions to the Governors in the form of a Schedule to the Constitution. Such an instrument was found to be necessary, "because of the mode of appointment and the injunction to act upon the advice of Ministers were not contained in the Constitution itself." (The framing of India India's Constitution _ Select Documents (Volume IV, B. Shiva Rao (ed.), New Delhi: Universal Law Publishing Cp, 2004) at p. 86. The complete test of the suggested Instructions is reproduced in pp.88-90). In the Government of India Act, 1935, the Instrument of Instructions appeared as instructions from the Sovereign.

61. The suggested list of instructions considered by the Constituent Assembly included value based standards that are expected of a Governor in discharging his duties vis-à-vis appointment of the Chief Minister after ascertaining a "stable majority"; appointments of Council of Ministers who "will best be in a position collectively to command the confidence of the Legislature"; to constitute an Advisory Board comprising of duly elected members of the Legislature, including the Leader of the Opposition, "to aid the Governor in the matter of making appointments under the Constitution" such as that of the Auditor-in-Chief for the State, Chairman of the State Public Services Commission; and mandating the Governor to do "all that in him lies to maintain standards of good administration, to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in the public life and government of the State, and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religious beliefs and sentiments."

62. The instructions were proposed as a Schedule to the Constitution as the Assembly felt that "it is preferable not to put them into the body of the Constitution, because they are conventions rather than legal rules." However, the same was not appended to the Constitution and lamenting about it, Shri A.G. Noorani has stated that the Instrument of Instructions could have codified conventions between the President and the Governors if allowed to exist. (A.G. Noorani, Constitutional Questions in India - The President, Parliament and the States (New Delhi: Oxford University Press, 2000) at p.11)

63. The P.V. Rajamannar Committee (1969), Inquiry Committee constituted by the Government of Tamil Nadu to report on the center-State relations, and the Study Team of the Administrative Reforms Commission (1967) headed by Shri M.C. Setalvad, have been quoted to have opined that "a specific provision should be inserted in the Constitution enabling the President to issue Instruments of Instructions to the Governors. The Instruments of Instructions should lay down guidelines indicating the matters in respect of which the Governor should consult the Central Government or in relation to which the Central Government could issue directions to him." (*White Paper on the Office of the Governor*, Government of Karnataka (22nd September, 1983) c.f. V.R. Krishna Iyer, *A Constitutional Miscellany* (Second Edition, Lucknow: Eastern Book Co., 2003) at p.47). Justice Krishna Iyer has stated that a "Handbook" setting out the guidelines for Governors must be prepared officially by the Law Commission and approved by the Parliament to be kept as a reference in the same status as that of an Instrument of Instructions. However, the Sarkaria Commission has observed that "considering the multi-faceted role of the Governor and the nature of his functions and duties, we are of the view that it would be neither feasible nor desirable to formulate a comprehensive set of guidelines for the exercise by him of his discretionary powers. No two situations which may require a Governor to use his discretion, are likely to be identical."

Discretionary Powers of the Governor:

64. Expounding in detail on the exercise of discretionary powers by the Governor, the Sarkaria Commission has mainly recommended the following:

• Appointment of the Chief Minister _ It is clear that the leader of the party which has an absolute majority in the Legislative Assembly should invariably be called upon by the Governor to form a Government. However, if there is a fractured mandate, then the Commission recommends an elaborate step-by-step approach and has further emphasized that "the Governor, while going through the process of selection as described, should select a leader who, in his (Governor's) judgement, is most likely to command a majority in the Assembly. The Governor's subjective judgement will play an important role." Upon being faced by several contesting claims, the Commission suggests that the most prudent measure on part of the Governor would be to test the claims on the floor of the House.

• Dismissal of the Chief Minister _ Recommending a test of majority on the floor of the House to ascertain whether an incumbent Chief Minister continues to enjoy the majority, the Commission clearly dissuades the Governor from dismissing the Ministry based only on his "subjective satisfaction".

• Dissolution of the Assembly _ Despite best efforts, if ultimately a viable Ministry fails to emerge, a Governor is faced with two alternatives, he may either dissolve the Assembly or recommend President's rule under Article 356, leaving it to the Union Government to decide the question of dissolution. The Commission expressed its firm view that the proper course would be "to allow the people of the State to settle matters themselves". The Commission recommended that "the Governor should first consider dissolving the Assembly and arranging for a fresh election and before taking a decision, he should consult the leaders of the political parties concerned and the Chief Election Commissioner."

65. Para 4.11.04 of Sarkaria Commission Report specifically deals with the situation where no single party obtains absolute majority and provides the order of preference the Governor should follow in selecting a Chief Minister. The order of preference suggested is:

1. An alliance of parties that was formed prior to the Elections.

2. The largest single party staking a claim to form the Government with the support of others, including "independents".

3. A post-electoral coalition of parties, with all the partners in the coalition joining the Government.

4. A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including "independents" supporting the Government from outside.

66. The Sarkaria Commission has noticed that in a number of situations of political instability in States, the Governors recommended President's Rule under Article 356 without exhausting all possible steps under the Constitution to induct or maintain a stable Government. The Governors concerned neither gave a fair chance to contending parties to form a Ministry, nor allowed a fresh appeal to the electorate after dissolving the Legislative Assembly. Almost all these cases have been criticized on the ground that the Governors, while making their recommendations to the President behaved in a partisan manner. The report further states that there has been no uniformity of approach in such situations and that these aspects have been dealt with in Chapter VI 'Emergency Provisions'.

67. In Chapter VI, Sarkaria Commission dealt with the emergency provisions noting the concern of framers of the Constitution of need for such provision in a country of our dimensions, diversities, disparities and "multitudinous people, with possibly divided loyalties". They took care to provide that, in a situation of such emergency, the Union shall have overriding powers to control and direct all aspects of administration and legislation throughout the country. They realised that a failure or breakdown of the constitutional machinery in a State could not be ruled out as an impossibility and a situation may arise in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

68. The common thread in all the emergency provisions is that the resort to such provision has to be in exceptional circumstances when there be the real and grave situation calling for the drastic action.

69. Sarkaria Commission as also this Court has noted the persistent criticism in ever-mounting intensity, both in regard to the frequency and the manner of the use of the power under Article 356. The Sarkaria Commission has noticed that gravemen of the criticism is that, more often than not, these provisions have been misused, to promote the political interests of the party in power at the center. Some examples have been noted of situations in which the power of Article 356 was invoked improperly if not illegally. It is noted that the constitutional framers did not intend that this power should be exercised for the purpose of securing good Government. It also notices that

this power cannot be invoked, merely on the ground that there are serious allegations of corruption against the Ministry.

70. Whether it is a case of existing Government losing the majority support or of installation of new Government after fresh elections, the act of the Governor in recommending dissolution of Assembly should be only with sole object of preservation of the Constitution and not promotion of political interest of one or the other party.

71. In the present context of fractured verdicts in elections, the aforesaid discussion assumes great importance and relevance. The criteria suggested in Sarkaria Commission Report for appointment of a person as a Governor is:

(i) He should be eminent in some walk of life;

(ii) He should be a person from outside the State;

(iii) He should be a detached figure and not too intimately connected with the local politics of the State; and

(iv) He should be a person who has not taken too great a part in politics generally and particularly in the recent past.

72. It has not been seriously disputed by learned Counsel appearing for the parties that, unfortunately, the criteria has been observed in almost total breach by all political parties. It is seen that one day a person is in active politics in as much as he holds the office of the Chief Minister or Minister or a party post and almost on the following day or, in any case, soon thereafter, the same person is appointed as the Governor in another State with hardly any cooling period. Ordinarily, it is difficult to expect detachment from party politics from such a person while performing the constitutional functions as Governor.

73. On this issue, we would like to say no more and leave this aspect to the wisdom of the political parties and their leaders to discuss and debate and arrive at, if possible, a national policy with some common minimum parameters applicable and acceptable to all major political parties.

Defections

74. At this stage, we may consider another side issue, namely, defections being a great evil.

75. Undoubtedly, defection is a great evil. It was contended for the Government that the unprincipled defections induced by allurements of office, monetary consideration, pressure, etc. were destroying the democratic fabric. With a view to control this evil, Tenth Schedule was added by the Constitution (Fifty-Second Amendment) Act, 1985. Since the desired goal to check defection by the legislative measure could not be achieved, law was further strengthened by the Constitution (Ninety-first Amendment) Act, 2003. The contention is that the Governor's action was directed to check this evil, so that a Government based on such defections is not formed.

76. Reliance has been placed on the decision in the case of ***Kihoto Hollohan v. Zachillhu and Ors. MANU/SC/0753/1992*** : [1992]1SCR686 to bring home the point that defections undermine the cherished values of democracy and Tenth Schedule was added to the Constitution to combat this evil. It is also correct that to further strengthen the law in this direction, as the existing provisions of the Tenth Schedule were not able to achieve the desired goal of checking defection, by 91st Amendment, defection was made more difficult by deleting provision which did not treat mass shifting of loyalty by 1/3 as defection and by making the defection, altogether impermissible and only permitting merger of the parties in the manner provided in the Tenth Schedule as amended by 91st Amendment.

77. In ***Kihoto's case***, the challenge was to validity of the Tenth Schedule, as it stood then. Argument was that this law was destructive of the basic structure of the Constitution as it is violative of the fundamental principle of Parliamentary democracy, a basic feature of the Indian Constitutionalism and is destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions seek to penalize and disqualify elected representatives for the exercise of these rights and freedoms which are essential to the sustenance of the system of parliamentary democracy. It was also urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the decease itself, are adopted. It was said that the Tenth Schedule seeks to throw away the baby with the bath water.

78. Dealing with aforesaid submissions, the Court noted that, in fact, the real question was whether under the Indian Constitutional Scheme, is there any immunity from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements. It was noted that the points raised in the petition are, indeed, far reaching and of no small importance-invoking the 'sense of relevance and constitutionally stated principles of unfamiliar settings'. On the one hand there was the real and imminent threat to the very fabric of Indian democracy posed by certain level of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil. On the other hand, there may be certain side-effects and fall-out which might affect and hurt even honest dissenters and conscientious objectors. While dealing with the argument that the constitutional remedy was violative of basic features of the Constitution, it was observed that the argument ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The unethical political defections was described as a 'canker' eating into the vitals of those values that make democracy a living and worthwhile faith.

79. It was contended that the Governor was only trying to prevent members from crossing the floor as the concept of the freedom of its members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but would also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay,

indeed, its very survival. The contention is based on Para 144 of the judgment in ***Kihoto's case*** which reads thus:

But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance -- nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on "Parliament, Functions, Practice & Procedure" (1989 Edn. page 119) say:

Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate. It is natural for members to accept the opinion of their Leaders and Spokesmen on the wide variety of matters on which those Members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy.

Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to "any directions" issued by the political party. The provision, however, recognises two exceptions : one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "Any Direction" in Clause (b) of Paragraph 2(1) whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately.

80. Our attention was also drawn to the objects and reasons for the 91st Constitutional Amendment. It states that demands were made from time to time in certain quarters for strengthening and amending the Anti- defection law as contained in the Tenth Schedule to the Constitution of India, on the ground that these provisions had not been able to achieve the desired goals of checking defections. The Tenth Schedule was also criticized on the ground that it allowed bulk defections while declaring individual defections as illegal. The provision for exemption from disqualification in case of splits as provided in paragraph 3 of the Tenth Schedule to the Constitution of India had, in particular, come under severe criticism on account of its destabilizing effect on the Government.

81. Reliance has also been placed to the exposition of Lord Diplock in a decision of House of Lords in the case of ***Council of civil Service Unions v. Minister for the civil Service*** 1984 (3) All.ER 935 on the aspect of irrationality to the effect that "it applies to a decision may be so outrageous or in defiance of logic or of accepted moral standards that no sensible person who had applied his 'mind to the question to be decided, could have arrived at it". It is contended that the Governor has many sources information wherefrom led him to conclude that the process that was going on in the State of Bihar was destroying the very fabric of democracy and, therefore, such approach cannot be described as outrageous or in defiance of logic, particularly, when proof in such cases is difficult if not impossible as bribery takes place in the cover of darkness and deals are made in secrecy. It is, thus, contended that Governor's view is permissible and legitimate view.

Almost similar contention has been rejected in ***Bommai's case.***

82. The other decision of House of Lords in ***Puhlhofer v. Hillingdon, London Borough Council*** (1986) 1 All.ER 467 relied upon by the respondents, has been considered by Justice Sawant in ***Bommai's case***. The reliance was to the proposition that where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the 'obvious' to the 'debatable' to the 'just conceivable', it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. But in the present case, the inference sought to be drawn by the Governor without any relevant material, cannot fall in the category of 'debatable' or 'just conceivable', it would fall in the category of 'obviously perverse'. On facts, the inescapable inference is that the sole object of the Governor was to prevent the claim being made to form the Government and the case would fall under the category of 'bad faith'.

83. The question in the present case is not about MLAs voting in violation of provisions of Tenth Schedule as amended by the Constitution (91st Amendment), as we would presently show.

84. Certainly, there can be no quarrel with the principles laid in ***Kihoto's case*** about evil effects of defections but the same have no relevance for determination of point in issue. The stage of preventing members to vote against declared policies of the political party to which they belonged had not reached. If MLAs vote in a manner so as to run the risk of getting disqualified, it is for them to face the legal consequences. That stage had not reached. In fact, the reports of the Governor intended to forestall any voting and staking of claim to form the Government.

85. Undisputedly, a Governor is charged with the duty to preserve, protect and defend the Constitution and the laws, has a concomitant duty and obligation to preserve democracy and not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy. But on facts of the present case, we are unable to accept that the Governor by reports dated 27th April and 21st May, 2005 sought to achieve the aforesaid objective. There was no material, let alone relevant, with the Governor to assume that there were no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means.

86. The report dated 27th April, 2005 refers to (1) serious attempt to cobble a majority; (2) winning over MLAs by various means; (3) targeting parties for a split; (4) high pressure moves; (5) offering various allurements like castes, posts, money etc.; and (6) Horse-trading. Almost similar report was sent by the Governors of Karnataka and Nagaland leading to the dissolution of the Assembly of Karnataka and Nagaland, invalidated in ***Bommai's case***. Further, the contention that the Central Government did not act upon the report dated 27th April, 2005 is of no relevance and cannot be considered in isolation since the question is about the manner in which the Governor moved, very swiftly and with undue haste, finding that one political party may be close to getting majority and the situation had reached where claim may be staked to form the Government which led to the report dated 21st May, 2005. It is in this context that the Governor says that instead of installing a Government based on a majority achieved by a distortion of the system, it would be preferable that the people/electorate could be provided with one more opportunity to seek the mandate of the people. This approach makes it evident that the object was to prevent a particular political party from staking a claim and not the professed object of anxiety not to permit the distortion of the political system, as sought to be urged. Such a course is nothing but wholly illegal and irregular and has to be described as mala fide. The recommendation for dissolution of the Assembly to prevent the staking of claim to form the Government purportedly on the ground that the majority was achieved by distortion of system by allurement, corruption and bribery was based on such general assumptions without any material which are quite easy to be made if any political party not gaining absolute majority is to be kept out of governance. No assumption without any basis whatever could be drawn that the reason for a group to support the claim to form the Government by Nitish Kumar, was only the aforesaid distortions. That stage had not reached. It was not allowed to be reached. If such majority had been presented and the Governor forms a legitimate opinion that the party staking claim would not be able to provide stable Government to the State, that may be a different situation. Under no circumstances, the action of Governor can be held to be bona fide when it is intended to prevent a political party to stake claim for formation of the Government. After elections, every genuine attempt is to be made which helps in installation of a popular Government, whichever be the political party.

Interpretation of a Constitution and Importance of Political Parties

87. For principles relevant for interpretation of a Constitution, our attention was drawn to what Justice Aharon Barak, President of Supreme Court of Israel says in Harvard Law Review, Vol.116 (2002-2003) dealing particularly with the aspect of purposive interpretation of Constitution. Learned Judge has noticed as under:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

88. It is further said that the political question doctrine, in particular, remits entire areas of public life to Congress and the President, on the grounds that the Constitution assigns responsibility for these areas to the other branches, or that their resolution will involve discretionary, polycentric decisions that lack discrete criteria for adjudication and thus are better handled by the more democratic branches.

In fact, the scope of judicial review as enunciated in ***Bommai's case*** is in tune with the principles sought to be relied upon.

89. In support of the proposition that in Parliament Democracy there is importance of political parties and that interpretation of the constitutional provisions should advance the said basic structure based on political parties, our attention was drawn to write up Designing Federalism _ A Theory of Self-Sustainable Federal Institution and what is said about political parties in a Federal State which is as under:

Political parties created democracy and _ modern democracy is unthinkable save in terms of parties.

Schattschneider 1942 : I

Here is a factor in the organisation of federal Government which is of primary importance but which cannot be ensured or provided for in a constitution _ a good party system Wheare 1953: 86 Whatever the general social conditions, if any, that sustain the federal bargain, there is one institutional condition that controls the nature of the bargain in all instances_ with which I am familiar. This is the structure of the party system, which may be regarded as the main variable intervening between the background social conditions and the specific nature of the federal bargain.

Riker 1964 : 136

In a country which was always to be in need of the cohesive force of institutions, the national parties, for all their faults, were to become at an early hour primary and necessary parts of the machinery of Government, essential vehicles to convey men's loyalties to the state.

Hofstadter 1969: 70-I

90. It is contended that the political parties are the main means not only whereby provincial grievances are aired but also whereby centralised and decentralised trends are legitimised. This contention is made in connection with the alleged stand of two-third MLAs of LJP against the professed stand of that political party.

91. We are afraid that on facts of present case, the aforesaid concept and relevance of political parties is not quite relevant for our purpose to decide why and how the members of political parties had allegedly decided to adopt the course which they did, to allegedly support the claim for formation of the Government.

Morality

92. We may also deal with the aspect of morality sought to be urged. The question of morality is of course very serious and important matter. It has been engaging the attention of many constitutional experts, legal luminaries, jurists and political leaders. The concept of morality has also been changing from time to time also having regard to the ground realities and the compulsion of the situation including the aspect and relevance of coalition governance as opposed to a single party Government. Even in the economic field, the concept of morality has been a matter of policy and priorities of the Government. The Government may give incentive, which ideally may be considered unethical and immoral, but in so far as Government is concerned, it may become necessary to give incentive to unearth black money. ***R.K. Garg and Ors. v. Union of India and Ors. MANU/SC/0074/1981 :*** [1982]133ITR239(SC) . It may be difficult to leave such aspects to be determined by high constitutional functionaries, on case to case basis, depending upon the facts of the case, and personal mould of the constitutional functionaries. With all these imponderables, the constitution does not contemplate the dissolution of Assemblies based on the assumption of such immoralities for formation of the satisfaction that situation has arisen in which the Government cannot be of the Constitution of India.

Article 356 and Bommai's case

93. Article 356(1) of the Constitution is as follows:

356.--(1) Provisions in case of failure of constitutional machinery in State.-- (1) If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

94. Power under Article 356(1) is an emergency power but it is not an absolute power. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to discharge the

obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution. The Governor takes the oath, prescribed by Article 159 to preserve, protect and defend the Constitution and the laws to the best of his ability. Power under Article 356 is conditional, condition being formation of satisfaction of the President as contemplated by Article 356(1). The satisfaction of the President is the satisfaction of Council of Ministers. As provided in Article 74(1), the President acts on the aid and advice of Council of Ministers. The plain reading of Article 74(2) stating that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court, may seem to convey that the Court is debarred from inquiring into such advice but ***Bommai*** has held that Article 74(2) is not a bar against scrutiny of the material on the basis of which the President has issued the proclamation under Article 356. Justice Sawant, in Para 86 states that:

What is further, although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The Courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74(2) does not negate their right to know about the factual existence of any such material.

95. It was further said that the Parliament would be entitled to go into the material on basis of what the Council of Ministers tendered the advice and, therefore, secrecy in respect of material cannot remain inviolable. It was said that:

When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government.

On the similar lines, is the opinion of Jeevan Reddy, J.:

Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers. In fact, Clause (2) is a reproduction of Sub-section (4) of Section 10 of the Government of India Act, 1935. (The Government of India Act did not contain a provision corresponding to An. 74(1) as it stood before or after the Amendments aforementioned). The scope of CI. (2) should not be extended beyond its legitimate fields. In any event, it cannot be read or understood as conferring an immunity upon the council of ministers or the Minister/ Ministry concerned to explain, defend and justify the orders and acts of the President done in exercise of his functions. The limited provision contained in Article 74(2) cannot override the basic provisions in the Constitution relating to judicial review. If and when any action taken by the President in exercise of his functions is questioned in a Court of Law, it is for the Council of Ministers to justify the same, since the action or order of the President is presumed Jo have been taken in accordance with

Article 74(1). As to which Minister or which official of which Ministry comes forward to defend the order/ action is for them to decide and for the Court to be satisfied about it. Where, of course, the act/order questioned is one pertaining to the executive power of the Government of India, the position is much simpler. It does not represent the act/order of the President done/taken in exercise of his functions and hence there is no occasion for any aid or advice by the Ministers to him. It is the act/order of Government of India, though expressed in the name of the President. It is for the concerned Minister or Ministry, to whom the function is allocated under the Rules of Business to defend and justify such action/ order.

In our respectful opinion, the above obligation cannot be evaded by seeking refuge under Article 74(2). The argument that the advice tendered to the President comprises material as well and, therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. The material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice. The material may be placed before the President to acquaint him -- and if need be to satisfy him -- that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Article 74(2). But it is difficult to appreciate how does the supporting material, becomes part of advice. The respondents cannot say that whatever the President sees -- or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the Court. Article 74(2) must be interpreted and understood in the context of entire constitutional system. Undue emphasis and expansion of its parameters would engulf valuable constitutional guarantees. For these reasons, we find if difficult to agree with the reasoning in State of Rajasthan on this score, insofar as it runs contrary to our holding.

96. The scope of judicial review has been expanded by ***Bommai*** and dissent has been expressed from the view taken in ***State of Rajasthan's case.***

97. The above approach shows objectivity even in subjectivity. The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself. This line is clear also from ***Maru Ram v. Union of India and Ors. MANU/SC/0159/1980 :*** 1980CriLJ1440 . It would also be clear on in depth examination of ***Bommai*** that declared the dissolution of three Assemblies illegal but before we further revert to that decision, a brief historical background including the apprehension of its abuse expressed by our founding fathers may be noted.

98. Articles 355 and 356 of the Constitution set the tenor for the precedence of the Union over the States. It has been explained that the rationale for introducing Article 355 was to distinctly demarcate the functioning of the State and Union governments and to prevent any form of unprincipled invasions by the Union into the affairs of the State. It was felt that through the unambiguous language of Articles 355 and 356, the Union shall be constitutionally obliged to interfere only under certain limited circumstances as laid down in the provisions.

99. Referring to what is now Article 355, Dr. Ambedkar had reasoned that "in view of the fact that we are endowing the Provinces with plenary powers and making them sovereign within their own fields it is necessary to provide that if any invasion of the provincial field is done, it is in virtue of this obligation." (T.K. Thope, ***Dr. Ambedkar and Article 356 of the Constitution - MANU/SC/0548/1993 : (1993)4SCC1*** . Pursuant to this reasoning, Dr. Ambedkar further explained that before resorting to Article 356 "the first thing the President will do would be to issue warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If the warning fails the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when those two remedies fail that he would resort to this Article." Dr. Ambedkar admitted that these articles were "liable to be abused" and that he cannot "altogether deny that there is a possibility of these articles being employed for political purposes." But he reasoned that such an "objection applies to every part of the Constitution which gives power to the center to override the Provinces" and added that the "proper thing we ought to expect is that such articles will never be called into operation and they would remain a dead letter." (*Constituent Assembly Debates (Volume IX, Revised Edition) at pp.175-177)*.

Scope of Judicial Review under Article 356 - State of Rajasthan v. Union of India :

100. In ***State of Rajasthan's case,*** there was a broad consensus among five of the seven Judges that the Court can interfere if it is satisfied that the power has been exercised *mala fide* or on "wholly extraneous or irrelevant grounds". Some learned Judges have stated the rule in narrow terms and some others in a little less narrow terms but not a single learned Judge held that the proclamation is immune from judicial scrutiny. It must be remembered that at that time Clause (5) was there barring judicial review of the proclamation and yet they said that Court can interfere on the ground of mala fides. Surely, the deletion of Clause (5) has not restricted the scope of judicial review but has widened it.

101. Justice Reddy in ***Bommai's case*** has noticed, in so far as it was relevant, the ratio underlying each of the six opinions delivered by Seven Judge Bench in the case of ***State of Rajasthan*** (supra) as under:

Beg, C.J. The opinion of Beg, C.J. contains several strands of thought. They may be stated briefly thus:

(i) The language of Article 356 and the practice since 1950 shows that the Central Government can enforce its will against the State Governments with respect to the question how the State Governments should function and who should hold reins of power.

(ii) By virtue of Article 365(5) and Article 74(2), it is impossible for the Court to question the satisfaction of the President. It has to decide the case on the basis of only those facts as may have been admitted by or placed by the President before the Court.

(iii) The language of Article 356(1) is very wide. It is desirable that conventions are developed channelsing the exercise of this power. The Court can interfere only when the power is used in a grossly perverse and unreasonable manner so as to constitute patent misuse of the provisions or to

an abuse of power. The same idea is expressed at another place saying that if "a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved" by the proclamation, it would be liable to be struck down. The question whether the majority party in the Legislative Assembly of a State has become totally estranged from the electorate is not a matter for the Court to determine.

(iv) The assessment of the Central Government that a fresh chance should be given to the electorate in certain States as well as the question when to dissolve the Legislative Assemblies are not matters alien to Article 356. It cannot be said that the reasons assigned by the Central Government for the steps taken by them are not relevant to the purposes underlying Article 356.

We may say at once that we are in respectful disagreement with propositions (i), (ii) and (iv) altogether. So far as proposition (iii) is concerned, it is not far off the mark and in substance accords with our view, as we shall presently show.

Y.V. Chandrachud, J. On the scope of judicial review, the learned Judge held that where the reasons disclosed by the Union of India are wholly extraneous, the Court can interfere on the ground of mala fides. Judicial scrutiny, said the learned Judge, is available "for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed". The Court cannot sit in judgment over the satisfaction of the President for determining whether any other view of the situation is reasonably possible, opined the learned Judge. Turning to the facts of the case before him, the learned Judge observed that the grounds assigned by the Central Government in its counter-affidavit cannot be said to be irrelevant to Article 356. The Court cannot go deeper into the matter nor shall the Court enquire whether there were any other reasons besides those disclosed in the counter-affidavit.

P.N. Bhagwati and A.C. Gupta, JJ. The learned Judges enunciated the following propositions in their opinion:

The action under Article 356 has to be taken on the subjective satisfaction of the President. The satisfaction is not objective. There are no judicially discoverable and manageable standards by which the Court can examine the correctness of the satisfaction of the President. The satisfaction to be arrived at is largely political in nature, based on an assessment of various and varied facts and factors besides several imponderables and fast changing situations. The Court is not a fit body to enquire into or determine the correctness of the said satisfaction or assessment, as it may be called. However, if the power is exercised mala fide or is based upon wholly extraneous or irrelevant grounds, the Court would have jurisdiction to examine it. Even Clause (5) is not a bar when the contention is that there was no satisfaction at all.

The scope of judicial review of the action under Article 356, -- the learned Judges held -- is confined to a "narrow minimal area: May be that in most cases, it would be difficult, if not impossible, to challenge the exercise of power under Article 356(1) on the aforesaid limited ground, because the facts and circumstances on which the satisfaction is based, would not be known. However, where it is possible, the existence of satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds."

We may say with great respect that we find it difficult to agree with the above formulations in toto. We agree only with the statements regarding the permissible grounds of interference by Court and the effect of Clause (5), as it then obtained. We also agree broadly with the first proposition, though not in the absolute terms indicated therein.

Goswami and Untwalia, JJ. The separate opinions of Goswami and Untwalia, JJ. emphasise one single fact, namely, that inasmuch as the facts stated in the counter-affidavit filed by the Home Minister cannot be said to be "mala fide, extraneous or irrelevant", the action impugned cannot be assailed in the Court.

Fazal Ali, J. The learned Judge held that:

(i) the action under Article 356 is immune from judicial scrutiny unless the action is "guided by extraneous consideration" or "personal considerations".

(ii) the inference drawn by the Central Government following the 1977 elections to the Lok Sabha cannot be said to be unreasonable. It cannot be said that the inference drawn had no nexus with Article 356.

Bommai's case

102. The Nine Judge Bench considered the validity of dissolution of Legislative Assembly of States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan. Out of six States, the majority held as unconstitutional the dissolution of Assemblies of Karnataka, Nagaland and Meghalaya as well. Six opinions have been expressed. There is unanimity on some issues, likewise there is diversity amongst several opinions on various issues.

Karnataka Facts

103. In the case of Karnataka, the facts were that the Janta Party being the majority party in the State Legislature had formed the Government under the leadership of Shri S.R. Bommai on August 30, 1988 following the resignation on August 1, 1988 of the earlier Chief Minister Shri Hegde who headed the ministry from March 1985 till his resignation. On 17th April, 1989 one legislator presented a letter to the Governor withdrawing his support to the Ministry. On the next day he presented to the Governor 19 letters allegedly written by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to the BJP which was supporting the ministry, withdrawing their support to the ministry. On receipt of these letters, the Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the said letters verified. On April 19, 1989, the Governor sent a report to the President stating therein that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and even after the formation of the new party viz. Janta Dal, there were dissensions and defections. In support, the Governor referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the Chief Minister Shri Bommai did not command a majority in the Assembly and hence it was inappropriate under the Constitution, to have the State administered by an Executive consisting of Council of Ministers which did not command the majority in the House. He also added that no other political party was in a position

to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356(1). The Governor did not ascertain the view of Shri Bommai either after the receipt of the 19 letters or before making his report to the President. On the next day i.e. April 20, 1989, 7 out of the 19 legislators who had allegedly sent the letters to the Governor complained that their signatures were obtained on the earlier letters by misrepresentation and affirmed their support to the Ministry. The State Cabinet met on the same day and decided to convene the Session of the Assembly within a week i.e. on April 27, 1989. The Chief Minister and his Law Minister met the Governor on the same day and informed him about the decision to summon the Assembly Session. The Chief Minister offered to prove his majority on the floor of the House, even by pre-phoning the Assembly Session, if needed. To the same effect, the Governor however sent yet another report to the President on the same day i.e. April 20, 1989, in particular, referring to the letters of seven Members pledging their support to the Ministry and withdrawing their earlier letters. He however opined in the report that the letters from the 7 legislators were obtained by the Chief Minister by pressurising them and added that horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356(1) of the Constitution. On that very day, the President issued the Proclamation in dissolving the House. The Proclamation was thereafter approved by the Parliament as required by Article 356(3).

104. A writ petition filed in the High Court challenging the validity of dissolution was dismissed by a three Judge Bench inter alia holding that the facts stated in the Governors report cannot be held to be irrelevant and that the Governor's satisfaction that no other party was in a position to form the Government had to be accepted since his personal bona fides were not questioned and his satisfaction was based upon reasonable assessment of all the relevant facts. The High Court relied upon the test laid down in the ***State of Rajasthan case*** and held that on the basis of materials disclosed, the satisfaction arrived at by the President could not be faulted.

Nagaland Facts

105. In the case of Nagaland, the Presidential Proclamation dated August 7, 1988 was issued under Article 356(1) imposing President's rule. At the relevant time in the Nagaland Assembly there were 60 legislators, 34 belonging to Congress (I), 18 to Naga National Democratic Party and 1 to Naga Peoples' Party and seven were independent legislators. On July 28, 1988, 13 out of the 34 MLAs of the ruling Congress (I) party informed the Speaker of the Assembly that they have formed a separate party and requested him for allotment of separate seats for them in the House. The Session was to commence on August 28, 1988. By decision dated July 30, 1988 the Speaker held that there was a split in the party within the meaning of the Tenth Schedule of the Constitution. On July 31, 1988, Shri Vamuzo, one of the 13 defecting MLAs who had formed a separate party, informed the Governor that he commanded the support of 35 out of the then 59 Members in the Assembly and was in a position to form the Government. On August 3, 1988, the Chief Secretary of the State wrote to Shri Vamuzo that according to his information, Shri Vamuzo had wrongfully confined the MLAs who had formed the new party. The allegations were denied by Shri Vamuzo and he asked the Chief Secretary to verify the truth from the Members themselves. On verification, the Members told the Chief Secretary that none of them was confined as alleged. On August 6, 1988 the Governor sent a report to the President of India about the formation of a new party by the 13

MLAs. He also stated that the said MLAs were allured by money. He further stated that the said MLAs were kept in forcible confinement by Mr. Vamuzo and one other person, and that the story of split in the ruling party was not true. He added that the Speaker was hasty in according recognition to the new group of the 13 members and commented that horse-trading was going on in the State. He made a special reference to the insurgency in Nagaland and also stated that some of the Members of the Assembly were having contacts with the insurgents. He expressed the apprehension that if the affairs were allowed to continue as they were, it would affect the stability of the State. In the meantime the Chief Minister submitted his resignation to the Governor and recommended the imposition of the President's rule. The President thereafter issued the impugned Proclamation and dismissed the Government and dissolved the Assembly. Shri Vamuzo, the leader of the new group challenged the validity of the Proclamation in the Gauhati High Court. The Petition was heard by a Division Bench. The Bench differed on the effective operation of Article 74(2) and hence the matter was referred to the third Judge. But before the third learned Judge could hear the matter, the Union of India moved this Court for grant of Special Leave which was granted and the proceedings in the High Court were stayed.

106. Dealing with the implications of Article 74(2) of the Constitution Justice Sawant speaking for himself and Justice Kuldip Singh came to the conclusion that although the advice given by the Council of Ministers is free from the gaze of the Court, the material on the basis of which the advice is given cannot be kept away from it and is open to judicial scrutiny. On the facts, Justice Sawant expressed the view that the Governor should have allowed Shri Vamuzo to test his strength on the floor of the House notwithstanding the fact that the Governor in his report has stated that during the preceding 25 years, no less than 11 Governments had been formed and according to his information, the Congress (I) MLAs were allured by the monetary benefits and that amounted to incredible lack of political morality and complete disregard of the wishes of the electorate.

Meghalaya

107. Insofar as the Proclamation in respect of the Meghalaya is concerned, that was also held to be invalid. The ground on which dissolution was invalidated was the constitutional functionary had failed to realize the binding legal consequences of the orders of this Court and the constitutional obligation to give effect to the said order.

Facts of Madhya Pradesh, Rajasthan and Himachal Pradesh

108. Insofar as the cases of States of Madhya Pradesh, Rajasthan and Himachal Pradesh are concerned the dismissal of the Governments was a consequence of violent reactions in India and abroad as well as in the neighbouring countries where some temples were destroyed, as a result of demolition of Babri Masjid structure on 6th December, 1992. The Union of India is said to have tried to cope up the situation by taking several steps including banning of some organizations which had along with BJP given a call for Kar sevaks to march towards Ayodhya on December 6, 1992. The Proclamation in respect of these States was issued on January 15, 1993. The Proclamations dissolving the assemblies were issued on arriving at satisfaction as contemplated by Article 356(1) on the basis of Governor's report. It was held that the Governor's reports are based on relevant materials and are made bona fide and after due verification.

109. The Conclusion Nos. I, II, IV, VI, VII, IX and X in the opinion of Justice Sawant are as under:

I. The validity of the Proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the mala fide exercise of the power. When a prima facie case is made out in the challenge to the Proclamation, the burden is on the Union Government to prove that the relevant material did in fact exist. Such material may be either the report of the Governor or other than the report.

II. Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction. IV. Since the provisions contained in cl. (3) of Article 356 are intended to be a, check on the powers of the President under Clause (1) thereof, it will not be permissible for the President to exercise powers under Sub-clauses (a), (b) and (c) of the latter clause, to take irreversible actions till at least both the Houses of Parliament have approved of the Proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly by using the powers of the Governor under Article 74(2)(b) read with Article 356(1)(a) till at least both the Houses of Parliament approve of the Proclamation.

VI. In appropriate cases, the Court will have power by an interim injunction, to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the Proclamation to avoid the fait accompli and the remedy of judicial review being rendered fruitless. However, the Court will not interdict the issuance of the Proclamation or the exercise of any other power under the Proclamation.

VII. While restoring the status quo ante, it will be open for the Court to mould the relief suitably and declare as valid actions taken by the President till that date. It will also be open for the Parliament and the Legislature of the State to validate the said actions of the President.

IX. The Proclamations dated April 21, 1989 and October 11, 1991 and the action taken by the President in removing the respective Ministries and the Legislative Assemblies of the State of Karnataka and the State of Meghalaya challenged in civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 and 7 of 1992 respectively are unconstitutional. The Proclamation dated August 7, 1988 in respect of State of Nagaland is also held unconstitutional. However, in view of the fact that fresh elections have since taken place and the new Legislative Assemblies and Ministries have been constituted in all the three States, no relief is granted consequent upon the above declarations. However, it is declared that all actions which might have been taken during the period the Proclamation operated, are valid. The civil Appeal No. 3645 of 1989 and Transfer case Nos. 5 and 7 of 1992 are allowed accordingly with no order as to costs. civil Appeal Nos. 193-194 of 1989 are disposed of by allowing the writ petitions filed in the Gauhati High Court accordingly but without costs.

X. The Proclamations dated 15th December, 1992 and the actions taken by the President removing the Ministries and dissolving the Legislative Assemblies in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to the said proclamations are not unconstitutional. civil Appeals Nos. 1692, 1692A-1692C, 4627-30 of 1993 are accordingly allowed and Transfer case Nos. 8 and 9 of 1993 are dismissed with no order as to costs.

110. Justice Jeevan Reddy has expressed opinion for himself and Justice Agrawal. The conclusions Nos. 2, 3, 7, 8 and 12 in paragraph 434 are relevant for our purpose and the same read as under:

(2) The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material -- which may comprise of or include the report(s) of the Governor -- is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Article 356 do merit serious consideration at the hands of all concerned.

(3) Though the power of dissolving of the Legislative Assembly can be said to be implicit in Clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it only after the proclamation is approved by both Houses of Parliament under Clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under Sub-clause (c) of Clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the proclamation.

(7) The proclamation under Article 356(I) is not immune from judicial review. The Supreme Court or the High Court can strike down the proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. The deletion of Clause (5) (which was introduced by 38th (Amendment) Act) by the 44th (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so. if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as, there is some material which is relevant to the action taken.

(8) If the court strikes down the proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the court has the power to declare that acts done, orders passed and laws made during the period the proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/ Legislative Assembly or other competent authority to review, repeal or modify such act orders and laws.

(12) The proclamations dated January 15, 1993 in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh concerned in civil Appeals Nos. 1692, I692A-I692C of 1993, 4627-4630 of 1990, Transferred Case (C) No. 9 of 1993 and Transferred Case No. 8 of 1993 respectively are not unconstitutional. The civil Appeals are allowed and the judgment of the High Court of Madhya Pradesh in M.P.(C) No. 237 of 1993 is set aside. The Transferred Cases are dismissed.

Justice Jeevan Reddy has also expressed agreement with the conclusions I, II and IV to VII in the Judgment of Justice Sawant delivered on behalf of himself and Justice Kuldip Singh.

111. Justice Pandian has expressed agreement with the opinion of Justice P.B. Sawant on his conclusions I, II and IV to VIII but so far as the reasoning and other conclusions are concerned, the learned Judge has agreed with the Judgment of Justice Reddy.

112. For determining the scope of judicial review in terms of law enunciated by ***Bommai***, it is vital to keep in view that majority opinion in that case declared as illegal the dissolution of assemblies of Karnataka and Nagaland. At an appropriate place later, we will note the reason that led to this declaration.

113. Some observations made in the minority opinion of Justice K. Ramaswamy are also very significant. Learned Judge has said that the motivating factor for action under Article 356(1) should never be for political gain to the party in power at the center, rather it must be only when it is satisfied that the constitutional machinery has failed. It has been further observed that the frequent elections would belie the people's belief and faith in parliamentary form of Government, apart from enormous election expenditure to the State and the candidates. The Court, if upon the material placed before it, finds that satisfaction reached by the President is unconstitutional, highly irrational or without any nexus, then the Court would consider the contents of the Proclamation or reasons disclosed therein and in extreme cases the material produced pursuant to discovery order nisi to find the action is wholly irrelevant or bears no nexus between purpose of the action and the satisfaction reached by the President or does not bear any rationale to the proximate purpose of the Proclamation. In that event, the Court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently, Proclamation issued under Article 356 would be declared unconstitutional.

114. It is apparent that Justice Ahmadi and Justice Ramaswamy though in minority, yet learned Judges have frowned upon the highly irrational action.

115. Now, let us see the opinion of Justice Sawant, who spoke for himself and Justice Kuldip Singh and with whom Justice Pandian, Justice Jeevan Reddy and Justice Agrawal agreed, to reach the conclusion as to the invalidity of Proclamation dissolving assemblies of Karnataka and Nagaland.

116. Learned Judge has opined that the President's satisfaction has to be based on objective material. That material may be available in the report sent to the President by the Governor or otherwise or both from the report and other sources. Further opines Justice Sawant that the objective material, so available must indicate that the Government of State cannot be carried on in accordance with the provisions of the Constitution. The existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the issue of the Proclamation.

117. Reference has been made to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant Articles of Pakistan Constitution is not couched in the same terms. In ***Muhammad Sharif v. Federation of Pakistan, PLD 1988 (LAH) 725***, the question was whether the order of the President dissolving the National Assembly on 29th May, 1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Pakistan Constitution. It was held in that case that it is not quite right to contend that since it was the discretion of the President, on the basis of his opinion, the President could dissolve the National

Assembly but he has to have the reasons which are justifiable in the eyes of the people and supportable by law in a court of justice. He could not rely upon the reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects **(Emphasis supplied by us).** It would be instructive to note as to what was stated by the learned Chief Justice and Justice R.S. Sidhwa, as reproduced in the opinion of Justice Sawant:

Whether it is 'subjective' or 'objective' satisfaction of the President or it is his 'discretion' or 'opinion', this much is quite clear that the President cannot exercise his powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representative of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law. No doubt, the Courts will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order under the Constitution, the Courts will have to perform their duty cast on them under the Constitution. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for.

Dealing with the second argument, the learned Chief Justice held:

If the argument be correct then the provision 'Notwithstanding anything contained in Clause (2) of Article 48' would be rendered redundant as if it was no part of the Constitution. It is obvious and patent that no letter or part of a provision of the Constitution can be said to be redundant or non-existent under any principle of construction of Constitutions. The argument may be correct in exercise of other discretionary powers but it cannot be employed with reference to the dissolution of National Assembly. Blanket coverage of validity and un-questionability of discretion under Article 48(2) was given up when it was provided under Article 58(2) that 'Notwithstanding Clause (2) of Article 48 - the discretion can be exercised in the given circumstances. Specific provision will govern the situation. This will also avoid expressly stated; otherwise it is presumed to be there in Courts of record.... therefore, it is not quite right to contend that since it was in his 'discretion', on the basis of his 'opinion' the President could dissolve the National Assembly. He has to have reasons which are justifiable in the eyes of the people and supportable by law in a Court of Justice.... It is understandable that if the President has any justifiable reason to exercise his 'discretion' in his 'opinion' but does not wish to disclose, he may say so and may be believed or if called upon to explain the reason he may take the Court in confidence without disclosing the reason in public, may be for reason of security of State. After all patriotism is not confined to the office holder for the time being. He cannot simply say like Caesar it is my will, opinion or discretion. Nor give reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects....

Dealing with the same arguments, R.S. Sidhwa, J. stated as follows:

...I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Arts. 58(2)(b) and 112(2) (b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided

on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer.

118. It is well settled that if the satisfaction is mala fide or is based on wholly extraneous or irrelevant grounds, the court would have the jurisdiction to examine it because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. On consideration of these observations made in the case of State of Rajasthan as also the other decisions ***{Kehar Singh and Anr. v. Union of India and Anr. MANU/SC/0240/1988 :*** 1989CriLJ941 and ***Maru Ram v. Union of India MANU/SC/0159/1980 :*** 1980CriLJ1440 }, Justice Sawant concluded that the exercise of power to issue proclamation under Article 356(1) is subject to judicial review at least to the extent of examining whether the conditions precedent to the issue of Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. While considering the question of material, it was held that it is not the personal whim, wish, view or opinion or the ipse dixit of the President de hors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. **(Emphasis supplied by us).** Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from material is certainly open to judicial review.

119. It has been further held that when the Proclamation is challenged by making a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government in view of the provisions of Section 106 of the Evidence Act, the burden of proof would be on the Union Government.

120. Thus having reached the aforesaid conclusions as to the parameters of the judicial review that the satisfaction cannot be based on the personal whim, wish, view, opinion or ipse dixit de hors the legitimate inference from the relevant material and that the legitimacy of the inference drawn was open to judicial review, the report on basis whereof Proclamation dissolving the Assembly of Karnataka had been issued was subjected to a close scrutiny, as is evident from paragraphs 118, 119 and 120 of the opinion of Justice Sawant which read as under:

118. In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the seven legislators, it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier nineteen letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislature Secretariat. Secondly, he also took upon himself the task of deciding that the seven out of the nineteen legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their free will. Again he had not cared even

to interview the said legislators. Thirdly, it is not known from where the Governor got the information that there was horse-trading going on between the legislators. Even assuming that it was so, the correct and the proper course for him to adopt was to await the test on the floor of the House which test the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on April 27, 1989, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such grave threat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all canons of propriety were thrown to wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356(1) clearly smacked of mala fides. The Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more firmly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed was, therefore, liable to be struck down.

(Emphasis supplied by us)

119. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some Legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides. It is possible that on some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor test was neither compulsory nor obligatory or that it was not a pre-requisite to sending the report to the President recommending action under Article 356(1). Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.

(Emphasis supplied by us)

120. The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the seven MLAs whether their retraction was genuine or not, proceeded to give his

unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional Government in the State before reporting that the constitutional machinery had broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty bound to opt for it so long as the Government could enjoy the confidence of the House. That is also the recommendation of the Five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the report of the Governor, there was no other material before the President before he issued the Proclamation. Since the "facts" stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid.

(Emphasis supplied by us)

121. The view of the High Court that the facts stated in the Governor's report had to be accepted was not upheld despite the fact that the Governor had got the authenticity of the signatures of 19 MLAs on letters verified from the Legislature Secretariat, on the ground that he had not cared to interview the legislators and that there were conflicting letters from the seven legislators. The conclusion drawn by the Governor that those seven legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their own free will was frowned upon, particularly when they had not been interviewed by the Governor. It was further observed that it is not known from where the Governor got the information about the horse-trading going on between the legislators. Further conclusion reached was that the Governor had thrown all cannons of propriety to the winds and showed undue haste in inviting the President to issue Proclamation under Article 356(1) which clearly smacked of mala fides. It was noticed that the facts stated by the Governor in his report were his own opinion based on unascertained material and in the circumstances they could hardly be said to form the objective material on which the President could have acted.

122. When the facts of the present case are examined in light of the scope of the judicial review as is clear from the aforesaid which represents *ratio decidendi* of majority opinion of ***Bommai's case***, it becomes evident that the challenge to the impugned Proclamation must succeed.

123. The case in hand is squarely covered against the Government by the dicta laid down in ***Bommai's case***. There cannot be any presumption of allurement or horse- trading only for the reason that some MLAs, expressed the view which was opposed to the public posture of their leader and decided to support the formation of the Government by the leader of another political party. The minority Governments are not unknown. It is also not unknown that the Governor, in a given circumstance, may not accept the claim to form the Government, if satisfied that the party or the group staking claim would not be able to provide to the State a stable Government. It is also not unknown that despite various differences of perception, the party, group or MLAs may still

not opt to take a step which may lead to the fall of the Government for various reasons including their being not prepared to face the elections. These and many other imponderables can result in MLAs belonging to even different political parties to come together. It does not necessarily lead to assumption of allurement and horse-trading.

124. As opposed to the cases of dissolution of Karnataka and Nagaland, while considering the cases of dissolution of assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh, it was held in ***Bommai*** that the reports of the Governors disclosed that the State Governments had miserably failed to protect the citizens and property of the State against internal disturbances, it was found that the Governor's reports are based on relevant material and are made bona fide and after due verification. It is in the light of these findings that the validity of the Proclamation was unanimously upheld in respect of these three States.

125. Now, let us revert to the reasoning given in the opinion of Justice B.P. Jeevan Reddy, speaking for himself and Justice Agrawal.

126. As already noticed, Justice Reddy to the extent stated in para 324 expressed his dissent with the reasoning of ***State of Rajasthan case.***

127. Before we examine paragraph 389, wherein Justice Reddy has noticed, in brief, eight reasons given by the Special Bench of the High Court in dismissing the writ petition and the opinion of learned Judge as contained in para 391, we feel that to fully appreciate ***Bommai's case*** which reversed Full Bench decision of Karnataka High Court, it would be quite useful to note what exactly was stated by the High Court in Paragraphs 28 to 34 of its judgment reported in ***S.R. Bommai and Ors. v. Union of India and Ors. MANU/KA/0003/1990 :*** AIR1990Kant5 . The said paragraphs read as under:

28. Coming to the second facet of the contention of Mr. Soli Sorabjee, we find that the criticism levelled is that the inference drawn by the Governor that there is no other party which is in a position to form the Government, is not only vague but factually incorrect and hence the President had no relevant material to arrive at his satisfaction for proclamation issued by him.

The aforesaid contention again is without any merit for the reasons: (i) that the Governor formed the said satisfaction which can necessarily be the result of his own impressions. Narration of events in no way advances the case of satisfaction because the very satisfaction of the Governor is an integral part of the material relevant fact. It may also be that the Governor would have met several MLAs and enquired of them. But what transpired between them cannot be a matter of record. In the context where the Governor's personal bona fides are not in question, his satisfaction expressed is to be assumed as part of the relevant material facts in the sense that the very satisfaction stated therein comprehends within itself the idea of all the other necessary factors, (ii) the report of 19th April, 1989 has to be read with the second report of 20th April, 1989 wherein "atmosphere getting vitiated" and "horse-trading" were referred. "Pressurization of MLAs", "Horse-trading" and "vitiating atmosphere" referred to in the report necessarily indicate the existence of facts for the satisfaction that no other party was in a position to form the Government in accordance with the Constitution: The report could have been more explicit and, not adopting such a course by itself cannot nullify the essence of the report. If the President had any reason to doubt the veracity of

those statements it was for him to seek a clarification or further report. However, if the President chose to accept the statement of the Governor as to the satisfaction that none else was in a position to form the Government it is because the President found it to be a sufficient arid acceptable statement as to the existence of factual situation. This statement in para 3 of the first report may also be weighed and understood in the background of the principle that in case the existing Ministry was found to have lost the majority in the House, it is left to the discretion of the Governor to call upon someone else to form the Ministry, whom he thinks is in a position to command majority in the House. Further, absolutely no material has been placed before us to show that any other party or individual staked his or her claim to form a stable Ministry; rather, throughout, the petitioners' case has been that the existing Ministry headed by Sri S.R. Bommai continued to enjoy the support of the majority in the House. This premise was held to be not correct for which material facts were given in both the reports made by the Governor.

29. It may be emphasised that a person holding majority does not require time to prove that majority. Instead of telling the Governor that he would prove majority on the floor of the House, the Chief Minister could have as well obtained the signatures of 113 MLAs and placed before the Governor to demonstrate his strength. Moreover, the second report of the Governor also conveys certain material facts; some of the ML As who withdrew their support to Sri S.R. Bommai wrote again withdrawing the earlier letters with oscillation and fickle-mindedness . Fluctuating loyalties leading to unhealthy practice are pointed out in the report. The democratic culture was being vulgarised. Vitiation of the atmosphere was felt by the Governor. In the context of the prevailing situation the Governor was certainly entitled to report to the President the aforesaid facts. We, are therefore, of the firm view that the two reports of the Governor conveyed to the President the essential and relevant facts from which the President could assess the situation for an action under Article 356 of the Constitution.

30. Another major attack levelled against the reports of the Governor by Mr. Soli Sorabjee was that nowhere in the report's it is stated that the State Government cannot be carried on in accordance with the Constitution. In other words, there is no material on the record to show that there has been Constitutional breakdown of the machinery in the State. In support of his argument the learned Counsel drew our attention to the statement in the report which reads:

It is not appropriate under the circumstances to have the State administered by an Executive consisting of Council of Ministers who do not command the majority in the House.

What was sought to be argued by the learned Counsel was to say that it is not appropriate is quite different from saying that there is a constitutional breakdown, and as the Governor only feels that it is not appropriate, there was no legal justification for taking the impugned action.

Again we find ourselves unable to agree with Mr. Soli Sorabjee. The words "it is not appropriate under the circumstances" have to be understood in the context of the report, especially the next sentence, so as to convey the meaning that the Executive which does not command the support of the majority in the House cannot administer the State in accordance with the Constitution. 'Inappropriateness' stated here is referable to the meaning 'is not in accordance with law'. Reference to any dictionary would show that 'appropriateness' and 'compatibility' are interchangeable and, therefore, when something is said to be not appropriate it conveys the meaning that it is not

compatible or not in accordance with law. Hence the statement of the Governor in this sentence clearly asserts his understanding of the true principle that an Executive having no majority support in the Legislature, if carries on the Government, will be administering the State not in accordance with the Constitution.

31. In view of the aforesaid discussion, we find no escape from the conclusion that the grounds stated and material supplied in the reports of the Governor are neither irrelevant nor vague, that the reasons disclosed bear a reasonable nexus with the exercise of the particular power and hence the satisfaction of the President must be treated as conclusive, and that there is no scope at all for a finding that the action of the President is in flagrant violation of the very words of Article 356(1).

32. Mr. Soli Sorabjee also contended that the factors like the alleged 'unethical methods adopted during the formation of Janata Dal' 'expansion of cabinet', 'horse-trading' and 'atmosphere getting vitiated' are not only vague but have no nexus at all with the question of failure of Constitutional machinery. The learned Counsel also laid great stress by contending that the Governor by acting upon the letters given by 19 legislators had circumvented the Anti Defection legislation, the primary aim of which is to discourage the toppling game by legislators by changing their loyalties, and by acting upon those letters the legislators were permitted, in substance, to play the game of toppling the ruling Ministry without incurring the consequences of Anti-Defection law because, if these legislators had withdrawn their support in the House and voted against the Ministry, they would have incurred disqualification under Anti-Defection Law. Reliance upon these letters is contrary to the underlying purpose and the essence of Anti- Defection legislation and therefore illegitimate and prohibited. The learned Counsel buttressed his arguments by contending that if the floor test had been held the legislators who had written letters might have changed their mind for several valid reasons e.g. (i) change in the style of functioning of leadership, (ii) change in the leadership, (iii) realisation for maintaining party unity, (iv) unwillingness to incur disqualification under Anti-Defection legislation and (v) not giving a pretext for imposition of President's Rule. In support of the contention that the floor test has always been recognised as the legitimate and relevant method, Sri Soli Sorabjee relied on the judgment of the Orissa High Court in Bijayananda v. President of India, Sarkaria Commission Report page 173 para6.5.01, the judgment of Gauhati High Court in Vamuzov. Union of India, (1988) 2 Gauh LJ 468 , Report of the Committee of Governors dated 1- 10-1971, pages 208, 209, 210, 217-219, 221-219, 221- 223 and 234, and Address by Speaker of Lok Sabha on the occasion of Speakers' Conference on 16-7-1970 paras 13 and 14.

33. In our view, the aforesaid contentions/ points urged by the learned Counsel do not in any way destroy the effect of the two material grounds on the basis of which the subjective satisfaction was arrived at by the President. The Governor honestly and truly has stated all the facts. They are not vague at all and are narrative in nature. What was happening in the State, the Governor has disclosed in the report. The Governor was assessing whether the first petitioner was commanding majority and he (Governor) was entitled to take into consideration the behaviour of the MLAs one way or the other.

It is expected that a Government to be effective should not only command a majority in the House but should also be backed by the majority members outside the house so that the Government would not be under a perennial pressure of being dislodged whenever the House meets again.

We have gone through the judgments of the Orissa and Gauhati High Courts mentioned above and find that the same are distinguishable. In Bijayanand's case the main fact was that the Leader of the Opposition who had shown his majority in the House was not tailed upon to form the Ministry not because he had no majority but because the Governor expected that the majority might fall at any moment and there may be no stable Ministry, and on this aspect G.K. Misra, C.J. observed that the Governor is not concerned whether the Ministry could be stable in future. If the Ministry which would have been formed by the Leader of the Opposition would have fallen afterwards, the Governor would have been justified to recommend for the President's Rule if at that time no other person was in a position to from an alternative Ministry by having majority support. But, in the instant case, the position is entirely different as at the initial stage itself the Governor has in unequivocal terms stated in his report that he is also satisfied that there is no other party which is in a position to form the Government.

Coming to the case of ***Vamuzo*** 1988 2 Gauh LJ 468 the facts are:

Hokishe Sema formed the Government in 1987. Chishi attempted to bring down and destabilize the Government. To achieve that end he offered money and lured the separated group of 13 to step out from the ruling party. The Governor called the episode 'incredible lack of political morality and complete disregard of the wishes of the electorates on the part of the break way congressmen'. That none of them therefore had ever expressed any grievances to the Chief Minister at any time in the past. The 13 persons are kept under forcible confinement by K.L. Chishi and Vamuzo. The split of the party is not true. It is obvious that what may be called a political group of the darkest hue has been stated in his absence contrary to the, noble Naga character and democratic traditions'. The recognition by the Speaker was done in haste. The entire incident manifests political horse trading and machinations. He added there is proof that they are the group of 13 persons have not separated from the ruling party voluntarily....

If we look at those facts, again we find that there is absolutely no similarity of the aforesaid facts to the two material facts in the case on hand. In the said case, as found on those facts, the Governor was held to have exceeded his jurisdiction and the facts stated therein were found to be irrelevant to the provisions of An. 356(1), by the Gauhati High Court.

So far as Sarkada Commission Report, the report of the Committee of Governors and the Address of the Speaker of Lok Sabha are concerned, the views expressed therein are really commendable and it is expected that wherever any such drastic action, like the exercise of power under Article 356(1), is taken, it should be ensured that the subjective satisfaction of the President is not based on any irrelevant, irrational or perverse ground. But, in the view we have taken on the facts of this case, the views expressed in those reports are of no assistance to the petitioners. Moreover these recommendations are to alter the existing laws, which implies that till these recommendations are moulded into constitutionally enforceable norms the existing law would prevail.

34. Mr. Soli Sorabjee had made pointed reference to the Tenth Schedule i.e. Anti Defection Law, for bringing home his point that the factum of the withdrawal of the support by 19 legislators was wholly irrelevant. This argument was advanced to prove his point that in the context of Anti Defection Legislation, floor test was the most relevant, legitimate and surest method to determine whether the Council of Ministers headed by Sri S.R. Bommai commanded the majority in the

House or not. We are afraid, we are unable to agree with this submission of the learned Counsel. The introduction of Tenth Schedule in the Constitution has not in any way affected the exercise of power under Article 356 nor has it amended Article 356 in any manner. The amending body which inserted the Tenth Schedule to the Constitution had before it several decisions (specially the Rajasthan Case as to the scope of Article 356. There is a presumption that the law-making body was aware of the existing interpretation given by the Supreme Court on a provision of law or of a Constitutional provision. If the said Constitutional provision (Article 356) was untouched while adding a new schedule to the Constitution elsewhere without reference to the existing provision (Article 356), we have to presume that the existing interpretation of the said provision continues to govern the situation. It is not possible to hold that the interpretation given to Article 356 in Rajasthan Case, if continued to govern it, would destroy the efficacy of the Tenth Schedule. Tenth Schedule to the Constitution is applicable to the transaction of business inside the House of Legislature. The ami defection activity outside the House is not penalised in any manner by Tenth Schedule. Concept of the failure of the Constitutional machinery of the Government is not confined to the loss of majority by a ministry in the House; it may be due to several reasons. therefore, if meeting of the Legislature, was contemplated as a mandatory requirement preceding a report of the Governor for an action under Article 356 and floor test was impliedly made the sole and exclusive test to judge the stability of the Ministry (after the Tenth Schedule was added to the Constitution), the Tenth Schedule would have been suitably worded, or Article 356 would have been altered.

128. In para 389, Justice Reddy states that the High Court has dismissed the writ petition giving following reasoning:

(1) The proclamation under Article 356(1) is not immune from judicial scrutiny. The court can examine Whether the satisfaction has been formed on wholly extraneous material or whether there is a rational nexus between the material and the satisfaction.

(2) In Article 356, the President means the Union council of ministers. The satisfaction referred to therein is subjective satisfaction. This satisfaction has no doubt to be formed on a consideration of all the facts and circumstances.

(3) The two reports of the Governor conveyed to the President essential and relevant facts which were relevant for the purpose of Article 356. The facts stated in the Governor's report cannot be stated to be irrelevant. They are perfectly relevant.

(4) Where the Governor's "personal bona fides" are not questioned, his satisfaction that no other party is in a position to form the government has to be accepted as true and is based upon a reasonable assessment of all the relevant facts.

(5) Recourse to floor test was neither compulsory nor obligatory. It was not a prerequisite to sending up a report recommending action under Article 356(1),

(6) The introduction of Xth Schedule to the Constitution has not affected in any manner the content of the power under Article 356.

(7) Since the proclamation has to be issued on the satisfaction of the Union council of ministers the Governor's report cannot be faulted on the ground of legal mala fides.

(8) Applying the test indicated in the State of Rajasthan v. Union of India, the court must hold, on the basis of material disclosed, that the subjective satisfaction arrived at by the President is conclusive and cannot be faulted. The proclamation, therefore, is unobjectionable.

129. Except for aforesaid reasons 1 and 2, other reasons were not accepted by Justice Reddy. Learned Judge did not accept the reasoning of the High Court that where Governor's personal bona fides are not questioned, his satisfaction that no party is in a position to form the Government has to be accepted as true as it is based on reasonable assessment of all the relevant facts. The Court also did not accept the reasoning that the Governor's report cannot be faulted on the ground of mala fides. Learned Judge has stated that the question whether government has lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The House is the place where the democracy is in action. It is not a question of subjective satisfaction of the Governor. It would be useful to note what has been observed in paragraph 391 which reads thus:

391. We must also say that the observation under point (7) is equally misplaced. It is true that action under Article 356 is taken on the basis of satisfaction of the Union Council of Ministers but on that score it cannot be said that 'legal mala fides' of the Governor is irrelevant. When the Article speaks of the satisfaction being formed on the basis of the Governor's report, the legal mala fides, if any, of the Governor cannot be said to be irrelevant. The Governor's report may not be conclusive but its relevance is undeniable. Action under Article 356 can be based only and exclusively upon such report. Governor is a very high constitutional functionary. He is supposed to act fairly and honestly consistent with his oath. He is actually reporting against his own Government. It is for this reason that Article 356 places such implicit faith on his report. If, however, in a given case his report is vitiated by legal mala fides, it is bound to vitiate the President's action as well. Regarding the other points made in the judgment of the High Court, we must say that the High Court went wrong in law in approving and upholding the Governor's report and the action of the President under Article 356. The Governor's report is vitiated by more than one assumption totally unsustainable in law. The Constitution does not create an obligation that the political party forming the ministry should necessarily have a majority in the Legislature. Minority Governments are not unknown. What is necessary is that that Government should enjoy the confidence of the House. This aspect does not appear to have been kept in mind by the Governor. Secondly and more importantly whether the council of ministers have lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The principle of democracy underlying our Constitution necessarily means that any such question should be decided on the floor of the House. The House is the place where the democracy is in action. It is not for the Governor to determine the said question on his own or on his own verification. This is not a matter within his subjective satisfaction. It is an objective fact capable of being established on the floor of the House. It is gratifying to note that Sri R. Venkataraman, the former President of India has affirmed this view in his Rajaji Memorial Lecture (Hindustan Times dated February 24, 1994).

130. The substantial reasons given by the High Court in paragraphs 28 to 34 for dismissing the writ petition did not find favour with this Court. Dealing with the report of the Governor in respect of Karnataka, it was held that in the circumstances it cannot be said that the Governor's report contained or was based upon relevant material. There could be no question of the Governor making an assumption of his own.

131. Clearly, ***Bommai's case*** expanded the scope of judicial review. True, observations by Justice Reddy were made in the context of a situation where the incumbent Chief Minister is alleged to have lost the majority support or the confidence of the House and not in the context of a situation arisen after a general election in respect whereof no opinion was expressed, but, in our view the principles of scope of judicial review in such matters cannot be any different. By and large, same principles will apply when making recommendation for dissolution of a newly elected Assembly and again plunging the State to elections.

132. Justice Reddy, for upholding the dissolution of the State Legislatures of Madhya Pradesh, Rajasthan and Himachal Pradesh also came to the conclusion that the reports of the Governor disclosed that the State Government had miserably failed to protect the citizens and the property of the State against the internal disturbances and on the basis of the said report, the President formed the requisite satisfaction. Dealing with the circumstances in the State of Madhya Pradesh, it was held that 'Governor's reports are based upon relevant material and are made bona fide and after due verification'.

(Emphasis supplied by us)

133. Thus, it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not. The absence of these factors resulted in the majority declaring the dissolution of State Legislatures of Karnataka and Nagaland as invalid.

134. In view of the above, we are unable to accept the contention urged by the ld. Attorney General for India, Solicitor General of India and Additional Solicitor General, appearing for the Government that the report of the Governor itself is the material and that it is not permissible within the scope of judicial review to go into the material on which the report of the Governor may be based and the question whether the same was duly verified by the Governor or not. In the present case, we have nothing except the reports of the Governor. In absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal ipse dixit of the Governor. The drastic and extreme action under Article 356 cannot be justified on mere ipse dixit, suspicion, whims and fancies of the Governor. This Court cannot remain a silent spectator watching the subversion of the Constitution. It is to be remembered that this Court is the sentinel on the qui vive. In the facts and circumstances of this case, the Governor may be main player, but Council of Ministers should have verified facts stated in the report of the Governor before hurriedly accepting it as a gospel truth as to what Governor stated. Clearly, the Governor has mislead the Council of Ministers which lead to aid and advice being given by the Council of Ministers to the President leading to the issue of the impugned Proclamation.

135. Regarding the argument urged on behalf of the Government of lack of judicially manageable standards and, therefore, the court should leave such complex questions to be determined by the President, Union Council of Ministers and the Governor, as the situation like the one in Bihar, is full of many imponderables, nuances, implications and intricacies and there are too many ifs and buts not susceptible of judicial scrutiny, the untenability of the argument becomes evident when it is examined in the light of decision in ***Bommai' case*** upholding the challenge made to dissolution of the Assemblies of Karnataka and Nagaland. Similar argument defending the dissolution of these two assemblies having not found favour before a Nine Judge Bench, cannot be accepted by us. There too, argument was that there were no judicially manageable standards for judging Horse-trading, Pressure, Atmosphere being vitiated, wrongful confinement, Allurement by money, contacts with insurgents in Nagaland. The argument was rejected.

136. The position was different when Court considered validity of dissolution of Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh.

137. In paragraphs 432 and 433 of the opinion of Justice Jeevan Reddy in ***Bommai's case***, after noticing the events that led to demolition of Babri Masjid on 6th December, 1992, the assurances that had been given prior to the said date, the extraordinary situation that had arisen after demolition, the prevailing tense communal situation, the learned Judge came to the conclusion that on material placed before the Court including the reports of the Governors, it was not possible to say that the President had no relevant material before him on the basis of which he could form satisfaction that BJP Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot disassociate themselves from the action and its consequences and that these Governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of structure, cannot be disassociated from the acts and deeds of the leaders of BJP. It was further held that if the President was satisfied that the faith of these BJP Governments in the concept of secularism was suspected in view of the acts and conduct of the party controlling these Governments and that in the volatile situation that developed pursuant to the demolition, the Government of these States cannot be carried on in accordance with the provisions of the Constitution, the Court is not able to say that there was no relevant material upon which he could be so satisfied. Under these circumstances, it was observed that the Court cannot question the correctness of the material produced and that even if part of it is not relevant to the action. The Court cannot interfere so long as there is some relevant material to sustain the action. For appreciating this line of reasoning, it has to be borne in mind that the same learned Judge, while examining the validity of dissolution of Karnataka and Nagaland Assemblies, agreeing with the reasoning and conclusions given in the opinion of Justice Sawant which held that the material relied upon by the Governor was nothing but his ipse dixit came to the conclusion that the said dissolution were illegal. The majority opinion and the correct ratio thereof can only be appreciated if it is kept in view that the majority has declared invalid the dissolution of Assemblies of Karnataka and Nagaland and held as valid the dissolution of the Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh. Once this factor is kept in full focus, it becomes absolutely clear that the plea of perception of the same facts or the argument of lack of any judicially manageable standards would have no legs to stand.

138. In the present case, like in ***Bommai's case***, there is no material whatsoever except the *ipse dixit* of the Governor. The action which results in preventing a political party from staking claim

to form a Government after election, on such fanciful assumptions, if allowed to stand, would be destructive of the democratic fabric. It is one thing to come to the conclusion that the majority staking claim to form the Government, would not be able to provide stable Government to the State but it is altogether different thing to say that they have garnered majority by illegal means and, therefore, their claim to form the Government cannot be accepted. In the latter case, the matter may have to be left to the wisdom and will of the people, either in the same House it being taken up by the opposition or left to be determined by the people in the elections to follow. Without highly cogent material, it would be wholly irrational for constitutional authority to deny the claim made by a majority to form the Government only on the ground that the majority has been obtained by offering allurements and bribe which deals have taken place in the cover of darkness but his undisclosed sources have confirmed such deals. The extra-ordinary emergency power of recommending dissolution of a Legislative Assembly is not a matter of course to be resorted to for good governance or cleansing of the politics for the stated reasons without any authentic material. These are the matters better left to the wisdom of others including opposition and electorate.

139. It was also contended that the present is not a case of undue haste. The Governor was concerned to see the trend and could legitimately come to the conclusion that ultimately, people would decide whether there was an 'ideological realignment", then there verdict will prevail and the such realigned group would win elections, to be held as a consequence of dissolution. It is urged that given a choice between going back to the electorate and accepting a majority obtained improperly, only the former is the real alternative. The proposition is too broad and wide to merit acceptance. Acceptance of such a proposition as a relevant consideration to invoke exceptional power under Article 356 may open a floodgate of dissolutions and has far reaching alarming and dangerous consequences. It may also be a handle to reject post-election alignments and realignments on the ground of same being unethical, plunging the country or the State to another election. This aspect assumes great significance in situation of fractured verdicts and in the formation of coalition Governments. If, after polls two or more parties come together, it may be difficult to deny their claim of majority on the stated ground of such illegality. These are the aspects better left to be determined by the political parties which, of course, must set healthy and ethical standards for themselves, but, in any case, the ultimate judgment has to be left to the electorate and the legislature comprising also of members of opposition.

140. To illustrate the aforesaid point, we may give two examples in a situation where none of the political party was able to secure majority on its own:

1. After polls, two or more political parties come together to form the majority and stake claim on that basis for formation of the Government. There may be reports in the media about bribe having been offered to the elected members of one of the political parties for its consenting to become part of majority. If the contention of the respondents is to be accepted, then the constitutional functionary can decline the formation of the Government by such majority or dissolve the House or recommend its dissolution on the ground that such a group has to be prevented to stake claim to form the Government and, therefore, a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

2. A political party stakes claim to form the Government with the support of independent elected candidates so as to make the deficient number for getting majority. According to the media reports,

under cover of darkness, large sums of bribe were paid by the particular party to independent elected candidates to get their support for formation of Government. The acceptance of the contention of the respondents would mean that without any cogent material the constitutional functionary can decline the formation of the Government or recommend its dissolution even before such a claim is made so as to prevent staking of claim to form the Government.

141. We are afraid that resort to action under Article 356(1) under the aforesaid or similar eventualities would be clearly impermissible. These are not the matters of perception or of the inference being drawn and assumptions being made on the basis whereof it could be argued that there are no judicial manageable standards and, therefore, the Court must keep its hands off from examining these matters in its power of judicial review. In fact, these matters, particularly without very cogent material, are outside the purview of the constitutional functionary for coming to the conclusion that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

142. The contention that the installation of the Government is different than removal of an existing Government as a consequence of dissolution as was the factual situation before the Nine Judge Bench in ***Bommai's case*** and, therefore, same parameters cannot be applied in these different situations, has already been dealt with hereinbefore. Further, it is to be remembered that a political party prima facie having majority has to be permitted to continue with the Government or permitted to form the Government, as the case may be. In both categories, ultimately the majority shall have to be proved on the floor of the House. The contention also overlooks the basic issue. It being that a party even, prima facie, having majority can be prevented to continue to run the Government or claim to form the Government declined on the purported assumption of the said majority having been obtained by illegal means. There is no question of such basic issues allegedly falling in the category of "political thicket" being closed on the ground that there are many imponderables for which there is no judicially manageable standards and, thus, outside the scope of judicial review.

143. The further contention that the expression 'situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution' in Article 356 shows that the power is both preventive and/or curative and, therefore, a constitutional functionary would be well within his rights to deny formation of the Government to a group of parties or elected candidates on the ground of purity of political process is of no avail on the facts and circumstances of this case, in view of what we have already stated. Even if preventive, power cannot be abused.

144. Another contention urged is that the power under Article 356 is legislative in character and, therefore, the parameters relevant for examining the validity of a legislative action alone are required to be considered and in that light of the expressions such as 'mala fide' or 'irrational' or 'extraneous' have to be seen with a view to ultimately find out whether the action is ultra vires or not. The contention is that the concept of malafides as generally understood in the context of executive action is unavailable while deciding the validity of legislative action. The submission is that that the malafides or extraneous consideration cannot be attributed to a legislative act which when challenged the scope of inquiry is very limited.

145. For more than one reason, we are unable to accept the contention of the proclamation of the nature in question being a legislative act. Firstly, if the contention was to be accepted, ***Bommai's case*** would not have held the proclamation in case of Karnataka and Nagaland as illegal and invalid. Secondly, the contention was specifically rejected in the majority opinion of Justice Jeevan Reddy in paragraph 377. The contention was that the proclamation of the present nature assumes the character of legislation and that it can be struck down only on the ground on which a legislation can be struck down. Rejecting the contention, it was held that every act of Parliament does not amount to and does not result in legislation and that the Parliament performs many other functions. One of such functions is the approval of the proclamation under Clause (3) of Article 356. Such approval can, by no stretch of imagination, be called 'legislation'. Its legal character is wholly different. It is a constitutional function, a check upon the exercise of power under Clause (1) of Article 356. It is a safeguard conceived in the interest of ensuring proper exercise of power under Clause (1). It is certainly not legislation nor legislative in character.

146. Mr. Subramaniam, learned Additional Solicitor General, however, contended that ***Bommai's case*** proceeded on the assumption that the proclamation under Article 356(1) is not legislative but when that issue is examined in depth with reference to earlier decisions in the cases of ***In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act,*** MANU/SC/0010/1951 : [1951]2SCR747 at page 970-971; ***Jayantilal Amrit Lal Shodhan v. F.N. Rana and Ors. MANU/SC/0046/1963*** : [1964]5SCR294 ; ***Rameshchandra Kachardas Porwal and Ors. State of Maharashtra and Ors.*** MANU/SC/0033/1981 : [1981]2SCR866 , ***A.K. Roy v. Union of India and Ors. MANU/SC/0051/1981 :*** 1982CriLJ340 , it would be clear that the conclusion of Justice Reddy in para 377 requires re-look in the light of these decisions. We are unable to accept the contention. The decision of Nine Judge Bench is binding on us.

147. Though ***Bommai*** has widened the scope of judicial review, but going even by principles laid in ***State of Rajasthan's case***, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. Apart from the fact that the narrow minimal area of judicial review as advocated in ***State of Rajasthan's case*** is no longer the law of the land in view of its extension in ***Bommai's case*** but the present case even when considered by applying limited judicial review, cannot stand judicial scrutiny as the satisfaction herein is based on wholly extraneous and irrelevant ground. The main ground being to prevent a party to stake claim to form the Government.

148. In ***State of Rajasthan's case***, in para 185, Justice Untwalia observed that this Court is not powerless to interfere with such an order which is ultra vires, wholly illegal or mala fide as in such a situation it will tantamount in law to be no order at all. Further observing that it is incompetent and hazardous for the Court to draw conclusions by investigation of facts by entering into the prohibited area but at the same time it would be equally untenable to say that the Court would be powerless to strike down the order, if on its face, or, by going round the circumference of the prohibited area, the Court finds the order as a mere pretence or colourable exercise of the extraordinary powers given under certain Articles of the Constitution and thus in a given case it may be possible to conclude that it is a fraud on the exercise of the power. In the present case, we have reached the conclusion that the action of the Governor was a mere pretence, the real object being to keep away a political party from staking a claim to form the Government.

149. Referring to the opinion of Justice Reddy, in ***Bommai's case***, it was contended for the respondents that the approach adopted in ***Barium Chemicals Ltd. and Anr. v. Company Law Board and Ors.*** (1966) Supl. SCR 311 and other cases where action under challenge is taken by statutory or administrative authorities, is not applicable when testing the validity of the constitutional action like the present one. For proper appreciation of the contention, it may be useful to reproduce in full paragraphs 372 and 373 from which certain observations were relied upon. The same read as under:

372. Having noticed various decisions projecting different points of view, we may now proceed to examine what should be the scope and reach of judicial review when a proclamation under Article 356(1) is questioned. While answering this question, we should be, and we are, aware that the power conferred by Article 356(1) upon the President is of an exceptional character designed to ensure that the Government of the States is carried on in accordance with the Constitution. We are equally aware that any misuse or abuse of this power is bound to play havoc with our constitutional system. Having regard to the form of Government we have adopted, the power is really that of the Union Council of Ministers with the Prime Minister at its head. In a sense, it is not really a power but an obligation cast upon the President in the interest of preservation of constitutional Government in the States. It is not a power conceived to preserve or promote the interests of the political party in power at the center for the time being nor is it supposed to be a weapon with which to strike your political opponent. The very enormity of this power --undoing the will of the people of a State by dismissing the duly constituted Government and dissolving the duly elected Legislative Assembly -- must itself act as a warning against its frequent use or misuse, as the case may be. Every misuse of this power has its consequences which may not be evident immediately but surface in a vicious form a few years later. Sow a wind and you will reap the whirlwind. Wisdom lies in moderation and not in excess.

class = "rightalign"> **(Emphasis supplied by us)**

Further, learned Judge states that:

373. Whenever a proclamation under Article 356 is questioned, the court will no doubt start with the presumption that it was validly issued but it will not and it should not hesitate to interfere if the invalidity or unconstitutionality of the proclamation is clearly made out. Refusal to interfere in such a case would amount to abdication of the duty cast upon the court -- Supreme Court and High Courts -- by the Constitution. Now, what are the grounds upon which the court can interfere and strike down the proclamation? While discussing the decisions herein-above, we have indicated the unacceptability of the approach adopted by the Privy Council in Bhagat Singh v. Emperor MANU/PR/0069/1931 and King Emperor v. Bengari Lal Sarma MANU/PR/0014/1944. That was in the years 1931 and 1944, long before the concept of judicial review had acquired its present efficacy. As stated by the Pakistan Supreme Court, that view is totally unsuited to a democratic polity. Even the Privy Council has not stuck to that view, as is evident from its decision in the case from Malaysia Stephen Kalong Ningkan v. Government of Malaysia 1970 AC 379. In this case, the Privy Council proceeded on the assumption that such a proclamation is amenable to judicial review. On facts and circumstances of this case, it found the action justified. Now, coming to the approach adopted by the Pakistan Supreme Court, it must be said -- as indicated hereinbefore -- that it is coloured by the nature of the power conferred upon the President by Section 58(2)(b) of

the Pakistani Constitution. The power to dismiss the federal Government and the National Assembly is vested in the President and President alone. He has to exercise that power in his personal discretion and judgment. One man against the entire system, so to speak --even though that man too is elected by the representatives of the people. That is not true of our Constitution. Here the President acts on the aid and advice of the Union Council of Ministers and not in his personal capacity. Moreover, there is the check of approval by Parliament which contains members from that State (against the Government/Legislative Assembly of which State, action is taken) as well. So far as the approach adopted by this Court in Barium Chemicals is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot ipso facto be extended to the exercise of a constitutional power under Article 356. Having regard to the fact that this is a high constitutional power exercised by the highest constitutional functionary of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities -- nor at any rate, in their entirety. We would rather adopt the formulation evolved by this Court in State of Rajasthan as we shall presently elaborate. We also recognise, as did the House of Lords in C.C.S.U. v. Minister for the civil Service 1985 AC 374 that there are certain areas including those elaborated therein where the court would leave the matter almost entirely to the President/Union Government. The court would desist from entering those arenas, because of the very nature of those functions. They are not the matters which the court is equipped to deal with. The court has never interfered in those matters because they do not admit of judicial review by their very nature. Matters concerning foreign policy, relations with other countries, defence policy, power to enter into treaties with foreign powers, issues relating to war and peace are some of the matters where the court would decline to entertain any petition for judicial review. But the same cannot be said of the power under Article 356. It is another matter that in a given case the court may not interfere. It is necessary to affirm that the proclamation under Article 356(1) is not immune from judicial review, though the parameters thereof may vary from an ordinary case of subjective satisfaction.

150. The aforesaid paragraphs cannot be read in isolation and have to be seen while bearing in mind that learned Judge invalidated dissolution of Assembly of Karnataka and Nagaland. Be that as it may, in the present case, the validity of the impugned notification is not being judged on application of principles available for judging the validity of administrative actions.

151. Further, para 376 of the opinion of Justice Jeevan Reddy is very instructive and it may be reproduced as under:

We recognise that judicial process has certain inherent limitations. It is suited more for adjudication of disputes rather than for administering the country. The task of governance is the job of the Executive. The Executive is supposed to know how to administer the country, while the function of the judiciary is limited to ensure that the Government is carried on in accordance with the Constitution and the Laws. Judiciary accords, as it should, due weight to the opinion of the Executive in such matters but that is not to say, it defers to the opinion of Executive altogether. What ultimately determines the scope of judicial review is the facts and circumstances of the given case. A case may be a clear one -- like Meghalaya and Karnataka cases -- where the court can find unhesitatingly that the proclamation is bad. There may also be cases -- like those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh -- where the situation is so complex, full of imponderables and a fast-evolving one that the court finds it not a matter which admits of judicial

prognosis, that it is a matter which should be left to the judgment of and to be handled by the Executive and may be in the ultimate analysis by the people themselves. The best way of demonstrating what we say is by dealing with the concrete cases before us.

class = "rightalign"> **(Emphasis supplied by us)**

152. It is evident from the above that what ultimately determines the scope of judicial review is the facts and circumstances of the given case and it is for this reason that the Proclamations in respect of Karnataka and Nagaland were held to be bad and not those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh.

153. We are not impressed with the argument based on a possible disqualification under Tenth Schedule if the MLAs belonging to LJP party had supported the claim of Nitish Kumar to form the Government. At that stage, it was a wholly extraneous to take into consideration that some of the members would incur the disqualification if they supported a particular party against the professed stand of the political party to which they belong. The intricate question as to whether the case would fall within the permissible category of merger or not could not be taken into consideration. Assuming it did not fall in the permissible arena of merger and the MLAs would earn the risk of disqualification, it is for the MLAs or the appropriate functionary to decide and not for the Governor to assume disqualification and thereby prevent staking of claim by recommending dissolution. It is not necessary for us to examine, for the present purpose, para 4 of the Tenth Schedule dealing with merger and/or deemed merger. In this view the question sought to be raised that there cannot be merger of legislative party without the first merger of the original party is not necessary to be examined. The contention sought to be raised was that even if two-third legislators of LJP legislative party had agreed to merge, in law there cannot be any merger without merger of original party and even in that situation those two-third MLAs would have earned disqualification. Presently, it is not necessary to decide this question. It could not have been gone into by the Governor for recommending dissolution.

154. The provision of the Tenth Schedule dealing with defections, those of RP Act of 1951 dealing with corrupt practice, electoral offences and disqualification and the provisions of Prevention of Corruption Act, 1988 are legal safeguards available for ensuring purity of public life in a democracy. But, in so far as the present case is concerned, these had no relevance at the stage when the dissolution of the Assembly was recommended without existence of any material whatsoever. There was no material for the assumption that claim may be staked based not on democratic principles and based on manipulation by breaking political parties.

155. There cannot be any doubt that the oath prescribed under Article 159 requires the Governor to faithfully perform duties of his office and to the best of his ability preserve, protect and defend the Constitution and the laws. The Governor cannot, in the exercise of his discretion or otherwise, do anything what is prohibited to be done. The Constitution enjoins upon the Governor that after the conclusion of elections, every possible attempt is made for formation of a popular Government representing the will of the people expressed through the electoral process. If the Governor acts to the contrary by creating a situation whereby a party is prevented even to stake a claim and recommends dissolution to achieve that object, the only inescapable inference to be drawn is that the exercise of jurisdiction is wholly illegal and unconstitutional. We have already referred to the

Governor report dated 21st May, 2005, inter alia, stating that 17 - 18 MLAs belonging to LJP party are moving towards JDU which would mean JDU may be in a position to stake claim to form the Government. The further assumption that the move of the said members was itself indicative of various allurements having been offered to them and on that basis drawing an assumption that the claim that may be staked to form a Government would affect the constitutional provisions and safeguards built therein and distort the verdict of the people would be arbitrary. This shows that the approach was to stall JDU from staking a claim to form the Government. At that stage, such a view cannot be said to be consistent with the provisions of Tenth Schedule. In fact, the provisions of the said Schedule at that stage had no relevance. It is not a case of 'assumption', or 'perception' as to the provisions of Constitution by the Governor. It is a clear case where attempt was to somehow or the other prevent the formation of a Government by a political party - an area wholly prohibited in so far as the functions, duties and obligations of the Governor are concerned. It was thus a wholly unconstitutional act.

156. It is true as has been repeatedly opined in various reports and by various constitutional experts that the defections have been a bane of the Indian Democracy but, at the same time, it is to be remembered that the defections have to be dealt with in the manner permissible in law.

157. If a political party with the support of other political party or other MLA's stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. Governor is not an autocratic political Ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous. The ground of mal administration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1). In the same vein, it has to be held that the power under Tenth Schedule for defection lies with the Speaker of the House and not with the Governor. The power exercised by the Speaker under the Tenth Schedule is of judicial nature. Dealing with the question whether power of disqualification of members of the House vests exclusively with the House to the exclusion of judiciary which in Britain was based on certain British legislature practices, as far as India is concerned, it was said in ***Kihoto's case*** that:

It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the non-justiciable legislative area.

158. The Governor cannot assume to himself aforesaid judicial power and based on that assumption come to the conclusion that there would be violation of Tenth Schedule and use it as a reason for recommending dissolution of assembly.

159. The Governor, a high Constitutional functionary is required to be kept out from the controversies like disqualification of members of a Legislative Assembly and, therefore, there are provisions like Article 192(2) in the Constitution providing for Governor obtaining the opinion of the Election Commission and acting according to such opinion, in the constitutional scheme of

things. Similar provision, in so far as, member of Parliament is concerned being in Article 103(2) of the Constitution ***{Brundaban Nayak v. Election Commission of India and Anr. MANU/SC/0214/1965 :*** [1965]3SCR53 ; and ***Election Commission of India and Anr. v. Dr. Subramaniam Swamy and Anr. MANU/SC/0459/1996 :*** AIR1996SC1810 .

160. For all the aforesaid reasons, the Proclamation dated 23rd May, 2005 is held to be unconstitutional.

POINT No. 3 : If the answer to the aforesaid questions is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

161. As a consequence of the aforesaid view on point No. 2, we could have made an order of status quo ante as prevailing before dissolution of Assembly. However, having regard to the facts and the circumstances of the case, in terms of order of this Court dated 7th October, 2005, such a relief was declined. Reasons are the larger public interest, keeping in view the ground realities and taking a pragmatic view. As a result of the impugned Proclamation, the Election Commission of India had not only made preparations for the four phase election to be conducted in the State of Bihar but had also issued Notification in regard to first two phases before conclusion of arguments. Further, in regard to these two phases, before 7th October, 2005, even the last date for making nominations and scrutiny thereof was also over. In respect of 1st phase of election, even the last date for withdrawal of nominations also expired and polling was fixed for 18th October, 2005. The election process had been set in motion and was at an advanced stage. Judicial notice could be taken of the fact that considerable amount must have been spent; enormous preparations made and ground works done in the process of election and that too for election in a State like the one under consideration. Having regard to these subsequent developments coupled with numbers belonging to different political parties, it was thought fit not to put the State in another spell of uncertainty. Having regard to the peculiar facts, despite unconstitutionality of the Proclamation, the relief was moulded by not directing status quo ante and consequently permitting the completion of the ongoing election process with the fond hope that the electorate may again not give fractured verdict and may give a clear majority to one or other political party - the Indian electorate possessing utmost intelligence and having risen to the occasion on various such occasions in the past.

POINT No. 4 : What is the scope of Article 361 granting immunity to the Governor?

162. By order dated 8th September, 2005, we held that the Constitution of India grants immunity to the Governor as provided in Article 361.

163. Article 361(1), inter alia, provides that the Governor shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purported to be done by him in the exercise and performance of those powers and duties. We accepted the submissions made on behalf of the respondents that in view of this Article notice could not be issued to the Governor, at the same time, further noticing that the immunity granted does not affect the power of this Court to judicial scrutinise attack made on the Proclamation issued under Article 356(1) of the Constitution of India on the ground of malafides or it being ultra vires and that it would be for the Government to satisfy the Court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of the

law. We, further held that the expression 'purported to be done' in Article 361 does not cover acts which are mala fide or ultra vires and thus, the Government supporting the Proclamation under Article 356(1) shall have to meet the challenge. The immunity granted under Article 361 does not mean that in the absence of Governor, the grounds of mala fide or being ultra vires would not be examined by the Court. This order was made at the stage when we had not examined the question whether the exercise of power by the Governor was mala fide or ultra vires or not. This question was argued later.

164. In our order dated 8th September, 2005 while giving the brief reasons we stated that detailed reasons will be given later.

165. Article 361(1) which grants protection to the President and the Governor reads as under:

361. Protection of President and Governors and Rajpramukhs.--(1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61: Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefore, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

166. A plain reading of the aforesaid Article shows that there is a complete bar to the impleading and issue of notice to the President or the Governor inasmuch as they are not answerable to any Court for the exercise and performance of their powers and duties. Most of the actions are taken on aid and advice of Council of Ministers. The personal immunity from answerability provided in Article 361 does not bar the challenge that may be made to their actions. Under law, such actions including those actions where the challenge may be based on the allegations of malafides are required to be defended by Union of India or the State, as the case may be. Even in cases where

the personal malafides are alleged and established, it would not be open to the Governments to urge that the same cannot be satisfactorily answered because of the immunity granted. In such an eventuality, it is for the respondent defending the action to satisfy the Court either on the basis of the material on record or even filing the affidavit of the person against whom such allegation of personal malafides are made. Article 361 does not bar filing of an affidavit if one wants to file on his own. The bar is only against the power of the Court to issue notice or making the President or the Governor answerable. In view of the bar, the Court cannot issue direction to President or Governor for even filing of affidavit to assist the Court. Filing of an affidavit on one's own volition is one thing than issue of direction by the Court to file an affidavit. The personal immunity under Article 361(1) is complete and, therefore, there is no question of the President or the Governor being made answerable to the Court in respect of even charges of malafides.<mpara>

167. In ***Union Carbide Corporation, etc., etc. v. Union of India, etc. etc. MANU/SC/0058/1992 :*** AIR1992SC248 , dealing with Article 361(2) of the Constitution, Justice Venkatahalliah referred to the famous case of ***Richard Nixon*** (1982) 457 US 731 : 102 S.Ct. 2690 : 73 Law Ed 2d 349 about theoretical basis for the need for such immunity. It was said

Article 361(2) of the Constitution confers on the President and the Governors immunity even in respect of their personal acts and enjoins that no criminal proceedings shall be instituted against them during their term of office. As to the theoretical basis for the need for such immunity, the Supreme Court of the United States in a case concerning immunity from civil liability (Richard Nixon v. Ernest Fitzgerald, 457 US 731 : 73 Law Ed 2d 349 said:

...This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our Government....

...In the case of the President the inquiries into history and policy though mandated independently by our case, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective Government under, a constitutionally mandated separation" of powers.

(L Ed p.367)

...In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognise absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encompassed a particular action....

168. A division Bench of the Bombay High Court in the case of ***Shri Pratapsing Raojirao Rane and Ors. v. The Governor of Goa and Ors. MANU/MH/0062/1999 :*** AIR1999Bom53 has correctly held that in respect of his official acts, the Governor is not answerable to the Court even in respect of charge of mala fide and that in such an eventuality the Governor cannot be said to be under the duty to deal with the allegations of mala fide. The Constitutional Law of India, 4th Edn. by H.M.Seervai has been rightly relied upon in the said judgment. The observations made by full Bench of the Madras High Court in ***K.A. Mathialagan and Ors. v. The Governor of Tamil Nadu and Ors. MANU/TN/0197/1973 :*** AIR1973Mad198 that the Governor would be under duty to deal with allegations of mala fide in order to assist the Court has been rightly described in Seervai's commentary being in direct conflict with the complete personal immunity of the Governor.

169. The words 'purported to be done' are of wide amplitude. In ***Biman Chandra v. Governor, West Bengal MANU/WB/0090/1952 :*** AIR1952Cal799 it was held that Article 361 affords immunity in respect of its exercise and performance of the power and duties of the office and any act done or purported to be done by him in exercise and performance of those powers and duties.

170. In ***G.D. Karkare v. T.L. Shevde*** MANU/NA/0099/1950 : AIR 1952 Nag 330 construing the expression 'purporting to be done' it was held that any act, though not done in pursuance of the Constitution, may nevertheless be accorded this protection if the act professes or purports to be done in pursuance of the Constitution. It was further explained that though the Governor is not amenable to the process of the Court but it cannot be said that the High Court cannot examine his action and grant relief in the absence of authority making the decision.

171. In ***State v. Kawas Manekshaw Nanavati MANU/MH/0105/1960 :*** (1960)62BOMLR383 full Bench of the High Court held that Article 361 only gives personal protection to the Governor. It is not necessary that the Governor should be a party to the proceeding. Validity of actions can be considered and decided in the absence of the Governor. In ***The State of West Bengal and Ors. v. Sallendra Nath Bose MANU/WB/0034/1964 :*** AIR1964Cal184 it was held that a citizen is not without redress even though he cannot implead the Governor as a party but can be given relief.

172. The position in law, therefore, is that the Governor enjoys complete immunity. Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of malafides.

173. In view of the above, while holding the impugned Proclamation dated 23rd May, 2005 unconstitutional, we have moulded the relief and declined to grant status quo ante and consequentially permitted the completion of ongoing election process.

174. All petitions are disposed of accordingly.

DISSENTING JUDGMENTS

Arijit Pasayat, J.

****

175. In the last few years the attack on actions of Governors in the matter of installation/dissolution of ministries has increased, which itself is a disturbing feature. A Governor has been assigned the role of a Constitutional sentinel and a vital link between the Union and the State. A Governor has also been described as a useful player in the channel of communication between the Union and the State in matters of mutual interest and responsibility. His oath of office binds him to preserve, protect and defend the Constitution of India, 1950 (in short 'the Constitution') and the law, and also to devote himself to the service and the well being of the people of the State concerned. When allegations are made that he is partisan and/or is acting like an agent of a political party, un- mind of his Constitutional duties, it naturally is a serious matter.

176. The cases at hand relate to acts of the Governor of Bihar.

Challenge in these writ petitions is to the constitutionality, legality and validity of a Notification GSR 333(E) dated 23.5.2005 of the Union of India in ordering dissolution of the Bihar Legislative Assembly. Writ Petition (C) No. 257 of 2005 has been filed by four persons who were elected to the dissolved Legislative Assembly. Petitioner No. 1 Shri Rameshwar Prasad was elected as a candidate of the Bhartiya Janta Party (in short 'BJP'). Petitioner No. 2 Shri Kishore Kumar was elected as an independent candidate. Petitioner No. 3 Shri Rampravesh Rai was elected as a candidate of the Janta Dal United (in short 'JDU') while petitioner NO. 4 Dr. Anil Kumar was elected as a candidate of the Lok Janshakti Party (in short 'LJP').

177. Writ Petition (C) No. 353 of 2005 has been filed by Smt. Purnima Yadav who was elected as an independent candidate. Writ Petition (C) No. 258 of 2005 has been filed by Shri Viplav Sharma, an Advocate, styled as a Public Interest litigation.

178. All these writ petitions have been filed under Article 32 of the Constitution. In Viplav Sharma's Writ Petition in addition to the challenges made by the writ petitioners in other two writ petitions, prayer has been made for a direction to the Governor of Bihar to administer oath to all the elected members of the 13th Legislative Assembly of the State of Bihar and make such assembly functional, purportedly in terms of Articles 172 and 176 of the Constitution and appoint the Chief Minister and Council of Ministers in terms of Article 164(1) of the Constitution. Further, consequential prayers have been made for a direction to the Election Commission of India (in short the 'Election Commission') not to hold fresh elections for the constitution of 14th State Legislative Assembly. It has also been prayed to direct stay the effect and operation of the purported report dated 22.5.2005 of the Governor of Bihar to the Union Cabinet inter-alia recommending the dissolution of the Assembly and the Presidential Proclamation dated 7.3.2005 placing the 13th State Legislative Assembly under suspended animation and the Presidential Proclamation dated 23.5.2005. In essence, his stand was that since the State Legislative Assembly was yet to be functional there was no question of dissolving the same. Certain other prayers have been made for laying down the guidelines and directions with which we shall deal with in detail later on. It is to be noted that by order dated 25.7.2005 it was noted that Mr. Viplav Sharma had stated before the Bench hearing the matter that he does not press the prayers (i), (ii), (vii) and (viii) in the writ petition.

179. The challenges in essence, as culled out from the submissions made by the petitioners are essentially as follows:

The dissolution of the Legislative Assembly by the impugned Notification dated 23.5.2005 in exercise of the powers conferred by Sub-clause (b) of Clause (2) of Article 174 of the Constitution read with Clause (a) of the Proclamation number GSR 162(E) dated 7th March, 2005 issued under Article 356 of the Constitution in relation to the State of Bihar has been made on the basis of a tainted and clearly unsustainable report of the Governor of Bihar. It is stated by Mr. Sorabjee that the Governor's report which led to imposition of President's Rule over the State of Bihar was not based on an objective assessment of the ground realities. The Home Minister in his speech made on 21.3.2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was being discussed in Rajya Sabha clearly indicated that it is not good for democracy to let the President's rule continue for a long time. It was unfortunate that no political party could get a majority and more parties could not come together to form the Government. The minority government also would not be proper to be installed where the difference between the requisite majority and the minority was not very small. The House was assured that the Government was not interested in continuation of President's Rule for a long time. It was categorically stated that sooner it disappears the better it would be for the State of Bihar, for democracy and for the system that has been followed in this country. The Governor was requested to explore the possibilities of formation of a Government. This could be achieved by talking to the elected representatives. Contrary to what was held out by the Home Minister, on totally untenable premises and with the sole objective of preventing Shri Nitish Kumar who was projected to be as the Chief Ministerial candidate by the National Democratic Alliance (in short the 'NDA') with support of a break away group of LJP and independents. In hot-haste, a report was given, which was attended to with unbelievable speed and the President's approval was obtained. The hot- haste and speed with which action was taken clearly indicates mala-fides. Though the Governor made reference to some horse trading or allurements the same was clearly on the basis of untested materials without details. Action of the Governor is of the nature which was condemned by this Court in S.R. Bommai and Ors. v. Union of India and Ors. MANU/SC/0444/1994 : [1994]2SCR644 . It was submitted that similar views expressed by respective Governors did not find acceptance in the cases of dissolution of Assemblies in Karnataka and Meghalaya in the said case. Though the Proclamations in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh were held to be not unconstitutional, yet the parameters of the scope of judicial review were highlighted. Even if it is accepted that the Governor's opinion is to be given respect and honour in view of the fact that he holds a high constitutional office, yet when the view is tainted with mala-fides the same has to be struck down. In the instant case according to learned Counsel for petitioners, the background facts clearly established that the Governor was not acting bona fide and his objective was to prevent installation of a majority Government. Even if it is accepted for the sake of arguments that the majority was cobbled by unfair means that is a matter with which the Governor has no role to play. It is for the Speaker of the Assembly, when there is a floor test to consider whether there was any floor crossing. If any material existed to show that any Legislature was lured by unfair means that is for the electorate to take care of and the media to expose. That cannot be a ground for the Governor to prevent somebody from staking a claim when he has the support of majority number of legislatures. It is submitted that similar views regarding horse trading etc. were made in the report of the Governor so far as the dissolution of the Karnataka Assembly is concerned and this Court

in S.R. Bommai's case (supra) found that the same cannot be the foundation for directing dissolution.

180. For the last few years formation of government by a party having majority has become rare. therefore, the coalition governments are in place in several States and in fact at the center. There is nothing wrong in post poll adjustments and when ideological similarity weighs with any political party to support another political party though there was no pre-poll alliance, there is nothing wrong in it. Majority of the legislatures of the LJP party had decided to support JDU in its efforts to form a Government. Clear decisions were taken in that regard. Some Independent M.L.As had also extended their support to Mr. Nitish Kumar. The Governor cannot refuse to allow formation of a Government once the majority is established. The only exception can be where the Governor is of the view that a stable Government may not be formed by the claimants. It is not the position in the case at hand. Mr. Nitish Kumar had support of legislators, more than the requisite number and in fact the number was far in excess of the requisite number. The Governor's actions show that he was acting in a partisan manner to help some particular political parties.

181. The scope of judicial review was delineated by this Court in State of Rajasthan and Ors. v. Union of India and Ors. MANU/SC/0370/1977 : [1978]1SCR1 and was further expanded in Bommai's case (supra). Tested on the touchstone of the guidelines set out in Rajasthan's case (supra) and Bommai's case (supra) the Governor's report is clearly unsustainable and consequential Presidential Proclamation is unconstitutional. It is to be noted that the Presidential Proclamation was based solely on the Governor's report as has been accepted by the Union of India.

182. Mr. P.S. Narasimha and Mr. Viplav Sharma supported the stand. Additionally, with reference to their additional stands noted supra in the writ petitions, they submitted that the President's Notification is not sustainable and is unconstitutional.

183. In response, Mr. Milon K. Banerjee, learned Attorney General, Mr. Goolam E. Vahanvati, learned Solicitor General, Mr. Gopal Subramaniam, learned Additional Solicitor General, Mr. P.P. Rao, learned senior counsel and Mr. B.B. Singh, learned Counsel submitted that there is no quarrel about the scope of judicial review of this Court in matters relating to Proclamation under Article 356(1) and consequentially Article 174(2) of the Constitution. But the factual scenario as projected by the petitioners is really not so.

184. In the instant case, the Governor had not in reality prevented anybody from staking a claim. It is nobody's case that somebody had staked a claim. What the Governor had indicated in his report dated 21.5.2005 (not dated 22.5.2005 as stated in the writ petitions by the writ petitioners) was that effort was to get the majority by tainted means by allurements like money, caste, posts and such unfair and other objectionable means. When the foundation for the claim was tainted the obvious inference is that it would not lead to a stable government and the same is clearly visible. It has been submitted that the parameters of judicial review are extremely limited so far as the Governor's report is concerned and consequential actions taken by the President. The Governor cannot be a mute spectator when democratic process is tampered with by unfair means. The effort is to grab power by presenting a majority, the foundation of which is based on factors which are clearly anti democratic in their conception. Parliamentary democracy is a part of the basic structure of the Constitution and when the majority itself is the outcome of foul means it is clearly against

the mandate given by the electorate. It can never be said that the electorate wanted that their legislators after getting their mandate would become the object of corrupt means. When the sole object is to grab power at any cost even by apparent unfair and tainted means, the Governor cannot allow such a government to be installed. By doing so, the Governor would be acting contrary to very essence of democracy. The purity of electorate process would get polluted. The framers of the Constitution never intended that democracy or governance would be manipulated. Defections strike at the root of representative government. They are unconstitutional, illegal, illegitimate, unethical and improper. The Tenth Schedule cannot take care of all situations and certainly not in the case of independents. It would be too hollow to contend that the floor test would cure all impurity in gathering support of the legislators. Floor test cannot always be a measure to restrain the corrupt means adopted and in cobbling the majority. It is also too much to expect that by exposure of the corrupt means so far as a particular legislature is concerned, by the people or by the media the situation would improve. Since there is no material to show that any party staked a claim and on the contrary as is evident from the initial report of the Governor dated 6.3.2005 that nobody was in a position to stake a claim and the fact that passage of about three months did not improve the situation, the Governor was not expected to wait indefinitely and in the process encourage defections or adoption of other objectionable activities. It is submitted that ratio in State of Rajasthan's case (supra) so far as the scope of judicial review is concerned has not been expanded in Bommai's case (supra), and the parameters remain the same.

185. With reference to Tenth Schedule more particularly sub-paragraphs 2 and 4 it is submitted that disqualification had been clearly incurred by the members of LJP break away group. There was in fact no merger of the so-called break away group with JDU. The documents filed by the petitioners amply show that there was only a proposal and in fact not any merger. Documents on the other hand show that the so called resolution was also manipulated. One person had signed for several persons and even the signatures differ. If really the persons were present in the so called meeting, adopted the resolution purported to have been taken, there was no reason as to why concerned participants did not sign the resolution and somebody else signed it in their favour. This clearly shows that on the basis of manipulated documents it was attempted to be projected as if Shri Nitish Kumar had a majority. Interestingly, Shri Nitish Kumar has not filed any petition and only four members have filed the petitions though claim was that more than 122 had extended support. Though that by itself may not be a ground to throw out the petitions, yet the petitions certainly suffer from legal infirmity. As amply proved, the petitioners have not approached this Court with clean hands and therefore are not entitled to any relief. It is submitted that the petitioners in WP (C) No. 257 and 353 have not questioned the correctness of the President's Notification dated 7.3.2005, and interestingly in the so called Public Interest Litigation, it has been challenged. After having given up challenge to the major portion of the challenges it has not been explained by the petitioner in person as to how and in which way any of his rights has been affected. If the persons affected have not questioned the correctness of the Notification dated 7.3.2005 the petitioner in person should not be permitted to raise that question. It is the basic requirement of a Public Interest Litigation that persons who are affected are unable to approach the Court. It is strange that learned Counsel for the legislators-writ petitioners have accepted the Notification dated 7.3.2005 to be valid and in order. The plea taken in the so called Public Interest Litigation is to the contrary. The factual position in *Bommai's* case (supra) was different. It related to cases where elected governments were in office and the Governors directed dissolution. The position is different here. Further it is submitted that the power exercised by the Governor is legislative in

character and it can only be nullified on the ground of ultra-vires. The reports of the National Commission To Review the Working Of The Constitution and Sarkaria Commission have amply indicated the role to be played by the Governors' and sanctity to be attached to their report. Even when the parameters of judicial review spelt out in the State of Rajasthan and Bommai's cases (supra) are kept in view, the impugned report and consequential President's Notification do not suffer from any infirmity to warrant interference. It is further submitted that the Election Commission had notified fresh elections and even if for the sake of arguments if any defect is noticed in the Governor's report or the consequential President's Notification, that cannot be a ground to stall the election already notified. People can give their mandate afresh and the plea that large sums of money would be spent if the fresh elections are held is really no answer to preventing installation of a government whose foundation is shaky. It is submitted that the report does not even show a trend of any partisan approach vis-a-vis any political party by the Governor who was acting independently. In fact before the report dated 21.5.2005 on which the final decision for the Presidential Proclamation was taken a report dated 27.4.2005 was given which clearly indicated that no party was in a position to form the Government. The Governor has clearly indicated the source from which he came to know about the efforts to form the Government by illegal means. It is pointed out that the decision relied upon by Mr. P.S. Narasimha and Mr. Viplav Sharma i.e. Udai Narain Sinha v. State of U.P. and Ors. AIR 1987 All 293 does not really reflect the correct position in law and was rendered in the peculiar fact situation. On the contrary, the decision of the Kerala High Court in K.K. Aboo v. Union of India MANU/KE/0092/1965 : AIR1965Ker229 lays the correct position. Stand that because of Articles 172 or 174 of the Constitution there is no scope of dissolving the Assembly before it was summoned to hold the meeting is not acceptable on the face of Section 73 of the Representation of People Act, 1951 (in short the 'RP Act'). It is pointed out that the decision in K.K. Aboo's case (supra) was approved to be laying down the correct law by a Constitution Bench of this Court in Special Reference No. 1 of 2002 MANU/SC/0891/2002 : AIR2003SC87 .

186. The reports of the Governor dated 6.3.2005, 27.4.2005 and 21.5.2005 need to be reproduced. They read as under:

D.O. No. 33/GB Patna, the 6th March, 2005

Respected Rashtrapati Jee,

The present Bihar Legislative Assembly has come to an end on 6th March, 2005. The Election Commission's notification with reference to the recent elections in regard to constitution of the new Assembly issued vide No. 308/B.R.L.A./2005 dated 4th March, 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005 is enclosed (Annexure-I)

2. Based on the results that have come up, the following is the party-wise position:

1.	R.J.D. :	75
2.	J.D.(U) :	55
3.	B.J.P. :	37
4.	Cong(I) :	10
5.	B.S.P. :	02
6.	L.J.P. :	29
7.	C.P.I. :	03
8.	C.P.I.(M) :	01
9.	C.P.I.(M.L.):	07
10.	N.C.P. :	03
11.	S.P. :	04
12.	Independent:	17
		243

The R.J.D. and its alliance position is as follows:

1.	R.J.D. :	75	
2.	Cong.(I) :	10	
3.	C.P.I. :	03	(support letter not recd.)
4.	C.P.I.(M) :	01	
5.	N.C.P. :	03	
		92	

The N.D.A. alliance position is as follows:

1.	B.J.P. :	37
2.	J.D.(U) :	55
		92

3. The present Chief Minister, Bihar, Smt. Rabri Devi met me on 28.2.2005 and submitted her resignation alongwith her Council of Ministers. I have accepted the same and asked her to continue till an alternative arrangement is made.

4. A delegation of members of L.J.P. met me in the afternoon of 28.2.2005 and they submitted a letter (Annexure II) signed by Shri Ram Vilas Paswan, President of the Party, stating therein that they will neither support the R.J.D. nor the B.J.P. in the formation of government. The State President of Congress Party, Shri Ram Jatan Sinha, also met me in the evening of 28.2.2005.

5. The State President of B.J.P., Shri Gopal Narayan Singh alongwith supporters met me on 1.3.2005. They have submitted a letter (Annexure III) stating that apart from combined alliance strength of 92 (BJP and JD(U) they have support of another 10 to 12 Independents. The request in the letter is not to allow the R.J.D. to form a Government.

6. Shri Dadan Singh, State President of Samajwadi Party, has sent a letter (Annexure IV) indicating their decision not to support the R.J.D. or N.D.A. in the formation of the Govt. He also met me on 2.3.2005.

7. Shri Ram Naresh Ram, Leader of the C.P.I. (M.L.-Lib), Legislature Party alongwith 4 others met me and submitted a letter (Annexure V) that they would not support any group in the formation of Government.

8. Shri Ram Vilas Paswan, National President of L.J.P. alongwith 15 others met me and submitted another letter (Annexure VI). They have re-iterated their earlier stand.

9. The R.J.D. met me on 5.3.2005 in the forenoon and they staked claim to form a Government indicating the support from the following parties:

1.	Cong(I) :	10
2.	NCP :	03
3.	CPI(M) :	01
4.	BSP :	02

(Copy enclosed as Ann.VII)

The R.J.D. with the above will have only 91.

They have further claimed that some of the Independent members may support the R.J.D. However, it has not been disclosed as to the number of Independent M.L.As. from whom they expect support nor their names.

Even if we assume the entire independents totalling 17 to extend support to R.J.D. alliance, which has a combined strength of 91, the total would be 108, which is still short of the minimum requirement of 122 in a House of 243.

10. The N.D.A. delegation led by Shri Sushil Kumar Modi, M.P., met me in the evening of 5.3.2005. They have not submitted any further letter. However, they stated that apart from their pre-election alliance of 92, another 10 Independents will also support them and they further stated that they would be submitting letters separately. This has not been received so far. Even assuming that they have support of 10 Independents, their strength will be only 102, which is short of the minimum requirement of 122.

11. Six Independents M.L.As. met me on 5.3.2005 and submitted a letter in which they have claimed that they may be called to form a Government and they will be able to get support of others (Annexure VIII). They have not submitted any authorization letter supporting their claim.

12. I have also consulted the legal experts and the case laws particularly the case reported in MANU/SC/0444/1994 : [1994]2SCR644 where the Supreme Court in para 365 of the report summarized the conclusion. The relevant part is para 2, i.e. the recommendation of the Sarkaria Commission do merit serious consideration at the hands of all concerned. Sarkaria Commission in its report has said that Governor while going through the process of selection should select a leader who in his judgment is most likely to command a majority in the Assembly. The Book

"Constitution of India" written by Shri V.N. Shukla (10th Edition) while dealing with Articles 75 and 164 of the Constitution of India has dealt with this subject wherein it has quoted the manner of selection by the Governor, in the following words:

In normal circumstances the Governor need have no doubt as to who is the proper person to be appointed; it is leader of majority party in the Legislative Assembly, but circumstances can arise when it may be doubtful who that leader is and the Governor may have to exercise his personal judgment in selecting the C.M. Under the Constitutional scheme which envisages that a person who enjoys the confidence of the Legislature should alone be appointed as C.M.

In Bommai case referred to above in para 153 S.C. has stated with regard to the position where, I quote:

Suppose after the General Elections held, no political party or coalition of parties or groups is able to secure absolute majority in the Legislative Assembly and despite the Governor's exploring the alternatives, the situation has arisen in which no political party is able to form stable Government, it would be case of completely demonstrable inability of any political party to form a stable Government commanding the confidence of the majority members of the Legislature. It would be a case of failure of constitutional machinery.

13. I explored all possibilities and from the facts stated above, I am fully satisfied that no political party or coalition of parties or groups is able to substantiate a claim of majority in the Legislative Assembly, and having explored the alternatives with all the political parties and groups and Independents M.L.As., a situation has emerged in which no political party or groups appears to be able to form a Government commanding a majority in the House. Thus, it is a case of complete inability of any political party to form a stable Government commanding the confidence of the majority members. This is a case of failure of constitutional machinery.

14. I, as Governor of Bihar, am not able to form a popular Government in Bihar, because of the situation created by the election results mentioned above.

15. I, therefore, recommend that the present newly Constituent Assembly be kept in suspended animation for the present and the President of India is requested to take such appropriate action/decision, as required.

With regards,

Yours sincerely,

(Buta Singh)

Dr. A.P.J. Abdul Kalam,
President of India,
Rashtrapati Bhavan,
New Delhi.

D.O. No. 52/GB Patna, the 27th April,2005

Respected Rashtrapati Jee,

I invite a reference to my D.O. No. 33/GB dated the 6th March, 2005 through which a detailed analysis of the results of the Assembly elections were made and a recommendation was also made to keep the newly constituted Assembly (Constituted vide Election Commission's notification No. 308/B.R.- L.A./2005 dated the 4th March, 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005) in a suspended animation and also to issue appropriate direction/decision. In the light of the same, the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No.G.S.R. 162(E), dated 7th March, 2005 and the proclamation has been approved and assented by the Parliament.

2. As none of the parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government wherein they could claim a support of a simple majority of 122 in a House of 243, I had no alternative but to send the above mentioned report with the said recommendation.

3. I am given to understand that serious attempts are being made by JD-U and BJP to cobble a majority and lay claim to form the Government in the State. Contacts in JD-U and BJP have informed that 16-17 LJP MLAs have been won over by various means and attempt is being made to win over others. The JD-U is also targeting Congress for creating a split. It is felt in JD-U circle that in case LJP does not split then it can still form the Government with the support of Independent, NCP, BSP and SP MLAs and two third of Congress MLAs after it splits from the main Congress party. The JD-U and BJP MLAs are quite convinced that by the end of this month or latest by the first week of May JD-U will be in a position to form the Government. The high pressure moves of JD-U/BJP is also affecting the RJD MLAs who have become restive. According to a report there is a lot of pressure by the RJD MLAs on Lalu Pd. Yadav to either form the Government in Bihar on UPA pattern in the center, with the support of Congress, LJP and others or he should at least ensure the continuance of President's rule in the State.

4. The National Commission To Review The Working Of The Constitution has also noticed that the reasons for increasing instability of elected Governments was attributable to unprincipled and opportunistic political realignment from time to time. A reasonable degree of stability of Government and a strong Government is important. It has also been noticed that the changing alignment of the members of political parties so openly really makes a mockery of our democracy.

Under the Constitutional Scheme a political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programmes. The 10th Schedule of the Constitution was introduced on the premise that political propriety and morality demands that if such persons after the elections changes his affiliation, that should be discouraged. This is on the basis that the loyalty to a party is a norm being based on shared beliefs. A divided party is looked on with suspicion by the electorate.

5. Newspaper reports in the recent time and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received by me, indicate a trend to gain

over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts, etc. which is a disturbing feature. This would affect the constitutional provisions and safeguards built therein. Any such move may also distort the verdict of the people as shown by results of the recent elections. If these attempts are allowed to continue then it would be amounting to tampering with constitutional provisions.

6. Keeping in view the above mentioned circumstances the present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practised by various political parties/groups trying to allure elected MLAs. Consequently it may not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll.

7. I am submitting these facts before the Hon'ble President for taking such action as deemed appropriate.

With regards,

Yours sincerely,

(Buta Singh)

Dr. A.P.J. Abdul Kalam,
President of India,
Rashtrapati Bhavan,
New Delhi.

D.O. No. 140/PS-GB/BN Patna, the 21st May, 2005

Respected Rashtrapati Jee,

I invite a reference to my D.O. letter No. 52/GB dated 27th April 2005 through which I had given a detailed account of the attempts made by some of the parties notably the JD-U and BJP to cobble a majority and lay a claim to form a Government in the State. I had informed that around 16-17 MLAs belonging to LJP were being wooed by various means so that a split could be effected in the LJP. Attention was also drawn to the fact that the RJD MLAs had also become restive in the light of the above moves made by the JD-U.

As you are aware after the Assembly Elections in February this year, none of the political parties either individually or with the then pre-election combination or with post election alliance combination could stake a claim to form a popular Government since they could not claim a support of a simple majority of 122 in a House of 243 and hence the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No. - GSR - 162 (E) dated 7th March 2005 and the Assembly was kept in suspended animation.

The reports received by me in the recent past through the media and also through meeting with various political functionaries, as also intelligence reports, indicate a trend to win over elected representatives of the people. Report has also been received of one of the LJP MLA, who is General Secretary of the party having resigned today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is a very disturbing and alarming feature. Any move by the break away action to align with any other party to cobble a majority and stake claim to form a Government would positively affect the Constitutional provisions and safeguards built therein and distort the verdict of the people as shown by the results in the recent Elections. If these attempts are allowed it would be amounting to tampering with Constitutional provisions.

Keeping the above mentioned circumstances, I am of the considered view that if the trend is not arrested immediately, it may not be possible to contain the situation. Hence in my view a situation has arisen in the State wherein it would be desirable in the interest of the State that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course.

With regards,

Yours sincerely

Sd/-
(Buta Singh)

Dr. A.P.J. Abdul Kalam,
President of India,
Rashtrapati Bhavan,
New Delhi.

We shall first deal with the question as to the essence of the judgment in Bommai's case (supra).

187. Lot of arguments have been advanced as to the true essence of the conclusions arrived at in Bommai's case (supra) and the view expressed as regards the scope of judicial review. In A.K. Kaul and Anr. v. Union of India and Anr. MANU/SC/0267/1995 : [1995]3SCR469 , the position was summed up as follows:

21. It would thus appear that in S.R. Bommai though all the learned Judges have held that the exercise of powers under Article 356(1) is subject to judicial review but in the matter of justiciability of the satisfaction of the President, the view of the majority (Pandian, Ahmadi, Verma Agrawal, Yogeshwar Dayal and Jeevan Reedy, JJ.) is that the principles evolved in Barium Chemicals for adjudging the validity of an action based on the subjective satisfaction of the authority created by statute do not, in their entirety, apply to the exercise of a constitutional power under Article 356. On the basis of the judgment of Jeevan Reddy, J., which takes a narrower view than that taken by Sawant, J., it can be said that the view of the majority (Pandian, Kuldip Singh, Sawant, Agrawal and Jeevan Reddy, JJ.) is that:

(i) the satisfaction of the President while making a Proclamation under Article 356(1) is justiciable;

(ii) it would be open to challenge on the ground of mala fides or being based wholly on extraneous and or irrelevant grounds;

(iii) even if some of the materials on which the action is taken is found to be irrelevant, the court would still not interferes so long as there is some relevant material sustaining the action;

(iv) the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material and it will also not substitute it opinion for that of the President; (v) the ground of mala fides takes in inter alia situations where the Proclamation is found to be a clear case a abuse of power or what is sometimes called fraud on power;

(vi) the court will not lightly presume abuse or misuse of power and will make allowance of the fact that the president and the Union Council of Ministers are the best judge of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgment in the matter; and

(vii) this does not mean that the President and the Council of Ministers are the final arbiters in the matter or that their opinion is conclusive.

188. If the State of Rajasthan's case (supra) and Bommai's case (supra) are read together it is crystal clear that in Bommai's case, the scope of judicial review as set out in the State of Rajasthan's case (supra) was elaborated as is clear from the summation in A.K. Kaul's case (supra).

189. Lord Greene said in 1948 in the famous Wednesbury case 1948 (1) KB 223 that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken.
Lord Diplock in Council for civil Services Union v. Minister of civil Service (1983) 1 AC 768 (called the CCSU case) summarized the principles of judicial review of administrative action as based upon one or other of the following viz., illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility".

190. In Om Kumar and Ors. v. Union of India MANU/SC/0704/2000 : 2000(7)SCALE524 , this Court observed, inter alia, as follows:

The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least- restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

x x x

The development of the principle of "strict scrutiny" or "proportionality" in administrative law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the Spycatcher case Attorney General v. Guardian Newspapers Ltd. (No. 2) (1990) 1 AC 109 , Lord Goff stated that there was no inconsistency between the convention and the common law. In Derbyshire County Council v. Times Newspapers Ltd. (1993) AC 534, Lord Keith treated freedom of expression as part of common law. Recently, in R. v. Secy. of State for Home Deptt., ex p. Simms (1999) 3 All ER 400 (HL), the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hobhouse held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in in R. v. Lord Saville ex p (1999) 4 All ER 860 (CA). In all these cases, the English Courts applied the "strict scrutiny" test rather than describe the test as one of "proportionality". But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply.

However, the principle of "strict scrutiny" or "proportionality" and primary review came to be explained in R. v. Secy. of State for the Home Deptt. ex p Brind (1991) 1 AC 696. That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organizations which were proscribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organizations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a "voice-over" account, paraphrasing what they said. The applicant's claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the Common law and that, even in the absence of the Convention, English Courts could go into the question (see p. 748-49).

...whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations and that the courts were not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it.

Lord Templeman also said in the above case that the courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that "in terms of the Convention" any such interference must be both necessary and proportionate (ibid pp. 750-51).

In the famous passage, the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the Brind case (1991) 1 AC 696. Where Convention rights were in question the courts could exercise a right of primary review. However, the courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment.

191. In Union of India and Anr. v. G. Ganayutham MANU/SC/0834/1997 : (2000)IILLJ648SC , in paragraph 31 this Court observed as follows:

31. The current position of proportionality in administrative law in England and India can be summarized as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury 1948 1 KB 223 test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational - in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU 1985 AC 374 principles. (3)(a) As per Bugdaycay 1987 AC 514, Brind 1991 (1) AC 696 and Smith 1996 (1) All

ER 257 as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

192. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

193. According to Wade, Administrative Law (9th Edition) is the law relating to the control of powers of the executive authorities. To consider why such a law became necessary, we have to consider its historical background.

194. Up to the 19th century the functions of the State in England were confined to (*i*) defence of the country from foreign invasion, and (*ii*) maintenance of law and order within the country.

195. This vast expansion in the State functions resulted in large number of legislations and also for wide delegation of State functions by Parliament to executive authorities, so also was there a need to create a body of legal principles to control and to check misuse of these new powers conferred on the State authorities in this new situation in the public interest. Thus, emerged Administrative Law. Maitland pointed out in his *Constitutional History*:

Year by year the subordinate Government of England is becoming more and more important. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.

196. But in the early 20th century following the tradition of Dicey's classic exposition in his: *The Law of the Constitution*, there was a spate of attacks on parliamentary delegation culminating in the book *New Despotism* by the then Chief Justice of England, Lord Hewart published in 1929. In response, the British Government in 1932 set up a committee called the Committee on Ministerial

Powers headed by Lord Donoughmore, to examine these complaints and criticisms. However, the Donoughmore Committee rejected the argument of Lord Hewart and accepted the reality that a modern State cannot function without delegation of vast powers to the executive authorities, though there must be some control on them.

197. In *R.* v. *Lancashire CC, ex p Huddleston* 1986 (2) All ER 941 (CA) : 136 NLJ 562 : 1986 WL 406 745, it was said about Administrative Law that it

has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely, the maintenance of the highest standards of public administration.

In *Liversidge* v. *Anderson* 1941 (3) All E.R. 338 (HL) : [1942] AC 206 the case related to the Defence (General) Regulations, 1939 which provided:

If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association he may make an order against that person directing that he be detained.

198. The detenu Liversidge challenged the detention order passed against him by the Secretary of State. The majority of the House of Lords, except Lord Atkin, held that the Court could not interfere because the Secretary of State had mentioned in his order that he had reasonable cause to believe that Liversidge was a person of hostile origin or association. Liversidge was delivered during the Second World War when the executive authority had unbridled powers to detain a person without even disclosing to the Court on what basis the Secretary had reached to his belief. However, subsequently, the British courts accepted Lord Atkin's dissenting view that there must be some relevant material on the basis of which the satisfaction of the Secretary of State could be formed. Also, the discretion must be exercised keeping in view the purpose for which it was conferred and the object sought to be achieved, and must be exercised within the four corners of the statute (See: *Clariant International Ltd. and Anr.* v. *Securities and Exchange Board of India* MANU/SC/0694/2004.

199. Sometimes a power is coupled with a duty. Thus, a limited judicial review against administrative action is always available to the Courts. Even after elaboration in *Bommai's* case (supra) the scope for judicial review in respect of Governors' action cannot be put on the same pedestal as that of other administrative orders. As observed in Para 376 of judgment in Bommai's case (supra) the scope of judicial review would depend upon facts of the given case. There may be cases which do not admit of judicial prognosis. The principles which are applicable when an administrative action is challenged cannot be applied stricto sensu to challenges made in respect of proclamation under Article 356. However, in view of what is observed explicitly in *Bommai's* case (supra), the proclamation under Article 356(1) is not legislative in character.

200. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

201. It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote.

(See: Smt. Shalini Soni and Ors. v. Union of India and Ors. MANU/SC/0227/1980 : 1980CriLJ1487).

202. The Wednesbury principle is often misunderstood to mean that any administrative decision which is regarded by the Court to be unreasonable must be struck down. The correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable in the Wednesbury sense if (*i*) it is based on wholly irrelevant material or wholly irrelevant consideration, (*ii*) it has ignored a very relevant material which it should have taken into consideration, or (*iii*) it is so absurd that no sensible person could ever have reached to it.

203. As observed by Lord Diplock in *CCSU's* case (supra) a decision will be said to suffer from Wednesbury unreasonableness if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

204. A Constitution is a unique legal document. It enshrines a special kind of norm and stands at the top of normative pyramid. Difficult to amend, it is designed to direct human behavior for years to come. It shapes the appearance of the State and its aspirations throughout history. It determines the State's fundamental political views. It lays the foundation for its social values. It determines its commitments and orientations. It reflects the events of the past. It lays the foundation for the present. It determines how the future will look. It is philosophy, politics, society, and law all in one. Performance of all these tasks by a Constitution requires a balance of its subjective and objective elements, because "it is a constitution we are expounding." As Chief Justice Dickson of the Supreme Court of Canada noted:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by it framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

205. The political question doctrine, in particular, remits entire areas of public life to Congress and the President, on the grounds that the Constitution assigns responsibility for these areas to the other branches, or that their resolution will involve discretionary, polycentric decisions that lack discrete criteria for adjudication and thus are better handled by the more democratic branches. By foreclosing judicial review, even regarding the minimal rationality of the political branches'

discretionary choices, the doctrine denies federal judges a role in "giving proper meaning to our public value" in important substantive fields. (Quoted from an Article in Harvard Law Review).

206. Democratic Theory is based on a notion of human dignity: as beings worthy of respect because of their very nature, adults must enjoy a large degree of autonomy, a status principally attainable in the modern world by being able to share in the Governance of their community. Because direct rule is not feasible for the mass of citizens, most people can share in self government only by delegating authority to freely chosen representatives. Thus Justice Hugo L. Black expressed a critical tenet of democratic theory when he wrote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we...must live."

207. For democratic theory, what makes governmental decisions morally binding is process: the people's freely choosing representatives, those representatives' debating and enacting policy and later standing for re-election, and administrators' enforcing that policy. Democratic theory, therefore, tends to embrace both positivism and moral relativism.

208. Whereas democratic theory turns to moral relativism, constitutionalism turns to moral realism. It presumes that "out there" lurk discoverable standards to judge whether public policies infringe on human dignity. The legitimacy of a policy depends not simply on the authenticity of decision makers' credentials but also on substantive criteria. Even with the enthusiastic urging of a massive majority whose representatives have meticulously observed proper processes, government may not trample on fundamental rights. For constitutionalists, political morality cannot be weighed on a scale in which "opinion is an omnipotence," only against the moral criterion of sacred, individual rights. They agree with Jafferson: "An elective despotism was not the government we fought for...." (From Constitutions, Constitutionalism, and Democracy by Walter F. Murphy).

209. Allegation of mala-fides without any supportable basis is the last feeble attempt of a losing litigant, otherwise it will create a smokescreen on the scope of judicial review. This is a pivotal issue around which the fate of this case revolves. As was noted in A.K. Kaul's case (supra) the satisfaction of the President is justiciable. It would be open to challenge on the ground of mala fides or being based wholly on extraneous or irrelevant grounds. The sufficiency or the correctness of the factual position indicated in the report is not open to judicial review. The truth or correctness of the materials cannot be questioned by the Court nor would it go into the adequacy of the material and it would also not substitute its opinion for that of the President. Interference is called for only when there is clear case of abuse of power or what is some times called fraud on power. The Court will not lightly presume abuse or misuse of power and will make allowance for the fact that the decision making authority is the best judge of the situation. If the Governor would have formed his opinion for dissolution with the sole objective of preventing somebody from staking a claim it would clearly be extraneous and irrational. The question whether such person would be in a position to form a stable government is essentially the subjective opinion of the Governor; of course to be based on objective materials. The basic issue therefore is did the Governor act on extraneous and irrelevant materials for coming to the conclusion that there was no possibility of stable government.

210. According to the petitioners, the question whether there was any allurement or horse trading (an expression frequently used in such cases) or allurement of any kind is not a matter which can be considered by the Governor. The scope of judicial review of Governor's decision does not and cannot stand on the same footing as that of any other administrative decision. In almost all legal inquiries intention as distinguished from motive is the all important factor and in common parlance a malicious act stands equated with an intentional act without just cause or excuse. Whereas fairness is synonymous with reasonableness bias stand included within the attributes and broader purview of the word "malice" which in common acceptation implies "spite" or "ill will". Mere general statements will not be sufficient for the purpose of indication of ill will. There must be cogent evidence available on record to come to a conclusion as to whether in fact there was bias or mala fide involved which resulted in the miscarriage of justice. The tests of real likelihood and reasonable suspicion are really inconsistent with each other. (See S. Parthasarthi v. State of A.P. MANU/SC/0059/1973 : (1973)IILLJ473SC . The word 'bias' is to denote a departure from the standing of even handed justice. (See: Franklin v. Minister of Town and Country Planning 1947 2 All ER 289 (HL).

211. In State of Punjab v. V.K. Khanna and Ors. MANU/SC/0744/2000 : 2000(7)SCALE731 , it was observed as follows:

Incidentally, Lord Thankerton in Franklin v. Minister of Town and Country Planning 1948 AC 87 : (1947) 2 All ER 289 (HL) opined that the word "bias" is to denote a departure from the standing of even-handed justice. Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar case MANU/SC/0639/2000 : (2001)ILLJ583SC further noted the different note sounded by the English Courts in the manner following : (SCC pp.199-201, paras 30-34)

30. Recently however, the English courts have sounded a different note, though may not be substantial but the automatic disqualification theory rule stands to some extent diluted. The affirmation of this dilution however is dependent upon the facts and circumstances of the matter in issue. The House of Lords in the case of R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2) (2000) 1 AC 119 observed:

...In civil litigation the matters in issue will normally have an economic impact; therefore a Judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a Judge applies just as much if the Judge's decision will lead to the promotion of a cause in which the Judge is involved together with one of the parties.

31. Lord Brown-Wilkinson at p. 136 of the report stated:

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25-11-1998 would lead to a position where Judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a Judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the Judge was a director of a charity closely allied to

A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a Judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a Judge normally be concerned either to reuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the Judge would be well advised to disclose a possible interest.

32. Lord Hutton also in Pinochet case (2000) 1 AC 119 observed:

There could be cases where the interest of the Judge in the subject- matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.

33. Incidentally in Locabail [Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. 2000 QB 451 the Court of Appeal upon a detail analysis of the oft-cited decision in R. v. Gough 1993 AC 646 together with the Dimes case (Dimes v. Grand Junction Canal, (1853) 3 HL Cas 759 : 10 ER 301 , Pinochet case (2000) 1 AC 119, Australian High Court's decision in the case of J.R.L., ex p C.J.L., Re (1986) 161 CLR 342 as also the Federal Court in Ebner, Re (1999) 161 ALR 557 and on the decision of the Constitutional Court of South Africa in President of the Republic of South Africa v. South African Rugby Football Union (1999) 4 SA 147 stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything will depend upon facts which may include the nature of the issue to be decided. It further observed:

By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (Vakuta v. Kelly (1989) 167 CLR 568 ; or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

34. The Court of Appeal judgment in Locabail (200 QB 451) though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case - a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient.

212. In Bommai's case (supra) though all the learned Judges held that exercise of power under Article 356(1) of the Constitution is subject to judicial review but in the matter of justiciability of the satisfaction of the President, the majority view was to the effect that the principles evolved in Barium Chemicals Ltd. and Anr. v. Company Law Board and Ors. MANU/SC/0037/1966 : [1967]1SCR898 for adjudging the validity of an action based on the subjective satisfaction of the authority created by the Statute do not in their entirety apply to the exercise of constitutional power under Article 356 of the Constitution. Mala fide intent or biased attitude cannot to be put on a strait- jacket formula but depend upon facts and circumstances of each case and in that perspective judicial precedent would not be of much assistance. It is important to note that in Bommai's case (supra) this Court was concerned with cases of dissolution of Assemblies when cabinets were in office. Though at first flush, it appears that the factual background in Karnataka's case (supra) dealt with in Bommai's case (supra) has lot of similarity with the factual position in hand, yet on a deeper analysis the position does not appear to be so. The factual position was peculiar. In the instant case, the Governor's report reveals that the source of his opinion was intelligence reports, media reports and discussions with functionaries of various parties. A plea was raised by the petitioners that it has not been indicated as to functionaries of which party the Governor had discussed with. That cannot be a ground to hold the report to be vulnerable. As was noted in Bommai's case (supra) the sufficiency or correctness of factual aspects cannot be dealt with. therefore, as noted above, the only question which needs to be decided is whether the conclusions of the Governor that if foul means are adopted to cobble the majority it would be against the spirit of democracy. Again the question would be if means are foul can the Governor ignore it and can it be said that his view is extraneous or irrational.

213. In the report dated 27.4.2005 to which reference has been made in the report dated 21.5.2005 reference is made to allurements like money, caste, posts etc. and this has been termed as a disturbing feature. In both the reports, the opinion of the Governor is that if these attempts are allowed to continue, it would amount to tampering with constitutional provisions. Stand of the petitioners is that even if it is accepted to be correct, there is no constitutional provision empowering the Governor to make the same basis for not allowing a claim to be staked. This argument does not appear to be totally sound.

214. In Kihoto Hollohan v. Zachillhu and Ors. MANU/SC/0753/1992 : [1992]1SCR686 the menace of defection was noted with concern and the validity of the Tenth Schedule was upheld. While upholding the validity of the provision this Court in no uncertain terms deprecated the change of loyalties to parties and the craze for power. The Statement of Objects and Reasons appended to the Constitution (52nd Amendment) Act, 1985 refer to the evil of political defection which has been the matter of national concern. It was noted that if it is not combated it is likely to undermine the very foundation of our democracy and the principles which sustain it. It was noted as follows:

26. In expounding the processes of the fundamental law, the Constitution must be treated as a logical whole. Westel Woodbury Willoughby in The Constitutional Law of the United States (2nd Edn. Vol.1 p.65) states:

The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of the other parts.

27. A constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances - a distinction which differentiates a statute from a Charter under which all statutes are made. Cooley on Constitutional Limitations (8th edn. Vol.1, p.129) says:

Upon the adoption of an amendment to a Constitution, the amendment becomes a part thereof; as much so as it had been originally incorporated in the Constitution; and it is to be construed accordingly.

215. Again, in paragraph 41, the position was illuminatingly stated by Mr. Justice M.N. Venkatachaliah (as His Lordship then was). A right to elect, fundamental though it is to democracy is anomalously enough neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So it is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are and therefore subject to statutory limitation. (See Jyoti Basu and Ors. v. Debi Ghosal and Ors. MANU/SC/0144/1982 : [1982]3SCR318 .

216. Democracy as noted above is the basic feature of the Constitution. In paragraphs 44 and 49 of *Kihoto's* case (supra) it was noted as follows:

44. But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on Parliament Functions, Practice and Procedure (1989 Edn., p.119) says;

Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate. It is natural for Members to accept the opinion of their Leaders and Spokesmen on the wide variety of matters on which those members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy.

49. Indeed, in a sense an anti-defection law is a statutory variant of its moral principle and justification underlying the power of recall. What might justify a provision for recall would justify a provision for disqualification for defection. Unprincipled defection is a political and social evil. It is perceived as such by the legislature. People, apparently, have grown distrustful of the emotive political exultations that such floor-crossing belong to the sacred area of freedom of conscience, or of the right to dissent or of intellectual freedom. The anti- defection law seeks to recognize the practical need to place the proprieties of political and personal conduct - whose awkward erosion and grotesque manifestations have been the bane of the times - above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation. We should, we think, defer to this legislative wisdom and perception. The choices in constitutional adjudications quite clearly indicate the need for such deference. "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are adopted to that end..." are constitutional.

217. therefore, the well recognised position in law is that purity in the electorate process and the conduct of the elected representative cannot be isolated from the constitutional requirements. "Democracy" and "Free and Fair Election" are inseparable twins. There is almost an inseverable umbilical cord joining them. In a democracy the little man- voter has overwhelming importance and cannot be hijacked from the course of free and fair elections.
His freedom to elect a candidate of his choice is the foundation of a free and fair election. But after getting elected, if the elected candidate deviates from the course of fairness and purity and becomes a "Purchasable commodity" he not only betrays the electorate, but also pollutes the pure stream of democracy.

218. Can the governor whose constitutional duty is to safeguard the purity throw up his hands in abject helplessness in such situations?

219. As noted by this Court in People's Union for civil Liberties (PUCL) and Anr. v. Union of India and Anr. MANU/SC/0234/2003 : [2003]2SCR1136 a well informed voter is the foundation of democratic structure. If that be so, can it be said that the Governor will remain mute and silent spectator when the elected representatives act in a manner contrary to the expectations of the voters who had voted for them. In paragraph 94 of it was noted as follows:

94. The trite saying that 'democracy is for the people, of the people and by the people' has to be remembered for ever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this Court in Lily Thomas v. Speaker, Lok Sabha MANU/SC/0564/1993 : (1993)4SCC234 quoting from Black's Law Dictionary. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of Government. People look to them for ventilation and redressal of their grievances. They are the

focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus two fold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information- relevant and essential would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the Press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly it will facilitate the Press and voluntary organizations in imparting information on a matter of vital public concern. An informed voter-whether he acquires information directly by keeping track of disclosures or through the Press and other channels of communication, will be able to fulfil his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of electoral process which is so essential for the growth of democracy. Though I do not go to the extent of remarking that the election will be a farce if the candidates' antecedents are not known to the voters, I would say that such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated.

220. There is no place for hypocrisy in democracy. The Governor's perception about his power may be erroneous, but it is certainly not extraneous or irrational. It has been rightly contended by learned Counsel for the Union of India that apart of Governor's role to ensure that the Government is stable, the case may not be covered by the Tenth Schedule and it cannot be said that by avoiding the Tenth Schedule by illegitimate or tainted means a majority if gathered leaves the Governor helpless, and a silent onlooker to the tampering of mandate by dishonest means. It is not and cannot be said that by preventing a claim to be staked the Governor does not act irrationally or on extraneous premises. Had the Governor acted with the object of preventing anyone from staking a claim his action would have been vulnerable. The conduct of the Governor may be suspicious and may be so in the present case, but if his opinion about the adoption of tainted means is supportable

by tested materials, certainly it cannot be extraneous or irrational. It would all depend upon the facts of each case. If the Governor in a particular case without tested or unimpeachable material merely makes an observation that tainted means are being adopted, the same would attract judicial review. But in the instant case there is some material on which the Governor has acted. This ultimately is a case of subjective satisfaction based on objective materials. On the factual background one thing is very clear i.e. no claim was staked and on the contrary the materials on record show what was being projected. It is also clear from a bare perusal of the documents which the petitioners have themselves enclosed to the writ petitions that authenticity of the documents is suspect.

221. Judicial response to human rights cannot be blunted by legal jugglery. (See: Bhupinder Sharma v. State of Himachal Pradesh MANU/SC/0825/2003 : 2004CriLJ1). Justice has no favourite other than the truth. Reasonableness, rationality, legality as well as philosophically provide colour to the meaning of fundamental rights. What is morally wrong cannot be politically right. The petitioners themselves have founded their claims on documents which do not have even shadow of genuineness so far as claim of majority is concerned. If the Governor felt that what was being done was morally wrong, it cannot be treated as politically right. This is his perception. It may be erroneous. It may not be specifically spelt out by the Constitution so far as his powers are concerned. But it ultimately is a perception. Though erroneous it cannot be termed as extraneous or irrational. therefore however suspicious conduct of the Governor may be, and even if it is accepted that he had acted in hot haste it cannot be a ground to term his action as extraneous. A shadow of doubt about bona fides does not lead to an inevitable conclusion about mala fides.

222. We may hasten to add that similar perceptions by Governors may lead to chaotic conditions. There may be human errors. therefore, the concerned Governor has to act carefully with care and caution and can draw his inference from tested and unimpeachable material; otherwise not.

223. In B.R. Kapur v. State of Tamil Nadu and Anr. : AIR2001SC3435 this Court considered the role of the Governor in appointing the Chief Minister. It was held that the Governor can exercise his discretion and can decline to make the appointment when the person chosen by the majority party is not qualified to be member of Legislature. It was observed that in such a case the Constitution prevails over the will of the people. It was further observed that accepting submissions as were made in that case that the Governor exercising powers under Article 164(1) read with (4) was obliged to appoint as Chief Minister whosoever the majority party in the Legislature nominated, regardless of whether or not the person nominated was qualified to be a member of the legislature under Article 173 or was disqualified in that behalf under Article 191,and the only manner in which a Chief Minister who was not qualified or who was disqualified could be removed was by a vote of no-confidence in the legislature or by the electorate at the next elections and that the Governor was so obliged even when the person recommended was, to the Governor's knowledge, a non-citizen, under age, a lunatic or an undischarged insolvent, and the only way in which a non- citizen, or under age or lunatic or insolvent Chief Minister could be removed was by a vote of no-confidence in the legislature or at the next election, is to invite disaster.

224. The situation cannot be different when the Chief Minister nominated was to head a Ministry which had its foundation on taint and the majority is cobbled by unethical means or corrupt means.

As was observed in B.R. Kapur's case (supra) in such an event the constitutional purity has to be maintained and the Constitution has to prevail over the will of the people.

225. With these conclusions the writ applications could have been disposed of. But, taking note of some of the disturbing features highlighted by learned Counsel about the suspicious and apparently indefensible roles of some Governors, it is necessary to deal with some of the relevant aspects.

226. It is relevant to take note of what the Sarkaria Committee had said about the role of Governors:

1. **INTRODUCTION**

4.1.01 The role of the Governor has emerged as one of the key issues in Union State relations. The Indian political scene was dominated by a single party for a number of years after Independence. Problems which arose in the working of Union-State relations were mostly matters for adjustment in the intra-party forum and the Governor had very little occasion for using his discretionary powers. The institution of Governor remained largely latent. Events in Kerala in 1959 when President's rule was imposed, brought into some prominence the role of the Governor, but thereafter it did not attract much attention for some years. A major change occurred after the Fourth General Elections in 1967. In a number of States, the party in power was different from that in the Union. The subsequent decades saw the fragmentation of political parties and emergence of new regional parties frequent, sometimes unpredictable realignments of political parties and groups took place for the purpose of forming governments. These developments gave rise to chronic instability in several State Governments. As a consequence, the Governors were called upon to exercise their discretionary powers more frequently. The manner in which they exercised these functions has had a direct impact on Union- State relations. Points of friction between the Union and the States began to multiply.

4.1.02 The role of the Governor has come in for attack on the ground that some Governors have failed to display the qualities of impartiality and sagacity expected of them. It has been alleged that the Governors have not acted with necessary objectivity either in the manner of exercise of their discretion or in their role as a vital link between the Union and the States. Many have traced this mainly to the fact that the Governor is appointed by, and holds office during the pleasure of, the President, (in effect, the Union Council of Ministers). The part played by some Governors, particularly in recommending President's rule and in reserving States Bills for the consideration of the President, has evoked strong resentment. Frequent removals and transfers of Governors before the end of their tenure has lowered the prestige of this office. Criticism has also been levelled that the Union Government utilizes the Governor's for its own political ends. Many Governors, looking forward to further office under the Union or active role in politics after their tenure, came to regard themselves as agents of the Union.

(Underlined for emphasis)

2. **Historical background:**

4.2.01 The Government of India Act, 1858 transferred the responsibility for administration of India from the East India Company to the British Crown. The Governor then became an agent of the

Crown, functioning under the general supervision of the Governor-General. The Montagu-Chelmsford Reforms (1919) ushered in responsible Government, albeit in a rudimentary form. However, the Governor continued to be the pivot of the Provincial administration.

4.2.02 The Government of India Act, 1935 introduced provincial autonomy. The Governor was now required to act on the advice of Ministers responsible to the Legislature. Even so, it placed certain special responsibilities on the Governor, such as prevention of grave menace to the peace or tranquility of the Province, safeguarding the legitimate interests of minorities and so on. The Governor could also act in his discretion in specified matters. He functioned under the general superintendence and control of the Governor General, whenever he acted in his individual judgment or discretion.

4.2.03 In 1937 when the Government of India Act, 1935 came into force, the Congress party commanded a majority in six provincial legislatures. They foresaw certain difficulties in functioning under the new system which expected Ministers to accept, without demur, the censure implied, if the Governor exercised his individual judgment for the discharge of his special responsibilities. The Congress Party agreed to assume office in these Provinces only after it received an assurance from the Viceroy that the Governors would not provoke a conflict with the elected Government.

4.2.04 Independence inevitably brought about a change in the role of the Governor. Until the Constitution came into force, the provisions of the Government of India Act, 1935 as adapted by the India (Provisional Constitution) Order, 1947 were applicable. This Order omitted the expressions 'in his discretion', 'acting in his discretion' and 'exercising his individual judgment', wherever they occurred in the Act. Whereas, earlier, certain functions were to be exercised by the Governor either in his discretion or in his individual judgment, the Adaptation Order made it incumbent on the Governor to exercise these as well as all other functions only on the advice of his Council of Ministers.

4.2.05 The framers of the Constitution accepted, in principle, the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. While the pattern of the two levels of government with demarcated powers remained broadly similar to the pre-independence arrangements, their roles and inter-relationships were given a major reorientation.

4.2.06 The Constituent Assembly discussed at length the various provisions relating to the Governor. Two important issues were considered. The first issue was whether there should be an elected Governor. It was recognized that the co-existence of an elected Governor and a Chief Minister responsible to the Legislature might lead to friction and consequent weakness in administration. The concept of an elected Governor was therefore given up in favour of a nominated Governor. Explaining in the Constituent Assembly why a Governor should be nominated by the President and not elected Jawaharlal Nehru observed that "an elected Governor would to some extent encourage that separatist provincial tendency more than otherwise. There will be far fewer common links with the center."

4.2.07 The second issue related to the extent of discretionary powers to be allowed to the Governor. Following the decision to have a nominated Governor, references in the various Articles of the

Draft Constitution relating to the exercise of specified functioned by the Governor 'in his discretion' were deleted. The only explicit provisions retained were those relating to Tribal Areas in Assam where the administration was made a Central responsibility. The Governor as agent of the Central Government during the transitional period could act independently of his Council of Ministers. Nonetheless, no change was made in Draft Article 143, which referred to the discretionary powers of the Governor. This provision in Draft Article 143 (now Article 163) generated considerable discussion. Replying to it, Dr. Ambedkar maintained that vesting the Governor with certain discretionary powers was not contrary to responsible Government.

x x x

4.3.09 The Constitution contains certain provisions expressly providing for the Governor to Act:

(A) in his discretion; or

(B) in his individual judgment; or

(C) independently of the State Council of Ministers; vis.

(a)(i) Governors of all the States-Reservation for the consideration of the President of any Bill which, in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Constitution designed to fill (Second Proviso to Article 200).

(ii) The Governors of Arunachal Pradesh, Assam, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura have been entrusted with some specific functions to be exercised by them in their discretion (vide Articles 371A, 371F and 371H and paragraph 9 of the Sixth Schedule). These have been dealt with in detail in Section 14 of this Chapter

(b) The Governors of Arunachal Pradesh and Nagaland have been entrusted with a special responsibility with respect to law and order in their respective States. In the discharge of this responsibility, they are required to exercise their "individual judgment" after consulting their Council of Ministers. This aspect also has been discussed in Section 14 of this Chapter.

(c) Governors as Administrator of Union Territory-Any Governor, on being appointed by the President as the administrator of an adjoining Union Territory, has to exercise his functions as administrator, independently of the State Council of Ministers (Article 239(2). In fact, as administrator of the Union Territory, the Governor is in the position of an agent of the President.

x x x

4.4.01 The three important facets of the Governor's role arising out of the Constitutional provisions, are:

(a) as the constitutional head of the State operating normally under a system of Parliamentary democracy;

(b) as a vital link between the Union Government and the State Government; and

(C) As an agent of the Union Government in a few specific areas during normal times (e.g. Article 239(2) and in a number of areas during abnormal situations (e.g. article 356(1))

4.4.02 There is little controversy about) above. But the manner in which he has performed the dull role, as envisaged in (a) and (b) above, has attracted much criticism. The burden of the complaints against the behaviour of Governors, in general, is that they are unable to shed their political inclinations, predilections and prejudices while dealing with different political parties within the State. As a result, sometimes the decisions they take in their discretion appear as partisan and intended to promote the interests of the ruling party in the Union Government, particularly if the Governor was earlier in active politics or intends to enter politics at the end of his term. Such a behaviour, it is said, tends to impair the system of Parliamentary democracy, detracts from the autonomy of the States, and generates strain in Union State relations.

227. In the Report of the "National Commission To Review The Working Of The Constitution" the role of the Governor has been dealt with in the following words:

The powers of the President in the matter of selection and appointment of Governors should not be diluted. However, the Governor of a State should be appointed by the President only after consultation with the Chief Minister of that State. Normally the five year term should be adhered to and removal or transfer should be by following a similar procedure as for appointment i.e. after consultation with the Chief Minister of the concerned State.

(Para 8.14.2)

In the matter of selection of a Governor, the following matters mentioned in para 4.16.01 of Volume I of the Sarkaria Commission Report should be kept in mind:

(i) He should be eminent in some walk of life.

(ii) He should be a person outside the State.

(iii) He should be a detached figure and not too intimately connected with the local politics of the State; and

(iv) He should be a person who has not taken too great a part in politics generally, and particularly in the recent past.

In selecting a Governor in accordance with the above criteria, persons, belonging to the minority groups continue to be given a chance as hitherto. **(para 8.14.3)**

There should be a time-limit-say a period of six months within which the Governor should take a decision whether to grant assent or to reserve a Bill for consideration of the President. If the Bill is reserved for consideration of the President, there should be a time-limit, say of three months, within which the President should take a decision whether to accord his assent or to direct the

Governor to return it to the State Legislature or to seek the opinion of the Supreme Court regarding the constitutionality of the Act under Article 143.

(Para 8.14.4.)

8.14.6 Suitable amendment should be made in the Constitution so that the assent given by the President should avail for all purposes of relevant articles of the Constitution. However, it is desirable that when a Bill is sent for the President's assent, it would be appropriate to draw the attention of the President to all the articles of the Constitution, which refer to the need for the assent of the President to avoid any doubts in court proceedings.

8.14.7 A suitable article should be inserted in the Constitution to the effect that an assent given by the President to an Act shall not be permitted to be argued as to whether it was given for one purpose or another. When the President gives his assent to the Bill, it shall be deemed to have been given for all purposes of the Constitution.

8.14.8 The following proviso may be added to Article 111 of the Constitution:

Provided that when the President declares that he assents to the Bill, the assent shall be deemed to be a general assent for all purposes of the Constitution.

Suitable amendment may also be made in Article 200.

Article 356 should not be deleted. But it must be used sparingly and only as a remedy of the last resort and after exhausting action under other articles like 256, 257 and 355.

(Paras 8.18 and 8.19.2)

8.16-Use-Misuse of Article 356

Since the coming into force of the Constitution on 26th January, 1950, Article 356 and analogous provisions have been invoked 111 times. According to a Lok Sabha Secretariat study, on 13 occasions the analogous provision namely was applied to Union Territories of which only Pondicherry had a legislative assembly until the occasion when it was last applied. In the remaining 98 instances the Article was applied 10 times technically due to the mechanics of the Constitution in circumstances like re-organisation of the States, delay in completion of the process of elections, for revision of proclamation and there being no party with clear majority at the end of an election. In the remaining 88 instances a close scrutiny of records would show that in as many as 54 cases there were apparent circumstances to warrant invocation of Article 356. These were instances of large scale defections leading to reduction of the ruling party into minority, withdrawal of support of coalition partners, voluntary resignation by the government in view of widespread agitations, large scale militancy, judicial disqualification of some members of the ruling party causing loss of majority in the House and there being no alternate party capable of forming a Government. About 13 cases of possible misuse are such in which defections and dissensions could have been alleged to be result of political manoeuvre or cases in which floor tests could have finally proved loss of support but were not resorted to. In 18 cases common perception is that of clear misuse. These

involved the dismissal of 9 State Governments in April 1977 and an equal number in February 1980. This analysis shows that number of cases of imposition of President's Rule out of 111, which could be considered as a mis-use for dealing with political problems or considerations irrelevant for the purposes in that Article such as mal-administration in the State are a little over 20. Clearly in many cases including those arising out of States Re-organisation it would appear that the President's Rule was inevitable. However, in view of the fact that Article 356 represents a giant instrument of constitutional control of one tier of the constitutional structure over the other raises strong misapprehensions.

8.17- Sarkaria Commission- Chapter 6 of the Sarkaria Commission Report deals with emergency provisions, namely, Articles 352 to 360. The Sarkaria Commission has made 12 recommendations; 11 of which are related to Article 356 while 1 is related to Article 355 of the Constitution. Sarkaria Commission also made specific recommendations for amendment of the Constitution with a view to protecting the States from what could be perceived as a politically driven interference in self-governance of States. The underlined theme of the recommendations is to promote a constitutional structure and culture that promotes co-operative and sustained growth of federal institutions set down by the Constitution.

8.19. Need for conventions-

Xx xx xx xx

8.19.5- In case of political breakdown, the Commission recommends that before issuing a proclamation under Article 356 the concerned State should be given an opportunity to explain its position and redress the situation, unless the situation is such, that following the above course would not be in the interest of security of State, or defence of the country, or for other reasons necessitating urgent action.

8.20. Situation of Political breakdown

x x x

8.20.3 The Commission recommends that the question whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. If necessary, the Union Government should take the required steps, to enable the Legislative Assembly to meet and freely transact its business. The Governor should not be allowed to dismiss the Ministry, so long as it enjoys the confidence of the House. It is only where a Chief Minister refuses to resign, after his Ministry is defeated on a motion of no-confidence, that the Governor can dismiss the State Government. In a situation of political breakdown, the Governor should explore all possibilities of having a Government enjoying majority support in the Assembly. If it is not possible for such a Government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, (if there is one), to continue as a caretaker government, provided the Ministry was defeated solely on a issue, unconnected with any allegations of maladministration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate.

8.20.4 The problem of political breakdown would stand largely resolved if the recommendations made in para 4.20.7 in Chapter 4 in regard to the election of the leader of the House (Chief Minister) and the removal of the Government only by a constructive vote of no-confidence are accepted and implemented.

8.20.5. Normally President's Rule in a State should be proclaimed on the basis of Governor's Report under article 356(1). The Governor's report should be a "speaking document", containing a precise and clear statement of all material facts and grounds, on the basis of which the President may satisfy himself, as to the existence or otherwise of the situation contemplated in Article 356.

8.21. Constitutional Amendments

8.21.1- Article 356 has been amended 10 times principally by way of amendment of Clause 356(4) and by substitution/omission of proviso to Article 356(5). These were basically procedural changes. Article 356, as amended by Constitution (44th Amendment) provides that a resolution with respect to the continuance in force of a proclamation for any period beyond one year from the date of issue of such proclamation shall not be passed by either House of Parliament unless two conditions are satisfied, viz:

(i) that a proclamation of Emergency is in operation in the whole of India or as the case may be, in the whole or any part of the State; and

(ii) that the Election Commission certifies that the continuance in force of the proclamation during the extended period is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.

8.21.2 The fulfillment of these two conditions together are a requirement precedent to the continuation of the proclamation. It could give rise to occasions for amendment of the Constitution from time to time merely for the purpose of this clause as happened in case of Punjab. Circumstances may arise where even without the proclamation of Emergency under Article 352, it may be difficult to hold general elections to the State Assembly. In such a situation continuation of President's Rule may become necessary. It may, therefore, be more practicable to decline the two conditions allowing for operation of each condition in its own specific circumstances for continuation of the President's Rule. This would allow for flexibility and save the Constitution from the need to amend it from time to time.

8.21.3. The Commission recommends that in Clause (5) of Article 356 of the Constitution, in Sub-clause (a) the word "and" occurring at the end should be substituted by "or" so that even without the State being under a proclamation of Emergency, President's rule may be continued if elections cannot be held.

8.21.4 Whenever a proclamation under Article 356 has been issued and approved by the Parliament it may become necessary to review the continuance in force of the proclamation and to restore the democratic processes earlier than the expiry of the stipulated period. The Commission are of the view that this could be secured by incorporating safeguards corresponding, in principal, to Clauses (7) and (8) of Article 352. The Commission, therefore, recommends that Clauses (6) and (7) under

Article 356 may be added on the following lines: "(6) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a proclamation issued under Clause (1) or a proclamation varying such proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such proclamation. (7) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for disapproving the continuance in force of, a proclamation issued under Clause (1) or a proclamation varying such proclamation:

(a) to the Speaker, if the House is in session; or

(b) to the President, if the House is not in session, a special sitting of the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution.

8.22- Dissolution of Assembly

8.22.1- When it is decided to issue a proclamation under Article 356(1), a matter for consideration that arises is whether the Legislative Assembly should also be dissolved or not. Article 356 does not explicitly provide for dissolution of the Assembly. One opinion is that if till expiry of two months from the Presidential Proclamation and on the approval received from both Houses of Parliament the Legislative Assembly is not dissolved, it would give rise to operational disharmony. Since the executive power of the Union or State is co-extensive with their legislative powers respectively, bicameral operations of the legislative and executive powers, both of the State Legislature and Parliament in List II of VII Schedule, is an anathema to the democratic principle and the constitutional scheme. However, the majority opinion in the Bommai judgment holds that the rationale of Clause (3) that every proclamation issued under Article 356 shall be laid before both Houses of Parliament and shall cease to operate at the expiry of two months unless before the expiration of that period it has been approved by resolutions passed by both Houses of Parliament, is to provide a salutary check on the executive power entrenching parliamentary supremacy over the executive.

8.22.2 The Commission having considered these two opinions in the background of repeated criticism of arbitrary use of Article 356 by the executive, is of the view that the check provided under Clause 3 of Article 356 would be ineffective by an irreversible decision before Parliament has had an opportunity to consider it. The power of dissolution has been inferred by reading Sub-clause (a) of Clause I of Article 356 along with Article 174 which empowers the Governor to dissolve Legislative Assembly. Having regard to the overall constitutional scheme it would be necessary to secure the exercise of consideration of the proclamation by the Parliament before the Assembly is dissolved.

8.22.3 The Commission, therefore, recommends that Article 356 should be amended to ensure that the State Legislative Assembly should not be dissolved either by the Governor or the President before the Proclamation issued under Article 356(1) has been laid before Parliament and it as had an opportunity to consider it.

228. It would also be appropriate to take note of very enlightening discussions in the Constituent Assembly which throw beacon light on the role of Governors, parameters of powers exercisable under Articles 174 and 356 of the Constitution.

229. **Constituent Assembly met on 1st June, 1949**

Article 143

(Amendment Nos. 2155 and 2156 were not moved)

H.V. Kamath (C.P. & Berar: General): Mr. President, Sir, I move:

That in Clause (1) of Article 143, the words 'except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion' be deleted.

If this amendment were accepted by the House, this clause of Article 143 would read thus:

There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the President in the exercise of his functions.

Sir, it appears from a reading of this clause that the Government of India Act of 1935 has been copied more or less blindly without mature consideration. There is no strong or valid reason for giving the Governor more authority either in his discretion or otherwise vis-a-vis his ministers, than has been given to the President in relation to his ministers. If we turn to Article 61(1), we find it reads as follows:

There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions.

When you, Sir, raised a very important issue, the other day, Dr. Ambedkar clarified this clause by saying that the President is bound to accept the advice of his ministers in the exercise of all of his functions. But here Article 143 vests certain discretionary powers in the Governor, and to me it seems that even as it was, it was bad enough, but now after having amended Article 131 regarding election of the Governor and accepted nominated Governors, it would be wrong in principle and contrary to the tenets and principles of constitutional Government, which you are going to build up in this country. It would be wrong I say, to invest a Governor with these additional powers, namely, discretionary powers. I feel that no departure from the principles of constitutional Government should be favoured except for reasons of emergency and these discretionary powers must be done away with. I hope this amendment of mine will commend itself to the House. I move, Sir.

Prof. K. T. Shah (Bihar: General) : Mr. President, I beg to move:

That in Clause (1) of Article 143, after the word 'head a comma be placed and the words 'who shall be responsible to the Governor and shall' be inserted and the word to' be deleted.

So, that the amended Article would read.

(1) There shall be a Council of Ministers with the Chief Minister at the head who shall be responsible to the Governor and shall aid and advise the Governor in the exercise of his functions...etc.

Sir, this is a logical consequence of the general principle of this Draft Constitution, namely, that the Government is to be upon the collective responsibility of the entire Cabinet to the legislature. At the same time, in the Cabinet the Prime Minister or the Chief Minister or by whatever title he is described would be the Principal Adviser and I would like to fix the responsibility definitely by the Constitution on the Chief Minister, the individual Ministers not being in the same position. Whatever may be the procedure or convention within the Cabinet itself, however the decisions of the Cabinet may be taken, so far as the Governor is concerned, I take it that the responsibility would be of the Chief Minister who will advise also about the appointment of his colleagues or their removal if it should be necessary. It is but in the fitness of things that he should be made directly responsible for any advice tendered to the Constitutional head of the State, namely, the Governor. As it is, in my opinion, a clear corollary from the principles we have so far accepted, I hope there would be no objection to this amendment.

(Amendments Nos. 2159 to 2163 were not moved.)

Mr. President: There is no other amendment. The Article and the amendments are open to discussion.

Shri T. T. Krishnamachari : Mr. President, I am afraid I will have to oppose the amendment moved by my honourable Friend Mr. Kamath, only for the reason that he has not understood the scope of the clearly and his amendment arises out of a misapprehension.

Sir, it is no doubt true, that certain words from this Article may be removed, namely, those which refer to the exercise by the Governor of his functions where he has to use his discretion irrespective of the advice tendered by his Ministers. Actually, I think this is more by way of a safeguard, because there are specific provisions in this Draft Constitution which occur subsequently where the Governor is empowered to act in his discretion irrespective of the advice tendered by his Council of Ministers. There are two ways of formulating the idea underlying it. One is to make a mention of this exception in this Article 143 and enumerating the specific power of the Governor where he can exercise his discretion in the s that occur subsequently, or to leave out any mention of this power here and only state is in the appropriate. The former method has been followed. Here the general proposition is stated that the Governor has normally to act on the advice of his Ministers except in so far as the exercise of his discretions covered by those in the Constitution in which he is specifically empowered to act in his discretion. So long as there are Articles occurring subsequently in the Constitution where he is asked to act in his discretion, which completely cover all cases of departure from the normal practice to which I see my honourable Friend Mr. Kamath has no objection, I may refer to Article 188, I see no harm in the provision in this Article being as it is. It happens that this House decides that in all the subsequent Articles, the discretionary power should not be there, as it may conceivably do, this particular provision will be of no use and will fall into desuetude. The point that my honourable Friend is trying to make, while he concedes that

the discretionary power of the Governor can be given under Article 188, seems to be pointless. If it is to be given in Article 188, there is no harm in the mention of it remaining here. No harm can arise by specific mention of this exception of Article 143. therefore, the serious objection that Mr. Kamath finds for mention of this exception is pointless. I therefore think that the Article had better be passed without any amendment. If it is necessary for the House either to limit the discretionary power of the Governor or completely do away with it, it could be done in the Articles that occur subsequently where specific mention is made without which this power that is mentioned here cannot at all be exercised. That is the point I would like to draw the attention of the House to and I think the Article had better be passed as it is.

Dr. P.S. Deshmukh (C. P. & Berar: General): Mr. President, Mr. T. T. Krishnamachari has clarified the position with regard to this exception which has been added to Clause (1) of Article 143. If the Governor is, in fact, going to have a discretionary power, then it is necessary that this clause which Mr. Kamath seeks to omit must remain.

Sir, Besides this, I do not know if the Drafting Committee has deliberately omitted or they are going to provide it at a later stage, and I would like to ask Dr. Ambedkar whether it is not necessary to provide for the Governor to preside at the meetings of the Council of Ministers. I do not find any provision here to this effect. Since this Article 143 is a mere reproduction of Section 50 of the Government of India Act, 1935, where this provision does exist that the Governor in his discretion may preside at the meetings of the Council of Minister, I think this power is very necessary. Otherwise, the Ministers may exclude the Governor from any meetings whatever and this power unless specifically provided for, would not be available to the Governor. I would like to draw the attention of the members of the Drafting Committee to this and to see if it is possible either to accept an amendment to Article 143 by leaving it over or by making this provision in some other part. I think this power of the Governor to preside over the meetings of the Cabinet is an essential one and ought to be provided for.

Shri Brajeshwar Prasad: Mr. President, Sir, the Article provides--

That there shall be a Council of Minister with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions.

Sir, I am not a constitutional lawyer but I feel that by the Provisions of this Article the Governor is not bound to act according to the advice tendered to him by his Council of Ministers. It only means that the Ministers have the right to tender advice to Governor. The Governor is quite free to accept or to reject the advice so tendered. In another sphere of administration the Governor can act in the exercise of his functions in his discretion. In this sphere the Ministry has not got the power to tender any advice. Of course it is left open to the Governor to seed the advice of the Ministers even in this sphere.

I feel that we have not taken into account the present facts of the situation. We have tried to copy and imitate the constitutions of the different countries of the world. The necessity of the hour requires that the Governor should be vested not only with the power to act in his discretion but also with the power to act in his individual judgment. I feel that the Governor should be vested with the power of special responsibilities which the Governor under the British regime were vested

in this country. I feel that there is a dearth of leadership in the provinces. Competent men are not available and there are all kinds of things going on in the various provinces. Unless the Governor is vested with large powers it will be difficult to effect any improvement in the Provincial administration. Such a procedure may be undemocratic but such a procedure will be perfectly right in the interest of the country. I feel there is no creative energy left in the middle class intelligentsia of this country. They seem to have become bereft of initiative and enterprise. The masses who ought to be the rulers of this land are down- trodden and exploited in all ways. Under these circumstances there is no way left open but for the Government of India to take the Provincial administrations in its own hands. I feel that we are on the threshold of a revolution in this country. There will be revolution, bloodshed and anarchy in this country. I feel that at this juncture it is necessary that all powers should remain centralised in the hands of the Government of India. In certain provinces the machinery of law and order seems to have completely broken down. Dacoities, arson, loot, murder and inflationary conditions are rampant. I am opposed to this Article, because I am convinced that federalism cannot succeed in a country which is passing through a transitory period. The national economy of America is fully developed. It can afford to have a federal form of Government. In a country where there is no room for expansion and for economic development, there is no necessity for a centralised economy. In India when our agriculture, industry, minerals etc. are in an incipient stage of development, it is necessary that power must be vested in the hands of the Government of India. Federalism was in vogue in the 19th century when the means of communications were undeveloped. The technical knowledge and resources at the disposal of Governments in ancient times were of a very meager character. Today the situation has completely changed. Means of communications have developed rapidly. Technical knowledge and the necessary personnel at the disposal of the Government of India are of such a wide character that it can undertake to perform all the functions which a modern Government is expected to perform. There is another reason why I am opposed to this Article. In this country there is no scope for federalism. All governments have become more or less unitary in character. If we are to escape political debacles, economic strangulation and military defeats on all fronts, then our leaders and statesmen must learn to think in unorthodox terms: otherwise there is no future for this country.

Pandit Hirday Kunzru: (United Provinces: General): Mr. President, I should like to ask Dr. Ambedkar whether it is necessary to retain after the words "that the Governor will be aided and advised by his Ministers", the words "except in regard to certain matter in respect of which he is to exercise his discretion". Supposing these words, which are reminiscent of the old Government of India Act and the old order, are omitted, what harm will be done? The functions of the Ministers legally will be only to aid and advice the Governor. The Article in which these words occur does not lay down that the Governor shall be guided by the advice of his Ministers but it is expected that in accordance with the Constitutional practice prevailing in all countries where responsible Government exists the Governor will in all matters accept the advice of his Ministers. This does not however mean that where the Statute clearly lays down that action in regard to specified matters may be taken by him on his own authority this Article 143 will stand in his way.

My Friend Mr. T. T. Krishnamachari said that as Article 188 of the Constitution empowered the Governor to disregard the advice of his Ministers and to take the administration of the province into his own hands, it was necessary that these words should be retained, i.e. the, discretionary power of the Governor should be retained. If however, he assured us, Article 188 was deleted later, the wording of Article 143 could be reconsidered. I fully understand this position and appreciate

it, but I should like the words that have been objected to by my Friend Mr. Kamath to be deleted. I do not personally think that any harm will be done if they are not retained and we can then consider not merely Article 188 but also Article 175 on their merits; but in spite of the assurance of Mr. Krishnamachari the retention of the words objected to does psychologically create the impression that the House is being asked by the Drafting Committee to commit itself in a way to a principle that it might be found undesirable to accept later on. I shall say nothing with regard to the merits of Article 188. I have already briefly expressed my own views regarding it and shall have an opportunity of discussing it fully later when that Article is considered by the House. But why should we, to being with, use a phraseology that it an unpleasant reminder of the old order and that makes us feel that though it may be possible later to reverse any decision that the House may come to now, it may for all practical purposes be regarded as an accomplished fact? I think Sir, for these reasons that it will be better to accept the amendment of my honourable Friend Mr. Kamath, and then to discuss Articles 157 and 188 on their merits.

I should like to say one word more before I close. If Article 143 is passed in its present form, it may give rise to misapprehensions of the kind that my honourable Friend Dr, Deshmukh seemed to be labouring under when he asked that a provision should be inserted entitling the Governor to preside over the meetings of the Council of Ministers. The Draft Constitution does not provide for this and I think wisely does not provide for this. It would be contrary to the traditions of responsible government as they have been established in Great British and the British Dominions, that the Governor or the Governor-General should, as a matter of right, preside over the meetings of his cabinet. All that the Draft Constitution does is to lay on the Chief Ministers the duty of informing the Governor of the decisions come to by the Council of Ministers in regard to administrative matter and the legislative programme of the government. In spite of this, we see that the Article 143, as it is worded, has created a misunderstanding in the mind of a member like Dr. Deshmukh who takes pains to follow every of the Constitution with care. This is an additional reason why the discretionary power of the Governor should not be referred to in Article 143. The speech of my friend Mr. Krishnamachari does not hold out the hope that the suggestion that I have made has any chance of being accepted. Nevertheless, I feel it my duty to say that the course proposed by Mr. Kamath is better than what the Drafting Sub-Committee seem to approve.

Prof. Shibban Lal Saksena (United Provinces: General): Mr. President, Sir, I heard very carefully the speech of my honourable Friend, Mr. krishnamachari, and his arguments for the retention of the words which Mr. Kamath wants to omit. If the Governor were an elected Governor, I could have understood that he should have these discretionary powers. But now we are having nominated Governors who will function during the pleasure of the President, and I do not think such persons should be given powers which are contemplated in Article 188.

Then, if Article 188 is yet to be discussed--and it may well be rejected--then it is not proper to give these powers in this Article beforehand. If Article 188 is passed, then we may reconsider this Article and add this clause if it is necessary. We must not anticipate that we shall pass Article 188, after all that has been said in the House about the powers of the Governor.

These words are a reminder of the humiliating past. I am afraid that if these words are retained, some Governor may try to imitate the Governors of the past and quote them as precedents, that this is how the Governor on such an occasion acted in his discretion. I think in our Constitution as

we are now framing it, these powers of the Governors are out of place; and no less a person than the honourable Pandit Govind Ballabh Pant had given notice of the amendment which Mr. Kamath has moved. I think the wisdom of Pandit Pant should be sufficient, guarantee that this amendment be accepted. It is just possible that Article 188 may not be passed by this House. If there is an emergency, the Premier of the province himself will come forward to request the Governor that an emergency should be declared, and the aid of the center should be obtained to meet the emergency. Why should the Governor declare an emergency over the head of the Premier of the Province? We should see that the Premier and the Governor of a Province are not at logger heads on such an occasion. A situation should not be allowed to arise when the Premier says that he must carry on the Government, and yet the Governor declares an emergency over his head and in spite of his protestations. This will make the Premier absolutely impotent. I think a mischievous Governor may even try to create such a situation if he so decides, or if the President wants him to do so in a province when a party opposite to that in power at the center is in power. I think Article 188, even if it is to be retained should be so modified that the emergency should be declared by the Governor on the advice of the Premier of the province. I suggest to Dr. Ambedkar that these words should not find a place in this Article, and as a consequential amendment, Sub-section (ii) of this Article should also be deleted.

Shri Mahavir Tyagi (United Provinces: General): Sir, I beg to differ from my honourable radical Friends Mr. Kamath and Prof. Shibban Lal Saksena, and I think the more powers are given to the provinces, the stiffer must be the guardianship and control of the center in the exercise of those powers. That is my view. We have now given up the center, and we are going to have nominated Governors. Those Governors are not to be there for nothing. After all, we have to see that the policy of the center is carried out. We have to keep the States linked together and the Governor is the Agent or rather he is the agency which will press for and guard the Central policy. In fact, our previous conception has now been changed altogether. The whole body politic of a country is affected and influenced by the policy of the center. Take for instance subjects like Defence involving questions of peace or war, of relationship with foreign countries; of our commercial relations, exports and imports. All these are subjects which affect the whole body politic, and the provinces cannot remain unaffected, they cannot be left free of the policy of the center. The policy which is evoked in the center should be followed by all the States, and if the Governors were to be in the hands of the provincial Ministers then there will be various policies in various provinces and the policy of each province shall be as unstable as the ministry. For there would be ministers of various types having different party labels and different programmes to follow. Their policies must differ from one another; it will therefore be all the more necessary that there must be coordination of programmes and policies between the States and the Central Government. The Governor being the agency of the center is the only guarantee to integrate the various Provinces or States. The Central Government also expresses itself through the provincial States; along with their own administration, they have also to function on behalf of the Central Government. A Governor shall act as the agency of the center and will see that the Central policy is sincerely carried out. therefore the Governor's discretionary powers should not be interfered with. Democratic trends are like a wild beast. Say what you will, democracy goes by the whims and fancies of parties and the masses. There must be some such machinery which will keep this wild beast under control. I do not deprecate democracy. Democracy must have its way. But do not let it degenerate into chaos. Moreover the State governments may not be quite consistent in their own policies. Governments may change after months or years; with them will change their policies. The Governors may

change too, but the policy and instructions given by the center to the Governors will remain practically unchanged. The more the powers given to the States the more vigilant must be the control. The Governor must remain as the guardian of the Central policy on the one side, and the Constitution on the other. His powers therefore should not be interfered with.

Shri B.M. Gupta (Bombay: General): Sir, I think the explanation given by my honourable Friend Mr. T. T. Krishnamachari Should be accepted by the House and the words concerning discretion of the Governor should be allowed to stand till we dispose of Article 175 and Article 188.

With regard to the suggestion made by the honourable Dr. Deshmukh about the power being given to the Governor to preside over the meetings of the cabinet I have to oppose it. He enquired whether the Drafting Committee intended to make that provision later on. I do not know the intentions of the Drafting Committee for the future but as far as the Draft before us is concerned I think the Drafting Committee has definitely rejected it.

I would invite the attention of the honourable House to Article 147 under which the Governor shall be entitled only to information. If we allow him to preside over the meetings of the Cabinet we would be departing from the position we want to give him, namely that of a constitutional head. If he presides over the meeting of the Cabinet be shall have an effective voice in shaping the decisions of the Cabinet in the entire field of administration, even in fields which are not reserved for his discretionary power. If certain powers have to be given to him, our endeavour should be to restrict them as far as possible, so that the Governor's position as a constitutional head may be maintained. therefore, Sir, I oppose the proposal of Dr. Deshmukh.

Shri Alladi Krishnaswami Ayyar (Madras: General): Sir, there is really no difference between those who oppose and those who approve the amendment. In the first place, the general principle is laid down in Article 143 namely, the principle of ministerial responsibility, that the Governor in the various spheres of executive activity should act on the advice of his ministers. Then the Article goes on to provide "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." So long as there are Articles in the Constitution which enable the Governor to act in his discretion and in certain circumstances, it may be, to over-ride the cabinet or to refer to the President, this Article as it is framed is perfectly in order. If later on the House comes to the conclusion that those Articles which enable the Governor to act in his discretion in specific cases should be deleted, it will be open to revise this Article. But so long as there are later Articles which permit the Governor to act in his discretion and not on ministerial responsibility, the Article as drafted is perfectly in order.

The only other question is whether first to make a provision in Article 143 that the Governor shall act on ministerial responsibility and then to go on providing "Notwithstanding anything contained in Article 143...he can do this" or "Notwithstanding anything contained in Article 143 he can act in his discretion." I should think it is a much better method of drafting to provide in Article 143 itself that the Governor shall always act on ministerial responsibility excepting in particular or specific cases where he is empowered to act in his discretion. If of course the House comes to the conclusion that in no case shall the Governor act in his discretion, that he shall in every case act only on ministerial responsibility, then there will be a consequential change in this Article. That is, after those Articles are considered and passed it will be quite open to the House to delete the

latter part of Article 143 as being consequential on the decision come to by the House on the later Articles. But, as it is, this is perfectly, in order and I do not think any change is warranted in the language of Article 143. It will be cumbrous to say at the opening of each "Notwithstanding anything contained in Article 143 the Governor can act on his own responsibility".

Shri H. V. Kamath: Sir, on a point of clarification, Sir, I know why it is that though emergency powers have been conferred on the President by the Constitution no less than on Governors, perhaps more so, discretionary power as such have not been vested in the President but only in Governors?

Pandit Thakur Das Bhargava (East Punjab: General): Sir, I beg to oppose the amendment of Mr. Kamath. Under Article 143 the Governor shall be aided in the exercise of his functions by a Council of Ministers. It is clear so far. I gave notice of an amendment which appears on the order paper as Article 142-A which I have not moved. In the amendment I have suggested that the Governor will be bound to accept the advice of his ministers on all matters except those which are under this Constitution required to be exercised by him in his discretion. My submission in that it is wrong to say that the Governor shall be a dummy or an automaton. As a matter of fact according to me the Governor shall exercise very wide powers and very significant powers too. If we look at Article 144 it says:

The Governor's ministers shall be appointed by him and shall hold office during his pleasure.

So he has the power to appoint his ministers. But when the ministers are not in existence who shall advise him in the discharge of his functions? When he dismisses his ministry then also he will exercise his functions under his own discretion.

Then again, when the Governor calls upon the leader of a party for the choice of ministers, after a previous ministry has been dissolved, in that case there will be no ministry in existence; and who will be there to advise him? therefore he will be exercising his functions in his discretion. It is wrong to assume that the Governor will not be charged with any functions which he will exercise in his discretion. Articles 175 and 188 are the other Articles which give him certain functions which he has to exercise in his discretion.

Under Article 144(4) there is a mention of the Instrument of Instructions which is given in the Fourth Schedule. The last paragraph of it runs thus:

The Governor shall do all that in him lies to maintain standards of good administration, to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in the public life and government of the state, and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religions beliefs and sentiments.

My submission is that according to me the Governor shall be a guide, philosopher and friend of the Ministry as well as the people in general, so that he will exercise certain functions some of which will be in the nature of unwritten conventions and some will be such as will be expressly conferred by this Constitutions. He will be a man above party and he will look at the Minister and

government from a detached standpoint. He will be able to influence the ministers and members of the legislature in such a manner that the administration will run smoothly. In fact to say that a person like him is merely a dummy, an automaton or a dignitary without powers is perfectly wrong. It is quite right that so far as our conception of a constitutional governor goes he will have to accept the advice of his ministers in many matters but there are many other matters in which the advice will neither be available nor will he be bound to accept that advice.

(underlined for emphasis)

Under Article 147 the Governor has power for calling for information and part (c) says: This will be the duty of the Chief Minister.

If the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

This is specifically a matter which is of great importance. The Governor is competent to ask the Chief Minister to place any matter before the Council of Ministers which one minister might have decided. When he calls for information he will be acting in the exercise of his discretion. He may call for any kind of information. With this power he will be able to control and restrain the ministry from doing irresponsible acts. In my opinion taking the Governor as he is conceived to be under the Constitution he will exercise very important functions and therefore it is very necessary to retain the words relating to his discretion in Article 143.

Shri H. V. Pataskar (Bombay: General): Sir, Article 143 is perfectly clear. With regard to the amendment of my honourable Friend Mr. Kamath various points were raised, whether the Governor is to be merely a figure- head, whether he is to be a constitutional head only or whether he is to have discretionary powers. To my mind the question should be looked at from and entirely different point of view. Article 143 merely relates to the functions of the ministers. It does not primarily relate to the power and functions of a Governor. It only says:

There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions.

Granting that we stop there, is it likely that any complications will arise or that it will interfere with the discretionary powers which are proposed to be given to the Governor? In my view Article 188 is probably necessary and I do not mean to suggest for a moment that the Governor's powers to act in an emergency which powers are given under Article 188, should not be there. My point is this, whether if this Provision, viz., "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion", is not there, is it going to affect the powers that are going to be given to him to act in his discretion under Article 188? I have carefully listened to my honourable Friend and respected constitutional lawyer. Mr. Alladi Krishnaswami Ayyer, but I was not able to follow why a provision like this is necessary. He said that instead later on, while considering Article 188, we might have to say "Notwithstanding anything contained in Article 143." In the first place to my mind it is not necessary. In the next place, even granting that it becomes necessary at a later stage to make provision on Article 188 by

saying "notwithstanding anything contained in Article 143", it looks so obnoxious to keep these words here and they are likely to enable certain people to create a sort of unnecessary and unwarranted prejudice against certain people. Article 143 primarily relates to the functions of the ministers. Why is it necessary at this stage to remind the ministers of the powers of the Governor and his functions, by telling them that they shall not give any aid or advice in so far as he, the Governor is required to act in his discretion? This is an Article which is intended to define the powers and functions of the Chief Minister. At that point to suggest this, looks like lacking in courtesy and politeness. therefore I think the question should be considered in that way. The question is not whether we are going to give discretionary power to the Governors or not. The question is not whether he is to be merely a figure-head or otherwise. These are question to be debated at their proper time and place. When we are considering Article 143 which defines the function of the Chief minister it looks so awkward and unnecessary to say in the same "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." Though I entirely agree that Article 188 is absolutely necessary I suggest that in this Article 143 these words are entirely unnecessary and should not be there. Looked at from a practical point of view this provision is misplaced and it is not courteous, nor polite, nor justified nor relevant. I therefore suggest that nothing would be lost by deleting these words. I do not know whether my suggestion would be acceptable but I think it is worth being considered from a higher point of view.

Shri Krishna Chandra Sharma (United Provinces: General): Sir, the position is that under Article 41 the executive powers of the Union are vested in the President and these may be exercised by him in accordance with the Constitution and the law. Now, the President of the Union is responsible for the maintenance of law and order and for good Government. The Cabinet of the State is responsible to the people through the majority in the Legislature. Now, what is the link between the President and the State? The link is the Governor. therefore through the Governor alone the President can discharge his functions for the good Government of the country. In abnormal circumstances it is the Governor who can have recourse to the emergency powers under Article 188. therefore the power to act in his discretion under Article 143 ipso facto follows and Article 188 is necessary and cannot be done away with. therefore certain emergency powers such as under Article 188 are necessary for the Governor to discharge his function of maintaining law and order and to carry on the orderly government of the State.

I wish to say word more with regard to Professor Shah's amendment that the Minister shall be responsible to the Governor. The Minister has a majority in the legislature and as such, through the majority, he is responsible to the people. If he is responsible to the Governor, as distinguished from his responsibility to the Legislature and through the legislature to the people of the State, then he can be overthrown by the majority in the legislature and he cannot maintain his position. He cannot hold the office. therefore it is an impossible proposition that a Minister could ever be responsible to the Governor as distinguished from his responsibility to the people through the majority in the legislature. He should therefore be responsible to the Legislature and the people and not to the President. That is the only way in which under the scheme in the Draft Constitution the government of the country can he carried on.

(underlined for emphasis)

Shri Rohini Kumar Chaudhari: (Assam: General): I rise to speak more in quest of clarification and enlightenment than out of any ambition to make a valuable contribution to this debate.

Sir, one point which largely influenced this House in accepting the Article which provided for having nominated Governors was that the Honourable Dr. Ambedkar was pleased to assure us that the Governor would be merely a symbol. I ask the honourable Dr. Ambedkar now, whether any person who has the right to act in his discretion can be said to be a mere symbol. I am told that this provision for nominated governorship was made on the model of the British Constitution. I would like to ask Dr. Ambedkar if His Majesty the king of English acts in his discretions in any matter. I am told--I may perhaps be wrong--that His Majesty has no discretion even in the matter of the selection of his bride. That is always done for him by the Prime Minister of England.

Sir, I know to my cost and to the cost of my Province what 'acting by the Governor in the exercise of his discretion' means. It was in the year 1942 that a Governor acting in his discretion selected his Ministry from a minority party and that minority was ultimately converted into a majority. I know also, and the House will remember too, that the exercise of his discretion by the Governor of the Province of Sindh led to the dismissal of one of the popular Ministers-- Mr. Allah Bux. Sir, if in spite of this experience of ours we are asked to clothe the Governors with the powers to act in the exercise of their discretion, I am afraid we are still living in the past which we all wanted to forget.

We have always thought that it is better to be governed by the will of the people than to be governed by the will of a single person who nominates the Governor who could act in his discretion. If this Governor is given the power to act in his discretion there is no power on earth to prevent him from doing so. He can be a veritable king Stork. Furthermore, as the Article says, whenever the Governor thinks that he is acting in his discretion nowhere can he be questioned. There may be a dispute between the Ministers and the Governor about the competence of the former to advise the Governor; the Governor's voice would prevail and the voice of the Ministers would count for nothing. Should we in this age countenance such a state of affairs? Should we take more then a minute to dismiss the idea of having a Governor acting in the exercise of his discretion? It may be said that this matter may be considered hereafter. But I feel that when once we agree to this provision, it would not take long for us to realise that we have made a mistake. Why should that be so? Is there any room for doubt in this matter? Is there any room for thinking that anyone in this country, not to speak of the members of the legislature, will ever countenance the idea of giving the power to the Governor nominated by a single person to act in the exercise of his discretion? I would submit, Sir, if my premise is correct, we should not waste a single moment in discarding the provisions which empower the Governor to act in his discretion.

(underlined for emphasis)

I also find in the last clause of this Article that the question as to what advice was given by a Minister should not be enquired into in any court. I only want to make myself clear on this point. There are two functions to be discharged by a Governor. In one case he has to act on the advice of the Minister and in the other case he has to act in the exercise of his discretion. Will the Ministry be competent to advise the Governor in matters where he can exercise his discretion? If I remember a right, in 1937 when there was a controversy over this matter whether Ministers would be

competent to advise the Governor in matters where the Governor could use his discretion, it was understood that Ministers would be competent to advise the Governor in the exercise of his discretion also and if the Governor did not accept their advice, the Ministers were at liberty to say what advice they gave. I do not know that is the intention at present. There may be cases where the Ministers are competent to give advice to the Governor but the Governor does not accept their advice and does something which is unpopular. A Governor who is nominated by the center can afford to be unpopular in the province where he is acting as Governor. He may be nervous about public opinion if he serves in his own province but he may not care about the public opinion in a province where he is only acting. Suppose a Governor, instead of acting on the advice of his Minister, acts in a different way. If the Minister are criticised for anything the Governor does on his own, and the Ministers want to prosecute a party for such criticism, would not the Ministers have the right to say that they advised the Governor to act in a certain way but that the Governor acted in a different way? Why should we not allow the Ministers the liberty to prosecute a paper, a scurrilous paper, a misinformed paper, which indulged in such criticism of the Ministers? Why should not the Ministers be allowed to say before a court what advice they gave to the Governor? I would say, Sir--and I may be excused for saying so-- that the best that can be said in favour of this Article is that it is a close limitation of a similar provision in the Government of India Act, 1935, which many Members of this House said, when it was published, that they would not touch even with a pair of tongs.

(underlined for emphasis)

The Honourable Dr. B. R. Ambedkar : Mr. President, Sir, I did not think that it would have been necessary for me to speak and take part in this debate after what my Friend, Mr. T. T. Krishnamachari, had said on this amendment of Mr. Kamath, but as my Friend, Pandit Kunzru, pointedly asked me the question and demanded a reply, I thought that out of courtesy I should say a few words. Sir, the main and the crucial question is, should the Governor have discretionary powers? It is that question which is the main and the principal question. After we come to some decision on this question, the other question whether the words used in the last part of Clause (1) of Article 143 should be retained in that Article or should be transferred somewhere else could be usefully considered. The first thing, therefore, that I propose to do so is to devote myself of this question which, as I said, is the crucial question. It has been said in the course of the debate that the retention of discretionary power in the Governor is contrary to responsible government in the provinces. It has also been said that the retention of discretionary power in the Governor smells of the Government of India Act, 1935, which in the main was undemocratic. Now, speaking for myself, I have no doubt in my mind that the retention on the vesting the Governor with certain discretionary powers is in no sense contrary to or in no sense a negation of responsible government. I do not wish to rake up the point because on this point I can very well satisfy the House by reference to the provisions in the Constitution of Canada and the Constitution of Australia. I do not think anybody in this House would dispute that the Canadian system of government is not a fully responsible system of government, nor will anybody in this House challenge that the Australian Government is not a responsible form of government. Having said that, I would like to read Section 55 of the Canadian Constitution.

Section 55. --Where a Bill passed by the House of Parliament is presented to the Governor- General for the Queen's assent, he shall, according to his discretion, and subject to the provisions of this

Act, either assent thereto in the Queen's name, or withhold the Queen's assent or reserve the Bill for the signification of the Queen's pleasure.

(underlined for emphasis)

Pandit Hirday Nath Kunzru: May I ask Dr. Ambedkar when the British North America Act was passed?

The Honourable Dr. B. R. Ambedkar : That does not matter at all. The date of the Act does not matter.

Shri H. V. Kamath: Nearly a century ago.

The Honourable Dr. B.R. Ambedkar : This is my reply. The Canadians and the Australians have not found it necessary to delete this provision even at this stage. They are quite satisfied that the retention of this provision in Section 55 of the Canadian Act is fully compatible with responsible government. If they had left that this provision was not compatible with responsible government, they have even today, as Dominions, the fullest right to abrogate this provision. They have not done so. therefore in reply to Pandit Kunzru I can very well say that the Canadians and the Australians do not think such a provision is an infringement of responsible government.

Shri Lokanath Misra (Orissa : General): On a point of order, Sir, are we going to have the status of Canada or Australia? Or are, we going to have a Republic Constitution?

The Honourable Dr. B. R. Ambedkar : I could not follow what he said. If, as I hope, the House is satisfied that the existence of a provision vesting a certain amount of discretion in the Governor is not incompatible or inconsistent with responsible government, there can be no dispute that the retention of this clause is desirable and, in my judgment, necessary. The only question that arises is....

Pandit Hirday Nath Kunzru : Well, Dr. Ambedkar has missed the point of the criticism altogether. The criticism is not that in Article 175 some powers might not be given to the Governor, the criticism is against vesting the Governor with certain discretionary powers of a general nature in the Article under discussion.

The Honourable Dr. B. R. Ambedkar: I think he has misread the Article. I am sorry I do not have the Draft Constitution with me. "Except in so far as he is by or under this Constitution," those are the words. If the words were "except whenever he thinks that he should exercise this power of discretion against the wishes or against the advice of the ministers", then I think the criticism made by my honourable Friend Pandit Kunzru would have been valid. The clause is a very limited clause; it says: "except in so far as he is by or under this Constitution". therefore, Article 143 will have to be read in conjunction with such other Articles which specifically reserve the power to the Governor. It is not a general clause giving the Governor power to disregard the advice of his ministers in any matter in which he finds he ought to disregard. There, I think, lies the fallacy of the argument of my honourable Friend, Pandit Kunzru.

therefore, as I said, having stated that there is nothing incompatible with the retention of the discretionary power in the Governor in specified cases with the system of responsible Government, the only question that arises is, how should we provide for the mention of this discretionary power? It seems to me that there are three ways by which this could be done. One way is to omit the words from Article 143 as my honourable Friend, Pandit Kunzru, and others desire and to add to such Articles as 175, or 188 or such other provisions which the House may hereafter introduce, vesting the Governor with the discretionary power, saying notwithstanding Article 143, the Governor shall have this or that power. The other way would be to say in Article 143, "that except as provided in Articles so and so specifically mentioned-Article 175, 188, 200 or whatever they are". But the point I am trying to submit to the House is that the House cannot escape from mentioning in some manner that the Governor shall have discretion.

Now the matter which seems to find some kind of favour with my honourable Friend, Pandit Kunzru and those who have spoken in the same way is that the words should be omitted from here and should be transferred somewhere else or that the specific Articles should be mentioned in Article 143. It seems to me that this is a mere method of drafting. There is no question of substance and no question of principle. I personally myself would be quite willing to amend the last portion of Clause (1) of Article 143 if I knew at this stage what are the provisions that this Constituent Assembly proposes to make with regard to the vesting of the Governor with discretionary power. My difficulty is that we have not as yet come either to Articles 175 or 188 nor have we exhausted all the possibilities of other provisions being made, vesting the Governor with discretionary power. If I knew that, I would very readily agree to amend Article 143 and to mention the specific, but that cannot be done now. therefore, my submission is that no wrong could be done if the words as they stand in Article 143 remains as they are. They are certainly not inconsistent.

Shri H. V. Kamath: Is there no material difference between Article 61(1) relating to the President vis-a-vis his ministers and this ?

The Honourable Dr. B. R. Ambedkar : Of course there is because we do not want to vest the President with any discretionary power. Because the provincial Governments are required to work in subordination to the Central Government, and therefore, in order to see that they do act in subordination to the Central Government the Governor will reserve certain things in order to give the President the opportunity to see that the rules under which the provincial Governments are supposed to act according to the Constitution or in subordination to the Central Government are observed.

Shri H. V. Kamath: Will it not be better to specify certain Articles in the Constitution with regard to discretionary power, instead of conferring general discretionary powers like this?

The Honourable Dr. B. R. Ambedkar : I said so, that I would very readily do it. I am prepared to introduce specific Articles, if I knew what are the Articles which the House is going to incorporate in the Constitution regarding vesting of the discretionary powers in the Governor.

Shri H. V. Kamath: Why not hold it over?

The Honourable Dr. B. R. Ambedkar : We can revise. This House is perfectly competent to revise Article 143. If after going through the whole of it, the House feels that the better way would be to mention the Articles specifically, it can do so. It is purely a logomachy.

Shri H. V. Kamath: Why go backwards and forwards?

Mr. President: The question is:

That in Clause (1) of Article 143, the words 'except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion be deleted."

The amendment was negatived.

Mr. President: The question is:

That in Clause (1) of Article 143, after the word 'head' a comma be placed and the words 'who shall be responsible to the Governor and shall' be inserted and the word 'to' be deleted.

The amendment was negatived.

Mr. President: The question is:

That Article 143 stand part of the Constitution.

The motion was adopted.

Article 143 was added to the Constitution.

230. **Constituent Assembly met on 2nd June, 1949**

ARTICLE 153

Mr. President: Article 153 is for the consideration of the House.

With regard to the very first amendment, No. 2321, as we had a similar amendment with regard to Article 69 which was discussed at great length the other day, does Professor Shah wish to move it?

Prof. K. T. Shah: If I am in order I would like to move it. But if you rule it out, it cannot be moved.

Mr. President: It is not a question of ruling it out. If it is moved, there will be a repetition of the argument once put forward.

Prof. K. T. Shah: I agree that this is a similar amendment, but not identical.

Mr. President: I have not said it is identical.

Prof. K. T. Shah: All right. I do not move it, Sir.

Mr. President: Amendment Nos. 2322, 2323, 2324, 2325 and 2326 are not moved, as they are verbal amendments.

Prof. K. T. Shah: As my amendment No. 2327 is part of the amendment not moved, I do not move it.

Mr. President: Then amendments Nos. 2328, 2329 and 2330 also go. Amendment No. 2331 is not moved.

Mr. Mohd. Tahir (Bihar: Muslim): Mr. President, I move:

That at the end of Sub-clause (c) of Clause (2) of Article 153, the words 'if the Governor is satisfied that the administration is failing and the ministry has become unstable' be inserted.

In this clause certain powers have been given to the Governor to summon, prorogue or dissolve the Legislative Assembly. Now I want that some reasons may be enumerated which necessitate the dissolution of a House. I find that to Clause (3) of Article 153 there is an amendment of Dr. Ambedkar in which he wants to omit the clause which runs thus: "(3) the functions of the Governor under Sub-clause (a) and (c) of Clause (2) of this Article shall be exercised by him in his discretion." I, on the other hand, want that some reasons should be given for the dissolution. Nowhere in the Constitution are we enumerating the conditions and circumstances under which the House can be dissolved. If we do not put any condition, there might be difficulties. Supposing in some province there is a party in power with whose views the some reasons to dissolve the Assembly and make arrangements for fresh elections. If such things happen there will be no justification for a dissolution of the House. Simply because a Governor does not subscribe to the views of the majority party the Assembly should not be dissolved. To avoid such difficulties I think it is necessary that some conditions and circumstances should be enumerated in the Constitution under which alone the Governor can dissolve the House. There should be no other reason for dissolution of the House except mal-administration or instability of the Ministry and its unfitness to work. therefore this matter should be considered and we should provide for certain conditions and circumstances under which the Governor can dissolve the House.

(underlined for emphasis)

Mr. President: The next amendment, No. 2333, is not moved. Dr. Ambedkar may move amendment No. 2334.

The Honourable Dr.B.R. Ambedkar: Sir, I move:

That Clause (3) of Article 153 be omitted.

This clause is apparently inconsistent with the scheme for a Constitutional Governor. Mr. President: Amendment No. 2335 is the same as the amendment just moved. Amendment No. 2336 is not moved.

Shri H.V. Kamath: Mr. President, Sir, may I have your leave to touch upon the meaning or interpretation of the amendment that has just been moved by my learned Friend, Dr. Ambedkar? If this amendment is accepted by the House it would do away with the discretionary powers given to the Governor. There is, however, Sub-clause (b). Am I to understand that so far as proroguing of the House is concerned, the Governor acts in consultation with the Chief Minister or the Cabinet and therefore no reference to it is necessary in Clause (3)?

Mr. President: He wants Clause (3) to be deleted.

Shri H.V. Kamath: In Clause (3) there is references to Sub-clauses (a) and (c). I put (a) and (b) on a par with each other. The Governor can summon the Houses or either House to meet at such time and place as he thinks fit. Then I do not know why the act of prorogation should be on a different level.

Mr. President: That is exactly what is not being done now. All the three are being put on a par.

Shri H. V. Kamath: Then I would like to refer to another aspect of this deletion. That is the point which you were good enough to raise in this House the other day, that is to say, that the President of the Union shall have a Council of Ministers to aid and advise him in the exercise of his functions.

The corresponding Article here is 143:

There shall be a Council of Minister with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions....

Sir, as you pointed out in connection with an Article relating to the President vis-a-vis his Council of Ministers, is there any provision in the Constitution which binds the Governor to accept or to follow always the advice tendered to him by his Council of Ministers? Power is being conferred upon him under this Article to dissolve the Legislative Assembly. This is a fairly serious matter in all democracies. There have been instances in various democracies, even in our own provinces sometimes, when a Cabinet seeking to gain time against a motion of censure being brought against them, have sought the Governor's aid, in getting the Assembly prorogued. This of course is not so serious as dissolution of the Legislative Assembly. Here the Article blindly says, "subject to the provisions of this Article." As regards Clause (1) of the Article, I am glad that our Parliament and our other Legislatures would meet more often and for longer periods. I hope that will be considered and will be given effect to at the appropriate time. Clause (2) of this Article is important because it deals with the dissolution of the Assembly by the Governor of a State and in view of the fact that there is no specific provision-of course it may be understood and reading between the lines Dr. Ambedkar might say that the substance of it is there, but we have not yet decided even to do away with the discretionary powers of the Governor to accept the advice tendered to him by his Council of Ministers, there is a lacuna in the Constitution. Notwithstanding this, we are conferring upon him the power to dissolve the Legislative Assembly, without even mentioning that he should consult or be guided by the advice of his Ministers in this regard. I am constrained to say that this power which we are conferring upon the Governor will be out of tune with the new set-up that we are going to create in the country unless we bind the Governor to accept the advice tendered to

him by his Minister. I hope that this Article will be held over and the Drafting Committee will bring forward another motion later on revising or altering this Article in a suitable manner.

Shri Gopal Narain (United Provinces: General): Mr. President, Sir, before speaking on this, I wish to lodge a complaint and seek redress from you. I am one of those who have attended all the meetings of this Assembly and sit from beginning to the end, but my patience has been exhausted now. I find that there are a few honourable Members of this House who have monopolised all the debates, who must speak on every Article, on every amendment and every amendment to amendment. I know, Sir, that you have your own limitations and you cannot stop them under the rules, though I see from your face that also feel sometimes bored, but you cannot stop them. I suggest to you, Sir, that some time-limit may be imposed upon some Members. They should not be allowed to speak for more than two or three minutes. So far as this Article is concerned, it has already taken fifteen minutes, though there is nothing new in it, and it only provides discretionary powers to the Governor. Still a Member comes and oppose it. I seek redress from you, but if you cannot do this, then you must allow us at least to sleep in our seats or do something else than sit in this House. Sir, I support this Article.

Mr. President: I am afraid I am helpless in this matter. I leave it to the good sense of the Members.

Shri Brajeshwar Prasad: (Rose to speak).

Mr. President: Do you wish to speak after this? (Laughter).

The Honourable Dr. B.R. Ambedkar: I do not think I need reply. This matter has been debated quite often.

Mr. President: Then I will put the amendments to vote.

The question is:

That at the end of Sub-clause (c) of Clause (2) of Article 153, the words `if the Governor is satisfied that the administration is failing and the ministry has become unstable' be inserted.

The amendment was negatived.

Mr. President: The question is:

That Clause (3) of Article 153 be omitted.

The amendment was adopted.

Mr. President: The question is:

That Article 153, as amended, stand part of the Constitution.

The motion was adopted.

Article 153, as amended, was added to the Constitution

231. **Constituent Assembly met on 3rd August, 1949**

Article 278. Provisions in case of Failure of Constitutional machinery in States.

x x x

Pandit Hirday Nath Kunzru (United Provinces: General): Mr. President, I am really very glad that the framers of the Constitution have at last accepted the view that Article 188 should not find a place in our Constitution. That Article was inconsistent with the establishment of responsible Government in the provinces and the new position of the Governor. It is satisfactory that this has at last been recognised and that the Governor is not going to be invested with the power that Article 188 proposed to confer on him. It is, however, now proposed to achieve the purpose of Article 188 and the old Article 278 by a revision of Article 278. We have today to direct our attention not merely to Articles 278 and 278-A, but also to Article 277-A. This Article lays down that it will be the duty of the Union to ensure that the provincial constitutions are being worked in a proper way makes a considerable addition to the powers that the Central Government will enjoy to protect a State against external aggression or internal disturbance. I think, Sir, that it will be desirable in this connection to consider Articles 275 and 276, for their provisions have vital bearing on the s that have been placed before us. Article 275 says that, when the President is satisfied that a grave emergency exists threatening the security of India or of any part of India, then he may make a declaration to that effect. Such a declaration will cease to operate at the end of two months, unless before the expiry of this period, it has been approved by resolutions passed by both Houses of Parliament. If it is so approved, then, the declaration of emergency may remain in force indefinitely, that is, so long as the Executive desires it to remain in force, or so long as Parliament allows it to remain in force. So long as the Proclamation operates, under Article 276, the Central Government will be empowered to issue directions to the government of any province as regards the manner in which its executive authority should be exercised and the Central Parliament will be empowered to make laws with regard to any matter even though it may not be included in the Union List. It will thus have the power of passing laws on subjects included in the State List. Further, the Central Legislature will be able to confer powers and impose duties on the officers and authorities of the Government of India in regard to any matter in respect of which it is competent to pass legislation. Now the effect of these two Articles is to enable the Central Government to intervene when owing to external or internal causes the peace and tranquility of India or any part of it is threatened. Further, if misgovernment in a province creates so much dissatisfaction as to endanger the public peace, the Government of India will have sufficient power, under these Articles to deal with the situation. What more is needed then in order to enable the Central Government to see that the government of a province is carried on in a proper manner. It is obvious that the framers of the Constitution are thinking not of the peace and tranquility of the country, of the maintenance of law and order but of good government in provinces. They will intervene not merely to protect provinces against external aggression and internal disturbances but also to ensure good government within their limits. In other words, the Central Government will have the power to intervene to protect the electors against themselves. If there is mismanagement or inefficiency or corruption in a province, I take it that under Articles 277, 278 and 278-A taken together the Central Government will have the power. I do not use the word 'President' because he

will be guided by the advice of his Ministers to take the government of that province into its own hands. My honourable Friend, Mr. Santhanam gave some instances in order to show how a breakdown might occur in a province even when there was no external aggression, no war and no internal disturbance. He gave one very unfortunate illustration to explain his point. He asked us to suppose that a number of factions existed in a province which prevented the government of that province from being carried on in accordance with the provisions of this Act i.e., I suppose efficiently. He placed before us his view that in such a case a dissolution of the provincial legislature should take place so that it might be found out whether the electors were capable of applying a proper remedy to the situation. If, however, in the new legislature the old factions-I suppose by factions he meant parties-re-appeared, then the Central Government in his opinion would be justified in taking over the administration of the province. Sir, if there is a multiplicity of parties in any province we may not welcome it, but is that fact by itself sufficient to warrant the Central Government's Interference in provincial administration? There are many parties in some countries making ministries unstable. Yet the Governments of those countries are carried on without any danger to their security or existence. It may be a matter of regret if too many parties exist in a province and they are not able to work together or arrive at an agreement on important matters in the interests of their province; but however regrettable this may be, it will not justify in my opinion, the Central Government in intervening and making itself jointly with Parliament responsible for the government of the province concerned. As I have already said, if mismanagement in a province takes place to such an extent as to create a grave situation in India or in any part of it, then the Central Government will have the right to intervene under Articles 275 and 276. Is it right to go further than this? We hear serious complaints against the governments of many provinces at present, but it has not been suggested so far that it will be in the ultimate interests of the country and the provinces concerned that the Central Government should set aside the provincial governments and practically administer the provinces concerned, as if they were Centrally administered areas. It may be said, Sir, that the provincial governments at present have the right to intervene when a municipality or District Board is guilty of gross and persistent mal-administration, but a municipality or a District Board is too small to be compared for a moment in any respect with a province. The very size of a province and the number of electors in it place it on a footing of its own. If responsible government is to be maintained, then the electors must be made to feel that the power to apply the proper remedy when misgovernment occurs rests with them. They should know that it depends upon them to choose new representatives who will be more capable of acting in accordance with their best interests. If the Central Government and Parliament are given the power that Articles 277, 278 and 278-A read together propose to confer on them, there is a serious danger that whenever there is dissatisfaction in a province with its government, appeals will be made to the Central Government to come to its rescue. The provincial electors will be able to throw their responsibility on the shoulders of the Central Government. Is it right that such a tendency should be encouraged? Responsible Government is the most difficult form of government. It requires patience, and it requires the courage to take risks. If we have neither the patience nor the courage that is needed, our Constitution will virtually be still- born. I think, therefore, Sir, that the Articles that we are discussing are not needed. Articles 275 and 276 give the Central Executive and Parliament all the power that can reasonably be conferred on them in order to enable them to see that law and order do not break down in the country, or that misgovernment in any part of India is not carried to such lengths as to jeopardise the maintenance of law and order. It is not necessary to go any further. The excessive caution that the framers of the Constitution seem to be desirous of exercising will, in my opinion, be inconsistent with the

spirit of the Constitution, and be detrimental, gravel detrimental, to the growth of a sense of responsibility among the provincial electors.

Before concluding, Sir, I should like to draw the attention of the House to the Government of India Act, 1935 as adopted by the India (Provisional Constitution) Order, 1947. Section 93 which formed an important part of this Act as originally passed, has been omitted from the Act as adopted in 1947, and I suppose it was omitted because it was thought to be inconsistent with the new order of things. My honourable Friend Mr. Santhanam said that in the Government of India Act, 1935, the Governor who was allowed to act in his discretion would not have been responsible to any authority. That, I think, is a mistake I may point out that the Governor, in respect of all powers that he could exercise in his discretion, was subject to the authority of the Governor-General and through him and the Secretary of State for India, to the British Parliament. The only difference now is that our executive, instead of being responsible to an electorate 5,000 miles away, will be responsible to the Indian electors. This is an important fact that must be clearly recognised, but I do not think that the lapse of two years since the adapted Government of India Act, 1935, came into force, warrants the acceptance of the Articles now before us. The purpose of Section 93 was political. Its object was to see that the Constitution was not used in such away as to compel the British Government to part with more power than it was prepared to give to the people of India. No such antagonism between the people and the Government of India can exist in future. Whatever differences there may be, will arise in regard to administrative or financial or economic questions. Suppose a province in respect of economic problems, takes a more radical line than the Government of India would approve. I think this will be no reason for the interference of the Government of India.

Shri T. T. Krishnamachari (Madras: General): What happens if the provincial government deliberately refuses to obey the provisions of the Constitution and impedes the Central Government taking action under Article 275 and 276?

Pandit Hirday Nath Kunzru: No province can do it. It cannot because it would be totally illegal. But if such a situation arises the Central Government will have sufficient power under Articles 275 and 276 to intervene at once. It will have adequate power to take any action that it likes. It can ask its own officers to take certain duties on themselves and if those officers are impeded in the discharge, of their duties, or, if force is used against them-to take an extreme case-the Central Government will be able to meet such a challenge effectively, without our accepting the Articles now before us. I should like the House to consider the point raised by my honourable Friend Mr. Krishnamachari very carefully. I have thought over such a situation in my own mind, over and over again, and every time I have come to the conclusion that Articles 275 and 276 will enable the Government of India to meet effectively such a manifestation oil recalcitrance, such a rebellious attitude as that supposed by Mr. Krishnamachari. In such a grave situation, the Government of India will have the power to take effective action under Articles 275 and 276. What need is there then for the Articles that have been placed before us?

Sir, one of the speakers said that we should not be legalistic. Nobody has discussed the Articles moved by Dr. Ambedkar in a legalistic spirit. I certainly have not discussed it in a narrow, legal way. I am considering the question from a broad political point of view from the point of view of the best interests of the country and the realization by provincial electors of the important fact that

they and they alone are responsible for the government of their province. They must understand that it rests with them to decide how it should be carried on.

Sir, even if the framers of the Constitution are not satisfied with the arguments that I have put forward and want that the Central Government should have more power than that given to it by Articles 275 and 276, I should ask them to pause and consider whether there was not a better way of approaching this question for the time being. In view of the discussions that have taken place in this House and outside, it seems to me that there is a respectable body of opinion in favour of not making the Constitution rigid, that is, there are many people who desire that for some time to come amendments to the Constitution should be allowed to be made in the same way as those of ordinary laws are. I think that the Prime Minister in a speech that he made here some months ago expressed the same view. If this idea is accepted by the House, if say for five years the Constitution can be amended in the same way as an ordinary law, then we shall have sufficient time to see how the Provinces develop and how their government is carried on. If experience shows that the position is so unfortunate as to require that the Central Government should make itself responsible not merely for the safety of every Province but also for its good government, then you can come forward with every justification for an amendment of the Constitution. But I do not see that there is any reason why the House should agree to the Articles placed before us today by Dr. Ambedkar.

Sir, I oppose these Articles.

Shri L. Krishnaswami Bharathi (Madras: General): Sir, I felt impelled by a sense of duty to place a certain point of view before the House, or else I would not have come before the mike. I feel the need for a brief speech. I accord my wholehearted support to the new Articles moved by Dr. Ambedkar, but I am not at all convinced of the wisdom of the Drafting Committee in deleting Article 188. It is this point of view which I want to emphasise.

Sir, that Article has a history behind it. There was a full-dress debate on it for two days when eminent Premiers participated in it. We must understand what Article 188 is for. It is not for normal conditions. It is in a state of grave emergency that a Governor was, under this Article, invested with some powers. I may remind the House of the debate where it was Mr. Munshi's amendment which ultimately formed part of Article 188. In moving the amendment Dr. Ambedkar said that no useful purpose would be served by allowing the Governor to suspend the Constitution and that the President must come into the picture even earlier. Article 188 provides for such a possibility. It merely says that when the Governor is satisfied that there is such a grave menace to peace and tranquility he can suspend the Constitution. It is totally wrong to imagine that he was given the power to suspend the Constitution for a duration of two weeks. Clause (3) provides that it is his duty to forthwith communicate his Proclamation to the President and the President will become seized of the matter under Article 188. That is an important point which seems lost sight of. The Governor has to immediately communicate his Proclamation. The Article was necessitated because it was convincingly put forward by certain Premiers. There may be a possibility that it is not at all possible to contact the President. Do you rule out the possibility of a state of inability to contact the Central Government? Time is of the essence of the matter. By the time you contact and get the permission, many things would have happened and the delay would have defeated the very purpose before us. The, honourable Mr. Kher said that it is not necessary to keep this Article because we have all sorts of communications available. In Bombay I know of instances where we

have not been able to contact the Governor for not less than twenty-four hours What is the provision under Article 278? The Governor of Madras says there is a danger to peace and tranquility. Assuming for a moment that the communications are all right, the President cannot act. He has to convene the Cabinet; the members of the Cabinet may not be readily available; and by the time he convenes the Cabinet and gets their consent the purpose of the Article would be defeated. therefore, it was only with a view to see in such a contingency where the Governor finds, that delay will defeat the very objective, that Article 188 was provided for. I see no reason why the Drafting Committee in their wisdom ruled out such a possibility. It is no doubt true that the Article was framed two years ago, but since those two years many things have happened that show that there is urgent need for the man on the spot to decide and act quickly so that a catastrophe may be prevented. Today there is an open defiance of authority everywhere and that defiance is well- organised. Before the act, they cut off the telephone wires, as they did in the Calcutta Exchange. That is what is happening in many parts of the country. therefore, when there is a coup d'etat it is just possible they will cut off communications and difficulties may arise. It is only to provide for this possibility that the Governor is given these powers. I do not think there will be any fool of a Governor who will, if there is time, fail to inform the President. I would like to have an explanation as to why this fool-proof arrangement has been changed and why we have become suspicious that the Governor will act in a wrong manner. According to the provision, he has to forthwith communicate to the President and the President may say, "Well, I am not convinced; cancel it." You must take into consideration that the Governor will be responsible, acting wisely and in order to save the country from disaster. The President comes into the picture directly, because the Governor has to communicate the matter forthwith according to Clause (3) of Article 188. As Mr. President said, it is sheer commonsense that the man on the spot should be given the powers to deal with the situation, so that it may not deteriorate. I am not at all convinced of the wisdom of the change. The provision as now proposed is not as fool-proof as it ought to be.

(underlined for emphasis)

Besides, I would like to have an explanation as to why the Drafting Committee goes out of the way to delete the provision which was considered and accepted by the House previously. In my view it is improper, because the House had decided it. If we appoint a Drafting Committee, we direct them to draft on the basis of the decisions taken by us. Is this the way in which they should draft? Their duty was to scrutinise the decisions already arrived at and then draft on that basis. therefore, I would like to have an explanation ----a convincing explanation---as to what happened within these two years which has made the members of the Drafting Committee delete this wholesome, healthy and useful provision.

Mr. Naziruddin Ahmad: Mr. President, Sir, I think that the amendments moved by Dr. Ambedkar constitute startling and revolutionary changes in the Constitution. I submit a radical departure has been made from our own decisions. We took important decisions in this House as to the principles of the Constitution and we adopted certain definite principles and Resolutions and the Draft Constitution was prepared in accordance with them. Now, everything has to be given up. Not only the Draft Constitution has been given up, but the official amendments which were submitted by Members of the House within the prescribed period which are printed in the official blue book have also been given up. During the last recess some additional amendments to those amendments were printed and circulated. Those have also been given up. I beg to point out that all the

amendments and amendments to amendments which have been moved today are to be found for the first time only on the amendment lists for this week which have been circulated only within a day or two from today. So serious and radical changes should not have been introduced at the last minute when there is not sufficient time for slow people like us to see what is happening and whether these changes really fit in with our original decisions and with other parts of the Constitution as a whole. I submit that the Drafting Committee has been drifting from our original decisions, from the Draft Constitution and from our original amendments. It would perhaps be more fitting to call the Drafting Committee "the Drifting Committee". I submit that the deletion of Article 188 is a very important and serious departure from principles which the House solemnly accepted before. Some honourable Members who usually take the business of the House seriously have attempted to support these changes on the ground that some emergency powers are highly necessary. I agree with them that emergency powers are necessary and I also agree that serious forces of disorder are working in a systematic manner in the country and drastic powers are necessary. But what I fail to appreciate is the attempt to take away the normal power of the Governor or the Ruler of a State to intervene and pass emergency orders. It is that which is the most serious change. In fact, originally the Governor was to be elected on adult suffrage of the province, but now we have made a serious departure that the Governor is now to be appointed by the President. This is the first blow to Provincial Autonomy. Again, we have deprived the Upper Houses in the States of real powers; not merely have we taken away all effective powers from Upper Houses in the Provinces, but also made it impossible for them to function properly and effectively. We are now going to take away the right of the Ministers of a State and the Members of the Legislatures and especially the people at large from solving their own problems. As soon as we deprive the Governor or a Ruler of his right to interfere in grave emergencies, at once we deprive the elected representatives and the Ministers from having any say in the matter. As soon as the right to initiate emergency measures is vested exclusively in the President, from that moment you absolve the Ministers and Members of the local legislatures entirely from any responsibility. The effect of this would mean that their moral strength and moral responsibility will be seriously undermined. It is the aspect of the problem to which I wish to draw the attention of the House.

(underlined for emphasis)

This aspect of the matter, I submit, has not received sufficient or adequate consideration in this House. If there is trouble in a State, the initial responsibility for quelling it must rest with the Ministers. If they fail, then the right to initiate emergency measures must lie initially with the Governor or the Ruler. If you do not allow this, the result would be that the local legislature and the Ministers would have responsibility of maintaining law and order without any powers. That would easily and inevitably develop a kind of irresponsibility. Any outside interference with the right of a State to give and ensure their own good Government will not only receive no sympathy from the Ministers and the members, but the action of the President will be jeered at, tabooed and boycotted by the people of the State, the Members of the Legislature and the Ministers themselves.

x x x

Pandit Thakur Das Bhargava : I think the constitutional machinery cannot be regarded ordinarily to have failed unless the dissolution powers are exercised by the Governor under Section 153.

x x x

I think we are drifting, perhaps unconsciously, towards a dictatorship. Democracy will flourish only in a democratic atmosphere and under democratic conditions. Let people commit mistakes and learn by experience. Experience is a great tutor. The arguments to the contrary which we have heard today were the old discarded arguments of the British bureaucracy. The British said that they must have overriding powers, that we cannot manage our affairs and that they only knew how to manage our affairs. They said also that if we mismanaged things they will supersede the constitution and do what they thought fit. What has been our reply to this? It was that "Unless you make us responsible for our acts, we can never learn the business of government. If we mismanage the great constitutional machinery, we must be made responsible for our acts. We must be given the opportunity to remedy the defects". This argument of ours is being forgotten. The old British argument that they must intervene in petty Provincial matters is again being revived and adopted by the very opponents of that argument. In fact, very respected Members of this House are adopting almost unconsciously the old argument of the British Government. I submit that even the hated British did not go so far as we do. I submit our reply to that will be the same as our respected leaders gave to the British Government. I submit, therefore, that too much interference by the center will create unpleasant reactions in the States. If you abolish provincial autonomy altogether that would be logical. But to make them responsible while making them powerless would be not a proper thing to do.

(underlined for emphasis)

Then I come to the proviso to Clause (1) of Article 278. It safeguards against the rights of the High Court in dealing with matters within their special jurisdiction. A Proclamation of emergency will not deprive the High Court of its jurisdiction. That is the effect of this proviso. But it conveniently forgets the existence of the Supreme Court. While it takes care to guarantee the rights of the High Courts against the Proclamation, the rights of the Supreme Court are not guaranteed. I only express the hope that the absence of any mention of the Supreme Court in the proviso will not affect the powers of that Court.

Shri T. T. Krisnamachari: It is not necessary because the Central Government is subject to the jurisdiction of the Supreme Court under all conditions.

(Underlined for emphasis)

Mr. Naziruddin Ahmad: As the honourable Member himself has on a previous occasion said, this Constitution would be the lawyers' heaven. Speaking from experience, I think that this proviso will lead to much legal battle, and lawyers alone will be benefited by this. I wish that the interpretation put forward by Mr. T. T. Krishnamachari is right, but it is not apparent to me. When we come to Clause (2) of Article 278, in this clause it is stated that any such proclamation may be revoked or varied by a subsequent proclamation.

(underlined for emphasis)

232. **Constituent Assembly met on 4th August 1949**

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Nine of the Clock, Mr. President (The Honourable Dr. Rajendra Prasad) in the Chair.

Articles 188, 277-A and 278-continued.

x x x

Then coming to proposed Article 278-A Sub-clause (a) and (b) of Clause (1) are new. Clause (a) is new and (b) is consequential. The new point which has been introduced is also revolutionary. Instead of allowing the Provincial Legislatures to have their say on the emergency legislation and thereby giving the Provincial Assemblies an opportunity to assess the guilt or innocence of the Ministers or other person or to give a verdict, the responsibility is thrown on the Parliament. 'That would again, as I submitted yesterday, go to make the Central Government and the Parliament unpopular in the State concerned. It may happen that Provincial Ministers and others are guilty of mismanagement and misgovernment; but if we do not allow the Provincial Assemblies to sit in judgment over them, the result would be that guilty or innocent persons, lawbreakers and law-abiding persons, good or bad people in the State should all be combined. The result would be that those for whose misdeeds the Emergency Powers would be necessary, would be made so many heroes; they would be lionised, and the object of teaching them a lesson would be frustrated. The center would be unpopular on the ground that it is poking its nose unnecessarily and mischievously into their domestic affairs.

Then, Sir, in Sub-clause (c) of Clause (1) of this Article 278-A, the President is expected to authorize and sanction the Budget as the head of the Parliament. This would be an encroachment on the domestic budget of the Provinces and the States. That would be regarded with a great deal of dis-favour. It would have been better to allow the Governor or the Ruler to function and allow their own budget to be managed in their own way. Subventions may be granted but that expenditure should not be directly managed by the President.

233. Coming to Clause (d) there is an exception in favour of Ordinances under Article 102 to the effect that "the President may issue Ordinances except when the Houses of Parliament are in session". The sub-clause is misplaced in the present Article. There is an appropriate place where Ordinances are dealt with. Sub-clause (d) should find a place among the group of Articles dealing with Ordinances and not here. This is again the result of hasty drafting.

234. These are some of the difficulties that have been created. It is not here necessary to deal with them in detail. The most important consequence of this encroachment on the States sphere would be that we would be helping the communist techniques. Their technique is that by creating trouble in a Province or a State, they would partially paralyse the administration and thereby force the Emergency Powers. Then, they will try to make those drastic powers unpopular. What is more, they will make the guilty Ministers and guilty officers heroes. The legislature of the State would, as I have submitted, be deprived of the right of discussion. If the President takes upon himself the responsibility of emergency powers, then his action, I suppose, cannot be discussed in the States legislatures. The only way of ventilating Provincial and States grievances is to allow the Provinces and the States to find out the guilty persons and hold them up to ridicule and contempt and that would be entirely lost. This would have the effect of bringing all sorts of people good and bad,

law- breaking and law-abiding persons into one congregation. The center will be unpopular and the guilty States would be regarded as so many martyrs and the center would be flouted and would be forced to use more and more Emergency Powers and would be caught in a vicious circle. Then, the States will gradually get dissatisfied and they will show centrifugal tendencies and this will be reflected in the general elections to the House of the People at the center. The result would be that very soon these very drastic powers calculated to strengthen the hands of the center will be rather a source of weakness in no distant time.

(underlined for emphasis)

x x x

235. There is an implication in Article 278 which is something like saying, that you must overcome evil by good and meet lawlessness with law. The President has no powers to meet undemocratic forces in the country except in a democratic manner. It is like saying that the forces of evil must be overcome by the forces of non-violence and good. Practical statesmen and law- makers will not accept this proposition easily.

x x x

Mr. President: Dr. Ambedkar.

The Honourable Dr. B. R. Ambedkar (Bombay : General) : Sir, although these Articles have given rise to a debate which has lasted for nearly five hours, I do not think that there is anything which has emerged from this debate which requires me to modify my attitude towards the principles that are embodied in these Articles. I will therefore not detain the House much longer with a detailed reply of any kind.

I would first of all like to touch for a minute on the amendment suggested by my Friend Mr. Kamath in Article 277-A. His amendment was that the word "and" should be substituted by the word "or". I do not think that that is necessary, because the word "and" in the context in which it is placed is both conjunctive as well as disjunctive, which can be read in both ways, "and" or "or", as the occasion may require. I, therefore, do not think that it is necessary for me to accept that amendment, although I appreciate his intention in making the amendment.

The second amendment to which I should like to refer is that moved by my Friend Prof. Saksena, in which he has proposed that one of the things which the President may do under the Proclamation is to dissolve the legislature. I think that is his amendment in substance. I entirely agree that that is one of the things which should be provided for because the people of the province ought to be given an opportunity to set matters right-by reference to the legislature. But I find that that is already covered by Sub-clause (a) of Clause (1) of Article 278, because Sub-clause (a) proposes that the President may assume to himself the powers exercisable by the Governor or the ruler. One of the powers which is vested and which is exercisable by the Governor is to dissolve the House. Consequently, when the President issues a Proclamation and assumes these powers under Sub-clause (a), that power of dissolving the legislature and holding a now election will be automatically transferred to the President which powers no doubt the President will exercise on the advice of his

Ministers. Consequently my submission is that the proposition enunciated by my Friend Prof. Saksena is already covered by Sub-clause (a), it is implicit in it and there is therefore no necessity for making any express provision of that character.

Now I come to the remarks made by my Friend Pandit Kunzru. The first point, if I remember correctly, which was raised by him was that the power to take over the administration when the constitutional machinery fails is a new thing, which is not to be found in any constitution. I beg to differ from him and I would like to draw his attention to the Article contained in the American Constitution, where the duty of the United States is definitely expressed to be to maintain the Republican form of the Constitution. When we say that the Constitution must be maintained in accordance with the provisions contained in this Constitution we practically mean what the American Constitution means, namely that the form of the constitution prescribed in this Constitution must be maintained. therefore, so far as that point is concerned we do not think that the Drafting Committee has made any departure from an established principle.

The other point of criticism was that Articles 278 and 278-A were unnecessary in view of the fact that there are already in the Constitution Articles 275 and 276. With all respect I must submit that he (Pandit Kunzru) has altogether misunderstood the purposes and intentions which underlie Article 275 and the present Article 278. His argument was that after all what you want is the right to legislate on provincial subjects. That right you get by the terms of Article 276, because under that the center gets the power, once the Proclamation is issued, to legislate on all subjects mentioned in List II. I think that is a very limited understanding of the provisions contained either in Articles 275 and 276 or in Articles 278 and 278-A.

I should like first of all to draw the attention of the House to the fact that the occasions on which the two sets of Articles will come into operation are quite different. Article 275 limits the intervention of the center to a state of affairs when there is war or aggression, internal or external. Article 278 refers to the failure of the machinery by reasons other than war or aggression. Consequently the operative clauses, as I said, are quite different. For instance, when a proclamation of war has been issued under Article 275, you get no authority to suspend the provincial constitution. The provincial constitution would continue in operation. The legislature will continue to function and possess the powers which the constitution gives it; the executive will retain its executive power and continue to administer the province in accordance with the law of the province. All that happens under Article 276 is that the center also gets concurrent power of legislation and concurrent power of administration. That is what happens under Article 276. But when Article 278 comes into operation, the situation would be totally different. There will be no legislature in the province, because the legislature would have been suspended. There will be practically no executive authority in the province unless any is left by the proclamation by the President or by Parliament or by the Governor. The two situations are quite different. I think it is essential that we ought to keep the demarcation which we have made by component words of Articles 275 and 278. I think mixing the two things up would cause a great deal of confusion.

x x x

The Honourable Dr. B.R. Ambedkar: Only when the government is not carried on in consonance with the provisions laid down for the constitutional government of the provinces, whether there is good government or not in the province is for the center to determine. I am quite clear on the point.

x x x

The Honorable Dr. B.R. Ambedkar: It would take me very long now to go into a detailed examination of the whole thing and, referring to each say, this is the print which is established in it and say, if any government or any legislature of a province does not act in accordance with it, that would act as a failure of machinery. The expression "failure of machinery" I find has been used in the Government of India Act, 1935. Everybody must be quite familiar therefore with its de facto and de jure meaning. I do not think any further explanation is necessary.

x x x

The Honourable Dr. B.R. Ambedkar: In regard to the general debate which has taken place in which it has been suggested that these Articles are liable to be abused, I may say that I do not altogether deny that there is a possibility of these Articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the center to override the Provinces. In fact I share the sentiments expressed by my honourable Friend Mr. Gupte yesterday that the proper thing we ought to expect is that such Articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere warning to a province that has erred, that things were not happening, in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this Article. It is only in those circumstances he would resort to this Article. I do not think we could then say that these Articles were imported in vain or that the President had acted wantonly.

Shri H.V. Kamath : Is Dr. Ambedkar in a position to assure the House that Article 143 will now be suitably amended?

The Honourable Dr. B.R. Ambedkar : I have said so and I say now that when the Drafting Committee meets after the Second Reading, it will look into the provisions as a whole and Article 143 will be suitably amended if necessary.

Mr. President: I will now put the amendment to vote one after another.

The question is:

That Article 188 be deleted.

The motion was adopted.

Article 188 was deleted from the Constitution.

Mr. President: Then I will take up Article 277-A.

The question is:

That in amendment No. 121 of List I (Second Week) of Amendments to Amendments, in the proposed new Article 277-A, for the word 'Union' the words 'Union Government' be substituted.

The amendment was negatived.

Mr. President: Now I will put amendment No. 221.

The question is:

That in amendment No. 121 of List I (Second Week) of Amendments to Amendments in the proposed new Article 277-A for the word 'and' where it occurs for the first time, the word 'or' be substituted.

The amendment was negatived.

Mr. President: The question is:

That in Amendment No. 121 of List I (Second Week) of Amendments to Amendments, for the words 'internal disturbance' the words 'internal insurrection or chaos' be substituted.

The amendment was negatived.

Mr. President: The question is:

That after Article 277 the following new Article be inserted:

277-A. It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

The motion was adopted,

Mr. President: The question is.:

That Article 277-A stand part of the Constitution.

The motion was adopted.

Article 277-A was added to the Constitution.

Mr. President: The question is:

That in amendment No. 160 of List II. (Second Week), of Amendments to Amendments in Clause (1) of the proposed Article 278, for the word 'Ruler' the words the Rajpramukh' be substituted.

The amendment was negatived.

Mr. President: The question is:

That in amendment No. 160 of List II (Second Week) of Amendments to Amendments, in Clause (1) of the proposed Article 278, the words 'or otherwise' be deleted.

The amendment was negatived.

Mr. President : The question is:

That in amendment No. 160 of List II (Second Week): of Amendments to Amendments, in Clause (1) of the proposed Article 278, after the words 'is satisfied that' the words 'a grave emergency has arisen which threatens the peace and tranquillity of the State and that' be added.

The amendment was negatived.

Mr. President: The question is:

That in amendment No. 160 of List II (Second Week) of Amendments to Amendments for the first proviso to Clause (4) of the proposed Article 278, the following be substituted-

Provided that the President may if he so thinks fit order at any time, during this period a dissolution of the State legislature followed by a fresh general election, and the Proclamation shall cease to have effect from the day on which the newly elected legislature meets in session.

The amendment was negatived.

Mr. President: The question is:

That for Article 278, the following articles be substituted

278(1). Provisions in case of failure of constitutional machinery in States. - If the President, on receipt of a report from the Governor or Ruler of a State or otherwise, is satisfied that the government of the State cannot be carried on in accordance with the provisions of the Constitution, the President may by Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any, of the powers vested in or exercisable by I the Governor or Ruler, as the case may be, or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court or to suspend in whole or in part the operation of any provisions of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this Article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation is issued at a time when the House of the People is dissolved or if the dissolution of the House of the People takes place during the period of two months referred to in this clause and the Proclamation has not been approved by a resolution passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of that period resolutions approving the Proclamation have been passed by both Houses of Parliament.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of six months form the date of the passing of the second of the resolutions approving the Proclamation under Clause (3) of this Article:

Provided that if and so often as a resolution approving the continuance in force of such a proclamation is passed: by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any, such period of six months and a resolution approving the continuance in force of such Proclamation has not been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of that period resolutions approving the Proclamation have been passed by both Houses of Parliament.

278-A. Exercise of legislative powers under proclamation issued under Article 278(1).. Where by a Proclamation issued under Clause (1) of Article 278 of this Constitution it has been declared that

the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent-

(a) for Parliament to delegate the power to make laws for, the State to the President or any other authority specified by him in, that behalf-

(b) for Parliament or for the President or other authority to whom the power to make laws is delegated under Sub-clause (a) of this clause to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Government of India or officers and authorities of the Government of India.

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament;

(d) for the President to promulgate Ordinances under Article 102 of this Constitution except when both Houses of Parliament are in session.

(2) Any law made by or under the authority of Parliament which Parliament or the President or other authority referred to in Sub-clause (a) of Clause (1) of this Article would not, but for the issue of a Proclamation under Article 278 of this Constitution, have been competent to make shall to the extent of the incompetency cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by an Act of the Legislature of the State.

The amendment was adopted.

Mr. President: The question is:

That the proposed Article 278 stand part of the Constitution.

The motion was adopted.

Article 278 was added to the Constitution.

Mr. President: The question is:

That proposed Article 278-A stand part of the Constitution.

The motion was adopted.

Article 278-A was added to the Constitution.

236. In the Adoption of the Constitution the speech of Dr. B.R. Ambedkar on 25.11.1949 contained the following significant observations:

As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr. T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the legislature, the executive and the judiciary. The factors on which the working of those organs of State depends are the people and the political parties they will set up as their instrument to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play.... Jefferson, the great American statesman who played so great a part in the making of the American Constitution, has expressed some very weighty views which makers of Constitutions can never afford to ignore. In one place, he has said:

We may consider each generation as a distinct nation, with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country.

In another place, he has said:

The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is mot absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead and not the living.

I admit that what Jefferson has said is not merely true, but is absolutely true. There can be no question about it. Had the Constituent Assembly departed from this principle laid down by Jefferson it would certainly be liable to blame even to condemnation. But I ask, has it? Quite the contrary. One has only to examine the provisions relating to the amendment of the Constitution. The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfillment of extraordinary terms and conditions as in America or Australia, but has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution. If those who are dissatisfied with the Constitution have only to obtain a two- thirds majority and if they cannot

obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public.

There is only one point of constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the center and the State, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the legislative and executive authority is partitioned between the center and the States not by any law to be made by the center but by the Constitution itself. That is what the Constitution does. The States under our Constitution are in no way dependent upon the center for their legislative or executive authority. The center and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the center a larger field for the operation of its legislative and executive authority than is to be found in any other federal Constitution. It may be that the residuary powers are given to the center and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said, lies in the partition of the legislative and executive authority between the center and the units by the Constitution. This is the principle embodied in our Constitution. There can be no mistake about it. It is, therefore, wrong to say that the States have been placed under the center. The center cannot by its own will alter the boundary of that partition. Nor can the judiciary. For as has been well said:

Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another.

The first charge of centralization defeating federalism must therefore fall.

237. As noted above, the Governor occupies a very important and significant post in the democratic set up. When his credibility is at stake on the basis of allegations that he was not performing his constitutional obligations or functions in the correct way, it is a sad reflection on the person chosen to be the executive Head of a particular State. A person appointed as a Governor should add glory to the post and not be a symbolic figure oblivious of the duties and functions which he has is expected to carry out. It is interesting to note that allegations of favoritism and mala fides are hurled by other parties at Governors who belonged or belong to the ruling party at the center, and if the Governor at any point of time was a functionary of the ruling party. The position does not change when another party comes to rule at the center. It appears to be a matter of convenience for different political parties to allege mala fides. This unfortunate situation could have been and can be avoided by acting on the recommendations of the Sarkaria Commission and the Committee of the National Commission To Review The Working Of The Constitution in the matter of appointment of Governors. This does not appear to be convenient for the parties because they want to take advantage of the situation at a particular time and cry foul when the situation does not seem favourable to them. This is a sad reflection on the morals of the political parties who do not loose

the opportunity of politicizing the post of the Governor. Sooner remedial measures are taken would be better for the democracy.

238. It is not deficiency in the Constitution which is responsible for the situation. It is clearly attributable to the people who elect the Governors on considerations other than merit. It is a disturbing feature, and if media reports are to be believed, Raj Bhawans are increasingly turning into extensions of party offices and the Governors are behaving like party functionaries of a particular party. This is not healthy for the democracy.

239. The key actor in the center-State relations is the Governor who is a bridge between the Union and the State. The founding fathers deliberately avoided election to the office of the Governor, as is in vogue in the U.S.A. to insulate the office from the linguistic chauvinism. The President has been empowered to appoint him as executive head of the State under Article 155 in Part VI, Chapter II. The executive power of the State is vested in him by Article 154 and exercised by him with the aid and advice of the Council of Ministers, the Chief Minister as its head. Under Article 159 the Governor shall discharge his functions in accordance with the oath to protect and defend the Constitution and the law. The office of the Governor, therefore, is intended to ensure protection and sustenance of the constitutional process of the working of the Constitution by the elected executive and given him an umpire's role. When a Gandhian economist Member of the Constituent Assembly wrote a letter to Gandhiji of his plea for abolition of the office of the Governor, Gandhiji wrote to him for its retention, thus; the Governor had been given a very useful and necessary place in the scheme of the team. He would be an arbiter when there was a constitutional dead lock in the State and he would be able to play an impartial role. There would be administrative mechanism through which the constitutional crisis would be resolved in the State. The Governor thus should play an important role. In his dual undivided capacity as a head of the State he should impartially assist the President. As a constitutional head of the State Government in times of constitutional crisis he should bring about sobriety. The link is apparent when we find that Article 356 would be put into operation normally based on Governor's report. He should truthfully and with high degree of constitutional responsibility, in terms of oath, inform the President that a situation has arisen in which the constitutional machinery in the State has failed and the Government of State cannot be carried on in accordance with the provisions of the Constitution, with necessary detailed factual foundation.

240. It is incumbent on each occupant of every high office to be constantly aware of the power in the High Office he holds that is meant to be exercised in public interest and only for public good, and that it is not meant to be used for any personal benefit or merely to elevate the personal status of the current holder of that office.

241. In Sarkaria Commission's report it was lamented that some Governors were not displaying the qualities of impartiality and sagacity expected of them. The situation does not seem to have improved since then.

242. Reference to Report of the Committee of Governors (1971) would also be relevant. Some relevant extracts read as follows:

According to British constitutional conventions, though the power to grant to a Prime Minister a dissolution of Parliament is one of the personal prerogatives of the Sovereign, it is now recognized that the Sovereign will normally accept the advice of the Prime Minister since to refuse would be tantamount to dismissal and involve the Sovereign in the political controversy which inevitably follows the resignation of a Ministry. A Prime Minister is entitled to choose his own time within the statutory five year limit for testing whether his majority in the House of Commons still reflects the will of the electorate. Only if a break up of the main political parties takes place can the personal discretion of the Sovereign become the paramount consideration. There are, however, circumstances when a Sovereign may be free to seek informal advice against that of the Prime Minister. Professor Wade, in Constitutional Law (Wade and Phillips, Eighth Edn. 1970), states these circumstances thus:

If the Sovereign can be satisfied that (1) an existing Parliament is still vital and capable of doing its job, (2) a general election would be detrimental to the national economy, more particularly if it followed closely on the last election, and (3) he could rely on finding another Prime Minister who was willing to carry on his Government for a reasonable period with a working majority, the Sovereign could constitutionally refuse to grant a dissolution to the Prime Minister in office.

Prof. Wade further observes:

It will be seldom that all these conditions can be satisfied. Particularly dangerous to a constitutional Sovereign is the situation which would arise if having refused a dissolution to the outgoing Prime Minister he was faced by an early request from his successor for a general election. Refusal might be justified if there was general agreement inside and outside the House of Commons that a general election should be delayed and clearly it would be improper for a Prime Minister to rely on defeat on a snap vote to justify an election.

The observations of Hood Phillips in his latest book, Reform of the Constitution (1970), are relevant:

"There is no precedent in this country of a Prime Minister, whose party has a majority in the Commons, asking for a dissolution in order to strengthen his weakening hold over his own party. If he did ask for a dissolution the better opinion is that the Queen would be entitled, perhaps would have a duty, to refuse. In the normal case when the Sovereign grants a dissolution this is on assumption that the Prime Minister is acting as leader on behalf of his party. Otherwise the electorate could not be expected to decide the question of leadership. So if the Sovereign could find another Prime Minister who was able to carry on the government for a reasonable period, she would be justified in refusing a dissolution. Something like this happened in South Africa in 1939 when the question was whether South Africa should enter the war: the Governor- General refused a dissolution to Hertzog, who resigned and was replaced by Smuts who succeeded in forming a Government.

x x x

243. We may first examine the precise import of Article 356 which sanctions President's rule in a State in the event of a break-down of the constitutional machinery. Four our present purpose, it is enough to read the language of Clause (1) of the Article:

Article 356(1):

356. Provisions in case of failure of constitutional machinery in State.--(1) If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

244. The salient features of this provision', in the words of Shri Alladi Krishnaswami Ayyar (speaking in the Constituent Assembly), "are that immediately the proclamation is made, the executive functions (of the State) are assumed by the President. What exactly does this mean? As members need not be repeatedly reminded on this point, 'the President' means the Central Cabinet responsible to the whole Parliament in which are represented representatives from the various units which form the component parts of the Federal Government. therefore, the State machinery having failed, the Central Government assumes the responsibility instead of the State Cabinet. Then, so far as the executive government is concerned, it will be responsible to the Union Parliament for the proper working of the Government in the State. If responsible government in a State functioned properly, the center would not and could not interfere.

245. While the Proclamation is in operation, Parliament becomes the Legislature for the State, and the Council of Ministers at the center is answerable to Parliament in all matters concerning the administration of the State. Any law made pursuant to the powers delegated by Parliament by virtue of the Proclamation is required to be laid before Parliament and is liable to modification by Parliament. Thus, a state under President's rule under Article 356 virtually comes under the executive responsibility and control of the Union Government. Responsible government in the State, during the period of the Proclamation, is replaced by responsible government at the center in respect of matters normally in the State's sphere.

246. In discussing Article 356, attention is inevitably drawn to Section 93 of the Government of India Act, 1935. This section had attained a certain notoriety in view of the enormous power that it vested in the Governor and the possibility of its misuse, the Governor being the agent of the British Government. Many of the leading members of the Constituent Assembly had occupied important positions as Ministers in the Provinces following the inauguration of Provincial autonomy and had thus first-hand experience of the working of this particular section and the possible effect of having in the Constitution a provision like Section 93. There was, therefore, considerable discussion, both in the Constituent Assembly and in the Committees, on the advisability, or necessity, of incorporating the provision in the Constitution. Pandit H.N. Kunzru, who had serious apprehensions regarding this provision, suggested the limiting of the Governor's functions to merely making a report to the President, it being left to the President to take such action as he considered appropriate on the report. Pandit Govind Ballabh Pant agreed with Pandit Kunzru in principle. The former referred in particular to the administrative difficulties that would be created by giving powers to the Governor to act on his own initiative over the head of his Ministers.

247. The whole question was examined at a meeting of the Drafting Committee with Premiers of Provinces on July 23, 1949. Pandit Pant again expressed the view that the Governor should not come into the picture as an authority exercising powers in his discretion. Armed with such powers, he would be an autocrat and that might lead to friction between him and his Ministers.

248. Shri Alladi Krishnaswami Ayyar tried to allay apprehensions in the minds of the members of the Constituent Assembly about the similarity between Section 93 of the Government of India Act and the provision made in Article 356 of the Constitution. He said in the Constituent Assembly:

There is no correspondence whatever between the old Section 93 (of the Government of India Act, 1935) and this except in regard to the language in some parts. Under Section 93, the ultimate responsibility for the working of Section 93 was the Parliament of great Britain which was certainly representative of the people of India, whereas under the present article the responsibility is that of the Parliament of India which is elected on the basis of universal franchise, and I have no doubt that not merely the conscience of the representatives of the State concerned but also the conscience of the representatives of the other units will be quickened and they will see to it that the provision is properly worked. Under those circumstances, except on the sentimental objection that it is just a repetition of the old Section 93, there is no necessity for taking exception to the main principle underlying this article.

249. In winding up the debate on the emergency provisions, Dr. Abmedkar observed:

In regard to the general debate which has taken place in which it has been suggested that these articles are liable to be abused, I may say that I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the center to override the Provinces. In fact I share the sentiments expressed by my honourable friend Mr. Gupte yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with

these powers, will take proper precautions before actually suspending the administration of the provinces.

250. Dr. Ambedkar's hope that this provision would be used sparingly, it must be admitted, has not been fulfilled. During the twenty-one years of the functioning of the Constitution, President's rule has been imposed twenty-four times- the imposition of President's rule in Kerala on November 1, 1956, was a continuation of President's rule in Travancore- Cochin imposed earlier on March 23, 1956- the State of Kerala having been under President's rule five times and for the longest period. Out of seventeen States (not taking into account PEPSU which later merged into Punjab, and excluding Himachal Pradesh which became a State only recently), eleven have had spells of President's rule. The kind of political instability in some of the states that we have witnessed and the politics of defection which has so much tarnished the political life of this country were not perhaps envisaged in any measure at the time the Constituent Assembly considered the draft Constitution. No Governor would, it can be safely asserted, want the State to be brought under President's rule except in circumstances which leave him with no alternative.

251. The article, as finally adopted, limits the functions of the Governor to making a report to the President that a situation has arisen in which there has been failure of the constitutional machinery. The decision whether a Proclamation may be issued under Article 356 rests with the President, that is to say, the Union Government. Significantly, the President can exercise the power "on receipt of a report from the Governor or otherwise" if he is satisfied that the situation requires the issue of such a Proclamation.

252. Some of the circumstances in which President's rule may have to be imposed have already been discussed. What is important to remember is that recourse to Article 356 should be the last resort for a Governor to seek. A frequent criticism of the Governor in this connection is that he sometimes acts at the behest of the Union Government. This criticism emanates largely from a lack of appreciation of the situations which confront the Governors. Imposition of President's rule normally results in the President vesting the Governor with executive functions which belong to his Council of Ministers This is a responsibility which no Governor would lightly accept. Under President's rule he functions in relation to the administration of the State under the superintendence, direction and control of the President and concurrently with him by virtue of an order of the President.

253. As Head of the State, the Governor has a duty to see that the administration of the State does not break down due to political instability. He has equally to take care that responsible Government in the State is not lightly disturbed or superseded. In ensuring these, it is not the Governor alone but also the political parties which must play a proper role. Political parties come to power with a mandate from the electorate and they owe primary responsibility to the Legislature. The norms of parliamentary government are best maintained by them.

254. Before leaving this issue, we would like to state that it is not in the event of political instability alone that a Governor may report to the President under Article 356. Reference has been made elsewhere in this report to occasions where a Governor may have to report to the President about any serious internal disturbances in the State, or more especially of the existence or possibility of

a danger of external aggression. In such situations also it may become necessary for the Governor to report to the President for action pursuant to Article 356.

255. It is difficult to lay down any precise guidelines in regard to the imposition of President's rule. The Governor has to act on each occasion according to his best judgment, the guiding principle being, as already stated, that the constitutional machinery in the State should, as far as possible, be maintained.

CONVENTIONS:

256. Conventions of the Constitution, according to Dicey's classic definition, consist of "customs, practices, maxims, or precepts which are not enforced or recognized by the Courts", but "make up a body not of laws, but of constitutional or political ethics". The broad basis of the operation of conventions has been set out in Prof. Wade's Introduction of Dicey's Law of the Constitution (1962 edn.). The dominant motives which secure obedience to conventions are stated to be:

(1) the desire to carry on the traditions of constitutional government;

(2) the wish to keep the intricate machinery of the ship of State in working order;

(3) the anxiety to retain the confidence of the public, and with it office and power.

257. These influences secure that the conventions of Cabinet Government, which are based on binding precedent and convenient usage, are observed by successive generations of Ministers. The exact content of a convention may change or even be reversed, but each departure from the previous practice is defended by those responsible as not violating the older precedents. Objections are only silenced when time has proved that the departure from precedent has created a new convention, or has shown itself to be a bad precedent and, therefore, constituted in itself a breach of convention.

258. This exposition of the nature of conventions will show that, if they have to be observed and followed, the primary responsibility therefore will rest on those charged with the responsibility of government. In a parliamentary system, this responsibility unquestionably belongs to the elected representatives of the people who function in the Legislatures. They are mostly members of political parties who seek the suffrage of the electorate on the basis of promises made and programmes announced. The political parties, therefore, are concerned in the evolution of healthy conventions so that they "retain the confidence of the public, and, with it, office and power".

I feel that it (the Constitution) is workable, it is flexible and it is strong enough to hold the country together both in peace time and in war time. Indeed if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile.

259. These words were uttered by Dr. Ambedkar in the Constituent Assembly in moving consideration of the draft Constitution. It has become the fashion, when situations arise which may not be the liking of a particular political party, to blame the Constitution. The Governors also

inevitably get their share of the blame either because, it is alleged they take a distorted view of the Constitution, or, as is also alleged, because the Constitution permits them to resort to "unconstitutional" acts. The essential structure of our Constitution relating to the functioning of the different branches of government is sound and capable of meeting all requirements. The conventions, or the guide-lines, that we are called upon to consider should be viewed in this background.

260. Conventions evolve from experience and from trial and error. The working of our Constitution during the past twenty-one years has exposed not so much any weaknesses in our political life. Some of the weaknesses will be evident from the discussions in the earlier part of this Report. The Governors, under our Constitution, do not govern; government is the primary concern of the Council of Ministers which is responsible to the Legislature and the people. therefore, for a purposeful evolution of conventions, the willing co-operation of the political parties and their readiness to adhere to such conventions are of paramount importance. In recent years, it has been a regrettable feature of political life in some of the States, with the growing number of splinter parties, some of them formed on the basis of individual or group alignments and not of well- defined programmes or policies, that governments are formed with a leader- a Chief Minister - who comes to that office not as of a right, with the previous acquiescence of followers and the deference of his colleagues, but as being the most "acceptable" candidate for the time. Much of his time and efforts are, therefore, inevitably spent in finding expedients to keep himself in power and the Cabinet alive".

261. In Special Reference No. 1 of 2002 case (supra) in paragraphs 55 and 56 it was observed as follows:

55. It was then urged on behalf of the Union that under Article 174 what is dissolved is an Assembly while what is prorogued is a House. Even when an Assembly is dissolved, the House continues to be in existence. The Speaker continues under Article 94 in the case of the House of the People or under Article 179 in the case of the State Legislative Assembly till the new House of the People or the Assembly is constituted. On that premise, it was further urged that the fresh elections for constituting a new Legislative Assembly have to be held within six months from the last session of the dissolved Assembly.

56. At first glance, the argument appeared to be very attractive, but after going deeper into the matter we do not find any substance for the reasons stated hereinafter

262. Article 172 provides for duration of the State Legislatures. The Superintendence, direction and control of the elections to Parliament and to the Legislatures of every State vest in the Election Commission under Article 324. Article 327 provides that Parliament may make provision with respect to all matters relating to, or in connection with, elections to the Legislative Assembly of a State and all other matters necessary for securing the due constitution of the House of the Legislature. Conjoint reading of Article 327 of the Constitution and Section 73 of the R.P. Act makes the position clear that the Legislative Assembly had been constituted. No provision of the Constitution stipulates that the dissolution can only be after the first meeting of the Legislature. Once by operation of Section 73 of the R.P. Act the House or Assembly is deemed to be constituted, there is no bar on its dissolution.

263. Coming to the plea that there was no Legislative Assembly in existence as contended by Mr. Viplav Sharma, appearing in person the same clearly overlooks Section 73 of the R.P. Act. There is no provision providing differently in the Constitution. There is no challenge to the validity of the Section 73 of the R.P. Act, which is in no way repugnant by any provision to the Constitution. That being so, by operation of Section 73 of the R.P. Act the Assembly was duly constituted. The stand that the Governor was obliged to convene the Session for administering oath to the members and for formation of a Cabinet thereafter has no relevance and is also not backed by any constitutional mandate. There was no compulsion on the Governor to convene a session or to install a Cabinet unless the pre-requisites in that regard were fulfilled. The reports of the Governor clearly indicated that it was not possible to convene a session for choosing a Chief Minister or for formation of a Cabinet.

264. Even if hypothetically it is held that the dissolution notifications are unsustainable, yet restoration of status quo ante is not in the present case the proper relief. As noted supra, no stake was claimed by any person before the Governor. The documents relied upon to show that a majority existed lack authenticity and some of them even have the stamp of manipulation. The elections as scheduled had reached on an advanced stage. Undisputedly, the Election Commission had made elaborate arrangements. It would be inequitable to put the clock back and direct restoration of state quo ante.

265. In Public Law 2005, some interesting write-ups are there which have relevance. They read as follows:

Judicial review-Power of the court to limit the temporal effect of the annulment of an administrative decision, postpone the date at which it will produce effects and qualify the extent of the nullity.

Under French welfare law, agreements relating to unemployment allowances are private agreements signed by unions and employers' associations- but they enter into force only if approved by the Minister for Social Affairs. They then become compulsory for all. Several associations defending the rights of the unemployed brought an action against ministerial decisions approving such agreements. Standing was granted. The decisions were quashed on procedural grounds, i.e. the composition of the committee which had to be consulted and the way the consultation took place. The issues at stake related to the date at which this annulment would enter into force and to its effects. The matter was an extremely sensitive one, socially and politically; the scope and amount of unemployment allowances. To say nothing would have led to the application of the principle according to which nullity is retroactive. An annulled decision is supposed never to have existed. It is therefore impossible to maintain its effects for a certain time. Such are the strict requirements of the principle of legality. On the other hand, the court cannot disregard the practical consequences of its decision, not only for the parties, but for a larger public, especially in such an area. These consequences may affect not only the functioning of a public service but also the rights of individuals. They may create a legal void, and social havoc.

Hence the idea of allowing the court, when it annuls an administrative decision, to include in its judgment specific orders as to whether and when the annulment will produce effects and, if so, which persons might be in a special position. Such a discretion has been used for a long time by

both European courts. The European Court of Human Right' judgment in Marckx v. Belgium (1979) 2 E.H.R.R. 330, is an apt illustration. As for the ECJ, it construed broadly the second paragraph of Article 231 EC (formerly Article 174) according to which: "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive". This derogation to the ex nunc effect has been applied in cases relating not only to regulations, but also to preliminary rulings concerning interpretation (Case C-43/75 Defrenne v. Sabena 1976 E.C.R. 455; Case C-61/79 Denkjavit Italiana 1980 E.C.R. 1205 ; Case C-4/79 Societe Cooperative Providence agricole de la Champagne 1980 ECR 2823; Case C-109/79 Maiseies de Because 1980 E.C.R. 2882; Case-145/79 Societe Roquette Freres 1980 E.C.R. 2917, directives (Case C-295/90 European Parliament v. Council 1992 E.C.R. I-4193 and decisions (Case C-22/96) European Parliament v. Council 1998 E.C.R. I-3231. The ECJ held that the use of such a power was justified in order to take into account "imperious considerations of legal certainty relating to all interests at stake, public and private". In doing so, however, the Court's decisions could harm the rights of the very petitioners who wanted the Court to arrive at the decision it took. Hence the dissenting decisions of several national higher courts, such as the Italian Constitutional Court (April 21, 1989, Fragd) and the Conceal d'Etat (June 28, 1985, Office national inter-professional des cereals o Societe Maiseries de Because, concl. Genevois, RTDE, 1986, 145; July 26, 1985; Office national inter-professional des cereals, p.233, concl. Genevois AJDA, 1985; June 13, 1986, Office national inter-professional des cereals, concl. Bonichot, RTDE 1986, 533). This is why the ECJ took some precautions to protect the rights of persons who had previously brought an action or an equivalent claim. Some ECJ judgments led to the inclusion of special clauses into the EC Treaty, as shown by the Maastricht Treaty Protocol 2 (the "Barber Declaration") following the ECJ's judgment in Case C-262/88 Barber v. Guardian Royal Exchange Assurance Group 1991 (1) Q.B. 344. This Protocol limits the effects ratione temporize (before May 17, 1990) of Article 141 EC. The ECJ has been explicit on the considerations it takes into account to use such powers. They relate, on the whole, to legal certainty lato sensu, i.e. to the concrete effects of its decision on existing legal situations, and the desirability of avoiding the creation of a legal void. Many European constitutional courts have a similar power.

The Conceal d'Etat had never affirmed that it had such a faculty. It was not, however, entirely unaware of the issue; in Vassilikiotis, June 26, 2001, p. 303 it annulled a ministerial decision in so far as it did not state how the permit necessary for guides in museums and historical monuments would be granted to persons with diplomas of other EU Member States. The judgment added precise and compulsory prescriptions telling the Administration exactly what it should do, even before revising the regulation. Otherwise an unlawful domestic regulation would have remained in force, perpetuating discrimination contrary to EC law. It thus held that the Administration was under an obligation to enact, after a reasonable delay, the rules applying to the persons mentioned above. Meanwhile the decision forbade the Administration to prevent EU nationals from guiding visits on the ground that they did not possess French diplomas. It belonged to the competent authorities to take, on a case-by-case basis, the appropriate decisions and to appreciate the value of the foreign diplomas (see also July 27, 2001, Titran, P.411)

In Association AC, a case that lent itself to such a move, the Conceal d'Etat decided to innovate and to give administrative courts new powers. The new principles affirmed may be summed up as follows:

1. The principle is that an annulled administrative decision is supposed never to have existed.

2. However, such a retroactive effect may have manifestly excessive consequences in view of (a) the previous effects of the annulled decision and of the situations thus created and (b) the general interest which could make it desirable to maintain its effects temporarily.

3. If so, administrative courts are empowered to take specific decisions as to the limitation of the effects, in time, of the annulment.

4. They may do so after having examined all grounds relating to the legality of the decision and after asking the parties their opinion on such a limitation.

5. They must take into account (a) the consequences of the retroactivity of the annulment for the public and private interests at stake and (b) the effects of such a limitation on the principle of legality and on the right to an effective remedy.

6. Such a limitation should be exceptional.

7. The rights of the persons who brought an action, before the court's judgment, against the annulled decision must be preserved.

8. The court may decide that all or part of the effects of the decision prior to its annulment will be regarded as definitive, or that the annulment will come into force at a later time as determined by the judgment.

In the present case the Conceal d'Etat annulled a number of ministerial decisions. It also annulled other ones, but only from July 1 onwards, thus giving seven weeks to the Minister. The rights of persons who had earlier brought an action were explicitly preserved. The effects of a third group of annulled decisions were declared to be definitive, with the same reservation.

Several comments are in order on this important judgment. The influence of the ECJ's case law and of its use of the ex nunc/ex nunc effect is evident. The judgment is also an apt illustration of a renewal of the conception of the role of administrative courts. It no longer stops when judgment is given. More and more attention is given to its effects, its practical consequences for all, the way it must be implemented by the Administration and its repercussions on the rights of individuals. Hence the attention given to the ways and means to conciliate the two basic principles of legality and of legal certainty (security juridique). The latter is more and more seen as a pressing social need, to borrow the vocabulary of the European Court of Human Rights. A strong illustration is the recent case law of the Cour de cassation restricting the scope not only of lois de validation but also of retroactive "interpretative statutes", on the basis of Articles 6(1) and 13 ECHIR: see cass. plen. January 24, 2003, Mme X o Association Promotion des handicape's dans le loiret, and Cass. Civ. April 7, 2004, in Bulletin d'information de la Cour de cassation, March 15, 2004, with the report of Mme Favre. The discretion of the courts is a two-fold one; on whether to use such a faculty and on how to use it. One last-prospective-remark: might the next step be the limitation, by the courts, of the effects in time of a change in the case law?

To Sum up:

266. So far as scope of Article 361 granting immunity to the Governor is concerned, I am in respectful agreement with the view expressed by Hon'ble the Chief Justice of India.

(1) Proclamation under Article 356 is open to judicial review, but to a very limited extent. Only when the power is exercised mala fide or is based on wholly extraneous or irrelevant grounds, the power of judicial review can be exercised. Principles of judicial review which are applicable when an administrative action is challenged, cannot be applied stricto sensu.

(2) The impugned Notifications do not suffer from any constitutional invalidity. Had the Governor tried to stall staking of claim regarding majority that would have fallen foul of the Constitution and the notifications of dissolution would have been invalid. But, the Governor recommended dissolution on the ground that the majority projected had its foundation on unethical and corrupt means which had been and were being adopted to cobble a majority, and such action is not constitutional. It may be a wrong perception of the Governor. But it is his duty to prevent installation of a Cabinet where the majority has been cobbled in the aforesaid manner. It may in a given case be an erroneous approach, it may be a wrong perception, but it is certainly not irrational or irrelevant or extraneous.

(3) A Public Interest Litigation cannot be entertained where the stand taken was contrary to the stand taken by those who are affected by any action. In such a case the Public Interest Litigation is not to be entertained. That is the case here.

(4) Hypothetically even if it is said that the dissolution notifications were unconstitutional, the natural consequence is not restoration of status quo ante. The Court declaring the dissolution notifications to be invalid can assess the ground realities and the relevant factors and can mould the reliefs as the circumstances warrant. In the present case restoration of the status quo ante would not have been the proper relief even if the notifications were declared invalid.

(5) The Assembly is constituted in terms of Section 73 of the R.P. Act on the conditions indicated therein being fulfilled and there is no provision in the Constitution which is in any manner contrary or repugnant to the said provision. On the contrary, Article 327 of the Constitution is the source of power for enactment of Section 73.

(6) In terms of Article 361 Governor enjoys complete immunity. Governor is not answerable to any Court for exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties. However, such immunity does not take away power of the Court to examine validity of the action including on the ground of mala fides.

(7) It has become imperative and necessary that right persons are chosen as Governors if the sanctity of the post as the Head of the Executive of a State is to be maintained.

267. The writ applications are accordingly dismissed but without any order as to costs.

K.G. Balakrishnan, J.

268. I have had the advantage of reading in draft the judgment prepared by Hon'ble the Chief Justice of India, Shri Y.K. Sabharwal and I find myself unable to agree with the decision on point No. 2 formulated in the judgment. On all other points, I gratefully adopt the exposition of law and agree with the decision proposed by the learned Chief Justice. Point No. 2 is as follows:

(1) ...

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

269. Few factual details are necessary to decide the question. The election to the Bihar State Legislature was held in the month of February, 2005 and the results of the election were declared on 23rd March, 2005. The names of the members elected to the Bihar State Legislature were notified by the Election Commission. Certain political groups and political parties participated and the National Democratic Alliance (for short 'NDA'), a coalition comprising Bhartiya Janata Party (for short 'BJP') and Janata Dal (United) (for short "JD(U)") secured the largest support of MLAs. The party-wise strength in the Assembly was as follows:

(1)	NDA	92
(2)	RJD	75
(3)	LJP	29
(4)	Congress (I)	10
(5)	CPI (ML)	07
(6)	Samajwadi Party	04
(7)	NCP	03
(8)	Bahujan Samaj Party	02
(9)	Independents	17
(10)	Others	09

270. In order to secure an absolute majority to form a Government in the State of Bihar, support of 122 Members of Legislative Assembly was required. NDA could secure only 92 seats and no other political parties or group came forward to support NDA to form a Government. RJD was also in the same dilemma. LJP, another political party which was under the leadership of Shri Ram Vilas Paswan had secured 29 seats in the State Legislature. This political party did not extend support either to NDA or RJD. As none could form a Government, Governor of the State of Bihar sent a Report on 6th March, 2005 to the President of India recommending President's Rule in the State and for keeping the Assembly in suspended animation for the time being. On 7th March, 2005 the President's Rule was imposed in the State of Bihar and the Assembly was kept in suspended animation. This order passed by the President of India under Article 356 of the Constitution on 7th March, 2005 is not challenged in most of the petitions before us. In one of the petitions, the Notification issued on 7th March, 2005 under Article 356 of the Constitution is also challenged but the petitioner could not substantiate his contentions and the very challenge itself is highly belated.

271. While the Assembly was in suspended animation, the two political groups, the NDA which had secured 92 seats and the RJD which had secured 75 seats in the State Legislature made attempts to form a Government in the State of Bihar. It appears that the LJP, which had secured

29 seats in the State Legislature was not prepared to extend support either to NDA or RJD. When the (Vote on Account) Bill of 2005 for the State of Bihar was presented before the Parliament, the Home Minister made a statement to the effect that the President's Rule would not be continued for a long time and they would have been happy if a Government had been formed by the elected representatives and that the elected representative should talk to each other and create a situation in which it becomes possible for them to form a Government. The discussion must have been continued between the political parties.

272. On 27th April, 2005 the Governor of Bihar sent a Report to the President of India wherein he stated that he had received Intelligence Reports to the effect that some elected representatives were said to have been approached by factions within the party and outside the party with various allurements like money, castes and posts etc. and the same was a disturbing trend. He also cautioned that if the trend is not arrested immediately, the political instability would further deepen and the horse-trading would be indulged in by various political parties and it would not be possible to contain the situation and the people should be given a fresh opportunity to elect their representatives.

273. It seems that pursuant to letter dated 27th April, 2005 sent by the Governor of Bihar to the President, no decision was taken by the President for dissolution of the State Assembly. Again on 21st May, 2005 the Governor of Bihar sent a letter to the President and this is the crucial document on the basis of which the Bihar State Legislative Assembly was dissolved under Article 174(2)(b) of the Constitution. The letter is as follows:

Respected Rashtrapati Jee,

I invite a reference to my D.O. letter No. 52/GB dated 27th April, 2005 through which I had given a detailed account of the attempts made by some of the parties notably the JD-U and BJP to cobble a majority and lay a claim to form a Government in the State. I had informed that around 16-17 MLAs belonging to LJP were being wooed by various means so that a split could be effected in the LJP. Attention was also drawn to the fact that the RJD MLAs had also become restive in the light of the above moves made by the JDU.

As you are aware after the Assembly Elections in February this year, none of the political parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government since they could not claim a support of a simple majority of 122 in a House of 243 and hence the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No. - GSR - 162 (E) dated 7th March, 2005 and the Assembly was kept in suspended animation.

The reports received by me in the recent past through the media and also through meeting with various political functionaries, as also intelligence reports, indicate a trend to win over elected representatives of the people. Report has also been received of one of the LJP MLA, who is General Secretary of the party having registered today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is very disturbing and alarming feature. Any move by the break away faction to align with any other party to cobble a majority and stake claim to form a Government would positively affect the

Constitutional provisions and safeguards built therein and distort the verdict of the people as shown by the results in the recent Elections. If these attempts are allowed it would be amounting to tampering with Constitutional provisions.

Keeping the above mentioned circumstances, I am of the considered view that if the trend is not arrested immediately, it may not be possible to contain the situation. Hence in my view a situation has arisen in the State wherein it would be desirable in the interest of the State that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course.

274. The gist of the letter written by the Governor is that political parties either individually or with the then pre-election combination or with post-election alliance combination could not stake a claim to form a popular Government since none could claim support of a simple majority of 122 in a House of 243 members and, therefore, the President issued a Proclamation under Article 356. The Governor further stated that he had received information through media and reports gathered through meeting with various political functionaries that there had been a trend to win over elected representatives of the people and 17-18 MLAs were moving towards JD(U) and various allurements had been offered to them. Governor also indicated that any move by the break-away faction to align with any other party, to cobble a majority and stake a claim to form a Government would positively affect the Constitutional provisions and safeguards provided therein. The Governor was of the view that if the Assembly is dissolved, the political parties would get another opportunity to seek a fresh mandate of the people. From the letter, it is clear that no political party or group or alliance had approached the Governor claiming absolute majority in the State Legislature nor did they try to form a Government with the help of other political parties or independent MLAs.

275. The Report of the Governor was received by the Union of India on 22nd May, 2005. The Union Cabinet which met at about 11.00 P.M., took a decision and sent a fax message to the President of India recommending dissolution of the Legislative Assembly of Bihar. On 23rd May, 2005 the Bihar Assembly was dissolved and that order of dissolution is under challenge before us.

276. We heard learned Attorney General, Mr. Milon K. Banerji; learned Solicitor General, Mr. Ghoolam E. Vahanvati; learned Additional Solicitor General, Mr. Gopal Subramaniam; Mr. Soli Sorabjee, learned Senior Advocate; Mr. P.S. Narasimha, learned Counsel for the petitioner and Mr. Viplav Sharma, Advocate, who appeared in person. Many other counsel who were supporting the petitioner submitted their written arguments. Most of the arguments centered around the decision rendered by this Hon'ble Court in ***S.R. Bommai and Ors.*** v. ***Union of India and Ors.*** MANU/SC/0444/1994 : [1994]2SCR644 . The decision in ***S.R. Bommai'***s case was rendered by a Nine Judge Bench and several opinions were expressed. Justice B.P. Jeevan Reddy gave a separate judgment with which Justice S.C. Agrawal agreed. Justice A.M. Ahmadi, Justice J.S. Verma, Justice K. Ramaswamy and Justice Yogeshwar Dayal agreed with certain propositions given by Justice B.P. Jeevan Reddy. Although there was a broad concurrence with the views expressed by Justice Jeevan Reddy, Justice Sawant & Kuldip Singh, JJ. struck a different note and their approach, reasoning and conclusion are not similar.

277. In order to understand the scope and ambit of the decision in ***S.R. Bommai'***s case it is necessary to see the earlier decision in ***State of Rajasthan and Ors.*** v. ***Union of India and Ors.*** reported in MANU/SC/0370/1977 : [1978]1SCR1 . The facts which had led to the filing of that case was that in March, 1977 elections were held to the Lok Sabha and the result of the elections was interpreted to mean that the Congress party had lost people's mandate. The Union Home Minister sent a letter to the Chief Ministers of certain States asking them to advise their respective Governors to dissolve the Assemblies and seek a fresh mandate from the people. The letter together with the statement made by the Union Law Minister was treated as a threat to dismiss those State Governments. They approached this Hon'ble Court by filing suits and writ petitions. In that case, six opinions were delivered by the Seven Judge Bench. Though all of them agreed that the writ petitions and suits be dismissed, the reasoning were not uniform. Some of the opinions in that judgment can be briefly stated as follows:

Bhagwati, J. on behalf of Gupta, J and himself, while dealing with the "satisfaction of the President" prior to the issuance of the Proclamation under Article 356(1), stated as follows:

So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so.... This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law....

He went on to say:

...Here the only limit on the power of the President under Article 356, Clause (1) is that the President should be satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of United States has described as 'judicially discoverable and manageable standards'. It would largely be a political judgment based on assessment of diverse and varied factors, fast changing situations, potential consequences, public reaction, motivations and responses of different classes of people and their anticipated future behaviour and a host of other considerations....

He further stated:

...It must of course be conceded that in most cases it would be difficult, if not impossible, to challenge the exercise of power under Article 356, Clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is

possible, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds.... This is the narrow minimal area in which the exercise of power under Article 356, Clause (1) is subject to judicial review and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists.

(Emphasis supplied)

278. Beg, CJ was of the opinion that by virtue of Article 356 and Article 74(2) of the Constitution, it is impossible for the court to question the 'satisfaction' of the President. It is to be decided on the basis of only those facts as may have been admitted or placed before the court. Beg CJ was also of the opinion that the language of Article 356 and the practice since 1950 shows that the Central Government can enforce its will against the State Government with respect to the question as to how the State Government should function and should hold reigns of power. But these views were not accepted by the majority. YV Chandrachud, J, speaking on the scope of judicial review held that if the reasons disclosed by the Union of India are wholly extraneous, the court can interfere on the ground of mala fides. "Judicial scrutiny", said the learned Judge, is available "for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed. The court cannot sit in judgment over the 'satisfaction' of the President for determining, if any other view is reasonably possible." As regards the facts disclosed in the case, the learned Judge was of the view that the facts disclosed by the Central Government in its counter affidavit cannot be said to be irrelevant to Article 356. Goswami and Untwalia, JJ. gave separate opinions and expressed the view that the facts stated cannot be said to be extraneous or irrelevant.

279. From the dicta laid down in ***State of Rajasthan'***s case, it is clear that the power of judicial review could be exercised when an order passed under Article 356 is challenged before the court on the ground of *mala fides* or upon wholly extraneous or irrelevant grounds and then only the court would have the jurisdiction to examine it. The plea raised by the learned Attorney General that a proclamation passed under Article 356 is legislative in character and outside the ken of judicial scrutiny was rejected by the majority of the Judges in ***State of Rajasthan'***s case.

280. On a careful examination of the various opinions expressed in ***S.R Bommai'***s case, it is clear that the majority broadly accepted the dicta laid down in ***Rajasthan'***s case. It was also held that the principles of judicial review that are to be applied when an administrative action is challenged cannot be applied when a challenge is made against a Presidential order passed under Article 356.

281. P.B. Sawant, J. speaking for himself and Kuldip Singh, J. took a different view and held that the same principles would apply when a proclamation under Article 356 also is challenged. Some of the observations made by the learned Judges would make the position clear.

282. In ***S.R. Bommai'***s case, a plea was raised that the principles of judicial review as laid down in ***Barium Chemicals Ltd. and Anr.*** v. ***The Company Law Board and Ors.*** (1966) Suppl. 3 SCR 311 are applicable and the subjective satisfaction of the President as contemplated under Article 356 could be examined. In the ***Barium Chemical'***s case, the Company Law Board under Section 237(b) of the Companies Act appointed four inspectors to investigate the affairs of the appellant-company on the ground that the Board was of the opinion that there were circumstances suggesting

that the business of the appellant-company was being conducted with intent to defraud its creditors, members or any other persons and that the persons concerned in the management of the affairs of the company had in connection therewith, been guilty of fraud, misfeasance and other misconduct towards the company and its members. The company filed a writ petition challenging the said order. In reply to the writ petition, the Chairman of the Company Law Board filed an affidavit and contended that there was material on the basis of which the order was issued and that he had himself examined this material and formed the necessary opinion within the meaning of the said Section 237(b) of the Companies Act. The majority of the Judges held that the circumstances disclosed in the affidavit must be regarded as the only material on the basis of which the Board formed the opinion before ordering an investigation under Section 237(b) and that the circumstances could not reasonably suggest that the company was being conducted to defraud the creditors, members or other persons and, therefore, the impugned order was held ultra vires the section. Hidayatullah, J. as he then was, stated that the power under Section 237(b) is discretionary power and the first requirement for its exercise is the honest formation of an opinion that an investigation is necessary and the next requirement is that there are circumstances suggesting the inferences set out in the section. An action not based on circumstances suggesting an inference of the enumerated kind will not be valid. Although the formation of opinion is subjective, the existence of circumstances relevant to the inference as the *sine quo non* for action must be demonstrable. If their existence is questioned, it has to be proved at least prima facie. It is not sufficient to assert that the circumstances must be such as to lead to conclusions of action definiteness.

283. These principles were also applied in some of the later decisions where the administrative action was challenged before the court. ***(See M.A. Rashid and Ors.*** v. ***State of Kerala*** MANU/SC/0051/1974 : [1975]2SCR93].

284. There was also a plea that the principles of judicial review enunciated by **Lord Diplock** in ***"Council of civil Services Union and Ors.*** v. ***Minister for civil Services*** 1985 AC 374 GCHQ would apply when Presidential Proclamation under Article 356 is challenged. This plea also was not accepted by the majority of the Judges in ***S.R. Bommai'***s case.

285. The broad view expressed by Sawant, J., to which Kuldip Singh, J. also agreed, could be gathered from the observations on page 102 in the ***S.R. Bommai'***s case which is to the following effect:

From these authorities, one of the conclusions which may safely be drawn is that the exercise of power by the President under Article 356(1) to issue Proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution....

In other words, the President has to be convinced of, or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the

material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial review.

286. The above opinion expressed by Sawant J., to which Kuldip Singh, J. also agreed was not fully accepted by other Judges. B.P. Jeevan Reddy, J. speaking for himself and Agrawal, J., held that the proclamation under Article 356 is liable to judicial review and held that the principles of judicial review, which are applicable when an administrative action is challenged, cannot be applied *stricto sensu.*

287. At the end of the judgment, Jeevan Redddy, J. summarized the conclusions and conclusions (6) and (7) speak of the scope and ambit of judicial review. Clause (1), (2), (6) and (7) are relevant for the purpose of the present case. These are as follows:

(1) Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the government of a State cannot be carried on in accordance with the provisions of the Constitution, Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the Article is subjective in nature.

(2) The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material -- which may comprise of or include the report(s) of the Governor -- is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Article 356 do merit serious consideration at the hands of all concerned.

[3] ...

[4] ...

[5] ...

(6) Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the ministers to the President. It does not bar the court from calling upon the Union Council of Ministers (Union of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields. It may happen that while defending the proclamation, the minister or the concerned official may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123.

(7) The proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. The deletion of Clause (5) (which was introduced by 38th (Amendment) Act) by the 44th (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which

action was taken. It cannot refuse to do so. if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to 'the action taken.

[Emphasis supplied]

288. Justice Ratnavel Pandian agreed with Jeevan Reddy J. on his conclusions on all the above points. He disagreed with only Clause (3) of the summary of conclusions. Clause (3) deals only with the power of dissolving the legislative assembly which shall be exercised by the President only after proclamation under Clause (1) of Article 356 is approved by both the Houses of Parliament and until such approval the President can only suspend the Legislative Assembly by suspending the provisions of the Constitution relating to the Legislative Assembly.

289. J.S. Verma, Ahmadi and Ramaswami, JJ. took a different note. Ahmadi, J. was of the opinion that the court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be *mala fide.* Before exercise of the Court's jurisdiction, sufficient caution must be administered and unless a strong and cogent prima facie case is made out, the President, i.e. the executive must not be called upon to answer the charge. Ramaswamy, J. was also of the same opinion.

290. Verma, J. was of the view that the test for adjudging the validity indicated in the ***The Barium Chemicals Ltd.'***s case and other cases of that category have no application for testing and invalidating a proclamation issued under Article 356. He was of the opinion that only cases which permit application of totally objective standards for deciding whether the constitutional machinery has failed are amenable to judicial review and the remaining cases wherein there is any significant area of subjective satisfaction dependent on some imponderables or inferences are not justiciable because there are no judicially manageable standards for resolving that controversy and those cases are subject only to political scrutiny and correction for whatever its value in the existing political scenario.

291. It is important to note that in ***S.R. Bommai'***s case, majority of Judges held, that as regards the imposition of President's Rule in Karnataka, Meghalaya and Nagaland, the Presidential proclamations were unconstitutional. The facts which ultimately led to the Presidential proclamation under Article 356(1) in two States are significant to understand the law laid down in ***S.R. Bommai'***s case.

292. In the case of Karnataka, the President dismissed the government and dissolved the State Assembly. The Janta Party was ruling the State and it had formed the Government under the leadership of Shri S.R. Bommai. One member of the legislature defected from the party and presented a letter to the Governor withdrawing his support to the Ministry. On the next day, he presented to the Governor 19 letters allegedly signed by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to Bhartiya Janata Party which was supporting the Ministry , withdrawing their support to the Ministry . On receipt of these letters, the Governor is said to have called the Secretary of the Legislative Department and got the authenticity of the signatures on the said letters verified. Governor then sent a report to the President stating therein

that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and he referred to the 19 letters received by him and in view of withdrawal of support by the said legislators , the Chief Minister Shri Bommai did not command a majority in the Assembly and no other political party was in a position to form the government and, therefore, recommended to the President to exercise power under Article 356(1). The Governor did not ascertain the view of the Chief Minister, Shri Bommai, and on the next day, seven out of the nineteen legislators who had allegedly written the said letters to the Governor made a complaint that their signatures were obtained by misrepresentation. The Governor also did not take any steps directing the Chief Minister to seek a vote of confidence in the legislature nor met any of the legislators who had allegedly defected from the Janta Party. It was in this background that the proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, equally suffered from *mala fides.* The duly constituted Ministry was dismissed on the basis of the material which was no more than the *ipse dixit* of the Governor.

293. In the case of Meghalaya, Meghalaya United Parliamentrary Party (MUPP) which had a majority in the Legislative Assembly formed the government in March, 1990 under the leadership of Shri B.B. Lyngdoh. One Kyndiah Arthree was at the relevant time the Speaker of the House. He was elected as the leader of the opposition known as United Meghalaya Parliamentary Forum (UMPF). On his election, Shri Arthree claimed support of majority of the members in the Assembly and requested the Governor to invite him to form the government. The Governor asked the Chief Minister Shri Lyngdoh to prove his majority on the floor of the House. A special sessions was convened on 7.8.91 and a Motion of Confidence in the Ministry was moved. Thirty Legislators supported the Motion and 27 voted against it. Instead of announcing the result of the voting on the Motion, the Speaker declared that he had received a complaint against five independent MLAs of the ruling coalition front alleging that they were disqualified as legislators under the anti-defection law and since they had become disentitled to vote, he was suspending their right to vote. On this announcement, there was uproar in the House and it had to be adjourned. On 11.8.1991, the Speaker issued show cause notices to the alleged defectors. The five MLAs replied stating that they had not joined any of the parties and they had continued to be independent. The Speaker passed an order disqualifying the five MLAs. Thereafter, on Governor's advice, the Chief Minister Shri Lyngdoh summoned the Session of the Assembly on 9.9.1991 for passing a vote of confidence in the Ministry. The Speaker, however, refused to send the notices of the Session to the five disqualified independent MLAs whereupon they approached this Court. This Court issued interim orders staying the operation of the Speaker's order. Only four of them had applied to the court for an order of stay. The Speaker issued a Press Statement in which he declared that he did not accept any interference by any court. The Governor, therefore, prorogued the Assembly indefinitely. The Assembly was again convened and the four independent MLAs who had obtained interim orders from the court moved a contempt petition before this Court against the Speaker. The Speaker made a declaration in a press statement defying the interim order of this Court. On 8.10.1991, this Court passed an order directing that all authorities of the State should ensure the compliance of the Court's interim order of 6.9.1991 and four of the five independent MLAs received invitation to attend the Session of the Assembly. After the Motion of Confidence in the Ministry was put to vote, the Speaker declared that 26 voted for the Motion and 26 against it and excluded the votes of the four independent MLAs. The 26 MLAs who had supported the Ministry and four MLAs who had voted in favour of the Motion elected a new Speaker and the new Speaker declared that the Motion of Confidence in the Ministry had been carried since 30 MLAs had voted in favour of

the Government. They thereafter sent letters to the Governor that they had voted in favour of the Ministry. However, the Governor wrote a letter to the Chief Minister asking him to resign in view of what had transpired in the Session on 8.10.1991. The Chief Minister moved this Court against the letter of the Governor. Despite all these facts, the President on 11.10.1991 issued a proclamation under Article 356(1) and in the proclamation it was stated that the President was satisfied on the basis of the report from the Governor and other information received by him that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution.

In the case of Nagaland also, similar situation had arisen. The facts are not necessary to be stated in detail.

294. In all these three cases where the Presidential Proclamations issued under Article 356 were quashed by this Court, were States wherein the Government was functioning on the strength of the majority, whereas in the instant case the decision of dissolution of the Assembly was evidently passed on the report of the Governor when the Assembly was in suspended animation and there was no democratically elected Government in the State and, therefore, there was no question of testing the majority of the Government on the floor of the Assembly.

295. From the ***S.R. Bommai'***s decision, it can be discerned that the majority was of the view that so far as the scope and ambit of judicial review is very limited when a proclamation under Article 356 is questioned and similar parameters would apply in a case where a Notification is passed under Article 174(2)(b) dissolving the State Legislative Assembly. The plea raised by the Additional Solicitor General, Shri Gopal Subramaniam that the Notification dissolving Assembly is of a legislative character and could be challenged only on the ground of absence of legislative competence or ultra vires of the Constitution, cannot be accepted. This plea was raised in ***Rajasthan'***s case as well as in ***S.R. Bommai'***s case, but it was rightly rejected in both the cases. However, the power exercised by the President is exceptional in character and it cannot be treated on par with an administrative action and grounds available for challenging the administrative action cannot be applied. In view of Article 174(2) of the Constitution, the court cannot go into the question as to what manner of advice was tendered by the Council of Ministers to the President. The power conferred on the President is not absolute; it has got checks and balances. It is true that the power exercised by the President is of serious significance and it sometime amounts to undoing the will of the people of the State by dismissing the duly constituted Government and dissolving the duly constituted Legislative Assembly. Any misuse of such power is to be curbed if it is exercised for *mala fide* purposes or for wholly extraneous reasons based on irrelevant grounds. The Court can certainly go into the materials placed by the Governor which led to the decision of dissolving the State Assembly.

296. The Presidential proclamation dissolving the Bihar State Legislative Assembly was issued pursuant to two reports sent in by the Governor. It may be remembered that Article 356(1) Proclamation imposing President's Rule was issued on 7th March, 2005. Thereafter, on 22nd April, 2005, the Governor sent a report wherein he stated that none of the political parties. either individually or with the then pre-election combination or with post-election alliance, could stake a claim to form a popular Government wherein they could claim support of a simple majority of 122 in a House of 243. The Governor had also indicated that there are certain newspaper reports

and other reports gathered through meeting with different parties' functionaries that some steps are being taken to win over the elected representatives of the people through various allurements like money, caste, post, etc. Thereafter, on 21.5.2005, the Governor of Bihar sent another report and based on that, the Bihar State Assembly was dissolved on 23rd May, 2005. In the report dated 21st May, 2005, the Governor reiterated his earlier report that no party had approached him to form a popular Government since none could claim the support of a simple majority of 122 in a House of 243. In that report, the Governor had also stated that 17/18, or more perhaps, LJP MLAs are moving towards the JD(U) and that various allurements have been offered to them and it was an alarming feature and the Governor was also of the opinion that it was positively affecting the Constitutional provisions and safeguards built therein and distorted the verdict of the people.

297. The contention urged by learned ASG, Shri Gopal Subramaniam was that this is the material which was placed before the President before a Proclamation was issued under Article 174(2)(b) of the Constitution. It is important to note that the writ petitioners have no case that JD(U) or any other alliance had acquired majority and that they had approached the Governor staking their claim for forming a Government. No material is placed before us to show that the JD(U) or its alliance with BJP had ever met the Governor praying that they had got the right to form a Government. The plea of the petitioners' counsel is that they were about to form a Government and in order to scuttle that plan the Governor sent a report whereby the Assembly was dissolved to defeat that plan is without any basis. The Governor in his report stated that 17 or 18 members of the LJP had joined the JD(U)-BJP alliance, but no materials have been placed before us to show that they had, in fact, joined the alliance to form a Government. One letter has been produced by one of the petitioners and the same is not signed by all the MLAs and as regards some of them, some others had put their signatures. therefore, it is incorrect to say that the Governor had taken steps to see that the Assembly was dissolved hastily to prevent the formation of a Government under the leadership of the political party JD(U). If any responsible political party had any case that they had obtained majority support or were about to get a majority support or were in a position to form minority Government with the support of some political parties and if their plea was rejected by the Governor, the position would have been totally different. No such situation had been reached in the instant case. It is also very pertinent to note that the order for dissolution of the State Assembly was passed after about three months of the proclamation imposing the President's Rule was issued under Article 356(1). When there was such a situation, the only possible way was to seek a fresh election and if it was done by the President, it cannot be said that it was a mala fide exercise of power and the dissolution of the Assembly was wholly on extraneous or irrelevant grounds. It is also equally important that in Karnataka, Meghalaya and Nagaland cases, there was a democratically-elected Government functioning and when there is an allegation that it had lost its majority in the Assembly, the primary duty was to seek a vote of confidence in the Assembly and test the strength on the floor of the Assembly. Such a situation was not available in the present case. It was clear that not a single political party or alliance was in a position to form the Government and when the Assembly was dissolved after waiting for a reasonable period, the same cannot be challenged on the ground that the Governor in his report had stated that some horse-trading is going on and some MLAs are being won over by allurements. These are certainly facts to be taken into consideration by the Governor. If by any foul means the Government is formed, it cannot be said to be a democratically- elected Government. If Governor has got a reasonable apprehension and reliable information such unethical means are being adopted by the political parties to get majority, they are certainly matters to be brought to the notice of the President and

at least they are not irrelevant matters. Governor is not the decision-making authority. His report would be scrutinized by the Council of Ministers and a final decision is taken by the President under Article 174 of the Constitution. therefore, it cannot be said that the decision to dissolve the Bihar State Legislative Assembly, is mala fide exercise of power based on totally irrelevant grounds.

298. Applying the parameters of judicial review of Presidential action in this regard, I do not think that the petitioners in these writ petitions have made out a case for setting aside the Notification issued by the President on 23rd May, 2005. The Writ Petitions are without any merit they are liable to be dismissed.

Back to Index

MANU/SC/0793/2012

Neutral Citation:2006/INSC/42

IN THE SUPREME COURT OF INDIA

Special Reference No. 1 of 2012 (Under Article 143 (1) of the Constitution of India)

Decided On: 27.09.2012

Appellants: In Re: Special Reference No. 1 of 2012

Hon'ble Judges/Coram:

S.H. Kapadia, C.J.I., Dipak Misra, Ranjan Gogoi, Devinder Kumar Jain and J.S. Khehar, JJ.

Subject: Commercial

Subject: Media and Communication

Relevant Section:

Constitution of India - Article 194; Constitution of India - Article 143; Constitution of India - Article 19(1)(g)

Case Note:

Constitution - Reference for opinion - Section 11A of Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act) - Whether only permissible method for disposal of all natural resources across all sectors and in all circumstances is by conduct of auctions - Held, enactment of MMDR Act deals exclusively with natural resources - Section 11A of MMDR Act had been chosen as illustrative provision, to demonstrate how a forthright legitimate legislative policy, may take shape of an illegitimate stratagem - Choice of Section 11A of MMDR Act is on account of fact that it was added to MMDR Act only on 13.2.2012, and as such, there may not have been, as of now, any actual allocation of coal lots based thereon - For grant of a mining lease in respect of an area containing coal, provision leaves no room for any doubt, that selection would be made through auction by competitive bidding - No process other than auction, could therefore be adopted for grant of a coal mining lease - Section 11A of MMDR Act also defines zone of eligibility, for participation in such competitive bidding - To be eligible, contender must be engaged in production of iron and steel, or generation of power, or washing of coal obtained from a mine, or an activity notified by Central Government - Only those satisfying legislatively prescribed zone of eligibility, were permitted to compete for a coal mining lease - Legislative policy limiting zone of

consideration could be subject matter of judicial review - In absence of any such challenge, legislative policy would be binding and enforceable - Policy of allocation of natural resources for public good could be defined by legislature - Likewise, policy for allocation of natural resources may also be determined by executive - Parameters for determining legality and constitutionality of two were exactly same - In aforesaid view of matter, there could be no doubt about conclusion recorded in "main opinion" that auction which was just one of several price recovery mechanisms, could not be held to be only constitutionally recognized method for alienation of natural resources - That should not be understood to mean, that it could never be a valid method for disposal of natural resources - Court would therefore conclude by stating that no part of natural resource could be dissipated as a matter of largess, charity, donation or endowment, for private exploitation - Each bit of natural resource expended must bring back a reciprocal consideration - Consideration might be in nature of earning revenue or might be to "best subserve common good" - It may well be amalgam of two - There could not be a dissipation of material resources free of cost or at a consideration lower than their actual worth - One set of citizens could not prosper at cost of another set of citizens, for that would not be fair or reasonable.

JUDGMENT

Devinder Kumar Jain, J.

1. In exercise of powers conferred under Article 143(1) of the Constitution of India, the President of India has on 12th April, 2012, made the present Reference. The full text of the Reference (sans the annexures) is as follows:

WHEREAS in 1994, the Department of Telecommunication, Government of India ("**GOI**"), issued 8 Cellular Mobile Telephone Services Licenses ("**CMTS Licenses**"), 2 in each of the four Metro cities of Delhi, Mumbai, Kolkata and Chennai for a period of 10 years (the "**1994 Licenses**"). The 1994 licensees were selected based on rankings achieved by them on the technical and financial evaluation based on parameters set out by the GoI in the tender and were required to pay a fixed licence fee for initial three years and subsequently based on number of subscribers subject to minimum commitment mentioned in the tender document and licence agreement. The 1994 Licenses issued by GoI mentioned that a cumulative maximum of upto 4.5 MHz in the 900 MHz bands would be permitted based on appropriate justification. There was no separate upfront charge for the allocation of Spectrum to the licensees, who only paid annual Spectrum usage charges, which will be subject to revision from time to time and which under the terms of the license bore the nomenclature "licence fee and royalty". A copy of the 1994 Licenses, along with a table setting out the pre-determined Licence Fee as prescribed by DoT in the Tender, is annexed hereto as **Annexure I** (Colly).

WHEREAS in December 1995, 34 CMTS Licenses were granted based on auction for 18 telecommunication circles for a period of 10 years (the "1995 Licenses"). The 1995 Licenses mentioned that a cumulative maximum of up to 4.4 MHz in the 900 MHz bands shall be permitted to the licensees, based on appropriate justification. There was no separate upfront charge for allocation of spectrum to the licensees who were also required to pay annual spectrum usage charges, which under the terms of the license bore the nomenclature "licence fee and royalty"

which will be subject to revision from time to time. A copy of the 1995 Licenses, along with a table setting out the fees payable by the highest bidder, is annexed hereto as **Annexure II** (Colly).

WHEREAS in 1995, bids were also invited for basic telephone service licenses ("BTS Licenses") with the license fee payable for a 15 year period. Under the terms of the BTS Licenses, a licensee could provide fixed line basic telephone services as well as wireless basic telephone services. Six licenses were granted in the year 1997-98 by way of auction through tender for providing basic telecom services (the "1997 BTS Licenses"). The license terms, inter-alia, provided that based on the availability of the equipment for Wireless in Local Loop (WLL), in the world market, the spectrum in bands specified therein would be considered for allocation subject to the conditions mentioned therein. There was no separate upfront charge for allocation of spectrum and the licensees offering the basic wireless telephone service were required to pay annual Spectrum usage charges, which under the terms of the license bore the nomenclature "licence fee and royalty". A sample copy of the 1997 BTS Licenses containing the table setting out the license fees paid by the highest bidder is annexed hereto as **Annexure III** (Colly).

WHEREAS in 1997, the Telecom Regulatory Authority of India Act, 1997 was enacted and the Telecom Regulatory Authority of India (the "TRAI") was established.

WHEREAS on 1st April, 1999, the New Telecom Policy 1999 ("NTP 1999") was brought into effect on the recommendation of a Group on Telecom ("**GoT**") which had been constituted by GoI. A copy of NTP 1999 is annexed hereto as **Annexure IV.** NTP 1999 provided that Cellular Mobile Service Providers ("CMSP") would be granted a license for a period of 20 years on the payment of a one-time entry fee and licence fee in the form of revenue share. NTP 1999 also provided that BTS (Fixed Service Provider or FSP) Licenses for providing both fixed and wireless (WLL) services would also be issued for a period of 20 years on payment of a one-time entry fee and licence fee in the form of revenue share and prescribed charges for spectrum usage, appropriate level of which was to be recommended by TRAI. The licensees both cellular and basic were also required to pay annual Spectrum usage charges.

WHEREAS based on NTP 1999, a migration package for migration from fixed license fee to one time entry fee and licence fee based on revenue share regime was offered to all the existing licenses on 22nd July, 1999. This came into effect on 1st August 1999. Under the migration package, the licence period for all the CMTS and FSP licensees was extended to 20 years from the date of issuance of the Licenses.

WHEREAS in 1997 and 2000, CMTS Licenses were also granted in 2 and 21 Circles to Mahanagar Telephone Nigam Limited ("MTNL") and Bharat Sanchar Nigam Limited ("BSNL") respectively (the "PSU Licenses"). However, no entry fee was charged for the PSU Licenses. The CMTS Licenses issued to BSNL and MTNL mentioned that they would be granted GSM Spectrum of 4.4 + 4.4 MHz in the 900 MHz band. The PSU Licensees were also required to pay annual spectrum usage charges. A copy of the PSU Licenses is annexed hereto as **Annexure V** (Colly).

WHEREAS in January 2001, based on TRAI's recommendation, DoT issued guidelines for issuing CMTS Licenses for the 4th Cellular Operator based on tendering process structured as "Multistage Informed Ascending Bidding Process". Based on a tender, 17 new CMTS Licenses

were issued for a period of 20 years in the 4 Metro cities and 13 Telecom Circles (the "2001 Cellular Licenses"). The 2001 Licenses required that the licensees pay a one-time non refundable entry fee as determined through auction as above and also annual license fee and annual spectrum usage charges and there was no separate upfront charge for allocation of spectrum. In accordance with the terms of tender document, the license terms, inter-alia, provided that a cumulative maximum of upto 4.4 MHz + 4.4 MHz will be permitted and further based on usage, justification and availability, additional spectrum upto 1.8 MHz + 1.8 MHz making a total of 6.2 MHz + 6.2 MHz, may be considered for assignment, on case by case basis, on payment of additional Licence fee. The bandwidth upto maximum as indicated i.e. 4.4 MHz & 6.2 MHz as the case may be, will be allocated based on the Technology requirements (e.g. CDMA @ 1.25 MHz, GSM @ 200 KHz etc.). The frequencies assigned may not be contiguous and may not be same in all cases, while efforts would be made to make available larger chunks to the extent feasible. A copy of the 2001 Cellular Licenses, along with a table setting out the fees payable by the highest bidder, is annexed hereto as **Annexure VI**.

WHEREAS in 2001, BTS Licenses were also issued for providing both fixed line and wireless basic telephone services on a continual basis (2001 Basic Telephone Licenses). Service area wise one time Entry Fee and annual license fee as a percentage of Adjusted Gross Revenue (AGR) was prescribed for grant of BTS Licenses. The licence terms, inter-alia, provided that for Wireless Access System in local area, not more than 5 + 5 MHz in 824-844 MHz paired with 869-889 MHz band shall be allocated to any basic service operator including existing ones on FCFS basis. A detailed procedure for allocation of spectrum on FCFS basis was given in Annexure-IX of the 2001 BTS license. There was no separate upfront charge for allocation of spectrum and the Licensees were required to pay revenue share of 2% of the AGR earned from wireless in local loop subscribers as spectrum charges in addition to the one time entry fee and annual license fee. A sample copy of the 2001 Basic Telephone License along with a table setting out the entry fees is annexed hereto as **Annexure VII**.

WHEREAS on 27th October, 2003, TRAI recommended a Unified Access Services Licence ("UASL") Regime. A copy of TRAI's recommendation is annexed hereto as **Annexure VIII**.

WHEREAS on 11.11.2003, Guidelines were issued, specifying procedure for migration of existing operators to the new UASL regime. As per the Guidelines, all applications for new Access Services License shall be in the category of Unified Access Services Licence. Later, based on TRAI clarification dated 14.11.2003, the entry fee for new Unified Licensee was fixed same as the entry fee of the 4th cellular operator. Based on further recommendations of TRAI dated 19.11.2003, spectrum to the new licensees was to be given as per the existing terms and conditions relating to spectrum in the respective license agreements. A copy of the Guidelines dated 11.11.2003 is annexed hereto as **Annexure IX**.

WHEREAS consequent to enhancement of FDI limit in telecom sector from 49% to 74%, revised Guidelines for grant of UAS Licenses were issued on 14.12.2005. These Guidelines, inter-alia stipulate that Licenses shall be issued without any restriction on the number of entrants for provision of Unified Access Services in a Service Area and the applicant will be required to pay one time non-refundable Entry, annual License fee as a percentage of Adjusted Gross Revenue (AGR) and spectrum charges on revenue share basis. No separate upfront charge for allocation of

spectrum was prescribed. Initial Spectrum was allotted as per UAS License conditions to the service providers in different frequency bands, subject to availability. Initially allocation of a cumulative maximum up to 4.4 MHz + 4.4 MHz for TDMA based systems or 2.5 MHz + 2.5 MHz for CDMA based systems subject to availability was to be made. Spectrum not more than 5 MHz + 5 MHz in respect of CDMA system or 6.2 MHz + 6.2 MHz in respect of TDMA based system was to be allocated to any new UAS licensee. A copy of the UASL Guidelines dated 14.12.2005 is annexed hereto as **Annexure X**.

WHEREAS after the introduction of the UASL in 2003 and until March 2007, 51 new UASL Licenses were issued based on policy of First Come-First Served, on payment of the same entry fee as was paid for the 2001 Cellular Licenses (the "2003-2007 Licenses") and the spectrum was also allocated based on FCFS under a separate wireless operating license on case by case basis and subject to availability. Licensees had to pay annual spectrum usage charges as a percentage of AGR, there being a no upfront charge for allocation of spectrum. A copy of the 2003-2007 License, along with a table setting out the fees payable, is annexed hereto as **Annexure XI** (Colly).

WHEREAS on 28th August 2007, TRAI revisited the issue of new licenses, allocation of Spectrum, Spectrum charges, entry fees and issued its recommendations, a copy of which is annexed hereto as **Annexure XII**. TRAI made further recommendations dated 16.07.2008 which is annexed hereto as **Annexure XIII**.

WHEREAS in 2007 and 2008, GoI issued Dual Technology Licences, where under the terms of the existing licenses were amended to allow licensees to hold a license as well as Spectrum for providing services through both GSM and CDMA network. First amendment was issued in December, 2007. All licensees who opted for Dual Technology Licences paid the same entry fee, which was an amount equal to the amount prescribed as entry fee for getting a new UAS licence in the same service area. The amendment to the license inter-alia mentioned that initially a cumulative maximum of upto 4.4 MHz + 4.4 MHz was to be allocated in the case of TDMA based systems (@ 200 KHz per carrier or 30 KHz per carrier) and a maximum of 2.5 MHz + 2.5 MHz was to be allocated in the case of CDMA based systems (@ 1.25 MHz per carrier), on case by case basis subject to availability. It was also, inter-alia, mentioned that additional spectrum beyond the above stipulation may also be considered for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking into account all types of traffic and guidelines/criteria prescribed from time to time. However, spectrum not more than 5 + 5 MHz in respect of CDMS system and 6.2 + 6.2 MHz in respect of TDMA based system was to be allocated to the licensee. There was no separate upfront charge for allocation of Spectrum. However, Dual Technology licensees were required to pay Spectrum usage charges in addition to the license fee on revenue share basis as a percentage of AGR. Spectrum to these licensees was allocated 10.01.2008 onwards.

WHEREAS Subscriber based criteria for CMTS was prescribed in the year 2002 for allocation of additional spectrum of 1.8 + 1.8 MHz beyond 6.2 + 6.2 MHz with a levy of additional spectrum usage charge of 1% of AGR. The allocation criteria was revised from time to time. A copy of the DoT letter dated 01.02.2002 in this regard is annexed hereto as **Annexure XIV**.

WHEREAS for the spectrum allotted beyond 6.2 MHz, in the frequency allocation letters issued by DoT May 2008 onwards, it was mentioned inter-alia that allotment of spectrum is subject to pricing as determined in future by the GoI for spectrum beyond 6.2 MHz + 6.2 MHz and the outcome of Court orders. However, annual spectrum usage charges were levied on the basis of AGR, as per the quantum of spectrum assigned. A sample copy of the frequency allocation letter is annexed hereto as **Annexure XV**.

WHEREAS Spectrum for the 3G Band (i.e. 2100 MHz band) was auctioned in 2010. The terms of the auction stipulated that, for successful new entrants, a fresh license agreement would be entered into and for existing licensees who were successful in the auction, the license agreement would be amended for use of Spectrum in the 3G band. A copy of the Notice inviting Applications and Clarifications thereto are annexed hereto and marked as **Annexure XVI** (Colly). The terms of the amendment letter provided, inter alia, that the 3G spectrum would stand withdrawn if the license stood terminated for any reason. A copy of the standard form of the amendment letter is annexed hereto and marked as **Annexure XVII**.

WHEREAS letters of intent were issued for 122 Licenses for providing 2G services on or after 10 January 2008, against which licenses (the "2008 Licenses") were subsequently issued. However, pursuant to the judgment of this Hon'ble Court dated 2nd February, 2012 in Writ Petition (Civil) No. 423 of 2010 (the "Judgment"), the 2008 Licenses have been quashed. A copy of the judgment is annexed hereto and marked **Annexure XVIII**.

WHEREAS the GoI has also filed an Interlocutory Application for clarification of the Judgment, wherein the GoI has placed on record the manner in which the auction is proposed to be held pursuant to the Judgment and sought appropriate clarificatory orders/directions from the Hon'ble Court. A copy of the Interlocutory Application is annexed hereto and marked as **Annexure XIX**.

WHEREAS while the GoI is implementing the directions set out in the Judgment at paragraph 81 and proceeding with a fresh grant of licences and allocation of spectrum by auction, the GoI is seeking a limited review of the Judgment to the extent it impacts generally the method for allocation of national resources by the State. A copy of the Review Petition is annexed hereto and marked as **Annexure XX**.

WHEREAS by the Judgment, this Hon'ble Court directed TRAI to make fresh recommendations for grant of licenses and allocation of Spectrum in the 2G band by holding an auction, as was done for the allocation of Spectrum for the 3G licenses.

WHEREAS, in terms of the directions of this Hon'ble Court, GoI would now be allocating Spectrum in the relevant 2G bands at prices discovered through auction.

WHEREAS based on the recommendations of TRAI dated 11.05.2010 followed by further clarifications and recommendations, the GoI has prescribed in February 2012, the limit for spectrum assignment in the Metro Service Areas as 2x10MHz/2x6.25 MHz and in rest of the Service Areas as 2x8MHz/2x5 MHz for GSM (900 MHz, 1800 MHz band)/CDMA(800 MHZ band), respectively subject to the condition that the Licensee can acquire additional spectrum beyond prescribed limit in the open market should there be an auction of spectrum subject to the

further condition that total spectrum held by it does not exceed the limits prescribed for merger of licenses i.e. 25% of the total spectrum assigned in that Service Area by way of auction or otherwise. This limit for CDMS spectrum is 10 MHz.

WHEREAS, in view of the fact that Spectrum may need to be allocated to individual entities from time to time in accordance with criteria laid down by the GoI, such as subscriber base, availability of Spectrum in a particular circle, inter-se priority depending on whether the Spectrum comprises the initial allocation or additional allocation, etc., it may not always be possible to conduct an auction for the allocation of Spectrum.

AND **WHEREAS** in view of the aforesaid, the auctioning of Spectrum in the 2G bands may result in a situation where none of the Licensees, using the 2G bands of 800 MHz., 900 MHz and 1800 MHz would have paid any separate upfront fee for the allocation of Spectrum.

AND **WHEREAS** the Government of India has received various notices from companies based in other countries, invoking bilateral investment agreements and seeking damages against the Union of India by reason of the cancellation/threat of cancellation of the licenses.

AND **WHEREAS** in the circumstance certain questions of law of far reaching national and international implications have arisen, including in relation to the conduct of the auction and the regulation of the telecommunications industry in accordance with the Judgment and FDI into this country in the telecom industry and otherwise in other sectors.

Given that the issues which have arisen are of great public importance, and that questions of law have arisen of public importance and with such far reaching consequences for the development of the country that it is expedient to obtain the opinion of the Hon'ble Supreme Court of India thereon.

NOW THEREFORE, in exercise of powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, Pratibha Devisingh Patil, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:

Q.1 Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

Q.2 Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of Larger Benches?

Q.3 Whether the enunciation of a broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling policy decisions formulated and approaches taken by various successive governments over the years for valid considerations, including lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy?

Q.4 What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?

Q.5 Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/bilateral agreements?

Q.6 If the answers to the aforesaid questions lead to an affirmation of the judgment dated 02.02.2012 then the following questions may arise, viz.

(i) whether the judgment is required to be given retrospective effect so as to unsettle all licences issued and 2G spectrum (800, 900, and 1800 MHz bands) allocated in and after 1994 and prior to 10.01.2008?

(ii) whether the allocation of 2G spectrum in all circumstances and in all specific cases for different policy considerations would nevertheless have to be undone?

And specifically

(iii) Whether the telecom licences granted in 1994 would be affected?

(iv) Whether the Telecom licences granted by way of basic licences in 2001 and licences granted between the period 2003-2007 would be affected?

(v) Whether it is open to the Government of India to take any action to alter the terms of any licence to ensure a level playing field among all existing licensees?

(vi) Whether dual technology licences granted in 2007 and 2008 would be affected?

(vii) Whether it is necessary or obligatory for the Government of India to withdraw the Spectrum allocated to all existing licensees or to charge for the same with retrospective effect and if so on what basis and from what date?

Q.7 Whether, while taking action for conduct of auction in accordance with the orders of the Supreme Court, it would remain permissible for the Government to:

(i) Make provision for allotment of Spectrum from time to time at the auction discovered price and in accordance with laid down criteria during the period of validity of the auction determined price?

(ii) Impose a ceiling on the acquisition of Spectrum with the aim of avoiding the emergence of dominance in the market by any licensee/applicant duly taking into consideration TRAI recommendations in this regard?

(iii) Make provision for allocation of Spectrum at auction related prices in accordance with laid down criteria in bands where there may be inadequate or no competition (for e.g. there is expected to be a low level of competition for CDMA in 800 MHz band and TRAI has recommended an equivalence ratio of 1.5 or 1.3X1.5 for 800 MHz and 900 MHz bands depending upon the quantum of spectrum held by the licensee that can be applied to auction price in 1800 MHz band in the absence of a specific price for these bands)?

Q.8 What is the effect of the judgment on 3G Spectrum acquired by entities by auction whose licences have been quashed by the said judgment?

NEW DELHI;

DATED: 12 April 2012

PRESIDENT OF INDIA

2. A bare reading of the Reference shows that it is occasioned by the decision of this Court, rendered by a bench of two learned Judges on 2nd February, 2012 in Centre for **Public Interest Litigation and Ors. v. Union of India and Ors.** MANU/SC/0089/2012 : (2012) 3 SCC 1 (for brevity "**2G Case**").

3. On receipt of the Reference, vide order dated 9th May, 2012, notice was issued to the Attorney General for India. Upon hearing the learned Attorney General, it was directed vide order dated 11th May, 2012, that notice of the Reference shall be issued to all the States through their Standing Counsel; on Centre for Public Interest Litigation (CPIL) and Dr. Subramanian Swamy (Petitioners in the **2G Case**); as also on the Federation of Indian Chambers of Commerce and Industry (FICCI) and Confederation of Indian Industry (CII), as representatives of the Indian industry. On the suggestion of the learned Attorney General, it was also directed (though not recorded in the order), that the reference shall be dealt with in two parts viz. in the first instance, only questions No. 1 to 5 would be taken up for consideration and the remaining questions shall be taken up later in the light of our answers to the first five questions.

4. At the commencement of the hearing of the Reference on 10th July, 2012, a strong objection to the maintainability of the Reference was raised by the writ Petitioners in the **2G Case**. Accordingly, it was decided to first hear the learned Counsel on the question of validity of the Reference.

SUBMISSIONS ON MAINTAINABILITY :

5. Mr. Soli Sorabjee, learned senior Counsel, appearing for CPIL, strenuously urged that in effect and substance, the Reference seeks to question the correctness of the judgment in the **2G Case**, which is not permissible once this Court has pronounced its authoritative opinion on the question of law now sought to be raised. The learned Counsel argued that reference under Article 143(1) of the Constitution does not entail appellate or review jurisdiction, especially in respect of a judgment which has attained finality. According to the learned Counsel, it is evident from the format of the Reference that it does not express or suggest any 'doubt' as regards the question of fact or law relating to allocation of all natural resources, a sine-qua-non for a valid reference. In support of the proposition, learned Counsel placed reliance on observations in earlier references - ***In Re: The Delhi Laws Act, 1912***, the Ajmer-Merwara (Extension of Laws) Act, 1947 And The Part C States (Laws) Act, 1950 MANU/SC/0010/1951 : (1951) S.C.R. 747, ***In Re: The Berubari Union and Exchange of Enclaves Reference*** Under Article 143(1) of the Constitution of India MANU/SC/0049/1960 : (1960) 3 S.C.R. 250, ***In Re: The Kerala Education Bill, 1957*** In Reference Under Article 143(1) Of The Constitution of India MANU/SC/0029/1958 : (1959)

S.C.R. 995, Special Reference No. 1 of 1964 (1965) 1 S.C.R. 413 (commonly referred to as "Keshav Singh"), ***In Re: Presidential Poll*** MANU/SC/0047/1974 : (1974) 2 SCC 33, ***In Re: The Special Courts Bill, 1978*** MANU/SC/0039/1978 : (1979) 1 SCC 380, In the Matter of : Cauvery Water Disputes Tribunal MANU/SC/0097/1992 : 1993 Supp (1) SCC 96 (II) (hereinafter referred to as "Cauvery-II") and Special Reference No. 1 of 1998 Re. MANU/SC/1146/1998 : (1998) 7 SCC 739

6. Next, it was contended by the learned senior Counsel that if for any reason, the Executive feels that the **2G Case** does not lay down a correct proposition of law, it is open to it to persuade another bench, before which the said judgment is relied upon, to refer the issue to a larger bench for reconsideration. In short, the submission was that an authoritative pronouncement, like the one in the **2G Case**, cannot be short circuited by recourse to Article 143(1).

7. Learned Counsel also contended that the Reference as framed is of an omnibus nature, seeking answers on hypothetical and vague questions, and therefore, must not be answered. Commending us to ***In Re: The Special Courts Bill, 1978*** (supra) and several other decisions, learned Counsel urged that a reference under Article 143(1) of the Constitution for opinion has to be on a specific question or questions. It was asserted that by reason of the construction of the terms of Reference, the manner in which the questions have been framed and the nature of the answers proposed, this Court would be entitled to return the Reference unanswered by pointing out the aforesaid impediments in answering it. Lastly, it was fervently pleaded that if the present Reference is entertained, it would pave the way for the Executive to circumvent or negate the effect of inconvenient judgments, like the decision in the **2G Case**, which would not only set a dangerous and unhealthy precedent, but would also be clearly contrary to the ratio of the decision in Cauvery II.

8. Mr. Prashant Bhushan, learned senior Counsel, while adopting the arguments advanced by Mr. Soli Sorabjee, reiterated that from the format of questions No. 1 to 5, as well as from the review petition filed by the Government in the **2G Case**, it is clear that the present Reference seeks to overrule the decision in the **2G Case** by reading down the direction that allowed only 'auction' as the permissible means for allocation of all natural resource, in paragraphs 94 to 96 of the **2G Case**, to the specific case of spectrum. It was argued by the learned Counsel that it is apparent from the grounds urged in the review petition filed by the Government that it understood the ratio of the **2G Case**, binding them to the form of procedure to be followed while alienating precious natural resources belonging to the people, and yet it is seeking to use the advisory jurisdiction of this Court as an appeal over its earlier decision. It was contended that even if it be assumed that a doubt relating to the disposal of all natural resources has arisen on account of conflict of decisions on the point, such a conflict cannot be resolved by way of a Presidential reference; that would amount to holding that one or the other judgments is incorrectly decided, which, according to the learned Counsel, is beyond the scope of Article 143(1). Learned Counsel alleged that the language in which the Reference is couched, exhibits mala fides on the part of the Executive. He thus, urged that we should refrain from giving an opinion.

9. Dr. Subramanian Swamy, again vehemently objecting to the maintainability of the Reference, on similar grounds, added that the present Reference is against the very spirit of Article 143(1), which, according to the constituent assembly debates, was meant to be invoked sparingly, unlike

the case here. It was pleaded that the Reference is yet another attempt to delay the implementation of the directions in the **2G Case**. Relying on the decision of this Court in **Dr. M. Ismail Faruqui and Ors. v. Union of India and Ors.** MANU/SC/0860/1994 : (1994) 6 SCC 360, Dr. Swamy submitted that we will be well advised to return the Reference unanswered.

10. Mr. G.E. Vahanvati, the learned Attorney General for India, defending the Reference, submitted that the plea regarding non-maintainability of the Reference on the ground that it does not spell out a 'doubt', is fallacious on a plain reading of the questions framed therein. According to him, Article 143(1) uses the word 'question' which arises only when there is a 'doubt' and the very fact that the President has sought the opinion of this Court on the questions posed, shows that there is a doubt in the mind of the Executive on those issues. It was stressed that merely because the Reference does not use the word 'doubt' in the recitals, as in other cited cases, does not imply that in substance no doubt is entertained in relation to the mode of alienation of all natural resources, other than spectrum, more so when the questions posed for opinion have far reaching national and international implications. It was urged that the content of the Reference is to be appreciated in proper perspective, keeping in view the context and not the form.

11. It was urged that maintainability and the discretion to decline to answer a reference are two entirely different things. The question of maintainability arises when ex-facie, the Presidential reference does not meet the basic requirements of Article 143(1), contrastive to the question of discretion, which is the power of the Court to decline to answer a reference, for good reasons, once the reference is maintainable. In support of the proposition, reliance was placed on ***In Re: The Kerala Education Bill, 1957*** (supra), Keshav Singh and ***In Re: The Special Courts Bill, 1978*** (supra). According to the learned Counsel, the question as to whether the reference is to be answered or not, is not an aspect of maintainability, and is to be decided only after hearing the reference on merits.

12. Learned Attorney General, while contesting the plea that in a reference under Article 143(1), correctness or otherwise of earlier decisions can never be gone into, submitted that in a Presidential reference, there is no constitutional embargo against reference to earlier decisions in order to clarify, restate or even to form a fresh opinion on a principle of law, as long as an inter partes decision is left unaffected. In support of the contention that in the past, references have been made on questions in relation to the correctness of judgments, learned Counsel placed reliance on the decisions of this Court ***In Re: The Delhi Laws Act, 1912*** (supra), Special Reference No. 1 of 1998 (supra), Keshav Singh (supra) and of the Privy Council In re Piracy Jure Gentium (1934) A.C. 586. It was asserted that it has been repeatedly clarified on behalf of the Executive that the decision in the **2G Case** has been accepted and is not being challenged. The Reference was necessitated by certain observations made as a statement of law in the said judgment which require to be explicated. Referring to certain observations ***In Re: The Berubari Union and Exchange of Enclaves*** (supra), learned Counsel submitted that this Court had accepted that a reference could be answered to avoid protracted litigation.

13. Learned Attorney General also contended that withdrawal of the review petition by the Government is of no consequence; its withdrawal does not imply that the question about the permissible manner of disposal of other natural resources, and the issues regarding the environment for investment in the country, stood settled. Stoutly refuting the allegation that the

reference is mala fide, learned Counsel submitted that in In Re Presidential Poll (supra), it is clearly laid down that the Court cannot question the bona fides of the President making the reference.

14. Mr. T.R. Andhyarujina, learned senior Counsel, voiced concerns arising out of an apparent conflict between provisions of the statutes and the judgment delivered in the **2G Case**; specifically with reference to Sections 10 and 11 of the Mines and Minerals (Regulation and Development) Act, 1957 (for short, "MMRD Act"), which prescribe a policy of preferential treatment and first come first served, unlike the **2G Case**, which according to the learned Counsel only mandates auction for all natural resources. He thus, urged this Court to dispel all uncertainties regarding the true position of law after the judgment in the **2G Case**, by holding it as per incuriam in light of the provisions of the MMRD Act and other statutes.

15. Mr. Harish Salve, learned senior Counsel, appearing on behalf of CII, while supporting the Reference, fervently urged that the contention that the Reference deserves to be returned unanswered due to the absence of the use of the word 'doubt' in the recitals of the Reference, is untenable. According to the learned Counsel, under Article 143(1), the President can seek an opinion on any question of law or fact that has arisen, or is likely to arise, which is of such a nature and such public importance that it is expedient to seek the opinion of this Court. There is no additional condition that there should be any 'doubt' in the mind of the President. It was submitted by the learned Counsel that the need for a Presidential reference may also arise to impart certainty to certain questions of law or fact which are of such a nature and of such moment as to warrant seeking opinion of this Court. It was urged that a pedantic interpretation, by which a Presidential reference would be declined on semantic considerations, such as the failure to use the word 'doubt' in the reference, should be eschewed.

16. Learned Counsel contended that at the stage of making a reference, it is the satisfaction of the President in relation to the nature of the question and its importance that is relevant. As a matter of comity of institutions, this Court has always declined to go behind the reasons that prevailed upon the President to make a reference and its bona fides. Nevertheless, this Court always has the discretion not to answer any such reference or the questions raised therein for good reasons. It was stressed that since this Court does not sit in review over the satisfaction of the President, the question of jurisdiction and of maintainability does not arise.

17. Learned Counsel also argued that the premise that earlier judgments of this Court are binding in reference jurisdiction, and thus any reference, which impinges upon an earlier judgment should be returned unanswered, is equally fallacious. It was argued that the principle of stare decisis and the doctrine of precedent are generally accepted and followed as rules of judicial discipline and not jurisdictional fetters and, therefore, this Court is not prevented from re-examining the correctness of an earlier decision. On the contrary, the precedents support the proposition that this Court can, when exercising its jurisdiction under Article 143(1), examine the correctness of past precedents. According to the learned Counsel, in Keshav Singh, this Court did examine the correctness of the judgment in **Pandit M.S.M. Sharma v. Shri Sri Krishna Sinha and Ors.** MANU/SC/0021/1958 : (1959) Supp. 1 S.C.R. 806 (hereinafter referred to as "Sharma"). Explaining the ratio of the decision in Cauvery-II, learned Counsel submitted that it is clear beyond any pale of doubt that the said pronouncement does not lay down, as an abstract proposition of law, that under Article 143(1), this Court cannot consider the correctness of any precedent. What

it lays down is that once a lis between the parties is decided, the operative decree can only be opened by way of a review. According to the learned Counsel, overruling a judgment - as a precedent - does not tantamount to reopening the decree.

18. Arguing on similar lines, Mr. C.A. Sundaram, learned senior Counsel appearing on behalf of FICCI, contended that if the observations in the **2G Case** are read as applying to all natural resources and not limited to spectrum, it would tantamount to de facto policy formulation by the Court, which is beyond the scope of judicial review. He also took a nuanced stance on this Court's power of reconsideration over its precedents. It was submitted that a precedent can be sliced into two parts viz. the decision or operative part of an order or decree pertaining to the inter partes dispute and the ratio with respect to the position of law; the former being beyond this Court's powers of review once an earlier bench of this Court has pronounced an authoritative opinion on it, but not the latter. He thus, urged that this Court does have the power to reconsider the principles of law laid down in its previous pronouncements even under Article 141.

19. Mr. Darius Khambata, learned Advocate General of Maharashtra, submitted that observations in the **2G Case** were made only with regard to spectrum thus, leaving it open to this Court to examine the issue with regard to alienation of other natural resources. It was urged that even if broader observations were made with respect to all natural resources, it would still be open to this Court under Article 143(1) to say otherwise. He also pointed to certain State legislations that prescribe methods other than auction and thus, urged this Court to answer the first question in the negative lest all those legislations be deemed unconstitutional.

20. Mr. Sunil Gupta, learned senior Counsel, appearing on behalf of the State of U.P., added that when Article 143(1) of the Constitution unfolds a high prerogative of a constitutional authority, namely, the President, to consult this Court on question of law or fact, it contains a no less high prerogative of this Court to report to the President its opinion on the question referred, either by making or declining to give an answer to the question. In other words, according to the learned Counsel, the issue of a reference being maintainable at the instance of the President is an issue different from the judicial power of this Court to answer or not to answer the question posed in the reference.

21. Mr. Ravindra Shrivastava, learned senior Counsel appearing on behalf of the State of Chhattisgarh, contended that neither history supports nor reality warrants auction to be a rule of disposal of all natural resources in all situations. He referred to decisions of this Court that unambiguously strike a just balance between considerations of power of the State and duty towards public good, by leaving the choice of method of allocation of natural resources to the State, as long as it conforms to the requirements of Article 14. It was pleaded that the State be allowed the choice of methodology of allocation, especially in cases where it intends to incentivize investments and job creation in backward regions that would otherwise have been left untouched by private players if resources were given at market prices.

22. To sum up, the objections relating to the maintainability of the Reference converge mainly on the following points: (i) the foundational requirement for reference under Article 143(1) viz. a genuine 'doubt' about questions of fact or law that the executive labours under, is absent; (ii) the filing and withdrawal of a review petition whose recitals pertain to the **2G Case** would be an

impediment in the exercise of discretion under Article 143(1); (iii) the language in which the Reference is couched exhibits mala fides on the part of the Executive; (iv) in light of enunciation of law on the point in Cauvery II, entertaining a Presidential reference on a subject matter, which has been decided upon directly and with finality, is barred; (v) the present Reference is an attempt to overturn the judgment of this Court in the **2G Case**, which is against the spirit of Article 143(1) of the Constitution and (vi) the Executive is adopting the route of this Reference to wriggle out of the directions in the **2G Case** as the same are inconvenient for them to follow.

DISCUSSION:

23. Before we evaluate the rival stands on the maintainability of the Reference, it would be necessary to examine the scope and breadth of Article 143 of the Constitution, which reads thus:

143. Power of President to consult Supreme Court.-(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

A bare reading at the Article would show that it is couched in broad terms. It is plain from the language of Article 143(1) that it is not necessary that the question on which the opinion of the Supreme Court is sought must have actually arisen. The President can make a reference under the said Article even at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise. The satisfaction whether the question meets the pre-requisites of Article 143(1) is essentially a matter for the President to decide. Upon receipt of a reference under Article 143(1), the function of this Court is to consider the reference; the question(s) on which the President has made the reference, on the facts as stated in the reference and report to the President its opinion thereon.

24. Nevertheless, the usage of the word "may" in the latter part of Article 143(1) implies that this Court is not bound to render advisory opinion in every reference and may refuse to express its opinion for strong, compelling and good reasons. In Keshav Singh, highlighting the difference in the phraseology used in clauses (1) and (2) of Article 143, P.B. Gajendragadkar, C.J., speaking for the majority, held as follows:

...whereas in the case of reference made under Article 143 (2) it is the constitutional obligation of this Court to make a report on that reference embodying its advisory opinion, in a reference made under Article 143 (1) there is no such obligation. In dealing with this latter class of reference, it is open to this Court to consider whether it should make a report to the President giving its advisory opinion on the questions under reference.

25. Further, even in an earlier judgment in ***In Re: Allocation of Lands and Buildings Situate*** in a Chief Commissioner's Province and in the matter of Reference by the Governor-General under S. 213, Government of India Act 1935 MANU/FE/0004/1943 : A.I.R. 1943 FC 13, the Federal Court had said that even though the Court is within its authority to refuse to answer a question on a reference, it must be unwilling to exercise its power of refusal "except for good reasons." A similar phrase was used in ***In Re: The Kerala Education Bill, 1957*** (supra) when this Court observed that opinion on a reference under Article 143(1), may be declined in a "proper case" and "for good reasons". In Dr. M. Ismail Faruqui & Ors. (supra), it was added that a reference may not be answered when the Court is not competent to decide the question which is based on expert evidence or is a political one.

26. Having noted the relevant contours of Article 143(1) of the Constitution, we may now deal with the objections to the maintainability of the Reference.

27. There is no denying the fact that in the entire Reference the word 'doubt' has not been used. It is also true that in all previous references, noted in para 5 (supra), it had been specifically mentioned that doubts had arisen about various issues. Nonetheless, the fact remains that Article 143(1) does not use the term 'doubt'. No specific format has been provided in any of the Schedules of the Constitution as to how a reference is to be drawn. The use of the word 'doubt' in a reference is also not a constitutional command or mandate. Needless to emphasise that the expression, 'doubt', which refers to a state of uncertainty, may be with regard to a fact or a principle. In P. Ramanatha Aiyar's, The Major Law Lexicon, 4th Edition, the words 'doubt' and 'question' have been dealt with in the following manner:

Doubt, Question. These terms express the act of the mind in staying its decision. Doubt lies altogether in the mind; it is a less active feeling than question; by the former we merely suspend decision; by the latter we actually demand proofs in order to assist us in deciding. We may doubt in silence. We cannot question without expressing it directly or indirectly. He who suggests doubts does it with caution: he who makes a question throws in difficulties with a degree of confidence. We doubt the truth of a position; we question the veracity of an author. (Crabb.)

As per the Concise Oxford Dictionary (Tenth Edition), 'question' means : "a doubt; the raising of a doubt or objection; a problem requiring solution". In Black's Law Dictionary 'doubt', as a verb, has been defined as follows:

To question or hold questionable.

The word 'doubt', as a noun, has been described as under:

Uncertainty of mind; the absence of a settled opinion or conviction; the attitude of mind towards the acceptance of or belief in a proposition, theory, or statement, in which the judgment is not at rest but inclines alternately to either side.

28. The afore-extracted recitals of the instant Reference state that in the current circumstances, certain questions of law with far reaching national and international implications have arisen, including in relation to conduct of the auction and the regulation of the telecommunications

industry in accordance with the judgment (2G Case) that may affect the flow of FDI in the telecom industry and otherwise in other sectors into this country. Thereafter, it is also stated that questions of law that have arisen are of great public importance and are of far reaching consequences for the development of the country and hence, it is thought expedient to obtain the opinion of this Court. Question No. 1 of the reference reads as follows:

Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

29. At this juncture, reference may profitably be made to the decision in ***In Re: The Special Courts Bill, 1978*** (supra), an opinion by a Bench of seven learned Judges, wherein it was observed as follows:

27. We were, at one stage of the arguments, so much exercised over the undefined breadth of the reference that we were considering seriously whether in the circumstances it was not advisable to return the reference unanswered. But the written briefs filed by the parties and the oral arguments advanced before us have, by their fullness and ability, helped to narrow down the legal controversies surrounding the Bill and to crystallize the issues which arise for our consideration. We propose to limit our opinion to the points specifically raised before us. It will be convenient to indicate at this stage what those points are.

While expressing the hope that, in future, specific questions would be framed for the opinion of this Court, Y.V. Chandrachud (as his Lordship then was), speaking for the majority, said:

30. We hope that in future, whenever a reference is made to this Court under Article 143 of the Constitution, care will be taken to frame specific questions for the opinion of the Court. Fortunately, it has been possible in the instant reference to consider specific questions as being comprehended within the terms of the reference but the risk that a vague and general reference may be returned unanswered is real and ought to engage the attention of those whose duty it is to frame the reference. Were the Bill not as short as it is, it would have been difficult to infuse into the reference the comprehension of the two points mentioned by us above and which we propose to decide. A long Bill would have presented to us a rambling task in the absence of reference on specific points, rendering it impossible to formulate succinctly the nature of constitutional challenge to the provisions of the Bill.

30. From the afore-extracted paragraphs, three broad principles emerge: (i) a reference should not be vague, general and undefined, (ii) this Court can go through the written briefs and arguments to narrow down the legal controversies, and (iii) when the question becomes unspecific and incomprehensible, the risk of returning the reference unanswered arises. In Keshav Singh, this Court while dealing with the validity of the reference, referred to earlier decisions and opined as follows:

...It would thus be seen that the questions so far referred by the President for the Advisory opinion of this Court under Article 143(1) do not disclose a uniform pattern and that is quite clearly consistent with the broad and wide words used in Article 143(1).

31. An analysis of the afore-noted cases, indicates that neither has a particular format been prescribed nor any specific pattern been followed in framing references. The first principle relates to the 'form' and the second pertains to the 'pattern of content'. Holistically understood, on the ground of form or pattern alone, a reference is not to be returned unanswered. It requires appropriate analysis, understanding and appreciation of the content or the issue on which doubt is expressed, keeping in view the concept of constitutional responsibility, juridical propriety and judicial discretion.

32. Thus, we find it difficult to accept the stand that use of the word 'doubt' is a necessary condition for a reference to be maintainable under Article 143(1). That apart, in our view, question No. 1, quoted above, is neither vague nor general or unspecific, but is in the realm of comprehension which is relatable to a question of law. It expresses a 'doubt' and seeks the opinion of the Court on that question, besides others.

33. In so far as the impact of filing and withdrawal of the review application by the Union of India, against the decision in the **2G Case** on the maintainability of the instant Reference is concerned, it is a matter of record that in the review petition, certain aspects of the grounds for review which have been stated in the recitals of the Reference as well as in some questions, were highlighted. However, there is a gulf of difference between the jurisdiction exercised by this Court in a review and the discretion exercised in answering a reference under Article 143(1) of the Constitution. A review is basically guided by the well-settled principles for review of a judgment and a decree or order passed inter se parties. The Court in exercise of power of review may entertain the review under the acceptable and settled parameters. But, when an opinion of this Court is sought by the Executive taking recourse to a constitutional power, needless to say, the same stands on a different footing altogether. A review is lis specific and the rights of the parties to the controversy are dealt with therein, whereas a reference is answered keeping in view the terms of the reference and scrutinising whether the same satisfies the requirements inherent in the language employed under Article 143(1) of the Constitution. In our view, therefore, merely because a review had been filed and withdrawn and in the recital the narration pertains to the said case, the same would not be an embargo or impediment for exercise of discretion to answer the Reference.

34. As far as the allegation of mala fide is concerned, it is trite that this Court is neither required to go into the truth or otherwise of the facts of the recitals nor can it go into the question of bona fides or otherwise of the authority making a reference. [See: ***In Re: Presidential Poll*** (supra)]. To put it differently, the constitutional power to seek opinion of this Court rests with the President. The only discretion this Court has is either to answer the reference or respectfully decline to send a report to the President. Therefore, the challenge on the ground of mala fide, as raised, is unsustainable.

35. The principal objection to the maintainability of the Reference is that it is an indirect endeavour to unsettle and overturn the verdict in the **2G Case**, which is absolutely impermissible. The stand of the objectors is that the **2G Case** is an authoritative precedent in respect of the principle or proposition of law that all natural resources are to be disposed of by way of public auction and, therefore, the Reference should be held as not maintainable. Emphasis in this behalf was on paragraphs 85 and 94 to 96 of the said judgment. In support of the proposition, heavy reliance was placed on Cauvery II.

36. At the outset, we may note that the learned Attorney General has more than once stated that the Government of India is not questioning the correctness of the directions in the **2G Case**, in so far as the allocation of spectrum is concerned, and in fact the Government is in the process of implementing the same, in letter and spirit. Therefore, in the light of the said statement, we feel that it would be unnecessary to comment on the submission that the Reference is an attempt to get an opinion to unsettle the decision and directions of this Court in the **2G Case**. Nevertheless, since in support of the aforesaid submission, the opinion of this Court in Cauvery II has been referred to and relied upon in extenso, it would be appropriate to decipher the true ratio of Cauvery II, the lynchpin of the opposition to maintainability of the present Reference.

37. Cauvery II was preceded by **State of Tamil Nadu v. State of Karnataka and Ors.** MANU/SC/0643/1991 : 1991 Supp (1) SCC 240 (hereinafter referred to as "Cauvery I"), which dwelled on the issue whether the Cauvery Water Disputes Tribunal (for short "the Tribunal") had the power to grant interim relief. In that case, applications filed by the State of Tamil Nadu for urgent interim reliefs were rejected by the Tribunal on the ground that they were not maintainable. This order was challenged, resulting in the judgment dated 26th April, 1991 by this Court, where it was held as follows:

15. Thus, we hold that this Court is the ultimate interpreter of the provisions of the Interstate Water Disputes Act, 1956 and has an authority to decide the limits, powers and the jurisdiction of the Tribunal constituted under the Act. This Court has not only the power but obligation to decide as to whether the Tribunal has any jurisdiction or not under the Act, to entertain any interim application till it finally decides the dispute referred to it...

38. The Tribunal had ruled that since it was not like other courts with inherent powers to grant interim relief, only in case the Central Government referred a case for interim relief to it, would it have the jurisdiction to grant the same. Inter-alia, the Court observed that the Tribunal was wrong in holding that the Central Government had not made any reference for granting any interim relief, and concluded that the interim reliefs prayed for clearly fell within the purview of the dispute referred by the Central Government. Accordingly, the appeals preferred by the State of Tamil Nadu were allowed and the Tribunal was directed to decide the applications for interim relief. However, the Court did not decide the larger question of whether a Tribunal, constituted under the Interstate Water Disputes Act, 1956 had the power to grant an interim relief, though the answer to the same may be deduced from the final direction.

39. In pursuance of these directions, the Tribunal decided the application and vide its order dated 25th June, 1991, proceeded to issue certain directions to the State of Karnataka. Thereafter, on 25th July 1991, the Governor of Karnataka issued an Ordinance named "The Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991". Hot on the heels of the Ordinance, the State of Karnataka also instituted a suit under Article 131 of the Constitution against the State of Tamil Nadu for a declaration that the Tribunal's order granting interim relief was without jurisdiction and, therefore, null and void, etc. The Ordinance was replaced by Act 27 of 1991. In the context of these developments, the President made a reference to this Court under Article 143(1) of the Constitution, posing three questions for opinion. The third question of the reference, relevant for the present Reference, was :

3. Whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute.

However, while dealing with the reference in Cauvery II, the Court split the question, viz., whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief into two parts: (i) when a reference for grant of interim relief is made to the Tribunal, and (ii) when no such reference is made to it. It was contended by the States of Karnataka and Kerala that if the Tribunal did not have power to grant interim relief, the Central Government would be incompetent to make a reference for the purpose in the first place and the Tribunal in turn would have no jurisdiction to entertain such reference, if made. Dealing with the said submission, after making a reference to the earlier order, this Court observed that once the Central Government had made a reference to the Tribunal for consideration of the claim for interim relief, prayed for by the State of Tamil Nadu, the Tribunal had jurisdiction to consider the said request being a part of the reference itself. Implicit in the said decision was the finding that the subject of interim relief was a matter connected with or relevant to the water dispute within the meaning of Section 5(1) of the said Act. It was held that the Central Government could refer the matter for granting interim relief to the Tribunal for adjudication.

40. The consequence of the Court in coming to the conclusion, while replying to the third question was that the Tribunal did not have the jurisdiction to make an interim award or grant interim relief, would have not only resulted in the Court overruling its earlier decision between the two contending parties i.e. the two States, but it would have also then required the Court to declare the order of the Tribunal as being without jurisdiction. The Court therefore, said:

83...Although this Court by the said decision has kept open the question, viz., whether the Tribunal has incidental, ancillary, inherent or implied power to grant the interim relief when no reference for grant of such relief is made to it, it has in terms concluded the second part of the question. We cannot, therefore, countenance a situation whereby question 3 and for that matter questions 1 and 2 may be so construed as to invite our opinion on the said decision of this Court. That would obviously be tantamount to our sitting in appeal on the said decision which it is impermissible for us to do even in adjudicatory jurisdiction. Nor is it competent for the President to invest us with an appellate jurisdiction over the said decision through a Reference under Article 143 of the Constitution.

These observations would suggest that the Court declined to construe Article 143 as a power any different from its adjudicative powers and for that reason, said that what could not be done in the adjudicatory process would equally not be achieved through the process of a reference.

41. The expression, "sitting in appeal" was accurately used. An appellate court vacates the decree (or writ, order or direction) of the lower court when it allows an appeal - which is what this Court was invited to do in Cauvery I. This Court, in that appeal decided earlier, held that the Tribunal had the jurisdiction to pass the interim order sought by the State of Tamil Nadu. To nullify the interim order passed by the Tribunal, pursuant to a direction of the Supreme Court, on the ground that it was without jurisdiction, would necessarily require vacating the direction of the Supreme Court to the Tribunal to exercise its jurisdiction and decide the interim matter. Para 85 of that decision puts the matter beyond any pale of doubt:

"85... In the first instance, the language of clause (1) of Article 143 far from supporting Shri Nariman's contention is opposed to it. The said clause empowers the President to refer for this Court's opinion a question of law or fact which has arisen or is likely to arise. When this Court in its adjudicatory jurisdiction pronounces its authoritative opinion on a question of law, it cannot be said that there is any doubt about the question of law or the same is res integra so as to require the President to know what the true position of law on the question is. The decision of this Court on a question of law is binding on all courts and authorities. Hence under the said clause the President can refer a question of law only when this Court has not decided it. Secondly, a decision given by this Court can be reviewed only under Article 137 read with Rule 1 of Order 40 of the Supreme Court Rules, 1966 and on the conditions mentioned therein. When, further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief. [See: **Bengal Immunity Company Limited v. State of Bihar** MANU/SC/0083/1955 : (1955) 2 SCR 603].
Under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143.
To accept Shri Nariman's contention would mean that the advisory jurisdiction under Article 143 is also an appellate jurisdiction of this Court over its own decision between the same parties and the executive has a power to ask this Court to revise its decision. If such power is read in Article 143 it would be a serious inroad into the independence of judiciary.

42. Eventually, the reference was answered in respect of question No. 3 in the following terms:

Question No. 3: (i) A Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute when a reference for such relief is made by the Central Government;

(ii) whether the Tribunal has power to grant interim relief when no reference is made by the Central Government for such relief is a question which does not arise in the facts and circumstances under which the Reference is made. Hence we do not deem it necessary to answer the same.

43. The main emphasis of Mr. Soli Sorabjee was on the second part of paragraph 85, which, according to him, prohibits this Court from overruling a view expressed by it previously under Article 143(1). We are not persuaded to agree with the learned senior Counsel. The paragraph has to be read carefully. Sawant J. first considers the case of a "decision" of this Court whereas in the subsequent sentence he considers a "view of law" expressed by the Court, and attempts to explain the difference between the approaches to these two situations. These words are sometimes used interchangeably but not hereinabove. We believe that Justice Sawant consciously draws a difference between the two by using the words "When, further, this Court overrules the view of law..." after discussing the case of a "decision".

44. Black's Law Dictionary defines a "decision" as "a determination arrived at after consideration of facts, and, in legal context, law"; an "opinion" as "the statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied

to the case, and detailing the reasons upon which the judgment is based"; and explains the difference between a "decision" and "opinion" as follows:

Decision is not necessarily synonymous with 'opinion'. A decision of the Court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge.

45. Therefore, references in Para 85 to "decision" and "view of law" must be severed from each other. The learned Judge observes that in case of a decision, the appellate structure is exhausted after a pronouncement by the Supreme Court. Therefore, the only option left to the parties is of review or curative jurisdiction (a remedy carved out in the judgment in **Rupa Ashok Hurra v. Ashok Hurra and Anr.** MANU/SC/0910/2002 : (2002) 4 SCC 388). After the exercise of those limited options, the concerned parties have absolutely no relief with regard to the dispute; it is considered settled for eternity in the eyes of the law. However what is not eternal and still malleable in the eyes of law is the opinion or "view of law" pronounced in the course of reaching the decision. Justice Sawant clarifies that unlike this Court's appellate power, its power to overrule a previous precedent is an outcome of its inherent power when he says, "...it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances...." This Court has pointed out the difference between the two expressions in Rupa Ashok Hurra (supra), in the following words:

24. There is no gainsaying that the Supreme Court is the court of last resort - the final court on questions both of fact and of law including constitutional law. The law declared by this Court is the law of the land; it is precedent for itself and for all the courts/tribunals and authorities in India. In a judgment there will be declaration of law and its application to the facts of the case to render a decision on the dispute between the parties to the lis. It is necessary to bear in mind that the principles in regard to the highest court departing from its binding precedent are different from the grounds on which a final judgment between the parties, can be reconsidered. Here, we are mainly concerned with the latter. However, when reconsideration of a judgment of this Court is sought the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge...

Therefore, there are two limitations - one jurisdictional and the other self-imposed.

46. The first limitation is that a decision of this Court can be reviewed only under Article 137 or a Curative Petition and in no other way. It was in this context that in para 85 of Cauvery II, this Court had stated that the President can refer a question of law when this Court has not decided it. Mr. Harish Salve, learned senior Counsel, is right when he argues that once a lis between parties is decided, the operative decree can only be opened in review. Overruling the judgment - as a precedent - does not reopen the decree.

47. The second limitation, a self imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. For this proposition, the Court relied upon the judgment in the Bengal Immunity case (supra) wherein it was held that when Article 141 lays down that the law declared by this Court shall be binding

on all courts within the territory of India, it quite obviously refers to courts other than this Court; and that the Court would normally follow past precedents save and except where it was necessary to reconsider the correctness of law laid down in that judgment. In fact, the overruling of a principle of law is not an outcome of appellate jurisdiction but a consequence of its inherent power. This inherent power can be exercised as long as a previous decree vis-à-vis lis inter partes is not affected. It is the attempt to overturn the decision of a previous case that is problematic which is why the Court observes that

"under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143."

48. Therefore, the controversy in Cauvery II was covered by the decision rendered by this Court in Cauvery I between the parties and the decision operated as res judicata and hence, it was opined that discretion under Article 143(1) could not be exercised. It has also been observed that this Court had analysed the relevant provisions of the Inter-State Water Disputes Act, 1956 and thereafter had come to the conclusion that the Tribunal had jurisdiction to grant interim relief if the question of granting interim relief formed part of the reference. On this bedrock it was held that the decision operated as res judicata. It is, therefore, manifest from Cauvery II that the Court was clearly not opposed to clarifying the ratio of a previous judgment in Cauvery I, in the course of an advisory jurisdiction. Afore-extracted para 85 of Cauvery II, restricts this Court's advisory jurisdiction on the limited point of overturning a decided issue vis-à-vis a 'dispute' or lis inter partes.

49. Finally a seven Judge Bench of this Court has clearly held that this Court, under Article 143(1), does have the power to overrule a previous view delivered by it. Justice Chandrachud, C.J. in ***In Re: The Special Courts Bill*** (supra) held:

101...We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the view earlier taken by it, insofar as all other courts in the territory of India are concerned they ought to be bound by the view expressed by this Court even in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution.

50. There is a catena of pronouncements in which this Court has either explained, clarified or read down the ratio of previous judgments. In the very first reference, ***In Re: Delhi Laws Act, 1912*** (supra), the reference was made by reason of a judgment of the Federal Court in **Jatindra Nath Gupta v. The Province of Bihar and Ors.** MANU/FE/0016/1949 : (1949-50) F.C.R. 595. The background of that reference was explained by Mukherjea, J. as under:

The necessity of seeking the advisory opinion of this Court is stated to have arisen from the fact that because of the decision of the Federal Court in **Jatindra Nath Gupta v. The Province of Bihar**, which held the proviso to Sub-section (3) of Section 1 of the Bihar Maintenance of Public Order Act, 1947, ultra vires the Bihar Provincial Legislature, by reason of its amounting to a delegation of its legislative powers to an extraneous authority, doubts have arisen regarding the validity of the three legislative provisions mentioned above, the legality of the first and the second

being actually called in question in certain judicial proceedings which are pending before some of the High Courts in India.

Justice Das in the same opinion, while noting that reliance was placed by learned Counsel for the interveners on the judgment of the Federal Court in Jatindra Nath Gupta (supra), recorded that the learned Attorney General had strenuously challenged the correctness of the decision of the majority of the Federal Court in that case. Inter-alia, observing that the reference was in a way occasioned by that decision, the learned Judge held as follows:

I feel bound to say, with the utmost humility and for reasons given already, that the observations of the majority of the Federal Court in that case went too far and, in agreement with the learned Attorney-General, I am unable to accept them as correct exposition of the principles relating to the delegation of legislative power.

51. In this context, it would be beneficial to refer to Keshav Singh's case. In the said case, a reference was made by the President which fundamentally pertained to the privileges of the Legislative Assembly and exercise of jurisdiction by a Bench of the High Court. The High Court entertained a writ petition under Article 226 of the Constitution, challenging the decision of the Assembly committing one Keshav Singh, who was not one of its members, to prison for its contempt. The issue was whether by entertaining the writ petition, the Judges of the High Court were in contempt of the Legislature for infringement of its privileges and immunities. For the same, this Court proceeded to construe the relevant provisions contained in Article 194(3) and its harmonization with other Articles of the Constitution, especially Articles 19(1)(a), 21 & 22. In that context, the decision in "Sharma" (supra) came up for consideration. One of the questions that arose in Sharma's case was the impact of Articles 19(1)(a) and 21 on the provisions contained in the latter part of Article 194(3). The majority view was that the privilege in question was subsisting at the relevant time and must, therefore, deemed to be included under the latter part of Article 194(3). It was held that Article 19(1)(a) did not apply under the rule of harmonious construction, where Article 19(1)(a) was in direct conflict with Article 194(3). The particular provision in the latter Article would prevail over the general provision contained in the former. It was further held that though Article 21 applied, it had not been contravened. The minority view, on the other hand, held that the privilege in question had not been established; even assuming the same was established and it was to be included in the latter part of Article 194(3), yet it must be controlled by Article 19(1)(a) on the ground that Fundamental Rights guaranteed by Part III of the Constitution were of paramount importance and must prevail over a provision like the one contained in Article 194(3) which may be inconsistent with them. The majority decision also commented on the decision in **Gunupati Keshavram Reddy v. Nafisul Hasan and the State of U.P.** MANU/SC/0100/1952 : AIR 1954 SC 636 and observed that the said decision was based entirely on a concession and could not, therefore, be deemed to be a considered decision of this Court.

52. The decision in Keshavram Reddy (supra) dealt with the applicability of Article 22(2) to a case falling under the latter part of Article 194(3). It is worth noting that the minority opinion of Sharma treated Keshavram Reddy, as expressing a considered opinion, which was binding on the Court. In Keshav Singh it was opined that in Sharma's case, the majority decision held in terms that Article 21 was applicable to the contents of Article 194(3), but on merits, it came to the conclusion

that the alleged contravention had not been proved. Commenting on the minority view it was opined that it was unnecessary to consider whether Article 21 as such applied because the said view treated all the Fundamental Rights guaranteed by Part III as paramount, and therefore, each one of them could control the provisions of Article 194(3).

53. At that juncture, the Bench stated that in the case of Sharma, contentions urged by the Petitioner did not raise a general issue as to the relevance and applicability of all the fundamental rights guaranteed by Part III at all. The contravention of only two Articles was pleaded and they were Articles 19(1)(a) and 21. Strictly speaking, it was, therefore, unnecessary to consider the larger issue as to whether the latter part of Article 194(3) was subject to the fundamental rights in general, and indeed, even on the majority view it could not be said that the said view excluded the application of all fundamental rights, for the obvious and simple reason that Article 21 was held to be applicable and the merits of the Petitioner's arguments about its alleged contravention in his case were examined and rejected. Therefore, it was not right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must always yield to the former. It was further observed that the majority decision had incidentally commented on the decision in Keshavram Reddy's case (supra). Apart from that there was no controversy about the applicability of Article 22 in that case, and, therefore, the comment made by the majority judgment on the earlier decision was partly not accurate. Their Lordships adverted to the facts in Sharma's case wherein the majority judgment had observed that it "proceeded entirely on a concession of counsel and cannot be regarded as a considered opinion on the subject." After so stating, the Bench opined thus:

...There is no doubt that the first part of this comment is not accurate. A concession was made by the Attorney-General not on a point of law which was decided by the Court, but on a point of fact; and so, this part of the comment cannot strictly be said to be justified. It is, however, true that there is no discussion about the merits of the contention raised on behalf of Mr. Mistry and to that extent, it may have been permissible to the majority judgment to say that it was not a considered opinion of the Court. But, as we have already pointed out, it was hardly necessary for the majority decision to deal with the point pertaining to the applicability of Article 22(2), because that point did not arise in the proceedings before the Court in Pandit Sharma's case. That is why we wish to make it clear that the obiter observations made in the majority judgment about the validity or correctness of the earlier decision of this Court in Gunupati Keshavram Reddy's case should not be taken as having decided the point in question. In other words, the question as to whether Article 22(2) would apply to such a case may have to be considered by this Court if and when it becomes necessary to do so.

54. From the aforesaid decision it is clear that while exercising jurisdiction under Article 143(1) of the Constitution this Court can look into an earlier decision for the purpose of whether the contentions urged in the previous decision did raise a general issue or not; whether it was necessary to consider the larger issue that did not arise; and whether a general proposition had been laid down. It has also been stated that where no controversy arose with regard to applicability of a particular facet of constitutional law, the comments made in a decision could be treated as not accurate; and further it could be opined that in an earlier judgment there are certain obiter observations.

55. Thus, in Keshav Singh, a seven-Judge Bench, while entertaining a reference under Article 143(1), dealt with a previous decision in respect of its interpretation involving a constitutional principle in respect of certain Articles, and proceeded to opine that the view expressed in Sharma's case, in relation to a proposition laid down in Keshavram Reddy's case, was inaccurate.

56. At this stage, it is worthy to refer to **Supreme Court Advocates-on-Record Association and Ors. v. Union of India** MANU/SC/0073/1994 : (1993) 4 SCC 441. J.S. Verma, J., (as his Lordship then was) speaking for the majority, apart from other conclusions relating to appointment of Judges and the Chief Justices, while dealing with transfer, expressed thus:

(8) Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

(10) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in anyone.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

As far as the ground of limited judicial review is concerned the majority opined thus:

481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

482. ...Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making.

57. In Special Reference No. 1 of 1998, (commonly referred as the "Second Judges Case"), question No. 2 reads as follows:

(2) Whether the transfer of Judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that 'such transfer is not justiciable on any ground' and its further observation that limited judicial review is available in matters of transfer, and the extent and scope of judicial review.

While answering the same, the Bench opined thus:

37. It is to our mind imperative, given the gravity involved in transferring High Court Judges, that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also the Chief Justice of the High Court to which the transfer is to be effected. This is in accord with the majority judgment in the Second Judges case which postulates consultation with the Chief Justice of another High Court. The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by the Chief Justice of India and the four senior most puisne Judges of the Supreme Court. These views and those of each of the four senior most puisne Judges should be conveyed to the Government of India along with the proposal of transfer. Unless the decision to transfer has been taken in the manner aforestated, it is not decisive and does not bind the Government of India.

In the conclusion their Lordships clearly state as follows:

1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four senior most puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

58. From the aforesaid, it is demonstrable that while entertaining the reference under Article 143(1), this Court had analysed the principles enunciated in the earlier judgment and also made certain modifications. The said modifications may be stated as one of the mode or method of inclusion by way of modification without changing the ratio decidendi. For the purpose of validity of a reference, suffice it to say, dwelling upon an earlier judgment is permissible. That apart, one cannot be oblivious of the fact that the scope of limited judicial review, in the Second Judges Case, which otherwise is quite restricted, was slightly expanded in the Court's opinion to the Presidential reference.

59. It is of some interest to note that almost every reference, filed under Article 143(1), has witnessed challenge as to its maintainability on one ground or the other, but all the same, the references have been answered, except in Dr. M. Ismail Faruqui & Ors. (supra), which was returned unanswered, mainly on the ground that the reference did not serve a constitutional purpose.

60. From the aforesaid analysis, it is quite vivid that this Court would respectfully decline to answer a reference if it is improper, inadvisable and undesirable; or the questions formulated have purely socio-economic or political reasons, which have no relation whatsoever with any of the provisions of the Constitution or otherwise are of no constitutional significance; or are incapable of being

answered; or would not subserve any purpose; or there is authoritative pronouncement of this Court which has already decided the question referred.

61. In the case at hand, it is to be scrutinized whether the **2G Case** is a decision which has dealt with and decided the controversy encapsulated in question No. 1 or meets any of the criteria mentioned above. As we perceive, the question involves interpretation of a constitutional principle inherent under Article 14 of the Constitution and it is of great public importance as it deals with allocation/alienation/disposal/ distribution of natural resources. Besides, the question whether the **2G Case** is on authoritative pronouncement in that regard, has to be looked into and only then an opinion can be expressed. For the said purpose all other impediments do not remotely come into play in the present Reference.

62. We are, therefore, of the view that as long as the decision with respect to the allocation of spectrum licenses is untouched, this Court is within its jurisdiction to evaluate and clarify the ratio of the judgment in the **2G Case**. For the purpose of this stage of argumentation, it needs little emphasis, that we have the jurisdiction to clarify the ratio of the judgment in **2G Case**, irrespective of whether we actually choose to do so or not. Therefore, the fact that this Reference may require us to say something different to what has been enunciated in the **2G Case** as a proposition of law, cannot strike at the root of the maintainability of the Reference. Consequently, we reject the preliminary objection and hold that this Reference is maintainable, notwithstanding its effect on the ratio of the **2G Case**, as long as the decision in that case qua lis inter partes is left unaffected.

ON MERITS :

63. This leads us to the merits of the controversy disclosed in the questions framed in the Reference for our advisory opinion.

64. As already pointed out, the judgment in the **2G Case** triggered doubts about the validity of methods other than 'auction' for disposal of natural resources which, ultimately led to the filing of the present Reference. Therefore, before we proceed to answer question No. 1, it is imperative to understand what has been precisely stated in the **2G Case** and decipher the law declared in that case.

65. All the counsel agreed that paragraphs 94 to 96 in the said decision are the repository of the ratio vis-à-vis disposal of natural resources in the **2G Case**. On the one hand it was argued that these paragraphs lay down, as a proposition of law, that all natural resources across all sectors, and in all circumstances are to be disposed of by way of public auction, and on the other, it was urged that the observations therein were made only qua spectrum. Before examining the strength of the rival stands, we may briefly recapitulate the principles that govern the determination of the 'law declared' by a judgment and its true ratio.

66. Article 141 of the Constitution lays down that the 'law declared' by the Supreme Court is binding upon all the courts within the territory of India. The 'law declared' has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. [See: **Fida Hussain and Ors. v. Moradabad Development Authority and Anr.** MANU/SC/0839/2011 : (2011) 12 SCC 615]. Hence, it flows

from the above that the 'law declared' is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided. [Also see: **Ambica Quarry Works v. State of Gujarat and Ors.** MANU/SC/0853/1988 : (1987) 1 SCC 213 and **Commissioner of Income Tax v. Sun Engineering Works (P) Limited** MANU/SC/0707/1992 : (1992) 4 SCC 363]. In other words, the 'law declared' in a judgment, which is binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which, the case is decided, which has to be ascertained in relation to the subject-matter of the decision.

67. Each case entails a different set of facts and a decision is a precedent on its own facts; not everything said by a Judge while giving a judgment can be ascribed precedental value. The essence of a decision that binds the parties to the case is the principle upon which the case is decided and for this reason, it is important to analyse a decision and cull out from it, the ratio decidendi. In the matter of applying precedents, the erudite Justice Benjamin Cardozo in "The Nature of a Judicial Process", had said that "if the judge is to pronounce it wisely, some principles of selection there must be to guide him along all potential judgments that compete for recognition" and "almost invariably his first step is to examine and compare them;" "it is a process of search, comparison and little more" and ought not to be akin to matching "the colors of the case at hand against the colors of many sample cases" because in that case "the man who had the best card index of the cases would also be the wisest judge". Warning against comparing precedents with matching colours of one case with another, he summarized the process, in case the colours don't match, in the following wise words:

It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate. The sentence of today will make the right and wrong of tomorrow.

68. With reference to the precedential value of decisions, in **State of Orissa and Ors. v. Md. Illiyas** MANU/SC/2004/2005 : (2006) 1 SCC 275 this Court observed:

...According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment...

69. Recently, in **Union of India v. Amrit Lal Manchanda and Anr.** MANU/SC/0133/2004 : (2004) 3 SCC 75, this Court has observed as follows:

...Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret

words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

70. It is also important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case. Every part of a judgment is intricately linked to others constituting a larger whole and thus, must be read keeping the logical thread intact. In this regard, in **Islamic Academy of Education and Anr. v. State of Karnataka and Ors.** MANU/SC/0580/2003 : (2003) 6 SCC 697, the Court made the following observations:

The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment.

71. The ratio of the **2G Case** must, therefore, be understood and appreciated in light of the above guiding principles.

72. In the **2G Case**, the Bench framed five questions. Questions No. (ii) and (v) pertain to the factual matrix and are not relevant for settling the controversy at hand. The remaining three questions are reproduced below:

(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?

(iii) Whether the exercise undertaken by DoT from September 2007 to March 2008 for grant of UAS licences to the private Respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and mala fides and is contrary to public interest?

(iv) Whether the policy of first-come-first-served followed by DoT for grant of licences is ultra vires the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (hereinafter referred to as "the Minister of Communications and Information Technology"), without consulting TRAI, with a view to favour some of the applicants?

73. While dealing with question No.(i), the Court observed that the State is empowered to distribute natural resources as they constitute public property/national assets. Thereafter, the Bench observed as follows:

75....while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public

interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection...

74. The learned Judges adverted to the 'public trust doctrine' as enunciated in **The Illinois Central Railroad Co. v. The People of the State of Illinois** 36 L ED 1018 : 146 U.S. 387 (1892); **M.C. Mehta v. Kamal Nath and Ors.** MANU/SC/1007/1997 : (1997) 1 SCC 388; **Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai and Anr.** MANU/SC/0033/2004 : (2004) 3 SCC 214; **Intellectuals Forum, Tirupathi v. State of A.P. and Ors.** MANU/SC/8047/2006 : (2006) 3 SCC 549; **Fomento Resorts and Hotels Limited and Anr. v. Minguel Martins and Ors.** MANU/SC/0063/2009 : (2009) 3 SCC 571 and **Reliance Natural Resources Limited v. Reliance Industries Limited** MANU/SC/0341/2010 : (2010) 7 SCC 1 and held:

85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.

Referring to the decisions of this Court in **Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh and Ors.** MANU/SC/0345/2011 : (2011) 5 SCC 29 and **Sachidanand Pandey and Anr. v. State of West Bengal and Ors.** MANU/SC/0136/1987 : (1987) 2 SCC 295, the Bench ultimately concluded thus:

89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good.

75. On a reading of the above paragraphs, it can be noticed that the doctrine of equality; larger public good, adoption of a transparent and fair method, opportunity of competition; and avoidance of any occasion to scuttle the claim of similarly situated applicants were emphasised upon. While dealing with alienation of natural resources like spectrum, it was stated that it is the duty of the State to ensure that a non-discriminatory method is adopted for distribution and alienation which would necessarily result in the protection of national/public interest.

76. Paragraphs 85 and 89, while referring to the concept of 'public trust doctrine', lay emphasis on the doctrine of equality, which has been segregated into two parts - one is the substantive part and the other is the regulatory part. In the regulatory facet, paragraph 85 states that the procedure adopted for distribution should be just and non-arbitrary and must be guided by constitutional principles including the doctrine of equality and larger public good. Similarly, in paragraph 89

stress has been laid on transparency and fair opportunity of competition. It is further reiterated that the burden of the State is to ensure that a non-discriminatory method is adopted for distribution and alienation which would necessarily result in the protection of national and public interest.

77. Dealing with Questions No.(iii) and (iv) in paragraphs 94 to 96 of the judgment, the Court opined as follows:

94. There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim.

95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/ instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.

78. Our reading of these paragraphs suggests that the Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent paragraph (96) with the rider 'perhaps'. It has been observed that "a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden." We are conscious that a judgment is not to be read as a statute, but at the same time, we cannot be oblivious to the fact that when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word "perhaps" gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources.

The choice of the word 'perhaps' suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable.

79. Further, the final conclusions summarized in paragraph 102 of the judgment (SCC) make no mention about auction being the only permissible and intra vires method for disposal of natural resources; the findings are limited to the case of spectrum. In case the Court had actually enunciated, as a proposition of law, that auction is the only permissible method or mode for alienation/allotment of natural resources, the same would have found a mention in the summary at the end of the judgment.

80. Moreover, if the judgment is to be read as holding auction as the only permissible means of disposal of all natural resources, it would lead to the quashing of a large number of laws that prescribe methods other than auction, e.g., the MMRD Act. While dealing with the merits of the Reference, at a later stage, we will discuss whether or not auction can be a constitutional mandate under Article 14 of the Constitution, but for the present, it would suffice to say that no court would ever implicitly, indirectly, or by inference, hold a range of laws as ultra vires the Constitution, without allowing every law to be tested on its merits. One of the most profound tenets of constitutionalism is the presumption of constitutionality assigned to each legislation enacted. We find that the **2G Case** does not even consider a plethora of laws and judgments that prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case, it intended to make an assertion as wide as applying auction to all natural resources. Therefore, we are convinced that the observations in Paras 94 to 96 could not apply beyond the specific case of spectrum, which according to the law declared in the **2G Case**, is to be alienated only by auction and no other method.

81. Thus, having come to the conclusion that the **2G Case** does not deal with modes of allocation for natural resources, other than spectrum, we shall now proceed to answer the first question of the Reference pertaining to other natural resources, as the question subsumes the essence of the entire reference, particularly the set of first five questions.

82. The President seeks this Court's opinion on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum. The question also harbours several concepts, which were argued before us through the hearing of the Reference, that require to be answered in order to derive a comprehensive answer to the parent question. Are some methods ultra vires and others intra vires the Constitution of India, especially Article 14? Can disposal through the method of auction be elevated to a Constitutional principle? Is this Court entitled to direct the executive to adopt a certain method because it is the 'best' method? If not, to what extent can the executive deviate from such 'best' method? An answer to these issues, in turn, will give an answer to the first question which, as noted above, will answer the Presidential Reference.

83. Before proceeding to answer these questions, we would like to dispose of a couple of minor objections. The first pertained to the classification of resources made in the **2G Case**. Learned Counsel appearing for CPIL argued that all that the judgment in the **2G Case** has done is to carve out a special category of cases where public auction is the only legally sustainable method of alienation viz. natural resources that are scarce, valuable and are allotted to private entities for

commercial exploitation. The learned Attorney General, however, contested this claim and argued that no such proposition was laid down in the 2G judgment. He pointed out that the words "commercial exploitation" were not even used anywhere in the judgment except in an extract from another judgment in a different context. We agree that the judgment itself does not carve out any special case for scarce natural resources only meant for commercial exploitation. However, we feel, despite that, in this Reference, CPIL is not barred from making a submission drawing a distinction between natural resources meant for commercial exploitation and those meant for other purposes. This Court has the jurisdiction to classify the subject matter of a reference, if a genuine case for it exists.

84. Mr. Shanti Bhushan, learned Senior Counsel, in support of his stand that the first question of the Reference must be answered in a way so as to allow auction as the only mode for the disposal of natural resources, submitted that a combined reading of Article 14, which dictates non-arbitrariness in State action and equal opportunity to those similarly placed; Article 39(b) which is a Directive Principle of State Policy dealing with distribution of natural resources for the common good of the people; and the "trusteeship" principle found in the Preamble which mandates that the State holds all natural resources in the capacity of a trustee, on behalf of the people, would make auction a constitutional mandate under Article 14 of the Constitution. It is imperative, therefore, that we evaluate each of these principles before coming to any conclusion on the constitutional verdict on auction.

85. In the **2G Case**, two concepts namely, "public trust doctrine" and "trusteeship" have been adverted to, which were also relied upon by learned Counsel for CPIL, in defence of the argument that the State holds natural resources in a fiduciary relationship with the people. As far as "trusteeship" is concerned, there is no cavil that the State holds all natural resources as a trustee of the public and must deal with them in a manner that is consistent with the nature of such a trust. However, what was asserted on behalf of CPIL was that all natural resources fall within the domain of the "public trust doctrine", and therefore, there is an obligation on the Government to ensure that their transfer or alienation for commercial exploitation is in a fair and transparent manner and only in pursuit of public good. The learned Attorney General on the other hand, zealously urged that the subject matter of the doctrine and the nature of restrictions, it imposes, are of limited scope; that the applicability of the doctrine is restricted to certain common properties pertaining to the environment, like rivers, seashores, forest and air, meant for free and unimpeded use of the general public and the restrictions it imposes is in the term of a complete embargo on any alienation of such resources, for private ownership. According to him, the extension of the public trust doctrine to all natural resources has led to a considerable confusion and needs to be clarified.

86. The doctrine of public trust enunciated more thoroughly by the United States Supreme Court in Illinois (supra) was introduced to Indian environmental jurisprudence by this Court in M.C. Mehta (supra). Speaking for the majority, Kuldip Singh, J. observed as follows :

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather

than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority:

Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.

The learned Judge further observed:

34. Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

87. The judgment in Kamal Nath's case (supra) was explained in Intellectuals Forum (supra). Reiterating that the State is the trustee of all natural resources which are by nature meant for public use and enjoyment, the Court observed thus:

76. The Supreme Court of California, in **National Audubon Society v. Superior Court of Alpine Country** also known as Mono Lake case summed up the substance of the doctrine. The Court said:

Thus the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust.

This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources...

It was thus, held that when the affirmative duties are set out from a nugatory angle, the doctrine does not exactly prohibit the alienation of property held as a public trust, but mandates a high degree of judicial scrutiny.

88. In Fomento (supra), the Court was concerned with the access of the public to a beach in Goa. Holding that it was a public beach which could not be privatized or blocked denying traditional access, this Court reiterated the public trust doctrine as follows:

52. The matter deserves to be considered from another angle. The public trust doctrine which has been invoked by Ms Indira Jaising in support of her argument that the beach in question is a public beach and the Appellants cannot privatise the same by blocking/ obstructing traditional access available through Survey No. 803 (new No. 246/2) is implicitly engrafted by the State Government in Clause 4(ix) of the agreement. That doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. These resources are gift of nature, therefore, they should be freely available to everyone irrespective of one's status in life.

89. In Reliance Natural Resources (supra), it has been observed that even though the doctrine of public trust has been applied in cases dealing with environmental jurisprudence, "it has broader application". Referring to Kamal Nath (supra), the Court held that it is the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large.

90. The public trust doctrine is a specific doctrine with a particular domain and has to be applied carefully. It has been seriously debated before us as to whether the doctrine can be applied beyond the realm of environmental protection. Richard J. Lazarus in his article, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine", while expressing scepticism over the 'liberation' of the doctrine, makes the following observations:

The strength of the public trust doctrine necessarily lies in its origins; navigable waters and submerged lands are the focus of the doctrine, and the basic trust interests in navigation, commerce, and fishing are the object of its guarantee of public access. Commentators and judges alike have made efforts to "liberate", "expand", and "modify" the doctrine's scope yet its basic focus remains relatively unchanged. Courts still repeatedly return to the doctrine's historical function to determine its present role. When the doctrine is expanded, more often than not the expansions require tortured constructions of the present rather than repudiations of the doctrine's past.

However, we feel that for the purpose of the present opinion, it is not necessary to delve deep into the issue as in Intellectuals Forum (supra), the main departure from the principle explained by Joseph. L. Sax in his Article "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" is that public trust mandates a high degree of judicial scrutiny, an issue that we will anyway elaborately discuss while enunciating the mandate of Article 14 of the Constitution.

91. We would also like to briskly deal with a similar argument made by Mr. Shanti Bhushan. The learned senior Counsel submitted that the repository of sovereignty in our framework is the people of this country since the opening words of the Constitution read "We The People of India... do hereby adopt, enact and give to ourselves this Constitution," and therefore the government, as the agent of the Sovereign, the people, while alienating natural resources, must heed to judicial care and due process. Firstly, this Court has held in **Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Ors.** MANU/SC/0241/2007 : (2007) 3 SCC 184; Para 21 that the "Constitution is the supreme lex in this country" and "all organs of the State derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it". Further, the notion that the Parliament is an agent of the people was squarely rebutted in ***In Re: Delhi Laws Act, 1912*** (supra), where it was observed that

"the legislature as a body cannot be seen to be an agency of the electorate as a whole" and "acts on its own authority or power which it derives from the Constitution".

92. In **Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi and Anr.** MANU/SC/0175/1968 : (1968) 3 SCR 251 this Court held that "the doctrine that it (the Parliament) is a delegate of the people coloured certain American decision does not arise here" and that in fact the "Parliament which by a concentration of all the powers of legislation derived from all the three Legislative Lists becomes the most competent and potent legislature it is possible to erect under our Constitution." We however, appreciate the concern of Mr. Shanti Bhushan that the lack of any such power in the hands of the people must not be a sanction for recklessness during disposal of natural resources. The legislature and the Executive are answerable to the Constitution and it is there where the judiciary, the guardian of the Constitution, must find the contours to the powers of disposal of natural resources, especially Article 14 and Article 39(b).

MANDATE OF ARTICLE 14:

93. Article 14 runs as follows:

14. Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

94. The underlying object of Article 14 is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the preamble to our Constitution. The language of Article 14 is couched in negative terms and is in form, an admonition addressed to the State. It does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The right to equality before law is secured from all legislative and executive tyranny by way of discrimination since the language of Article 14 uses the word "State" which as per Article 12, includes the executive organ. [See: **Basheshar Nath v. The Commissioner of Income Tax, Delhi and Rajasthan and Anr.** MANU/SC/0064/1958 : 1959 Supp (1) SCR 528[1]. Besides, Article 14 is expressed in absolute terms and its effect is not curtailed by restrictions like those imposed on Article 19(1) by Articles 19(2)-(6). However, notwithstanding the absence of such restrictions, certain tests have been devised through judicial decisions to test if Article 14 has been violated or not.

95. For the first couple of decades after the establishment of this Court, the 'classification' test was adopted which allowed for a classification between entities as long as it was based on an intelligible differentia and displayed a rational nexus with the ultimate objective of the policy. **Budhan Choudhry and Ors. v. State of Bihar** MANU/SC/0047/1954 : AIR 1955 SC 191 referred to in **Shri Ram Krishna Dalmiya v. Shri Justice S.R. Tendolkar and Ors.** MANU/SC/0024/1958 : (1959) 1 SCR 279 explained it in the following terms:

It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation

to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

96. However, after the judgment of this Court in **E.P. Royappa v. State of Tamil Nadu and Anr.** MANU/SC/0380/1973 : (1974) 4 SCC 3 the 'arbitrariness' doctrine was introduced which dropped a pedantic approach towards equality and held the mere existence of arbitrariness as violative of Article 14, however equal in its treatment. Justice Bhagwati (as his Lordship was then) articulated the dynamic nature of equality and borrowing from Shakespeare's Macbeth, said that the concept must not be "cribbed, cabined and confined" within doctrinaire limits: -

85. ...Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits.

His Lordship went on to explain the length and breadth of Article 14 in the following lucid words:

85... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

97. Building upon his opinion delivered in Royappa's case (supra), Bhagwati, J., held in **Maneka Gandhi v. Union of India and Anr.** MANU/SC/0133/1978 : (1978) 1 SCC 248:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive.

98. In **Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors.** MANU/SC/0498/1980 : (1981) 1 SCC 722, this Court said that the 'arbitrariness' test was lying "latent and submerged" in the "simple but pregnant" form of Article 14 and explained the switch from the 'classification' doctrine to the 'arbitrariness' doctrine in the following words:

16...The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.

99. **Ramana Dayaram Shetty v. International Airport Authority of India and Ors.** MANU/SC/0048/1979 : (1979) 3 SCC 489 : AIR 1979 SC 1628 explained the limitations of Article 14 on the functioning of the Government as follows: -

12...It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

100. Equality and arbitrariness were thus, declared "sworn enemies" and it was held that an arbitrary act would fall foul of the right to equality. Non-arbitrariness was equated with the rule of law about which Jeffrey Jowell in his seminal article "The Rule of Law Today" said: -

Rule of law principle primarily applies to the power of implementation. It mainly represents a state of procedural fairness. When the rule of law is ignored by an official it may on occasion be enforced by courts.

101. As is evident from the above, the expressions 'arbitrariness' and 'unreasonableness' have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in **Sharma Transport v. Government of A.P. and Ors.** MANU/SC/0759/2001 : (2002) 2 SCC 188, this Court has observed thus:

25...In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.<mpara>

102. Further, even though the 'classification' doctrine was never overruled, it has found less favour with this Court as compared to the 'arbitrariness' doctrine. In **Om Kumar and Ors. v. Union of India** MANU/SC/0704/2000 : (2001) 2 SCC 386, this Court held thus:

59. But, in **E.P. Royappa v. State of T. N. Bhagwati**, J laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary", it could be struck down under Article 14. This principle is now uniformly followed in all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

103. However, this Court has also alerted against the arbitrary use of the 'arbitrariness' doctrine. Typically, laws are struck down for violating Part III of the Constitution of India, legislative incompetence or excessive delegation. However, since Royappa's case (supra), the doctrine has been loosely applied. This Court in **State of A.P. and Ors. v. McDowell and Co. and Ors.** MANU/SC/0427/1996 : (1996) 3 SCC 709 stressed on the need for an objective and scientific analysis of arbitrariness, especially while striking down legislations. Justice Jeevan Reddy observed:

43...The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness - concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (s) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary** or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this

connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety
(see **Council of Civil Service Unions v. Minister for Civil Service** which decision has been accepted by this Court as well).

An expression used widely and rather indiscriminately - an expression of inherently imprecise import. The extensive use of this expression in India reminds one of what Frankfurter, J said in **Hattie Mae Tiller v. Atlantic Coast Line Railroad Co. 87 L ED 610 : 318 US 54 (1943). "The phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas", said the learned Judge.

104. Therefore, ever since the Royappa era, the conception of 'arbitrariness' has not undergone any significant change. Some decisions have commented on the doctrinal looseness of the arbitrariness test and tried keeping its folds within permissible boundaries. For instance, cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [See: **Air India v. Nergesh Meerza** MANU/SC/0688/1981 : (1981) 4 SCC 335 (SCC at pp. 372-373)] only on the basis of "arbitrariness", as explained above, have been doubted in McDowell's case (supra). But otherwise, the subject matter, content and tests for checking violation of Article 14 have remained, more or less, unaltered.

105. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell's case (supra) has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

WHETHER ' AUCTION ' A CONSTITUTIONAL MANDATE :

106. Such being the constitutional intent and effect of Article 14, the question arises - can auction as a method of disposal of natural resources be declared a constitutional mandate under Article 14 of the Constitution of India? We would unhesitatingly answer it in the negative since any other answer would be completely contrary to the scheme of Article 14. Firstly, Article 14 may imply positive and negative rights for an individual, but with respect to the State, it is only couched in negative terms; like an admonition against the State which prohibits the State from taking up actions that may be arbitrary, unreasonable, capricious or discriminatory. Article 14, therefore, is an injunction to the State against taking certain type of actions rather than commanding it to take particular steps. Reading the mandate of auction into its scheme would thus, be completely contrary to the intent of the Article apparent from its plain language.

107. Secondly, a constitutional mandate is an absolute principle that has to be applied in all situations; it cannot be applied in some and not tested in others. The absolute principle is then applied on a case by case basis to see which actions fulfill the requirements of the constitutional principle and which do not.

108. Justice K. Subba Rao in his lectures compiled in a book titled "Some Constitutional Problems", critically analyzing the trends of Indian constitutional development, stated as follows:

If the Courts, instead of limiting the scope of the articles by construction, exercise their jurisdiction in appropriate cases, I have no doubt that the arbitrariness of the authorities will be minimised. If these authorities entrusted with the discretionary powers, realize that their illegal orders infringing the rights of the people would be quashed by the appropriate authority, they would rarely pass orders in excess of their powers. If they knew that not only the form but the substance of the orders would be scrutinized in open court, they would try to keep within their bounds. The fear of ventilation of grievance in public has always been an effective deterrent. The apprehension that the High Courts would be swamped with writs has no basis.

109. Similar sentiments were expressed by Justice K. K. Mathew in series of lectures incorporated in the form of a book titled "Democracy, Equality and Freedom" in which it is stated that "the strength of judicial review lies in case to case adjudication." This is precisely why this Court in **His Holiness Kesavananda Bharti Sripadagalvaru v. State of Kerala and Anr.** MANU/SC/0445/1973 : (1973) 4 SCC 225 quoting from an American decision, observed as follows:

1695...The reason why the expression "due process" has never been defined is that it embodies a concept of fairness which has to be decided with reference to the facts and circumstances of each case and also according to the mores for the time being in force in a society to which the concept has to be applied. As Justice Frankfurter said, "due process" is not a technical conception with a fixed content unrelated to time, place and circumstances [See **Joint Anti-Fascist Refugee Committee v. McGrath** 341 U.S. 123].

110. Equality, therefore, cannot be limited to mean only auction, without testing it in every scenario. In **The State of West Bengal v. Anwar Ali Sarkar** MANU/SC/0033/1952 : 1952 SCR 284 at pp. 297, this Court, quoting from **Kotch v. Pilot Comm'rs** 330 U.S. 552, had held that "the constitutional command for a State to afford equal protection of the laws sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task". One cannot test the validity of a law with reference to the essential elements of ideal democracy, actually incorporated in the Constitution. (See: **Indira Nehru Gandhi v. Raj Narain** MANU/SC/0304/1975 : 1975 (Supp) SCC 1). The Courts are not at liberty to declare a statute void, because in their opinion it is opposed to the spirit of the Constitution. Courts cannot declare a limitation or constitutional requirement under the notion of having discovered some ideal norm. Further, a constitutional principle must not be limited to a precise formula but ought to be an abstract principle applied to precise situations. The repercussion of holding auction as a constitutional mandate would be the voiding of every action that deviates from it, including social endeavours, welfare schemes and promotional policies, even though CPIL itself has argued against the same, and asked for making auction mandatory only in the alienation of scarce natural

resources meant for private and commercial business ventures. It would be odd to derive auction as a constitutional principle only for a limited set of situations from the wide and generic declaration of Article 14. The strength of constitutional adjudication lies in case to case adjudication and therefore auction cannot be elevated to a constitutional mandate.

111. Finally, reading auction as a constitutional mandate would be impermissible because such an approach may distort another constitutional principle embodied in Article 39(b). The said article enumerating certain principles of policy, to be followed by the State, reads as follows:

The State shall, in particular, direct its policy towards securing -

(a)... ... ...

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

... ...

The disposal of natural resources is a facet of the use and distribution of such resources. Article 39(b) mandates that the ownership and control of natural resources should be so distributed so as to best subserve the common good. Article 37 provides that the provisions of Part IV shall not be enforceable by any Court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

112. Therefore, this Article, in a sense, is a restriction on 'distribution' built into the Constitution. But the restriction is imposed on the object and not the means. The overarching and underlying principle governing 'distribution' is furtherance of common good. But for the achievement of that objective, the Constitution uses the generic word 'distribution'. Distribution has broad contours and cannot be limited to meaning only one method i.e. auction. It envisages all such methods available for distribution/allocation of natural resources which ultimately subserve the "common good".

113. In **State of Tamil Nadu and Ors. v. L. Abu Kavur Bai and Ors.** MANU/SC/0073/1983 : (1984) 1 SCC 515, this Court explained the broad-based concept of 'distribution' as follows:

89. ...The word 'distribution' used in Article 39(b) must be broadly construed so that a court may give full and comprehensive effect to the statutory intent contained in Article 39 (b). A narrow construction of the word 'distribution' might defeat or frustrate the very object which the Article seeks to subserve...

114. After noting definitions of 'distribution' from different dictionaries, this Court held:

92. It is obvious, therefore, that in view of the vast range of transactions contemplated by the word 'distribution' as mentioned in the dictionaries referred to above, it will not be correct to construe the word 'distribution' in a purely literal sense so as to mean only division of a particular kind or to particular persons. The words, apportionment, allotment, allocation, classification, clearly fall

within the broad sweep of the word 'distribution'. So construed, the word 'distribution' as used in Article 39(b) will include various facets, aspects, methods and terminology of a broad-based concept of distribution...

115. It can thus, be seen from the afore-quoted paragraphs that the term "distribute" undoubtedly, has wide amplitude and encompasses all manners and methods of distribution, which would include classes, industries, regions, private and public sections, etc. Having regard to the basic nature of Article 39(b), a narrower concept of equality under Article 14 than that discussed above, may frustrate the broader concept of distribution, as conceived in Article 39(b). There cannot, therefore, be a cavil that "common good' and "larger public interests" have to be regarded as constitutional reality deserving actualization.

116. Learned Counsel for CPIL argued that revenue maximization during the sale or alienation of a natural resource for commercial exploitation is the only way of achieving public good since the revenue collected can be channelized to welfare policies and controlling the burgeoning deficit. According to the learned Counsel, since the best way to maximize revenue is through the route of auction, it becomes a constitutional principle even under Article 39(b). However, we are not persuaded to hold so. Auctions may be the best way of maximizing revenue but revenue maximization may not always be the best way to subserve public good. "Common good" is the sole guiding factor under Article 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy subserves the "common good" and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in Article 39(b).

117. In The **State of Karnataka and Anr. v. Shri Ranganatha Reddy and Anr.** MANU/SC/0062/1977 : (1977) 4 SCC 471, Justice Krishna Iyer observed that keeping in mind the purpose of an Article like 39(b), a broad rather than a narrow meaning should be given to the words of that Article. In his inimitable style, his Lordship opined thus:

83. Two conclusions strike us as quintessential. Part IV, especially Article 39(b) and (c), is a futuristic mandate to the state with a message of transformation of the economic and social order. Firstly, such change calls for collaborative effort from all the legal institutions of the system: the legislature, the judiciary and the administrative machinery. Secondly and consequentially, loyalty to the high purpose of the Constitution, viz., social and economic justice in the context of material want and utter inequalities on a massive scale, compels the court to ascribe expansive meaning to the pregnant words used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision. To be Pharisaic towards the Constitution through ritualistic construction is to weaken the social-spiritual thrust of the founding fathers' dynamic faith.

118. In the case of **Bennett Coleman and Co. and Ors. v. Union of India and Ors.** MANU/SC/0038/1972 : (1972) 2 SCC 788, it has been held by this Court that "the only norm which the Constitution furnishes for distribution of material resources of the community is elastic norm of common good." Thus "common good" is a norm in Article 39(b) whose applicability was considered by this Court on the facts of the case. Even in that case, this Court did not evolve economic criteria of its own to achieve the goal of "common good" in Article 39(b), which is part of the Directive Principles.

119. The norm of "common good" has to be understood and appreciated in a holistic manner. It is obvious that the manner in which the common good is best subserved is not a matter that can be measured by any constitutional yardstick - it would depend on the economic and political philosophy of the government. Revenue maximization is not the only way in which the common good can be subserved. Where revenue maximization is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method. Where revenue maximization is not the object of a policy of distribution, the question of auction would not arise. Revenue considerations may assume secondary consideration to developmental considerations.

120. Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximization, and thus by auction, is based neither on law nor on logic.

There is no constitutional imperative in the matter of economic policies- Article 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term 'distribution', suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate.

LEGITIMATE DEVIATIONS FROM AUCTION

121. As a result, this Court has, on a number of occasions, delivered judgments directing means for disposal of natural resources other than auction for different resources in different circumstances. It would be profitable to refer to a few cases and appreciate the reasons this Court has adopted for deviating from the method of auction.

122. In **M/s Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir and Anr.** MANU/SC/0079/1980 : (1980) 4 SCC 1, while comparing the efficacy of auction in promoting a domestic industry, P.N. Bhagwati, J. observed: -

22. ...If the State were giving tapping contract simpliciter there can be no doubt that the State would have to auction or invite tenders for securing the highest price, subject, of course, to any other relevant overriding considerations of public weal or interest, but in a case like this where the State is allocating resources such as water, power, raw materials etc. for the purpose of encouraging setting up of industries within the State, we do not think the State is bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry.

The State is not obliged to tell such party: "Please wait I will first advertise, wee whether any other offers are forthcoming and then after considering all offers, decide whether I should let you set up the industry"...The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneur for providing resources and other facilities for setting up an industry, the contract cannot be assailed as invalid so long as the State has acted bona fide, reasonably and in public interest. If the terms and conditions of the contract or the surrounding circumstances show that the State has acted mala fide or out of improper or corrupt motive or in order to promote the private interests of someone at the cost of the State, the court will undoubtedly interfere and strike down State action as arbitrary, unreasonable or contrary to public interest. But so long as the State action is bona fide and reasonable, the court will not interfere merely on the ground that no advertisement was given or publicity made or tenders invited.

123. In Sachidanand Pandey (supra) after noticing Kasturi Lal's case (supra), it was concluded as under:

40. On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.

124. In **Haji T.M. Hassan Rawther v. Kerala Financial Corporation** MANU/SC/0516/1987 : (1988) 1 SCC 166, after an exhaustive review of the law including the decisions in Kasturi Lal (supra) and Sachidanand Pandey (supra), it was held that public disposal of State owned properties is not the only rule. It was, inter-alia, observed that:

14. The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be aboveboard. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the court repeatedly stated and reiterated that the State-owned properties are required to be disposed of publicly. But that is not the only rule. As O. Chinnappa Reddy, J. observed "that though that is the ordinary rule, it is not an invariable rule". There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience.

Here, the Court added to the previous decisions and said that a blithe deviation from public disposal of resources would not be tolerable; such a deviation must be justified by compelling reasons and not by just convenience.

125. In **M.P. Oil Extraction and Anr. v. State of M.P. and Ors.** MANU/SC/1302/1997 : (1997) 7 SCC 592, this Court held as follows:

45. Although to ensure fair play and transparency in State action, distribution of largesse by inviting open tenders or by public auction is desirable, it cannot be held that in no case distribution of such largesse by negotiation is permissible. In the instant case, as a policy decision protective measure by entering into agreements with selected industrial units for assured supply of sal seeds at concessional rate has been taken by the Government. The rate of royalty has also been fixed on some accepted principle of pricing formula as will be indicated hereafter. Hence, distribution or allotment of sal seeds at the determined royalty to the Respondents and other units covered by the agreements cannot be assailed. It is to be appreciated that in this case, distribution by public auction or by open tender may not achieve the purpose of the policy of protective measure by way of supply of sal seeds at concessional rate of royalty to the industrial units covered by the agreements on being selected on valid and objective considerations.

126. In **Netai Bag and Ors. v. State of W.B. and Ors.** MANU/SC/0604/2000 : (2000) 8 SCC 262, this Court observed that non- floating of tenders or not holding of public auction would, not in all cases, be deemed to be the result of the exercise of the executive power in an arbitrary manner. It was stated:

19. ...There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process.

This Court once again pointed out that there can be exceptions from auction; the ultimate test is only that of fairness of the decision making process and compliance with Article 14 of the Constitution.

127. In **M and T Consultants, Secunderabad v. S.Y. Nawab** MANU/SC/0777/2003 : (2003) 8 SCC 100, this Court again reiterated that non-floating of tenders does not always lead to the conclusion that the exercise of the power is arbitrary:

17. A careful and dispassionate assessment and consideration of the materials placed on record does not leave any reasonable impression, on the peculiar facts and circumstances of this case, that

anything obnoxious which requires either public criticism or condemnation by courts of law had taken place. It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favour of sufficient latitude being left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority motivated by public interest as well in undertaking such ventures.

128. In **Villianur Iyarkkai Padukappu Maiyam v. Union of India and Ors.** MANU/SC/0811/2009 : (2009) 7 SCC 561, a three Judge Bench of this Court was concerned with the development of the Port of Pondicherry where a contractor had been selected without floating a tender or holding public auction. It was held as under:

164. The plea raised by the learned Counsel for the Appellants that the Government of Pondicherry was arbitrary and unreasonable in switching the whole public tender process into a system of personal selection and, therefore, the appeals should be accepted, is devoid of merits. It is well settled that non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner.

171. In a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging development of the port, this Court does not think that the State is bound to advertise and tell the people that it wants development of the port in a particular manner and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to develop the port, the State would not be committing breach of any constitutional obligation if it negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the port.

129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially whenever the object of policy is anything but revenue maximization, the Executive is seen to adopt methods other than auction.

130. A fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilization of the resource discovered; a prudent business venture, would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur

research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.

131. Similar deviation from auction cannot be ruled out when the object of a State policy is to promote domestic development of an industry, like in Kasturi Lal's case, discussed above. However, these examples are purely illustrative in order to demonstrate that auction cannot be the sole criteria for alienation of all natural resources.

POTENTIAL OF ABUSE

132. It was also argued that even if the method of auction is not a mandate under Article 14, it must be the only permissible method, due to the susceptibility of other methods to abuse. This argument, in our view, is contrary to an established position of law on the subject cemented through a catena of decisions.

133. In **R.K. Garg v. Union of India and Ors.** MANU/SC/0074/1981 : (1981) 4 SCC 675, Justice P. N. Bhagwati, speaking for a Constitution Bench of five learned Judges, held:

8....The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meager and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in **Secretary of Agriculture v. Central Reig Refining Co.** 94 L Ed 381 : 338 US 604 (1950) be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

134. Then again, in **D.K. Trivedi and Sons and Ors. v. State of Gujarat and Ors.** MANU/SC/0636/1986 : (1986) Supp SCC 20, while upholding the constitutional validity of Section 15(1) of the MMRD Act, this Court explained the principle in the following words:

50. Where a statute confers discretionary powers upon the executive or an administrative authority, the validity or constitutionality of such power cannot be judged on the assumption that the executive or such authority will act in an arbitrary manner in the exercise of the discretion conferred upon it. If the executive or the administrative authority acts in an arbitrary manner, its action would be bad in law and liable to be struck down by the courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power or the power which has been conferred by it.

135. Therefore, a potential for abuse cannot be the basis for striking down a method as ultra vires the Constitution. It is the actual abuse itself that must be brought before the Court for being tested on the anvil of constitutional provisions. In fact, it may be said that even auction has a potential of abuse, like any other method of allocation, but that cannot be the basis of declaring it as an unconstitutional methodology either. These drawbacks include cartelization, "winners curse" (the phenomenon by which a bidder bids a higher, unrealistic and unexecutable price just to surpass the competition; or where a bidder, in case of multiple auctions, bids for all the resources and ends up winning licenses for exploitation of more resources than he can pragmatically execute), etc. However, all the same, auction cannot be called ultra vires for the said reasons and continues to be an attractive and preferred means of disposal of natural resources especially when revenue maximization is a priority. Therefore, neither auction, nor any other method of disposal can be held ultra vires the Constitution, merely because of a potential abuse.

JUDICIAL REVIEW OF POLICY DECISIONS

136. The learned Attorney General also argued that dictating a method of distribution for natural resources violates the age old established principle of noninterference by the judiciary in policy matters. Even though the contours of the power of judicial review of policy decisions has become a trite subject, as the Courts have repeatedly delivered opinions on it, we wish to reiterate some of the principles in brief, especially with regard to economic policy choices and pricing.

137. One of the earliest pronouncements on the subject came from this Court in **Rustom Cavasjee Cooper v. Union of India** MANU/SC/0011/1970 : (1970) 1 SCC 248 (commonly known as "Bank Nationalization Case") wherein this Court held that it is not the forum where conflicting policy claims may be debated; it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories. The Court observed:

63. This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural sector, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration, whether the Government administration will eschew the profit-motive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court

to consider the relative merits of the different political theories or economic policies. The Parliament has under Entry 45, List I the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto: it has the power to legislate for acquiring the undertaking of the named banks under Entry 42, List III. Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws, results could be achieved which it is the object of the Act to achieve, is, in our judgment, not relevant in considering whether the Act amounts to abuse of legislative power. This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the Petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry.

138. In R.K. Garg (supra), this Court even observed that greater judicial deference must be shown towards a law relating to economic activities due to the complexity of economic problems and their fulfillment through a methodology of trial and error. As noted above, it was also clarified that the fact that an economic legislation may be troubled by crudities, inequities, uncertainties or the possibility of abuse cannot be the basis for striking it down. The following observations which refer to a couple of American Supreme Court decisions are a limpid enunciation on the subject :

8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in **Morey v. Doud** 354 US 457 where Frankfurter, J., said in his inimitable style:

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events - self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability...

139. In **Premium Granites and Anr. v. State of T.N. and Ors.** MANU/SC/0466/1994 : (1994) 2 SCC 691 this Court clarified that it is the validity of a law and not its efficacy that can be challenged:

54. It is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities

as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right...

140. In **Delhi Science Forum and Ors. v. Union of India and Anr.** MANU/SC/0360/1996 : (1996) 2 SCC 405 a Bench of three learned Judges of this Court, while rejecting a claim against the opening up of the telecom sector reiterated that the forum for debate and discourse over the merits and demerits of a policy is the Parliament. It restated that the services of this Court are not sought till the legality of the policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions. It held thus:

7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies...

141. In **BALCO Employees' Union (Regd.) v. Union of India and Ors.** MANU/SC/0779/2001 : (2002) 2 SCC 333, this Court further pointed out that the Court ought to stay away from judicial review of efficacy of policy matters, not only because the same is beyond its jurisdiction, but also because it lacks the necessary expertise required for such a task. Affirming the previous views of this Court, the Court observed that while dealing with economic legislations, the Courts, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all. The Court went on to emphasize that unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere.

142. In BALCO (supra), the Court took notice of the judgment in **Peerless General Finance and Investment Co. Limited and Anr. v. Reserve Bank of India** MANU/SC/0685/1992 : (1992) 2 SCC 343 and observed that some matters like price fixation are based on such uncertainties and dynamics that even experts face difficulty in making correct projections, making it all the more necessary for this Court to exercise non- interference:

31. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.

143. In an earlier case in **M/s Prag Ice and Oil Mills and Anr. v. Union of India** MANU/SC/0493/1978 : (1978) 3 SCC 459, this Court had observed as under: (SCC p. 478, Para 24)

We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly by differ. Courts can certainly not be expected to decide them without even the aid of experts.

144. In **State of Madhya Pradesh v. Narmada Bachao Andolan and Anr.** MANU/SC/0599/2011 : (2011) 7 SCC 639, this Court said that the judiciary cannot engage in an exercise of comparative analysis over the fairness, logical or scientific basis, or wisdom of a policy. It held that the Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer, or more scientific or logical, or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.

145. Mr. Subramanian Swamy also brought to our notice a Report on Allocation of Natural Resources, prepared by a Committee, chaired by Mr. Ashok Chawla (hereinafter referred to as the "Chawla Committee Report"), which has produced a copious conceptual framework for the Government of India on the allocation and pricing of scarce natural resources viz. coal, minerals, petroleum, natural gas, spectrum, forests, land and water. He averred to observations of the report in favour of auction as a means of disposal. However, since the opinion rendered in the Chawla Committee Report is pending acceptance by the Government, it would be inappropriate for us to place judicial reliance on it. Besides, the Report conducts an economic, and not legal, analysis of the means of disposal of natural resources. The purpose of this Reference would be best served if this Court gave a constitutional answer rather than economic one.

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

147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables; it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra-vires the constitutional mandate.
149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle.
Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution.
Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution.

150. In conclusion, our answer to the first set of five questions is that auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances.

151. As regards the remaining questions, we feel that answer to these questions would have a direct bearing on the mode of alienation of Spectrum and therefore, in light of the statement by the learned Attorney General that the Government is not questioning the correctness of judgment in the **2G Case**, we respectfully decline to answer these questions. The Presidential Reference is answered accordingly.

152. This opinion shall be transmitted to the President in accordance with the procedure prescribed in Part V of the Supreme Court Rules, 1966.

J.S. Khehar, J.

153. I have had the privilege of perusing the opinion rendered by my esteemed brother, D.K. Jain, J. Every bit of the opinion (which shall hereinafter be referred to by me, as the "main opinion") is based on settled propositions of law declared by this Court. There can, therefore, be no question of any disagreement therewith. I fully endorse the opinion expressed therein.

154. The first question posed in the Presidential reference, is in fact the reason, for my having to record, some other nuances on the subject whereof advice has been sought. The first question in the Presidential reference requires the Supreme Court to tender advice on, "Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances,

is by the conduct of auctions?". It is of utmost importance to understand, the tenor of the first question in the Presidential reference. Take for instance a hypothetical situation where, the legality of 100 instances of disposal of different types of natural resources is taken up for consideration. If the first question is taken in its literal sense, as to whether the method of disposal of all natural resources in all circumstances is by auction alone, then, even if 99 out of the aforesaid 100 different natural resources are such, which can only be disposed of by way of auction, the answer to the first question would still be in the negative. This answer in the negative would give the erroneous impression, that it is not necessary to dispose of natural resources by way of auction. Surely, the Presidential reference has not been made, to seek such an innocuous advice. The instant reference has been made despite the Central Government being alive to the fact, that there are natural resources which can only be disposed of by way of auction. A mining lease for coal under Section 11A of the Mines and Minerals (Development and Regulation) Act, 1957 can be granted, only by way of selection through auction by competitive bidding. Furthermore, the learned Attorney General for India informed us, about a conscious decision having been taken by the Central Government to henceforth allot spectrum only through competitive bidding by way of auction. Such instances can be multiplied. It is therefore obvious, that Government is alive to the fact, that disposal of some natural resources have to be made only by auction. If that is so, the first question in the reference does not seek a literal response. The first question must be understood to seek this Court's opinion on whether there are circumstances in which natural resources ought to be disposed of only by auction. Tendering an opinion, without a response to this facet of the matter, would not make the seeker of advice, any wiser. It is this aspect alone, which will be the main subject of focus of my instant opinion.

155. Before venturing into the area of consideration expressed in the foregoing paragraph, it is necessary to record, that there was extensive debate during the course of hearing, on whether, maximization of revenue must be the sole permissible consideration, for disposal of all natural resources, across all sectors and in all circumstances. During the course of this debate, the learned Attorney General for India acknowledged, that auction by way of competitive bidding, was certainly an indisputable means, by which maximization of revenue returns is assured. It is not as if, one would like to bind the learned Attorney General to the acquiesced proposition. During the course of the days and weeks of erudite debate, learned Counsel emphasized, that disposal of assets by processes of tender, tender-cum-auction and auction, could assure maximization of revenue returns. Of course, there are a large variety of tender and auction processes, each one with its own nuances. And we were informed, that a rightful choice, would assure maximization of revenue returns. The term "auction" expressed in my instant opinion, may therefore be read as a means to maximize revenue returns, irrespective of whether the means adopted should technically and correctly be described as tender, tender-cum-auction, or auction.

156. The concept of equality before the law and equal protection of the laws, emerges from the fundamental right expressed in Article 14 of the Constitution of India. Equality is a definite concept. The variation in its understanding may at best have reference to the maturity and evolution of the nation's thought. To start with, breach of equality was a plea advanced by individuals claiming fair treatment. Challenges were raised also on account of discriminatory treatment. Equality was sought by those more meritorious, when benefits were bestowed on those with lesser caliber. Gradually, judicial intervention came to be sought for equitable treatment, even for a section of the society put together. A jurisdiction, which in due course, came to be described as

public interest litigation. It all started with a demand for the basic rights for respectable human existence. Over the years, the concept of determination of societal rights, has traversed into different directions and avenues. So much so, that now rights in equity, sometimes even present situations of conflict between individual rights and societal rights. The present adjudication can be stated to be a dispute of such nature. In a maturing society, individual rights and plural rights have to be balanced, so that the oscillating pendulum of rights, fairly and equally, recognizes their respective parameters. For a country like India, the pendulum must be understood to balance the rights of one citizen on the one side, and 124,14,91,960 (the present estimated population of India) citizens of the country on the other. The true effect of the Article 14 of the Constitution of India is to provide equality before the law and equal protection of the laws not only with reference to individual rights, but also by ensuring that its citizens on the other side of the balance are likewise not deprived of their right to equality before the law, and their right to equal protection of the laws. An individual citizen cannot be a beneficiary, at the cost of the country (the remaining 124,14,91,960 citizens) i.e., the plurality. Enriching one at the cost of all others would amount to deprivation to the plurality i.e., the nation itself. The gist of the first question in the Presidential reference, raises the issue whether ownership rights over the nation's natural resources, vest in the citizens of the country. An answer to the instant issue in turn would determine, whether or not it is imperative for the executive while formulating a policy for the disposal of natural resources, to ensure that it subserves public good and public interest.

157. The introduction and acceptance of public interest litigation as a jurisprudential concept is a matter of extensive debate in India, and even more than that, outside India. This concept brings into focus the rights of the plurality (as against individual's right) specially when the plurality is, for one or the other reason, not in a position to seek redressal of its grievances. This inadequacy may not always emerge from financial constrains. It may sometimes arise out of lack of awareness. At other times merely from the overwhelming might of executive authority. The jurisprudential thought in this country, after the emergence of public interest litigation, is seeking to strike a balance between individual rights and the rights of the plurality. After all, all natural resources are the nation's collective wealth. This Court has had the occasion over the last few decades, to determine rights of citizens with reference to natural resources. The right of an individual citizen to those assets, as also, the rights of the remaining citizens of the country, have now emerged on opposite sides in a common litigation. One will endeavour to delineate the legal position expressed in decisions rendered by this Court, on issues relatable to disposal of resources by the State, to determine whether the instant issue stands settled, by law declared by this Court.

158(a) First of all reference was made to the decision of this Court in **S.G. Jaisinghani v. Union of India and Ors.** MANU/SC/0361/1967 : AIR 1967 SC 1427, wherein this Court observed as under:

14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in

accordance with the Rule of law. (See Dicey - *Law of the Constitution* - 10th Edn., Introduction cx). "Law has reached its finest moments," stated Douglas, J. in **United States v. Wunderlich** (1951) 342 US 98, "when it has freed man from the unlimited discretion of some ruler....
Where discretion, is absolute, man has always suffered." It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield slated it in classic terms in the case of John Wilkes (1770) 4 Burr 2528 2539 "means sound discretion guided by law. It must be governed by Rule, not by humour: it must not be arbitrary, vague, and fanciful.

(Emphasis is mine)

In the aforesaid case, it came to be emphasized that executive action should have clearly defined limits and should be predictable. In other words, the man on the street should know why the decision has been taken in favour of a particular party. What came to be impressed upon was, that lack of transparency in the decision making process would render it arbitrary.

(b) Also cited for our consideration was the judgment in **Rashbihari Panda etc. v. State of Orissa** MANU/SC/0054/1969 : (1969) 1 SCC 414. In this case it was canvassed on behalf of the Appellants, that the machinery devised by the Government for sale of Kendu leaves in which they had acquired a trade monopoly, was violative of the fundamental rights guaranteed under Articles 14 and 19(1)(g) of the Constitution. It was pointed out, that in the scheme of events the purchasers were merely nominees of the agents. It is also contended, that after the Supreme Court had struck down the policy under which the agents were to carry on business in Kendu leaves on their own and to make profit for themselves, the Government to help their party-men set up a body of persons who were to be purchasers to whom the monopoly sales were to be made at concessional rates and that the benefit which would have otherwise been earned by the State would now get diverted to those purchasers. It was held:

15. Section 10 of the Act is a counterpart of Section 3 and authorises the Government to sell or otherwise dispose of *Kendu* leaves in such manner as the Government may direct. If the monopoly of purchasing *Kendu* leaves by Section 3 is valid, insofar as it is intended to be administered only for the benefit of the State, the sale or disposal of *Kendu* leaves by the Government must also be in the public interest and not to serve the private interest of any person or class of persons. It is true that it is for the Government, having regard to all the circumstances, to act as a prudent businessman would, and to sell or otherwise dispose of *Kendu* leaves purchased under the monopoly acquired under Section 3, but the profit resulting from the sale must be for the public benefit and not for private gain. Section 11 which provides that out of the net profits derived by the Government from the trade in *Kendu* leaves an amount not less than one half is to be paid to the *Samitis* and *Gram Panchayats* emphasises the concept that the machinery of sale or disposal of *Kendu* leaves must also be quashed to serve the public interest. If the scheme of disposal creates a class of middlemen who would purchase from the Government *Kendu* leaves at concessional rates and would earn large profits disproportionate to the nature of the service rendered or duty performed by them, it cannot claim the protection of Article 19(6)(ii).

16. Section 10 leaves the method of sale or disposal of *Kendu* leaves to the Government as they think fit. The action of the Government if conceived and executed in the interest of the general

public is not open to judicial scrutiny. But it is not given to the Government thereby to create a monopoly in favour of third parties from their own monopoly.

17. Validity of the schemes adopted by the Government of Orissa for sale of *Kendu* leaves must be adjudged in the light of Article 19(1)(g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase *Kendu* leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government is not of any significance. From the affidavit filed by the State Government it appears that the price fetched at public auctions before and after January 1968, were much higher than the prices at which *Kendu* leaves were offered to the old contractors. The Government realised that the scheme of offering to enter into contracts with the old licensees and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade. The Government then decided to invite offers for advance purchases of *Kendu* leaves but restricted the invitation to those individuals who had carried out the contracts in the previous year without default and to the satisfaction of the Government. By the new scheme instead of the Government making an offer, the existing contractors were given the exclusive right to make offers to purchase *Kendu* leaves. But insofar as the right to make tenders for the purchase of *Kendu* leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection. The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in *Kendu* leaves and also new entrants into that business. It was ex facie discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business. In our view, both the schemes evolved by the Government were violative of the fundamental right of the Petitioners under Article 19(1)(g) and Article 14 because the schemes gave rise to a monopoly in the trade in *Kendu* leaves to certain traders, and singled out other traders for discriminatory treatment.

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e. effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of *Kendu* leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in *Kendu* leaves from carrying on their business. The scheme of selling *Kendu* leaves to selected purchasers or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in *Akadasi Padhan Case (1963) Supp. 2 SCC 691*,

protected by Article 19(6)(ii): it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in *Kendu* leaves. The High Court also did not consider whether the restrictions imposed upon persons excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19(6). The High Court examined the problem from the angle whether the action of the State Government was vitiated on account of any obligue motive, and whether it was such as a prudent person carrying on business may adopt.

20. No explanation has been attempted on behalf of the State as to why an offer made by a well known manufacturer of *bidis* interested in the trade to purchase the entire crop of *Kendu* leaves for the year 1968 for rupees three crores was turned down. If the interests of the State alone were to be taken into consideration, the State stood to gain more than rupees one crore by accepting that offer. We are not suggesting that merely because that offer was made, the Government was bound to accept it. The Government had to consider, as prudent businessman, whether, having regard to the circumstances, it should accept the offer, especially in the light of the financial position of the offer or, the security which he was willing to give and the effect which the acceptance of the offer may have on the other traders and the general public interest.

21. The learned Judges of the High Court have observed that in their view the exercise of the discretion was not shown to be arbitrary, nor was the action shown to be lacking in bona fides. But that conclusion is open to criticism that the Government is not shown to have considered the prevailing prices of *Kendu* leaves about the time when offers were made, the estimated crop of *Kendu* leaves, the conditions in the market and the likelihood of offerers at higher prices carrying out their obligations, and whether it was in the interests of the State to invite tenders in the open market from all persons whether they had or had not taken contracts in the previous year. If the Government was anxious to ensure due performance by those who submitted tenders for purchase of *Kendu* leaves, it was open to the Government to devise adequate safeguards in that behalf. In our judgment, the plea that the action of the Government was bona fide cannot be an effective answer to a claim made by a citizen that his fundamental rights were infringed by the action of the Government, nor can the claim of the Petitioners be defeated on the plea that the Government in adopting the impugned scheme committed an error of judgment.

22. That plea would have assisted the Government if the action was in law valid and the objection was that the Government erred in the exercise of its discretion. It is unnecessary in the circumstances to consider whether the Government acted in the interest of their party-men and to increase party funds in devising the schemes for sale of *Kendu* leaves in 1968.

23. During the pendency of these proceedings the entire year for which the contracts were given has expired. The persons to whom the contracts were given are not before us, and we cannot declare the contracts which had been entered into by the Government for the sale of *Kendu* leaves for the year 1968 unlawful in these proceedings. Counsel for the Appellants agrees that it would be sufficient if it be directed that the tenders for purchase of *Kendu* leaves be invited by the Government in the next season from all persons interested in the trade. We trust that in accepting tenders, the State Government will act in the interest of the general public and not of any class of traders so that in the next season the State may get the entire benefit of the monopoly in the trade

in *Kendu* leaves and no disproportionate share thereof may be diverted to any private agency. Subject to these observations we make no further order in the petitions out of which these appeals arise.

(Emphasis is mine)

A perusal of the observations made by this Court reveal, that the Government must act as a prudent businessman, and that, the profit earned should be for public benefit and not for private gains. A plea of reasonable restriction raised under Article 19(6) of the Constitution of India to save the governmental action was rejected on the ground that the scheme created middlemen who would earn large disproportionate profits. This Court also held the action to be discriminatory because it excluded others like the Petitioners from the zone of consideration. Finally, a direction came to be issued by this Court requiring the Government to act in the interest of the general public and to invite tenders so that the State may earn the entire benefit in a manner that no disproportionate profits are diverted to any private agency.

(c) Reliance was also placed on **Ramana Dayaram Shetty v. International Airport Authority of India and Ors.** MANU/SC/0048/1979 : (1979) 3 SCC 489, wherein this Court held as under:

21. This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well-settled as a result of the decisions of this Court in *E.P. Royappa* v. *State of Tamil Nadu MANU/SC/0380/1973 : (1974) 4 SCC 3*, and *Maneka Gandhi* v. *Union of India MANU/SC/0133/1978 : (1978) 1 SCC 248*, that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship-contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and nondiscriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in **Erusian Equipment and Chemicals Limited v. State of West Bengal** *(supra)* where the learned Chief Justice pointed out that-

the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting.... A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.... It is true that neither

the Petitioner nor the Respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods.

It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and nondiscrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non discriminatory ground.

22. It is interesting to find that this rule was recognised and applied by a Constitution Bench of this Court in a case of sale of kendu leaves by the Government of Orissa in *Rashbihari Panda* v. *State of Orissa MANU/SC/0054/1969 : (1969) 1 SCC 414*.....

This decision wholly supports the view we are taking in regard to the applicability of the rule against arbitrariness in State action.

(Emphasis is mine)

An analysis of the aforesaid determination by this Court would lead to the inference that the State has the right to trade. In executing public contracts in its trading activity the State must be guided by relevant principles, and not by extraneous or irrelevant consideration. The same should be based on reasonableness and rationality as well as non-arbitrariness. It came to be concluded, that the State while entering into a contractual relationship, was bound to maintain the standards referred to above. And any departure from the said standards would be invalid unless the same is supported by good reasons.

(d) Our attention was also invited to the decision rendered in Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir and Anr. MANU/SC/0079/1980 : (1980) 4 SCC 1, wherein the factual background as well as, the legal position came to be expressed in paragraph 19 of the judgment which is being set out below:

19. It is clear from the backdrop of the facts and circumstances in which the impugned Order came to be made and the terms and conditions set out in the impugned Order that it was not a tapping contract simpliciter which was intended to be given to the second Respondents. The second Respondents wanted to be assured of regular supply of raw material in the shape of resin before they could decide to set up a factory within the State and it was for the purpose of ensuring supply of such raw material that the impugned Order was made giving tapping contract to the second Respondents. It was really by way of allocation of raw material for running the factory that the impugned Order was passed. The terms of the impugned Order show beyond doubt that the second Respondents were under an obligation to set up a factory within the State and that 3500 metric tonnes of resin which was permitted to be retained by the second Respondents out of the resin extracted by them was required to be utilised in the factory to be set up by them and it was provided that no part of the resin extracted should be allowed to be removed outside the State. The whole object of the impugned Order was to make available 3500 metric tonnes of resin to the second

Respondents for the purpose of running the factory to be set up by them. The advantage to the State was that a new factory for manufacture of rosin, turpentine oil and other derivatives would come up within its territories offering more job opportunities to the people of the State increasing their prosperity and augmenting the State revenues and in addition the State would be assured of a definite supply of at least 1500 metric tonnes of resin for itself without any financial involvement or risk and with this additional quantity of resin available to it, it would be able to set up another factory creating more employment opportunities and, in fact, as the counter-affidavit of Ghulam Rasul, Under-Secretary to the Government filed on behalf of the State shows the Government lost no time in taking steps to set up a public sector resin distillation plant in a far-flung area of the State, namely, Sundarbani, in Rajouri District. Moreover, the State would be able to secure extraction of resin from these inaccessible areas on the best possible terms instead of allowing them to remain unexploited or given over at ridiculously low royalty. We cannot accept the contention of the Petitioners that under the impugned Order a huge benefit was conferred on the second Respondents at the cost of the State. It is clear from the terms of the impugned Order that the second Respondents would have to extract at least 5000 metric tonnes of resin from the blazes allotted to them in order to be entitled to retain 3500 metric tonnes. The counter-affidavit of Ghulam Rasul on behalf of the first Respondent and Guran Devaya on behalf of the second Respondents show that the estimated cost of extraction and collection of resin from these inaccessible areas would be at the least Rs. 175 per quintal, though according to Guran Devaya it would be in the neighbourhood of Rs. 200 per quintal, but even if we take the cost at the minimum figure of Rs. 175 per quintal, the total cost of extraction and collection would come to Rs. 87,50,000 and on this investment of Rs. 87,50,000 required to be made by the second Respondents the amount of interest at the prevailing bank rate would work out to about Rs. 13,00,000. Now, as against this expenditure of Rs 87,50,000 plus Rs. 13,00,000 the second Respondents would be entitled to claim from the State, in respect of 1500 metric tonnes of resin to be delivered to it only at the rate sanctioned by the Forest Department for the adjoining accessible forests which were being worked on wage-contract basis. It is stated in the counter-affidavits of Ghulam Rasul and Guran Devaya and this statement is not seriously challenged on behalf of the Petitioners, that the cost of extraction and collection as sanctioned by the Forest Department for the adjoining accessible forests given on wage-contract basis in the year 1978-79 was Rs. 114 per quintal and the second Respondents would, thus, be entitled to claim from the State no more than Rs. 114 per quintal in respect of 1500 metric tonnes to be delivered to it and apart from bearing the difference between the actual cost of extraction and collection and the amount received from the State at the rate of Rs. 114 per quintal in respect of 1500 metric tonnes, the second Respondents would have to pay the price of the remaining 3500 metric tonnes to be retained by them at the rate of Rs. 350 per quintal. On this reckoning, the cost of 3500 metric tonnes to be retained by the second Respondents would work out at Rs. 474 per quintal. The result would be that under the impugned Order the State would get 1500 metric tonnes of resin at the rate of Rs. 114 per quintal while the second Respondents would have to pay at the rate of Rs. 474 per quintal for the balance of 3500 metric tonnes retained by them. Obviously, a large benefit would accrue to the State under the impugned Order. If the State were to get the blazes in these inaccessible areas tapped through wage contract, the minimum cost would be Rs. 175 per quintal, without taking into account the additional expenditure on account of interest, but under the impugned Order the State would get 1500 metric tonnes of resin at a greatly reduced rate of Rs. 114 per quintal without any risk or hazard. The State would also receive for 3500 metric tonnes of resin retained by the second Respondents price or royalty at the rate of Rs. 474 per quintal which would be much higher than the rate of Rs. 260 per

quintal at which the State was allotting resin to medium scale industrial units and the rate of Rs. 320 per quintal at which it was allotting resin to small scale units within the State. It is difficult to see how on these facts the impugned Order could be said to be disadvantageous to the State or in any way favouring the second Respondents at the cost of the State. The argument of the Petitioners was that at the auctions held in December 1978, January 1979 and April 1979, the price of resin realised was as much as Rs. 484, Rs. 520 and Rs. 700 per quintal respectively and when the market price was so high, it was improper and contrary to public interest on the part of the State to sell resin to the second Respondents at the rate of Rs. 320 per quintal under the impugned Order. This argument, plausible though it may seem, is fallacious because it does not take into account the policy of the State not to allow export of resin outside its territories but to allot it only for use in factories set up within the State. It is obvious that, in view of this policy, no resin would be auctioned by the State and there would be no question of sale of resin in the open market and in this situation, it would be totally irrelevant to import the concept of market price with reference to which the adequacy of the price charged by the State to the 2nd Respondents could be judged. If the State were simply selling resin-there can be no doubt that the State must endeavour to obtain the highest price subject, of course, to any other overriding considerations of public interest and in that event, its action in giving resin to a private individual at a lesser price would be arbitrary and contrary to public interest. But, where the State has, as a matter of policy, stopped selling resin to outsiders and decided to allot it only to industries set up within the State for the purpose of encouraging industrialisation, there can be no scope for complaint that the State is giving resin at a lesser price than that which could be obtained in the open market. The yardstick of price in the open market would be wholly inept, because in view of the State policy, there would be no question of any resin being sold in the open market. The object of the State in such a case is not to earn revenue from sale of resin, but to promote the setting up of industries within the State. Moreover, the prices realised at the auctions held in December 1978, January 1979 and April 1979 did not reflect the correct and genuine price of resin, because by the time these auctions came to be held, it had become known that the State had taken a policy decision to ban export of resin from its territories with effect from 1979-80 and the prices realised at the auctions were therefore scarcity prices. In fact, the auction held in April 1979 was the last auction in the State and since it was known that in future no resin would be available for sale by auction in the open market to outsiders, an unduly high price of Rs. 700 per quintal was offered by the factory owners having their factories outside the State, so that they would get as much resin for the purpose of feeding their industrial units for some time. The counter-affidavits show that, in fact, the average sale price of resin realised during the year 1978-79 was only Rs. 433 per quintal and as compared to this price, the 2nd Respondents were required to pay price or royalty at a higher rate of Rs. 474 per quintal for 3500 metric tonnes of resin to be retained by them under the impugned Order. It is in the circumstances impossible to see how it can at all be said that any benefit was conferred on the second Respondents at the cost of the State. The first head of challenge against the impugned Order must, therefore, be rejected.

(Emphasis is mine)

An examination of the factual position of the controversy dealt with in the judgment extracted above reveals, that the State Government formulated a policy to set up a factory within the State, which would result in creation of more job opportunities for the people of the State. The setting up of the said factory would assure the State of atleast 1500 metric tones of resin without any

financial involvement. This in turn would enable the State to set up another factory creating further employment opportunities for the people of the State. It is therefore, that this Court concluded that the impugned order passed by the State in favour of the second Respondent could not be said to be disadvantageous to the State and favouring the second Respondent. In a manner of understanding, this Court found no infirmity in the impugned order passed by the State Government because the State Government had given effect to a policy which would "best subserve the common good" of the inhabitants of the State (as in Article 39(b) of the Constitution of India) while assigning a material resource, though no reference was made to Article 39(b) of the Constitution of India in the judgment. What is also of importance is, that this Court expressly noticed, that if the State Government was simply selling resin, it was obliged to obtain the highest possible price.

(e) Reference was then made to **Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay** MANU/SC/0330/1989 : (1989) 3 SCC 293, wherein the case of the Respondent was, that in his evidence it had been mentioned by Katara that the plot had been allotted to Dhanji Mavji since it was the policy of the Bombay Port Trust to allot a reconstituted plot to a person occupying a major portion of such plot. It was further asserted, that there was no challenge to this evidence in cross-examination. It was also asserted, that there was no evidence on the alleged policy of the Port Trust of giving plots on joint tenancy to all the occupants. According to learned Counsel for the Respondent, in the letters addressed by the Port Trust and in the letters by and on behalf of the Appellant and/or their alleged associate concerns they had specifically admitted, that there was a policy of the Port Trust to allot plots to the occupants of the major portions thereof and in fact a grievance was made by them, that in accordance with the said policy of the Bombay Port Trust, a plot was not being allotted to the associates of the Appellant. In that view of the matter it was contended, that the issue whether the plot should have been given on joint tenancy or not, could not have been gone into by the court in exercise of its jurisdiction of judicial review. Reliance was placed on the observations of Lord Justice Diplock in **Council of Civil Service Unions v. Minister for the Civil Service** (1984) 3 All ER 935, 950, where the learned Lord Justice classified 3 grounds subject to control of judicial review, namely, illegality, irrationality and procedural impropriety. In the aforesaid factual background this Court concluded as under:

21. We are unable to accept the submissions. Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction.

...

28. Learned Additional Solicitor General reiterated on behalf of the Respondent that no question of mala fide had been alleged or proved in these proceedings. Factually, he is right. But it has to be borne in mind that governmental policy would be invalid as lacking in public interest, unreasonable or contrary to the professed standards and this is different from the fact that it was not done bona fide. It is true as learned Additional Solicitor General contended that there is always a presumption that a governmental action is reasonable and in public interest. It is for the party challenging its validity to show that the action is unreasonable, arbitrary or contrary to the professed norms or not informed by public interest, and the burden is a heavy one.

...

37. As we look upon the facts of this case, there was an implied obligation in respect of dealings with the tenants/occupants of the Port Trust authority to act in public interest/purpose. That requirement is fulfilled if it is demonstrated that the Port Trust authorities have acted in pursuance of a policy which is referable to public purpose. Once that norm is established whether that policy is the best policy or whether another policy was possible, is not relevant for consideration. It is, therefore, not necessary for our present purposes to dwell on the question whether the obligation of the Port Trust authorities to act in pursuance of a public purpose was a public law purpose or a private law purpose. Under the constitutional scheme of this country the Port Trust authorities were required by relevant law to act in pursuance of public purpose. We are satisfied that they have proceeded to so act.

(Emphasis is mine)

In the instant matter, even though the controversy pertained to a tenancy issue, this Court held, that a public body was bound to act in public interest.

(f) In chronological sequence, learned Counsel then cited **Mahabir Auto Stores and Ors. v. Indian Oil Corporation and Ors.** MANU/SC/0191/1990 : (1990) 3 SCC 752. Relevant observations made therein, with reference to the present controversy, are being placed below:

12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Radha Krishna Agarwal* v. *State of Bihar MANU/SC/0053/1977 : (1977) 3 SCC 457*. It appears to us, at the outset, that in the facts and circumstances of the case, the Respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See *Radha Krishna Agarwal v. State of Bihar* at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the Respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts. Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such

monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa* v. *State of Tamil Nadu MANU/SC/0380/1973 : (1974) 4 SCC 3*, *Maneka Gandhi* v. *Union of India MANU/SC/0133/1978 : (1978) 1 SCC 248*, *Ajay Hasia* v. *Khalid Mujib Sehravardi MANU/SC/0498/1980 : (1981) 1 SCC 722*, *R.D. Shetty* v. *International Airport Authority of India MANU/SC/0048/1979 : (1979) 3 SCC 489*, and also *Dwarkadas Marfatia and Sons* v. *Board of Trustees of the Port of Bombay MANU/SC/0330/1989 : (1989) 3 SCC 293*. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any strait-jacket formula. It has to be examined in each particular case. Mr. Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a statute. We are of the opinion that that would depend upon the factual matrix.

18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the Appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the Respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence.

19. Such transaction should continue as an administrative decision with the organ of the State. It may be contractual or statutory but in a situation of transaction between the parties for nearly two

decades, such procedure should be followed which will be reasonable, fair and just, that is, the process which normally be accepted (sic is expected) to be followed by an organ of the State and that process must be conscious and all those affected should be taken into confidence.

20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the Appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work.

...

23. It is not our decision which is important but a decision on the above basis should be arrived at which should be fair, just and reasonable - and consistent with good government - which will be arrived at fairly and should be taken after taking the persons concerned whose rights/obligations are affected, into confidence-Fairness in such action should be perceptible, if not transparent.

(Emphasis is mine)

What came to be concluded in the judgment extracted above can be described as an extension of the applicability of Article 14 of the Constitution of India on the subject of contractual agreements. Hitherto before, an act of awarding contracts was adjudged on the touchstone of fairness. For the first time, even a decision of not entering into a contractual arrangement has been brought under the scope of judicial review. The requirement of being fair, just and reasonable, i.e., principles applicable in good governance, have been held to be equally applicable for not entering into a contractual arrangement. Another facet of the aforesaid decision was, that this Court expressed, that the contracting party had the right to be informed (the right to know) why the contractual arrangement which had continued for long years (from 1965 to 1983) was being terminated.

(g) Much emphasis was placed on the judgment rendered by this Court in Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors. MANU/SC/0504/1991 : (1991) 1 SCC 212. Observations which relied upon during the course of hearing are being set out hereinunder:

21. The Preamble of the Constitution of India resolves to secure to all its citizens *Justice*, social, economic and political; and *Equality* of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directives Principles of State Policy' which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or

unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

24. The State cannot be attributed the split personality of Dr Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

25. In Wade: *Administrative Law* (6th edn.) after indicating that 'the powers of public authorities are essentially different from those of private persons', it has been succinctly stated at pp. 400-01 as under:

... *The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.*

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law: it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. *Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose*, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.

The view, we are taking, is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

26. A useful treatment of the subject is to be found in an article *"Judicial Review and Contractual Powers of Public Authorities"*, (1990) 106 LQR 277-92. The conclusion drawn in the article on the basis of recent English decisions is that "public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest". The trend now is towards judicial review of contractual powers and the other activities of the government. Reference is made also to the recent decision of the Court of Appeal in *Jones* v. *Swansea City Council (1990) 1 WLR 54*, where the court's clear inclination to the view that contractual powers should generally be reviewable is indicated, even though the Court of Appeal faltered at the last step and refrained from saying so. It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function: and all powers possessed by a public authority, howsoever conferred, are possessed 'solely in order that it may use them for the public good'. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny.

27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse conseguences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on

behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

29. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. [See *Ramana Dayaram Shetty* v. *International Airport Authority of India MANU/SC/0048/1979 : (1979) 3 SCC 489*, and *Kasturi Lal Lakshmi Reddy* v. *State of Jammu and Kashmir MANU/SC/0079/1980 : (1980) 4 SCC 1]*. In *Col. A.S. Sangwan* v. *Union of India MANU/SC/0182/1980 : (1980) Supp. SCC 559*, while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose.

...

33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in *Dwarkadas Marfatia case (supra)* to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness

is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, L.J., in *Council of Civil Service Unions* v. *Minister for the Civil Service (1984) 3 All ER 935*, the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

...

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always.

(Emphasis is mine)

The legal proposition laid down in the instant judgment may be summarized as follows. Firstly, State action in the contractual field are meant for public good and in public interest and are expected to be fair and just. Secondly, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 of the Constitution of India in contractual matters. Thirdly, the fact that a dispute falls in the domain of contractual obligation, would make no difference, to a challenge raised under Article 14 of the Constitution of India on the ground that the impugned act is arbitrary, unfair and unreasonable. Fourthly, every State action must be informed of reason and it follows that an act uninformed by reason is arbitrary. Fifthly, where no plausible reason or principle is indicated (or is discernible), and where the impugned action ex facie appears to be arbitrary, the onus shifts on the State to justify its action as fair and reasonable. Sixthly, every holder of public office is accountable to the people in whom the sovereignty vests. All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest. And Seventhly, Article 14 of the Constitution of India applies also to matters of governmental policy even in contractual matters, and if the policy or any action of the government fails to satisfy the test of reasonableness, the same would be unconstitutional.

(h) Thereafter our attention was invited to the decision rendered in Lucknow Development Authority v. M.K. Gupta MANU/SC/0178/1994 : (1994) 1 SCC 243. Seriously, the instant judgment has no direct bearing to the issue in hand. The judgment determines whether compensation can be awarded to an aggrieved consumer under the Consumer Protection Act, 1986. It also settles who should shoulder the responsibility of paying the compensation awarded. But all the same it has some interesting observations which may be noticed in the context of the matter under deliberation. Portions of the observations emphasized upon are being noticed below:

8... Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

...

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No.... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by alloting alternative site to the Respondent. It was compensation for exact loss suffered by the Respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the *Law of Torts*). Misfeasance in public office is explained by Wade in his book on *Administrative Law* thus:

Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury. (p. 777)

The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in *Cassell and Co. Limited v. Broome 1972 AC 1027,* on the principle that, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In *Rookes v. Barnard 1964 AC 1129*, it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book *Administrative Law* has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government or semi-government offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them. Various decisions rendered from time to time have been referred to by Wade on *Misfeasance by Public Authorities.* We shall refer to some of them to demonstrate how necessary it is for our society. In *Ashby v. White (1703) 2 LD Raym 938*, the House of Lords invoked the principle of *ubi jus ibi remedium* in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance

appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

(Emphasis is mine)

The judgment brings out the foundational principle of executive governance. The said foundational principle is based on the realization that sovereignty vests in the people. The judgment therefore records that every limb of the constitutional machinery is obliged to be people oriented. The fundamental principle brought out by the judgment is, that a public authority exercising public power discharges a public duty, and therefore, has to subserve general welfare and common good. All power should be exercised for the sake of society. The issue which was the subject matter of consideration, and has been noticed along with the citation, was decided by concluding that compensation shall be payable by the State (or its instrumentality) where inappropriate deprivation on account of improper exercise of discretion has resulted in a loss, compensation is payable by the State (or its instrumentality). But where the public functionary exercises his discretion capriciously, or for considerations which are malafide, the public functionary himself must shoulder the burden of compensation held as payable. The reason for shifting the onus to the public functionary deserves notice. This Court felt, that when a court directs payment of damages or compensation against the State, the ultimate sufferer is the common man, because it is tax payers money out of which damages and costs are paid.

(i) Next cited for our consideration was the judgment in Common Cause, A Registered Society v. Union of India and Ors. MANU/SC/0976/1996 : (1996) 6 SCC 530. The instant case dealt with a challenge to the allotment of retail outlets for petroleum products (petrol pumps). Allotment was made in favour of 15 persons on the ground of poverty or unemployment. Rest of the relevant facts emerge from the extracts from the judgment reproduced below:

24. The orders of the Minister reproduced above read: "the applicant has no regular income to support herself and her family", "the applicant is an educated lady and belongs to Scheduled Tribe community", "the applicant is unemployed and has no regular source of income", "the applicant is an uneducated, unemployed Scheduled Tribe youth without regular source of livelihood", "the applicant is a housewife whose family is facing difficult financial circumstances" etc. etc. There would be literally millions of people in the country having these circumstances or worse. There is no justification whatsoever to pick up these persons except that they happen to have won the favour of the Minister on mala fide considerations. None of these cases fall within the categories placed before this Court in *Centre for Public Interest Litigation v. Union of India : 1995 Supp. (3) SCC 382, but even* if we assume for argument sake that these cases fall in some of those or similar guidelines the exercise of discretion was wholly arbitrary. Such a discretionary power which is capable of being exercised arbitrarily is not permitted by Article 14 of the Constitution of India. While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. If there are two eminent sportsmen in distress and only one petrol pump is available, there should be clear, transparent and objective criteria/procedure to indicate who out of the two is to be preferred. Lack of transparency in the system promotes nepotism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the stage of calling for the applications up to the stage of passing the orders of allotment. The names of the allottees, the orders and the reasons for allotment should be available for public knowledge and scrutiny. Mr. Shanti Bhushan has suggested that the petrol pumps, agencies etc. may be allotted by public auction - category wise amongst the eligible and objectively selected applicants. We do not wish to impose any procedure on the Government. It is a matter of policy for the Government to lay down. We, however, direct that any procedure laid down by the Government must be transparent, just, fair and non-arbitrary.

...

26. With the change in socio-economic outlook, the public servants are being entrusted with more and more discretionary powers even in the field of distribution of government wealth in various forms. We take it to be perfectly clear, that if a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. No public servant can say "you may set aside an order on the ground of mala fide but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is arbitrary."

(Emphasis is mine)

This judgment has a direct bearing on the controversy in hand. It clearly delineates the manner in which discretion must be exercised, specially when the object of discretion is State largesse. A perusal of the observations reproduced above reveal, that the State largesse under reference (petrol pumps) were to be allotted on the ground of poverty and unemployment. Such an allotment was obviously based on a policy to "best subserve the common good" enshrined in Article 39(b) of the

Constitution of India. This Court found no fault in the policy itself. The fault was with the manner of giving effect to the policy. It was held, that a transparent and objective criteria/procedure has to be evolved, so that the choice out of those who are eligible can be made fairly and without any arbitrariness. The exercise of discretion which enables the competent authority to arbitrarily pick and choose out of several persons falling in the same category, according to the above decision would be arbitrary, and as such violative of Article 14 of the Constitution of India.

(j) Out of the more recent judgments our attention was invited to Meerut Development Authority v. Association of Management Studies and Anr. etc. MANU/SC/0616/2009 : (2009) 6 SCC 171. The controversy adjudicated upon in this case emerges from the decision of the Appellant to allotment of 2 plots of land. For the said purpose the Appellant invited tenders from interested persons. In response the Respondent submitted its tender. After the allotment of one of the plots to the Respondent, the Respondent raised an objection that the Appellant had fixed the reserved price of the second plot at a rate much higher than its adjoining plots. The Respondent assailed the action of the Appellant in issuing a fresh advertisement for the allotment of the second plot. In the course of determination of the aforesaid controversy this Court held:

26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.
28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.
29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism.

...

39. The law has been succinctly stated by Wade in his treatise, *Administrative Law*:

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. So a city council acted unlawfully when it refused unreasonably to let a local rugby football club use the city's sports ground, though a private owner could of course have refused with impunity. Nor may a local authority arbitrarily release debtors, and if it evicts tenants, even though in accordance with a contract, it must act reasonably and 'within the limits of fair dealing'. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."- *Administrative Law, 9th Edn. H.W.R. Wade and C.F. Forsyth.*

40. There is no difficulty to hold that the authorities owe a duty to act fairly but it is equally well settled in judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The court cannot substitute its own opinion for the opinion of the authority deciding the matter.
41. The distinction between appellate power and a judicial review is well known but needs reiteration. By way of judicial review, the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. The courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly examine whether the "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14. (See *Sterling Computers Limited v. M and N Publications Limited MANU/SC/0439/1993 : (1993) 1 SCC 445).*

...

50. We are, however, of the opinion that the effort, if any, made by MDA to augment its financial resources and revenue itself cannot be said to be an unreasonable decision. It is well said that the struggle to get for the State the full value of its resources is particularly pronounced in the sale of State-owned natural assets to the private sector. Whenever the Government or the authorities get less than the full value of the asset, the country is being cheated: there is a simple transfer of wealth from the citizens as a whole to whoever gets the assets "at a discount". Most of the times the wealth of the State goes to the individuals within the country rather than to multinational corporations; still, wealth slips away that ought to belong to the nation as a whole.

(Emphasis is mine)

In the instant judgment this Court laid down, that in a tender process, a tenderer has the right to fair treatment and the right to be treated equally. The evaluation of tenders, it has been held, must be transparent and free from any hidden agenda. The view expressed in Wades Tretise on

Administrative Law, that public authorities cannot act in a manner which is open to private persons, was accepted. Public authorities, it was held, can neither act out of malice nor a spirit of revenge. A public authority is ordained to act, reasonably and in good faith and upon lawful and relevant grounds of public interest. Most importantly it was concluded, that the State "must" get the "full value" of the resources, specially when State owned assets are passed over to private individuals/entities. Not stopping there the Court added further, that whoever pays less than the full value, get the assets belonging to the citizens "at a discount", and as such the wealth that belongs to the nation slips away.

(k) Also cited for our consideration was the judgment in Reliance Natural Resources Limited v. Reliance Industries Ltd. etc. MANU/SC/0341/2010 : (2010) 7 SCC 1. The Court's attention was invited to the following:

33. Mr. R.F. Nariman, learned Senior Counsel appearing for RIL concentrated his argument with reference to Sections 391 to 394 of the Companies Act. According to him, Section 392 of the Act had no predecessors either in English law or in the Companies Act of 1913. The reason why the legislature appears to have felt the necessity of enacting Section 392 is to bring Section 391 on a par with Section 394. Section 394 applies only to companies which are reconstructing and or amalgamating, involving the transfer of assets and liabilities to another company. It is thus, applicable to a species of the genus of company referred to under Section 391. Section 394, Sub-section 1 specifically gives the Company Court the power not merely to sanction the compromise or arrangement but also gives the Company Court the power, by a subsequent order, to make provisions for "such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out" [Section 394(1)(vi)]. This power is absent in Section 391, so that companies falling within Section 391, but not within Section 394, would not be amenable to the Company Court's jurisdiction to enforce a compromise or arrangement made under Section 391 and to see that they are fully carried out. Hence, the power under Section 392 has to be understood in the above context, and is of the same quality as the power expressly given to the Company Court post-sanction under Section 394.

...

122. From the above analysis, the following are the broad sustainable conclusions which can be derived from the position of the Union:

(1) The natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest.

(2) Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, the Government has decided to privatise some of its functions. For this reason, the constitutional restrictions on the Government would equally apply to the private players in this process. Natural resources must always be used in the interests of the country, and not private interests.

(3) The broader constitutional principles, the statutory scheme as well as the proper interpretation of the PSC mandates the Government to determine the price of the gas before it is supplied by the contractor.

(4) The policy of the Government, including the gas utilisation policy and the decision of EGOM would be applicable to the pricing in the present case.

(5) The Government cannot be divested of its supervisory powers to regulate the supply and distribution of gas.

...

128. In a constitutional democracy like ours, the national assets belong to the people. The Government holds such natural resources in trust. Legally, therefore, the Government owns such assets for the purposes of developing them in the interests of the people. In the present case, the Government owns the gas till it reaches its ultimate consumer. A mechanism is provided under the PSC between the Government and the contractor (RIL, in the present case). The PSC shall override any other contractual obligation between the contractor and any other party.

...

243. The structure of our Constitution is not such that it permits the reading of each of the Directive Principles of State Policy, that have been framed for the achievement of conditions of social, economic and political justice in isolation. The structural lines of logic, of ethical imperatives of the State and the lessons of history flow from one to the other. In the quest for national development and unity of the nation, it was felt that the "ownership and control of the material resources of the community" if distributed in a manner that does not result in common good, it would lead to derogation from the quest for national development and the unity of the nation. Consequently, Article 39(b) of the Constitution should be construed in light of Article 38 of the Constitution and be understood as placing an affirmative obligation upon the State to ensure that distribution of material resources of the community does not result in heightening of inequalities amongst people and amongst regions. In line with the logic of the constitutional matrix just enunciated, and in the sweep of the quest for national development and unity, is another provision. Inasmuch as inequalities between people and regions of the nation are inimical to those goals, Article 39(c) posits that the "operation of the economic system" when left unattended and unregulated, leads to "concentration of wealth and means of production to the common detriment" and commands the State to ensure that the same does not occur.

...

250 We hold that with respect to the natural resources extracted and exploited from the geographic zones specified in Article 297 the Union may not:

(1) transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same;

(2) allow a situation to develop wherein the various users in different sectors could potentially be deprived of access to such resources;

(3) allow the extraction of such resources without a clear policy statement of conservation, which takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements;

(4) allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions;

(5) allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilisation policy; and

(6) no end user may be given any guarantee for continued access and of use beyond a period to be specified by the Government.

Any contract including a PSC which does not take into its ambit stated principles may itself become vulnerable and fall foul of Article 14 of the Constitution.

(Emphasis is mine)

Interestingly, in this case the position adopted by the Union needs to be highlighted. This Court was informed, that natural resources are vested in the Government, as a matter of trust, in the name of the people of India. And that, it was the solemn duty of the State to protect the national interest. The most significant assertion expressed on behalf of the Union was, that natural resources must always be used in the interest of the country and not in private interest. It is in the background of the stance adopted by the Union, that this Court issued the necessary directions extracted above.

(l) Last of all reference was made to the decision of this Court in Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh and Ors. MANU/SC/0345/2011 : (2011) 5 SCC 29:

65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a nondiscriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion. if any, conferred upon the particular functionary or officer of the State.

66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

67. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution.

(Emphasis is mine)

The observations of this Court in the judgment extracted above neither need any summarization, nor any further elaboration.

(m) Surely, there cannot be any escape from a reference to the judgment rendered by this Court in Centre for Public Interest Litigation and Ors. v. Union of India and Ors. MANU/SC/0089/2012 : (2012) 3 SCC 1, which according to the preamble of the Presidential reference, seems to be the reason why the reference came to be made. During the course of hearing extensive debate, between rival parties, ensued on the effect of the observations recorded by this Court in paragraphs 95 and 96 of the judgment. The aforesaid paragraphs are being extracted herein below:

95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

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

constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.

In so far as the controversy in the aforesaid case is concerned, it would be relevant to mention that the Petitioner approached this Court by invoking the extraordinary writ jurisdiction of this Hon'ble Court under Article 32 of the Constitution of India. The petition came to be filed as a cause in public interest. The reason which promoted the Petitioner to approach this Court was that the Union had adopted the policy of "first come first serve" for allocation of licences of spectrum. It was alleged that the aforesaid policy involved the element of pure chance or accident. It was asserted on behalf of the Petitioners that invocation of the principles of "first come first serve" for permission to use natural resources had inherently dangerous implications. The implications expressed by the Petitioners were duly taken into consideration and the plea raised on behalf of the Petitioners was accepted. Thereupon, the following directions came to be issued in paragraph 102 of the judgment:

102. In the result, the writ petitions are allowed in the following terms:

(i) The licences granted to the private Respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.

(ii) The above direction shall become operative after four months.

(iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.

(iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.

(v) Respondent Nos. 2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who offloaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of Rs. 5 crores each. Respondent Nos. 4, 6, 7 and 10 shall pay cost of Rs. 50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band. We have not imposed cost on the Respondents who had submitted their applications in 2004 and 2006 and whose applications were kept pending till 2007.

(vi) Within four months, 50% of the cost shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants. The remaining 50% cost shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

(vii) However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and Ors. agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of chargesheet(s) which may be filed by the CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. We also make it clear that this judgment shall not prejudice any person in the action which may be taken by other investigating agencies under Income Tax Act, 1961, Prevention of Money Laundering Act, 2002 and other similar statutes.

It needs to be noticed that a review petition came to be filed by the Union against the instant judgment. The same, however, came to be withdrawn without any reservations. During the course of hearing of the instant petition, the Learned Attorney General for India informed this Court that the Union had decided to give effect to the judgment, in so far as the allocation of spectrum is concerned. In the above view of the matter, one only needs to notice the observations recorded by this Court in paragraphs 95 and 96 extracted hereinabove. A perusal of the aforesaid paragraphs reveals, that in line with the judgments rendered by this Court interpreting Article 14 of the Constitution of India, this Court yet again held, that while awarding a contact or a licence, the executive must adopt a transparent and fair method. The executive must ensure, that all eligible persons get a fair opportunity to compete. For awarding contracts or licences, the executive should adopt a rational method, so as to ensure that claims of worthy applicants are not scuttled. On the subject of natural resources like spectrum, etc., this Court held that it was the bounden duty of the State to ensure the adoption of a non-discriminatory method which would result in protection of national/public interest. This Court also expressed the view that "perhaps" the best method for doing so would be through a duly publicized auction conducted fairly and impartially. Thus viewed, it was affirmed, that the State was duty bound to adopt the method of auction by giving wide publication while alienating natural resources, so as to ensure that all eligible persons can participate in the process.

159. The parameters laid by this Court on the scope of applicability of Article 14 of the Constitution of India, in matters where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations (as they emerge from the judgments extracted in paragraph 6 above) are being briefly paraphrased. For an action to be able to withstand the test of Article 14 of the Constitution of India, it has already been expressed in the "main opinion" that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments referred to, endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to contractual matters, it has been held, must conform to the aforesaid parameters. While Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, a criteria or procedure has to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency.

160. Another aspect which emerges from the judgments (extracted in paragraph 6 above) is that, the State, its instrumentalities and their functionaries, while exercising their executive power in matters of trade or business etc. including making of contracts, should be mindful of public interest, public purpose and public good. This is so, because every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests. As such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an executive authority, just does not arise. The fetters on discretion are - a clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good. A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest.

161. Observations recorded by this Court on the subject of revenue returns, during the course of the States engagements in commercial ventures (emerging from the judgments extracted in paragraph 6 above), are being summarized hereunder. It has been held, where the state is simply selling a product, there can be no doubt that the State must endeavour to obtain the highest price, subject of course to any other overriding public consideration. The validity of a trading agreement executed by the Government has to be judged by the test, that the entire benefit arising therefrom enures to the State, and is not used as a cloak for conferring private benefits on a limited class of persons. If a contract has been entered into, taking in account the interest of the State and the public, the same would not be interfered with by a Court, by assuming the position of an appellate authority. The endeavour to get the State the "full value" of its resources, it has been held, is particularly pronounced in the sale of State owned natural resources, to the private sector. Whenever the State gets less than the full value of the assets, it has been inferred, that the country has been cheated, in a much as, it amounts to a simple transfer of wealth, from the citizens as a whole, to whoever gets the assets at a discount. And in that sense, it has been concluded, the wealth that belongs to the nation is lost. In Reliance Natural Resources Ltd.'s case (supra), the Union of India adopted the position, that natural resources are vested in the State as a matter of trust, for and on behalf of the citizens of the country. It was also acknowledged, that it was the solemn duty of the State, to protect those natural resources. More importantly, it was accepted, that natural resources must always be used in the common interest of the citizens of the country, and not for private interest.

162. Based on the legal/constitutional parameters/requirements culled out in the preceding three paragraphs, I shall venture an opinion on whether there are circumstances in which natural resources ought to be disposed of only by ensuring maximum returns. For this, I shall place reliance on a conclusion drawn in the "main opinion", namely, "Distribution of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue, may be arbitrary and face the wrath of Article 14 of the Constitution." (refer to paragraph 149 of the "main opinion"). I am in respectful agreement with the aforesaid conclusion, and would accordingly opine, that when natural resources are made available by the State to private persons for commercial exploitation exclusively for their individual gains, the State's endeavour must be towards maximization of revenue returns. This alone would ensure, that the fundamental right

enshrined in Article 14 of the Constitution of India (assuring equality before the law and equal protection of the laws), and the directive principle contained in Article 39(b) of the Constitution of India (that material resources of the community are so distributed as best to subserve the common good), have been extended to the citizens of the country.

163. A similar conclusion would also emerge in a slightly different situation. This Court in a case dealing with a challenge to the allotment of retail outlets for petroleum products [Common Cause, A Registered Society v. Union of India and Ors. MANU/SC/0976/1996 : (1996) 6 SCC 530] has held, that Article 14 of the Constitution of India, does not countenance discretionary power which is capable of being exercised arbitrarily. While accepting that Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it was held that Article 14 of the Constitution of India does not permit the State to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice amongst those belonging to the same class or category is based on reason, fair play, and non-arbitrariness. Envisage a situation as the one expressed above, where by reasonable classification based on some public purpose, the choice is limited to a set of private persons, amongst whom alone, the State has decided to dispose of natural resources. Herein again, in my opinion, if the participation of private persons is for commercial exploitation exclusively for their individual gains, then the State's endeavour to maximize revenue alone, would satisfy the constitutional mandate contained in Articles 14 and 39(b) of the Constitution of India.

164. In the "main opinion", it has been concluded, that auction is not a constitutional mandate, in the nature of an absolute principle which has to be applied in all situations. And as such, auction cannot be read into Article 14 of the Constitution of India, so as to be applied in all situations (refer to paragraph 107 of the "main opinion"). Auction is certainly not a constitutional mandate in the manner expressed, but it can surely be applied in some situations to maximize revenue returns, to satisfy legal and constitutional requirements. It is, therefore, that I have chosen to express the manner of disposal of natural resources by using the words "maximization of revenue" in place of the term "auction", in the foregoing two paragraphs. But it may be pointed out, the Attorney General for India had acknowledged during the course of hearing, that auction by way of competitive bidding was certainly an indisputable means, by which maximization of revenue returns is assured (in this behalf other observations recorded by me in paragraph 3 above may also be kept in mind). In the aforesaid view of the matter, all that needs to be stated is, that if the State arrives at the conclusion, in a given situation, that maximum revenue would be earned by auction of the natural resource in question, then that alone would be the process which it would have to adopt, in the situations contemplated in the foregoing two paragraphs.

165. One is compelled to take judicial notice of the fact, that allotment of natural resources is an issue of extensive debate in the country, so much so, that the issue of allocation of such resources had recently resulted in a washout of two sessions of Parliament. The current debate on allotment of material resources has been prompted by a report submitted by the Comptroller and Auditor General, asserting extensive loss in revenue based on inappropriate allocations. The report it is alleged, points out that private and public sector companies had made windfall gains because the process of competitive bidding had not been adopted. The country witnessed a similar political spat a little while earlier, based on the allocation of the 2G spectrum. On that occasion the

controversy was brought to this Court by way of a public interest litigation, the judgment whereof is reported as Centre for Public Interest Litigation v. Union of India MANU/SC/0089/2012 : (2012) 3 SCC 1. Extensive revenue loss, in the course of allocation of the 2G spectrum was duly noticed. On each occasion when the issue of allocation of natural resources, results in an alleged loss of revenue, it is portrayed as a loss to the nation. The issue then becomes a subject matter of considerable debate at all levels of the Indian polity. Loss of one, essentially entails a gain to the other. On each such occasion loss to the nation, translates into the identification of private players as the beneficiaries. If one were to accept the allegations appearing in the media, on account of defects in the disposal mechanism, private parties have been beneficiaries to the tune of lakhs of crores of Indian Rupees, just for that reason. In the current debate, rival political parties have made allegations against those responsible, which have been repudiated with counter allegations. This Court is not, and should never be seen to be, a part of that debate. But it does seem, that the Presidential reference is aimed at invoking this Court's advisory jurisdiction to iron out the creases, so that legal and constitutional parameters are correctly understood. This would avoid such controversies in future. It is therefore, that an opinion is also being rendered by me, on the fourth question, namely, "What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?" On this the advice tendered in the "main opinion" inter alia expresses, "We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls fouls of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.", (refer to paragraph 146 of the "main opinion"). While fully endorsing the above conclusion, I wish to further elucidate the proposition.

Before adverting to anything else, it is essential to refer to Article 39 (b) of the Constitution of India.

39. Certain principles of policy to be followed by the State - The State shall in particular, direct its policy towards securing -

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(Emphasis is mine)

The mandate contained in the Article extracted above envisages, that all material resources ought to be distributed in a manner which would "best subserve the common good". It is therefore apparent, that governmental policy for distribution of such resources should be devised by keeping in mind the "common good" of the community i.e., the citizens of this country. It has been expressed in the "main opinion", that matters of policy fall within the realm of the legislature or the executive, and cannot be interfered with, unless the policy is in violation of statutory law, or is ultra vires the provision(s) of the Constitution of India. It is not within the scope of judicial review for a Court to suggest an alternative policy, which in the wisdom of the Court could be better suited in the circumstances of a case. Thus far the position is clearly unambiguous.

The legality and constitutionality of policy is one matter, and the manner of its implementation quite another. Even at the implementation stage a forthright and legitimate policy, may take the shape of an illegitimate stratagem (which has been illustrated at a later juncture hereinafter). Since the Presidential reference is not based on any concrete fact situation, it would be appropriate to hypothetically create one. This would enable those responsible for decision making, to be able to appreciate the options available to them, without the fear of trespassing beyond the limitations of legality and constitutionality. This would also ensure that a truly meaningful opinion has been rendered. The illustration, that has been chosen is imaginary, and therefore, should not be taken as a reference to any similar real life situation(s)/circumstance(s). The focus in the instant consideration is limited to allocation of natural resources for private commercial exploitation, i.e., where a private player will be the beneficiary of such allocation, and will exploit the natural resource to make personal profits therefrom.

The illustration chosen will be used to express an opinion on matters which are governed by statutory provisions, as also, those which are based on governmental policy. This is so because in so far as the present controversy is concerned, the parameters for distribution of natural resources must be examined under these two heads separately.

Coal is a natural resource. It shall constitute the illustrative natural resource for the present consideration. Let us assume a governmental decision to allocate coal lots for private commercial exploitation. First, the legislative policy angle. Reference may be made to the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as, the MMDR Act). The enactment deals exclusively with natural resources. Section 11A of the MMDR Act has been chosen as the illustrative provision, to demonstrate how a forthright legitimate legislative policy, may take the shape of an illegitimate stratagem. The choice of Section 11A aforesaid is on account of the fact that it was added to the MMDR Act only on 13.2.2012, and as such, there may not have been, as of now, any actual allocation of coal lots based thereon. Section 11A of the MMDR Act, is being placed hereunder:

11A. Procedure in respect of coal or lignite - The Central Government may, for the purpose of granting reconnaissance permit, prospecting licence or mining lease in respect of an area containing coal or lignite, select, through auction by competitive bidding on such terms and conditions as may be prescribed, a company engaged in, -

(i) production of iron and steel;

(ii) generation of power;

(iii) washing of coal obtained from a mine; or

(iv) such other end use as the Central Government may, by notification in the Official Gazette, specify,

and the State Government shall grant such reconnaissance permit, prospecting licence or mining lease in respect of coal or lignite to such company as selected through auction by competitive bidding under this section:

Provided that the auction by competitive bidding shall not be applicable to an area containing coal or lignite,-

(a) where such area is considered for allocation to a Government company or corporation for mining or such other specified end use;

(b) where such area is considered for allocation to a company or corporation that has been awarded a power project on the basis of competitive bids for tariff (including Ultra Mega Power Projects).

Explanation - For the purposes of this section "company" means a company as defined in Section 3 of the Companies Act, 1956 and includes a foreign company within the meaning of Section 591 of that Act.

(Emphasis is mine)

For the grant of a mining lease in respect of an area containing coal, the provision leaves no room for any doubt, that selection would be made through auction by competitive bidding. No process other than auction, can therefore be adopted for the grant of a coal mining lease.

Section 11A of the MMDR Act also defines the zone of eligibility, for participation in such competitive bidding. To be eligible, the contender must be engaged in the production of iron and steel, or generation of power, or washing of coal obtained from a mine, or an activity notified by the Central Government. Only those satisfying the legislatively prescribed zone of eligibility, are permitted to compete for a coal mining lease. For the sake of fairness, and to avoid arbitrariness, the provision contemplates, that the highest bidder amongst those who participate in the process of competitive bidding, would succeed in obtaining the concerned coal mining lease. The legislative policy limiting the zone of consideration could be subject matter of judicial review. It could be assailed, in case of violation of a legal or constitutional provision. As expressed in the "main opinion" the facts of each individual case, will be the deciding factor for such determination. In the absence of any such challenge, the legislative policy would be binding and enforceable. In such an eventuality, those who do not fall within the zone of consideration, would be precluded from the process of competitive bidding for a mining lease over an area having coal deposits. In the process of auction through competitive bidding, if the objective is to best subserve the common good (as in Article 39(b) of the Constitution of India) the legislative policy would be fully legitimate. If however, the expressed legislative policy has no nexus to any legitimate objective, or it transgresses the mandate of distribution of material resources to "best subserve the common good", it may well be unfair, unreasonable or discriminatory.

For an effective analysis, Section 11A of the MMDR Act needs a further closer examination. Section 11A aforesaid, as an exception to the legislative policy referred to in the foregoing paragraph, also provides for the grant of a mining lease for coal to a private player, without following the auction route. The provision contemplates the grant of a mining lease for coal, without any reciprocal monetary or other consideration from the lessee. The proviso in Section 11A of the MMDR Act, excludes the auction route where the beneficiary is engaged in power generation. Such exclusion, is contemplated only when the power generating concern, was awarded the power project, on the basis of "competitive bids for tariff". It is important to highlight,

that there is no express assurance in Section 11A aforesaid, that every entrepreneur who sets up a power project, having succeeded on the basis of competitive bidding, would be allotted a coal mining lease. But if such an allotment is actually made, it is apparent, that such entrepreneur would get the coal lot, without having to participate in an auction, free of cost. The legislative policy incorporated in Section 11A of the MMDR Act, if intended to best subserve the common good, may well be valid, even in a situation where the material resource is being granted free of cost. What appears to be free of cost in the proviso in Section 11A of the MMDR Act, is in actuality consideration enmeshed in providing electricity at a low tariff. The aforesaid proviso may be accepted as fair, and may not violate the mandate contained in Article 14 of the Constitution of India, or even the directive principles contained in Article 39(b) of the Constitution of India.

Hypothetically, assume a competitive bidding process for tariff, amongst private players interested in a power generation project. The private party which agrees to supply electricity at the lowest tariff would succeed in such an auction. The important question is, if the private party who succeeds in the award of the project, is granted a mining lease in respect of an area containing coal, free of cost, would such a grant satisfy the test of being fair, reasonable, equitable and impartial. The answer to the instant query would depend on the facts of each individual case. Therefore, the answer could be in the affirmative, as well as, in the negative. Both aspects of the matter are being explained in the succeeding paragraph.

Going back to the hypothetical illustration based on Section 11A of the MMDR Act. One would add some further facts so as to be able to effectively project the legal point of view. If the bidding process to determine the lowest tariff has been held, and the said bidding process has taken place without the knowledge, that a coal mining lease would be allotted to the successful bidder, yet the successful bidder is awarded a coal mining lease. Would such a grant be valid? In the aforesaid fact situation, the answer to the question posed, may well be in the negative. This is so because, the competitive bidding for tariff was not based on the knowledge of gains, that would come to the vying contenders, on account of grant of a coal mining lease. Such a grant of a coal mining lease would therefore have no nexus to the "competitive bid for tariff". Grant of a mining lease for coal in this situation would therefore be a windfall, without any nexus to the object sought to be achieved. In the bidding process, the parties concerned had no occasion to bring down the electricity tariff, on the basis of gains likely to accrue to them, from the coal mining lease. In this case, a material resource would be deemed to have been granted without a reciprocal consideration i.e., free of cost. Such an allotment may not be fair and may certainly be described as arbitrary, and violative of the Article 14 of the Constitution of India. Such an allotment having no nexus to the objective of subserving the common good, would fall foul even of the directive principle contained in Article 39(b) of the Constitution of India. Therefore, a forthright and legitimate policy, on account of defective implementation, may become unacceptable in law.

In a slightly changed factual scenario, the conclusion may well be different. If before the holding the process of auction, for the award of a power project (based on competitive bids for tariff), it is made known to the contenders, that the successful bidder would be entitled to a mining lease over an area containing coal, those competing for the power project would necessarily incorporate the profit they were likely to make from such mining lease. While projecting the tariff at which they would supply electricity, they would be in a position to offset such profits from their costs. This would result in an in an opportunity to the contenders to lower the tariff to a level lower than would

have been possible without the said lease. In such a situation the gains from the coal mining lease, would be enmeshed in the competitive bidding for tariff. Therefore, it would not be just to assume in the instant sequence of facts, that the coal lot has been granted free of cost. One must read into the said grant, a reciprocal consideration to provide electricity at a lower tariff. In the instant factual scenario, the allotment of the mining lease would be deemed to be aimed at "subserving the common good" in terms of Article 39(b) of the Constitution of India. Therefore even the allotment of such a mining lease, which appears to result in the allocation of a natural resource free of cost, may well satisfy the test of fairness and reasonableness contemplated in Article 14 of the Constitution of India. Moreso, because a fair playing field having been made available to all those competing for the power project, by making them aware of the grant of a coal mining lease, well before the bidding process. The question of favouritism therefore would not arise. Would such a grant of a natural resource, free of cost, be valid? The answer to the query, in the instant fact situation, may well be in the affirmative.

The policy of allocation of natural resources for public good can be defined by the legislature, as has been discussed in the foregoing paragraphs. Likewise, policy for allocation of natural resources may also be determined by the executive. The parameters for determining the legality and constitutionality of the two are exactly the same. In the aforesaid view of the matter, there can be no doubt about the conclusion recorded in the "main opinion" that auction which is just one of the several price recovery mechanisms, cannot be held to be the only constitutionally recognized method for alienation of natural resources. That should not be understood to mean, that it can never be a valid method for disposal of natural resources (refer to paragraphs 10 to 12 of my instant opinion).

I would therefore conclude by stating that no part of the natural resource can be dissipated as a matter of largess, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to "best subserve the common good". It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable.

---

1 Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The obligation thus imposed on the State, no doubt, ensures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy.

Back to Index

MANU/SC/0478/2013

Neutral Citation:2006/INSC/42

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 135 of 2012

Decided On: 26.04.2013

Appellants: Republic of Italy and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.
[Alongwith Special Leave Petition (Civil) No. 20370 of 2012]

Hon'ble Judges/Coram:

Altamas Kabir, C.J.I., Anil R. Dave and Vikramajit Sen, JJ.

Subject: Criminal

Case Note:

Criminal - Jurisdiction - Court held that State of Kerala had no jurisdiction to investigate into incident and that till such time it was proved that provisions of Article 100 of UNCLOS, 1982, applied to facts of matter in question, it was the Union of India which alone had jurisdiction to proceed with investigation and trial of Petitioner Nos. 2 and 3 - Hence, this Petition -Held, direction which Court had given in judgment dated 18th January, 2013, was in context of whether Kerala Courts or Indian Courts or even Italian Courts would have jurisdiction to try e two Italian marines - Any particular Agency was not to be entrusted with investigation and to take further steps in connection therewith - Intention in giving direction for formation of special Court was for Central Government to first of all entrust investigation to neutral agency, and, thereafter, to have dedicated Court having jurisdiction to conduct trial - Consequently, since steps were duly taken for appointment of Court of competent jurisdiction to try case, Central Government appeared to have taken steps in terms of directions given in Court's judgment dated 18th January, 2013 - It was for Central Government to take decision in matter - Thus, if there was any jurisdictional error on part of Central Government , it would always be open to Accused to question same before appropriate forum - Hence, taking note of steps taken by Central Government pursuant to directions given in Court's judgment dated 18th January, 2013, matter was left to Central Government to take further steps - Petition disposed of.

Ratio Decidendi

"Courts shall not act beyond scope of their statutory jurisdiction."

ORDER

Altamas Kabir, C.J.I.

1. These proceedings are an offshoot of the judgment delivered by this Court on 18th January, 2013, disposing of Writ Petition (Civil) No. 135 of 2012 filed by the Republic of Italy through its Ambassador in India and the two marines who had been arrested by the Kerala Police in connection with the killing of two Indian fishermen on board an Indian fishing vessel at a distance of 20.5 nautical miles from the Indian sea-coast off the coastline of the State of Kerala. While the Special Leave Petition was filed by the two marines challenging the dismissal of their Writ Petition No. 4542 of 2012 by the Kerala High Court rejecting their prayer for quashing of FIR No. 2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District, Kerala, as being without jurisdiction, the Writ Petition (Civil) No. 135 of 2012 was also filed for much the same reliefs. Both the matters were, therefore, taken up together for hearing and were disposed of together on 18th January, 2013.

2. While disposing of the two matters, this Court held that the State of Kerala had no jurisdiction to investigate into the incident and that till such time it is proved that the provisions of Article. 100 of UNCLOS, 1982, applied to the facts of this case, it is the Union of India which alone has the jurisdiction to proceed with the investigation and trial of the Petitioner Nos. 2 and 3 in the Writ Petition. We, accordingly, directed the Union of India, in consultation with the Chief Justice of India, to set-up a special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and the provisions of UNCLOS 1982. It was further directed that the proceedings before the Chief Judicial. Magistrate, Kollam, would stand transferred to the Special Court to be constituted in terms of the judgment, upon the expectation that the trial would be conducted expeditiously. Liberty was given to the Petitioners to re-agitate the question of jurisdiction once the evidence was adduced on behalf of the parties.

3. On 14th March, 2013, the matter was mentioned by the learned Attorney General, on basis of Note Verbale No. 89/635 dated 11th March, 2013, received by the Ministry of External Affairs, Government of India, from the Embassy of Italy in New Delhi, whereby it was indicated that the Government of Italy had decided not to return the accused marines to India to stand trial for the offences alleged to have been committed by them. Pursuant to the directions given on that date, the matter was again listed on 2nd April, 2013, and the learned Attorney General was requested by the Court to indicate what steps had been taken for constitution of a separate Court to try the two Italian marines separately on a fast track basis, in order to dispose of the matter as quickly as possible. The matter was then listed again on 22nd April, 2013, when the learned Attorney General informed the Court that pursuant to the directions of this Court in its judgment dated 18th January, 2013, the Government of India, in the Ministry of Home Affairs, had appointed the National Investigation Agency created under the National Investigation Agency Act, 2008, to take over the investigation on the basis of FIR No. 2 of 2012 dated 29th August, 2012, Coastal PS Neendakara, Kollam. The case was re-registered at PS NIA, New Delhi as Case No. RC-04/2013/NIA/DLI under Sections 302, 307, 427 read with Section 34 of the Indian Penal Code and Section 3 of The

Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002. The learned Attorney General submitted that the case is under investigation by the National Investigation Agency, and such investigation would be completed shortly.

4. The submissions made by the learned Attorney General were vehemently opposed by Shri Mukul Rohatgi, learned Senior Advocate, on behalf of the accused mainly on the ground that by handing over the investigation to the National Investigation Agency, the Government was also altering the forum before which the matter could be heard. Furthermore, by entrusting the investigation to the National Investigation Agency, the investigating authorities were being permitted to invoke the provisions of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, which provides for death penalty in regard to cognizance being taken on any of the scheduled offences. Mr. Mukul Rohtagi, learned Senior Advocate, who appeared for the Petitioners, urged that since the provisions of the aforesaid Act had not been included in the original charge-sheet, the investigating authorities could not be permitted to take recourse to the same, especially when directions had been given by this Court in the judgment dated 18th January, 2013, that the case was to be tried under the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and the provisions of UNCLOS 1982.

5. Mr. Rohtagi submitted that since the National Investigation Agency could only try the Scheduled Offences, referred to in the Act, the investigation could not, in any event, be taken up under the National Investigation Agency Act, 2008.

6. Having heard the learned Attorney General for India and Mr. Mukul Rohtagi for the Petitioners, we do not see why this Court should be called upon to decide as to the agency that is to conduct the investigation. The direction which we had given in our judgment dated 18th January, 2013, was in the context of whether the Kerala Courts or the Indian Courts or even the Italian Courts would have the jurisdiction to try the two Italian marines. It was not our desire that any particular Agency was to be entrusted with the investigation and to take further steps in connection therewith. Our intention in giving the direction for formation of a special Court was for the Central Government to first of all entrust the investigation to a neutral agency, and, thereafter, to have a dedicated Court having jurisdiction to conduct the trial. Since steps have been duly taken for the appointment of a Court of competent jurisdiction to try the case, the Central Government appears to have taken steps in terms of the directions given in our judgment dated 18th January, 2013. It is for the Central Government to take a decision in the matter.

7. If there is any jurisdictional error on the part of the Central Government in this regard, it will always be open to the accused to question the same before the appropriate forum.

8. We, therefore, take note of the steps taken by the Central Government pursuant to the directions given in our judgment dated 18th January, 2013, and leave it to the Central Government to take further steps in the matter.

9. In addition to the above, we sincerely hope that the investigations will be completed at an early date and the trial will also be conducted on a day-to-day basis and be completed expeditiously as well.

10. The terms and conditions regarding bail, as were indicated in our Order dated 18th January, 2013, will continue to remain operative in the meantime.

Back to Index

MANU/SC/1563/2019

Neutral Citation: 2019/INSC/1236

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 8588 of 2019 (Arising out of SLP (C) No. 15804 of 2017), Writ Petition (Civil) Nos. 267/2012, 279, 558, 561, 625, 640, 1016, 788, 925, 1098, 1129/2017, 33, 205, 467/2018, Transferred Case (Civil) Nos. 49, 51 and 2199/2018

Decided On: 13.11.2019

Appellants: Rojer Mathew **Vs.** Respondent: South Indian Bank Ltd. and Ors.

Hon'ble Judges/Coram:

Ranjan Gogoi, C.J.I., N.V. Ramana, Dr. D.Y. Chandrachud, Deepak Gupta and Sanjiv Khanna, JJ.

Subject: Constitution

Relevant Section:

Constitution Of India - Article 110; Constitution Of India - Article 323-A; Constitution Of India - Article 323-B; Finance Act, 2017 - Section 184

Prior History / High Court Status:

From the Judgment and Order dated 20.01.2017 of the High Court of Kerala at Ernakulam in W.A. No. 2349/2016 in W.P.(C) No. 26290/2014 (MANU/KE/0069/2017)

HIGH COURT Status:

Judgment challenged *vide* MANU/SC/0666/2020 dated: 04.08.2020

Case Note:

Constitution- Validity of provision - Section 184 of the Finance Act, 2017 and Articles 110, 323-A and 323-B of Constitution of India, 1950 - In present batch of cases, Petitioners had questioned validity of Part XIV read with 8th and 9th Schedules of Finance Act 2017, as being ex-facie unconstitutional, arbitrary, in colourable exercise of legislative power, and offensive to basic structure of Constitution - Whether 'Finance Act, 2017' insofar as it amended certain other enactments and altered conditions of service of persons manning

different Tribunals could be termed as a 'money bill' under Article 110 and consequently was validly enacted - If the answer to the above was in the affirmative then Whether Section 184 of the Finance Act, 2017 was unconstitutional on account of Excessive Delegation - If Section 184 was valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 were in consonance with Principal Act and various decisions of this Court on functioning of Tribunals - Whether there should be a Single Nodal Agency for administration of all Tribunals - Whether there was a need for conducting a Judicial Impact Assessment of all Tribunals in India - Whether judges of Tribunals set up by Acts of Parliament under Articles 323-A and 323-B of the Constitution can be equated in 'rank' and 'status' with Constitutional functionaries - Whether direct statutory appeals from Tribunals to the Supreme Court ought to be detoured - Whether there was a need for amalgamation of existing Tribunals and setting up of benches.

Facts:

The present lead matter was filed by Rojer Mathew, assailing the final judgment and order of the High Court of Kerala. The Petitioner had originally approached the High Court challenging the constitutional validity of Section 13 (5-A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 which permits secured creditors to participate in auction of immoveable property if it remained unsold for want of reserve bid in an earlier auction. Rojer Mathew claimed that the aforementioned provision violated his rights Under Article 300A and Article 14 of the Constitution, besides being in contravention of the Code of Civil Procedure which prohibits mortgagees from participating in auction of immovable property without prior Court permission.

Held, while striking down Section 184 of Finance Act, 2017

Ranjan Gogoi, C.J.I.

1. It is apparent that the Legislature has not been provided with desired assistance so that it may rectify the anomalies which arise from provisions of direct appeal to the Supreme Court. Considering that such direct appeals have become serious impediments in the discharge of Constitutional functions by this Court and also affects access to justice for citizens, it is high time that the Union of India, in consultation with either the Law Commission or any other expert body, revisit such provisions under various enactments providing for direct appeals to the Supreme Court against orders of Tribunals, and instead provide appeals to Division Benches of High Courts, if at all necessary. Doing so would have myriad benefits. In addition to increasing affordability of justice and more effective Constitutional adjudication by this Court, it would also provide an avenue for High Court Judges to keep face with contemporaneous evolutions in law, and hence enrich them with adequate experience before they come to this Court. The Union is directed undertake such an exercise expeditiously, preferably within a period of six months at the maximum, and place the findings before Parliament for appropriate action as may be deemed fit.[223]

2. While seeking a 'Judicial Impact Assessment' of all existing Tribunals, counsels for Petitioners/Appellant(s) have underscored the exorbitant pendency before of a number of Tribunals like the CESTAT and ITAT, which they claim affects the very objective of tribunalisation. On the other hand, they also highlight an incongruity wherein numerous Tribunals are hardly seized of any matters, and are exclusively situated in one location.[224]

3. As noted by this Court on numerous occasions, including in Madras Bar Association (2014), although it is the prerogative of the Legislature to set up alternate avenues for dispute resolution to supplement the functioning of existing Courts, it is essential that such mechanisms are equally effective, competent and accessible. Given that jurisdiction of High Courts and District Courts is affected by the constitution of Tribunals, it is necessary that benches of the Tribunals be established across the country. However, owing to the small number of cases, many of these Tribunals do not have the critical mass of cases required for setting up of multiple benches. On the other hand, it is evident that other Tribunals are pressed for resources and personnel.[225]

4. This 'imbalance' in distribution of case-load and inconsistencies in nature, location and functioning of Tribunals require urgent attention. It is essential that after conducting a Judicial Impact Assessment as directed earlier, such 'niche' Tribunals be amalgamated with others dealing with similar areas of law, to ensure effective utilisation of resources and to facilitate access to justice.[226]

5. Union is directed to rationalise and amalgamate the existing Tribunals depending upon their case-load and commonality of subject-matter after conducting a Judicial Impact Assessment, in line with the recommendation of the Law Commission of India in its 272nd Report. Additionally, the Union must ensure that, at the very least, circuit benches of all Tribunals are set up at the seats of all major jurisdictional High Courts.[227]

6. The issue and question of Money Bill, as defined Under Article 110(1) of the Constitution, and certification accorded by the Speaker of the Lok Sabha in respect of Part-XIV of the Finance Act, 2017 is referred to a larger Bench. Section 184 of the Finance Act, 2017 does not suffer from excessive delegation of legislative functions as there are adequate principles to guide framing of delegated legislation, which would include the binding dictums of this Court. The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 suffer from various infirmities. These Rules formulated by the Central Government under Section 184 of the Finance Act, 2017 being contrary to the parent enactment and the principles envisaged in the Constitution as interpreted by this Court, are hereby struck down in entirety. The Central Government is accordingly directed to re-formulate the Rules strictly in conformity and in accordance with the principles delineated by this Court in R.K. Jain, L. Chandra Kumar, Madras Bar Association and Gujarat Urja Vikas Ltd. conjointly read with the observations made in the earlier part of this decision. The new set of Rules to be formulated by the Central Government shall ensure non-discriminatory and uniform conditions of service, including assured tenure, keeping in mind the fact that the Chairperson and Members appointed after retirement and those who are appointed from the Bar or from other specialised professions/services, constitute two separate and distinct homogeneous classes. It would be

open to the Central Government to provide in the new set of Rules that the Presiding Officers or Members of the Statutory Tribunals shall not hold 'rank' and 'status' equivalent to that of the Judges of the Supreme Court or High Courts, as the case may be, only on the basis of drawing equal salary or other perquisites. There is a need-based requirement to conduct 'Judicial Impact Assessment' of all the Tribunals referable to the Finance Act, 2017 so as to analyse the ramifications of the changes in the framework of Tribunals as provided under the Finance Act, 2017. Thus, it is appropriate to issue a writ of mandamus to the Ministry of Law and Justice to carry out such 'Judicial Impact Assessment' and submit the result of the findings before the competent legislative authority. The Central Government in consultation with the Law Commission of India or any other expert body shall re-visit the provisions of the statutes referable to the Finance Act, 2017 or other Acts as listed in para 174 of this order and place appropriate proposals before the Parliament for consideration of the need to remove direct appeals to the Supreme Court from orders of Tribunals. A decision in this regard by the Union of India shall be taken within six months. The Union Government shall carry out an appropriate exercise for amalgamation of existing Tribunals adopting the test of homogeneity of the subject matters to be dealt with and thereafter constitute adequate number of Benches commensurate with the existing and anticipated volume of work.[228]

7. As the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and other Conditions of Service of Members) Rules, 2017 have been struck down and several directions have been issued vide the majority judgment for framing of fresh set of Rules, present Court, as an interim order, direct that appointments to the Tribunal/Appellate Tribunal and the terms and conditions of appointment shall be in terms of the respective statutes before the enactment of the Finance Bill, 2017. However, liberty is granted to the Union of India to seek modification of this order after they have framed fresh Rules in accordance with the majority judgment. However, in case any additional benefits concerning the salaries and emoluments have been granted under the Finance Act, they shall not be withdrawn and will be continued. These would equally apply to all new members.[229]

8. The present batch of matters is accordingly disposed of.[230]

Dr. D.Y. Chandrachud, J.

9. Part XIV of the Finance Act 2017 could not have been enacted in the form of a Money Bill. The Rules which have been framed pursuant of the Rule making power Under Section 184 are held to be unconstitutional. However, since during the pendency of these proceedings, certain steps were taken in pursuance of the interim orders and appointments have been made, we direct that those appointments shall not be affected by the declaration of unconstitutionality. The terms and conditions governing the personnel so appointed shall however abide by the parent enactments. Upon the declaration of unconstitutionality, the conditions specified in all corresponding aspects in the parent enactments shall continue to operate.[334]

10. This Court has repeatedly emphasised the need for setting up an independent statutory body to oversee the working of tribunals. Despite the directions issued by this Court in Chandra Kumar nearly two decades ago, no action has been taken by the legislature to put

in place an umbrella organisation which would be tasked with addressing the drawbacks of the system to which we have adverted above. The lack of a single authority to ensure competence and uniform service conditions has led to a fragmented tribunal system that defeats the purpose for which the system was constituted. Moreover, the co-ordinating authority for all tribunals must be the Department of Justice. Vesting that function in individual ministries has led to haphazard evolution of the tribunal structure, besides posing serious dangers to the independence of tribunals.[335]

11. It is imperative that an overarching statutory organisation be constituted through legislative intervention to oversee the working of tribunals. We recommend the constitution of an independent statutory body called the "National Tribunals Commission"39 to oversee the selection process of members, criteria for appointment, salaries and allowances, introduction of common eligibility criteria, for removal of Chairpersons and Members as also for meeting the requirement of infrastructural and financial resources. The legislation should aim at prescribing uniform service conditions for members. The Commission should comprise the following members: (i) Three serving judges of the Supreme Court of India nominated by the Chief Justice of India; (ii) Two serving Chief Justices or judges of the High Court nominated by the Chief Justice of India; (iii) Two members to be nominated by the Central Government from amongst officers holding at least the rank to a Secretary to the Union Government: one of them shall be the Secretary to the Department of Justice who will be the ex-officio convener; and (iv) Two independent expert members to be nominated by the Union government in consultation with the Chief Justice of India.[336]

12. The senior-most among the Judges nominated by the Chief Justice of India shall be designated as the Chairperson of the NTC.[337]

13. While the setting up of the NTC is within the competence of the legislature, it must be ensured that the guidelines that have been laid down by this Court to ensure the independence and efficient functioning of the tribunal system in India are observed. The independence of judicial tribunals is an inviolable feature of the basic structure of the Constitution. The procedure of selection, appointment, removal of members and prescription of the service conditions of tribunal members determine the independence of the tribunals. As we have held, in preserving the independence of the tribunals as a facet of judicial independence, the adjudicatory body must be robust: subservient to none and accountable to the need to render justice in the context of specialized adjudication. This is reflected in the need for vigilance in guarding the independence of courts and tribunals.[338]

14. Competence, professionalism and specialisation are indispensable facets of a robust tribunal system designed to deliver specialised justice. The Commission must be vested with the power to oversee the administration of all tribunals established under the enactments of Parliament to ensure the adequate manning of the tribunals with the infrastructure and staff required to meet the exigencies of the system. The Union government should also consider formulating a law to ensure the constitution of an All India Tribunal Service governing the recruitment and conditions of service of the non-adjudicatory personnel for tribunals. At present, the administrative staff of the tribunals is by and large brought on deputation. The tribunals are woefully short of an adequate complement of trained administrative personnel.

Hence, there is an urgent need to set up an All India Tribunal Service in the interests of the effective functioning of the tribunal system. Though the present judgment analyses the ambit of the word "only" in Article 110(1) and the interpretation of Sub-clauses (a) to (g) of Clause (1) of Article 110 and concludes that Part XIV of the Finance Act 2017 could not have been validly enacted as a Money Bill. The qualifications of members to tribunals constitute an essential legislative function and cannot be delegated. Tribunals have been conceptualized as specialized bodies with domain-specific knowledge expertise. Indispensable to this specialized adjudicatory function is the selection of members trained in their discipline. Keeping this in mind, the prescription of qualifications for members of tribunals is a legislative function in its most essential character. The qualifications for appointment to adjudicatory bodies determine the character of the body. The adjudicatory tribunals are intended to fulfil the objects of legislation enacted by Parliament, be it in the area of consumer protection, environmental adjudication, industrial disputes and in diverse aspects of economic regulation. Defining the qualifications necessary for appointment of members constitutes the core, the very essence of the tribunal. This is an essential legislative function and cannot be delegated to the Rule making authority of the central government. It is for the legislature to define the conditions which must be fulfilled for appointment after assessing the need for domain specific knowledge.[339]

Deepak Gupta, J.

15. The decision of the Hon'ble Speaker of the House of People under Article 110 (3) of the Constitution is not beyond judicial review. If two views are possible then there can be no manner of doubt that the view of the Speaker must prevail. Keeping in view the lack of clarity as to what constitutes a Money Bill, the issue as to whether Part XIV of the Finance Act, 2017, is a Money Bill or not may be referred to a larger bench.[357]

16. There can be no doubt that Parliament is not expected to deal with all matters and it can delegate certain "non-essential" matters to the executive. Every condition need not be laid down by the Legislature.[358]

17. A 7-Judge Bench of this Court in Re Article 143, Constitution of India and Delhi Laws Act (1912) etc. held that, the legislature cannot be expected to legislate on all issues and has the power to delegate non-essential functions to a delegatee. At the same time, a close reading of the judgment indicates that it was clearly held that the "essential legislative functions" cannot be delegated. There can be no quarrel with the proposition that delegation of non-essential legislative functions can be done. Even to this there is a caveat. The legislature must have control and functional powers over the delegatee. One of the known methods of exercising such powers is for the delegatee to place the rules/orders passed by it in exercise of powers delegated to it before the legislature. There should always be legislative control over delegated legislation.[360]

18. An analysis of Section 184 clearly indicates that the Parliament has delegated to the Central Government the power to make Rules to provide for the qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of the Chairpersons/Members of the tribunals. The issue before us is whether by doing so

Parliament has delegated "essential legislative functions" and whether Parliament has retained any control.[365]

19. Present Court in the present case dealing with the appointment of Chairpersons/Members to various Tribunals. They are enjoined upon to discharge a constitutional function of delivering justice to the people. What should be the essential qualifications and attributes of persons selected to man such high posts is, an essential part of legislative functions. Constitution could not have provided that the qualifications of the Judges of the Supreme Court of India or of the High Courts could be fixed by the Government. If these tribunals are to replace the High Courts, why should the same principles not apply to them. Laying down the qualifications of the persons eligible to hold these high posts was an essential aspect of the legislation keeping in view the importance of the tribunals, the importance of Rule of law and the importance of an independent and fearless judiciary.[358]

20. As far as providing the qualifications for appointment are concerned, these qualifications have to be provided in the legislation and could not be delegated. However, as far as the other terms and conditions such as pay and allowances are concerned, these can be delegated.[367]

21. For the sake of argument, even if it was to be said that laying down the qualifications is not an essential function then also, in view of the law laid down by this Court, the guidelines should have been found in the legislation itself. It is paradoxical that there are no guidelines for the essential qualifications, even though there are some guidelines with regard to the terms and conditions of services of Chairpersons/Members of the Tribunals.[368]

22. The previous enactments were repealed in so far as matters covered by Part XIV of the Finance Act are concerned. Therefore, it cannot be expected that the delegatee would again refer to the repealed enactments to seek the guidelines for fixing the terms and conditions, etc. of those to be appointed as Chairpersons/Members. If we exclude the judgments of this Court and the terms and conditions laid down in the repealed enactments then there are no guidelines whatsoever left for the delegatee to fall back on. The Finance Act provides no guidelines in this regard. It is absolutely silent with regard to the qualification, the eligibility criteria, experience etc. required for those who are to be appointed as Chairpersons/Members of the Tribunals. These powers have been delegated to the government.[370]

23. There being no guidelines, unfettered and unguided powers have been vested in the delegatee and, therefore, in my opinion, there is excessive delegation. As such Section 184 of the Finance Act, 2017 insofar as it delegates the powers to lay down the qualifications of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule, suffers from the vice of excessive delegation and is accordingly struck down.[371]

24. There are various reasons why there should be one nodal agency. Tribunals are facing many problems like lack of manpower, very few benches, vacancies lying unfilled for long

period, financial dependence on the department which may be litigating before the tribunal etc. These are ills which can be avoided if Tribunals fall under one umbrella organisation. One umbrella organisation will be better equipped to understand the problems faced by all the Tribunals. This could lead to standardization of Tribunals and a uniform approach to the needs of each tribunal. A large number of tribunals, especially those cast with the duty of discharging adjudicatory functions have been constituted with a view to replace the courts and in many cases the jurisdiction earlier exercised by the High Courts has been vested in such tribunals. It is, therefore, imperative that these tribunals must be manned by persons of impeccable integrity, high intellect and having vast experience in the field in which they will exercise jurisdiction. These tribunals also must have functional autonomy. This cannot be achieved unless there is a nodal body which shall look after the administrative needs of the tribunals. For more than 2 decades the Government has not thought it fit to comply with the 7-Judge Bench judgment of this Court in L. Chandra Kumar. These matters cannot be permitted to linger on indefinitely. Therefore, in my view, a direction must be given to the Government to set up a single nodal agency within a period of 6 months from today till which time the present system may continue. Merely giving financial autonomy to the tribunals will not do away with the need of having one common umbrella organisation to supervise all the tribunals.[375]

25. Even without carrying out any judicial impact assessment it is clear, as held in Madras Bar Association, 2010 that, tribunals in India have unfortunately not achieved full independence. When tribunals are established, they depend upon the sponsoring department for funds, infrastructure and even space for functioning. Administrative members of the tribunal are, more often than not, drawn from this department. This strikes at the very root of judicial independence because the biggest litigant or stakeholder itself becomes part and parcel of the adjudicating body which is supposed to be free, independent and fearless.[376]

26. An attempt should be made to do away with filing of first appeal as a matter of right to the Supreme Court. At present, at least 2 dozen statues provide for appeals directly to the Supreme Court. The Supreme Court becomes a Court of first appeal which is highly avoidable. If the jurisdiction of the High Courts is bypassed by providing for appeals directly to the Supreme Court, soon a stage will come when we will have no High Court Judges who would have heard matters in various jurisdictions. It would be virtually impossible for them to handle such matters in the Supreme Court where the tenure of a Judge is on an average only about 4 years.[390]

27. The Judicial Impact Assessment Committee can also after assessment recommend that some tribunal(s) should be wound up and the jurisdiction of that tribunal(s) be given back to civil courts or to the High Courts or to some other tribunal. It can also suggest the merger of two or more tribunals.[391]

28. The next issue is who should carry out the judicial impact assessment. The Judicial Impact Assessment Committee should comprise of two retired judges of the Supreme Court, the senior being the Chairperson of the Committee, and one retired Chief Justice of a High Court all three to be nominated by the Chief Justice of India. Out of the three at least two should have been the Chairperson or members of tribunals. Two members of the Executive,

not below the rank of Secretary, to the Government of India, one from the Ministry of Law and Justice and one from some other branch can also be members but these members should be appointed in consultation with the Chief Justice of India.[392]

29. The last issue is whether there should be a Commission or a body to oversee the appointment of members of various tribunals. It is necessary to have such a Commission which is itself an independent body manned by honest and competent persons. This body is required to select those persons who man the specialised tribunals in terms of the law laid down in various judgments of this Court.[393]

30. Serving Judges of the Supreme Court or the Chief Justice of the High Courts are already overburdened and have no time to spare. It would be much better, if they could spend their time and energy in filling up the vacancies in the High Courts rather than venturing into the field of tribunals.[394]

31. Having a very large committee would not serve the purpose. A smaller committee comprising of competent people is a better solution and, such commission should comprise of 2 retired Supreme Court Judges with the senior most being the Chairman and one retired Chief Justice of High Court to be appointed by the Chief Justice of India. There must be one member representing the executive to be nominated by the Central Government from amongst officers holding the rank of Secretary to the Government of India or equivalent. This member shall be the ex-officio convener. One expert member can be co-opted by the by full time members. This expert member must have expertise and experience in the field/jurisdiction covered by the tribunal to which appointments are to be made.[395]

Industry: Banks

JUDGMENT

Ranjan Gogoi, C.J.I.

1. Leave granted.

BRIEF BACKGROUND:

2. In the present batch of cases, the constitutionality of Part XIV of the Finance Act, 2017 and of the Rules framed in consonance has been assailed. While it would be repetitious to reproduce the pleadings of each case separately, a brief reference is being made, illustratively, to the prayers made in three matters to aid the formulation of core issues arising for adjudication.

3. The Madras Bar Association has preferred Writ Petition (Civil) No. 267 of 2012 seeking the following reliefs:

i. A writ of mandamus, directing the Union of India, to implement the directions of this Hon'ble Court in Union of India v. R. Gandhi [MANU/SC/0378/2010 : (2010) 11 SCC 1, para 96 at pg. 310] and L. Chandra Kumar v. Union of India [MANU/SC/0261/1997 : (1997) 3 SCC 261], paras 120 and 121 at page 65 to 67], where Ministry of Law and Justice, Govt. Of India was ordered to take over the administration of all tribunals created by Parliament and streamline the functioning of the same.

ii. A writ of mandamus directing the Ministry of Law & Justice to promptly carry out a 'Judicial Impact Assessment' on all tribunals created by Parliament and submit a report on the same to this Hon'ble Court.

4. This Writ Petition was originally heard by a three-judge Bench on 18th February, 2015 wherein it was observed that the case presented substantial questions of Constitutional interpretation, necessitating hearing by a Constitution Bench. The orders passed from time to time reveal that, on 18th January, 2016, this Court perused the contents of the Tribunals, Appellate Tribunals and other Authorities (Conditions of Service) Bill, 2014 and felt that *"it would be more appropriate if observations made in* ***Union of India v. R. Gandhi, President, Madras Bar Association*** MANU/SC/0378/2010 : (2010) 11 SCC 1 *(in paragraphs 64-70) are also considered by the Government."*

5. The matter was listed again on 27th March, 2019 and this Court took cognizance of non-implementation of the directions issued vide para 96 of ***L. Chandra Kumar v. Union of India*** MANU/SC/0261/1997 : (1997) 3 SCC 261, which reads as follows:

96. We are of the opinion that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals.

6. Thereafter on the same day, this Court opined as follows:

Tentatively, we are of the view that the said directions ought to have been implemented by the Government of India long back. In the course of hearing today, learned Attorney General for India relying on an affidavit filed on behalf of the Union of India in the year 2013, had pointed out certain difficulties including the need for an amendment of the Government of India (Allocation of Business) Rules, 1961. Learned Attorney General has also pointed out that the Ministry of Law and Justice is overburdened and may not be able to act and function as the nodal agency, which the Court had in mind while issuing directions way back in the year 1997 in L. Chandra Kumar (supra). There cannot by any manner of doubt that to ensure the efficient functioning and to streamline the working of Tribunals, they should be brought under one agency, as already felt and observed by this Court in L. Chandra Kumar (supra). The Court would like to have benefit of the view of the Government of India as on today by means of an affidavit of the competent authority to be filed within two weeks from today.

The second prayer made in the writ petition has also been considered by us and in this regard we have taken note of compilation placed before the Court by the learned Attorney General, which would go to show the present vacancy position in different Tribunals, which is one of the issues that we would attempt to resolve. From the compilation of the learned Attorney General, it appears that the Central Administrative Tribunal, the Intellectual Property Appellate Board, the Armed Forces Tribunal, the National Green Tribunal and the Income Tax Appellate Tribunal would require immediate attention. While every endeavour would be made by the nominee of the Chief Justice who heads the Selection Committee before whom the issue of recommendations may have been pending to expedite the same, such of the recommendations which have already been made by the Search-cum-Selection Committee as is in the case of National Company Law Tribunal and National Law Appellate Tribunal, should be immediately implemented by making appointments within the aforesaid period of two weeks and the result thereof be placed before the Court vide affidavit of the competent authority, as ordered to be filed by the present order.

Once the aforesaid information is made available, appropriate orders will be passed by this Court, which may, inter alia, include remitting the matter to smaller Bench for monitoring on a continuous basis, so as to ensure due and proper functioning of the Tribunals. Matter be listed before this Bench after two weeks.

7. During the pendency of the aforementioned writ petition, the present lead matter bearing SLP(C) No. 15804/2017 was filed by Rojer Mathew, assailing the final judgment and order of the High Court of Kerala. The Petitioner had originally approached the High Court challenging the constitutional validity of Section 13 (5-A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 which permits secured creditors to participate in auction of immoveable property if it remained unsold for want of reserve bid in an earlier auction. Rojer Mathew claimed that the aforementioned provision violated his rights Under Article 300A and Article 14 of the Constitution, besides being in contravention of the Code of Civil Procedure which prohibits mortgagees from participating in auction of immovable property without prior Court permission.

8. During the course of arguments, it was brought to the notice of this Court that appointments to the Debt Recovery Tribunals was not in consonance with the Constitutional spirit of judicial independence. Accordingly, though Rojer Mathew was given an opportunity to approach the High Court for reconsideration of his plea on 16th May, 2018, nevertheless this Court kept his petition pending to allow consideration of broader issues concerning restructuring of Tribunals. Assistance of Shri Arvind P. Datar, Sr. Advocate as Amicus Curiae was also requested by this Court.

9. The third matter to be taken note of is Writ Petition (Civil) No. 279/2017 where the Petitioner, Kudrat Sandhu, has filed a Public Interest Litigation challenging the vires of Part XIV of the Finance Act, 2017 by which the provisions of twenty-five different enactments were amended to effect sweeping changes to the requisite qualifications, method of appointment, terms of office, salaries and allowances, and various other terms and conditions of service of the members and presiding officers of different statutory Tribunals. The impugned provisions of the Finance Act, 2017 have been referred to in extenso at appropriate parts of this order.

GENESIS OF TRIBUNALISATION:

10. Delay and backlogs in the administration of justice is of paramount concern for any country governed by the Rule of law. In our present judicial setup, disputes often take many decades to attain finality, travelling across a series of lower courts to the High Court and ending with an inevitable approach to the Supreme Court.

11. Such crawling pace of the justice delivery system only aggravates the misery of affected parties. Although with nebulous origins, the adage *"justice delayed, is justice denied"* is apt in this context. Courts in this country, probably in a quest to ensure complete justice for everyone, overlook the importance of expediency and finality. This situation has only worsened over the years, as evidenced through piling pendency across all Courts. It would however be wrong to place the blame of such delay squarely on the judiciary, for an empirical examination of pendency clearly demonstrates that the ratio of judges against the country's population is one of the lowest in the world and the manpower (support staff) and infrastructure provided is dismal.

12. In addition to the delay in administration of justice, another important facet requiring attention is the rise of specialization and increase of complex regulatory and commercial aspects, which require esoteric appraisal and adjudication. The existing lower courts in the country are not well equipped to deal with such complex new issues which see constant evolution as compared to the stable nature of existing civil, criminal and the tax jurisprudence.

13. Evidently, there is a desperate need to overcome these hurdles of delay in administration of justice. Creation of tribunals has evolved as one solution in the ever-constant strive to increase access to justice. A 'Tribunal' can be understood as a body tasked with discharging quasi-judicial functions with the primary objective of providing a special forum for specific type of disputes and for faster and more efficacious adjudication of issues. In ***Jaswant Sugar Mills Ltd., Meerut v. Lakshmichand*** MANU/SC/0277/1962 : AIR 1963 SC 677, a test was laid down whereunder it is to be examined whether the authority has the trappings of a Court, facets of which include the authority to make determinations, evidentiary and procedural powers and ability to impose sanctions. However, per a five-judge bench in ***Associated Cement Co. Ltd. v. P.N. Sharma*** MANU/SC/0215/1964 : AIR 1965 SC 1595, Tribunals were vested with a primarily judicial character for it was observed that:

9. ..... Special matters and questions are entrusted to them for their decision and in that sense, they share with the courts one common characteristic; both the courts and the tribunals are "constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions", (vide Durga Shankar Mehta v. Thakur Raghuraj Singh [MANU/SC/0099/1954 : (1955) 1 SCR 267 at p. 272]). They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. The procedure which the tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge. Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial

functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the tribunals and the courts, and features which are distinct and separate. The basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State.

14. Further, this Court has in various judgments explicitly held that tribunals are mutually exclusive from administrative or legislative bodies, and although not strictly Courts, they nevertheless perform judicial functions. With the inclusion of technical members along with judicial members in composition of Tribunals, it is ensured that the adjudicatory authority is equipped with the technical knowledge required to comprehend and decide issues involving specialised subjects.

15. Such issues are not unique to our country. Globally, the issues such as need for specialization or pendency have resulted in a unanimous consensus for tribunalisation. A perusal of the prevailing legal regime governing tribunals and their interface with the government, provides a useful benchmark in examining methods to retain their character.

AN INTERNATIONAL PERSPECTIVE

16. The global approach to the institution of specialized Tribunals is a largely consistent one. A cursory examination brings to fore a universal inherent need to disperse disputes across different adjudicatory bodies to reduce the burden on Constitutional Courts and ensure faster resolution of specific disputes. Almost all countries in the world have incorporated laws pertaining to the working of Tribunals within their Constitutional framework in some form or the other. In light of our common law traditions and colonial history, it would be imperative to examine the position of law across the world:

I. United Kingdom

17. Tribunals are one of the most important institutions in the dispensation of justice in the British Judicial system. Numerous Tribunals have been established to deal with issues involving property rights, employment, immigration, mental health, etc. Their functions are similar to the mainstream judicial bodies and are concerned with disputes between individuals and the State. However, there is a stark distinction between Tribunals and Ordinary Courts in England; for unlike ordinary Courts, the Tribunals comprise of members with special expertise and experience with many of them being appointed from amongst advocates or from persons with technical exposure.

18. Such tribunalisation traces its origins to the early twentieth century. The efficacy of a specialised, quasi-judicial body for adjudication of specific disputes was realised over a period of time as the newly evolved system of Tribunals gradually gained appreciation and recognition in the legal fraternity. During the development of the railways in the early 19th century, the judges found themselves ill-equipped to deal with technically specialised trade disputes arising from

monopolistic railway companies. Such inexpert adjudication also resulted in dissatisfaction of the litigants. Consequently, a specialized tribunal of Commissioners was appointed in 1873 and later converted to the Railways and Canals Commission. Later in the nineteenth century, the British Government set up tribunals for pension and unemployment benefit to enhance accessibility to the poor and less-educated, including, special tribunals set up to adjudicate disablement pensions for servicemen wounded in World War I. In the twentieth century, post the Leggatt review, many dozens of tribunals for subjects as diverse as tax, mental health, social security, employment and asylum were set up, with thousands of adjudicating members.

19. As Tribunals started marking their individual identity and resolving conflicts brought before them, there was an emergent need to amend the framework of these alternate fora in tune with societal changes. The Donoughmore Committee, in 1932, critiqued the delegation of judicial functions to quasi-judicial body and recommended that the judicial powers should vest solely with the Ordinary Courts of law. It was further recommended that establishment of Tribunals should only be in special cases where Ordinary Courts lacks expertise. Applicability of principles of natural justice must also be extended to such Tribunals. Courts should be adequately empowered to ensure that the Tribunals function within their restricted domain.

20. The need for supervisory jurisdiction over Tribunals was again discussed in 1957 when the Frank's Committee made its recommendations which were implemented by the Tribunal and Inquiries Act, 1958. The Frank's Committee Report presented a glowing critique in favour of tribunalisation, contending that it was cheaper, faster, better and more accessible. This finding has been echoed by various international commissions which have noted the beneficial impacts of tribunalisation viz., cost effectiveness, accessibility, reduction in pendency, specialized expertise, etc.

Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence ... appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Thus, for example, tribunals in the social services field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance ... or on appeal from a decision of a Minister or of an official in a special statutory position... Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term 'tribunal' in legislation undoubtedly bears this connotation, and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.[1]

21. Pursuant to this, the Council on Tribunals was established with the purpose of overseeing composition and working of various Tribunals. Further, the Sir Andrew Leggatt Committee (2001) scrutinised the existing state of Tribunals wherein the inherent deficiencies of a non-uniform Tribunal system were highlighted. The report of the Committee, titled *'Tribunals for User--One System, One Service'* suggested a new structurally reformed system of Tribunals with a more uniform administration and procedure. It was also suggested that a single Appellate Division

should be the only route of appeal against the orders of the Tribunals. In 2007, the Tribunals, Courts and Enforcement Act was enacted which formulated a new system of two Tribunals-the First-tier Tribunal and the Upper Tribunal-with unified route for appeal.[2]

22. In the year 2006 the United Kingdom created a Tribunal Service, which was later merged with the Courts Service in 2010, resulting in the creation of a single cohesive judicial structure and service for the country.

II. Canada

23. The Tribunal system in Canada, although of recent origin, is well established having a distinct identity of its own. Similar to the system in England, in Canada too, the Tribunal system has successfully become one of the foundations of the judicial system.[3] Federal or provincial legislations are enacted to constitute and empower specialised Tribunals for specific subject matters such as human rights, insurance claims, etc.[4] The work of the Tribunals are regulated by legislation and Members are usually appointed for their expertise in the subject.

24. Many of the Tribunals are empowered by their enabling legislation or general legislations to have powers similar to Civil Courts. However, Tribunals in Canada are less formal than Courts and are outside the general Court system; their decisions are subject to Judicial Review to ensure adherence to law. In a striking resemblance to our judicial system, the Canadian Constitution also provides inherent power of judicial review of decisions of Tribunals to superior Courts, where either no provision of appeal is provided or is specifically barred by a statute. Appeals from orders of Tribunals in Canada are heard by Federal Court of Canada, the immediate forum below the Supreme Court of Canada.

III. Australia

25. The Australian system of Tribunals is an amalgamation of the system prevalent in England and Canada. Tribunals in Australia were established primarily to reduce the burden on Civil Courts and provide an effective, yet cheap means of justice for the public. There prevails a variety of Tribunals to review different types of Government decisions including social security, taxation, etc. The Tribunals serve a multifarious purpose, deciding issues between individuals and individuals & State. For instance, in several Australian States, the Tribunals work as Small Claims Courts. The Court of Appeals is a facet of the Supreme Court, enjoying appellate powers over all the other Courts and Tribunals in the country.

IV. United States of America

26. The doctrine of separation of powers is adhered to in a much stringent manner in comparison to other common law countries. There is no delegation of judicial powers and no judicial power is vested in administrative bodies which are not Courts. The inception of judicial control over administrative action was with the enactment of Administrative Procedure Act, 1946. However, the Act merely made the decisions of Tribunals appealable on question of interpretation of law. Nevertheless, the Supreme Court of the United States had taken a more liberal view of the same leaving scope, though extremely limited, for judicial review.

V. France

27. Being a Civil Law system, France has a dual legal system comprising of-- Private Law (*droit privé*) and Administrative Law (*droit administratif*).[5] It has a special Tribunal viz. *Tribunal des Conflicts* for performing both judicial and administrative functions.[6] The decisions of Tribunal des Conflicts are not entirely within the purview of judicial review. Judicial Review is expressly ousted from some of the administrative actions. Further, to adjudicate disputes between individual and officials of State, the *Conseil d'Etat* was formed.

28. With change in time, the Tribunal system of France also evolved. A new Three-Tier Tribunal system was established. The first tier being *Tribunal administratif* -- Administrative Court or the Original Court having a wide jurisdiction covering all subject matters; the second tier is *Cour administrative d'appel* -- Administrative Court of Appeal, formed to decide appeals from the Original Court and; the third tier is *Conseil d'Etat* -- Court of Last Resort, which was formed to finally decide appeals from the Original Court or Court of Appeal. However, unlike in common law countries, the Appellate Courts in France lack power of judicial review on the ground of authority being ultra vires.

VI. South Africa

29. South Africa having similar colonial origins as India, inherited a similar legal system as India. Having multiple functions and discharging a range of judicial, quasi-judicial as well as administrative powers, every tribunal is a unique creation of its parent statute. Akin to many critiques in India, such tribunals are often criticized for their lack of uniformity, incoherence and haphazardness.

DOMESTIC PERCEPTION:

30. It is interesting to note that establishment of Tribunals in India relate back to as early as the year 1941 when the Income Tax Appellate Tribunal (ITAT) was established to expedite tax disputes. To structuralise the establishment of Tribunals, vide the 42nd Constitutional Amendment, Article 323A and 323B were introduced, delineating powers as well as the composition and formation of Tribunals. Numerous Tribunals thereafter have been established, with the source of power to legislate for establishing such tribunals being referable to Article 323A or Article 323B of the Constitution. The three-tier tribunal system in India finds its resemblance to the system as prevalent in France. The forums of first instance have Original Jurisdiction with High Court as the Appellate Court and the Supreme Court being the final adjudicatory body. Furthermore, it is not out of context to point out the similarity of the Constitution of India with the Canadian Constitution, insofar as it also provides inherent power of judicial review to Constitutional Courts over all subordinate Courts.

31. Hence, the need for establishment of newer and more specialised adjudicatory bodies is not newfound but has evolved through developments spread over an era.

I. Administrative Reforms Commission-1966

32. The Administrative Reforms Commission was set up to explore the arenas for establishing Administrative Tribunals for different subject matters. It recommended establishment of Civil Services Tribunals as adjudicatory entities for disciplinary punishments awarded to civil servants.

II. Wanchoo Committee-1970

33. The Wanchoo Committee recommended reforms to the Income Tax Appellate Tribunal to effectuate replacement of Civil Courts for expeditious redressal of tax disputes. It also recommended formation of a Direct Taxes Settlement Tribunal to ensure speedy remedies and decisions of disputes.

III. High Court's Arrears Committee Report-1972

34. A committee headed by Justice JC Shah highlighted an urgent need for individual-specialised Tribunals for exclusively dealing with service matters and to unburden High Courts by restricting the barrage of writ petitions being filed by government employees.

IV. Swaran Singh Committee-1976

35. The Swaran Singh Committee took a radical view by advocating amendments to the Constitution for Regulation of Tribunals and to curtail the writ jurisdiction of High Court and the Supreme Court. This report attracted a lot of critique from the legal fraternity and was later rejected in ***Sakinala Hari Nath v. State Of Andhra Pradesh***[7].

V. Raghavan Committee-2002

36. In accordance with contemporaneous evolutions in the commercial sphere, the Raghavan Committee was set up to suggest methods to regulate anticompetitive practices. This Committee recommended establishment of the Competition Commission of India (CCI), which was envisioned to maintain adequate competition in the market and protect consumer welfare. Further, the Competition Act, 2002 was later enacted which provided certain powers of Civil Courts to the CCI for effective enquiry and adjudication.

37. Tribunals can thus be viewed as alternate avenues to facilitate swift dispensation of justice through less-formal procedures of adjudication. An examination of existing Tribunals in India and across foreign jurisdictions, shows that they are best suited to deal with complex subject-matters requiring technical expertise such as service law, tax law, company law or environment law, etc.

LEGISLATIVE DEVELOPMENT OF TRIBUNALISATION:

38. In India, the Constitution (42nd Amendment) Act, 1976 paved way for tribunalisation of the justice dispensation system by introduction of Articles 323A and 323B in the Constitution. These provisions are to the following effect:

PART XIV-A: TRIBUNALS

323-A. Administrative tribunals.--(1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

(2) A law made under Clause (1) may--

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and Rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court Under Article 136, with respect to the disputes or complaints referred to in Clause (1);

(e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under Clause (3) of Article 371-D;

(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(3) The provisions of this Article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

323-B. Tribunals for other matters.--(1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in Clause (2) with respect to which such Legislature has power to make laws.

(2) The matters referred to in Clause (1) are the following, namely:

(a) levy, assessment, collection and enforcement of any tax;

(b) foreign exchange, import and export across customs frontiers;

(c) industrial and labour disputes;

(d) land reforms by way of acquisition by the State of any estate as defined in Article 31-A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

(e) ceiling on urban property;

(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329-A;

(g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this Article and control of prices of such goods;

(h) rent, its Regulation and control and tenancy issues including the right, title and interest of landlords and tenants;

(i) offences against laws with respect to any of the matters specified in Sub-clauses (a) to (h) and fees in respect of any of those matters;

(j) any matter incidental to any of the matters specified in Sub-clauses (a) to (i).

(3) A law made under Clause (1) may--

(a) provide for the establishment of a hierarchy of tribunals;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and Rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court Under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals;

(e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(4) The provisions of this Article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Explanation.--In this article, "appropriate Legislature", in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI.

39. Drawing its competence from Article 323A of the Constitution, the Parliament enacted the Administrative Tribunals Act, 1985. The primary objective was to provide a forum alternative to the High Courts for routine service appeals, which otherwise was overburdening the working of the Constitutional Courts. It recognised that the higher Courts were envisaged to primarily deal with important Constitutional issues and substantial question of law of general public importance.

40. Furthermore, guidelines were issued by this Court in numerous decisions to highlight a paucity of technical expertise in certain subject-matters and thus the imminent need for an expedited disposal of such cases through Tribunals. It was indicated in ***M.C. Mehta v. Union of India*** MANU/SC/0291/1986 : 1986 (2) SCC 176, that a dedicated Tribunal with both judicial and technical experts is necessary to hear environmental disputes.

41. Consequently, the National Environment Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997 were enacted. However, these were soon found to be incapable of providing expeditious resolution of disputes which necessitated reforms as suggested by the Law Commission of India. This led to the establishment of the National Green Tribunal (NGT) in 2010 as a special fast-track Court only to deal with issues related to the environment.

42. Similarly, Article 323B empowers the appropriate Legislature to enact legislation to provide for adjudication or trial by Tribunals of any disputes, complaints or offences with respect to the matters specified in Clause (2) of the said Article. The matters specified in Article 323B(2) exhaustively deal with a variety of matters which can be brought within the purview of tribunalisation by both the Parliament and State Legislatures.

JUDICIAL DEVELOPMENT OF TRIBUNALISATION:

43. This Court has observed through numerous decisions that the term 'Tribunal' refers to a quasi-judicial authority. A test to determine whether a particular body was merely an administrative organ of the Executive or a Tribunal was evolved by this Court in ***Jaswant Sugar Mills Ltd., Meerut v. Lakshmichand*** MANU/SC/0277/1962 : AIR 1963 SC 677. It was to be examined whether the body is vested with powers of a Civil Court or not, and it was held that any adjudicatory body vested with powers of taking evidence, summoning of witnesses, etc. must be categorised as a Tribunal.

44. In ***R.K. Jain v. Union of India*** MANU/SC/0291/1993 : (1993) 4 SCC 119 a three-judge Bench of this Court emphasised the need for a safe and sound justice delivery system adept at satisfying the confidence of litigants. It was further noted that since members of Tribunals discharge quasi-judicial functions, it is imperative that they possess requisite legal expertise, some judicial experience and an iota of legal training. Moreover, since Tribunals are constituted as substitutes

to Courts, their efficacy in upholding the faith of litigants cannot be compromised. It was however observed that true delivery of justice by Tribunals was still a far-fetched idea since the mechanism for judicial review and remedy of appeal to the Supreme Court was costly and discouraging. People from remote areas often found their right to appeal being handicapped by geographical and financial constraints. Hence, it was suggested by this Court that newer fora be dispersed across the country and that members from the Bar also be included in the composition of such Tribunals. An urgent need to reform the working of tribunals and regular monitoring of their functioning was also stressed upon.

45. Subsequently, in ***L. Chandra Kumar v. Union of India*** MANU/SC/0261/1997 : (1997) 3 SCC 261, a Constitution Bench of seven judges of this Court examined reports of expert committees and commissions analysing the problem of arrears. The Malimath Committee Report (1989-1990) was also referred to, wherein it was found that many Tribunals failed the test of public confidence due to purported lack of competence, objectivity and judicial approach. This Court thus called for drastic measures to elevate the standards of Tribunals in the country.

46. It was also reiterated that the exclusion of judicial review by High Courts was impermissible and providing direct statutory appeals to the Supreme Court impeded the common litigant from exercising his right to appeal because the appellate forum, being situated in Delhi, was inaccessible to many. While criticising the short terms of members and the lack of judicial experience of non-judicial members, this Court observed a need for establishment of an oversight mechanism to review the competence of all persons manning Tribunals. Thus, it was suggested that all Tribunals be brought under a 'Single Nodal Ministry', most appropriately the Ministry of Law & Justice, for overseeing of working of Tribunals. Liberty was however, granted to the Ministry to appoint an independent supervisory body to delegate the aforesaid functions. Further, the court noted that the procedure of selection of members of Tribunals, allocation of funds and all other intricacies would have to be culled out by such an umbrella organisation.

47. In ***Union of India v. R. Gandhi, President, Madras Bar Association*** MANU/SC/0378/2010 : (2010) 11 SCC 1, a Constitution Bench of five judges of this Court reviewed the Constitutional validity of Parts I-B and I-C of The Companies Act, 1956 inserted by the Companies (2nd Amendment) Act, 2002.

48. The bench observed that if Tribunals are established in substitution of Courts, they must also possess independence, security and capacity. Additionally, with transfer of jurisdiction from a traditional Court to a Tribunal, it would be imperative to include members of the judiciary as presiding officers/members of the Tribunal. Technical members could only be in addition to judicial members and that also only when specialised knowledge or know-how is required. Any inclusion of technical members in the absence of any discernible requirement of specialisation would amount to dilution and encroachment upon the independence of the judiciary.

49. This Court also observed that higher administrative experience does not necessarily result in better adjudication and that there had been a gradual encroachment on the independence of the judiciary through inclusion of more administrative/technical members in the Tribunals. It held that such practice needed to be checked and accordingly made requisite corrections to Parts I-B and I-

C of The Companies Act, 1956 (as amended in 2002) as elucidated in para 120 of the judgment, which is reproduced below:

120. We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:

(i) Only Judges and advocates can be considered for appointment as judicial members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practised as a lawyer for ten years can be considered for appointment as a judicial member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members as provided in Sub-sections (2)(c) and (d) of Section 10-FD. The expertise in Company Law Service or the Indian Legal Service will at best enable them to be considered for appointment as technical members.

(ii) As NCLT takes over the functions of the High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as technical members of the National Company Law Tribunal. Clauses (c) and (d) of Sub-section (2) and clauses (a) and (b) of Sub-section (3) of Section 10-FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in the Central or the State Government, being qualified for appointment as Members of Tribunal, are invalid

(iii) A "technical member" presupposes an experience in the field to which the Tribunal relates. A member of the Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of company law cannot be considered as "experts" qualified to be appointed as technical members. Therefore clauses (a) and (b) of Sub-section (3) are not valid.

(iv) The first part of Clause (f) of Sub-section (3) providing that any person having special knowledge or professional experience of 20 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as technical members in the Company Law Tribunal, is invalid.

(v) Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as technical members.

(vi) In regard to category of persons referred in Clause (g) of Sub-section (3) at least five years' experience should be specified.

(vii) Only clauses (c), (d), (e), (g), (h), and the latter part of Clause (f) in Sub-section (3) of Section 10-FD and officers of civil services of the rank of the Secretary or Additional Secretary in the Indian Company Law Service and the Indian Legal Service can be considered for purposes of appointment as technical members of the Tribunal.

(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:

a. Chief Justice of India or his nominee--Chairperson (with a casting vote);

b. A Senior Judge of the Supreme Court or Chief Justice of High Court--Member;

c. Secretary in the Ministry of Finance and Company Affairs--Member; and

d. Secretary in the Ministry of Law and Justice--Member.

(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the field concerned. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

(x) The second proviso to Section 10-FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of members. Any person appointed as member should be prepared to totally disassociate himself from the executive. The lien cannot therefore exceed a period of one year.

(xi) To maintain independence and security in service, Sub-section (3) of Section 10-FJ and Section 10-FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

(xii) The administrative support for all Tribunals should be from the Ministry of Law and Justice. Neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned.

(xiii) Two-member Benches of the Tribunal should always have a judicial member. Whenever any larger or special Benches are constituted, the number of technical members shall not exceed the judicial members.

50. Later, in ***Madras Bar Association v. Union of India (2014)*** MANU/SC/0875/2014 : (2014) 10 SCC 1, whilst striking down the newly-created National Tax Tribunal under the National Tax Tribunals Act, 2005, it was observed that procedure of appointment and conditions of service of members must be akin to judges of the Courts which were sought to be substituted by the Tribunal(s).

51. Only persons with professional legal qualifications coupled with substantial experience in law were held to be competent to handle complex legal issues. It was further held that a litigating party (Govt.) should never be a participant in the appointment process of members of the Tribunal. Similarly, a provision for reappointment or extension of tenure is ipso facto prejudicial to the independence of the members of Tribunal. A difference was also drawn between appointments to Tribunals which substituted Courts of first instance and to those which were not subordinate to High Courts.

52. It was further reiterated that establishment of a Tribunal with its seat at Delhi could cause hardship to litigants from other parts of the country, depriving them of convenient access to justice. Moreover, the Court held that in order to uphold their independence and fairness it would be inappropriate for the Central Government to have any administrative control over members of the Tribunal.

53. In ***Madras Bar Association v. Union of India (2015)*** MANU/SC/0610/2015 : (2015) 8 SCC 583, vires of the Companies Act, 2013 which contemplated establishment of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) were challenged. Interestingly, while examining Chapter XXVII of Companies Act, 2013 i.e. Sections 407 to 434, this Court held that although the establishment of NCLT and NCLAT was not unconstitutional but there was a need for curing defects in accordance with the dictum of ***R. Gandhi (supra)***.

54. Finally, in ***Gujarat Urja Vikas Ltd. v. Essar Power Ltd.*** MANU/SC/0874/2016 : (2016) 9 SCC 103, while examining the composition and working of Tribunals and statutory framework thereof, this Court reiterated its earlier decisions in ***L. Chandra Kumar (supra)*** and ***Madras Bar Association (2014) (supra)***, observing that remedy of appeal to this Court was in effect, being obliterated due to cost and inaccessibility. In addition to this, a flood of appeals from all the Tribunals directly to this Court hindered its efficiency in fulfilling its primary Constitutional role. Since appellate tribunals, manned by non-judicial members, were adjudging complex questions of law, the composition of Tribunals was put under review by this Court and a reference to the Law Commission of India was made in this regard. Pursuant to this, the Law Commission of India, in its 272nd Report titled 'Assessment of Statutory Frameworks of Tribunals in India' gave a detailed analysis of statutory framework with respect to Tribunalisation in India.

THE FINANCE ACT, 2017: ITS LEGISLATIVE BACKGROUND

55. Primary challenge in the present batch of cases is to the Finance Act, 2017. Though this enactment was purportedly to give effect to *"the finance proposals of the central government for the financial year 2017-18"* but Part XIV thereof consists of comprehensive provisions meant to effect *"Amendments to Central Acts to Provide for Merger of Tribunals and other Authorities and Conditions of Service of Chairpersons, Members, etc"*.

56. A scrutiny of Part XIV of the Finance Act, 2017 discloses how by virtue of Sections 158 to 182, Parliament has amended twenty-five central enactments which form the foundation for multiple Tribunals. It has been submitted by the learned Attorney General, these amendments seek to rationalise the functioning of Tribunals, in conformity with the principles laid down by this Court in its prior decisions.

57. Sections 158 to 182 of Part-XIV are broadly in *pari materia* except that each Section deals with a separate Tribunal. In order to comprehend the manner in which Parliament has sought to achieve a uniform pattern of qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of members and presiding officers of various Tribunals, it would be sufficient to illustratively reproduce Sections 158 and 173 of Part XIV of the Finance Act, 2017. Section 173 reads as follows:

I.--AMENDMENT TO THE CINEMATOGRAPH ACT, 1952

173. In the Cinematograph Act, 1952, after Section 5D, the following Section shall be inserted, namely:

5E. Notwithstanding anything contained in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairman and other members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall be governed by the provisions of Section 184 of that Act: Provided that the Chairman and member appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall continue to be governed by the provisions of this Act and the Rules made thereunder as if the provisions of Section 184 of the Finance Act, 2017 had not come into force..

58. In addition to this, some Sections in Part XIV also amalgamate existing Tribunals. Section 158 has been reproduced below as an example of such Sections which in addition to the elements of Section 173 also effect amalgamations:

158. Amendment of Act 14 of 1947.-- In the Industrial Disputes Act, 1947,--

(a) in Section 7A, after Sub-section (1), the following Sub-section shall be inserted, namely:

(1A) The Industrial Tribunal constituted by the Central Government under Sub-section (1) shall also exercise, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, the jurisdiction, powers and authority conferred on the Tribunal referred to in Section 7D of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952).;

(b) after Section 7C, the following Section shall be inserted, namely:

7D. Qualifications, terms and conditions of service of Presiding Officer.-- Notwithstanding anything contained in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation and removal and other terms and conditions of service of the Presiding Officer of the Industrial Tribunal appointed by the Central Government under Sub-section (1) of

Section 7A, shall, after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be governed by the provisions of Section 184 of that Act:

Provided that the Presiding Officer appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall continue to be governed by the provisions of this Act, and the Rules made thereunder as if the provisions of Section 184 of the Finance Act, 2017 had not come into force.

59. There are two significant expressions worth noticing in these similarly worded Sections 158 to 182. *First*, every such Section opens up with a non-obstante Clause and it provides that *"notwithstanding anything contained in ..... Act the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairman and other members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall be governed by the provisions of Section 184 of that Act"*. *Second,* Section 184 of the Finance Act overrides all other provisions in both the Finance Act, 2017 as well as the other twenty-five enactments which stand amended.

60. To critical analyse the intention of the legislature in enacting Section 184, reference must be made to the immediately preceding Section 183 which is to be found in sub-part 'S' of the Act titled *"Conditions of service of Chairpersons and members of Tribunals, Appellate Tribunals and other Authorities"*. Since Sections 183 and 184 would need to be read conjointly, both are reproduced below:

S.--CONDITIONS OF SERVICE OF CHAIRPERSON AND MEMBERS OF TRIBUNALS, APPELLATE TRIBUNALS AND OTHER AUTHORITIES

183. Application of Section 184.-- Notwithstanding anything to the contrary contained in the provisions of the Acts specified in column (3) of the Eighth Schedule, on and from the appointed day, provisions of Section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the said Schedule:

Provided that the provisions of Section 184 shall not apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or, as the case may be, Member holding such office as such immediately before the appointed day.

184. Qualifications, appointment, term and conditions of service, salary and allowances, etc., of Chairperson, Vice-Chairperson and Members, etc., of the Tribunal, Appellate Tribunal and other Authorities.-- (1) The Central Government may, by notification, make Rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:

Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the Rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the Rules made by the Central Government which shall not exceed,--

(a) in the case of Chairperson, Chairman [President or the Presiding Officer of the Securities Appellate Tribunal], the age of seventy years;

(b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer [of the Industrial Tribunal constituted by the Central Government and the Debts Recovery Tribunal] or any other Member, the age of sixty-seven years:

(2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment.

61. Further, the Central Government in purported exercise of its powers under the aforementioned provisions, has notified the 'Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017' [in short "the Rules"].

PetitionerS' CASE:

62. The pleadings and arguments in most of the individual cases are similar and overlapping. Hence, for the sake of brevity, it is not necessary to refer to the submissions of each of the counsel individually. Broadly, however, Petitioners have questioned the validity of Part XIV read with the 8th and 9th Schedules of the Finance Act 2017, as being ex-facie unconstitutional, arbitrary, in colourable exercise of legislative power, and offensive to the basic structure of the Constitution.

63. The foremost contention on behalf of the Petitioners is that Part-XIV could not and ought not to have been made part of the Finance Act, 2017 as the said part is not classifiable as a 'money bill'. Emphasis was placed on the wordings of Article 110 which allows those bills which contain "only" provisions which fall within the metes and bounds of Clauses (a) to (g) thereof, to be treated as 'money bill'. By virtue of inclusion of Part XIV, the entirety of the Finance Act, 2017 was contended to have lost its colour as a 'money bill' Under Article 110 and hence its passage without the assent of the Rajya Sabha as required Under Article 107 renders it ultra vires the legislative scheme contemplated in the Constitution.

64. Learned Counsels vehemently placed reliance on the Constituent Assembly Debates to lend strength to the importance of the expression "only" Under Article 110(1). They seek to make out a case that such phraseology was deliberately incorporated in the Constitution by making a

conscious departure from Section 37 of the Government of India Act, 1935. Inclusion of Part XIV in the Finance Act, 2017 is shown as being an act of camouflage and a colourable exercise and Petitioners assert that such indirect manner of bypassing of the Rajya Sabha is impermissible. A larger narrative was presented before this Court, that is, of the Central Government undermining the character and essence of a bicameral legislature as envisaged under the Constitution; and interference of this Court was sought through examination of the substance of the legislation and not mere acceptance of the nomenclature accorded by the Lok Sabha Speaker Under Article 110(3).

65. A nuanced argument was also furthered by Petitioners' counsels who highlighted that Tribunals are governed by Article 323-A and 323-B of the Constitution and laws enacted in this regard cannot be classified as money bills. Further, Parliament in making changes to Tribunals can trace its competence to Entry 11-A of List III of the Constitution which deals with administration of justice, and not financial matters.

66. Part XIV was also impugned for its effect of terminating the services of presiding officers and members of various now-defunct Tribunals, which was claimed as being a direct interference in the independence of the judiciary.

67. Section 184(1) of the Finance Act, 2017, in so far as it empowers the Central Government to make Rules to provide for qualifications and procedure of appointment, conditions of service, terms and salaries was contended to suffer from the vice of excessive delegation. It was stated that the said provision takes away all judicial safeguards and makes the Tribunals amenable to the whims and fancies of the largest litigant, the State. This was contended as being against the grain of the Constitution, besides affecting administration of justice. In the alternative, counsels also contended that the present formulation of Rules Under Section 184 was ultra vires the parent enactment and the binding dictum expressed by this Court in a catena of judgments.

68. Further, during the course of arguments, various other deficiencies and contradictions in the administration of Tribunals and certain anomalous situations like providing direct appeals to this Court were highlighted, which were contended as being against the spirit of the Constitution. Petitioners, in addition to challenging the vires of the Finance Act, 2017 also prayed for a mandamus directing the State to mandatorily conduct 'Judicial Impact Assessment' of legislations.

UNION OF INDIA'S CASE:

69. Learned Attorney General, on the other hand, passionately drew attention to the existence of over 40 tribunals, statutory commissions, and authorities functioning under the Government of India, each of which has been established under a different enactment and is governed by different set of rules. As a result, the conditions of service, modes of appointment, tenures etc. of members and presiding officers in different Tribunals were shown as vastly varying from one to another, giving rise to several anomalies and distortions. He put forth multiple examples; like how while members of some of the Commissions/Tribunals enjoy the status of Supreme Court judges, others like the members of the Debt Recovery Tribunal have only been kept at par with District Court judges. Similarly, while a person once appointed to the ITAT can continue till the age of superannuation, tenures of persons appointed to the APTEL was merely three years. The Attorney

General attributed such inconsistencies as drafting errors and further stressed the need to streamline and harmonise the applicable rules, which is what was attempted through the Finance Act, 2017.

70. He also highlighted the inherent contradiction in according status and rank equivalent to that of Constitutional Court judges to members and presiding officers of such Tribunals and regulatory bodies. It was argued that the two have different functions and roles in our Constitutional setup. While the Supreme Court had a strength of 31 judges (when the matter was argued), he pointed out, that there are more than 50 functionaries enjoying the conditions of service of a Supreme Court judge and more than 150 such functionaries who have been brought at par with High Court judges. After placing on record multiple problems arising in the administration of justice as a result of such practice, he advocated the need to keep 'rank' and 'status' separate from 'salary' and 'allowances'.

71. Learned Attorney General further relied upon an order passed by this Court in ***Rajiv Garg v. Union of India (WP No. 120 of 2017)*** on 08th February, 2013 directing that a decision be taken by the Central Government on uniformity of service conditions in various tribunals. Reliance was also placed on the 13th Report of the 2nd Administrative Reforms Commission submitted in April 2009 which recommended greater uniformity in service conditions in various tribunals. It was pointed out that, in fact, the Tribunals, Appellate Tribunals and other Authorities (Conditions of Service) Bill, 2014 was introduced in the Rajya Sabha on 14th February, 2014 but somehow could not be passed. Introducing separate amendments for each of these Tribunals would have been unwieldy and impractical, besides resulting in several inconsistencies. Resultantly, he submits a holistic view was taken and a single enactment was sought to be introduced in order to harmoniously bring uniformity.

72. On behalf of the Union, the Petitioners' contentions were elaborately refuted. It was submitted that it is a settled principle of Constitutional interpretation that terms of the Constitution, including Clauses (a) to (g) of Article 110(1), must be interpreted in their widest amplitude, with the result that when the principal enactment had the dominant character of a 'money bill', all matters incidental thereto and inserted therein would also draw the colour and characteristic of a 'money bill'.

73. In the alternative, he took aid of Clause (3) of Article 110 to contend that the Speaker of the Lok Sabha was the final and only Constitutional authority to adjudge the nature of a bill sought to be introduced Under Article 109. Such decision was both final and hence not subject to any judicial review by any Court; even otherwise such exercise of passing legislations and certifications by the Speaker were "proceedings in Parliament" and could hence "not be called in question" before this Court in view of Article 122(1).

74. Both sides have extensively relied upon case law and Constitutional history to substantiate their respective pleas. Relevant portions of the same are being referred to in the latter parts of this judgment whenever necessary.

BRIEF REFERENCE TO INTERLOCUTORY ORDERS:

75. After considering the suggestions filed during the course of hearing in SLP(C) No. 15804/2017, this Court passed an interim order on 9 February 2018, suggesting:

1. Staying the composition of Search-cum-Selection Committee as prescribed in Column 4 of the Schedule to the Tribunal, Appellate Tribunal and Other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017 both in respect of Chairman/Judicial Members and Administrative Members. A further direction to constitute an interim Search-cum-Selection Committee during the pendency of this W.P. in respect of both Judicial/Administrative members as under:

a. Chief Justice of India or his nominee-Chairman

b. Chairman of the Central Administrative Tribunal-Member

c. Two Secretaries nominated by the Government of India-Members

2. Appointment to the post of Chairman shall be made by nomination by the Chief Justice of India.

3. Stay the terms of office of 3 years as prescribed in Column 5 of the Schedule to the Tribunal, Appellate Tribunal and other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017. A further direction fixing the term of office of all selectees by the aforementioned interim Search-cum-Selection Committee and consequent appointees as 5 years.

4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall be with conditions of service as applicable to the Judges of High Court.

5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members for a term of 5 years with conditions of service as applicable to Judges of High Court shall not be affected by the final outcome of the Writ Petition.

76. The learned Attorney General agreed with all except the fourth and fifth suggestions reproduced above, and suggested certain modifications as follows:

4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall abide by the conditions of service as per the old Acts and the Rules.

5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members shall be for a period as has been provided in the old Acts and the Rules.

77. This Court agreed to the learned Attorney General's suggestions and accordingly made the following operative directions:

In view of the aforesaid, we accept the suggestions and direct that the same shall be made applicable for selection of the Chairpersons and the Judicial/Administrative/Technical/Expert Members for all tribunals.

78. Since many of the Search-cum-Selection Committees had initiated selection processes and had completed a substantial portion of the exercise prior to the above order dated 9th February, 2018, this Court, on 12th February, 2018 passed the following order:

As some Committees had proceeded, the matter was listed for further hearing. We have heard learned Counsel for the parties. Mr. Rohit Bhat, learned Counsel assisting the learned Attorney General for the Union of India shall file the status of the selection process by the Committees, by 13.2.2018.

Mr. Arvind Datar, Mr. C.A. Sundaram and Mr. Mohan Parasaran, learned senior Counsel shall also file through their Advocates-on-Record a joint memorandum with regard to which tribunals are covered and not covered. The same shall be filed by 10.30 a.m. on 13.2.2018.

Orders reserved.

79. Further, vide order dated 20th March 2018, this Court clarified its previous order of 9th February 2018 and directed:

(iii) The tenure of the Chairperson and the Judicial/Administrative/Expert/Technical Members of all the Tribunals shall be for a period of five years or the maximum age that was fixed/determined under the old Acts and Rules;

80. The following directions were also issued on 16th July, 2018 with regard to the age of superannuation of Members of the ITAT:

At this juncture, we may note that there is some confusion with regard to the Income Tax Appellate Tribunal (ITAT) as regards the age of superannuation. We make it clear that the person selected as Member of the ITAT will continue till the age of 62 years and the person holding the post of President, shall continue till the age of 65 years.

81. Corollary to the order dated 16th July 2018, six officers who had been selected as Member (Judicial) in CESTAT, also demanded the age of superannuation as noted in the case of Members of ITAT, to be applicable to them. Following the same dictum, vide order dated 21st August 2018, clarification regarding the age of superannuation for Members of CESTAT, Armed Forces Tribunal and Central Administrative Tribunal was made. The relevant portion of that order reads as follows:

CESTAT:

2. In IA 113281 of 2018, the Applicant is an Additional District and Sessions Judge in the State of West Bengal, who has been selected as Member (Judicial) in the CESTAT. The notification of appointment of six officers who have been selected as Member (Judicial), including the applicant,

stipulates that they shall hold office for a period of five years or till attaining the age of 62 years, whichever is earlier "in terms of the Hon'ble Supreme Court's order dated 20 March 2018". A member of the judicial service would have ordinarily continued until the date of superannuation in the state judicial service, subject to the service rules. It would be manifestly inappropriate to adopt an interpretation as a result of which, upon assuming office as Member (Judicial) in CESTAT the officer will have a tenure which will expire after five years, if it falls prior to attaining the age of 62 years. We, accordingly, are of the view that the clarification issued for the ITAT in the order dated 20 March 2018 needs to be reiterated in the case of the members of the CESTAT, which we do. We clarify that a person selected as Member of the CESTAT will continue until the age of 62 years while a person holding the post of President shall continue until the age of 65 years.

AFT:

3. Members of the Armed Forces Tribunal shall hold office until the attainment of the age of 65 years. Chairpersons who have been former Judges of the Supreme Court shall hold office until the attainment of the age of 70 years.

CAT:

4. In the case of the Central Administrative Tribunal, we clarify that the old rules/provisions shall continue to apply.

CONCEPT NOTE OF LEARNED AMICUS CURIAE:

82. On the request of this Court, learned Senior Advocate Arvind Datar has provided invaluable assistance as the Amicus Curiae. In his detailed Concept Note, he has stressed the need for setting up an independent oversight body in light of the observations in ***L. Chandra Kumar (supra)***, and as reiterated in ***Madras Bar Association v. Union of India (2015) (supra)*** to the effect that Tribunals or their members should not be required to seek facilities from the sponsoring or parent ministries or concerned departments.

83. The Concept Note also emphasised the need to implement the '74th Report of the Parliamentary Standing Committee' which recommended the creation of a 'National Tribunal Commission' (NTC) to oversee all the Tribunals in the country. Mr. Datar further suggests that such National Tribunal Commission may consist of the following:

• Two retired Supreme Court Judges (with the senior-most amongst them to be Chairman).

• Two retired High Court Judges (Members).

• Three members representing the Executive.

84. It is further suggested in the concept note that such members be appointed by the following Selection Committee:

• Chief Justice of India (as Chairperson of the Committee who exercises a casting vote);

• Two senior-most judges of the Supreme Court after the Chief Justice of India;

• Current Law Minister; and

• Leader of the opposition.

85. The Concept Note also contains the following suggestions:

• The NTC should oversee functioning of central Tribunals and similar body may be constituted for State Tribunals.

• The NTC should deal with appointment and removal of members of the Tribunals by constituting sub-committees.

• The member of the Tribunals should be recruited by national competition. Once recruited they should continue till the age of 62/65 years subject to their efficiency and satisfactory working.

• The Tribunals should not be haven for retired persons and appointment process should not result in decisions being influenced if the Government itself is a litigant and the appointing authority at the same time.

• There should be restriction on acceptance of any employment after retirement.

• Bypassing of High Court jurisdiction Under Article 226/227 need to be remedied by statutory amendment excluding direct appeals to this Court.

• There should be proper mechanism for removal of members.

86. The aforementioned Concept Note of Learned Amicus Curiae was considered by this Court on 07.05.2018, resulting in the following observations:

We broadly approve the concept of having an effective and autonomous oversight body for all the Tribunals with such exceptions as may be inevitable. Such body should be responsible for recruitments and oversight of functioning of members of the Tribunals. Regular cadre for Tribunals may be necessary. Learned amicus suggests setting up of all India Tribunal service on the pattern of U.K. The members can be drawn either from the serving officers in Higher Judicial Service or directly recruited with appropriate qualifications by national competition. Their performance and functioning must be reviewed by an independent body in the same was as superintendence by the High Court Under Article 235 of the Constitution. Direct appeals must be checked. Members of the Tribunals should not only be eligible for appointment to the High Courts but a mechanism should be considered whereby due consideration is given to them on the same pattern on which it is given to the members of Higher Judicial Service. This may help the High Courts to have requisite talent to deal with issues which arise from decisions of Tribunals. A regular cadre for the Tribunals can be on the pattern of cadres for the judiciary. The objective of setting up of Tribunals to have speedy and inexpensive justice will not in any manner be hampered

in doing so. Wherever there is only one seat of the Tribunal, its Benches should be available either in all states or at least in all regions wherever there is litigation instead of only one place.

87. On 07.05.2018 itself, the following additional issues were also suggested for consideration:

(i) Creation of a regular cadres laying down eligibility for recruitment for Tribunals;

(ii) Setting up of an autonomous oversight body for recruitment and overseeing the performance and discipline of the members so recruited and other issues relating thereto;

(iii) Amending the scheme of direct appeals to this Court so that the orders of Tribunals are subject to jurisdiction of the High Courts;

(iv) Making Benches of Tribunals accessible to common man at convenient locations instead of having only one location at Delhi or elsewhere. In the alternative, conferring jurisdiction on existing courts as special Courts or Tribunals.

88. Thereafter, this Court opined the following recourse:

20. The above issues may require urgent setting up of a committee, preferably of three members, one of whom must be retired judge of this Court who may be served in a Tribunal. Such Committee can have inter action with all stakeholders and suggest a mechanism consistent with the constitutional scheme as interpreted by this Court in several decisions referred to above and also in the light of recommendations of expert bodies. This exercise must be undertaken in a time bound manner.

89. This was followed by yet another order of 16th May, 2018 recommending constitution of a Committee within two months and expecting the Committee to give its report within three months thereafter.

FORMULATION OF ISSUES:

90. The core issues canvassed at the Bar concern the constitutionality of the Finance Act, 2017, particularly whether it satisfies the test of a 'money bill' Under Article 110 of the Constitution? Further, in the eventuality that it is held that the impugned legislation has been validly enacted, then does it through Section 184 excessively delegate legislative power to the Executive? Finally, whether the Rules thus framed as delegated legislation are ultra vires their parent enactments and are liable to be struck down?

91. In addition, learned Counsel for the parties have drawn attention to the need to rationalise the administration of Tribunals, especially the conditions of service, mode of appointment, security of tenure and requisite qualifications of members and presiding officers of various Tribunals. They have also highlighted the growing menace of pendency before this Court arising from direct statutory appeals from orders of such Tribunals.

92. In light of these arguments put forth by learned Counsels and the suggestions of by the Amicus Curiae, the following issues arise for our consideration:

I. Whether the 'Finance Act, 2017' insofar as it amends certain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a 'money bill' Under Article 110 and consequently is validly enacted?

II. If the answer to the above is in the affirmative then Whether Section 184 of the Finance Act, 2017 is unconstitutional on account of Excessive Delegation?

III. If Section 184 is valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on functioning of Tribunals?

IV. Whether there should be a Single Nodal Agency for administration of all Tribunals?

V. Whether there is a need for conducting a Judicial Impact Assessment of all Tribunals in India?

VI. Whether judges of Tribunals set up by Acts of Parliament Under Articles 323-A and 323-B of the Constitution can be equated in 'rank' and 'status' with Constitutional functionaries?

VII. Whether direct statutory appeals from Tribunals to the Supreme Court ought to be detoured?

VIII. Whether there is a need for amalgamation of existing Tribunals and setting up of benches.

ISSUE I: WHETHER THE 'FINANCE ACT, 2017' INSOFAR AS IT AMENDS CERTAIN OTHER ENACTMENTS AND ALTERS CONDITIONS OF SERVICE OF PERSONS MANNING DIFFERENT TRIBUNALS CAN BE TERMED AS A 'MONEY BILL' UNDER ARTICLE 110 AND CONSEQUENTLY IS VALIDLY ENACTED?

93. The Indian Parliament is a bicameral legislature. In order to become law, as per the general legislative scheme as provided Under Article 107, an ordinary bill must be passed by a simple majority of both the Rajya Sabha and the Lok Sabha and must then receive Presidential ratification. Ordinary bills can be introduced either by the government or by any private member in either house of Parliament. After securing requisite majority in the House it is introduced in, ordinary bills are then sent to the other House for its assent. The Constitution, however, makes two exemptions to this general legislative procedure for formulation of laws.

94. Article 368 provides for the Constituent power of the Parliament to amend the Constitution itself and concomitantly requires a higher threshold of majority in both houses of Parliament, and in certain cases also require the assent of a simple majority of the State legislatures. Article 110, in stark contrast, reverses the threshold and significantly reduces the role of the Rajya Sabha for 'money bills'. Articles 109 and 110 provide that:

109. (1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:

(a) the imposition, abolition, remission, alteration or Regulation of any tax;

(b) the Regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in Sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for

services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States Under Article 109, and when it is presented to the President for assent Under Article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

95. 'Money bills' as defined Under Article 110(1) thus include bills which contain "only" provisions covered by Sub-clauses (a) to (g). These money bills can be introduced only in the Lok Sabha and the role of the Rajya Sabha is merely consultative. Unlike in the case of ordinary bills where the Upper House can block the proposed legislation and act as a check on the power of the directly elected Lower House, in case of money bills, the Rajya Sabha merely has the ability to recommend amendments, that too only within fourteen days. In case the Lok Sabha refuses to accept those recommendations or in case no recommendations are made by the Rajya Sabha within the period of fourteen days, the money bill can be directly sent for Presidential ratification and thereafter it becomes valid law.

96. Such an exceptional provision has its roots in British tradition and is an inheritance of the Westminster form of government. The Parliament Act of 1911 was formulated by the United Kingdom Parliament in response to the Constitutional crisis of 1909 whereby the unelected Upper House (House of Lords) had stalled important budgetary bills passed by the elected Lower House (House of Commons), causing a governmental crisis and forcing the elected government to resign and seek re-election. Through Section 3, the said enactment required the Speaker of the House of Commons to certify that the bill was a 'money bill' and post such certification, the Upper House would forfeit its ability to amend or veto the bill. Further, it also allowed 'public bills' to become law irrespective of refusal by the House of Lords, in case the House of Commons had passed the same draft thrice in a minimum span of two years. It must be noted that the Indian adaptation Under Article 109 and 110 do not have exceptions for 'public bills' nor do they explicitly provide that such certification shall not be amenable to judicial review unlike in the Parliament Act of 1911.

97. The Constitution of India by Article 110(4), requires that every 'money bill' be certified to be so by the Speaker before it is transmitted to the Rajya Sabha for their non-binding consideration. The Speaker of the Lok Sabha hence is the only appropriate authority to decide the nature of a bill Under Article 110(3).

98. In the present dispute, the Union has relied upon the finality accorded to such certification by the terminology of Article 110(3) which provides that in case of any dispute as to the nature of a bill, *"the decision of the Speaker of the House of the People thereon shall be final."* The Lok Sabha Speaker, in fact, on a dispute having so arisen has adjudicated the then Finance Bill, 2017 to be a 'money bill'. Further, the Union also places emphasis on Article 122(1) of the Constitution which provides that:

122. (1) The validity of any proceedings in Parliament all not be called in question on the ground of any alleged irregularity of procedure.

99. The Union thus, alternatively, contends that the challenge before this Court to the certification of the Speaker of the Finance Bill, 2017 as a 'money bill' and its consequent passage without the assent of the Rajya Sabha would at best amount to an 'irregularity of procedure' of 'proceedings in Parliament' and hence cannot be inquired into by this Court.

100. It must be noted once again, that like Articles 109 and 110, Article 122 of our Constitution too can be traced to the Constitutional history and developments in the United Kingdom. Certain Members of Parliament were tried and imprisoned for their remarks in Parliament during the seventeenth century resulting in the enactment of Article 9 of the Bill of Rights, 1688 which specifies that *".... proceedings in Parliament ought not to be impeached or questioned in any Court...."* Article 212(1) of the Constitution of India provides a direct corollary of Article 122(1) with respect to State legislatures.

101. This provision was initially interpreted in ***MSM Sharma v. Dr. Shree Krishna Sinha*** MANU/SC/0021/1958 : AIR 1959 SC 395 to mean that legislative business cannot be invalidated even if it is not strictly in compliance with law for such issues were within the "special jurisdiction" of the legislature to regulate its own business.

102. The Union's contention that Article 122 would exempt from judicial scrutiny passage of bills is a far-fetched contention. If such a blanket exemption were to be granted, then it would open the floodgates to deviation from any Constitutional provision governing the functioning of Parliament and its legislative procedure. Since the Constitution explicitly provides a self-contained detailed procedure for enactment of legislation, and does not suggest that mere assent of the President to a law, by whatsoever method adopted, would become a valid law, it is necessary that this Court being the highest Constitutional forum for judicial review is provided with enough space for enforcement and protection of the Constitutional scheme. A perusal of the expressions used in Article 122 and a comparison with its British roots make it clear that the "proceedings" referred to include the power of the Parliament to frame its own rules, set out procedures for debate and discussion and powers to enforce disciple. Section 3 of the Parliament Act, 1911 in the United Kingdom makes the decision of the Speaker of the House of Commons 'conclusive for all purposes' and 'shall not be questioned in any court of law'. The Constitution of India however, Under Article 110(3), states that 'if any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final'. A different syntax seems to indicate that our Constitution makes the decision of the Speaker as to the nature of Bill final qua members of both the Houses of Parliament, though it is not conclusive and unchallengeable before the Courts. The scope of judicial review of decisions that enjoy the status of finality under the Constitution has been examined by this Court on several occasions. We would like to refer to a few precedents in this regard. In ***Raja Ram Pal*** v. ***Lok Sabha*** MANU/SC/0241/2007 : (2007) 3 SCC 184, this Court had examined the ambit and scope of judicial review in matters of Parliamentary privileges and powers Under Article 105 of the Constitution. The Court had held that Under Article 122(1) and 212(1), immunity that has been granted is limited to 'irregularity of procedure' and does not extend to substantive illegality or unconstitutionality by observing:

Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text. Applying the principle of "expressio unius est exclusio alterius" (whatever has not been included has by implication been excluded), it is plain and clear that prohibition against examination on the touchstone of "irregularity of procedure" does not make taboo judicial review on findings of illegality or unconstitutionality.

In ***Union of India*** v. ***Jyoti Prakash Mitter*** MANU/SC/0061/1971 : (1971) 1 SCC 396, this Court had examined Clause (3) to Article 217 which makes the decision of the President after consultation with the Chief Justice of India 'final', if the question arises as to the age of a Judge of a High Court. It was observed that notwithstanding the declared finality of the order of the President, the Court can, in appropriate cases when the order has been passed on collateral considerations or the Rules of natural justice are not observed or when the judgment of the President is coloured by the advice or representation made by the Executive or is made with no evidence, set aside the order of the President made Under Article 217(3). The Courts, however, do not sit in appeal over the judgment of the President or decide the weight to be attached to the evidence which is entirely within the domain of the President.

Reading of the above decisions exposit that 'finality' of decisions under the Constitution has been subject to judicial review by the Courts. However, the jurisdiction exercisable by the Courts in such matters is rather limited and is subject to the satisfaction of specific conditions as discussed. We find no good ground and reason to take a different view with respect to the power of judicial review against certification of a bill as a Money Bill by the Speaker Under Article 110(4). Article 110(3) which makes this decision final qua both the Houses of Parliament and Article 122(1) which prohibits review by the courts in matters of 'irregularity of procedure' cannot operate as a bar when a challenge is made on the ground of illegality or unconstitutionality under the Constitutional scheme.

103. Determining whether an impugned action or breach is an exempted irregularity or a justiciable illegality is a matter of judicial interpretation and would undoubtedly fall within the ambit of Courts and cannot be left to the sole authority of the Parliament to decide. Such a position has also been taken in the United Kingdom by the House of Lords in ***R (Jackson) v. Attorney General*** [2005] UKHL 56 where notwithstanding the explicit bar to judicial consideration of all Parliamentary proceedings (and not just procedural irregularities as under the Constitution of India), the Court assumed jurisdiction whilst noting that interpretation of statutes dealing with legislative processes would fall within the domain of the Courts; statutory interpretation being a judicial exercise, regardless of the immunities granted to parliamentary proceedings under the Bill of Rights.

104. It would hence be gainsaid that gross violations of the Constitutional scheme would not be mere procedural irregularities and hence would be outside the limited ambit of immunity from judicial scrutiny Under Article 122(1). In the case at hand, jurisdiction of this Court is, hence, not barred.

105. On the substantive question of whether the Finance Act, 2017 was a 'money bill' Under Article 110(3) it must be noted that until the turn of the twenty-first century, this Court took a consistent

position that Article 110(3) of the Constitution would act as an express bar against judicial inquiry into the correctness of the certificate of 'money bill' given by the Speaker of the Lok Sabha.

106. In ***Mohd. Saeed Siddiqui v. State of Uttar Pradesh*** MANU/SC/0350/2014 : (2014) 11 SCC 415, a three-judge bench refused to judicially review the speaker's certification of the Uttar Pradesh Lokayukta and Up-Lokayuktas (Amendment) Bill as a Money bill. The phrase "proceedings of the Legislature" Under Article 212(1) was interpreted to include "everything said or done in either house". This Court thus held:

43. As discussed above, the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. Further, as noted earlier, Article 255 also shows that under the Constitution the matters of procedure do not render invalid an Act to which assent has been given to by the President or the Governor, as the case may be. Inasmuch as the Bill in question was a Money Bill, the contrary contention by the Petitioner against the passing of the said Bill by the Legislative Assembly alone is unacceptable.

107. This was relied upon in ***Yogendra Kumar Jaiswal v. State of Bihar*** MANU/SC/1441/2015 : (2016) 3 SCC 183, wherein a division bench of this Court refused to judicially review the certification of 'money bill' accorded by the Speaker to the Orissa Special Courts Bill noting that it was settled post ***Mohd. Siddiqui (supra)*** that any such certification would be an "irregularity" and not a "substantiality".

108. A co-ordinate bench of this Court in ***Justice Puttaswamy (Retd.) and Anr. v. Union of India*** MANU/SC/1054/2018 : (2019) 1 SCC 1, was tasked with a similar question of the certification of 'money bill' accorded to the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 by the Speaker of the Lok Sabha. The majority opinion after noting the important role of the Rajya Sabha in a bicameral legislative setup, observed that Article 110 being an exceptional provision, must be interpreted narrowly. Although the majority opinion did not examine the correctness of the decisions in ***Md. Siddiqui (supra)*** and ***Yogendra Kumar Jaiswal (supra)*** or conclusively pronounce on the scope of jurisdiction or power of this Court to judicially review certification by the Speaker Under Article 110(3), yet, it independently reached a conclusion that the impugned enactment fell within the four-corners of Articles 110(1) and hence was a 'money bill'. The minority view rendered, however, explicitly overruled both ***Md. Siddiqui (supra)*** and ***Yogendra Kumar Jaiswal (supra)***.

109. The majority opinion in ***Puttaswamy (supra)*** by examining whether or not the impugned enactment was in fact a 'money bill' Under Article 110 without explicitly dealing with whether or not certification of the speaker is subject to judicial review, has kept intact the power of judicial review Under Article 110(3). It was further held therein that the expression 'money bill' cannot be construed in a restrictive sense and that the wisdom of the Speaker of the Lok Sabha in this regard must be valued, save where it is blatantly violative of the scheme of the Constitution. We respectfully endorse the view in ***Puttaswamy (supra)*** and are in no doubt that ***Md. Siddiqui*** and ***Yogendra Kumar Jaiswal*** in so far as they put decisions of the Speaker Under Article 110(3) beyond judicial review, cannot be relied upon.

110. It must be emphasized that the scope of judicial review in matters Under Article 110(3) is extremely restricted, with there being a need to maintain judicial deference to the Lok Sabha Speaker's certification. There would be a presumption of legality in favour of the Speaker's decision and onus would undoubtedly be on the person challenging its validity to show that such certification was grossly unconstitutional or tainted with blatant substantial illegality. Courts ought not to replace the Speaker's assessment or take a second plausible interpretation. Instead, judicial review must be restricted to only the very extreme instance where there is a complete disregard to the Constitutional scheme itself. It is not the function of Constitutional Courts to act as appellate forums, especially on the opinion of the Speaker, for doing so would invite the risk of paralyzing the functioning of the Parliament.

111. In light of the aforementioned narrow scope of inquiry and the high burden to be discharged by the Petitioner(s) against the Speaker's certification, we may now examine the challenge laid to the Finance Act, 2017.

112. Provisions of Part XIV can be broken down into three broad categories. First, abolition and merger of existing Tribunals; second, uniformizing and delegating to the Central Government through the Rules the power to lay down qualifications; method of appointment and removal, and terms and conditions of service of Presiding Officers and members; and third, termination of services and payment of compensation to presiding officers and members of certain tribunals that have now become de-funct.

113. Interpretation of Article 110 was made by a coordinate Constitution Bench in ***K.S. Puttaswamy*** (Aadhaar-5) and is relied upon by both sides.

114. The majority judgment in ***K.S. Puttaswamy*** (Aadhaar-5) under the heading 'Money Bill', in paragraph 448 and then in paragraphs 452 to 461, had recorded the submissions made by the learned Counsel, including the submission made on behalf of the Petitioners relying upon the word 'only' appearing in Article 110 which defines a 'Money Bill'. With regard to the interpretation to be given to the meaning of the word 'only', reliance was placed on ***Hari Ram*** v. ***Babu Gopal Prasad*** MANU/SC/0110/1991 : (1991) Supp. 2 SCC 608 and ***M/s. Saru Smelting (P) Ltd.*** v. ***Commissioner of Sales Tax, Lucknow*** MANU/SC/0835/1993 : (1993) Supp. 3 SCC 97. The majority judgment had thereupon referred to the power of judicial review notwithstanding the use of the word 'final' with reference to the power of the Speaker Under Article 110(3) of the Constitution, an aspect which we have already answered earlier, and examined Section 7 of the Aadhaar Act to observe *"it is also accepted by the Petitioners that Section 7 is the main provision of the Act"*. Thereafter, reference was made to the other provisions of the Aadhaar Act to record the majority opinion that the bill in question was rightly introduced as a "Money Bill". The majority judgment, therefore, did not elucidate and explain the scope and ambit of ub-clauses (a) to (f) to Clause (1) of Article 110 of the Constitution, a legal position and facet which arises for consideration in the present case and assumes considerable importance.

115. Ashok Bhushan, J., in his concurring judgment, from paragraph 886 onwards, had examined the issue of "Money Bill" and its justiciability and as noticed above, overruled ***Mohd. Saeed Siddiqui*** (supra) and ***Yogesh*** (supra) as not laying down the correct law by relying upon the decisions of this Court in ***Kihoto Hollohan*** v. ***Zachillhu and Ors.*** MANU/SC/0753/1992 : (1992)

Supp. 2 SCC 651 and ***Raja Ram Pal*** (supra). Referring to the definition of "Money Bill" and the meaning and purpose of the word 'only' used in Article 110(1) of the Constitution, Ashok Bhushan, J. had observed that legislative intent was that the main and substantive provision of an enactment should only be any or all of the Sub-clauses from (a) to (f). In the event the main or substantive provisions of the Act are not covered by Sub-clauses (a) to (f), the bill cannot be said to be a "Money Bill" {See paragraph 905}. It was further observed that the use of the word 'only' in Article 110(1) has its purpose, which is clear restriction for a bill to be certified as a "Money Bill" {See paragraph 906}. Referring to the Aadhaar Act, it was observed that it veers around the government's constitutional obligation to provide for subsidies, benefits and services to individuals and other provisions are only incidental provisions to the main provision. Therefore, the Aadhaar Bill was rightly certified by the Speaker as a "Money Bill".

116. Dr. D.Y. Chandrachud, J., in his minority opinion on the said question, referring to the word 'only' in Article 110(1) of the Constitution had observed that the pith and substance doctrine which is applicable to legislative entries would not apply when deciding the question whether or not a particular bill is a "Money Bill". Referring to Sub-clause (e) of Article 110(1), it was held that the Money Bill must deal with the declaration of any expenditure to be charged on the Consolidated Fund of India (or increasing the amount of expenditure) and, therefore, Section 7 of the Aadhaar Act did not have the effect of making the bill a Money Bill as it did not declare the expenditure incurred on services, benefits or subsidies to be a charge on the Consolidated Fund of India. Section 7 mandates Aadhaar for availing services, benefits or subsidies which were already charged to the Consolidated Fund of India. However, this view was not accepted by the majority judgment.

117. In the context of Article 110(1) of the Constitution, use of the word 'only' in relation to Sub-clauses (a) to (f) pose an interesting, albeit a difficult question which was not examined and answered by the majority judgment in ***K.S. Puttaswamy*** (Aadhaar-5). While it may be easier to decipher a bill relating to imposition, abolition, remission, alteration or Regulation of any tax, difficulties would arise in the interpretation of Article 110(1) specifically with reference to Sub-clauses (b) to (f) in a bill relating to borrowing of money or giving of any guarantee by the Government of India, or an amendment of law concerning financial obligation. In the book, "Practices and Procedures of Parliament" by Kaul and Shakdher, it is opined that unless the word 'only' is interpreted in a right manner, Article 110(1) would be a nullity. A liberal and wide interpretation, on the other hand, possibly exposits an opposite consequence. Relevant portion of the opinion by Kaul and Shakdher reads:

Speaker Mavalankar observed as follows: "Prima facie, it appears to me that the words of Article 110 (imposition, abolition, remission, alteration, Regulation of any tax) are sufficiently wide to make the Consolidated Bill a Money Bill. A question may arise as to what is the exact significance or scope of the word 'only' and whether and how far that word goes to modify or control the wide and general words 'imposition, abolition, remission, etc.'. I think, prima facie, that the word 'only' is not restrictive of the scope of the general terms. If a Bill substantially deals with the imposition, abolition, etc., of a tax, then the mere fact of the inclusion in the Bill of other provisions which may be necessary for the administration of that tax or, I may say, necessary for the achievement of the objective of the particular Bill, cannot take away the Bill from the category of Money Bills. One has to look to the objective of the bill. Therefore, if the substantial provisions of the Bill aim at imposition, abolition, etc., of any tax then the other provisions would be incidental and their

inclusion cannot be said to take it away from the category of a Money Bill. Unless one construes the word 'only' in this way it might lead to make Article 110 a nullity. No tax can be imposed without making provisions for its assessment, collection, administration, reference to courts or tribunals, etc, one can visualise only one Section in a Bill imposing the main tax and there may be fifty other Sections which may deal with the scope, method, manner, etc., of that imposition. Further, we have also to consider the provisions of Sub-clause (2) of Article 110; and these provisions may be helpful to clarify the scope of the word 'only', not directly but indirectly.

118. The majority judgment did not advert to the doctrine of pith and substance whereas judgment of Ashok Bhushan, J. had referred to the dominant purpose. The test of dominant purpose possibly has its own limitation as many a legislation would have more than one dominant objective especially when this prescription is read with reference to Sub-clauses (a) to (f) of Article 110(1) of the Constitution. Further, determination of what constitutes paramount and cardinal purpose of the legislation and the test applicable to determine this compunction and incertitude itself is not free from ambiguity. Difficulties would arise with reference to Sub-clauses (b), (c), (d) and (e) of Article 110(1), when we apply the principles of dominant or the main purpose of an enactment test. Sub-clause (c) to Article 110(1) refers to payment of monies into or withdrawal of monies from the Consolidated Fund of India. Sub-clause (d) refers to appropriation of monies out of the Consolidated Fund of India. Sub-clause (e) refers to declaration of any expenditure charged on the Consolidated Fund of India or increasing of the amount of such expenditure. Sub-clause (f) relates to receipt of money on account of Consolidated Fund of India or Public Account of India or issue of such money or the audit of the accounts of the Union or of State. Even Clause (b) in its amplitude includes an amendment of the law in respect of a financial obligation undertaken or to be undertaken by the Government of India. Once we hold that the decision of the Speaker under Clause (3) of Article 110 of the Constitution though final, is subject to judicial scrutiny on the principle of constitutional illegality, the provisions of Article 110(1) have to be given an appropriate meaning and interpretation to avoid and prevent over-inclusiveness or under-inclusiveness. Any interpretation would have far reaching consequences. It is therefore, necessary that there should be absolute clarity with regard to the provisions and any ambiguity and debate should be ironed out and affirmatively decided. In case of doubt, certainly the opinion of the Speaker would be conclusive, but that would not be a consideration to avoid answering and deciding the scope and ambit of "Money Bill" Under Article 110(1) of the Constitution. For example, taxation enactments like the Income Tax Act would qualify as Money Bill under Sub-clause (a) to Clause (1) of Article 110 and may include provisions relating to Appellate Tribunals which would possibly qualify as incidental provisions covered under Sub-clause (g) to Clause (1) of Article 110, even if we exclude application of Sub-clause (d) to Clause (1) of Article 110. The position it could be argued would be different with reference to provisions for constitution of a tribunal under the Administrative Tribunal Act or the National Green Tribunal Act. The bill could however state that the expenditure would be charged on the Consolidated Fund of India.

119. Another aspect which would arise for consideration would be the legal consequences in case a Non-Money Bill certified by the Speaker as a Money Bill, when presented before the Rajya Sabha is specifically objected to on this count by some Members, but on being put to vote no recommendations are made in respect of "Non-Money" Bill related provisions.

120. The Petitioners had argued on the strength of the concurring opinion by Ashok Bhushan, J. holding that in addition to at least one provision falling Under Article 110(1) (a) to (f), each of the other remaining provisions must also be incidental to such core provision(s), and hence must satisfy the requirement of Article 110(g). Such an interpretation, it was contended, would make the insertion of the word 'only' under the prefatory part of Article 110(1) purposeful, which was said to have been glossed over by the Union. Further, it was contended that the manner in which the majority correlated Section 7 of the Aadhaar Act to Article 110(1)(e) was erroneous, for it only regulated procedure for withdrawal by imposing a requirement for authentication and did not declare any expenditure to be a charge on the Consolidated Fund of India. They had contended that the interpretation of the enactment by the majority judgment was constitutionally inexact and that a similar analysis ought not to be made in the present case. The Petitioners, therefore, contend that every impugned provision be individually examined and brought either Under Article 110(1)(a) to (f) or be incidental thereto, as permitted by Article 110(g). In case even a single provision did not satisfy either of the aforementioned two categories, then the entire Finance Act, 2017 would be an affront to the prefatory phraseology of Article 110(1) and must be declared as being unconstitutional.

121. However, the learned Attorney General has propounded that constitutionality of the Finance Act, 2017 would be safe if its dominant provisions, which form the core of the enactment, fall within the ambit of Article 110(1)(a) to (f). Other minor provisions, even if not strictly incidental, could take the dominant colour and could be passed along with it as a Money Bill. As per such interpretation, provisions ought not to be read in a piece-meal manner, and judicial review ought to be applied deferentially.

122. Upon an extensive examination of the matter, we notice that the majority in ***K.S. Puttaswamy*** (Aadhaar-5) pronounced the nature of the impugned enactment without first delineating the scope of Article 110(1) and principles for interpretation or the repercussions of such process. It is clear to us that the majority dictum in ***K.S. Puttaswamy*** (Aadhaar-5) did not substantially discuss the effect of the word 'only' in Article 110(1) and offers little guidance on the repercussions of a finding when some of the provisions of an enactment passed as a "Money Bill" do not conform to Article 110(1)(a) to (g). Its interpretation of the provisions of the Aadhaar Act was arguably liberal and the Court's satisfaction of the said provisions being incidental to Article 110(1)(a) to (f), it has been argued is not convincingly reasoned, as might not be in accord with the bicameral Parliamentary system envisaged under our constitutional scheme. Without expressing a firm and final opinion, it has to be observed that the analysis in ***K.S. Puttaswamy*** (Aadhaar-5) makes its application difficult to the present case and raises a potential conflict between the judgments of coordinate Benches.

123. Given the various challenges made to the scope of judicial review and interpretative principles (or lack thereof) as adumbrated by the majority in ***K.S. Puttaswamy*** (Aadhaar-5) and the substantial precedential impact of its analysis of the Aadhaar Act, 2016, it becomes essential to determine its correctness. Being a Bench of equal strength as that in ***K.S. Puttaswamy*** (Aadhaar-5), we accordingly direct that this batch of matters be placed before Hon'ble the Chief Justice of India, on the administrative side, for consideration by a larger Bench.

124. There is yet another reason why we feel the matter should be referred to a Constitution Bench of seven judges. ***L. Chandra Kumar*** (supra), which was decided by a Bench of seven Judges, had also interpreted on the ambit of supervision by the High Courts Under Article 227(1) of the Constitution to observe that the Constitutional scheme does not require all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction, as the idea is to divest the High Courts of their onerous burden. Consequently, adding to their supervisory functions vide Article 227(1) cannot be of assistance in any manner. Thereafter, it was observed that different tribunals constituted under different enactments are administered by the Central and the State Governments, yet there was no uniformity in administration. This Court was of the view that until a wholly independent agency for such tribunals can be set up, it is desirable that all such tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these tribunals. For a number of reasons, the Court observed that the Ministry of Law would be the appropriate ministry. The Ministry of Law in turn was required to appoint an independent supervisory body to oversee the working of the Tribunals. As noticed above, this has not happened. In these circumstances, it would be appropriate if these aspects and questions are looked into by a Bench of seven Judges.

ISSUE II: WHETHER SECTION 184 OF THE FINANCE ACT, 2017 IS UNCONSTITUTIONAL ON ACCOUNT OF EXCESSIVE DELEGATION?

125. The second challenge against Part XIV of the Finance Act, 2017 is predicated on the assertion that this is a case of excessive delegation as it falters on the anvil of "essential legislative functions" and "policy and guidelines" tests.

126. The Eighth Schedule referred to in Section 183 contains a list of 19 tribunals with corresponding enactments under which they were constituted. Section 183 overrides the provisions of the enactments specified in column (3) of the Eighth Schedule and mandates that from the appointed date, the Chairperson, Vice-Chairperson, Chairman, Vice Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule shall be appointed in terms of provisions of Section 184 of the Finance Act. These provisions however, do not apply to those who have already been appointed to the said posts immediately before the appointed date, that is the date on which the Central Government may, by a notification in the Official Gazette, bring the said provisions into effect.

127. Section 184, to repeat, reads as under:

184. Qualifications, appointment, term and conditions of service, salary and allowances, etc., of Chairperson, Vice-Chairperson and Members, etc., of the Tribunal, Appellate Tribunal and other Authorities.--(1) The Central Government may, by notification, make Rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:

Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the Rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the Rules made by the Central Government which shall not exceed,--

(a) in the case of Chairperson, Chairman or President, the age of seventy years;

(b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member, the age of sixty-seven years:

(2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment.

Section 184 has conferred upon the Central Government power to make Rules by way of notification to provide for (a) qualifications; (b) appointment; (c) term of office; (d) salaries and allowances; (e) resignation; and (f) removal and other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule. The first proviso states that the incumbent officers shall hold office for such terms as may be specified in the Rules made by the Central Government but the term shall not exceed five years from the date on which he assumes the office and shall be eligible for reappointment. The second proviso states that the persons so appointed shall hold office till they attain the age specified in the Rules made by the Central Government which shall not exceed in the case of Chairperson, Chairman and the President, the age of 70 years and in the case of Vice-Chairperson, Vice-Chairman, Vice-President or any other Members, the age of 67 years. Sub-section 2 to Section 184 states that the salaries and allowances and other terms and conditions of service of the persons appointed may not be varied to their disadvantage after appointment.

128. Section 185 (1) of the Finance Act is also relevant and reads:

185. Transitional provisions.-- (1) Any person appointed as the Chairperson or Chairman, President or Vice-Chairperson or Vice-Chairman, Vice-President or Presiding Officer or Member of the Tribunals, Appellate Tribunals, or as the case may be, other Authorities specified in column (2) of the Ninth Schedule and holding office as such immediately before the appointed day, shall on and from the appointed day, cease to hold such office and such Chairperson or Chairman, President, Vice-Chairperson or Vice-Chairman, Vice-President or Presiding officer or Member shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service.

The Chairperson or Chairman, President or Vice-Chairperson or Vice-Chairman, Vice-President or Presiding Officer or Member of the Tribunals/Appellate Tribunals specified in column (2) of the Ninth Schedule who hold office as per the above provisions before the appointed date shall cease to do so and will be entitled to compensation not exceeding three months' pay and allowance for the premature termination of the office or the contract of office. However, we would clarify that presently we are not examining constitutional vires of Sub-section (1) to Section 185.

129. Section 186 of the Finance Act, 2017 reads as under:

186. General Power to make rules.-- Without prejudice to any other power to make Rules contained elsewhere in this Part, the Central Government may, by notification, make Rules generally to carry out the provisions of this Part.

The aforesaid provisions stipulate that without prejudice to any other power to make Rules contained elsewhere in the Part XIV of the Finance Act, 2017, the Central Government may, by notification, makes Rules generally to carry out the provisions of the said Part.

130. Reading of the said provisions indicates that except for providing the upper age limit and that the person appointed shall not have tenure exceeding five years from the date on which he enters office and shall be eligible for re-appointment, the Finance Act delegates the power to specify the qualifications, method of selection and appointment, terms of office, salaries and allowances, removal including resignation and all other terms and conditions of service to the Central Government which would act as a delegatee of the Parliament. The governing statutory provisions embodied in the existing parent legislation specified in the column (3) of the Schedule and the Rules made thereunder are overwritten and authority and power is conferred on the Central Government to decide qualifications for appointment, process for selection, and terms and conditions of service including salaries allowance, resignation and removal through delegated or subordinate legislation. Before we look into the vires of this delegation, it behaves us to recount and reflect on the approach adopted by this Court in gauging the validity of delegated legislation.

131. This Court addressed this conundrum the first time in ***In re: The Delhi Laws Act***, MANU/SC/0010/1951 : 1951 AIR 332 wherein a seven-Judge Bench delivered seven different judgments clearly evincing the divergence of opinion on the issue. Albeit, the majority view, as clarified and held by J.M. Shelat, J. speaking for the majority in ***B. Shama Rao*** v. ***Union Territory of Pondicherry***, (2015) 4 SCC 770 can be deduced as under:

In view of the intense divergence of opinion except for their conclusion partially to uphold the validity of the said laws it is difficult to deduce any general principle which on the principle of state decision can be taken as binding in for future cases. It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein. The utmost therefore that can be said of this decision is that the minimum on which there appears to be consensus was (1) that legislatures in India both before and after the Constitution had plenary power within their respective fields; (2) that they were never the delegates of the British Parliament; (3) that they had power to delegate within certain limits not by reason of such a power being inherent in the legislative power but because such power is recognised even in the United States of America were separatist ideology prevails on the ground that it is necessary to effectively

exercise the legislative power in a modem state with multifarious activities and complex problems facing legislatures and (4) that delegation of an essential, legislative function which amounts to abdication even partial is not permissible. All of them were agreed that it could be in respect of subsidiary and ancillary power.

All the seven Judges were in unison that abdication or effacement by conferring the power of legislation to the subordinate authority even if partial is not permissible. The difference of opinion primarily arose from the meaning and scope of the abdication or effacement of the legislative power. On the said aspect, we would like to refer to the judgments of Fazl Ali, J, Mukherjea, J and Bose, J. Fazl Ali, J. had expressed the said principle as:

The true distinction ..... is this. The legislature cannot delegate the power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Government.

2. The true import of the Rule against delegation is this:

This Rule in a broad sense involves the principle underlying the maxim, delegatus non potest delegate, but it is apt to be misunderstood and has been misunderstood. In my judgment, all that it means is that the legislature cannot abdicate its legislative functions and it cannot efface itself and set up a parallel legislature to discharge the primary duty with which it has been entrusted. This Rule has been recognised both in America and in England .....

xx xx xx

What constitutes abdication and what class of cases will be covered by that expression will always be a question of fact, and it is by no means easy to lay down any comprehensive formula to define it, but it should be recognised that the Rule against abdication does not prohibit the Legislature from employing any subordinate agency of its own choice for doing such subsidiary acts as may be necessary to make its legislation effective, useful and complete.

The learned Judge had further observed that an act is a law when it embodies policies, defines standards and directs the authority chosen to act within certain prescribed limits and not go beyond. The Act should be a complete expression of the will of the Legislature to act in a particular way and of its command on how it should be carried out. When the Legislature decides the circumstances as the best way to legislate on a subject, then, such legislation does not amount to abdication of powers because from the very nature to legislation it is manifest that when power is misused it can be withdrawn, altered and repealed. Most importantly, the delegate is to only adopt and extend the laws enacted by the Legislature.

132. Mukherjea, J. opined that the legislative functions concern with declaring the legislative policy and laying down the standards which is to be enacted into a Rule of law, and what can be delegated as the task of subordinate legislation by its very nature is ancillary to the statute which delegates the power to make it. When the legislative policy is enunciated with sufficient clearness or the standards are laid down, the Courts cannot interfere with the discretion that the Legislature

has exercised in determining the extent of necessary delegation. The delegatee cannot be allowed to check the policy declared by the legislators and cannot be given the power to repeal or abrogate any statute.

133. Bose, J. while observing that the main function of the legislature is to legislate and not leave it to others, nevertheless acknowledged that it is impossible to carry on government of a modern State with its infinite complexities and ramifications without a large devolution of power and delegation of authority. This is a practical necessity which has been acknowledged even by the American Courts. To decide otherwise would make it difficult for the government to function and work effectively.

134. A Division Bench of this Court in ***Ramesh Birch*** v. ***Union of India*** MANU/SC/0452/1989 : 1990 AIR 560 had examined the aforesaid seven opinions and culled out the ratio to observe that the lines of reasoning were different but nevertheless the judges had accepted the inevitable-that while Parliament has ample and extensive powers of legislation, these would include the power to entrust some of the functions and powers to another body or authority. At the same time, in ***Delhi Laws Act*** (supra) the judges had agreed that there should be limitations on such delegation. However, on the question as to what is this limitation, there was a lack of consensus. The two judges in ***Ramesh Birch*** (supra) relying on the ratio in ***Delhi Laws Act*** (supra), had observed:

Some thought that there is no abdication or effacement unless it is total i.e. unless Parliament surrenders its powers in favour of a "parallel" legislature or loses control over the local authority to such an extent as to be unable to revoke the powers given to, or to exercise effective supervision over, the body entrusted therewith. But others were of opinion that such "abdication" or "effacement" could not even be partial and it would be bad if full powers to do everything that the legislature can do are conferred on a subordinate authority, although the legislature may retain the power to control the action of such authority by recalling such power or repealing the Acts passed by the subordinate authority. A different way in which the second of the above views has been enunciated--and it is this view which has dominated since--is by saying that the legislatures cannot wash their hands off their essential legislative function. Essential legislative function consists in laying down the legislative policy with sufficient clearness and in enunciating the standards which are to be enacted into a Rule of law. This cannot be delegated. What can be delegated is only the task of subordinate legislation which is by its very nature ancillary to the statute which delegates the power to make it and which must be within the policy and framework of the guidance provided by the legislature.

Thereupon the Division Bench had referred to the "policy and guideline" theory as a test to decide whether or not it is a case of excessive delegation which it was observed means reference and giving proper regard to the context of the Act and the object and purposes sought to be achieved which should be clear and it is not necessary that the legislation should "dot all the i's and cross all the t's of its policy". It is sufficient if it gives the broadest indication of the general policy of the legislature.

135. We would now refer to an earlier decision of this Court in ***Devi Das Gopal Krishnan and Ors.*** v. ***State of Punjab and Ors.*** MANU/SC/0305/1967 : AIR 1967 SC 1895 wherein K. Subba Rao, CJ. speaking for the Court had struck down Section 5 of the East Punjab General Sales Tax

Act, 1948 which had empowered the State Government to fix rate of tax to such rate as it deemed fit, as bad and unconstitutional observing that the needs of the State and the purposes of the Act did not provide sufficient guidance for fixing the rates of tax. It was observed:

16. ...But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal on construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.

136. A year later in ***Municipal Corporation of Delhi*** v. ***Birla Cotton, Spinning and Weaving Mills, Delhi and Another*** MANU/SC/0175/1968 : AIR 1968 SC 1232 this Court, however, upheld Section 113(2) of the Delhi Municipal Act, 1957 which had empowered the corporation to levy certain optional taxes by observing that there were sufficient guidelines, safeguards and checks in the Act which prevented excessive delegation as the Act had provided maximum rate of tax. It was observed that the nature of body to which delegation is made is also a relevant factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation and also when delegation is made to an elected body accountable to the people including those who paid taxes, as this acted as a sufficient check. It was observed:

A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding Rule of conduct and cannot be delegated by the legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation.

Thus, the guidelines in the form of providing maximum rates of tax up to which a local body may be given discretion to make its choice or provision for consultation with the people of the local

area and then fixing the rates or subjecting the rate of tax so fixed by the local authority to the approval of the Government which acts as watch-dog were treated as satisfying the policy and guideline test.

137. This ratio was followed and expounded in ***M.K. Papiah & Sons*** v. ***Excise Commissioner*** MANU/SC/0322/1975 : (1975) 1 SCC 492 in which this Court had examined what constitutes essential features that the legislature cannot delegate, to observe that this cannot be delineated in detail but nevertheless and certainly it does not include the change of policy. The legislator is the master of the policy and the delegate is not free to switch the policy for then it would be usurpation of legislative power itself. Therefore, when the question of the excessive delegation arises, investigation has to be made whether policy of the legislation has not been indicated sufficiently or whether change of policy has been left to the pleasure of the delegate. This aspect is of substantial importance and relevance in the present case.

138. In ***Avinder Singh*** v. ***State of Punjab*** MANU/SC/0299/1978 : (1979) 1 SCC 137 this Court had highlighted that the founding document, that is, the Constitution had created three instrumentalities with certain basic powers and it is axiomatic that legislative powers are not abdicated for this would mean betrayal of the Constitution and is intolerable in law. Therefore, legislature cannot self-efface its personality and make over in terms the plenary and essential legislative functions. Nevertheless, the complexities of modern administration are bafflingly intricate and present themselves with urgencies and difficulties and the need for flexibility, which the direct legislation may not provide. Delegation of some part of the legislative powers therefore became inevitable and an administrative necessity. Thus, while essential legislative policy cannot be delegated, however inessentials can be delegated over to relevant agencies.

139. Similar opinion was expressed in ***Registrar of Coop. Societies*** v. ***K. Kunjabmu*** MANU/SC/0507/1979 : (1980) 1 SCC 340, wherein it has been observed:

3. ...They function best when they concern themselves with general principles, broad objectives and fundamental issues instead of technical and situational intricacies which are better left to better equipped full time expert executive bodies and specialist public servants. Parliament and the State Legislatures have neither the time nor the expertise to be involved in detail and circumstance. Nor can Parliament and the State Legislatures visualise and provide for new, strange, unforeseen and unpredictable situations arising from the complexity of modern life and the ingenuity of modern man. That is the raison d'etre for delegated legislation. That is what makes delegated legislation inevitable and indispensable. The Indian Parliament and the State Legislatures are endowed with plenary power to legislate upon any of the subjects entrusted to them by the Constitution, subject to the limitations imposed by the Constitution itself. The power to legislate carries with it the power to delegate. But excessive delegation may amount to abdication. Delegation unlimited may invite despotism uninhibited. So, the theory has been evolved that the legislature cannot delegate its essential legislative function. Legislate it must by laying down policy and principle and delegate it may to fill in detail and carry out policy. The legislature may guide the delegate by speaking through the express provision empowering delegation or the other provisions of the statute, the preamble, the scheme or even the very subject matter of the statute. If guidance there is, wherever it may be found, the delegation is valid. A good deal of latitude has been held to be permissible in the case of taxing statutes and on the same principle a generous degree of latitude must be

permissible in the case of welfare legislation, particularly those statutes which are designed to further the Directive Principles of State Policy.

The above decision states that the policy and principles test can be applied through express provisions empowering delegation or any other provision of the statute including the preamble, the scheme or even the subject matter of the statute.

140. We will refer to a recent decision of this Court in ***Keshavlal Khemchand and Son Private Limited & Ors.*** v. ***Union of India*** MANU/SC/0073/2015 : (2015) 4 SCC 770 wherein a Division Bench of this Court had observed that in spite of abundance of authority on the subject we are not blessed with certainty, and then observed that in ***Kunjabmu*** (supra) this Court had declined to consider whether ***M.K. Papiah & Sons*** (supra) had beaten the final retreat from the position enunciated in ***Delhi Laws Act*** (supra) and had proceeded to examine the theory of "policy and guidelines" referring to several judgments. The Division Bench then went on to observe that the earlier judgments had not been able to lay down the principle including as to what exactly constitutes "essential legislative function", but the following inferences can be drawn:

51.1 The proposition that essential legislative functions cannot be delegated does not appear to be such a clearly settled proposition and requires a further examination which exercise is not undertaken by the counsel appearing in the matter. We leave it open for debate in a more appropriate case on a future date. For the present, we confine to the examination of the question:

'Whether defining every expression used in an enactment is an essential legislative function or not?'

51.2 All the judgments examined above recognize that there is a need for some amount of delegated legislation in the modern world.

51.3 If the parent enactment enunciates the legislative policy with sufficient clarity, delegation of the power to make subordinate legislation to carry out the purpose of the parent enactment is permissible.

51.4 Whether the policy of the legislature is sufficiently clear to guide the delegate depends upon the scheme and the provisions of the parent Act.

51.5 The nature of the body to whom the power is delegated is also a relevant factor in determining "whether there is sufficient *guidance* in the matter of delegation.

141. Appropriate in regard to 'policy and guideline' test would be reference to yet another earlier judgment of this Court in ***Gwalior Rayon Silk Mfg. (Wvg.) Co.*** v. ***Asstt. Commissioner of Sales*** MANU/SC/0361/1973 : (1974) 4 SCC 98 wherein while referring to the views of an eminent American jurist Willioughby, it was stated:

24. The matter has been dealt with on page 1637 of Vol. III in *Willoughby on the Constitution of the United States*, 2nd Edition, in the following words:

The qualifications to the Rule prohibiting the delegation of legislative power which have been earlier adverted to are those which provide that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities: (1) to determine in specific cases when and how the powers legislatively conferred are to be exercised; and (2) to establish administrative Rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met, and the rights therein created to be enjoyed.

25. The matter has also been dealt with in *Corpus Juris Secundum* Vol. 73, page 324. It is stated there that the law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the Legislature must ordinarily prescribe a policy, standard, or Rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid. In other words, in order to avoid the pure delegation of legislative power by the creation of an administrative agency, the Legislature must set limits on such agency's power and enjoin on it a certain course of procedure and Rules of decision in the performance of its function; and, if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.

142. It is in this context we have to examine whether the plea of excessive delegation would prevail and merits acceptance as Section 184 of the Finance Act does not prescribe the qualifications for appointment, and terms and conditions of service. It will be difficult to hold that Part XIV of the Finance Act suffers from the vice of unguided delegation as it fails to clearly specify the eligibility qualifications for the Members, Chairpersons, Chairman etc. of different Tribunals as such requirements, though important, are not *per se* functionally undelegatable.

143. The objects of the parent enactments as well as the law laid down by this Court in ***R.K. Jain*** (supra), ***L Chandra Kumar*** (supra), ***R. Gandhi*** (supra), ***Madras Bar Association*** (supra) and ***Gujarat Urja Vikas*** (supra) undoubtedly bind the delegate and mandatorily requires the delegate Under Section 184 to act strictly in conformity with these decisions and the objects of delegated legislation stipulated in the statutes. It must also be emphasised that the Finance Act, 2017 nowhere indicates that the legislature had intended to differ from, let alone make amendments, to remove the edifice and foundation of such decisions by enacting the Finance Act. Indeed, the learned Attorney General was clear in suggesting that Part XIV was inserted with a view to incorporate the changes recommended by this Court in earlier decisions.

144. Independence of a quasi-judicial authority like the tribunal highlighted in the above decisions would be, therefore, read as the policy and guideline applicable. Principle of independence of judiciary/tribunal has within its fold two broad concepts, as held in ***Supreme Court Advocates-On-Record Association and Another*** v. ***Union of India*** MANU/SC/1183/2015 : (2016) 5 SCC 1 {See paragraph 714}, (i) independence of an individual judge, that is, decisional independence; and (ii) independence of the judiciary or the Tribunal as an institution or an organ of the State, that is, functional independence. Individual independence has various facets which include security of tenure, procedure for renewal, terms and conditions of service like salary, allowances, etc. which

should be fair and just and which should be protected and not varied to his/her disadvantage after appointment. Independence of the institution refers to sufficient degree of separation from other branches of the government, especially when the branch is a litigant or one of the parties before the tribunal. Functional independence would include method of selection and qualifications prescribed, as independence begins with appointment of persons of calibre, ability and integrity. Protection from interference and independence from the executive pressure, fearlessness from other power centres-economic and political, and freedom from prejudices acquired and nurtured by the class to which the adjudicator belongs, are important attributes of institutional independence.

145. Further, cursory examination of the specified enactments mentioned in column (3) of the Eighth Schedule reveals that most enactments did not stipulate the manner of appointment, terms of office, salaries and allowances, resignation, removal, that is, the terms and conditions of service, which stipulations are delegated and they are not part of the principal enactment. For example, Sub-section (1) of Section 252 of the Income Tax Act, 1961 states that the Central Government may constitute the Appellate Tribunal consisting of as many judicial and accountant members as it thinks fit to exercise the powers and discharge the functions prescribed by the Act. Sub-sections (3) and (4) state that the Central Government shall ordinarily appoint a judicial Member as the President and may appoint one or more members as Vice President or Senior Vice President. Sub-section (2) prescribes the eligibility requirements for being a judicial member and Sub-section (2A) stipulates the eligibility requirements for being an administrative member. The Income Tax Act does not prescribe or stipulate manner or method for selection or terms and conditions of service. This is equally true for the Appellate Tribunal constituted under the Central Excise Act.

146. Wanchoo, CJ. in ***The Municipal Corporation of Delhi*** (supra) had observed:

13. The question as to the limits of permissible delegation of legislative power by a legislature to a subordinate authority has come before this Court in a number of cases and the law as laid down by this Court is not in doubt now. Considering the complexity of modern life it is recognised on all hands that legislature cannot possibly have time to legislate in every minute detail. That is why it has been recognised that it is open to the legislature to delegate to subordinate authorities the power to make ancillary Rules for the purpose of carrying out the intention of the legislature indicated in the law which gives power to frame such ancillary rules. The matter came before this Court for the first time *In re The Delhi Laws Act, 1912* and it was held in that case that it could not be said that an unlimited right of delegation was inherent in the legislative power itself. This was not warranted by the provisions of the Constitution, which vested the power of legislation either in Parliament or State legislatures and the legitimacy of delegation depended upon its being used as an ancillary measure which the legislature considered to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative function. Exactly what constituted "essential legislative function", it was held further, was difficult to define in general terms, but this much was clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding Rule of conduct. Thus where the law passed by the legislature declares the legislative policy and lays down the standard which is enacted into a Rule of law, it can leave the task of subordinate legislation which by its very nature is ancillary to the statute to subordinate bodies i.e. the making of rules, regulations or bye-laws. The subordinate authority must do so

within the framework of the law which makes the delegation, and such subordinate legislation has to be consistent with the law under which it is made and cannot go beyond the limits of the policy and standard laid down in the law. Provided the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case.

xx xx xx

28. A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding Rule of conduct and cannot be delegated by the legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation.

147. Referring to ***The Municipal Corporation of Delhi*** (supra), this Court in ***Keshav Lal***, had observed:

45. ... The Court held that there was no impermissible delegation of legislative power. Hidayatullah, J. speaking for himself and for Ramaswami, J. agreed with the conclusion reached at by Wanchoo, C.J., though on slightly different reasons.

148. On examining the Constitutional scheme, the statutes which had created tribunals and the precedents of this Court laying down attributes of independence of tribunals in different facets, we do not think that the power to prescribe qualifications, selection procedure and service conditions of members and other office holders of the tribunals is intended to vest solely with the Legislature for all times and purposes. Policy and guidelines exist. Subject to aforesaid, the submission of learned Attorney General that Section 184 was inserted to bring uniformity and with a view to harmonise the diverse and wide-ranging qualifications and methods of appointment across different tribunals carries weight and, in our view, needs to be accepted.

149. Cautioning against the potential misuse of Section 184 by the executive, it was vehemently argued by the learned Counsel for the Petitioner(s) that any desecration by the Executive of such powers threatens and poses a risk to the independence of the tribunals. A mere possibility or eventuality of abuse of delegated powers in the absence of any evidence supporting such claim, cannot be a ground for striking down the provisions of the Finance Act, 2017. It is always open to a Constitutional court on challenge made to the delegated legislation framed by the Executive to examine whether it conforms to the parent legislation and other laws, and apply the "policy and

guideline" test and if found contrary, can be struck down without affecting the constitutionality of the Rule making power conferred Under Section 186 of the Finance Act, 2017.

ISSUE III: IF SECTION 184 IS VALID, WHETHER TRIBUNAL, APPELLATE TRIBUNAL AND OTHER AUTHORITIES (QUALIFICATIONS, EXPERIENCE AND OTHER CONDITIONS OF SERVICE OF MEMBERS) RULES, 2017 ARE IN CONSONANCE WITH THE PRINCIPAL ACT AND VARIOUS DECISIONS OF THIS Court ON FUNCTIONING OF TRIBUNALS?

150. Given that the Central Government has formulated the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017, (hereinafter referred to as "the Rules") Under Section 184 of the Finance Act, 2017, it is necessary at this stage to examine whether the Rules conform to the judicial principles inherent in our Constitutional scheme as established by this Court in its earlier dicta. Some salient provisions of the Rules are extracted hereunder:

TRIBUNAL, APPELLATE TRIBUNAL AND OTHER AUTHORITIES (QUALIFICATIONS, EXPERIENCE AND OTHER CONDITIONS OF SERVICE OF MEMBERS) RULES, 2017

xxxxxx

3. Qualifications for appointment of Member.-- The qualification for appointment of the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority shall be such as specified in column (3) of the Schedule annexed to these rules.

4. Method of recruitment.-- (1) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority shall be appointed by the Central Government on the recommendation of a Search-cum-Selection Committee specified in column (4) of the said Schedule in respect of the Tribunal, Appellate Tribunal or, as the case may be, Authority specified in column (2) of the said Schedule.

(2) The Secretary to the Government of India in the Ministry or Department under which the Tribunal, Appellate Tribunal or, as the case may be, Authority is constituted or established shall be the convener of the Search-cum-Selection Committee.

(3) The Search-cum-Selection Committee shall determine its procedure for making its recommendation.

(4) No appointment of Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial

Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or Authorities shall be invalid merely by reason of any vacancy or absence in the Search-cum-Selection Committee.

(5) Nothing in this Rule shall apply to the appointment of Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority functioning as such immediately before the commencement of these rules.

xxxxxxx

6. Resignation by a Member.-- A Member may, by writing under his hand addressed to the Central Government, resign his office at any time:

Provided that the Member shall, unless he is permitted by the Central Government to relinquish office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as a successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

7. Removal of Member from office.-- The Central Government may, on the recommendation of a Committee constituted by it in this behalf, remove from office any Member, who --

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that where a Member is proposed to be removed on any ground specified in clauses (b) to (e), the Member shall be informed of the charges against him and given an opportunity of being heard in respect of those charges:

Provided further that the Chairperson or member of the National Company Appellate Tribunal shall be removed from office in consultation with the Chief Justice of India.

8. Procedure for inquiry of misbehavior or incapacity of the Member.-- (1) If a written complaint is received by the Central Government, alleging any definite charge of misbehavior or incapacity to perform the functions of the office in respect of a Chairman, Vice-Chairman, Chairperson, Vice-Chairperson, President, Vice-President, Presiding Officer, Accountant

Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member, the Ministry or Department of the Government of India under which the Tribunal, Appellate Tribunal or, as the case may be, Authority is constituted or established, shall make a preliminary scrutiny of such complaint.

(2) If on preliminary scrutiny, the Ministry or Department of the Government of India under which the Tribunal, Appellate Tribunal or, as the case may be, Authority is constituted or established, is of the opinion that there are reasonable grounds for making an inquiry into the truth of any misbehavior or incapacity of a Chairman, Vice-Chairman, Chairperson, Vice-Chairperson, President, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member, it shall make a reference to the Committee constituted Under Rule 7 to conduct the inquiry.

(3) The Committee shall complete the inquiry within such time or such further time as may be specified by the Central Government.

(4) After the conclusion of the inquiry, the Committee shall submit its report to the Central Government stating therein its findings and the reasons therefor on each of the charges separately with such observations on the whole case as it may think fit.

(5) The Committee shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and shall have power to regulate its own procedure, including the fixing of date, place and time of its inquiry.

9. Term of office of Member.-- Save as otherwise provided in these rules, the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or, as the case may be, Member shall hold office for a term as specified in column (5) of the said Schedule and shall hold the office up to such age as specified in column (6) in the said Schedule from the date on which he enters upon his office and shall be eligible for reappointment.

10. Casual vacancy.-- (1) In case of a casual vacancy in the office of,--

(a) the Chairman, Chairperson, President, or Presiding Officer of the Security Appellate Tribunal, the Central Government shall have the power to appoint the senior most Vice-Chairperson or Vice-Chairman, Vice-President or in his absence, one of the Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member, or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority to officiate as Chairperson, Chairman, President or Presiding Officer.

(b) the Chairperson of the Debts Recovery Appellate Tribunal, the Central Government shall have power to appoint the Chairperson of another Debts Recovery Appellate Tribunal to officiate as Chairperson and in case of a casual vacancy in the office of the Presiding Officer of the Debts Recovery Tribunal, the Chairperson of the Debts Recovery Appellate Tribunal shall have power

to appoint the Presiding Officer of another Debts Recovery Appellate Tribunal to officiate as Presiding Officer.

11. Salary and allowances.-- (1) The Chairman, Chairperson or President of the Tribunal, Appellate Tribunal or, as the case may be, Authority or the Presiding Officer of the Security Appellate Tribunal shall be paid a salary of Rs. 2,50,000 (fixed) and other allowances and benefits as are admissible to a Central Government officer holding posts carrying the same pay.

(2) The Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or, as the case may be, Member shall be paid a salary of Rs. 2,25,000 and shall be entitled to draw allowances as are admissible to a Government of India Officer holding Group 'A' post carrying the same pay.

(3) A Presiding Officer of the Debt Recovery Tribunal or a Presiding Officer of the Industrial Tribunal constituted by the Central Government shall be paid a salary of Rs. 1,44,200-2,18,200 and shall be entitled to draw allowances as are admissible to a Government of India officer holding Group 'A' post carrying the same pay.

(4) In case of a person appointed as the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member, as the case may be, is in receipt of any pension, the pay of such person shall be reduced by the gross amount of pension drawn by him.

12. Pension, Gratuity and Provident Fund -- (1) In case of a serving Judge of the Supreme Court, a High Court or a serving Judicial Member of the Tribunal or a member of the Indian Legal Service or a member of an organised Service appointed to the post of the Chairperson, Chairman, President or Presiding Officer of the Security Appellate Tribunal, the service rendered in the Tribunal, Appellate Tribunal or, as the case may be, Authority shall count for pension to be drawn in accordance with the Rules of the service to which he belongs and he shall be governed by the provisions of the General Provident Fund (Central Services) Rules, 1960 and the Contribution Pension System.

(2) In all other cases, the Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member shall be governed by the provisions of the Contributory Provident Fund (India) Rules, 1962 and the Contribution Pension System.

(3) Additional pension and gratuity shall not be admissible for service rendered in the Tribunal, Appellate Tribunal or, as the case may be, Authority.

13. Leave.-- (1) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member, Presiding Officer or a Member shall be entitled to thirty days of earned Leave for every year of service.

(2) Casual Leave not exceeding eight days may be granted to the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member or Technical Member, Presiding Officer or a Member in a calendar year.

(3) The payment of leave salary during leave shall be governed by Rule 40 of the Central Civil Services (Leave) Rules, 1972.

(4) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member shall be entitled to encashment of leave in respect of the earned Leave standing to his credit, subject to the condition that maximum leave encashment, including the amount received at the time of retirement from previous service shall not in any case exceed the prescribed limit under the Central Civil Service (Leave) Rules, 1972.

14. Leave sanctioning authority.-- (1) Leave sanctioning authority --

(a) for the Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer of the Debts Recovery Tribunal and Industrial Tribunal, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member shall be Chairman, Chairperson or as the case may be, President; and

(b) for the Chairman, Chairperson, Presiding Officer of Security Appellate Tribunal or President, shall be the Central Government, who shall also be sanctioning authority for Accountant Member, Administrative Member, Judicial Member, Expert Member or Member in case of absence of Chairman, Chairperson, Presiding Officer of Security Appellate Tribunal or President.

(2) The Central Government shall be the sanctioning authority for foreign travel to the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or a Member.

xxx

18. Other conditions of service.-- (1) The terms and conditions of service of a Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or Member with respect to which no express provision has been made in these rules, shall be such as are admissible to a Group 'A' Officer of the Government of India of a corresponding status.

(2) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or Member shall not practice before the Tribunal, Appellate Tribunal or Authority after retirement from the service of that Tribunal, Appellate Tribunal or, as the case may be, Authority.

(3) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or Member shall not undertake any arbitration work while functioning in these capacities in the Tribunal, Appellate Tribunal or Authority.

(4) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any person who has been a party to a proceeding before the Tribunal, Appellate Tribunal or, as the case may be, Authority:

Provided that nothing contained in this Rule shall apply to any employment under the Central Government or a State Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013).

xxx

20. Power to relax.-- Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order for reasons to be recorded in writing relax any of the provisions of these Rules with respect to any class or category of persons.

21. Interpretation.-- If any question arises relating to the interpretation of these rules, the decision of the Central Government thereon shall be final.

22. Saving.-- Nothing in these Rules shall affect reservations, relaxation of age limit and other concessions required to be provided for the Scheduled Castes, Scheduled Tribes, Ex-servicemen and other special categories of persons in accordance with the orders issued by the Central Government from time to time in this regard.

(A) Composition of Search-cum-Selection Committees

151. The composition of some of the Search-cum-Selection Committees, as provided in the Rules, have been reproduced below illustratively:

Industrial Tribunal:

Search-cum-Selection Committee for the post of the Presiding Officer,-

(i) a person to be nominated by the Central Government-chairperson;

(ii) Secretary to the Government of India, Ministry of Labour and Employment-member;

(iii) Secretary to the Government of India to be nominated by the Central Government-member;

(iv) two experts to be nominated by the Central Government-members.

Income Tax Appellate Tribunal:

(A) Search-cum-Selection Committee for the post of the President and Vice-President,-

(i) a sitting Judge of Supreme Court to be nominated by the Chief Justice of India-chairperson;

(ii) the President, Income-tax Appellate Tribunal-member; and

(iii) the Secretary to the Government of India, Ministry of Law and Justice (Department of Legal Affairs)-member.

(B) Search-cum-Selection Committee for the Accountant Member and Judicial Member,-

(i) a nominee of the Minister of Law and Justice-chairperson;

(ii) Secretary to the Government of India, Ministry of Law and Justice (Department of Legal Affairs)-member;

(iii) President of the Income tax Appellate Tribunal-member; and

(iv) such other persons, if any, not exceeding two, as the Minister of Law and Justice may appoint-member.

Central Administrative Tribunal:

(A) Search-cum-Selection Committee for the post of Chairman and Judicial Member,-

(i) Chief Justice of India or his nominee-chairperson;

(ii) Chairman of the Central Administrative Tribunal, Principal Bench-member;

(iii) Secretary to the Government of India, (Department of Personnel and Training)-member;

(iv) Secretary to the Government of India, Ministry of Law and Justice-member;

(v) one expert, to be nominated by the Central Government of India-member.

(B) Search-cum-Selection Committee for the post of Administrative Member,-

(a) a person to be nominated by the Central Government-chairperson;

(b) Chairman of the, Central Administrative Tribunal-member;

(c) Secretary to the Government of India, (Department of Personnel and Training)-member;

(d) Secretary to the Government of India, Ministry of Law and Justice-member;

(e) one expert, to be nominated by the Government of India-member.

152. Composition of a Search-cum-Selection Committee is contemplated in a manner whereby appointments of Member, Vice-President and President are predominantly made by nominees of the Central Government. A perusal of the Schedule to the Rules shows that save for token representation of the Chief Justice of India or his nominee in some Committees, the role of the judiciary is virtually absent.

153. We are in agreement with the contentions of the Learned Counsel for the Petitioner(s), that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain. The doctrine of separation of powers has been well recognised and re-interpreted by this Court as an important facet of the basic structure of the Constitution, in its dictum in ***Kesavananda Bharati v. State of Kerala*** MANU/SC/0445/1973 : (1973) 4 SCC 225, and several other later decisions. The exclusion of the Judiciary from the control and influence of the Executive is not limited to traditional Courts alone, but also includes Tribunals since they are formed as an alternative to Courts and perform judicial functions.

154. Clearly, the composition of the Search-cum-Selection Committees under the Rules amounts to excessive interference of the Executive in appointment of members and presiding officers of statutory Tribunals and would undoubtedly be detrimental to the independence of judiciary besides being an affront to the doctrine of separation of powers.

155. In ***R.K. Jain v. Union of India (supra)***, a three-Judge Bench of this Court asserted the need for independent system of appointment and administration of Tribunals to maintain public trust in the judiciary while expressing its agony over inefficacy of the working of Tribunals in the country. In addition to discussing the perils of providing direct statutory appeals to the Apex Court from the Tribunals, it was also suggested that there is an imminent need for reform in the manner of recruitment of members of Tribunals to maintain public faith in the institution of judiciary. Adjudication of disputes by technical members should be confined only to cases requiring specialised technical knowledge. [**Union of India** v. **Madras Bar Association** MANU/SC/0378/2010 : (2010) 11 SCC 1 and **Madras Bar Association** v. **Union of India and Anr.** MANU/SC/0875/2014 : (2014) 10 SCC 1 [Para 107 & 126]]

156. Subsequently, in its dictum in ***L. Chandra Kumar v. Union of India (supra)***, a seven-Judge Bench of this Court noted the observations in the Malimath Committee Report, discussing the administration of the Tribunals established Under Article 323-A and Article 323-B of the Constitution. The Malimath Committee Report had pointed out that a Tribunal constituted in substitution of any other Court should have similar standards of appointment, qualifications and conditions of service, to inspire the confidence of the public at large. Shortcomings in composition, tenure, conditions of service, etc. of the Members of Tribunals were also highlighted in the Report as reasons for increased intervention by the Executive in the working of judicial institutions. The relevant extract is reproduced below:

88. ...The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, "Alternative Modes and Forums for Dispute Resolution", deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up "Gram Nyayalayas", Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up Under Articles 323-A and 323-B of the Constitution. The relevant observations in this regard, being of considerable significance to our analysis, are extracted in full as under:

Functioning of Tribunals

8.63 Several tribunals are functioning in the country. Not all of them, however, have inspired confidence in the public mind. The reasons are not far to seek. The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.

8.64 Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decision of the State Administrative Tribunals are not appealable except Under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.

Tribunals -- Tests for Including High Court's Jurisdiction

8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach. When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such tribunal. (See S.P. Sampath Kumar v. Union of India, MANU/SC/0851/1987 : (1987) 1 SCC 124) The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals,

ought not to overlook these vital and important aspects. It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid....

157. We are of the view that the Search-cum-Selection Committee as formulated under the Rules is an attempt to keep the judiciary away from the process of selection and appointment of Members, Vice-Chairman and Chairman of Tribunals. This Court has been lucid in its ruling in ***Supreme Court Advocates-on-Record Assn. v. Union of India*** MANU/SC/1183/2015 : (2016) 5 SCC 1 ***(Fourth Judges Case)***, wherein it was held that primacy of judiciary is imperative in selection and appointment of judicial officers including Judges of High Court and Supreme Court. Cognisant of the doctrine of Separation of Powers, it is important that judicial appointments take place without any influence or control of any other limb of the sovereign. Independence of judiciary is the only means to maintain a system of checks and balances on the working of Legislature and the Executive. The Executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments.

158. We are in complete agreement with the analogy elucidated by the Constitution Bench in the ***Fourth Judges Case (supra)*** for compulsory need for exclusion of control of the Executive over quasi-judicial bodies of Tribunals discharging responsibilities akin to Courts. The Search-cum-Selection Committees as envisaged in the Rules are against the constitutional scheme inasmuch as they dilute the involvement of judiciary in the process of appointment of members of tribunals which is in effect an encroachment by the executive on the judiciary.

(B) Qualifications of members and presiding officers

159. The Rules also prescribe the qualifications for Chairperson, Vice-Chairperson, Member, etc. of both judicial and technical members. A bare perusal of the Rules reveals that while prescribing the qualifications of technical member, the prior dicta of this Court has been ignored by the Central Government inasmuch as the technical members are being appointed without any adjudicatory experience. The qualifications for appointment as technical member in the Customs, Excise and Service Tax Appellate Tribunal as prescribed under the Rules are illustratively reproduced below:

(1) A person shall not be qualified for appointment as President unless,-

(a) he is or has been a Judge of a High Court; or

(b) he is the member of the Appellate Tribunal.

(2) A person shall not be qualified for appointment as a Judicial Member, unless,-

(a) he has for at least ten years held a judicial office in the territory of India; or

(b) he has been a member of the Indian Legal Service and has held a post in Grade-I of that Service or any equivalent or higher post for at least three years; or

(c) he has been an advocate for at least ten years.

(3) A person shall not be qualified for appointment as a Technical Member unless he has been a member of the Indian Revenue Service (Customs and Central Excise Service Group 'A') and has held the post of Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years.

160. In addition to this, there has been a blatant dilution of judicial character in appointments whereby candidates without any judicial experience are prescribed to be eligible for adjudicatory posts such as that of the Presiding Officer. Illustratively, the qualifications for Presiding Officer in Industrial Tribunal as specified in the Rules may be noticed below:

A person shall not be qualified for appointment as Presiding Officer, unless he,-

(a) is, or has been, or is qualified to be, a Judge of a High Court; or

(b) he has, for a period of not less than three-years, been a District Judge or an Additional District Judge; or

(c) is a person of ability, integrity and standing, and having special knowledge of, and professional experience of not less than twenty years in economics, business, commerce, law, finance, management, industry, public affairs, administration, labour relations, industrial disputes or any other matter which in the opinion of the Central Government is useful to the Industrial Tribunal.

161. The contentions of the Learned Counsel for Petitioner(s) are, therefore, duly accepted by this Court insofar as it is contended that the Rules have an effect of dilution of the judicial character in adjudicatory positions. It has been repeatedly ruled by this Court in a catena of decisions that judicial functions cannot be performed by technical members devoid of any adjudicatory experience.

162. In ***Madras Bar Assn. v. Union of India (supra)***, a five-judge Bench of this Court reiterated the urgent need to monitor the pressure and/or influence of the executive on the Members of the Tribunals. It was asserted that any Tribunal which sought to replace the High Court must be no less independent or judicious in its composition. It was also clarified that the Members of the Tribunal, replacing any Court, including the High Court must possess expertise in law and shall have appropriate legal experience. Even though Parliament can transfer jurisdiction from the traditional Courts to any other analogous Tribunal, the Tribunal must be manned by members having qualifications equivalent to that of the Court from which adjudicatory function is transferred. Hence, any adjudication transferred to a Technical or Non-Judicial member is a clear act of dilution and an encroachment upon the independence of judiciary. It was further ruled by this Court that even though the legislature has the powers to reorganise or prescribe qualifications

for members of Tribunals, it is open for this Court to exercise "judicial review" of the prescribed standards, if the adjudicatory standards are adversely affected. The decision of this Court read as follows:

105. ... It was also sought to be asserted that the tribunal constituted under the enactment being a substitute of the High Court ought to have been constituted in a manner that it would be able to function in the same manner as the High Court itself. Since insulation of the judiciary from all forms of interference even from the coordinate branches of the Government was by now being perceived as a basic essential feature of the Constitution, it was felt that the same independence from possibility of executive pressure or influence needed to be ensured for the Chairman, Vice-Chairman and Members of the Administrative Tribunal. In recording its conclusions, even though it was maintained that "judicial review" was an integral part of the "basic structure" of the Constitution yet it was held that Parliament was competent to amend the Constitution, and substitute in place of the High Court another alternative institutional mechanism or arrangement. This Court, however cautioned that it was imperative to ensure that the alternative arrangement was no less independent and no less judicious than the High Court (which was sought to be replaced) itself.

xxx

107. In Union of India v. Madras Bar Assn. [MANU/SC/0378/2010 : (2010) 11 SCC 1], all the conclusions/propositions narrated above were reiterated and followed, whereupon the fundamental requirements which need to be kept in mind while transferring adjudicatory functions from courts to tribunals were further crystallised. It came to be unequivocally recorded that tribunals vested with judicial power (hitherto before vested in, or exercised by courts), should possess the same independence, security and capacity, as the courts which the tribunals are mandated to substitute. The members of the tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. Technical members can be appointed to tribunals where technical expertise is essential for disposal of matters, and not otherwise. Therefore it was held that where the adjudicatory process transferred to tribunals did not involve any specialised skill, knowledge or expertise, a provision for appointment of technical members (in addition to, or in substitution of judicial members) would constitute a clear case of delusion and encroachment upon the independence of the judiciary and the "rule of law". The stature of the members, who would constitute the tribunal, would depend on the jurisdiction which was being transferred to the tribunal. In other words, if the jurisdiction of the High Court was transferred to a tribunal, the stature of the members of the newly constituted tribunal, should be possessed of qualifications akin to the Judges of the High Court. Whereas in case, the jurisdiction and the functions sought to be transferred were being exercised/performed by District Judges, the Members appointed to the tribunal should be possessed of equivalent qualifications and commensurate stature of District Judges. The conditions of service of the members should be such that they are in a position to discharge their duties in an independent and impartial manner. The manner of their appointment and removal including their transfer, and tenure of their employment, should have adequate protection so as to be shorn of legislative and executive interference. The functioning of the tribunals, their infrastructure and responsibility of fulfilling their administrative requirements ought to be assigned to the Ministry of Law and Justice. Neither the tribunals nor their members, should be required to seek any facilities from the parent ministries or department

concerned. Even though the legislature can reorganise the jurisdiction of judicial tribunals, and can prescribe the qualifications/eligibility of members thereof, the same would be subject to "judicial review" wherein it would be open to a court to hold that the tribunalisation would adversely affect the adjudicatory standards, whereupon it would be open to a court to interfere therewith. Such an exercise would naturally be a part of the checks and balances measures conferred by the Constitution on the judiciary to maintain the Rule of "separation of powers" to prevent any encroachment by the legislature or the executive.

xxx

113.2. ...The power of discharging judicial functions which was exercised by members of the higher judiciary at the time when the Constitution came into force should ordinarily remain with the court, which exercised the said jurisdiction at the time of promulgation of the new Constitution. But the judicial power could be allowed to be exercised by an analogous/similar court/tribunal with a different name. However, by virtue of the constitutional convention while constituting the analogous court/tribunal it will have to be ensured that the appointment and security of tenure of Judges of that court would be the same as of the court sought to be substituted. This was the express conclusion drawn in Hinds case [Hinds v. R., 1977 AC 195]. In Hinds case, it was acknowledged that Parliament was not precluded from establishing a court under a new name to exercise the jurisdiction that was being exercised by members of the higher judiciary at the time when the Constitution came into force. But when that was done, it was critical to ensure that the persons appointed to be members of such a court/tribunal should be appointed in the same manner and should be entitled to the same security of tenure as the holder of the judicial office at the time when the Constitution came into force. Even in the treatise Constitutional Law of Canada by Peter W. Hogg, it was observed: if a province invested a tribunal with a jurisdiction of a kind, which ought to properly belong to a Superior, District or County Court, then that court/tribunal (created in its place), whatever is its official name, for constitutional purposes has to, while replacing a Superior, District or County Court, satisfy the requirements and standards of the substituted court. This would mean that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same manner, and till its members are entitled to the same conditions of service as were available to the Judges of the court sought to be substituted. In the judgments under reference it has also been concluded that a breach of the above constitutional convention could not be excused by good intention (by which the legislative power had been exercised to enact a given law). We are satisfied, that the aforesaid exposition of law is in consonance with the position expressed by this Court while dealing with the concepts of "separation of powers", the "rule of law" and "judicial review". In this behalf, reference may be made to the judgments in L. Chandra Kumar case, as also, in Union of India v. Madras Bar Assn. (2010). Therein, this Court has recognised that transfer of jurisdiction is permissible but in effecting such transfer, the court to which the power of adjudication is transferred must be endured with salient characteristics, which were possessed by the court from which the adjudicatory power has been transferred...

XXX

128. There seems to be no doubt, whatsoever, that the Members of a court/tribunal to which adjudicatory functions are transferred must be manned by Judges/members whose stature and

qualifications are commensurate to the court from which the adjudicatory process has been transferred. This position is recognised the world over. The constitutional conventions in respect of Jamaica, Ceylon, Australia and Canada, on this aspect of the matter have been delineated above. The opinion of the Privy Council expressed by Lord Diplock in Hinds case, has been shown as being followed in countries which have Constitutions on the Westminster model. The Indian Constitution is one such constitution. The position has been clearly recorded while interpreting Constitutions framed on the above model, namely, that even though the legislature can transfer judicial power from a traditional court to an analogous court/tribunal with a different name, the court/tribunal to which such power is transferred should be possessed of the same salient characteristics, standards and parameters, as the court the power whereof was being transferred. It is not possible for us to accept that Accountant Members and Technical Members have the stature and qualification possessed by the Judges of High Courts.

163. We concur with the above which reiterates the consistent view taken by this Court in a number of cases. It is also a well-established principle followed throughout in various other jurisdictions as well, that wherever Parliament decides to divest the traditional Courts of their jurisdiction and transfer the lis to some other analogous Court/Tribunal, the qualification and acumen of the members in such Tribunal must be commensurate with that of the Court from which the adjudicatory function is transferred. Adjudication of disputes which was originally vested in Judges of Courts, if done by technical or non-judicial member, is clearly a dilution and encroachment on judicial domain. With great respect, Parliament cannot divest judicial functions upon technical members, devoid of the either adjudicatory experience or legal knowledge.

164. It is necessary to notice few other changes brought about by the new Rules. Firstly, most Tribunals were earlier headed by judicial members. With the exception of some Tribunals like the Debt Recovery Tribunal, presiding officers were retired judges either of the Supreme Court or of High Courts. Under the present formulation of Rules, the Central Government has widened eligibility by making persons who otherwise have no judicial or legal experience but if they are otherwise of *"ability, integrity and standing, and having special knowledge of, and professional experience of"* certain specialised subjects *"which in the opinion of the Central Government is useful"* eligible for being appointed as presiding officers. Further, others who are *"qualified to be"* Supreme Court and High Court judges can also head Tribunals. A perusal of Articles 124(3) and 217(2) of the Constitution shows that it specifies only the very minimum prerequisites for appointment as a judge of the Constitutional Courts. Instead, a predominant portion of the consideration for appointment to this Court or to the High Courts is uncodified and is based on a holistic consideration of the practice, legal acumen, expertise and character of Advocates. The effect of the new criteria would be to make every second advocate eligible, in effect, vastly diluting the qualifications for appointment. The characteristics necessary of such people are also vague which resultantly increases executive discretion. It thus affects both judicial independence as well as capability and competency of these Tribunals. The power/discretion vested to specify qualifications and decide who should man the Tribunals has to be exercised keeping in view the larger public interest and the same must be just, fair and reasonable and not vague or imprecise.

165. At this juncture it must also be reiterated that equality can only be amongst equals, and that it would be impermissible to treat unequals equally on the basis of undefined contours of 'Uniformity'. A Tribunal to have the character of a quasi- judicial body and a legitimate

replacement of Courts, must essentially possess a dominant judicial character through their members/presiding officers. It was observed in ***Madras Bar Association (2010)*** **(supra)** that it is a fundamental prerequisite for transferring adjudicatory functions from Courts to Tribunals that the latter must possess the same capacity and independence as the former, and that members as well as the presiding officers of Tribunals must have significant judicial training and legal experience. Further, knowledge, training and experience of members/presiding officers of a Tribunal must mirror, as far as possible, that of the Court which it seeks to substitute. Illustratively, the composition of Appellate Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, delineating this incongruity is reproduced below for reference:

Appellate Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976

(1) The Chairman of the Appellate Tribunal shall be a person who is or has been or is qualified to be a Judge of a Supreme Court or a Judge of a High Court.

(2) The Member of the Appellate Tribunal shall be a person not below the rank of Joint Secretary to the Government of India.

166. It appears to us to be incomprehensible as to how both Supreme Court and High Court judges can be eligible for the same post when their experience, exposure, knowledge and stature under the Constitution are vastly different and the two do not form one homogenous class. There can be no forced equality between the two. Doing so would be suggestive of non-application of mind. Such an exercise would merit judicial interference.

167. Further, dispensation of justice requires that the adjudicating institution command respect with the populace. Anomalous situations created by allowing High Court judges to be appointed to a position occupied earlier by a Supreme Court judge, affects the prestige of the Judiciary as an institution.

168. The stature of the people manning an institution lends credibility and colour to the institution itself. There is a perceptible signalling effect in having retired Supreme Court justices as presiding officers of a particular Tribunal of National importance. The same instills an inherent fairness, dignity and exalted status in the Tribunal. Permitting such institutions to be also occupied by persons who have not manned an equivalent position or those with lesser judicial experience, does not bode well for the Tribunal besides discouraging competent people from offering their services. On the same analogy, it would be an anathema to say that High Court judges and District Court judges can both occupy the same position in a Tribunal.

(C) Constitutionality of procedure of removal

169. It is clear from the Scheme contemplated under the Rules that the government has significantly diluted the role of the Judiciary in appointment of judicial members. Further, in many Tribunals like the NGT, the role of the Judiciary in appointment of non-judicial members has entirely been taken away. Such a practice violates the Constitutional scheme and the dicta of this Court in various earlier decisions already referred to. It is also important to note that in many

Tribunals like the National Green Tribunal where earlier removal of members or presiding officer could only be after an enquiry by Supreme Court Judges and with necessary consultation with the Chief Justice of India, under the present Rules it is permissible for the Central Government to appoint an enquiry committee for removal of any presiding officer or member on its own. The Rules are not explicit on who would be part of such a Committee and what would be the role of the Judiciary in the process. In doing so, it significantly weakens the independence of the Tribunal members. It is well understood across the world and also under our Constitutional framework that allowing judges to be removed by the Executive is palpably unconstitutional and would make them amenable to the whims of the Executive, hampering discharge of judicial functions.

170. In ***Madras Bar Association (2014)*** (supra), this Court held that:

...it was acknowledged that Parliament was not precluded from establishing a court under a new name to exercise the jurisdiction that was being exercised by members of the higher judiciary at the time when the Constitution came into force. But when that was done, it was critical to ensure that the persons appointed to be members of such a court/tribunal should be appointed in the same manner and should be entitled to the same security of tenure as the holder of the judicial office at the time when the Constitution came into force. Even in the treatise Constitutional Law of Canada by Peter W. Hogg, it was observed: if a province invested a tribunal with a jurisdiction of a kind, which ought to properly belong to a Superior, District or Country Court, then that court/tribunal (created in its place), whatever is its official name, for constitutional purposes has to, while replacing a Superior, District or Country Court, satisfy the requirements and standards of the substituted court. This would mean that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same manner, and till its members are entitled to the same conditions of service as were available to the Judges of the court sought to be substituted.

171. It is essential that the same be observed in letter and spirit and we therefore reiterate that Members and Presiding Officers of Tribunals cannot be removed without either the concurrence of the Judiciary or in the manner specified in the Constitution for Constitutional Court judges.

(D) Term of Office and Maximum Age

172. Various enactments providing for appointment and other incidentals of members have been brought to our notice to demonstrate an apparent disparity in age of superannuation of Members and Chairpersons/Presiding Officers of different Tribunals. Illustratively, Section 14D of the Telecom Regulatory Authority of India Act, 1997 provides a Member of Telecom Disputes Settlement and Appellate Tribunal shall not hold office after attaining the age of sixty-five years, whereas, Section 55(1) of the Consumer Protection Act, 2019 provides that a Member of the National Consumer Disputes Redressal Commission shall not hold office after attaining the age of sixty-seven years. This difference in superannuation age may lead to an undesirable situation wherein a member of a Tribunal with low retirement age can be reappointed in another Tribunal with a higher retirement age.

173. The Constitution of India doesn't differentiate between High Courts in terms of conditions of service of judges and prescribes a uniform age of superannuation for judges of all High Courts.

Conforming to the principle, as held in earlier judgments of this Court, the Tribunals should have similar standards of appointment and service as that of the Court it is substituting. There must, therefore, be a uniform age of superannuation for all members in all the Tribunals.

174. The only differentiation in age of superannuation provided by the Constitution is that between judges of High Courts and Supreme Court. We find the reason for the same in the intention of the Constituent Assembly which aimed to incorporate the experience and knowledge of a High Court Judge when elevated as a Supreme Court judge. Hence, to utilise the experience and knowledge acquired during tenure as a judge of High Court, Supreme Court judges are provided with higher age of superannuation than the judges of High Court. Similarly, the difference between age of superannuation of Chairman/Presiding Officer and Member of a Tribunal is because Chairman/Presiding Officer is not a promotional post and thus cannot be equated with that of the Member. The post of Chairman/Presiding Officer requires judicial and administrative experience of at least that of the judge of a High Court which is evident from the statutes prescribing them.

175. Another oddity which was brought to our notice is that there has been an imposition of a short tenure of three years for the members of the Tribunals as enumerated in the Schedule of Tribunals Rules, 2017. A short tenure, coupled with provision of routine suspensions pending enquiry and lack of immunity thereof increases the influence and control of the Executive over Members of Tribunals, thus adversely affecting the impartiality of the Tribunals. Furthermore, prescribing such short tenures precludes cultivation of adjudicatory experience and is thus injurious to the efficacy of Tribunals.

176. This Court criticised the imposition of short tenures of members of Tribunals in ***Union of India v. Madras Bar Association, (2010)*** (supra) and a longer tenure was recommended. It was observed that short tenures also discourage meritorious members of Bar to sacrifice their flourishing practice to join a Tribunal as a Member for a short tenure of merely three years. The tenure of Members of Tribunals as prescribed under the Schedule of the Rules is anti-merit and attempts to create equality between unequals. A tenure of three years may be suitable for a retired Judge of High Court or the Supreme Court or even in case of a judicial officer on deputation. However, it will be illusory to expect a practising advocate to forego his well-established practice to serve as a Member of a Tribunal for a period of three years. The legislature intended to incorporate uniformity in the administration of Tribunal by virtue of Section 184 of Finance Act, 2017. Nevertheless, such uniformity cannot be attained at the cost of discouraging meritorious candidates from being appointed as Members of Tribunals.

177. Additionally, the discretion accorded to the Central or State Government to reappoint members after retirement from one Tribunal to another discourages public faith in justice dispensation system which is akin to loss of one of the key limbs of the sovereign. Additionally, the short tenure of Members also increases interference by the Executive jeopardising the independence of judiciary.

178. In the light of the discussion as aforesaid, we hold that the Rules would require a second look since the extremely short tenure of the Members of Tribunals is anti-merit and has the effect of discouraging meritorious candidates to accept posts of Judicial Members in Tribunals.

(E) Contradictions in the Rules

179. On the contentions of parties and in the light of the aforementioned discussion, the Bench has observed following contradictions in the Rules:

(a) There is an inconsistency within the Rules with regard to the tenure prescribed for the Members of Tribunals insofar as a fixed tenure of three years for both direct appointments from the Bar and appointment of retired judicial officers or judges of High Court or Supreme Court. It is also discriminatory to the extent that it attempts to create equality between unequal classes. The tenure of Members, Vice-Chairman, Chairman, etc. must be increased with due consideration to the prior decisions of the Court.

(b) The difference in the age of superannuation of the Members, Vice-Chairmen and Chairmen, as formulated in the Rules is contrary to the objectives of the Finance Act, 2017 viz., to attain uniformity in the composition of the Tribunal framework. There should be a uniform age of superannuation for Members, Vice-Chairmen, Chairmen, etc. in all Tribunals.

(c) Rule 4(2) of the Rules providing that the Secretary to the Government of India in the Ministry or Department under which the Tribunal is constituted shall be the convener of the Search-cum-Selection Committee, is in direct violation of the doctrine of Separation of Powers and thus contravenes the basic structure of the Constitution. Corollary to the dictum of this Court in the ***Fourth Judges Case***, judicial dominance in appointment of members of judiciary cannot be diluted by the Executive.

(d) Rule 7 accords unwarranted discretion to the Central Government insofar as it merely directs and not mandates the Central Government to consider the recommendation of Committee for removal of a Member of a Tribunal. The Central Government shall mandatorily consider the recommendation of the Committee before removal of any Member of Tribunal. Furthermore, the proviso to Rule 7 creates an unjust classification between National Company Law Appellate Tribunal (NCLAT) and other fora inasmuch as the removal of Chairperson or member of NCLAT alone is to be in consultation with the Chief Justice of India.

(e) Moral turpitude is a term well defined by this Court in numerous decisions. Rule 7(b) cannot be allowed to survive as it allows the Executive to interpret the meaning of 'moral turpitude', which is an encroachment on the judicial domain.

(f) The power of relaxation of Rules with respect to any class of persons shall be vested with the Search-cum-Selection Committee and not with the Central Government as provided Under Rule 20. As ruled by this Court earlier in ***Madras Bar Association (2014) (supra)***, the Central Government cannot be allowed to have administrative control over the Judiciary without subverting the doctrine of separation of powers.

ISSUE IV: WHETHER THERE SHOULD BE A SINGLE NODAL AGENCY FOR ADMINISTRATION OF ALL TRIBUNALS?

180. Ld. Amicus highlighted an apparent problem persisting in the current Tribunal framework in India. Tribunals established under different Central and State enactments are usually administered by their sponsoring or parent Ministry or concerned department. Thus, when Tribunals or members thereof have to seek financial, administrative or any other facility from a department who is also the litigant before them, their fairness or independence is likely to be compromised. Such an anomalous situation can only be remedied by the establishment of a single nodal agency, overseeing the entire Tribunal system in the country, bringing all such Tribunals to parity.

181. This Court in ***L. Chandra Kumar v. Union of India*** **(supra)**, envisaged the administration of the entire Tribunal Framework in the country to be monitored by a single nodal agency/ministry. It was observed not to be advisable to allow supervision of a Tribunal by a department/ministry which is a party before it. This Court recommended constitution of an independent agency by the concerned Ministry, to oversee the working of Tribunals. The independent agency when constituted, may also prescribe a uniform code for appointment, qualification, condition of service, manner of allocation of fund, etc. of the Tribunals. This will, the Court suggested, minimise the influence of the parent ministry of the Tribunal, in addition to ensuring uniformity in the entire Tribunal framework. The relevant excerpt may be reproduced below:

96. ...We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

182. In ***Union of India v. Madras Bar Association (2010)*** (supra), a five-Judge Constitution Bench of this Court had the opportunity to discuss the Tribunals' structure as prevalent in the United Kingdom. It was noted that United Kingdom has a variety of dispute redressal mechanisms which necessitated constitution of numerous committees to analyse the functioning of Tribunals. However, this Court primarily referred to the Leggatt Committee Report, constituted to undertake the review of delivery of justice through tribunals. After analysing the success story of Tribunals in U.K., this Court noticed a contrast in India and expressed its dissatisfaction with respect to the functioning of Tribunals in India, observing:

70. But in India, unfortunately tribunals have not achieved full independence. The Secretary of the "sponsoring department" concerned sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependent on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide

for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by L. Chandra Kumar are brought about, tribunals in India will not be considered as independent.

183. This Court had earlier noted the statements of the Ld. Attorney General vide order dated 27 March 2019 in *W.P. (C) No. 267/2012*, wherein it was submitted that the Ministry of Law is already overburdened and cannot effectively perform the supervisory function, as a single nodal Ministry, for all the Tribunals, as was earlier suggested by this Court.

184. What appears to be of paramount importance is that every Tribunal must enjoy adequate financial independence for the purpose of its day to day functioning including the expenditure to be incurred on (a) recruitment of staff; (b) creation of infrastructure; (c) modernisation of infrastructure; (d) computerisation; (e) perquisites and other facilities admissible to the Presiding Authority or the Members of such Tribunal. It may not be very crucial as to which Ministry or Department performs the duties of Nodal Agency for a Tribunal, but what is of utmost importance is that the Tribunal should not be expected to look towards such Nodal Agency for its day to day requirements. There must be a direction to allocate adequate and sufficient funds for each Tribunal to make it self-sufficient and self-sustainable authority for all intents and purposes. The expenditure to be incurred on the functioning of each Tribunal has to be necessarily a charge on the Consolidated Fund of India. Therefore, hitherto, the Ministry of Finance shall, in consultation with the Nodal Ministry/Department, shall earmark separate and dedicated funds for the Tribunals. It will not only ensure that the Tribunals are not under the financial control of the Department, who is a litigant before them, but it may also enhance the public faith and trust in the mechanism of Tribunals.

ISSUE V: WHETHER THERE IS A NEED FOR CONDUCTING A JUDICIAL IMPACT ASSESSMENT OF ALL TRIBUNALS IN INDIA?

185. It was brought to our notice by the Learned Counsel for the Petitioner(s) that there is an imminent need for conducting a Judicial Impact Assessment of all the Tribunals referable to the Finance Act, 2017. It was argued that neither the Legislature nor the Executive had conducted any assessment to analyse the adverse repercussions of the changes brought in the framework of Tribunals in India, if any, by the legislative exercises carried out from time to time.

186. The contentions of the Petitioner(s) cannot be said to be unfounded. The three limbs of the State viz., the Legislature, the Executive and the Judiciary are so intertwined that there is a direct impact of the action of one limb on another. Every legislation results in an immediate increase in the number of pending litigations. It is the responsibility of the other branches of the State to be conscious of the limitations of the Judiciary in keeping pace with increasing pendency of litigation. Care has to be taken to ensure that while enhancing the efficacy of legislations the accrual of resultant litigation is minimal.

187. The American principle of 'Judicial Impact Assessment' was first borrowed by this Court in its dictum in ***Salem Advocate Bar Assn. (II) v. Union of India*** MANU/SC/0450/2005 : (2005) 6 SCC 344, whereby it was observed that it is imperative for the Legislature to perform a Judicial

Impact Assessment of the enactment passed to assess its ramifications on the judiciary. This Court had directed for a committee to be constituted to assess the need for Judicial Impact Assessment in the Indian context. Pursuant thereto the *Jagannadha Rao Committee Report* was submitted. The *Report* suggested that by way of Judicial Impact Assessment, the legislature must analyse the budgetary requirement of the staff that would require to be created by the statute and additional expenditure arising out of the new cases consequent to the enactment. Further, the financial memorandum, as prepared by the legislature, must specifically include the number of civil and criminal cases expected to arise from the new enactment, requirement of more judges and staff for adjudication of these cases and the necessary infrastructure. The requisite paragraphs of the decision in ***Salem Advocate Bar Assn.*** **(supra)** are reproduced as follows:

49. The Committee has also suggested that:

Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such judicial impact assessment has never been made by any legislature or by Parliament in our country.

50. Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report to this Court within four months.

188. In the present case, we are of the view that the legislature has not conformed to the opinion of this Court with respect to 'Judicial Impact Assessment' and thus, has not made any attempt to assess the ramifications of the Finance Act, 2017. It can be legitimately expected that the multifarious amendments in relation to merger and reorganisation of Tribunals may result in massive increase in litigation which, in absence of adequate infrastructure, or budgetary grants, will overburden the Judiciary.

189. In the fitness of things, we deem it appropriate to direct the Union of India to carry out financial impact assessment in respect of all the Tribunals referable to Sections 158 to 182 of the Finance Act, 2017 and undertake an exercise to assess the need based requirements and make available sufficient resources for each Tribunal established by the Parliament.

ISSUE VI: WHETHER JUDGES OF TRIBUNALS SET UP BY ACTS OF PARLIAMENT UNDER ARTICLES 323-A AND 323-B OF THE CONSTITUTION CAN BE EQUATED IN 'RANK' AND 'STATUS' WITH CONSTITUTIONAL FUNCTIONARIES?

190. A concerning trend has been brought to the notice of this Court by the Learned Counsels. The Union has, in addition to equal pay and perks, accorded status equivalent to that of Supreme Court and High Court judges to Chairmen/Presidents of various Tribunals and authorities.

191. It is apposite to refer to the 'Warrant of Precedence' which delineates the sequential hierarchy of functionaries which is used most often for formal ceremonial arrangements. Such enhancement of the status of certain officials is sans any rationale and falls squarely outside the Constitutional scheme. Although seemingly pedantic, according status equivalent or higher than Constitutional functionaries by executive order or by legislation strikes at the essence of the Constitutional dignity and stature accorded to such authorities. The absurdity of the situation can be demonstrated clearly if tomorrow a bureaucrat is accorded higher status than that of a Minister, who is the head of his department. Such designations do not have a personal value but rather represent the framework and structure of governance envisaged. Illogical changes or altercations hence disturbs the fabric of hierarchy and discipline necessary for the effective functioning of the State.

192. A similar situation arose in ***T.N. Seshan v. Union of India*** MANU/SC/2271/1995 : (1995) 4 SCC 611 wherein the Government of India had by ordinance accorded pay and perks equivalent to that of Supreme Court judges to the Chief Election Commissioner. Consequently, a demand was made for according rank in the Warrant of Precedence equivalent to that of Supreme Court judges. A five-judge bench of this Court held that mere equality in conditions of service to that of a Supreme Court judge cannot confer equal status to such other functionaries. It was noted that:

34. One of the matters to which we must advert is the question of the status of an individual whose conditions of service are akin to those of the Judges of the Supreme Court. This seems necessary in view of the reliance placed by the CEC on this aspect to support his case. In the instant case some of the service conditions of the CEC are akin to those of the Supreme Court Judges, namely, (i) the provision that he can be removed from office in like manner and on like grounds as a Judge of the Supreme Court and (ii) his conditions of service shall not be varied to his disadvantage after appointment. So far as the first is concerned instead of repeating the provisions of Article 124(4), the draftsman has incorporated the same by reference. The second provision is similar to the proviso to Article 125(2). But does that confer the status of a Supreme Court Judge on the CEC? It appears from the D.O. No. 193/34/92 dated 23-7-1992 addressed to the then Home Secretary, Shri Godbole, the CEC had suggested that the position of the CEC in the Warrant of Precedence needed reconsideration. This issue he seems to have raised in his letter to the Prime Minister in December 1991. It becomes clear from Shri Godbole's reply dated 25-7-1992, that the CEC desired that he be placed at No. 9 in the Warrant of Precedence at which position the Judges of the Supreme Court figured. It appears from Shri Godbole's reply that the proposal was considered but it was decided to maintain the CEC's position at No. 11 along with the Comptroller and Auditor General of India and the Attorney General of India. However, during the course of the hearing of these petitions it was stated that the CEC and the Comptroller and Auditor General of India were thereafter placed at No. 9-A. At our request the learned Attorney General placed before us the revised Warrant of Precedence which did reveal that the CEC had climbed to position No. 9-A along with the Comptroller and Auditor General of India. Maintenance of the status of Judges of the Supreme Court and the High Courts is highly desirable in the national interest. We mention this because of late we find that even personnel belonging to other fora claim equation with High Court and Supreme Court Judges merely because certain jurisdictions earlier exercised by those Courts are transferred to them not realising the distinction between constitutional and statutory functionaries. We would like to impress on the Government that it should not confer equivalence or interfere with the Warrant of Precedence, if it is likely to affect the position of High Court and Supreme Court Judges, however pressing the demand may be, without first seeking the views of

the Chief Justice of India. We may add that Mr. G. Ramaswamy, learned Counsel for the CEC, frankly conceded that the CEC could not legitimately claim to be equated with Supreme Court Judges. We do hope that the Government will take note of this and do the needful.

193. In light of the unequivocal assertions of a co-ordinate bench of this Court, there can be no doubt that executive action cannot confer status equivalent to that of either Supreme Court or High Court judges on any member or head of any Tribunal or other judicial fora.

194. Furthermore, that even though manned by retired judges of High Courts and the Supreme Court, such Tribunals established Under Article 323-A and 323-B of the Constitution cannot seek equivalence with High Courts or the Supreme Court. Once a judge of a High Court or Supreme Court has retired and he/she no longer enjoys the Constitutional status, the statutory position occupied by him/her cannot be equated with the previous position as a High Court or a Supreme Court judge. The rank, dignity and position of Constitutional judges is hence sui generis and arise not merely by their position in the Warrant of Precedence or the salary and perquisites they draw, but as a result of the Constitutional trust accorded in them. Indiscriminate accordance of status of such Constitutional judges on Tribunal members and presiding officers will do violence to the very Constitutional Scheme
[8].

195. This Court in ***L. Chandra Kumar*** (supra) observed that Tribunals are not substitutes of Superior Courts and are only supplemental to them. Hence, the status of members of such Tribunals cannot be equated with that of the sitting judges of Constitutional Courts else, as V.R. Krishna Iyer, J. aptly pointed in his Article titled 'Why Stultify Judges' Status?', "Creating deemed Justices of High Courts with equal status and salaries suggests an oblique bypassing of the Constitution....". The relevant extract of ***L. Chandra Kumar*** (supra) is reproduced as follows:

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional power of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts....

196. We would further point out that the Warrant of Precedence is a mere self-serving executive decision and not a law in itself. It is a reflection of the inter-se hierarchy amongst functionaries for the purposes of discharge of important ceremonial functions and other State duties. It cannot either confer rights or alter the status accorded by law. It would further be clearly abhorrent to use such an instrument to undermine the order of precedence clearly accorded under the Constitution.

197. It is hence essential that the Union of India, takes note of the observations of this Court herein and abide by the spirit of the Constitution in respecting the aforementioned difference between constitutional functionaries and statutory authorities. It is important for the Union of India to ensure that judges of High Courts and the Supreme Court are kept on a separate pedestal distanced from any other Tribunal or quasi-judicial Authority.

ISSUE VII: WHETHER DIRECT STATUTORY APPEALS FROM TRIBUNALS TO THE SUPREME COURT OUGHT TO BE DETOURED?

198. During the course of arguments, various facets were highlighted before this Court, including the soaring pendency of cases and non-adherence of directions of this Court in earlier judgments requiring reconsideration by the legislature of the increasing trend of providing direct statutory appeals to this Court against orders of Tribunals.

199. As discussed earlier, Tribunalisation has increased at a rapid pace in the past few decades in our country. Since establishment of the ITAT during the pre-independence era, the number of tribunals has now increased to several dozens. The Constitution of India (42nd Amendment) Act, 1976 provided for setting up of Administrative Tribunals through Article 323A as well as other Tribunals Under Article 323B. These aforementioned provisions in the Constitution were construed by the legislature in a manner resulting in the ousting of jurisdiction of all Courts except the Supreme Court Under Article 136. Later, in ***L. Chandrakumar (supra)***, this Court very aptly held that judicial review by High Courts Under Article 226 is a part of the basic structure and hence could not be ousted by any legislation or even Constitutional amendment. Moreover, this Court in ***L. Chandrakumar (supra)*** and later in ***Madras Bar Association (2014) (supra)*** and ***Gujarat Urja Vikas Ltd. (supra)*** reiterated the urgent need to do away with increasingly common provisions in statutes providing direct statutory appeal to this Court, which as discussed elaborately below poses significant problems in the administration of justice and is also against the Constitutional scheme.

200. Since the aforesaid issue has not been directly raised by the Petitioners and only a passing reference has been made, it is necessary to delineate whether providing such appeals to this Court is in consonance with the three-tier Judicial system as established under our Constitution.

201. An examination of the jurisdiction of the Supreme Court as envisaged under the Constitution must be made. Such jurisdiction bestowed upon this Court by the Constitution can be broken into three limbs: appellate, original and advisory. A brief description of these jurisdictions is provided below:

<u>Original jurisdiction:</u>

(i) Writ jurisdiction Under Article 32.

(ii) Disputes of election to President/Vice-President Under Article 71.

(iii) Inter-state or State-Centre disputes Under Article 131.

(iv) Transfer cases Under Articles 139 and 139A.

(v) Contempt of Court Under Article 145.

<u>Appellate jurisdiction:</u>

(i) Appeals against orders of High Courts with certificate of there being substantial constitutional questions Under Article 132.

(ii) Appeals against orders of High Courts in civil cases with certificate that there is substantial question of general importance or that the matter needs to be decided by the HC Under Article 133.

(iii) Appeals against orders of High Courts in criminal cases against award of death penalty in the first instance by the HC, either on appeal or in original trial Under Article 134.

(iv) All other cases appealable to the Federal Court before commencement of the Constitution Under Article 135.

(v) Discretionary power to grant special leave to appeal any order by any court or tribunal Under Article 136.

Advisory jurisdiction:

(i) Presidential reference Under Article 143.

(ii) Reference on removal of Public Service Commission member Under Article 317.

202. The ambit of appellate jurisdiction is clear from a perusal of Articles 132 to 136 of the Constitution. Article 132 provides that an appeal may be instituted before the Supreme Court against any order of the High Court where a substantial question of law arises for consideration. Article 133(3) specifies that there shall be no appeal from the order of a single judge of the High Court unless the contrary is provided through a law by the Parliament. Further, Article 134 delineates the jurisdiction of the Supreme Court in criminal matters restricting it primarily to cases where the High Court has awarded death sentence either in trial before it or in reversal of an earlier acquittal by the trial court. In addition to this, Article 134(2) is lucid in its wording to provide that in absence of any specific legislation by the Parliament to enlarge the criminal appellate jurisdiction of this Court, no routine appeal lies before the Supreme Court in criminal matters. The extract from Article 134(2) has been reproduced below:

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

203. Article 134(2) is successful in clarifying two things. *Firstly*, there is no provision analogous to Article 134(2) Under Article 133 to expand the jurisdiction of the Supreme Court in non-criminal matters. *Secondly*, Article 134(2) does not encompass matters other than those arising out of criminal proceedings from the High Courts.

204. Presently, there are more than two dozen statutes which provide direct appeals to the Supreme Court from various Tribunals and High Courts. A non-exhaustive list of such Statutes includes:

(i) Section 35L of the Central Excise Act, 1944 (1 of 1944);

(ii) Section 116A of the Representation of the People Act, 1951 (43 of 1951);

(iii) Section 38 of the Advocates Act, 1961 (25 of 1961);

(iv) Section 261 of the Income Tax Act, 1961 (43 of 1961) before the establishment of National Tax Tribunal;

(v) Section 130E of the Customs Act, 1962 (52 of 1962);

(vi) Section 19(1)(b) of the Contempt of Courts Act, 1971 (70 of 1971);

(vii) Section 374 and 379 of the Code of Criminal Procedure, 1973 (2 of 1974) read with Section 2 of Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (28 of 1970);

(viii) Section 23 of the Consumer Protection Act, 1986 (68 of 1986);

(ix) Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987);

(x) Section 10 of the Special Courts (Trial of Offences relating to Transactions in Securities) Act, 1992 (27 of 1992);

(xi) Section 15Z of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(xii) Section 18 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997);

(xiii) Section 53T of the Competition Act, 2002 (12 of 2003);

(xiv) Section 125 of the Electricity Act, 2003 (36 of 2003);

(xv) Section 24 of the National Tax Tribunal Act, 2005 (49 of 2005);

(xvi) Section 30 of the Armed Forces Tribunal Act, 2007 (55 of 2007);

(xvii) Section 37 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006);

(xviii) Section 31 of the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008);

(xix) Section 22 of the National Green Tribunal Act, 2010 (19 of 2010);

(xx) Section 423 of the Companies Act, 2013 (18 of 2013);

(xxi) Section 38 of the Pension Fund Regulatory and Development Authority Act, 2013 (23 of 2013);

(xxii) Section 21 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015);

(xxiii) Section 62 and 182 of Insolvency and Bankruptcy Code, 2016 (31 of 2016); and

(xxiv) Section 118 of the Central Goods and Services Tax Act, 2017 (12 of 2017).

205. Such statutory appeals take away the inherent ability of the Supreme Court, as envisaged in the Constitution, to regulate cases before it by confining its consideration to cases involving the most egregious of wrongs and/or having the greatest impact on public interest.

206. Further, in providing for appeals directly from Tribunals, the jurisdiction of High Courts is in effect curtailed to a great extent. Not only does this hamper access to justice, but it also takes away the much needed exposure for High Court judges, earnestly needed in a vibrant and ever-evolving judiciary. Since majority of the judges of the Supreme Court are elevated from the High Courts, their lack of exposure to these specialised areas of law hinders their efficacy in adjudicating the direct statutory appeals from specialised Tribunals.

207. A perusal of the *Indian Judiciary: Annual Report 2017-18*, published by this Court shows that pendency in the Supreme Court stands at more than 56,000 cases. Each year this Court hears a humungous volume of cases and disposes of approximately 60,000-90,000 cases annually, thus amounting to a staggering 4,000-6,000 cases per bench. Out of all the cases instituted before this Court, less than 2% is for exercise of writ jurisdiction Under Article 32 whereas an overwhelming majority of cases are petitions for special leave to appeal Under Article 136.

208. Although the rate of admission of cases peaked at about 20% in 2011 and has fallen since then, it is still far above the marginal rate of about 1% in other comparable jurisdictions such as the Supreme Court of the United States. The mere task of hearing all cases and considering whether to grant leave or not usurps a majority of the Court's time. As a result of frequent invocation of Article 136 by litigants, the Court is left with hardly any time to discharge its key Constitutional functions of deciding substantial Constitutional questions, as envisaged by our founding fathers. As compared to the early 1960s where Constitution Benches decided hundreds of cases, the number is no more than a dozen now. Most seminal cases involving major issues of jurisprudence or effecting revolutionary changes on the legal landscape are by compulsion heard by Division Benches, thus defeating the very objective of Article 145(3).

209. The decrease in propensity of a person with humble means or situated farther away from the Delhi to approach the Supreme Court is evidence of the fact that the remedy to approach this Court has been, in effect, limited to only those with access to ample financial resources. Numerous studies have shown how every tenth case decided by the High Court of Delhi or every sixteenth case decided by the High Court of Punjab & Haryana is appealed before this Court, as compared to a minuscule rate of appeal of a little over 1% against the decision of High Court of Madras. Being an authority entrusted to resolve Constitutional conflicts or to safeguard the fundamental rights of citizens, this Court cannot afford to provide access only to the affluent. Although it would be futile to examine the effects of such rampant regular appeals, however, it is apparent that it

substantially affects the time and quality of judicial determination by this Court. This view had also been noted in the 272nd Report of the Law Commission wherein it was pointed out that:

3.12. The objective behind establishing the 'Tribunals' was to provide an effective and speedier forum for dispensation of justice, but in the wake of routine appeals arising from the orders of such forums, certain issues have been raised because such appeals are obstructing the constitutional character of the Supreme Court and thus, disturbing the effective working of the Supreme Court as the appeals in these cases do not always involve a question of general public importance. The Supreme Court is primarily expected to deal with matters of constitutional importance and matters involving substantial question of law of general public importance. Due to overburdening, the Supreme Court is unable to timely address such matters.

210. Resultantly, majority of the matters involving significant Constitutional questions remain untouched for years; consequently the ability of this Court to keep in check the legislative and executive encroachments is significantly compromised. Cases heard by the Constitution Bench comprising of five or more judges have fallen significantly from over 15% in the 1950s to an average of 0.1-0.2% during the last two decades. Hence, it is clear that this Court has been, in a way, transformed from a Constitutional-Writ Court to a Court of Appeals whereunder mere increase of the number of judges is no more a solution. Whilst the number of judges has increased slightly more than four times, the number of cases since 1950 has increased more than seventy folds! It is clear that there is a pressing need to realign the exercise of jurisdiction of this Court and ensure that the Constitutional vision is not defeated. This view has been resonated by this Court since it was highlighted by Justice P.N. Bhagwati in ***Bihar Legal Support Authority v. Chief Justice of India*** MANU/SC/0163/1986 : (1986) 4 SCC 767 in the following manner:

The Supreme Court of India was never intended to be a regular court of appeal against orders made by the High Court or the sessions court of the magistrates. It was created for the purpose of laying down the law for the entire country and the extraordinary jurisdiction of granting special leave was conferred upon it Under Article 136 of the Constitution so that it could interfere whenever it found that the law was not correctly enunciated by the lower courts or tribunals and it was necessary to pronounce the correct law on the subject.

211. It is evident that this Court has also lost its original character owing to the routine hearing of appeals through invocation of the discretionary jurisdiction Under Article 136. It is apposite to hold that Article 136 was never meant to be used in this manner as was very aptly remarked by Dr. B.R. Ambedkar before the Constituent Assembly, who noted that:

The Supreme Court is not likely to grant special leave in any matter whatsoever unless it finds that it involves a serious breach of some principle in the administration of justice, or breach of certain principles which strike at the very root of administration of justice as between man and man.

212. Such self-effacement of this Court's Constitutional duties requires to be reined in. It is, therefore, essential that this Court judiciously exercise its appellate jurisdiction. For the discharge of Constitutional functions of deliberating on substantial questions of law, answering Constitutional questions and resolving other issues of great public importance, it is essential that

this Court has adequate time to apply its mind and consider matters in depth. The existing practice of bringing every second case before the SC Under Article 136 must be deprecated.

213. Such a proposed restrictive appellate jurisdiction would mirror the practice of the highest Courts in various other jurisdictions. The Supreme Court of the United States in the famous case of ***Marbury v. Madison*** MANU/USSC/0017/1803 : 5 U.S. (1 Cranch) 137 (1803) noted that it was impermissible for the legislature to expand its original jurisdiction. After examining the framework of the Constitution of the United States, the Court noted that the original jurisdiction of the SC was limited to disputes involving States (as federal units) and the Union only. Except for that, all other cases can only be brought about in appellate jurisdiction. Although not explicitly stated, such an exercise was felt to be necessary to check a burgeoning expansion and overloading of the Court's docket.

214. Providing statutory appeals directly to the Supreme Court dents this to no end. With increasing tribunalisation, statutory appeal provisions are ostensibly being included without undertaking any 'Judicial Impact Assessment'. As of last count there are several hundreds of cases which have been decided by the NCLAT and many other thousands by other tribunals pending in this Court.

215. Note must be taken of the direction this country is heading towards for the same has a lasting impact on the kind of disputes which arise before this Court. No system can be made in a vacuum, including our own. With the establishment of more tribunals and with increasing commercialisation in line with India's transformation to an open market liberal economy, the number of these cases is bound to only increase. Unlike routine criminal or civil matters which are tried exclusively before ordinary courts, matters which fall before Tribunals are often complex and commercial.

216. In light of this, provisions for statutory appeals directly and liberally to the Supreme Court raises the inevitability of bogging the Court down and inhibiting its Constitutional objective. Further, providing statutory appeals to this Court against orders of Tribunals also undermines the essence of tribunalisation. It is hardly rational to state on one hand that an alternate to the ordinary method of justice dispensation needs to be provided owing to the complicated procedures and owing to the lack of specialisation of District and High Courts, and in the same breadth also provide statutory appeals to the final Court in that very original system.

217. If High Courts are ill placed to hear routine matters then it hardly seems justifiable that this Court would be any better placed to resolve disputes in appellate jurisdiction. Finality as a principle must be encouraged and providing statutory appeals to the Supreme Court only undermines the same. Instead, no discernible harm would arise if decisions of Tribunals or High Courts attain finality, without reaching this Court.

218. A dichotomy in law is further caused by provisions of direct appeal from Tribunals to this Court, as noted in the case of the Armed Forces Tribunals in ***Union of India v. Major General Shrikant Sharma*** MANU/SC/0242/2015 : (2015) 6 SCC 773. The two-judge Bench viewed that:

Likelihood of anomalous situation

42. If the High Court entertains a petition Under Article 226 of the Constitution of India against an order passed by the Armed Forces Tribunal Under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.

43. Section 30 provides for an appeal to this Court subject to leave granted Under Section 31 of the Act. By Clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court Under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves the High Court Under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal Under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by Clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition Under Article 226 of the Constitution against the order of the Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal Under Section 30 with leave to appeal Under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court Under Article 226 of the Constitution Under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court Under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy Under Section 30 read with Section 31 of the Armed Forces Tribunal Act.

44. The High Court (the Delhi High Court) while entertaining the writ petition Under Article 226 of the Constitution bypassed the machinery created Under Sections 30 and 31 of the Act. However, we find that the Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions Under Article 226 and directed the writ Petitioners to seek resort Under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that the Delhi High Court was not justified in entertaining the petition Under Article 226 of the Constitution of India.

219. The seven-judge Constitution Bench in ***L. Chandra Kumar (supra)*** considered at great length the permissibility of altering the power of judicial review exercisable by High Courts Under Article 226. It authoritatively held that all orders passed by Tribunals which have been established Under Article 323A or 323B of the Constitution, shall be amenable to the writ jurisdiction of High Courts. This Court, however, in an attempt to respect the intent of facilitating speedy disposal expressed by the Parliament, directed that such orders of the Central Administrative Tribunals be heard by a Division Bench of the High Court if challenged Under Article 226. This Court, thus, held:

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave Under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective.

Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals Under Article 227 of the Constitution. In R.K. Jain case [MANU/SC/0291/1993 : (1993) 4 SCC 119: 1993 SCC (L&S) 1128: (1993) 25 ATC 464], after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction Under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

220. It is hence clear post ***L. Chandrakumar (supra)*** that writ jurisdiction Under Article 226 does not limit the powers of High Courts expressly or by implication against military or armed forces disputes. The limited ouster made by Article 227(4) only operates qua administrative supervision by the High Court and not judicial review. Article 136(2) prohibits direct appeals before the Supreme Court from an order of armed forces tribunals, but would not prohibit an appeal to the Supreme Court against the judicial review exercised by the High Court Under Article 226.

221. However, it is essential that High Courts use such powers of judicial review restrictively and on limited grounds, similar to the concept of 'regulatory deference' which has evolved in the United States. Such a need was also noted by a nine-judge bench in ***Mafatlal Industries Ltd. v. Union of India*** MANU/SC/1203/1997 : (1997) 5 SCC 536 which held that:

... While the jurisdiction of the High Courts Under Article 226--and of this Court Under Article 32--cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power Under Article 226 has to be exercised to effectuate the Rule of law and not for abrogating it.

222. The jurisdiction Under Article 226, being part of the basic structure, can neither be tampered with nor diluted. Instead, it has to be zealously-protected and cannot be circumscribed by the provisions of any enactment, even if it be formulated for expeditious disposal and early finality of disputes. Further, High Courts are conscious enough to understand that such power must be exercised sparingly by them to ensure that they do not become alternate forums of appeal. A five-judge bench in ***Sangram Singh v. Election Tribunal*** MANU/SC/0044/1955 : (1955) 2 SCR 1 whilst reiterating that jurisdiction Under Article 226 could not be ousted, laid down certain guidelines for exercise of such power:

13. The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction

cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-a-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review Under Articles 226 and 136. Therefore, the jurisdiction of the High Courts Under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105.

223. It is apparent that the Legislature has not been provided with desired assistance so that it may rectify the anomalies which arise from provisions of direct appeal to the Supreme Court. Considering that such direct appeals have become serious impediments in the discharge of Constitutional functions by this Court and also affects access to justice for citizens, it is high time that the Union of India, in consultation with either the Law Commission or any other expert body, revisit such provisions under various enactments providing for direct appeals to the Supreme Court against orders of Tribunals, and instead provide appeals to Division Benches of High Courts, if at all necessary. Doing so would have myriad benefits. In addition to increasing affordability of justice and more effective Constitutional adjudication by this Court, it would also provide an avenue for High Court Judges to keep face with contemporaneous evolutions in law, and hence enrich them with adequate experience before they come to this Court. We direct that the Union undertake such an exercise expeditiously, preferably within a period of six months at the maximum, and place the findings before Parliament for appropriate action as may be deemed fit.

ISSUE VIII: WHETHER THERE IS A NEED FOR AMALGAMATION OF EXISTING TRIBUNALS AND SETTING UP OF BENCHES

224. While seeking a 'Judicial Impact Assessment' of all existing Tribunals, counsels for Petitioners/Appellant(s) have underscored the exorbitant pendency before of a number of Tribunals like the CESTAT and ITAT, which they claim affects the very objective of tribunalisation. On the other hand, they also highlight an incongruity wherein numerous Tribunals are hardly seized of any matters, and are exclusively situated in one location.

225. As noted by this Court on numerous occasions, including in ***Madras Bar Association (2014)*** (supra), although it is the prerogative of the Legislature to set up alternate avenues for dispute resolution to supplement the functioning of existing Courts, it is essential that such mechanisms are equally effective, competent and accessible. Given that jurisdiction of High Courts and District Courts is affected by the constitution of Tribunals, it is necessary that benches of the Tribunals be established across the country. However, owing to the small number of cases, many of these Tribunals do not have the critical mass of cases required for setting up of multiple benches. On the other hand, it is evident that other Tribunals are pressed for resources and personnel.

226. This 'imbalance' in distribution of case-load and inconsistencies in nature, location and functioning of Tribunals require urgent attention. It is essential that after conducting a Judicial Impact Assessment as directed earlier, such 'niche' Tribunals be amalgamated with others dealing

with similar areas of law, to ensure effective utilisation of resources and to facilitate access to justice.

227. We accordingly direct the Union to rationalise and amalgamate the existing Tribunals depending upon their case-load and commonality of subject-matter after conducting a Judicial Impact Assessment, in line with the recommendation of the Law Commission of India in its 272nd Report. Additionally, the Union must ensure that, at the very least, circuit benches of all Tribunals are set up at the seats of all major jurisdictional High Courts.

CONCLUSION

228. In light of the above discussions and our analysis, it is held that:

(i) The issue and question of Money Bill, as defined Under Article 110(1) of the Constitution, and certification accorded by the Speaker of the Lok Sabha in respect of Part-XIV of the Finance Act, 2017 is referred to a larger Bench.

(ii) Section 184 of the Finance Act, 2017 does not suffer from excessive delegation of legislative functions as there are adequate principles to guide framing of delegated legislation, which would include the binding dictums of this Court.

(iii) The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 suffer from various infirmities as observed earlier. These Rules formulated by the Central Government Under Section 184 of the Finance Act, 2017 being contrary to the parent enactment and the principles envisaged in the Constitution as interpreted by this Court, are hereby struck down in entirety.

(iv) The Central Government is accordingly directed to re-formulate the Rules strictly in conformity and in accordance with the principles delineated by this Court in ***R.K. Jain (supra), L. Chandra Kumar (supra), Madras Bar Association (supra) and Gujarat Urja Vikas Ltd. (supra)*** conjointly read with the observations made in the earlier part of this decision.

(v) The new set of Rules to be formulated by the Central Government shall ensure non-discriminatory and uniform conditions of service, including assured tenure, keeping in mind the fact that the Chairperson and Members appointed after retirement and those who are appointed from the Bar or from other specialised professions/services, constitute two separate and distinct homogeneous classes.

(vi) It would be open to the Central Government to provide in the new set of Rules that the Presiding Officers or Members of the Statutory Tribunals shall not hold 'rank' and 'status' equivalent to that of the Judges of the Supreme Court or High Courts, as the case may be, only on the basis of drawing equal salary or other perquisites.

(vii) There is a need-based requirement to conduct 'Judicial Impact Assessment' of all the Tribunals referable to the Finance Act, 2017 so as to analyse the ramifications of the changes in the framework of Tribunals as provided under the Finance Act, 2017. Thus, we find it appropriate to

issue a writ of mandamus to the Ministry of Law and Justice to carry out such 'Judicial Impact Assessment' and submit the result of the findings before the competent legislative authority.

(viii) The Central Government in consultation with the Law Commission of India or any other expert body shall re-visit the provisions of the statutes referable to the Finance Act, 2017 or other Acts as listed in para 174 of this order and place appropriate proposals before the Parliament for consideration of the need to remove direct appeals to the Supreme Court from orders of Tribunals. A decision in this regard by the Union of India shall be taken within six months.

(ix) The Union Government shall carry out an appropriate exercise for amalgamation of existing Tribunals adopting the test of homogeneity of the subject matters to be dealt with and thereafter constitute adequate number of Benches commensurate with the existing and anticipated volume of work.

INTERIM RELIEF

229. As the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and other Conditions of Service of Members) Rules, 2017 have been struck down and several directions have been issued vide the majority judgment for framing of fresh set of Rules, we, as an interim order, direct that appointments to the Tribunal/Appellate Tribunal and the terms and conditions of appointment shall be in terms of the respective statutes before the enactment of the Finance Bill, 2017. However, liberty is granted to the Union of India to seek modification of this order after they have framed fresh Rules in accordance with the majority judgment. However, in case any additional benefits concerning the salaries and emoluments have been granted under the Finance Act, they shall not be withdrawn and will be continued. These would equally apply to all new members.

230. The present batch of matters is accordingly disposed of.

231. Writ Petition (Civil) No. 267 of 2012 is also disposed of in the above terms as the issues arising are similar.

Dr. D.Y. Chandrachud, J.

INDEX

A Introduction

A.1 Challenges of the tribunal structure

A global trend

232. India is no exception to the global trend towards the tribunalisation of justice. World over, tribunals have been constituted both in regulatory and adjudicatory areas. Tribunals act as adjudicators of disputes. This movement has in part been occasioned by new legislation governing modern societies as they confront the challenges thrown up by the complexities of social and economic orderings. The engagement of law with economics and technology has been shaped by social, cultural and historical contexts. While many of them may reflect the shared aspirations of societies governed by a common legal tradition, it would be simplistic to assume that the challenges thrown up by the layered adjudication through tribunals are common to all societies. Hence, as we analyse the impact of the growing movement towards tribunalisation-a feature which is common to all societies-it is important to bear in mind the context in which our problems have arisen as we attempt to find answers to many of those concerns. Precedents, both judicial and scholarly, in other jurisdictions furnish a useful point of reference, so long as we understand that which is peculiarly our own.

The old and the new

233. Courts and tribunals should in theory be, but are not always in practice, cooperative allies. Tribunals have taken over the mantle of deciding cases which conventionally were assigned for adjudication to courts. Litigation, traditionally the domain of courts, has in incremental stages come to be transferred to the decision-making authority of tribunals. There is hence a jurisdictional transfer of dispute resolution to tribunals. Accompanied by legislative enactment, this postulates the exclusivity of entrustment to tribunals. Then again, new tribunals have been constituted to deal with subject areas of a genre quite distinct from, and therefore, unlike the traditional pattern of litigation with which conventional courts were familiar. Tribunals have thus not only taken away subjects which have been carved out of the jurisdiction of courts as a matter of legislative policy, but have also fostered a new culture of adjudication over areas in which a traditional court mechanism had little experience and expertise. In that sense, tribunalisation represents an amalgam of the old and the new: a combination of the role which was traditionally performed by the court together with new functional responsibilities, quite unlike the dispute resolution function which was traditionally performed by courts.

Domain specialisation

234. The movement towards setting up tribunals has been hastened in many parts by the need for specialisation. Specialisation acknowledges the pool of knowledge and domain expertise of persons who discharge core adjudicatory functions within tribunals. The assumption which underlies the setting up of tribunals is that those who decide are individuals possessed of the qualities necessary for adjudication in that specific field. Acquisition of knowledge prior to appointment to a tribunal and practical experience of handling subject areas reserved for the tribunal bring together a pool of individuals possessing the qualifications and abilities to render specialised justice. In fostering specialisation, the tribunal structure emphasises the specialisation of adjudicatory personnel. But equally, an important facet is the specialisation of those who appear before the tribunals. A specialised Bar is an invaluable input towards the efficiency of institutional adjudication. Together, this contributes to an adjudicatory process which is cognisant of the special features, needs and requirements of the subject areas carved for the tribunal.

235. The extent to which the purpose of setting up tribunals is realized is often a projection of ground realities. These realities, including the manner and extent to which provisions of the law governing a tribunal are enforced, directly impact upon the efficacy of the tribunal. Critical to the purpose of having a specialised tribunal is the presence of specialised adjudicators on decision-making posts. For, it is their domain expertise which defines the quality of outcomes in the adjudicatory process. Collectively, the presence of specialised adjudicators depends upon well-trained and qualified persons and their availability in a source pool. This factor has often been lost sight of in the selection of judges to specialised tribunals. Absent the requisite degree of expertise, the procedure and functioning of the tribunal may only replicate a conventional adjudication in a court of law which the tribunal seeks to substitute.

Expedition

236. Apart from specialisation, a significant reason for the establishment of tribunals is expedition in the course of justice. This is also linked to the perceived values implicit in a specialised adjudicatory process. Domain expertise, particularly in a complex area, is a means of allowing adjudicators who understand the subject to decide quickly and effectively. It is often expected that the tribunal will follow procedures which are less cumbersome and tied to forms established in conventional courts. By allowing for a measure of procedural flexibility coupled with domain knowledge, tribunals are expected to remedy some of the causes which burden the judicial system.

237. Similarly, another object of the growing need for tribunalisation is to unburden the court system. That purpose may be subserved when a chunk of existing cases pending before the conventional court system are transferred for adjudication to the newly created body. Reducing the burden on courts is a partial realisation of the purpose underlying the creation of the tribunal. Equally significant is that the tribunal must possess the ability not to allow, over a period of time, accretions of undisposed cases which had created judicial arrears in the first place. Statistical reduction of pending arrears in the judicial system occasioned by the creation of a tribunal has to be matched by the capacity of the new body to dispose of cases transferred to it from the court as well as new institutions before it. If this is not achieved, the net result is to defeat the very purpose of establishing the tribunal.

Impact assessment

238. Our analysis above indicates that the actual impact of the creation of a structure of tribunals needs to be closely monitored to assess the efficacy of a tribunal as a measure of legal reform. The efficacy of the tribunal is functionally dependent on the availability of resources and capital, both human and otherwise. The tribunal must be possessed of adequate infrastructure both in terms of physical availability and the deployment of technological knowledge in the management of litigation. The procedures adopted by the tribunal must be flexible enough to allow for decision-making effectively and without delay. The process of making appointments to the tribunals must be seamless in order to fill up vacancies arising from retirement or unforeseen causes. The presence of large-scale vacancies can render tribunals defunct. This defeats the cause of justice in the area of the jurisdiction of the tribunal. This problem becomes particularly acute where a jurisdiction of a conventional court has been transferred to the tribunal under the provisions of an operating enactment. Absent a recourse to traditional courts for the resolution of conflicts, a litigant is

virtually denied access as a result of an unavailable adjudicator to resolve a dispute. In other words, the process for appointment and selection has a direct bearing on the efficacy of tribunalisation. Keeping vacancies unfilled, either as a matter of tardy procedures or for other reasons, has the tendency to denude the efficacy of the tribunal as a dispute resolution mechanism. The surest way to deny access to justice is to keep a large number of vacancies.

Independence

239. Above all, the efficacy of tribunalisation rests in the confidence in the process of providing justice. This is determined by the independence and objectivity of justice providers. There is a vital societal interest in preserving the sanctity of the process by which judges are selected for appointment. The method of selecting and appointing judges to tribunals determines in the ultimate analysis, the independence of the tribunals. Tribunals have been conceived as institutional measures to provide justice in substitution of that provided by conventional courts. Hence, there is a valid reason to ensure the independence of these adjudicating bodies. The process of selection as well as the terms of appointment is determinative of the ability to attract talent to the tribunals. Hence, in preserving the independence of the tribunals as a facet of judicial independence, the effort must be to ensure that the adjudicatory body is robust: subservient to none and accountable to the need to render justice in the context of specialised adjudication.

A.2 A brief history of tribunalisation in India

240. Delay and backlog in adjudication of cases was a problem even during the colonial era.[9] The earliest available effort suggesting reforms to handle arrears was the Justice Rankin Committee report in 1924. Since then, there have been a number of expert body reports, including the Law Commission of India. In India, the establishment of tribunals was done in 1941 by the colonial government. Post-Independence, tribunals were first created in the sphere of tax laws. The original Constitution referred to tribunals only incidentally in Articles 136 and 227, which specify that the Supreme Court and the High Courts respectively shall have power to review decisions of tribunals. The High Court Arrears Committee constituted with Justice J.C. Shah as Chairperson in 1969 recommended the constitution of an independent tribunal to handle service matters pending before the High Courts and the Supreme Court. The Swaran Singh Committee had been constituted by the Union Government to recommend changes to the Constitution. Its report released in 1986 recommended the setting up of tribunals for three broad subject areas to reduce arrears in the Indian legal system. The report further recommended that the decisions of all these tribunals should be subject to the jurisdiction of the Supreme Court Under Article 136 of the Constitution, but should exclude the jurisdiction of all other courts, including writ jurisdiction.

241. Consequently, the establishment of tribunals in India attained constitutional recognition by the insertion of Articles 323A and 323B in the Constitution, which granted power to the Parliament and state legislatures to establish administrative tribunals and tribunals for other matters respectively.

242. In pursuance of the power conferred upon it by Clause (1) of Article 323A of the Constitution, Parliament enacted the Administrative Tribunals Act 1985[10] for the setting up of tribunals to deal exclusively with service matters. In **S.P. Sampath Kumar** v. **Union of India**

MANU/SC/0851/1987 : (1987) 1 SCC 124 ('**Sampath Kumar**'), the first challenge to the constitutionality of tribunals arose. This Court held that the 'tribunal should be a real substitute for High Courts -- 'not only in form and *de jure* but in content and *de facto*.' In this view, alternative arrangements have to be effective and efficient as also capable of upholding constitutional limitations. The court held that though judicial review is a basic feature of the Constitution, vesting of the power of judicial review in an alternative institutional mechanism would not do violence to the basic structure of the Constitution so long as it was ensured that the alternative mechanism was an effective and real substitute for the High Court. It was also held that a High-Power Selection Committee[11] must be constituted with a sitting judge of the Supreme Court nominated by the Chief Justice of India to ensure the selection of competent adjudicators to the tribunals. Upholding the vires of the 1985 Act, the Court suggested several amendments to cure the defects with respect to the composition of the tribunal and the mode of appointment of the Chairperson, Vice-Chairperson and members which were to be carried out by 31 March, 1987.

243. Decisions subsequent to **Sampath Kumar** had required a fresh look by a larger Bench of this Court over the issues that had been decided. In **L Chandra Kumar** v. **Union of India** MANU/SC/0261/1997 : (1997) 3 SCC 261 ('**Chandra Kumar**'), a seven judge Bench of this Court revisited the challenge to the 1985 Act and the power conferred on the Parliament or the state legislatures by Articles 323A(2)(d) and 323B(3)(d), as the case may be, to exclude the jurisdiction of 'all courts', except that of this Court Under Article 136 in respect of disputes referred to in those Articles. Overruling the decision in **Sampath Kumar**, this Court drew a distinction between the substitutional role and the supplemental role of tribunals with respect to High Courts and held that the role of tribunals is supplemental in nature.

244. Chief Justice A.M. Ahmadi noted that the Constitution provides elaborate provisions dealing with terms of appointments of judges of higher courts. The learned judge observed that the same safeguards are not available to the subordinate judiciary or members of tribunals. Hence, they can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation:

78...The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation...

The Court struck down Articles 323A(2)(d) and 323B(3)(d) as unconstitutional. It was also held that an "exclusion of jurisdiction" Clause enacted in any legislation, under the aegis of Articles 323A(2)(d) and 323B(3)(d) is unconstitutional.

245. In **Union of India** v. **R. Gandhi, President, Madras Bar Association** MANU/SC/0378/2010 : (2010) 11 SCC 1 ('**R. Gandhi**'), the constitutional validity of Chapters 1-B and 1-C of the Companies Act, as inserted by the Companies (Second Amendment) Act 2002 which provided for the constitution of a National Company Law Tribunal[12] and the National Company Law Appellate Tribunal[13] was challenged. Justice R.V. Raveendran noted that despite the salient objective behind the constitution of tribunals, 'full independence' had not been achieved

by them. The Court affirmed the view in **Chandra Kumar** that a tribunal may consist of both judicial and technical members. Judicial members ensure 'impartiality, fairness and reasonableness in consideration' and technical members ensure 'the availability of expertise and experience related to the field of adjudication'.

246. Though the legislature is empowered to prescribe qualifications for members, the Court held that superior courts in the country retain their power of judicial review over the prescribed qualifications to ensure that judicial functions are discharged effectively. The Court surveyed various enactments[14] and the qualifications prescribed in them for appointment as judicial and technical members and noted that the 'speed at which the qualifications for appointment as members is being diluted is, to say the least, a matter of great concern for the independence of the judiciary.' The Court cautioned that tribunals cannot become providers of sinecure to members of civil services, by appointing them as technical members. The Court emphasised that 'impartiality, independence, fairness and reasonableness in decision making are the hallmarks of judiciary' and laid down the eligibility criteria for judicial and technical members. Taking note of the recruitment conditions for judicial and technical members, tenure and service conditions, the Court upheld the creation of the NCLT and NCLAT. Several suggestions to amend part 1-B and 1-C were issued, to be carried out as a condition precedent to ensure that the NCLT and the NCLAT may be made operational in accordance with the observations made by this Court.

247. In **Madras Bar Association** v. **Union of India** MANU/SC/0875/2014 : (2014) 10 SCC 1 ('**Madras Bar Association II**'), the constitutional validity of the National Tax Tribunal Act 2005[15] and the Constitution (Forty-Second) Amendment 1976 was challenged on the ground of violating the basic structure of the Constitution. The National Tax Tribunal[16] was vested with the power of adjudicating appeals which included a substantial question of law arising from orders passed by appellate tribunals under specific tax enactments. Prior to the 2005 Act, the jurisdiction to adjudicate these appeals lay with the jurisdictional High Court.

248. The Court rejected the contention that there was a constitutional mandate for the appellate jurisdiction pertaining to tax matters to remain with the High Courts, but held that the members of the Tribunal should be appointed in the same manner and should be entitled to the same security of tenure as the judges of the Court sought to be substituted. The Court rejected the challenge based on the separation of powers and proceeded to examine the validity of individual provisions. Section 6 of the Act permitted accountant members or technical members in the respective appellate tribunals to be appointed as members of the NTT. The Court affirmed the position laid down in **Chandra Kumar** and **R. Gandhi** that the appointment of technical members is restricted to the cases where technical expertise is essential for adjudication and is impermissible in any other case. Thus, the provision was struck down.

249. Section 7 of the 2005 Act provided for the process of selection and appointment of the Chairperson and members of the NTT. The Court observed that as the jurisdiction of the High Courts was being transferred to the Tribunal, the stature of the members, conditions of service, and manner of appointment and removal of members must be akin to that of the judges of High Courts. The selection process included Secretaries of the Departments of the Central Government. The Court struck down the Section as unconstitutional. Finally, Section 8 stipulated that that a Chairperson/Member who is appointed for an initial duration of five years, is eligible for

reappointment for a further period of five years. Striking down the provision as unconstitutional, the Court held that the provision for reappointment would undermine the independence of the member who would presumably be constrained to decide matters in a manner that would ensure their reappointment. The Court noted that since the NTT had been vested with jurisdiction that earlier vested in the High Courts, all matters of appointment and extension of tenure must be shielded from the executive. The Court noted that upon the declaration of numerous provisions as unconstitutional, the remaining provisions were rendered 'otiose and worthless'. Hence, the 2005 Act was struck down in its entirety.

250. Pursuant to the enactment of the Companies Act 2013, a Constitution Bench of this Court in **Madras Bar Association** v. **Union of India** MANU/SC/0610/2015 : (2015) 8 SCC 583 dealt with the contention that despite the directions issued in **R. Gandhi** in respect of the provisions concerning the NCLT and the NCLAT, analogous provisions had been inserted in the 2013 Act without complying with those directions. The Court embarked on a comparison of various provisions of the Companies Act 2013 with the directions issued in **R. Gandhi** and observed that many discrepancies persisted which were in contravention of the directions issued by this Court in the earlier round of litigation concerning the qualifications, appointments, eligibility, and composition of the Selection Committees. The Court affirmed the directions issued in **R. Gandhi** including the direction on the composition of the Selection Committee and held that once remedial measures are taken to bring the provisions in conformity with the directions issued, the NCLT and the NCLAT may commence operations.

A.3 Shortcomings of the current framework

251. Tribunalisation was intended to combat the high pendency of cases before Indian Courts. However, experience gained from the working of tribunals suggests that the efficiency of tribunals in India is significantly reduced due to systemic and administrative problems. The 272nd Report of the Law Commission of 2017 has highlighted the high level of pendency before the Tribunals. The chart from the report is reproduced below:

	Tribunal	As On	Number of Pending cases
1	Central Administrative Tribunal	July, 2017	44,333
2	Railway Claims Tribunal	30.09.2016	45,604
3	Debt Recovery Tribunal	03.07.2016	78,118
4	Customs, Excise, and Service Tax Appeal Tribunal	End of 2016	90,592
5	Income Tax Appellate Tribunal	End of 2016	91,538

252. Vidhi Centre for Legal Policy in a report titled "**Reforming The Tribunals Framework In India**" highlights the problems plaguing the tribunal system in India. These problems have been categorised thus:

A) Lack of independence

The report highlights that in some cases, Ministries are parties before the tribunals. The staff, finances, and administration are under the control of the Ministry. The problem is exacerbated by a revolving door between the bureaucracy and tribunal posts. Therefore, the report states that it is crucial to assess the independence of tribunals based on the certain parameters including (a) appointment of members; b) removal of members; (c) reappointments; (d) nodal ministry; and (e) proclivity to appoint judges/bureaucrats.

B) Administrative concerns: lack of uniformity in regulation

The report notes that an inconsistency in qualification requirements leads to differences in competencies, maturity and status of members. These inconsistencies are problematic with regard to the growing trend of tribunalisation. Further, the short tenure of members obviates the cultivation of 'domain expertise', which can have an impact on the efficacy of tribunals. It is also recommended that the age of retirement be made uniform as uneven tenures hamper institutional continuity. The report notes the holding in **L Chandra Kumar** which criticizes the inconsistencies in the appointment process, qualification of members, age of retirement, resources and infrastructure of different tribunals. They can be attributed to tribunals operating under different ministries. The report affirms the observation in the judgment that a single nodal authority or ministry is required for the administration of tribunals in order to improve efficiency.

C) Pendency and vacancy in Tribunals

The report notes that the high rate of pendency can be attributed to systemic issues. For example, the Debt Recovery Tribunal had 58% failed hearings (i.e. avoidable adjournments that were not penalised) and condonations were often granted due to delays in filing. Such delays accounted for more than half the time taken up by cases. Another significant cause for delays is absenteeism of tribunal members.

D) Jurisdiction of the High Courts

Provisions allowing direct appeals to the Supreme Court which by-pass the jurisdiction of High Courts have been examined in multiple cases. Despite existing precedents and Law Commission of India recommendations, parent statutes of many tribunals allow for a direct appeal to the Supreme Court. Two issues have been noted: Firstly, a direct appeal to the Supreme Court is inaccessible to litigants; and Secondly, such a provision leads to congestion of the docket of the Supreme Court.

B The Reference to the Constitution Bench

253. At its core, the present reference before the Constitution Bench raises the issue of whether a law which seeks to substitute existing statutory provisions governing the appointment, selection and conditions of service of diverse tribunals can validly be enacted as a Money Bill as a component of the Finance Act. The answer to this question must in turn depend upon two facets:

(i) Whether judicial review can extend to determining the constitutional validity of a decision of the Speaker of the Upper House to certify the passage of a Bill as a Money Bill Under Article 110 of the Constitution; and

(ii) Whether the statutory modification of the procedure for appointment and selection of members and their conditions of service is destructive of judicial independence and hence *ultra vires.*

Between the universe represented by these two issues, lie the shades of argument upon which the decision of this case will turn.

C Money Bills

Ordinary Bills, Money Bills and Financial Bills

254. Conceptually, the Constitution contains a classification of Bills as: (i) Ordinary Bills; (ii) Money Bills and (iii) Financial Bills. Bills other than Money Bills and Financial Bills can originate in either House of Parliament[17]. An Ordinary Bill is passed by both the Houses of Parliament when it has been agreed upon by both the Houses, either without amendment or with such amendments as agreed. The President is conferred with the constitutional authority to convene a joint sitting of both the Houses of Parliament in order to deliberate upon and vote on a Bill which is not a Money Bill[18]. Special provisions are engrafted into the Constitution for the passage of Money Bills. Unlike an Ordinary Bill which can originate in either House of Parliament, a Money Bill cannot be introduced in the Council of States. Article 109 specifies the procedure for the passage of a Money Bill. Article 109 reads thus:

109. (1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

255. The role of the Rajya Sabha in the passage of Money Bill is restricted. A Money Bill can originate only in the Lok Sabha. After it is passed by the Lok Sabha, the Bill is transmitted to the Rajya Sabha for its recommendation. The Rajya Sabha has a stipulated period of fourteen days to submit the Bill back to the Lok Sabha with its recommendation. Recommendations of the Rajya Sabha are of a non-binding character. If the Lok Sabha rejects the recommendations, it is deemed to have been passed by both the Houses in the form in which it was passed by the Lok Sabha without the recommendations of the Rajya Sabha. If the Rajya Sabha were not to respond within the stipulated period of fourteen days, the same consequence would ensue. In distinction to the role which is entrusted to the Rajya Sabha in the passage of Ordinary Bills by Article 107, Article 109 confers virtually an overriding authority to the Lok Sabha in the passage of Money Bills. A Money Bill, unlike an Ordinary Bill, can only originate in the Lok Sabha. In the passage of a Money Bill, the Rajya Sabha has thus only a recommendatory role. Ordinary Bills, on the other hand, require the agreement of both the Houses of Parliament to ensure their passage.

256. The third category of Bills-Financial Bills, is specified in Article 117 [19]. The reference to Financial Bills is contained in the marginal note to Article 117. Article 117 (1) indicates that a Bill which makes provision for any of the matters specified in clauses (a) to (f) of Article 110 (1) can be introduced or moved only on the recommendation of the President and such a Bill shall not be introduced in the Rajya Sabha. The text of Article 117 (1) speaks of Money Bills and other Financial Bills as classes of Bills which can originate only in the Lok Sabha.

Money Bills: Article 110

Article 110 contains a definition of Money Bills in the following terms:

110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:

(a) the imposition, abolition, remission, alteration or Regulation of any tax;

(b) the Regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in Sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States Under Article 109, and when it is presented to the President for assent Under Article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

257. Tracing the origin and evolution of Money Bills, **Thomas Erskine May** in "**The Treatise on The Law, Privileges, Proceedings and Usage of Parliament**"[20] dwells on the relationship between the House of Commons and House of Lords in Britain in regard to their powers of taxation and on matters of national revenue and public expenditure. For nearly three hundred years, the House of Commons was possessed of the legal right to originate grants, but the House of Lords was not precluded from amending a Bill. By two resolutions of the Commons in 1671 and 1678, the powers of the House of Lords were curtailed so as to enable only the Commons to have the sole right to direct or limit the scope of a Bill regarding taxation and government expenditure. The House of Lords came to be excluded from altering any such Bill. Even after the enactment of the Standing Order of 1849 which accommodated space to the House of Lords to suggest amendments of legislative issues, the tussle between the House of Commons and the House of Lords continued, resulting in the passage of the Parliament Act of 1911. Section 1 defines the power of the House of Lords in Money Bills in the following terms:

1. Powers of House of Lords as to Money Bills.--(1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

Section 1(2) defines the expression Money Bill in the following manner:

1. (2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or Regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this Sub-section the expressions "taxation", "public money", and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.

258. Two facets of the above definition merit emphasis: the first is the use of the expression 'means' which indicates that the definition is exhaustive; and second, that the content of a Money Bill can have "only provisions" dealing with the subjects enunciated in the provision. Under Section 1(3), a Money Bill sent to the House of Lords and to Her Majesty for assent should be endorsed with the certificate of the Speaker of the House of Commons that it is a Money Bill. Section 3 attributes finality to the decision of the Speaker, rendering it immune from judicial review:

3. Certificate of Speaker.--Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, **and shall not be questioned in any court of law.**

The Treatise by **Erskine May** contains the following elaboration of the procedure in passing a Money Bill:

A 'Money Bill' which has been passed by the House of Commons and sent up to the House of Lords at least one month before the end of the session, but is not passed by the House of Lords without amendment within one month after it is so sent up, is, unless the House of Commons direct to the contrary, to be presented for the Royal Assent and becomes an Act of Parliament on the Royal Assent being signified to it. A 'Money Bill', when it is sent up to the House of Lords and when it is presented to Her Majesty, must be endorsed with the Speakers' certificate that it is such a bill. Before giving this certificate the Speaker is directed to consult, if practicable, those two members of the Panel of Chairs who are appointed for the purpose at the beginning of each session by the Committee of Selection.

When the Speaker has certified a bill to be a 'Money Bill' this is recorded in the journal; **and Section 3 of the Parliament Act 1911 stipulates such certificate is conclusive for all purposes and may not be questioned in a court of law.**

No serious practical difficulty normally arises in deciding whether a particular bill is or is not a 'Money Bill'; and criticism has seldom been voiced of the Speaker's action in giving or withholding a certificate. **A bill which contains any of the enumerated matters and nothing besides is indisputably a 'Money Bill'. If it contains any other matters, then, unless these are 'subordinate matters incidental to' and of the enumerated matters so contained in the bill, the bill is not a 'Money Bill'. Furthermore, even if the main object of a bill is to create a new charge on the Consolidated Fund or on money provided by Parliament, the bill will not be certified if it is apparent that the primary purpose of the new charge is not purely financial.**

The Speaker does not consider the question of certifying a bill until it has reached the form in which it will leave the House of Commons, and has declined to give an opinion on whether the acceptance of a proposed amendment would prevent a bill for being certified as a Money bill. Similarly, in committee the chairman has declined to anticipate the Speaker's decision in this matter or to allow the effect of an amendment in this regard to be raised as a point of order.

259. Section 37 of the Government of India Act 1935 contained a special provision for Financial Bills:

37. Special provisions as to financial Bills.--(1) A Bill or amendment making provision--

(a) for imposing or increasing any tax; or

(b) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government; or

(c) for declaring any expenditure to be expenditure charged on the revenues of the Federation, or for increasing the amount of any such expenditure, shall not be introduced or moved except on the recommendation of the Governor-General, and a Bill making such provision shall not be introduced in the Council of State.

As the Bill could not be introduced or moved "except on the recommendation of the Governor General", Section 38 authorized each House namely the Council of States and the Federal Assembly to make Rules for regulating their procedure and the conduct of business.

During the course of the debates in the Constituent Assembly, one of the draft amendments moved to Article 90 was the deletion of the expression "only". Explaining the rationale for moving the proposed amendment, Shri Ghanshyam Singh Gupta stated thus:

...This Article is a prototype of Section 37 of the Government of India Act which says that a Bill or amendment providing for imposing or increasing a tax or borrowing money, etc. shall not be introduced or moved except on the recommendation of the governor-General. This means that the whole Bill need not be a money Bill: it may contain other provisions, but if there is any provision about taxation or borrowing, etc. It will come under this Section 37 and the recommendation of the Governor-General is necessary. Now Article 90 says that a Bill shall be deemed to be a money Bill if it contains only provisions dealing with the imposition, regulation, etc., of any tax or the borrowing of money, etc. This can mean that if there is a Bill which has other provisions and also a provision about taxation or borrowing etc., it will not become a money Bill. If that is the intention I have nothing to say; but that if that is not the intention I must say the word "only" is dangerous, because if the Bill does all these things and at the same time does something else also it will not be a money Bill. I do not know what the intention of the Drafting Committee is but I think this aspect of the Article should be borne in mind.[21]

The amendment was however negatived.

260. Article 110 of the Constitution defines a Money Bill for the purposes of the Chapter. A Bill is deemed to be a Money Bill "if it contains only provisions" dealing with any of the matters described in clauses (a) to (g). The word "only" is of crucial significance. The consequence of the use of the expression "only" is to impart exclusivity. In other words, a Bill will be deemed to be a Money Bill only if it falls within the description of the matters enunciated in clauses (a) to (g). If the Bill contains matters which are unrelated to or do not fall within clauses (a) to (g), it is not a Money Bill. Article 110 (2) supports this construction since it indicates that a Bill shall not be deemed to be a Money Bill only for the reason that it provides for:

(i) Imposition of fines or other pecuniary penalties;

(ii) Demand or payment of fees for licences or fees for services rendered; or

(iii) The imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes.

261. This is a clear indicator of the constitutional position that what makes a Bill a Money Bill for the purposes of Chapter II of Part V of the Constitution is that it deals only with matters falling under the description provided in clauses (a) to (g) of Article 110 (1). Clause (g) of Article 110 (1) covers "any matter incidental to" what is specified in clauses (a) to (f). Clause (g) must not be understood as a residuary provision or a catch-all-phrase encompassing all other matters which are not specified in clauses (a) to (f). If this construction were to be placed on Clause (g), the distinction between an Ordinary Bill and a Money Bill would vanish. Hence, to be incidental within the meaning of Clause (g), the Bill must cover only those matters which fall within the ambit of clauses (a) to (f). It is only a matter which is incidental to any of the matters specified in clauses (a) to (f) which is contemplated in Clause (g).

Certification by the Speaker

262. The issue which needs analysis is whether a certification of a Bill as a Money Bill by the Speaker is immune from judicial review. Article 110 (3) states that if any question arises as to whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final. In essence, the point for consideration is whether the finality as stipulated in Clause (3) to Article 110 excludes judicial review.

263. During the course of the framing of the Constitution, Sir. B.N. Rau, acting as the Constitutional Advisor, prepared a memorandum of the draft Constitution for the Union Constitution Committee. B Shiva Rao makes a reference to Article 75 of the draft which provided that:

if any question arises whether a Bill is a "Money Bill" or not, the decision of the Speaker of the House of the People thereon shall be final.[22]

The draft provision bore a resemblance to Article 22 of the Constitution of Ireland (1937) which provides thus:

1. The Chairman of Dáil Éireann [Lower House in Ireland] shall certify any Bill which, in his opinion, is a Money Bill to be a Money Bill, and his certificate shall, subject to the subsequent provisions of this section, **be final and conclusive**.

2. Seanad Éireann [Upper House in Ireland], by a resolution, passed at a sitting at which not less than thirty members are present, may request the President to refer the question whether the Bill is or is not a Money Bill to a Committee of Privileges.

3. If the President after consultation with the Council of State decides to accede to the request he shall appoint a Committee of Privileges consisting of an equal number of members of Dáil Éireann and of Seanad Éireann and a Chairman who shall be a Judge of the Supreme Court: these

appointments shall be made after consultation with the Council of State. In the case of an equality of votes but not otherwise the Chairman shall be entitled to vote.

4. The President shall refer the question to the Committee of Privileges so appointed and the Committee shall report its decision thereon to the President within twenty-one days after the day on which the Bill was sent to Seanad Éireann.

5. The decision of the Committee shall be final and conclusive.

6. If the President after consultation with the Council of State decides not to accede to the request of Seanad Éireann, or if the Committee of Privileges fails to report within the time hereinbefore specified the certificate of the Chairman of Dáil Éireann shall stand confirmed.

The Irish model contained a provision for resolving a dispute on the certification of a Bill as a Money Bill. This part of the dispute resolution procedure was not adopted when our Constitution was framed. Moreover, the Clause on finality was adopted in a modified form. Whereas Clause (1) of Article 22 of the Irish Constitution uses the expression "final and conclusive", draft Article 75 provided for the decision of the Speaker of the House of People being final. On 5 December 1947, the Expert Committee on Financial Provisions suggested an amendment to the draft provision, the gist of which is indicated by B Shiva Rao:

When a Money Bill is sent from the Lower House to the Upper, a certificate of the Speaker of the Lower House saying that it is a Money Bill should be attached to, or endorsed on, the Bill and a provision to that effect should be made in the Constitution on the lines of the corresponding provision in the Parliament Act, 1911. **This will prevent controversies about the matter outside the Lower House.**[23]

The extract quoted above is a clear indicator that the purpose of the certification by the Speaker was to prevent controversies in the Upper House of Parliament by incorporating an element of procedural simplicity.

Final but not conclusive

264. When the draft Article as proposed was accepted and eventually incorporated as Article 110, Clause (3) incorporated the principle of finality without a specific exclusion of judicial review. Section 3 of the Parliament Act 1911 in Britain specifically excluded judicial review by providing that a certificate of the Speaker of the House of Commons "shall be conclusive for all purposes and shall not be questioned in any court of law". These words imparted both conclusiveness and immunity from judicial review to the certificate from the Speaker. This language was not adopted in the Indian Constitution. The draftspersons of the Constitution carefully did not incorporate an exclusion from judicial review, in respect of a certificate issued by the Speaker under Clause (3) of Article 110. Finality, in other words, operates as between the Upper and the Lower Houses and does not exclude judicial review by a constitutional court.

265. The interpretation that we have adopted is supported for yet another reason. In contexts where the Constitution intends to confer immunity from judicial review, specific words to that effect are

used. The expression "shall not be called in question in any court" is, for instance, utilized in Article 329 (a), Article 243-O and Article 243ZG. These Articles read thus:

329. Bar to interference by courts in electoral matters --

Notwithstanding anything in this Constitution--

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made Under Article 327 or Article 328, **shall not be called in question in any court.**

243-O. Bar to interference by courts in electoral matters.--Notwithstanding anything in this Constitution--(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made Under Article 243-K, **shall not be called in question in any court."**

"243ZG. Bar to interference by courts in electoral matters.--Notwithstanding anything in this Constitution--(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made Under Article 243-ZA **shall not be called in question in any court.**

In **N.P. Ponnuswami** v. **Returning Office, Namakkal Constituency, Namakkal, Salem, Dist.** MANU/SC/0049/1952 : 1952 SCR 218, a six judge Bench of this Court construed Article 329 of the Constitution in the following terms:

5. ... A notable difference in the language used in Articles 327 and 328 on the one hand, and Article 329 on the other, is that while the first two articles begin with the words "subject to the provisions of this Constitution", the last Article begins with the words "notwithstanding anything in this Constitution". It was conceded at the Bar that the effect of this difference in language is that whereas any law made by Parliament Under Article 327, or by the State Legislature Under Article 328, cannot exclude the jurisdiction of the High Court Under Article 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Article 329.

266. Distinct from the exclusion of judicial review by the above provisions, there are other provisions of the Constitution where a decision is made "final". Finality in such contexts has been held not to exclude judicial review. Articles 217 (3), 311 (3) and paragraph 6 (1) of the Tenth Schedule use the expression "final":

217. (3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President **shall be final.**

311. (3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank **shall be final.**

6. *Decision on questions as to disqualification on ground of defection.*--(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman, or, as the case may be, the Speaker of such House and his decision **shall be final:**

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision **shall be final.**

In **Union of India** v. **Jyoti Prakash Mitter** MANU/SC/0061/1971 : (1971) 1 SCC 396, a six judge Bench of this Court held that Under Article 217 (3), the President performs a judicial function and a decision rendered is subject to judicial review on stipulated grounds:

32. ... The President acting Under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the Rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. ... appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion.

267. In the context of Article 311 (3), a Constitution Bench of this Court in **Union of India** v. **Tulsiram Patel** MANU/SC/0373/1985 : (1985) 3 SCC 398 held that the finality attributed to the decision of a disciplinary authority that it is not reasonably practical to hold an inquiry, does not render it immune from judicial review. In **Kihoto Hollohan** v. **Zachillhu** MANU/SC/0753/1992 : 1992 Supp. (2) SCC 651, a Constitution Bench of this Court held that the finality attributed to the decision of the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha in paragraph 6 (1) of the Tenth Schedule of the Constitution does not abrogate judicial review:

111. ... That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen is valid. But the concept of statutory finality embodied in Para 6(1) does not detract from or abrogate judicial review Under Articles 136, 226 and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of natural justice and perversity, are concerned.

The Constitution Bench held:

101. ... The principle that is applied by the courts is that in spite of a finality Clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations....

Consequently, purely as a matter of textual analysis, the finality attributed to a certificate issued by the Speaker Under Article 110 (3) does not grant immunity from judicial review.

Matters of procedure and substantive illegalities

268. Article 118 of the Constitution allows each of the Houses of Parliament to make Rules for regulating their procedure and the conduct of business, subject to the provisions of the Constitution. Article 118 provides thus:

118. Rules of procedure.--

(1) Each House of Parliament may make Rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

(2) Until Rules are made under Clause (1), the Rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make Rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by Rules of procedure made under Clause (3), shall preside.

Article 122 of the Constitution provides thus:

122. Courts not to inquire into proceedings of Parliament.--

(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

Article 122 of the Constitution is similar to Section 41 of the Government of India Act 1935[24]. In the Commentary on the Government of India Act 1935 by N Rajagopala Aiyangar[25], there is an eloquent distinction made between matters of procedure and those of substance in the context of Section 41 (1):

This Sub-section seeks to cure defects arising from irregularity of procedure in the Legislature. The activities of a chamber may be divided into internal and external, the internal activities being the sphere of procedure, while the external are subject to the law of

the constitution. It is to irregularities in the domain of the former class that this Sub-section addresses itself. Under the latter head would fall defects arising from want of legislative competence, which is a matter external to the assembly and not a matter of procedure.

269. In the decision of a Constitution Bench in **Babulal Parate** v. **State of Bombay** MANU/SC/0008/1959 : (1960) 1 SCR 605, this Court noted the distinction between an issue which pertains to the validity of proceedings in Parliament and a violation of a constitutional provision. This was in the context of the provisions contained in clauses (a) to (e) of Article 3. The Constitution Bench held:

11. It is advisable, perhaps, to add a few more words about Article 122(1) of the Constitution. Learned Counsel for the Appellant has posed before us the question as to what would be the effect of that Article if in any Bill completely unrelated to any of the matters referred to in clauses (a) to (e) of Article 3 an amendment was to be proposed and accepted changing (for example) the name of a State. We do not think that we need answer such a hypothetical question except merely to say that if an amendment is of such a character that it is not really an amendment and is clearly violative of Article 3, the question then will be not the validity of proceedings in Parliament but the violation of a constitutional provision. That, however, is not the position in the present case.

270. Article 122 (1) provides immunity to proceedings before Parliament being called into question on the ground of "any alleged irregularities of procedure". In several decisions of this Court which construed the provisions of Article 122 and the corresponding provisions contained in Article 212 for the state legislatures, a distinction has been drawn between an irregularity of procedure and an illegality. Immunity from judicial review attaches to the former but not to the latter. This distinction found expression in a seven judge Bench decision of this Court in Special **Reference No. 1 of 1964** [26] ("**Special Reference**"). This Court held:

61. ... Article 212(2) confers immunity on the officers and members of the legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order, in the legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. Article 212(1) seems to make it possible for a citizen to call in question in the appropriate Court of law the validity of any proceedings inside the Legislative Chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. **If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a Court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular...**

This formulation was applied in the context of Article 122 by the Constitution Bench in **Ramdas Athawale** v. **Union of India** MANU/SC/0212/2010 : (2010) 4 SCC 1 ("**Ramdas Athawale**"):

36. This Court Under Article 143, Constitution of India In re (Special Reference No. 1 of 1964) [Powers, Privileges and Immunities of State Legislatures, In re (Special Reference No. 1 of 1964), MANU/SC/0048/1964 : AIR 1965 SC 745] (also known as Keshav Singh case) while construing Article 212(1) observed that it may be possible for a citizen to call in question in the appropriate court of law, the validity of any proceedings inside the legislature if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned

procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular. The same principle would equally be applicable in the matter of interpretation of Article 122 of the Constitution.

A subsequent Constitution Bench decision in **Raja Ram Pal** v. **Hon'ble Speaker, Lok Sabha** MANU/SC/0241/2007 : (2007) 3 SCC 184 emphasized the distinction between a procedural irregularity and an illegality:

386. ... Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text. Applying the principle of "expressio unius est exclusio alterius" (whatever has not been included has by implication been excluded), it is plain and clear that prohibition against examination on the touchstone of "irregularity of procedure" does not make taboo judicial review on findings of illegality or unconstitutionality.

***

398. ... the court will decline to interfere if the grievance brought before it is restricted to allegations of "irregularity of procedure". But **in case gross illegality or violation of constitutional provisions is shown, the judicial review will not be inhibited in any manner by Article 122, or for that matter by Article 105...**

271. The fundamental constitutional basis for the distinction between an irregularity of procedure and an illegality is that unlike in the United Kingdom where Parliamentary sovereignty governs, India is governed by constitutional supremacy. The legislative, executive and judicial wings function under the mandate of a written Constitution. The ambit of their powers is defined by the Constitution. The Constitution structures the powers of Parliament and the state legislatures. Their authority is plenary within the field reserved to them. Judicial review is part of the basic structure of the Constitution. Any exclusion of judicial review has to be understood in the context in which it has been mandated under a specific provision of the Constitution. Hence the provisions contained in Article 122 which protect an alleged irregularity of procedure in the proceedings in Parliament being questioned cannot extend to a substantive illegality or a violation of a constitutional mandate.

272. Mr. K.K. Venugopal, learned Attorney General for India relied on three decisions in support of his submission that the certificate issued by the Speaker of the Lok Sabha that a Bill is a Money Bill is immune from judicial review:

(I) **Mangalore Ganesh Beedi Works v. State of Mysore** MANU/SC/0347/1962 : AIR 1963 SC 589 ("**Mangalore Beedi**");

(II) **Mohd. Saeed Siddiqui v. State of Uttar Pradesh** MANU/SC/0350/2014 : (2014) 11 SCC 415 ("**Mohd. Saeed Siddiqui**"); and

(III) **Yogendra Kumar Jaiswal v. State of Bihar** MANU/SC/1441/2015 : (2016) 3 SCC 183 ("**Yogendra Kumar**").

Mangalore Beedi was a case where a new system of coinage had introduced a naya paisa (one hundred naya paisas being equivalent to a rupee) instead of the erstwhile legal tender of sixteen annas or sixty-four pice, which continued to remain legal tender. The Appellant which was subjected to an additional amount as sales tax due to the change in currency urged that as a result of the substitution of the coinage, there was a change in tax imposed under the Mysore Sales Tax Act 1948 which could have been effectuated only by passing a Money Bill Under Articles 198, 199 and 207 of the Constitution. Rejecting this submission, the Constitution Bench held that the substitution of a new coinage did not amount to an enhancement of tax. Consequently, there was no requirement of taking recourse to the provisions for enacting a Money Bill. However, Justice J.L. Kapur, speaking for the Court held:

5. ... Even assuming that it is a taxing measure its validity cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202 of the Constitution. Article 212 prohibits the validity of any proceedings in a legislature of a State from being called in question on the ground of any alleged irregularity of procedure and Article 255 lays down that requirements as to recommendation and previous sanction are to be regarded as matters of procedure only.

273. The ratio of the decision in **Mangalore Beedi** is that the substitution of coinage did not amount to an enhancement of tax. Hence, the provisions of Article 199 pertaining to a Money Bill were not attracted. Once that was the finding, it was not necessary for the decision to Rule on whether the certificate of a Speaker Under Article 199 (3) (corresponding to Article 110 (3)) is immune from judicial review. The ratio of the decision is that a new coinage does not amount to an enhancement of tax and hence a Bill providing for the substitution of coinage is not a Money Bill. The observations which are extracted above proceed on an assumption, namely that even assuming that it was a taxing measure, its validity could not be challenged on the ground of an alleged irregularity of procedure. This part of the observations is evidently not the ratio of **Mangalore Beedi**.

274. Subsequently in **Mohd. Saeed Siddiqui**, a three judge Bench of this Court dealt with an amendment brought about by the state legislature to a statute governing the Lokayukta and Up-Lokayukta so as to provide for an extension of the term from six years to eight years or until the successor enters office. The amendment was challenged on the ground that the Bill could not have been introduced as a Money Bill. Relying on the decision in **Mangalore Beedi**, a three judge Bench held that the issue as to whether a Bill was a Money Bill could only be raised by a Member before the legislative assembly before it was passed. Chief Justice P Sathasivam, speaking for the Bench formulated the following principles:

(i) the validity of an Act cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202;

(ii) Article 212 prohibits the validity of any proceedings in a legislature of a State from being called in question on the ground of any alleged irregularity of procedure; and

(iii) Article 255 lays down that the requirements as to recommendation and previous sanction are to be regarded as a matter of procedure only.

It is further held that the validity of the proceedings inside the legislature of a State cannot be called in question on the allegation that the procedure laid down by the law has not been strictly followed and that no court can go into those questions which are within the special jurisdiction of the legislature itself, which has the power to conduct its own business.

The decision adverted to Article 212 (1) (which corresponds to Article 122(1)) and to Article 255 [27] of the Constitution. While the decision also adverted to **Raja Ram Pal**, this Court held that any infirmity of procedure was protected by Article 255.

275. The subsequent decision of a two judge Bench of this Court in **Yogendra Kumar** dealt with the constitutional validity of the Orissa Special Courts Act 2006, enacted to provide special courts for offences involving the accumulation of properties disproportionate to their known-sources of income by persons who have held or hold high political and public offices. Repelling the challenge that the law could not have been introduced as a Money Bill in the legislative assembly, this Court, speaking through Justice Dipak Misra (as the than was) held thus:

43. In our considered opinion, the authorities cited by the learned Counsel for the Appellants do not render much assistance, for the introduction of a Bill, as has been held in Mohd. Saeed Siddiqui [Mohd. Saeed Siddiqui v. State of U.P., MANU/SC/0350/2014 : (2014) 11 SCC 415], comes within the concept of "irregularity" and it does come with the realm of substantiality. What has been held in Special Reference No. 1 of 1964 [Powers, Privileges and Immunities of State Legislatures, In re (Special Reference No. 1 of 1964), MANU/SC/0048/1964 : AIR 1965 SC 745] has to be appositely understood. The factual matrix therein was totally different than the case at hand as we find that the present controversy is wholly covered by the pronouncement in Mohd. Saeed Siddiqui and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned Counsel for the Appellants.

276. The three judge Bench decision in **Mohd. Saeed Siddiqui** relied on **Mangalore Beedi** as laying down the principle that a certificate of the Speaker that a Bill is a Money Bill is immune from judicial review. The decision in **Mangalore Beedi**, as we have seen, was based on a finding by the Constitution Bench that the substitution of a new coinage did not constitute an enhancement of tax and hence did not attract the requirements of a Money Bill. But the three judge Bench decision in **Mohd. Saeed Siddiqui** also adverts to the provisions of the Article 255 in attributing immunity to the certificate of the Speaker that a Bill is a Money Bill. Now Article 255 applies in a situation where "some recommendation or previous sanction" required by the Constitution was not given though the Act of Parliament or the legislature of state has since received assent. Thus, where the recommendation required is that of the Governor, the assent of the President or of the Governor and where the recommendation or previous sanction required is that of the President, the assent by the President will protect the legislation being called into question. The subsequent assent to the law cures the absence of a recommendation, or as the case may be, sanction. Article 255 does not deal with the certificate of the Speaker Under Article 110 (3) or Article 199 (3), which is neither a recommendation nor a previous sanction within the meaning of Article 255.

277. **Mohd. Saeed Siddiqui** proceeds on an incorrect construction of the decision in **Mangalore Beedi** and on an erroneous understanding of Article 255. The decision in **Pandit MSM Sharma** v. **Dr Shree Krishna Sinha** MANU/SC/0020/1960 : AIR 1960 SC 1186 which was adverted to

in **Mohd. Syed Siddiqui** was discussed in the **Special Reference** to hold that the validity of the proceedings in a legislative chamber can be questioned on the ground of illegality. The decisions in the **Special Reference, Ramdas Athawale** and **Raja Ram Pal** clearly hold that the validity of the proceedings before Parliament or a state legislature can be subject to judicial review on the ground of an illegality (as distinguished from an irregularity of procedure) or a constitutional violation. Hence, the decisions in **Mohd. Syed Siddiqui** and **Yogendra Kumar** on the above aspect do not lay down the correct position in law and are overruled.

D Puttaswamy: Judicial review of the certificate of the Speaker

278. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill 2016 was certified as a Money Bill Under Article 110 by the Speaker of the Lok Sabha. The exclusion of the Rajya Sabha from the legislative process consequent upon the certification by the Speaker Under Article 110(3) was one of the specific challenges addressed before the Constitution Bench (**K.S. Puttaswamy** v. **Union of India**). MANU/SC/1054/2018 : (2019) 1 SCC 1 ("Puttaswamy") Justice A.K. Sikri, speaking for three of the five judges of the Constitution Bench, analysed the provisions of the Aadhaar Act 2016 on the basis of two fundamental precepts: first, the importance of the Rajya Sabha in a bicameral legislature as "succinctly exemplified"[28] by the decision in **Kuldip Nayar** v. **Union of India** MANU/SC/3865/2006 : (2006) 7 SCC 1 ("**Kuldip Nayar**") and second, the Rajya Sabha as an "important institution signifying the constitutional federalism"[29].

279. Having enunciated these principles, Justice Sikri emphasised the need for the passage of a Bill by both the Houses of Parliament which, according to the learned Judge, is a "constitutional mandate"[29]. The only exception, the majority observed, is contained in Article 110. As a result, Article 110 being an exception to the scheme of bicameralism had to be given a "strict construction"[29]. The majority held thus:

463. The Rajya Sabha, therefore, becomes an important institution signifying constitutional federalism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides.

The above extract clearly indicates that the arguments were considered on the touchstone of the requirement that for a Bill to be a Money Bill, strict adherence to the provisions of Article 110 is necessary.

280. On the issue of justiciability[30] Justice Sikri rejected specifically the submissions urged on behalf of the Union of India that the certification of the Speaker was not subject to judicial review. The majority held:

464. We would also like to observe at this stage that insofar as submission of the Respondents about the justiciability of the decision of the Speaker of the Lok Sabha is concerned, we are unable

to subscribe to such a contention. Judicial review would be admissible under certain circumstances having regard to the law laid down by this Court in various judgments which have been cited by Mr. P. Chidambaram, learned senior Counsel appearing for the Petitioners, and taken note of in paragraph 455.

The decisions which were adverted to in para 455 referred to in the above extract are:

455.1. Sub-Committee on Judicial Accountability v. Union of India MANU/SC/0060/1992 : (1991) 4 SCC 699].

455.2. S.R. Bommai v. Union of India, MANU/SC/0444/1994 : (1994) 3 SCC 1].

455.3. Raja Ram Pal v. Lok Sabha (Supra)

455.4. Ramdas Athawale (5) v. Union of India (Supra)

455.5. Kihoto Hollohan v. Zachillhu (Supra).

The majority then proceeded to analyse whether the provisions contained in the Act could validly pass muster Under Article 110. In the view of the majority, Section 7 which makes the receipt of a subsidy, benefit or service conditional on the identity of the recipient being established by the process of authentication under Aadhaar was referable to Article 110 since these financial benefits were "extended with the support of the Consolidated Fund of India"[31]. The provisions of Section 23(2)(h) and Section 54 were held to be incidental to the main provision and covered by Article 110(g). Section 57, which permitted the use of Aadhaar by private entities for other purposes, was held to be unconstitutional. Having thus analysed the provisions of the Bill, the majority held:

472. For all the aforesaid reasons, we are of the opinion that Bill was rightly introduced as Money Bill. **Accordingly, it is not necessary for us to deal with other contentions of the Petitioners, namely, whether certification by the Speaker about the Bill being Money Bill is subject to judicial review or not,** whether a provision which does not relate to Money Bill is severable or not. We reiterate that main provision is a part of Money Bill and other are only incidental and, therefore, covered by Clause (g) of Article 110 of the Constitution.

281. Both Mr. Arvind Datar, learned *amicus curiae* and the learned Attorney General for India have highlighted the apparent inconsistency among the observations contained in paragraphs 463, 464 and 472 of the judgment. For, paragraph 464 rejects the submissions of the Union of India that the Speaker's decision is not justiciable in the aftermath of the earlier discussion that Article 110 must receive a strict construction, while para 472 holds that it was not necessary for the majority to deal with whether certification by the Speaker of a Bill as a Money Bill is subject to judicial review. However, in the course of the conclusion in paragraph 515, the issue to which answers were framed was:

515.(6). Whether the Aadhaar Act could be passed as "Money Bill" within the meaning of Article 110 of the Constitution?

The answer in paragraph 515.1 is in the following terms:

515.1. We do recognise the importance of Rajya Sabha (Upper House) in a bicameral system of the Parliament. The significance and relevance of the Upper House has been succinctly exemplified by this Court in Kuldip Nayar's case [Kuldip Nayar v. Union of India, MANU/SC/3865/2006 : (2006) 7 SCC 1]. The Rajya Sabha, therefore, becomes an important institution signifying constitutional federalism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides.

282. On merits, Section 7 was held to be a core provision, satisfying the conditions of Article 110 while the others were held to be incidental in nature. Section 57 had been held to be unconstitutional. Hence the conclusion was in the following terms:

467. ...Section 7 is the core provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.

515.5. On examining of the other provisions pointed out by the Petitioners in an attempt to take it out of the purview of Money Bill, we are of the view that those provisions are incidental in nature which have been made in the proper working of the Act. In any case, a part of Section 57 has already been declared unconstitutional. We, thus, hold that the Aadhaar Act is validly passed as a 'Money Bill'.

283. A holistic reading of the decision of the majority would indicate that: (i) Article 110 has been construed to be an exception to the principle of bicameralism and, therefore, the provision must (it has been held) receive strict interpretation; (ii) Section 7 constituted the core provision of the Aadhaar Bill which was referable to Article 110 while the other provisions were incidental; and (iii) Section 57 was held to be unconstitutional in so far as it allowed the use of the Aadhaar platform by private entities including corporate bodies. The observations in para 472 cannot, therefore, be construed to mean that the majority desisted from expressing a final view on justiciability.

284. The judgment of Justice D.Y. Chandrachud specifically holds that the decision of the Speaker to certify a Bill as a Money Bill is not immune from judicial review. After tracing the constitutional history of Article 110 including the provisions of the Parliament Act 1911 in Britain and Section 37 of the Government of India Act 1935, the judgment places reliance on the construction placed on the provisions of Article 122 and the corresponding provision in Article 212 in (i) **Special Reference**; (ii) **Ramdas Athawale**; and (iii) **Raja Ram Pal**. In coming to the conclusion that the decision of the Speaker is amenable to judicial review if it suffers from illegality or from a violation of constitutional provisions, the decisions in **Mohd. Saeed Siddiqui** and **Yogendra Kumar Jaiswal** were disapproved. Distinguishing the principle of Parliamentary sovereignty in the UK from the position of constitutional supremacy in India, the decision observes:

1067. The purpose of judicial review is to ensure that constitutional principles prevail in interpretation and governance. Institutions created by the Constitution are subject to its norms. No constitutional institution wields absolute power. No immunity has been attached to the certificate of the Speaker of the Lok Sabha from judicial review, for this reason. The Constitution makers have envisaged a role for the judiciary as the expounder of the Constitution. The provisions relating to the judiciary, particularly those regarding the power of judicial review, were framed, as Granville Austin observed, with "idealism" [Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at p. 205.] Courts of the country are expected to function as guardians of the Constitution and its values. Constitutional courts have been entrusted with the duty to scrutinise the exercise of power by public functionaries under the Constitution. No individual holding an institutional office created by the Constitution can act contrary to constitutional parameters. Judicial review protects the principles and the spirit of the Constitution. Judicial review is intended as a check against arbitrary conduct of individuals holding constitutional posts. It holds public functionaries accountable to constitutional duties. If our Constitution has to survive the vicissitudes of political aggrandisement and to face up to the prevailing cynicism about all constitutional institutions, notions of power and authority must give way to duties and compliance with the Rule of law. Constitutional institutions cannot be seen as focal points for the accumulation of power and privilege. They are held in trust by all those who occupy them for the moment. The impermanence of power is a sombre reflection for those who occupy constitutional offices. The Constitution does not contemplate a debasement of the institutions which it creates. The office of the Speaker of the House of People, can be no exception. The decision of the Speaker of the Lok Sabha in certifying a Bill as a Money Bill is liable to be tested upon the touchstone of its compliance with constitutional principles. Nor can such a decision of the Speaker take leave of constitutional morality.

285. Justice Ashok Bhushan, in his separate opinion, specifically held that the decision of the Speaker in certifying a Bill as a Money Bill is capable of judicial review. The learned judge held thus:

901. We have noticed the Constitution Bench judgments in Kihoto Hollohan [Kihoto Hollohan v. Zachillhu, MANU/SC/0753/1992 : 1992 Supp (2) SCC 651] and Raja Ram Pal [Raja Ram Pal v. Lok Sabha, MANU/SC/0241/2007 : (2007) 3 SCC 184] that finality of the decision of the Speaker is not immuned from Judicial Review. All Bills are required to be passed by both Houses of Parliament. Exception is given in case of Money Bills and in the case of joint sitting of both Houses. In event, we accept the submission of learned Attorney General that certification by Speaker is only a matter of procedure and cannot be questioned by virtue of Article 122(1), any Bill, which does not fulfil the essential constitutional condition Under Article 110 can be certified as Money Bill by-passing the Upper House. **There is a clear difference between the subject "irregularity of procedure" and "substantive illegality". When a Bill does not fulfil the essential constitutional condition under Article 110(1), the said requirement cannot be said to be evaporated only on certification by Speaker. Accepting the submission that certification immunes the challenge on the ground of not fulfilling the constitutional condition, Court will be permitting constitutional provisions to be ignored and by-passed. We, thus, are of the view that decision of the Speaker certifying the Bill as Money Bill is not only a matter of procedure and in event, any illegality has occurred in the decision and the decision is clearly in breach of the constitutional provisions, the decision is subject to Judicial Review.** We are, therefore,

of the view that the Three Judge Bench judgment of this Court in Mohd. Saeed Siddiqui [Mohd. Saeed Siddiqui v. State of UP., MANU/SC/0350/2014 : (2014) 11 SCC 415] and Two Judge Bench judgment of this Court in Yogendra Kumar Jaiswal [Yogendra Kumar Jaiswal v. State of Bihar, MANU/SC/1441/2015 : (2016) 3 SCC 183: (2016) 2 SCC (Cri.) 1] do not lay down the correct law. We, thus, conclude that the decision of the Speaker certifying the Aadhaar Bill as Money Bill is not immuned from Judicial Review.

Justice Ashok Bhushan then held on merits that the Bill had been correctly passed as a Money Bill.

286. From the above analysis, it is evident that the judgments of both Justice D.Y. Chandrachud and Justice Ashok Bhushan categorically held that the decision of the Speaker to certify a Bill as a Money Bill is not immune from judicial review. There is a clear distinction between an irregularity of procedure Under Article 122(1) and a substantive illegality. The certificate of the Speaker Under Article 110(3) is not conclusive in so far as judicial review is concerned. Judicial review can determine whether the conditions requisite for a Bill to be validly passed as a Money Bill were fulfilled. The point of difference between the majority (represented by the decisions of Justice Sikri and Justice Ashok Bhushan) and Justice Chandrachud was that on merits, the majority came to the conclusion that the Aadhaar Bill is a Money Bill within the meaning of Article 110(1) while the dissent held otherwise.

287. On an overall reading of the judgment of Justice Sikri, it is not possible to accede to the submission of the learned Attorney General that the issue of the reviewability of the certificate of the Speaker is left at large by the decision of the majority. In any event, in view of the issue having arisen in the present case, we have dealt with the aspect of judicial review independently of the decision in **Puttaswamy**.

E Role of the Rajya Sabha

288. The Rajya Sabha consists of not more than two hundred and fifty members, twelve nominated by the President (from persons with special knowledge or practical experience in literature, science, art and social service) and not more than two hundred and thirty eight representatives of the States and Union Territories[32]. The Fourth Schedule specifies the manner in which allocation of seats is made in the Rajya Sabha. The elected members of the legislative assembly of every state elect the representatives of the state in the Rajya Sabha in accordance with "the system of proportional representation by means of the single transferable vote". Representation of the Union Territories is provided by a law enacted by Parliament.

289. The Rajya Sabha, unlike the Lok Sabha, is not subject to dissolution but one-third of its members retire by rotation[33]. The Lok Sabha, unless sooner dissolved, has a life span of five years. In contrast, the Constitution envisages that the Rajya Sabha is an institution possessed of constitutional continuity with a third of its members retiring by rotation at stipulated intervals. In line with the principle of constitutional continuity, Article 107(4) stipulates that a Bill which is pending in the Rajya Sabha which has not been passed by the Lok Sabha shall not lapse on the dissolution of the Lok Sabha. On the other hand, under Clause (5), a Bill which is pending in the Lok Sabha or upon being passed by the Lok Sabha is pending in the Rajya Sabha, shall lapse on a dissolution of the Lok Sabha, subject to Article 108 [34]. The role of the Rajya Sabha in respect of

Money Bills has, however, been substantially curtailed. Money Bills can originate only in the Lok Sabha. Moreover, the Rajya Sabha has only a recommendatory power, as noticed earlier, in regard to Money Bills.

Bicameralism

290. Bicameralism emerged in 14th century Britain. The House of Lords represented a chamber where a debate took place with feudal lords, while the House of Commons was where citizens were represented. The House of Lords comprised of hereditary peers while the House of Commons in their historical origin comprised of persons possessed of property as required. Across the Atlantic, the Constitution of the United States adopted bicameralism. The Constitutional Convention of 1787 represented a constitutional compromise where the House of Representatives comprised of directly elected legislatures, each voter possessed of an equal vote in the elections and the Senate, where each state could send two members elected indirectly. In the *Federalist Papers*, James Madison underscored the importance of the Senate as an indirectly elected Upper House of a bicameral legislature:

First ... a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. ...

Second: The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. ...

Third: Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. ...

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. ...

Fourth: The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government.

291. Madison conceived of the Senate as a body which imposes a salutary check on government. To Madison, the requirement of concurrence of two legislative bodies ensured against usurpation of public power. The Senate was conceived of as a body capable of calm deliberation, isolated from the governing passions of the day. As a sobering voice, the Senate, it was conceived would

reflect an expertise in framing legislation. It was an institution which symbolises stability in constitutional governance.

HM Seervai in his classical text, **Constitutional Law of India**[35] emphasises the position of the Rajya Sabha as a critical ingredient in the federal structure:

First and foremost, Parliament (the Central Legislature) is dependent upon the States, because one of its Houses, the Council of States, is elected by the Legislative Assemblies of the States. Where the ruling party, or group of parties, in the House of the People has a majority but not an overwhelming majority, the Council of States can have a very important voice in the passage of legislation other than financial Bills. Secondly, a Bill to amend the Constitution requires to be passed by each House of Parliament separately by an absolute majority in that House and by not less than two-thirds of those present and voting. Since the Council of States is indirectly elected by the State Legislatures, the State Legislatures have an important say in the amendment of the Constitution because of the requirement of special majorities in each House. Thirdly, the very important matters mentioned in the proviso to Article 368 (Amendment of the Constitution) cannot be amended unless the amendments passed by Parliament are ratified by not less than half the number of Legislatures of the States ... Fourthly, the amendment of Article 352 by the 44th Amendment gives the Council of States a most important voice in the declaration of Emergency, because a proclamation of emergency must be approved by each House separately by majorities required for an amendment of the Constitution ... Fifthly, the executive power of the Union is vested in the President of India who is not directly elected by the people but is elected by an electoral college consisting of (a) the elected Members of the Legislative Assemblies of the States, and (b) the elected members of both Houses of Parliament ... Directly the State Legislatures have substantial voting power in electing the President; that power is increased indirectly through the Council of States, which is elected by the Legislative Assemblies of States.

292. The Rajya Sabha Secretariat has, in its publication titled "Second Chamber in Indian Parliament: Role and Studies of Rajya Sabha", emphasised the position of the Rajya Sabha as an institution sensitive to the aspirations of the states, contributing in that capacity to strengthening the federal structure of the nation. The publication emphasises some of the special powers possessed by the Rajya Sabha:

(i) Article 249 of the Constitution provides that Rajya Sabha may pass a resolution, by a majority of not less than two-thirds of the Members present and voting to the effect that it is necessary or expedient in the national interest that Parliament should make a law with respect to any matter enumerated in the State List. Then, Parliament is empowered to make a law on the subject specified in the resolution for the whole or any part of the territory of India. Such a resolution remains in force for a maximum period of one year but this period can be extended by one year at a time by passing a further resolution;

(ii) Under Article 312 of the Constitution, if Rajya Sabha passes a resolution by a majority of not less than two-thirds of the Members present and voting declaring that it is necessary or expedient in the national interest to create one or more All India Services common to the Union and the States, Parliament has the power to create by law such services; and

(iii) Under the Constitution, the President is empowered to issue Proclamations in the event of national emergency (Article 352), in the event of failure of constitutional machinery in a State (Article 356), or in the case of financial emergency (Article 360). Normally, every such Proclamation has to be approved by both Houses of Parliament within a stipulated period. Under certain circumstances, however, Rajya Sabha enjoys special powers in this regard. If a Proclamation is issued at a time when the dissolution of the Lok Sabha takes place within the period allowed for its approval, then the Proclamation can remain effective if a resolution approving it, is passed by Rajya Sabha.

293. In **Kuldip Nayar**, Chief Justice Y.K. Sabharwal speaking for the Constitution Bench emphasised the role of the Rajya Sabha in the following observations:

47. The Rajya Sabha is a forum to which experienced public figures get access without going through the din and bustle of a general election which is inevitable in the case of the Lok Sabha. It acts as a revising chamber over the Lok Sabha. The existence of two debating chambers means that all proposals and programmes of the Government are discussed twice. As a revising chamber, the Rajya Sabha helps in improving Bills passed by the Lok Sabha.

The significance of the role of the Rajya Sabha was also emphasised by Justice A.K. Sikri (writing on behalf of himself and two other judges) in **Puttaswamy**. Complementing those observations, the judgment of Justice D.Y. Chandrachud places the position of the Rajya Sabha, in the context of federalism being a part of the basic features of the Constitution:

1106. The institutional structure of the Rajya Sabha has been developed to reflect the pluralism of the nation and its diversity of language, culture, perception and interest. The Rajya Sabha was envisaged by the makers of the Constitution to ensure a wider scrutiny of legislative proposals. As a second chamber of Parliament, it acts as a check on hasty and ill-conceived legislation, providing an opportunity for scrutiny of legislative business. The role of the Rajya Sabha is intrinsic to ensuring executive accountability and to preserving a balance of power. The Upper Chamber complements the working of the Lower Chamber in many ways. The Rajya Sabha acts as an institution of balance in relation to the Lok Sabha and represents the federal structure [In *S.R. Bommai* v. *Union of India*, MANU/SC/0444/1994 : (1994) 3 SCC 1: AIR 1994 SC 1998] of India. Both the existence and the role of the Rajya Sabha constitute a part of the basic structure of the Constitution. The architecture of our Constitution envisions the Rajya Sabha as an institution of *federa* bicameralism and not just as a part of a simple bicameral legislature. Its nomenclature as the "Council of States" rather than the "Senate" appropriately justifies its federal importance.

294. Bicameral legislatures have a significant constitutional role particularly in the context of federal structures. The Rajya Sabha, as our Constitution emphasises, represents the aspirations of the states and is hence a critical element in the constitutional design of the federal structure. The Rajya Sabha is an institution possessed of constitutional continuity. The body is not dissolved like the House of the People and its members retire by rotation. The exclusion of the Rajya Sabha has been contemplated in the context of Money Bills. However, this is an exception to the overarching principle that Bills have to be passed by both Houses of Parliament.

295. There is a significant difference between the provisions of Article 110(1) which defines Money Bills and the provisions of Article 117(1) which enunciates special provisions as to Financial Bills. Article 117(1) provides that a Bill or amendment making provision for any of the matters specified in Sub-clauses (a) to (f) of Article 110(1) shall not be introduced or moved except on the recommendation of the President of India and the Bill making such provision shall not be introduced in the Council of States. The word 'only' which is employed in Article 110(1) in the definition of Money Bills is absent in Article 117(1). The Legislative Procedure in the Rajya Sabha[36] explains that Financial Bills are comprised in categories I and II respectively:

b. Financial Bills-Category-I

A Bill falling under Clause (1) of Article 117 of the Constitution is called a Financial Bill. It is a Bill which seeks to make provision for any of the matters specified in Sub-clauses(a) to (f) of Clause (1) of Article 110 as also other matters. It is, so to say, a Bill which has characteristics both of a Money Bill... firstly, it cannot be introduced in Rajya Sabha, and secondly, it cannot be introduced except on the recommendations of the President. Except these two points of difference, a Financial Bill in all other respects is just like any other ordinary Bill.

(c). Financial Bills-Category-II

There is yet another class of Bills which are also Financial Bills Under Article 117(3). Such Bills are more in the nature of ordinary Bills rather than the Money Bills and Financial Bills mentioned earlier. The only point of difference between this category of Financial Bills and the ordinary Bills is that such a Financial Bill, if enacted and brought into operation, involves expenditure from the Consolidated Fund of India and cannot be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill. In all other respects this category of Bills is, just like ordinary Bills, so that such a Financial Bill can be introduced in Rajya Sabha, amended by it or a joint sitting can be introduced in Rajya Sabha, amended by it or a joint sitting can be held in case of disagreement between the Houses over such a Bill. There is, in other words, no limitation on the power of Rajya Sabha in respect of such Financial Bills.

The above classification re-emphasises the distinction of a Financial Bill with a Money Bill, which is a Bill which contains 'only' provisions of the description specified in Sub-clauses (a) to (g) of Article 110(1).

296. The Rajya Sabha reflects the pluralism of the nation and ensures a balance of power. It is an indispensable constitutive unit of the federal backbone of the Constitution. Potential differences between the two houses of the Parliament cannot be resolved by simply ignoring the Rajya Sabha. In a federal polity such as ours, the efficacy of a constitutional body created to subserve the purpose of a deliberate dialogue, cannot be defeated by immunising from judicial review the decision of the Speaker to certify a Bill as a Money Bill.

F Merits of the challenge

F.1 Passage as a Money Bill

297. On 19 February 2014, the Appellate Tribunals and Other Authorities (Conditions of Service) Bill 2014 was introduced in the Rajya Sabha to provide "uniform conditions of service of the Chairman and Members" of 26 tribunals. Clause 3 of the Bill provides:

3. Notwithstanding anything to the contrary contained in the provisions of the specified Acts, the provisions of this Act shall apply to the Chairman and Members appointed under the specified Acts:

Provided that the provisions of this Act shall not apply to the Chairman and other Members, as the case may be, holding such office immediately before the commencement of the said Act.

'Specified Acts' were enunciated in the First Schedule to the Bill. The Bill was referred to the Department related Standing Committee which submitted its Seventy Fourth Report on 26 February 2015. The Bill was withdrawn on 11 April 2017.

298. The Finance Bill 2017 was introduced as a Money Bill in the Lok Sabha with a recommendation of the President under clauses (1) and (3) of Article 117 of the Constitution. At the time of the introduction of the Bill on 1 February 2017, the Finance Bill 2017 comprised of 150 clauses together with seven schedules "to give effect to the financial proposals of the Central Government for the financial year 2017-18". The Bill contained proposals *inter alia* to amend, add to and modify legislation dealing with taxation-direct, indirect and service taxes and other fiscal aspects. Part VIII of the Finance Bill 2017 sought to expand the jurisdiction of the Securities Appellate Tribunal[37] established under the SEBI Act 1992 [38] and to make changes in the existing provisions for the appointments to the SAT. The Finance Bill was taken up for discussion on 21 March 2017 and was passed by the Lok Sabha on 22 March 2017 with 29 government amendments.

299. On 21 March 2017, the Union Finance Minister proposed an amendment to incorporate Part XI (subsequently renumbered as Part XIV in the Finance Act) containing 34 new clauses and two schedules to the Finance Bill. Rule 80(i) of the Rules of Procedure for the Conduct of Business in the Lok Sabha stipulates that:

80. Admissibility of amendments.

The following conditions shall govern the admissibility of amendments to clauses or schedules of a Bill:

(i) An amendment shall be within the scope of the Bill and relevant to the subject-matter of the Clause to which it relates.

During the course of the discussion, the Speaker overruled the objection against the inclusion of the proposed amendments dealing with non-fiscal subjects. The Lok Sabha Debates elucidate:

Hon. Members would recall that during last year when similar objections were raised at the time of consideration of the Finance Bill, 2016, I had observed that as per Rule 219, the primary object of a Finance Bill is to give effect to the financial proposals of the Government. There is no doubt

about it. At the same time, this Rule does not Rule out the possibility of inclusion of non-taxation proposals. Therefore, I have accepted this. The Finance Bill may contain non-taxation proposals also...

So, incidental provisions can be made. That is why, keeping in view that Rule 2019 does not specifically bar inclusion of non-taxation proposals in a Finance Bill, I Rule out the Point of Order.

300. The Lok Sabha suspended the operation of Rule 80(1) so as to allow the proposed amendments to be incorporated in the Finance Bill. On 22 March 2017, the House adopted the Finance Bill 2017 along with an amendment to insert Part XI (renumbered as Part XIV in the Finance Act). The Bill was transmitted to the Rajya Sabha Under Article 109(2) together with the certification of the Speaker. The Rajya Sabha returned the Bill with its recommendations on 29 March 2017. On 30 March 2017, the Lok Sabha rejected the recommendations. Resultantly the Finance Bill was deemed to have been passed by both the Houses.

301. Upon the passage of the Finance Bill 2017, the Rules were notified by the Union of India in the Ministry of Finance on 1 June 2017. In terms of Section 184 of the Finance Act 2017, the Rules specify: (i) criteria of eligibility; (ii) procedure of selection; (iii) provisions for resignation and removal; (iv) salaries and emoluments; (v) term and tenure; and (vi) other service conditions such as leave and allowances to members of scheduled tribunals.

Part XIV of the Finance Act 2017 is titled: "**Amendments to certain Acts to provide for Merger of Tribunals and Other Authorities and Conditions of Service of Chairpersons, Members etc.**"

302. Section 158 effects amendments to several Parliamentary enactments:

i. The Industrial Disputes Act, 1947

ii. The Employees' Provident Funds and Miscellaneous Provisions Act 1952

iii. The Copyright Act 1957

iv. The Trade Marks Act 1999

v. The Railway Claims Tribunal Act 1987

vi. The Railways Act 1989

vii. The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act 1976

viii. The Foreign Exchange Management Act 1999

ix. The Airports Authority of India Act 1994

x. The Control of National Highways (Land and Traffic) Act 2002

xi. The Telecom Regulatory Authority of India Act 1997

xii. The Information Technology Act 2000

xiii. The Airports Economic Regulatory Authority of India Act 2008

xiv. The Competition Act 2002

xv. The Companies Act 2013

xvi. The Cinematograph Act 1952

xvii. The Income Tax Act 1961

xviii. The Customs Act 1962

xix. The Administrative Tribunals Act 1985

xx. The Consumer Protection Act 1986

xxi. The Securities and Exchange Board of India Act 1992

xxii. The Recovery of Debts Due to Banks and Financial Institutions Act 1993

xxiii. The Armed Forces Tribunal Act 2007

xxiv. The National Green Tribunal Act 2010

303. Section 183 provides:

183. Notwithstanding anything to the contrary contained in the provisions of the Acts specified in column (3) of the Eighth Schedule, on and from the appointed day, provisions of Section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the said Schedule:

Provided that the provisions of Section 184 shall not apply to the Chairperson, Vice Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or, as the case may be, Member holding such office as such immediately before the appointed day.

The Eighth Schedule contains a list of 19 Tribunals together with the corresponding enactments under which they were constituted. The effect of Section 183 is to override the provisions of those enactments and to stipulate that from the appointed day, the provisions of Section 184 shall apply to Chairpersons, Vice Chairpersons, Presidents, Vice Presidents, Presiding Officers and Members of the Tribunals or, as the case may be, Appellate Tribunals. Those who hold office immediately before the appointed day have been excluded.

Section 184 stipulates:

184. (1) The Central Government may, by notification, make Rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:

Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the Rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the Rules made by the Central Government which shall not exceed,--

(a) in the case of Chairperson, Chairman or President, the age of seventy years;

(b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member, the age of sixty-seven years:

(2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment.

304. Section 184 has conferred a Rule making power on the Central Government to provide for the (i) qualifications; (ii) appointment; (iii) terms of office; (iv) salaries and allowances; (iv) resignation; (vi) removal; and (viii) other terms and conditions of service. The proviso stipulates that the term of office shall be such as is prescribed in the Rules made by the Central Government not exceeding five years and that a Member would be eligible for reappointment. An upper age limit is prescribed by the second proviso. Section 185 (1) stipulates that Chairpersons, Presidents or Vice Chairpersons, Vice Presidents, Presiding Officers and Members of the Tribunals or Appellate Tribunals who hold office before the appointed day shall cease to do so and be entitled to compensation not exceeding three months' pay and allowances for the premature termination of the term of office or the contract of service.

305. The learned Attorney General for India submitted that Part XIV of the Finance Act 2017 is sustainable with reference to Sub-clauses (c), (d) and (g) of Clause (1) of Article 110. The submission is that the certification by the Speaker is of the entire Finance Bill when it was transmitted to the Rajya Sabha. The Attorney General urged that payment of salaries is made out of the Consolidated Fund of India. Once this be the position, the other provisions of Part XIV are, it was urged, incidental in nature. It is argued that salaries, allowances and pension will have a direct nexus with the Consolidated Fund of India and are incidental to the provisions contained in

the Finance Act 2017. In this context, reliance was placed on: (i) the presumption of constitutional validity (**State of West Bengal** v. **Anwar Ali Sarkar** MANU/SC/0033/1952 : (1952) SCR 284, **R.K. Garg** v. **Union of India** MANU/SC/0074/1981 : (1981) 4 SCC 675 and **Subramanian Swamy** v. **Director, Central Bureau of Investigation** MANU/SC/0417/2014 : (2014) 8 SCC 682); (ii) the importance of the doctrine of separation of powers (**Bhim Singh** v. **Union of India** MANU/SC/0327/2010 : (2010) 5 SCC 538).

306. The provisions of Part XIV of the Finance Act 2017 amend, first and foremost, the legislative enactments under which diverse tribunals, including appellate tribunals were constituted. By and as a result of the amendments, the statutory provisions relating to qualifications for appointment, the process of appointment, terms of office and the terms and conditions of service including salaries, allowances, resignation and removal are overridden and are to be governed by the provisions of Section 184. Section 184 confers a Rule making power on the Central Government to stipulate all the above aspects in regard to the adjudicatory personnel appointed to these tribunals. By this process, the governing statutory provisions embodied in the parent legislation are overridden and authority is conferred upon the Central Government to formulate other aspects of the process from qualifications for office and the process of appointment to the terms of service, through delegated legislation.

307. This, in our view, completely transgresses the conditions stipulated in Article 110(1) for constituting a Money Bill. Article 110 does not bar the inclusion of non-fiscal proposals in a Money Bill. But while permitting the inclusion of non-fiscal subjects, Sub-clause (g) of Article 110(1) embodies the requirement that such a matter must be incidental to any of the matters specified in Sub-clauses (a) to (f). In other words, the inclusion of a non-fiscal matter is permissible in a Money Bill only if it is incidental or ancillary to a matter specified in Sub-clauses (a) to (f). Part XIV has repealed and replaced substantive provisions contained in the enactments specified in the Eighth and Ninth Schedules which are not referable to Sub-clauses (a) to (f) of Article 110(1). Part XIV of the Finance Act 2017 is thus not incidental within the meaning of Sub-clause (g). The plain consequence is that by adopting the special procedure contained in Article 109, the substantive procedure governing Ordinary Bills Under Articles 107 and 108 has been rendered otiose. If the provisions contained in Part XIV were to be enacted in the form of an Ordinary Bill, the Rajya Sabha would have a vital voice in deliberating and discussing on the nature of the legislative proposals. Part XIV contains provisions which lie outside the domain permissible Under Article 110.

308. We are unimpressed with the submissions of the learned Attorney General that since salaries are payable out of the Consolidated Fund, Part XIV of the Finance Act bears a nexus with Sub-clauses (c) and (d) of Article 110(1) and that the other provisions are merely incidental. That the amendment has a bearing on the financial burden on the Consolidated Fund of India cannot be the sole basis of bringing the amendment within the purview of Article 110(1). On a close analysis of the provisions, it is evident that what is claimed to be incidental has swallowed up the entire legislative exercise. The provisions of Part XIV of the Finance Act 2017 canvass a range of amendments which include qualifications and process for appointment terms of office and terms and conditions of service including salaries, allowances, resignation and removal which cannot be reduced to only a question of the financial burden on the Consolidated Fund of India. The effect of Part XIV is to amend and supersede the provisions contained in the parent enactments governing

all aspects of the appointment and terms of service of the adjudicatory personnel of the tribunals specified in the Eighth and Ninth Schedules. This exercise cannot be construed as a legitimate recourse to the power of enacting a Money Bill.

309. The Attorney General for India urged that the provisions of Part XIV of the Finance Act 2017, in so far as they have a financial bearing on the Consolidated Fund of India, are sustainable with reference to Sub-clauses (c), (d), (e) and (g) of Clause (1) of Article 110.

310. Sub-clause (c) deals, *inter alia*, with the withdrawal of money from either the Consolidated Fund of India or the Contingency Fund of India. Sub-clause (d) deals with the appropriation of money out of the Consolidated Fund of India. Sub-clause (e) stipulates either the declaration of any expenditure or the increase in the amount of expenditure charged on the Consolidated Fund of India. It was contended that Part XIV of the Finance Act 2017, in so far as it has a bearing on the Consolidated Fund of India, is *incidental* to the matters referred in Sub-clauses (c), (d) and (e) of Article 110(1).

311. Sub-clause (g) stipulates that provisions dealing with any matter incidental to the matters specified in Sub-clauses (a) to (f) fall within the purview of Article 110(1). However, this is distinct from contending that where a bill contains provisions not referable to the Sub-clauses (a) to (f) stipulated in Clause (1) of Article 110 but has an incidental bearing on the Consolidated Fund of India, this by itself would bring such a bill within the purview of Sub-clause (g) of Article 110(1).

312. Article 110(1) defines a Money Bill as a bill which contains "only provisions" dealing with all or any of the matters enumerated in Sub-clauses (a) to (f). The import of Sub-clause (g) of Clause (1) of Article 110 is that the proposed bill may also contain provisions which have an incidental bearing on the matters enumerated in Sub-clauses (a) to (f). However, Sub-clause (g) cannot be read to permit a bill consisting of provisions which do not directly pertain to matters enumerated in Sub-clauses (a) to (f), but have only an incidental bearing on the matters enumerated in Sub-clauses (a) to (f). Implicit in the term "incidental" is the relation between the principal subject matters of the bill which must be referable to Sub-clauses (a) to (f) and other matters. Every provision of a bill which is claimed to be a Money Bill must directly pertain to any of the matters enumerated in clauses (a) to (f). Where it is claimed that a provision falls within the ambit of Sub-clause (g), the provision must depend on or be appurtenant "to any of the matters specified in Sub-clauses (a) to (f)."

313. Part XIV of the Finance Act 2017 canvasses a range of amendments which include qualifications and process for appointment of members of tribunals, terms of office and terms and conditions of service including salaries, allowances, resignation and removal which are not referable to Sub-clauses (a) to (f) of Clause (1) of Article 110. Almost every government action involves an increase or decrease of expenditure which may be relatable to the Consolidated Fund of India. Accepting the argument urged would amount to inverting Sub-clause (g) and allowing any bill which is not referable to the matters enumerated in Article 110(1) to be passed as a Money Bill so long as it can be shown that the provisions may have some bearing on the Consolidated Fund of India.

314. Further, the contention urged that the transfer of the power to determine salaries has a direct nexus with the Consolidated Fund of India glosses over the distinction between the **power** to determine of modify salaries and the determination or modification of the salary. The transfer of the power to determine or modify salaries does not, by itself, lead to the conclusion that such transfer of authority to the Rule making function by the Central Government is referable to the Consolidated Fund of India in the manner contemplated in the Sub-clauses referred to above.

315. The transfer of authority to determine qualifications and process for appointments, terms of office and terms and conditions of service including salaries, allowances, resignation and removal of tribunal members from the statutory provisions determined by the legislature to the executive is the transfer of a substantive right which has a bearing on constitutional design as well as the independence of adjudicatory tribunals. They are not referable to Sub-clauses (c), (d) and (e) of Article 110(1) and do not amount to matters incidental to any of the matters enumerated in Sub-clauses (a) to (f) of Clause (1) of Article 110.

316. There is undoubtedly a presumption of constitutionality which attaches to legislation. The presumption is founded on the principle that the legislature in a parliamentary democracy understands the needs and conditions of the time and that the executive government which pilots legislation through the competent legislature is accountable to both the legislature and to the people whom the elected arm of government represents. But the presumption of constitutionality is what it is, namely, a presumption. The presumption can be displaced on a clear violation of a constitutional mandate or infraction being established. Where a Bill which contains provisions which are not referable to Sub-clauses (a) to (g) of Clause (1) of Article 110 is passed as a Money Bill, that constitutes a clear violation of the mandate of Article 110. The presumption of constitutionality stands displaced.

317. The learned Attorney General urged that the doctrine of separation of powers would require this Court to tread with caution since certification of a Bill as a Money Bill, as he submits, pertains to the internal functioning of Parliament. Judicial review, it was submitted, would violate the separation of powers. The submission overlooks the fundamental position that the certification of a Bill as a Money Bill and the invocation of the provisions of Article 110 is an exception which has been carved out by the Constitution to the constitutional requirements accompanying the passage of ordinary legislation. In passing the Bill as a Money Bill, the immediate impact is to denude the Rajya Sabha of the legislative role which is assigned to it in the passage of legislation.

318. The Rajya Sabha as a legislative institution represents the voice, concerns and aspirations of Indian federalism. The reduction of the role of the Rajya Sabha in the case of a Money Bill was engrafted by the draftspersons of the Constitution with a specific purpose. In their view, Money Bills should appropriately be reserved for the authority of the Lower House which consists of directly elected representatives of the people. But to regard a Bill which is not a Money Bill as one which passes muster Under Article 110 is a breach of a substantive constitutional provision, a violation of constitutional process and hence, an illegality.

319. The basic postulate of our Constitution is that every authority is subservient to constitutional supremacy. No authority can assume to itself the ultimate power to decide the limits of its own constitutional mandate. Judicial review is intended to ensure that every constitutional authority

keeps within the bounds of its constitutional functions and authority. In holding a constitutional institution within its bounds, judicial review does not trench upon the doctrine of separation of powers. The adjudicatory power vests in the Supreme Court as a constitutional court. In adjudicating on whether there has been a violation of a constitutional mandate in passing a Bill as a Money Bill, judicial review does not traverse beyond the limit set by the separation of powers. On the contrary, the independence of judicial tribunals has been consistently recognised by this Court as an inviolable feature of the basic structure of the Constitution. Determination of the norms of eligibility, the process of selection, conditions of service, and those regulating the impartiality with which the members of the tribunals discharge their functions and their effectiveness as adjudicatory bodies is dependent on their isolation from the executive. By leaving the Rule making power to the uncharted wisdom of the executive, there has been a self-effacement by Parliament. The conferment of the power to frame Rules on the executive has a direct impact on the independence of the tribunals. Allowing the executive a controlling authority over diverse facets of the tribunals would be destructive of judicial independence which constitutes a basic feature of the Constitution.

F.2 Violation of directions issued by this Court

320. The Rules Under Section 184 of the Finance Act 2017, termed the Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules 2017 were notified on 1 June 2017. Rule 1(3) provides for the applicability of the Rules in the following terms:

(3) These Rules shall apply to the Chairman, Vice-Chairman, Chairperson, Vice-Chairperson, President, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member, Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority as specified in column (2) of the Eighth Schedule of the Finance Act, 2017 (7 of 2017).

321. Rule 3 prescribes the qualifications for appointment to those tribunals which are specified in Column 3 of the Schedule. Rule 4 provides that the method of recruitment is specified in Column 4 of the Schedule. Rule 7 provides for the removal of a member from office by the Central Government "on the recommendation of a committee constituted by it in this behalf". Rule 8 provides for the procedure for enquiry into an alleged misbehaviour or incapacity of a member. It contemplates a preliminary scrutiny by the Ministry or the Department of the Government of India under which the tribunal or appellate tribunal is constituted or established. Upon finding that there are reasonable grounds in an inquiry, a reference is made to the committee constituted Under Rule 7. After the conclusion of the enquiry, the committee is to submit its report to the Central Government with its findings. Rule 9 provides for the term of office as specified in Column 5 of the Schedule with a cap on age as specified in Column 6. Rule 11 provides for a fixed salary of Rs. 2.50 lakhs together with allowances and benefits admissible to a Central Government officer holding an office carrying the same pay in the case of the Chairperson or President or Presiding Officer of SAT. A consolidated salary of Rs. 2.25 lakhs is payable to Vice Chairpersons, Vice Presidents and Members.

Column 4 of the Schedule stipulates the composition of the Search-cum-Selection Committee for the various tribunals. The Search-cum-Selection Committee of the Industrial Tribunal is as follows:

Search-cum-Selection Committee for the post of the Presiding Officer,-(i) a person to be nominated by the Central Government chairperson; (ii) Secretary to the Government of India, Ministry of Labour and Employment-member; (iii) Secretary to the Government of India to be nominated by the Central Government-member; (iv) two experts to be nominated by the Central Government-members.

It is evident that the Search-cum-Selection Committee is constituted entirely from personnel within or nominated by the Central Government. Barring the National Company Law Appellate Tribunal, the Search-cum-Selection Committee for all other seventeen tribunals specified in the Schedule is constituted either entirely from personnel within or nominated by the Central Government or comprises a majority of personnel from the Central Government. The Search-cum-Selection Committee of the National Company Law Appellate Tribunal consists of an equal number of members from the judiciary as well as from the Central Government with no casting vote to the Chief Justice of India or their nominee:

(B) Search-cum-Selection Committee for the post of the Judicial Member and Technical Member of the Appellate Tribunal,-(i) Chief Justice of India or his nominee-chairperson; (ii) a senior Judge of the Supreme Court or a Chief Justice of a High Court-member; (iii) Secretary to the Government of India, Ministry of Corporate Affairs-member; (iv) Secretary to the Government of India, Ministry of Law and Justice-member.

The procedure for selection is fundamentally destructive of judicial independence. The Union Government has vital status in the disputes before many tribunals. Even otherwise, conferring upon the government such a dominating and overwhelming voice in making appointments is a negation of judicial independence.

322. Sub-rule 2 of Rule 4 of the 2017 Rules stipulates that the Secretary to the Government of India in the Ministry or Department shall be the Convener of the Search-cum-Selection Committee. In **R. Gandhi**, the Court specifically issued the following directions in regard to the constitution of the Selection Committees:

(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee--Chairperson (**with a casting vote**);

(b) A Senior Judge of the Supreme Court or Chief Justice of High Court--Member;

(c) Secretary in the Ministry of Finance and Company Affairs--Member; and

(d) Secretary in the Ministry of Law and Justice-Member.

Significantly, Section 10 (FX) which was inserted into the Companies Act 1956 by the Companies (Second Amendment) Act 2002 relating to the Constitution of NCLT and NCLAT contained the following provision:

10-FX. Selection Committee--(1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of--

(a)	Chief Justice of India or his nominee	Chairperson;
(b)	Secretary in the Ministry of Finance and Company Affairs	Member;
(c)	Secretary in the Ministry of Labour	Member;
(d)	Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department)	Member;
(e)	Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs)"	Member

323. In **Madras Bar Association**, Section 7 of the National Tax Tribunal Act 2005 provided for the process of selection and appointment of the Chairperson and members of the NTT. The Court observed that as the jurisdiction of the High Courts was being transferred to the Tribunal, the stature of the members, conditions of service, and manner of appointment and removal of members must be akin to that of the judges of High Courts. Section 7 was held to be invalid (among other provisions). The leading judgment of the majority by Justice J.S. Khehar (as the learned Judge then was) held:

131. Section 7 cannot even otherwise be considered to be constitutionally valid, since it includes in the process of selection and appointment of the Chairperson and Members of NTT, Secretaries of Departments of the Central Government. In this behalf, it would also be pertinent to mention that the interests of the Central Government would be represented on one side in every litigation before NTT. It is not possible to accept a party to a litigation can participate in the selection process whereby the Chairperson and Members of the adjudicatory body are selected. This would also be violative of the recognised constitutional convention recorded by Lord Diplock in *Hinds case* [*Hinds* v. *R.*, 1977 AC 195: (1976) 2 WLR 366: (1976) 1 All ER 353 (PC)], namely, that it would make a mockery of the Constitution, if the legislature could transfer the jurisdiction previously exercisable by holders of judicial offices to holders of a new court/tribunal (to which some different name was attached) and to provide that persons holding the new judicial offices should not be appointed in the manner and on the terms prescribed for appointment of members of the judicature. For all the reasons recorded hereinabove, we hereby declare Section 7 of the NTT Act, as unconstitutional.

324. The constitution of the Search-cum-Selection committees as stipulated in the Schedule to the 2017 Rules cannot pass constitutional muster under a system governed by the Rule of law that

accords primacy to the independence of the judiciary. Independence of the judiciary requires that judicial functioning be free from interference by the other two organs of the state. The Central Government is the largest litigant before the tribunals constituted under various statutes. The independent functioning of the tribunals stands compromised where the executive has the controlling authority in the selection of members to the tribunals. The executive is often a litigant before and has an interest in the disputes which are adjudicated by the tribunals. The constitution of the Search-cum-Selection committees stipulated in the 2017 Rules violates the principle of judicial independence and the directions issued by this Court in **R. Gandhi** and **Madras Bar Association**.

325. Column 5 of the Schedule to the 2017 Rules stipulates that the term of office shall be three years for all tribunals. This disregards the principle enunciated by this Court in **R. Gandhi**. By the judgment of this Court, the following direction was issued:

(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the field concerned. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

Rule 18(2) stipulates that members who have been appointed to tribunals shall not practice before the tribunal, appellate tribunal or the authority after retirement. We are in agreement with the views expressed by this Court in **R. Gandhi**. Inherent in the efficient functioning of tribunals is that appointment to tribunals is made attractive to practicing individuals who are guaranteed a reasonable period of service.

326. Section 184 stipulates that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority is eligible for reappointment. This is restated in Rule 9. This is in violation of the direction issued by this Court in **Madras Bar Association** where Section 8 which provided for reappointment was struck down in the following terms:

132. Insofar as the validity of Section 8 of the NTT Act is concerned, it clearly emerges from a perusal thereof that a Chairperson/Member is appointed to NTT, in the first instance, for a duration of 5 years. Such Chairperson/Member is eligible for reappointment for a further period of 5 years. **We have no hesitation to accept the submissions advanced at the hands of the learned Counsel for the Petitioners, that a provision for reappointment would itself have the effect of undermining the independence of the Chairperson/Members of NTT. Every Chairperson/Member appointed to NTT would be constrained to decide matters in a manner that would ensure his reappointment in terms of Section 8 of the NTT Act. His decisions may or may not be based on his independent understanding. We are satisfied that the above provision would undermine the independence and fairness of the Chairperson and Members of NTT.** Since NTT has been vested with jurisdiction which earlier lay with the High Courts, in

all matters of appointment, and extension of tenure, must be shielded from executive involvement. The reasons for our instant conclusions are exactly the same as have been expressed by us while dealing with Section 5 of the NTT Act. We therefore hold that Section 8 of the NTT Act is unconstitutional.

Rule 20 vests the Central Government with vast powers to relax the provisions of the applicable rules:

Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order for reasons to be recorded in writing relax any of the provisions of these Rules with respect to any class or category of persons.

327. The Central Government to whom a Rule making authority was conferred by Section 184 has not observed the principles which were enunciated in **R. Gandhi** and **Madras Bar Association** either in letter or in spirit. The dangers inherent in conferring such an unguided power on the executive to frame Rules governing the selection, appointment and conditions of service of the members of the tribunals is evident from the Rules which have been framed. The Rules disregard binding principles enunciated in decisions of this Court. The Rules are destructive of judicial independence and are unconstitutional.

328. Before concluding, it is necessary to advert to two pre-eminent authorities which were adverted to in the decisions in **R. Gandhi** and in the concurring judgment in **Madras Bar Association**. In **R. Gandhi**, Justice RV Raveendran observed:

112. What is a matter of concern is the gradual erosion of the independence of the judiciary, and shrinking of the space occupied by the judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. There is also a gradual dilution of the standards and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts.

The learned Judge referred to the cautionary words of Justice William O Douglas, a distinguished judge of the US Supreme Court:

52. The need for vigilance in jealously guarding the independence of courts and Tribunals against dilution and encroachment, finds an echo in an advice given by Justice William Order Douglas to young lawyers (The Douglas Letters: Selections from the Private Papers of William Douglas, edited by Melvin L. Urofsky, 1987 Edn., p. 162, Adler and Adler):

... The Constitution and the Bill of Rights were designed to get Government off the backs of people--all the people. Those great documents did not give us the welfare State.

Instead, they guarantee to us all the rights to personal and spiritual self-fulfilment.

But that guarantee is not self-executing. As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged.

And it is in such twilight that we all must be most aware of change in the air--however slight--lest we become unwitting victims of the darkness.

In **Madras Bar Association**, Justice Rohinton Nariman, in the course of his concurring judgment, adverted to a decision of Lord Atkin:

178. In Proprietary Articles Trades Assn. v. Attorney General for Canada [MANU/PR/0153/1931 : 1931 AC 310 (PC)], Lord Atkin said: (AC p. 317)

... Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment.

329. We find that though the decision in **R. Gandhi** was delivered in 2010 and in **Madras Bar Association** in 2014, the same anomalies have persisted. An attempt has been made to dilute judicial independence by a creeping assertion of executive power. This is unconstitutional.

F.3 Severability

330. The learned Attorney General submitted that the certification of the Speaker of the Bill as a Money Bill attaches to the entirety of the Finance Bill. Hence, it was urged, that the consequence of accepting the submission of the Petitioners would result in the invalidation of the entire Finance Act. We are of the view that this Court should apply the doctrine of severability to Part XIV of the Finance Act 2017. Severability was applied in a judgment of this Court in **R.M.D. Chamarbaugwalla** v. **Union of India ("Chamarbaugwalla")** MANU/SC/0020/1957 : 1957 SCR 930. Justice Venkatarama Ayyar, speaking for a Constitution Bench of this Court observed:

12. The question whether a statute which is void in part is to be treated as void in toto, or whether it is capable of enforcement as to that part which is valid, is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation, as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds: It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, Sections 91 and 92 of the Canadian Constitution, and Section 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act.

Adverting to the decision in **State of Bombay** v. **F.N. Balsara** MANU/SC/0009/1951 : 1951 SCR 682, the Constitution Bench observed:

This decision is clear authority that the principle of severability is applicable even when the partial invalidity of the Act arises by reason of its contravention of constitutional limitations.

331. In **State of Bombay** v. **United Motors (India) Ltd.** MANU/SC/0095/1953 : 1953 SCR 1069, Chief Justice Patanjali Sastri held that the doctrine of severability should be extended in dealing with taxing statutes. After adverting to these decisions in **Chamarbaugwalla**, Justice Venkatarama Ayyar concluded:

21. ..The resulting position may thus be stated: When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this Rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions.

The principles which govern the exercise of the doctrine of severability have been formulated thus:

22. ...

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2 pp. 176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. I at pp. 360-361; Crawford on Statutory Construction, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same Section or different sections; (Vide Cooley's Constitutional Limitations, Vol. I, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp. 177-178.

332. In the present case, applying these principles enunciated above, Part XIV of the Finance Act 2017 is severable. The intent of the legislature is the guiding principle under the first of the above principles. Parliament would, in any event, have enacted the valid parts of the Finance Act 2017 if it had known that Part XIV is invalid. The valid and invalid parts are not so inextricably linked that the invalidity of Part XIV should result in the invalidity of the rest. Nor is Part XIV a part of a composite scheme linked to the other parts of the Finance Act 2017. Even after the excision of Part XIV the remaining part of the Finance Act would still survive on its own. Hence, Part XIV of the Finance Act 2017 can be excised from the Act.

333. Finally, a fervent plea was made by the learned Attorney General to the effect that even though some provisions contained in the Rules framed on 1 June 2017 may run contrary to the principles enunciated by this Court in **R. Gandhi** and **Madras Bar Association**, the Central Government would be willing to proceed on the basis of the interim orders which were passed by this Court during the pendency of the proceedings with certain modifications. We are unable to accept the submission. Part XIV of the Finance Act 2017 could not have been enacted in the form of a Money Bill. The Rules framed by the Central Government are unconstitutional on the ground that they violate the principles of judicial independence set out in judgments of this Court.

G Conclusion

334. Part XIV of the Finance Act 2017 could not have been enacted in the form of a Money Bill. The Rules which have been framed pursuant of the Rule making power Under Section 184 are held to be unconstitutional. However, since during the pendency of these proceedings, certain steps were taken in pursuance of the interim orders and appointments have been made, we direct that those appointments shall not be affected by the declaration of unconstitutionality. The terms and conditions governing the personnel so appointed shall however abide by the parent enactments. Upon the declaration of unconstitutionality, the conditions specified in all corresponding aspects in the parent enactments shall continue to operate.

335. This Court has repeatedly emphasised the need for setting up an independent statutory body to oversee the working of tribunals. Despite the directions issued by this Court in **Chandra Kumar** nearly two decades ago, no action has been taken by the legislature to put in place an umbrella organisation which would be tasked with addressing the drawbacks of the system to which we have adverted above. The lack of a single authority to ensure competence and uniform service conditions has led to a fragmented tribunal system that defeats the purpose for which the system was constituted. Moreover, the co-ordinating authority for all tribunals must be the Department of

Justice. Vesting that function in individual ministries has led to haphazard evolution of the tribunal structure, besides posing serious dangers to the independence of tribunals.

336. It is imperative that an overarching statutory organisation be constituted through legislative intervention to oversee the working of tribunals. We recommend the constitution of an independent statutory body called the "National Tribunals Commission"[39] to oversee the selection process of members, criteria for appointment, salaries and allowances, introduction of common eligibility criteria, for removal of Chairpersons and Members as also for meeting the requirement of infrastructural and financial resources. The legislation should aim at prescribing uniform service conditions for members. The Commission should comprise the following members:

(i) Three serving judges of the Supreme Court of India nominated by the Chief Justice of India;

(ii) Two serving Chief Justices or judges of the High Court nominated by the Chief Justice of India;

(iii) Two members to be nominated by the Central Government from amongst officers holding at least the rank to a Secretary to the Union Government: one of them shall be the Secretary to the Department of Justice who will be the ex-officio convener; and

(iv) Two independent expert members to be nominated by the Union government in consultation with the Chief Justice of India.

337. The senior-most among the Judges nominated by the Chief Justice of India shall be designated as the Chairperson of the NTC.

338. While the setting up of the NTC is within the competence of the legislature, it must be ensured that the guidelines that have been laid down by this Court to ensure the independence and efficient functioning of the tribunal system in India are observed. The independence of judicial tribunals is an inviolable feature of the basic structure of the Constitution. The procedure of selection, appointment, removal of members and prescription of the service conditions of tribunal members determine the independence of the tribunals. As we have held, in preserving the independence of the tribunals as a facet of judicial independence, the adjudicatory body must be robust: subservient to none and accountable to the need to render justice in the context of specialized adjudication. This is reflected in the need for vigilance in guarding the independence of courts and tribunals.

339. Competence, professionalism and specialisation are indispensable facets of a robust tribunal system designed to deliver specialised justice. The Commission must be vested with the power to oversee the administration of all tribunals established under the enactments of Parliament to ensure the adequate manning of the tribunals with the infrastructure and staff required to meet the exigencies of the system. The Union government should also consider formulating a law to ensure the constitution of an All India Tribunal Service governing the recruitment and conditions of service of the non-adjudicatory personnel for tribunals. At present, the administrative staff of the tribunals is by and large brought on deputation. The tribunals are woefully short of an adequate complement of trained administrative personnel. Hence, there is an urgent need to set up an All India Tribunal Service in the interests of the effective functioning of the tribunal system.

Though the present judgment analyses the ambit of the word "only" in Article 110(1) and the interpretation of Sub-clauses (a) to (g) of Clause (1) of Article 110 and concludes that Part XIV of the Finance Act 2017 could not have been validly enacted as a Money Bill, I am in agreement with the reasons which have been set out by the learned Chief Justice of India to refer the aspect of money bill to a larger Bench and direct accordingly.

I am in agreement with the observations of brother Justice Deepak Gupta that the qualifications of members to tribunals constitute an essential legislative function and cannot be delegated. Tribunals have been conceptualized as specialized bodies with domain-specific knowledge expertise. Indispensable to this specialized adjudicatory function is the selection of members trained in their discipline. Keeping this in mind, the prescription of qualifications for members of tribunals is a legislative function in its most essential character.

The qualifications for appointment to adjudicatory bodies determine the character of the body. The adjudicatory tribunals are intended to fulfil the objects of legislation enacted by Parliament, be it in the area of consumer protection, environmental adjudication, industrial disputes and in diverse aspects of economic regulation. Defining the qualifications necessary for appointment of members constitutes the core, the very essence of the tribunal. This is an essential legislative function and cannot be delegated to the Rule making authority of the central government. It is for the legislature to define the conditions which must be fulfilled for appointment after assessing the need for domain specific knowledge.

Deepak Gupta, J.

340. I have had the privilege of going through the detailed and erudite judgments of the Chief Justice and brother Chandrachud, J.

341. Since the entire gamut of facts, submissions and laws have been dealt with in the judgment of Chief Justice, for the sake of brevity, it would not be necessary to set out all the facts and contentions in detail.

342. Reference in this judgment to 'Tribunal' will include tribunal, appellate tribunal or other authorities referred to in Part XIV of the Finance Act, 2017. Reference to 'Chairpersons/Members' will include Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President or other members referred to in Section 184 of the Finance Act, 2017. Some tribunals have both regulatory as well as adjudicatory roles. Most of the discussion hereinafter relates to the adjudicatory role of tribunals.

343. The order dated 27.03.2019 quoted in the judgment of the Chief Justice clearly sets out the issues with which the present bench is concerned. To put it in a nutshell, the issue before this Court is whether tribunals are an effective alternative to Courts; if yes, who should man them. Keeping in view the ever-changing developments in law and the provisions of Articles 323-A and 323-B of the Constitution of India, tribunals as an alternative to Courts, have come to stay. The main issue is how to ensure that these tribunals function effectively, fearlessly and efficiently.

344. The Chief Justice in his judgment has culled out the following issues for determination:

I. Whether the 'Finance Act, 2017' insofar as it amends certain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a 'money bill' Under Article 110 and consequently is validly enacted?

II. If the answer to the above is in the affirmative then whether Section 184 of the Finance Act, 2017 is unconstitutional on account of Excessive Delegation?

III. If Section 184 is valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on functioning of Tribunals?

IV. Whether there should be a Single Nodal Agency for administration of all Tribunals?

V. Whether there is a need for conducting a Judicial Impact Assessment of all Tribunals in India?

VI. Whether judges of Tribunals set up by Acts of Parliament Under Articles 323-A and 323-B of the Constitution can be equated in 'rank' and 'status' with Constitutional functionaries?

VII. Whether direct statutory appeals from Tribunals to the Supreme Court ought to be detoured?

VIII. Whether there is a need for amalgamation of existing Tribunals and setting up of benches.

345. By and large I am in agreement with the reasoning and conclusions arrived at by the Chief Justice, especially on issues 1 and 3 to 8. I am, however, unable to persuade myself to agree with the Chief Justice that Section 184 of the Finance Act of 2017 does not suffer from the vice of excessive delegation. I am also of the view that though the issue with regard to the Money Bill may be referred to a larger bench of 7 judges, since the correctness of the law laid down in ***L. Chandrakumar*** v. ***Union of India*** MANU/SC/0261/1997 : (1997) 3 SCC 261 has not been doubted, there is no need to refer this matter to a bench of 7 judges.

346. I also feel that some specific directions need to be given for appointment of a body to carry out judicial impact assessment. It may also be necessary to lay down some parameters or reference points for such a body to look into. I am of the view that since the Government till date has not followed the recommendation of 7-Judge Bench of this Court in ***L. Chandra Kumar*** (supra) that there should be a wholly independent agency for the administration of all tribunals, some directions in this regard are required. Lastly, I feel that a direction needs to be given to constitute a body to select the Chairpersons/Members of the Tribunals.

347. Before entering into a detailed discussion on the issues involved, I would like to highlight that there are some glaring errors in Part XIV which clearly show non-application of mind.

348. Section 9A of the Armed Forces Tribunal Act, 2007 was introduced by Section 181 of the Finance Act, 2017 and reads as follows:

9A. Notwithstanding anything contained in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation, removal and terms and conditions of service of the

Chairperson and other Members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall be governed by the provisions of Section 184 of that Act:

Provided that the Chairperson and Member appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall continue to be governed by the provisions of this Act, and the Rules made thereunder as if the provisions of Section 184 of the Finance Act, 2017 had not come into force.

This provides the qualifications, terms and conditions of service etc. of Chairpersons and Members of the appellate tribunal. This provision shows total non-application of mind because the Armed Forces Tribunal Act, 2007 has no provision for an appellate tribunal. In fact, Section 6 of the Armed Forces Tribunal Act, 2007 itself provides the qualifications for appointment for Chairperson and other members and it is not clear what was sought to be achieved by introducing Section 9A by the Finance Act, 2017.

Background

349. On 26.11.1949, we, the people of India gave unto ourselves the Constitution, the basic features of which amongst others are judicial review[40], democracy, separation of powers[41] etc. These basic features of the Constitution are an inherent part of our Constitution and polity.

350. Part III of the Constitution which sets out the fundamental rights has often been referred to as the heart and soul of the Constitution. In my view, the essence of the Constitution was beautifully captured by our founding fathers in the Preamble of the Constitution where we promised to ourselves Justice, Liberty, Equality and Fraternity. The first and foremost attribute of the Preamble is Justice. India should be a democratic republic is also a part of the Preamble. The ultimate power under our Constitution resides with the people and not those holding positions of power.

351. The Rule of law is the golden thread which runs through our Constitution. This golden thread binds together the various chapters of the Constitution dealing with Citizenship, Fundamental Rights, the Union, the States, the Panchayats, Scheduled and Tribal Areas, Relations between Union and States, Trade, Commerce and Intercourse within the Territory of India, Services under the Union and States etc. Each of these facets amongst others are governed not only by the Constitution but by the laws. The oath, to which each one of us, holding Constitutional posts, subscribes enjoins us to uphold the Constitution and the laws. This is the Rule of law. The bedrock of our democracy is the Rule of law and not the Rule of men. Anywhere, anytime, when ordinary people are given the chance to choose, the choice is always the same; freedom, not tyranny; democracy, not dictatorship; Rule of law, not the Rule of men.

352. One of the essential ingredients of both democracy and Rule of law is an independent and fearless judiciary. A free and vibrant country is one where there is freedom of expression and governance by the Rule of law. There can be Rule of law only when we have judges and adjudicators who can take decisions independent of any extraneous influence. If Rule of law is

absent, there is no accountability, there is abuse of power and corruption. When the Rule of law disappears, we are ruled not by laws but by the idiosyncrasies and whims of those in power.

353. Tribunals have come to stay. Both the Chief Justice and brother Chandrachud, J. have dealt with the issue of tribunalisation in great detail. One aspect which needs to be highlighted and also comes out from the judgments of my learned brothers is that the men who man the tribunals should command the same respect as the Judges of Courts and they should, as far as possible, have the same qualifications and attributes. This is absolutely necessary because if the people of this country are to have faith in tribunals then it is the duty of all concerned to ensure that these tribunals function fairly and independently like Courts are expected to. With the increase in specialisation in different branches of law, it would not be possible to urge that we do not need specialised tribunals. No human being can be expected to know the entire law. As judges we are trained to work in various fields of law. At the same time, it cannot be denied that the fast-changing face of technology and ever-growing demands of the people have led to the introduction of thousands of new legislations and some of these require specialised knowledge of certain branches of law combined with technology.

354. The courts in India were successfully handling all jurisdictions. The problem was not lack of talent. The problem was not lack of knowledge[42]. The main problem was extremely low number of judges as compared to the population and a very high vacancy position. Tribunalisation of justice was done not because the courts were incapable of handling the matters but mainly because there were huge delays in settling matters. Now even for complex commercial matters, specialised commercial courts have been set up. However, at the same time, one cannot deny that in the fast-expanding technological world, there is a need to have expert adjudicators. Therefore, there is a need to have specialised tribunals. These tribunals being substitutes for courts must also meet the expectations of our founding fathers and be totally independent and fearless.

355. Unfortunately, the working of some of the tribunals leaves much to be desired. Not all the problems arise because of the persons who run the tribunals. Many difficulties arise because of huge vacancies, few benches, financial crunch and dependence of the tribunals on the departments, which sadly administer the tribunals. Some of the tribunals are virtually subjugated to the departments as far as the administrative matters are concerned and this also affects the independence of the judiciary. Judicial independence not only means independence to take the right decisions but functional independence is equally important. Perceptions are also very important. What does the litigating public appearing before the tribunal feel? Is the tribunal functioning like a wing of the government or as an independent body? If there has to be separation of powers then these tribunals must have functional autonomy to run themselves as they best feel like.

356. In this background, I shall deal with the various issues culled out by the Chief Justice.

Issue No. 1

357. I am in total agreement with the Chief Justice in as much as he has held that the decision of the Hon'ble Speaker of the House of People Under Article 110 (3) of the Constitution is not beyond judicial review. I also agree with his views that keeping in view of the high office of the Speaker,

the scope of judicial review in such matters is extremely restricted. If two views are possible then there can be no manner of doubt that the view of the Speaker must prevail. Keeping in view the lack of clarity as to what constitutes a Money Bill, I agree with the Hon'ble Chief Justice that the issue as to whether Part XIV of the Finance Act, 2017, is a Money Bill or not may be referred to a larger bench.

Issue No. 2

358. As far as Issue No. 2 is concerned, I am unable to agree with the conclusion of Chief Justice. There can be no doubt that Parliament is not expected to deal with all matters and it can delegate certain "non-essential" matters to the executive. Every condition need not be laid down by the Legislature.

359. In his judgment the Chief Justice has referred to a catena of judgments dealing with limits of delegation. It is not necessary to repeat all that has been said in those judgments but reference may be made to a few.

360. A 7-Judge Bench of this Court in ***Re Article 143, Constitution of India and Delhi Laws Act (1912) etc.*** MANU/SC/0010/1951 : AIR (38) 1951 SC 332 held that the legislature cannot be expected to legislate on all issues and has the power to delegate non-essential functions to a delegatee. At the same time, a close reading of the judgment indicates that it was clearly held that the "essential legislative functions" cannot be delegated. There can be no quarrel with the proposition that delegation of non-essential legislative functions can be done. Even to this there is a caveat. The legislature must have control and functional powers over the delegatee. One of the known methods of exercising such powers is for the delegatee to place the rules/orders passed by it in exercise of powers delegated to it before the legislature. There should always be legislative control over delegated legislation.

361. In ***Gwalior Rayon Mills*** v. ***Assistant Commissioner, Sales Tax*** MANU/SC/0361/1973 : AIR 1974 SC 1660, Khanna, J. dealt with this matter in his inimitable style. Paras 24 and 25 of the judgment have been quoted in the opinion of the Chief Justice but I think Para 26 is also very relevant and it reads as follows:

26. We are also unable to subscribe to the view that if the legislature can repeal an enactment, as it normally can, it retains enough control over the authority making the subordinate legislation and, as such, it is not necessary for the legislature to lay down legislative policy, standard or guidelines in the statute. The acceptance of this view would lead to startling results. Supposing the Parliament tomorrow enacts that as the crime situation in the country has deteriorated, criminal law to be enforced in the country from a particular date would be such as is framed by an officer mentioned in the enactment. Can it be said that there has been no excessive delegation of legislative power even though the Parliament omits to lay down in the statute any guideline or legislative policy for the making of such criminal law? The vice of such an enactment cannot, in our opinion, be ignored or lost sight of on the ground that if the Parliament does not approve the law made by the officer concerned, it can repeal the enactment by which that officer was authorised to make the law.

This makes it clear that merely because the subordinate legislation has to be placed before the legislature does not mean that there is effective control in all cases.

362. In ***Harishankar Bagla*** v. ***M.P. State*** MANU/SC/0063/1954 : AIR 1954 SC 465, the test laid down was that there should be a reasonably clear statement of policy which should guide formulation of delegated legislation.

363. In **Ramesh Birch v. Union of India** MANU/SC/0452/1989 : 1989 Supp (1) SCC 430, a Bench of this Court clearly held that the legislature cannot wash their hands of their essential legislative functions. It held as follows.

19. ...A different way in which the second of the above views has been enunciated -- and it is this view which has dominated since -- is by saying that the legislatures cannot wash their hands of their essential legislative function. Essential legislative function consists in laying down the legislative policy with sufficient clearness and in enunciating the standards which are to be enacted into a Rule of law. This cannot be delegated. What can be delegated is only the task of subordinate legislation which is by its very nature ancillary to the statute which delegates the power to make it and which must be within the policy and framework of the guidance provided by the legislature.

By the Finance Act, 2017 the number of tribunals were reduced to 19. It is the case of the Government that the tribunals are necessary so that technically qualified people can man the tribunal. The nature of work done by different tribunals is totally different. The essential qualifications for filling up the posts of members of administrative tribunals, company law tribunals or the National Green Tribunal would be totally different. This function, in my opinion, being an essential legislative function, could not have been delegated especially without laying down any guidelines.

364. Section 184 empowers the Central Government to make Rules to provide for qualification, appointment term of office, salaries and allowances etc. of various Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule. Section 184 of the Finance Act, 2017 reads as follows:

184. (*1*) The Central Government may, by notification, make Rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:

Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the Rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the Rules made by the Central Government which shall not exceed,--

(a) in the case of Chairperson, Chairman or President, the age of seventy years;

(b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member, the age of sixty-seven years:

(*2*) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment.

365. An analysis of Section 184 clearly indicates that the Parliament has delegated to the Central Government the power to make Rules to provide for the qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of the Chairpersons/Members of the tribunals. The issue before us is whether by doing so Parliament has delegated "essential legislative functions" and whether Parliament has retained any control.

366. We are in the present case dealing with the appointment of Chairpersons/Members to various Tribunals. They are enjoined upon to discharge a constitutional function of delivering justice to the people. What should be the essential qualifications and attributes of persons selected to man such high posts is, in my view, an essential part of legislative functions. I have no doubt, in my mind, that the Constitution could not have provided that the qualifications of the Judges of the Supreme Court of India or of the High Courts could be fixed by the Government. If these tribunals are to replace the High Courts, why should the same principles not apply to them. In my view, laying down the qualifications of the persons eligible to hold these high posts was an essential aspect of the legislation keeping in view the importance of the tribunals, the importance of Rule of law and the importance of an independent and fearless judiciary.

367. As far as providing the qualifications for appointment are concerned, as discussed above, I am of the view that these qualifications have to be provided in the legislation and could not be delegated. However, as far as the other terms and conditions such as pay and allowances are concerned, these can be delegated.

368. For the sake of argument, even if it was to be said that laying down the qualifications is not an essential function then also, in view of the law laid down by this Court, the guidelines should have been found in the legislation itself. It is paradoxical that there are no guidelines for the essential qualifications, even though there are some guidelines with regard to the terms and conditions of services of Chairpersons/Members of the Tribunals.

369. I am in respectful disagreement with the Chief Justice that the objects of the parent enactments and the law laid down by this Court in ***R.K. Jain*** v. ***Union of India*** MANU/SC/0291/1993 : (1993) 4 SCC 119, ***L. Chandra Kumar*** (supra), ***Union of India*** v. ***Madras Bar Association*** MANU/SC/0378/2010 : (2010) 11 SCC 1, ***Madras Bar Association*** v. ***Union of India***

MANU/SC/0875/2014 : (2014) 10 SCC 1, Madras Bar Association v. Union of India MANU/SC/0610/2015 : (2015) 8 SCC 583, ***Gujarat Urja Vikas Nigam Ltd.*** v. ***Essar Power Ltd.*** MANU/SC/0874/2016 : (2016) 9 SCC 103 in essence should be read as the guidelines. One would expect the Union Government to abide by the directions of this Court. However, this expectation has been belied by this very enactment which violates every principle of law laid down by this Court and, as held in the judgments of both my brothers, the Rules framed by the delegatee are violative of the law laid down by this Court. In this background, it is apparent that both the delegator and the delegatee felt that they were not bound by these judgments. This is also apparent from the fact that the Rules framed by the delegatee have not been brought in consonance with the law by the delegator.

370. The previous enactments were repealed in so far as matters covered by Part XIV of the Finance Act are concerned. Therefore, it cannot be expected that the delegatee would again refer to the repealed enactments to seek the guidelines for fixing the terms and conditions, etc. of those to be appointed as Chairpersons/Members. If we exclude the judgments of this Court and the terms and conditions laid down in the repealed enactments then there are no guidelines whatsoever left for the delegatee to fall back on. The Finance Act provides no guidelines in this regard. It is absolutely silent with regard to the qualification, the eligibility criteria, experience etc. required for those who are to be appointed as Chairpersons/Members of the Tribunals. These powers have been delegated to the government.

371. There being no guidelines, unfettered and unguided powers have been vested in the delegatee and, therefore, in my opinion, there is excessive delegation. As such, I would hold that Section 184 of the Finance Act, 2017 insofar as it delegates the powers to lay down the qualifications of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule, suffers from the vice of excessive delegation and is accordingly struck down.

Issue Nos. 3 & 6

372. I agree with the Chief Justice and I do not want to add anything.

Issue Nos. 4, 5, 7 & 8

373. I agree with the Chief Justice both on the reasoning and conclusions on these issues. However, as already pointed out above, I am of the view that since nobody has raised a challenge to the correctness of the law laid down by 7-Judge Bench in ***L. Chandra Kumar*** (supra) that there should be one wholly independent agency for the administration of all the tribunals. There is no need to refer this issue to a Bench of 7 Judges.

374. However, I would like to add a few words because I feel that it is important to highlight the problems being faced and the issues which need to be resolved by the body which will carry out the judicial impact assessment of the tribunals in the form of a Judicial Impact Assessment Committee. I am clearly of the view that as laid down in ***L. Chandra Kumar*** (supra), there must be a single independent nodal agency for administering all the tribunals. The 7-Judge Bench of

this Court held that all tribunals should as far as possible be under a single nodal agency. Until such a nodal agency is set up it was felt that the Ministry of Law and Justice would be the most appropriate Ministry for this purpose.

375. There are various reasons why there should be one nodal agency. Tribunals are facing many problems like lack of manpower, very few benches, vacancies lying unfilled for long period, financial dependence on the department which may be litigating before the tribunal etc. These are ills which can be avoided if Tribunals fall under one umbrella organisation. One umbrella organisation will be better equipped to understand the problems faced by all the Tribunals. This could lead to standardization of Tribunals and a uniform approach to the needs of each tribunal. A large number of tribunals, especially those cast with the duty of discharging adjudicatory functions have been constituted with a view to replace the courts and in many cases the jurisdiction earlier exercised by the High Courts has been vested in such tribunals. It is, therefore, imperative that these tribunals must be manned by persons of impeccable integrity, high intellect and having vast experience in the field in which they will exercise jurisdiction. These tribunals also must have functional autonomy. This cannot be achieved unless there is a nodal body which shall look after the administrative needs of the tribunals. For more than 2 decades the Government has not thought it fit to comply with the 7-Judge Bench judgment of this Court in ***L. Chandra Kumar*** (supra). These matters cannot be permitted to linger on indefinitely. Therefore, in my view, a direction must be given to the Government to set up a single nodal agency within a period of 6 months from today till which time the present system may continue. Merely giving financial autonomy to the tribunals will not do away with the need of having one common umbrella organisation to supervise all the tribunals.

376. Even without carrying out any judicial impact assessment it is clear, as held in ***Madras Bar Association, 2010*** (supra) that tribunals in India have unfortunately not achieved full independence. When tribunals are established, they depend upon the sponsoring department for funds, infrastructure and even space for functioning. Administrative members of the tribunal are, more often than not, drawn from this department. This, in my opinion, strikes at the very root of judicial independence because the biggest litigant or stakeholder itself becomes part and parcel of the adjudicating body which is supposed to be free, independent and fearless.

377. The need for carrying out judicial impact assessment of all the tribunals in India cannot be over emphasised. Experience has shown that the tribunals are not fully independent and more often than not, the number of vacancies in the tribunals are so high as to make the tribunals dysfunctional if not non-functional. The promised benches remain a mirage in the air and the litigants from remote areas of the country have to come to the State capitals or the National Capital for redressal of their grievances.

378. Access to justice is a fundamental right[43]. Denial of access to justice also takes place when a litigant has to spend too much money, time and effort to approach the adjudicating authority to get justice. In India where delays plague the tribunals, a client will not hurriedly approach a tribunal even if he has a genuine grievance. Amongst the many tribunals set up, the tax tribunals have been probably the most successful. In my view, one of the reasons why the tax tribunals have been successful is that the recruitment of members of these tax tribunals is normally done at a younger age and there is scope of career progression not only within the tribunal but also from the tribunals

to the High Courts. This can only happen if we recruit younger and competent people rather than retired persons. Another reason for the success of the tax tribunals is that the litigant is either the revenue or an Assessee, both of whom have the wherewithal to fight cases. Similarly, in administrative tribunals it is government servants mainly who are involved. Commercial tribunals also deal with the litigants who normally have sufficient finances. But now we have other tribunals like the NGT which may be approached by poor villagers.

379. The Central Administrative Tribunal (CAT) was set up in the year 1985. It can definitely be termed as one of the better functioning tribunals. However, even this tribunal has only 17 regular benches including the Principal Bench at Delhi and 4 Circuit Benches. Prior to the establishment of the CAT, a Central Government employee had a right to move the Civil Courts for grant of relief. This meant that such employee could even approach a Sub-Judge for grant of relief. That jurisdiction has been taken away. In ***L. Chandra Kumar*** (supra), while upholding the constitution of the tribunals, a 7-Judge Bench of this Court held that the orders of the tribunals would be amenable to judicial review Under Article 226 of the Constitution albeit with a caveat that these matters would be decided by a Division Bench.

380. The vacancy position even in the CAT is very high. Out of a total strength of 65 members, the CAT is short by 25 members-12 administrative members and 13 judicial members. This is a shortage of about 38%. The Chandigarh Bench of the tribunal is supposed to have 4 members. However, presently there is only 1 judicial member and as such there is no bench available in Chandigarh. The Chandigarh Bench has jurisdiction over the States of Punjab, Haryana, Himachal Pradesh and Union Territories of Jammu and Kashmir, Ladakh and Chandigarh. The Central Government employees in these areas have virtually been left remediless. It is easy for the members of the All India Civil Services holding high positions to approach the Principal Bench at Delhi, but one cannot even imagine the plight of a lowly placed peon or clerk who is expected to travel long distances to New Delhi, spend huge amount of money, pay the extremely high fees of the lawyers of a metropolis like Delhi to file a case in Delhi. Such a litigant is financially boarded out of the litigation process.

381. To give another example, the NGT was to have its Principal Bench at Delhi and 4 Zonal Benches and 4 Circuit Benches. It was expected that in the future more benches would be added. Sadly, the reverse has taken place. At the present moment, only the Principal Bench is functioning with only one Chairperson and 3 judicial members (as against the sanctioned strength of 20 judicial members), and two expert members (as against the total sanctioned strength of 20 expert members). The situation is extremely grim. Day in and day out we all talk about pollution and the environment but the harsh reality is that as against a Chairperson and 40 members, at present the Chairperson has the assistance of only 5 members. The result is that no hearings are taking place in the Zonal Benches or the Circuit Benches. We have been informed that cases are taken up by video conferencing. Video conferencing can definitely be used as a tool to hold hearings in some cases but initial filing and hearings must as far as possible be done in open Court if the public is to have faith in the institution. Open hearings are essential to build trust and confidence in the community. Members of the public will have faith only in those tribunals and courts which are open to the public. Presently, the situation is such that if someone from Andaman and Nicobar Islands wants to raise some issue before the NGT he will have to come at least to Calcutta to file a case, whereas earlier he could have filed a case before the Circuit Bench of the Calcutta High

Court at Port Blair. Here also, the hearing, if any, will be conducted through video conferencing. There is no bench of the NGT functioning in the North-East covering as many as 8 States. Similarly, there is no bench functioning in the environmentally and ecologically fragile States of Himachal Pradesh and Uttarakhand and the Union Territories of Ladakh and Jammu and Kashmir. This clearly shows that functioning of the tribunals leaves much to be desired.

382. The committee which carries out the judicial impact assessment of the functioning of the tribunals has to deal with a whole lot of issues. It is neither feasible nor proper to lay down all the issues in this judgment but I am highlighting some of them. Another important issue which must be dealt with is whether the tribunals have really helped in early disposal of the cases. The time spent for disposal may vary from case to case but we are mainly dealing with the cases which end in the High Courts or at the Supreme Court. This must be done not only on an all India basis but also on State to State basis. There are many smaller States in the country where the Civil Courts and the High Courts are not overburdened with work. In these States, the cases are decided much faster than in many other larger States. Normally, it is these smaller States which do not get permanent benches, sometimes not even Circuit Benches. It is a paradox that the States which are judicially well administered and where disposal is quick, do not get the permanent benches and the litigants suffer whereas States which are very slow in disposing of the cases get more benches. Even when Circuit Benches come to these States there is a huge time gap between two sittings. The whole purpose of providing cheaper and faster justice gets lost because the Circuit Benches come rarely and many times the constitution of the Circuit Benches changes on every visit resulting in matters being reheard every time.

383. Having tribunals without benches in at least the capitals of States and Union Territories amounts to denial of justice to citizens of those States and Union Territories. It also makes the justice delivery system very metropolis centric. This has many adverse effects. The bench and the bar in smaller district towns and capitals of smaller States which were handling these matters in a competent manner are deprived of handling these types of cases. This also makes access to justice expensive for the litigants. It also leads to a situation where the bench and the bar in these areas would not have any experience of handling matters relating to jurisdictions transferred to tribunals which they used to handle earlier. Therefore, the local bench and bar will never develop and the entire bulk of work will be captured by those practicing in Delhi or in those State capitals where benches of the tribunals are set up. Instead of taking justice to the common man, we are forcing the common man to spend more money, spend more time and travel long distances in his quest for justice, which is his fundamental right.

384. The litigants cannot wait for judicial impact assessment and action by the Government which may or may not take place. Experience has shown that the judgments right from ***L. Chandra Kumar*** (supra) to ***Madras Bar Association, 2010*** (supra) have not been complied with by the Union in letter and spirit. Citizens of this country cannot be denied justice which is the first promise made in the Preamble. Therefore, I am of the view that in whichever State/Union Territory the bench of a particular tribunal is not established or functioning, the litigants of that State will have a right to invoke the extraordinary writ jurisdiction of the jurisdictional High Court Under Article 226 of the Constitution for redressal of their grievances. They cannot be expected to go to far off distant places and spend huge amounts of money, much beyond their means to ventilate their grievances. The alternative remedy of approaching a tribunal is an illusory remedy and not an

efficacious alternative remedy. The self-imposed bar or restraint of an alternative efficacious remedy would not apply. Such litigants are entitled to file petitions Under Article 226 of the Constitution of India before the jurisdictional High Court. In ***L. Chandra Kumar*** (supra) it was clearly held that the right of judicial review is a part of the basic structure of the Constitution and this right must be interpreted in a manner that it is truly available to the litigants and should not be an illusory right.

385. One more aspect which needs to be looked into is the need to have a two-tier tribunal system like in the United Kingdom-a lower tribunal and an appellate tribunal. If there are two-tier tribunals then there would be adjudication at the appellate level by an appellate tribunal. Having one appellate forum within the hierarchy of tribunals would probably lessen the burden on the High Courts and the Supreme Court.

386. Recruitment to the lower tribunal should be done on the basis of an objective criteria like the written test conducted for the post of District Judges. The persons selected to the lower tribunals can be made eligible for promotion to the appellate tribunals. In fact, there can be common service to man more than one or more tribunals. To give an example, there can be a common service for all the tax tribunals. There can also be a common service for the State administrative tribunals, the Central Administrative Tribunal and for the judicial members of the Armed Forces Tribunal. This will obviously require setting up of separate tribunal services. If this is done, we will have tribunal services from which people will rise to man these tribunals, the appellate tribunals and also to the posts of Chairpersons of tribunals. The body carrying out the judicial impact assessment should also look into the issue as to whether it would be better to have a tribunal service rather than appointing retired judges. If members of the bar or from the administration or from the State judiciary are appointed at the lowest rung of the tribunal and they have a long tenure knowing that they will retire after 15 or 20 years, one would be able to attract better talent and a more committed workforce. A long tenure for members is also essential for maintaining judicial independence. They shall also have aspirations of reaching the higher levels, which would be an inducement for a better work culture.

387. If there are tribunal services and there is provision for appeal within the hierarchy of the tribunals and the High Courts exercise their writ jurisdiction or if in some matters appeals are provided to the High Courts in the first instance, many of the ills which plague the system may be overcome. If the aforesaid system is followed then the question of appointing retired Judges or bureaucrats will not arise. Learned amicus curiae in his note has raised an issue that tribunals should not become a haven for retired persons. In my view, there should normally be no post retiral sinecures. Though the ideal situation would be to have no appointments from retired judges or bureaucrats, this may not be possible in the near future because we have no tribunal services and most of the posts at this stage may have to be filled from amongst retired persons. At the same time, an effort has to be made to ensure that in the foreseeable future the number of retired persons being reappointed is brought down and more persons from within the tribunal services are appointed up to the highest level in the tribunal.

388. There may be some posts which require retired judges to be appointed such as Lokpal, Lokayukta, Chairpersons of the Human Rights Commission, Chairman of the Law Commission of India, etc. But this should not become a matter of routine especially when the appointments are

being made by the executive. If the administration makes appointments and judges, serving or newly retired judges, are under consideration for such posts then the independence of the judiciary is likely to be compromised. The public of this country still reposes great faith in the judiciary. That faith will be eroded in case it is felt that the appointments are made for extraneous reasons. Most judges live up to the expectations of the high standards of integrity and propriety expected from them but we cannot shut our eyes to the harsh reality that there are a few black sheep. One cannot expect justice from those who, on the verge of retirement, throng the corridors of power looking for post retiral sinecures. Therefore, I am of the considered opinion that the majority of members of the selecting body must comprise of the Chief Justice of India and/or his/her nominees and the views of the Chief Justice and/or his/her nominees must be given precedence over the views of other members.

389. If retired judges of the High Courts or the Supreme Court are good enough to man the tribunals after retirement, I do not see any reasons why the retirement age of the High Court Judges should not be increased to make it at par with the retirement age of the Judges of the Supreme Court. This would take care of the vacancies which would otherwise arise in the next 3 years. As of 01.09.2019 as against the sanctioned strength of 1079 judges there were 414 vacancies in the High Courts. Given the slow pace at which these vacancies are being filled up, the number of vacancies is bound to rise. Though we are discussing tribunals, even the independence and functioning of the High Courts is threatened by this humungous vacancy position.

390. I agree with the Chief Justice that an attempt should be made to do away with filing of first appeal as a matter of right to the Supreme Court. At present, at least 2 dozen statues provide for appeals directly to the Supreme Court. The Supreme Court becomes a Court of first appeal which is highly avoidable. If we follow the law laid down in ***L. Chandra Kumar*** (supra), the High Courts should have the jurisdiction to entertain writ petitions against the orders of the tribunals. This will reduce the burden on the Supreme Court. Even more importantly, the High Courts, when they entertain these matters, will deal with them within the limited scope of writ jurisdiction. If the jurisdiction of the High Courts is bypassed by providing for appeals directly to the Supreme Court, soon a stage will come when we will have no High Court Judges who would have heard matters in various jurisdictions. It would be virtually impossible for them to handle such matters in the Supreme Court where the tenure of a Judge is on an average only about 4 years.

391. The Judicial Impact Assessment Committee can also after assessment recommend that some tribunal(s) should be wound up and the jurisdiction of that tribunal(s) be given back to civil courts or to the High Courts or to some other tribunal. It can also suggest the merger of two or more tribunals.

392. The next issue is who should carry out the judicial impact assessment. In my view, the Judicial Impact Assessment Committee should comprise of two retired judges of the Supreme Court, the senior being the Chairperson of the Committee, and one retired Chief Justice of a High Court all three to be nominated by the Chief Justice of India. Out of the three at least two should have been the Chairperson or members of tribunals. Two members of the Executive, not below the rank of Secretary, to the Government of India, one from the Ministry of Law and Justice and one from some other branch can also be members but these members should be appointed in consultation with the Chief Justice of India.

393. The last issue is whether there should be a Commission or a body to oversee the appointment of members of various tribunals. In my view it is necessary to have such a Commission which is itself an independent body manned by honest and competent persons. This body is required to select those persons who man the specialised tribunals in terms of the law laid down in various judgments of this Court. We need persons who not only have grassroot experience but a judicious mix of judicial members and those with grassroot experience[44]. We need persons who have an independent outlook, integrity, character and good reputation[45]. We need people who are totally free from the influence or pressure from the Government[46]. It is only then that the people will have faith in the adjudicating mechanism of the tribunals.

394. In my view, serving Judges of the Supreme Court or the Chief Justice of the High Courts are already overburdened and have no time to spare. It would be much better if they could spend their time and energy in filling up the vacancies in the High Courts rather than venturing into the field of tribunals.

395. I also feel that having a very large committee would not serve the purpose. A smaller committee comprising of competent people is a better solution and, in my view, such commission should comprise of 2 retired Supreme Court Judges with the senior most being the Chairman and one retired Chief Justice of High Court to be appointed by the Chief Justice of India. There must be one member representing the executive to be nominated by the Central Government from amongst officers holding the rank of Secretary to the Government of India or equivalent. This member shall be the ex-officio convener. One expert member can be co-opted by the by full time members. This expert member must have expertise and experience in the field/jurisdiction covered by the tribunal to which appointments are to be made.

396. At the end I would like to quote what Dr. B.R. Ambedkar said while addressing the Constituent Assembly on 25.11.1949. In his words:

Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics.

One can only hope that keeping these thoughts in mind a system is developed which ensures selection of people having impeccable integrity, who are totally independent, have a good character and reputation, are free from influence or pressure, and have requisite experience in the jurisdictions they would deal with as Chairpersons/Members of Tribunals.

---

[1] Drewry, Gavin, "The Judicialisation of Administrative Tribunals in the U.K.: From Hewart to Leggatt" 28 TRAS 51 (2009)
[2] Excerpts from the 'Explanatory Notes to the Tribunals, Courts and Enforcement Act, 2007'

prepared by the Ministry of Justice, British Parliament.
[3] Malik, Lokendra; Lata, Kusum; Kaur, Avneet, Constitutional Government in India (Satyam Law International, New Delhi, 2016) at p. 191.
[4] Administrative Tribunals in Canada, available at: http://www.thecanadianencyclopedia.ca/en/article/administrative-tribunals/ (last visited on 10.09.2019).
[5] George A. Bermann; Etienne Picard, Introduction to French Law (Kluwer Law International, Netherlands, 2008) at p. 58.
[6] Bartlett, C.A. Hereshoff, "The French Judicial System" 33 CLT 952 (1913).
[7] MANU/AP/0251/1993 : 1993 (3) ALT 471; See also: L. Chandra Kumar v. Union of India MANU/SC/0261/1997 : 1997 (2) SCR 1186
[8] Justice VR Krishna Iyer, "Why Stultify Judges' Status?", (2002) 2 LW (JS) 85 (June, 2000)
[9] Arun K Thiruvengadam, 'Tribunals' in The Oxford Handbook Of The Indian Constitution (Sujit Choudhry et al eds., (Oxford University Press New York, 2016), pp. 412-31.
[10] "1985 Act"
[11] "We do not want to say anything about Vice-Chairman and members dealt with in Sub-sections (2), (3) or (3-A) because so far as their selection is concerned, we are of the view that such selection when it is not of a sitting Judge or retired Judge of a High Court should be done by a high-powered committee with a sitting Judge of the Supreme Court to be nominated by the Chief Justice of India as its Chairman. This will ensure selection of proper and competent people to man these high offices of trust and help to build up reputation and acceptability."
[12] "NCLT"
[13] "NCLAT"
[14] Administrative Tribunals Act 1985, Information Technology Act 2000, Companies Act 1956 as amended (Chapter 1B).
[15] 2005 Act
[16] "NTT"
[17] Article 107(1): Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.
[18] Article 108: (1) If after a Bill has been passed by one House and transmitted to the other House--
(a) the Bill is rejected by the other House; or
(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or
(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,
the President may, unless the Bill has elapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:
Provided that nothing in this Clause shall apply to a Money Bill.
(2) In reckoning any such period of six months as is referred to in Clause (1), no account shall be taken of any period during which the House referred to in Sub-clause (c) of that Clause is prorogued or adjourned for more than four consecutive days.
(3) Where the President has under Clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the

purpose specified in the notification and, if he does so, the Houses shall meet accordingly.
(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:
Provided that at a joint sitting--
(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;
(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed;
and the decision of the person presiding as to the amendments which are admissible under this Clause shall be final.
(5) A joint sitting may be held under this Article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.
[19] Article 117: (1) A Bill or amendment making provision for any of the matters specified in Sub-clauses (a) to (f) of Clause (1) of Article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States:
Provided that no recommendation shall be required under this Clause for the moving of an amendment making provision for the reduction or abolition of any tax.
(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or Regulation of any tax by any local authority or body for local purposes.
(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.
[20] C. Knight & Company, 1844
[21] Constituent Assembly Debates (20 May 1949)
[22] B. Shiva Rao, The Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration (2012), at p. 32
[23] B. Shiva Rao, The Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration, at p. 281.
[24] 41.-(1) The validity of any proceedings in the Federal Legislature shall not be called in question on the ground of any alleged irregularity of procedure.
(2) No officer or other member of the Legislature in whom powers are vested by or under this Act for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.
[25] N Rajagopala Aiyangar, Government of India Act 1935, Madras Law Journal Office (1937) at page 63.

[26] Powers, Privileges and Immunities of State Legislatures, In re (Special Reference No. 1 of 1964), MANU/SC/0048/1964 : AIR 1965 SC 745
[27] Article 255: No Act of Parliament or of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given-
(a) where the recommendation required was that of the Governor, either by the Governor or by the President;
(b) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;
(c) where the recommendation or previous sanction required was that of the President, by the President.
[28] Puttaswamy at para 462
[29] Puttaswamy at para 463
[30] Puttaswamy at para 455
[31] Puttaswamy at para 466
[32] 80. (1) The Council of States] shall consist of--
(a) twelve members to be nominated by the President in accordance with the provisions of Clause (3); and
(b) not more than two hundred and thirty-eight representatives of the States [and of the Union territories.]
(2) The allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories] shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.
(3) The members to be nominated by the President under Sub-clause (a) of Clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:
Literature, science, art and social service.
(4) The representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.
(5) The representatives of the [Union territories] in the Council of States shall be chosen in such manner as Parliament may by law prescribe.
[33] 83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.
(2) The House of the People, unless sooner dissolved, shall continue for [five years] from the date appointed for its first meeting and no longer and the expiration of the said period of [five years] shall operate as a dissolution of the House:
Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.
[34] Article 108 contains provisions for a joint sitting of two Houses of Parliament.
[35] HM Seervai, Constitutional Law of India, Universal Law Co. Pvt. Ltd., Vol I, (1991), at pp. 299-300
[36] Legislative Procedure in the Rajya Sabha,: Rajya Sabha Secretariat at p. 17
[37] "SAT"

[38] "SEBI Act 1992"
[39] "NTC"
[40] Minerva Mills Ltd. v. Union of India, MANU/SC/0075/1980 : (1980) 2 SCC 591; L. Chandra Kumar v. Union of India, MANU/SC/0261/1997 : (1997) 3 SCC 261
[41] Kesavananda Bharati v. State of Kerala, MANU/SC/0445/1973 : (1973) 4 SCC 225
[42] Union of India v. Madras Bar Association, MANU/SC/0378/2010 : (2010) 11 SCC 1
[43] Anita Kushwaha v. Pushap Sudan, MANU/SC/0797/2016 : (2016) 8 SCC 509
[44] L. Chandra Kumar v. Union of India, MANU/SC/0261/1997 : (1997) 3 SCC 261
[45] Union of India v. Madras Bar Association, MANU/SC/0378/2010 : (2010) 11 SCC 1
[46] R.K. Jain v. Union of India, MANU/SC/0291/1993 : (1993) 4 SCC 119

Back to Index

MANU/SC/0910/2002

Neutral Citation:2002/INSC/189

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) 509 of 1997, Writ Petition (Civil) 108 of 1999

Decided On: 10.04.2002

Appellants: Rupa Ashok Hurra **Vs.** Respondent: Ashok Hurra and Ors.

Hon'ble Judges/Coram:
S.P. Bharucha, C.J., S.S.M. Quadri, U.C. Banerjee, S.N. Variava and Shivaraj V. Patil, JJ.

Subject: Constitution

Relevant Section:
Constitution of India - Article 32; Constitution of India - Article 129

Disposition:
Petition Dismissed

Case Note:

Constitution of India - Article 124, 32, 137 - Supervisory jurisdiction - Only over inferior courts - Jurisdiction of this court cannot be invoked under article 32 to challenge the validity of the final order passed by this court without exhausting the remedy of review

Supreme Court - Court of last resort on questions of fact as well as of law including constitutional law - Law declared is the law of the land - Precedent for itself or all other courts

Maxim - Interest reipublicae lit sit finis lithium - It is in the interest of the state that there should be an end of law suits

Finality of judgment - Supreme Court after review can reconsider a judgment on the ground that it is vitiated being in violation of principles of natural justice or scope for apprehension of bias due to a judge or on account of abuse of the process of the court - Rarest of rare cases would require reconsideration of final judgment - Curative petition for re-examination to be circulated to a bench of 3 senior most judges - Curative petition to be regarded as rarity - Procedural justice system to give way to conceptual justice system - Flexibility of courts are its greatest virtue

JUDGMENT

S.S.M. Quadri, J.

1. These writ petitions have come up before us as a Bench of three learned Judges of this Court referred the first mentioned writ petition to a Constitution Bench observing thus :

"Whether the judgment of this Court dated March 10, 1997 in civil Appeal No. 1843 of 1997 can be regarded as a nullity and whether a writ petition under Article 32 of the Constitution can be maintained to question the validity of a judgment of this Court after the petition for review of the said judgment has been dismissed are, in our opinion, questions which need to be considered by a Constitution Bench of this Court."

2. The other writ petitions were tagged to that case.

3. In these cases the following question of constitutional law of considerable significance arises for consideration : whether an aggrieved person is entitled to any relief against a final judgment/order of this Court, after dismissal of review petition, either under Article 32 of the Constitution or otherwise.

4. In our endeavour to answer the question, we may begin with noticing that the Supreme Court of India is established by Article 124 of the Constitution which specifies its jurisdiction and powers and enables Parliament to confer further jurisdiction and powers on it. The Constitution conferred on the Supreme Court original jurisdiction (Articles 32 and 131); appellate jurisdiction both civil and criminal (Articles 132, 133, 134);discretionary jurisdiction to grant special leave to appeal (Article 136) and very wide discretionary powers, in the exercise of its jurisdiction, to pass decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, which shall be enforceable throughout the territory of India in the manner prescribed (Article 142); powers like the power to withdraw any case pending in any High Court or High Courts to itself or to transfer any case from one High Court to another High Court (Article 139) and to review judgment pronounced or order made by it (Article 137).Conferment of further jurisdiction and powers is left to be provided by Parliament by law (Article 138). Parliament is also enabled to confer further powers on the Supreme Court(Articles 134(2), 139, 140). Article 141 says that the law declared by the Supreme Court shall be binding on all courts within the territory of India and Article 144 directs that all authorities civil and judicial, in the territory of India, shall act in aid of the Supreme Court. It is a Court of record and has all the powers of such a Court including power to punish for contempt of itself (Article 129).

5. Since the jurisdiction of this Court under Article 32 of the Constitution is invoked in these writ petitions, we shall advert to the provisions of Article 32 of the Constitution. It is included in Part III of the Constitution and is quoted hereunder :

"32. Remedies for enforcement of rights conferred by this Part. -

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus,prohibition, quo warranto and certiorari,whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2) Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause(2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

6. A perusal of the Article, quoted above, shows it contains four clauses. Clause (1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III - fundamental rights. By clause (2) the Supreme Court is vested with the power to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari whichever may be appropriate for the enforcement of any of the rights conferred by Part III. Without prejudice to the powers of the Supreme Court in the aforementioned clauses (1)and (2), the Parliament is enabled, by clause (3), to empower bylaw any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). The constitutional mandate embodiedin clause (4) is that Article 32 shall not be suspended except as otherwise provided for by the Constitution.

7. Inasmuch as the Supreme Court enforces the fundamental rights by issuing appropriate directions, orders or writs,including writs in the nature of habeas corpus, mandamus,prohibition, quo warranto and certiorari, it may be useful to refer to, in brief, the characteristics of the writs in general and writ of certiorari in particular with which we are concerned here. In English law there are two types of writs -- (i) judicial procedural writs like writ of summons, writ of motion etc. which are issued as a matter of course; these writs are not in vogue in India and (ii) substantive writs often spoken of as high prerogative writs like writ of quo warranto, habeas corpus,mandamus, certiorari and prohibition etc.; they are frequently resorted to in Indian High Courts and the Supreme Court."Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts;certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs." In England while issuing these writs, at least in theory,the assumption was that the King was present in the King's Court. The position regarding the House of Lords is described thus, "of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country." in Rajunder Narain Rai Vs. Bijai Govind Singh (1836 (1) Moo. P.C. 117). They are discretionary writs but the principles for issuing such writs are well defined. In the pre-constitutional era the jurisdiction to issue the prerogative writs was enjoyed only by three chartered High Courts in India but with the coming into force of the Constitution, all the High Courts and the Supreme Court are conferred powers to issue those writs under Article 226 and Article 32, respectively, of the Constitution. In regard to the writ jurisdiction, the High Courts in India are placed virtually in the same position as the Courts

of King's Bench in England. It is a well-settled principle that the technicalities associated with the prerogative writs in English Law have no role to play under our constitutional scheme. It is, however, important to note that a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by a superior court to an inferior court which certifies its records for examination."Certiorari lies to bring decisions of an inferior court, tribunal,public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition a reemployed for the control of inferior courts, tribunals and public authorities."

8. Having carefully examined the historical background and the very nature of writ jurisdiction, which is a supervisory jurisdiction over inferior Courts/Tribunals, in our view, on principle a writ of certiorari cannot be issued to co-ordinate courts and a fortiori to superior courts. Thus, it follows that a High Court cannot issue a writ to another High Court; nor can one Bench of a High Court issue a writ to a different Bench of the same High Court; much less can writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. Though, the judgments/orders of High Courts are liable to be corrected by the Supreme Court in its appellate jurisdiction under Articles 132, 133 and 134 as well as under Article 136 of the Constitution, the High Courts are not constituted as inferior courts in our constitutional scheme. therefore, the Supreme Court would not issue a writ under Article 32 to a High Court. Further, neither a smaller Bench not a larger Bench of the Supreme Court can issue a writ under Article 32 of the Constitution to any other Bench of the Supreme Court. It is pointed out above that Article 32 can be invoked only for the purpose of enforcing the fundamental rights conferred in Part III and it is a settled position in law that no judicial order passed by any superior court in judicial proceedings can be said to violate any of the fundamental rights enshrined in Part III. It may further be noted that the superior courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution.

9. In Naresh Shridhar Mirajkar & Ors. vs. State of Maharashtra & Anr. MANU/SC/0044/1966 : [1966]3SCR744 : [1966]3SCR744 , some journalists filed a Writ Petition in the Supreme Court under Article 32 of the Constitution challenging an oral order passed by the High Court of Bombay, on the Original Side, prohibiting publication of the statement of a witness given in open court, as being violative of Article 19(1)(a) of the Constitution of India. A Bench of nine-learned Judges of this Court considered the question whether the impugned order violated fundamental rights of the petitioners under Article 19(1)(a) and if so whether a writ under Article 32 of the Constitution would issue to the High Court. The Bench was unanimous on the point that an order passed by this Court was not amenable to the writ jurisdiction of this Court under Article 32 of the Constitution. Eight of the learned Judges took the view that a judicial order cannot be said to contravene fundamental rights of the petitioners. Sarkar, J. Was of the view that the Constitution does not contemplate the High Courts to be inferior courts so their decisions would not be liable to be quashed by a writ of certiorari issued by the Supreme Court and held that this Court had no power to issue a writ of certiorari to the High Court. To the same effect are the views expressed by Shah and Bachawat, JJ. Though, in his dissenting judgment Hidayatullah, J. (as he then was) held that a judicial order of the High Court, if erroneous, could be corrected in an appeal under Article 136

of the Constitution, he,nonetheless, opined that the impugned order of the High Court committed breach of the fundamental right of freedom of speech and expression of the petitioners and could be quashed under Article 32 of the Constitution by issuing a writ of certiorari to the High Court as subordination of the High Court under the scheme of the Constitution was not only evident but also logical. In regard to the apprehended consequences of his proposition, the learned Judge observed :

"It was suggested that the High Courts might issue writs to this Court and to other High Courts and one Judge or Bench in the High Court and the Supreme Court might issue a writ to another Judge or Bench in the same Court. This is an erroneous assumption. To begin with the High Courts cannot issue a writ to the Supreme Court because the writ goes down and not up. Similarly, a High Court cannot issue a writ to another High Court. The writ does not go to a court placed on an equal footing in the matter of jurisdiction. Where the county court exercised the powers of the High Court, the writ was held to be wrongly issued to it (See : In re The New Par Consols, Limited 1898(1) Q.B. 669."

(Emphasis supplied)

10. In A.R. Antulay vs. R.S. Nayak & Anr. MANU/SC/0002/1988 : 1988CriLJ1661 : 1988CriLJ1661 , the question debated before a seven-Judge Bench of this Court was whether the order dated February 16, 1984, passed by a Constitution Bench of this Court, withdrawing the cases pending against the appellant in the Court of Special Judge and transferring them to the High Court of Bombay with a request to the Chief Justice to assign them to a sitting Judge of the High Court for holding trial from day to day. [R.S. Nayak vs. A.R. Antulay MANU/SC/0102/1984 : 1984CriLJ613 : 1984CriLJ613 , was a valid order. It is relevant to notice that in that case the said order was not brought under challenge in a petition under Article 32 of the Constitution. Indeed, the appellant's attempt to challenge the aforementioned order of the Constitution Bench before this Court under Article 32 of the Constitution, turned out to be abortive on the view that the writ petition under Article 32,challenging the validity of the order and judgment passed by the Supreme Court as nullity or otherwise incorrect, could not be entertained and that he might approach the court with appropriate review petition or any other application which he might be entitled to file in law. While so, in the course of the trial of those cases the appellant raised an objection in regard to the jurisdiction of the learned Judge of the High Court to try the cases against him. The learned Judge rejected the objection and framed charges against the appellant, which were challenged by him by filing a Special Leave Petition to appeal before this Court wherein the question of jurisdiction of the High Court to try the cases was also raised. It was numbered as Criminal Appeal No. 468 of 1986 and was ultimately referred to a seven-Judge Bench. By majority of 5 : 2 the appeal was allowed and all proceedings in the cases against the appellant before the High Court pursuant to the said order of the Constitution Bench dated February 16, 1984, were set aside and quashed. Mukharji, Oza and Natarajan, JJ. took the view that the earlier order of this Court dated February 16, 1984 which deprived the appellant of his constitutional rights, was contrary to the provisions of the Act of 1952 and was in violation of the principles of natural justice and in the background of the said Act was without any precedent and that the legal wrong should be corrected ex debito justitiae Ranganath Misra, J., with whom Ray,J., agreed, while concurring with the majority, observed that it was a duty of the Court to rectify the mistake by exercising inherent powers. Ranganathan, J. expressed his agreement with the view of the majority that the order was

bad being in violation of Articles 14 and 21 of the Constitution. However, he held that the said order was not one such order as to be recalled because it could not be said to be based on a view which was manifestly incorrect, palpably absurd or patently without jurisdiction. In that he agreed with Venkatachaliah, J. (as he then was) who gave a dissenting opinion. The learned Judge held that it would be wholly erroneous to characterise the directions issued by a five-Judge Bench as a nullity liable to be ignored and so declared in a collateral attack. However, five learned Judges were unanimous that the Court should act exdebi to justitiae. On the question of power of the Supreme Court to review its earlier order under its inherent powers Mukharji, Oza and Natarajan, JJ. expressed the view that the Court could do so even in a petition under Articles 136 or Article 32 of the Constitution. Ranganath Misra,J. gave a dissenting opinion holding that the appeal could not be treated as a review petition. Venkatachaliah, J. (as he then was) also gave a dissenting opinion that inherent powers of the Court do not confer or constitute a source of jurisdiction and they are to be exercised in aid of a jurisdiction that is already invested for correcting the decision under Article 137 read with Order XL Rule 1 of the Supreme Court Rules and for that purpose the case must go before the same Judges as far as practicable.

11. On the question whether a writ of certiorari under Article32 of the Constitution could be issued to correct an earlier order of this Court Mukharji and Natarajan, JJ. concluded that the powers of review could be exercised under either Article 136 or Article 32 if there had been deprivation of fundamental rights. Ranganath Misra, J. (as he then was) opined that no writ of certiorari was permissible as the Benches of the Supreme Court are not subordinate to the larger Benches of this Court. To the same effect is the view expressed by Oza, Ray, Venkatachaliah and Ranganathan, JJ. Thus, in that case by majority of 5 : 2 it was held that an order of the Supreme Court was not amenable to correction by issuance of a writ of certiorari under Article 32of the Constitution.

12. In Smt. Triveniben vs. State of Gujarat MANU/SC/0520/1989 : 1990CriLJ1810 : 1990CriLJ1810 , speaking for himself and other three learned Judges of the Constitution Bench, Oza, J., reiterating the same principle,observed :

"It is well settled now that a judgment of court can never be challenged under Articles 14 or 21 and therefore the judgment of the court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in Naresh Shridhar Mirajkarvs. State of Maharashtra and also in A.R. Antulayvs. R.S. Nayak, the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper."

Jagannatha Shetty, J. expressed no opinion on this aspect.

13. We consider it inappropriate to burden this judgment with discussion of the decisions in other cases taking the same view. Suffice it to mention that various Benches of this Court reiterated the same principle in the following cases :[A.R. Antulay vs. R.S. Nayak & Anr. MANU/SC/0002/1988 : 1988CriLJ1661 : 1988CriLJ1661 ,Krishna Swami vs. Union of India & Ors. MANU/SC/0222/1993 : AIR1993SC1407 : AIR1993SC1407, Mohd. Aslam vs. Union of India MANU/SC/0421/1996 : [1996]3SCR782 : [1996]3SCR782 , KhodayDistilleries Ltd. & Anr. vs. Registrar General, Supreme Court of India MANU/SC/1104/1996 : (1996)3SCC114 : (1996)3SCC114 , Gurbachan Singh & Anr. vs.Union of India & Anr. MANU/SC/1105/1996 : [1996]2SCR400 : [1996]2SCR400 , Babu Singh Bains& Ors. vs. Union of India & Ors. MANU/SC/0039/1997 : AIR1997SC116 : AIR1997SC116 and P.Ashokan vs. Union of India & Anr. MANU/SC/0103/1998 : [1998]1SCR717 : [1998]1SCR717 .

14. It is, however, true that in Supreme Court Bar Association vs. Union of India & Anr. MANU/SC/0291/1998 : [1998]2SCR795 : [1998]2SCR795 , a Constitution Bench and in M.S. Ahlwat vs. State of Haryana & Anr. MANU/SC/0687/1999 : 2000CriLJ388 a three-Judge Bench, and in other cases different Benches quashed the earlier judgments/orders of this Court in an application filed under Article 32 of the Constitution. But in those cases no one joined issue with regard to the maintainability of the writ petition under Article 32 of the Constitution. therefore, those cases cannot be read as authority for the proposition that a writ of certiorari under Article 32would lie to challenge an earlier final judgment of this Court. On the analysis of the ratio laid down in the afore mentioned cases, we reaffirm our considered view that a final judgment/order passed by this Court cannot be assailed in an application under Article 32 of the Constitution of India by an aggrieved person whether he was a party to the case or not.

15. In fairness to the learned counsel for the parties, were cord that all of them at the close of the hearing of these cases conceded that the jurisdiction of this Court under Article 32 of the Constitution cannot be invoked to challenge the validity of a final judgment/order passed by this Court after exhausting the remedy of review under Article 137 of the Constitution read with Order XL Rule 1 of the Supreme Court Rules 1966.

16. However, all the learned counsel for the parties as also the learned Attorney-General who appeared as amicus curiae,on the notice of this Court, adopted an unusual unanimous approach to plead that even after exhausting the remedy of review under Article 137 of the Constitution, an aggrieved person might be provided with an opportunity under inherent powers of this Court to seek relief in cases of gross abuse of the process of the Court or gross miscarriage of justice because against the order of this Court the affected party cannot have recourse to any other forum.

17. Mr. Shanti Bhushan, the learned senior counsel appearing for the petitioner, submitted that the principle of finality of the order of this Court had to be given a go-by and the case re-examined where the orders were passed without jurisdiction or in violation of the principles of natural justice, violation of any fundamental rights or where there has been gross injustice. He invited our attention to Order XLVII, Rule 6 of the Supreme Court Rules, 1966 and submitted that this Court had inherent jurisdiction and that cases falling in the aforementioned categories should be examined under the inherent jurisdiction of this Court. According to the learned counsel Article 129would not be available to correct a judgment of this Court but he pleaded that as from the order of the Apex Court no appeal would lie, therefore, an application, by whatever name called,which should

be certified by a senior counsel in regard to existence of permissible ground, has to be entertained on any of the aforementioned grounds to correct a judgment of this Court. He cited Antulay's case, Supreme Court Bar Association's case and Ahlwat's case as instances in which this Court had corrected its earlier judgments. He advocated : (i) for oral hearing on such an application and (ii) for hearing by a Bench of Judges other than those who passed the order on the ground that it would inspire confidence in the litigant public. Mr. K.K.Venugopal, the learned senior counsel, while adopting the arguments of Mr. Shanti Bhushan submitted that the provisions of Order XLVII, Rule 6 of the Supreme Court Rules, is a mere restatement of the provisions of Article 137 of the Constitution and that the inherent jurisdiction of this Court might be exercised to remedy the injustice suffered by a person. He suggested that a Constitution Bench consisting of senior judges and the judges who passed the order under challenge,could be formed to consider the application seeking correction of final orders of this Court. He added that to ensure that floodgates are not opened by such a remedy, an application for invoking the inherent power of this Court might require that it should be certified by a senior advocate and in case of frivolous application the petitioner could be subjected to costs. He relied on the judgment of United States in United States of America Vs. Ohio Power Company [1 Lawyers' Ed. 2d 683] to show that in every jurisdiction the courts have corrected their own mistakes. He cited the judgment of this Court in Harbans SinghVs. State of Uttar Pradesh & Ors. MANU/SC/0072/1982 : 1982CriLJ795 : 1982CriLJ795 to show that even after the dismissal of the Review Petition the Supreme Court reconsidered its own judgment; he pleaded for laying down guidelines in regard to entertaining such an application. Mr. Anil B. Divan, the learned senior counsel, submitted that Article 129 of the Constitution declared this Court to be a court of record so it would have inherent powers to pass appropriate orders to undo injustice to any party resulting from judgments of this Court. He relied on the judgment of this Court in Supreme Court Bar Association's case (supra) to show that such a power was exercised by this Court and pleaded to fashion appropriate procedure for entertaining application to reconsider earlier judgment of this Court at the instance of an aggrieved person to do justice to the parties.

18. The learned Attorney-General argued that the remedy provided under Article 32 of the Constitution would not be available to a person aggrieved by the final order of this Court;he nonetheless supported the contentions urged by other learned counsel that in case of gross miscarriage of justice, this Court ought to exercise its inherent powers by entertaining an application to examine the final order of this Court, even when a review was rejected, in the rarest of the rare cases. According to him where the order was passed without jurisdiction or in violation of the principles of natural justice, the case would fall in the rarest of the rare cases. He, however, contended that an order of this Court could not be said to violate fundamental rights conferred under Part III of the Constitution and, therefore, on that ground no relief could be claimed. He submitted that under Article 137 read with Order XL Rule 1 of the Supreme Court Rules, 1966 review of an order of this Court is provided which will be considered by the same Bench unless the same Judges are not available by reason of demitting the office. In regard to reconsideration of the judgment under the inherent power of the Court he referred to the judgment of the Federal Court in Raja Prithwi Chand Lall Choudhry etc. Vs. Rai Bahadur Sukhraj Rai & Ors. etc.1940 (2) FCR 78. Hesubmitted that for correction of a final judgment of this Court on the ground of lack of jurisdiction or violation of principle of natural justice, a curative petition could be entertained which might be heard by an appropriate Bench composed of the senior Judges as well as Judges who passed the order.

19. Dr.Rajiv Dhavan, the learned senior counsel, argued that since the Supreme Court is the creature of the Constitution so the corrective power has to be derived from the provisions conferring jurisdiction on the Supreme Court like Articles 32and 129-140; such a power does not arise from an abstract inherent jurisdiction. The corrective power must be exercised so as to correct an injustice in a case of patent lack of jurisdiction in a narrow sense, not in the Anisminic's broader sense, and gross violation of natural justice. Relying on the judgment of House of Lords in R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Grate(No. 2)'s case 1999 (1) All ER 577 he has submitted that this Court has inherent power to correct its own judgment where a party through no fault of his own has been subjected to an unfair procedure giving scope for bias. His further contention is that the corrective power is a species of the review power and Articles 129, 137, Order XL Rule 5 and Order XLVII Rules 1and 6 indicate that this Court has inherent power to set right its own judgment. He referred to the decisions of this Court in Antulay's case, Supreme Court Bar Association's case, Ahlwat's case and Triveniben's case (supra) to impress upon us that this Court has earlier exercised this power. He submitted that the Supreme Court can also issue practice direction in that behalf.

20. Mr. Ranjit Kumar, the learned senior counsel, invited our attention to various provisions of the Constitution dealing with different types of jurisdictions of this Court and advocated that in case of manifest illegality and palpable injustice this Court under its inherent powers could reconsider final judgment/order passed by this Court. He submitted that the composition of the Bench might include senior-most Judges along with the Judges who passed the order, if available. It is also his submission that while considering such curative petitions on the ground of manifest illegality and palpable injustice, in the rarest of rare cases, factors like the doctrine of stare decisis and the finality and the certainty of the law declared by this Court are required to be kept in mind. He referred to the judgment of this Court rendered by seven learned Judges in The Keshav Mills Co. Ltd. vs. Commissioner of Income-Tax Bombay North MANU/SC/0102/1965 : [1965]56ITR365(SC) : [1965]56ITR365(SC) , which was followed by another Bench of seven learned Judges reported in Maganlal Chhaganlal (P) Ltd. vs. Municipal Corporation of Greater Bombay & Ors. MANU/SC/0052/1974 : 1974 (2)SCC 402 and by a Bench of five learned Judges in the case of The Indian Aluminium Co. Ltd. vs. The Commissioner of Income-tax, West Bengal, Calcutta MANU/SC/0355/1972 : [1972]84ITR735(SC) : [1972]84ITR735(SC) . He stressed that the power of re-consideration of an earlier decision had to be very restricted; when the power of review is very limited and circumscribed as is evident from the decision of the Constitution Bench in Cauvery Water Disputes Tribunal 1993Suppl.(1) SCC 96 and the Bench of three learned Judges in S. Nagaraj & Ors. vs. State of Karnataka & Anr. 1993 Suppl.(4)SCC 595 and in Ramdeo Chauhan vs. State of Assam MANU/SC/0297/2001 : 2001CriLJ2902 : 2001CriLJ2902 by three learned Judges and in the case of Lily Thomas & Ors. vs. Union of India & Ors. MANU/SC/0327/2000 : 2000CriLJ2433 : 2000CriLJ2433 the exercise of inherent power for correcting the manifest illegality and palpable injustice after dismissal of the review petition has to be much narrower than the power of review.

These contentions pose the question, whether an order passed by this Court can be corrected under its inherent powers after dismissal of the review petition on the ground that it was passed either without jurisdiction or in violation of the principles of natural justice or due to unfair procedure giving scope for bias which resulted in abuse of the process of the Court or miscarriage of justice to an aggrieved person.

There is no gainsaying that the Supreme Court is the Court of last resort - the final Court on questions both of fact and of law including constitutional law. The law declared by this Court is the law of the land; it is precedent for itself and for all the courts/tribunals and authorities in India. In a judgment there will be declaration of law and its application to the facts of the case to render a decision on the dispute between the parties to the lis. It is necessary to bear in mind that the principles in regard to the highest Court departing from its binding precedent are different from the grounds on which a final judgment between the parties, can be reconsidered. Here,we are mainly concerned with the latter. However, when re-consideration of a judgment of this Court is sought the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge.<mpara>
It is, therefore, relevant to note that so much was the value attached to the precedent of the highest court that in The London Street Tramways Company, Limited Vs. The London County Council [LR 1898 Appeal Cases 375], the House of Lords laid down that its decision upon a question of law was conclusive and would bind the House in subsequent cases and that an erroneous decision could be set right only by an Act of Parliament.

21. In Hoystead & Ors. Vs. Commissioner of Taxation LR1926 AC 155 Lord Shaw observed :"Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result... If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

22. To the same effect is the view expressed by the Federal Court of India in Raja Prithwi Chand Lall Choudhary's case(supra) placing reliance on dicta of the Privy Council in Venkata Narasimha Appa Row vs. Court of Wards 1886 (II)Appeal Cases 660 . Gwyer, CJ. speaking for the Federal Court observed :

"This Court will not sit as a court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard : "There is a salutary maxim which ought to be observed by all Courts of last resort -- Interest reipublicae ut sit finis lithium . Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this."

23. In S. Nagaraj's case (supra), an application was filed by the State for clarification of the order passed earlier. It was urged by the petitioner that any modification or recalling of the order passed by this Court would result in destroying the principle of finality enshrined in Article 141 of the Constitution. Sahai, J. speaking for himself and for Pandian, J. observed :

"Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice."

24. The learned Judge referring to the judgment of Raja Prithwi Chand Lall Choudhury's case (supra) further observed :

"Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice."

25. The position with regard to conclusive nature of the precedent obtained in England till the following practice statement was made by Lord Gardiner, L.C. in Lloyds Bank,Ltd. Vs. Dawson and Ors. [Note 1966 (3) All E.R. 77 on behalf of himself and the Lords of Appeal in Ordinary,"They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."The principle in regard to departing from an earlier view by the House, after the said practice statement, is reflected in the speech of Lord Reid in Jones Vs. Secretary of State for Social Services, Hudson Vs. Secretary of State for Social Services (conjoined appeals) 1972 (1) All E.R. 145, who observed:

"The old view was that any departure from rigid adherence to precedent would weaken that certainty. I did not and do not accept that view. It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing; they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law.

26. But that certainty will be impaired unless this practice is used sparingly. I would not seek to categorise cases in which it should or cases in which it should not be used. As time passes experience will supply some guide. But I would venture the opinion that the typical case for reconsidering an old decision is where some broad issue is involved, and that it should only be in rare cases that we should reconsider questions of construction of statutes or other documents."

27. In Fitzleet Estates Ltd. Vs. Cherry (Inspector of Taxes) 1977 (3) All E.R. 996 Lord Wilber force observed :

"My Lords, in my firm opinion, the 1966 Practice Statement was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority : I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."

Lord Edmund-Davies observed :

"My Lords, I respectfully share your views that the Chancery Lane decision 1966 (1) All.E.R. 1 was correct. But even had I come to the opposite conclusion, the circumstances adverted to are such that I should not have thought it 'right' to depart from it now. To do so would have been to open the floodgates to similar appeals and thereby to impair that reasonable certainty in the law which the Practice Statement [Note 1966 (3) All E.R. 77 itself declared to be 'an indispensable foundation upon which to decide what is the law and its application to individual cases'."

28. The law existing in other countries is aptly summarised by Aaron Barak in his treatise thus :

"The authority to overrule exists in most countries,whether of civil law or common law tradition. Even the House of Lords in the United Kingdom is not bound any more by its precedents. The Supreme Court of the United States was never bound by its own decisions, and neither are those of Canada, Australia, and Israel."

29. To what extent the principle of stare decisis binds this Court, was considered in the case of Keshav Mills Co. Ltd.(supra). The question before a Constitution Bench of Seven learned Judges of this Court was : to what extent the principle of stare decisis could be pressed into service where the power of this Court to overrule its earlier decisions was invoked. The Court expressed its view thus :

"When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions."

30. In Maganlal Chhaganlal's case (supra), a Bench of seven learned Judges of this Court considered, inter alia, the question: whether a judgment of the Supreme Court in Northern India Caterers' case was required to be overruled. Khanna, J. observed :

"At the same time, it has to be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in law would be considerably eroded and suffer a serious set back if the highest court of the land readily overrules the view expressed by it in earlier cases, even though that view has held the field for a number of years. In quite a number of cases which come up before this Court, two views are possible, and simply because the Court considers that the view not taken by the Court in the earlier case was a better view of the matter would not justify the overruling of the view. The law laid down by this Court is binding upon all courts in the country under Article

141 of the Constitution, and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the view taken by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law."

31. In the case of The Indian Aluminium Co. Ltd. (supra),the question before a Constitution Bench of five learned Judges was : when can this Court properly dissent from a previous view?

32. In regard to the effect of an earlier order of this Court Sawant, J. speaking for the Constitution Bench observed in Cauvery Water Disputes Tribunal's case (supra) as follows :

"The decision of this Court on a question of law is binding on all courts and authorities. Hence under the said clause the President can refer a question of law only when this court has not decided it. Secondly, a decision given by this Court can be reviewed only under Article 137 read with Rule 1of Order XL of the Supreme Court Rules, 1966and on the conditions mentioned therein. When,further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is per in curiam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief. [See : Bengal Immunity Company Ltd. Vs. State of Bihar MANU/SC/0083/1955 : [1955]2SCR603 : [1955]2SCR603]

33. In the cases of Ramdeo Chauhan (supra) and Lily Thomas (supra), the question before the Court was, the scope of the power of review of a judgment of this Court under Article137 of the Constitution read with Section 114, Order XLVII of the C.P.C. and Order XL Rule 1 of the Supreme Court Rules,1966.

34. In the case of Ex parte Pinochet Grate (No 2) (supra),on November 25, 1998 the House of Lords by majority 3 : 2restored warrant of arrest of Senator Pinochet who was the Head of the State of Chile and was to stand trial in Spain for some alleged offences. It came to be known later that one of the Law Lords (Lord Hoffmann), who heard the case, had links with Amnesty International (A.I.) which had become a party to the case. This was not disclosed by him at the time of the hearing of the case by the House. Pinochet Grate, on coming to know of that fact, sought reconsideration of the said judgment of the House of Lords on the ground of an appearance of bias not actual bias. On the principle of disqualification of a judge to hear a matter on the ground of appearance of bias it was pointed out,

35. "The principle that a judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties. That did not mean that judges could not sit on cases concerning charities in whose work they were involved, and judges would normally be concerned to reuse themselves or disclose the position to the parties only where they had an active role as trustee or director of a charity which was closely allied to and acting with a party to the

litigation. In the instant case, the facts were exceptional in that AI was a party to the appeal, it had been joined in order to argue for a particular result and the Law Lord was a director of a charity closely allied to AI and sharing its objects. Accordingly,he was automatically disqualified from hearing the appeal. The petition would therefore be granted and the matter referred to another committee of the House for rehearing per curiam"

36. On the point of jurisdiction of the House to correct any injustice in an earlier order, it was observed :"In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Cassell & Co. Ltd. v Broome (No. 2) 1972 (2) All ER 849 :1972 AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point."

And it was held,

"An appeal to the House of Lords will only be reopened where a party through no fault of its own,has been subjected to an unfair procedure. A decision of the House of Lords will not be varied or rescinded merely because it is subsequently thought to be wrong."

37. We may notice here that in these cases except in Raja Prithwi Chand Lall Choudhary (supra) and Ex parte Pinochet Grate (No. 2) (supra), the question was in what circumstances the ratio in the earlier judgment of the highest court having precedent value could be departed. In the aforementioned two cases the decision was rendered on an application seeking re-consideration of the final judgment of the Federal Court and House of Lords respectively. In view of the specific provision of Article 137 of the Constitution read with Order XL Rule 1 of the Supreme Court Rules, conferring power of review on this Court, the problem in entertaining a review petition against its final judgment which its precursor - the Federal Court - had to face, did not arise before this Court.

38. The petitioners in these writ petitions seek re-consideration of the final judgments of this Court after they have been unsuccessful in review petitions and in that the secases are different from the cases referred to above. The provision of Order XL Rule 5 of the Supreme Court Rules bars further application for review in the same matter. The concern of the Court now is whether any relief can be given to the petitioners who challenge the final judgment of this Court,though after disposal of review petitions, complaining of the gross abuse of the process of Court and remedial injustice. In a State like India, governed by rule of law, certainty of law declared and the final decision rendered on merits in a lis between the parties by the highest court in the country is of paramount importance. The principle of finality is insisted upon not on the ground that a judgment given by the apex Court is impeccable but on the maxim "Interest reipublicae ut sit finis litium

39. At one time adherence to the principle of stare decisis was so rigidly followed in the courts governed by the English Jurisprudence that departing from an earlier precedent was considered heresy. With the declaration of the practice statement by the House of Lords, the highest court in England was enabled to depart from a previous decision when it appeared right to do so. The next step forward by the highest court to do justice was to review its judgment inter parties to correct

injustice. So far as this Court is concerned, we have already pointed out above that it has been conferred the power to review its own judgments under Article 137 of the Constitution. The role of judiciary merely to interpret and declare the law was the concept of bygone age. It is no more open to debate as it is fairly settled that the courts can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society,the ultimate objective being to dispense justice. In the recent years there is a dis-cernable shift in the approach of the final courts in favour of rendering justice on the facts presented before them, without abrogating but by-passing the principle of finality of the judgment. In Union of India and Anr. etc. Vs. Raghubir Singh (Dead) by Lrs. etc. etc. MANU/SC/0619/1989 : [1989]178ITR548(SC) : [1989]178ITR548(SC) Pathak, CJ. speaking for the Constitution Bench aptly observed :

"But like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for re-adjustment in a changing society, a re-adjustment of legal norms demanded by a changed social context. This need for adapting the law to new urges in society brings home the truth of the Holmesian aphorism that "the life of the law has not been logic it has been experience"(Oliver Wendell Holmes : The Common Law, p.5), and again when he declared in another study (Oliver Wendell Holmes : Common Carriers and the Common Law, 388) that ",(1943) 9 CLT 387the law is forever adopting new principles from life at one end", and"sloughing off" old ones at the other. Explaining the conceptual import of what Holmes had said,Julius Stone elaborated that it is by the introduction of new extra-legal propositions emerging from experience to serve as premises, or by experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of law tends to be determined (Julius Stone: Legal Systems & Lawyers Reasoning, pp.58-59)"

40. The concern of this Court for rendering justice in a cause is not less important than the principle of finality of its judgment. We are faced with competing principles - ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on reconsideration of a judgment on the ground that it is vitiated being in violation of the principle of natural justice or apprehension of bias due to a Judge who participated in decision making process not disclosing his links with a party to the case, or abuse of the process of the court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice - a concept which is not disputed but by a few. We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in public interest that a final judgment of the final court in the country should not be open to challenge yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and cause perpetuation of irremediable injustice.

It may be useful to refer to the judgment of the Supreme Court of United States in Ohio Power Company's case (supra).In that case the Court of Claims entered judgment for refund of tax, alleged

to have been overpaid, in favour of the tax payer. On the application of the Government a writ of certiorari against that judgment was declined by the Supreme Court of United States in October 1955. The Government sought re-hearing of the case by filing another application which was dismissed in December 1955. A second petition for hearing was also rejected in May 1956. However, in June 1956 the order passed in December 1955 was set aside sua sponge (of its own motion) and that case was ordered to be heard along with two other pending cases in which the same question was presented. In those two cases the Supreme Court held against the tax payer and, on the authority of that judgment, reversed the judgment of the Court of Claims. Four learned members of the Court, in per curiam opinion, rested the decision "on the ground of interest in finality of the decision must yield where the interest of justice so required". Three learned members dissented and held that denial of certiorari had become final and ought not to be disturbed. Two learned members, however, did not participate.

41. This Court in Harbans Singh's case (supra), on an application under Article 32 of the Constitution filed after the dismissal of special leave petition and the review, reconsidered its judgment. In that case, among others, the petitioner and another person were convicted under Section 302 of I.P.C. And sentenced to death. In the case of one of the remaining two convicts, the Supreme Court commuted the death sentence to life imprisonment. While staying the death sentence of the petitioner, A.N.Sen, J. in his concurring opinion, noticed the dismissal of the petitioner's special leave, review petitions and the petition for clemency by the President and observed :

"Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution, I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice."

42. In Antulay's case (supra), the majority in the seven-Judge Bench of this Court set aside an earlier judgment of the Constitution Bench in a collateral proceeding on the view that the order was contrary to the provisions of the Act of 1952; in the background of that Act without precedent and in violation of the principles of natural justice, which needed to be corrected ex debito justitiae.

43. In Supreme Court Bar Association's case (supra), on an application filed under Article 32 of the Constitution of India,the petitioner sought declaration that the Disciplinary Committees of the Bar Councils set up under the Advocates Act, 1961, alone had exclusive jurisdiction to inquire into and suspend or debar an advocate from practising law for professional or other misconduct and that the Supreme Court of India or any High Court in exercise of its inherent jurisdiction had no such jurisdiction, power or authority in that regard. A Constitution Bench of this Court considered the correctness of the judgment of this Court in Re: Vinay Chandra MishraMANU/SC/0471/1995 : 1995CriLJ3994 : 1995CriLJ3994 . The question which fell for consideration of this Court was : whether the punishment of debarring an advocate from practice and suspending his licence for a specified period could be passed in exercise of power of this Court under Article 129 read with Article 142 of the Constitution of India. There an errant advocate was found guilty of criminal contempt and was awarded the punishment of simple imprisonment for a

period of six weeks and was also suspended from practice as an advocate for a period of three years from the date of the judgment of this Court for contempt of the High Court of Allahabad. As a result of that punishment all elective and nominated offices/posts then held by him in his capacity as an advocate had to be vacated by him. Elucidating the scope of the curative nature of power conferred on the Supreme Court under Article 142, it was observed :

"The plenary powers of the Supreme Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which the Supreme Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. It is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Supreme Court to prevent "clogging or obstruction of the stream of justice"."

44. In spite of the width of power conferred by Article 142, the Constitution Bench took the view that suspending the advocate from practice and suspending his licence was not within the sweep of the power under the said Article and overruled the judgment in Re V.C.Mishra's case (supra).

45. In M.S.Ahlwat's case (supra), the petitioner, who was found guilty of forging signatures and making false statements at different stages before this Court, was inflicted punishment under Section 193 IPC in Afzal vs. State of Haryana MANU/SC/0590/1996 : 1996CriLJ1679 . He filed an application under Article 32 of the Constitution assailing the validity of that order. Taking note of the complaint of miscarriage of justice by the Supreme Court in ordering his incarceration which ruined his career, acting without jurisdiction or without following the due procedure, it was observed that to perpetuate an error was no virtue but to correct it was a compulsion of judicial conscience. The correctness of the judgment was examined and the error was rectified.

46. In the cases discussed above this Court reconsidered its earlier judgments, inter alia, under Articles 129 and 142 which confer very wide powers on this Court to do complete justice between the parties. We have already indicated above that the scope of the power of this Court under Article 129 as a court of record and also adverted to the extent of power under Article142 of the Constitution.

47. The upshot of the discussion in our view is that this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may re-consider its judgments in exercise of its inherent power.

48. The next step is to specify the requirements to entertain such a curative petition under the inherent power of this Court so that floodgates are not opened for filing a second review petition

as a matter of course in the guise of a curative petition under inherent power. It is common ground that except when very strong reasons exist, the Court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of a review petition. It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained.

49. Nevertheless, we think that a petitioner is entitled to relief ex debito justitiae if he establishes (1) violation of principles of natural justice in that he was not a party to the lis but the judgement adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice and(2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

50. The petitioner, in the curative petition, shall aver specifically that the grounds mentioned therein had been taken in the review petition and that it was dismissed by circulation. The curative petition shall contain a certification by a Senior Advocate with regard to the fulfillment of the above requirements.

51. We are of the view that since the matter relates to re-examination of a final judgment of this Court, though on limited ground, the curative petition has to be first circulated to a Bench of the three senior-most Judges and the Judges who passed the judgment complained of, if available. It is only when a majority of the learned Judges on this Bench conclude that the matter needs hearing that it should be listed before the same Bench (as far as possible) which may pass appropriate orders. It shall be open to the Bench at any stage of consideration of the curative petition to ask a senior counsel to assist it as amicus curiae. In the event of the Bench holding at any stage that the petition is without any merit and vexatious, it may impose exemplary costs on the petitioner.

52. Insofar as the present writ petitions are concerned, the Registry shall process them, notwithstanding that they do not contain the averment that the grounds urged were specifically taken in the review petitions and the petitions were dismissed in circulation.

53. The point is accordingly answered.

Back to Index

MANU/SC/0444/1994

Neutral Citation: 1994/INSC/111

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 3645 of 1989, with (Transferred Case (Civil) Nos. 5 to 9 of 1993; Civil Appeal Nos. 193, 194, 1692, 1692A, 1692C and 4627-30 of 1993 and IA No. 4 in Civil Appeal No. 1692 of 1993).

Decided On: 11.03.1994

Appellants: S.R. Bommai and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
S.R. Pandian, A.M. Ahmadi, Kuldip Singh, J.S. Verma, P.B. Sawant, K. Ramaswamy, S.C. Agrawal, Yogeshwar Dayal and B.P. Jeevan Reddy, JJ.

Subject: Constitution

Subject: Law of Evidence

Relevant **Section:**
Constitution of India - Article 356

Disposition:
Appeal Dismissed

Authorities Referred:

American Jurisprudence 2d Series, vol. 73 at page 397 in para 203; Craies on Statute Law, 7th Edition, at page 69; shorter Oxford dictionary, third edition, at page 255; Salmond in his Jurisprudence. 9th edition; "Political Thought by Dr. Ambedkar compiled by R.K.. Kshersagar, Intellectual Public House Edition 1992 at page 155; "the Statute of Westminster and Dominion status" (fourth Edition); Sir W. Ivon Jennings, in his "Law and the Constitution" (Fifth Edition); K.C. Wheare in his book "Modern Constitutional" (1967 edition); Modes of Constitutional Interpretation by Craig R. Ducat, 1978 Edition at p.125, Craig's Administrative Law (Second Edition), Administrative Law (Sixth Edition) by H.W.R. Wade, in the chapter "Constitutional Foundation of the power of the Courts" under the heading 'The Sovereignty of Parliament'; the

effect of Parliament's intervention is started thus:(at page 29), Prof. H.W.R. Wade in "Administrative Law - 6th Edition."; "Constitutional Law of India" [page 166, third edition]

Cases Overruled/Partly Overruled:
S.R. Bommai v. U.O.I. MANU/KA/0003/1990 and State of Rajasthan v. Union of India MANU/SC/0370/1977

Case Note:

Constitution - judicial review - Section 51 of Government of India Act, 1935 and Article 365 of Constitution of India - judicial review capable of exercise in testing invalidating proclamation - several States having controversy on ground that proclamation issued are justiciable - provision of Article 365 of Constitution of India is indication that cases falling within its ambit capable of judicial scrutiny by application of objective standards - Court observed that constitutional machinery failed to specified existence - Court capable to determine objective - Court observed that it is reasonable to held that cases falling under Article 365 justiciable and must be determined by Court.

ORDER

S.R. Pandian, J.

1. I have had the privilege of going through the erudite and scholarly judgments of my learned brothers making an exhaustive and in-depth analysis, evaluating the constitutional mechanism and exploring the whole realm of constitutional imperatives as envisaged by the founding fathers of the Indian Constitution on Central-State relations and throwing abundant light on the controversial role of State Governors inviting President's Rule and the mode by which the Union Cabinet and Parliament discharged their responsibility in this regard with reference to Articles 74(2), 163, 355, 356, 357 and the other allied constitutional provisions.

2. I find myself in agreement with the opinion of P.B. Sawant, J. on his conclusion 1, 2 and 4 to 8 with which B.P. Jeevan Reddy, J. concurs in his judgment (speaking for himself and on behalf of S.C. Agrawal, J.) but so far as the reasoning and other conclusions are concerned, I agree fully with the judgment of B.P. Jeevan Reddy, J. Yet I would like to give my a brief opinion on the constitutional question of substantial importance in relation to the powers of the President to issue proclamations under Article 356(1) of the Constitution.

3. The Indian Constitution is both a legal and social document. It provides a machinery for the governance of the country. It also contains the ideals expected by the nation. The political machinery created by the Constitution is a means to the achieving of this ideal.

4. To what extent we have been successful in achieving the Constitutional ideals is a question with a wide spectrum which needs an elaborate debate. Harking back to the question involved in this case. The framers of the Constitution met and were engaged for months together with the formidable task of drafting the Constitution on the subject of center-State relationship that would solve all the problems pertaining thereto and frame a system which would ensure for a long time

to come. During the debates and deliberations, the issues that seemed to crop up at every point was the States' rights vis-a-vis the Central rights. Some of the members seem to have expressed their conflicting opinions and different reasonings and sentiments on every issue influenced and inspired by the political ideology to which they were wedded. The two spinal issues before the Constituent Assembly were (1) what powers were to be taken away from the States; and (2) how could a national supreme Government be formed without completely eviscerating the power of the State. Those favouring the formation of a strong Central Government insisted that the said Government should enjoy supreme power while others supporting States' rights expostulated that view. The two sides took turns making their representations but finally realising that all might be lost, they reached a compromise that resolved the dead look on the key issue and consequently the present form of Government, more federal in structure, came into being instead of a unitary Government.

5. It is and undeniable fact that the Constitution of India was ordained and established by the people of India for themselves for their own governance and not for the governance of individual States. Resultantly, the Constitution acts directly on the people by means of power communicated directly from the people.

6. In regard to the Central-State relationship there are various reports suggesting certain recommendations for the smooth relationship of both the Governments without frequently coming into conflicts thereby creating constitutional crisis. The reports suggesting recommendations are that of (1) Administrative Reforms Commission Report 1969; (2) Rajmanner Committee Report 1969; and (3) Sarkaria Commission Report 1987.

7. When the question with regard to the center-State relations stands thus, the publication issued by the Lok Sabha Secretariat giving an analytical tabular form with significant details pertaining to the President's proclamation made under Article 356(1) of the Constitution and under Section 51 of the Government of Union Territories Act 1963 during the last 41 years of the Republic, that is upto 1991, indicates the frequency of user of Article 356(1). It appears from the summary table given in the tabular form (Appendix IV) that on 82 occasions the President's Rule in States have been imposed by invoking or resorting to Article 356(1) and on 13 occasion the President's Rule have been imposed in Union Territories including erstwhile Union Territories which have become States under Section 51 of the Government of Union Territories Act 1963. All total upto 95 times, of which on 23 occasions the assemblies were dissolved on the advice of the Chief Ministers/or due to their resignations. It may be recalled that on 18 occasions the assemblies suspended were subsequently revived. The above statistics does not include the proclamations which are presently under challenge before us. We may hasten to add that the proclamations were made on different occasions on the advice of the Council of Ministers of the Central Government belonging to different political complexions. Some of the States, dissolved valiantly fought, honourably bled and pathetically lost their legal battle.

8. Since my learned brothers have elaborately dealt with the constitutional provisions relating to the issue of the proclamation and as I am in agreement with the reasoning given by B.P. Jeevan Reddy, J. it is not necessary for me to make further discussion on this matter except saying that I am of the firm opinion that the power under Article 356 should be used very sparingly and only when President is fully satisfied that a situation has arisen where the Government of the State

cannot be carried on in accordance with the provisions of the Constitution. Otherwise, the frequent use of this power and its exercise are likely to disturb the Constitutional balance. Further if the proclamation is freely made, then the Chief Minister of every State who has to discharge his constitutional functions will be in perpetual fear of the axe of proclamation falling on him because he will not be sure whether he will remain in power or not and consequently he has to stand up every time from his seat without properly discharging his constitutional obligations and achieving the desired target in the interest of the State.

9. All the matters are disposed of accordingly with no order as to costs.

A.M. Ahmadi, J.

10. I have had the advantage of perusing the views expressed by my esteemed colleagues P.B. Sawant, K. Ramaswamy and B.P. Jeevan Reddy. JJ. and while I am largely in agreement with the 'conclusions' recorded by K. Ramaswamy, J. I would like to briefly indicate the area of my agreement.

11. In a country geographically vast, inhabited by over 850 million people belonging to different religions, castes and creeds, majority of them living in villages under different social orders and in abject poverty, with a constant tug of war between the organised and the unorganised sectors, it is not surprising that problems crop up time and again requiring strong and at times drastic state action to preserve the unity and integrity of the country. Notwithstanding these problems arising from time to time on account of class conflicts, religious intolerance and socio- economic imbalances, the fact remains that India has a reasonably stable democracy. The resilience of our Republic to face these challenges one after another has proved the peoples' faith in the political philosophy of socialism, secularism and democracy enshrined in the Preamble of our Constitution. Yet, the fact remains that the nation has had from time to time with increasing frequency to combat upheavals occasioned on account of militancy, communal and class conflicts, politico religious turmoils, strikes, bandhs and the like occurring in one corner of the country or the other, at times assuming ugly proportions. We are a crisis-laden country; crisis situations created by both external and internal forces necessitating drastic State action to preserve the security, unity and integrity of the country. To deal with such extraordinarily difficult situations exercise of emergency power becomes an imperative. Such emergency powers existed under the Government of India Act, 1935, vide Sections 93 and 45 of that enactment. However, when similar powers were sought to be conferred on the President of India by the Constitution, there was a strong opposition from many members of the Constituent Assembly, vide constituent assembly Debates on draft Articles 277 and 277A. Dr. Ambedkar pacified the members by stating:

In fact I share the sentiments expressed...that the proper thing we ought to expect is that such Articles will never be called into operation and that they will remain a dead letter. If at all, they are brought into operation, I hope the President who is endowed with all these powers will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a clear warning to a province that has erred that things were not happening in the way in which they were intended to happen in the Constitution.

Dr. Ambedkar's hope that in rarest of rare cases only there will be an occasion to invoke the emergency provisions was soon belied as we were told at the Bar that the provisions of Article 356 of the Constitution have had to be invoked over ninety times by now. What was, therefore expected to be a 'dead letter' has in fact become an oft-invoked provision. This is not the occasion to embark on an inquiry into the circumstances leading to the utilisation of this emergency power, but the fact remains that the President has had to invoked the power quite frequently. This may be on account of the degradation in the political environment of the country. Since I am not probing into the circumstances in which the said power had to be invoked, I do not express myself on the question whether or not there existed adequate justification for resorting to this emergency power.

12. Although the emergency provisions found in Part XVIII of the Constitution are more or less modelled on the pattern of similar provisions contained in the Government of India Act, 1935, the exercise of that power under the said provisions cannot be compared with its exercise under the Constitution for the obvious reason that they operated under totally different conditions. Under the Government of India Act, 1935, the Governor General and the Governor exercised as representatives of the Crown near absolute powers, only limited powers were given to the elected governments and those too could be taken away if it was felt that the concerned Government could not be carried on in accordance therewith. So also reference to the British Joint Parliamentary Report is inapposite for the simple reason that the situation under the Constitution is not comparable with that which formed the basis for the Report. The Power conferred on the President of India under Article 356 has to be exercised in a wholly different political set up as compared to that obtaining under the Government of India Act, 1935. The constitutional philosophy of a free country is totally different from the philosophy, of a similar law introduced for the governance of a country by its colonial masters. It is, therefore, unnecessary to examine the case law based on the exercise of similar powers under the Government of India Act, 1935.

FEDERAL CHARACTER OF THE CONSTITUTION

13. India, as the Preamble proclaims, is a Sovereign, Socialist, Secular, Democratic Republic. It promises liberty of thought, expression, belief, faith and worship, besides equality of status and opportunity. What is paramount is the unity and integrity of the nation. In order to maintain the unity and integrity of the nation our founding fathers appear to have leaned in favour of a strong center while distributing the powers and functions between the center and the States. This becomes obvious from even a cursory examination of the provisions of the Constitution. There was considerable argument at the Bar on the question whether our Constitution could be said to be 'Federal' in character.

14. In order to understand whether our Constitution is truly federal, it is essential to know the true concept of federalism. Dicey calls it a political contrivance for a body of states which desire Union but not unity. Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies. Thus the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a Federal compact.

15. The oldest federal model in the modern world can be said to be the Constitution of the United States of America. The American federation can be described as the outcome of the process of evolution, in that, the separate States first formed into a Confederation (1781) and then into a Federation (1789). Although the States may have their own Constitutions, the Federal Constitution is the suprema-lex and is made binding on the States. That is because under the American constitution, amendments to the Constitution are required to be ratified by three-fourths of the States. Besides under that Constitution there is a single legislative list enumerating the powers of the Union and, therefore, automatically the other subjects are left to the States. This is evident from the Tenth Amendment. Of course, the responsibility to protect the States against invasion is of the Federal Government. The States are, therefore, prohibited from entering into any treaty, alliance, etc., with any foreign power. The principle of dual sovereignty is carried in the judicial set up as well since disputes under federal laws are to be adjudicated by federal courts, while those under State Laws are to be adjudicated by State Courts, subject of course to an appeal to the Supreme Court of the United States. The interpretation of the Constitution is by the United States Supreme Court.

16. We may now read some of the provisions of our Constitution. Article 1 of the Constitution says: India, that is Bharat, shall be a Union of States. Article 2 empowers Parliament to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Under Article 3 Parliament can by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; increasing the area of any State; diminishing the area of any State; altering the boundaries of any State; or altering the name of any State. The proviso to that Article requires that the Bill for the purpose shall not be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon. On a conjoint reading of these Articles, it becomes clear that Parliament has the right to form new States, alter the areas of existing States, or the name of any existing State. Thus the Constitution permits changes in the territorial limits of the States and does not guarantee their territorial integrity. Even names can be changed. Under Article 2 it is left to the Parliament to determine the terms and conditions on which it may admit any area into the Union or establish new States. In doing so, it has not to seek the concurrence of the State whose area, Boundary or name is likely to be affected by the proposal. All that the proviso to Article 3 requires is that in such cases the President shall refer the Bill to the legislatures of the concerned states likely to be affected 'to express their views'. Once the views of the States are known, it is left to Parliament to decide on the proposed changes. The Parliament can, therefore, without the concurrence of the concerned state or States change the boundaries of the State or increase or diminish its area or change its name. These provisions show that in the matter of Constitution of States, Parliament is paramount. This scheme substantially differs from the federal set up established in the United States of America. The American States were independent sovereign States and the territorial boundaries of those independent States cannot be touched by the Federal Government. It is these independent sovereign units which together decided to form into a Federation unlike in India where the States were not independent sovereign units but they were formed by Article 1 of the Constitution and their areas and boundaries could, therefore, be altered, without their concurrence, by Parliament. It is well- known that since independence, new States have been created boundaries

of existing States have been altered, States have been renamed and individual States have been extinguished by Parliamentary legislation;

17. Our founding fathers did not deem it wise to shake the basic structure of Government and in distributing the legislative functions they, by and large, followed the pattern of the Government of India Act, 1935. Some of the subjects of common interest were, however, transferred to the Union List, thereby enlarging the powers of the Union to enable speedy and planned economic development of the nation. The scheme for the distribution of powers between the Union and the States was largely maintained except that some of the subjects of common interest were transferred from the Provincial List to the Union List thereby strengthening the administrative control of the Union. It is in this context that this Court in 'State of West Bengal v. union of India MANU/SC/0086/1962 : [1964]1SCR371 ,observed:

The exercise of powers, legislative and executive, in the allotted fields is hedged in by the numerous restrictions so that the powers of the States are not co-ordinate with the Union and are not in many respects independent.

18. In Union of India v. H.S. Dhillon MANU/SC/0062/1971 : [1972]83ITR582(SC) another feature in regard to the distribution of Legislative power was pointed out, in that, under the Government of India Act, 1935, the residuary power was not given either to the Union Legislature or to the provincial Legislatures, but under our Constitution, by virtue of Article 248, read with Entry 97 in List I of the VII Schedule, the residuary power has been conferred on the Union. This arrangement substantially differs from the scheme of distribution of powers in the United States of America where the residual powers are with the States.

19. The Preamble of our Constitution shows that the people of India had resolved to constitute India into a Sovereign Secular Democratic Republic and promised to secure to all its citizens Justice, Liberty and Equality and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. In the people of India, therefore vests the legal sovereignty while the political sovereignty is distributed between the Union and the States. Article 73 extends the executive power of the Union to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. The executive power which is made co-extensive with Parliament's power to make laws shall not, save as expressly provided by the Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State also has power to make laws. Article 162 stipulates that the executive power of a State shall extend to matters with respect to which the Legislature of the State has power to make laws provided that in any matter with respect to which the legislature of State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. It may also be noticed that the executive power of every State must be so exercised as not to impede or prejudice the exercise of the executive power by the Union. The executive power of the Union also extends to giving such directions to a State as may appear to the Government of India to be necessary for those purposes and as to the construction, maintenance of means of communication declared to be of national or military importance and for protection of railways. The States have to largely depend on financial

assistance from the Union. Under the scheme of Articles 268 to 273, States are in certain cases allowed to collect and retain duties imposed by the Union; in other cases taxes levied and collected by the Union are assigned to the States and in yet other cases taxes levied and collected by the Union are shared with States. Article 275 also provides for the giving of grants by the Union to certain States. There is, therefore, no doubt that States depend for financial assistance upon the Union since their power to raise resources is limited. As economic planning is a concurrent subject, every major project must receive the sanction of the Central Government for its financial assistance since discretionary power under Article 282 to make grants for public purposes is vested in the Union or a State, notwithstanding that the purpose is one in respect to which Parliament or State Legislature can make laws. It is only after a project is finally sanctioned by the Central Government that the State Government can execute the same which demonstrates the control that the Union can exercise even in regard to a matter on which the State can legislate. In addition to these controls Article 368 confers powers on the Parliament to amend the Constitution, albeit by a specified majority. The power extends to amending matters pertaining to the executive as well as legislative powers of the States if the amendments are ratified by the legislatures of not less than one-half of the States. This provision empowers Parliament to so amend the Constitution as to curtail the powers of the States. A strong Central Government may not find it difficult to secure the requisite majority as well as ratification by one-half of the legislatures if one goes by past experience. These limitations taken together indicate that the Constitution of India cannot be said to be truly federal in character as understood by lawyers in the United States of America.

20. In State of Rajasthan v. Union of India MANU/SC/0370/1977 : [1978]1SCR1

A conspectus of the provisions of our Constitution will indicate that whatever appearances of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of its provisions carry with them and the use that has been made of them, more unitary than federal.

Further, in paragraph 52, the learned Chief Justice proceeded to add :

In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically co-ordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government.

Pointing out that national planning involves disbursement of vast amount of money collected as taxes from citizens spread over all the States and placed at the disposal of the Central Government for the benefit of the States, the learned Chief Justice proceeds to observe in paragraph 56 of the judgment :

If then our Constitution creates a Central Government which is 'amphibian' in the sense that it can move either on the federal or unitary plane, according to the needs of the situation and circumstances of a case, the question which we are driven back to consider is whether on assessment of the 'situation' in which the Union Government should move either on the Federal or

Unitary plane are matters for the Union Government itself or for this Court to consider and determine.

When the Union Government issued a notification dated 23rd May, 1977 constituting a Commission of Inquiry in exercise of its power under Section 3 of the Commissions of Inquiry Act, 1952, to inquire into certain allegations made against the Chief Minister of the State, the State of Karnataka instituted a suit under Article 131 of the Constitution challenging the legality and validity of the notification as unjustifiable trespass upon the domain of State powers. While dealing with the issues arising in that suit The State of Karnataka v. Union of India MANU/SC/0144/1977 : [1978]2SCR1 , once again examined the relevant provisions of the Constitution and the Commission of Inquiry Act, 1952, and observed in paragraph 33 as under :

In our country, there is, at the top, a Central or the Union Government responsible to Parliament, and there are, below it, State Governments, responsible to the State Legislatures, each functioning within the sphere of its own powers which are divided into two categories, the exclusive and the concurrent. Within the exclusive sphere of the powers of the State Legislature is local Government. And, in all States there is a system of local Government in both Urban and Rural areas, functioning under State enactments. Thus, we can speak of a three tier system of Government in our country in which the Central or the Union Government comes at the apex....

It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of Governmental powers of State and Central Governments, is overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain Constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Government in emergency situations, vide Articles 352 to 360 of the Constitution.

21. It is common knowledge that shortly after we constituted ourselves into a Republic, the Princely States gradually disappeared leading to the unification of India into a single polity with duality of governmental agencies for effective and efficient administration of the country under Central direction and, if I may say so, supervision. The duality of governmental organs on the Central and State levels reflect demarcation of functions in a manner as would ensure the sovereignty and integrity of our country. The experience of partition of the country and its aftermath had taught lessons which were too fresh to be forgotten by our Constitution makers. It was perhaps for that reason that our founding fathers thought a strong center was essential to ward off separatist tendencies and consolidate the unite and integrity of the country.

22. A Division Bench of the Madras High Court in N. Karunanidhi v. Union of India MANU/TN/0227/1977 : AIR1977Mad192 , while dealing with the contention that the Constitution is a federal one and that the States are autonomous having definite powers and independent rights to govern, and the Central Government has no right to interfere in the governance of the State, observed as under :

...There may be a federation of independent States, as it is in the case of the United States of America. As the name itself denotes, it is a Union of States, either by treaty or by legislation of the concerned States. In those cases, the federating units gave certain powers to the federal Government and retained some. To apply the meaning to the word 'federation' or 'autonomy' used in the context of the American Constitution, to our Constitution will be totally misleading.

After tracing the history of the governance of the country under the British rule till the framing of our Constitution, the court proceeded to add as follows:

The feature of the Indian Constitution is the establishment of a Government for governing the entire country. In doing so, the Constitution prescribes the powers of the Central Government and the powers of the State Governments and the relationship between the two. In a sense, if the word 'federation' can be used at all, it is a federation of various States which were designated under the Constitution for the purpose of efficient administration and governance of the country. The powers of the center and the States are demarcated under the Constitution. It is futile to suggest that the States are independent, sovereign or autonomous units which had joined the federation under certain conditions. No such State ever existed or acceded to the Union.

Under our Constitution the State as such has no inherent sovereign power or autonomous power which cannot be encroached upon by the center. The very fact that under our Constitution, Article 3, Parliament may by law form a new State by separation of territory from any State or by uniting two or more State or parts of States or by uniting any territory to a part of any State, etc., militates against the view that the States are sovereign or autonomous bodies having definite independent rights of governance. In fact, as pointed out earlier in certain circumstances the Central Government can issue directions to States and in emergency conditions assume far-reaching powers affecting the states as well, and the fact that the President has powers to take over the administration of states demolishes the theory of an independent or autonomous existence of a State. It must also be realised that unlike the Constitution of the United States of America which recognises dual citizenship (Section 1(1), Fourteenth Amendment), the Constitution of India, Article 5, does not recognise the concept of dual citizenship. Under the American Constitution all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside whereas under Article 5 of the Indian Constitution at its commencement, every person domiciled in the territory of India and (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India. Article 9 makes it clear that if any person voluntarily acquires the citizenship of any foreign country, he will cease to be a citizen of India. These provisions clearly negative the concept of dual citizenship, a concept expressly recognised under the American Constitution. The concept of citizenship assumes some importance in a federation because in a country which recognises dual citizenship, the individual would owe allegiance both to the federal Government as well as the State Government but a country recognising a single citizenship does not face complications arising from dual citizenship and by necessary implication negatives the concept of State sovereignty.

23. Thus the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, the Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary

powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VII Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution. Said Prof. K.C. Where in his work 'Federal Government'

What makes one doubt that the Constitution of India is strictly and fully federal, however, are the powers of intervention in the affairs of the States given by the Constitution to the Central Government and Parliament.

Thus in the United States, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc., and even curtail the power, both executive and legislative, by amending the Constitution. That is why

the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter
but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions.

SECULARISM UNDER THE CONSTITUTION

24. India can rightly be described as the world's most heterogeneous society. It is a country with a rich heritage. Several races have converged in this sub-continent. They brought with them their own cultures, languages, religions and customs. These diversities threw up their own problems but the early leadership showed wisdom and sagacity in tackling them by preaching the philosophy of accommodation and tolerance. This is the message which saints and Sufis spread in olden days and which Mahatma Gandhi and other leaders of modern times advocated to maintain national unity and integrity The British policy of divide and rule, aggravated by separate electorates based on religion, had added a new dimension of mixing religion with politics which had to be countered and which could be countered only if the people realised the need for national unity and integrity. It was with the weapons of secularism and non-violence that Mahatma Gandhi fought the battle for independence against the mightly colonial rulers. As early as 1908, Gandhiji wrote in Hind Swaraj:

India cannot cease to be one nation, because people belonging to different religions live in it....In no part of the world are on nationality and on religion synonymous terms; nor has it ever been so in India.

Gandhiji was ably assisted by leaders like Pandit Jawaharlal Nehru, Maulana Abul Kalam Azad and others in the task of fighting a peaceful battle for securing independence by uniting the people of India against separatist forces. In 1945 pandit Nehru wrote:

I am convinced that the future government of free India must be secular in the sense that government will not associate itself directly with any religious faith but will give freedom to all religious functions.

And this was followed up by Gandhiji when in 1946 he wrote in Harijan:

I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State will look after your secular welfare, health, communication, foreign relations, currency and so on, but not my religion. That is everybody's personal concern.

25. The great Statesman-Philosopher Dr. Radhakrishnan said:

When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that Secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, *the Indian State will not identify itself with or be controlled by any particular religion.* We hold that no one religion should be given preferential status, or unique distinction, that *no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy* and contrary to the best interests of religion and government. This view of religious impartiality, of comprehension and forbearance, has a prophetic role to play within the national and international life. No group of citizens shall arrogate to itself rights and privileges which it denies to others. No person should suffer any form of disability or discrimination because of his religion but all like should be free to share to the fullest degree in the common life. This is the basic principle involved in the separation of Church and State.

(Recovery of Faith, New york, Harper brothers 1955, p. 202)

(Emphasis supplied.)

Immediately after we attained independence, the Constituent Assembly, aware of the danger of communalism, passed the following resolution on April 3, 1894:

Whereas it is essential for the proper functioning of democracy and growth of national unity and solidarity that communalism should be eliminated from Indian life, this Assembly is of the opinion that no communal organisation which by its Constitution or by exercise of discretionary power vested in any of its officers and organs admits to, or excludes from, its membership persons on grounds of religion, race and caste, or any of them should be permitted to engage in any activities other than those essential for the bonafide religious, cultural, social and educational needs of the community, and that all steps, legislative and administrative, necessary to prevent such activities should be taken.

26. Since it was felt that separate electorates for minorities were responsible for communal and separatist tendencies, the Advisory Committee resolved that the system of reservation for minorities, excluding SC/ST, should be done away with. Pursuant to the goal of secularism, the Constituent Assembly adopted Clauses 13, 14 and 15 roughly corresponding to the present Articles

25, 26 and 27. During the debates Prime Minister Jawaharlal Nehru declared that secularism was an ideal to be achieved and that establishment of a secular state was an act of faith, an act of faith above all for the majority community because they will have to show that they can behave to others in a generous, fair and just way. When objection was sought to be voiced from certain quarters, Pandit Laxmikantha Mitra explained:

By Secular State, as I understand, it is meant that the state is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the state will receive any state patronage whatsoever. The state is not going to establish, patronize or endow any particular religion to the exclusion of or in preference to others and that no citizen in the state will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion.

In other words, in the affairs of the State the preferring of any particular religion will not be taken into consideration at all. This I consider to be the essence of a secular State. At the same time we must be very careful to see that in this land of ours we do not deny to anybody the right not only to profess or practice but also propagate any particular religion.

27. This in brief was the notion of secularism and democracy during the pre-independence era and immediately before we gave unto ourselves the Constitution. We may now very briefly notice the provisions in the Constitution.

28. Notwithstanding the fact that the words 'Socialist', and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd amendment, the concept of Secularism was very much embedded in our Constitutional philosophy. The term 'secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit.
The Preamble itself spoke of liberty of thought, expression, belief, faith and worship. While granting this liberty the Preamble promised equality of status and opportunity. It also spoke of promoting fraternity, thereby assuring the dignity of the individual and the unity and integrity of the Nation. While granting to its citizens liberty of belief, faith and worship, the Constitution abhorred discrimination on grounds of religion etc., but permitted special treatment for Schedule Castes and Tribes, vide Articles 15 & 16. Article 25 next provided, subject to public order, morality and health, that all person shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Article 26 grants to every religious denomination or any section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two articles clearly confer a right to freedom of religion. Article 27 provides that no person shall be compelled to pay any taxes, the proceeds whereof are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. This is an important article which prohibits the exercise of State's taxation power if the proceeds thereof are intended to be appropriated in payment of expenses for the promotion and maintenance of any particular religion or religious denomination. That means that State's revenue cannot be utilised for the promotion and maintenance of any religion or religious group. Article 28 relates to attendance at religious instructions or religious worship in certain educational institutions. Then come Articles 29 and 30

which refer to the cultural and educational rights. Article 29 inter alia provides that no citizen will be denied admission to an educational institution maintained wholly or partly from State funds on grounds only of religion, etc. Article 30 permits all minorities, whether based on religion or language, to establish and administer educational institutions of their choice and further prohibits the State from discriminating against such institutions in the matter of granting aid. These fundamental rights enshrined in Articles 15, 16 and 25 to 30 leave no manner of doubt that they form part of the basic structure of the Constitution. Besides, by the 42nd Amendment, Part IVA entitled 'Fundamental Duties' was introduced which inter alia casts a duty on every citizen to cherish and follow the noble ideals which inspired our national struggle for freedom, to uphold and protect the sovereignty, unity and integrity of India, to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, and to value and preserve the rich heritage of our composite culture. These provisions which I have recalled briefly clearly bring out the dual concept of secularism and democracy, the principles of accommodation and tolerance as advocated by Gandhiji and other national leaders. I am, therefore, in agreement with the views expressed by my learned colleagues Sawant, Ramaswamy and Reddy, JJ, that secularism is a basic feature of our Constitution. They have elaborately dealt with this aspect of the matter and I can do no better than express my concurrence but I have said these few words merely to complement their views by pointing out how this concept was understood immediately before the Constitution and till the 42nd Amendment. By the 42nd Amendment what was implicit was made explicit.

29. After the demise of Gandhiji national leaders like Pandit Nehru, Maulana Azad, Dr. Ambedkar and others tried their best to see that the secular character of the nation, as bequeathed by Gandhiji, was not jeopardised. Dr. Ambedkar, Chairman of the Drafting Committee, aware of the undercurrents cautioned that India was not yet a consolidated and integrated nation but had to become one. This anxiety was also reflected in his speeches in the Constituent Assembly. He was, therefore, careful while drafting the Constitution to ensure that adequate safeguards were provided in the Constitution to protect the secular character of the country and to keep divisive forces in check so that the interests of religious, linguistic and ethnic groups were not prejudiced. He care fully weaved Gandhiji's concept of secularism and democracy into the constitutional fabric. This becomes evident from a cursory look at the provisions of the Constitution referred to earlier.

JUDICIAL REVIEW AND JUSTICIABILITY:

30. Having noticed the nature of the federal structure under the Constitution, the possibility of different political parties ruling at the center and in one or more States cannot be ruled out. The Constitution clearly permits it. Therefore, the mere defeat of the ruling party at the center cannot by itself, without anything more, entitle the newly elected party which comes to power at the center to advise the President to dissolve the Assemblies of those States where the party in power is other than the one in power at the center. Merely because a different political party is elected to power at the center, even if with a thumping majority, is no ground to hold that 'a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution', which is the requirement for the exercise of power under Article 356(1) of the Constitution. To exercise power under the said provision and to dissolve the State Assemblies solely on the ground of a new political party having come to power at the center with a sweeping majority would, to say the least, betray intolerance on the part of the Central Government clearly

basing the exercise of power under Article 356(1) on considerations extraneous to the said provision and, therefore, legally malafide. It is a matter of common knowledge that people vote for different political parties at the center and in the State and , therefore, if a political party with an ideology different from the ideology of the political party in power in any State comes to power in the center, the Central Government would not be justified in exercising power under Article 356(1) unless it is shown that the ideology of the political party in power in the State is inconsistent with the constitutional philosophy and, therefore, it is not possible for that party to run the affairs of the State in accordance with the provisions of the Constitution. It is axiomatic that no State Government can function on a programme which is destructive of the Constitutional philosophy as such functioning can never be in accordance with the provisions of the Constitution. But where a State Government is functioning in accordance with the provisions of the Constitution and its ideology is consistent with the constitutional philosophy, the Central Government would not be justified in resorting to Article 356(1) to get rid of the State Government 'solely' on the ground that a different political party has come to power at the center with a landslide victory. Such exercise of power would be clearly malafide. The decision of this Court in The State of Rajasthan v. The Union of India MANU/SC/0370/1977 : [1978]1SCR1 , to the extent it is inconsistent with above discussion, does not, in my humble view, lay down the law correctly.

31. Since it was not disputed before us by the learned Attorney General as well as Mr. Parasaran, the learned Counsel for the Union of India, that a proclamation issued by the President on the advice of his Council of Ministers headed by the Prime Minister, is amenable to judicial review, the controversy narrows down to the determination of the scope and ambit of judicial review i.e. in other words, to the area of justiciability. The debate at the Bar was limited to this area; the learned Attorney General as well as Mr. Parasaran contending for the view that the law laid down in the Rajasthan case in this behalf was correct and did not require reconsideration while the counsel for the concerned State Governments which were superseded by exercise of power under Article 356(1) contending that the said decision required reconsideration.

32. Before I deal with the said issue I may dispose of the question whether the provision of Article 74(2) of the Constitution permits withholding of the reasons and material forming the basis for the ministerial advice tendered to the President. Article 74(1) ordains that the President 'shall' act in accordance with the advice tendered by the Council of Ministers. The proviso, however, entitles him to require the Council of Ministers to reconsider its advice if he has any doubts or reservation but once, the Council of Ministers has reconsidered the advice, he is obliged to act in accordance therewith. Article 74(2) then provides that 'the question whether any, and if so what, advice was tendered to the President shall not be inquired into in any Court'. What this clause bars from being inquired into is 'whether any, and if so what, advice was tendered' and nothing beyond that . This question has been elaborately discussed by my learned colleagues who have examined in detail its pros and cons in their judgments and therefore, I do not consider it necessary to traverse the same path. It would suffice to say that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but I agree that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based. Of course the privilege available under the Evidence Act, Sections 123 and 124, would stand on a different footing and can be claimed de hors Article 74(2) of the Constitution. To the extent the decision in Rajasthan case conflicts with this view, I respectfully disagree.

33. That takes me to the question of the scope and extent of judicial review i.e. the area of justiciability insofar as the subjective satisfaction of the President under Article 356(1) of the Constitution is concerned. Part XVIII, which deals with Emergency Provisions provides for exercise of emergency powers under different situations. Article 352 provides that 'if the President is satisfied' that a grave emergency exists threatening the security of India or any part thereof, whether by war or external aggression or armed rebellion, the President may make a declaration to that effect specifying the area of its operation in the Proclamation. Notwithstanding the use of the language 'if the President is satisfied' which suggests that the decision would depend on the subjective satisfaction of the President, counsel agreed that such a decision cannot be made the subject matter of judicial scrutiny for the obvious reason that the existence or otherwise of a grave emergency does not fall within the purview of judicial scrutiny since the Courts are ill- equipped to undertake such a delicate function. So also under Article 360 the exercise of emergency power is dependent on the satisfaction of the President that a situation has arisen whereby the financial stability or credit of India or any part thereof is threatened. The decision to issue a proclamation containing such a declaration is also based on the subjective satisfaction of the President, i.e. Council of Ministers, but the Court would hardly be in a position to x'ray such a subjective satisfaction for want of expertise in regard to fiscal matters. These provisions, therefore, shed light on the extent of judicial review.

34. The marginal note of Article 356 indicates that the power conferred by that provision is exercisable 'in case of failure of constitutional machinery in the States'. While the text of the said article does not use the same phraseology, it empowers the President, on his being satisfied that, 'a situation has arisen' in which the Government of the State 'cannot' be carried on in accordance with the provisions of the Constitution, i.e. on the failure of the constitutional machinery, to take action in the manner provided in Sub-clause (a), (b) and (c) and Clause (1) thereof. This action he must take on receipt of a report from the Governor of the concerned State or 'otherwise', if he is satisfied therefrom about the failure of the constitutional machinery. Article 356(1) confers extra-ordinary powers on the President, which he must exercise sparingly and with great circumspection, only if he is satisfied from the Governor's report or otherwise that a situation has arisen in which the Government of the State cannot be carried out in accordance with the provisions of the Constitution. The expression 'otherwise' is of very wide import and cannot be restricted to material capable of being tested on principles relevant to admissibility of evidence in courts of law. It would be difficult to predicate the nature of material which may be placed before the President or which he may have come across before taking action under Article 356(1). Besides, since the President is not expected to record his reasons for his subjective satisfaction, it would be equally difficult for the court to enter 'the political thicket' to ascertain what weighed with the President for the exercise of power under the said provision. The test laid down by this Court in The Barium Chemicals Ltd. v. The Company Law Board and Ors. MANU/SC/0037/1966 : [1966] Supp. SCR 311 and subsequent decisions for adjudging the validity of administrative action can have no application for testing the satisfaction of the President under Article 356. It must be remembered that the power conferred by Article 356 is of an extraordinary nature to be exercised in grave emergencies and, therefore, the exercise of such power cannot he equated to the power exercise in administrative law field and cannot, therefore, be tested by the same yardstick. Several imponderables would enter consideration and govern the ultimate decision, which would be based, not only events that have preceded the decision, but would also depend on likely consequences to follow and, therefore, it would be wholly incorrect to view exercise of the President's satisfaction

on par with the satisfaction recorded by executive officers in the exercise of administrative control. The opinion which the President would form on the basis of the Governor's report or otherwise would be based on his political judgment and it is difficult to evolve judicially manageable norms for scrutinising such political decisions. It, therefore, seems to me that by the very nature of things which would govern the decision making under Article 356, it is difficult to hold that the decision of the President is justiciable. To do so would be entering the political thicket and questioning the political wisdom which the Courts of law must avoid. The temptation to delve into the President's satisfaction may be great but the courts would be well advised to resist the temptation for want of judicially manageable standards. Therefore, in my view, the Court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be malafide. Before exercise of the Court's jurisdiction sufficient caution must be administered and unless a strong and cogent prima facie case is made out, the President i.e. the executive must not be called upon to answer the charge. In this connection I agree with the observation of Ramaswamy, J. I am also in agreement with Verma, J. when he says that no quia timet action would be permissible in such cases in view of the limited scope of judicial review in such cases. I am, therefore, in respectful agreement with the view expressed in the Rajasthan case as regards the extent of review available in relation to a proclamation issued under Article 356 of the Constitution. In other words it can be challenged on the limited ground that the action is malafide or ultra vires Article 356 itself.

35. Applying the above test I am in agreement with the view that the proclamations issued and consequential action taken against the States of Madhya Pradesh, Himachal Pradesh, Rajasthan and Karnataka are not justiciable while the proclamation issued in connection with Meghalaya may be vulnerable but it is not necessary to issue any order or direction in that behalf as the issue is no more live in view of the subsequent developments that have taken place in that State after fresh election. I am, therefore, in respectful agreement with the final order proposed by Verma and Ramaswamy, JJ. I may also add that I agree with the view expressed by all the three learned colleagues on the concept of secularism.

36. This also indicates the areas of agreement and disagreements with the views expressed by Sawant and Reddy, JJ.

37. Before concluding , I must express my gratitude for the excellent assistance rendered by the learned Attorney General and all the learned Counsel who appeared for the contesting parties.

J.S. Verma, J.

38. This separate opinion is occasioned by the fact that in our view the area of justiciability is even narrower than that indicated in the elaborate opinions prepared by our learned brethren. The purpose of this separate note is merely indicate the area of such difference. It is unnecessary to mention the facts and discuss the factors which must guide the exercise of power under Article 356 which have been elaborately discussed in the other opinions. Indication of these factors including the concept of secularism for proper exercise of the power does not mean necessarily that the existence of these factors is justiciable. In our view, these factors must regulate the issuance of a proclamation under Article 356 to ensure proper exercise of the power but the judicial scrutiny

thereof is available only in the limited area indicated hereafter, the remaining area being amenable to scrutiny and correction only by the Parliament and the subsequent electoral verdict.

39. There is no dispute that the proclamation issued under Article 356 is subject to judicial review. The debate is confined essentially to the scope of judicial review or the area of justiciability in that sphere. It does appear that the area of justiciability is narrow in view of the nature of that power and the wide discretion which inheres its exercise. This indication appears also from the requirement of approval of the proclamation by the Parliament which is a check provided in the Constitution of scrutiny by political process of the decision taken by the Executive. The people's verdict in the election which follow is intended to be the ultimate check.

40. To determine the justiciable area, we prefer to recall and keep in view that which was said in K. Ashok Reddy v. The Government of India and Ors., MANU/SC/0400/1994 : [1994]1SCR662

21. A useful passage from Craig's Administrative Law (Second Edition) is as under:

The traditional position was that the courts would control the existence and extent of prerogative power, but not the manner of exercise hereof... The traditional position has however now been modified by the decision in the G.C.H.Q. case. Their Lordships emphasised that the reviewability of discretionary power should be dependent upon whether its source was statute or the prerogative. Certain exercises of prerogative power would, because of their subject-matter, be less justiciable, with Lord Roskill compiling the broadest list of such forbidden territory....

22. In Council of Civil Service Unions and Ors. v. Minister for the Civil Service (1985) A.C. 374 [G.C.H.Q.], Lord Roskill stated thus:

But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter or the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, The defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.... (at page 418)

23. The same indication of judicial self-restraint in such matters is to be found in De Smith's Judicial Review of Administrative Action, thus:

Judicial self-restraint was still more marked in cases where attempts were made to impugn the exercise of discretionary powers by alleging abuse of the discretion itself rather than alleging non-existence of the state of affairs on which the validity of its exercise was predicated. Quite properly, the courts were slow to read implied limitations into grants to wide discretionary powers which might have to be exercised on the basis of broad considerations of national policy....(at page 32)

40A. It is also useful to refer to Puhlhofer and Anr. v. Hillingdon London Borough council (1986) AC 484, wherein Lord Brightman with whom the other Law Lords agree, stated thus:

Where the existence or non existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.

41. In our view, this principle is equally applicable in the present case to determine the extent to which alone a proclamation issued under Article 356 is justiciable.

42. The question now is of the test applicable to determine the situation in which the power of judicial review is capable of exercise or, in other words, the controversy is justiciable. The deeming provision in Article 365 is an indication that cases falling within its ambit are capable of judicial scrutiny by application of objective standards. The facts which attract the legal fiction that the constitutional machinery has failed are specified and their existence is capable of objective determination. It is, therefore, reasonable to hold that the cases falling under Article 365 are justiciable.

43. The expression 'or otherwise' in Article 356 indicates the wide range of the materials which may be taken into account for the formation of opinion by the President. Obviously, the materials could consist of several imponderables including some matter which is not strictly legal evidence, the credibility and authenticity of which is incapable of being tested in law courts. The ultimate opinion formed in such cases, would be mostly a subjective political judgement. There are no judicially manageable standards for scrutinising such materials and resolving such a controversy. By its very nature such controversy cannot be justiciable. It would appear that all such cases are, therefore, not justiciable.

44. It would appear that situations wherein the failure of constitutional machinery has to be inferred subjectively from a variety of facts and circumstances, including some imponderables and inferences leading to a subjective political decision, judicial scrutiny of the same is not permissible for want of judicially manageable standards. These political decisions call for judicial hands of envisaging correction only by a subsequent electoral verdict, unless corrected earlier in Parliament.

45. In other words, only cases which permit application of totally objective standards for deciding whether the constitutional machinery has failed, are amenable to judicial review and the remaining cases wherein there is any significant area of subjective satisfaction dependent on some imponderables or inferences are not justiciable because there are no judicially manageable standards for resolving that controversy; and those cases are subject only political scrutiny and correction for whatever its value in the existing political scenario. This appears to be the constitutional scheme.

46. The test for adjudging the validity of an administrative action and the grounds of its invalidity indicated in The Barium Chemicals Ltd. and Anr. v. The Company Law Board and Ors. MANU/SC/0037/1966 : [1966] Supp. SCR 311, and other cases of that category have no application for testing and invalidating a proclamation issued under Article 356. The test applicable has been indicated above and the grounds of invalidity are those mentioned in State of Rajasthan and Ors. Etc. Etc. v. Union of India Etc. Etc. MANU/SC/0370/1977 : [1978]1SCR1 .

47. Article 74(2) is no bar to production of the materials on which the ministerial advice is based, for ascertaining whether the case falls within the justiciable area and acting on it when the controversy, is found justiciable, but that is subject to the claim of privilege under Section 123 of the Evidence Act, 1872. This is considered at length in the opinion of Sawant J. We, therefore, regret our inability to concur with the different view on this point taken in State of Rajasthan and Ors. v. Union of India etc. etc. MANU/SC/0370/1977 : [1978]1SCR1 , even though we agree that the decision does not require any reconsideration on the aspect of area of Justiciability and the grounds of invalidity indicated therein.

48. In the above view, it follows that no quia timet action would be permissible in such cases in view of the limited scope of judicial review: and electoral verdict being the ultimate check, courts can grant substantive relief only if the issue remains live in cases which are justiciable. In Kihoto Hollohan v. Zachillhu and Ors. MANU/SC/0753/1992 : [1992]1SCR686 , it was stated thus:

In view of the limited scope of judicial review that is available on account of the finality clause in Paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings.

49. It is also clear that mere parliamentary approval does not have the effect of excluding judicial review to the extent permissible. In Sarojini Ramaswami (Mrs.) v. Union of India and Ors. MANU/SC/0439/1992 : AIR1992SC2219 , it has been stated thus:

72. We may, however, add that the intervention of the parliamentary part of the process, in case a finding of guilty is made, which according to Shri Sibal would totally exclude judicial review thereafter is a misapprehension since limited judicial review even in that area is not in doubt after the decision of this Court in Keshav Singh.

73. At this stage, a reference to the nature and scope of judicial review as understood in similar situations is helpful. In Administrative Law (Sixth Edition) by H.W.R. Wade, in the chapter "Constitutional Foundation of the power of the Courts" under the heading 'The Sovereignty of Parliament', the effect of Parliament's intervention is started thus:(at page 29)

...There are many cases where some administrative order or regulation is required by statute to be approved by resolutions of the Houses. But this procedure in no way protects the order or regulation from being condemned by the court, under the doctrine of ultra vires, if it is not strictly in accordance with the Act. Whether the challenge is made before or after the Houses have given their approval is immaterial.

Later at p. 411, Wade has said that ":in accordance with constitutional principle, parliamentary approval does not affect the normal operation of judicial review". At p. 870 while discussing 'judicial Review", Wade indicates the position thus:

As these cases show, judicial review is in no way inhibited by the fact that rules or regulations have been laid before Parliament and approved, despite the ruling of the House of Lords that the

test of unreasonableness should not then operate in its normal way. The Court of appeal has emphasised that in the case of subordinate legislation such as in Order in council approved in draft by both House, the Courts would without doubt be competent to consider whether or not the order was properly made in the sense of being intra vires'.

74. The clear indication, therefore, is that mere parliamentary approval of an action or even a report by an outside authority when without such approval, the action or report is ineffective by itself, does not have the effect of excluding judicial review on the permissible grounds.

50. Applying this principle, only the Meghalaya case is justiciable and that proclamation was invalid while those relating to Madhya Pradesh, Himachal Pradesh, Rajasthan and Karnataka are not justiciable. There is rightly no challenge to the proclamation relating to Uttar Pradesh. However, in view of the subsequent elections held in Meghalaya, that is no longer a live issue and, therefore, there is no occasion to grant any substantial relief, even in that case.

51. It is to this extent our view differ's on the question of justiciability. On this view, it is unnecessary for us to express any opinion on the remaining matters. According to us, except to the extent indicated, the decision in State of Rajasthan and Ors. Etc. Etc. v. Union of India Etc. Etc. MANU/SC/0370/1977 : [1978]1SCR1 , does not require reconsideration.

P.B. Sawant, J.

(On behalf of Kuldip Singh, J. and himself)

52. Article 356 has a vital bearing on the democratic parliamentary form of government and the autonomy of the States under the federal Constitution that we have adopted. The interpretation of the Article has, therefore, once again engaged the attention of this Court in the background of the removal of the governments and the dissolution of the legislative assemblies in six States with which we are concerned here, on different occasions and in different situations by the exercise of power under the Article. The crucial question that falls for consideration in all these matters is whether the President has unfettered powers to issue Proclamation under Article 356(1) of the Constitution. The answer to this question depends upon the answers to the following questions:

(a) Is the Proclamation amenable to judicial review? (b) If yes, what is the scope of the judicial review in this respect? and (c) What is the meaning of the expression "a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution" used in Article 356(1)?

Article 356 reads as follows:

356, Provisions in case of failure of constitutional machinery in States. - (1) If the President, on receipt of report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation-

(a)assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation issued under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation:

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the

Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

Provided also that in the case of the Proclamation issued under Clause (1) on the 11th day of May, 1987 with respect to the State of Punjab, the reference in the first proviso to this clause to "three years" shall be construed as a reference to "five years".

(5) Notwithstanding anything contained in Clause (4), a resolution with respect to the continuance in force of a Proclamation approved under Clause (3) for any period beyond the expiration of one year from the date of issued of such Proclamation shall not be passed by either House of Parliament unless:

(a) a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the state, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under Clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned:

Provided that nothing in this clause shall apply to the Proclamation issued under Clause (1) on the 11th day of May, 1987 with respect to the State of Punjab.

53. Before we analyse the provisions of Article 356, it is necessary to bear in mind the context in which the Article finds place in the Constitution. The Article belongs to the family of Articles 352 to 360 which have been incorporated in Part XVIII dealing with "Emergency Provisions" as the title of the said Part specifically declares. Among the preceding Articles, Article 352 deals with Proclamation of emergency. It states that if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or armed rebellion, he may by Proclamation make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation. Explanation to Clause (1) of the said Article states that Proclamation of emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion, may be made before the actual occurrence of war or of any such aggression or rebellion if the President is satisfied that there is imminent danger thereof. Clause (4) of the said Article requires that every Proclamation issued under the said Article shall be laid before each House of Parliament and shall cease to operate at the expiration of one month, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. It is not necessary for our purpose to refer to other provisions of the said Article. Article 353 refers to the effect of the Proclamation of emergency. It states that while the Proclamation of emergency is in operation, executive power of the Union shall extend to the giving of the directions to any State as to the manner in which the executive power thereof is to be exercised. It further states that during the emergency the power of Parliament to make laws with respect to any matter, shall include power to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Union or officers and

authorities of the Union as respects that matter even if it is not enumerated in the Union List. Article 354 gives power to the President to direct that Articles 268 and 269 which relate to the distribution of revenue between the Union and the States shall cease to operate during the period of emergency. Article 358 gives power during the emergency to suspend the provisions of Article 19 to enable the State (i.e., the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India) to make any law or to take any executive action which the State would be competent to make or to take but for the provisions contained in Part III of the Constitution while the Proclamation of emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression, is in operation. Such power, it appears, cannot be assumed by the State when the security of India is threatened by armed rebellion and the Proclamation of emergency is issued for that purpose. Article 359 gives power to the President to declare that the right to move any Court for the enforcement of rights conferred by Part III of the Constitution except those conferred by Articles 20 and 21, shall remain suspended when a Proclamation of emergency is in operation.

Article 355 makes an important provision. It casts a duty on the Union to protect States against external aggression and internal disturbance, and to ensure that the Government of every State is carried "in accordance with the provisions of the Constitution". This Article corresponds to Article 277-A of the Draft Constitution. Explaining the purpose of the said Article to the Constituent Assembly, Dr. Ambedkar stated as follows:

Some people might think that Article 277-A is merely a pious declaration, that it ought not to be there. The Drafting Committee has taken a different view and I would, therefore, like to explain why it is that the Drafting Committee feels that Article 277-A ought to be there. I think it is agreed that our Constitution, notwithstanding the many provisions which are contained in it, whereby the center has been given powers to override the Provinces, none-the-less is a Federal Constitution and when we say that Constitution is a Federal Constitution, it means this, that the provinces are as sovereign in their field which is left to them by the Constitution as the center is in the field which is assigned to it. In other words, barring the provisions which permit that center to override any legislation that may be passed by the Provinces, the Provinces have a plenary authority to make any law for the peace, order and good government of that Province. Now, when once the Constitution makes the sovereign and gives them plenary power to make any law for the peace, order and good government of the province, really speaking, the intervention of the center or any other authority must be deemed to be barred, because that would be an invasion of the sovereign authority of the province. That is a fundamental proposition which, I think, we must accept by reason of the fact that we have a Federal Constitution. That being so, if the center is to interfere in the administration of provincial affairs, as we propose to authorise the center by virtue of Articles 278 and 278-A, it must be by and under some obligation which the Constitution imposes upon the center. The invasion must not be an invasion which is wanton, arbitrary and unauthorised by law. Therefore, in order to make it quite clear that Articles 278 and 278-A are not to be deemed as a wanton invasion by the center upon the authority of the province, we propose to introduce Article 277-A. As Members will see, Article 277-A says that it shall be the duty of the Union to protect every unit, and also to maintain the Constitution. So far as such obligation is concerned, it will be found that it is not our Constitution alone which is going to create this duty and this obligation. Similar clauses appear in the American Constitution. They also occur in the Australian

Constitution, where the Constitution in express terms, provides that it shall be the duty of the Central Government to protect the units or the States from external aggression or internal commotion. All that we propose to do is to add one more clause to the principle enunciated in the American and Australian Constitutions, namely, that it shall also be the duty of the Union to maintain the Constitution in the provinces as enacted by this law. There is nothing new in this and as I said, in view of the fact that we are endowing the provinces with plenary powers and making them sovereign within their own field, it is necessary to provide that if any invasion of the provincial field is done by the center it is in virtue of this obligation. It will be an act in fulfilment of the duty and the obligation and it cannot be treated, so far as the Constitution is concerned, as a wanton, arbitrary, unauthorised act. That is the reason why we have introduced Article 277-A. (C.A.D. Vol. IX, p-133)

Articles 278 and 278-A of the Draft Constitution referred to above correspond to present Articles 356 and 357 of the Constitution respectively. Thus it is clear from Article 355 that it

is not an independent source of power for interference with the functioning of the State Government but is in the nature of justification for the measures to be adopted under Articles 356 and 357. What is however, necessary to remember in this connection is that while Article 355 refers to three situations, viz., (i) external aggression, (ii) internal disturbance, and (iii) non-carrying on of the Government of the States, in accordance with the provisions of the Constitution, Article 356 refers only to one situation, viz., the third one. As against this, Article 352 which provides for Proclamation of emergency speaks of only one situation, viz., where the security of India or any part of the territory thereof, is threatened either by war or external aggression or armed rebellion. The expression "internal disturbance" is certainly of larger connotation than "armed rebellion" and includes situations arising out of "armed rebellion" as well. In other words, while a Proclamation of emergency can be made for internal disturbance only if it is created by armed rebellion, neither such Proclamation can be made for internal disturbance caused by any other situation nor a Proclamation can be issued under Article 356 unless the internal disturbance gives rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. A mere internal disturbance short of armed rebellion cannot justify a Proclamation of emergency under Article 352 nor such disturbance can justify issuance of Proclamation under Article 356(1), unless it disables or prevents carrying on of the Government of the State in accordance with the provisions of the Constitution.
Article 360 envisages the Proclamation of financial emergency by the President when he is satisfied that a situation has arisen whereby the financial stability or credit of the country or of any part of the territory thereof is threatened. It declares that such Proclamation shall be laid before each House of Parliament and shall cease to operate at the expiration of two months unless it is approved by the resolutions of both Houses of Parliament. We have thus emergency provisions contained in other Articles in the same Part of the Constitution.

The common thread running through all these Articles in Part XVIII relating to emergency provisions is that the said provisions can be invoked only when there is an emergency and the emergency is of the nature described therein and not of any other kind. The Proclamation of emergency under Articles 352, 356 and 360 is further dependent on the satisfaction of the President with regard to the existence of the relevant conditions precedent. The duty cast on the Union under Article 355 also arises in the twin conditions stated therein.

It is in the light of these other provisions relating to the emergency that we have to construe the provisions of Article 356. The crucial expressions in Article 356(1) are - if the President, "on the receipt of report from the Governor of a State or otherwise" "is satisfied" that "the situation has arisen in which the Government of the State cannot be carried on "in accordance with the provisions of the Constitution". The conditions precedent to the issuance of the Proclamation, therefore, are: (a) that the President should be satisfied either on the basis of a report form the Governor of the State or otherwise, (b) that in fact a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. In other words, the President's satisfaction has to be based on objective material. That material may be available in the report sent to him by the Governor or otherwise or both from the report and other sources. Further, the objective material so available must indicate that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Thus the existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the President issued the Proclamation. Once such material is shown to exist, the satisfaction of the President based on the material is not open to question, However, if there is no such objective material before the President, or the material before him cannot reasonably suggest that the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the Proclamation issued is open to challenge.

It is further necessary to note that the objective material before the President must indicate that the Government of the State "cannot be carried on in accordance with the provisions of the Constitution". In other words, the provisions require that the material before the President must be sufficient to indicate that unless a Proclamation is issued, it is not possible to carry on the affairs of the State as per the provisions of the Constitution. It is not every situation arising in the State but a situation which shows that the constitutional Government has become an impossibility, which alone will entitle the President to issue the Proclamation. These parameters of the condition precedent to the issuance of the Proclamation indicate both the extent of and the limitations on, the power of the judicial review of the Proclamation issued. It is not disputed before us that the Proclamation issued under Article 356(1) is open to judicial review. All that is contended is that the scope of the review is limited. According to us, the language of the provisions of the Article contains sufficient guidelines on both the scope and the limitations, of the judicial review.

54. Before we examine the scope and the limitations of the judicial review of the Proclamation issued under Article 356(1), it is necessary to deal with the contention raised by Shri Parasaran appearing for the Union of India. He contended that there is difference in the nature and scope of the power of judicial review in the administrative law and the constitutional law. While in the field of administrative law, the Court's power extends to legal control of public authorities in exercise of their statutory power and therefore not only to preventing excess and abuse of power but also to irregular exercise of power, the scope of judicial review in the constitutional law extends only to preventing actions which are unconstitutional or ultra vires the Constitution. The areas where the judicial power, therefore can operate are limited and pertain to the domain where the actions of the Executive or the legislation enacted infringe the scheme of the division of power between the Executive, the Legislature and the judiciary or the distribution of powers between the States and the center. Where, there is a Bill of Rights as under our Constitution, the areas also cover the infringements of the fundamental rights. The judicial power has no scope in constitutional law

beyond examining the said infringements. He also contended that likewise, the doctrine of proportionality or unreasonableness has no play in constitutional law and the executive action and legislation cannot be examined and interfered with on the anvil of the said doctrine.

We are afraid that this contention is too broad to be accepted. The implication of this contention, among others, is that even if the Constitution provides preconditions for exercise of power by the constitutional authorities, the Courts cannot examine whether the preconditions have been satisfied. Secondly, if the powers are entrusted to a constitutional authority for achieving a particular purpose and if the concerned authority under the guise of attaining the said purpose, uses the powers to attain an impermissible object, such use of power cannot be questioned. We have not been pointed out any authority is support of these propositions. We also find that many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by the constitutional law. That is also true of the doctrine of proportionality.

55. We may now examine the principles of judicial review evolved in the field of administrative law. As has been stated by Lord Brightman in Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141, "judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made". In other words, judicial review is concerned with reviewing not the merits of the decision but the decision-making process itself. Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 374 , has enunciated three heads of grounds upon which administrative action is subject to control by judicial review, viz., (i) illegality, (ii) irrationality and (iii) procedural impropriety. He has also stated there that the three grounds evolved till then did not rule out that "further development on a case by case basis may not in course of time add further grounds" and has added that "principle of proportionality" which is recognised in the administrative law by several members of European Economic Community may be a possible ground for judicial review for adoption in the future. It may be stated here that we have already adopted the said ground both statutorily and judicially in our labour and service jurisprudence. Lord Diplock has explained the three heads of grounds. By "illegality" he means that the decision-maker must understand correctly that law that regulates its decision-making power and must give effect to it, and whether he has or has not, is a justiciable question. By "irrationality" he means unreasonableness. A decision may be so outrageous or in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it, and it is for the judges to decide whether a decision falls in the said category. By "procedural impropriety" he means not only failure to observe the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules that are expressly laid down in the legislative instrument by which the Tribunal's jurisdiction is conferred even where such failure does not involve any denial of natural justice. Where the decision is one which does not alter rights or obligations enforceable in private law, but only deprives a person of legitimate expectations, "procedural impropriety" will normally provide the only ground on which the decision is open to judicial review.

It was observed by Donaldson LJ in R. v. Crown Court at Carlisle, exp Marcus-Moore [1981] Time 26 October, DC, that judicial review was capable of being extended to meet changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. The purpose of the remedy of judicial review is to ensure that the individual

is given fair treatment to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in issue. In R. v. Panel on Take-overs and Mergers, exp Guinness plc (1987) QB 815, he referred to the judicial review jurisdiction as being supervisory or as 'longstep' jurisdiction. He observed that unless that restriction on the power of the Court is observed, the Court will under the guise of preventing the abuse of power be itself guilty of usurping power. That is so whether or not there is a right of appeal against the decision on the merits. The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers.

Lord Roskil in Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 374, opined that the phrase "principles of natural justice" "be better replaced by speaking of a duty to act fairly....It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case...Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken."

In Puhlhofer v. Hillingdon London Borough Council [1986] AC 484 , Lord Brightman stated:

Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.

In Leech v. Deputy Governor of Parkhurst Prison [1988] AC 533 , Lord Oliver stated:

the susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision and not upon the personality or individual circumstances of the person called upon to make the decision.

While we are on the point, it will be instructive to refer to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant Articles of the Pakistan Constitution is not couched in the same terms.

In Muhammad Sharif v. Federation of Pakistan, PLD [1988] Lah 725, the question was whether the order of the President dissolving the National Assembly on 29.5.1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Constitution. Article 58(2)(b) is as follows:

58(2) Notwithstanding anything contained in Clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion....

(a) xxxxxxxxxxx

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

The provisions of Article 48(2) are as follows:

Notwithstanding anything contained in Clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so (and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever.

The Presidential Order read as follows:

WHEREAS the objects and purposes for which the National Assembly was elected have not been fulfilled;

AND WHEREAS the law and order in the country have broken down to an alarming extent resulting in tragic loss of innumerable valuable lives as well as loss of property;

AND WHEREAS the life, property, honour and security of the citizens of Pakistan have been rendered totally unsafe and the integrity and ideology of Pakistan have been seriously endangered;

AND WHEREAS public morality has deteriorated to unprecedented level;

AND WHEREAS in my opinion a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

NOW THEREFORE, I, General Muhammad Zia-ul-Haq, President of Pakistan in exercise of the powers conferred on me by Clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan hereby dissolve the national Assembly with immediate effect and in consequence thereof the Cabinet also stands dissolved forthwith.

The main argument against the order was that an order under the said provision is to be issued not in subjective discretion or opinion but on objective facts in the sense that the circumstances must exist to lead one to the conclusion that the relevant situation had arisen. As against this, the argument of the Attorney General and other counsel supporting the Presidential Order was that it is the subjective satisfaction of the President and it is in his discretion and opinion to dissolve the National Assembly. It was also argued on their behalf that in spite of the fact that Article 58(2)(b) states that "notwithstanding anything contained in Clause (2) of Article 48," the President may also dissolve the National Assembly in his discretion under Article 58(2) and when he does exercise his discretion to dissolve the Assembly, the validity thereof cannot be questioned on any ground whatsoever as provided for under Article 48(2). Dealing with the first argument, the learned Chief Justice, Salam stated as follows:

Whether it is 'subjective' or 'objective' satisfaction of the President or it is his 'discretion' or 'opinion', this much is quite clear that the President cannot exercise this powers under the

Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representative of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law. No doubt, the Courts will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order under the Constitution, the Courts will have to perform their duty cast on them under the Constitution. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for.

Dealing with the second argument, the learned Chief Justice held:

If the argument be correct then the provision "Notwithstanding anything contained in Clause (2) of Article 48" would be rendered redundant as if it was no part of the Constitution. It is obvious and patent that no letter or part of a provision of the Constitution can be said to be redundant or non-existent under any principle of construction of Constitutions. The argument may be correct in exercise of other discretionary powers but it cannot be employed with reference to the dissolution of National Assembly. Blanket coverage of validity and unquestionability of discretion under Article 48(2) was given up when it was provided under Article 58(2) that "Notwithstanding Clause (2) of Article 48--", the discretion can be exercised in the given circumstances. Specific provision will govern the situation. This will also avoid redundancy. Courts' Power whenever intended to be excluded is expressly stated; otherwise it is presumed to be there in Courts of record....Therefore, it is not quite right to contend that since it was in his 'discretion', on the basis of his 'opinion' the President could dissolve the National Assembly. He has to have reasons which are justifiable in the eyes of the people and supportable by law in a Court of Justice.... It is understandable that if the President has any justifiable reason to exercise his 'discretion' in his 'opinion' but does not wish to disclose, he may say so and may be believed or if called upon to explain the reason he may take the Court in confidence without disclosing the reason in public, may be for reason of security of State. After all patriotism is not confined to the office holder for the time being. He cannot simply say like Caesar it is my will, opinion or discretion. Nor give reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects....

Dealing with the same arguments, R.S. Sidhwa, J. stated as follows:

...I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Articles 58(2)(b) and 112(2)(b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer.

x x x

15. The main question that arises in this case is when can it be said that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. The expression "Government of the Federation" is not limited to any one

particular function, such as the executive, the legislative, or the judicial, but includes the whole functioning of the Federation Government in all its ramifications.

56. We may now refer to the decisions of this Court on the subject.

In Barium Chemicals Ltd. and Anr. v. The Co. Law Board and Ors. [1966] Supp. 3 S.C.R. 311, the facts were that an order was issued on behalf of the Company Law Board under Section 237(b) of the Companies Act appointing four Inspectors to investigate the affairs of the appellant-Company on the ground that the Board was of the opinion that there were circumstances suggesting that the business of the appellant-Company was being conducted with intent to defraud its creditors, members or any other persons and that the persons concerned in the management of the affairs of the Company had in connection therewith, been guilty of fraud, misfeasance and other misconduct towards the Company and its members. The appellant-Company had filed a writ petition before the High Court challenging the said order and one of the grounds of challenge was that there was no material on which such order could have been made. In reply to the petition, the Chairman of the Company Law Board filed an affidavit in which it was contended, inter alia, that there was material on the basis of which the order was issued and that he had himself examined this material and formed the necessary opinion within the meaning of the said Section 237(b) before the issue of the order and that it was not competent for the Court to go into the question of the adequacy or otherwise of such material. However, in the course of reply to some of the allegations in the petition, the affidavit in paragraph 14 had also proceeded to state the facts on the basis of which the opinion was formed. The majority of the judges held that the circumstances disclosed in paragraph 14 of the said affidavit must be regarded as the only material on the basis of which the Board formed the opinion before ordering an investigation under Section 237(b) and that the said circumstances could not reasonably suggest that the business of the Company was being conducted to defraud the creditors, members or other persons or that the management was guilty of fraud towards the Company and its members. They were, therefore, extraneous to the matters mentioned in Section 237(b) and the impugned order was ultra vires the section. Hidaytullah, J., as he then was, in this connection stated that the power under Section 237(b) is discretionary power and the first requirement for its exercise is the honest formation of an opinion that an investigation is necessary and the next requirement is that there are circumstances suggesting the inferences set out in the section. An action not based on circumstances suggesting an inference of the enumerated kind will not be valid. Although the formation of opinion is subjective, the existence of circumstances relevant to the inference as the sine qua non for action, must be demonstrable. If their existence is questioned, it has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist, and give no clue to what they are, because the circumstances must be such as to lead to conclusions of action definiteness. Shelat, J. commenting on the same issue, stated that although the formation of opinion is a purely subjective process and such an opinion cannot be challenged in a Court on the ground of propriety, reasonableness or sufficiency, the authority concerned is nevertheless required to arrive at such an opinion from circumstances suggesting what is set out in Sub-clauses (i), (ii) or (iii) of Section 237(b). The expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. It is hard to contemplate that the Legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and

which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the matters enumerated in Section 237(b), the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

In MA. Rashid and Ors. v. State of Kerala MANU/SC/0051/1974 : [1975]2SCR93 , the facts were that the respondent State issued a notification under Rule 114(2) of the Defence of India Rules, 1971 imposing a total ban on the use of machinery for defibring husks in the districts of Trivandrum, Quilon and Alleppey. The appellants who were owners of Small Scale Industrial Units, being affected by the notification, challenged the same. In that connection, this Court observed that where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them" or when "in their opinion" a certain state of affairs existed, or when powers enable public authorities to take "such action as they think fit" in relation to a subject matter, the courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated. Administrative decisions in exercise of powers conferred in subjective terms are to be made in good faith and on relevant considerations. The courts can inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the courts opinion of what is reasonable to the criterion of what a reasonable body might have decided; and courts will find out whether conditions precedent to the formation of the opinion have a factual basis. But the onus of establishing unreasonableness rests upon the person challenging the validity of the acts.

In State of Rajasthan and Ors. etc. etc. v. Union of India etc. etc. MANU/SC/0370/1977 : [1978]1SCR1 , Bhagwati, J. on behalf of Gupta, J. and himself, while dealing with the "satisfaction of the President" prior to the issuance of the Proclamation under Article 356(1) stated as follows:

...So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so....
This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitation. That is the essence of the Rule of Law....

x x x

...we must make it clear that the constitutional jurisdiction of this Court is confined only to saying whether the limits on the power conferred by the Constitution have been observed or there is transgression of such limits. Here the only limit on the Power of the President under Article 356, Clause (1) is that the President should be satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective

tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of United States has described as "judicially discoverable" and "manageable standards". It would largely be a political judgment based on assessment of diverse and varied factors, fact changing situations, potential consequences, public reaction, motivations and responses of different classes of people and their anticipated future behaviour and a host of other considerations, in the light of experience of public affairs and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic government. It cannot, therefore, by its very nature be a fit subject-matter for judicial determination and hence it is left to the subjective satisfaction of the Central Government which is best in a position to decide it. The Court cannot in the circumstances, go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based....
But one thing is certain that if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 356, Clause (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid....
It must of course be concerned (sic.) that in most cases it would be difficult, if not impossible, to challenge the exercise of power under Article 356, Clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds....
This is the narrow minimal area in which the exercise of power under Article 356, Clause (1) is subject to judicial review and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists.

In Kehar Singh and Anr. etc. v. Union of India and Anr. [1988] Supp. 3 S.C.R. 1103 , it is held that the President's power under Article 72 of the Constitution dealing with the grant of pardons, reprives, respites, remissions of punishments or suspensions, remissions or commutations of sentences of any person convicted of any offence falls squarely within the judicial domain and can be examined by the court by way of judicial review However, the order of the President cannot be subjected to judicial review on its merits except within the strict limitation defined in Mam Ram etc. etc. v. Union of India and Anr. MANU/SC/0159/1980 : 1980CriLJ1440 . Those limitations are whether the power is exercised on considerations or actions which are wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases the Court will examine the exercise of the said power.

57. From these authorities, one of the conclusions which may safely be drawn is that the exercise of power by the President under Article 356(1) to issue Proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as

to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. Needless to emphasise that it is not any material but material which would lead to the conclusion that the Government of the State cannot be carried on in accordance with the provisions of the Constitution which is relevant for the purpose. It has further to be remembered that the Article requires that the President "has to be satisfied" that the situation in question has arisen. Hence the material in question has to be such as would induce a reasonable man to come to the conclusion in question. The expression used in the Article is "if the President is satisfied". The word "satisfied" has been defined in Shorter Oxford English Dictionary [3rd Edition] at page 1792 as 4. To furnish with sufficient proof or information, to set free from doubt or uncertainty, to convince; 5. To answer sufficiently [an objection, question]; to fulfil or comply with [a request]; to solve [a doubt, difficulty]; 6. To answer the requirements of [a state of things, hypothesis, etc.]; to accord with [conditions]. Hence, it is not the personal whim, wish, view or opinion or the ipse dixit of the President de hors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial review.

It has also to be remembered in this connection that the power exercised by the President under Article 356[1] is on the advice of the Council of Ministers tendered under Article 74[1] of the Constitution. The Council of Ministers under our system would always belong to one or the other political party. In view of the pluralist democracy and the federal structure that we have accepted under our Constitution, the party or parties in power [in case of coalition Government] at the center and in the States may not be the same. Hence there is a need to confine the exercise of power under Article 356[1] strictly to the situation mentioned therein which is a condition precedent to the said exercise. That is why the framers of the Constitution have taken pains to specify the situation which alone would enable the exercise of the said power. The situation is no less than one in which "the Government of the State cannot be carried on in accordance with the provisions of this Constitution". A situation short of the same does not empower the issuance of the Proclamation. The word "cannot" emphatically connotes a situation of impasse. In shorter Oxford dictionary, third edition, at page 255, the word "can" is defined as "to be able; to have power or capacity". The word "cannot", therefore, would mean "not to be able" or "not to have the power or capacity". In Stroud's judicial dictionary, fifth edition, the word "cannot" is defined to include a legal inability as well as physical impossibility. Hence situation which can be remedied or do not create an impasse, or do not disable or interfere with the governance of the State according to the Constitution, would not merit the issuance of the Proclamation under the Article.

It has also to be remembered that a situation contemplated under the Article is one where the government of the state cannot be carried on "in accordance with the provisions of the Constitution". The expression indeed envisages varied situations. Article 365 which is in Part XIX entitled Miscellaneous", has contemplated one such situation. It states that:

Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be

lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.

The failure to comply with or to give effect to the directions given by the Union under any of the provisions of the Constitution, is of course, not the only situation contemplated by the expression "government of the State cannot be carried on in accordance with the provisions of this Constitution" Article 365 is more in the nature of a deeming provision. However, the situations other than those mentioned in Article 365 must be such where the governance of the State is not possible to be carried on in accordance with the provisions of the Constitution. In this connection, we may refer to what Dr. Ambedkar had to say on the subject in the Constituent Assembly:

Now I come to the remarks made by my Friend Pandit Kunzru. The first point, if I remember correctly, which was raised by him was that the power to take over the administration when the constitutional machinery fails is a new thing, which is not to be found in any constitution. I beg to differ from him and I would like to draw his attention to the article contained in the American Constitution, where the duty of the United States is definitely expressed to be to maintain the Republican form of the Constitution. When we say that the Constitution must be maintained in accordance with the provisions contained in this Constitution we practically mean what the American Constitution means, namely that the form of the Constitution prescribed in this Constitution must be maintained. Therefore, so far as that point is concerned we do not think that the Drafting Committee has made any departure from an established principle. [C.A.D. Vol. IX, p.175-76]

As pointed out earlier, more or less similar expression occurs in Article 58[2][b] of the Pakistan Constitution. The expression there is that the "Government of the Federation cannot be carried on in accordance with provisions of the Constitution and an appeal to the electorate is necessary." Commenting upon the said expression, Shafiur Rahman, J. in Ahmad Tariq v. Federation of Pakistan, PLD [1992] S.C. 646 observed "It is an extreme power to be exercised where there is actual or imminent breakdown of the constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. There may be occasions for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous, provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by the methods extra-Constitutional."

Sidhwa, J. in the same case observed that "to hold that because a particular provision of the Constitution was not complied with, the National Assembly could be dissolved under Article 58[2][b] of the Constitution would amount to an abuse of power. Unless such a violation independently was so grave that a Court could come to no other conclusion but that it alone directly led to the breakdown of the functional working of the Government, it would not constitute a valid ground.

The expression and its implication have also been the subject of elaborate discussion in the Report of the Sarkaria Commission on center-State Relations. It will be advantageous to refer to the relevant part of the said discussion, which is quite illuminating:

6.3.23 In Article 356, the expression "the government of the State cannot be carried on in accordance with the provisions of the Constitution", is couched in wide terms. It is, therefore, necessary to understand its true import and ambit. In the day-to-day administration of the State, its various functionaries in the discharge of their multifarious responsibilities take decisions or actions which may not, in some particular or the other, be strictly in accord with all the provisions of the Constitution. Should every such breach or infraction of a constitutional provision, irrespective of its significance, extent and effect, be taken to constitute a "failure of the constitutional machinery" within the contemplation of Article 356. In our opinion, the answer to the question must be in the negative. We have already noted that by virtue of Article 355 it is the duty of the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. Article 356, on the other hand, provides the remedy when there has been an actual break-down of the constitutional machinery of the State. Any abuse or misuse of this drastic power damages the fabric of the Constitution, whereas the object of this Article is to enable the Union to take remedial action consequent upon break-down of the constitutional machinery, so that that governance of the State in accordance with the provisions of the Constitution, is restored. A wide literal construction of Article 356[1], will reduce the constitutional distribution of the powers between the Union and the States to a licence dependent on the pleasure of the Union Executive. Further it will enable the Union Executive to cut at the root of the democratic Parliamentary form of government in the State. It must, therefore, be rejected in favour of a construction which will preserve that form of government. Hence, the exercise of the power under Article 356 must be limited to rectifying a 'failure of the constitutional machinery in the State'. The marginal heading of Article 356 also points to the same construction.

6.3.24. Another point for consideration is, whether 'external aggression' or 'internal disturbance' is to be read as an indispensable element of the situation of failure of the constitutional machinery in a State, the existence of which is a pre-requisite for the exercise of the power under Article 356. We are clear in our mind that the answer to this question should be in the negative. On the one hand, 'external aggression' or 'internal disturbance' may not necessarily create a situation where government of the State cannot be carried on in accordance with the Constitution. On the other, a failure of the constitutional machinery in the State may occur, without there being a situation of 'external aggression' or 'internal disturbance'.

x x x

6.4.01. A failure of constitutional machinery may occur in a number of ways. Factors which contribute to such a situation are diverse and imponderable. It is, therefore, difficult to give an exhaustive catalogue of all situations which would fall within the sweep of the phrase, "the government of the State cannot be carried on in accordance with the provisions of this Constitution". Even so, some instances of what does and what does not constitute a constitutional failure within the contemplation of this Article, may be grouped and discussed under the following heads:

[a] Political crisis.

[b] Internal subversion.

[c] Physical break-down.

[d] Non-compliance with constitutional directions of the Union Executive.

It is not claimed that this categorisation is comprehensive or perfect. There can be no water-tight compartmentalisation, as many situations of constitutional failure will have elements of more than one type. Nonetheless, it will help determine whether or not, in a given situation it will be proper to invoke this last-resort power under Article 356.

The Report then goes on to discuss the various occasions on which the political crisis, internal subversion, physical break-down and non-compliance with constitutional directions of the Union Executive may or can be said to, occur. It is not necessary here to refer to the said elaborate discussion. Suffice it to say that we are in broad agreement with the above interpretation given in the Report, of the expression "the government of the State cannot be carried on in accordance with the provisions of this Constitution", and are of the view that except in such and similar other circumstances, the provisions of Article 356 cannot be pressed into service.

58. It will be convenient at this stage itself, also to illustrate the situations which may not amount to failure of the constitutional machinery in the State inviting the presidential power under Article 356[l] and where the use of the said power will be improper. The examples of such situations are given in the Report in paragraph 6.5.01. They are:

[i] A situation of maladministration in a State where a duly constituted Ministry enjoying majority support in the Assembly, is in office. Imposition of President's rule in such a situation will be extraneous to the purpose for which the power under Article 356 has been conferred. It was made indubitably clear by the Constitution framers that this power is not meant to be exercised for the purpose of securing good government.

[ii] Where a Ministry resigns or is dismissed on losing its majority support in the Assembly and the Governor recommends, imposition of President's rule without exploring the possibility of installing an alternative government enjoying such support or ordering fresh elections.

[iii] Where, despite the advice of a duly constituted Ministry which has not been defeated on the floor of the House, the Governor declines to dissolve the Assembly and without giving the Ministry an opportunity to demonstrate its majority support through the 'floor test', recommends its supersession and imposition of President's rule merely on his subjective assessment that the Ministry no longer commands the confidence of the Assembly.

[iv] Where Article 356 is sought to be invoked for superseding the duly constituted Ministry and dissolving the State Legislative Assembly on the sole ground that, in the General Elections to the Lok Sabha, the ruling party in the State, has suffered a massive defeat.

[v] Where in a situation of 'internal disturbance', not amounting to or verging on abdication of its governmental powers by the State Government, all possible measures to contain the situation by the Union in the discharge of its duty, under Article 355, have not been exhausted.

[vi] The use of the power under Article 356 will be improper if, in the illustrations given in the preceding paragraphs 6.4.10, 6.4.11 and 6.4.12, the President gives no prior warning or opportunity to the State Government to correct itself. Such a warning can be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action, under Article 356, will lead to disastrous consequences.

[vii] Where in response to the prior warning or notice or to an informal or formal direction under Articles 356, 257, etc., the State Government either applies the corrective and thus complies with the direction, or satisfies the Union Executive that the warning or direction was based on incorrect facts, it shall not be proper for the President to hold that "a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution". Hence, in such a situation, also, Article 356 cannot be properly invoked.

[viii] The use of this power to sort out internal difference or intra-party problems of the ruling party would not be constitutionally correct.

[ix] This power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.

[x] This power cannot be invoked, merely on the ground that there are serious allegations of corruption against the Ministry.

[xi] The exercise of this power, for a purpose extraneous or irrelevant to the one for which it has been conferred by the Constitution, would be vitiated by legal mala fides.

We have no hesitation in concurring broadly with the above illustrative occasions where the exercise of power under Article 356[1] would be improper and uncalled for.

59. It was contended on behalf of the Union of India that since the Proclamation under Article 356[1] would be issued by the President on the advice of the Council of Ministers given under Article 74[1] of the Constitution and since Clause [2] of the said Article bars enquiry into the question whether any, and if so, what advice was tendered by Ministers to the President, judicial review of the reasons which led to the issuance of the Proclamation also stands barred. This contention is fallacious for reasons more than one. In the first instance, it is based on a misconception of the purpose of Article 74[2]. As has been rightly pointed out by Shri Shanti Bhushan, the object of Article 74[2] was not to exclude any material or documents from the scrutiny of the Courts but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Its object was only to make the question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable. What advice, if any, was tendered by the Ministers to the President was thus to be beyond the scrutiny of the Court.

A good deal of light on the said purpose of the provision is thrown by its history. Identical provisions were contained in Sections 10[4] and 51[4] of the Government of India Act, 1935.

However, in the Government of India Act, 1915, as amended by the Act of 1919 it was provided under Section 52[3] as follows:

3. In relation to the transferred subjects the governor shall be guided by the advice of his Ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice.

The relations of the Governor-General and the Governor with the Ministers were not regulated by the Act but were left to be governed by an Instrument of Instructions issued by the Crown. It was considered undesirable to define these relations in the Act or to impose an obligation on the Governor-General or Governor to be guided by the advice of their Ministers, since such a course might convert a constitutional convention into a rule of law and thus bring it within the cognisance of the Court. Prior to the Constitution [42nd Amendment] Act, 1976, under the Constitutional convention, the President was bound to act in accordance with the advice of the Council of Ministers [Re: Shamsher Singh and Anr. v. Slate of Punjab MANU/SC/0073/1974 : (1974)IILLJ465SC . By the 42nd Amendment, it was expressly so provided in Article 74[1], The object of Article 74[2] was thus not to exclude any material or document from the scrutiny of the courts. This is not to say that the rule of exclusion laid down in Section 123 of the Indian Evidence Act is given a go-bye. However, it only emphasises that the said rule can be invoked in appropriate cases.

60. What is further, although Article 74[2] bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The Courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74[2] does not negate their right to know about the factual existence of any such material. This is not to say that the Union Government cannot raise the plea of privilege under Section 123 of the Evidence Act. As and when such privilege against disclosure is claimed, the Courts will examine such claim within the parameters of the said section on its merits. In this connection, we may quote Justice Mathew, who in the case of State of U.P. v. Raj Narain MANU/SC/0032/1975 : [1975]3SCR333 observed as follows:

To justify a privilege, secrecy must be indispensable to induce freedom of official communication or efficiency in the transaction of official business and it must be further a secrecy which has remained or would have remained inviolable but for the compulsory disclosure. In how many transactions of official business is there ordinarily such a secrecy? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined on its merits.

61. Since further the Proclamation issued under Article 356[1] is required by Clause [3] of that Article to be laid before each House of Parliament and ceases to operate on the expiration of two months unless it has been approved by resolutions by both the Houses of Parliament before the expiration of that period, it is evident that the question as to whether a Proclamation should or

should not have been made, has to be discussed on the floor of each House and the two Houses would be entitled to go into the material on the basis of which the Council of Ministers had tendered the advice to the President for issuance of the Proclamation Hence the secrecy claimed in respect of the material in question cannot remain inviolable, and the plea of non-disclosure of the material can hardly be pressed.

When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government.

62. A further question which has been raised in this connection is whether the validity of the Proclamation issued under Article 356[1] can be challenged even after it has been approved by both Houses of Parliament under Clause [3] of Article 356. There is no reason to make a distinction between the Proclamation so approved and a legislation enacted by the Parliament. If the Proclamation is invalid, it does not stand validated merely because it is approved of by the Parliament. The grounds for challenging the validity of the Proclamation may be different from those challenging the validity of a legislation. However, that does not make any difference to the vulnerability of the Proclamation on the limited grounds available. As has been stated by Prof. H.W.R. Wade in "Administrative Law - 6th Edition."

...There are many cases where some administrative order or regulation is required by statute to be approved by resolutions of the Houses. But this procedure in no way protects the order or regulation from being condemned by the court, under the doctrine of ultra vires, if it is not strictly in accordance with the Act. Whether the challenge is made before or after the Houses have given their approval is immaterial. [p-29]

x x x

...in accordance with constitutional principle, parliamentary approval does not affect the normal operation of judicial review. [p-411]

x x x

As these cases show, judicial review is in no way inhibited by the fact that rules or regulations have been laid before Parliament and approved, despite the ruling of the House of Lords that the test of unreasonableness should not then operate in its normal way. The Court of Appeal has emphasised that in the case of subordinate legislation such as an Order in Council approved in draft by both Houses, 'the courts would without doubt be competent to consider whether or not the Order was properly made in the sense of being intra vires'. [p- 870]

In this connection a reference may also be made to R v. H.M. Treasury ex p. Smelday (1985) QB 657, from which decision the learned author has extracted the aforesaid observations.

63. We may also point out that the deletion of Clause [5] of Article 356 as it stood prior to its deletion by the Constitution [44th Amendment] Act in 1978, has made no change in the legal position that the satisfaction of the President under Clause [1] of Article 356, was always judicially reviewable. The clause read as follows:

5. Notwithstanding anything in this Constitution, satisfaction of the President mentioned under Clause [1], shall be final and conclusive and shall not be questioned in any court on any ground.

On the other hand, the deletion of the clause has reinforced the earlier legal position, viz., that notwithstanding the existence of the Clause [5], the satisfaction of the President under Clause [1] was judicially review-able and the judicial review was not barred on account of the presence of the clause. In this connection, we may usefully refer to the decision of this Court in State of Rajasthan v. Union of India [supra] where it was unanimously held that in spite of the said finality clause, the Presidential Proclamation was subject to judicial review on various grounds. It was observed there as follows:

...This is indeed a very drastic power which, if misused or abused, can destroy the constitutional equilibrium between the Union and the States and its potential for harm was recognized even by the Constitution makers.... [p-72]

x x x

Of course by reason of Clause [5] of Article 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself. [p-82]

It was accordingly held that in view of the finality clause, the narrow area in which the exercise of power under Article 356 was subject to judicial review included the grounds where the satisfaction is perverse or mala fide or based on wholly extraneous and irrelevant grounds and was therefore, no satisfaction at all.

In A.K. Roy v. Union of India MANU/SC/0051/1981 : 1982CriLJ340 , the Court has observed that "Clause [5] has been deleted by the 44th Amendment and, therefore, any observations made in the State of Rajasthan case [supra] on the basis of that clause cannot any longer hold good". These observations imply that after the deletion of Clause [5], the judicial review of the Proclamation issued under Article 356[1] has become wider than indicated in the State of Rajasthan case [supra].

In Kihoto Hollohan v. Zachillhu and Ors. MANU/SC/0753/1992 : [1992]1SCR686 , the Court has observed that "an ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action, but precludes challenge to such action on the grounds of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction".

Again in Union of India v. Jyoti Prakash Mittar MANU/SC/0061/1971 : (1971)ILLJ256SC and Union of India v. Tulsi Ram Patel MANU/SC/0373/1985 : [1985] Supp. 2 SCR 131, this Court observed that "When there is such a finality clause restricting the scope of judicial review, the judicial review would be confined to jurisdictional errors only, viz., infirmities based on violation of constitutional mandates, mala fides, non-compliance with rule of natural justice and perversity". These observations are of course, in the field of administrative law and hence a reference to the rule of natural justice has to be viewed in that light.

64. It will be an inexcusable error to examine the provisions of Article 356 from a pure legalistic angle and interpret their meaning only through jurisdictional technicalities. The Constitution is essentially a political document and provisions such as Article 356 have a potentiality to unsettle and subvert the entire constitutional scheme. The exercise of powers vested under such provisions needs, therefore, to be circumscribed to maintain the fundamental constitutional balance lest the Constitution is defaced and destroyed. This can be achieved even without bending much less breaking the normal rules of interpretation, if the interpretation is alive to the other equally important provisions of the Constitution and its bearing on them.

Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore help to preserve and not subvert their fabric. The power vested de jure in the President but de facto in the Council of Ministers under Article 356 has all the latent capacity to emasculate the two basic features of the Constitution and hence it is necessary to scrutinise the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly. This can be done by the Courts while confining themselves to the acknowledged parameters of the judicial review as discussed above viz., illegality, irrationality and mala fides. Such scrutiny of the material will also be within the judicially discoverable and manageable standards.

65. We may in this connection, refer to the principles of federalism and democracy which are embedded in our Constitution. Article 1 of the Constitution states that India shall be a Union of States. Thus the States are constitutionally recognised units and not mere convenient administrative divisions. Both the Union and the States have sprung from the provisions of the Constitution. The learned author, H.M. Seervai, in his commentary "Constitutional Law of India" [page 166, third edition] has summed up the federal nature of our Constitution by observing that the federal principle is dominant in our Constitution and the principle of federalism has not been watered down for the following reasons : "(a) It is no objection to our Constitution being federal that the States were not independent States before they became parts of a Federation. A Federal situation existed, first, when the British Parliament adopted a federal solution in the G.I. Act, 1935, and secondly, when the Constituent Assembly adopted a federal solution in our Constitution; (b) Parliament's power to alter the boundaries of States without their consent is a breach of the federal principle, but in fact it is not Parliament which has, on its own, altered the boundaries of States. By extra constitutional agitation, the States have forced Parliament to alter the boundaries of States. In practice, therefore, the federal principle has not been violated; (c) The allocation of the residuary power of legislation to Parliament (i.e. the Federation) is irrelevant for determining the federal nature of a Constitution. The U.S. and the Australian Constitutions do not confer the residuary power on the Federation but on the States, yet those Constitutions are indisputably federal; (d) External sovereignty is not relevant to the federal nature of a Constitution, for such

sovereignty must belong to the country as a whole. But the division of internal sovereignty by a distribution of legislative powers is an essential feature of federalism, and our Constitution possesses that feature. With limited exceptions, the Australian Constitution confers overlapping legislative powers on the States and the Commonwealth, whereas List II, Schedule VII of our Constitution confers exclusive powers of legislation on the States, thus emphasising the federal nature of our Constitution; (e) The enactment in Article 352 of the emergency power arising from war or external aggression which threatens the security of India merely recognises de jure what happens de facto in great federal countries like the U.S., Canada and Australia in times of war, or imminent threat of war, because in war, these federal countries act as though they were unitary. The presence in our Constitution of exclusive legislative powers conferred on the States makes it reasonable to provide that during the emergency created by war or external aggression, the Union should have power to legislate on topics exclusively assigned to the States and to take corresponding executive action. The Emergency Provisions, therefore, do not dilute the principle of Federalism, although the abuse of those provisions by continuing the emergency when the occasion which caused it had ceased to exist, does detract from the principle of federal government. The amendments introduced in Article 352 by the 44th Amendment have, to a considerable extent, reduced the chances of such abuse. And by deleting clauses which made the declaration and the continuance of emergency by the President conclusive, the 44th Amendment has provided opportunity for judicial review which, it is submitted, the Courts should not lightly decline when as a matter of common knowledge, the emergency has ceased to exist. This deletion of the conclusive satisfaction of the President has been prompted not only by the abuse of the Proclamation of emergency arising out of war or external aggression, but, even more, by the wholly unjustified Proclamation of emergency issued in 1975 to protect the personal position of the Prime Minister; (f) The power to proclaim an emergency originally on the ground of internal disturbance, but now only on the ground of armed rebellion, does not detract from the principle of federalism because such a power exists in indisputably federal constitutions. Deb Sadhan Roy v. The State of West Bengal MANU/SC/0091/1971 : 1973CriLJ446 has established that internal violence would ordinarily interfere with the powers of the Federal Government to enforce its own laws and to take necessary executive action. Consequently, such interference can be put down with the total force of the United States. And the same position obtains in Australia; (g) The provisions of Article 355 imposing a duty on the Union to protect a State against external aggression and internal disorder are not inconsistent with the federal principle. The War Power belongs to the Union in all federal governments and therefore the defence of a State against external aggression is essential in any federal government. As to internal disturbance, the position reached in Deb's case |supra] shows that the absence of an application by the State does not materially affect the federal principle. Such application has lost its importance in the United States and in Australia; (h) Since it is of the essence of the Federal principle that both Federal and State laws operate on the same individual, it must follow that in case of conflict of a valid Federal law and a valid State law, the Federal law must prevail and our Constitution so provides in Article 254, with an exception noted earlier which does not affect the present discussion; (i) It follows from what is stated in (g) above, that Federal laws must be implemented in the States and that the Federal executive must have power to take appropriate executive action under Federal laws in the State, including the enforcement of those laws. Whether this is done by setting up in each State a parallel Federal machinery of law enforcement, or by using the existing State machinery, is a matter governed by practical expediency which does not affect the Federal principle. In the United States, a defiance of Federal law can be, and has been put down by the use of Armed Forces of the U.S. and the National Militia

of the States. This is not inconsistent with the Federal principle in the United States. Our Constitution has adopted the method of empowering the Union Government to give directions to the States to give effect to the Union law and to prevent obstruction in the working of the Union law. Such a power, though different in form, is in substance the same as the power of the Federal government in the U.S. to enforce its laws, if necessary by force. Therefore, the power to give directions to the State governments does not violate the Federal principle; (j) Article 356 (read with Article 355) which provides for the failure of constitutional machinery was based of Article 4, Section 4 of the U.S. Constitution and Article 356, like Article 4, Section 4, is not inconsistent with the Federal principle. As stated earlier, these provisions were meant to be the last resort, but have been gravely abused and can therefore be said to affect the working of the Constitution as a Federal Government. But the recent amendment of Article 356 by the 44th Amendment, and the submission to be made hereafter that the doctrine of the Political Question does not apply in India, show that the Courts can now take a more active part in preventing a mala fide or improper exercise of the power to impose a President's Rule, unfettered by the American doctrine of the political question;

(k) The view that unimportant matters were assigned to the Stales cannot be sustained in face of the very important subjects assigned to the States in List II, and the same applies to taxing powers of the States, which are made mutually exclusive of the taxing powers of the Union so that ordinarily the States have independent source of revenue of their own. The legislative entries relating to taxes in List II show that the sources of revenue available to the States are substantial and would increasingly become more substantial. In addition to the exclusive taxing powers of the Stales, the States become entitled either to appropriate taxes collected by the Union or to a share in the taxes collected by the Union."

In this connection, we may also refer to what Dr. Ambedkar had to say while answering the debate in the Constituent Assembly in the context of the very Articles 355, 356 and 357. The relevant portion of his speech has already been reproduced above. He has emphasised there that notwithstanding the fact that there are many provisions in the Constitution whereunder the center has been given powers to override the States, our Constitution is a federal Constitution. It means that the States are sovereign in the field which is left to them. They have a plenary authority to make any law for the peace, order and good government of the State.

66. The above discussion thus shows that the States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. They are neither satellites nor agents of the center. The fact that during emergency and the certain other eventualities their powers are overriden or invaded by the center is not destructive of the essential federal nature of our Constitution. The invasion of power in such circumstances is not a normal feature of the Constitution. They are exceptions and have to be resorted to only occasionally to meet the exigencies of the special situations. The exceptions are not a rule.

67. For our purpose, further it is really not necessary to determine whether, in spite of the provisions of the Constitution referred to above, our Constitution is federal, quasi- federal or unitary in nature. It is not the theoretical label given to the Constitution but the practical implications of the provisions of the Constitution which are of importance to decide the question

that arises in the present context, viz., whether the powers under Article 356[1] can be exercised by the President arbitrarily and unmindful of its consequences to the governance in the concerned State. So long as the States are not mere administrative units but in their own right constitutional potentates with the same paraphernalia as the Union, and with independent Legislature and the Executive constituted by the same process as the Union, whatever the bias in favour of the center, it cannot be argued that merely because (and assuming it is correct) the Constitution is labelled unitary or quasi-federal or a mixture of federal and unitary structure, the President has unrestricted power of issuing Proclamation under Article 356[1]. If the Presidential powers under the said provision are subject to judicial review within the limits discussed above, those limitations will have to be applied strictly while scrutinising the concerned material.

67A. It must further not be forgotten that in a representative democracy in a populous country like ours when legislatures of the States are dissolved pursuant to the power used under Article 356[1] of the Constitution and the elections are proposed to be held, it involves for the public exchequer an enormous expenditure and consequently taxes the public. The machinery and the resources of the State are diverted from other useful work. The expenses of contesting elections which even other wise are heavy and unaffordable for common man are multiplied. Frequent elections consequent upon unjustified use of Article 356[1] has thus a potentially dangerous consequence of negating the very democratic principle by making the election-contest the exclusive preserve of the affluent. What is further, the frequent dissolution of the Legislature, has the tendency to create disenchantment in the people with the process of election and thus with the democratic way of life itself. The history warns us that the frustration with democracy has often in the past, led to an invitation to fascism and dictatorship of one form or the other.

68. The Presidential power under Article 356[1] has also to be viewed from yet another and equally important angle. Decentralisation of power is not only valuable administrative device to ensure closer scrutiny, accountability and efficiency, but is also an essential part of democracy. It is for this purpose that Article 40 in Part IV of our Constitution dealing with the Directive Principles of State Policy enjoins upon the State to take steps to organise village panchayats and endow them with the such powers and authorities as may be necessary to enable them to function as units of sell-governance. The participation of the people in the governance is a since qua non of democracy. The democratic way of life began by direct participation of the people in the day to day affairs of the society. With the growth of population and the expansion of the territorial boundaries of the State, representative democracy replaced direct democracy and people gradually surrendered more and more of their rights of direct participation, to their representatives, Notwithstanding the surrender of the requisite powers, in matters which are retained, the powers are jealously guarded and rightly so. If it is true to say that in democracy, people are sovereign and all power belongs primarily to the people, the retention of such power by the people and the anxiety to exercise them is legitimate. The normal rule being the selfgovernance, according to the wishes expressed by the people, the occasions to interfere with the self-governance should both be rare and demonstrably compelling.

68A. In this connection, a very significant and special feature of our society has to be constantly kept in mind. Our society is, among other things, multi-lingual, multi-ethnic and multi-cultural. Prior to independence, political promises were made that the States will be formed on linguistic basis and the ethnic and cultural identities will not only be protected but promoted. It is in keeping

with the said promises, that the States eventually have come to be organised broadly on linguistic, ethnic and cultural basis. The peoples in every State desire to fulfil their own aspirations through self-governance within the framework of the Constitution. Hence interference with the self governance also amounts to the betrayal of the people and unwarranted interference. The betrayal of the democratic aspirations of the people is a negation of the democratic principle which runs through our constitution.

69. What is further- and this is an equally, if not more important aspect of our Constitutional law, we have adopted a pluralist democracy. It implies, among other things, a multi- party system. Whatever the nature of federalism, the fact remains that as stated above, as per the provisions of the Constitution, every State is constituent political unit and has to have an exclusive Executive and Legislature elected and constituted by the same process as the Union Government. Under our political and electoral system, political parties may operate at the State and national level or exclusively at the State level. There may be different political parties in different States and at the national level. Consequently, situations may arise, as indeed they have, when the political parties in power in various States and at the center may be different. It may also happen - as has happened till date - that through political bargaining, adjustment and understanding, a State-level party may agree to elect candidates of a national level party to the Parliament and vice versa. This mosaic of variegated pattern of political life is potentially inherent in a pluralist multi-party democracy like ours. Hence the temptation of the political party or parties in power [in a coalition Government] to destabilise or sack the Government in the State not run by the same political party or parties is not rare and in fact the experience of the working of Article 356[1] since the inception of the Constitution, shows that the State Governments have been sacked and the legislative assemblies dissolved on irrelevant, objectionable and unsound grounds. So far the power under the provision has been used on more than 90 occasions and in almost all cases against governments run by political parties in opposition. If the fabric of pluralism and pluralist democracy and the unity and integrity of the country are to be preserved, judiciary in the circumstances is the only institution which can act as the saviour of the system and of the nation.

It is for these reasons that we are unable to agree with the view that if the ruling party in the States suffers an overwhelming defeat in the elections to the Lok Sabha - however complete the defeat may be - it will be a ground for the issue of the Proclamation under Article 356[1]. We do not read the decision in State of Rajasthan case [supra] to have taken such a view. This is particularly so since it is observed in the judgment that:

Now, we have no doubt at all that merely because the ruling party in a State suffers defeat in the elections to the Lok Sabha or for the matter of that, in the panchayat elections, that by itself can be no ground for saying that the government of the State cannot be carried on in accordance with the provisions of the Constitution. The Federal structure under our Constitution clearly postulates that there may be one party in power in the State and another at the center. It is also not an unusual phenomenon that the same electorate may elect a majority of members of one party to the Legislative Assembly, while at the same time electing a majority of members of another party to the Lok Sabha. Moreover, the Legislative Assembly, once elected, is to continue for a specific term and mere defeat at the elections to the Lok Sabha prior to the expiration of the term without anything more would be no ground for its dissolution. The defeat would not necessarily in all cases indicate that the electorate is no longer supporting the ruling party because the issues may be

different. But even if it were indicative of a definite shift in the opinion of the electorate, that by itself would be no ground for dissolution, because the Constitution contemplates that ordinarily the will of the electorate shall be expressed at the end of the term of the Legislative Assembly and a change in the electorate's will in between would not be relevant...the defeat of the ruling party in a State at the Lok Sabha elections cannot by itself, without anything more, support the inference that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. To dissolve the Legislative Assembly solely on such ground would be an indirect exercise of the right of recall of all the members by the President without there being any provision in the Constitution for recall even by the electorate. [p-84-85]

There is no doubt that certain observations in the said decision create an impression to the contrary. We have already endorsed earlier the recommendation in the Report of the Sarkaria Commission that the concerned ground cannot be available for invoking power under Article 356[1]. It has no relevance to the conditions precedent for invoking the said power, viz., the break-down of the constitutional machinery in the State.

70. Thus the federal principle, social pluralism and pluralist democracy which form the basic structure of our Constitution demand that the judicial review of the Proclamation issued under Article 356[1] is not only an imperative necessity but is a stringent duty and the exercise of power under the said provision is confined strictly for the purpose and to the circumstances mentioned therein and for none else. It also requires that the material on the basis of which the power is exercised is scrutinised circumspectly. In this connection, we may refer to what Dr. Ambedkar had to say in reply to the apprehensions expressed by the other Hon'ble Members of the Constituent Assembly, in this context which also bring out the concerns weighing on the mind of the Hon'ble Members:

In regard to the general debate which has taken place in which it has been suggested that these articles are liable to be abused, 1 may say that I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the center to override the Provinces. In fact I share the sentiments expressed by my honourable Friend Mr. Gupte yesterday that the proper thing we ought to expect is that such articles will never be called into operation and they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this article. It is only in those circumstances he would resort to this article. I do not think we could then say that these articles were imported in vain or that the President had acted wantonly." [C.A.D. Vol. IX, p - 177]

The extract from the Report of the Sarkaria Commission which has been reproduced in paragraph 7 above will show that these hopes of Dr. Ambedkar and other Hon'ble Member of the Constituent Assembly have not come true.

71. The further equally important question that arises in this context is whether the President when he issues Proclamation under Article 356[1], would be justified in removing the Government in power or dissolving the Legislative Assembly and thus in exercising all the powers mentioned in Sub-clauses (a), (b) and (c) of Clause [1] of Article 356 whatever the nature of the situation or the degree of the failure of the constitutional machinery. A strong contention was raised that situations of the failure of the constitutional machinery may be varied in nature and extent, and hence measures to remedy the situation may differ both in kind and degree. It would be a disproportionate and unreasonable exercise of power if the removal of Government or dissolution of the Assembly is ordered when what the situation required, was for example, only assumption of some functions or powers of the Government of the State or of any body or authority in the State under Article 356[1][a]. The excessive use of power also amounts to illegal, irrational and mala fide exercise of power. Hence, it is urged that the doctrine of proportionality is relevant in this context and has to be applied in such circumstances. To appreciate the discussion on the point, it is necessary to realise that the removal of Government and the dissolution of Assembly are effected by the President, if he exercises powers of the Governor under Articles 164[1] and 174[2](b) respectively under Sub-clause [a] of Article 356[1], though that is neither necessary nor obligatory while issuing the Proclamation. In other words, the removal of the Ministry or the dissolution of the Legislative Assembly is not an automatic consequence of the issuance of the Proclamation. The exercise of the powers under Sub-clauses [a], [b] and [c] of Article 356[1] may also co-exist with a mere suspension of the political Executive and the Legislature of the State. Sub-clause [c] of Article 356[1] makes it clear. It speaks of incidental and consequential provisions to give effect to the objects of the Proclamation including suspension in whole or part of the operation of any provision of the Constitution relating to any body or authority in the State. It has to be noted that unlike Sub-clause [a], it does not exclude the Legislature of the State. Sub-clause [b] only speaks of exercise of the powers of the Legislature of the State by or under the authority of the Parliament. What is further, the assumption of only some of the functions of the Government and the powers of the Governor or of any body or authority in the State other than the Legislature of the State under Sub-clause [a], is also conceivable with the retention of the other functions and powers with the Government of the State and the Governor or any body or authority in the State. The language of Sub-clause [a] is very clear on the subject. It must be remembered in this connection that where there is a bicameral Legislature, the Upper House, i.e., the Legislative Council cannot be dissolved. Yet under Sub-clause [b] of Article 356[1] its powers are exercisable by or under the authority of Parliament. The word used there is "Legislature" and not "Legislative Assembly". Legislature includes both the Lower House and the Upper House, i.e., the Legislative Assembly and the Legislative Council. It has also to be noted that when the powers of the Legislature of the State are declared to be exercisable by or under the authority of the Parliament under Article 356[1][b], it is competent for Parliament under Article 357, to confer on the President the power of such Legislature to make laws and to authorise the President to delegate the powers so conferred, to any other authority to be specified by him. The authority so chosen may be the Union or officers and authorities thereof. Legally, therefore, it is permissible under Article 356[1], firstly, only to suspend the political executive or any body or authority in the State and also the Legislature of the State and not to remove or dissolve them. Secondly, it is also permissible for the president to assume only some of the functions of the political executive or of any body or authority of the State other than the Legislature while neither suspending nor removing them. The fact that some of these exercises have not been resorted to in practice so far, does not militate against the legal position which emerges from the clear language of Article 356[1]. In this connection, we may refer

to what Dr. Ambedkar had to say on the subject in the Constituent Assembly. The relevant extract from his speech is reproduced in paragraph 21 above. Hence it is possible for the President to use only some of the requisite powers vested in him under Article 356[1] to meet the situation in question. He does not have to use all the powers to meet all the situations whatever the kind and degree of the failure of the constitutional machinery in the State. To that extent, the contention is indeed valid. However, whether in a particular situation the extent of powers used is proper and justifiable is a question which would remain debatable and beyond judicially discoverable and manageable standards unless the exercise of the excessive power is so palpably irrational or mala fide as to invite judicial intervention. In fact, once the issuance of the Proclamation is held valid, the scrutiny of the kind and degree of power used under the Proclamation, falls in a narrower compass. There is every risk and fear of the Court undertaking upon itself the task of evaluating with fine scales and through its own lenses the comparative merits of one rather than the other measure. The Court will thus travel unwittingly into the political arena and subject itself more readily to the charges of encroaching upon policy-making. The "political thicket" objection sticks more easily in such circumstances. Although, therefore, on the language of Article 356[1], it is legal to hold that the President may exercise only some of the powers given to him, in practice it may not always be easy to demonstrate the excessive use of the power.

72. An allied question which arises in this connection is whether, notwithstanding the fact that a situation has arisen where there is a breakdown of the constitutional machinery in the State, it is always necessary to resort to the power of issuing Proclamation under Article 356[1]. The contention is that since under Article 355, it is the duty of the Union to ensure that the government of every State is carried on in accordance with the provisions of the Constitution and since further the issuance of the. Proclamation under Article 356[1] is admittedly a drastic step, there is a corresponding obligation on the President to resort to other measures before the step is taken under Article 356[1]. This is all the more necessary considering the principles of federal and democratic polity embedded in our Constitution. In this connection, we may refer again to what Dr. Ambedkar himself had to say on the subject. We have quoted the relevant extract from his speech in paragraph 6 above. He has expressed the hope there that resort to Article 356[1] would be only as a last measure and before the Article is brought into operation, the President would take proper precaution. He hoped that the first thing the President would do would be to issue a mere warning. If the warning failed, he would order an election and it is only when the said two remedies fail that he would resort to the Article. We must admit that we are unable to appreciate the second measure to which Dr. Ambedkar referred as a preliminary to the resort to Article 356[1]. We should have thought that the elections to the Legislative Assembly are a last resort and if they are held, there is nothing further to be done by exercising power under Article 356[1]. We may, therefore, ignore the said suggestion made by him. But we respectfully endorse the first measure viz. of warning to which the President should resort before rushing to exercise the power under Article 356[1]. In addition to warning, the President will always have the power to issue the necessary directives. We are of the view that except in situations where urgent steps are imperative and exercise of the drastic power under the Article cannot brook delay, the President should use all other measures to restore the constitutional machinery in the State. The Sarkaria Commission has also made recommendations in that behalf in paragraphs 6.8.01 to 6.8.04 of its Report. It is not necessary to quote them here. We endorse the said recommendations.

73. The next important question to be considered is of the nature and effect of the action to be taken by the President pursuant to the Proclamation issued by him. The question has to be considered with reference to three different situations. Since Clause [3] of Article 356 requires every Proclamation issued under Clause[1] thereof, to be laid before each House of Parliament and also states that it shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament, the question which emerges is what is the legal consequence of the actions taken by the President, [a] if the Proclamation is invalid, yet it is approved by both Houses of Parliament; [b] if the Proclamation is invalid and not approved by either or both Houses of Parliament; and [c] if the Proclamation is valid but not approved by either or both Houses of Parliament. The other question that arises in this connection is, whether the legal consequences differ in these three classes of cases, depending upon the nature of the action taken by the President.

The Proclamation falling under Clauses [a] and [b] will not make any difference to the legal status of the actions taken by the President under them. The actions will undoubtedly be illegal. However, the Court by suitably moulding the relief, and the Parliament and the State Legislature by legislation, may validate those acts of the President which are capable of being validated. As far as the Parliament is concerned, such acts will not include the removal of the Council of Ministers and the dissolution of the Legislative Assembly since there is no provision in the Constitution which gives such power to the Parliament. That power is given exclusively to the Governor under Articles 164[1] and 174[2][b] respectively. It is this power, among others, which the President is entitled to assume under Article 356[1][a]. The Parliament can only approve or disapprove of the removal of the Council of Ministers and the dissolution of the Legislative Assembly under Clause [3] of that Article, if such action is taken by the President. The question then arises is whether the Council of Ministers and the Legislative Assembly can be restored by the Court when it declares the Proclamation invalid. There is no reason why the Council of Ministers and the Legislative Assembly should not stand restored as a consequence of the invalidation of the Proclamation, the same being the normal legal effect to the invalid action. In the context of the constitutional provisions which we have discussed and in view of the power of the judicial review vested in the Court, such a consequence is also a necessary constitutional fall-out. Unless such result is read, the power of judicial review vested in the judiciary is rendered nugatory and meaningless. To hold otherwise is also tantamount to holding that the Proclamation issued under Article 356[1] is beyond the scope of judicial review. For when the validity of the Proclamation is challenged, the Court will be powerless to give relief and would always be met with the fait accompli. Article 356 would then have to be read as an exception to judicial review. Such an interpretation is neither possible nor permissible. Hence the necessary consequence of the invalidation of the Proclamation would be the restoration of the Ministry as well as the Legislative Assembly, in the State. In this connection, we may refer to the decision of the Supreme Court of Pakistan in Mian Mumammad Nawaz Sharif v. President of Pakistan and Ors. [1993] PLD SC 473. The Court there held that the impugned order of dissolution of National Assembly and the dismissal of the Federal Cabinet were without lawful authority and, therefore, of no legal effect. As a consequence of the said declaration, the Court declared that the National Assembly, Prime Minister and the Cabinet stood restored and entitled to function as immediately before the impugned order was passed. The Court further declared that all steps taken pursuant to the impugned order including the appointment of care-taker Cabinet and care-taker Prime Minister were also of no legal effect. The Court, however, added that all orders passed, acts done and measures taken in the meanwhile, by the care-taker

Government which had been done, taken and given effect to in accordance with the terms of the Constitution and were required to be done or taken for the ordinary and orderly running of the State, shall be deemed to have been validly and legally done.

As regards the third class of cases where the Proclamation is held valid but is not approved by either or both Houses of Parliament, the consequence of the same would be the same as where the Proclamation is revoked subsequently or is not laid before each House of the Parliament before the expiration of two months or where it is revoked after its approval by the Parliament or ceases to operate on the expiration of a period of six months from the date of its issue, or of the further permissible period under Clause [4] of Article 356. It does not, however, appear from the provisions of Article 356 or any other provision of the Constitution, that mere non-approval of a valid Proclamation by the Parliament or its revocation or cessation, will have the effect either of restoring the Council of Ministers or the Legislative Assembly. The inevitable consequence in such a situation is fresh elections and the Constitution of the new Legislative Assembly and the Ministry in the State. The law made in exercise of the power of the Legislature of the State by Parliament or the President or any other authority during the period the valid Proclamation subsists before it is revoked or disapproved, or before it expires, is protected by Clause [2] of Article 357.

It is therefore, necessary to interpret Clauses [1] and [3] of Article 356 harmoniously since the provisions of Clause [3] are obviously meant to be a check by the Parliament [which also consist of members from the concerned States] on the powers of the President under Clause [1]. The check would become meaningless and rendered ineffective if the President takes irreversible actions while exercising his powers under Sub-clauses [a], [b] and [c] of Clause [1] of the said Article. The dissolution of the Assembly by exercising the powers of the Governor under Article 174[2][b] will be one such irreversible action. Hence, it will have to be held that in no case, the President shall exercise the Governor's power of dissolving the Legislative Assembly till at least both the Houses of Parliament have approved of the Proclamation issued by him under Clause [1] of the said Article. The dissolution of the assembly prior to the approval of the Proclamation by the Parliament under Clause [3] of the said Article will be per se invalid. The President may, however, have the power of suspending the Legislature under Sub-clause [c] of Clause [1] of the said Article.

74. Our conclusion, therefore, firstly, is that the President has no power to dissolve the Legislative Assembly of the State by using his power under Sub-clause [a] of Clause [1] of Article 356 till the Proclamation is approved by both the Houses of the Parliament under Clause [3] of the said Article. He may have power only to suspend the Legislative Assembly under Sub-clause [c] of Clause [1] of the said Article. Secondly, the Court may invalidate the Proclamation whether it is approved by the Parliament or not. The necessary consequence of the invalidation of the Proclamation would be to restore the status quo ante and, therefore, to restore the Council of Ministers and the Legislative Assembly as they stood on the date of the issuance of the Proclamation. The actions taken including the laws made during the interregnum may or may not be validated either by the Court or by the Parliament or by the State Legislature. It may, however, be made clear that it is for the Court to mould the relief to meet the requirements the situation. It is not bound in all cases to grant the relief of restoration of the Legislative Assembly and the Ministry. The question of relief to be granted in a particular case pertains to the discretionary jurisdiction of the Court.

The further important question that arises is whether the Court will be justified in granting interim relief and what would be the nature of such relief and at what stage it may be granted. The grant of interim relief would depend upon various circumstances including the expeditiousness with which the Court is moved, the prima facie case with regard to the invalidity of the Proclamation made out, the steps which are contemplated to be taken pursuant to the Proclamation etc. However, if other conditions are satisfied, it will defeat the very purpose of the judicial review if the requisite interim relief is denied. The least relief that can be granted in such circumstances is an injunction restraining the holding of fresh elections for constituting the new Legislative Assembly. There is no reason why such a relief should be denied if a precaution is taken to hear the challenge as expeditiously as possible taking into consideration the public interests involved. The possibility of a delay in the disposal of the challenge cannot be a ground for frustrating the constitutional right and defeating the constitutional provisions. It has, however, to be made clear that the interlocutory relief that may be granted on such challenge is to prevent the frustration of the constitutional remedy. It is not to prevent the constitutional authority from exercising its powers and discharging its functions. Hence it would be wholly impermissible either to interdict the issuance of the Proclamation or its operation till a final verdict on its validity is pronounced. Hence the normal rules of quia timet action have no relevance in matters pertaining to the challenge to the Proclamation. To conclude, the Court in appropriate cases will not only be justified in preventing holding of fresh elections but would be duty-bound to do so by granting suitable interim relief to make effective the constitutional remedy of judicial review and to prevent the emasculation of the Constitution.

75. In the light of our conclusions with regard to the scope of the power of the President to issue Proclamation under Article 356[1], of the parameters of judicial review and the quia timet action, we may now examine the facts in the individual cases before us. It has, however, to be made clear at the outset that the facts are not being discussed with a view to give relief prayed for, since in all cases fresh elections have been held, new Legislative Assemblies have been elected and new Ministries have been installed. Nor do the petitioners/appellants seek any such relief. The facts are being discussed to find out whether the action of the President was justified in the light of our conclusions above. The finding may serve as a guidance for future. For the sake of convenience, we propose to deal with the cases of the States of Karnataka, Meghalaya and Nagaland separately from those of the States of Himachal Pradesh, Madhya Pradesh and Rajasthan.

KARNATAKA:

C.A.No. 3645 of 1989

76. Taking first the challenge to the Proclamation issued by the President on 21.4.1989 dismissing the Government of Karnataka and dissolving the State Assembly, the Proclamation does not contain any reasons and merely recites that the President is satisfied on a consideration of the report of the Governor and other information received by him, that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The facts were that the Janata Party being the majority party in the State Legislature had formed Government under the leadership of Shri S.R. Bommai on 30.8.1988 following the resignation on 1.8.1988 of the earlier Chief Minister, Shri Hegde who headed the Ministry from March 1985 till his resignation. In September 1988, the Janata Party and Lok Dal [B] merged into a new party called Janata Dal. The

Ministry was expanded on 15.4.1989 with addition of 13 members. Within two days thereafter, i.e., on 17.4.1989, one Shri K.R. Molakery, a legislator of Janata Dal defected from the party and presented a letter to the Governor withdrawing his support to the Ministry. On the next day, he presented to the Governor 19 letters allegedly signed by 17 Janata Dal legislators, one independent but associate legislator and one legislator belonging to the Bhartiya Janata Party which was supporting the Ministry, withdrawing their support to the Ministry. On receipt of these letters, the Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the said letters verified. On 19.4.1989, the Governor sent a report to the President stating therein that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and even after the formation of the new party, viz., Janata Dal, there were dissensions and defections. In support of his case, he referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the chief Minister, Shri Bommai did not command a majority in the Assembly and, hence, it was inappropriate under the Constitution, to have the State administered by an Executive consisting of Council of Ministers which did not command the majority in the House. He also added that no other political party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356[1]. It is not disputed that the Governor did not ascertain the view of Shri Rommai either after the receipt of the nineteen letters or before making his report to the President. On the next day, i.e., 20.4.1989. seven out of the nineteen legislators who had allegedly written the said letters to the Governor sent letters to him complaining that their signatures were obtained on the earlier letters by misrepresentation and affirmed their support to the Ministry. The State Cabinet met on the same day and decided to convene the Session of the Assembly within a week i.e., on 27.4.1989. The Chief Minister and his Law Minister met the Governor the same day and informed him about the decision to summon the Assembly Session. It is also averred in the petition that they had pointed out to the Governor the recommendation of the Sarkaria Commission that the strength of the Ministry should be tested on the floor of the House. The Chief Minister also offered to prove has majority on the floor of the House even by proponing the Assembly Session, if needed. To the same effect, he sent a telex message to the President. The Governor, however sent yet another report to the President on the same day i.e., 20-4-1989, in particular, referring to the letters of seven members pledging their support to the Ministry and withdrawing their earlier letters. He, however, opined in the report that the letters from the seven legislators were obtained by the Chief Minister by pressurising them and added that horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356[1]. On that very day, the President issued the Proclamation in question with the recitals already referred to above. The Proclamation was, thereafter approved by the Parliament as required by Article 356[3], Shri Bommai and some other members of the Council of Ministers challenged the validity of the Proclamation before the Karnataka High Court by a writ petition on various grounds. The petition was resisted by the Union of India, among others. A three-Judge Bench of the High Court dismissed the petition holding, among other things, that the facts stated in the Governor's report could not be held to be irrelevant and that the Governor's satisfaction that no other party was in a position to form the Government had to be accepted since his personal bona fides were not questioned and his satisfaction was based upon reasonable assessment of all the relevant facts. The Court also held that recourse to floor-test was neither compulsory nor obligatory and was not a pre-requisite to sending the report to the President. It was also held that the Governor's report could not be challenged on the ground of

legal mala fides since the Proclamation had to be issued on the satisfaction of the Union Council of Ministers. The Court further relied upon the test laid down in the State of Rajasthan case [supra] and held that on the basis of the material disclosed, the satisfaction arrived at by the President could not be faulted.

In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the seven legislators, it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier nineteen letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislature Secretariat. Secondly, he also took upon himself the task of deciding that the seven out of the nineteen legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their free will. Again he had not cared even to interview the said legislators. Thirdly, it is not known from where the Governor got the information that there was horse-trading going on between the legislators. Even assuming that it was so, the correct and the proper course for him to adopt was to await the test on the floor of the House which lest the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on 27-4-89, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such grave threat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all cannons of propriety were thrown to wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356[1] clearly smacked of mala fides. The Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more fairly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed, was therefore liable to be struck down.

77. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some Legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides. It is possible that on some rare occasions, the floor-test may be impossible, although it

is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor test was neither compulsory nor obligatory or that it was not a pre-requisite to sending the report to the President recommending action under Article 356[1]. Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.

The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the seven MLAs whether their retraction was genuine or not, proceeded to give his unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional government in the State before reporting that the constitutional machinery had broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty bound to opt for it so long as the Government could enjoy the confidence of the House. That is also the recommendation of the Five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the report of the Governor, there was no other material before the President before he issued the Proclamation. Since the "facts" stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid.

We may on this subject refer to the unanimous Report of the Five-member Committee of Governors which recommended as follows:

...the test of confidence in the ministry, should normally be left to a vote in the Assembly...where the Governor is satisfied by whatever process or means, that the ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove this majority within the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as prima facie proof of his no longer enjoying the confidence of the legislature. If then, an alternative ministry can be formed, which, in the Governor's view, is able to command a majority in the assembly, he must dismiss the ministry in power and install the alternative ministry in office. On the other hand, if no such ministry is possible, the Governor will be left with no alternative but to make a report to the President under Article 356....

x x x

As a general proposition, it may be stated that, as far as possible, the verdict as to majority support claimed by a Chief Minister and his Council of Ministers should be left to the legislature, and that

it is only if a responsible government cannot be maintained without doing violence to correct constitutional practice that the Governor should resort to Article 356 of the Constitution....

x x x

What is important to remember is that recourse to Article 356 should be the last resort for a Governor to seek....

x x x

...the guiding principle being, as already stated, that the constitutional machinery in the state should, as far as possible, be maintained.

MEGHALAYA:

T.C. Nos. 5 & 7 of 1992.

78. In this case the challenge is to the Proclamation dated 11.10.1991 issued under Article 356[1]. The facts are that the writ petitioner G.S. Massar belonged to a Front known as Meghalaya United Parliamentary Party [MUPP] which had a majority in the Legislative Assembly and had formed in March 1990, a Government under the leadership of Shri B.B. Lyngdoh. On 25-7-1991, one Kyndiah Arthree who was at the relevant time, the Speaker of the House, was elected as the leader of the opposition group known as United Meghalaya Parliamentary Forum [UMPF]. The majority in this group belonged to the Congress Party. On his election, Shri Arthree claimed support of majority of the members in the Assembly and requested the Governor to invite him to form the Government. Thereupon, the Governor asked the then Chief Minister Shri Lyngdoh to prove his majority on the floor of the House. Accordingly, a special Session of the Assembly was convened on 7.8.1991 and a Motion of Confidence in the Ministry was moved. Thirty legislators supported the Motion and 27 voted against it. However, instead of announcing the result of the voting on the Motion, the Speaker declared that he had received a complaint against five independent MLAs of the ruling coalition front alleging that they were disqualified as legislators under the Anti-defection law and since they had become disentitled to vote, he was suspending their right to vote. On this announcement, uproar ensured in the House and it had to be adjourned. On 11.8.1991, the Speaker issued show cause notices to the alleged defectors, the five independent MLAs on a complaint filed by one of the legislators Shri Shylla. The five MLAs replied to the notice denying that they had joined any of the parties and contended that they had continued to be independent. On receipt of the replies, the speaker passed an order on 17.8.1991, disqualifying the five MLAs on the ground that four of them were Ministers in the then Ministry and one of them was the Deputy Government Chief Whip. Thereafter, again on the Governor's advice, the Chief Minister Shri Lyngdoh summoned the Session of the Assembly on 9.9.1991 for passing a vote of confidence in the Ministry. The Speaker however, refused to send the notices of the Session to the five independent MLAs disqualified by him and simultaneously made arrangements to prohibit their entry into the Assembly. On 6.9.1991, the five MLAs, approached this Court. The Court issued interim order staying the operation of the Speaker's orders dated 7.8.1991 and 17.8.1991 in respect of four of them. It appears that one of the members did not apply for such order. The Speaker, thereafter, issued a Press-statement in which he declared that he did not accept any interference by any Court

with his order of 17.8.1991. The Governor, therefore, prorogued the Assembly indefinitely by his Order dated 8.9.1991. The Assembly was again convened at the instance of the Governor on 8.10.1991. In the meanwhile, the four independent MLAs who had obtained the interim orders moved a contempt petition in this Court against the Speaker who had not only made the declaration in the Press statement defying the interim order of this Court but also taken steps to prevent the independent MLAs from entering the House. On 8.10.1991, this Court passed another order directing that all authorities of the State should ensure the compliance of the Court's interim order of 6.9.1991. Pursuant to this direction, the four of the five independent MLAs received invitation to attend the Session of the Assembly convened on October 8, 1991. In all, 56 MLAs including the four independent MLAs attended the Session. After the Motion of Confidence in the Ministry was put to vote, the Speaker declared that 26 voted for the Motion and 26 against it and excluded the votes of the four independent MLAs. Thereafter, declaring that there was a tie in voting, he cast his own vote against the Motion and declared that the Motion had failed and adjourned the House sine die. However, 30 MLAs, viz., 26 plus four independent MLAs who had voted for the Motion, continued to stay in the House and elected the Speaker from amongst themselves to conduct the business. The new Speaker declared that the Motion of Confidence in the Ministry had been carried since 30 MLAs had voted in favour of the Government. They further proceeded to pass a Motion of No- confidence in the Speaker. The thirty MLAs thereafter sent a letter to the Governor stating therein that they had voted in favour of the Ministry and had also passed a Motion of No-confidence in the Speaker. However, on 9.10.1991, the Governor wrote a letter to the Chief Minister asking him to resign in view of what had transpired in the Session on 8.10.1991. Unfortunately, the Governor in the said letter also proceeded to observe that the non-cognisance by the Speaker of the Supreme Court's orders relating to the four independent MLAs was a matter between the Speaker and the Court. The Chief Minister moved this Court, thereafter, against the letter of the Governor, and this Court on 9.10.1991, among other things, asked the Governor to take into consideration the orders of this Court and votes cast by the four independent MLAs before taking any decision on the question whether the Government had lost the Motion of Confidence. In spite of this, the President on 11.10.1991 issued Proclamation under Article 356[1]. The Proclamation stated that the President was satisfied on the basis of the report from the Governor and other information received by him that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. The Government was dismissed and the Assembly was dissolved. This Court by an order of 12.10.1991, set aside the order dated 17.8.1991 of the then Speaker. However, thereafter, both the Houses of Parliament met and approved the Proclamation issued by the President.

79. The unflattering episode shows in unmistakable terms the Governor's unnecessary anxiety to dismiss the Ministry and dissolve the Assembly and also his failure as a constitutional functionary to realise the binding legal consequences of and give effect to the orders of this Court. What is worse, the Union Council of Ministers also chose to give advice to the President to issue the Proclamation on the material in question. It is not necessary to comment upon the validity of the Proclamation any further save and except to observe that prima facie, the material before the President was not only irrational but motivated by factual and legal mala fides. The Proclamation was, therefore, invalid.

NAGALAND

80. The Presidential Proclamation dated 7.8.1988 was issued under Article 356[1] imposing President's rule in the State of Nagaland. At the relevant time, in the Nagaland Assembly consisting of 60 members, 34 belonged to Congress-I, 18 to Naga National Democratic Party, one belonged to Naga Peoples Party and seven were independent, Shri Sema, the leader of the ruling party was the Chief Minister heading the State Government. On 28th July, 1988, 13 of the 34 MLAs of the ruling Congress-I Party informed the Speaker of the Assembly that they had formed a party separate from Congress-I ruling party and requested him for allotment of separate seats for them in the House. The Session was to commence on 28.8.1988. By his decision of 30.7.1988, the Speaker held that there was a split in the party within the meaning of the Tenth Schedule of the Constitution. On 31.7.1988, Shri Vamuzo, one of the 13 defecting MLAs who had formed separate party, informed the Governor that he commanded the support of 35 out of the then 59 members in the Assembly and was in a position to form the Government. On 3.10.1988, the Chief Secretary of the State wrote to Shri Vamuzo that according to his information, Shri Vamuzo had wrongfully confined the MLAs who had formed the new party. Shri Vamuzo denied the said allegation and asked the Chief Secretary to verify the truth from the Members themselves. On verification, the Members told the Chief Secretary that none of them was confined, as alleged. On 6.8.1988, the Governor sent a report to the President of India about the formation of a new party by the 13 MLAs. He also stated that the said MLAs were allured by money. He further stated that the said MLAs were kept in forcible confinement by Shri Vamuzo and one other person, and that the story of split in the ruling party was not true. He added that the Speaker was hasty in according recognition to the new group of the 13 members and commented that horse-trading was going on in the State. He made a special reference to the insurgency in Nagaland and also stated that some of the members of the Assembly were having contacts with the insurgents. He expressed the apprehension that if the affairs were allowed to continue as they were, it would affect the stability of the State. In the meanwhile, the Chief Minister submitted his resignation to the Governor and recommended the imposition of the President's rule. The President thereafter, issued the impugned Proclamation and dismissed the Government and dissolved the Assembly. Shri Vamuzo, the leader of the new group challenged the validity of the Proclamation in the Guahati High Court. The petition was heard by a Division Bench comprising the Chief Justice and Hansaria, J. The Bench differed on the effect and operation of Article 74[2] and hence the matter was referred to the third Judge. But before the third learned judge could hear the matter, the Union of India moved this Court for grant of special leave which was granted and the proceedings in the High Court were stayed. It may be stated here that the Division Bench was agreed that the validity of the Proclamation could be examined by the Court and it was not immune from judicial review. We have already discussed the implications of Article 74[2] earlier and have pointed out that although the advice given by the Council of Ministers is free from the gaze of the Court, the material on the basis of which the advice is given cannot be kept away from it and is open to judicial scrutiny. On the facts of this case also we are of the view that the Governor should have allowed Shri Vamuzo to test his strength on the floor of the House. This was particularly so because the Chief Minister, Shri Sema had already submitted his resignation to the Governor. This is notwithstanding the fact that the Governor in his report had stated that during the preceding 25 years, no less than 11 Governments had been formed and according to his information, the Congress-I MLAs were allured by the monetary benefits and that amounted to incredible lack of the political morality and complete disregard of the wishes of the electorate. It has to be emphasised here that although the

Tenth Schedule was added to the Constitution to prevent political bargaining and defections, it did not prohibit the formation of another political party if it was backed by no less than 1/3 rd members of the existing legislature party. Since no opportunity was given to Shri Vamuze to prove his strength on the floor of the House as claimed by him and to form the Ministry, the Proclamation issued was unconstitutional.

81. We may now deal with the cases of the States of Madhya Pradesh. Rajasthan and Himachal Pradesh. The elections were held to the Legislative Assemblies in these States along with the elections to the Legislative Assembly of Uttar Pradesh, in February, 1990. The Bhartiya Janata Party [BJP] secured majority in the Assemblies of all the four States and formed Governments there.

Following appeals of some organisations including the BJP, thousands of kar sevaks from Uttar Pradesh as well as from other States including Madhya Pradesh, Rajasthan and Himachal Pradesh gathered near the Ram Janam Bhumi-Babri Masjid structure on the 6th December, 1992 and eventually some of them demolished the disputed structure. Following the demolition, on the same day the Uttar Pradesh Government resigned. Thereafter, on the same day the President issued Proclamation under Article 356[1] and dissolved the Legislative Assembly of the State. The said Proclamation in not challenged. Hence we are not concerned in these proceedings with its validity.

As a result of the demolition of the structure which was admittedly a mosque standing at the site for about 400 years, there were violent reactions in this country as well as in the neighbouring countries where some temples were destroyed. This in turn created further reactions in this country resulting in violence and destruction of the property. The Union Government tried to cope up with the situation by taking several steps including a ban on several organisations including Rashtriya Swayamsevak Sangh [RSS], Vishva Hindu Parishad [VHP] Bajrang Dal which had along with BJP given a call for kar sevaks to march towards Ayodhya on 6th December, 1992. The ban order was issued on 10th December, 1992 under under the Unlawful Activities [Prevention] Act, 1967. The dismissal of the State Governments and the State Legislative Assemblies in Madhya Pradesh, Rajasthan and Himachal Pradesh were admittedly a consequence of these developments and were effected by the issuance of Proclamations under Article 356[1], all on the 15th December, 1992.

MADHYA PRADESH

C.A. Nos. 1692, 1692-A to 1692-C of 1993 & C.A. Nos. 4627-30 of 1993.

82. The Proclamation was a consequence of three reports sent by the Governor to the President. The first was of 8.12.1992. It referred to the fast deteriorating law and order situation in the wake of widespread acts of violence, arson and looting. He expressed his "lack of faith" in the ability of the State Government to stem the tide primarily because of the political leadership's "overt and covert support to the associate communal organisations" which seemed to point out that there was a break-down of the administrative machinery of the State. This report was followed by second report on 10.12.1992 which referred to the spread of violence to the other till then peaceful areas. Yet another report was sent by him on 13.12.1992 along with a copy of a letter dated 11.12.1992 received by him from the Executive Director, Bharat Heavy Electricals Ltd., Bhopal [BHEL]. This letter had referred to the total failure of the law and order machinery to provide safety and security

of life and property in the areas in and around the BHEL factory and the pressure brought on the Administration of the factory to accommodate the kar sevaks in the BHEL area. The Governor also referred to the statement of the Chief Minister of Madhya Pradesh, Shri Sunder Lal Patwa describing the ban of RSS and VHP as unfortunate. In view of the statement of the Chief Minister, the Governor expressed his doubt about the credibility of the State Government to implement sincerely the center's direction to ban the said organisations, particularly because the BJP leaders including the Chief Minister, Shri Patwa had always sworn by the values and traditions of the RSS. In this context, he also referred to the decision of the VHP to observe December 13th as blackday to protest against the ban and to observe protest week against the "heinous law" from 14th to 20th December, 1992. He expressed his anxiety that all these moves were fraught with danger in the context of the situation obtaining then. The Governor, therefore, recommended that considering the said facts and the fact that the RSS was contemplating a fresh strategy to chalk out its future plan, and also the possibility of the leaders of the banned organisations going underground, particularly with the connivance of the State Administration, the situation demanded immediate issuance of the Proclamation. Hence the Proclamation.

HIMACHAL PRADESH

T.C. No. 8 of 1993

83. The Proclamation issued by the President succeeded the report of the Governor of Himachal Pradesh which was sent to him on 15.12.1992. In his report the Governor had stated, among other things, that the Chief Minister and his Cabinet had instigated kar sevaks from Himachal Pradesh to participate in the kar seva on 6.12.1992 at Ayodhya. Not only that, but some of the Ministers had expressed their desire publicly to participate in kar seva if the party high-command permitted them to do so. As a result, a number of kar sevaks including some BJP MLAs participated in the kar seva at Ayodhya. A member of the Legislative Assembly belonging to the ruling BJP had also openly stated that he had participated in the demolition of the Babri Masjid. The Governor then added that Chief Minister, Shri Shanta Kumar had met him on 13.12.1992, i.e., two days before he sent the letter to the President, and had informed him "that he desired to implement the ban orders imposed by the Government of India on RSS, VHP and three other organisations and that he had already issued directions in that behalf. The Governor, however, opined that since the Chief Minister himself was a member of RSS, he was not in a position to implement the directions honestly and effectively and that most of the people in the State felt the same way. He also stated that some of the Ministers were publicly criticising the ban on the said three communal organisations and when the Chief Minister and some of his colleagues in the Ministry were members of the RSS, it was not possible for the administrative machinery to implement the ban honestly and effectively. It is on the basis of this report that the Proclamation in question was issued.

RAJASTHAN

T.C.No. 9 of 1993

84. The Presidential Proclamation was pursuant to the report of the Governor sent to the Prime Minister that Government of Rajasthan had played "an obvious role" in the episode at Ayodhya;

that the BJP had control over RSS, VHP and Bajrang Dal which were the banned organisations, and the ban was not being implemented at all. One of the Ministers had resigned and along with him, 22 MLAs and 15500 BJP workers had participated in the Kar seva at Ayodhya. They were given a royal send-off on their departure from the State and a royal welcome on their return by the influential people in the political party running the Government, i.e., BJP. For more than a week, the law and order situation had deteriorated and the dominant feature of the break- down of the law and order situation was the anti-minority acts. He opined that it was not possible for the Administration to function effectively, objectively and in accordance with the rule of law, in the then political set up and hence a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution.

85. The validity of the three Proclamations was challenged by writ petitions in the respective State High Courts. The writ petition challenging the Proclamations in respect of Madhya Pradesh Government and the Legislative Assembly was allowed by the High Court and the appeal against the decision of the High Court is preferred in this Court by the Union of India. By its order dated 16.4.93, the writ petitions challenging the Proclamations in respect of the Governments and the Legislative Assemblies of Rajasthan and Himachal Pradesh which were pending in the respective High Courts, stand transferred to this Court.

86. It is contended that the imposition of the President's rule in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh was mala fide, based on no satisfaction and was purely a political act. Mere fact that communal disturbances and/or instances of arson and looting took place is no ground for imposing the President's rule. Indeed, such incidents took place in several Congress (I) - ruled States as well as in particular, in the State of Maharashtra - on a much larger scale and yet no action was taken to displace those governments whereas action was taken only against BJP governments. It is pointed out that so far as Himachal Pradesh is concerned, there were no communal disturbances at all. There was no law and order problem worth the name. Even the Governor's report did not speak of any such incidents. The governments of Madhya Pradesh, Rajasthan and Himachal Pradesh, it is argued, cannot be held responsible for what happened at Ayodhya on December 6, 1992. For that incident, the Government of Uttar Pradesh had resigned owning responsibility therefore. It is also pointed out that according to the report of the Governor of Himachal Pradesh, the Chief Minister met him and indicated clearly that he was desirous of and was implementing the ban, and that some arrests were also made. In such a situation, there was no reason for the Governor to believe, or to report, that the Chief Minister is not sincere or keen to implement the ban on the said organisations. As a matter of fact, the Tribunal under Unlawful Activities (Prevention) Act, 1967, has declared the ban on RSS as illegal and accordingly the ban has since been revoked. The non-implementation of an illegal ban cannot be made the basis of action under Article 356. Assuming that there was such inaction or refusal, it cannot be made a ground for dismissing the State Government and for dissolving the Assembly. The White Paper now placed before the Court was not in existence on December 15, 1992. The manifestoes issued by the BJP from time to time cannot constitute the information referred to in the Proclamations- not, in any event, legally relevant material.

In the counter to the writ petition in the Madhya Pradesh High Court, the case of the Union of India inter alia, was that the Proclamation is issued on the satisfaction of the President that government of Madhya Pradesh cannot be carried on in accordance with the provisions of the

Constitution. The reports of the Governor disclosed that the State Government had miserably failed to protect the citizens and property of the State against internal disturbance. On the basis of the said reports, the President formed the requisite satisfaction. The Proclamation under Clause (1) has been approved by both Houses of Parliament. In such a situation the Court ought not to entertain the writ petition to scrutinise the wisdom or otherwise of the Presidential Proclamation or of the approval of the Parliament.

It was further contended that the circumstances in the State of M.P. were different from several other States where too serious disturbance to law and order took place. There is no comparison between both situations. "Besides Bhopal, over-all situation in the State of M.P. was such that there were sufficient and cogent reasons to be satisfied that the Government in the State could not be carried on in accordance with the provisions of the Constitution. It is denied that there was no law and order situation in the State." The Governor's reports are based upon relevant material and are made bona fide, and after due verification.

In the counter affidavit filed in the writ petition (T.C. 8/93) relating to Himachal Pradesh, it is stated that the events of 6th December, 1992 were not the handiwork of few persons. It is "the public attitude and statements of various groups and political parties including BJP which led to the destruction of the structure in question and caused great damage to the very secular fabric of the country and created communal discord and disharmony all over the country including Himachal Pradesh." It is stated that the repercussions of the event cannot be judged by comparing the number of persons killed in different States. It is asserted that the Council of Ministers and the President "had a wealth of material available to them in the present case which are relevant to the satisfaction formed under Article 356. They were also aware of the serious damage to communal amity and harmony which has been caused in the State of Madhya Pradesh, among others. They were extremely concerned with repercussions which events at Ayodhya might still have in the States" and "the ways and means to bring back normally not only in the law and order situation but also communal amity and harmony which had been so badly damaged as a result of the activities, attitude and stand of inter alia the party in power in the State." It is also stated that, according to the definite information available to the Government of India, members of the RSS were not only present on the spot at Ayodhya but actually participated in the demolition and they were responsible for promotion of communal disharmony. It is also asserted that the action was taken by the President not only on the basis of the report of the Governor but also on the basis of other information received by him.

In the Counter affidavit filed in the writ petition relating to Rajasthan (T.C. No. 9 of 1993), it is stated that after the demolition on 6th December, 1992, violence started in various parts of the country leading to loss of life and property. It is asserted that it is not possible to assess the law and order situation in different States only on the basis of casualty figures. The situation in each State has to be assessed differently. The averment of the petitioner that the State Government implemented the ban on RSS properly is denied. There is no requirement that the report of the Governor should be addressed to the President. It can also be addressed to the Prime Minister. Besides the report of the Governor, other information was also available on which the President had formed his satisfaction. The allegations of mala fide, capricious and arbitrary exercise of power are denied. The Presidential Proclamation need not contain reasons for the action, it is submitted. No irrelevant material was taken into consideration by the President.

The learned Counsel for Union of India and other counsel supporting the impugned Proclamations argued that the main plank and the primary programme of BJP was the construction of a Ram Temple at the very site where the Babri Masjid stood. The party openly proclaimed that it will remove - relocate, as it called it - the Babri Masjid structure since according to it the Babri Masjid was super-imposed on an existing Ram Temple by Emperor Babar. The party came to power in all the four States on the said plank and since then had been working towards the said goal. It has been the single goal of all the leaders of BJP, their Ministers, Legislators and all cadres. For this purpose, they had been repeatedly collecting kar sevaks from all corners at Ayodhya from time to time. In the days immediately preceding December 6, 1992, their leaders had been inciting and exhorting their followers to demolish the Babri Masjid and to build a temple there. The Ministers in Madhya Pradesh, Himachal Pradesh and Rajasthan had taken active part in organising and sending kar sevaks to Ayodhya. When the kar sevaks returned from Ayodhya after demolishing the Masjid, they were welcomed as heroes by those very persons. Many of the Ministers and Chief Ministers were members of RSS and were protesting against the ban on it. They could not, therefore, be trusted to enforce the ban, notwithstanding the protestations to the contrary by some of them. The counsel relied for the purpose upon the following facts to support there contentions:

In May/June, 1991, mid-term poll was held to Lok Sabha. The manifesto issued by the BJP on the eve of May/June, 1991 mid-term poll states that the BJP "seeks the restoration of Ram Janambhoomi in Ayodhya only by way of a symbolic righting of historic wrongs, so that the old unhappy chapter of acrimony could be ended, and a Grand National Reconciliation effected." At another place under the head "Sri Ram Mandir at Janmasthan", the following statement occurs: "BJP firmly believes that construction of Ram Mandir at Janmasthan is a symbol of the vindication of our cultural heritage and national self-respect. For BJP it is purely a national issue and it will not allow any vested interests to give it a sectarian and communal colour. Hence, the party is committed to build Shri Ram Mandir at Janmasthan by relocating super-imposed Babri structure with due respect." By themselves, the above statements may not mean that the programme envisaged unlawful or forcible demolition of the disputed structure. The said statements are also capable of being understood as meaning that the party proposed to vindicate their stand by constitutional means that the disputed structure was in fact the Ram Janmasthan which was forcibly converted into a mosque by Emperor Babar and that only thereafter they would relocate the said structure and build Shri Ram Temple at that site. However, the above statements when read in the light of the speeches and acts of the leaders of the BJP., give room for another interpretation as well. Those facts are brought out in the "White Paper on Ayodhya" issued by the Government of India in February, 1993. They are as follows: A movement to construct the Shri Ram Temple at the site of the disputed structure by removing or relocating it gathered strength in recent years. A determined bid to storm the structure in October/November, 1990 resulted in some damage to the structure and loss of lives as a result of police firing. The Central Government was negotiating with various parties and organisations for a peaceful settlement of the issue. However, a new dimension was added to the campaign for construction of the temple with the formation of the Government in Uttar Pradesh in June, 1991. The Government declared itself committed to the construction of the temple and took certain steps like the acquisition of land adjoining the disputed structure, demolition of certain other structure, including temples standing on the acquired land, and digging and levelling of a part of the acquired land. The disputed structure itself was left out of the acquisition. The plan of the proposed temple released by the VHP envisaged location of the sanctum sanctorum of the temple at the very site of the disputed structure. The Union Government

was concerned about the safety of the structure. But at the meeting of the National Integration Council held on November 2, 1991, the Chief Minister of Uttar Pradesh, Shri Kalyan Singh, undertook to protect the structure and assured everybody there that it is the responsibility of the State Government to protect the disputed structure and that no one would be allowed to go there. He also undertook that all the orders of the Court will be faithfully implemented. In July 1992, a large number of kar sevaks gathered on the acquired land and proposed to start the construction. The situation was averted and kar seva was called off on July 26, 1992. The BJP decided to re-enact the Rath Yatra by Sri L.K. Advani and Shri M.M. Joshi on the pattern of 1990 Rath Yatra with the objective of mobilising people and kar sevaks for the construction of Shri Ram Temple. Shri Advani said that they have now plunged into the temple movement in full strength. The leaders of the BJP were acting in concert with VHP, RSS and allied organisations. The Rath Yatras started on December 1, 1992. Shri Advani started from Varanasi and Shri Joshi from Mathura. The starting points had their own sinister significance for the future demands and programmes for restoration of the temples at both these places. Both the leaders travelled through eastern and western parts of Uttar Pradesh and reached Ayodhya. During their Yatra, both these leaders gave provocative speeches and mobilised kar sevaks and asked their workers and people to reach Ayodhya in large numbers to perform kar seva. Shri L.K. Advani, during the Rath Yatra, kept constantly appealing to the kar sevaks to take the plunge and not bother about the survival of the Kalyan Singh Government. He also kept saying that kar seva in Ayodhya would not remain restricted to "bhajan or kirtan" but would involve physical labour. Shri Joshi, during the Rath Yatra, maintained that the BJP Government in U.P. would not use force against the kar sevaks in Ayodhya and that the nature of kar seva would be decided by Sants/Mahants and the RJB-BM issue was a religious matter which can be solved only by the Dharmacharyas but not by the Supreme Court. He threatened of serious consequences if the BJP Government in U.P. was dismissed. On 1st December, 1992, Shri Joshi appealed to the gathering [at Mathura] to assemble at Ayodhya in large numbers for kar seva and demolish the so-called Babri Masjid. Smt. Vijayaraje Scindia, another leader of the BJP stated at Patna on November 23, 1992 that the Babri Masjid will have to be demolished. Shri V.H. Dalmiya, a leader of VHP declared on November 9, 1992 at Delhi that the RJB Temple would be constructed in the same way it was demolished by Babar. He stated that Kar sevaks were pressuring the leadership the they should be called not to construct the RJB Temple but to demolish the masjid. As early as 1st December, 1992, 25,000 kar sevaks had reached Ayodhya. By 5th December, their number crossed two lacs. Arrangements were made for their accommodation in tents, schools and colleges and even in the open near the disputed structure. The local Administration stepped up its efforts to increase civic amenities in view of the arrival of kar sevaks in such large numbers.

The Central Government had posted paramilitary forces at Ayodhya to meet any eventuality and to be ready for any assistance that the local Administration or the BJP Government may ask for. Instead of utilising the services of the said forces, the Chief Minister of Uttar Pradesh had been protesting to the Central Government about the camping of the said forces at Ayodhya. In his letter dated 1st December, 1992 addressed to the Prime Minister, Sri Kalyan Singh recorded his protest about the continued presence of the said forces at Ayodhya, termed it as unauthorised and illegal on the ground that they were stationed there without the consent and against the wishes of the State Government.

On December 6, 1992, while the crowd of kar sevaks was being addressed by leaders of the BJP, VHP etc., roughly 150 persons in a sudden move broke through the cordon on the terrace, regrouped and started pelting stones at the police personnel. A large crowd broke into the dispute structure. The mob swelled enormously within a short time and started demolishing the structure. The local police stood by as mute spectators since they were under orders of the Chief Minister not to use force against the kar sevaks. The Central forces were equally helpless since they were not allowed to intervenes by the local Magistrate on the spot.

It was also emphasised that according to the statement of the Union Home Minister made in Rajya Sabha on December 21, 1992, "all these kar sevaks, when they returned, were received by the Chief Ministers and Ministers,.

Relying on these facts and events, it was contended that what happened on December 6, 1992 did not happen in a day. It was the culmination of a sustained campaign carried on by the BJP and other allied organisations over the last few years. It was then pointed out that in the manifesto issued by the BJP in connection with the 1993 General Elections, there is not a word of regret about what happened on December 6, 1992. On the contrary, the following statement occurs there under the heading "Ayodhya".

Ayodhya

In their actions and utterances, the forces of pseudo-secularism convey the unmistakable impression of a deep repugnance for all things Hindu. Indeed, in their minds "Hindu" has come to be associated with "communal". The controversy over the Ram Janmabhoomi temple in Ayodhya is a powerful illustration of this phenomenon. For them "Sahmat" is secular and "Saffron" communal. Although the facts of the dispute are well known, certain features merit repetition. First, it was always apparent that a vast majority of Hindus were totally committed to the construction of a grand temple for Lord Rama at the site where puja has been performed uninterruptedly since 1948 and where besides, no namaz has been offered since 1936. The structure build by the Moghul Emperor Babur was viewed by the Hindus as a symbol of national humiliation.

Second, the election of 1991 in Uttar Pradesh centerd on the Ayodhya dispute. It was a virtual referendum on Ram Janmabhoomi and the BJP with its promise to facilitate the construction of the Ram Temple won the election. However, this update did not prevent the Congress and other pseudo-secular parties from wilfully obstructing the initiatives of the Uttar Pradesh government. Everything, from administrative subterfuge to judicial delay, was used by the opponents of the temple to prevent the BJP government from fulfilling its promise to the electorate.

On December 6, 1992 kar sevaks from all over India assembled in Ayodhya to begin the reconstruction of the Rama Temple at the site adjoining the garbha griha. Matters took an unexpected turn when, angered by the obstructive tactics of the Narasimha Rao government, inordinate judicial delays and pseudo-secularist taunts, the kar sevaks took matters into their own hands, demolished the disputed structure and constructed a makeshift temple for Lord Rama at the garbha griha.

Owning responsibility for its inability to prevent the demolition, the BJP-government headed by Shri Kalyan Singh submitted its resignation. A disoriented Central government was not content with the imposition of President's rule in Uttar Pradesh. In violation of democratic norms, the center dismissed the BJP governments in Rajasthan, Madhya Pradesh and Himachal Pradesh. Further, it banned the Rashtriya Swayamsevak Sangh, Vishwa Hindu Parishad and Bajrang Dal.

Worst of all, in collusion with other rootless forces the government unleashed a vicious propaganda offensive aimed at belittling the Hindus. The kar sevaks were denigrated as fascists, lumpens and vandals, and December 6, was described as a "national shame". Recently, the CBI has filed chargesheets against leaders of the BJP and the Vishwa Hindu Parishad with the purpose of projecting them as criminals.

This relentless onslaught of the pseudo-secular forces against the people of India had very serious consequences. For a start, it created a wide emotional gulf between the rulers and the people. Ayodhya was a popular indictment of the spurious politics of double-standards. Far from recognising it as such, the Congress and other anti-BJP parties used it as a pretext for furthering the cause of unprincipled minorityism.

It is this minorityism that prevents the Congress, Janata Dal, Samajvadi Party and the Communist Parties from coming out with an unambiguous declaration of intent on Ayodhya. This BJP is the only party which is categorical in its assurance to facilitate the construction of the Rama Temple at the site of the erstwhile Babri structure. This is what the people desire.

The further submission was that the demolition of the disputed structure was the outcome of the speeches, programme and the several campaigns including Rath Yatras undertaken by the leaders of the BJP. It is neither possible nor realistic to dissociate the Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh from the acts and deeds of their party. It is one party with one programme. It is stated in the report of the Himachal Pradesh Governor that the Chief Minister himself was a member of the RSS. In the report of the Governor of Madhya Pradesh also, it is stated that the Chief Minister and other ministers swore by the values and traditions of the RSS. The reports also indicate that these governments actively participated in organising and despatching the kar sevaks to Ayodhya and welcomed them and praised when they came back after doing the deed. Thus, a common thread runs through all the four BJP Governments and binds them together. The manifestoes of the party on the basis of which these Governments came to power coupled with their speeches and actions clearly demonstrate a commonness, and unity of action between the party and the four Governments. The very manifestoes and their programme of action were such as to hurt the religious feelings of the Muslim Community. The demolition of the disputed structure was no ordinary event. The disputed structure had become the focal point, and the bone of contention between two religious communities. The process which resulted in the demolition and the manner in which it was perpetrated, dealt a serious blow to the communal harmony and peace in the country. It had adverse international repercussions as well. A number of Hindu temples were demolished in Pakistan and Bangladesh in reprisal of the demolition at Ayodhya. It was difficult in this situation for the minorities in the four States to have any faith in the neutrality of the four Governments. It was absolutely necessary to recreate a feeling of security among them. They required to be assured of the safety and security of their person and property. This was not possible with the BJP Governments in power.

It was also stressed that the Chief Ministers of Himachal Pradesh and Madhya Pradesh were the members of the banned RSS in such circumstances, the respective Governors were rightly of the view that the said Chief Ministers could not be expected to, or relied upon to implement the ban sincerely. Hence it could not be said to be an unfounded opinion. Allowing a party which had consciously and actively brought about such a situation to continue in office in these circumstances would not have helped in restoring the faith of people in general and of the minorities in particular. It is no answer to say that disturbance took place on a much larger scale in certain States ruled by Congress (I) party and that no action was taken against those Governments.

In reply to these contentions, the counsel for the petitioners submitted that if the reasoning of the counsel for the Union of India was accepted, it would mean that BJP cannot form government in any State and the party has to be banned and that the acceptance of such submissions would create a serious political situation. They also pointed out that the majority judgment of the two judges of the Madhya Pradesh High Court had quashed the Proclamation taking the view that it was not possible to accept that failure on the part of the State Government to save the lives and properties of citizens in a few cities in the State as a result of sudden outbreak of violence could reasonably lead to the satisfaction of the President that the Government was unable to function in accordance with the Constitution and, therefore, the consequent dissolution of the Assembly was also bad in law.

87. The gist of the contentions of the petitioners was that a mere disturbance in some parts of Madhya Pradesh and Rajasthan involving the loss of some lives and destruction of some property did not amount to a situation where it could be said that the Governments of those States could not be carried on in accordance with the provisions of the Constitution. Further, the fact that the ministries of these States belonged to BJP whose one of the political planks in the election manifesto was the construction of Shri Ram Temple at the site of the mosque by relocating the mosque somewhere else, did not amount to an act to give rise to the apprehension that the Ministries of that party were infidel to the objective of secularism enshrined in the Constitution. So also, the pursuit of the programme of constructing the temple on the site of the mosque by relocating the latter elsewhere, by speeches and by exhorting the kar sevaks to assemble at Ayodhya on 6th December, 1992 and by giving them a warm send-off for the purpose did not amount to a deviation form the creed of secularism nor did the welcome to the kar sevaks in the State after the destruction of the mosque or the inaction of the leaders of the BJP present at the site in preventing the kar sevaks from destroying the mosque or want of the expression of regret on their part over such destruction amount to a breach of the goal of secularism. A mere continuance in office of the Ministries which were formed on the said political plank in the aftermath of the destruction of the mosque by itself could not further have led to the feelings of insecurity in the minds of the Muslims when the State Governments of Rajasthan and Madhya Pradesh could not be said to be remiss in taking all necessary actions to prevent riots and violence and when there was no incident of violence or destruction in Himachal Pradesh. As against this, the sum and substance of the contentions on behalf of the Union of India and others supporting the Proclamations in these States was that the Ministries heading the administration in these States could not be trusted to adhere to secularism when they had admittedly come to power on the political plank of constructing Shri Ram Mandir on the site of the mosque by relocating the mosque elsewhere which meant by destroying it and then reconstructing it at other place. This was particularly so, when by its actual deed on 6th December, 1992, the party in question demonstrated

what they meant by their said political manifesto. It was facile thereafter to contend that the party only wanted to follow the constitutional means to pursue the goal of constructing the Ram Temple on the said site. The destruction of mosque was a concrete proof of the creed which the party in question wanted to pursue.

In such circumstances, the Ministries formed by the said party could not be trusted to follow the objective of secularism which was part of the basic structure of the Constitution and also the soul of the Constitution.

88. These contentions inevitably invite us to discuss the concept of secularism as accepted by our Constitution. Our Constitution does not prohibit the practice of any religion either privately or publicly. Through the Preamble of the Constitution, the people of this country have solemnly resolved to constitute this country, among others, into a secular republic and to secure to all its citizens [i] JUSTICE, social, economic and political; [ii] LIBERTY of thought, expression, belief, faith and worship; [iii] EQUALITY of status and of opportunity; and [iv] to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation. Article 25 of the Constitution guarantees to all persons equally the freedom of conscience and the right freely to profess, practice and propagate religion subject to public order, morality and health and subject to the other Fundamental Rights and the State's power to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. Article 26 guarantees every religious denomination or any section thereof the right [a] to establish and maintain institutions for religious and charitable purposes, [b] to manage its own affairs in matters of religion, [c] to own and acquire movable and immovable property and [d] to administer such property in accordance with law. Article 29 guarantees every section of the citizens its distinct culture, among others. Article 30 provides that all minorities based on religion shall have the right to establish and administer educational institutions of their choice. It prohibits the State from making any discrimination in granting aid to an educational institution managed by a religious minority. Under Articles 14, 15 and 16, the Constitution prohibits discrimination against any citizen on the ground of his religion and guarantees equal protection of law and equal opportunity of public employment. Article 44 enjoins upon the State to endeavour to secure to its citizens a uniform civil code. Article 51A casts a duty on every citizen of India, among others, [a] to abide by the Constitution and respect its ideals and institutions, [b] to promote harmony and the spirit of common brotherhood, among all the people of India, transcending, among others, religious and sectional diversities, [c] to value and preserve the rich heritage of our composite culture, [d] to develop scientific temper, humanism and the spirit of inquiry and reform; and [e] to safeguard public property and to abjure violence.

These provisions by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations.

As has been explained by Shri M.C. Setalvad, [Patel Memorial Lecturer - 1965 on Secularism], "secularism often denotes the way of life and conduct guided by materialistic considerations devoid of religion. The basis of this ideology is that material means alone can advance mankind and that religious beliefs retard the growth of the human beings...this ideology is of recent growth

and it is obvious that it is quite different from the concept of Secular State in the West which took root many centuries ago..."

"A different view in relation to religion is the basis of 'secularism' understood in the sense of what may be called a "secular attitude" towards life. Society generally or the individual constituting it tend progressively to isolate religion from the more significant areas of common life. Many of us, Hindus and Muslims and others, are in our way of life, and outlook on most matters largely governed by ideas and practices which are connected with or are rooted in our religion. The secular attitude would wean us away from this approach so that in our relations with our fellow-beings or in dealings with other social groups, we have less and less regard for religion and religious practices and base our lives and actions more on worldly consideration, restricting religion and its influence to what has been called its "proper" sphere, i.e., the advancement of the spiritual life and well-being of the individual. Secularism of this character is said to be essential to our progress as human beings and as a nation because it will enable us to shake off the narrow and restrictive outlook arising out of castism, communalism and other life ideas which come in the way of our development".

"...the concept of a Secular State is quite distinct from 'secularism' of the kinds we have adverted to above....No doubt, the two concepts are interdependent in the sense that it is difficult to conceive of a society or a group of individuals being induced to adopt a secular philosophy or a secular attitude without the aid of a Secular State."

"A secular State is not easy to define. According to the liberal democratic tradition of the West, the secular State is not hostile to religion but holds itself neutral in matters of religion...." Thereafter, referring to the Indian concept of secularism, the learned jurist stated as follows: "...the secularist way of life was repeatedly preached by leaders of movement so that religious matters came to be regarded entirely as relating to the conscience of the individuals...."

"The coming of the partition emphasised the great importance of secularism. Notwithstanding the partition, a large Muslim minority consisting of a tenth of the population continued to be the citizens of independent India. There are other important minority groups of citizens. In the circumstances, a secular Constitution for independent India under which all religions could enjoy equal freedom and all citizens equal right and which could weld together into one nation, the different religious communities, became inevitable." Thereafter, the learned jurist has gone on to point out that our Constitution undoubtedly lacks a complete separation between the church and the State as in the United States and at the same time, we have no established church as in Great Britain or some other countries, In our country, all religions are placed on the basis of equality and it would, therefore, seem that it is erroneous to describe our country as a secular State. He quoted Dr. Radhakrishnan who said that "the religious impartiality of the Indian State is not to be confused with secularism or atheism. He also pointed out that the proceedings of the Constituent Assembly show that "two attempts made to introduce the word "secular" in the Constitution had failed...."At the same time, he asserted that"...nevertheless, it could not be said that the Indian State did not possess some important characteristics of a secular State" and has pointed out some of the provisions of the Constitution to which we have already made a reference above. He has then stated that the ideal of a secular State in the sense of a State which treats all religions alike and displays benevolence towards them is in a way more suited to the Indian environment and climate

than that of a truly secular State by which he meant a State which creates complete separation between religion and the State. Justice Chinnapga Reddy, delivering his Ambedkar Memorial lecture on 'Indian Constitution and Secularism' has observed that "...Indian constitutional secularism is not supportive of religion at all but has adopted what may be termed as permissive attitude towards religion out of respect for individual conscience and dignity. There, even while recognising the right to profess and practice religion etc., it has excluded all secular activities from the purview of religion and also of practices which are repugnant to public order, morality and health and are abhorrent to human rights and dignity, as embodied in the other fundamental rights guaranteed by the Constitution."

One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited.
This is evident from the provisions of the Constitution to which we have made reference above. The State's tolerance of religion or religions does not make it either a religious or a theocratic State. When the State allows citizens to practice and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State. This is also clear from Sub-section [3] of Section 123 of the Representation of the Peoples Act, 1951 which prohibits an appeal by a candidate or his agent or by any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of or appeal to religious symbols. Sub-section [3A] of the same section prohibits the promotion or attempt to promote feelings of enmity and hatred between different classes of the citizens of India on the grounds of religion, race, caste community or language by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate. A breach of the provisions of the said Sub-sections [3] and [3A] are deemed to be corrupt practices within the meaning of the said section.

Mr. Ram Jethmalani contended that what was prohibited by Section 123[3] was not an appeal to religion as such but an appeal to religion of the candidate and seeking vote in the name of the said religion. According to him, it did not prohibit the candidate from seeking vote in the name of a religion to which the candidate did not belong. With respect, we are unable to accept this contention. Reading Sub-sections [3] and [3A] of Section 123 together, it is clear that appealing to any religion or seeking votes in the name of any religion is prohibited by the two provisions. To read otherwise is to subvert the intent and purpose of the said provisions. What is more, assuming that the interpretation placed by the learned Counsel is correct, it cannot the content of secularism which is accepted by and is implicit in our Constitution.

89. In view of the content of secularism adopted by our Constitution as discussed above, the question that poses itself for our consideration in these matters is whether the three Governments when they had to their credit the acts discussed above, could be trusted to carry on the governance of the State in accordance with the provisions of the Constitution and the President's satisfaction

based on the said acts could be challenged in law. To recapitulate, the acts were [i] the BJP manifesto on the basis of which the elections were contested and pursuant to which elections the three Ministries came to power stated as follows:

BJP firmly believes that construction of Shri Ram Mandir at Janmasthan is a symbol of the indication of our cultural heritage and national self-respect. For BJP it is purely a national issue and it not allow any vested interest to give it a sectarian and communal colour. *Hence party is committed* to build Shri Ram Mandir at Janmasthan by relocating superimposed Babri structure with due respect.

class ="rightAlign"> [Emphasis supplied]

[ii] Leaders of the BJP had consistently made speeches thereafter to the same effect. [iii] Some of the Chief Ministers and Ministers belonged to RSS which was a banned organisation at the relevant time. [iv] The Ministers in the Ministries concerned exhorted people to join kar seva in Ayodhya on 6th December, 1992. One MLA belonging to the ruling BJP in Himachal Pradesh made a public statement that he had actually participated in the destruction of the mosque. [v] Ministers had given public send-off to the kar sevaks and had also welcomed them on their return after the destruction of the mosque. [vi] The implementation of the policy pursuant to the ban or the RSS was to be executed by the Ministers who were themselves members of the said organisation. [vii] At least in two States, viz., Madhya Pradesh & Rajasthan there were atrocities against the Muslims and loss of lives and destruction of property.

As stated above, religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. It is our cardinal faith. Any profession and action which go counter to the aforesaid creed are a prima facie proof of the conduct in defiance of the provisions of our Constitution.
If, therefore, the President had acted on the aforesaid "credentials" of the Ministries in these States which had unforeseen and imponderable cascading consequences, it can hardly be argued that there was no material before him to come to the conclusion that the Governments in the three States could not be carried on in accordance with the provisions of the Constitution. The consequences of such professions and acts which are evidently against the provisions of the Constitution cannot be measured only by what happens in praesentia. A reasonable prognosis of events to come and of their multifarious effects to follow can always be made on the basis of the events occurring, and if such prognosis and led to the conclusion that in the circumstances, the governments of the States could not be carried on in accordance with the provisions of the Constitution, the inference could hardly be faulted. We are, therefore, of the view that the president had enough material in the form of the aforesaid professions and acts of the responsible section in the political set up of the three States including the Ministries to form his satisfaction that the Governments of the three States could not be carried on in accordance with the provisions of the Constitution. Hence the Proclamations issued could not be said to be invalid.

90. The appeals filed against the judgment of the Madhya Pradesh High Court have, therefore, to be allowed and the Transfer Cases challenging the Proclamation, have to be dismissed.

SUMMARY OF CONCLUSION:

91. Our conclusions, therefore, may be summarised as under:

I. The validity of the Proclamation issued by the President under Article 356[1] is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the mala fide exercise of the power. When a prima facie case is made out in the challenge to the Proclamation, the burden is on the Union Government to prove that the relevant material did in fact exist. Such material may be either the report of the Governor or other than the report.

II. Article 74[2] is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.

III. When the President issues Proclamation under Article 356[1], he may exercise all or any of the powers under Sub-clauses [a], [b] and [c] thereof. It is for him to decide which of the said powers he will exercise, and at what stage, taking into consideration the exigencies of the situation.

IV. Since the provisions contained in Clause [3] of Article 356 are intended to be a check on the powers of the President under Clause [1] thereof, it will not be permissible for the President to exercise powers under Sub-clauses [a], [b] and [c] of the latter clause, to take irreversible actions till a least both the Houses of Parliament have approved of the Proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly by using the powers of the Governor under Article 174[2][b] read with Article 356[1][a] till at least both the Houses of Parliament approve of the Proclamation.

v. If the Proclamation issued is held invalid, then notwithstanding the fact that it is approved by both Houses of the Parliament, it will be open to the Court to restore the status quo ante to the issuance of the Proclamation and hence to restore the Legislative Assembly and the Ministry.

VI. In appropriate cases, the Court will have power by an interim injunction, to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the proclamation to avoid the fait accompli and the remedy of judicial review being rendered fruitless. However, the Court will not interdict the issuance of the Proclamation or the exercise of any other power under the Proclamation.

VII. While restoring the status quo ante, it will be open for the Court to mould the relief suitable and declare as valid actions taken by the President till that date. It will also be open for the Parliament and the Legislature of the State to validate the said actions of the President.

VIII. Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

IX. The Proclamations dated 21.4.1989 and 11.10.1991 and the action taken by the president in removing the respective Ministries and the Legislative Assemblies of the State of Karnataka and the State of Meghalaya challenged in Civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 & 7 of 1992 respectively are unconstitutional. The Proclamation dated 7.8.1988 in respect of State of Nagaland is also held unconstitutional. However, in view of the fact that fresh elections have since taken place and the new Legislative Assemblies and Ministries have been constituted in all the three States, no relief is granted consequent upon the above declarations. However, it is declared that all actions which might have been taken during the period the proclamation operated, are valid. The Civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 & 7 of 1992 are allowed accordingly with no order as to costs. Civil Appeal Nos. 193-94 of 1989 are disposed of by allowing the writ petitions filed in the Guahati High Court accordingly but without costs.

X. The proclamations dated 15th December, 1992 and the actions taken by the President removing the Ministries and dissolving the Legislative Assemblies in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to the said Proclamations are not unconstitutional. Civil Appeals No. 1692, 1692A-1692C, 4627-30 of 1993 are accordingly allowed and Transfer Case Nos. 8 & 9 of 1993 are dismissed with no order as to costs.

K. Ramaswamy, J.

92. The appeals and transferred cases raise questions of far-reaching consequences in the working of the federal structure under the Constitution of India. Whether the President of India can keep fiddling like Emperor Nero while Roma was burning or like Hamlet, Prince of Denmark of Shakespear keep the pendulum oscillating between "to be or not to be" for the issuance of the proclamation under Article 356 of the Constitution dismissing the State Government and dissolving the State Legislatures and to bring the administration of the State under his rule. If he so acts, the scope and width of the exercise of the power and parameters of judicial review, by this Court, as centennial qui vive, under Article. 32 or Article. 136 or High Court under Article 226 to consider the satisfaction, reached by the President under Article 356: When the actions of one State Government found seismic vibrations in other states governed by the same political party, (in the language of S/Sri Parasaran and P.P. Rao, learned senior counsel, 'common thread rule' are also liable to be brought under the President Rule need to be critically examined and decided for successful working of the democratic institutions set up by the suprema lex. Though the need to decide these questions practically became academic due to conducting elections to the State Assemblies and the new legislative assemblies were constituted in the States of U.P., Rajasthan, Madhya Pradesh and Himachal Pradesh, all the counsel requested us to decide the questions regardless of the relief to be granted in this case. As stated earlier since the decision on these questions is of paramount importance for successful working of the Constitution, we acceded to their prayer.

93. In S.R. Bhommai's appeal the facts are that on March 5, 1985 elections held to the Karnataka State Legislative Assembly and the Janta Dal won 139 seats out of 225 seats and the Congress Party was the next largest party securing 66 seats. Sri R.K. Hedge was elected as the leader of Janta Dal and became the Chief Minister. Due to his resignation on August 12, 1988, Sri S.R. Bhommai's was elected as leader of the party and became the Chief Minister. As on February 1, 1989 the strength of Janta Dal was 111 and the Congress was 65 and Janta Party was 27, apart

from others. On April 15, 1989 his expanding the Ministry caused dissatisfaction to some of the aspirants. One Kalyan Molakery and others defected form Janta Dal and he wrote letters on April 17 and 18, 1989 to the Governor enclosing the letters of 19 others expressing want of confidence in Sri Bhommai. On April 19, 1989 the Governor of Karnataka sent a report to the President. On April 20, 1989, 7 out of 19 M.L.As. that supported Kalyan Molakery, wrote to the Governor that their signatures were obtained by misrepresentation and reaffirmed their support to Sri Bommai. On the same day the cabinet also decided to convene the Assembly session on April 27, 1989 at 3.30 P.M. to obtain vote of confidence and Sri Bommai met the Governor and requested him, to allow floor test to prove his majority and he was prepared even to advance the date of the session. In this scenario the Governor sent his second report to the President and exercising the power under Article. 356 the President issued proclamation, dismissed Bhommai Government and dissolved the Assembly on April 21, 1989 and assumed the administration of the State of Karnataka. When a writ petition was filed on April 26, 1989, a special bench of three Judges of the High Court of Karnataka dismissed the writ petition (reported in S.R. Bhommai and Ors. v. Union of India AIR (1990) Kar 5. Thus this appeal by special leave.

94. In the elections held in February 1990, the Bhartiya Janta party, for short BJP, emerged as majority party in the legislative assemblies of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh and formed the Governments in the respective states. Due of the programmes of the B.J.P. was to construct a temple for Lord Sri Rama at his birth place Ayodhya. That was made an issue in its manifesto for the elections to the legislative assemblies. On December 6, 1992 Ram Janambhoomi Babri Masjid Structure (there is a dispute that after destroying Lord Sri Rama temple Babar, the Moghal invader, built Babri Masjid at the birth place of Lord Sri Rama, it is an acutely disputed question as to its correctness. However Ram Janambhoomi Babri Masjid structure was demolished by the Kar Sewaks gathered at Ayodhya, as a result of sustained momentum generated by BJP, Vishwa Hindu Parishad for short VHF, Rashtriya Swayamsewak Sangh, for short RSS. Bajrang Dal for short BD. Shiv Sena for short SS and other organisations. Preceding thereto when the dispute was brought to this Court, the Govt. of India was made to act on behalf of the Supreme Court and from time to time directions were issued to the State Government who gave an assurance of full protection to Sri Ram Janambhoomi Babari Masjid Structure. On its demolition though the Govt. of Uttar Pradesh, resigned, the President of India by proclamation issued under Article. 356 dissolved the state legislature on December 6, 1992. The disastrous fall out of the demolition was in the nature of loss of precious lives of innocents, and property throughout the country and in the neighbouring countries. The President, therefore, exercised the power under Article. 356 and by the proclamations of December 15, 1992, dismissed the State Governments and dissolved the legislative assemblies of Rajasthan Madhya Pradesh and Himachal Pradesh and assumed administration of the respective states.

95. Sri Soli Sorabjee, the learned senior counsel appearing for Sri Bommai contended that power of the President under Article. 356 is not unfettered nor unlimited; its exercise is dependent upon the existence of the objective fact, namely a situation has arisen in which the Govt. of the State cannot be carried on in accordance with the provisions of the Constitution. This condition precedent is sine quo non to exercise the power and issuance of the proclamation under Article. 356. The proclamation must set forth the grounds and reasons for reaching the satisfaction supported with the materials or the gist of the events in support thereof. The grounds and reasons should be cogent and credible and must bear proximate nexus to the exercise of the power under

Article. 356. The break down of the constitutional machinery is generally capable of objective determination. The power under Article 356 cannot be exercised on the basis of the report of the Governor or otherwise of an inefficient or malfunctioning of the Government or mere violation of some provisions of the constitutions. It could be exercised only when the Govt. misuses its power contrary to the basic scheme and purpose of the Constitution or for its inability to discharge its basic constitutional duties and functions due to political or economic crises which have led to completely paralysing the State administration.

96. The federal character of the Constitution carries by its implication an obligation to exercise the power under Article 356 only when there is a total break down of the administration of the State. In interpretating Article 356 the Court should need in view the legislative and constitutional history of Article 356 and corresponding provisions of Government of India Act 1935. The exercise of the power under Article 356 impinges upon federalism and visits with great political consequences. Therefore, court should exercise the power of judicial review and interdict and restrict wide scope of power under Article 356. The scope of judicial review would be on the same or similar grounds on which the executive action of the state is challengeable under constitutional or administrative law principles evolved by this court, namely non-compliance with the requirements of natural justice, irrational or arbitrary, perverse, irrelevant to the purpose or extraneous grounds weighed with the President, misdirection in law or mala fide or colorable exercise of power, on all or some of the principle. The Petitioner has to satisfy the court only prima facie that the proclamation is vitiated by any one or some of the above grounds and burden then shifts on the Council of Ministers to satisfy the Court of the legality and validity of the Presidential proclamation issued under Article 356. The prohibition of Article 74(2) has to be understood and interpreted in that background. The legal immunity under Article 74(2) must be distinguished from the actions done by the President in discharge of his administrative functions under Article 356. The executive cannot seek shelter under "or other information" mentioned in Article 356(1) as an embargo under Article 361 to state reasons or as a shield to disclose all the materials in their custody preventing court to exercise judicial review. Only the actual advice or part of the advice tendered by the Minister or Council of Ministers alone would be beyond the ken and scrutiny of judicial review. The administrative decision taken by the Council of Ministers is entirely different from the advice rendered to the President, and the later cannot be equated with the grounds or the reasons for presidential proclamation. The former are not part of the advice tendered to the President by the Council of Ministers.

97. Sri Shanti Bhushan, learned senior counsel, while adopting the above contentions argued that the exercise of the power under Article 356 must be regarded as arbitrary when there was no constitutional break down. Every act of the Stats Govt. cannot be regarded as violation of the provisions of the Constitution or constitutional break down. The power under Article 356 must be exercised only when there was actual break down of the constitutional machinery and not mere opinion in that behalf of the Council of Ministers. The Govt., to justify its action, must place all relevant materials before the Court and only when court is satisfied that the cases relate to actual break down of the constitutional machinery in the State the proclamation may be upheld. The burden of proof is always on the Government to establish the validity or legality of the proclamation issued under Article 356. Sri Ram Jethmalani tracing historical evidence from the debates that took place on the floor of the constituent assembly, contended that the keywords for construction are "cannot be carried on" and "failure of machinery". The provisions of Article 356

would be strictly construed so as to preserve the federal character of the constitution. The State is a sovereign and autonomous entity in its own field and intervention by the center would be permissible only when there is no other way for the center to perform its duties under Article 356 It cannot be invoked for the sake of good governance of the State or to prevent misgovernance of the State. The words "cannot be carried on" are not to be confused with and are vitally different from the words "is not being carried on." The significance of the keyword gets accentuation from the marginal note of the Article "failure of the constitutional machinery" and the Legislative history of Sections 45 and 93 of the Government of India act must be kept in view for proper construction of Article 356. According to the learned Counsel, Article 356 gives an indication that extreme step of proclamation under Article 356 could be invoked sparingly only when all the alternatives are exhausted. Secularism part of the preamble is not a part of the Constitution and Religion is fundamental right to every citizen who composes of a political party. The election law prohibits election prospects on religious grounds if the other candidate's religion is attacked. It cannot be tested on vague secularism nor be buttressed into religion right at particular to a political party. There is no pleading founded by factual base in these cases that BJP had used Hindutva as a ground, or criticised Islamic faith. It used in its manifesto the need for construction of Sri Ram Temple at his birth place by demolishing Babri Masjid with most respectful and dignified language. Even otherwise Section 29A and 123(3A) of R.P. Act. are ultra vires of Article 25. The consistent view of this Court that corrupt practice on grounds of religion is only of the other candidate and not of the petitioner much more so to a political party. Sri K. Parasanan, learned senior counsel for the Union and Sri P.P. Rao, learned Counsel for the State of Madhya Pradesh refuted the contentions.

98. The crux of the question is the width of the President's power under Article 356. It finds its birth from a family of emergency provisions in Part XVIII of the Constitution. Article 355 imposes duty on the Union to protect States against external aggression and internal disturbance and to ensure that Govt. of every State is carried on in accordance with the provisions of the Constitution. As a corollary when the Government of the State is not being carried or in accordance with the provisions of the Constitution, a constitutional duty and responsibility is put on the Union to set it right. The foundational factual metrics is the report of the governor or other information in possession of the union received otherwise to reach a satisfaction that a situation has arisen for the intervention by the Union of India. Then comes the exercise of the power under Article 356 by the President. On the receipt of a report from the Governor of a State or otherwise if the President (the Council of Ministers with Prime Minister as its head) is satisfied that a situation has arisen in which the Govt. of a State cannot be carried on in accordance with the provisions of the Constitution, the President may by proclamation: (a) assume to himself all or any of the function of the Govt. of the State and all or any of the power vested in or exercised by the Governor or any body or authority in the State other than the Legislature of the State; (b) declare that the powers or the Legislature of the State shall be exercisable by or under the authority of Parliament; (c) make such incidental or consequential provisions as appear to the President to be necessary or desirable for given effect to the objects of the proclamation including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authorities in the State. By operation of the proviso to Clause I of Article 356, the President shall not assume to himself any of the powers vested in or exercisable by a High Court or to suspend in whole or in part the operation of any provisions for the Constitution relating to High Courts.

99. Clause 2 of Article 356 controls the President's exercise of power, if the proclamation is not revoked or varied by a subsequent proclamation in other words, the President, through the Council of Ministers have been given full play to reconsider the question and may revoke it before the Parliament's approval is sought. It shall remain in operation for a period of two months unless it is either revoked by another proclamation or approved by the Parliament. Clause 3 guarantees built in check and control on the exercise of the power. It postulate that every proclamation issued under Clause I shall be laid before each house of Parliament and shall,ex-cept where it is a proclamation revoking a previous proclamation, ceases to operate at the expiration of two months unless before the expiration of that period it has been approved by a resolution of both Houses of Parliament. In other words, The question of the operation of the proclamation issued by the President was limited only for a period of two months from the date of issue of such proclamation.

100. Unless it is revoked or disapproved by the Parliament in the meanwhile. It costs an obligation to lay the proclamation on the floor of both Houses of Parliament in accordance with the provisions of the Constitution and the business rules. This clearly meant that it was to operate upto the time of two months and when it was in force it carries with its necessary implication that all acts done or actions taken under the proclamation during the period are legal and valid.

101. Under the proviso to Clause 3 of Article 356 if any such proclamation not being a proclamation revoking a previous proclamation is issued at a time when House of People is dissolved or the dissolution of the House of people takes place during the period of two months referred to in the clause and if a resolution approving the proclamation has been passed by the Council of State but no resolution with respect to such proclamation has been passed by the House of People before the expiry of that period, the proclamation shall cease to operate at the expiration of 30 days from the date on which the House of People first sits after its reconstitution unless before the expiration of the said period of 30 days a resolution approving the proclamation has been also passed by the House of people.

102. By operation of Clause 4 of Article 356 a proclamation so approved under proviso to Clause 3 shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of proclamation provided that if and so often as a resolution approving the continuance in force of such proclamation is passed by both Houses of Parliament, the proclamation shall unless revoked continue in force for a further period of six months from the date on which it would otherwise have ceased to operate and no such proclamation shall in any case remain in force for more than only year with second approval. The second proviso adumbrates that if the resolution of the House of People takes place during any such period of six months and a resolution approving the continuance in force of such proclamation has been passed by the Council of States but no resolution with respect to the continuance in force of such proclamation has been passed by the House of People during the said date the proclamation shall cease to operate at the expiration of 30 days from the date on which the House of the People first sits after the reconstitution unless before the expiration of the said period of 30 days a resolution approving the continuance in force of the proclamation have also been passed by the House of the People. The third proviso is not material for the purpose of this case. Hence omitted under Clause 5 for continuance of the proclamation beyond one year and not more than three years, two conditions are necessary i.e. (1) existence of emergency issued under Article 352 in the whole of Indian or whole or part of the State at the time of passing the resolution and (11) the Certificate of the Election Commissioner

of its inability to hold elections to the Assembly of that State. Article 357 provides the consequential exercise of legislative power by the Parliament or delegation thereof to the president to exercise them under Article 123 etc.

FEDERALISM AND ITS EFFECT BY ACTS DONE UNDER ARTICLE 356

103. The polyglot Indian society of wide geographical dimensions habiting by social milieu, ethnic variety or cultural diversity, linguistic multiplicity, hierarchical caste structure among Hindus, religious pluralism, majority of rural population and minority urban habitus, the social and cultural diversity of the people furnish a manuscript historical material for and the founding fathers of the Constitution to lay federal structure as foundation to integrate India as an united Bharat. Federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the center and the States which are the structural units operating on balancing wheel of concurrence and promise to resolve problems and promote social, economic and cultural advancement of its people and to create fraternity among the people. Article 1 is a recognition of the history that Union of Indian's territorial limits are unalterable and the States are creatures of the Constitution and they are territorially alterable constituents with single citizenship of all the people by birth or residence with no right to cessation. Under Articles 2 and 4 the significant feature is that while the territorial integrity of India is fully ensured and maintained, there is a significant absence of the territorial integrity of the Constituent States under Article 3. Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or part of States or uniting any territory to a part of any State or by increasing area of any State or diminishing the area of any State or alter the boundary of any State.

104. IN RE: THE BERUBARI UNION AND EXCHANGE OF ENCLAVE REFERENCE UNDER ARTICLE 143 OF THE Constitution of India - [1960] 3 SCR 250 & 285 Gajendragadkar, J. speaking for (8 Judges Bench) held that:

Unlike other federations, the Federation embodied in the said Act was not the result of a pack or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty . The constituent units of the federation were deliberately created and it is significant that they, unlike the units of other federations, had no organic roots in the past. Hence, in the India Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution were aware of the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Article 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the India States. In fact is is well-known that as a result of the states Reorganisation Act, 1965 (Act XXXVII of 1956), in the place of the original 27 States and one Area which were mentioned in part in the first Schedule to the constitution, there are now only 14 states and 6 other areas which constitute the Union Territory mentioned in the first Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution.

The same was reiterated in State of West Bengal v. Union of India [1964] 1 SCR 321 and State of Karnataka v. union of India MANU/SC/0171/1975 : 1976CriLJ336 .

105. Union and States Relations under the Constitution Tagore Law Lectures by M.C. Setalwad at page 10 stated that:

....one notable departure from the accepted ideas underlying a federation when the power in the Central Government to redraw the boundaries of States or even to destroy them.

106. The Constitution decentralises the governance of the States by a four tier administration i.e. Central Government. State Government, Union territories, Municipalities and Panchayats. See Constitution for Municipalities and Panchayats: Part IX (Panchayats) and Part IX-A (Municipalities) introduced through the Constitution 73rd Amendment Act, making the peoples participation in the democratic process from grass root level a reality. Participation of the people in governance of the State is sine qua non of functional democracy. Their surrender of rights to be governed is to have direct encounter in electoral process to choose their representatives for resolution of common problems and social welfare. Needless interference in self- governance is betrayal of their faith to fulfil self-governance and their democratic aspirations. The constitutional culture and political morality based on healthy conventions are the fruitful soil to nurture and for sustained growth of the federal institutions set down by the Constitution. In the context of the Indian Constitution federalism is not based on any agreement between federating units but one of integrated whole as pleaded with vision by Dr. B.R. Ambedkar on the floor of the constituent assembly at the very inception of the deliberations and the Constituent Assembly unanimously approved the resolution of federal structure. He poignantly projected the pitfalls flowing from the word "federation.

107. The federal state is a political convenience intended to reconcile national unity and integrity and power with maintenance of the state's right. The end aim of the essential character of the Indian federalism is to place the nation as a whole under control of a national Government, while the states are allowed to exercise their sovereign power within its legislative and co- extensive executive and administrative sphere. The common interest is shared by the center and the local interests are controlled by the state. The distribution of the legislative and executive power within limits and coordinates authority of different organs are delineated in the organic law of the land, namely the Constitution itself. The essence of the federalism, therefore, is distribution of the force of the state among its coordinate bodies. Each is organised and controlled by the constitution. The division of the power between the union and the states is made in such a way that whatever has been the power distributed, legislative and executive, be exercised by the respective units making each a sovereign in its sphere and the rule pi law requires that there should be a responsible Government. Thus the state is a federal status. The state qua the center has quasi-federal unit. In the language of Prof. K.C. Wheare in his Federal Government, 1963 Edition, at page 12 to ascertain the federal character, the important point is, "whether the powers of the Government are divided between coordinate independent authorities of not", and at page 33 he stated that" the systems of Government embody predominantly on division of powers between center and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so is that Govt. federal?"

108. Salmond in his Jurisprudence. 9th edition brought about the distinction between unitary type of Govt. and federal form of Govt. According to him a unitary or a simple state is one which is not made up of territorial division which are states themselves. A composite state on the other hand is

one which is itself an aggregate or groups of constituent states. Such composite states can be called as imperial, federal or confederate. The Constitution of India itself provided the amendments to territorial limits from which we discern that the federal structure is not obliterated but regrouped with distribution of legislative powers and their scope as well as the co-extensive executive and administrative powers of the Union and the States. Articles 245 to 255 of the Constitution deal with relative power of the Union and the States legislature read with Schedule Seven of the Constitution and the entries in List I preserved exclusively to the Parliament to make law and List II confines solely to the state legislature and List III concurrent list in which both the Parliament as well as the state legislature have concurrent jurisdiction to make law in the occupied field, with predominance to the law made by the Parliament, by operation of proviso to Clause (2) of Article 254. Article 248, gives residuary legislative powers exclusively to the parliament to make any law with respect to any matters not enumerated in the concurrent list of the state list including making any law, imposing a tax not mentioned in either of those lists. The relative importance of entries in the respective lists to the Seventh Schedule assigned to the Parliament or a State Legislature are neither relevant nor decisive though contended by Sri K. Parasaran. Indian federalism is in contra distinction to the federalism prevalent in U.S.A., Australia and Canada.

109. In regard to distribution of executive powers Constitution itself made demarcation the Union and the States. Article 73(1) read with proviso and Article 162 read with proviso bring out this demarcation. The executive power of the Union and the State are co-extensive with their legislative powers. However, during the period of emergency Articles 352 and 250 envisaged certain contingencies in which the executives power of the concerned state would be divested and taken over by the Union of India which would last upto a period of 6 months, after that emergency in that area is so lifted or ceased.

110. The administrative relations are regulated by Articles 256 and 258A for effective working of the Union executive without in any way impeding or impairing the exclusive and permissible jurisdiction of the State within the territory. Articles 268 and 269 enjoin the Union to render financial assistance to the states. The Constitution also made the Union to depend on the States to enforce the union law within concerned states. The composition of Rajya Sabha as laid down by Article 80 makes the legislature of the state to play its part including the one for ratifying the constitutional amendments made by Article 368. The election of the President through the elected representative of the State legislature under Article 54 makes the legislature of federal unit an electoral college. The legislature of the state has exclusive power to make laws for such state or any part thereto with respect to any of the enumerated matters in List II of the Seventh Schedule by operation of Article 246(3) of the Constitution.

111. The Union of India by operation of Articles 340 and 245, subject to the provisions of the Constitution, has power to make laws for the whole or any part of the territory of India and the said law does not eclipse, nor become invalid on the ground of extra- territorial operation. In the national interest it has power to make law in respect of entries mentioned in List II. State List, in the penal field, as indicated in Article 249. With the consent of the state, it has power to make law under Article 252. The Union judiciary, the Supreme Court of India, has power to interpret the Constitution and decide the disputes between Union and the states and the states inter se. The law laid down by the Supreme Court is the law of the land under Article 141. The High court has judicial power over territorial jurisdiction over the area over which it exercises power including

control over lower judiciary. Article 261 provides full faiths and credit to the proceedings of public acts or judicial proceedings or the union and of the States throughout the territory of India as its fulgrum. Indian judiciary is unitary in structure and operation. Articles 339, 344, 346, 347, 353, 358, 360, 365 and 371-C(2) give power to the Union to issue directions to the States. Under Article 339(2) the Union has power to issue directions relating tribal welfare and the state is enjoined to implement the same. In an emergency arising out of war or aggression or armed rebellion, contemplated under Articles 352 or emergency due to failure of the Constitutional machinery in a state envisaged under Articles 356 or emergency in the event of threat to the financial stability or credit of India. Article 360 gives dominant power to the Union. During the operation of emergency Article 19 of the Constitution would become inoperative and the center assumes the legislative power of a State unit. Existence of All India Services under Article 312 and establishment of inter-state councils under Article 263 and existence of financial relations in part 12 of the Constitution also indicates the scheme of distribution of the revenue and the primacy to the Union to play its role. Establishment of financial Commission for recommendations to the President under Article 280 for the distribution of the revenue between the Union and the States and allocation of the respective shares of such inter- state trade and commerce envisaged in Part 13 of the Constitution and primacy to the law made therein bring out, though strongly in favour of unitary character, but suggestively for balancing operational federal character between the Union and the States make the Constitution a quasi-federal.

112. As earlier stated, the organic federalism designed by the founding fathers is to suit the parliamentary from the Govt. to suit the Indian conditions with the objective of promoting mutuality and common purpose rendering social, economic and political justice, equality of status and opportunity; dignity of person to all its citizens transcending regional, religious, sectional or linguistic barriers as complimentary units in working the Constitution without confrontation. Institutional mechanism aimed to avoid friction to promote harmony to set constitutional culture on firm foothold for successful functioning of the democratic institutions, to bring about matching political culture adjustment and distribution of the roles in the operational mechanism are necessary for national integration and transformation of stagnant social order into vibrant egalitarian social order with change and continuity economically, socially and culturally. In the State of West Bengal v. Union of India MANU/SC/0086/1962 : [1964]1SCR371 , this Court laid emphasis that the basis of distribution of powers and between union and the States is that only those powers and authorities, which are concerned with the regulation of local problems are vested in the state and those which tend to maintain the economic nature and commerce, unity of the nation are left with the Union. In Shumsher Singh v. Union of India MANU/SC/0073/1974 : (1974)IILLJ465SC , this Court held that parliamentary system of quasi-federalism was accepted rejecting the substance of Presidential style of executive. Dr. Ambedkar stated on the floor of the Constituent Assembly that the Constitution is. "both unitary as well as federal according to the requirement of time and circumstances". He also further stated that the center would work for common good and for general interest of the country as a whole while the states work for local interest. He also refuted the plea for exclusive autonomy of the States. It would thus appear that the overwhelming opinion of the founding fathers and the law of the land is to preserve the unity and territorial integrity of the nation and entrusted the common wheel to the Union insulating from future divisive forces or local zealotrds to disintegrating India. It neither leaned heavily in favour of wider powers in favour of the Union while maintaining to preserve the federal character of the States which are integral part of the Union. The Constitution being the permanent and not self

destructive, the Union of India is indestructable. The democratic form of Govt. should nurture and work within the constitutional parameters provided by the system of law and balancing wheel has been entrusted in the hands of the union judiciary to harmonise the conflicts and adopt constitutional construction to subserve the purpose envisioned by the Constitution.

ROLE OF THE GOVERNOR

113. The key actor in the center-State relations is the Governor, a bridge between the Union and the State. The founding fathers deliberately avoided election to the office of the Governor, as is in vogue in U.S.A. to insulate the office from linguistic chauvinism. The President has been empowered to appoint him as executive head of the state under Article 155 in Part VI. Chapter II. The executive power of the State is vested in him by Article 154 and exercised by him with the aid and advice of the Council of Ministers, the Chief Minister as its head. Under Article 159 the Governor shall discharge his functions in accordance with the oath "to protect and defend the Constitution and the law". The office of the Governor, therefore, is intended to ensure protection and sustenance of the constitutional process of the working of the Constitution by the elected executive and given him an umpire's role. When a Gandhian economist Member of the Constituent Assembly wrote a letter to Gandhiji of his plea for abolition of the office of the Governor, Gandhiji wrote to him for its retention, thus: "The Governor had been given a very useful and necessary place in the scheme of the team. He would be an arbiter when there was a constitutional dead-lock in the State and he would be able to play an impartial role. There would be administrative mechanism through which the constitutional crises would be resolved in the State." The Governor thus should play an important role, in his dual undivided capacity as an head of the State he should impartially assist the President. As a constitutional head of the State Govt. in times of constitutional crisis he should bring about sobriety. The link is apparent when we find that Article 356 would be put into operation normally based on Governor's report he should truthfully and with high degree of constitutional responsibility, in terms of oath, inform the President that a situation has arisen in which the constitutional machinery in the State has failed and the Government of State cannot be carried on in accordance with the provisions of the constitution, with necessary detailed factual foundation. The report normally is the foundation to reach the satisfaction by the President. So it must furnish material with clarity for later fruitful discussion by the parliament. When challenged in a constitutional court it gives insight into the satisfaction reached by the President. The Governor therefore, owes constitutional duty and responsibility in sending the report with necessary factual details and it does require the approval of the council of ministers; equally not with their aid and advice.

DEMOCRACY AND SECULARISM

114. Democracy stands for freedom of conscience and belief, tolerance and mutual respect. India being a plural society with multi- religious faiths, diverse creeds, castes and cultures, secularism is the bastion to build fraternity, and amity with dignity of person as its constitutional policy. It allows diverse faiths to flourish and make it a norm for tolerance and mutual respect between various sections of the people and to integrate them with dignity and fulfilment of cravings for self-realisation of religious belief with larger national loyalty and progress. Rule of law has been chosen as an instrument for social adjustment in the event of clash of interests. In a tree society, law interacts between competing claims in a continuing process to establish under with stability.

Law should not only reflect social and religious resilience but has also to provide a lead by holding forth the norms for continuity for its orderly march towards an ideal egalitarian social order envisioned in the preamble of the Constitution the culture of the law, in the Indian Democratic Republic, should be on secular lines. A balance, therefore, has to be struck to ensure an atmosphere of full faith and confidence. Charles Broadlaugh in Seventeenth century for the first time used secularism as antagonistic to religious dogma as ethical are moral finding force. This western thought, in course of time gained humanistic acceptance. The word secularism defined in Oxford dictionary means that "morality should be based solely in regard to the well-being of the mankind in the present life to the exclusion of all considerations drawn from the belief in God or a future study": In Encyclopaedia Britannica secularism is defined as "branch of totalitarian ethics, it is for the physical, moral and social improvement of mankind which neither affirms nor denies theistic problems of religion". Prof. Goethinysem of the Berlin University writing on secularism in the Encyclopaedia of the Social Sciences (1939 ED.) defined it as "the attempt to establish autonomous sphere of Knowledge purged of supernatural, fideistic pre-suppositions". He described it, in its philosophical aspect, "as a revolt against theological and eventually against metaphysical absolutes and universals". He pointed out that "the same trend may be charted out in the attitudes towards social and political institutions", so that men in general broke away from their dependence upon the Church which was regarded as the guardian of an eternal welfare which included that in this world as well as that in the next, and , therefore, was considered entitled to primacy or supremacy over transient secular authorities. He indicates how this movement expanded in the second half of the eighteenth century, into a secularised universalism, described as "Enlightenment", which conceived of man on earth as the source of all really significant and verifiable knowledge and the light. It was increasingly realised that man depended for his welfare in this world upon his own scientific knowledge and wisdom and their applications and upon a socio-economic system of which, willy-nilly, he found himself a part. He had, therefore, argued that the man has to take the responsibility for and bear the consequence of his own follies and inequities and not look upon them as a part of some inscrutable design of external powers or beings controlling his destiny. G.L. Holyoake, and associate of Charles Broadlaugh in his "Principles of Secularism" in 1859 advocated for secularism which received approval and acceptance by celebrated political philosopher J.B. Mill. Jeremy Bentham's Principles of Legislation formulated in the eighteenth century stand on moral based politics and defined law from the point of view of human welfare sought through democratic liberal channels and intended to attain "the greatest happiness of the greatest number", a maxim bear to democratic utilitarian political philosophers.

115. Secularism became means and consciously pursued for full practical necessities of human life to liberate the human spirit from bondage, ignorance, superstition which have held back humanity. The goal of every civilised democratic society is the maximisation of human welfare and happiness which would be best served by a hobby organisation.

116. Freedom of faith and religion is an integral part of social structure. Such freedom is not a bounty of the State but constitutes the very foundation on which the state is erected. Human Liberty sometimes means to satisfy the human needs in one's own way. Freedom of religion is imparted in every free society because it is a part of the general structure of the liberty in such a society and secondly because restrictions imposed by one religion would be an obstacle for others. In the past religious beliefs have become battle grounds for power and root cause for suppression of liberty. Religion has often provided a pretext to have control over vast majority of the members of the

society. Democratic society realises folly of the vigour of religious practices in society. Strong religious consciousness not only narrows the vision but hampers rule of law. The founding fathers of the Constitution, therefore, gave unto themselves "we the people of India" the fundamental rights and Directive Principles as State policy to establish an egalitarian social order for all sections of the society inn the supreme law of the land itself. Though the concept of the "secularism" was not expressly engrafted while making the constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualise not only of the subject of God but also an understanding between man and man. Secularism in the Constitution is not anti-God and it is sometimes believed to be a stay in a free society. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State on grounds of public interest, order and general welfare. The State guarantee individual and corporate religious freedom and dealt with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another. The concept of the secular State is, therefore, essential for successful working of the democratic form of Government. There can be no democracy if anti-secular forces are allowed to work dividing followers of different religious faith flying at each other's throats. The secular Government should negate the attempt and bring order in the Society. Religion in the positive sense, is an active instrument to allow citizen for full development of his person, not merely in the physical and material but in the non-material and non- secular life.

117. Prof. Goethinysem in his Article referred to hereinbefore outlined the process of secularism to life and thoughts by which religious sectarianism comes into contact in daily social and economic spheres of life and he summarises with "the ideal of human and social happiness through secularisation of life all the groups of people in the country striving by most enlightened methods to establish the maximum of social justice and welfare in the world. According to Pt. Jawaharlal Nehru democracy necessarily implies rigorous self-discipline without which democracy cannot succeed, Swami Vivekanand explaining the Vedantic ideas of God and religion in comparison with western thoughts stated that the religious attitude is always to seek the dignity inside of his own self as a natural characteristic of Hindu religion and religious attitude is always presented by making the subject close his eye looking inward. Dr. Thouless in his "Introduction to the Psychology of Religion" after analysing diverse elements and definitions of religion defined religion as "a felt practical relationship with what is believed in a super human being or beings". The process of secularisation of life and thought consistently increasing the withdrawal and separation of religion properly so called from other spheres of life and thought which are governed by independent form above rules and standards. According to Sir James Freezer in his "Golden Bough" religion consists largely of not only of methodological and rituals dominated by all aspects of his life, social, economic, political, legal, cultural, ethical or moral, but also technological. The interaction of religion and secular factors in ultimate analysis is to expose the abuses of religion and of belief in God by purely partisan, narrow or for selfish purpose to serve the economic or political interest of a particular class or group or a country. The progress of human history is replete with full misuse of religious notions in that behalf. But the scientific and analytical spirit characterises the secularism as saviour of the people from the dangers of supposed fusion of religion with political and economic activities and inspire the people. The secularism, therefore, represents faiths born out of the exercise of rational facilities. It enables people to see the

imperative requirements for human progress in all aspects and cultural and social advancement and indeed for human survival itself. It also not only improves the material conditions of human life, but also liberates the human spirit from bondage of ignorance, supression, irrationality, injustice, fraud, hypocrisy and oppressive exploitations. In other words, through the whole course of human history discloses an increasing liberation of mankind, accomplished thought, all is covered by the term secularism. Trever Ling's Writing on Bhudhism spoke of it as a secular religion, which teaches eight-fold path of his mastery and virtuous conduct of ceaseless, self critical endeavour for right belief, right aspiration, right speech, right conduct, right modes of livelihood, right efforts, right mindedness and right scrupture. Bhudhism rationalises the religion and civilisation to liberate individual from blind fold adherence to religious belief to rationalisation, in the language of Trever Ling "flat alluvial expansion of secularism". Dr. Ambedkar believed that Bhudhism is the best religion suited to the Indian soil. Mahatma Gandhiji, father of the nation, spoke for the need of religion thus, "the need of the mankind is not one of religion, but mutual respect and tolerance of the devotees of different religions. We want to reach not a data level, but unity in diversity. The soul of all religion is one, but it is encased in the multitude of forms. The latter will persist to the end of the time."

118. Dr. S. Radhakrishnan, the Philosopher, former President of India, in his Discovery of Faith stated that the religious impartiality of the Indian state is not to be confused with the secularism or ethism. Secularism as defined here is in accordance with the enormous religious traditions of India. It is for living in harmony with each other. This fellowship is based on the principle of diversity in unity which alone has all quality of creativeness. In his foreword to Dr. Abid Hussain's "The National Culture of India", Dr. S. Radhakrishnan remarked that the secularism does not mean licence or a thrust of material comfort. It lays thrust on universal of the supreme fellow which may be attained by variety of ways. Indian concept of secularism means "the equal status to all religions". He said that "no-one religion should be given preferential status or unique distinction and that no-one religion should be accorded special privileges in national life". That would be violative of basic principles of democracy. No group of citizen can so arrogate itself the right and privilege which he denies to others. No person shall suffer any form of disability or discrimination because of his religion, but also alike should be free to share to the fullest degree in the common life. This is the basic principle in separation of religion and the State. Granvelle Austin in his "The Indian Constitution the cornerstone of a Nation" stated that the Constitution makers were intended to secure secular and socialist goals envisaged in the preamble of the Constitution. In Ziyauddin Burhamuddin Bukhari v. Brijmohan Ramdass Mehra and Ors. [1975] Suppl. SCR 281, this Court held that:

The Secular State rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. Maitland had pointed out that such a state has to ensure, through its laws, that the existence or exercise of a political or civil right or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practice of any particular religion.

It was further pointed out:

Our Constitution and the laws framed thereunder leave citizens free to work out happy and harmonious relationships between their religions and the quite separable secular fields of law and politics. But, they do not permit an unjustifiable invasion of what belongs to one's sphere by what appertains really to another. It is for courts to determine in a case of dispute, whether any sphere was or was not properly interfered with, in accordance with the Constitution, even by a purported law.

Thereby this Court did not accept the wall of separation between law and the religion with a wider camouflage to impress control of what may be described exploitative parading under grab of religion. Throughout ages endless stream of humans of diverse creeds, cultures and races have come to India from outside regions and climate and contributed to the rich cultural diversity. Hindu religion developed resilience to accommodate and imbibe with tolerance the culture richness with religious assimilation and became a land of religious tolerance.

119. Swami Vivekanand stated that right of religious system and ideals is the Same morality; one thing is only preached: Myself, say "Om"; others one says "Johova" another " Allaha ho Mohammad", another cries " Jesus". Gandhiji recognised that all religions are imperfect and because they are imperfect they require perfecting themselves rather than conducting individually. He stated: "the separate religions - Hinduism, Islam, Christianity, Budhism are different rights converging on the same point even as the tree has the single trunk but many branches and leaves so there one perfect religion but it becomes many as it passes through the human medium. The Allaha of Muslims is the same as the God of Christians and Ishwara of Hindus".

120. Making of a nation state involves increasing secularisation of society and culture. Secularism operates as a bridge to across over from tradition to modernity. The Indian state opted this path for universal tolerance due to its historical and cultural background and multi-religious faiths. Secularism in the Indian context bears positive and affirmative emphasis. Religions with secular craving for spiritual tolerance have flourished more and survived for linger period in the human history than those who claimed to live in a non-human existent world of their own. Positive secularism., therefore, separates the religious faith personal to man and limited to material, temporal aspects of human life. Positive secularism believes in the basic values of freedom, equality and fellowship. It does not believe in hark back either into country's history or seek shelter in its spiritual or cultural identity dehors the man's need for his full development. It moves mainly around the state and its institution and, therefore, is political in nature. At the same time religion does not include other socio-economic or cultural social structure. The state is enjoined to counteract the evils of social force, maintaining internal peace and to defend the nation from external aggression. Welfare State under the Constitution is enjoined to provide means for well-being of its citizens; essential services and amenities to all its people. Morality under positive secularism is a pervasive force in favour of human freedom or secular living. Prof. Holyoake as stated earlier, who is the father of modern secularism stated that "morality should be based on regard for well being or the mankind in the person, to the exclusion of all considerations drawn from the belief in God or a future state." Morality to him was a system of human duty commencing from man and not from God as in the case of religion. He distinguished his secularism from Christianity, the living interest of the world that is prospects of another life. Positive secularism gives birth to biological and social nature of the man as a source of morality. True religion must develop into a dynamic force for integration without which the continued existence of human race

itself would become uncertain and unreal. Secularism teaches spirit of tolerance, catholicity of outlook, respect for each other's faith and willingness to abide by rules of self-discipline. This has to be for both as an individual and as a member of the group. Religion and secularism operate at different planes. Religion is a matter of personal belief and mode of worship and prayer, personal to the individual while secularism operates, as stated earlier, on the temporal aspect of the state activity in dealing with the people professing different religious faiths. The more a devoted person in his religious belief, the greater should be his sense of heart, spirit of tolerance, adherence of secular path Secularism, therefore, is not anti-thesis of religious devout-ness. Swami Vivekanand and Mahatma Gandhiji, though greatest Hindus, their teachings and examples of lives give us the message of the blend of religion and the secularism for the good of all the men. True religion does not teach to hate those professing other faiths. Bigotry is not religion, nor can narrow minded favouritism be taken to be an index of one's loyalty to his religion. Secularism does not contemplate closing each other voices to the sufferings of the people of other community nor it postulates keeping mum when his or other community make legitimate demands any group of people are subjected to hardship or sufferings, secularism always requires that one should never remain insensitive and aloof to the feelings and sufferings of the victims. At moments of testing times people rose above religion and protected the victims. This cultural heritage in India shaped that people of all religious faith, living in different parts of the country are to tolerate each other's religious faith or beliefs and each religion made its contribution to enrich the composite Indian culture as a happy blend or synthesis. Our religious tolerance received reflections in our constitutional creed.

121. The preamble of the Constitution inter alia assures to every citizen liberty of thought, expression, belief, faith and worship. Article 5 guarantees by birth citizenship to every Indian. No one bargained to be born in a particular religion, cast or region. Birth is a biological act of parents. Article 14 guarantees equality before the law or equal protection of laws. Discrimination on grounds of religion was prohibited to by Article 15. Article 16 mandates equal opportunity to all citizens in matters relating to employment or appointment to any office or post under the State and prohibits discrimination on grounds only of inter alia religion. Article 25 while reassuring to all persons freedom of conscience and the right to freely profess, practice and propagate his religion, it does not affect the operation of any existing law or preventing the State from making any law regulating or restricting any social, financial, political or other secular activity which may be associated with the religious practice. It is subject to provide a social welfare and reform or throwing open all Hindu religious institutions of public character to all classes of citizens and sections of Hindus. Article 26 equally guarantees freedom to manage religious affairs, equally subject to public order, morality and health. Article 27 reinforces the secular character of Indian democracy enjoining the State from compelling any person or making him liable to pay any tax, the proceeds of which are specifically prohibited to be appropriated from the consolidated fund for the promotion or maintaining or any particular religion or religious denomination. Taxes going into consolidated funds should be used generally for the purpose of ensuring the secular purposes of which only some are mentioned in Articles 25 and 26 like regulating social welfare etc. Article 28(1) maintains that no religious instruction shall be imparted in any educational institutions wholly maintained out of the State funds or receiving aid from the State. Equally no person attending any educational institution recognised by the state or receiving aid from the State funds should be compelled to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any

premises attached thereto unless person or in the case of a minor person his guardian has given his consent thereto. By Article 30(2) the State is enjoined not to discriminate, in giving aid to an educational institution, on the ground that it is a minority institution whether based on religion or language. It would thus be clear that Constitution made demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any particular religion, state is neither pro particular religion nor anti particular religion. It stands aloof, in other words maintains neutrality in matters of religion and provide equal protection to all religions subject to regulation and actively acts on secular part.

122. In Radial Pannachand Gandhi v. State of Bombay [1954] SCR 1035, this Court defined the religion that it is not necessarily atheistic and , in fact, there are well-known religions in India like Budhism and Jainism which do not believe in the existence of God or caste. A religion undoubtedly has different connotations which are regarded by those who profess that religion to be conducive to their spiritual well-being but it would not be correct to say or seems to have been suggested by the one of the learned brothers therein that matters of religion are nothing but matters of religious faith and religious belief. The religion is not merely only a doctrine or belief as it finds expression in acts as well. In Commissioner of Madras v. Sri Lakshmindra Thirtha Swamiar MANU/SC/0136/1954 : [1954]1SCR1005 , know as Sirurmath case, this Court interpreted religion in a restricted sense confining to personal beliefs and attended ceremonies or rituals. The restriction contemplated in Part-Ill of the Constitution are not the control of personal religious practices as such by the State but to regulates their activities which are secular in character though associated with religions, like management of property attached to religious institutions or endowment on secular activity which are amenable to such regulation. Matters such as offering food to the deity etc. are essentially religious and the State does not regulate the same, leaving to the individuals for their regulation. The caste system though formed the Kernal of Hinduism, and as a matter of practice, for millenniums l/4th of the Indian population (Scheduled castes and Scheduled Tribes) were prohibited entry into religious institutions like temples, maths etc. on grounds of untouchability; Article 17 outlawed it and declared such practice an offence. Article 25 and 26 own open all public places and all places of public to all Hindu religious denominations or sects for worship offering prayers or performing any religious service in the places of public worship and no discrimination should be meted out on grounds of caste or sect or religious denomination. In Keshevanand Bharati's case [1973] Suppl. 1 SCR II and Indira Gandhi v. Raj Narain MANU/SC/0304/1975 : [1976]2SCR347 , this Court held that secularism is a basic feature of the constitution. It is true that Schedule-Ill of the Constitution provided the form of oath being taken in the name of God. This is not in recognition that he has his religion or religious belief in God of a particular religion but he should be bound by the oath to administer and to abide by the Constitution and laws as a moral being, in accordance with their mandate and the individual will ensure that he will not transgress the oath taken by him. It is significant to not that the Oath's Act. 1873 was repealed by Oath's Act, 1966 and was made consistent with the constitutional scheme of secularism in particular, Sections 7 to 11.

123. Equally admission into an educational institution has been made a fundamental right to every person and he shall not be discriminated on grounds only of religion or caste. The education also should be imparted in the institutions maintained out of the State fund or receiving aid only on secular lines. The State, therefore, have a missionary role to reform the Hindu society, Hindu social

order and dilute the beliefs of caste hierarchy. Even in matters of entry into religious institutions on places of public resort prohibition of entry only on grounds of caste or religion is outlawed.

124. Dr. S. Radhakrishnan, stated that "Religion can be identified with emotion, sentiments, intensity, cultural, profession, conscious belief of faith". According to Gandhiji "By religion I do not mean formal religion or customary religion but that religion which underlies all religions". The religion to him was spiritual commitment just total but intentionally personal. In other words, it is for only development of the man for the absolution of his consciousness in certain direction which he considered to be good. Therefore, religion is one of belief to the Individual which binds him to his conscience and the moral and basic principles regulating the life of a man had had constituted the religion, as understood in our Constitution. Freedom of conscience allows a person to believe in particular religious tenets of his choice. It is quite distinct from the freedom to perform external acts in pursuance of faith, freedom of conscience means that a person cannot be made answerable for rights of religion. Undoubtedly, it means that no man possess a right to dictate to another what religion he believes in; what philosophy he holds, what shall be his politics or what views he shall accept etc. Article 25(1) protects freedom of conscience and religion of members of only of an organised system of belief and faith irrespective of particular affiliations and does not march out of concern itself as a part of the right to freedom of conscience and dignity of person and such beliefs and practices which are reasonable. The Constitution, therefore, protects only the essential and integral practices of the religion. The religious practice is subject to the control of public order, morality and health which includes economic, financial or other secular activities. Could the religious practice control over members to vote or not to vote, to ignore the national flag, national anthem, national institutions? Freedom of conscience under Article 25 whether guarantees people of different religious faiths the right to religious procession to antagonise the people of different religious faiths or right to public worship? It is a fact of social and religious history in India that religious processions are known to ignite serious communal riots, disturb peace, tranquillity and public order. The right to free profession of religion and exercising right to organise religious congregations does not carry with it the right to make inflammatory speeches, nor be a licence to spread violence, nor speak religious intolerance as an aspect of religious faiths. They are subject to the State control. In order to secure constitutional protection, the religious practices should not only be an essential part but should also be an integral part of proponent's religion but subject to slate's control. Otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be quoted as religious form and make a claim for being treated as religious practices. Law as social engineer provides the means as well as lays down the rules for social control and resolution of conflicts of all kinds in a human society. But the motive force for social, economic and cultural transformation comes from individuals who comprise the society. They are the movers in the mould of the law as the principle instrument of an orderly transient to a new socio- economic order or social integration and fraternity among the people. The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. I respectfully in agreement with our Brethren Sawant and Jeevan Reddy, JJ. in this respect. Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure to all its people socio-economic needs essential for man's excellence and of moral well being, fulfilment of material prosperity and political justice.

SEPARATION OF POLITICS AND RELIGION

125. Black's Law Dictionary (6th Edn.) page 1158: defined politics as pertaining or relating to the policy or administration of the Government, State or national; pertaining to or incidental to exercise all the functions vest in those with the conduct of the Government; relating to the management of State as political force all are pertaining to exercise the rights and privileges or the consensus by which the individuals of a State seek to determine or control its public policy having to do with the kind of individual parties or interest they seek to control and action of those who manage affairs of a State. Political Party was defined as an association of individuals for Parliamentary purpose to promote or accomplishing elections or appointments to public offices, positions or jobs. A political party, association or organisation which makes contributions for the purpose of influencing or attempt to influence the electoral process of any individual or political party whose name is presented for election to any State or local elected public office, whether or not such individual is elected. Politics in positively secular State is to get over their religion, in other words, in politics a political party should neither invoke religion nor be dependent on it for support or sustenance. Constitution ensures to the individual to protect religion right to belief or propagate teachings conducive for secular living, later to be controlled by the State for betterment of human life and progress. Positive secularism concerns with such aspects of human life. The political conduct in his "Political Thought by Dr. Ambedkar compiled by R.K.. Kshersagar, Intellectual Public House Edition 1992 at page 155, stated that: In India the majority is not a political majority. The majority is born but not made, that is the difference between a communal majority and a political majority. A political majority is not a purely majority, it is the majority which is always made, unmade and remade. A communal majority is unalterable majority in its ethics, its attitudes. "Whether the Hindu communal majority was prepared to accept the views of the minorities whether it was prepared to conceive the Constitutional safeguards to the minorities". The problems according to Dr. Ambedkar should be solved by adopting right principles which should be evolved and applied equally without fear or favour. According to him the majority community should accept a relative majority and it should not claim absolute majority. Communal majority is not a political majority and in politics the principle of one vote one value should be adopted irrespective of related considerations. According to Abdul Kalam Azad: "India is a democracy secular where every citizen whether he is Hindu, Muslim or Sikh has equal rights and privileges. Rise of fundamentalism and communalisation in national or regional politics are anti-secular and tends to encourage separatist and divisive forces laying the seeds to disintegrate the Parliamentary democratic system. The political parties or candidates should be stopped to run after vote banks and judicial process must promote the citizens' active participation by interpretation of the Constitution and the laws in proper perspective in order to maintain the democratic process on an even keel.

126. For a political party or an organisation that seeks to influence the electorates to promote of accomplishing success at an election for governance of Parliamentary form of Government, the principles are those embedded in the Directive Principles of the Constitution vis-a-vis the fundamental rights and the fundamental duties in Part IV(A) and should abide by the Constitution and promote tolerance, harmony and the spirit of commonness amongst all the people of India transcending religious, linguistic regional or sectional diversities and to preserve the rich heritage of our composite culture, to develop humanism, spirit of reformation and to abstain violence. Therefore, the manifesto of a political party should be consistent with these fundamental and basic features of the Constitution, secularism, socio-economic and political justice, fraternity, unity and national integrity.

127. Under Section 29A of the Representation of Peoples' Act, 1951 for short 'R.P. Act' registration of a political party, or a group of individual citizens of India calling itself a political party has been given right to make an application to the Election Commission constituted under Article 324 for its registration as political party with a copy of the memorandum or rules or regulations of the association of the body signed by its Chief Executive Officer. The applicant shall contain a specific provision that the association or the body shall bear true faith and allegiance to the Constitution of India as by law established and its members shall be bound by the socialism, secularism and democracy and would uphold the sovereignity and integrity of India. It is, therefore, a mandatory duty of very political party, body of individuals or association and its members to abide by the Constitution and the laws; they should uphold secularism, socialism and democracy, uphold sovereignity and integrity of the nation. Section 123(3) prohibits use of religion or caste in politics and declares that promotion or attempt to promote violence and hatred between different classes of citizens of India on groups of religion and caste for the furtherance of the prospect at the election of the candidate or for effecting the election of any candidate was declared to be a corrupt practice. As per Sub-section 3A of Section 123 the promotion of, or attempt to promote feeling of enemity or hatred between different classes of India citizens, on grounds of religion, etc. by a candidate, his election agent or any person with his consent to further the election prospects of that candidate or for prejudicially affecting the election of any candidate was declared as corrupt practice. A political party, therefore, should not ignore the fundamental features of the Constitution and the laws. Even its manifesto with all sophistication or felicity of its language, a political party cannot escape constitutional mandate and negates the abiding faith and solemn responsibility and duty undertaken to uphold the Constitutional and laws after it was registered under Section 29A. Equally it/they should not sabotage the same basic features of the Constitution either influencing the electoral process or working the Constitution or the law. The political party or the political executive securing the governance of the State by securing majority in the legislature through the battle of ballot throughout its tenure by its actions and programmes, it is required to abide by the Constitution and the laws in letter and spirit.

128. Article 25 inhibits the Government to patronise a particular religion as State religion overtly or covertly. Political party is, therefore, positively enjoined to maintain neutrality in religious beliefs and prohibit practices derogatory to the Constitution and the laws. Introduction of religion into politics is not merely in negation of the Constitutional mandates but also a positive violation of the Constitutional obligation, duty, responsibility and positive prescription of prohibition specially enjoined by the Constitution and the R.P. Act. A political party that seeks to secure power through a religious policy or caste orientation policy disintegrates the people on grounds of religion and caste. It divides the people and disrupts the social structure on grounds of religion and caste which is obnoxious and anthema to the constitutional culture and basic features. Appeal on grounds of religion offends Secular Democracy.

129. An appeal to the electorates on the grounds of religion offends secular democracy. In S. Veerabadran Chettiar v. E.V. Ramaswami Naicker and Ors. MANU/SC/0050/1958 : 1958CriLJ1565 this Court held that the Courts would be cognizant to the susceptibilities of class of persons to which the appeal to religious susceptibility is made and it is a corrupt practice. Interpreting Section 123(3A) this Court held that "the section has been intended to respect the religions irrespective of persons of different religions or groups.... very circumspect in such matters

and to pay due regards to feelings of different class of persons with different beliefs irrespective of the Constitution whether or not they share those beliefs or whether the revisionary or otherwise".

130. This Court in Shubnath Deogram v. Ramnarain Prasad MANU/SC/0108/1959 : [1960]1SCR953 , held that:

it would appear that the pleasure of the deities is indicated through the cock taking the food that is given to it and that the deities only thereafter accept the sacrifice of the cock. Therefore, when the leaflet stated that food should be given to the cock in the shape of votes what was meant was that the deities would be pleased if votes were cast in the box with the cock symbol.

In Z.B. Bukhari v. Brijmohan MANU/SC/0277/1975 : [1975] Supp. SCR 281, this Court held thus:

Our Constitution makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotion depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

In another case S. Harcharan Singh v. S. Sajjan Singh MANU/SC/0165/1984 : [1985]2SCR159 , This Court fully discussed the question of what constitutes an appeal on grounds of religion falling within the scope of Section 123(3) and Section 123(3A) of the R.P. Act, when there is an appeal on the ground of religion. Section 123(3) of R.P. Act should not be permitted to be circumvented to resort to technical arguments as to interpretation of the Section as our Constitution is one of secular democracy. In S. Veerabadran Chettiar's case this Court held thus :

In our opinion, placing such restricted interpretation on the words of such general import, is against all established cannons of construction. Any object, however, trivial or destitute of real value in itself, if regarded as sacred by any class of people would come within the meaning of the penal section. Nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshiped. An object may be held sacred by a class of persons without being worshipped by them. It is clear, therefore, that the courts below were rather cynical in so lightly brushing aside the religious susceptibilities of that class of persons to which the complainant claims to belong. The Section has been intended to respect the religious susceptibilities of persons of different religious persuasions or creeds. Courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the court.

In Sri Mullapudi Venkata Krishna Rao v. Sri Vedula Suryanarayana MANU/SC/0388/1994 : [1993]2SCR346 this Court held thus:

There is no doubt in our mind that the offending posted is a religious symbol. The depiction of anyone, be it N.T. Rama Rao or any other person, in the attire of Lord Krishna blowing a 'shanku' and quoting the words from the Bhagavad Gita addressed by Lord Krishna to Arjuna that his incarnation would be born upon the earth in age after age to restore dhrama is not only to a Hindu by religion but to every Indian symbolic by the Hindu religion. The use by the candidate of such a symbol coupled with the printing upon it of words derogatory of rival political party must lead to the conclusion that the religious symbol was used with a view to prejudicially affect the election of the candidate of the rival political party.

131. The contention of Sri Ram Jethmalani that the interpretation and applicability of Sub-sections (3) & (3A) of Section 123 of R.P. Act would confined to only cases in which individual candidate offends religion of rival candidate in the election contest and the ratio therein cannot be extended when a political party has espoused, as part of its manifesto a religious cause is totally untenable. This Court laid the law though in the context of the contesting candidates, that interpretation lends no licence to a political party to influence the electoral prospects on grounds of religion. In a secular democracy, like ours, mingling of religious with politics is unconstitutional, in other words a flagrant breach of constitutional features of secular, democracy. It is, therefore, imperative that the religious and caste should not be introduced into politics by any political party, association or an individual and it is imperative to prevent religious and caste pollution of politics. Every political party, association of persons or individuals contesting election should abide by the constitutional ideals, the Constitution and the laws thereof. I also agree with my learned brethren Swant and Jeevan Reddy, JJ., in this behalf.

132. Rise of fundamentalism and communalisation of politics are anti-secularism. They encourage separatist and divisive forces and become breeding grounds for national disintegration and fail the Parliamentary democratic system and the constitution. Judicial process must promote Citizens active participation in electoral process uninfluenced by any corrupt practice to exercise their free and fair franchise. Correct interpretation in proper perspective would be in the defence of the democracy and to maintain the democratic process on an even keel even in the face of possible friction, it is but the duty of the Court to interpret the Constitution to bring the political parties within the purview of constitutional parameters for accountability and to abide by the Constitution, the laws for their strict adherence.

SCOPE OF JUDICIAL REVIEW OF ARTICLE 356

133. In the judicial review in the field of administrative law and the constitutional law, the courts are not concerned with the merits of the decision, but with the manner in which the decision was taken or order was made. Judicial review is entirely different from an ordinary appeal. The purpose of judicial review is to ensure that the individual is given fair treatment by the authority or the Tribunal to which he has been subjected to. It is no part of the duty or power of the Court to substitute its opinion for that of the Tribunal or authority or person constituted by law or administrative agency in deciding the matter in question. Under the thin guise of preventing the abuse of power, there is a lurking suspicion that the court itself is guilty of usurping that power. The duty of the court, therefore, is to confine itself to the question of legality, propriety or regularity of the procedure adopted by the Tribunal or authority to find whether it committed an error of law or jurisdiction in reaching the decision or making the order. The judicial review is,

therefore, is a protection, but not a weapon. The Court with an avowed endeavour to render justice, applied principles of natural justice with a view to see that the authority would act fairly. Therefore the grounds of illegality, irrationality, unreasonableness, procedural impropriety and in some cases proportionality has been applied, to test the validity of the decision or order apart from its ultra vires, mala fides or unconstitutionality. Initially in the process of judicial review the court tested the functions from the purview of the "source of power". In the course of evolution of judicial review it tested on the "nature of the subject matter", "the nature of the power" "the purpose" or "the indelible effect" of the "order or decision on the individual or public. The public element was evolved, confining initially judicial review to the actions of State, Public authority or instrumentality of the State but in its due course many a time it entrenched into private law field where public element or public duty or public interest is created by private person or corporate person and relegated purely private issues to private law remedy. This Court relaxed standing in favour of bona fide persons or accredited Associations to espouse the cause on behalf of the under privileged or handicapped groups of persons. Interpreting Articles 14 and 21, tested administrative orders or actions or process on grounds of arbitrariness, irrationality, unfairness or unjustness. It would thus be apparent that in exercising the power of judicial review, the constitutional Courts in India testing the constitutionality of an administrative or constitutional acts did not adopt any rigid formula universally applicable to all occasions. Therefore, it serves no useful purpose to elaborately consider various decisions or text-books referred to us during the course of hearing. Suffice to state that each case should be considered, depending upon the authority that exercises the power, the source the nature or scope of the power and indelible effects it generates in the operation of law or effects the individual or society without laying down any exhaustive or catalogue of principles. Lest it would itself result in standardised rule. To determine whether a particular policy or a decision taken in furtherance thereof is a fulfilment of that policy or is a accordance with the Constitution or the law, many an imponderable feature will come into play including the nature of the decision, the relationship of those involved on either side before the decision was taken, existence or non-existence of the factual foundation on which the decision was taken or the scope of the discretion of the authority or the functionary. Supervision of the court, ultimately, depend upon the analysis of the nature of the consequences of the decision and yet times upon the personality of the authority that takes decision or individual circumstances in which the person was called upon to make the decision; acted on and the decision itself.

134. The scope of judicial review of the presidential proclamation under Article 356 was tested for the first time by this Court in State of Rajasthan v. Union of India MANU/SC/0370/1977 : [1978]1SCR1 . In that case Clause (5) inserted by the Constitution 38th Amendment Act prohibited judicial review of the presidential proclamation, which was later on substituted by the Constitution 44th Amendment Act, was called into operation. Before its substitution the constitutionality of the letter issued by the Home Minister and dissolution of the Assemblies of Northern India States were in question. The reason for the dissolution was that the Congress party was routed completely in 1977 Parliamentary elected in all those states and thereby the people's mandate was against the legitimacy of the Governments of the States represented by the Congress Party to remain in office. Suits under Articles 133 and Article so were filed in this Court. In that context this Court held that though the power of the judicial review was excluded by Clause (5) of Article 356, as then stood, judicial review was open on limited grounds, namely mala fides, wholly extraneous or irrelevant grounds without nexus between power exercised and the reasons in support thereof. The contention of Sri Parasaran, learned Counsel for the Union, as stated earlier, is that though judicial review is

available, he paused and fell upon the operation of Article 74(2), and contended that the Union of India need not produce the records; burden is on the writ petitioners to prove that the orders are unconstitutional or ultra vires; the exercise of power by the President under Article 356 is constitutional exercise of the power life one under Article 123 or Legislative Process and the principles evolved in the field of administrative law are inapplicable. It should be tested only on the grounds of ultra vires or unconstitutionality. The reasons in support of the satisfaction reached by the President are part of the advice tendered by the Council of Ministers. Therefore, they are immuned from judicial scrutiny though every order passed by the President does not receive the protection under Article 74(2) or Section 123 of the Evidence Act.

135. The question, therefore, is what is the scope of judicial review of the presidential proclamation under Article 356. Though the arm of the Court is long enough to reach injustice wherever it finds and any order or action is not beyond its ken, whether its reach could be projected to Constitutional extraordinary functionary of the coordinate branch of the Government, the highest executive, when it records subjective satisfaction to issue proclamation under Article 356. The contention of S/Sri Shanti Bhushan. Soli Sorabji and Ram Jethmalani that all the principles of judicial review of administrative action would stand attracted to the presidential proclamation under Article 356 cannot be accepted in toto. Equally the wide proposition of law canvassed by Sri Parasaran also is untenable. At the cost of repetition it is to reiteration that judicial review is the basic feature of the Constitution. This Court has constitutional duty and responsibility, since judicial review having been expressly entrusted to it as a constituent power, to review the acts done by the co-ordinate branches, the executive or the legislature under the Constitution, or under law or administrative orders within the parameters applicable to a particular impugned action. This Court has duty and responsibility to find the extend and limits of the power of the co-ordinate authorities and to find the law. It is the province and duty of this Court, as ultimate interpreter of the Constitution, to say what the law is. This is a delicate task assigned to the Court to determine what power Constitution has conferred on each branch of the Government. Whether it is limited to and if so what are the limits and whether any action of that branch transgresses such limits. The action of the President under Article 356 is a constitutional function and the same is subject to judicial review. Sri T.R. Andhyarujina the learned Advocate General of Maharashtra, contended that though the presidential proclamation is amenable to judicial review, it is in the thicket of political question and is not generally justiciable. Applying self imposed limitations this Court may be refrained to exercise judicial review. This contention too need to be qualified and circumscribed.

136. Judicial review must be distinguished from justiciability. The two concepts are not synonymous. The power of judicial review goes to the authority of the Court, though in exercising the power of judicial review, the Court in an appropriate case may decline to exercise the power as being not justiciable. The Constitution is both the source of power as well as it limits the power of the an authority. Ex necessitate. Judiciary has to decide the source, extent, limitations of the power and legitimacy in some cases of the authority exercising the power. There is no hard an fast fixed rules as to justiciability of a controversy. The satisfaction of the President under Article 356(1) is basically subjective satisfaction based on the material on record. It may not be susceptible to scientific verification hedged with several imponderables. The question, therefore, may be looked at from the point of view of common sense limitation, keeping always that the Constitution has entrusted the power to the highest executive, the President of India, to issue proclamation under Article 356, with the aid and advice of the Council of Ministers, again further subject to his own

discretion given in proviso to Article 74(1). Whether the question has raised for decision is judicially based on manageable standards? The question relating to the extents scope and power of the President under Article 356 though wrapped up with political thicket, per se it does not get immunity from judicial review.

137. However, a distinction be drawn between judicial review of the interpretation of the order or the extent of the exercise of the power by the President under Article 356. In the latter case the limits of the power of the President in issuing the proclamation under Article 356 and the limits of judicial review itself are to be kept in view. The question of justiciability would in either case mutually arise for decision. In this behalf, the question would be whether the controversy is amenable to judicial review in a limited area but the later depends upon the nature of the order and its contents. The question may be camouflaged with a political thicket, yet since the Constitution entrusted that delicate task in the scheme of the Constitution itself to this Court, in an appropriate case, the Court may unwrap the dressed up question, to find the validity thereof. The doctrine of political thicket is founded on the theory of separation of powers between the executive, the legislature and the judiciary. The Constitution of the United States of America, gave no express power of judicial review to the Supreme Court of USA. Therefore, the scope of political question, when came up for consideration in Baker v. Can (1962) 27 L.Ed. 663 , It was held in a restricted sense, but the same was considerably watered down in later decision of that Court. Vide Gillegan v. Morgan (1973), 37 L.Ed. 407 . But in deciding the political question the Court must keep in forefront whether the Court has judicially discoverable and manageable standards to decide the particular controversy placed before it, keeping in view that the subjective satisfaction was conferred in the widest term to a co-ordinated political department, by the Constitution itself.

138. In the State of Rajasthan's case Chandrachud, J., as he then was, held at p.61 that "probing at any greater dept. into the reasons given by the Home Minister is to enter a field from which Judges must scrupulously keep away. The field is reserved for the politicians and the Courts must avoid trespassing into it". Bhagwati. J., as he then was, speaking per himself as Gupta, J., held at p.81 that "it is not a decision which can be based on what the Supreme Court of United States has described as judicially discoverable and manageable standards. It would largely be a political Judgment based on assessment of diverse and varied factors, fast changing situation, potential consequences, public reaction, motivations and responses of different classes of people and their anticipated future behaviour an a host of other considerations in the light of experience of public affairs and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic Government. It cannot, therefore, by its very nature be a fit subject matter for judicial determination and hence it is left to the subjective legislation of the Central Government which is best in a position to decide it." Utwalia. J., at p.94 laid down that "Even if one were to assume such a fact in favour of the Plaintiff or the Petitioner, the facts disclosed undoubtedly lie in the field or an area purely of a political nature which are essentially non-justiciable. It would be legitimate to characterise such a field as prohibited area in which it is neither permissible for the Courts to enter, nor should they ever take upon themselves the hazardous task of entering into such an area." Fazal Ali, J. reiterating the same view held, that "it is manifestly clear that the Court does not possess resources which are in the hands of the Government to find out the political needs that they seek to subserve and the feelings or the aspirations of the nation that require a particular action to be taken at a particular time. It is difficult for the Court to embark on an enquiry of that type." Beg, C.J. at p.26 held that "In so far as Article

356(1) may embrace matters of political and executive policy and expediency, Courts cannot interfere with these unless and until it is shown what constitutional provision the President is going to contravene."

139. We respectfully agree that the above approach would be the proper course to tackle the problem. Yet another question to be disposed of at this stage is the scope of Article 74(2). In the cabinet system of the Government the Council of Ministers with the Prime Minister as the head would aid and advise the President to exercise the functions under the Constitution except where the power was expressly given to the President to his individual discretion. The scope thereof was considered vis-a-vis the claim of privilege under Section 123 of the Evidence Act. At the outset we say that Section 123 of Evidence Act is available to the President to claim privilege. In R.K. Jain v. Union of India MANU/SC/0291/1993 : [1993] 4 SCC 119 it was held that the President exercises his executive power through the Council of Ministers as per the rules of business for convenient transaction of the Government business made under Article 77(3). The Government of India (Transaction of Business) Rules, 1961 provides the procedure in that behalf. After discussing the scope of the cabinet system of Government in paragraphs 24 to 28 it was held that the cabinet known as Council of Ministers headed by the Prime Minister is the driving and steering body responsible for the governance of the country. They enjoy the confidence of the Parliament and remain on office so long as they maintain the confidence of the majority. They are answerable to the Parliament and accountable to the people. They bear collective responsibility. Their executive functions comprises of both the determination of the policy as well as carrying its executive, the initiation of legislation, maintenance of order, promotion of social and economic welfare and direction of foreign policy. In short the carrying on or supervision of the general administration of the affairs of the Union which includes political activity and carrying on all trading activities, etc. and they bear collective responsibility of the Constitution. It was also held therein that subject to the claim of privilege under Section 123 of the Evidence Act, the Minister was constitutionally bound under Article 142 to assist the court in producing the documents before the court and the court has to strike a balance between the competing interest of public justice and the interest of the State before directing to disclose the documents to the opposite party. But the documents shall be places before the court for its perusal in camera.

140. Article 74(2) provides that the question whether any, and if so what, service was rendered by Ministers to the President shall not be inquired into in any Court. In other words it intends to give immunity to the Council of Ministers to withhold production of the advice for consideration by the Court. In other words it is a restrictive power. Judicial review is a basic and fundamental feature of the Constitution and it is the duty and responsibility of the constitutional court to exercise the power of judicial review. Article 142, in particular, gives power to this Court in its exercise of the jurisdiction to make any necessary order "for doing complete justice in any cause or matter pending before it" and shall be enforceable throughout the territory of India is such manner as prescribed by or under any law made by the Parliament and subject to such law. The said restriction is only in matter of procedure and does not effect the power under Article 142. This Court has all or every power to make any order to secure the "attendance of any person, discovery or production of any documents or "investigation". Thereby the power of this Court to secure or direct production of any document or discovery is a constitutional power. The restrictive clause under Article 74(2) and the wider power of this Court under Article 142 need to be harmonised.

141. In R.K. Jain's case it was held that the court is required to consider whether public into is so strong to over-ride the ordinary right and interest of the litigant that he shall be able to lay before a court of justice the relevant evidence in balancing the competing interest. It is the duty of the court to see that there is a public interest and that harm shall not be done to the nation or to the public service by disclosure of the document and there is a public interest that the administration of justice shall not be frustrated by withholding the documents which must be produced, if justice is to be done. It is, therefore, the paramount right and duty of the court, not of the executive, to decide whether the document will be produced or withheld. The court must decide which aspect of the public interest predominates, in other words which public interest requires that the document whether should be produced for effectuating justice and meaningful judicial review performing its function and/or should it not be produced. In some cases, therefore, the court must, in a clash of competing public interests of the State and administration of justice, weigh the scales and decide where the balance lies. The basic question to which the court would, therefore, has to address itself for the purpose of deciding the validity of the objection would be, whether the document relates to affairs of the State, in other words, is of such a character that is disclosure would be, against the interest of the State or the public service and if so whether public interest in its non-disclosure is so strong that it must prevail over the public interest in administration of justice. On that account it should not be allowed to be disclosed. (vide paras 16 & 17)

142. When public interest immunity against disclosure of the State documents in the transaction of the business by the Council of Ministers of a class character was claimed, in the clash of this interest, it is the right and duty of the court to weigh1 the balance in that case also and that the harm shall not be done to the nation or the public service and in the administration of justice each case must be considered on its backdrop.

143. The President has no implied authority under the Constitution to withhold the document. On the other hand it is his solemn constitutional duty to act in aid of the court to effectuate judicial review. (Vide paragraphs 54 and 55). That was a case of statutory exercise of power, in accordance with the business rules in appointing the President of CEGAT and considering the facts in that case, it was held that it was not necessary to direct disclosure of the documents to the other side. In view of the scheme of the Constitution and paramount judicial review to be complete justice it must be considered in each case whether record should be produced. But by operation of Article 74(2) only the actual advice tendered by the Council of Ministers gets immunity from production and the court shall not incurred into the question whether and if so what advice was rendered by the Minister. In other words, the records other then the advice tendered by the Minister to the President, if found necessary, may be required to be produced before the constitutional court. This restrictive interpretation would subserve the wider power under Article 142 given to this Court and the protection accorded by Article 74(2) maintaining equl-balance.

144. Article 74(2) creates bar of enquiry and not a claim of privilege for decision in the exercise of the jurisdiction whether and, if so, what advice was tendered by the Council of Ministers to the President. The power of Article 74(2) applied only to limited cases where the matter has gone to the President for his orders on the advice of the Council of Ministers. Exercise of personal discretion calling the leader of a political party that secured majority to form the Government or the leader expressing his inability, to explore other possibilities is not liable to judicial scrutiny. Action based on the aid and advice also restricted the scope, for instance, the power of the President

to grant pardon or appointing a Minister etc., is the discretion of the President. Similarly prorogation of the Parliament or dissolution of the Parliament done under Article 85 is not liable to Judicial review. The accountability is of the Prime Minister to the people though the President acts in his discretionary power, with the aid and advice of the Prime Minister. Similarly, the right of the President to address and send message to the Lok Sabha and Rajya Sabha as under Article 86 are also in the area of the discretion with the aid and advice of the Council of the Ministers. The power of President to promulgate an ordinance under Article 123 and the assent of the Bills under Article 200, are reserved for consideration under Article 201. As stated earlier, the discretion of the President on the choice of the Prime Minister is his personal discretion though paramount consideration in the choice would be of the person who should command the majority in the House. Equally when the Government has lost its majority in the House and refuse to lay down the office, it is his paramount duty to dismiss the Government. Equally as said earlier, the dissolution of the Lok Sabha would be on aid and advice of the Prime Minister, the President while dissolving the Lok Sabha without getting involved in politics would exercise his discretion under Article 85, but the ultimate responsibility and the accountability for such advice is of the Prime Minister and the President would act consistent with the conventions with an appeal to the people of the necessity to dissolve the House and their need to express their will at the Polls. In this area the communication of the aid and advice whether receives confidentiality and bar the enquiry as to the nature of the advice or the record itself. Therefore, the enquiry under Article 74(2) is to the advice and if so, what advice was tendered to the President would be confined to limit power but not to the decision taken on administrative routine though expressed in the name of the President under Article 73 read with Article 71 of the Constitution.

145. The matter can be looked at from a different perspective that under Article 361. the President shall not be answerable to any Court for the exercise or the performance of his power and duty of his office or for any act purported to have been done by him in the exercise and performance of those powers and duties. When the President acts not necessarily on the aids and advice of the Council of Ministers but only "or otherwise i.e. "on any other information" under Article 356(1) his satisfaction is a subjective one that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution and issues the proclamation required under Article 356(1) of the Constitution. When it was challenged and asked to give his reasons, he is immuned from judicial process. The Union of India will not have a say for the exercise or the satisfaction reached by the President on otherwise self satisfaction:" for his issuing his proclamation under Article 356. Then no one can satisfy the Court the grounds for the exercise of the powers by the President. Therefore, we are of the considered view that the advice and, if so, what advice was tendered by the Council of Ministers for exercise of the power under Article 356(1) would be beyond the judicial enquiry under Article 74(2) of the Constitution. Nevertheless, the record on the basis of which the advice was tendered constitute the material. But, however, the material on record, the foundation for advice or a decision, does not receives total protection under Article 74(2). Normally the record may not be summoned by "rule nisi" or "discovery order nisi". Even if so summoned it may not be looked into unless a very strong case is made out from the pleadings, the order of proclamation if produced and other relevant material on record. If the court after due deliberation and, reasoned order by a High Court, issues "discovery order nisi" the record is liable to be reproduced pursuant to discovery order-nisi issued by this Court or the High Court subject to the claim under Section 123 of Evidence Act to examine the record in camera.

146. At this juncture we are to reiterate that judicial review is not concerned with the merits of the decision but with the decision making process. This is on the premise that modern democratic system has chosen that political accountability is more important than other kinds of accountability and the judiciary exercising its judicial review may be refrained to do so when it finds that the controversy is not based on judicially discoverable and manageable standards. However, if a legal question camouflaged by political thicket has arisen, the power and the doors, of constitutional Court are not closed, nor can they be prohibited to enter in the political field under the grab of political thicket in particular, when the Constitution expressly has entrusted the duty to it. If it is satisfied that a judicially discoverable and manageable issue arises, it may be open to the court to issue discovery order nisi and consider the case and then issue rule nisi. It would thus be the duty and responsibility of this Court to determine and found law as its premise and lay the law in its duty entrusted by the Constitution, as ultimate interpretor of the Constitution, though it is a delicate task and issue appropriate declaration. This Court equally declare and determine the limit, and whether the action is in transgression of such limit.

Interpretation of the Constitution and Scope of value orientation.

147. Before discussing the crucial question it. may be necessary to preface that the Constitution is intended to endure for succeeding generations to come. The best of the vision of the founding fathers could not visualise the fit falls in the political governance, except the hoary history of the working of the emergency provisions in the Government of India Act and wished that Article 356 should not be "put to operation" or be a 'dead latter' and at best "sparingly" be used. In working the Constitution, Article 356 has been used 90 times so far a daunting exercise of the power. But it is settled law that in interpreting the Constitution neither motives nor bad faith nor abuse of power be presumed unless in an individual case it is assailed and arise for consideration on that premise. Section 114(e) of the Evidence Act raises statutory presumption that official acts have been regularly performed.

148. Prof. Bork in his "Neutral Principles and Some First Amendments Problems", 47 Ind. Law Journal, p. 1 at p. 8, 1971 Edn. stated that the choice of fundamental values by the courts cannot be justified. When constitutional materials do not clearly specify the value to be preferred, there is no principle weighing to prefer any claimed human value to any other. The Judge must stick close to the text and the history and their fair implications and not to constant new rights. The same Neutral Principle was preferred by Prof. Hans Linde in his Judges "Critics and Realistic Traditions" 82 Yale Law Journal 127 at 254 (1972) that "the judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text. Prof. Ely in his "Wages of Crying Wolf a comment on the Reo v. Ved (1982) Y L J 1920 stated that a neutral principle if it lacks connection with any value, the Constitution marks it as special. It is not a constitutional principle and the court has no business in missing it. In Encyclopedia of the American Constitution by Leonard W. Levy at p. 464 it is stated that "the Constitution is a political document it serves political ends; its interpretations are political acts." Any theory of constitutional interpretation therefore presupposes a normative theory of the Constitution itself- a theory, for example, about the constraints that the words and intentions of the adopters should impose on those who apply or interpret the Constitution. As Ronald Dworkin observed. "Some parts of any constitutional theory must be independent of the intentions or beliefs or indeed the acts of the people the theory designates as

Framers. Some part must stand on its own political or moral theory; otherwise the theory would be wholly circular". The courts an interpreters are called upon to fill was significant constitutional gaps in variety of ways. The court should vigorously describe, as determiners, of public values as and small revolution and principles. Their source of moral foundation, available at the time when momentus issues based on ethical or moral principles arise. What is left for the other social decision makers, the state, the legislative and the executive? Where does the non-original political process fit in? Prof. Neil K. Komuser in his "The Features of Interpreting Constitution" North Western Law Review. (1986-87) p. 191 at p. 202 to 210 stated that the non-originalist interpreters leave the above questions largely unanswered. He says, they seem or busy of timing to convince the world that one cannot and should not have a non narrow originalist approach" nor that one or another branch of philosophy of language should prevail for they have failed to address an essential-to my mind, the essential question of constitutional law. Who decides? None of the non-originalists vaguely phrased assignments for the judiciary, such as "search for public or traditional values", or "protection of principles" or "evolution of morals" tell us what the courts should do or hold or describe, what they actually do." The judiciary can be seen as doing everything or nothing under these schemes. If the judiciary is meant merely to list values or principles that might be considered by political process, the judicial role is toothless. The list of values or principles that might be justiciably considered is virtually infinite. Anyone with the slighest sophistication can find some benefit, value or justiciable principles virtually in any legislation. That is how the minimal scrutiny or rational review techniques of judicial review generally have been employed. This level of review is no review at all. On the other hand one close up to the tenor of the arguments that the non-originalists can be seen as giving the judicial task of balancing the conflicting public values for proclamation which principles triumph. Here the judiciary becomes the central societal decision makers. The resolution of conflicts among public values is coterminous with social decision making. It is what the legislature, the executive and even the judiciary do. Put simply, the value formulations of the non-originalists do not address the essential issue raised by the earlier discussions. How shall responsibility for decisions be allocated in a word of highly imperfect decision makers? How would these scholars have judiciary (let alone the other institution) face such terms as distrust, uncertainty and ignorance? One does not have to be hostile to a substantial role for judicial review to be concerned when so much constitutional scholarship skirts so central an issue. Indeed, one could allow for significantly more judicial activism than our constitutional history reveals without approaching the limits inherent in the nebulous formulations of the various non-originalists positions. As a general matter even in the most activist spirit, for example "the Lochner and Warran's Courts Eras", the judiciary seems to have decided, not to decide more questions leaving the discovery of the public values or moral evolution in more areas to other societal decision makers. Although such things are within the measures, it seems that there is legislative, executive and to a greater extent administrative agencies, interpreters, have actively influenced only a small percentage of public decision making. This it seems to me the non-originalists literature threatens to be largely irrelevant to "constitutional analysis" so long as it does not consider with greater care under what circumstances the usually passive mode of judicial interpretation is to be replaced by the less common, but more important active mode. Bennion on statutory interpretation at p. 721 stated that since constitutional law is the framework or the state it is not to be altered by a side wind. A caveat is needed to be entered here. In interpreting the constitution, to give effect to personal liberty or rights of a section of the society, a little play provides teeth to operate the law or filling the yearning gaps even "purposive principle" would be

adaptable which may seek to serve the law. But we are called to interpret the constitutional operation in political field, whether it would be permissible is the question.

SATISFACTION OF THE PRESIDENT AND JUSTICIABILITY

149. The satisfaction of the President that a situation has arisen in which the Government of the State cannot be carried out in accordance with the of the Constitution is founded normally upon from the Governor or any other information which the President has in possession, in other words, the "Council of Ministers", "the President" reached a satisfaction. Normally, the report of the Governor would form basis. It is already stated that the Governor's report should contain material facts relevant to the satisfaction reached by the President. In an appropriate case where the Governor was not inclined to report to the President of the prevailing situation contemplated by Article 356. the President' may otherwise have information through accredited channels of communications and have it is their custody and on consideration of which the President would reach a satisfaction that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions.

"OTHERWISE"

150. The word "otherwise" in Article 356(i) was not originally found in the Draft Article 278, but it was later introduced by an amendment. Dr. Ambedkar supported the amendment on the floor of the Constituent Assembly stating that, "the original Article merely provided that the president could on the report of the Governor, "or otherwise" was not there. Now it is felt that in view of the facts that Article 277A (now Article 355) which precedes the Article 278 (Article 356 imposed a duty and obligation upon the center. That it would not be proper to restrict and confine action of the President which undoubtedly he will be taking in the fulfillment of the duty, the report made by the Governor of the province. It may be that the Governor does not make the report. I think as a necessary consequence to the effectuation of Article 277A we must give liberty to the President to act even when there is no report of the Governor and when the President got certain facts even from his knowledge that he thinks he ought to have acted in fulfillment of his duty." The width of the power is very wide, the satisfaction of the President is subjective satisfaction. It must be based on relevant materials. The doctrine that the satisfaction reached by an administrative officer based on irrelevant and relevant grounds and when some irrelevant grounds were taken into account, the whole order gets vitiated has no application to the action under Article 356. Judicial review of the Presidential proclamation is not concerned with the merits of the decision, but to the manner in which the decision had been reached. The satisfaction of the President cannot be equated with the discretion conferred upon an administrative agency of his subjective satisfaction upon objective material like in detention cases administrative action or by subordinates legislation. The analogy of the provisions in the Government of India Act or similar provision in the Constitution of Pakistan and the interpretation put upon it by the Supreme Court of Pakistan do not assist us. The exercise of the power under Article 356 is with the aid and advice of the Council of Ministers with the Prime Minister as its head. They are answerable to the Parliament and accountable to the people.

151. To test the satisfaction reached by the President there is no satisfactory criteria for judicially discoverable and manageable standards that what grounds prevailed with the President to reach

his subjective satisfaction. There may be diverse, varied and variegated considerations for the President to reach the satisfaction. The question of satisfaction basically a political one, practically it is an impossible question to adjudicate on any judicially manageable standards. Obviously the founding fathers entrusted that power to the highest executive. The President of India, with the aid and advice of the Council of Ministers. The satisfaction of the President being subjective, it is not judicially discoverable by any manageable standards and the court would not substitute their own satisfaction to that of the President. The President's satisfaction would be the result of his comprehending in his own way the facts and circumstances relevant to the satisfaction that the Government of the State cannot be carried on in accordance with the provisions of the constitution. There may be wide range of situations and sometimes may not be enumerated, nor there be any satisfactory criteria, but on a conspectus of the facts and circumstances the President may reach the satisfaction that the Government of the State cannot be carried on in accordance with the provisions of the constitution. Therefore, the subjective satisfaction is not justiciable on any judicially manageable standards. Moreover, the executive decision of the President receives the flavour of the legislative approval after both Houses of the Parliament approved the proclamation and executive satisfaction ceases to be relevant. Article 100 of the Constitution protects the parliamentary approval from assailment on any ground. The judicial review becomes unavailable, that apart a writ petition under Article 226, if is maintainable to question the satisfaction, equally a declaration that a situation has arisen in the state to clamp emergency or to declare President Rule by judicial order is permissible and cannot be wished away. Could it be done?

152. The use of the world "may" in Clause (1) of Article 356 discerns discretion vested in the President (Council of Ministers) to consider whether the situation contemplated under Article 356 has arisen and discernable from the report submitted by the Governor or other information otherwise had necessitated to dismiss the State Government and dissolve the Assembly to take over the administration of a State or any one of the steps envisaged in Sub-clauses (a) to (c) of Clause 1. The issuance of proclamation is subject to approval which includes (disapproval in inappropriate case) by both Houses of Parliament. In other words, the issuance of the proclamation and actions taken in furtherance thereof re subject to the Parliamentary control which itself is a check and safeguard to protect the Federal character of the State and democratic form of Government. The President is not necessarily required to approve the advice given by the Council of Ministers to exercise the power under Article 356. The proviso to sub-Article (i) of Article 74, brought by Constitution 44th Amendment Act, itself is a further assurance that it was issued after due and great deliberations. It also assures that the President actively applied his mind to the advice tendered and the material placed before him to arrive at his subjective satisfaction. In an appropriates case be may require the Council of Ministers to reconsider such advice, either generally or he may himself suggest an alternative course of action to the proposed advice tendered by the Council of Ministers. By necessary implication it assures that the President is an active participant nor merely acted as a constitutional head under Article 73, but also active participant in the decision making process and the proclamation was issued after due deliberations. The court cannot, therefore, go behind the issue of proclamation under Article 356 and substitute its own satisfaction for that of the President./p>

"CANNOT BE CARRIED ON" - MEANING AND SCOPE

153. We are to remind ourselves that application of "principle of the source" from Part 18, the family of emergency provisions conveniently employed or the grammarian's rule would stultify the operation of Articles 356 wisely incorporated in Constitution. Instead placing it in the spectrum of "purposive operation" with prognosis would yield its efficacy for succeeding generations to meet diverse situations that may arise in its operation. The phrase "cannot be carried on" in Clause 1 of Article 356 does not mean that it is impossible to carry on the Government of the State. It only means that a situation has so arisen that the Government of the State cannot be carried on its administration in accordance with the provisions of the Constitution. It is not the violation of one provision or another of the Constitution which bears no nexus to the object of the action under Article 356. The key word in the marginal note of Article 356 that "the failure of Constitutional machinery" open up its mind of the operational area of Article 356(1) Suppose after general elections held, no political party or coalition of parties or groups is able to secure absolute majority in the legislative assembly and despite the Governor's exploring the alternatives, the situation has arisen in which no political party is able to form stable Government, it would be a case of completely demonstrable inability of any political party to form a stable Government commanding the confidence of the majority members of the legislatures. It would be a case of failure of constitutional machinery. After formation of the ministry, suppose due to internal dissensions, a deliberate dead-lock was created by a party or a group of parties or members and the Governor recommends to the President to dissolve the assembly, situation may be founded on imponderable variable opinions and if the President satisfied that the Government of the State cannot be carried on and dissolved the assembly by proclamation under Article 356, would it be judicially discoverable and based on manageable standard to decide the issued? On a ministry is voted by motion of no confidence but the Chief Minister refuses to resign or he resigns due to loss of support and no other political party is in a position to form an alternative Government or a party having majority refuses to form the Ministry would not a constitutional dead-lock be created ? When in situations the Governor reported to the President, and President issued proclamation could it be said that it would be unreasonable or mala fides exercise of power ? Take another instance where the Government of a State, although enjoying the majority support in the assembly, it has deliberately conducted, over a period of time, its administration in disregard of the Constitution and the law and while ostensibly acting within the constitutional form, inherently flouts the constitutional principles and conventions as a responsible Government or in secret collaboration with the foreign powers or agencies creates subvertive situation, in all the cases each is a case of failure of the constitutional machinery.

154. While it is not possible to exhaustively catalogue diverse situation when the constitutional break down may justifiably be inferred from, for instance (i) large scale break down of the law and order or public order situation; (ii) gross mismanagement of affairs by a State Government; (iii) corruption or abuse of its power; (iv) danger to national integration or security of the state or aiding or abetting national disintegration or a claim for independent sovereign status, and (v) subversion of the Constitution while professing to work under the Constitution or creating disunity or disaffection among the people to disintegrate democratic social fabrics.

155. The Constitution itself provides indication in Article 365 that on the failure of the State Government to comply with or to give effect to any directions given by the Union Government in exercise of its executive powers and other provisions of the Constitution it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried

on in accordance with the provisions of the Constitution. For instance, the State failed to preserve the maintenance of means of communication declared to be of national or material means envisaged under Article 257(2) of the Constitution and despite the directions, the State Govt. fails to comply with the same. It would be an instance envisaged under Article 356. Similarly protection of the railways within the State is of paramount importance. If a direction issued under Article 257(3) was failed to be complied with by the State to protect the railways, it would be another instance envisaged under Article 365. In these or other analogous situations the warning envisaged by Dr. Ambedkar need to be given and failure to comply with the same would be obvious failure of the constitutional machinery. During proclamation of emergency under Art, 352 if directions issued under Article 353A were not complied with or given effect to, it would also be an instance under Article 365. Equally directions given under Article 360(3) as to observance of financial propriety or the proclamation as to financial emergency is yet another instance envisaged by Article 365. The recent phenomena that the Chief Minister gets life size photo published in all national and regional dailies everyday at great public expenditure. Central government has responsibility to prevent such wasteful expenditure. Sufficient warning given yielded no response nor the Chief Minister desisted to have it published it is not a case for action under Article 356? These instances would furnish evidence as to the circumstances in which the President could be satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. These instances appear to be of curative in nature. In these cases forward may be called for before acting under Article 356.

156. Take another instance that under Article 339(2) of the Constitution the Union of India gives direction to the State to draw and execute the schemes specified therein for the welfare of the Scheduled Tribes in that state and allocated funds for the purpose. The state, in defiance, neither grew the plans nor execute the schemes, but diverted the finances allocated for other purposes. It would be failure of the constitutional machinery to elongate the constitutional purpose of securing socio-economic justice to the tribals envisaged in the directive principles warranting the President to reach his satisfaction that the Government of the state is not carried on in accordance with the provisions of the constitution. Where owing to armed rebellion or extra-ordinary natural calamity, like earth-quake, the Government of the State is unable to perform its duty in accordance with the provisions of the Constitution, then also satisfaction of the president that the government of the State is unable to perform as a responsible Government in accordance with the provisions of the Constitution is not justiciable.

157. Conversely, on the resignation of the Chief Minister the Governor without attempting or probing to form an alternative Government by an opposition party recommends for dissolution of the Assembly, it would be an obvious case of highly irrational exercise of the power. Where the Chief Minister himself express inability to cope with his majority legislators, recommends to the Governor for dissolution, and dissolution accordingly was made, exercising the power by the President, it would also be a case of highly irrational exercise of the power. Where the Governor recommends to the President to dissolve the Assembly on the ground that the Chief Minister belongs to a particular religion, caste on creed, it would also be a case that the President reached satisfaction only on highly irrational consideration and does not bear any nexus or correlation to the approximate purpose of the Action. It is clearly unconstitutional. Take an instance that national language is Hindi. center directs a non-Hindi speaking state to adopt Hindi in the Devnagari script as state language, though predominantly 95% of the population do not know Hindi, nor have need

to adopt it as lingua franca, the violation of the directives does not entail with imposition of President rule.

158. The exercise of power under Article 356 by the President through Council of Ministers Places a great responsibility on it and inherent therein are the seeds of bitterness between the Union of India and the states. A political party with people's mandate of requisite majority or of coalition with value based principles or programmes and not of convenience are entitled to form Government and carry on administration for its full term unless voted down from power in accordance with the Constitution. We have multi-party system and in recent past regional parties are also emerging. So one political party would be in power at the center and another at the State level. In particular, when the Union of India seeks to dismiss a State Ministry belonging to a different political party, there bound to exist friction. The motivating factor for action under Article 356(1) should never be for political gain to the party in power at the center, rather it must be only when it is satisfied that the constitutional machinery has failed. It is to reiterate that the federal character of the Government reimposes the belief that the people's faith in democratically elected majority or coalition government would run its full term, would not be belied unless the situation is otherwise unavoidable. The frequent elections would belie the people's belief and faith in parliamentary form of Government, apart from enormous election expenditure to the State and the candidates. It also generates disbelief in the efficacy of the democratic process which is a death knell to the parliamentary system itself. It is, therefore, extremely necessary that the power of proclamation under Article 356 must be used with circumspection and in a non-partisan manner. It is not meant to be invoked to serve political pain or to get rid of an inconvenient State Governments for good or bad governance, but only in cases of failure of the constitutional machinery of the State Government.

159. As stated earlier, the constitutional and political features should be nurtured and set conventions be laid by consensus among the political parties either by mutual agreement or resolution passed in this behalf. It is undoubted that Sarkaria Commission appointed by the Union of India and Rajamannar commission appointed by the State Govt. of Tamilnadu suggested certain amendments to Article 356, distinguished Judges gave guidelines. Though they bear weight, it is for the consideration of the political parties or Governments, but Judicially it would not be adapted as guidance as some of them would be beset with difficulties in implementation. However, their creases could be ironed out by conference or by consensus of the political parties. As regards horse-trading by the legislators, there are no judicially discoverable and manageable standards to decide in judicial review. A floor test may provide impetus for corruption and rank force and violence by muscle men or wrongful confinement or volitional captivity of legislators occur till the date of the floor test in the House to gain majority on the floor of the House.

160. At some quarters it is believed that power under Article 356 was mis-used. We are not called to examine each case. A bird's eye view of the proclamations issued by the president under article 356 it would appear that on three occasions the Speaker if the legislative assembly created dead-lock to pass the financial bills. The power was used to resolve the deadlock. When there was break down of law and order and public order due to agitations for creation of a separate states for Telangana and Andhra, the Andhra Pradesh legislative assembly was dissolved and the Congress Ministry itself was dismissed while the same party was in power at the center. Similar instance would show that the power under Article 356 was used when constitutional machinery failed. This

would establish that the width of the power under Article 356 cannot be cut down, clipped or crapped. Moreover, the elected representatives from that State represent in the Parliament and do participate in the discussion of the presidential proclamation when its approval was sought and the transaction of legislative business concerning that state and express their dissent when it was mis-used, though temporarily the democratic form Government was not in the governance of that State. The basic feature of the Constitution, namely democracy is not affected for the governance by the elected executives temporarily at times maximum period of three years.

161. The President being the highest executive of the State, it is impermissible to attribute personal mala fides or bad faith to the President. The proviso to Article 74(1) presumptively prohibits such a charge unless established by unimpeachable evidence at the threshold. For the exercise the power under Article 356 the Prime Minister and his Council of Ministers, he/they are collectively responsible to the Parliament and accountable to the people. The only recourse, in case of misuse or abuse of power by the President, is to take either impeachment proceedings under Article 61 against the President or seek confidence of the people at the polls.

162. These conclusions do not reach the journey's end. However, it does not mean that the court can merely be an onlooker and a helpless spectator to exercise of the power under Article 356. It owes duty and responsibility to defend the democracy. If the court, upon the material placed before it finds that the satisfaction reached by the President is unconstitutional, highly irrational or without any nexus, then the court would consider the contents of the proclamation or reasons disclosed therein and in extreme cases the material produced pursuant to discovery order nisi to find the action is wholly irrelevant or bears no nexus between purpose of the action and the satisfaction reached by the President or does not bear any rationale to the proximate purpose of the proclamation. In that event the court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently proclamation issued under Article 356 would be declared unconstitutional. The court cannot go into the question of adequacy of the material or the circumstances justifying the declaration of the President Rule. Roscoupoun in his Development of the Constitutional Guarantees of liberty, 1963 Edn. quoted hearing that, "Form is sworn enemy of caprice, the twin sisters of liberty, fixed forms are the school of discipline and order and thereby of liberty itself. The exercise of the discretion by the President is hedged with the constitutional constraint to obtain approval or the Parliament within two months from the date of the issue, itself is an assurance of proper exercise of the power that the President exercises the power properly and legitimately that the administration of the state is nor carried on in accordance with the provisions of the Constitution.

SCOPE OF REINDUCTION OF THE DISMISSED GOVERNMENT, RENOTIFICTION AND REVIVAL OF DISSOLVED ASSEMBLY AND ITS EFFECT

163. Contention was raised that until all avenues of preventing failure of the machinery by appropriate directions by the Central Government failed or found it absolutely impossible for the State Govt. to carry on the administration in accordance with the provisions of the Constitution or by dual exercise of the power partly by state and partly by the President or alternatively with dissolution of the Assembly should be deferred till approval by the Parliament is given and stay the operation of the Presidential proclamation till that time have been canvassed by the counsel for

the States. It is already considered that warnings are only in limited areas in the appropriate cases of financial mismanagement, but not in all the other situations.

CONSTITUTIONAL CONVENTIONS PROVIDE FLESH WHICH CLOTHES DRY BONES OF LAW

164. Ever since Article 356 was put in operation convention has been developed that the legislative Assembly is dissolved, the State Government is removed and the executive power assumed by the President is entrusted to the Governor to carry on the executive actions with the aid and advice of the appointed AdvisOrs. The Parliament exercises the legislative powers of the entries in List II of the Schedule and delegates legislative power to the President. The President makes incidental and consequential provisions. The Government of the State is thus under the administration of the Union Government. The Constitution though provided an elaborate procedure with minute details, that in the event of the Parliament did not approve the proclamation issued under Article 356, the contingency of restitution of removed government and restoration of dissolved Assembly, obviously with the fond hope that Article 356 would remain a "dead letter" or it will "not be put to operation", or at best "sparingly" used. Dr. Ambedkar in his closing speech in the constituent Assembly stated that "The Conventions and political morality" would held successful working of the constitution. Constitution cannot provide detailed rules for every eventuality. Conventions are found in all established Constitutions. The Conventions are meant to bring about Constitutional development without formal change in the law. Prof. K.C. Wheare in his book "the Statute of Westminster and Dominion status" (fourth Edition) defined the conventions thus:

The definition of conventions may thus be amplified by saying that their purpose is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating the way in which legal rules shall be applied.

165. Sir W. Ivon Jennings, in his "Law and the Constitution" (Fifth Edition) elaborated the constitutional convention:

Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow.

166. The Constitutional conventions provide the flesh which clothes the dry bones of the law; they make the Constitution work; they keep it in touch with the growth of ideas. A Constitution does not work itself; it has to be worked by men. It is an instrument of national cooperation which is as necessary as the instrument. The conventions are the rules elaborated for effecting that cooperation. Convention entrust power granted in the Constitution from one person to the other when the law is exercised by whom they are granted, they are in practice by some other person or body of persons. The primary role of conventions is to regulate the exercise of the discretion facing that irresponsible abuse of power.

167. K.C. Wheare in his book "Modern Constitutional" (1967 edition) stated that : "The conventions not only give discretionary powers to the Government but also in executive governance and a legislature or executive relations, where such rules and practice operate. They

may be found in other spheres of constitutional activities also". He stated that: "A course of conduct may be persisted over a period of time and gradually attain first persuasive and then obligatory force. A convention may arise much more quickly than that. There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct". Sir W. Ivor Jennings had stated that "The law provides only a framework; these who put the laws into operation give the framework a meaning and fill in the interstices. Those who take decisions create precedents which others tend to follow, and when they have been followed long enough they acquire the sanctity and the respectability of age. They not only are followed but they have to be followed." One of us, learned brother Kuldip Singh. J. had elaborately considered the scope of conventions which obviated the need to tread the path once over and held in the Supreme Court Advocates on Record Association and Ors. v. Union of India, MANU/SC/0073/1994 : JT (1993) 5 SC 479 that:

The Written Constitution cannot provide for every eventuality. Constitutional institutions are often created by the provisions which are generally worded. Such provisions are interpreted with the help of conventions which grow by the passage of time, conventions are vital in so far a they fill-up the gaps in the Constitution itself, help, solve problems of interpretation and allow for the future development of the Constitutional frame work. Whatever the nature of the Constitution, a great deal may be left unsaid in legal rules allowing enormous discretion to the constitutional functionaries. Conventions regulate the exercise of that discretion.

168. The convention in working Article 356 of the Constitution has been established and became the constitutional law filling the interstices of legislative process. The actions done by the President in accordance with the choice left to him by Sub-clauses (a) to (c) of Article 356 and by Parliament under Article 357, i.e. dissolution of the legislative assembly, removing the State Government, assumption of administration and entrustment of the administration and the executive power to the Governor of that State with the aid and advice of the appointed Advisors and to take over legislative functions by the Parliament and the power of promulgation of Ordinance by the President, etc. by operation of Article 357 and making all incidental and consequential provisions for convenient administration of executive Government of the State attained status of constitutional law. This constitutional convention firmly set the working of the Constitution on smooth working base and is being operated upon all these years. We hold that that upsetting the settled convention and the law and adopting value oriented interpretation would generate uncertainty and create constitutional crises in the administration and the Government and would lead to failing the Constitution itself.

PRESIDENTIAL PROCLAMATION - SO FAR PARLIAMENT DID NOT DISAPPROVE

169. The proclamation issued under Article 356 requires to be laid before each House of Parliament within two months from the date of its issue. Unless it receives the approval, it shall cease to operate at the expiration of two months. The legal consequences of the proclamation, as stated earlier, is that the State Government is removed, the legislative Assembly is dissolved and in exercising the power mentioned in Sub-clauses (a)(b) & (c) of Clause (1) of Article 356 the President takes either steps mentioned therein and the Parliament exercises the power under Article 357 conferring the Legislative power on the President and arrangement for convenient administration made while exercising legislative powers in the entries in List II of Schedule VII

of the Constitution. The contention is that till expiry of two months the legislative assembly should not be dissolved and on the approval received from both the Houses of Parliament the President should dissolve it. If the President fails to get the approval then the dissolved Assembly must be revived and the dismissed Ministry should be reinducted into office. We find it difficult to give acceptance to this contention and if given acceptance it would beset with grave incongruities and result in operational disharmony. The Parliament did not disapprove any proclamation so far issued. There is no express provision engrafted in the Constitution to fill in this contingency. In Rajasthan's case this Court considered the contingency and held that dissolution of the Legislative Assembly is part of the same proclamation or by a subsequent order and that even if the Parliament does not approve the proclamation the dissolved Assembly and the removed Ministry cannot be restored. We respectfully agree with the view for the reasons we independently give hereinunder.

FUNCTIONAL INCONGRUITY AND DISHARMONY

170. The executive power of the Union or the State is co-extensive with their legislative powers respectively. When the President assumed administration of the State under Article 356, without dissolving the Legislative Assembly could the President discharge the executive powers without legislative powers being armed with by the Parliament? Could the President discharge the duties under the directions of the State Legislature, if need arises for passing appropriate legislative sanctions. By cameral operation of the legislative and executive powers both by the State legislature and Parliament in List II of VII Schedule is an anthema to the democratic principle and constitutional scheme. The question of conflict of parliamentary supremacy and executive over-bearing is more imaginary than actual or real.

171. The reinduction of the government of the State also besets with several incongruities. It cannot be assumed that the President lightly removed the State government. It must be for formidable grounds, though not judicially discoverable nor discernible to strict judicial scrutiny. All the proclamations so far issued were not disapproved by the Parliament. The dismissed Government, if restituted into power, may violate with impunity the provisions of the Constitution and Laws for the balance period taking advantage of majority in the legislature and full scale corruption or other unconstitutional acts will have their free play. The political party itself and all their members of the legislature should collectively own responsibility for the removal of their Government and their unconstitutional governance writes its own death warrant. Restitution thereby puts a premium on failing the Constitution. The political party must seek afresh mandate from the electorates and establish their credibility by winning majority seats. The existence of the legislative council which is not dissolvable, like Rajya Sabha, cannot by itself transact any business, in particular the finance bills or appropriate bills or annual financial statements. Therefore, its continuance shall render no criteria to the continuance of legislature or to assume it be not dissolved on grammarian rule to reconstitute the dissolved legislative assembly of which the majority members belong to the same party. No doubt dissolution of the legislature literally would include legislative council but not every State has a council. No distinction between two types of States, one with Council and another without Council and the former would be eligible for revival and later per force would not be, was not meant by the Constitution. Grammarian rules carries no consistance. Moreover this problem could also be tested from the expediency and functional efficacy. The possibility of reinduction creates functional hiatus. Suppose the court grants stay till the Parliament approves the proclamation, if urgent need arose to issue ordinance or transact legislative or financial business,

who would do it? The suspended Assembly cannot do nor the Parliament. The dismissed Ministry cannot transact the legislative business. Even if permitted to function and ultimately the proclamation is approved by the Parliament, what would happen to the validity of the executive and legislative acts done in the interregnum. As stated, is there no possibility of large scale abuse of office for personal or political gain? If the orders are issued by the Courts on value based opinion, where is the finality and at what point a stop is to be put? If stay is granted, by a High Court and writ petition is not disposed of and the term of the legislative Assembly expires what would happen to the Ministry in office? Whether it would continue by order of the Court? How elections are to be conducted by the Election Commission? Is it under the orders of the Court or by the Exercise of the power under Article 324. Is day to day executive, legislative and administrative actions are to be done under the writ of the Court? If a High Court issues a direction to allow the dissolved assembly its full course of balance period including the suspended period what would happen? Is it not violative of Article 172? Whether it could be prevented to be done? If such Order is not complied with, is not the President liable to contempt of the Court and if so what happens to the protection of Article 361? Instead of solving the problems, does not the writ of the court creates constitutional crisis? Giving deep and anxious consideration and visualising the far reaching constitutional crisis, we are firmly of the view that the self restraint constitutions us to express no value opinion, leaving to the Parliament to ponder over and if deemed necessary amend Article 356 suitably.

172. The Constitution was amended more than 77 times and Article 356 itself was amended six times through the Constitution Section 38th Amendment Act; 42nd Amendment Act: 44th Amendment Act; 59th Amendment Act; 64th Amendment Act and 68th Amendment Act. Apart from the Congress Party, three non congress political parties were in power at the center during these 44 years and no amendment was brought to Article 356(3) that on disapproval of the proclamation by the Parliament the dissolved Assembly stands revived and removed Government stood reinducted. The statutory construction fortifies this conclusion.

CASUS OMISSUS - WHETHER PERMISSIBLE TO SUPPLY

173. The question, further arises whether by interpretative process, would it be permissible to fill in the gaps. Though it is settled law that in working the law and finding yearning gaps therein, to give life and force to the legislative intent, instead of blaming the draftsman, the Courts ironed out the creases by appropriate technique of interpretation and infused life into dry bones of law. But such an interpretation in our respectful view is not permissible, when we are called upon to interpret the organic Constitution and working the political institutions created therein. When Parliament has had an opportunity to consider what exactly is going wrong with the political system designed by the Constitution but took no steps to amend the Constitution in this behalf, it is a principle of legal policy, that the law should be altered deliberately, rather than casually by a sidewind only, by major and considered process. Amendment of the Constitution is a serious legislative business and change in the basic law, carefully workout, more fundamental changes are brought out by more through going and in-depth consideration and specific provisions should be made by which it is implemented. Such is the way to contradict the problem by the legislative process of a civilised State. It is a well established principle of construction that a statute is not to be taken as affecting Parliamentary alteration in the general law unless it shows words that are found unmistakably to that conclusion. No motive or bad faith is attributable to the legislature.

Bennion at page 336 extracting from the Institute of the Law of Scotland vol. 3 Page 1 of The Practice by David Maxwell at page 127 abstracted that "where a matter depends entirely on the construction of the words of a statute, there cannot be any appeal to the nobile officium." He stated at page 344 that "where the literal meaning of the enactment goes narrower than the object of the legislator, the court may be required to apply a rectifying construction. Nowadays it is regarded as not in accordance with public policy to allow a draftsman's ineptitude to prevent justice being done. This was not always the case". Where the language of a statute is clear and unambiguous, there is no room for the application either of the doctrine of casus omissus or of pressing into service external aid, for in such a case the words used by the Constitution or the statute speak for themselves and it is not the function of the court to add words or expressions merely to suit what the courts think is the supposed intention of the legislature. In American Jurisprudence 2d Series, vol. 73 at page 397 in para 203 it is stated that, "It is a general rule that the courts may not, by construction insert words or phrases in a statute or supply a casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law". Under such circumstances new provisions or ideas may not be interpolated in a statute or engrafted thereon. At page 434 in para 366 it is further stated that "While it has been held that it is duty of the courts to interpret a statute as they find it without reference to whether its provisions are expedient or unexpedient. It has also been recognised that where a statute is ambiguous and subject to more than one interpretation, the expediency of one Constitution or the other is property considered. Indeed, where the arguments are nicely balanced, expediency may tip the scales in favour of a particular construction. It is not the function of a court in the interpretation of statutes, to vindicate the wisdom of the law. The mere fact that statute leads to unwise results is not sufficient to justify the court in rejecting the plain meaning of unambiguous words or in giving to a statute a meaning of which its language is not susceptible, or in restricting the scope of a statute. By the same taken, an omission or failure to provide for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the courts to interpret a statute as they find it without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived".

174. Craies on Statute Law, 7th Edition, at page 69 states that the second consequence of the rule of casus omissus is that the statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made. In Construction of Statutes by Crawford at page 269 in paragraph 169 it is stated that omissions in a statute cannot, as a general rule, be supplied by construction. Thus, if a particular case is omitted from the terms of a statute, even though such a case is within the obvious purpose of the statute and the omission appears to have been due to accident or inadvertence, the court cannot include the omitted case by supplying the omission. This is equally true where the omission was due to the failure of the legislature to foresee the missing case. As is obvious, to permit the court to supply the omissions in statutes, would generally constitute an encroachment upon the field of the legislature. In construing the Constitution we cannot look beyond the letter of the Constitution to adopt something which would command itself to our minds as being implied from the context. In State of Tasmania v. The Commonwealth of Australia and State of Victoria [1904] 1 CriLR 329, Connor. J. dealing with the question observed thus:

It appears to me the only safe rule is to look at the Statute itself and to gather from it what is its intention. If we depart from that rule we are apt to run the risk of the danger described by Pollack, O.B., in Mille v. Salomons., If he says, 'the meaning of the language be plain and clear, we have nothing to do but to obey it is to administer it as we find it; and , I think, to take a different course is to abandon the office of Judge, and to assume the province of legislation. Some passages were cited by Mr. Glynn from Black on the 'Interpretation of laws', which seem to imply that there might be a difference in the rules of interpretation to be applied to the Constitution and those to be applied to any other Act of Parliament, but there is no foundation for any such distinction. The intention of the enactment is to be gathered from its word. If the words are plain, affect must be given to them; if they are doubtful, the intention of legislature is to be gathered from the other provisions of the statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances - to the history of the law, and you may gather from the instrument itself the object of the Legislature in passing it. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing of law into existence. In the case of a Federal Constitution the field of inquiry is naturally more extended than in the case of a State Statute, but the principles to be applied are the same. You may deduce the intention of the Legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it. If that limitation is to be applied in the interpretation of an ordinary act of Parliament, it should at least be as stringently applied in the interpretation of an instrument of this kind, which not only is a statutory enactment, but also embodies the compact by which the people of the several colonies of Australia agreed to enter into an indissoluble Union.

175. In Encyclopedia of the American Judicial System the Constitutional Interpretation by Craig R. Ducat it is stated that the standard for assessing constitutionality must be the words of the Constitution, not what the judges would prefer the Constitution to mean. The constitutional supremacy necessarily assumes that a superior rule is what the Constitution says, it is not what the judges prefer it to be, vide page 973,. (emphasis supplied) In judicial tributes balancing the competing interest Prof. Ducat quoted with approval the statement of Bickel at page 798 trust:

The judicial process is top principle-phone and principle-pound - it has to be, there is no other justification or explanation for the role it plays, it is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive, it has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, on it lags, its pace hardly even seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

176. In the Modes of Constitutional Interpretation by Craig R. Ducat, 1978 Edition at p.125. he stated that the judges decision ought to mean society values not their own. He quoted Cardozo's passage from the Nature of Judicial process at page 108 that, "a judge, I think would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief." The court when caught in a paralysis of dilema should adopt self-restraint, it must use the judicial review with greatest caution. In clash of political forces in political statement the interpretation should only be in rare and auspicious occasions to nullify ultra vires orders in highly arbitrary or

wholly irrelevant proclamation which does not bear any nexus to the pre-dominant purpose for which the proclamation was issued, to declare it to be unconstitutional and no more.

177. Frankfurter, J. Says in Dennis v. United States,341 US 494 thus:

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?--who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures ....

178. Regionalism, legalism and religious fundamentalism have become divisive forces to weaken the unity and integrity of the country. linguistic chauvinism aiding its fuel to keep the people poles apart. Communalism and casteism for narrow political gains are creating foul atmosphere. The secessionist forces are working from within and out side the country threatening national integration. To preserve the unity and integrity of the nation, it is necessary to sustain the power of the president to wisely use Article 356 to stem them out and keep the Government of the state function in accordance with the provisions of the Constitution. Article 356 should, therefore, be used sparingly in only cases in which the exercise of the power is called for. It is not possible to limit the scope of action under Article 356 to specific situations, since the failure of the constitutional machinery may occur in several ways due to diverse causes be it political, internal subversion or economic causes and no straight- jacket formula would be possible to evolve. The founding fathers thus confided the exercise of the power in the highest executive, the President of India, through his Council of Ministers headed by the Prime Minister of the country who is accountable to the people of the country.

STAY OF ELECTIONS WHETHER COULD BE MADE:

179. Under Article 168 for every State there shall be Legislative Assembly and in some states legislative council. Article 172(1) provides that every Legislative Assembly of every State, unless sooner dissolved shall continue for five years from the date appointed for its first meeting and "no longer" and the expiration of such period of five years shall operate as dissolution of the Assembly. The proviso to Clause (1) or Sub-clause (2) are not relevant. It is thereby declared the constitutional policy that five years tenure of the Legislature starts running from the date appointed for its first meeting and expiration of the period operates constitutionally as date of dissolution of the Assembly. The phrase " no longer" reinforces its mandatory character. Article 324(1) enjoins the Election Commission to conduct elections to the Parliament and to the Legislature of every State, etc. The R.P. Act, Rules and the instructions prescribes the procedure to conduct and complete elections four months before the expiry of the date of dissolution. Article 329(b) issues an injunction that "no election to either House of Parliament or to the House of the Legislature of a State shall be called in question" except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. In

other words, the election process once set in motion should run its full course and all election disputes shall be resolved in accordance with the procedure established by R.P. Act.

180. In N.P. Ponnuswami v. Returning Officer, Namakkal Constituency [1952] SCR 2181. at the earliest Constitution Bench of this Court held that having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections shall be concluded as early as possible according to the time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted. In Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman MANU/SC/0567/1983 : [1985] Suppl. 1 SCR 493, another Constitution Bench considered the effect of interim stay of general elections to West Bengal legislative Assembly granted by the Calcutta High Court in a writ proceeding, held that the High Court must observe self imposed limitation on their power to act under Article 226 by refusing to pass orders or giving directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of election within the meaning of Article 329(b) of the Constitution. It is the duty of the court to protect and preserve the integrity of the Constitutional institutions which are devised to foster democracy and when the method of their functioning is questioned, which is open to the citizen to do, the court must examine the allegations with more than ordinary care. Vary often the exercise of jurisdiction especially the writ jurisdiction involves questions of propriety rather than of power. The fact that the court has power to do a certain thing does not mean that it must exercise that power regardless of consequences. Holding the elections to the legislatures and holding them according to law are both matters of paramount importance and is the constitutional obligation imposed by Article 168. The pragmatic approach was couched at 523 thus:

...India is an oasis of democracy, a fact of contemporary History which demands of the Courts the use of wise statesmanship in the exercise of their extraordinary powers under the Constitution. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass order or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within meaning of Article 329(b) of the Constitution....

There are plethora of precedents in this behalf, but suffice for the limited purpose to say that the exercise of the power either under Article 226 or Article 32 or Article 136 staying the elections to the dissolved Assembly under Article 356 not only flies in the face of the constitutional mandates and the law laid down by this Court, but creates uncertainty and constitutional crises as stated hereinbefore. Enlightened public opinion both inside or outside the Parliament, informed public objective criticism, objective assessment of the ground realities would inhibit misuse of power and hinder highly irrational exercise of the power.

181. The question, finally emerges is whether issuance of the proclamation under Article 356 without affording a particular Chief Minister to test his majority support of his party in the

Legislatures of Janta Dal or coalition on the floor of the House is arbitrary and bears no reasonable nexus or irrational. Having given our anxious consideration to the facts in Bommai's case and in the light of the discussion made hereinbefore that the fluid situation prevailing during the relevant period appears to have persuaded the president that he had constitutional duty to maintain the purity of the democratic process and required to stamp out horse-trading among the Legislatures which had resulted in the failure of the constitutional machinery, satisfied himself that necessitated to issuance of the proclamation under Article 356. Though the majority strength of the ruling party or coalition in the legislative Assembly may be tested on the floor of the House and may be a salutary principle as recommended by the Conference of the governors, it would appear that in its working there emerged several pitfalls and so it was not found enforceable as a convention. It is for the political parties or the Chief Ministers conference to take a decision in that behalf and it is not judicially manageable for the Court to give any declaration in this behalf. In regard to dissolution of U.P. Assembly, though there is no writ petition filed, since the Government machinery of that Government had failed to prevent destruction of Sri Ram Janambhoomi-Babri Masjid disputed structure and failed to protect the religious property, be it belong to Hindus or Muslims and in that surged atmosphere when it was done, it cannot be concluded that the President acted unconstitutionally or that there is no proximate nexus between the action and the demolition to exercise the power under Article 356. Equally regarding dissolution of Legislative Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh, the reports of the Governors do disclose that some of the Ministers and some Chief Ministers actively associated or encouraged Kar Sewaks to participate in the demolition of Ram Janambhoomi-Babri Masjid disputed structure and also criticised the imposition of ban on R.S.S. The law and order situation or public order situation do not appear to have been brought under control. The common thread of breach of secularism ban through the events and with prognosis action was taken. Our learned brother Jeevan Reddy, J. elaborately considered the pleadings of the parties and arguments by the respective counsel. He also deduced the conclusions. The need for discussion once over is thereby redundant. We respectfully agree with him and in case of Meghalaya also. We conclude that the satisfaction reached by the President cannot be adjudicated with any judicially discoverable and manageable standards, but one stark fact that emerged is that due to sustained campaign by the BJP and other organisations Sri Ram Janambhoomi-Babri-Masjid disputed structure was destroyed. Consequential situation that has arisen due to which the President satisfied that Governments of the States of Madhya Pradesh , Rajasthan and Himachal Pradesh cannot be carried on in accordance with the provisions of the Constitution and they breached the basic features of the Constitution, namely secularism. Therefore the satisfaction reached by the President cannot be said to be irrelevant warranting interference. As regards Meghalaya is concerned, though a declaration may possibly be made on the validity of the Presidential proclamation, since the elections have already been held. Its need became fiat accompli

.

CONCLUSIONS

182. Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The state is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its boundaries alterable by a law made by the

Parliament. Neither the relative importance of the legislative entries in Schedule VII, List I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The state qua the Constitution as federal in structure and independent in the exercise of legislative and executive power. However, being the creature of the Constitution the State has no right to secede or claim sovereignity. Qua the union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism.

183. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure. Unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution.<mpara>

184. The office of the Governor is a vital link and a channel of impartial and objective communication of the working of the Constitution by the State Government to the President of India. He is to ensure protection and sustenance of the constitutional process of the working of the Constitution in the State playing an impartial role. As head of the executive he should truthfully with high degree of constitutional responsibility inform the President that a situation has arisen in which the constitutional machinery has failed and the State cannot be carried on in accordance with the provisions of the Constitution with necessary factual details in a non-partisan attitude.

185. The Union of India shall protect the State Government and as corollary under Article 356 it is enjoined that the Government of every state should be carried on in accordance with the provisions of the Constitution. On receipt of a report from the Governor or otherwise the President (Council of Ministers) on being satisfied that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the constitution, is empowered to issue proclamation under Article 356(1) and impose President rule in the State in the manner laid down in Clauses (a) to (c) of Article 356(1) of the Constitution.

186. The exercise of the power under Article 356 is an extra-ordinary one and need to be used sparingly when the situation contemplated by Article 356 warrants to maintain democratic form of Government and to prevent paralysing of the political process. Single or individual act or acts of violation of the Constitution for good, bad or indifferent administration does not necessarily constitute failure of the constitutional machinery or characterises that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The exercise of power under Article 356 should under no circumstance be for a political gain to the party in power in the Union Govt. It should be used sparingly and with circumspection that the Govt. of the State function with responsibility in accordance with the provisions of the Constitution.

187. Rule of law has been chosen as an instrument of social adjustment and resolution of conflicting social problems to integrate diverse sections of the society professing multi-religious faiths, creed, caste or region fostering among them fraternity, transcending social, religious, linguistic or regional barriers. Citizenship is either by birth or by domicile and not as a member of religion, caste, sect, region or language. Secularism has both positive and negative contents. The

Constitution struck a balance between temporal parts confining it to the person professing a particular religious faith or belief and allows him to practice, profess and propagate his religion, subject to public order, morality and health. The positive part of secularism has been entrusted to the State to regulate by law or by an executive order. The State is prohibited to patronise any particular religion as State religion and is enjoined to observe neutrality. The State strikes a balance to ensue an atmosphere of full faith and confidence among its people to realise full growth of personality and to make him a rational being on secular lines, to improve individual excellence, regional growth, progress and national integrity. Religion being susceptible to the individuals or groups of people professing a particular religion, antagonistic to another religion or groups of persons professing different religion, brings inevitable social or religious frictions. If religion is allowed to over-play, social disunity is bound to erupt leading to national disintegration. Secularism is a part of the basic features of the Constitution. Political parties, group of persons or individual who would seek to influence electoral process with a view to come to political power, should abide by the Constitution and the laws including secularism, sovereignity, integrity of the nation. They/he should not mix religion with politics. Religious tolerance and fraternity are basic features and postulates of the Constitution as a scheme for national integration and sectional or religious unity. Programmes or principles evolved by political parties based on religion amounts to recognising religion as a part of the political governance which the Constitution expressly prohibited it. It violates the basic features of the Constitution. Positive secularism negates such a policy and any action in furtherance thereof would be violative of the basic features of the Constitution. Any act done by a political party or the Government of the State run by that party in furtherance of its programme or policy would also be in violation of the Constitution and the law. When the President receives a report from a Governor or otherwise had such information that the Government of the State is not being carried on in accordance with the provisions of the Constitution, the President is entitled to consider such report and reach his satisfaction in accordance with law.

188. A person who challenges the presidential proclamation must prove strong prima facie case that the presidential proclamation is unconstitutional or invalid and not in accordance with law. On the Court's satisfying that the strong prima facie case has been made out and if it is a High Court, it should record reasons before issuing "discovery order nisi", summoning the records from the Union of India. The Government is entitled to claim privilege under Section 123 of the Indian Evidence Act and also the claim under Article 74(2) of the Constitution. The Court is to consider the records in camera before taking any further steps in the matter. Article 74(2) is not a barrier for judicial review. It only places limitation to examine whether any advice and if so what advice was tendered by the Council of Ministers to the President. Articles 74(2) receives only this limited protective canopy from disclosure, but the material on the basis of which the advice was tendered by the council of Ministers is subject to judicial scrutiny.

189. The Union of India, when discovery order nisi is issued by this Court, would act in aid of the Court under Article 142(2) and is enjoined to produce the material, the foundation for action under Article 356. As held earlier before calling upon the Union to produce the material, the Court must first find strong prima facie case and when the records are produced they are to be considered in camera.

190. Judicial review is a basic feature of the Constitution. This Court/High Courts have constitutional duty and responsibility to exercise judicial review as centennial que vive. Judicial review is not concerned with the merits of the decision, but with the manner in which the decision was taken.

The exercise of the power under Article 356 is a constitutional exercise of the power, the normal subjective satisfaction of an administrative decision on objective basis applied by the Courts to administrative decision by subordinate officers or quasi-judicial or subordinate legislation does not apply to the decision of the President under Article 356.

191. Judicial review must be distinguished from the justiciability by the Court. The two concepts are not synonymous. The power of judicial review is a constituent power and cannot be abdicated by judicial process of interpretation. However, justiciability of the decision taken by the President is one of exercise of the power by the Court hedged by self-imposed judicial restraint. It is a cardinal principle of our Constitution that no-one, howsoever lefty, can claim to be the sole judge of the power given under the Constitution. Its actions are within the confines of the powers given by the Constitution.

192. This Court as final orbiter in interpreting the Constitution, declares what the law is. Higher judiciary has been assigned a delicate task to determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations, it is the duty and responsibility of this Court/High court to lay down the law. It is the constitutional duty to uphold the constitutional values and to enforce the constitutional limitations as the ultimate interpreter of the Constitution. The Judicial review, therefore, extends to examine the constitutionality of the proclamation issued by the President under Article 356. It is a delicate task, though loaded with political over-tones, to be exercised with circumspection and great care. In deciding finally the validity of the proclamation, there cannot be any hard and fast rules or fixed set of rules or principles as to when the President's satisfaction is justiciable and valid.

193. Justiciability is not a legal concept with a fixed content, nor is it susceptible of scientific verification. Its use is the result of many pressures or variegated reasons. Justiciability may be looked at from the point of view of common sense limitation. Judicial review may be avoided on questions of purely political nature, though pure legal questions camouflaged by the political questions are always justiciable. The Courts must have judicially manageable standards to decide a particular controversy, Justiciability on a subjective satisfaction conferred in the widest terms to the political co-ordinate executive branch created by the constitutional scheme itself is one of the considerations to be kept in view in exercising judicial review. There is an initial presumption that the acts have been regularly performed by the President.

194. The provision to Article 74(1) re-enforces that on the advice tendered by the Council of Ministers to the President, the latter actively applies his mind and reaches the satisfaction that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The word "otherwise" enlarges the width and ambit of satisfaction reached by the President. In some cases such satisfaction lacks judicially manageable standards for resolution. The abuse of the power by high constitutional functionaries cannot be assumed, but must be strictly proved. It also cannot be assumed that the presidential proclamation

was lightly issued. The exercise of discretionary satisfaction may depend on diverse varied and variegated circumstances. The Constitution confided exercise of the power under Article 356 in the highest executive of the land, the President of India aided and advised by the Council of Ministers at its head by the Prime Minister. The Prime Minister and his Council of Ministers are collectively and individually responsible to the Parliament and accountable to the people. Confidence reposed on the highest executive itself is a circumstance to be kept in view in adjudging whether the satisfaction reached by the President is vitiated by law. It is impermissible to attribute bad faith or personal mala fides to the President in the face of constitutional prohibition of answerability by Article 361. But if the proof of mala fide abuse of power is available, appropriate remedy would be available in the Constitution under Article 61.

195. The decision can be tested on the ground of legal mala fides, or high irrationality in the exercise of the discretion to issue presidential proclamation. Therefore, the satisfaction reached by the President for issuing the proclamation under Article 356 must be tested only on those grounds of unconstitutionality, but not on the grounds that the material which enabled him to reach the satisfaction was not sufficient or inadequate. The traditional parameters of judicial review, therefore, cannot be extended to the area of exceptional and extra-ordinary powers exercised under Article 356. The doctrine of proportionality cannot be extended to the power exercised under Article 356. The ultimate appeal over the action of the President is to the electorate and judicial self-restraint is called in aid, in which event the faith of the people in the efficacy of the judicial review would be strengthened and the judicial remedy becomes meaningful.

196. Under Article 356 as soon as the proclamation was issued, under Sub-clause (3) of Article 356, the President shall seek its approval from both Houses of Parliament within two months from the date of its issue unless it is revoked in the meanwhile. A consistent constitutional convention has been established that on issuing the proclamation the President on his assumption of the function of the Government of the State directs the Governor to exercise all the executive functions of the Government of the State with the aid and advice of the appointed Advisors. He declares that the power of the legislature of the state shall be exercisable by or under the authority of the Parliament and makes incidental and consequential provisions necessary to give effect to the object of proclamation by suspending whole or any part of the operation of any provision of the Constitution relating to any body or authority of the State which includes dissolution of the Legislative Assembly and removal of the State Government. The Parliament exercises the legislative power thereon under Article 357 and in turn it confers on the President the powers relating to entries in List II of the VII Schedule. The governor of the State with the aid and advice of the advisors exercise the executive functions on behalf of the President. The convention attained the status of law. This consistent law has been operating without any constitutional hiatus. Granting of stay of operation of presidential proclamation creates constitutional and administrative hiatus and incongruity. The Union and the State simultaneously cannot operate the legislative and executive powers in List II of Schedule 7 of the Constitution. Thereby the simultaneous by cameral functions by the Union and the State is an anthema to the democratic principle and constitutional scheme. It would lead to incongruity and incompatibility.

197. There is no express provision in the Constitution to revive the Assembly dissolved under the Presidential proclamation or to reinduct the removed Government of the State. In interpreting the Constitution on the working of the democratic institutions set up under the Constitution, it is

impermissible to fill the gaps or to give directions to revive the dissolved assembly and to reinduct the dismissed government of the State into office. Equally stay cannot be granted of the operation of the presidential proclamation till both Houses of Parliament approve the presidential proclamation. The suspension without dissolution of the legislative Assembly of the State also creates functional disharmony leading to constitutional crisis. The grant of stay of elections to the legislative assembly, occasioned pursuant to the presidential proclamation, also creates constitutional crisis. Therefore, the courts should not issue such directions leaving it to the Parliament to amend the Constitution if need be.

198. The floor test, may be one consideration which the Governor may keep in view. But whether or not to resort to it would depend on prevailing situation. The possibility of horse trading also to be kept in view having regard to the prevailing political situation. It is not possible to formulate or comprehend a set of rules for the exercise of the power by the Governor to conduct floor test. The Governor should be left free to deal with the situation according to his best judgment keeping in view the Constitution and the conventions of the Parliamentary system of Government. Though Sarkaria Commission and Rajamanner Commission, headed by two distinguished Judges of this land, recommended floor test, it could only mean that is consideration which must cross the mind of the Governor. It would be suffice to say that the Governor should be alive to the situation but the sole Judge on the question whether or not conditions are conducive to resort to floor test.

199. The satisfaction reached by the President in issuing presidential proclamation and dissolving the legislative assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot be faulted as it was based on the fact of violation of the secular features of the Constitution which itself is a ground to hold that a situation has arisen in which the Government of the concerned states cannot be carried on in accordance with the provisions of the Constitution. Therefore, the satisfaction cannot be said to be unwarranted. The appeals of the Union from the judgment of the Madhya Pradesh High Court is allowed accordingly and the judgment of the High Court is set aside. The dissolution of the Meghalaya Assembly though vulnerable to attack as unconstitutional, it has become infructuous due to subsequent elections and the newly elected state legislature and the Government of the State of Meghalaya are functioning thereafter. Therefore, no futile writs could be issued as the court does not act in vain. The appeal of Bommai's and the transferred petitions are accordingly dismissed, but in the circumstances without costs.

B.P. Jeevan Reddy, J.

200. Article 356 of the Constitution of India is a provision without a parallel. Constitution of no other country contains a similar provision. The only other Constitution that contains a somewhat similar provision is the Constitution of Pakistan of 1973, viz., Article 58(2) and Article 112(2). Both the Indian and Pakistani provisions appear to be inspired by Section 45 and Section 93 of the Government of India Act, 1935. Article 356, however, is qualitatively different, while the Pakistani provisions are more akin to the provisions of 1935 Act. Under Article 356, the President is empowered to remove the State Government, dissolve the Legislative Assembly of the State and take over the functions of the government of the State in case he is satisfied that the government of that State cannot be carried on in accordance with the provisions of the Constitution. In the context of the Indian Constitution (more specifically after the amendment of Article 74(1) by the 42nd (Amendment) Act) this really is the power vested in the council of ministers headed by the

Prime Minister at the center. The action can be taken either on the report of the Governor or on the basis of information received otherwise or both. An awesome power indeed. The only check envisaged by the Constitution apart from the judicial review - is the approval by both Houses of Parliament which in practice has proved to be ineffective, as this judgment will demonstrate. And with respect to judicial review of the action under Article 356, serious reservations are expressed by the counsel for the Union of India and other respondents. If what they say is accepted, there is a danger of this power eroding the very federal structure of our State and introducing a serious imbalance in our constitutional scheme. It is, therefore, necessary to define the parameters of this power and the parameters of judicial review in these matters in the interest of our constitutional system. It is for this reason that we heard elaborate arguments from all the parties before us on the meaning, scope and dimensions of the power under this Article. We may say, we are fully aware of the delicate nature of the problem. We are aware that though the questions raised herein are constitutional in character, they do have political overtones. Is quite likely that our views will not be found palatable by some but that probably cannot be helped. Sworn to uphold the Constitution, we must say what the Article says and means.

201. It is true that on account of elections having taken place subsequent to the issuance of the proclamations impugned herein, no effective relief can be granted in these matters, we are yet requested by all the parties concerned herein that we should express ourselves on all the issues arising herein so that the principles enunciated by this Court may serve as guidelines for the future for all concerned.

ARTICLE 356: THE BACKGROUND:

202. India became a British colony in the year 1858. Roughly two- thirds of it was under direct British rule while the remaining one-third was under the rulership of more than 500 Princes, who in turn were directly under the thumb of the British crown. The 1935 Act introduced, for the first time, the concept of division of powers between the center and the provinces. Most of the powers were retained with the center. The provincial governments were kept under an ever-watchful and all powerful center. The Governors in the provinces and the Governor-General at the center exercised real and substantial power, unlike the Governors and the President under the Constitution. From the British point of view, it was an experiment, the first one, in self-rule by the Indians. A few powers were entrusted to the elected governments at the center or in the provinces; even those could be resumed and taken back by the Governor-General or Governor, as the case may be, whenever he was satisfied that the government at the center or of the province could not be carried on in accordance with the provisions of the Act. Governor-General and Governor, under the 1935 Act, meant the imperial colonial power. Evidently, the British Parliament was not prepared to trust the Indian political parties. Many of them were opposed to British rule and some of their leaders had declared openly that they would enter the Legislatures and the government with a view to break the system from within. Sections 45 and 93 were the products of this mis-trust.

203. But then why was a provision like Article 356 ever made in the Constitution? What was the occasion and necessity for it? For ascertaining this, we may have to turn to the debates in the Constituent Assembly. The draft Articles 277(4) and 278 (corresponding to Articles 355 and 356)

were taken up for consideration on August 3, 1949. It would be appropriate to read both Articles 355 and 356 as enacted by the Constituent Assembly:

355. Duty of the Union to protect States against external aggression and internal disturbance.-- It shall be the duty of the Union to products every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

356. Provisions in case of failure of constitutional machinery in Slates.-- (1) If the President, on receipt of report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution the President may by Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State.

(b) declare that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament:

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State;

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provisions of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a sub-sequent Proclamation.

(3) Every Proclamation issued under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the people takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of State, but no resolutions with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

204. Dr. B.R. Ambedkar was of the view that the Constitution must provide for situation of break-down of the Constitutional machinery in the State analogous to provisions contained in Section 93 of the 1935 Act. If a situation arises, for whatever reason, where the government of a State cannot be carried on in accordance with the provisions of the Constitution, he said, the President of India must be empowered to remedy it. For that purpose, he could take over all or any of the functions of the government as well as of the State Legislature. He could also make such other provisions as he may think necessary - including suspension of the provisions of the Constitution except those relating to High Court. This power, he stated must be understood in the context of draft Article 277(A) (Article 355), which cast an obligation upon the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. To discharge this obligation, he said, the center must be empowered to take over the government of the State. At the same time, he said, the President is not expected to act in a wanton or arbitrary manner but on the basis of a report from the Governor or on the basis of other material in his possession, as the case may be.

205. Several members strongly opposed the incorporation of a provisions like the one contained in draft Article 278 on the ground inter alia that it would be an invasion upon the field reserved for the States and that permitting the President to take over the government of the State even on the basis of the information received "otherwise" - i.e., without there being a report of the Governor to that effect, was bound to be abused. A few members pleaded that this power should be exercised only on the report of the Governor and that the words "or otherwise" should be deleted from the Article. All these objection were over-ridden by Dr. Ambedkar with the argument that no provisions of any Constitution, for that matter, is immune from being abused. He then made this significant statement: "In fact I share the sentiments expressed by my Hon'ble friend Mr. Gupte yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all the are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces." He added: "I hope the first tiling be will do would be to issue a clear warning to province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution."

206. Article 356 was thus conceived as a mechanism to ensure that the government of the State is carried on in accordance with the provisions of the Constitution. Democratic rule based on adult franchise was being introduced for the first time. Almost l/3rd of the country, under princely rule,

had never known elections. Rule of Law was a novelty in those areas. The infant democracy required careful nurturing. Many a hiccup was expected in the days to come. This perhaps explains the need for a provisions like the one in Article 356.

Article 356 finds place in Part XVIII which carries the heading "Emergency Provisions". Article 352, the first article in this Part, empowers the President of India to proclaim emergency in the country or any part thereof if he is satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened whether by war, external aggression or armed rebellion. (By the 44th Amendment, the words "armed rebellion" were substituted in the place of the words "internal disturbance"). Articles 353 and 354 set out the effects of such a proclamation and provide for certain incidental matters. Article 355, set out hereinbefore, imposes a duty upon the Union to protect the States against external aggression and armed rebellion and also to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. Articles 355, 356 and 357 go together. Article 356 provides for the action to be taken by the President where he is satisfied that a situation has arisen in which the government of a State cannot be carried on in accordance with the provisions of the Constitution by making a proclamation in that behalf, while Article 357 sets out the powers that can be exercised by the Parliament when a proclamation under Article 356 is in operation. Articles 358 and 359 deal with suspending of certain fundamental rights during the period the proclamation under Article 352 is in operation, while Article 360 empowers the President to declare financial emergency in certain situations.

207. In a sense, Article 356 is an emergency provision though, it is true, it is qualitatively different from the emergency contemplated by Article 352, or for that matter, from the financial emergency contemplated by Article 360. Undoubtedly, break-down of the Constitutional machinery in a State does gives rise to a situation of emergency. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution, consistent with his oath. He is as much bound to exercise this power in a situation contemplated by Article 356 as he is bound not to use it where such a situation has not really arisen.

208. By 42nd (Amendment) Act of the Constitution, Clause (5) was added in Article 356. It was deleted by 44th (Amendment) Act which incorporated an altogether different provisions as Clause (5). It would be appropriate to take the article as it now stands while trying to understand its meaning, purpose and scope. But before we do that, it would be appropriate to examine the nature or the Indian Federation as ordained by our Constitution.

THE FEDERAL NATURE OF THE CONSTITUTION:

209. The expression "Federation" or "federal form of government" has no fixed meaning. It broadly indicates a division of powers between a central (federal) government and the units (States) comprised therein. No two federal constitutions are alike. Each of them, be it of U.S.A., Canada, Australia or of any other country, has its own distinct character. Each of them is the culmination of certain historical process. So is our constitution. It is, therefore, futile to try to ascertain and fit our Constitution into any particular mould. It must be understood in the light of our own historical

process and the constitutional evolution. One thing is clear: it was not a case of independent State coming together to form a federation as in the case of U.S.A.

210. A review of the provisions of the Constitution shows unmistakably that while creating a federation, the founding fathers wished to establish a strong a center. In the light of the past history of this sub-continent, this was probably a natural and necessary decision. A land as varied as India is, a strong center is perhaps a necessity. This bias towards center is reflected in the distribution of legislative heads between the center and States. All the more important heads of Legislation are placed in List-I. Even among the legislative heads mentioned List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain Entries in List-I to some or the other extent. Even in the concurrent list (List-III), the Parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the center. By the 42nd Amendment, quite a few of the Entries in List-II were omitted and/or transferred to other lists. Above all, Article 3 empowers the Parliament to form new States out of existing States either by merger or division as also to increase, diminish or alter the boundaries of the States.

In the process, existing States may disappear and new ones may come into existence. As a result of the Reorganisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty seven States and one area. Even the names of the States can be changed by the Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the Legislatures of the affected States. There is single citizenship, unlike U.S.A. The judicial organ, one of the three organs of the State, is one and single for the entire country - again unlike U.S.A., where you have the Federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List-II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a proclamation of emergency, Parliament can make laws with respect to any matter in List-II (Article 250). Similarly, the Parliament has power to make laws for giving effect to International Agreements (Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the Stales and the proponents of the States autonomy. Several taxes are collected by the center and made over, either partly or fully, to the States. Suffice it to say that center has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the center including the one in Article 355 - the duty to protect every State against external aggression and internal disturbance. Indeed, this very Articles confers greater power upon the center in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power.

211. The fact that under the scheme of our Constitution, greater power is conferred upon the center vis-a-vis the States does not mean that Stales are mere appendages of the center Within the sphere allotted to them. States are supreme. The center cannot tamper with their powers. More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States.

It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Government - be it the result of advances in

technological/scientific fields or otherwise, and that even in U.S.A. the center has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle - the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Sri M.C. Setalvad in his Tagore Law Lectures "Union and State relations under the Indian Constitution" (published by Eastern Law House, Calcutta, 1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible - nor is it necessary - for the present purposes to refer to them.
It is enough to note that our Constitution has certainly a bias towards center vis-a-vis the States The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and Ors. MANU/SC/0065/1962 : [1963]1SCR491 . It is equally necessary to emphasise that Courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation.

212. A few decisions supporting the view expressed hereinabove may be referred to briefly. In Berubari Union and Exchange of Enclaves - Reference under Article 143 - [1960] 3 S.C.R. 850 and 256, Gajendragadkar, J. observed:

It may, therefore, be assumed that in construing Article 3 we should take into account the fact that the Constitution contemplated changes of the territorial limits of the constituent States and there was no guarantee about their territorial integrity.

213. Similarly, in State of West Bengal v. Union of India MANU/SC/0086/1962 : [1964]1SCR371 , this Court observed:

There is no constitutional guarantee against alteration of the boundaries of the States. By Article 2 of the Constitution the Parliament may admit into the Union of establish new States on such terms and conditions as it thinks fit, and by Article 3 the Parliament is by law authorised to form a new State by redistribution of the territory of a State of by uniting any territory to a part of any State, increase the area of any State, diminish the area of any State alter the boundaries of any State, and alter the name of any State. Legislation which so vitally affects the very existence of the States may be moved on the recommendation of the President which in practice means the recommendation of the Union Ministry, and if the proposal in the Bill affects the area, boundaries or name of any of the States, the President has to refer the Bill to the Legislature of that. State for merely expressing its views thereon. Parliament is therefore by law invested with authority to alter the boundaries of any State and to diminish its area so as to destroy a State with all its powers and authority.

AN ANALYSIS OF ARTICLE 356:

214. The heading of Article 356 characterises it as a provision providing for failure of Constitutional machinery in State. Clause (1), however, does not use the words "failure of constitutional machinery". Even so, the significance of the title of the Section cannot be overlooked. It emphasises the level, the stage, the situation in which the power is to be exercised.

Clause (1) speaks of the President being satisfied "that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution". If so satisfied, he may, by proclamation, assume and exercise the several powers mentioned in Sub-clauses (a), (b) and (c). An analysis of Clause (1) of the Article yields the following ingredients: (a) if the President is satisfied; (b) on receipt of report from the Governor of State or otherwise; (c) that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution; (d) the President may by proclamation, (1) assume to himself all or any of the functions of the Government of the State of all or any of the powers of the Governor or any other body or authority in the State except the legislature of the State; (ii) declare that the powers of the legislature of the State shall be exercised by the Parliament or under its authority; and (iii) make such incidental or consequential provisions as appear to him to be necessary or desirable for giving effect to the objects of the proclamation including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State. (The proviso to Clause (1) clarifies that nothing in the said clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court or to suspend in whole or part the operation of any provision relating to High Courts.) Clause (2) says that any proclamation under Clause (1) can be revoked or varied by a subsequent proclamation. Clause (3) provides that every proclamation issued under Clause (1) (except a proclamation revoking a previous proclamation) shall be laid before each House of the Parliament and "shall...cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament". The proviso to Clause (3) provides for a situation where the Lok Sabha is dissolved on the date of the proclamation or is dissolved within two months of such proclamation. Clause (4) says that a proclamation so approved by both Houses of Parliament shall, unless revoked earlier, cease to operate on the expiration of period of six months. (By 42nd Amendment, the words 'one year' were substituted for the words 'six months' but by 44th Amendment, the words "six months" have been restored). The three provisos to Clause (4) provide for certain situations which it is not necessary for us to consider for the purpose of these cases. Clause (5), as inserted by 38th Amendment ran as follows: " (5) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in Clause (1) shall be final and conclusive and shall not be questioned in any court on any grounds". By 44th Amendment, however, this clause was repealed altogether and in its place a new Clause (5) introduced which limits the maximum period, for which such a proclamation can be operative, to one year except in a case where a proclamation of emergency is in operation. It is not necessary to consider Clause (5) also for the purpose of these cases.

215. The power conferred by Article 356 is a conditioned power; it is not an absolute power to be exercised in the discretion of the President. The condition is the formation of satisfaction-subjective, no doubt-that a situation of the type contemplated by the clause has arisen. This satisfaction may be formed on the basis of the report of the Governor or on the basis of other information received by him or both. The existence of relevant material is a pre-condition to the formation of satisfaction. The use of the word "may indicates not only a discretion but an obligation to consider the advisability and necessity of the action. It also involves an obligation to consider which of the several steps specified in Sub-clauses (a), (b) and (c) should be taken and to what extent? The dissolution of the Legislative Assembly-assuming that it is permissible is not a matter of course. It should be resorted to only when it is necessary for achieving the purposes of the

proclamation. The exercise of the power is made subject to approval of the both Houses of Parliament.

Clause (3) is both a check on the power and a safeguard against abuse of power. Clause (1): Clause (1) opens with the words "if the president...is satisfied". These words are indicative of the satisfaction being a subjective one. In Barium Chemicals v. Co. Law Board [1966] Suppl. S.C.R. 311 - a decision followed uniformly ever since it was pronounced-Shelat, J. pointed out, on a consideration of several English and Indian authorities that the expressions "is satisfied", "is of the opinion", "or has reasons to believe" are indicative of subjective satisfaction, though it is true the nature of the power has to be determined on a totality of consideration of all relevant provisions. Indeed, there was no controversy before us regarding the nature of this power. Clause (1), it may be noted, uses the words "is satisfied", which indicates a more definite state of mind than is indicated by the expressions "is of the opinion" or "has reasons to believe". Since it is a case of subjective satisfaction, question of observing the principles of natural justice does not and cannot arise. Having regard to the nature of the power and the situation in which it is supposed to be exercised, principles of natural justice cannot be imported into the clause. It is evident that the satisfaction has to be formed by the President fairly, on a consideration of the report of the Governor and or other material, if any, placed before him. Of course, the President under our Constitution being, what may be called, a constitutional President obliged to act upon the aid and advice of the council of ministers (which aid and advice is binding upon him by virtue of Clause (1) of Article 74), the satisfaction referred to in Article 356(1) really means the satisfaction of the union council of ministers with the Prime Minister at its head.

216. Clause (1) requires the President to be satisfied that a situation has arisen in which the government of the state "cannot" be carried on "in accordance with the provisions of this constitution". The words "cannot" emphasise the type of situation contemplated by the clause. These words read with the title of one Article "provisions in case of failure of constitutional machinery in states" emphasise the nature of the situation contemplated.

217. The words "provisions of this Constitution" mean what they say. The said words cannot be limited or confined to a particular chapter in the Constitution or to a particular set of Articles, while construing a constitutional provision, such a limitation ought not to be ordinarily inferred unless the context does clearly so require. The provisions of the Constitution include the chapter relating to fundamental rights, the chapter relating to directive principles of the state policy as also the preamble to the Constitution. Though, at one time, it was thought that preamble does not form part of the Constitution, that view is no longer extent. It has been held by the majority of judges in Keshavananda Bharti v. State of Kerala [1973] Suppl. S.C.R. 1 that preamble does form part of the Constitution. It cannot be otherwise. The attempt to limit the said words to certain machinery provisions in the Constitution is misconceived and cannot be given effect to. It is difficult to believe that the said words do not take in fundamental provisions like the fundamental rights in Chapter-III. It must, however, be remembered that it is not each and every non-compliance with a particular provision of the Constitution that calls for the exercise of the power under Article 356(1). The non-compliance or violation of the Constitution should be such as to lead to or given rise to a situation where the government of the State cannot be carried on in accordance with the provisions of the Constitution. It is indeed difficult-nor is it advisable-to catalogue the various situations

which may arise and which would be comprised within Clause (1). It would be more appropriate to deal with concrete cases as and when they arise.

218. The satisfaction of the President referred to in Clause (1) may be formed either on the receipt of the report(s) of the Governor or otherwise. The Governor of a State is appointed by the President under Article 155. He is indeed a part of the government of the State. The executive power of the State is vested in him and is exercised by him directly or through officers subordinate to him in accordance with the provisions of the Constitution (Article 154). All executive action of the government of a State is expressed to be taken in the name of the Governor, except a few functions which he is required to exercise in his discretion. He has to exercise his powers with the aid and advice of the council of ministers with the Chief Minister at its head (Article 163). He takes the oath, prescribed by Article 159, to preserve, protect and defend the Constitution and the laws to the best of his ability. It is this obligation which requires him to report to the President the commissions and omission of the government of his State which according to him are creating or have created a situation where the government of the State cannot be carried on in accordance with the provisions of the Constitution. In fact, it would be a case of his reporting against his own government but, this may be a case of his wearing two hats, one as the head of the State government and the other as the holder of an independent constitutional office whose duty it is to preserve, protect and defend the Constitution See Shamsher Singh v. State of Punjab MANU/SC/0073/1974 : (1974)IILLJ465SC . Since he cannot himself take any action action of the nature contemplated by Article 356(1), he reports the matter to the President and it is for the President to be satisfied- whether on the basis of the said report or on the basis of any other information which he may receive otherwise- that situation of the nature contemplated by Article 356(1) has arisen. It is then and only then that he can issue the proclamation. Once the proclamation under Article 356(1) is issued or simultaneously with it, the President can take any or all the actions specified in Clauses (a), (b) and (c).

219. Power of the President to dissolve Legislative Assembly of the State:

We shall now examine whether Clause (1) of Article 356 empowers the President to dissolve the Legislative Assembly of the State. There are two points of view-which we may set out before expressing our preference:

ONE VIEW, which is supported by the opinions of some of learned Judges in State of Rajasthan and Ors. v. Union of India MANU/SC/0370/1977 : [1978]1SCR1 , is that the power of dissolution is implicit in Sub-clause (a). The reasoning runs thus: the President assumes the functions of the government of the State as well as the Powers of the Governor under the said sub-clause; the Legislative Assembly can be dissolved by the Governor under Article 174(2)(B); of course, this may have to be done on the advice of the council of ministers with the Chief Minister at its head; since the President assumes to himself the powers and functions of both the government and the Governor, he can dissolve the Legislative assembly as part of the same proclamation or by a subsequent order.

THE OTHER VIEW, which says that the President has no such power, runs along the following lines:

The clause does not speak of dismissal of the government or the dissolution of the Legislative Assembly. It says that if the President is satisfied "that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution", the President may (i) assume to himself all or any of the functions of the government of the state; (ii) assume to himself all or any of the powers vested in or exercisable by the Governor; (iii) assume to himself all or any of the functions of any body or authority in the State other than the Legislature of the State,(iv) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament and (v) make such incidental or consequential provision, as may be necessary for giving effect to the proclamation including suspending in whole or part the operation of any provisions of the Constitutions relating to any body or authority in the state except the High Court. Now, when Sub-clause (a) speaks of the President assuming to himself all or any of the powers vested in or exercisable by the Governor, it surely does not mean or imply dismissal or removal of the Governor. Similarly, the assuming by the President of all or any of the functions or powers of any body or authority in the state (other than the legislature of the state) does not mean the dismissal or dissolution of such body or authority. For the same reason, it must be held that the words "the President may assume to himself all or any of the functions of the government of the state" in Sub-clause (a) do not by themselves mean the dismissal of the state government, But if these words are read along with the main limb of Clause (1) which speaks of a situation in which "the government of the state cannot be carried on in accordance with the provisions of this Constitution", it can and does mean dismissal of the government for the reason that government of the state is carried on by the government of the State alone. This dismissal is not absolute in the sense of a physical death of a living being. It only means putting the government out of the way. Such dismissal does not preclude the President from restoring the government after the period of proclamation is over, or at any time earlier by revoking the proclamation, if he is so advised. Coming to Sub-clause (b), when it speaks of the powers of Legislature of the State being made exercisable by Parliament, or under its authority, it cannot and does not mean or imply dissolution of the Legislature of the State. It is significant to note that the sub-clause refers to Legislature of the State and not Legislative Assembly. In a given State, the legislature may consist of Legislative Assembly as well as Legislative Council. In such a case, there can be no question of dissolving the Legislative Council since it is a continuing body [Article 172(3)]. Only the Legislative Assembly can be dissolved [Article 174(2)(b)]. In other words, there can be no question of dissolution of the "Legislature of the State" - the expression employed in Sub-clause (b). The question may then arise, why was Sub-clause (b) put in and what does it imply? The answer must be that when the government of the State is dismissed or removed from office, the Legislative Assembly cannot function normally. It is difficult to visualise a legislative Assembly, or for that matter Legislature, functioning without a council of ministers, i.e., government. Thus, where the government of a State is dismissed or removed from the office, the Legislature of the State becomes ipso facto unworkable. It is for this reason that Sub-clause (b) provides that the powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament. Indeed, the very fact that Clause (b) has provided for only one situation (viz., the powers of the Legislature being vested in the Parliament) means and implies that any other step like dissolution of the Legislative Assembly was not within the contemplation of the Constitution makers. Sub-clause (c) empowers the President to make such incidental or consequential provisions as may appear to be necessary or desirable for giving effect to the objects of the proclamation. Such incidental or consequential provisions may also include "suspending in whole or part the operation of any provisions of this Constitution relating to any body or authority"

except, of course, the High Court. The provisions of the Constitution relating to the Legislative Assembly of the State may be suspended under Sub-clause (c) during the period of proclamation - generally referred to as keeping the Legislative Assembly under suspended animation - to prevent the majority party (or any other party) calling upon the Governor to invite it to form the ministry and/or for preventing the Legislature from passed resolutions or transacting other business which may interfere with the President's 'rule in the State. It is significant to notice in this connection that during the Constituent Assembly debates on these Articles, Dr. Ambedkar only spoke of suspension of the powers of the Legislatures and not their dissolution. (Vide Page 134 - Vol. IX - Constituent Assembly Debates.)

220. According to this line of reasoning - since the Legislature of the State can only be kept under suspended animation by suspending the relevant provisions of the Constitution - the Legislature of the State springs back to life with the expiry of the period of proclamation. This is for the reason that with the expiry of the period of proclamation or on the revocation of the proclamation, as the case may be, the suspension of the provision of the Constitution will also come to end.

221. The proponents of this view criticise the other (first) view on several grounds: firstly, they say, it does not seem to take into consideration the fact that dissolution of the Legislative Assembly is an extremely serious step; if this power was supposed to be conferred on the President under Clause (1) of Article 356, the Constitution makers would have said so expressly and not left it to be inferred. Secondly, it ignores the language of Sub-clause (b). Sub-clause (b) speaks of "powers of the Legislature of the State" being exercised by the Parliament or under its authority. Clause (b) does not speak of dissolution of "Legislature of the State", since that is an impossibility - only the Legislative Assembly can be dissolved and not the Legislative Council as explained hereinabove. There are quite a few States where the Legislature consists of Legislative Assembly as well as Legislative Council. Thirdly, Clause (1) speaks of failure of the government and not of the Legislative Assembly, though it is true, the government is drawn from and very often forms the majority party in the Legislative Assembly. But the Legislative Assembly also consists of the opposition and other parties, groups and independent members, who may themselves have been pointing out and demonstrating against the unconstitutional working of the government. There does not appear to be any good reason why the Legislative Assembly should be dissolved for the acts and defaults of the government. It is true, say the proponents of this view, if the President cannot dissolve the Legislative Assembly, it would spring back to life after the period of proclamation and elect the very same government which was dismissed. They answer it by saying firstly that this may or may not happen. Secondly, they say, even if the same government is elected again, it is in no way contrary to the spirit of the Article. The objection was not to its existence but to its working. There is no reason to presume that it will again carry on the government otherwise than in accordance with the provisions of the Constitution.

222. Having given our anxious consideration to both the contending view points - and notwithstanding the obvious appeal of the second point of view - we are inclined to agree with the first view which says that Clause (1) does empower the President to dissolve the Legislative Assembly. This view is also supported by the decision in State of Rajasthan, besides the fact that over the last forty-four years, the said power has never been questioned. We are inclined to hold that the power to dissolve the Legislative Assembly is implicit in Sub-clause (a) of Clause (1) though there is no such thing as dissolution of the 'Legislature of the State' where it consists of two

Houses. It must also be recognised that in certain situations, dissolution of Legislative Assembly may be found to be necessary for achieving the purposes of the proclamation. Power there is. It's exercise is a different matter. The existence of power does not mean that dissolution of Legislative Assembly should either be treated as obligatory or should invariably be order whenever a government of the State is dismissed. It should be a matter for the President to consider, taking into consideration all the relevant facts and circumstances, whether the Legislative Assembly should also be dissolved or not. If he thinks that it should be so dissolved, it would be appropriate, indeed highly desirable, that he states the reasons for such extraordinary step in the order itself.

223. The question then arises at what stage should he exercise this power? To answer this query, we must turn to Clause (3). Clause (3) says that every proclamation issued under Article 356(1) shall be laid before both Houses of Parliament and shall cease to operate at the expiry of two months unless before the expiration of that period it has been approved by resolutions passed by both Houses. This is conceived both as a check upon the power and as a vindication of the principle of Parliamentary supremacy over the Executive. The President's action - which is really the action of the Union Council of Ministers - is subject to approval of both Houses of Parliament. Unless approved by both House of Parliament, the proclamation lapses at the end of two months and earlier if it is disapproved or declined to be approved by both the Houses of Parliament, as explained hereinafter. Having regard to the incongruity of the Executive (even though Union Executive) dissolving the Legislature (even if of a State), it would be consistent with the scheme and spirit of the Constitution - particularly in the absence of a specific provision in the Constitution expressly empowering the President to do so - to hold that this power of dissolution can be exercised by the President only after both Houses of Parliament approve the proclamation and not before such approval. Once the Parliament places its seal of approval on the proclamation, further steps as may be found necessary to achieve the purposes of the proclamation, i.e., dissolution of Legislative Assembly, can be ordered. In other words, once the Parliament approves the initial exercise of his power, i.e., his satisfaction that a situation had arisen where the government of the State could not be carried on in accordance with the Constitution, the President can go ahead and take further steps necessary for effectively achieving the objects of the proclamation. Until the approval, he can only keep the Assembly under suspended animation but shall not dissolve it.

224. It must be made clear even at this stage that while no writ petition shall be entertained by any court before the actual issuance of proclamation under Clause (1), it shall be open to a High Court or Supreme Court to entertain a writ petition questioning the proclamation if it is satisfied that the writ petition raises arguable questions with respect to the validity of the proclamation. The court would be entitled to entertain such a writ petition even before the approval of the proclamation by the Parliament -as also after such approval. In an appropriate case and if the situation demands, the High Court/Supreme Court can also state the dissolution of the Assembly but not in such a manner as to allow the Assembly to continue beyond its original term. But in every such case where such an order is passed the High court/Supreme Court shall have to dispose of the matter within two to three months. Not disposing of the writ petition while; granting such an interim order would create several complications because the life of the proclamation does not exceed six months even after the; approval by Parliament and in any event the proclamation cannot survive beyond one year except in the situation contemplated by Clause (5) which is, of course, an exceptional situation.

Meaning of approval in Clause (3)" In State of Rajasthan Chandrachud, Bhagwati and A.C. Gupta, JJ. have expressed the view that the proclamation issued under Clause (1) remains in operation for a period of two months in any event. It is held that even if the Parliament disapproves or declines to approve the proclamation within the said period of two months, the proclamation continues to be valid for two months. The approval of the Parliament under Clause (3) is held to be relevant only for the purpose of continuance of the proclamation beyond two months. It has also been held further that even if both the Houses do not approve or disapprove the proclamation, the government which has been dismissed or the Assembly which may have been dissolved do not revive. With utmost respect to the learned Judges, we find ourselves unable to agree with the said view in so far as it says that even where both Houses of Parliament disapprove or do not approve the proclamation, the government which has been dismissed does not revive. (The State of Rajasthan also holds that such disapproval or non-approval does not revive the Legislative Assembly which may have been dissolved but we need not deal with this aspect since according to the view expressed by us hereinabove, no such dissolution is permissible before the approval of both the Houses.) Clause (3), it may be emphasised, uses the words "approved by resolutions of both Houses of Parliament". The word "approval" means affirmation of the action by higher or superior authority. In other words, the action of the President has to be approved by the Parliament. The expression "approval" has an intrinsic meaning which cannot be ignored. Disapproval or non-approval means that the Houses of Parliament are saying that the President's action was not justified or warranted and that if shall no longer continue. In such a case, the proclamation lapses, i.e., ceases to be in operation at the end of two months - the necessary consequence of which is the status quo ante revives. To say that notwithstanding the disapproval or non-approval, the status quo ante does not revive is to rob the concept of approval of its content and meaning. Such a view renders the check provided by Clause (3) ineffective and of no significance whatsoever. The Executive would be telling the Parliament: "I have dismissed the government. Now, whether you approve or disapprove is of no consequence because the government in no event be revived. The deed is done. You better approve it because you have practically no choice". We do not think that such a course is consistent with the principle of Parliamentary supremacy and Parliamentary control over the Executive, the basic premise of the Parliamentary supremacy. It would indeed mean supremacy of the Executive over the Parliament. The dismissal of a government under Sub-clause (a) of Clause (1) cannot also be equated to the physical death of a living being. There is no irrevocability about it. It is capable of being revived and it revives. Legislative Assembly which may have kept in suspended animation also springs back to life. So far as the validity of the acts done, orders passed and laws, if any, made during the period of operation of the proclamation is concerned, they would remain unaffected inasmuch as the disapproval or non-approval does not render the proclamation invalid with retrospective effect. It may be recalled that the power under Article 356(1) is the power vested in the President subject no doubt to approval within two months. The non-approval means that the proclamation ceases to be in operation at the expiry of two months, as held in State of Rajasthan.

225. Now, coming to the power of the court to restore the government to office in case it finds the proclamation to be unconstitutional, it is, in our opinion, beyond question. Even in case the proclamation is approved by the Parliament it would be open to the court to restore the State government to its office in case it strikes down the proclamation as unconstitutional. If this power were not conceded to the court, the very power of judicial review would be rendered nugatory and the entire exercise meaningless. If the court cannot grant the relief flowing from the invalidation

of the proclamation, it may as well decline to entertain the challenge to the proclamation altogether. For, there is no point in the court entertaining the challenge, examining it, calling upon the Union Government to produce the material on the basis of which the requisite satisfaction was formed and yet not give the relief. In our considered opinion, such a course is inconceivable.

226. A question may arise - what happens to the acts done, orders made and laws enacted by Parliament or under its authority during the period the proclamation was in operation in case the proclamation is declared to be unconstitutional by the court? Would all of them become unconstitutional or void? Firstly, there is no reason to presume that a court which strikes down the proclamation would not provide for this contingency. It would be within the power of the court to say that these acts and orders are saved. Indeed, it should say so in the interests of general public and to avoid all kinds of complication, leaving it to government and the Legislature of the State concerned to rectify, modify or repeal them, if they so choose. The theory of factum valet may also be available to save the act, orders and things done by the President or under his authority during the said period.

227. It was suggested by Sri Ram Jethmalani that the President can "assume all or any of the functions" of the State government without dismissing the government. Emphasis is laid upon the words "all or any" in Sub-clause (1). In particular, he submitted, where the State government is found remiss in performing one or some of the functions, that or those functions of the State government can be assumed by the President with a view to remedy the situation. After rectifying the situation, the counsel submitted, the President will give those functions back to the State government and that in such a situation there would be no occasion or necessity for dismissing the State government. The learned Counsel gave the analogy of a motor car - if one or a few of the parts of a car mal-function or cease to function, one need not throw away the car. That or those particular parts can be replaced or rectified and the car would function normally again. It is difficult to agree with the said interpretation. The power under Article 356(1) can be exercised only where the President is satisfied that "the government of the State cannot be carried on in accordance with the provisions of the Constitution." The title to the Article "failure of constitutional machinery in the States" also throws upon the nature of the situation contemplated by it. It means a situation where the government of the State, - and not one or a few functions of the government - cannot be carried on in accordance with the Constitution. The inability or unfitness aforesaid may arise either on account of the non- performance or mal-performance of one or more functions of the government or on account of abuse or misuse of any of the powers, duties and obligations of the government. A proclamation under Article 356(1) necessarily contemplates the removal of the government of the state since it is found unable or unfit to carry on the government of the State in accordance with the provisions of the Constitution. In our considered opinion, it is not possible to give effect to the argument of Sri Ram Jethmalani. Acceptance of such an argument would introduce the concept of two governments in the same sphere - the Central Government exercising one of some of the powers of the State government and the State government performing the rest. Apart from its novelty, such a situation, in our opinion, does not promote the object underlying Article 356 nor is it practicable.

228. Sri Jethmalani brought to our notice the British Joint Parliamentary Report, para 109, in support of his contention aforementioned. We are unable to see any relevance of the said para to the interpretation of Article 356(1). Under the Government of India Act, 1935 the Governor-

General and the Governor were not constitutional heads of State as under the Constitution. They exercised real power in their own right. Only a few powers were entrusted to the elected governments and even those could be taken away (by the governor-General at the center and the Governor in the provinces) as and when they were satisfied that a situation has arisen where the government at the center of the province cannot be carried on the accordance with the provisions of the said Act. Under Article 356, the position is entirely different. The power can be exercised only against the States and that too by the President and not by the Governor. The entire constitutional philosophy is different. Therefore, merely because the same words "all or any" in Sections 93 and 45 of the Government of India Act occur in Article. 356(1), the same meaning cannot be attributed to them mechanically, ignoring all other factors - assuming that the said words in Sections 93 and 45 meant what Sri Jethmalani says.

ARTICLE 356 IN ACTION:

229. Since the commencement of the Constitution, the President has invoked Article 356 on as many as ninety or more occasions. Quite a performance for a provision which was supposed to remain a 'dead-letter'. Instead of remaining a 'dead-letter', it has proved to be the 'death-letter' of scores of State Governments and Legislative Assemblies. The Sarkaria Commission which was appointed to look into and report on center-State relations considered inter alia the manner in which this power has been exercised over the years and made certain recommendations designed to prevent its misuse. Since the Commission was headed by a distinguished Judge of this Court and also because it made its report after an elaborate and exhaustive study of all relevant aspects, its opinions are certainly entitled to great weight notwithstanding the fact that the report has not been accepted so far by the Government of India.

230. In para 6.3.23, the Commission observed that though the words "a government of the State cannot be carried on in accordance with the provisions of the Constitution" are of wide amplitude, each and every breach and infraction of constitutional provision, irrespective of its significance, extent and effect, cannot be treated as constituting failure of constitutional machinery. Article 356 the Commission said, provides remedy for a situation where there has been an actual break-down of the constitutional machinery of the State. Any abuse or misuse of this drastic power, said the Commission, damages the fabric of the Constitution. A literal construction of Article 356(1) should be avoided, it opined.

231. In para 6.4.01, the Commission noted that failure of constitutional machinery may occur in a number of cases. It set- out some of the instances leading to it, viz., (1) political crisis; (b) internal subversion; (c) fiscal break-down; and (d) non-compliance with constitutional directions of the Union Executive. The Commission, however, hastened to add that the instances set out by it are not claimed to be comprehensive or perfect. Then it examined each of the said four heads separately.

232. In para 6.5.01, the Commission set out illustrations in which invoking Article 356 would be improper. Illustration (iii) in the said paragraph read thus:

(iii) Where, despite the advice of a duly constituted ministry which has not been defeated no the floor of the house, the Governor decides to dissolve the assembly and without giving the ministry

an opportunity to demonstrate its majority through the floor-test, recommends its supersession and imposition of President's rule merely on subjective assessment that the ministry no longer commands the confidence of the assembly.

233. In para 6.6.01, the Commission noticed the criticism levelled against the frequent invoking of Article 356 and proceeded to examine its validity. In its opinion, dismissal of nine assemblies following the general elections to the Lok Sabha in March, 1977 and a similar dismissal following the general election to the Lok Sabha in 1980, were clear instances of invoking Article 356 for purely political purposes unrelated to Article 356. After examining the facts and the principle of the decision of this Court in State of Rajasthan v. Union of India, and after considering the various suggestions placed before it by several parties, individuals and organisations, the Commission made the following recommendation in para 6.8, which have been strongly commended for our acceptance by the learned Counsel for the petitioners. They read as follows:

class = "centerAlign">RECOMMENDATIONS

6.8.01,Article 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a break-down of constitutional machinery in the State. All attempts should be made to resolve the crisis at the State level before taking recourse to the provisions of Article 356. The availability and Choice of these alternatives will depend on the nature of the constitutional crisis, its causes and exigencies of the situation. These alternatives may be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action under Article 356 will lead to disastrous consequences, (paragraph 6.7.04)

6.8.02,A warning should be issued to the errant State, in specific terms, that it is not carrying on the Government of the State in accordance with the Constitution. Before taking action under Article 356, any explanation received from the State should be taken into account. However, this may not be possible in a situation when not taking immediate action would lead to disastrous consequences, (paragraph 6.7.08)

6.8.03. When an 'external aggression' or 'internal disturbance' paralyses the State administration creating a situation drafting towards a potential breakdown of the Constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under Article 355 should be exhausted to contain the situation. (paragraph 6.3.17)

6.8.04. (a) In situation of political breakdown, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. If it is not possible for such a government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, if there is one, to continue as a caretaker government, provided the Ministry was defeated solely on a major policy issue, unconnected with any allegations of mal-administration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. During the interim period, the caretaker government should be allowed to function. As a matter of convention, the caretaker government should merely carry on the day-to day government and desist form taking any major policy decision. (Paragraph 6.4.08)

(b) If the important ingredients described above are absent, it would not be proper for the Governor to dissolve the Assembly and instal a caretaker government. The Governor should recommend proclamation of President's rule without dissolving the Assembly. (Paragraph 6.4.09)

6.8.05. Every Proclamation should be placed before each house of Parliament at the earliest, in any case before the expiry of the two month period contemplated in clause (3) of Article 356 (Paragraph 6.7.13)

6.8.06. The State Legislative Assembly should not be dissolved either by the Governor or the President before the Proclamation issued under Article 356(1) has been laid before parliament and it has had an opportunity to consider it. Article 356 should be suitably amended to ensure this (paragraph 6.6.20)

6.8.07. Safeguards corresponding, in principle, to Clauses (7) and (8) of Article 352 should be incorporated in Article 356 to enable Parliament to review continuance in force of a Proclamation. (Paragraph 6.6.23)

6.6.08. To make the remedy of judicial review on the ground of mala fides a little more meaningful, it should be provided, through an appropriate amendment, notwithstanding anything in Clause (2) of Article 74 of the Constitution, the material facts and grounds on which Article 356(1) is invoked should be made an integral part of the Proclamation issued under that Article this will also make the control of Parliament over the exercise of this power by the Union Executive, more effective. (paragraph 6.6.25)

6.8.09. Normally, the President is moved to action under Article 356 on the report of the Governor. The report of the Governor is placed before each house of Parliament. Such a report should be a "speaking document" containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356 (Paragraph 6.6.26)

6.8.10. The Governor's report, on the basis of which a Proclamation under Article 356(1) is issued, should be given wide publicity in all the media and in full. (Paragraph 6.6.28)

6.8.11. Normally, President's Rule in a State should be proclaimed on the basis of the Governor's report under Article 356(1). (Paragraph 6.6.29)

6.8.12. In Clause (5) of Article 356, the word 'and' occurring between Sub-clauses (a) and (b) should be substituted by 'or'.(Paragraph 6.7.11)

234. The aforesaid recommendations are evidently the outcome of the opinion formed by the Commission that more often than not, the power under Article 356 has been invoked improperly. It is not for us to express any opinion whether this impression of the commission is justified or not. It is not possible for us to review all the ninety cases in which the said power has been invoked and to say in which cases it was invoked properly and in which cases, not. At the same time, we are inclined to say, having regard to the constitutional scheme obtaining under our Constitution, that the recommendations do merit serious consideration.

235. It is probably because he was of the opinion that the invocation of this power was not warranted in many cases, Sri P.V. Rajamannar, former Chief Justice of Madras High Court, - (who was appointed as the Inquiry Committee by the Government of Tamil Nadu to report on the center-State relations) - recommended that Articles 356 and 357 be repealed altogether. (See Para (8) in Chapter IX, "Emergency Provisions" of his Report, submitted in 1971). In the alternative, he recommended safeguards must be provided to secure the interests of the States against the arbitrary and unilateral action of a party commanding overwhelming majority at the center. In other respects, Sri Rajamannar's views accord broadly with the views expressed by the Sarkaria Commission and hence, need not be set out in extenso.

THE Constitution of India AND THE CONCEPT OF SECULARISM:

236. Article 356(1) speaks of a situation where the government of a state cannot be carried on in accordance with the provisions of the Constitution. We have said hereinbefore that the words "the provisions of this Constitution" take in all the provisions including the Preamble to the Constitution. The Preamble to the Constitution speaks of a secular Indian Republic. While the respondents' counsel contended that secularism being a basic feature of the Constitution, a State government can be dismissed if it is guilty of unsecular acts, the counsel for petitioners, Sri Ram Jethmalani strongly refuted the idea. According to Sri Jethmalani, 'secularism' is a vague concept, not defined in the Constitution and hence, cannot furnish a ground for taking action under Article 356. Without going into the specifics of the said contention, we shall examine first how far this concept is embedded in our Constitution and in what sense.

237. Having completed the process of framing the Constitution, the Constituent Assembly proceeded to finalise its preamble. Speaking on behalf of and in the name of the people of India, they said, their object has been to constitute India into a "Sovereign Democratic Republic", and to secure to all its citizens social justice, liberty of belief, faith and worship, and equality of status and opportunity. They said, the goal was also to promote among all the people of India " fraternity assuring the dignity of the individual...". By the 42nd Amendment to the Constitution, the words "socialist, secular" were added after the word "sovereign" and before the word "democratic". No other provision of the Constitution was amended to adumbrate these concepts.

Both the expressions - 'socialist' and 'secular' - by themselves are not capable of precise definition. We are, however, not concerned with their general meaning or content. Our object is to ascertain the meaning of the expression "secular" in the context of our Constitution. As the discussion hereafter would demonstrate, the 42nd Amendment merely made explicit what was implicit in it. The preamble speaks of "social justice", "liberty of belief, faith and worship" and of "equality of status and of opportunity". Article 14 (under the sub-heading "Right of Equality") enjoins the State not to deny to any person equality before the law or the equal protection of laws within the territory of India. Articles 15 and 16 elucidate this doctrine of equality. They say that the State shall not discriminate against any citizen on ground only of religion, race or caste, whether in the matter of employment under the State or otherwise. By Article 25, "all persons" are declared equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion, subject, of course, to public order, morality and health. Articles 26, 27 and 28 elucidate the freedom guaranteed by Article 25. Article 27 declares that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or

maintenance of any particular religion or religious denomination. Article 28(1) decrees that no religious instruction shall be provided in any educational institution wholly maintained out of the State funds while Article 28(3) says that no person attending an educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious worship conducted in such institution, except with his or his guardian's (in the case of a minor) consent. Similarly, Clause (2) of Article 30 enjoins upon the State not to discriminate against any educational institution, in granting aid, on the ground that it is under the management of a minority, religious or linguistic. Clause (3) of Article 51-A [introduced by the 42nd (Amendment) Act] says that "it shall be the duty of every citizen of India - to promote harmony and spirit of brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities". What do these articles, read together with the Preamble signify? While Article 25 of the Constitution guarantees to all its people freedom of religion, Articles 14, 15 and 16 enjoin upon the State to treat all its people equally irrespective of their religion, caste faith or belief.

While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally.

How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes.

How are the Constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religious. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitution as affirmed in Keshavananda Bharti and Indira N. Gandhi v. Raj Narain MANU/SC/0025/1975 : [1975] 2 S.C.C. 159. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional.

This does not mean that the State has no say whatsoever in matters of religion. Laws can be made regulating the secular affairs of Temples, Mosques and other places of worship; and maths. (See S.P. Mittal v. Union of India : [1983]1SCR729 .) The power of the Parliament to reform and rationalise the personal laws is unquestioned. The command of Article 44 is yet to be realised. The correct perspective appeared to have been placed by Sri K.M. Munshi during the Constituent Assembly Debates. He said:

Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors - and important factors - which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say. 'Well, we are not merely a nation

because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation.

238. Sri M.C. Setalvad in his lecture on secularism (Patel Memorial Lectures - 1965) points out that after affirming the ideas of religious liberty and adequate protection to the minorities at its Karachi Session (1931), the Congress party asserted emphatically that "the State shall observe neutrality in regard to all religions". He says that this resolution is in a manner the key to the under standing of the attitude adopted by those who framed the Indian Constitution nearly twenty years later, embodying in it the guarantee of religious neutrality. He also points out that "the debates in the Constituent Assembly leave little doubt that what was intended by the Constitution was not the secularisation of the State in the sense of its complete dissociation from religion, but rather an attitude of religious neutrality, with equal treatment to all religions and religious minorities." The same idea is put forward by Gajendragadkar, J., (in his inaugural address to the Seminar on "Secularism; to its implications for Law and life in India") in the following words:

It is true that the Indian Constitution does not use the word "secularism" in any of its provisions, but its material provisions are inspired by the concept of secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socio-economic justice, it placed before the country as a whole, the ideal of a welfare State. And the concept of welfare is purely secular and not based on any considerations of religion. The essential basis of the Indian Constitution is that all citizens are equal, and this basic equality (guaranteed by Article 14) obviously proclaims that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights. The state does not owe loyalty to any particular religion as such; it is not irreligious or anti-religion; it gives equal freedom for all religions and holds that the religion of the citizen has nothing to do in the matter of socio-economic problems. That is the essential characteristic of secularism which is writ large in all the provisions of the Indian Constitution.

239. Prof. Upendra Baxi says that "Secularism" in the Indian Constitution connotes:

(i) The state by itself, shall not espouse or establish or practice any religion;

(ii) public revenues will not be used to promote any religion;

(iii) the state shall have the power to regulate any "economic, financial or other secular activity" associated with religious practice (Article 25(2)(a) of the Constitution);

(iv) the state shall have the power through the law to provide for "social welfare and reform or the throwing open of the Hindu religious institutions of a public character to all classes and sections of Hindus" (Article 25(2)(b) of the Constitution);

(v) the practice of untouchability (in so far as it may be justified by Hindu religion) is constitutionally outlawed by Article 17;

(vi) every individual person will have, in that order, an equal right to freedom of conscience and religion;

(vii) these rights are however subject to the power of the state through law to impose restrictions on the ground of "public order, morality and health";

(viii) these rights are furthermore subject to other fundamental rights in Part III;

(The Struggle for the Re-definition of Secularism in India - published in Social Action Vol. 44 - January, March 1994)

240. In short, in the affairs of the State (in its widest connotation) religion is irrelevant; it is strictly a personal affair. In this sense and in this behalf, our Constitution is broadly in agreement with the U.S. Constitution, the First Amendment whereof declares that " Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof..." (generally referred to as the "establishment clause"). Perhaps, this is an echo of the doctrine of separation of Church and State; may be it is the modern political thought which seeks to separate religion from the State - it matters very little.

241. In this view of the matter, it is absolutely erroneous to say that secularism is a "vacuous word" or a "phantom concept".

242. It is perhaps relevant to point out that our founding fathers read this concept into our Constitution not because it was fashionable to do so, but because it was an imperative in the Indian context. It is true - as Sri Ram Jethmalani was at pains to emphasise - that India was divided on the basis of religion and that areas having majority muslim population were constituted into a new entity - Pakistan - which immediately proceeded to proclaim itself as an Islamic Republic, but it is equally a fact that even after partition, India contained a sizeable population of minorities. They comprised not less than 10 to 12% of the population. Inspired by Indian tradition of tolerance and fraternity, for whose sake, the greatest son of Modern India, Mahatma Gandhi, laid down his life and seeking to redeem the promise of religious neutrality held forth by the Congress party, the founding fathers proceeded to create a state, secular in its outlook and egalitarian in its action. They could not have countenanced the idea of treating the minorities as second-class citizens. On the contrary, the dominant thinking appears to be that the majority community, Hindus, must be secular and thereby help the minorities to become secular. For, it is the majority community alone that can provide the sense of security to others. The significance of the 42nd (Amendment) Act lies in the fact that it formalised the pre-existing situation. It put the matter beyond any doubt, leaving no room for any controversy. In such a situation, the debate whether the Preamble to the Constitution is included within the words "the provisions of this Constitution" is really unnecessary. Even if we accept the reading of Sri Jethmalani, Preamble is a key to the understanding of the relevant provisions of the Constitution. The 42nd (Amendment) Act has furnished the key in unmistakable terms.

243. Given the above position, it is clear that if any party or organisation seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution would certainly be guilty of following an unconstitutional course of action. Political parties are formed and exist to capture or share State power. That is their aim. They may be associations of individuals but one cannot ignore the functional relevance. An association of individuals may be devoted to propagation of religion; it would be a religious body. Another may

be devoted to promotion of culture; it would be an cultural organisation. They are not aimed at acquiring State power, whereas a political party does. That is one of its main objectives. This is what we mean by saying 'functional relevance'. One cannot conceive of a democratic form of government without the political parties. They are part of the Political system and constitutional scheme. Nay, they are integral to the governance of a democratic society. If the Constitution requires the State to be secular in thought and action, the same requirement attaches to political parties as well. The Constitution does not recognise, it does not permit, mixing religion and State power. Both must be kept apart. That is the constitutional injunction. None can say otherwise so long as this Constitution governs this country. Introducing religion into politics is to introduce an impermissible element into body politic and an imbalance in our constitutional system. If a political party espousing a particular religion comes to power, that religion tends to become, in practice, the official religion. All other religions come to acquire a secondary status, at any rate, a less favourable position. This would be plainly antithetical to Articles 14 to 16, 25 and the entire constitutional scheme adumbrated hereinabove. Under our Constitution, no party or organisation can simultaneously be a political and a religious party.

It has to be either. Same would be the position, if a party or organisation acts and/or behaves by word of mouth, print or in any other manner to bring about the said effect, it would equally be guilty of an act of unconstitutionality. It would have no right to function as a political party. The fact that a party may be entitled to go to people seeking a mandate for a drastic amendment of the Constitution or its replacement by another Constitution is wholly irrelevant in the context. We do not know how the Constitution can be amended so as to remove secularism from the basic structure of the Constitution. The decision of this Court in Keshavananda Bharti [1973] Suppl. 1 SCR at 166 and 280 says that secularism is one of the basic features of the Constitution. Nor do we know how the present Constitution can be replaced by another; it is enough for us to know that the Constitution does not provide for such a course - that it does not provide for its own demise.

244. Consistent with the constitutional philosophy, Sub-section (3) of Section 123 the Representation of Peoples Act, 1951 treats an appeal to the electorate to vote on the basis of the religion, race, caste or community of the candidate or the use of religious symbols as a corrupt practice. Even a single instance of such a nature is enough to vitiate the election of the candidate. Similarly, Sub-section (3-A) of Section 123 provides that "promotion of , or attempt to promote, feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community or language" by a candidate or his agent etc. for the furtherance of the prospects of the election of the candidate is equally a corrupt practice. Section 29-A provides for registration of associations and bodies as political parties with the Election Commission. Every party contesting elections and seeking to have a uniform symbol for all its candidates has to apply for registration, while making such application, the association or body has to affirm its faith and allegiance to "the principles of socialism, secularism and democracy" among others. Since the Election Commission appears to have made some other orders in this behalf after the conclusion of arguments and because those orders have not been placed before us or debated, we do not wish to say anything more on this subject.

ARTICLE 74(2) - ITS MEANING AND SCOPE:

245. The Constitution of India has introduced parliamentary democracy in this country. The parliamentary democracy connotes vesting of real power of governance in the Prime Minister and council of his ministers who are very often drawn from the majority party in Parliament. Some Jurists indeed refer to it derisively as Prime-ministerial form of Government. In such a democracy, the head of the State, be he the King or the President, remains a constitutional head of the State. He acts in accordance with the aid and advice tendered to him by the council of ministers with the Prime Minister at its head. This is what Clause (1) of Article 74 provided, even before it was amended by the 42nd (Amendment) Act. It was so understood and interpreted in Ramjaway Kapoor v. State of Punjab MANU/SC/0011/1955 : [1955]2SCR225 , and in Shamsher Singh. The 42nd Amendment merely made explicit what was already implicit in Clause (1). The 44th Amendment inserted a proviso to Clause (1) which too was in recognition of an existing reality. It empowers the President to require the council of ministers to reconsider the advice tendered by them. The advice tendered on such reconsideration is made binding upon the President. Since Clause (2) of Article 74 has to be read and understood having regard its context, it would be appropriate to read both the Clauses of Article 74 as they stand now:

74. Council of Ministers to aid and advice President --(1) There shall be a Council of the Ministers with the Primes Minister at (he head to aid and advice the President who shall, *in the exercise of his functions,* act in accordance with such advice:

Provided that the President may require the Council of Ministers to reconsider such advice., either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the president shall not be inquired into in any Court.

class ="rightAlign"> (Emphasis added)

246. Article 53(1) of the Constitution says that "the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution." Clause (2), however, declares that without prejudice to Clause (1), the supreme command of the Armed forces of the Union shall be vested in the President and that the exercise of such power shall be regulated by law.

247. Clause (1) of Article 77 provides that "all executive action of the Government of India shall be expressed to be taken in the names of the President." Clause (2) then says that all orders made and other instruments executed in the name of the President shall be authenticated in such manner as may be specified in the Rules to be made by the President. It further provides that the validity of an order or instrument which is authenticated in accordance with the said Rules shall not be called in question on the ground that it is not an order or instrument made or executed by the President. Rules have been made by the President as contemplated by this clause contained in Notification No. SO. 2297 dated November 11, 1958 (as amended from time to time). Several officers of the Government have been empowered to authenticate the orders and other instruments to be made and executed in the name of the President. Clause (3) requires the President to make Rules for the more convenient transaction of the business of the Government of India and for

allocation among Ministers of the said business. In other words, Rules have to be made by the President under Clause (3) for two purposes, viz., (1) for the more convenient transaction of the business of the Government of India and (b) for the allocation among Ministers of the said business. Rules of business have indeed been made as required by this clause and the business of the Government of India allocated between several Ministers.

248. Yet another article which requires to be noticed in this connection is Article 361 which declares that "the President shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties". No criminal proceeding can be instituted or continued against the President in any Court while he is in office, nor is he subject to any process for his arrest or imprisonment.

249. Article 78 specifies the duties of the Prime Minister as regards the furnishing of information to President and certain other matters. Clause (1) obliges the Prime Minister to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation. Clause (b) says that Prime Minister shall furnish such information as the president may call for with respect to the matters communicated under Clause (a). Clause (c) obliges the Prime Minister, if required by the President, to submit any matter for reconsideration of the Council of Ministers which has not been considered by it.

250. The President is clothed with several powers and functions by the Constitution. It is not necessary to detail them to expect to say that Article 356 is one of them. When Article 74(1) speaks of the President acting "in the exercise of his functions", it refers to those powers and functions. Besides the Constitution, several other enactments too confer and may hereinafter confer, certain powers and functions upon the President. They too will be covered by Article 74(1). To wit, the President shall exercise those powers and discharge those functions only on the aid and advice of the Council of Ministers with the Prime Minister at its head.

251. Article 361 is the manifestation of the theory prevalent in English law that 'King can do no wrong' and, for that reason, beyond the process of the court. Any and every action taken by the President is really the action of his ministers and subordinates. It is they who have to answer for, defend and justify any and every action taken by them in the name of the President, if such action is questioned in a Court of law. The President cannot be called upon to answer for or justify the action. It is for the council of ministers to do so. Who comes forward to do so is a matter for them to decide and for the court to be satisfied about it. Normally speaking, the Minister or other official or authority of the Ministry as is entrusted with the relevant business of the Government, has to do it.

252. Article 53(1) insofar as says that the executive power of the Union, which vests in the President, can be exercised by him either directly or through officers subordinate to him in accordance with the Constitution stresses the very idea. Even where he acts directly, the President has to act on the aid and advice of the Council of Ministers or the Minister concerned, as the case may be. (Advice tendered by a Minister is deemed to be the advice tendered by the council of Ministers in view of the principle of joint responsibility of the cabinet/council of ministers). If such act is questioned in a Court of Law, it is for the Minister concerned (according to Rules of

Business) or an official of that Ministry to defend the Act. Where the President acts through his subordinates, it is for that subordinate to defend the action.

253. Article 74 and 77 are in a sense complimentary to each other , though they may operate in different fields. Article 74(1) deals with the acts of the President done "in exercise of his functions", whereas Article 77 speaks of the executive action of the Government of India which is taken in the names of the President of India. Insofar as the executive action of the Government of India is concerned, it has to be taken by the Minister/Official to whom the said business is allocated by the rules of Business made under Clause (3) of Article 77 for the more convenient transaction of the business of the Government of India. All orders issued and the instruments executed relatable to the executive action of the Government of India have to be authenticated in the manner and by the officer empowered in that behalf. The President does not really comes into the picture so far as Article 77 is concerned. All the business of the Government of India is transacted by the Ministers or other officials empowered in that behalf, of course, in the name of the President. Orders are issued, instruments are executed and other acts done by various Ministers and officials, none of which may reach the President or may be placed before him for his consideration. There is no occasion in such cases for any aid and advice being tendered to the President by the Council of Ministers. Though expressed in the name of the President, they are the acts of the Government of India. They are distinct from the acts of the President "in the exercise of his functions" contemplated by Article. 74. Of course, even while acting in exercise of his functions, the President has to act in accordance with the aid and advice tendered by the Council of Ministers with the Prime Minister at its head. He is thus rendered a constitutional - or a titular-head. (The proviso to Clause (1) no doubt empowers him to require the Council of Ministers to reconsider such advice, either generally or in any particular cases, but if and when the Council of Ministers tenders the advice on such re-consideration, he is bound by it.) Then comes Clause (2) of Article 74 which says that the question "whether any, and if so, what advice was tendered by the Ministers to the President shall not be enquired into in any Court." The idea behind Clause (2) is this: the Court is not to enquire - it is not concerned with - whether any advice was tendered by any Minister or Council of Ministers to the President, and if so, what was that advice. That is a matter between the President and his Council of Ministers. What advice was tendered, whether it was required to be reconsidered, what advice was tendered after reconsideration, if any, what was the opinion of the President, whether the advice was changed pursuant to further discussion, if any, and how the ultimate decision was arrived at, are all matters between the President and his Council of Ministers. They are beyond the ken of the Court. The Court is not to go into it. It is enough that there is an order/act of the President in appropriate form. It will take it as the order/act of the President. It is concerned only with the validity of the order and legality of the proceeding or action taken by the President in exercise of his functions and not with what happened in the inner Councils of the President and his Ministers. No one can challenge such decision or action on the ground that it is not in accordance with the advice tendered by the Ministers or that it is based on no advice. If, in a given case, the President acts without, or contrary to, the advice tendered to him, it may be a case warranting his impeachment, but so far as the Court is concerned, it is the act of the President. (We do not wish to express any opinion as to what would be the position if in the unlike event of the council of Ministers itself questioning the action of the President as being taken without, or contrary, to their advice).

254. Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers. In fact, Clause (2) is a reproduction of Sub-section (4) of Section 10 of the Government of India Act, 1935. (The Government of India Act did not contain a provision corresponding to Article 74(1) as it stood before or after the Amendments aforementioned). The scope of Clause (2) should not be extended beyond its legitimate field. In any event, it cannot be read or understood as conferring an immunity upon the council of ministers or the Minister/Ministry concerned to explain, defend and justify the orders and acts of the President done in exercise of his function. The limited provision contained in Article 74(2) cannot override relating to judicial review. If and when any action taken by the President in exercise of his functions is questioned in a Court of Law, it is for the Council of Ministers to justify the same, since the action or order of the President is presumed to have been taken in accordance with Article 74(1). As to which Minister or which official of which Ministry comes forward to defend the order/action is for them to decide and for the Court to be satisfied about it. Where, of course, the act/order questioned is one pertaining to the executive power of the Government of India, the position is much simpler. It does not represent the act/order of the President done/taken in exercise of his functions and hence there is no occasion for any aid or advice by the Ministers to him. It is the act/order of Government of India, though expressed in the name of the President. It is for the concerned Minister or Ministry, to whom the function is allocated under the Rules of Business to defend and justify such action/order.

255. Section 123 of the Evidence Act, in our opinion, is in no manner relevant in ascertaining the meaning and scope of Article 74(2). Its field and purpose is altogether different and distinct. Section 123 reads thus:

123. Evidence as to affairs of State--No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

256. Evidence Act is a pre Constitution enactment. Section 123 enacts a rule of English common Law that no one shall be permitted to give evidence derived from unpublished official records relating to affairs of State except with the permission of the concerned head of the department. It does not prevent the head of department permitting it or the head of the department himself giving evidence on that basis. The law relating to Section 123 has been elaborately discussed in several decisions of this Court and is not in issue herein. Our only object has been to emphasise that Article 74(2) and Section 123 cover different and distinct areas. It may happen that while justifying and government's action in Court, the Minister or the concerned official may claim a privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of that Section. But, Article 74(2) does not and cannot mean that the Government of India need not justify the action taken by the President in the exercise of his functions because of the provision contained therein. No such immunity was intended - or is provided - by the clause, if the act or order of the President is questioned in a Court of Law, it is for the Council of Ministers to justify it by disclosing the material which formed the basis of the act/order. The Court will not ask whether such material formed part of the advice tendered to the President or whether that material was placed before the President. The Court will not also ask

what advice was tendered to the President, what deliberations or discussions took place between the President and his Ministers and how was the ultimate decision arrived at. The Court will only see what was the material on the basis of which the requisite satisfaction is formed and whether it is relevant to the action under Article 356(1). The court will not go into the correctness of the material or its adequacy. Even if the court were to come to a different conclusion on the said material, it would not interfere since the Article speaks of satisfaction of the President and not that of the court.

257. In our respectful opinion, the above obligation cannot be evaded by seeking refuge under Article 74(2). The argument that the advice tendered to the President comprises material as well and , therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. The material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice. The material may be placed before the President to acquaint him - and if need be to satisfy him - that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. One can understand if the advice is tendered in writing in such a case that writing is the advice and is covered by the protection provided by Article 74(2). But it is difficult to appreciate how does the supporting material becomes part of advice. The respondents cannot say that whatever the President sees - or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the court. Article 74(2) must be interpreted and understood in the context of entire constitutional system. Undue emphasis and expansion of its parameters would engulf valuable constitutional guarantees. For these reasons, we find it difficult to agree with the reasoning in State of Rajasthan on this score, insofar as it runs contrary to our holding.

ARTICLE 356 AND JUDICIAL REVIEW:

258. Judicial review of administrative and statutory action is perhaps the most important development in the field of public law in the second half of this century. In India, the principles governing this jurisdiction are exclusively Judge-made. A good amount of debate took place before us with respect to the applicability, scope and reach of judicial review vis-a-vis the proclamation issued by the President under Article 356 of the Constitution. A Large volumes of case-law and legal literature has been placed before us. Though it may not be possible to refer to all that material, we shall refer to relevant among them at the appropriate place.

259. One of the contentions raised by the Union of India in Writ Petition No. 237 of 1993 (filed by Sri Sunderlal Patwa and others in Madhya Pradesh High Court questioning the proclamation) and other writ petitions is that inasmuch as the action under Article 356 is taken on the subjective satisfaction of the President and further because the President cannot be sued in a Court of Law by virtue of Article 361, the impugned proclamation is not justiciable, this argument is, however, not pressed before us. It is also averred that since the Parliament has approved the said proclamation, the Court ought not to entertain the writ petition and/or examine the correctness or otherwise of the Presidential proclamation. (This contention has been further elaborated and pressed before us, as we shall mention hereinafter). Article 74(2) is relied upon to submit that the material on which the President based the requisite satisfaction cannot be compelled to be produced in Court. (This

contention has already been dealt with by us.) It is also submitted that the report of the Governor which forms the basis of action under Article 356 and the material upon which it is based cannot be called in question by virtue Article 361 - (urged in a modified form).

260. Sri K. Parasaran, learned Counsel appearing for the Union of India conceded that the action of the President under Article 356 cannot be said to be beyond judicial review and judicial scrutiny. He, however, submitted that having regard to the nature of the function, the high constitutional status of the authority in whom the power is vested and the exigencies in which the said action is taken, the Court ought not to go into the question of the advisability of the action or into the adequacy of the material on which it is based. The Presidential action, counsel submitted, is not susceptible to normal rules of judicial review, having regard to the political nature of the action and absence of any judicially manageable standards. There may be several imponderables in the situation, which the Court cannot weigh. The President's action under Article 356 cannot be equated to administrative action of a government official. It is exercise of a constitutional function by the highest dignitary of the nation, the President of India. May be the learned Counsel submitted, in a case like Meghalya (Transferred Case Nos. 5 and 7 of 1992), the Court may interfere where the invalidity of action is demonstrable with reference to the orders of this Court, i.e., where the invalidity is writ large on its face. But, generally speaking, the Court is ill-fitted to judge the material on which the action is based to determine whether the said material warranted the action taken. The Court cannot sit in judgment over the prognosis of the President (for that matter, of the Union Council of Ministers) that the situation in a given State was one in which the government of that State could not be carried on in accordance with the provisions of the Constitution. This is an instance, the learned Counsel continued, where the Constitution has committed a particular power to the President to be exercised in his discretion in certain specified situations - a power flowing from the obligation cast by Article 355 upon the Union of India to ensure that "the government of every State is carried on in accordance with the provisions of this Constitution". The President is oath-bound to protect and preserve the Constitution. Placed as he is and having regard to the material which is available to him alone - and also because he alone is best fitted to determine on the basis of material before him whether the situation contemplated by Article 356(1) has arisen - the matter must be left to his judgment and good sense. He alone is presumed to possess the astute political-cum-administrative expertise necessary for a proper and sound exercise of the said power. Judicial approach, which the courts are trained to adopt, is not suited to the function under Article 356. The Courts would be better advised to leave the function to those to whom it is entrusted by the Constitution. The President of India has to be trusted. Of course, President in Article 356(1) means the Union Council of Ministers by virtue of Article 74(1) but that makes little difference in principle. That is the system of government we have adopted. There is no reason to believe that the highest authority like the President of India - i.e., the Union Council of Ministers - would not act fairly and honestly or that they would not act in accordance with the spirit and scheme of the Constitution. Sri Parasaran further submitted that where a particular proclamation is questioned, the burden of establishing its invalidity lies upon the petitioner. It is for him to produce the material to substantiate his contentions. By virtue of Article 74(2), the Court would not enquire into the advice tendered by the Ministers to the President leading to the issuance of the impugned proclamation. The advice comprises and is based upon certain material and information. The advice and material cannot be separated. If the Court cannot enquire into the advice, it cannot also call upon the Union of India to disclose that material. The learned Counsel submitted further that there is a distinction between judicial review of

administrative action and Judicial review of constitutional action. The decisions of this Court relating to judicial review of administrative or statutory action and discretion cannot be applied to judicial review of constitutional action. Appeal against such action, properly and truly speaking, must, and should always be, to the ultimate political sovereign -the people.

261. Sri P.P. Rao, learned Counsel for the State of Madhya Pradesh while adopting the contentions of Sri K. Parasaran concentrated mainly upon the secular nature of our Constitution, with the sequiter that non-secular policies, programmes and acts of political parties place such parties outside the pale of constitutionalism. He submitted that by adopting such policies and programmes and by indulging in non-secular course of action, the governments run by such parties render themselves amenable to action under Article 356. According to the learned Counsel, B.J.P.'s election manifesto, together with the speeches and acts of their leaders and cadres make it a non-secular party and, therefore, the dismissal of their government in Madhya pradesh is perfectly justified. Sri Andhyarujina, learned Advocate-General of Maharashtra submitted that the doctrine of political question has not been given-up altogether by the decision of the U.S. Supreme Court in Baker v. Carr [1962] 11 L.Ed. 633. All that the decision has done is to limit the area of operation of the said doctrine. The dismissal of a State government or dissolution of the State Legislative Assembly is essentially a political question, the validity and correctness whereof cannot be adjudged with reference to any know judicial standards and/or dicta. Such matters be best left to the wisdom of the President and ultimately of the people. It is for the people to judge whether a particular dismissal or dissolution was just or not.

262. S/Sri Soli Sorabjee, Ram Jethmalani and Shanti Bhushan, learned Counsel for the Petitioners submitted, on the other hand, that the action of the President under Article 356 is not beyond judicial scrutiny. The Constitution does not create any such immunity and it would not be desirable to infer any such immunity by a process of reasoning or as a matter of self-restraint by this Court. The power has been used more often than not for purposes other than those contemplated by Article 356. The provision has been abused repeatedly over the years reducing the State governments and the State Legislatures to the status of mere municipalities. If the Court were to refuse to enquire into the validity of such proclamations, a serious imbalance will set in the constitutional scheme. This Court is as much bound to uphold, protect and preserve the Constitution as the President of India. The founding fathers did not say or indicate anywhere that the President shall exercise the said power in his absolute discretion/judgment. On the contrary, the action is made expressly subject to approval by both the Houses of Parliament. The remedy of judicial review guaranteed by Articles 32 and 226 extends and applies to this action as to any other action of the President under the Constitution. Where the Parliament wished to bar judicial review, it has said so expressly, e.g., Article 31-B and 31-C. There is no distinction between the judicial review of administrative/statutory action and judicial review of Constitutional action. The tests are the same. No other tests can possibly be suggested. The power under Article 356 is undoubtedly the power to be exercised on the subjective satisfaction of the President, which means the Council of Ministers. The latter is undoubtedly a political body and the experience shows that where a different party is in power in a state, the Central Government has been resorting to Article 356 to destabilise that party and to further the prospects of their own party. The circumstances in which and the grounds on which the action based on subjective satisfaction can be interfered with, have been exhaustively stated by this Court in Barium Chemicals as far back as 1966 which decision has been followed uniformly by this Court over the last three decades. The tests evolved in the

said decision are relevant even in the case of action under Article 356. The power under Article 356 is a conditioned power; it can be exercised only when the President is satisfied that the government of a State cannot be carried on in accordance with the provisions of the Constitution. Even in the case of an unqualified and unconditional power like the one under Article 72 (power to grant pardon etc.) this Court has held that the action of the President is amenable to judicial review Kehar Singh v. Union of India [1988] Suppl. 3 S.C.R. 1102. The satisfaction must be based upon existing material and must be such as would lead a reasonable man to be satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Even if the action is taken with the best of intentions, it would be bad if the action is outside the pale of Article 356. If the grounds are not relevant or if there are no grounds warranting the requisite satisfaction, the action would be bad. Article 74(2) has no relevance in this behalf. It is a sort of red herring drawn across the trial by the Respondents' counsel to confuse the issue. The petitioners are not interested in or anxious to know that advice, it any, was tendered by the Ministers to the President leading to the issuance of the impugned proclamation. They are not interested in that aspect. There challenge is to the validity of the proclamation and since it is an action based upon subjective satisfaction and also because the proclamation does not recite the grounds upon it has been issued, it is for the Union of India to justify their action before this Court. This is the general principle applicable to cases of subjective satisfaction and the proclamation under Article 356 is no exception to this rule say the counsel.

263. Since it is not disputed by the counsel for the Union of India and other respondents that the proclamation under Article 356 is amenable to judicial review, it is not necessary for us to dilate on that aspect. The power under Article 356(1) is a conditional power. In exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. In what circumstances the court would interfere is a different matter but the amenability of the action to judicial review is beyond dispute. It would be sufficient to quote a passage form State of Rajasthan:

...So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so...this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of law....

264. The controversy really pertains to the scope, reach and extent of the judicial review.

Regarding the scope and reach of judicial review, it must be said at the very outset that there is not, and there cannot be, a uniform rule applicable to all cases. It is bound to vary depending upon the subject-matter, nature of the right and various other factors.

265. This aspect has been emphasised by this Court in Indra Sawhney v. Union of India MANU/SC/0664/1992 : (1992) 6 J.T. 655, in the following words:

The extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the Executive - a co-equal wing - in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to the due weight.

266. A passage from the article "Justiciability and the control of discretionary power" b Prof. D.G.T. Welliams appears to echo our thought correctly the Professor says, "Variability, of course, is the outstanding feature of judicial review of administrative action...an English Judge has commented that (with administrative law 'in a phase of active development') the Judges 'will adapt the rules...to protect the rule of law' and an Australian judge has noted that there 'is no fixed rule which requires the same answer to be given in every case'. Similar sentiments have been expressed in the case of express procedural requirements where the Courts have to wrestle with the distinction between mandatory and directory requirements, where the law has been described 'as inextricable tangle of loose ends', and where the variables - including ideas of substantial compliance' or as to whether anyone has been prejudiced - are such that even the same statutory provision may be differently interpreted according to the circumstances of a case...the fluidity of the rules on express procedural requirements has been eloquently recognized both by Lord Hailsham - who, against a background of 'the rapidly developing jurisprudence of administrative law' spoke of a 'spectrum of possibilities' when he stressed that the Courts are not necessarily 'bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invested by lawyers for the purposes of convenient exposition'...".

267. Having said this, we may now proceed to examine a few decisions where proclamations of emergency were questioned to notice how the challenge was dealt with. We may first notice the decision of the Privy Council in Bhagat Singh v. King Emporer MANU/PR/0069/1931 Section 72 of the Government of India Act, 1919 empowered the Governor-General to make and promulgate ordinance for the peace and good Government of British India in case of emergency. The ordinance so made, however was to be effective for a period of six months from the date of its promulgation and was to be effective like an enactment made by the Indian legislature and be subject to the very same restrictions applying to an enactment made by the Indian legislature. The section read as follow:

72. The Governor-General may in cases of emergency make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinance under this section is subject to the like restrictions, as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature and may be controlled or superseded by any such Act.

Exercising the said power, the Governor-General issued an ordinance whereunder the appellant was convicted. In the appeal to the Board, the appellant contended that, as a matter of fact, there

was no state of emergency and that the Governor-General acted illegally in proclaiming that one exists and issuing the ordinance on that basis. This contention was rejected by the Board in the following words:

That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the ordinance.

Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (a) by this Board declaring that once the ordinance was challenged in proceedings by way of habeas corpus the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (b) by a finding of this Board-after a contentious and protracted enquiry-that no state of emergency existed, and that the ordinance with all that followed on it was illegal.

In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it.

It was next said that the ordinance did not conduce to the peace and good government of British India The same remarks applies. The Governor-General is also the judge of that. The power given by Section 72 is an absolute power without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good Government of India demands it.

268. Thus, the approach of the Board was one of 'hands-off. The Governor-General was held to be the final Judge of the question whether an emergency exists. The power conferred by Section 72 was described as an absolute power without any limits prescribed, except that which apply to an enactment made by the Indian legislature. It was also observed that the subject matter is not fit one for a court to enquire into.

269. We may point out that this extreme position is not adopted by Sri Parasaran, learned Counsel appearing for the Union of India. He did concede that judicial review under the Constitution is not excluded in the matter of proclamation under Article 356(1) though his submission was that it should be available in an extremely narrow and limited area since it is a power committed expressly to the President by the Constitution and also because the issue is not one amenable to judicial review by applying known judicially manageable standards. The Supreme Court of Pakistan in Federation of Pakistan v. Mohd. Saifullah Khan, P.L.D. (1989) S.C. 166 , described the approach (adopted in Bhagat Singh) in the following words (quoting Cornelius, J.): "In the period of foreign rule, such an argument, i.e., that the opinion of the person exercising authority is absolute may have at times prevailed, but under autonomous rule, where those who exercise power in the State are themselves citizens of the same State, it can hardly be tolerated."

270. We have no hesitation in rejecting the said approach as totally inconsistent with the ethos of our Constitution, as would be evident from the discussion infra.

271. The view taken in Bhagat Singh was affirmed by the Privy Council in the year 1944 in King Emporer v. Benoari Lal Sharma and Ors. (1944) 72 I.A. 57 , CPC. It was held that whether an emergency existed at the time the ordinance was made and promulgated was a matter of which the Governor-General was the sole Judge. If it were not so, it was observed, the Governor- General would be disabled from taking action necessary to meet the emerging dangerous situation, according to his assessment of the situation. It is enough to say that this case again represents what we have called the extreme view. It is inappropriate in the context of Article 356.

272. The next decision is again of the Privy Council in Stephen Kalong Ningkan v. Government of Malaysia (1970) A.C. 379. The appellant was the Chief Minister of Sarawak, and Estate in the Federation of Malaysia. On June 16, 1966, the Governor of Sarawak requested him to resign on the ground that he had ceased to command the confidence of the council Negri. The appellant refused whereupon the Governor informed him on June 17, 1966 that he ceased to hold the office. The appellant approached the High Court of Kuching against the governor's intimation. On September 7, 1966, the High Court upheld his plea and ruled that the Governor had no power to dismiss him. On September 14, 1966, His Majesty Yang di-Pertuan Agong (Head of the State of Malaysia) proclaimed a state of emergency throughout the territories of the State of Sarawak. The proclamation was made under Article 150 of the Federal Constitution of Malaysia, which reads thus:

Article 150(1): If the Yang di-Petruan Agong is satisfied that a grave emergency exists whereby the security or the economic life of the Federation or of any part thereof is threatened, he may issue a proclamation or emergency.

273. The Article provided for such proclamation being placed for approval before both the Houses of Parliament, who had the power to disapprove the same. Clause (5) of Article 150 empowered the Federal Parliament, during the period the proclamation of emergency was in operation, to make laws with respect to any matter which it appeared to it as required by reason of the emergency. Such law, it was provided, shall be operative notwithstanding anything contained either in the Constitution of the Federation or the Constitution of the State of Sarawak, and will not be treated as amendment to the constitution. Any such law was, however, to be in force only for the period of emergency. In exercise of the power conferred by Clause (5) of Article 150, the Federation Parliament passed Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. Section 5 of this Act specifically empowered the Governor to dismiss the Chief Minister, in his absolute discretion, if, at any time, the Council Negri passed the resolution of no-confidence in the Government by a majority and yet the Chief Minister failed to resign. On September 23, 1966, the Council Negri met and passed the resolution of no-confidence in the Chief Minister (appellant). On the next day, the Governor dismissed the appellant under the new Act. He impugned the action in the Federal Court of Malaysia, wherein he sought for a declaration that the 1966 Act aforesaid was ultra vires the Federal Parliament. He contended that the proclamation of emergency was a fraud on the Constitution and of no effect inasmuch as no state of grave emergency existed. The Act aforesaid founded as it was on the proclamation of emergency, was equally void and of no effect, he submitted. He contended that the evidence showed that non of the usual signs and symptoms of "grave emergency" existed in Sarawak at or before the time of the proclamation; that no disturbances, riots or strikes had occurred; that no extra troops or police had been placed on duty; that no curfew or other restrictions on movement had been found necessary and that the

'confrontation' with Indonesia had already come to an end. The Federation of Malaysia repudiated all the said contentions. It submitted that the proclamation of emergency was conclusive and not assailable before the Court.

274. The Privy Council (Lord MacDermott speaking for the Board) expressed the view in the first instance that it was "unsettled and debatable" whether a proclamation made by the Supreme Head of the Federation of Malaysia under statutory powers could be challenged on some or other grounds but then proceeded on the assumption that the matter is justiciable. On that assumption, the Board proceeded to examine the further contentions of the appellant. It found that the proclamation of emergency and the impugned Act were really designed to meet the constitutional dead-lock that had arisen on account of the absence of provision empowering the Governor to dismiss the Chief Minster where the latter ceased to enjoy the confidence of the Council Negri. It observed: "It is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Governor of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to enquire whether that situation could itself have been avoided by a different approach." The Privy Council observed further that "they can find, in the material presented, no ground for holding that the respondent- government was acting erroneously or in any way malafide in taking the view that there was a constitutional crisis in Sarawak, that it involved or threatened a breakdown of a state government and amounted to any emergency calling for immediate action. Nor can their Lordships find any reason for saying that the emergency thus considered to exist was not grave and did not threaten the security of Sarawak. These were essential matters to be determined according to the judgment of the respondent-ministers in the light of their knowledge and experience...and that he (the appellant) failed to satisfy the Board that the steps taken by the Government including the proclamation and the impugned Act, were in fraudem Legis or otherwise unauthorised by the relevant legislation". The appeal was according dismissed.

275. There stands of reasoning are evident in the decision. Firstly, the Privy Council assumed that the issue was justiciable. On that basis, it examined the facts of the case and found that the situation did amount to an emergency. Secondly and more importantly, it examined and found that there was no "reason for saying that the emergency thus considered to exist was not grave and not threaten the security of Sarawak", though at the same time, it held that existence of emergency is a matter to be determined by the council of ministers in the light of their knowledge and experience and thirdly, that the appellant failed to establish that the proclamation of emergency was a fraud on the Constitution.

276. We may now notice the only decision of this Court dealing with Article 356, viz., State of Rajasthan. Two circumstances must be kept in mind while examining the decision, viz., (i) the writ petitions (and suits) filed by various states were not directed against proclamation(s) of emergency, since no such proclamations were issued prior to the filing of those suits and writ petitions; and (ii) at that time, Clause (5) introduced by 38th (Amendment) Act was in force. Clause (5) read as follows:

5. Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in the Clause (1) shall be final and conclusive and/shall not be questioned in any court on any ground.

[This clause was substituted by an altogether different clause by the 44th (Amendment) Act].

277. The subject matter of challenge in the suits (under Article 131) and writ petitions (under Article 32) in this matter was a letter written by the then Home Minister to Chief Ministers of certain States advising them to seek the dissolution of respective Legislative Assemblies and seek a fresh mandate from the people. The letter stated that the elections to Lok Sabha held in March, 1977 indicated that the Congress party, in power in those States, has lost its mandate totally and has become alienated with the people. The letter, together with a statement made by the then Union Law Minister, was treated as a threat to dismiss those State governments. To ward off such a threat, they approached the Supreme Court by way of suits and writ petitions. They was heard expeditiously and dismissed on April 29, 1977. Reasoned opinions were delivered later, by which date proclamations under Article 356(1) were actually issued. One of the questions related to the maintainability of the suits, with which question, of course, we are not concerned.

278. Six opinions were delivered by the Seven-Judge Bench. Though all of them agreed that the writ petitions and suits be dismissed, their reasoning is not uniform. It would, therefore, be appropriate to notice the ratio underlying each of the opinions insofar as it is relevant for our purposes:

Beg, C.J. The opinion of Beg, C.J. contains several strands of thought. They may be stated briefly thus:

(i) The language of Article 356 and the practice since 1950 shows that the Central Government can enforce its will against the State governments with respect to the question how the State governments should function and who should hold reins of power.

(ii) By virtue of Article 365(5) and Article 74(2), it is impossible for the Court to question the satisfaction of the President. It has to decide the case on the basis of only those facts as may have been admitted by or placed by the President before the Court.

(iii) The language of Article 356(i) is very wide. It is desirable that conventions are developed channelising the exercise of this power. The Court can interfere only when the power is used in a grossly perverse and unreasonable manner so as to constitute patent misuse of the provisions or to an abuse of power. The same idea is expressed at another place saying that "a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved" by the proclamation, it would be liable to be struck down. The question whether the majority party in the Legislative Assembly of a State has become totally estranged from the electorate is not a matter for the Court to determine.

(iv) The assessment of the Central Government that a fresh chance should be given to the electorate in certain States as well as the question when to dissolve the Legislative Assemblies are not matters alien to Article 356. It cannot be said that the reasons assigned by the Central Government for the steps taken by them are not relevant to the purposes underlying Article 356.

We may say at once that we are in respectful disagreement with propositions (i), (ii) and (iv) altogether. So far as proposition (iii) is concerned, it is not far off the mark and in substance accords with our view, as we shall presently show.

Y . Chandrachud, J. On the scope of judicial review, the learned Judge held that where the reasons disclosed by the Union of India are wholly extraneous, the court can interfere on the ground of malafides. Judicial scrutiny, said the learned Judge, is available "for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed". The court cannot sit in judgment over the satisfaction of the President for determining whether any other view of the situation is reasonably possible, opined the learned Judge. Turning to the facts of the case before him, th6 learned Judge observed that the grounds assigned by the Central Government in its counter-affidavit cannot be said to be irrelevant to Article 356. The Court cannot go deeper into the matter nor shall the Court enquire whether there were any other reasons besides those disclosed in the counter-affidavit.

P.N. Bhagwati and A.C. Gupta, JJ. The learned Judges enunciated the following propositions in their opinion:

The action under Article 356 has to be taken on the subjective satisfaction of the President. The satisfaction is not objective. There are no judicially discoverable and manageable standards by which the Court can examine the correctness of the satisfaction of the President. The satisfaction to be arrived at is largely political in nature, based on an assessment of various and varied facts and factors besides several imponderables and fast changing situations. The court is not a fit body to enquire into or determine the correctness of the said satisfaction or assessment, as it may be called. However, if the power is exercised malafide or is based upon wholly extraneous or irrelevant grounds, the Court would have jurisdiction to examine it. Even Clause (5) is not a bar when the contention is that there was no satisfaction at all.

The scope of judicial review of the action under Article 356, - the learned Judge held - is confined to a "narrow minimal area: May be that in most cases, it would be difficult, if not impossible, to challenge the exercise of power under Article 356(1) on the aforesaid limited ground, because the facts and circumstances on which the satisfaction is based, would not be known, however, where it is possible, the existence of satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds.

We may say with great respect that we find it difficult to agree with the above formulations in toto. We agree only with the statements regarding the permissible grounds of interference by court and the effect of Clause (5), as it then obtained. We also agree broadly with the first proposition, though not in the absolute terms indicated therein.

Goswami and Untwalia, JJ. The separate opinions of Goswami and Untwalia, JJ. emphasise one single fact, namely, that inasmuch as the facts stated in the counter-affidavit filed by the Home Minister cannot be said to be "malafide, extraneous or irrelevant", the action impugned cannot be assailed in the Court.

Fazal Ali, J. The learned Judge held that:

(i) the action under Article 356 is immune from judicial scrutiny unless the action is "guided by extraneous consideration" or "personal consideration".

(ii) the inference drawn by the Central Government following the 1977 elections to the Lok Sabha cannot be said to be unreasonable. It cannot be said that the inference drawn had no nexus with Article 356.

279. It would thus be seen that there is a broad consensus among five of the seven Judges that the court can interfere if it is satisfied that the power has been exercised malafide or on wholly extraneous or irrelevant grounds. Some learned Judges have stated the rule in narrow terms and some others in a little less narrow terms but not a single learned Judge held that the proclamation is immune from judicial scrutiny. It must be remembered that at that time Clause (5) was there barring judicial review of the proclamation and yet they said that court can interfere on the ground of malafides or where it is based wholly on extraneous or irrelevant grounds. Surely, the deletion of Clause (5) has not restricted the scope of judicial review. Indeed, it removed the cloud cast on the said power. The court should, if anything, be more inclined to examine the constitutionality of the proclamation after such deletion.

280. It would be appropriate at this stage to examine a few decisions of the Pakistan Supreme Court, since the Constitution of Pakistan, 1973 contains a provision somewhat similar to Article 356.

281. Article 58 of the Constitution of Pakistan, 1973 provides for dissolution of National Assembly. Clause (1) says that the President shall dissolve the National Assembly if so advised by the Prime Minister. It further provides that in any event on the expiry of forty-eight hours after the Prime Minister has advised the dissolution, the National Assembly stands dissolved. Clause (2) is relevant for our purpose. It reads thus:

(2) Notwithstanding anything contained in Clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion-

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of majority of the members of the National Assembly in accordance with the provisions of the Constitution as ascertained in a session of the National Assembly summoned for the purpose; or

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

282. Sub-clause (b) of Clause (2) approximates to Clause (1) of Article 356 of our Constitution. Under this clause, the President may dissolve the National Assembly, in his discretion, where in his opinion, a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

283. The first decision is in Federation of Pakistan v. Mohammad Khan, a decision of a Bench of twelve-Judges of the Pakistan Supreme Court, reported in P.K.D. [1989] S.C. 166. Acting under Article 58(2)(b), the President of Pakistan dissolved the National Assembly and dismissed the federal cabinet with immediate effect by a notification dated May 29, 1988. The order made by the President recited 'that the objects and purposes for which the National Assembly was elected

have not been fulfilled; that the law and order in the country have broken down to an alarming extent, resulting in tragic loss of innumerable valuable lives as well as property; that the life, property, honour and security of the citizens of Pakistan have been rendered totally unsafe; and that the integrity and ideology of Pakistan have been seriously endangered." The validity of the said order was challenged by a member of the National Assembly by way of writ petition in the Lahore High Court, which allowed it but declined to grant the further relief sought for by the petitioner; viz., restoration of the National Assembly, (Provincial Assembly of Punjab was also dissolved by a similar order made by the Governor of Punjab under Article 112(2)(b), which too was questioned in the High Court and with the same result.) In the appeal before the Supreme Court, it was contended that the action of the President was immune from judicial scrutiny inasmuch as it was an instance of exercise of his discretionary power. The contention was repelled by the Supreme Court in the following words.

The discretion conferred by Article 58(2)(b) of the Constitution on the President cannot, therefore, be regarded to be an absolute one, but is to be deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it.

It must further be noted that the reading of the provisions of Article 48(2) and 58(2) shows that the President has to first form his opinion, objectively, and then, it is open to him to exercise his discretion one way or the other, i.e., either to dissolve the Assembly or to decline to dissolve it. Even if some immunity envisaged by Article 48(2) is available to the action taken under Article 58(2) that can possibly be only in relation to his 'opinion'. An obligation is cast on the President by the aforesaid Constitutional provision that before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2)(b) has arisen which necessitates the grave step of dissolving the National Assembly. In Abul Ala Maudoodi v . Government of West Pakistan, P.L.D. [1964] S.C. 673, Cornelius C.J., while interpreting certain provisions of the Criminal Law Amendment Act, 1908, construed the word 'opinion' as under:

...it is a duty of Provincial Government to take into consideration all relevant facts and circumstances. That imports the exercise of an honest judgment as to the existence of conditions in which alone the opinion must be formed honestly, that the restriction is necessary. In this process, the only element which I find to possess a subjective quality as against objective determination, is the final formation of opinion that the action proposed is necessary. Even this is determined, for the most part, by the existence of circumstances compelling the conclusion. The scope for exercise of personal discretion is extremely limited....As I have pointed out, if the section be construed in a comprehensive manner, the requirement of an honest opinion based upon the ascertainment of certain matters which are entirely within the grasp and appreciation of the government agency is clearly a pre-requisite to the exercise of the power. In the period of foreign rule, such an argument, i.e., that the opinion of the person exercising authority is absolute may have at times prevailed, but under autonomous rule, where those who exercise power in the State are themselves citizens of the same States, it can hardly be tolerated.

284. It was further held that "though the President can make his own assessment of the situation as to the course of action to be followed but his opinion must be founded on some material."

285. One of the learned Judges (Shaifur Rehman, J.) dealt with the meaning and significance of the words "cannot be carried on" occurring in Article 58(2)(b) in the following words:

the expression "cannot be carried on", sandwiched as it is between "Federation Government" and "in accordance with the provisions of the Constitution", acquires a very potent, a very positive and very concrete content. Nothing has been left to surmises, like or dislikes, opinion or view. It does not concern itself with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of the achievement. It concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock ensuring the observance of the provisions of the Constitution.

286. The next decision of the Pakistan Supreme Court brought to our notice is in Khaja Ahmed Tariq Rahim v. The Federation of Pakistan, reported in P.L.D. 1992 S.C. 646. On August 6, 1990, the President of Pakistan dissolved the National Assembly in exercise of his discretion, by an order made under Article 58(2)(b) of the Constitution of Pakistan. The formal order referred to the National Assembly being afflicted with internal dissensions and frictions, persistent and scandalous 'horse-trading' for political gain and furtherance of personal interests, corrupt practices and inducement in contravention of the Constitution and the Law and failure to discharge substantive legislative functions other than the adoption of the Finance Bill all of which led the President to believe that the National Assembly has lost the confidence of the people. The validity of the order was challenged by a former Federal Minister in the Lahore High Court. The High Court upheld the Presidential Order whereupon the matter was carried to the Supreme Court. Both the parties agreed that the principles enunciated by the Supreme Court in Federation of Pakistan v. Mohammad Saifullah Khan, do govern the controversy.

287. On fact, the Supreme Court found that though some of the goods given may not be relevant, there are other relevant goods all of which read together "are sufficient to justify the action taken".

288. The next decision relied upon by Sri Sorabjee is in Mirza Mohd. Nawaz Sharief v. The President of Pakistan reported in P.L.D. 1993 S.C. 473. The said decision pertains to the most recent dismissal of the Federal Government and dissolution of the National Assembly by the President of Pakistan by his order dated April 18, 1993.

289. In this decision, several propositions have been enunciated by the court. Firstly, it is reiterated that "if it could be shown that no grounds existed on the basis of which an honest opinion could be formed 'that a situation had arisen in which the government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary' the exercise of the power would be unconstitutional and open to correction through judicial review". It is next held that "Article 58(2)(b) of the Constitution empowers the executive head to destroy the legislature and to remove the chosen representatives. It is an exceptional power provided for an exceptional situation and must receive, as it has in Federation of Pakistan v. Haji Md. Seifullah Khan and Ors., P.L.D 1989 SC 166, the narrowest interpretation". It is also held that if there is a doubt whether the Prime Minister had lost the confidence of the National Assembly "the only course left constitutionally open for the President for arriving at his satisfaction in this matter is to 'summon the National Assembly and require the Prime Minister to obtain a vote of

confidence in the National Assembly". This observation was, of course, me ie in the context of Article 91(5), which says:

(5) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly.

290. The court then examined the presidential order and held that none of the ground therein bore any nexus to the order passed and that the grounds stated were extraneous and irrelevant and in clear departure of the constitutional provisions. Accordingly, it was held that the presidential declaration was unconstitutional and that as a natural and logical corollary, the ministry which has been dismissed along with the dissolved National Assembly must be restored and revived.

291. Before we refer to the principle of these decisions, it is necessary to bear in mind the nature of the power conferred by the Constitution of Pakistan. Under Article 58(2)(b), the President, who acts alone and personally, is empowered not only to dismiss the federal government but also to dissolve the National Assembly if, in his opinion, a situation has arisen in which the government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. This is of course, not the position under our Constitution. Under our Constitution, the President has to act and does act in accordance with the aid and advice tendered to him by the council of ministers with the Prime Minister at its head. There is no occasion for the President to act in his personal capacity or without reference to council of ministers. The second distinguishing feature is that under the Pakistan Constitution the President is empowered to dismiss the federal government just as the Governor of a province is empowered to dismiss the provincial government, whereas under our Constitution, there is no question of President dismissing the Union Government; it is really a case where the Union Government dismisses the State government if the situation contemplated by Article 356(1) arises. The strong remarks made by the Pakistan Supreme Court must no doubt be understood in the context of the aforesaid character of Article 58(2)(b). Yet the relevance of the approach adopted by the Pakistan Supreme Court is not without significance.

292. We may at this stage refer to the decision of the Constitution Bench of this Court in Kehar Singh and Anr. v. Union of India [1988] Suppl. 3 S.C.R. 1102 . Article 72 of the Constitution confers upon the President the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. The power extends to cases where the sentence is a sentence of death. The article does not provide any guidance in which matters should the President exercise which power and in which cases to refuse. In other words, the power appears ex-fade to be absolute. Kehar Singh was convicted under Section 302 IPC in connection with the assassination of the then Prime Minister of India, Smt. Indira Gandhi and sentenced to death. The sentence was confirmed by this Court on appeal. A subsequent writ petition and review filed by him in this Court failed. Kehar Singh's son then presented a petition to the President of India for grant of pardon under Article 72. He requested a personal hearing. Personal hearing was refused and in a letter addressed to Kehar Singh a counsel, the Secretary to the President expressed the President's opinion that the President cannot go into

the merits of the case finally decided by the highest court of the land. The petition was accordingly rejected. The rejection of the petition was questioned by way of writ petition in this Court. This Court expressed the view that under Article 72, it is open to the President to scrutinise the evidence on record of a criminal case and come to a different conclusion from that recorded by the court both on the question of guilt as well as sentence. This power, it was held, is not in conflict with nor in supersession of judicial power. It is an altogether different power, an executive power exercised on the aid and advice of the council of ministers. It was also stated that any number of considerations may enter the decision of the President and that it is not possible to lay any guidelines governing the exercise of the said power. What is relevant for our purpose is the holding regarding the extent of judicial review of the exercise of power under the said article. It was held that the exercise of power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review. While the court cannot go into the merits, the limitations of such review are those enunciated in Maru Ram v. Union of India MANU/SC/0159/1980 : 1980CriLJ1440 . The court held, "the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self denial on an erroneous appreciation of the full amplitude of the power is a matter for the court." This was so held inspite of the seemingly absolute nature of the power conferred by Article 72 upon the President. The argument of the learned Attorney General of India that the exercise of power under Article 72 was not justiciable was accordingly rejected.

293. Counsel appearing on both the sides placed strong reliance upon the decision of the House of Lords in C.C.S.U. v. Minister for the Civil Service, as laying down correctly the principles to be followed in the matter of judicial review of administrative action whether governed by a statute or by 'common law'. The petitioners say that this approach ought to be adopted even in the case of the Constitutional action like the one under Article 356. The respondents demur to it. It is, therefore, necessary to examine what does the said decision lay down precisely.

294. The Government Communications Headquarters is a branch of the public services under the Foreign and Commonwealth office. Its main functions are to ensure the security of the United Kingdom military and official communications and to provide signals intelligence for the Government. Since 1947, i.e., from the time of its establishment, the staff employed therein were permitted to belong to national trade unions and most of them did so. There were several disputes between the staff and the government over the years all of which were settled by negotiations with the Union. On January 25, 1984, however, the Secretary of the State for Foreign and Commonwealth Affairs announced suddenly that the staff of the Government Communications Headquarters will no longer be permitted to belong to national trade unions and that they would be permitted to belong to only to a departmental staff association approved by the Director. The said decision was given effect to by certain orders issued on December 22, 1993. The Unions questioned the validity of the said instructions.

295. The conditions of service of the staff working in Government Communications Headquarters were to be regulated by the Minister for the Civil Service, empowered as he was by Article 4 of the 1982 Order-in-Council. The said order-in-Council was not issued under powers conferred by any Act of Parliament. It was issued by the Sovereign by virtue of her prerogative. According to the definition given by Dicey in "Introduction to the study of the Law of the Constitution" - which

has been accepted and followed at all points of time in U.K. - "prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers." The very same idea has been stated by Lord Diplock in the following words:

For a decision to be susceptible to judicial review, the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision, the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of the prerogative.

296. The contention on behalf of the Minister was that action taken by him in exercise of the prerogative power is not amenable to judicial review. The said contention was rejected. So far as the merits are concerned, the only contention urged by the Unions related to "the manner in which the decision which led to these instructions being given, was taken, that is to say, without prior consultation of any kind with the appellant or, indeed, others." The right of prior consultation was founded upon the theory of legitimate expectation. All the Law Lords agreed that having regard to the practice in vogue since the establishment of the said establishment, the Unions could claim a legitimate expectation to be consulted before effecting any change in the conditions of their service. But, they held, the said legitimate expectation cannot prevail over the considerations of national security which prompted the Minister to issue the impugned instructions. It is on this ground alone that the House of Lords dismissed the appeal preferred by the Unions.

297. So far as India is concerned, there is no such thing as 'prerogative'. There is the executive power of the Government of India and there are the constitutional functions of the President. It is not suggested by the counsel for the respondents that all the orders passed and every action taken by the President or the Government of India is beyond judicial review. All that is suggested is that some of the powers of the President and the Government of India are immune. Sri Parasaran relies upon the opinion of Lord Roskill where certain prerogative powers are held not fit subject-matters for judicial scrutiny. They are the powers relating to entering of treaties with foreign power, defence of the realm, grant of pardon/mercy, conferring of honours, dissolution of Parliament and appointment of Ministers. We agree that broadly speaking the above matters, because of their very nature, are outside the ken of courts and the courts would not, ordinarily speaking, interfere in matters relating to above subjects. But that is different from saying all the President's action are immune. In fact, the main holding in this decision is that action taken in exercise of the prerogative power is not immune from judicial review apart from the clear enunciation of the grounds of judicial review. It is also held, of course, that in matters involving government policy, the ground of irrationality may not be an appropriate one.

298. We may now examine the principles enunciated by this Court in Barium Chemicals, which is the leading decision of this Court on the subject of subjective satisfaction, it exhaustively lays

down the parameters of judicial review in such matters. Barium Chemicals was concerned with an enquiry ordered into the affairs of the appellant-company by the Company Law Board under Section 237(b) of the Companies Act, 1956. Section 237 read as follows :

Without prejudice to its powers under Section 235, the Central Government

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the center Government may direct, if

(i) the company, by special resolution, or

(ii) the Court, by order, declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government; and

(b) may do so it, in the opinion of the Central Government,there are circumstances suggesting

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or in a manners oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose; of

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager of the company.

299. Clause (b) empowered the Central Government to appoint one or more persons as inspectors to investigate into the affairs of a Company and to report thereon if in its opinion "there are circumstances suggesting" one or the other of the circumstances mentioned in Sub-clauses (i), (ii) and (iii). The main opinion was delivered by Shelat, J. That the action contemplated under Section 237(b) could be taken on the subjective satisfaction of the Central Government was not in dispute. The controversy, however, centered round the next aspect. According to the appellant, though the opinion was subjective, the existence of circumstances set out in Clause (b) was a condition precedent to the formation of such opinion and, therefore, even if the impugned orders were to contain a recital of the existence of those circumstances, the Court can go behind that recital and determine whether they did in fact exist. On the other hand, the contention for the Company Law Board was that Clause (b) was incapable of such dichotomy and that not only the opinion was subjective but that the entire clause was made dependent on such opinion. It was urged that the words "opinion" and "suggesting" were clear indications that the entire function was subjective, that the opinion which the authority has to form is that circumstances suggesting what is set out in Sub-clauses (i) and (ii) exist and, therefore, the existence of those circumstances is by itself a matter of subjective opinion. The Legislature having entrusted that function to the authority, it was

urged, the Court cannot go behind its opinion and ascertain whether the relevant circumstances exist or not.

300. After considering a large number of decisions, Shelat, J. held:

....the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits of, as Lord Redcliffe and Lord Reid called, the restraint of the statute as an alternative safeguard to rules of natural justice where the function is administrative.

The learned Judge then examined the object underlying Section 237 and held:

There is no doubt that the formation of opinion by the Central Government is purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in Sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression" circumstances suggesting". But, that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three Sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause per mitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process There must, therefore, exist circumstances which in the opinion of the Authority suggest what has been set out in Sub-clauses (i), (ii) and (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

Hidayatullah, J. observed thus in his separate opinion :

Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not

sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind.

The learned Judge proceeding further to say:

We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in Section 237(b) can at all be drawn the action would be ultra vires the Act and void.

301. The principles enunciated in this case are not only self-evident, they have been followed uniformly since. We do not think it necessary to re-state these principles - they are too well-known.

302. Counsel brought to our notice a decision of the High Court of Australia in the Queen v. Toohey-Ex parte Northern Land Council, 151 Common Wealth Law Reports 170. Under the Aboriginal Land Rights (Northern Territory) Act, 1976, provision was made for the aboriginals to claim return of the land traditionally occupied by them. The application was to be made to the Commissioner under the Act. Tochey, J. was acting as the Commissioner. The application was made by the Prosecutor, Northern Land Council,. According to the Land Rights Act, no such claim could be laid if the land claimed was comprised in a town. The expression 'town' was defined to have the same meaning as in the law relating to Planning and Development of Town. In 1979, Planning Act was enacted superseding an earlier Act. In Section 4(1) of the Planning Act, "town" meant inter alia "lands specified by the regulations to be an area which has to be treated as a town". Planning Regulations were made by the Administrator of the Northern territory under the Planning Act specifying inter alia the cox peninsula as part of 'Darwin town'. The cox peninsula was separated from Darwin town-proper by an arm of the sea. The land route for reaching the peninsula from Darwin town-proper was a difficult and long one. The Prosecutor, Northern Land Council challenged the validity of the Planning Regulation on the ground that the inclusion of cox peninsula in the Darwin town is not really for the purposes germane to the Planning Act and the Regulations made thereunder but for an altogether extraneous purpose. The question was whether such a plea can be investigated by the courts. The contention of the other side was that the Administrator was the Crown's Representative in the Territory and, therefore, the power exercised by him was immune from any examination by the courts. This argument was met by the prosecutor of the Northern Land Council saying that the Administrator is only the servant of the crown and not its representative and hence, possesses no immunity and on the further ground that even if he is the Representative of the Crown, there was no such immunity. The majority (Murphy, J. dissenting) held that judicial review of the Regulations was not barred. The conclusion may best be set out in the words of Stephen, J.:

Conclusion on examinability.

The trend of decisions in British and Commonwealth courts has encouraged me to conclude that, in the unsettled state of Australian authority, the validity of reg.5 was open to be attacked in the manner attempted by the Council. Such a view appears to me to be in accord with principle. It involves no intrusion by the courts into the sphere either of the legislature or of the executive. It ensures that, just as legislatures of constitutionally limited competence must remain within their limits of power, so too must the executive, the exercise by it of power granted to it by the legislature being confined to the purposes for which it was granted. In drawing no distinction of principle between the acts of the representative of the Crown and those of Ministers of the Crown it recognises that in the exercise of statutory powers the former acts upon the advice of the latter: as Latham, C.J. said in the Australian Communist Part Case, the opinion of the Queen's representative "is really the opinion of the Government of the day". That this is so in the Northern Territory appears from Section.33 of the Northern Territory (Self-Government) Act 1978.

I have already referred to the possibility of a legislature by appropriate words excluding judicial review of the nature here in question. The terms of the present grant of power conferred by Section 165(1) are devoid of any suggestion of such exclusion. It follows that if it be shown that a regulation made under that power was made for a purpose wholly alien to the Planning Act it will be ultra vires the power and will be so treated by the courts.

303. This case establishes that the validity of an action whether taken by a Minister or a Representative of the Crown is subject to judicial review even if done under the statute. In this case, it may be noted, the Regulations in question were made under a statute, no doubt by the Administrator who was supposed to be the Representative of the Crown in the Territory. This factor, the court held, did not preclude the court from reviewing the validity of the Regulations made by him.

304. Having noticed various decisions projecting different points of view, we may now proceed to examine what should be the scope and reach of judicial review when a proclamation under Article 356(1) is questioned. While answering this question, we should be, and we are, aware that the power conferred by Article 356(1) upon the President is of an exceptional character designed to ensure that the government of the States is carried on in accordance with the Constitution. We are equally aware that any misuse or abuse of this power is bound to play havoc with our constitutional system. Having regard to the form of government we have adopted, the power is really that of the Union Council of Ministers with the Prime Minister at its head. In absence, it is not really a power but an obligation cast upon the President in the interest of preservation of constitutional government in the States. It is not a power conceived to preserve or promote the interests of the political party in power at the center for the time being nor is it supposed to be a weapon with which to strike your political opponent. The very enormity of this power - undoing the will of the people of a State by dismissing the duly constituted government and dissolving the duly elected Legislative Assembly - must itself act as a warning against its frequent use or misuse, as the case may be. Every misuse of this power has its consequences which may not be evident immediately but surface in a vicious form a few years later. Sow a wind and you will reap the whirlwind. Wisdom lies in moderation and not in excess.

305. Whenever a proclamation under Article 356 is questioned, the court will no doubt start with the presumption that it was validly issued but it will not and it should not hesitate to interfere if

the invalidity or unconstitutionality of the proclamation is clearly made out. Refusal to interfere in such a case would amount to abdication of the duty cast upon the court - Supreme Court and High Courts - by the Constitution. Now, what are the grounds upon which the court can interfere and strike down the proclamation? While discussing the decisions hereinabove, we have indicated the unacceptability of the approach adopted by the Privy Council in Bhagat Singh v. Emporer and King Emporer v. Benoari Lal Sarma. That was in the years 1931 and 1944, long before the concept of judicial review had acquired its present efficacy. As stated by the Pakistan Supreme Court, that view is totally unsuited to a democratic polity. Even the Privy Council has not stuck to that view, as is evident from its decision in the case from Malaya Stephen Kaalong Ningkan v. Government of Malaysia. In this case, the Privy Council proceeded on the assumption that such a proclamation is amenable to judicial review. On facts and circumstances of this case, it found the action justified. Now, coming to the approach adopted by the Pakistan Supreme Court, it must be said - as indicated hereinbefore - that it is coloured by the nature of the power conferred upon the President by Section 58(2)(b) of the Pakistan Constitution. The power to dismiss the federal government and the National Assembly is vested in the President and President alone. He has to exercise that power in his personal discretion and judgment. One man against the entire system, so to speak - even though that man too is elected by the representatives of the people. That is not true of our Constitution. Here the President acts on the aid and advice of the Union council of Ministers and not in his personal capacity. Moreover, there is the check of approval by Parliament which contains members from that State (against the government/Legislative Assembly of which State, action is taken) as well. So far as the approach adopted by this Court in Barium Chemicals is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot ipso facto be extended to the exercise of a constitutional power under Article 356. Having regard to the fact that this is a high constitutional power exercised by the highest constitutional functionary of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities - nor at any rate, in their entirety. We would rather adopt the formulation evolved by this Court in State of Rajasthan, as we shall presently elaborate. We also recognise, as did the House of Lords in C.C.S.U. v. Minister for the Civil Service that there are certain areas including those elaborated therein where the court would leave the matter almost entirely to the President/Union Government. The court would desist from entering those arenas, because of the very nature of those functions. They are not the matter which the court is equipped to deal with. The court has never interfered in those matters because they do not admit of judicial review by their very nature. Matters concerning foreign policy, relations with other countries, defence policy, power to enter into treaties with foreign powers, issues relating to war and peace are some of the matters where the court would decline to entertain any petition for judicial review. But the same cannot be said of the power under Article 356. It is another matter that in a given case the court may not interfere. It is necessary to affirm that the proclamation under Article 356(1) is not immune from judicial review, though the parameters thereof may very from an ordinary case of subjective satisfaction.

306. Without trying to be exhaustive, it can be stated that if a proclamation is found to be malafide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be struck down, as indicated by a majority of learned Judges in the State of Rajasthan. This holding must be read along with our opinion on the meaning and scope of Article 74(2) and the further circumstance that Clause (5) which expressly barred the jurisdiction of the courts to examine the validity of the proclamation has been deleted by the 44th Amendment to the Constitution. In other words, the

truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its' opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of malafides takes in inter alia situations where the proclamation is found to be a clear case of abuse of power, or what is sometimes called fraud on power - cases where this power is invoked for achieving oblique ends. This is indeed merely an elaboration of the said ground. The Meghalaya case, discussed hereinafter, demonstrates that the types of cases calling for interference cannot either be closed or specified exhaustively. It is a case, as will be elaborated a little later, where the Government recommended the dismissal of the government and dissolution of the Assembly in clear disregard of the orders of this Court. Instead of carrying out the orders of this Court, as he ought to have, he recommended the dismissal of the government on the ground that it has lost the majority support, when in fact he should have held following this Court's orders that it did not. His action can be termed as a clear case of malafides as well. That a proclamation was issued acting upon such a report is no less objectionable.

307. It is necessary to reiterate that the court must be conscious while examining the validity of the proclamation that it is a power vested in the highest constitutional functionary of the Nation. The court will not lightly presume abuse or misuse. The court would, as it should, tread wearily, making allowance for the fact that the President and the Union Council of Ministers are the best judges of the situation, that they alone are in possession of information and material - sensitive in nature sometimes -and that the Constitution has trusted their judgment in the matter. But all this does not mean that the President and the Union Council of Ministers are the final arbiters in the matter or that their opinion is conclusive. The very fact that the founding fathers have chosen to provide for approval of the proclamation by the Parliament is itself a proof of the fact that the opinion or satisfaction of the President (which always means the Union Council of Ministers with the Prime Minister at its head) is not final or conclusive. It is well-known that in the parliamentary form of government, where the party in power commands a majority in the Parliament more often that not, approval of Parliament by a simple majority is not difficult to obtain. Probably, it is for this reason that the check created by Clause (3) of Article 356 has not proved to be as effective in practice as it ought to have been. The very fact that even in cases like Meghalaya and Karnataka, both Houses of Parliament approved the proclamations shows the enervation of this check. Even the proponents of the finality of the decision of the President in this matter could not but concede that the said check has not proved to be an effective one. Nor could they say with any conviction that judicial review is excluded in this behalf. If judicial review is not excluded in matters of pardon and remission of sentence under Article 72 - a seemingly absolute and unconditional power - it is difficult to see on what principle can it be said that it is excluded in the case of a conditional power like the one under Article 356.

308. We recognise that judicial process has certain inherent limitations. It is suited more for adjudication of disputes rather than for administering the country. The task of governance is the job of the Executive. The Executive is supposed to know how to administer the country, while the function of the judiciary is limited to ensure that the government is carried on in accordance with the Constitution and the Laws. Judiciary accords, as it should, due weight to the opinion of the Executive in such matters but that is not to say, it defers to the opinion of Executive altogether. What ultimately determines the scope of judicial review is the facts and circumstances of the given

case. A case may be a clear one - like Meghalaya and Karnataka cases where the court can find unhesitatingly that the proclamation is bad. There may also be cases like those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh - where the situation is so complex, full of imponderables and a fast-evolving one that the court finds it not a matter which admits of judicial prognosis, that it is a matter which should be left to the judgment of and to be handled by the Executive and may be in the ultimate analysis by the people themselves. The best way of demonstrating what we say is by dealing with the concrete cases before us.

309. Sri Parasaran, learned Counsel for the Union of India urged that inasmuch as the Proclamation under Clause (i) has been approved by both Houses of Parliament as contemplated by Clause (3), the proclamation assumes the character of Legislation and that it can be struck down only on grounds on which a Legislation can be struck down. We cannot agree. Every act of parliament does not amount to and does not result in Legislation, though Legislation is its main function. Parliament performs many other functions, e.g., election of Speaker and Deputy Speaker, vote of confidence/no-confidence in the Ministry, motion of thanks to the President after the address by the President and so on. One of such functions is the approval of the proclamation under Clause (3). Such approval can by no stretch of imagination be called 'Legislation'. It is not processed or passed as a Bill nor is it presented to the President for his assent. Its legal character is wholly different. It is a constitutional function, a check upon the exercise of power under Clause (1). It is a safeguard conceived in the interest of ensuring proper exercise of power under Clause (1). It is another matter that in practice the check has not proved effective. But that may not be so in future or for all times to come. Be that as it may, it is certainly not Legislation nor Legislative in character.

310. Sri Shanti Bhushan, learned Counsel for the petitioners urged that the deletion of Clause (5) by 44th Amendment, which clause was introduced by 38th Amendment, necessarily implies that the exercise of power under Clause (1) is amenable to judicial review in a far more extensive manner. Clause (5), as introduced by 38th Amendment, read as follows:

(5) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in the clause. (1) shall be final and conclusive and shall not be questioned in any court on any ground.

311. The effect of this clause was considered by-this Court in State of Rajasthan. It was held that the said clause does not preclude the Court from examining Whether the exercise of power is malafide or is based on extraneous grounds or whether it is based on no satisfaction at all. It was held that the said clause does not prevent the Court from examining the proclamation on the aforesaid grounds. We, however, agree that the deletion of this clause is certainly significant in the sense that the express bar created in the way of judicial review has since been removed consciously and deliberately in exercise of the constituent power of the Parliament. [See A.K. Roy v. Union of India (supra)J. The cloud cast by the clause on the power of judicial review has been lifted.

312. It was urged by Sri Parasaran,learned Counsel appearing for the Union of India that where a person challenges the validity of the proclamation under Article 356(1), the burden lies upon him to establish its validity and that it is not part of the duty of the Union of India to assist the petitioner in establishing his case. Reliance is placed on certain observations in Stephen kalong Ningkong. He submitted that it would not be a correct practice for the court to call upon the Union of India to justify and establish the validity of the proclamation merely because a person chooses to question

it. We do not think that there ought to be any room for confusion on this score - nor can the observations of Hidayatullah, J. in Barium Chemicals, quoted elsewhere be understood as saying so. We agree that merely because a person challenges the validity of the proclamation, the Court would not as a matter of course call upon the Union of India to produce the material/information on the basis of which the President formed the requisite satisfaction, the Court must be satisfied, prima facie, on the basis of the averments made by the petitioner and the material, if any, produced by him that is is a fit case where the Union of India should be called upon to produce the material/information on the basis of which the President formed the requisite satisfaction. It is then that the Union of India comes under a duty to disclose the same. Since the material/information on which the satisfaction was formed is available to, and known to, only the Union of India, it is for it to tell the Court what that material/information was. They are matters within the special knowledge of the Union of India. In such a case, only the Union of India can be called upon to satisfy the Court that there was relevant material/information before the President on the basis of which he had acted. It may be that, in a given case, the material/information may be such that the Union of India may feel it necessary to claim the privilege provided by Section 123 of the Indian Evidence Act. As and when such claim is made, it is obvious, it will be dealt with according to law.

313. While on this question, we may mention that if in a given case the proclamation contains the reasons, with adequate specificity, for which the proclamation was issued, the Court may have to be satisfied before calling upon the Union of India to produce the material/information that the reasons given in the proclamation are prima facie irrelevant to the. formation of the requisite satisfaction and/or that it is a fit case where the Union of India must yet be called upon to place the material/information on the basis of which it had formed the satisfaction. The Union of India may perhaps be well advised to follow the practice of stating the reasons and the grounds upon which the requisite satisfaction is founded.

ARTICLE 356 - IS IT CONFINED ONLY TO CASES WHERE THE STATE GOVERNMENT FAILS OR REFUSES TO ABIDE BY THE DIRECTIONS ISSUED BY THE CENTRAL GOVERNMENT?

314. It was submitted by Sri Jethmalani, the learned Counsel for some of the petitioners that in view of Article 365 of the Constitution, the only situation in which the power under Article 356 can be invoked by the President is the failure of the State Government to comply with or to give effect to the direction given in exercise of the executive power of the Union under any of the provisions of the Constitution and not in any other case. Reference is made in this connection to Articles 256 and 257. It would be appropriate to read all the three Articles at this stage:

256. Obligation of States and the Union:- The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

257. Control of the Union over States in certain cases:- (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the

Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purposes.

(2)The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection or the railways within the State.

(4) Where in carrying out any direction given to a State under Clause (2) as to the construction or maintenance of any means of communication or under Clause (3) as to the measures to be taken for protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such directions had not be given, there shall be paid by the Government of India to the State such sum as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India with respect of the extra costs so incurred by the State.

365. Effect of failure to comply with, or to give effect to, directions given by the Union:- Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.

315. In our opinion, the contention urged is unacceptable. Article 256 merely states that the executive power of every State shall be so exercised as to ensure compliance with the laws made by the Parliament whether existing or to be made in future. It is stated therein that the executive power of the Union shall extend to giving of such directions to a State as may appear to the Government of India to be necessary for the said purpose. This Article is confined to proper and due implementation of the parliamentary enactments and the power to give directions for that purpose. Article 257 says that executive power of every State shall be so exercised as to impede or prejudice the exercise of the executive power of the Union; for ensuring the same, the Union Government is empowered to give appropriate directions. Clauses (2), (3) and (4) illustrate and elaborate the power contained in Clause (1). Article 365, which incidentally does not occur in Part XVIII, but in Part XIX (Miscellaneous) merely says that where any State has failed to comply with or give effect to any directions given by the Union of India in exercise of its executive power under my of the provisions of the Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The article merely sets out one instance in which the President may hold that the Government of the State cannot be carried on in accordance with the provisions of

the Constitution. It cannot be read as exhaustive of the situation where the President may form the said satisfaction. Suffice it to say that the directions given must be lawful and their disobedience must give rise to a situation contemplated by Article 356(1). Article 365 merely says that in case of failure to comply with the directions given, "it shall be lawful" for the President to hold that the requisite type of situation [contemplated by Article 356(1)] has arisen. It is not as if each and every failure ipso facto gives rise to the requisite situation. The President has to judge in each case whether it has so arisen. Article 365 says it is permissible for him to say so in such a case. The discretion is still there and has to be exercised fairly.

FACTS AND MERITS OF INDIVIDUAL CASES:

KARNATAKA:

316. By a proclamation dated April 21, 1989 the President dismissed the Government of Karnataka, dissolved the Legislative Assembly, took over the powers of the Government and the Governor, vested the powers of the State legislature in the Parliament and made other incidental and ancillary provisions suspending several provisions of the Constitution with respect to that State. The proclamation does not contain any reasons except barely reciting the satisfaction of the President. The satisfaction is stated to have been formed on a consideration of the report of the Governor and other information received by him. Sri S.R. Bommai was the Chief Minister then.

317. The Janata Legislature Party emerged as the majority party in the State Legislature following elections to the Assembly in March, 1985. Sri Ramakrishna Hegde was elected the leader of the Janata Legislature Party and was sworn in as the Chief Minister in March, 1985. In August, 1988, Sri Hegde resigned and Sri Bommai was elected as the leader and sworn in as the Chief Minister on August 30, 1988. In September, 1988, Janata Party and Lok Dal (B) merged resulting in the formation of Janata Dal. The Janata Party in Karnataka Legislature was re-named Janata Dal. On April 15, 1989 the Ministry was expanded by Sri Bommai including thirteen more members. On April 17, 1989, a legislator, Sri Kalyan Rao Molakery, defected from the party and presented a letter to the Governor withdrawing his support to the Janata Dal Government. On the next day, he met the Governor and presented nineteen letters purported to have been signed by seventeen Janata Dal legislators, one associate independent legislator and one B.J.P. legislator withdrawing their support to the Government. The Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the letters verified. He did not, of course, inform Sri Bommai about these developments. On April 19, 1989, the Governor sent a report to the President stating that there were dissensions in Janta Party which led to the resignation of Sri Hegde earlier and that even after the formation of Janata Dal, there have been dissensions and defections. He referred to the letters received by him from defecting members and opined that on that account, the ruling party has been reduced to minority in the Assembly. He stated that the council of ministers headed by Sri Bommai does not command a majority in the House and that, therefore, "it is not appropriate under the Constitution to have the State administered by an executive consisting of council of ministers who do not command the majority in the House". He opined that no other party is in a position to from the Government and recommended action under Article 356(1).

318. On April 20, 1989, seven legislators out of those who were said to have submitted the letters to the Governor submitted letters to the Governor complaining that their signatures were obtained on those letters by mis-representation and by misleading them. They re-affirmed their support to the Bommai Ministry. On the same day, the State Cabinet met and decided to convene the Assembly session on April 27, 1989. The Chief Minister and the Law Minister met the Governor on that day itself and informed him about the summoning of the Assembly session. They also brought to the Governor's notice the recommendation of the Sarkaria Commission that the support and strength of the Chief Minister should be tested on the floor of the Assembly. Sri Bommai offered to prove his majority on the floor of the House. He even expressed his readiness to pre-pone the Assembly Session if so desired by the Governor. He also sent a telex message to that effect to the President of India. Inspite of all this, the Governor sent another report to the President of India on April 20, 1989 referring to the letter of seven members withdrawing their earlier letters and opining that the said letters were evidently obtained by Sri Bommai by pressuring those M.L.As. He reported that "horse-trading is going on and atmosphere is getting vitiated". He reiterated his opinion that Sri Bommai has lost the confidence of the majority in the State Assembly and requested action being taken on his previous letter. On that very day, the President issued the proclamation. It says that the said action was taken on the basis of "the report form the Governor of the State of Karnataka and - other information received".

319. Both the Houses of Parliament duly met and approved the said proclamation as contemplated by Clause (3) of Article 356.

320. The validity of the proclamation was challenged by Sri Bommai and certain other members of the council of ministers by way of a writ petition (W.P. 7899 of 1989) in the Karnataka High Court. The Union of India (the first respondent in the writ petition) submitted that the decision of the President of India based on the report of the Governor and other information brought to his notice is not justiciable and cannot be challenged in the writ petition. While making a report, it was submitted, the Governor does not act on the aid and advice of his council of ministers but in his individual capacity. The report of the Governor cannot be challenged in view of Article 361 of the Constitution nor can he or the President be compelled to disclose the information or material upon which they have acted. Article 74(2) was said to be a bar to the Court enquiring into the said information, material and advice. It was also submitted that the proclamation has since been approved by both Houses of Parliament under Clause (3) of Article 356. The State of Karnataka submitted that the Governor had taken into consideration all the facts and circumstances prevailing in the State while submitting his report and that the proclamation issued on that basis is unobjectionable.

321. A Special Bench of three-Judges of High court heard the writ petition and dismissed the same on the following reasoning:

(1) The proclamation under Article 356(1) is not immune from judicial scrutiny. The court can examine whether the satisfaction has been formed on wholly extraneous material or whether there is a rational nexus between the material and the satisfaction.

(2) In Article 356, the President means the Union council of ministers. The satisfaction referred to therein is subjective satisfaction. This satisfaction has no doubt to be formed on a consideration of all the facts and circumstances.

(3) The two reports of the Governor conveyed to the President essential and relevant facts which were relevant for the purpose of Article 356. The facts stated in the Governor's report cannot be stated to be irrelevant. They are perfectly relevant.

(4) Where the Governor's "personal bona fides" are not questioned, his satisfaction that no other party is in a position to form the government has to be accepted as true and is based upon a reasonable assessment of all the relevant facts.

(5) Recourse to floor test was neither compulsory nor obligatory. It was not a pre-requisite to sending up a report recommending action under Article 356(1).

(6) The introduction of Xth Schedule to the Constitution has not affected in any manner the content of the power under Article 356.

(7) Since the proclamation has to be issued on the satisfaction of the Union council of ministers, the Governor's report cannot be faulted on the ground of legal malafides.

(8) Applying the test indicated in the State of Rajasthan v. Union of India, the court must hold, on the basis of material disclosed, that the subjective satisfaction arrived at by the President is conclusive and cannot be faulted. The proclamation, therefore, is unobjectionable.

322. We find ourselves unable to agree with the High Court except on points (1) and (2). To begin with, we must say that question of 'personal bonafides' of Governor is really irrelevant.

323. We must also say that the observation under point (7) is equally misplaced. It is true that action under Article 356 is taken on the basis of satisfaction of the Union Council of Ministers but on that score it cannot be said that 'legal malafides' of the Governor is irrelevant. When the Article speaks of the satisfaction being formed on the basis of the Governor's report, the legal malafides, if any, of the Governor cannot be said to the irrelevant. The Governor's report may not be conclusive but its relevance is undeniable. Action under Article 356 can be based only and exclusively upon such report. Governor is a very high constitutional functionary. He is supposed to act fairly and honestly consistent with his oath. He is actually reporting against his own government. It is for this reason that Article 356 places such implicit faith in his report. If, however, in a given case his report is vitiated by legal malafides, it is bound to vitiate the President's action as well. Regarding the other points made in the judgment of the High Court, we must say that the High Court went wrong in law in approving and upholding the Governor's report and the action of the President under Article 356. The Governor's report is vitiated by more than one assumption totally unsustainable in law.

The Constitution does not create an obligation that the political party forming the ministry should necessarily have a majority in the Legislature. Minority governments are not unknown. What is necessary is that that government should enjoy the confidence of the House. This aspect does not

appear to have been kept in mind by the Governor. Secondly and more importantly, whether the council of ministers has lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The principle of democracy underlying our Constitution necessarily means that any such question should be decided on the floor of the House. The House is the place where the democracy is in action. It is not for the Governor to determine the said question on his own or on his own verification. This is not a matter within his subjective satisfaction. It is an objective fact capable of being established on the floor of the House.
It is gratifying to note that Sri R. Venkataraman, the former President of India has affirmed this view in his Rajaji Memorial Lecture (Hindustan Times dated February 24, 1994).

324. Exceptional and rare situations may arise where because of all pervading atmosphere of violence or other extraordinary reasons, it may not be possible for the members of the Assembly to express their opinion freely. But no such situation had arisen here. No one suggested that any such violent atmosphere was obtaining at the relevant time.

325. In this connection, it would be appropriate to notice the unanimous report of the committee of governors appointed by the President of India. The five Governors unanimously recommended that "the test of confidence in the ministry should normally be left to a vote in the Assembly....Where the Governor is satisfied by whatever process or means, that the ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove his majority within the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as prima facie proof of his no longer enjoying the confidence of the legislature. If then, an alternative ministry can be formed, which, in the Governor's view, is able to command a majority in the assembly, he must dismiss the ministry in power and instal the alternative ministry in office. On the other hand, if no such ministry is possible, the Governor will be left with no alternative but to make a report to the President under Article 356....As a general proposition, it may be stated that, as far as possible, the verdict as to majority support claimed by a Chief Minister and his Council of Ministers should be left to the legislature, and that it is only if a responsible government cannot be maintained without doing violence to correct constitutional practice that the Governor should resort to Article 356 of the Constitution....What is important to remember is that recourse to Article 356 should be the last resort for a Governor to seek.... the guiding principle being, as already stated, that the constitutional machinery in the state should, as far as possible, be maintained." (quoted from the Book "President's Rule in the States", edited by Sri Rajiv Dhavan and published under the auspices of the Indian Law Institute, New Delhi). It is a pity that the Governor of Karnataka did not keep the above salutary guidelines and principles in mind while making his report.

326. Dr. G.S. Dhillon Speaker, Lok Sabha (in his address to the conference of the Presiding Officers of legislative bodies in India) too affirmed in clear words that "whether the Ministry continued to command majority support in the legislature, the doubt should as far as possible be left to be resolved on the floor of the House and the Governor should not take upon himself unenviable task of deciding the question himself outside the legislature.

327. The High Court, in our opinon, erred in holding that the floor test is not obligatory. If only one keeps in mind the democratic principle underlying the Constitution and the fact that it is the legislative assembly that represents the will of the people - and not the Governor - the position would be clear beyond any doubt. In this case, it may be remembered that the council of ministers not only decided on April 20, 1989 to convene the Assembly on 27th of that very month i.e., within seven days, but also offered to pre-pone the Assembly if the Governor so desired. It pains us to note that the Governor did not choose to act upon the said offer. Indeed, it was his duty to summon the Assembly and call upon the Chief Minister to establish that he enjoyed the confidence of the House. Not only did he not do it but when the Council of Minister offered to do the same, he demurred and chose instead to submit the report to the President. In the circumstances, it cannot be said that the Governor's report contained, or was based upon, relevant material.

There could be no question of the Governor making an assessment of his own. The loss of confidence of the House was an objective fact, which could have been demonstrated, one way or the other, on the floor of the House. In our opinion, wherever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House except in an extraordinary situation whether because of all-pervasive violence, the Governor comes to the conclusion - and records the same in his report - that for the reasons mentioned by him, a free vote is not possible in the House.

328. We make it clear that what we have said above is confined to a situation where the incumbent Chief Minister is alleged to have lost the majority support or the confidence of the House. It is not relevant to a situation arising after a general election where the Governor has to invite the leader of the party commanding majority in the House or the single largest party/group to form the government. We need express no opinion regarding such a situation.

329. We are equally of the opinion that the High Court was in error in holding that enactment/addition of Xth Schedule to the Constitution has not made any difference. The very object of the Xth Schedule is to prevent and discourage 'floor-crossing' and defections, which at one time had assumed alarming proportions. Whatever may be his personal predilections, a legislator elected on the ticket of a party is bound to support that party in case of a division or vote of confidence in the House, unless he is prepared to forgo his membership of the House. The Xth Schedule was designed precisely to counter-act 'horse-trading'. Except in the case of a split, a legislator has to support his party willy- nilly. This is the difference between the position obtaining prior to and after the Xth Schedule. Prior to the said Amendment, a legislator could shift his loyalty from one party to the other any number of times without imperilling his membership of the House - it was as if he had a property in the office.

330. Though the proclamation recites that the President's satisfaction was based also on "other information received", the counter-affidavit of the Union of India does not indicate or state that any other information/material was available to the President or the Union Council of Ministers other than the report of the Governor - much less disclose it. In the circumstances, we must hold that there was no other information before the President except the report of the Governor and that the word "and other information received by me" were put in the proclamation mechanically. The Governor's report and the 'facts' stated therein appear to be the only basis of dismissing the government and dissolving the Assembly under Article 356(1). The proclamation must, therefore,

be held to be not warranted by Article 356. It is outside its purview. It cannot be said, in the circumstances, that the President (or the Union council of ministers) was 'satisfied' that the government of the State cannot be carried on in accordance with the provisions of the Constitution. The action was malafide and unconstitutional. The proclamation is accordingly liable to be struck down and we would have struck it down herewith but for the fact that the elections have since been held to the Legislative Assembly of the State and a new House has come into being. The issuance of a writ at this juncture would be a futile one. But for the said fact, we could certainly have considered restoring the dismissed government to office and reactivating the dissolved Assembly. In any event, the judgment of Karnataka High Court is set aside.

MEGHALAYA: (Transferred case Nos. 5 and 7 of 1992)

331. In March, 1990, Hill Peoples' Union, to which the petitioner, Gonald Stone Massar, belonged and several other State political parties and certain independent M.L.As. joined together to form a 'front', known as Meghalaya United Parliamentary Party (MUPP). This Front had a majority in the Assembly and formed the government headed by Sri B.B. Lyngdoh. On July 25, 1991, the then Speaker of the House, Sri P.R. Kyndiah Arthree was elected as the leader of the opposition group known as United Meghalaya Parliamentary Forum (UMPF), which was led by the Congress party to which Sri Kyndiah belonged. He claimed the support of the majority of members in the House and requested the Governor to invite him to form the Government. Thereupon the Governor requested Sri Lyngdoh to prove his majority on the floor of the House. On August 7, 1991, a special session of the Assembly was convened to pass a motion of confidence in the ministry. On the motion being moved, thirty members supported it and twenty seven voted against it. Before announcing the result, however, the Speaker announced that he had received a complaint against five independent M.L.As. in the ruling coalition alleging disqualification under the Anti-defection Law and that he was forthwith suspending their right to vote. This resulted in an uproar in the Assembly. The session had to be adjourned. On August 11, 1991. the Speaker sent identical show-cause notices to the said five independent MLAs on the basis of the complaint filed by one Sri H.S. Shylla. On August 16, the five MLAs sent their replies denying that they have joined any of the parties as alleged. They affirmed that they continue to remain independents. On August 17, 1991 the Speaker passed on order disqualifying all the five MLAs on the basis that four of them were ministers in the Lyngdoh ministry and one of them (Sri Chamberlain Marak) was the Deputy Government Chief Whip. The disqualification, it may be noted, was not on the ground alleged in the show cause notice.

332. Meanwhile, on the Governor's advice, the Chief Minister summoned the session of the Assembly for September 9, 1991 for passing a vote of confidence. The Speaker refused to send the notices of the session to the five MLAs disqualified by him. He also made arrangements to ensure that the said five members are not allowed to enter the Assembly. On September 6, 1991, four of the said five MLAs approached this Court and obtained an interim order staying the operation of the orders of the Speaker dated August 7, 1991 and August 17, 1991, (one Member, Sri Ch. Marak, did not obtain any such orders). On coming to know of the order of this Court, the Speaker issued a press statement saying that he does not accept any interference by any court with his order dated August 7, 1991 disqualifying five members. He issued strict instructions to the security guards not to allow the said five members to enter the Assembly premises. In this explosive situation, the Governor adjourned the Assembly indefinitely by an order dated

September 8, 1991. After a brief interval and on the advice of the Governor, the Assembly was again summoned to meet on October 8, 1991. Meanwhile, a contempt petition was filed by the said four MLAs in this Court against the Speaker. They complained that his action in preventing them from entering into the Assembly premises and from acting as members of the Assembly was in violation of the orders of this Court dated September 6, 1991. On October 3, 1991, this Court passed another order affirming that all authorities of the State including the Governor must ensure that the orders of this Court dated September 6, 1991 are implemented. Accordingly, the said four independent MLAs were issued invitation to attend the session on October 8, 1991. The agenda relating to the business of the House showed two items for consideration on that day (1) a motion of confidence in the government and (2) a motion of no-confidence in the Speaker.

333. On October 8, 1991, 56 MLAs apart from the Speaker attended the session. The four MLAs who were disqualified by the Speaker but who had obtained orders from this Court also attended but not Sri Ch. Marak who did not obtain any orders from any court. After the motion of confidence in the government was put to vote, the Speaker declared that 26 voted for the motion and 26 against. In counting the votes casts in favour of the motion, he excluded the votes of the said four independent MLAs again. Holding that there was a tie, he cast his vote against the motion and declared the motion lost. He then adjourned the House sine die, evidently with a view to ward off the passing of motion against himself. The thirty MLAs (including the said four independent MLAs) however, continued to stay in the House. They elected a Speaker from among themselves and continued the business of the Assembly. The new Speaker found on a scrutiny of the records relating to voting on the motion of confidence that actually 30 members have signed in favour of the motion and 26 against. Accordingly, he declared that the motion of confidence in the government was carried. They also passed the motion of no confidence in the Speaker, Sri Kyndiah. The 26 members who had voted against the motion had, of course, left the House by that time. The said 30 MLAs thereafter sent a letter to the Governor affirming that they had voted in favour of the government and also in favour of the motion of no confidence in the Speaker. Inspite of all this, the Chief Minister received a letter dated October 9, 1991 from the Governor advising him to resign in view of the proceedings of the Assembly dated October 8, 1991. The Governor observed in his letter that the dispute about the Speaker not taking cognizance of the orders of the Supreme Court was a matter between the Speaker and the Supreme Court and in that view of the matter, the Chief Minister should resign! Immediately, thereupon, the Chief Minister apprised his advocate in the Supreme Court of the said letter of the Governor. The counsel brought the matter to the notice of this Court and at 4.00 P.M. on the same day (October 9, 1991), this Court passed the following order: "Since the matter is extremely urgent, we deem it fit to pass this further order asking the Governor while taking any decision on the question whether the Government has lost the motion of confidence and lost its majority in the House, to take into account, the two earlier orders dated 6.9.1991 and 3.10.1991 of this Court and also to take into account how the aforesaid four appellant had cast their vote." No heed was paid to this order and on October 11, 1991, the President of India issued a proclamation under Article 356 of the Constitution declaring that he was satisfied on the basis of a report from the Governor of Meghalaya and other information received by him that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. He accordingly dismissed the government and dissolved the Assembly. Before proceeding further, it may be mentioned that by an order dated October 12, 1991, a Constitution Bench of this Court set aside the order of the Speaker dated August 17, 1989.

Both Houses of Parliament duly met and approved the proclamation.

334. It is a matter of deep regret that the Governor of Meghalaya did not think it his constitutional duty to give effect to the orders of this Court, not even after a specific direction to that effect. He could not have been unaware of the obligation created by Article 144, viz., the duty of all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court and its orders. By order dated October 9, 1991, he was specifically requested to take into account the orders of this Court while deciding whether the government has lost the confidence of the House and yet he ignored the same and reported to the President that the Ministry has lost the confidence of the House. We are intrigued by the strange logic of the Governor that obedience to the orders of this Court relating to the disqualification of members of the House is a matter between the Speaker and the Supreme Court. Evidently, he invoked this strange logic to enable him to say - as he wanted to say or as he was asked to say, as the case may be - that the Speaker's decision that the Ministry has lost the confidence of the House, is valid and effective - at any rate, so far as he is concerned. The governor ought to have noted that this Court had stayed the operation of the orders of the speaker disqualifying the four independent members, which meant that the said four MLAs were entitled to participate in the proceedings of the Assembly and to vote. They did vote in favour of the motion expressing confidence in the government. The Speaker was, however, bent upon unseating the government by means fair or foul and with tha view was openly flouting the orders of this Court. He managed to declare that the government has lost the confidence of the House by excluding the votes of the said four members in clear violation of the orders of this Court. It is surprising that the Governor chose to turn Nelson's eye upon the misdeeds of the Speaker and also chose to refuse to take note of the proceedings of the majority of members taken upon the Speakership of another member elected by them. It is equally curious that the Governor chose to report that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution. The violation of the provisions of the Constitution was by Sri Kyndiah and not by the ministry in office and yet Article 356 was resorted to by the President to dismiss the government on the basis of such a report. That even such an ex-fade unconstitutional proclamation was approved by both Houses of Parliament shows up the inadequacy of the safeguard envisaged in Clause (3) - by which provision much store was laid by the Counsel appearing for the Union of India as well as those supporting the impugned proclamations.

335. In this case too, the proclamation recites that the requisite satisfaction was arrived at on the basis of the report of the Governor and the other information received by the President but no such information or material has been brought to our notice. We must conclude that there was none and that the recital to that effect is a mere mechanical one.

336. We must say in fairness to Sri Parasaran, learned Counsel appearing for the Union of India that he did not seek to defend the proclamation in this case.

337. Accordingly, we hold the proclamation as unconstitutional. But for the fact that since the date of proclamation, fresh elections have been held to the Assembly and a new House has come into existence, we would have certainly issued the writ and directed the restoration of the Lyngdoh ministry to office and restored the Assembly as well.

NAGALAND :

338. Elections to the Nagaland Assembly were held in November, 1987. The strength of the Assembly was 60. The position emerging from the election was: Congress (1)-35, Naga national Democratic Party-13 and Independents-7. The Congress (1) party formed the government with Sri Hokishe Sema as the Chief Minister. In August, 1988, a split occurred in the ruling party whose strength was 34 at that time, one member having died. The particulars of the split in the party are the following: On July 28, 1988, 13 of the 34 MLAs informed the Speaker of the assembly that they have dissociated from the ruling party and have formed a separate party called "Congress Ruling Party". They requested the Speaker for allotment of separate seats for them in the Assembly, the session of which was to commence on August 28, 1988. On July 30, 1988 the Speaker held that a split had occurred within the meaning of the Xth Schedule of the Constitution in the ruling party. Sri Vamuzo was one among the said 13 MLAs. He informed the Governor on July 31, 1988 that he has secured the support of 35 of the 59 members of the Assembly and was in a position to form the ministry in the State. At this stage, the Chief Secretary to the Government of Nagaland wrote to Sri Vamuzo on August 3, 1988 that according to the information received by him, the group of 13 MLAs aforesaid were wrongfully confined by him. Sri Vamuzo denied the same and invited the Chief Secretary to come and verify the truth of the allegation from the said members themselves. The members stated before the Chief Secretary that they were free agents and were not confined by any one. On August 6, 1988 the Governor of Nagaland sent a report to the President of India about the formation of Congress Ruling Party. He reported that in the past 25 years, eleven governments have been formed and that thirteen MLAs who had dissociated themselves from the Congress (1) party were allured with money. He characterised the said weaning away of the thirteen members as "incredible lack of political morality and complete disregard to the wishes to the electorate on the part of the break-away congressmen". He also stated that the said thirteen persons were kept in forcible confinement by Sri Vamuzo and another person and that the story of split in the party is not true. He characterised the recognition accorded to the said group of thirteen members by the Speaker as hasty. He also spoke of political 'horse-trading' and machinations. He referred to the insurgency in Nagaland and that indeed some of the members of the Assembly were having contacts with the insurgent groups. He reported that the stability of the State may suffer due to the said episode and further that if the present affairs are allowed to continue, a serious development may ensue.

339. The Chief Minister, Sri Hokishe Sema, probably finding that he has lost the majority support in the House, submitted his resignation to the Governor and recommended the imposition of the President's rule. On August 7, 1988, the President issued the proclamation under Article 356 assuming the functions of the government of the State of Nagaland. The government was dismissed and the Assembly dissolved. The action was challenged by Sri Vamuzo by way of a writ petition in the Guwahati High Court being C.R. No. 1414 of 1988. The writ petition was heard by a Division Bench comprising the Chief Justice and Hansaria, J. Both the learned Judges agreed that the validity of the proclamation can be examined by the court and that the proclamation under Article 356 is not immune from judicial scrutiny. But on the question of the effect and operation of Article 74(2), they differed. The learned Chief Justice held : "the Union cannot be compelled to tender any information to this Court covered by Article 74 of the Constitution relevant to the dissolution of the Nagaland assembly. I am also of the view that the Union of India can legally claim all documents relevant to the dissolution of the Nagaland assembly as privileged documents

and a 'class' documents under Section 123 of the Evidence Act. Therefore, the objection that the courts do not have powers to call for the information from the President of India in view of Article 74(2) of the Constitution is sustained. Since the Nagaland legislative assembly is dissolved by the two Houses of Parliament, no relief can be granted in the circumstances of this case". Accordingly, he proposed to dismiss the wit petition. Hansaria, J., however, took a contrary view. The learned Judge held that the material which formed part of 'other information' but has not been produced before the court, does not form part of the advice tendered by the council of ministers to the President. The court is, therefore, entitled to see the said material and for that purpose the Union of India must be given ten days time for producing the same. If, however, they decline to do so, the court would have no alternative but to act upon the present material and the Union of India will have to take the consequences of such a course. The learned judge did not propose to dispose of the writ petition but to wait for ten days and then pronounce the final orders. In view of the said difference of opinion, the matter was referred to a third Judge,but before the third Judge could hear the matter, the Union of India moved this Court for grant of special Leave. Special Leave was granted and the proceedings in the High Court stayed.

340. We have discussed the effect and scope of Article 74(2) elsewhere. In the light of the same, the view taken by Hansaria, J. (as he then was) must be held to be the correct one and not the view taken by the learned Chief Justice. This Special Leave Petition is accordingly disposed of with the above direction. Inasmuch as fresh elections have since been held, the High Court may consider the advisability of proceeding with the matter at this point of time.

MADHYA PRADESH, RAJASTHAN AND HIMACHAL PRADESH;

341. In the elections held in February, 1990, the BJP emerged as the majority party in the Assemblies of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh and formed the government therein.

342. On December 6,1992, the Ram Janambhoomi-Babri Masjid structure (disputed structutre) was demolished by the kar sevaks who had gathered there in response to appeals by the B.J.P., V.J.P.,Bajrang Dal, Shiv Sena and some other organisation.

343. Following the demolition at Ayodhya on 6th December, 1992, the Government of Uttar Pradesh resigned. It was dismissed by the President and the Legislative Assembly dissolved by a proclamation under Article 356 issued on the same day. The proclamation does not refer either to the report of the Governor nor does it say that the President had received any information otherwise. Be that as it may, the validity of the said proclamation not being in issue before us, we need not express any opinion in that behalf.

344. The demolition of the disputed mosque had serious repercussions all over the country as also in some neighbouring countries. A number of temples were reportedly demolished there. Serious disturbance to law and order occurred in various parts of the country resulting in considerable loss of lives and property. By an order dated December 10,1992 issued under Section 3(1) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), the Government of India banned several alleged communal organisations including RSS, VHP and Bajrang Dal.

MADHYA PRADESH:

345. On December 8,1992, the Governor of Madhya Pradesh sent a report to the President setting out the "fast deteriorating law and order situation in the State in the wake of wide-spread acts of violence, arson and looting". He observed in his report that "the lack of faith in the ability of the State Government to stem the tide primarily because of the political leadership's overt and covert covert support to the associate communal organisations seem to point out that there is breakdown of the administrative machinery of the state." He followed it up with another report on December 10, 1992 wherein he mentioned about the violence spreading to hither to peaceful areas. On December 13, 1992, he sent his third report enclosing the photocopy of a letter received from the executive Director, Bharat Heavy Electricals Limited (BHEL), Bhopal dated December 11, 1992. The said letter, said the Governor, indicated the "abject failure of the law and order machinery to provide safety and security to life and property in the areas in and around BHEL factory". The letter also spoke of "the pressure brought on the administration to accommodate the so called kar sewaks in BHEL area". The Governor termed them as extremely serious developments that deserve a high level probe. The third report further stated that with the reported statement of the Chief Minister Sri Sunder Lal Patwa that the decision of banning the RSS and VHP was unfortunate, the State Government's credibility to sincerely implement the center's direction in the matter is under a cloud... there is a question mark as to how BJP leaders like Sri Patwa who swore by the values and traditions of the RSS will be able to implement the ban both in letter and spirit. The VHP's decision to observe December 13 as 'Black Day' all over the country to protest against the above mentioned ban and its decision to observe protest week against these 'heinous laws' from December 14 to 20 are moves fraught with danger, particularly in the present context". The Governor recommended that "considering this and looked in the background of the RSS etc, contemplating on a fresh strategy to chalk out its future plan and the possibility of the leaders of the banned organisations going underground taking advantage of the soft reaction of the administration have reasons to be convinced that there should not be any further delay in imposition of President's rule according to Article 356 of the Constitution of India".

HIMACHAL PRADESH:

346. The Governor of Himachal Pradesh sent a report on December 15,1992 wherein he stated inter alia: "there is no dispute on the point that the Chief Minister and his cabinet had instigated the kar sevaks from Himachal Pradesh to participate in the kar seva on the 6th December, 1992. Some of the Ministers expressed their desire even openly, provided the party High command permitted to do so. Consequently, a large number of kar sevaks including some BJP M.L.As. participated in the kar seva from Himachal Pradesh. A member of the Vidhan Sabha publicly admitted that he had participated in the demolition of the Babri Masjid (Indian Express dated 15.12.1992, Chandigarh Edition). Though Sri Shanta Kumar met me on December 13, 1992 and had informed me that he desired to implement the ban orders imposed by the Government of India on RSS, VHP and three other organisations and that he has already issued directions in this regard but since the Chief Minister himself is a member of RSS, therefore, he is not in a position to implement these directions honestly and effectively. Most of the people of the state also feel alike....As a matter of fact, when the Chief Minister himself and some of the colleagues are members of the banned RSS, then it is not possible for the administrative machinery to implement

the ban honestly, especially when some of the Ministers are openly criticising the ban on these communal organisations". He, therefore, recommended imposition of the President's rule.

RAJASTHAN:

347. The report of the Governor of Rajasthan, recommending imposition of the President's rule, stated the following facts: the government of Rajasthan has played 'an obvious role' in the Ayodhya episode. The BJP has control over RSS, VHP and Bajrang Dal which are now banned by the center. The said ban is not being implemented at all. Indeed, one of the Ministers had resigned and along with 22 MLAs and 15,500 BJP workers had participated in the kar seva at Ayodhya on December 12, 1992. They were given a royal send off and when they returned, they were given a similar royal welcome by the influential people in the political set up running the government. The law and order has been very bad for more than a week, the dominant character being the anti-minority on whom largely atrocities have been committed. The administration could not function effectively under the present political set up. He expressed the apprehension that it would be extremely difficult to expect the administration to function objectively, effectively and in accordance with the rule of law and that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the constitution.

348. On December 15, 1992, the President issued three proclamations dismissing all the three government in Madhya Pradesh, Rajasthan and Himachal Pradesh and dissolving their Legislative Assemblies. The action was purported to be taken on the basis of the reports of the Governors concerned as well as on the basis of other information received. The validity of the proclamations was challenged immediately by filing writ petitions in the appropriate High Courts. The Madhya Pradesh High Court allowed the same which is challenged by the Union of India in Civil Appeal Nos. 1692, 1692A-1692C of 1993. The writ petitions relating to Rajasthan and Himachal Pradesh were withdrawn to this Court and are numbered as Transferred case No. 9 of 1993 and transferred case No. 8 of 1993 respectively.

349. The petitioners challenged the proclamation as malafide, vitiated by extraneous considerations and an instance of political vendetta. It is submitted that incidents of disturbance to law and order cannot attract action under Article 356. In any event, in Himachal Pradesh, there was not a single instance. All the three governments were faithfully implementing all the Central and State laws. The impugned proclamations, it is submitted, are the result of internal differences among the leaders of the Congress party and are not supportable in law.

350. It is submitted by the learned Counsel for the petitioners that the imposition of the President's rule in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh was malafide, based on no satisfaction and was purely a political act. Mere fact that communal disturbances and/or instances of arson and looting took place is no ground for imposing the President's rule. Indeed, such incidents took place in several Congress (I) - ruled States as well - in particular, in the State of Maharashtra - on a much larger scale and yet no action was taken to displace those governments whereas action was taken only against B.J.P. governments. It is pointed out that so far as Himachal Pradesh is concerned, there were no communal disturbances at all. There was no law and order problem worth the name. Even the Governor's report did not speak of any such incidents. The governments of Madhya Pradesh, Rajasthan and Himachal Pradesh, it is argued, cannot be held

responsible for what happened at Ayodhya on December 6, 1992. For that incident, the Government of Uttar Pradesh had resigned owning responsibility therefore and it was dismissed. That is not under challenge. But the Governments of these three States were in no way connected with the said incident and could not have been dismissed on account of the said incident. It is also pointed out that according to the report of the Governor of Himachal Pradesh, the Chief Minister met him and indicated clearly that he was desirous of and was implementing the ban and than some arrests were also made. In such a situation, there was no reason for the Governor to believe, or to report, that the Chief Minister is not sincere or keen to implement the ban on the said organisations. As a matter of fact, the Tribunal under Unlawful Activities (Prevention) Act, 1967, has declared the ban on R.S.S. as illegal and accordingly the ban has since been revoked. The non-implementation of an illegal ban cannot be made the basis of action under Article 356. Assuming that there was such an inaction or refusal, it cannot be made a ground for dismissing the State Government and for dissolving the Assembly. The Union Government has also not disclosed what other material/information they had received on the basis of which the President had acted, though a recital to that effect has been made in the proclamations. The action taken by the President cannot be justified by producing the material gathered later. The respondents must disclose the information that was before the President when he issued the impugned proclamations. The White Paper now placed before the Court was not in existence on December 15, 1992. The manifestos issued by the B.J.P. from time to time cannot constitute the information referred to in the proclamations - not, in any event, legally relevant material. The counter filed by the Union of India in Madhya Pradesh High Court in M.P. No. 237/93 (Sunder Lal Patwa and Ors. v. Union of India and Ors.) does not refer to or disclose the other information received by the President. Even in the counters filed in writ petitions questioning the proclamations relating the Himachal Pradesh and Rajasthan, no such material is disclosed. It was the duty of the Union government to have disclosed to the Court the material/information upon which the requisite satisfaction was formed, more so because the proclamations themselves do not refer to any such material. Since they have failed to do so, an adverse inference should be drawn against them. Article 74(2), it is argued, does not and cannot relieve the Union of India of this obligation. The power and remedy of judicial review, it is argued, cannot be rendered ineffective with reference to Article 74(2).

351. A counter affidavit was filed by the Union of India in the writ petition filed in the Madhya Pradesh High Court questioning the Proclamation with respect to that State. Apart from the legal contentions, the following facts are stated therein:

352. The reports of the Governor disclosed that the State Government had miserably failed to protect the citizens and property of the State against internal disturbance. On the basis of the said reports, the President formed the requisite satisfaction.

353. The circumstances in the State of M.P. were different from several other States where too serious disturbance to law and order took place. There is no comparison between both situations. "Besides Bhopal, over-all situation in the State of M.P. was such that there was sufficient and cogent reasons to be satisfied that the Government in the State could not be carried on in accordance with the provisions of the Constitution. It is denied that there was no law and other situation in the State." The Governor's reports are based upon relevant material and are made bonafide and after due verification.

354. The allegations made against Sri Arjun Singh, Minister for Human Resource Development are baseless. The decision was a collective decision of the Council of Ministers. No comparison with regard to the State of affairs in the State of Madhya Pradesh can be made with those States. The Governor of Madhya Pradesh having reported that the Constitutional machinery in the State had broken down, the proclamation of President's rule is justified and Constitutional.

355. In the counter affidavit filed in the writ petition (Transferred Case No. 8 of 1993) relating to Himachal Pradesh, the very same objections as are put forward in the counter affidavit filed in the Madhya Pradesh case have been reiterated. In the para-wise replies, it is stated that the events of 6th December, 1992 were not the handiwork of few persons but that "the public attitude and statements of various groups and political parties including B.J.P. led to the destruction of the structure in question and caused great damage to the very secular fabric of the country and created communal discord and disharmony all over the country including Himachal Pradesh." It is stated that the repercussions of the event cannot be judged by comparing the number of persons killed in different States. It is asserted that the Council of Ministers and the President "had a wealth of material available to them in the present case which are relevant to the satisfaction formed under Article 356. They were also aware of the serious damage to communal amity and harmony which has been caused in the State of Madhya Pradesh among others. They were extremely concerned with repercussions which events at Ayodhya might still have in the States and the ways and means to bring back normalcy not only in the law and order situation but also communal amity and harmony which had so badly damaged as a result of the activities, attitude and stand of inter alia the party in power in the State." It is also stated that, according to the definite information available to the Government of India, members of the R.S.S. were not only present on the spot at Ayodhya but actually participated in the demolition and that they were responsible for promotion of communal disharmony. It is for this reason that it was banned. It is also asserted that the action was taken by the President not only on the basis of the report of the Governor but also on the basis of other information received by him.

356. In the Counter affidavit filed in the writ petition relating to Rajasthan (Transferred Case No. 9 of 1993) it is stated that after the demolition on 6th December, 1992, violence started in various parts of the country leading to loss of life and property. It is asserted that it is not possible to assess the law and order situation in different states only on the basis of casualty figures. The situation in each State has to be assessed differently. The averment of the petitioner that the State Government implemented the ban on R.S.S. properly is denied. There is no requirement that the report of the Governor should be addressed to the President. It can also be addressed to the Prime Minister. Besides the report of the Governor, other information was also available on which the President had formed his satisfaction. The correctness, adequacy or sufficiency of the material contained in the Governor's report is not justiciable and cannot be gone into by the Court. The allegations of malafide, capricious and arbitrary exercise of power are denied. No irrelevant material was taken into consideration by the President and hence, it is averred, the satisfaction of the President is not judicially reviewable.

357. The learned Counsel for Union of India and other counsel supporting the impugned proclamations put their case thus: the main plank and the primary programme of B.J.P. was the construction of a Ram temple at the very site where the Babri Masjid stood. The party openly proclaimed that they will remove - relocate, as they called it - the Babri Masjid structure since

according to them the Babri Masjid was super-imposed on an existing Ram temple by Emperor Babar. The party came to power in all the four States on the said plank and since then had been working towards the said goal. It is the one single goal of all the leaders of B.J.P., their Ministers, Legislators and all cadres. For his purpose, they have been repeatedly gathering kar sevaks' from all corners at Ayodhya from time to time. In the days immediately preceding December 6, 1992, their leaders have been inciting and exhorting their followers to demolish the Babri Masjid and to build the temple there. The Ministers in Madhya Pradesh, Himachal Pradesh and Rajasthan took active part in organising and despatching kar sevaks to Ayodhya. When the kar sevaks returned from Ayodhya after demolishing the Masjid, they were welcomed as heroes by those very persons. Many of the Ministers and Chief Ministers were members of R.S.S. and were protesting against the ban on it. They could not, therefore, be trusted to enforce the ban, notwithstanding the protestations to the contrary by some of them.

358. The manifesto issued by the BJP on the eve of May/June, 1991 midterm poll states that the B.J.P. "seeks the restoration of Ram Janmabhoomi in Ayodhya only by way of a symbolic righting of historic wrongs, so that the old unhappy chapter of acrimony could be ended, and a Grand National Reconciliation effected." At another place under the head "Sri Ram Mandir at Janmasthan", the following statement occurs: "BJP firmly believes that construction of Ram Mandir at Janmasthan is a symbol of the vindication of our cultural heritage and national self-respect. For BJP it is purely a national issue and it will not allow any vested interests to give it a sectarian and communal colour. Hence, the party is committed to build Shri Ram Mandir at Janmasthan by relocating super-imposed Babri structure with due respect." Standing by themselves, it is true, the above statements may not mean that the programme envisaged unlawful or forcible demolition of the disputed structure. The said statement are also capable of being understood as meaning that the party proposed to vindicate their stand in Courts that the disputed structure was in fact the Ram Janmasthan which was forcible converted into a mosque by Emperor Babar and that only thereafter they will relocate the said structure and build Ram Temple at that site. But, says the counsel, if we read the above statements in the light of the speeches and acts of the leaders of the B.J.P., referred to in the White Paper issued by the Government of India, there would hardly be any room for such beneficial interpretation. The "White Paper on Ayodhya" issued by the Government of India in February, 1993, establishes the complicity of the Bhartiya Janta Party as such in the demolition of the disputed structure and its aftermath.

359. According to the statement of the Union Home Minister made in Rajya Sabha on December 21, 1992, the counsel pointed out, "all these kar sevaks, when they returned, were received by the Chief Ministers and Ministers".

360. The counsel for the respondents argued further that what happened on December 6, 1992 did not happen in a day. It was the culmination of a sustained campaign carried on by the BJP and other allied organisations over the last few years. They had been actively campaigning for the construction of Ram temple at the disputed site. They had been speaking of relocating the disputed structure which only meant that they wanted the disputed structure removed and a Ram temple constructed in that very place. The several speeches of the leaders of BJP and other allied parties, referred to in the White Paper, do clearly establish the said fact. Indeed, in the manifesto issued by the BJP in connection with the 1993 General Elections, there is not a word of regret as to what

happened on December 6, 1992. On the contrary, the following statement occurs under the heading "Ayodhya":

Ayodhya

In their actions and utterances, the forces of pseudo-secularism convey the unmistakable impression of a deep repugnance for all things Hindu. Indeed, in their minds "Hindu" has come to be associated with "communal". The controversy over the Ram Janmabhoomi temple in Ayodhya is a powerful illustration of this phenomenon. For them "Sahmat" is secular and "Saffron" communal. Although the facts of the dispute are well known, certain features merit repetition, first, it was always apparent that a vast majority of Hindus were totally committed to the construction of a grand temple for Lord Rama at the site where puja has been performed uninterruptedly since 1948 and where besides, no namaz has been offered since 1936. The structure build by the Moghul Emporer Babur was viewed by the Hindus as a symbol of national humiliation.

Second, the election of 1991 in Uttar Pradesh centered on the Ayodhya dispute. It was a virtual referendum on Ram Janmabhoomi and the BJP with its promise to facilitate the construction the Ram Temple won the election. However, this mandate did not prevent the Congress and other pseudo-secular parties from wilfully obstructing the initiatives of the Uttar Pradesh government. Everything, from administrative subterfuge to judicial delay, was used by the opponents of the temple to prevent the BJP government from fulfilling its promise to the electorate.

On December 6, 1992 kar sevaks from all over India assembled in Ayodhya to begin the reconstruction of the Rama Temple at the site adjoining the garbha grina. Matters took an unexpected turn when, angered by the obstructive tactics of the Narasimha Rao government, inordinate judicial delays and pseudo-secularist taunts, the kar sevaks took matters into their own hands, demolished the disputed structure and constructed a makeshift temple for Lord Rama at the garbha griha.

Owing responsibility for its inability to prevent the demolition, the BJP-government headed by Shri Kalyan Singh submitted its resignation. A disoriented Central Government was not content with the imposition of President's rule in Uttar Pradesh. In violation of democratic norms, the center dismissed the BJP governments in Rajasthan, Madhya Pradesh and Himachal Pradesh. Further, it banned the Rashtriya Swaymsevak Sangh, Vishwa Hindu Parishad and Bajrang Dal.

Worst of all, in collusion with other rootless forces the government unleashed a vicious propaganda offensive aimed at belittling the Hindus. The kar sevaks were denigrated as fascists, lumpens and vandals, and December 6, was described as a "national shame". Recently, the CBI has filed chargesheets against leaders of the BJP and the Vishwa Hindu Parishad with the purpose of projecting them as criminals.

This relentless onslaught of the pseudo-secular forces against the people of India had very serious consequences. For a stare, it created a wide emotional gulf between the rulers and the people. Ayodhya was a popular indictment of the spurious politics of double-standards. Far from recognising it as such, the Congress and other anti-BJP parties used it as pretext for furthering the cause of unprincipled minorityism.

It is this minorityism that prevents the Congress, Janata Dal, Samajvadi Party and the Communist Parties from coming out with an unambiguous declaration of intent on Ayodhya. This BJP is the only party which is categorical is its assurance to facilitate the construction of the Rama temple at the site of the erstwhile Babri structure. That is what the People of what desire.

361. The counsel further pointed out the significance of the total inaction on the part of the top leaders of the B.J.P. present near the disputed structure at Ayodhya on December 6,1992. They took no steps whatsoever to stop the demolition. The kar sevaks had gathered there at their instance. They had appealed to the kar sevaks to gather there from all corners of the country. Some of these leaders had been speaking of demolition of the disputed structure to enable the construction of Ram temple at that very place. Even assuming that the assault on the disputed structure was a sudden move on the part of some kar sevaks, it is not as if the demolition took place in a couple of minutes. It must have certainly taken a few hours. If the BJP leaders present there really wanted to prevent it, they should have appealed to the people and ought to have taken other effective steps to prevent the kar sevaks from demolishing the structure. There is no allegation anywhere in the writ petition or other material placed before the court that they ever did so. If one reads the aforesaid statements in the manifestos of 1991 and 1993 in the light of the above facts, if would be clear,says the counsel, that the demolition of the disputed structure was the outcome of the speeches, programme and the several campaigns including Rath Yatras undertaken by the leaders of the BJP. It is neither possible nor realistic to dissociate the governments of Madhya Pradesh, Rajasthan and Himachal Pradesh from the acts and deeds of their party. It is one party with one programme. Kar sevaks were sent by and welcomed back by the Ministers and legislators (belonging to B.J.P.) of these three States as well. Thereby they expressed and demonstrated their approval of the deed done by the kar sevaks. It is stated in the report of the Himachal Pradesh Governor that the Chief Minister himself was a member of the RSS. In the report of the Governor of Madhya Pradesh also, it is stated that the Chief Minister and other ministers swore by the values and traditions of the RSS. The reports also indicate that these governments actively participated in organising and despatching the kar sevaks to Ayodhya and welcomed them and praised when they came back after doing the deed. Thus, a common thread runs through all the four B.J.P. governments and binds them together, say the counsel. All these four governments had launched upon a course of action in tandem with top B.J.P. leaders, which led to the demolition. Their actions and deeds were contrary to these provisions of the Constitution. The manifestos of the party on the basis of which these governments came to power coupled with their speeches and actions clearly demonstrate a commonness, an inseparable unity of action between the party and these four governments. The very manifestos and their programme of action were such as to hurt the religious feelings of the Muslim community. They negated the secular concept, a basic feature of our Constitution. The demolition of the disputed structure was no ordinary event. The disputed structure had become the focal point, the bone of contention between two religious communities. The process which resulted in the demolition and the manner of in which it was perpetrated, dealt a serious blow to the communal harmony and peace in the country. It had adverse international repercussions as well. A number of Hindu temples were demolished in Pakistan and Bangladesh in reprisal of the demolition at Ayodhya. It was difficult in this situation to ask the minorities in the four States to have any faith in the neutrality of these four administrations. It was absolutely necessary, say the counsel, to recreate the feeling of security among the Muslims. They required to be assured of the safety and security of their person and property. It was not possible with the B.J.P. governments in power. They had to go.

362. The learned Counsel for the respondents submitted further that the R.S.S. was banned on December 10,1992. The Chief Ministers of Himachal Pradesh and Madhya Pradesh were said to be the members of the R.S.S. and adhering to its tenets. In such circumstances, the respective Governors were of the opinion that the said Chief Ministers cannot be expected to, or relied upon to, implement the ban sincerely. It cannot be said to be an unreasonable or unfounded opinion. It was also necessary to create a sense of confidence in the people in general and in the minorities, in particular, that the governments would be acting promptly and sternly to prevent communal incidents. Following December 6 incident, there were reports of destruction of a large number of temples in the adjoining countries. These reports, it was apprehended, may add fuel to the fire. The situation was deteriorating. What happened on December 6 was no ordinary event. It had touched the psyche of the minority community. The entire nation was put in turmoil. Allowing a party which had consciously and actively brought about such a situation to continue in office in these three States would not have helped in restoring the faith of people in general and of the minorities in particular in the resolve of the central government to abide by and implement the constitutional values of equality, peace and public order. It is no answer to say that disturbance took place on a much larger scale in certain states ruled by Congress (I) party (in particular in Maharashtra) and that no action was taken against those governments. Stating the proposition in such simplistic terms is neither acceptable nor realistic. One should look at the totality of the picture,say the counsel, and not to the isolated incidents which took place either before or after the demolition. It is not even a question of punishing the governments for what happened on December 6, 1992. The real question was who created this turmoil in the life of the nation and who put the nation's soul in torment. The immediate need was the restoration of the faith of the people in the impartiality of the administration, in the secular credentials of the nation and to ensure not only that the ban on the alleged communal organisations is effectively implemented but also to ensure that the administration acts promptly and impartially in maintaining- the law and order. The center government, submitted the counsel, acted with this perception and it cannot be said either that the said action was outside the purview of Article 356 or that it was malafide or that there was no material on which the President could be reasonably satisfied that the dismissal of these State Government was indeed called for, submitted the learned Counsel for Union of India and other respondents.

363. With a view to demonstrate his submission that judicial approach and judicial processes are not appropriate to judge the various situations calling for action under Article 356, Sri Parasaran gave the following scenario: the Union Council of Ministers was apprehensive of the safety of the disputed structure once the B.J.P. came to power in Uttar Pradesh. It was repeatedly reminding the State Government in that behalf. All the time, the State Government and its Chief Minister were assuring the Union of India, the National Integration Council and even the Supreme Court, through statements, affidavits and representations that the State Government was committed to the safety of the disputed structure and that it would ensure that no harm comes to it. The Central Government was sceptical of these assurances. But suppose it had taken action under Article 356, dismissed the Government of Uttar Pradesh some time prior to December 6, 1992 on the ground that it did not have any faith in those assurances, the Court could well have found fault with the action. The Court would have said that there was no basis for their apprehension when the State government itself represented by the Chief Minister and other high officials was repeatedly assuring everyone including the Supreme Court that they will protect the structure. There was no reason no to believe them and that the action taken under Article 356 is, therefore, unjustified, being based upon mere

suspicion. But, in the event, the Central Government did not take, action and the disputed structure was demolished with enormous consequences and repercussions. This only shows, says Sri Parasaran, that these matters cannot be weighed in golden scales and that judicial approach and assumptions are ill-suited to such situations.

364. Having given our earnest consideration to the matter, we are of the opinion that the situation which arose in these three States consequent upon the demolition of the disputed structure is one which cannot be assessed properly by the court. Sri Parasaran is right in his submission that what happened on 6th December, 1992 was no ordinary event, that it was the outcome of a sustained campaign carried out over a number of years throughout the country and that it was the result of the speeches, acts and deeds of several leaders of B.J.P. and other organisations. The event had serious repercussions not only within the country but outside as well. It put in doubt the very secular credentials of this nation and its government -and those credentials had to be redeemed. The situation had many dimensions, social, religious, political and international. Rarely do such occasions arise in the life of a nation. The situation was an extraordinary one; its repercussions could not be foretold at that time. Nobody could say with definiteness what would happen and where? The situation was not only unpredictable, it was a fast-evolving one. The communal situation was tense. It could explode anywhere at any time. On the material placed before us, including the reports of the Governors, we cannot say that the President had no relevant material before him on the basis of which he could form the satisfaction that the B.J.P. governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot dissociate themselves from the action and its consequences and that these governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of the disputed structure, cannot be dissociated from the acts and deeds of the leaders of B.J.P. In the then prevailing situation, the Union of India thought it necessary to ban certain organisations including R.S.S. and here were governments which were headed by persons who "swore by the values and traditions of the R.S.S." and were giving "overt and covert support to the associate communal organisation" (vide report of the Governor of Madhya Pradesh). The Governor of Himachal Pradesh reported that "the Chief Minister himself is a member of R.S.S.". The Governor of Rajasthan reported that the ban on R.S.S. and other organisations was not being implemented because of the intimate connection between the members of the government and those organisations. The three Governors also spoke of the part played by the members of the government in sending and welcoming back the kar sevaks. They also expressed the opinion that these governments cannot be expected, in the circumstances, to function objectively and impartially in dealing with the emerging law and order situation, which had all the ominous makings of a communal conflagration. If the President was satisfied that the faith of these B.J.P. government in the concept of secularism was suspect in view of the acts and conduct of the party controlling these governments and that in the volatile situation that developed pursuant to the demolition, the government of these State cannot be carried on in accordance with the provisions of the Constitution, we are not able to say that there was no relevant material upon which he could be so satisfied. The several facts stated in the counter affidavits and the material placed before us by the Union of India cannot be said to be irrelevant or extraneous to the purpose for which the power under Article 356 is to be exercised. As pointed out by us supra (under the heading 'Judicial Review') we cannot question the correctness of the material produced and that even if part of its is not relevant to the action, we cannot interfere so long as there is some relevant material to sustain the action. If the President was satisfied that the governments, which have already acted contrary to one of the basic features of the Constitution, viz., secularism, cannot

be trusted to do so in future, it is not possible to say that in the situation then obtaining, he was not justified in believing so. This is precisely the type of situation, which the court cannot judge for lack of judicially manageable standards. The Court could be well advised to leave such complex issues to the President and the Union Council of Ministers to deal with. It was a situation full of many imponderables, nuances, implications and intricacies. There were too many if's and but's which are not susceptible of judicial scrutiny. It is not correct to depict the said proclamations as the outcome of political vendetta by the political party in power at the center against the other political party in power in some States. Probably in such matters, the ultimate arbiter is the people. The appeal should be to the people and to people alone. The challenge to the proclamation relating to these three States is, therefore, liable to fail.

365. We may summarise our conclusion now:

(1) Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature.

(2) The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material which may comprise of or include the report (s) of the governor - is a precondition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Article 356 do merit serious consideration at the hands of all concerned.

(3) Though the power of dissolving of the Legislative Assembly can be said to be implicit in Clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it only after the proclamation is approved by both Houses of Parliament under Clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under Sub-clause (c) of Clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the proclamation.

(4) The proclamation under Clause (1) can be issued only where the situation contemplated by the clause arises. In such a situation, the government has to go. There is no room for holding that the President can take over some of the functions and powers of the State government while keeping the State government in office. There cannot be two governments in one sphere.

(5) (a) Clause (3) of Article 356 is conceived as a check on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the proclamation, the proclamation lapses at the end of the two-month period. In such a case, government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation gets re-activated. Since the Proclamation lapses - and is not retrospectively invalidated - the acts done, orders made and laws passed during the period of two months do not

become illegal or void. They are, however, subject to review, repeal or modification by the government/Legislation Assembly or other competent authority.

(b) However, if the proclamation is approved by both the Houses within two months, the government (which was dismissed) does not revive on the expiry of period of proclamation or on its revocation. Similarly, if the Legislative Assembly has been dissolved after the approval under Clause (3), the Legislative Assembly does not revive on the expiry of the period of proclamation or on its revocation.

(6) Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the ministers to the President. It does not bar the court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields. It may happen that while defending the proclamation, the minister or the concerned official may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123.

(7) The proclamation under Article 356(1) is not immune from judicial review. The Supreme court or the High court can strike down the proclamation if it is found to be malafide or based on wholly irrelevant or extraneous grounds. The deletion of Clause (5) (which was introduced by 38th (Amendment) Act) by the 44th (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. It's enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken.

(8) If the Court strikes down the proclamation, it has the power to restore the dismissed government to office and revive and re-activate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such case, the court has the power to declare that acts done, orders passed and laws made during the period the proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the government/Legislative assembly or other competent authority to review, repeal or modify such acts, orders and laws.

(9) The Constitution of India has created a federation but with a bias in favour of the center. Within the sphere allotted to the States, they are supreme.

(10) Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the state, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356.

(11) The proclamation dated April 21, 1989 in respect of Karnataka (Civil Appeal No. 3645 of 1989) and the proclamation dated October 11, 1991 in respect of Meghalaya (Transferred Case Nos. 5 and 7 of 1992) are unconstitutional. But for the fact that fresh elections have since taken place in both the states - and new Legislative Assemblies and governments have come into existence - we would have formally struck down the proclamations and directed the revival and restoration of the respective governments and Legislative Assemblies. The Civil Appeal No. 3645 of 1989 and Transferred Case Nos. 5 and 7 of 1992 are allowed accordingly. Civil Appeal Nos. 193 and 194 of 1989 relating to Nagaland are disposed of in terms of the opinion expressed by us on the meaning and purport of Article 74(2) of the Constitution.

(12) The proclamations dated January 15, 1993 in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh concerned in Civil Appeal Nos. 1692, 1692A- 1692C of 1993, 4627-4630 of 1990, Transferred Case (C) No. 9 of 1993 and Transferred Case No. 8 of 1993 respectively are not unconstitutional. The Civil Appeals are allowed and the judgment of the High Court of Madhya Pradesh in M.P. (C) No. 237 of 1993 is set aside. The Transferred Cases are dismissed.

366. In the light of the reasons given and conclusions recorded hereinabove, we find ourselves in agreement with the conclusions 1, 2 and 4 to 7 in the judgment of our learned brother Sawant, J. delivered on behalf of himself and Kuldip Singh, J. We are also in broad agreement with conclusion No. 8 in the said judgment.

367. No orders on Interlocutory Applications.

368. There shall be no order as to costs in these matters.

Back to Index

MANU/SC/1787/2005

Neutral Citation: 2005/INSC/526

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 3777, 4168, 4169 and 4170-4173/2003 and civil Appeal Nos. 6562, 6563-6564, 6565-6566 of 2005 (Arising out of SLP (C) Nos. 3205 and 14033-14034/2004 and 21272-21273/2002)

Decided On: 26.10.2005

Appellants: S.B.P. and Co. **Vs.** Respondent: Patel Engineering Ltd. and Ors.

Hon'ble Judges/Coram:

R.C. Lahoti, C.J., P.K. Balasubramanyan, B.N. Agrawal, Arun Kumar, G.P. Mathur, A.K. Mathur and C.K. Thakker, JJ.

Subject: Arbitration

Relevant Section:

ARBITRATION AND CONCILIATION ACT, 1996 - Section 11

Authorities Referred:

Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn., 2005; Black's Law Dictionary; Osborn's Concise Law Dictionary, 4th Edn., p. 253; Law and Practice of International Commercial Arbitration", (4th edn.),; International Commercial Arbitration (1994 edn.); (para 854); Judicial Review of Administrative Action"; (1995); p. 399; Wade & Forsyth; "Administrative Law"; (2005); pp. 492-94

Cases Overruled/Partly Overruled:

Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. (MANU/SC/0053/2002); Konkan Railway Corporation Ltd. v. Mehul Construction Co. (Konkan Railway Corporation Ltd. I) (MANU/SC/0523/2000)

Case Overruled/Partly Overruled by:

Vidya Drolia and Ors. vs. Durga Trading Corporation and Ors. MANU/SC/0939/2020

Case Note:

Arbitration and Conciliation Act, 1996 - Section 11--Appointment of Arbitrator by Chief Justice--Whether Chief Justice exercises judicial power or administrative power?--Held, by Majority of 6 : 1 that Chief Justice exercises judicial power--Scope of Section 11 (6) delineated by majority and minority.

The Majority, speaking through P. K. Balasubramanyan, J. held :

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11 (6) of the Arbitration and Conciliation Act, 1996 is not an administrative power. It is a judicial power.

(ii) The power under Section 11 (6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated, Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11 (8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the Judge designate.

(v) Designation of a District Judge as the authority under Section 11 (6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11 (6) of the Act.

(ix) In a case where an arbitral Tribunal has been constituted by the parties without having recourse to Section 11 (6) of the Act, the arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of the Supreme Court in Konkan Railway Corpn. Ltd. and another v. Rani Construction Pvt. Ltd., (2000) 8 SCC 159 and orders under Section 11 (6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11 (6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11 (6) of the Act, the appointment orders thus far made by them will be treated as valid ; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that Court designated by the Chief Justice.

Decision in Konkan Railway Corporation Ltd. v. Rani Construction (P.) Ltd., 2001 (1) AWC 59 (SC) : (2000) 8 SCC 159, overruled.

C. K. Thakker, J., in his minority opinion, held:

(i) The function performed by the Chief Justice of the High Court or the Chief Justice of India under sub-section (6) of Section 11 of the Act (i.e. Arbitration and Conciliation Act, 1996) is administrative, -pure and simple-, and neither judicial nor quasi-judicial.

(ii) The function to be performed by the Chief Justice under sub-section (6) of Section 11 of the Act may be performed by him or by 'any person or institution designated by him.'

(iii) While performing the function under sub-section (6) of Section 11 of the Act, the Chief Justice should be prima facie satisfied that the conditions laid down in Section 11 are satisfied.

(iv) The Arbitral Tribunal has power and jurisdiction to rule 'on its own jurisdiction' under sub-section (1) of Section 16 of the Act.

(v) Where the Arbitral Tribunal holds that it has jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award.

(vi) A remedy available to the party aggrieved is to challenge the award in accordance with Section 34 or Section 37 of the Act.

(vii) Since the order passed by the Chief Justice under sub-section (6) of Section 11 of the Act is administrative, a writ petition under Article 226 of the Constitution is maintainable. A letters patent appeal/Intra-court appeal is competent. A special leave petition under

Article 136 of the Constitution also lies to the Supreme Court.

(viii) While exercising extraordinary jurisdiction under Article 226 of the Constitution, however, the High Court will be conscious and mindful of the relevant provisions of the Act, including Sections 5, 16, 34 to 37 as also the object of the legislation and exercise its power with utmost care, caution and circumspection.

(ix) The decision of the Constitution Bench in Konkan Railway Corporation Ltd. II, to the extent that it held the function of the Chief Justice under sub-section (6) of Section 11 of the Act as administrative is in consonance with settled legal position and lays down correct law on the point.

(x) The decision of the Constitution Bench in Konkan Railway Corporation Ltd. II, to the extent that it held Clause 7 of "The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996" providing for issuance of notice to affected parties as "beyond the term of Section 11'' and bad on that ground is not in accordance with law and does not state the legal position correctly.

(xi) Since the Chief Justice is performing administrative function in appointing an Arbitral Tribunal, there is no 'duty to act judicially' on his part. The doctrine of 'duty to act fairly', however, applies and the Chief Justice must issue notice to the person or persons likely to be affected by the decision under sub-section (6) of Section 11 of the Act.

(xii) All appointments of Arbitral Tribunals so far made without issuing notice to the parties affected are held legal and valid. Henceforth, however, every appointment will be made after issuing notice to such person or persons. In other words, this judgment will have prospective operation and it will not affect past appointments or concluded proceedings.

Industry: Capital Goods/ Engineering

JUDGMENT

P.K. Balasubramanyan, J.

Leave granted in SLP(C) Nos. 3205/2004, 14033-14034/2004, 21272-273/2002.

1. What is the nature of the function of the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996 is the question that is posed before us. The three judges bench decision in **Konkan Rly. Corporation Ltd. v. Mehul Construction Co. MANU/SC/0523/2000 :** AIR2000SC2821 as approved by the Constitution Bench in **Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. MANU/SC/0053/2002 :** [2002]1SCR728 has taken the view that it is purely an administrative function, that it is neither judicial nor quasi-judicial and the Chief Justice or his nominee performing the function under Section 11(6) of the Act, cannot decide any contentious issue between the parties. The correctness of the said view is questioned in these appeals.

2. Arbitration in India was earlier governed by the Indian Arbitration Act, 1859 with limited application and the Second Schedule to the Code of civil Procedure, 1908. Then came the Arbitration Act, 1940. Section 8 of that Act conferred power on the Court to appoint an arbitrator on an application made in that behalf. Section 20 conferred a wider jurisdiction on the Court for directing the filing of the arbitration agreement and the appointment of an arbitrator. Section 21 conferred a power on the Court in a pending suit, on the agreement of parties, to refer the differences between them for arbitration in terms of the Act. The Act provided for the filing of the award in court, for the making of a motion by either of the parties to make the award a rule of court, a right to have the award set aside on the grounds specified in the Act and for an appeal against the decision on such a motion. This Act was replaced by the Arbitration and Conciliation Act, 1996 which, by virtue of Section 85, repealed the earlier enactment.

3. The Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') was intended to comprehensively cover international and commercial arbitrations and conciliations as also domestic arbitrations and conciliations. It envisages the making of an arbitral procedure which is fair, efficient and capable of meeting the needs of the concerned arbitration and for other matters set out in the objects and reasons for the Bill. The Act was intended to be one to consolidate and amend the law relating to domestic arbitrations, international commercial arbitrations and enforcement of foreign arbitral awards, as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The preamble indicates that since the United Nations Commission on International Trade Law (UNCITRAL) has adopted a Model Law for International Commercial Arbitration and the General Assembly of the United Nations has recommended that all countries give due consideration to the Model Law and whereas the Model Law and the Rules make significant contribution to the establishment of a unified legal framework for a fair and efficient settlement of disputes arising in international commercial relations and since it was expedient to make a law respecting arbitration and conciliation taking into account the Model Law and the Rules, the enactment was being brought forward. The Act replaces the procedure laid down in Sections 8 and 20 of the Arbitration Act, 1940. Part I of the Act deals with arbitration. It contains Sections 2 to 43. Part II deals with enforcement of certain foreign awards, and Part III deals with conciliation and Part IV contains supplementary provisions. In this case, we are not concerned with Part III, and Parts II and IV have only incidental relevance. We are concerned with the provisions in Part I dealing with arbitration.

4. Section 7 of the Act read with Section 2 (b) defines an arbitration agreement. Section 2(h) defines 'party' to mean a party to an arbitration agreement. Section 4 deals with waiver of objections on the part of the party who has proceeded with an arbitration, without stating his objections referred to in the section, without undue delay. Section 5 indicates the extent of judicial intervention. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in Part I. The expression 'judicial authority' is not defined. So, it has to be understood as taking in the courts or any other judicial fora. Section 7 defines an arbitration agreement and insists that it must be in writing and also explains when an arbitration agreement could be said to be in writing. Section 8 confers power on a judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement, to refer the dispute to arbitration, if a party applies for the same. Section 9 deals with the power of the Court to pass interim orders and the power to give interim protection in appropriate cases. It gives a right to a party, before or during

arbitral proceedings or at any time after the making of the arbitral arbitral award but before its enforcement in terms of Section 36 of the Act, to apply to a court for any one of the orders specified therein. Chapter III of Part I deals with composition of arbitral tribunals. Section 10 gives freedom to the parties to determine the number of arbitrators but imposes a restriction that it shall not be an even number. Then comes Section 11 with which we are really concerned in these appeals.

5. The marginal heading of Section 11 is 'Appointment of arbitrators'. Sub-Section (1) indicates that a person of any nationality may be an arbitrator, unless otherwise agreed to by the parties. Under sub-Section (2), subject to sub-Section (6),the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Under sub- Section (3), failing any agreement in terms of sub-Section (2), in an arbitration with three arbitrators, each party could appoint one arbitrator, and the two arbitrators so appointed, could appoint the third arbitrator, who would act as the presiding arbitrator. Under sub- Section (4), the Chief Justice or any person or institution designated by him could make the appointment, in a case where sub-Section (3) has application and where either the party or parties had failed to nominate their arbitrator or arbitrators or the two nominated arbitrators had failed to agree on the presiding arbitrator. In the case of a sole arbitrator, sub- Section (5) provides for the Chief Justice or any person or institution designated by him, appointing an arbitrator on a request being made by one of the parties, on fulfilment of the conditions laid down therein. Then comes sub-Section (6), which may be quoted hereunder with advantage:

"(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

Sub-Section (7) gives a finality to the decision rendered by the Chief Justice or the person or institution designated by him when moved under sub-Section (4), or sub-Section (5), or sub-Section (6) of Section 11. Sub-Section (8) enjoins the Chief Justice or the person or institution designated by him to keep in mind the qualifications required for an arbitrator by the agreement of the parties, and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Sub-Section (9) deals with the power of the Chief Justice of India or a person or institution designated by him to appoint the sole or the third arbitrator in an international commercial arbitration. Sub-Section (10) deals with Chief Justice's power to make a scheme for dealing with matters entrusted to him by sub-Section (4) or sub-Section (5) or sub-Section (6) of Section 11. Sub-Section (11) deals with the respective jurisdiction of Chief Justices of different High Courts who are approached with requests regarding the same dispute and specifies as to who

should entertain such a request. Sub-Section 12 clause (a) clarifies that in relation to international arbitration, the reference in the relevant sub-sections to the 'Chief Justice' would mean the 'Chief Justice of India'. Clause (b) indicates that otherwise the expression 'Chief Justice' shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Court is situated. 'Court' is defined under Section 2(e) as the principal civil Court of original jurisdiction in a district.

6. Section 12 sets out the grounds of challenge to the person appointed as arbitrator and the duty of an arbitrator appointed, to disclose any disqualification he may have. Sub-Section (3) of Section 12 gives a right to the parties to challenge an arbitrator. Section 13 lays down the procedure for such a challenge. Section 14 takes care of the failure of or impossibility for an arbitrator to act and Section 15 deals with the termination of the mandate of the arbitrator and the substitution of another arbitrator. Chapter IV deals with the jurisdiction of arbitral tribunals. Section 16 deals with the competence of an arbitral tribunal, to rule on its jurisdiction. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. A person aggrieved by the rejection of his objection by the tribunal on its jurisdiction or the other matters referred to in that Section, has to wait until the award is made to challenge that decision in an appeal against the arbitral award itself in accordance with Section 34 of the Act. But an acceptance of the objection to jurisdiction or authority, could be challenged then and there, under Section 37 of the Act. Section 17 confers powers on the arbitral tribunal to make interim orders. Chapter V comprising of Sections 18 to 27 deals with the conduct of arbitral proceedings. Chapter VI containing Sections 28 to 33 deals with making of the arbitral award and termination of the proceedings. Chapter VII deals with recourse against an arbitral award. Section 34 contemplates the filing of an application for setting aside an arbitral award by making an application to the Court as defined in Section 2(e) of the Act. Chapter VIII deals with finality and enforcement of arbitral awards. Section 35 makes the award final and Section 36 provides for its enforcement under the Code of civil Procedure, 1908 in the same manner as if it were a decree of court. Chapter IX deals with appeals and Section 37 enumerates the orders that are open to appeal. We have already referred to the right of appeal available under Section 37(2) of the Act, on the Tribunal accepting a plea that it does not have jurisdiction or when the arbitral tribunal accepts a plea that it is exceeding the scope of its authority. No second appeal is contemplated, but right to approach the Supreme Court is saved. Chapter X deals with miscellaneous matters. Section 43 makes the Limitation Act, 1963 applicable to proceedings under the Act as it applies to proceedings in Court.

7. We will first consider the question, as we see it. On a plain understanding of the relevant provisions of the Act, it is seen that in a case where there is an arbitration agreement, a dispute has arisen and one of the parties had invoked the agreed procedure for appointment of an arbitrator and the other party has not cooperated, the party seeking an arbitration, could approach the Chief Justice of the High Court if it is an internal arbitration or of the Supreme Court if it is an international arbitration to have an arbitrator or arbitral tribunal appointed. The Chief Justice, when so requested, could appoint an arbitrator or arbitral tribunal depending on the nature of the agreement between the parties and after satisfying himself that the conditions for appointment of an arbitrator under sub-Section (6) of Section 11 do exist. The Chief Justice could designate another person or institution to take the necessary measures. The Chief Justice has also to have the qualification of the arbitrators in mind before choosing the arbitrator. An arbitral tribunal so

constituted, in terms of Section 16 of the Act, has the right to decide whether it has jurisdiction to proceed with the arbitration, whether there was any agreement between the parties and the other matters referred to therein.

8. Normally, any tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the tribunal. Here, sub-Section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or institution designated by him in respect of matters falling under sub-Sections (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless, the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty, exist. therefore, unaided by authorities and going by general principals, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him, is a party, whether the conditions for exercise of the power have been fulfilled and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final.

9. The very scheme, if it involves an adjudicatory process, restricts the power of the Chief Justice to designate, by excluding the designation of a non-judicial institution or a non-judicial authority to perform the functions. For, under our dispensation, no judicial or quasi-judicial decision can be rendered by an institution if it is not a judicial authority, court or a quasi-judicial tribunal. This aspect is dealt with later while dealing with the right to designate under Section 11(6) and the scope of that designation.

10. The appointment of an arbitrator against the opposition of one of the parties on the ground that the Chief Justice had no jurisdiction or on the ground that there was no arbitration agreement, or on the ground that there was no dispute subsisting which was capable of being arbitrated upon or that the conditions for exercise of power under Section 11(6) of the Act do not exist or that the qualification contemplated for the arbitrator by the parties cannot be ignored and has to be borne in mind, are all adjudications which affect the rights of parties. It cannot be said that when the Chief Justice decides that he has jurisdiction to proceed with the matter, that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon, he is not adjudicating on the rights of the party who is raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power, gets all the more emphasized, when sub-Section (7) designates the order under sub-sections (4), (5) or (6) a 'decision' and makes the decision of the Chief Justice final on the matters referred to in that sub-Section. Thus, going by the general principles of law and the scheme of Section 11, it is difficult to call the order of the

Chief Justice merely an administrative order and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

11. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the arbitral tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the arbitral tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the arbitral tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the arbitral tribunal overrules the objections under sub-section (2) or sub-section (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of Sub-Section (7) of Section 11 is, what is the scope of the right conferred on the arbitral tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-Section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the arbitral tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an arbitral tribunal, the arbitral tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of learned Senior Counsel, Mr. K.K. Venugopal that Section 16 has full play only when an arbitral tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitral tribunal and at subsequent stages of the proceeding except in

an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him.

12. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration. But at the same time, it has made some departures from the model law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11 of the Act, are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. 'Court' is defined in the Act to be the principal civil court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The principal civil court of original jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the concerned court would be the District Court. Obviously, the Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an arbitral tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of 'court' in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the concerned State or in the country. This is to ensure the utmost authority to the process of constituting the arbitral tribunal.

13. Normally, when a power is conferred on the highest judicial authority who normally performs judicial functions and is the head of the judiciary of the State or of the country, it is difficult to assume that the power is conferred on the Chief Justice as persona designata. Under Section 11(6), the Chief Justice is given a power to designate another to perform the functions under that provision. That power has generally been designated to a Judge of the High Court or of the Supreme Court respectively. Persona designata, according to Black's Law Dictionary, means "A person considered as an individual rather than as a member of a class". When the power is conferred on the Chief Justices of the High Courts, the power is conferred on a class and not considering that person as an individual. In the **Central Talkies Ltd., Kanpur** v. **Dwarka Prasad** MANU/SC/0332/1961 : 1961CriLJ740 while considering the status in which the power was to be exercised by the District Magistrate under the United Provinces (Temporary) Control of Rent and Eviction Act, 1947, this Court held:

"a persona designata is "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character." (See Osborn's Concise Law Dictionary, 4th Edition., p.253). In the words of Schwabe, C.J., in Parthasardhi Naidu v. Koteswara Rao, I.L.R. Mad 369 personae designate are, "persons selected to act in their private capacity and not in their capacity as Judges." The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purpose of the Eviction Act."

In **Mukri Gopalan** v. **Cheppilat Puthanpurayil Aboobacker** MANU/SC/0453/1995 : AIR1995SC2272 this Court after quoting the above passage from the **Central Talkies Ltd., Kanpur** v. **Dwarka Prasad**, applied the test to come to the conclusion that when Section 18 of the Kerala Buildings (Lease and Rent Control) Act, 1965 constituted the District Judge as an appellate authority under that Act, it was a case where the authority was being conferred on District Judges who constituted a class and, therefore, the appellate authority could not be considered to be persona designata. What can be gathered from P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition, 2005, is that "persona designate" is a person selected to act in his private capacity and not in his capacity as a judge. He is a person pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character. It is also seen that one of the tests to be applied is to see whether the person concerned could exercise the power only so long as he holds office or could exercise the power even subsequently. Obviously, on ceasing to be a Chief Justice, the person referred to in Section 11(6) of the Act could not exercise the power. Thus, it is clear that the power is conferred on the Chief Justice under Section 11(6) of the Act not as persona designata.

14. Normally a persona designata cannot delegate his power to another. Here, the Chef Justice of the High Court or the Chief Justice of India is given the power to designate another to exercise the power conferred on him under Section 11(6) of the Act. If the power is a judicial power, it is obvious that the power could be conferred only on a judicial authority and in this case, logically on another Judge of the High Court or on a Judge of the Supreme Court. It is logical to consider the conferment of the power on the Chief Justice of the High Court and on the Chief Justice of India as presiding Judges of the High Court and the Supreme Court and the exercise of the power so conferred, is exercise of judicial power/authority as presiding Judges of the respective courts. Replacing of the word 'court' in the Model Law with the expression "Chief Justice" in the Act, appears to be more for excluding the exercise of power by the District Court and by the court as an entity leading to obvious consequences in the matter of the procedure to be followed and the rights of appeal governing the matter. The departure from Article 11 of the Model Law and the use of the expression "Chief Justice" cannot be taken to exclude the theory of its being an adjudication under Section 11 of the Act by a judicial authority.

15. We may at this stage notice the complementary nature of Sections 8 and 11. Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. The expression used in this Section is 'shall' and this Court in **P. Anand Gajapathi Raju v. P.V. G. Raju MANU/SC/0281/2000 :** [2000]2SCR684 and in **Hindustan**

Petroleum Corporation Ltd. v. Pink City Midway Petroleum MANU/SC/0482/2003 : AIR2003SC2881 has held that the judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. Thus, the judicial authority is entitled to, has to and bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11 only covers another situation. Where one of the parties has refused to act in terms of the arbitration agreement, the other party moves the Chief Justice under Section 11 of the Act to have an arbitrator appointed and the first party objects, it would be incongruous to hold that the Chief Justice cannot decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question or cannot decide the question, it will lead to an anomalous situation in that a judicial authority under Section 8 can decide, but not a Chief Justice under Section 11, though the nature of the objection is the same and the consequence of accepting the objection in one case and rejecting it in the other, is also the same, namely, sending the parties to arbitration. The interpretation of Section 11 that we have adopted would not give room for such an anomaly.

16. Section 11(6) does enable the Chief Justice to designate any person or institution to take the necessary measures on an application made under Section 11(6) of the Act. This power to designate recognized in the Chief Justice, has led to an argument that a judicial decision making is negatived, in taking the necessary measures on an application, under Section 11(6) of the Act. It is pointed out that the Chief Justice may designate even an institution like the Chamber of Commerce or the Institute of Engineers and they are not judicial authorities. Here, we find substance in the argument of Mr. F.S.Nariman, learned senior counsel that in the context of Section 5 of the Act excluding judicial intervention except as provided in the Act, the designation contemplated is not for the purpose of deciding the preliminary facts justifying the exercise of power to appoint an arbitrator, but only for the purpose of nominating to the Chief Justice a suitable person to be appointed as arbitrator, especially, in the context of Section 11(8) of the Act. One of the objects of conferring power on the highest judicial authority in the State or in the country for constituting the arbitral tribunal, is to ensure credibility in the entire arbitration process and looked at from that point of view, it is difficult to accept the contention that the Chief Justice could designate a non- judicial body like the Chamber of Commerce to decide on the existence of an arbitration agreement and so on, which are decisions, normally, judicial or quasi judicial in nature. Where a Chief Justice designates not a Judge, but another person or an institution to nominate an arbitral tribunal, that can be done only after questions as to jurisdiction, existence of the agreement and the like, are decided first by him or his nominee Judge and what is to be left to be done is only to nominate the members for constituting the arbitral tribunal. Looking at the scheme of the Act as a whole and the object with which it was enacted, replacing the Arbitration Act of 1940, it seems to be proper to view the conferment of power on the Chief Justice as the conferment of a judicial power to decide on the existence of the conditions justifying the constitution of an arbitral tribunal. The departure from the UNCITRAL model regarding the conferment of the power cannot be said to be conclusive or significant in the circumstances. Observations of this Court in paragraphs 389 and 391 in **Supreme Court Advocates on Record Association v. Union of India MANU/SC/0073/1994 :** AIR1994SC268 support the argument that the expression chief justice is used in the sense of collectivity of judges of the Supreme Court and the High Courts respectively.

17. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power.

18. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See **Fair Air Engineers (P) Ltd. and Anr.** v. **N.K. Modi** MANU/SC/0141/1997 : AIR1997SC533.

When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause.
It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration.
Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern

the adjudication [See **R.M.A.R.A. Adaikappa Chettiar and Anr.** v. **R. Chandrasekhara Thevar** MANU/PR/0005/1947]

19. Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the arbitral tribunal. In **Konkan Railway** (Supra) what is considered is only the fact that under Section 16, the arbitral tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the arbitral tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an arbitral tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the arbitral tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

20. We will now consider the prior decisions of this Court. In **Sundaram Finance Ltd.** v. **NEPC India Ltd.** MANU/SC/0012/1999 : [1999]1SCR89 this Court held that the provisions of the Act must be interpreted and construed independently of the interpretation placed on the Arbitration Act, 1940 and it will be more relevant to refer to the UNCITRAL model law while called upon to interpret the provisions of the Act. This Court further held that under the 1996 Act, appointment of arbitrator(s) is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing an arbitrator or arbitrators. It is seen that the question was not discussed as such, since the court in that case was not concerned with the interpretation of Section 11 of the Act. The view as above was quoted with approval in **Ador Samia Private Limited** v. **Peekay Holdings Limited and Ors.** MANU/SC/0506/1999 : AIR1999SC3246 and nothing further was said about the question. In other words, the question as to the nature of the order to be passed by the Chief Justice when moved under Section 11(6) of the Act, was not discussed or decided upon.

21. In **Wellington Associates Ltd.** v. **Kirit Mehta** MANU/SC/0232/2000 : AIR2000SC1379 it was contended before the designated Judge that what was relied on by the applicant was not an arbitration clause. The applicant contended that the Chief Justice of India or the designate Judge cannot decide that question and only the arbitrator can decide the question in view of Section 16 of the Act. The designated Judge held that Section 16 did not exclude the jurisdiction of the Chief Justice of India or the designated Judge to decide the question of the existence of an arbitration clause. After considering the relevant aspects, the learned Judge held:

"I am of the view that in cases where --- to start with - there is a dispute raised at the stage of the application under Section 11 that there is no arbitration clause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the "existence" of the arbitration clause cannot be doubted and cannot be said to be excluded by Section 16. "

22. Then came **Konkan Railway Corporation Ltd.** v. **Mehul Construction Co.** MANU/SC/0523/2000 : AIR2000SC2821 in which the first question framed was, what was the nature of the order passed by the Chief Justice or his nominee in exercise of his power under Section 11(6) of the Arbitration and Conciliation Act, 1996? After noticing the Statement of Objects and Reasons for the Act and after comparing the language of Section 11 of the Act and the corresponding article of the model law, it was stated that the Act has designated the Chief Justice of the High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of an arbitrator, whereas under the model law, the said power was vested with the court. When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it was imperative for the Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues left to be raised before the arbitral tribunal itself. It was further held that at that stage, it would not be appropriate for the Chief Justice or his nominee, to entertain any contention or decide the same between the parties. It was also held that in view of the conferment of power on the arbitral tribunal under Section 16 of the Act, the intention of the legislature and its anxiety to see that the arbitral process is set in motion at the earliest, it will be appropriate for the Chief Justice to appoint an arbitrator without wasting any time or without entertaining any contentious issue by a party objecting to the appointment of an arbitrator. The Court stated:

"Bearing in mind the purpose of legislation, the language used in Section 11(6) conferring power on the Chief Justice or his nominee to appoint an arbitrator, the curtailment of the power of the court in the matter of interference, the expanding jurisdiction of the arbitrator in course of the arbitral proceeding, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing an arbitrator by the Chief Justice or his nominee under Section 11(6) has to be decided upon. If it is held that an order under Section 11(6) is a judicial or quasi-judicial order then the said order would be amenable to judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a court of law even against an order of appointment of an arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting the UNCITRAL Model."

23. The Court proceeded to say that if it were to be held that the order passed was purely administrative in nature, that would facilitate the achieving of the object of the Act, namely, quickly setting in motion the process of arbitration. Great emphasis was placed on the conferment of power on the Chief Justice in preference to a court as was obtaining in the model law. It was concluded " The nature of the function performed by the Chief Justice being essentially to aid the constitution of the arbitral tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a court, it is apparent that the order passed by the

Chief Justice or his nominee is an administrative order as has been held by this Court in **Ador Samia** case (supra) and the observations of this Court in **Sundaram Finance Ltd.** case (supra) also are quite appropriate and neither of those decisions require any reconsideration."

24. It was thus held that an order passed under Section 11(6) of the Act, by the Chief Justice of the High Court or his nominee, was an administrative order, its purpose being the speedy disposal of commercial disputes and that such an order could not be subjected to judicial review under Article 136 of the Constitution of India. Even an order refusing to appoint an arbitrator would not be amenable to the jurisdiction of the Supreme Court under Article 136 of the Constitution. A petition under Article 32 of the Constitution was also not maintainable. But, an order refusing to appoint an arbitrator made by the Chief Justice could be challenged before the High Court under Article 226 of the Constitution. What seems to have persuaded this Court was the fact that the statement of objects and reasons of the Act clearly enunciated that the main object of the legislature was to minimize the supervisory role of courts in arbitral process. Since Section 16 empowers the arbitral tribunal to rule on its own jurisdiction including ruling on objections with respect to the existence or validity of an arbitration agreement, a party would have the opportunity to raise his grievance against that decision either immediately or while challenging the award after it was pronounced. Since it was not proper to encourage a party to an arbitration, to frustrate the entire purpose of the Act by adopting dilatory tactics by approaching the court even against the order of appointment of an arbitrator, it was necessary to take the view that the order was administrative in nature. This was all the more so, since the nature of the function performed by the Chief Justice was essentially to aid the constitution of the arbitral tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not on the court, it was apparent that the order was an administrative order. With respect, it has to be pointed out that this Court did not discus or consider the nature of the power that the Chief Justice is called upon to exercise. Merely because the main purpose was the constitution of an arbitral tribunal, it could not be taken that the exercise of power is an administrative power. While constituting an arbitral tribunal, on the scheme of the Act, the Chief Justice has to consider whether he as the Chief Justice has jurisdiction in relation to the contract, whether there was an arbitration agreement in terms of Section 7 of the Act and whether the person before him with the request, is a party to the arbitration agreement. On coming to a conclusion on these aspects, he has to enquire whether the conditions for exercise of his power under Section 11(6) of the Act exist in the case and only on being satisfied in that behalf, he could appoint an arbitrator or an arbitral tribunal on the basis of the request. It is difficult to say that when one of the parties raises an objection that there is no arbitration agreement, raises an objection that the person who has come forward with a request is not a party to the arbitration agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Can he constitute an arbitrary tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of the power under Section 11(6) of the Act are not fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an arbitral tribunal the rights of parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be preliminary expenses and his

objection is upheld by the arbitral tribunal. therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an arbitral tribunal.

25. It is also somewhat incongruous to permit the order of the Chief Justice under Section 11(6) of the Act being subjected to scrutiny under Article 226 of the Constitution at the hands of another Judge of the High Court. In the absence of any conferment of an appellate power, it may not be possible to say that a certiorari would lie against the decision of the High Court in the very same High Court. Even in the case of an international arbitration, the decision of the Chief Justice of India would be amenable to challenge under Article 226 of the Constitution before a High Court. While construing the scope of the power under Section 11(6), it will not be out of place for the court to bear this aspect in mind, since after all, courts follow or attempt to follow certain judicial norms and that precludes such challenges (see **Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr. MANU/SC/0044/1966 :** [1966]3SCR744 and **Rupa Ashok Hurra** v. **Ashok Hurra and Anr.** MANU/SC/0910/2002 : [2002]2SCR1006.

26. In **Nimet Resources Inc. and Anr.** v. **Essar Steels Ltd.** MANU/SC/0603/2000 : AIR2000SC3107 the question of existence or otherwise of an arbitration agreement between the parties was itself held to be referable to the arbitrator since the order proceeded on the basis that the power under Section 11(6) was merely administrative.

27. The correctness of the decision in **Konkan Railway Corporation Ltd.** v. **Mehul Construction Co.** (supra) was doubted in **Konkan Railway Cooperation Ltd.** v. **Rani Construction Pvt. Ltd. MANU/SC/0653/2000 :** and the order of reference, is reported in (2000)2SCC388. The reconsideration was recommended on the ground that the Act did not take away the power of the Court to decide preliminary issues notwithstanding the arbitrator's competence to decide such issues including whether particular matters were "excepted matters", or whether an arbitration agreement existed or whether there was a dispute in terms of the agreement. It was noticed that in other countries where UNCITRAL model was being followed, the court could decide such issues judicially and need not mechanically appoint an arbitrator. There were situations where preliminary issues would have to be decided by the court rather than by the arbitrator. If the order of the Chief Justice or his nominees were to be treated as an administrative one, it could be challenged before the single Judge of the High Court, then before a Division Bench and then the Supreme Court under Article 136 of the Constitution, a result that would cause further delay in arbitral proceedings, something sought to be prevented by the Act. An order under Section 11 of the Act did not relate to the administrative functions of the Chief Justice or of the Chief Justice of India.

28. The reference came up before a Constitution Bench. In **Konkan Railway Construction Ltd.** v. **Rani Construction Pvt. Ltd. MANU/SC/0053/2002 :** [2002]1SCR728, the Constitution Bench reiterated the view taken in **Mehul Construction Co.'s** case (supra), if we may say so with respect, without really answering the questions posed by the order of reference. It was stated that there is nothing in Section 11 of the Act that requires the party other than the party making the request, to be given notice of the proceedings before the Chief Justice. The Court went on to say that Section 11 did not contemplate a response from the other party. The approach was to say that none of the requirements referred to in Section 11(6) of the Act contemplated or amounted to an adjudication by the Chief Justice while appointing an arbitrator. The scheme framed under the Arbitration Act

by the Chief Justice of India was held to be not mandatory. It was stated that the UNCITRAL model law was only taken into account and hence the model law, or judgments and literature thereon, was not a guide to the interpretation of the Act and especially of Section 11.

29. With respect, what was the effect of the Chief Justice having to decide his own jurisdiction in a given case was not considered by the Bench. Surely, the question whether the Chief Justice could entertain the application under Section 11(6) of the Act could not be left to the decision of the arbitral tribunal constituted by him on entertaining such an application. We also feel that adequate attention was not paid to the requirement of the Chief Justice having to decide that there is an arbitration agreement in terms of Section 7 of the Act before he could exercise his power under Section 11(6) of the Act and its implication. The aspect, whether there was an arbitration agreement, was not merely a jurisdictional fact for commencing the arbitration itself, but it was also a jurisdictional fact for appointing an arbitrator on a motion under Section 11(6) of the Act, was not kept in view. A Chief Justice could appoint an arbitrator in exercise of his power only if there existed an arbitration agreement and without holding that there was an agreement, it would not be open to him to appoint an arbitrator saying that he was appointing an arbitrator since he has been moved in that behalf and the applicant before him asserts that there is an arbitration agreement. Acceptance of such an argument, with great respect, would reduce the high judicial authority entrusted with the power to appoint an arbitrator, an automaton and subservient to the arbitral tribunal which he himself brings into existence. Our system of law does not contemplate such a situation.

30. With great respect, it is seen that the court did not really consider the nature of the rights of the parties involved when the Chief Justice exercised the power of constituting the arbitral tribunal. The court also did not consider whether it was not necessary for the Chief Justice to satisfy himself of the existence of the facts which alone would entitle him or enable him to accede to the request for appointment of an arbitrator and what was the nature of that process by which he came to the conclusion that an arbitral tribunal was liable to be constituted. When, for example, a dispute which no more survives as a dispute, was referred to an arbitral tribunal or when an arbitral tribunal was constituted even in the absence of an arbitration agreement as understood by the Act, how could the rights of the objecting party be said to be not affected, was not considered in that perspective. In other words, the Constitution Bench proceeded on the basis that while exercising power under Section 11(6) of the Act there was nothing for the Chief Justice to decide. With respect, the very question that fell for decision was whether there had to be an adjudication on the preliminary matters involved and when the result had to depend on that adjudication, what was the nature of that adjudication. It is in that context that a reconsideration of the said decision is sought for in this case. The ground of ensuring minimum judicial intervention by itself is not a ground to hold that the power exercised by the Chief Justice is only an administrative function. As pointed out in the order of reference to that Bench, the conclusion that it is only an administrative act is the opening of the gates for an approach to the High Court under Article 226 of the Constitution, for an appeal under the Letters Patent or the concerned High Court Act to a Division Bench and a further appeal to this Court under Article 136 of the Constitution of India.

31. Moreover, in a case where the objection to jurisdiction or the existence of an arbitration agreement is overruled by the arbitral tribunal, the party has to participate in the arbitration proceedings extending over a period of time by incurring substantial expenditure and then to come

to court with an application under Section 34 of the Arbitration Act seeking the setting aside of the award on the ground that there was no arbitration agreement or that there was nothing to be arbitrated upon when the tribunal was constituted. Though this may avoid intervention by court until the award is pronounced, it does mean considerable expenditure and time spent by the party before the arbitral tribunal. On the other hand, if even at the initial stage, the Chief Justice judicially pronounces that he has jurisdiction to appoint an arbitrator, that there is an arbitration agreement between the parties, that there was a live and subsisting dispute for being referred to arbitration and constitutes the tribunal as envisaged, on being satisfied of the existence of the conditions for the exercise of his power, ensuring that the arbitrator is a qualified arbitrator, that will put an end to a host of disputes between the parties, leaving the party aggrieved with a remedy of approaching this Court under Article 136 of the Constitution. That would give this Court, an opportunity of scrutinizing the decision of the Chief Justice on merits and deciding whether it calls for interference in exercise of its plenary power. Once this Court declines to interfere with the adjudication of the Chief Justice to the extent it is made, it becomes final. This reasoning is also supported by sub-section (7) of Section 11, making final, the decision of the Chief Justice on the matters decided by him while constituting the arbitral tribunal. This will leave the arbitral tribunal to decide the dispute on merits unhampered by preliminary and technical objections. In the long run, especially in the context of the judicial system in our country, this would be more conducive to minimising judicial intervention in matters coming under the Act. This will also avert the situation where even the order of the Chief Justice of India could be challenged before a single judge of the High Court invoking the Article 226 of the Constitution of India or before an arbitral tribunal, consisting not necessarily of legally trained persons and their coming to a conclusion that their constitution by the Chief Justice was not warranted in the absence of an arbitration agreement or in the absence of a dispute in terms of the agreement.

32. Section 8 of the Arbitration Act, 1940 enabled the court when approached in that behalf to supply an omission. Section 20 of that Act enabled the court to compel the parties to produce the arbitration agreement and then to appoint an arbitrator for adjudicating on the disputes. It may be possible to say that Section 11(6) of the Act combines both the powers. May be, it is more in consonance with Section 8 of the Old Act. But to call the power merely as an administrative one, does not appear to be warranted in the context of the relevant provisions of the Act. First of all, the power is conferred not on an administrative authority, but on a judicial authority, the highest judicial authority in the State or in the country. No doubt, such authorities also perform administrative functions. An appointment of an arbitral tribunal in terms of Section 11 of the Act, is based on a power derived from a statute and the statute itself prescribes the conditions that should exist for the exercise of that power. In the process of exercise of that power, obviously the parties would have the right of being heard and when the existence of the conditions for the exercise of the power are found on accepting or overruling the contentions of one of the parties it necessarily amounts to an order, judicial in nature, having finality subject to any available judicial challenge as envisaged by the Act or any other statute or the Constitution. Looked at from that point of view also, it seems to be appropriate to hold that the Chief Justice exercises a judicial power while appointing an arbitrator.

33. In **Attorney General of the Gambia** v. **Pierre Sarr N'jie** 1961 App Cas 617 the question arose whether the power to judge an alleged professional misconduct could be delegated to a Deputy Judge by the Chief Justice who had the power to suspend any barrister or solicitor from

practicing within the jurisdiction of the court. Under Section 7 of the Supreme Court Ordinance of the Gambia, the Deputy Judge could exercise "all the judicial powers of the Judge of the Supreme Court". The question was, whether the taking of disciplinary action for professional misconduct; was a judicial power or an administrative power. The Judicial Committee of the Privy Council held that a judge exercises judicial powers not only when he is deciding suits between the parties but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge. By way of illustration, Lord Dining stated "Suppose, for instance, that a judge finding that a legal practitioner had been guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see **Myers** v. **Elman**, per Lord Wright). That would be an exercise of the judicial powers of the judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off."

34. The above example gives an indication that it is the nature of the power that is relevant and not the mode of exercise. In **Shankarlal Aggarwal and Ors.** v. **Shankar Lal Poddar and Ors.** MANU/SC/0026/1963 : [1964]1SCR717 this Court was dealing with the question whether the order of the Company Judge confirming a sale was merely an administrative order passed in the course of the administration of the assets of the company under liquidation and, therefore, not a judicial order subject to appeal. This Court held that the order of the Company Judge confirming the sale was not an administrative but a judicial order. Their Lordships stated thus:

"It is not correct to say that every order of the Court, merely for the reason that it is passed in the course of the realization of the assets of the Company, must always be treated merely as an administrative one. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely an administrative order, for before confirming the sale the court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realization.

It is not possible to formulate a definition which would satisfactorily distinguish between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a court is not decisive of the question whether the act or decision is administrative or judicial. An administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective consideration, it would be a judicial decision. It has sometimes been said that the essence of a judicial proceeding or of a judicial order is that there would be two parties and a lis between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. No doubt it would not be possible to describe an order passed deciding a lis between the authority that is not a judicial order but it does not follow that the absence of a lis necessarily negatives the order being judicial. Even viewed from this narrow standpoint, it is possible to hold that there was a lis before the

Company Judge which he decided by passing the order. On the one hand were the claims of the highest bidder who put forward the contention that he had satisfied the requirements laid down for the acceptance of his bid and was consequently entitled to have the sale in his favour confirmed, particularly so as he was supported in this behalf by the Official Liquidators. On the other hand, there was the first respondent and the large body of unsecured creditors whose interests, even if they were not represented by the first respondent, the court was bound to protect. If the sale of which confirmation was sought was characterized by any deviation subject to which the sale was directed to be held or even otherwise was for a gross undervalue in the sense that very much more could reasonably be expected to be obtained if the sale were properly held, in view of the figure of Rs. 3,37,000/- which had been bid by Nandlal Agarwalla it would be duty of the court to refuse the confirmation in the interests of the general body of creditors, and this was the submission made by the first respondent. There were thus two points of view presented to the court by two contending parties or interests and the court was called upon to decide between them, and the decision vitally affected the rights of the parties to property. Under the circumstances, the order of the Company Judge was a judicial order and not administrative one, and was therefore not inherently incapable of being brought up in appeal."

35. Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existence of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the rival parties, is called upon to decide between them and the decision vitally affects the rights of the parties in that, either the claim for appointing an arbitral tribunal leading to an award is denied to a party or the claim to have an arbitration proceeding set in motion for entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to opposite side before appointing an arbitrator.

36. It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or an arbitral tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the concerned party had certified that he had no further claims against the other contracting party. In other words, there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the concerned arbitration clause at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by **Ridge v. Baldwin** [(1963) 2 ALL

ER 66] are well known therefore, to the extent, **Konkan Railway** (supra) states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable.

37. It is true that finality under Section 11 (7) of the Act is attached only to a decision of the Chief Justice on a matter entrusted by sub-Section (4) or sub-Section (5) or sub-Section (6) of that Section. Sub-Section (4) deals with the existence of an appointment procedure and the failure of a party to appoint the arbitrator within 30 days from the receipt of a request to do so from the other party or when the two appointed arbitrators fail to agree on the presiding arbitrator within 30 days of their appointment. Sub-Section (5) deals with the parties failing to agree in nominating a sole arbitrator within 30 days of the request in that behalf made by one of the parties to the arbitration agreement and sub-Section (6) deals with the Chief Justice appointing an arbitrator or an arbitral tribunal when the party or the two arbitrators or a person including an institution entrusted with the function, fails to perform the same. The finality, at first blush, could be said to be only on the decision on these matters. But the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the applicant before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the concerned State. therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the requirements of sub-Section (4), sub-Section (5) or sub-Section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator. It is difficult to understand the finality to referred to in Section 11(7) as excluding the decision on his competence and the locus standi of the party who seeks to invoke his jurisdiction to appoint an arbitrator. Viewed from that angle, the decision on all these aspects rendered by the Chief Justice would attain finality and it is obvious that the decision on these aspects could be taken only after notice to the parties and after hearing them.

38. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act.

For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded

, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal.<mpara>

39. An aspect that requires to be considered at this stage is the question whether the Chief Justice of the High Court or the Chief Justice of India can designate a non-judicial body or authority to exercise the power under Section 11(6) of the Act. We have already held that, obviously, the legislature did not want to confer the power on the Court as defined in the Act, namely, the District Court, and wanted to confer the power on the Chief Justices of the High Courts and on the Chief Justice of India. Taking note of Section 5 of the Act and the finality attached by Section 11 (7) of the Act to his order and the conclusion we have arrived at that the adjudication is judicial in nature, it is obvious that no person other than a Judge and no non-judicial body can be designated for entertaining an application for appointing an arbitrator under Section 11(6) of the Act or for appointing an arbitrator. In our dispensation, judicial powers are to be exercised by the judicial authorities and not by non-judicial authorities. This scheme cannot be taken to have been given the go-by by the provisions in the Act in the light of what we have discussed earlier. therefore, what the Chief Justice can do under Section 11(6) of the Act is to seek the help of a non-judicial body to point out a suitable person as an arbitrator in the context of Section 11(8) of the Act and on getting the necessary information, if it is acceptable, to name that person as the arbitrator or the set of persons as the arbitral tribunal.

40. Then the question is whether the Chief Justice of the High Court can designate a district judge to perform the functions under Section 11(6) of the Act. We have seen the definition of 'Court' in the Act. We have reasoned that the intention of the legislature was not to entrust the duty of appointing an arbitrator to the District Court. Since the intention of the statute was to entrust the power to the highest judicial authorities in the State and in the country, we have no hesitation in holding that the Chief Justice cannot designate a district judge to perform the functions under Section 11(6) of the Act. This restriction on the power of the Chief Justice on designating a district judge or a non-judicial authority flows from the scheme of the Act.

41. In our dispensation of justice, especially in respect of matters entrusted to the ordinary hierarchy of courts or judicial authorities, the duty would normally be performed by a judicial authority according to the normal procedure of that court or of that authority. When the Chief Justice of the High Court is entrusted with the power, he would be entitled to designate another judge of the High Court for exercising that power. Similarly, the Chief Justice of India would be in a position to designate another judge of the Supreme Court to exercise the power under Section 11(6) of the Act. When so entrusted with the right to exercise such a power, the judge of the High Court and the judge of the Supreme Court would be exercising the power vested in the Chief Justice of the High Court or in the Chief Justice of India. therefore, we clarify that the Chief Justice of a High Court can delegate the function under Section 11(6) of the Act to a judge of that court and he would actually exercise the power of the Chief Justice conferred under Section 11(6) of the Act. The position would be the same when the Chief Justice of India delegates the power to another judge of the Supreme Court and he exercises that power as designated by the Chief Justice of India.

42. In this context, it has also to be noticed that there is an ocean of difference between an institution which has no judicial functions and an authority or person who is already exercising judicial power in his capacity as a judicial authority. therefore, only a judge of the Supreme Court or a judge of the High Court could respectively be equated with the Chief Justice of India or the Chief Justice of the High Court while exercising power under Section 11(6) of the Act as designated by the Chief Justice. A non-judicial body or institution cannot be equated with a Judge of the High Court or a Judge of the Supreme Court and it has to be held that the designation contemplated by Section 11(6) of the Act is not a designation to an institution that is incompetent to perform judicial functions. Under our dispensation a non-judicial authority cannot exercise judicial powers.

43. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution of India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.

44. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

45. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every

order made by the arbitral tribunal. therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

46. We, therefore, sum up our conclusions as follows:

i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.

(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators.

The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in **Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. MANU/SC/0653/2000 :** (2000)2SCC388 and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.

(xii) The decision in **Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. MANU/SC/0653/2000 :** (2000)2SCC388 is overruled.

47. The individual appeals will be posted before the appropriate bench for being disposed of in the light of the principles settled by this decision.

C.K. Thakker, J.

48. I have had the benefit of going through the judgment prepared by my learned brother P.K. Balasubramanyan ('majority judgment' for short). I, however, express my inability to agree with the majority judgment on the question as to the nature of function performed by the Chief Justice of the High Court/Chief Justice of India or 'any person or institution designated by him' under Sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996.

49. The concept of arbitration is not unknown to India. In good old days, disputes between private individuals used to be placed before *Panchas* and *Panchayats*. Likewise, commercial matters were decided by *Mahajans* and Chambers. Formal arbitration proceedings, however, came into existence after Britishers started commercial activities in India. The provisions relating to arbitration were found in the Code of civil Procedure, 1859 (Act VIII of 1859) which was repealed by Act X of 1877. A full-fledged law pertaining to arbitration in India was the Arbitration Act, 1899. A consolidated and amended law relating to arbitration was passed in 1940, known as the Arbitration Act, 1940 (Act X 1940).

50. As has been said, protracted, time consuming, atrociously expensive and complex court procedure impelled the commercial-world to an alternative, less formal, more effective and speedy mode of resolution of disputes by a Judge of choice of the parties which culminated into passing of an Arbitration Act. Experience, however, belied expectations. Proceedings became highly technical and thoroughly complicated. The provisions of the Act made 'lawyers laugh and litigants weep'. Representations were made from all quarters of the society to amend the law by making it more responsive to contemporary requirements. Moreover, apart from arbitration, conciliation has been getting momentum and worldwide recognition as an effective instrument of settlement of disputes. There was no composite statute dealing with all matters relating to arbitration and conciliation.

51. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law in 1985 on International Commercial Arbitration. The General Assembly of the United Nations recommended member - States to give due consideration to the Model Law to have uniformity in arbitration procedure which resulted in passing of the Arbitration and Conciliation Act, 1996. The Act is a complete Code in itself and consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The Preamble expressly refers to UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Conciliation Rules.

52. Over and above 'Preliminary' (Section 1), the Act is in four parts. Part I (Sections 2 to 43) deals with Arbitration. Part II (Sections 44 to 60) contains provisions relating to Enforcement of Foreign Awards. While Part III (Section 61 to 81) provides for Conciliation, Part IV (Sections 82 to 86) relates to Supplementary Provisions. In these cases, we are mainly concerned with Part I.

53. General provisions are found in Chapter I (Sections 2 to 6). Section 2(b) defines 'arbitration agreement' as referred to in Section 7. 'Arbitral tribunal' means a sole arbitrator or a panel of arbitrators - Section 2 (d). Clause (h) defines 'party' as a party to arbitration agreement.

54. Section 5 restricts judicial intervention. The said section is material and reads thus ;

"5. **Extent of judicial intervention.** -Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

55. Chapter II deals with 'Arbitration agreement'. Section 7 declares that by an arbitration agreement, the parties may submit to arbitration all or certain disputes between them. Such agreement must be in writing. Section 8 confers power on a judicial authority to refer the dispute to arbitration in certain cases. Section 9 enables the court to make interim orders.

56. Chapter III provides for composition of Arbitral Tribunal. Section 10 allows parties to determine the number of arbitrators but declares that 'such number shall not be an even number'. Section 11 relates to appointment of arbitrators. It is relevant and material and may be quoted *in extenso*;

"11. **Appointment of arbitrators.** - (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in Sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in Sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment; the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in Sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, -

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by Sub-section (4) or Sub-section (5) or Sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to -

(a) any qualification required for the arbitrator by the agreement of the parties, and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by Sub-section (4) or Sub-section (5) or Sub-section (6) to him.

(11) Where more than one request has been made under Sub-section (4) or Sub-section (5) or Sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or

his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12)(a) Where the matters referred to in Sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in Sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal civil Court referred to, in Clause (e) of Sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

57. Section 12 requires the arbitrator to disclose the disqualification, if any. It also permits parties to challenge such arbitrator. Whereas Section 13 lays down procedure for challenge, Sections 14 and 15 deal with special situations.

58. Chapter IV relates to jurisdiction of Arbitral Tribunals. Section 16 is another important provision and confers power on the Arbitral Tribunal to rule on its own jurisdiction. It reads thus ;

"16. **Competence of arbitral tribunal to rule on its jurisdiction.**-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose. -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the submission clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3) admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34. "

59. Chapters V and VI relate to 'Conduct of Arbitral Proceedings' and 'Making of Arbitral Award and Termination of Proceedings'. Chapters VII, VIII and IX provide for 'Recourse Against Arbitral Award', 'Finality and Enforcement of Arbitral Awards' and 'Appeals' respectively. Chapter X covers 'Miscellaneous' matters.

60. The controversy in the present group of matters centers round interpretation of Section 11 and the nature of function performed by the Chief Justice under Sub-section (6) thereof. According to one view, it is administrative, while according to the other view, it is judicial or quasi-judicial.

61. I have already quoted Section 11. It provides for appointment of arbitrators. Sub-sections (1) to (3) which confer power on parties to arbitration agreement to appoint arbitrators present no difficulty. Sub-sections (4) to (6) deal with cases where there is failure by the parties to appoint an arbitrator or arbitrators or default by two arbitrators in appointing the third arbitrator. The Act in such eventuality empowers the Chief Justice or any person or institution designated by him to take necessary steps for securing the appointment. Sub-section (7) of Section 11 makes the 'decision' of the Chief Justice 'final'. Sub-section (8) requires the Chief Justice or the person or institution designated by him in appointing an arbitrator to have due regard to qualifications required of the arbitrator by the agreement of the parties as also other considerations as are likely to secure the appointment of independent and impartial arbitrator. Sub-section (10) enables the Chief Justice to frame a scheme dealing with matters entrusted to him by Sub-sections (4) to (6).

62. Section 11 came to be interpreted by this Court in few cases. In *Sundaram Finance Ltd. v. NEPC India Ltd. MANU/SC/0012/1999 :* [1999]1SCR89, a two Judge Bench was called upon to consider whether under Section 9 of the Act, the 'court' had jurisdiction to pass interim orders before arbitral proceedings commenced and before an arbitrator was appointed. Considering the scope of the said provision, this Court held that the 'court' had no jurisdiction to entertain application under Section 9 before initiation of arbitration proceedings.

63. The Court, however, taking note of UNCITRAL Model Law, observed:

"Under the 1996 Act, appointment of Arbitrator(s) is made as per the provision of *Section 11 which does not require the Court to pass a judicial order appointing Arbitrator(s)"*.

(emphasis supplied)

64. It is, no doubt, true that the question about nature of function to be performed by the Chief Justice under Section 11 did not *strictly* arise in that case and, hence, the above observation could not be termed as *'ratio'*. As I will presently show, in a subsequent case, it was submitted that the statement was in the nature of 'passing observation' or 'obiter'.

65. In Ador Sami Private Ltd. v. Peekay Holdings Ltd. and Ors., MANU/SC/0506/1999 : AIR1999SC3246, a direct question arose before a two-Judge Bench. There, an order passed by the Chief Justice under Sub-section (6) of Section 11 of the Act was challenged in this Court under

Article 136 of the Constitution. The question before the Court was whether a special leave petition was maintainable. Reproducing the observation in *Sundaram Finance Ltd.*, the Court held that the order passed by the Chief Justice under Section 11 of the Act was administrative in nature. Referring to a decision of the Constitution Bench in *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs and Ors. MANU/SC/0094/1964 :* , 1964CriLJ234, the Court observed that it is well settled that a petition under Article 136 of the Constitution would lie against an order made by a Court or Tribunal. Since the Chief Justice or his designate acts under Section 11(6) of the Act in administrative capacity, the order could not be said to have been passed by a court or by a tribunal having trappings of a court. Special leave petition was hence held not maintainable.

66. In *Konkan Railway Corporation Ltd. v. Mehul Construction Co. (Konkan Railway Corporation Ltd. I)MANU/SC/0523/2000 :* AIR2000SC2821, the point was again considered by a three-Judge Bench. It was observed that an important question had arisen for consideration of the Court as to the nature of the order passed by the Chief Justice under Section 11(6) of the Act and the remedy available to the aggrieved party against such order. Referring to *Sundaram Finance Ltd. and Ador Samia Private Ltd.*, the Court held that the function performed by the Chief Justice was essentially to aid the constitution of Arbitral Tribunal. The Legislature had consciously chosen to confer the power on the 'Chief Justice' and not on the 'Court'. The order passed by the Chief Justice or his nominee was administrative order. The Court considered UNCITRAL Model Law of International Commercial Arbitration, the old Act of 1940 and the relevant provisions of 1996 Act and observed that the sole objective was to resolve disputes as expeditiously as possible so that trade and commerce are not adversely affected on account of litigation. The Statement of Objects and Reasons of the Act clearly enunciated the object of the legislation that it was intended to minimize the supervisory role of the court in arbitral process.

67. According to the Court, when the matter is placed before the Chief Justice or his nominee under Section 11 of the Act, it is imperative for the Chief Justice or his nominee to bear in mind the legislative intent. The Chief Justice or his nominee is not expected to entertain contentious issues between the parties and decide them. Section 16 of the Act empowers the Arbitral Tribunal to rule on its own jurisdiction. Combined reading of Sections 11 and 16 make it crystal clear that questions as to qualifications, independence and impartiality of Arbitral Tribunal as also of the jurisdiction of the tribunal can be raised before the arbitrator who will decide them. The function of the Chief Justice or his nominee is just to appoint an arbitrator without wasting time. The nature of the function to be performed by the Chief Justice is essentially to aid the constitution of the tribunal and is administrative. If the function is held to be judicial or quasi-judicial, the order passed by the Chief Justice or his nominee would be amenable to judicial intervention and a reluctant litigant would attempt to frustrate the object of the Act by adopting dilatory tactics by approaching a court of law against an appointment of arbitrator. Such an interpretation should be avoided to achieve the basic objective for which the Act has been enacted.

68. In *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd. (Konkan Railway Corporation Ltd. II)MANU/SC/0653/2000 :* , (2000)2SCC388, a similar question had come for consideration before a two-Judge Bench. The attention of the Court was invited to earlier decisions including a three-Judge Bench decision in *Konkan Railway Corporation Ltd. I.* It was, however, argued by the learned Solicitor General that once a contention is raised that the matter cannot be

referred to arbitration, the issue has to be decided by the Chief Justice or his nominee and such an order cannot be characterized as administrative. When the attention of the learned Solicitor General was invited to *Sundarm Finance Ltd.*, submitted that the question about nature of the order under Section 11 was never raised before the Court and the observation that the order passed by the Chief Justice or his nominee under Section 11 was administrative was merely 'passing observation' or 'obiter'. In *Ador Samia*, special leave petition under Article 136 of the Constitution was dismissed merely relying upon observation in *Sundaram Finance Ltd.* It was no doubt true that in *Konkan Railway Corporation Ltd.* , a three-Judge Bench held that an order passed under Section 11 of the Act by the Chief Justice or his nominee was administrative in nature but it required reconsideration in view of several factors. It was submitted that the Act did not take away the power of the court to decide preliminary issues; the Chief Justice or his nominee was bound to consider whether there was an arbitration agreement, or whether an arbitration clause existed or the matters were 'excepted matters'. Again, if the order of the Chief Justice or his nominee would be treated as administrative, it could be challenged before a High Court under Article 226 of the Constitution, then before a Division Bench in Letters Patent Appeal/Intra-court Appeal and then before the Supreme Court under Article 136 of the Constitution which would further delay arbitration proceedings. It was, therefore, necessary to reconsider the law laid down in *Konkan Railway Corporation Ltd. I.*

69. In view of the contentions raised before a two-Judge Bench, an order was passed directing the Registry to place the papers before Hon. the Chief Justice for passing appropriate orders. *Konkan Railway Corporation Ltd. I* was thus placed before a Constitution Bench of five Judges. The Constitution Bench, MANU/SC/0053/2002 : [2002]1SCR728 considered the relevant provisions of the Act and the scheme framed by the Chief Justice of India known as "The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996".

70. Discussing the Statement of Objects and Reasons and considering the relevant provisions of the Act, the Court held that the only function the Chief Justice or his designate was required to perform was to fill the gap left by a party to the arbitration agreement or two arbitrators appointed by the parties and nominate an arbitrator or umpire so that Arbitral Tribunal is expeditiously constituted and arbitration proceedings commenced. According to the Constitution Bench, the order passed by the Chief Justice or his designate under Section 11 nominating an arbitrator could not be said to be 'adjudicatory order' and the Chief Justice or his designate could not be described as 'Tribunal'. Such an order, therefore, could not be challenged under Article 136 of the Constitution. The decision of three-Judge Bench in *Konkan Railway Corporation Ltd. I* was thus affirmed.

71. The Court observed:

"Section 11 of the Act deals with the appointment of arbitrators. It provides that the parties are free to agree on a procedure for appointing an arbitrator or arbitrators. In the event of there being no agreement in regard to such procedure, in an arbitration by three arbitrators each party is required to appoint one arbitrator and the two arbitrators so appointed must appoint the third arbitrator. If a party fails to appoint an arbitrator within thirty days from the request to do so by the other party or the two arbitrators appointed by the parties fail to agree on a third arbitrator within thirty days of their appointment, a party may request the Chief Justice to nominate an arbitrator and the

nomination shall be made by the Chief Justice or any person or institution designated by him. If the parties have not agreed on a procedure for appointing an arbitrator in an arbitration with a sole arbitrator and the parties fail to agree on an arbitrator within thirty days from receipt of a request to one party by the other party, the nomination shall be made on the request of a party by the Chief Justice or his designate. Where an appointment procedure has been agreed upon by the parties but a party fails to act as required by that procedure or the parties, or the two arbitrators appointed by them, fail to reach the agreement expected of them under that procedure or a person or institution fails to perform the function entrusted to him or it under that procedure, a party may request the Chief Justice or his designate to nominate an arbitrator, unless the appointment procedure provides other means in this behalf. The decision of the Chief Justice or his designate is final. In nominating an arbitrator the Chief Justice or his designate must have regard to the qualifications required of the arbitrator in the agreement between the parties and to other considerations that will secure the nomination of an independent and impartial arbitrator.

There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word 'decision' is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated.

As we see it, the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated.

It might be that though the Chief Justice or his designate might have taken all due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about that arbitrator's independence or impartiality. In that event it would be open to that party to challenge the arbitrator under Section 12, adopting the procedure under Section 13. There is no reason whatever to conclude that the grounds for challenge under Section 13 are not available only because the arbitrator has been nominated by the Chief Justice or his designate under Section 11.

It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the arbitral tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the arbitral tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the arbitral tribunal may rule on its own jurisdiction. That the arbitral tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the arbitral tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned Counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the arbitral tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."

72. Regarding the scheme, the Court observed that such scheme could not govern the Act. Since Section 11 did not contain any element of 'adjudication' and the function of the Chief Justice or his designate was purely administrative, there was no question of issuing notice to affected persons or to afford opportunity of hearing. The scheme, however, contained Clause 7 (Notice to affected persons) and expressly provided for issuance of notice to persons likely to be affected thereby. It thus went 'beyond terms of Section 11' and was, therefore, bad.

73. The Court, in this connection, observed ;

"The schemes made by the Chief Justices under Section 11 cannot govern the interpretation of Section 11. If the schemes, as drawn, go beyond the terms of Section 11 they are bad and have to be amended. To the extent that The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, goes beyond Section 11 by requiring, in Clause 7, the service of a notice upon the other party to the arbitration agreement to show cause why the nomination of an arbitrator, as requested, should not be made, it is bad and must be amended. The other party needs to be given notice of the request only so that it may know of it and it may, if it so chooses, assist the Chief Justice or his designate in the nomination of an arbitrator."

74. The point was thus concluded by a Constitution Bench of five Judges wherein it was held that the function performed by the Chief Justice or his designate was administrative and did not contain any adjudicatory process. The order passed by the Chief Justice or his designate could not be challenged before this Court under Article 136 of the Constitution.

75. In the light of the above legal position, when these matters were placed before a Constitution Bench of five Judges on July 19, 2005, the following order was passed :

"After hearing the learned Counsel for the parties, we are of the opinion that the cases may call for re-consideration of the decision of this Court in *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. MANU/SC/0053/2002 :* , [2002]1SCR728, in particular the view taken in paras 18 to 21 thereof, which is by a Constitution Bench.

Be placed before a seven-Judge Bench."

76. That is how, the matters have been placed before us.

77. We have heard the learned Counsel for the parties at considerable length. It was urged by Mr. Venugopal, Senior Advocate that when the Chief Justice is requested to make an appointment of an arbitrator under Sub-section (6) of Section 11 of the Act, the Chief Justice must apply his mind and satisfy himself about the fulfillment of conditions for the exercise of power for appointment of an arbitrator. The Chief Justice for that purpose, is bound to decide certain preliminary or 'jurisdictional' facts before taking a decision of appointment of arbitrator. He must be convinced that there is an 'arbitration agreement' under Section 7 of the Act, the other party has refused to make an appointment, or parties or two arbitrators have failed to reach an agreement or a person or institution has failed to perform the function entrusted to him or it. Moreover, the Chief Justice in appointing an arbitrator 'shall have regard to' qualifications, independence and impartiality of the arbitrator. The Chief Justice, after considering all those factors will come to a conclusion whether the provisions of law have been complied with and only then he may make such order. The issues arise before the Chief Justice are thus contentious issues and require adjudication. Such adjudication affects rights of parties. The 'duty to act judicially' is, therefore, implicit and the decision is judicial or quasi-judicial.

78. I am unable to uphold the argument. In my view, it is based on the misconception that wherever a statute requires certain matters to be taken into account and the authority is obliged to apply its mind to those considerations, the action, decision or adjudication must be held judicial or quasi-judicial. With respect, this is not the legal position.

79. It is settled law that in several cases, an appropriate authority may have to consider the circumstances laid down in the Act, apply its mind and then to take a decision. Such decision may affect one or the other party and may have far reaching consequences. But from that it cannot be concluded that the decision is judicial or quasi-judicial and not administrative.

80. Before more than fifty years, in *State of Madras v. C.P. Sarthy MANU/SC/0054/1952 :* , (1953)ILLJ174SC, the Constitution Bench of this Court, while interpreting the provisions of Section 10 of the Industrial Disputes Act, 1947 held that the action of the Government of referring or refusing to refer the matter for an adjudication to Labour Court or Industrial Tribunal is administrative.

81. The Court stated:

This is, however, not to say that the Government will be justified in making a reference under Section 10(1) without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishments engaged in a particular industry. It is also desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference. But *it must be remembered that in making a reference under Section 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character.* The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it

was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters.

(emphasis supplied)

82. Now, it cannot be disputed that the action of the Government (of referring the dispute or refusing to refer it) certainly affects one party or the other. Still an action which is otherwise administrative in nature does not change its character and remains as it is irrespective of the consequences likely to ensue or the effect of decision on parties to such dispute. [See also *Prem Kakar v. State of Haryana MANU/SC/0446/1976 :* , [1976]3SCR1010 ; *Sultan Singh v. State of Haryana MANU/SC/0271/1996 :* , (1996)ILLJ879SC ; *Secretary Indian Tea Association v. Ajit Kumar Barat MANU/SC/0081/2000 :* , (2000)ILLJ809SC]

83. Several similar actions having far reaching consequences have been held administrative, for instance, an order of acquisition or requisition of property; an order making an appointment to a civil post, an order granting sanction to prosecute a public servant; etc.

84. It cannot be gainsaid that there must be an 'arbitration agreement' between the parties. It also cannot be denied that there must be default or failure on the part of one party to appoint an arbitrator. But that will not make the function performed by the Chief Justice as judicial or quasi-judicial. Chapter II (Arbitration Agreement) precedes Chapter III (Composition of Arbitral Tribunal). therefore, when the question as to composition of Arbitral Tribunal and appointment of an arbitrator comes up for consideration, it can safely be assumed that there is an arbitration agreement, inasmuch as it is in consonance with the legislative scheme and the question as to the appointment of arbitrator arises only in view of such agreement. Moreover, before exercising the power to appoint an arbitrator, the Chief Justice must peruse the relevant record relating to an agreement and failure by one party in making an appointment which would enable him to act.

There is, however, no doubt in my mind that at that stage, the satisfaction required is merely of *prima facie* nature and the Chief Justice does not decide *lis* nor contentious issues between the parties. Section 11 neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters.

85. The Law Commission, in 176th Report on Arbitration and Conciliation (Amendment) Bill, 2001, after referring to the relevant Rules and legal opinion, stated:

It is, therefore, clear that the ICC Rules and the opinion of jurists support the view that at the stage of Section 11, it is permissible to decide preliminary issues. There are considerable advantages if such issues are decided at that stage, inasmuch as a decision at that stage saves time and expense

for the parties. As pointed out by Fouchard and others, there is no question of an 'automatic appointment' of arbitrators, whenever an application is made for an appointment of arbitrators. *The appointing authority normally considers if a case is made out for appointment of arbitrators and such a decision can be taken on undisputed facts available at that stage.*

(emphasis supplied)

86. As Fouchard, Gaillard, Goldman on International Commercial Arbitration (1994 edn.); (para 854) pithily put it; "the Court should only verity that *the clause is not patently void*, as it would be unreasonable to require it to appoint an arbitrator where there is no indication that an arbitration clause exists. The Court should not be seen to automatically appoint arbitrators in cases where the arbitration clearly has no contractual basis and the award has no chance of being recognized in any jurisdiction".

(emphasis supplied)

87. At the stage of exercising powers under Sub-section (6) of Section 11, the Chief Justice is bound to apply his mind to allegations and counter-allegations of the parties and will form an opinion on the available material. Thus, in *Wellington Associates Ltd. v. Kirit Mehta MANU/SC/0232/2000 :* , AIR2000SC1379 at the stage of Section 11, it was argued that the relevant clause relied upon by the applicant was not an 'arbitration clause'. It merely permitted parties to agree, in future, to go to arbitration.

88. Upholding the objection, the Court observed that the clause was not an arbitration clause and the application was not maintainable. It held that Section 16 did not take away the jurisdiction of the Chief Justice to decide the question of 'existence' of the arbitration agreement. The said section did not declare that except the Arbitral Tribunal, none else could determine such question. "Merely because the new Act permits the arbitrator to decide this question, it does not necessarily follow that at the stage of Section 11, the Chief Justice of India or his designate cannot decide the question as to the existence of the arbitration clause." [See also *Malaysian Airlines System v. Stic Travels (P) Ltd. MANU/SC/0729/2000 :* , 2000(7)SCALE670 ; *Nimeet Resources INC v. Essar Steels Ltd.*; (2000) SCC 497; *Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr. MANU/SC/0488/2005 :* AIR2005SC3766].

89. It was then argued that Sub-section (7) of Section 11 empowers the Chief Justice to decide the question and uses the expression 'decision' which is significant. Whenever a statute confers power on an authority to pass an order or to take a decision, it must be held that the function is judicial or quasi-judicial and duty to act judicially must be inferred.

90. Even this contention is not well founded. Sub-section (7), no doubt, uses the term 'decision'. But as I have already observed earlier, the Chief Justice forms *prima facie* opinion as to the fulfillment of conditions specified in Sub-section (6). The decision neither contemplates adjudication of *lis* between two or more parties nor resolves controversial and contentious issues. It merely requires the Chief Justice to take an appropriate action keeping in view the provisions of Part II and Sub-sections (1), (4) and (5) of Section 11. Regarding matters which the Chief Justice is expected to consider, such as qualification, independence and impartiality of arbitrator, they are

statutory provisions and the Chief Justice is obliged to keep them in view as per mandate of the Legislature. The said fact, however, does not make the function of the Chief Justice judicial or quasi-judicial.

91. It was also submitted that there is an important provision which cannot be lost sight of and it is the finality of decision rendered by the Chief Justice. Sub-section (7) expressly declares that the decision of the Chief Justice under Sub-section (6) of Section 11 is 'final'. It was submitted that in view of finality attached to the order passed by the Chief Justice, the order passed by him cannot be made subject-matter of dispute under the Act and all provisions, including Section 16 must be read in conformity with 'finality clause'. For that reason also, the action must be held judicial or quasi-judicial.

92. As to the ambit and scope of Section 16, I will refer to little later, but in my view, finality of an order has nothing to do with the nature of function to be performed by the Chief Justice. Several statutes declare an order passed, decision taken or declaration made by the competent authority 'final' or 'final and conclusive' or 'final and conclusive and is not open to challenge in any court'. This is known as 'statutory finality' and such clauses require to be interpreted in juxta-position of constitutional provisions. As a general rule, no appeal, revision or review lies against an order which has been treated by a statute as 'final'. It may not be challenged by instituting a civil suit in certain cases. But such finality cannot take away the jurisdiction of High Courts or the Supreme Court and judicial review is available against 'final' orders albeit on limited grounds. [*Vide Somvanti v. State of PunjabMANU/SC/0034/1962 :* [1963]2SCR774 ; *Neelima Misra v. Harvinder Kaur Paintal and Ors.* : [1990]2SCR84]

93. But there is another important reason why the function of the Chief Justice under Section 11 should be considered administrative. All the three Sub-sections, (4), (5) and (6) of the said section empower the Chief Justice or 'any person or institution designated by him' to exercise the power of the Chief Justice. No provision similar to the one in hand was present in 1940 Act. Parliament, therefore, has consciously and intentionally made the present arrangement for the first time allowing exercise of the power by the Chief Justice himself or through 'any person or institution designated by him', since the function is administrative in character and is required to be performed on *prima facie* satisfaction under Sub-section (6) of Section 11 of the Act.

94. Now, let us consider Section 16 of the Act. This section is new and did not find place in the old Act of 1940. Sub-section (1) of that section enables the Arbitral Tribunal to rule on its own jurisdiction. It further provides that the jurisdiction of the tribunal includes ruling on any objections with respect to existence or validity of the arbitration agreement. Sub-sections (2), (3) and (4) lay down procedure of raising plea as to the jurisdiction of the Arbitral Tribunal and entertaining such plea. Sub-section (5) mandates that the Arbitral Tribunal 'shall decide' such plea and, 'where the arbitral tribunal takes a decision rejecting the plea, *continue with the arbitration proceedings and make an arbitral award'*. Sub-section (6) is equally important and expressly enacts that a party aggrieved by arbitral award may invoke Section 34 of the Act for setting aside such award. The provision appears to have been made to prevent dilatory tactics and abuse of immediate right to approach the court. If an aggrieved party has right to move the court, it would not have been possible to preclude the court from granting stay or interim relief which would bring the arbitration

proceedings to a grinding halt. The provisions of Section 16 (6) read with Section 5 now make the legal position clear, unambiguous and free from doubt.

95. Section 16 (1) incorporates the well-known doctrine of *Kompetenz - Kompetenz or competence de la competence*. It recognizes and enshrines an important principle that initially and primarily, it is for the Arbitral Tribunal itself to determine whether it has jurisdiction in the matter, subject of course, to ultimate court-control. It is thus a rule of chronological priority. *Kompetenz -Kompetenz* is a widely accepted feature of modern international arbitration, and allows the Arbitral Tribunal to decide its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration-agreement, subject to final review by a competent court of law; i.e. subject to Section 34 of the Act.

96. Chitty on Contract (1999 edn.; p. 802) explains the principle thus:

English law has always taken the view that the arbitral tribunal cannot be the final adjudication of its own jurisdiction. The final decision as per the substantive jurisdiction of the tribunal rests with the Court. However, *there is no reason why the tribunal should not have the power, subject to review by the Court, to rule on its own jurisdiction.* Indeed such a power (often referred to as the principle of "*Kompetenz - Kompetenz*" has been generally recognized in other legal systems. It had also been recognized by English Law before the 1986 Act, but Section 30 of the Act put this on a statutory basis. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its substantive jurisdiction that is, as to (a) whether there is valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Any such ruling may be challenged by any arbitral process of appeal or review or in accordance with the provisions of Part I of the Act, notably by an application under Section 32 or by a challenge to the award under Section 67. (emphasis supplied) Alan Redfern and Martin Hunter in their work on "Law and Practice of International Commercial Arbitration", (4th edn.), (para 5-34) also said:

When any question is raised as to the jurisdiction of the Arbitral Tribunal, a two stage procedure is followed. At the first stage, if one of the parties raises 'one or more pleas concerning the existence, validity or scope of the agreement to arbitrate', the ICC's Court must satisfy itself of the *prima facie* existence of such an agreement [ICC Arbitration Rules 6(2)]. If it is satisfied that such an agreement exists, the ICC's Court must allow the arbitration to proceed so that, at the second stage, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.

To cite Fouchard, Gaillard, Goldman again:

658. - More fundamentally, although the arbitrators' jurisdiction to rule on their own jurisdiction is indeed one of the effects of the arbitration agreement (or even of a *prima facie* arbitration agreement, since the question would not arise in the absence of a *prima facie* arbitration agreement), the basis of that power is neither the arbitration agreement itself, nor the principle of *pacta sunt servanda* under which the arbitration agreement is Binding.

The competence-competence principle enables the arbitral tribunal to continue with the proceedings even where the existence or validity of the arbitration agreement has been challenged by one of the parties for reasons directly affecting the arbitration agreement, and not simply on the basis of allegations that the main contract is void or otherwise ineffective. The principle that the arbitration agreement is autonomous of the main contract is sufficient to resist a claim that the arbitration agreement is void because the contract containing it is invalid, but it does not enable the arbitrators to proceed with the arbitration where the alleged invalidity directly concerns the arbitration agreement. That is a consequence of the competence-competence principle alone. The competence-competence principle also allows arbitrators to determine that an arbitration agreement is invalid and to make an award declaring that they lack jurisdiction without contradicting themselves.

Of course, neither of those effects results from the arbitration agreement. If that were the case, one would immediately be confronted with the "vicious circle" argument put forward by authors opposed to the competence-competence principle: how can an arbitrator, solely on the basis of an arbitration agreement, declare that agreement to be void or even hear a claim to that effect? The answer is simple: the basis for the competence-competence principle lies not in the arbitration agreement, but in the arbitration laws of the country where the arbitration is held and, more generally, in the laws of all countries liable to recognize an award made by arbitrators concerning their own jurisdiction. For example, an international arbitral tribunal sitting in France can properly make an award declaring that it lacks jurisdiction for want of a valid arbitration agreement, because it does so on the basis of French arbitration law, and not on the basis of the arbitration agreement held to be non-existent or invalid. Similarly, it is perfectly logical for the interested party to rely on that award in other jurisdictions, provided that those other jurisdictions also recognize the competence-competence principle. As we shall now see, the legal basis for the principle does not prejudice the subsequent review by the courts, in France or in the country where recognition is sought, of the arbitrators' finding that the arbitration agreement is non-existent or invalid.

659. - Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award. Nevertheless, the competence-competence rule ties in with the idea that there are no grounds for the *prima facie* suspicion that the arbitrators themselves will not be able to reach decisions which are fair and protect the interests of society as well as those of the parties to the dispute. This same philosophy is also found in the context of arbitrability, where it serves as the basis for the case law which entrusts arbitrators with the task of applying rules of public policy (in areas such as antitrust law and the prevention of corruption), subject to subsequent review by the courts.

660. - However, it is important to recognize that the competence-competence rule has a dual function. Like the arbitration agreement, it has or may have both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions. The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, as is widely recognized by international conventions and by recent statutes on international arbitration. However, the negative effect is equally important. It is to allow the

arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award. The principle of competence-competence thus obliges any court hearing a claim concerning the jurisdiction of an arbitral tribunal - regarding, for example, the constitution of the tribunal or the validity of the arbitration agreement - to refrain from hearing substantive argument as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had the opportunity to do so. In that sense, the competence-competence principle is a rule of chronological priority. Taking both of its facets into account, the competence-competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts.

From a practical standpoint, the rule is intended to ensure that a party cannot succeed in delaying the arbitral proceedings by alleging that the arbitration agreement is invalid or non-existent. Such delay is avoided by allowing the arbitrators to rule on this issue themselves, subject to subsequent review by the courts, and by inviting the courts to refrain from intervening until the award has been made. Nevertheless, the interests of parties with legitimate claims concerning the invalidity of the arbitration agreement are not unduly prejudiced, because they will be able to bring those claims before the arbitrators themselves and, should the arbitrators choose to reject them, before the courts thereafter.

The competence-competence rule thus concerns not only the positive, but also the negative effects of the arbitration agreement.

97. In *Renusagar Power Co. Ltd. v. General Electric Co. and Anr. MANU/SC/0001/1984 :* [1985]1SCR432, considering the relevant provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, this Court held that the arbitrator or umpire is competent to *provisionally* decide his own jurisdiction, if the arbitration agreement so provides, however, subject to final determination by a competent court.

The Court stated:

"As explained earlier the scheme that emerges on a combined reading of Sections 3 and 7 of the Foreign Awards Act clearly contemplates that questions of existence, validity or effect (scope) of the arbitration agreement itself, in cases where such agreement is wide enough to include within its ambit such questions, may be decided by the arbitrators initially but their determination is subject to the decision of the Court and such decision of the Court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided in a Section 3 petition or can be had under Section 7 after the award is mane and filed in the Court and is sought to be enforce by a party thereto. In the face of such schemes envisaged by the Foreign Awards Act which governs this case it will be difficult to accept the contention that the arbitrators will have no jurisdiction to decide questions regarding the existence, validity or effect (scope) of the arbitration agreement. *In fact the scheme makes for avoidance of dilatory tactics on the part of any party to such agreement by merely raising a plea of lack of arbitrator's competence -and a frivolous plea at that - and enables the arbitrator to determine the plea one way or the other and if negatived to*

proceed to make his award with the further safeguard that the Court would be in a position to entertain and decide the same plea finally when the award is sought to be enforced."

(emphasis supplied)

98. In the instant case, according to the majority, Section 16(1) only makes explicit what is even otherwise implicit, namely, that the tribunal has the jurisdiction to rule its own jurisdiction, 'including ruling on any objections with respect to the existence or validity of the arbitration agreement.'

99. So far, so good and I am in respectful agreement with these observations. The matter, however, does not rest there. Over and above Sub-section (1), Section 16 contains other sub-sections and in particular, Sub-sections (5) and (6). The former requires the tribunal to continue the proceedings in case it decides that the tribunal has jurisdiction in the matter and the latter provides remedy to the aggrieved party.

100. In my opinion, conjoint reading of Sub-sections (1), (4), (5) and (6) makes it abundantly clear that the provision is 'self-contained' and deals with all cases, even those wherein the plea as to want of jurisdiction has been rejected. As a general rule, such orders are subject to *certiorari* jurisdiction since a court of limited jurisdiction or an inferior tribunal by wrongly interpreting a statutory provision cannot invest itself with the jurisdiction which it otherwise does not possess. But it is always open to a competent Legislature to invest a tribunal of limited jurisdiction with the power to decide or determine *finally* the preliminary or jurisdictional facts on which exercise of its jurisdiction depends. In such cases, the finding recorded by the tribunal cannot be challenged by *certiorari*. *(Vide Ujjam Bai v. State of U.P., MANU/SC/0101/1961 : [1963]1SCR778.*

101. As a general rule, neither in England, nor in India, such jurisdiction is granted on a court of limited jurisdiction or on an inferior tribunal.

102. In *Halsbury's Laws of England, (4th edn. vol. 1; para 56);* it has been stated;

It is possible for an inferior tribunal to be vested with power to determine conclusively questions demarcating the limits of its own jurisdiction. *Such a grant of power must now be regarded as exceptional,* in view of the very restrictive interpretation placed by the courts on statutory formulae purporting to exclude their inherent supervisory jurisdiction, and their reluctance to be precluded by subjectively worded grants of power from determining judicially ascertainable matters delimiting the area of competence of inferior tribunals, especially where the relevant question is one of law.

(emphasis supplied)

103. In fact, one of the points of differentiation between a Crown's Court and a statutory tribunal is that whereas a court has inherent power to decide the question of its own jurisdiction, although as a result of inquiry, it may turn out that it has no jurisdiction to try the suit, the jurisdiction of a tribunal constituted under a statute is strictly confined to the terms of the statute creating it. The existence of preliminary or 'jurisdictional' fact is a *sine qua non* to the assumption of jurisdiction

by a tribunal of limited jurisdiction. If the jurisdictional fact does not exist, the tribunal cannot act. But a Legislature may confer such power on a court of limited jurisdiction or on an inferior tribunal (vide *Ebrahim Aboobaker v. Custodian General MANU/SC/0058/1952 :* [1952]1SCR696 ; Ujjam Bai v. State of U.P., MANU/SC/0101/1961 : [1963]1SCR778 ; *Raja Anand v. State of U.P. MANU/SC/0214/1966 : ,* [1967]1SCR373 ; *Naresh Shridhar Mirazkar v. State of Maharashtra MANU/SC/0044/1966 : ,* [1966]3SCR744 ; *Raza Textiles Ltd. v. I.T.O. MANU/SC/0333/1972 : ,* [1973]87ITR539(SC) ; *Shiv Chander v. Amar Bose MANU/SC/0498/1989 : ,* AIR1990SC325 ; *Shrisht Dhawan v. Shaw Brothers MANU/SC/0295/1992 : ,* AIR1992SC1555 ; *Vatticherubura Village Panchayat v. Nari Venkatarama Deekshithulu MANU/SC/0691/1991 : ,* [1991]2SCR531 ; *Executive Officer, Arthanareswarar Temple v. R. Sathyamoorthy and Ors. MANU/SC/0085/1999 :* [1999]1SCR485].

104. Let us consider the principle in the light of case-law on the point:

105. Keeping in view, the distinction referred to hereinabove, before more than hundred years, in *Queen v. Commissioner of Income Tax* (1888) 21 QB 313: 33 WR 776, Lord Esher, M.R. made the following observations:

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider, what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may in trust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

(emphasis supplied)

106. The above statement of law has been quoted with approval by this Court in several cases. In *Chaube Jagdish Prasad and Anr. v. Ganga Prasad Chaturvedi MANU/SC/0133/1958 :* AIR1959SC492 the Court stated:

"These observations which relate to inferior courts or tribunals with limited jurisdiction show that there are two classes of cases dealing with the power of such a tribunal (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the

preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. *The difference is that in the former case the tribunal has power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists."*

(emphasis supplied)

107. Again, in *Addanki Tiruvenkata Thata Desika Charyulu v. State of Andhra Pradesh and Anr. MANU/SC/0281/1963 :* AIR1964SC807, the Settlement Officer was empowered to decide finally as to whether *inam* village was an '*inam* estate'. It also barred jurisdiction of civil Court from questioning the correctness of the decision.

108. Considering the question as to extent to which the powers of statutory tribunals are 'exclusive', the Constitution Bench after referring to *Commissioner of Income Tax*, stated:

"It is manifest that the answer to the question as to whether any particular case falls under the first or the second of the above categories would depend on the purpose of the statute and its general scheme, taken in conjunction with the scope of the enquiry entrusted to the tribunal set up and other relevant factors."

109. As already indicated by me earlier, Sub-section (1) of Section 16 does not merely enable the Arbitral Tribunal to rule on its own jurisdiction, but requires it to continue arbitral proceedings and pass an arbitral award. [Sub-section (5)] It allows the aggrieved party to make an application for setting aside the award in accordance with Section 34. [Sub-section (6)]. Thus, in my judgment, Section 16 can be described as 'self-contained Code' as regards the challenge to the jurisdiction of Arbitral Tribunal. As per the scheme envisaged by Parliament, once the Arbitral Tribunal rules that it has jurisdiction, it will proceed to decide the matter on merits and make an award. Parliament has also provided the remedy to the aggrieved party by enacting that he may make an application under Section 34 of the Act. In the circumstances, the proceedings cannot be allowed to be arrested or interference permitted during the pendency of arbitration proceedings.

110. It was submitted by Mr. Venugopal that once the Chief Justice is satisfied as to fulfillment of conditions for the exercise of power to appoint an arbitrator and his decision is 'final', it would be impossible to hold that the Arbitral Tribunal can go behind the decision of the Chief Justice and hold otherwise.

111. Mr. Venugopal suggested that Section 16 should be so construed that it would apply only to the cases covered by Sub-sections (2) and (3) of Section 11 and not to Sub-section (6) of Section 11 and the appointment of an arbitrator made by the Chief Justice. By such interpretation, submitted the counsel, both the provisions can be harmoniously interpreted and properly applied.

112. Though the majority observed it to be 'one of the ways of reconciliation', I have my own reservation in accepting it. Firstly, the function of the Court is to interpret the provision as it is and not to amend, alter or substitute by interpretative process. Secondly, it is for the Legislature to make a law applicable to certain situations contemplated by it and the judiciary has no power in

entering into 'legislative wisdom'. Thirdly, as held by me, the 'decision' of the Chief Justice is merely *prima facie* decision and Sub-section (1) of Section 16 confers express power on the Arbitral Tribunal to rule on its own jurisdiction. Fourthly, it provides remedy to deal with situations created by the order passed by the Arbitral Tribunal. Finally and importantly, the situation envisaged by Mr. Venugopal would seldom arise. Normally, when parties agree on the appointment of an arbitrator or arbitrators, there would hardly be any dispute between them on such appointment which may call for intervention by Arbitral Tribunal under Section 16 of the Act. For all these reasons, I am unable to persuade myself to hold that Section 16 has limited application to cases covered by Sub-sections (2) and (3) and not to Sub-section (6) of Section 11 of the Act. The phraseology used by the Legislature does not warrant interpretation sought to be suggested by Mr. Venugopal.

113. It was also submitted that in case of failure on the part of the party to the arbitration agreement in appointing an arbitrator, an application can be made under Section 11 of the Act and arbitrator can be appointed by the Chief Justice or any person or institution designated by him. It was urged that it is settled law that judicial or quasi-judicial power has to be exercised by the authority to whom it is granted and cannot be delegated. As the intention of Parliament was to confer the power on the highest judicial authority in the State and in the country, it cannot be allowed to be exercised by 'any person' or 'institution'.

114. In my view, the submission is ill-conceived and has been made by looking at the matter from an incorrect angle. It first assumes that the function performed by the Chief Justice is judicial or quasi-judicial and then proceeds to examine legal position on that basis and attempts to salvage the situation by urging that the power must be exercised by the Chief Justice. In that case, however, the subsequent part "or any person or institution designated by him" (Chief Justice) would become redundant. Realising the difficulty and keeping in view the principles relating to interpretation of statutes, Mr. Nariman, Senior Advocate submitted that Section 11 provides for dichotomy of functions. It contemplates two situations, and deals with two stages. The first stage consists of consideration of preliminary facts and taking of decision as to whether an arbitrator can be appointed. The second stage allows nomination of an arbitrator. According to Mr. Nariman, the first part is *essentially a judicial function*, which cannot be delegated to 'any person or institution' and at the most, it can be delegated to any Judge of the court. The second stage, however, is more or less *ministerial* and at that stage, the Chief Justice may, if he thinks fit, take help of any person or institution so that proper and fit person is appointed as arbitrator.

115. Though the submission weighed with the majority, I express my inability to agree with it for several reasons. Firstly, as earlier noted, it proceeds on the basis that the function of the Chief Justice is judicial or quasi-judicial, which is not correct. In my view, it is administrative which is apparent from the language of Section 11 and strengthened by Section 16 which enables the Arbitral Tribunal to rule on its own jurisdiction. Secondly, a court of law must give credit to Parliament that it is aware of settled legal position that judicial or quasi-judicial function cannot be delegated and if the function performed by the Chief Justice is judicial or quasi-judicial in nature, keeping in view legal position, it would not have allowed delegation of such function to 'any person or authority'. Thirdly, the majority held, and I am in respectful agreement with it, that the conferment of power on the Chief Justice is not as *'persona designata'*. Hence, the power can

be delegated. Finally, if the legislative intent is the exercise of power by the Chief Justice alone, one fails to understand as to how it can be exercised by a 'colleague' of the Chief Justice as well.

116. In my opinion, acceptance of the submission of Mr. Nariman would result in rewriting of a statute. The scheme of the legislation does not warrant such construction. No court much less the highest court of the country would interpret one provision (Section 11) of an Act of Parliament which would make another provision (Section 16) totally redundant, otiose and nugatory. The Legislature has conferred power on the Chief Justice to appoint an arbitrator in certain contingencies. By the same pen and ink, it allowed the Chief Justice to get that power exercised through 'any person or institution'. It is not open to a court to ignore the legislative mandate by making artificial distinction between the power to be exercised by the Chief Justice or by his 'colleague' and the power to be exercised by other organs though Legislature was quite clear on the exercise of power by the persons and authorities specified therein. I accordingly reject the argument.

117. It was then urged that the principal ground for holding the function of the Chief Justice under Sub-section (6) of Section 11 as administrative was to ensure immediate commencement of arbitration proceedings and speedy disposal of cases. In reality, however, it is likely to cause delay for the simple reason that if the order passed by the Chief Justice of the High Court is treated as judicial or quasi judicial, it can only be challenged in the Supreme Court under Article 136 of the Constitution. So far as the order of the Chief Justice of India is concerned, it is 'final' as no appeal/application/writ petition lies against it. But if such decision is held to be administrative, initially, it can be challenged on the judicial side of the High Court under Article 226 of the Constitution. Normally, under the High Court Rules, such petitions are dealt with and decided by a Single Judge. Hence, the decision of a single Judge can further be challenged by filing a Letters Patent Appeal or Intra-court Appeal under the relevant clause of the Letters Patent applicable to the High Court concerned. Finally, an order passed by the Division Bench can always be made subject-matter of challenge before this Court under Article 136 of the Constitution. Thus, an interpretation sought to be adopted for the purpose of reducing litigation and speedy disposal of proceedings would really result in increase of litigation and delay in disposal of cases.

118. I must admit that once it is held that the order passed by the Chief Justice is administrative, it can be challenged in Writ Petition, Letters Patent Appeal and in Special Leave Petition. But in my opinion, while exercising extraordinary jurisdiction under Article 226 of the Constitution, the High Court would consider the provisions of the Act, such as, limited judicial intervention of Court (Section 5); power of Arbitral Tribunal to rule on its own jurisdiction and the effect of such decision (Section 16). It will also keep in mind the legislative intent of expeditious disposal of proceedings and may not interfere at that stage. Ultimately, having jurisdiction or power to entertain a cause and interference with the order are two different and distinct matters. One does not necessarily result into the other. Hence, in spite of jurisdiction of the High Court, it may not stall arbitration proceedings by allowing the party to raise all objections before the Arbitral Tribunal.

119. In *Laxmikant Revchand Bhojwani and Anr. v. Pratapsingh Mohansingh Pardeshi MANU/SC/0828/1995 :* , (1995)6SCC576, the relevant Rent Act did not provide for further appeal or revision against an order passed by the appellate authority. The aggrieved party, therefore,

invoked supervisory jurisdiction of the High Court. The High Court allowed the petition and set aside the order passed by the appellate court.

120. Quashing the order of the High Court and keeping in view the legislative scheme, this Court said;

"Before parting with this judgment we would like to say that the High Court was not justified in extending its jurisdiction under Article 227 of the Constitution of India in the present case. The Act is a special legislation governing landlord-tenant relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decision of the appellate authority. The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes."

[*See also Koyilerian Janaki and Ors. v. : Rent Controller (Munsiff), Cannore and Ors.;* (2000)9SCC406 ; *Ouseph Mathai and Ors. v. M. Abdul Khadir MANU/SC/0718/2001 :* ; AIR2002SC110]

121. In *State of Orissa and Ors. v. Gokulananda Jena MANU/SC/0510/2003 :* , AIR2003SC4207, relying upon *Konkan Railway Corporation Ltd. II*, the High Court of Orissa held that since the order passed by the Chief Justice was administrative, it was not amenable to writ jurisdiction under Article 226 of the Constitution.

122. Holding that the High Court was wrong and the writ petition under Article 226 was maintainable, a two-Judge Bench stated;

"However, we must notice that in view of Section 16 read with Sections 12 and 13 of the Act as interpreted by the Constitution Bench of this Court in the M/s. Konkan Railway (supra) almost all disputes which could be presently contemplated can be raised and agitated before the Arbitrator appointed by the Designated Judge under Section 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the Arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy is available before the Arbitrator, writ court normally would not entertain a challenge to an order of the Designated Judge made under Section 11(6) of the Act which includes considering the question of jurisdiction of the Arbitrator himself. therefore, *in our view even though a writ petition under Article 226 of the Constitution is available to an aggrieved party, ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself."*

(emphasis supplied)

123. The above observations clearly go to show that though the constitutional remedy cannot be taken away and an aggrieved party can invoke the jurisdiction of the High Court against an order

passed by the Chief Justice, the Writ Court will be circumspect in entertaining a petition and in exercising extraordinary jurisdiction in such cases.

124. As has been held in earlier decisions as also in the majority judgment, the paramount consideration of Parliament in selecting the Chief Justice and in conferring upon him the power to appoint an arbitrator is to ensure complete independence, total impartiality and highest degree of credibility in arbitral process. The Chief Justice of India and Chief Justices of High Courts have been specially chosen considering their constitutional status as Judges of superior courts and their rich experience in dealing with such matters. The office occupied by them would infuse greater confidence in the procedure in appointing an arbitrator and in ensuring fairness, integrity and impartiality.

125. But that does not mean that the Chief Justice is exercising judicial or quasi-judicial power. On the contrary, the Chief Justice, acting in administrative capacity, as distinguished from judicial capacity, is expected to act quickly and expeditiously without being inhibited by procedural requirements and 'technical tortures'. In undertaking the task to appoint an Arbitral Tribunal, he is neither required to consult parties nor arbitrators. The Chief Justice would thus uphold, preserve and protect solemnity of agreement between the parties to arbitration. This practice is prevalent in England and in other countries since several years.

126. I intend to conclude the discussion on this point by quoting the following pertinent observations of Lord Hobhouse in *Palgrave Gold Mining Co. v. McMillan*, 1892 AC 460 : 61 LJ PC 85. Dealing with a similar situation and repelling an identical contention, before more than hundred years, the Law Lord rightly declared;

It is very common in England to invest responsible public officials with the duty of appointing Arbitrators under given circumstances. Such appointment should be made with integrity and impartiality, but *it is new to their Lordships to hear them called judicial acts...*"

(emphasis supplied)

127. The last question relates to issuance of notice to the party likely to be affected and affording an opportunity of hearing before making an order of composition of Arbitral Tribunal. Section 8 of the old Act of 1940 expressly provided written notice and opportunity of hearing in case of appointment of an arbitrator or umpire. The present Act of 1996 neither provides for issuance of notice nor for opportunity of being heard.

128. In exercise of power under Sub-section (10) of Section 11 of the Act, the Chief Justice of India had framed a scheme, known as "The Appointment of Arbitrators by the Chief Justice of India Scheme. 1996". Clause 7 provided for issuing notice to affected persons and read thus;

"**Notice to affected persons.**- Subject to the provisions of paragraph 6, the Chief Justice or the person or the institution designated by him shall direct that a notice of the request be given to all the parties to the arbitration agreement and such other person or persons as may seem to him or is likely to be affected by such request to show cause, within the time specified in the notice, why the appointment of the arbitrator or the measure proposed to be taken should not be made or taken

and such notice shall be accompanied by copies of all documents referred to in paragraph 2 or, as the case may be, by information or clarification, if any, sought under paragraph 5."

129. In *Konkan Railway Corporation Ltd. II*, the Constitution Bench held the function of the Chief Justice of appointment of an arbitrator under Sub-section (6) of Section 11 as administrative and not judicial. In the light of the said finding, the Court proceeded to state that it was not necessary to issue notice to the parties likely to be affected. Section 11 did not provide for such notice. The Court, however, did not stop there. It held that by making a provision for issuance of notice, the scheme went 'beyond the terms of Section 11' and was bad on that ground. A direction was, therefore, issued to amend it.

130. Since the majority judgment has held the function of the Chief Justice as judicial, it ruled that such notice ought to be issued and opportunity of hearing ought to be afforded by the Chief Justice to the person or persons likely to be affected thereby in an appointment of arbitrator.

131. I have, on the other hand, held that the function of the Chief Justice under Sub-section (6) of Section 11 is neither judicial nor quasi-judicial but administrative. It is also true that unlike Section 8 of the 1940 Act, 1996 Act does not envisage issuance of notice to the party likely to be affected by the order of the Chief Justice.

132. The question, however, is : Can such clause in the scheme prepared by the Chief Justice of India be held bad as going 'beyond the terms of Section 11'? The Constitution Bench so held in *Konkan Railway Corporation Ltd. II.* With great respect to the Constitution Bench, such provision cannot be held inconsistent with the parent Act or otherwise bad in law. The Constitution Bench did not assign any reason as to why it was of the view that Clause 7 could not stand or how it violated Section 11. But reference to *Jaswant Sugar Mills Ltd v. Lakshmi Chand MANU/SC/0277/1962 :* , (1963)ILLJ524SC ; *Engineering Mazdoor Sabha v. Hind Cycles Ltd. MANU/SC/0279/1962 :* , (1962)IILLJ760SC and *Associated Cement Companies Ltd. v. P.N. Sharma MANU/SC/0215/1964 :* , (1965)ILLJ433SC clearly shows that since the Constitution Bench was of the view that while performing function of appointing an Arbitral Tribunal the Chief Justice was not acting as a Court or Tribunal, he was not expected to issue notice or afford an opportunity of hearing to the parties likely to be affected by such decision.

133. Once the function of the Chief Justice is held to be administrative, there may not be 'duty to act judicially' on the part of the Chief Justice. Nevertheless in such cases, an administrative authority is required to act 'fairly'. Basic procedural fairness requires such notice to the opposite party. The principle in *R. v. Electricity Commissioners*, or *Ridge v. Baldwin*, may not apply to administrative functions, but another concept which developed at a later stage and accepted in public law field and found place in Administrative Law of 'duty to act fairly' would apply to administrative actions as well.

134. By now, it is well settled that when an administrative action is likely to affect rights of subjects, there would be a duty on the part of the authority to act fairly.

135. In *Pearlberg v. Varity (Inspector of Taxes)*, Lord Pearson said;

"A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles (i.e. the rules of natural justice) in performing those functions unless there is a provision to title contrary. But *where some person or body is entrusted by Parliament that administrative or executive functions there is no presumption that compliance with the principles of natural justice is required although, as 'Parliament is not to be presumed to act unfairly', the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness."* 5

(emphasis supplied)

136. In *R. v. Commissioner for Racial Equality*, Lord Diplock stated;

"Where an act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions."

137. The above principles have been accepted and applied in India also. In the leading case of *Keshav Mills Co. Ltd. v. Union of India MANU/SC/0447/1972 :* [1973]3SCR22, a textile mill was closed down. A Committee was appointed by the Government of India to investigate into the affairs of the mill-company under the Industries (Development and Regulation) Act, 1951. After affording opportunity to the Company, a report was prepared by the Committee and submitted to the Government. A copy of the report, however, was not supplied to the Company. On the basis of the report, the Government took over the management of the Company. The said action was challenged by the company *inter alia* on the ground of violation of principles of natural justice inasmuch as no copy of the report submitted by the Committed to the Government was supplied to the Company nor was hearing afforded before finally deciding to take over the management.

138. Rejecting the contention and observing that no prejudice had been caused to the mill-company, this Court did not interfere with the order.

139. Speaking for the Court, A.K. Mukherjea, J. stated:

"The second question, however, as to what are the principles of natural justice that should regulate an administrative act or order is a much more difficult one to answer. We do not think it either feasible or even desirable to lay down any fixed or rigorous yardstick in this manner. The concept of natural justice cannot be put into a straitjacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. *Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly.*

(emphasis supplied)

140. In *Mohinder Singh Gill v. Chief Election Commission MANU/SC/0209/1977 :* [1978]2SCR272 after considering several cases, Krishna Iyer, J. stated :

"Once we understand the soul of the rule as fairplay in action -and it is so - we must hold that it extends to both the fields. *After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice.* Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet: *Its essence is good conscience in a given situation; nothing more - but nothing less."*

(emphasis supplied)

141. In *Nally Bharat Engineering Co. Ltd. v. State of Bihar MANU/SC/0430/1990 : ,* (1990)IILLJ211SC, the Government, on an application by a dismissed workman transferred his case from one Labour Court to another Labour Court without issuing a notice or giving opportunity to the employer.

142. Setting aside the order and referring to several cases, the Supreme Court invoked the 'acting fairly' doctrine. The Court stated: "Fairness, in our opinion, is a fundamental principle of good administration. It is a rule to ensure the vast power in the modern State is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness, is also a principle to ensure that statutory authority arrives at a just decision either in promoting the interest or affecting the rights of persons. To use the time hallowed phrase that 'justice should not only be done but be seen to be done' is the essence of fairness equally applicable to administrative authorities. *Fairness is thus a prime test for proper and good administration. It has no set form or procedure. It depends upon the facts of each case."*

(emphasis supplied)

143. Quoting the observations of Paul Jackson, the Court said:

"It may be noted that the terms 'fairness of procedure', 'fair play in action', 'duty to act fairly' are perhaps used as alternatives to 'natural justice' without drawing any distinction. But Prof Paul Jackson points out that *'such phrases may sometimes be used to refer not to the obligation to observe the principles of natural justice but, on the contrary, to refer to a standard of behavior which increasingly, the courts require to be followed even in circumstances where the duty to observe natural justice is inapplicable'."*

(emphasis supplied)

de Smith states:

"The principal value of the introduction of the 'duty to act fairly' into the courts' vocabulary has been to assist them to extend the benefit of basic procedural protections to situations where it

would be both confusing to characterize as judicial or even quasi-judicial, the decision-makers' functions, and inappropriate to insist on a procedure analogous to a trial."

['Judicial Review of Administrative Action'; (1995); p. 399]

144. It is thus clear that the doctrine of 'fairness' has become all pervasive. As has been said, the 'acting fairly' doctrine proved useful as a device for evading confusion which prevailed in the past. "The courts now have two strings to their bow." An administrative act may be held to be subject to the requirement and observance of natural justice either because it affects rights or interests and hence would involve a 'duty to act judicially' or it may be administrative, pure and simple, and yet, may require basic procedural protection which would involve 'duty to act fairly'. [Wade & Forsyth; 'Administrative Law'; (2005); pp. 492-94; de Smith; "Judicial Review of Administrative Action", (1995); pp. 397-98]

145. 'Acting fairly' is thus an additional weapon in the armoury of the court. It is not intended to be substituted for another much more powerful weapon 'acting judicially'. Where, however, the former ('acting judicially') cannot be wielded, the court will try to reach injustice by taking resort to the latter - less powerful weapon ('acting fairly'). [See C.K. Thakker : "From Duty to Act Judicially to Duty to Act Fairly", MANU/SC/0259/2003 : [2003]3SCR143].

146. As the Chief Justice is performing administrative function under Sub-section (6) of Section 11 in appointing an arbitrator, mere is no 'duty to act judicially' on his part, nonetheless there is 'duty to act fairly' which requires him to issue notice to the other side before taking a decision to appoint an arbitrator. I am, therefore, of the view that Clause 7 of the scheme as stood prior to the amendment, could neither be held bad in law nor inconsistent with Section 11 of the Act. I am, therefore, in respectful agreement with the majority judgment on that point.

147. On the basis of the above findings, my conclusions are as under;

(i) The function performed by the Chief Justice of the High Court or the Chief Justice of India under Sub-section (6) of Section 11 of the Act (i.e. Arbitration and Conciliation Act, 1996) is administrative, - pure and simple -, and neither judicial nor quasi-judicial.

(ii) The function to be performed by the Chief Justice under Sub-section (6) of Section 11 of the Act may be performed by him or by 'any person or institution designated by him'.

(iii) While performing the function under Sub-section (6) of Section 11 of the Act, the Chief Justice should be *prima facie* satisfied that the conditions laid down in Section 11 are satisfied.

(iv) The Arbitral Tribunal has power and jurisdiction to rule 'on its own jurisdiction' under Sub-section (1) of Section 16 of the Act.

(v) Where the Arbitral Tribunal holds that it has jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award.

(vi) A remedy available to the party aggrieved is to challenge the award in accordance with Section 34 or Section 37 of the Act.

(vii) Since the order passed by the Chief Justice under Sub-section (6) of Section 11 of the Act is administrative, a Writ Petition under Article 226 of the Constitution is maintainable. A Letters Patent Appeal/Intra-court Appeal is competent. A Special Leave Petition under Article 136 of the Constitution also lies to this Court.

(viii) While exercising extraordinary jurisdiction under Article 226 of the Constitution, however, the High Court will be conscious and mindful of the relevant provisions of the Act, including Sections 5, 16, 34 to 37 as also the object of the legislation and exercise its power with utmost care, caution and circumspection.

(ix) The decision of the Constitution Bench in *Konkan Railway Corporation Ltd. II*, to the extent that it held the function of the Chief Justice under Sub-section (6) of Section 11 of the Act as administrative is in consonance with settled legal position and lays down correct law on the point.

(x) The decision of the Constitution Bench in *Konkan Railway Corporation Ltd. II*, to the extent that it held Clause 7 of "The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996" providing for issuance of notice to affected parties as 'beyond the term of Section 11' and bad on that ground is not in accordance with law and does not state the legal position correctly.

(xi) Since the Chief Justice is performing administrative function in appointing an Arbitral Tribunal, there is no 'duty to act judicially' on his part. The doctrine of 'duty to act fairly', however, applies and the Chief Justice must issue notice to the person or persons likely to be affected by the decision under Sub-section (6) of Section 11 of the Act.

(xii) All appointments of Arbitral Tribunals so far made without issuing notice to the parties affected are held legal and valid. Henceforth, however, every appointment will be made after issuing notice to such person or persons. In other words, this judgment will have prospective operation and it will not affect past appointments or concluded proceedings.

Back to Index

MANU/SC/0325/2010

Neutral Citation: 2007/INSC/520

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 1267 of 2004, 54, 55, 56, 57, 58 and 59 of 2005, 1199 of 2006, 1471 of 2007, 987 and 990 of 2010 (Arising out of SLP (Crl.) Nos. 10 of 2006 and 6711 of 2007)

Decided On: 05.05.2010

Appellants: Selvi and Ors. **Vs.** Respondent: State of Karnataka

Hon'ble Judges/Coram:

K.G. Balakrishnan, C.J., R.V. Raveendran and J.M. Panchal, JJ.

Subject: Criminal

Subject: Law of Evidence

Relevant Section:

Code of Criminal Procedure, 1973 (CrPC) - Section 39; Indian Evidence Act, 1872 - Section 19; Motor Vehicles Act, 1988 - Section 185; Indian Penal Code, 1860 (IPC) - Section 44

Reference Alert:

On the issue of Provisions of Section 27 of the Evidence Act are not within the prohibition under Article 20(3) of Constitution of India unless compulsion has been used in obtaining the information (Section 27 of the Indian Evidence Act, 1872 and Article 20(3) of Constitution of India - This case may be considered as a good law on the present issue

Prior History / High Court Status:

From the Judgment and Order dated 10.09.2004 of the High Court of Karnataka at Bangalore in Criminal Petition No. 1964 of 2004 (MANU/KA/0588/2004)

Disposition:
Disposed of

Case Note:

Constitution - Right against self-incrimination - Constitutionality of Involuntary administration of Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) - Article 20(3) of Constitution of India, 1950 - Whether the involuntary administration of the Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) violates the 'right against self-incrimination' enumerated in Article 20(3) of the Constitution - Held, circumstances that could 'expose a person to criminal charges' amounts to incrimination' for the purpose of Article 20(3) - Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue' - Protective scope of Article 20(3) extends to the investigative stage in criminal cases - Since, the underlying rationale of the 'right against self-incrimination' is to ensure the reliability as well as voluntariness of statements that are admitted as evidence, the compulsory administration of the impugned techniques violates the 'right against self-incrimination - Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory - Results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence - Hence, test results cannot be admitted in evidence if they have been obtained through the use of compulsion - Appeal Disposed of

Constitution - Right against self-incrimination' - Who can avail Right against self-incrimination - Held - 'Right against self-incrimination ' available to persons who have been formally accused as well as those who are examined as suspects in criminal cases - Extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated - Appeal Disposed of

Constitution - 'Testimonial Compulsion' - Whether the results derived from the impugned techniques amount to 'testimonial compulsion' thereby attracting the bar of Article 20(3) of the Constitution of India, 1950 - Held, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators not barred - Narcoanalysis technique involves testimonial act as the subject is encouraged to speak in a drug-induced state such - Hence, compulsory administration of the narcoanalysis technique amounts to 'testimonial compulsion' and thereby triggers the protection of Article 20(3) - Appeal Disposed of

Constitution - Inter-relation between Right to fair trial and 'personal liberty' - Article 21 of the Constitution of India,1950 - Whether the involuntary administration of the impugned techniques a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution - Held, inter-relationship between the `right against self-incrimination' and the `right to fair trial' has been recognised under Article 21 - Forcing an individual to undergo any of the impugned techniques violates the standard of `substantive due process' which is required for restraining personal liberty - Compulsory administration of these techniques an unjustified intrusion into the mental privacy of an individual which amount to `cruel, inhuman or degrading treatment' - Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the `right against self-incrimination - Thus, no individual to be forcibly subjected to any of the techniques in

question, whether in the context of investigation in criminal cases or otherwise - Appeal Disposed of

Criminal - Derivative evidence - Admissibility of - Section 27 Evidence Act, 1872 and Article 20(3) of Constitution of India, 1950 - Permissibility of extracting statements which may furnish a link in the chain of evidence and hence create a risk of exposure to criminal charges - Whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3) - Held, Section 27 of Evidence Act, permits the derivative use of custodial statements in the ordinary course of events - Provisions of Section 27 of the Evidence Act are not within the prohibition under Article 20(3) unless compulsion has been used in obtaining the information - Thus, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act - Appeal Disposed of

Ratio Decidendi:

"Compulsory involuntary administration of the Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution as the subject does not exercise conscious control over the responses during the administration of the test."

"Article 20(3) not only a trial right but its protection extends to the stage of investigation also."

"Provisions of Section 27 of the Evidence Act are not within the prohibition under Article 20(3) unless compulsion has been used in obtaining the information and any information or material that is subsequently discovered with the help of voluntary administered test results to be admitted."

JUDGMENT

K.G. Balakrishnan, C.J.

1. Leave granted in SLP (Crl.) Nos. 10 of 2006 and 6711 of 2007. 1.

The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

2. Objections have been raised in respect of instances where individuals who are the accused, suspects or witnesses in an investigation have been subjected to these tests without their consent. Such measures have been defended by citing the importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidence through ordinary means. In some of the impugned judgments, reliance has been placed on certain provisions of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 to refer back to the responsibilities placed on citizens to fully co-operate with investigation agencies. It has also been urged that administering these techniques does not cause any bodily harm and that the extracted information will be used only for strengthening investigation efforts and will not be admitted as evidence during the trial stage. The assertion is that improvements in fact-finding during the investigation stage will consequently help to increase the rate of prosecution as well as the rate of acquittal. Yet another line of reasoning is that these scientific techniques are a softer alternative to the regrettable and allegedly widespread use of `third degree methods' by investigators.

3. The involuntary administration of the impugned techniques prompts questions about the protective scope of the `right against self-incrimination' which finds place in Article 20(3) of our Constitution. In one of the impugned judgments, it has been held that the information extracted through methods such as `polygraph examination' and the `Brain Electrical Activation Profile (BEAP) test' cannot be equated with `testimonial compulsion' because the test subject is not required to give verbal answers, thereby falling outside the protective scope of Article 20(3). It was further ruled that the verbal revelations made during a narcoanalysis test do not attract the bar of Article 20(3) since the inculpatory or exculpatory nature of these revelations is not known at the time of conducting the test. To address these questions among others, it is necessary to inquire into the historical origins and rationale behind the `right against self-incrimination'. The principal questions are whether this right extends to the investigation stage and whether the test results are of a `testimonial' character, thereby attracting the protection of Article 20(3). Furthermore, we must examine whether relying on the test results or materials discovered with the help of the same creates a reasonable likelihood of incrimination for the test subject.

4. We must also deal with arguments invoking the guarantee of `substantive due process' which is part and parcel of the idea of `personal liberty' protected by Article 21 of the Constitution. The first question in this regard is whether the provisions in the Code of Criminal Procedure, 1973 that provide for `medical examination' during the course of investigation can be read expansively to include the impugned techniques, even though the latter are not explicitly enumerated. To answer this question, it will be necessary to discuss the principles governing the interpretation of statutes in light of scientific advancements. Questions have also been raised with respect to the professional ethics of medical personnel involved in the administration of these techniques. Furthermore, Article 21 has been judicially expanded to include a `right against cruel, inhuman or degrading treatment', which requires us to determine whether the involuntary administration of the impugned techniques violates this right whose scope corresponds with evolving international human rights norms. We must also consider contentions that have invoked the test subject's `right to privacy', both in a physical and mental sense.

5. The scientific validity of the impugned techniques has been questioned and it is argued that their results are not entirely reliable. For instance, the narcoanalysis technique involves the intravenous

administration of sodium pentothal, a drug which lowers inhibitions on part of the subject and induces the person to talk freely. However, empirical studies suggest that the drug-induced revelations need not necessarily be true. Polygraph examination and the BEAP test are methods which serve the respective purposes of lie-detection and gauging the subject's familiarity with information related to the crime. These techniques are essentially confirmatory in nature, wherein inferences are drawn from the physiological responses of the subject. However, the reliability of these methods has been repeatedly questioned in empirical studies. In the context of criminal cases, the reliability of scientific evidence bears a causal link with several dimensions of the right to a fair trial such as the requisite standard of proving guilt beyond reasonable doubt and the right of the accused to present a defence. We must be mindful of the fact that these requirements have long been recognised as components of `personal liberty' under Article 21 of the Constitution. Hence it will be instructive to gather some insights about the admissibility of scientific evidence.

6. In the course of the proceedings before this Court, oral submissions were made by Mr. Rajesh Mahale, Adv. (Crl. App. No. 1267 of 2004), Mr. Manoj Goel, Adv. (Crl. App. Nos. 56-57 of 2005), Mr. Santosh Paul, Adv. (Crl. App. No. 54 of 2005) and Mr. Harish Salve, Sr. Adv. (Crl. App. Nos. 1199 of 2006 and No. 1471 of 2007) - all of whom argued against the involuntary administration of the impugned techniques. Arguments defending the compulsory administration of these techniques were presented by Mr. Goolam E. Vahanvati, Solicitor General of India [now Attorney General for India] and Mr. Anoop G. Choudhari, Sr. Adv. who appeared on behalf of the Union of India. These were further supported by Mr. T.R. Andhyarujina, Sr. Adv. who appeared on behalf of the Central Bureau of Investigation (CBI) and Mr. Sanjay Hegde, Adv. who represented the State of Karnataka. Mr. Dushyant Dave, Sr. Adv., rendered assistance as *amicus curiae* in this matter.

7. At this stage, it will be useful to frame the questions of law and outline the relevant sub-questions in the following manner:

I. Whether the involuntary administration of the impugned techniques violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution? I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

I-B. Whether the results derived from the impugned techniques amount to `testimonial compulsion' thereby attracting the bar of Article 20(3)?

II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution?

8. Before answering these questions, it is necessary to examine the evolution and specific uses of the impugned techniques. Hence, a description of each of the test procedures is followed by an overview of their possible uses, both within and outside the criminal justice system. It is also necessary to gauge the limitations of these techniques. Owing to the dearth of Indian decisions on this subject, we must look to precedents from foreign jurisdictions which deal with the application of these techniques in the area of criminal justice.

DESCRIPTIONS OF TESTS - USES, LIMITATIONS AND PRECEDENTS

Polygraph Examination

9. The origins of polygraph examination have been traced back to the efforts of Lombroso, a criminologist who experimented with a machine that measured blood pressure and pulse to assess the honesty of persons suspected of criminal conduct. His device was called a hydrosphygmograph. A similar device was used by psychologist William Marston during World War I in espionage cases, which proved to be a precursor to its use in the criminal justice system. In 1921, John Larson incorporated the measurement of respiration rate and by 1939 Leonard Keeler added skin conductance and an amplifier to the parameters examined by a polygraph machine.

10. The theory behind polygraph tests is that when a subject is lying in response to a question, he/she will produce physiological responses that are different from those that arise in the normal course. During the polygraph examination, several instruments are attached to the subject for measuring and recording the physiological responses. The examiner then reads these results, analyzes them and proceeds to gauge the credibility of the subject's answers. Instruments such as cardiographs, pneumographs, cardio-cuffs and sensitive electrodes are used in the course of polygraph examinations. They measure changes in aspects such as respiration, blood pressure, blood flow, pulse and galvanic skin resistance. The truthfulness or falsity on part of the subject is assessed by relying on the records of the physiological responses. [See: *Laboratory Procedure Manual - Polygraph Examination* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi - 2005)]

11. There are three prominent polygraph examination techniques:

i. The relevant-irrelevant (R-I) technique

ii. The control question (CQ) technique

iii. Directed Lie-Control (DLC) technique

Each of these techniques includes a pre-test interview during which the subject is acquainted with the test procedure and the examiner gathers the information which is needed to finalize the questions that are to be asked. An important objective of this exercise is to mitigate the possibility of a feeling of surprise on part of the subject which could be triggered by unexpected questions. This is significant because an expression of surprise could be mistaken for physiological responses that are similar to those associated with deception. [Refer: David Gallai, `Polygraph evidence in federal courts: Should it be admissible?' 36 *American Criminal Law Review* 87-116 (Winter 1999) at p. 91]. Needless to say, the polygraph examiner should be familiar with the details of the ongoing investigation. To meet this end the investigators are required to share copies of documents such as the First Information Report (FIR), Medico-Legal Reports (MLR) and Post-Mortem Reports (PMR) depending on the nature of the facts being investigated.

12. The control-question (CQ) technique is the most commonly used one and its procedure as well as scoring system has been described in the materials submitted on behalf of CBI. The test consists of control questions and relevant questions. The control questions are irrelevant to the facts being

investigated but they are intended to provoke distinct physiological responses, as well as false denials. These responses are compared with the responses triggered by the relevant questions. Theoretically, a truthful subject will show greater physiological responses to the control questions which he/she has reluctantly answered falsely, than to the relevant questions, which the subject can easily answer truthfully. Conversely, a deceptive subject will show greater physiological responses while giving false answers to relevant questions in comparison to the responses triggered by false answers to control questions. In other words, a guilty subject is more likely to be concerned with lying about the relevant facts as opposed to lying about other facts in general. An innocent subject will have no trouble in truthfully answering the relevant questions but will have trouble in giving false answers to control questions. The scoring of the tests is done by assigning a numerical value, positive or negative, to each response given by the subject. After accounting for all the numbers, the result is compared to a standard numerical value to indicate the overall level of deception. The net conclusion may indicate truth, deception or uncertainty.

13. The use of polygraph examinations in the criminal justice system has been contentious. In this case, we are mainly considered with situations when investigators seek reliance on these tests to detect deception or to verify the truth of previous testimonies. Furthermore, litigation related to polygraph tests has also involved situations where suspects and defendants in criminal cases have sought reliance on them to demonstrate their innocence. It is also conceivable that witnesses can be compelled to undergo polygraph tests in order to test the credibility of their testimonies or to question their mental capacity or to even attack their character.

14. Another controversial use of polygraph tests has been on victims of sexual offences for testing the veracity of their allegations. While several states in the U.S.A. have enacted provisions to prohibit such use, the text of the *Laboratory Procedure Manual for Polygraph Examination* [supra.] indicates that this is an acceptable use. In this regard, Para 3.4 (v) of the said Manual reads as follows:

(v) In cases of alleged sex offences such as intercourse with a female child, forcible rape, indecent liberties or perversion, it is important that the victim, as well as the accused, be made available for interview and polygraph examination. It is essential that the polygraph examiner get a first hand detailed statement from the victim, and the interview of the victim precede that of the suspect or witnesses....

[The following article includes a table which lists out the statutorily permissible uses of polygraph examination in the different state jurisdictions of the United States of America: Henry T. Greely and Judy Illes, `Neuroscience based lie- detection: The urgent need for regulation', 33 *American Journal of Law and Medicine*, 377-421 (2007)]

15. The propriety of compelling the victims of sexual offences to undergo a polygraph examination certainly merits consideration in the present case. It must also be noted that in some jurisdictions polygraph tests have been permitted for the purpose of screening public employees, both at the stage of recruitment and at regular intervals during the service-period. In the U.S.A., the widespread acceptance of polygraph tests for checking the antecedents and monitoring the conduct of public employees has encouraged private employers to resort to the same. In fact the Employee Polygraph Protection Act, 1998 was designed to restrict their use for employee screening. This

development must be noted because the unqualified acceptance of `Lie-detector tests' in India's criminal justice system could have the unintended consequence of encouraging their use by private parties.

16. Polygraph tests have several limitations and therefore a margin for errors. The premise behind these tests is questionable because the measured changes in physiological responses are not necessarily triggered by lying or deception. Instead, they could be triggered by nervousness, anxiety, fear, confusion or other emotions. Furthermore, the physical conditions in the polygraph examination room can also create distortions in the recorded responses. The test is best administered in comfortable surroundings where there are no potential distractions for the subject and complete privacy is maintained. The mental state of the subject is also vital since a person in a state of depression or hyperactivity is likely to offer highly disparate physiological responses which could mislead the examiner. In some cases the subject may have suffered from loss of memory in the intervening time-period between the relevant act and the conduct of the test. When the subject does not remember the facts in question, there will be no self-awareness of truth or deception and hence the recording of the physiological responses will not be helpful. Errors may also result from `memory-hardening', i.e. a process by which the subject has created and consolidated false memories about a particular incident. This commonly occurs in respect of recollections of traumatic events and the subject may not be aware of the fact that he/she is lying.

17. The errors associated with polygraph tests are broadly grouped into two categories, i.e., `false positives' and `false negatives'. A `false positive' occurs when the results indicate that a person has been deceitful even though he/she answered truthfully. Conversely a `false negative' occurs when a set of deceptive responses is reported as truthful. On account of such inherent complexities, the qualifications and competence of the polygraph examiner are of the utmost importance. The examiner needs to be thorough in preparing the questionnaire and must also have the expertise to account for extraneous conditions that could lead to erroneous inferences.

18. However, the biggest concern about polygraph tests is that an examiner may not be able to recognise deliberate attempts on part of the subject to manipulate the test results. Such `countermeasures' are techniques which are deliberately used by the subject to create certain physiological responses in order to deceive the examiner. The intention is that by deliberately enhancing one's reaction to the control questions, the examiner will incorrectly score the test in favour of truthfulness rather than deception. The most commonly used `countermeasures' are those of creating a false sense of mental anxiety and stress at the time of the interview, so that the responses triggered by lying cannot be readily distinguished.

19. Since polygraph tests have come to be widely relied upon for employee screening in the U.S.A., the U.S. Department of Energy had requested the National Research Council of the National Academies (NRC) to review their use for different purposes. The following conclusion was stated in its report, i.e. *The Polygraph and Lie-Detection: Committee to Review the scientific evidence on the Polygraph* (Washington D.C.: National Academies Press, 2003) at pp. 212-213:

Polygraph Accuracy: Almost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy. The physiological responses measured by the polygraph are not uniquely related to deception. That

is, the responses measured by the polygraph do not all reflect a single underlying process: a variety of psychological and physiological processes, including some that can be consciously controlled, can affect polygraph measures and test results. Moreover, most polygraph testing procedures allow for uncontrolled variation in test administration (e.g., creation of the emotional climate, selecting questions) that can be expected to result in variations in accuracy and that limit the level of accuracy that can be consistently achieved.

Theoretical Basis: The theoretical rationale for the polygraph is quite weak, especially in terms of differential fear, arousal, or other emotional states that are triggered in response to relevant or comparison questions. We have not found any serious effort at construct validation of polygraph testing.

Research Progress: Research on the polygraph has not progressed over time in the manner of a typical scientific field. It has not accumulated knowledge or strengthened its scientific underpinnings in any significant manner.

Polygraph research has proceeded in relative isolation from related fields of basic science and has benefited little from conceptual, theoretical, and technological advances in those fields that are relevant to the psychophysiological detection of deception.

Future Potential: The inherent ambiguity of the physiological measures used in the polygraph suggests that further investments in improving polygraph technique and interpretation will bring only modest improvements in accuracy.

20. A Working Party of the British Psychological Society (BPS) also came to a similar conclusion in a study published in 2004. The key finding is reproduced below, [Cited from: *A Review of the current scientific status and fields of application of polygraph deception detection* - Final Report (6 October, 2004) from The British Psychological Society (BPS) Working Party at p. 10]:

A polygraph is sometimes called a lie detector, but this term is misleading. A polygraph does not detect lies, but only arousal which is assumed to accompany telling a lie. Polygraph examiners have no other option than to measure deception in such an indirect way, as a pattern of physiological activity directly related to lying does not exist (Saxe, 1991). Three of the four most popular lie detection procedures using the polygraph (Relevant/Irrelevant Test, Control Question Test and Directed Lie Test, ...) are built upon the premise that, while answering so-called `relevant' questions, liars will be more aroused than while answering so-called `control' questions, due to a fear of detection (fear of getting caught lying). This premise is somewhat naive as truth tellers may also be more aroused when answering the relevant questions, particularly: (i) when these relevant questions are emotion evoking questions (e.g. when an innocent man, suspected of murdering his beloved wife, is asked questions about his wife in a polygraph test, the memory of his late wife might re-awaken his strong feelings about her); and (ii) when the innocent examinee experiences fear, which may occur, for example, when the person is afraid that his or her honest answers will not be believed by the polygraph examiner. The other popular test (Guilty Knowledge Test, ...) is built upon the premise that guilty examinees will be more aroused concerning certain information due to different orienting reactions, that is, they will show enhanced orienting responses when

recognising crucial details of a crime. This premise has strong support in psychophysiological research (Fiedler, Schmidt & Stahl, 2002).

21. Coming to judicial precedents, a decision reported as ***Frye*** v. ***United States*** (1923) 54 App DC 46, dealt with a precursor to the polygraph which detected deception by measuring changes in systolic blood pressure. In that case the defendant was subjected to this test before the trial and his counsel had requested the court that the scientist who had conducted the same should be allowed to give expert testimony about the results. Both the trial court and the appellate court rejected the request for admitting such testimony. The appellate court identified the considerations that would govern the admissibility of expert testimony based on scientific insights. It was held, *Id.* at p. 47:

...Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well- recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

22. The standard of `general acceptance in the particular field' governed the admissibility of scientific evidence for several decades. It was changed much later by the U.S. Supreme Court in ***Daubert*** v. ***Merrell Dow Pharmaceuticals Inc.*** 509 US 579 (1993). In that case the petitioners had instituted proceedings against a pharmaceutical company which had marketed `Bendectin', a prescription drug. They had alleged that the ingestion of this drug by expecting mothers had caused birth defects in the children born to them. To contest these allegations, the pharmaceutical company had submitted an affidavit authored by an epidemiologist. The petitioners had also submitted expert opinion testimony in support of their contentions. The District Court had ruled in favour of the company by ruling that their scientific evidence met the standard of `general acceptance in the particular field' whereas the expert opinion testimony produced on behalf of the petitioners did not meet the said standard. The Court of Appeals for the Ninth Circuit upheld the judgment and the case reached the U.S. Supreme Court which vacated the appellate court's judgment and remanded the case back to the trial court. It was unanimously held that the `general acceptance' standard articulated in ***Frye*** (supra.) had since been displaced by the enactment of the Federal Rules of Evidence in 1975, wherein Rule 702 governed the admissibility of expert opinion testimony that was based on scientific findings. This rule provided that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

23. It was held that the trial court should have evaluated the scientific evidence as per Rule 702 of the Federal Rules of Evidence which mandates an inquiry into the relevance as well as the

reliability of the scientific technique in question. The majority opinion (Blackmun, J.) noted that the trial judge's first step should be a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and whether it can be properly applied to the facts in issue. Several other considerations will be applicable, such as:

• whether the theory or technique in question can be and has been tested

• whether it has been subjected to peer review and publication

• its known or potential error rate

• the existence and maintenance of standards controlling its operation

• whether it has attracted widespread acceptance within the scientific community

24. It was further observed that such an inquiry should be a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. It was reasoned that instead of the wholesale exclusion of scientific evidence on account of the high threshold of proving `general acceptance in the particular field', the same could be admitted and then challenged through conventional methods such as cross-examination, presentation of contrary evidence and careful instructions to juries about the burden of proof. In this regard, the trial judge is expected to perform a `gate-keeping' role to decide on the admission of expert testimony based on scientific techniques. It should also be kept in mind that Rule 403 of the Federal Rules of Evidence, 1975 empowers a trial judge to exclude any form of evidence if it is found that its probative value will be outweighed by its prejudicial effect.

25. Prior to the ***Daubert*** decision (supra.), most jurisdictions in the U.S.A. had disapproved of the use of polygraph tests in criminal cases. Some State jurisdictions had absolutely prohibited the admission of polygraph test results, while a few had allowed consideration of the same if certain conditions were met. These conditions included a prior stipulation between the parties to undergo these tests with procedural safeguards such as the involvement of experienced examiners, presence of counsel and proper recording to enable subsequent scrutiny. A dissonance had also emerged in the treatment of polygraph test results in the different Circuit jurisdictions, with some jurisdictions giving trial judges the discretion to enquire into the reliability of polygraph test results on a case-by-case basis.

26. For example, in ***United States*** v. ***Piccinonna*** 885 F.2d 1529 (11th Circ. 1989), it was noted that in some instances polygraphy satisfied the standard of `general acceptance in the particular field' as required by ***Frye*** (supra.). It was held that polygraph testimony could be admissible under two situations, namely when the parties themselves agree on a stipulation to this effect or for the purpose of impeaching and corroborating the testimony of witnesses. It was clarified that polygraph examination results could not be directly used to bolster the testimony of a witness. However, they could be used to attack the credibility of a witness or even to rehabilitate one after his/her credibility has been attacked by the other side. Despite these observations, the trial court did not admit the polygraph results on remand in this particular case.

27. However, after ***Daubert*** (supra.) prescribed a more liberal criterion for determining the admissibility of scientific evidence, some Courts ruled that weightage could be given to polygraph results. For instance in ***United States*** v. ***Posado*** 57 F.3d 428 (5th Circ. 1995), the facts related to a pre-trial evidentiary hearing where the defendants had asked for the exclusion of forty-four kilograms of cocaine that had been recovered from their luggage at an airport. The District Court had refused to consider polygraph evidence given by the defendants in support of their version of events leading up to the seizure of the drugs and their arrest. On appeal, the Fifth Circuit Court held that the rationale for disregarding polygraph evidence did not survive the ***Daubert*** decision. The Court proceeded to remand the case to the trial court and directed that the admissibility of the polygraph results should be assessed as per the factors enumerated in ***Daubert*** (supra.). It was held, *Id.* at p. 434:

There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since Frye. The test at issue in Frye measured only changes in the subject's systolic blood pressure in response to test questions. [*Frye* v. *United States* ...] Modern instrumentation detects changes in the subject's blood pressure, pulse, thoracic and abdominal respiration, and galvanic skin response. Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in many of the disciplines and for much of the scientific evidence we routinely find admissible under Rule 702. [See *McCormick on Evidence* 206 at 915 & n. 57] Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. In addition, polygraph technique has been and continues to be subjected to extensive study and publication. Finally, polygraph is now so widely used by employers and government agencies alike.

To iterate, we do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court.

(internal citations omitted)

28. Despite these favourable observations, the polygraph results were excluded by the District Court on remand. However, we have come across at least one case decided after ***Daubert*** (supra.) where a trial court had admitted expert opinion testimony about polygraph results. In ***United States*** v. ***Galbreth*** 908 F. Supp 877 (D.N.M. 1995), the District Court took note of New Mexico Rule of Evidence 11-707 which established standards for the admission of polygraph evidence. The said provision laid down that polygraph evidence would be admissible only when the following conditions are met: the examiner must have had at least 5 years experience in conducting polygraph tests and 20 hours of continuing education within the past year; the polygraph examination must be tape recorded in its entirety; the polygraph charts must be scored quantitatively in a manner generally accepted as reliable by polygraph experts; all polygraph materials must be provided to

the opposing party at least 10 days before trial; and all polygraph examinations conducted on the subject must be disclosed. It was found that all of these requirements had been complied with in the facts at hand. The District Court concluded with these words, *Id.* at p. 896:

...the Court finds that the expert opinion testimony regarding the polygraph results of defendant Galbreth is admissible. However, because the evidentiary reliability of opinion testimony regarding the results of a particular polygraph test is dependent upon a properly conducted examination by a highly qualified, experienced and skilful examiner, nothing in this opinion is intended to reflect the judgment that polygraph results are per se admissible. Rather, in the context of the polygraph technique, trial courts must engage upon a case specific inquiry to determine the admissibility of such testimony.

29. We were also alerted to the decision in ***United States*** v. ***Cordoba***, 104 F.3d 225 (9th. Circ. 1997). In that case, the Ninth Circuit Court concluded that the position favouring absolute exclusion of unstipulated polygraph evidence had effectively been overruled in ***Daubert*** (supra.). The defendant had been convicted for the possession and distribution of cocaine since the drugs had been recovered from a van which he had been driving. However, when he took an unstipulated polygraph test, the results suggested that he was not aware of the presence of drugs in the van. At the trial stage, the prosecution had moved to suppress the test results and the District Court had accordingly excluded the polygraph evidence. However, the Ninth Circuit Court remanded the case back after finding that the trial judge should have adopted the parameters enumerated in ***Daubert*** (supra.) to decide on the admissibility of the polygraph test results. It was observed, *Id.* at p. 228:

With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence. The inherent problematic nature of such evidence remains. As we noted in *Brown*, polygraph evidence has grave potential for interfering with the deliberative process. [*Brown* v. *Darcy* 783 F.2d 1389 (9th Circ. 1986) at 1396-1397] However, these matters are for determination by the trial judge who must not only evaluate the evidence under Rule 702, but consider admission under Rule 403. Thus, we adopt the view of Judge Jameson's dissent in *Brown* that these are matters which must be left to the sound discretion of the trial court, consistent with Daubert standards.

30. The decisions cited above had led to some uncertainty about the admissibility of polygraph test results. However, this uncertainty was laid to rest by an authoritative ruling of the U.S. Supreme Court in ***United States*** v. ***Scheffer*** 523 US 303 (1998). In that case, an eight judge majority decided that Military Rule of Evidence 707 (which made polygraph results inadmissible in court-martial proceedings) did not violate an accused person's Sixth Amendment right to present a defence. The relevant part of the provision follows:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

31. The facts were that Scheffer, a U.S. Air Force serviceman had faced court-martial proceedings because a routine urinalysis showed that he had consumed methamphetamines. However, a

polygraph test suggested that he had been truthful in denying the intentional consumption of the drugs. His defence of `innocent ingestion' was not accepted during the court-martial proceedings and the polygraph results were not admitted in evidence. The Air Force Court of Criminal Appeals affirmed the decision given in the court-martial proceedings but the Court of Appeals for the Armed Forces reversed the same by holding that an absolute exclusion of polygraph evidence (offered to rebut an attack on the credibility of the accused) would violate Scheffer's Sixth Amendment right to present a defence. Hence, the matter reached the Supreme Court which decided that the exclusion of polygraph evidence did not violate the said constitutional right.

32. Eight judges agreed that testimony about polygraph test results should not be admissible on account of the inherent unreliability of the results obtained. Four judges agreed that reliance on polygraph results would displace the fact-finding role of the jury and lead to collateral litigation. In the words of Clarence Thomas, J., *Id.* at p. 309:

Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial. The rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.

33. On the issue of reliability, the Court took note of some Circuit Court decisions which had permitted trial courts to consider polygraph results in accordance with the *Daubert* factors. However, the following stance was adopted, *Id.* at p. 312:

...Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence.

34. Since a trial by jury is an essential feature of the criminal justice system in the U.S.A., concerns were expressed about preserving the jury's core function of determining the credibility of testimony. It was observed, *Id.* at p. 314:

...Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt....

35. On the issue of encouraging litigation that is collateral to the primary purpose of a trial, it was held, *Id.* at p. 314:

...Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case. It thus offends no constitutional principle for the President to conclude that a per se rule excluding all polygraph evidence is appropriate. Because litigation over the admissibility of polygraph evidence is by its very nature collateral, a per se rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it.

36. In the same case, Kennedy, J. filed an opinion which was joined by four judges. While there was agreement on the questionable reliability of polygraph results, a different stand was taken on the issues pertaining to the role of the jury and the concerns about collateral litigation. It was observed that the inherent reliability of the test results is a sufficient ground to exclude the polygraph test results and expert testimony related to them. Stevens, J. filed a dissenting opinion in this case.

37. We have also come across a decision of the Canadian Supreme Court in ***R*** v. ***Beland*** [1987] 36 C.C.C. (3d) 481. In that case the respondents had been charged with conspiracy to commit robbery. During their trial, one of their accomplices had given testimony which directly implicated them. The respondents contested this testimony and after the completion of the evidentiary phase of the trial, they moved an application to re-open their defence while seeking permission for each of them to undergo a polygraph examination and produce the results in evidence. The trial judge denied this motion and the respondents were convicted. However, the appellate court allowed their appeal from conviction and granted an order to re-open the trial and directed that the polygraph results be considered. On further appeal, the Supreme Court of Canada held that the results of a polygraph examination are not admissible as evidence. The majority opinion explained that the admission of polygraph test results would offend some well established rules of evidence. It examined the `rule against oath-helping' which prohibits a party from presenting evidence solely for the purpose of bolstering the credibility of a witness. Consideration was also given to the `rule against admission of past or out-of-court statements by a witness' as well as the restrictions on producing `character evidence'. The discussion also concluded that polygraph evidence is inadmissible as `expert evidence'.

38. With regard to the `rule against admission of past or out- of-court statements by a witness', McIntyre, J. observed (in Para. 11):

...In my view, the rule against admission of consistent out-of-court statements is soundly based and particularly apposite to questions raised in connection with the use of the polygraph. Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court. Assuming, as in the case at bar, that the evidence sought to be adduced would not fall within any of the well recognized exceptions to the operation of the rule - where it is permitted to rebut the allegation of a recent fabrication or to show physical, mental or emotional condition - it should be rejected. To do otherwise is to open the trial process to the time-consuming and

confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence. This view is summarized by D.W. Elliott in `Lie-Detector Evidence: Lessons from the American Experience' in *Well and Truly Tried* (Law Book Co., 1982), at pp. 129-30:

A defendant who attempts to put in the results of a test showing this truthfulness on the matters in issue is bound to fall foul of the rule against self- serving statements or, as it is sometimes called, the rule that a party cannot manufacture evidence for himself, and the falling foul will not be in any mere technical sense. The rule is sometimes applied in a mechanical unintelligent way to exclude evidence about which no realistic objection could be raised, as the leading case, *Gillie v. Posho* shows; but striking down defence polygraph evidence on this ground would be no mere technical reflex action of legal obscurantists. The policy behind the doctrine is a fundamental one, and defence polygraph evidence usually offends it fundamentally. As some judges have pointed out, only those defendants who successfully take examinations are likely to want the results admitted. There is no compulsion to put in the first test results obtained. A defendant can take the test many times, if necessary "examiner- shopping", until he gets a result which suits him. Even stipulated tests are not free of this taint, because of course his lawyers will advise him to have several secret trial runs before the prosecution is approached. If nothing else, the dry runs will habituate him to the process and to the expected relevant questions.

39. On the possibility of using polygraph test results as character evidence, it was observed (Para. 14):

...What is the consequence of this rule in relation to polygraph evidence? Where such evidence is sought to be introduced it is the operator who would be called as the witness and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph tests would violate the character evidence rule.

40. Mcintyre, J. offered the following conclusions (at Paras. 18, 19 and 20):

18. In conclusion, it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important task. This argument has a superficial appeal, but, in my view, it cannot prevail in the face of realities of court procedures.

19. I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of errors in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in

human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is two-fold. First, the admission of polygraph evidence would run counter to the well established rules of evidence which have been referred to. Second, while there is no reason why the rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists.

20. Since litigation replaced trial by combat, the determination of fact, including the veracity of parties and their witnesses, has been the duty of judges or juries upon an evaluation of the statements of witnesses. This approach has led to the development of a body of rules relating to the giving and reception of evidence and we have developed methods which have served well and have gained a wide measure of approval. They have facilitated the orderly conduct of judicial proceedings and are designed to keep the focus of the proceedings on the principal issue, in a criminal case, the guilt or innocence of the accused. What would be served by the introduction of evidence of polygraph readings into the judicial process? To begin with, it must be remembered that however scientific it may be, its use in court depends on the human intervention of the operator. Whatever results are recorded by the polygraph instrument, their nature and significance reach the trier of fact through the mouth of the operator. Human fallibility is therefore present as before, but now it may be said to be fortified with the mystique of science....

Narcoanalysis technique

41. This test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The drug-induced hypnotic stage is useful for investigators since it makes the subject more likely to divulge information. The drug used for this test is sodium pentothal, higher quantities of which are routinely used for inducing general anaesthesia in surgical procedures. This drug is also used in the field of psychiatry since the revelations can enable the diagnosis of mental disorders. However, we have to decide on the permissibility of resorting to this technique during a criminal investigation, despite its' established uses in the medical field. The use of `truth-serums' and hypnosis is not a recent development. Earlier versions of the narcoanalysis technique utilised substances such as scopolamine and sodium amytal. The following extracts from an article trace the evolution of this technique, [Cited from: C.W. Muehlberger, `Interrogation under Drug-influence: The so-called Truth serum technique', 42(4) *The Journal of Criminal Law, Criminology and Police Science* 513-528 (Nov-Dec. 1951) at pp. 513-514]:

With the advent of anaesthesia about a century ago, it was observed that during the induction period and particularly during the recovery interval, patients were prone to make extremely naive remarks about personal matters, which, in their normal state, would never have revealed.

Probably the earliest direct attempt to utilize this phenomenon in criminal interrogation stemmed from observations of a mild type of anaesthesia commonly used in obstetrical practice during the period of about 1903-1915 and known as `Twilight sleep'. This anaesthesia was obtained by hypodermic injection of solutions of morphine and scopolamine (also called `hyoscine') followed

by intermittent chloroform inhalations if needed. The pain relieving qualities of morphine are well known. Scopolamine appears to have the added property of blocking out memories of recent events. By the combination of these drugs in suitable dosage, morphine dulled labor pains without materially interfering with the muscular contractions of labor, while scopolamine wiped out subsequent memories of the delivery room ordeal. The technique was widely used in Europe but soon fell into disrepute among obstetricians of this country, largely due to overdosage.

During the period of extensive use of `twilight sleep' it was a common experience that women who were under drug influence, were extremely candid and uninhibited in their statements. They often made remarks which obviously would never have been uttered when in their normal state. Dr. Robert E. House, an observant physician practising in Ferris, Texas, believed that a drug combination which was so effective in the removal of ordinary restraints and which produced such utter candor, might be of value in obtaining factual information from persons who were thought to be lying. Dr. House's first paper presented in 1922 suggested drug administration quite similar to the standard `twilight sleep' procedure: an initial dose of grain of morphine sulphate together with 1/100 grain of scopolamine hydrobromide, followed at 20-30 minute intervals with smaller (1/200 - 1/400 grain) doses of scopolamine and periods of light chloroform anaesthesia. Subjects were questioned as they recovered from the light chloroform anaesthesia and gave answers which subsequently proved to be true. Altogether, Dr. House reported about half-a-dozen cases, several of which were instrumental in securing the release of convicts from State prisons, he also observed that, after returning to their normal state, these subjects had little or no recollection of what had transpired during the period of interrogation. They could not remember what questions had been asked, nor by whom; neither could they recall any answers which they had made.

42. The use of the `Scopolamine' technique led to the coining of the expression `truth serum'. With the passage of time, injections of sodium amytal came to be used for inducing subjects to talk freely, primarily in the field of psychiatry. The author cited above has further observed, *Id.* at p. 522:

During World War II, this general technique of delving into a subject's inner consciousness through the instrumentality of narcotic drugs was widely used in the treatment of war neuroses (sometimes called `Battle shock' or `shell shock'). Fighting men who had been through terrifically disturbing experiences often times developed symptoms of amnesia, mental withdrawal, negativity, paralyses, or many other mental, nervous, and physical derangements. In most instances, these patients refused to talk about the experiences which gave rise to the difficulty, and psychiatrists were at a loss to discover the crux of the problem. To intelligently counteract such a force, it was first necessary to identify it. Thus, the use of sedative drugs, first to analyze the source of disturbance (narcoanalysis) and later to obtain the proper frame of mind in which the patient could and would `talk out' his difficulties, and, as they say `get them off his chest' - and thus relieve himself (narco-synthesis or narco-therapy) - was employed with signal success.

In the narcoanalysis of war neuroses a very light narcosis is most desirable. With small doses of injectable barbiturates (sodium amytal or sodium pentothal) or with light inhalations of nitrous oxide or somnoform, the subject pours out his pent-up emotions without much prodding by the interrogator.

43. It has been shown that the Central Investigation Agency (C.I.A.) in the U.S.A. had conducted research on the use of sodium pentothal for aiding interrogations in intelligence and counter-terrorism operations, as early as the 1950's [See `Project MKULTRA - The CIA's program of research in behavioral modification', On file with *Schaffer Library of Drug Policy*, Text available from . In recent years, the debate over the use of `truth-serums' has been revived with demands for their use on persons suspected of involvement in terrorist activities. Coming to the test procedure, when the drug (sodium pentothal) is administered intravenously, the subject ordinarily descends into anaesthesia in four stages, namely:

(i) Awake stage

(ii) Hypnotic stage

(iii) Sedative stage

(iv) Anaesthetic stage

44. A relatively lighter dose of sodium pentothal is injected to induce the `hypnotic stage' and the questioning is conducted during the same. The hypnotic stage is maintained for the required period by controlling the rate of administration of the drug. As per the materials submitted before us, the behaviour exhibited by the subject during this stage has certain specific characteristics, namely:

• It facilitates handling of negative emotional responses (i.e. guilt, avoidance, aggression, frustration, non-responsiveness etc.) in a positive manner.

• It helps in rapid exploration and identification of underlying conflicts in the subject's mind and unresolved feelings about past events.

• It induces the subject to divulge information which would usually not be revealed in conscious awareness and it is difficult for the person to lie at this stage

• The reversal from this stage occurs immediately when the administration of the drug is discontinued.

[Refer: *Laboratory Procedure Manual - Forensic Narco-Analysis* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi - 2005); Also see John M. Macdonald, `Truth Serum', 46(2) *The Journal of Criminal Law, Criminology and Police Science* 259-263 (Jul.-Aug. 1955)]

45. The personnel involved in conducting a `narcoanalysis' interview include a forensic psychologist, an anaesthesiologist, a psychiatrist, a general physician or other medical staff and a language interpreter if needed. Additionally a videographer is required to create video-recordings of the test for subsequent scrutiny. In India, this technique has been administered either inside forensic science laboratories or in the operation theatres of recognised hospitals. While a psychiatrist and general physician perform the preliminary function of gauging whether the subject is mentally and physically fit to undergo the test, the anaesthesiologist supervises the intravenous

administration of the drug. It is the forensic psychologist who actually conducts the questioning. Since the tests are meant to aid investigation efforts, the forensic psychologist needs to closely co-operate with the investigators in order to frame appropriate questions.

46. This technique can serve several ends. The revelations could help investigators to uncover vital evidence or to corroborate pre-existing testimonies and prosecution theories. Narcoanalysis tests have also been used to detect `malingering' (faking of amnesia). The premise is that during the `hypnotic stage' the subject is unable to wilfully suppress the memories associated with the relevant facts. Thus, it has been urged that drug-induced revelations can help to narrow down investigation efforts, thereby saving public resources. There is of course a very real possibility that information extracted through such interviews can lead to the uncovering of independent evidence which may be relevant. Hence, we must consider the implications of such derivative use of the drug- induced revelations, even if such revelations are not admissible as evidence. We must also account for the uses of this technique by persons other than investigators and prosecutors. Narcoanalysis tests could be requested by defendants who want to prove their innocence. Demands for this test could also be made for purposes such as gauging the credibility of testimony, to refresh the memory of witnesses or to ascertain the mental capacity of persons to stand trial. Such uses can have a direct impact on the efficiency of investigations as well as the fairness of criminal trials. [See generally: George H. Dession, Lawrence Z. Freedman, Richard C. Donnelly and Frederick G. Redlich, `Drug-Induced revelation and criminal investigation', 62 *Yale Law Journal* 315-347 (February 1953)]

47. It is also important to be aware of the limitations of the `narcoanalysis' technique. It does not have an absolute success rate and there is always the possibility that the subject will not reveal any relevant information. Some studies have shown that most of the drug-induced revelations are not related to the relevant facts and they are more likely to be in the nature of inconsequential information about the subjects' personal lives. It takes great skill on part of the interrogators to extract and identify information which could eventually prove to be useful. While some persons are able to retain their ability to deceive even in the hypnotic state, others can become extremely suggestible to questioning. This is especially worrying, since investigators who are under pressure to deliver results could frame questions in a manner that prompts incriminatory responses. Subjects could also concoct fanciful stories in the course of the `hypnotic stage'. Since the responses of different individuals are bound to vary, there is no uniform criteria for evaluating the efficacy of the `narcoanalysis' technique.

48. In an article published in 1951, C.W. Muehlberger (supra.) had described a French case which attracted controversy in 1948. Raymond Cens, who had been accused of being a Nazi collaborator, appeared to have suffered an apoplectic stroke which also caused memory loss. The French Court trying the case had authorised a board of psychiatrists to conduct an examination for ascertaining the defendant's amnesia. The narcoanalysis technique was used in the course of the examination and the defendant did not object to the same. However, the test results showed that the subject's memory was not impaired and that he had been faking amnesia. At the trial, testimony about these findings was admitted, thereby leading to a conviction. Subsequently, Raymond Cens filed a civil suit against the psychiatrists alleging assault and illegal search. However, it was decided that the board had used routine psychiatric procedures and since the actual physical damage to the defendant was nominal, the psychiatrists were acquitted. At the time, this case created quite a stir

and the Council of the Paris Bar Association had passed a resolution against the use of drugs during interrogation. [Refer C.W. Muehlberger (1951) at p. 527; The Raymond Cens case has also been discussed in the following article: J.P. Gagnieur, `The Judicial use of Psychonarcosis in France', 40(3) *Journal of Criminal Law and Criminology* 370-380 (Sept.-Oct. 1949)]

49. An article published in 1961 [Andre A. Moenssens, `Narcoanalysis in Law Enforcement', 52(4) *The Journal of Criminal Law, Criminology and Police Science* 453-458 (Nov.- Dec. 1961)] had surveyed some judicial precedents from the U.S.A. which dealt with the forensic uses of the narcoanalysis technique. The first reference is to a decision from the State of Missouri reported as ***State*** v. ***Hudson*** 314 Mo. 599 (1926). In that case, the defence lawyer in a prosecution for rape attempted to rely on the expert testimony of a doctor. The doctor in turn declared that he had questioned the defendant after injecting a truth-serum and the defendant had denied his guilt while in a drug-induced state. The trial court had refused to admit the doctor's testimony by finding it to be completely unreliable from a scientific viewpoint. The appellate court upheld the finding and made the following observation, *Id.* at p. 602:

Testimony of this character - barring the sufficient fact that it cannot be classified otherwise than a self-serving declaration - is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its alleged truth compelling powers are distilled. Its origin is as nebulous as its effect is uncertain....

50. In ***State*** v. ***Lindemuth*** 56 N.M. 237 (1952) the testimony of a psychiatrist was not admitted when he wanted to show that the answers given by a defendant while under the influence of sodium pentothal supported the defendant's plea of innocence in a murder case. The trial court's refusal to admit such testimony was endorsed by the appellate court, and it was noted, *Id.* at p. 243:

Until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition, we are unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposed views on the same facts and conditions, to the despair of the court reporter and the bewilderment of the fact-finder.

51. However, Andre Moenssens (1961) also took note of a case which appeared to endorse an opposing view. In ***People*** v. ***Jones*** 42 Cal. 2d 219 (1954), the trial court overruled the prosecution's objection to the introduction of a psychiatrist's testimony on behalf of the defendant. The psychiatrist had conducted several tests on the defendant which included a sodium pentothal induced interview. The Court found that this was not sufficient to exclude the psychiatrist's testimony in its entirety. It was observed that even though the truth of statements revealed under narcoanalysis remains uncertain, the results of the same could be clearly distinguished from the psychiatrist's overall conclusions which were based on the results of all the tests considered together.

52. At the federal level, the U.S. Court of Appeals for the Ninth Circuit dealt with a similar issue in ***Lindsey*** v. ***United States*** 237 F. 2d 893 (9th Circ. 1956). In that case, the trial court had admitted a psychiatrist's opinion testimony which was based on a clinical examination that included psychological tests and a sodium pentothal induced interview. The subject of the interview was a

fifteen-year old girl who had been sexually assaulted and had subsequently testified in a prosecution for rape. On cross-examination, the credibility of the victim's testimony had been doubted and in an attempt to rebut the same, the prosecution had called on the psychiatrist. On the basis of the results of the clinical examination, the psychiatrist offered his professional opinion that the victim had been telling the truth when she had repeated the charges that were previously made to the police. This testimony was admitted as a prior consistent statement to rehabilitate the witness but not considered as substantive evidence. Furthermore, a tape recording of the psychiatrist's interview with the girl, while she was under narcosis, was also considered as evidence. The jury went on to record a finding of guilt. When the case was brought in appeal before the Ninth Circuit Court, the conviction was reversed on the ground that the defendant had been denied the `due process of law'. It was held that before a prior consistent statement made under the influence of a sodium pentothal injection could be admitted as evidence, it should be scientifically established that the test is absolutely accurate and reliable in all cases. Although the value of the test in psychiatric examinations was recognised, it was pointed out that the reliability of sodium pentothal tests had not been sufficiently established to warrant admission of its results in evidence. It was stated that "Scientific tests reveal that people thus prompted to speak freely do not always tell the truth". [Cited from Andre A. Moenssens (1961) at pp. 455- 456]

53. In ***Lawrence M. Dugan*** v. ***Commonwealth of Kentucky*** 333 S.W.2d. 755 (1960), the defendant had been given a truth serum test by a psychiatrist employed by him. The trial court refused to admit the psychiatrist's testimony which supported the truthfulness of the defendant's statement. The defendant had pleaded innocence by saying that a shooting which had resulted in the death of another person had been an accident. The trial court's decision was affirmed on appeal and it was reasoned that no court of last resort has recognised the admissibility of the results of truth serum tests, the principal ground being that such tests have not attained sufficient recognition of dependability and reliability.

54. The U.S. Supreme Court has also disapproved of the forensic uses of truth-inducing drugs in ***Townsend*** v. ***Sain*** 372 US 293 (1963). In that case a heroin addict was arrested on the suspicion of having committed robbery and murder. While in custody he began to show severe withdrawal symptoms, following which the police officials obtained the services of a physician. In order to treat these withdrawal symptoms, the physician injected a combined dosage of 1/8 grain of Phenobarbital and 1/230 grain of Hyoscine. Hyoscine is the same as `Scopolamine' which has been described earlier. This dosage appeared to have a calming effect on Townsend and after the physician's departure he promptly responded to questioning by the police and eventually made some confessional statements. The petitioner's statements were duly recorded by a court reporter. The next day he was taken to the office of the prosecutor where he signed the transcriptions of the statements made by him on the previous day. [The facts of this case have also been discussed in: Charles E. Sheedy, `Narco-interrogation of a Criminal Suspect', 50(2) *The Journal of Criminal Law, Criminology and Police Science* 118-123 (July- Aug 1959) at pp. 118-119]

55. When the case came up for trial, the counsel for the petitioner brought a motion to exclude the transcripts of the statements from the evidence. However, the trial judge denied this motion and admitted the court reporter's transcription of the confessional statements into evidence. Subsequently, a jury found Townsend to be guilty, thereby leading to his conviction. When the petitioner made a *habeas corpus* application before a Federal District Court, one of the main

arguments advanced was that the fact of Scopolamine's character as a truth-serum had not been brought out at the time of the motion to suppress the statements or even at the trial before the State Court. The Federal District Court denied the habeas corpus petition without a plenary evidentiary hearing, and this decision was affirmed by the Court of Appeals. Hence, the matter came before the U.S. Supreme Court. In an opinion authored by Earl Warren, C.J. the Supreme Court held that the Federal District Court had erred in denying a writ of habeas corpus without giving a plenary evidentiary hearing to examine the voluntariness of the confessional statements. Both the majority opinion as well as the dissenting opinion (Stewart, J.) concurred on the finding that a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial. On this issue, Warren, C.J. observed, 372 US 293 (1963), at pp. 307-308:

Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's `will was overborne' or if his confession was not `the product of a rational intellect and a free will', his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement. It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a `truth serum'. It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a `truth serum', if these properties exist. Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible.

(internal citations omitted)

56. In ***United States*** v. ***Swanson*** 572 F.2d 523 (5th Circ. 1978), two individuals had been convicted for conspiracy and extortion through the acts of sending threatening letters. At the trial stage, one of the defendants testified that he suffered from amnesia and therefore he could not recall his alleged acts of telephoning the co-defendant and mailing threatening letters. In order to prove such amnesia his counsel sought the admission of a taped interview between the defendant and a psychiatrist which had been conducted while the defendant was under the influence of sodium amytal. The drug-induced statements supposedly showed that the scheme was a joke or a prank. The trial court refused to admit the contents of this sodium amytal induced interview and the Fifth Circuit Court upheld this decision. In holding the same, it was also observed, *Id.* at p. 528:

...Moreover, no drug-induced recall of past events which the subject is otherwise unable to recall is any more reliable than the procedure for inducing recall. Here both psychiatrists testified that sodium amytal does not ensure truthful statements. No re-creation or recall, by photograph, demonstration, drug-stimulated recall, or otherwise, would be admissible with so tenuous a predicate.

57. A decision given by the Ninth Circuit Court in ***United States*** v. ***Solomon*** 753 F. 2d 1522 (9th Circ. 1985), has been cited by the respondents to support the forensic uses of the narcoanalysis technique. However, a perusal of that judgment shows that neither the actual statements made during narcoanalysis interviews nor the expert testimony relating to the same were given any weightage. The facts were that three individuals, namely Solomon, Wesley and George (a minor

at the time of the crime) were accused of having committed robbery and murder by arson. After their arrest, they had changed their statements about the events relating to the alleged offences. Subsequently, Wesley gave his consent for a sodium amytal induced interview and the same was administered by a psychiatrist named Dr. Montgomery. The same psychiatrist also conducted a sodium amytal interview with George, at the request of the investigators.

58. At the trial stage, George gave testimony which proved to be incriminatory for Solomon and Wesley. However, the statements made by Wesley during the narcoanalysis interview were not admitted as evidence and even the expert testimony about the same was excluded. On appeal, the Ninth Circuit Court held that there had been no abuse of discretion by the trial court in considering the evidence before it. Solomon and Wesley had contended that the trial court should have excluded the testimony given by George before the trial judge, since the same was based on the results of the sodium amytal interview and was hence unreliable. The Court drew a distinction between the statements made during the narcoanalysis interview and the subsequent statements made before the trial court. It was observed that it was open to the defendants to show that George's testimony during trial had been bolstered by the previous revelations made during the narcoanalysis interview. However, the connection between the drug-induced revelations and the testimony given before the trial court could not be presumed. It was further noted, *Id.* at p. 1525:

The only Ninth Circuit case addressing narcoanalysis excluded a recording of and psychiatric testimony supporting an interview conducted under the influence of sodium pentothal, a precursor of sodium amytal. [*Lindsey* v. *United States* 237 F.2d 893 (9th Cir. 1956) ...] The case at bar is distinguishable because no testimony concerning the narcoanalysis was offered at trial. Only George's current recollection of events was presented.

In an analogous situation, this circuit has held that the current recollections of witnesses whose memories have been refreshed by hypnosis are admissible, with the fact of hypnosis relevant to credibility only [*United States* v. *Adams* 581 F.2d 193, 198-199 (9th Cir. 1978) ...], *cert. denied.* We have cautioned, however, that "great care must be exercised to insure" that statements after hypnosis are not the product of hypnotic suggestion. *Id.*

We find no abuse of discretion in the trial court's ruling to admit the testimony of the witness George. The court's order denying Solomon's Motion to Suppress reflects a careful balancing of reliability against prejudicial dangers:

59. However, Wesley wanted to introduce expert testimony by Dr. Montgomery which would explain the effects of sodium amytal as well as the statements made during his own drug-induced interview. The intent was to rehabilitate Wesley's credibility after the prosecution had impeached it with an earlier confession. The trial court had held that even though narcoanalysis was not reliable enough to admit into evidence, Dr. Montgomery could testify about the statements made to him by Wesley, however without an explanation of the circumstances. On this issue, the Ninth Circuit Court referred to the ***Frye*** standard for the admissibility of scientific evidence. It was also noted that the trial court had the discretion to draw the necessary balance between the probative value of the evidence and its prejudicial effect. It again took note of the decision in ***Lindsey*** v. ***United States*** 237 F. 2d 893 (1956), where the admission of a tape recording of a narcoanalysis

interview along with an expert's explanation of the technique was held to be a prejudicial error. The following conclusion was stated, 753 F.2d 1522, at p. 1526:

Dr. Montgomery testified also that narcoanalysis is useful as a source of information that can be valuable if verified through other sources. At one point he testified that it would elicit an accurate statement of subjective memory, but later said that the subject could fabricate memories. He refused to agree that the subject would be more likely to tell the truth under narcoanalysis than if not so treated.

Wesley wanted to use the psychiatric testimony to bolster the credibility of his trial testimony that George started the fatal fire. Wesley's statement shortly after the fire was that he himself set the fire. The probative value of the statement while under narcoanalysis that George was responsible, was the drug's tendency to induce truthful statements.

Montgomery admitted that narcoanalysis does not reliably induce truthful statements. The judge's exclusion of the evidence concerning narcoanalysis was not an abuse of discretion. The prejudicial effect of an aura of scientific respectability outweighed the slight probative value of the evidence.

60. In ***State of New Jersey*** v. ***Daryll Pitts*** 56 A.2d 1320 (N.J. 1989), the trial court had refused to admit a part of a psychiatrist's testimony which was based on the results of the defendant's sodium-amytal induced interview. The defendant had been charged with murder and had sought reliance on the testimony to show his unstable state of mind at the time of the homicides. Reliance on the psychiatrist's testimony was requested during the sentencing phase of the trial in order to show a mitigating factor. On appeal, the Supreme Court of New Jersey upheld the trial court's decision to exclude that part of the testimony which was derived from the results of the sodium-amytal interview. Reference was made to the ***Frye*** standard while observing that "in determining the admissibility of evidence derived from scientific procedures, a court must first ascertain the extent to which the reliability of such procedures has attained general acceptance within the relevant scientific community." (*Id.* at p. 1344) Furthermore, the expert witnesses who had appeared at the trial had given conflicting accounts about the utility of a sodium-amytal induced interview for ascertaining the mental state of a subject with regard to past events. It was stated, *Id.* at p. 1348:

On the two occasions that this Court has considered the questions, we have concluded, based on the then-existing state of scientific knowledge, that testimony derived from a sodium-amytal induced interview is inadmissible to prove the truth of the facts asserted. [See *State* v. *Levitt* 36 N.J. 266, 275 (1961)...; *State* v. *Sinnott* ...132 A.2d 298 (1957)] Our rule is consistent with the views expressed by other courts that have addressed the issue.

...The expert testimony adduced at the Rule 8 hearing indicated that the scientific community continues to view testimony induced by sodium amytal as unreliable to ascertain truth. Thus, the trial court's ruling excluding Dr. Sadoff's testimony in the guilt phase was consistent with our precedents, with the weight of authority throughout the country, and also with contemporary scientific knowledge as reflected by the expert testimony....

(internal citations omitted)

61. Since a person subjected to the narcoanalysis technique is in a half-conscious state and loses awareness of time and place, this condition can be compared to that of a person who is in a hypnotic state. In ***Horvath*** v. ***R*** [1979] 44 C.C.C. (2d) 385, the Supreme Court of Canada held that statements made in a hypnotic state were not voluntary and hence they cannot be admitted as evidence. It was also decided that if the post- hypnotic statements relate back to the contents of what was said during the hypnotic state, the subsequent statements would be inadmissible. In that case a 17 year old boy suspected for the murder of his mother had been questioned by a police officer who had training in the use of hypnotic methods. During the deliberate interruptions in the interrogation sessions, the boy had fallen into a mild hypnotic state and had eventually confessed to the commission of the murder. He later repeated the admissions before the investigating officers and signed a confessional statement. The trial judge had found all of these statements to be inadmissible, thereby leading to an acquittal. The Court of Appeal had reversed this decision, and hence an appeal was made before the Supreme Court.

62. Notably, the appellant had refused to undergo a narcoanalysis interview or a polygraph test. It was also evident that he had not consented to the hypnosis. The multiple opinions delivered in the case examined the criterion for deciding the voluntariness of a statement. Reference was made to the well-known statement of Lord Summer in ***Ibrahim*** v. ***R*** [1914] A.C. 599 (P.C.), at p. 609:

It has long been established as a positive rule of English criminal law that no statement made by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

63. In ***Horvath*** v. ***R*** (supra.), the question was whether statements made under a hypnotic state could be equated with those obtained by `fear of prejudice' or `hope of advantage'. The Court ruled that the inquiry into the voluntariness of a statement should not be literally confined to these expressions. After examining several precedents, Spence J. held that the total circumstances surrounding the interrogation should be considered, with no particular emphasis placed on the hypnosis. It was observed that in this particular case the interrogation of the accused had resulted in his complete emotional disintegration, and hence the statements given were inadmissible. It was also held that the rule in ***Ibrahim*** v. ***R*** (supra.) that a statement must be induced by `fear of prejudice' or `hope of advantage' in order to be considered involuntary was not a comprehensive test. The word `voluntary' should be given its ordinary and natural meaning so that the circumstances which existed in the present case could also be described as those which resulted in involuntary statements.

64. In a concurring opinion, Beetz., J. drew a comparison between statements made during hypnosis and those made under the influence of a sodium-amytal injection. It was observed, at Para. 91:

91. Finally, voluntariness is incompatible not only with promises and threats but actual violence. Had Horvath made a statement while under the influence of an amytal injection administered without his consent, the statement would have been inadmissible because of the assault, and presumably because also of the effect of the injection on his mind. There was no physical violence in the case at bar. There is not even any evidence of bodily contact between Horvath and Sergeant

Proke, but through the use of an interrogation technique involving certain physical elements such as a hypnotic quality of voice and manner, a police officer has gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. As I have already indicated, it is my view that this was a form of violence or intrusion of a moral or mental nature, more subtle than visible violence but not less efficient in the result than an amytal injection administered by force.

65. In this regard, the following observations are instructive for the deciding the questions before us, at Paras. 117,118:

117. It would appear that hypnosis and narcoanalysis are used on a consensual basis by certain police forces as well as by the defence, and it has been argued that they can serve useful purposes.

118. I refrain from commenting on such practices, short of noting that even the consensual use of hypnosis and narcoanalysis for evidentiary purposes may present problems. Under normal police interrogation, a suspect has the opportunity to renew or deny his consent to answer each question, which is no longer the case once he is, although by consent, in a state of hypnosis or under the influence of a `truth serum'.

(internal citation omitted)

66. Our attention has also been drawn to the decision reported as ***Rock*** v. ***Arkansas*** 483 US 44 (1987), in which the U.S. Supreme Court ruled that hypnotically-refreshed testimony could be admitted as evidence. The constitutional basis for admitting such testimony was the Sixth Amendment which gives every person a right to present a defence in criminal cases. However, the crucial aspect was that the trial court had admitted the oral testimony given during the trial stage rather than the actual statements made during the hypnosis session conducted earlier during the investigation stage. It was found that such hypnotically-refreshed testimony was the only defence available to the defendant in the circumstances. In such circumstances, it would of course be open to the prosecution to contest the reliability of the testimony given during the trial stage by showing that it had been bolstered by the statements made during hypnosis. It may be recalled that a similar line of reasoning had been adopted in ***United States*** v. ***Solomon*** 753 F. 2d 1522 (9th Circ. 1985), where for the purpose of admissibility of testimony, a distinction had been drawn between the statements made during a narcoanalysis interview and the oral testimony given during the trial stage which was allegedly based on the drug-induced statements. Hence, the weight of precedents indicates that both the statements made during narcoanalysis interviews as well as expert testimony relating to the same have not been given weightage in criminal trials.

Brain Electrical Activation Profile (BEAP) test

67. The third technique in question is the `Brain Electrical Activation Profile test', also known as the `P300 Waves test'. It is a process of detecting whether an individual is familiar with certain information by way of measuring activity in the brain that is triggered by exposure to selected stimuli. This test consists of examining and measuring `event-related potentials' (ERP) i.e. electrical wave forms emitted by the brain after it has absorbed an external event. An ERP measurement is the recognition of specific patterns of electrical brain activity in a subject that are

indicative of certain cognitive mental activities that occur when a person is exposed to a stimulus in the form of an image or a concept expressed in words. The measurement of the cognitive brain activity allows the examiner to ascertain whether the subject recognised stimuli to which he/she was exposed. [Cited from: Andre A Moenssens, `Brain Fingerprinting - Can it be used to detect the innocence of persons charged with a crime?' 70 *University of Missouri at Kansas City Law Review* 891-920 (Summer 2002) at p. 893]

68. By the late 19th century it had been established that the brain functioned by emitting electrical impulses and the technology to measure them was developed in the form of the electroencephalograph (EEG) which is now commonly used in the medical field. Brain wave patterns observed through an EEG scan are fairly crude and may reflect a variety of unrelated brain activity functions. It was only with the development of computers that it became possible to sort out specific wave components on an EEG and identify the correlation between the waves and specific stimuli. The P300 wave is one such component that was discovered by Dr. Samuel Sutton in 1965. It is a specific event-related brain potential (ERP) which is triggered when information relating to a specific event is recognised by the brain as being significant or surprising.

69. The P300 waves test is conducted by attaching electrodes to the scalp of the subject, which measure the emission of the said wave components. The test needs to be conducted in an insulated and air-conditioned room in order to prevent distortions arising out of weather conditions. Much like the narcoanalysis technique and polygraph examination, this test also requires effective collaboration between the investigators and the examiner, most importantly for designing the stimuli which are called `probes'. Ascertaining the subject's familiarity with the `probes' can help in detecting deception or to gather useful information. The test subject is exposed to auditory or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated alongside other irrelevant words and pictures. Such stimuli can be broadly classified as material `probes' and neutral `probes'. The underlying theory is that in the case of guilty suspects, the exposure to the material probes will lead to the emission of P300 wave components which will be duly recorded by the instruments. By examining the records of these wave components the examiner can make inferences about the individual's familiarity with the information related to the crime. [Refer: *Laboratory Procedure Manual - Brain Electrical Activation Profile* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi - 2005)]

70. The P300 wave test was the precursor to other neuroscientific techniques such as `Brain Fingerprinting' developed by Dr. Lawrence Farwell. The latter technique has been promoted in the context of criminal justice and has already been the subject of litigation. There is an important difference between the `P300 waves test' that has been used by Forensic Science Laboratories in India and the `Brain Fingerprinting' technique. Dr. Lawrence Farwell has argued that the P300 wave component is not an isolated sensory brain effect but it is part of a longer response that continues to take place after the initial P300 stimulus has occurred. This extended response bears a correlation with the cognitive processing that takes place slightly beyond the P300 wave and continues in the range of 300-800 milliseconds after the exposure to the stimulus. This extended brain wave component has been named as the MERMER (Memory-and- Encoding-Related-Multifaceted-Electroencephalographic Response) effect. [See generally: Lawrence A. Farwell, `Brain Fingerprinting: A new paradigm in criminal investigations and counter-terrorism', (2001) Text can be downloaded from

71. Functional Magnetic Resonance Imaging (FMRI) is another neuroscientific technique whose application in the forensic setting has been contentious. It involves the use of MRI scans for measuring blood flow between different parts of the brain which bears a correlation to the subject's truthfulness or deception. FMRI-based lie-detection has also been advocated as an aid to interrogations in the context of counter-terrorism and intelligence operations, but it prompts the same legal questions that can be raised with respect to all of the techniques mentioned above. Even though these are non- invasive techniques the concern is not so much with the manner in which they are conducted but the consequences for the individuals who undergo the same. The use of techniques such as `Brain Fingerprinting' and `FMRI-based Lie-Detection' raise numerous concerns such as those of protecting mental privacy and the harms that may arise from inferences made about the subject's truthfulness or familiarity with the facts of a crime. [See generally: Michael S. Pardo, `Neuroscience evidence, legal culture and criminal procedure', 33 *American Journal of Criminal Law* 301-337 (Summer 2006); Sarah E. Stoller and Paul Root Wolpe, `Emerging neurotechnologies for lie detection and the fifth amendment', 33 *American Journal of Law and Medicine* 359-375 (2007)]

72. These neuroscientific techniques could also find application outside the criminal justice setting. For instance, Henry T. Greely (2005, Cited below) has argued that technologies that may enable a precise identification of the subject's mental responses to specific stimuli could potentially be used for market-research by business concerns for surveying customer preferences and developing targeted advertising schemes. They could also be used to judge mental skills in the educational and employment-related settings since cognitive responses are often perceived to be linked to academic and professional competence. One can foresee the potential use of this technique to distinguish between students and employees on the basis of their cognitive responses. There are several other concerns with the development of these `mind-reading' technologies especially those relating to the privacy of individuals. [Refer: Henry T. Greely, `Chapter 17: The social effects of advances in neuroscience: Legal problems, legal perspectives', in Judy Illes (ed.), *Neuroethics - Defining the issues in theory, practice and policy* (Oxford University Press, 2005) at pp. 245-263]

73. Even though the P300 Wave component has been the subject of considerable research, its uses in the criminal justice system have not received much scholarly attention. Dr. Lawrence Farwell's `Brain Fingerprinting' technique has attracted considerable publicity but has not been the subject of any rigorous independent study. Besides this preliminary doubt, an important objection is centred on the inherent difficulty of designing the appropriate `probes' for the test. Even if the `probes' are prepared by an examiner who is thoroughly familiar with all aspects of the facts being investigated, there is always a chance that a subject may have had prior exposure to the material probes. In case of such prior exposure, even if the subject is found to be familiar with the probes, the same will be meaningless in the overall context of the investigation. For example, in the aftermath of crimes that receive considerable media-attention the subject can be exposed to the test stimuli in many ways. Such exposure could occur by way of reading about the crime in newspapers or magazines, watching television, listening to the radio or by word of mouth. A possibility of prior exposure to the stimuli may also arise if the investigators unintentionally reveal crucial facts about the crime to the subject before conducting the test. The subject could also be familiar with the content of the material probes for several other reasons.

74. Another significant limitation is that even if the tests demonstrate familiarity with the material probes, there is no conclusive guidance about the actual nature of the subject's involvement in the crime being investigated. For instance a by- stander who witnessed a murder or robbery could potentially be implicated as an accused if the test reveals that the said person was familiar with the information related to the same. Furthermore, in cases of amnesia or `memory-hardening' on part of the subject, the tests could be blatantly misleading. Even if the inferences drawn from the `P300 wave test' are used for corroborating other evidence, they could have a material bearing on a finding of guilt or innocence despite being based on an uncertain premise. [For an overview of the limitations of these neuroscientific techniques, see: John G. New, `If you could read my mind - Implications of neurological evidence for twenty-first century criminal jurisprudence', 29 *Journal of Legal Medicine* 179-197 (April-June 2008)]

75. We have come across two precedents relatable to the use of `Brain Fingerprinting' tests in criminal cases. Since this technique is considered to be an advanced version of the P300 Waves test, it will be instructive to examine these precedents. In ***Harrington*** v. ***Iowa*** 659 N.W.2d 509 (2003), Terry J. Harrington (appellant) had been convicted for murder in 1978 and the same had allegedly been committed in the course of an attempted robbery. A crucial component of the incriminating materials was the testimony of his accomplice. However, many years later it emerged that the accomplice's testimony was prompted by an offer of leniency from the investigating police and doubts were raised about the credibility of other witnesses as well. Subsequently it was learnt that at the time of the trial, the police had not shared with the defence some investigative reports that indicated the possible involvement of another individual in the said crime. Harrington had also undergone a `Brain Fingerprinting' test under the supervision of Dr. Lawrence Farwell. The test results showed that he had no memories of the `probes' relating to the act of murder. Hence, Harrington approached the District Court seeking the vacation of his conviction and an order for a new trial. Post-conviction relief was sought on grounds of newly discovered evidence which included recantation by the prosecution's primary witness, the past suppression of police investigative reports which implicated another suspect and the results of the `Brain Fingerprinting' tests. However, the District Court denied this application for post-conviction relief. This was followed by an appeal before the Supreme Court of Iowa.

76. The appellate court concluded that Harrington's appeal was timely and his action was not time barred. The appellant was granted relief in light of a `due process' violation, i.e. the failure on part of the prosecution at the time of the original trial to share the investigative reports with the defence. It was observed that the defendant's right to a fair trial had been violated because the prosecution had suppressed evidence which was favourable to the defendant and clearly material to the issue of guilt. Hence the case was remanded back to the District Court. However, the Supreme Court of Iowa gave no weightage to the results of the `Brain Fingerprinting' test and did not even inquire into their relevance or reliability. In fact it was stated: "Because the scientific testing evidence is not necessary to a resolution of this appeal, we give it no further consideration." [659 N.W.2d 509, at p. 516]

77. The second decision brought to our attention is ***Slaughter*** v. ***Oklahoma*** 105 P. 3d 832 (2005). In that case, Jimmy Ray Slaughter had been convicted for two murders and sentenced to death. Subsequently, he filed an application for post- conviction relief before the Court of Criminal Appeals of Oklahoma which attempted to introduce in evidence an affidavit and evidentiary

materials relating to a `Brain Fingerprinting' test. This test had been conducted by Dr. Lawrence Farwell whose opinion was that the petitioner did not have knowledge of the `salient features of the crime scene'. Slaughter also sought a review of the evidence gathered through DNA testing and challenged the bullet composition analysis pertaining to the crime scene. However, the appellate court denied the application for post-conviction relief as well as the motion for an evidentiary hearing. With regard to the affidavits based on the `Brain Fingerprinting' test, it was held, *Id.* at p. 834:

10. Dr. Farwell makes certain claims about the Brain Fingerprinting test that are not supported by anything other than his bare affidavit. He claims the technique has been extensively tested, has been presented and analyzed in numerous peer-review articles in recognized scientific publications, has a very low rate of error, has objective standards to control its operation, and is generally accepted within the `relevant scientific community'. These bare claims, however, without any form of corroboration, are unconvincing and, more importantly, legally insufficient to establish Petitioner's post-conviction request for relief. Petitioner cites one published opinion, *Harrington* v. *State* 659 N.W.2d 509 (Iowa 2003), in which a brain fingerprinting test result was raised as error and discussed by the Iowa Supreme Court (`a novel computer-based brain testing'). However, while the lower court in Iowa appears to have admitted the evidence under non-Daubert circumstances, the test did not ultimately factor into the Iowa Supreme Court's published decision in any way.

Accordingly, the following conclusion was stated, *Id.* at p. 836:

18. Therefore, based upon the evidence presented, we find the Brain Fingerprinting evidence is procedurally barred under the Act and our prior cases, as it could have been raised in Petitioner's direct appeal and, indeed, in his first application for post-conviction relief. We further find a lack of sufficient evidence that would support a conclusion that Petitioner is factually innocent or that Brain Fingerprinting, based solely upon the MERMER effect, would survive a *Daubert* analysis.

CONTENTIOUS ISSUES IN THE PRESENT CASE

78. As per the Laboratory Procedure manuals, the impugned tests are being conducted at the direction of jurisdictional courts even without obtaining the consent of the intended test subjects. In most cases these tests are conducted conjunctively wherein the veracity of the information revealed through narcoanalysis is subsequently tested through a polygraph examination or the BEAP test. In some cases the investigators could first want to ascertain the capacity of the subject to deceive (through polygraph examination) or his/her familiarity with the relevant facts (through BEAP test) before conducting a narcoanalysis interview. Irrespective of the sequence in which these techniques are administered, we have to decide on their permissibility in circumstances where any of these tests are compulsorily administered, either independently or conjunctively.

79. It is plausible that investigators could obtain statements from individuals by threatening them with the possibility of administering either of these tests. The person being interrogated could possibly make self-incriminating statements on account of apprehensions that these techniques will extract the truth. Such behaviour on part of investigators is more likely to occur when the person being interrogated is unaware of his/her legal rights or is intimidated for any other reason.

It is a settled principle that a statement obtained through coercion, threat or inducement is involuntary and hence inadmissible as evidence during trial. However, it is not settled whether a statement made on account of the apprehension of being forcibly subjected to the impugned tests will be involuntary and hence inadmissible. This aspect merits consideration. It is also conceivable that an individual who has undergone either of these tests would be more likely to make self-incriminating statements when he/she is later confronted with the results. The question in that regard is whether the statements that are made subsequently should be admissible as evidence. The answers to these questions rest on the permissibility of subjecting individuals to these tests without their consent.

I. Whether the involuntary administration of the impugned techniques violates the `right against self- incrimination' enumerated in Article 20(3) of the Constitution?

80. Investigators could seek reliance on the impugned tests to extract information from a person who is suspected or accused of having committed a crime. Alternatively these tests could be conducted on witnesses to aid investigative efforts. As mentioned earlier, this could serve several objectives, namely those of gathering clues which could lead to the discovery of relevant evidence, to assess the credibility of previous testimony or even to ascertain the mental state of an individual. With these uses in mind, we have to decide whether the compulsory administration of these tests violates the `right against self-incrimination' which finds place in Article 20(3) of the Constitution of India. Along with the `rule against double-jeopardy' and the `rule against retrospective criminalisation' enumerated in Article 20, it is one of the fundamental protections that controls interactions between individuals and the criminal justice system. Article 20(3) reads as follows:

No person accused of any offence shall be compelled to be a witness against himself.

81. The interrelationship between the `right against self- incrimination' and the `right to fair trial' has been recognised in most jurisdictions as well as international human rights instruments. For example, the U.S. Constitution incorporates the `privilege against self-incrimination' in the text of its Fifth Amendment. The meaning and scope of this privilege has been judicially moulded by recognising it's interrelationship with other constitutional rights such as the protection against `unreasonable search and seizure' (Fourth amendment) and the guarantee of `due process of law' (Fourteenth amendment). In the International Covenant on Civil and Political Rights (ICCPR), Article 14(3)(g) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that `Everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law'. The guarantee of `presumption of innocence' bears a direct link to the `right against self- incrimination' since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

82. In the Indian context, Article 20(3) should be construed with due regard for the inter-relationship between rights, since this approach was recognised in ***Maneka Gandhi's*** case, (1978) 1 SCC 248. Hence, we must examine the `right against self-incrimination' in respect of its relationship with the multiple dimensions of `personal liberty' under Article 21, which include

guarantees such as the `right to fair trial' and `substantive due process'. It must also be emphasized that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Fourty-Fourth amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during the operation of a proclamation of emergency. In this regard, Article 359(1) of the Constitution of India reads as follows:

359. Suspension of the enforcement of the rights conferred by Part III during emergencies. - (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order....

83. Undoubtedly, Article 20(3) has an exalted status in our Constitution and questions about its meaning and scope deserve thorough scrutiny. In one of the impugned judgments, it was reasoned that all citizens have an obligation to co- operate with ongoing investigations. For instance reliance has been placed on Section 39, CrPC which places a duty on citizens to inform the nearest magistrate or police officer if they are aware of the commission of, or of the intention of any other person to commit the crimes enumerated in the section. Attention has also been drawn to the language of Section 156(1), CrPC which states that a police officer in charge of a police station is empowered to investigate cognizable offences even without an order from the jurisdictional magistrate. Likewise, our attention was drawn to Section 161(1), CrPC which empowers the police officer investigating a case to orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. While the overall intent of these provisions is to ensure the citizens' cooperation during the course of investigation, they cannot override the constitutional protections given to accused persons. The scheme of the CrPC itself acknowledges this hierarchy between constitutional and statutory provisions in this regard. For instance, Section 161(2), CrPC prescribes that when a person is being examined by a police officer, he is not bound to answer such questions, the answers of which would have a tendency to expose him to a criminal charge or a penalty or forfeiture.

84. Not only does an accused person have the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence. At the trial stage, Section 313(3) of the CrPC places a crucial limitation on the power of the court to put questions to the accused so that the latter may explain any circumstances appearing in the evidence against him. It lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, Proviso (b) to Section 315(1) of CrPC mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the trial. It is evident that Section 161(2), CrPC enables a person to choose silence in response to questioning by a police officer during the stage of investigation, and as per the scheme of Section 313(3) and Proviso (b) to Section 315(1) of the same code, adverse inferences cannot be drawn on account of the accused person's silence during the trial stage.

Historical origins of the `right against self-incrimination'

85. The right of refusal to answer questions that may incriminate a person is a procedural safeguard which has gradually evolved in common law and bears a close relation to the `right to fair trial'. There are competing versions about the historical origins of this concept. Some scholars have identified the origins of this right in the medieval period. In that account, it was a response to the procedure followed by English judicial bodies such as the Star Chamber and High Commissions which required defendants and suspects to take ex officio oaths. These bodies mainly decided cases involving religious non-conformism in a Protestant dominated society, as well as offences like treason and sedition. Under an ex officio oath the defendant was required to answer all questions posed by the judges and prosecutors during the trial and the failure to do so would attract punishments that often involved physical torture. It was the resistance to this practice of compelling the accused to speak which led to demands for a `right to silence'.

86. In an academic commentary, Leonard Levy (1969) had pointed out that the doctrinal origins of the right against self-incrimination could be traced back to the Latin maxim *`Nemo tenetur seipsum prodere'* (i.e. no one is bound to accuse himself) and the evolution of the concept of `due process of law' enumerated in the Magna Carta. [Refer: Leonard Levy, `The right against self-incrimination: history and judicial history', 84(1) *Political Science Quarterly* 1-29 (March 1969)] The use of the *ex officio* oath by the ecclesiastical courts in medieval England had come under criticism from time to time, and the most prominent cause for discontentment came with its use in the Star Chamber and the High Commissions. Most scholarship has focussed on the sedition trial of John Lilburne (a vocal critic of Charles I, the then monarch) in 1637, when he refused to answer questions put to him on the ground that he had not been informed of the contents of the written complaint against him. John Lilburne went on to vehemently oppose the use of ex-officio oaths, and the Parliament of the time relented by abolishing the Star Chamber and the High Commission in 1641. This event is regarded as an important landmark in the evolution of the `right to silence'.

87. However, in 1648 a special committee of Parliament conducted an investigation into the loyalty of members whose opinions were offensive to the army leaders. The committee's inquisitional conduct and its requirement that witnesses take an oath to tell the truth provoked opponents to condemn what they regarded as a revival of Star Chamber tactics. John Lilburne was once again tried for treason before this committee, this time for his outspoken criticism of the leaders who had prevailed in the struggle between the supporters of the monarch and those of the Parliament in the English civil war. John Lilburne invoked the spirit of the Magna Carta as well as the 1628 Petition of Right to argue that even after common-law indictment and without oath, he did not have to answer questions against or concerning himself. He drew a connection between the right against self-incrimination and the guarantee of a fair trial by invoking the idea of `due process of law' which had been stated in the Magna Carta.

88. John H. Langbein (1994) has offered more historical insights into the emergence of the `right to silence'. [John H. Langbein, `The historical origins of the privilege against self- incrimination at common law', 92(5) *Michigan Law Review* 1047-1085 (March 1994)] He draws attention to the fact that even though *ex officio* oaths were abolished in 1641, the practice of requiring defendants to present their own defence in criminal proceedings continued for a long time thereafter. The Star Chamber and the High Commissions had mostly tried cases involving religious non-conformists

and political dissenters, thereby attracting considerable criticism. Even after their abolition, the defendants in criminal courts did not have the right to be represented by a lawyer (`right to counsel') or the right to request the presence of defence witnesses (`right of compulsory process'). Hence, defendants were more or less compelled to testify on their own behalf. Even though the threat of physical torture on account of remaining silent had been removed, the defendant would face a high risk of conviction if he/she did not respond to the charges by answering the material questions posed by the judge and the prosecutor. In presenting his/her own defence during the trial, there was a strong likelihood that the contents of such testimony could strengthen the case of the prosecution and lead to conviction. With the passage of time, the right of a criminal defendant to be represented by a lawyer eventually emerged in the common law tradition. A watershed in this regard was the Treason Act of 1696 which provided for a `right to counsel' as well as `compulsory process' in cases involving offences such as treason. Gradually, the right to be defended by a counsel was extended to more offences, but the role of the counsel was limited in the early years. For instance defence lawyers could only help their clients with questions of law and could not make submissions related to the facts.

89. The practice of requiring the accused persons to narrate or contest the facts on their own corresponds to a prominent feature of an inquisitorial system, i.e. the testimony of the accused is viewed as the `best evidence' that can be gathered. The premise behind this is that innocent persons should not be reluctant to testify on their own behalf. This approach was followed in the inquisitional procedure of the ecclesiastical courts and had thus been followed in other courts as well. The obvious problem with compelling the accused to testify on his own behalf is that an ordinary person lacks the legal training to effectively respond to suggestive and misleading questioning, which could come from the prosecutor or the judge. Furthermore, even an innocent person is at an inherent disadvantage in an environment where there may be unintentional irregularities in the testimony. Most importantly the burden of proving innocence by refuting the charges was placed on the defendant himself. In the present day, the inquisitorial conception of the defendant being the best source of evidence has long been displaced with the evolution of adversarial procedure in the common law tradition. Criminal defendants have been given protections such as the presumption of innocence, right to counsel, the right to be informed of charges, the right of compulsory process and the standard of proving guilt beyond reasonable doubt among others. It can hence be stated that it was only with the subsequent emergence of the `right to counsel' that the accused's `right to silence' became meaningful. With the consolidation of the role of defence lawyers in criminal trials, a clear segregation emerged between the testimonial function performed by the accused and the defensive function performed by the lawyer. This segregation between the testimonial and defensive functions is now accepted as an essential feature of a fair trial so as to ensure a level-playing field between the prosecution and the defence. In addition to a defendant's `right to silence' during the trial stage, the protections were extended to the stage of pre-trial inquiry as well. With the enactment of the Sir John Jervis Act of 1848, provisions were made to advise the accused that he might decline to answer questions put to him in the pre-trial inquiry and to caution him that his answers to pre-trial interrogation might be used as evidence against him during the trial stage.

90. The judgment in ***Nandini Satpathy*** v. ***P.L. Dani*** MANU/SC/0139/1978 : (1978) 2 SCC 424, at pp. 438-439, referred to the following extract from a decision of the US Supreme Court in ***Brown***

v. ***Walker*** 161 US 591 (1896), which had later been approvingly cited by Warren, C.J. in ***Miranda*** v. ***Arizona*** 384 US 436 (1966):

The *maxim nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which have long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, were not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the State, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Underlying rationale of the right against self-incrimination

91. As mentioned earlier, `the right against self-incrimination' is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives - firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the `rule against involuntary confessions' is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

92. The concerns about the `voluntariness' of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements - often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined.
In this sense, `the right against self-incrimination' is a vital safeguard against torture and other `third-degree methods' that could be used to elicit information. It serves as a check on police

behaviour during the course of investigation. The exclusion of compelled testimony is important, otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such `short-cuts' will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the `right against self-incrimination' is a vital protection to ensure that the prosecution discharges the said onus.

93. These concerns have been recognised in Indian as well as foreign judicial precedents. For instance, Das Gupta, J. had observed in ***State of Bombay*** v. ***Kathi Kalu Oghad*** MANU/SC/0134/1961 : [1962] 3 SCR 10, at pp. 43-44:

...for long it has been generally agreed among those who have devoted serious thought to these problems that few things could be more harmful to the detection of crime or conviction of the real culprit, few things more likely to hamper the disclosure of truth than to allow investigators or prosecutors to slide down the easy path of producing by compulsion, evidence, whether oral or documentary, from an accused person. It has been felt that the existence of such an easy way would tend to dissuade persons in charge of investigation or prosecution from conducting diligent search for reliable independent evidence and from sifting of available materials with the care necessary for ascertainment of truth. If it is permissible in law to obtain evidence from the accused person by compulsion, why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law `to sit comfortably in the shade rubbing red pepper into a poor devils' eyes rather than to go about in the sun hunting up evidence.' [Sir James Fitzjames Stephen, History of Criminal Law, p. 442] No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false - out of sheer despair and an anxiety to avoid an unpleasant present. Of all these dangers the Constitution makers were clearly well aware and it was to avoid them that Article 20(3) was put in the Constitution.

94. The rationale behind the Fifth Amendment in the U.S. Constitution was eloquently explained by Goldberg. J. in ***Murphy*** v. ***Waterfront Commission*** 378 US 52 (1964), at p. 55:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self- accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state- individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contests with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self- deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

A similar view was articulated by Lord Hailsham of St. Marylebone in ***Wong Kam-ming*** v. ***R*** [1979] 1 All ER 939, at p. 946:

...any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.

95. V.R. Krishna Iyer, J. echoed similar concerns in ***Nandini Satpathy's*** case MANU/SC/0139/1978 : (1978) 2 SCC 424, at p. 442:

...And Article 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy.

96. In spite of the constitutionally entrenched status of the right against self-incrimination, there have been some criticisms of the policy underlying the same. John Wigmore (1960) argued against a broad view of the privilege which extended the same to the investigative stage. [Refer: John Wigmore, `The privilege against self-incrimination, its constitutional affectation, raison d'etre and miscellaneous implications', 51 *Journal of Criminal Law, Criminology and Police Science* 138 (1960)] He has asserted that the doctrinal origins of the `rule against involuntary confessions' in evidence law and those of the `right to self-incrimination' were entirely different and catered to different objectives. In the learned author's opinion, the `rule against involuntary confessions' evolved on account of the distrust of statements made in custody. The objective was to prevent these involuntary statements from being considered as evidence during trial but there was no prohibition against relying on statements made involuntarily during investigation. Wigmore argued that the privilege against self-incrimination should be viewed as a right that was confined to the trial stage, since the judge can intervene to prevent an accused from revealing incriminating information at that stage, while similar oversight is not always possible during the pre-trial stage.

97. In recent years, scholars such as David Dolinko (1986), Akhil Reed Amar (1997) and Mike Redmayne (2007) among others have encapsulated the objections to the scope of this right. [See: David Dolinko, `Is There a Rationale for the Privilege Against Self-Incrimination?', 33 *University of California Los Angeles Law Review* 1063 (1986); Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997) at pp. 65-70; Mike Redmayne, `Re-thinking the Privilege against Self- incrimination', 27 *Oxford Journal of Legal Studies* 209-232 (Summer 2007)] It is argued that in aiming to create a fair state-individual balance in criminal cases, the task of the investigators and prosecutors is made unduly difficult by allowing the accused to remain silent. If the overall intent of the criminal justice system is to ensure public safety through expediency in investigations and prosecutions, it is urged that the privilege against self-incrimination protects the guilty at the cost of such utilitarian objectives. Another

criticism is that adopting a broad view of this right does not deter improper practices during investigation and it instead encourages investigators to make false representations to courts about the voluntary or involuntary nature of custodial statements. It is reasoned that when investigators are under pressure to deliver results there is an inadvertent tendency to rely on methods involving coercion, threats, inducement or deception in spite of the legal prohibitions against them. Questions have also been raised about conceptual inconsistencies in the way that courts have expanded the scope of this right. One such objection is that if the legal system is obliged to respect the mental privacy of individuals, then why is there no prohibition against compelled testimony in civil cases which could expose parties to adverse consequences. Furthermore, questions have also been asked about the scope of the privilege being restricted to testimonial acts while excluding physical evidence which can be extracted through compulsion.

98. In response to John Wigmore's thesis about the separate foundations of the `rule against involuntary confessions', we must recognise the infusion of constitutional values into all branches of law, including procedural areas such as the law of evidence. While the above-mentioned criticisms have been made in academic commentaries, we must defer to the judicial precedents that control the scope of Article 20(3). For instance, the interrelationship between the privilege against self- incrimination and the requirements of observing due process of law were emphasized by William Douglas, J. in ***Rochin*** v. ***California*** 342 US 166 (1951), at p. 178:

As an original matter it might be debatable whether the provision in the Fifth Amendment that no person `shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse.

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

99. The respondents have submitted that the compulsory administration of the impugned tests will only be sought to boost investigation efforts and that the test results by themselves will not be admissible as evidence. The next prong of this position is that if the test results enable the investigators to discover independent materials that are relevant to the case, such subsequently discovered materials should be admissible during trial. In order to evaluate this position, we must answer the following questions:

• Firstly, we should clarify the scope of the `right against self-incrimination' - i.e. whether it should be construed as a broad protection that extends to the investigation stage or should it be viewed as a narrower right confined to the trial stage?

• Secondly, we must examine the ambit of the words `accused of any offence' in Article 20(3) - i.e. whether the protection is available only to persons who are formally accused in criminal cases, or does it extend to include suspects and witnesses as well as those who apprehend incrimination in cases other than the one being investigated?

• Thirdly, we must evaluate the evidentiary value of independent materials that are subsequently discovered with the help of the test results. In light of the `theory of confirmation by subsequent facts' incorporated in Section 27 of the Indian Evidence Act, 1872 we need to examine the compatibility between this section and Article 20(3). Of special concern are situations when persons could be compelled to reveal information which leads to the discovery of independent materials. To answer this question, we must clarify what constitutes `incrimination' for the purpose of invoking Article 20(3).

Applicability of Article 20(3) to the stage of investigation

100. The question of whether Article 20(3) should be narrowly construed as a trial right or a broad protection that extends to the stage of investigation has been conclusively answered by our Courts. In ***M.P. Sharma*** v. ***Satish Chandra*** MANU/SC/0018/1954 : [1954] SCR 1077, it was held by Jagannadhadas, J. at pp. 1087-1088:

Broadly stated, the guarantee in Article 20(3) is against `testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions...."

"Indeed, every positive volitional act which furnished evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Article 20(3) is `to be a witness' and not to `appear as a witness': It follows that the protection afforded to an accused in so far as it is related to the phrase `to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

101. These observations were cited with approval by B.P. Sinha, C.J. in ***State of Bombay*** v. ***Kathi Kalu Oghad and Ors.*** MANU/SC/0134/1961 : [1962] 3 SCR 10, at pp. 26-28. In the minority opinion, Das Gupta, J. affirmed the same position, *Id.* at p. 40:

...If the protection was intended to be confined to being a witness in Court then really it would have been an idle protection. It would be completely defeated by compelling a person to give all the evidence outside court and then, having what he was so compelled to do proved in court through other witnesses. An interpretation which so completely defeats the constitutional guarantee cannot, of course, be correct. The contention that the protection afforded by Article 20(3) is limited to the stage of trial must therefore be rejected.

102. The broader view of Article 20(3) was consolidated in ***Nandini Satpathy*** v. ***P.L. Dani*** MANU/SC/0139/1978 : (1978) 2 SCC 424:

...Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being a witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3).This is precisely what Section 161(2) means. That Sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are coterminous in the protective area. While the code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3)."
(at p. 435)

"If the police can interrogate to the point of self- accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has already been done. The police will prove through other evidence what they have procured through forced confession. So it is that the foresight of the framers has pre-empted self- incrimination at the incipient stages by not expressly restricting it to the trial stage in court. True, compelled testimony previously obtained is excluded. But the preventive blow falls also on pre-court testimonial compulsion. The condition, as the decisions now go, is that the person compelled must be an accused. Both precedent procurement and subsequent exhibition of self-incriminating testimony are obviated by intelligent constitutional anticipation. (at p. 449)

103. In upholding this broad view of Article 20(3), V.R. Krishna Iyer, J. relied heavily on the decision of the US Supreme Court in ***Ernesto Miranda*** v. ***Arizona*** 384 US 436 (1966). The majority opinion (by Earl Warren, C.J.) laid down that custodial statements could not be used as evidence unless the police officers had administered warnings about the accused's right to remain silent. The decision also recognised the right to consult a lawyer prior to and during the course of custodial interrogations. The practice promoted by this case is that it is only after a person has `knowingly and intelligently' waived of these rights after receiving a warning that the statements made thereafter can be admitted as evidence. The safeguards were prescribed in the following manner, *Id.* at pp. 444-445:

...the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [...] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question

him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

104. These safeguards were designed to mitigate the disadvantages faced by a suspect in a custodial environment. This was done in recognition of the fact that methods involving deception and psychological pressure were routinely used and often encouraged in police interrogations. Emphasis was placed on the ability of the person being questioned to fully comprehend and understand the content of the stipulated warning. It was held, *Id.* at pp. 457-458:

In these cases, we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect the precious Fifth Amendment right is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures....
It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carried its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [Professor Sutherland, `Crime and Confessions', 79 *Harvard Law Review* 21, 37 (1965)] The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles - that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

105. The opinion also explained the significance of having a counsel present during a custodial interrogation. It was noted, *Id.* at pp. 469-470:

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more `will benefit only the recidivist and the professional.' [Brief for the *National District Attorneys Association* as amicus curiae, p. 14] Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. [Cited from *Escobedo* v. *State of Illinois* 378 U.S. 478, 485 ...] Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

106. The majority decision in ***Miranda*** (supra.) was not a sudden development in U.S. constitutional law. The scope of the privilege against self-incrimination had been progressively expanded in several prior decisions. The notable feature was the recognition of the interrelationship between the Fifth Amendment and the Fourteenth Amendment's guarantee that

the government must observe the `due process of law' as well as the Fourth Amendment's protection against `unreasonable search and seizure'. While it is not necessary for us to survey these decisions, it will suffice to say that after ***Miranda*** (supra.), administering a warning about a person's right to silence during custodial interrogations as well as obtaining a voluntary waiver of the prescribed rights has become a ubiquitous feature in the U.S. criminal justice system. In the absence of such a warning and voluntary waiver, there is a presumption of compulsion with regard to the custodial statements, thereby rendering them inadmissible as evidence. The position in India is different since there is no automatic presumption of compulsion in respect of custodial statements. However, if the fact of compulsion is proved then the resulting statements are rendered inadmissible as evidence.

Who can invoke the protection of Article 20(3)?

107. The decision in ***Nandini Satpathy's*** case, (supra.) also touched on the question of who is an `accused' for the purpose of invoking Article 20(3). This question had been left open in ***M.P. Sharma's*** case (supra.). Subsequently, it was addressed in ***Kathi Kalu Oghad*** (supra.), at p. 37:

To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, anytime after the statement has been made.

108. While there is a requirement of formal accusation for a person to invoke Article 20(3) it must be noted that the protection contemplated by Section 161(2), CrPC is wider. Section 161(2) read with 161(1) protects `any person supposed to be acquainted with the facts and circumstances of the case' in the course of examination by the police. The language of this provision is as follows:

161. Examination of witnesses by police.

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

109. Therefore the `right against self-incrimination' protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. Krishna Iyer, J. clarified this position MANU/SC/0139/1978 : (1978) 2 SCC 424, at p. 435:

The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression `expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges.

It was further observed, *Id.* at pp. 451-452 (Para. 50):

...`To be a witness against oneself' is not confined to the particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from `tendency to be exposed to a criminal charge'. A `criminal charge' covers any criminal charge then under investigation or trial or which imminently threatens the accused.

110. Even though Section 161(2) of the CrPC casts a wide protective net to protect the formally accused persons as well as suspects and witnesses during the investigative stage, Section 132 of the Evidence Act limits the applicability of this protection to witnesses during the trial stage. The latter provision provides that witnesses cannot refuse to answer questions during a trial on the ground that the answers could incriminate them. However, the proviso to this section stipulates that the content of such answers cannot expose the witness to arrest or prosecution, except for a prosecution for giving false evidence. Therefore, the protection accorded to witnesses at the stage of trial is not as wide as the one accorded to the accused, suspects and witnesses during investigation [under Section 161(2), CrPC]. Furthermore, it is narrower than the protection given to the accused during the trial stage [under Section 313(3) and Proviso (b) to Section 315(1), CrPC]. The legislative intent is to preserve the fact- finding function of a criminal trial. Section 132 of the Evidence Act reads:

132. Witness not excused from answering on ground that answer will criminate. - A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

Proviso. - Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

111. Since the extension of the `right against self- incrimination' to suspects and witnesses has its basis in Section 161(2), CrPC it is not readily available to persons who are examined during proceedings that are not governed by the code. There is a distinction between proceedings of a purely criminal nature and those proceedings which can culminate in punitive remedies and yet cannot be characterised as criminal proceedings. The consistent position has been that ordinarily Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as

criminal proceedings. In administrative and quasi-criminal proceedings, the protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. For instance in ***Raja Narayanlal Bansilal*** v. ***Maneck Phiroz Mistry*** MANU/SC/0016/1960 : [1961] 1 SCR 417, the contention related to the admissibility of a statement made before an inspector who was appointed under the Companies Act, 1923to investigate the affairs of a company and report thereon. It had to be decided whether the persons who were examined by the concerned inspector could claim the protection of Article 20(3). The question was answered, *Id.* at p. 438:

The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise, against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed ; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser, and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Article 20(3) of the Constitution....

112. A similar issue arose for consideration in ***Romesh Chandra Mehta*** v. ***State of West Bengal*** MANU/SC/0282/1968 : [1969] 2 SCR 461, wherein it was held, at p. 472:

Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, [which he is bound to do under Article 22(1) of the Constitution] for the purpose of holding an inquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act which is punishable at the trial before a Magistrate, there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.

113. In ***Balkishan A. Devidayal*** v. ***State of Maharashtra*** MANU/SC/0112/1980 : (1980) 4 SCC 600, one of the contentious issues was whether the statements recorded by a Railway Police Force (RPF) officer during an inquiry under the Railway Property (Unlawful Possession) Act, 1996 would attract the protection of Article 20(3). Sarkaria, J. held that such an inquiry was substantially different from an investigation contemplated under the CrPC, and therefore formal accusation was a necessary condition for a person to claim the protection of Article 20(3). It was observed, *Id.* at p. 623:

To sum up, only a person against whom a formal accusation of the commission of an offence has been made can be a person `accused of an offence' within the meaning of Article 20(3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any

other formal document or notice served on that person, which ordinarily results in his prosecution in court. In the instant case no such formal accusation has been made against the appellant when his statements in question were recorded by the RPF Officer.

What constitutes `incrimination' for the purpose of Article 20(3)?

114. We can now examine the various circumstances that could `expose a person to criminal charges'. The scenario under consideration is one where a person in custody is compelled to reveal information which aids the investigation efforts. The information so revealed can prove to be incriminatory in the following ways:

• The statements made in custody could be directly relied upon by the prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from the evidence.

• Another possibility is that of `derivative use', i.e. when information revealed during questioning leads to the discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by the investigators.

• Yet another possibility is that of `transactional use', i.e. when the information revealed can prove to be helpful for the investigation and prosecution in cases other than the one being investigated.

• A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of the investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration.

115. The decision in ***Nandini Satpathy's*** case (supra.) sheds light on what constitutes incrimination for the purpose of Article 20(3). Krishna Iyer, J. observed, at pp. 449-450:

In this sense, answers that would in themselves support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused....

An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self- incriminations but leaves untouched other relevant facts.

116. Reliance was also placed on the decision of the US Supreme Court in ***Samuel Hoffman*** v. ***United States*** 341 US 479 (1951). The controversy therein was whether the privilege against self-incrimination was available to a person who was called on to testify as a witness in a grand-jury investigation. Clark, J. answered the question in the affirmative, at p. 486:

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. [...]

But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. [...]

(internal citations omitted)

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure may result." (at p. 487)

117. However, Krishna Iyer, J. also cautioned against including in the prohibition even those answers which might be used as a step towards obtaining evidence against the accused. It was stated MANU/SC/0139/1978 : (1978) 2 SCC 424, at p. 451:

The policy behind the privilege, under our scheme, does not swing so wide as to sweep out of admissibility statements neither confessional per se nor guilty in tendency but merely relevant facts which, viewed in any setting, does not have a sinister import. To spread the net so wide is to make a mockery of the examination of the suspect, so necessitous in the search for truth. Over breadth undermines, and we demur to such morbid exaggeration of a wholesome protection....

In *Kathi Kalu Oghad's* case, this Court authoritatively observed, on the bounds between constitutional proscription and testimonial permission:

'In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused at least probable, considered by itself.' MANU/SC/0134/1961 : [1962] 3 SCR 10, 32

Again the Court indicated that Article 20(3) could be invoked only against statements which `had a material bearing on the criminality of the maker of the statement'. `By itself' does not exclude the setting or other integral circumstances but means something in the fact disclosed a guilt element. Blood on clothes, gold bars with notorious marks and presence on the scene or possession of the lethal weapon or corrupt currency have a tale to tell, beyond red fluid, precious metal, gazing at the stars or testing sharpness or value of the rupee. The setting of the case is an implied component of the statement.

118. In light of these observations, we must examine the permissibility of extracting statements which may furnish a link in the chain of evidence and hence create a risk of exposure to criminal charges. The crucial question is whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3). It is a settled principle that statements made in custody are considered to be unreliable unless they have been subjected to cross- examination or judicial scrutiny. The scheme created by the Code of Criminal Procedure and the Indian Evidence

Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only the statements made in the presence of a judicial magistrate which can be given weightage. The doctrine of excluding the `fruits of a poisonous tree' has been incorporated in Sections 24, 25 and 26 of the Indian Evidence Act, 1872 which read as follows:

24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding. - A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

25. Confession to police officer not proved. - No confession made to a police officer shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him. - No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

119. We have already referred to the language of Section 161, CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 of the CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the `theory of confirmation by subsequent facts' - i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which `furnish a link in the chain of evidence' needed for a successful prosecution. This provision reads as follows:

27. How much of information received from accused may be proved. - Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

120. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of Miranda warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).

The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in ***Kathi Kalu Oghad*** (supra.). It was observed in the majority opinion by Jagannadhadas, J., at pp. 33-34:

The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that Section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of Clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion has been used in obtaining the information.

(emphasis supplied)

This position was made amply clear at pp. 35-36:

Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it.

121. The minority opinion also agreed with the majority's conclusion on this point since Das Gupta, J., held at p. 47:

Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence, and therefore is a `witness' during the investigation. Unless, however he is `compelled' to give the information he cannot be said to be `compelled' to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under Section 27. There will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion....

122. We must also address another line of reasoning which was adopted in one of the impugned judgments. It was stated that the exclusionary rule in evidence law is applicable to statements that are inculpatory in nature. Based on this premise, it was observed that at the time of administering the impugned tests, it cannot be ascertained whether the resulting revelations or inferences will prove to be inculpatory or exculpatory in due course. Taking this reasoning forward, it was held that the compulsory administration of the impugned tests should be permissible since the same does not necessarily lead to the extraction of inculpatory evidence. We are unable to agree with this reasoning.

123. The distinction between inculpatory and exculpatory evidence gathered during investigation is relevant for deciding what will be admissible as evidence during the trial stage. The exclusionary rule in evidence law mandates that if inculpatory evidence has been gathered through improper methods (involving coercion, threat or inducement among others) then the same should be excluded from the trial, while there is no such prohibition on the consideration of exculpatory evidence. However, this distinction between the treatment of inculpatory and exculpatory evidence is made retrospectively at the trial stage and it cannot be extended back to the stage of investigation. If we were to permit the admission of involuntary statement on the ground that at the time of asking a question it is not known whether the answer will be inculpatory or exculpatory, the `right against self-incrimination' will be rendered meaningless. The law confers on `any person' who is examined during an investigation, an effective choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question will eventually prove to be inculpatory or exculpatory. Furthermore, it is also likely that the information or materials collected at an earlier stage of investigation can prove to be inculpatory in due course.

124. However, it is conceivable that in some circumstances the testimony extracted through compulsion may not actually lead to exposure to criminal charges or penalties. For example this is a possibility when the investigators make an offer of immunity against the direct use, derivative use or transactional use of the testimony. Immunity against direct use entails that a witness will not be prosecuted on the basis of the statements made to the investigators. A protection against derivative use implies that a person will not be prosecuted on the basis of the fruits of such testimony. Immunity against transactional use will shield a witness from criminal charges in cases other than the one being investigated. It is of course entirely up to the investigating agencies to decide whether to offer immunity and in what form. Even though this is distinctly possible, it is difficult to conceive of such a situation in the context of the present case. A person who is given an offer of immunity against prosecution is far more likely to voluntarily cooperate with the investigation efforts. This could be in the form of giving testimony or helping in the discovery of material evidence. If a person is freely willing to cooperate with the investigation efforts, it would be redundant to compel such a person to undergo the impugned tests. If reliance on such tests is sought for refreshing a cooperating witness' memory, the person will in all probability give his/her consent to undergo these tests.

125. It could be argued that the compulsory administration of the impugned tests can prove to be useful in instances where the cooperating witness has difficulty in remembering the relevant facts or is wilfully concealing crucial details. Such situations could very well arise when a person who is a co- accused is offered immunity from prosecution in return for cooperating with the investigators. Even though the right against self-incrimination is not directly applicable in such situations, the relevant legal inquiry is whether the compulsory administration of the impugned tests meets the requisite standard of `substantive due process' for placing restraints on personal liberty.

126. At this juncture, it must be reiterated that Indian law incorporates the `rule against adverse inferences from silence' which is operative at the trial stage. As mentioned earlier, this position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and Proviso (b) of Section 315(1) of the CrPC. The gist of this position is that even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer

questions that could expose him/her to incrimination and the trial judge cannot draw adverse inferences from the refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence. This rule was lucidly explained in the English case of ***Woolmington*** v. ***DPP*** (1935) AC 462, at p. 481:

The `right to silence' is a principle of common law and it means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court.<mpara>

127. The *180th Report* of the Law Commission of India (May 2002) dealt with this very issue. It considered arguments for diluting the `rule against adverse inferences from silence'. Apart from surveying several foreign statutes and decisions, the report took note of the fact that Section 342(2) of the erstwhile Code of Criminal Procedure, 1898 permitted the trial judge to draw an inference from the silence of the accused. However, this position was changed with the enactment of the new Code of Criminal Procedure in 1973, thereby prohibiting the making of comments as well as the drawing of inferences from the fact of an accused's silence. In light of this, the report concluded:

...We have reviewed the law in other countries as well as in India for the purpose of examining whether any amendments are necessary in the Code of Criminal Procedure, 1973. On a review, we find that no changes in the law relating to silence of the accused are necessary and if made, they will be ultra vires of Article 20(3) and Article 21 of the Constitution of India. We recommend accordingly.

128. Some commentators have argued that the `rule against adverse inferences from silence' should be broadly construed in order to give protection against non-penal consequences. It is reasoned that the fact of a person's refusal to answer questions should not be held against him/her in a wide variety of settings, including those outside the context of criminal trials. A hypothetical illustration of such a setting is a deportation hearing where an illegal immigrant could be deported following a refusal to answer questions or furnish materials required by the concerned authorities. This question is relevant for the present case because a person who refuses to undergo the impugned tests during the investigative stage could face non-penal consequences which lie outside the protective scope of Article 20(3). For example, a person who refuses to undergo these tests could face the risk of custodial violence, increased police surveillance or harassment thereafter. Even a person who is compelled to undergo these tests could face such adverse consequences on account of the contents of the test results if they heighten the investigators' suspicions. Each of these consequences, though condemnable, fall short of the requisite standard of `exposure to criminal charges and penalties' that has been enumerated in Section 161(2) of the CrPC. Even though Article 20(3) will not be applicable in such circumstances, reliance can be placed on Article 21 if such non-penal consequences amount to a violation of `personal liberty' as contemplated under the Constitution. In the past, this Court has recognised the rights of prisoners (undertrials as well as convicts) as well as individuals in other custodial environments to receive `fair, just and equitable' treatment. For instance in ***Sunil Batra*** v. ***Delhi Administration*** MANU/SC/0184/1978 : (1978) 4 SCC 494, it was decided that practices such as `solitary confinement' and the use of bar- fetters in jails were violative of Article 21. Hence, in circumstances where persons who refuse to answer

questions during the investigative stage are exposed to adverse consequences of a non-penal nature, the inquiry should account for the expansive scope of Article 21 rather than the right contemplated by Article 20(3).

I-B. Whether the results derived from the impugned techniques amount to `testimonial compulsion' thereby attracting the bar of Article 20(3)?

129. The next issue is whether the results gathered from the impugned tests amount to `testimonial compulsion', thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes `testimonial compulsion' and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3).

For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or `furnish a link in the chain of evidence' which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.

130. It is quite evident that the narcoanalysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation. In one of the impugned judgments, the compulsory administration of the narcoanalysis technique was defended on the ground that at the time of conducting the test, it is not known whether the results will eventually prove to be inculpatory or exculpatory. We have already rejected this reasoning. We see no other obstruction to the proposition that the compulsory administration of the narcoanalysis technique amounts to `testimonial compulsion' and thereby triggers the protection of Article 20(3).

131. However, an unresolved question is whether the results obtained through polygraph examination and the BEAP test are of a testimonial nature. In both these tests, inferences are drawn from the physiological responses of the subject and no direct reliance is placed on verbal responses. In some forms of polygraph examination, the subject may be required to offer verbal answers such as `Yes' or `No', but the results are based on the measurement of changes in several physiological characteristics rather than these verbal responses. In the BEAP test, the subject is not required to give any verbal responses at all and inferences are drawn from the measurement of electrical activity in the brain. In the impugned judgments, it has been held that the results obtained from both the Polygraph examination and the BEAP test do not amount to `testimony' thereby lying outside the protective scope of Article 20(3). The same assertion has been reiterated before us by the counsel for the respondents. In order to evaluate this position, we must examine the contours of the expression `testimonial compulsion'.

132. The question of what constitutes `testimonial compulsion' for the purpose of Article 20(3) was addressed in ***M.P. Sharma's*** case (supra.). In that case, the Court considered whether the issuance of search warrants in the course of an investigation into the affairs of a company (following allegations of misappropriation and embezzlement) amounted to an infringement of Article 20(3). The search warrants issued under Section 96 of the erstwhile Code of Criminal Procedure, 1898 authorised the investigating agencies to search the premises and seize the documents maintained by the said company. The relevant observations were made by Jagannadhadas, J., at pp. 1087-1088:

...The phrase used in Article 20(3) is `to be a witness'. A person can `be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness [see Section 119 of the Evidence Act or the like]. `To be a witness' is nothing more than `to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes....

Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part....

133. These observations suggest that the phrase `to be a witness' is not confined to oral testimony for the purpose of invoking Article 20(3) and that it includes certain non-verbal forms of conduct such as the production of documents and the making of intelligible gestures. However, in ***Kathi Kalu Oghad*** (supra.), there was a disagreement between the majority and minority opinions on whether the expression `to be a witness' was the same as `to furnish evidence'. In that case, this Court had examined whether certain statutory provisions, namely - Section 73 of the Evidence Act, Sections 5 and 6 of the Identification of Prisoners Act, 1920 and Section 27 of the Evidence Act were compatible with Article 20(3). Section 73 of the Evidence Act empowered courts to obtain specimen handwriting or signatures and finger impressions of an accused person for purposes of comparison. Sections 5 and 6 of the Identification of Prisoners Act empowered a Magistrate to obtain the photograph or measurements of an accused person. In respect of Section 27 of the Evidence Act, there was an agreement between the majority and the minority opinions that the use of compulsion to extract custodial statements amounts to an exception to the `theory of confirmation by subsequent facts'. We have already referred to the relevant observations in an earlier part of this opinion. Both the majority and minority opinions ruled that the other statutory provisions mentioned above were compatible with Article 20(3), but adopted different approaches to arrive at this conclusion. In the majority opinion it was held that the ambit of the expression `to be a witness' was narrower than that of `furnishing evidence'. B.P. Sinha, C.J. observed, MANU/SC/0134/1961 : [1962] 3 SCR 10, at pp. 29-32:

`To be a witness' may be equivalent to `furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. `Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that - though they may have intended to protect an accused person from the hazards of self- incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the

way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution- makers were aware of the existing law, for example, Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (XXXIII of 1920).

...The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not `to be a witness'. `To be a witness' means imparting knowledge in respect of relevant fact, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said `to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma's case MANU/SC/0018/1954 : [1954] SCR 1077, that the prohibition in Clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him....

...Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a `personal testimony'. The giving of a `personal testimony' must depend on his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to `furnishing evidence' in the larger sense, is not included within the expression `to be a witness'.

In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person atleast probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are

unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of `testimony'.

134. Hence, B.P. Sinha, C.J. construed the expression `to be a witness' as one that was limited to oral or documentary evidence, while further confining the same to statements that could lead to incrimination by themselves, as opposed to those used for the purpose of identification or comparison with facts already known to the investigators. The minority opinion authored by Das Gupta, J. (3 judges) took a different approach, which is evident from the following extracts, *Id.* at pp. 40-43:

That brings us to the suggestion that the expression `to be a witness' must be limited to a statement whether oral or in writing by an accused person imparting knowledge of relevant facts; but that mere production of some material evidence, whether documentary or otherwise would not come within the ambit of this expression. This suggestion has found favour with the majority of the Bench, we think however that this is an unduly narrow interpretation. We have to remind ourselves that while on the one hand we should bear in mind that the Constitution-makers could not have intended to stifle legitimate modes of investigation we have to remember further that quite clearly they thought that certain things should not be allowed to be done, during the investigation, or trial, however helpful they might seem to be to the unfolding of truth and an unnecessary apprehension of disaster to the police system and the administration of justice, should not deter us from giving the words their proper meaning. It appears to us that to limit the meaning of the words `to be a witness' in Article 20(3) in the manner suggested would result in allowing compulsion to be used in procuring the production from the accused of a large number of documents, which are of evidentiary value, sometimes even more so than any oral statement of a witness might be....

...There can be no doubt that to the ordinary user of English words, the word `witness' is always associated with evidence, so that to say that `to be a witness' is to `furnish evidence' is really to keep to the natural meaning of the words....

...It is clear from the scheme of the various provisions, dealing with the matter that the governing idea is that to be evidence, the oral statement or a statement contained in a document, shall have a tendency to prove a fact - whether it be a fact in issue or a relevant fact - which is sought to be proved. Though this definition of evidence is in respect of proceedings in Court it will be proper, once we have come to the conclusion, that the protection of Article 20(3) is available even at the stage of investigation, to hold that at that stage also the purpose of having a witness is to obtain evidence and the purpose of evidence is to prove a fact.

The illustrations we have given above show clearly that it is not only by imparting of his knowledge that an accused person assists the proving of a fact; he can do so even by other means, such as the production of documents which though not containing his own knowledge would have a tendency to make probable the existence of a fact in issue or a relevant fact.

135. Even though Das Gupta, J. saw no difference between the scope of the expressions `to be a witness' and `to furnish evidence', the learned judge agreed with the majority's conclusion that for the purpose of invoking Article 20(3) the evidence must be incriminating by itself. This entailed that evidence could be relied upon if it is used only for the purpose of identification or comparison with information and materials that are already in the possession of the investigators. The following observations were made at pp. 45-46:

...But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself....

...This view, it may be pointed out does not in any way militate against the policy underlying the rule against `testimonial compulsion' we have already discussed above. There is little risk, if at all, in the investigator or the prosecutor being induced to lethargy or inaction because he can get such handwriting or impressions from an accused person. For, by themselves they are of little or of no assistance to bring home the guilt of an accused. Nor is there any chance of the accused to mislead the investigator into wrong channels by furnishing false evidence. For, it is beyond his power to alter the ridges or other characteristics of his hand, palm or finger or to alter the characteristics of his handwriting.

We agree therefore with the conclusion reached by the majority of the Bench that there is no infringement of Article 20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature; or impressions of his fingers, palm or foot to the investigating officer or under orders of a court for the purpose of comparison under the provisions of Section 73 of the Indian Evidence Act; though we have not been able to agree with the view of our learned brethren that `to be a witness' in Article 20(3) should be equated with the imparting of personal knowledge or that an accused does not become a witness when he produces some document not in his own handwriting even though it may tend to prove facts in issue or relevant facts against him.

136. Since the majority decision in ***Kathi Kalu Oghad*** (supra.) is the controlling precedent, it will be useful to re- state the two main premises for understanding the scope of `testimonial compulsion'. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to `personal testimony' thereby coming within the prohibition contemplated by Article 20(3). In most cases, such `personal testimony' can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or `furnish a link in the chain of evidence' needed to do so. We must emphasize that a situation where a testimonial response is used for comparison with facts already known to investigators is inherently different from a situation where a testimonial response helps the investigators to subsequently discover fresh facts or materials that could be relevant to the ongoing investigation.

137. The recognition of the distinction between testimonial acts and physical evidence for the purpose of invoking Article 20(3) of the Constitution finds a close parallel in some foreign decisions. In ***Armando Schmerber*** v. ***California*** 384 US 757 (1966), the U.S. Supreme Court had to determine whether an involuntary blood test of a defendant had violated the Fifth Amendment. The defendant was undergoing treatment at a hospital following an automobile accident. A blood sample was taken against his will at the direction of a police officer. Analysis of the same revealed that Schmerber had been intoxicated and these results were admitted into evidence, thereby leading to his conviction for drunk driving. An objection was raised on the basis of the Fifth Amendment and the majority opinion (Brennan, J.) relied on a distinction between evidence of a `testimonial' or `communicative' nature as opposed to evidence of a `physical' or `real nature', concluding that the privilege against self-incrimination applied to the former but not to the latter. In arriving at this decision, reference was made to several precedents with a prominent one being ***United States*** v. ***Holt*** 218 US 245 (1910). In that case, a defendant was forced to try on an article of clothing during the course of investigation. It had been ruled that the privilege against self-incrimination prohibited the use of compulsion to `extort communications' from the defendant, but not the use of the defendant's body as evidence.

138. In addition to citing John Wigmore's position that `the privilege is limited to testimonial disclosures' the Court in *Schmerber* also took note of other examples where it had been held that the privilege did not apply to physical evidence, which included `compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.' However, it was cautioned that the privilege applied to testimonial communications, irrespective of what form they might take. Hence it was recognised that the privilege not only extended to verbal communications, but also to written words as well as gestures intended to communicate [for, e.g., pointing or nodding]. This line of thinking becomes clear because the majority opinion indicated that the distinction between testimonial and physical acts may not be readily applicable in the case of Lie-Detector tests. Brennan, J. had noted, 384 US 757 (1966), at p. 764:

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain `physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege `is as broad as the mischief against which it seeks to guard.' [...]

In a recently published paper, Michael S. Pardo (2008) has made the following observation in respect of this judgment [Cited from: Michael S. Pardo, `Self-Incrimination and the Epistemology of Testimony', 30 *Cardozo Law Review* 1023-1046 (December 2008) at pp. 1027-1028]:

the Court notes that even the physical-testimonial distinction may break down when physical evidence is meant to compel `responses which are essentially testimonial' such as a lie-detector test measuring physiological responses during interrogation.

139. Following the ***Schmerber*** decision (supra.), the distinction between physical and testimonial evidence has been applied in several cases. However, some complexities have also arisen in the application of the testimonial-physical distinction to various fact-situations. While we do not need to discuss these cases to decide the question before us, we must take note of the fact that the application of the testimonial- physical distinction can be highly ambiguous in relation to non-verbal forms of conduct which nevertheless convey relevant information. Among other jurisdictions, the European Court of Human Rights (ECtHR) has also taken note of the distinction between testimonial and physical acts for the purpose of invoking the privilege against self-incrimination. In ***Saunders*** v. ***United Kingdom*** (1997) 23 EHRR 313, it was explained:

...The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence... The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

Evolution of the law on `medical examination'

140. With respect to the testimonial-physical distinction, an important statutory development in our legal system was the introduction of provisions for medical examination with the overhauling of the Code of Criminal Procedure in 1973. Sections 53 and 54 of the CrPC contemplate the medical examination of a person who has been arrested, either at the instance of the investigating officer or even the arrested person himself. The same can also be done at the direction of the jurisdictional court.

141. However, there were no provisions for authorising such a medical examination in the erstwhile Code of Criminal Procedure, 1898. The absence of a statutory basis for the same had led courts to hold that a medical examination could not be conducted without the prior consent of the person who was to be subjected to the same. For example in ***Bhondar*** v. ***Emperor*** MANU/WB/0223/1931 : AIR 1931 Cal 601, Lord Williams, J. held, at p. 602:

If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop.

...Any such examination without the consent of the accused would amount to an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination."

S.K. Ghose, J. concurred, at p. 604:

Nevertheless the examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search, is not provided for by Code, and is such a case the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report, so that the doctor would be in a position to testify to such consent if called upon to do so.

A similar conclusion was arrived at by Tarkunde, J. in ***Deomam Shamji Patel*** v. ***State of Maharashtra*** MANU/MH/0088/1959 : AIR 1959 Bom 284, who held that a person suspected or accused of having committed an offence cannot be forcibly subjected to a medical examination. It was also held that if police officers use force for this purpose, then a person can lawfully exercise the right of private defence to offer resistance.

142. It was the 37th and 41st Reports of the Law Commission of India which recommended the insertion of a provision in the Code of Criminal Procedure to enable medical examination without the consent of an accused. These recommendations proved to be the precursor for the inclusion of Sections 53 and 54 in the Code of Criminal Procedure, 1973. It was observed in the *37th Report (December 1967)*, at pp. 205-206:

...It will suffice to refer to the decision of the Supreme Court in Kathi Kalu MANU/SC/0134/1961 : AIR 1961 SC 1808 which has the effect of confining the privilege under Article 20(3) to testimony - written or oral. [Fn ...] The Supreme Court's judgment in Kathi Kalu should be taken as overruling the view taken in some earlier decisions, [Fn 6, 7 ...] invalidating provisions similar to Section 5, Identification of Prisoners Act, 1920.

The position in the U.S.A. has been summarised [Fn 8 - Emerson G., `Due Process and the American Criminal Trial', 33 *Australian Law Journal* 223, 231 (1964)]

`Less certain is the protection accorded to the defendant with regard to non-testimonial physical evidence other than personal papers. Can the accused be forced to supply a sample of his blood or urine if the resultant tests are likely to further the prosecution's case? Can he be forced to give his finger prints to wear a disguise or certain clothing, to supply a pair of shoes which might match footprints at the scene of the crime, to stand in a line-up, to submit to a hair cut or to having his hair dyed, or to have his stomach pumped or a fluoroscopic examination of the contents of his intestines? The literature on this aspect of self- incrimination is voluminous. [Fn...]

The short and reasonably accurate answer to the question posed is that almost all such physical acts can be required. [Fn...] Influenced by the historical development of the doctrine, its purpose, and the need to balance the conflicting interests of the individual and society, the courts have generally restricted the protection of the Fifth Amendment to situations where the defendant would be required to convey ideas, or where the physical acts would offend the decencies of civilized conduct.

(some internal citations omitted)

Taking note of ***Kathi Kalu Oghad*** (supra.) and the distinction drawn between testimonial and physical acts in American cases, the Law Commission observed that a provision for examination of the body would reveal valuable evidence. This view was taken forward in the *41st Report* which recommended the inclusion of a specific provision to enable medical examination during the course of investigation, irrespective of the subject's consent. [See: *41st* Report of the Law Commission of India, Vol. I (September 1969), Para 5.1 at p. 37]

143. We were also alerted to some High Court decisions which have relied on ***Kathi Kalu Oghad*** (supra.) to approve the taking of physical evidence such as blood and hair samples in the course of investigation. Following the overhaul of the Code of Criminal Procedure in 1973, the position became amply clear. In recent years, the judicial power to order a medical examination, albeit in a different context, has been discussed by this Court in ***Sharda*** v. ***Dharampal*** MANU/SC/0260/2003 : (2003) 4 SCC 493. In that case, the contention related to the validity of a civil court's direction for conducting a medical examination to ascertain the mental state of a party in a divorce proceeding. Needless to say, the mental state of a party was a relevant issue before the trial court, since insanity is a statutory ground for obtaining divorce under the Hindu Marriage Act, 1955. S.B. Sinha, J. held that Article 20(3) was anyway not applicable in a civil proceeding and that the civil court could direct the medical examination in exercise of its inherent powers under Section 151 of the Code of Civil Procedure, since there was no ordinary statutory basis for the same. It was observed, *Id.* at p. 508:

Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so. In matrimonial disputes, the court also has a conciliatory role to play - even for the said purpose it may require expert advice.

Under Section 75(e) of the Code of Civil Procedure and Order 26, Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation.

144. The decision had also cited some foreign precedents dealing with the authority of investigators and courts to require the collection of DNA samples for the purpose of comparison. In that case the discussion centered on the `right to privacy'. So far, the authority of investigators and courts to compel the production of DNA samples has been approved by the Orissa High Court in ***Thogorani*** v. ***State of Orissa*** 2004 Cri L J 4003 (Ori).

145. At this juncture, it should be noted that the Explanation to Sections 53, 53A and 54 of the Code of Criminal Procedure, 1973 was amended in 2005 to clarify the scope of medical

examination, especially with regard to the extraction of bodily substances. The amended provision reads:

53. Examination of accused by medical practitioner at the request of police officer.-

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation. - In this section and in Sections 53A and 54, -

(a) `examination' shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b)`registered medical practitioner' means a medical practitioner who possesses any medical qualification as defined in Clause (h) of Section 2 of the Indian Medical Council Act , 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

(emphasis supplied)

146. The respondents have urged that the impugned techniques should be read into the relevant provisions - i.e. Sections 53 and 54 of CrPC. As described earlier, a medical examination of an arrested person can be directed during the course of an investigation, either at the instance of the investigating officer or the arrested person. It has also been clarified that it is within the powers of a court to direct such a medical examination on its own. Such an examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Furthermore, Section 53 contemplates the use of `force as is reasonably necessary' for conducting a medical examination. This means that once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

147. The contentious provision is the Explanation to Sections 53, 53A and 54 of the CrPC (amended in 2005) which has been reproduced above. It has been contended that the phrase `modern and scientific techniques including DNA profiling and such other tests' should be liberally construed to include the impugned techniques. It was argued that even though the narcoanalysis technique, polygraph examination and the BEAP test have not been expressly enumerated, they

could be read in by examining the legislative intent. Emphasis was placed on the phrase `and such other tests' to argue that the Parliament had chosen an approach where the list of `modern and scientific techniques' contemplated was illustrative and not exhaustive. It was also argued that in any case, statutory provisions can be liberally construed in light of scientific advancements. With the development of newer technologies, their use can be governed by older statutes which had been framed to regulate the older technologies used for similar purposes.

148. On the other hand, the counsel for the appellants have contended that the Parliament was well aware of the impugned techniques at the time of the 2005 amendment and consciously chose not to include them in the amended Explanation to Sections 53, 53A and 54 of the CrPC. It was reasoned that this choice recognised the distinction between testimonial acts and physical evidence. While bodily substances such as blood, semen, sputum, sweat, hair and fingernail clippings can be readily characterised as physical evidence, the same cannot be said for the techniques in question. This argument was supported by invoking the rule of `ejusdem generis' which is used in the interpretation of statutes. This rule entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of the commonality between those specific words. In the present case, the substances enumerated are all examples of physical evidence. Hence the words `and such other tests' which appear in the Explanation to Sections 53, 53A and 54 of the CrPC should be construed to include the examination of physical evidence but not that of testimonial acts.

149. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase `and such other tests' [which appears in the Explanation to Sections 53, 53A and 54 of the CrPC] should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant's contention about the applicability of the rule of `ejusdem generis'. It should also be noted that the Explanation to Sections 53, 53A and 54 of the CrPC does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts.

150. However, the submissions touching on the legislative intent require some reflection. While it is most likely that the Parliament was well aware of the impugned techniques at the time of the 2005 amendment to the CrPC and deliberately chose not to enumerate them, we cannot arrive at a conclusive finding on this issue. While it is open to courts to examine the legislative history of a statutory provision, it is not proper for us to try and conclusively ascertain the legislative intent. Such an inquiry is impractical since we do not have access to all the materials which would have been considered by the Parliament. In such a scenario, we must address the respondent's arguments about the interpretation of statutes with regard to scientific advancements. To address this aspect, we can refer to some extracts from a leading commentary on the interpretation of statutes [See: Justice G.P. Singh, *Principles of Statutory Interpretation, 10th edn.* (New Delhi: Wadhwa & Co. Nagpur, 2006) at pp. 239-247]. The learned author has noted, at pp. 240-241:

Reference to the circumstances existing at the time of the passing of the statute does not, therefore, mean that the language used, at any rate, in a modern statute, should be held to be inapplicable to social, political and economic developments or to scientific inventions not known at the time of the passing of the statute.... The question again is as to what was the intention of the law makers: Did they intend as originalists may argue, that the words of the statute be given the meaning they would have received immediately after the statute's enactment or did they intend as dynamists may contend that it would be proper for the court to adopt the current meaning of the words? The courts have now generally leaned in favour of dynamic construction. [...] But the doctrine has also its limitations. For example it does not mean that the language of an old statute can be construed to embrace something conceptually different.

The guidance on the question as to when an old statute can apply to new state of affairs not in contemplation when the statute was enacted was furnished by Lord Wilberforce in his dissenting speech in *Royal College of Nursing of the U.K.* v. *Dept. of Health and Social Security* (1981) 1 All ER 545, which is now treated as authoritative. (...) Lord Wilberforce said, at pp. 564-565:

In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, `What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

(internal citations omitted)

151. The learned author has further taken note of several decisions where general words appearing in statutory provisions have been liberally interpreted to include newer scientific inventions and technologies. [Id. at pp. 244-246] The relevant portion of the commentary quotes Subbarao, J. in ***Senior Electric Inspector*** v. ***Laxminarayan Chopra*** MANU/SC/0221/1961 : AIR 1962 SC 159, at p. 163:

It is perhaps difficult to attribute to a legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention

only to the circumstances obtaining at the time the law was made. But in modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them.

152. In light of this discussion, there are some clear obstructions to the dynamic interpretation of the amended Explanation to Sections 53, 53A and 54 of the CrPC. Firstly, the general words in question, i.e. `and such other tests' should ordinarily be read to include tests which are in the same genus as the other forms of medical examination that have been specified. Since all the explicit references are to the examination of bodily substances, we cannot readily construe the said phrase to include the impugned tests because the latter seem to involve testimonial responses. Secondly, the compulsory administration of the impugned techniques is not the only means for ensuring an expeditious investigation. Furthermore, there is also a safe presumption that Parliament was well aware of the existence of the impugned techniques but deliberately chose not to enumerate them. Hence, on an aggregate understanding of the materials produced before us we lean towards the view that the impugned tests, i.e. the narcoanalysis technique, polygraph examination and the BEAP test should not be read into the provisions for `medical examination' under the Code of Criminal Procedure, 1973.

153. However, it must be borne in mind that even though the impugned techniques have not been expressly enumerated in the CrPC, there is no statutory prohibition against them either. It is a clear case of silence in the law. Furthermore, in circumstances where an individual consents to undergo these tests, there is no dilution of Article 20(3). In the past, the meaning and scope of the term `investigation' has been held to include measures that had not been enumerated in statutory provisions. For example, prior to the enactment of an express provision for medical examination in the CrPC, it was observed in ***Mahipal Maderna*** v. ***State of Maharashtra*** 1971 Cri L J 1405 (Bom), that an order requiring the production of a hair sample comes within the ordinary understanding of `investigation' (at pp. 1409-1410, Para. 17). We must also take note of the decision in ***Jamshed*** v. ***State of Uttar Pradesh*** 1976 Cri L J 1680 (All), wherein it was held that a blood sample can be compulsorily extracted during a `medical examination' conducted under Section 53 of the CrPC. At that time, the collection of blood samples was not expressly contemplated in the said provision. Nevertheless, the Court had ruled that the phrase `examination of a person' should be read liberally so as to include an examination of what is externally visible on a body as well as the examination of an organ inside the body. [See p. 1689, Para 13]

154. We must also refer back to the substance of the decision in ***Sharda*** v. ***Dharampal***, (supra.) which upheld the authority of a civil court to order a medical examination in exercise of the inherent powers vested in it by Section 151 of the Code of Civil Procedure, 1908. The same reasoning cannot be readily applied in the criminal context. Despite the absence of a statutory basis, it is tenable to hold that criminal courts should be allowed to direct the impugned tests with the subject's consent, keeping in mind that there is no statutory prohibition against them either.

155. Another pertinent contention raised by the appellants is that the involvement of medical personnel in the compulsory administration of the impugned tests is violative of their professional ethics. In particular, criticism was directed against the involvement of doctors in the narcoanalysis technique and it was urged that since the content of the drug- induced revelations were shared with investigators, this technique breaches the duty of confidentiality which should be ordinarily maintained by medical practitioners. [See generally: Amar Jesani, `Willing participants and tolerant profession: Medical ethics and human rights in narco-analysis', *Indian Journal of Medical Ethics*, Vol. 16(3), July-Sept. 2008] The counsel have also cited the text of the *`Principles of Medical Ethics'* adopted by the United Nations General Assembly [GA Res. 37/194, 111th Plenary Meeting] on December 18, 1982. This document enumerates some *`Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment of punishment'*. Emphasis was placed on Principle 4 which reads:

Principle 4

It is a contravention of medical ethics for health personnel, particularly physicians:

To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;

156. Being a court of law, we do not have the expertise to mould the specifics of professional ethics for the medical profession. Furthermore, the involvement of doctors in the course of investigation in criminal cases has long been recognised as an exception to the physician-patient privilege. In the Indian context, the statutory provisions for directing a medical examination are an example of the same. Fields such as forensic toxicology have become important in criminal-justice systems all over the world and doctors are frequently called on to examine bodily substances such as samples of blood, hair, semen, saliva, sweat, sputum and fingernail clippings as well as marks, wounds and other physical characteristics. A reasonable limitation on the forensic uses of medical expertise is the fact that testimonial acts such as the results of a psychiatric examination cannot be used as evidence without the subject's informed consent.

Results of impugned tests should be treated as `personal testimony'

157. We now return to the operative question of whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses. Ordinarily evidence is classified into three broad categories, namely oral testimony, documents and material evidence. The protective scope of Article 20(3) read with Section 161(2), CrPC guards against the compulsory extraction of oral testimony, even at the stage of investigation. With respect to the production of documents, the applicability of Article 20(3) is decided by the trial judge but parties are obliged to produce documents in the first place. However, the compulsory extraction of material (or physical) evidence lies outside the protective scope of Article 20(3). Furthermore, even testimony in oral or written form can be required under compulsion if it is to be used for the purpose of identification or comparison with materials and information that is already in the possession of investigators.

158. We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the `right against self-incrimination'. The crucial test laid down in ***Kathi Kalu Oghad***, (supra.) is that of `imparting knowledge in respect of relevant fact by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation' [*Id.* at p. 30]. The difficulty arises since the majority opinion in that case appears to confine the understanding of `personal testimony' to the conveyance of personal knowledge through oral statements or statements in writing. The results obtained from polygraph examination or a BEAP test are not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of these tests. It could also be argued that tests such as polygraph examination and the BEAP test do not involve a `positive volitional act' on part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and thereby excluded from the protective scope of Article 20(3). We must refer back to the substance of the decision in ***Kathi Kalu Oghad*** (supra.) which equated a testimonial act with the imparting of knowledge by a person who has personal knowledge of the facts that are in issue. It has been recognised in other decisions that such personal knowledge about relevant facts can also be communicated through means other than oral or written statements. For example in ***M.P. Sharma's*** case (supra.), it was noted that "...evidence can be furnished through the lips or by production of a thing or of a document or in other modes" [*Id.* at p. 1087]. Furthermore, common sense dictates that certain communicative gestures such as pointing or nodding can also convey personal knowledge about a relevant fact, without offering a verbal response. It is quite foreseeable that such a communicative gesture may by itself expose a person to `criminal charges or penalties' or furnish a link in the chain of evidence needed for prosecution.

159. We must also highlight that there is nothing to show that the learned judges in ***Kathi Kalu Oghad*** (supra.) had contemplated the impugned techniques while discussing the scope of the phrase `to be a witness' for the purpose of Article 20(3). At that time, the transmission of knowledge through means other than speech or writing was not something that could have been easily conceived of. Techniques such as polygraph examination were fairly obscure and were the subject of experimentation in some Western nations while the BEAP technique was developed several years later. Just as the interpretation of statutes has to be often re-examined in light of scientific advancements, we should also be willing to re-examine judicial observations with a progressive lens. An explicit reference to the Lie-Detector tests was of course made by the U.S. Supreme Court in the ***Schmerber*** decision, 384 US 757 (1966), wherein Brennan, J. had observed, at p. 764:

To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

160. Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two

tests are different from medical examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie-detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly-strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of `personal knowledge' through such means.

161. During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject. In any case, the compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information. The requirement of a `positive volitional act' becomes irrelevant since the subject is compelled to convey personal knowledge irrespective of his/her own volition.

162. Some academics have also argued that the results obtained from tests such as polygraph examination are `testimonial' acts that should come within the prohibition of the right against self-incrimination. For instance, Michael S. Pardo (2008) has observed [Cited from: Michael S. Pardo, `Self- Incrimination and the Epistemology of Testimony', 30 *Cardozo Law Review* 1023-1046 (December 2008) at p. 1046]:

The results of polygraphs and other lie-detection tests, whether they call for a voluntary response or not, are testimonial because the tests are just inductive evidence of the defendant's epistemic state. They are evidence that purports to tell us either: (1) that we can or cannot rely on the assertions made by the defendant and for which he has represented himself to be an authority, or (2) what propositions the defendant would assume authority for and would invite reliance upon, were he to testify truthfully.

163. Ronald J. Allen and M. Kristin Mace (2004) have offered a theory that the right against self-incrimination is meant to protect an individual in a situation where the State places reliance on the `substantive results of cognition'. The following definition of `cognition' has been articulated to explain this position [Cited from: Ronald J. Allen and M. Kristin Mace, `The Self-Incrimination Clause explained and its future predicted', 94 *Journal of Criminal Law and Criminology* 243-293 (2004), Fn. 16 at p. 247]:

...`Cognition' is used herein to refer to these intellectual processes that allow one to gain and make use of substantive knowledge and to compare one's `inner world' (previous knowledge) with the `outside world' (stimuli such as questions from an interrogator). Excluded are simple psychological responses to stimuli such as fear, warmness, and hunger: the mental processes that produce muscular movements; and one's will or faculty for choice....

(internal citations omitted)

164. The above-mentioned authors have taken a hypothetical example where the inferences drawn from an involuntary polygraph test that did not require verbal answers, led to the discovery of incriminating evidence. They have argued that if the scope of the Fifth Amendment extends to protecting the subject in respect of `substantive results of cognition', then reliance on polygraph test results would violate the said right. A similar conclusion has also been made by the National Human Rights Commission, as evident from the following extract in the *Guidelines Relating to Administration of Polygraph Test [Lie Detector Test] on an Accused (2000):*

The extent and nature of the `self-incrimination' is wide enough to cover the kinds of statements that were sought to be induced. In M.P. Sharma MANU/SC/0018/1954 : AIR 1954 SC 300, the Supreme Court included within the protection of the self- incrimination rule all positive volitional acts which furnish evidence. This by itself would have made all or any interrogation impossible. The test - as stated in Kathi Kalu Oghad MANU/SC/0134/1961 : AIR 1961 SC 1808 - retains the requirement of personal volition and states that `self- incrimination' must mean conveying information based upon the personal knowledge of the person giving information. By either test, the information sought to be elicited in a Lie Detector Test is information in the personal knowledge of the accused.

165. In light of the preceding discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as `personal testimony', since they are a means for `imparting personal knowledge about relevant facts'. Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come within the scope of `testimonial compulsion', thereby attracting the protective shield of Article 20(3).

II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution?

166. The preceding discussion does not conclusively address the contentions before us. Article 20(3) protects a person who is `formally accused' of having committed an offence or even a suspect or a witness who is questioned during an investigation in a criminal case. However, Article 20(3) is not applicable when a person gives his/her informed consent to undergo any of the impugned tests. It has also been described earlier that the `right against self-incrimination' does not protect persons who may be compelled to undergo the tests in the course of administrative proceedings or any other proceedings which may result in civil liability. It is also conceivable that a person who is forced to undergo these tests may not subsequently face criminal charges. In this context, Article 20(3) will not apply in situations where the test results could become the basis of non-penal consequences for the subject such as custodial abuse, police surveillance and harassment among others.

167. In order to account for these possibilities, we must examine whether the involuntary administration of any of these tests is compatible with the constitutional guarantee of `substantive due process'. The standard of `substantive due process' is of course the threshold for examining the validity of all categories of governmental action that tend to infringe upon the idea of `personal

liberty. We will proceed with this inquiry with regard to the various dimensions of `personal liberty' as understood in the context of Article 21 of the Constitution, which lays down that:

`No person shall be deprived of his life and liberty except according to procedure established by law'.

168. Since administering the impugned tests entails the physical confinement of the subject, it is important to consider whether they can be read into an existing statutory provision. This is so because any form of restraint on personal liberty, howsoever slight it may be, must have a basis in law. However, we have already explained how it would not be prudent to read the explanation to Sections 53, 53A and 54 of the CrPC in an expansive manner so as to include the impugned techniques. The second line of inquiry is whether the involuntary administration of these tests offends certain rights that have been read into Article 21 by way of judicial precedents. The contentions before us have touched on aspects such as the `right to privacy' and the `right against cruel, inhuman and degrading treatment'. The third line of inquiry is structured around the right to fair trial which is an essential component of `personal liberty'.

169. There are several ways in which the involuntary administration of either of the impugned tests could be viewed as a restraint on `personal liberty'. The most obvious indicator of restraint is the use of physical force to ensure that an unwilling person is confined to the premises where the tests are to be conducted. Furthermore, the drug-induced revelations or the substantive inferences drawn from the measurement of the subject's physiological responses can be described as an intrusion into the subject's mental privacy. It is also quite conceivable that a person could make an incriminating statement on being threatened with the prospective administration of any of these techniques. Conversely, a person who has been forcibly subjected to these techniques could be confronted with the results in a subsequent interrogation, thereby eliciting incriminating statements.

170. We must also account for circumstances where a person who undergoes the said tests is subsequently exposed to harmful consequences, though not of a penal nature. We have already expressed our concern with situations where the contents of the test results could prompt investigators to engage in custodial abuse, surveillance or undue harassment. We have also been apprised of some instances where the investigation agencies have leaked the video-recordings of narcoanalysis interviews to media organisations. This is an especially worrisome practice since the public distribution of these recordings can expose the subject to undue social stigma and specific risks. It may even encourage acts of vigilantism in addition to a `trial by media'.

171. We must remember that the law does provide for some restrictions on `personal liberty' in the routine exercise of police powers. For instance, the CrPC incorporates an elaborate scheme prescribing the powers of arrest, detention, interrogation, search and seizure. A fundamental premise of the criminal justice system is that the police and the judiciary are empowered to exercise a reasonable degree of coercive powers. Hence, the provision that enables Courts to order a person who is under arrest to undergo a medical examination also provides for the use of `force as is reasonably necessary' for this purpose. It is evident that the notion of `personal liberty' does not grant rights in the absolute sense and the validity of restrictions placed on the same needs to be evaluated on the basis of criterion such as `fairness, non- arbitrariness, and reasonableness'.

172. Both the appellants and the respondents have cited cases involving the compelled extraction of blood samples in a variety of settings. An analogy has been drawn between the pin-prick of a needle for extracting a blood sample and the intravenous administration of drugs such as sodium pentothal. Even though the extracted sample of blood is purely physical evidence as opposed to a narcoanalysis interview where the test subject offers testimonial responses, the comparison can be sustained to examine whether puncturing the skin with a needle or an injection is an unreasonable restraint on `personal liberty'.

173. The decision given by the U.S. Supreme Court in ***Rochin*** v. ***California*** 342 US 165 (1952), recognised the threshold of `conduct that shocks the conscience' for deciding when the extraction of physical evidence offends the guarantee of `due process of law'. With regard to the facts in that case, Felix Frankfurter, J. had decided that the extraction of evidence had indeed violated the same, *Id.* at pp. 172-173:

...we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents - this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

...Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

174. Coming to the cases cited before us, in ***State of Maharashtra*** v. ***Sheshappa Dudhappa Tambade*** AIR 1964 Bom 253, the Bombay High Court had upheld the constitutionality of Section 129A of the Bombay Prohibition Act, 1949. This provision empowered prohibition officers and police personnel to produce a person for `medical examination', which could include the collection of a blood sample. The said provision authorised the use of `all means reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test'. Evidently, the intent behind this provision was to enforce the policy of prohibition on the consumption of intoxicating liquors. Among other questions, the Court also ruled that this provision did not violate Article 21. Reliance was placed on a decision of the U.S. Supreme Court in ***Paul H. Breithaupt*** v. ***Morris Abram*** 352 US 432 (1957), wherein the contentious issue was whether a conviction on the basis of an involuntary blood-test violated the guarantee of `due process of law'. In deciding that the involuntary extraction of the blood sample did not violate the guarantee of `Due Process of Law', Clark, J. observed, at pp. 435-437:

...there is nothing `brutal' or `offensive' in the taking of a blood sample when done as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the

blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right and certainly the test administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of `decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not such `conduct that shocks the conscience' [*Rochin* v. *California* 342 US 165, 172 (1952)], nor such a method of obtaining evidence that it offends a `sense of justice' [*Brown* v. *Mississippi* 297 US 278, 285 (1936)]...

175. In ***Jamshed*** v. ***State of Uttar Pradesh*** 1976 Cri L J 1680 (All), the following observations were made in respect of a compulsory extraction of blood samples during a medical examination (in Para 12):

We are therefore of the view that there is nothing repulsive or shocking to the conscience in taking the blood of the appellant in the instant case in order to establish his guilt. So far as the question of causing hurt is concerned, even causing of some pain may technically amount to hurt as defined by Section 319 of the Indian Penal Code. But pain might be caused even if the accused is subjected to a forcible medical examination. For example, in cases of rape it may be necessary to examine the private parts of the culprit. If a culprit is suspected to have swallowed some stolen article, an emetic may be used and X-ray examination may also be necessary. For such purposes the law permits the use of necessary force. It cannot, therefore, be said that merely because some pain is caused, such a procedure should not be permitted.

A similar view was taken in ***Ananth Kumar Naik*** v. ***State of Andhra Pradesh*** 1977 Cri L J 1797 (A.P.), where it was held (in Para. 20):

...In fact Section 53 provides that while making such an examination such force as is reasonably necessary for that purpose may be used. Therefore, whatever discomfort that may be caused when samples of blood and semen are taken from an arrested person, it is justified by the provisions of Sections 53 and 54, CrPC.

We can also refer to the following observations in ***Anil Anantrao Lokhande*** v. ***State of Maharashtra*** 1981 Cri L J 125 (Bom), (in Para. 30):

...Once it is held that Section 53 of the Code of Criminal Procedure does confer a right upon the investigating machinery to get the arrested persons medically examined by the medical practitioner and the expression used in Section 53 includes in its import the taking of sample of the blood for analysis, then obviously the said provision is not violative of the guarantee incorporated in Article 21 of the Constitution of India.

176. This line of precedents shows that the compelled extraction of blood samples in the course of a medical examination does not amount to `conduct that shocks the conscience'. There is also an endorsement of the view that the use of `force as may be reasonably necessary' is mandated by law and hence it meets the threshold of `procedure established by law'. In this light, we must restate two crucial considerations that are relevant for the case before us. Firstly, the restrictions placed on `personal liberty' in the course of administering the impugned techniques are not limited to physical confinement and the extraction of bodily substances. All the three techniques in question also involve testimonial responses. Secondly, most of the above-mentioned cases were decided in accordance with the threshold of `procedure established by law' for restraining `personal liberty'. However, in this case we must use a broader standard of reasonableness to evaluate the validity of the techniques in question. This wider inquiry calls for deciding whether they are compatible with the various judicially-recognised dimensions of `personal liberty' such as the right to privacy, the right against cruel, inhuman or degrading treatment and the right to fair trial.

Applicability of the `right to privacy'

177. In ***Sharda*** v. ***Dharampal***, (supra.) this Court had upheld the power of a civil court to order the medical examination of a party to a divorce proceeding. In that case, the medical examination was considered necessary for ascertaining the mental condition of one of the parties and it was held that a civil court could direct the same in the exercise of its inherent powers, despite the absence of an enabling provision. In arriving at this decision it was also considered whether subjecting a person to a medical examination would violate Article 21. We must highlight the fact that a medical test for ascertaining the mental condition of a person is most likely to be in the nature of a psychiatric evaluation which usually includes testimonial responses. Accordingly, a significant part of that judgment dealt with the `right to privacy'. It would be appropriate to structure the present discussion around extracts from that opinion.

178. In ***M.P. Sharma*** (supra.), it had been noted that the Indian Constitution did not explicitly include a `right to privacy' in a manner akin to the Fourth Amendment of the U.S. Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement.
Similar issues were discussed in ***Kharak Singh*** v. ***State of Uttar Pradesh*** MANU/SC/0085/1962 : AIR 1963 SC 1295, where the Court considered the validity of police-regulations that authorised police personnel to maintain lists of `history-sheeters' in addition to conducting surveillance activities, domiciliary visits and periodic inquiries about such persons. The intention was to monitor persons suspected or charged with offences in the past, with the aim of preventing criminal acts in the future. At the time, there was no statutory basis for these regulations and they had been framed in the exercise of administrative functions. The majority opinion (Ayyangar, J.) held that these regulations did not violate `personal liberty', except for those which permitted domiciliary visits. The other restraints such as surveillance activities and periodic inquiries about `history-sheeters' were justified by observing, at Para. 20:
...the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

179. Ayyangar, J. distinguished between surveillance activities conducted in the routine exercise of police powers and the specific act of unauthorised intrusion into a person's home which violated `personal liberty'. However, the minority opinion (Subba Rao, J.) in ***Kharak Singh*** took a different approach by recognising the interrelationship between Article 21 and 19, thereby requiring the State to demonstrate the `reasonableness' of placing such restrictions on `personal liberty' [This approach was later endorsed by Bhagwati, J. in ***Maneka Gandhi*** v. ***Union of India*** MANU/SC/0133/1978 : AIR 1978 SC 597, see p. 622]. Subba Rao, J. held that the right to privacy `is an essential ingredient of personal liberty' and that the right to `personal liberty is `a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.' [MANU/SC/0085/1962 : AIR 1963 SC 1295, at p. 1306]

180. In ***Gobind*** v. ***State of Madhya Pradesh*** MANU/SC/0119/1975 : (1975) 2 SCC 148, the Supreme Court approved of some police-regulations that provided for surveillance activities, but this time the decision pointed out a clear statutory basis for these regulations. However, it was also ruled that the `right to privacy' was not an absolute right. It was held, at Para. 28:

"The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

...Assuming that the fundamental right explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. (at p. 157, Para. 31)

181. Following the judicial expansion of the idea of `personal liberty', the status of the `right to privacy' as a component of Article 21 has been recognised and re-inforced. In ***R. Raj Gopal*** v. ***State of Tamil Nadu*** MANU/SC/0056/1995 : (1994) 6 SCC 632, this Court dealt with a fact-situation where a convict intended to publish his autobiography which described the involvement of some politicians and businessmen in illegal activities. Since the publication of this work was challenged on grounds such as the invasion of privacy among others, the Court ruled on the said issue. It was held that the right to privacy could be described as the `right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among others. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical'. However, it was also ruled that exceptions may be made if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records or relates to an action of a public official concerning the discharge of his official duties.

182. In ***People's Union for Civil Liberties*** v. ***Union of India*** MANU/SC/0149/1997 : AIR 1997 SC 568, it was held that the unauthorised tapping of telephones by police personnel violated the `right to privacy' as contemplated under Article 21. However, it was not stated that telephone-tapping by the police was absolutely prohibited, presumably because the same may be necessary in some circumstances to prevent criminal acts and in the course of investigation. Hence, such

intrusive practices are permissible if done under a proper legislative mandate that regulates their use. This intended balance between an individual's `right to privacy' and `compelling public interest' has frequently occupied judicial attention. Such a compelling public interest can be identified with the need to prevent crimes and expedite investigations or to protect public health or morality.

183. For example, in ***X*** v. ***Hospital Z*** MANU/SC/0733/1998 : (1998) 8 SCC 296, it was held that a person could not invoke his `right to privacy' to prevent a doctor from disclosing his HIV-positive status to others. It was ruled that in respect of HIV-positive persons, the duty of confidentiality between the doctor and patient could be compromised in order to protect the health of other individuals. With respect to the facts in that case, Saghir Ahmad, J. held, at Para. 26-28:

...When a patient was found to be HIV (+), its disclosure by the Doctor could not be violative of either the rule of confidentiality or the patient's right of privacy as the lady with whom the patient was likely to be married was saved in time by such disclosure, or else, she too would have been infected with a dreadful disease if marriage had taken place and been consummated.

184. However, a three judge bench partly overruled this decision in a review petition. In ***X*** v. ***Hospital Z*** MANU/SC/1121/2002 : (2003) 1 SCC 500, it was held that if an HIV-positive person contracted marriage with a willing partner, then the same would not constitute the offences defined by Sections 269 and 270 of the Indian Penal Code. [Section 269 of the IPC defines the offence of a `Negligent act likely to spread infection of disease dangerous to life' and Section 270 contemplates a `Malignant act likely to spread infection of disease dangerous to life'.] A similar question was addressed by the Andhra Pradesh High Court in ***M. Vijaya*** v. ***Chairman and Managing Director, Singareni Collieries Co. Ltd.*** MANU/AP/0574/2001 : AIR 2001 AP 502, at pp. 513- 514:

There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV-infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV-positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India....

185. The discussion on the `right to privacy' in ***Sharda*** v. ***Dharampal***, (supra.) also cited a decision of the Court of Appeal (in the U.K.) in ***R (on the application of S)*** v. ***Chief Constable of South Yorkshire*** (2003) 1 All ER 148 (CA). The contentious issues arose in respect of the retention of fingerprints and DNA samples taken from persons who had been suspected of having committed offences in the past but were not convicted for them. It was argued that this policy violated Articles 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms, 1950 [Hereinafter `ECtHR]. Article 8 deals with the `Right to respect for private and family life' while Article 14 lays down the scope of the `Prohibition Against Discrimination'. For the present discussion, it will be useful to examine the language of Article 8 of the ECtHR:

Article 8 - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

186. In that case, a distinction was drawn between the `taking', `retention' and `use' of fingerprints and DNA samples. While the `taking' of such samples from individual suspects could be described as a reasonable measure in the course of routine police functions, the controversy arose with respect to the `retention' of samples taken from individuals who had been suspected of having committing offences in the past but had not been convicted for them. The statutory basis for the retention of physical samples taken from suspects was Section 64(1A) of the Police and Criminal Evidence Act, 1984. This provision also laid down that these samples could only be used for purposes related to the `prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'. This section had been amended to alter the older position which provided that physical samples taken from suspects were meant to be destroyed once the suspect was cleared of the charges or acquitted. As per the older position, it was only the physical samples taken from convicted persons which could be retained by the police authorities. It was contended that the amended provision was incompatible with Articles 8 and 14 of the ECtHR and hence the relief sought was that the fingerprints and DNA samples of the concerned parties should be destroyed.

187. In response to these contentions, the majority (Lord Woolf, C.J.) held that although the retention of such material interfered with the Article 8(1) rights of the individuals (`right to respect for private and family life') from whom it had been taken, that interference was justified by Article 8(2). It was further reasoned that the purpose of the impugned amendment, the language of which was very similar to Article 8(2), was obvious and lawful. Nor were the adverse consequences to the individual disproportionate to the benefit to the public. It was held, at Para. 17:

So far as the prevention and detection of crime is concerned, it is obvious the larger the databank of fingerprints and DNA samples available to the police, the greater the value of the databank will be in preventing crime and detecting those responsible for crime. There can be no doubt that if every member of the public was required to provide fingerprints and a DNA sample this would make a dramatic contribution to the prevention and detection of crime. To take but one example, the great majority of rapists who are not known already to their victim would be able to be identified. However, the 1984 Act does not contain blanket provisions either as to the taking, the retention, or the use of fingerprints or samples; Parliament has decided upon a balanced approach.

Lord Woolf, C.J. also referred to the following observations made by Lord Steyn in an earlier decision of the House of Lords, which was reported as ***Attorney General's Reference (No. 3 of 1999)*** (2001) 1 All ER 577, at p. 584:

...It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.

On the question of whether the retention of material samples collected from suspects who had not been convicted was violative of the `Prohibition against Discrimination' under Article 14 of the ECtHR, it was observed, (2003) 1 All ER 148 (CA), at p. 162:

In the present circumstances when an offence is being investigated or is the subject of a charge it is accepted that fingerprints and samples may be taken. Where they have not been taken before any question of the retention arises, they have to be taken so there would be the additional interference with their rights which the taking involves. As no harmful consequences will flow from the retention unless the fingerprints or sample match those of someone alleged to be responsible for an offence, the different treatment is fully justified.

188. In the present case, written submissions made on behalf of the respondents have tried to liken the compulsory administration of the impugned techniques with the DNA profiling technique. In light of this attempted analogy, we must stress that the DNA profiling technique has been expressly included among the various forms of medical examination in the amended explanation to Sections 53, 53A and 54 of the CrPC. It must also be clarified that a `DNA profile' is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies.

The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts.
It may also be recalled that the as per the majority decision in ***Kathi Kalu Oghad***, (supra.) the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain.

189. The judgment delivered in ***Sharda*** v. ***Dharampal***, (supra.) had surveyed the above-mentioned decisions to conclude that a person's right to privacy could be justifiably curtailed if it was done in light of competing interests. Reference was also made to some statutes that permitted the compulsory administration of medical tests. For instance, it was observed, at Para. 61-62:

Having outlined the law relating to privacy in India, it is relevant in this context to notice that certain laws have been enacted by the Indian Parliament where the accused may be subjected to certain medical or other tests.

By way of example, we may refer to Sections 185, 202, 203 and 204 of the Motor Vehicles Act, Sections 53 and 54 of the Code of Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Indian Penal Code. Constitutionality of these laws, if challenge is thrown, may be upheld.

190. However, it is important for us to distinguish between the considerations that occupied this Court's attention in ***Sharda*** v. ***Dharampal***, (supra.) and the ones that we are facing in the present case. It is self-evident that the decision did not to dwell on the distinction between medical tests whose results are based on testimonial responses and those tests whose results are based on the analysis of physical characteristics and bodily substances. It can be safely stated that the Court did not touch on the distinction between testimonial acts and physical evidence, simply because Article 20(3) is not applicable to a proceeding of a civil nature.

191. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the `right to privacy' we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.

192. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact'.

The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of `personal liberty' under Article 21. Hence, our understanding of the `right to privacy' should account for its intersection with Article 20(3).
Furthermore, the `rule against involuntary confessions' as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.
193. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the `right against self-incrimination'.
However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21.

Safeguarding the `right against cruel, inhuman or degrading treatment'

194. We will now examine whether the act of forcibly subjecting a person to any of the impugned techniques constitutes `cruel, inhuman or degrading treatment', when considered by itself. This inquiry will account for the permissibility of these techniques in all settings, including those where a person may not be subsequently prosecuted but could face adverse consequences of a non-penal nature. The appellants have contended that the use of the impugned techniques amounts to `cruel, inhuman or degrading treatment'. Even though the Indian Constitution does not explicitly enumerate a protection against `cruel, inhuman or degrading punishment or treatment' in a manner akin to the Eighth Amendment of the U.S. Constitution, this Court has discussed this aspect in several cases. For example, in ***Sunil Batra*** v. ***Delhi Administration*** MANU/SC/0184/1978 : (1978) 4 SCC 494, V.R. Krishna Iyer, J. observed at pp. 518-519:

True, our Constitution has no `due process' clause or the VIII Amendment; but, in this branch of law, after *Cooper* MANU/SC/0011/1970 : (1970) 1 SCC 248 and *Maneka Gandhi* MANU/SC/0133/1978 : (1978) 1 SCC 248 the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears? Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap. Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanize and civilize the life- style within the caceres. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether....

195. In the above-mentioned case, this Court had disapproved of practices such as solitary-confinement and the use of bar- fetters in prisons. It was held that prisoners were also entitled to `personal liberty' though in a limited sense, and hence judges could enquire into the reasonableness of their treatment by prison-authorities. Even though `the right against cruel, inhuman and degrading punishment' cannot be asserted in an absolute sense, there is a sufficient basis to show that Article 21 can be invoked to protect the `bodily integrity and dignity' of persons who are in custodial environments. This protection extends not only to prisoners who are convicts and under-trials, but also to those persons who may be arrested or detained in the course of investigations in criminal cases. Judgments such as ***D.K. Basu*** v. ***State of West Bengal*** MANU/SC/0157/1997 : AIR 1997 SC 610, have stressed upon the importance of preventing the `cruel, inhuman or degrading treatment' of any person who is taken into custody. In respect of the present case, any person who is forcibly subjected to the impugned tests in the environs of a forensic laboratory or a hospital would be effectively in a custodial environment for the same. The presumption of the person being in a custodial environment will apply irrespective of whether he/she has been formally accused or is a suspect or a witness. Even if there is no overbearing police presence, the fact of physical confinement and the involuntary administration of the tests is sufficient to constitute a custodial environment for the purpose of attracting Article 20(3) and Article 21. It was

necessary to clarify this aspect because we are aware of certain instances where persons are questioned in the course of investigations without being brought on the record as witnesses. Such omissions on part of investigating agencies should not be allowed to become a ground for denying the protections that are available to a person in custody.

196. The appellants have also drawn our attention to some international conventions and declarations. For instance in the *Universal Declaration of Human Rights* [GA Res. 217 A (III) of December 10 1948], Article 5 states that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) [GA Res. 2200A (XXI), entered into force March 23, 1976] also touches on the same aspect. It reads as follows:

...No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Special emphasis was placed on the definitions of `torture' as well as `cruel, inhuman or degrading treatment or punishment' in Articles 1 and 16 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.*

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Article 10, 11 , 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

197. We were also alerted to the *Body of Principles for the Protection of all persons under any form of Detention or Imprisonment* [GA Res. 43/173, 76th plenary meeting, 9 December 1988] which have been adopted by the United Nations General Assembly. Principles 1, 6 and 21 hold relevance for us:

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

The term `cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or judgment.

198. It was shown that protections against torture and `cruel, inhuman or degrading treatment or punishment' are accorded to persons who are arrested or detained in the course of armed conflicts between nations. In the *Geneva Convention relative to the Treatment of Prisoners of War* (entry into force 21 October 1950) the relevant extract reads:

Article 17

...No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind....

199. Having surveyed these materials, it is necessary to clarify that we are not absolutely bound by the contents of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)* [Hereinafter `Torture Convention'] This is so because even

though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and neither do we have a national legislation which has provisions analogous to those of the Torture Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms.

200. The definition of torture indicates that the threshold for the same is the intentional infliction of physical or mental pain and suffering, by or at the instance of a public official for the purpose of extracting information or confessions. `Cruel, Inhuman or Degrading Treatment' has been defined as conduct that does not amount to torture but is wide enough to cover all kinds of abuses. Hence, proving the occurrence of `cruel, inhuman or degrading treatment' would require a lower threshold than that of torture. In addition to highlighting these definitions, the counsel for the appellants have submitted that causing physical pain by injecting a drug can amount to `Injury' as defined by Section 44 of the IPC or `Hurt' as defined in Section 319 of the same Code.

201. In response, the counsel for the respondents have drawn our attention to literature which suggests that in the case of the impugned techniques, the intention on part of the investigators is to extract information and not to inflict any pain or suffering. Furthermore, it has been contended that the actual administration of either the narcoanalysis technique, polygraph examination or the BEAP test does not involve a condemnable degree of `physical pain or suffering'. Even though some physical force may be used or threats may be given to compel a person to undergo the tests, it was argued that the administration of these tests ordinarily does not result in physical injuries. [See: Linda M. Keller, `Is Truth Serum Torture?' 20 *American University International Law Review* 521-612 (2005)] However, it is quite conceivable that the administration of any of these techniques could involve the infliction of `mental pain or suffering' and the contents of their results could expose the subject to physical abuse. When a person undergoes a narcoanalysis test, he/she is in a half- conscious state and subsequently does not remember the revelations made in a drug-induced state. In the case of polygraph examination and the BEAP test, the test subject remains fully conscious during the tests but does not immediately know the nature and implications of the results derived from the same. However, when he/she later learns about the contents of the revelations, they may prove to be incriminatory or be in the nature of testimony that can be used to prosecute other individuals. We have also highlighted the likelihood of a person making incriminatory statements when he/she is subsequently confronted with the test results. The realisation of such consequences can indeed cause `mental pain or suffering' for the person who was subjected to these tests. The test results could also support the theories or suspicions of the investigators in a particular case. These results could very well confirm suspicions about a person's involvement in a criminal act. For a person in custody, such confirmations could lead to specifically targeted behaviour such as physical abuse. In this regard, we have repeatedly expressed our concern with situations where the test results could trigger undesirable behaviour.

202. We must also contemplate situations where a threat given by the investigators to conduct any of the impugned tests could prompt a person to make incriminatory statements or to undergo some mental trauma. Especially in cases of individuals from weaker sections of society who are unaware of their fundamental rights and unable to afford legal advice, the mere apprehension of undergoing scientific tests that supposedly reveal the truth could push them to make confessional statements. Hence, the act of threatening to administer the impugned tests could also elicit testimony. It is also

quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by the investigators. For example, a person may be convinced to give his/her consent after being promised that this would lead to an early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances.

203. Such a possibility had been outlined by the National Human Rights Commission which had published *`Guidelines relating to administration of Polygraph test (Lie Detector test) on an accused (2000)'*. The relevant extract has been reproduced below:

...The lie detector test is much too invasive to admit of the argument that the authority for Lie Detector tests comes from the general power to interrogate and answer questions or make statements. (Sections 160-167 CrPC) However, in India we must proceed on the assumption of constitutional invasiveness and evidentiary impermissiveness to take the view that such holding of tests is a prerogative of the individual, not an empowerment of the police. In as much as this invasive test is not authorised by law, it must perforce be regarded as illegal and unconstitutional unless it is voluntarily undertaken under non-coercive circumstances. If the police action of conducting a lie detector test is not authorised by law and impermissible, the only basis on which it could be justified is, if it is volunteered. There is a distinction between: (a) volunteering, and (b) being asked to volunteer. This distinction is of some significance in the light of the statutory and constitutional protections available to any person. There is a vast difference between a person saying, `I wish to take a lie detector test because I wish to clear my name', and when a person is told by the police, `If you want to clear your name, take a lie detector test'. A still worse situation would be where the police say, `Take a lie detector test, and we will let you go'. In the first example, the person voluntarily wants to take the test. It would still have to be examined whether such volunteering was under coercive circumstances or not. In the second and third examples, the police implicitly (in the second example) and explicitly (in the third example) link up the taking of the lie detector test to allowing the accused to go free.

204. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous manner. After the initial consent is given, the subject has no conscious control over the subsequent responses given during the test. In case of the narcoanalysis technique, the subject speaks in a drug-induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the `relevant questions' that will be asked or the `probes' that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot

exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent. In this respect, we can re-emphasize Principle 6 and 21 of the *Body of Principles for the Protection of all persons under any form of Detention or Imprisonment (1988)*. The explanation to Principle 6 provides that:

The term `cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Furthermore, Principle 21(2) lays down that:

No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or judgment.

205. It is undeniable that during a narcoanalysis interview, the test subject does lose `awareness of place and passing of time'. It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's `capacity of decision or judgment'. Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes `cruel, inhuman or degrading treatment' in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same.

The popular perceptions of terms such as `torture' and `cruel, inhuman or degrading treatment' are associated with gory images of blood-letting and broken bones. However,
we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.
[A similar conclusion has been made in the following paper: Marcy Strauss, `Criminal Defence in the Age of Terrorism - Torture', 48 *New York Law School Law Review* 201-274 (2003/2004)]

206. It would also be wrong to sustain a comparison between the forensic uses of these techniques and the practice of medicine. It has been suggested that patients undergo a certain degree of `physical or mental pain and suffering' on account of medical interventions such as surgeries and drug- treatments. However, such interventions are acceptable since the objective is to ultimately cure or prevent a disease or disorder. So it is argued that if the infliction of some `pain and suffering' is permitted in the medical field, it should also be tolerated for the purpose of expediting investigations in criminal cases. This is the point where our constitutional values step in. A society governed by rules and liberal values makes a rational distinction between the various circumstances where individuals face pain and suffering. While the infliction of a certain degree of pain and suffering is mandated by law in the form of punishments for various offences, the same cannot be extended to all those who are questioned during the course of an investigation. Allowing the same would vest unlimited discretion and lead to the disproportionate exercise of police powers.

Incompatibility with the `Right to fair trial'

207. The respondents' position is that the compulsory administration of the impugned techniques should be permitted at least for investigative purposes, and if the test results lead to the discovery of fresh evidence, then these fruits should be admissible. We have already explained in light of the conjunctive reading of Article 20(3) of the Constitution and Section 27 of the Evidence Act, that if the fact of compulsion is proved, the test results will not be admissible as evidence. However, for the sake of argument, if we were to agree with the respondents and allow investigators to compel individuals to undergo these tests, it would also affect some of the key components of the `right to fair trial'.

208. The decision of this Court in ***D.K. Basu*** v. ***State of West Bengal*** MANU/SC/0157/1997 : AIR 1997 SC 610, had stressed upon the entitlement of a person in custody to consult a lawyer. Access to legal advice is an essential safeguard so that an individual can be adequately apprised of his constitutional and statutory rights. This is also a measure which checks custodial abuses. However, the involuntary administration of any of the impugned tests can lead to a situation where such legal advice becomes ineffective. For instance even if a person receives the best of legal advice before undergoing any of these tests, it cannot prevent the extraction of information which may prove to be inculpatory by itself or lead to the subsequent discovery of incriminating materials. Since the subject has no conscious control over the drug-induced revelations or substantive inferences, the objective of providing access to legal advice are frustrated.

209. Since the subject is not immediately aware of the contents of the drug-induced revelations or substantive inferences, it also conceivable that the investigators may chose not to communicate them to the subject even after completing the tests. In fact statements may be recorded or charges framed without the knowledge of the test subject. At the stage of trial, the prosecution is obliged to supply copies of all incriminating materials to the defendant but reliance on the impugned tests could curtail the opportunity of presenting a meaningful and wholesome defence. If the contents of the revelations or inferences are communicated much later to the defendant, there may not be sufficient time to prepare an adequate defence.

210. Earlier in this judgment, we had surveyed some foreign judicial precedents dealing with each of the tests in question. A common concern expressed with regard to each of these techniques was the questionable reliability of the results generated by them. In respect of the narcoanalysis technique, it was observed that there is no guarantee that the drug- induced revelations will be truthful. Furthermore, empirical studies have shown that during the hypnotic stage, individuals are prone to suggestibility and there is a good chance that false results could lead to a finding of guilt or innocence. As far as polygraph examination is concerned, though there are some studies showing improvements in the accuracy of results with advancement in technology, there is always scope for error on account of several factors. Objections can be raised about the qualifications of the examiner, the physical conditions under which the test was conducted, the manner in which questions were framed and the possible use of `countermeasures' by the test subject. A significant criticism of polygraphy is that sometimes the physiological responses triggered by feelings such as anxiety and fear could be misread as those triggered by deception. Similarly, with the P300 Waves test there are inherent limitations such as the subject having had `prior exposure' to the `probes' which are used as stimuli. Furthermore, this technique has not been the focus of rigorous

independent studies. The questionable scientific reliability of these techniques comes into conflict with the standard of proof `beyond reasonable doubt' which is an essential feature of criminal trials.

211. Another factor that merits attention is the role of the experts who administer these tests. While the consideration of expert opinion testimony has become a mainstay in our criminal justice system with the advancement of fields such as forensic toxicology, questions have been raised about the credibility of experts who are involved in administering the impugned techniques. It is a widely accepted principle for evaluating the validity of any scientific technique that it should have been subjected to rigorous independent studies and peer review. This is so because the persons who are involved in the invention and development of certain techniques are perceived to have an interest in their promotion. Hence, it is quite likely that such persons may give unduly favourable responses about the reliability of the techniques in question.

212. Even though India does not have a jury system, the use of the impugned techniques could impede the fact-finding role of a trial judge. This is a special concern in our legal system, since the same judge presides over the evidentiary phase of the trial as well as the guilt phase. The consideration of the test results or their fruits for the purpose of deciding on their admissibility could have a prejudicial effect on the judge's mind even if the same are not eventually admitted as evidence. Furthermore, we echo the concerns expressed by the Supreme Court of Canada in ***R*** v. ***Beland*** [1987] 36 C.C.C. (3d) 481, where it was observed that reliance on scientific techniques could cloud human judgment on account of an `aura of infallibility'. While judges are expected to be impartial and objective in their evaluation of evidence, one can never discount the possibility of undue public pressure in some cases, especially when the test results appear to be inculpatory. We have already expressed concerns with situations where media organisations have either circulated the video-recordings of narcoanalysis interviews or broadcasted dramatized re-constructions, especially in sensational criminal cases.

213. Another important consideration is that of ensuring parity between the procedural safeguards that are available to the prosecution and the defence. If we were to permit the compulsory administration of any of the impugned techniques at the behest of investigators, there would be no principled basis to deny the same opportunity to defendants as well as witnesses. If the investigators could justify reliance on these techniques, there would be an equally compelling reason to allow the indiscrete administration of these tests at the request of convicts who want re-opening of their cases or even for the purpose of attacking and rehabilitating the credibility of witnesses during a trial. The decision in ***United States*** v. ***Scheffer*** 523 US 303 (1998), has highlighted the concerns with encouraging litigation that is collateral to the main facts in issue. We are of the view that an untrammelled right of resorting to the techniques in question will lead to an unnecessary rise in the volume of frivolous litigation before our Courts.

214. Lastly, we must consider the possibility that the victims of offences could be forcibly subjected to any of these techniques during the course of investigation. We have already highlighted a provision in the *Laboratory Procedure Manual* for Polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. In light of the preceding discussion, it is our view that irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in

question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim.

Examining the `compelling public interest'

215. The respondents have contended that even if the compulsory administration of the impugned techniques amounts to a seemingly disproportionate intrusion into personal liberty, their investigative use is justifiable since there is a compelling public interest in eliciting information that could help in preventing criminal activities in the future. Such utilitarian considerations hold some significance in light of the need to combat terrorist activities, insurgencies and organised crime. It has been argued that such exigencies justify some intrusions into civil liberties. The textual basis for these restraints could be grounds such as preserving the `sovereignty and integrity of India', `the security of the state' and `public order' among others. It was suggested that if investigators are allowed to rely on these tests, the results could help in uncovering plots, apprehending suspects and preventing armed attacks as well as the commission of offences. Reference was also made to the frequently discussed `Ticking Bomb' scenario. This hypothetical situation examines the choices available to investigators when they have reason to believe that the person whom they are interrogating is aware of the location of a bomb. The dilemma is whether it is justifiable to use torture or other improper means for eliciting information which could help in saving the lives of ordinary citizens. [The arguments for the use of `truth serums' in such situations have been examined in the following articles: Jason R. Odeshoo, `Truth or Dare?: Terrorism and Truth Serum in the Post- 9/11 World, 57 *Stanford Law Review* 209-255 (October 2004); Kenneth Lasson, `Torture, Truth Serum, and Ticking Bombs: Toward a pragmatic perspective on coercive interrogation', 39 *Loyola University Chicago Law Journal* 329-360 (Winter 2008)]

216. While these arguments merit consideration, it must be noted that ordinarily it is the task of the legislature to arrive at a pragmatic balance between the often competing interests of `personal liberty' and public safety. In our capacity as a constitutional court, we can only seek to preserve the balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the `right against self-incrimination' and the various dimensions of `personal liberty'. We have already pointed out that the rights guaranteed in Articles 20 and 21 of the Constitution of India have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of the judiciary to create exceptions and limitations on the availability of these rights.

217. Even though the main task of constitutional adjudication is to safeguard the core organising principles of our polity, we must also highlight some practical concerns that strengthen the case against the involuntary administration of the tests in question. Firstly, the claim that the results obtained from these techniques will help in extraordinary situations is questionable. All of the tests in question are those which need to be patiently administered and the forensic psychologist or the examiner has to be very skilful and thorough while interpreting the results. In a narcoanalysis test the subject is likely to divulge a lot of irrelevant and incoherent information. The subject is as likely to divulge false information as he/she is likely to reveal useful facts. Sometimes the revelations may begin to make sense only when compared with the testimony of several other individuals or through the discovery of fresh materials. In a polygraph test, interpreting the results

is a complex process that involves accounting for distortions such as `countermeasures' used by the subject and weather conditions among others. In a BEAP test, there is always the possibility of the subject having had prior exposure to the `probes' that are used as stimuli. All of this is a gradually unfolding process and it is not appropriate to argue that the test results will always prove to be crucial in times of exigency. It is evident that both the tasks of preparing for these tests and interpreting their results need considerable time and expertise.

218. Secondly, if we were to permit the forcible administration of these techniques, it could be the first step on a very slippery-slope as far as the standards of police behaviour are concerned. In some of the impugned judgments, it has been suggested that the promotion of these techniques could reduce the regrettably high incidence of `third degree methods' that are being used by policemen all over the country. This is a circular line of reasoning since one form of improper behaviour is sought to be replaced by another. What this will result in is that investigators will increasingly seek reliance on the impugned techniques rather than engaging in a thorough investigation. The widespread use of `third-degree' interrogation methods so as to speak is a separate problem and needs to be tackled through long-term solutions such as more emphasis on the protection of human rights during police training, providing adequate resources for investigators and stronger accountability measures when such abuses do take place.

219. Thirdly, the claim that the use of these techniques will only be sought in cases involving heinous offences rings hollow since there will no principled basis for restricting their use once the investigators are given the discretion to do so. From the statistics presented before us as well as the charges filed against the parties in the impugned judgments, it is obvious that investigators have sought reliance on the impugned tests to expedite investigations, unmindful of the nature of offences involved. In this regard, we do not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law- making function which is clearly outside the judicial domain.

220. One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the government. As the guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations. Sometimes there are apprehensions about judges imposing their personal sensibilities through broadly worded terms such as `substantive due process', but in this case our inquiry has been based on a faithful understanding of principles entrenched in our Constitution. In this context it would be useful to refer to some observations made by the Supreme Court of Israel in ***Public Committee Against Torture in Israel*** v. ***State of Israel*** H.C. 5100/94 (1999), where it was held that the use of physical means (such as shaking the suspect, sleep-deprivation and enforcing uncomfortable positions for prolonged periods) during interrogation of terrorism suspects was illegal. Among other questions raised in that case, it was also held that the `necessity' defence could be used only as a *post factum* justification for past conduct and that it could not be the basis of a blanket pre-emptive permission for coercive interrogation practices in the future. Ruling against such methods, Aharon Barak, J. held at p. 26:

...This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the `Rule of Law' and recognition of an individual's liberty constitutes an important component in its understanding of security.

CONCLUSION

221. In our considered opinion, the compulsory administration of the impugned techniques violates the `right against self- incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible `conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a `testimonial' character and they cannot be categorised as material evidence.

222. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of `substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of `ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements.

We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to `cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms.
Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the `right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the `right against self-incrimination'.
223. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the

test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872.

The National Human Rights Commission had published *`Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused'* in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the `Narcoanalysis technique' and the `Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

(i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a `confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

224. The present batch of appeals is disposed of accordingly.

Back to Index

MANU/SC/0291/2018

Neutral Citation: 2018/INSC/266

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 231 of 2010 (Under Article 32 of the Constitution of India)

Decided On: 27.03.2018

Appellants: Shakti Vahini **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Dipak Misra, C.J.I., A.M. Khanwilkar and Dr. D.Y. Chandrachud, JJ.

Subject: Criminal

Case Category:

LETTER PETITION AND PIL MATTER - WRIT PETITIONS (CRIMINAL) AND WRIT PETITIONS FILED AS PIL PERTAINING TO CRIMINAL INVESTIGATIONS/PROSECUTION

Case Note:

Criminal - Honor Killing - Present petition filed seeking directions to Respondents to take preventive steps combating honor crimes - Directions to constitute special cells approached by couples for their safety - Whether steps be taken to curb honor crimes

Facts:

Present petition filed seeking directions to the Respondents to take preventive steps in order to combat honor crimes and to constitute special cells approached by couples for their safety.

Held, while disposing off petition:

(i) To meet the challenges of the agonizing effect of honor crime, the present Court was of the view that there has to be preventive, remedial and punitive measures and accordingly issued following directions:

A. Preventive Steps:

The State Governments should forthwith identify Districts, Sub-Divisions and/or Villages where instances of honor killing or assembly of Khap Panchayats have been reported in the recent past, in the last five years. The Secretary, Home Department of the concerned States should issue directives/advisories to the Superintendent of Police of the concerned Districts for ensuring that the Officer In charge of the Police Stations of the identified areas are extra cautious if any instance of inter-caste or inter-religious marriage within their jurisdiction comes to their notice. If information about any proposed gathering of a Khap Panchayat comes to the knowledge of any police officer or any officer of the District Administration, he shall forthwith inform his immediate superior officer and also simultaneously intimate the jurisdictional Deputy Superintendent of Police and Superintendent of Police. On receiving such information, the Deputy Superintendent of Police (or such senior police officer as identified by the State Governments with respect to the area/district) shall immediately interact with the members of the Khap Panchayat and impress upon them that convening of such meeting/gathering is not permissible in law and to eschew from going ahead with such a meeting. Additionally, he should issue appropriate directions to the Officer In charge of the jurisdictional Police Station to be vigilant and, if necessary, to deploy adequate police force for prevention of assembly of the proposed gathering. Despite taking such measures, if the meeting is conducted, the Deputy Superintendent of Police shall personally remain present during the meeting and impress upon the assembly that no decision can be taken to cause any harm to the couple or the family members of the couple, failing which each one participating in the meeting besides the organizers would be personally liable for criminal prosecution. He shall also ensure that video recording of the discussion and participation of the members of the assembly is done on the basis of which the law enforcing machinery can resort to suitable action. [53]

B. Remedial Measures:

Despite the preventive measures taken by the State Police, if it comes to the notice of the local police that the Khap Panchayat has taken place and it has passed any diktat to take action against a couple/family of an inter-caste or inter-religious marriage (or any other marriage which does not meet their acceptance), the jurisdictional police official shall cause to immediately lodge an F.I.R. under the appropriate provisions of the Indian Penal Code. Upon registration of F.I.R., intimation should be simultaneously given to the Superintendent of Police/Deputy Superintendent of Police who, in turn, shall ensure that effective investigation of the crime is done and taken to its logical end with promptitude and necessary

steps should be taken accordingly to provide security to the couple/family and, if necessary, to remove them to a safe house within the same district or elsewhere keeping in mind their safety and threat perception. The State Government may consider of establishing a safe house at each District Headquarter for that purpose. [53]

C. Punitive Measures:

Any failure by either the police or district officer/officials to comply with the aforesaid directions shall be considered as an act of deliberate negligence and/or misconduct for which departmental action must be taken under the service rules. The departmental action shall be initiated and taken to its logical end, preferably not exceeding six months, by the authority of the first instance. [53]

Disposition:
Disposed of

JUDGMENT

Dipak Misra, C.J.I.

1. Assertion of choice is an insegregable facet of liberty and dignity. That is why the French philosopher and thinker, Simone Weil, has said:

Liberty, taking the word in its concrete sense consists in the ability to choose.

When the ability to choose is crushed in the name of class honour and the person's physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large.
The question that poignantly emanates for consideration is whether the elders of the family or clan can ever be allowed to proclaim a verdict guided by some notion of passion and eliminate the life of the young who have exercised their choice to get married against the wishes of their elders or contrary to the customary practice of the clan. The answer has to be an emphatic "No". It is because the sea of liberty and the ingrained sense of dignity do not countenance such treatment inasmuch as the pattern of behaviour is based on some extra-constitutional perception. Class honour, howsoever perceived, cannot smother the choice of an individual which he or she is entitled to enjoy under our compassionate Constitution. And this right of enjoyment of liberty deserves to be continually and zealously guarded so that it can thrive with strength and flourish with resplendence. It is also necessary to state here that the old order has to give way to the new. Feudal perception has to melt into oblivion paving the smooth path for liberty. That is how the statement of Joseph J. Ellis becomes relevant. He has propounded:

We don't live in a world in which there exists a single definition of honour anymore, and it's a fool that hangs on to the traditional standards and hopes that the world will come around him.

2. Presently, to the factual score. The instant Writ Petition has been preferred Under Article 32 of the Constitution of India seeking directions to the Respondents-State Governments and the Central Government to take preventive steps to combat honour crimes, to submit a National Plan of Action and State Plan of Action to curb crimes of the said nature and further to direct the State Governments to constitute special cells in each district which can be approached by the couples for their safety and well being. That apart, prayers have been made to issue a writ of mandamus to the State Governments to launch prosecutions in each case of honour killing and take appropriate measures so that such honour crimes and embedded evil in the mindset of certain members of the society are dealt with iron hands.

3. The Petitioner-organization was authorized for conducting Research Study on "Honour Killings in Haryana and Western Uttar Pradesh" by order dated 22.12.2009 passed by the National Commission for Women. It is averred that there has been a spate of such honour killings in Haryana, Punjab and Western Uttar Pradesh and the said trend is on the increase and such killings have sent a chilling sense of fear amongst young people who intend to get married but do not enter into wedlock out of fear. The social pressure and the consequent inhuman treatment by the core groups who arrogate to themselves the position of law makers and impose punishments which are extremely cruel instill immense fear that compels the victims to commit suicide or to suffer irreparably at the hands of these groups. The egoism in such groups getting support from similarly driven forces results in their becoming law unto themselves. The violation of human rights and destruction of fundamental rights take place in the name of class honour or group right or perverse individual perception of honour. Such individual or individuals consider their behaviour as justified leaning on the theory of socially sanctioned norms and the legitimacy of their functioning in the guise of ethicality of the community which results in vigilantism. The assembly or the collective defines honour from its own perception and describes the same in such astute cleverness so that its actions, as it asserts, have the normative justification.

4. It is contended that the existence of a woman in such an atmosphere is entirely dependent on the male view of the reputation of the family, the community and the milieu. Sometimes, it is centered on inherited local ethos which is rationally not discernible. The action of a woman or a man in choosing a life partner according to her or his own choice beyond the community norms is regarded as dishonour which, in the ultimate eventuate, innocently invites death at the cruel hands of the community prescription. The reputation of a woman is weighed according to the manner in which she conducts herself, and the family to which the girl or the woman belongs is put to pressure as a consequence of which the members of the family, on certain occasions, become silent spectators to the treatment meted out or sometimes become active participants forming a part of the group either due to determined behaviour or unwanted sense of redemption of family pride.

5. The concept of honour with which we are concerned has many facets. Sometimes, a young man can become the victim of honour killing or receive violent treatment at the hands of the family members of the girl when he has fallen in love or has entered into marriage.

The collective behaves like a patriarchal monarch which treats the wives, sisters and daughters subordinate, even servile or self-sacrificing, persons moving in physical frame having no individual autonomy, desire and identity. The concept of status is accentuated by the male

members of the community and a sense of masculine dominance becomes the sole governing factor of perceptive honour.

6. It is set forth in the petition that the actions which are found to be linked with honour based crimes are- (i) loss of virginity outside marriage; (ii) pre-marital pregnancy; (iii) infidelity; (iv) having unapproved relationships; (v) refusing an arranged marriage; (vi) asking for divorce; (vii) demanding custody of children after divorce; (viii) leaving the family or marital home without permission; (ix) causing scandal or gossip in the community, and (x) falling victim to rape. Expanding the aforesaid aspect, it is stated that some of the facets relate to inappropriate relationship by a woman some of which lead to refusal of arranged marriages. Certain instances have been cited with regard to honour crimes and how the said crimes reflect the gruesome phenomena of such incidents. Murder in day light and brutal treatment in full public gaze of the members of the society reflect that the victims are treated as inanimate objects totally oblivious of the law of the land and absolutely unconcerned with the feelings of the victims who face such cruelty and eventually succumb to them. The expression of intention by the couples to get married even if they are adults is sans sense to the members who constitute the assembly, for according to them, it is the projected honour that Rules supreme and the lives of others become subservient to their desires and decisions. Instances that have been depicted in the Writ Petition pertain to beating of people, shaving of heads and sometimes putting the victims on fire as if they are "flies to the wanton boys". Various news items have been referred to express anguish with regard to the abominable and horrifying incidents that the human eyes cannot see and sensitive minds can never countenance.

7. It is contended in the petition that the parallel law enforcement agency consists of leading men of a group having the same lineage or caste which quite often meets to deal with the problems that affect the group. They call themselves Panchayats which have the power to punish for the crimes and direct for social boycott or killing by a mob. Sometimes these Panchayats have the nomenclature of *Khap Panchayats* which have cultivated and nurtured the feeling amongst themselves that their duty is sanctified and their action of punishing the hapless victims is inviolable. The meetings of the collective and the discussions in the congregation reflect the level of passion at the highest. It is set forth that the extra-constitutional bodies which engage in feudalistic activities have no compunction to commit such crimes which are offences under the Indian Penal Code. It is because their violent acts have not been taken cognizance of by the police and their functioning is not seriously questioned by the administration. The constitutional provisions are shown scant regard and human dignity is treated at the lowest melting point by this collective. Article 21 which provides for protection of life and liberty and guards basic human rights and equality of status has been unceremoniously shown the exit by the actions of these Panchayats or the groups who, without the slightest pangs of conscience, subscribe to honour killing. In this backdrop, prayers have been made as has been stated hereinbefore.

8. A counter affidavit has been filed on the behalf of the Union of India, Ministry of Home Affairs and Ministry of Women and Child Development, Respondent Nos. 1, 2 and 3 respectively. It has been contended that honour killings are treated as murder as defined Under Section 300 of the Indian Penal Code and punishable Under Section 302 of the Indian Penal Code. As the police and public order are State subjects under the Constitution, it is primarily the responsibility of the States to deal with honour killings. It is put forth that the Central Government is engaging various States

and Union Territories for considering a proposal to either amend the Indian Penal Code or enact a separate legislation to address the menace of honour killing and related issues.

9. Pursuant to the order of this Court dated 9th September, 2013, the Union of India has filed another affidavit stating, *inter alia*, that in order to tackle the issue of 'honour killings', a Bill titled 'The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill' has been recommended by the Law Commission of India vide the 242nd Law Commission Report. The Union of India has further contended that since the matter of the 242nd Law Commission Report falls under List III, i.e., Concurrent list of the Seventh Schedule to the Constitution of India, consultation with the Governments of the States and Union Territories is a *sine qua non* for taking a policy decision in this regard.

10. In a further affidavit dated 16th January, 2014, the Union of India has contended that as on the said date, 15 States/UTs have sent their positive responses, while responses from other remaining States/UTs were awaited. The Union of India filed an additional affidavit on 25th September, 2014 wherein vide paragraph 4 it is averred that six more States/UTs have sent positive responses in favour of 'The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill' and that reminders have been sent to the remaining States/UTs whose responses are awaited. Further, it has been submitted that after receiving comments from the remaining States/UTs, necessary action shall be taken by the Union of India in the matter. It is the stand of the Union of India that a draft Bill in consultation with all stakeholders will be prepared for the avowed purpose as soon as the comments are received. It has also been set forth that several advisories have been issued to the State Governments from time to time regarding the steps needed to prevent crimes against women including special steps to be taken to curb the menace of honour killing.

11. An affidavit has been filed by the State of Punjab stating, *inter alia*, that it is not taking adversarial position and it does not intend to be a silent spectator to any form of honour killing and for the said reason, it has issued Memo No. 5/151/10-5H4/2732-80 in the Department of Home Affairs and Justice laying down and bringing into force the revised guidelines/policies in order to remove any doubt and to clear any uncertainty and/or threat prevalent amongst the public at large. The policy, as put forth, envisages dealing with protection to newly wedded couples who apprehend danger to life and liberty for at least six weeks after marriage. It also asserted that the State is determined to take pre-emptive, protective and corrective measures and whenever any individual case comes to notice or is highlighted, appropriate action has been taken and shall also be taken by the Government. That apart, the reply affidavit reflects that all the culprits of the crime have been booked under the law and proceeded against.

12. The State of Haryana has filed an affidavit denying the allegations made against the State and further stating that adequate protection has been given to couples by virtue of the order of the High Court and District Courts and sometimes by the police directly coming to know of the situation. It is contended that FIRs have been lodged against persons Accused of the crime and the cases are progressing as per law. The stand of the State of Haryana is that an action plan has already been prepared and the Crime Against Women Cells are functioning at every district headquarter in the State and necessary publicity has already been given and the citizens are aware of those cells.

13. The State of Jharkhand has filed its response stating, *inter alia*, the measures taken against persons involved in such crimes. Apart from asseverating that honour killing is not common in the State of Jharkhand, it is stated that it shall take appropriate steps to combat such crimes.

14. A counter affidavit has been filed on behalf of NCT of Delhi. The affidavit states that Delhi Police does not maintain separate record for cases under the category of "Honour Killing". However, it has been mentioned that by the time the affidavit was filed, 11 cases were registered. It is urged that such cases are handled by the District Police and there is a special cell functioning within Delhi Police meant for serious crimes relating to internal security and such cases can be referred to the said cell and there is no necessity for constitution of a special cell in each police district. Emphasis has been laid that Delhi Police has sensitized the field officers in this regard so that the issues can be handled with necessary sensitivity and sensibility. The Department of Women and Child Development has also made arrangements for rehabilitation of female victims facing threat of honour killing and efforts have been made to sensitize the society against commission of such crimes. A circular dealing with the subject 'Action to be taken to prevent cases of "Honour Killing"' has been brought on record.

15. The State of Rajasthan, in its reply, had strongly deplored the exercise of unwarranted activities under the garb of khap panchayats. The State of Rajasthan contends that it has issued circulars to the police personnel to keep a check on the activities of the panchayats and further expressed its willingness to abide by any guidelines that may be issued by this Court to ameliorate and curb the evil of honour killing that subsists in our society.

16. The State of Uttar Pradesh has filed two counter affidavits wherein it is stated that it is the primary duty of the States to protect the Fundamental Rights enshrined and guaranteed under the Constitution of India. It is further contended that although there is no specific legislation to regulate and prevent "honour killing", yet effective measures under the present law are being taken by the State to control the same. The said measures are in the nature of directions and guidelines to the law enforcement agencies. Further, the State of Uttar Pradesh has brought on record that there have been no reported cases of "honour killing" or "social ostracizing" in the State for the period from 01.01.2010 till 31.12.2012. Yet, time and again, directions are being given to the police stations to keep a close watch on the activities and functioning of the Khaps. The State of Uttar Pradesh has acceded to comply with any directions which this Court may issue.

17. The State of Bihar has, in its affidavit, acknowledged that honour killing is a heinous crime which violates the fundamental rights of the citizens. Although the State of Bihar has taken the stance that cases of honour killing in the State are almost nil, yet a list of five cases which may assume the character of honour killing have been mentioned in the affidavit. The State has further averred that several reformative steps have been taken for the upliftment and empowerment of women and constant efforts are being made to sensitize people. It has been asserted that the State of Bihar has initiated a scheme to provide National Saving Certificate amounting to Rs. 25,000/- as incentive to any woman performing inter-caste marriage in order to ensure their economic stability.

18. It has been contended by the State of Madhya Pradesh that the State Government and the police are alive to the problem of honour killings and they have created a "Crime Against Women Cell"

at the State level headed by the Inspector General of Police to ensure safety of couples and active prosecution in each case of honour killing. The M.P. Government, vide order No. F/21-261/10 dated 27.01.2011, has issued specific instructions to the District Magistrates/Superintendent of Police for taking strict action in cases of honour killing.

19. It is the contention of the State of Himachal Pradesh that there are no Panchayats of the nature of Khap Panchayats operating in the State of Himachal Pradesh and that there have been no cases of honour killing reported in the past 10 years. The State avers that several measures are being taken to combat the social evils prevailing in the society.

20. An application for intervention, on behalf of several Khap Panchayats, filed by "Manushi Sanghatan" has been allowed. It has been averred by Manushi Sanghatan that, on being requested by the media to voice their concern on the activities of Khap panchayats, the Sanghatan has conducted a survey into the functioning of the Khap Panchayats, but they were unable to find any evidence to hold the Khap Panchayats responsible for honour killings occurring in the country. In this factual background, the Sanghatan contends that the proposed bill, "The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill', is a futile exercise in view of the ample existing penal provisions and it is stated that the powers that the said bill aims to stipulate may have the result of giving power to vested interests to harass well meant gatherings of local communities. The intervenor has also challenged the findings of the report of the Petitioner on various grounds.

21. The Petitioner has filed a rejoinder affidavit wherein it has been highlighted that this Court has taken cognizance of the brutal killings that take place in the name of honour and it is urged that although some States have formed an Action Plan in pursuance of the directions issued by this Court, yet they have failed to effectively implement the same in letter and spirit. In view of this fact, effective guidelines to the police and law enforcement agencies to curb the menace of honour killing need to be formulated and implemented.

22. From the stand taken by the concerned States, it is perceivable that the authorities, while denying the incidences being visible, do not dispute the sporadic happenstance of such occurrences and speak in a singular voice by decrying such acts. It is also clear that some such Panchayats take the positive stance demonstrating their collective effort as to how they cultivate in people the idea of inter-caste marriage and community acceptance. The duty of this Court, in view of the authorities in the field that deal with specific circumstances, is to view the scenario from the prism of pragmatic ground reality as has been projected and to act within the constitutional parameters to protect the liberty and life of citizens. Commitment to the constitutional values requires this Court to be sensitive and act in such a matter and we shall do so within the permissible boundaries and framework because as the guardian of the rights of the citizens, this Court cannot choose the path of silence.

23. Before we engage ourselves in the process what we have stated hereinabove and refer to the earlier decisions of this Court, we think it apt to refer to the 242nd Report submitted by the Law Commission of India, namely, "Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework". The relevant extracts of the Report read as follows:

1.2 At the outset, it may be stated that the words 'honour killings' and 'honour crimes' are being used loosely as convenient expressions to describe the incidents of violence and harassment caused to the young couple intending to marry or having married against the wishes of the community or family members. They are used more as catch phrases and not as apt and accurate expressions.

1.3 The so-called 'honour killings' or 'honour crimes' are not peculiar to our country. It is an evil which haunts many other societies also. The belief that the victim has brought dishonour upon the family or the community is the root cause of such violent crimes. Such violent crimes are directed especially against women. Men also become targets of attack by members of family of a woman with whom they are perceived to have an 'inappropriate relationship'. Changing cultural and economic status of women and the women going against their male dominated culture has been one of the causes of honour crimes. In some western cultures, honour killings often arise from women seeking greater independence and choosing their own way of life. In some cultures, honour killings are considered less serious than other murders because they arise from long standing cultural traditions and are thus deemed appropriate or justifiable. An adulterous behaviour of woman or pre-marital relationship or assertion of right to marry according to their choice, are widely known causes for honour killings in most of the countries. The report of the Special Rapporteur to U.N.[1] of the year 2002 concerning cultural practices in the family that are violent towards women indicated that honour killings had been reported in Jordon, Lebanon, Morocco, Pakistan, United Arab Republic, Turkey, Yemen and other Persian Gulf countries and that they had also taken place in western countries such as France, Germany and U.K. mostly within migrant communities. The report "Working towards the elimination of crimes against women committed in the name of honour"[2] submitted to the United Nations High Commissioner for Human Rights is quite revealing. Apart from the other countries named above, according to the UN Commission on Human Rights, there are honour killings in the nations of Bangladesh, Brazil, Ecuador, India, Israel, Italy, Morocco, Sweden, Turkey and Uganda. According to Mr. Widney Brown, Advocacy Director for Human Rights Watch, the practice of honour killing "goes across cultures and across religions". There are reports that in some communities, many are prepared to condone the killing of someone who have dishonoured their family. The 2009 European Parliamentary Assembly noted the rising incidents of honour crimes with concern. In 2010, Britain saw a 47% rise of honour-related crimes. Data from police agencies in the UK report 2283 cases in 2010 and most of the attacks were conducted in cities that had high immigrant populations. The national legal Courts in some countries viz., Haiti, Jordon, Syria, Morocco and two Latin American countries do not penalize men killing female relatives found committing adultery or the husbands killing their wives in flagrante delicto. A survey by Elen R. Sheelay[3] revealed that 20% of Jordanites interviewed simply believe that Islam condones or even supports killing in the name of family honour which is a myth.

1.4 As far as India is concerned, "honour killings" are mostly reported from the States of Haryana, Punjab, Rajasthan and U.P. Bhagalpur in Bihar is also one of the known places for "honour killings". Even some incidents are reported from Delhi and Tamil Nadu. Marriages with members of other castes or the couple leaving the parental home to live together and marry provoke the harmful acts against the couple and immediate family members. 1.5 The Commission tried to ascertain the number of such incidents, the Accused involved, the specific reasons, etc., so as to have an idea of the general crime scenario in such cases. The Government authorities of the States where incidents often occur have been addressed to furnish the information. The Director (SR) in

the Ministry of Home Affairs, by her letter dated 26 May 2010, also requested the State Governments concerned to furnish the necessary information to the Commission. However, there has been no response despite reminder. But, from the newspaper reports, and reports from various other sources, it is clear that the honour crimes occur in those States as a result of people marrying without their family's acceptance and for marrying outside their caste or religion. Marriages between the couple belonging to same Gotra (family name) have also often led to violent reaction from the family members or the community members. The Caste councils or Panchayats popularly known as 'Khap Panchayats' try to adopt the chosen course of 'moral vigilantism' and enforce their diktats by assuming to themselves the role of social or community guardians.

24. Adverting to the dimensions of the problem and the need for a separate law, the Report states:

2.3 The pernicious practice of Khap Panchayats and the like taking law into their own hands and pronouncing on the invalidity and impropriety of Sagotra and inter-caste marriages and handing over punishment to the couple and pressurizing the family members to execute their verdict by any means amounts to flagrant violation of Rule of law and invasion of personal liberty of the persons affected.

2.4 Sagotra marriages are not prohibited by law, whatever may be the view in olden times. The Hindu Marriage Disabilities Removal Act, 1946 was enacted with a view to dispel any doubts in this regard. The Act expressly declared the validity of marriages between the Hindus belonging to the same 'gotra' or 'pravara' or different sub-divisions of same caste. The Hindu Marriage Act does not prohibit sagotra or inter-caste marriages.

And further:

2.5 The views of village elders or family elders cannot be forced on the willing couple and no one has a right to use force or impose far-reaching sanctions in the name of vindicating community honour or family honour. There are reports that drastic action including wrongful confinement, persistent harassment, mental torture, infliction of or threats of severe bodily harm is resorted to either by close relations or some third parties against the so-called erring couple either on the exhortations of some or all the Panchayatdars or with their connivance. Several instances of murder of one or the other couple have been in the news. Social boycotts and other illegal sanctions affecting the young couple, the families and even a Section of local inhabitants are quite often resorted to. All this is done in the name of tradition and honour. The cumulative effect of all such acts have public order dimensions also.

25. The Law Commission had prepared a draft Bill and while adverting to the underlying idea of the provisions of the draft Bill, it has stated:

2.8 The idea underlying the provisions in the draft Bill is that there must be a threshold bar against congregation or assembly for the purpose of objecting to and condemning the conduct of young persons of marriageable age marrying according to their choice, the ground of objection being that they belong to the same gotra or to different castes or communities. The Panchayatdars or caste elders have no right to interfere with the life and liberty of such young couples whose marriages are permitted by law and they cannot create a situation whereby such couples are placed in a hostile

environment in the village/locality concerned and exposed to the risk of safety. Such highhanded acts have a tendency to create social tensions and disharmony too. No frame of mind or belief based on social hierarchy can claim immunity from social control and Regulation, in so far as such beliefs manifest themselves as agents of enforcement of right and wrong. The very assembly for an unlawful purpose viz. disapproving the marriage which is otherwise within the bounds of law and taking consequential action should be treated as an offence as it has the potential to endanger the lives and liberties of individuals concerned. The object of such an assembly is grounded on disregard for the life and liberty of others and such conduct shall be adequately tackled by penal law. This is without prejudice to the prosecution to be launched under the general penal law for the commission of offences including abetment and conspiracy.

2.9 Given the social milieu and powerful background of caste combines which bring to bear intense pressure on parents and relatives to go to any extent to punish the 'sinning' couples so as to restore the community honour, it has become necessary to deal with this fundamental problem. Any attempt to effectively tackle this socio-cultural phenomenon, rooted in superstition and authoritarianism, must therefore address itself to various factors and dimensions, viz., the nature and magnitude of the problem, the adequacy of existing law, and the wisdom in using penal and other measures of sanction to curb the power and conduct of caste combines. The law as it stands does not act either as a deterrence or as a sobering influence on the caste combinations and assemblies who regard themselves as being outside the pale of law. The socio-cultural outlook of the members of caste councils or Panchayats is such that they have minimal or scant regard for individual liberty and autonomy.

26. Highlighting the aspect of autonomy of choices and liberty, the underlying object of the proposed Bill as has been stated by the Law Commission reads as under:

4.1 The autonomy of every person in matters concerning oneself - a free and willing creator of one's own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary.

4.2 In moments and periods of social transition, the tensions between individual freedom and past social practices become focal points of the community's ability to contemplate and provide for least hurting or painful solutions. The wisdom or wrongness of certain community perspectives and practices, their intrinsic impact on liberty, autonomy and self-worth, as well as the parents' concern over impulsive and unreflective choices - all these factors come to the fore-front of consideration.

4.3 The problem, however, is the menacing phenomena of repressive social practices in the name of honor triggering violent reaction from the influential members of community who are blind to individual autonomy. ...

27. Thus, the Report shows the devastating effect of the crime and the destructive impact on the right of choice of an individual and the control of the collective over the said freedom. The Commission has emphasized on the intense pressure of the powerful community and how they punish the "sinning couples" according to their socio-cultural perception and community honour and the action taken by them that results in extinction of the rights of individuals which are guaranteed under the Constitution. It has eloquently canvassed about the autonomy of every person in matters concerning oneself and the expression of the right which is integral to the said individual.

28. Be it noted, the draft Bill refers to "Khap Panchayat" to mean any person or group of persons who have gathered, assembled or congregated at any time with the view or intention of condemning any marriage, including a proposed marriage, not prohibited by law, on the basis that such marriage has dishonoured the caste or community tradition or brought disrepute to all or any of the persons forming part of the assembly or the family or the people of the locality concerned.

29. Presently, we shall advert to certain pronouncements of this Court where the Court, while adjudicating the *lis* of the said nature, has expressed its concern with regard to such social evil which is the manifestation of perverse thought, egotism at its worst and inhuman brutality.

30. In ***Lata Singh v. State of U.P. and Anr.*** MANU/SC/2960/2006 : (2006) 5 SCC 475, a two-Judge Bench, while dealing with a writ petition Under Article 32 of the Constitution which was filed for issuing a writ of certiorari and/or mandamus for quashing of a trial, allowed the writ petition preferred by the Petitioner whose life along with her husband's life was in constant danger as her brothers were threatening them. The Court observed that there is no bar for inter-caste marriage under the Hindu Marriage Act or any other law and, hence, no offence was committed by the Petitioner, her husband or husband's relatives. The Court also expressed dismay that instead of taking action against the Petitioner's brothers for unlawful and high handed acts, the police proceeded against the Petitioner's husband and her sisters-in-law. Being aware of the harassment faced and violence against women who marry outside their caste, the Court observed:

17. ... This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. ...

31. After so stating, the two-Judge Bench directed the administration/police authorities throughout the country to ensure that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is neither harassed by anyone nor subjected to threats or acts of violence, and that anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law. Deliberating further, the Court painfully stated:

18. We sometimes hear of "honour" killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact

they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

32. In ***Arumugam Servai v. State of Tamil Nadu*** MANU/SC/0434/2011 : (2011) 6 SCC 405, the Court referred to the observations made in ***Lata Singh's*** case and opined:

12. We have in recent years heard of "Khap Panchayats" (known as "Katta Panchayats" in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh case, there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.

33. After so stating, the Court directed the administrative and police officials to take strong measures to prevent such atrocious acts. If such incidents happen, apart from instituting criminal proceedings against those responsible for the atrocities, the State Government was directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge-sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and Ors. involved and institute criminal proceedings against them. Be it noted, in the said case, the Court commented on the Appellants that they had behaved like uncivilized savages and deserved no mercy.

34. The aforesaid view of the Court was further emphasized in ***Bhagwan Dass v. State (NCT of Delhi)*** MANU/SC/0568/2011 : (2011) 6 SCC 396 wherein it has been stated that

many people feel that they are dishonoured by the behaviour of the young man/woman who is related to them or belongs to their caste simply because he/she is marrying against their wish or having an affair with someone, and hence they take the law into their own hands and kill or physically assault such person or commit some other atrocities
which is wholly illegal. Regard being had to the expression of unhappiness with the behaviour of a daughter or other person, the Court observed that the maximum a person can do is to cut off social relations with her/him, but he cannot take the law into his own hands by committing violence or giving threats of violence.

35. In ***Re: India Woman says Gang-raped on Orders of Village Court published in Business & Financial News dated 23-1-2014*** MANU/SC/0242/2014 : (2014) 4 SCC 786, the Court, after referring to ***Lata Singh*** (supra), ***Arumugam Servai*** (supra) and adverting to the 242nd Report of the Law Commission, opined:

16. Ultimately, the question which ought to consider and assess by this Court is whether the State police machinery could have possibly prevented the said occurrence. The response is certainly a

"yes". The State is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the State's incapacity or inability to protect the fundamental rights of its citizens.

And again:

18. As a long-term measure to curb such crimes, a larger societal change is required via education and awareness. The Government will have to formulate and implement policies in order to uplift the socio-economic condition of women, sensitisation of the police and other parties concerned towards the need for gender equality and it must be done with focus in areas where statistically there is higher percentage of crimes against women.

36. In ***Vikas Yadav v. State of Uttar Pradesh and Ors.*** MANU/SC/1167/2016 : (2016) 9 SCC 541, the two-Judge Bench, while dwelling upon the quantum of sentence in the case where the young man chosen by the sister was murdered by the brother who had received education in good educational institutions, observed that the Accused persons had not cultivated the ability to abandon the depreciable feelings and attitude for centuries. Perhaps, they had harboured the fancy that it is an idea of which time had arrived from time immemorial and ought to stay till eternity. Proceeding further, the Court held:

75. One may feel "My honour is my life" but that does not mean sustaining one's honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions.

37. In ***Asha Ranjan v. State of Bihar and Ors.*** MANU/SC/0159/2017 : (2017) 4 SCC 397, the Court, in a different context, noted:

61. ...choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognised in the Constitution Under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion.

38. In ***State of U.P. v. Krishna Master and Ors.*** MANU/SC/0553/2010 : AIR 2010 SC 3071, the Court, while setting aside the judgment of acquittal of the High Court, convicted the Accused persons with rigorous imprisonment for life and fine of Rs. 25,000/-. It observed that killing of six persons and wiping out of almost the whole family on the flimsy ground of saving of honour of the family would fall within the 'rarest of rare' case evolved by this Court and, therefore, the trial court was perfectly justified in imposing capital punishment on the Respondents. However, taking

into consideration the fact that the incident had taken place before twenty years, it did not pass the death sentence but imposed the sentence of rigorous imprisonment for life. The said decision reflects the gravity of the crime that occurs due to "honour killing".

39. The aforesaid authorities show the distress with which the Court has perceived the honour crimes and also reflects the uneasiness and anxiety to curb such social symptoms. The observations were made and the directions were issued in cases where a crime based on honour was required to be dealt with. But, the present case, in contradistinction, centres around honour killing and its brutality and the substantive measures to be taken to destroy the said menace. The violation of the constitutional rights is the fulcrum of the issue. The protection of rights is pivotal. Though there has been constant social advancement, yet the problem of honour killing persists in the same way as history had seen in 1750 BC under the Code of Hammurabi. The people involved in such crimes become totally oblivious of the fact that they cannot tread an illegal path, break the law and offer justification with some kind of moral philosophy of their own. They forget that the law of the land requires that the same should be shown implicit obedience and profound obeisance. The human rights of a daughter, brother, sister or son are not mortgaged to the so-called or so-understood honour of the family or clan or the collective. The act of honour killing puts the Rule of law in a catastrophic crisis.

40. It is necessary to mention here that honour killing is not the singular type of offence associated with the action taken and verdict pronounced by the Khap Panchayats. It is a grave one but not the lone one. It is a part of honour crime. It has to be clearly understood that honour crime is the genus and honour killing is the species, although a dangerous facet of it. However, it can be stated without any fear of contradiction that any kind of torture or torment or ill-treatment in the name of honour that tantamounts to atrophy of choice of an individual relating to love and marriage by any assembly, whatsoever nomenclature it assumes, is illegal and cannot be allowed a moment of existence.

41. What we have stated hereinabove, to explicate, is that the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock. Their consent has to be piously given primacy. If there is offence committed by one because of some penal law, that has to be decided as per law which is called determination of criminality. It does not recognize any space for informal institutions for delivery of justice. It is so since a polity governed by 'Rule of Law' only accepts determination of rights and violation thereof by the formal institutions set up for dealing with such situations. It has to be constantly borne in mind that Rule of law as a concept is meant to have order in a society. It respects human rights. Therefore, the Khap Panchayat or any Panchayat of any nomenclature cannot create a dent in exercise of the said right.

42. In this regard, we may fruitfully reproduce a passage from ***Kartar Singh v. State of Punjab*** MANU/SC/1597/1994 : (1994) 3 SCC 569 wherein C.G. Weeramantry in 'The Law in Crisis - Bridges of Understanding' emphasizing the importance of Rule of law in achieving social interest has stated:

The protections the citizens enjoy under the Rule of Law are the quintessence of twenty centuries of human struggle. It is not commonly realised how easily these may be lost. There is no known

method of retaining them but eternal vigilance. There is no known authority to which this duty can be delegated but the community itself. There is no known means of stimulating this vigilance but education of the community towards an enlightened interest in its legal system, its achievements and its problems.

Honour killing guillotines individual liberty, freedom of choice and one's own perception of choice. It has to be sublimely borne in mind that

when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized Under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.

43. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the *sentinel on qui vive* to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

44. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law.

45. It has been argued on behalf of the "Khap Panchayats" that it is a misnomer to call them by such a name. The nomenclature is absolutely irrelevant. What is really significant is that the assembly of certain core groups meet, summon and forcefully ensure the presence of the couple

and the family members and then adjudicate and impose punishment. Their further submission is that these panchayats are committed to the spreading of awareness of permissibility of inter-community and inter-caste marriages and they also tell the people at large how "Sapinda" and "Sagotra" marriages have no sanction of law. The propositions have been structured with immense craft and advanced with enormous zeal and enthusiasm but the fallacy behind the said proponements is easily decipherable. The argument is founded on the premise that there are certain statutory provisions and certain judgments of this Court which prescribe the prohibitory degrees for marriages and provide certain guidelines for maintaining the sex ratio and not giving any allowance for female foeticide that is a resultant effect of sex determination which is prohibited under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex Selection) Act, 1994 (for short 'PCPNDT Act') (See: ***Voluntary Health Association of Punjab v. Union of India and Ors.*** MANU/SC/0205/2013 : (2013) 4 SCC 1 and ***Voluntary Health Association of Punjab v. Union of India and Ors.*** MANU/SC/1433/2016 : (2016) 10 SCC 265).

46. The first argument deserves to be rejected without much discussion. Suffice it to say, the same relates to the recognition of matrimonial status. If it is prohibited in law, law shall take note of it when the courts are approached. Similarly, PCPNDT Act is a complete code. That apart, the concern of this Court in spreading awareness to sustain sex ratio is not to go for sex determination and resultantly female foeticide. It has nothing to do with the institution of marriage.

47. The 'Khap Panchayats' or such assembly should not take the law into their hands and

further cannot assume the character of the law implementing agency, for that authority has not been conferred upon them under any law. Law has to be allowed to sustain by the law enforcement agencies. For example, when a crime under Indian Penal Code is committed, an assembly of people cannot impose the punishment. They have no authority. They are entitled to lodge an FIR or inform the police. They may also facilitate so that the Accused is dealt with in accordance with law. But, by putting forth a stand that they are spreading awareness, they really can neither affect others' fundamental rights nor cover up their own illegal acts. It is simply not permissible. In fact, it has to be condemned as an act abhorrent to law and, therefore, it has to stop. Their activities are to be stopped in entirety. There is no other alternative. What is illegal cannot commend recognition or acceptance.<mpara>

48. Having noted the viciousness of honour crimes and considering the catastrophic effect of such kind of crimes on the society, it is desirable to issue directives to be followed by the law enforcement agencies and also to the various administrative authorities. We are disposed to think so as it is the obligation of the State to have an atmosphere where the citizens are in a position to enjoy their fundamental rights. In this context, a passage from ***S. Rangarajan v. P. Jagjivan Ram and Ors.*** MANU/SC/0475/1989 : (1989) 2 SCC 574 is worth reproducing:

51. We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film, is unobjectionable and cannot constitutionally be restricted Under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the Rule of law and a surrender to blackmail

and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.

We are absolutely conscious that the aforesaid passage has been stated in respect of a different fundamental right but the said principle applies with more vigour when the life and liberty of individuals is involved. We say so reminding the States of their constitutional obligation to comfort and nurture the sustenance of fundamental rights of the citizens and not to allow any hostile group to create any kind of trench in them.

49. We may also hold here that an assembly or Panchayat committed to engage in any constructive work that does not offend the fundamental rights of an individual will not stand on the same footing of Khap Panchayat. Before we proceed to issue directions to meet the challenges of honour crime which includes honour killing, it is necessary to note that as many as 288 cases of honour killing were reported between 2014 and 2016. According to the data of National Crime Records Bureau (NCRB), 28 honour killing cases were reported in 2014, 192 in 2015 and 68 in the year 2016.

50. We may note with profit that honour killings are condemned as a serious human rights violation and are addressed by certain international instruments. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence addresses this issue. Article 42 reads thus:

Article 42 - Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour"

1. Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.

2. Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.

51. Once the fundamental right is inherent in a person, the intolerant groups who subscribe to the view of superiority class complex or higher clan cannot scuttle the right of a person by leaning on any kind of philosophy, moral or social, or self-proclaimed elevation. Therefore, for the sustenance of the legitimate rights of young couples or anyone associated with them and keeping in view the role of this Court as the guardian and protector of the constitutional rights of the citizens and further to usher in an atmosphere where the fear to get into wedlock because of the threat of the collective is dispelled, it is necessary to issue directives and we do so on the foundation of the principle stated in ***Lakshmi Kant Pandey v. Union of India*** MANU/SC/0054/1984 : (1984) 2 SCC 244, ***Vishaka and Ors. v. State of Rajasthan and Ors.*** MANU/SC/0786/1997 : (1997) 6 SCC 241 and ***Prakash Singh and Ors. v. Union of India and Ors.*** MANU/SC/8516/2006 : (2006) 8 SCC 1.

52. It is worthy to note that certain legislations have come into existence to do away with social menaces like "Sati" and "Dowry". It is because such legislations are in accord with our Constitution. Similarly, protection of human rights is the elan vital of our Constitution that epitomizes humanness and the said conceptual epitome of humanity completely ostracizes any idea or prohibition or edict that creates a hollowness in the inalienable rights of the citizens who enjoy their rights on the foundation of freedom and on the fulcrum of justice that is fair, equitable and proportionate. There cannot be any assault on human dignity as it has the potentiality to choke the majesty of law. Therefore, we would recommend to the legislature to bring law appositely covering the field of honour killing. In this regard, we may usefully refer to the authority wherein this Court has made such recommendation. In ***Samrendra Beura v. Union of India and Ors.*** MANU/SC/0547/2013 : (2013) 14 SCC 672, this Court held:

16. Though such amendments have been made by Parliament under the 1950 Act and the 1957 Act, yet no such amendment has been incorporated in the Air Force Act, 1950. The aforesaid provisions, as we perceive, have been incorporated in both the statutes to avoid hardship to persons convicted by the Court Martial. Similar hardship is suffered by the persons who are sentenced to imprisonment under various provisions of the Act. Keeping in view the aforesaid amendment in the other two enactments and regard being had to the purpose of the amendment and the totality of the circumstances, we think it apt to recommend the Union of India to seriously consider to bring an amendment in the Act so that the hardships faced by the persons convicted by the Court Martial are avoided.

53. Mr. Raju Ramachandran, learned senior Counsel being assisted by Mr. Gaurav Agarwal, has filed certain suggestions for issuing guidelines. The Union of India has also given certain suggestions to be taken into account till the legislation is made. To meet the challenges of the agonising effect of honour crime, we think that there has to be preventive, remedial and punitive measures and, accordingly, we state the broad contours and the modalities with liberty to the executive and the police administration of the concerned States to add further measures to evolve a robust mechanism for the stated purposes.

I. Preventive Steps:

(a) The State Governments should forthwith identify Districts, Sub-Divisions and/or Villages where instances of honour killing or assembly of Khap Panchayats have been reported in the recent past, e.g., in the last five years.

(b) The Secretary, Home Department of the concerned States shall issue directives/advisories to the Superintendent of Police of the concerned Districts for ensuring that the Officer Incharge of the Police Stations of the identified areas are extra cautious if any instance of inter-caste or inter-religious marriage within their jurisdiction comes to their notice.

(c) If information about any proposed gathering of a Khap Panchayat comes to the knowledge of any police officer or any officer of the District Administration, he shall forthwith inform his immediate superior officer and also simultaneously intimate the jurisdictional Deputy Superintendent of Police and Superintendent of Police.

(d) On receiving such information, the Deputy Superintendent of Police (or such senior police officer as identified by the State Governments with respect to the area/district) shall immediately interact with the members of the Khap Panchayat and impress upon them that convening of such meeting/gathering is not permissible in law and to eschew from going ahead with such a meeting. Additionally, he should issue appropriate directions to the Officer Incharge of the jurisdictional Police Station to be vigilant and, if necessary, to deploy adequate police force for prevention of assembly of the proposed gathering.

(e) Despite taking such measures, if the meeting is conducted, the Deputy Superintendent of Police shall personally remain present during the meeting and impress upon the assembly that no decision can be taken to cause any harm to the couple or the family members of the couple, failing which each one participating in the meeting besides the organisers would be personally liable for criminal prosecution. He shall also ensure that video recording of the discussion and participation of the members of the assembly is done on the basis of which the law enforcing machinery can resort to suitable action.

(f) If the Deputy Superintendent of Police, after interaction with the members of the Khap Panchayat, has reason to believe that the gathering cannot be prevented and/or is likely to cause harm to the couple or members of their family, he shall forthwith submit a proposal to the District Magistrate/Sub-Divisional Magistrate of the District/Competent Authority of the concerned area for issuing orders to take preventive steps under the Code of Criminal Procedure, including by invoking prohibitory orders Under Section 144 Code of Criminal Procedure and also by causing arrest of the participants in the assembly Under Section 151 Code of Criminal Procedure.

(g) The Home Department of the Government of India must take initiative and work in coordination with the State Governments for sensitising the law enforcement agencies and by involving all the stake holders to identify the measures for prevention of such violence and to implement the constitutional goal of social justice and the Rule of law.

(h) There should be an institutional machinery with the necessary coordination of all the stakeholders. The different State Governments and the Centre ought to work on sensitization of the law enforcement agencies to mandate social initiatives and awareness to curb such violence.

II. Remedial Measures:

(a) Despite the preventive measures taken by the State Police, if it comes to the notice of the local police that the Khap Panchayat has taken place and it has passed any diktat to take action against a couple/family of an inter-caste or inter-religious marriage (or any other marriage which does not meet their acceptance), the jurisdictional police official shall cause to immediately lodge an F.I.R. under the appropriate provisions of the Indian Penal Code including Sections 141, 143, 503 read with 506 of Indian Penal Code.

(b) Upon registration of F.I.R., intimation shall be simultaneously given to the Superintendent of Police/Deputy Superintendent of Police who, in turn, shall ensure that effective investigation of the crime is done and taken to its logical end with promptitude.

(c) Additionally, immediate steps should be taken to provide security to the couple/family and, if necessary, to remove them to a safe house within the same district or elsewhere keeping in mind their safety and threat perception. The State Government may consider of establishing a safe house at each District Headquarter for that purpose. Such safe houses can cater to accommodate (i) young bachelor-bachelorette couples whose relationship is being opposed by their families/local community/Khaps and (ii) young married couples (of an inter-caste or inter-religious or any other marriage being opposed by their families/local community/Khaps). Such safe houses may be placed under the supervision of the jurisdictional District Magistrate and Superintendent of Police.

(d) The District Magistrate/Superintendent of Police must deal with the complaint regarding threat administered to such couple/family with utmost sensitivity. It should be first ascertained whether the bachelor-bachelorette are capable adults. Thereafter, if necessary, they may be provided logistical support for solemnising their marriage and/or for being duly registered under police protection, if they so desire. After the marriage, if the couple so desire, they can be provided accommodation on payment of nominal charges in the safe house initially for a period of one month to be extended on monthly basis but not exceeding one year in aggregate, depending on their threat assessment on case to case basis.

(e) The initial inquiry regarding the complaint received from the couple (bachelor-bachelorette or a young married couple) or upon receiving information from an independent source that the relationship/marriage of such couple is opposed by their family members/local community/Khaps shall be entrusted by the District Magistrate/Superintendent of Police to an officer of the rank of Additional Superintendent of Police. He shall conduct a preliminary inquiry and ascertain the authenticity, nature and gravity of threat perception. On being satisfied as to the authenticity of such threats, he shall immediately submit a report to the Superintendent of Police in not later than one week.

(f) The District Superintendent of Police, upon receipt of such report, shall direct the Deputy Superintendent of Police incharge of the concerned sub-division to cause to register an F.I.R. against the persons threatening the couple(s) and, if necessary, invoke Section 151 of Code of Criminal Procedure Additionally, the Deputy Superintendent of Police shall personally supervise the progress of investigation and ensure that the same is completed and taken to its logical end with promptitude. In the course of investigation, the concerned persons shall be booked without any exception including the members who have participated in the assembly. If the involvement of the members of Khap Panchayat comes to the fore, they shall also be charged for the offence of conspiracy or abetment, as the case may be.

III. Punitive Measures:

(a) Any failure by either the police or district officer/officials to comply with the aforesaid directions shall be considered as an act of deliberate negligence and/or misconduct for which departmental action must be taken under the service rules. The departmental action shall be initiated and taken to its logical end, preferably not exceeding six months, by the authority of the first instance.

(b) In terms of the ruling of this Court in ***Arumugam Servai*** (supra), the States are directed to take disciplinary action against the concerned officials if it is found that (i) such official(s) did not prevent the incident, despite having prior knowledge of it, or (ii) where the incident had already occurred, such official(s) did not promptly apprehend and institute criminal proceedings against the culprits.

(c) The State Governments shall create Special Cells in every District comprising of the Superintendent of Police, the District Social Welfare Officer and District Adi-Dravidar Welfare Officer to receive petitions/complaints of harassment of and threat to couples of inter-caste marriage.

(d) These Special Cells shall create a 24 hour helpline to receive and register such complaints and to provide necessary assistance/advice and protection to the couple.

(e) The criminal cases pertaining to honour killing or violence to the couple(s) shall be tried before the designated Court/Fast Track Court earmarked for that purpose. The trial must proceed on day to day basis to be concluded preferably within six months from the date of taking cognizance of the offence. We may hasten to add that this direction shall apply even to pending cases. The concerned District Judge shall assign those cases, as far as possible, to one jurisdictional court so as to ensure expeditious disposal thereof.

54. The measures we have directed to be taken have to be carried out within six weeks hence by the Respondent-States. Reports of compliance be filed within the said period before the Registry of this Court.

55. The Writ Petition is, accordingly, disposed of. There shall be no order as to costs.

---

[1]http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/42e7191fae543562c1256ba7004e963c/$FILE/G0210428. pdf

[2]http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/985168f508ee799fc1256c52002ae5a9/$FILE/N0246790. pdf

[3]Quoted in Anver Emon's Article on Honour Killings

Back to Index

MANU/SC/1778/2019

Neutral Citation: 2019/INSC/1397

IN THE SUPREME COURT OF INDIA

Review Petition (Civil) Nos. 786-787 of 2019 in Civil Appeal Nos. 8442-8443 of 2016, Review Petition (Civil) No. 789 of 2019 in Civil Appeal Nos. 8450 of 2016 and Review Petition (Civil) No. 788 of 2019 in Civil Appeal No. 8445 of 2016

Decided On: 18.12.2019

Appellants: Shanti Conductors (P) Ltd. and Ors. **Vs.** Respondent: Assam State Electricity Board and Ors.

Hon'ble Judges/Coram:

Ashok Bhushan, S. Abdul Nazeer and Navin Sinha, JJ.

Subject: Limitation

Relevant Section:

Limitation Act, 1963 - Section 19

Case Note:

Civil - Barred by time - Maintainability of suit - Respondent had issued supply orders to Petitioner for supply of aluminium electrical conductors - Petitioner completed supply in pursuance of supply orders - Money Suit was filed by Petitioner in Court of Civil Judge for decree towards interest only on payment of principal amount, which had already been received by Petitioner - Trial court decreed money suit of Petitioner for sum with future interest - Appeal was filed by Petitioner against judgment of Trial court - Division Bench of High Court allowed appeal filed by Respondents and dismissed suit of Petitioner - Against judgment of Division Bench, appeal was filed by Petitioner which stand dismissed - Hence, present review petition - Whether there was any error in judgment of this Court holding that suit of Plaintiff was barred by time.

Facts:

The Respondent had issued supply orders to the Petitioner for supply of aluminium electrical conductors. The Petitioner completed supply in pursuance of the supply orders. A Money Suit was filed by the Petitioner in the Court for a decree of sum towards the interest only on the payment of the principal amount, which had already been received by the Petitioner. The trial court decreed the money suit of the Petitioner with future interest. The appeal was filed by the Petitioner against the judgment of the trial court. The Division Bench of the High Court allowed the appeal filed by the Respondents and dismissed the suit of the Petitioner. Against the judgment of the Division Bench, appeal was filed by the Petitioner which stand dismissed.

Held, while dismissing the petition:

(i) The proviso of Order 7 Rule 6, which had been added by Act 104 of 1976, which provided that the Court may permit the Plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint. The proviso of Order 7 Rule 6 could not come to the rescue of the Plaintiff since, the Plaintiffs had specifically pleaded that the provisions of the Limitation Act were not applicable since Act, 1993 had overriding effect. The trial court in decreeing the suit of the Plaintiff had accepted the submission and had held that Limitation Act, 1963 was not applicable. [18]

(ii) The plaint, which was a paragraph of cause of action for the suit, which refers to date beginning from the first supply order and date of last supply order, but cause of action was not claimed from the date when the last payment was received by the Petitioner. The Petitioner in the plaint had clearly not pleaded for benefit of Section 19 nor had brought necessary facts to enable the Court to consider the claim under Section 19 of Act. Thus, Petitioner was not entitled for benefit of Section 19 of the Limitation Act and there was no error in the judgment of this Court holding that the suit of the Plaintiff was barred by time. [19]

(iii) The benefit of Section 14 of Limitation Act could not be claimed by the Plaintiff since writ petition, which was filed by the Association was by different entity. The question of benefit of Section 14 having been specifically considered and rejected by this Court in its judgment, there was no error apparent on the said ground. Moreover, present was a case where writ petition filed by Association was dismissed subsequent to filing of the suit by Plaintiff. Furthermore, after the judgment of the Single Judge Association had filed a writ appeal challenging the said judgment, which facts also detracts from fulfilling the conditions as required for extending the benefit of Section 14 of the Limitation Act. [20]

Disposition:
Petition Dismissed

Industry: Power and Energy

Industry: Construction/ Building Products

JUDGMENT

Ashok Bhushan, J.

1. These review petitions have been filed against the common judgment dated 23.01.2019 passed in Civil Appeal Nos. 8442-8443 of 2016, Civil Appeal No. 8450 of 2016 and Civil Appeal No. 8445 of 2016, by which all the Civil Appeals were dismissed, sought to be reviewed by these applications. All the review petitions filed have raised different grounds, which need to be considered separately.

Review Petition (C) Nos. 786-787 of 2019

2. To consider the grounds raised in the review petition, few facts need to be noticed.

2.1 The Assam State Electricity Board, the Respondent has issued two supply orders to the Petitioner dated 31.03.1992 and 13.05.1992 for supply of aluminium electrical conductors. Petitioner completed supply in pursuance of the above supply orders beginning from June, 1992 till 04.10.1993. The President of India to provide for and regulate payment of interest on delayed payment to small scale industries issued an Ordinance on 23.09.1992 namely "The interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Ordinance", which subsequently became the Act namely "The interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 (hereinafter referred to as "Act, 1993")" w.e.f. 23.09.1992.

2.2 A Writ Petition (C) No. 1351 of 1993 was filed by Assam Conductors Manufacturers Association on behalf of its five members, which included M/s. Shanti Conductors Private Limited also for realisation of its dues and for seeking payment. An interim order was passed by the Guwahati High Court on 21.07.1993, in which the High Court observed that Respondents may settle with the outstanding bills of the Petitioners. The Respondent paid an amount of approx. Rs. 2.15 Crores in instalments to the Petitioner and the last instalment of payment being made on 05.03.1994. A Money Suit No. 21 of 1997 was filed by the Petitioner in the Court of Civil Judge (Sr. Division) No. 1 at Guwahati on 10.01.1997 for a decree of Rs. 53,68,492.56 towards the interest only on the payment of the principal amount, which had already been received by the Petitioner.

2.3 On 28.08.1997, Writ Petition (C) No. 1351 of 1993 was dismissed observing that writ Petitioner may go to the Civil Court for realisation of its dues.

2.4 The trial court on 02.02.2000 decreed the money suit of the Petitioner for Rs. 51,60,507.42 with future interest @ 23.75% on a monthly compounding basis. RFA No. 66 of 2000 was filed by the Petitioner against the judgment of the trial court. The Division Bench made a reference to the Full Bench for answering three points as raised by the counsel for the Appellant. Three-Judge Bench answered the reference on 05.03.2002. The Respondent filed Special Leave Petition (C) No. 24577 of 2002, which was subsequently converted in Civil Appeal No. 2351 of 2003. This

Court on 10.07.2012 dismissed the Civil Appeal No. 2351 of 2003 [M/s. Assam State Electricity Board v. M/s. Shanti Conductors Pvt. Ltd.] alongwith another Civil Appeal No. 2348 of 2003 [M/s. Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board]. After dismissal of the above Civil Appeals, the Division Bench of the High Court allowed the RFA No. 66 of 2000 filed by the Respondents and dismissed the suit of the Petitioner.

2.5 Against the judgment of the Division Bench dated 20.11.2012, Civil appeal Nos. 8442-8443 of 2016 was filed by M/s. Shanti Conductors (P) Ltd., the Petitioner in the appeal. Two judgments were delivered by two Hon'ble Judges with two divergent opinion, which judgment is reported in MANU/SC/0972/2016 : (2016) 15 SCC Page 13. The matter was referred to Three Judge Bench, which heard all the appeals and vide its judgment dated 23.01.2019 dismissed the appeals.

3. In the suit filed by the Petitioners, one of the questions, which was framed was "Whether the suit filed by the Appellants is barred by limitation?" In paragraph 27 of the judgment dated 23.01.2019, Seven question, which had arisen in these appeals have been noticed. Issue No. 3 was "Whether money suit by M/s. Shanti Conductors was barred by limitation?

4. Issue No. 3 has been dealt from paragraphs 59 to 76 and we concluded in paragraph 76 that suit filed by M/s. Shanti Conductors (P) Ltd. was barred by time.

5. Shri Abhishek Manu Singhvi, learned senior Counsel appearing for Petitioner submits that there is an apparent error in the judgment dated 23.01.2019 in holding that suit was barred by time. He submitted that according to admitted facts last payment made by the Respondent was on 05.03.1994 and suit having been filed within three years, i.e., on 10.01.1997 was well within time. It is submitted that last supply having been completed on 04.10.1993 and even though three years period from 04.10.1993 had lapsed, but the payment having been made on 05.03.1994 by the Respondents, a fresh period of limitation shall be available to the Petitioner as per Section 19 of the Limitation Act, 1963. It is submitted that in the written submission, which was submitted on behalf of the Petitioner, reliance was placed on Section 19 and further in earlier judgment of this Court reported in MANU/SC/0972/2016 : (2016) 15 SCC 13, in paragraph 53, Justice Gowda has answered the question of limitation in favour of the Appellant relying on Section 13. It is submitted that Section 19 escaped the notice of this Court while answering the question of limitation, which is an error apparent, need to be corrected and it has to be held that suit was well within time. Dr. Singhvi further submits that Petitioners were also entitled for benefit of Section 14 of the Limitation Act since Writ Petition No. 1351 of 1993 was filed in the High Court by Assam Conductors manufacturers Association, of which Petitioner was one of the members, which writ petition came to be dismissed on 28.08.1997, the period during which the writ petition was pending consideration ought to have been excluded while computing the limitation for money suit filed by the Petitioner. Dr. Singhvi submits that although in the impugned judgment, this Court has considered claim of Petitioner of exclusion of time Under Section 14 of the Limitation Act but the benefit was erroneously denied on the ground that writ petition was filed by the Assam Conductors Manufacturers Association, which is a different entity than the Petitioner. He submits that the said view is apparently erroneous and need to be corrected. In the review petition, apart from submissions of limitation, several other grounds have been urged touching on the issues, which have been considered and decided in the judgment dated 23.01.2019. He sought to contend that

Act, 1993 is retroactive and further any outstanding amount at the time of commencement of the Act ought to attract interest under the Act, 1993.

6. Shri Vijay Hansaria, learned senior Counsel appearing for the Respondents refuted the contentions of the Petitioner and submitted that there is no error apparent on record. The question on limitation of Suit has been specifically considered and this Court held that suit is barred by time. Arguments made on the strength of Section 14 has been specifically considered and rejected. The Petitioner was not entitled for any benefit of Section 14 of the Limitation Act since Section 14 contemplates exclusion of time of the proceeding, which the Plaintiff has been prosecuting with due diligence. He submits that Plaintiff in the suit in question is M/s. Shanti Conductors whereas Petitioner in the writ petition, which was filed in the Guwahati High Court was association, which is a different entity and it cannot be said that Plaintiff of suit was the same entity, which had filed the writ petition. Shri Hansaria further submits that against the dismissal of the writ petition, a writ appeal was filed by the Association, which writ appeal was also subsequently dismissed by the Division Bench, which fact has been concealed by the Petitioner. When against the judgment of learned Single Judge, the appeal was filed, no question of bonafide prosecuting the earlier proceedings arises. Shri Hansaria further submits that for taking benefit Under Section 19 of the Limitation Act, there has to be specific pleading and proof in the suit. Plaintiffs have neither pleaded any ground for claiming benefit Under Section 19 nor proved the same in the suit, hence benefit of Section 19 cannot be extended. He further submits that for taking benefit of Section 19 of the Limitation Act, there has to be acknowledgment of the payment, which is a question of fact required to be pleaded and proved by the Plaintiffs.

7. Learned senior Counsel for the parties have also placed reliance on various judgments of this Court, which shall be referred to while considering the submissions.

8. We may first consider the grounds raised by the Petitioner on Section 19 of the Limitation Act. Although, during oral submissions, no argument was raised on Section 19 of the Limitation Act, but the question being of limitation of the suit, we permitted the learned Counsel for the parties to advance their submissions.

9. Section 19 of the Limitation Act is as follows:

19. Effect of payment on account of debt or of interest on legacy.--Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Explanation.--For the purposes of this section,--

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) "debt" does not include money payable under a decree or order of a court.

10. In the judgment dated 23.01.2019, it has been held that the limitation of the suit filed by the Petitioner shall be governed by Article 113 of the Limitation Act, 1963, which is three years from the date when the right to sue accrues. In paragraph 71 of the judgment, it has been held that last supply was completed on 04.10.1993, thus, amount became due on 04.11.1993 and the period of three years shall start running from 04.11.1993 and suit filed was beyond three years. The Petitioners on the strength of Section 19 contends that since the last payment was made on 05.03.1994, a fresh period of limitation shall begin from the fresh date, i.e., 05.03.1994 and the suit filed on 10.01.1997 was well within time. Section 3 of the Limitation Act, 1963 deals with bar of limitation. Section 3(1) is as follows:

3. Bar of limitation.--(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

XXXXXXXXXXXXXXXXX

11. The above provision makes it clear that in event, a suit is instituted after the prescribed period, it shall be dismissed although limitation has not been set up as a defence. The Court by mandate of law, is obliged to dismiss the suit, which is filed beyond limitation even though no pleading or arguments are raised to that effect. The provisions of Sections 4 to 20 are exceptions when suit beyond the period of limitation as prescribed in the Schedule shall not be dismissed as required by Section 3. In this context, we need to refer to Order VII Rule 6 of the Code of Civil Procedure. Order VII deals with plaint. Order VII Rule 6 contains a heading "Grounds of exemption from limitation law". Order VII Rule 6 is as follows:

6. Grounds of exemption from limitation law. - Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed:

Provided that the Court may permit the Plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint.

12. Order VII Rule 6 uses the words "the plaint shall show the ground upon which exemption from such law is claimed". The exemption provided Under Sections 4 to 20 of the Limitation Act, 1963 are based on certain facts and events. Section 19, with which we are concerned, provide for a fresh period of limitation, which is founded on certain facts, i.e., (i) whether payment on account of debt or of interest on legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, (ii) an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. We may notice the judgment of this Court dealing with Section 20 of the Limitation Act, 1908, which was akin to present Section 19 of the Limitation Act, 1963. In Sant Lal Mahton v. Kamla Prasad and Ors. MANU/SC/0043/1951 : AIR 1951 SC 477, this Court held that for applicability of Section 20 of the Limitation Act, 1908, two conditions were essential that the payment must be made within the prescribed period of

limitation and it must be acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. This Court further held that for claiming benefit of exemption Under Section 20, there has to be pleading and proof. In paragraphs 9 and 10, following has been laid down:

9. It would be clear, we think, from the language of Section 20, Limitation Act, that to attract its operation two conditions are essential: first, the payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. We agree with the Subordinate Judge that it is the payment which really extends the period of limitation Under Section 20, Limitation Act; but the payment has got to be proved in a particular way and for reason of policy the legislature insists on a written or signed acknowledgment as the only proof of payment and excludes oral testimony. Unless, therefore, there is acknowledgment in the required from, the payment by itself is of no avail. The Subordinate Judge, however, is right in holding that while the Section requires that the payment should be made within the period of limitation, it does not require that the acknowledgment should also be made within that period. To interpret the proviso in that way would be to import into it certain words which do not occur there. This is the view taken by almost all the High Courts in India and to us it seems to be a proper view to take (See Md. Moizuddin v. Nalini Bala MANU/WB/0020/1937 : A.I.R. (24) 1937 Cal 284 : I.L.R. (1937) 2 Cal. 137; Lal Singh v. Gulab Rai MANU/UP/0303/1932 : 55 All 280, Venkata Subbhu v. Appu Sundaram 17 Mad. 92, Ram Prasad v. Mohan Lal A.I.R. (10) 1923 Nag 117 and Viswanath v. Mahadeo 57 Bom. 453.

10. ...If the Plaintiff's right of action is apparently barred under the Statute of limitation, Order 7, Rule 6, Code of Civil Procedure makes it his duty to state specifically in the plaint the grounds of exemption allowed by the Limitation Act upon which he relies to exclude its operation; and if the Plaintiff has got to allege in his plaint the facts which entitle him to exemption, obviously these facts must be in existence at or before the time when the plaint is filed; facts which come into existence after the filing of the plaint cannot be called in aid to revive a right of action which was dead at the date of the suit. To claim exemption Under Section 20. Limitation Act the Plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the principal, but that such payment had been acknowledged in writing in the manner contemplated by that section....

13. We need to notice as to whether the Petitioners in plaint have pleaded any exclusion of time Under Section 19 of the Act or not. The plaint is filed as Annexure P/2 in Civil Appeal Nos. 8442-8443 of 2016. A perusal of the plaint indicates that there is no pleading as to exception of limitation by running any fresh period of limitation as per Section 19. In paragraph 10, the details of delivery challans have been given, last challan being dated 04.10.1993 has been mentioned by which supply was made. In paragraph 12, details of payments received have also been mentioned, in which last being made on 05.03.1994 has been mentioned, but for the last payment made on 05.03.1994, there was no pleading of an acknowledgment on the part of the Respondents, which could result in start of fresh period of limitation. Further in paragraph 21, it has been further specifically pleaded that provisions of Limitation Act do not apply in view of the provisions contained in the Act, 1993 as because the Act, 1993 is having overriding effect over the Limitation Act and all other Acts. Paragraph 21 of the plaint is referred to for ready reference:

21. That the transaction between the Plaintiffs and the Defendants are duly maintained by the Plaintiffs in the Books of Accounts like ledger, Sale Register etc., which are kept in the usual course of the business of the Plaintiffs and those accounts between the Plaintiffs and the Defendants are in continuity and the interest payable by the Defendants to the Plaintiffs are carried over till date. As such the suit of the Plaintiffs is in within time. Apart from that the provisions of the Limitation Act do not apply in view of the provisions contained in the Act, 1993 as because the Act of 1993 is having overriding effect over the Limitation Act and all other Acts.

14. There being no specific pleading by the Plaintiffs claiming any start of fresh period of limitation, there was no occasion for Defendants to raise any reply in reference to Section 19. Shri Abhishek Manu Singhvi, learned senior Counsel has relied on two judgments of this Court, which need to be noticed: (i) Jiwanlal Achariya v. Rameshwarlal Agarwalla MANU/SC/0190/1966 : AIR 1967 SC 1118, and (ii) Kamla Devi and Ors. v. Pt. Mani Lal Tewari and Ors. MANU/SC/0375/1975 : (1976) 4 SCC 818. In Jiwanlal Achariya (supra), this Court had occasion to consider Section 20 of the Limitation Act, 1908, which was akin to present Section 19 of the Limitation Act, 1963. The Court was considering the question as to what shall be the date of a postdated cheque, whether it shall be the date on which cheque bears or the date the cheque is handed over to compute the start of fresh period of limitation. The Court held that the date which post-dated cheque bears subject to payment by the bank shall be treated as a date for start of the fresh period of limitation. In paragraph 8 of the judgment, it was observed that the proviso to Section 20 shall be treated to be complied with for the cheque itself is an acknowledgment of the payment in the handwriting of the person giving the cheque. Paragraph 8 of the judgment is as follows:

8. This brings us to the question of limitation. The facts are not in dispute now. The promissory note was executed on February 4, 1954. On the same date a postdated cheque bearing the date February 25, 1954 was given by the Defendant-Appellant to the Plaintiff-Respondent, the intention being that on being realised it would be credited towards part payment. It was realised sometime after February 25, 1954 and was credited towards part payment, the Appellant himself having made an endorsement admitting this part payment. But it is contended on behalf of the Appellant that as the post-dated cheque was given on February 4, 1954, that must be held to be the date on which part payment was made. It has been held by the High Court that the acceptance of the post-dated cheque on February 4, 1954 was not an unconditional acceptance. Where a bill or note, is given by way of payment, the payment may be absolute or conditional, the strong presumption being in favour of conditional payment. It followed from the finding of the High Court that the payment was conditional i.e. that the payment will be credited to the person giving the cheque in case the cheque is honoured. In the present case the cheque was realised and the question is what is the date of payment in the circumstances of this case for the purpose of Section 20 of the Limitation Act. Section 20 inter alia lays down that where payment on account of debt is made before the expiration of the prescribed period by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made. Where therefore the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. Where the cheque is not accepted as an unconditional payment, it can only be treated as a conditional payment. In such a case the payment for purposes of Section 20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured.

Thus if in the present case the cheque which was handed over on February 4, 1954 bore the date February 4, 1954 and was honoured when presented to the bank the payment must be held to have been made on February 4, 1954, namely, the date which the cheque bore. But if the cheque is post-dated as in the present case it is obvious that it could not be paid till February 25, 1954 which was the date it bore. As the payment was conditional it would only be good when the cheque is presented on the date it bears, namely, February 25, 1954 and is honoured. The earliest date therefore on which the Respondent could have realised the cheque which he had received as conditional payment on February 4, 1954 was 25th February, 1954 if he had presented it on that date and it had been honoured. The fact that he presented it later and was then paid is immaterial for it is the earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated cheque becomes actual payment when honoured. We are therefore of opinion that as a post-dated cheque was given on February 4, 1954 and it was dated February 25, 1954 and as this was not a case of unconditional acceptance, the payment for the purpose of Section 20 of the Limitation Act could only be on February 25, 1954 when the cheque could have been presented at the earliest for payment. As in the present case the cheque was honoured it must be held that the payment was made on February 25, 1954. It is not in dispute that the proviso to Section 20 is complied with in this case, for the cheque itself is an acknowledgment of the payment in the handwriting of the person giving the cheque. We are therefore of opinion that a fresh period of limitation began on February 25, 1954 which was the date of the post-dated cheque which was eventually honoured.

15. In the above case, in the plaint itself it was noticed that although the promissory note was executed on 04.02.1954 and the suit was filed on 22.04.1957 but the Plaintiff had relied on payment of a cheque on 25.02.1954 to bring the suit within time. Paragraph 1 of the judgment is to the following effect:

Two questions of law arise in this appeal by special leave against the judgment of the Patna High Court. The facts which have been found by the High Court and which are necessary for our purposes may be briefly narrated. The Appellant was the Defendant in a suit filed by the Plaintiff-Respondent for recovery of money on the basis of a promissory note for Rs. 10,000 executed on February 4, 1954 by the Defendant-Appellant in favour of the Plaintiff-Respondent. 12 per cent per annum interest was to run on the promissory note which was payable on demand or to the order of the Plaintiff-Respondent. The suit was filed on February 22, 1957 and was thus obviously beyond time from February 4, 1954. The Plaintiff-Respondent relied on a payment by cheque on February 25, 1954 to bring the suit within time.

16. The judgment of this Court in Jiwanlal Achariya (supra) does not lay down that even without pleading all facts for claiming start of fresh period of limitation, the Plaintiff is entitled for the benefit of Section 19. The next judgment relied by Shri Singhvi is Kamla Devi and Ors. (supra), in which case, this Court was considering Section 19 of the Limitation Act, 1963. This Court relied on an acknowledgement of payment for holding that from the date of acknowledgment of order period of limitation shall start. In paragraph 4 of the judgment following has been laid down:

4. The last contention pressed was that the personal decree should not have been granted, because it was barred by limitation. The basis for this contention is that the payment of Rs. 25, which has been acknowledged on the registered mortgage deed, was not itself by a registered endorsement

and, therefore, the Plaintiff was entitled to a period of three years only, even if Section 19 may give an extension of limitation. We see no merit in this contention. The function of Section 19 is to provide a later date to count the period of limitation afresh, and that fresh period of limitation will be computed from the time when the acknowledgement is signed. Nothing turns on whether the acknowledgement is itself registered or not. The office of Section 19 being to postpone the date of reckoning limitation and not to create a different substantive period of limitation, the latter depends upon the appropriate Article of the Limitation Act which applies to the suit. In this case, the mortgage document was registered and the personal covenant was contained in the registered deed. Therefore, Article 116, which gives a period of six years, applies. Thus, the fresh period of limitation will be six years and it has to be counted from the date of acknowledgement, namely, August 31, 1940.

In this view, there in no merit in the plea of limitation either. This is obviously a case where the revisional court had missed a fact apparent upon the record and, therefore, thought it fit, in the exercise of its discretion to review its judgment. Justice has thereby been furthered rather than frustrated. We are not here concerned with an endorsement on the deed as constituting a cause of action.

17. The above judgment noticed the function of Section 19, which provides for a later date to count the period of limitation afresh. There cannot be any dispute to the preposition as laid down by this Court in above case.

18. We may also notice the proviso of Order VII Rule 6, which has been added by Act 104 of 1976, which provided that the Court may permit the Plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint. The proviso of Order VII Rule 6 cannot come to the rescue of the Plaintiff since as noticed above, the Plaintiffs have specifically pleaded in paragraph 21 that the provisions of the Limitation Act are not applicable since Act, 1993 has overriding effect. The trial court in decreeing the suit of the Plaintiff has accepted the above submission and has held that Limitation Act, 1963 is not applicable.

19. We may further notice that paragraph 24 of the plaint, which is a paragraph of cause of action for the suit, which refers to date beginning from 31.03.1992 till 05.10.1993, i.e., the beginning from the first supply order i.e., 31.03.1992 and date of last supply order, i.e., 05.10.1993, but cause of action is not claimed from the date 05.03.1994, which was the date when the last payment was received by the Petitioner. The Petitioner in the plaint has clearly not pleaded for benefit of Section 19 nor has brought necessary facts to enable the Court to consider the claim Under Section 19. We, thus, are of the view that Petitioner is not entitled for benefit of Section 19 of the Limitation Act and there is no error in the judgment of this Court dated 23.01.2019 holding that the suit of the Plaintiff was barred by time.

20. We may also notice few submissions of Dr. Singhvi in support of his plea that the Petitioner was entitled for benefit of Section 14. In our judgment dated 23.01.2019, we have already taken the view that benefit of Section 14 of Limitation Act cannot be claimed by the Plaintiff since writ petition, which was filed by the Association was by different entity. The question of benefit of Section 14 having been specifically considered and rejected by this Court in its judgment dated

23.01.2019, we do not find any error apparent on the aforesaid ground. Moreover, present is a case where writ petition filed by Association was dismissed on 28.08.1997 subsequent to filing of the suit by Plaintiff on 10.01.1997. Furthermore, after the judgment of the learned Single Judge on 28.08.1997 Association has filed a writ appeal challenging the said judgment, which facts also detracts from fulfilling the conditions as required for extending the benefit of Section 14 of the Limitation Act.

21. Insofar as other submissions of Dr. Singhvi that Act, 1993 is retroactive in nature and further amount due at the time of the commencement of the Act ought to attract interest of the Act, 1993, all these submissions have been elaborately considered in the judgment dated 23.01.2019, which have been considered on merits. The scope of review is limited and under the guise of review, Petitioner cannot be permitted to reagitate and reargue the questions, which have already been addressed and decided. The scope of review has been reiterated by this Court from time to time. It is sufficient to refer the judgment of this Court in Parsion Devi and Ors. v. Sumitri Devi and Ors. MANU/SC/1360/1997 : (1997) 8 SCC 715, wherein in paragraph 9 following has been laid down:

9. Under Order 47 Rule 1 Code of Civil Procedure a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review Under Order 47 Rule 1 Code of Civil Procedure. In exercise of the jurisdiction Under Order 47 Rule 1 Code of Civil Procedure it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

22. We, thus, do not find any merit in Review Petition (C) Nos. 786-787 of 2019, which is accordingly dismissed.

Review Petition (C) No. 789 of 2019

23. Shri Ajit Kumar Sinha, learned senior Counsel in support of the review petition contended that there is an error apparent on the face of record in observation of the Court made in paragraph 85 of the judgment. Some of the supplies have been made prior to the commencement of the Act, 1993, i.e., prior to 23.09.1992. It is submitted that some of the supplies were made after 23.09.1992, hence the Petitioner was entitled for the benefit of interest under the Act, 1993. He submits that in ground (b), it has been mentioned that details of supply and reason of corresponding details have been noticed by the trial court in the judgment dated 30.09.2002 passed in Money Suit No. 32 of 1996. Reference has been made to Annexure - P/3 at Page - 71 @ Page 88 of Civil Appeal No. 8450 of 2016. We have perused Annexure P/3, the judgment of the trial court dated 30.09.2002, our attention has been invited to page 88 of the judgment, where reference of 12 bills have been made in the judgment, which is to the following effect:

Stated specifically, it is the Plaintiff's evidence that against the supply of poles to the Defendants different divisions on receipt of orders from the Defendants, the Plaintiff submitted a number of twelve bills for the payment to the Defendants to be reiterated as:

Sl. No.	Bill No.	Date	Gross Amount of Bill
1.	BCPI/31/91/92	20.3.92	Rs. 5,02,545.92
2.	BCPI/32/91/92	20.3.92	Rs. 2,99,541.65
3.	BCPI/33/91/92	20.3.92	Rs. 2,98,344.48
4.	BCPI/3/92/93	7.4.92	Rs. 4,67,928.48
5.	BCPI/11/92-93	8.6.92	Rs. 1,08,806.45
6.	BCPI/12/92-93	8.6.92	Rs. 2,48,459.90
7.	BCPI/26/92-93	29.9.92	Rs. 17,729.50
8.	BCPI/27/92-93	-	Rs. 79,699.77
9.	BCPI/28/92-93	-	Rs. 1,81,497.98
10.	BCPI/29/92-93	-	Rs. 87,249.81
11.	BCPI/30/92-93	-	Rs. 12,782.45
12.	5% Security Deposit Bill	-	Rs. 23,738.00
	Total Outstanding Amount		Rs. 23,28,324.39

24. A perusal of the above chart given in the judgment indicates that the date 29.09.1992 is a date of bill for the payment for supply of the materials by the Plaintiffs. In the judgment dated 23.01.2019, we had observed that "there being nothing on record to come to the conclusion that any supply was made after the enforcement of the Act so as to enable the Appellant to claim interest Under Section 3 read with Section 4 of the Act, 1993, we are of the view that judgment of the High Court does not need any interference in this appeal".

25. We, thus, do not find any merit in the submission of the learned Counsel for the Appellant that there is error apparent on the face of record in observation of the Court made in paragraph 85 of the judgment, the said submission is rejected and the Review Petition (C) No. 789 of 2019 is dismissed.

Review Petition (C) No. 788 of 2019

26. Shri Basava S. Prabhu Patil, learned senior Counsel appearing for the Petitioner contends that this Court in the judgment dated 23.01.2019 has dismissed the appeal of the Petitioner as not maintainable, which is an error apparent on record. He submits that the appeal filed by the Petitioner being Civil Appeal No. 8445 of 2016 against the review judgment of the High Court dated 19.03.2013 was maintainable.

27. Shri Patil submits that in the judgment dated 23.01.2019, the Issue No. 6 was specifically framed regarding maintainability of the Civil Appeal No. 8445 of 2016. The maintainability of the appeal was specifically considered and answered in paragraphs 80, 81 and 82 of the impugned judgment. The submission of Shri Patil is that since the Civil Appeal No. 8445 of 2016 was against the judgment of the High Court dated 19.03.2013 by which review petition was partly allowed by allowing interest @9% p.a., against which judgment, the appeal was maintainable and withdrawal of earlier appeal by the Petitioner was not fatal. The Appellants were issued two supply orders

dated 17.02.1992 and 17.03.1992. The suit was filed on 16.05.1994 seeking decree with interest, which trial court decreed. Assam Electricity Board filed a first appeal, which was allowed by the High Court holding that bills raised by the Appellants were cleared by the Assam Electricity Board prior to commencement of Act, 1993, hence the Appellant was not entitled for benefit of Act, 1993. Special leave petition filed against the judgment of the High Court dated 05.04.2001 was permitted to be withdrawn by following order:

Learned Counsel for the Petitioner seeks leave to withdraw the special leave petition. He states that he will move the High Court in review stating that it has erred in recording that "all the bills were paid and cleared earlier to the commencement of the Act." The special leave petition is dismissed as withdrawn accordingly.

28. After the aforesaid judgment of this Court permitting the Petitioner to withdraw the special leave petition, a review petition was filed, which was partly allowed on 19.03.2013. A perusal of the judgment dated 19.03.2013 indicates that the grounds on which the Petitioner prayed liberty to file review was not proved in the review petition. The High Court in the review judgment did not hold in favour of the Petitioner that he was entitled for the benefit of Act, 1993 rather the High Court accepted the submission of the Petitioner that Plaintiffs are not debarred from claiming cost Under Section 34 Code of Civil Procedure, Section 61 of the Sale of Goods Act, 1930 or Section 3 of the Interest Act, 1978 or in equity only on the ground of principal amount. The High Court granted interest at the rate of 9% per annum. The Civil Appeal No. 8445 of 2016 has been filed against the review judgment but obviously the appeal is not against the 9% interest granted to the Petitioner. Review judgment does not grant interest under Act, 1993 since the High Court in the review judgment did not interfere with the earlier finding that Petitioner is not entitled for benefit under Act, 1993. The review on the ground on which liberty was sought was in essence not accepted by the High Court in its review judgment. Moreover, in judgment dated 23.01.2019, the maintainability of appeal having been considered and found against the Petitioner, we do not find any ground to review the petition.

29. In result, Review Petition (C) Nos. 786-787 of 2019, Review Petition (C) No. 789 of 2019 and Review Petition (C) No. 788 of 2019 are dismissed.

Back to Index

MANU/SC/0111/1984

Neutral Citation: 1984/INSC/121

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 745 of 1983

Decided On: 17.07.1984

Appellants: Sharad Birdhichand Sarda **Vs.** Respondent: State of Maharashtra

Hon'ble Judges/Coram:

A. Vardarajan, S. Murtaza Fazal Ali and Sabyasachi Mukherjee, JJ.

Subject: Criminal

Subject: Law of Evidence

Relevant Section:

INDIAN EVIDENCE ACT, 1872 - Section 32

Cases Overruled/Partly Overruled:

Gokul Chandra Chatterjee v. The State (MANU/WB/0001/1950)

Prior History:

From the Judgment and Order dated September 20, 21, 22 and 23, 1983 of the Bombay High Court in Criminal Appeal No. 265 of 1983 with confirmation case No. 3 of 1983--

Disposition:
In Favour of Accused

Authorities Referred:

'Law of Evidence' by Woodroffe & Ameer Ali, (Vol. II) ; Ratanlal and Dhirajlal in their Law of Evidence (1982 reprint); Dr. Modi's Medical Jurisprudence and Texicology (19th Edn.) at page 747

Case Note:

Criminal - Benefit of Doubt - Acquittal - Present appeal filed against conviction of appellant - Held, Doctor has tampered with material evidence - High Court has clearly misdirected itself on many points in appreciating evidence and has thus committed a gross error of law - It is clear that evidence on basis of which questions have been put to appellant is wholly irrelevant and that those questions do not relate to any circumstance appearing in the evidence against appellant - In view of fact that this is a case of circumstantial evidence and further in view of fact that two views are possible on evidence on record, one pointing to guilt of accused and other his innocence, accused is entitled to have benefit of one which is favourable to him - Guilt of accused has not been proved beyond all reasonable doubt - Appeal is allowed

JUDGMENT

1. This is rather an unfortunate case where a marriage arranged and brought about through the intervention of common friends of the families of the bride and bridegroom though made a good start but ran into rough weather soon thereafter. The bride, Manju, entertained high hopes and aspirations and was not only hoping but was anxiously looking forward to a life full of mirth and merriment, mutual love and devotion between the two spouses. She appears to be an extremely emotional and sensitive girl at the very behest cherished ideal dreams to be achieved after her marriage, which was solemnised, on February 11, 1982 between her and the appellant, Sharad Birdhichand Sarda. Soon after the marriage, Manju left for her new marital home and started residing with the appellant in Takshila Apartments at Pune. Unfortunately, however, to her utter dismay and disappointment she found that the treatment of her husband and his parents towards her was cruel and harsh and her cherished dreams seem to have been shattered to pieces. Despite this shocking state of affairs she did not give in and kept hoping against hope and being of a very noble and magnanimous nature she was always willing to forgive and forget. As days passed by, despite her most laudable attitude she found that "things were not what they seem" and to quote her own words "she was treated in her husband's house as a labourer or as an unpaid maid-servant". She was made to do all sorts of odd jobs and despite her protests to her husband nothing seems to have happened. Even so, Manju had such a soft and gentle frame of mind as never to complain to her parents-in-law, not even to her husband except sometimes. On finding things unbearable, she did protest, and expressed her feelings in clearest possible terms, in a fit of utter desperation and frustration, that he hated her. Not only this, when she narrated her woeful tale to her sister Anju in the letters written to her (which would be dealt with in a later part of the judgment), she took the abundant care and caution of requesting Anju not to reveal her sad plight to her parents lest they, may get extremely upset, worried and distressed.

2. Ultimately, things came to such a pass that Manju was utterly disgusted and disheartened and she thought that a point of no-return had reached. At last, on the fateful morning of June 12, 1982, i.e., nearly four months after her marriage, she was found dead in her bed.

3. As to the cause of death, there appears to be a very serious divergence between the prosecution version and the defence case. The positive case of the prosecution was that as the appellant was not at all interested in her and had illicit intimacy with another girl, Ujvala, he practically discarded

his wife and when he found things to be unbearable he murdered her between the night of June 11 and 12, 1982, and made a futile attempt to cremate the dead body. Ultimately, the matter was reported to the police. On the other hand, the plea of the defence was that while there was a strong possibility of Manju having been ill-treated and uncared for by her husband or her in-laws, being a highly sensitive and impressionate woman she committed suicide out of sheer depression and frustration arising from an emotional upsurge. This is the dominant issue which falls for decision by this Court.

4. Both the High Court and the trial Court rejected the theory of suicide and found that Manju was murdered by her husband by administering her a strong dose of potassium cyanide and relied on the Medical evidence as also that of the Chemical Examiner to show that it was a case of pure and simple homicide rather than that of suicide as alleged by the defence. The High Court while confirming the judgment of the trial Court affirmed the death sentence and hence this appeal by special leave.

5. Before discussing the facts of the case, it may be mentioned that although the High Court and the trial Court have gone into meticulous and minutest matters pertaining to the circumstances leading to the alleged murder of Manju, yet after going through the judgments we feel that the facts of the case lie within a very narrow compass.

6. The story of this unfortunate girl starts on 11-2-1982 when her marriage was solemnised with the appellant preceded by a formal betrothal ceremony on 2-8-81. After the marriage, Manju, for the first time, went to her parents' house on 22-2-82 for a very short period and returned to Pune on 26-2-82. It is the prosecution case that on 17-3-82 the appellant had called Manju at Pearl Hotel where he introduced her to Ujvala and told her that she must act according to the dictates and orders of Ujvala, if she wanted to lead a comfortable life with her husband. In other words, the suggestion was that the appellant made it clear to his wife that Ujvala was the real mistress of the house and Manju was there only to obey her orders. After this incident, Manju went to her parents' house on 2-4-82 and returned to Pune on 12-4-82. This was her second visit. The third and perhaps the last visit of Manju to her parents' house was on 25-5-82 from where she returned to Pune on 3-6-82, never to return again. The reason for her return to Pune was that her father-in-law insisted that she should return to Pune because the betrothal ceremony of Shobha (sister of the appellant) was going to be held on 13-6-82.

7. The last step in this unfortunate drama was that Manju, accompanied by Anuradha (wife of A-2) and her children returned to the flat on 11-6-82 near about 11.00 p.m. Her husband was not in the apartment at that time but it is alleged by the prosecution that he returned soon after and administered potassium cyanide to Manju. Thereafter, the appellant went to his brother, Rameshwar who was also living in the same flat and brought Dr. Lodha (PW 24) who was living at a distance of 1 1/2 kms. from Takshila Apartments. At the suggestion of Dr. Lodha, Dr. Gandhi (PW 25.) was also called and both of them found that Manju was dead and her death was an unnatural one and advised the body to be sent for post-mortem in order to determine the cause of death. Ultimately, Mohan Asava (PW 30) was approached on telephone and was informed that Manju had died at 5.30 a.m. Subsequently, the usual investigation and the post-mortem followed which are not very germane for our purpose at present and would be considered at the appropriate stage.

8. The plea of the appellant was that Manju was not administered potassium cyanide by him but she appears to have committed suicide out of sheer frustration. In order to prove his bona fide the accused relied on the circumstances that as soon as he came to know about the death of his wife he called two Doctors (Pws. 24 and 25) and when they declared that Manju had died an unnatural death, as the cause of death was not known, and therefore the body had to be sent for post-mortem, he immediately took steps to inform the police. He flatly denied the allegation of the prosecution that there was any attempt on his part to persuade Mohan Asava (PW 30) to allow the body of the deceased to be cremated.

9. We might state that the High Court has mentioned as many as 17 circumstances in order to prove that the circumstantial evidence produced by the prosecution was complete and conclusive. Some of these circumstances overlap, some are irrelevant and some cannot be taken into consideration because they were not put to the appellant in his statement under Section 313 of the CrPC in order to explain the effect of the same as we shall presently show.

The law regarding the nature and character of proof of circumstantial evidence has been settled by several authorities of this Court as also of the High Courts. The locus classicus of the decision of this Court is the one rendered in the case of Hanumant v. State of Madhya Pradesh MANU/SC/0037/1952 : 1953CriLJ129 , where Mahajan, J. clearly expounded the various concomitants of the proof of a case based purely on circumstantial evidence, and pointed out thus:

The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved...
it must be such as to show that within all human probability the act must have been done by the accused."

This decision was followed and endorsed by this Court in the case of Dharambir Singh v. State of Punjab Criminal Appeal No. 98 of 1958 decided on 4-11-58 printed on green papers in bound volumes. We shall however discuss Hanumant's case fully in a later part of our judgment. Coming now to the question of interpretation of Section 32(1) of the Evidence Act, this Court in the case of Ratan Gond v. State of Bihar MANU/SC/0054/1958 : 1959CriLJ108 , S.K. Das, J. made the following observations (at p. 21 of AIR):

'The only relevant clause of Section 32 which may be said to have any bearing is clause (1) which relates to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. In the case before us, the statements made by Aghani do not relate to the cause of her death or to any of the circumstances relating to her death; on the contrary, the statements relate to the death of her sister."

In the 'Law of Evidence' by Woodroffe & Ameer Ali, (Vol. II) the authors have collected all the cases at one place and indicated their conclusions thus:

To sum up, the test of the relevancy of a statement under Section 32(1), is not what the final finding in the case is but whether the cause of the death of the person making the statement comes into question in the case. The expression 'any of the circumstances of the transaction which resulted in his death'; is wider in scope than the expression 'the cause of his death'; in other words, Clause (1)

of Section 32 refers to two kinds of statements: (1) statement made by a person as to the cause of his death, and (2) the statement made by a person as to any of the circumstances of the transaction which resulted in his death.

The words 'resulted in his death' do not mean 'caused his death'. Thus, it is well settled that declarations are admissible only in so far as they point directly to the fact constituting the res gestae of the homicide; that is to say, to the act of killing and to the circumstances immediately attendant thereon, like threats and difficulties, acts, declarations and incidents, which constitute or accompany and explain the fact or transaction in issue. They are admissible for or against either party, as forming parts of the res gestae." (P. 952)

It would appear that the solid foundation and the pivotal pillar on which rests the edifice of the prosecution may be indicated as follows:

(1) Written dying declaration by the deceased in her letters, two of which were addressed to her sister Anju and one her friend Vahini.

(2) The oral statements made by the deceased to her father (PW 2), mother (PW 20), Sister (PW 6) and her friend (PW 3) and also to PWs 4 and 5 showing her state of mind shortly before her death and the complaints which she made regarding the ill-treatment by her husband.

(3) Evidence showing that the appellant was last seen with the deceased in the room until the matter was reported to the police.

(4) The unnatural and incriminating conduct of the appellant.

(5) The medical evidence taken along with the Report of the Chemical Examiner which demonstrably proves that it was a case of homicide, completely rules out the theory of suicide as alleged by the appellant.

Mr. Jethmalani, learned Counsel for the appellant, has vehemently argued that there was a very strong possibility of the deceased having committed suicide due to the circumstances mentioned in her own letters. He has also questioned the legal admissibility of the statements contained in the written and oral dying declarations. He has submitted that the so-called dying declarations are admissible neither under Section 32 nor under Section 8 of the Evidence Act it was submitted by the appellant that the present case is not at all covered by Clause (1) of Section 32 of the Evidence Act.

11. The leading decision on this question, which has been endorsed by this Court, is the case of Pakala Narayana Swami v. Emperor MANU/PR/0001/1939, where Lord Atkin has laid down the following tests:

It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused.

Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible

....

Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence.

....

It will be observed that "the circumstances are of the transaction which resulted in the death of the declarant."

These principles were followed and fully endorsed by a decision of this Court in Shiv Kumar v. State of Uttar Pradesh (Crl. Appeal No. 55 of 1966 decided on 29-7-66 : (reported in 966 Cri APP R (SC) 281 where the following observations were made:

It is clear that if the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed,.... A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence.... The phrase "circumstances of the transaction" is a phrase that no doubt conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae" (See Pakala Narayana Swaraj v. King Emperor MANU/PR/0001/1939 : AIR 1939 PC 47.

The aforesaid principles have been followed by a long catena of authorities of almost all the Courts which have been noticed in this case. To mention only a few important ones, in Manohar Lal v. State of Punjab MANU/PH/0271/1981, the Division Bench of the Punjab & Haryana High Court observed thus:

The torture administered sometimes manifests itself in various forms. To begin with, it might be mental torture and then it may assume the form of physical torture. The physical harm done to the victim might be increased from stage to stage to have the desired effect. The fatal assault might be made after a considerable interval of time, but if the circumstances of the torture appearing in the writings of the deceased come into existence after the initiation of the torture the same would be held to be relevant as laid down in Section 32(1) of the Evidence Act.

12. We fully agree with the above observations made by the learned Judges. In Protima Dutta & Anr. v. The State while relying on Hanumant's case (supra) the Calcutta High Court has clearly pointed out the nature and limits of the doctrine of proximity and has observed that in some cases where there is a sustained cruelty, the proximity may extend even to a period of three years. In this connection, the High Court observed thus:

The 'transaction' in this case is systematic ill-treatment for years since the marriage of Sumana with incitement to end her life. Circumstances of the transaction includes evidence of cruelty which

produces a state of mind favourable to suicide. Although that would not by itself be sufficient unless there was evidence of incitement to end her life it would be relevant as evidence.

This observation taken as a whole would, in my view, imply that the time factor is not always a criterion in determining whether the piece of evidence is properly included within "circumstances of transaction".... "In that case the allegation was that there was sustained cruelty extending over a period of three years interspersed with exhortation to the victim to end her life". His Lordship further observed and held that the evidence of cruelty was one continuous chain, several links of which were touched up by the exhortations to die. "Thus evidence of cruelty, ill-treatment and exhortation to end her life adduced in the case must be held admissible, together with the statement of Nilima (who committed suicide) in that regard which related to the circumstances terminating in suicide.

13. Similarly, in Onkar v. State of Madhya Pradesh MANU/MP/0087/1973, while following the decision of the Privy Council in Pakala Narayana Swami's case" MANU/PR/0001/1939 (supra), the Madhya Pradesh High Court has explained the nature of the circumstances contemplated by Section 32 of the Evidence Act thus:

The circumstances must have some proximate relation to the actual occurrence and they can only include the acts done when and where the death was caused.... Thus a statement merely suggesting motive for a crime cannot be admitted in evidence unless it is so intimately connected with the transaction itself as to be a circumstance of the transaction. In the instant case evidence has been led about statements made by the deceased long before this incident which may suggest motive for the crime.

14. In Allijan Munshi v. State MANU/MH/0095/1960 : AIR 1960 Bom 290, the Bombay High Court has taken a similar view.

15. In Chinnavalayan v. State of Madras (1959) 1 MLJ 246, two eminent Judges of the Madras High Court while dealing with the connotation of the word 'circumstances' observed thus:

The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder. This is because the natural meaning of the words, according to their Lordships, do not convey any of the limitations such as (1) that the statement must be made after the transaction has taken place, (2) that the person making it must be at any rate near death, (3) that the circumstances can only include acts done when and where the death was caused. But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

16. In Gokul Chandra Chatterjee v. The State MANU/WB/0001/1950 : AIR1950Cal306 , the Calcutta High Court has somewhat diluted, the real concept of proximity and observed thus;

In the present case, it cannot be said that statements in the letters have no relation to the cause of death. What drove her to kill herself was undoubtedly her unhappy state of mind, but the statements in my view have not that proximate relation to the actual occurrence as to make them admissible

under Section 32(1), Evidence Act. They cannot be said to be circumstances of the transaction which resulted in death.

17. We, however, do not approve of the observations made by the High Court in view of the clear decision of this Court and that of the Privy Council. With due respect, the High Court has not properly interpreted the tenor and the spirit of the ratio laid down by the Privy Council. We are, therefore, of the opinion that this case does not lay down the correct law on the subject.

18. Before closing this chapter we might state that the Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English law where only the statements which directly relate to the cause of death are admissible. The second part of Clause (1) of Section 32, viz.., "the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question" is not to be found in the English Law. This distinction has been clearly pointed out in the case of Rajindera Kumar v. The State AIR 1960 Punjab 310, where the following observations were made:

Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written Or verbal, of relevant facts made by a person who is dead...are, themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case, in which the cause of that person's death comes into question....It is well settled by now that there is difference between the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death.

In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death.

19. And in the case of State v. Kanchan Singh AIR 1934 All 153, it was observed thus:

The law in India does not make the admissibility of a dying declaration dependent upon the person's having a consciousness of the approach of death. Even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under Section 32, Evidence Act.

20. In these circumstances, therefore, it is futile to refer to English cases on the subject.

21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar, conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of Clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.

22. This now brings us to a close consideration of the contents of the letters (Exts. 30, 32 and 33) written by Manju to her sister and friend. We propose to examine the contents of the letters for four purposes:

(1) in order to find out the state of mind and psychological attitude of Manju,

(2) the nature of Manju's attitude towards her husband and in-laws,

(3) the amount of tension and frustration which seems to be clearly expressed in the letters, and

(4) to determine Manju's personal traits and psychological approach to life to determine if she was ever capable of or prone to committing suicide.

23. We start with the letter dated 8-5-82 (Ext. 30) which was addressed to her sister Anju and is printed at page 191 of Part I of the printed Paperbook. The learned Counsel for the appellant in order to make our task easy has supplied the English translation as also the Roman script of the original letter. On a comparison of the two versions, we are of the opinion that by and large the English translation printed in the Paperbook is a true and faithful rendering of the contents of the

original letter. It is not necessary for us to extract the entire letter but we propose to extract only the relevant portions which seek to explain and illustrate the four purposes mentioned above.

All read the letter with curiosity, or it may go to anybody's hand. I do not want to take any such risk. So I have taken up today for writing, the second letters to you.

The Roman script runs thus:

Khat to sabhi utsukta se padte hain. Kahin kisi ke hath pad sakta hai. Aisi risk leni nahin hai. Isliye maine tumhe aaj doosra khat likhne ko liya.

24. An analysis of the above clearly shows that Manju was a highly secretive woman and wanted to keep her personal matters or secrets to herself except giving a rough idea or a passing glimpse of her feelings only to those who were very close to her as friends or near relations. The extract shows that perhaps in a spell of heavy emotions she had written a very long letter to her sister whom she regarded as her best friend but on second thought she tore it off lest it may fall in anybody's hands and she was not prepared to take such a risk. This mentality and noble nature would be of great assistance to us in assessing the probative value of the statements made by her to her parents sister and friend during her last visit to Beed. The second paragraph, which is extracted below, reflects her state of mind and the tension and torture which she was Undergoing:

Now in this letter, when (out of) the things coming to my mind which cannot be written. I do not understand what is to be written. The state of mind now is very much the same. Enough. You understand (me). I am undergoing a very difficult test. I am unable to achieve it. Till I could control (myself), well and good. When it becomes impossible, some other way will have to be evolved. Let us see what happens. All right.

25. She has hinted that she was passing through difficult times but was trying to control herself as much as she could. She has further indicated that if things did not improve then she may have to evolve some other method. The exact words used in the Roman script runs thus:

Jab tak sambhal sakti hoon theek hai jab assambhab ho jayega to phir rasta nikalna padega, dekhenge kya kya hota hai.

26. The words "some other way will have to be evolved" clearly gives a clue to her psychotic state of mind and seem to suggest that the other method to get rid of all her troubles was to commit suicide. It is pertinent to note that in the first two paragraphs of her letter extracted above there is no indication nor any hint about the conduct of her husband.

27. In the third para of her letter she states her feelings thus:

I thought much that since the house of my husband's parents is at Pune, I would do this and that or the people from the house of my husband's parents are free. However, I have gradually come to know that in that house, the worth of a daughter-in-law is no more than that of a labourer.

The relevant portion in the Roman script reads thus:

Is ghar mein bahu ki keemat majdoor se jyada nahin hai.

28. At the end of the third paragraph she repeats her sad plight thus:

My state here however is like an unclaimed person. Let it be gone. I do not like to weep (over it). When we will meet, we will talk all the things.

29. In the middle of the 4th paragraph she comes out with an emotional outburst by indicating that all her hopes had been shattered and because of being neglected by her husband her health was adversely affected. In the Roman script she used the following words:

Sachmuch kya kya sapne rahte hain kuarepan mein, magar toote huye dekhkar dilpar kya gujarti hai. Vaise to maine kuch bhi sapne nahin dekhe the, bas ek hi sapna tha ki mera pati mujhse bahut pyar kare, magar abhi wo bhi na pakar dilki halat per kaboo nahin pa sak rahi. Tabiyat par uska asar dikh raha hai.

30. In the latter part of the 8th paragraph while giving vent to her feelings she states thus:

Now Manju is moving, it is necessary to tell that she is alive. You don't tell anybody about this letter. I felt like telling all this to Bhausab. What, however, is the use of making him sorry. One should test one's fate, whatever may be the result I want to tell you all. But I cannot tell.

31. The words used by her show her affectionate and secretive nature and the precaution taken by her not to tell anything to her father, who is addressed as 'Bhausab'. The Roman script of the relevant portion runs thus:

Dil to karta tha Bai Bhau Sahab ko sab bataon, magar unko dukh dekar kya phaida. Apne apne naseeb dekhenge, natija kya nikalta hai. Mujhe tumhein sab kuch batana hai, magar bata nahin sakti.

32. These extracts throw a flood of light on the nature, character, mental attitude, suffering and shock of the deceased. One thing which may be conspicuously noticed is that she was prepared to take all the blame on her rather than incriminate her husband or her in-laws. The other portions of the letter (Ext. 30) are not at all germane for the purpose of this case. Summarising the main contents of the letter, the following conclusions or inferences follow:

(a) Manju was a highly emotional and sensitive woman.

(b) she got the shock of her life when due to ill-treatment by her husband and in-laws she found that all her dreams had been shattered to pieces after marriage leaving her a dejected, depressed and disappointed woman.

(c) she had been constantly ill-treated by her in-laws and her position in the house was nothing but that of an unpaid maid-servant or a labourer.

(d) she wanted to keep all her worries and troubles to herself and on no account was she prepared to disclose them to her parents or even to her sister, lest they also get depressed and distressed.

(e) no serious allegation of cruelty had been made against the husband personally by her and she thought that she herself should suffer out of sheer frustration.

33. Now we shall examine Ext. 32 which is a letter dated 8-6-82 written by Manju to her sister Anju. This was perhaps her last letter to Anju and is very important and relevant for decision of the case. The letter begins with the words "I am happy here". In the second paragraph she expresses her feelings as follows:

Shobhabai's 'Sadi' programme is fixed on 13th I do not know why there is such a dirty atmosphere in the house ? It is felt every moment that something will happen. Everybody is in tension. No work has been started in the house. Let it go. I am out of mind. Still I am used not to pay heed to it. Ala what about your law.

34. So far as the first part is concerned, the 'dirty atmosphere' about which she speaks is totally unrelated to anything done by the husband or of any cruel treatment by him; it merely refers to the tension prevailing in the family as the 'Sadi' (Kohl) was fixed on 13-6-82. Her anger is not so much towards her husband or herself as for the manner in which things were being done. She complained that no work had been started and being the eldest daughter-in-law of the family she felt it her duty to see that all arrangements were complete. It was conceded by the Additional Solicitor-General that this portion of the letter does not refer to any ill-treatment by the husband or his parents but relates only to the defective and unsatisfactory arrangements for such an important function. The relevant portion of the 3rd paragraph is also more or less innocuous but in between the lines it contains a tale of woe, a spirit of desperation and frustration and a wave of pessimism. The actual vernacular words are -

Mera to aane ka kya hota hai dekna hai. Buaji ke yahan se khat aur aaya to shahid chance mil sakta hai. Magar meri mangal ke dulhan ke roop mein dekhne ki bahut ichha hai. Dekhenge.

35. She was naturally apprehending something and was not very hopeful of going to her father's place. This being her last letter, and that too a short one, it gives a clear inkling of the manner of how her mind was working. She did not lay any blame on her husband or anybody else but still she was afraid that something was going to happen and that she may not be able to go to her father and see the marriage of her sister-in-law for which preparations were being made. In our opinion, these words are extremely prophetic and seem to indicate that by that time she had almost made up her mind to end her life instead of carrying on her miserable existence. As brevity is the soul of wit, she directly hinted that she may not be able to meet her father or anybody naturally because when a life comes to an end there can be no such question. Exhibit 32, though a short letter, depicts her real feeling and perhaps a tentative decision which she may have already taken but did not want to disclose for obvious reasons.

36. Then we come to Ext. 33 which is a letter dated 23-4-82 written by the deceased to her close friend, Vahini and which shows her exact feelings, changing mood and emotions. This is the only

letter where she had made clear complaints against her husband and the relevant portions may be extracted thus:

Really, Vahini, I remember you very much. Even if I am little uneasy, I feel that you should have been near with me.

All persons here are very good. Everybody is loving. Still I feel lonely. One reason is that, in the house there are many persons and they are elder to me and as such I do not dare to do any work independently. Every time some fear is in mind which leads to confusion.

God knows when I can come there? The point on which we had discussion is as it was Vahini, I swear you if you talk to anyone. I am much in pains. But what else can I do ? No other go than that, and the same mistake is done again and again by me. It is that I go ahead and talk for ten times, then I become angry if he does not speak, Vahini, there is nothing in my hands except to weep profusely. At least till now this man has no time to mind his wife, let it be, but Vahini, what shall I do ?

Who knows what hardships befall on me, so long I am alive. Why the God has become (unkind) towards me.

Since yesterday I have made up my mind not to speak a word even, till he speaks (to me). Let me see to what extent I control my feelings. Vahini, you also pray to god for me whether a girl like me should be put to such a difficult test Vahini, I am so much afraid of him that the romantic enchantment during first 10-15 days after marriage has become like a dream.

I cannot dare to ask him whether his clothes be taken for wash. At present my status is only that of a maid servant without pay as of right.

Why so much indifference towards me only ? Vahini, I feel to weep in your arms. Vahini, come to Pune early.

On getting up every morning I feel he will speak today but every day I am hoping against hope. Vahini, what will happen? Now there is no ray of hope.

Day before yesterday I became excited and uttered in rage. "You hate me, was I Unable to get food in my parent's house?

He was irritated due to word 'hate'. He said, if you talk more like this, I will be very bad man.

If this goes on, I will not come to sleep. That means not permitted (to cry) also. How he says to me, are you tired of me so early? What shall I say to such a man. Once I feel that he does not count me. On second thought, I feel he cares me much. But due to moody nature, it will take time to pacify the same. On the day on which self-pride is lessened, no other person will be more fortunate than me. But till that day it is not certain that I will be alive.

37. In the second paragraph she starts by giving an indication that she was feeling uneasy and would have very much liked to have Vahini with her. In the third paragraph she clearly states that all persons in her father-in-laws' place were very good and loving but due to a number of persons in the house she did not get a chance to work independently. The last line "every time some fear is in mind which leads to confusion" is the starting point of the first symptom of her invisible fear which she was unable to locate. The fourth paragraph is rather important which shows that whatever her feelings may have been she sought an oath from Vahini not to talk to anyone regarding the matters which she proposed to write in the said letter. She says that she was much in pains and hints that she weeps profusely and the reason given by her for this is that she went on committing mistakes and talked to her husband many times but his silence was extremely painful which made her angry. In the last portion, for the first time, she makes a direct complaint against her husband to the effect that he had no time to look after her (Manju). In the same paragraph she describes her hardships and complains why God was unkind to her. She further expresses her sentiments that the romantic enchantment which she experienced during the first few days of her marriage had completely disappeared and looks like a lost dream or a "Paradise lost". Then she describes her plight as being a maid-servant without pay. She again complains of indifference towards her. Ultimately, she hopes against hope that some day he will speak to her and discuss the problems but there is no response. Later, she refers to a particular incident and goes to the extent of telling him that he hates her. This seems to have irritated the husband who resented this remark very much. Again in the same breath towards the end of the paragraph, while she says that her husband does not care for her yet she at once changes her mind and says that he cares for her much but due to his moody nature it will take time to pacify him. Her feelings again take a sudden turn when she says that when her husband's self-pride is lessened none would be more fortunate than her. The next line is rather important because she hints that till the said heyday comes perhaps she might not be alive.

38. A careful perusal of this letter reveals the following features-

(1) After going to her marital home she felt completely lost and took even minor things to her heart and on the slightest provocation she became, extremely sentimental and sensitive.

(2) She exhibited mixed feelings of optimism and pessimism at the same time.

(3) It can easily be inferred that she did not have any serious complaint against her husband but she became sad and morose because she was not getting the proper attention which she thought she would get.

(4) There is no indication that she expected any danger from her husband nor is there anything to show that things had come to such a pass that a catastrophe may have resulted. There may be certain concealed and hidden hints which she was not prepared to reveal in writing; what they were is not clear.

(5) A close reading and analysis of the letter clearly shows at least two things-

(a) that she felt extremely depressed.

(b) that there was a clear tendency resulting from her psychotic nature to end her life or commit suicide.

39. This possibility is spelt out from the various letters which we have extracted. Indeed, if this was not so how could it be possible that while not complaining against her husband she gives a hint not only to Vahini but also to Anju that she might not live. She mentions of no such threat having been given to her by husband at any time or anywhere.

(6) The contents of the letter lead us to the irresistible conclusion that Manju felt herself lonely and desolate and was treated as nothing but a chattel or a necessary evil ever since she entered her marital home.

40. Thus, from the recitals in the letters we can safely hold that there was a clear possibility and a tendency on her part to commit suicide due to desperation and frustration. She seems to be tired of her married life, but she still hoped against hope that things might improve. At any rate, the fact that she may have committed suicide cannot be safely excluded or eliminated. It may be that her husband may have murdered her but when two views are reasonably possible the benefit must go to the accused. In order to buttress our opinion, we would like to cite some passages of an eminent psychiatrist, Robert I. Kastenbaum where in his book 'Death, Society and Human Experience' he analyses the causes, the circumstances, the moods and emotions which may drive a person to commit suicide. The learned author has written that a person who is psychotic in nature and suffers from depression and frustration is more prone to commit suicide than any other person. In support of our view, we extract certain passages from his book:

The fact is that some people who commit suicide can be classified as psychotic or severely disturbed.

If we are concerned with the probability of suicide in very large populations, then mental and emotional disorder is a relevant variable to consider.

And it is only through a gross distortion of the actual circumstances that one could claim all suicides are enacted in a spell of madness.

Seen in these terms, suicide is simply one of the ways in which a relatively weak member of society loses out in the jungle like struggle.

The individual does not destroy himself in hope of thereby achieving a noble postmortem reputation or a place among the eternally blessed. Instead he wishes to subtract himself from a life whose quality seems a worse evil than death.

The newly awakened spirit of hope and progress soon became shadowed by a sense of disappointment and resignation that, it sometimes seemed, only death could swallow.

Revenge fantasies and their association with suicide are well known to people who give ear to those in emotional distress.

People who attempt suicide for reasons other than revenge may also act on the assumption that, in a sense, they will survive the death to benefit by its effect. The victim of suicide may also be the victim of self-expectations that have not been fulfilled. The sense of disappointment and frustration may have much in common with that experienced by the person who seeks revenge through suicide....

However, for some people a critical moment arrives when the discrepancy is experienced as too glaring and painful to be tolerated. If something has to go it may be the person himself, not the perhaps excessively high standards by which the judgment has been made.... Warren Breed and his colleagues found that a sense of failure is prominent among many people who take their own lives.

41. The above observations are fully applicable to the case of Manju. She solemnly believed that her holy union with her husband would bring health and happiness to her but unfortunately it seems to have ended in a melancholy marriage which in view of the circumstances detailed above, left her so lonely and created so much of emotional disorder resulting from frustration and pessimism that she was forced to end her life. There can be no doubt that Manju was not only a sensitive and sentimental woman but was extremely impressionable and the letters show that a constant conflict between her mind and body was going on and unfortunately the circumstances which came into existence hastened her end. People with such a psychotic philosophy or bent of mind always dream of an ideal and if the said ideal fails, the failure drives them to end their life, for they feel that no charm is left in their life.

42. Mary K. Hinchliffe, Douglas Hooper and F. John Roberts in their book The Melancholy Marriage' observe that-

Studies of attempted suicide cases have also revealed the high incidence of marital problems which lie behind the act. In our own study of 100 consecutive cases (Roberts and Hooper 1969), we found that most of them could be understood if the patients' interactions with others in their environment were considered.

43. Such persons possess a peculiar psychology which instills extreme love and devotion but when they are faced with disappointment or find their environment unhealthy or unhappy, they seem to loose all the charms of life. The authors while describing these sentiments observe thus:

'Hopelessness', 'despair', 'lousy' and 'miserable' draw attention to the relationship of the depressed person to his environment. The articulate depressed person will often also struggle to put into words the fact that not only does there appear to be no way forward and thus no point to life - but that the world actually looks different.

44. Coleridge in 'Ode to Dejection' in his usual ironical manner has very beautifully explained the sentiments of such persons thus:

I see them all so excellently fair-

I see, not fed, how beautiful they are.

45. At another place the author (Hinchliffe, Hooper and John) come to the final conclusion that ruptured personal relationships play a major part in the clinical picture and in this connection observed thus:

"Initially We applied these ideas to study of cases of attempted suicide (Roberts and Hooper 1969) and although we did not assume that they were all necessarily depressed, we looked for distal and proximal causes for their behaviour and found that ruptured personal relationships played a major part in the clinical picture." (p. 50)

The observations of the authors aptly and directly apply to the nature, mood and the circumstances of the unfortunate life of Manju which came to an end within four months of her marriage.

46. We have pointed out these circumstances because the High Court has laid very great stress on the fact that the evidence led by the prosecution wholly and completely excludes the possibility of suicide and the death of Manju was nothing but a dastardly murder.

47. We shall now deal with the next limb of the oral dying declaration said to have been made by the deceased to her parents and friends. Some of the statements which have a causal connection with the death of Manju or the circumstances leading to her death are undoubtedly admissible under Section 32 of the Evidence Act as held by us but other statements which do not bear any proximity with the death or if at all are very remotely and indirectly connected with the death would not be admissible. Unfortunately, however, the two kinds of statements are so inextricably mixed up that it would take a great effort in locating the part which is admissible and the one which is not.

48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.

49. This now takes us to a consideration of the evidence of the witnesses concerned which read together with the letters form a composite chain of evidence regarding the causes or the circumstances relating to the death of the deceased. According to the Prosecution, the last visit of Manju to Beed was on 25-5-1982 where she stayed till 3rd of June 1982 when she was brought back by the father of the appellant. In other words, the narration of the troubles and tribulations of Manju was made only during her last visit and not earlier. These statements are alleged to have been made to Rameshwar Chitlange (P. W. 2), Manju's father, Rekha (P. W. 3), who was Manju'a

friend and referred to as 'Vahini' in the letter Ex. 33, Anju (P. W. 6), Manju's sister to whom letters (Exhs. 30 and 32) were written, and P. W. 20, Bai, the, mother of Manju. Meena Mahajan (P. W. 5} was also examined but we are not in a position to rely on the evidence of this witness for two reasons- (1) she does not figure anywhere in any of the letters written by Manju, and (2) nothing was told to her by Manju directly but she was merely informed regarding the incidents mentioned by P. W. 2. This sort of indirect evidence is not worthy of any credence.

50. We would first deal with the evidence of P. W. 2, Rameshwar Chitlange (Manju's father). We shall give a summary of the relevant part of his evidence because the other parts relate to how the marriage was performed and the spouses had gone for honeymoon which are not germane for our purpose. The witness states that when Manju came to Beed with her maternal uncle he found her somewhat uneasy and on making enquiries whether she was happy at her husband's house she told him that she was not very happy with her husband since she noticed that her husband was not very much pleased with her and in fact hated her. These facts are the result of the usual domestic quarrels between a husband and a wife, hence this statement cannot be said to be so directly or proximately related to the death of Manju so as to be admissible under Section 32 of the Evidence Act.

51. It appears from his evidence that even after hearing the narration from his daughter he advised her to get herself adjusted to the situation and to the atmosphere of her new marital home. Apart from being inadmissible this does not appear to be of any assistance to the prosecution in proving the case of murder alleged against the appellant. The witness goes on to state that as the grandfather of the accused had died he visited Pune, accompanied by his wife and Manju. Since this was more or less a formal visit for expressing his condolences to the bereaved family, he left Manju at the house of the accused. The only part of his evidence on which reliance was placed by the prosecution is that he had noticed Manju very much disturbed and uneasy and requested Birdichand (father of the accused) to allow him to take Manju to the house of Dhanraj, which he did. On reaching the house of Dhanraj, the witness states that Manju completely broke down and started weeping and fell in the grip of her mother. This state of Manju, which the witness saw with his own eyes, would undoubtedly be primary evidence of what he saw and felt though not in any way connected with Section 32 of the Evidence Act. But from this circumstance alone it cannot be safely inferred that Manju apprehended any serious danger to her life from her husband.

52. The witness further states that he informed Birdichand about the grievances made to him by Manju. The appellant, Sharad, was sent for and he quietly listened to his father but the witness felt that whatever Birdichand may have told to his son that does not appear to have made any serious impact on him (appellant) and he left the room. This is purely an opinion evidence and therefore not admissible. Even so, the accused perhaps did not think it necessary to enter into arguments with his father-in-law in the presence of his father and that is why he may have kept quiet. From this no inference can be drawn that he was in any way inimically disposed towards Manju or was animated by a desire to take her life.

53. The witness further stated that he found that Manju was weeping every now and then during the night at Dhanraj's place. Later, in the morning the witness took Manju back to her in-laws house but his grievance was that Sharad did not care to meet or talk to them. These are however small circumstances which are incidents of any married life and from this no adverse inference can be drawn against the appellant.

54. Another complaint made in the statement was that when he made a voluntary offer to solve the difficulties of Sharad, the appellant curtly told him that he did not want to get his difficulties solved by other persons and at this attitude of Sharad the witness was naturally very much disappointed. This conduct of the accused also is not of such an importance as to lead to any adverse inference. Some persons who have a keen sense of pride and self-respect do not like anyone else not even their father or father-in-law to interfere in their personal matters. Perhaps this may be the reason for the somewhat cool and curt attitude of Sharad but that proves nothing. In fact, experience shows that where elders try to intermeddle in the affairs of a husband and his wife, this creates a serious obstruction in the relation of the married couple. Nothing therefore, turns upon this statement of P. W. 2.

55. Again, the witness repeats that when Manju came down to see him off he noticed her weeping all the time. To cut a long story short, the witness came back to Beed and sent his son Pradeep to bring Manju from Pune to Beed. On reaching there he was informed that Manju and Sharad had gone on a holiday trip to Mysore, Tirupati, etc. After the return of Pradeep to Beed, Dhanraj informed the witness that Sharad and Manju had returned to Pune and therefore, he sent his son, Deepak to Pune to bring back Manju. When Manju arrived at Beed, the witness found her totally disturbed and frightened. This statement would be admissible as primary evidence. What probative value should be attached to this small matter is a different issue.

56. Thereafter, the witness was told the incidents by his wife (P. W. 20) which had been narrated to her by Manju but that is of no value so far as this witness is concerned as the main evidence would be that of P. W. 20. However, in order to save the marriage from a total break-down the witness was extremely worried and therefore, he called one Hira Sarda, a close acquaintance of the family of accused, who told him (witness) that he was going to Hyderabad and after 4th-5th June some solution would be found out. At the same time, he advised the witness not to make any haste in sending back Manju to Pune.

57. On the 2nd of June 1982 Birdichand arrived at Beed and requested the witness to send Manju to Pune because the marriage of Birdichand's daughter was fixed for 30th June 1982 and the Kohl (betrothal) ceremony was to be held on the 13th of June so that Manju may be present at the ceremony and look after the arrangements. The witness says that after hearing this he apprised Birdichand that Manju was extremely frightened and that she was not ready to go back to her husband's house nor was he (witness) willing to send her back so soon. He suggested to Birdichand that as the marriage of his nephew was to be celebrated at Beed on 25th June, Sharad would come to attend the marriage and at that time he can take Manju with him. Birdichand, however, persuaded the witness to send back Manju and assured him that no harm of any kind would come to her and he also promised that Manju would be sent back to Beed. The most important statement in the evidence of this witness may be extracted thus:

I was having this talk with Birdichand On the first floor of my house, Manju heard this from the staircase, called me out in the ground portion of the house and told me that she was not in a position to go to the house of the accused. Since she was in a state of fear or extreme fear in her mind and she also told me that she was not prepared to go to the house of the accused.

Therefore, after the meals I sent Manju with Birdichand. Birdichand, Manju and Kavita then left Beed by about 12.30 p.m. by bus on 3rd of June, 1982. At that time Manju was constantly weeping right from inside my house till the bus left. She was also in a state of extreme fear.

58. The witness has said many times in his statement that Manju was always weeping and crying and the final crisis came when on hearing the talks between him and Birdichand she called him from the staircase and told him that she was not prepared to go to her husband's house as she was in a state of extreme fear. It is difficult to believe this part of the evidence of the witness for two reasons-

(1) When the talks were going on between two elders would Manju be sitting near the staircase to listen to their talks and call her father and give vent to her feelings and her decision not to go back to Pune at any cost. This conduct appears to be directly opposed not only to the tenor and spirit of the letters (Exhs. 30, 32 and 33) which we have discussed but also against her mental attitude and noble nature.

(2) As indicated by us while discussing the letters - could a woman who was so affectionate and reserved in nature and who would not like the contents of her letters to Anju and Vahini to be disclosed to her parents lest they feel worried, disturbed and distressed - suddenly turn turtle, forgetting her sentiments not to worry them and come out in the open to declare before all by weeping and crying that she was in a state of extreme fear, seem to us to be inherently improbable. Once a mature woman develops a particular nature or habit or a special bent of mind she is not likely to forgo her entire nature - in this case, her affection and love for her parents and the feeling of not doing anything which may cause distress or worry to them, and start telling her woeful story to everyone whom she met.

59. Manju must have known fully that her husband's, sister's betrothal ceremony was to be held on 13th June and if her father-in-law was making request after request to take her to Pune to attend the said ceremony, and had given all sorts of assurances that no harm would come to her, would she still call her father and express her state of fear and go on repeating what she had already said. This seems to us to be an afterthought or an embellishment introduced in the evidence of the witness so as to add credence to the prosecution story and provide an imaginary motive for the murder of the deceased. Indeed, if she was bent on resisting all attempts of her father-in-law to take her to Pune she would not have gone at all. On the other hand, her subsequent conduct of ultimately going to Pune and making arrangements for the Kohl ceremony belies the story put forward by the witness. It is extremely difficult for a person to change a particular bent of mind or a trait of human nature unless there are substantial and compelling circumstances to do so. In the instant case, we find no such compelling circumstance even taking the statement of the witness at its face value.

60. To take the other side of the picture, the witness says that when he reached Pune on 12-6-1982 and visited the place where Manju had died, he found Sharad sleeping or lying on the cot and on seeing him he immediately started crying vigorously and making a show of the grief and shock they had received. The exact statement of the witness may be extracted thus:

I could notice that Sharad who was sleeping or lying on the cot in the said room on seeing me entering the room immediately started crying vigorously giving jerks to his body and making show of the grief and the shock he had received. Ultimately I asked him as to what had happened to Manju when he told me that since 11th it was the day of his marriage with Manju, he and Manju were in joyest mood. According to him they went to bed by about 12 midnight and he had a sexual act with Manju in such a manner which they never had enjoyed before. Ultimately according to him when they completely felt tired and exhausted both of them fell asleep. According to him by about 5.30 a.m. when he got up and after visiting the urinal, when returned to the room he found that Manju had not got up as usual since according to him, she used to wake up at the same time he used to wake up and so he went near Manju and called her out when he found her dead.

61. It is rather strange that while the witness took whatever his daughter told him at its face value without making any further enquiry, he immediately jumped to the conclusion that the grief and tears in the eyes of his son-in-law were fake and that he was merely shedding crocodile tears. There is nothing on the record nor in the evidence to show any circumstance which may have led the witness to arrive at this conclusion. On the other hand, if the conduct of the appellant, as described by the witness, is seen from a dispassionate angle, it was quite spontaneous and natural because by the time the witness reached Pune the postmortem had been done and the death of Manju had come to light long before his arrival. There was no reason for the witness to have presumed at that time that Sharad must have committed the murder of the deceased. There were no materials or data before him which could have led him to this inference. This clearly shows one important fact, viz., that the witness was extremely prejudiced against Sharad and if one sees anything - even the truth - with a pale glass everything would appear to him to be pale.

62. The second part of the statement made by the witness regarding having sexual intercourse near about midnight seems to us to be inherently improbable. However, educated or advanced one may be, it is against our precious cultural heritage for a person to utter such things in a most frank and rudimentary fashion to his father-in-law. We are clearly of the opinion that the story of having a sexual act, etc., was a pure figment of the imagination of the witness and this, therefore, goes a long way off to detract from the truth of the testimony of this witness.

63. Furthermore, at page 175 the witness admits that during the lifetime of Manju, Anju and Rekha told him about the receipt of the letters from Manju but they never referred to the nature or the contents of the letters. This is a correct statement because both Anju and Vahini had been requested by Manju not to disclose to her parents the state of affairs or the tortures which she was suffering and perhaps they kept the sanctity of oath given to them by the deceased. This is an additional circumstance to show that even when Manju visited-Beed for the last time she might tell something to her own sister Anju or to Vahini but she would never dare to disclose all the details and put all the cards on the table before her parents - a step which she deliberately desisted from coming into existence. We can understand the evidence of the witness that Manju was worried, distressed and depressed. Sometimes out of natural love and affection parents make a mountain of a mole hill and this is what seems to have happened in this case.

64. Great reliance was placed by the Additional Solicitor General, on behalf of the respondent, on the relevance of the statements of P.Ws. 2, 3, 6 and 20. He attempted to use their statements for twin purposes - firstly, as primary evidence of what the witnesses saw with their own eyes and felt

the mental agony and the distress through which the deceased was passing. Secondly, he relied on the statements made by the deceased (Manju) to these witnesses about the treatment meted out to her by her husband during her stay at Pune and furnishes a clear motive for the accused to murder her.

65. As regards the first circumstance, there can be no doubt that the said evidence of the witnesses would undoubtedly be admissible as revealing the state of mind of the deceased. This would be primary evidence in the case and, therefore, there cannot be any doubt about the relevancy of the statement of the witnesses in regard to this aspect of the matter. As to what probative value we should attach to such statements would depend on a proper application of the context and evidence of each of the witnesses.

66. As regards the second aspect -which is in respect of what the deceased told the witnesses - it would only be admissible under Section 32 of the Evidence Act as relating to the circumstances that led to the death of the deceased. In view of the law discussed above and the propositions and the conclusions we have reached, there cannot be any doubt that these statements would fall in the second part of Section 32 of the Evidence Act relating directly to the transaction resulting in the death of Manju, and would be admissible. Before, however, examining this aspect of the question we might at the outset state that the character, conduct and the temperament of Manju, as disclosed or evinced by the admitted letters (Exhs. 30, 32 and 33), which demonstrate that it is most unlikely, if not impossible, for Manju to have related in detail the facts which the aforesaid witnesses deposed. If this conclusion is correct, then no reliance can be placed on this part of the statement of the aforesaid witnesses.

67. We now proceed to discuss the evidence of P. Ws. 3, 4, 5, 6 and 20. As we have discussed the evidence of P. W. 2, father of Manju, it will be more appropriate to discuss now the evidence of P. W. 20 (Manju's mother) from whom most of the matters spoken to by P. W. 2 were derived. Her evidence appears at page 305 of Part I of the Paperbook. It is not necessary for us to go into those details which have already been deposed to by P. W. 2. The most relevant part of her evidence is about the visit of Manju to Beed on 2-4-1982. She states that during this visit she found Manju cheerful and happy and she did not complain of anything during her stay for 8-10 days. In answer to a question - whether she enquired from Manju or had any talk with her during that period - she stated that Manju told her that her husband was not taking any interest in her and used to leave the house early in the morning and return late at night on the excuse that he was busy with his factory work. It may be stated here that the accused had a chemical factory where he used to work from morning till late at night. The witness further deposed that Manju informed her that there was no charm left for her at the house of her husband. These facts however run counter to her first statement where she stated that Manju was quite happy and cheerful as was expected of a newly married girl. Even so, whatever Manju had said does not appear to be of any consequence because she (the witness) herself admits that she did not take it seriously and told Manju that since she had entered a new family it might take some time for her to acclimatise herself with the new surroundings. She also warned Manju against attaching much importance to such matters.

68. Thereafter she goes on to state that near about the 11th or 12th of April 1982 she (P. W. 20) along with her husband left for Pune to offer condolences on the death of the grandfather of the appellant. She then proceeds to state that during their second visit to Pune on the 11th or 12th of

May 1982 she stayed with her brother, Dhanraj and that while she was there Manju hugged at her neck and having lost her control, started weeping profusely. She further states that Manju requested her to take her to Beed as it was not possible for her to stay in her marital house where she was not only bored but was extremely afraid and scared.

69. On the next day she (P. W. 20) met the mother of the appellant and told her plainly that she found Manju extremely perturbed, uneasy and scared and that she was experiencing tremendous pressure and restrictions from her husband. But the mother of the appellant convinced her that there was nothing to worry about and everything will be alright. The witness then narrated the facts to her husband and requested him to take Manju with them to Beed. P. W. 2 then sought the permission of Birdichand to take Manju to Beed but he told him that as some guests were to visit him, he (P. W. 2) can send somebody after 4-5 days to take Manju to Beed. It may be mentioned here that the details about the sufferings and the mental condition of Manju was not mentioned by this witness even to her husband (P. W. 2) as he does not say anything about this matter. Further, her statement is frightfully vague.

70. As already indicated that the letters (Exs. 30, 32, 33) clearly show that Manju never wanted to worry or bother her parents about her disturbed condition, it appears to be most unlikely that on the occasion of the death of her grandfather-in-law she would choose that opportunity to narrate her tale of woe to her mother. This appears to us to be a clear embellishment introduced by the prosecution to give a sentimental colour to the evidence of this witness. Ultimately, on May 25, 1982 Deepak brought Manju to Beed and this time she was accompanied by her cousin, Kavita. Here again, she states that on her arrival she found Manju extremely disturbed and under tension of fear and Manju was prepared to make a clean breast, of all her troubles. However, as Kavita was there and did not give any opportunity to Manju to meet her mother alone, she (Kavita) was sent out on some pretext or the other. Thereafter, Manju told her mother that she was receiving a very shabby treatment from her husband and while narrating her miserable plight she told her about two important incidents which had greatly upset her- (1) that she happened to come across a love letter written by P. W. 37, Ujwala Kothari, to her husband which showed that the appellant was carrying on illicit relations with P. W. 37, and (2) that on one occasion the appellant told Manju that he was tired of his life and did not want to live any more and, therefore, wanted to commit suicide. Despite Manju's enquiries as to why he wanted to commit suicide, he did not give any reason. She then informed her mother that when this talk was going on she (Manju) herself volunteered to commit suicide. Thereafter, Sharad put forth a proposal under which both of them were to commit suicide and they decided to write notes showing that they were committing suicide. On hearing this plan from Sharad, Manju told him that she was not inclined to commit suicide as she had not lost all hope of life and that she had expressed her desire to commit suicide only because he had said that he would do so. P. W. 20 would have us believe that while in one breath she agreed to the suicide pact yet the next moment she made a complete volte face. This is hard to believe having regard to the nature of the temperament of Manju.

71. The two statements said to have been made by Manju to her mother appear to be contradictory and irreconcilable and smack of concoction. According to Manju, Sharad then prepared two notes one addressed to his father and another to his father-in-law and asked Manju to do the same but she refused to do anything of the sort. The witness admitted that she was not told as to what had happened to the notes written by the appellant.

72. All this story of a suicidal pact seems to us nothing but a fairy tale. There is no mention nor even a hint in the letters (Exhibits 30, 32, 33) written by Manju about the aforesaid suicidal pact and the story narrated by the witness before the trial Court, nor was the note produced in the Court. This appears to us to be a make-believe story and was introduced to castigate the appellant for his shabby treatment towards Manju.

73. Another intrinsic circumstance to show the untruth of this statement is that although P. W. 2 was apprised of these facts yet he never mentioned them to Birdichand particularly when he was insisting that Manju should be sent back to Pune for attending the betrothal ceremony of his daughter, Shobha. Indeed, if this fact, which is of very great importance so far as the lives of both the husband and the wife are concerned, would have been there, the first thing which P. W. 2 would have done was to tell Birdichand that matters had reached such a stage as to leave no doubt that her daughter was in an instant fear of death and it was impossible for him to allow his daughter to go to Pune where Sharad was bent on forcing her to commit suicide or even murder her, more particularly because P. W. 20 admits in her evidence that as all the things she had learnt from Manju were serious, she had informed her husband about the same who agreed with her.

74. Apart from this grave incident, the witness deposed to another equally important matter, viz., that on the Shitla Saptami day, the appellant rang up his mother to send Manju along with Shobha to a hotel (Pearl Hotel, as has been deposed to by other witnesses) because he wanted to give a party to his friends. As Shobha was not present in the house, Manju's mother-in-law sent her alone in a rickshaw to the hotel. On reaching the hotel she did not find any other person except a girl who was introduced by her husband as Ujvala Kothari. The most critical part of the incident is that the appellant is alleged to have informed Manju that she should take lessons from Ujvala as to how she should behave with him and also told her that Ujvala knew everything about him and he was completely in her hands. Subsequently, the appellant went away and Ujvala told her that the appellant was a short-tempered man and she should talk to him only if and when he wanted to talk to her. She (Ujvala) also told Manju that the appellant was completely under her command and she was getting every bit of information about the incidents happening between the husband and the wife. Finally, she was apprised of the fact by Ujvala that she and Sharad were in love with each other. Manju is said to have retorted and protested to Ujvala by saying that she was not prepared to take any lessons from her regarding her behaviour towards her husband as she (Manju) was his wedded wife while Ujvala was only a friend, Manju also told her mother that these facts were narrated by her to the appellant and accused No. 2. As a result of this incident, Manju became a little erratic which attracted double cruelty towards her by her husband and made her extremely scared of her life and in view of this development she requested her mother not to send her back to the house of the accused.

75. One point of importance which might be noticed here and which shows that whatever be the relations between her husband and Ujvala, the picture presented by the witness is not totally correct because if such a point of no return had already been reached, there was absolutely no question of Birdichand sending for the appellant and arranging a trip to Ooty, Mysore and other places nor would have Manju agreed to go to these places. The witness further stated that as soon as Manju came to know that Birdichand had come to take her away she was shocked and continuously kept saying that she was extremely afraid of going to her husband's house and that she should not be sent back.

76. The behavioural attitude of Manju depicted by the witness seems to us to be absolutely contradictory to and not at all in consonance with her temperament, frame of mind, psychological approach to things and innate habits. That is why no reference had been made even directly or indirectly in any of the letters written by Manju, and she had expressly requested both Anju and Vahini not to disclose anything to her parents lest they may get worried and distressed on her account. In other words, Manju was a woman who despite her troubles and tribulations, sufferings and travails, anxiety and anguish would never have thought of narrating her woeful story to her parents and thereby give an unexpected shock to them. This feeling is mentioned in the clearest possible terms in the letters (Exts. 30, 32, 33) which we have already discussed. There is no reference at all in any of the letters regarding suicidal pact or the illicit relationship of her husband with Ujvala.

77. Another important fact which the High Court has missed is that even according to the statement of this witness, the appellant had asked his mother to send Shobha along with Manju to the hotel and at that time he could not have been aware that Shobha would not be available. Indeed, if he had an evil intention of insulting or injuring the feelings of Manju by keeping Ujvala there he would never have asked his mother to send Shobha also because then the matter was likely to be made public. This is another inherent improbability which makes the whole story difficult to believe.

78. Despite these serious developments both PWs. 2 and 20 tried to convince Manju to accept the assurances given by Birdichand that no harm would come to her and if anything might happen they will take proper care. We find it impossible to believe that the parents who had so much love and affection for their daughter would, after knowing the circumstances, still try to take the side of Birdichand and persuade their daughter to go to Pune. Rameshwar (PW 2) should have told Birdichand point blank that he would not send Manju in view of the serious incidents that had happened, viz., the suicidal pact, the cruel treatment of the appellant towards Manju, the constant fear of death which Manju was apprehending, the illicit relationship between the appellant and Ujvala, and the strong resistance of his daughter who was not prepared to go to Pune at any cost and was weeping and wailing all the time. On the other hand, knowingly and deliberately they seem to have thrown their beloved daughter into a well of death. The fact that Manju's parents tried to console her and believed the assurance of Birdichand knowing full well the history of the case shows that any statement made by Manju to her parents was not of such great consequence as to harden their attitude. This is yet another intrinsic circumstance which negatives the story of suicidal pact and the invitation to Manju to come to the Pearl Hotel and the manner in which she was insulted in the presence of Ujvala. There is no doubt that relations between the appellant and Manju were extremely strained, may be due to his friendship with Ujvala, she may not have felt happy in her marital home as she has clearly expressed in her letters but she did not disclose anything of such great consequence which would have shocked the parents and led them to resist her going to Pune at any cost. This makes the version given by PWs. 2 and 20 unworthy of credence.

79. We now proceed to take up the evidence of PW-6, Anju, the sister of Manju. The statement of this witness is more or less a carbon copy of the evidence of P.W-20 which has been discussed above and, therefore, it is not necessary to consider her evidence in all its details. So far as the first visit is concerned, she fully supports her mother that Manju was very happy as was expected of a

newly married girl. When Manju came to Beed around 2nd April, 1982 she stayed there for 8-10 days and during that period the witness noticed that she was somewhat dissatisfied and complained that her husband used to return late at night. She also complained against the callous attitude of the other members of her husband's family. She also introduced the story of Ujvala Kothari and corroborated what PW 20 had said which we have discussed above. She also refers to the said suicidal pact and then to the fact that Birdichand had come to take away Manju to Pune so that she may be able to attend the betrothal ceremony of Shobha. Then she deposes to an incident which appears to be wholly improbable. According to her, on the 3rd of June, 1982, PW 2 invited his two friends, Raju and Rath, for lunch at which Birdichand was also present, and told them that Manju was not prepared to go to Pune as she was afraid to go there but Birdichand, along with his two friends, assured him that nothing would happen. We do not think that in the course of things PW-2 would be so foolish as to let the secret matters of the house known to others than the parties concerned. Thereafter the witness proves the letters (Exts. 30 and 32).

80. She stated one important statement to the effect that on some occasions Manju had a talk with her mother in her presence. Although Manju had requested Anju not to disclose anything to her parents yet everything was made known to them. During cross-examination the witness was asked-how was it that Manju was narrating these talks when the witness had been asked not to disclose the same to her parents, which she explained away by saying that she did not ask Manju why she was disclosing these things to her mother. No satisfactory answer to this question seems to have been given by her. At another place, the witness states thus:

I did not tell all these informations I received from Manju to anybody. Nor anybody enquired from me till my statement was recorded by the Police.

81. Her evidence, therefore, taken as a whole is subject to the same infirmity as that of PW 20 and must suffer the same fate.

82. PW-3, Rekha (who was addressed as Vahini') in Manju's letter (Ex. 33), states that on the first occasion when Manju came home she was quite happy but during her second visit to Beed in the month of April, 1982 she did not find her so and Manju complained that her husband was avoiding her to have a talk with her on one excuse or another. Manju also informed the witness that the appellant had a girl-friend by name Ujvala and the witness says that she tried to console Manju by saying that since her husband was a Chemical Engineer he may have lot of friends. While referring to Ext. 33 (letter written to her by Manju) she stated that the only complaint made in that letter was that her husband was not talking to her properly. She then deposed to an incident which happened when on her way to Bombay when the witness stayed at Pune for some time. She states that she had a talk with Manju for about half-an-hour when she narrated the story of the suicidal pact. She also stated that she was extremely afraid of the situation and almost broke down in tears and wept.

83. The most important fact which may be noted in her evidence is a clear pointer to the frame of mind and the psychotic nature of Manju. At page 212 of Part 1 of the Paperbook while narrating the relationship of her husband with Ujvala she says that the appellant lost his temper and thereupon she spoke the following words to him:

I am not going to spare this, I will not allow this, his bad relations even though a blot may come to our family and I have decided likewise.

84. These significant and pregnant words clearly show that Manju was so much bored and disgusted with her life that she entertained a spirit of revenge and told the witness that she was not going to tolerate this even though a blot may come to the family and that she had decided likewise. This statement undoubtedly contains a clear hint that she had almost made up her mind to end her life, come what may and thereby put to trouble her husband and his family members as being suspect after her death. This appears to be a culmination of a feeling which she had expressed in one of her letters to Anju in the following words:

Till I could control (myself), well and good. When it becomes impossible, some other way will have to be evolved. Let us see what happens. All right.

Similarly, in her letter (Ext. 33) to this witness she gives a concealed hint "But till that day it is not certain that I will be alive".

85. Thus the feelings of death and despair which she orally expressed to the witness at Pune seems to have been fulfilled when on the morning of 12th June, 1982 she was found dead.

86. The evidence of PW 4, Hiralal Ramlal Sarda, is not that important. He merely states that in the last week of May, 1982, PW 2 had called him and told him that Manju was being ill-treated by her husband and therefore she was not prepared to go to her marital home. PW 2 also informed him about the suicidal pact affair. As the witness was in a hurry to go to Hyderabad he counseled PW 2 not to take any final decision in a hurry and that Manju should not be sent to Pune with Birdichand until his return when a decision may be taken. On return from Hyderabad he learnt that Birdichand had already taken Manju to Pune and thereafter he left for Pune. Indeed, if the matter was so grave and serious that a person like PW 4, who was a relation of the appellant rather than that of PW 2, had advised him not to make haste and take a final decision but wait until his return yet PW 2 seems to have spurned his advice and sent Manju to Pune. This shows that the matter was not really of such great importance or urgency as to take the drastic step of making a blunt refusal to Birdichand about Manju's not going to Pune. This also shows that the story of suicidal pact and other things had been introduced in order to give a colour or orientation to the prosecution story.

87. Another fact to which this witness deposes is the narration by the appellant about his having sexual act with his wife. We have already disbelieved this story as being hopelessly improbable and against the cultural heritage of our country or of our nature and habits. This is the only purpose for which this witness was examined and his evidence does not advance the matter any further.

88. PW-5, Meena Mahajan, has also been examined to boost up the story narrated by PW 2 and other witnesses. She was not at all connected with the family of PW 2 but is alleged to be a friend of Manju and she says that she found Manju completely disheartened and morose and she started weeping and crying while narrating her said story. The witness goes on to state that Manju was so much terrified of the appellant that she was afraid of her life at his hands. No witness has gone to the extent of saying that there was any immediate danger to Manju's life nor did Manju say so to

PWs. 2, 6 and 20. This witness appears to us to be more loyal than the king. Even assuming that Manju was a friend of PW 6 but she never wrote to her any letter indicating anything of the sort. For these reasons, we are not satisfied that this witness is worthy of credence.

89. A close and careful scrutiny of the evidence of the aforesaid witnesses clearly and conspicuously reveals a story which is quite different from the one spelt out from the letters (Exts. 30, 32 and 33). In fact, the letters have a different tale to tell particularly in respect of the following matters:

(1) There is absolutely no reference to suicidal pact or the circumstances leading to the same,

(2) There is no reference even to Ujvala and her illicit relations with the appellant,

(3) There is no mention of the fact that the deceased was not at all willing to go to Pune and that she was sent by force,

(4) The complaints made in the letters are confined to ill-treatment, loneliness, neglect and anger of the husband but no apprehension has been expressed in any of the letters that the deceased expected imminent danger to her life from her husband.

(5) In fact, in the letters she had asked her sister and friend not to disclose her sad plight to her parents but while narrating the facts to her parents she herself violated the said emotional promise which appears to us to be too good to be true and an afterthought added to strengthen the prosecution case.

(6) If there is anything inherent in the letters it is that because of her miserable existence and gross ill-treatment by her husband, Manju might have herself decided to end her life rather than bother her parents.

90. We are therefore unable to agree with the High Court and the trial Court that the witnesses discussed above are totally dependable so as to exclude the possibility of suicide and that the only irresistible inference that can be drawn from their evidence is that it was the appellant who had murdered the deceased.

91. Putting all these pieces together a general picture of the whole episode that emerges is that there is a reasonable possibility of Manju having made up her mind to end her life either due to frustration or desperation or to take a revenge on her husband for shattering her dream and ill-treating her day-to-day out.

92. Apart from the spirit of revenge which may have been working in the mind of Manju, it seems to us that what may have happened is that the sum total and the cumulative effect of the circumstances may have instilled in her an aggressive impulse engendered by frustration of which there is ample evidence both in her letters and her subsequent conduct. In Encyclopedia of Crime and Justice (Vol. 4) by Stanford H. Kadish the author mentions thus:

Other psychologically oriented theories have viewed suicide as a means of handling aggressive impulses engendered by frustration.

93. Another inference that follows from the evidence of the witness discussed is that the constant fact of wailing and weeping is one of the important symptoms of an intention to commit suicide as mentioned by George W. Brown and Tirril Harris in their book "Social Origins of Depression" thus:

1. Symptom data

Depressed mood--

1. Crying

2. feeling miserable/looking miserable, unable to smile or laugh

3. feelings of hopelessness about the future

4. suicidal thoughts

5. suicidal attempts

Fears/anxiety/worry

15. psychosomatic accompaniments

16. tenseness/anxiety

17. specific worry

18. panic attacks

19. phobias

Thinking

20. feelings of self-depreciation/nihilistic delusions

21. delusions or ideas of reference

22. delusions of persecution/jealousy

23. delusions of grandeur

24. delusions of control/influence

25. other delusions e.g. hypochondriacal worry

26. auditory hallucinations

27. visual hallucinations.

94. Most of these symptoms appear to have been proved as existing in Manju both from her letters (Exts. 30, 32 and 33) and from the evidence discussed.

95. We might hasten to observe here that in cases of woman of a sensitive and sentimental nature it has usually been observed that if they are tired of their life due to the action of their kith and kin, they become so desperate that they develop a spirit of revenge and try to destroy those who had made their lives worthless and under this strong spell of revenge sometimes they can go to the extreme limit of committing suicide with a feeling that the subject who is the root cause of their malady is also destroyed. This is what may have happened in this case. Having found her dreams shattered to pieces Manju tried first to do her best for a compromise but the constant ill-treatment and callous attitude of her husband may have driven her to take revenge by killing herself so that she brings ruination and destruction to the family which was responsible for bringing about her death. We might extract What Robert J. Kastenbaum in his book 'Death, Society and Human Experience' has to say:

Revenge fantasies and their association with suicide are well known to people who give ear to those in emotional distress.

96. After a careful consideration and discussion of the evidence we reach the following conclusions on point No. 1:

(1) that soon after the marriage the relations between Manju and her husband became extremely strained and went to the extent that no point of return had been almost reached,

(2) that it has been proved to some extent that the appellant had some sort of intimacy with Ujvala which embittered the relationship between Manju and him,

(3) that the story given out by PW 2 and supported by PW 20 that when they reached Pune after the death of Manju they found appellant's weeping and wailing out of grief as this was merely a pretext for shedding of crocodile tears, cannot be believed,

(4) that the story of suicidal pact and the allegation that appellant's illicit relations with Ujvala developed to such an extreme extent that he was so much infatuated with Ujvala as to form the bedrock of the motive of the murder of Manju, has not been clearly proved,

(5) the statement of PW 2 that the appellant had told him that during the night on 11th June, 1982 he had sexual act with the deceased is too good to be true and is not believable as it is inherently improbable,

(6) that despite the evidence of PWs. 2, 3, 6 and 20 it has not been proved to our satisfaction that the matter had assumed such extreme proportions that Manju refused to go to Pune with her father-in-law (Birdichand) at any cost and yet she was driven by use of compulsion and persuasion to accompany him,

(7) that the combined reading and effect of the letters (Exts. 30, 32 and 33) and the evidence of PWs. 2, 3, 4, 6 and 20 clearly reveal that the signs and symptoms resulting from the dirty atmosphere and the hostile surroundings in which Manju was placed is a pointer to the fact that there was a reasonable possibility of her having committed suicide and the prosecution has not been able to exclude or eliminate this possibility beyond reasonable doubt.

We must hasten to add that we do not suggest that this was not a case of murder at all but would only go to the extent of holding that at least the possibility of suicide as alleged by the defence may be there and cannot be said to be illusory.

(8) that a good part of the evidence discussed above, is undoubtedly admissible as held by us but its probative value seems to be precious little in view of the several improbabilities pointed out by us while discussing the evidence.

97. We might mention here that we had to reappreciate the evidence of the witnesses and the circumstances taking into account the psychological aspect of suicide as found in the psychotic nature and character of Manju because these are important facts which the High Court completely overlooked. It seems to us that the High Court while appreciating the evidence was greatly influenced by the fact that the evidence furnished by the contents of the letters were not admissible in evidence which, as we have shown, is a wrong view of law.

98. We now come to the second limb- perhaps one of the most important limbs of the prosecution case viz., the circumstance that the appellant was last seen with the deceased before her death. Apparently, if proved, this appears to be a conclusive evidence against the appellant but here also the High Court has completely ignored certain essential details which cast considerable doubt on the evidence led by the prosecution on this point.

99. The question of the appellant having been last seen with the deceased may be divided into three different stages:

(1) The arrival of Anuradha and her children along with Manju at Takshila Apartments, followed by the arrival of the appellant and his entry into his bedroom where Anuradha was talking to Manju,

(2) The calling of PW 29 by A-2 followed by the appellant and his brother's going out on a scooter to get Dr. Lodha and thereafter Dr. Gandhi,

(3) Sending for Mohan Asava (PW 30) and the conversation between the appellant, Birdichand and others as a result of which the matter was reported to the police.

100. Although the aforesaid three stages of this circumstance cannot technically be called to mean that the accused was last seen with the deceased but the three parts combined with the first circumstance might constitute a motive for the murder attributed to the appellant.

101. From a perusal of the judgment of the High Court on these points, it appears that the High Court has made a computerise and mathematical approach to the problem in fixing the exact time of the various events which cannot be correct as would appear from the evidence of the witnesses, including Dr. Banerjee (PW 33).

102. The evidence of PW 7, the motor-rickshaw driver shows that on the night of the 11th of June he had brought the deceased along with Anuradha and others and dropped them near the Takshila Apartments at about 11.00 p.m. The witness was cross-examined on several points but we shall accept the finding of the High Court on the fact that on the 11th of June, 1982 the witness had dropped the persons, mentioned above, at about 11.00 p.m. The rest of the evidence is not germane for the purpose of this case. It may, however, be mentioned that one should always give some room for a difference of a few minutes in the time that a layman like PW 7 would say. We cannot assume that when the witness stated that he had dropped Manju and others at 11.00 p.m., it was exactly 11.00 p.m. - it would have been 10-15 minutes this way or that way. His evidence is only material to show the approximate time when Manju returned to the apartments.

103. The next witness on this point is PW-28, K. N. Kadu. This witness corroborates PW-7 and stated that he had heard the sound of a rickshaw near the apartments when the wife of A-2, Manju and 3 children entered the apartments and went to their rooms. He further says that after about 15 minutes he saw the appellant coming on a scooter and while he was parking his scooter the witness asked him why did he come so late to which he replied that he was busy in some meeting. This would show that the appellant must have arrived at the apartments near about 11.30 or 11.45 p.m. It is very difficult to fix the exact time because the witness himself says that he had given the timings approximately. The High Court was, therefore, not justified in fixing the time of the arrival of Manju and party or the appellant with almost mathematical precision for that would be a most unrealistic approach. The High Court seems to have speculated that Manju must have died at 12 midnight, that is to say, within 15-20 minutes of the arrival of the appellant. It is, however, impossible for us to determine the exact time as to when Manju died because even Dr. Banerjee says in his evidence that the time of death of the deceased was between 18 to 36 hours which takes us to even beyond past 12 in the night. At any rate, this much is certain that Manju must have died round about 2.00 a.m. because when Dr. Lodha arrived at 2.45 a.m. he found her dead and he had also stated that rigor mortis had started setting in. It is, therefore, difficult to fix the exact time as if every witness had a watch which gave correct and exact time. Such an inference is not at all called for.

104. The third stage of this matter is that while the witness was sleeping he heard the sound of starting of a scooter and got from his bed and saw appellant and A-2 going away. Thereafter, he found 7-8 persons coming and going on their scooters. The High Court seems to suggest that this must have happened by about 1.30 p.m. Even so, this does not prove that Manju have died at midnight. As the witness had been sleeping and was only aroused by the sound of scooters, it would be difficult to fix the exact time when he saw the appellant and A-2 going out on their

scooters. His evidence, therefore was rightly relied upon by the High Court in proving the facts stated by him.

105. PW-29, B. K. Kadu, who was serving as a watchman at the Takshila Apartments says that near about the midnight he was called by Rameshwar, A-2 and on hearing the shouts he went to flat No. 5. He further says that A-2 directed him to unbolt or unchain the door but the door was not found closed from inside and hence A-2 went out and returned after some time. While the witness was standing at the door A-2 returned and after his return the witness also came back to his house and went to sleep. Perhaps the witness was referring to the incident when A-1 and A-2 had gone on scooter to fetch Dr. Lodha. During cross-examination the witness admitted that he did not possess any watch and gave the timings only approximately. We shall accept his evidence in toto but that leads us nowhere.

106. This is all the evidence so far as the first stage of the case is concerned and, in all probability, it does not at all prove that A-1 had murdered the deceased. On the other hand, the circumstances proved by the three witnesses are not inconsistent with the defence plea that soon after entering the room Manju may have committed suicide.

107. Part II of this circumstance relates to the coming of Dr. Lodha and then Dr. Gandhi on the scene of occurrence and we accept their evidence in toto. Dr. Lodha was a family doctor of the appellant's family and it was quite natural to send for him when the appellant suspected that his wife was dead. Although Dr. Lodha (PW 24) was a family doctor of the appellant's family yet he did not try to support the defence case and was frank enough to tell the accused and those who were present there that it was not possible for him to ascertain the cause of death which could only be done by a post-mortem. In other words, he indirectly suggested that Manju's death was an unnatural one, and in order to get a second opinion he advised that Dr. Gandhi (PW 25) may also be summoned. Accordingly, Dr. Gandhi was called and he endorsed the opinion of Dr. Lodha. Such a conduct on the part of the appellant or the persons belonging to his family is wholly inconsistent with the allegation of the prosecution that the appellant had murdered the deceased.

108. The High Court seems to have made one important comment - as to why Dr. Lodha and Dr. Gandhi were called from some distance when Dr. Kelkar, who was a Skin Specialist and another Doctor who was a Child Expert, were living in the same building. This comment is neither here nor there. It is manifest that Birdichand was a respectable person of the town and when he found that his daughter-in-law had died he would naturally send for his family doctor rather than those who were not known to him.

109. It appears that PW 30 Mohan Asava was also summoned on telephone and when he came at the scene of occurrence he found A-2, Birdichand sitting on the floor of the room and Birdichand hugged him out of grief, and told him that Manju had died of shock and the Doctors were not prepared to give a death certificate.

110. In order to understand the evidence of this witness it may be necessary to determine the sequence of events so far as PW 30 is concerned. The witness has stated that while he was sleeping he was aroused from his sleep by a knock at the door by Ram Vilas Sharda (brother of appellant) at about 4.00 or 4.15 a.m. Ram Vilas told him that Manju had died and the doctors were not

prepared to give any death certificate. After having these talks the witness, along with Ram Vilas, proceeded to the apartments and remained there till 5.15 a.m. Then he returned to his house, took bath and at about 6.30 a.m. he received a telephone call from Ram Vilas for lodging a report with the police with the request that the time of death should be given as 5.30 a.m. Consequently, he reached the police station near about 7.00 or 7.15 a.m. and lodged a report stating that Manju had died at 5.30 a.m.

111. This witness appears to be of doubtful antecedents and, therefore, his evidence has to be taken with a grain of salt. He admitted in his statement at P. 387 that some proceedings about evasion of octroi duty were pending against him in the Court. He also admitted that he was convicted and sentenced to 9 months' R. I. under the Food Adulteration Act in the year 1973.

112. Apart from this, it appears that most of the statements which he made in the Court against Birdichand and the other accused, were not made by him before the police. These statements were put to him and he denied the same but they have been proved by the Investigation Officer, PW 40 whose evidence appears at P. 521 of Part II of the printed Paperbook. These belated statements made in the Court may be summarised thus:

113. While in his statement before the Court the witness at P. 386 (para 19) states that the death of Manju was suspicious yet he made no such statement before the police on being confronted by the statement of PW 40. Another important point on which his statement does not appear to be true is that the dominant fact mentioned to him by Birdichand and others was that the doctors were not prepared to issue death certificate but he did not say so before the police. Similarly he deposed in the Court about the statement made to him by Birdichand that he would lose his prestige and therefore the body should be cremated before 7.00 a.m. but he advised him not to do so unless he has informed the police otherwise his whole family would be in trouble. Almost the entire part of his evidence in para 5 at p. 381 appears to be an afterthought, as PW 40 stated thus: "I recorded the statement of PW 30 Mohan Asava. He did not state before me that death of Manju was suspicious. He did not state before me that accused No. 3 informed him that the Doctors were not prepared to issue the death certificate. He did not state before me that the demand was made of the death certificate from the Doctors or the Doctors refused to give the same. During his statement this witness did not make the statements as per para No. 5 excluding the portions from A to F of his examination-in-chief.

114. The portions referred to as 'A to F' in para No. 5 of examination-in-chief of PW 30 may be extracted thus:

Birdichand then started telling me that Manju had died on account of shock and that...he said that she died of heart attack....under any circumstance he wanted to cremate Manju before 7. O' clock...when he said that he would spend any amount but wanted to cremate her before 7.00 a.m.

115. This statement does not appear to be true for the following reasons:

(a) Birdichand knew full well that PW 30 was a police contact constable and as he was not prepared to persuade the doctors to give a death certificate, his attitude was hardly friendly as he was insisting that the matter should be reported to the police.

It is, therefore, difficult to believe that Birdichand would take such a great risk in laying all his cards on the table knowing full well that the witness was not so friendly as he thought and therefore he might inform the police; thereby he would be in a way digging his own grave.

(b) On a parity of reasoning it would have been most improbable on the part of the appellant, after having decided to report the matter to the police, to ask PW 30 to report the time of death as 5.30 a.m. knowing full well his attitude when he came to the apartments.

116. It is not at all understandable how the witness could have mentioned the time of Manju's death as 5.30 a.m. or, at any rate, whether death was known to her husband and when he himself having gone to the apartments near about 4.15 a.m. knew full well that Manju had died earlier and that Dr. Lodha and Dr. Gandhi had certified the same and advised Birdichand to report the matter to the police. In the original Ext. 120 (in Marathi language), it appears that the time of death given by the witness is 'Pahate' which, 'according to Molesworth's Marathi-English Dictionary at p. 497, means 'The period of six ghatika before sunrise, the dawn' i.e., about 2 hours 24 minutes before sunrise (one ghatika is equal to 24 minutes). This would take us to near about 3.00 a.m. Either there is some confusion in the translation of the word 'Pahate' or in the words '5.30 a.m.', as mentioned in the original Ext. 120. However, nothing much turns on this except that according to the witness Manju must have died around 3.00 a.m. which is consistent with the evidence of Dr. Lodha that when he examined Manju at about 2.30 a.m. he found her dead and rigor mortis had already started setting in.

117. We are not concerned here with the controversy whether the report was admissible under Section 154 or Section 174 of the CrPC but the fact remains that the police did receive the information that the death took place at 5.30 a.m. The High Court seems to have made a capital out of this small incident and has not made a realistic approach to the problem faced by Birdichand and his family. Being a respectable man of the town, Birdichand did not want to act in a hurry lest his reputation may suffer and naturally required some time to reflect and consult his friends before taking any action. The allegation that A-3 told him to report the time of death as 5.30 a.m. is not at all proved but is based on the statement of PW 30, before the police. Thus, the approach made by the High Court to this aspect of the matter appears to be artificial and unrealistic as it failed to realise that the question of the time of death of the deceased as 5.30 a.m. could never have been given by the appellant or any other accused because they knew full well that the two doctors had examined the whole matter and given the time of death as being round about 1.30 a.m. Having known all these facts how could anyone ask PW 30 to give the time of death at the police station as 5.30 a.m.

118. Thus, it will be difficult for us to rely on the evidence of such a witness who had gone to the extent of making wrong statements and trying to appease both Birdichand and the prosecution, and, therefore, his evidence does not inspire any confidence.

119. The last part of the case on this point is the evidence of PWs. 2 and 4, where the appellant is said to have told them that he had sexual intercourse with his wife near about 5.00 a.m. on the 12th June, 1982. Apart from the inherent improbability in the statement of the appellant, there is one other circumstance which almost clinches the issue. It appears that Kalghatgi (PW 20), Inspector-in-charge of the Police Station made a query from Dr. Banerjee which is extracted below:

Whether it can be said definitely or not as to whether sexual intercourse might have taken just prior to death?"

The above query was made in Ext. 129 and the answer of the Doctor appears in Exhibit 187 which is extracted below:

"From clinical examination there was no positive evidence of having any recent sexual intercourse just prior to death."

120. This positive finding of the Doctor therefore knocks the bottom out of the case made out by the prosecution that the appellant had told PWs. 2 and 4 about having sexual intercourse with his wife. Unfortunately, however, the High Court instead of giving the benefit of this important circumstance to the accused has given the benefit to the prosecution which is yet another error in the approach made by the High Court while assessing the prosecution evidence. Having regard to the very short margin of time between the arrival of the appellant in his bedroom and the death of Manju, it seems to be well-nigh impossible to believe that he would try to have sexual intercourse with her. This circumstance, therefore, falsifies the evidence of PWs. 2 and 4 on this point and shows the extent to which the witnesses could go to implicate the appellant.

121. Finally, in view of the disturbed nature of the state of mind of Birdichand and the catastrophe faced by him and his family, it is difficult to believe that the grief expressed and the tears shed by the appellant when PW 2 met him could be characterised as fake. If it is assumed that the accused did not commit the murder of the deceased then the weeping and wailing and expressing his grief to PW 2 would be quite natural and not fake.

122. There are other minor details which have been considered by the High Court but they do not appear to us to be very material.

123. Taking an overall picture on this part of the prosecution case the position seems to be as follows:

(1) if the accused wanted to give poison while Manju was wide awake, she would have put up stiffest possible resistance as any other person in her position would have done. Dr. Banerjee in his post-mortem report has not found any mark of violence or resistance. Even if she was overpowered by the appellant she would have shouted and cried and attracted persons from the neighbouring flats which would have been a great risk having regard to the fact that some of the inmates of the house had come only a short-while before the appellant.

(2) Another possibility which cannot be ruled out is that potassium cyanide may have been given to Manju in a glass of water, if she happened to ask for it. But if this was so, she being a chemist herself would have at once suspected some foul play and once her suspicion would have arisen it would be very difficult for the appellant to murder her.

(3) The third possibility is that as Manju had returned pretty late to the flat she went to sleep even before the arrival of the appellant and then he must have tried to forcibly administer the poison by the process of mechanical suffocation, in which case alone the deceased could not have been in a

position to offer any resistance. But this opinion of the Doctor has not been accepted by the High Court which, after a very elaborate consideration and discussion of the evidence, the circumstances and the medical authorities, found that the opinion of the Doctor that Manju died by mechanical suffocation has not been proved or, at any rate, it is not safe to rely on such evidence. In this connection, we might refer to the finding of fact arrived at by the High Court on this point:

In view of the above position as is available from the evidence of Dr. Banerjee and from the observations made by the medical authorities it will not be possible to say that the existence of the dark red blood in the right ventricle exclusively points out the mechanical suffocation particularly when such phenomenon is available in cases of poisoning by potassium cyanide.

In view of this answer it will not be possible to say conclusively that this particular symptom of observation is exclusively available in case of mechanical suffocation.

Thus we have discussed all the seven items on which Dr. Banerjee has relied for the purpose of giving an opinion that there was mechanical suffocation. In our view, therefore, those 7 findings would not constitute conclusive date for the purpose of holding that there was mechanical suffocation. As the 7 findings mentioned above can be available even in the case of cyanide poisoning we think that it would not be safe to rely upon these circumstances for recording an affirmative finding that there was mechanical suffocation. As the 7 findings mentioned above can be available even in the case of cyanide poisoning we think that it would not be safe to rely upon these circumstances for recording an affirmative finding that there was mechanical suffocation.

124. It is not necessary for us to repeat the circumstances relied upon by the High Court because the finding of fact speaks for itself. This being the position, the possibility of mechanical suffocation is completely excluded.

(4) The other possibility that may be thought of is that Manju died a natural death. This also is eliminated in view of the report of the Chemical Examiner as confirmed by the post-mortem that the deceased had died as a result of administration of potassium cyanide.

(5) The only other reasonable possibility that remains is that as the deceased was fed up with the maltreatment by her husband, in a combined spirit of revenge and hostility after entering the flat she herself took potassium cyanide and lay limp and lifeless. When the appellant entered the room he must have thought that as she was sleeping she need not be disturbed but when he found that there was no movement in the body after an hour so, his suspicion was roused and therefore he called his brother from the adjacent flat to send for Dr. Lodha.

125. In these circumstances, it cannot be said that a reasonable possibility of the deceased having committed suicide, as alleged by the defence, can be safely ruled out or eliminated.

126. From a review of the circumstances mentioned above, we are of the opinion that the circumstance of the appellant having been last seen with the deceased has not been proved conclusively so as to raise an irresistible inference that Manju's death was a case of blatant homicide.

127. This now brings us to an important chapter of the case on which great reliance appears to have been placed by Mr. Jethmalani on behalf of the appellant. Unfortunately, however, the aspect relating to interpolations in the post-mortem report has been completely glossed over by the High Court which has not attached any importance to the infirmity appearing in the medical evidence in support of the said interpolations. Although the learned Counsel for the appellant drew our attention to a number of interpolations in the postmortem report as also the report sent to the Chemical Examiner, we are impressed only with two infirmities which merit serious consideration. To begin with, it has been pointed out that in the original post-mortem notes which were sent to Dr. Banerjee (P. W. 33) for his opinion, there is a clear interpolation by which the words 'can be a case of suicidal death' appear to have been scored out and Dr. Banerjee explained that since he had written the words "time since death' twice, therefore, the subsequent writing had been scored out by him. In other words, the Doctor clearly admitted the scoring out of the subsequent portion and we have to examine whether the explanation given by him is correct. In order to decide this issue we have examined for ourselves the original post-mortem notes (Exhibit 128) where the writing has been admittedly scored out by Dr. Banerjee. The relevant column against which the scoring has been done is column No. 5 which runs thus:

5. Substance of accompanying Report from Police Officer or Magistrate, together with the date of death, if known. Supposed cause of death, or reason for examination.

128. The last line indicates that the Doctor was to note two things- (1) the date of death, if known, and (2) the supposed cause of death. This document appears to have been written by P. W. 33 on 12-6-1982 at 4.30 p.m. The relevant portion of the words written by the Doctor are 'time since death' which were repeated as he states in his statement. After these words some other words have been admittedly scored out and his (P. W. 33) explanation was that since he had written 'time since death' twice, the second line being a repetition was scored out. A bare look at Ex. 128 does not show that the explanation given by the Doctor is correct. We have ourselves examined the said words with the help of a magnifying glass and find that the scored words could not have been 'time since death'. The only word common between the line scored out and the line left intact is 'death'. To us, the scored out words seem to be 'can be a case of suicidal death'. Dr. Banerjee however stuck to his original stand which is not supported by his own writing in the document itself. It seems to us that at the first flush when he wrote the post-mortem notes it appeared to him that no abnormality was detected and that it appears to be a case of suicide rather than that of homicide. This, therefore, is the strongest possible circumstance to make the defence highly probable, if not certain. Furthermore, the Doctor's explanation that the scored words were "time since death", according to the said explanation, the scored words are only three whereas the portion scored out contains as many as seven words. Hence the explanation of the Doctor is not borne out from the document.

129. It is true that the Doctor reserved his opinion until the chemical examiner's report but that does not answer the question because of column No. 5 of postmortem notes Dr. Banerjee has clearly written "can be a case of suicidal death" which indicates that in the absence of the report of the chemical examiner, he was of the opinion that it could have been a case of suicide. In his evidence, P. W. 33 stated that in Exh. 128 in column No. 5 the contents scored out read 'time since death and since it was repeated in the next line, he scored the words in the second line. Despite persistent cross-examination the Doctor appears to have stuck to his stand. It cannot, therefore, be

gainsaid that this matter was of vital importance and we expected the High Court to have given serious attention to this aspect which goes in favour of the accused.

130. Another interpolation pointed out by the learned Counsel is regarding position of tongue as mentioned in Exh. 134. In the original while filling up the said column the Doctor appears to have scored out something; the filled up entry appears thus - 'mouth is closed with tip (something scored out) seen caught between the teeth'. But in the carbon copy of the report which was sent to the Chemical Examiner (Exh. 132) he has added 'caught between the teeth' in ink but in the original there is something else. This is fortified by the fact that the copy of the report actually, sent to the chemical examiner does not contain any interpolation against the said column where the filled up entry reads 'Inside mouth'.

131. The combined effect of these circumstances show that Dr. Banerjee (P. W. 33) tried to introduce some additional facts regarding the position of the tongue. Perhaps this may be due to his final opinion that the deceased died due to mechanical suffocation which might lead to the tongue being pressed between the teeth. This, however, throws a cloud of doubt on the correctness or otherwise of the actual reports written by him and the one that was sent to the Chemical Examiner. It is obvious that in the carbon copy which was retained by the Doctor, the entries must have been made after the copy was sent to the Chemical Examiner. However, this circumstance is not of much consequence because the opinion of the Doctor that Manju died by forcible administration of potassium cyanide or by the process of mechanical suffocation has not been proved. This aspect need not detain us any further because the High Court has not accepted the case of mechanical suffocation.

132. So far as the other findings of Dr. Banerjee are concerned we fully agree with the same. A number of comments were made on behalf of the appellant about Dr. Banerjee's integrity and incorrect reports but subject to what we have said, we do not find any substance in those contentions.

133. In para 90 of its judgment the High Court has given a number of circumstances which according to it, go to prove the prosecution case showing that the appellant had administered the poison during the night of 11th June, 1982. These circumstances may be extracted thus:

(1) In the bed-room Manju died of poisoning between 11.30 p.m. and 1 a.m. in the night between 11/12th June, 1982.

(2) Accused No. 1 was present in that bedroom since before the death of Manju i.e. since about 11.15 p.m.

(3) Accused No. 1 did not return to the flat at 1.30 a.m. or 1.45 a.m. as alleged.

(4) The conduct of accused No. 1 in not calling for the immediate help of Dr. Shrikant Kelkar and/or Mrs. Anjali Kelkar is inconsistent with his defence that he felt suspicious of the health of Manju when he allegedly returned to the flat at 1.50 a.m.

(5) In different conduct of accused No. 1 when Dr. Lodha and Dr. Gandhi went to the flat in Takshila apartment, Accused No. 1 did not show any anxiety which one normally finds when the doctor comes to examine the patient. Accused No. 1 should have accompanied the doctor when they examined Manju and should have expressly or by his behaviour disclosed his feelings about the well being of his wife. It was also necessary for him to disclose the alleged fact that he saw Manju in a suspicious condition when he returned at about 1.30 a.m. or so.

(6) An attempt of Birdichand to get the cremation of Manju done before 7 a.m. on 12-6-1982 even by spending any amount for that purpose. This conduct though of Birdichand shows the conduct of a person to whom accused No. 1 had gone and informed as to what had happened.

(7) Delay and false information to police at the hands of Mohan Asava. Though the information is given by Mohan as per the phone instructions of accused No. 3 it is presumed that accused No. 1 must have told accused No. 3 about the incident and on that basis accused No. 3 gave instructions to Mohan Asava.

(8) Accused No. 1 himself does not take any action either personally or through somebody else to give correct information to police.

(9) Arrangement of the dead body to make show that Manju died a peaceful and natural death.

(10) Accused No. 1 has a motive to kill Manju as he wanted to get rid of her to continue relations with Ujwala.

(11) Absence of an anklet on left ankle of Manju is inconsistent with the defence that Manju committed suicide.

(12) The conduct of the accused in concealing the anklet in the fold of the Chaddar is a conduct of a guilty man.

(13) The door of the bedroom was not found bolted from inside. This would have been normally done by Manju if she had committed suicide.

(14) Potassium cyanide must not have been available to Manju.

(15) Manju was 4 to 6 weeks pregnant. This is a circumstance which would normally dissuade her from committing suicide.

(16) Denial of the part of accused No. 1 of admitted or proved facts.

(17) Raising a false plea of absence from the bedroom at the relevant time.

134. We have already discussed most of the circumstances extracted above and given our opinion, and have also fully explained the effect of circumstances Nos. 1, 2, 3, 4, 5 and 6. We might again even at the risk of repetition say that too much reliance seems to have been placed by the High Court on circumstance No. 4 as the appellant did not immediately call for Dr. Shrikant Kelkar (P.

W. 26) and Dr. (Mrs.). Anjali Kelkar (P. W. 27). In a matter of this magnitude it would be quite natural for the members of the appellant's family to send for their own family doctor who was fully conversant with the ailment of every member of the family. In these circumstances there was nothing wrong if the appellant and his brother went to a distance of 1 1/2 Km. to get Dr. Lodha. Secondly, Dr. Shrikant Kelkar was a skin specialist whereas Dr. (Mrs.) Anjali Kelkar was a Paediatrician and the appellant may have genuinely believed that as they belonged to different branches, they were not at all suitable to deal with such a serious case. The High Court was, therefore, wrong in treating this circumstance as an incriminating conduct of the appellant.

135. Circumstance No. 5 is purely conjectural because as soon as Dr. Lodha came he examined Manju and advised that Dr. Gandhi be called. We fail to understand what was the indifferent conduct of the appellant when he had sent for the two doctors who examined the deceased. The appellant was in the same room or rather in an adjacent room when the deceased was being examined. From this no inference can be drawn that the appellant was indifferent to the state in which Manju was found.

136. As regards circumstance No. 6 we have already explained this while dealing with the evidence of Mohan Asava, P. W. 30. As regards circumstance No. 7, the High Court has presumed that there being no dependable evidence that the information given to the police by P. W. 30 was false and that the appellant must have told A-3 about the incident on the basis of which he gave instructions to P. W. 30. This is also far from the truth as has been pointed out by us while dealing with the evidence of P. W. 30.

137. Circumstance No. 8 is that P. W. 30 was asked to report the matter to the police. When the dead body was lying in the flat what action could the appellant have taken except reporting the matter to the police through one of his known persons. So far as circumstances Nos. 9 and 10 are concerned, they do not appear to us, to be of any consequence because, as shown by us, from a reading of the letters (Exhs. 30, 32 and 33) and the conduct of the appellant, we do not find any evidence of a clear motive on the part of the appellant to kill Manju.

138. Circumstances Nos. 11 and 12 are also of no assistance to the prosecution because whether the anklet was in the chaddar or elsewhere is wholly insignificant and does not affect the issue in question at all. Circumstance No. 13 is also speculative because if the bedroom was not found bolted from inside that would itself not show that Manju could not have committed suicide. Various persons may react to circumstances in different ways. When Manju entered her bedroom her husband had not come and since she went to sleep she may not have bolted the door from inside to enable her husband to enter the room. As regards circumstance No. 14, the High Court has overlooked a very important part of the evidence of P. W. 2 who has stated at page 178 of Part I of the printed paperbook thus:

The plastic factory at Beed is a partnership concern in which two sons of Dhanraj, my wife and sister-in-law, i.e., brother's wife are partners.

135. Dr. Modi's Medical Jurisprudence and Texicology (19th Edn.) at page 747 show that 'Cyanide is also used for making basic chemicals for plastics'. Apart from the fact that the High Court in relying on this circumstance has committed a clear error of record, it is an additional factor to show

that cyanide could have been available to Manju when she visited Beed for the last time and had stayed there for more than a week.

140. Circumstance No. 15 - the fact that Manju was 4 to 6 weeks pregnant would dissuade Manju from committing suicide is also purely speculative. A pregnancy of 4 to 6 weeks is not very serious and can easily be washed out. Moreover, when a person has decided to end one's life these are matters which do not count at all. On the other hand, this circumstance may have prompted her to commit suicide for if a child was born to her, in view of her ill-treatment by her husband and her in-laws, the child may not get proper upbringing. Any way, we do not want to land ourselves in the field of surmises and conjectures as the High Court has done.

141. Circumstance No. 16 is wholly irrelevant because the prosecution cannot derive any strength from a false plea unless it has proved its case with absolute certainty. Circumstance No. 17 also is not relevant because there is no question of taking a false plea of absence from the bed-room at the relevant time as there is no clear evidence on this point.

142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Fateh Singh Bhagat Singh v. State of Madhya Pradesh AIR 1953 SC 468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or Section 313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra MANU/SC/0206/1975 : 1976CriLJ492 this Court held thus:

The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

143. To the same effect is another decision of this Court in Harijan Megha Jesha v. State of Gujarat MANU/SC/0113/1979 : 1979CriLJ1137 where the following observations were made:

In the first place, he stated that on the personal search of the appellant, a chadi was found which was bloodstained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant.

144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration.

145. We might mention here an important argument advanced by counsel for the appellant and countered by the Additional Solicitor-General. It was argued before the High Court that it was highly improbable that if the betrothal ceremony of appellant's sister, which was as important as the marriage itself, was going to be performed on the 13th of June, would the appellant choose a day before that for murdering his wife and thereby bring disgrace and destruction not only to his family but also to his sister. We have already adverted to this aspect of the matter but it is rather interesting to note how the High Court has tried to rebut this inherent improbability, on the ground that in a case of administration of poison the culprit would just wait for an opportunity to administer the same and once he gets the opportunity he is not expected to think rationally but would commit the murder at once. With due respect to the Judges of the High Court, we are not able to agree with the somewhat complex line of reasoning which is not supported by the evidence on record. There is clear evidence, led by the prosecution, that except for a week or few days of intervals, Manju always used to live with her husband and she had herself complained that he used to come late at night. Hence, as both were living alone in the same room for the last four months there could be no dearth of any opportunity on the part of the appellant to administer poison if he really wanted to do so. We are unable to follow the logic of the High Court's reasoning that once the appellant got an opportunity he must have clung to it. The evidence further shows that both Manju and appellant had gone for a honeymoon outside Pune and even at that time he could have murdered her and allowed the case to pass for a natural death. However, these are matters of conjectures.

146. The Additional Solicitor-General realising the hollowness of the High Court's argument put it in a different way. He submitted that as the deceased was 4-6 weeks pregnant the appellant realised that unless the deceased was murdered at the behest it would become very difficult for him to murder her, even if he had got an opportunity, if a child was born and then he would have to maintain the child also which would have affected his illicit connections with Ujvala. This appears to be an attractive argument but on close scrutiny it is untenable. If it was only a question of Manju's being 4-6 weeks pregnant before her death, the appellant could just as well have waited just for another fortnight till the marriage of his sister was over which was fixed for 30th June, 1982 and then either have the Pregnancy terminated or killed her. Moreover, it would appear from the evidence of P. W. 2 (p. 176) that in his community the Kohl ceremony is not merely a formal betrothal but a very important ceremony in which all the near relations are called and invited to attend the function and a dinner is hosted. We might extract what P. W. 2 says about this:

At the time of Kohl celebration of Manju, on 2-8-1981 my relatives i. e. my sister from outside had attended this function and many people were invited for this function. A dinner was also hosted by me. In that function the father of the bridegroom is required to spend for the; dinner, while the presentations made to the bride are required to be given or donned at the expenses of the side of bridegroom. This programme is not attended by the bridegroom.

147. As Birdichand and others were made co-accused in the case they were unable to give evidence on this point but it is the admitted case of both the parties that the accused belonged to the same community as P. W. 2. In these circumstances, it is difficult to accept the argument that the appellant would commit the murder of his wife just on the eve of the Kohl ceremony, when he could have done the same long before that ceremony or after the marriage as there was no hurry nor any such impediment which would deny him any opportunity of murdering his wife.

148. We now come to the nature and character of the circumstantial evidence. The law on the subject is well settled for the last 6-7 decades and there have been so many decisions on this point that the principles laid down by Courts have become more or less axiomatic.

149. The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall show, are clearly distinguishable. The High Court was greatly impressed by the view taken by some Courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is not what this Court has said. We shall elaborate this aspect of the matter a little later.

150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.
In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by the false defence or a plea which is not accepted by a Court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh MANU/SC/0037/1952 : 1953CriLJ129 . This case has been uniformly followed and applied by this Court in a large number of latter decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh : (1969)3SCC198 and Ramgopal v State of Maharashtra MANU/SC/0168/1971 : 1972CriLJ473 .

It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):
It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so
the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra MANU/SC/0167/1973 : 1973CriLJ1783 where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.<mpara>

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus deliciti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry (1952) NZLR 111, thus:

Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt : the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.

155. Lord Goddard slightly modified the expression 'morally certain' by 'such circumstances as render the commission of the crime certain'.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay MANU/SC/0043/1959 : 1960CriLJ682. Lagu's case as also the principles enunciated by this Court

in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases --Tufail's case : (1969)3SCC198 (supra). Ramgopal's case MANU/SC/0168/1971 : 1972CriLJ473 (supra). Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19-2-1958), Dharambir Singh v. State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration MANU/SC/0138/1973 : 1974CriLJ617 , Mohan Lal Pangasa v. State of U. P. MANU/SC/0425/1974 : 1974CriLJ800 , Shankarlal Gyarasilal Dixit v. State of Maharashtra MANU/SC/0211/1980 : 1981CriLJ325 and M. G. Agarwal v. State of Maharashtra MANU/SC/0117/1962 : [1963]2SCR405 a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar MANU/SC/0030/1955 : 1955CriLJ1647 , to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation...
such absence of explanation or false explanation would itself be an additional link which completes the chain.

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case MANU/SC/0211/1980 : 1981CriLJ325 (supra) where this Court observed thus:

Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.

160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case MANU/SC/0037/1952 : 1953CriLJ129 (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the Court. When the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General.

161. Moreover, in M. G. Agarwal's case MANU/SC/0117/1962 : [1963]2SCR405 (supra) this Court while reiterating the principles enunciated in Hanumant's case observed thus:

If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt.

In Shankarlal's (supra) this Court reiterated the same view thus:

Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment.

162. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In Kali Ram v. State of Himachal Pradesh MANU/SC/0121/1973 : 1974CriLJ1 , this Court made the following observations:

Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.

163. We now come to the mode and manner of proof of cases of murder by administration of poison. In Ramgopal's case MANU/SC/0168/1971 : 1972CriLJ473 (supra) this Court held thus (at p. 659):

Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question ? (secondly), had the accused the poison in question in his possession ? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased ? It is only when the motive is there and these facts are all proved that the Court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death.

164. So far as this matter is concerned, in such cases the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for an accused to administer poison to the deceased.

(2) that the deceased died of poison said to have been administered.

(3) that the accused had the poison in his possession.

(4) that he had an opportunity to administer the poison to the deceased.

165. In the instant case, while two ingredients have been proved but two have not. In the first place, it has no doubt been proved that Manju died of potassium cyanide and secondly, it has also been proved that there was an opportunity to administer the poison. It has, however, not been proved by any evidence that the appellant had the poison in his possession. On the other hand, as indicated above, there is clear evidence of P. W. 2 that potassium cyanide could have been available to Manju from the plastic factory of her mother, but there is no evidence to show that the accused could have procured potassium cyanide from any available source. We might here extract a most unintelligible and extraordinary finding of the High Court-

It is true that there is no direct evidence on these two points, because the prosecution is not able to lead evidence that the accused had secured potassium cyanide poison from a particular source. Similarly there is no direct evidence to prove that he had administered poison to Manju. However, it is not necessary to prove each and every fact by a direct evidence. Circumstantial evidence can be a basis for proving, this fact.

166. The comment made by the High Court appears to be frightfully vague and absolutely unintelligible. While holding in the clearest possible terms that there is no evidence in this case to show that the appellant was in possession of poison, the High Court observes that this fact may be proved either by direct or indirect (circumstantial) evidence. But it fails to indicate the nature of the circumstantial or indirect evidence to show that the appellant was in possession of poison. If the Court seems to suggest that merely because the appellant had the opportunity to administer poison and the same was found in the body of the deceased, it should be presumed that the appellant was in possession of poison, then it has committed a serious and gross error of law and has blatantly violated the principles laid down by this Court. The High Court has not indicated as to what was the basis for coming to a finding that the accused could have procured the cyanide. On the other hand, in view of the decision in Ramgopal's case (supra) failure to prove possession of the cyanide poison with the accused by itself would result in failure of the prosecution to prove its case.

We are constrained to observe that the High Court has completely misread and misconstrued the decision in Ramgopal's case. Even Prior to Ramgopal's case there are two decisions of this Court which have taken the same view. In Chandrakant Nyalchand Seth's case (Criminal Appeal No. 120 of 1957 decided on 19-2-1958) this Court observed thus:
Before a person can be convicted of murder by poisoning, it is necessary to prove that the death of the deceased was caused by poison, that the poison in question was in possession of the accused and that poison was administered by the accused to the deceased. There is no direct evidence in this case that the accused was in possession of Potassium Cyanide or that he administered the same to the deceased.

167. The facts of the case cited above were very much similar to the present appeal. Here also, the Court found that, the circumstances afforded a greater motive to the deceased to commit suicide than for the accused to commit murder. This view was reiterated in Dharambir Singh's case (Criminal Appeal No. 98 of 1958 decided on 4-11-1958) where the Court observed as follows:

Therefore, along with the motive, the prosecution has also to establish that the deceased died of a particular poison said to have been administered, that the accused was in possession of that poison and that he had the opportunity to administer the same to the deceased; (see Mt. Gajrani v. Emperor MANU/UP/0252/1933 : AIR 1933 All 394). It is only when the motive is there and these facts are all proved that the Court may be able to draw the inference, in a case of circumstantial evidence, that the poison was administered by the accused to the deceased resulting in his death.

We feel that it was not right for the High Court to say, when this link in the chain had failed, that it could not be very difficult for anybody to procure potassium cyanide and therefore the absence of proof of possession of potassium cyanide by the accused was practically of no effect. On the facts as found by the High Court it must be held that the second of the three facts which have to be proved, in case of poisoning based on circumstantial evidence has not been proved, namely that the accused was in possession of the poison that had been found in the body.... Can it be said in these circumstances when the proof of a very vital fact, namely, that the accused was in possession of potassium cyanide, has failed that the chain of circumstantial evidence is so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and that the evidence which remains after the rejection of this fact is such as to show that within all human probability the act must have been done by the accused.

168. We are, therefore, clearly of the opinion that the facts of the present appeal are covered by the ratio of the aforesaid decisions. At any rate, taking the worst view of the matter on the evidence in this case two possibilities are clearly open--

(1) that it may be a case of suicide, or

(2) that it may be a case of murder

and both are equally probable, hence the prosecution case stands disproved.

169. We now proceed to deal with some of the judgments of this Court on which great reliance has been placed by the High Court. In the first place, the High Court relied on the case of Pershadi v. State of Uttar Pradesh MANU/SC/0100/1956 : 1957CriLJ328 . This case appears to be clearly distinguishable because no point of law was involved therein and on the facts proved and the very extraordinary conduct of the accused, the Court held that the circumstantial evidence was consistent only with the guilt of the accused and inconsistent with any other rational explanation. Indeed, if this would have been our finding in this particular case, there could be no question that the conviction of the accused would have been upheld.

170. The next case on which the High Court placed great reliance is Lagu's case MANU/SC/0043/1959 : 1960CriLJ682 (supra). This case also does not appear to be of any assistance to the prosecution. In the first place, the case was decided on the peculiar facts of that

case. Secondly, even though the corpus deliciti was not held to be proved yet the medical evidence and the conduct of the accused unerringly pointed to the inescapable conclusion that the death of the deceased was as a result of administration of poison and that the accused was the person who administered the same. This, however, is not the case here. On the other band, we have held that the conduct of the appellant has not been proved to be inconsistent with his guilt and on this ground alone the present case can be easily distinguished. If at all it is an authority, it is on the point that this Court is not required to enter into an elaborate examination of the evidence unless there are very special circumstances to justify the same. As this Court in that case was clearly of the view that the High Court had fully considered the facts and a multitude of circumstances against the accused remained unexplained, the presumption of innocence was destroyed and the High Court was therefore right in affirming the conviction. Of course, Sarkar, J. gave a dissenting judgment. From a detailed scrutiny of the decision cited above (Lagu's case) we find that there is nothing in common between the peculiar facts of that case and the present one. Hence, this authority is also of no assistance to the prosecution.

171. Reliance was then placed on the case of Ram Dass v. State of Maharashtra MANU/SC/0123/1977 : 1977CriLJ955 but we are unable to see how this decision helps the prosecution. The High Court relied on the fact that as the accused had taken the deceased immediately to the Civil Hospital in order to stop the poison from spreading, this particular fact was eloquent enough to speak for the innocence of the accused. A careful, perusal of that decision shows that this Court did not accept the prosecution case despite circumstances appearing in that case which are almost similar to those found in the present one. Moreover, here also the accused had immediately sent for their family Doctor after they had detected that Manju was dead. The reason for a little delay in lodging the FIR has already been explained by us while dealing with the facts. In the decision cited above, it was clearly held that the case against the accused was not proved conclusively and unerringly and that two reasonable views were possible, the relevant portion of which may be extracted thus:

On a consideration of the evidence and the circumstances referred to above, we are satisfied that this is a case in which the circumstantial evidence did not prove the case against the accused conclusively and unerringly, and at any rate two reasonable views were possible.

172. We have already found in the instant case that taking the prosecution at the highest the utmost that can be said is that two views-one in favour of the accused and the other against him - were possible. Ram Dass's case also therefore supports the appellant rather than the prosecution.

173. The last case relied upon by the High Court is Shankarlal's case MANU/SC/0211/1980 : 1981CriLJ325 (supra) but we are unable to see how this case helps the prosecution. The observations on which the High Court has relied upon appears to have been torn from the context. On the other hand, this decision fully supports the case of the appellant that falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. This decision has already been dealt with by us while considering the merits of the present case and it is not necessary to repeat the same.

174. These are the only important cases of this Court on which the High Court seeks to rely and which, on a close examination, do not appear to be either relevant or helpful to the prosecution

case in any way. On the other hand, some of the observations made in these cases support the accused rather than the prosecution.

175. This now brings us to the fag end of our judgment. After a detailed discussion of the evidence, the circumstances of the case and interpretation of the decisions of this Court the legal and factual position may be summarised thus:

(1) That the five golden principles enunciated by this Court in Hanumant's decision MANU/SC/0037/1952 : 1953CriLJ129 have not been satisfied in the instant case. As a logical corollary, it follows that it cannot be held that the act of the accused cannot be explained on any other hypothesis except the guilt of the appellant nor can it be said that in all human probability, the accused had committed the murder of Manju. In other words, the prosecution has not fulfilled the essential requirements of a criminal case which rests purely, on circumstantial evidence.

(2) That, at any rate, the evidence clearly shows that two views are possible - one pointing to the guilt of the accused and the other leading to his innocence. It may be very likely that the appellant may have administered the poison (potassium cyanide) to "Manju but at the same time a fair possibility that she herself committed suicide cannot be safely excluded or eliminated. Hence, on this ground alone the appellant is entitled to the benefit of doubt resulting in his acquittal.

(3) The prosecution has miserably failed to prove one of the most essential ingredients of a case of death caused by administration of poison, i.e., possession of poison with the accused (either, by direct or circumstantial evidence) and on this ground alone the prosecution must fail.

(4) That in appreciating the evidence, the High Court has clearly misdirected itself on many points, as pointed out by us, and has thus committed a gross error of law.

(5) That the High Court has relied upon decisions of this Court which are either inapplicable or which, on closer examination, do not support the view of the High Court being clearly distinguishable.

(6) That the High Court has taken a completely wrong view of law in holding that even though the prosecution may suffer from serious infirmities it could be re-enforced by additional link in the nature of false defence in order to supply the lacuna and has thus committed a fundamental error of law.

(7) That the High Court has not only misappreciated the evidence but has completely overlooked the well established principles of law and in view of our findings it is absolutely clear that the High Court has merely tried to accept the prosecution case based on tenterhooks and slender tits and bits.

(8) We entirely agree with the High Court that it is wholly unsafe to rely on that part of the evidence of Dr. Banerjee (P. W. 33) which shows that poison was forcibly administered by the process of mechanical suffocation.

(9) We also agree with the High Court that there is no manifest defect in the investigation made by the police which appears to be honest and careful. A proof positive of this fact is that even though Rameshwar Birdichand and other members of his family who had practically no role to play had been arrayed as accused but they had to be acquitted by the High Court for lack of legal evidence.

(10) That in view of our finding that two views are clearly possible in the present case, the question of defence being false does not arise and the argument of the High Court that the defence is false does not survive.

176. This was a fit case in which the High Court should have given at least the benefit of doubt to the appellant.

177. Normally, this Court does not interfere with the concurrent findings of fact of the Courts below, in the absence of very special circumstances or gross errors of law committed by the High Court. But where the High Court ignores or overlooks the crying circumstances and proved facts, violates and misapplies the well established principles of criminal jurisprudence or decisions rendered by this Court on appreciation of circumstantial evidence and refuses to give benefit of doubt to the accused despite facts apparent on the face of the record or on its own findings or tries to gloss over them without giving any reasonable explanation or commits errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of this Court to step in and correct the legally erroneous decision of the High Court.

178. We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any Court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction, however strong or genuine, cannot amount to a legal conviction supportable in law.

179. It must be recalled that the well established rule of criminal justice is that 'fouler the crime higher the proof'. In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made.

180. Manju (from the evidence on the record) appears to be not only a highly sensitive woman who expected whole hearted love and affection from her husband but having been thoroughly disappointed out of sheer disgust, frustration and depression she may have chosen to end her life at least this possibility is clearly gleaned from her letters and mental attitude. She may have been fully justified in entertaining an expectation that after marriage her husband would look after her with affection and regard. This is clearly spelt out in the letters where she hinted that her husband was so busy that he found no time for her. A hard fact of life, which cannot be denied, is that some people in view of their occupation or profession find very little time to devote to their family. Speaking in a light vein, lawyers, professors, Doctors and perhaps Judges fall within, this category and to them Manju's case should be an eye-opener.

181. For the reasons given above we hold that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. We, therefore, allow the appeal, set aside the judgments of the Courts below and acquit the appellant, Sharad Birdichand Sarda, of the charges framed against him and direct him to be released and set at liberty forthwith.

A. Vardarajan, J. (Concurring)

182. This appeal by special leave is directed against the judgment of a Division Bench of the Bombay High Court in Criminal Appeal No. 265 of 1983 and Confirmation Case No. 3 of 1983, dismissing the appeal and confirming the sentence of death awarded to the first accused Sharad Birdhichand Sarda (hereinafter referred to as the 'appellant') by the Additional Sessions Judge, Pune in Sessions Case No. 203 of 1982. The appellant, Rameshwar Birdhichand Sarda and Ramvilas Rambagas Sarda were accused 1, 2 and 3 respectively in the Sessions Case.

183. The appellant and the second accused are the sons of one Birdhichand of Pune whose family has a cloth business. In addition, the appellant who is said to be a graduate in Chemical Engineering had started a chemical factory at Bhosari, a suburb of Pune. The third accused is uncle of the appellant and the second accused. The appellant is the husband of Manjushree alias Manju while the second accused is the husband of Anuradha (P. W. 35). Birdhichand's family has its residential house at Ravivar Peth in Pune and owns a flat in a building known as Takshasheela Apartments in Mukund Nagar area of Pune.

184. Manju, the alleged victim in this case, was the eldest amongst the five children of Rameshwar (P. W. 2) and Parwati (P. W. 20). Anju (P. W. 6) is the second daughter of P. W. 2 who is a Commercial Tax and Income Tax Consultant since 1960. P. W. 2 is living in his own house situate in Subash Road in Beed city since 1973, prior to which he was living in a rented house in Karimpura Peth in that city. Meena (P. W. 5) is a school and college mate and friend of Manju who passed the B. Sc. examination in Chemistry in the First Class in 1980 while P. W. 5 who had passed the 10th standard examination together with Manju was still studying in college. Rekha (P. W. 3) whom Manju used to call as Vahini is another friend of Manju. She is living with her husband Dr. Dilip Dalvi in a portion of P. W. 2's house in Subash Road, Pune as his tenant. P. W. 20's elder brother, Dhanraj Rathi (P. W. 22) is a resident of Pune where he is doing business in the sale of plastic bags for the manufacture of which he has a plastic factory called Deepak Plastics at Beed. It is a partnership concern of P. W. 20 and some others including P.W. 22's third son Shrigopal. Deepak is one of the two sons of P. Ws. 2 and 20.

185. After Manju passed her B. Sc. degree examination in 1980 her marriage with the appellant was settled by a formal betrothal ceremony which took place in June 1981. The marriage of the appellant and Manju was performed at the expense of P. W. 2 at Beed on 11-2-1982. The appellant and Manju left for Pune on 12-2-1982 after the marriage. Subsequently, P. W. 2 sent his elder son Deepak for fetching Manju from the appellant's house at Pune and they accordingly came back to Beed on 22-2-1982. The appellant went to Beed four or five days later and took Manju back to Pune on the next day after pleading his inability to stay in P. W. 2's house for some more days. This was Manju's first visit to her parents' house after her marriage with the appellant. She is said to have been very happy during that visit. Thereafter Manju came to her parents' house along with her maternal uncle Dhanraj Rathi (P. W. 22) on or about 2-4-1982. It is the case of the prosecution

that during that visit Manju was uneasy and had generally complained against the appellant to P. Ws. 3 and 6. P. W. 2 planned to keep Manju in his house for about three weeks on that occasion. But news' of the death of the appellant's grandfather was received in P. W. 2's house in Beed and, therefore, P. Ws. 2 and 20 and Manju went to Pune for condolences on 11-4-1982. After meeting the appellant's father and others at Pune, P. Ws. 2 and 20 returned to Beed leaving Manju in the appellant's house in Pune. That was the second visit of Manju to her parents' house after marriage with the appellant. P. Ws. 2 and 20 came to Pune again on or about 13-5-1982. After staying for some time as usual in the house of P. W. 22, P. Ws. 2 and 20 visited the house of Birdhichand on that occasion. It is the case of the prosecution that P.Ws. 2 and 20 found Manju disturbed and uneasy and that they, therefore, took her to the house of P. W. 22 with the permission of Birdhichand. It is also the case of the prosecution that on reaching P. W. 22's house Manju completely broke down and started weeping in the arms of P. W. 20. P. Ws. 2 and 20 returned to Beed from Pune and sent their second son Pardeep four or five days later to fetch Manju, who had, however, by then gone with the appellant to Tirupati in Andhra Pradesh. After learning that the appellant and Manju had returned to Pune, P. W. 2 sent his son Deepak to fetch Manju to Beed. Accordingly Deepak brought Manju to Beed accompanied by the third accused's daughter Kavita on 25-5-1982. This was Manju's third and last visit to her parents' house after her marriage with the appellant. It is the case of the prosecution that Manju was totally disturbed and frightened during that visit and that she complained to her mother P. W. 20 against the appellant and she in turn conveyed to P. W. 20 what she heard from Manju. Birdhichand went to Beed on 2-6-1982 without any prior intimation for taking Manju to Pune on the ground that Manju's presence in his family house at Pune was necessary for the betrothal ceremony of his daughter Shobha fixed for 13-6-1982 as well as for her marriage fixed for 30-6-1982. It is the case of the prosecution that when Manju came to know that her father-in-law Birdhichand had come for taking her to Pune she wept and expressed her unwillingness to go to Pune and that, however, on the assurance of Birdhichand that he would see to it that nothing happened to the life of Manju, P. W. 2 permitted Manju to go to Pune along with Birdhichand and she accordingly went to Pune on 3-6-1982 along with Kavita and Birdhichand.

186. The family of Birdhichand and his sons including the appellant is joint. As, stated earlier they have their family's residential house at Ravivar Peth, Pune besides the flat which they owned in the Takshasheela Apartments situate at some distance from their family house. Their flat has two bed-rooms besides a hall and other portions. Birdhichand's two married sons, the appellant and the second accused used to go to the family's flat in the Takshasheela Apartments for sleeping during the nights. The appellant and Manju used to sleep in one of the two bed-rooms while the second accused and his wife Anuradha (P. W. 35) and their children used to sleep in the other bed-room.

187. Manju had written amongst others, three letters, Ex. 33 dated 25-4-1982 to her friend Vahini (P. W. 3) and Ex. P-30 dated 8-2-1982 and P-32 dated 8-6-1982 to her younger sister Anju (P. W. 6). In Ex. 33 Manju has stated inter alia that she was feeling lonely though all persons in Pune were very good and everybody was loving and that one reason is that there are many elderly persons in the house and, therefore, she does not dare to do any work independently and the fear which is in her mind every time leads to confusion. She has also stated in that letter though all person in Pune were very good that she becomes angry if he (appellant) does not speak to her when she goes and talks to him even ten times and that till now this man (appellant) had no time to mind his wife. She has stated in that letter that she dare not ask him (appellant) whether his clothes be

taken for washing and that at present her status is only that of an unpaid maid-servant. She has finally stated in that letter that on the day on which self-pride in the appellant is reduced no other person will be more fortunate than her but it is not certain whether she will be alive until that date. In Ex. 30 she has stated inter alia that she was undergoing a very difficult test and was unable to achieve her object, that it would be well and good only if she controls herself and that some other way will have to be evolved when that becomes impossible. In Ex. 32 she has stated that though she was happy at Pune she does not know why there is such a dirty atmosphere in the house and it is felt every moment that something will happen. She has also stated in that letter that no work had been started in the house though Shobha's "sari" function is fixed for 13-6-1982 and, therefore, she is out of her mind.

188. The case of the prosecution as regards the alleged occurrence during the night of 11/12-6-1982 is thus: on 11-6-1982 at about 10.30 p.m. Manju accompanied by Anuradha, (P. W. 35) and three children of the latter came to the Takshasheela Apartments by an auto-rickshaw. The night-watchman of the Takshasheela Apartments, Kerba (P. W. 28) has deposed about this fact. Syed Mohideen, (P. W. 7) an auto-rickshaw driver residing in the border of Ganesh Peth and Ravivar Peth in Pune claims to have taken two ladies, three children and a baby by his auto-rickshaw at about 11 p.m. on that day to Mukund Nagar. He has identified the photo of Manju published in a newspaper two or three days later as that of one of the two ladies who travelled by his auto-rickshaw as aforesaid. The second accused had already gone to the flat in the Takshasheela Apartments. The appellant reached the flat about 15 minutes later by a scooter, when the night-watchman (P. W. 28) remarked that he was coming rather late he told P. W. 28 that it was because he had a meeting. After the appellant reached the flat he and Manju retired(sic) to their bed-room while the second accused and P. W. 35 retired(sic) to theirs. Thereafter the appellant came out of his bed-room at about 2 a.m. on 12-6-1982 and went to the second accused and both of them went out of that flat by scooters soon afterwards. The appellant proceeded to Ravivar Peth and called his father while the second accused went to call Dr. Uttamchand Lodha, (P. W. 24) who lives about one and a half kilometres away from the Takshasheela Apartments without seeking the help of Dr. Anjali Kelkar, (P. W. 26) and her husband Dr. Shrikant Kelkar (P. W. 27) who lived close by in the same Takshasheela Apartments. P.W. 24 reached the appellant's flat at about 2.30 a.m. and found Manju dead, with rigor mortis having already set in and no external mark showing the cause of death. He, however, opined that it may be a case of unnatural death and suggested that the police may be informed. When Birdhichand who had arrived at the flat by then advised that some other doctor may be called as he was not satisfied with the opinion of P. W. 24, P. W. 24 suggested that Dr. Anil Gandhi, P. W. 25 may be called if so desired. Thereafter, P. W. 24 and the third accused who had come with Birdhichand went to call P.W. 25 who lives about 7 kilometres away from the Takshasheela Apartments. On their way they contacted P. W. 25 over the phone and took him to the appellant's flat where he examined Manju at about 4 a.m. and pronounced that she was dead. He opined that she might have died three or four hours earlier and stated that there was no external evidence showing the cause of death. He too suggested that the police should be informed to avoid any trouble.

189. The third accused went to Mohan Asava, (P. W. 30) at about 4.30 a.m. on 12-6-1982 and called him to the appellant's flat after informing him that Manju was dead. P. W. 30, who accompanied the third accused, saw the body of Manju in the flat and left the place after suggesting that the police should be informed. The third accused contacted P. W. 30 over the phone at about

6.30 a.m. and asked him to go and inform the police that Manju had died at 5.30 a.m. P. W. 30 accordingly went to Maharishi Nagar Police Station at about 7 or 7.15 a.m. and informed the Head Constable, (P. W. 31) who thereupon made the entry Ex. 120 to the effect that Manju was found to be dead when the appellant tried to wake her up at 5.30 a.m. on 12-6-1982. P. W. 31 proceeded to the appellant's flat at about 8 a.m. after informing the inspector of Police, P. W. 40 telephonically about the suspicious death of Manju.

190. On receipt of information from P. W. 22 by a lightning telephone call at about 6 a.m. on 12-6-1982 that Manju was extremely serious P. W. 2 went from Beed to Pune along with his wife P. W. 20 and his son Pardeep and Hiralal Sarda (P. W. 4) by jeep at about 1 p.m. on 12-6-1982 and learnt that Manju was dead. Thereafter P. W. 2 went along with Hiralal Sarda to the Sassoon Hospital where Manju's body had been sent by the police for autopsy.

191. Dr. Kalikrishnan Banerji, (P. W. 33) who conducted autopsy on the body of Manju did not find any external or internal injury. He preserved the viscera, small intestines etc. of Manju and reserved his opinion about the cause of her death. On receipt of the Chemical Examiner's report Ex. 130 to the effect that Manju's viscera contained potassium cyanide poison P. W. 33 finally opined that Manju had died due to potassium cyanide poisoning and simultaneous mechanical suffocation. After completing the investigation P. W. 40 filed the charge-sheet against the appellant and the other two accused on 13-9-1982.

192. The Additional Sessions Judge, Pune tried the appellant for the offence under Section 302, IPC of murder of Manju by administering potassium cyanide poison or by suffocating her or by both all the three accused for the offence under Section 120-B, IPC of conspiring to destroy the evidence of the murder of Manju by giving a false report to the police about the time of her death and the third accused for the offence under Section 109 read with Section 201, IPC and Section 201, IPC for instigating P. W. 30 to give false information to the police and giving false information to P. W. 22 regarding the murder of Manju.

193. The appellant and the other two accused denied the charges framed against them. The appellant denied that he had anything to do with Ujwala (P. W. 37) with whom is alleged to have been in love at the relevant time. He admitted that Manju and P. W. 35 accompanied by some children went to their flat in the Takshasheela Apartments at about 10.30 p.m. on 11-6-1982 but denied that they travelled by any auto-rickshaw and stated that they went there by their family's car driven by the second accused. He denied that he went to the flat about 15 minutes later and stated that he returned to the flat only at 1.30 or 1.45 a.m. on 12-6-1982 after attending a meeting in the Rajasthan Youth Club. He stated that after changing his clothes he looked at Manju and found something abnormal and became suspicious and then went to the second accused and that thereafter he went to call his father and uncle while the second accused went to call Dr. Lodha, P. W. 24.

194. The trial Court found all the three accused guilty as charged and convicted them accordingly and sentenced the appellant to death under Section 302, IPC and all the three accused to rigorous imprisonment for two years and a fine of Rs. 2,000/- each under Section 120-B, IPC but did not award any sentence under Section 201 read with Section 120-B.

195. The appellant and the other two accused filed appeals against their conviction and the sentences awarded to them. The State filed a criminal revision application for enhancement of the sentence awarded to accused 2 and 3. These appeals, confirmation case and criminal revision application were heard together by the Division Bench of the Bombay High Court, which in a lengthy judgment (195 pages of our paper book) allowed the appellant's appeal in part regarding his conviction and sentence under Section 120-B, IPC but confirmed his conviction and sentence of death awarded under Section 302, IPC and allowed the appeal of accused 2 and 3 in full and acquitted them and dismissed the criminal revision application. Hence, the appellant alone has come up before this Court on special leave against his conviction and the sentence of death.

196. I had the benefit of reading the judgment of my learned brother Fazal Ali, J. I agree with his final conclusion that the appeal should succeed. The learned Judges of the High Court have relied upon 17 circumstances for confirming the conviction and sentence of death awarded to the appellant. My learned brother Fazal Ali, J. has rightly rejected every one of those circumstances as not conclusively pointing to the guilt of the appellant, including the circumstances that the appellant was last seen with Manju before her death on the ground that the case of the prosecution based on the evidence of Dr. Banerji (P. W. 33) that there was any mechanical suffocation of Manju has been disbelieved by the High Court itself and that some entries in the carbon copy Ex. 134 of P. W. 33's report sent to the Chemical Examiner had been scored and interpolated after his report Ex. 132 to the Chemical Examiner had left his hands, that the original entry in the post-mortem certificate Ex. 134 contained the words 'can be a case of suicidal death' and that the explanation of P. W. 33 that he wrote the words 'time of death' twice and not the words 'can be a case of suicidal death' and, therefore, he scored off one of them is not acceptable at all. The Doctors P. Ws. 24 and 25 did not find any external injury on the body of Manju which they saw at about 2.30 and 4.30 a.m. on 12-6-1982. Even P. W. 33 did not find any external or internal injury on the body of Manju. In these circumstances, unless the prosecution excludes the possibility of Manju having committed suicide by consuming potassium cyanide poison, as rightly pointed out by my learned brother Fazal Ali, J., no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen with Manju, he being no other than her own husband who is naturally expected to be with her during nights. Some of these 17 circumstances cannot, by any stretch of imagination, be held to point to the guilt of the appellant. Circumstance No. 6 is an attempt of the appellant's father Birdhichand to get the body of Manju cremated before 7 a.m. On 12-6-1982 by expressing such a desire to P. W. 30. Circumstance No. 9 is arrangement of the dead body of Manju to make it appear that she died a peaceful and natural death. Circumstance No. 11 is absence of an anklet of Manju from her leg. Circumstance No. 12 is the conduct of the appellant in allegedly concealing the anklet in the fold of the chaddar. Circumstance No. 15 is the fact that according to the medical evidence Manju was pregnant by four to six weeks and it would normally dissuade her from committing suicide. With respect to the learned Judges of the High Court, in my view, by no stretch of imagination, can any of these circumstances be considered to point to nothing but the guilt of the appellant in a case resting purely on circumstantial evidence.

197. However, since I am unable to persuade myself to agree with my learned brother Fazal Ali, J. on four points, I am writing this separate but concurring judgment, giving my view on those points, namely, (1) ill-treatment of Manju by the appellant, (2) intimacy of the appellant with Ujvala (P. W. 37), (3) admissibility of Manju's letters Exts. 30, 32 and 33 and the Oral evidence of P. Ws. 2, 3, 5, 6 and 20 about the alleged complaints made by Manju against the appellant under

Section 32(1) of the Evidence Act and (4) conduct of Dr. Banerji (P.W. 33) who had conducted autopsy on the body of Manju.

198. My learned brother Fazal Ali, J. has observed as follows at pages 1626 and 1653 of his judgment:

Page-1626 On the other hand the plea of the defence was that while there was a strong possibility of Manju having been ill-treated and uncared for by her husband and her in-laws, being a highly sensitive and impressionate woman, she committed suicide out of sheer depression and frustration arising from an emotional upsurge.

Page-1653 On the other hand this circumstance may have prompted her to commit suicide, for if a child was born to her, in view of her ill-treatment by her husband and her in-laws the child may not get proper upbringing.

I do not recollect any admission by Mr. Ram Jethmalani, learned Counsel for the appellant in the course of his arguments about any cruelty or ill-treatment to Manju on the part of the appellant or his parent. The evidence of P.W. 3 is that during Manju's second visit to Beed after her marriage with the appellant she found Manju not quite happy and very much afraid of the appellant. The evidence of P. W. 5 is that during Manju's second visit to Beed, Manju complained to her about the appellant returning home late in the night and avoiding to have a talk with her and that Manju told her that she was afraid of the appellant and apprehended danger to her life at his hands. The further evidence of the P. W. 5 is that during her third visit to Beed she inferred from Manju's face a spell of fear. The evidence of P. W. 6 is that during Manju's second visit to Beed, Manju told her that the appellant used to leave the house early in the morning and return late at night under the pretext of work in his factory and that he was even reluctant to talk with her. P.W. 6 has stated that during Manju's third visit to Beed she was extremely uneasy, disturbed and under a spell of fear, that Manju told her that the appellant did not relish even her question as to why he was not prepared to have a simple talk with her, and that during her third visit to Beed, Manju expressed her unwillingness to go to Pune when Birdhichand went to Beed on 2-6-1982 for taking her to Pune. To the same effect is the evidence of P. Ws. 2 and 20 about how Manju looked in spirit and what she stated during her last two visits. My learned brother Fazal Ali, J. has rightly rejected the oral evidence of P. Ws. 2, 3, 5, 6 and 20. He has extracted the relevant portions of the letters Exts. 30, 32 and 33 in his judgment and has observed at page 1632 that one thing which may be conspicuously noticed in Ext. 30 is that Manju was prepared to take all the blame on herself rather than incriminating her husband or his parents; at page 1633 that it was conceded by the learned Additional Solicitor General that the relevant portion of Ext. 32 does not refer to any ill-treatment of Manju by' the appellant or his parents; and at page 1633 that it can be easily inferred from Ext. 33 that Manju did not have any serious complaint against the appellant except that she was not getting proper attention which she deserved from him. These three letters do not establish that Manju made any complaint of any ill-treatment by the appellant or his parents. In my view, these three letters and the aforesaid oral evidence of P. Ws. 2, 3, 5, 6 and 20 are inadmissible in evidence under Section 32(1) of the Evidence Act for reasons to be given elsewhere in my judgment. Thus there is no acceptable evidence on record to show that either the appellant or his parents ill-treated Manju. The High Court also has not found any such ill-treatment in its judgment. On the other hand, what has been found by the High Court in para 104 of its judgment is that the appellant

treated Manju contemptuously. Even while setting out the case of the prosecution the High Court has stated in para 7 of its judgment that it is alleged that the appellant started giving contemptuous treatment to Manju and in para 20 that the appellant has denied in his statement recorded under Section 313, Cr. P. C. that Manju was being treated contemptuously. No question has been put to the appellant in the course of his examination under Section 313, Cr. P. C, about any ill-treatment of Manju by the appellant or his parents. My learned brother Fazal Ali, J. has referred on page 1654 of his judgment to this Court's decisions in Fateh Singh Bhagat Singh v. State of Madhya Pradesh AIR 1953 SC 468 ; Shamu Babu Chaugale v. State of Maharashtra MANU/SC/0206/1975 : 1976CriLJ492 and Harijan Megha Jesha v. State of Gujarat MANU/SC/0113/1979 : 1979CriLJ1137 and has observed at page 1654 of his judgment that circumstances not put to the appellant in his examination under Section 313, Cr. P. C. have to be completely excluded from consideration in view of those; decisions. Therefore, since no question has been put to the appellant in this regard in the course of his examination under Section 313, Cr. P. C., even if there is any evidence about any ill-treatment of Manju by the appellant or his parents it has to be completely excluded from consideration. I felt it necessary to say this in my judgment since I think that in fairness to the appellant it has to be done.

199. My learned brother Fazal Ali, J. has set out the case of the prosecution in so far as. it connects P. W. 37 with the appellant at page 1626 of his judgment where he has stated that the positive case of the prosecution is that the appellant was not at all interested in Manju and had illicit intimacy with P. W. 37. On this point there is the evidence of P. Ws. 3, 5 and 6. The evidence of P.W. 3 is that during her second visit to Beed, Manju informed her that the appellant had a girl-friend by name Ujvala Kothari and that he introduced her (Ujvala Kothari) to her and told her that she should learn from Ujvala Kothari about how she should behave with him. The evidence of P. W. 5 is that during her second visit to Beed, Manju told her that the appellant had an affair with a girl by name Ujvala Kothari and that she had seen Ujvala's letter addressed to the appellant and an incomplete letter of the appellant addressed to that girl. No such letters have been produced in evidence. The evidence of P. W. 6 is that during her second visit to Beed, Manju told her that the appellant had an affair with a girl by name Ujvala Kothari and also introduced that girl to her in the Pearl Hotel saying that she has complete command over him and that she (Manju) should take lessons from her (Ujvala Kothari) about how she should behave with him. There is no other evidence regarding this alleged illicit intimacy between the appellant and P. W. 37. This alleged illicit intimacy is totally denied not only by the appellant but also by P. W. 37. The alleged incident in the Pearl Hotel, according to the case of the prosecution, took place on 17-3-1982. But there is no reference whatever to any such incident in any of the subsequent three letters of Manju, Exts. 30, 32 and 33, dated 25-4-1982, 8-5-1982 and 8-6-1982 respectively. My learned brother Fazal Ali, J. has rightly rejected the oral evidence not only of P. Ws. 3, 5 and 6 but also of P. Ws. 2 and 20 as untrustworthy at page 1644 of his judgment. However, at page 1645 he has stated that it has been proved, to come extent that the appellant had some sort of intimacy With Ujvala Kothari and it had embittered the relationship between the appellant and Manju. In my view, as already stated, the oral evidence of P. Ws. 2, 3, 5, 6 and 20 about what Manju is alleged to have told them against the appellant and/of his family and even her letters Exts. 30, 32 and 33 are inadmissible in evidence under Section 32(1) of the Evidence Act. Thus, there is absolutely no reliable or admissible evidence on record to show that the appellant had any intimacy with Ujvala (P. W. 37). I am, therefore, unable to share the view of my learned brother Fazal Ali, J. that the prosecution has proved to some extent that the appellant had some sort of intimacy with P. W. 37 and it had embittered the relationship between

the appellant and Manju. I think that I am bound to say this in fairness to not only the appellant but also P. W. 37 who, on the date of her examination in the Court, was a 19 years' old student and has stated in her evidence that she had known the appellant only as the President of the Rajasthan Youth Club in the year 1979 when she was a member of that Club for about 5 or 6 months in that year.

200. My learned brother Fazal Ali, J. has referred to the oral evidence of P. Ws. 2, 3, 5, 6 and 20 about Manju's alleged complaint against the appellant and or his parents and also to the contents of Manju's letters, Exts. 30, 32 and 33. I have mentioned above the gist of that oral evidence and those three letters. My learned brother has held the said oral evidence and those three letters to be admissible under Section 32(1) of the Evidence Act while rejecting the oral evidence of those five witnesses as untrustworthy at pages 1644 and 1645 of his judgment, mainly on the ground that the oral evidence is quite inconsistent with the spirit and contents of those letters. He appears to have relied upon those three letters for two purposes, namely, rejecting the oral evidence of those five witnesses as untrustworthy and supporting the defence version that it may be a case of suicidal death. In my opinion the oral evidence of those five witnesses about what Manju is alleged to have told them against the appellant and/or his parents and the three letters, are inadmissible under Section 32(1) of the Evidence Act, which reads thus:

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

201. The alleged oral statements of Manju to P. Ws. 2, 3, 5, 6 and 20 are said to have been made during her second and third visits to Beed in the end of Feb., 1982 and end of May, 1982 respectively before her death during the night of 11/12-6-1982. She had written the letters, Exts. 33, 30 and 32 on 25-4-1982, 8-5-1982 and 8-6-1982 as stated earlier. The oral evidence of these witnesses and these three letters are not as to the cause of Manju's death or as to any of the circumstances of the transaction which resulted in her death during that night. The position of law relating to the admissibility of evidence under Section 32(1) is well settled. It is, therefore, not necessary to refer in detail to the decisions of this Court or of the Privy Council or our High Courts. It would suffice to extract what the learned authors Woodroffe and Amir Ali have stated in their Law of Evidence, fourteenth edition and Ratanlal and Dhirajlal in their Law of Evidence (1982 reprint). Those propositions are based mostly on decisions of Courts for which reference has been given at the end. They are these:

Woodroffe & Amir Ali's Law of Evidence, fourteenth edition.

Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the test applied to admissible evidence, namely, the oath and cross-

examination. But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

What is relevant and admissible under clause (1) of this section (Section 32) is the statement actually made by the deceased as to the cause of his death or of the circumstances, of the transaction which resulted in his death.

A statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death i. e. the cause and circumstances of the death and not previous or subsequent transaction, such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received. When a person is not proved to have died as a result of injuries received in the incident in question, his statement cannot be said to be a statement as to the Cause of his death or as to any of the circumstances which resulted in his death. MANU/SC/0055/1963 : 1964CriLJ727 . Where there is nothing to show that the injury to which a statement in the dying declaration relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the statement is not admissible under this clause. ILR (1901) 25 Bom 45.

Circumstances of the transaction resulting in his death. This clause refers to two kinds of statements: (i) when the statement is made by a person as to the cause of his death, or (ii) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words 'resulted in his death" do not mean 'caused his death'. The expression 'any of the circumstances of the transaction which resulted in his death' is wider in scope than the expression 'the cause of his death'. The declarant need not actually have been apprehending death. MANU/MP/0010/1964 : AIR1964MP30 .

"The expression 'circumstances of the transaction' occurring in Section 32, clause (1) has been a source of perplexity to Courts faced with the question as to what matters are admissible within the meaning of the expression. The decision of their Lordships of the Privy Council in Pakala Narayanaswami v. Emperor MANU/PR/0001/1939, sets the limits of the matters that could legitimately be brought within the purview of that expression. Lord Atkin, who delivered the judgment of the Board, has, however, made it abundantly clear that, except in special circumstances no circumstance could be a circumstance of the transaction if it is not confined to either the time actually occupied by the transaction resulting in death or the scene in which the actual transaction resulting in death took place. The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder. But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes the evidence of all relevant factors. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in the case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose.

The Supreme Court in the case of Shiv Kumar v. State of U.P. 1966 Cri AR 281 has made similar observations that the circumstances must have some proximate relation to the actual occurrence, and that general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly to the occasion of death will not be admissible.

The clause does not permit the reception in evidence of all such statement of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. It is confined to only such statements as relate to matters so closely connected with the events which resulted in his death that may be said to relate to circumstances of the transaction which resulted in his death. MANU/PR/0001/1939. 'Circumstances of the transaction which resulted in his death' means only such facts or series or facts which have a ' direct or organic relation to death. Hence statement made by the deceased long before the incident of murder is not admissible.MANU/MP/0087/1973.

Law of Evidence by Ratanlal & Dhirajlal (1982 Reprint)

Circumstances of the transaction; General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death are not admissible.

MANU/PR/0001/1939.

Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. The condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. It is not necessary that the statement must be made after the transaction has taken place or that the person making it must be near death or that the 'circumstance' can only include the acts done when and where the death was caused. Dying declarations are admissible under this clause.

202. The alleged oral statements of Manju and what she has stated in her letters, Exts. 30, 32 and 33 may relate to matters perhaps having a very remote bearing on the cause or the circumstances of her death. Those circumstances do not have any proximate relation to the actual occurrence resulting in her death due to potassium cyanide poison, though, as for instance in the case of prolonged poisoning they may relate to dates considerably distant from the date of the actual fatal dose. They are general impressions of Manju indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of her death. It is not the case of the prosecution that the present case is one of prolonged poisoning. Since it is stated by the learned authors Woodroffe and Amir Ali in their treatise at page 947 that the decision of their Lordships of the Privy Council in Pakala Narayana Swami v. Emperor MANU/PR/0001/1939, sets the limit of the matters that could legitimately "be brought within the purview of the expression 'circumstances of the transaction' and that decision is referred to in several other decisions of our Courts, it would be necessary to extract the relevant passage in this judgment. The learned Lords have observed at pages 75 and 76 (of Ind App): (at p. 50 of AIR) thus:

A variety of questions has been mooted in the Indian Courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expression indicating

fear of suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence: though, as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose.

203. I am, therefore of the opinion that the oral evidence of these witnesses, P.Ws. 2, 3, 5, 6 and 20 about what Manju is alleged to have told them against the appellant and/or his parents and what she has stated in her letters, Exts. 30, 32 and 33, are inadmissible in evidence under Section 32(1) of the Evidence Act and cannot be looked into for any purpose. At this stage, it may be stated that Mr. Ram Jethmalani, learned Counsel for the appellant submitted that the said oral evidence of those five witnesses is inadmissible under Section 32(1) and that though at first he sought to rely upon the letters, Exts. 30, 32 and 33 which seem to lend support to the defence theory that it may be a case of suicide, he ultimately conceded that what applies to the relative oral evidence of P. Ws. 2, 3, 5, 6 and 20 would equally apply to the letters, Exts. 30, 32 and 33 and that they too would be inadmissible in evidence. The Additional Solicitor General who had strongly relied upon the said oral evidence of these five witnesses and the letters, Exts. 30, 32 and 33 at first proceeded in the end of his arguments on that basis that they are inadmissible in evidence. In these circumstances, I am firmly of the opinion that the oral evidence of P. Ws. 2, 3, 5, 6 and 20 about what Manju is alleged to have told them against the appellant and/or his parents as well as the letters, Exts. 30, 32 and 33 are inadmissible in evidence under Section 32(i) of the Evidence Act.

204. About Dr. Banerji (P. W. 33) who conducted autopsy on the body of Manju what my learned brother Fazal Ali, J. has said in his judgment is this:

In Column 5 of the post-mortem notes Dr. Banerjee has clearly written 'can be a case of suicidal death' which indicates that in the absence of the report of the Chemical Examiner he was of the opinion that it could have been a case of suicide. In his evidence P. W. 33 has stated that in Ex. 128 in column No. 5 the contents scored out read 'time since the death' and since it was repeated in the next line he scored out the words in the second line. Despite persistent cross-examination the Doctor appears to have struck to his stand. It cannot, therefore, be gainsaid that this matter was of vital importance and expected the High Court to have given serious attention to this aspect which goes in favour of the accused.

...In the original while filling up the said column the Doctor appears to have scored out something. The filled up entry appears thus :- 'mouth is closed with tip (something scored out) seen caught between the teeth'. But in the carbon copy of the report which was sent to the Chemical Examiner (Ex. 132) he has written 'caught between the teeth' in ink; but in the original there is something else. This is fortified by the fact that the copy of the report actually sent to the Chemical Examiner

does not contain any interpolation against the said column where the filled up entry reads "inside side mouth'.... These circumstances show that Dr. Banerjee (P. W. 33) tried to introduce some additional facts regarding the position of the tongue....This, however, throws a cloud of doubt on the correctness or otherwise of the actual reports written by him and the one that was sent to the Chemical Examiner. It is obvious that in the carbon copy which was retained by the Doctor the entries must have been made after the copy was sent to the Chemical Examiner.

205. I entirely agree with these findings of my learned brother Fazal Ali, J. But I am unable to share his view that these "circumstances are not of much consequence the opinion of the Doctor was that Manju died by forcible administration of potassium cyanide or by the process of mechanical suffocation and that this aspect need not detain the Court any further because the High Court has not accepted the case of mechanical suffocation" and that though a number of comments were made on behalf of the appellant about Dr. Banerji's integrity and incorrect report he does not find any substance in those contentions subject to what he has stated about him.

206. The fact that the High Court has rejected the case of the prosecution based on Dr. Banerji's report and evidence that it was also a case of mechanical suffocation is not one that could be taken into consideration as a mitigating circumstance in judging the conduct of the Doctor who had conducted the autopsy in a case of suspicious death. The fact that he had reserved his opinion about the cause of death and had then noted in his report that the tongue was inside the mouth but has interpolated the words "mouth is closed with tip (something scored out) seen caught between the teeth' and 'caught between the teeth' only after receipt of the Chemical Examiner's report to support the view that it was also a case of mechanical suffocation, is not a mitigating circumstance in favour of P. W. 33. The Doctor had scored out the words "can be a case of suicidal death' and has persisted in his reply that he had scored out only the words 'time since the death' which he claims to have written twice, which explanation has been rightly rejected by my learned brother Fazal Ali, J. The conduct of the Doctor in making these later interpolations and alterations in the records of the postmortem examination in the case of suspicious death in which the appellant has been sentenced to death by the two Courts below, deserves serious condemnation. The Doctor has tampered with material evidence in the case of alleged murder, may be at the instance of somebody else, ignoring the probable consequences of his act. In these circumstances, I am of the opinion that Dr. Banerji (P. W. 33) is a person who should not be entrusted with any serious and responsible work such as conducting autopsy in the public interest. In this case the appellant would have gone to gallows on the basis of the evidence of P. W. 33 as he would have the Court to believe it, and the other evidence, if they had been accepted but they have been rightly discarded by my learned brother Fazal Ali, J. as unworthy of acceptance against the appellant.

207. I agree with my learned brother Fazal Ali, J. that the High Court has clearly misdirected itself on many points in appreciating the evidence and has thus committed a gross error of law.

208. I feel that something has to be stated in the judgment in this case about the way the Investigating Officer and the learned Additional Sessions Judge, Pune who had tried the case had gone about their business. Charge No. 3 is against the third accused for instigating Mohan Asava (P. W. 30) to give false information to the police regarding the offence of murder namely, that the appellant found Manju dead when he tried to wake her up at 5.30 a.m. on 12-6-1982. It is the case of the prosecution itself that P. W. 30 informed the police accordingly at 7 or 7.15 a.m. on that day

after receipt of telephonic instructions from the third accused at 6.30 a.m. though he had himself seen the dead body of Manju earlier in the appellant's flat where he was taken by the third accused who had gone to his flat at about 4 or 4.15 a.m. and informed him that Manju was dead, and he (P.W. 30) left the appellants flat a little later at about 5 or 5.15 a.m. after telling Dr. Lodha (P. W. 34) that he was going to report to the police. Thus, it would appear that the case of the prosecution itself is that P. W. 30 is the principal offender as regards giving false information to the police about the death of Manju. Yet the Investigating Officer had not filed any charge-sheet against P. W. 30 but has conveniently treated him as a prosecution witness. The Additional Sessions Judge, Pune appears to have exercised no control over the evidence that was tendered in this case and to have been oblivious of the scope of the examination of the accused under Section 313, Cr. P. C. This is reflected by some of the questions put to the appellant. Question No. 24 relates to P. W. 20 not maintaining good health and falling ill now and then. Question No. 25 relates to P. W. 22 being a patient of high blood pressure and having suffered a stroke of paralysis 7 years earlier. Question No. 30 relates to a reception held at Pune on 13-2-1982 in connection with the appellant's marriage with Manju. Question No. 32 relates to P. W. 6 asking the appellant's father Birdhichand for permission to take Manju to Beed with her when the party from P. W. 2's side started from Pune for Beed on 14-2-1982. Question No. 115 relates to P. W. 30 indulging in criminal acts of rowdyism; tax evasion etc. and being known as a contact-man of the police. Section 313, Cr. P. C. lays down that in every inquiry or trial for the purpose of enabling the accused personally to explain any circumstance appearing in the evidence against him the Court may at any stage, without previously warning the accused, put such questions to him, as the Court considers necessary and shall, after the witnesses for the prosecution have been examined and before he is called for his defence, question him generally on the case. It is clear that the evidence on the basis of which the above questions have been put to the appellant is wholly irrelevant and that those questions do not relate to any circumstance appearing in the evidence against the appellant. The learned Additional Sessions Judge was bound to exercise control over the evidence being tendered in his Court and to know the scope of the examination of the accused under Section 313, Cr. P. C.

209. In the end, as I said earlier, I agree with my learned brother Fazal, Ali, J. that the appeal has to be allowed. Accordingly I allow the appeal and set aside the conviction and sentence awarded to the appellant and direct him to be set at liberty forthwith.

Sabyasachi Mukherjee, J. (Concurring)

210. I have the advantage of having read the judgments prepared by my learned brothers Fazal Ali, J. and Varadarajan, J. I agree with the order proposed that the appeal should be allowed and the judgments of the Courts below should be set aside and the appellant Sharad Birdhichand Sarda be acquitted of the charges, framed against him and he should be released forthwith. I do so with some hesitation and good deal of anxiety, because that would be interfering with the concurrent findings by two Courts below on a pure appreciation of facts. The facts and circumstances have been exhaustively and very minutely detailed in the judgment of my learned brother Fazal Ali, J. Those have also been set out to certain extent by my brother Varadarajan, J. It will therefore serve no useful purpose to repeat these here. It is necessary, however, for me to make the following observations.

211. It is a case of circumstantial evidence. It is also undisputed that the deceased died of potassium cyanide on the night of 11th and 12th June. 13th June was the date fixed for the betrothal of the sister of the accused. There is no evidence that the accused was in any way hostile or inimical towards his sister. The deceased had a very sensitive mind and occasionally had suffered from mental depression partly due to the fact of adjusting in a new family and partly due to her peculiar mental make up but mainly perhaps due to the family set up of the accused husband. There is no direct evidence of administering poison. There is no evidence either way that either the deceased or the accused had in her or his possession any potassium cyanide. In these circumstances my learned brothers, in view of the entire evidence and the letters and other circumstances, have come to the conclusion that the guilt of the accused has not been proved beyond all reasonable doubt.

212. As I have mentioned before, I have read the two judgments by my two learned brothers and on some points namely, four points mentioned in the judgment prepared by my brother Varadarajan, J., he has expressed views different from those expressed by Fazal Ali, J. and these are:

(1) ill-treatment of Manju by the appellant;

(2) intimacy of the appellant with Ujwala (P. W. 37);

(3) admissibility of Manju's letters Exhibits 30, 32 and 33 and the oral evidence of P. Ws. 2, 3, 5, 6 and 20 about the alleged complaints made by Manju against the appellant under Section 32(1) of the Evidence Act; and

(4) conduct of Dr. Banerji (P. W. 33) who had conducted autopsy on the body of Manju.

213. On the three points, namely ill-treatment of Manju by the appellant, intimacy of the appellant with Ujwala (P. W. 37) and the conduct of Dr. Banerji (P. W. 33) who had conducted autopsy on the body of Manju, I would prefer the views expressed by my learned brother Fazal Ali, J. On the question of admissibility of Manju's letters Exs. 30, 32 and 33 and the oral evidence of P. Ws. 2, 3, 5, 6 and 20 about the alleged complaints made by Manju against the accused under Section 32(1) of the Evidence Act, my learned brother Fazal Ali, J. has observed about Section 32(1) as follows:

The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend on vary with the circumstances of each case.
For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context.
Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death.

For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

214. I would, however, like to state here that this approach should be taken with a great deal with caution and care and though I respectfully agree with Fazal Ali, J. that the test of proximity cannot and should not be too literally construed and be reduced practically to a cut-and-dried formula of universal application, it must be emphasised that whenever it is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within short time of marriage and the distance of time is not spread over three or four months, the statement would be admissible under Section 32 of the Evidence Act. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but as an indication of a negative fact, namely raising some doubt about the guilt of the accused as in this case.

215. For the purpose of expressing my respectful concurrence with the views of Justice Fazal Ali, it is not necessary for me to agree and I do not do so with all the detailed inferences that my learned brother has chosen to draw in respect of the several matters from the exhibits in this case. I am also with respect not prepared to draw all the inferences that my learned brother has chosen to draw in the paragraph beginning with the expression "the careful perusal of this letter revealed the following features". This my learned brother was speaking in respect of Ex. 33. I, however, respectfully agree with my learned brother when he says that a close analysis and reading of the letter namely Ex. 33 clearly indicates:

(a) that the deceased was extremely depressed.

(b) that there was a clear tendency resulting from her psychotic nature to end her life or commit suicide.

216. Similarly, I have some hesitation about the English rendering of Ex. 32 which is letter dtd. 8th June, 1982 which has been set out by my learned brother and which has been set out in his judgment which contains the expression "I do not know why there is such a dirty atmosphere in the house ?" As the original letter was read out in Court and we had the advantage of that, I am inclined to take the view that the correct and the more expressive expression would be "I do not know why there is such a foul atmosphere in the house ?" Read in that light and in the context of other factors, this letter causes some anxiety. If the deceased was sensing foul atmosphere, why was it ? But this again is only a doubt. It does not prove the guilt of the accused

217. In view of the fact that this is a case of circumstantial evidence and further in view of the fact that two views are possible on the evidence on record, one pointing to the guilt of the accused and the other his innocence, the accused is entitled to have the benefit of one which is favourable to him. In that view of the matter I agree with my learned brothers that the guilt of the accused has not been proved beyond all reasonable doubt.

218. In the premises as indicated before, I agree with the order proposed.

Back to Index

MANU/SC/1031/2017

Neutral Citation: 2017/INSC/785

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 118, 288, 327, 665 of 2016, 43 of 2017 and Suo Moto Writ Petition (Civil) No. 2 of 2015 (Under Article 32 of the Constitution of India)

Decided On: 22.08.2017

Appellants: Shayara Bano and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

J.S. Khehar, C.J.I., Kurian Joseph, Rohinton Fali Nariman, U.U. Lalit and S. Abdul Nazeer, JJ.

Subject: Constitution

Relevant Section:

CONSTITUTION OF INDIA - Article 13; CONSTITUTION OF INDIA - Article 14; CONSTITUTION OF INDIA - Article 15; CONSTITUTION OF INDIA - Article 21; CONSTITUTION OF INDIA - Article 25; CONSTITUTION OF INDIA - Article 142; MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937 - Section 2

Authorities Referred:

Baillie's Digest, 2nd Edition, Page 208; Ameer Ali, Mohammedan Law, 3rd Edition, vol. II, Page 518; Hamilton, Hedaya, Vol. I, Page 211; Dicey, Law of the Constitution, 10th Edition; Wade and Phillips, Constitutional Law, 6th Edition; Blacks Law Dictionary, 10th edition, 2014; R.H. Graveson, 'Conflict of Laws 188, 7th Edition, 1974; Chambers 20th Century Dictionary, New Edition; Abdullah Yusuf Ali, The Holy Quran: Text Translation and Commentary, 14th Edition, 2010; Tahir Mahmood and Saif Mahmood, 'Muslim Law in India and Abroad, 2012 Edition; H.M. Seervai, Constitutional Law of India, 4th Edition, Vol. 2; Sir Dinshaw Fardunji Mulla, Principles of Mahomedan Law, 20th edition; Al-Halal Wal Haram Fil Islam, The lawful and the prohibited in Islam, 2009 Edition; Maulana Wahiduddin Khan, Woman in Islamic Shariah; Al-Hafiz Zakiuddin Abdul-Azim Al-Mundhiri, Sahih Muslim; A. Rahman, Marriage and family life in Islam, 2013 Edition; Allamah Shiblinu'mani, Imam Abu Hanifa - Life and Work; Imam Abu Yusuf, Ikhtilaaf Abi Hanifah; Imam Abu Mohammed, Al-Mautta; Imam Shafe'I, Al-Umm, Vol. 5; Mauffaqud Din Abi Muhammed Abdillah Ben Ahmed Ben Muhammed Ben Qudamah Al-Muqaddasi Al-Jammaili Al-Dimashqi Al-Salihi Al-Hanbali, Mughni, Vol, 10; Basheer Ahmad

Mohyidin, Quran: The Living Truth; IbnKathi, TafsirIbnKathir; Abu Ameenah Bilal Philips, Evolution of Fiqh

Case Note:

Family - Divorce - Triple talaq - Validity thereof - Section 2 of Muslim Personal Law (Shariat) Application Act, 1937 and Articles 13, 14, 15, 21, 25 and 142 of Constitution of India - Petitioner/Wife had approached present Court, for assailing divorce pronounced by her Husband in presence of witnesses saying that I gave 'talak, talak, talak' - Petitioner had sought declaration, that talaq-e-biddat pronounced by her husband be declared as void ab initio - Whether triple talaq, could be interfered with on judicial side by present Court.

Facts:

The Petitioner/Wife had approached present Court, for assailing the divorce pronounced by her Husband in the presence of witnesses saying that I gave 'talak, talak, talak'. The Petitioner had sought a declaration, that the talaq-e-biddat pronounced by her husband be declared as void ab initio.

Held, while allowing the petition:

J.S. Khehar, C.J.I. and S. Abdul Nazeer, J.:Dissenting view

(i) Practice of 'talaq-e-biddat', has had the sanction and approval of the religious denomination which practiced it, and as such, there could be no doubt that the practice, was a part of their personal law. [145]

(ii) After examined Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, the limited purpose of the aforesaid provision was to negate the overriding effect of usages and customs over the Muslim 'personal law'-'Shariat'. The debates reveal that customs and usages by tribals were being given overriding effect by courts while determining issues between Muslims. The Shariat Act, neither lays down nor declares the Muslim 'personal law'-'Shariat'. Not even, on the questions/subjects covered by the legislation. There was no room for any doubt, that there was substantial divergence of norms regulating Shias and Sunnis. There was further divergence of norms, in their respective schools. The Shariat Act did not crystallise the norms as were to be applicable to Shias and Sunnis, or their respective schools. What was sought to be done through the Shariat Act, was to preserve Muslim 'personal law'-'Shariat', as it existed from time immemorial. The Shariat Act recognizes the Muslim 'personal law' as the 'rule of decision' in the same manner as Article 25 recognises the supremacy and enforceability of 'personal law' of all religions. Muslim 'personal law'-'Shariat' as body of law, was perpetuated by the Shariat Act, and what had become ambiguous (due to inundations through customs and usages), was clarified and crystalised. Muslim 'personal law'-'Shariat' could not be considered as a State enactment. [156]

(iii) The fundamental rights enshrined in Articles 14, 15 and 21 are as against State actions.

A challenge under these provisions Articles 14, 15 and 21 could be invoked only against the State. It was essential to keep in mind, that Article 14 forbids the State from acting arbitrarily. Article 14 requires the State to ensure equality before the law and equal protection of the laws, within the territory of Country. Likewise, Article 15 prohibits the State from taking discriminatory action on the grounds of religion, race, caste, sex or place of birth, or any of them. The mandate of Article 15 requires, the State to treat everyone equally. Even Article 21 is a protection from State action, inasmuch as, it prohibits the State from depriving anyone of the rights ensuring to them, as a matter of life and liberty (-except, by procedure established by law). Muslim 'personal law'-'Shariat', could not be tested on the touchstone of being a State action. Muslim 'personal law'-'Shariat', is a matter of 'personal law' of Muslims, to be traced from four sources, namely, the Quran, the 'hadith', the 'ijma' and the 'qiyas'. None of these could be attributed to any State action. Talaq-e-biddat is a practice amongst Sunni Muslims of the Hanafi school. A practice which was a component of the faith of those belonging to that school. Personal law, being a matter of religious faith, and not being State action, there was no question of its being violative of the provisions of the Constitution, more particularly, the provisions relied upon by the Petitioners, to assail the practice of talaq-e-biddat, namely, Articles 14, 15 and 21 of the Constitution. [165]

(iv) This was a case which presents a situation where present Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. Direction granted to Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. The contemplated legislation would also take into consideration advances in Muslim 'personal law'-'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. [199]

(v) Till such time as legislation in the matter is considered, Muslim husbands are injuncted from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-e-biddat' (three pronouncements of 'talaq', at one and the same time)-as one, or alternatively, if it was decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate. [200]

Kurian Joseph, J.: Concurring view

(vi) To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Constitution. Under Article 25 (2) of the Constitution, the State is also granted power to make law in two contingencies notwithstanding the freedom granted under Article 25(1). Article 25 (2) states that "nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus. Except to the above extent, the freedom of religion under the

Constitution is absolute. On the statement that triple talaq was an integral part of the religious practice, could not be agreed. Merely because a practice had continued for long, that by itself could not make it valid if it had been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the Rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2 which include talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of Quran was permissible. Hence, there could not be any Constitutional protection to such a practice and thus, disagreement with the Chief Justice for the constitutional protection given to triple talaq. [224]

Rohinton Fali Nariman, J. and and U.U. Lalit J.: Concurring view

(vii) Marriage in Islam is a contract, and like other contracts, may under certain circumstances, be terminated. There was something astonishingly modern about this-no public declaration was a condition precedent to the validity of a Muslim marriage nor was any religious ceremony deemed absolutely essential, though they were usually carried out. Apparently, before the time of Prophet, the pagan Arab was absolutely free to repudiate his wife on a mere whim, but after the advent of Islam, divorce was permitted to a man if his wife by her indocility or bad character renders marital life impossible. In the absence of good reason, no man could justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet had declared divorce to be the most disliked of lawful things in the sight of God. The reason for this was not far to seek. Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage. [234]

(viii) Given the fact that Triple Talaq is instant and irrevocable, it was obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which was essential to save the marital tie, could not ever take place. Also, as understood by the Privy Council in Rashid Ahmad, such Triple Talaq was valid even if it was not for any reasonable cause, which view of the law no longer holds good after Shamim Ara. This being the case, it was clear that this form of Talaq was manifestly arbitrary in the sense that the marital tie could be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained Under Article 14 of the Constitution. The 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, was within the meaning of the expression laws in force in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. The practice of talaq-e-biddat-triple talaq was set aside. [283]

JUDGMENT

J.S. Khehar, C.J.I.

Index

10.	Part-10	The declaration	191-201

Part-1.

The Petitioner's marital discord, and the Petitioner's prayers:

1. The Petitioner-Shayara Bano, has approached this Court, for assailing the divorce pronounced by her husband - Rizwan Ahmad on 10.10.2015, wherein he affirmed "...in the presence of witnesses saying that I gave 'talak, talak, talak', hence like this I divorce from you from my wife. From this date there is no relation of husband and wife. From today I am 'haraam', and I have become 'naamharram'. In future you are free for using your life ...". The aforesaid divorce was pronounced before Mohammed Yaseen (son of Abdul Majeed) and Ayaaz Ahmad (son of Ityaz Hussain) - the two witnesses. The Petitioner has sought a declaration, that the 'talaq-e-biddat' pronounced by her husband on 10.10.2015 be declared as *void ab initio*. It is also her contention, that such a divorce which abruptly, unilaterally and irrevocably terminates the ties of matrimony, purportedly Under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as, the Shariat Act), be declared unconstitutional. During the course of hearing, it was submitted, that the 'talaq-e-biddat' (-triple talaq), pronounced by her husband is not valid, as it is not a part of 'Shariat' (Muslim 'personal law'). It is also the Petitioner's case, that divorce of the instant nature, cannot be treated as "rule of decision" under the Shariat Act. It was also submitted, that the practice of 'talaq-e-biddat' is violative of the fundamental rights guaranteed to citizens in India, Under Articles 14, 15 and 21 of the Constitution. It is also the Petitioner's case, that the practice of 'talaq-e-biddat' cannot be protected under the rights granted to religious denominations (-or any Sections thereof) Under Articles 25(1), 26(b) and 29 of the Constitution. It was submitted, that the practice of 'talaq-e-biddat' is denounced internationally, and further, a large number of Muslim theocratic countries, have forbidden the practice of 'talaq-e-biddat', and as such, the same cannot be considered sacrosanctal to the tenets of the Muslim religion.

2. The counter affidavit filed by Respondent No. 5 - the Petitioner's husband - Rizwan Ahmad, discloses, that the 'nikah' (marriage) between the Petitioner and the Respondent was solemnized on 11.04.2001, as per 'Shariat', at Allahabad. It was submitted, that the Petitioner - Shayara Bano, performed her matrimonial duties intermittently, coming and leaving the matrimonial home from time to time. The matrimonial relationship between the parties resulted in the births of two children, a son - Mohammed Irfan (presently about 13 years old) studying in the 7th standard, and a daughter - Umaira Naaz (presently about 11 years old) studying in the 4th standard, both at Allahabad.

3. It is the case of the Respondent-husband, that the Petitioner-wife, left her matrimonial home on 9.4.2015 in the company of her father - Iqbal Ahmad and maternal uncle - Raees Ahmed, as well as children - Mohammed Irfan and Umaira Naaz, to live in her parental home. The Respondent claims, that he continued to visit the Petitioner, for giving her maintenance, and for enquiring about her well being. When the husband met the wife at her parental home in May and June 2015, she refused to accompany him, and therefore, refused to return to the matrimonial home. On 03.07.2015, Rizwan Ahmad, asked the father of Shayara Bano to send her back to her matrimonial home. He was informed by her father, after a few days, that the Petitioner was not inclined to live with the Respondent.

4. On 07.07.2015 the father of the Petitioner, brought the two children - Mohammed Irfan and Umaira Naaz to Allahabad. The husband submits, that both the children have thereafter been in his care and custody, at Allahabad. It is the assertion of the husband, that the Petitioner's father had given him the impression, that the Petitioner would be inclined to return to Allahabad, consequent upon the husband's care and custody of both children, at the matrimonial home.

5. It is claimed by the Respondent-husband, that he made another attempt to bring back the Petitioner-wife from her parental home on 09.08.2015, but Shayara Bano refused to accompany him. It is submitted, that Rizwan Ahmad was opposed in the above endeavour, both by the Petitioner's father and her maternal uncle.

6. Finding himself in the above predicament, Rizwan Ahmad approached the Court of the Principal Judge, Family Court at Allahabad, Uttar Pradesh, by preferring Matrimonial Case No. 1144 of 2015 with a prayer for restitution of conjugal rights. The Petitioner-Shayara Bano, preferred Transfer Petition (C) No. 1796 of 2015, Under Section 25 of the Code of Civil Procedure, 1908, read with Order XXXVI-B of the Supreme Court Rules, 1966, for the transfer of Matrimonial Case No. 1144 of 2015, filed by the Respondent-husband (seeking restitution of conjugal rights) pending at Allahabad, Uttar Pradesh, to the Principal Judge, Family Court, Kashipur, Uttarakhand. In the above transfer petition, the wife *inter alia* asserted as under:

2.3. The Petitioner who hails from Kashipur, Uttarakhand is unemployed and her father is a government employee. The only source of income is the Petitioner's father who has a low income and despite this the Petitioner during the time of marriage had made arrangements beyond their capacity. But soon after the marriage the Respondent husband started demanding for additional dowry and made unreasonable demands for a car and cash.

2.4. The Petitioner who rightfully denied the demands of the Respondent was tortured and physically abused by the Respondent and his family. She was often beaten and kept hungry in a closed room for days. The family of the Respondent administered her with medicines that caused her memory to fade. Due to the medicines she remained unconscious for long hours.

xxx xxx xxx

2.6. On 09.04.2015, the Respondent attempted to kill the Petitioner by administering medicines. These medicines on inspection by a doctor on a later date were revealed to cause loss of mental balance after regular consumption. The Respondent brought the Petitioner to Moradabad in a critical near-death condition with the intention of abandoning her if his dowry demands were not fulfilled.

2.7. Thereafter on 10.04.2015 the Respondent called the parents of the Petitioner to Moradabad to take their daughter. The parents of the Petitioner requested him to come to Kashipur to meet and settle the issue. He refused to go to Kashipur and said that they should come and take their daughter or fulfil his demands for more dowry. He demanded Rs. 5,00,000/- (Rupees Five Lakh Only).

2.8. Due to the unreasonable demands and the torturous behaviour of the Respondent husband, the Petitioner's parents came to Moradabad to take her and she was forced to stay with her parents after 10.04.2015.

xxx xxx xxx

2.13. The Respondent has filed for restitution despite the fact that he himself had asked the Petitioner wife's father to either fulfil his dowry demands or to take the Petitioner back to her maternal home and in pursuance of the same had drugged the Petitioner and had left her in Moradabad.

7. It is the case of the Respondent-Rizwan Ahmad, that in view of the above averments of the Petitioner-Shayara Bano, he felt that his wife was not ready for reconciliation, and therefore, he withdrew the suit (-for restitution of conjugal rights), preferred by him at Allahabad, and divorced the Petitioner-Shayara Bano, by serving upon her a 'talaq-nama' (deed of divorce) dated 10.10.2015. The text of the 'talaq-nama', is reproduced below:

Deed of Divorce

Dated 10.10.2015

Madam,
Shayara Bano D/o. Iqbal Ahmad.

Be it clear that I Rizwan Ahmed married with you without any dowry to spend a peaceful and happy marital life. After marriage you came in my marital tie. From the relation between you and me two issues namely Irfan Ahmad aged about 13 years and Kumari Humaira Naz @ Muskan aged about 11 years were born who are receiving education living under my guardianship. With a great sorrow it is being written that you, just after 6 months of marriage, with your unreasonable and against Shariat acts started to pressurize me to live separately from my parents. I, in order to keep you happy and as per your wish started to live at a rented house at Mohalla Ghausnagar and while working as a clerk under a builder tried my level best to spend peaceful marital life with you and children. However, you, in an unreasonable manner and against Shariah continued to create problem and quarrel in house on regular basis. When you were asked the reason in a very affectionate manner about two years ago, you had put a condition that now when your other relatives are not with you in such situation come with me to my parents' house and live further life there. I being a person from a self-respecting family refused to live as 'son in law living at in-laws house'. Then you, under the influence of your parents, continued to fake various mental and physical pains and continued to behave life a mental patient. When tried to know the reason then you after much difficulty told that you had med with a serious accident before marriage. I for the sake of my children and you tolerated that. I became despondent from your persistent demand of living at your parental house and your being of stubborn nature, your giving threat of implicating in false case and threat of inflicting injury to yourself and of consuming poison and implicating me in false case on that count given on daily basis and complained about the same to your paternal uncle but your father replied that whenever you do such acts sleeping pills be given to you. I found this very baffling, upon asking your father told that since the time before your marriage you had

been under treatment for mental ailment. I ignored such a big incident and the information received about you. Resultantly you became audacious in your behavior. When reported all these things to your father, your father told me that this is the time of children's holidays you be sent to your parents' house with children. You take them back after the atmosphere is changed and summer vacations are over. Acting on the words of your father I left you at your parents' place along with children and while going, you took away gold jewelry given by me including a gold neck set of two Tolas, gold bangles of one and a half Tola, two gold rings of half Tola and cash Rs. 15,000/-. I continued to visit you enquiring your wellbeing and giving you expenses from time to time. That in the month of May and June when I tried to bring you then you gave excuses and pleas. I continued to make repeated attempts between May to July to bring you back but ultimately on 03.07.2015 you clearly refused to return and on 07.07.2015 you father brought both the children at Allahabad Railway Station and left them there informing me and gave threat on phone that either you will come here and live or shall perform the role of father and mother of both the children. In this regard when I enquired from you then you also refused to return in clear words and said to the extent that you raise the children and forget me or separate from me to bring another mother for the children. On this also I could not satisfy myself, whereupon I filed a suit for bringing you back. After receiving notice, out of the blues you threatened me on phone that I will soon file a case and will tell you how a son in law is kept at the in-laws house. Being fed up with your unreasonable conduct and against Sharaih acts I found it better to separate from you, therefore, I on 8.10.2015 applied for dismissal of the suit for bringing you back and now I, in my full senses and in the presence of marginal witnesses, release you from my marriage in the light of Shariah through triple talaq by uttering 'I give talaq', 'I give talaq', 'I give talaq'. From today the relation of husband and wife forever ends between you and me. After today you are unlawful for me and I have become unlawful for you. You are free to spend your life the way you want.

Note: So far is the question of your dower (Mehr) and expenses of waiting period (iddat) that I am paying through demand draft No. 096976 dated 06.10.2015 drawn at Allahabad Bank, Karaili, Allahabad Branch, which comprises a sum of Rs. 10,151 towards payment of dower and Rs. 5,500/- towards the expenses of waiting period which I am sending along with this written deed of divorce, you kindly take paid to accept the same.

Dated 10.10.2015

Witnesses:

1. Mohd. Yaseen, s/o Abdul Majid, R/o J.K. Colony, Ghaus Nagar, Karaili, Allahabad;

2. Ayaz Ahmed S/o Imtiyaz Hussain R/o G.T.B. Nagar, Karaili Scheme, Allahabad

Only

Sd/ Hindi Rizwan Ahmed

(Rizwan Ahmed)

S/o Iqbal Ahmed

Ghaus Nagar, Karaili, Allahabad

8. Based on the above, the case of the Respondent-husband is, that he had pronounced 'talaq' in consonance with the prevalent and valid mode of dissolution of Muslim marriages. It was submitted, that the pronouncement of divorce by him, fulfils all the requirements of a valid divorce, under the Hanafi sect of Sunni Muslims, and is in consonance with 'Shariat' (Muslim 'personal law').

9. It is also the submission of the Respondent-husband, that the present writ petition filed by the Petitioner-wife Under Article 32 of the Constitution of India, is not maintainable, as the questions raised in the petition are not justiciable Under Article 32 of the Constitution.

10. Keeping in view the factual aspect in the present case, as also, the complicated questions that arise for consideration in this case (and, in the other connected cases), at the very outset, it was decided to limit the instant consideration, to 'talaq-e-biddat' - triple talaq. Other questions raised in the connected writ petitions, such as, polygamy and 'halala' (-and other allied matters), would be dealt with separately. The determination of the present controversy, may however, coincidentally render an answer even to the connected issues.

Part-2.

The practiced modes of 'talaq' amongst Muslims:

11. Since the issue under consideration is the dissolution of marriage by 'talaq', under the Islamic law of divorce, it is imperative, to understand the concept of 'talaq'. In this behalf, it is relevant to mention, that under the Islamic law, divorce is classified into three categories. Talaq understood simply, is a means of divorce, at the instance of the husband. 'Khula', is another mode of divorce, this divorce is at the instance of the wife. The third category of divorce is 'mubaraat' - divorce by mutual consent.

12. 'Talaq', namely, divorce at the instance of the husband, is also of three kinds - 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. The Petitioner's contention before this Court is, that 'talaq-e-ahsan', and 'talaq-e-hasan' are both approved by the 'Quran' and 'hadith'. 'Talaq-e-ahsan', is considered as the 'most reasonable' form of divorce, whereas, 'talaq-e-hasan' is also considered as 'reasonable'. It was submitted, that 'talaq-e-biddat' is neither recognized by the 'Quran' nor by 'hadith', and as such, is to be considered as sacrosanctal to Muslim religion. The controversy which has arisen for consideration before this Court, is with reference to 'talaq-e-biddat'.

13. It is necessary for the determination of the present controversy, to understand the parameters, and the nature of the different kinds of 'talaq'. 'Talaq-e-ahsan' is a single pronouncement of 'talaq' by the husband, followed by a period of abstinence. The period of abstinence is described as 'iddat'. The duration of the 'iddat' is ninety days or three menstrual cycles (in case, where the wife is menstruating). Alternatively, the period of 'iddat' is of three lunar months (in case, the wife is not menstruating). If the couple resumes cohabitation or intimacy, within the period of 'iddat', the pronouncement of divorce is treated as having been revoked. Therefore, 'talaq-e-ahsan' is revocable. Conversely, if there is no resumption of cohabitation or intimacy, during the period of 'iddat', then the divorce becomes final and irrevocable, after the expiry of the 'iddat' period. It is considered irrevocable because, the couple is forbidden to resume marital relationship thereafter,

unless they contract a fresh 'nikah' (-marriage), with a fresh 'mahr'. 'Mahr' is a mandatory payment, in the form of money or possessions, paid or promised to be paid, by the groom or by the groom's father, to the bride, at the time of marriage, which legally becomes her property. However, on the third pronouncement of such a 'talaq', the couple cannot remarry, unless the wife first marries someone else, and only after her marriage with other person has been dissolved (either through 'talaq' - divorce, or death), can the couple remarry. Amongst Muslims, 'talaq-e-ahsan' is regarded as - 'the most proper' form of divorce.

14. 'Talaq-e-hasan' is pronounced in the same manner, as 'talaq-e-ahsan'. Herein, in place of a single pronouncement, there are three successive pronouncements. After the first pronouncement of divorce, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. The same procedure is mandated to be followed, after the expiry of the first month (during which marital ties have not been resumed). 'Talaq' is pronounced again. After the second pronouncement of 'talaq', if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. It is significant to note, that the first and the second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, 'talaq' pronounced by the husband becomes ineffective, as if no 'talaq' had ever been expressed. If the third 'talaq' is pronounced, it becomes irrevocable. Therefore, if no revocation is made after the first and the second declaration, and the husband makes the third pronouncement, in the third 'tuhr' (period of purity), as soon as the third declaration is made, the 'talaq' becomes irrevocable, and the marriage stands dissolved, whereafter, the wife has to observe the required 'iddat' (the period after divorce, during which a woman cannot remarry. Its purpose is to ensure, that the male parent of any offspring is clearly identified). And after the third 'iddat', the husband and wife cannot remarry, unless the wife first marries someone else, and only after her marriage with another person has been dissolved (either through divorce or death), can the couple remarry. The distinction between 'talaq-e-ashan' and 'talaq-e-hasan' is, that in the former there is a single pronouncement of 'talaq' followed by abstinence during the period of 'iddat', whereas, in the latter there are three pronouncements of 'talaq', interspersed with abstinence. As against 'talaq-e-ahsan', which is regarded as 'the most proper' form of divorce, Muslims regard 'talaq-e-hasan' only as 'the proper form of divorce'.

15. The third kind of 'talaq' is - 'talaq-e-biddat'. This is effected by one definitive pronouncement of 'talaq' such as, "I talaq you irrevocably" or three simultaneous pronouncements, like "talaq, talaq, talaq", uttered at the same time, simultaneously. In 'talaq-e-biddat', divorce is effective forthwith. The instant talaq, unlike the other two categories of 'talaq' is irrevocable at the very moment it is pronounced. Even amongst Muslims 'talaq-e-biddat', is considered irregular.

16. According to the Petitioner, there is no mention of 'talaq-e-biddat' in the Quran. It was however acknowledged, that the practice of 'talaq-e-biddat' can be traced to the second century, after the advent of Islam. It was submitted, that 'talaq-e-biddat' is recognized only by a few Sunni schools. Most prominently, by the Hanafi sect of Sunni Muslims. It was however emphasized, that even those schools that recognized 'talaq-e-biddat' described it, "as a sinful form of divorce". It is acknowledged, that this form of divorce, has been described as "bad in theology, but good in law". We have recorded the instant position at this juncture, because learned Counsel for the rival parties, uniformly acknowledge the same.

Part-3.

The Holy Quran - with reference to 'talaq':

17. Muslims believe that the Quran was revealed by God to the Prophet Muhammad over a period of about 23 years, beginning from 22.12.609(sic), when Muhammad was 40 years old. The revelation continued upto the year 632 - the year of his death. Shortly after Muhammad's death, the Quran was completed by his companions, who had either written it down, or had memorized parts of it. These compilations had differences of perception. Therefore, Caliph Usman-the third, in the line of caliphs recorded a standard version of the Quran, now known as Usman's codex. This codex is generally treated, as the original rendering of the Quran.

18. During the course of hearing, references to the Quran were made from 'The Holy Quran: Text Translation and Commentary' by Abdullah Yusuf Ali, (published by Kitab Bhawan, New Delhi, 14th edition, 2016). Learned Counsel representing the rival parties commended, that the text and translation in this book, being the most reliable, could safely be relied upon. The text and the inferences are therefore drawn from the above publication.

(i) The Quran is divided into 'suras' (chapters). Each 'sura' contains 'verses', which are arranged in sections. Since our determination is limited to the validity of 'talaq-e-biddat', within the framework of the Muslim 'personal law' - 'Shariat', we shall only make a reference to such 'verses' from the Quran, as would be relevant for our above determination. In this behalf, reference may first be made to 'verses' 222 and 223 contained in 'section' 28 of 'sura' II. The same are reproduced below:

222. They ask thee
Concerning women's courses.
Say: They are
A hurt and a pollution:
So keep away from women
In their courses, and do not
Approach them until
They are clean.
But when they have
Purified themselves,
Ye may approach them
In any manner, time, or place
Ordained for you by God.
For God loves those
Who turn to Him constantly
And he loves those
Who keep themselves pure and clean.

223. Your wives are
As a tilth unto you;
So approach your tilth
When or how ye will;

But do some good act
For your souls beforehand;
And fear God,
And know that ye are
To meet Him (in the Hereafter),
And give (these) good tidings
To those who believe.

The above 'verses' have been extracted by us for the reason, that the Quran mandates respectability at the hands of men - towards women. 'Verse' 222 has been interpreted to mean, that matters of physical cleanliness and purity should be looked at, not only from a man's point of view, but also from the woman's point of view. The 'verse' mandates, that if there is danger of hurt to the woman, she should have every consideration. The Quran records, that the action, of men towards women are often worse. It mandates, that the same should be better with reference to the woman's health, both mental and spiritual. 'Verse' 223 postulates, that sex is as solemn, as any other aspect of life. It is compared to a husband-man's tilth, to illustratively depict, that in the same manner as a husband-man sows his fields, in order to reap a harvest, by choosing his own time and mode of cultivation, by ensuring that he does not sow out of season, or cultivate in a manner which will injure or exhaust the soil. So also, in the relationship towards a wife, 'verse' 223 exalts the husband, to be wise and considerate towards her, and treat her in such manner as will neither injure nor exhaust her. 'Verses' 222 and 223 exhort the husband, to extend every kind of mutual consideration, as is required towards a wife.

(ii) Reference is also necessary to 'verses' 224 to 228 contained in Section 28 of 'sura' II of the Quran. The same are extracted below:

224. And make not
God's (name) an excuse
In your oaths against
Doing good, or acting rightly,
Or making peace
Between persons;
For God is one
Who heareth and knoweth
All things.

225. God will not
Call you to account
For thoughtlessness
In your oaths,
But for the intention
In your hearts;
And He is
Oft-forgiving
Most Forbearing.

226. For those who take
An oath for abstention
From their wives,
A waiting for four months
Is ordained;
If then they return,
God is Oft-forgiving,
Most Merciful.

227. But if their intention
Is firm for divorce,
God heareth
And knoweth all things.

228. Divorced women
Shall wait concerning themselves
For three monthly periods.
Nor is it lawful for them
To hide what God
Hath created in their wombs,
If they have faith
In God and the Last Day.
And their husbands
Have the better right
To take them back
In that period, if
They wish for reconciliation.
And women shall have rights
Similar to the rights
Against them, according
To what is equitable;
But men have a degree
(Of advantage) over them
And God is Exalted in Power
Wise.

'Verse' 224, has a reference to many special kinds of oaths practised amongst Arabs. Some of the oaths even related to matters concerning sex. These oaths caused misunderstanding, alienation, division or separation between husbands and wives. 'Verses' 224 to 227 are pointed references to such oaths. Through 'verse' 224, the Quran ordains in general terms, that no one should make an oath - in the name of God, as an excuse for not doing the right thing, or for refraining from doing something which will bring people together. The text relied upon suggests, that 'verses' 225 to 227 should be read together with 'verse' 224. 'Verse' 224 is general and leads up to the next three 'verses'. These 'verses' are in the context of existing customs, which were very unfair to married women. Illustratively, it was sought to be explained, that in a fit of anger or caprice, sometimes a husband would take an oath - in the name of God, not to approach his wife. This act of the husband,

it was sought to be explained, deprives the wife of her conjugal rights, and yet, keeps her tied to the husband indefinitely, inasmuch as, she has no right to remarry. Even if this act of the husband, was protested by the wife, the explanation provided is, that the husband was bound - by the oath in the name of God. Through the above verses, the Quran disapproves thoughtless oaths, and at the same time, insists on a proper solemn and conscious/purposeful oath, being scrupulously observed. The above 'verses' caution husbands to understand, that an oath in the name of God was not a valid excuse - since God looks at intention, and not mere thoughtless words. It is in these circumstances, that 'verses' 226 and 227 postulate, that the husband and wife in a difficult relationship, are allowed a period of four months, to determine whether an adjustment is possible. Even though reconciliation is recommended, but if the couple is against reconciliation, the Quran ordains, that it is unfair to keep the wife tied to her husband indefinitely. The Quran accordingly suggests, that in such a situation, divorce is the only fair and equitable course. All the same it is recognized, that divorce is the most hateful action, in the sight of the God.

(iii) 'Verses' 229 to 231 contained in 'section' 29 of 'sura' II, and 'verses' 232 and 233 included in 'section' 30 of 'sura' II, as also 'verse' 237 contained in 'section' 31 in 'sura' II, are relevant on the issue of divorce.

The same are extracted below:

229. A divorce is only
Permissible twice: after that,
The parties should either hold
Together on equitable terms,
Or separate with kindness.
It is not lawful for you,
(Men), to take back
Any of your gifts (from your wives),
Except when both parties
Fear that they would be
Unable to keep the limits
Ordained by God.
If ye (judges) do indeed
Fear that they would be
Unable to keep the limits
Ordained by God,
There is no blame on either
Of them if she give
Something for her freedom.
These are the limits
Ordained by God;
So do not transgress them
If any do transgress
The limits ordained by God,
Such persons wrong
(Themselves as well as others)

230. So if a husband
Divorces his wife (irrevocably),
He cannot, after that,
Re-marry her until
After she has married
Another husband and
He has divorced her.
In that case there is
No blame on either of them
If they re-unite, provided
They feel that they
Can keep the limits
Ordained by God.
Such are the limits
Ordained by God,
Which He makes plain
To those who understand.

231. When ye divorce
Women, and they fulfil
The term of their ('Iddat')
Either taken them back
On equitable terms
Or set them free
On equitable terms;
But do not take them back
To injure them, (or) to take
Undue advantage;
If any one does that,
He wrongs his own soul.
Do not treat God's Signs
As a jest,
But solemnly rehearse
God's favours on you,
And the fact that He
Send down to you
The Book
And Wisdom,
For your instruction.
And fear God,
And know that God
Is well acquainted
With all things.

A perusal of the aforesaid 'verses' reveals, that divorce for the reason of mutual incompatibility is allowed. There is however a recorded word of caution - that the parties could act in haste and then

repent, and thereafter again reunite, and yet again, separate. To prevent erratic and fitful repeated separations and reunions, a limit of two divorces is prescribed. In other words, reconciliation after two divorces is allowed. After the second divorce, the parties must definitely make up their mind, either to dissolve their ties permanently, or to live together honourably, in mutual love and forbearance - to hold together on equitable terms. However, if separation is inevitable even on reunion after the second divorce, easy reunion is not permitted. The husband and wife are forbidden from casting aspersions on one another. They are mandated to recognize, what is right and honourable, on a collective consideration of all circumstances. After the divorce, a husband cannot seek the return of gifts or properties, he may have given to his wife. Such retention by the wife is permitted, only in recognition that the wife is economically weaker. An exception has been carved out in the second part of 'verse' 229, that in situations where the freedom of the wife could suffer on account of the husband refusing to dissolve the marriage, and perhaps, also treat her with cruelty. It is permissible for the wife, in such a situation, to extend some material consideration to the husband. Separation of this kind, at the instance of the wife, is called 'khula'. 'Verse' 230 is in continuation of the first part of 'verse' 229. The instant 'verse' recognizes the permissibility of reunion after two divorces. When divorce is pronounced for the third time, between the same parties, it becomes irreversible, until the woman marries some other man and he divorces her (or is otherwise released from the matrimonial tie, on account of his death). The Quranic expectation in 'verse' 230, requires the husband to restrain himself, from dissolving the matrimonial tie, on a sudden gust of temper or anger. 'Verse' 231 provides, that a man who takes back his wife after two divorces, must not put pressure on her, to prejudice her rights in any way. Remarriage must only be on equitable terms, whereupon, the husband and wife are expected to lead a clean and honourable life, respecting each other's personalities. The Quranic message is, that the husband should either take back the wife on equitable terms, or should set her free with kindness.

(iv) The 'verses' referred to above need to be understood along with 'verses' 232 and 233, contained in 'section' 20 of 'sura' II, of the Quran. The above two 'verses' are extracted below:

232. When ye divorce
Women, and they fulfil
The term of their ('Iddat'),
Do not prevent them
From marrying
Their (former) husbands,
If they mutually agree
On equitable terms.
This instruction
Is for all amongst you,
Who believe in God
And the Last Day.
That is (the course Making for) more virtue
And purity amongst you,
And God knows,
And ye know not.

233. The mothers shall give suck
To their offspring
For two whole years,
If the father desires
To complete the term.
But he shall bear the cost
Of their food and clothing
On equitable terms.
No soul shall have
A burden laid on it
Greater than it can bear.
No mother shall be
Treated unfairly
On account of his child,
An heir shall be chargeable
In the same way.
If they both decide
On weaning,
By mutual consent,
And after due consultation,
There is no blame on them.
If ye decide
On a foster-mother
For your offspring,
There is no blame on you,
Provided ye pay (the mother)
What ye offered,
On equitable terms.
But fear God and know
That God sees well
What ye do.

A perusal of the above 'verses' reveals, that the termination of the contract of marriage, is treated as a serious matter for family and social life. And as such, every lawful advice, which can bring back those who had lived together earlier, provided there is mutual love and they can live with each other on honourable terms, is commended. After following the above parameters, the Quran ordains, that it is not right for outsiders to prevent the reunion of the husband and wife. 'Verse' 233 is in the midst of the Regulations on divorce. It applies primarily to cases of divorce, where some definite Rule is necessary, as the father and mother would not, on account of divorce, probably be on good terms, and the interest of children must be safeguarded. Since the language of 'verse' 233 is general, the edict contained therein is interpreted, as applying equally to the father and mother, inasmuch as, each must fulfil his or her part, in the fostering of children.

(v) The last relevant 'verse' in 'sura' II of the Quran, is contained in 'section' 31, namely, 'verse' 237. The same is reproduced below:

237. And if ye divorce them
Before consummation,
But after the fixation
Of a dower for them,
Then the half of the dower
(Is due to them), unless
They remit it
Or (the man's half) is remitted
By him in whose hands
Is the marriage tie;
And the remission
(Of the man's half)
Is the nearest to righteousness.
And do not forget
Liberality between yourselves.
For God sees well
All that ye do.

In case of divorce before consummation of marriage, it is recognized, that only half the dower fixed needed to be refunded to the wife. It is however open to the wife, to remit the half due to her. And likewise, it is open to the husband to remit the half which he is entitled to deduct (and thus pay the whole dower amount).

19. Reference is also necessary to 'verses' 34 and 35, contained in 'section' 6, as well as, 'verse' 128 contained in 'section' 19, of 'sura' IV. All the above verses are extracted below:

34. Men are the protectors
And maintainers of women,
Because God has given
The one more (strength)
Than the other, and because
They support them
From their means.
Therefore the righteous women
Are devoutly obedient, and guard
In (the husband's) absence
What God would have them guard.
As to those women
On whose part ye fear
Disloyalty and ill-conduct,
Admonish them (first),
(Next), refuse to share their beds,
(And last) beat them (lightly);
But if they return to obedience,
Seek not against them
Means (of annoyance):

For God is Most High,
Great (above you all).

35. If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things."
Section 19, Sura IV

"128. If a wife fears
Cruelty or desertion
On her husband's part,
There is no blame on them,
If they arrange
An amicable settlement
Between themselves;
And such settlement is best;
Even though men's souls
Are swayed by greed.
But if ye do good
And practice self-restraint
God is well-acquainted
With all that ye do.

The Quran declares men as protectors, and casts a duty on them to maintain their women. In order to be entitled to the husband's support, the Quran ordains the women to be righteous, and to be devoutly obedient to the husband, even in his absence. 'Verse' 34, extends to the husband the right to admonish his wife who is either disloyal, or ill-conducts herself. Such admonition can be by refusing to share her bed, and as a last resort, even to beat her lightly. Thereafter, if the woman does not return to obedience, the husband is advised not to use means of annoyance against her. 'Verse' 35, sets out the course of settlement of family disputes. It postulates the appointment of two arbitrators - one representing the family of the husband, and the other the family of the wife. The arbitrators are mandated to explore the possibility of reconciliation. In case reconciliation is not possible, dissolution is advised, without publicity or mud-throwing or by resorting to trickery or deception. 'Verse' 128 provides for divorce at the instance of the wife - 'khula'. It provides for a situation where, the wife fears cruelty or desertion on her husband's part. In such a situation, her desire to seek an amicable settlement, cannot be treated as an aspersion on her. The couple must then settle to separate, on most amicable terms. The husband is cautioned not to be greedy. He is required to protect the wife's economic interest. In case of disputation between the couple, for

economic reasons, the Quran ordains, that sanctity of the marriage itself, is far greater than any economic interest, and accordingly suggests, that if separation can be prevented by providing some economic consideration to the wife, it is better for the husband to make such a concession, than to endanger the future of the wife and children.

20. The last relevant 'verses' - 1 and 2, are contained in 'section' 1 of 'sura' - LXV. The same are reproduced below:

1. Prophet! When ye
Do divorce women,
Divorce them at their
Prescribed periods,
And count (accurately)
Their prescribed periods:
And fear God your Lord:
And turn them not out
Of their houses, nor shall
They (themselves) leave,
Except in case they are
Guilty of some open lewdness,
Those are limits
Set by God: and any
Who transgresses the limits
Of God, does verily
Wrong his (own) soul:
Thou knowest not if
Perchance God will
Bring about thereafter
Some new situation.

2. Thus when they fulfil
Their term appointed,
Either take them back
On equitable terms
Or part with them
On equitable terms;
And take for witness
Two persons from among you,
Endued with justice,
And establish the evidence
(As) before God. Such
Is the admonition given
To him who believes
In God and the Last Day.
And for those who fear

God, He (ever) prepares
A way out,

'Verse' 1 above, it may be noticed, has reference to the Prophet Muhammad himself. It is addressed in his capacity as teacher and representative of the community. It endorses the view, that of all things permitted, divorce is the most hateful in the sight of the God. Even though, the 'verse' provides for divorce, it proscribes the husband from turning out his wife/wives from his house. It also forbids the wife/wives, to leave the house of their husband, except when they are guilty. Those who transgress the above limitation, are cautioned, that they are committing wrong to their own souls. Reconciliation is suggested, whenever it is possible. It is recommended at every stage. The first serious difference between the spouses is first to be submitted to a family counsel, on which both sides are to be represented. The 'verse' requires the divorce to be pronounced, only after the period of prohibitory waiting. 'Dower' has to be paid, and due provisions have to be made, by the husband, for many things on equitable terms. On each aspect, there is to be consideration. Reconciliation is recommended till the last moment. The message contained in 'verse' 2 is, that everything should be done fairly, and all interests should be safeguarded. It is ordained, that the parties should remember, that such matters affect the most intimate aspect of their lives, and therefore, have a bearing even in the spiritual kingdom. It is therefore, that the 'verses' extracted above, impress on the parties, to fear God, and ensure that their determination is just and true.

21. The understanding of the 'verses' of the Quran, is imperative in this case, because the Petitioner and those supporting the Petitioner's case contend *inter alia*, that 'talaq-e-biddat', is not in conformity with the unambiguous edicts of the Quran, and therefore, cannot be considered as valid constituents of Muslim 'personal law'.

Part-4.

Legislation in India, in the field of Muslim 'personal law':

22. It would be relevant to record, that 'personal law' dealing with the affairs of those professing the Muslim religion, was also regulated by custom or usage. It was also regulated by 'Shariat' - the Muslim 'personal law'. The status of Muslim women under customs and usages adopted by Muslims, were considered to be oppressive towards women. Prior to the independence of India, Muslim women organisations condemned customary law, as it adversely affected their rights, under the 'Shariat'. Muslim women claimed, that the Muslim 'personal law' be made applicable to them. It is therefore, that the Muslim Personal Law (Sharait) Application Act, 1937 (hereinafter referred to, as the Shariat Act), was passed. It is essential to understand, the background which resulted in the enactment of the Shariat Act. The same is recorded in the statement of objects and reasons, which is reproduced below:

For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer inasmuch as it has not any sound basis to stand upon and is very much liable to frequent

changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (*Shariat*) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.

23. Sections 2, 3 and 5 of the Shariat Act are relevant and are extracted hereunder:

2. Application of personal law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the Rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

3. Power to make a declaration.- (1) Any person who satisfies the prescribed authority-

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of Section 11 of the Contract Act, 1872 (9 of 1872), and

(c) that he is a resident of the territories to which this Act extends, may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of the provisions of this section, and thereafter the provisions of Section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under Sub-section (1), the person desiring to make the same may appeal to such officer as the Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the Appellant is entitled to make the declaration, order the prescribed authority to accept the same.

xxx xxx xxx

5. Dissolution of marriage by Court in certain circumstances.-The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim Personal Law (Shariat).

A close examination of Section 2, extracted above, leaves no room for any doubt, that custom and usage, as it existed amongst Muslims, were sought to be expressly done away with, to the extent the same were contrary to Muslim 'personal law'. Section 2 also mandated, that Muslim 'personal law' (Shariat) would be exclusively adopted as "... the Rule of decision ..." in matters of intestate succession, special property of females, including all questions pertaining to "... personal property inherited or obtained under contract or gift or any other provision of 'personal law', marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, gifts, trusts and trust properties, and wakfs ...". Section 3 added to the above list, "... adoption, wills and legacies ...", subject to the declaration expressed in Section 3.

24. It is relevant to highlight herein, that Under Section 5 of the Shariat Act provided, that a Muslim woman could seek dissolution of her marriage, on the grounds recognized under the Muslim 'personal law'. It would also be relevant to highlight, that Section 5 of the Shariat Act was deleted, and replaced by the Dissolution of Muslim Marriages Act, 1939.

25. In the above context, it would be relevant to mention, that there was no provision in the Hanafi Code, of Muslim law for a married Muslim woman, to seek dissolution of marriage, as of right. Accordingly, Hanafi jurists had laid down, that in cases in which the application of Hanafi law caused hardship, it was permissible to apply the principles of the Maliki, Shafii or Hanbali law. This position was duly noticed in the introduction to the 1939 Act, as well as, in the statement of its objects and reasons. Be that as it may, the alternatives suggested by the Hanafi jurists were not being applied by courts. Accordingly, in order to crystalise the grounds of dissolution of marriage, by a Muslim woman, the 1939 Act, was enacted. The statement of objects and reasons of the above enactment is relevant, and is accordingly extracted hereunder:

There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances.

The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the "Maliki, Shafii or Hambali Law".

Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in Clause 3, Part A of this Bill (now see Section 2 of the Act), a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called "Heelatun Najeza" published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki Law which under the circumstances prevailing in India may be applied to such cases. This has been approved by a large number of Ulemas who have put their seals of approval on the book.

As the Courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the above mentioned principle is called for in order to relieve the sufferings of countless Muslim women.

One more point remains in connection with the dissolution of marriages. It is this. The Courts in British India have held in a number of cases that the apostasy of a married Muslim woman ipso facto dissolves her marriage. This view has been repeatedly challenged at the bar, but the Courts continue to stick to precedents created by rulings based on an erroneous view of the Muslim Law. The Ulemas have issued Fatwas supporting non-dissolution of marriage by reason of wife's apostasy. The Muslim community has, again and again, given expression to its supreme dissatisfaction with the view held by the Courts. Any number of articles have been appearing in the press demanding legislation to rectify the mistake committed by the Courts; hence Clause 5 (now see Section 4) is proposed to be incorporated in this Bill.

Thus, by this Bill the whole Law relating to dissolution of marriages is brought at one place and consolidated in the hope that it would supply a very long felt want of the Muslim Community in India".

26. The Dissolution of Muslim Marriages Act, 1939 provided, the grounds on which a Muslim woman, could seek dissolution of marriage. Section 2 of the enactment is reproduced below:

2. Grounds for decree for dissolution of marriage.--A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say,--

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that--

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

27. We may record here, that the Dissolution of Muslim Marriages Act, 1939, is irrelevant for the present controversy on account of the fact, that the issue in hand does not pertain to the dissolution of marriage at the behest of a Muslim wife (but pertains to the dissolution of marriage, at the behest of a Muslim husband). The provisions of the instant enactment are relevant, to understand the submissions advanced by learned Counsel, representing the Petitioners, as also the Respondents, based on their individual perspectives.

Part-5.

Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States:

28. 'Muslim Law in India and Abroad', by Tahir Mahmood and Saif Mahmood (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012 edition), records the following position about the abrogation of the practice of 'talaq-e-biddat' as a means of divorce, through statutory enactments, the world over. The countries which have abolished 'talaq-e-biddat' have been divided into Arab States, Southeast Asian States, and Subcontinental States. We have maintained the above classifications, in order to establish their factual positions. Firstly, to demonstrate that the practice

was prevalent across the globe in States having sizeable Muslim populations. And secondly, that the practice has been done away with, by way of legislation, in the countries referred to below.

A. Laws of Arab States

(i) Algeria: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Family Law 1984

Law No. 84-11 of 1984 as amended in 2005

Article 49. Divorce cannot be established except by a judgment of the court, preceded by an attempt at reconciliation for a period not exceeding three months.

(ii) Egypt: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Law of Personal Status 1929

Law 25 of 1929 as amended by Law 100 of 1985

Article 1. A Talaq pronounced under the effect of intoxication or compulsion shall not be effective.

Article 2. A conditional Talaq which is not meant to take effect immediately shall have no effect if it is used as an inducement to do some act or to abstain from it.

Article 3. A Talaq accompanied by a number, expressly or impliedly, shall not be effective except as a single revocable divorce.

Article 4. Symbolic expressions of talaq, i.e., words which may or may not bear the implication of a divorce, shall not effect a divorce unless the husband actually intended it.

(iii) Iraq: Is a theocratic State, which declares Islam to be its official religion. The majority of Iraq's Muslims is Shias. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1959

Law 188 of 1959 as amended by Law 90 of 1987

Article 35. No divorce shall be effective when pronounced by the persons mentioned below:

(a) one who is intoxicated, insane or imbecile, under duress, or not in his senses due to anger, sudden calamity, old age or sickness;

(b) a person in death-sickness or in a condition which in all probabilities is fatal and of which he actually dies, survived by his wife.

xxx xxx xxx

Article 37. (1) Where a Talaq is coupled with a number, express or implied, not more than one divorce shall take place.

(2) If a woman is divorced thrice on three separate occasions by her husband, no revocation or remarriage would be permissible after that.

xxx xxx xxx

Article 39. (1) When a person intends to divorce his wife, he shall institute a suit in the Court of Personal Status requesting that it be effected and that an order be issued therefor. If a person cannot so approach the court, registration of the divorce in the court during the period of Iddat shall be binding on him.

(2) The certificate of marriage shall remain valid till it is cancelled by the court.

(iv) Jordan: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1976

Law 61 of 1976

Article 88. (1) Talaq shall not be effective if pronounced under intoxication, bewilderment, compulsion, mental disorder, depression or effect of sleep.

(2) 'Bewildered' is one who has lost senses due to anger or provocation, etc., and cannot understand what he is saying.

xxx xxx xxx

Article 90. A divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce.

xxx xxx xxx

Article 94. Every divorce shall be revocable except the final third, one before consummation and one with consideration.

xxx xxx xxx

Article 98. Where an irrevocable Talaq was pronounced once or twice, renewal of marriage with the consent of parties is not prohibited.

(v) Kuwait: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Personal Status 1984

Law 51 of 1984

Article 102. Talaq may be effected by major and sane men acting by their free will and understanding the implications of their action. Therefore Talaq shall not take effect if the husband is mentally handicapped, imbecile, under coercion, mistake, intoxication, fear or high anger affecting his speech and action.

xxx xxx xxx

Article 109. If a Talaq is pronounced with a number (two, three) by words, signs or writing, only one Talaq shall take effect.

(vi) Lebanon: Is a secular State. Muslims constitute its majority, which is estimated to be 54% (27% Shia, and 27% Sunni). On the issue in hand, it has enacted the following legislation:

Family Rights Law 1962

Law of 16 July 1962

Article 104. A divorce by a drunk person shall have no effect.

Article 105. A divorce pronounced under coercion shall have no effect.

(vii) Libya: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Family Law 1984

Law 10 of 1984 as amended by Law 15 of 1984

Article 28. Divorce is termination of the marriage bond. No divorce will become effective in any case except by a decree of a competent court and subject to the provision of Article 30.

Article 29. Divorce is of two kinds - revocable and irrevocable. Revocable divorce does not terminate the marriage till the expiry of Iddat.

Irrevocable divorce terminates the marriage forthwith.

Article 30. All divorces shall be revocable except a third-time divorce, one before consummation of marriage, one for a consideration, and those specified in this law to be irrevocable.

Article 31. A divorce shall be effective only if pronounced in clear words showing intention to dissolve the marriage. Symbolic or metaphorical expression will not dissolve the marriage.

Article 32. A divorce pronounced by a minor or insane person, or if pronounced under coercion, or with no clear intention to dissolve the marriage, shall have no legal effect.

Article 33. (1) A divorce meant to be effect on some action or omission of the wife shall have no legal effect.

(2) A divorce given with a view to binding the wife to an oath or restrain her from doing something shall have no legal effect.

(3) A divorce to which a number is attached, by express words or a gesture, shall effect only a single revocable divorce, except when it is pronounced for the third time.

xxx xxx xxx

Article 35. The marriage may be dissolved by mutual consent of the parties. Such a divorce must be registered with the court. If the parties cannot agree on the terms of such a divorce, they shall approach the court and it will appoint arbitrators to settle the matter or reconcile them.

xxx xxx xxx

Article 47. A divorce must be pronounced in a court and in the presence of the other party or his or her representative. The court shall before giving effect to a divorce exhaust all possibilities of reconciliation.

(viii) Morocco: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 2004

Law 70.03 of 2004

Article 79. Whoever divorces his wife by Talaq must petition the court for permission to register it with the Public Notaries of the area where the matrimonial home is situate, or where the wife resides, or where the marriage took place.

Article 80. The petition will mention the identity of spouses, their professions, addresses, number of children, if any, with their age, health condition and educational status. It must be supported by a copy of the marriage agreement and a document stating the husband's social status and financial obligations.

Article 81. The court shall summon the spouses and attempt reconciliation. If the husband deliberately abstains, this will be deemed to be withdrawal of the petition. If the wife abstains, the court will notify her that if she does not present herself the petition may be decided in her absence. If the husband has fraudulently given a wrong address for the wife, he may be prosecuted at her instance.

Article 82. The court will hear the parties and their witnesses in camera and take all possible steps to reconcile them, including appointment of arbitrators or a family reconciliation council, and if there are children such efforts shall be exhausted within thirty days. If reconciliation takes place, a report will be filed with the court.

Article 83. If reconciliation attempts fail, the court shall fix an amount to be deposited by the husband in the court within thirty days towards payment of the wife's post-divorce dues and maintenance of children.

xxx xxx xxx

Article 90. No divorce is permissible for a person who is not in his senses or is under coercion or provocation.

xxx xxx xxx

Article 92. Multiple expressions of divorce, oral or written, shall have the effect of a single divorce only.

xxx xxx xxx

Article 123. Every divorce pronounced by the husband shall be revocable, except a third-time divorce, divorce before consummation of marriage, divorce by mutual consent, and divorce by Khula or Talaq-e-Tafweez.

(ix) Sudan: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law on Talaq 1935

Judicial Proclamation No. 4 of 1935

Article 1. A divorce uttered in a state of intoxication or under duress shall be invalid and ineffective.

Article 2. A contingent divorce which is not meant to be effective immediately and is used as an inducement or threat shall have not effect.

Article 3. A formula of divorce coupled with a number, expressly or impliedly, shall effect only one divorce.

Article 4. Metaphorical expressions used for a divorce shall have the effect of dissolving the marriage only if the husband actually meant a divorce.

(X) Syria: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1953

Law 59 of 1953 as amended by Law 34 of 1975

Article 89. No divorce shall take place when the man is drunk, out of his senses, or under duress. A person is out of his senses when due to anger, etc. he does not appreciate what he says.

Article 90. A conditional divorce shall have no effect if not actually intended and used only as an inducement to do or abstain from doing something or as an oath or persuasion.

xxx xxx xxx

Article 92. If a divorce is coupled with a number, expressly or impliedly, not more than one divorce shall take place.

xxx xxx xxx

Article 94. Every divorce shall be revocable except a third-time divorce, one before consummation, a divorce with a consideration, and a divorce stated in this Code to be irrevocable.

xxx xxx xxx

Article 117. Where a person divorces his wife the court may, if satisfied that he has arbitrarily done so without any reasonable cause and that as a result of the divorce the wife shall suffer damage and become destitute, give a decision, with due regard to the husband's financial condition and the amount of wife's suffering, that he should pay her compensation not exceeding three years' maintenance, in addition to maintenance payable during the period of Iddat. It may be directed to be paid either in a lump sum or in instalments as the circumstances of a case may require.

(xi) Tunisia: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1956

Law 13-8 of 1956 as amended by Law 7 of 1981

Article 31. (1) A decree of divorce shall be given: (i) with the mutual consent of the parties; or (ii) at the instance of either party on the ground of injury; or (iii) if the husband insists on divorce or the wife demands it. The party causing material or mental injury by the fact of divorce under Clauses (ii) and (iii) shall be directed to indemnify the aggrieved spouse.

(2) As regards the woman to be indemnified for material injury in terms of money, the same shall be paid to her after the expiry of Iddat and may be in the form of retention of the matrimonial home. This indemnity will be subject to revision, increase or decrease in accordance with the changes in the circumstances of the divorced wife until she is alive or until she changes her marital status by marrying again. If the former husband dies, this indemnity will be a charge on his estate and will have to be met by his heirs if they consent to it and will be decided by the court if they disagree. They may pay her in a lump sum within one year from the former husband's death the indemnity claimable by her.

Article 32 (1) No divorce shall be decreed except after the court has made an overall inquiry into the causes of rift and failed to effect reconciliation.

(2) Where no reconciliation is possible the court shall provide, even if not asked to, for all important matters relating to the residence of the spouses, maintenance and custody of children and meeting the children, except when the parties specifically agree to forgo all or any of these rights. The court shall fix the maintenance on the basis of all those facts which it comes to know while attempting reconciliation. All important matters shall be provided for in the decree, which shall be non-appealable but can be reviewed for making additional provisions.

(3) The court of first instance shall pass orders in the matters of divorce and all concerning matters including the compensation money to which the divorced wife may be entitled after the expiry of Iddat. The portions of the decree relating to custody, maintenance, compensation, residence and right to visit children shall be executed immediately.

(xii) United Arab Emirates: Is a theocratic State, as the Federal Constitution declares Islam to be the official religion. The Constitution also provides for freedom of religion, in accordance with established customs. Muslims of the Shia sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law of Personal Status 2005

Federal Law No. 28 of 2005

Article 140(1). If a husband divorces his wife after consummation of a valid marriage by his unilateral action and without any move for divorce from her side, she will be entitled to compensation besides maintenance for Iddat. The amount of compensation will be decided with due regard to the means of the husband and the hardship suffered by the wife, but it shall not exceed the amount of one year's maintenance payable in law to a woman of her status.

(2) The Kazi may decree the compensation, to be paid as a lump sum or in instalments, according to the husband's ability to pay.

(xiii) Yemen: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Decree on Personal Status 1992

Decree 20 of 1992

Article 61. A divorce shall not be effective if pronounced by a man who is drunk, or has lost his senses, or has no power of discernment, if this is shown by his condition and action.

xxx xxx xxx

Article 64. A divorce to which a number is attached, whatever be the number, will effect only a single revocable divorce.

Article 65. The words saying that if the wife did or failed to do something she will stand divorced will not effect a divorce.

Article 66. The words that if an oath or vow is broken it will effect a divorce will not dissolve the marriage even if the said oath or vow is broken.

Article 67. A divorce can be revoked by the husband during the Iddat period. After the expiry of Iddat, a direct remarriage between them will be lawful.

xxx xxx xxx

Article 71. If a man arbitrarily divorces his wife without any reasonable ground and it causes hardship to her, the court may grant her compensation payable by the husband not exceeding maintenance for one year in accordance with her status. The court may decide if the compensation will be paid as a lump sum or in instalments.

B. Laws of Southeast Asian States

(i) Indonesia: The Constitution of Indonesia guarantees freedom of religion among Indonesians. However, the Government recognizes only six official religions - Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

(a) Law of Marriage 1974

Law 1 of 1974

Article 38. A divorce shall be effected only in the court and the court shall not permit a divorce before attempting reconciliation between the parties. Divorce shall be permissible only for sufficient reasons indicating breakdown of marriage.

xxx xxx xxx

Article 41. In the event of a divorce both the parents shall continue to be responsible for the maintenance of their children. As regards custody of children, in case of a dispute between them the court shall take a decision. Expenses of maintenance and education shall be primarily the

father's liability, but if he is unable to discharge this liability the court may transfer it to the mother. The court may also direct the former husband to pay alimony to the divorced wife.

(b) Marriage Regulations 1975

Regulation 9 of 1975

Article 14. A man married under Islamic law wanting to divorce his wife shall by a letter notify his intention to the District Court seeking proceedings for that purpose.

Article 15. On receiving a letter the court shall, within thirty days, summon the parties and gather from them all relevant facts.

Article 16. If the court is satisfied of the existence of any of the grounds mentioned in Article 19 below and is convinced that no reconciliation between the parties is possible it will allow a divorce.

Article 17. Immediately after allowing a divorce as laid down in Article 16 above the court shall issue a certificate of divorce and send it to the Registrar for registration of the divorce.

xxx xxx xxx

Article 19. A divorce may be allowed on the petition of either party if the other party:

(a) has committed adultery or become addict to alcohol, drugs, gambling or another serious vice;

(b) has deserted the aggrieved party for two years or more without any legal ground and against the said party's will;

(c) has been imprisoned for at least five years;

(d) has treated the aggrieved party with cruelty of an injurious nature;

(e) has been suffering from a physical deformity affecting conjugal duties, or where relations between the spouses have become too much strained making reconciliation impossible.

(ii) Malaysia: Under the Constitution of Malaysia, Islam is the official religion of the country, but other religions are permitted to be practiced in peace and harmony. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Islamic Family Law Act 1984

Act 304 of 1984

Article 47. (1) A husband or a wife who desires a divorce shall present an application for divorce to the court in the prescribed form accompanied by a statutory declaration containing (a) particulars of the marriage and the name, ages and sex of the children, if any, of the marriage; (b) particulars

of the facts giving the court jurisdiction Under Section 45; (c) particulars of any previous matrimonial proceedings between the parties, including the place of the proceedings; (d) a statement as to the reasons for desiring divorce; (e) a statement as to whether any, and if so, what steps have been taken to effect reconciliation; (f) the terms of any agreement regarding maintenance and habitation of the wife and the children of the marriage, if any, and the division of any assets acquired through the joint effort of the parties, if any, or where no such agreement has been reached, the applicant's proposals regarding those matters; and (g) particulars of the order sought.

(2) Upon receiving an application for divorce, the court shall cause summons to be served on the other party together with a copy of the application and the statutory declaration made by the applicant, and the summons shall direct the other party to appear before the court so as to enable it to inquire whether or not the other party consents to the divorce.

(3) If the other party consents to the divorce and the court is satisfied after due inquiry and investigation that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one Talaq before the court.

(4) The court shall record the fact of the pronouncement of one Talaq and shall send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(5) Where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall as soon as possible appoint a Conciliatory Committee consisting of a religious officer as Chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the Committee.

(6) In appointing the two persons under Sub-section (5) the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.

(7) The court may give directions to the Conciliatory Committee as to the conduct of the conciliation and it shall conduct it in accordance with such directions.

(8) If the Committee is unable to agree or if the court is not satisfied with its conduct of the conciliation, the court may remove the Committee and appoint another Committee in its place.

(9) The Committee shall endeavour to effect reconciliation within a period of six months from the date of its being constituted or such further period as may be allowed by the court.

(10) The Committee shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it thinks fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(11) If the Conciliatory Committee is unable to effect reconciliation and is unable to persuade the parties to resume their conjugal relationship, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody

of the minor children of the marriage, if any, regarding division of property and other matters related to the marriage.

(12) No advocate and solicitor shall appear or act for any party in any proceeding before a Conciliatory Committee and no party shall be represented by any person other than a member of his or her family without the leave of the Conciliatory Committee.

(13) Where the Committee reports to the court that reconciliation has been effected and the parties have resumed their conjugal relationship, the court shall dismiss the application for divorce.

(14) Where the Committee submits to the court a certificate that it is unable to effect reconciliation and to persuade the parties to resume the conjugal relationship, the court shall advise the husband to pronounce one Talaq before the court, and where the court is unable to procure the presence of the husband before the court to pronounce one Talaq, or where the husband refuses to pronounce one Talaq, the court shall refer the case to the Hakams [arbitrators] for action according to Section 48.

(15) The requirement of Sub-section (5) as to reference to a Conciliatory Committee shall not apply in any case (a) where the applicant alleges that he or she has been deserted by an does not know the whereabouts of the other party; (b) where the other party is residing outside West Malaysia and it is unlikely that he or she will be within the jurisdiction of the court within six months after the date of the application; (c) where the other party is imprisoned for a term of three years or more; (d) where the applicant alleges that the other party is suffering from incurable mental illness; or (e) where the court is satisfied that there are exceptional circumstances which make reference to a Conciliatory Committee impracticable.

(16) Save as provided in Sub-section (17), a Talaq pronounced by the husband or an order made by the court shall not be effective until the expiry of the Iddat.

(17) If the wife is pregnant at the time the Talaq is pronounced or the order is made, the Talaq or the order shall not be effective until the pregnancy ends.

(iii) Philippines: Is a secular State. Christians constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Muslim Personal Law 1977

Decree No. 1083 of 1977

Article 46. (1) A divorce by Talaq may be effected by the husband in a single repudiation of his wife during her Tuhr [non-menstrual period] within which he has totally abstained from carnal relations with her.

(2) Any number of repudiations made during one Tuhr [non-menstrual period] shall constitute only one repudiation and shall become irrevocable after the expiration of the prescribed Iddat.

(3) A husband who repudiates his wife, either for the first or second time, shall have the right to take her back within the Iddat period by resumption of cohabitation without need of a new contract of marriage. Should he fail to do so, the repudiation shall become irrevocable.

xxx xxx xxx

Article 85. Within seven days after the revocation of a divorce the husband shall, with the wife's consent, send a statement thereof to the Circuit Registrar in whose records the divorce was previously entered.

xxx xxx xxx

Article 161. (1) A Muslim male who has pronounced a Talaq shall, without delay, file with the Clerk of the Sharia Circuit Court of the place where his family resides a written notice of such fact and the circumstances attending thereto, after having served a copy to the wife concerned. The Talaq pronounced shall not become irrevocable until after the expiration of the prescribed Iddat.

(2) Within seven days from receipt of notice the Clerk of the Court shall require each of the parties to nominate a representative. The representatives shall be appointed by the court to constitute, with the Clerk of the Court as Chairman, an Agama [religious scholars] Arbitration Council which shall try and submit to the court a report on the result of arbitration on the basis of which, and such other evidence as may be allowed, the court will pass an order.

(3) The provisions of this Article will be observed if the wife exercises right to Talaq-e-Tafweez.

xxx xxx xxx

Article 183. A person who fails to comply with the requirements of Article 85, 161 and 162 of this Code shall be penalized by imprisonment or a fine of two hundred to two thousand Pesos, or both.

C. Laws of Sub-continental States

(i) Pakistan & Bangladesh: Are both theocratic States, wherein Islam is the official religion. In both countries Muslims of the Sunni sect constitute the majority. On the issue in hand, it has the following legislation in place:

Muslim Family Laws Ordinance 1961

Ordinance VIII of 1961 amended in Bangladesh by Ordinance 114 of 1985

(Bangladesh changes noted below relevant provisions)

Section 7. (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provision of Sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

[Bangladesh: ten thousand taka]

(3) Save as provided in Sub-section (5), a Talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under Sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Sub-section (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period mentioned in Sub-section (3) or of pregnancy, whichever is later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by Talaq effective under this Section from re-marrying the same husband without any intervening marriage with a third person, unless such termination is for the third time so effective.

(ii) Sri Lanka: Is a secular State. Buddhists constitute its majority. On the issue in hand, it has the following legislation in place:

Muslim Marriage and Divorce Act, 1951 Act 6 of 1951 as amended by Act 40 of 2006

Section 17(4) Save as otherwise hereinafter expressly provided, every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of the Nikah ceremony connected therewith.

(5) In the case of each such marriage, the duty of causing it to be registered is hereby imposed upon the following persons concerned in the marriage; (a) the bridegroom, (b) the guardian of the bride, and (c) the person who conducted the Nikah ceremony connected with the marriage. Section 27. Where a husband desires to divorce his wife the procedure laid down in Schedule II shall be followed.

(2) Where a wife desires to effect a divorce from her husband on any ground not referred to in Sub-section (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Schedule III shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure.

29. 'Talaq-e-biddat' is effective, the very moment it is pronounced. It is irrevocable when it is pronounced.

Part-6.

Judicial pronouncements, on the subject of 'talaq-e-biddat':

30. Rashid Ahmad v. Anisa Khatun MANU/PR/0074/1931 : AIR 1932 PC 25.

(i) The facts: The primary issue that came to be adjudicated in the above case, pertained to the validity of 'talaq-e-biddat' pronounced by Ghiyas-ud-din, a Sunni Mahomedan of the Hanafi school, to his wife Anisa Khatun - Respondent No. 1. The marriage of the Respondent with Ghiyas-ud-din had taken place on 28.08.1905. Ghiyas-ud-din divorced her on or about 13.09.1905. Ghiyas-ud-din pronounced triple talaq, in the presence of witnesses, though in the absence of his wife - Anisa Khatun. Respondent No. 1 - Anisa Khatun received Rs. 1,000 in payment of 'dower' on the same day, which was confirmed by a registered receipt. Thereafter, Ghiyas-ud-din executed a 'talaqnama' (decree of divorce) dated 17.09.1905, which narrates the divorce. The 'talaqnama' is alleged to have been given to Anisa Khatun - Respondent No. 1.

(ii) The challenge: Anisa Khatun - Respondent No. 1, challenged the validity of the divorce, firstly, for the reason, that she was not present at the time of pronouncement of divorce. And secondly, that even after the aforestated pronouncement, cohabitation had continued and subsisted for a further period of fifteen years, i.e., till the death of Ghiyas-ud-din. In the interregnum, five children were born to Ghiyas-ud-din and Anisa Khatun. According to Anisa Khatun, Ghiyas-ud-din continued to treat Anisa Khatun - Respondent No. 1, as his wife, and the children born to her, as his legitimate children. It was also the case of Respondent No. 1, that the payment of Rs. 1,000, was a payment of prompt dower, and as such, not payment in continuation of the 'talaq-e-biddat', pronounced by Ghiyas-ud-din.

(iii) The consideration: While considering the validity of the 'talaq-e-biddat' pronounced on 13.09.1905, and the legitimacy of the children born to Anisa Khatun, the Privy Council held as under:

15. Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid and effective: Baillie's Digest, 2nd edn., p. 208; Ameer Ali's Mohammedan Law, 3rd edn., vol. ii, p. 518; Hamilton's Hedaya, vol. i, p. 211.

16. The Respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas-ud-din treated Anisa Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by Appellant No. 1 and Respondent pro forma No. 10, who are brothers of Ghiyas-ud-din, but once the divorce is held proved such facts could not undo its effect or confer such a status on the Respondents.

17. While admitting that, upon divorce by the triple talak, Ghiyas-ud-din could not lawfully remarry Anisa Fatima until she had married another and the latter had divorced her or died, the Respondents maintained that the acknowledgment of their legitimacy by Ghiyas-ud-din, subsequent to the divorce, raised the presumption that Anisa Fatima had in the interval married

another, who had died or divorced her, and that Ghiyas-ud-din had married her again, and that it was for the Appellants to displace that presumption. In support of this contention, they founded on certain dicta in the judgment of this Board in Habibur Rahman Chowdhury v. Altaf Ali Chowdhury MANU/PR/0011/1921 : L.R. 48 IndAp 114. Their Lordships find it difficult to regard this contention as a serious one, for these dicta directly negative it. The passage relied on, which related to indirect proof of Mahomedan marriage by acknowledgment of a son as a legitimate son is as follows: "It must not be impossible upon the face of it, i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledge or to be the father of the acknowledge, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledge or, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledge. But if none of these objections occur, then the acknowledgment has more than evidential value. It raises a presumption of marriage - a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not juris et de jure, it is, like every other presumption of fact capable of being set aside by contrary proof.

18. The legal bar to re-marriage created by the divorce in the present case would equally prevent the raising of the presumption. If the Respondents had proved the removal of that bar by proving the marriage of Anisa Fatima to another after the divorce and the death of the latter or his divorce of her prior to the birth of the children and their acknowledgment as legitimate, the Respondents might then have had the benefit of the presumption, but not otherwise.

19. Their Lordships are, therefore, of opinion that the appeal should be allowed, that the decree of the High Court should be reversed, and that the decree of the Subordinate Judge should be restored, the Appellants to have the costs of his appeal and their costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.

(iv) The conclusion: The Privy Council, upheld as valid, 'talaq-e-biddat' - triple talaq, pronounced by the husband, in the absence and without the knowledge of the wife, even though the husband and wife continued to cohabit for 15 long years thereafter, wherefrom 5 offsprings were born to them

31. Jiauddin Ahmed v. Anwara Begum MANU/GH/0033/1978 : (1981) 1 Gau. L.R. 358, (Single Judge judgment, authored by Baharul Islam, J., as he then was).

(i) The facts: The Respondent - Anwara Begum had petitioned for maintenance, Under Section 125 of the Code of Criminal Procedure. Her contention was, that she had lived with her husband for about 9 months, after her marriage. During that period, her marriage was consummated. Anwara Begum alleged, that after the above period, her husband began to torture her, and even used to beat her. It was therefore, that she was compelled to leave his company, and start living with her father, who was a day labourer. Maintenance was duly granted, by the First Class Magistrate, Tinsukia. Her husband, the Petitioner - Jiauddin Ahmed, contested the Respondent's claim for maintenance, before the Gauhati High Court, on the ground that he had divorced her, by pronouncing divorce by adopting the procedure of 'talaq-e-biddat'.

(iii) The challenge: It is in the above circumstances, that the validity of 'talaq-e-biddat', and the wife's entitlement to maintenance came to be considered by the Gauhati High Court, which examined the validity of the concept of 'talaq-e-biddat'.

(iv) The consideration: (a) The High Court placed reliance on 'verses' 128 to 130, contained in 'section' 19, of 'sura' IV, and 'verses' 229 to 232, contained in 'sections' 29 and 30 of 'sura' II, and thereupon, referred to the commentary on the above verses by scholars (Abdullah Yusuf Ali and Maulana Mohammad Ali) and the views of jurists (Ameer Ali and Fyzee), with pointed reference to 'talaq', which was narrated as under:

Islam tried to maintain the married state as far as possible, especially where children are concerned, but it is against the restriction of the liberty of men and women in such vitally important matters as love and family life. It will check hasty action as far as possible and leave the door to reconciliation open at many stages. Even after divorce a suggestion of reconciliation is made, subject to certain precautions against thoughtless action. A period of waiting (Iddat) for three monthly courses is prescribed, in order to see if the marriage conditionally dissolved is likely to result in issue. But this is not necessary where the divorced woman is a virgin. It is definitely declared that women and men shall have similar rights against each other.

Yusuf Ali has further observed:

Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with a reconciliation between) are allowed. After that the parties must unitedly make up their minds, either to dissolve their union permanently, or to live honourable lives together in mutual love and forbearance to 'hold together on equitable terms, 'neither party worrying the other nor grumbling nor evading the duties and responsibilities of marriage".

Yusuf Ali proceeds:

All the prohibitions and limits prescribed here are in the interests of good and honourable lives for both sides, and in the interests of a clean and honourable social life, without public or private scandals...

* * * *

Two divorces followed by re-union are permissible; the third time the divorce becomes irrevocable, until the woman marries some other man and he divorces her. This is to set an almost impossible condition. The lesson is: if a man loves a woman he should not allow a sudden gust of temper or anger to induce him to take hasty action...

If the man takes back his wife after two divorces, he must do so only on equitable terms, i.e. he must not put pressure on the woman to prejudice her rights in any way, and they must live clean and honourable lives, respecting each other's personalities...

The learned Commentator further observes:

The termination of a marriage bond is a most serious matter for family and social life. An every lawful device is approved which can equitably bring back those who have lived together, provided only there is mutual love and they can live on honourable terms with each other. If these conditions are fulfilled, it is no right for outsiders to prevent or hinder re-union. They may be swayed by property or other considerations.

(b) The High Court also placed reliance on 'verse' 35 contained in 'section' 6, of 'sura' IV, and again referred to the commentary on the above 'verse' (by Abdullah Yusuf Ali), who had interpreted the same as under:

An excellent plan for settling family disputes, without too much publicity or mud-throwing, or resort to the chicaneries of the law. The Latin countries recognise this plan in their legal system. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties, and would be able, with God's help, effect a real reconciliation.

Maulana Mohammad Ali has commented on the above verse thus: This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The Judge is required to appoint two arbitrators, one belonging to the wife's family and the other to the husband's. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam." The same learned author commenting on the above verse (IV: 35) in his the Religion of Islam has observed:

From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce.

Fyzee denounces talaq as "absurd and unjust". Abdur Rahim says:

I may remark that the interpretation of the law of divorce by the jurists, specially of the Hanafi School, is one flagrant instance where because of literal adherence to mere words and a certain tendency towards subtleties they have reached a result in direct antagonism to the admitted policy of the law on the subject.

12. Mohammad Ali has observed:

Divorce is thus discouraged:

If you hate them (i.e. your wives) it may be that you dislike a thing while Allah has placed abundant good in it." Remedies are also suggested to avoid divorce so long as possible:

And if you fear a breach between the two (i.e. the husband and the wife), then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them. It was due to such teachings of the Holy Quran that the Holy Prophet declared divorce to be the most hateful of all things permitted....The mentality of the Muslim is to face the difficulties of the married life along with its comforts and to avoid disturbing the disruption of the family relations as long as possible, turning to divorce only as a last resort." The learned author has further observed:

The principle of divorce spoken of in the Holy Quran and which in fact includes to a greater or less extent all causes, is the decision no longer to live together as husband and wife. In fact, marriage itself is nothing but an agreement to live together as husband and wife and when either of the parties finds him or herself unable to agree to such a life, divorce must follow. It is not, of course, meant that every disagreement between them would lead to divorce; it is only the disagreement to live any more as husband and wife...

He then refers to the condition laid down in Sura IV verse 35.

The learned author proceeds:

The 'shiqaq' or breach of the marriage agreement may also arise from the conduct of either party; for instance, if either of them misconducts himself or herself, or either of them is consistently cruel to the other, or, as may sometimes happen there is incompatibility of temperament to such an extent that they cannot live together in marital agreement.

The 'shiqaq' in these cases is more express, but still it will depend upon the parties whether they can pull on or not. Divorce must always follow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off. At first sight it may look like giving too much latitude to the parties to allow them to end the marriage contract thus, even if there is no reason except incompatibility of temperament, but this much is certain that if there is such disagreement that the husband and the wife cannot pull together, it is better for themselves, for their offspring and for society in general that they should be separated than that they should be compelled to live together. No home is worth the name wherein instead of peace there is wrangling; and marriage is meaningless if there is no spark of love left between the husband and the wife. It is an error to suppose that such latitude tends to destroy the stability of marriage, because marriage is entered into as a permanent and sacred relation based on love between a man and a woman, and divorce is only a remedy when marriage fails to fulfill its object.

With regard to the husband's right of pronouncing divorce the learned author has found;

Though the Holy Quran speaks of the divorce being pronounced by the husband, yet a limitation is placed upon the exercise of this right.

He then refers to the procedure laid down in Sura IV Verse 35 quoted above, and says:

It will be seen that in all disputes between the husband and the wife, which it is feared will lead to a breach, two judges are to be appointed from the respective people of the two parties. These judges are required first to try to reconcile the parties to each other, failing which divorce is to be effected. Therefore, though it is the husband who pronounces the divorce, he is as much bound by the decision of the judges, as is the wife. This shows that the husband cannot repudiate the marriage at will. The case must first be referred to two judges and their decision is binding..... The Holy Prophet is reported to have interfered and disallowed a divorce pronounced by a husband, restoring the marital relations (Bu. 68: 2). It was no doubt matter of procedure, but it shows that the authority constituted by law has the right to interfere in matters of divorce.

The learned author has further observed:

Divorce may be given orally, or in writing, but it must take place in the presence of witnesses.

(iv) The conclusion: Based on the Quranic verses referred to above, the High Court concluded as under:

13. A perusal of the Quranic verses quoted above and the commentaries thereon by well-recognized Scholars of great eminence like Mahammad Ali and Yusuf Ali and the pronouncements of great jurists like Ameer Ali and Fyzee completely Rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J. (ILR 30 Bom. 537) that "the whimsical and capricious divorce by the husband is good in law, though bad in theology". These observations have been based on the concept that women were chattal belonging to men, which the Holy Quran does not brook. Costello, J. In 59 Calcutta 833 has not, with respect, laid down the correct law of talaq. In my view the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family the other from the husband's. If the attempts fail, talaq may be effected.

xxx xxx xxx

16. In the instant case the Petitioner merely alleged in his written statement before the Magistrate that he had pronounced talaq to the opposite party; but he did not examine himself, nor has he adduced any evidence worth the name to prove 'talaq'. There is no proof of talaq, or its registration. Registration of marriage and divorce under the Assam Muslim Marriages and Divorces Registration Act, 1935 is voluntary, and unilateral. Mere registration of divorce (or marriage) even if proved, will not render valid divorce which is otherwise invalid under Muslim Law.

A perusal of the conclusion recorded by the High Court, through the above observations, leaves no room for any doubt, that the 'talaq-e-biddat' pronounced by the husband without reasonable cause, and without being preceded by attempts of reconciliation, and without the involvement of arbitrators with due representation on behalf of the husband and wife, would not lead to a valid divorce. The High Court also concluded, that the Petitioner - Jiauddin Ahmed, had mainly alleged that he had pronounced talaq, but had not established the factum of divorce by adducing any cogent evidence. Having concluded, that the marriage between the parties was subsisting, the High Court upheld the order awarding maintenance to the wife - Anwara Begum.

32. Must. Rukia Khatun v. Abdul Khalique Laskar MANU/GH/0031/1979 : (1981) 1 Gau. L.R. 375, (Division Bench judgment, authored by Baharul Islam, CJ., as he then was).

(i) The facts: Rukia Khatun was married to Abdul Khalique Laskar. The couple lived together for about 3 months, after their marriage. During that period, the marriage was consummated. Rukia Khatun alleged, that after the above period, her husband abandoned and neglected her. She was allegedly not provided with any maintenance, and as such, had been living in penury, for a period of about 3 months, before she moved an application for grant of maintenance. The Petitioner's application for maintenance filed Under Section 125 of the Code of Criminal Procedure, was rejected by the Sub-Divisional Judicial Magistrate, Hailakandi. She challenged the order rejecting her claim of maintenance, before the Gauhati High Court. The Respondent-husband - Abdul Khalique Laskar, contested the claim for maintenance by asserting, that even though he had married the Petitioner, but he had divorced her on 12.4.1972 by way of 'talaq-e-biddat', and had thereafter even executed a talaknama. The husband also asserted, that he had paid dower to the Petitioner. The claim of the Petitioner-wife for maintenance was declined on the ground, that she had been divorced by the Respondent-husband.

(ii) The challenge: It is in the above circumstances, that the validity of the divorce pronounced by the Respondent-husband, by way of 'talaq-e-biddat', and the wife's entitlement to maintenance, came up for consideration.

(iii) The consideration: The Gauhati High Court recorded the following observations in respect of the validity of 'talaq' pronounced by the Respondent-husband, on 12.4.1972.

7. The first point to be decided, therefore, is whether the opposite party divorced the Petitioner. The equivalent of the word 'divorce' is 'talaq' in Muslim Law. What is valid 'talaq' in Muslim law was considered by one of us (Baharul Islam, J. as he then was) sitting singly in Criminal Revision No. 199/77 (supra). The word 'talaq' carries the literal significance of 'freeing' or 'the undoing of knot'. 'Talaq' means divorce of a woman by her husband. Under the Muslim law marriage is a civil contract. Yet the rights and responsibilities consequent upon it are of such importance to the welfare of the society that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriagetic, Islam recognizes the necessity in exceptional circumstances of keeping the way open for its dissolution.

There has been a good deal of misconception of the institution of 'talaq' under the Muslim law. From the Holy Quran and the Hadis, it appears that though divorce was permitted, yet the right could be exercised only under exceptional circumstances. The Holy Prophet is reported to have said: "Never did Allah allow anything more hateful to Him than "divorce." According to a report of Ibn Umar, the Prophet said: "With Allah the most detestable of all things permitted is divorce". (See the Religion of Islam by Maulana Muhammed Ali at page 671).

In the case of Ahmed Kasim Molla v. Khatun Bibi reported in MANU/WB/0267/1931 : ILR Cal 833, which has so long been regarded as a leading case on the law of divorce, Justice Costello held:

Upon that point (divorce), there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the mere recent decisions of the Courts. I regret that I have to come to the conclusion that at the law stands at present, any Mohamedan may divorce his wife at his mere whim and caprice.

Following Macnaghten, J. who held: "there is no occasion for any particular cause for divorce, and mere whim is sufficient," and Batchelor, J, in case of Sarabai v. Babiabai (MANU/MH/0009/1905 : ILR 30 Bombay 537) Costello, J. held:

It is good in law, though bad in theology." Ameer Ali, in his Treatise on Mahomedan Law has observed:

The Prophet pronounced talaq to be a most detestable thing before the Almighty God of all permitted things.

If 'talaq' is given without any reason it is stupidity and ingratitude to God.

The learned Author in the same book has also observed

The author of the Multeka (Ibrohim Halebi) is more concise. He says-'The law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no Musalman can justify a divorce either in the eyes of the religion or the law. If he abandons his wife or put her away from simple caprice, he draws, upon himself the divine anger, for 'the curse of God', said the Prophet, 'rests on him who repudiates his wife capriciously.

In ILR Madras 22, a Division Bench of the Madras High Court, consisting of Munro and Abdur Rahim, JJ., held:

No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband.

What Munro and Abdur Rahmim, JJ. in ILR 30 Madras 22 precisely held was that impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband. The emphasis was that a talaq would be valid only if it is effected in accordance with the Muslim Law.

In ILR 5, Rangoon 18, their Lordships of the Privy Council observed:

According to that law (the Muslim Law), a husband can effect a divorce whenever he desires.

But the Privy Council has not said that the divorce need not be duly effected or that procedure enjoined by the Quran need not be followed.

8. It is needless to say that Holy Quran is the primary source and is the weightiest authority on any subject under the Muslim Law. The Single Judge in Criminal Revision No. 199/77 in his judgment quoted the relevant verses of the Quran, to deal with divorce. We need not refer to all the Verses. It will be sufficient if we refer to only one of them, which is Sura IV verse 35. It reads:

If ye fear a breach
Between them twain,
Appoint two arbiters
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things.

From the verse quoted above, it appears that there is a condition precedent which must be complied with before the talaq is effected. The condition precedent if when the relationship between the husband and the wife is strained and the husband intends to give 'talaq' to his wife he must chose an arbiter from his side and the wife an arbiter from her side, and the arbiters must attempt at reconciliation, with a time gap so that the passions of the parties may call down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to give 'talaq'. The 'talaq' must be for good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. It must not be secret.

Maulana Mohammad Ali, an eminent Muslim jurist, in his Religion of Islam, after referring to, and considering, the relevant verses on the subject has observed:

From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce.

The learned Jurist also has observed:

Divorce must always follow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off.

9. Costello, J. in ILR 59 Calcutta 833 (supra) considered the judgments of Munro and Abdur Rahim, JJ. in ILR 33 Mad. 22 (supra) and of the Privy Council in ILR 5, Rangoon 18, (supra) but he preferred the opinions of Machaghten and Batchelor, JJ. in MANU/MH/0009/1905 : ILR 30 Bombay 537 (supra). The reason perhaps is, as observed by Krishna Ayer, J. (now of the Supreme Court) in the case of A. Yusuf Rowther v. Sowramma, reported in MANU/KE/0059/1971 : AIR 1971 Kerala 261:

Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a Culture law is largely the formalised and enforceable expression of a community's culture norms-cannot be fully understood by alien minds.

10. Krishna Ayer, J., in MANU/KE/0059/1971 : AIR 1971 Kerala 261 (supra) has further observed:

The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions...

Indeed, a deeper study of the subject disclosed a surprisingly rational, realistic and modern law of divorce.... .....

The learned Judge has further observed:

It is a popular fallacy that a Muslim male enjoys, under the Quranic law, Unbridled Authority to liquidate the marriage. The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them' (Quran IV: 34)

(iv) The conclusion: Based on the above consideration above, the High Court recorded the following conclusion:

11. In our opinion the correct law of 'talaq' as ordained by Holy Quran is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, '*talaq*' may be effected. In our opinion the Single Judge has correctly laid down the law in Criminal Revision No. 199/77 (supra), and, with respect the Calcutta High Court in ILR 59 Calcutta 833 and the Bombay High Court in MANU/MH/0009/1905 : ILR 30 Bombay 537 have not laid down the correct law.

A perusal of the consideration extracted above, when examined closely, reveals that the High Court listed the following essential ingredients of a valid 'talaq' under Muslim law. Firstly, 'talaq' has to be based on good cause, and must not be at the mere desire, sweet will, whim and caprice of the husband. Secondly, it must not be secret. Thirdly, between the pronouncement and finality, there must be a time gap, so that the passions of the parties may calm down, and reconciliation may be possible. Fourthly, there has to be a process of arbitration (as a means of reconciliation), wherein the arbitrators are representatives of both the husband and the wife. If the above ingredients do not exist, 'talaq' - divorce would be invalid. For the reason, that the 'talaq-e-biddat' - triple talaq pronounced by the Respondent-husband - Abdul Khalique Laskar, did not satisfy all the ingredients for a valid divorce, the High Court concluded that the marriage was subsisting, and accordingly held the wife to be entitled to maintenance.

33. Masroor Ahmed v. State (NCT of Delhi) MANU/DE/9441/2007 : 2008 (103) DRJ 137, (Single Bench judgment, authored by Badar Durrez Ahmed, J., as he then was).

(i) The facts: Aisha Anjum was married to the Petitioner - Masroor Ahmed, on 02.04.2004. The marriage was duly consummated and a daughter was born to the couple (-on 22.10.2005). It was alleged by the wife - Aisha Anjum, that the husband's family threw her out of her matrimonial home (-on 08.04.2005), on account of non-fulfilment of dowry demands. While the wife - Aisha Anjum was at her maternal home, the husband - Masroor Ahmed filed a case for restitution of conjugal rights (-on 23.03.2006), before the Senior Civil Judge, Delhi. During the course of the above proceedings, the wife returned to the matrimonial home, to the company of her husband (-on 13.04.2006), whereupon, marital cohabitation was restored. Once again there was discord between the couple, and Masroor Ahmed pronounced 'talaq-e-biddat', on 28.08.2006. The wife - Aisha Anjum alleged, that she later came to know that her husband - Masroor Ahmed, had divorced her by exercising his right of 'talaq-e-biddat', in the presence of the brothers of Aisha Anjum, in October 2006. And that, the husband had lied to the Court, (and to her, as well) when he had sought her restitution, from the Court, by making out as if the marriage was still subsisting. It was her claim, that she would not have agreed to conjugal relations with him, had she known of the divorce. And therefore, her consent to have conjugal relations with Masroor Ahmed, was based on fraud committed by him, on her - Aisha Anjum. She therefore Accused Masroor Ahmed, for having committed the offence Under Section 376 of the Indian Penal Code, i.e., the offence of rape. She also claimed maintenance from her husband, Under Section 125 of the Code of Criminal Procedure. During the pendency of the above proceedings, the parties arrived at an amicable settlement on 1.9.2007.

(ii) The challenge: The position expressed by the High Court in paragraph 12 of the judgment, crystalises the challenge. Paragraph 12, is reproduced below:

12. Several questions impinging upon muslim law concepts arise for consideration. They are:

(1) What is the legality and effect of a triple talaq?

(2) Does a talaq given in anger result in dissolution of marriage?

(3) What is the effect of non-communication of the talaq to the wife?

(4) Was the purported talaq of October 2005 valid?

(5) What is the effect of the second nikah of 19.4.2006?

(iii) The consideration: While considering the legality and effect of 'talaq-e-biddat', the High Court recorded the following consideration:

Sanctity and effect of Talaq-e-bidaat or triple talaq.

24. There is no difficulty with ahsan talaq or hasan talaq. Both have legal recognition under all fiqh schools, sunni or shia. The difficulty lies with triple talaq which is classed as bidaat (an innovation). Generally speaking, the shia schools do not recognise triple talaq as bringing about a valid divorce [1]. There is, however, difference of opinion even within the sunni schools as to

whether the triple talaq should be treated as three talaqs, irrevocably bringing to an end the marital relationship or as one rajai (revocable) talaq [2], operating in much the same way as an ahsan talaq.

(iv) The conclusion: Based on the consideration recorded above, the High Court arrived at the following conclusions:

26. It is accepted by all schools of law that talaq-e-bidaat is sinful [3]. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression-bad in theology but valid in law-is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by prophet Muhammad [4]. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by shia schools. There are views even amongst the sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular point of time in history [5] but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.

27. In this background, I would hold that a triple talaq (talaq-e-bidaat), even for sunni muslims be regarded as one revocable talaq. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the iddat period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the iddat period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh nikah on fresh terms of mahr etc.

A perusal of the conclusions recorded by the High Court would reveal, that triple talaq pronounced at the same time, is to be treated as a single pronouncement of divorce. And therefore, for severing matrimonial ties finally, the husband would have to complete the prescribed procedure, and thereafter, the parties would be treated as divorced.

34. Nazeer v. Shemeema MANU/KE/2403/2016 : 2017 (1) KLT 300, (Single Bench judgment, authored by A. Muhamed Mustaque, J.).

(i) The facts: Through the above judgment, the High Court disposed of a number of writ petitions, including three writ petitions, wherein husbands had terminated their matrimonial alliance with their spouses, by pronouncing 'talaq-e-biddat' - triple talaq. Their matrimonial relationship having come to an end, one or the other or both (-this position is unclear, from the judgment) spouses approached the passport authorities, to delete the name of their former spouse, from their respective passports. The passport authorities declined to accept their request, as the same was based on private actions of the parties, which were only supported by unauthenticated 'talaq-namas' (deeds of divorce). The stance adopted by the passport authorities was, that in the absence of a formal decree of divorce, the name of the spouse could not be deleted. By passing interim directions, the High Court ordered the passport authorities, to correct the spouse details (as were sought), based on the admission of the corresponding spouse, that their matrimonial alliance had been dissolved.

(ii) The challenge: Even though the authenticity and/or the legality of 'talaq-e-biddat', did not arise for consideration before the High Court, it noticed "....Though the issue related to triple talaq does not directly crop up in these writ petitions calling upon this Court to decide the validity of triple talaq, this Court cannot ignore while granting a relief based on admission, the fact that direction of this Court would result in greater or lesser extent of injustice if it remains oblivious to the repercussions of the repudiation of marriage by volition of individual.....". The High Court therefore, embarked on the exercise of examining the validity of 'talaq-e-biddat'.

(iii) The consideration: The High Court took into consideration texts by renowned scholars, as for instance, from "Sharia" by Wael B. Hallaq, "Sharia Law, An Introduction" by Mohammad Hashim Kamali, "Qur'an: The Living Truth" by Basheer Ahmad Mohyidin, "Muslim Law in India And Abroad" by Dr. Tahir Mahmood, "The Lawful and the Prohibited in Islam" by Sheikh Yusuf al-Qaradawi, from the Urdu book "Hikmatul Islam" by Moulana Wahidul Khan. The High Court also took into consideration Quranic verses (all of which have been, extracted above). The High Court even took note of the two judgments of the Gauhati High Court (referred to above), besides other High Court judgments, and thereupon, observed as under:

12. This case only symptomize the harsh realities encountered by women belonging to Muslim community, especially of the lower strata. It is a reminder to the court unless the plight of sufferers is alleviated in a larger scheme through legislation by the State, justice will be a distant dream deflecting the promise of justice by the State "equality before the law". The State is constitutionally bound and committed to respect the promise of dignity and equality before law and it cannot shirk its responsibility by remaining mute spectator of the malady suffered by Muslim women in the name of religion and their inexorable quest for justice broke all the covenants of the divine law they professed to denigrate the believer and faithful. Therefore, the remainder of the judgment is a posit to the State and contribution for settlement of the 'legal vex' which remains unconcluded more than four decades after this Court's reminder in Mohamed Haneefas' case (supra).

13. The State is constitutionally obliged to maintain coherent order in the society, foundation of which is laid by the family. Thus sustenance or purity of the marriage will lay a strong foundation for the society, without which there would be neither civilisation nor progress. My endeavour in this judgment would have been over with the laying of correct principles related to triple talaq in Qur'anic perspective to declare the law and to decide the matter. However, I find the dilemma in this context is not a singular problem arisen demanding a resolution of the dispute between the litigants by way of adjudication. But rather it require a State intervention by way of legislation to regulate triple talaq in India. Therefore, settlement of law relating to talaq is necessary and further discussion is to be treated as an allude for the State to consider for possible reforms of divorce Law of Muslim in this Country. The empirical research placed herein justifies such course of action to remind the State for action. It is to be noted, had the Muslim in India been governed by the true Islamic law, Penal law would have acted as deliverance to sufferings of Muslim women in India to deter arbitrary talaq in violation of Qur'anic injunction.

xxx xxx xxx

15. This takes me to the question why the State is so hesitant to reforms. It appears from public debate that resistance is from a small Section of Ulemas (scholars within the society) on the ground

that Sharia is immutable and any interference would amount to negation of freedom of religion guaranteed under the Constitution. I find this dilemma of Ulema is on a conjecture of repugnancy of divine law and secular law. The State also appears as reluctant on an assumption that reforms of religious practice would offend religious freedom guaranteed under the Constitution of India. This leads me to discuss on facets of Islamic law. I also find it equally important to discuss about the reforms of personal law relating to triple talaq within the constitutional polity, as the ultimately value of its legality has to be tested under the freedom of religious practices.

(iv) The conclusion: In the background of the above consideration, the High Court held as under:

The W.P.(C) 37436 of 2003 is filed by the husband alleging that the triple talaq pronounced by him is not valid in accordance with Islamic law. Therefore, proceedings initiated before the Magistrate Under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and consequent order will have to be set aside. This case depicts the misuse of triple talaq, wife appears to have accepted the talaq and moved the Magistrate court on a folly created by husband. There are innumerable cases as revealed from the empirical data referred in the research in which neither party are aware of the procedure of talaq according to the personal law. This Court Under Article 226 of the Constitution of India is not expected to go into the disputed questions of fact. The entire exercise in this judgment is to alert the State that justice has become elusive to the Muslim woman and the remedy thereof lies in codification of law of divorce. This Court cannot grant any relief to the writ Petitioner as the true application of the law to be considered in a given facts is upon the Court trying the matter. It is for the subordinate court to decide whether there was application of Islamic law in effecting divorce by triple talaq. Therefore, declining jurisdiction, this writ petition is dismissed.

W.P.(C) Nos. 25318 & 26373 of 2015 and 11438 of 2016

In these Writ Petitions question of validity of triple talaq does not arise. However this question was considered in larger perspective for the reason that if court grant any relief based on admission of the parties as to the repudiation of marriage by triple talaq, that would amount to recognition of a triple talaq effected not in accordance with law, as this Court has no mechanism to find out the manner in which talaq is effected. The Court cannot become a party to a proceedings to recognise an ineffective divorce in the guise of directions being given to passport authorities to accept the divorce. The legal effect of such divorce has to be probed by a fact finding authority in accordance with the true Islamic law. Stamp of approval being given by the court by ordering passport authority to accept divorce effected not in accordance with the law, will create an impression that court transgressed its limits while directing a public authority to honour an act which was done not in accordance with law. Though in these Writ Petitions, considering the urgency of the matters, this Court granted interim order directing the passport authorities to act upon the request of the Petitioners. Considering the large number of similar reliefs sought before this Court in various Writ Petitions, this Court is of the view that the issue can be resolved only through a larger remedy of codification of law in the light of the discussion as above. In the light of interim order, these Writ Petitions are disposed of.

Conclusion:

Courts interpret law and evolve justice on such interpretation of law. It is in the domain of the legislature to make law. Justice has become elusive for Muslim women in India not because of the religion they profess, but on account of lack of legal formalism resulting in immunity from law. Law required to be aligned with justice. The search for solution to this predicament lies in the hands of the law makers. It is for the law makers to correlate law and social phenomena relating to divorce through the process of legislation to advance justice in institutionalized form. It is imperative that to advance justice, law must be formulated without any repugnance to the religious freedom guaranteed under the Constitution of India. It is for the State to consider the formulation of codified law to govern the matter. Therefore, I conclude by drawing attention of those who resist any form of reform of the divorce law of Muslim community in India to the following verses of Holy Quran. (Chapter 47:2)

And those who believe and do good works and believe in that which is revealed unto Muhammad-and it is the truth from their Lord-He riddeth them of their ill deeds and improveth their state.

Thus we display the revelations for people who have sense (Chapter 30:28)

The Registry shall forward the copy of this judgment to Union Law Ministry and Law Commission of India.

A perusal of the conclusions drawn by the High Court reveals, that the practice of 'talaq-e-biddat', was deprecated by the Court. The Court however called upon the legislature, to codify the law on the issue, as would result in the advancement of justice, as a matter of institutional form.

Part-7.

The Petitioner's and the interveners' contentions:

35. On behalf of the Petitioner, besides the Petitioner herself, submissions were initiated by Mr. Amit Singh Chadha, Senior Advocate. He invited this Court's attention to the legislative history in the field of Muslim 'personal law' (-for details, refer to Part-4 - Legislation in India, in the field of Muslim 'personal law'). It was submitted, that all fundamental rights contained in Part III of the Constitution were justiciable. It was therefore pointed out, that the Petitioner's cause before this Court, was akin to such rights as were considered justiciable. The practice of 'talaq-e-biddat', according to learned Counsel, permitted a male spouse an unqualified right, to severe the matrimonial tie. It was pointed out, that the right to divorce a wife, by way of triple talaq, could be exercised without the disclosure of any reason, and in fact, even in the absence of reasons. It was submitted, that a female spouse had no say in the matter, inasmuch as, 'talaq-e-biddat' could be pronounced in the absence of the wife, and even without her knowledge. It was submitted, that divorce pronounced by way of triple talaq was final and binding, between the parties. These actions, according to learned Counsel, vested an arbitrary right in the husband, and as such, violated the equality Clause enshrined in Article 14 of the Constitution. It was submitted, that the Constitution postulates through the above article, equality before the law and equal protection of the laws. This right, according to learned Counsel, was clearly denied to the female spouse in the matter of pronouncement of divorce by the husband by adopting the procedure of 'talaq-e-biddat'. Furthermore, it was submitted, the Constitution postulates through Article 15, a clear restraint on

discrimination, on the ground of sex. It was submitted, that 'talaq-e-biddat' violated the aforesaid fundamental right, which postulates equality between men and women. Learned Counsel relied on the decisions of this Court in Kesavananda Bharati v. State of Kerala MANU/SC/0445/1973 : (1973) 4 SCC 225, and Minerva Mills Ltd. v. Union of India MANU/SC/0075/1980 : (1980) 3 SCC 625 to contend, that it was the duty of courts to intervene in case of violation of any individual's fundamental right, and to render justice. It was also submitted, that the rights of the female partner in a matrimonial alliance amongst Muslims, had resulted in severe gender discrimination, which amounted to violating their human rights Under Article 21 of the Constitution. Learned Counsel accordingly sought intervention, for grave injustice practiced against Muslim wives.

36. Mr. Amit Singh Chadha, learned senior Counsel, then placed reliance on the Jiauddin Ahmed MANU/GH/0033/1978 : (1981) 1 Gau. L.R. 358, and the Rukia Khatun cases MANU/GH/0031/1979 : (1981) 1 Gau. L.R. 375 (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat'). Based on the above judgments, it was submitted, that courts of this country had not found favour with the practice of triple talaq, in the manner prevalent in India. It was contended, that 'talaq-e-biddat' should not be confused with the profession, practice and propagation of Islam. It was pointed out, that 'talaq-e-biddat' was not sacrosanctal to the profession of the Muslim religion. It was accordingly submitted, that this Court had an indefeasible right, to intervene and render justice. In order to press his claim based on constitutional morality, wherein the Petitioners were claiming not only gender equality, but also the progression of their matrimonial life with dignity, learned senior Counsel placed reliance on Manoj Narula v. Union of India MANU/SC/0736/2014 : (2014) 9 SCC 1, wherein this Court observed as under:

The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr Ambedkar had, throughout the debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said:

Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.

[Constituent Assembly Debates, 1948, Vol. VII, 38.]

The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the Rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality...

In continuation with the instant submission, it was also the contention of learned senior Counsel, that Articles 25, 26 and 29 of the Constitution, did not in any manner, impair the jurisdiction of this Court, to set right the apparent breach of constitutional morality. In this behalf, the Court's attention was invited to the fact, that Article 25 itself postulates, that the freedoms contemplated thereunder, were subject to the overriding principles enshrined in Part III - Fundamental Rights, of the Constitution. This position, it was submitted, was affirmed through judgments rendered by this Court in John Vallamattom v. Union of India MANU/SC/0480/2003 : (2003) 6 SCC 611, Javed v. State of Haryana MANU/SC/0523/2003 : (2003) 8 SCC 369, and Khursheed Ahmad Khan v. State of Uttar Pradesh MANU/SC/0113/2015 : (2015) 8 SCC 439.

37. Learned senior Counsel also drew our attention to the fact, that a number of countries had, by way of express legislations, done away with the practice of 'talaq-e-biddat'. It was submitted, that even when talaq was pronounced thrice simultaneously, the same has, by legislation, been treated as a single pronouncement, in a number of countries, including countries which have declared Islam as their official State religion. It was accordingly contended, that had 'talaq-e-biddat' been an essential part of religion, i.e., if it constituted a core belief, on which Muslim religion was founded, it could not have been interfered with, by such legislative intervention. It was accordingly suggested, that this Court should have no difficulty whatsoever in remedying the cause with which the Petitioners had approached this Court, as the same was not only violative of the fundamental rights enshrined in the Constitution, but was also in contravention of the principle of constitutional morality emerging therefrom.

38. Last of all, it was contended, that it is nobody's case before this Court, that 'talaq-e-biddat' is a part of an edict flowing out of the Quran. It was submitted, that triple talaq is not recognized by many schools of Islam. According to learned Counsel, all concerned acknowledge, that 'talaq-e-biddat' has all along been treated irregular, patriarchal and even sinful. It was pointed out, that it is accepted by all schools - even of Sunni Muslims, that 'talaq-e-biddat' is "bad in theology but good in law". In addition, it was pointed out, that even the Union of India had affirmed before this Court, the position expressed above. In such situation, it was prayed, that this Court being a constitutional court, was obliged to perform its constitutional responsibility Under Article 32 of the Constitution, as a protector, enforcer, and guardian of citizens' rights Under Articles 14, 15 and 21 of the Constitution. It was submitted, that in discharge of the above constitutional obligation, this Court ought to strike down, the practice of 'talaq-e-biddat', as violative of the fundamental rights and constitutional morality contemplated by the provisions of the Constitution. It was commended, that the instant practice of 'talaq-e-biddat' should be done away with, in the same manner as the practice of 'Sati', 'Devadasi' and 'Polygamy', which were components of Hindu religion, and faith. Learned Counsel concluded his submissions by quoting from the Constitutional Law of India, by H.M. Seervai (fourth edition, Volume 2, published by N.M. Tripathi Private Ltd., Bombay), wherein in Clause 12.60, at page 1281, the author has expressed the following view:

12.60 I am aware that the enforcement of laws which are violated is the duty of Govt., and in a number of recent cases that duty has not been discharged. Again, in the last instance, blatant violation of religious freedom by the arbitrary action of religious heads has to be dealt with firmly by our highest Court. This duty has resolutely discharged by our High Courts and the Privy Council before our Constitution. No greater service can be done to our country than by the Sup. Ct. and the High Courts discharging that duty resolutely, disregarding popular clamour and disregarding

personal predilections. I am not unaware of the present political and judicial climate. But I would like to conclude with the words of very great man "never despair", for when evil reaches a particular point, the antidote of that evil is near at hand.

39. Mr. Anand Grover, Senior Advocate, represented Zakia Soman - Respondent No. 10. Respondent No. 10 was added as a party Respondent on 29.6.2016, on the strength of an interlocutory application filed by her. Learned senior advocate, in the first instance, invited our attention to the various kinds of 'talaq' practiced amongst Muslims (-for details, refer to Part-2 - The practiced modes of 'talaq' amongst Muslims). It was submitted, that 'talaq-e-ahsan' and 'talaq-e-hasan' were approved by the Quran and the 'hadith'. It was submitted, that 'talaq-e-biddat' is neither recognized by the Quran, nor approved by the 'hadith'. With reference to 'talaq-e-biddat', it was asserted, that the same was contrary to Quranic prescriptions. It was submitted, that the practice of 'talaq-e-biddat' was traceable to the second century, after the advent of Islam. It was asserted, that 'talaq-e-biddat' is recognized only by a few Sunni schools, including the Hanafi school. In this behalf, it was also brought to our notice, that most of the Muslims in India belonged to the Hanafi school of Sunni Muslims. It was submitted, that even the Hanafi school acknowledges, that 'talaq-e-biddat' is a sinful form of divorce, but seeks to justify it on the ground that though bad in theology, it is good in law. In India 'talaq-e-biddat', according to learned Counsel, gained validity based on the acceptance of the same by the British courts, prior to independence. It was submitted, that the judgments rendered by the British courts were finally crystallized, in the authoritative pronouncement by the Privy Council in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25. It was pointed out, that thereafter, 'talaq-e-biddat' has been consistently practised in India.

40. The first contention advanced at the hands of learned senior Counsel was, that after the adoption of the Constitution, various High Courts in India had the occasion to consider the validity of 'talaq-e-biddat', exercised by Muslim men to divorce their wives. And all the High Courts (which had the occasion to deal with the issue) unanimously arrived at the conclusion, that the same could not muster support either from the Quran or the 'hadith'. In this behalf, the Court's attention was drawn to the various judgments of High Courts including the High Court of Gauhati in the Jiauddin Ahmed case MANU/GH/0033/1978 : (1981) 1 Gau. L.R. 358 - by a Single Bench, and by the same High Court in the Rukia Khatun case MANU/GH/0031/1979 : (1981) 1 Gau. L.R. 375 - by a Division Bench. By the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137 - by a Single Bench, and finally by the Kerala High Court in the Nazeer case MANU/KE/2403/2016 : 2017 (1) KLT 300 - by a Single Bench (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat'). It was submitted, that the High Courts were fully justified in their opinions and their conclusions. It was pointed out, that despite the aforesaid judgments, Muslim husbands continued to divorce their wives by 'talaq-e-biddat', and therefore, an authoritative pronouncement on the matter was required to be delivered, by this Court. Based on the decisions relied upon, it was submitted, that a Muslim husband, could not enjoy arbitrary or unilateral power to proclaim a divorce, as the same does not accord with Islamic traditions. It was also contended, that the proclamation of talaq must be for a demonstrated reasonable cause, and must proceed by an attempt at reconciliation by two arbiters (one each, from the side of the rival parties). In order to affirm the aforesaid position, learned Counsel placed reliance on Shamim Ara v. State of U.P. MANU/SC/0850/2002 : (2002) 7 SCC 518, to assert, that this Court approved the judgments referred to above. It was accordingly asserted, that this Court

has already recognized, the Quranic position as recorded in verses 128 to 130 of 'sura' IV and verses 229-232 of 'sura' II, and also, 'verse' 35 of 'sura' IV. These verses, according to learned senior Counsel, declare the true Quranic position on the subject of divorce (-for details, refer to Part-3 - The Holy Quran - with reference to 'talaq'). Learned Counsel heavily relied on the decision rendered by the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137, and by the Kerala High Court in the Nazeer case MANU/KE/2403/2016 : 2017 (1) KLT 300 to bring home his contention, that 'talaq-e-biddat' was wholly unjustified and could not be recognized as a valid means of divorce in the Muslim community. It was the vehement submission of learned Counsel, that the legal position being canvassed on behalf of the Petitioners, clearly emerged from the judgments referred to above, and should be treated as the foundation, for adoption and declaration by this Court. It was therefore prayed, that triple talaq as was being practiced in India, be declared unsustainable in law.

41. It was also contended by learned senior Counsel, that the settled principles applicable in all common law jurisdictions including India was that courts do not test the constitutionality of laws and procedures, if the issue arising between the parties can be decided on other grounds. It was submitted, that only when the relief being sought, cannot be granted without going into the constitutionality of the law, only then courts need to enter the thicket of its constitutional validity. Learned Counsel invited the Court's attention, to the judgment of this Court in State of Bihar v. Rai Bahadur Hurdut Roy Moti Lal Jute Mills MANU/SC/0010/1959 : AIR 1960 SC 378, wherein this Court refused to test the constitutional validity of certain provisions, by holding as under:

7. On behalf of the Appellant Mr. Lal Narain Sinha has contended that the High Court was in error in holding that the proviso to Section 14A violates either Article 20(1) or Article 31(2) of the Constitution. He has addressed us at length in support of his case that neither of the two articles is violated by the impugned proviso. On the other hand, the learned Solicitor-General has sought to support the findings of the High Court on the said two constitutional points; and he has pressed before us as a preliminary point his argument that on a fair and reasonable construction, the proviso cannot be applied to the case of the first Respondent. We would, therefore, first deal with this preliminary point. In cases where the vires of statutory provisions are challenged on constitutional grounds, it is essential that the material facts should first be clarified and ascertained with a view to determine whether the impugned statutory provisions are attracted; if they are, the constitutional challenge to their validity must be examined and decided. If, however, the facts admitted or proved do not attract the impugned provisions there is no occasion to decide the issue about the vires of the said provisions. Any decision on the said question would in such a case be purely academic. Courts are and should be reluctant to decide constitutional points merely as matters of academic importance.

xxx xxx xxx

19. In view of this conclusion it is unnecessary to consider the objections raised by the first Respondent against the validity of the proviso on the ground that it contravenes Articles 20(1) and 31(2) of the Constitution.....

In the context of 'personal law', it was submitted, that in Shabnam Hashmi v. Union of India MANU/SC/0119/2014 : (2014) 4 SCC 1, the Court had recently refused to examine the

constitutional validity of 'personal laws', when the issue could be plainly decided on the interpretation of the concerned statute. It was therefore contended, that through a purely interpretative exercise, this Court should declare 'talaq-e-biddat' as illegal, ineffective and having no force in law, in the same manner as the Gauhati High Court and the Delhi High Court, have previously so held. It was submitted, that the same declaration be given by this Court, by an interpretation of 'personal law', as would incorporate the ingredients of the permissible and acceptable modes of talaq into 'talaq-e-biddat'.

42. In the present determination, learned senior Counsel submitted, that it would be essential to recognize the existence of distortions in the 'hadiths'. It was pointed out, that it was by now well settled, that there were various degrees of reliability and/or authenticity of different 'hadiths' (reference in this behalf was made to - Principles of Mahomedan Law by Sir Dinshaw Fardunji Mulla, LexisNexis, Butterworths Wadhwa, Nagpur, 20th edition). It was the contention of learned senior Counsel, that the All India Muslim Personal Law Board (hereinafter referred to as, the AIMPLB), had relied on 'hadiths', that were far removed from the time of the Prophet. It was submitted, that they were therefore far less credible and authentic, and also distorted and unreliable, as against the 'hadiths' taken into consideration in the judgments rendered by the High Courts (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat'). It was pointed out, that the AIMPLB had relied upon a later 'hadith' (that is, Sunan Bayhaqi 7/547). It was pointed out, that when compared to the 'hadith' of Bhukahri (published by Darussalam, Saudi Arabia), the 'hadith' relied upon by the AIMPLB appeared to be a clear distortion. It was also submitted, that the 'hadith' relied upon by the AIMPLB, was not found in the Al Bukhari Hadiths, and as such, it would be inappropriate to place reliance on the same. As against the submissions advanced on behalf of AIMPLB, it was pointed out (in rejoinder), that Sahih Muslims believe, that during the Prophet's time, and that of the First Caliph Abu Baqhr and the Second Caliph Umar, pronouncements of 'talaq' by three consecutive utterances were treated as one. Reference in this behalf was made to "Sahih Muslim" compiled by Al-Hafiz Zakiuddin Abdul-Azim Al-Mundhiri, and published by Darussalam. Learned senior Counsel also invited this Court's attention to "The lawful and the prohibited in Islam" by Al-Halal Wal Haram Fil Islam (edition - August 2009), which was of Egyptian origin. It was pointed out, that Egypt was primarily a Sunni Hanafi nation. It was submitted, that the text of the above publication, clearly showed, that the practice of instant talaq was described sinful, and was to be abhorred. Reference was also made to "Woman in Islamic Shariah" by Maulana Wahiduddin Khan (published by Goodword Books, reprinted in 2014), wherein it is opined, that triple talaq pronounced on a singular occasion, would be treated as a single pronouncement of talaq, in terms of the 'hadith' of Imam Abu Dawud in Fath al-bari 9/27. It was submitted, that the views of the above author, were also relied upon by the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137. Reference was also made to "Marriage and family life in Islam" by Prof. (Dr.) A. Rahman (Adam Publishers and Distributors, New Delhi, 2013 edition), wherein by placing reliance on a Hanafi Muslim scholar, it was expressed that triple talaq was not in consonance with Quranic verses. Reliance was also placed on "Imam Abu Hanifa - Life and Work" by Allamah Shiblinu'mani's of Azamgarh, who founded the Shibli College in the 19th century. It was submitted, that Abu Hanifa himself ruled, that it was forbidden to give three divorces at the same time, and whoever did so was a sinner. Based on the aforestated submissions, it was the pointed contention of learned senior Counsel, that there was no credibility in the position adopted by the AIMPLB, in its pleadings to demonstrate the validity of the practice of 'talaq-e-biddat'.

43. Based on the above submissions, it was contended, that the judgment rendered by the Privy Council in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25 with reference to the validity of 'talaq-e-biddat' needed to be overruled. Since 'talaq-e-biddat' cannot be traced to the Quran, and since the Prophet himself deprecated it, and since 'talaq-e-biddat' was considered sinful by all schools of Sunni Muslims, and as invalid by all the Shia Muslim schools, it could not be treated to be a part of Muslim 'personal law'. It was asserted, that triple talaq was not in tune with the prevailing social conditions, as Muslim women were vociferously protesting against the practice. Learned senior Counsel solicited, that this Court in order to resolve the present dispute, declare that the pronouncement of triple talaq by a Muslim husband, in order to divorce his wife, would be treated as a single pronouncement of talaq, and would have to follow the procedure of 'talaq-e-ahsan' (or, 'talaq-e-hasan') in accordance with the Quran, so as to conclude a binding dissolution of marriage by way of 'talaq', in terms of Muslim 'personal law'.

44. Ms. Indira Jaising, Senior Advocate, was the third counsel to represent the cause of the Petitioners. She entered appearance on behalf of Respondent No. 7 - Centre for Study of Society and Secularism, which came to be added as a party Respondent vide an order dated 29.6.2016. It was the contention of learned senior Counsel, that the term 'personal laws' had not been defined in the Constitution, although there was reference to the same in entry 5 of the Concurrent List of the Seventh Schedule. Learned Counsel referred to Article 372 of the Constitution which mandates, that all laws in force, in the territory of India immediately before the commencement of the Constitution, "shall" continue in force until altered or repealed or amended by a competent legislature (or other competent authority). It was submitted, that on personal issues, Muslims were governed by the Muslim 'personal law' - Shariat. It was contended, that even before, the commencement of the Constitution, the Muslim Personal Law (Shariat) Application Act, 1937 enforced Muslim 'personal law', and as such, the Muslim 'personal law' should be considered as a "law in force", within the meaning of Article 13(3)(b). It was pointed out, that the instant position made the legal position separate and distinct from what ordinarily falls in the realm of 'personal law'. It was also highlighted, that a reading of entry 5 in the Concurrent List of the Seventh Schedule, leaves no room for any doubt, that 'personal law' necessarily has to have nexus, to issues such as marriage and divorce, infants and minors, adoptions, wills, intestacy and succession, joint family property and partition, etc. It was contented, that 'personal law' could therefore conveniently be described as family law, namely, disputes relating to issues concerning the family. It was pointed out, that such family law disputes, were ordinarily adjudicated upon by the Family Courts, set up under the Family Courts Act, 1984. The matters which arise for consideration before the Family Courts are disputes of marriage (namely, restitution of conjugal rights, or judicial separation, or dissolution of marriage), and the like. Based on the above backdrop, it was submitted, that it could be safely accepted that 'personal law' deals with family laws and law of succession such as marriage, divorce, child custody, inheritance, etc.

45. Based on the foundation recorded in the preceding paragraph, it was submitted, that the question in the present controversy was, whether "rule of decision" (the term used in Section 2, of the Shariat Act) could be challenged, on the ground that the same was violative of the fundamental rights postulated in Part III of the Constitution? It was the pointed contention of learned Counsel, that no "rule of decision" can be violative of Part III of the Constitution. It was acknowledged (we would say - fairly), that 'personal law' which pertained to disputes between the family and private individuals (wherein the State has no role), cannot be subject to a challenge, on the ground of being

violative of the fundamental rights enshrined in Part III of the Constitution. It was submitted, that insofar as Muslim 'personal law' is concerned, it could no longer be treated as 'personal law', because it had been statutorily declared as "rule of decision" by Section 2 of the Shariat Act. It was therefore asserted, that all questions pertaining to Muslims, 'personal law' having been described as "rule of decision" could no longer be treated as private matters between parties, nor can they be treated as matters of mere 'personal law'. It was therefore contended, that consequent upon the inclusion/subject of the question of "...dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat,...", amongst Muslims in the statute book, the same did not remain a private matter between the parties. And as such, all questions/matters, falling within the scope of Section 2 aforementioned, were liable to be considered as matters of 'public law'. Learned senior Counsel therefore asserted, that no one could contest the legitimacy of a challenge to 'public law' on the ground of being violative of the provisions of the Constitution. In support of the aforesaid foundational premise, learned senior Counsel placed reliance on Charu Khurana v. Union of India MANU/SC/1044/2014 : (2015) 1 SCC 192, to contend that 'talaq-e-biddat' should be considered as arbitrary and discriminatory, Under Articles 14 and 15, in the same manner as the Rule prohibiting women make-up artists and hair dressers from becoming members of registered make-up artists and hair dressers association, was so declared. It was also pointed out, that discrimination based on sex was opposed to gender justice, which position was clearly applicable to the controversy in hand. Insofar as the instant aspect of the matter is concerned, learned Counsel placed reliance on the following observations recorded in the above judgment:

46. These bye-laws have been certified by the Registrar of Trade Unions in exercise of the statutory power. Clause 4, as is demonstrable, violates Section 21 of the Act, for the Act has not made any distinction between men and women. Had it made a bald distinction it would have been indubitably unconstitutional. The legislature, by way of amendment in Section 21-A, has only fixed the age. It is clear to us that the clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, Article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood.

xxx xxx xxx

50. From the aforesaid enunciation of law, the signification of right to livelihood gets clearly spelt out. A Clause in the bye-laws of a trade union, which calls itself an Association, which is accepted by the statutory authority, cannot play foul of Article 21.

46. Learned senior Counsel, thereupon attempted to express the same position, through a different reasoning. It is necessary to recall, that the question posed for consideration is, whether this Court should accept "rule of decision" Under Section 2 of the Shariat Act - as "laws in force" within the meaning of Article 13 of the Constitution, and thereby, test the validity thereof, on the touchstone of the fundamental rights enshrined in Part III of the Constitution? It was the fervent contention of learned senior Counsel, that all questions falling for consideration within the meaning of the term "rule of decision" had necessarily to be treated as "laws in force". Thus, it was submitted, that such

laws were to be in consonance with the provisions of Part III - Fundamental Rights, of the Constitution. Insofar as the challenge to the constitutional validity of 'talaq-e-biddat' is concerned, learned senior Counsel, adopted the submissions advanced by other learned Counsel.

47. Learned senior Counsel, then placed reliance on the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10.12.1948, to contend that the preamble thereof recognised the inherent dignity of the entire human family, as equal and inalienable. It was submitted, that the charter provides for equal rights to men and women. It was submitted, that Article 1 thereof provides, that all human beings were born free and equal, in dignity and rights. Referring to Article 2, it was submitted, that there could be no distinction/discrimination on the basis *inter alia* of sex and/or religion. It was submitted, that it was this Court's responsibility to widen, and not to narrow, the right of equality contained in the aforestated Declaration. The Court's attention was also drawn to the International Convention on Economic, Social and Cultural Rights (ICESCR), which provided for elimination of all forms of discrimination against women. The instant convention was adopted by the United Nations General Assembly on 10.04.1979. It was submitted, that the International Convention bill of rights for women, was instituted on 3.9.1981, and had been ratified by 189 States. It was pointed out, that India had also endorsed the same. It was submitted, that Article 1 thereof defines "discrimination", as discrimination against women on the basis of sex. Referring to Article 2, it was submitted, that all State parties who ratified the above convention, condemned discrimination against women in all its forms, and agreed to eliminate discrimination against women by following the principle of equality amongst men and women, in their national Constitutions, as well as, other legislations. It was submitted, that Article 2 of the convention mandates, that all States would take all steps to eliminate discrimination against women - by any person, organisation or enterprise. It was submitted, that insofar as the present controversy is concerned, the provisions of the above declarations and conventions can be relied upon, to test the validity of 'talaq-e-biddat', by treating it as "rule of decision" and for that matter, as law in force (on the touchstone of Articles 14, 15 and 21 of the Constitution). It was further submitted, that in any case, the practice of 'talaq-e-biddat', clearly violated the norms adopted by the declaration, and conventions.

48. It was acknowledged, by learned senior Counsel, that India recognises a plural legal system, wherein different religious communities are permitted to be governed by different 'personal laws', applicable to them. It was submitted, that there could be no dispute, that different religious communities can have different laws, but the laws of each religious community must meet the test of constitutional validity and/or constitutional morality, inasmuch as, they cannot be violative of Articles 14 and 15 of the Constitution. Viewed in the above context, it was submitted, that even though matters of faith and belief are protected by Article 25 of the Constitution, yet law relating to marriage and divorce were matters of faith and belief, were also liable to be tested on grounds of public order, morality and health, as well as, on the touchstone of the other provisions of Part III of the Constitution. Therefore, on a plain reading of Article 25, according to learned senior Counsel, the right to freedom of conscience was subject to public order, morality, health, and the other provisions contained in Part III of the Constitution. And as such, according to learned Counsel, the said rights must be so interpreted, that no 'personal law' negates any of the postulated conditions contained in Article 25 of the Constitution itself. It was submitted, that Articles 14 and 15 of the Constitution were not subject to any restrictions, including any restriction Under Article 25 or 26 of the Constitution. It was contended, that the cardinal principle of interpretation of the

Constitution was, that all provisions of the Constitution must be harmoniously construed, so that there remained no conflict between them. It was therefore submitted, that Articles 14 and 15 on the one hand, and Articles 25 and 26 on the other, must be harmoniously construed with each other, to prevent discrimination against women, in a manner as would give effect to equality, irrespective of gender. It was contended, that it was totally irrelevant whether 'personal law' was founded on custom or religion, or was codified or uncodified, if it is law and "rule of decision", it can be challenged under Part III of the Constitution.

49. Learned senior Counsel, also expressed a personal view on the matter, namely, that divorce altered the status of married women, which can leave her destitute. It was asserted, that for all other communities in India, divorce could only be obtained from a judicial forum. And, a judgment and decree of divorce, was a decision in rem, which alters the legal status of the concerned person, as against the whole world. It was submitted, that for all other communities in India, divorce was not a matter between the private parties, to be settled on their own. Nor could any 'fatwa' be issued, recognising unilateral 'talaq'. It was submitted, that for one party alone, the right to annul a marriage, by a unilateral private 'talaq', was clearly against public policy, and required to be declared as impermissible in law, and even unconstitutional. In this behalf, it was contended, that no person's status could be adversely altered so as to suffer civil consequences (for the concerned person - the wife in this case) by a private declaration. It was submitted, that annulment of the matrimonial bond was essentially a judicial function, which must be exercised by a judicial forum. Any divorce granted by way of a private action, could not be considered as legally sustainable in law. And for the instant additional reason, it was submitted, that unilateral talaq in the nature of talaq-e-biddat, whereby, a Muslim woman's status was associated with adverse civil consequences, on the unilateral determination of the male spouse, by way of a private declaration, must be considered (-and therefore, be held) as clearly unsustainable in law.

50. Mr. Salman Khurshid, Senior Advocate, appearing as an intervener, submitted, that for searching a solution to a conflict, or for the resolution of a concern under Islamic law, reference had first to be made to the Quran. The availability of an answer to the disagreement, from the text of the Quran, has to be treated as a final pronouncement on the issue. When there is no clear guidance from the Quran, reference must be made to the traditions of the Prophet Muhammad - 'sunna', as recorded in the 'hadiths'. If no guidance is available on the issue, even from the 'hadiths', reference must then be made to the general consensus of opinion - 'ijma'. If a resolution to the dispute is found in 'ijma', it should be considered as a final view on the conflicting issue, under Islamic law. It was submitted, that the precaution that needed to be adopted while referring to 'hadiths' or 'ijma' was, that neither of the two can derogate from the position depicted in the Quran.

51. Learned senior Counsel, then invited our attention to different kinds of 'talaq', including 'ila', 'zihar', 'khula' and 'mubaarat'. It was emphasised, that the concept of 'talaq-e-biddat' (also described as irregular talaq), was based on the limit of three talaqs available to a man, namely, that a man can divorce the same wife (woman) three times in his life time. The first two are revocable within the period of 'iddat', whereas, the third talaq was irrevocable. Learned senior Counsel, then invited the Court's attention to verses from the Quran (-for details, refer to Part-3 - The Holy Quran, with reference to 'talaq'). However, during the course of his submissions, learned senior Counsel emphasized the fact, that mere repetition of divorce thrice in one sitting, would not result in a final

severance of the matrimonial relationship between spouses. In order to support his above contention, reliance was placed on the following traditions, from Sunna Muslim:

i. [3652] 1 - (1471) It was narrated from Ibn 'Umar that he divorced his wife while she was menstruating, at the time of the Messenger of Allah 'Umar bin Al-Khattab asked the Messenger of Allah about that and the Messenger of Allah said to him: "Tell him to take her back, then wait until she has become pure, then menstruated again, then become pure again. Then if he wishes he may keep her, or if he wishes he may divorce her before he has intercourse with her. That is the 'Iddah (prescribed periods) for which Allah has enjoined the divorce of women.

ii. [3673] 15 - (1472) It was narrated that Ibn 'Abbas said: "During the time of the Messenger of Allah it, Abu Bakr and the first two years of 'Umar's Khjlafah, a threefold divorce (giving divorce thrice in one sitting) was counted as one. Then 'Umar bin Al-Khattab said: 'People have become hasty in a matter in which they should take their time. I am thinking of holding them to it.' So he made it binding upon them."

iii. [3674] 16 - (...) Ibn Tawus narrated from his father that Abu As-Sahba' said to Ibn 'Abbas: "Do you know that the threefold divorce was regarded as one at the time of the Messenger of Allah iW and Abu Bakr, and for three years of 'Umar's leadership? "He said: "Yes".

iv. [3675] 17 - (...) It was narrated from Tawus that AN As-Sahba' said to Ibn 'Abbas: "Tell us of something interesting that you know. Wasn't the threefold divorce counted as one at the time of the Messenger of Allah and Abu Bakr?" He said: "That was so, then at the time of 'Umar the people began to issue divorces frequently, so he made it binding upon them.

v. "Mahmud-b, Labeed reported that the Messenger of Allah was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said, 'Are you playing with the Book of Allah who is great and glorious while I am still amongst you? So much so that a man got up and said; shall I not kill him."

vi. According to an Hadith quoted by M. Mohammed Ali in Manual of Hadeth p. 2861 from Masnad of Imam Ahmad bin Hanbul 1:34, the procedure during the time of Prophet and the caliphate of Abu Bakr, and the first two years of Hazrat Umar was that divorce uttered thrice was considered as one divorce. The Umar said, "people had made haste in a matter in which that was moderation for them, so we may make it take effect with regard to them. So he made it take effect to them." The Holy Quran is however very clear on the point that such a divorce must be deemed to be a single divorce.

vii. There is another tradition reported by Rokanah-b. Abu Yazid that he gave his wife Sahalmash an irrevocable divorce, and he conveyed it to the Messenger of Allah and said: by Allah, I have not intended but one divorce. Then messenger of Allah asked Have you not intended but one (divorce)? Rokana said: By Allah, I did not intend but one divorce. The Messenger of Allah then returned her back to him. Afterwards he divorced her for second time at the time of Hadrat Omar and third time at the time of Hadrat Osman.

viii. The Quranic philosophy of divorce is further buttressed by the Hadith of the Prophet wherein he warned, 'of all things which have been permitted, divorce is the most hated by Allah'. The Prophet told his people: "Al-Talaqu indallah-I abghad al-mubahat", meaning "Divorce is most detestable in the sight of God; abstain from it.

ix. [2005] 43 - (867) It was narrated that Jabir bin 'Abdullah said: "When the Messenger of Allah delivered a Khutbah, his eyes would turn red, his voice would become loud, and his anger would increase, until it was as if he was warning of an attacking army, saying: 'The enemy will attack in the morning or in the evening.' He said: 'The Hour and I have been sent like these two,' and he held his index finger and middle finger up together. And he would say: 'The best of speech is the Book of Allah, the best of guidance is the guidance of Muhammad, and the worst of matters are those which are newly-invented, and every innovation is a going astray.' Then he would say: 'I am closer to every believer than his own self. Whoever leaves behind wealth, it is for his family; whoever leaves behind a debt or dependants, then the responsibility of paying it off and of caring for them rests upon me.

x. [2006] 44 - (...) Jabir bin 'Abdullah said: "In the Khutbah of the Prophet on Friday, he would praise Allah, then he would say other things, raising his voice..." a similar Hadith (as No. 2005).

xi. [4796] 59 - (1852) It was narrated that Ziyad bin 'Ilaqah said: "I heard 'Arfajah say: 'I heard the Messenger of Allah say: "There will be Fitnah and innovations. Whoever wants to divide this Ummah when it is united, strike him with the sword, no matter who he is."

xii. [4797] (...) A similar report (as No. 2796) was narrated from 'Arfajah from the Prophet, except that in their Hadith it says: "...kill him".

Based on the above, it was submitted, that in terms of the clear message in the Quran, the acts and sayings of the Prophet Muhammad are to be obeyed. Therefore, when the aforementioned 'hadiths' are available stating in clear terms, that the Prophet Muhammad, considered the pronouncement of three divorces in one sitting as one, that should be given due expression. It was the contention of learned senior Counsel, that it is reported, that when once news was brought to the Prophet Muhammad, that one of his disciples had divorced his wife, by pronouncing three talaqs at one and the same time, the Prophet Muhammad stood up in anger and declared that the man was making a plaything of the words of God, and made him take back his wife. The instance, which is supported by authentic support through available text, according to learned senior Counsel, was sufficient by itself, to dispose of the present controversy.

52. It was also submitted, that even if one examines the deeds of the Prophet Muhammad's companions, it was quite clear from the 'hadiths', that the same were followed during Caliph Abu Bakr's time, and also during the first two years of Caliph Umar. But thereafter, only to meet an exigency, Caliph Umar started accepting the practice of pronouncing three divorces in one sitting, as final and irrevocable. Insofar as the instant aspect of the matter is concerned, learned senior Counsel narrated the following background:

(a) Caliph Umar, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose.

(b) When the Arabs conquered Syria, Egypt, Perisa, etc. they found women there much better in appearance as compared to Arabian women and hence they wanted to marry them. But the Egyptian and Syrian women insisted that in order to marry them, they should divorce their existing wives instantaneously, by pronouncing three divorces in one sitting.

(c) The condition was readily acceptable to the Arabs, because they knew that in Islam divorce was permissible only twice in two separate period of tuhr and its repetition in one sitting was considered un-Islamic, void and not effective. In this way, they could not only marry these women, but also retain their existing wives. This fact was reported to the second Caliph Hazrat Umar.

(d) The Caliph Umar then, in order to prevent misuse of the religion by the unscrupulous husbands decreed, that even repetition of the word talaq, talaq, talaq at one sitting, would dissolve the marriage irrevocably. It was, however, a mere administrative measure of Caliph Umar, to meet an emergency situation, and not to make it a legally binding precedent permanently.

53. It was also the contention of learned senior Counsel, that Hanafi jurists who considered three pronouncements at one sitting, as amounting to a final divorce explained, that in those days people did not actually mean three divorces but meant only one divorce, and other two pronouncements were meant merely to emphasise the first pronouncement. But in the contemporary era, three pronouncements were made with the intention to effect three separate and distinct declarations, and hence, they were not to be counted as a singular announcement. This interpretation of the Hanafi jurists, it was submitted, was generally not acceptable, as it went against the very spirit of the Quran, as well as, the 'hadith' which enjoin, that in case of breach between husband and wife, it should be referred to the arbitration, and failing an amicable settlement, a divorce was permissible, subject to a period of waiting or 'idaat', during which a reconciliation was also to be attempted, and if successful, the husband could take back his wife. The main idea in the procedure for divorce, as laid down by Islam, it was submitted, was to give the parties an opportunity for rapprochement. If three pronouncements are treated as a 'mughallazah' - divorce, then no opportunity is available to the spouses, to retrieve a decision taken in haste. The Rule of 'talaq-e-biddat', it was pointed out, was introduced long after the time of the Prophet. It was submitted, that it renders the measures provided for in the Quran against hasty action ineffective, and thereby deprives people of a chance to change their minds, to retrieve their mistakes and retain their wives.

54. Based on the above submissions, it was contended, that though matters of religion have periodically come before courts in India, and the issues have been decided in the context of Articles 25 and 26 of the Constitution. Raising concerns over issues of empowerment of all citizens and gender justice, it was submitted, had increased the demand on courts to respond to new challenges. The present slew of cases, it was pointed out, was a part of that trend. It was submitted, that the Supreme Court could not refuse to engage itself, on the ground that the issues involved have political overtones or motives, and also because, they might pertain to a narrow constitutional permissibility. It was contended, that to refuse an invitation to examine broader issues such as whether 'personal laws' were part of 'laws in force' Under Article 13, and therefore, subject to

judicial review, or whether a uniform civil code should be enforced, would not be appropriate. It was submitted, if the immediate concern about triple talaq could be addressed, by endorsing a more acceptable alternate interpretation, based on a pluralistic reading of the sources of Islam, i.e., by taking a holistic view of the Quran and the 'hadith' as indicated by various schools of thought (not just the Hanafi school), it would be sufficient for the purpose of ensuring justice to the Petitioners, and Ors. similarly positioned as them.

55. In support of his above submissions, learned senior Counsel placed reliance on legislative changes with reference to 'talaq-e-biddat' all over the world (-for details, refer to Part-5 - Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). Reliance was also placed on judicial pronouncements, rendered by different High Courts with reference to 'talaq-e-biddat' (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat'), so as to conclude, that triple talaq pronounced at the same time should be treated as a single pronouncement of divorce, and thereafter, for severing matrimonial ties, the husband would have to complete the prescribed procedure provided for 'talaq-e-ahsan'/'talaq-e-hasan', and only thereafter, the parties would be treated as divorced.

56. While advancing his aforesaid contention, there was also a note of caution expressed by learned senior Counsel. It was pointed out, that it was not the role of a court, to interpret Muslim 'personal law' - Shariat. It was asserted, that under Muslim 'personal law', the religious head - the Imam would be called upon, to decipher the teachings of the Quran and the 'hadiths' in case of a conflict. And thereupon, the Imam had the responsibility to resolve issues of conflict, not on the basis of his own views, but by reading the verses, namely, the Quran and the 'hadiths', and to determine therefrom, the correct interpretation. It was submitted, that the role of a court, not being a body well versed in the intricacies of faith, would not extend to an interpretation of either the Quran or the 'hadiths', and therefore, 'talaq-e-biddat' should also be interpreted on the touchstone of reasonableness, in tune with the prevailing societal outlook.

57. Ms. Nitya Ramakrishna, Advocate, appeared on behalf of Respondent No. 11 (in Writ Petition (C) No. 118 of 2016) - Dr. Noorjehan Safia Niaz, who was impleaded as such, by an order dated 29.6.2016. It was submitted by learned Counsel, that 'talaq-e-biddat' was a mode of divorce that operated instantaneously. It was contended, that the practice of 'talaq-e-biddat', was absolutely invalid even in terms of Muslim 'personal law' - 'Shariat'. It was submitted, that it was not required of this Court to strike down the practice of 'talaq-e-biddat', it was submitted, that it would suffice if this Court merely upholds the order passed by the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137, by giving a meaningful interpretation to 'talaq-e-biddat', which would be in consonance with the verses of the Quran and the relevant 'hadiths'.

58. It was also asserted by learned Counsel, that Islam from its very inception recognized rights of women, which were not available to women of other communities. It was pointed out, that the right of divorce was conferred on Muslim women, far before this right was conferred on women belonging to other communities. It was asserted, that even in the 7th century, Islam granted women the right of divorce and remarriage. The aforesaid legal right, according to learned Counsel, was recognized by the British, when it promulgated the Shariat Act in 1937. It was submitted, that through the above legislation all customs and usages contrary to the Muslim 'personal law' - 'Shariat', were unequivocally annulled. It was therefore contended, that while evaluating the

validity of 'talaq-e-biddat', this Court should be conscious of the fact, that the Muslim 'personal law' - 'Shariat', was a forward looking code of conduct, regulating various features in the lives of those who professed the Muslim religion.

59. It was also submitted, that the Quran did not recognize 'talaq-e-biddat'. It was pointed out, that the Prophet Muhammad considered only two forms of divorce to be valid, namely, 'talaq-e-ahsan' and 'talaq-e-hasan'. Despite there being numerous schools of Muslim jurisprudence, only two schools recognized 'talaq-e-biddat' as a mode of divorce. It was submitted, that none of the Shia schools recognized triple talaq, as a valid process of divorce between spouses. Insofar as 'talaq-e-biddat' is concerned, it was asserted, that the Quran does not approve instantaneous talaq. During the process of initiation of divorce and its finalization, it is necessarily to have a time lag and a timeline. It cannot be instantaneous. It was pointed out, that the time lag is the period of 'iddat' for determining whether the wife is pregnant or not, i.e., for ascertaining the wife's purity. But the time line, is for adopting arbitration, to probe the possibility of reconciliation. 'Talaq-e-biddat', according to learned Counsel, was a subsequent improvisation, that had crept into the Hanafi school of Sunnis. It was asserted, that the British judges prior to independence, made a huge blunder by upholding 'talaq-e-biddat' - triple talaq. Learned Counsel placed reliance on a number of judgments rendered by different High Courts, culminating in the recent judgments of three High Courts (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat').

60. Based on the above, it was asserted, that 'talaq-e-biddat' could not be considered as a valid mode for severing matrimonial ties under the Muslim 'personal law' - 'Shariat'. In view of the above submissions, and on a reiteration of the submissions advanced by learned Counsel who had entered appearance prior to her, it was submitted, that the clear preponderance of judicial opinion after independence of India has been, that Muslim 'personal law', does not approve 'talaq-e-biddat', and therefore, in terms of the Muslim 'personal law', this Court should declare 'talaq-e-biddat', as unacceptable in law, and should also declare it as unconstitutional.

61. Dr. Rajan Chandra and Mr. Arif Mohd. Khan, Advocates, appeared on behalf of the Muslim Women Personal Law Board. It was their contention, that it has been acknowledged by all concerned, including the AIMPLB, that 'talaq-e-biddat' was derogatory to the dignity of women, and that, it breaches the concept of gender equality. It was submitted, that the above position could easily be remedied through judicial intervention. In this behalf, our attention was drawn to Article 13 of the Constitution, which mandates, that all laws in force in the territory of India (immediately before the commencement of the Constitution), as were inconsistent with the Fundamental Rights contained in Part III of the Constitution, were to the extent of such inconsistency, to be treated as void. The above declaration, it was pointed out, had to be expressed through legislation, by the Parliament, and in case the Parliament was reluctant in bringing out such a legislation (-presumably, for political considerations), it was the bounden duty of this Court, to declare such existing laws which were derogatory to the dignity of women, and which violated the concept of gender equality, as void, on account of their being in conflict with the fundamental rights contained in Part III of the Constitution. Both learned Counsel, invited our attention to the legislative march of events commencing from the enactment of the Shariat Act in 1937, by the British rulers of India, who took upon themselves, extreme cudgels to initiate the grant of appropriate rights to women. As also, the enactment of the Dissolution of Muslim Marriages Act, 1939 (again during the British regime), whereby, Muslim women were conferred with a right to divorce their husbands, on eight

distinct grounds. It was submitted, that the protection of Muslim women's rights, which needed to have continued even after independence, had remained stagnant, resulting in insurmountable sufferings to the Muslim women, specially in comparison with women of other faiths. One of the grounds of such suffering, it was pointed out, was surely 'talaq-e-biddat' - triple talaq, which has been a matter of substantial furore and outcry at the hands of Muslim women. During the course of hearing, our attention was drawn to fundamentals of Islam from the Quran (-for details, refer to Part-3 - The Holy Quran - with reference to 'talaq'), and 'hadiths'. Views of Imams on 'fiqh' and 'hadith' and other relevant texts were referred to (as were also relied upon by learned Counsel who appeared before them - and have been duly referred to above), to contend that triple talaq had never been accepted as a valid means of divorce, even under the Muslim 'personal law'. Adopting the submissions of learned Counsel, who had already assisted this Court on behalf of the Petitioners, it was submitted, that this Court should declare 'talaq-e-biddat', as unconstitutional and violative of Articles 14 and 15 of the Constitution.

62. The learned Attorney General for India - Mr. Mukul Rohatgi commenced his submissions by contending, that in this case, this Court has been called upon to determine, whether the practice of 'talaq-e-biddat' was compatible with contemporary constitutional morality and the principles of gender equality and gender equity guaranteed under the Constitution. In the context of the above debate, it was submitted, that the pivotal issue that needed to be answered was, whether under a secular Constitution, Muslim women could be discriminated against, merely by virtue of their religious identity. And/or whether Muslim women, could be relegated to a status significantly more vulnerable than their counterparts who professed other faiths-Hindu, Christian, Zoroastrian, Buddhist, Sikh, Jain, etc.. In other words, the fundamental question for determination by this Court, according to learned Attorney General was, whether in a secular democracy, religion can be a reason to deny equal status and dignity, to Muslim women.

63. In the above context, it was pointed out, that the fundamental right to equality guaranteed Under Article 14 of the Constitution, manifested within its fold, equality of status. Gender equality, gender equity and gender justice, it was submitted, were values intrinsically entwined in the guarantee of equality, Under Article 14. The conferment of a social status based on patriarchal values, or a social status based on the mercy of the men-folk, it was contended, were absolutely incompatible with the letter and spirit of Articles 14 and 15 of the Constitution. The rights of a Muslim woman to human dignity, social esteem and self-worth, it was submitted, were vital facets of a woman's right to life with dignity, Under Article 21 of the Constitution. It was submitted, that gender justice was a constitutional goal of overwhelming importance and magnitude, without accomplishing the same, half of the country's citizenry, would not be able to enjoy to the fullest-their rights, status and opportunities. Reference was also made to Clause (e) of Article 51-A of the Constitution, which is extracted below:

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

It was accordingly asserted, that Muslim women could not be subjected to arbitrary and unilateral whims of their husbands, as in the case of divorce by triple talaq amongst Shia Muslims belonging to the Hanafi school.

64. It was submitted, that gender equality and the dignity of women, were non-negotiable. These rights were necessary, not only to realize the aspirations of every individual woman, who is an equal citizen of this country, but also, for the larger well being of society and the progress of the nation, one half of which is made up by women. It was submitted, that women deserved to be equal participants in the development and advancement of the world's largest democracy, and any practice which denudes the status of an inhabitant of India, merely by virtue of the religion he/she happens to profess, must be considered as an impediment to that larger goal. In this behalf, reliance was placed on C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil MANU/SC/0441/1996 : (1996) 8 SCC 525, wherein a 3-Judge Bench of this Court observed as under:

15. It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S.R. Bommai v. Union of India [MANU/SC/0444/1994 : (1994) 3 SCC 1] this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under Rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void Under Article 13 if they violate fundamental rights. Right to equality is a fundamental right....

16. The General Assembly of the United Nations adopted a declaration on 4-12-1986 on "The Development of the Right to Development" in which India played a crusading role for its adoption and ratified the same. Its preamble recognises that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfilment of human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic, social and political rights.

17. Article 1(1) assures right to development an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6(1) obligates the State to observance of all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion. Sub-article (2) enjoins that ... equal attention and urgent consideration should be given to implement, promotion and protection of civil, political, economic, social and political rights. Sub-article (3) thereof enjoins that:

State should take steps to eliminate obstacle to development, resulting from failure to observe civil and political rights as well as economic, social and economic rights. Article 8 casts duty on the State to undertake, ... necessary measures for the realisation of right to development and ensure,

inter alia, equality of opportunity for all in their access to basic resources ... and distribution of income.

Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

18. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

Reference was also made to Anuj Garg v. Hotel Association of India MANU/SC/8173/2007 : (2008) 3 SCC 1, wherein it was submitted, that this Court had emphasized on the value of gender equality, and the need to discard patriarchal mindset. For arriving at the above conclusion, it was submitted, that this Court had relied upon international jurisprudence, to strike down a law which debarred women from employment on the pretext that the object of the law was, to afford them protection. The Court held that "it is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy (of the women)". The Court also quoted from a judgment of the U.S. Supreme Court where discrimination was rationalized "by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage...". Reference was also made to Vishaka v. State of Rajasthan MANU/SC/0786/1997 : (1997) 6 SCC 241, wherein, in the context of protection of women against sexual harassment at the workplace, this Court underlined the right of women to a life with dignity. Additionally, our attention was drawn to the Charu Khurana case MANU/SC/1044/2014 : (2015) 1 SCC 192, wherein it was concluded, that the "sustenance of gender justice is the cultivated achievement of intrinsic human rights and that there cannot be any discrimination solely on the ground of gender." The learned Attorney General also cited, Githa Hariharan v. Reserve Bank of India MANU/SC/0117/1999 : (1999) 2 SCC 228, wherein this Court had the occasion to interpret the provisions of the Hindu Minority and Guardianship Act, 1956. It was submitted, that this Court in the above judgment emphasized the necessity to take measures to bring domestic law in line with international conventions, so as to eradicate discrimination of all forms, against women. It was submitted, that Articles 14, 15 and 21 constituted an inseparable part of the basic structure of the Constitution. These values - the right to equality, non-discrimination and the right to live life with dignity, it was emphasized, formed the bedrock of the Constitution. Gender equality and dignity for women, it was pointed out, was an inalienable and inseparable part of the basic structure of the Constitution. Since women transcend all social barriers, it was submitted, that the most fundamental facet of equality under the Constitution was gender equality, and gender equity.

65. The learned Attorney General also pointed out, that a large number of Islamic theocratic countries and countries with overwhelmingly large Muslim populations, had undertaken

significant reforms including the practice of triple talaq. These societies had accepted reform, as being consistent with the practice of Islam (-for details, refer to Part-5 - Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). The paradox was that, Muslim women in India, were more vulnerable in their social status as against women even in predominantly Islamic States, even though India is a secular country. It was submitted, that the position of Indian Muslim women was much worst, than Muslim women who live in theocratic societies, or countries where Islam is the State religion. It was contended, that the impugned practice was repugnant to the guarantee of secularism, which it was pointed out, was an essential feature of the Constitution. Perpetuation of regressive or unjust practices in the name of religion, it was submitted, was anathema to a secular Constitution, which guarantees non-discrimination on grounds of religion. It was also submitted, that in the context of gender equality and gender equity, the larger goal of the State was, to strive towards the establishment of a social democracy, where each one was equal to all others. Reference in this behalf was made to the closing speech on the draft Constitution on 25th November, 1949, of Dr. Ambedkar who had stated: "What we must do is not to be attained with mere political democracy; we must make out political democracy and a social democracy as well. Political democracy cannot last unless there lies on the base of it a social democracy." A social democracy has been described as "A way of life which recognizes liberty, equality and fraternity as principles of life". It was therefore submitted, that in order to achieve social democracy, and in order to provide social and economic justice (envisaged in the preamble), namely, goals articulated in the fundamental rights and directive principles, and in particular, Articles 14, 15, 16, 21, 38, 39 and 46, had to be given effect to. In the instant context, the learned Attorney General placed reliance on Valsamma Paul v. Cochin University MANU/SC/0275/1996 : (1996) 3 SCC 545, and drew the Court's attention to the following:

16. The Constitution seeks to establish secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide: S.R. Bommai v. Union of India, MANU/SC/0444/1994 : (1994) 3 SCC 1 and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular socialist order becomes difficult. In State of Karnataka v. Appu Balu Ingale and Ors. MANU/SC/0151/1993 : AIR (1993) SC 1126 this Court has held in paragraph 34 that judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seamless web of life. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the act with its interpretive armoury to articulate the felt necessities of the time. Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the

underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through Rule of law....

The learned Attorney General then submitted, that in paragraph 20 of the Valsamma Paul case MANU/SC/0275/1996 : (1996) 3 SCC 545, it was noted, that various Hindu practices which were not in tune with the times, had been done away with, in the interest of promoting equality and fraternity. In paragraph 21 of the above judgment, this Court had emphasized the need to divorce religion from 'personal law'. And in paragraph 22, a mention was made about the need to foster a national identity, which would not deny pluralism of Indian culture, but would rather preserve it. Relevant extracts of the aforesaid judgment relied upon during the course of hearing, are reproduced herein below:

21. The Constitution through its Preamble, Fundamental Rights and Directive Principles created secular State based on the principle of equality and non-discrimination striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr. K.M. Munshi contended on the floor of the Constituent Assembly that "we want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation (Vide: Constituent Assembly Debates, Vol. VII 356-8).

22. In the onward march of establishing an egalitarian secular social order based on equality and dignity of person, Article 15(1) prohibits discrimination on grounds of religion or caste identities so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it. Indian culture is a product or blend of several strains or elements derived from various sources, in spite of inconsequential variety of forms and types. There is unity of spirit informing Indian culture throughout the ages. It is this underlying unity which is one of the most remarkable everlasting and enduring feature of Indian culture that fosters unity in diversity among different populace. This generates and fosters cordial spirit and toleration that make possible the unity and continuity of Indian traditions. Therefore, it would be the endeavour of everyone to develop several identities which constantly interact and overlap, and prove a meeting point for all members of different religious communities, castes, sections, subsections and regions to promote rational approach to life and society and would establish a national composite and cosmopolitan culture and way of life.

66. It was also asserted, that patriarchal values and traditional notions about the role of women in society, were an impediment to the goal for achieving social democracy. In this behalf it was contended, that gender inequity impacts not only women, but had a ripple effect on the rest of the community, preventing it from shaking out of backwardness and partaking to the full, liberties

guaranteed under the Constitution. Citizens from all communities, it was submitted, had the right to the enjoyment of all the constitutional guarantees, and if some Sections of society were held back, it was likely to hold back the community at large, resulting in a lopsided development, with pockets of social backwardness. According to the learned Attorney General, this kind of lopsided development was not in the larger interest of the integrity and development of the nation. It was submitted, that secularism, equality and fraternity being the overarching guiding principles of all communities, must be given effect to. This would move the entire citizenry forward, guaranteeing to women equal rights, and at the same time, preserving diversity and plurality.

67. It was the emphatic assertion of the learned Attorney General, that freedom of religion was subservient to fundamental rights. It was contended in this behalf, that the words employed in Article 25(1) of the Constitution, which conferred the right to practice, preach and propagate religion were "subject to the provisions of this Part", which meant that the above rights are subject to Articles 14 and 15, which guarantee equality and non-discrimination. In other words, under India's secular Constitution, the right to freedom of religion was subject to, and in that sense, subservient to other fundamental rights - such as the right to equality, the right to non-discrimination, and the right to life with dignity. In this behalf reference was made to Sri Venkataramana Devaru v. State of Mysore MANU/SC/0026/1957 : 1958 SCR 895. In this judgment, it was submitted, that this Court considered the meaning of the phrase "subject to the provisions of this Part" in Article 25(1) to conclude, that the other provisions of the Part would "prevail over" and would "control the right conferred" by Article 25(1).

68. In the above context it was also submitted, that the freedom of religion, expressed in Article 25 of the Constitution was, not confined to the male gender. Article 25 is extracted below:

25. Freedom of conscience and free profession, practice and propagation of religion. - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus.

Explanation I.- The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.- In Sub-clause (b) of Clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

It was highlighted, that it was also necessary to note, that Article 25(1) provides that "all" persons were "equally" entitled to the freedom of conscience, and the right to profess, practice and propagate religion. This, according to the learned Attorney General, should be understood to mean, that the rights conferred by this Article were equally available to women, and were not confined to men alone. Therefore, it was contended, that any patriarchal or one sided interpretation of religion (or a practice of religion), ought not to be countenanced.

69. It was emphasised by the learned Attorney General, that it was necessary to draw a line between religion per se, and religious practices. It was submitted, that the latter were not protected Under Article 25. "Religion", according to the learned Attorney General, has been explained by this Court in A.S. Narayana Deekshitulu v. State of A.P. MANU/SC/0455/1996 : (1996) 9 SCC 548, as under:

86. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, cannot be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice.

87. In pluralistic society like India, as stated earlier, there are numerous religious groups who practise diverse forms of worship or practise religions, rituals, rites etc., even among Hindus, different denominants and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be predominant in the matter of religion; to others, rituals or ceremonies may be predominant facets of religion; and to yet another class or persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets or religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice. That is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right to profess religion. Therefore, the right to religion guaranteed Under Article 25 or 26 is not an absolute or unfettered right to propagating religion which is subject to legislation by the State limiting or

regulating any activity - economic, financial, political or secular which are associated with religious belief, faith, practice or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters or religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence - factual or legislative or historic - presented in that context is required to be considered and a decision reached.

In order to support the above view, the Court's attention was also drawn to the Javed case MANU/SC/0523/2003 : (2003) 8 SCC 369, wherein this Court observed as under:

49. In State of Bombay v. Narasu Appa Mali [MANU/MH/0040/1952 : AIR 1952 Bom 84 : 53 Cri. LJ 354] the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) was challenged on the ground of violation of Articles 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held:

A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.

50. Their Lordships quoted from American decisions that the laws are made for the governance of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is a recognized institution according to Hindu religious practice, Their Lordships stated in no uncertain terms:

The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform Under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion.

It was further submitted, that practices such as polygamy cannot be described as being sanctioned by religion, inasmuch as, historically polygamy prevailed across communities for several centuries, including the ancient Greeks and Romans, Hindus, Jews and Zoroastrians. It was pointed out, that polygamy had less to do with religion, and more to do with social norms of that time. In the Quran as well, it was contended, it appears that the prevalence (or perhaps, rampant practice) of polygamy in pre-Islamic society, was sought to be regulated and restricted, so as to treat women better than they were treated in pre-Islamic times. It was submitted, that the practice of polygamy

was a social practice rather than a religious one, and therefore, would not be protected Under Article 25. It was sought to be explained, that 'talaq-e-biddat' was similarly a practice never clearly recognized, nor was it seen with favour, and needed to be examined in the background of the above narrated historic position.

70. In order to be able to seek interference, with reference to the issue canvassed, and in order to surmount the legal object in advancing his contentions, the learned Attorney General pointed out, that there was an apparent misconstruction, which had led to the conclusions drawn by the Bombay High Court, in State of Bombay v. Narasu Appa Mali MANU/MH/0040/1952 : AIR 1952 Bom. 84. It was submitted, that 'personal laws' ought to be examined, in the light of the overarching goal of gender justice, and dignity of women. The underlying idea behind the preservation of 'personal laws' was, to safeguard the plurality and diversity among the people of India. However, the sustenance of such diverse identities, according to the learned Attorney General, cannot be a pretext for denying women their rightful status and gender equality. It was submitted, that 'personal law' was a part and parcel of "law" within the meaning of Article 13. And therefore, any such law ('personal law') which was inconsistent with fundamental rights, would have to be considered void. It was further submitted, that the interpretation of the Bombay High Court in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84, to the effect that Article 13 of the Constitution, would not cover 'personal laws' warranted reconsideration. Firstly, it was contended, that a reading of the plain language adopted in Article 13 would clearly establish that 'personal law', as well as customs and usages, were covered within the scope of "law". Article 13 reads as under:

13. Laws inconsistent with or in derogation of the fundamental rights.-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this Clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye law, rule, Regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this Article shall apply to any amendment of this Constitution made Under Article 368.

It was submitted, that the meaning of "law" as defined in Clauses (2) and (3) of Article 13 is not exhaustive, and should be read as if it encompassed within its scope, 'personal law' as well. It was submitted, that under Clause (2) of Article 246 of the Constitution, Parliament and State Legislatures had the power to make laws, also on the subject enumerated in entry 5 of the Concurrent List in the Seventh Schedule, pertaining to "Marriage and divorce; infants and minors; adoption; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." Since the subjects expressed in entry 5 aforementioned, were relatable to 'personal law', therefore, 'personal law', according to the learned Attorney General, was liable to include law within the meaning of Sub-clause (a) of Clause (3) of Article 13 of the Constitution. The observations of the Bombay High Court in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84, it was contended, were contrary to the plain language of Article 13. Secondly, it was submitted, the plain language of Article 13(3)(a) which defines "law" as including "any...custom or usage having in the territory of India the force of law", left no room for any doubt, on the issue. It was pointed out, that the observations in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84, were in the nature of *obiter*, and could not be considered as the ratio of the judgment. Furthermore, the said judgment, being a judgment of a High Court, was not binding on this Court. Without prejudice to the above, according to the learned Attorney General, the said practices under challenge had been incorporated into the Muslim 'personal law' by the Shariat Act. It was reasoned, that the Shariat Act, was clearly a "law in force", within the meaning of Article 13(3)(b). It was submitted, that the Petitioner has challenged Section 2 of the aforesaid Act, insofar as it recognises and validates the practices of triple talaq or talaq-e-biddat (nikah halala and polygamy). Therefore, even assuming (for the sake of argument), that these practices do not constitute customs, the same were nonetheless manifestly covered by Article 13.

71. It was acknowledged, that the legal position expressed in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84 had been affirmed by this Court, on various occasions. Rather than recording the learned Attorney General's submissions in our words, we would extract the position acknowledged in the written submissions filed on behalf of the Union of India, in this matter, below:

(e) Pertinently, despite this ruling that was later followed in Krishna Singh v. Mathura Ahir, MANU/SC/0657/1981 : (1981) 3 SCC 689 and Maharshi Avdhesh v. Union of India, (1994) Supp (1) SCC 713, the Supreme Court has actively tested personal laws on the touchstone of fundamental rights in cases such as Daniel Latifi v. Union of India, MANU/SC/0595/2001 : (2001) 7 SCC 740 (5-Judge Bench), Mohd. Ahmed Khan v. Shah Bano Begum, MANU/SC/0194/1985 : (1985) 2 SCC 556 (5-Judge Bench), John Vallamatom v. Union of India, MANU/SC/0480/2003 : (2003) 6 SCC 611 (3-Judge Bench) etc. Further, in Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, MANU/SC/0441/1996 : (1996) 8 SCC 525, ...

However, reference was nevertheless made to the Masilamani Mudaliar case MANU/SC/0441/1996 : (1996) 8 SCC 525, wherein, it was submitted, that this Court had adopted a contrary position to the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84 and had held, "But the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined

in the Constitution and the personal law also needs to be in conformity with the constitutional goal." It was also asserted, that this Court had further held, "Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void Under Article 13 if they violate fundamental rights." It is significant to note, that this case concerned the inheritance rights of Hindu women. In view of the aforesaid, it was submitted, that the observations in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84, that 'personal law' was not covered Under Article 13, was incorrect and not binding upon this Court.

72. It was also contended, that the Constitution undoubtedly accords guarantee of faith and belief to every citizen, but every practice of faith could not be held to be an integral part of religion and belief. It was therefore submitted, that every sustainable (and enforceable) religious practice, must satisfy the overarching constitutional goal, of gender equality, gender justice and dignity. It was asserted, that the practice of 'talaq-e-biddat', could not be regarded as a part of any "essential religious practice", and as such, could not be entitled to the protection of Article 25. The test of what amounts to an essential religious practice, it was submitted, was laid down in a catena of judgments including Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt MANU/SC/0136/1954 : AIR 1954 SC 282, wherein this Court held as under:

20. The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b). What Article 25(2)(a) contemplates is not Regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality but Regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as "Jehova's Witnesses". This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of "Jehova's Witnesses" incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them under the National Security Regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that Section 116, which guaranteed freedom of religion under the

Australian Constitution, was not in any way infringed by the National Security Regulations (Vide Adelaide Company v. Commonwealth, 67 CLR 116, 127). These were undoubtedly political activities though arising out of religious belief entertained by a particular community. In such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery.

Reference was then made to Ratilal v. State of Bombay MANU/SC/0138/1954 : AIR 1954 SC 388, wherein it was observed as under:

13. Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate. Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar, J. in the case of Jamshed ji v. Soonabai [MANU/MH/0216/1907 : 33 Bom 122] and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad baj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think, are quite appropriate for our present purpose. "If this is the belief of the community" thus observed the learned Judge, "and it is proved undoubtedly to be the belief of the Zoroastrian community,--a secular Judge is bound to accept that belief--it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by Article 26(b) of our Constitution.

Our attention was also drawn to Qureshi v. State of Bihar MANU/SC/0027/1958 : AIR 1958 SC 731, wherein this Court held as under:

13. Coming now to the arguments as to the violation of the Petitioners' fundamental rights, it will be convenient to take up first the complaint founded on Article 25(1). That Article runs as follows:

Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

After referring to the provisions of Clause (2) which lays down certain exceptions which are not material for our present purpose this Court has, in Ratilal Panachand Gandhi v. The State of Bombay [MANU/SC/0138/1954 : (1954) SCR 1055, 1062-1063] explained the meaning and scope of this Article thus:

Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and Section also violates the fundamental rights of the Petitioners ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State Regulation imposed to secure order, public health and morals of the people.

What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meagre and it is surprising that on a matter of this description the allegations in the petition should be so vague. In the Bihar Petition No. 58 of 1956 are set out the following bald allegations:

That the Petitioners further respectfully submit that the said impugned guaranteed Under Article 25 of the Constitution in-as-much as on the occasion of their Bakr Id Day, it is the religious practice of the Petitioners' community to sacrifice a cow on the said occasion. The poor members of the community usually sacrifice one cow for every 7 members whereas it would require one sheep or one goat for each member which would entail considerably more expense. As a result of the total ban imposed by the impugned Section the Petitioners would not even be allowed to make the said sacrifice which is a practice and custom in their religion, enjoined upon them by the Holy Quran, and practised by all Muslims from time immemorial and recognised as such in India.

The allegations in the other petitions are similar. These are met by an equally bald denial in paragraph 21 of the affidavit in opposition. No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem. We, however, find it laid down in Hamilton's translation of Hedaya Book XLIII at p. 592 that it is the duty of every free Mussulman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveller. The sacrifice established for one person is a goat and that for seven a cow or a camel. It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats. So there may be an economic compulsion although there is no religious compulsion. It is also pointed out that from time immemorial the

Indian Mussalmans have been sacrificing cows and this practice, if not enjoined, is certainly sanctioned by their religion and it amounts to their practice of religion protected by Article 25. While the Petitioners claim that the sacrifice of a cow is essential, the State denies the obligatory nature of the religious practice. The fact, emphasised by the Respondents, cannot be disputed, namely, that many Mussalmans do not sacrifice a cow on the Bakr Id Day. It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah, it is said, prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cows. We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the Petitioners.

Learned Attorney General also cited, State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat MANU/SC/1352/2005 : (2005) 8 SCC 534, and placed reliance on the following observations:

22. In State of W.B. v. Ashutosh Lahiri [MANU/SC/0100/1995 : (1995) 1 SCC 189] this Court has noted that sacrifice of any animal by Muslims for the religious purpose on BakrI'd does not include slaughtering of cows as the only way of carrying out that sacrifice. Slaughtering of cows on BakrI'd is neither essential to nor necessarily required as part of the religious ceremony. An optional religious practice is not covered by Article 25(1). On the contrary, it is common knowledge that the cow and its progeny i.e. bull, bullocks and calves are worshipped by Hindus on specified days during Diwali and other festivals like Makar Sankranti and Gopashtami. A good number of temples are to be found where the statue of "Nandi" or "Bull" is regularly worshipped. However, we do not propose to delve further into the question as we must state, in all fairness to the learned Counsel for the parties, that no one has tried to build any argument either in defence or in opposition to the judgment appealed against by placing reliance on religion or Article 25 of the Constitution.

Finally, our attention was invited to Sardar Syedna Taher Saifuddin Saheb v. State of Bombay MANU/SC/0072/1962 : AIR 1962 SC 853, wherein it was observed as under:

60. But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform". To start with, it has to be admitted that this phrase is, as contrasted with the second portion of Article 25(2)(b), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Article 25(1) and the saving would cover beliefs and practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Article 25(1) for two reasons: (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of

religious freedom -- a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform". (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Article 25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and Sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform.

73. It was pointed out, that in the counter-affidavit dated August 2016, filed on behalf of the Muslim Personal Law Board, i.e., Respondent No. 3 to this petition, the practices of triple talaq (as well as, 'nikah halala' and polygamy) have been referred to as "undesirable". It was accordingly submitted, that no "undesirable" practice can be conferred the status of an "essential practice", much less one that forms the substratum of the concerned religion.

74. It was asserted on behalf of the Union of India, that the Indian State was obligated to adhere to the principles enshrined in international covenants, to which it is a party. India being a founding member of the United Nations, is bound by its Charter, which embodies the first ever international agreement to proclaiming gender equality, as a human right in its preamble, and reaffirming faith in fundamental human rights, through the dignity of the human person, by guaranteeing equal rights to men and women. It was submitted, that significantly, the United Nations Commission on the Status of Women, first met in February, 1947, with 15 member States - all represented by women, including India (represented through Shareefah Hamid Ali). During its very first session, the Commission declared its guiding principles, including the pledge to raise the status of women, irrespective of nationality, race, language or religion, to the same level as men, in all fields of human enterprise, and to eliminate all discrimination against women in the provisions of statutory law, in legal maxims or rules, or in interpretation of customary law. (United Nations Commission on the Status of Women, First Session, E/281/Rev. 1, February 25, 1947). It was submitted, that the Universal Declaration of Human Rights, 1948, the International Covenant of Economic, Social and Cultural Rights, 1966 and the International Covenant of Social and Political Rights, 1966, emphasized on equality between men and women. The other relevant international instruments on women which were brought to our notice, included the Convention on the Political Rights of Women (1952), Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1955), Universal Declaration on Democracy (1997), and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999). It was submitted by the learned Attorney General, that the Government of India ratified the Vienna Declaration and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 19-6-1993. The preamble of CEDAW reiterates, that discrimination against women violated the principles of equality of rights and respect for human dignity. And that, such inequality was an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country. It was emphasized that such inequality, also hampered the growth of the personality from society and family, and made it more difficult for the full development of potentialities of women, in the service of their countries and of humanity. Article 1 of the CEDAW, it was pointed out, defines discrimination against women, while Article 2(b) enjoins the State parties to pursue elimination of discrimination against women, by adopting "appropriate legislative and other measures including sanctions where appropriate,

prohibiting all discriminations against women". Clause (c) of Article 2 enjoins the ratifying States, to ensure legal protection of the rights of women, and Article 3 of the CEDAW enjoins the States to take all appropriate measures to ensure full development and advancement of women, for the purpose of guaranteeing to them, the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. It was further submitted on behalf of the Union of India, that the equality principles were reaffirmed in the Second World Conference on Human Rights, held at Vienna in June 1993, as also, in the Fourth World Conference on Women, held at Beijing in 1995. It was pointed out, that India was a party to this convention and other declarations, and was committed to actualize them. It was asserted, that in the 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation, were condemned.

75. Last of all, the Attorney General pointed out, the prevailing international trend all around the world, wherein the practice of divorce through 'talaq-e-biddat', has been statutorily done away with (-for details, refer to Part-5 - Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). On the basis of the submissions noticed above, it was contended, that it was extremely significant to note, that a large number of Muslim countries, or countries with a large Muslim populations such as, Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia, Turkey, Indonesia, Egypt, Iran and Sri Lanka had undertaken significant reforms and had regulated divorce law. It was pointed out, that legislation in Pakistan requires a man to obtain the permission of an Arbitration Council. Practices in Bangladesh, it was pointed out, were similar to those in Pakistan. Tunisia and Turkey, it was submitted, also do not recognize extra-judicial divorce, of the nature of 'talaq-e-biddat'. In Afghanistan, divorce where three pronouncements are made in one sitting, is considered to be invalid. In Morocco and Indonesia, divorce proceedings take place in a secular court, procedures of mediation and reconciliation are encouraged, and men and women are considered equal in matters of family and divorce. In Indonesia, divorce is a judicial process, where those marrying under Islamic Law, can approach the Religious Court for a divorce, while others can approach District Courts for the same. In Iran and Sri Lanka, divorce can be granted by a Qazi and/or a court, only after reconciliation efforts have failed. It was submitted, that even Islamic theocratic States, have undergone reform in this area of the law, and therefore, in a secular republic like India, there is no reason to deny women, the rights available all across the Muslim world. The fact that Muslim countries have undergone extensive reform, it was submitted, also establishes that the practice in question is not an essential religious practice.

76. In the circumstance aforesaid, it was submitted, that the practice of 'talaq-e-biddat' cannot be protected Under Article 25(1) of the Constitution. Furthermore, since Article 25(1) is subject to Part III of the Constitution, as such, it was liable to be in consonance with, and not violative of the rights conferred through Articles 14, 15 and 21 of the Constitution. Since the practice of 'talaq-e-biddat' clearly violates the fundamental rights expressed in the above Articles, it was submitted, that it be declared as unconstitutional.

77. It is also necessary for us to recount an interesting incident that occurred during the course of hearing. The learned Attorney General having assisted this Court in the manner recounted above, was emphatic that the other procedures available to Muslim men for obtaining divorce, such as, 'talaq-e-ahsan' and 'talaq-e-hasan' were also liable to be declared as unconstitutional, for the same reasons as have been expressed with reference to 'talaq-e-biddat'. In this behalf, the contention

advanced was, that just as 'talaq-e-biddat', 'talaq-e-ahsan' and 'talaq-e-hasan' were based on the unilateral will of the husband, neither of these forms of divorce required the availability of a reasonable cause with the husband to divorce his wife, and neither of these needed the knowledge and/or notice of the wife, and in neither of these procedures the knowledge and/or consent of the wife was required. And as such, the other two so-called approved procedures of divorce ('talaq-e-ahsan' and 'talaq-e-hasan') available to Muslim men, it was submitted, were equally arbitrary and unreasonable, as the practice of 'talaq-e-biddat'. It was pointed out, that submissions during the course of hearing were confined by the Union of India, to the validity of 'talaq-e-biddat' merely because this Court, at the commencement of hearing, had informed the parties, that the present hearing would be limited to the examination of the prayer made by the Petitioners and the interveners on the validity of 'talaq-e-biddat'. It was contended, that the challenge to 'talaq-e-ahsan' and 'talaq-e-hasan' would follow immediately after this Court had rendered its pronouncement with reference to 'talaq-e-biddat'. We have referred to the incident, and considered the necessity to record it, because of the response of the learned Attorney General to a query raised by the Bench. One of us (U.U. Lalit, J.), enquired from the learned Attorney General, that if all the three procedures referred to above, as were available to Muslim men to divorce their wives, were set aside as unconstitutional, Muslim men would be rendered remediless in matters of divorce? The learned Attorney General answered the query in the affirmative. But assured the Court, that the Parliament would enact a legislation within no time, laying down grounds on which Muslim men could divorce their wives. We have accordingly recorded the above episode, because it has relevance to the outcome of the present matter.

78. Mr. Tushar Mehta, learned Additional Solicitor General of India, endorsed all the submissions and arguments, advanced by the learned Attorney General. On each aspect of the matter, the learned Additional Solicitor General, independently supported the legal propositions canvassed on behalf of the Union of India.

Part-8.

The rebuttal of the Petitioners' contentions:

79. The submissions advanced on behalf of the Petitioners, were first of all sought to be repudiated by the AIMPLB - Respondent No. 8 (hereinafter referred to as the AIMPLB). Mr. Kapil Sibal, Senior Advocate, and a number of other learned Counsel represented the AIMPLB. In order to lay down the foundation to the submissions sought to be canvassed on behalf of the Respondents, it was asserted, that ceremonies performed at the time of birth of an individual, are in consonance with the religious norms of the family to which the child is born. And thereafter, in continuation each stage of life during the entire progression of life, is punctuated by ceremonies. It was pointed out, that even the act of adoption of a child, in some other family, has religious ceremonies. In the absence of such religious rituals, adoption is not valid. It was submitted, that religious observances manifest an important fundamental position, in the life of every individual. Such religious observances, according to learned Counsel, include the manner in which members of a community were required to dress. Insofar as the Muslim women are concerned, reference was made to 'burqa' or 'hijab' worn by women, whereby women veil themselves, from the gaze of strangers. All these observances, are matters of faith, of those professing the religion. It was asserted, that those who profess the Muslim religion, follow the edicts expressed in the Quran. It was submitted, that

matrimony, is like any other stage in an individual's life. It has to be performed, in consonance with the ceremonies relating thereto. So also, if a married couple decides to part ways, by way of divorce. It was pointed out, that express religious ceremonies are observed even on an individual's death. It was submitted, that all issues including custody and guardianship of children, maintenance, dower, gifts and such like issues, were matters guided by the faith of the people, associated to their religion. How property has to be distributed, upon divorce and/or at the time of death, is also governed by faith. It was submitted, that questions of inheritance and succession, were likewise dealt with in consonance with the edicts of the individual's religion. All these issues, it was submitted, were matters of religious faith.

80. It was pointed out, that the personal affairs referred to in the foregoing paragraph, fall in the realm of 'personal law'. This assertion, was sought to be demonstrated, by placing reliance on the definition of the term 'personal law' in Blacks Law Dictionary (10th edition, 2014), as follows:

The law that governs a person's family matters, regardless of where the person goes. In common law systems, personal law refers to the law of the person's domicile. In civil-law systems, it refers to the law of the individual's nationality (and so is sometimes called lex patriae).

Reference was also made to the definition of the term 'personal law' in 'Conflict of Laws 188' (7th edition, 1974) by R.H. Graveson, who defined the term as under:

The idea of the personal law is based on the conception of man as a social being, so that those transactions of his daily life which affect him most closely in a personal sense, such as marriage, divorce, legitimacy, many kinds of capacity, and succession, may be governed universally by that system of law deemed most suitable and adequate for the purpose ...

Based on the cumulative definition of the term 'personal law', it was submitted, that the evolution of the matters of faith relating to religious practices, must necessarily be judged in the context of practices adopted by the concerned community, with reference to each individual aspect of 'personal law'. It was conceded, on behalf of the AIMPLB, that 'personal laws' were per se subservient to legislation, and as such, 'personal laws' were liable to be considered as mandatory, with reference to numerous aspects of an individual's life, only in the absence of legislation.

81. Even though it was acknowledged, that legislation on an issue would override 'personal law' on the matter, it was pointed out, that in the absence of legislation 'personal laws' in the Indian context, could not be assailed on the basis of their being in conflict with any of the provisions contained in Part III of the Constitution - the Fundamental Rights. It was submitted, that in the absence of statutory law, religious practices and faith, constituted the individual's (belonging to a community) right to profess the same. In order to substantiate his contention, that a challenge to 'personal law' could not be raised on the anvil of Articles 14, 15 and 21 of the Constitution, learned senior Counsel, placed reliance on the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84. Learned senior Counsel, also placed reliance on Shri Krishna Singh v. Mathura Ahir MANU/SC/0657/1981 : (1981) 3 SCC 689, wherein this Court arrived at the conclusion, that the rights of 'sudras' (the lowest amongst the four Hindu castes - members of the workers caste), as were expressed by the Smriti (-refers to a body of Hindu texts, traditionally recorded in writing) writers, were invalid because they were in conflict with the fundamental rights guaranteed under

Part III of the Constitution. It was submitted, that both the above judgments were considered by this Court in Ahmedabad Women Action Group v. Union of India MANU/SC/0896/1997 : (1997) 3 SCC 573, wherein, the legal position recorded in the above judgments was confirmed. It was pointed out, that there was a clear distinction between 'law' and 'law in force', thus far interpreted by this Court with reference to Article 13 of the Constitution. It was asserted, that read along with Article 372 - which mandates, that all laws in force in the territory of India, immediately before the commencement of the Constitution, would continue to remain in force, until altered, repealed or amended by a competent legislature or other competent authority. It was submitted, that to affect a change in 'personal law', it was imperative to embark on legislation, as provided for through entry 5 of the Concurrent List in the Seventh Schedule, which provides - "marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." It was therefore urged, that 'personal laws' *per se* were not subject to challenge, under any of the provisions contained in Part III of the Constitution.

82. It was contended, that the expression 'custom and usage' in Article 13 of the Constitution, would not include faith of religious denominations, embedded in their 'personal law'. Insofar as the instant aspect of the matter is concerned, reference was also made to Section 112 of the Government of India Act, 1915, wherein a clear distinction was sought to be drawn between 'personal laws' and 'customs having force of law'. Section 112, aforementioned is extracted hereunder:

112. Law to be administered in cases of inheritance and succession. - The high courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the Defendant is subject.

It was pointed out, that in framing Article 13, the choice of the words "custom and usage" and the exclusion of the expression "personal law" needed to be taken due note of. It was submitted, that the Constituent Assembly was aware of the use of the term 'personal law' (-which it consciously used in entry 5 of the Concurrent List, in the Seventh Schedule) and the term 'customs and usages', which the Constituent Assembly, employed while framing Article 13 of the Constitution. It was pointed out, that the above position was consciously highlighted by a Full Bench of the Andhra Pradesh High Court in the Youth Welfare Federation case [6]. It was submitted, that if the term 'personal law' was excluded from the definition 'law in force' deployed in Article 13, then matters of faith having a direct relationship to some religious denomination (matters of 'personal law'), do not have to satisfy the rights enumerated in Articles 14, 15 and 21 of the Constitution. In the above view of the matter, it was contended, that the challenge raised on behalf of the Petitioners on the basis of the provisions contained in Part III - Fundamental Rights, needed to be summarily rejected

83. Having presented the aforesaid overview of the constitutional position Mr. Kapil Sibal, learned senior Counsel, endeavoured to deal with the concept of 'talaq' in 'Shariat' - Muslim 'personal law'.

Learned senior Counsel pointed out, that religious denominations in India with reference to Islam were divided into two categories - the Sunnis, and the Shias. It was pointed out, that Sunnis were again sub-divided into religious denominations/schools. The four prominent Sunni schools being - Hanafi, Malaki, Shafei and Hanbali. It was submitted, that a fifth school/denomination had emerged later - Ahl-e-Hadith. It was pointed out, that in India 90% of the Muslims amongst the Sunnis, belonged to the Hanafi school. It was submitted, that Shia and the other denominations of the Sunnis comprised a very small population of Muslims in India.

84. Learned Counsel emphasized, that the three forms of talaq - 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat' referred to by the Petitioners, during the course of hearing, were merely depicting the procedure which a Muslim husband was required to follow, to divorce his wife. It was pointed out, that none of these procedural forms, finds a reference in the Quran. It was asserted, that none of these forms is depicted even in the 'hadith'. It was acknowledged, that 'hadiths' declared talaq by itself, as not a good practice, and yet - recognized the factum of talaq, and its legal sanctity. It was submitted, that talaq was accepted by all believers of Islam. It was therefore contended, that it was absurd for the Petitioners to have submitted that the Quran alone, provided the details with reference to which, and in the manner in which, talaq could be administered. It was therefore asserted, that a close examination of the challenge raised by the Petitioners would reveal that talaq as a concept itself was not under challenge at the hands of the Petitioners. It was pointed out, that truthfully the Petitioners were merely assailing the course adopted by Muslim men, in divorcing their wives through the 'talaq-e-biddat' procedure.

85. Learned Counsel acknowledged the position adopted on behalf of the Petitioners, namely, that Islam represents (i) what is provided for in the Quran, (ii) what was stated and practiced by the Prophet Muhammad from time to time, and (iii) what was memorized and recorded in the 'hadiths' which through centuries of generations, Muslim belief represents what the Prophet Muhammad had said and practiced. It was asserted, that the afore-stated parameters represent Islamic law being practiced by Muslims over centuries, which had become part of the religious faith of various Muslim denominations/schools. This ambit of recognized practices, according to learned Counsel, falls within the sphere of Muslim 'personal law' - 'Shariat'.

86. Learned senior Counsel then attempted to highlight various verses from the Quran, to substantiate his contention. The same are set out hereunder:

i. Whatever 'Allah has passed on to His Messenger from the people of the towns is for Allah and for the Messenger, and for the kinsmen and the orphans and the needy and the wayfarer, so that it may not circulate only between the rich among you. And whatever the Messenger gives you, take it, and whatever he forbids you from, abstain (from it). And fear Allah. Indeed Allah is severe in punishment. (Quran, Al-Hashr 59:71)

ii. O you who believe, obey Allah and His Messenger, and do not turn away from Him when you listen (to him). (Quran, Al-Anfal 8:20)

iii. We did not send any Messenger but to be obeyed by the leave of Allah. Had they, after having wronged themselves, come to you and sought forgiveness from Allah, and had the Messenger

prayed for their forgiveness, they would certainly have found Allah Most-Relenting, Very-Merciful (Quran, Al-Nisa 4:64)

iv. That is because they were hostile to Allah and His Messenger; and whoever becomes hostile to Allah and His Messenger, then, Allah is severe at punishment. (Quran, Al-Anfal 8:13)

v. It is not open for a believing man or a believing woman, once Allah and His messenger have decided a thing, that they should have a choice about their matter; and whoever disobeys Allah and His messenger, he indeed gets off the track, falling into an open error. (Quran, Al-Ahzab 33:36)

vi. Whoever breaks away with the Messenger after the right path has become clear to him, and follows what is not the way of the believers, we shall let him have what he chose, and We shall admit him to Jahannam, which is an evil place to return. (Quran, Al-Nisa 4:115)

In addition to the above, reference was also made to the Quran with respect to triple talaq. The same are set out hereunder:

i. Divorce is twice; then either to retain in all fairness, or to release nicely. It is not lawful for you to take back anything from what you have given them, unless both apprehend that they would not be able to maintain the limits set by Allah. Now, if you apprehend that they would not maintain the limits set by Allah, then, there is no sin or them in what she gives up to secure her release. These are the limits set by Allah. Therefore, do not exceed them. Whosoever exceeds the limits set by Allah, then, those are the transgressors. (Quran, Al-Baqarah 2:229)

ii. Thereafter, if he divorces her, she shall no longer remain lawful for him unless she marries a man other than him. Should he too divorce her, then there is no sin on them in their returning to each other, if they think they would maintain the limits set by Allah. These are the limits set by Allah that He makes clear to a people who know (that Allah is alone capable of setting these limits. (Quran, Al-Baqarah 2:229 and 230) iii. When you have divorced women, and they have reached (the end of) their waiting period, do not prevent them from marrying their husbands when they mutually agree with fairness. Thus, the advice is given to everyone of you who believes in Allah and in the Hereafter. This is more pure and clean for you. Allah knows and you do not know. (Quran, Al-Baqarah, 2:232)

iv. O Prophet, when you people divorce women, divorce them at a time when the period of Iddah may start. And count the period of Iddah, and fear Allah, your Lord. Do not expel them from their houses, nor should they go out, unless they come up with a clearly shameless act. These are the limits prescribed by Allah. And whoever exceeds the limits prescribed by Allah wrongs his own self. You do not know (what will happen in future); it may be that Allah brings about a new situation thereafter. (Quran, Al-Talaq, 65:1)

In order to demonstrate the complete picture, learned senior Counsel invited the Court's attention to the statements attributed to the Prophet Mohamad with reference to talaq which, according to learned Counsel, would have a bearing on the determination of the controversy in hand. The same are extracted as under:

i. Salmah bid Abi Salmah narrated to his father that when Hafs bin Mughaira resorted to Triple Talaq, the Prophet (Pbuh) held it as valid. All the three pronouncements were made with a single word so the Prophet (Pubh) separated her from him irrevocably. And it didn't reach to us that the Prophet (Pubh) rebuked him for that (Daraqutni, Kitab Al-Talaq wa Al-Khula wa Al-Aiyla, 5/23, Hadith number: 3992)

ii. Amas recpimts pm Muadh's authority: "I heard the Prophet (Pbuh) saying: O Muadh, whoever resorts to bidaa divorce, be it one, two or three. We will make his divorce effective. (Daraqutni, 5/81. Kitab al-Talaq wa Al-Khulawa al-Aiyala, Hadith number: 4020)

iii. (When Abdullah Ibn Umar divorced his wife once while she was having menses. The Prophet (Pbuh) asked him to retain his wife saying, O Ibn e Umar, Allah Tabarak wa taala didn't command like this: "You acted against Sunnah. And sunnah is that you wait for Tuhar then divorce at every purity period. He said so Prophet (Pbuh) Ordered me so I retained her. Then he said to me: When she becomes pure divorce at that time or keep (her) So Abdullah ibn Umar asked: "Had I resorted to Triple Talaq then, could I retain her?" The Prophet (Pbuh) replied: "No, she would be separated from you and such an action on your part would have been a sin" (Sunan Bayhaqi, 7/547, Hadith number: 14955).

iv. Aishah Khathmiya was Hasan bin Ali's wife. When Ali was killed and Hasan bin Ali was made caliph. Hasan bin Ali visited her and she congratulated him for the caliphate. Hasan bin Ali replied, "you have expressed happiness over the killing of Ali. So you are divorced thrice". She covered herself with her cloth and said, "By Allah I did not mean this". She stayed until her iddat lapsed and she departed. Hasan bin Ali sent her the remaining dower and a gift of twenty thousand dirhams. When the messenger reached her and she saw the money she said "this is a very small gift from the beloved from whom I have been separated". When the messenger informed Hasan bin Ali about this he broke into tears saying, "Had I not heard from my father reporting from my grandfather that the Prophet (Pbuh) said that whoever pronounced triple talaq upon his wife, she will not be permitted to him till the time she marries a husband other than he, I would have taken her back. (AI-Sunan AI-Kubra Iil Bayhaqi, Hadith number: 14492)

v. Uwaymar Ajlani complained to the Prophet (Pbuh) that he had seen his wife committing adultery. His wife denied this charge. In line with the Quranic command, the Prophet (Pbuh) initiated "a proceeding for the couple. Upon the completion of the process, Uwaymar said: "If I retain her, I Will be taken as a liar". So in the Prophet's presence, and without the Prophet's command, he pronounced Triple Talaq. (Sahi al-Bukhari Kitab al-Talaq, Hadith number: 5259)

87. Having dealt with the verses from the Quran and the statements attributed to the Prophet Muhammad, learned senior Counsel invited the Court's attention to 'hadiths', in relation to talaq. The same are extracted below:

(i) of all the things permitted by Allah, divorce is the most undesirable act. (Sunan Abu Dawud, Bad Karahiya al-Talaq, Hadith no: 2178).

(ii) If a person who had pronounced Triple Talaq in one go was brought to Caliph Umar he would put him to pain by beating and thereafter separate the couple. (Musannaf ibn Abi Shaybah, Bab

man kara an yatliq aI rajal imratahuu thalatha fi maqad wahadi wa ajaza dhalika alayhi. Hadith number: 18089.

(iii) Alqama narrated from Abdullah that he was asked about a person who pronounced hundred divorces to his wife. He said three made her prohibited (to him) and ninety seven is transgression (Musannaf ibn Abi Shayba, Kitab al-Talaq, bab fi al rajal yatlaqu imratahuu miata aw alfa. Hadith number: 18098)

(iv) A man met another playful man in Medinah. He saidk, "Did you divorce your wife? He said, "Yes". He said, "How many thousand? (How many? He replied: thousand). So he was presented before Umar. He said so you have divorced your wife? He said I was playing. So he mounted upon him with the whip and said out of these three will suffice you. Another narrator reports Umar saying: "Triple Talaq will suffice you" (Musannaf Abdul-Razzaq, Kitab al-talaq, Hadith number 11340).

(v) Abdullah Ibn Umar said: "Whoever resorts to Triple Talaq, he disobeys his Lord and wife is alienated from him." (Musannaf ibn Abi Shayba, Kitab aI-Talaq, Hadith no: 18091).

(vi) Imran Ibn Hussain was asked about a person who divorced his wife by Triple Talaq in single session. He said that the person had disobeyed his Lord and his wife had become prohibited to him. (Musannaf Ibn Abi Shayba, Hadith no: 18087)

(vii) If one tells his wife with whom he did not have conjugal relations: Triple Talaq be upon you it will be effective. For he divorced her while she was his wife. Same holds true for his wife with whom his marriage was consummated." (Al-Muhadhdhab, 4/305)

(viii) Chapter heading runs thus: "The stance of those who take the Quranic statement: 'Divorce can be pronounced twice, then either honourable retention or kind release; to mean that Triple Talaq becomes effective. (Bukhari, 3/402)

88. Based on the factual position recorded in the previous three paragraphs, it was submitted, that this Court should not attempt to interpret the manner in which the believers of the faith had understood the process for pronouncement of talaq. It was pointed out, that matters of faith should best be left to be interpreted by the community itself, in the manner in which its members understand their own religion. This, according to learned Counsel, was imperative in view of the absolute contradictions which clearly emerge from a collective perusal of the submissions advanced on behalf the Petitioners, as also, those canvassed on behalf of the Respondents. It was submitted, that different scholars have applied different interpretations. It was also pointed out, that the interpretations relied upon on behalf of the Petitioners, were mostly of scholars who did not belong to the Sunni faith, and were therefore irrelevant, for the determination of the interpretation of the believers and followers of the Hanafi school of Sunni Muslims. One of the scholars relied upon, according to learned senior Counsel, was a disciple of Mirza Ghulam Ahmed (the founder of the Quadini school), who declared himself to be the Prophet, after the demise of the Prophet Muhammad. It was pointed out, that Quadini's disciple was Mohammed Ali. And, the interpretations relied upon by different High Courts (-for reference, see Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat'), in recording their conclusions, were based on

views attributed to Mohammed Ali. It was submitted, that Mohammed Ali is not recognized by all Muslims, and as such, it would be a travesty of justice if his utterances were to be relied upon and followed, contrary to the faith of Muslims (-especially Muslims belonging to Hanafi school). Having expressed the aforesaid overview, learned senior Counsel highlighted from individual judgments of the High Courts (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat') and pointed out, that the reliances on various 'hadiths' recorded therein were not appropriate in the background projected above.

89. Having made the above submissions, learned senior Counsel attempted to pointedly approach the subject of 'talaq-e-biddat' - triple talaq. In this behalf it was reiterated, that talaq was in three forms - 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. It was pointed out, that none of these forms of talaq are referred to either in the Quran, or the 'hadith'. It was submitted, that the aforesaid three forms of talaq, have been so categorized by Islamic scholars. It was pointed out, that what was common in all the forms of talaq, was the finality thereof, in the matter of severance of the matrimonial tie between the husband and wife. Another commonness was also pointed out, namely, that 'talaq-e-ahsan', if not revoked, attain finality; that 'talaq-e-hasan' if likewise not revoked, is treated as final; and that 'talaq-e-biddat' - triple talaq at the time of its pronouncement, is considered as final. It was submitted, that all kinds/forms of talaq when administered three times became irrevocable. Yet again, it was reiterated, that the Petitioners before this Court were not challenging the finality of talaq, they were merely challenging the procedure adopted by the Muslim husbands while administering 'talaq-e-biddat', which has the immediate consequences of finality.

90. In the context expressed in the preceding paragraph, it was sought to be highlighted, that Imam Abu Hanifa did not himself record his own understanding what the Prophet Muhammad had said. It was pointed out, that he had two disciples - Abu Yusuf and Imam Mohammed. It was submitted, that Imam Abu Yusuf in his book "Ikhtilaaf Abi Hanifah wabni Abi Laila" (first edition, 1357) stated the following on the triple talaq:

i. If the man said to his wife, "Your matter is in your hand:, she said, "I have divorced myself three times". Abu Haneefah (may Allah be pleased with him) says: "If the husband intends three times, then it is three.

Reference was also made to the writings of Imam Abu Mohammed in his book entitled "Al-Mautta" (first volume), wherein he asserted as under:

i. Muhammad says: So we follow this that if she chooses her husband then it will not be counted a divorce, and if she chooses herself then it is according to what her husband intended, if his intention is one hen it will be counted one irrevocable (Baainah) divorce, and if his is three it will be three divorces. This is the saying of Abu Hanifah.

91. Reference was also made to writings with respect to 'talaq-e-biddat' by scholars of other schools. In this behalf, the Court's attention was invited to the following:

(i) Most of the Ulema take the innovative divorce as effective (Baday al-sanay, fasl Hukum Talaq-al Bidaa, Kitab al-Talaq, 3/153).

(ii) What do you think about the effectiveness of pronouncing divorce thrice upon one's pregnant wife either in one go or in three different sessions, Imam Malik replied in the affirmative. (AI-Mudawwana, 2/68)

(iii) The validity of triple talaq is also endorsed by all Ahl Al Sunnah jurists. Allama Ibn Quda ma adds that: "This view is attributed to Abdul/ah ibn Abbas. The same stance is shared by most of the successors and later scholars." (AI-Mughni Ii Ibn Qudama, 10/334)

(iv) The Book, Sunnah, and the consensus view of classical authorities is that Triple Talaq is effective, even if pronounced in one go. The act in itself is, however, a sin." (Ahkam al-Quran Iil Jassas, 2/85)

(v) Imam Shafe'I (of Shafe'I School) has stated as follows in his book entitled as Al-Umm (fifth volume):

If he says you are divorced absolutely, with the intention of triple divorce then it will be considered triple divorce and if he intends one it will be considered one divorce and if he says you are divorced with the intention of three it will be considered three. (page 359)

(vi) Mauffaqud Din Abi Muhammed Abdillah Ben Ahmed Ben Muhammed Ben Qudamah Al-Muqaddasi Al-Jammaili Al-Dimashqi Al-Salihi Al-Hanbali (of the Hanbali School) in his book entitled as Al-Mughni (tenth volume) has stated as follows:

Ahmed said: If he says to wife: Divorce yourself, intending three, and she has divorced herself thrice, it will be considered three, and if he has intended one then it will considered one. (page 394)

(vii) Allama Ibn Qudama, a Hanbali jurist is of the view that if one divorces thrice with a single utterance, this divorce will be effective and she will be unlawful for him until she marries someone else. Consummation of marriage is immaterial. The validity of Triple Talaq is also endorsed by all Ahl Al Sunnah juristics. Allama Ibn Qudamma adds that: "This view is attributed to Abdullah ibn Abbas, Abu Huraira, Umar, Abdullah ibn Umar, Abdullah ibn Amr ibn Aas, Abdullah ibn Masud, and Anas. The same stance is shared by most of the successors and later scholars."" (Al-Mughni li Ibn Qudama, 10,334)".

92. Based on the 'hadiths' depicted in the foregoing, and in the paragraphs preceding thereto, it was submitted, that for the Hanafi school of Sunni Muslims 'talaq-e-biddat' - triple talaq was a part and parcel of their 'personal law', namely, a part and parcel of their faith, which they had followed generation after generation, over centuries. That being the position, it was submitted, that 'talaq-e-biddat' should be treated as the constitutionally protected fundamental right of Muslims, which could not be interfered with on the touchstone of being violative of the fundamental rights, enshrined in the Constitution-or for that matter, constitutional morality propounded at the behest of the Petitioners.

93. Learned senior Counsel reiterated, that judicial interference in the matter of 'personal law' is not the proper course to be adopted for achieving the prayers raised by the Petitioners. Reference

was made by a large number of Muslim countries across the world (-for details, refer to Part-5 - Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States), which had provided the necessary succor by legislating on orthodox practices, which were not attuned to present day social norms. It was submitted, that in all the countries in which the practice of 'talaq-e-biddat' has been annulled or was being read down, as a matter of interpretation, the legislatures of the respective countries have interfered to bring in the said reform.

94. In order to fully express the ambit and scope of 'personal law', and to demonstrate the contours of the freedom of conscience and free profession, practice and propagation of religion propounded in Article 25, learned senior Counsel placed reliance on the Constituent Assembly debates. Interestingly reference was, first of all, made to Article 44 of the Constitution, which is extracted below:

44. Uniform civil code for the citizens.- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

It is necessary to notice, that during the Constituent Assembly debates, the present Article 44 was numbered as draft Article 35. During the course of the Constituent Assembly debates, amendments to draft Article 35 were proposed by Mohamed Ismail Sahib, Naziruddin Ahmad, Mahboob Ali Beg, Sahib Bahadur and Pocker Sahib Bahadur. Relevant extract of their amendments and their explanations thereto are reproduced below:

Mr. Mohamad Ismail Sahib (Madras: Muslim): Sir, I move that the following proviso be added to Article 35:

Provided that any group, Section or community of people shall not be obliged to give up its own personal law in case it has such a law.

The right of a group or a community of people to follow and adhere to its own personal law is among the fundamental rights and this provision should really be made amongst the statutory and justiciable fundamental rights. It is for this reason that I along with other friends have given amendments to certain other articles going previous to this which I will move at the proper time.

Now the right to follow personal law is part of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. This secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people. The matter of retaining personal law is nothing new; we have precedents in European countries. Yugoslavia, for instance, that is, the kingdom of the Serbs, Croats and Slovenes, is obliged under treaty obligations to guarantee the rights of minorities. The Clause regarding rights of Mussulmans reads as follows:

The Serb, Croat and Slovene State agrees to grant to the Mussulmans in the matter of family law and personal status provisions suitable for regulating these matters in accordance with the

Mussulman usage." We find similar clauses in several other European constitutions also. But these refer to minorities while my amendment refers not to the minorities alone but to all people including the majority community, because it says," Any group, Section or community of people shall not be obliged" etc. Therefore it seeks to secure the rights of all people in regard to their existing personal law.

Again this amendment does not seek to introduce any innovation or bring in a new set of laws for the people, but only wants the maintenance of the personal law already existing among certain Sections of people. Now why do people want a uniform civil code, as in Article 35? Their idea evidently is to secure harmony through uniformity. But I maintain that for that purpose it is not necessary to regiment the civil law of the people including the personal law. Such regimentation will bring discontent and harmony will be affected. But if people are allowed to follow their own personal law there will be no discontent or dissatisfaction. Every Section of the people, being free to follow its own personal law will not really come in conflict with others.

Mr. Naziruddin Ahmad: Sir, I beg to move:

That to Article 35, the following proviso be added, namely:

Provided that the personal law of any community which has been guaranteed by the statue shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law.

In moving this, I do not wish to confine my remarks to the inconvenience felt by the Muslim community alone. I would put it on a much broader ground. In fact, each community, each religious community has certain religious laws, certain civil laws inseparably connected with religious beliefs and practices. I believe that in framing a uniform draft code these religious laws or semi-religious laws should be kept out of its way. There are several reasons which underlie this amendment. One of them is that perhaps it clashes with Article 19 of the Draft Constitution. In Article 19 it is provided that 'subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. In fact, this is so fundamental that the Drafting Committee has very rightly introduced this in this place. Then in clause(2) of the same Article it has been further provided by way of limitation of the right that 'Nothing in this Article shall affect the operation of any existing law or preclude the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice'. I can quite see that there may be many pernicious practices which may accompany religious practices and they may be controlled. But there are certain religious practices, certain religious laws which do not come within the exception in Clause (2), viz. financial, political or other secular activity which may be associated with religious practices. Having guaranteed, and very rightly guaranteed the freedom of religious practice and the freedom to propagate religion, I think the present Article tries to undo what has been given in Article 19. I submit, Sir, that we must try to prevent this anomaly. In Article 19 we enacted a positive provision which is justiciable and which any subject of a State irrespective of his caste and community can take to a Court of law and seek enforcement. On the other hand, by the Article under reference we are giving the State some amount of latitude which may enable into ignore the right conceded. And this right is not justiciable. It recommends

to the State certain things and therefore it gives a right to the State. But then the subject has not been given any right under this provision. Submit that the present Article is likely to encourage testate to break the guarantees given in Article 19. I submit, Sir, there are certain aspects of the Code of Civil Procedure which have already interfered with our personal laws and very rightly so. But during the 175 years of British rule, they did not interfere with certain fundamental personal laws. They have enacted the Registration Act, the Limitation Act, the Code of Civil Procedure, the Code of Criminal Procedure, the Penal Code, the Evidence Act, the Transfer of Property Act, the Sarda Act and various other Acts. They have been imposed gradually as occasion arose and they were intended to make the laws uniform although they clash with the personal laws of particular community. But take the case of marriage practice and the laws of inheritance. They have never interfered with them. It will be difficult at this stage of our society to ask the people to give up their ideas of marriage, which are associated with religious institutions in many communities. The laws of inheritance are also supposed to be the result of religious injunctions. I submit that the interference with these matters should be gradual and must progress with the advance of time. I have no doubt that a stage would come when the civil law would be uniform. But then that time has not yet come. We believe that the power that has been given to the State to make the Civil Code uniform is in advance of the time. As it is, any State would be justified Under Article 35 to interfere with the settled laws of the different communities at once. For instance, there remarriage practices in various communities. If we want to introduce a law that every marriage shall be registered and if not it will not be valid, we can do so Under Article 35. But would you invalidate a marriage which is valid under the existing law and under the present religious beliefs and practices on the ground that it has not been registered under any new law and thus bastardize the children born?

This is only one instance of how interference can go too far. As I have already submitted, the goal should be towards a uniform civil code but it should be gradual and with the consent of the people concerned. I have therefore in my amendment suggested that religious laws relating to particular communities should not be affected except with their consent to be ascertained in such manner as Parliament may decide by law. Parliament may well decide to ascertain the consent of the community through their representatives, and this could be secured by the representatives by their election speeches and pledges. In fact, this may be made an Article of faith in an election, and a vote on that could be regarded as consent. These are matters of detail. I have attempted by my amendment to leave it to the Central Legislature to decide how to ascertain this consent. Submit, Sir, that this is not a matter of mere idealism. It is a question of stern reality which we must not refuse to face and I believe it will lead to a considerable amount of misunderstanding and resentment amongst the various Sections of the country. What the British in 175 years failed to door was afraid to do, what the Muslims in the course of 500 years refrained from doing, we should not give power to testate to do all at once. I submit, Sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy.

Mahbood Ali Baig Sahib Bahadur: Sir, I move that the following proviso be added to Article 35:

Provided that nothing in this Article shall affect the personal law of the citizen.

My view of Article 35 is that the words "Civil Code" do not cover the strictly personal law of a citizen. The Civil Code covers laws of this kind: laws of property, transfer of property, law of

contract, law of evidence etc. The law as observed by a particular religious community is not covered by Article 35. That is my view. Anyhow, in order to clarify the position that Article 35 does not affect the personal law of the citizen, I have given notice of this amendment. Now, Sir, if for any reason the framers of this Article have got in their minds that the personal law of the citizen is also covered by the expression "Civil Code", I wish to submit that they are overlooking the very important fact of the personal law being so much dear and near to certain religious communities. As far as the Mussalmans are concerned, their laws of succession, inheritance, marriage and divorce are completely dependent upon their religion.

Shri M. Ananthasayanam Ayyangar: It is a matter of contract.

Mahboob Ali Baig Sahib Bahadur: I know that Mr. Ananthasayanam Ayyangar has always very queer ideas about the laws of other communities. It is interpreted as contract, while the marriage amongst the Hindus is a Samskara and that among Europeans it is a matter of status. I know that very well, but this contract is enjoined on the Mussalmans by the Quran and if it is not followed, marriage is not a legal marriage at all. For 1350 years this law has been practised by Muslims and recognised by all authorities in all states. If today Mr. Ananthasayanam Ayyangar is going to say that some other method of proving the marriage is going to be introduced, we refuse to abide by it because it is not according to our religion. It is not according to the code that is laid down for us for all times in this matter. Therefore, Sir, it is not a matter to be treated so lightly. I know that in the case of some other communities also, their personal law depends entirely upon their religious tenets. If some communities have got their own way of dealing with their religious tenets and practices, that cannot be imposed on a community which insists that their religious tenets should be observed.

B. Pocker Sahib Bahadur (Madras: Muslim): Mr. Vice-President, Sir, I support the motion which has already been moved by Mr. Mohamed Ismail Sahib to the effect that the following proviso be added to Article 35:

Provide that any group, Section or community of people shall not be obliged to give up its own personal law in casein has such a law.

It is a very moderate and reasonable amendment to this Article 35. Now I would request the House to consider this amendment not from the point of view of the Mussalman community alone, but from the point of view of the various communities that exist in this country, following various codes of law, with reference to inheritance, marriage, succession, divorce, endowments and so many other matters. The House will not that one of the reasons why the Britisher, having conquered this country, has been able to carry on the administration of this country for the last 150 years and over was that he gave a guarantee of following their own personal laws to each of the various communities in the country. That is one of the secrets of success and the basis of the administration of justice on which even the foreign Rule was based. I ask, Sir, whether by the freedom we have obtained for this country, are we going to give up that freedom of conscience and that freedom of religious practices and that freedom of following one's own personal law and try or aspire to impose upon the whole country one code of civil law, whatever it may mean, - which I say, as it is, may include even all branches of civil law, namely, the law of marriage, law of inheritance, law of divorce and so many other kindred matters?

In the first place, I would like to know the real intention with which this Clause has been introduced. If the words "Civil Code" are intended only to apply to matters procedure like the Code of Civil Procedure and such other laws which are uniform so far as India is concerned at present well, nobody has any objection to that, but the various civil Courts Acts in the various provinces in this country have secured for each community the right to follow their personal laws as regards marriage, inheritance, divorce, etc. But if it is intended that the aspiration of the State should be to override all these provisions and to have uniformity of law to be imposed upon the whole people on these matters which are dealt with by the Civil Courts Acts in the various provinces, well, I would only say, Sir, that it is a tyrannous provision which ought not to be tolerated; and let it not be taken that I am only voicing forth the feelings of the Mussalmans. In saying this, I am voicing forth the feelings of ever so many Sections in this country who feel that it would be really tyrannous to interfere with the religious practices, and with the religious laws, by which they are governed now.

xxx xxx xxx

If such a body as this interferes with the religious rights and practices, it will be tyrannous. These organisations have used a much stronger language than I amusing, Sir. Therefore, I would request the Assembly not to consider what I have said entirely as coming from the point of view of the Muslim community. I know there are great differences in the law of inheritance and various other matters between the various Sections of the Hindu community. Is this Assembly going to set aside all these differences and make them uniform? By uniform, I ask, what do you mean and which particular law, of which community are you going to take as the standard? What have you got in your mind in enacting a Clause like this? There are the mitakshara and Dayabaga systems; there are so many other systems followed by various other communities. What is it that you are making the basis?

Is it open to us to do anything of this sort? By this one Clause you are revolutionising the whole country and the whole setup. There is no need for it.

Sir, as already pointed out by one of my predecessors in speaking on this motion, this is entirely antagonistic tithe provision made as regards Fundamental Rights in Article 19. If it is antagonistic, what is the purpose served by Clause like this? Is it open to this Assembly to pass by one stroke of the pen an Article by which the whole country is revolutionised? Is it intended? I do not know what the framers of this Article mean by this. On a matter of such grave importance, I am very sorry to find that the framers or the draftsmen of this Article have not bestowed sufficiently serious attention to that. Whether it is copied from anywhere or not, I do not know. Anyhow, if it is copied from anywhere, I must condemn that provision even in that Constitution. It is very easy to copy Sections from other constitutions of countries where the circumstances are entirely different. There are ever so many multitudes of communities following various customs for centuries or thousands of years. By one stroke of the pen you want to annul all that and make them uniform. What is the purpose served? What is the purpose served by this uniformity except to murder the consciences of the people and make them feel that they are being trampled upon as regards their religious rights and practices? Such a tyrannous measure ought not to find a place in our Constitution. I submit, Sir, there are ever so many Sections of the Hindu community who are rebelling against this and who voice forth their feelings in much stronger language than I am using. If the framers of this

Article say that even the majority community is uniform in support of this, I would challenge them to say so. It is not so. Even assuming that the majority community is of this view, I say, it has to be condemned and it ought not to be allowed, because, in a democracy, as I take it, it is the duty of the majority to secure the sacred rights of every minority. It is a misnomer to call it a democracy if the majority rides rough-shod over the rights of the minorities. It is not democracy at all; it is tyranny. Therefore, I would submit to you and all the Members of this House to take very serious notice of this article; it is not a light thing to be passed like this.

In this connection, Sir, I would submit that I have given notice of an amendment to the Fundamental Right Article also. This is only a Directive Principle.

The above stated amendments proposed to draft Article 35 were opposed by K.M. Munshi and Alladi Krishnaswami Ayyar. Relevant extracts of their responses are reproduced below:

Shri K.M. Munshi (Bombay: General): Mr. Vice-President, I beg to submit a few considerations. This particular Clause which is now before the House is not brought for discussion for the first time. It has been discussed in several committees and at several places before it came to the House. The ground that is now put forward against it is, firstly that it infringes the Fundamental Right mentioned in Article 19; and secondly, it is tyrannous to the minority.

As regards Article 19 the House accepted it and made it quite clear that-"Nothing in this Article shall affect the operation of any existing law or preclude the State from making any law (a) regulating or restricting"-I am omitting the unnecessary words-"or other secular activity which may be associated with religious practices; (b) for social welfare and reforms". Therefore the House has already accepted the principle that if a religious practice followed so far covers a secular activity or falls within the field of social reform or social welfare, it would be open to Parliament to make laws about it without infringing this Fundamental Right of a minority.

It must also be remembered that if this Clause is not put in, it does not mean that the Parliament in future would have no right to enact a Civil Code. The only restriction touch a right would be Article 19 and I have already pointed out that Article 19, accepted by the House unanimously, permits legislation covering secular activities. The whole object of this Article is that as and when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt may be made to unify the personal law of the country.

A further argument has been advanced that the enactment of a Civil Code would be tyrannical to minorities. Is it tyrannical? Nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a Civil Code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. But I go further. When the Shariat Act was passed or when certain laws were passed in the Central Legislature in the old regime, the Khojas and Cutchi Memons were highly dissatisfied.

They then followed certain Hindu customs; for generations since they became converts they had done so. They did not want to conform to the Shariat; and yet by legislation of the Central Legislature certain Muslim members who felt that Shariat law should be enforced upon the whole community carried their point. The Khojas and Cutchi Memons most unwillingly had to submit to

it. Where were the rights of minority then? When you want to consolidate a community, you have to take into consideration the benefit which may accrue to the whole community and motto the customs of a part of it. It is not therefore correct to say that such an act is tyranny of the majority. If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority, has to submit to the Civil Code. It is not felt to be tyrannical to the minority. The point however is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things got to do with religion I really fail to understand. Take for instance the Hindu Law Draft which is before the Legislative Assembly. If one looks at Manu and Yagnyavalkya and all the rest of them, I think most of the provisions of the new Bill will run counter to their injunctions. But after all we are an advancing society. We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If however the religious practices in the past have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. This is what is emphasised by this article.

Now look at the disadvantages that you will perpetuate if there is no Civil Code. Take for instance the Hindus. We have the law of Mayukha applying in some parts of India; we have Mitakshara in others; and we have the law-Dayabagha in Bengal. In this way even the Hindus themselves have separate laws and most of our Provinces and States have started making separate Hindu law for themselves. Are we going to permit this piecemeal legislation on the ground that it affects the personal law of the country? It is therefore not merely a question for minorities but it also affects the majority.

I know there are many among Hindus who do not like a uniform Civil Code, because they take the same view as the honourable Muslim Members who spoke last. They feel that the personal law of inheritance, succession etc. is really apart of their religion. If that were so, you can never give, for instance, equality to women. But you have already passed a Fundamental Right to that effect and you have an Article here which lays down that there should be no discrimination against sex. Look at Hindu Law; you get any amount of discrimination against women; and if that is part of Hindu religion or Hindu religious practice, you cannot pass a single law which would elevate the position of Hindu women to that of men. Therefore, there is no reason why there should not be a civil code throughout the territory of India.

xxx xxx xxx

Shri Alladi Krishanaswami Ayyar (Madras: General): Mr. Vice-President, after the very full exposition of my friend the Honourable Mr. Munshi, it is not necessary to cover the whole ground. But it is as well to understand whether there can be any real objection to the Article as it runs.

The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

xxx xxx xxx

Now, my friend Mr. Pocker levelled an attack against the Drafting Committee on the ground that they did not know their business. I should like to know whether he has carefully read what happened even in the British regime. You must know that the Muslim law covers the field of contracts, the field of criminal law, the field of divorce law, the field of marriage and every part of law as contained in the Muslim law. When the British occupied this country, they said, we are going to introduce one criminal law in this country which will be applicable to all citizens, be they Englishmen, be they Hindus, be they Muslims. Did the Muslims take exception, and did they revolt against the British for introducing a single system of criminal law? Similarly we have the law of contracts governing transactions between Muslims and Hindus, between Muslims and Muslims. They are governed not by the law of the Koran but by the Anglo-Indian jurisprudence, yet no exception was taken to that. Again, there are various principles in the law of transfer which have been borrowed from the English jurisprudence.

Therefore, when there is impact between two civilizations or between two cultures, each culture must be influenced and influence the other culture. If there is a determined opposition, or if there is strong opposition by any Section of the community, it would be unwise on the part of the legislators of this country to attempt to ignore it. Today, even without Article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a uniform civil code.

Now, again, there are Muslims and there are Hindus, there are Catholics, there are Christians, there are Jews, indifferent European countries. I should like to know from Mr. Pocker whether different personal laws are perpetuated in France, in Germany, in Italy and in all the continental countries of Europe, or whether the laws of succession aren't coordinated and unified in the various States. He must have made a detailed study of Muslim jurisprudence and found out whether in all those countries, there is a single system of law or different systems of law.

Leave alone people who are there. Today, even in regard to people in other parts of the country, if they have property in the continent of Europe where the German Civil Code or the French Civil Code obtains, the people are governed by the law of the place in very many respects. Therefore, it is incorrect to say that we are invading the domain of religion. Under the Moslem law, unlike under Hindu law, marriage is purely a civil contract. The idea of a sacrament does not enter into the concept of marriage in Muslim jurisprudence though the incidence of the contract may be governed by what is laid down in the Koran and by theater jurists. Therefore, there is no question of religion being in danger. Certainly no Parliament, no Legislature will be so unwise as to attempt it, apart from the power of the Legislature to interfere with religious tenets of peoples. After all the only community that is willing to adapt itself to changing times seems to be the majority community in the country. They are willing to take lessons from the minority and adapt their Hindu Laws and take a leaf from the Muslims for the purpose of reforming even the Hindu Law. Therefore, there is no force to the objection that is put forward to Article 35. The future Legislatures may attempt a uniform Civil Code or they may not. The uniform Civil Code will run into every aspect of Civil Law. In regard to contracts, procedure and property uniformity is sought to be secured by their finding a place in the Concurrent List. In respect of these matters the greatest contribution of British jurisprudence has been to bring about a uniformity in these matters. We only go a step further than the British who ruled in this country. Why should you distrust much more a national indigenous Government than a foreign Government which has been ruling? Why should our

Muslim friends have greater confidence, greater faith in the British Rule than in a democratic Rule which will certainly have regard to the religious tenets and beliefs of all people? Therefore, for those reasons, I submit that the House may unanimously pass this Article which has been placed before the Members after due consideration.

Before the amendments were put to vote, Dr. B.R. Ambedkar made the following observations:

The Honourable Dr. B.R. Ambedkar: Sir, I am afraid I cannot accept the amendments which have been moved to this article. In dealing with this matter, I do not propose to touch on the merits of the question as to whether this country should have a Civil Code or it should not. That is a matter which I think has been dealt with sufficiently for the occasion by my friend, Mr. Munshi, as well as by Shri Alladi Krishnaswami Ayyar. When the amendments to certain fundamental rights are moved, it would be possible for me to make a full statement on this subject, and I therefore do not propose to deal with it here.

My friend, Mr. Hussain Imam, in rising to support the amendments, asked whether it was possible and desirable to have a uniform Code of laws for a country so vast as this is. Now I must confess that I was very much surprised at that statement, for the simple reason that we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Code of Criminal Procedure operating throughout the country, which is contained in the Penal Code and the Code of Criminal Procedure. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there are the Negotiable Instruments Acts: and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have Article 35 as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it.

Coming to the amendments, there are only two observations which I would like to make. My first observation would be to state that members who put forth these amendments say that the Muslim personal law, so far as this country was concerned, was immutable and uniform through the whole of India. Now I wish to challenge that statement. I think most of my friends who have spoken on this amendment have quite forgotten that up to 1935 the North-West Frontier Province was not subject to the Shariat Law. It followed the Hindu Law in the matter of succession and in other matters, so much so that it was in 1939 that the Central Legislature had to come into the field and to abrogate the application of the Hindu Law to the Muslims of the North-West Frontier Province and to apply the Shariat Law to them. That is not all.

My honourable friends have forgotten, that, apart from the North-West Frontier Province, up till 1937 in the rest of India, in various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu Law in the matter of succession. In order to bring them on the plane of uniformity with regard to the other Muslims

who observed the Shariat Law, the Legislature had to intervene in 1937 and to pass an enactment applying the Shariat Law to the rest of India.

I am also informed by my friend, Shri Karunakara Menon, that in North Malabar the Marumakkathayam Law applied to all-not only to Hindus but also to Muslims. It is to be remembered that the Marumakkathayam Law is a Matriarchal form of law and not a Patriarchal form of law. The Mussulmans, therefore, in North Malabar were up to now following the Marumakkathayam law. It is therefore no use making a categorical statement that the Muslim law has been an immutable law which they have been following from ancient times. That law as such was not applicable in certain parts and it has been made applicable ten years ago. Therefore if it was found necessary that for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindus, law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by Article 35, I am quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community.

My second observation is to give them an assurance. I quite realise their feelings in the matter, but I think they have read rather too much into Article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province. The law said that here is a Shariat law which should be applied to Mussulmans who wanted that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successors. It would be perfectly possible for parliament to introduce a provision of that sort; so that the fear which my friends have expressed here will be altogether nullified. I therefore submit that there is no substance in these amendments and I oppose them.

When the matter was put to vote by the Vice President of the Constituent Assembly, it was resolved as under:

Mr. Vice-President: The question is:

That the following proviso be added to Article 35:

'Provided that any group, Section or community or people shall not be obliged to give up its own personal law in case it has such a law'.

The motion was negatived.

Based on the Constituent Assembly debates with reference to draft Article 35, which was incorporated in the Constitution as Article 44 (extracted above), it was submitted, that as expressed in Article 25(2)(b), so also the debates of Article 44, the intent of the Constituent Assembly was to protect 'personal laws' of different communities by elevating their stature to that of other fundamental rights, however with the rider, that the legislature was competent to amend the same.

95. Sequentially, learned senior Counsel invited our attention to the Constituent Assembly debates with reference to Article 25 so as to bring home his contention, that the above Article preserved to all their 'personal laws' by elevating the same to the stature of a fundamental right. The instant elevation, it was pointed out, was by incorporating Articles 25 and 26 as components of Part III - Fundamental Rights, of the Constitution. It would be relevant to record, that Article 25 as it now exists, was debated as draft Article 19 by the Constituent Assembly. It was pointed out, that only one amendment proposed by Mohamed Ismail Sahib and its response by Pt. Laxmikanta Mitra would bring home the proposition being canvassed, namely, that 'personal laws' were inalienable rights of individuals and permitted them to be governed in consonance with their faith. The amendment proposed by Mohamed Ismail Sahib and his statement in that behalf before the Constituent Assembly, as is relevant for the present controversy, is being extracted hereunder:

Mr. Mohamed Ismail Sahib: Thank you very much, Sir, forgiving me another opportunity to put my views before the House on this very important matter. I beg to move:

That after Clause (2) of Article 19, the following new Clause be added:

(3) Nothing in Clause (2) of this Article shall affect the right of any citizen to follow the personal law of the group or the community to which he belongs or professes to belong.

Sir, this provision which I am suggesting would only recognise the age long right of the people to follow their own personal law, within the limits of their families and communities. This does not affect in any way the members of other communities. This does not encroach upon the rights of the members of other communities to follow their own personal law. It does not mean any sacrifice at all on the part of the members of any other community. Sir, here what we are concerned with is only the practice of the members of certain families coming under one community. It is a family practice and in such cases as succession, inheritance and disposal of properties by way of wakf and will, the personal law operates. It is only with such matters that we are concerned under personal law. In other matters, such as evidence, transfer of property, contracts and in innumerable other questions of this sort, the civil code will operate and will apply to every citizen of the land, to whatever community he may belong. Therefore, this will not in any way detract from the desirable amount of uniformity which the state may try to bring about, in the matter of the civil law.

This practice of following personal law has been there amongst the people for ages. What I want under this amendment is that that practice should not be disturbed now and I want only the continuance of a practice that has been going on among the people for ages past. On a previous occasion Dr. Ambedkar spoke about certain enactments concerning Muslim personal law, enactments relating to Wakf, Shariat law and Muslim marriage law. Here there was no question of the abrogation of the Muslim personal law at all. There was no revision at all and in all those cases

what was done was that the Muslim personal law was elucidated and it was made clear that these laws shall apply to the Muslims. They did not modify them at all. Therefore those enactments and legislations cannot be cited now as matters of precedents for us to do anything contravening the personal law of the people. Under this amendment what I want the House to accept is that when we speak of the State doing anything with reference to the secular aspect of religion, the question of the personal law shall not be brought in and it shall not be affected.

xxx xxx xxx

The question of professing, practising and propagating one's faith is a right which the human being had from the very beginning of time and that has been recognised as an inalienable right of every human being, not only in this land but the whole world over and I think that nothing should be done to affect that right of man as a human being. That part of the Article as it stands is properly worded and it should stand as it is. That is my view.

Another honourable Member spoke about the troubles that had arisen as a result of the propagation of religion. I would say that the troubles were not the result of the propagation of religion or the professing or practicing of religion. They arose as a result of the misunderstanding of religion. My point of view, and I say that that is the correct point of view, is that if only people understand their respective religions aright and if they practise them aright in the proper manner there would be no trouble whatever; and because there was some trouble due to some cause it does not stand to reason that the fundamental right of a human being to practise and propagate his religion should be abrogated in any way.

The response of Pt. Laxmikanta Mitra is reproduced below:

Pandit Lakshmi Kanta Mitra (West Bengal: General): Sir, I feel myself called upon to put in a few words to explain the general implications of this Article so as to remove some of the misconceptions that have arisen in the minds of some of my honourable Friends over it.

This Article 19 of the Draft Constitution confers on all person the right to profess, practise and propagate any religion they like but this right has been circumscribed by certain conditions which the State would be free to impose in the interests of public morality, public order and public health and also in so far as the right conferred here does not conflict in any way with the other provisions elaborated under this part of the Constitution. Some of my Friends argued that this right ought not to be permitted in this Draft Constitution for the simple reason that we have declared time and again that this is going to be a secular State and as such practice of religion should not be permitted as a fundamental right. It has been further argued that by conferring the additional right to propagate a particular faith or religion the door is opened for all manner of troubles and conflicts which would eventually paralyse the normal life of the State. I would say at once that this conception of a secular State is wholly wrong. (By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronise or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be

discriminated against simply on the ground that he professed a particular form of religion. In other words in the affairs of the State the professing of any particular religion will not be taken into consideration at all.) This I consider to be the essence of a secular state. At the same time we must be very careful to see that this land of ours we do not deny to anybody the right not only to profess or practise but also to propagate any particular religion. Mr. Vice-President, this glorious land of ours is nothing if it does not stand for lofty religious and spiritual concepts and ideals. India would not be occupying any place of honour on this globe if she had not reached that spiritual height which she did in her glorious past. Therefore I feel that the Constitution has rightly provided for this not only as a right but also as a fundamental right. In the exercise of this fundamental right every community inhabiting this State professing any religion will have equal right and equal facilities to do whatever it likes in accordance with its religion provided it does not clash with the conditions laid down here.

In addition to the above, it is only relevant to mention, that the amendment proposed by Mohamed Ismail Sahib was negatived by the Constituent Assembly.

96. While concluding his submissions Mr. Kapil Sibal, learned Senior Advocate, focused his attention to the Muslim Personal Law (Shariat) Application, 1937 and invited our attention to some of the debates which had taken place when the Bill was presented before the Legislative Assembly. Reference is only necessary to the statements made by H.M. Abdullah and Abdul Qaiyum on the floor of the House. The same are extracted hereunder:

Mr. H.M. Abdullah (West Central Punjab: Muhammadan): Sir, I beg to move: "That the Bill to make provision for the application of the Moslem Personal Law (Shariat) to Moslems in British India, as reported by the Select Committee, be taken into consideration."

The object of the Bill, as the House is already aware, is to replace the customary law by the Shari at law in certain matters where the parties to a dispute are Muslims. By doing so, it also helps the weaker sex as it enables women to succeed to the ancestral property and to claim dissolution of marriage on certain grounds. After explaining the object of the Bill briefly, it gives me great pleasure to say that the Bill has met with a unanimous support from the Select Committee except in one or two points. Objection has been taken to the words "or Law" in Clause 2 of the Bill by Messrs Mudie, Muhammad Azhar Ali and Sir Muhammad Yarnin Khan in their minutes of dissent. As there is an amendment on the agenda for the omission of these words, I shall deal with it when it is moved. Meanwhile, I would confine my remarks to the modifications suggested by the Select Committee. The main changes made by it are two, one relating to the exclusion of the agricultural land from the purview of the Bill, and the other concerning the amplification of the word "divorce". As succession to agricultural land is an exclusively provincial subject under the Government of India Act, 1935, it had, much against my wish, to be excluded from the Bill. Having regard to the different forms of dissolution of marriage recognised by the Shariat, it was considered necessary to provide for all of them. In order to implement the provisions in this respect, a new Clause 3 has been inserted in the Bill empowering the District Judge to grant dissolution of marriage on petition of a married Muslim woman on certain grounds. These changes have been introduced in the interest of the females who, in such matters, are at present at the mercy of their husbands.

I am sure that these wholesome changes will be supported by the House. In addition to the above, the Select Committee have made a few other amendments which are fully explained in the report, and I need not take the time of the House in dilating upon them. I hope that the Bill in its present form will meet with the approval of the whole House. Sir, I move.

Mr. Deputy President (Mr. Akhil Chandra Dattas): Motion moved: "That the Bill to make provision for the application of the Moslem Personal Law (Shariat) to Moslems in British India, as reported by the Select Committee, be taken into consideration."

Mr. Abdul Qaiyum (North-West Frontier Province: General): Sir, I am in sympathy with the objects which this very useful Bill aims at. There is a great awakening among the Muslim masses, and they are terribly conscious of their wretched condition socially, politically and economically. There is a desire in the 107 108 Appendix B community for an advance in all these directions. The feelings of the Muslim community have been expressed in public meetings throughout the length and breadth of this country. This feeling, I have great pleasure in stating, is not merely confined to males but it has spread to the females also, and for the first time the Muslim women in India have given expression to their strong feelings against the dead hand of customary law which has reduced them into the position of chattels. Sir, these feelings have been expressed by various organisations of Muslim women throughout India. A representative body of Muslim Ulema like the Jamait-ul-Ulemai-Hind has also expressed its sympathy with the objects of this Bill. Sir, there is something in the word Shariat, -may be it is Arabic, - which gives a sort of fright to some of my Honourable friends, but I think if they try to read the Muhammadan Law on the point, especially on the point of succession, they will realise that this Bill was long overdue and that it is a step in the right direction. People have no idea of what terrible conditions the Muslim women have had to endure in my own Province: I can say that whenever a Muslim died, at least before the Frontier Shariat Law was enacted in the North-West Frontier Province, his daughter, his sister and his wife all used to be thrown into the street, and the reversioner in the tenth degree would come round and collar all his property. I think that the conscience of all those who believe in progress, social, political and economic will revolt against such practice and once people realise that this Bill is primarily intended to improve the status of women and to confer upon them benefits which are lawfully their due under the Muhammadan law, then they will gladly support this measure. 'Custom' is a very indefinite term. I know it as a lawyer that in my Province whenever a question of custom used to crop up it used to involve any amount of research work, lawyers used to indulge in research work to find out cases, look up small books on customary law and it was found that the custom varied from tribe to tribe, from village to village and it has been held, by the High Court in our Province before the Shariat Act came into force, that custom varied from one part of the village to the other. The position was so uncertain that people had to spend so much money on litigation that by the time litigation came to an end the property for which people were fighting would disappear. It was with a view to put an end to this uncertainty that people in the Frontier Province pressed for an Act which was subsequently passed into law.

I have only one thing to say. Personally I want the Muslims in India in matters affecting them to follow the personal law of the Muslims as far as they can. I want them to move in this direction because it is a thing which is going to help the Muslims and because the Muslims form a very important minority community in this country-they are 80 millions-all well-wishers of this country will agree with me that if it enhances the states of Muslims, if it brings the much needed relief to

the Muslim women, it will be a good thing for the cause of the Indian nation. Therefore, in our Province an Act was passed which goes much further than this particular Bill which is now under discussion before this House. It is a very well-known fact that under the new Government of India Act, agricultural land and waqfs and religious trusts are provincial subjects and that this Honourable House cannot legislate about matters which are now on the provincial legislative list. The Act which we have in the Frontier Province, Act VI of 1935, goes much further than this Bill because it includes agricultural land and religious trusts. Therefore, I have tabled an amendment that this particular Bill-though I heartily agree with the principles of Appendix B 109 the Bill-when enacted into law, should not be extended to our Province. If it is so extended, it would mean that the people of the Frontier Province would be taking a step backward and not forwards. It is well-known fact and it is laid down in the Government of India Act, Section 107, that where a Federal Law comes into conflict with a Provincial Law and even if the Federal Law has been passed after the Provincial Law, then to that extent it over-rides the Provincial law and the Provincial Law becomes null and void. Therefore, my submission is that the intention with which I tabled my amendment was not with any idea of opposing the object of this Bill, but my reason for moving this amendment is that this Bill does not go as far as we wish to go-at least in one Province, namely, the North-West Frontier Province. I submit this is a measure which has been long overdue. I have known cases where a widow who was enjoying life estate-and whose reversioners were waiting for her death-did not die but happened to have a very long life. There have been cases in the Northwest Frontier Province where people have taken the law into their own hands and in order to get the property they have murdered the widow. I can cite other cases before this Honourable House. There have been cases which I have come across in my legal and professional career where, when a man dies leaving a wife who by customary law has to enjoy the property till her death or remarriage, certain reversioners come forward and bring a suit to declare that the widow had married one of the reversioners with a view to proving that she was no longer a widow and with a view to terminate her life estate. There have been numerous cases where families have been ruined, murderers and stabbings have taken place because the dead hand of customary law stood in the way of the reversioners who were anxious to get what they could not get and in order to deprive the poor widow, false cases have been tromped up that she had remarried. There have been many other illegal tricks resorted to by people with a view to get hold of the property. I submit, Sir, that the dead hand of customary law must be removed. We are living in an age in which very important changes are taking place. After all this customary law is a thing of the past When many other things are going the way of all flesh, when even systems of Government have to change, when even mighty Empires have disappeared, when we see signs of softening even in the hearts of the Government of India, when we have got popular Congress Governments in seven Provinces-a thing which nobody would have believed six months ago or one year ago. I submit that it is high time that we got rid of this dead hand of custom. After all custom is a horrible thing as far as this particular matter is concerned, and by endorsing the principles of this Bill we would be doing justice to millions of Indian women who profess Muslim faith. I hope, Sir, the day is not far off when other communities will also bring similar measures and when in India women and men will be treated equally in the eyes of law in the matter of property, political rights, social rights and in all other respects. I have, therefore, great pleasure in supporting the principles of this Bill.

Based on the aforesaid debates and the details expressed hereinabove (-for details, refer to Part-4 - Legislation in India, in the field of Muslim 'personal law'), it was contended, that the main object

of the legislation was not to express the details of the Muslim 'personal law' - 'Shariat'. The object was merely to do away with customs and usages as were in conflict with Muslim 'personal law' - 'Shariat'. It was therefore submitted, that it would not be proper to hold, that by the Shariat Act, the legislature gave statutory status to Muslim 'personal law' - 'Shariat'. It would be necessary to understand the above enactment, as statutorily abrogating customary practices and usages, as were in conflict with the existing Muslim 'personal law' - 'Shariat'. It was submitted, that the above enactment did not decide what was, or was not, Muslim 'personal law' - 'Shariat'. It would therefore be a misnomer to consider that the Muslim Personal Law (Shariat) Application Act, 1937, in any way, legislated on the above subject. It was pointed out, that Muslim 'personal law' - 'Shariat' comprised of the declarations contained in the Quran, or through 'hadiths', 'ijmas' and 'qiyas' (-for details, refer to Part-2 - The practiced modes of 'talaq' amongst Muslims). It was pointed out, that the articles of faith, as have been expressed on a variety of subjects of Muslim 'personal law' - 'Shariat', have been in place ever since they were declared by the Prophet Mohammed. Insofar as the practice of 'talaq-e-biddat' is concerned, it was submitted, that it has been practised amongst Muslims for the last 1400 years. It was submitted, that the same is an accepted mode of divorce amongst Muslims. It was therefore urged, that it was not for this Court to decide, whether the aforesaid practice was just and equitable. The reason for this Court not to interfere with the same, it was submitted was, that the same was a matter of faith, of a majority of Muslims in this country, and this Court would be well advised to leave such a practice of faith, to be determined in the manner as was considered fit by those who were governed thereby. A belief, according to learned senior Counsel, which is practiced for 1400 years, is a matter of faith, and is protected Under Article 25 of the Constitution. Matters of belief and faith, it was submitted, have been accepted to constitute the fundamental rights of the followers of the concerned religion. Only such practices of faith, permitted to be interfered with Under Article 25(1), as are opposed to public order, morality and health. It was pointed out, that in addition to the above, a court could interfere only when articles of faith violated the provisions of Part III - Fundamental Rights, of the Constitution. Insofar as the reliance placed by the Petitioners on Articles 14, 15 and 21 is concerned, it was submitted, that Articles 14, 15 and 21 are obligations cast on the State, and as such, were clearly inapplicable to matters of 'personal law', which cannot be attributed to State action.

97. While concluding his submissions, learned senior Counsel also affirmed, that he would file an affidavit on behalf of the AIMPLB. The aforesaid affidavit was duly filed, which reads as under:

1. I am the Secretary of All India Muslim Personal Law Board which has been arraigned as Respondent No. 3 and as Respondent No. 8 respectively to the above-captioned Writ Petitions. I am conversant with the facts and circumstances of the present case and I am competent to swear this Affidavit.

2. I say and submit that the All India Muslim Personal Law Board will issue an advisory through its Website, Publications and Social Media Platforms and thereby advise the persons who perform 'Nikah' (marriage) and request them to do the following:

(a) At the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise the Bridegroom/Man that in case of differences leading to Talaq the Bridegroom/Man shall not pronounce three divorces in one sitting since it is an undesirable practice in Shariat;

(b) That at the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise both the Bridegroom/Man and the Bride/Woman to incorporate a condition in the 'Nikahnama' to exclude resorting to pronouncement of three divorces by her husband in one sitting.

3. I say and submit that, in addition, the Board is placing on record, that the Working Committee of the Board had earlier already passed certain resolutions in the meeting held on 15th and 16th April, 2017 in relation to Divorce (Talaq) in the Muslim community. Thereby it was resolved to convey a code of conduct/guidelines to be followed in the matters of divorce particularly emphasizing to avoid pronouncement of three divorces in one sitting. A copy of the resolution dated April 16, 2017 alongwith the relevant Translation of Resolution Nos. 2, 3, 4 & 5 relating to Talaq (Divorce) is enclosed herewith for the perusal of this Hon'ble Court and marked as Annexure A-1 (Colly) [Page Nos. 4 to 12] to the present Affidavit.

Based on the above affidavit, it was contended, that social reforms with reference to 'personal law' must emerge from the concerned community itself. It was reiterated, that no court should have any say in the matter of reforms to 'personal law'. It was submitted, that it was not within the domain of judicial discretion to interfere with the matters of 'personal law' except on grounds depicted in Article 25(1) of the Constitution. It was contended, that the practice of 'talaq-e-biddat' was not liable to be set aside, on any of the above grounds.

98. While supplementing the contentions noticed in the preceding paragraph, it was submitted, that Article 25(2)(b) vested the power with the legislature, to interfere with 'personal law' on the ground of social welfare and reform. It was therefore contended, that the prayer made by the Petitioner and those supporting the Petitioner's case before this Court, should be addressed to the members of the community who are competent to amend the existing traditions, and alternatively to the legislature which is empowered to legislatively abrogate the same, as a measure of social welfare and reform. With the above observations, learned senior Counsel prayed for the rejection of the prayers made by the Petitioners.

99. Mr. Raju Ramachandran, Senior Advocate, entered appearance on behalf of Jamiat Ulema-i-Hind, i.e., Respondent No. 1 in Suo Motu Writ Petition (Civil) No. 2 of 2015 and Respondent No. 9 in Writ Petition (Civil) No. 118 of 2016. At the beginning of his submissions, learned senior Counsel stated, that he desired to endorse each one of the submissions advanced before this Court by Mr. Kapil Sibal, Senior Advocate. We therefore hereby record the aforesaid contention of learned senior Counsel.

100. In addition to the above, it was submitted, that the cause raised by the Petitioner (and others) before this Court was clearly frivolous. It was submitted, that under the Muslim 'personal law' - 'Shariat', parties at the time of executing 'nikahnama' (marriage deed) are free to incorporate terms and conditions, as may be considered suitable by them. It was submitted, that it was open to the wife, at the time of executing 'nikahnama', to provide therein, that her husband would not have the right to divorce her through a declaration in the nature of 'talaq-e-biddat'. It was therefore submitted, that it was clearly misconceived for the Petitioner to approach this Court to seek a declaration against the validity of 'talaq-e-biddat'. Alternatively, it was contended, that after the enactment of the Special Marriage Act, 1954, all citizens of India whether male or female, irrespective of the faith they professed, have the option to be governed by the provisions of the

said Act, instead of their own 'personal law'. It was therefore contended, that spouses belonging to a particular religious denomination, had the choice to opt for a secular and non-religious law, namely, the Special Marriage Act, 1954, and such of the parties who accept the choice (even if they profess the Muslim religion), would automatically escape from all religious practices, including 'talaq-e-biddat'. It was therefore contended, that such of the couples who married in terms of their 'personal law', must be deemed to have exercised their conscious option to be regulated by the 'personal law', under which they were married. Having exercised the aforesaid option, it was submitted, that it was not open to a Muslim couple to then plead, against the practice of 'talaq-e-biddat'. It was submitted, that when parties consent to marry, their consent does not extend to the choice of the person with reference to whom the consent is extended, but it also implicitly extends to the law by which the matrimonial alliances are to be regulated. If the consent is to marry in consonance with the 'personal law', then the rigours of 'personal law' would regulate the procedure for dissolution of marriage. And likewise, if the consent is to marry under the Special Marriage Act, 1954, the consent is to be governed by the provisions of the aforesaid legislation. In such a situation, it was submitted, that a person, who had consciously opted for the matrimonial alliance under 'personal law' cannot complain, that the 'personal law' was unfavourable or discriminatory. It was submitted, that in the above view of the matter, the very filing of the instant petition before this Court, and the support of the Petitioner's cause by those who have been impleaded, or had appeared to represent the Petitioner's cause, must be deemed to be wholly misconceived in law.

101. The second submission advanced at the hands of the learned senior Counsel, was that the issues raised by the Petitioner with reference to the validity of 'talaq-e-biddat' - triple talaq were matters of legislative policy, and could not (though learned Counsel truly meant - ought not) be interfered with through the judicial process. In this behalf, learned senior Counsel invited the Court's attention to Maharshi Avadhesh v. Union of India (1994) Suppl. (1) SCC 713, wherein the Petitioner had approached this Court by filing a writ petition Under Article 32 of the Constitution, with the following prayers:

(i) A writ of mandamus to the Respondents to consider the question of enacting a common civil code for all citizens of India.

(ii) To declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15 and Articles 44, 38 39 and 39-A of the Constitution of India.

(iii) To direct the Respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection.

It was pointed out, that this Court dismissed the above writ petition by observing, "these are all matters for legislature. The court cannot legislate on these matters."

102. Reliance was also placed on the Ahmedabad Women Action Group case MANU/SC/0896/1997 : (1997) 3 SCC 573. It was submitted that this Court considered the following issues during the course of adjudication of the above matter.

(i) Whether Muslim Personal Law which allows Polygamy is void as offending Articles 14 and 15 of the Constitution.

(ii) Whether Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, is void as it offends Articles 13, 14 and 15 of the Constitution.

(iii) Whether the mere fact that a Muslim husband takes more than one wife is an act of cruelty.

103. It was pointed out, that having heard the above matter, the same was dismissed by recording the following observations in paragraph 4 of the judgment:

At the outset, we would like to state that these writ petitions do not deserve disposal on merits inasmuch as the arguments advanced by the learned Senior Advocate before us wholly involve issues of State policies with which the Court will not ordinarily have any concern. Further, we find that when similar attempts were made, of course by others, on earlier occasions this Court held that the remedy lies somewhere else and not by knocking at the doors of the courts.

104. Having raised the two preliminary objections with reference to the entertainment of the prayer made by the Petitioner, learned Counsel invited the Court's attention to abolition of the practice of 'talaq-e-biddat' in other countries. It was submitted, that (-for details, refer to Part-5 - Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States), the above contention was adopted both by the Petitioner, as well as, those who supported the Petitioner's cause, as also by the Union of India, in order to contend, that the practice of 'talaq-e-biddat' has been done away with in other Islamic countries, as a matter of social reform, on account of its being abhorrent, and also unilateral and arbitrary. It was submitted, that the constitutional validity of 'personal law' in India, cannot be tested on the basis of enacted legislations of other countries. At this juncture, learned senior Counsel desired us to notice, that the instant submission had been advanced without prejudice to the contention being canvassed by him, that the validity of 'personal law' cannot be tested at all, with reference to the fundamental rights vested in individuals under Part III of the Constitution, for the reason, that 'personal law' cannot be treated as law within the meaning of Article 13 of the Constitution.

105. Mr. Raju Ramachandran, learned senior Counsel, then endeavoured to establish the validity of 'talaq-e-biddat' - triple talaq. It was submitted, that out of the five schools of Sunni Muslims 'talaq-e-biddat' was considered a valid form of divorce of four of the said schools. It was submitted, that the above position was accepted by the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137, wherein in paragraph 26, the High Court observed ".....It is accepted by all schools of law that 'talaq-e-biddat' is sinful, yet some schools regarded it as valid.....". It has also been acknowledged by the High Courts in different judgments rendered by them (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat'). It was accordingly sought to be inferred, that once it was established as a fact, that certain schools of Shia Muslims believed 'talaq-e-biddat' to be a valid form of divorce, the consequence that would follow would be, that cohabitation amongst the spouses after the pronouncement of 'talaq-e-biddat' would be sinful, as per the injunction of the Quran, in 'sura' 2, Al Baqara Ayah 230. The same is reproduced hereunder:

And if he has divorced her (for the third time), then she is not lawful to him afterward until (after) she marries a husband other than him. And if the latter husband divorces her (or dies), there is no blame upon the woman and her former husband for returning to each other if they think that they can keep (within) the limits of Allah. These are the limits of Allah, which He makes clear to a people who know.

It was pointed out, that the belief that after a husband has divorced his wife by pronouncing talaq thrice, it had been interfered that the three pronouncements should be treated as a singular pronouncement. It was pointed out, that High Courts have no such jurisdiction as has been exercised by them on the subject of 'talaq-e-biddat'. It was accordingly asserted, that the above action constituted the creation of inroads into 'personal law' of Muslims, which stood protected Under Article 25 of the Constitution. In this behalf, it was also submitted, that while deciding the issue whether a belief or a practice constituted an integral part of religion, this Court held, that the above question needed to be answered on the basis of the views of the followers of the faith, and none else. In order to support his above submission, learned senior Counsel, placed reliance on the Sardar Syedna Taher Saifuddin Saheb case MANU/SC/0072/1962 : AIR 1962 SC 853, wherein this Court observed as under:

The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt; Mahant Jagannath Ramanuj Das v. The State of Orissa; Sri Ventatamana Devaru v. The State of Mysore; Durgah Committee, Ajmer v. Syed Hussain Ali and several Ors. cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

It was pointed out, that the above view of this Court had been affirmed by this Court in N. Adithyan v. Travancore Devaswom Board MANU/SC/0862/2002 : (2002) 8 SCC 106, wherein in paragraphs 9 and 16, it was observed as under:

9. This Court, in Seshammal v. State of T.N., MANU/SC/0631/1972 : (1972) 2 SCC 11 again reviewed the principles underlying the protection engrafted in Articles 25 and 26 in the context of a challenge made to abolition of hereditary right of Archaka, and reiterated the position as hereunder: (SCC p. 21, paras 13-14)

13. This Court in Sardar Taher Saifuddin Saheb v. State of Bombay MANU/SC/0072/1962 : AIR 1962 SC 853 has summarized the position in law as follows (pp. 531 and 532):

'The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, Mahant Jagannath Ramanuj Das v. State of Orissa, Venkataramana Devaru v. State of Mysore, Durgah Committee, Ajmer v. Syed Hussain Ali and several other cases and the main principles

underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

14. Bearing these principles in mind, we have to approach the controversy in the present case.

16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus and any such rights of the State or of the communities or classes of society were also considered to need due Regulation in the process of harmonizing the various rights. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection Under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down.

In continuation of the above submission, learned senior Counsel also placed reliance on Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of U.P. MANU/SC/1164/1997 : (1997) 4 SCC 606, wherein this Court held as under:

28.....All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State Regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. .....

It was the pointed contention of learned senior Counsel, that the judgments rendered by the High Courts on the subject of 'talaq-e-biddat' (-for details, refer to Part-6 - Judicial pronouncements, on

the subject of 'talaq-e-biddat'), were unsustainable in law, because the High Courts had substituted their own views with reference to their understanding of 'talaq-e-biddat'. It was also pointed out, that supplanting of the views of one of the schools on the beliefs of the other four schools, of Sunni Muslims, with reference to 'talaq-e-biddat', was in clear breach of the understanding of Muslims.

106. Learned senior Counsel also disputed the reliance on International Conventions by all those who had assisted this Court on behalf of the Petitioner. In this behalf, it was pointed out, that reliance on International Conventions, particularly on CEDAW was wholly misplaced, since India had expressed a clear reservation to the Conventions in order to support its constitutional policy of non-interference in the personal affairs of any community. In this behalf, while making a particular reference to CEDAW, it was submitted, that the above declarations/reservations were first made at the time of signing the aforesaid conventions and thereafter, even at the time of ratification. In this behalf, it was pointed out, that the first declaration was made by India in the following format:

i) With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

In view of the clear stance adopted at the time of signing the Convention, as also, at the time of its ratification, it was submitted, that there could be no doubt, that India had itself committed that it would not interfere with personal affairs of any community, without the initiative and consent of the concerned community. It was submitted, that the aforesaid commitment could not be ignored by the Union of India. While addressing this Court on the issue under reference, it was submitted, that the position adopted by the Union of India, was in clear derogation of the stance adopted on behalf of the India, as has been detailed above.

107. Learned senior Counsel also seriously disputed the submissions advanced at the hands of the Petitioners based on repudiation of the practice of 'talaq-e-biddat' in various secular countries with Muslims in the majority, as also, theocratic States, through express legislation on the issue (-for details, refer to Part-5 - Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). In this behalf, it was submitted, that 'personal law' of classes and Sections of the society and/or of religious denominations are sought to be protected by the Constitution by raising them to the high position of fundamental rights. It was accordingly asserted, that what was available to such classes and Sections of society, as also, to the religious denominations as a matter of fundamental right under the Constitution, could not be negated, because other countries had enacted legislations for such annulment. Furthermore, it was submitted, that legislation is based on the collective will of the residents of a particular country, and as such, the will of the residents of a foreign country, cannot be thrust upon the will of the residents in India. While adopting the position canvassed on behalf of learned senior Counsel who had preceded him, it was pointed out, that it was open to the legislature in India, to likewise provide for such legislation, because entry 5 of the Concurrent List contained in the Seventh Schedule allows legislation even with reference to matters governed by 'personal law'. Additionally, it was submitted, that provision in this behalf was available in Article 25(2)(b), which provides that for espousing the cause of social welfare and reform it was open to the legislature even to legislate on

matters governed under 'personal law'. It was therefore contended that all such submissions advanced on behalf of the Petitioners need to be ignored.

108. Mr. V. Giri, Senior Advocate, entered appearance on behalf of Jamiat-ul-Ulama-i-Hind (represented by its General Secretary, 1 Bahadur Shah Zafar Marg, New Delhi) - Respondent No. 7 in Suo Motu Writ Petition (Civil) No. 2 of 2015 and Respondent No. 6 in Writ Petition (Civil) No. 118 of 2016. It would be relevant to mention, at the outset, that learned senior Counsel endorsed the submissions advanced by Mr. Kapil Sibal and Mr. Raju Ramachandra, Senior Advocates, who had assisted this Court before him. Learned senior Counsel focused his contentions, firstly to the challenge raised to the validity of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, insofar as, it relates to 'talaq-e-biddat' on the ground, that the same being unconstitutional, was unenforceable. Learned senior Counsel, in order to raise his challenge, first and foremost, drew our attention to Sections 2 and 3 of the Muslim Personal Law (Shariat) Application Act, 1937 (-for details, refer to Part-4 - Legislation in India, in the field of Muslim 'personal law'). It was submitted, that Section 2 aforesaid, commenced with a *non obstante* clause. It was pointed out, that the aforesaid *non obstante* Clause was referable only to amplify the exclusion of such customs and usages, as were contrary to Muslim 'personal law' - 'Shariat'. It was submitted, that reference was pointedly made only to such customs and usages as were not in consonance with the Muslim 'personal law' - 'Shariat'. It was asserted, that the mandate of Section 2 was aimed at making Muslim 'personal law' - 'Shariat' as "the Rule of decision", even when customs and usages were to the contrary. It was sought to be explained, that the Shariat Act neither defined nor expounded, the parameters of the same, with reference to subjects to which Sections 2 and 3 were made applicable. It was therefore submitted, that the enactment under reference did not introduce Muslim 'personal law' - 'Shariat', as the same was the law applicable to the Muslims even prior to the enactment of the said legislation. In this behalf, it was pointed out, that in different parts of the country customs and usages were being applied even with reference to the Muslims overriding their 'personal law'. In order to substantiate the above contention learned senior Counsel made a pointed reference to the statement of objects and reasons of the above enactment, which would reveal that Muslims of British India had persistently urged that customary law and usages should not take the place of Muslim 'personal law' - 'Shariat'. It was also pointed out, that the statement of objects and reasons also highlight that his client, namely, Jamiat-ul-Ulema-i-Hind had supported the demand of the applicability of the Muslim 'personal law' - 'Shariat', for adjudication of disputes amongst Muslims, and had urged, that custom and usage to the contrary, should not have an overriding effect. It was pointed out, that this could be done only because Muslim 'personal law' - 'Shariat' was in existence and was inapplicable to the adjudication of disputes amongst Muslims, even prior to the above enactment in 1937. Understood in the aforesaid manner, it was submitted, that Muslim 'personal law' as a body of law, was only perpetuated, by the Shariat Act. It was submitted, that the Muslim 'personal law' had not been subsumed by the statute nor had the 1937 Act codified the Muslim 'personal law'. It was submitted, that the 1937 legislation was only statutorily declared that the Muslim 'personal law', as a set of rules, would govern the Muslims in India, and that, it would be the Muslim 'personal law' that would have an overriding effect over any custom or usage to the contrary. It was therefore reiterated, that the legislature which enacted the Muslim Personal Law (Shariat) Application Act, 1937, neither modified nor amended even in a small measure, the Muslim 'personal law' applicable to the Muslims in India, nor did the legislature while enacting the above enactment, subsumed the Muslim 'personal law', and therefore, the character of the Muslim 'personal law' did not undergo a

change on account of the enactment of the Muslim Personal Law (Shariat) Application Act, 1937. According to learned senior Counsel, the Muslim 'personal law' did not metamorphized into a statute, and as such, the rights and duties of Muslims in India continued to be governed even after the enactment of the Shariat Act, as before. It was pointed out, that the Shariat Act did not substitute, nor did it provide for any different set of rights and obligations other than those which were recognized and prevalent as Muslim 'personal law' - 'Shariat'. As such, it was contended, that it was wholly unjustified to assume, that Muslim 'personal law' - 'Shariat' was given statutory effect, through the Shariat Act. It was therefore submitted that a challenge to the validity of Section 2 of the above enactment, so as to assail the validity of 'talaq-e-biddat' as being contrary to the fundamental rights contained in Part III of the Constitution, was an exercise in futility. Insofar as the instant assertion is concerned, learned senior Counsel advanced two submissions - firstly, that Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 did not by itself bring about any law providing for rights and obligations to be asserted and discharged by the Muslims as a community, for the simple reason, that it only reaffirmed the perpetuities of the Muslim 'personal law' - 'Shariat', and as such, the rights and obligations of persons which were subjected to Muslim 'personal law' - 'Shariat', continued as they existed prior to the enactment of the Shariat Act. And secondly, the Muslim 'personal law' - 'Shariat', was neither transformed nor metamorphized by the Shariat Act, in the nature of crystalised Rules and Regulations, and as such, even if Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 was struck down, the same would automatically revive the Muslim 'personal law' - 'Shariat', in view of the mandate contained in Article 25 of the Constitution. Accordingly, it was pointed out, that the parameters of challenge, as were applicable to assail a statutory enactment, would not be applicable in the matter of assailing the Muslim 'personal law' - 'Shariat'. It was also the contention of learned senior Counsel, that Under Article 25(1) of the Constitution the right to freely profess, practice and propagate religion, was a universal right, guaranteed to every person, to act in affirmation of his own faith. It was submitted, that the above ambit was the core of the secular nature of the Indian Constitution. It was accordingly pointed out, that the confines of the rights protected Under Article 25(1), could be assailed on limited grounds of public order, morality and health, and also if, the provisions of Part III - Fundamental Rights, of the Constitution were breached.

109. It was submitted, that a breach of the provisions contained in Part III - Fundamental Rights under the Constitution, could only be invoked with reference to a State action, as only State action has to conform to Articles 14, 15 and 21. It was therefore submitted, that a facial subjugation of the right Under Article 25(1) to the other provisions of the Constitution would be inapplicable in the case of 'personal law', that has no source to any statute, or State action. It was submitted, that the Shariat Act affirms the applicability of Muslim 'personal law' - 'Shariat' and perpetuates it by virtue of Section 2 thereof. And therefore, it would not give the Muslim 'personal law' - 'Shariat' a statutory flavour.

110. It was also submitted, that Sunnis were a religious denomination within the meaning of Article 25 of the Constitution, and therefore, were subject to public policy, morality and health. Sunni Muslims, therefore had a right *inter alia* to manage their own affairs in matters relating to religion. It was pointed out, that it could not be gainsaid, that marriage and divorce were matters of religion. Therefore, Sunnis as a religious denomination, were entitled to manage their own affairs in matters of marriage and divorce, which are in consonance with the Muslim 'personal law' - 'Shariat'. It was therefore submitted, that the provisions relating to marriage and divorce, as were contained in the

Muslim 'personal law' - 'Shariat', were entitled to be protected as a denominational right, Under Article 25 of the Constitution.

111. Mr. V. Shekhar, Mr. Somya Chakravarti, Senior Advocates, Mr. Ajit Wagh, Ajmal Khan, Senior Advocate, Mr. V.K. Biju, Mr. Banerjee, Mr. Ashwani Upadhyay, Mr. Vivek C. Solsha, Ms. Rukhsana, Ms. Farah Faiz, Advocates also assisted the Court. Their assistance to the Court, was on issues canvassed by other learned Counsel who had appeared before them. The submissions advanced by them, have already been recorded above. For reasons of brevity, it is not necessary for us to record the same submission once again, in the names of learned Counsel referred to above. All that needs to be mentioned is, that we have taken due notice of the nuances pointed out, and their emphasis on different aspects of the controversy.

Part-9.

Consideration of the rival contentions, and our conclusions:

112. During the course of our consideration, we will endeavour to examine a series of complicated issues. We will need to determine, the legal sanctity of 'talaq-e-biddat' - triple talaq. This will enable us to ascertain, whether the practice of talaq has a legislative sanction, because it is the Petitioner's case, that it is so through express legislation (-the Muslim Personal Law (Shariat) Application Act, 1937). But the stance adopted on behalf of those contesting the Petitioner's claim is, that its stature is that of 'personal law', and on that account, the practice of 'talaq-e-biddat' has a constitutional protection.

113. Having concluded one way or the other, we will need to determine whether divorce by way of 'talaq-e-biddat' - triple talaq, falls foul of Part III - Fundamental Rights of the Constitution (this determination would be subject to, the acceptance of the Petitioner's contention, that the practice has statutory sanction). However, if We conclude to the contrary, namely, that the 'talaq-e-biddat' - triple talaq, has the stature of 'personal law', We will have to determine the binding effect of the practice, and whether it can be interfered with on the judicial side by this Court. The instant course would be necessary, in view of the mandate contained in Article 25 of the Constitution, which has been relied upon by those who are opposing the Petitioner's cause.

114. Even if we agree with the proposition that 'talaq-e-biddat' - triple talaq constitutes the 'personal law' governing Muslims, on the issue of divorce, this Court will still need to examine, whether the practice of 'talaq-e-biddat' - triple talaq, violates the acceptable norms of "... public order, morality and health and to the other provisions ..." of Part III of the Constitution (-for that, is the case set up by the Petitioner). Even if the conclusions after the debate travelling the course narrated in the foregoing paragraph does not lead to any fruitful results for the Petitioner's cause, it is their case, that the practice of 'talaq-e-biddat' being socially repulsive should be declared as being violative of constitutional morality - a concept invoked by this Court, according to the Petitioner, to interfere with on the ground that it would serve a cause in larger public interest. The Petitioners' cause, in the instant context is supported by the abrogation of the practice of 'talaq-e-biddat', the world over in countries with sizeable Muslim populations including theocratic Islamic States. The following examination, shall traverse the course recorded herein above.

I. Does the judgment of the Privy Council in the Rashid Ahmad case, upholding 'talaq-e-biddat', require a relook?

115. It would not be necessary for this debate-about the validity of 'talaq-e-biddat' under the Muslim 'personal law' - 'Shariat', to be prolonged or complicated, if the decision rendered by the Privy Council, in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25 is to be considered as the final word on its validity, as also, on the irrevocable nature of divorce, by way of 'talaq-e-biddat'. The debate would end forthwith. The aforesaid judgment was rendered by applying the Muslim 'personal law'. In the above judgment, 'talaq-e-biddat' was held as valid and binding. The pronouncement in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25 is of extreme significance, because Anisa Khatun-the erstwhile wife and her former husband Ghyas-ud-din had continued to cohabit and live together with her husband, for a period of fifteen years, after the pronouncement of 'talaq-e-biddat'. During this post divorce cohabitation, five children were born to Anisa Khatun, through Ghiyas-ud-din. And yet, the Privy Council held, that the marital relationship between the parties had ceased forthwith, on the pronouncement of 'talaq-e-biddat' - triple talaq. The Privy Council also held, that the five children born to Anisa Khatun, could not be considered as the legitimate children of Ghyas-ud-din, and his erstwhile wife. The children born to Anisa Khatun after the parties stood divorced, were therefore held as disentitled to inherit the property of Ghyas-ud-din. The judgment in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25 was rendered in 1932. The asserted statutory status of Muslim 'personal law' (as has been canvassed by the Petitioners), emerged from the enactment of the Muslim Personal Law (Shariat) Application Act, 1937. The 'Shariat' Act expressly provided, that the Muslim 'personal law' - 'Shariat', would constitute "the Rule of decision", in causes where the parties were Muslim. It is not in dispute, that besides other subjects, consequent upon the enactment of the Shariat Act, dissolution of marriage amongst Muslims, by way of 'talaq', would also have to be in consonance with the Muslim 'personal law' - 'Shariat'. As noticed herein above, 'talaq-e-biddat' is one of the forms of dissolution of marriage by 'talaq', amongst Muslims. According to the Petitioners case, the issue needed a fresh look, of the conferment of statutory status to Muslim 'personal law' - 'Shariat'. It was submitted, that after having acquired statutory status, the questions and subjects (including 'talaq-e-biddat'), would have to be in conformity (-and not in conflict), with the provisions of Part III - Fundamental Rights, of the Constitution. Needless to mention, that all these are important legal questions, requiring examination.

116. In our considered view, the matter would most certainly also require a fresh look, because various High Courts, having examined the practice of divorce amongst Muslims, by way of 'talaq-e-biddat', have arrived at the conclusion, that the judgment in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25 was rendered on an incorrect understanding, of the Muslim 'personal law' - 'Shariat'.

117. If the Muslim Personal Law (Shariat) Application Act, 1937, had incorporated the manner in which questions regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or matters such as marriage, dissolution of marriage, including talaq, ila, jihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (-as in Section 2 thereof), had to be dealt with, as per Muslim 'personal law' - 'Shariat' according to the Petitioners, it would be quite a different matter. All the same, the Shariat Act did not describe how the above questions and subjects had to be dealt

with. And therefore, for settlement of disputes amongst Muslims, it would need to be first determined, what the Muslim 'personal law', with reference to the disputation, was. Whatever it was, would in terms of Section 2 of the 1937 Act, constitute "the Rule of decision". After the Privy Council had rendered the judgment in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25, and well after the asserted statutory status came to be conferred on Muslim 'personal law' - 'Shariat', the issue came up for consideration before the Kerala High Court in A. Yusuf Rawther v. Sowramma MANU/KE/0059/1971 : AIR 1971 Ker 261, wherein, the High Court examined the above decision of the Privy Council in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25, and expressed, that the views of the British Courts on Muslim 'personal law', were based on an incorrect understanding of 'Shariat'. In the above judgment, a learned Single Judge (Justice V.R. Krishna Iyer, as he then was) of the Kerala High Court, recorded the following observations:

7. There has been considerable argument at the bar - and precedents have been piled up by each side - as to the meaning to be given to the expression 'failed to provide for her maintenance' and about the grounds recognised as valid for dissolution under Muslim law. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture - law is largely the formalized and enforceable expression of a community's cultural norms - cannot be fully understood by alien minds.

The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions ....
It is a popular fallacy that a Muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them"." (Quran IV: 34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." As the learned author, Ahmad A. Galwash notices, the pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came He declared divorce to he "the most disliked of lawful things in the sight of God. He was indeed never tired of expressing his abhorrence of divorce. Once he said: 'God created not anything on the face of the earth which He loveth more than the act of manumission. (of slaves) nor did He create anything on the face of the earth which he detesteth more than the act of divorce". Commentators on the Quoran have rightly observed - and this tallies with the law now administered in some Muslim countries like Iraq - that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce.

118. Without pointedly examining the issue of the validity of 'talaq-e-biddat', under the Muslim 'personal law' - 'Shariat', this Court in Fuzlunbi v. K. Khader Vali MANU/SC/0508/1980 : (1980) 4 SCC 125, recorded the following observations:

20. Before we bid farewell to Fazlunbi it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with talaq in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor J. ILR 30 Bom 539 that this view 'is good in law, though bad in theology'. Maybe, when the point directly arises, the question will have to be considered by this Court, but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case.

The above observations lead to the inference, that the proposition of law pronounced by the Privy Council in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25, needed a relook.

119. It would be relevant to mention, that in the interregnum, the validity of 'talaq-e-biddat' was considered by a learned Single Judge (Justice Baharul Islam, as he then was) of the Gauhati High Court, in the Jiauddin Ahmed case MANU/GH/0033/1978 : (1981) 1 Gau. L.R. 358, wherein, the High Court took a view different from the one recorded by the Privy Council (-in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25). In doing so, it relied on 'hadiths', 'ijma' and 'qiyas'. The issue was again examined, by a Division Bench of the Gauhati High Court, in the Mst. Rukia Khatun case MANU/GH/0031/1979 : (1981) 1 Gau. L.R. 375. Yet again, the High Court (speaking through, Chief Justice Baharul Islam, as he then was), did not concur with the view propounded by the Privy Council. The matter was also examined by a Single Judge (Justice Badar Durrez Ahmed, as he then was) of the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137. Herein again, by placing reliance on relevant 'hadiths', the Delhi High Court came to the conclusion, that the legal position expressed by the Privy Council on 'talaq-e-biddat', was not in consonance with the Muslim 'personal law'. The Kerala High Court, in the Nazeer case MANU/KE/2403/2016 : 2017 (1) KLT 300 (authored by, Justice A. Muhamed Mustaque) highlighted the woeful condition of Muslim wives, because of the practice of 'talaq-e-biddat', and recorded its views on the matter.

120. In view of the position expressed hereinabove, we are of the considered view, that the opinion expressed by the Privy Council with reference to 'talaq-e-biddat', in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25, holding that 'talaq-e-biddat' results in finally and irrevocably severing the matrimonial tie between spouses, the very moment it is pronounced, needs to be examined afresh. More particularly, because the validity of the same as an approved concept, of Muslim 'personal law' - 'Shariat', was not evaluated at that juncture (-as it indeed could not have been, as the legislation was not available, when the Privy Council had rendered its judgment), in the backdrop of the Shariat Act, and also, the provisions of the Constitution of India.

II. Has 'talaq-e-biddat', which is concededly sinful, sanction of law?

121. The Petitioners, and Ors. who support the Petitioner's cause, have vehemently contended, that 'talaq-e-biddat', does not have its source of origin from the Quran. The submission does not need a serious examination, because even 'talaq-e-ahsan' and 'talaq-e-hasan' which the Petitioners

acknowledge as - 'the most proper', and - 'the proper' forms of divorce respectively, also do not find mention in the Quran. Despite the absence of any reference to 'talaq-e-ahsan' and 'talaq-e-hasan' in the Quran, none of the Petitioners has raised any challenge thereto, on this score. A challenge to 'talaq-e-biddat' obviously cannot be raised on this ground. We are satisfied, that the different approved practices of talaq among Muslims, have their origin in 'hadiths' and other sources of Muslim jurisprudence. And therefore, merely because it is not expressly provided for or approved by the Quran, cannot be a valid justification for setting aside the practice.

122. The Petitioners actually call for a simple and summary disposal of the controversy, by requiring us to hold, that whatever is irregular and sinful, cannot have the sanction of law. The above prayer is supported by contending, that 'talaq-e-biddat' is proclaimed as bad in theology. It was submitted, that this practice is clearly patriarchal, and therefore, cannot be sustained in today's world of gender equality. In order to persuade this Court, to accept the Petitioners' prayer - to declare the practice of 'talaq-e-biddat' as unacceptable in law, the Court's attention was invited to the fact, that the present controversy needed a similar intervention, as had been adopted for doing away with similar patriarchal, irregular and sinful practices amongst Hindus. In this behalf, reference was made to the practices of 'Sati', 'Devadasi' and 'Polygamy'.

123(i). We may only highlight, that 'Sati' was commonly described as - widow burning. The practice required a widow to immolate herself, on her husband's pyre (or alternatively, to commit suicide shortly after her husband's death). 'Sati' just like 'talaq-e-biddat', had been in vogue since time immemorial. It is believed, that the practice of 'Sati' relates back to the 1st century B.C.. On the Indian sub-continent, it is stated to have gained popularity from the 10th century A.D. The submission was, that just as 'Sati' had been declared as unacceptable, the practice of 'talaq-e-biddat' should likewise be declared as unacceptable in law.

(ii) 'Devadasi' translated literally means, a girl dedicated to the worship and service of a diety or temple. The surrender and service of the 'Devadasi', in terms of the practice, was for life. This practice had also been in vogue since time immemorial, even though originally 'Devadasis' had a high status in society, because the Rulers/Kings of the time, were patrons of temples. During British Rule in India, the Rulers backing and support to temples, waned off. It is believed, that after funds from the Rulers stopped, to sustain themselves 'Devadasis' used dancing and singing as a means of livelihood. They also commenced to indulge in prostitution. The life of the 'Devadasi', thereupon came into disrepute, and resulted in a life of destitution. The practice had another malady, tradition forbade a 'Devadasi' from marrying.

(iii) So far as 'polygamy' is concerned, we are of the view that polygamy is well understood, and needs no elaboration.

124. We are of the view, that the practices referred to by the Petitioners, to support their claim, need a further examination, to understand how the practices were discontinued. We shall now record details, of how these practices, were abolished:

(i) Insofar as the practice of 'Sati' is concerned, its practice reached alarming proportion between 1815-1818, it is estimated that the incidence of 'Sati' doubled during this period. A campaign to abolish 'Sati' was initiated by Christian missionaries (- like, William Carey), and by Hindu

Brahmins (-like, Ram Mohan Roy). The provincial Government of Bengal banned 'Sati' in 1829, by way of legislation. This was then followed by similar laws by princely States in India. After the practice was barred by law, the Indian Sati Prevention Act, 1988 was enacted, which criminalised any type of aiding, abetting or glorifying the practice of 'Sati'.

(ii) Insofar as the practice of 'Devadasi' is concerned, soon after the end of British rule, independent India passed the Madras Devadasi's (Prevention of Dedication) Act (-also called the Tamil Nadu Devadasis (Prevention of Dedication Act) on 09.10.1947. The enactment made prostitution illegal. The other legislations enacted on the same issue, included the 1934 Bombay Devadasi Protection Act, the 1957 Bombay Protection (Extension) Act, and the Andhra Pradesh Devadasi (Prohibition of Dedication) Act of 1988. It is therefore apparent, that the instant practice was done away with, through legislation.

(iii) The last of the sinful practices brought to our notice was 'polygamy'. Polygamy was permitted amongst Hindus. In 1860, the Indian Penal Code made 'polygamy' a criminal offence. The Hindu Marriage Act was passed in 1955. Section 5 thereof provides, the conditions for a valid Hindu marriage. One of the conditions postulated therein was, that neither of the parties to the matrimonial alliance should have a living spouse, at the time of the marriage. It is therefore apparent, that the practice of polygamy was not only done away with amongst Hindus, but the same was also made punishable as a criminal offence. This also happened by legislation.

125. The factual and the legal position noticed in the foregoing paragraph clearly brings out, that the practices of 'Sati', 'Devadasi' and 'polygamy' were abhorrent, and could well be described as sinful. They were clearly undesirable and surely bad in theology. It is however important to notice, that neither of those practices came to be challenged before any court of law. Each of the practices to which our pointed attention was drawn, came to be discontinued and invalidated by way of legislative enactments. The instances cited on behalf of the Petitioners cannot therefore be of much avail, with reference to the matter in hand, wherein, the prayer is for judicial intervention.

126. We would now venture to attempt an answer to the simple prayer made on behalf of the Petitioners, for a summary disposal of the Petitioner's cause, namely, for declaring the practice of 'talaq-e-biddat', as unacceptable in law. In support of the instant prayer, it was submitted, that it could not be imagined, that any religious practice, which was considered as a sin, by the believers of that very faith, could be considered as enforceable in law. It was asserted, that what was sinful could not be religious. It was also contended, that merely because a sinful practice had prevailed over a long duration of time, it could best be considered as a form of custom or usage, and not a matter of any binding faith. (This submission, is being dealt with in part IV, immediately hereinafter). It was submitted, that no court should find any difficulty, in declaring a custom or usage - which is sinful, as unacceptable in law. It was also the pointed assertion on behalf of the Petitioners, that what was sacrilegious could not ever be a part of Muslim 'personal law' - 'Shariat'. The manner in which one learned Counsel expressed the proposition, during the course of hearing, was very interesting. We may therefore record the submission exactly in the manner it was projected. Learned Counsel for evoking and arousing the Bench's conscience submitted, "if something is sinful or abhorrent in the eyes of God, can any law by man validate it". It seems to us, that the suggestion was, that 'talaq-e-biddat' did not flow out of any religious foundation, and therefore, the practice need not be considered as religious at all. One of the non-professional

individuals assisting this Court on behalf of the Petitioners', went to the extent of stating, that the fear of the fact, that the wife could be thrown out of the matrimonial house, at any time, was like a sword hanging over the matrimonial alliance, during the entire duration of the marriage. It was submitted, that the fear of 'talaq-e-biddat', was a matter of continuous mental torture, for the female spouse. We were told, that the extent of the practice being abhorrent, can be visualized from the aforesaid, position. It was submitted, that the practice was extremely self-effacing, and continued to be a cause of insecurity, for the entire duration of the matrimonial life. It was pointed out, that this practice violated the pious and noble prescripts of the Quran. It was highlighted, that even those who had appeared on behalf of the Respondents, had acknowledged, that the practice of 'talaq-e-biddat' was described as irregular and sinful, even amongst Muslims. It was accordingly asserted, that it was accepted by one and all, that the practice was bad in theology. It was also acknowledged, that it had no place in modern day society. Learned Counsel therefore suggested, that triple talaq should be simply declared as unacceptable in law, and should be finally done away with.

127. A simple issue, would obviously have a simple answer. Irrespective of what has been stated by the learned Counsel for the rival parties, there can be no dispute on two issues. Firstly, that the practice of 'talaq-e-biddat' has been in vogue since the period of Umar, which is roughly more than 1400 years ago. Secondly, that each one of learned Counsel, irrespective of who they represented, (-the Petitioners or the Respondents), acknowledged in one voice, that 'talaq-e-biddat' though bad in theology, was considered as "good" in law. All learned Counsel representing the Petitioners were also unequivocal, that 'talaq-e-biddat' was accepted as a "valid" practice in law. That being so, it is not possible for us to hold, the practice to be invalid in law, merely at the asking of the Petitioners, just because it is considered bad in theology.

III. Is the practice of 'talaq-e-biddat', approved/disapproved by "hadiths"?

128. At the beginning of our consideration, we have arrived at the conclusion, that the judgment rendered by the Privy Council in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25, needs a reconsideration, in view of the pronouncements of various High Courts including a Single Judge of the Gauhati High Court in the Jiauddin Ahmed case MANU/GH/0033/1978 : (1981) 1 Gau. L.R. 358, a Division Bench of the same High Court - the Gauhati High Court in the Rukia Khatun case MANU/GH/0031/1979 : (1981) 1 Gau. L.R. 375, by a Single Judge of the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137, and finally, on account of the decision of a Single Judge of the Kerala High Court in the Nazeer case MANU/KE/2403/2016 : 2017 (1) KLT 300.

129. Even though inconsequential, and the same can never - never be treated as a relevant consideration, it needs to be highlighted, that each one of the Judges who authored the judgments rendered by the High Courts referred to above, professed the Muslim religion. They were Sunni Muslims, belonging to the Hanafi school. The understanding by them, of their religion, cannot therefore be considered as an outsider's view. In the four judgments referred to above, the High Courts relied on 'hadiths' to support and supplement the eventual conclusion drawn. There is certainly no room for any doubt, that if 'hadiths' relied upon by the High Courts in their respective judgments, validly affirmed the position expressed with reference to 'talaq-e-biddat', there would be no occasion for us to record a view to the contrary. It is in the aforestated background, that we

proceed to examine the 'hadiths' relied upon by learned Counsel appearing for the rival parties, to support their individual claims.

130. A number of learned Counsel who had appeared in support of the Petitioners' claim, that the practice of 'talaq-e-biddat' was un-Islamic, and that this Court needed to pronounce it as such, invited our attention to a set of 'hadiths', to substantiate their position. The assertions made on behalf of the Petitioners were opposed, by placing reliance on a different set of 'hadiths'. Based thereon, we will endeavour to record a firm conclusion, whether 'talaq-e-biddat', was or was not, recognized and supported by 'hadiths'.

131. First of all, we may refer to the submissions advanced by Mr. Amit Singh Chadha, Senior Advocate, who had painstakingly referred to the 'hadiths' in the four judgments of the High Courts (-for details, refer to Part-6 - Judicial pronouncements, on the subject of 'talaq-e-biddat'). Insofar as the Jiauddin Ahmed case MANU/GH/0033/1978 : (1981) 1 Gau. L.R. 358 is concerned, details of the entire consideration have been narrated in paragraph 31 hereinabove. Likewise, the consideration with reference to the Rukia Khatun case MANU/GH/0031/1979 : (1981) 1 Gau. L.R. 375 has been recorded in paragraph 32. The judgment in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137 has been dealt with in paragraph 33. And finally, the Nazeer case MANU/KE/2403/2016 : 2017 (1) KLT 300 has been deciphered, by incorporating the challenge, the consideration and the conclusion in paragraph 34 hereinabove. For reasons of brevity, it is not necessary to record all the above 'hadiths' for the second time. Reference may therefore be made to the paragraphs referred to above, as the first basis expressed on behalf of the Petitioners, to lay the foundation of their claim, that the practice, of 'talaq-e-biddat' cannot be accepted as a matter of 'personal law' amongst Muslims, including Sunni Muslims belonging to the Hanafi school. In fact, learned senior Counsel, asserted, that the position expressed by the High Courts, had been approved by this Court in the Shamim Ara case MANU/SC/0850/2002 : (2002) 7 SCC 518.

132. Mr. Anand Grover, Senior Advocate, reiterated and reaffirmed the position expressed in the four judgments (two of the Gauhati High Court, one of the Delhi High Court, and the last one of the Kerala High Court) to emphasize his submissions, as a complete justification for accepting the claims of the Petitioners. Interestingly, learned senior Counsel made a frontal attack to the 'hadiths' relied upon by the AIMPLB. To repudiate the veracity of the 'hadiths' relied upon by the Respondents, it was pointed out, that it was by now settled, that there were various degrees of reliability and/or authenticity of different 'hadiths'. Referring to the Principles of Mahomedan Law by Sir Dinshaw Fardunji Mulla (LexisNexis, Butterworths Wadhwa, Nagpur, 20th edition), it was asserted, that the 'hadiths' relied upon by the AIMPLB (to which a reference will be made separately), were far - far removed from the time of the Prophet Mohammad. It was explained, that 'hadiths' recorded later in point of time, were less credible and authentic, as with the passage of time, distortions were likely to set in, making them unreliable. It was asserted, that 'hadiths' relied upon in the four judgments rendered by the High Courts, were the truly reliable 'hadiths', as they did not suffer from the infirmity expressed above. In addition to the above, learned senior Counsel drew our attention, to Sunan Bayhaqi 7/547 referred to on behalf of the AIMPLB, so as to point out, that the same was far removed from the time of Prophet Mohammad. As against the above, it was submitted, that the 'hadiths' of Bhukahri (published by Darussalam, Saudi Arabia), also relied upon by the AIMPLB, were obvious examples of a clear distortion. Moreover, it was

submitted, that the 'hadiths', relied upon by the AIMPLB were not found in the Al Bukhari Hadiths. It was therefore submitted, that reliance on the 'hadiths' other than those noticed in the individual judgments referred to hereinabove, would be unsafe (-for details, refer to paragraph 42).

133. Learned senior Counsel also asserted, that as a historical fact Shia Muslims believe, that during the Prophet's time, and that of the First Caliph - Abu Baqhr, and the Second Caliph - Umar, pronouncements of talaq by three consecutive utterances were treated as one. (Reference in this behalf was made to "Sahih Muslim" compiled by Al-Hafiz Zakiuddin Abdul-Azim Al-Mundhiri, and published by Darussalam). Learned senior Counsel also placed reliance on "The lawful and the prohibited in Islam" by Al-Halal Wal Haram Fil Islam (edition - August 2009). It was pointed out, that the instant transcript was of Egyptian origin, and further emphasized, that the same therefore needed to be accepted as genuine and applicable to the dispute, because Egypt was primarily dominated by Sunni Muslims belonging to the Hanafi school. In the above publication, it was submitted, that the practice of instant triple talaq was described as sinful. Reference was then made to "Woman in Islamic Shariah" by Maulana Wahiduddin Khan (published by Goodword Books, reprinted in 2014), wherein, irrespective of the number of times the word 'talaq' was pronounced (if pronounced at the same time, and on the same occasion), was treated as a singular pronouncement of talaq, in terms of the 'hadith' of Imam Abu Dawud in Fath al-bari 9/27. It was submitted, that the aforesaid 'hadith' had rightfully been taken into consideration by the Delhi High Court in the Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137. In addition to the above, reference was made to "Marriage and family life in Islam" by Prof. (Dr.) A. Rahman (Adam Publishers and Distributors, New Delhi, 2013 edition), wherein by placing reliance on a Hanafi Muslim scholar, it was opined that triple talaq was not in consonance with the verses of the Quran. Reliance was also placed on "Imam Abu Hanifa - Life and Work" by Allamah Shiblinu'mani's of Azamgarh, who founded the Shibli College in the 19th century. Relying upon a prominent Hanafi Muslim scholar, it was affirmed, that Abu Hanifa himself had declared, that it was forbidden to give three divorces at the same time, and whoever did so was a sinner (-for details, refer to paragraph 42). Based on the aforestated text available in the form of 'hadiths', it was submitted, that the position adopted by the AIMPLB in its pleadings, was clearly unacceptable, and need to be rejected. And that, the conclusions drawn by the four High Courts referred to above, need to be declared as a valid determination on the subject of 'talaq-e-biddat', in exercise of this Court's power Under Article 141 of the Constitution.

134. Mr. Kapil Sibal, appearing on behalf of the AIMPLB, contested the submissions advanced on behalf of the Petitioners. In the first instance, learned senior Counsel placed reliance on verses from the Quran. Reference was made to Quran, Al-Hashr 59:71; Quran, Al-Anfal 8:20; Quran, Al-Nisa 4:64; Quran, Al-Anfal 8:13; Quran, Al-Ahzab 33:36; and Quran, Al-Nisa 4:115 (-for details, refer to paragraph 86 above). Pointedly on the subject of triple talaq, and in order to demonstrate, that the same is not in consonance with the Quranic verses, the Court's attention was drawn to Quran, Al-Baqarah 2:229; Quran, Al-Baqarah 2:229 and 230; Quran, Al-Baqarah 2:232; and Quran, Al-Talaq 65:1 (-for details, refer to paragraph 86 above). Besides the aforesaid, learned senior Counsel invited this Court's attention to the statements attributed to the Prophet Mohammad, with reference to talaq. On this account, the Court's attention was drawn to Daraqutni, Kitab Al-Talaq wa Al-Khula wa Al-Aiyla, 5/23, Hadith number: 3992; Daraqutni, 5/81; Kitab al-Talaq wa Al-Khulawa aI-Aiyala, Hadith number: 4020; Sunan Bayhaqi, 7/547, Hadith number: 14955; AI-Sunan AI-Kubra Iil Bayhaqi, Hadith number: 14492; and Sahi al-Bukhari Kitab al-Talaq, Hadith

number: 5259 (-for details, refer to paragraph 86 above). Representing the AIMPLB, learned senior Counsel, also highlighted 'hadiths' on the subject of 'talaq' and drew our attention to Sunan Abu Dawud, Bad Karahiya al-Talaq, Hadith no: 2178; Musannaf ibn Abi Shaybah, Bab man kara an yatliq aI rajal imratahuu thalatha fi maqad wahadi wa ajaza dhalika alayhi, Hadith number: 18089; (Musannaf ibn Abi Shayba, Kitab al-Talaq, bab fi al rajal yatlaqu imratahuu miata aw alfa, Hadith number: 18098; Musannaf Abdul-Razzaq, Kitab al-talaq, Hadith number 11340; Musannaf ibn Abi Shayba, Kitab aI-Talaq, Hadith no: 18091; Musannaf Ibn Abi Shayba, Hadith no: 18087; Al-Muhadhdhab, 4/305; and Bukhari, 3/402 (-for details, refer to paragraph 87 above).

135. Having dealt with the position expounded in the Quran and 'hadiths' as has been noticed above, learned senior Counsel attempted to repudiate the veracity of the 'hadiths' relied upon, in all the four judgments rendered by the High Courts. In this behalf learned senior Counsel provided the following compilation for this Court's consideration:

1. The Jiauddin Ahmed case MANU/GH/0033/1978 : (1981) 1 Gau. L.R. 358

Sl. No.	Reference	Comments
(i)	Maulana Mohammad Ali (referred to at paras 7, 11, 12 and 13 of the judgment)	He is a Qadiyani. MirzaGhulam Ahmed (founder of the Qadiyani School) declared himself to be the Prophet after Prophet Mohammed and it is for this reason that all Muslims do not consider the Qadiyani sect to be a part of the Islamic community.

2. The RukiaKhatun case MANU/GH/0031/1979 : (1981) 1 Gau. L.R. 375

Sl. No.	Reference	Comments
(i)		Authorities in this judgment are identical to the above mentioned judgment of Jiauddin Ahmed v. Anwara Begum.

3. The Masroor Ahmed case MANU/DE/9441/2007 : 2008 (103) DRJ 137

Sl. No.	Reference	Comments
(i)	Mulla (Referred at the footnote at page 153 of the judgment)	Approves the proposition that triple talaq is sinful, yet effective as an irrevocable divorce.

4. The Nazeer case MANU/KE/2403/2016 : 2017 (1) KLT 300.

Sl. No.	Reference	Comments
(i)	Basheer Ahmad Mohyidin (Referred at paras 1 and 6 of the judgment)	He wrote a commentary on the Quran entitled as Quran: The Living Truth, however the extract relied upon in the decision does not discuss triple talaq.
(ii)	IbnKathir (Referred in paras 1 and 8 of the judgment)	He wrote a commentary on the Quran entitled as TafsirIbnKathir. He takes the view, that three pronouncements at the same time were unlawful. It is submitted that he belonged to the Ahl-e-Hadith/Salafi school, which school does not recognize triple talaq.
(iii)	Dr. TahirMahmood (Referred in para 6 of the judgment)	He was a Professor of Law, Delhi University. He wrote a book entitled "Muslim Law in India and Abroad" and other books. Referred to other Islamic scholars to state, that it is a misconception that three talaqs have to be pronounced in three consecutive months, it is not a general rule as the three pronouncements have to be made when the wife is not in her menses, which would obviously require about three months. It is submitted, that the said extract is irrelevant and out of context as it does not specifically deal with validity of triple talaq.
(iv)	Sheikh Yusuf Al-Qaradawi (Referred in para 8 of the judgment)	He regarded triple talaq as against God's law. It is submitted that he was a follower of the Ahl-e-Hadith School.
(v)	MahmoudRidaMurad (Referred in para 8 of the judgment)	He authored the book entitled as Islamic Digest of Aqeedah and Fiqh. He took the view that triple talaq does not conform to the teachings of the Prophet. He is a follower of the Ahl-e-Hadith school.
(vi)	Sayyid Abdul Ala Maududi (Referred in para 11 of the judgment)	He is a scholar of the Hanafi School. Though the passages extracted in the judgment indicate that he was of the view that three pronouncements can be treated as one depending on the

		intention. However, subsequently he has changed his own view and has opined that triple talaq is final and irrevocable.
(vii)	Dr. Abu Ameenah Bilal Philips (Referred in para 19 of the judgment)	He authored the book 'Evolution of Fiqh'. He states that Caliph Umar introduced triple talaq in order to discourage abuse of divorce. He is a follower of the Ahl-e Hadith school.
(viii)	Mohammed Hashim Kamali (Referred in para 23 of the judgment)	He was of the view that Caliph Umar introduced triple talaq in order to discourage abuse of divorce. He is a professor of law.

It was the submitted on behalf of the AIMPLB, that the views of persons who are not Sunnis, and those who did not belong to the Hanafi school, could not have been validly relied upon. It was submitted, that reliance on Maulana Muhammad Ali was improper because he was a Qadiyani, and that Muslims do not consider the Qadiyani sect to be a part of the Islamic community. Likewise, it was submitted, that reference to Basheer Ahmad Mohyidin was misplaced, as the commentary authored by him, did not deal with the concept of 'talaq-e-biddat'. Reference to Tafsir Ibn Kathir was stated to be improper, as he belonged to the Ahl-e-Hadith/Salafi school, which school does not accept triple talaq. It was submitted, that Dr. Tahir Mahmood was a Professor of Law at the Delhi University, and his views must be treated as personal to him, and could not be elevated to the position of 'hadiths'. It was pointed out, that Sheikh Yusuf al-Qaradawi, was a follower of Ahl-e-Hadith school, and therefore, his views could not be taken into consideration. So also, it was submitted, that Mahmoud Rida Murad was a follower of Ahl-e-Hadith/Salafi school. Reference to Sayyid Abdul Ala Maududi, it was pointed out, was improperly relied upon, because the view expressed by the above scholar was that "three pronouncements of talaq could be treated as one, depending on the 'intention' of the husband". This position, according to learned senior Counsel, does not support the position propounded on behalf of the Petitioners, because if the 'intention' was to make three pronouncements, it would constitute a valid 'talaq'. With reference to Dr. Abu Ameenah Bilal Philips, it was submitted, that he was also a follower of the Ahl-e-Hadith/Salafi school. Last of all, with reference to Mohammed Hashim Kamali, it was pointed out, that he was merely a Professor of Law, and the views expressed by him should be considered as his personal views. It was accordingly asserted, that supplanting the views of other schools of Sunni Muslims, with reference to the practice of 'talaq-e-biddat' by the proponents of the Hanafi school, and even with the beliefs of Shia Muslims, was a clear breach of a rightful understanding of the school, and the practice in question.

136. Based on the submissions advanced on behalf of the AIMPLB, as have been noticed hereinabove, it was sought to be emphasized, that such complicated issues relating to norms applicable to a religious sect, could only be determined by the community itself. Learned Counsel cautioned, this Court from entering into the thicket of the instant determination, as this Court did not have the expertise to deal with the issue.

137. Having given our thoughtful consideration, and having examined the rival 'hadiths' relied upon by learned Counsel for the parties, we have no other option, but to accept the contention of learned senior Counsel appearing on behalf of the AIMPLB, and to accept his counsel, not to enter into the thicket of determining (on the basis of the 'hadiths' relied upon) whether or not 'talaq-e-biddat' - triple talaq, constituted a valid practice under the Muslim 'personal law' - 'Shariat'. In fact, even Mr. Salman Khurshid appearing on behalf of the Petitioners (seeking the repudiation of the practice of the 'talaq-e-biddat') had pointed out, that it was not the role of a court to interpret nuances of Muslim 'personal law' - 'Shariat'. It was pointed out, that under the Muslim 'personal law', the religious head - the Imam would be called upon to decipher the teachings expressed in the Quran and the 'hadiths', in order to resolve a conflict between the parties. It was submitted, that the Imam alone, had the authority to resolve a religious conflict, amongst Muslims. It was submitted, that the Imam would do so, not on the basis of his own views, but by relying on the verses from the Quran, and the 'hadiths', and based on other jurisprudential tools available, and thereupon he would render the correct interpretation. Mr. Salman Khurshid, learned Senior Advocate also cautioned this Court, that it was not its role to determine the true intricacies of faith.

138. All the submissions noted above, at the behest of the learned Counsel representing the AIMPLB would be inconsequential, if the judgment rendered by this Court in the Shamim Ara case MANU/SC/0850/2002 : (2002) 7 SCC 518, can be accepted as declaring the legal position in respect of 'talaq-e-biddat'. Having given a thoughtful consideration to the contents of the above judgment, it needs to be recorded, that this Court in the Shamim Ara case MANU/SC/0850/2002 : (2002) 7 SCC 518 did not debate the issue of validity of 'talaq-e-biddat'. No submissions have been noticed for or against, the proposition. Observations recorded on the subject, cannot therefore be treated as *ratio decidendi* in the matter. In fact, the question of validity of talaq-e-biddat' has never been debated before this Court. This is the first occasion that the matter is being considered after rival submissions have been advanced. Moreover, in the above judgment the Court was adjudicating a dispute regarding maintenance Under Section 125 of the Code of Criminal Procedure. The husband, in order to avoid the liability of maintenance pleaded that he had divorced his wife. This Court in the above judgment decided the factual issue as under:

15. The plea taken by Respondent 2 husband in his written statement may be renoticed. Respondent 2 vaguely makes certain generalized accusations against the Appellant wife and states that ever since the marriage he found his wife to be sharp, shrewd and mischievous. Accusing the wife of having brought disgrace to the family, Respondent 2 proceeds to state, vide para 12 (translated into English) -- "The answering Respondent, feeling fed up with all such activities unbecoming of the Petitioner wife, has divorced her on 11-7-1987." The particulars of the alleged talaq are not pleaded nor the circumstances under which and the persons, if any, in whose presence talaq was pronounced have been stated. Such deficiency continued to prevail even during the trial and Respondent 2, except examining himself, adduced no evidence in proof of talaq said to have been given by him on 11-7-1987. There are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq.

16. We are also of the opinion that the talaq to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (see Chambers 20th Century Dictionary, New Edition, p. 1030). There is no proof of talaq having taken place on 11-7-1987. What the High Court has upheld as talaq is the plea taken in the

written statement and its communication to the wife by delivering a copy of the written statement on 5-12-1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent 2 ought to have adduced evidence and proved the pronouncement of talaq on 11-7-1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on the wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31-8-1988, filed in some previous judicial proceedings not inter partes, containing a self-serving statement of Respondent 2, could not have been read in evidence as relevant and of any value.

17. For the foregoing reasons, the appeal is allowed. Neither the marriage between the parties stands dissolved on 5-12-1990 nor does the liability of Respondent 2 to pay maintenance comes to an end on that day. Respondent 2 shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law. The costs in this appeal shall be borne by Respondent 2.

The liability to pay maintenance was accepted, not because 'talaq-e-biddat'-triple talaq was not valid in law, but because the husband had not been able to establish the factum of divorce. It is therefore not possible to accept the submission made by learned Counsel on the strength of the Shamim Ara case MANU/SC/0850/2002 : (2002) 7 SCC 518.

139. Having given our thoughtful consideration on the entirety of the issue, we are persuaded to accept the counsel of Mr. Kapil Sibal and Mr. Salman Khurshid, Senior Advocates. It would be appropriate for us, to refrain from entertaining a determination on the issue in hand, irrespective of the opinion expressed in the four judgments relied upon by learned Counsel for the Petitioners, and the Quranic verses and 'hadiths' relied upon by the rival parties. We truly do not find ourselves, upto the task. We have chosen this course, because we are satisfied, that the controversy can be finally adjudicated, even in the absence of an answer to the proposition posed in the instant part of the consideration.

IV. Is the practice of 'talaq-e-biddat', a matter of faith for Muslims? If yes, whether it is a constituent of their 'personal law'?

140. In the two preceding parts of our consideration, we have not been able to persuade ourselves to disapprove and derecognize the practice of 'talaq-e-biddat'. It may however still be possible for us, to accept the Petitioners' prayer, if it can be concluded, that 'talaq-e-biddat' was not a constituent of 'personal law' of Sunni Muslims belonging to the Hanafi school. And may be, it was merely a usage or custom. We would, now attempt to determine an answer to the above noted poser.

141. As a historical fact, 'talaq-e-biddat' is known to have crept into Muslim tradition more than 1400 years ago, at the instance of Umayyad monarchs. It can certainly be traced to the period of Caliph Umar-a senior companion of Prophet Muhammad. Caliph Umar succeeded Abu Bakr (632-634) as the second Caliph on 23.8.634. If this position is correct, then the practice of 'talaq-e-biddat' can most certainly be stated to have originated some 1400 years ago. Factually, Mr. Kapil Sibal had repeatedly emphasized the above factual aspects, and the same were not repudiated by any of learned Counsel (-and private individuals) representing the Petitioner's cause.

142. The fact, that the practice of 'talaq-e-biddat' was widespread can also not be disputed. In Part-5 of the instant judgment-Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States, we have dealt with legislations at the hands of Arab States-Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libiya, Mrocco, Sudan, Syria, Tunisia, United Arab Emirates, Yemen; we have also dealt with legislations by South-east Asian States-Indonesia, Malaysia, Philippines; we have additionally dealt with legislations by sub-continental States-Pakistan and Bangladesh. All these countries have legislated with reference to-'talaq-e-biddat', in one form or the other. What can certainly be drawn from all these legislations is, that 'talaq-e-biddat' was a prevalent practice amongst Muslims, in these countries. Had it not been so, legislation would not have been required on the subject. It is therefore clear that the practice of 'talaq-e-biddat' was not limited to certain areas, but was widespread.

143. We have also extracted in the submissions advanced by learned Counsel representing the rival parties, 'hadiths' relied upon by them, to substantiate their rival contentions. The debate and discussion amongst Islamic jurists in the relevant 'hadiths' reveal, that the practice of triple talaq was certainly, in vogue amongst Muslims, whether it was considered and treated as irregular or sinful, is quite another matter. All were agreed, that though considered as improper and sacrilegious, it was indeed accepted as lawful. This debate and discussion in the Muslim community-as has been presently demonstrated by the disputants during the course of hearing, and as has been highlighted through articles which appeared in the media (at least during the course of hearing), presumably by knowledgeable individuals, reveal views about its sustenance. The only debate in these articles was about the consistence or otherwise, of the practice of 'talaq-e-biddat'-with Islamic values. Not that, the practice was not prevalent. The ongoing discussion and dialogue, clearly reveal, if nothing else, that the practice is still widely prevalent and in vogue.

144. The fact, that about 90% of the Sunnis in India, belong to the Hanafi school, and that, they have been adopting 'talaq-e-biddat' as a valid form of divorce, is also not a matter of dispute. The very fact, that the issue is being forcefully canvassed, before the highest Court of the land, and at that-before a Constitution Bench, is proof enough. The fact that the judgment of the Privy Council in the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25 as far back as in 1932, upheld the severance of the matrimonial tie, based on the fact that 'talaq' had been uttered thrice by the husband, demonstrates not only its reality, but its enforcement, for the determination of the civil rights of the parties. It is therefore clear, that amongst Sunni Muslims belonging to the Hanafi school, the practice of 'talaq-e-biddat', has been very much prevalent, since time immemorial. It has been widespread amongst Muslims in countries with Muslim popularity. Even though it is considered as irreligious within the religious denomination in which the practice is prevalent, yet the denomination considers it valid in law. Those following this practice have concededly allowed their civil rights to be settled thereon. 'Talaq-e-biddat' is practiced in India by 90% of the Muslims

(who belong to the Hanafi school). The Muslim population in India is over 13% (-about sixteen crores) out of which 4-5 crores are Shias, and the remaining are Sunnis (besides, about 10 lakhs Ahmadias)-mostly belonging to the Hanafi school. And therefore, it would not be incorrect to conclude, that an overwhelming majority of Muslims in India, have had recourse to the severance of their matrimonial ties, by way of 'talaq-e-biddat'-as a matter of their religious belief-as a matter of their faith.

145. We are satisfied, that the practice of 'talaq-e-biddat' has to be considered integral to the religious denomination in question-Sunnis belonging to the Hanafi school. There is not the slightest reason for us to record otherwise. We are of the view, that the practice of 'talaq-e-biddat', has had the sanction and approval of the religious denomination which practiced it, and as such, there can be no doubt that the practice, is a part of their 'personal law'.

V. Did the Muslim Personal Law (Shariat) Application Act, 1937 confer statutory status to the subjects regulated by the said legislation?

146. 'Personal law' has a constitutional protection. This protection is extended to 'personal law' through Article 25 of the Constitution. It needs to be kept in mind, that the stature of 'personal law' is that of a fundamental right. The elevation of 'personal law' to this stature came about when the Constitution came into force. This was because Article 25 was included in Part III of the Constitution. Stated differently, 'personal law' of every religious denomination, is protected from invasion and breach, except as provided by and Under Article 25.

147. The contention now being dealt with, was raised with the object of demonstrating, that after the enactment of the Muslim Personal Law (Shariat) Application Act, 1937, the questions and subjects covered by the Shariat Act, ceased to be 'personal law', and got transformed into 'statutory law'. It is in this context, that it was submitted, by Ms. Indira Jaising, learned senior Counsel and some others, that the tag of 'personal law' got removed from the Muslim 'personal law'-'Shariat', after the enactment of the Shariat Act, at least for the questions/subjects with reference to which the legislation was enacted. Insofar as the present controversy is concerned, suffice it to notice, that the enactment included "... dissolution of marriage, including talaq ..." amongst the questions/subjects covered by the Shariat Act. And obviously, when the parties are Muslims, 'talaq' includes 'talaq-e-biddat'. The pointed contention must be understood to mean, that after the enactment of the Shariat Act, dissolution of marriage amongst Muslims including 'talaq' (and, 'talaq-e-biddat') had to be considered as regulated through a State legislation.

148. Having become a part of a State enactment, before the Constitution of India came into force, it was the submission of learned senior Counsel, that all laws in force immediately before the commencement of the Constitution, would continue to be in force even afterwards. For the instant assertion, reliance was placed on Article 372 of the Constitution. We may only state at this juncture, if the first proposition urged by the learned senior Counsel is correct (that dissolution of marriage amongst Muslims including 'talaq' was regulated statutorily after the 1937 Act), then the latter part of the submission advanced, has undoubtedly to be accepted as accurate.

149. We have already enumerated the relevant provisions of the Shariat Act (-for details, refer to Part-4-Legislation in India, in the field of Muslim 'personal law'). A perusal of Section 2 thereof

(extracted in paragraph 23 above) reveals, that on the questions/subjects of intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of 'personal law', marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs, "... the Rule of decision ...", where the parties are Muslims, shall be "... the Muslim Personal Law-Shariat. The submission of the learned Counsel representing the Petitioners, in support of the instant contention was, that since the "rule of the decision" *inter alia* with reference to 'talaq' (-'talaq-e-biddat'), was thereafter to be regulated in terms of the Shariat Act, what was 'personal law' (-prior to the above enactment), came to be transformed into 'statutory law'. This, according to learned Counsel for the Petitioners, has a significant bearing, inasmuch as, what was considered as 'personal law' prior to the Shariat Act, became an Act of the State. Having become an Act of the State, it was submitted, that it has to satisfy the requirements of Part III-Fundamental Rights, of the Constitution. This, it was pointed out, is indeed the express mandate of Article 13(1), which provides that laws in force immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part III of the Constitution, shall to the extent of such inconsistency, be considered as void.

150. In order to support the issue being canvassed, it was submitted, that no "rule of decision" can be violative of Part III of the Constitution. And "rule of decision" on questions/subjects covered by the Shariat Act, would be deemed to be matters of State determination. Learned senior Counsel was however candid, in fairly acknowledging, that 'personal laws' which pertained to disputes between the family and private individuals (where the State had no role), cannot be subject to a challenge on the ground, that they are violative of the fundamental rights contained in Part III of the Constitution. The simple logic canvassed by learned Counsel was, that all questions pertaining to different 'personal laws' amongst Muslims having been converted into "rule of decision" could no longer be treated as private matters between the parties, nor would they be treated as matters of 'personal law". In addition, the logic adopted to canvass the above position was, that if it did not alter the earlier position, what was the purpose of bringing in the legislation (the Shariat Act).

151. On the assumption, that 'personal law' stood transformed into 'statutory law', learned senior Counsel for the Petitioners assailed the constitutional validity of 'talaq-e-biddat', on the touchstone of Articles 14, 15 and 21 of the Constitution.

152. Mr. Kapil Sibal, learned senior Counsel appearing for the AIMPLB, drew our attention to the debates in the Legislative Assembly, whereupon, the Muslim Personal Law (Shariat) Application Act, 1937 was enacted (for details, refer to paragraph 94). Having invited our attention to the above debates and more particularly to the statements of Abdul Qaiyum (representing North-West Frontier Province), it was contended, that the legislation under reference, was not enacted with the object of giving a statutory status to the Muslim 'personal law'-'Shariat'. It was asserted, that the object was merely to negate the effect of usages and customs. It was pointed out, that even though Muslims were to be regulated under the Muslim 'personal law'-'Shariat', yet customs and usages to the contrary were being given an overriding effect. To the extent that customs and usages even of local tribes (-as also of local villages), were being given an overriding position over Muslim 'personal law', in the course of judicial determination, even where the parties were Muslims. It was therefore asserted, that it would be wrong to assume, that the aim and object of the legislators, while enacting the Shariat Act, was to give statutory status to Muslim 'personal law'-'Shariat'. In

other words, it was the contention of learned senior Counsel, that the Shariat Act should only be understood as having negated customary practices and usages, which were in conflict with the existing Muslim 'personal law'-'Shariat'.

153. Mr. V. Giri, learned senior Counsel, supported the above contention by placing reliance on Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, on behalf of the AIMPLB. It was asserted, that Section 2 has a *non obstante* clause. It was pointed out, that aforestated *non obstante* Clause was merely relatable to customs and usages. A perusal of Section 2, according to learned senior Counsel, would leave no room for any doubt, that the customs and usages referred to in Section 2 of the Shariat Act, were only such customs and usages as were in conflict with the Muslim 'personal law'-'Shariat'. It was accordingly submitted, that the object behind Section 2 of the Shariat Act was to declare the Muslim 'personal law'-'Shariat', as the "rule of decision", in situations where customs and usages were to the contrary.

154. Learned senior Counsel for the Respondents desired us to accept their point of view, for yet another reason. It was submitted, that the Muslim Personal Law (Shariat) Application Act, 1937, did not decide what was, and what was not, Muslim 'personal law'-'Shariat'. It was therefore pointed out, that it would be a misnomer to consider, that the Shariat Act, legislated in the field of Muslim 'personal law'-'Shariat' in any manner on Muslim 'personal law'-'Shariat'. It was submitted, that Muslim 'personal law'-'Shariat' remained what it was. It was pointed out, that articles of faith as have been expressed on the questions/subjects regulated by the Shariat Act, have not been dealt with in the Act, they remained the same as were understood by the followers of that faith. It was accordingly contended, that the Muslim 'personal law'-'Shariat', was not introduced/enacted through the Shariat Act. It was also pointed out, that the Shariat Act did not expound or propound the parameters on different questions or subjects, as were applicable to the Sunnis and Shias, and their different schools. It was accordingly submitted, that it would be a misnomer to interpret the provisions of the Shariat Act, as having given statutory status to different questions/subjects, with respect to 'personal law' of Muslims. It was therefore contended, that the Muslim 'personal law'-'Shariat' was never metamorphosed into a statute. It was therefore contended, that it would be wholly improper to assume that Muslim 'personal law'-'Shariat' was given statutory effect, through the Muslim Personal Law (Shariat) Application Act, 1937.

155. Based on the above contentions, it was submitted, that the Muslim Personal Law (Shariat) Application Act, 1937 cannot be treated as having conferred statutory status on the Muslim 'personal law'-'Shariat', and as such, the same cannot be treated as a statutory enactment, so as to be tested for its validity in the manner contemplated Under Article 13(1) of the Constitution.

156. We have given our thoughtful consideration to the submissions advanced at the hands of learned Counsel for the rival parties. Having closely examined Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, we are of the view, that the limited purpose of the aforesaid provision was to negate the overriding effect of usages and customs over the Muslim 'personal law'-'Shariat'. This determination of ours clearly emerges even from the debates in the Legislative Assembly before the enactment of Muslim Personal Law (Shariat) Application Act, 1937. In fact, the statements of H.M. Abdullah (representing West Central Punjab) and Abdul Qaiyum (representing North-West Frontier Province), leave no room for any doubt, that the objective sought to be achieved by the 'Shariat' was *inter alia* to negate the overriding effect on customs and

usages over the Muslim 'personal law'-'Shariat'. The debates reveal that customs and usages by tribals were being given overriding effect by courts while determining issues between Muslims. Even usages and customs of particular villages were given overriding effect over Muslim 'personal law'-'Shariat'. We are also satisfied to accept the contention of the learned senior Counsel, that a perusal of Section 2 and the *non obstante* Clause used therein, has that effect. The Shariat Act, in our considered view, neither lays down nor declares the Muslim 'personal law'-'Shariat'. Not even, on the questions/subjects covered by the legislation. There is no room for any doubt, that there is substantial divergence of norms regulating Shias and Sunnis. There was further divergence of norms, in their respective schools. The Shariat Act did not crystallise the norms as were to be applicable to Shias and Sunnis, or their respective schools. What was sought to be done through the Shariat Act, in our considered view, was to preserve Muslim 'personal law'-'Shariat', as it existed from time immemorial. We are of the view, that the Shariat Act recognizes the Muslim 'personal law' as the 'rule of decision' in the same manner as Article 25 recognises the supremacy and enforceability of 'personal law' of all religions. We are accordingly satisfied, that Muslim 'personal law'-'Shariat' as body of law, was perpetuated by the Shariat Act, and what had become ambiguous (due to inundations through customs and usages), was clarified and crystalised. In contrast, if such a plea had been raised with reference to the Dissolution of Muslim Marriages Act, 1939, which legislatively postulated the grounds of divorce for Muslim women, the submission would have been acceptable. The 1939 Act would form a part of 'statutory law', and not 'personal law'. We are therefore constrained to accept the contention advanced by learned Counsel for the Respondents, that the proposition canvassed on behalf of the Petitioners, namely, that the Muslim Personal Law (Shariat) Application Act, 1937 conferred statutory status, on the questions/subjects governed by the Shariat Act, cannot be accepted. That being the position, Muslim 'personal law'-'Shariat' cannot be considered as a State enactment.

157. In view of the conclusions recorded in the foregoing paragraph, it is not possible for us to accept, the contention advanced on behalf of the Petitioners, that the questions/subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937 ceased to be 'personal law' and got transformed into 'statutory law'. Having concluded as above, we must also hold (-which we do), that the practices of Muslim 'personal law'-'Shariat' cannot be required to satisfy the provisions contained in Part III-Fundamental Rights, of the Constitution, applicable to State actions, in terms of Article 13 of the Constitution.

VI. Does 'talaq-e-biddat', violate the parameters expressed in Article 25 of the Constitution?

158. In our consideration recorded hereinabove, we have held, that the provisions of the Muslim Personal Law (Shariat) Application Act, 1937 did not alter the 'personal law' status of the Muslim 'personal law'-'Shariat'. We shall now deal with the next step. Since 'talaq-e-biddat' remains a matter of 'personal law', applicable to a Sunni Muslim belonging to the Hanafi school, can it be declared as not enforceable in law, as it violates the parameters expressed in Article 25 (which is also one of the pointed contentions of those supporting the Petitioners case)?

159. The above proposition is strenuously opposed by all the learned Counsel who appeared on behalf of the Respondents, more particularly, learned senior Counsel representing the AIMPLB. During the course of the instant opposition, our attention was invited to the judgment rendered by the Bombay High Court in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom

84. We may briefly advert thereto. In the said judgment authored by M.C. Chagla, CJ, in paragraph 13 and Gajendragadkar, J. (as he then was) in paragraph 23, recorded the following observations:

13. That this distinction is recognised by the Legislature is clear if one looks to the language of Section 112, Government of India Act, 1915. That Section deals with the law to be administered by the High Courts and it provides that the High Courts shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the Defendant is subject. Therefore, a clear distinction is drawn between personal law and custom having the force of law. This is a provision in the Constitution Act, and having this model before them the Constituent Assembly in defining "law" in Article 13 have expressly and advisedly used only the expression "custom or usage" and have omitted personal law. This, in our opinion, is a very clear pointer to the intention of the Constitution-making body to exclude personal law from the purview of Article 13. There are other pointers as well. Article 17 abolishes untouchability and forbids its practice in any form. Article 25(2)(b) enables the State to make laws for the purpose of throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus. Now, if Hindu personal law became void by reason of Article 13 and by reason of any of its provisions contravening any fundamental right, then it was unnecessary specifically to provide in Article 17 and Article 25(2)(b) for certain aspects of Hindu personal law which contravened Arts. 14 and 15. This clearly shows that only in certain respects has the Constitution dealt with personal law. The very presence of Article 44 in the Constitution recognizes the existence of separate personal laws, and Entry No. 5 in the Concurrent List gives power to the Legislatures to pass laws affecting personal law. The scheme of the Constitution, therefore, seems to be to leave personal law unaffected except where specific provision is made with regard to it and leave it to the Legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform Code. Our attention has been drawn to Section 292, Government of India Act, 1935, which provides that all the law in force in British India shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority, and Section 293 deals with adaptation of existing penal laws. There is a similar provision in our Constitution in Article 372(1) and Article 372(2). It is contended that the laws which are to continue in force Under Article 372(1) include personal laws, and as these laws are to continue in force subject to the other provisions of the Constitution, it is urged that by reason of Article 13(1) any provision in any personal law which is inconsistent with fundamental rights would be void. But it is clear from the language of Arts. 372(1) and 372(2) that the expression "laws in force" used in this Article does not include personal law because Article 372(2) entitles the President to make adaptations and modifications to the law in force by way of repeal or amendment, and surely it cannot be contended that it was intended by this provision to authorise the President to make alterations or adaptations in the personal law of any community. Although the point urged before us is not by any means free from difficulty, on the whole after a careful consideration of the various provisions of the Constitution, we have come to the conclusion that personal law is not included in the expression "laws in force" used in Article 13(1).

23. .....The Constitution of India itself recognises the existence of these personal laws in terms when it deals with the topics falling under personal law in item 5 in the Concurrent List--List III.

This item deals with the topics of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law and yet the expression "personal law" is not used in Article 13. because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression "laws in force." Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Article 13(1) at all.

160. It seems to us, that the position expressed by the Bombay High Court, as has been extracted above, deserves to be considered as the presently declared position of law, more particularly, because it was conceded on behalf of the learned Attorney General for India, that the judgment rendered by the Bombay High Court in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84, has been upheld by the Court in the Shri Krishna Singh case MANU/SC/0657/1981 : (1981) 3 SCC 689 and the Maharshi Avadhesh cases (1994) Suppl. (1) SCC 713, wherein, this Court had tested the 'personal laws' on the touchstone of fundamental rights in the cases of Mohd. Ahmed Khan v. Shah Bano Begum MANU/SC/0194/1985 : (1985) 2 SCC 556 (by a 5-Judge Constitution Bench), Daniel Latifi v. Union of India MANU/SC/0595/2001 : (2001) 7 SCC 740 (by a 5-Judge Constitution Bench), and in the John Vallamattom case MANU/SC/0480/2003 : (2003) 6 SCC 611, (by a 3-Judge Division Bench). An extract of the written submissions placed on the record of the case, on behalf of the Union of India, has been reproduced verbatim in paragraph 71 above.

161. The fair concession made at the hands of the learned Attorney General, is reason enough for us to accept the proposition, and the legal position expressed by the Bombay High Court, relevant part whereof has been extracted above. Despite our instant determination, it is essential for us to notice a few judgments on the issue, which would put a closure to the matter.

(i) Reference may first of all be made to the Shri Krishna Singh case MANU/SC/0657/1981 : (1981) 3 SCC 689. The factual position which arose in the above case, may be noticed as under:

'S', a Hindu ascetic, established the Garwaghat Math at Varanasi in 1925. The 'math' (monastery) comprised of Bangla Kuti and other buildings and lands endowed by his devotees. 'S' belonged to the Sant Math Sampradaya, which is a religious denomination of the Dasnami sect, founded by the 'Sankaracharya' (head of a monastery). During this lifetime, 'S' initiated 'A' as his 'chela' (disciple) and gave him full rights of initiation and 'bhesh' (spiritual authority). After the death of 'S', his 'bhesh' and sampradaya (succession of master or disciples) gave 'A' the 'chadar mahanti' (cloak of the chief priest) of the 'math' and made him the 'mahant' (chief priest), according to the wishes of 'S'. 'A' thereafter initiated the Plaintiff, a 'sudra' (lowest caste of the four Hindu castes), as his 'chela' according to the custom and usage of the sect and after this death, in accordance with his wishes the 'mahants' and 'sanyasis' (persons leading a life of renunciation) of the 'bhesh' and

'sampradaya' gave the 'chadar mahanti' to the Plaintiff, and installed him as the 'mahant' of the 'math' in the place of 'A', by executing a document to that effect. 'A' during his life time purchased two houses in the city of Varanasi, from out of the income of the 'math'. When the Plaintiff became the 'mahant', he brought a suit for ejectment of Respondents 2 to 5 from one of those houses, on the ground that Respondent 2 after taking the house on rent from 'A', had unlawfully sublet the premises to Respondents 3 to 5. The Defendant Respondents inter alia pleaded, that they were in occupation of the house as 'chelas' of 'A', in their own rights, by virtue of a licence granted to them by 'A', and therefore, on his death his natural son and disciple, the Appellant became the owner thereof. One of the questions which needed to be determined in the above controversy, was formulated as under:

(1) Whether the Plaintiff being a 'sudra' could not be ordained to a religious order and become a 'sanyasi' or 'yati' and therefore, installed as 'mahant' according to the tenets of the Sant Mat Sampradaya?

In recording its conclusions with reference to Article 25, in the above disputed issue, this Court held as under:

17. It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict Rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law i.e. Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except, where such law is altered by any usage or custom or is modified or abrogated by statute.

(ii) Reference is also essential to Madhu Kishwar v. State of Bihar MANU/SC/0468/1996 : (1996) 5 SCC 125, wherein this Court observed a under:

It is worthwhile to account some legislation on the subject. The Hindu Succession Act governs and prescribes Rules of succession applicable to a large majority of Indians being Hindus, Sikhs, Buddhists, Jains etc. whereunder since 1956, if not earlier, the female heir is put on a par with a male heir. Next in the line of numbers is the Shariat law, applicable to Muslims, whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets. Then comes the Indian Succession Act which applies to Christians and by and large to people not covered under the aforesaid two laws, conferring in a certain manner heirship on females as also males. Certain chapters thereof are not made applicable to certain communities. Sub-section (2) of Section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled Tribe within the meaning of Clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government by means of a notification in the Official Gazette. Section 3(2) further provides that in the Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females. General Rule of legislative practice is that unless there is anything repugnant in the subject or

context, words importing the masculine gender used in statutes are to be taken to include females. Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general Rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted ex abundanti cautela. Even Under Section 3 of the Indian Succession Act, the State Government is empowered to exempt any race, sect or tripe from the operation of the Act and the tribes of Mundas, Oraons, Santhals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region.

In the face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and Governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist court. apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the Petitioners in their written submissions. However laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For, in whatever measure be the concern of the court, it compulsively needs to apply, motion, described in judicial parlance as self-restraint. We agree therefore with brother K. Ramaswamy, J. as summed up by him in the paragraph ending on p. 36 (para 46) of his judgment that under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 45 and 21 of the Constitution and each case must be examined when full facts are placed before the court.

With regard to the statutory provisions of the Act, he has proposed to the reading down of Sections 7 and 8 in order to preserve their constitutionality. This approach is available from p. 36 (paras 47, 48) onwards of his judgment. The words "male descendant wherever occurring, would include "female descendants". It is also proposed that even though the provisions of the Hindu Succession Act, 1925 in terms would not apply to the Schedule Tribes, their general principles composing of justice, equity and fair play would apply to them. On this basis it has been proposed to take the view that the Scheduled Tribe women would succeed to the estate of paternal parent, brother or husband as heirs by intestate succession and inherit the property in equal shares with the male heir with absolute rights as per the principles of the Hindu Succession Act as also the Indian Succession Act. However, much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route of return on the court's entering the thicket, it would follow a beeline for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the line with the systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are, indeed susceptible of providing differential treatment, not necessarily equal. Non-uniformities would not in all events violate Article 14. Judge-made amendments to provisions, should normally be avoided. We are thus constrained to take this view. even though it may appear to be conservative

for adopting a cautious approach, and the one proposed by our learned brother is, regretfully not acceptable to us.

(iii) In the Ahmedabad Women Action Group case MANU/SC/0896/1997 : (1997) 3 SCC 573, this Court recorded the questions arising for consideration in paragraphs 1 to 3, which are reproduced below:

All these Writ Petitions are filed as Public Interest Litigation. In W.P. (C) No. 494 of 1996, the reliefs prayed for are as follows:

(a) to declare Muslim Personal Law which allows polygamy as void as offending Articles 14 and 15 of the Constitution;

(b) to declare Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, as void, offending Articles 13, 14 and 15 of the Constitution;

(c) to declare that the mere fact that a Muslim husband takes more than one wife is an act of cruelty within the meaning of Clause VIII (f) of Section 2 of Dissolution of Muslim Marriages Act, 1939;

(d) to declare that Muslim Women (Protection of Rights on Divorce) Act, 1986 is void as infringing Articles 14 and 15;

(e) to further declare that the provisions of Sunni and Shia laws of inheritance which discriminate against females in their share as compared to the share of males of the same status, void as discriminating against females only on the ground of sex.

2. In writ Petition (C) No. 496 of 1996, the reliefs prayed for are the following:

(a) to declare Sections 2(2), 5(ii) and (iii), 6 and Explanation to Section 30 of Hindu Succession Act, 1956, as void offending Articles 14 and 15 read with Article 13 of the Constitution of India;

(b) to declare Section (2) of Hindu Marriage Act, 1955, as void offending Articles 14 and 15 of the Constitution of India;

(c) to declare Sections 3 (2), 6 and 9 of the Hindu Minority and Guardianship Act read with Section 6 of Guardians and Wards Act void;

(d) to declare the unfettered and absolute discretion allowed to a Hindu spouse to make testamentary disposition without providing for an ascertained share of his or her spouse and dependant, void.

3. In writ Petition (C) No. 721 of 1996, the reliefs prayed for are the following:

(a) to declare Sections 10 and 34 of Indian Divorce Act void and also to declare Sections 43 to 46 of the Indian Succession Act void.

The position expressed in respect of the above questions, after noticing the legal position propounded by this Court in the Madhu Kishwar case MANU/SC/0468/1996 : (1996) 5 SCC 125, was recorded in paragraph 4 as under:

4. At the outset. we would like to state that these Writ Petitions do not deserve disposal on merits inasmuch as the arguments advanced by the learned Senior Advocate before us wholly involve issues of State policies with which the Court will not ordinarily have any concern. Further, we find that when similar attempts were made, of course by others, on earlier occasions this Court held that the remedy lies somewhere else and not by knocking at the doors of the courts.

(iv) Reference may also be made to the Sardar Syedna Taher Saifuddin Saheb case MANU/SC/0072/1962 : AIR 1962 SC 853, wherein, this Court held as under:

The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt; Mahant Jagannath Ramanuj Das v. The State of Orissa; Sri Ventatamana Devaru v. The State of Mysore; Durgah Committee, Ajmer v. Syed Hussain Ali and several Ors. cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

(v) It is also essential to note the N. Adithyan case MANU/SC/0862/2002 : (2002) 8 SCC 106, wherein this Court observed as under:

9. This Court, in Seshammal v. State of T.N., MANU/SC/0631/1972 : (1972) 2 SCC 11 again reviewed the principles underlying the protection engrafted in Articles 25 and 26 in the context of a challenge made to abolition of hereditary right of Archaka, and reiterated the position as hereunder: (SCC p. 21, paras 13-14)

13. This Court in Sardar Taher Saifuddin Saheb v. State of Bombay MANU/SC/0072/1962 : AIR 1962 SC 853 has summarized the position in law as follows (pp. 531 and 532):

The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, Mahant Jagannath Ramanuj Das v. State of Orissa, Venkataramana Devaru v. State of Mysore, Durgah Committee, Ajmer v. Syed Hussain Ali and several Ors., cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with

reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

14. Bearing these principles in mind, we have to approach the controversy in the present case.

16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus and any such rights of the State or of the communities or classes of society were also considered to need due Regulation in the process of harmonizing the various rights. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection Under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down.

(vi) Relevant to the issue is also the judgment in the Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi case MANU/SC/1164/1997 : (1997) 4 SCC 606, wherein it was held:

28. .....All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State Regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. .....

(vii) The position seems to be clear, that the judicial interference with 'personal law' can be rendered only in such manner as has been provided for in Article 25 of the Constitution. It is not possible to breach the parameters of matters of faith, as they have the protective shield of Article 25 (except as provided in the provision itself).

162. To be fair to the learned Attorney General, it is necessary to record, that he contested the determination recorded by the Bombay High Court in the Narasu Appa Mali case MANU/MH/0040/1952 : AIR 1952 Bom 84, and the judgments rendered by this Court affirming

the same, by assuming the stance that the position needed to be revisited (-for details, refer to paragraph 71 above). There are two reasons for us not to entertain this plea. Firstly, even according to the learned Attorney General, the proposition has been accepted by this Court in at least two judgments rendered by Constitution Benches (-of 5-Judge each), and as such, we (-as a 5-Judge Bench) are clearly disqualified to revisit the proposition. And secondly, a challenge to 'personal law' is also competent Under Article 25, if the provisions of Part III-Fundamental Rights, of the Constitution, are violated, which we shall in any case consider (hereinafter) while examining the submissions advanced on behalf of the Petitioners. Likewise, we shall not dwell upon the submissions advanced in rebuttal by Mr. Kapil Sibal, Senior Advocate.

163. So far as the challenge to the practice of 'talaq-e-biddat', with reference to the constitutional mandate contained in Article 25 is concerned, we have also delved into the submissions canvassed, during the course of hearing. It would be pertinent to mention, that the constitutional protection to tenets of 'personal law' cannot be interfered with, as long as the same do not infringe "public order, morality and health", and/or "the provisions of Part III of the Constitution". This is the clear position expressed in Article 25(1).

164. We will now venture to examine the instant challenge with reference to the practice of 'talaq-e-biddat'. It is not possible for us to accept, that the practice of 'talaq-e-biddat' can be set aside and held as unsustainable in law for the three defined purposes expressed in Article 25(1), namely, for reasons of it being contrary to public order, morality and health. Viewed from any angle, it is impossible to conclude, that the practice impinges on 'public order', or for that matter on 'health'. We are also satisfied, that it has no nexus to 'morality', as well. Therefore, in our considered view, the practice of 'talaq-e-biddat' cannot be struck down on the three non-permissible/prohibited areas which Article 25 forbids even in respect of 'personal law'. It is therefore not possible for us to uphold the contention raised on behalf of the Petitioners on this account.

165. The only remaining ground on which the challenge to 'talaq-e-biddat' Under Article 25 could be sustainable is, if 'talaq-e-biddat' can be seen as violative of the provisions of Part III of the Constitution. The challenge raised at the behest of the Petitioners, as has been extensively noticed during the course of recording the submissions advanced on behalf of the Petitioners, was limited to the practice being allegedly violative of Articles 14, 15 and 21. We shall now examine the veracity of the instant contention. The fundamental rights enshrined in Articles 14, 15 and 21 are as against State actions. A challenge under these provisions (Articles 14, 15 and 21) can be invoked only against the State. It is essential to keep in mind, that Article 14 forbids the State from acting arbitrarily. Article 14 requires the State to ensure equality before the law and equal protection of the laws, within the territory of India. Likewise, Article 15 prohibits the State from taking discriminatory action on the grounds of religion, race, caste, sex or place of birth, or any of them. The mandate of Article 15 requires, the State to treat everyone equally. Even Article 21 is a protection from State action, inasmuch as, it prohibits the State from depriving anyone of the rights ensuring to them, as a matter of life and liberty (-except, by procedure established by law). We have already rejected the contention advanced on behalf of the Petitioners, that the provisions of the Muslim Personal Law (Shariat) Application Act, 1937, did not alter the 'personal law' status of 'Shariat'. We have not accepted, that after the enactment of the Shariat Act, the questions/subjects covered by the said legislation ceased to be 'personal law', and got transformed into 'statutory law'. Since we have held that Muslim 'personal law'-'Shariat' is not based on any State Legislative action,

we have therefore held, that Muslim 'personal law'-'Shariat', cannot be tested on the touchstone of being a State action. Muslim 'personal law'-'Shariat', in our view, is a matter of 'personal law' of Muslims, to be traced from four sources, namely, the Quran, the 'hadith', the 'ijma' and the 'qiyas'. None of these can be attributed to any State action. We have also already concluded, that 'talaq-e-biddat' is a practice amongst Sunni Muslims of the Hanafi school. A practice which is a component of the 'faith' of those belonging to that school. 'Personal law', being a matter of religious faith, and not being State action, there is no question of its being violative of the provisions of the Constitution of India, more particularly, the provisions relied upon by the Petitioners, to assail the practice of 'talaq-e-biddat', namely, Articles 14, 15 and 21 of the Constitution.

VII. Constitutional morality and 'talaq-e-biddat':

166. One of the issues canvassed on behalf of the Petitioners, which was spearheaded by the learned Attorney General for India, was on the ground, that the constitutional validity of the practice of 'talaq-e-biddat'-triple talaq, was in breach of constitutional morality. The question raised before us was, whether under a secular Constitution, women could be discriminated against, only on account of their religious identity? It was asserted, that women belonging to any individual religious denomination, cannot suffer a significantly inferior status in society, as compared to women professing some other religion. It was pointed out, that Muslim women, were placed in a position far more vulnerable than their counterparts, who professed other faiths. It was submitted, that Hindu, Christian, Zoroastrian, Buddhist, Sikh, Jain women, were not subjected to ouster from their matrimonial relationship, without any reasonable cause, certainly not, at the whim of the husband; certainly not, without due consideration of the views expressed by the wife, who had the right to repel a husband's claim for divorce. It was asserted, that 'talaq-e-biddat', vests an unqualified right with the husband, to terminate the matrimonial alliance forthwith, without any reason or justification. It was submitted, that the process of 'talaq-e-biddat' is extra-judicial, and as such, there are no remedial measures in place, for raising a challenge, to the devastating consequences on the concerned wife. It was pointed out, that the fundamental right to equality, guaranteed to every citizen Under Article 14 of the Constitution, must be read to include, equality amongst women of different religious denominations. It was submitted, that gender equality, gender equity and gender justice, were values intrinsically intertwined in the guarantee assured to all (-citizens, and foreigners) Under Article 14. It was asserted, that the conferment of social status based on patriarchal values, so as to place womenfolk at the mercy of men, cannot be sustained within the framework of the fundamental rights, provided for under Part III of the Constitution. It was contended, that besides equality, Articles 14 and 15 prohibit gender discrimination. It was pointed out, that discrimination on the ground of sex, was expressly prohibited Under Article 15. It was contended, that the right of a woman to human dignity, social esteem and self-worth were vital facets, of the right to life Under Article 21. It was submitted, that gender justice was a constitutional goal, contemplated by the framers of the Constitution. Referring to Article 51A(e) of the Constitution, it was pointed out, that one of the declared fundamental duties contained in Part IV of the Constitution, was to ensure that women were not subjected to derogatory practices, which impacted their dignity. It was pointed out, that gender equality and dignity of women, were non-negotiable. It was highlighted, that women constituted half of the nation's population, and inequality against women, should necessarily entail an inference of wholesale gender discrimination.

167. In order to support the submissions advanced on behalf of the Petitioners, as have been noticed hereinabove, reliance was placed on Sarla Mudgal v. Union of India MANU/SC/0290/1995 : (1995) 3 SCC 635. Our pointed attention was drawn to the following observations recorded therein:

44. Marriage, inheritance, divorce, conversion are as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before Qazi are as much matter of faith and conscience as the worship itself. When a Hindu becomes a convert by reciting Kalma or a Muslim becomes Hindu by reciting certain Mantras it is a matter of belief and conscience. Some of these practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another. But these are matters of faith. Reason and logic have little role to play. The sentiments and emotions have to be cooled and tempered by sincere effort. But today there is no Raja Ram Mohan Rai who single handedly brought about that atmosphere which paved the way for Sati abolition. Nor is a statesman of the stature of Pt. Nehru who could pilot through, successfully, the Hindu Succession Act and Hindu Marriage Act revolutionising the customary Hindu Law. The desirability of uniform Code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.

Reliance was also placed on the Valsamma Paul case MANU/SC/0275/1996 : (1996) 3 SCC 545, wherefrom learned Counsel emphasized on the observations recorded in the following paragraphs:

6. The rival contentions give rise to the question of harmonising the conflict between the personal law and the constitutional animation behind Articles 16(4) and 15(4) of the Constitution. The concepts of "equality before law" and "equal protection of the laws" guaranteed by Article 14 and its species Articles 15(4) and 16(4) aim at establishing social and economic justice in political democracy to all Sections of society, to eliminate inequalities in status and to provide facilities and opportunities not only amongst individuals but also amongst groups of people belonging to Scheduled Castes (for short 'Dalits'), Scheduled Tribes (for short 'Tribes') and Other Backward Classes of citizens (for short 'OBCs') to secure adequate means of livelihood and to promote with special care the economic and educational interests of the weaker Sections of the people, in particular, Dalits and Tribes so as to protect them from social injustice and all forms of exploitation. By 42nd Constitution (Amendment) Act, secularism and socialism were brought in the Preamble of the Constitution to realise that in a democracy unless all Sections of society are provided facilities and opportunities to participate in political democracy irrespective of caste, religion and sex, political democracy would not last long. Dr Ambedkar in his closing speech on the draft Constitution stated on 25-11-1949 that "what we must do is not to be attained with mere political democracy; we must make our political democracy a social democracy as well. Political democracy cannot last unless there lies on the base of it a social democracy.

Social democracy means "a way of life which recognises liberty, equality and fraternity as principles of life". They are not separate items in a trinity but they form union of trinity. To diversity one from the other is to defeat the very purpose of democracy. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of

things. Articles 15(4) and 16(4), therefore, intend to remove social and economic inequality to make equal opportunities available in reality. Social and economic justice is a right enshrined for the protection of society. The right to social and economic justice envisaged in the Preamble and elongated in the Fundamental Rights and Directive Principles of the Constitution, in particular, Articles 14, 15, 16, 21, 38, 39 and 46 of the Constitution, is to make the quality of the life of the poor, disadvantaged and disabled citizens of society, meaningful. Equal protection in Article 14 requires affirmative action for those unequals by providing facilities and opportunities. While Article 15(1) prohibits discrimination on grounds of religion, race, caste, sex, place of birth, Article 15(4) enjoins upon the State, despite the above injunction and the one provided in Article 29(2), to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Dalits and Tribes. Equally, while Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, Article 16(4) enjoins upon the State to make provision for reservation for these Sections which in the opinion of the State are not adequately represented in the services under the State. Article 335 of the Constitution mandates that claims of the members of the Dalits and Tribes shall be taken into consideration in making appointments to services and posts in connection with affairs of the Union or of a State consistent with the maintenance of efficiency of administration. Therefore, this Court interpreted that equal protection guaranteed by Articles 14, 15(1) and 16(1) is required to operate consistently with Articles 15(4), 16(4), 38, 39, 46 and 335 of the Constitution, vide per majority in Indra Sawhney v. Union of India MANU/SC/0104/1993 : [1992 Supp (3) SCC 217] known as Mandal case [MANU/SC/0104/1993 : 1992 Supp (3) SCC 217]. In other words, equal protection requires affirmative action for those unequals handicapped due to historical facts of untouchability practised for millennium which is abolished by Article 17; for tribes living away from our national mainstream due to social and educational backwardness of OBCs.

xxx xxx xxx

16. The Constitution seeks to establish a secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide: S.R. Bommai v. Union of India MANU/SC/0444/1994 : (1994) 3 SCC 1) and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular socialist order becomes difficult. In State of Karnataka v. Appa Balu Ingale [MANU/SC/0151/1993 : 1995 Supp (4) SCC 469] this Court has held in para 34 that judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seamless web of life. A Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. Social

legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through Rule of law. In that case, the need for protection of right to take water, under the Civil Rights Protection Act, and the necessity to uphold the constitutional mandate of abolishing untouchability and its practice in any form was emphasised.

xxx xxx xxx

21. The Constitution through its Preamble, Fundamental Rights and Directive Principles created a secular State based on the principle of equality and non-discrimination, striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr K.M. Munshi contended on the floor of the Constituent Assembly that "we want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation [Vide: Constituent Assembly Debates, Vol. VII, pp. 356-58].

xxx xxx xxx

26. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth -- cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the UNO on 18-12-1979 and the Government of India had ratified as an active participant on 19-6-1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity.

Reference was also made to the decision of this Court in the John Vallamattom case MANU/SC/0480/2003 : (2003) 6 SCC 611, wherefrom learned Counsel for the Petitioner highlighted the following observations:

42. Article 25 merely protects the freedom to practise rituals and ceremonies etc. which are only the integral parts of the religion. Article 25 of the Constitution of India will, therefore, not have any application in the instant case.

xxx xxx xxx

44. Before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined Under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In Sarla Mudgal v. Union of India MANU/SC/0290/1995 : (1995) 3 SCC 635 it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined Under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

Last of all, our attention was drawn to the Masilamani Mudaliar case MANU/SC/0441/1996 : (1996) 8 SCC 525, wherefrom reliance was placed on the following:

15. It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S.R. Bommai v. Union of India MANU/SC/0444/1994 : (1994) 3 SCC 1 this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under Rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void Under Article 13 if they violate ght. Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14(1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it.

168. We have given our thoughtful consideration to the submissions noticed in the foregoing paragraphs. We are of the view, that in the determination of the matter canvassed, the true purport and substance of Articles 25 and 44 have to be understood. We shall now endeavour to deal with the above provisions.

169. During the course of hearing our attention has been drawn to the Constituent Assembly debates, with reference to Article 25 (-draft Article 19). The debates reveal that the members of the Constituent Assembly understood a clear distinction between 'personal law' and the 'civil code'. 'Personal law' was understood as based on the practices of members of communities. It was to be limited to the community itself, and would not affect members of other communities. The 'civil code' on the other hand, had an unlimited reach. The 'civil code' was understood to apply to every citizen of the land, to whatever community he may belong. So far as 'personal law' is concerned, it was recognized as arising out of, practices followed by members of particular communities, over the ages. The only member of the Assembly, who made a presentation during the debates (-Mohammed Ismail Sahib) stated, "This practice of following 'personal law' has been there amongst the people for ages. What we want under this amendment is that that practice should not be disturbed now and I want only the continuance of a practice that has been going on among the people for ages past ..... Under this amendment what I want this House to accept is that when we speak of the State doing anything with reference to the secular aspect of religion, the question of personal law shall not be brought in and it shall not be affected. ..... The question of professions, practicing and propagating one's faith is a right which the human being had from the very beginning of time and that has been recognized as an inalienable right of every human being, not only in this land, but the world over and I think that nothing should be done to affect that right of man as a human being. That part of the Article as it stands is properly worded and it should stand as it is." It is apparent, that the position expressed in the Sarla Mudgal case MANU/SC/0290/1995 : (1995) 3 SCC 635, clearly reiterates the above exposition during the Constituent Assembly debates. The response to the above statement (-of Mohammed Ismail Sahib), was delivered by Lakshmikanta Mitra, who observed, "This Article 19 of the Draft Constitution confers on all persons the right to profess, practise and propagate any religion they like but this right has been circumscribed by certain conditions which the State would be free to impose in the interests of public morality, public order and public health and also in so far as the right conferred here does not conflict in any way with the other provisions elaborated under this part of the Constitution. Some of my Friends argued that this right ought not to be permitted in this Draft Constitution for the simple reason that we have declared time and again that this is going to be a secular State and as such practice of religion should not be permitted as a fundamental right. It has been further argued that by conferring the additional right to propagate a particular faith or religion the door is opened for all manner of troubles and conflicts which would eventually paralyse the normal life of the State. We would say at once that this conception of a secular State is wholly wrong. By secular State, as we understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronise or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. ..... At the same time we must be very careful to see that this land of ours we do not deny to anybody the right not only to profess or practise but also to

propagate any particular religion. .....Therefore I feel that the Constitution has rightly provided for this not only as a right but also as a fundamental right. In the exercise of this fundamental right every community inhabiting this State professing any religion will have equal right and equal facilities to do whatever it likes in accordance with its religion provided it does not clash with the conditions laid down here."

170. The debates in the Constituent Assembly with reference to Article 25, leave no room for any doubt, that the framers of the Constitution were firm in making 'personal law' a part of the fundamental rights. With the liberty to the State to provide for social reform. It is also necessary to notice at this stage, that the judgment in the Valsamma Paul case MANU/SC/0275/1996 : (1996) 3 SCC 545, cannot be the basis for consideration in the present controversy, because it did not deal with issues arising out of 'personal law' which enjoy a constitutional protection. What also needs to be recorded is, that the judgment in the John Vallamattom case MANU/SC/0480/2003 : (2003) 6 SCC 611, expresses that the matters of the nature, need to be dealt with through legislation, and as such, the view expressed in the above judgment cannot be of any assistance to further the Petitioners' cause.

171. The debates of the Constituent Assembly with reference to Article 44, are also relevant. We may refer to draft Article 25 (which came to be enacted as Article 44). The Article requires the State to endeavour to secure a uniform 'civil code'. A member who debated the provision during the deliberations of the Constituent Assembly, canvassed that groups and Sections of religious denominations be given the right to adhere to their own personal law (-Mohamed Ismail Sahib), as it was felt, that interference in 'personal law' would amount to interfering with "...the way of life and religion of the people...". It was also argued (-by Naziruddin Ahmad), that what was extended as a protection through Article 25 (-draft Article 19), namely, "...all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion...", was sought to be taken away via Article 44. The position highlighted, was that all religious practices should remain, beyond the purview of law. One member of the Constituent Assembly (-Mahbood Ali Baig Sahib Bahadur), said that the uniform civil code, in the Article, should not include 'personal law'. He refuted the suggestions of M. Ananthasayanam Ayyangar by asserting, that practices of Muslims, in vogue for 1350 years could not be altered. Another member-Pocker Sahib Bahadur, supported the suggestion of Mohamed Ismail Sahib. The question he posed was "...whether by the freedom we have obtained for this country, are we going to give up the freedom of conscience and that freedom of religion practices and that freedom of following ones own personal law..." But all these submissions were rejected. All this leads to the clear understanding, that the Constitution requires the State to provide for a uniform civil code, to remedy and assuage, the maladies expressed in the submissions advanced by the learned Attorney General.

172. There can be no doubt, that the 'personal law' has been elevated to the stature of a fundamental right in the Constitution. And as such, 'personal law' is enforceable as it is. All constitutional Courts, are the constitutional guardians of all the Fundamental Rights (-included in Part III of the Constitution). It is therefore the constitutional duty of all Courts to protect, preserve and enforce, all fundamental rights, and not the other way around. It is judicially unthinkable for a Court, to accept any prayer to declare as unconstitutional (-or unacceptable in law), for any reason or logic, what the Constitution declares as a fundamental right. Because, in accepting the prayer(s), this Court would be denying the rights expressly protected Under Article 25.

173. It is not possible to adopt concepts emerging from the American Constitution, over the provisions of the Indian Constitution. It is therefore not possible to refer to substantive due process, as the basis of the decision of the present controversy, when there are express provisions provided for, on the matter in hand, under the Indian Constitution. It is also not possible, to read into the Constitution, what the Constituent Assembly consciously and thoughtfully excluded (-or, to overlook provisions expressly incorporated). One cannot make a reference to decisions of the U.S. Supreme Court, though there would be no difficulty of their being taken into consideration for persuasive effect, in support of a cause, in consonance with the provisions of the Constitution of India and the laws. In fact, this Court is bound by the judgments of the Supreme Court of India, which in terms of Article 141 of the Constitution, are binding declarations of law.

174. The prayer made to this Court by those representing the Petitioners' cause, on the ground that the practice of 'talaq-e-biddat' is violative of the concept of constitutional morality cannot be acceded to, and is accordingly declined.

VIII. Reforms to 'personal law' in India:

175. In our consideration, it is also necessary to briefly detail legislation in India with regard to matters strictly pertaining to 'personal law', and particularly to the issues of marriage and divorce, i.e., matters strictly within the confines of 'personal law'.

176(i). Reference in this context may first of all be made to the Divorce Act, 1869. The Statement of objects and reasons of the Bill, delineates the purpose that was sought to be achieved through the enactment. Relevant part thereof, is reproduced hereunder:

Statement of objects and reasons

The object of Indian Divorce Bill is to place the Matrimonial Law administered by the High Courts, in the exercise of their original jurisdiction, on the same footing as the Matrimonial Law administered by the court for Divorce and Matrimonial Causes in England.

The 9th Section of the Act of Parliament for establishing High Courts of Judicature in India (24 and 25 Vic., C. 104) provides that the High Courts shall exercise such Matrimonial Jurisdiction as Her Majesty by Letters Patent shall grant and direct. Under the authority thus conferred by Parliament, the 35th Section of the Letters Patent, constituting the High Courts of Judicature, provides as follows:

And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction in matters matrimonial between our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has Ecclesiastical Jurisdiction. Provided always that nothing herein contained shall be held to interfere with the exercise of any Jurisdiction in matters matrimonial by any court not established by Royal Charter within the said Presidency lawfully possessed thereof.

In the Despatch of the Secretary of State transmitting the Letters Patent the 33rd and 34th paragraphs are to the following effect:

33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to matters matrimonial in general as they now are under the Supreme Court, and this they believe to be effected by Clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of the Act 20 and 21 Vic., C. 85, and in regard to which further provisions were made by 22 and 23 Vic., C. 61, and 23 and 24 Vic., C. 144. The Act of Parliament for establishing the High Courts, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them, the Crown clearly could not so import, such, for instance, as those which prescribe the period of re-marriage, and those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian legislation, and I request that you will immediately take the subject into your consideration, and introduce into your Council a Bill for conferring upon the High Court, the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The objects of the provision at the end of Clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within Divisions of the Presidency, not established by Royal Charter, any jurisdiction which they might have in matters matrimonial, as for instance in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere.

In addition to the Act of Parliament mentioned by the Secretary of State as regulating the jurisdiction of the England Divorce Court the Statute 25 and 26 Vic., Ch. 81 has been passed in the year just expired (1862). The object of this statute is to render perpetual 23 and 24 Vic., Ch. 144 the duration of which had been originally limited to two years.

The draft of a Bill has been prepared to give effect to the Secretary of State's instructions, but some variations from the English Statutes in respect of Procedure have been adopted.

With a view to uniformity in practice in the several branches of jurisdiction, the Bill provides that the Procedure of the Code of Civil Procedure shall be followed, instead of the Rules of Her Majesty's Court for Divorce and Matrimonial Causes in England, and it omits the provision in 20 and 21 Vic., Ch. 85 respecting the occasional trial of questions of fact by juries.

(ii) The Divorce Act, 1869 provided for the grounds for dissolution of marriage in Section 10 thereof. The same is extracted hereunder:

10. Grounds for dissolution of marriage.-(1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the Respondent--

(i) has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the Respondent if the Respondent had been alive; or

(vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the Respondent; or

(ix) has deserted the Petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the Petitioner with such cruelty as to cause a reasonable apprehension in the mind of the Petitioner that it would be harmful or injurious for the Petitioner to live with the Respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

(iii) In addition to the above, consequent upon a further amendment, Section 10A was added thereto, to provide for dissolution of marriage by consent. What is sought to be highlighted is, that it required legislation to provide for divorce amongst the followers of the Christian faith in India. The instant legislation provided for grounds on which Christian husbands and wives could obtain divorce.

177. (i). Parsis in India, are the followers of the Iranian prophet Zoroaster. The Parsis, are stated to have migrated from Iran to India, to avoid religious persecution by the Muslims. Parsis in India were governed in the matter of marriage and divorce by their 'personal law'. For the first time in 1865, the Parsi Marriage and Divorce Act was passed. The same was substituted by the Parsi Marriage and Divorce Act, 1936 after substantial amendments to the original enactment. The statement of objects and reasons of the Parsi Marriage and Divorce Act, 1936 clearly demonstrates the above position. The same is reproduced below:

Statement of objects and reasons

The Parsi Marriage and Divorce Act at present in force was passed in 1865. Since then circumstances have greatly altered and to some extent there has also been a change in the sentiments and views of the Parsi community. Hence a necessity for some change in the law has been felt for years. The Parsi Central Association took up the question in 1923 and appointed a Sub-Committee to suggest amendments. The Sub-Committee submitted a report which the Association got printed and circulated for opinion to most other Parsi Associations as well as prominent members of the community both in Bombay and outside. Many suggestions were made, and among them by the Trustees of the Bombay Parsi Panchayat who had the advantage of seeing the suggestions of others. The Central Association adopted the suggestions of the Panchayat Trustees and reprinted the whole and again circulated it. Fresh suggestions were thereupon made in the press, on the platform, by associations and individuals. These were fully considered by the Trustees as well as the Association and the present draft is the result. On the whole it represents, the views of the great majority of the community, and has been approved by leading Parsis like Sir Dinshaw E. Wacha and the late Rt. Hon. Sir Dinshaw F. Mulla.

(ii) Chapter II of the aforesaid enactment, deals with the subject of marriages between Parsis. Section 3 provides for requisites of a valid Parsi marriage. Section 6 denotes a requirement of a certificate of marriage. Chapter IV provides for a variety of matrimonial suits, wherein Section 30 deals with suits for nullity. Section 31 deals with suits for dissolution of marriage. The grounds for divorce are set out in Section 32, which is reproduced herein below:

32. Grounds for divorce.-Any married person may sue for divorce on any one or more of the following grounds, namely:

(a) that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the Defendant to consummate it;

(b) that the Defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit:

Provided that divorce shall not be granted on this ground, unless the Plaintiff; (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage;

(bb) that the Defendant has been incurable of the unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the Plaintiff cannot reasonable be expected to live with the Defendant.

Explanation.-In this clause,-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder of disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or

seriously irresponsible conduct on the part of the Defendant, and whether or not it requires or is susceptible to medical treatment;

(c) that the Defendant was at the time of marriage pregnant by some person other than the Plaintiff:

Provided that divorce shall not be granted on this ground, unless: (1) the Plaintiff was at the time of the marriage ignorant of the fact alleged, (2) the suit has been filed within two years of the date of marriage, and (3) marital intercourse has not taken place after the Plaintiff came to know of the fact;

(d) that the Defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the Plaintiff came to know of the fact;

(dd) that the Defendant has since the solemnization of the marriage treated the Plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court improper to compel the Plaintiff to live with the Defendant:

Provided that in every suit for divorce on this ground it shall be in the discretion of the Court whether it should grant a decree for divorce or for judicial separation only;

(e) that the Defendant has since the marriage voluntarily caused grievous hurt to the Plaintiff or has infected the Plaintiff with venereal disease or, where the Defendant is the husband, has compelled the wife to submit herself to prostitution:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years (i) after the infliction of the grievous hurt, or (ii) after the Plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution;

(f) that the Defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860):

Provided that divorce shall not be granted on this ground, unless the Defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period;

(g) that the Defendant has deserted the Plaintiff for at least two years;

(h) that an order has been passed against the Defendant by a Magistrate awarding separate maintenance to the Plaintiff, and the parties have not had marital intercourse for one year or more since such decree or order;

(j) that the Defendant has ceased to be a Parsi by conversion to another religion;

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the Plaintiff came to know of the fact.

(iii) In addition to the above, Section 32B introduced by way of an amendment, provides for divorce by mutual consent, and Section 34 provides for suits for judicial separation, and Section 36 provides for suits for restitution of conjugal rights.

178(i). The Special Marriage Act, 1872 provided for inter-faith marriages. The same came to be replaced by the Special Marriage Act, 1954. The statement of objects and reasons thereof is reproduced hereunder:

Statement of objects and reasons

This Bill revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The parties may observe any ceremonies for the solemnization of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officers. For the benefit of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnizing and registering marriages between citizens of India in a foreign country.

2. Provision is also sought to be made for permitting persons who are already married under other forms of marriage to register their marriages under this Act and thereby avail themselves of these provisions.

3. The bill is drafted generally on the lines of the existing Special Marriage Act of 1872 and the notes on clauses attached hereto explain some of the changes made in the Bill in greater detail.

(ii) The subject of solemnization of special marriages, is provided for in Section 4 of the above enactment. Section 4 lays down the conditions related to solemnization of special marriages, which requires a notice of the parties intending to get married, the procedure and conditions whereof are contained in Section 5. The provisions of the enactment require, entering a copy of the notice in the 'marriage notice book', and the publication thereof by affixation of the copy thereof to some conspicuous place in the office of marriage officer. Objections to the contemplated marriage can be preferred Under Section 7. The manner in which the objections have to be dealt with is provided for in Sections 8, 9 and 10. Consequent upon the completion of the formalities postulated in Chapter II of the enactment, parties are permitted to solemnize their marriage, for which the marriage officer shall issue a certificate of marriage, that would be considered as conclusive evidence of the fact that parties are married under the provisions of the Special Marriages Act, 1954.

(iii) Parties who have entered into a matrimonial alliance by way of ceremonies of marriage conducted under different faiths, and have been living together, are also permitted to register their marriage under the Special Marriage Act, 1954, Under Section 15 thereof.

(iv) Chapter IV of the enactment deals with consequences of marriage under the Act. Chapter V provides the remedies of restitution of conjugal rights and judicial separation. Chapter VI defines void and voidable marriages, and provides for nullity of marriage and divorce. Section 27 included in Chapter VI incorporates the grounds for divorce, which are extracted hereunder:

27. Divorce.-(1) Subject to the provisions of this Act and to the Rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the Respondent--

(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(b) has deserted the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860);

(d) has since the solemnization of the marriage treated the Petitioner with cruelty; or

(e) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the Petitioner cannot reasonably be expected to live with the Respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the Respondent, and whether or not it requires or is susceptible to medical treatment; or

(f) has been suffering from venereal disease in a communicable form;

or

(g) has been suffering from leprosy, the disease not having been contacted from the Petitioner; or

(h) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the Respondent if the Respondent had been alive;

Explanation.--In this Sub-section, the expression "desertion" means desertion of the Petitioner by the other party to the marriage without reasonable cause and without the consent or against the

wish of such party, and includes the wilful neglect of the Petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly;

(1A) A wife may also present a petition for divorce to the district court on the ground,--

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;

(ii) that in a suit Under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding Under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding Section 488 of the Code of Criminal Procedure, 1898) (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.

(2) Subject to the provisions of this Act and to the Rules made thereunder, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage (Amendment) Act, 1970 (29 of 1970), may present a petition for divorce to the district court on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

In addition to the above, Section 28 provides for divorce by mutual consent.

179. The Foreign Marriage Act, 1969 followed the Special Marriage Act, 1954. It was enacted on account of uncertainty of law related to foreign marriages. The statement of objects and reasons of the Foreign Marriage Act, 1969 expresses the holistic view, which led to the passing of the legislation. The same is reproduced below:

Statement of objects and reasons

This Bill seeks to implement the Twenty-third Report of the Law Commission on the law relating to foreign marriages. There is, at present considerable uncertainty as to the law on the subject, as the existing legislation touches only the fringes of the subject and the matter is governed by principles of private international law which are by no means well-settled, and which cannot readily be applied to a country such as ours in which different marriage laws apply to different communities. The Special Marriage Act, 1954 sought to remove the uncertainty to some extent by providing that marriages abroad between citizens of India who are domiciled in India might be solemnized under it. In the course of the debates in relation to that Act in Parliament, it was urged that a provision should be made for marriages abroad where one of the parties alone is an Indian

citizen. In this context, an assurance was given that Government would, after careful consideration, introduce comprehensive legislation on the subject of foreign marriages. The present Bill is the outcome of that assurance.

(2) The Bill is modelled on the Special Marriage Act, 1954, and the existing English and Australian Legislation on the subject of foreign marriages, subject to certain important modifications rendered necessary by the peculiar conditions obtaining in our country.

The following are the salient features of the Bill:

(i) It provides for an enabling form of marriage more or less on the same lines as the Special Marriage Act, 1954 which can be availed of outside India where one of the parties to the marriage is an Indian citizen; the form of marriage thus provided being not in supersession of, but only in addition to or as an alternative to, any other form that might be permissible to the parties.

(ii) It seeks to lay down certain Rules in respect of capacity of parties and conditions of validity of marriage and also provides for registration of marriage on lines similar to those in the Special Marriage Act, 1954.

(iii) The provisions of the Special Marriage Act, 1954, in regard to matrimonial reliefs are sought to be made applicable, with suitable modifications, not only to marriages solemnized or registered under the proposed legislation, but also to other marriages solemnized abroad to which a citizen of India is a party.

(ii) Chapter II of the Foreign Marriage Act, 1969 provides for the solemnization of the foreign marriages. Section 4 contained therein expresses the conditions relating to solemnization of foreign marriages. The notice of an intended marriage is provided for in Section 5. The incorporation of the said marriage in the 'marriage notice book' is contained in Section 6. The publication of such notice is provided for in Section 7. Objections to the proposed marriage can be filed Under Section 8. Consequent upon the fulfillment of the conditions and determination by the marriage officer, the place and form of solemnization of marriage are detailed in Section 13, whereupon, the marriage officer is required to enter a certificate of marriage, which is accepted as evidence of the fact that the marriage between the parties had been solemnized. Chapter III mandates the registration of foreign marriages, solemnized under other laws. Section 17 provides for necessary requirements therefor.

(v) It would be relevant to mention, that matrimonial reliefs as are provided for under the Special Marriage Act, 1954 (-which are contained in Chapters IV, V and VI thereof) have been adopted for marriages registered under the Foreign Marriage Act, 1969 (-see paragraph 179 above).

180. Muslims are followers of Islam. Muslims consider the Quran their holy book. For their personal relations, they follow the Muslim 'personal law'-'Shariat'. The Muslim Personal Law (Shariat) Application Act, 1937, as already noticed above provided, "the Rule of decision" in matters pertaining, inter alia, to marriage, dissolution of marriage including talaq, ila, zihar, lian, khula and mubaraat would be the Muslim 'personal law'-'Shariat', and not, any custom or usage to the contrary. It is therefore, that by a statutory intervention, customs and usages in conflict with

Muslim 'personal law', were done away with, in connection with 'personal law' matters, in relation to Muslims. The Dissolution of Muslim Marriages Act, 1939 provided, grounds for dissolution of marriage to Muslim women, Under Section 2 of the above enactment. Details with reference to 1937 and 1939 legislations, have already been narrated, in Part IV-Legislation in India, in the field of Muslim 'personal law'. Reference may, therefore, be made to Part IV above.

181 (i). The law of marriage and divorce amongst Hindus, has had a chequered history. A marriage, according to Hindu law, is a holy sacrament, and not a contract (as is the case of Muslims). Originally there were eight forms of Hindu marriages, four of which were considered regular-and the rest irregular. The choice of marriage, was limited only to one's own religion and caste. Polygamy was permitted amongst Hindus, but not polyandry. Widow marriage was also not permitted. Legislation in respect of Hindu marriages commenced in 1829 when Sati was abolished by law. In 1856, Hindu Widows' Remarriage Act, legalized the marriage of Hindu widows. In 1860, the Indian Penal Code made polygamy a criminal offence. In 1866, Native Converts Marriage Dissolution Act facilitated divorce for Hindus, who had adopted the Christian faith. In 1872, Special Marriage Act was enacted, but it excluded Hindus. In 1869, the Indian Divorce Act was passed, but this too remained inapplicable to Hindus. In 1909, the Anand Marriage Act legalized marriages amongst Sikhs (called-Anand). In 1923, by an amendment to the Special Marriage Act, inter-religious civil marriages between Hindus, Buddhists, Sikhs and Jains were legalized. In 1937, the Arya Marriage Validation Act legalized the inter-caste marriages, and marriages with converts to Hinduism, among the followers of Arya Samaj. In 1949, Hindu Marriages Validity Act legalized inter-religious marriages.

(ii) The Hindu Marriage Act, was passed in 1955. Section 5 of the Hindu Marriage Act, 1955, provides for the conditions of a valid Hindu marriage. Section 7 incorporates the ceremonies required for a Hindu marriage. Section 8 provides for the requirement of registration of Hindu marriages. The remedies of restitution of conjugal rights and judicial separation, are provided for in Sections 9 and 10 respectively. Provisions related to nullity of marriages and divorce are contained in Sections 11 and 12. The grounds of divorce have been expressed in Section 13, which is reproduced below:

13. Divorce.-(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the Petitioner with cruelty; or

(ib) has deserted the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the Petitioner cannot reasonably be expected to live with the Respondent.

Explanation-In this clause,-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from veneral disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation.-In this Sub-section, the expression "desertion" means the desertion of the Petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the Petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.

(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the Petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit Under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding Under Section 125 of the Code of Criminal Procedure, 1973, (2 of 1974) or under corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.-This Clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

By subsequent amendments, Section 13B was introduced, which provides for divorce by mutual consent.

182. A perusal of the details pertaining to legislation in India with regard to matters pertaining to 'personal law', and particularly to issues of marriage and divorce for different religious communities reveals, that all issues governed by 'personal law', were only altered by way of legislation. There is not a singular instance of judicial intervention, brought to our notice except a few judgments rendered by High Courts (-for details, refer to Part-6-Judicial pronouncements, on the subject of 'talaq-e-biddat'). These judgments, however, attempted the interpretative course, as against an invasive one. The details depicted above relate to marriage between Christians, Parsis, inter-faith marriages, Muslims and Hindus, including Buddhists, Sikhs and Jains. The unbroken practice during the pre-independence period, and the post independence period-under the Constitution, demonstrates a clear and unambiguous course, namely, reform in the matter of marriage and divorce (which are integral components of 'personal law') was only introduced through legislation. Therefore in continuation of the conclusion already recorded, namely, that it is the constitutional duty of all courts to preserve and protect 'personal law' as a fundamental right, any change thereof, has to be only by legislation Under Articles 25(2) and 44, read with entry 5 of the Concurrent List contained in the Seventh Schedule to the Constitution.

IX. Impact of international conventions and declarations on 'talaq-e-biddat':

183. A number of learned Counsel who assisted us in support of the Petitioners' cause were emphatic, that the practice of 'talaq-e-biddat' was rendered impermissible, as soon as, India accepted to be a signatory to international conventions and declarations, with which the practice was in clear conflict. It was submitted, that continuation of the practice of 'talaq-e-biddat', sullied the image of the country internationally, as the nation was seen internationally as a defaulters to those conventions and declarations. It was pointed out, that by not consciously barring 'talaq-e-

biddat', and by knowingly allowing the practice to be followed, India was seen as persisting and propagating, what the international community considers abhorrent. It was therefore submitted, that the practice of 'talaq-e-biddat' be declared as unacceptable in law, since it was in conflict with international conventions and declarations.

184. We may, in the first instance, briefly point out to the submissions advanced by Ms. Indira Jaising, learned senior Counsel. She placed reliance on the Universal Declaration of Human Rights, adopted by the United Nations General Assembly as far back as in 1948. She drew our attention to the preamble thereof, to emphasise, that the declaration recognized the inherent dignity of human beings as equal and inalienable. She highlighted the fact, that the declaration envisioned equal rights for men and women-both in dignity and rights. For this, she placed reliance on Article 1 of the Declaration. Referring to Article 2, she asserted, that there could be no discrimination on the basis of sex. Learned senior Counsel evoked the conscience of this Court, to give effect to the declaration, to which India was a signatory. This Court's attention was also invited to the International Conventions on Economic, Social and Cultural Rights (ICESCR). The pointed aim whereof was to eliminate all forms of discrimination, including discrimination on the basis of sex. It was highlighted, that the International Conventions Bill for Rights for Women was ratified by 189 States. Referring to Article 1 thereof, it was submitted, that the objective of the convention was to eradicate discrimination against women. Having signed the aforesaid convention, it was submitted, that it was the obligation of all the signatory States, to take positive and effective steps for elimination of all facets of discrimination against women. It was highlighted, that 'talaq-e-biddat' was the worst form of discrimination, against women.

185. Learned Attorney General for India strongly supported the instant contention. It was his pointed assertion, that the Indian State was obligated to adhere the principles enshrined in international conventions. It was highlighted, that India was a founding member of the United Nations, and was bound by its charter. It was submitted, that gender equality as a human right, had been provided for in various conventions and declarations. We do not consider the necessity to repeat the submissions canvassed at the hands of the learned Attorney General, who painstakingly adverted to the same, to support his prayer, that 'talaq-e-biddat' was a practice which violated a number of conventions to which India was a signatory. Details in this behalf, have been recorded by us in paragraph 74, while recording the submissions advanced by the learned Attorney General. The same be read herein, in continuation of the submissions briefly noticed above.

186. We have considered the submissions advanced on behalf of the Petitioners, pointedly with reference to international conventions and declarations. We have not the least doubt, that the Indian State is committed to gender equality. This is the clear mandate of Article 14 of the Constitution. India is also committed to eradicate discrimination on the ground of sex. Articles 15 and 16 of the Constitution, prohibit any kind of discrimination on the basis of sex. There is therefore no reason or necessity while examining the issue of 'talaq-e-biddat', to fall back upon international conventions and declarations. The Indian Constitution itself provides for the same.

187. The reason for us, not to accede to the submissions advanced at the behest of those who support the Petitioners' cause, with pointed reference to international conventions and declarations, is based on Article 25 of the Constitution, whereby 'personal law' of all religious denominations, is sought to be preserved. The protection of 'personal laws' of religious sections, is elevated to the

stature of a fundamental right, inasmuch as Article 25 of the Constitution, which affords such protection to 'personal law' is a part of Part III (-Fundamental Rights), of the Constitution. It is therefore apparent, that whilst the Constitution of India supports all conventions and declarations which call for gender equality, the Constitution preserves 'personal law' through which religious communities and denominations have governed themselves, as an exception.

188. Our affirmation, that international conventions and declarations are not binding to the extent they are in conflict with domestic laws, can be traced from a series of judgments rendered by this Court on the subject. Reference is being made to some of them herein below:

(i) Apparel Export Promotion Council v. A.K. Chopra MANU/SC/0014/1999 : (1999) 1 SCC 759,

The question that arose for consideration before this Court, in the instant case was, whether an action of a superior against a sub-ordinate female employee, which is against moral sanctions can withstand the test of decency and modesty, not amounting to sexual harassment? The question that arose was, whether the allegation that a superior tried to molest an inferior female employee at the work place, constituted an act unbecoming of the conduct and behaviour expected from the superior? And, whether an inferior female employee, has recourse to a remedial action? While examining the above proposition, this Court relying on international conventions and declarations arrived at the conclusion, that the same have to be given effect to unless they were contrary to domestic laws, by holding as under:

26. There is no gainsaying that each incident of sexual harassment at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty -- the two most precious fundamental rights guaranteed by the Constitution of India. As early as in 1993, at the ILO Seminar held at Manila, it was recognized that sexual harassment of women at the workplace was a form of "gender discrimination against women". In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("CEDAW") and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate the working environment. These international instruments cast an obligation on the Indian State to gender-sensitise its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws,

more so, when there is no inconsistency between them and there is a void in domestic law. (See with advantage -- Prem Shankar Shukla v. Delhi Admn., Mackinnon Mackenzie and Co. Ltd. v. Audrey D' Costa; Sheela Barse v. Secy., Children's Aid Society SCC at p. 54; Vishaka v. State of Rajasthan People's Union for Civil Liberties v. Union of India and D.K. Basu v. State of W.B. SCC at p. 438.)

27. In cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case.

(ii) Krishna Janardhan Bhat v. Dattaraya G. Hegde MANU/SC/0503/2008 : (2008) 4 SCC 54 In the instant case, this Court relied upon international conventions to determine the true import of 'burden of proof', under the Negotiable Instruments Act, 1881. This Court held as under:

44. The presumption of innocence is a human right. (See Narendra Singh v. State of M.P., Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Rajesh Ranjan Yadav v. CBI.) Article 6(2) of the European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated Under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the Accused e.g. honest and reasonable mistake of fact. In a recent Article The Presumption of Innocence and Reverse Burdens: A Balancing Duty published in 2007 CLJ (March Part) 142 it has been stated:

In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent Defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the Defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice--where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.

45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the

cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

(iii) State of Kerala v. Peoples Union for Civil Liberties MANU/SC/1302/2009 : (2009) 8 SCC 46. The issue that arose for consideration in the instant case was with reference to the binding nature of the Indigenous and Tribal Populations Convention, 1957 and the declarations on the Rights of Indigenous People, 2007. Even though India had ratified convention and declaration, it was held, that the same were not binding. Reference may be made to the following observations recorded in the above judgment:

105. We may notice that in Indigenous and Tribal Populations Convention, 1957 which has been ratified by 27 countries including India contained the following clauses:

Article 11.--The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 12.--1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and Regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13.--1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and Regulations, insofar as they satisfy the needs of these populations and do not hinder their economic and social development.

2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members."

Thus, removal of the population, by way of an exceptional measure, is not ruled out. It is only subject to the condition that lands of quality at least equal to that of the lands previously occupied

by them, suitable to provide for their present needs and future development. We may, however, notice that this Convention has not been ratified by many countries in the Convention held in 1989. Those who have ratified the 1989 Convention are not bound by it.

106. Furthermore, the United Nations adopted a Declaration on the Rights of Indigenous People in September 2007. Articles 3 to 5 thereof read as under:

3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

4. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

107. It is now accepted that the Panchsheel doctrine which provided that the tribes could flourish and develop only if the State interfered minimally and functioned chiefly as a support system in view of passage of time is no longer valid. Even the notion of autonomy contained in the 1989 Convention has been rejected by India. However, India appears to have softened its stand against autonomy for tribal people and it has voted in favour of the United Nations Declaration on the Rights of Indigenous People which affirms various rights to autonomy that are inherent in the tribal peoples of the world. This declaration, however, is not binding.

(iv) Safai Karamchari Andolan v. Union of India MANU/SC/0233/2014 : (2014) 11 SCC 224. In the instant case, the question that arose for consideration revolved around the validity of the inhuman practice of manually removing night soil, which involves removal of human excrements from dry toilets with bare hands, brooms or metal scrappers, and thereupon, carrying the same in baskets to dumping sites for disposal. Dealing with the issue in the context of international conventions and declarations, this Court observed as under:

16. Apart from the provisions of the Constitution, there are various international conventions and covenants to which India is a party, which proscribe the inhuman practice of manual scavenging. These are the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The relevant provisions of UDHR, CERD and CEDAW are hereunder:

Article 1 of UDHR

1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Article 2 of UDHR

2. Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 23(3) of UDHR

23. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Article 5(a) of CEDAW

5. States parties shall take all appropriate measures--

(a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;"

Article 2 of CERD

2. (1) States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end--

* * *

(c) each State party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and Regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;

The above provisions of the International Covenants, which have been ratified by India, are binding to the extent that they are not inconsistent with the provisions of the domestic law.

189. In view of the above, we are satisfied, that international conventions and declarations are of utmost importance, and have to be taken into consideration while interpreting domestic laws. But, there is one important exception to the above rule, and that is, that international conventions as are not in conflict with domestic law, alone can be relied upon. We are of the firm opinion, that the disputation in hand falls in the above exception. Insofar as 'personal law' is concerned, the same has constitutional protection. Therefore if 'personal law' is in conflict with international conventions and declarations, 'personal law' will prevail. The contention advanced on behalf of the

Petitioners to hold the practice of 'talaq-e-biddat', on account it being in conflict with conventions and declarations to which India is a signatory can therefore not be acceded to.

X. Conclusions emerging out of the above consideration:

190. The following conclusions emerge from the considerations recorded at I to IX above:

(1) Despite the decision of the Rashid Ahmad case MANU/PR/0074/1931 : AIR 1932 PC 25 on the subject of 'talaq-e-biddat', by the Privy Council, the issue needs a fresh examination, in view of the subsequent developments in the matter.

(2) All the parties were unanimous, that despite the practice of 'talaq-e-biddat' being considered sinful, it was accepted amongst Sunni Muslims belonging to the Hanafi school, as valid in law, and has been in practice amongst them.

(3) It would not be appropriate for this Court, to record a finding, whether the practice of 'talaq-e-biddat' is, or is not, affirmed by 'hadiths', in view of the enormous contradictions in the 'hadiths', relied upon by the rival parties.

(4) 'Talaq-e-biddat' is integral to the religious denomination of Sunnis belonging to the Hanafi school. The same is a part of their faith, having been followed for more than 1400 years, and as such, has to be accepted as being constituent of their 'personal law'.

(5) The contention of the Petitioners, that the questions/subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937, ceased to be 'personal law', and got transformed into 'statutory law', cannot be accepted, and is accordingly rejected.

(6) 'Talaq-e-biddat', does not violate the parameters expressed in Article 25 of the Constitution. The practice is not contrary to public order, morality and health. The practice also does not violate Articles 14, 15 and 21 of the Constitution, which are limited to State actions alone.

(7) The practice of 'talaq-e-biddat' being a constituent of 'personal law' has a stature equal to other fundamental rights, conferred in Part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention.

(8) Reforms to 'personal law' in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention. Such legislative intervention is permissible Under Articles 25(2) and 44, read with entry 5 of the Concurrent List, contained in the Seventh Schedule of the Constitution. The said procedure alone need to be followed with reference to the practice of 'talaq-e-biddat', if the same is to be set aside.

(9) International conventions and declarations are of no avail in the present controversy, because the practice of 'talaq-e-biddat', is a component of 'personal law', and has the protection of Article 25 of the Constitution.

Part-10.

The declaration:

191. The whole nation seems to be up in arms. There is seemingly an overwhelming majority of Muslim-women, demanding that the practice of 'talaq-e-biddat' which is sinful in theology, be declared as impermissible in law. The Union of India, has also participated in the debate. It has adopted an aggressive posture, seeking the invalidation of the practice by canvassing, that it violates the fundamental rights enshrined in Part III of the Constitution, and by further asserting, that it even violates constitutional morality. During the course of hearing, the issue was hotly canvassed in the media. Most of the views expressed in erudite articles on the subject, hugely affirmed that the practice was demeaning. Interestingly even during the course of hearing, learned Counsel appearing for the rival parties, were in agreement, and described the practice of 'talaq-e-biddat' differently as, unpleasant, distasteful and unsavory. The position adopted by others was harsher, they considered it as disgusting, loathsome and obnoxious. Some even described it as being debased, abhorrent and wretched.

192. We have arrived at the conclusion, that 'talaq-e-biddat', is a matter of 'personal law' of Sunni Muslims, belonging to the Hanafi school. It constitutes a matter of their faith. It has been practiced by them, for at least 1400 years. We have examined whether the practice satisfies the constraints provided for Under Article 25 of the Constitution, and have arrived at the conclusion, that it does not breach any of them. We have also come to the conclusion, that the practice being a component of 'personal law', has the protection of Article 25 of the Constitution.

193. Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion. The Constitution allows the followers of every religion, to follow their beliefs and religious traditions. The Constitution assures believers of all faiths, that their way of life, is guaranteed, and would not be subjected to any challenge, even though they may seem to others (-and even rationalists, practicing the same faith) unacceptable, in today's world and age. The Constitution extends this guarantee, because faith constitutes the religious consciousness, of the followers. It is this religious consciousness, which binds believers into separate entities. The Constitution endeavours to protect and preserve, the beliefs of each of the separate entities, Under Article 25.

194. Despite the views expressed by those who challenged the practice of 'talaq-e-biddat', being able to demonstrate that the practice transcends the barriers of constitutional morality (emerging from different provisions of the Constitution), we have found ourselves unable to persuade ourselves, from reaching out in support of the Petitioners concerns. We cannot accept the Petitioners' claim, because the challenge raised is in respect of an issue of 'personal law' which has constitutional protection.

195. In continuation of the position expressed above, we may acknowledge, that most of the prayers made to the Court (-at least on first blush) were persuasive enough, to solicit acceptance. Keeping in mind, that this opportunity had presented itself, so to say, to assuage the cause of Muslim women, it was felt, that the opportunity should not be lost. We are however satisfied that, that would not be the rightful course to tread. We were obliged to keep reminding ourselves, of

the wisdoms of the framers of the Constitution, who placed matters of faith in Part III of the Constitution. Therefore, any endeavour to proceed on issues canvassed before us would, tantamount to overlooking the clear letter of law. We cannot nullify and declare as unacceptable in law, what the Constitution decrees us, not only to protect, but also to enforce. The authority to safeguard and compel compliance, is vested under a special jurisdiction in constitutional Courts (-Under Article 32, with the Supreme Court; and Under Article 226, with the High Courts). Accepting the Petitioners prayers, would be in clear transgression of the constitutional mandate contained in Article 25.

196. Such a call of conscience, as the Petitioners desire us to accept, may well have a cascading effect. We say so, because the contention of the learned Attorney General was, that 'talaq-e-ahsan' and 'talaq-e-hasan' were also liable to be declared unconstitutional, for the same reasons as have been expressed with reference to 'talaq-e-biddat' (-for details, refer to paragraph 77 above). According to the learned Attorney General, the said forms of talaq also suffered from the same infirmities as 'talaq-e-biddat'. The practices of 'polygamy' and 'halala' amongst Muslims are already under challenge before us.

It is not difficult to comprehend, what kind of challenges would be raised by rationalists, assailing practices of different faiths on diverse grounds, based on all kinds of enlightened sensibilities. We have to be guarded, lest we find our conscience traversing into every nook and corner of religious practices, and 'personal law'. Can a court, based on a righteous endeavour, declare that a matter of faith, be replaced-or be completely done away with.
In the instant case, both prayers have been made. Replacement has been sought by reading the three pronouncements in 'talaq-e-biddat', as one. Alternatively, replacement has been sought by reading into 'talaq-e-biddat', measures of arbitration and conciliation, described in the Quran and the 'hadiths'. The prayer is also for setting aside the practice, by holding it to be unconstitutional.
The wisdom emerging from judgments rendered by this Court is unambiguous, namely, that while examining issues falling in the realm of religious practices or 'personal law', it is not for a court to make a choice of something which it considers as forward looking or non-fundamentalist. It is not for a court to determine whether religious practices were prudent or progressive or regressive. Religion and 'personal law', must be perceived, as it is accepted, by the followers of the faith.
And not, how another would like it to be (-including self-proclaimed rationalists, of the same faith). Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault therewith. Interference in matters of 'personal law' is clearly beyond judicial examination. The judiciary must therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem. It is therefore, that this Court had the occasion to observe, "..... However laudable, desirable and attractive the result may seem ... an activist Court is not fully equipped to cope with the intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For, in whatever measure be the concern of this Court, it compulsively needs to apply, motion, described in judicial parlance as self-restraint .....

197. We have arrived at the conclusion, that the legal challenge raised at the behest of the Petitioners must fail, on the judicial front. Be that as it may, the question still remains, whether this is a fit case for us to exercise our jurisdiction Under Article 142, "...for doing complete justice ...", in the matter. The reason for us to probe the possibility of exercising our jurisdiction Under

Article 142, arises only for one simple reason, that all concerned are unequivocal, that besides being arbitrary the practice of 'talaq-e-biddat' is gender discriminatory.

198. A perusal of the consideration recorded by us reveals, that the practice of 'talaq-e-biddat' has been done away with, by way of legislation in a large number of egalitarian States, with sizeable Muslim population and even by theocratic Islamic States. Even the AIMPLB, the main contestant of the Petitioners' prayers, whilst accepting the position canvassed on behalf of the Petitioners, assumed the position, that it was not within the realm of judicial discretion, to set aside a matter of faith and religion. We have accepted the position assumed by the AIMPLB. It was however acknowledged even by the AIMPLB, that legislative will, could salvage the situation. This assertion was based on a conjoint reading of Articles 25(2) and Article 44 of the Constitution, read with entry 5 of the Concurrent List contained in the Seventh Schedule of the Constitution. There can be no doubt, and it is our definitive conclusion, that the position can only be salvaged by way of legislation. We understand, that it is not appropriate to tender advice to the legislature, to enact law on an issue. However, the position as it presents in the present case, seems to be a little different. Herein, the views expressed by the rival parties are not in contradiction. The Union of India has appeared before us in support of the cause of the Petitioners. The stance adopted by the Union of India is sufficient for us to assume, that the Union of India supports the Petitioners' cause. Unfortunately, the Union seeks at our hands, what truly falls in its own. The main party that opposed the Petitioners' challenge, namely, the AIMPLB filed an affidavit before this Court affirming the following position:

1. I am the Secretary of All India Muslim Personal Board will issue an advisory through its Website, Publications and Social Media Platforms and thereby advise the persons who perform 'Nikah' (marriage) and request them to do the following:

(a) At the time of performing 'Nikah' (marriage), the person performing the 'Nikah' will advise the Bridegroom/Man that in case of differences leading to Talaq the Bridegroom/Man shall not pronounce three divorces in one sitting since it is an undesirable practice in Shariat;

(b) That at the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise both the Bridegroom/Man and the Bride/Woman to incorporate a condition in the 'Nikahnama' to exclude resorting to pronouncement of three divorces by her husband in one sitting.

3. I say and submit that, in addition, the Board is placing on record, that the Working Committee of the Board had earlier already passed certain resolutions in the meeting held on 15th & 16th April, 2017 in relation to Divorce (Talaq) in the Muslim community. Thereby it was resolved to convey a code of conduct/guidelines to be followed in the matters of divorce particularly emphasizing to avoid pronouncement of three divorces in one sitting. A copy of the resolution dated April 16, 2017 along with the relevant Translation of Resolution Nos. 2, 3, 4 & 5 relating to Talaq (Divorce) is enclosed herewith for the perusal of this Hon'ble Court and marked as Annexure A-1 (Colly) [Page Nos. 4 to 12] to the present Affidavit.

A perusal of the above affidavit reveals, that the AIMPLB has undertaken to issue an advisory through its website, to advise those who enter into a matrimonial alliance, to agree in the 'nikah-nama', that their marriage would not be dissolvable by 'talaq-e-biddat'. The AIMPLB has sworn

an affidavit to prescribe guidelines, to be followed in matters of divorce, emphasizing that 'talaq-e-biddat' be avoided. It would not be incorrect to assume, that even the AIMPLB is on board, to assuage the Petitioner's cause.

199. In view of the position expressed above, we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions Under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. We hope and expect, that the contemplated legislation will also take into consideration advances in Muslim 'personal law'-'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denominations (see at IX-Reforms to 'personal law' in India), even in India, but not for the Muslims. We would therefore implore the legislature, to bestow its thoughtful consideration, to this issue of paramount importance. We would also beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation.

200. Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-e-biddat' (three pronouncements of 'talaq', at one and the same time)-as one, or alternatively, if it is decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate.

201. Disposed of in the above terms.

Note: The emphases supplied in all the quotations in the instant judgment, are ours.

Kurian Joseph, J.

202. What is bad in theology was once good in law but after Shariat has been declared as the personal law, whether what is Quranically wrong can be legally right is the issue to be considered in this case. Therefore, the simple question that needs to be answered in this case is only whether triple talaq has any legal sanctity. That is no more *res integra*. This Court in **Shamim Ara v. State of UP and Another** MANU/SC/0850/2002 : (2002) 7 SCC 518 has held, though not in so many words, that triple talaq lacks legal sanctity. Therefore, in terms of Article 141[7], **Shamim Ara** is the law that is applicable in India.

203. Having said that, I shall also make an independent endeavor to explain the legal position in **Shamim Ara** and lay down the law explicitly.

204. The Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as "the 1937 Act") was enacted to put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community.[8] Section 2 is most relevant in the face of the present controversy.

2. Application of Personal law to Muslims.-Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, *ila, zihar, lian, khula and mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the Rule of decision in cases where the parties are Muslims shall be Muslim Personal Law (*Shariat*).

(Emphasis supplied)

205. After the 1937 Act, in respect of the enumerated subjects Under Section 2 regarding "marriage, dissolution of marriage, including talaq", the law that is applicable to Muslims shall be only their personal law namely Shariat. Nothing more, nothing less. It is not a legislation regulating talaq. In contradistinction, The Dissolution of Muslim Marriages Act, 1939 provides for the grounds for dissolution of marriage. So is the case with the Hindu Marriage Act, 1955. The 1937 Act simply makes Shariat applicable as the Rule of decision in the matters enumerated in Section 2. Therefore, while talaq is governed by Shariat, the specific grounds and procedure for talaq have not been codified in the 1937 Act.

206. In that view of the matter, I wholly agree with the learned Chief Justice that the 1937 Act is not a legislation regulating talaq. Consequently, I respectfully disagree with the stand taken by Nariman, J. that the 1937 Act is a legislation regulating triple talaq and hence, the same can be tested on the anvil of Article 14.

However, on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness, I agree with the illuminating exposition of law by Nariman, J. I am also of the strong view that the Constitutional democracy of India cannot conceive of a legislation which is arbitrary.

207. Shariat, having been declared to be Muslim Personal Law by the 1937 Act, we have to necessarily see what Shariat is. This has been beautifully explained by the renowned author, **Asaf A.A. Fyzee** in his book **Outlines of Muhammadan Law, 5th Edition, 2008** at page 10.[9]

...What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or *Shariat* and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have *Hadith* which are the Traditions of the Prophet-the records of his actions and his sayings-from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the *Hadith* to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with

certain definite principles. These principles constitute the basis of sacred law or *Shariat* as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law.

208. There are four sources for Islamic law-(i) Quran (ii) Hadith (iii) Ijma (iv) Qiyas. The learned author has rightly said that the Holy Quran is the "first source of law". According to the learned author, pre-eminence is to be given to the Quran. That means, sources other than the Holy Quran are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran. Islam cannot be anti-Quran. According to Justice Bader Durrez Ahmad in **Masroor Ahmed v. State (NCT of Delhi) and Anr.** MANU/DE/9441/2007 : ILR (2007) II Delhi 1329:

14. In essence, the Shariat is a compendium of Rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These Rules have been crystallized through the process of *ijtihad* employing the sophisticated jurisprudential techniques. The primary source is the *Quran*. Yet, in matters not directly covered by the divine book, Rules were developed looking to the *hadis* and upon driving a consensus. The differences arose between the schools because of reliance on different *hadis*, differences in consensus and differences on *qiyas* and *aql* as the case may be.

(Emphasis supplied)

209. It is in that background that I make an attempt to see what the Quran states on talaq. There is reference to talaq in three Suras-in Sura II while dealing with social life of the community, in Sura IV while dealing with decencies of family life and in Sura LXV while dealing explicitly with talaq.

210. Sura LXV of the Quran deals with talaq. It reads as follows:

Talaq, ***or*** ***Divorce.***

In the name of God, Most Gracious, Most Merciful.

1. O Prophet! When Ye
Do divorce women,
Divorce them at their
Prescribed periods,
And count (accurately)
Their prescribed periods:
And fear God your Lord:
And turn them not out
Of their houses, nor shall
They (themselves) leave,
Except in case they are
Guilty of some open lewdness,
Those are limits

Set by God: and any
Who transgresses the limits
Of God, does verily
Wrong his (own) soul:
Thou knowest not if
Perchance God will
Bring about thereafter
Some new situation.

2. Thus when they fulfill
Their term appointed,
Either take them back
On equitable terms
Or part with them
On equitable terms;
And take for witness
Two persons from among you,
Endued with justice,
And establish the evidence
(As) before God. Such
Is the admonition given
To him who believes
In God and the Last Day.
And for those who fear
God, He (ever) prepares
A way out,

3. And He provides for him
From (sources) he never
Could imagine. And if
Any one puts his trust
In God, sufficient is (God)
For him. For God will
Surely accomplish His purpose:
Verily, for all things
Has God appointed
A due proportion.

4. Such of your women
As have passed the age
Of monthly courses, for them
The prescribed period, if ye
Have any doubts, is
Three months, and for those
Who have no courses
(It is the same):

For those who carry
(Life within their wombs),
Their period is until
They deliver their burdens:
And for those who
Fear God, He will
Make their path easy.

5. That is the Command
Of God, which He
Has sent down to you:
And if any one fears God,
He will remove his ills
From him, and will enlarge
His reward.

6. Let the women live
(In '*iddat*) in the same
Style as ye live,
According to your means:
Annoy them not, so as
To restrict them.
And if they carry (life
In their wombs), then
Spend (your substance) on them
Until they deliver
Their burden: and if
They suckle your (offspring),
Give them their recompense:
And take mutual counsel
Together, according to
What is just and reasonable.
And if ye find yourselves
In difficulties, let another
Woman suckle (the child)
On the (father's) behalf.

7. Let the man of means
Spend according to
His means: and the man
Whose resources are restricted,
Let him spend according
To what God has given him.
God puts no burden
On any person beyond
What He has given him.

After a difficulty, God
Will soon grant relief.

Verse 35 in Sura IV of the Quran speaks on arbitration for reconciliation-

35. If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things.

Sura II contains the following verses pertaining to divorce:

226. For those who take
An oath for abstention
From their wives,
A waiting for four months
Is ordained;
If then they return,
God is Oft-forgiving,
Most Merciful.

227. But if their intention is firm for divorce, God heareth and knoweth all things.

228. Divorced women
Shall wait concerning themselves
For three monthly periods.
Nor is it lawful for them
To hide what God
Hath created in their wombs,
If they have faith
In God and the Last Day.
And their husbands
Have the better right
To take them back
In that period, if
They wish for reconciliation.
And women shall have rights
Similar to the rights
Against them, according

To what is equitable;
But men have a degree
(of advantage) over them.
And God is Exalted in Power,
Wise.

229. A divorce is only
Permissible twice: after that,
The parties should either hold
Together on equitable terms,
Or separate with kindness.
It is not lawful for you,
(Men), to take back
Any of your gifts (from your wives),
Except when both parties
Fear that they would be
Unable to keep the limits
Ordained by God.
If ye (judges) do indeed
Fear that they would be
Unable to keep the limits
Ordained by God,
There is no blame on either
Of them if she give
Something for her freedom.
These are the limits
Ordained by God;
So do not transgress them
If any do transgress
The limits ordained by God,
Such persons wrong
(Themselves as well as others).

230. So if a husband
Divorces his wife (irrevocably),
He cannot, after that,
Re-marry her until
After she has married
Another husband and
He has divorced her.
In that case there is
No blame on either of them
If they re-unite, provided
They feel that they
Can keep the limits
Ordained by God.

Such other limits
Ordained by God,
Which He makes plain
To those who understand.

231. When ye divorce
Women, and they fulfill
The term of their ('*Iddat*),
Either take them back
On equitable terms
Or set them free
On equitable terms;
But do not take them back
To injure them, (or) to take
Undue advantage;
If anyone does that,
He wrongs his own soul.
Do not treat God's Signs
As a jest,
But solemnly rehearse
God's favours on you,
And the fact that He
Sent down to you
The Book
And Wisdom,
For your instruction.
And fear God,
And know that God
Is well acquainted
With all things.[10]

211. These instructive verses do not require any interpretative exercise. They are clear and unambiguous as far as talaq is concerned. The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then revocation are the Quranic essential steps before talaq attains finality.[11] In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat.

212. The above view has been endorsed by various High Courts, finally culminating in **Shamim Ara** by this Court which has since been taken as the law for banning triple talaq. Interestingly, prior to **Shamim Ara**, Krishna Iyer, J. in **Fuzlunbi v. K Khader Vali and Anr.** MANU/SC/0508/1980 : (1980) 4 SCC 125, while in a three judge bench in this Court, made a very poignant observation on the erroneous approach of Batchelor, J. in **Sarabai v. Rabiabai** ILR 30 Bom 537 on the famous comment "good in law, though bad in theology". To quote:

20. Before we bid farewell to *Fuzlunbi* it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quran, has exposed the error of early English authors and judges who dealt with *talaq* in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor, J. that this view "is good in law, though bad in theology". Maybe, when the point directly arises, the question will have to be considered by this Court but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case.

213. More than two decades later, **Shamim Ara** has referred to, as already noted above, the legal perspective across the country on the issue of triple talaq starting with the decision of the Calcutta High Court in **Furzund Hossein v. Janu Bibee** MANU/WB/0103/1878 : ILR (1878) 4 Cal 588 in 1878 and finally, after discussing two decisions of the Gauhati High Court namely **Jiauddin Ahmed v. Anwara Begum** MANU/GH/0033/1978 : (1981) 1 Gau LR 358 and **Rukia Khatun v. Abdul Khalique Laskar** MANU/GH/0031/1979 : (1981) 1 Gau LR 375, this Court held as follows-

13. There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in *Jiauddin Ahmed v. Anwara Begum* (1981) 1 Gau LR 358 and later speaking for the Division Bench in *Rukia Khatun v. Abdul Khalique Laskar* MANU/GH/0031/1979 : (1981) 1 Gau LR 375. In Jiauddin Ahmed case a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid *talaq* of the wife by the husband under the Muslim law. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family and the other from the husband's; if the attempts fail, '*talaq*' may be effected. (para 13). In *Rukia Khatun case*, the Division Bench stated that the correct law of *talaq* as ordained by the Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the above said observations made by the learned Judges of High Courts....

(Emphasis supplied)

214. There is also a fruitful reference to two judgments of the Kerala High Court-one of Justice Krishna Iyer in **A. Yousuf Rawther v. Sowramma** MANU/KE/0059/1971 : AIR 1971 Ker 261 and the other of Justice V. Khalid in **Mohd. Haneefa v. Pathummal Beevi** MANU/KE/0336/1972 : 1972 KLT 512. No doubt, Sowaramma was not a case on triple talaq, however, the issue has been discussed in the judgment in paragraph 7 which has also been quoted in **Shamim Ara**.

..The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. ...It is a popular fallacy that a Muslim male enjoys, under the Quoranic law, unbridled authority to liquidate the marriage. 'The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them".' (Quoran IV: 34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." ....Commentators on the Quoran have rightly observed-and this tallies with the law now administered in some Muslim countries like Iraq-that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce...

215. Khalid, J. has been more vocal in **Mohd. Haneefa**:

5. Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed.

216. After a detailed discussion on the aforementioned cases, it has been specifically held by this Court in **Shamim Ara**, at paragraph 15 that "...there are no reasons substantiated in justification of *talaq* and no plea or proof that any effort at reconciliation preceded the *talaq*." It has to be particularly noted that this conclusion by the Bench in **Shamim Ara** is made after "respectful agreement" with **Jiauddin Ahmed** that "talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters -- one from the wife's family and the other from the husband's; if the attempts fail, '*talaq*' may be effected." In the light of such specific findings as to how triple talaq is bad in law on account of not following the Quranic principles, it cannot be said that there is no *ratio decidendi* on triple talaq in **Shamim Ara**.

217. **Shamim Ara** has since been understood by various High Courts across the country as the law deprecating triple talaq as it is opposed to the tenets of the Holy Quran. Consequently, triple talaq lacks the approval of Shariat.

218. The High Court of Andhra Pradesh, in **Zamrud Begum v. K. Md. Haneef and Anr.** MANU/AP/1306/2002 : (2003) 3 ALD 220, is one of the first High Courts to affirm the view adopted in **Shamim Ara**. The High Court, after referring to **Shamim Ara** and all the other decisions mentioned therein, held in paragraphs 13 and 17 as follows:

13. It is observed by the Supreme Court in the above said decision that talaq may be oral or in writing and it must be for a reasonable cause. It must be preceded by an attempt of reconciliation of husband and wife by two arbitrators one chosen from the family of the wife and other by husband. If their attempts fail then talaq may be effected by pronouncement. The said procedure has not been followed. The Supreme Court has culled out the same from *Mulla* and the principles of Mohammedan Law.

XXXX

17. I am of the considered view that the alleged talaq is not a valid talaq as it is not in accordance with the principles laid down by the Supreme Court. If there is no valid talaq the relationship of the wife with her husband still continues and she cannot be treated as a divorced wife....

(Emphasis supplied)

219. In **A.S. Parveen Akthar v. The Union of India** MANU/TN/2472/2002 : 2003-1- L.W. 370, the High Court of Madras was posed with the question on the validity and constitutionality of Section 2 of the 1937 Act in so far as it recognises triple talaq as a valid form of divorce. The Court referred to the provisions of the Quran, opinions of various eminent scholars of Islamic Law and previous judicial pronouncements including **Shamim Ara** and came to the following conclusion:

45. Thus, the law with regard to talaq, as declared by the apex Court, is that talaq must be for a reasonable cause and must be preceded by attempt at reconciliation between the husband and the wife by two arbiters one chosen by wife's family and the other from husband's family and it is only if their attempts fail, talaq may be effected.

XXXX

48. Having regard to the law now declared by the apex Court in the case of *Shamim Ara*, MANU/SC/0850/2002 : 2002 AIR SCW 4162, talaq, in whatever form, must be for a reasonable cause, and must be preceded by attempts for reconciliation by arbiters chosen from the families of each of the spouses, the petitioner's apprehension that notwithstanding absence of cause and no efforts having been made to reconcile the spouses, this form of talaq is valid, is based on a misunderstanding of the law.

(Emphasis supplied)

As far as the constitutionality of Section 2 is concerned, the Court refrained from going into the question in view of the decisions of this Court in **Shri Krishna Singh v. Mathura Ahir and Ors.** MANU/SC/0657/1981 : (1981) 3 SCC 689 and **Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India** MANU/SC/0896/1997 : (1997) 3 SCC 573.

220. The High Court of Jammu and Kashmir, in **Manzoor Ahmad Khan v. Saja and Ors.** MANU/JK/0263/2003 : 2010 (4) JKJ 380, has also placed reliance on **Shamim Ara**. The Court, at paragraph 11, noted that in **Shamim Ara**, the Apex Court relied upon the passages from judgments of various High Courts "which are eye openers for those who think that a Muslim man can divorce his wife merely at whim or on caprice." The Court finally held that the marriage between the parties did not stand dissolved.

221. In **Ummer Farooque v. Naseema** MANU/KE/0402/2005 : 2005 (4) KLT 565, Justices R Bhaskaran and K.P. Balachandran of the High Court of Kerala, after due consideration of the prior decisions of the various Courts, in paragraphs 5 and 6 held that:

5...The general impression as reflected in the decision of a Division Bench of this Court in *Pathayi v. Moideen* (MANU/KE/0264/1968 : 1968 KLT 763) was that the only condition necessary for a valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at the that time and he can effect divorce whenever he desires and no witnesses are necessary for dissolution of the marriage and the moment when talaq is pronounced, dissolution of marriage is effected; it can be conveyed by the husband to the wife and it need not be even addressed to her and it takes effect the moment it comes to her knowledge etc. But this can no longer be accepted in view of the authoritative pronouncement of the Supreme Court in *Shamim Ara v. State of U.P.* [MANU/SC/0850/2002 : 2002 (3) KLT 537 (SC)].

6. The only thing to be further considered in this case is whether the divorce alleged to have been effected by the husband by pronouncement of talaq on 23-7-1999 is proved or not. The mere pronouncement of talaq three times even in the presence of the wife is not sufficient to effect a divorce under Mohammadan Law. As held by the Supreme Court in *Shamim Ara's case* [MANU/SC/0850/2002 : 2002 (3) KLT 537 (SC)], there should be an attempt of mediation by two mediators; one on the side of the husband and the other on the side of the wife and only in case it was a failure that the husband is entitled to pronounce talaq to divorce the wife...

(Emphasis supplied)

222. In **Masroor Ahmed**, Justice Badar Durrez Ahmed, held as follows:

32. In these circumstances (the circumstances being-(1) no evidence of pronouncement of *talaq*; (2) no reasons and justification of *talaq*; and (3) no plea or proof that *talaq* was preceded by efforts towards reconciliation), the Supreme Court held that the marriage was not dissolved and that the liability of the husband to pay maintenance continued. Thus, after **Shamim Ara** (supra), the position of the law relating to *talaq*, where it is contested by either spouse, is that, if it has to take effect, first of all the pronouncement of *talaq* must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that *talaq* was given at some earlier point of time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place....

(Emphasis supplied)

223. As recently as in 2016, Mustaque, J. of the High Court of Kerala in **Nazeer @ Oyoor Nazeer v. Shemeema** MANU/KE/2403/2016 : 2017 (1) KLT 300, has *inter alia* referred to **Shamim Ara** and has disapproved triple talaq.

224. Therefore, I find it extremely difficult to agree with the learned Chief Justice that the practice of triple talaq has to be considered integral to the religious denomination in question and that the same is part of their personal law.

225. To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Indian Constitution. That is subject only to the following-(1) public order, (2) health, (3) morality and (4) other provisions of Part III dealing with Fundamental Rights. Under Article 25 (2) of the Constitution of India, the State is also granted power to make law in two contingencies notwithstanding the freedom granted Under Article 25(1). Article 25 (2) states that "nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus." Except to the above extent, the freedom of religion under the Constitution of India is absolute and on this point, I am in full agreement with the learned Chief Justice. However, on the statement that triple talaq is an integral part of the religious practice, I respectfully disagree. Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the Rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2 which include talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice and thus, my disagreement with the learned Chief Justice for the constitutional protection given to triple talaq. I also have serious doubts as to whether, even Under Article 142, the exercise of a Fundamental Right can be injuncted.

226. When issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights. I believe that a reconciliation between the same is possible, but the process of harmonizing different interests is within the powers of the legislature. of course, this power has to be exercised within the constitutional parameters without curbing the religious freedom guaranteed under the Constitution of India. However, it is not for the Courts to direct for any legislation.

227. Fortunately, this Court has done its part in **Shamim Ara**. I expressly endorse and re-iterate the law declared in **Shamim Ara**. What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.

Rohinton Fali Nariman, J.

Having perused a copy of the learned Chief Justice's judgment, I am in respectful disagreement with the same.

228. This matter has found its way to a Constitution Bench of this Court because of certain newspaper articles which a Division Bench of this Court in **Prakash** v. **Phulavati**, MANU/SC/1241/2015 : (2016) 2 SCC 36, adverted to, and then stated:

28. An important issue of gender discrimination which though not directly involved in this appeal, has been raised by some of the learned Counsel for the parties which concerns rights of Muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that in spite of guarantee of the Constitution, Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during currency of the first marriage, resulting in denial of dignity and security to her. Although the issue was raised before this Court in *Ahmedabad Women Action Group (AWAG)* v. *Union of India* [MANU/SC/0896/1997 : (1997) 3 SCC 573], this Court did not go into the merits of the discrimination with the observation that the issue involved State policy to be dealt with by the legislature. [This Court referred to the observations of Sahai, J. in *Sarla Mudgal* v. *Union of India*, MANU/SC/0290/1995 : (1995) 3 SCC 635: 1995 SCC (Cri) 569 that a climate was required to be built for a uniform civil code. Reference was also made to observations in *Madhu Kishwar* v. *State of Bihar*, MANU/SC/0468/1996 : (1996) 5 SCC 125 to the effect that the Court could at best advise and focus attention to the problem instead of playing an activist role.] It was observed that challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 was pending before the Constitution Bench and there was no reason to multiply proceedings on such an issue.

31. It was, thus, submitted that this aspect of the matter may be gone into by separately registering the matter as public interest litigation (PIL). We are of the view that the suggestion needs consideration in view of the earlier decisions of this Court. The issue has also been highlighted in recent articles appearing in the press on this subject. [*The Tribune* dated 24-9-2015 "Muslim Women's Quest for Equality" by Vandana Shukla and *Sunday Express Magazine* dated 4-10-2015 "In Her Court" by Dipti Nagpaul D'Souza.]

32. For this purpose, a PIL be separately registered and put up before the appropriate Bench as per orders of Hon'ble the Chief Justice of India.

(at pages 53 and 55)

Several writ petitions have thereafter been filed and are before us seeking in different forms the same relief-namely, that a Triple Talaq at one go by a Muslim husband which severs the marital bond is bad in constitutional law.

229. Wide ranging arguments have been made by various counsel appearing for the parties. These have been referred to in great detail in the judgment of the learned Chief Justice. In essence, the Petitioners, supported by the Union of India, state that Triple Talaq is an anachronism in today's day and age and, constitutionally speaking, is anathema. Gender discrimination is put at the forefront of the argument, and it is stated that even though Triple Talaq may be sanctioned by the Shariat law as applicable to Sunni Muslims in India, it is violative of Muslim women's fundamental rights to be found, more particularly, in Articles 14, 15(1) and 21 of the Constitution of India. Opposing this, counsel for the Muslim Personal Board and Ors. who supported them, then relied heavily upon a Bombay High Court judgment, being **State of Bombay** v. **Narasu Appa Mali**

MANU/MH/0040/1952 : AIR 1952 Bom 84, for the proposition that personal laws are beyond the pale of the fundamental rights Chapter of the Constitution and hence cannot be struck down by this Court. According to them, in this view of the matter, this Court should fold its hands and send Muslim women and other women's organisations back to the legislature, as according to them, if Triple Talaq is to be removed as a measure of social welfare and reform Under Article 25(2), the legislature alone should do so. To this, the counter argument of the other side is that Muslim personal laws are not being attacked as such. What is the subject matter of attack in these matters is a statute, namely, the Muslim Personal Law (*Shariat*) Application Act, 1937 (hereinafter referred to as the "1937 Act"). According to them, Triple Talaq is specifically sanctioned by statutory law *vide* Section 2 of the 1937 Act and what is sought for is a declaration that Section 2 of the 1937 Act is constitutionally invalid to the aforesaid extent. To this, the Muslim Personal Board states that Section 2 is not in order to apply the Muslim law of Triple Talaq, but is primarily intended to do away with custom or usage to the contrary, as the non-obstante Clause in Section 2 indicates. Therefore, according to them, the Muslim personal law of Triple Talaq operates of its own force and cannot be included in Article 13(1) as "laws in force" as has been held in **Narasu Appa** (supra).

230. The question, therefore, posed before this Court is finally in a very narrow compass. Triple Talaq alone is the subject matter of challenge-other forms of Talaq are not. The neat question that arises before this Court is, therefore, whether the 1937 Act can be said to recognize and enforce Triple Talaq as a Rule of law to be followed by the Courts in India and if not whether **Narasu Appa** (supra) which states that personal laws are outside Article 13(1) of the Constitution is correct in law.

231. Inasmuch as the Muslims in India are divided into two main sects, namely Sunnis and Shias, and this case pertains only to Sunnis as Shias do not recognize Triple Talaq, it is important to begin at the very beginning.

232. In a most illuminating introduction to Mulla's Principles of Mahomedan Law (16th Ed.) (1968), Justice Hidayatullah, after speaking about Prophet Mahomed, has this to say:

The Prophet had established himself as the supreme overlord and the supreme preceptor. Arabia was steeped in ignorance and barbarism, superstition and vice. Female infanticide, drinking, lechery and other vices were rampant.

However, the Prophet did not nominate a successor. His death was announced by Abu Bakr and immediate action was taken to hold an election. As it happened, the Chiefs of the tribe of Banu Khazraj were holding a meeting to elect a Chief and the Companions went to the place. This meeting elected Abu Bakr as the successor. The next day Abu Bakr ascended the pulpit and everyone took an oath of allegiance (*Bai'at*).

This election led to the great schism between the Sunnis and Shias. The Koreish tribe was divided into Ommayads and Hashimites. The Hashimites were named after Hashim the great grand-father of the Prophet. There was bitter enmity between the Ommayads and the Hashimites. The Hashimites favoured the succession of Ali and claimed that he ought to have been chosen because of appointment by the Prophet and propinquity to him. The election in fact took place when the

household of the Prophet (including Ali) was engaged in the obsequies. This offended the Hashimites. It may, however, be said that Ali, regardless of his own claims, immediately swore allegiance to Abu Bakr. Ali was not set up when the second and third elections of Omar and Osman took place, but he never went against these decisions and accepted the new Caliph each time and gave him unstinted support.

Abu Bakr was sixty years old and was Caliph only for two years (d. 634 A.D.). Even when he was Caliph, the power behind him was Omar Ibnul Khattab. It is said that Abu Bakr named Omar as his successor. Even if this be not true, it is obvious that the election was a mere formality. Omar was assassinated after ten years as Caliph (644 A.D.). Osman was elected as the third Caliph. Tradition is that Omar had formed an inner panel of electors (six in number), but this is discountenanced by some leading historians. Later this tradition was used by the Abbasids to form an inner conclave for their elections. This special election used to be accepted by the people at a general, but somewhat formal, election. Osman was Caliph for 12 years and was assassinated (656 A.D.). Ali was at last elected as the fourth Caliph. The election of the first four Caliphs, who are known as *Khulfai-i-Rashidin* (rightly-guided Caliphs) was real, although it may be said that each time the choice was such as to leave no room for opposition. Ali was Caliph for five years. He was killed in battle in 661 A.D. Ali's son Hasan resigned in favour of Muavia the founder of the Ommayad dynasty. Hasan was, however, murdered. The partisans of Ali persuaded Hussain, the second son of Ali, to revolt against Mauvia's son Yezid, but at Kerbala, Husain died fighting after suffering great privations. The rift between the Sunnis and the *Shias (Shiat-i-Ali* party of Ali) became very great thereafter.

233. It is in this historical setting that it is necessary to advert to the various sub-sects of the Sunnis. Four major sub-sects are broadly recognized schools of Sunni law. They are the Hanafi school, Maliki school, Shafi'i school and Hanbali school. The overwhelming majority of Sunnis in India follow the Hanafi school of law. Mulla in Principles of Mahomedan Law (20th Ed.), pg. xix to xxi, has this to say about the Hanafi school:

This is the most famous of the four schools of Hanafi law. This school was founded by Abu Hanifa (699-767 A.D.). The school is also known as "Kufa School". Although taught by the great Imam Jafar-as-Sadik, the founder of the Shia School, Abu Hanifa was, also a pupil of Abu Abdullah ibn-ul-Mubarak and Hamid bin-Sulaiman and this may account for his founding a separate school. This school was favoured by the Abbasid Caliphs and its doctrines spread far and wide. Abu Hanifa earned the appellation "The Great Imam". The school was fortunate in possessing, besides Abu Hanifa, his two more celebrated pupils, Abu Yusuf (who became the Chief Kazi at Baghdad) and Imam Muhammad Ash-Shaybani, a prolific writer, who has left behind a number of books on jurisprudence. The founder of the school himself left very little written work. The home of this school was Iraq but it shares this territory with other schools although there is a fair representation. The Ottoman Turks and the Seljuk Turks were Hanafis. The doctrines of this school spread to Syria, Afghanistan, Turkish Central Asia and India. Other names connected with the Kufa School are Ibn Abi Layla and Safyan Thawri. Books on the doctrines are al-Hidaay of Marghinani (translated by Hamilton), *Radd-al-Mukhtar* and *Durr-ul-Mukhtar* of Ibn Abidin and *al-Mukhtasar of Kuduri*. The *Fatawa-i-Alamgiri* collected in Aurangzeb's time contain the doctrines of this school with other material.

234. Needless to add, the Hanafi school has supported the practice of Triple Talaq amongst the Sunni Muslims in India for many centuries.

235. Marriage in Islam is a contract, and like other contracts, may under certain circumstances, be terminated. There is something astonishingly modern about this-no public declaration is a condition precedent to the validity of a Muslim marriage nor is any religious ceremony deemed absolutely essential, though they are usually carried out. Apparently, before the time of Prophet Mahomed, the pagan Arab was absolutely free to repudiate his wife on a mere whim, but after the advent of Islam, divorce was permitted to a man if his wife by her indocility or bad character renders marital life impossible. In the absence of good reason, no man can justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet Mahomed had declared divorce to be the most disliked of lawful things in the sight of God. The reason for this is not far to seek. Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage.

236. This then leads us to the forms of divorce recognized in Islamic Law. **Mulla** (supra), at pages 393-395, puts it thus:

S. **311. Different modes of talak.**-A talak may be effected in any of the following ways:

(1) *Talak ahsan*.-This consists of a single pronouncement of divorce made during a *tuhr* (period between menstruations) followed by abstinence from sexual intercourse for the period of *iddat*.

When the marriage has not been consummated, a talak in the *ahsan* form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruation the requirement of a declaration during a *tuhr* is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing.

Talak Ahsan is based on the following verses of Holy Quran: "and the divorced woman should keep themselves in waiting for three courses." (II: 228).

And those of your woman who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those too, who have not had their courses." (LXV: 4).

(2) *Talak hasan*-This consists of three pronouncements made during *successive tuhrs*, no intercourse taking place during any of the three *tuhrs*.

The first pronouncement should be made during a *tuhr*, the second during the *next tuhr*, and the third during the *succeeding tuhr*.

Talak Hasan is based on the following Quranic injunctions:

Divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness. (II: 229).

So if he (the husband) divorces her (third time) she shall not be lawful to him afterward until she marries another person. (II: 230).

(3) *Talak-ul-bidaat or talak-i-badai*.-This consists of-

(i) Three pronouncements made during a single *tuhr* either in one sentence, e.g., "I divorce thee *thrice*,"-or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee", or

(ii) a *single* pronouncement made during a *tuhr* clearly indicating an intention *irrevocably* to dissolve the marriage, e.g., "I divorce thee irrevocably".

Talak-us-sunnat and talak-ul-biddat

The Hanafis recognized two kinds of *talak*, namely, (1) *talak-us-sunnat*, that is, *talak* according to the Rules laid down in the *sunnat* (traditions) of the Prophet; and (2) *talak-ul-biddat*, that is, new or irregular *talak*. *Talak-ul-biddat* was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. *Talak-ul-sunnat* is of two kinds, namely, (1) ahsan, that is, most proper, and (2) *hasan*, that is, proper. The *talak-ul-biddat* or heretical divorce is good in law, though bad in theology and it is the most common and prevalent mode of divorce in this country, including Oudh. In the case of *talak ahsan* and *talak hasan*, the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (S. 312), and the husband has the option to revoke it before then. But the *talak-ul-biddat* becomes irrevocable immediately it is pronounced (S. 312). The essential feature of a *talak-ul-biddat* is its irrevocability. One of tests of irrevocability is the repetition *three times* of the formula of divorce *within one tuhr*. But the triple repetition is not a necessary condition of *talak-ul-biddat*, and the intention to render a talak irrevocable may be expressed even by a *single* declaration. Thus if a man says "I have divorced you by a *talak-ul-bain* (irrevocable divorce)", the *talak* is *talak-ul-biddat* or *talak-i-badai* and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "*bain*" (irrevocable) manifests of itself the intention to effect an irrevocable divorce.

(Emphasis Supplied)

237. Another noted author, A.A.A. Fyzee, in his book "Outlines of Muhammadan Law" (5th Ed.), at pages 120-122, puts it thus:

The pronouncement of *talaq* may be either revocable or irrevocable. As the Prophet of Islam did not favour the institution of *talaq*, the revocable forms of *talaq* are considered as the 'approved' and the irrevocable forms are treated as the 'disapproved' forms. A revocable pronouncement of divorce gives a *locus poenitentiae* to the man; but an irrevocable pronouncement leads to an undesirable result without a chance to reconsider the question. If this principle is kept in mind the terminology is easily understood. The forms of talaq may be classified as follows:

(a) *talaq al-sunna* (i.e., in conformity with the dictates of the Prophet)-

(i) *ahsan* (the most approved), (ii) *hasan* (approved).

(b) *talaq al-bid'a* (i.e., of innovation; therefore not approved)-(i) three declarations (the so-called triple divorce) at one time, (ii) one irrevocable declaration (generally in writing).

The *talaq al-sunna*, most approved form consists of one single pronouncement in a period of *tuhr* (purity, i.e., when the woman is free from her menstrual courses), followed by abstinence from sexual intercourse during that period of sexual purity (*tuhr*) as well as during the whole of the *iddat*. If any such intercourse takes place during the periods mentioned, the divorce is void and of no effect in Ithna Ashari and Fatimi laws. It is this mode or procedure which seems to have been approved by the Prophet at the beginning of his ministry and is consequently regarded as the regular or proper and orthodox form of divorce.

Where the parties have been away from each other for a long time, or where the wife is old and beyond the age of menstruation, the condition of *tuhr* is unnecessary.

A pronouncement made in the *ashan* form is revocable during *iddat*. This period is three months from the date of the declaration or, if the woman is pregnant, until delivery. The husband may revoke the divorce at any time during the *iddat*. Such revocation may be by express words or by conduct. Resumption of conjugal intercourse is a clear case of revocation. For instance, *H* pronounces a single revocable *talaq* against his wife and then says 'I have retained thee' or cohabits with her, the divorce is revoked under Hanafi as well as Ithna Ashari law. After the expiration of the *iddat* the divorce becomes irrevocable.

A Muslim wife after divorce is entitled to maintenance during the *iddat*, and so also her child in certain circumstances.

The *hasan* form of *talaq*, also an approved form but less approved than the first (*ahsan*), consists of three successive pronouncements during three consecutive periods of purity (*tuhr*). Each of these pronouncements should have been made at a time when no intercourse has taken place during that particular period of purity. The *hasan* form of *talaq* requires some explanation and a concrete illustration should suffice. The husband (H) pronounces *talaq* on his wife (W) for the first time during a period when W is free from her menstrual courses. The husband and wife had not come together during this period of purity. This is the first talaq. H resumes cohabitation or revokes this first *talaq* in this period of purity. Thereafter in the following period of purity, at a time when no intercourse has taken place, *H* pronounces the second *talaq*. This talaq is again revoked by express words or by conduct and the third period of purity is entered into. In this period, while no intercourse having taken place, H for the third time pronounces the formula of divorce. This third pronouncement operates in law as a final and irrevocable dissolution of the marital tie. The marriage is dissolved; sexual intercourse becomes unlawful; *iddat* becomes incumbent; remarriage between the parties becomes impossible unless W lawfully marries another husband, and that other husband lawfully divorces her after the marriage has been actually consummated.

Thus it is clear that in these two forms there is a chance for the parties to be reconciled by the intervention of friends or otherwise. They are, therefore, the 'approved' forms and are recognized both by Sunni and Shia laws. The Ithna Ashari and the Fatimi schools, however, do not recognize the remaining two forms and thus preserve the ancient conventions of the times of the Law-giver.

The first, or *ahsan*, form is 'most approved' because the husband behaves in a gentlemanly manner and does not treat the wife as a chattel. The second is a form in which the Prophet tried to put an end to a barbarous pre-Islamic practice. This practice was to divorce a wife and take her back several times in order to ill-treat her. The Prophet, by the Rule of the irrevocability of the third pronouncement, indicated clearly that such a practice could not be continued indefinitely. Thus if a husband really wished to take the wife back he should do so; if not, the third pronouncement after two reconciliations would operate as a final bar. These Rules of law follow the spirit of the Quranic injunction: 'when they have reached their term take them back in kindness or part from them in kindness'.

A disapproved form of divorce is *talaq* by triple declarations in which three pronouncements are made in a single *tuhr*, either in one sentence e.g. 'I divorce thee triply or thrice' or in three sentences 'I divorce thee, I divorce thee, I divorce thee.' Such a *talaq* is lawful, although sinful, in Hanafi law; but in Ithna Ashari and the Fatimi laws it is not permissible. This is called *talaq al-ba'in*, irrevocable divorce.

Another form of the disapproved divorce is a single, irrevocable pronouncement made either during the period of *tuhr* or even otherwise. This form is also called *talaq al-ba'in* and may be given in writing. Such a 'bill of divorcement' comes into operation immediately and severs the marital tie. This form is not recognized by the Ithna Ashari or the Fatimi schools.

(Emphasis Supplied)

238. It is at this stage that the 1937 Act needs consideration. The Statement of Objects and Reasons of this Act are as follows:

For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (*Shariat*) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (*Shariat*) exists in the form of a veritable code and is too well known to admit of

any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.

(Emphasis Supplied)

239. It is a short Act consisting of 6 Sections. We are directly concerned in these cases with Section 2. Section 2 of the 1937 Act states:

2. Application of Personal law to Muslims.-Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs* (other than charities and charitable institutions and charitable and religious endowments) the Rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).

240. A word as to the meaning of the expression "Shariat". A.A.A. Fyzee (supra), at pages 9-11, describes "Shariat" as follows:

Coming to law proper, it is necessary to remember that there are two different conceptions of law. Law may be considered to be of divine origin, as is the case with the Hindu law and the Islamic law, or it may be conceived as man-made. The latter conception is the guiding principle of all modern legislation; it is, as Ostrorog has pointed out, the Greek, Roman, Celtic or Germanic notion of law. We may be compelled to act in accordance with certain principles because God desires us to do so, or in the alternative because the King or the Assembly of wise men or the leader of the community or social custom demand it of us, for the good of the people in general. In the case of Hindu law, it is based first on the Vedas or *Sruti* (that which is heard); secondly on the *Smriti* (that which is remembered by the sages or *rishis*). Although the effect of custom is undoubtedly great yet *dharma*, as defined by Hindu lawyers, implies a course of conduct which is approved by God.

Now, what is the Islamic notion of law? In the words of Justice Mahmood, 'It is to be remembered that Hindu and Muhammadan law are so intimately connected with religion that they cannot readily be dissevered from it'. There is in Islam a doctrine of 'certitude' (*ilm al-yaqin*) in the matter of Good and Evil. We in our weakness cannot understand what Good and Evil are unless we are guided in the matter by an inspired Prophet. Good and Evil-*husn* (beauty) and *qubh* (ugliness)-are to be taken in the ethical acceptation of the terms. What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or *Shariat* and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have *Hadith* which are Traditions of the Prophet-the records of his actions and his sayings-from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or *Shariat* as the Muslim doctors understand it. And it is these fundamental

juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law.

Modern jurists emphasize the importance of law for understanding the character and ethos of a people. Law, says a modern jurist, 'streams from the soul of a people like national poetry, it is as holy as the national religion, it grows and spreads like language; religious, ethical, and poetical elements all contribute to its vital force'; it is 'the distilled essence of the civilization of a people'; it reflects the people's soul more clearly than any other organism. This is true of Islam more than of any other faith. The *Shari'at* is the central core of Islam; no understanding of its civilization, its social history or its political system, is possible without a knowledge and appreciation of its legal system.

Shariat (lit., the road to the watering place, the path to be followed) as a technical term means the Canon law of Islam, the totality of Allah's commandments. Each one of such commandments is called *hukm* (pl. *ahkam*). The law of Allah and its inner meaning is not easy to grasp; and *Shariat* embraces all human actions. For this reason it is not 'law' in the modern sense; it contains an infallible guide to ethics. It is fundamentally a Doctrine of Duties, a code of obligations. Legal considerations and individual rights have a secondary place in it; above all the tendency towards a religious evaluation of all the affairs of life is supreme.

According to the *Shariat* religious injunctions are of five kinds, *al-ahkam al-khamsah*. Those strictly enjoined are *farz*, and those strictly forbidden are *haram*. Between them we have two middle categories, namely, things which you are advised to do (*mandub*), and things which you are advised to refrain from (*makruh*) and finally there are things about which religion is indifferent (*ja'iz*). The daily prayers, five in number, are *farz*; wine is haram; the addition prayers like those on the *Eid* are *mandub*; certain kinds of fish are *makruh*; and there are thousands of *ja'iz* things such as travelling by air. Thus the *Shariat* is totalitarian; all human activity is embraced in its sovereign domain. This fivefold division must be carefully noted; for unless this is done it is impossible to understand the distinction between that which is only morally enjoined and that which is legally enforced. Obviously, moral obligation is quite a different thing from legal necessity and if in law these distinctions are not kept in mind error and confusion are the inevitable result.

241. It can be seen that the 1937 Act is a pre-constitutional legislative measure which would fall directly within Article 13(1) of the Constitution of India, which reads as under:

Article 13-Laws inconsistent with or in derogation of the fundamental rights-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

(2) xxx xxx xxx

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, Regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

242. However, learned Counsel for the Muslim Personal Board as well as other counsel supporting their stand have argued that, read in light of the Objects and Reasons, the 1937 Act was not meant to enforce Muslim personal law, which was enforceable by itself through the Courts in India. The 1937 Act was only meant, as the non-obstante Clause in Section 2 indicates, to do away with custom or usage which is contrary to Muslim personal law.

243. We are afraid that such a constricted reading of the statute would be impermissible in law. True, the Objects and Reasons of a statute throw light on the background in which the statute was enacted, but it is difficult to read the non-obstante Clause of Section 2 as governing the enacting part of the Section, or otherwise it will become a case of the tail wagging the dog. A similar attempt was made many years ago and rejected in **Aswini Kumar Ghosh** v. **Arabinda Bose** MANU/SC/0022/1952 : 1953 SCR 1. This Court was concerned with Section 2 of the Supreme Court Advocates (Practice in High Courts) Act, 1951. Section 2 of the said Act read as follows:

Notwithstanding anything contained in the Indian Bar Councils Act, 1926, or in any other law regulating the conditions subject to which a person not entered in the roll of Advocates of a High Court may, be permitted to practice in that High Court every Advocate of the Supreme Court shall be entitled as of right to practice in any High Court whether or not he is an Advocate of that High Court:

Provided that nothing in this Section shall be deemed to entitle any person, merely by reason of his being an Advocate of the Supreme Court, to practice in any High Court of which he was at any time a judge, if he had given an undertaking not to practice therein after ceasing to hold office as such judge.

244. The argument made before this Court was that the non-obstante Clause furnishes the key to the proper interpretation of the scope of the Section and the enacting Clause must, therefore, be construed as conferring only a right co-extensive with the disability removed by the opening clause. This argument was rejected by this Court as follows:

23. Turning now to the *non obstante* Clause in Section 2 of the new Act, which appears to have furnished the whole basis for the reasoning of the Court below -- and the argument before us closely followed that reasoning -- we find the learned Judges begin by inquiring what are the provisions which that Clause seeks to supersede and then place upon the enacting Clause such construction as would make the right conferred by it co-extensive with the disability imposed by the superseded provisions. "The meaning of the Section will become clearer", they observe, "if we examine a little more closely what the Section in fact supersedes or repeals..... The disability which the Section removes and the right which it confers are co-extensive." This is not, in our judgment,

a correct approach to the construction of Section 2. It should first be ascertained what the enacting part of the Section provides on a fair construction of the words used according to their natural and ordinary meaning, and the *non obstante* Clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment.

(at pages 21-22)

This view was followed in **A.V. Fernandez** v. **State of Kerala**, MANU/SC/0093/1957 : 1957 SCR 837 at 850.

245. It is, therefore, clear that all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq when it comes to the Muslim personal law applicable to Sunnis in India. Therefore, it is very difficult to accept the argument on behalf of the Muslim Personal Board that Section 2 does not recognize or enforce Triple Talaq. It clearly and obviously does both, because the Section makes Triple Talaq "the Rule of decision in cases where the parties are Muslims".

246. As we have concluded that the 1937 Act is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression "laws in force" in Article 13(3)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency.

247. At this stage, it is necessary to refer to the recognition of Triple Talaq as a legal form of divorce in India, as applicable to Sunni Muslims. In an early Bombay case, **Sarabai** v. **Rabiabai**, MANU/MH/0009/1905 : (1906) ILR 30 Bom 537, Bachelor, J. referred to Triple Talaq and said that "it is good in law though bad in theology". In a Privy Council decision in 1932, 5 years before the 1937 Act, namely **Rashid Ahmad** v. **Anisa Khatun**, MANU/PR/0074/1931 : (1931-32) 59 IA 21: AIR 1932 PC 25, the Privy Council was squarely called upon to adjudicate upon a Triple Talaq. Lord Thankerton speaking for the Privy Council put it thus:

There is nothing in the case to suggest that the parties are not Sunni Mohammedans governed by the ordinary Hanafi law, and, in the opinion of their Lordships, the law of divorce applicable in such a case is correctly stated by Sir R.K. Wilson, in his Digest of Anglo-Muhammadan Law, 5th ed., at p. 136, as follows: "The divorce called *talak* may be either irrevocable (*bain*) or revocable (*raja*). A *talak bain*, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A *talak bain* may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either:-(*a*) Once, followed by abstinence from sexual intercourse, for the period called the iddat; or (*b*) Three times during successive intervals of purity, i.e., between successive menstruations, no intercourse taking place during any of the three intervals; or (*c*) Three times at shorter intervals, or even in immediate succession; or (*d*) Once, by words showing a clear intention that the divorce shall immediately became irrevocable. The first-named of the above methods is called *ahsan* (best), the second *hasan* (good), the third and fourth are said to be *bidaat* (sinful), but are, nevertheless, regarded by Sunni lawyers as legally valid.

(at page 26)

The Privy Council went on to state:

Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid and effective: Baillie's Digest, 2nd ed., p. 208; Ameer Ali's Mohammedan Law, 3rd ed., vol. ii., p. 518; Hamilton's Hedaya, vol. i., p. 211.

(at page 27)

248. It is thus clear that it is this view of the law which the 1937 Act both recognizes and enforces so as to come within the purview of Article 13(1) of the Constitution.

249. In this view of the matter, it is unnecessary for us to decide whether the judgment in **Narasu Appa** (supra) is good law. However, in a suitable case, it may be necessary to have a re-look at this judgment in that the definition of "law" and "laws in force" are both inclusive definitions, and that at least one part of the judgment of P.B. Gajendragadkar, J., (para 26), in which the learned Judge opines that the expression "law" cannot be read into the expression "laws in force" in Article 13(3) is itself no longer good law-See **Sant Ram and Ors.** v. **Labh Singh and Ors.**, MANU/SC/0045/1964 : (1964) 7 SCR 756.

250. It has been argued somewhat faintly that Triple Talaq would be an essential part of the Islamic faith and would, therefore, be protected by Article 25 of the Constitution of India. Article 25 reads as follows:

Article 25-Freedom of conscience and free profession, practice and propagation of religion.-

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law--

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus.

Explanation I.--The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.--In Sub-clause (b) of Clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

251. "Religion" has been given the widest possible meaning by this Court in **Commissioner, Hindu Religious Endowments, Madras** v. **Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt**, MANU/SC/0136/1954 : 1954 SCR 1005 at 1023-1024. In this country, therefore, atheism would also form part of "religion". But one important caveat has been entered by this Court, namely, that only what is an essential religious practice is protected Under Article 25. A few decisions have laid down what constitutes an essential religious practice. Thus, in **Javed** v. **State of Haryana**, MANU/SC/0523/2003 : 2003 (8) SCC 369, this Court stated as under:

60. Looked at from any angle, the challenge to the constitutional validity of Section 175(1)(*q*) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

(at page 394)

And in **Commissioner of Police** v. **Acharya Jagdishwarananda Avadhuta**, MANU/SC/0218/2004 : 2004 (12) SCC 770, it was stated as under:

9. The protection guaranteed Under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion. (See generally the Constitution Bench decisions in *Commr., H.R.E.* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [MANU/SC/0136/1954 : AIR 1954 SC 282: 1954 SCR 1005], *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay* [MANU/SC/0072/1962 : AIR 1962 SC 853: 1962 Supp (2) SCR 496] and *Seshammal* v. *State of T.N.* [MANU/SC/0631/1972 : (1972) 2 SCC 11: AIR 1972 SC 1586] regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.) What is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part

or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (*sic* essential) part or practices.

(at pages 782-783)

252. Applying the aforesaid tests, it is clear that Triple Talaq is only a form of Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it. According to **Javed** (supra), therefore, this would not form part of any essential religious practice. Applying the test stated in **Acharya Jagdishwarananda** (supra), it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice.
Indeed, Islam divides all human action into five kinds, as has been stated by Hidayatullah, J. in his introduction to **Mulla** (supra). There it is stated:

E. Degrees of obedience: Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.

(i) **First degree:** *Fard.* Whatever is commanded in the Koran, *Hadis* or *ijmaa* must be obeyed.

Wajib. Perhaps a little less compulsory than *Fard* but only slightly less so.

(ii) **Second degree:** *Masnun, Mandub and Mustahab*: These are recommended actions.

(iii) **Third degree**: *Jaiz or Mubah*: These are permissible actions as to which religion is indifferent.

(iv) **Fourth degree**: *Makruh*: That which is reprobated as unworthy.

(v) **Fifth degree**: *Haram*: That which is forbidden.

Obviously, Triple Talaq does not fall within the first degree, since even assuming that it forms part of the Koran, Hadis or Ijmaa, it is not something "commanded". Equally Talaq itself is not a recommended action and, therefore, Triple Talaq will not fall within the second degree. Triple Talaq at best falls within the third degree, but probably falls more squarely within the fourth degree. It will be remembered that under the third degree, Triple Talaq is a permissible action as to which religion is indifferent. Within the fourth degree, it is reprobated as unworthy. We have already seen that though permissible in Hanafi jurisprudence, yet, that very jurisprudence castigates Triple Talaq as being sinful. It is clear, therefore, that Triple Talaq forms no part of

Article 25(1). This being the case, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered Under Article 25(1) of the Constitution.

253. And this brings us to the question as to when petitions have been filed Under Article 32 of the Constitution of India, is it permissible for us to state that we will not decide an alleged breach of a fundamental right, but will send the matter back to the legislature to remedy such a wrong.

254. In **Prem Chand Garg** v. **Excise Commissioner, U.P.**, MANU/SC/0082/1962 : 1963 (Supp.) 1 SCR 885, this Court held:

2. Article 32(1) provides that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed, and sub-art. (4) lays down that this right shall not be suspended except as otherwise provided for by this Constitution. There is no doubt that the right to move this Court conferred on the citizens of this country by Article 32 is itself a guaranteed right and it holds the same place of pride in the Constitution as do the other provisions in respect of the citizens fundamental rights. The fundamental rights guaranteed by Part III which have been made justiciable, form the most outstanding and distinguishing feature of the Indian Constitution. It is true that the said rights are not absolute and they have to be adjusted in relation to the interests of the general public. But the scheme of Article 19 illustrates, the difficult task of determining the propriety or the validity of adjustments made either legislatively or by executive action between the fundamental rights and the demands of socio-economic welfare has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution. It is in the light of this position that the Constitution makers thought it advisable to treat the citizen's right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself. The fundamental right to move this Court can, therefore, be appropriately described as the corner-stone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should, in the words of Patanjali Sastri J., regard itself "as the protector and guarantor of fundamental rights," and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights." (Vide *Romesh Thappar* v. *State of Madras* [MANU/SC/0006/1950 : [1950] SCR 594 at 697]). In discharging the duties assigned to it, this Court has to play the role "of a sentinel on the qui vive" (Vide *State of Madras* v. *V.C. Row* [MANU/SC/0013/1952 : [1952] SCR 594 at 597]) and it must always regard it as its solemn duty to protect the said fundamental rights' zealously and vigilantly (Vide *Daryao* v. *State of U.P.* [MANU/SC/0012/1961 : [1962] 1 SCR 574 at p. 582])

255. We are heartened to note that in a recent U.S. Supreme Court decision the same thing has been said with respect to knocking at the doors of the U.S. Supreme Court in order to vindicate a basic right. In **Obergefell** v. **Hodges**, 135 S. Ct. 2584 at 2605, decided on June 26, 2015, the U.S. Supreme Court put it thus:

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees

and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West *Virginia Bd. of Ed.* v. *Barnette*, MANU/USSC/0148/1943 : 319 U.S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

256. However, counsel for the Muslim Personal Board relied heavily on this Court's decision in **Ahmedabad Women Action Group** v. **Union of India**, MANU/SC/0896/1997 : (1997) 3 SCC 573. This judgment refers to several earlier decisions to hold that the declarations sought for did not deserve disposal on merits, which involve issues of State policy that courts ordinarily do not have concern with. This Court, therefore, declined to entertain writ petitions that asked for very sweeping reliefs which, interestingly enough, included a declaration of voidness as to "unilateral talaq". This Court referred in detail to the judgment of the Bombay High Court in **Narasu Appa** (supra) in declining to review Muslim personal law. However, when it came to the challenge of a statutory enactment, Muslim Women (Protection of Rights on Divorce) Act, 1986, this Court did not wish to multiply proceedings in that behalf, as a challenge was pending before a Constitution Bench regarding the same.

257. Hard as we tried, it is difficult to discover any ratio in this judgment, as one part of the judgment contradicts another part. If one particular statutory enactment is already under challenge, there is no reason why other similar enactments which were also challenged should not have been disposed of by this Court. Quite apart from the above, it is a little difficult to appreciate such declination in the light of **Prem Chand Garg** (supra). This judgment, therefore, to the extent that it is contrary to at least two Constitution Bench decisions cannot possibly be said to be good law.

258. It is at this point that it is necessary to see whether a fundamental right has been violated by the 1937 Act insofar as it seeks to enforce Triple Talaq as a Rule of law in the Courts in India.

259. Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts-(1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the U.K., and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in **State of U.P.** v. **Deoman Upadhyaya** MANU/SC/0060/1960 : (1961) 1 SCR 14 at 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the "discrimination" aspect of Article 14, and evolved a Rule by which subjects could be classified. If the classification was "intelligible" having regard to the object sought to be achieved, it would pass muster Under Article 14's anti-discrimination aspect. Again, Subba Rao, J., dissenting, in **Lachhman Das** v. **State of Punjab**, MANU/SC/0032/1962 : (1963) 2 SCR 353 at 395, warned that

overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content.

He referred to the doctrine of classification as a "subsidiary rule" evolved by courts to give practical content to the said Article.

260. In the pre-1974 era, the judgments of this Court did refer to the "rule of law" or "positive" aspect of Article 14, the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground.

In **S.G. Jaisinghani** v. **Union of India**, MANU/SC/0361/1967 : (1967) 2 SCR 703, this Court held:

In this context it is important to emphasize that the absence of arbitrary power is the first essential of the Rule of law upon which our whole constitutional system is based. In a system governed by Rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The Rule of law from this point of view means that decisions should be made by the application of known principles and Rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any Rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey -- "Law of the Constitution" -- 10th Edn., Introduction cx). "Law has reached its finest moments", stated Douglas, J. in *United States* v. *Wunderlick* [342 US 98],

"when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered". It is in this sense that the Rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilkes* [(1770) 4 Burr. 2528 at 2539],

"means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful".

(pages 718-719)

This was in the context of service Rules being seniority rules, which applied to the Income Tax Department, being held to be violative of Article 14 of the Constitution of India.

261. Similarly, again in the context of an Article 14 challenge to service rules, this Court held in State of **Mysore** v. **S.R. Jayaram**, MANU/SC/0362/1967 : (1968) 1 SCR 349 as follows:

The principle of recruitment by open competition aims at ensuring equality of opportunity in the matter of employment and obtaining the services of the most meritorious candidates. Rules 1 to 8, 9(1) and the first part of Rule 9(2) seek to achieve this aim. The last part of Rule 9(2) subverts and destroys the basic objectives of the preceding rules. It vests in the Government an arbitrary power of patronage. Though Rule 9(1) requires the appointment of successful candidates to Class I posts in the order of merit and thereafter to Class II posts in the order of merit, Rule 9(1) is subject to Rule 9(2), and under the cover of Rule 9(2) the Government can even arrogate to itself the power of assigning a Class I post to a less meritorious and a Class II post to a more meritorious candidate. We hold that the latter part of Rule 9(2) gives the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It is violative of Articles 14 and 16(1) of the Constitution and must be struck down.

(pages 353-354)

262. In the celebrated **Indira Gandhi** v. **Raj Narain** judgment, reported in MANU/SC/0304/1975 : 1975 Supp SCC 1, Article 329-A Sub-clauses (4) and (5) were struck down by a Constitution Bench of this Court. Applying the newly evolved basic structure doctrine laid down in **Kesavananda Bharati** v. **State of Kerala**, MANU/SC/0445/1973 : (1973) 4 SCC 225, Ray, C.J. struck down the said amendment thus:

59. Clause (4) suffers from these infirmities. First, the forum might be changed but another forum has to be created. If the constituent power became itself the forum to decide the disputes the constituent power by repealing the law in relation to election petitions and matters connected therewith did not have any petition to seize upon to deal with the same. Secondly, any decision is to be made in accordance with law. Parliament has power to create law and apply the same. In the present case, the constituent power did not have any law to apply to the case, because the previous law did not apply and no other law was applied by Clause (4). The validation of the election in the present case is, therefore, not by applying any law and it, therefore, offends Rule of law.

(at page 44)

263. This passage is of great significance in that the amendment was said to be bad because the constituent power did not have any law to apply to the case, and this being so, the Rule of law contained in the Constitution would be violated. This Rule of law has an obvious reference to Article 14 of the Constitution, in that it would be wholly arbitrary to decide the case without applying any law, and would thus violate the Rule of law contained in the said Article. Chandrachud, J., was a little more explicit in that he expressly referred to Article 14 and stated that Article 329-A is an outright negation of the right of equality conferred by Article 14. This was the case because the law would be discriminatory in that certain high personages would be put above the law in the absence of a differentia reasonably related to the object of the law. He went on to add:

681. It follows that Clauses (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the Rule of law. Imperfections of language hinder a precise definition of the Rule of law as of the definition of 'law' itself. And the Constitutional law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the Rule of law, delivered his lectures as Vinerian Professor of English law at Oxford, which were published in 1885 under the title, "*Introduction to the Study of the Law of the Constitution*". But so much, I suppose, can be said with reasonable certainty that the Rule of law means that the exercise of powers of Government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to Rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts. The second meaning grew out of Dicey's unsound dislike of the French Droit Administratif which he regarded "as a misfortune inflicted upon the benighted folk across the Channel" [See S.A. de Smith: Judicial Review of Administrative Action, (1968) p. 5]. Indeed, so great was his influence on the thought of the day that as recently as in 1935 Lord Hewart, the Lord Chief Justice of England, dismissed the term "administrative law" as "continental jargon". The third meaning is hardly apposite in the context of our written Constitution for, in India, the Constitution is the source

of all rights and obligations. We may not therefore rely wholly on Dicey's exposition of the Rule of law but ever since the second world war, the Rule has come to acquire a positive content in all democratic countries. [See Wade and Phillips: Constitutional Law (Sixth Edn., pp. 70-73)] The International Commission of Jurists, which has a consultative status under the United Nations, held its Congress in Delhi in 1959 where lawyers, judges and law teachers representing fifty-three countries affirmed that the Rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. One of the committees of that Congress emphasised that no law should subject any individual to discriminatory treatment. These principles must vary from country to country depending upon the provisions of its Constitution and indeed upon whether there exists a written Constitution. As it has been said in a lighter vein, to show the supremacy of the Parliament, the charm of the English Constitution is that "it does not exist". Our Constitution exists and must continue to exist. It guarantees equality before law and the equal protection of laws to everyone. The denial of such equality, as modified by the judicially evolved theory of classification, is the very negation of Rule of law.

(at page 258)

264. This paragraph is an early application of the doctrine of arbitrariness which follows from the Rule of law contained in Article 14. It is of some significance that Dicey's formulation of the Rule of law was referred to, which contains both absence of arbitrary power and equality before the law, as being of the essence of the Rule of law.

265. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the Rule of law contained in Article 14. In a significant passage Bhagwati, J., in **E.P. Royappa** v. **State of T.N.**, MANU/SC/0380/1973 : (1974) 4 SCC 3 stated (at page 38):

85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn

enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

(Emphasis Supplied)

266. This was further fleshed out in **Maneka Gandhi** v. **Union of India**, MANU/SC/0133/1978 : (1978) 1 SCC 248, where, after stating that various fundamental rights must be read together and must overlap and fertilize each other, Bhagwati, J., further amplified this doctrine as follows (at pages 283-284):

The nature and requirement of the procedure Under Article 21

7. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa* v. *State of Tamil Nadu* [MANU/SC/0380/1973 : (1974) 4 SCC 3: 1974 SCC (L&S) 165: (1974) 2 SCR 348] namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

(Emphasis Supplied)

267. This was further clarified in **A.L. Kalra** v. **Project and Equipment Corpn.**, MANU/SC/0259/1984 : (1984) 3 SCC 316, following **Royappa** (supra) and holding that arbitrariness is a doctrine distinct from discrimination. It was held:

19... It thus appears well-settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in *Ajay Hasia case* [MANU/SC/0498/1980 : (1981) 1 SCC 722: 1981 SCC (L&S) 258: AIR 1981 SC 487: (1981) 2 SCR 79: (1981) 1 LLJ 103] and put the matter beyond controversy when it said "wherever therefore, there is arbitrariness in State action whether it be of the Legislature or of the executive or of an 'authority' Under Article 12, Article 14 immediately springs into action and strikes down such State action". This view was further elaborated and affirmed in *D.S. Nakara* v. *Union of India* [MANU/SC/0237/1982 : (1983) 1 SCC 305: 1983 SCC (L&S) 145: AIR 1983 SC 130: (1983) UPSC 263]. In *Maneka Gandhi* v. *Union of India* [MANU/SC/0133/1978 : (1978) 1 SCC 248: AIR 1978 SC 597: (1978) 2 SCR 621] it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14.

(at page 328)

The same view was reiterated in **Babita Prasad** v. **State of Bihar**, MANU/SC/0723/1993 : (1993) Suppl. 3 SCC 268 at 285, at paragraph 31.

268. That the arbitrariness doctrine contained in Article 14 would apply to negate legislation, subordinate legislation and executive action is clear from a celebrated passage in the case of **Ajay Hasia** v. **Khalid Mujib Sehravardi**, MANU/SC/0498/1980 : (1981) 1 SCC 722 (at pages 740-741):

16... The true scope and ambit of Article 14 has been the subject-matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in *E.P. Royappa* v. *State of Tamil Nadu* [MANU/SC/0380/1973 : (1974) 4 SCC 3, 38: 1974 SCC (L&S) 165, 200: (1974) 2 SCR 348] that this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said: [SCC p. 38: SCC (L&S) p. 200, para 85]

The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in *Royappa* case [MANU/SC/0059/1975 : (1975) 1 SCC 485 : 1975 SCC (L&S) 99 : (1975) 3 SCR 616] and it was reaffirmed and elaborated by this Court in *Maneka Gandhi* v. *Union of India* [MANU/SC/0133/1978 : (1978) 1 SCC 248] where this Court again speaking through one of us (Bhagwati, J.) observed: (SCC pp. 283-84, para 7)

Now the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in this Article?

There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

This was again reiterated by this Court in *International Airport Authority* case [MANU/SC/0048/1979 : (1979) 3 SCC 489] at p. 1042 (SCC p. 511) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality Under Article 14 would be breached.

Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' Under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.

(Emphasis Supplied)

269. In this view of the law, a three Judge Bench of this Court in **K.R. Lakshmanan (Dr.)** v. **State of T.N.**, MANU/SC/0309/1996 : (1996) 2 SCC 226, struck down a 1986 Tamil Nadu Act on the ground that it was arbitrary and, therefore, violative of Article 14. Two separate arguments were addressed Under Article 14. One was that the Act in question was discriminatory and, therefore, violative of Article 14. The other was that in any case the Act was arbitrary and for that reason would also violate a separate facet of Article 14. This is clear from paragraph 45 of the said judgment. The judgment went on to accept both these arguments. In so far as the discrimination aspect is concerned, this Court struck down the 1986 Act on the ground that it was discriminatory in paragraphs 46 and 47. Paragraphs 48 to 50 are important, in that this Court struck down the 1986 Act for being arbitrary, separately, as follows (at pages 256-257):

48. We see considerable force in the contention of Mr. Parasaran that the acquisition and transfer of the undertaking of the Club is arbitrary. The two Acts were amended by the 1949 Act and the definition of 'gaming' was amended. The object of the amendment was to include horse-racing in the definition of 'gaming'. The provisions of the 1949 Act were, however, not enforced till the 1974 Act was enacted and enforced with effect from 31-3-1975. The 1974 Act was enacted with a view to provide for the abolition of wagering or betting on horse-races in the State of Tamil Nadu. It is thus obvious that the consistent policy of the State Government, as projected through various legislations from 1949 onwards, has been to declare horse-racing as gambling and as such prohibited under the two Acts. The operation of the 1974 Act was stayed by this Court and as a consequence the horse-races are continuing under the orders of this Court. The policy of the State Government as projected in all the enactments on the subject prior to 1986 shows that the State Government considered horse-racing as gambling and as such prohibited under the law. The 1986 Act on the other hand declares horse-racing as a public purpose and in the interest of the general public. There is apparent contradiction in the two stands. We do not agree with the contention of Mr. Parasaran that the 1986 Act is a colourable piece of legislation, but at the same time we are of the view that no public purpose is being served by acquisition and transfer of the undertaking of the Club by the Government. We fail to understand how the State Government can acquire and take over the functioning of the race-club when it has already enacted the 1974 Act with the avowed object of declaring horse-racing as gambling? Having enacted a law to abolish betting on horse-racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse-racing again in the name of public good and public purpose. It is ex facie irrational to invoke "public good and public purpose" for declaring horse-racing as gambling and as such prohibited under law, and at the same time speak of "public purpose and public good" for acquiring the race-club and conducting the horse-racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1986 Act.

49. We, therefore, hold that the provisions of 1986 Act are discriminatory and arbitrary and as such violate and infract the right to equality enshrined Under Article 14 of the Constitution.

50. Since we have struck down the 1986 Act on the ground that it violates Article 14 of the Constitution, it is not necessary for us to go into the question of its validity on the ground of Article 19 of the Constitution.

(Emphasis Supplied)

270. Close upon the heels of this judgment, a discordant note was struck in **State of A.P.** v. **McDowell & Co.**, MANU/SC/0427/1996 : (1996) 3 SCC 709. Another three Judge Bench, in repelling an argument based on the arbitrariness facet of Article 14, held:

43. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is 'arbitrary' and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in *State of T.N.* v. *Ananthi Ammal* [MANU/SC/0416/1995 : (1995) 1 SCC 519]. Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, Parliament is supreme. There are no limitations upon the power of Parliament. No court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness -- concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection Clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the

representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see *Council of Civil Service Unions* v. *Minister for Civil Service* [MANU/UKHL/0045/1984 : 1985 AC 374 : (1984) 3 All ER 935: (1984) 3 WLR 1174] which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in *R.* v. *Secy. of State for Home Deptt., ex p Brind* [MANU/UKHL/0008/1991 : 1991 AC 696 : (1991) 1 All ER 720] AC at 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted. (at pages 737-739)

271. This judgment failed to notice at least two binding precedents, first, the judgment of a Constitution Bench in **Ajay Hasia** (supra) and second, the judgment of a coordinate three judge bench in **Lakshmanan** (supra). Apart from this, the reasoning contained as to why arbitrariness cannot be used to strike down legislation as opposed to both executive action and subordinate legislation was as follows:

(1) According to the Bench in **McDowell** (supra), substantive due process is not something accepted by either the American courts or our courts and, therefore, this being a reiteration of substantive due process being read into Article 14 cannot be applied. A Constitution Bench in **Mohd. Arif** v. **Supreme Court of India**, MANU/SC/0754/2014 : (2014) 9 SCC 737, has held, following the celebrated **Maneka Gandhi** (supra), as follows:

27. The stage was now set for the judgment in *Maneka Gandhi* [*Maneka Gandhi* v. *Union of India*, MANU/SC/0133/1978 : (1978) 2 SCR 621: (1978) 1 SCC 248]. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [See at SCR pp. 646-48: SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687: SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23: SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus: (SCR p. 723: SCC pp. 338-39, para 85)

85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness,

dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses.

28. Close on the heels of *Maneka Gandhi case* [*Maneka Gandhi* v. *Union of India*, MANU/SC/0133/1978 : (1978) 2 SCR 621: (1978) 1 SCC 248] came *Mithu* v. *State of Punjab* [MANU/SC/0065/1983 : (1983) 2 SCC 277: 1983 SCC (Cri) 405], in which case the Court noted as follows: (SCC pp. 283-84, para 6)

6. ... In *Sunil Batra* v. *Delhi Admn.* [MANU/SC/0184/1978 : (1978) 4 SCC 494: 1979 SCC (Cri) 155], while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" Clause as in the American Constitution; the same consequence ensued after the decisions in *Bank Nationalisation case [Rustom Cavasjee Cooper (Banks Nationalisation)* v. *Union of India*, MANU/SC/0011/1970 : (1970) 1 SCC 248] and *Maneka Gandhi case [Maneka Gandhi* v. *Union of India*, MANU/SC/0133/1978 : (1978) 2 SCR 621: (1978) 1 SCC 248]....

In *Bachan Singh [Bachan Singh* v. *State of Punjab*, MANU/SC/0055/1982 : (1980) 2 SCC 684: 1980 SCC (Cri) 580] which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in *Maneka Gandhi [Maneka Gandhi* v. *Union of India*, MANU/SC/0133/1978 : (1978) 2 SCR 621: (1978) 1 SCC 248], it will read to say that: (SCC p. 730, para 136)

136. "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty.

(at pages 755-756)

Clearly, therefore, the three Judge Bench has not noticed **Maneka Gandhi** (supra) cited in **Mohd. Arif** (supra) to show that the wheel has turned full circle and substantive due process is part of Article 21 as it is to be read with Articles 14 and 19.

Mathew, J., while delivering the first Tej Bahadur Sapru Memorial Lecture entitled *"Democracy and Judicial Review*", has pointed out:

Still another point and I am done. The constitutional makers have formally refused to incorporate the "due process clause" in our Constitution on the basis, it seems, of the advice tendered by Justice Frankfurter to Shri B.N. Rau thinking that it will make the Court a third Chamber and widen the area of Judicial review. But unwittingly, I should think, they have imported the most vital and active element of the concept by their theory of review of 'reasonable restrictions' which might be imposed by law on many of the fundamental rights. Taken in its modern expanded sense, the American "due process clause" stands as a high level guarantee of 'reasonableness' in relation between man and state, an injunction against arbitrariness or oppressiveness. I have had occasion to consider this question in *Kesavananda Bharati's case.* I said:

When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources...If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause.

In fact, **Mithu** v. **State of Punjab**, MANU/SC/0065/1983 : (1983) 2 SCC 277, followed a Constitution Bench judgment in **Sunil Batra** v. **Delhi Administration and Ors.**, MANU/SC/0184/1978 : (1978) 4 SCC 494. In that case, Section 30(2) of the Prisons Act was challenged as being unconstitutional, because every prisoner under sentence of death shall be confined in a cell apart from all other prisoners, that is to say he will be placed under solitary confinement. The Constitution Bench read down Section 30(2) to refer only to a person who is sentenced to death finally, which would include petitions for mercy to the Governor and/or to the President which have not yet been disposed of. In so holding, Desai, J. speaking for four learned Judges, held (at pages 574-575):

228. The challenge Under Article 21 must fail on our interpretation of Sub-section (2) of Section 30. Personal liberty of the person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of Article 21 unless the curtailment has the backing of law. Sub-section (2) of Section 30 establishes the procedure by which it can be curtailed but it must be read subject to our interpretation. The word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in *Maneka Gandhi's case* (supra) that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14. Once Section 30(2) is read down in the manner in which we have done, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law.

(Emphasis Supplied)

In a long and illuminating concurring judgment, Krishna Iyer, J., added (at page 518):

52. True, our Constitution has no 'due process' Clause or the VIII Amendment; but, in this branch of law, after *R.C. Cooper* v. *Union of India*, MANU/SC/0011/1970 : (1970) 1 SCC 248 and *Maneka Gandhi v. Union of India*, MANU/SC/0133/1978 : (1978) 1 SCC 248, the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.

(Emphasis Supplied)

Coming to **Mithu** (supra), a Constitution Bench of this Court struck down Section 303 of the Indian Penal Code, by which a mandatory sentence of death was imposed on life convicts who commit murder in jail. The argument made by the learned Counsel on behalf of the Petitioner was set out thus:

5. But before we proceed to point out the infirmities from which Section 303 suffers, we must indicate the nature of the argument which has been advanced on behalf of the Petitioners in order to assail the validity of that section. The sum and substance of the argument is that the provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and Section 303 of the Penal Code struck down.

(at page 283)

After quoting from **Sunil Batra** (supra), the question before the Court was set out thus:

6.....The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21.

(at page 285)

After setting out the question thus, the Court further stated:

9.....Is a law which provides for the sentence of death for the offence of murder, without affording to the Accused an opportunity to show cause why that sentence should not be imposed, just and fair? Secondly, is such a law just and fair if, in the very nature of things, it does not require the court to state the reasons why the supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused?" (at page 287)

The question was then answered in the following manner:

18. It is because the death sentence has been made mandatory by Section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity Under Section 235(2) of the Code of Criminal Procedure to show cause why they should not be sentenced to death and the court is relieved from its obligation Under Section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust."

19... To prescribe a mandatory sentence of death for the second of such offences for the reason that the offender was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bounds of all reason. Assuming that Section 235(2) of the Code of Criminal Procedure were applicable to the case and the court was under an obligation to hear the Accused on the question of sentence, it would have to put some such question to the accused:

You were sentenced to life imprisonment for the offence of forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be sentenced to death?

The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances.

23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law."

(at pages 293, 294 and 296)

In a concurring judgment, Chinnappa Reddy, J., struck down the Section in the following terms:

25. Judged in the light shed by *Maneka Gandhi* [MANU/SC/0133/1978 : (1978) 1 SCC 248] and *Bachan Singh* [MANU/SC/0055/1982 : (1980) 2 SCC 684], it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the Accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."

(at page 298)

It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".

However, the three Judge Bench in **Mcdowell** (supra) dealt with the binding Constitution Bench decision in **Mithu** (supra) as follows (at page 739):

45. Reference was then made by Shri G. Ramaswamy to the decision in *Mithu* v. *State of Punjab* [MANU/SC/0065/1983 : (1983) 2 SCC 277: 1983 SCC (Cri) 405] wherein Section 303 of the Indian Penal Code was struck down. But that decision turned mainly on Article 21 though Article 14 is also referred to along with Article 21. Not only did the offending provision exclude any scope for application of judicial discretion, it also deprived the Accused of the procedural safeguards contained in Sections 235(2) and 354(3) of the Code of Criminal Procedure. The ratio of the said decision is thus of no assistance to the Petitioners herein.

A binding judgment of five learned Judges of this Court cannot be said to be of "no assistance" by stating that the decision turned mainly on Article 21, though Article 14 was also referred to. It is clear that the ratio of the said Constitution Bench was based both on Article 14 and Article 21 as

is clear from the judgment of the four learned Judges in paragraphs 19 and 23 set out supra.[12] A three Judge Bench in the teeth of this ratio cannot, therefore, be said to be good law. Also, the binding Constitution Bench decision in **Sunil Batra** (supra), which held arbitrariness as a ground for striking down a legislative provision, is not at all referred to in the three Judge Bench decision in **Mcdowell** (supra).

(2) The second reason given is that a challenge Under Article 14 has to be viewed separately from a challenge Under Article 19, which is a reiteration of the point of view of **A.K. Gopalan** v. **State of Madras**, MANU/SC/0012/1950 : 1950 SCR 88, that fundamental rights must be seen in watertight compartments. We have seen how this view was upset by an eleven Judge Bench of this Court in Rustom Cavasjee Cooper v. Union of India, MANU/SC/0011/1970 : (1970) 1 SCC 248, and followed in **Maneka Gandhi** (supra). Arbitrariness in legislation is very much a facet of unreasonableness in Article 19(2) to (6), as has been laid down in several Judgments of this Court, some of which are referred to in **Om Kumar** (infra) and, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation Under Article 14 as well.

(3) The third reason given is that the Courts cannot sit in judgment over Parliamentary wisdom. Our law reports are replete with instance after instance where Parliamentary wisdom has been successfully set at naught by this Court because such laws did not pass muster on account of their being "unreasonable", which is referred to in **Om Kumar** (infra).

We must never forget the admonition given by Khanna, J. in **State of Punjab** v. **Khan Chand**, MANU/SC/0353/1973 : (1974) 1 SCC 549. He said:

12. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any Article of the Constitution as it is theirs to uphold its validity in case it is found' to suffer from no such infirmity.

This again cannot detain us.

(4) One more reason given is that the proportionality doctrine, doubtful of application even in administrative law, should not, therefore, apply to this facet of Article 14 in constitutional law. Proportionality as a constitutional doctrine has been highlighted in **Om Kumar** v. **Union of India**, MANU/SC/0704/2000 : (2001) 2 SCC 386 at 400-401 as follows:

30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India -- such as freedom of speech and expression, freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India -- this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. "Reasonable restrictions" Under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which "reasonable restrictions" could be imposed was considered. In *Chintamanrao* v. *State of M.P.* [MANU/SC/0008/1950 : AIR 1951 SC 118 : 1950 SCR 759] Mahajan, J. (as he then was) observed that "reasonable restrictions" which the State could impose on the fundamental rights "should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public". "Reasonable" implied intelligent care and deliberation, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a *proper balance* between the rights guaranteed and the control permissible Under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in *State of Madras* v. *V.G. Row* [MANU/SC/0013/1952 : AIR 1952 SC 196 : 1952 SCR 597: 1952 Cri LJ 966], observed that the Court must keep in mind the "nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the *disproportion* of the imposition, the prevailing conditions at the time". This principle of proportionality vis-à-vis legislation was referred to by Jeevan Reddy, J. in *State of A.P.* v. *McDowell & Co.* [MANU/SC/0427/1996 : (1996) 3 SCC 709] recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of "proportionality". Provisions of the Code of Criminal Procedure, 1974 and the Indian Penal Code came up for consideration in *Bachan Singh* v. *State of Punjab* [MANU/SC/0055/1982 : (1980) 2 SCC 684: 1980 SCC (Cri) 580] the majority upholding the legislation. The dissenting judgment of Bhagwati, J. (see *Bachan Singh* v. *State of Punjab* [MANU/SC/0055/1982 : (1982) 3 SCC 24: 1982 SCC (Cri) 535]) dealt elaborately with "proportionality" and held that the punishment provided by the statute was *disproportionate*.

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or Rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India* v. *Nergesh Meerza* [MANU/SC/0688/1981 : (1981) 4 SCC 335: 1981 SCC (L&S) 599] (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in State of A.P. v. McDowell and Co. [MANU/SC/0427/1996 : (1996) 3 SCC 709].

272. The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the Rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in **McDowell** (supra) when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.<mpara>

273. We only need to point out that even after **McDowell** (supra), this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In **Malpe Vishwanath Acharya** v. **State of Maharashtra**, MANU/SC/0905/1998 : (1998) 2 SCC 1, this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India

(see paragraphs 8 to 15 and 31).

274. Similarly in **Mardia Chemicals Ltd. and Ors.** v. **Union of India and Ors. etc. etc.**, MANU/SC/0323/2004 : (2004) 4 SCC 311 at 354, this Court struck down Section 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as follows:

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (*i*) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (*ii*) there is no determination of the amount due as yet, (*iii*) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (*iv*) no special reason for double security in respect of an amount yet to be determined and settled, (*v*) 75% of the amount claimed by no means would be a meagre amount, and (*vi*) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not only onerous and

oppressive but also unreasonable and arbitrary. Therefore, in our view, Sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.

275. In two other fairly recent judgments namely **State of Tamil Nadu** v. **K. Shyam Sunder**, MANU/SC/0911/2011 : (2011) 8 SCC 737 at paragraphs 50 to 53, and **A.P. Dairy Development Corpn. Federation** v. **B. Narasimha Reddy**, MANU/SC/1020/2011 : (2011) 9 SCC 286 at paragraph 29, this Court reiterated the position of law that a legislation can be struck down on the ground that it is arbitrary and therefore violative of Article 14 of the Constitution.

276. In a Constitution Bench decision in **Ashoka Kumar Thakur** v. **Union of India**, MANU/SC/1397/2008 : (2008) 6 SCC 1 at 524, an extravagant argument that the impugned legislation was intended to please a Section of the community as part of the vote catching mechanism was held to not be a legally acceptable plea and rejected by holding that:

219. A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires the provisions of the Constitution. If any of the provisions of the legislation violates fundamental rights or any other provisions of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights Under Article 19 of the Constitution. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. This Court in ***State of Rajasthan*** v. ***Union of India*** [MANU/SC/0370/1977 : (1977) 3 SCC 592] said: (SCC p. 660, para 149)

149. ... if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities.

277. A subsequent Constitution Bench in **K.T. Plantation (P) Ltd.** v. **State of Karnataka**, MANU/SC/0914/2011 : (2011) 9 SCC 1, dealt with the constitutional validity of the Roerich and Devikarani Roerich Estate (Acquisition and Transfer) Act, 1996, the legal validity of Section 110 of the Karnataka Land Reforms Act, 1961, Notification No. RD 217 LRA 93 dated 8-3-1994 issued by the State Government thereunder and the scope and content of Article 300-A of the Constitution. While examining the validity of a legislation which deprives a person of property Under Article 300-A, this Court when faced with **Mcdowell** (supra) pointed out that (at page 58):

203. Even in *McDowell case* [MANU/SC/0427/1996 : (1996) 3 SCC 709], it was pointed out that some or other constitutional infirmity may be sufficient to invalidate the statute. A three-Judge Bench of this Court in *McDowell & Co. case* [MANU/SC/0427/1996 : (1996) 3 SCC 709] held as follows: (SCC pp. 737-38, para 43)

43. ... The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two

grounds alone viz. (*1*) lack of legislative competence and (*2*) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground....
No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom.

204. A two-Judge Bench of this Court in *Union of India* v. *G. Ganayutham* [MANU/SC/0834/1997 : (1997) 7 SCC 463: 1997 SCC (L&S) 1806], after referring *to McDowell case* [MANU/SC/0427/1996 : (1996) 3 SCC 709] stated as under: (*G. Ganayutham case* [MANU/SC/0834/1997 : (1997) 7 SCC 463: 1997 SCC (L&S) 1806], SCC p. 476, para 22)

22. ... That a statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the *statute* and that the court can go into the question whether there is a proper *balancing* of the fundamental right and the restriction imposed, is well settled.

205. Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy.

(Emphasis Supplied)

278. In a recent Constitution Bench decision in **Natural Resources Allocation, In re, Special Reference No. 1 of 2012**, MANU/SC/0793/2012 : (2012) 10 SCC 1, this Court went into the arbitrariness doctrine in some detail. It referred to **Royappa** (supra), **Maneka Gandhi** (supra) and **Ajay Hasia** (supra) (and quoted from paragraph 16 which says that "... the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality Under Article 14 would be breached..."). It then went on to state that "arbitrariness" and "unreasonableness" have been used interchangeably as follows:

103. As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in *Sharma Transport* v. *Govt. of A.P.* [MANU/SC/0759/2001 : (2002) 2 SCC 188], this Court has observed thus: (SCC pp. 203-04, para 25)

25. ... In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary.

The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

(at page 81)

After stating all this, it then went on to comment, referring to **McDowell** (supra) that no arbitrary use should be made of the arbitrariness doctrine. It then concluded (at page 83):

107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as *McDowell case* [MANU/SC/0427/1996 : (1996) 3 SCC 709] has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

(Emphasis Supplied)

On a reading of this judgment, it is clear that this Court did not read **McDowell** (supra) as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and **Ajay Hasia** (supra) in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" Under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary"; i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favoritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

279. Another Constitution Bench decision reported as **Dr. Subramanian Swamy** v. **Director, Central Bureau of Investigation**, MANU/SC/0417/2014 : (2014) 8 SCC 682, dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This Section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been made to the Constitution Bench by the reference order in **Dr. Subramanian Swamy** v. **Director, Central Bureau of Investigation**, MANU/SC/0083/2005 : (2005) 2 SCC 317, and after referring to several judgments including **Ajay Hasia** (supra), **Mardia Chemicals** (supra), **Malpe Vishwanath Acharya** (supra) and **McDowell** (supra), the reference *inter alia* was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

After referring to the submissions of counsel, and several judgments on the discrimination aspect of Article 14, this Court held:

48. In *E.P. Royappa [E.P. Royappa* v. *State of T.N.*, MANU/SC/0380/1973 : (1974) 4 SCC 3: 1974 SCC (L&S) 165], it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)

85. ... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders--if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.

(at pages 721-722)

Since the Court ultimately struck down Section 6-A on the ground that it was discriminatory, it became unnecessary to pronounce on one of the questions referred to it, namely, as to whether arbitrariness could be a ground for invalidating legislation Under Article 14. Indeed the Court said as much in paragraph 98 of the judgment as under (at page 740):

Having considered the impugned provision contained in Section 6-A and for the reasons indicated above, we do not think that it is necessary to consider the other objections challenging the impugned provision in the context of Article 14.

280. However, in **State of Bihar** v. **Bihar Distillery Ltd.**, MANU/SC/0354/1997 : (1997) 2 SCC 453 at paragraph 22, in **State of M.P.** v. **Rakesh Kohli**, MANU/SC/0443/2012 : (2012) 6 SCC

312 at paragraphs 17 to 19, in **Rajbala** v. **State of Haryana and Ors.**, MANU/SC/1416/2015 : (2016) 2 SCC 445 at paragraphs 53 to 65 and Binoy Viswam v. Union of India, MANU/SC/0693/2017 : (2017) 7 SCC 59 at paragraphs 80 to 82, **McDowell** (supra) was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation Under Article 14. As has been noted by us earlier in this judgment, **Mcdowell** (supra) itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following **McDowell** (supra) are, therefore, no longer good law.

281. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In **Cellular Operators Association of India** v. **Telecom Regulatory Authority of India**, MANU/SC/0551/2016 : (2016) 7 SCC 703, this Court referred to earlier precedents, and held:

Violation of fundamental rights

42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. (See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [MANU/SC/0406/1984 : (1985) 1 SCC 641: 1985 SCC (Tax) 121], SCC at p. 689, para 75.)

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of Karnataka* [MANU/SC/0242/1996 : (1996) 10 SCC 304], this Court held: (SCC p. 314, para 13)

13. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the Appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here Under Article 14 is not executive action but delegated legislation. *The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [MANU/SC/0406/1984 : (1985) 1 SCC 641: 1985 SCC (Tax) 121], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned Under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'*. Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires'. *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.*

44. Also, in *Sharma Transport* v. *State of A.P.* [MANU/SC/0759/2001 : (2002) 2 SCC 188], this Court held: (SCC pp. 203-04, para 25)

25. ... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

(at pages 736-737)

282. It will be noticed that a Constitution Bench of this Court in **Indian Express Newspapers** v. **Union of India**, MANU/SC/0406/1984 : (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case,

there is no rational distinction between the two types of legislation when it comes to this ground of challenge Under Article 14.
The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14.
Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.
We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.

283. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in **Fyzee's book** (supra), the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God. Indeed, in **Shamim Ara** v. **State of U.P.**, MANU/SC/0850/2002 : (2002) 7 SCC 518, this Court after referring to a number of authorities including certain recent High Court judgments held as under:

13...The correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters -- one from the wife's family and the other from the husband's; if the attempts fail, *talaq* may be effected (para 13). In *Rukia Khatun* case [MANU/GH/0031/1979 : (1981) 1 Gau LR 375] the Division Bench stated that the correct law of *talaq*, as ordained by the Holy Quran, is: (*i*) that "talaq" must be for a reasonable cause; and (*ii*) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, *"talaq"* may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts.

(at page 526)

284. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in **Rashid Ahmad** (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after **Shamim Ara** (supra). This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained Under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.

ORDER of THE COURT

In view of the different opinions recorded, by a majority of 3:2 the practice of 'talaq-e-biddat'- triple talaq is set aside.

---

[1] With regard to triple talaq, Fyzee comments: Such a talaq is lawful, although sinful, in Hanafi law; but in Ithna 'Ashari and the Fatimid laws it is not permissible. p. 154. Ameer Ali notes: The Shiahs and the Malikis do not recognise the validity of the talak-ul-bid'at, whilst the Hanafi and the Shaf'eis agree in holding that a divorce is effective, if pronounced in the bid'at form, though in its commission the man incurs a sin. p. 435. These statements may not be accurate as to the views of Malikis and Shaf'eis, but it is universally recognized that the above-mentioned Shi'a schools do not find triple talaq to be a valid form of divorce.

[2] Classical Hanafi law, especially as it is practiced in India, seems to take the opinion that triple talaq is sinful yet effective as an irrevocable divorce. See, e.g., Mulla p. 261-62; The Hedaya, p. 72-73, 83. On the other hand, Ameer Ali suggests that a triple talaq can be revoked within the iddat period. p. 436. Maulana 'Umar Ahmad 'Usmani, in The Quran, Women and Modern Society, by Asghar Ali Engineer, New Dawn: New Delhi (2005), states that Muhammad ibn Muqatil, a Hanafi jurist, gave evidence indicating that Imam Abu Hanifa developed a second opinion that a triple talaq constitutes one talaq and that it can therefore be revoked within the iddat period. Maulana 'Umar Ahmad 'Usmani quotes from Fath al-Bari by Hafiz Ibn Jahar al-Asqalani, who states that many eminent jurists have held the opinion that three talaqs pronounced in one sitting constitute

only one talaq. Maulana Wahiduddin Khan, in Concerning Divorce, Goodword Books: New Delhi (2003), p. 29, says that in the case of a man who was 'emotionally overwrought' when pronouncing talaq three times, "His three utterances of the word talaq may be taken as an expression of the intensity of his emotions and thus the equivalent of only one such utterance". He further gives the example of a Hadith recorded by Imam Abu Dawud in which Rukana ibn Abu Yazid said talaq to his wife three times in one sitting, and then regretted his action. When he told the Prophet Muhammad (peace be upon him) how he had divorced his wife, the Prophet (pbuh) observed, "All three count as only one. If you want, you may revoke it." p. 28-29 (original Hadith found in Musnad Ahmad ibn Hanbal). There is also a Hadith reported by Abdullah ibn Abbas that in the Prophet's (pbuh) lifetime, during the caliphate of Abu Bakr, and during the first two years of Umar ibn al-Khattab's caliphate, triple talaq was counted as one talaq only, but that Umar then made triple talaq binding upon his people so that they learned the consequences of their hasty actions. Sahih Muslim 3491. Maulana Wahiduddin Khan observes this Rule was of a "temporary nature" and was specific to the people of the time, and that the 'ijma of the Companions on Umar's decision was also temporary, as 'ijma cannot override the system of divorce prescribed in the Quran. p. 30, 32. He notes that the Shariah is eternal, but that a Muslim ruler can make exceptions in special circumstances and can ensure that women affected by such a ruling are fully compensated. p. 30-31. He concludes that scholars today cannot justify enforcing triple talaq by citing Umar's ruling because they do not have the powers of a Caliph as Umar had. p. 32. It seems that modern Indian Hanafi scholars have taken this opinion as well: the Compendium of Islamic Laws, 2001, Part II, Section 24, states the following: "If a person pronouncing talaq says that he intended only a single talaq and repeated the words of talaq only to put emphasis and these words were not meant to pronounce more than one talaq, his statement on oath will be accepted". Translated by Mahmood. (Also see: The Muslim Law of India, 3rd ed., Tahir Mahmood, Lexis Nexis Butterworths: New Delhi (2002), p. 107, where the learned author noted: "In India there has been no legislation in this regard, but the muftis of the time now agree that if a man pronounces the so-called 'triple talaq' but later swears that he did not mean it, his declaration may be given the effect of a single talaq revocable during iddat and, if not so revoked, leaving room for a fresh nikah thereafter with the wife's consent"). Such a view is, perhaps, based upon an application of the following legal maxim of Islamic law-Al-umuru bi-maqasidiha: Acts are judged by the intention behind them.

Sheikh Sayyed Sabiq in Fiqh As-Sunnah states on the subject of triple talak that although the majority opinion is that triple talak will count as three divorces, other scholars such as Ibn Taymiyyah and Ibn al-Qayyim, as well as Companions like 'Ata', Tawuus, Ibn Dinar, 'Ali ibn Abi Talib, Ibn Mas'ud, 'Abdur-Rahman ibn 'Awf, Az-Zubayr, were of the opinion that it counts as only one pronouncement of divorce. He then says, "This latter view is believed to be the most correct." Some go as far as to argue that there is ijma 'that triple talak counts as three talaks. However, according to the requirements for ijma '(in the Hanafi madhab), 'no opinion to the contrary should have been expressed on the question by any of the Companions, or by other Mujtahids before the formation of the Ijma'," and "none of the Mujtahids taking part in the decision should have afterwards changed his opinion." Abdur Rahim, p. 145. Here, the first condition is certainly not met, and the second is arguably not met. Finally, many Muslim countries, including Algeria, Egypt, Jordan, Morocco, Sudan, Syria, and Yemen, have implemented laws that uphold the notion that a triple talak counts as only one talak. Personal Law in Islamic Countries, Tahir Mahmood, Academy of Law and Religion: New Delhi (1987).

[3] See supra, fn 25 & 26, for the opinion of the Hanafi madhab that triple talaq is sinful.

[4] Once the Prophet (pbuh) was informed about a man who had pronounced three divorces at one time. He got up in anger, saying, "Is sport being made of the Book of Allah while I am (yet) among you?" Reported by an-Nasai'i.

[5] The exact Hadith is as follows: "Abdullah ibn Abbas reported that the pronouncement of three divorces during the lifetime of Allah's Messenger (pbuh) and that of Abu Bakr and two years of the caliphate of Umar was treated as one. But Umar ibn al-Khattab said, "Verily the people have begun to hasten in the matter in which they are required to observe respite. So if we had imposed this upon them, [it would have deterred them from doing so!] and he imposed it upon them." Sahih Muslim 3491.

[6] MANU/AP/0626/1996 : (1996) ALT 1138 (-Writ Petition No. 9717 of 1983, decided on 9.10.1996)

[7] **141. Law declared by Supreme Court to be binding on all courts.**-The law declared by the Supreme Court shall be binding on all courts within the territory of India.

[8]**STATEMENT of OBJECTS AND REASONS**
For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (*Shariat*) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.

(Emphasis supplied)

[9] Tahir Mahmood (ed.), Asaf A.A. Fyzee Outlines of Muhammadan Law, 5th edition 2008.

[10] Verses from the Holy Quran as extracted above are taken from "The Holy Qur'an" translated by Abdullah Yusuf Ali which was agreed to be a fair translation by all parties.

[11]Similar observations were made by the High Court of Gauhati through Baharul Islam, J. in

Jiauddin Ahmed v. Anwara Begum MANU/GH/0033/1978 : (1981) 1 Gau LR 358 wherein he noted that "though marriage under Muslim Law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution". This view has been noted and approved of in **Shamim Ara** at paragraph 13.

(Emphasis supplied)

[12] It is clear that one judgment can have more than one *ratio decidendi*. This was recognized early on by the Privy Council in an appeal from the Supreme Court of New South Wales, in **Commissioners of Taxation for the State of New South Wales** v. **Palmer and Ors.**, 1907 Appeal Cases 179 at 184. Lord Macnaghten put it thus:
... But it is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.

In **Jacobs** v. **London County Council**, [1950] 1 All E.R. 737 at 741, the House of Lords, after referring to some earlier decisions held, as follows:
..However, this may be, there is, in my opinion, no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in *London Jewellers, Ltd.*, v. *Attenborough* ([1934] 2 K.B. 206). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in *Folkes* v. *King* ([1923] 1 K.B. 282), in which the court had given two grounds for its decision, the second of which [as stated by Greer, L.J. ([1934] 2 K.B. 222), in *Attenborough's* case ([1934] 2 K.B. 206)] was that:
....where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick.

In *Attenborough's* case ([1934] 2 K.B. 206) it was contended that, since there was another reason given for the decision in Folkes' case ([1923] 1 K.B. 282), the second reason was obiter, but Greer, L.J., said ([1934] 2 K.B. 222) in reference to the argument of counsel:
I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift, J., and which commended itself to me in *Folkes* v. *King* ([1923] 1 K.B. 282), but that view is not open to us in view of the decision of the Court of Appeal in Folkes v. King ([1923] 1 K.B. 282). In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the *ratio decidendi* and neglect the second, or to pick out the second reason as the *ratio decidendi* and neglect the first; we must take both as forming the ground of the judgment.

Back to Index

MANU/SC/0329/2015

Neutral Citation: 2015/INSC/257

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 167 of 2012, Writ Petition (Civil) No. 21 of 2013, Writ Petition (Civil) No. 23 of 2013, Writ Petition (Civil) No. 97 of 2013, Writ Petition (Criminal) No. 199 of 2013, Writ Petition (Civil) No. 217 of 2013, Writ Petition (Criminal) No. 222 of 2013, Writ Petition (Criminal) No. 225 of 2013, Writ Petition (Civil) No. 758 of 2014 and Writ Petition (Criminal) No. 196 of 2014

Decided On: 24.03.2015

Appellants: Shreya Singhal **Vs.** Respondent: Union of India (UOI)

Hon'ble Judges/Coram:

Jasti Chelameswar and Rohinton Fali Nariman, JJ.

Subject: Media and Communication

Subject: Criminal

Relevant Section:

INFORMATION TECHNOLOGY ACT, 2000 - Section 69A; INFORMATION TECHNOLOGY ACT, 2000 - Section 79; INFORMATION TECHNOLOGY ACT, 2000 - Section 66A; CONSTITUTION OF INDIA - Article 19(1)(a)

Disposition:
Disposed of

Case Note:

Constitution - Speech and expression - Freedom of - Infringement thereto - Sections 66A, 69 and 79 of Information Technology Act, 2000, Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 and Section 118(d) of Kerala Police Act, Section 95 and 96 Code of Criminal Procedure, 1973 and Articles 19(1)A and 19(2) of Constitution of India - Present appeal filed to determine validity of Sections 66A, 69A and 79 of Act, Information Technology Rules, 2009 and Section 118(d) of Kerala Police Act - Whether Sections 66A, 69 and 79 of IT Act and Section 118(d) of Act

required to be declared unconstitutional for being in violation of Article 19(1)(a) and not saved by Article 19(2) - Held, Petitioners were correct in saying that public's right to know was directly affected by Section 66A - Petitioners were right in saying that Section 66A in creating offence against persons who use internet and annoy or cause inconvenience to others very clearly affects freedom of speech and expression of citizenry of India at large - Section 66A arbitrarily, excessively and disproportionately invades right of free speech and upsets balance between such right and reasonable restrictions that may be imposed on such right - Therefore, hold Section 66A was unconstitutional also on ground that it takes within its sweep protected speech and speech that was innocent in nature - Therefore hold that no part of Section 66A was severable and provision as whole must be declared unconstitutional - Section 66A creates offence which was vague and overbroad, and, therefore, unconstitutional under Article 19(1)(a) and not saved by Article 19(2) - Kerala Police Act as whole would necessarily fall under Entry 2 of List II - Section 66A would apply directly to Section 118(d) of Act, as causing annoyance in indecent manner suffers from same type of vagueness and over breadth, that led to the invalidity of Section 66A - Section 118(d) also violates Article 19(1)(a) and not being reasonable restriction on said right and not being saved under any of subject matters contained in Article 19(2) (i) was hereby declared to be unconstitutional - Section 69A unlike Section 66A was narrowly drawn provision with several safeguards - Merely because certain additional safeguards such as those found in Section 95 and 96 Code were not available did not make Rules constitutionally infirm - Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79 - Thus, Section 66A of Act, 2000 was struck down in its entirety being violative of Article 19(1)(a) and not saved Under Article 19(2) - Section 69A and Information Technology Rules 2009 were constitutionally valid - Section 79 was valid subject to Section 79(3)(b) - Section 118(d) of Kerala Police Act was struck down being violative of Article 19(1)(a) and not saved by Article 19(2) - Petitions disposed of. [paras 20, 41, 44, 90, 98, 100, 105, 106, 109, 111, 117 and 119]

JUDGMENT

Rohinton Fali Nariman, J.

1. This batch of writ petitions filed Under Article 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The immediate cause for concern in these petitions is Section 66A of the Information Technology Act of 2000. This Section was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27.10.2009. Since all the arguments raised by several counsel for the Petitioners deal with the unconstitutionality of this Section it is set out hereinbelow:

66-A. Punishment for sending offensive messages through communication service, etc.--Any person who sends, by means of a computer resource or a communication device,--

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.--For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.[1]

2. A related challenge is also made to Section 69A introduced by the same amendment which reads as follows:

69-A. Power to issue directions for blocking for public access of any information through any computer resource.--(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of Sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued Under Sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.

3. The Statement of Objects and Reasons appended to the Bill which introduced the Amendment Act stated in paragraph 3 that:

3. A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal code, the Indian Evidence Act and the code of Criminal Procedure to prevent such crimes.

4. The Petitioners contend that the very basis of Section 66A-that it has given rise to new forms of crimes-is incorrect, and that Sections 66B to 67C and various Sections of the Indian Penal Code (which will be referred to hereinafter) are good enough to deal with all these crimes.

5. The Petitioners' various counsel raised a large number of points as to the constitutionality of Section 66A. According to them, first and foremost Section 66A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2). According to them, the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill-will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said Section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court. The enforcement of the said Section would really be an insidious form of censorship which impairs a core value contained in Article 19(1)(a). In addition, the said Section has a chilling effect on the freedom of speech and expression. Also, the right of viewers is infringed as such chilling effect would not give them the benefit of many shades of grey in terms of various points of view that could be viewed over the internet.

The Petitioners also contend that their rights Under Articles 14 and 21 are breached inasmuch there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case.

6. In reply, Mr. Tushar Mehta, learned Additional Solicitor General defended the constitutionality of Section 66A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen under Part-III of the Constitution. There is a presumption in favour of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

Freedom of Speech and Expression

Article 19(1)(a) of the Constitution of India states as follows:

Article 19. Protection of certain rights regarding freedom of speech, etc.--(1) All citizens shall have the right--

(a) to freedom of speech and expression;

7. Article 19(2) states:

Article 19. Protection of certain rights regarding freedom of speech, etc.--(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

8. The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be over emphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.

9. Various judgments of this Court have referred to the importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government. For example, in the early case of Romesh Thappar v. State of Madras MANU/SC/0006/1950 : (1950) S.C.R. 594 at 602, this Court stated that freedom of speech lay at the foundation of all democratic organizations. In Sakal Papers (P) Ltd. and Ors. v. Union of India MANU/SC/0090/1961 : (1962) 3 S.C.R. 842 at 866, a Constitution Bench of this Court said freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. In a separate concurring judgment Beg, J. said, in Bennett Coleman & Co. and Ors. v. Union of India and Ors. MANU/SC/0038/1972 : (1973) 2 S.C.R. 757 at 829, that the freedom of speech and of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.[2]

10. Equally, in S. Khushboo v. Kanniamal and Anr. MANU/SC/0310/2010 : (2010) 5 SCC 600 this Court stated, in paragraph 45 that the importance of freedom of speech and expression though not absolute was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is generally of great societal importance.

11. This last judgment is important in that it refers to the "market place of ideas" concept that has permeated American Law. This was put in the felicitous words of Justice Holmes in his famous dissent in Abrams v. United States MANU/USSC/0180/1919 : 250 US 616 (1919), thus:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to

get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

12. Justice Brandeis in his famous concurring judgment in Whitney v. California MANU/USSC/0176/1927 : 71 L. Ed. 1095 said:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. (at page 1105, 1106)

13. This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of

incitement that Article 19(2) kicks in.[3] It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both Petitioners and Respondents tended to veer around the expression "public order".

14. It is at this point that a word needs to be said about the use of American judgments in the context of Article 19(1)(a). In virtually every significant judgment of this Court, reference has been made to judgments from across the Atlantic. Is it safe to do so?

15. It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the U.S. first Amendment-Congress shall make no law which abridges the freedom of speech. Second, whereas the U.S. First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject matters-that is any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject matters set out in Article 19(2).

16. Insofar as the first apparent difference is concerned, the U.S. Supreme Court has never given literal effect to the declaration that Congress shall make no law abridging the freedom of speech. The approach of the Court which is succinctly stated in one of the early U.S. Supreme Court Judgments, continues even today. In Chaplinsky v. New Hampshire MANU/USSC/0058/1942 : 86 L. Ed. 1031, Justice Murphy who delivered the opinion of the Court put it thus:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut MANU/USSC/0110/1940 : 310 U.S. 296, 309, 310 : 60 S. Ct. 900, 906 : 84 L. Ed. 1213 : 128 A.L.R. 1352. (at page 1035)

17. So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered Under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and

reasonable restrictions are concerned, both the U.S. Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject matters that there is a vast difference. In the U.S., if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject matters set out Under Article 19(2). If it does not, and is outside the pale of 19(2), Indian courts will strike down such law.

18. Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to sub-serving the general public interest that there is the world of a difference.

This is perhaps why in Kameshwar Prasad and Ors. v. The State of Bihar and Anr. MANU/SC/0410/1962 : 1962 Supp. (3) S.C.R. 369, this Court held:
As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United State reading "Congress shall make no law.... abridging the freedom of speech..."
appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power-the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising Under Article 19(1)(a) or (b) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision. (At page 378)

19. But when it comes to understanding the impact and content of freedom of speech, in Indian Express Newspapers (Bombay) Private Limited and Ors. v. Union of India and Ors. MANU/SC/0406/1984 : (1985) 2 SCR 287, Venkataramiah, J. stated:

While examining the constitutionality of a law which is alleged to contravene Article 19(1)(a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19(1)(a) and of Article 19(1)(g) of our constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed Under Article 19(1)(a) and Article 19(1)(g) of the Constitution are to be read along with Clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made. (at page 324)

20. With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. Article 19(1)(a)-

Section 66A has been challenged on the ground that it casts the net very wide-"all information" that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(v) of Information Technology Act, 2000 defines information as follows:

2. Definitions.--(1) In this Act, unless the context otherwise requires,--

(v) "Information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche.

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the Petitioners are correct in saying that the public's right to know is directly affected by Section 66A. Information of all kinds is roped in-such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know-the market place of ideas-which the internet provides to persons of all kinds is what attracts Section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The Petitioners are right in saying that Section 66A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A.

In this regard, the observations of Justice Jackson in American Communications Association v. Douds 94 L. Ed. 925 are apposite:

Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.

B. Article 19(2)

One challenge to Section 66A made by the Petitioners' counsel is that the offence created by the said Section has no proximate relation with any of the eight subject matters contained in Article 19(2). We may incidentally mention that the State has claimed that the said Section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

21. Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In Sakal Papers (P) Ltd. and Ors. v. Union of India MANU/SC/0090/1961 : (1962) 3 S.C.R. 842, this Court said:

It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in Clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under Clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and Clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom. (at page 863)

22. Before we come to each of these expressions, we must understand what is meant by the expression "in the interests of". In The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia MANU/SC/0058/1960 : (1960) 2 S.C.R. 821, this Court laid down:

We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied there from; and between an Act that directly maintained public order and that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act. (at pages 834, 835)

The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause. (at page 835)
The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.....
There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected Under Section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order (at page 836).

Reasonable Restrictions:

23. This Court has laid down what "reasonable restrictions" means in several cases. In Chintaman Rao v. The State of Madhya Pradesh MANU/SC/0008/1950 : (1950) S.C.R. 759, this Court said:

The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality. (at page 763)

24. In State of Madras v. V.G. Row MANU/SC/0013/1952 : (1952) S.C.R. 597, this Court said:

This Court had occasion in Dr. Khare's case MANU/SC/0004/1950 : (1950) S.C.R. 519 to define the scope of the judicial review under Clause (5) of Article 19 where the phrase "imposing reasonable restriction on the exercise of the right" also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, where ever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable. (at page 606-607)

25. Similarly, in Mohd. Faruk v. State of Madhya Pradesh and Ors. MANU/SC/0046/1969 : (1970) 1 S.C.R. 156, this Court said:

The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency-national or local-or the necessity to maintain essential supplies, or the necessity to stop

activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved. (at page 161)

26. In Dr. N.B. Khare v. State of Delhi MANU/SC/0004/1950 : (1950) S.C.R. 519, a Constitution Bench also spoke of reasonable restrictions when it comes to procedure. It said:

While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years externment or ten years externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the court under Clause (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine if the exercise of the right has been reasonably restricted. (at page 524)

27. It was argued by the learned Additional Solicitor General that a relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds. To appreciate the width and scope of his submissions, we are setting out his written submission verbatim:

(i) the reach of print media is restricted to one state or at the most one country while internet has no boundaries and its reach is global;

(ii) the recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;

(iii) In case of televisions serials [except live shows] and movies, there is a permitted pre-censorship' which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of an internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory Regulation;

(iv) In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted I televised I viewed. While in case of an internet, morphing of images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied.

(v) By the medium of internet, rumors having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums.

(vi) In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right Under Article 21 of the Constitution of India.

(vii) By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

(viii) By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy/borrow a newspaper and/or will have to go to a theater to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed and that too only at a time where it is being telecast. While in case of an internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

(ix) In case of other mediums, it is impossible to maintain anonymity as a result of which speech ideal opinions films having serious potential of creating a social disorder never gets generated since its origin is bound to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

(x) In case of other mediums like newspapers, television or films, the approach is always institutionalized approach governed by industry specific ethical norms of self conduct. Each newspaper/magazine/movie production house/TV Channel will have their own institutionalized policies in house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression Under Article 19[1] [a].

(xi) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constrains. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constrains have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click.

28. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved-that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a Section creating a new offence, such as Section 69A for

instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

29. In fact, this aspect was considered in Secretary Ministry of Information & Broadcasting, Government of India v. Cricket Association of Bengal MANU/SC/0246/1995 : (1995) 2 SCC 161 in para 37, where the following question was posed:

The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media.

This question was answered in para 78 thus:

There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audiovisual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs Regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right Under Article 19(1)(a) should be in addition to those permissible Under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater Regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will

be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media.

Public Order

30. In Article 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made Under Section 7 of the Punjab Maintenance of Public Order Act and to an order made Under Section 9(1)(a) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus in Romesh Thappar v. State of Madras MANU/SC/0006/1950 : (1950) S.C.R. 594, this Court held that an order made Under Section 9(1)(a) of the Madras Maintenance of Public Order Act (XXIII of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal Regulations enforced by the Government which they have established.

31. Similarly, in Brij Bhushan and Anr. v. State of Delhi MANU/SC/0007/1950 : (1950) S.C.R. 605, an order made Under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

32. As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

33. In Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia MANU/SC/0058/1960 : (1960) 2 S.C.R. 821, this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. This definition was further refined in Dr. Ram Manohar Lohia v. State of Bihar and Ors. MANU/SC/0054/1965 : (1966) 1 S.C.R. 709, where this Court held:

It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. (at page 746)

34. In Arun Ghosh v. State of West Bengal MANU/SC/0035/1969 :

(1970) 3 S.C.R. 288, Ram Manohar Lohia's case was referred to with approval in the following terms:

In Dr. Ram Manohar Lohia's case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large Sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr. Ram Manohar Lohia's case examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is: Does

it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another. (at pages 290 and 291).

35. This decision lays down the test that has to be formulated in all these cases. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where Under Sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent-there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel `annoying' girls is telling-this Court has held that mere `annoyance' need not cause disturbance of public order. Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyance, either `persistently' or otherwise without in any manner impacting public order.

Clear and present danger-tendency to affect.

36. It will be remembered that Justice Holmes in Schenck v. United States MANU/USSC/0119/1919 : 63 L. Ed. 470 enunciated the clear and present danger test as follows:

...The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co. MANU/USSC/0140/1911 : 221 U.S. 418, 439 : 31 Sup. Ct. 492 : 55 L. ed. 797 : 34 L.R.A. (N.S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. (At page 473, 474)

37. This was further refined in Abrams v. Unites States MANU/USSC/0180/1919 : 250 U.S. 616 (1919), this time in a Holmesian dissent, to be clear and imminent danger. However, in most of the subsequent judgments of the U.S. Supreme Court, the test has been understood to mean to be "clear and present danger". The test of "clear and present danger" has been used by the U.S. Supreme Court in many varying situations and has been adjusted according to varying fact

situations. It appears to have been repeatedly applied, see-Terminiello v. City of Chicago MANU/USSC/0173/1949 : 93 L. Ed. 1131 (1949) at page 1134-1135, Brandenburg v. Ohio MANU/USSC/0132/1969 : 23 L. Ed. 2d 430 (1969) at 434-435 & 436, Virginia v. Black MANU/USSC/0028/2003 : 155 L. Ed. 2d 535 (2003) at page 551, 552 and 553[4].

38. We have echoes of it in our law as well S. Rangarajan v. P. Jagjivan and Ors. MANU/SC/0475/1989 : (1989) 2 SCC 574 at paragraph 45:

45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated Under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

39. This Court has used the expression "tendency" to a particular act. Thus, in State of Bihar v. Shailabala Devi MANU/SC/0015/1952 : (1952) S.C.R. 654, an early decision of this Court said that an article, in order to be banned must have a tendency to excite persons to acts of violence (at page 662-663). The test laid down in the said decision was that the article should be considered as a whole in a fair free liberal spirit and then it must be decided what effect it would have on the mind of a reasonable reader. (at pages 664-665)

40. In Ramji Lal Modi v. The State of U.P. MANU/SC/0101/1957 : (1957) S.C.R. 860 at page 867, this Court upheld Section 295A of the Indian Penal Code only because it was read down to mean that aggravated forms of insults to religion must have a tendency to disrupt public order. Similarly, in Kedar Nath Singh v. State of Bihar MANU/SC/0074/1962 : 1962 Supp. (2) S.C.R. 769, Section 124A of the Indian Penal Code was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or creating feelings of enmity in certain people was not good enough or else it would violate the fundamental right of free speech Under Article 19(1)(a). Again, in Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte and Ors. MANU/SC/0982/1996 : 1996(1) SCC 130, Section 123(3A) of the Representation of People Act was upheld only if the enmity or hatred that was spoken about in the Section would tend to create immediate public disorder and not otherwise.

41. Viewed at either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.<mpara>

Defamation

42. Defamation is defined in Section 499 of the Penal Code as follows:

499. Defamation.--Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.--It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.--It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.--An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.--No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

43. It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear therefore that the Section is not aimed at defamatory statements at all.

Incitement to an offence:

44. Equally, Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66A has nothing to do with "incitement to an offence". As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters Under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved Under Article 19(2), is declared as unconstitutional.

Decency or Morality

45. This Court in Ranjit Udeshi v. State of Maharashtra MANU/SC/0080/1964 : (1965) 1 S.C.R. 65 took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in Hicklin's case which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open

to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the UK, United States as well as in our country. Thus, in Director General, Directorate General of Doordarshan v. Anand Patwardhan MANU/SC/3637/2006 : 2006 (8) SCC 433, this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value (see Para 31).

46. In a recent judgment of this Court, Aveek Sarkar v. State of West Bengal MANU/SC/0081/2014 : 2014 (4) SCC 257, this Court referred to English, U.S. and Canadian judgments and moved away from the Hicklin test and applied the contemporary community standards test.

47. What has been said with regard to public order and incitement to an offence equally applies here. Section 66A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be obscene at all-in fact the word 'obscene' is conspicuous by its absence in Section 66A.

48. However, the learned Additional Solicitor General asked us to read into Section 66A each of the subject matters contained in Article 19(2) in order to save the constitutionality of the provision. We are afraid that such an exercise is not possible for the simple reason that when the legislature intended to do so, it provided for some of the subject matters contained in Article 19(2) in Section 69A. We would be doing complete violence to the language of Section 66A if we were to read into it something that was never intended to be read into it. Further, he argued that the statute should be made workable, and the following should be read into Section 66A:

(i) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi racial society;

- Director of Public Prosecutions v. Collins MANU/UKHL/0071/2006 : (2006) 1 WLR 2223 @ para 9 and 21

- Connolly v. Director of Public Prosecutions reported in MANU/UKAD/0043/2007 : (2008) 1 W.L.R. 276 : 2007 [1] All ER 1012

- House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media And Criminal Offences" @ pg 260 of compilation of judgments Vol I Part B

(ii) Information which is directed to incite or can produce imminent lawless action Brandenburg v. Ohio MANU/USSC/0132/1969 : 395 U.S. 444 (1969);

(iii) Information which may constitute credible threats of violence to the person or damage;

(iv) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;

Terminiello v. Chicago MANU/USSC/0173/1949 : 337 US 1 (1949)

(v) Information which advocates or teaches the duty, necessity or proprietary of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify glorify such violent means to accomplish political, social, economical or religious reforms

[Whitney v. California MANU/USSC/0176/1927 : 274 US 357];

(vi) Information which contains fighting or abusive material;

Chaplinsky v. New Hampshire MANU/USSC/0058/1942 : 315 U.S. 568 (1942)

(vii) Information which promotes hate speech i.e.

(a) Information which propagates hatred towards individual or a groups, on the basis of race, religion, religion, casteism, ethnicity,

(b) Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.

(c) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.

(viii) Satirical or iconoclastic cartoon and caricature which fails the test laid down in Hustler Magazine, Inc. v. Falwell MANU/USSC/0049/1988 : 485 U.S. 46 (1988)

(ix) Information which glorifies terrorism and use of drugs;

(x) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking.

(xi) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it.

Aveek Sarkar and Anr. v. State of West Bengal and Ors. MANU/SC/0081/2014 : (2014) 4 SCC 257.

(xii) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.

Aveek Sarkar and Anr. v. State of West Bengal and Ors. MANU/SC/0081/2014 : (2014) 4 SCC 257.

49. What the learned Additional Solicitor General is asking us to do is not to read down Section 66A-he is asking for a wholesale substitution of the provision which is obviously not possible.

Vagueness

50. Counsel for the Petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall.

51. We were given Collin's dictionary, which defined most of the terms used in Section 66A, as follows:

Offensive:

1. Unpleasant or disgusting, as to the senses

2. Causing anger or annoyance; insulting

3. For the purpose of attack rather than defence.

Menace:

1. To threaten with violence, danger, etc.

2. A threat of the act of threatening

3. Something menacing; a source of danger

4. A nuisance

Annoy:

1. To irritate or displease

2. To harass with repeated attacks Annoyance

1. The feeling of being annoyed

2. The act of annoying.

Inconvenience

1. The state of quality of being inconvenient

2. Something inconvenient; a hindrance, trouble, or difficulty

Danger:

1. The state of being vulnerable to injury, loss, or evil risk 2. A person or a thing that may cause injury pain etc.

Obstruct:

1. To block (a road a passageway, etc.) with an obstacle

2. To make (progress or activity) difficult.

3. To impede or block a clear view of.

Obstruction: a person or a thing that obstructs. Insult:

1. To treat, mention, or speak to rudely; offend; affront

2. To assault; attack

3. An offensive or contemptuous remark or action; affront; slight

4. A person or thing producing the effect of an affront = some television is an insult to intelligence

5. An injury or trauma.

52. The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in Musser v. Utah MANU/USSC/0036/1948 : 92 L. Ed. 562, a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

53. In Winters v. People of State of New York MANU/USSC/0130/1948 : 92 L. Ed. 840, a New York Penal Law read as follows:

1141. Obscene prints and articles

1. A person.....who,

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the

publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; .....

'Is guilty of a misdemeanor, ...' (at page 846)

The court in striking down the said statute held:

The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law-obscene, lewd, lascivious, filthy, indecent or disgusting--and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct--massing stories to incite crime--has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character 'that men of common intelligence must necessarily guess at its meaning.' Connally v. General Constr. Co. MANU/USSC/0140/1926 : 269 U.S. 385, 391 : 46 S. Ct. 126, 127 : 70 L. Ed. 322. The entire text of the statute or the subjects dealt with may furnish an adequate standard. The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.

The Sub-section of the New York Penal Law, as now interpreted by the Court of Appeals prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passion,' we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this Petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required--no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crime of violence against the person. No conspiracy to commit a crime is required. See Musser v. State of Utah MANU/USSC/0036/1948 : 68 S. Ct. 397, this Term. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. As said in the Cohen Grocery Co. case, supra, MANU/USSC/0146/1921 : 255 U.S. at page 89 : 41 S. Ct. at page 300 : 65 L. Ed. 516 : 14 A.L.R. 1045:

It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.

The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated it does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. Herndon v. Lowry MANU/USSC/0201/1937 : 301 U.S. 242, 259 : 57 S. Ct. 732, 739 : 81 L. Ed. 1066. (at page 851-852)

54. In Burstyn v. Wilson MANU/USSC/0107/1952 : 96 L. Ed. 1098, sacrilegious writings and utterances were outlawed. Here again, the U.S. Supreme Court stepped in to strike down the offending Section stating:

It is not a sufficient answer to say that 'sacrilegious' is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York. To allow such vague, indefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art--for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious.' And if we cannot tell, how are those to be governed by the statute to tell? (at page 1121)

55. In City of Chicago v. Morales et al MANU/USSC/0045/1999 : 527 U.S. 41 (1999), a Chicago Gang Congregation Ordinance prohibited criminal street gang members from loitering with one another or with other persons in any public place for no apparent purpose. The Court referred to an earlier judgment in United States v. Reese MANU/USSC/0108/1875 : 92 U.S. 214 (1875) at 221 in which it was stated that the Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and say who could be rightfully detained and who should be set at liberty. It was held that the broad sweep of the Ordinance violated the requirement that a legislature needs to meet: to establish minimum guidelines to govern law enforcement. As the impugned Ordinance did not have any such guidelines, a substantial amount of innocent conduct would also be brought within its net, leading to its unconstitutionality.

56. It was further held that a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.

57. Similarly, in Grayned v. City of Rockford MANU/USSC/0169/1972 : 33 L. Ed. 2d. 222, the State of Illinois provided in an anti noise ordinance as follows:

(N)o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof....' Code of Ordinances, c. 28, § 19.2(a).

The law on the subject of vagueness was clearly stated thus:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone'... than if the boundaries of the forbidden areas were clearly marked.' (at page 227-228)

58. The anti noise ordinance was upheld on facts in that case because it fixed the time at which noise disrupts school activity-while the school is in session-and at a fixed place-'adjacent' to the school.

59. Secondly, there had to be demonstrated a causality between disturbance that occurs and the noise or diversion. Thirdly, acts have to be willfully done. It is important to notice that the Supreme Court specifically held that "undesirables" or their "annoying conduct" may not be punished. It is only on these limited grounds that the said Ordinance was considered not to be impermissibly vague.

60. In Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al. MANU/USSC/0082/1997 : 521 U.S. 844 (1997), two provisions of the Communications Decency Act of 1996 which sought to protect minors from harmful material on the internet were adjudged unconstitutional. This judgment is a little important for two basic reasons-that it deals with a penal offence created for persons who use the internet as also for the reason that the statute which was adjudged unconstitutional uses the expression "patently offensive" which comes extremely close to the expression "grossly offensive" used by the impugned Section 66A. Section 223(d), which was adjudged unconstitutional, is set out hereinbelow:

223(d) Whoever--

(1) in interstate or foreign communications knowingly--

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both. (at page 860)

Interestingly, the District Court Judge writing of the internet said:

[i]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country-and indeed the world-as yet seen. The Plaintiffs in these actions correctly describe the 'democratizing' effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luther's still post their theses, but to electronic bulletins boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen. 929 F. Supp. At 881. (at page 425)

61. The Supreme Court held that the impugned statute lacked the precision that the first amendment required when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the impugned Act effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.

62. Such a burden on adult speech is unacceptable if less restrictive alternatives would be as effective in achieving the legitimate purpose that the statute was enacted to serve. It was held that the general undefined term "patently offensive" covers large amounts of non-pornographic material with serious educational or other value and was both vague and over broad.

It was, thus, held that the impugned statute was not narrowly tailored and would fall foul of the first amendment.

63. In Federal Communications Commission v. Fox Television Stations MANU/USSC/0066/2012 : 132 S. Ct. 2307, it was held:

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See Connally v. General Constr. Co. MANU/USSC/0140/1926 : 269 U.S. 385, 391 (1926)("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); Papachristou v. Jacksonville MANU/USSC/0187/1972 : 405 U.S. 156 : 162 (1972)("Living under

a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" (quoting Lanzetta v. New Jersey MANU/USSC/0042/1939 : 306 U.S. 451 : 453 (1939) (alteration in original))). This requirement of clarity in Regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See United States v. Williams 553 U.S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or Regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." Ibid. As this Court has explained, a Regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See Grayned v. City of Rockford MANU/USSC/0169/1972 : 408 U.S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech. (at page 2317)

64. Coming to this Court's judgments, in State of Madhya Pradesh v. Baldeo Prasad MANU/SC/0067/1960 : (1961) 1 S.C.R. 970 an inclusive definition of the word "goonda" was held to be vague and the offence created by Section 4A of the Goondas Act was, therefore, violative of Article 19(1)(d) and (e) of the Constitution. It was stated:

Incidentally it would also be relevant to point out that the definition of the word "goonda" affords no assistance in deciding which citizen can be put under that category. It is an inclusive definition and it does not indicate which tests have to be applied in deciding whether a person falls in the first part of the definition. Recourse to the dictionary meaning of the word would hardly be of any assistance in this matter. After all it must be borne in mind that the Act authorises the District Magistrate to deprive a citizen of his fundamental right Under Article 19(1)(d) and (e), and though the object of the Act and its purpose would undoubtedly attract the provisions of Article 19(5) care must always be taken in passing such acts that they provide sufficient safeguards against casual, capricious or even malicious exercise of the powers conferred by them. It is well known that the relevant provisions of the Act are initially put in motion against a person at a lower level than the District magistrate, and so it is always necessary that sufficient safeguards should be provided by the Act to protect the fundamental rights of innocent citizens and to save them from unnecessary harassment. That is why we think the definition of the word "goonda" should have given necessary assistance to the District Magistrate in deciding whether a particular citizen falls under the category of goonda or not; that is another infirmity in the Act. As we have already pointed out Section 4-A suffers from the same infirmities as Section 4.

Having regard to the two infirmities in Sections 4, 4-A respectively we do not think it would be possible to accede to the argument of the learned Advocate-General that the operative portion of the Act can fall Under Article 19(5) of the Constitution. The person against whom action can be taken under the Act is not entitled to know the source of the information received by the District

Magistrate; he is only told about his prejudicial activities on which the satisfaction of the District Magistrate is based that action should be taken against him Under Section 4 or Section 4-A. In such a case it is absolutely essential that the Act must clearly indicate by a proper definition or otherwise when and under what circumstances a person can be called a goonda, and it must impose an obligation on the District Magistrate to apply his mind to the question as to whether the person against whom complaints are received is such a goonda or not. It has been urged before us that such an obligation is implicit in Sections 4 and 4-A. We are, however, not impressed by this argument. Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Article 19(5). The result of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda. In other words, the restrictions which it allows to be imposed on the exercise of the fundamental right of a citizen guaranteed by Article 19(1)(d) and (e) must in the circumstances be held to be unreasonable. That is the view taken by the High court and we see no reason to differ from it. (at pages 979, 980)

65. At one time this Court seemed to suggest that the doctrine of vagueness was no part of the Constitutional Law of India. That was dispelled in no uncertain terms in K.A. Abbas v. The Union of India and Anr. MANU/SC/0053/1970 : (1971) 2 S.C.R. 446:

This brings us to the manner of the exercise of control and restriction by the directions. Here the argument is that most of the Regulations are vague and further that they leave no scope for the exercise of creative genius in the field of Article This poses the first question before us whether the 'void for vagueness' doctrine is applicable. Reliance in this connection is placed on Municipal Committee Amritsar and Anr. v. The State of Rajasthan. In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid on the ground that it violates the due process clause or that it is vague..... (at page 469)

These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in State of Madhya Pradesh and Anr. v. Baldeo Prasad MANU/SC/0067/1960 : 1961 (1) SCR 970 where the Central Provinces and Berar Goondas Act 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance

with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases. (at pages 470, 471)

66. Similarly, in Harakchand Ratanchand Banthia and Ors. v. Union of India and Ors. MANU/SC/0038/1969 : 1969 (2) SCC 166, Section 27 of the Gold Control Act was struck down on the ground that the conditions imposed by it for the grant of renewal of licences are uncertain, vague and unintelligible. The Court held:

21. We now come to Section 27 of the Act which relates to licensing of dealers. It was stated on behalf of the Petitioners that the conditions imposed by Sub-section (6) of Section 27 for the grant or renewal of licences are uncertain, vague and unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. In our opinion this contention is well founded and must be accepted as correct. Section 27(6)(a) states that in the matter of issue or renewal of licences the Administrator shall have regard to "the number of dealers existing in the region in which the applicant intends to carry on business as a dealer". But the word "region" is nowhere defined in the Act. Similarly Section 27(6)(b) requires the Administrator to have regard to "the anticipated demand, as estimated by him, for ornaments in that region." The expression "anticipated demand" is a vague expression which is not capable of objective assessment and is bound to lead to a great deal of uncertainty. Similarly the expression "suitability of the applicant" in Section 27(6)(e) and "public interest" in Section 27(6)(g) do not provide any objective standard or norm or guidance. For these reasons it must be held that Clauses (a),(d),(e) and (g) of Section 27(6) impose unreasonable restrictions on the fundamental right of the Petitioner to carry on business and are constitutionally invalid. It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous as the conditions for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of Section 26 of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be unreasonable. In our opinion Clauses (a), (b), (e) and (g) are inextricably bound up with the other clauses of Section 27(6) and form part of a single scheme. The result is that Clauses (a), (b), (c), (e) and (g) are not severable and the entire Section 27(6) of the Act must be held invalid. Section 27(2)(d) of the Act states that a valid licence issued by the Administrator "may contain such conditions, limitations and restrictions as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers". On the face of it, this Sub-section confers such wide and vague power upon the Administrator that it is difficult to limit its scope. In our opinion Section 27(2)(d) of the Act must be struck down as an unreasonable restriction on the fundamental right of the Petitioners to carry on business. It appears, however, to us that if Section 27(2)(d) and Section 27(6) of the Act are invalid the licensing scheme contemplated by the rest of Section 27

of the Act cannot be worked in practice. It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose in exercise of its rule-making power Under Section 114 of the Act.

67. In A.K. Roy and Ors. v. Union of India and Ors. MANU/SC/0051/1981 : (1982) 2 S.C.R. 272, a part of Section 3 of the National Security Ordinance was read down on the ground that "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" is an expression so vague that it is capable of wanton abuse. The Court held:

What we have said above in regard to the expressions 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" which occurs in Section 3(2) of the Act. Which supplies and services are essential to the community can easily be defined by the legislature and indeed, legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of Sub-section (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

But that is not all. The Explanation to Sub-section (2) gives to the particular phrase in that Sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of Sub-section (2), "acting in any manner prejudicial to the maintenance of supplies essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to Sub-section (1) of Section 3 of the Act of 1980. Clauses (a) and (b) of the Explanation to Section 3(1) of the Act of 1980 exhaust almost the entire range of essential commodities. Clause (a) relates to committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (b) of the Explanation to Section 3(1) of the Act of 1980 relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred to in Clause (a). We find it quite difficult to understand as to which are the remaining commodities outside the scope of the Act of 1980, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in Sub-section (2) of Section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community.

To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21. (at page 325-326)

68. Similarly, in Kartar Singh v. State of Punjab MANU/SC/1597/1994 : (1994) 3 SCC 569 at para 130-131, it was held:

130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

131. Let us examine Clause (i) of Section 2(1)(a). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned Counsel, even an innocent person who ingenuously and undefiledly communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted.

69. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined. Section 66 in stark contrast to Section 66A states:

66. Computer related offences.--If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

Explanation.--For the purposes of this section,--

(a) the word "dishonestly" shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860);

(b) the word "fraudulently" shall have the meaning assigned to it in Section 25 of the Indian Penal Code (45 of 1860).

70. It will be clear that in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expression "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66A.

71. The provisions contained in Sections 66B up to Section 67B also provide for various punishments for offences that are clearly made out. For example, Under Section 66B, whoever dishonestly receives or retains any stolen computer resource or communication device is punished with imprisonment. Under Section 66C, whoever fraudulently or dishonestly makes use of any identification feature of another person is liable to punishment with imprisonment. Under Section 66D, whoever cheats by personating becomes liable to punishment with imprisonment. Section 66F again is a narrowly drawn section which inflicts punishment which may extend to imprisonment for life for persons who threaten the unity, integrity, security or sovereignty of India. Sections 67 to 67B deal with punishment for offences for publishing or transmitting obscene material including depicting children in sexually explicit acts in electronic form.

72. In the Indian Penal Code, a number of the expressions that occur in Section 66A occur in Section 268.

268. Public nuisance.--A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

73. It is important to notice the distinction between the Sections 268 and 66A. Whereas, in Section 268 the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66A. Further, Under Section 268, the person should be guilty of an act or omission which is illegal in nature-legal acts are not within its net. A further ingredient is that injury, danger or annoyance must be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression "annoyance" appears also in Sections 294 and 510 of the Indian Penal Code:

294. Obscene acts and songs.--Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

510. Misconduct in public by a drunken person.--Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

74. If one looks at Section 294, the annoyance that is spoken of is clearly defined-that is, it has to be caused by obscene utterances or acts. Equally, Under Section 510, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66A which in stark contrast uses completely open ended, undefined and vague language.

75. Incidentally, none of the expressions used in Section 66A are defined. Even "criminal intimidation" is not defined-and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

76. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise-suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions-and that is what renders the Section unconstitutionally vague.

77. However, the learned Additional Solicitor General argued before us that expressions that are used in Section 66A may be incapable of any precise definition but for that reason they are not constitutionally vulnerable. He cited a large number of judgments in support of this submission. None of the cited judgments dealt with a Section creating an offence which is saved despite its being vague and in capable of any precise definition. In fact, most of the judgments cited before us did not deal with criminal law at all. The few that did are dealt with hereinbelow. For instance, Madan Singh v. State of Bihar MANU/SC/0297/2004 : (2004) 4 SCC 622 was cited before us. The passage cited from the aforesaid judgment is contained in para 19 of the judgment. The cited passage is not in the context of an argument that the word "terrorism" not being separately defined would, therefore, be struck down on the ground of vagueness. The cited passage was only in the context of upholding the conviction of the accused in that case. Similarly, in Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra and Ors. MANU/SC/0289/2010 : (2010) 5 SCC 246, the expression "insurgency" was said to be undefined and would defy a precise definition, yet it could be understood to mean break down of peace and tranquility as also a grave disturbance of public order so as to endanger the security of the State and its sovereignty. This again was said in the context of a challenge on the ground of legislative competence. The provisions of the Maharashtra Control of Organised Crime Act were challenged on the ground that they were outside the expression "public order" contained in Entry 1 of List I of the 7th Schedule of the Constitution of India. This contention was repelled by saying that the expression "public order" was wide enough to encompass cases of "insurgency". This case again had nothing to do with a challenge raised on the ground of vagueness.

78. Similarly, in State of M.P. v. Kedia Leather & Liquor Limited MANU/SC/0625/2003 : (2003) 7 SCC 389, paragraph 8 was cited to show that the expression "nuisance" appearing in Section 133 of the Code of Criminal Procedure was also not capable of precise definition. This again was said in the context of an argument that Section 133 of the Code of Criminal Procedure was impliedly

repealed by the Water (Prevention and Control of Pollution) Act, 1974. This contention was repelled by saying that the areas of operation of the two provisions were completely different and they existed side by side being mutually exclusive. This case again did not contain any argument that the provision contained in Section 133 was vague and, therefore, unconstitutional. Similarly, in State of Karnataka v. Appa Balu Ingale MANU/SC/0151/1993 : 1995 Supp. (4) SCC 469, the word "untouchability" was said not to be capable of precise definition. Here again, there was no constitutional challenge on the ground of vagueness.

79. In fact, two English judgments cited by the learned Additional Solicitor General would demonstrate how vague the words used in Section 66A are. In Director of Public Prosecutions v. Collins MANU/UKHL/0071/2006 : (2006) 1 WLR 2223, the very expression "grossly offensive" is contained in Section 127(1)(1) of the U.K. Communications Act, 2003. A 61 year old man made a number of telephone calls over two years to the office of a Member of Parliament. In these telephone calls and recorded messages Mr. Collins who held strong views on immigration made a reference to "Wogs", "Pakis", "Black bastards" and "Niggers". Mr. Collins was charged with sending messages which were grossly offensive. The Leicestershire Justices dismissed the case against Mr. Collins on the ground that the telephone calls were offensive but not grossly offensive. A reasonable person would not so find the calls to be grossly offensive. The Queen's Bench agreed and dismissed the appeal filed by the Director of Public Prosecutions. The House of Lords reversed the Queen's Bench stating:

9. The parties agreed with the rulings of the Divisional Court that it is for the Justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ("Old Contemptibles"). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

10. In contrast with Section 127(2)(a) and its predecessor subsections, which require proof of an unlawful purpose and a degree of knowledge, Section 127(1)(a) provides no explicit guidance on the state of mind which must be proved against a Defendant to establish an offence against the subsection.

80. Similarly in Chambers v. Director of Public Prosecutions MANU/UKAD/0597/2012:

(2013) 1 W.L.R. 1833, the Queen's Bench was faced with the following facts:

Following an alert on the Internet social network, Twitter, the Defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several "tweets" on Twitter in his own name, including the following: "Crap 1 Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high 1" None of the Defendant's "followers" who

read the posting was alarmed by it at the time. Some five days after its posting the Defendant's tweet was read by the duty manager responsible for security at the airport on a general Internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the Defendant asserted that the tweet was a joke and not intended to be menacing. The Defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to Section 127(1)(a) of the Communications Act 2003. He was convicted in a magistrates' court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was "menacing per se" and that the Defendant was, at the very least, aware that his message was of a menacing character.

81. The Crown Court was satisfied that the message in question was "menacing" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "menacing". The Queen's Bench Division reversed the Crown Court stating:

31. Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent. The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on "Twitter" for widespread reading, a conversation piece for the Defendant's followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address "you", meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or it to be taken as a serious warning. Moreover, as Mr. Armson noted, it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet "followers" in ample time for the threat to be reported and extinguished.

82. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In Collins' case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence Under Section 66A. This being the case, having regard also to the two English precedents

cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague.

Ultimately, applying the tests referred to in Chintaman Rao and V.G. Row's case, referred to earlier in the judgment, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

Chilling Effect And Overbreadth

83. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views"-such as the emancipation of women or the abolition of the caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

84. Incidentally, some of our judgments have recognized this chilling effect of free speech. In R. Rajagopal v. State of T.N. MANU/SC/0056/1995 : (1994) 6 SCC 632, this Court held:

19. The principle of Sullivan MANU/USSC/0245/1964 : 376 US 254 : 11 L Ed 2d 686 (1964) was carried forward--and this is relevant to the second question arising in this case--in Derbyshire County Council v. Times Newspapers Ltd. MANU/UKHL/0010/1993 : (1993) 2 WLR 449 : (1993) 1 All ER 1011, HL, a decision rendered by the House of Lords. The Plaintiff, a local authority brought an action for damages for libel against the Defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the Plaintiff has a cause of action against the Defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in Attorney General v. Guardian Newspapers Ltd. (No. 2) ((1990) 1 AC 109 : MANU/UKHL/0018/1988 : (1988) 3 All ER 545 : (1988) 3 WLR 776, HL) popularly known as "Spycatcher case", the House of Lords had opined that "there are rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is

in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States Supreme Court in New York Times v. Sullivan MANU/USSC/0245/1964 : 376 US 254 : 11 L Ed 2d 686 (1964) and certain other decisions of American Courts and observed--and this is significant for our purposes--

while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.

Accordingly, it was held that the action was not maintainable in law.

85. Also in S. Khushboo v. Kanniammal MANU/SC/0310/2010 : (2010) 5 SCC 600, this Court said:

47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the Appellant's remarks. If the complainants vehemently disagreed with the Appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression".

86. That the content of the right Under Article 19(1)(a) remains the same whatever the means of communication including internet communication is clearly established by Reno's case (supra) and by The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal and Anr. MANU/SC/0246/1995 : (1995) SCC 2 161 at Para 78 already referred to. It is thus clear that not only are the expressions used in Section 66A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, Kedar Nath Singh v. State of Bihar MANU/SC/0074/1962 : (1962) Supp. 2 S.C.R. 769 at 808-809. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first Ram Manohar Lohia case, namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the Section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the Section takes in the innocent as well as the guilty, bonafide and malafide advice and whether the person be a legal adviser, a friend or a well wisher of the person instigated, he cannot escape the tentacles of the Section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the

field of constitutional prohibitions. It further held that the Section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

87. In Kameshwar Prasad and Ors. v. The State of Bihar and Anr. MANU/SC/0410/1962 : (1962) Supp. 3 S.C.R. 369, Rule 4A of the Bihar Government Servants Conduct Rules, 1956 was challenged. The rule states "No government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

88. The aforesaid rule was challenged Under Articles 19(1)(a) and (b) of the Constitution. The Court followed the law laid down in Ram Manohar Lohia's case MANU/SC/0058/1960 : (1960) 2 S.C.R. 821 and accepted the challenge. It first held that demonstrations are a form of speech and then held:

The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Article 19(2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the Respondent-State is that the rule is framed "in the interest of public order". A demonstration may be defined as "an expression of one's feelings by outward signs." A demonstration such as is prohibited by, the rule may be of the most innocent type-peaceful orderly such as the mere wearing of a badge by a Government servant or even by a silent assembly say outside office hours-demonstrations which could in no sense be suggested to involve any breach of tranquility, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type-innocent as well as otherwise-and in consequence its validity cannot be upheld. (at page 374)

89. The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited. Finally, the Court held:

The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration-be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result. (at page 384)

90. These two Constitution Bench decisions bind us and would apply directly on Section 66A.

We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of over breadth.

Possibility of an act being abused is not a ground to test its validity:

91. The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66A is capable of being abused by the persons who administered it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In The Collector of Customs, Madras v. Nathella Sampathu Chetty and Anr. MANU/SC/0089/1961 : (1962) 3 S.C.R. 786, this Court observed:

....This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:

If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably

and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission 1960 AC 490 at pp. 520-521:

It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute.

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements. (at page 825)

92. In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General's argument is to be accepted. If Section 66A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered.

Severability:

93. The argument of the learned Additional Solicitor General on this score is reproduced by us verbatim from one of his written submissions:

Furthermore it is respectfully submitted that in the event of Hon'ble Court not being satisfied about the constitutional validity of either any expression or a part of the provision, the Doctrine of Severability as enshrined Under Article 13 may be resorted to.

94. The submission is vague: the learned Additional Solicitor General does not indicate which part or parts of Section 66A can possibly be saved. This Court in Romesh Thappar v. The State of Madras MANU/SC/0006/1950 : (1950) S.C.R. 594 repelled a contention of severability when it came to the courts enforcing the fundamental right Under Article 19(1)(a) in the following terms:

It was, however, argued that Section 9(1-A) could not be considered wholly void, as, Under Article 13(1), an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more. Insofar as the securing of the public safety or the maintenance of public order would include the security of the State, the impugned provision, as applied to the latter purpose, was covered by Clause (2) of Article 19 and must, it was said, be held to be valid. We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, Clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent. (At page 603)

95. It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following K.A. Abbas' case (Supra) that the possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void. Romesh Thappar's Case was distinguished in R.M.D. Chamarbaugwalla v. The Union of India MANU/SC/0020/1957 : (1957) S.C.R. 930 in the context of a right Under Article 19(1)(g) as follows:

20. In Romesh Thappar v. State of Madras MANU/SC/0006/1950 : (1950) SCR 594, the question was as to the validity of Section 9(1-A) of the Madras Maintenance of Public Order Act, 23 of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order." Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Article 19(2), which saved "existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State." It was held by this Court that as the purposes mentioned in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it

was not possible to split up Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really a decision that the impugned provision was on its own contents inseverable. It is not an authority for the position that even when a provision is severable, it must be struck down on the ground that the principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. It should be mentioned that the decision in Romesh Thappar v. State of Madras MANU/SC/0006/1950 : (1950) SCR 594 was referred to in State of Bombay v. F.N. Balsara MANU/SC/0009/1951 : (1951) SCR 682 and State of Bombay v. United Motors (India) Ltd. MANU/SC/0095/1953 : (1953) SCR 1069 at 1098-99 and distinguished.

96. The present being a case of an Article 19(1)(a) violation, Romesh Thappar's judgment would apply on all fours. In an Article 19(1)(g) challenge, there is no question of a law being applied for purposes not sanctioned by the Constitution for the simple reason that the eight subject matters of Article 19(2) are conspicuous by their absence in Article 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66A does not fall within any of the subject matters contained in Article 19(2) and the possibility of its being applied for purposes outside those subject matters is clear. We therefore hold that no part of Section 66A is severable and the provision as a whole must be declared unconstitutional.

Article 14

97. Counsel for the Petitioners have argued that Article 14 is also infringed in that an offence whose ingredients are vague in nature is arbitrary and unreasonable and would result in arbitrary and discriminatory application of the criminal law. Further, there is no intelligible differentia between the medium of print, broadcast, and real live speech as opposed to speech on the internet and, therefore, new categories of criminal offences cannot be made on this ground. Similar offences which are committed on the internet have a three year maximum sentence Under Section 66A as opposed to defamation which has a two year maximum sentence. Also, defamation is a non-cognizable offence whereas Under Section 66A the offence is cognizable.

98. We have already held that Section 66A creates an offence which is vague and overbroad, and, therefore, unconstitutional Under Article 19(1)(a) and not saved by Article 19(2). We have also held that the wider range of circulation over the internet cannot restrict the content of the right Under Article 19(1)(a) nor can it justify its denial. However, when we come to discrimination Under Article 14, we are unable to agree with counsel for the Petitioners that there is no intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear - the internet gives any individual a platform which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the Petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject matter of challenge in these petitions. We make it clear that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore, that the challenge on the ground of Article 14 must fail.

Procedural Unreasonableness

99. One other argument must now be considered. According to the Petitioners, Section 66A also suffers from the vice of procedural unreasonableness. In that, if, for example, criminal defamation is alleged, the safeguards available Under Section 199 Code of Criminal Procedure would not be available for a like offence committed Under Section 66A. Such safeguards are that no court shall take cognizance of such an offence except upon a complaint made by some person aggrieved by the offence and that such complaint will have to be made within six months from the date on which the offence is alleged to have been committed. Further, safeguards that are to be found in Sections 95 and 96 of the Code of Criminal Procedure are also absent when it comes to Section 66A. For example, where any newspaper book or document wherever printed appears to contain matter which is obscene, hurts the religious feelings of some community, is seditious in nature, causes enmity or hatred to a certain section of the public, or is against national integration, such book, newspaper or document may be seized but Under Section 96 any person having any interest in such newspaper, book or document may within two months from the date of a publication seizing such documents, books or newspapers apply to the High court to set aside such declaration. Such matter is to be heard by a Bench consisting of at least three Judges or in High Courts which consist of less than three Judges, such special Bench as may be composed of all the Judges of that High Court.

100. It is clear that Sections 95 and 96 of the Code of Criminal Procedure reveal a certain degree of sensitivity to the fundamental right to free speech and expression. If matter is to be seized on specific grounds which are relatable to the subject matters contained in Article 19(2), it would be open for persons affected by such seizure to get a declaration from a High Court consisting of at least three Judges that in fact publication of the so-called offensive matter does not in fact relate to any of the specified subjects contained in Article 19(2).

Further, Section 196 of the Code of Criminal Procedure states:

196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.--(1) No Court shall take cognizance of--

(a) any offence punishable under Chapter VI or Under Section 153-A, [Section 295-A or Sub-section (1) of Section 505] of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in Section 108A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.

[(1-A)

No Court shall take cognizance of--

(a) any offence punishable Under Section 153B or Sub-section (2) or Sub-section (3) of Section 505 of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.]

(2) No court shall take cognizance of the offence of any criminal conspiracy punishable Under Section 120-B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit [an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction [Under Sub-section (1) or Sub-section (1-A) and the District Magistrate may, before according sanction Under Sub-section (1-A)] and the State Government or the District Magistrate may, before giving consent Under Sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in Sub-section (3) of Section 155.

101. Again, for offences in the nature of promoting enmity between different groups on grounds of religion etc. or offences relatable to deliberate and malicious acts intending to outrage religious feelings or statements that create or promote enmity, hatred or ill-will between classes can only be taken cognizance of by courts with the previous sanction of the Central Government or the State Government. This procedural safeguard does not apply even when a similar offence may be committed over the internet where a person is booked Under Section 66A instead of the aforesaid Sections.

Having struck down Section 66A on substantive grounds, we need not decide the procedural unreasonableness aspect of the Section.

Section 118 of the Kerala Police Act.

102. Learned Counsel for the Petitioner in Writ Petition No. 196 of 2014 assailed Sub-section (d) of Section 118 which is set out hereinbelow:

118. Penalty for causing grave violation of public order or danger.-Any person who,-

(d) Causes annoyance to any person in an indecent manner by statements or verbal or comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means; shall, on conviction be punishable with imprisonment for a term which may extend to three years or with fine not exceeding ten thousand rupees or with both.

103. Learned Counsel first assailed the Section on the ground of legislative competence stating that this being a Kerala Act, it would fall outside Entries 1 and 2 of List II and fall within Entry 31 of List I. In order to appreciate the argument we set out the relevant entries:

List-I

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

List-II

1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

2. Police (including railway and village police) subject to the provisions of entry 2A of List I.

The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II. In addition, Section 118 would also fall within Entry 1 of List II in that as its marginal note tells us it deals with penalties for causing grave violation of public order or danger.

104. It is well settled that a statute cannot be dissected and then examined as to under what field of legislation each part would separately fall. In A.S. Krishna v. State of Madras MANU/SC/0035/1956 : (1957) S.C.R. 399, the law is stated thus:

The position, then, might thus be summed up: When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not. (at page 410)

105. It is, therefore, clear that the Kerala Police Act as a whole and Section 118 as part thereof falls in pith and substance within Entry 2 List II, notwithstanding any incidental encroachment that it may have made on any other Entry in List I. Even otherwise, the penalty created for causing annoyance in an indecent manner in pith and substance would fall within Entry 1 List III which speaks of criminal law and would thus be within the competence of the State Legislature in any case.

106. However, what has been said about Section 66A would apply directly to Section 118(d) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and over breadth, that led to the invalidity of Section 66A, and for the reasons given for striking down Section 66A, Section 118(d) also violates Article 19(1)(a) and not being a reasonable restriction on the said right and not being saved under any of the subject matters contained in Article 19(2) is hereby declared to be unconstitutional.

Section 69A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

107. Section 69A of the Information Technology Act has already been set out in paragraph 2 of the judgment. Under Sub-section (2) thereof, the 2009 Rules have been framed. Under Rule 3, the Central Government shall designate by notification in the official gazette an officer of the Central Government not below the rank of a Joint Secretary as the Designated Officer for the purpose of issuing direction for blocking for access by the public any information referable to Section 69A of the Act. Under Rule 4, every organization as defined Under Rule 2(g), (which refers to the Government of India, State Governments, Union Territories and agencies of the Central Government as may be notified in the Official Gazette by the Central Government)-is to designate one of its officers as the "Nodal Officer". Under Rule 6, any person may send their complaint to the "Nodal Officer" of the concerned Organization for blocking, which complaint will then have to be examined by the concerned Organization regard being had to the parameters laid down in Section 69A(1) and after being so satisfied, shall transmit such complaint through its Nodal Officer to the Designated Officer in a format specified by the Rules. The Designated Officer is not to entertain any complaint or request for blocking directly from any person. Under Rule 5, the Designated Officer may on receiving any such request or complaint from the Nodal Officer of an Organization or from a competent court, by order direct any intermediary or agency of the Government to block any information or part thereof for the reasons specified in 69A(1). Under Rule 7 thereof, the request/complaint shall then be examined by a Committee of Government Personnel who Under Rule 8 are first to make all reasonable efforts to identify the originator or intermediary who has hosted the information. If so identified, a notice shall issue to appear and submit their reply at a specified date and time which shall not be less than 48 hours from the date and time of receipt of notice by such person or intermediary. The Committee then examines the request and is to consider whether the request is covered by 69A(1) and is then to give a specific recommendation in writing to the Nodal Officer of the concerned Organization. It is only thereafter that the Designated Officer is to submit the Committee's recommendation to the Secretary, Department of Information Technology who is to approve such requests or complaints. Upon such approval, the Designated Officer shall then direct any agency of Government or intermediary to block the offending information. Rule 9 provides for blocking of information in cases of emergency where delay caused would be fatal in which case the blocking may take place without any opportunity of hearing. The Designated Officer shall then, not later than 48 hours of the issue of the interim direction, bring the request before the Committee referred to earlier, and only on the recommendation of the Committee, is the Secretary Department of Information Technology to pass the final order. Under Rule 10, in the case of an order of a competent court in India, the Designated Officer shall, on receipt of a certified copy of a court order, submit it to the Secretary, Department of Information Technology and then initiate action as directed by the Court. In addition to the above safeguards, Under Rule 14 a Review Committee shall meet at least once in two months and record its findings as to whether directions issued are in accordance with Section 69A(1) and if it is of the contrary opinion, the Review Committee may set aside such directions and issue orders to unblock the said information. Under Rule 16, strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.

108. Learned Counsel for the Petitioners assailed the constitutional validity of Section 69A, and assailed the validity of the 2009 Rules. According to learned Counsel, there is no pre-decisional

hearing afforded by the Rules particularly to the "originator" of information, which is defined Under Section 2(za) of the Act to mean a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person. Further, procedural safeguards such as which are provided Under Section 95 and 96of the Code of Criminal Procedure are not available here. Also, the confidentiality provision was assailed stating that it affects the fundamental rights of the Petitioners.

109. It will be noticed that Section 69A unlike Section 66A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition Under Article 226 of the Constitution.

110. The Rules further provide for a hearing before the Committee set up-which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable Under Sub-section (3) of Section 69A.

111. Merely because certain additional safeguards such as those found in Section 95 and 96 Code of Criminal Procedure are not available does not make the Rules constitutionally infirm. We are of the view that the Rules are not constitutionally infirm in any manner.

Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011.

112. Section 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfill the conditions of the Section. Section 79 states:

79. Exemption from liability of intermediary in certain cases.--(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of Sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of Sub-section (1) shall apply if--

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not--

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of Sub-section (1) shall not apply if--

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.--For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.]

113. Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and Regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rule 3(2) and 3(4) are important, they are set out hereinbelow:

3. Due diligence to be observed by intermediary.--The intermediary shall observe following due diligence while discharging his duties, namely:

(2) Such rules and Regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that--

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(c) harm minors in any way;

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

(f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(g) impersonate another person;

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in Sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of Sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

114. Learned Counsel for the Petitioners assailed Rules 3(2) and 3(4) on two basic grounds. Firstly, the intermediary is called upon to exercise its own judgment Under Sub-rule (4) and then disable information that is in contravention of Sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet. Further, no safeguards are provided as in the 2009 Rules made Under Section 69A. Also, for the very reasons that Section 66A is bad, the Petitioners assailed Sub-rule (2) of Rule 3 saying that it is vague and over broad and has no relation with the subjects specified Under Article 19(2).

115. One of the Petitioners' counsel also assailed Section 79(3)(b) to the extent that it makes the intermediary exercise its own judgment upon receiving actual knowledge that any information is being used to commit unlawful acts. Further, the expression "unlawful acts" also goes way beyond the specified subjects delineated in Article 19(2).

116. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69A. We have seen how Under Section 69A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed - one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69A read with 2009 Rules.

117. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

118. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.

119. In conclusion, we may summarise what has been held by us above:

(a) Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved Under Article 19(2).

(b) Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

(c) Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 Sub-rule (4) being read down in the same manner as indicated in the judgment.

(d) Section 118(d) of the Kerala Police Act is struck down being violative of Article 19(1)(a) and not saved by Article 19(2).

All the writ petitions are disposed in the above terms.

---

[1]The genealogy of this Section may be traced back to Section 10(2)(a) of the U.K. Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character. This Section was

substantially reproduced by Section 66 of the UK Post Office Act, 1953 as follows:
66. Prohibition of sending offensive or false telephone messages or false telegrams, etc.
If any person--
(a) sends any message by telephone which is grossly offensive or of an indecent, obscene or menacing character;
(b) sends any message by telephone, or any telegram, which he knows to be false, for the purpose of causing annoyance, inconvenience or needless anxiety to any other person; or
(c) persistently makes telephone calls without reasonable cause and for any such purpose as aforesaid,
he shall be liable on summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both.
This Section in turn was replaced by Section 49 of the British Telecommunication Act, 1981 and Section 43 of the British Telecommunication Act, 1984. In its present form in the UK, it is Section 127 of the Telecommunication Act, 2003 which is relevant and which is as follows:
127. Improper use of public electronic communications network
(1) A person is guilty of an offence if he-
(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
(b) cause any such message or matter to be so sent.
(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he-
(a) sends by means of a public electronic communications network, a message that he knows to be false,
(b) causes such a message to be sent; or
(c) persistently makes use of a public electronic communications network.
(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.
(4) Sub-sections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c.42)).
[2]Incidentally, the Ark of the Covenant is perhaps the single most important focal point in Judaism. The original ten commandments which the Lord himself gave to Moses was housed in a wooden chest which was gold plated and called the Ark of the Covenant and carried by the Jews from place to place until it found its final repose in the first temple-that is the temple built by Solomon.
[3]A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an "honourable man". He then shows the crowd Caesar's mantle and describes who struck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says-
ANTONY-Good friends, sweet friends, let me not stir you up
To such a sudden flood of mutiny.
They that have done this deed are honourable:
What private griefs they have, alas, I know not,
That made them do it: they are wise and honourable,
And will, no doubt, with reasons answer you.

I come not, friends, to steal away your hearts:
I am no orator, as Brutus is;
But, as you know me all, a plain blunt man,
That love my friend; and that they know full well
That gave me public leave to speak of him:
For I have neither wit, nor words, nor worth,
Action, nor utterance, nor the power of speech,
To stir men's blood: I only speak right on;
I tell you that which you yourselves do know;
Show you sweet Caesar's wounds, poor poor dumb mouths,
And bid them speak for me: but were I Brutus,
And Brutus Antony, there were an Antony
Would ruffle up your spirits and put a tongue
In every wound of Caesar that should move
The stones of Rome to rise and mutiny.
ALL-We'll mutiny.

[4]In its present form the clear and present danger test has been reformulated to say that:

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Interestingly, the US Courts have gone on to make a further refinement. The State may ban what is called a "true threat".

'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.

The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.

Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

See Virginia v. Black (Supra) and Watts v. United States 22 L. Ed. 2d. 664 at 667

Back to Index

MANU/SC/0705/2019

Neutral Citation: 2019/INSC/647

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 4779 of 2019 (Arising out of SLP (C) No. 19033 of 2017)

Decided On: 08.05.2019

Appellants: Ssangyong Engineering & Construction Co. Ltd. **Vs.** Respondent: National Highways Authority of India (NHAI)

Hon'ble Judges/Coram:

Rohinton Fali Nariman and Vineet Saran, JJ.

Subject: Commercial

Relevant Section:

Arbitration And Conciliation Act, 1996 - Section 34

Industry: Real Estate

Industry: Infrastructure

Prior History / High Court Status:

From the Judgment and Order dated 03.04.2017 of the High Court of Delhi at New Delhi in FAO (OS) COMM. No. 82 of 2016 (MANU/DE/0987/2017)

Case Category:

ARBITRATION MATTERS - SLPS CHALLENGING ARBITRATION MATTERS

Case Note:

Arbitration - Majority award - Public policy - Respondent, invited bids for construction of a four-lane bypass on National Highway - Appellant's bid was accepted - Dispute arose between parties - Appellant approached High Court for interim protection against deduction and recoveries sought to be made by Respondent by applying said Circular - High Court,

restrained Respondent from implementing said Circular retrospectively - Meanwhile, dispute was referred to Dispute Adjudicating Board as envisaged under contract in which arbitral award was passed - Section 34 petition was filed by Appellant was rejected by Single Judge of High Court, in which it was held that possible view was taken by majority arbitrators which, therefore, could not be interfered with - Single Judge also went on to hold that New Series published by Ministry could be applied in case of the Appellant as base indices under New Series were available - Section 37 appeal to Division Bench of High Court yielded same result - Hence, present appeal - Whether majority award had created new contract for parties by applying unilateral circular and was liable to be set aside.

Facts:

The Respondent, invited bids for construction of a four-lane bypass on National Highway. The Appellant's bid was accepted vide its letter of acceptance. Thereafter dispute arose between parties. The Appellant then approached the High Court vide an application under Section 9 of the Arbitration and Conciliation Act, 1996 for interim protection against deduction and recoveries sought to be made by the Respondent by applying the Circular. The Delhi High Court, by its order dated 31.05.2013, restrained the Respondent from implementing the said Circular retrospectively. Meanwhile, the said dispute was referred to the Dispute Adjudicating Board as envisaged under the contract. Section 34 petition which was filed by the Appellant was rejected by the Single Judge of the High Court, by a judgment and order, in which it was held that a possible view was taken by the majority arbitrators which, therefore, could not be interfered with, given the parameters of challenge to arbitral awards. The Single Judge also went on to hold that the New Series published by the Ministry could be applied in the case of the Appellant as the base indicesunder the New Series were available. Having so held, the Single Judge stated that even though the view expressed in the dissenting award was more appealing, and that he preferred that view, yet he found that since the majority award was a possible view, the scope of interference being limited, the Section 34 petition was dismissed. A Section 37 appeal to the Division Bench of the High Court yielded the same result.

Held, while allowing the appeal:

(i) In the guise of misinterpretation of the contract, and consequent errors of jurisdiction, it was not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the said misinterpretation, could be said to have been fairly comprehended as disputes within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator was alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of patent illegality, which, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) of Act would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which were beyond the arbitration agreement or beyond the reference to the arbitral tribunal. [43]

(ii) Insofar as the argument that a new contract had been made by the majority award for the parties, without the consent of the Appellant, by applying a formula outside the agreement, as per the Circular, which itself could not be applied without the Appellant's consent, this ground under Section 34(2)(a)(iv) of Act would not be available, given the authorities discussed in detail. It was enough to state that the Appellant argued before the arbitral tribunal that a new contract was being made by applying the formula outside what was prescribed, which was answered by the Respondent, stating that it would not be possible to apply the old formula without a linking factor which would have to be introduced. Considering that the parties were at issue on this, the dispute as to whether the linking factor applied, thanks to the Circular was clearly something raised and argued by the parties, and was certainly something which would fall within the arbitration Clause or the reference to arbitration that governs the parties. This being the case, this argument would not obtain and Section 34(2)(a)(iv), as a result, would not be attracted. [47]

(iii) However, when it comes to the public policy of India argument based upon most basic notions of justice, it was clear that this ground could be attracted only in very exceptional circumstances when the conscience of the Court was shocked by infraction of fundamental notions or principles of justice. It could be seen that the formula that was applied by the agreement continued to be applied in short, it was not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, could not possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it could not apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular was acceptable to them. How the Appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular did not and could not apply. This being the case, it was clear that the majority award had created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice had been breached, namely, that a unilateral addition or alteration of a contract could never be foisted upon an unwilling party, nor could a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, this ground was available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance could any Court interfere with an arbitral award on the ground that justice had not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, was contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment. [48]

(iv) The judgments of the Single Judge and of the Division Bench of the Delhi High Court are set aside. Consequently, the majority award was also set aside. Under the Scheme of Section 34 of the 1996 Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. This would cause considerable delay and be contrary to one of the important objectives of the 1996 Act, namely, speedy resolution of

disputes by the arbitral process under the Act. Therefore, in order to do complete justice between the parties, invoking our power under Article 142 of the Constitution of India, and given the fact that there was a minority award which awards the Appellant its claim based upon the formula mentioned in the agreement between the parties, we uphold the minority award, and state that it was this award, together with interest, that will now be executed between the parties. Therefore award the claim of the Claimant in full. [49]

Disposition:
Appeal Allowed

JUDGMENT

Rohinton Fali Nariman, J.

1. Leave granted.

2. The Respondent, National Highways Authority of India ["NHAI"], invited bids for construction of a four-lane bypass on National Highway 26 in the State of Madhya Pradesh. The Appellant's bid was accepted vide its letter of acceptance dated 30.12.2005, for a total contract value of INR 2,19,01,16,805/-. The Appellant before us is a company registered under the laws of the Republic of Korea, whereas the Respondent is a Government of India undertaking, responsible for construction of National Highways throughout the territory of India. The components used in execution of work for which price adjustment was payable to the Appellant are labour, plant and machinery, petroleum, oil and lubricant (POL), cement, steel, bitumen, and other local materials. Price adjustment for four of these components, i.e., cement, steel, plant and machinery, and other local materials was agreed to be calculated as per a formula given in Sub-clause 70.3 of the contract. The relevant portion of Sub-clause 70.3 states as under:

ii. Adjustment for Cement Component

Price adjustment for increase or decrease in the cost of cement procured by the contractor shall be paid in accordance with the following formula:

$$V_c = 0.85 \times \frac{P_c}{100} \times R_i \times \frac{(C_1 - C_0)}{C_0}$$

Where,

V_c = increase or decrease in the cost of work during the month under consideration due to change in rates of component.

C_0 = the all India average wholesale price index for cement on the day 28 days prior to the closing date of submission of bids, as published by Ministry of Industrial Development, Government of India, New Delhi.

C_1 = the all India average wholesale price index for cement on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related, as published by Ministry of Industrial Development, Government of India, New Delhi.

P_c = percentage of Cement component.

Insofar as the component C_0 is concerned, the date which is 28 days prior to the last submission of bids is 29.09.2005, which is the base date for calculation of price adjustment, since it is common ground that the date of submission of the bid is 27.10.2005.

3. The price adjustment was being paid to the Appellant every month in terms of the agreed formula Under Sub-clause 70.3 by using the Wholesale Price Index ["**WPI**"] published by the Ministry of Industrial Development, which followed the years 1993-94 = 100 ["**Old Series**"]. However, with effect from 14.09.2010, the Ministry of Industrial Development stopped publishing the WPI for the Old Series and started publishing indices under the WPI series 2004-05 = 100 ["**New Series**"]. It is important to note that even under this New Series, the WPIs for the previous years beginning from April, 2005 were also being published by the Ministry. This being so, as both the indices C_1 and C_0 were available to the Appellant under the New Series for calculating price adjustment, the Appellant raised its bills accordingly. It is undisputed that payments of 90% of the monthly bills on this basis were made for the period September, 2010 to February, 2013. On 15.02.2013, the Respondent issued a Policy Circular ["**Circular**"], in which a new formula for determining indices was used by applying a "linking factor" based on the year 2009-10. However, this Circular expressly stated:

Thus, payment on account of price adjustment may be made by adopting the above process subject to the condition that the contractors furnish undertaking/affidavit that this price adjustment is acceptable to them and they will not make any claim, whatsoever, on this account in future after this payment.

4. After this Circular, the Respondent stated that the Circular would have to be applied to the contract in question, as a result of which, a linking factor would have to be provided by which the Old Series was connected to the New Series. The Appellant never accepted this and knocked at the doors of the High Court of Madhya Pradesh through a writ petition in which it challenged the validity of the Circular. However, the High Court vide its order dated 03.04.2013 disposed of the writ petition with the observation that there exists a dispute resolution mechanism through the Dispute Adjudication Board, after which arbitration is also provided, and as the Appellant had an efficacious alternative remedy, it was relegated to the same. The Respondent then asked the Appellant to give its consent to receive monthly payment under the Circular. The Appellant submitted a conditional undertaking dated 17.05.2013, in which it was clearly stated:

The above undertaking is without prejudice to the Contractor's right to challenge the said Circular dated 15.02.2013 as per provisions of contract and other legal remedies available to the Contractor before the appropriate forum.

5. The Appellant then approached the Delhi High Court vide an application Under Section 9 of the Arbitration and Conciliation Act, 1996 [**"1996 Act"**], for interim protection against deduction and

recoveries sought to be made by the Respondent by applying the said Circular. The Delhi High Court, by its order dated 31.05.2013, restrained the Respondent from implementing the said Circular retrospectively.

6. Meanwhile, the aforesaid dispute was referred to the Dispute Adjudicating Board as envisaged Under Sub-clause 67 of the contract. The Dispute Adjudicating Board, by its majority recommendation dated 31.10.2013, recommended a certain linking factor and then arrived at the figures of price adjustment in the aforesaid four materials by applying such linking factor. However, one of the members of the Dispute Adjudicating Board gave a dissenting note in favour of the Appellant, recommending that in view of the express terms of the contract, the provisions contained in the impugned Circular cannot be applied for calculation of price adjustment. Aggrieved by the recommendations of the Dispute Adjudicating Board, the Appellant issued a notice of dissatisfaction dated 19.11.2013, and referred the dispute to an arbitral tribunal consisting of three members. The Appellant raised a claim of INR 2,01,42,827/- towards unpaid price adjustment for the period September 2010 up to May 2014, plus INR 1,00,86,417/- for interest on the aforesaid unpaid amount. The dispute that was thus referred to arbitration was a narrow one, namely, as to whether price adjustment would continue under the terms of the contract, or whether the Circular dated 15.02.2013, applying the linking factor, would have to be applied. Two out of three members of the arbitral tribunal, by their award dated 02.05.2016 made at New Delhi, after noting the arguments of both sides, held that the Circular could be applied as it was within contractual stipulations, as has been held by the Dispute Adjudicating Board, and hence, rejected the Appellant's claim. While doing so, the majority award applied certain government guidelines of the Ministry of Commerce and Industry, as per which it was stated that the establishment of a linking factor to connect the Old Series with the New Series is imperative, and therefore, required. The Appellant's argument that the linking factor is de hors the contract and not at all required was, therefore, rejected. The majority award further made it clear that these guidelines are available on a certain website, as they were not on record. Paragraph 13 of the guidelines was then referred to, and applying the arithmetic conversion method, which is one of the three methods referred to in the said paragraph, a linking factor was applied in accordance with the formula prescribed in the said method which is as follows:

Arithmetic conversion method:

$y = cx$ or $c = y/x$

Where y is average value of indices of 12 months for the Old Series and x for the New Series; c being conversion factor. Meaning thereby that relation between y and x is linear. Average of 12 months for x is taken 100.

Thus, the final majority award, based on the aforesaid linking factor, was as follows:

9. Award

9.1. Based on the findings above, we hold that introducing linkage factor is imperative and required for conversion of indices from the base 2004-05 series to the earlier series base 1993-94 as basis

for determination of price adjustment. Linking factors for four items of work/materials involved in price adjustment, shall be as under:

Cement	1.528
Steel	2.365
Plant and Machinery	1.840
Other Materials	1.873

9.2. The final amount of price adjustment shall be worked out on the basis of above-mentioned linkage factors. After deducting the amount already paid to the Claimant, the amount payable to them against their claim shall be determined and the same shall be paid by the Respondent to the Claimant.

9.3. This amount shall also attract interest @ 10% per annum compounded monthly from due date of payment to the date of award, viz. 02.05.2016.

9.4. Further interest @ 12% per annum, simple interest, shall be payable to the Claimant from 02.05.2016 onwards till the date of payments. No future interest however shall be payable in case the amounts are paid within 90 days of the date of the award, that is by 02.08.2016.

A dissenting award was given by Shri Dilip Namdeo Potdukhe, in which the learned dissenting arbitrator expressly stated that neither the Circular nor the guidelines could be applied as they were de hors the contract between the parties. Accordingly, the dissenting award awarded the claim of the claimant-Appellant in full.

7. A Section 34 petition which was filed by the Appellant was rejected by the learned Single Judge of the Delhi High Court, by a judgment and order dated 09.08.2016, in which it was held that a possible view was taken by the majority arbitrators which, therefore, could not be interfered with, given the parameters of challenge to arbitral awards. The learned Single Judge also went on to hold that the New Series published by the Ministry could be applied in the case of the Appellant as the base indices for 2004-05 under the New Series were available. Having so held, the learned Single Judge stated that even though the view expressed in the dissenting award is more appealing, and that he preferred that view, yet he found that since the majority award is a possible view, the scope of interference being limited, the Section 34 petition was dismissed. A Section 37 appeal to the Division Bench of the Delhi High Court yielded the same result, by the impugned judgment dated 03.04.2017.

8. Smt. Rashmeet Kaur, learned Advocate appearing on behalf of the Appellant, first submitted that Section 34(2)(a)(iv) of the 1996 Act was attracted to the facts of the present case as the majority award contained decisions on matters beyond the scope of the submission to arbitration. The learned Counsel argued that this was a jurisdictional error, and a new contract was substituted by the majority award amounting to a novation of the old agreement and the old formula contained in the agreement, which would be a decision on a matter beyond the scope of the submission to arbitration. She also argued that Section 34(2)(b)(ii) of the 1996 Act would also be attracted as the award was in conflict with the public policy of India, being contrary to the fundamental policy of Indian law as well as the most basic notions of justice. According to her, the rewriting of the terms

of the contract ought to shock the conscience of the Court, as a new contract was foisted on one of the parties unilaterally. For this, she cited various judgments. She also argued that the principles of natural justice were violated and, therefore, Section 34(2)(a)(iii) would also be attracted. She argued that the government guidelines were never produced before the arbitrators, and the arbitrators applied the said guidelines behind the back of the parties, thus, resulting in breach of Section 34(2)(a)(iii) of the 1996 Act. Finally, though she argued the ground of patent illegality, this argument was given up when it was pointed out by the Court that this ground, which obtains Under Section 34(2A) of the 1996 Act, would not be available in the case of an international commercial arbitration that is decided in India. Shri Mukul Rohatgi, learned Senior Advocate, supplemented the submissions of Smt. Rashmeet Kaur.

9. On the other hand, Shri S. Nandakumar, learned Counsel appearing on behalf of the Respondent, argued that applying the new formula with the base index of 2004-05 would make the contract unworkable, as a result of which, it was imperative to have a linking factor. According to the learned Counsel, the Appellant itself applied a linking factor when the Tribunal asked it to do so, may be without prejudice to its other contentions. In any case, this was a matter of interpretation of the agreement in which the arbitrators' view is final, as has been correctly held by the learned Single Judge and the Division Bench. He also cited some judgments in support of this proposition. According to him, therefore, this appeal should be dismissed.

Applicability of the Arbitration and Conciliation (Amendment) Act, 2015

10. Since the Section 34 petition in the present case is dated 30.07.2016, an important question as to the applicability of the parameters of review of arbitral awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 ["**Amendment Act, 2015**"] with effect from 23.10.2015 - in particular, in the "public policy of India" ground for challenge of arbitral awards. The question which arises is whether the amendments made in Section 34 are applicable to applications filed Under Section 34 to set aside arbitral awards made after 23.10.2015. This Court, in **Board of Control for Cricket in India v. Kochi Cricket (P.) Ltd. and Ors.,** MANU/SC/0256/2018 : (2018) 6 SCC 287 ["BCCI"], has held that the Amendment Act, 2015 would apply to Section 34 petitions that are made after this date. Thus, this Court held:

75. Shri Viswanathan then argued, relying upon *R. Rajagopal Reddy v. Padmini Chandrasekharan* [*R. Rajagopal Reddy v. Padmini Chandrasekharan*, MANU/SC/0061/1996 : (1995) 2 SCC 630], *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* [*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, MANU/SC/0329/2001 : (2001) 6 SCC 356], *Sedco Forex International Drill Inc. v. CIT* [*Sedco Forex International Drill Inc. v. CIT*, MANU/SC/2079/2005 : (2005) 12 SCC 717] and *Bank of Baroda v. Anita Nandrajog* [*Bank of Baroda v. Anita Nandrajog*, MANU/SC/1587/2009 : (2009) 9 SCC 462 : (2009) 2 SCC (L&S) 689], that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that "for the avoidance of any doubt, it is clarified", this is not language that is conclusive in nature, but it is open to the court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to the learned Senior

Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being *Saw Pipes Ltd.* [*ONGC Ltd.* v. *Saw Pipes Ltd.*, MANU/SC/0314/2003 : (2003) 5 SCC 705] and *Western Geco* [*ONGC Ltd.* v. *Western Geco International Ltd.*, MANU/SC/0772/2014 : (2014) 9 SCC 263: (2014) 5 SCC (Civ) 12], as has been held in para 18 in *HRD Corpn. v. GAIL (India) Ltd.* [*HRD Corpn.* v. *GAIL (India) Ltd.*, MANU/SC/1066/2017 : (2018) 12 SCC 471], it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.

xxx xxx xxx

78. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,

... have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act,

and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in *HRD Corpn. v. GAIL (India) Ltd.*, MANU/SC/1066/2017 : (2018) 12 SCC 471 of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)

18. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC Ltd.* v. *Saw Pipes Ltd.*, MANU/SC/0314/2003 : (2003) 5 SCC 705 has been expressly done away with. So has the judgment in *ONGC Ltd.* v. *Western Geco International Ltd.*, MANU/SC/0772/2014 : (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Plant Co. Ltd.* v. *General Electric Company*, MANU/SC/0195/1994 : 1994 Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in *Renusagar*, MANU/SC/0195/1994 : 1994 Supp (1) SCC 644. "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of

justice and morality i.e. such notions as would shock the conscience of the Court as understood in *Associate Builders* v. *DDA*, MANU/SC/1076/2014 : (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204. Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders*, MANU/SC/1076/2014 : (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.]

It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated.

11. There is no doubt that the amendments made in Explanations 1 and 2 to Section 34(2)(b)(ii) have been made for the avoidance of any doubt, which language, however, is not found in Section 34(2A). Apart from the anomalous position which would arise if the Section were to be applied piecemeal, namely, that Explanations 1 and 2 were to have retrospective effect, being only to remove doubts, whereas Sub-section (2A) would have to apply prospectively as a new ground, with inbuilt exceptions, having been introduced for the first time, it is clear that even on principle, it is the substance of the amendment that is to be looked at rather than the form. Therefore, even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been changed substantively. Thus, in **Sedco Forex International Drill, Inc. and Ors. v. Commissioner of Income Tax, Dehradun and Anr.,** MANU/SC/2079/2005 : (2005) 12 SCC 717 [**"Sedco"**], this Court held:

17. As was affirmed by this Court in *Goslino Mario* Case [MANU/SC/1227/1999 : (2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (*See* also *Reliance Jute and Industries Ltd.* v. *CIT* [MANU/SC/0338/1979 : (1980) 1 SCC 139: 1980 SCC (Tax) 67].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main Section [See *Sonia Bhatia* v. *State of U.P.*, MANU/SC/0363/1981 : (1981) 2 SCC 585, 598: AIR 1981 SC 1274, 1282 para 24]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See *Shyam Sunder* v. *Ram Kumar*, MANU/SC/0405/2001 : (2001) 8 SCC 24 (para 44); *Brij Mohan Das Laxman Das* v. *CIT*, MANU/SC/1004/1997 : (1997) 1 SCC 352, 354; *CIT* v. *Podar Cement (P) Ltd.*, MANU/SC/0649/1997 : (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

12. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of "public policy of India" in **ONGC Ltd. v. Saw Pipes Ltd.**, MANU/SC/0314/2003 : (2003) 5 SCC 705 [**"Saw Pipes"**] and **ONGC Ltd. v. Western Geco International Ltd.,** MANU/SC/0772/2014 : (2014) 9 SCC 263 ["**Western Geco**"] has been done away with, and a new ground of "patent illegality", with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that

have been made to the Court on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.

Changes made by the Amendment Act, 2015

13. It is first necessary to survey the law insofar as it relates to the ground of setting aside an award if it is in conflict with the public policy of India, as it existed before the Amendment Act, 2015. In **Associate Builders v. Delhi Development Authority**, MANU/SC/1076/2014 : (2015) 3 SCC 49 [**"Associate Builders"**], this Court referred to the judgment in **Renusagar Power Co. Ltd. v. General Electric Co.**, MANU/SC/0195/1994 : 1994 Supp (1) SCC 644 [**"Renusagar"**], as follows:

18. In *Renusagar Power Co. Ltd.* v. *General Electric Co.* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, MANU/SC/0195/1994 : 1994 Supp (1) SCC 644], the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

7. *Conditions for enforcement of foreign awards.*--(1) A foreign award may not be enforced under this Act--

xxx xxx xxx

(*b*) if the Court dealing with the case is satisfied that--

xxx xxx xxx

(*ii*) the enforcement of the award will be contrary to the public policy.

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

(*i*) The fundamental policy of Indian law,

(*ii*) The interest of India,

(*iii*) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

To this statement of the law, this Court added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian Law [see paragraph 27].

14. It is important to note that Sections 34(2)(b) and 48(2)(b) of the 1996 Act, before their amendment in 2015, stated as follows:

34. Application for setting aside arbitral award.--

xxx xxx xxx

(2) An arbitral award may be set aside by the court only if-

xxx xxx xxx

(*b*) The court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of Sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

xxx xxx xxx

48. Conditions for enforcement of foreign awards.--

xxx xxx xxx

(2) Enforcement of an arbitral award may also be refused if the Court finds that-

xxx xxx xxx

(b) The enforcement of the award would be contrary to the public policy of India.

Explanation.-Without prejudice to the generality of Clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

xxx xxx xxx

It will thus be seen that whether the ground of "public policy of India" is used to set aside an award Under Section 34, or to refuse recognition and enforcement of a foreign award Under Section 48, Section 34(2)(b) ought to have been construed in the same manner as Section 48(2)(b).

15. However, this Court, in **Saw Pipes** (supra), added yet another ground, namely, that of "patent illegality" to the three grounds mentioned in **Renusagar** (supra) in order to set aside an award Under Section 34 of the 1996 Act. This ground was added in the following terms:

31. ..... [Patent] Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

16. Given this interpretation of the law, insofar as Section 34 was concerned, this Court, in **DDA** v. **R.S. Sharma and Co.**, MANU/SC/3624/2008 : (2008) 13 SCC 80, summarised the law as it stood at that point of time, as follows:

21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court Under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India. .....

17. Yet another expansion of the phrase "public policy of India" contained in Section 34 of the 1996 Act was by another judgment of this Court in **Western Geco** (supra), which was explained in **Associate Builders** (supra) as follows:

28. In a recent judgment, *ONGC Ltd.* v. *Western Geco International Ltd.* [MANU/SC/0772/2014 : (2014) 9 SCC 263: (2014) 5 SCC (Civ) 12], this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in *ONGC* [MANU/SC/0314/2003 : (2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The *first and foremost* is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a '*judicial approach*' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

xxx xxx xxx

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* Rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so

deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, MANU/UKWA/0002/1947 : (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These Sections read as follows:

18. ***Equal treatment of parties.***--The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

xxx xxx xxx

34. ***Application for setting aside arbitral award.--***

xxx xxx xxx

(2) An arbitral award may be set aside by the court only if--

(*a*) the party making the application furnishes proof that--

xxx xxx xxx

(*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(*i*) a finding is based on no evidence, or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held: (SCC p. 317, para 7)

7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In *Kuldeep Singh v. Commr. of Police* [MANU/SC/0793/1998 : (1999) 2 SCC 10: 1999 SCC (L&S) 429], it was held: (SCC p. 14, para 10)

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* [MANU/SC/1248/2011 : (2012) 1 SCC 594: (2012) 1 SCC (Civ) 342], this Court held: (SCC pp. 601-02, para 21)

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent

has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

18. It is at this stage that certain fundamental changes were made in the law pursuant to the 246th Report of the Law Commission of India [**"Law Commission Report"**] of August 2014. The Law Commission Report first suggested an amendment to the Preamble of the 1996 Act as follows:

Amendment to the Preamble

After the words aforesaid "Model Law and Rules" the following be inserted:

And WHEREAS it is further required to improve the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation, in order to provide a fair, expeditious and cost-effective means of dispute resolution;

[**NOTE:** This amendment is proposed in order to further demonstrate and reaffirm the Act's focus on achieving the objectives of fairness, speed and economy in resolution of disputes through arbitration.]

The Law Commission Report, when it came to setting aside of domestic awards and recognition or enforcement of foreign awards, prescribed certain changes to the 1996 Act as follows:

SETTING ASIDE OF DOMESTIC AWARDS AND RECOGNITION/ENFORCEMENT OF FOREIGN AWARDS

34. Once an arbitral award is made, an aggrieved party may apply for the setting aside of such award. Section 34 of the Act deals with setting aside a domestic award and a domestic award resulting from an international commercial arbitration whereas Section 48 deals with conditions for enforcement of foreign awards. As the Act is currently drafted, the grounds for setting aside (Under Section 34) and conditions for refusal of enforcement (Section 48) are in *pari materia*. The Act, as it is presently drafted, therefore, treats all three types of awards - purely domestic award (i.e. domestic award not resulting from an international commercial arbitration), domestic award in an international commercial arbitration and a foreign award - as the same. The Commission believes that this has caused some problems. The legitimacy of judicial intervention in the case of

a purely domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration.

35. It is for this reason that the Commission has recommended the addition of Section 34 (2A) to deal with purely domestic awards, which may also be set aside by the Court if the Court finds that such award is vitiated by "patent illegality appearing on the face of the award." In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed proviso to the proposed Section 34 (2A) that such "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence." The Commission believes that this will go a long way to assuage the fears of the judiciary as well as the other users of arbitration law who expect, and given the circumstances prevalent in our country, legitimately so, greater redress against purely domestic awards. This would also do away with the unintended consequences of the decision of the Supreme Court in *ONGC v. Saw Pipes Ltd.,* MANU/SC/0314/2003 : (2003) 5 SCC 705, which, although in the context of a purely domestic award, had the unfortunate effect of being extended to apply equally to both awards arising out of international commercial arbitrations as well as foreign awards, given the statutory language of the Act. The amendment to Section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in *ONGC v. Saw Pipes Ltd.*, MANU/SC/0314/2003 : (2003) 5 SCC 705 - and in order that any contravention of a term of the contract by the tribunal should not *ipso jure* result in rendering the award becoming capable of being set aside. The Commission believes no similar amendment is necessary to Section 28 (1) given the express restriction of the public policy ground.

36. Although the Supreme Court has held in *Shri Lal Mahal v. Progetto Grano Spa,* MANU/SC/0655/2013 : (2014) 2 SCC 433, that the expansive construction accorded to the term "public policy" in *Saw Pipes* cannot apply to the use of the same term "public policy of India" in Section 48(2)(b), the recommendations of the Commission go even further and are intended to ensure that the legitimacy of court intervention to address patent illegalities in purely domestic awards is directly recognised by the addition of Section 34 (2A) and not indirectly by according an expansive definition to the phrase "public policy".

37. In this context, the Commission has further recommended the restriction of the scope of "public policy" in both Sections 34 and 48. This is to bring the definition in line with the definition propounded by the Supreme Court in *Renusagar Power Plant Co. Ltd. v. General Electric Co* MANU/SC/0195/1994 : AIR 1994 SC 860 where the Supreme Court while construing the term "public policy" in Section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 held that an award would be contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality". The formulation proposed by the Commission is even tighter and does not include the reference to "interests of India", which is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations (under S 34) or foreign awards (under S 48). Under the formulation of the Commission, an award can be set aside on public policy grounds *only* if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice".

19. Consequently, changes were suggested in Sections 28, 34, and 48 of the 1996 Act. The amendment to Section 28 was prescribed in the following terms:

Amendment of Section 28

16. In Section 28,

xxx xxx xxx

(ii) In Sub-section (3), after the words "tribunal shall decide" delete the words "in accordance with" and add the words "having regard to"

[*Note:* This amendment is intended to overrule the effect of *ONGC Ltd.* v. *Saw Pipes Ltd.*, MANU/SC/0314/2003 : (2003) 5 SCC 705, where the Hon'ble Supreme Court held that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being against public policy.]

Similarly, amendment of Section 34 was prescribed as follows:

Amendment of Section 34

18. In Section 34,

(i) In Sub-section (1), after the words "Sub-section (2)" add the words ", Sub-section (2A)".

(ii) In Sub-section (2), after the word "*Explanation*.--" delete the words "Without prejudice to the generality of Sub-clause (ii), it is hereby declared, for" and add the word "For" and after the words "the avoidance of any doubt," add the words "it is clarified" and after the words "public policy of India" add the word "only" and after the word "if" delete the word "-" and add the word ":" and add the Sub-clause "(a)" before the words "the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81" and add the word "; or" after the words "violation of Section 75 or Section 81" and add Sub-clause "(b) it is in contravention with the fundamental policy of Indian law; or" and add Sub-clause "(c) it is in conflict with the most basic notions of morality or justice."

[*NOTE:* The proposed Explanation II is required to bring the standard for setting aside an award in conformity with the decision of the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*, MANU/SC/0195/1994 : 1994 Supp (1) SCC 644 and *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, MANU/SC/0655/2013 : (2014) 2 SCC 433, for awards in both domestic as well as international commercial arbitrations. Ground (c) reflects an internationally recognized formulation. Such a formulation further tightens the *Renusagar* test and ensures that "morality or justice" - terms used in Renusagar - cannot be used to widen the test.]

(iii) After the *Explanation* in Sub-section (2), insert Sub-section "(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence."

[**NOTE**: The proposed S 34(2A) provides an additional, albeit carefully limited, ground for setting aside an award arising out of a domestic arbitration (and not an international commercial arbitration). The scope of review is based on the patent illegality standard set out by the Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.*, MANU/SC/0314/2003 : (2003) 5 SCC 705. The proviso creates exceptions for erroneous application of the law and re-appreciation of evidence, which cannot be the basis for setting aside awards.]

xxx xxx xxx

So far as Section 48 is concerned, an amendment was proposed as follows:

Amendment of Section 48

22. In Section 48,

(i) In Sub-section (2), in the "*Explanation*.--", delete the words "Without prejudice to the generality of Clause (b), it is hereby declared, for" and add the word "For" and after the words "avoidance of any doubt," add the words "it is clarified" and after the words "the public policy of India" add the word "only" and after the word "if" delete "-" and ";" and insert Sub-clause "(a)" before the words "the making of the award" and delete "." And add ";" after the words "by fraud or corruption" and add sub-clauses "(b) it is in contravention with the fundamental policy of Indian law; (c) it is in conflict with India's most basic notions of morality or justice."

xxx xxx xxx

20. After **Western Geco** (supra) was delivered by this Court, a **Supplementary Report** of February 2015 ["Supplementary Report"] was made by the Law Commission of India, in which the Law Commission stated:

10. The 246th Report of the Law Commission and the decision in *Western Geco*.

10.1. The Law Commission, in the 246th Report, provided for the same narrow standard, namely that a mere violation of law of India would not be a violation of 'public policy' in cases of *international commercial arbitrations held in India*. It suggested substantial amendments to Section 34 of the Act, with an endeavour to ensure that the Renusagar position applies to all foreign awards and all awards passed in international commercial arbitrations. With respect to domestic arbitrations, the Commission recommended that the "patent illegality" test be retained, although it be construed more narrowly than under the *Saw Pipes* regime. In this regard, the following provisions were added to Section 34(2)(b)(ii) and a new provision, Section 34(2A) was introduced. These provisions are stated as follows:

Section 34(2)(b)(ii) the arbitral award is in conflict with the public policy of India.

Explanation.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if:

(a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81;

(b) it is in contravention with the fundamental policy of Indian law; or

(c) it is in conflict with the most basic notions of morality or justice.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.

10.2. The above amendments were suggested on the assumption that other terms such as "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.

10.3. However, a month after the submission of the 246th Report in August 2014, the term "fundamental policy of India" was construed widely by a three-judge bench of Supreme Court in *ONGC Ltd. v. Western Geco International Ltd.*, MANU/SC/0772/2014 : (2014) 9 SCC 263 in September to include an award that "no reasonable person would have arrived at". This permitted the review of an arbitral award on merits on the basis of it violating public policy. The Supreme Court's decision was followed by a subsequent two-judge bench in *Associate Builders v. Delhi Development Authority*, MANU/SC/1076/2014 : (2015) 3 SCC 49 dated 25.11.2014. In the words of Supreme Court in Western Geco:

35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [*ONGC Ltd. v. Saw Pipes Ltd.*, MANU/SC/0314/2003 : (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial

approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem Rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. *No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law.* Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* MANU/UKWA/0002/1947 : (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.

Therefore, among others, the Wednesbury principle of reasonableness has now been incorporated into the public policy test Under Section 34, as it is deemed to be part of "fundamental policy of Indian law."

10.4. Such a power to review an award on merits is contrary to the object of the Act and international practice. As stated in the Statement of Objects and Reasons of the 1996 Act itself, one of the principal objects of that law was "minimization of judicial intervention" [The 1996 Act, Statement of Objects and Reasons, paragraph 4(v)].

10.5. As the Supreme Court's judgment in *Western Geco* (supra) would expand the Court's power rather than minimise it, and given that it is also contrary to international practice, a clarification

needs to be incorporated to ensure that the term "fundamental policy of Indian law" is narrowly construed. If not, all the amendments suggested by the Law Commission in relation to construction of the term "public policy" will be rendered nugatory, as the applicability of Wednesbury principles to public policy will certainly open the floodgates.

10.6. This will have four major deleterious effect, being (a) a further erosion of faith in arbitration proceedings amongst individuals and businesses in India and abroad;

(b) a reduction in popularity of India as a destination for international and domestic commercial arbitration; (c) increased investor concern, amongst domestic and foreign investors, about the efficacy and speed of dispute resolution and potential for judicial interference; and, (d) an incidental increase in judicial backlog. In this regard, the following amendment to the draft is suggested, by inserting Explanation 2 to Section 34(2)(b)(ii) of the Act:

For the avoidance of doubt the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

21. Pursuant to the Law Commission Report, the 1996 Act was amended by the Amendment Act, 2015 with effect from 23.10.2015. The Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Bill, 2015 is set out as follows:

xxx xxx xxx

2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22-12-2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee, submitted its Report to Parliament on 4-8-2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

xxx xxx xxx

22. Section 28(3), before the Amendment Act, read as follows:

28. Rules applicable to substance of dispute.--

xxx xxx xxx

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Section 28(3), after amendment, reads as follows:

28. Rules applicable to substance of dispute.--

xxx xxx xxx

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

Section 34(2)(b)(ii), after amendment, reads as follows:

34. Application for setting aside arbitral award.--

xxx xxx xxx

(2) An arbitral award may be set aside by the Court only if --

xxx xxx xxx

(*b*) the Court finds that--

xxx xxx xxx

(*ii*) the arbitral award is in conflict with the public policy of India.

Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(*i*) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(*ii*) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

xxx xxx xxx

Sub-section (2A) of Section 34 was also added, which reads as follows:

34. Application for setting aside arbitral award.--

xxx xxx xxx

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

xxx xxx xxx

Correspondingly, Section 48 was also amended to bring the unamended Section 48 in line with the amendments made in Section 34, except that Sub-section (2A) of Section 34 is missing in Section 48 as the said Section deals with recognition and enforcement of foreign awards. Section 48, post amendment, reads as follows:

48. Conditions for enforcement of foreign awards.--

xxx xxx xxx

(2) Enforcement of an arbitral award may also be refused if the Court finds that--

xxx xxx xxx

(*b*) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(*i*) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(*ii*) it is in contravention with the fundamental policy of Indian law; or

(*iii*) it is in conflict with the most basic notions of morality or justice.

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

xxx xxx xxx

23. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of **Associate Builders** (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the **Western Geco** (supra) expansion has been done away with. In short, **Western Geco** (supra), as explained in paragraphs 28 and 29 of **Associate Builders** (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of **Associate Builders** (supra).

24. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of **Associate Builders** (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of **Associate Builders** (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of **Associate Builders** (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that **Western Geco** (supra), as understood in **Associate Builders** (supra), and paragraphs 28 and 29 in particular, is now done away with.

26. Insofar as domestic awards made in India are concerned, an additional ground is now available Under Sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short,

what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of **Associate Builders** (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of **Associate Builders** (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

29. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in **Associate Builders** (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added Under Section 34(2A).

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of **Associate Builders** (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

31. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Section 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.

Section 34(2)(a) Does Not Entail a Challenge to an Arbitral Award on Merits

32. Section 34(2)(a)(iii) and (iv) state as under:

34. Application for setting aside arbitral award.--

xxx xxx xxx

(2) An arbitral award may be set aside by the Court only if--

(*a*) the party making the application furnishes proof that--

xxx xxx xxx

(*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (*iv*) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

xxx xxx xxx

33. In **Renusagar** (supra), this Court dealt with a challenge to a foreign award Under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 ["**Foreign Awards Act**"]. The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"], which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement Under Sections 34 and 48, respectively, being the same.

After referring to the New York Convention, this Court delineated the scope of enquiry of grounds Under Sections 34/48 (equivalent to the grounds Under Section 7 of the Foreign Awards Act, which was considered by the Court), and held:

34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of Clauses (*a*) to (*e*) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in Clauses (*a*), (*b*) and (*c*). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (*See*: Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in Sub-clauses (*a*) to (*e*) of Clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in Sub-clauses (*a*) and (*b*) of Clause (2) of Article V None of the grounds set out in Sub-clauses

(*a*) to (*e*) of Clause (1) and Sub-clauses (*a*) and (*b*) of Clause (2) of Article V postulates a challenge to the award on merits.

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation,* has expressed the view:

It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a Respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted." (*Redfern & Hunter, Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

xxx xxx xxx

65. This would imply that the defence of public policy which is permissible Under Section 7(1)(*b*)(*ii*) should be construed narrowly. In this context, it would also be of relevance to mention that Under Article I(*e*) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837(sic 1937) which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(*b*) of the New York Convention of 1958 and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is

confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2) (b) of the New York Convention and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(*b*)(*ii*) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria, it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (*i*) fundamental policy of Indian law; or *(ii)* the interests of India; or *(iii)* justice or morality.

This judgment was cited with approval in *Redfern and Hunter on International Arbitration* by Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter (Oxford University Press, Fifth Ed., 2009) [**"Redfern and Hunter"**] as follows:

11.56. First, the New York Convention does not permit any review on the merits of an award to which the Convention applies. [This statement, which was made in an earlier edition of this book, has since been cited with approval by the Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co.* The court added that in its opinion 'the scope of enquiry before the court in which the award is sought to be enforced is limited [to the grounds mentioned in the Act] and does not enable a party to the said proceedings to impeach the Award on merits']. Nor does the Model Law.

The same theme is echoed in standard textbooks on international arbitration. Thus, in *International Commercial Arbitration* by Gary B. Born (Wolters Kluwer, Second Ed., 2014) [**"Gary Born"**], the learned author deals with this aspect of the matter as follows:

[12] No Judicial Review of Merits of Foreign or Non-Domestic Awards in Recognition Actions

It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign or non-domestic arbitral awards in recognition proceedings. Virtually every authority acknowledges this Rule and virtually nobody suggests that this principle should be abandoned. When national courts do review the merits of awards, they labour to categorize their action as an application of public policy, excess of authority, or some other Article V exception, rather than purporting to justify a review of the merits.

[a] **No Judicial Review of Awards Under New York and Inter-American Conventions**

Neither the New York Convention nor the Inter-American Convention contains any exception permitting non-enforcement of an award simply because the arbitrators got their decision on the substance of the parties' dispute wrong, or even badly wrong. This is reasonably clear from the

language of the Convention, which makes no reference to the possibility of a review of the merits in Article V's exhaustive list of the exclusive grounds for denying recognition of foreign and non-domestic awards. There is also no hint in the New York Convention's drafting history of any authority to reconsider the merits of an arbitral award in recognition proceedings.

Likewise, the prohibition against review of the merits of the arbitrator's decision is one of the most fundamental pillars of national court authority interpreting the Convention. This prohibition has repeatedly and uniformly been affirmed by national courts, in both common law and civil law jurisdictions. Simply put: "the court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact" [*Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* MANU/FEFT/0277/2004 : 364 F.3d 274, 287-88 (5th Cir. 2004)]. Thus, in the words of the Luxembourg Supreme Court [Judgment of 24 November 1993, XXI Y.B. Comm. Arb. 617, 623 (Luxembourg Cour Superieure de Justice) (1996)]:

The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with as the only reservation, the respect of international public policy. Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal's award.

Or, as a Brazilian recognition decision under the Convention held [*Judgment of 19 August 2009, Atecs Mannesmann GmbH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazes Gerais*, XXXV Y.B. Comm. Arb. 330, 331 (Brazilian Tribunal de Justica) (2010)]:

these questions pertain to the merits of the arbitral award that, according to precedents from the Federal Supreme Court and of this Superior Court of Justice, cannot be reviewed by this Court since recognition and enforcement of a foreign award is limited to an analysis of the formal requirements of the award.

Commentators have uniformly adopted the same view of the Convention [*See, for e.g.,* K.-H. Bockstiegel, S. Kroll & P. Nacimiento, *Arbitration in Germany* 452 (2007)].

(at pp. 3707-3710)

Likewise, the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2016 Ed.) ["**UNCITRAL Guide on the New York Convention**"] also states:

9. The grounds for refusal Under Article V do not include an erroneous decision in law or in fact by the arbitral tribunal. A court seized with an application for recognition and enforcement under the Convention may not review the merits of the arbitral tribunal's decision. This principle is unanimously confirmed in the case law and commentary on the New York Convention.

The Ground of Challenge Under Section 34(2)(a)(iii)

34. Under Section 34(2)(a)(iii), one of the grounds of challenge of an arbitral award is that a party is unable to present its case. In order to understand the import of Section 34(2)(a)(iii), Section 18 of the 1996 Act should also be seen. Section 18 reads as follows:

18. Equal treatment of parties.--The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

Section 24(3) also states as follows:

24. Hearings and written proceedings.--

xxx xxx xxx

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Section 26 of the 1996 Act is also important and states as follows:

26. Expert appointed by arbitral tribunal.--(1) Unless otherwise agreed by the parties, the arbitral tribunal may--

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

35. Section 24(3) is a verbatim reproduction of Article 24(3) of the UNCITRAL Model Law on International Commercial Arbitration [**"UNCITRAL Model Law"**]. Similarly, Section 26(1) and (2) is a verbatim reproduction of Article 26 of the UNCITRAL Model Law. Sub-section (3) of Section 26 has been added by the Indian Parliament in enacting the 1996 Act.

36. Sections 18, 24(3), and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(a)(iii). Under Section 18, each party is to be given a full opportunity to present its case. Under Section 24(3), all statements, documents, or other

information supplied by one party to the arbitral tribunal shall be communicated to the other party, and any expert report or document on which the arbitral tribunal relies in making its decision shall be communicated to the parties. Section 26 is an important pointer to the fact that when an expert's report is relied upon by an arbitral tribunal, the said report, and all documents, goods, or other property in the possession of the expert, with which he was provided in order to prepare his report, must first be made available to any party who requests for these things. Secondly, once the report is arrived at, if requested, parties have to be given an opportunity to put questions to him and to present their own expert witnesses in order to testify on the points at issue.

37. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground Under Section 34(2)(a)(iii) would be made out.

In *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards - Commentary,* edited by Dr. Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:

4. Right to Comment

According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators' decision-making.

a) Right to Comment on Evidence and Arguments Submitted by the Other Party

As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in the proceedings by the other party. The right to comment on the counterparty's submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial, unless the tribunal relied on this piece of evidence or argument in making its decision.

In order to ensure that the parties can exercise their right to comment effectively, the arbitral tribunal must grant them **access to the evidence and arguments submitted by the other side**. Affording a party the opportunity to make submissions or to give its view without also informing it of the opposing side's claims and arguments typically constitutes a violation of due process, unless specific non-disclosure Rules apply (e.g., such disclosure would constitute a violation of trade secrets or applicable legal privileges).

In practice, national courts have **afforded arbitral tribunals considerable leeway in setting and adjusting the procedures** by which parties respond to one another's submissions and evidence, reasoning that there were "several ways of conducting arbitral proceedings." Accordingly, absent any specific agreement by the parties, the arbitral tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

b) Right to Comment on Evidence Known to or Determined by the Tribunal

The parties' right to comment also extends to facts that have not been introduced in the proceedings by the parties, but that the tribunal has raised sua sponte, provided it was entitled to do so. For instance, if the tribunal gained "**out of court knowledge**" of circumstances (e.g., through its own investigations), it may only rest its decision on those circumstances if it informed both parties in advance and afforded them the opportunity to comment thereon. The same Rule applies to cases where an arbitrator intends to base the award on his or her own **expert knowledge**, unless the arbitrator was appointed for his or her special expertise or knowledge (*e.g.*, in quality arbitration). Similarly, a tribunal must give the parties an opportunity to comment on **facts of common knowledge** if it intends to base its decision on those facts, unless the parties should have known that those facts could be decisive for the final award.

In *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) [**"Fouchard"**] it is stated:

In some rare cases, recognition or enforcement of an award has been refused on the grounds of a breach of due process. One example is the award made in a quality arbitration where the Defendant was never informed of the identity of the arbitrators hearing the dispute [*Danish buyer v. German (F.R.) seller*, IV Y.B. Comm. Arb. 258 (1979) (Oberlandesgericht Cologne)]. It also occurred in a case where various documents were submitted by one party to the arbitral tribunal but not to the other party [*G.W.I. Kersten & Co. B.V. v. Societe Commerciale Raoul Duval et Co.,* XIX Y.B. Comm. Arb. 708 (Amsterdam Court of Appeals) (1992)], in another case where the Defendant was not given the opportunity to comment on the report produced by the expert appointed by the tribunal [*Paklito Inv. Ltd. v. Klockner East Asia Ltd.,* XIX Y.B. Comm. Arb. 664, 671 (Supreme Court of Hong Kong) (1994)], and again where the arbitral tribunal criticized a party for having employed a method of presenting evidence which the tribunal itself had suggested [*Iran Aircraft Indus. v. Avco* Corporation, MANU/FESC/0426/1992 : 980 F.2d 141 (2nd Cir. 1992)].

(at p. 987)

Gary Born (supra) states:

German courts have adopted similar reasoning, holding that the right to be heard entails two related sets of rights: (a) a party is entitled to present its position on disputed issues of fact and law, to be informed about the position of the other parties and to a decision based on evidence or materials known to the parties [*See*, e.g., Judgment of 5 July 2011, 34 SCH 09/11, II(5)(c)(bb) (Oberlandesgericht Munchen)]; and (b) a party is entitled to a decision by the arbitral tribunal that takes its position into account insofar as relevant [*See*, e.g., Judgment of 5 October 2009, 34 Sch 12/09 (Oberlandesgericht Munchen)]. Other authorities provide comparable formulations of the content of the right to be heard [*See, e.g., Slaney v. Int'l Amateur Athletic Foundation*, MANU/FEVT/0404/2001 : 244 F.3d 580, 592 (7th Cir. 2001)].

(at p. 3225)

Similarly, in *Redfern and Hunter* (supra):

11.73. The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing. One mistake in the course of the proceedings may be sufficient to lead the court to conclude that there was a denial of justice. For example, in a case to which reference has already been made, a US corporation, which had been told that there was no need to submit detailed invoices, had its claim rejected by the Iran-US Claims Tribunal, for failure to submit detailed invoices! The US court, rightly it is suggested, refused to enforce the award against the US company [*Iran Aircraft Ind v. Avco Corporation* MANU/FESC/0426/1992 : 980 F.2d. 141 (2nd Cir. 1992)]. In different circumstances, a German court held that an award that was motivated by arguments that had not been raised by the parties or the tribunal during the arbitral proceedings, and thus on which the parties had not had an opportunity to comment, violated due process and the right to be heard [See the decision of the Stuttgart Court of Appeal dated 6 October 2001 referred to in Liebscher, The *Healthy Award, Challenge in International Commercial Arbitration* (Kluwer law International, 2003), 406]. Similarly, in *Kanoria v. Guinness*, MANU/UKWA/0361/2006 : [2006] EWCA Civ. 222, the English Court of Appeal decided that the Respondent had not been afforded the chance to present its case when critical legal arguments were made by the claimant at the hearing, which the Respondent could not attend due to a serious illness. In the circumstances, the court decided that 'this is an extreme case of potential injustice' and resolved not to enforce the arbitral award.

11.74. Examples of unsuccessful 'due process' defences to enforcement are, however, more numerous. In *Minmetals Germany v. Ferco Steel*, [1999] CLC 647, the losing Respondent in an arbitration in China opposed enforcement in England on the grounds that the award was founded on evidence that the arbitral tribunal had obtained through its own investigation. An English court rejected this defence on the basis that the Respondent was eventually given an opportunity to ask for the disclosure of evidence at issue and comment on it, but declined to do so. The court held that the due process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it.

38. In **Minmetals Germany GmbH v. Ferco Steel Ltd.,** [1999] CLC 647, the Queen's Bench Division referred to this ground under the New York Convention, and held as follows:

The inability to present a case issue

Although many of those states who are parties to the New York Convention are civil law jurisdictions or are those which like China derive the whole or part of their procedural Rules from the civil law and therefore have essentially an inquisitorial system, Article V of the Convention protects the requirements of natural justice reflected in the audi alteram partem rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcee has not been given any reasonable opportunity to present its case in relation to the results of such investigations. Article 26 of the CIETAC Rules by reference to which the parties had agreed to arbitrate provided:

Article 26 - The parties shall give evidence for the facts on which their claim or defence is based. The arbitration tribunal may, if it deems it necessary, make investigations and collect evidence on its own initiative.

That, however, was not treated by the Beijing court as permitting the tribunal to reach its conclusions and make an award without first disclosing to both parties the materials which it had derived from its own investigations. That quite distinctly appears from the grounds of the court's decision - that Ferco was, for reasons for which it was not responsible, unable 'to state its view'. Those reasons could only have been its lack of prior access to the sub-sale award and the evidence which underlay it. I conclude that it was to give Ferco's lawyer an opportunity to refute this material that the Beijing court ordered a 'resumed' arbitration.

(at pp. 656-657)

The Ground of Challenge Under Section 34(2)(a)(iv)

39. So far as this defence is concerned, standard textbooks on the subject have held that the expression "submission to arbitration" either refers to the arbitration agreement itself, or to disputes submitted to arbitration, and that so long as disputes raised are within the ken of the arbitration agreement or the disputes submitted to arbitration, they cannot be said to be disputes which are either not contemplated by or which fall outside the arbitration agreement. The expression "submission to arbitration" occurs in various provisions of the 1996 Act. Thus, Under Section 28(1)(a), an arbitral tribunal "... shall decide the dispute submitted to arbitration ...". Section 43(3) of the 1996 Act refers to "... an arbitration agreement to submit future disputes to arbitration ....". Also, it has been stated that where matters, though not strictly in issue, are connected with matters in issue, they would not readily be held to be matters that could be considered to be outside or beyond the scope of submission to arbitration.
Thus, in *Fouchard* (supra), it is stated:

This provision applies where the arbitrators have gone beyond the terms of the arbitration agreement. It complements Article V, paragraph 1(a), which concerns invalid arbitration agreements. The two grounds are similar in nature: in both cases, the arbitrator will have ruled in the absence of an arbitration agreement, either because the agreement is void (as in Sub-section (a)) or because it does not cover the subject-matter on which the arbitrator reached a decision (as in Sub-section (c)). For that reason, more recent arbitration statutes often either treat the two grounds as one, as in Article 1502 1° of the French New Code of Civil Procedure, or refer generally to the "absence of a valid arbitration agreement," as in Article 1065 of the Netherlands Code of Civil Procedure.

However, Article V, paragraph 1(c) does not cover all the cases listed in Article 1502 3° of the French New Code of Civil Procedure, which provides that recognition or enforcement can be refused where "the arbitrator ruled without complying with the mission conferred upon him or her." That extends to decisions that are either *infra petita* and *ultra petita*, as well as to situations where the arbitrators have exceeded their powers in the examination of the merits of the case (for example, by acting as amiable compositeurs when that was not agreed by the parties, or by failing to apply the Rules of law chosen by the parties). Generally speaking, such situations cannot be

said to be outside the terms of the arbitration agreement within the meaning of the New York Convention. In practice, it is only where the terms of reference - which, provided that they have been accepted by the parties, can constitute a form of arbitration agreement - set out the parties' claims in detail that arbitrators who have decided issues other than those raised in such claims can be said both to have ruled ultra petita and to have exceeded the terms of the arbitration agreement. If, on the other hand, the arbitration agreement is drafted in general terms and the claims are not presented in a way that contractually determines the issues to be resolved by the arbitrators, a decision that is rendered ultra petita would not contravene Article V, paragraph 1(c).

It is important to note that the Convention provides that the refusal of recognition or enforcement can be confined to aspects of the award which fail to comply with the terms of the arbitration agreement, provided that those aspects can be separated from the rest of the award (Article V(1)(c)).

Once again, the courts have taken a very restrictive view of the application of this ground.

(at p. 988)

Similarly, *Gary Born* (supra) states:

There are a number of recurrent grounds for claiming that an arbitral tribunal has exceeded its authority. These generally involve claims of either extra petita (the tribunal went beyond the limits of its authority) or infra petita (the tribunal failed to fulfil its mandate by not exercising authority it was granted).

[a] Awards Ruling on Matters Outside Scope of Parties' Submissions

Article 34(2)(a)(iii) permits annulment of awards where the arbitrators "rule (d) on issues not presented to [them] by the parties" - so-called "extra petita" or "*ultra petita*" [*Allen v. Hounga* [2012] EWCA Civ 609 (English Ct. App.)] As with other grounds for annulment, most courts are reluctant to accept claims that the arbitrators exceeded the scope of the parties' submissions [*See, e.g., Stark v. Sandberg, Phoenix & von Gontard, PC*, MANU/FEVT/0572/2004 : 381 F.3d 793, 800 (8th Cir. 2004)].

One of the clearest examples of an excess of authority Under Article 34(2)(a)(iii) and parallel provisions of other national arbitration legislation is a tribunal's award of relief that neither party requested. A French appellate decision explained the rationale for these limits on the arbitrators' authority (which, in this respect, are more rigorous under French law than some other national arbitration regimes) as follows [Judgment of 30 June 2005, *Pilliod v. Econosto*, 2006 Rev. arb. 687, 688 (Paris Cour d'appel)]:

The fact that the contract was governed by French law does not allow the arbitrators to award interest pursuant to Article 1153 (1) of the Civil Code on the sole ground that this is permitted under that provision, even in the absence of a request of the parties. There is a difference between the role of a state court and that of an arbitrator, whose jurisdiction is based on the parties' consent

and who must therefore preserve the consensual character of the proceedings by consulting the parties on their intention as to the mission of the tribunal.

Similarly, another court annulled an award on the grounds that the relief ordered by the tribunal "exceeded the arbitrators' powers because it was not sought by either party, and was completely irrational because it wrote material terms of the contract out of existence [*PMA Capital Inc. Co. v. Platinum Underwriters Bermuda, Ltd.,* MANU/FETC/1703/2010 : 400 F. Appx. 654 (3d Cir. 2010)].

Nonetheless, an award will not be subject to annulment where the arbitrators grant relief that, while different from what a party requested, is subsumed within relief that the party requested (most obviously, a lower quantum of damages than that requested by the claimant). More generally, courts also accord arbitrators substantial discretion in fashioning remedies, including granting relief that neither party has expressly requested [See, *e.g., Harper Ins. Ltd. v. Century Indem. Co.,* 819 F. Supp. 2d 270, 277 (S.D.N.Y. 2011)]. Although categorical Rules are impossible to formulate, the decisive issue appears to be whether the relief granted by the arbitrators was subsumed within or reasonably related to that requested by the parties.

Another example of an excess of authority Under Article 34(2)(a)(iii) and parallel provisions of other arbitration statues involves awards deciding issues or disputes that the parties have not submitted to the arbitral tribunal [*See, e.g., Emilio v. Sprint Spectrum LP,* 2013 WL 203361 (2d Cir.)]. A tribunal exceeds its authority by ruling on an issue not presented by the parties in the arbitration even if the issue or dispute that it addresses is within the scope of the parties' arbitration agreement. As one court explained: "Arbitrators have the authority to decide only those issues actually submitted by the parties" [*AGCO Corporation v. Anglin,* MANU/FEVT/0391/2000 : 216 F.3d 589, 593 (7th Cir. 2000)].

Doubts about the scope of the parties' submissions are resolved in most legal systems in favour of encompassing matters decided by the arbitrators. Put differently, a considerable measure of judicial deference is accorded to the arbitrators' interpretation of the scope of their mandate under the parties' submissions [*See, e.g., Downer v. Siegel,* MANU/FEFT/2414/2007 : 489 F.3d 623, 627 (5th Cir. 2007)]. In the words of one court, "[w]e will not over-scrutinize the panel's language and leap to the conclusion that it exceeded its power in formulating the award" [*Certain Underwriters at Lloyd's v. BCS Ins. Co.,* 239 F. Supp. 2d 812, 817 (N.D. III. 2003)].

Some annulment courts have adopted unduly formalistic approaches to the question whether a particular issue or argument was submitted to the tribunal. For example, one recent Singaporean decision held that issues not raised in the parties' "pleadings" had not been submitted to the tribunal, notwithstanding the fact that these issues had been raised in argument during the arbitration [*See PT Prima Int'l Dev. v. Kempinski Hotels SA,* MANU/SGCA/0066/2012 : [2012] SGCA 35]. The better view is not to look to local Rules of civil procedure or litigation practices in determining whether an issue was presented to the arbitrators; the proper inquiry is instead a pragmatic one into whether the parties and tribunal had an opportunity to consider and submit evidence and argument on a particular issue.

(at pp. 3289-3293)

Redfern and Hunter (supra) states as follows:

11.77. The first part of this ground for refusal of enforcement under the Convention (and under the Model Law) envisages a situation in which the arbitral tribunal is alleged to have acted in excess of its authority, i.e. ultra petita, and to have dealt with a dispute that was not submitted to it. According to a leading authority on the Convention, the courts almost invariably reject this defence [*See* Albert Jan van den Berg, 'Court Decisions on the *New York Convention*', Swiss Arbitration Association Conference, February 1996, Collected Reports, 86]. By way of example, the German courts have rejected *ultra petita* defences raised in complaint of an arbitral tribunal's application of *lex mercatoria*, [see the decision of the regional court of Hamburg of 18 September 1997, (2000) XXV Y.B. Comm. Arb. 710] and an arbitral tribunal's award of more interest than was claimed [see the decision of the Court of Appeal of Hamburg of 30 July 1998, (2000) XXV Y.B. Comm. Arb. 714]. A further robust rejection of such a defence comes from the US Court of Appeals for the District of Columbia, in a case in which it was pleaded that the arbitral tribunal had awarded a considerable sum of damages for consequential loss, when the contract between the parties clearly excluded this head of damage [*Libyan American Oil Company (Liamco) v. Socialist Peoples Libyan Arab Yamahirya*, (1982) VII Y.B. Comm. Arb. 382]. The court stated that, without an in-depth review of the law of contract, the court could not state whether a breach of contract would abrogate a Clause which excluded consequential damages. However, 'the standard of review of an arbitration award by an American Court is extremely narrow', and (adopting the words of the US Court of Appeals in the well-known case of *Parsons Whittemore Overseas Co. Inc v. Societe Generale de l'Industrie du Papier (RAKTA)*, MANU/FESC/0007/1974 : (1974) 508 F. 2d 969 (2nd Cir. 1974)) the Convention did not sanction 'second-guessing the arbitrators' construction of the parties' agreement'. Nor would it be proper for the court to 'usurp the arbitrators' role' [*Libyan American Oil Company (Liamco) v. Socialist Peoples Libyan Arab Yamahirya*, (1982) VII Y.B. Comm. Arb., 382 at 388]. Accordingly, enforcement was ordered.

40. The Court of Appeal of Singapore, in **CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK**, MANU/SGCA/0064/2011 : [2011] SGCA 33, held as follows:

25. The court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under Article 34 of the Model Law and Section 24 of the IAA. As declared by this Court in *Soh Beng Tee & Co. Pte Ltd. v. Fairmount Development Pte Ltd.* MANU/SGCA/0050/2007 : [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [59], the current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.

26. However, it has also been said (correctly) that no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings (see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) at para 7-001).

27. While the Singapore courts infrequently exercise their power to set aside arbitral awards, they will unhesitatingly do so if a statutorily prescribed ground for setting aside an arbitral award is clearly established. The relevant grounds in this regard can be classified into three broad categories (*see* generally Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) ("*Redfern and Hunter*") at paras 10.30-10.86). First, an award may be challenged on jurisdictional grounds (i.e., the non-existence of a valid and binding arbitration clause, or other grounds that go to the adjudicability of the claim determined by the arbitral tribunal). Second, an award may be challenged on procedural grounds (*e.g.*, failure to give proper notice of the appointment of an arbitrator), and, third, the award may be challenged on substantive grounds (*e.g.*, breach of the public policy of the place of arbitration).

xxx xxx xxx

31. It is useful, at this juncture, to set out some of the legal principles underlying the application of Article 34(2)(a) (iii) of the Model Law. First, Article 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. In other words, Article 34(2)(a)(iii) addresses the situation where the arbitral tribunal exceeded (or failed to exercise) the authority that the parties granted to it (see Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606-2607 and 2798-2799). This ground for setting aside an arbitral award covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters (see Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ("*Singapore Arbitration Legislation*") at p. 117).

32. Second, it must be noted that a failure by an arbitral tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. In this regard, the following passage in *Redfern and Hunter* ([27] *supra* at para 10.40) correctly summarises the position:

The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different.

33. Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Article 34(2)(a)(iii) of the Model Law (*see Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.* MANU/SGHC/0056/2010 : [2010] 3 SLR 1 at [19]-[22]). In the House of Lords decision of *Lesotho Highlands Development Authority v. Impregilo SpA* MANU/UKHL/0074/2005 : [2006] 1 AC 221, which concerned an application to set aside an arbitral award on the ground of the arbitral tribunal's "exceeding its powers" (see Section 68(2)(b) of the Arbitration Act 1996 (c 23) (UK) ("the UK Arbitration Act")), Lord Steyn made clear (at [24]-[25]) the vital distinction between the erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported

exercise by the arbitral tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside Under Section 68(2)(b) of the UK Arbitration Act on the ground that the arbitral tribunal had exceeded its powers. In a similar vein, Article 34(2)(a) (iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (see above at [31]).

The *UNCITRAL Guide on the New York Convention* (supra) states:

2. Article V (1)(*c*) finds its roots in Article 2(*c*) of the 1927 Geneva Convention. The language at the outset of Article V (1)(*c*), providing a ground for refusal of recognition or enforcement of awards exceeding the scope of the arbitration agreement, is largely unchanged from its counterpart in the 1927 Geneva Convention. The New York Convention, however, limits the scope of Article V (1)(*c*) by omitting language found in Article 2 of the 1927 Geneva Convention which permitted enforcing authorities to delay, or create conditions in relation to, the enforcement of awards, where the award did not cover all the questions submitted to the arbitral tribunal.

3. The drafters of the New York Convention further built on the 1927 Geneva Convention by explicitly allowing for severability of the part of the award dealing with a difference not contemplated by or not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration, in order to permit recognition and enforcement of the part of the award containing decisions on matters submitted to arbitration. Although there is generally little discussion of Article V (1)(*c*) in the *travaux preparatoires*, the inclusion of the provision allowing for partial recognition and enforcement was the subject of some debate. The *travaux preparatoires* show that various concerns were raised over the form and substance of this principle, including concerns that severability of arbitral awards would in practice "open the door to a review as to substance", which the drafters of the New York Convention sought to prevent. Courts have since uncompromisingly asserted that Article V (1)(*c*) does not permit an enforcing authority to reconsider the merits of a dispute.

xxx xxx xxx

6. Courts and commentators agree that an arbitration agreement constitutes a "submission to arbitration" within the meaning of Article V (1)(*c*). Consequently, where an arbitral tribunal has rendered an award which decides matters beyond the scope of the arbitration agreement, there is a ground for refusing to enforce an award Under Article V (1)(*c*).

7. Courts have also held that the term "submission to arbitration" can include an arbitration agreement modified, amended or supplemented by an arbitral institution's terms of reference agreed to by the arbitrators and disputing parties. Terms of reference may indeed supplement or modify the arbitration agreement. For example, a German court of appeal held that the parties had concluded a new arbitration agreement by signing ICC Terms of Reference. Similarly, a decision by the English House of Lords stated that "[i]n the present case one is dealing with an ICC arbitration agreement. In such a case the terms of reference which Under Article 18 of the ICC

Rules are invariably settled may, of course, amend or supplement the terms of the arbitration agreement."

8. Authors and courts have also considered whether Article V (1)(*c*) provides grounds for refusing to recognize or enforce where the arbitrator's decision goes beyond the parties' pleadings or prayers for relief to render an award *ultra petita*. Though some authors have argued that Article V (1)(*c*) provides a second, separate ground for refusal to enforce an award rendered *ultra petita*, courts have rejected challenges to recognition or enforcement Under Article V (1)(*c*) based on the fact that the arbitrators had exceeded their authority by deciding on issues or granting forms of relief beyond those pleaded by the parties. As one United States court observed, "[u]nder the New York Convention, we examine whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of the parties' pleadings". This interpretation of Article V (1)(*c*) which distinguishes the parties' pleadings or prayers for relief from the "submission to arbitration" referred to in Article V (1)(*c*), is consistent with a narrow interpretation of the grounds for refusal to recognize or enforce an award.

41. In an early U.S. judgment, viz., **Parsons & Whittemore Overseas Co., Inc., V. Societe Generale De L'industrie Du Papier (RAKTA)**, MANU/FESC/0007/1974 : (1974) 508 F. 2d 969 (United States Court of Appeals, Second Circuit, 1974) [**"Parsons"**], it was held:

19. Under Article V(1)(c), one defending against enforcement of an arbitral award may prevail by proving that:

20. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

21. This provision tracks in more detailed form 10(d) of the Federal Arbitration Act, 9 U.S.C. 10(d), which authorizes vacating an award 'where the arbitrators exceeded their powers.' Both provisions basically allow a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration. This defense to enforcement of a foreign award, like the others already discussed, should be construed narrowly. Once again, a narrow construction would comport with the enforcement-facilitating thrust of the Convention. In addition, the case law under the similar provision of the Federal Arbitration Act strongly supports a strict reading. See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corporation, MANU/USSC/0059/1960 : 363 U.S. 593 : 80 S. Ct. 1358 : 4 L. Ed. 2d 1424 (1960); Coenen v. R.W. Pressprich & Co., MANU/FESC/0356/1972 : 453 F.2d 1209 (2d Cir.), cert. denied, 406 U.S. 949 : 92 S. Ct. 2045 : 32 L. Ed. 2d 337 (1972).

22. In making this defense as to three components of the award, Overseas must therefore overcome a powerful presumption that the arbitral body acted within its powers. Overseas principally directs its challenge at the $185,000 awarded for loss of production. Its jurisdictional claim focuses on the provision of the contract reciting that 'neither party shall have any liability for loss of production.' The tribunal cannot properly be charged, however, with simply ignoring this alleged limitation on the subject matter over which its decision-making powers extended. Rather, the arbitration court interpreted the provision not to preclude jurisdiction on this matter. As in United Steelworkers of

America v. Enterprise Wheel & Car Corporation, supra, the court may be satisfied that the arbitrator premised the award on a construction of the contract and that it is 'not apparent,' MANU/USSC/0059/1960 : 363 U.S. 593 at 598, 80 S. Ct. 1358, that the scope of the submission to arbitration has been exceeded."

xxx xxx xxx

24. Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The Appellant's attempt to invoke this defense, however, calls upon the court to ignore this limitation on its decision-making powers and usurp the arbitrator's role. The district court took a proper view of its own jurisdiction in refusing to grant relief on this ground.

In **Lesotho Highlands Development Authority v. Impregilo SpA and Ors.,** MANU/UKHL/0074/2005 : [2005] 3 All ER 789 [HL], after setting out the English statutory provision, the precise question which faced the Court was stated thus:

[**3**] ..... Section 68, so far as material, reads as follows:

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award ...

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant -

... (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see Section 67)

The question arises how Section 68(2)(b) and Section 69, so far as the latter excludes a right of appeal on a question of law, are to operate. Specifically, can an alleged error of arbitrators in interpreting the underlying or principal contract be an excess of power Under Section 68(2)(b), so as to give the court the power to intervene, rather than an error of law, which can only be challenged Under Section 69 if the right of appeal has not been excluded?

This was answered by the Court, thus:

[**23**] Contrary to the view I have expressed, I will now assume that the tribunal committed an error of law. That error of law could have taken more than one form. The judge (para 25) and the Court of Appeal (para 35) approached the matter on the basis that the tribunal erred in the interpretation of the underlying contract. Another possibility is that the tribunal misinterpreted its powers, Under Section 48(4) to express the award in any currency. Let me approach the matter on the basis that there was a mistake by the tribunal in one of these forms. Whichever is the case, the highest the case can be put is that the tribunal committed an error of law."

xxx xxx xxx

[**30**] The New York Convention on the recognition and enforcement of Foreign arbitral awards 1958 and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration were in part a provenance of Section 68: see General Note to Section 68 of the Arbitration Act 1996 as published in Current Law Statutes 1996, p. 23-46. Specifically, it is likely that the inspiration of the words "the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)" in Section 68 are the terms of Article V(1)(c) of the New York Convention and the jurisprudence on it. The context is that Article V(1)(a) stipulates that the invalidity of the arbitration agreement is a ground for non-enforcement of an award: it involves the competence of the arbitrator. Article V(1)(c) relates to matters beyond the scope of the submission to arbitration. It deals with cases of excess of power or authority of the arbitrator. It is well established that Article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award: *Parsons & Whittemore Overseas Co. Inc* v. *Societe Generale de l'Industrie du Papier (RAKTA)* MANU/FESC/0007/1974 : 508 F 2d 969 (2nd Cir 1974); Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981), pp 311-318; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001), pp 158-162. By citing the Parsons decision counsel for the contractors alerted the House to this analogy. It points to a narrow interpretation of Section 68(2)(b). The policy underlying Section 68(2)(b) as set out in the DAC report similarly points to a restrictive interpretation.

[**31**] By its very terms Section 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal *exceeding its powers* under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a "question of law" which may in the circumstances specified in Section 69 be appealed unless the parties have excluded that right by agreement. In cases where the right of appeal has by agreement, sanctioned by the Act, been excluded, it would be curious to allow a challenge Under Section 68(2)(b) to be based on a mistaken interpretation of the underlying contract. Moreover, it would be strange where there is no exclusion agreement, to allow parallel challenges Under Section 68(2)(b) and Section 69.

[**32**] In order to decide whether Section 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power Under Section 68(2)(b).

[**33**] For these reasons the Court of Appeal erred in concluding that the tribunal exceeded its powers on the currency point. If the tribunal erred in any way, it was an error within its power.

[**34**] I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed, it would have opened up many opportunities for challenging awards on the

basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of Appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point."

The High Court of Ireland, in **Patrick Ryan & Ann Ryan and Kevin O'Leary (Clonmel) Ltd. & General Motors**, [2018] IEHC 660 (High Court of Ireland, 2018), put it thus:

24. As regards the second principle which emerges from the case law, namely, that an application to set aside is not an appeal from the decision of the arbitrator and does not confer upon the court the opportunity of second-guessing the arbitrator's decision on the merits, it is sufficient to refer to a small number of the Irish cases and the observations made in those cases. In *Snoddy* (*Snoddy* v. *Mavroudis* [2013] IEHC 285), Laffoy J. made it very clear that it was not open to the court to second-guess the construction of the relevant contractual issue in that case by the arbitrator by way of a set aside application. Laffoy J. stated that if the court were to do so, it would be usurping the arbitrator's role (para. 34, p. 16). In *Delargy* (*Delargy* v. *Hickey* [2015] IEHC 436), Gilligan J. stated:

It is no function of this Court to attempt in any way to second guess the decision as arrived at by the arbitrator and this Court does not propose to do so. (para. 74, p. 37).

Later in his judgment, Gilligan J. stated that:

This Court does not consider that it is appropriate to revisit the merits of the arbitrator's award." (para. 78, p. 39).

25. In *O'Leary Lissarda* (*O'Leary Lissarda* v. *Ryan* [2015] IEHC 820), McGovern J. noted the acknowledgment of the applicant that an application to set aside an award "...*is not a proceeding in the nature of an appeal against the arbitral award on the merits.*" (para. 5, p. 2). He rejected one of the grounds on which it was sought to set aside the award in that case on the basis that it"... *effectively amounts to an attempt to appeal the arbitrator's decision which is not permissible.*" (para. 11, p. 4).

xxx xxx xxx

39. The Irish courts have had the opportunity of considering the proper approach to be taken in considering a challenge to an award based on Article 34(2)(a)(iii) where it is suggested that an arbitrator has exceeded his or her authority or acted outside his or her mandate. The leading Irish case on this point is *Snoddy* (*Snoddy v. Mavroudis* [2013] IEHC 285). In *Snoddy*, (*Snoddy v. Mavroudis* [2013] IEHC 285) Laffoy J. quoted with approval the commentary contained in Mansfield in relation to Article 34(2)(a)(iii). She stated as follows:

Mansfield's commentary on that provision is that it is a ground -

[t]hat the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Commentators have noted that 'this ground is infrequently invoked and it is even less frequently accepted by national courts to set an award aside' and international case-law decided under the Model Law has held that this ground is to be narrowly construed.

The commentators cited in that passage are Brekoulakis and Shore in Mistelis on Concise International Arbitration (1st Ed., Kluwer, 2010). In that text, the commentators also state (at p. 647) that 'a strong presumption should exist that a tribunal acts within its mandate'." (per Laffoy J. at para. 32, pp. 14 - 14).

40. Laffoy J. in *Snoddy* (*Snoddy* v. *Mavroudis* [2013] IEHC 285) went on to observe that Article 34(2)(a)(iii) of the Model Law was based on a corresponding provision contained in the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958), which was Article V(1)(c). Laffoy J. continued:

As was pointed out by Lord Steyn in *Lesotho Highlands Development v. Impregilo SpA* MANU/UKHL/0074/2005 : [2006] 1 AC 221, Section 68 of the UK Arbitration Act 1996 was modelled on the New York Convention and on the Model Law. In considering the application of that statutory provision, Lord Steyn considered Article V(1)(c) of the New York Convention stating (at p. 236):

It deals with cases of excess of power or authority of the arbitrator. It is well established that Article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award.

Lord Steyn cited a decision of the US Federal Courts as authority for that last proposition: *Parsons & Whittemore Overseas Co. Inc v. Societe Generale de l'Industrie du Papier,* MANU/FESC/0007/1974 : (1974) 508 F. 2d 969 (2nd Circuit). The limits on the excess of jurisdiction ground for setting aside an arbitration are, in my view, clearly brought home by the following passage from the opinion of Judge Smith in the Parsons case where he stated:

Although the Convention recognises that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The Appellant's attempt to invoke this defense, however, calls upon the Court to ignore this limitation on its decision-making powers and usurp the arbitrator's role.'" (per Laffoy J. at para. 33, pp. 15 - 16).

41. These dicta of Laffoy J. in *Snoddy* (*Snoddy* v. *Mavroudis* [2013] IEHC 285) were cited with approval and followed by Galligan J. in *Delargy* (*Delargy* v. *Hickey* [2015] IEHC 436) (at para. 31, pp. 13 - 14 and para. 65, pp. 33 - 34). The cases make clear that there is a presumption that the arbitral tribunal has acted within its mandate and the onus of establishing otherwise rests with the party seeking to set aside the award on this ground."

In **State of Goa v. Praveen Enterprises**, MANU/SC/0812/2011 : (2012) 12 SCC 581 ["**Praveen Enterprises**"], this Court set out what is meant by "reference to arbitration" as follows:

10. "Reference to arbitration" describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:

(*a*) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the "reference" contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(*b*) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the "reference" contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(*c*) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

42. A conspectus of the above authorities would show that where an arbitral tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the arbitral tribunal, as understood in **Praveen Enterprises** (supra), the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration.

43. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we

have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration Under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal.

Most Basic Notions of Justice

44. The expression "most basic notions of ... justice" finds mention in Explanation 1 to Sub-clause (iii) to Section 34(2)(b). Here again, what is referred to is, substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court.
Thus, in **Parsons** (supra), it was held:

7. Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the Defendant's motion or sua sponte, if 'enforcement of the award would be contrary to the public policy of (the forum) country.' The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to 'principles of the law' and awards violative of 'fundamental principles of the law.' In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense [Contini, International Commercial Arbitration, 8 Am.J. Comp.L. 283, 304]. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense [Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1070-71 (1961)].

8. Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. [See Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes 114-15 (1971); Digest of Proceedings of International Business Disputes Conference, April 14, 1971, at 191 (remarks of Professor W. Reese)]. Additionally, considerations of reciprocity - considerations given express recognition in the Convention itself - counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

9. We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. [Restatement Second of the Conflict of Laws 117, comment c, at 340 (1971); Loucks v. Standard Oil Co., 224 N.Y. 99, 111 : 120 N.E. 198 (1918)].

In **Dongwoo Mann+hummel Co. Ltd. v. Mann+hummel Gmbh**, MANU/SGHC/0111/2008 : [2008] SGHC 67, the High Court of Singapore held:

131. In *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* MANU/NULL/0084/2006 : [2007] 1 SLR 597 (*"PT Asuransi Jasa Indonesia (Persero)"*), the Court of Appeal explained what would constitute a conflict with public policy (at [57] and [59]):

57. ... The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed Under Section 24 of the Act and Article 34 of the Model Law. ... In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under Article 34(2)(b) (ii) of the Model Law when they cannot be set aside under Article 34(2)(a) (iii) of the Model Law.

xxx xxx xxx

59. Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a *narrow scope*. In our view, it should only operate in instances where the upholding of an arbitral award would "*shock the conscience*" (*see Downer Connect* ([58] supra) at [136]), or is "*clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" (see Deutsche Schachbau v. Shell International Petroleum Co. Ltd.* [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or *where it violates the forum's most basic notion of morality and justice: see Parsons & Whittemore Overseas Co. Inc v. Societe Generale de L'Industrie du Papier (RAKTA)* MANU/FESC/0007/1974 : 508 F 2d, 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):

In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice*... It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, *instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.*

132. In *Profilati Italia SRL v. Paine Webber Inc* MANU/UKCM/0001/2001 : [2001] 1 Lloyd's Rep 715 (*"Profilati"*), Moore-Bick J made the following observations in relation to the argument that non-disclosure of material documents constituted a breach of public policy in the context of Section 68 of the English Arbitration Act 1996 (at [17], [19] and [26]):

17. ... Where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the Court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in

his favour. Moreover, I do not think that the Court should be quick to interfere under this Section [*i.e.*, Section 68(2)(g) of the Arbitration Act 1996]. In those cases in which Section 68 has so far been considered the Court has emphasized that it is intended to operate only in extreme cases...

xxx xxx xxx

19. Where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favour the Court may well consider that he procured that award in a manner contrary to public policy. After all, such conduct is not far removed from fraud...

xxx xxx xxx

26. Even if there had been a deliberate failure to give disclosure of the two documents in question it would still be necessary for Profilati to satisfy the Court that it had suffered substantial injustice as a result.

And finally, in **BAZ v. BBA and Ors.**, MANU/SGHC/0001/2018 : [2018] SGHC 275, the High Court of Singapore stated:

156. From the outset, it is important to reiterate that the public policy ground for setting aside or refusal of recognition/enforcement is very narrow in scope. The Court of Appeal has held that the ground should only succeed in cases where upholding or enforcing the arbitral award would "shock the conscience", or be "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public", or violate "the forum's most basic notion of morality and justice" (*PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* MANU/NULL/0084/2006 : [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59]). In *Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.* MANU/SGHC/0056/2010 : [2010] 3 SLR 1 ("*Sui Southern Gas*"), the High Court stated that to succeed on a public policy argument, the party "had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice" (at [48]). The *1985 UN Commission Report* states at para 297 that the term public policy "comprised the fundamental notions and principles of justice", and it was understood that the term "covered fundamental principles of law and justice in substantive as well as procedural respects". The *1985 UN Commission Report* further explains that Article 34(2)(b)(ii) of the Model Law "was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at".

157. It is clear that errors of law or fact, per se, do not engage the public policy of Singapore under Article 34(2)(b) (ii) of the Model Law when they cannot be set aside under Article 34(2)(a)(iii) of the Model Law (*PT* Asuransi at [57]), with the exception that the court's judicial power to decide what the public policy of Singapore is cannot be abrogated (*AJU v. AJT* MANU/SGCA/0084/2011 : [2011] 4 SLR 739 ("*AJU v. AJT*") at [62]). .....

xxx xxx xxx

159. ..... This balance is generally in favour of the policy of enforcing arbitral awards, and only tilts in favour of the countervailing public policy where the violation of that policy would "shock the conscience" or would be contrary to "the forum's most basic notion of morality and justice". In determining whether the balance tilts towards the countervailing public policy, it is important to consider both the subject nature of the public policy, the degree of violation of that public policy and the consequences of the violation."

45. Given these parameters of challenge, let us now examine the arguments of learned Counsel on behalf of the Appellant. There can be no doubt that the government guidelines that were referred to and strongly relied upon by the majority award to arrive at the linking factor were never in evidence before the Tribunal. In fact, the Tribunal relies upon the said guidelines by itself and states that they are to be found on a certain website. The ground that is expressly taken in the Section 34 petition by the Appellant is as follows:

It is pertinent to mention here that no such guidelines of the Ministry of Industrial Development had been filed on record by either of the parties and therefore, the Tribunal had no jurisdiction to rely upon the same while deciding the issue before it. Accordingly, the impugned Award is liable to be set aside."

46. Learned Counsel for the Respondent also agreed that these guidelines were never, in fact, disclosed in the arbitration proceedings. This being the case, and given the authorities cited hereinabove, it is clear that the Appellant would be directly affected as it would otherwise be unable to present its case, not being allowed to comment on the applicability or interpretation of those guidelines. For example, the Appellant could have argued, without prejudice to the argument that linking is de hors the contract, that of the three methods for linking the New Series with the Old Series, either the second or the third method would be preferable to the first method, which the majority award has applied on its own. For this reason, the majority award needs to be set aside Under Section 34(2)(a)(iii).

47. Insofar as the argument that a new contract had been made by the majority award for the parties, without the consent of the Appellant, by applying a formula outside the agreement, as per the Circular dated 15.02.2013, which itself could not be applied without the Appellant's consent, we are of the view that this ground Under Section 34(2)(a)(iv) would not be available, given the authorities discussed in detail by us. It is enough to state that the Appellant argued before the arbitral tribunal that a new contract was being made by applying the formula outside what was prescribed, which was answered by the Respondent, stating that it would not be possible to apply the old formula without a linking factor which would have to be introduced. Considering that the parties were at issue on this, the dispute as to whether the linking factor applied, thanks to the Circular dated 15.02.2013, is clearly something raised and argued by the parties, and is certainly something which would fall within the arbitration Clause or the reference to arbitration that governs the parties. This being the case, this argument would not obtain and Section 34(2)(a)(iv), as a result, would not be attracted.

48. However, when it comes to the public policy of India argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice.

It can be seen that the formula that was applied by the agreement continued to be applied till February, 2013 - in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-94 to 2004-05. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the Appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.

49. The judgments of the Single Judge and of the Division Bench of the Delhi High Court are set aside. Consequently, the majority award is also set aside. Under the Scheme of Section 34 of the 1996 Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. This would cause considerable delay and be contrary to one of the important objectives of the 1996 Act, namely, speedy resolution of disputes by the arbitral process under the Act. Therefore, in order to do complete justice between the parties, invoking our power Under Article 142 of the Constitution of India, and given the fact that there is a minority award which awards the Appellant its claim based upon the formula mentioned in the agreement between the parties, we uphold the minority award, and state that it is this award, together with interest, that will now be executed between the parties. The minority award, in paragraphs 11 and 12, states as follows:

11. I therefore award the claim of the Claimant in full.

12. Costs - no amount is awarded to the parties. Each party shall bear its own cost.

Given the reliefs claimed by the Appellant in their statement of claim before the learned arbitrators, what is awarded to the Appellant is the principal sum of INR 2,01,42,827/- towards price adjustment payable Under Sub-clause 70.3 of the contract, for the work done under the contract from September 2010 to May 2014, as well as interest at the rate of 10%, compounded monthly from the due date of payment to the date of the award, i.e., 02.05.2016, plus future interest at the rate of 12% per annum (simple) till the date of payment.

50. The appeal is allowed in the aforesaid terms.

Back to Index

MANU/SC/0121/2010

Neutral Citation: 2010/INSC/104

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 6249-6250 of 2001 in Writ Petition (Criminal) 24 of 2008, SLP (Crl.) No. 4096 of 2007 and Writ Petition (Civil) No. 573 of 2006

Decided On: 17.02.2010

Appellants: State of West Bengal and Ors. **Vs.** Respondent: The Committee for Protection of Democratic Rights, West Bengal and Ors.

Hon'ble Judges/Coram:

K.G. Balakrishnan, C.J., R.V. Raveendran, Devinder Kumar Jain, P. Sathasivam and J.M. Panchal, JJ.

Subject: Criminal

Relevant Section:

Delhi Special Police Establishment Act, 1946 - Section 1(1); Arms Act 1959 - Section 27; Explosives Act, 1884 - Section 9B; Indian Penal Code, 1860 (IPC) - Section 302

Prior History / High Court Status:

From the Judgment and Order dated 30.03.2001 of the High Court of Calcutta in Civil Rule No. 1601 (W) of 2001 with Writ Petition No. 450 (W) of 2001 (MANU/WB/0134/2001)

Case Note:
Constitution - Power of High Courts to Issue certain Writs - Article 226 of the Constitution of India, 1950 - FIR lodged by complainant for offences under Sections 148/149/448/436/364/302/201 of the Indian Penal Code, 1860 read with Sections 25/27 of the Arms Act, 1959 and Section 9(B) of the Explosives Act, 1884 against around 50-60 miscreants - No effective step taken by the state investigating authorities for investigation of the alleged offence - Writ Petition filed in High Court for transfer of investigation from state machinery to Central Bureau of investigation (CBI) for the protection of fundamental Rights of the victims - Whether High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the CBI, established under the Delhi Special Police Establishment Act, 1946 ,to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government - Held, Fundamental Rights, are inherent and cannot be extinguished by any

constitutional or Statutory provision and any law that abrogates or abridges such rights would be violative of the basic structure doctrine - Also, Being the protectors of civil liberties of the citizens, Apex court and the High Courts have not only the power and jurisdiction but also an obligation to protect the Fundamental Rights, guaranteed by Constitution - In the present case where the violation of Fundamental Rights of the citizens are in issue, a direction by the High Court to the CBI to investigate a cognizable offence which is violative of Fundamental Right of the citizen and alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be perfectly valid in law - No inflexible guidelines can be laid down to decide whether or not such power should be exercised but such extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations as per the facts of the case - Matter referred to bench for disposal accordingly

Constitution - Judicial Review - Article 226 of the Constitution of India, 1950 - Validity of - Whether the doctrine of separation of powers curtail the power of judicial review, conferred on the constitutional Courts even in situations where the Fundamental Rights are sought to be abrogated or abridged on the ground that exercise of such power would impinge upon the said doctrine - Held, Courts a the guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation of Fundamental Rights - Violation of Fundamental Rights cannot be immunised from judicial scrutiny on the touchstone of doctrine of separation of powers between the Legislature, Executive and the Judiciary - Any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure or doctrine of separation of power - But such extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations - Matter referred to bench for disposal accordingly

Ratio Decidendi:

"The doctrine of separation of powers cannot curtail the power of judicial review conferred on the constitutional Courts specially in situations where the fundamental rights are sought to be abrogated or abridged under the garb of these doctrines."

"Violation of Fundamental Rights cannot be immunised from judicial scrutiny under Article 226 or under Article 32 on the touchstone of doctrine of separation of powers between the Legislature, Executive and the Judiciary."

JUDGMENT

Devinder Kumar Jain, J.

1. The issue which has been referred for the opinion of the Constitution Bench is whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the Central Bureau of Investigation (for short "the CBI"), established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act"), to investigate a cognizable offence,

which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government.

2. For the determination of the afore-stated important legal issue, it is unnecessary to dilate on the facts obtaining in individual cases in this bunch of civil appeals/special leave petitions/writ petitions and a brief reference to the facts in Civil Appeal Nos. 6249- 6250 of 2001, noticed in the referral order dated 8th November, 2006, would suffice. These are: One Abdul Rahaman Mondal (hereinafter referred to as, "the complainant") along with a large number of workers of a political party had been staying in several camps of that party at Garbeta, District Midnapore, in the State of West Bengal. On 4th January, 2001, the complainant and few others decided to return to their homes from one such camp. When they reached the complainant's house, some miscreants, numbering 50-60, attacked them with firearms and other explosives, which resulted in a number of casualties. The complainant managed to escape from the place of occurrence, hid himself and witnessed the carnage. He lodged a written complaint with the Garbeta Police Station on 4th January, 2001 itself but the First Information Report ("the FIR" for short) for offences under Sections 148/149/448/436/364/302/201 of the Indian Penal Code, 1860 (for short "the IPC") read with Sections 25/27 of the Arms Act, 1959 and Section 9(B) of the Explosives Act, 1884 was registered only on 5th January, 2001. On 8th January, 2001, Director General of Police, West Bengal directed the C.I.D. to take over the investigations in the case. A writ petition under Article 226 of the Constitution was filed in the High Court of Judicature at Calcutta by the Committee for Protection of Democratic Rights, West Bengal, in public interest, *inter alia*, alleging that although in the said incident 11 persons had died on 4th January, 2001 and more than three months had elapsed since the incident had taken place yet except two persons, no other person named in the FIR, had been arrested; no serious attempt had been made to get the victims identified and so far the police had not been able to come to a definite conclusion whether missing persons were dead or alive. It was alleged that since the police administration in the State was under the influence of the ruling party which was trying to hide the incident to save its image, the investigations in the incident may be handed over to the CBI, an independent agency.

3. Upon consideration of the affidavit filed in opposition by the State Government, the High Court felt that in the background of the case it had strong reservations about the impartiality and fairness in the investigation by the State police because of the political fallout, therefore, no useful purpose would be served in continuing with the investigation by the State Investigating Agency.

Moreover, even if the investigation was conducted fairly and truthfully by the State police, it would still be viewed with suspicion because of the allegation that all the assailants were members of the ruling party. Having regard to all these circumstances, the High Court deemed it appropriate to hand over the investigation into the said incident to the CBI.

4. Aggrieved by the order passed by the High Court, the State of West Bengal filed a petition for special leave to appeal before this Court. On 3rd September, 2001 leave was granted. When the matter came up for hearing before a two-Judge Bench on 8th November, 2006, taking note of the contentions urged by learned Counsel for the parties and the orders passed by this Court in ***The Management of Advance Insurance Co. Ltd.*** *v.* ***Shri Gurudasmal and Ors.*** MANU/SC/0205/1970 : 1970 (1) SCC 633 and ***Kazi Lhendup Dorji*** *v.* ***Central Bureau of Investigation and Ors.*** MANU/SC/0620/1994 : 1994 Supp (2) SCC 116, the Bench was of the

opinion that the question of law involved in the appeals was of great public importance and was coming before the courts frequently and, therefore, it was necessary that the issue be settled by a larger Bench. Accordingly, the Bench directed that the papers of the case be placed before the Hon'ble Chief Justice of India for passing appropriate orders for placing the matter before a larger Bench. When the matter came up before a three-Judge Bench, headed by the Hon'ble Chief Justice of India, on 29th August, 2008, this batch of cases was directed to be listed before a Constitution Bench. This is how these matters have been placed before us.

The Rival Contentions:

5. Shri K.K. Venugopal, learned senior counsel appearing on behalf of the State of West Bengal, referring to Entry 80 of List I of the Seventh Schedule to the Constitution of India; Entry 2 of List II of the said Schedule as also Sections 5 and 6 of the Special Police Act strenuously argued that from the said Constitutional and Statutory provisions it is evident that there is a complete restriction on Parliament's legislative power in enacting any law permitting the police of one State to investigate an offence committed in another State, without the consent of that State. It was urged that the Special Police Act enacted in exercise of the powers conferred under the Government of India Act, 1935, Entry 39 of List I (Federal Legislative List) of the Seventh Schedule, the field now occupied by Entry 80 of List I of the Seventh Schedule of the Constitution, replicates the prohibition of police of one State investigating an offence in another State without the consent of that State. It was submitted that Entry 2 of List II which confers exclusive jurisdiction on the State Legislature in regard to the police, the exclusive jurisdiction of a State Legislature cannot be encroached upon without the consent of the concerned State being obtained.

6. Learned senior counsel submitted that the separation of powers between the three organs of the State, i.e. the Legislature, the Executive and the Judiciary would require each one of these organs to confine itself within the field entrusted to it by the Constitution and not to act in contravention or contrary to the letter and spirit of the Constitution.

7. Thus, the thrust of argument of the learned Counsel was that both, the federal structure as well as the principles of separation of powers, being a part of the basic structure of the Constitution, it is neither permissible for the Central Government to encroach upon the legislative powers of a State in respect of the matters specified in List II of the Seventh Schedule nor can the superior courts of the land adjure such a jurisdiction which is otherwise prohibited under the Constitution. It was urged that if the Parliament were to pass a law which authorises the police of one State to investigate in another State without the consent of that State, such a law would be pro tanto invalid and, therefore, the rule of law would require the courts, which are subservient to the Constitution, to ensure that the federal structure embodied in the Constitution as a basic principle, is not disturbed by permitting/directing the police force of a State to investigate an offence committed in another State without the consent of that State.

8. Relying heavily on the observations of the Constitution Bench in ***Supreme Court Bar Association*** *v.* ***Union of India and Anr.*** MANU/SC/0291/1998 : (1998) 4 SCC 409 to

the effect that Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject

and thereby to achieve something indirectly which cannot be achieved directly, learned counsel contended that when even Article 142 of the Constitution cannot be used by this Court to act contrary to the express provisions of law, the High Court cannot issue any direction ignoring the Statutory and Constitutional provisions. Learned Counsel went to the extent of arguing that even when the State police is not in a position to conduct an impartial investigation because of extraneous influences, the Court still cannot exercise executive power of directing the police force of another State to carry out investigations without the consent of that State. In such a situation, the matter is best left to the wisdom of the Parliament to enact an appropriate legislation to take care of the situation. According to the learned Counsel, till that is done, even such an extreme situation would not justify the Court upsetting the federal or quasi-federal system created by the Constitution.

9. As regards the exercise of jurisdiction by a High Court under Article 226 of the Constitution, learned Counsel submitted that apart from the fact that there is a significant difference between the power of this Court under Article 142 of the Constitution and the jurisdiction of the High Court under Article 226 of the Constitution because of territorial limitations under Article 226(1) of the Constitution, a High Court is disentitled from issuing any direction to the authorities situated outside the territories over which it has jurisdiction. According to the learned Counsel Clause (2) of Article 226 would have no application in a case, such as the present one, since the cause of action was complete at the time of filing the writ petition and the power under Clause (2) can be exercised only where there is a nexus between the cause of action which arises wholly or partly within the State and the authority which is situated outside the State. It was asserted that the CBI being a rank outsider, unconnected to the incident, which took place within the State of West Bengal, the investigation of which was being conducted by the jurisdictional local police in West Bengal, had no authority to take up the case for investigation.

10. Shri Goolam E. Vahanvati, learned Solicitor General of India, appearing on behalf of the Union of India, submitted that the entire approach of the State being based on an assumption that the alleged restriction on Parliament's legislative power under Entry 80 of List I of the Seventh Schedule to the Constitution and restriction on the power of the Central Government under Section 6 of the Special Police Act to issue a notification binds the constitutional courts i.e. the Supreme Court and the High Courts is fallacious, inasmuch as the restrictions on the Central Government and Parliament cannot be inferentially extended to be restrictions on the Constitutional Courts in exercise of their powers under Articles 32 and 226 of the Constitution as it is the obligation of the Superior Courts to protect the citizens and enforce their fundamental rights. Learned Counsel vehemently argued that the stand of the appellants that the exercise of power by the Supreme Court or the High Courts to refer investigation to CBI directly without prior approval of the concerned State Government would violate the federal structure of the Constitution is again misconceived as it overlooks the basic fact that in a federal structure it is the duty of the courts to uphold the Constitutional values and to enforce the Constitutional limitations as an ultimate interpreter of the Constitution. In support of the proposition, learned Counsel placed reliance on the decisions of this Court in ***State of Rajasthan and Ors.*** *v.* ***Union of India and Ors.*** MANU/SC/0370/1977 : (1977) 3 SCC 592, ***S.R. Bommai and Ors.*** *v.* ***Union of India and Ors.*** MANU/SC/0444/1994 : (1994) 3 SCC 1 and ***Kuldip Nayar and Ors.*** *v.* ***Union of India and Ors.*** MANU/SC/3865/2006 : (2006) 7 SCC 1.

11. Relying on the recent decision by a Bench of nine Judges of this Court in ***I.R. Coelho (D) By LRs.*** *v.* ***State of Tamil Nadu*** MANU/SC/0595/2007 : (2007) 2 SCC 1, learned counsel submitted that the judicial review being itself the basic feature of the Constitution, no restriction can be placed even by inference and by principle of legislative competence on the powers of the Supreme Court and the High Courts with regard to the enforcement of fundamental rights and protection of the citizens of India. Learned Counsel asserted that in exercise of powers either under Article 32 or 226 of the Constitution, the courts are merely discharging their duty of judicial review and are neither usurping any jurisdiction, nor overriding the doctrine of separation of powers. In support of the proposition that the jurisdiction conferred on the Supreme Court by Article 32 as also on the High Courts under Article 226 of the Constitution is an important and integral part of the basic structure of the Constitution, learned Counsel placed reliance on the decisions of this Court in ***Special Reference No. 1 of 1964*** : [1965] 1 S.C.R. 413, ***Minerva Mills Ltd. and Ors.*** *v.* ***Union of India and Ors.*** MANU/SC/0075/1980 : (1980) 3 SCC 625, ***Fertilizer Corporation Kamgar Union (Regd.), Sindri and Ors.*** *v.* ***Union of India and Ors.*** MANU/SC/0010/1980 : (1981) 1 SCC 568, ***Nilabati Behera*** *v.* ***State of Orissa and Ors.*** MANU/SC/0307/1993 : (1993) 2 SCC 746 and ***L. Chandra Kumar*** *v.* ***Union of India and Ors.*** MANU/SC/0261/1997 : (1997) 3 SCC 261. Relying on the decision of this Court in ***Dwarkanath, Hindu Undivided Family*** *v.* ***Income-Tax Officer, Special Circle, Kanpur and Anr.*** MANU/SC/0166/1965 : [1965] 3 S.C.R. 536, learned Counsel emphasised that the powers of the High Court under Article 226 are also wide and plenary in nature similar to that of the Supreme Court under Article 32 of the Constitution.

The Questions for Consideration:

12. It is manifest that in essence the objection of the appellant to the CBI's role in police investigation in a State without its consent, proceeds on the doctrine of distribution of legislative powers as between the Union and the State Legislatures particularly with reference to the three Lists in the Seventh Schedule of the Constitution and the distribution of powers between the said three organs of the State.

13. In order to appreciate the controversy, a brief reference to some of the provisions in the Constitution would be necessary. The Constitution of India is divided into several parts, each part dealing in detail with different aspects of the social, economic, political and administrative set up. For the present case, we are mainly concerned with Part III of the Constitution, which enumerates the fundamental rights guaranteed by the State primarily to citizens and in some cases to every resident of India and Part XI thereof, which pertains to the relations between the Union and the States.

14. Bearing in mind the basis on which the correctness of the impugned direction is being questioned by the State of West Bengal, we shall first notice the scope and purport of Part XI of the Constitution. According to Article 1 of the Constitution, India is a `Union' of States, which means a Federation of States. Every federal system requires division of powers between the Union and State Governments, which in our Constitution is effected by Part XI thereof. While Articles 245 to 255 deal with distribution of legislative powers, the distribution of administrative powers is dealt with in Articles 256 to 261. Under the Constitution, there is a three-fold distribution of legislative powers between the Union and the States, made by the three Lists in the Seventh Schedule of the Constitution. While Article 245 confers the legislative powers upon the Union and

the States, Article 246 provides for distribution of legislative powers between the Union and the States. Article 246, relevant for our purpose, reads as follows:

246. Subject-matter of laws made by Parliament and by the Legislatures of States -- (1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in Clause (3), Parliament and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the `State List').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

15. The Article deals with the distribution of legislative powers between the Union and the State Legislatures. List I or the `Union List' enumerates the subjects over which the Union shall have exclusive powers of legislation in respect of 99 items or subjects, which include Defence etc.; List II or the `State List' comprises of subjects, which include Public Order, Police etc., over which the State Legislature shall have exclusive power of legislation and List III gives concurrent powers to the Union and the State Legislatures to legislate in respect of items mentioned therein. The Article postulates that Parliament shall have exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3).

The non obstante clause in Article 246(1) contemplates the predominance or supremacy of the Union Legislature. This power is not encumbered by anything contained in Clause (2) and (3) for these clauses themselves are expressly limited and made subject to the non obstante clause in Article 246(1). The State Legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III (Concurrent List). The exclusive power of the State Legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an Entry in List I and an Entry in List II, which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State Legislature. Both Parliament and the State Legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III. The words "notwithstanding anything contained in Clauses (2) and (3)" in Article 246(1) and the words "subject to Clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III and in case of an

overlapping between Lists II and III, the latter shall prevail. Though, undoubtedly, the Constitution exhibits supremacy of Parliament over State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the Lists is not to confer powers; they merely demarcate the Legislative field.
But the issue we are called upon to determine is that when the scheme of Constitution prohibits encroachment by the Union upon a matter which exclusively falls within the domain of the State Legislature, like public order, police etc., can the third organ of the State viz. the Judiciary, direct the CBI, an agency established by the Union to do something in respect of a State subject, without the consent of the concerned State Government?

16. In order to adjudicate upon the issue at hand, it would be necessary to refer to some other relevant Constitutional and Statutory provisions as well.

17. As noted earlier, the Special Police Act was enacted by the Governor General in Council in exercise of the powers conferred by the Government of India Act, 1935 (Entry 39 of List I, Seventh Schedule). The said Entry reads as under:

Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, **but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province** or the Chief Commissioner as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

It is manifest that the Special Police Act was passed in terms of the said Entry imposing prohibition on the Federal Legislature to enact any law permitting the police of one State from investigating an offence committed in another State, without the consent of the State. The said Entry was replaced by Entry 80 of List I of the Seventh Schedule to the Constitution of India. The said entry reads thus:

Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, **but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Govt. of the State in which such area is situated;** extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

Entry 2 of List II of the Constitution of India, which corresponds to Entry 2 List II of the Government of India Act, conferring exclusive jurisdiction to the States in matter relating to police reads as under:

Entry 2 List II:

Police (including railway and village police) subject to the provisions of entry 2A of List I.

Entry 2A of List I:

Development of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

18. From a bare reading of the afore-noted Constitutional provisions, it is manifest that by virtue of these entries, the legislative power of the Union to provide for the regular police force of one State to exercise power and jurisdiction in any area outside the State can only be exercised with the consent of the Government of that particular State in which such area is situated, except the police force belonging to any State to exercise power and jurisdiction to railway areas outside that State.

19. As the preamble of the Special Police Act states, it was enacted with a view to constitute a special force in Delhi for the investigation of certain offences in the Union Territories and to make provisions for the superintendence and administration of the said force and for the extension to other areas of the powers and jurisdiction of the members of the said force in regard to the investigation of the said offences. Sub-section (1) of Section 1 specifies the title of the Special Police Act and Sub-section (2) speaks that the Special Police Act extends to the whole of India. Section 2 contains 3 Sub-sections. Sub-section (1) empowers the Central Government to constitute a special police force to be called the Delhi Special Police Establishment for the investigation of offences notified under Section 3 in any Union Territory; Sub-section (2) confers upon the members of the said police establishment in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers of that Union Territory have in connection with the investigation of offences committed therein and Sub-section (3) provides that any member of the said police establishment of or above the rank of Sub-Inspector be deemed to be an officer in charge of a police station. Under Section 3 of the Special Police Act, the Central Government is required to specify and notify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment, constituted under the Special Police Act, named "the CBI". Section 4 deals with the administrative control of the establishment and according to Sub-section (2), the "superintendence" of the Establishment vests in the Central Government and the administration of the said establishment vests in an officer appointed in this behalf by the Central Government. Explaining the meaning of the word "Superintendence" in Section 4(1) and the scope of the authority of the Central Government in this context, in ***Vineet Narain and Ors.*** *v.* ***Union of India and Anr.*** MANU/SC/0827/1998 : (1998) 1 SCC 226, a Bench of three Judges of this Court said:

40. ...The word "superintendence" in Section 4(1) cannot be construed in a wider sense to permit supervision of the actual investigation of an offence by the CBI contrary to the manner provided by the statutory provisions. The broad proposition urged on behalf of the Union of India that it can issue any directive to the CBI to curtail or inhibit its jurisdiction to investigate an offence specified in the notification issued under Section 3 by a directive under Section 4(1) of the Act cannot be accepted. The jurisdiction of the CBI to investigate an offence is to be determined with reference to the notification issued under Section 3 and not by any separate order not having that character.

20. Section 5 of the Special Police Act empowers the Central Government to extend the powers and jurisdiction of the Special Police Establishment to any area, in a State, not being a Union Territory for the investigation of any offences or classes of offences specified in a notification under Section 3 and on such extension of jurisdiction, a member of the Establishment shall discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of the police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force.

21. Section 6, the pivotal provision, reads as follows:

6. Consent of State Government to exercise of powers and jurisdiction. - Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or railway area, **without the consent of the Government of that State.**

22. Thus, although Section 5(1) empowers the Central Government to extend the powers and jurisdiction of members of the Delhi Special Police Establishment to any area in a State, but Section 6 imposes a restriction on the power of the Central Government to extend the jurisdiction of the said Establishment only with the consent of the State Government concerned.

23. Having noticed the scope and amplitude of Sections 5 and 6 of the Special Police Act, the question for consideration is whether the restriction imposed on the powers of the Central Government would apply mutatis mutandis to the Constitutional Courts as well. As stated above, the main thrust of the argument of Shri K.K. Venugopal, learned senior counsel, is that the course adopted by the High Court in directing the CBI to undertake investigation in the State of West Bengal without the consent of the State is incompatible with the federal structure as also the doctrine of separation of powers between the three organs of the State, embodied in the Constitution even when the High Court, on the material before it, was convinced that the State Police was dragging its feet in so far as investigation into the 4th January, 2001 carnage was concerned.

24. In so far as the first limb of the argument is concerned, it needs little emphasis that, except in the circumstances indicated above, in a federal structure, the Union is not permitted to encroach upon the legislative powers of a State in respect of the matters specified in List II of the Seventh Schedule. However, the second limb of the argument of the learned Counsel in regard to the applicability of the doctrine of separation of powers to the issue at hand, in our view, is clearly untenable. Apart from the fact that the question of Centre - State relationship is not an issue in the present case, a Constitutional Court being itself the custodian of the federal structure, the invocation of the federal structure doctrine is also misplaced.

25. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. As observed in ***Raja Ram Pal*** *v.* ***Hon'ble Speaker, Lok Sabha and Ors.*** MANU/SC/0241/2007 : (2007) 3 SCC 184, the Constitution is the suprema lex in this country. All organs of the State, including this Court and the High Courts, derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it. Highlighting the fundamental features

of a federal Constitution, in ***Special Reference No. 1*** (supra), the Constitution Bench (7-Judges) observed as follows:

...the essential characteristic of federalism is `the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other'. The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers.

26. It is trite that in the Constitutional Scheme adopted in India, besides supremacy of the Constitution, the separation of powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution. In fact, the importance of separation of powers in our system of governance was recognised in ***Special Reference No. 1*** (supra), even before the basic structure doctrine came to be propounded in the celebrated case of ***His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.*** MANU/SC/0445/1973 : (1973) 4 SCC 225, wherein while finding certain basic features of the Constitution, it was opined that separation of powers is part of the basic structure of the Constitution. Later, similar view was echoed in ***Smt. Indira Nehru Gandhi v. Shri Raj Narain and Anr.*** MANU/SC/0304/1975 : 1975 (Supp) SCC 1 and in a series of other cases on the point. Nevertheless, apart from the fact that our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure of the Constitution, it cannot be ousted or abridged by even a Constitutional amendment. [See: ***L. Chandra Kumar v. Union of India and Ors.*** (supra)]. Besides, judicial review is otherwise essential for resolving the disputes regarding the limits of Constitutional power and entering the Constitutional limitations as an ultimate interpreter of the Constitution. In ***Special Reference No. 1 of 1964*** (supra), it was observed that whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. In ***Smt. Indira Nehru Gandhi*** (supra), Y.V. Chandrachud, J. (as His Lordship then was), drawing distinction between the American and Australian Constitution on the one hand and the Indian Constitution on the other, observed that the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. The learned judge also observed that in a federal system, which distributes powers between three coordinate branches of government, though not rigidly, disputes regarding the limits of Constitutional power have to be resolved by courts. Quoting George Whitecross Paton, an Australian Legal Scholar, that "the distinction between judicial and other powers may be vital to the maintenance of the Constitution itself", the learned judge said that the principle of separation of powers is a principle of restraint which "has in it the percept, innate in the prudence of self-preservation (even if history has not repeatedly brought in home), that discretion is the better part of valour" Julius Stone: Social Dimensions of Law and Justice, (1966) p. 668.

27. Recently in ***State of U.P. and Ors. v. Jeet S. Bisht and Anr.*** MANU/SC/7702/2007 : (2007) 6 SCC 586, S.B. Sinha, J. dealt with the topic of separation of powers in the following terms:

77. Separation of powers is a favourite topic for some of us. Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large are functions of the legislature and the executive respectively, it is too late in the day to say that the constitutional court's role in that behalf is non-existent. The judge-made law is now well recognised throughout the world. If one is to put the doctrine of separation of power to such a rigidity, it would not have been possible for any superior court of any country, whether developed or developing, to create new rights through interpretative process.

78. Separation of powers in one sense is a limit on *active jurisdiction* of each organ. But it has another deeper and more relevant purpose: to act as *check* and balance over the activities of other organs. Thereby the *active jurisdiction* of the organ is not challenged; nevertheless there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

X X X

80. The modern view, which is today gathering momentum in constitutional courts the world over, is not only to demarcate the *realm of functioning* in a negative sense, but also to define the *minimum* content of the demarcated *realm of functioning.* Objective definition of function and role entails executing the same, which however may be subject to the plea of *financial constraint* but only in exceptional cases. In event of any such shortcoming, it is the essential duty of the other organ to advise and recommend the *needful* to substitute inaction. To this extent we must be prepared to frame answers to these difficult questions.

X X X

83. If we notice the evolution of separation of powers doctrine, traditionally the *checks and balances* dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable *social and economic* entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of *checks and balances* to include governmental inaction. Otherwise we envisage the country getting transformed into a *state of repose*. Social engineering as well as institutional engineering therefore forms part of this obligation.

28. Having discussed the scope and width of the doctrine of separation of powers, the moot question for consideration in the present case is that when the fundamental rights, as enshrined in Part III of the Constitution, which include the right to equality (Article 14); the freedom of speech [Article 19(1)(a)] and the right not to be deprived of life and liberty except by procedure established by law (Article 21), as alleged in the instant case, are violated, can their violation be immunised from judicial scrutiny on the touchstone of doctrine of separation of powers between

the Legislature, Executive and the Judiciary. To put it differently, can the doctrine of separation of powers curtail the power of judicial review, conferred on the Constitutional Courts even in situations where the fundamental rights are sought to be abrogated or abridged on the ground that exercise of such power would impinge upon the said doctrine?

29. The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and liberally having regard to the changed circumstances and the needs of time and polity. In ***Kehar Singh and Anr.*** *v.* ***Union of India and Anr.*** MANU/SC/0240/1988 : (1989) 1 SCC 204, speaking for the Constitution Bench, R.S. Pathak, C.J. held that in keeping with modern Constitutional practice, the Constitution of India is a constitutive document, fundamental to the governance of the country, whereby the people of India have provided a Constitutional polity consisting of certain primary organs, institutions and functionaries with the intention of working out, maintaining and operating a Constitutional order. On the aspect of interpretation of a Constitution, the following observations of Justice Dickson of the Supreme Court of Canada in ***Lawson A.W. Hunter and Ors.*** *v.* ***Southam Inc.*** (1984) 2 S.C.R. 145 (Can SC) are quite apposite:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

30. In ***M. Nagaraj and Ors.*** *v.* ***Union of India and Ors.*** MANU/SC/4560/2006 : (2006) 8 SCC 212, speaking for the Constitution Bench, S.H. Kapadia, J. observed as under:

The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges.

31. Recently, in ***I.R. Coelho*** (supra), noticing the principles relevant for the interpretation of Constitutional provisions, Y.K. Sabharwal, C.J., speaking for the Bench of nine Judges of this Court, observed as follows:

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle

of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

Observing further that the protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism, the Court went on to say:

Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained.

32. The Constitution of India expressly confers the power of judicial review on this Court and the High Courts under Article 32 and 226 respectively. Dr. B.R. Ambedkar described Article 32 as the very soul of the Constitution - the very heart of it - the most important Article. By now, it is well settled that the power of judicial review, vested in the Supreme Court and the High Courts under the said Articles of the Constitution, is an integral part and essential feature of the Constitution, constituting part of its basic structure. Therefore, ordinarily, the power of the High Court and this Court to test the Constitutional validity of legislations can never be ousted or even abridged. Moreover, Article 13 of the Constitution not only declares the pre- constitution laws as void to the extent to which they are inconsistent with the fundamental rights, it also prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Therefore, judicial review of laws is embedded in the Constitution by virtue of Article 13 read with Articles 32 and 226 of our Constitution. It is manifest from the language of Article 245 of the Constitution that all legislative powers of the Parliament or the State Legislatures are expressly made subject to other provisions of the Constitution, which obviously would include the rights conferred in Part III of the Constitution. Whether there is a contravention of any of the rights so conferred, is to be decided only by the Constitutional Courts, which are empowered not only to declare a law as unconstitutional but also to enforce fundamental rights by issuing directions or orders or writs of or "in the nature of" *mandamus, certiorari, habeas corpus, prohibition* and *quo warranto* for this purpose. It is pertinent to note that Article 32 of the Constitution is also contained in Part III of the Constitution, which enumerates the fundamental rights and not alongside other Articles of the Constitution which define the general jurisdiction of the Supreme Court. Thus, being a fundamental right itself, it is the duty of this Court to ensure that no fundamental right is contravened or abridged by any statutory or constitutional provision. Moreover, it is also plain from the expression "in the nature of" employed in Clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high prerogative writs specified in the said clause but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of the fundamental rights. Therefore, even when the conditions for issue of any of these writs are not fulfilled, this Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who

has come before it for judicial redress. (per P.N. Bhagwati, J. in ***Bandhua Mukti Morcha** v. **Union of India and Ors.*** MANU/SC/0051/1983 : (1984) 3 SCC 161).

33. In this context, it would be profitable to make a reference to the decision of this Court in ***Nilabati Behera*** (supra). The Court concurred with the view expressed by this Court in ***Khatri and Ors. (II)** v. **State of Bihar and Ors.*** MANU/SC/0518/1981 : (1981) 1 SCC 627 and Khatri and Ors. (IV) v. State of Bihar and Ors. MANU/SC/0163/1981 : (1981) 2 SCC 493, wherein it was said that the Court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared "to forge new tools and devise new remedies" for the purpose of vindicating these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the enquiry, needed to ascertain the necessary facts, for granting the relief, as may be available mode of redress, for enforcement of the guaranteed fundamental rights. In his concurring judgment, Dr. A.S. Anand, J. (as His Lordship then was), observed as under:

35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law - through appropriate proceedings.

34. It may not be out of place to mention that in so far as this Court is concerned, apart from Articles 32 and 142 which empower this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter, Article 144 of the Constitution also mandates all authorities, civil or judicial in the territory of India, to act in aid of the orders passed by this Court.

35. As regards the power of judicial review conferred on the High Court, undoubtedly they are, in a way, wider in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and, "for any other purpose". It is manifest from the difference in the phraseology of Articles 32 and 226 of the Constitution that there is a marked difference in the nature and purpose of the right conferred by these two Articles. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III of the Constitution, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but "for any other purpose" as well, i.e. for enforcement of any legal right conferred by a Statute etc.

36. In ***Tirupati Balaji Developers (P) Ltd. and Ors.** v. **State of Bihar and Ors.*** MANU/SC/0369/2004 : (2004) 5 SCC 1, this Court had observed thus:

8. Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court "subordinate" to the Supreme Court.

In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose while the original jurisdiction of Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters, such as Presidential elections or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts.

37. In ***Dwarkanath's case*** (supra), this Court had said that Article 226 of the Constitution is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. This Article enables the High Courts to mould the reliefs to meet the peculiar and extra-ordinary circumstances of the case. Therefore, what we have said above in regard to the exercise of jurisdiction by this Court under Article 32, must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226 of the Constitution.

38. Article 21, one of the fundamental rights enshrined in Part III of the Constitution declares that no person shall be deprived of his "life" or "personal liberty" except according to the procedure established by law. It is trite that the words "life" and "personal liberty" are used in the Article as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of person's animal existence. (See: ***Kharak Singh v. State of U.P.*** MANU/SC/0085/1962 : (1964) 1 SCR 332)

39. The paramountcy of the right to "life" and "personal liberty" was highlighted by the Constitution Bench in ***Kehar Singh*** (supra). It was observed thus:

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ.

40. In ***Minerva Mills*** (supra), Y.V. Chandrachud, C.J., speaking for the majority observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be drained of its life blood. Emphasising the significance of Articles 14, 19 and 21, the learned Chief Justice remarked:

74. Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without

emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.

41. The approach in the interpretation of fundamental rights has again been highlighted in ***M. Nagaraj*** (supra), wherein this Court observed as under:

This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part- III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part-III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. **Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction.** In Sakal Papers (P) Ltd. v. Union of India MANU/SC/0090/1961 : AIR 1962 SC 305, this Court has held that **while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure.** An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in ***A.K. Gopalan v. State of Madras*** MANU/SC/0012/1950 : AIR 1950 SC 27. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in ***A.K. Gopalan*** and held in its landmark judgment in ***Maneka Gandhi v. Union of India*** MANU/SC/0133/1978 : (1978) 1 SCC 248 that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. **The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity.** This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees.

42. Thus, the opinion of this Court in ***A.K. Gopalan*** (supra) to the effect that a person could be deprived of his liberty by `any' procedure established by law and it was not for the Court to go into the fairness of that procedure was perceived in ***Maneka Gandhi*** (supra) as a serious curtailment of liberty of an individual and it was held that the law which restricted an individual's freedom

must also be right, just and fair and not arbitrary, fanciful or oppressive. This judgment was a significant step towards the development of law with respect to Article 21 of the Constitution, followed in a series of subsequent decisions. This Court went on to explore the true meaning of the word "Life" in Article 21 and finally opined that all those aspects of life, which make a person live with human dignity are included within the meaning of the word "Life".

43. Commenting on the scope of judicial review vis-à-vis constitutional sovereignty particularly with reference to Articles 14, 19 and 21 of the Constitution, in ***I.R. Coelho*** (supra), this Court said:

There is a difference between Parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in future, judicial review was to be abolished by a constitutional amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in ***Kesavananda Bharati case*** (supra) has to apply.

While observing that the abrogation or abridgement of the fundamental rights under Chapter III of the Constitution have to be examined on broad interpretation so as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure, the Court explained the doctrine of separation of powers as follows: (SCC p.86- 87, paras 64-66)

...[i]t was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In *The Federalist* Nos. 47, 48, and 51, James Madison details how a separation of powers preserves liberty and prevents tyranny. In The Federalist No. 47, Madison discusses Montesquieu's treatment of the separation of powers in *Spirit of Laws,* (Book XI, Chapter 6). There Montesquieu writes,

When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty... Again, there is no liberty, if the judicial power be not separated from the legislative and executive.

Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of Government should not be entirely in the hands of another department of Government.

Alexander Hamilton in *The Federalist* No. 78, remarks on the importance of the independence of the judiciary to preserve the separation of powers and the rights of the people:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor

of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Montesquieu finds that tyranny pervades when there is no separation of powers:

There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

The Court further observed: (SCC pg. 105, paras 129-130)

Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

Realising that it is necessary to secure the enforcement of the Fundamental Rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality which is a part of the basic structure can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure - rule of law, separation of power - the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure.

Conclusions:

44. Thus, having examined the rival contentions in the context of the Constitutional Scheme, we conclude as follows:

(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence,

which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review".

(iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v) Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution.

(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.

(vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts.

Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure.

45. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

46. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order,

the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise.
In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police.
This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.
Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.<mpara>

47. In ***Secretary, Minor Irrigation & Rural Engineering Services, U.P. and Ors.*** *v.* ***Sahngoo Ram Arya and Anr.*** MANU/SC/0441/2002 : (2002) 5 SCC 521, this Court had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency. We respectfully concur with these observations.

48. All the cases shall now be placed before the respective Benches for disposal in terms of this opinion.

Back to Index

MANU/SC/1183/2015

Neutral Citation: 2015/INSC/787

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 13, 14, 18, 23, 24, 70, 83, 108, 124, 209, 309, 310, 323, 341 of 2015, Transfer Petition (Civil) Nos. 391 and 971 of 2015 (Under Article 32 of the Constitution of India)

Decided On: 16.10.2015

Appellants: Supreme Court Advocates-on-Record-Association and Ors. **Vs.** Respondent: Union of India (UOI)

Hon'ble Judges/Coram:

J.S. Khehar, Jasti Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ.

For Appellant/Petitioner/Plaintiff: Mathews J. Nedumpara, Manohar Lal Sharma, R.K. Kapoor, Bishwajit Bhattacharyya, Rajiv Daiya (NP), P.M. Duraiswamy (NP), Petioner-in-Person

For Respondents/Defendant: Party-in-Person

Subject: Constitution

Subject: Service

Disposition:
Petition Allowed

Case Note:

Constitution - Independence of judiciary - Constitution (Ninety-ninth Amendment) Act, 2014 and National Judicial Appointments Commission Act, 2014; Article 368 of the Constitution - Central Government introduced legislation amending Articles 124 and 217 of the Constitution - Substituted Collegium system of appointment of judges in higher judiciary - Introduced National Judicial Appointments Commission - Comprising Chief Justice of India, two Judges of Supreme Court, Minister of Law and Justice and 'eminent persons' - Whether the Acts altered the "basic structure" of the Constitution endangering

independence of judiciary from the Executive - Whether the Acts purporting to amend Articles 124 and 217 of the Constitution are invalid - Whether the Collegium system for appointment of judges will endure

Constitution - Appointment of judges - Articles 124 and 217 Constitution of India - "Consultation" with President of India - S.P. Gupta v. Union of India held that power of appointment of judges lay with Central Government - Chief Justice of India could only tender advice - Overruled in Supreme Court Advocates-on-Record Association v. Union of India - Opinion of Chief Justice of India held primacy in appointments - Affirmed and clarified in Re: Special Reference No. 1 of 1998 - Respondent accepted decisions - Published Memorandum for appointment of judges in accordance with law laid down - Whether the court in the Second and Third Judges cases had construed "consultation" to mean "concurrence" - Whether the decision in First Judges case was correct and subsequent judgments overruling erred in their interpretation - Whether the Court can delve into the correctness of the decisions in the three cases

Civil - Recusal - Hearings for validity of National Judicial Appointments Commission referred to five judge Bench - Justice Dave recused himself for being part of the proposed NJAC - Replaced by Justice Khehar - Petitioners submitted Justice Khehar was member of existing Collegium for selection and appointment of judges to Higher judiciary - Whether a Judge hearing a matter should recuse despite the prayer for recusal being unsubstantiated - Whether Justice Khehar should recuse from the matter for the mere possibility of a conflict of interest

Facts

Two acts, the Constitution (Ninety-ninth Amendment) Act, 2014 and National Judicial Appointments Commission Act, 2014 were enacted by Parliament to set up a National Judicial Appointments Commission (NJAC) for selection, appointment and transfer of Judges to the Higher judiciary. The Commission would replace the prevailing procedure under Articles 124(2) and 217(1) of the Constitution, otherwise known as the Collegium. The Commission was purported to introduce transparency in the selection process.

Articles 124 and 217 of the Constitution were accordingly amended by the Constitution (Ninety-ninth Amendment) Act, 2014, which received Presidential assent on 31.12.2014. The National Judicial Appointments Commission Act, 2014 was simultaneously assented to. The proposed NJAC would be comprised of the Chief Justice of India, next two senior most judges in the Supreme Court, the Union Minister for Law and Justice and two eminent persons nominated by a separate committee. The committee to nominate the eminent persons would include the Chief Justice of India, the Prime Minister and Leader of the Opposition. Hence, the present petition questioning the constitutional validity of the two acts.

Hearings at the Supreme Court of India on the NJAC were initiated before a three-Judge Bench, which referred it to a five-Judge Bench, which included Justice Anil R. Dave. On 13.4.2015 the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, were notified, making Justice Anil R. Dave, J. an ex-

officio Member of the National Judicial Appointments Commission, for being the second senior-most Judge after the Chief Justice of India, under Article 124A(1)(b) of the Constitution. The Bench was reconstituted with Justice J.S. Khehar replacing Justice Dave. Submissions were made for Justice Khehar to recuse himself from the matter as he was a member of the Collegium of five Judges of the Supreme Court which recommended judicial appointments to the Higher judiciary, which was directly affected by the creation of the NJAC and the validity of which was under challenge.

In their submissions bolstering the validity of the NJAC, Respondents relied on the decision in S.P. Gupta v. Union of India (First Judges case), which was overruled by Supreme Court Advocates-on-Record Association v. Union of India (Second Judges case), affirmed in Re: Special Reference No. 1 of 1998 (Third Judges case). Respondents sought to prove correct the interpretation in the First Judges case and challenged the correctness of precedent laid down in Second and Third Judges case.

From the opinion in the First Judges case emerged: Chief Justice of India, Chief Justice of the High Court, and other Judges of the High Court and Supreme Court were constitutional functionaries, having a consultative role, and the power of appointments rested solely and exclusively in the decision of the Central Government. This power was not unfettered in that the Central Government could not act arbitrarily, without consulting fully and effectively the constitutional functionaries specified in Articles 124 and 217 of the Constitution. With reference to appointment of Judges of the Supreme Court, it was held, that the Chief Justice of India was required to be consulted, but the Central Government was not bound to act in accordance with the opinion of the Chief Justice of India even though his opinion was to be considered with due importance. Consultation with the Chief Justice of India was a mandatory requirement. but while making an appointment, consultation could extend to other Judges of the Supreme Court and High Courts, as deemed necessary by the Central Government. Moreover, Article 222 of the Constitution conferred expressly a power on the President to transfer a judge from one State to another to have 1/3rd of Judges in the High Court from outside the State. The President possessed an implied power to lay down the norms, the principles, the conditions and the circumstances, under which such power was to be exercised. With regards to the "independence of the judiciary", it was observed that while the administration of justice drew its legal sanction from the Constitution, its credibility rested in the faith of the people. Thus, it was held that the ultimate power of appointment rested with the Central Government.

The Second Judges case decided: The process of appointment of Judges to the Supreme Court and the High Courts was an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment. Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India; and in the instance of High Court, by the Chief Justice of the High Court. In the event of conflicting opinions by constitutional functionaries, the opinion of the judiciary, the Chief Justice of India, has primacy. No appointment, to the Supreme Court or a High Court, could be made unless conforming with the opinion of the Chief Justice of India. Only in exceptional cases, stated with strong cogent reasons, should the appointment recommended by the Chief Justice not be made. Provisions of the Constitution, and its scheme, should be construed and

implemented in a manner conducive to such an interpretation.

Finally, in the Third Judges case it was held: "consultation with the Chief justice of India" in Articles 217(1) of the Constitution of India required consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India did not constitute "consultation". The Chief Justice of India was not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment. "Strong cogent reasons" did not have to be recorded as justification for a departure from the order of seniority in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

Attention was also drawn to several speeches, debates and deliberations of the Constituent Assembly. Dr. Ambedkar had in the course of the Assembly observed: "...there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creating...We do not want to create an *Imperium in Imperio,* and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive."

In asserting the validity of the Constitution (Ninety-ninth Amendment) Act, 2014, Respondents submitted that Parliament's power to amend the Constitution was plenary, subject only to it not altering the "basic structure" of the Constitution. As such, a constitutional amendment must be presumed to be constitutionally valid unless shown otherwise. The Constitution (Ninety-ninth Amendment) Act, 2014 only introduced checks and balances, which were inherent components of an effective constitutional arrangement. Further, it was not within the ambit of this Court to suggest an alternative combination of Members for the NJAC or an alternative procedure to regulate its functioning. In conjunction with the issue of "independence of the judiciary", which emanated from the concept of "separation of powers", the Respondents submitted that the scheme of the Constitution envisaged a system of checks and balances. With each organ of governance while being allowed the freedom to discharge the duties assigned to it, was subject to controls in the hands of one or both of the other organs. In the matter of appointment of judges, whereas Articles 124 and 217 provided executive control under the scheme of checks and balances, the Second and Third Judges case had done away with the same.

Held, allowing the petition

1. Justice Khehar noted that besides him, three other judges on the instant Bench would over time be a part of the Collegium or would be a part of the NJAC. As such, the averment of conflict of interest should have been raised against them all. Though a Judge may recuse of his own volition from a case entrusted to him by the Chief Justice, such would be a matter of

his own choosing. A judge before he assumes his office takes an oath to discharge his duties without fear or favour. He would be in breach of his oath of office if he accepted a prayer for recusal, unless justified. Justice Chelameswar opined the following: (1) if a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case; (2) in cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias; and (3) the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case.[18] and[389]

2. In UOI v. Sankalchand Himatlal Sheth the court had held that "consultation" could not be deemed to be "concurrence" with reference to Article 222 of the Constitution. Determining whether the President was to act in its individual capacity, at his own discretion, Court determined that President means the Minister or the Council of Ministers and his opinion, satisfaction or decision is constitutionally secured when Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. Consultation with that highest dignitary of Indian justice will and should be accepted by the government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice, the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. It is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue. [34]

3. The position having been conceded by the Respondents in the Third Judges case, accepting the decision in the Second Judges case, they cannot seek reconsideration of the judicial declaration in the Second and Third Judges cases. Consequent to pronouncement of judgments in the Second and Third Judges cases, a Memorandum of Procedure for Appointment of Judges and Chief Justices to the Higher judiciary was drawn by the Ministry of Law, Justice and Company Affairs on 30.6.1999. The Memorandum of Procedure provides for a participatory role, to the judiciary as well as the political-executive. While the judicial contribution is responsible for evaluating the individual's professional ability, the political-executive is tasked with the obligation to provide details about the individual's character and antecedents. [62] and[68]

4. In the Collegium system of appointment, it is open to the Executive to return the file to the Chief Justice of India, for a reconsideration of the proposal, by enclosing material which may have escaped the notice of the Chief Justice of India and his collegium of Judges. There is a complete comity of purpose between the judiciary and the political-executive in the matter of selection and appointment of High Court Judges, and there is clear transparency as views and counter-views are exchanged in writing. [69] and[70]

5. When the Constituent Assembly used the term "consultation" its intent was to limit the participatory role of the political-executive in the matter of appointments of Judges to the higher judiciary. It was the view of Dr. B.R. Ambedkar, that the draft article had adopted a middle course, by not making the President-the executive "the supreme and absolute authority in the matter of making appointments" of Judges. The judgments in the Second and Third Judges cases cannot be blamed, for not assigning a dictionary meaning to the term "consultation". If the real purpose sought to be achieved by the term "consultation" was to shield the selection and appointment of Judges to the higher judiciary, from executive and political involvement, certainly the term "consultation" was meant to be understood as something more than a mere "consultation". Thus, Article 124 was clearly meant to propound that the matter of "appointments of Judges was an integral part of the "independence of the judiciary". The process contemplated for appointment of Judges would therefore have to be understood to be shielded from political pressure and political considerations. Thus, the court on a harmonious construction of the provisions of the Constitution in the Second and Third Judges cases rightly held that primacy in appointments vested with the judiciary; leading to the inference that the term "consultation" should be understood as giving primacy to the view expressed by the judiciary through the Chief Justice of India. [77],[78],[79] and[89]

6. From Article 74 of the Constitution it cannot be concluded that "aid and advice" can be treated synonymous with a binding "direction", an irrevocable "command" or a conclusive "mandate". The phrase "aid and advice" cannot be individually construed as an imperative diktat, which had to be obeyed under all circumstances. In common parlance, a process of "consultation" is really the process of "aid and advice". The only distinction being, that "consultation" is obtained, whereas "aid and advice" may be tendered. On a plain reading therefore, neither can be understood to convey that they can be of a binding nature. Through the Constitution (Forty-second Amendment) Act, 1976, Article 74 came to be amended, and with the insertion of the words "shall ... act in accordance with such advice", the President came to be bound, to exercise his functions, in consonance with the "aid and advice" tendered to him, by the Council of Ministers headed by the Prime Minister. The instant seen as clarificatory in character, merely reiterates the manner in which the original provision ought to have been understood. [97]

7. For the nomination of the two "eminent persons", the Selection Committee comprises of one member of the executive, one member of the legislature, and one member of the judiciary. For the two "eminent persons", purported to not be identified with either the executive or legislature, there were no guidelines, for appointment. The sensitivity of selecting Judges is so enormous, and the consequences of making inappropriate appointments so dangerous, that if those involved in the process of selection and appointment of Judges to the higher judiciary, make wrongful selections, it may lead to chaos. The two "eminent persons" would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would include the power to reject the unanimous recommendation of the entire judicial component of the NJAC. Vesting of such authority on persons who have no nexus to the system of administration of justice is arbitrary. The inclusion of "eminent persons", would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary.

Article 124A(1)(d) is liable to be set aside and struck down as being violative of the "basic structure" of the Constitution. [214],[285] and[286]

8. The contention of Respondents that an amendment to the Constitution, passed by following the procedure expressed in the proviso to Article 368(2), constituted the will of the people, and the same was not subject to judicial review was rejected. Article 368 postulates only a "procedure" for amendment of the Constitution, and that, the same could not be treated as a "power" vested in the Parliament to amend the Constitution, so as to alter, the "core" of the Constitution, which has also been described as, the "basic features/basic structure" of the Constitution. [246]

9. Since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, would be questionable. One of the rules of natural justice is that the adjudicator should not be biased. In the NJAC, the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest where the political-executive is a party to the lis. It would have the inevitable effect of undermining the "independence of the judiciary". Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Merely the participation of the Union Minister in charge of Law and Justice, in the final process of selection, as an ex officio Member of the NJAC, would render the amended provision of Article 124A(1)(c) as ultra vires the Constitution, as it impinges on the principles of "independence of the judiciary" and "separation of powers". [268] and[269]

10. It is evident from the conclusions returned in the State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd., that in the facts and circumstances of the instant the construction suggested by Respondents would result in the creation of a void if neither the original nor amended constitutional provision of the Constitution would survive. The clear intent of the Parliament while enacting the Constitution (Ninety-ninth Amendment) Act, 2014 was to provide for a new process of selection and appointment of Judges to the higher judiciary by amending the existing provisions. Therefore, when the amended provision postulating a different procedure is set aside, the original process of selection and appointment under the unamended provisions would revive. The above position also emerges from the legal position declared in Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. Plea for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases is rejected.[352] and[359]

11. This Court can reconsider an earlier decision rendered by it. The broad principles that can be culled out from the various decisions suggest that: (1) If the decision concerns an interpretation of the Constitution, perhaps the bar for reconsideration might be lowered a bit; where a constitutional issue is involved, the necessity of reconsideration should be shown beyond all reasonable doubt, the remedy of amending the Constitution always being available to Parliament. (2) If the decision concerns the imposition of a tax, then too the bar might be lowered since the tax burden would affect a large section of the public. (3) If the

decision concerns the fundamental rights of the people. (4) In other cases, the Court must be convinced that the earlier decision is plainly erroneous and has a baneful effect on the public; that it is vague or inconsistent or manifestly wrong. (5) If the decision only concerns two contending private parties or individuals, then perhaps it might not be advisable to reconsider it. (6) The power to reconsider is not unrestricted or unlimited, but is confined within narrow limits and must be exercised sparingly and under exceptional circumstances for clear and compelling reasons. Therefore, merely because a view different from or contrary to what has been expressed earlier is preferable is no reason to reconsider an earlier decision. [806]

12. There are two crucial factors to be carefully considered before a person is appointed as a judge of the Supreme Court or a High Court. These are: (1) The professional skills, judicial potential, suitability and temperament of a person to be a good judge, and (2) The personal strengths, weaknesses, habits and traits of that person. As far as the professional skills, judicial potential, suitability and temperament of a person being a good judge is concerned, the most appropriate person to make that assessment would be the Chief Justice of India (in consultation with the other judges) and not somebody from outside the legal fraternity. On the other hand, as far as the personal strengths, weaknesses, habits and traits of a person are concerned, appropriate inputs can come only from the executive, since the Chief Justice of India and other judges may not be aware of them. Since these two facets of the personality of a would-be judge are undoubtedly distinct, there cannot be a difference of opinion between the judiciary and the executive in this regard since they both express an opinion on different facets of a person's life. The Chief Justice of India cannot comment upon the 'expert opinion' of the executive nor can the executive comment upon the 'expert opinion' of the Chief Justice of India. [1056]

13. The 'collegium system' postulated by the Second Judges case and the Third Judges case gets revived. A 'consequence hearing' is required to assist in the matter for steps to be taken in the future to streamline the process and procedure of appointment of judges, to make it more responsive to the needs of the people, to make it more transparent and in tune with societal needs. [1097]

14. The word amendment literally means betterment or improvement and sponsor of amendment may always claim improvement. Such claim has to be tested by applying the 'identity test' and the 'impact test'. The amendment should not affect the identity of an essential feature of the Constitution. The impact of the amendment on the working of the scheme of the Constitution has to be taken into account. The criticism against perceived short comings in the working of the collegium also does not justify the impugned provisions. [1150] and[1153]

15. Justice Chelameswar dissented. "(Judicial independence) connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees...It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over

which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of Government.[415]

16. Further, in M. Nagaraj and Ors. v. Union of India and Ors. it was held: "The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules." [476]

17. In Minerva Mills Ltd. and Ors. v. Union of India and Ors. it was held the amendment of a single article may result in the destruction of the basic structure of the Constitution depending upon the nature of the basic feature and the context of the abrogation of that article if the purpose sought to be achieved by the Article constitutes the quintessential to the basic structure of the Constitution. The case, and similar, do not help determine the instant case as they do not lay down any general principle by which it can be determined as to when can a constitutional amendment be said to destroy the basic structure of the Constitution. In the present case the identity of the basic feature is not in dispute, rather the question is whether the amendment is abrogative of the independence of judiciary (the basic feature) resulting in the destruction of the basic structure of the Constitution. This basic feature with does not confer any fundamental or constitutional right in favour of individuals. It is only a means for securing to the people of India, justice, liberty and equality. It creates a collective right in favour of the polity to have a judiciary which is free from the control of the Executive or the Legislature in its essential function of decision making. [482],[483] and[484]

18. By Articles 124, 217 and 124-A and 124-B of the Constitution it leads to the position that the Executive Branch of Government cannot push through an 'undeserving candidate' so long as at least two members representing the Judicial Branch are united in their view as to unsuitability of that candidate. Even one eminent person and a single judicial member of NJAC could effectively stall entry of an unworthy appointment. Similarly, the judicial members also cannot push through persons of their choice unless at least one other member belonging to the non-judicial block supports the candidate proposed by them. An identical inference is that in difficult times when political branches cannot be counted upon, neither can the Judiciary: the judiciary is not the only constitutional organ which protects liberties of the people. Accordingly, primacy to the opinion of the judiciary in the matter of judicial appointments is not the only mode of securing independence of judiciary for protection of liberties. Consequently, the assumption that primacy of the Judicial Branch in the appointments process is an essential element and thus a basic feature is empirically flawed without any basis either in the constitutional history of the Nation or any other and normatively fallacious apart from being contrary to political theory.[496] and[499]

19. To wholly eliminate the Executive from the process of selection would be inconsistent with the foundational premise that government in a democracy is by chosen representatives of the people. To hold that it should be totally excluded from the process of appointing judges would be wholly illogical and inconsistent with the foundations of the theory of democracy and a doctrinal heresy. Such exclusion has no parallel in any other democracy whose models

were examined by the Constituent Assembly and none other were brought to our notice either. Established principles of constitutional government, practices in other democratic constitutional arrangements and the fact that the Constituent Assembly provided a role for the Executive clearly prohibit the inference that Executive participation in the selection process abrogates a basic feature. Submissions that exclusion of the Executive Branch is destructive of the basic feature of checks and balances-a fundamental principle in constitutional theory- are correct. [500]

20. In I.R. Coelho v. State of Tamil Nadu it was opined, "Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power." Such a test is relevant only for bodies created by statutes and subordinate legislation. The functioning of any constitutional body is only disciplined by appropriate legislation. Constitution does not lay down any guidelines for the functioning of the President and Prime Minister nor the Governors or the Chief Ministers. Performance of constitutional duties entrusted to them is structured by legislation and constitutional culture. To contend that the amendment is destructive of the basic structure since it does not lay down any guidelines is tantamount to holding that the design of the Constitution as originally enacted is defective. For the abovementioned reasons, amendment should be upheld. [503],[509] and[516]

JUDGMENT

J.S. Khehar, J.

Index

THE RECUSAL ORDER

1. In this Court one gets used to writing common orders, for orders are written either on behalf of the Bench, or on behalf of the Court. Mostly, dissents are written in the first person. Even though, this is not an order in the nature of a dissent, yet it needs to be written in the first person. While endorsing the opinion expressed by J. Chelameswar, J., adjudicating upon the prayer for my recusal, from hearing the matters in hand, reasons for my continuation on the Bench, also need to be expressed by me. Not for advocating any principle of law, but for laying down certain principles of conduct.

2. This order is in the nature of a prelude-a precursor, to the determination of the main controversy. It has been necessitated, for deciding an objection, about the present composition of the Bench. As already noted above, J. Chelameswar, J. has rendered the decision on the objection. The events which followed the order of J. Chelameswar, J., are also of some significance. In my considered view, they too need to be narrated, for only then, the entire matter can be considered to have been fully expressed, as it ought to be. I also need to record reasons, why my continuation on the reconstituted Bench, was the only course open to me. And therefore, my side of its understanding, dealing with the perception, of the other side of the Bench.

3(i) A three-Judge Bench was originally constituted for hearing these matters. The Bench comprised of Anil R. Dave, J. Chelameswar and Madan B. Lokur, JJ.. At that juncture, Anil R. Dave, J. was a part of the 1+2 collegium, as also, the 1+4 collegium. The above combination heard the matter, on its first listing on 11.3.2015. Notice returnable for 17.3.2015 was issued on the first date of hearing. Simultaneously, hearing in Y. Krishnan v. Union of India and Ors. Writ Petition (MD) No. 69 of 2015, pending before the High Court of Madras (at its Madurai Bench), wherein the same issues were being considered as the ones raised in the bunch of cases in hand, was stayed till further orders.

(ii) On the following date, i.e., 17.3.2015 Mr. Fali S. Nariman, Senior Advocate, in Supreme Court Advocates-on-Record Association v. Union of India (Writ Petition (C) No. 13 of 2015), Mr. Anil B. Divan, Senior Advocate, in Bar Association of India v. Union of India (Writ Petition (C) No. 108 of 2015), Mr. Prashant Bhushan, Advocate, in Centre for Public Interest Litigation v. Union of India (Writ Petition (C) No. 83 of 2015) and Mr. Santosh Paul, Advocate, in Change India v. Union of India (Writ Petition (C) No. 70 of 2015), representing the Petitioners were heard. Mr. Mukul Rohatgi, Attorney General for India, advanced submissions in response. The matter was shown as part-heard, and posted for further hearing on 18.3.2015.

(iii) The proceedings recorded by this Court on 18.3.2015 reveal, that Mr. Santosh Paul, (in Writ Petition (C) No. 70 of 2015) was heard again on 18.3.2015, whereupon, Mr. Mukul Rohatgi and Mr. Ranjit Kumar, Solicitor General of India, also made their submissions. Thereafter, Mr. Dushyant A. Dave, Senior Advocate-and the President of Supreme Court Bar Association, addressed the Bench, as an intervener. Whereafter, the Court rose for the day. On 18.3.2015, the matter was adjourned for hearing to the following day, i.e., for 19.3.2015.

(iv) The order passed on 19.3.2015 reveals, that submissions were advanced on that date, by Mr. Dushyant A. Dave, Mr. Mukul Rohatgi, Mr. T.R. Andhyarujina, Senior Advocate, and Mr. Mathews J. Nedumpara. When Mr. Fali S. Nariman was still addressing the Bench, the Court rose for the day, by recording *inter alia*, "The matters remained Part-heard." Further hearing in the cases, was deferred to 24.3.2015.

(v) On 24.3.2015, Mr. Fali S. Nariman and Mr. Anil B. Divan, were again heard. Additionally, Mr. Mukul Rohatgi concluded his submissions. On the conclusion of hearing, judgment was reserved. On 24.3.2015, a separate order was also passed in Writ Petition (C) No. 124 of 2015 (Mathews J. Nedumpara v. Supreme Court of India, through Secretary General and Ors.). It read as under:

The application filed by Mr. Mathews J. Nedumpara to argue in person before the Court is rejected. The name of Mr. Robin Mazumdar, AOR, who was earlier appearing for him, be shown in the Cause List.

(vi) On 7.4.2015, the following order came to be passed by the three-Judge Bench presided by Anil R. Dave, J.:

1. In this group of petitions, validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014 (hereinafter referred to as 'the Act') has been challenged. The challenge is on the ground that by virtue of the aforestated amendment and enactment of the Act, basic structure of the Constitution of India has been altered and therefore, they should be set aside.

2. We have heard the learned Counsel appearing for the parties and the parties appearing in-person at length.

3. It has been mainly submitted for the Petitioners that all these petitions should be referred to a Bench of Five Judges as per the provisions of Article 145(3) of the Constitution of India for the

reason that substantial questions of law with regard to interpretation of the Constitution of India are involved in these petitions. It has been further submitted that till all these petitions are finally disposed of, by way of an interim relief it should be directed that the Act should not be brought into force and the present system with regard to appointment of Judges should be continued.

4. Sum and substance of the submissions of the counsel opposing the petition is that all these petitions are premature for the reason that the Act has not come into force till today and till the Act comes into force, cause of action can not be said to have arisen. In the circumstances, according to the learned Counsel, the petitions should be rejected.

5. The learned Counsel as well as parties in-person have relied upon several judgments to substantiate their cases.

6. Looking at the facts of the case, we are of the view that these petitions involve substantial questions of law as to the interpretation of the Constitution of India and therefore, we direct the Registry to place all the matters of this group before Hon'ble the Chief Justice of India so that they can be placed before a larger Bench for its consideration.

7. As we are not deciding the cases on merits, we do not think it appropriate to discuss the submissions made by the learned Counsel and the parties in-person.

8. It would be open to the Petitioners to make a prayer for interim relief before the larger bench as we do not think it appropriate to grant any interim relief at this stage.

4. During the hearing of the cases, Anil R. Dave, J. did not participate in any collegium proceedings.

5. Based on the order passed by the three-Judge Bench on 7.4.2015, Hon'ble the Chief Justice of India, constituted a five-Judge Bench, comprising of Anil R. Dave, Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ.

6. On 13.4.2015 the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, were notified in the Gazette of India (Extraordinary). Both the above enactments, were brought into force with effect from 13.4.2015. Accordingly, on 13.4.2015 Anil R. Dave, J. became an ex officio Member of the National Judicial Appointments Commission, on account of being the second senior most Judge after the Chief Justice of India, under the mandate of Article 124A(1)(b).

7. When the matter came up for hearing for the first time, before the five-Judge Bench on 15.4.2015, it passed the following order:

List the matters before a Bench of which one of us (Anil R. Dave, J.) is not a member.

It is, therefore, that Hon'ble the Chief Justice of India, reconstituted the Bench with myself, J. Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ., to hear this group of cases.

8. When the reconstituted Bench commenced hearing on 21.4.2015, Mr. Fali S. Nariman made a prayer for my recusal from the Bench, which was seconded by Mr. Mathews J. Nedumpara (Petitioner-in-person in Writ Petition (C) No. 124 of 2015), the latter advanced submissions, even though he had been barred from doing so, by an earlier order dated 24.3.2015 (extracted above). For me, to preside over the Bench seemed to be imprudent, when some of the stakeholders desired otherwise. Strong views were however expressed by quite a few learned Counsel, who opposed the prayer. It was submitted, that a prayer for recusal had earlier been made, with reference to Anil R. Dave, J. It was pointed out, that the above prayer had resulted in his having exercised the option to step aside (-on 15.4.2015). Some learned Counsel went to the extent of asserting, that the recusal of Anil R. Dave, J. was not only unfair, but was also motivated. It was also suggested, that the Bench should be reconstituted, by requesting Anil R. Dave, J. to preside over the Bench. The above sequence of facts reveals, that the recusal by Anil R. Dave, J. was not at his own, but in deference to a similar prayer made to him. Logically, if he had heard these cases when he was the presiding Judge of the three-Judge Bench, he would have heard it, when the Bench strength was increased, wherein, he was still the presiding Judge.

9(i) Mr. Fali S. Nariman strongly refuted the impression sought to be created, that he had ever required Anil R. Dave, J. to recuse. In order to support his assertion, he pointed out, that he had made the following request in writing on 15.4.2015:

The provisions of the Constitution (Ninety-Ninth Amendment) Act, 2014 and of the National Judicial Appointments Commission Act, 2014 have been brought into force from April 13, 2015. As a consequence, the Presiding Judge on this Bench, the Hon'ble Mr. Justice Anil R. Dave, has now become (not out of choice but by force of Statute) a member ex officio of the National Judicial Appointments Commission, whose constitutional validity has been challenged.

It is respectfully submitted that it would be appropriate if it is declared at the outset-by an order of this Hon'ble Court-that the Presiding Judge on this Bench will take no part whatever in the proceedings of the National Judicial Appointments Commission.

Learned senior Counsel pointed out, that he had merely requested the then presiding Judge (Anil R. Dave, J.) not to take any part in the proceedings of the National Judicial Appointments Commission, during the hearing of these matters. He asserted, that he had never asked Anil R. Dave, J. not to hear the matters pending before the Bench.

(ii) The submission made in writing by Mr. Mathews J. Nedumpara for the recusal of Anil R. Dave, J. was in the following words:

...VI. Though Hon'ble Shri Justice Anil R. Dave, who heads the Three-Judge Bench in the instant case, is a Judge revered and respected by the legal fraternity and the public at large, a Judge of the highest integrity, ability and impartiality, still the doctrine of *nemo iudex in sua causa or nemo debet esse judex in propria causa*-no one can be judge in his own cause-would require His Lordship to recuse himself even at this stage since in the eye of the 120 billion ordinary citizens of this country, the instant case is all about a law whereunder the exclusive power of appointment invested in the Judges case is taken away and is invested in the fair body which could lead to displeasure of the Judges and, therefore, the Supreme Court itself deciding a case involving the

power of appointment of Judges of the Supreme Court will not evince public credibility. The question then arises is as to who could decide it. The doctrine of necessity leaves no other option then the Supreme Court itself deciding the question. But in that case, it could be by Judges who are not part of the collegium as of today or, if an NJAC is to be constituted today, could be a member thereof. With utmost respect, Hon'ble Shri Justice Dave is a member of the collegium; His Lordship will be a member of the NJAC if it is constituted today. Therefore, there is a manifest conflict of interest.

VII. Referendum. In Australia, a Constitutional Amendment was brought in, limiting the retirement age of Judges to 70 years. Instead of the Judges deciding the correctness of the said decision, the validity of the amendment was left to be decided by a referendum, and 80% of the population supported the amendment. Therefore, the only body who could decide whether the NJAC as envisaged is acceptable or not is the people of this country upon a referendum.

VIII. The judgment in *Judges-2*, which made the rewriting of the Constitution, is void ab initio. The said case was decided without notice to the public at large. Only the views of the government and Advocates on record and a few others were heard. In the instant case, the public at large ought to be afforded an opportunity to be heard; at least the major political parties, and the case should be referred to Constitutional Bench. The constitutionality of the Acts ought to be decided, brushing aside the feeble, nay, apologetical plea of the learned Attorney General that the Acts have been brought into force and their validity cannot be challenged, and failing to come forward and state in candid terms that the Acts are the will of the people, spoken through their elected representatives and that too without any division, unanimous. The plea of the Advocates on Record Association that the notification bringing into force the said Acts be stayed be rejected forthwith; so too its demand that the collegium system, which has ceased to be in existence, be allowed to be continued and appointments to the august office of Judges of High Courts and Supreme Court on its recommendation, for to do so would mean that Judges of the High Courts who are currently Chief Justices because they were appointed at a young age in preference over others will be appointed as Judges of the Supreme Court and if that is allowed to happen, it may lead to a situation where the Supreme Court tomorrow will literally be packed with sons and sons-in-law of former Judges. There are at least three Chief Justices of High Courts who are sons of former Judges of the Supreme Court. The Petitioner is no privy to any confidential information, not even gossips. Still he believes that if the implementation of the NJAC is stayed, three sons of former Judges of the Supreme Court could be appointed as Judges of the Supreme Court. The Petitioner has absolutely nothing personal against any of those Judges; the issue is not at all about any individual. The Petitioner readily concedes, and it is a pleasure to do so, that few of them are highly competent and richly deserving to be appointed.

IX. Equality before law and equal protection of law in the matter of public employment. The office of the Judge of the High Court and Supreme Court, though high constitutional office, is still in the realm of public employment, to which every person eligible ought to be given an opportunity to occupy, he being selected on a transparent, just, fair and non-arbitrary system. The Petitioner reiterates that he could be least deserving to be appointed when considered along with others of more meritorious than him, but the fact that since he satisfies all the basic eligibility criteria prescribed Under Articles 124A, as amended, and 217, he is entitled to seek a declaration at the

hands of this Hon'ble Court that an open selection be made by advertisement of vacancies or such other appropriate mechanism.

X. Judicial review V. democracy. Judicial review is only to prevent unjust laws to be enacted and the rights of the minorities, whatever colour they could be in terms of religion, race, views they hold, by a legislation which enjoys brutal majority and an of the executive which is tyrannical. It is no way intended to substitute the voice of the people by the voice of the high judiciary.

XI. Article 124A, as amended, is deficient only in one respect. The collegium contemplated thereunder is still fully loaded in favour of the high judiciary. Three out of the six members are Judges. In that sense it is failing to meet to be just and democratic. But the Parliament has in its wisdom enacted so and if there is a complaint, the forum is to generate public opinion and seek greater democracy. The Petitioner is currently not interested in that; he is happy with the Acts as enacted and the principal relief which he seeks in the instant petition is the immediate coming into force of the said Acts by appropriate notification and a mandamus to that effect at the hands of this Hon'ble Court.

10. When my recusal from the reconstituted Bench was sought on 21.4.2015, I had expressed unequivocally, that I had no desire to hear the matters. Yet, keeping in view the reasons expressed in writing by Mr. Fali S. Nariman, with reference to Anil R. Dave, J. I had disclosed in open Court, that I had already sent a communication to Hon'ble the Chief Justice of India, that I would not participate in the proceedings of the 1+4 collegium (of which I was, a member), till the disposal of these matters. Yet, the objection was pressed. It needs to be recorded that Anil R. Dave, J. was a member of the 1+2 collegium, as well as, the 1+4 collegium from the day the hearing in these matters commenced. Surprisingly, on that account, his recusal was never sought, and he had continued to hear the matters, when he was so placed (from 11.3.2015 to 7.4.2015). But for my being a member of the 1+4 collegium, a prayer had been made for my recusal.

11. It was, and still is, my personal view, which I do not wish to thrust either on Mr. Fali S. Nariman, or on Mr. Mathews J. Nedumpara, that Anil R. Dave, J. was amongst the most suited, to preside over the reconstituted Bench. As noticed above, he was a part of the 1+2 collegium, as also, the 1+4 collegium, under the 'collegium system'; he would continue to discharge the same responsibilities, as an ex officio Member of the National Judicial Appointments Commission, in the 'Commission system', under the constitutional amendment enforced with effect from 13.4.2015. Therefore, irrespective of the system which would survive the adjudicatory process, Anil R. Dave, J. would participate in the selection, appointment and transfer of Judges of the higher judiciary. He would, therefore, not be affected by the determination of the present controversy, one way or the other.

12. The prayer for my recusal from the Bench was pressed by Mr. Fali S. Nariman, Senior Advocate, in writing, as under:

8. In the present case the Presiding Judge, (the Hon'ble Mr. Justice J.S. Khehar) by reason of judgments reported in the Second Judges case Supreme Court Advocates-on-Record Assn. v. Union of India MANU/SC/0073/1994 : (1993) 4 SCC 441, (reaffirmed by unanimously by a Bench of 9 Judges in the Third Judges case Special Reference No. 1 of 1998 Re. (MANU/SC/1146/1998

: 1998 7 SCC 739), is at present a member of the Collegium of five Hon'ble Judges which recommends judicial appointments to the Higher Judiciary, which will now come under the ambit of the National Judicial Appointments Commission set up under the aegis of the Constitution (Ninety-ninth Amendment) Act, 2014 read with National Judicial Appointments Commission Act No. 40 of 2014-if valid; but the constitutional validity of these enactments has been directly challenged in these proceedings.

The position of the Presiding Judge on this Bench hearing these cases of constitutional challenge is not consistent with (and apparently conflicts with) his position as a member of the 'collegium'; and is likely to be seen as such; always bearing in mind that if the Constitution Amendment and the statute pertaining thereto are held constitutionally valid and are upheld, the present presiding Judge would no longer be part of the Collegium-the Collegium it must be acknowledged exercises significant constitutional power.

9. In other words would it be inappropriate for the Hon'ble Presiding Judge to continue to sit on a Bench that adjudicates whether the Collegium system, (as it is in place for the past two decades and is stated (in the writ petitions) to be a part of the basic structure of the Constitution), should continue or not continue. The impression in peoples mind would be that it is inappropriate if not unfair if a sitting member of a Collegium sits in judgment over a scheme that seeks to replace it. This is apart from a consideration as to whether or not the judgment is (or is not) ultimately declared invalid or void: whether in the first instance or by Review or in a Curative Petition.

The above prayer for my recusal was supported by Mr. Mathews J. Nedumpara, Petitioner-in-person, in writing, as under:

...Hon'ble Shri Justice J.S. Khehar, the presiding Judge, a Judge whom the Petitioner holds in high esteem and respect, a Judge known for his uprightness, impartiality and erudition, the Petitioner is afraid to say, ought not to preside over the Constitution Bench deciding the constitutional validity or otherwise of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 ("the said Acts", for short). His Lordship will be a member of the collegium if this Hon'ble Court were to hold that the said Acts are unconstitutional or to stay the operation of the said Acts, for, if the operation of the Acts is stayed, it is likely to be construed that the collegium system continues to be in force by virtue of such stay order. Though Hon'ble Shri Justice J.S. Khehar is not a member of the National Judicial Appointments Commission, for, if the NJAC is to be constituted today, it will be consisting of the Hon'ble Chief Justice of India and two senior most Judges of this Hon'ble Court. With the retirement of Hon'ble Shri H.L. Dattu, Chief Justice of India, His Lordship Hon'ble Shri Justice J.S. Khehar will become a member of the collegium. Therefore, an ordinary man, nay, an informed onlooker, an expression found acceptance at the hands of this Hon'ble Court on the question of judicial recusal, will consider that justice would not have been done if a Bench of this Hon'ble Court headed by Hon'ble Shri Justice J.S. Khehar were to hear the above case. For a not so informed onlooker, the layman, the *aam aadmi*, this Hon'ble Court hearing the Writ Petitions challenging the aforesaid Acts is nothing but a fox being on the jury at a goose's trial. The Petitioner believes that the Noble heart of his Lordships Justice Khehar could unwittingly be influenced by the nonconscious, subconscious, unconscious bias, his Lordships having been placed himself in a position of conflict of interest.

3. This Hon'ble Court itself hearing the case involving the power of appointment of Judges between the collegium and the Government, nay, the executive, will not evince any public confidence, except the designated senior lawyers who seem to be supporting the collegium system. The collegium system does not have any confidence in the ordinary lawyers who are often unfairly treated nor the ordinary litigants, the *Daridra Narayanas*, to borrow an expression from legendary Justice Krishna Iyer, who considered that the higher judiciary, and the Supreme Court in particular, is beyond the reach of the ordinary man. An ordinary lawyer finds it difficult to get even an entry into the Supreme Court premises. This is the stark reality, though many prefer to pretend not to notice it. Therefore, the Petitioner with utmost respect, while literally worshipping the majesty of this Hon'ble Court, so too the Hon'ble presiding Judge of this Hon'ble Court, in all humility, with an apology, if the Petitioner has erred in making this plea, seeks recusal by Hon'ble Shri Justice J.S. Khehar from hearing the above case.

13. As a Judge presiding over the reconstituted Bench, I found myself in an awkward predicament. I had no personal desire to participate in the hearing of these matters. I was a part of the Bench, because of my nomination to it, by Hon'ble the Chief Justice of India. My recusal from the Bench at the asking of Mr. Fali S. Nariman, whom I hold in great esteem, did not need a second thought. It is not as if the prayer made by Mr. Mathews J. Nedumpara, was inconsequential.

14. But then, this was the second occasion when proceedings in a matter would have been deferred, just because, Hon'ble the Chief Justice of India, in the first instance, had nominated Anil R. Dave, J. on the Bench, and thereafter, had substituted him by nominating me to the Bench. It was therefore felt, that reasons ought to be recorded, after hearing learned Counsel, at least for the guidance of Hon'ble the Chief Justice of India, so that His Lordship may not make another nomination to the Bench, which may be similarly objected to. This, coupled with the submissions advanced by Mr. Mukul Rohatgi, Mr. Harish N. Salve and Mr. K.K. Venugopal, that parameters should be laid down, led to a hearing, on the issue of recusal.

15. On the basis of the submissions advanced by the learned Counsel, the Bench examined the prayer, whether I should remain on the reconstituted Bench, despite my being a member of the 1+4 collegium. The Bench, unanimously concluded, that there was no conflict of interest, and no other justifiable reason in law, for me to recuse from the hearing of these matters. On 22.4.2015, the Bench passed the following short order, which was pronounced by J. Chelameswar, J.:

A preliminary objection, whether Justice Jagdish Singh Khehar should preside over this Bench, by virtue of his being the fourth senior most Judge of this Court, also happens to be a member of the collegium, was raised by the Petitioners. Elaborate submissions were made by the learned Counsel for the Petitioners and the Respondents. After hearing all the learned Counsel, we are of the unanimous opinion that we do not see any reason in law requiring Justice Jagdish Singh Khehar to recuse himself from hearing the matter. Reasons will follow.

16. After the order was pronounced, I disclosed to my colleagues on the Bench, that I was still undecided whether I should remain on the Bench, for I was toying with the idea of recusal, because a prayer to that effect, had been made in the face of the Court. My colleagues on the Bench, would have nothing of it. They were unequivocal in their protestation.

17. Despite the factual position noticed above, I wish to record, that it is not their persuasion or exhortation, which made me take a final call on the matter. The decision to remain a member of the reconstituted Bench was mine, and mine alone. The choice that I made, was not of the heart, but that of the head. The choice was made by posing two questions to myself. Firstly, whether a Judge hearing a matter should recuse, even though the prayer for recusal is found to be unjustified and unwarranted? Secondly, whether I would stand true to the oath of my office, if I recused from hearing the matters?

18. The reason that was pointed out against me, for seeking my recusal was, that I was a part of the 1+4 collegium. But that, should have been a disqualification for Anil R. Dave, J. as well. When he commenced hearing of the matters, and till 7.4.2015, he suffered the same alleged disqualification. Yet, the objection raised against me, was not raised against him. When confronted, Mr. Fali S. Nariman vociferously contested, that he had not sought the recusal of Anil R. Dave, J.. He supported his assertion with proof. One wonders, why did he not seek the recusal of Anil R. Dave, J.? There is no doubt about the fact, that I have been a member of the 1+4 collegium, and it is likely that I would also shortly become a Member of the NJAC, if the present challenge raised by the Petitioners was not to succeed. I would therefore remain a part of the selection procedure, irrespective of the process which prevails. That however is the position with reference to four of us (on the instant five-Judge Bench). Besides me, my colleagues on the Bench-J. Chelameswar, Madan B. Lokur and Kurian Joseph, JJ. would in due course be a part of the collegium (if the writ-Petitioners before this Court were to succeed), or alternatively, would be a part of the NJAC (if the writ-Petitioners were to fail). In such eventuality, the averment of conflict of interest, ought to have been raised not only against me, but also against my three colleagues. But, that was not the manner in which the issue has been canvassed. In my considered view, the prayer for my recusal is not well founded. If I were to accede to the prayer for my recusal, I would be initiating a wrong practice, and laying down a wrong precedent. A Judge may recuse at his own, from a case entrusted to him by the Chief Justice. That would be a matter of his own choosing. But recusal at the asking of a litigating party, unless justified, must never to be acceded to. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. A Judge before he assumes his office, takes an oath to discharge his duties without fear or favour. He would breach his oath of office, if he accepts a prayer for recusal, unless justified. It is my duty to discharge my responsibility with absolute earnestness and sincerity. It is my duty to abide by my oath of office, to uphold the Constitution and the laws. My decision to continue to be a part of the Bench, flows from the oath which I took, at the time of my elevation to this Court.

THE REFERENCE ORDER

I. THE CHALLENGE:

19. The question which has arisen for consideration, in the present set of cases, pertains to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 (hereinafter referred to as, the Constitution (99th Amendment) Act), as also, that of the National Judicial Appointments Commission Act, 2014 (hereinafter referred to as, the NJAC Act).

20. During the course of hearing on the merits of the controversy, which pertains to the selection and appointment of Judges to the higher judiciary (i.e., Chief Justices and Judges of the High

Courts and the Supreme Court), and the transfer of Chief Justices and Judges of one High Court to another, it emerged that learned Counsel for the Respondents, were *inter alia* relying on the judgment rendered in S.P. Gupta v. Union of India MANU/SC/0080/1981 : 1981 (Supp) SCC 87, (hereinafter referred to as, the First Judges case); whereas, the learned Counsel for the Petitioners were inter alia relying on the judgment in Supreme Court Advocates-on-Record Association v. Union of India MANU/SC/0073/1994 : (1993) 4 SCC 441 (hereinafter referred to as, the Second Judges case), and the judgment in Re: Special Reference No. 1 of 1998 MANU/SC/1146/1998 : (1998) 7 SCC 739, (hereinafter referred to as, the Third Judges case).

21. *Per se*, the stance adopted by learned Counsel for the Respondents in placing reliance on the judgment in the First Judges case, was not open to them. This, for the simple reason, that the judgment rendered in the First Judges case, had been overruled by a larger Bench, in the Second Judges case. And furthermore, the exposition of law declared in the Second Judges case, was reaffirmed by the Third Judges case.

22. Visualizing, that the position adopted by the Respondents, was not legally permissible, the Attorney General, the Solicitor General, and other learned Counsel representing the Respondents, adopted the only course open to them, namely, to seek reconsideration of the decisions rendered by this Court in the Second and Third Judges cases. For the above objective it was asserted, that various vital aspects of the matter, had not been brought to the notice of this Court, when the controversy raised in the Second Judges case was canvassed. It was contended that, had the controversy raised in the Second Judges case, been examined in the right perspective, this Court would not have recorded the conclusions expressed therein, by the majority. It was submitted, that till the Respondents were not permitted to air their submissions, with reference to the unacceptability of the judgments rendered in the Second and Third Judges cases, it would not be in the fitness of matters, for this Court to dispose of the present controversy, by placing reliance on the said judgments.

23. Keeping in mind the importance and the sensitivity of the controversy being debated, as also, the vehemence with which learned Counsel representing the Respondents, pressed for a re-examination of the judgments rendered by this Court, in the Second and Third Judges cases, we permitted them, to detail the basis of their assertions.

24. Before embarking on the issue, namely, whether the judgments rendered by this Court in the Second and Third Judges cases, needed to be revisited, we propose first of all, to determine whether or not it would be justified for us, in the peculiar facts and circumstances of this case, keeping in view the technical parameters laid down by this Court, to undertake the task. In case, we conclude negatively, and hold that the prayer seeking a review of the two judgments was not justified, that would render a quietus to the matter. However, even if the proposition canvassed at the behest of the Respondents is not accepted, we would still examine the submissions canvassed at their behest, as in a matter of such extreme importance and sensitivity, it may not be proper to reject a prayer for review, on a mere technicality. We shall then endeavour to determine, whether the submissions canvassed at the hands of the Respondents, demonstrate clear and compelling reasons, for a review of the conclusions recorded in the Second and Third Judges cases. We shall also venture to examine, whether the Respondents have been able to *prima facie* show, that the earlier judgments could be seen as manifestly incorrect. For such preliminary adjudication, we are satisfied, that the

present bench-strength satisfies the postulated requirement, expressed in the proviso Under Article 145(3).

25. Consequent upon the above examination, if the judgments rendered in the Second and Third Judges cases, are shown to *prima facie* require a re-look, we would then delve on the merits of the main controversy, without permitting the Petitioners to place reliance on either of the aforesaid two judgments.

26. In case, we do not accept the submissions advanced at the hands of the Petitioners on merits, with reference to the main controversy, that too in a sense would conclude the matter, as the earlier regime governed by the Second and Third Judges cases, would become a historical event, of the past, as the new scheme contemplated under the impugned Constitution (99th Amendment) Act, along with the NJAC Act, would replace the earlier dispensation. In the above eventuality, the question of re-examination of the Second and Third Judges cases would be only academic, and therefore uncalled for.

27. However, if we accept the submissions advanced at the hands of the learned Counsel for the Petitioners, resulting in the revival of the earlier process, and simultaneously conclude in favour of the Respondents, that the Second and Third Judges cases need a re-look, we would be obliged to refer this matter to a nine-Judge Bench (or even, to a larger Bench), for re-examining the judgments rendered in the Second and Third Judges cases.

II. THE BACKGROUND TO THE CHALLENGE:

28. Judges to the Supreme Court of India and High Courts of States, are appointed Under Articles 124 and 217 respectively. Additional Judges and acting Judges for High Courts are appointed Under Articles 224 and 224A. The transfer of High Court Judges and Chief Justices, of one High Court to another, is made Under Article 222. For the controversy in hand, it is essential to extract the original Articles 124 and 217, hereunder:

124. Establishment and constitution of Supreme Court. (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that-

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in Clause (4).

(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and--

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist.

Explanation I.--In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II.--In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district Judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge Under Clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

217. Appointment and conditions of the office of a Judge of a High Court.--(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years:

Provided that-

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in Clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and--

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such courts in succession;

Explanation.--For the purposes of this clause-

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

29. The true effect and intent of the provisions of the Constitution, and all other legislative enactments made by the Parliament, and the State legislatures, are understood in the manner they are interpreted and declared by the Supreme Court, Under Article 141. The manner in which Articles 124 and 217 were interpreted by this Court, emerges principally from three-Constitution Bench judgments of this Court, which are now under pointed consideration. The first judgment

was rendered, by a seven-Judge Bench, by a majority of 4:3, in the First Judges case on 30.12.1981. The correctness of the First Judges case was doubted by a three-Judge Bench in Subhash Sharma v. Union of India MANU/SC/0643/1990 : 1991 Supp (1) SCC 574, which opined that the majority view, in the First Judges case, should be considered by a larger Bench. The Chief Justice of India constituted a nine-Judge Bench, to examine two questions. Firstly, whether the opinion of the Chief Justice of India in regard to the appointment of Judges to the Supreme Court and to the High Courts, as well as, transfer of Chief Justices and Judges of High Courts, was entitled to primacy? And secondly, whether the fixation of the judge-strength in High Courts, was justiciable? By a majority of 7:2, a nine-Judge Bench of this Court, in the Second Judges case, overruled the judgment in the First Judges case. The instant judgment was rendered on 6.10.1993. Consequent upon doubts having arisen with the Union of India, about the interpretation of the Second Judges case, the President of India, in exercise of his power Under Article 143, referred nine questions to the Supreme Court, for its opinion. A nine-Judge Bench answered the reference unanimously, on 28.10.1998.

30. After the judgment of this Court in the Second Judges case was rendered in 1993, and the advisory opinion of this Court was tendered to the President of India in 1998, the term "consultation" in Articles 124(2) and 217(1), relating to appointment (as well as, transfer) of Judges of the higher judiciary, commenced to be interpreted as vesting primacy in the matter, with the judiciary. This according to the Respondents, had resulted in the term "consultation" being understood as "concurrence" (in matters governed by Articles 124, 217 and 222). The Union of India, then framed a Memorandum of Procedure on 30.6.1999, for the appointment of Judges and Chief Justices to the High Courts and the Supreme Court, in consonance with the above two judgments. And appointments came to be made thereafter, in consonance with the Memorandum of Procedure.

31. As per the position expressed before us, a feeling came to be entertained, that a Commission for selection and appointment, as also for transfer, of Judges of the higher judiciary should be constituted, which would replace the prevailing procedure, for appointment of Judges and Chief Justices of the High Courts and the Supreme Court of India, contemplated Under Articles 124(2) and 217(1). It was felt, that the proposed Commission should be broad based. In that, the Commission should comprise of members of the judiciary, the executive and eminent/important persons from public life. In the above manner, it was proposed to introduce transparency in the selection process.

32. To achieve the purported objective, Articles 124 and 217 were *inter alia* amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (99th Amendment) Act, by following the procedure contemplated Under Article 368(2), more particularly, the proviso thereunder. The amendment, received the assent of the President on 31.12.2014. It was however given effect to, with effect from 13.4.2015 (consequent upon its notification in the Gazette of India (Extraordinary) Part II, Section 1). Simultaneously therewith, the Parliament enacted the NJAC Act, which also received the assent of the President on 31.12.2014. The same was also brought into force, with effect from 13.4.2015 (by its notification in the Gazette of India (Extraordinary) Part II, Section 1). The above constitutional amendment and the legislative enactment, are subject matter of challenge through a bunch of petitions, which are collectively being heard by us. In order to effectively understand the true purport of the

challenge raised by the Petitioners, and the nuances of the legal and constitutional issues involved, it is imperative to have a bird's eye view of the First Judges case, upon which reliance has been placed by the learned Counsel for the Respondents, in their attempt to seek a review of the Second and Third Judges cases.

The First Judges case-MANU/SC/0080/1981 : 1981 Supp SCC 87.

33. The Union Law Minister addressed a letter dated 18.3.1981 to the Governor of Punjab and to Chief Ministers of all other States. The addressees were *inter alia* informed, that "...one third of the Judges of High Court, should as far as possible be from outside the State in which the High Court is situated...". Through the above letter, the addressees were requested to "...(a) obtain from all additional Judges working in the High Courts... their consent to be appointed as permanent Judges in any other High Court in the country..." The above noted letter required, that the concerned appointees "...be required to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and (b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts...". The Union Law Minister, in the above letter clarified, that furnishing of their consent or indication of their preference, would not imply any commitment, at the behest of the Government, to accommodate them in accordance with their preferences. In response, quite a few additional Judges, gave their consent to be appointed outside their parent State.

(i) Iqbal Chagla (and the other Petitioners) felt, that the letter dated 18.3.1981 was a direct attack on the "independence of the judiciary", and an uninhibited assault on a vital/basic feature of the Constitution. A series of Advocates' Associations in Bombay passed resolutions, condemning the letter dated 18.3.1981, as being subversive of "judicial independence". They demanded the withdrawal of the letter. Since that was not done, a writ petition was filed by the above Associations in the Bombay High Court, challenging the letter dated 18.3.1981. An interim order was passed by the High Court, restraining the Union Law Minister and the Government from implementing the letter dated 18.3.1981. A Letters Patent Appeal preferred against the above interim order, came to be dismissed by a Division Bench of the High Court. The above interim order, was assailed before this Court. While the matter was pending before this Court, the Union Law Minister and the Government of India, filed a transfer petition Under Article 139A. The transfer petition was allowed, and the writ petition filed in the Bombay High Court, was transferred to the Supreme Court.

(ii) A second petition was filed by V.M. Tarkunde, in the High Court of Delhi. It raised a challenge to the constitutional validity of the letter dated 18.3.1981. One additional ground was raised with reference to the three additional Judges of the Delhi High Court, namely, O.N. Vohra, S.N. Kumar and S.B. Wad, JJ., whose term was expiring on 6.3.1981. Rather than being appointed for a further term of two years, their appointment was extended for three months, from 7.3.1981. These short term appointments were assailed, as being unjustified Under Article 224, besides being subversive of the "independence of the judiciary". This writ petition was also transferred for hearing to the Supreme Court. So far as the circular letter dated 18.3.1981 is concerned, the Supreme Court, on an oral prayer made by the Petitioner, directed that any additional Judge who did not wish to respond to the circular letter may not do so, and that, he would neither be refused extension nor

permanent appointment, on the ground that he had not sent a reply to the letter dated 18.3.1981. Thereafter, the appointment of S.B. Wad, J., was continued, as an additional Judge for a period of one year from 7.6.1981, but O.N. Vohra and S.N. Kumar, JJ., were not continued beyond 7.6.1981.

(iii & iv) A third writ petition, was filed by J.L. Kalra and others who were practicing Advocates, in the Delhi High Court. And a fourth writ petition was filed by S.P. Gupta, a practicing Advocate, of the Allahabad High Court. The third and fourth writ petitions were for substantially the same relief's, as the earlier two petitions.

(v) A fifth writ petition, was filed by Lily Thomas. She challenged a transfer order dated 19.1.1981, whereby the Chief Justice of the High Court of Madras was transferred as the Chief Justice of the High Court of Kerala. The above order had been passed by the President, Under Article 222(1), after consultation with the Chief Justice of India. Likewise, the transfer of the Chief Justice of the High Court of Patna to the Madras High Court was challenged by asserting, that the power of transfer Under Article 222(1) was limited to Judges of the High Courts, and did not extend to Chief Justices. Alternatively, it was contended, that transfers could only be made with the consent of the concerned Judge, and only in public interest, and after full and effective consultation with the Chief Justice of India.

(vi & vii) A sixth writ petition was filed by A. Rajappa, principally challenging the order dated 19.1.1981, whereby some Chief Justices had been transferred. One additional submission was raised in this petition, namely, that the transfer of the Chief Justices had been made without the prior consultation of the Governors of the concerned States, and further, that the said transfers were not in public interest, and therefore, violated the procedural requirements contained in Article 217(1). The seventh writ petition was filed by P. Subramanian, on the same grounds, as the petition filed by A. Rajappa.

(viii) An eighth writ petition was filed by D.N. Pandey and Thakur Ramapati Sinha, practicing Advocates, of the Patna High Court. In this petition, Justice K.B.N. Singh, the Chief Justice of the Patna High Court was impleaded as Respondent No. 3. On a prayer made by Respondent No. 3, he was transposed as Petitioner No. 3. As Petitioner No. 3, Justice K.B.N. Singh filed a detailed affidavit asserting, that his transfer had been made as a matter of punishment, and further, that it had been made on irrelevant and on insufficient grounds, and not in public interest. And further that, it was not preceded by a full and effective consultation with the Chief Justice of India.

It is therefore apparent, that the above mentioned petitions related to two different sets of cases. Firstly, the issue pertaining to the initial appointment of Judges, and the extension of the term of appointment of additional Judges, on the expiry of their original term. And secondly, the transfer of Judges and Chief Justices from one High Court to another.

34. The opinions recorded in the First Judges case, insofar as they are relevant to the present controversy, are being summarized herein:

P.N. Bhagwati, J. (as he then was):

(i). On the subject of independence of the judiciary, it was opined, that "...The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the entire Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective...The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive, and therefore, it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution. "...It was felt, that the concept of "independence of the judiciary" was not limited only to the independence from executive pressure or influence, but it was a much wider concept, which took within its sweep, independence from many other pressures and prejudices. It had many dimensions, namely, fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. It was held, that the principle of "independence of the judiciary" had to be kept in mind, while interpreting the provisions of the Constitution (paragraph 27).

(ii). On the subject of appointment of High Court Judges, it was opined, that just like Supreme Court Judges, who are appointed Under Article 124 by the President (which in effect and substance meant the Central Government), likewise, the power of appointment of High Court Judges Under Article 217, was to be exercised by the Central Government. Such power, it was held, was exercisable only "...after consultation with the Chief Justice of India, the Governor of the State, and, the Chief Justice of the High Court..." It was concluded, that it was clear on a plain reading of the above two Articles, that the Chief Justice of India, the Chief Justice of the High Court, and such other Judges of the High Court and of the Supreme Court (as the Central Government may deem necessary to consult), were constitutional functionaries, having a consultative role, and the power of appointments rested solely and exclusively in the decision of the Central Government. It was pointed out, that the above power was not an unfettered power, in the sense, that the Central Government could not act arbitrarily, without consulting the constitutional functionaries specified in the two Articles. The Central Government was to act, only after consulting the constitutional functionaries, and that, the consultation had to be full and effective (paragraph 29).

(iii). On the question of the meaning of the term "consultation" expressed in Article 124(2) and Article 217(1), it was held, that this question was no longer *res integra*, as the issue stood concluded by the decision of the Supreme Court in Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977 : (1977) 4 SCC 193, wherein its meaning was determined with reference to Article 222(1). But, since it was the common ground between the parties, that the term "consultation" used in Article 222(1) had the same meaning, which it had in Articles 124(2) and 217(1), it was held that, "...therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system..." It was further concluded, that the above observation in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193 would apply

with equal force to determine the scope and meaning of the term "consultation" within the meaning of Articles 124(2) and 217(1). Each of the constitutional functionaries, required to be consulted under these two Articles, must have for his consideration, full and identical facts bearing upon appointment or non-appointment of the person concerned, and the opinion of each of them taken on identical material, must be considered by the Central Government, before it takes a decision, whether or not to appoint the person concerned as a Judge. It was open to the Central Government to take its own decision, in regard to the appointment or non-appointment of a Judge to a High Court or the Supreme Court, after taking into account and giving due weight to, the opinions expressed. It was also observed, that the only ground on which such a decision could be assailed was, that the action was based on *mala fides* or irrelevant considerations. In case of a difference of opinion amongst the constitutional functionaries, who were to be consulted, it was felt, that it was for the Central Government to decide, whose opinion should be accepted. The contention raised on behalf of the Petitioners, that in the consultative process, primacy should be that of the Chief Justice of India, since he was the head of the Indian judiciary and *pater familias* of the judicial fraternity, was rejected for the reason, that each of the constitutional functionaries was entitled to equal weightage. With reference to appointment of Judges of the Supreme Court, it was held, that the Chief Justice of India was required to be consulted, but the Central Government was not bound to act in accordance with the opinion of the Chief Justice of India, even though, his opinion was entitled to great weight. It was therefore held, that the ultimate power of appointment, rested with the Central Government (paragraph 30).

(iv). On the issue of appointment of Judges of the Supreme Court, it was concluded, that consultation with the Chief Justice of India was a mandatory requirement. But while making an appointment, consultation could extend to such other Judges of the Supreme Court, and of the High Courts, as the Central Government may deem necessary. In response to the submission, where only the Chief Justice of India was consulted (i.e., when consultation did not extend to other Judges of the Supreme Court, or of the High Courts), whether the opinion tendered by the Chief Justice of India should be treated as binding, it was opined, that there was bound to be consultation, with one or more of the Judges of the Supreme Court and of the High Courts, before exercising the power of appointment conferred Under Article 124(2). It was felt, that consultation with the Chief Justice of India alone, with reference to the appointment of Judges to the Supreme Court, was not a very satisfactory mode of appointment, because wisdom and experience demanded, that no power should rest in a single individual howsoever high and great he may be, and howsoever honest and well-meaning. It was suggested, that it would be more appropriate if a collegium would make the recommendations to the President, with regard to appointments to the higher judiciary, and the recommending authority should be more broad based. If the collegium was comprised of persons who had knowledge of persons, who may be fit for appointment to the Bench, and possessed the qualities required for such appointment, it would go a long way towards securing the right kind of Judges, who would be truly independent (paragraph 31).

(v). It was held, that the appointment of an additional Judge, must be made by following the procedure postulated in Article 217(1). Accordingly, when the term of an additional Judge expired, and he ceased to be a Judge, his reappointment could only be made by once again adopting the procedure set out in Article 217(1). The contention, that an additional Judge must automatically and without any further consideration be appointed as an additional Judge for a further term, or, as a permanent Judge, was rejected (paragraphs 38 to 44).

(vi). On the question of validity of the letter of the Union Law Minister dated 18.3.1981, it was opined, that the same did not violate any legal or constitutional provision. It was felt, that the advance consent sought to be obtained through the letter dated 18.3.1981, from additional Judges or Judges prior to their permanent appointment, would have no meaning, so far as the Chief Justice of India was concerned, because irrespective of the fact, whether the additional Judge had given his consent or not, the Chief Justice of India would have to consider, whether it would be in public interest to allow the additional Judge to be appointed as a permanent Judge in another High Court (paragraph 54).

(vii). After having determined the merits of the individual claim raised by S.N. Kumar, J., (who was discontinued by the Central Government, while he was holding the position of additional Judge), it was concluded, that it would be proper if the Union of India could find a way, to place the letter dated 7.5.1981 addressed by the Chief Justice of Delhi High Court to the Law Minister, before the Chief Justice of India, and elicit his opinion with reference to that letter. And thereupon consider, whether S.N. Kumar, J., should be reappointed as additional Judge.

(viii). With reference to K.B.N. Singh, CJ., it was opined that there was a clear abdication by the Central Government of its constitutional functions, and therefore, his transfer from the Patna High Court to the Madras High Court was held as unconstitutional and void.

A.C. Gupta, J.

(i). On the subject of the "independence of the judiciary", it was opined, that the same did not mean freedom of Judges to act arbitrarily. It only meant, that Judges must be free, while discharging their judicial functions. In order to maintain "independence of the judiciary", it was felt, that Judges had to be protected against interference, direct or indirect. It was concluded, that the constitutional provisions should not be construed in a manner, that would tend to undermine the concept of "independence of the judiciary" (paragraph 119).

(ii). On the question, whether, on the expiry of the term of office of an additional Judge of a High Court, it was permissible to drop him by not giving him another term, though the volume of work, pending in the High Court, required the services of another Judge? It was opined, that the tenure of an additional Judge, was only dependent on the arrears of work, or the temporary increase in the business of a High Court. And since an additional Judge was not on probation, his performance could not be considered to determine, whether he was fit for appointment as a permanent Judge. Therefore, it was concluded, that if the volume of work pending in the High Court justified the appointment of an additional Judge, there could be no reason, why the concerned additional Judge should not be appointed for another term. The submission that the two years' period mentioned in Article 224, depicted the upper limit of the tenure, and that the President was competent to appoint an additional Judge, for any shorter period, was rejected. Since the fitness of a Judge, had been considered at the time of his initial appointment, therefore, while determining whether he should be reappointed, Under Article 217(1), it was opined, that the scope of inquiry was limited, to whether the volume of work pending in the High Court, necessitated his continuation.

(iii). Referring to the opinion expressed by the Chief Justice of the High Court, in connection with S.N. Kumar, J., it was opined, that when allegations were levelled against a Judge with respect to

the discharge of his duties, the only reasonable course open, which would not undermine the "independence of the judiciary" was, to proceed with an inquiry into the allegations and remove the Judge, if the allegations were found to be true (in accordance with the procedure laid down Under Article 124(4) and (5) read with Article 218). It was felt that, dropping an additional Judge, at the end of his initial term of office, on the ground that there were allegations against him, without properly ascertaining the truth of the allegations, was destructive of the "independence of the judiciary" (paragraph 123).

(iv). With reference to the non-continuation of S.N. Kumar, J., an additional Judge of the Delhi High Court, it was observed, that the letter of the Chief Justice of the Delhi High Court dated 7.5.1981, addressed to the Law Minister, was not disclosed to the Chief Justice of India. As the relevant material was withheld from the Chief Justice of India, it was concluded, that there was no full and effective "consultation", as contemplated by Article 217(1). And therefore, the decision not to extend the term of office of S.N. Kumar, J., as additional Judge of the Delhi High Court, though the volume of pending work in the High Court required the services of an additional Judge, was invalid.

(v). On the question, whether the opinion of the Chief Justice of India would have primacy, in case of a difference of opinion between the Chief Justice of a High Court and the Chief Justice of India, the view expressed was, that the President should accept the opinion of the Chief Justice of India, unless such opinion suffered from any obvious infirmity. And that, the President could not act as an umpire, and choose between the two opinions (paragraph 134).

(vi). Referring to the judgment in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, wherein it was concluded, that mass transfers were not contemplated Under Article 222(1), it was opined, that the President could transfer a Judge from one High Court to another, only after consultation with the Chief Justice of India. And that, the Chief Justice of India must consider in each case, whether the proposed transfer was in public interest (paragraph 138).

(vii). With reference to the transfer of K.B.N. Singh, CJ., from the Patna High Court to the Madras High Court, it was opined, that even if the above transfer had been made for administrative reasons, and in public interest, it was likely to cause some injury to the transferee, and it would only be fair to consider the possibility of transferring him, where he would face least difficulties, namely, where the language difficulty would not be acute.

S. Murtaza Fazal Ali, J.

(i). On the issue, whether the transfer of a High Court Judge Under Article 222 required the consent of the Judge proposed to be transferred, it was opined, that a non-consensual transfer, would not amount to punishment, nor would it involve any stigma. It was accordingly concluded, that a transfer made after complying with Article 222, would not mar or erode the "independence of the judiciary" (paragraph 345).

(ii). With reference to appointing Chief Justices of High Courts from outside the State, and for having 1/3rd Judges in every High Court from outside the State, it was expressed, that Article 222 conferred an express power with the President, to transfer a Judge (which includes, Chief Justice)

from one State to another. In determining as to how this power had to be exercised, it was felt, that the President undoubtedly possessed an implied power to lay down the norms, the principles, the conditions and the circumstances, under which the said power was to be exercised. A declaration by the President regarding the nature and terms of the policy (which virtually meant a declaration by the Council of Ministers) was quite sufficient, and absolutely legal and constitutional (paragraph 410).

(iii). On the subject of validity of the letter of the Union Law Minister dated 18.3.1981, it was held, that the same did not in any way tarnish the image of Judges, or mar the "independence of the judiciary" (paragraph 433).

(iv). On the question of appointment of additional Judges, and the interpretation of Article 217, the opinion expressed by P.N. Bhagwati and E.S. Venkataramiah, JJ. were adopted (paragraph 434).

(v). Insofar as the interpretation of Article 224 was concerned, the opinion of P.N. Bhagwati and D.A. Desai, JJ. were accepted, (paragraph 537). And accordingly, their conclusion about the continuation of S.N. Kumar, J., as an additional Judge, after the expiry of his term of appointment, was endorsed.

(vi). On analyzing the decision rendered in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, *inter alia*, the following necessary concomitants of an effective consultation between the President and the Chief Justice of India were drawn. That the consultation, must be full and effective, and must precede the actual transfer of the Judge. If consultation with the Chief Justice of India had not taken place, before transferring a Judge, it was held, that the transfer would be unconstitutional. All relevant data and necessary facts, must be provided to the Chief Justice of India, so that, he could arrive at a proper conclusion. Only after the above process was fully complied with, the consultation would be considered full and effective. It was felt, that the Chief Justice of India owed a duty, both to the President and to the Judge proposed to be transferred, to consider every relevant fact, before tendering his opinion to the President. Before giving his opinion the Chief Justice of India, could informally ascertain from the Judge, if there was any personal difficulty, or any humanitarian ground, on which his transfer should not be made. And only after having done so, the Chief Justice of India, could forward his opinion to the President. Applying the above facets of the consultation process, with respect to the validity of the order dated 19.1.1981, by which K.B.N. Singh, CJ., was transferred, it was held, that the consultation process contemplated Under Article 222, had been breached, rendering the order passed by the President invalid (paragraph 589).

V.D. Tulzapurkar, J.:

(i). Insofar as the question of "independence of the judiciary" is concerned, it was asserted that all the Judges, who had expressed their opinions in the matter, had emphasized, that the framers of the Constitution had taken the utmost pains, to secure the "independence of the Judges" of the higher judiciary. To support the above contention, several provisions of the Constitution were referred to. It was also pointed out, that the Attorney General representing the Union of India, had not dispute the above proposition (paragraph 639).

(ii). With reference to additional Judges recruited Under Article 224(1), from the fraternity of practicing Advocates, it was pointed out, that an undertaking was taken from them at the time of their initial appointment, that if and when a permanent judgeship of that Court was offered to them, they would not decline the same. And additionally, the Chief Justice of the Bombay High Court would require them to furnish a further undertaking, that if they decline to accept such permanent judgeship (though offered), or if they resigned from the office of the additional judgeship, they would not practice before the Bombay High Court, or any court or tribunal subordinate to it. Based on the aforesaid undertakings, the contention advanced was, that a legitimate expectancy, and an enforceable right to continue in office, came to be conferred on the additional Judges recruited from the Bar. It was felt, that it was impossible to construe Article 224(1), as conferring upon the appointing authority, any absolute power or discretion in the matter of appointment of additional Judges to a High Court (paragraphs 622 and 624).

(iii). All submissions made on behalf of the Respondents, that granting extension to an additional Judge, or making him a permanent Judge was akin to a fresh appointment, were rejected. It was concluded, that extension to an additional Judge, or making him permanent, did not require re-determination of his suitability Under Article 217(1) (paragraph 628).

(iv). While dealing with the question of continuation of an additional Judge, in situations where there were facts disclosing suspected misbehaviour and/or reported lack of integrity, the view expressed was, that while considering the question of continuation of a sitting additional Judge, on the expiry of his initial term, the test of suitability contemplated within the consultative process Under Article 217(1) should not be evoked--at least till a proper mechanism, having a legal sanction, was provided for holding an inquiry, against the Judge concerned, with reference to any suspected misbehavior and/or lack of integrity (paragraph 628).

(v). On the scope of consideration, for continuation as a sitting additional Judge (on the expiry of a Judge's initial term), it was opined, that the consultative process should be confined only to see, whether the preconditions mentioned in Article 224(1) existed or not, or whether, pendency of work justified continuation or not. It was held, that the test of suitability contemplated within the consultative process Under Article 217(1), could not and should not, be resorted to (paragraph 629).

(vi). On the question of primacy of the Chief Justice of India, with reference to Article 217(1), the view expressed was, that the scheme envisaged therein, by implication and intent, clearly gave primacy to the advice tendered by the Chief Justice of India. It was however sought to be clarified, that giving primacy to the advice of the Chief Justice of India, in the matter of appointment of Judges of the High Court, should not be construed as a power to veto any proposal. And that, if the advice of the Chief Justice of India, had proceeded on extraneous or non germane considerations, the same would be subject to judicial review, just as the President's final decision, if he were to disregard the advice of the Chief Justice of India, but for justified and cogent reasons. Interpreting Article 217(1) in the above manner, it was felt, would go a long way in preserving the "independence of the judiciary" (paragraph 632).

(vii). With regard to the scope of 'consultation', contemplated Under Article 222(1), the conclusion(s) drawn by the majority view, in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, were endorsed.

(viii). Insofar as, the issue of taking the consent of the concerned Judge, prior to his transfer is concerned, based on the decision rendered in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, it was felt, that transfers could be made without obtaining the consent of the concerned Judge. And accordingly it was held, that non-consensual transfers, were within the purview of Article 222(1) (paragraphs 645 and 646).

(ix). With reference to the letter written by the Union Law Minister dated 18.3.1981, it was asserted, that even a policy transfer, without fixing the requisite mechanism or modality of procedure, would not ensure complete insulation against executive interference. Conversely it was felt, that a selective transfer in an appropriate case, for strictly objective reasons, and in public interest, could be non-punitive. It was therefore concluded, that each case of transfer, whether based on policy, or for individual reasons, would have to be judged on the facts and circumstances of its own, for deciding, whether it was punitive (paragraph 649).

(x). It was concluded, that by requiring a sitting additional Judge, to give his consent for being appointed to another High Court, virtually amounted to seeking his consent for his transfer from his own High Court to another High Court, falling within the ambit of Article 222(1). Referring to the judgment rendered in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, it was felt, that the circular letter dated 18.3.1981 was an attempt to circumvent the safeguards and the stringent conditions expressed in the above judgment (paragraph 652). And further, that the circular letter clearly exuded an odour of executive dominance and arrogance, intended to have coercive effects on the minds of sitting additional Judges, by implying a threat to them, that if they did not furnish their consent to be shifted elsewhere, they would neither be continued nor made permanent. The above letter, was held to be amounting to, executive interference with the "independence of the judiciary", and thus illegal, unconstitutional and void. Any consent obtained thereunder, was also held to be void (paragraph 654).

(xi). It was also concluded that, the advice of the Chief Justice of India, would be robbed of its real efficacy, in the face of such pre-obtained consent, and it would have to be regarded as having been issued malafide and for a collateral purpose, namely, to bypass Article 222(1) and to confront the Chief Justice of India, with a *fait accompli*, and as such, the same was liable to be declared as illegal and unconstitutional (paragraph 655).

(xii). The above circular letter dated 18.3.1981, was also held to be violative of Article 14, since invidious discrimination was writ large on the face of the circular letter. For this additional reason, the letter of the Union Law Minister dated 18.3.1981, it was felt, was liable to be struck down (paragraphs 659 and 660).

(xiii). On the subject of non-continuation of S.N. Kumar, J., it was held, that it was abundantly clear from the correspondence and notings, that further details and concrete facts and materials relating to his integrity, though specifically asked for by the Chief Justice of India, were not furnished, and the letter dated 7.5.1981, which contained such details and concrete facts and

materials, were kept away from him, leading to the inference, that facts which were taken into consideration by the Union Law Minister and the Chief Justice of Delhi High Court (which provided the basis to the appointing authority, not to extend the appointment of S.N. Kumar, J.), were not placed before the Chief Justice of India, and therefore, there was neither full nor effective consultation, between the President and the Chief Justice of India, as required by Article 217(1). It was accordingly concluded, that the decision against S.N. Kumar, J., stood vitiated by legal *mala fides*, and as such, was liable to be held void and *non est*, and his case had to be sent back to the President, for reconsideration and passing appropriate orders, after the requisite consultation was undertaken afresh (paragraphs 664 and 666 to 668).

(xiv). With respect to the validity of the transfer of K.B.N. Singh, CJ., it was felt, that in the absence of any connivance or complicity, since no unfair play was involved in the procedure followed by the Chief Justice of India, it was liable to be concluded, that the impugned transfer had been made in public interest, and not by way of punishment. The above transfer was accordingly held to be valid (paragraph 680).

D.A. Desai, J.:

(i). After noticing, that the President Under Article 74, acts on the advice of the Council of Ministers, and that, while acting Under Article 217(3), the President performs functions of grave importance. It was felt, that it could not be said that while exercising the power of appointment of Judges to the higher judiciary, the President was performing either judicial or quasi judicial functions. The function of appointment of Judges was declared as an executive function, and as such, it was held, that Article 74 would come into operation. And therefore concluded, that the President would have to act, on the advice of the Council of Ministers, in the matter of appointment of Judges Under Article 217 (paragraph 715). And therefore it came to be held, that the ultimate power of appointment Under Article 217, "unquestionably" rested with the President.

(ii). It was pointed out, that before exercising the power of appointment of a Judge (other than the Chief Justice of a High Court), the President was under a constitutional obligation, to consult the three constitutional functionaries, mentioned in Article 217 (paragraphs 718 and 719). And that the aforementioned three constitutional functionaries were at par with one another. They were coordinate authorities, without any relative hierarchy, and as such, the opinion of the Chief Justice of India could not be given primacy on the issue of appointment of Judges of High Courts (paragraphs 724, 726 and 728).

(iii). It was also concluded, that on the expiry of the original term of appointment of an additional Judge Under Article 224, the continuation of the concerned Judge, would envisage the re-adoption of the procedure contained in Article 217 (paragraphs 736 and 745).

(iv). It was felt, that there was no gainsaying, that a practice which had been followed for over 25 years, namely, that an additional Judge was always considered for a fresh tenure, if there was no permanent vacancy, and if there was such a vacancy, he was considered for appointment as a permanent Judge. It was held, that the contention of the Attorney General, that such additional Judge had no priority, preference, weightage or right to be considered, and that, he was on par with any other person, who could be brought from the market, would amount to disregarding the

constitutional scheme, and must be rejected (paragraph 759). It was held, that when a Judge was appointed for a term of two years, as an additional Judge, it was sufficient to contemplate, that his appointment was not as a permanent Judge. And therefore, if a permanent vacancy arose, the additional Judge could not enforce his appointment against the permanent vacancy (paragraph 762).

(v). It was also concluded, that the term of an additional Judge could not be extended for three months or six months, since such short term appointments, were wholly inconsistent and contrary to the clear intendment of Article 224, and also, unbecoming of the dignity of a High Court Judge (paragraphs 763 and 764).

(vi). On the subject of extension of the term of an additional Judge, it was felt, that it was not open to the constitutional functionaries, to sit tight over a proposal, without expressing their opinion on the merits of the proposal, and by sheer inaction, to kill a proposal. It was accordingly opined, that when the term of an additional Judge was about to expire, it was obligatory on the Chief Justice of the High Court, to initiate the proposal for completing the process of consultation, before the period of initial appointment expired (paragraph 772).

(vii). With reference to the non-extension of the tenure of S.N. Kumar, J., it was felt, that when two high constitutional functionaries, namely, the Chief Justice of the Delhi High Court and the Chief Justice of India, had met with a specific reference to his doubtful integrity, the act of not showing the letter dated 7.5.1981 to the Chief Justice of India, would not detract from the fullness of the consultation, as required by Article 217. Accordingly, it was held, that there was a full and effective consultation, on all relevant points, including those set out in the letter dated 7.5.1981. And the claim of the concerned Judge for continuation, was liable to be rejected. It was however suggested, that the Government of India could even now, show the letter dated 7.5.1981 to the Chief Justice of India, and request him to give his comments. After receiving his comments, the Government of India could decide afresh, whether S.N. Kumar, J., should be re-appointed as an additional Judge of the Delhi High Court. It was however clarified, that the proposed reconsideration, should not be treated as a direction, but a mere suggestion.

(viii). On the question, whether the consent of the concerned Judge should be obtained prior to his transfer Under Article 222(1), it was concluded, that the requirement of seeking a prior consent, as a prerequisite for exercising the power of transfer Under Article 222(1), deserved to be rejected (paragraph 813). It was however observed, that the above power of transfer Under Article 222(1) could not be exercised in the absence of public interest, merely on the basis of whim, caprice or fancy of the executive, or its desire to bend a Judge to its own way of thinking. Three safeguards, namely, full and effective consultation with the Chief Justice of India, the exercise of power only aimed at public interest, and judicial review--in case the power was exercised contrary to the mandate of law, were suggested to insulate the "independence of the judiciary", against an attempt by the executive to control it (paragraphs 813 to 815).

(ix). It was also concluded, that the transfer of an individual Judge, for something improper in his behavior, or conduct, would certainly cast a slur or attach a stigma, and would leave an indelible mark on his character. Even the High Court to which he was transferred would shun him, and the consumers of justice would have little or no faith in his judicial integrity. Accordingly it was

concluded, that a transfer on account of any complaint or grievance against a Judge, referable to his conduct or behaviour, was impermissible Under Article 222(1).

(x). On the question of transfer of K.B.N. Singh, CJ., it was felt, that his order of transfer was vitiated for want of effective consultation, and his selective transfer would cast a slur or stigma on him. It was felt, that the transfer did not appear to be in public interest. The order of transfer dated 20.12.1980 was accordingly, considered to be vitiated, and as such, was declared void.

R.S. Pathak, J. (as he then was):

(i). With reference to the issue of "independence of the judiciary", it was observed, that while the administration of justice drew its legal sanction from the Constitution, its credibility rested in the faith of the people. Indispensable to such faith, was the "independence of the judiciary". An independent and impartial judiciary, it was felt, gives character and content to the constitutional milieu (paragraph 874).

(ii). On the subject of appointment of Judges to High Courts, it was essential for the President, to consult the Governor of the State, the Chief Justice of India and the Chief Justice of the concerned High Court. It was pointed out, that three distinct constitutional functionaries were involved in the consultative process, and each had a distinct role to play (paragraph 887). In a case where the Chief Justice of the High Court and the Chief Justice of India, were agreed on a recommendation, it was within reason to hold, that the President would ordinarily accept the recommendation, unless there were strong and cogent reasons, for not doing so (paragraph 889). It was however pointed out, that the President was not always obliged to agree, with a recommendation, wherein the Chief Justice of the High Court and the Chief Justice of India, had concurred. In this behalf, it was observed, that even though, during the Constituent Assembly debates, a proposal was made, that the appointment of a Judge should require the "concurrence" of the Chief Justice of India, and the above proposal was endorsed by the Law Commission of India, yet the proposal had fallen through, and as such, the Constitution as it presently exists, contemplated "consultation" and not "concurrence" (paragraph 890).

(iii). On the question, as to whether the Chief Justice of India had primacy, over the recommendation made by the Chief Justice of the High Court, it was felt, that the Chief Justice of India did not sit in appellate judgment, over the advice tendered by the Chief Justice of the High Court. It was pointed out, that the advice tendered by the Chief Justice of India, emerged after taking into account, not only the primary material before him, but also, the assessment made by the Chief Justice of the High Court. And therefore, when he rendered his advice, the assessment of the Chief Justice of the High Court, must be deemed to have been considered by him. It was pointed out, that from the constitutional scheme, it appeared, that in matters concerning the High Courts, there was a close consultative relationship, between the President and the Chief Justice of India. In that capacity, the Chief Justice of India functioned, as a constitutional check, on the exercise of arbitrary power, and was the protector of the "independence of the judiciary" (paragraph 891).

(iv). On the subject of appointment of Judges to the High Courts, it was concluded, that the appointment of an additional Judge, like the appointment of a permanent Judge, must be made in

the manner prescribed in Article 217(1). Accordingly, it was felt, that there was no reason to suspect, that a person found fit for appointment as an additional Judge, and had already gained proficiency and experience, would not be appointed as a Judge for a further period, in order that the work may be disposed of (paragraph 893).

(v). It was also opined, that the judiciary by judicial verdict, could not decide, how many permanent Judges were required for a High Court. And if a Court was not competent to do that, it could not issue a direction to the Government, that additional Judges should be appointed as permanent Judges (paragraph 895). Accordingly it was felt, that there was no doubt whatever, that the provision of Article 217(1) would come into play, when an additional Judge was to be considered for further appointment as an additional Judge, or was to be considered for appointment as a permanent Judge (paragraph 897).

(vi). With reference to the non-continuation of S.N. Kumar, J., it was pointed out, that the allegations contained in the letter dated 7.5.1981 strongly influenced the decision of the Government. Since the aforesaid letter was not brought to the notice of the Chief Justice of India, it was inevitable to conclude, that the process of consultation with the Chief Justice of India was not full and effective, and the withholding of important and relevant material from the Chief Justice of India, vitiated the process. It was accordingly held, that the non-continuation of the term of S.N. Kumar, J., was in violation of the mandatory constitutional requirements contained in Article 217(1). It was felt, that the issue pertaining to the continuation of S.N. Kumar, J., needed to be reconsidered, and a decision needed to be taken, only after full and effective consultation (paragraph 904).

(vii). On the issue of transfer of Judges Under Article 222(1), it was concluded, that the consent of the concerned Judge was not one of the mandated requirements (paragraph 913). It was pointed out, that the transfer of a Judge, could be made only in public interest, and that no Judge could be transferred, on the ground of misbehaviour or incapacity. The question of invoking Article 222(1), for purposes of punishing a Judge, was clearly ruled out (paragraphs 917 and 918). It was clarified, that the Judge proposed to be transferred, did not have a right of hearing. And that, the scope and degree of inquiry by the Chief Justice of India, fell within his exclusive discretion. All that was necessary was, that the Judge should know why his transfer was proposed, so that he would be able to acquaint the Chief Justice of India, why he should not be so transferred. It was further clarified, that the process of consultation envisaged Under Article 222(1) required, that all the material in possession of the President must be placed before the Chief Justice of India (paragraph 919).

(viii). It was held that, it was open to the Judge, who was subjected to transfer, to seek judicial review, by contesting his transfer on the ground that it violated Article 222(1) (paragraph 920).

(ix). It was also felt, that the power to transfer a Judge from one High Court to another, could constitute a threat, to the sense of independence and impartiality of the Judge, and accordingly, it was held, that the said power should be exercised sparingly, and only for very strong reasons (paragraph 921).

(x). On the validity of the transfer of K.B.N. Singh, CJ., it was concluded, that the considerations on which the transfer had been made, could be regarded as falling within the expression "public interest", and therefore, the order of transfer did not violate Article 222(1).

(xi). Insofar as the validity of the letter of the Union Law Minister dated 18.3.1981 is concerned, it was observed, that neither the proposal nor the consent given thereto, had any legal status. In the above view, it was held, that the circular letter could not be acted upon, and any consent given pursuant thereto, was not binding.

E.S. Venkataramiah, J. (as he then was):

(i). With reference to the "independence of the judiciary", it was opined, that the same was one of the central values on which the Constitution was based. It was pointed out, that in all countries, where the rule of law prevailed, and the power to adjudicate upon disputes between a man and a man, and a man and the State, and a State and another State, and a State and the Centre, was entrusted to a judicial body, it was natural that such body should be assigned a status, free from capricious or whimsical interference from outside, so that it could act, without fear and in consonance with judicial conscience (paragraph 1068).

(ii). Referring to Article 217(1) it was asserted, that each of the three functionaries mentioned therein, had to be consulted before a Judge of a High Court could be appointed. It was pointed out, that each of the consultees, had a distinct and separate role to play. Given the distinct roles assigned to them, which may to some extent be overlapping, it could not be said, that the Chief Justice of India occupied a position of primacy, amongst the three consultees (paragraph 1019).

(iii). The power of appointment of a Judge of a High Court was considered to be an executive power (paragraph 1023). Accordingly, while making an appointment of a High Court Judge, the President was bound to act, on the advice of his Council of Ministers, and at the same time, giving due regard to the opinions expressed by those who were required to be consulted Under Article 217(1). Despite the above, it was felt, that there was no scope for holding, that either the Council of Ministers could not advise the President, or the opinion of the Chief Justice of India was binding on the President. Although, it was felt, that such opinion should be given due respect and regard (paragraph 1032). It was held, that the above method was intrinsic in the matter of appointment of Judges, as in that way, Judges may be called people's Judges. If the appointments of Judges were to be made on the basis of the recommendations of Judges only, then they will be Judges' Judges, and such appointments may not fit into the scheme of popular democracy (paragraph 1042).

(iv). It was held, that the Constitution did not prescribe different modes of appointment for permanent Judges, additional Judges, or acting Judges. All of them were required to be appointed by the same process, namely, in the manner contemplated Under Article 217(1) (paragraph 1061). The appointment of almost all High Court Judges initially as additional Judges Under Article 224(1), and later on as permanent Judges Under Article 217(1), was not conducive to the independence of judiciary (paragraph 1067). It was held, that the Constitution did not confer any right upon an additional Judge, to claim as of right, that he should be appointed again, either as a permanent Judge, or as an additional Judge. Accordingly, it was held, that there was no such enforceable right (paragraph 1074).

(v). Despite the above, it was observed, that in the absence of cogent reasons for not appointing an additional Judge, the appointment of somebody else in his place, would be an unreasonable and a perverse act, which would entitle the additional Judge, to move a Court for appropriate relief, in the peculiar circumstances (paragraph 1086). It was held, that having regard to the high office, to which the appointment was made, and the association of high dignitaries, who had to be consulted before any such appointment was made, the application of principles of natural justice, as of right, was ruled out (paragraph 1087).

(vi). With reference to Article 222, it was opined, that the consent of the Judge being transferred, was not a prerequisite before passing an order of transfer (paragraphs 1097 and 1099). It was held, that the transfer of a Judge of a High Court to another High Court, could not be construed as a fresh appointment, in the High Court to which the Judge was transferred. An order of transfer made Under Article 222, it was held, was liable to be struck down by a Court, if it could be shown, that it had been made for an extraneous reason, i.e., on a ground falling outside the scope of Article 222. Under Article 222, a Judge could be transferred, when the transfer served public interest. It was held, that the President had no power to transfer a High Court Judge, for reasons not bearing on public interest, or arising out of whim, caprice or fancy of the executive, or because of the executive desire to bend a Judge to its own way of thinking (paragraphs 1097, 1099 and 1132).

(vii). It was held, that Article 222 cannot be resorted to on the ground of alleged misbehaviour or incapacity of a Judge (paragraph 1139).

(viii). Based on the opinion expressed by several expert bodies, it was opined, that any transfer of a Judge of a High Court Under Article 222, in order to implement the policy of appointing Chief Justice of every High Court from outside the concerned State, and of having at least 1/3rd of Judges of every High Court from outside the State, would not be unconstitutional (paragraph 1164).

(ix). The letter of the Union Minister of Law dated 18.3.1981, was found to be valid. All contentions raised against the validity thereof were rejected (paragraph 1239).

(x). The decision of the President not to issue a fresh order of appointment to S.N. Kumar, J., on the expiry of his term as an additional Judge of the Delhi High Court, was held to be justified (paragraph 1128).

(xi). The transfer of K.B.N. Singh, CJ., was held to have been made strictly in consonance with the procedure indicated in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193. It was accordingly concluded, that there was no ground to hold, that the above transfer was not considered by the Chief Justice of India, in a fair and reasonable way. On the facts and circumstances of the case, it was concluded that it was not possible to hold that the above transfer was either illegal or void (paragraphs 1252 and 1257).

The Second Judges Case-MANU/SC/0073/1994 : (1993) 4 SCC 441:

35. For the purpose of adjudication of the present issue, namely, whether the judgment rendered by this Court in the Second Judges case needs to be re-examined, it is not necessary to delineate the views expressed by the individual Judges, as the conclusions drawn by them are *per se* not

subject matter of challenge. The limited challenge being, that vital aspects of the matter, which needed to have been considered were not canvassed, and therefore, could not be taken into consideration in the process of decision making. In the above perspective, we consider it just and proper to extract hereunder, only the conclusions drawn by the majority view:

(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.

(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.

(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.

(6) Appointment to the office of the Chief Justice of India should be of the senior most Judge of the Supreme Court considered fit to hold the office.

(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court judges/Chief Justices.

(8) Consent of the transferred Judge/Chief Justice is not required for either the first of any subsequent transfer from one High Court to another.

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

(10) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in any one.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

(12) The initial appointment of Judge can be made to a High Court other than that for which the proposal was initiated.

(13) Fixation of Judge-strength in the High Courts is justiciable, but only to the extent and in the manner indicated.

(14) The majority opinion in S.P. Gupta v. Union of India MANU/SC/0080/1981 : (1982) 2 SCR 365 : AIR 1982 SC 149, in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution, including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us.

The Third Judges case-MANU/SC/1146/1998 : (1998) 7 SCC 739:

36. For exactly the same reasons as have been noticed with reference to the Second Judges case, it is not necessary to dwell into the unanimous view expressed in the Third Judges case. The concession of the Attorney General for India, as was expressly recorded in paragraph 11 of the Third Judges case, needs to be extracted to highlight the fact, that the then Attorney General had conceded, that the opinion recorded by the majority in the Second Judges case, had been accepted by the Union of India and, as such, would be binding on it. Paragraph 11 is accordingly reproduced hereunder:

11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case MANU/SC/0073/1994 : (1993) 4 SCC 441 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

37. It is likewise necessary to extract herein, only the final summary of conclusions expressed in the Third Judges case, which are placed below:

1. The expression "consultation with the Chief justice of India" in Articles 217(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of Indian does not constitute "consultation" within the meaning of the said Articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four senior most puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior most puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with two senior most puisne Judges of the Supreme Court.

4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.

7. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India.

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India.

III. MOTION BY THE RESPONDENTS, FOR THE REVIEW OF THE SECOND AND THIRD JUDGES CASES:

38. It was the contention of the learned Attorney General, that in the submissions advanced at the hands of the learned Counsel representing the Petitioners, for adjudication of the merits of the controversy, emphatic reliance had been placed on the judgments rendered by this Court in the Second and Third Judges cases. It was the contention of the learned Attorney General, that the conclusions drawn in the above judgments, needed a reconsideration by way of a fresh scrutiny, to determine, whether the conclusions recorded therein, could withstand the original provisions of the Constitution, viewed in the background of the debates in the Constituent Assembly.

39. In order to record the facts truthfully, it was emphasized, that the submissions advanced by him, could not be canvassed on behalf of the Union of India as in the Third Judges case, the Union had consciously accepted as binding the judgment rendered in the Second Judges case. Despite the above, the Attorney General was emphatic, that the Union of India could not be debarred from

seeking reconsideration of the judgment rendered by this Court in the Second Judges case. In order to dissuade the learned Attorney General from the course he insisted to pursue, it was suggested, that the determination by this Court in the Second Judges case would not prejudice the claim of the Union of India, if the Union could establish, that the "basic structure" of the Constitution, namely, the "independence of the judiciary" would not stand compromised by the Constitution (99th Amendment) Act. Despite the instant suggestion, the Attorney General pleaded, that he be allowed to establish, that the determination rendered by the nine-Judge Bench in the Second Judges case, was not sustainable in law. At his insistence, we allowed him to advance his submissions. Needless to mention, that if the Attorney General was successful in persuading us, that the said judgment did not *prima facie* lay down the correct legal/constitutional position, the matter would have to be examined by a Constitution Bench, with a strength of nine or more Judges of this Court, only if, we would additionally uphold the challenge to the impugned constitutional amendment, and strike down the same, failing which the new regime would replace the erstwhile system.

40. First and foremost, our attention was drawn to Article 124 of the Constitution, as it existed, prior to the present amendment. It was submitted that Article 124 contemplated, that the Supreme Court would comprise of the Chief Justice of India, and not more than seven other Judges (unless, the Parliament by law, prescribed a larger number). It was submitted, that Clause (2) of Article 124 vested the power of appointment of Judges of the Supreme Court, with the President. The proviso Under Article 124(2) postulated a mandatory "consultation" with the Chief Justice of India. Appointments contemplated Under Article 124, also required a non-mandatory "consultation" with such other Judges of the Supreme Court and High Courts, as the President may deem necessary. It was accordingly submitted, that the consultation contemplated Under Article 124(2), at the hands of the President was wide enough to include, not only the collegium of Judges, in terms of the judgment rendered by this Court in the Second Judges case, but each and every single Judge on the strength of the Supreme Court, and also the Judges of the High Courts of the States, as the President may choose to consult. It was submitted, that only a limited role assigned to the Chief Justice of India, had been altered by the judgment in the Second Judges case, into an all pervasive decision taken by the Chief Justice of India, in consultation with a collegium of Judges. It was pointed out, that the term "consultation" expressed in Article 124 with reference to the Chief Justice of India, had been interpreted to mean "concurrence". And accordingly, the President has been held to be bound, by the recommendation made to him, by the Chief Justice of India and his collegium of Judges. It was contended, that the above determination, was wholly extraneous to the plain reading of the language engaged in Article 124 (in its original format). It was asserted, that there was never any question of "concurrence", as Article 124 merely contemplated "consultation". It was contended, that the above "consultation" had been made mandatory and binding, on the President even in a situation where, the opinion expressed by the Chief Justice and the collegium of Judges, was not acceptable to the President. It was asserted, that it was not understandable, how this addition came to be made to the plain and simple language engaged in framing Article 124. It was submitted, that once primacy is given to the Chief Justice of India (i.e., to the collegium of Judges, contemplated under the Second and Third Judges cases), then there was an implied exclusion of "consultation", with the other Judges of the Supreme Court, and also, with the Judges of the High Courts, even though, there was an express provision, empowering the President to make up his mind, after consulting the other Judges of the Supreme Court and the Judges of the High Courts, as he may choose.

41. The Attorney General further contended, that the interpretation placed on Article 124 in the Second Judges case, was an absolutely unsustainable interpretation, specially when examined, with reference to the following illustration. That even if all the Judges of the Supreme Court, recommend a name, to which the Chief Justice of India alone, was not agreeable, the said recommendee could not be appointed as a Judge. This illustration, it was submitted, placed absolute power in the hands of one person-the Chief Justice of India.

42. The learned Attorney General, then invited the Court's attention to Article 125, so as to contend, that the salary payable to the Judges of the Supreme Court has to be determined by the Parliament by law, and until such determination was made, the emoluments payable to a Judge would be such, as were specified in the Second Schedule. It was submitted, that the Parliament was given an express role to determine even the salary of Judges, which is a condition of service of the Judges of the Supreme Court. He also pointed to Article 126, which contemplates, the appointment of one of the Judges of the Supreme Court, to discharge the functions of Chief Justice of India, on account of his absence or otherwise, or when the Chief Justice of India, was unable to perform the duties of his office. The Court's attention was also drawn to Article 127, to point out, that in a situation where the available Judges of the Supreme Court, could not satisfy the quorum of the Bench, required to adjudicate upon a controversy, the Chief Justice of India could continue the proceedings of the case, by including therein, a Judge of a High Court (who was qualified for appointment as a Judge of the Supreme Court), in order to make up the quorum, with the previous consent of the President of India. It was submitted, that the role of the President of India was manifestly inter-twined with administration of justice, by allowing the President to appoint a Judge of the High Court, as a Judge of the Supreme Court on *'ad hoc'* basis. Reference was then made to Article 128, whereby the Chief Justice of India, with the previous approval of the President, could require a retired Judge of the Supreme Court, or a person who has held office as a Judge of a High Court, and was duly qualified for appointment as a Judge of the Supreme Court, to sit and act as a Judge of the Supreme Court. It was pointed out, that this was yet another instance, where the President's noticeable role in the functioning of the higher judiciary, was contemplated by the Constitution itself. The Court's attention was then drawn to Article 130, whereunder, even though the seat of the Supreme Court was to be at Delhi, it could be moved to any other place in India, if so desired by the Chief Justice of India, with the approval of the President. Yet again, depicting the active role assigned to the President, in the functioning of the higher judiciary. Likewise, the Court's attention was invited to Articles 133 and 134, providing for an appellate remedy in civil and criminal matters respectively, to the Supreme Court, leaving it open to the Parliament to vary the scope of the Courts' appellate jurisdiction. Insofar as Article 137 is concerned, it was pointed out, that the power of review of the judgments or orders passed by the Supreme Court, was subject to the provisions of any law made by the Parliament, or any rules that may be made Under Article 145. With reference to Article 138, it was contended, that the jurisdiction of the Supreme Court, could be extended to matters falling in the Union List, as the Parliament may choose to confer. Similar reference was made to Clause (2) of Article 138, wherein further jurisdiction could be entrusted to the Supreme Court, when agreed to, by the Government of India and by any State Government, if the Parliament by law so provides. Based on the above, it was contended, that Article 138 was yet another provision, which indicated a participatory role of the Parliament, in the activities of the Supreme Court. Likewise, this Court's attention was drawn to Article 139, whereby the Parliament could confer, by law, the power to issue directions, orders or writs, in addition to the framework demarcated through Article 32(2). This, according to the learned

Attorney General, indicated another participatory role of the Parliament in the activities of the Supreme Court. Pointing to Article 140, it was submitted, that the Parliament could by law confer upon the Supreme Court supplemental powers, in addition to the powers vested with it by the Constitution, as may appear to the Parliament to be necessary or desirable, to enable the Supreme Court to exercise its jurisdiction more effectively. It was submitted, that one Article after the other, including Article 140, indicated a collective and participatory role of the President and the Parliament, in the activities of the Supreme Court. Having read out Article 142(2), it was asserted, that even on the subject of securing the attendance of any person, and the discovery or production of any documents, or the investigation or punishment of any contempt of itself, the jurisdiction of the Supreme Court was subject to the law made by the Parliament. The learned Attorney General, also referred to Article 145, whereunder, it was open to the Parliament to enact law framed by the Parliament, for regulating generally the practice and procedure of the Supreme Court. In the absence of any such law, the Supreme Court had the liberty to make rules for regulating the practice and procedure of the Court, with the approval of the President. It was submitted, that even on elementary issues like procedure, the Parliament and/or the President were assigned a role by the Constitution, in activities strictly in the judicial domain. With reference to the activities of the Supreme Court, the Court's attention was also drawn to Article 146, which envisages that appointments of officers and servants of the Supreme Court, were to be made by the Chief Justice of India. It was pointed out, that the authority conferred Under Article 146, was subservient to the right of the President, to frame rules requiring future appointments to any office connected to the Supreme Court, to be made, only in consultation with the Union Public Service Commission. The aforesaid right of appointing officers and servants to the Supreme Court, is also clearly subservient to the right of the Parliament, to make provisions by enacting law on the above subject. In the absence of a legislation, at the hands of the Parliament, the conditions of service of officers and servants of the Supreme Court would be such, as may be prescribed by rules framed, by the Chief Justice of India. The rules framed by the Chief Justice, are subject to the approval by the President, with reference to salaries, allowances, leave and pension.

43. With reference to the appointments made to the High Courts, the Court's attention was invited to Article 217, whereunder, the authority of appointing a Judge to a High Court was vested with the President. The President alone, was authorized to make such appointments, after "consultation" with the Chief Justice of India, the Governor of the State, and the Chief Justice of the concerned High Court. The Court's attention was also drawn to Article 221, whereunder, the power to determine the salary payable to a Judge, was to be determined by law to be enacted by the Parliament. Till any such law was framed by the Parliament, High Court Judges would be entitled to such salaries, as were specified in the Second Schedule. The allowances payable to Judges of the High Court, as also, the right in respect of leave of absence and pension, were also left to the wisdom of Parliament, to be determined by law. And until such determination, Judges of the High Courts were entitled to allowances and rights, as were indicated in the Second Schedule. The Court's attention was also drawn to Article 222, wherein, the President was authorized, after "consulting" the Chief Justice of India, to transfer a Judge from one High Court to another. Inviting the Court's attention to the provisions referred to in the foregoing two paragraphs contained in Part V, Chapter IV-The Union Judiciary, and Part VI, Chapter V-The High Courts in the States, it was asserted, that the role of the President, and also, that of the Parliament was thoughtfully interwoven in various salient aspects, pertaining to the higher judiciary. Exclusion of the executive and the legislature, in the manner expressed through the Second Judges case, in the matter of appointment

of Judges to the higher judiciary, as also, transfer of Judges and Chief Justices of one High Court to another, was clearly against the spirit of the Constitution.

44. It was submitted, that the method of appointment of Judges to the higher judiciary, was not the "be all" or the "end all", of the independence of the judiciary. The question of independence of the judiciary would arise, with reference to a Judge, only after his appointment as a Judge of the higher judiciary. It was submitted, that this Court had repeatedly placed reliance on the debates in the Constituent Assembly, so as to bring out the intention of the framers of the Constitution, with reference to constitutional provisions. In this behalf, he placed reliance on T.M.A. Pai Foundation v. State of Karnataka MANU/SC/0905/2002 : (2002) 8 SCC 481, Re: Special Reference No. 1 of 2002 MANU/SC/0891/2002 : (2002) 8 SCC 237, and also on S.R. Chaudhuri v. State of Punjab MANU/SC/0457/2001 : (2001) 7 SCC 126. The following observations in the last cited judgment were highlighted:

33. Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a "privilege" that extends only for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit. The debates clearly indicate the "privilege" to extend "only" for six months.

For the same purpose, he referred to Indra Sawhney v. Union of India MANU/SC/0104/1993 : 1992 Supp (3) SCC 217, and drew the Court's attention to the opinion expressed therein:

217. Further, it is clear for the afore-mentioned reasons that the executive while making the division or sub-classification has not properly applied its mind to various factors, indicated above which may ultimately defeat the very purpose of the division or sub-classification. In that view, para 2(i) not only becomes constitutionally invalid but also suffers from the vice of non-application of mind and arbitrariness.

xxx

772. We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr. Ambedkar as conclusive on the meaning of the expression "backward classes". We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put in Clause (4). We are aware that what is said during these debates is not conclusive or binding upon the Court because several

members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr. Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft Clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court. [See Madhu Limaye In Re: MANU/SC/0047/1968 : AIR 1969 SC 1014, Golak Nath v. State of Punjab MANU/SC/0029/1967 : AIR 1967 SC 1643 (Subba Rao, CJ); opinion of Sikri, CJ, in Union of India v. H.S. Dhillon MANU/SC/0062/1971 : (1971) 2 SCC 779 and the several opinions in Kesavananda Bharati MANU/SC/0445/1973 : (1973) 4 SCC 225, where the relevance of these debates is pointed out, emphasing at the same time, the extent to which and the purpose for which they can be referred to.] Since the expression "backward" or "backward class of citizens" is not defined in the Constitution, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable.

Reliance was also placed on Kesavananda Bharati v. State of Kerala MANU/SC/0445/1973 : (1973) 4 SCC 225, and this Court's attention was invited to the following:

1088. Before I refer to the proceedings of the Constituent Assembly, I must first consider the question whether the Constituent Assembly Debates can be looked into by the Court for construing these provisions. The Advocate-General of Maharashtra says until the decision of this Court in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and Ors. v. Union of India MANU/SC/0050/1970 : (1971) 1 SCC 85-commonly known as Privy Purses case-debates and proceedings were held not to be admissible. Nonetheless counsel on either side made copious reference to them. In dealing with the interpretation of ordinary legislation, the widely held view is that while it is not permissible to refer to the debates as an aid to construction, the various stages through which the draft passed, the amendments proposed to it either to add or delete any part of it, the purpose for which the attempt was made and the reason for its rejection may throw light on the intention of the framers or draftsmen. The speeches in the legislatures are said to afford no guide because members who speak in favour or against a particular provision or amendment only indicate their understanding of the provision which would not be admissible as an aid for construing the provision. The members speak and express views which differ from one another, and there is no way of ascertaining what views are held by those who do not speak. It is, therefore, difficult to get a resultant of the views in a debate except for the ultimate result that a particular provision or its amendment has been adopted or rejected, and in any case none of these can be looked into as an aid to construction except that the legislative history of the provision can be referred to for finding out the mischief sought to be remedied or the purpose for which it is enacted, if they are relevant. But in Travancore Cochin and Ors. v. Bombay Co. Ltd. MANU/SC/0068/1952 : AIR 1952 SC 366, the Golaknath case (supra), the Privy Purses case (supra), and Union of India v. H.S. Dhillon MANU/SC/0062/1971 : (1971) 2 SCC 779, there are dicta against referring to the speeches in the Constituent Assembly and in the last mentioned case they were referred to as supporting the conclusion already arrived at. In Golaknath case (supra), as well as Privy Purses

case (supra), the speeches were referred to though it was said not for interpreting a provision but for either examining the transcendental character of Fundamental Rights or for the circumstances which necessitated the giving of guarantees to the rulers. For whatever purpose speeches in the Constituent Assembly were looked at though it was always claimed that these are not admissible except when the meaning was ambiguous or where the meaning was clear for further support of the conclusion arrived at. In either case they were looked into. Speaking for myself, why should we not look into them boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned. Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations. The Assembly constituted Committees of able men of high calibre, learning and wide experience, and it had an able adviser, Shri B.N. Rau to assist it. A memorandum was prepared by Shri B.N. Rau which was circulated to the public of every shade of opinion, to professional bodies, to legislators, to public bodies and a host of others and was given the widest publicity. When criticism, comments and suggestions were received, a draft was prepared in the light of these which was submitted to the Constituent Assembly, and introduced with a speech by the sponsor Dr. Ambedkar. The assembly thereupon constituted three Committees: (1) Union Powers Committee; (2) Provincial Powers Committee; and (3) Committee on the Fundamental Rights and Minorities Committee. The deliberations and the recommendations of these Committees, the proceedings of the Drafting Committee, and the speech of Dr. Ambedkar introducing the draft so prepared along with the report of these Committees are all valuable material. The objectives of the Assembly, the manner in which they met any criticism, the resultant decisions taken thereupon, amendments proposed, speeches in favour or against them and their ultimate adoption or rejection will be helpful in throwing light on the particular matter in issue. In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a Constituent Assembly have no such partisan nuances and their only concern is to give the national a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly. Be that as it may, all I intend to do for the present is to examine the stages through which the draft passed and whether and what attempts were made to introduce words or expressions or delete any that were already there and for what purpose. If these proceedings are examined from this point of view, do they throw any light on or support the view taken by me?

For the same proposition, reliance was also placed on Samsher Singh v. State of Punjab MANU/SC/0073/1974 : (1974) 2 SCC 831, and on Manoj Narula v. Union of India MANU/SC/0736/2014 : (2014) 9 SCC 1.

45. Having emphasized, that Constituent Assembly debates, had been adopted as a means to understand the true intent and import of the provisions of the Constitution, reference was made in extenso to the Constituent Assembly debates, with reference to the provisions (more particularly, to Article 124) which are subject matter of the present consideration. It was pointed out, that after the constitution of the Constituent Assembly, the issue of judicial appointments and salaries was taken up by an *ad hoc* committee on the Supreme Court. The committee comprised of S. Varadachariar (a former Judge of the Federal Court), B.L. Mitter (a former Advocate General of the Federal Court), in addition to some noted jurists-Alladi Krishnaswamy Ayyar, K.M. Munshi and B.N. Rau (Constitutional Adviser to the Constituent Assembly of India). The *ad hoc* committee presented its report to the Constituent Assembly on 21.5.1947. With reference to judicial independence, it modified the consultative proposal suggested in the Sapru Committee report, by recommending a panel of 11 persons, nominated by the President, in consultation with the Chief Justice of India. Alternatively, it was suggested, that the panel would recommend three candidates, and the President in consultation with the Chief Justice of India, would choose one of the three. It was suggested, that the panel would take its decision(s) by 2/3rd majority. To ensure independence, it was recommended, that the panel should have a tenure of ten years. Based on the above report, it was submitted, that the proposal suggested a wider participation of a collegium of Judges, politicians and law officers, in addition to the President and the Chief Justice of India, in the matter of appointment of Judges to the higher judiciary. Learned Attorney General went on to inform the Court, that on the basis of the above report, B.N. Rau prepared a memorandum dated 30.5.1947, wherein he made his own suggestions. The above suggestions related to Judges of the Supreme Court, as also, of High Courts. The Court was also informed, that the Union Constitution Committee presented its report to the Constituent Assembly on 4.7.1947, also pertaining to appointments to the higher judiciary. Yet another memorandum, on the Principles of a Model Provincial Constitution was prepared by the Constitutional Adviser on 13.5.1947, relating to appointments to the higher judiciary, which was adopted by the Provincial Constitution Committee. Reliance was placed by the Attorney General, on the speech delivered by Sardar Vallabhbhai Patel on 15.7.1947, wherein he expressed the following views:

The committee have given special attention to the appointment of judges of the High Court. This is considered to be very important by the committee and as the judiciary should be above suspicion and should be above party influences, it was agreed that the appointment of High Court judges should be made by the President of the Union in consultation with the Chief Justice of the Supreme Court, the Chief Justice of the Provincial High Court and the Governor with the advice of the Ministry of the Province concerned. So there are many checks provided to ensure fair appointments to the High Court.

The Court was informed, that the first draft of the new constitution prepared by B.N. Rau was presented to the Constituent Assembly in October 1947, wherein, it was expressed that Judges of the Supreme Court, would be appointed by the President, in consultation with the sitting Judges of the Supreme Court, and Judges of High Courts in consultation with the Chief Justice of India, except in the matter of appointment of the Chief Justice of India himself. It was suggested, that this was the immediate precursor to Article 124(2) of the Constitution, as it was originally framed.

46. It was pointed out, that in the above report prepared by the Constitutional Adviser, the following passage related to the judiciary:

Regarding the removal of judges, he (Justice Frankfurter, Judge, Supreme Court of the United States of America) drew attention to a provision which had just been proposed in New York State- the provision has since been approved and which had the support of most of the judges and lawyers in this country. The provision is reproduced below: 9-a (1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims... (types of judges) may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judges of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division...

(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard...

(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be held before a court on the judiciary...

(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the governor or by the presiding justice of any appellate division....

It was submitted, that the above suggestion of vesting the power of impeachment, in-house by the judiciary itself, as recommended by Justice Frankfurter, was rejected. It was pointed out, that the second draft of the Constitution was placed before the Constituent Assembly on 21.2.1948. Articles 103 and 193 of the above draft, pertained to appointments of Judges to the Supreme Court and High Courts. It was submitted, that several public comments were received, with reference to the second draft. In this behalf, a memorandum was also received, from the Judges of the Federal Court and the Chief Justices of the High Courts which, *inter alia*, expressed as under:

It seems desirable to insert a provision in these articles (Draft Articles 103(2) and 193(2) to the effect that no person should be appointed a judge of the Supreme Court or of a High Court who has at any time accepted the post of a Minister in the Union of India or in any State. This is intended to prevent a person who has accepted office of a Minister from exercising his influence in order to become a judge at any time. It is the unanimous view of the judges that a member of the Indian Civil Service should not be a permanent Chief Justice of any High Court. Suitable provision should be made in the article for this.

It was submitted, that in response to the above memorandum, B.N. Rau made the following observations:

It is unnecessary to put these prohibitions into the Constitution. The Attorney-General in England is invariably one of the Ministers of the Crown and often even a Cabinet Minister; he is often appointed a judge afterwards (The Lord Chancellor is, of course, both a Cabinet Minister and the head of the judiciary). In India, Sapru and Sircar were Law Members, or Law Ministers, as they

would be called in future; no one would suggest that men of this type should be ineligible for appointment as judges afterwards....

Merit should be the only criterion for these high appointments; no constitutional ban should stand in the way of merit being recognized.

It was asserted, that in the memorandum submitted by the Judges of the Federal Court and the Chief Justices of the High Courts, the following suggestions were made:

It is therefore suggested that Article 193(1) may be worded in the following or other suitable manner:

Every Judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India....

We do not think it is necessary to make any provision in the Constitution for the possibility of the Chief Justice of India refusing to concur in an appointment proposed by the President. Both are officers of the highest responsibility and so far no case of such refusal has arisen although a convention now exists that such appointments should be made after referring the matter to the Chief Justice of India and obtaining his concurrence. If per chance such a situation were ever to arise it could of course be met by the President making a different proposal, and no express provision need, it seems to us, be made in that behalf.

The foregoing applies mutatis mutandis to the appointment of the Judges of the Supreme Court, and Article 103(2) may also be suitably modified. In this connection it is not appreciated why a constitutional obligation should be cast on the President to consult any Judge or Judges of the Supreme Court or of the High Court in the States before appointing a Judge of the Supreme Court. There is nothing to prevent the President from consulting them whenever he deems it necessary to do so.

It was pointed out, that none of the above proposals were accepted. Reference was also made to the Editor of the Indian Law Review and the Members of the Calcutta Bar Association, who made the following suggestions:

That in Clause (4) of Article 103 the words "and voting" should be deleted, as they consider that in an important issue as the one contemplated in this clause, opportunity should be as much minimized as practicable for the legislators for remaining neutral.

to which, the response of B.N. Rau was as under:

In the Constitutions of Canada, Australia, South Africa and Ireland, a bare majority of the members present and voting suffices for the presentation of the address for removal of a judge. Article 103(4) requires a two-thirds majority of those present and voting. It is hardly necessary to tighten it further by deleting the words "and voting".

With reference to the suggestions regarding non-reduction of salaries of Judges, the Constitutional Adviser made the following comments:

The constitutional safeguard against the reduction of salary of the Chief Justice and the judges of a High Court below the minimum has been prescribed in Article 197 so as to prevent the Legislatures of the States from reducing the salaries below a reasonable figure. It is hardly necessary to put such a check on the power of Parliament to fix the salaries of the judges of the Supreme Court.

The suggestions made by Pittabhi Sitaramayya and others with reference to officers, and servants and the expenses of the Supreme Court, were also highlighted. They are extracted hereunder:

That in Article 122, for the words "the Chief Justice of India in consultation with the President" the words "the President in consultation with the Chief Justice of India" be substituted.

The response of the Constitutional Adviser was as follows:

The provision for the fixation of the salaries, allowances and pensions of the officers and servants of the Supreme Court by the Chief Justice of India in consultation with the President contained in Clause (1) of Article 122 is based on the existing provision contained in Section 242(4) of the Government of India Act, 1935, as adapted. The Drafting Committee considered such a provision to be necessary to ensure the independence of the judiciary, the safeguarding of which was so much stressed by the Federal Court and the High Courts in their comments on the Draft Constitution.

47. It was pointed out, that the second draft of the Constitution, was introduced in the Constituent Assembly on 4.11.1948. The Court's attention was drawn to the discussions, with reference to appointments to the higher judiciary, including the suggestion of B. Pocker Sahib, who proposed an alternative to Article 103(2). Reference was also made to the proposal made by Mahboob Ali Baig Sahib, guarding against party influences, that may be brought to the fore, with reference to appointment of Judges. It was submitted, that the above suggestion was rejected by the Chairman of the Drafting Committee, who felt that it would be dangerous to enable the Chief Justice to veto the appointment of a Judge to the higher judiciary. The opinion of T.T. Krishnamachari was also to the following effect:

[T]he independence of the Judiciary should be maintained and that the Judiciary should not feel that they are subject to favours that the Executive might grant to them from time to time and which would naturally influence their decision in any matter they have to take where the interests of the Executive of the time being happens to be concerned. At the same time, Sir, I think it should be made clear that it is not the intention of this House or of the framers of this Constitution that they want to crate specially favoured bodies which in themselves becomes an Imperium in Imperio, completely independent of the Executive and the legislature and operating as a sort of superior body to the general body politic.

48. The proposals and the decision taken thereon, were brought to our notice, specially the observations made by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar, Ananthasayanam Ayyangar, and finally Dr. B.R. Ambedkar. Dr. B.R. Ambedkar had stated thus:

Finally, BR Ambedkar said:

Mr. President, Sir, I would just like to make a few observations in order to clear the position. Sir, there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creating, what my Friend Mr. T.T. Krishnamachari very aptly called an *"Imperium in Imperio". We do not want to create an Imperium in Imperio, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive. My friends, if they will carefully examine the provisions of the new amendment which I have proposed in place of the original Article 122, will find that the new article proposes to steer a middle course. It refuses to create an Imperium in Imperio, and I think it gives the Judiciary as much independence as is necessary for the purpose of administering justice without fear or favour.*

49. Having extensively brought to our notice, the nature of the debates before the Constituent Assembly, and the decisions taken thereon, the learned Attorney General ventured to demonstrate, that the participation of the executive in the matter of appointment of high constitutional functionaries, "could not-and did not", impinge upon their independence, in the discharge of their duties. Illustratively, reliance was placed on Part IV Chapter V of the Constitution, comprising of 4 Articles of the Constitution (Articles 148 to 151), dealing with the Comptroller and Auditor-General of India. It was submitted, that duties and powers of the Comptroller and Auditor-General of India, delineated in Article 149, revealed, that the position of the Comptroller and Auditor-General of India, was no less in importance vis-à-vis the Judges of the higher judiciary. Pointing out to Article 148, it was his contention, that the appointment of the Comptroller and Auditor-General of India is made by the President. His removal Under Clause (1) of Article 148 could only, in the like manner, be made on the like grounds as a Judge of the Supreme Court of India. Just like a Judge of the Supreme Court, his salary and other conditions of service were to be determined by Parliament by law, and until they were so determined, they were to be as expressed in the Second Schedule. Further more, just like a Judge of the Supreme Court, neither the salary of the Comptroller and Auditor-General, nor his rights in respect of leave of absence, pension or age of retirement, could be varied to his disadvantage, after his appointment. In a similar fashion, as in the case of the Supreme Court, persons serving in the Indian Audit and Accounts Department, were to be subject to such conditions of service, as were determined by law made by Parliament, and till such legislative enactment was made, their conditions of service were determinable by the President, by framing rules, in consultation with the Comptroller and Auditor-General of India. Based on the above, it was contended, that even though the appointment of the Comptroller and Auditor-General of India, was exclusively vested with the executive, there had never been an adverse murmur with reference to his being influenced by the executive. The inference sought to be drawn was, that the manner of "appointment" is irrelevant, to the question of independence. Independence of an authority, according to the learned Attorney General, emerged from the protection of the conditions of the incumbent's service, after the appointment had been made.

50. In the like manner, our attention was drawn to Part XV of the Constitution, pertaining to elections. It was submitted, that Article 324 vested the superintendence, direction and control of elections to the Parliament, and the Legislatures of every State, and election to the offices of President and Vice-President, with the Election Commission. The Election Commission in terms of Article 324(2) was comprised of the Chief Election Commissioner, and such number of other Election Commissioners as the President may from time to time fix. It was submitted, that the appointment of the Chief Election Commissioner, and the other Election Commissioners, was to be made by the President, and was subject to the provisions of law made by Parliament. It was further pointed out, that Under Article 324(5), the conditions of service and the tenure of the office of the Election Commissioners (and the Regional Commissioners) is regulated in the manner, as the President may by rules determine. Of course, subject to, enactment of law by Parliament. So as to depict similarity with the matter under consideration, it was contended, that the proviso Under Article 324(5) was explicit to the effect, that the Chief Election Commissioner could not be removed from his office, except in like manner, and on like grounds, as a Judge of the Supreme Court. And further more, that the conditions of service of the Chief Election Commissioner, could not be varied to his disadvantage, after his appointment. It was contended, that the Indian experience had been, that the Chief Election Commissioner, and the other Election Commissioners, had functioned with absolute independence, and that, their functioning remained unaffected, despite the fact that their appointment had been made, by the executive. It was submitted, that impartiality/independence emerged from the protection of the conditions of service of the incumbent after his appointment, and not by the method or manner of his appointment.

51. It was also the contention of the learned Attorney General, that implicit in the scheme of the Constitution, was a system of checks and balances, wherein the different constitutional functionaries participate in various processes of selection, appointment, etc., so as to ensure, that the constitutional functionaries did not exceed, the functions/responsibilities assigned to them. To substantiate the above contention, reliance was placed on the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, wherein this Court observed as under:

577. We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process; (per Bose, J., in Bidi Supply Co. v. Union of India MANU/SC/0040/1956 : AIR 1956 SC 479). The observations of Patanjali Sastri, C.J., in State of Madras v. V.G. Row MANU/SC/0013/1952 : AIR 1952 SC 196, which have become locus classicus need alone be repeated in this connection. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution". The Respondents have also contended that to let the court have judicial review over constitutional amendments would mean involving the court in political questions. To this the answer may be given in the words of Lord Porter in Commonwealth of Australia v. Bank of New South Wales 1950 AC 235 at 310:

The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand

and citizens and States on the other, it is only the Court that can decide the issue, it is vain to invoke the voice of Parliament.

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation to a degree as was found in Ranasinghe's case. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances. Apart from that, as already stated, the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution (per Haldane, L.C. in Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. 1914 AC 237 and Ex Parte Walsh and Johnson; In Re: Yates (1925) 37 CLR 36 at p.58. The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the Legislature conferred by the Constitution would always be a question of interpretation of the Constitution. It may be added that at no stage the Respondents have contested the proposition that the validity of a constitutional amendment can be the subject of review by this Court. The Advocate-General of Maharashtra has characterised judicial review as undemocratic. That cannot, however, be so in our Constitution because of the provisions relating to the appointment of judges, the specific restriction to which the fundamental rights are made subject, the deliberate exclusion of the due process clause in Article 21 and the affirmation in Article 141 that judges declare but not make law. To this may be added the none too rigid amendatory process which authorises amendment by means of 2/3 majority and the additional requirement of ratification.

The Court's attention was also invited to the observations recorded in Bhim Singh v. Union of India MANU/SC/0327/2010 : (2010) 5 SCC 538:

77. Another contention raised by the Petitioners is that the Scheme violates the principle of separation of powers under the Constitution. The concept of separation of powers, even though not found in any particular constitutional provision, is inherent in the polity the Constitution has adopted. The aim of separation of powers is to achieve the maximum extent of accountability of each branch of the Government.

78. While understanding this concept, two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability.

79. In Ram Jawaya Kapur v. State of Punjab MANU/SC/0011/1955 : AIR 1955 SC 549, this Court held that: (AIR p. 556, para 12)

12. ...The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law.

80. In Kesavananda Bharati v. State of Kerala MANU/SC/0445/1973 : (1973) 4 SCC 225, and later in Indira Nehru Gandhi v. Raj Narain MANU/SC/0303/1975 : (1976) 3 SCC 321, this Court declared separation of powers to be a part of the basic structure of the Constitution. In Kesavananda Bharati case Shelat and Grover, JJs. in SCC para 577 observed the precise nature of the concept as follows: (SCC p. 452)

577. ... There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in Ranasinghe case. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances.

and conclusion No. 5, which is reproduced as under:

...

(5) Indian Constitution does not recognise strict separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of one branch is taken over by another branch, leading to a removal of checks and balances.

Last of all, the learned Attorney General placed reliance on State of U.P. v. Jeet S. Bisht MANU/SC/7702/2007 : (2007) 6 SCC 586, wherein this Court held:

78. Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

52. The learned Attorney General emphasized, that there was a very serious and sharp cleavage of opinion on the subject, which is being canvassed before this Court. Relying on the judgment

rendered by in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, he pointed out, that in the aforesaid judgment, this Court had arrived at the conclusion, that the term "consultation" could not be deemed to be "concurrence", with reference to Article 222. In conjunction with the above, he invited our attention to the judgment in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, wherein a seven-Judge Bench, which was dealing with a controversy relating to Judges of subordinate courts, and the impact of Article 311, had examined the question whether the President was to act in his individual capacity, i.e., at his own discretion; or he was liable to act on the aid and advice of the Council of Ministers, as mandated Under Article 74. Reliance was placed on the following observations from the aforesaid judgment:

149. In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue.

53. It was submitted, that the aforesaid observations as were recorded in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, were relied upon in the Second Judges case. This Court, it was pointed out, had clarified that the observations recorded in paragraph 149 in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, were merely in the nature of an *obiter*. It was submitted, that the aforesaid observations in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, were also noticed in paragraph 383 (at page 665), wherein it was sought to be concluded, that the President, for all practical purposes, should be construed, as the concerned Minister or the Council of Ministers. Having noticed the constitutional provisions regarding "consultation" with the judiciary, this Court had expressed, that the Government was bound by such counsel. Reference was then made to the judgment of this Court in the First Judges case, wherein it was held, that "consultation" did not include "concurrence", and further, that the power of appointment of Judges Under Article 124, was vested with the President, and also, that the President could override the views of the consultees. Last of all, to substantiate his submission(s) pertaining to the cleavage of opinion, reliance was placed on the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, wherein a thirteen-Judge Bench of this Court, had held, with reference to the power of amendment Under Article 368, that the concept of "basic structure", was a limitation, to the otherwise plenary power of amendment of the Constitution.

54. In his effort to persuade us, to refer the instant matter, to a nine-Judge Bench (or, to a still larger Bench), the learned Attorney General placed reliance on Suraz India Trust v. Union of India MANU/SCOR/70411/2012 : (2012) 13 SCC 497, and invited our attention to the following:

3. Shri A.K. Ganguli, learned Senior Advocate, has submitted that the method of appointment of a Supreme Court Judge is mentioned in Article 124(2) of the Constitution of India which states:

124. (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

It may be noted that there is no mention:

(i) of any Collegium in Article 124(2).

(ii) The word used in Article 124(2) is "consultation", and not "concurrence".

(iii) The President of India while appointing a Supreme Court Judge can consult any Judge of the Supreme Court or even the High Court as he deems necessary for the purpose, and is not bound to consult only the five senior most Judges of the Supreme Court.

4. That by the judicial verdicts in the aforesaid two cases, Article 124(2) has been practically amended, although amendment to the Constitution can only be done by Parliament in accordance with the procedure laid down in Article 368 of the Constitution of India.

5. That Under Article 124(2) while appointing a Supreme Court Judge, the President of India has to consult the Chief Justice of India, but he may also consult any other Supreme Court Judge and not merely the four senior most Judges. Also, the President of India can even consult a High Court Judge, whereas, according to the aforesaid two decisions the President of India cannot consult any Supreme Court Judge other than the four senior most Judges of the Supreme Court, and he cannot consult any High Court Judge at all.

6. Shri Ganguli submits that the matter is required to be considered by a larger Bench as the petition raises the following issues of constitutional importance:

(1) Whether the aforesaid two verdicts viz. the seven-Judge Bench and nine-Judge Bench decisions of this Court referred to above really amount to amending Article 124(2) of the Constitution?

(2) Whether there is any "Collegium" system for appointing the Supreme Court or High Court Judges in the Constitution?

(3) Whether the Constitution can be amended by a judicial verdict or can it only be amended by Parliament in accordance with Article 368?

(4) Whether the constitutional scheme was that the Supreme Court and High Court Judges can be appointed by mutual discussions and mutual consensus between the judiciary and the executive; or whether the judiciary can alone appoint Judges of the Supreme Court and High Courts?

(5) Whether the word "consultation" in Article 224 means "concurrence"?

(6) Whether by judicial interpretation words in the Constitution can be made redundant, as appears to have been done in the aforesaid two decisions which have made consultation with the High Court Judges redundant while appointing a Supreme Court Judge despite the fact that it is permissible on the clear language of Article 124(2)?

(7) Whether the clear language of Article 124(2) can be altered by judicial verdicts and instead of allowing the President of India to consult such Judges of the Supreme Court as he deems necessary (including even junior Judges) only the Chief Justice of India and four senior most Judges of the Supreme Court can alone be consulted while appointing a Supreme Court Judge?

(8) Whether there was any convention that the President is bound by the advice of the Chief Justice of India, and whether any such convention (assuming there was one) can prevail over the clear language of Article 124(2)?

(9) Whether the opinion of the Chief Justice of India has any primacy in the aforesaid appointments?

(10) Whether the aforesaid two decisions should be overruled by a larger Bench?

7. Mr. G.E. Vahanvati, learned Attorney General for India, supports the Petitioner contending that the aforesaid judgments require reconsideration. However, he also submits:

(a) A writ petition Under Article 32 is not maintainable at the behest of a trust as the trust cannot claim violation of any of its fundamental rights;

(b) The Petitioner has no *locus standi* to seek review of the judgments of this Court. In fact, a petition Under Article 32 of the Constitution does not lie to challenge the correctness of a judicial order; and

(c) A Bench of two Judges cannot examine the correctness of the judgment of a nine-Judge Bench.

(d) A Bench of two Judges cannot refer the matter to the larger Bench of nine Judges or more, directly.

xxx

11. However, Mr. Ganguli dealing with the issue of locus standi of the Trust has submitted that the petition may not be maintainable but it should be entertained because it raises a large number of substantial questions of law. In order to fortify his submission he places reliance upon a recent Constitution Bench judgment of this Court in B.P. Singhal v. Union of India MANU/SC/0350/2010 : (2010) 6 SCC 331 wherein while dealing with the issue of removal of Governors, this Court held as under: (SCC p. 346, para 15) "15. The Petitioner has no locus to maintain the petition in regard to the prayers claiming relief for the benefit of the individual Governors. At all events, such prayers no longer survive on account of passage of time. However, with regard to the general question of public importance referred to the Constitution Bench, touching upon the scope of Article 156(1) and the limitations upon the doctrine of pleasure, the Petitioner has the necessary locus.

Thus, Mr. Ganguli submits that considering the gravity of the issues involved herein, the matter should be entertained.

12. While dealing with the issue of reference to the larger Bench, Mr. Ganguli has placed a very heavy reliance on the recent order of this Court dated 30-3-2011 in Mineral Area Development Authority v. SAIL MANU/SC/0342/2011 : (2011) 4 SCC 450, wherein considering the issue of interpretation of the constitutional provisions and validity of the Act involved therein, a three-Judge Bench presided over by the Hon'ble Chief Justice has referred the matter to a nine-Judge Bench.

13. At this juncture, Mr. Ganguli as well as Mr. Vahanvati have submitted that even at the stage of preliminary hearing for admission of the petition, the matter requires to be heard by a larger Bench as this matter has earlier been dealt with by a three-Judge Bench and involves very complicated legal issues.

14. In view of the above, we place the matter before the Hon'ble the Chief Justice for appropriate directions.

It was pointed out, that when the above matter was placed before a three-Judge Bench of this Court, the same was dismissed on the ground of locus standi. Yet, since the above order was passed in the absence of the Petitioner trust, an application had been moved for recall of the above order. It was his assertion, that whether or not a recall order was passed with reference to the questions raised, it was apparent, that a Bench of this Court has already expressed the view, that the conclusions drawn in the Second and Third Judges cases, need a relook.

55. Finally, to support the above suggestions, the Court's attention was drawn to the observations recorded by H.M. Seervai in the 4th edition of his book "Constitutional Law of India" wherein, with reference to the Second Judges case, very strong and adverse views were expressed. The aforesaid views are contained in paragraphs 25.448 to 25.497. For reasons of brevity, it is not possible for us to extract the same herein. Suffice it to state, that the submissions advanced by the learned Attorney General, as have been detailed in the foregoing paragraphs, were more or less, in accord with the views expressed by H.M. Seervai.

56. In order to contend, that it was open to this Court, to make a reference for reconsideration of the matters already adjudicated upon, the learned Attorney General, invited our attention to Jindal Stainless Limited v. State of Haryana MANU/SC/0260/2010 : (2010) 4 SCC 595.

6. In Keshav Mills Co. Ltd. v. CIT MANU/SC/0102/1965 : AIR 1965 SC 1636...(AIR pp. 1643-44, para 23) a Constitution Bench of this Court enacted the circumstances in which a reference to the larger Bench would lie. It was held that in revisiting and revising its earlier decision, this Court should ask itself whether in the interest of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised? Whether on the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision bearing on the point not noticed? What was the impact of the error in the previous decision on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief?

7. According to the judgment in Keshav Mills case these and other relevant considerations must be born in mind whenever this Court is called upon to exercise its jurisdiction to review and revisit its earlier decisions. of course, in Keshav Mills case a caution was sounded to the effect that frequent exercise of this Court of its power to revisit its earlier decisions may incidentally tend to make the law uncertain and introduce confusion which must be avoided. But, that is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error.

8. In conclusion, in Keshav Mills case, this Court observed that it is not possible to lay down any principles which should govern the approach of the Court in dealing with the question of revisiting its earlier decision. It would ultimately depend upon several relevant considerations.

9. In Central Board of Dawoodi Bohra Community v. State of Maharashtra MANU/SC/1069/2004 : (2005) 2 SCC 673...,

a Constitution Bench of this Court observed that, in case of doubt, a smaller Bench can invite attention of Chief Justice and request for the matter being placed for hearing before a Bench larger than the one whose decision is being doubted.

57. With the above noted submissions, learned Attorney General for India concluded his address, for the review of the judgments in the Second and Third Judges cases.

58. Mr. K.K. Venugopal, learned senior Counsel, commenced his submissions by highlighting the main features of the Constitution (67th Amendment) Bill, 1990. He invited our attention, to the proposed amendments of Articles 124, 217, 222 and 231, and more particularly, to the insertion of Part XIIIA in the Constitution, under the heading "National Judicial Commission". Article 307A was proposed as the singular Article in Part XIIIA. Based on the constitution of the National Judicial Commission, it was asserted, that the above Bill, had been introduced, to negate the effect of the judgment of this Court in the First Judges case. It was submitted, that when the aforesaid Bill was introduced in the Parliament, the Supreme Court Bar Association, of which Mr.

Venugopal himself was the then President, organized a seminar on 1.9.1990, for the purpose of debating the pros and cons of the Constitution (67th Amendment) Bill, 1990. It was submitted, that a large number of speakers had taken part in the debate and had made important suggestions. The above suggestions, drafted as a resolution of the seminar, were placed before the House, and were passed either unanimously or with an overwhelming majority. It was submitted, that the aforesaid resolutions were forwarded to the Chief Justice of India, through a covering letter dated 5.10.1990. It was pointed out, that resolutions were also passed, at the conclusion of the Chief Justices' Conference, held between 31.8.1990 and 2.9.1990, wherein also, the provisions of the Constitution (67th Amendment) Bill, 1990, were deliberated upon. It was submitted, that he had made a compilation of the resolutions passed at the Chief Justices Conference, and the conclusions drawn in the Second Judges case, which would give a bird's eye view, of the views expressed. The compilation to which learned Counsel drew our attention, is being extracted hereunder:

...(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.

(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.

(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention....

Based on the aforesaid compilation, it was contended, that the judgment rendered in the Second Judges case, completely obliterated three salient features of Article 124. Firstly, under the original Article 124, the main voice was that of the President. It was submitted, that the voice of the President was totally choked in the Second Judges case. Secondly, Article 124, as it was originally framed, vested the executive with primacy, in respect of the appointments to the higher judiciary, whereas the position was reversed by the Second Judges case, by vesting primacy with the

judiciary. Thirdly, the role of the Chief Justice of India, which was originally, that of a mere consultee, was "turned over its head", by the decision in the Second Judges case. Now, the collegium of Judges, headed by the Chief Justice of India, has been vested with the final determinative authority for making appointments to the higher judiciary. And the President is liable to "concur", with the recommendations made. Based on the above assertions, it was the submission of the learned Counsel, that by wholly misconstruing Article 124, the Supreme Court had assumed the entire power of appointment. And the voice of the executive had been completely stifled. It was submitted, that the judiciary had performed a legislative function, while interpreting Article 124. It was asserted, that originally the founding fathers had the power to frame the provisions of the Constitution, and thereafter, the Parliament had the power to amend the Constitution in terms of Article 368. It was submitted, that the role assigned to the Constituent Assembly, as also to the Parliament, has been performed by this Court in the Second Judges case. It was submitted, that all this had been done in the name of "judicial independence". The above logic was sought to be seriously contested by asserting, that judicial independence could not stand by itself, there was something like judicial accountability also, which had to be kept in mind.

59. It was also contended, that the judiciary had taken upon itself, the exclusive role of making appointments to the higher judiciary, without taking into consideration any of the stakeholders. It is submitted, that the judiciary is meant for the litigating community, and therefore, the litigating community was liable to be vested with some role in the matter of appointments to the higher judiciary. Likewise, it was pointed out, that there were about ten lakhs lawyers in this country. They also had not been given any say in the matter. Even the Bar Associations, which have the ability to represent the lawyers' fraternity, had been excluded from any role in the process of appointments. It was highlighted, that under the old system, all the above stakeholders, had an opportunity to make representations to the executive, in the matter of appointments to the higher judiciary. But, that role has now been totally excluded, by the interpretation placed on Article 124, by the Second Judges case. The Court's attention was drawn to conclusion No. 14 drawn in the summary of conclusions (recorded in paragraph 486, in the Second Judges case) that the majority opinion in the First Judges case, insofar as, it had taken a contrary view, relating to primacy of the role of the Chief Justice of India, in matters of appointments and transfers, and the justiciability of these matters, as well as, in relation to judge-strength, did not commend itself as being the correct view. Accordingly it was concluded, that the relevant provisions of the Constitution including the constitutional scheme must now be construed, understood and implemented, in the manner indicated in the conclusions drawn in the Second Judges case. The above determination, according to learned Counsel, was absolutely misconceived, as the same totally negated the effect of Article 74, which required the President to act only on the aid and advice of the Council of Ministers. According to learned Counsel, the President would now have to act as per the dictate of the Chief Justice of India and the collegium of Judges. It was submitted, that it was impermissible in law, for a party to make a decision in its own favour. This, according to learned Counsel, is exactly what the Supreme Court had done in the Second Judges case. It was contented, that the impugned constitutional amendment was an effort at the behest of the Parliament, to correct the above historical aberration. Learned Counsel concluded, by asserting, that there were two Houses of Parliament under the Constitution, but the Supreme Court in the Second Judges case, had acted as a third House of Parliament, namely, as the House of corrections. In the background of the aforesaid factual position, it was submitted, that when the Union of India and the States which

ratified the Constitution (99th Amendment) Act, seek reconsideration of the Second Judges case, was it too much, that the Union and the States were asking for?

60. Following the submissions noticed hereinabove, we heard Mr. K. Parasaran, Senior Advocate, who also supported the prayer made by the learned Attorney General. It was submitted, that the appointment of Judges had nothing to do with "independence of the Judge" concerned, or the judicial institution as a whole. It was submitted, that subsequent to their appointment to the higher judiciary, the conditions of service of Judges of the High Court and the Supreme Court were securely protected. Thereafter, the independence of the Judges depended on their judicial conscience, and the executive has no role to play therein.

61. It was asserted, that the Judges who expressed the majority view, in the Second Judges case, entertained a preconceived notion about the "basic structure", even before hearing commenced, in the Second Judges case. In this behalf, he placed reliance on the resolutions passed at the conclusion of the Chief Justices' Conference, held between 31.8.1990 and 2.9.1990. It was asserted, that the controversy had not been adjudicated on the basis of an independent assessment, of the views expressed in the Constituent Assembly debates (with reference to the text of Article 124). It was submitted, that the interpretation rendered on Article 124, expressly ignored, not only the simple language indicating the procedure for appointment of Judges, but also the surrounding constitutional provisions. According to learned senior Counsel, the judiciary had encroached into the executive power of appointment of Judges. This amounted to encroaching into a constitutional power, reserved for the executive, by the Constitution. It was asserted, that the power of amendment of the Constitution, vested in the Parliament Under Article 368, was only aimed at keeping the Constitution in constant repair. It was submitted, that the aforesaid power vested with the Parliament, could not have been exercised by the Supreme Court, by substituting the procedure of appointment of Judges, in the manner the Supreme Court felt. It was submitted, that in the Second Judges case, as also, the Third Judges case, the Supreme Court had violated the "basic structure", by impinging upon legislative power. It was contended, that it was imperative for this Court to have a re-look at the two judgments, so as to determine, whether there had been a trespass by the judiciary, into the legislative domain. And, if this Court arrives at the conclusion, that such was the case, it should strike down its earlier determination. It was further submitted, that the majesty of the Constitution, must be maintained and preserved at all costs, and there should be no hesitation in revisiting any earlier judgment, so as to correct an erroneous decision. With the aforesaid observations, learned Counsel commended the Bench, to accept the prayer made by the learned Attorney General, and to make a reference for reconsideration of the judgments rendered by this Court, in the Second and Third Judges cases, to a Bench with an appropriate strength.

62. Mr. Ravindra Srivastava, Senior Advocate, also supported the submissions for reference to a larger Bench. It was submitted, that the conclusions drawn by this Court in the Second Judges case, and the Third Judges case, were liable to be described as doubtful, because a large number of salient facts, had not been taken into consideration, when the same were decided. It was the contention of the learned Counsel, that the submissions advanced on behalf of the Petitioners, on merits, could not be supported by the text of the constitutional provisions, and that, the Petitioners' reliance squarely based on the majority judgment in the Second Judges case, as was further explained in the Third Judges case, was seriously flawed. It was submitted, that the thrust of the submissions advanced on behalf of the Petitioners on merits had been, not only that the

consultation with the Chief Justice of India was mandatory, but the opinion of the collegium of Judges was binding on the executive. It was asserted, that neither of the above requirements emerged from the plain reading of Article 124. It was asserted, that the basis of the learned Counsel representing the Petitioners, to assail the impugned constitutional amendment, as also the NJAC Act, was squarely premised on the above determination. It was asserted, that the conclusion of primacy of the judiciary, in the matter of appointment of Judges in the higher judiciary, could not be supported by any text of the original constitutional provisions. It was, accordingly suggested, that it was absolutely imperative to correct the majority view expressed in the Second Judges case.

63. According to the learned Counsel, the primary objection raised, at the behest of the Petitioners, opposing the reconsideration of the decision rendered in the Second Judges case, was based on the observations recorded in paragraph 10 of the Third Judges case, wherein the statement of the then Attorney General for India, had been recorded, that the Union of India was not seeking a review or reconsideration of the judgment in the Second Judges case. It was submitted, that the aforesaid statement, could not bar the plea of reconsideration, for all times to come. It was further submitted, that the above statement would not bind the Parliament. It was contended, that the statement to the effect, that the Union of India, was not seeking a review or reconsideration of the Second Judges case, should not be understood to mean, that it was impliedly conceded, that the Second Judges case had been correctly decided. It was pointed out, that the advisory jurisdiction Under Article 143, which had been invoked by the Presidential Reference made on 23.7.1998, requiring this Court to render the Third Judges case, was neither appellate nor revisionary in nature. In this behalf, learned Counsel placed reliance on Re: Cauvery Water Disputes Tribunal MANU/SC/0097/1992 : 1993 Supp (1) SCC 96(II), wherein it was held, that an order passed by the Supreme Court, could be reviewed only when its jurisdiction was invoked Under Article 137 of the Constitution (read with Rule 1 of Order 40 of the Supreme Court Rules, 1946). And that, a review of the judgment rendered by the Supreme Court, in the Second Judges case, could not be sought through a Presidential Reference made Under Article 143. In fact, this Court in the above judgment, had gone on to conclude, that if the power of review was to be read in Article 143, it would be a serious inroad into the "independence of the judiciary". It was therefore submitted, that the statement of the then Attorney General, during the course of hearing of the Third Judges case, could not be treated as binding, for all times to come, so as to deprive the executive and the legislature from even seeking a review of the judgments rendered. It was therefore contended, that it was implicit while discharging its duty, that this Court was obliged to correct the errors of law, which may have been committed in the past. Learned Counsel contended, that a perusal of the judgment of this Court in the Subhash Sharma case MANU/SC/0643/1990 : 1991 Supp (1) SCC 574, clearly brought out, that no formal request was made to this Court for reconsideration of the legal position declared by this Court in the First Judges case. Yet, this Court, on its own motion, examined the correctness of the First Judges case, and *suo motu*, made a reference of the matter, to a nine-Judge Bench, to reconsider the law declared in the First Judges case.

64. While pointing to the reasons for reconsideration of the law laid down by this Court in the Second Judges case (read with the Third Judges case), learned senior Counsel, asserted, that the essence of Article 124, had been completely ignored by the majority view. learned senior Counsel, accordingly, invited our attention to the scheme of Article 124(2) and canvassed and summarized the following salient features emerging therefrom:

i. The authority to appoint Judges of the higher judiciary was vested in the President.

ii. The above power of appointment by the President, was subject to only one condition, namely, 'consultation'.

iii. The above consultation was a two-fold-one which in the opinion of the President may be deemed necessary, and the other which was mandatory.

iv. The mandatory consultation was with the Chief Justice of India. The consultation which the President may have 'if deemed necessary for the purpose, was with judges of the Supreme Court and also of the High Courts in the states, as may be felt appropriate.

v. There was no limitation on the power, scope and ambit of the President to engage in consultation, he may not only with the judges of the Supreme Court, but may also consult judges of High Courts as he may deem necessary, for this purpose.

vi. There was also no limitation on the President's power of consultation. He could consult as many judges of the Supreme Court and High Courts which he deemed necessary for the purpose.

vii. Having regard to the object and purpose of the appointment of a judge of the Supreme Court, and that, such appointment was to the highest judicial office in the Republic, was clearly intended to be broad-based, interactive, informative and meaningful, so that, the appointment was made of the most suitable candidate.

viii. This aspect of the power of consultation of the President, as had been provided had been completely ignored in the majority judgment in Second Judges' case. And the focus has been confined only to the consultation, with the Chief Justice of India.

ix. The interpretation of the consultative process, and the procedure laid down, in the majority judgment in the Second Judges case, that the President's power of consultation, was all-pervasive had been 'circumscribed', having been so held expressly in paragraph 458 (by Justice J.S. Verma) in the Second Judges' case.

x. The majority judgment has focused only on the requirement of consultation by the President with the Chief Justice of India which is requirement of proviso, ignoring the substantive part.

xi. The collegium system had been evolved, for consultation with the Chief Justice of India on the interpretation, that for purposes of consultation with the Chief Justice of India, the CJI alone as an individual would not matter, but would mean in plurality i.e. his collegium. But this is an interpretation only of the proviso and not of the substantive part of Article 124(2).

xii. The collegium system was evolved for consultation with the CJI and his colleagues in particular in fixed numbers as laid down in the judgment.

xiii. The whole provision for consultation by the President of India with the judges of the Supreme Court and the High Court, had thus been stultified, in ignorance of the substantive part of Article 124(2), and as such, one was constrained to question the majority judgment as being *'per incuriam'*.

65. According to learned senior Counsel, a perusal of the judgment in the Subhash Sharma case MANU/SC/0643/1990 : 1991 Supp (1) SCC 574 would reveal, that reconsideration of the judgments in the First Judges case, was only on two issues. Firstly, the status and importance of consultation, and the primacy of the position of the Chief Justice of India. And secondly, the justiceability of fixation, of the judge-strength of a Court. It was asserted, that no other issue was referred for reconsideration. This assertion was sought to be supported with the following observations, noticed in the Subhash Sharma case MANU/SC/0643/1990 : 1991 Supp (1) SCC 574:

49. .....Similarly, the writ application filed by Subhash Sharma for the reasons indicated above may also be disposed of without further directions. As and when necessary the matter can be brought before the court. As in our opinion the correctness of the majority view in S.P. Gupta case [MANU/SC/0080/1981 : (1981) Supp. SCC 87] should be considered by a larger bench we direct the papers of W.P. No. 1303 of 1987 to be placed before the learned Chief Justice for constituting a bench of nine Judges to examine the two questions we have referred to above, namely, the position of the Chief Justice of India with reference to primacy and, secondly, justiciability of fixation of Judge strength.

It was asserted, that there was no scope or occasion for the Bench hearing the Second Judges case, to rewrite the Constitution, on the subject of appointment of Judges to the higher judiciary. It was submitted, that the observations recorded in the Second Judges case, in addition to the above mentioned two issues, were liable to be regarded as *obiter dicta*. In the Second Judges case, the *ratio decidendi*, according to learned Counsel, was limited to the declaration of the legal position, only on the two issues, referred to the larger Bench for consideration. Thus viewed, it was asserted, that all other conclusions recorded in the Second Judges case, on issues other than the two questions referred for reconsideration, cannot legitimately be described as binding law Under Article 141. To support the above contention, reliance was placed on Kerala State Science and Technology Museum v. Rambal Co. MANU/SC/3410/2006 : (2006) 6 SCC 258, wherein this Court held as under:

8. It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to. (See Kesho Nath Khurana v. Union of India [MANU/SC/0227/1980 : (1981) Supp. SCC 38], Samaresh Chandra Bose v. District Magistrate, Burdwan [MANU/SC/0224/1972 : (1972) 2 SCC 476] and K.C.P. Ltd. v. State Trading Corporation of India [MANU/SC/1241/1995 : (1995) Supp. (3) SCC 466].

66. Learned senior Counsel submitted, that in the Second Judges case, this Court assigned an innovative meaning to the words "Chief Justice of India", by holding that the term "Chief Justice of India" in Article 124, included a plurality of Judges, and not the individual Chief Justice of India. This, according to learned Counsel, was against the plain meaning and text of Article 124.

Learned Counsel, went on to add, that this Court in the Second Judges case, had laid down an inviolable rule of seniority, for appointment of Chief Justice of India. It also laid down, the rules and the norms, for transfer of Judges and Chief Justices, from one High Court to another. It also concluded, that any transfer of a Judge or Chief Justice of a High Court, made on the recommendation of the Chief Justice of India, would be deemed to be non-punitive. In sum and substance, learned Counsel contended, that the Second Judges case, laid down a new structure, in substitution to the role assigned to the Chief Justice of India. The conclusions recorded in the Second Judges case, according to learned Counsel, could not be described as a mere judicial interpretation. It was asserted, that the same was nothing short of judicial activism (or, judicial legislation).

67. Learned senior Counsel then invited the Court's attention, to the principles laid down for reconsideration, or review of a previous judgment. For this he pointedly invited the Court's attention to Bengal Immunity Co. Ltd. v. State of Bihar MANU/SC/0083/1955 : (1955) 6 SCR 603, Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay MANU/SC/0052/1974 : (1974) 2 SCC 402, and Union of India v. Raghubir Singh MANU/SC/0619/1989 : (1989) 2 SCC 754. Learned Counsel also referred to Pradeep Kumar Biswas v. Indian Institute of Chemical Biology MANU/SC/0330/2002 : (2002) 5 SCC 111, wherein it was observed:

61. Should Sabhajit Tewary MANU/SC/0059/1975 : (1975) 1 SCC 485

... still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the facts leading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and

[t]here is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public." [Bengal Immunity Co. Ltd. v. State of Bihar MANU/SC/0083/1955 : AIR 1955 SC 661, 672] (AIR p. 672, para 15) Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake.

It was pointed out, that in the Second Judges case, S. Ratnavel Pandian, J. had observed as follows:

17. So it falls upon the superior courts in a large measure the responsibility of exploring the ability and potential capacity of the Constitution with a proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without sacrificing its essential features and basic principles which lie at the root of Indian democracy. However, in this process, our main objective should be to make the Constitution quite understandable by stripping away the mystique and enigma that permeates and surrounds it and by clearly focussing on the reality of the working of the constitutional system and scheme so as to make the justice delivery system more effective and resilient. Although frequent overruling of decisions will make the law uncertain and later decisions unpredictable and this Court would not normally like to reopen the issues which are concluded, it is by now well settled by a line of judicial pronouncements that it is emphatically the province and essential duty of the superior courts to

review or reconsider their earlier decisions, if so warranted under compelling circumstances and even to overrule any questionable decision, either fully or partly, if it had been erroneously held and that no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception grown along with the passage of time. This power squarely and directly falls within the rubric of judicial review or reconsideration.

It was submitted, that Kuldip Singh, J., in the Second Judges case, had recorded as follows:

320. It is no doubt correct that the rule of stare decisis brings about consistency and uniformity but at the same time it is not inflexible. Whether it is to be followed in a given case or not is a question entirely within the discretion of this Court. On a number of occasions this Court has been called upon to reconsider a question already decided. The Court has in appropriate cases overruled its earlier decisions. The process of trial and error, lessons of experience and force of better reasoning make this Court wiser in its judicial functioning. In cases involving vital constitutional issues this Court must feel to bring its opinions into agreement with experience and with the facts newly ascertained. Stare decisis has less relevance in constitutional cases where, save for constitutional amendments, this Court is the only body able to make needed changes. Re-examination and reconsideration are among the normal processes of intelligent living. We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice.

Based on the above, learned Counsel summarized his assertions as follows. Firstly, the real constitutional question, requiring re-examination, was in the context of appointment of Judges to the higher judiciary, was the interpretation of Article 74. Because the Second Judges case, had made a serious inroad into the power of the President which was bound to be exercised in consonance with Article 74. It was contended, that the functioning of the President, in the absence of the aid and advice of the Council of Ministers, could not just be imagined under the scheme of the Constitution. And therefore, the substitution of the participatory role of the Council of Ministers (or, the Minister concerned), with that of the Chief Justice of India in conjunction with his collegium, was just unthinkable. And secondly, that the First Judges case, was wrongly overruled, and the correct law for appointment of Judges, vis-à-vis the role of the executive, was correctly laid down in the First Judges case, by duly preserving the "independence of the judiciary". It was submitted, that reference to a larger Bench was inevitable, because it was not open to the Respondents, to canvass the above submission, before a five-Judge Bench."

68. Mr. Harish N. Salve and Mr. T.R. Andhyarujina, learned senior Counsel, addressed the Court separately. Their submissions were however similar. It was their contention, that a Constitutional Court revisits constitutional issues, from time to time. This, according to learned Counsel, has to be done because the Constitution is a living document, and needed to be reinvented, to keep pace with the change of times. It was submitted, that this may not be true for other branches of law, wherein judgments are not revisited, because the Courts were expected to clearly and unambiguously follow the principle of stare decisis, with reference to laws dealing with private rights. Insofar as the controversy in hand is concerned, it was submitted, that the conclusions recorded by this Court in the Second and Third Judges cases, indicated doubtful conclusions, because a large number of salient facts (as have been recorded above), had not been taken into

consideration. It was submitted, that expediency in a controversy like the one in hand, should be in favour of the growth of law. It was submitted, that in their view this was one such case, wherein the issue determined by this Court in the Second and Third Judges cases, needed to be re-examined by making a reference to a larger Bench. Learned Counsel pointed out, that the submissions made in the different petitions filed before this Court, were not supported by the text of any constitutional provision, but only relied on the legal position declared by this Court, in the above two cases. In such an important controversy, according to learned Counsel, this Court should not be hesitant in revisiting its earlier judgments. Mr. Andhyarujina posed a query, namely, can we decide the controversy raised in the present case, without the reconsideration of the judgments in the Second and Third Judges cases? He answered the same through another query, how can appointments of Judges be by Judges? The above position was again posed differently, by putting forth a further query, can primacy rest with the Chief Justice of India in the matter of appointment of Judges to the higher judiciary?

69. Mr. Ajit Kumar Sinha, learned Senior Advocate, in support of his contention, that the matter needed to be heard by a larger Bench, placed reliance on Mineral Area Development Authority v. Steel Authority of India MANU/SC/0342/2011 : (2011) 4 SCC 450, and invited our attention to question No. 5 of the reference made by this Court:

5. Whether the majority decision in State of W.B. v. Kesoram Industries Ltd. [MANU/SC/0038/2004 : (2004) 10 SCC 201] could be read as departing from the law laid down in the seven-Judge Bench decision in India Cement Ltd. v. State of T.N. [MANU/SC/0226/1989 : (1990) 1 SCC 12)?

It was pointed out, that the above question came to be framed because in State of West Bengal v. Kesoram Industries Ltd. MANU/SC/0038/2004 : (2004) 10 SCC 201, this Court by a majority of 4:1 had clarified the judgment rendered by a seven-Judge Bench of this Court in India Cement Ltd. v. State of Tamil Nadu MANU/SC/0226/1989 : (1990) 1 SCC 12. This Court had to frame the above question, and refer the matter to a nine-Judge Bench. Learned Counsel, then placed reliance on Sub-Committee of Judicial Accountability v. Union of India MANU/SC/0007/1992 : (1992) 4 SCC 97, wherein this Court had observed as under:

5. Even if the prayer is examined as if it were an independent substantive proceeding, the tests apposite to such a situation would also not render the grant of this relief permissible. The considerations against grant of this prayer are obvious and compelling. Indeed, no co-ordinate bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercised or judgment rendered in a cause or matter before another co-ordinate bench....

In view of the above, it was contended, that this Court while examining the merits of the controversy in hand, was bound to rely on the judgments in the Second and Third Judges cases, to record its conclusions. Referring to the factual position narrated above, it was submitted, that this Court would not be in a position to effectively adjudicate on the issues canvassed, till the matter was referred to a nine-Judge Bench (or even, a still larger Bench).

70. Mr. Ranjit Kumar, learned Solicitor General of India submitted, that he would support the claim for reference to a larger Bench, by relying upon two judgments, and say no more. First and

foremost, he placed reliance on the Bengal Immunity Company Ltd. case MANU/SC/0083/1955 : (1955) 6 SCR 603, which it was pointed out, had considered the judgment in State of Bombay v. United Motors (India) Ltd. MANU/SC/0095/1953 : (1953) SCR 1069. The matter, it was submitted, came to be referred to a seven-Judge Bench, to decide whether the judgment needed to be reconsidered. This process, according to learned Solicitor General, need to be adopted in the present controversy as well, so as to take a fresh call on the previous judgments. Learned Solicitor General then placed reliance on Keshav Mills Co. Ltd. v. Commissioner of Income-tax, Bombay North MANU/SC/0102/1965 : (1965) 2 SCR 908, wherein a seven-Judge Bench held as under:

In dealing with the question as to whether the earlier decisions of this Court in the New Jehangir Mills case MANU/SC/0074/1959 : (1960) 1 SCR 249 and the Petlad Co. Ltd. case MANU/SC/0201/1962 : (1963) Supp. SCR 871, should be reconsidered and revised by us, we ought to be clear as to the approach which should be adopted in such cases. Mr. Palkhivala has not disputed the fact that, in a proper case, this Court has inherent jurisdiction to reconsider and revise its earlier decisions, and so, the abstract question as to whether such a power vests in this Court or not need not detain us. In exercising this inherent power, however, this would naturally like to impose certain reasonable limitations and would be reluctant to entertain pleas for the reconsideration and revision of its earlier decisions, unless it is satisfied that there are compelling and substantial reasons to do so. It is general judicial experience that in matters of law involving question of constructing statutory or constitutional provisions, two views are often reasonably possible and when judicial approach has to make a choice between the two reasonably possible views, the process of decision-making is often very difficult and delicate. When this Court hears appeals against decisions of the High Courts and is required to consider the propriety or correctness of the view taken by the High Courts on any point of law, it would be open to this Court to hold that though the view taken by the High Court is reasonably possible, the alternative view which is also reasonably possible is better and should be preferred. In such a case, the choice is between the view taken by the High Court whose judgment is under appeal, and the alternative view which appears to this Court to be more reasonable; and in accepting its own view in preference to that of the High Court, this Court would be discharging its duty as a Court of Appeal. But different considerations must inevitably arise where a previous decision of this Court has taken a particular view as to the construction of a statutory provision as, for instance, Section 66(4) of the Act. When it is urged that the view already taken by this Court should be reviewed and revised, it may not necessarily be an adequate reason for such review and revision to hold that though the earlier view is a reasonably possible view, the alternative view which is pressed on the subsequent occasion is more reasonable. In reviewing and revising its earlier decision, this Court should ask itself whether in interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When this Court decides questions of law, its decisions are, Under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified.

It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations:-What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court.

...The principle of stare decisis, no doubt, cannot be pressed into service in cases where the jurisdiction of this Court to reconsider and revise its earlier decisions is invoked; but nevertheless, the normal principle that judgments pronounced by this Court would be final, cannot be ignored, and unless considerations of a substantial and compelling character make it necessary to do so, this Court should and would be reluctant to review and revise its earlier decisions. That, broadly stated, is the approach which we propose to adopt in dealing with the point made by the learned Attorney-General that the earlier decisions of this Court in the New Jehangir Mills case, MANU/SC/0074/1959 : (1960) 1 SCR 249 and the Petlad Company Ltd. case, MANU/SC/0201/1962 : (1963) Supp. 1 SCR 871, should be reconsidered and revised.

Let us then consider the question of construing Section 66(4) of the Act. Before we do so, it is necessary to read Sub-section (1), (2) and (4) of Section 66. Section 66(1) reads thus:-

Within sixty days of the date upon which he is served with notice of an order Under Sub-section (4) of Section 33, the Assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the Assessee by a fee of one hundred rupees, require the appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court....

Based on the above, it was asserted, on the basis of the factual and legal position projected by the learned Attorney General, that the position declared by this Court in the Second Judges case, as also, in the Third Judges case, was clearly erroneous. It was submitted, that the procedure evolved by this Court for appointment of Judges to the higher judiciary having miserably failed, not because of any defect in the independence of the procedure prescribed, but because of the "intra-dependence of the Judges", who took part in discharging the responsibilities vested in the collegium of Judges, certainly required a re-examination.

71. It is apparent from the submissions advanced at the hands of the learned Counsel representing the Union of India and the different State Governments, that rather than choosing to respond to the

assertions made with reference to the constitutional validity of the Constitution (99th Amendment) Act, 2014 and the NJAC Act, had collectively canvassed, that the present five-Judge Bench should refer the present controversy for adjudication to a Bench of nine or more Judges, which could effectively revisit, if necessary, the judgments rendered by this Court in the Second and Third Judges cases. In view of the aforesaid consideration, we are of the view, that the observations recorded by this Court, in the Suraz India Trust case MANU/SCOR/70411/2012 : (2012) 13 SCC 497, as also, the fact that the same is pending before this Court, is immaterial. Consequent upon the instant determination by us, the above matter will be liable to be disposed of, in terms of the instant judgment.

IV. OBJECTION BY THE PETITIONERS, TO THE MOTION FOR REVIEW:

72. Mr. Fali S. Nariman, disagreed with the suggestion that the controversy in hand, needed to be decided by a larger Bench. It was his pointed submission, that the issue canvassed had been improperly pressed, by overlooking certain salient features, which had necessarily to be taken into consideration, before a prayer for reference to a larger Bench could be agitated. It was submitted, that all the learned Counsel representing the Respondents had overlooked the fact, that the interpretation of Article 124 of the Constitution, was rendered in the first instance, by a seven-Judge Bench in the First Judges case. It was pointed out, that the law declared by this Court in the First Judges case, having been doubted, the matter was referred for reconsideration, before the nine-Judge Bench, which delivered the judgment in the Second Judges case. It was pointed out, that the prayer for revisitation, which is being made at the behest of the learned Counsel representing the Union of India and the different participating States, was clearly unacceptable, because the legal position declared by this Court in the First Judges case had already been revisited in the Second Judges case by a larger Constitution Bench. Not only that, it was asserted, that when certain doubts arose about the implementation of the judgment in the Second Judges case, a Presidential Reference was made Under Article 143, resulting in the re-examination of the matter, at the hands of yet another nine-Judge Bench, where the Union of India clearly expressed its stand in paragraph 11 as under:

11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

It was submitted, that thereupon, the matter was again examined and the declared legal position in the Second Judges case, was reiterated and confirmed, by the judgment rendered in the Third Judges case. Premised on the aforesaid factual position, learned Counsel raised a poser, namely, how many times, can this Court revisit the same question? It was asserted, that just because such a prayer seems to be the only way out, for those representing the Respondents, the same need not be accepted.

73. Learned senior Counsel pointed out, that the legal position with reference to appointments to the higher judiciary came to be examined and declared, for the first time, in the First Judges case, in 1981. It was submitted, that the aforesaid determination would not have been rendered, had this Court's attention been drawn to the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC

831, during the course of hearing, in the First Judges case. It was submitted, that the position declared by this Court in the First Judges case needed to be revisited, was realized during the hearing of the case in the Subhash Sharma case MANU/SC/0643/1990 : 1991 Supp (1) SCC 574. While examining the justification of the conclusions drawn by this Court, in the First Judges case, the matter was placed for consideration, before a nine-Judge Bench. It was submitted, that all the issues, which have now been raised at the hands of learned senior Counsel representing the Respondents, were canvassed before the Bench hearing the Second Judges case. This Court, in the Second Judges case, clearly arrived at the conclusion, that the earlier judgment rendered in the First Judges case, did not lay down the correct law. It was submitted, that the legal position had been declared in the Second Judges case, by a majority of 7:2.

74. It was submitted, that the minority view, in the Second Judges case, was expressed by A.M. Ahmadi and M.M. Punchhi, JJ., (as they then were). Learned senior Counsel, referred to the observations recorded in the Second Judges case by M.M. Punchhi, J.:

500. Thus S.P. Gupta case, as I view it, in so far as it goes to permit the Executive trudging the express views of disapproval or non-recommendation made by the Chief Justice of India, and for that matter when appointing a High Court Judge the views of the Chief Justice of the High Court, is an act of impermissible deprival, violating the spirit of the Constitution, which cannot he approved, as it gives an unjust and unwarranted additional power to the Executive, not originally conceived of. Resting of such power with the Executive would be wholly inappropriate and in the nature of arbitrary power. The constitutional provisions conceives, as it does, plurality and mutuality, but only amongst the constitutional functionaries and not at all in the extra-constitutional ones in replacement of the legitimate ones. The two functionaries can be likened to the children of the cradle, intimately connected to their common mother--the Constitution. They recognise each other through that connection. There is thus more an obligation towards the tree which bore the fruit rather than to the fruit directly. Watering the fruit alone is pointless ignoring the roots of the tree. The view that the two functionaries must keep distances from each other is counter-productive. The relationship between the two needs to be maintained with more consideration.

xxx

503. A centuries old Baconian example given to describe the plight of a litigant coming to a court of law comes to my mind. It was described that when the sheep ran for shelter to the bush to save itself from rain and hail, it found itself deprived of its fleece when coming out. Same fate for the institution of the Chief Justice of India. Here it results simply and purely in change of dominance. In the post-S.P. Gupta period, the Central Government i.e. the Law Minister and the Prime Minister were found to be in a dominant position and could even appoint a Judge in the higher judiciary despite his being disapproved or not recommended by the Chief Justice of India and likewise by the Chief Justice of a State High Court. Exception perhaps could be made only when the Chief Justice was not emphatic of his disapproval and was non-committed. His stance could in certain circumstance be then treated, as implied consent. These would of course be rare cases. Now in place of the aforesaid two executive heads come in dominant position, the first and the second puisne, even when disagreeing with the Chief Justice of India. A similar position would emerge when appointing a Chief Justice or a Judge of the High Court. Thus in my considered view the

position of the institution of the Chief Justice being singular and unique in character under the Constitution is not capable of being disturbed. It escaped S.P. Gupta case, though in a truncated form, and not to have become totally extinct, as is being done now. Correction was required in that regard in S.P. Gupta, but not effacement.

Pointing to the opinion extracted above, it was asserted, that the action of the executive to put off the recommendation made by the Chief Justice of India (disapproving the appointment of a person, as a Judge of the High Court) would amount to an act of deprival, "violating the sprit of the Constitution". Inasmuch as, the above demeanour/expression, would give an unjust and unwarranted power to the executive, which was not intended by the framers of the Constitution. The Court went on to hold, that the vesting of such power with the executive, would be wholly inappropriate, and in the nature of arbitrary power. It was also noted, that after this Court rendered its decision in the First Judges case, the Law Minister and the Prime Minister were found to be in such a dominant position, that they could appoint a Judge to the higher judiciary, despite his being disapproved (or, even when he was not recommended at all) by the Chief Justice of India (and likewise, by the Chief Justice of the High Court). Thus, in the view of M.M. Punchhi, J., these details had escaped the notice of the authors of the First Judges case, and corrections were required, in that regard, in the said judgment. Accordingly, it was the contention of the learned senior Counsel, that one of the minority Judges had also expressed the same sentiments as had been recorded by the majority, on the subject of primacy of the judiciary in matters regulated Under Articles 124, 217 and 222.

75. It was submitted, that the issue in hand was examined threadbare by revisiting the judgment rendered in the First Judges case, when this Court reviewed the matter through the Second Judges case. It was submitted, that during the determination of the Third Judges case, the then Attorney General for India had made a statement to the Bench, that the Union of India, was not seeking a review or reconsideration of the judgment in the Second Judges case. Even though, the opinion tendered by this Court, consequent upon a reference made to the Supreme Court by the President of India Under Article 143, is not binding, yet a statement was made by Attorney General for India, that the Union of India had accepted as binding, the answers of this Court to the questions set out in the reference. All this, according to learned Counsel, stands recorded in paragraph 11 of the judgment rendered in the Third Judges case. According to learned senior Counsel, it was clearly beyond the purview of the Union of India, to seek a revisit of the Second and Third Judges cases.

76. Besides the position expressed in the foregoing paragraphs, even according to the legal position declared by this Court, it was not open to the Union of India and the State Governments, to require this Court to examine the correctness of the judgments rendered in the Second and Third Judges cases. It was submitted, that such a course could only be adopted, when it was established beyond all reasonable doubt, that the previous judgments were erroneous. Insofar as the instant aspect of the matter is concerned, learned Counsel placed reliance on Lt. Col. Khajoor Singh v. Union of India MANU/SC/0039/1960 : (1961) 2 SCR 828 (Bench of 7 Judges), wherefrom learned Counsel highlighted the following:

We have given our earnest consideration to the language of Article 226 and the two decisions of this Court referred to above. We are of opinion that unless there are clear and compelling reasons, which cannot be denied, we should not depart from the interpretation given in these two cases and

indeed from any interpretation given in an earlier judgment of this Court, unless there is a fair amount of unanimity that the earlier decisions are manifestly wrong. This Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue.

Reference was also made to the Keshav Mills Company Ltd. case MANU/SC/0102/1965 : (1965) 2 SCR 908, wherein a seven-Judge Bench of this Court held as under:

It must be conceded that the view for which the learned Attorney-General contends is a reasonably possible view, though we must hasten to add that the view which has been taken by this Court in its earlier decisions is also reasonably possible. The said earlier view has been followed by this Court on several occasions and has regulated the procedure in reference proceedings in the High Courts in this country ever since the decision of this Court in the New Jehangir Mills, MANU/SC/0074/1959 : (1960) 1 SCR 249, was pronounced on May 12, 1959. Besides, it is somewhat remarkable that no reported decision has been cited before us where the question about the construction of Section 66(4) was considered and decided in favour of the Attorney-General's contention. Having carefully weighed the pros and cons of the controversy which have been pressed before us on the present occasion, we are not satisfied that a case has been made out to review and revise our decisions in the case of the New Jehangir Mills and the case of the Petlad Company Ltd. MANU/SC/0201/1962 : (1963) Supp. 1 SCR 871. That is why we think that the contention raised by Mr. Palkhivala must be upheld. In the result, the order passed by the High Court is set aside and the matter is sent back to the High Court with a direction that the High Court should deal with it in the light of the two relevant decisions in the New Jehangir Mills and the Petlad Company Ltd.

While referring to Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh MANU/SC/0397/1979 : (1980) 1 SCC 223, our attention was drawn to the following observations recorded by the five-Judge Bench:

28. We are somewhat surprised that the argument about the invalidity of the Act on the score that it is with respect to a controlled industry' dies hard, despite the lethal decision of this Court in Ch. Tika Ramji case MANU/SC/0008/1956 : [1956] SCR 393. Enlightened litigative policy in the country must accept as final the pronouncements of this Court by a Constitution Bench unless the subject be of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. Stare decisis is not a ritual of convenience but a rule with limited exceptions, Pronouncements by Constitution Benches should not be treated so cavalierly as to be revised frequently. We cannot devalue the decisions of this Court to brief ephemerality which recalls the opinion expressed by Justice Roberts of the U.S. Supreme Court in Smith v. Allwright 321 U.S. 649 at 669 (1944) "that adjudications of the Court were rapidly gravitating 'into the same class as a restricted railroad ticket, good for this day and train only'"".

Learned Counsel while relying upon Gannon Dunkerley and Co. v. State of Rajasthan MANU/SC/0437/1993 : (1993) 1 SCC 364 (Bench of 5 Judges), referred to the following:

28...We are not inclined to agree. The principles governing reconsideration of an earlier decision are settled by the various decisions of this Court. It has been laid down: "This Court should not, accept when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue." (See: Lt. Col. Khajoor Singh v. The Union of India MANU/SC/0039/1960 : (1961) 2 SCR 828). In Keshav Mills Company Ltd. v. CIT MANU/SC/0102/1965 : (1965) 2 SCR 908, it has been observed: (SCR pp. 921-22)

...but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified.

xxx

30. Having regard to the observations referred to above and the stand of the parties during the course of arguments before us, we do not consider it appropriate to reopen the issues which are covered by the decision in Builders' Association case....

Having referred to the above judgments, it was submitted, that it was clearly misconceived for the learned Counsel for the Respondents, to seek a reference of the controversy, to a larger Bench for the re-examination of the decisions rendered by this Court in the Second and Third Judges cases.

77. Yet another basis for asserting, that the prayer made at the behest of the learned Counsel representing the Respondents for revisiting the judgments rendered by this Court in the Second and Third Judges cases, was canvassed on the ground that the observations recorded by this Court in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831 (in paragraph 149) could neither be understood as stray observations, nor be treated as *obiter dicta*. The reasons expressed by the learned senior Counsel on the above issue were as follows:

(i) In the other case relating to the independence of the judiciary (re transfer of High Court Judges)-UOI v. Sankal Chand Seth MANU/SC/0065/1977 : (1977) 4 SCC 193 (5J)-as to whether a Judge of a High Court can be transferred to another High Court without his consent, it was decided by majority that he could be: the majority consisted of Justice Chandrachud, Justice Krishna Iyer and Justice Murtaza Fazal Ali.

(ii) The judgment of Justice Krishna Iyer (on behalf of himself and Justice Murtaza Fazal Ali in Sankal Chand Seth-[with which Bhagwati, J. said he was "entirely in agreement"] reads as follows (paras 115-116):

115. The next point for consideration in this appeal is as to the nature, ambit and scope of consultation, as appearing in Article 222(1) of the Constitution, with the Chief Justice of India. The consultation, in order to fulfil its normative function in Article 222(1), must be a real, substantial and effective consultation based on full and proper materials placed before the Chief Justice by the Government. Before giving his opinion the Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the Judge concerned if he has any real personal difficulty or any humanitarian ground on which his transfer may not be

directed. Such grounds may be of a wide range including his health or extreme family factors. It is not necessary for the Chief Justice to issue formal notice to the Judge concerned but it is sufficient--although it is not obligatory--if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or through any other means which the Chief Justice thinks safe, fair and reasonable. Where a proposal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion. Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power Under Article 222 cannot be exercised whimsically or arbitrarily. In the case of Chandramouleshwar Prasad v. Patna High Court MANU/SC/0495/1969 : (1969) 3 SCC 36, while interpreting the word "consultation" as appearing in Article 233 of the Constitution this Court observed as follows:

Consultation with the High Court Under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion....We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the prosper the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation.

In Samsher Singh's case MANU/SC/0073/1974 : AIR 1974 SC 2192, one of us has struck the same chord. It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India. It seems to us that the word, 'consultation' has been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries are concerned in the matter, namely, the President and the Chief Justice of India. of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly.

(iii) Justice Chandrachud (in the course of his judgment) agreeing-in paragraph 41 of Sankalchand Seth followed Shamsher Singh (para 149).

Based on the aforesaid, it was the assertion of the learned senior Counsel that even if the contention advanced by the counsel for the Respondents was to be accepted, namely, that the decisions rendered by this Court in the above two cases were required to be re-examined, by a reference to a larger Bench, still the observations recorded in paragraph 149 in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831 would continue to hold the field, as the review of the same had not been sought.

V. <u>THE CONSIDERATION:</u>

I.

78. In the scheme of the Constitution, the Union judiciary has been dealt in Chapter IV of Part V, and the High Courts in the States, as well as, the Subordinate-courts have been dealt with in Chapters V. and VI respectively, of Part VI. The provisions of Parts V. and VI of the Constitution, with reference to the Union and the States judiciaries including Subordinate-courts, have arisen for interpretative determination by this Court, on several occasions. We may chronologically notice the determination rendered by this Court, with reference to the above Parts, especially those dealing with the executive participation, in the matters relating to the Union judiciary, the High Courts in the States, and the Subordinate-courts. During the course of hearing, our attention was invited to the following:

(i) Samsher Singh v. State of Punjab MANU/SC/0073/1974 : (1974) 2 SCC 831-rendered by a five-Judge Bench,

(ii) Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977 : (1977) 4 SCC 193-rendered by a five-Judge Bench,

(iii) S.P. Gupta v. Union of India MANU/SC/0080/1981 : 1981 Supp SCC 87-rendered by a seven-Judge Bench,

(iv) Supreme Court Advocates-on-Record Association v. Union of India MANU/SC/0073/1994 : (1993) 4 SCC 441-rendered by a nine-Judge Bench, and

(v) Re: Special Reference No. 1 of 1998 MANU/SC/1146/1998 : (1998) 7 SCC 739-rendered by a nine-Judge Bench.

This Court on no less than five occasions, has examined the controversy which we are presently dealing with, through Constitution Benches. In the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, it was concluded, that in all conceivable cases, consultation with the highest dignitary in the Indian judiciary-the Chief Justice of India, will and should be accepted by the Government of India, in matters relatable to the Chapters and Parts of the Constitution referred to above. In case, it was not so accepted, the Court would have an opportunity to examine, whether any other extraneous circumstances had entered into the verdict of the concerned Minister or the Council of Ministers (headed by the Prime Minister), whose views had prevailed in ignoring the counsel given by the Chief Justice of India. This Court accordingly concluded, that in practice, the last word must belong to the Chief Justice of India. The above position was also further clarified, that rejection of the advice tendered by the Chief Justice of India, would ordinarily be regarded as prompted by oblique considerations, vitiating the order. In a sense of understanding, this Court in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, is seen to have read the term "consultation" expressed in Articles 124 and 217 as conferring primacy to the opinion tendered by the Chief Justice. When the matter came to be examined in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, with reference to Article 222, another Constitution Bench of this Court, reiterated the conclusion drawn in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, by holding, that in all conceivable cases, "consultation" with the Chief Justice of India, should be accepted, by the Government of India. And further, that in the event of any departure, it would be open to a court to examine whether, any other circumstances had entered into the verdict of the executive. More importantly, this Court

expressly recorded an ardent hope, that the exposition recorded in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, would not fall on deaf ears. No doubt can be entertained, that yet again, this Court read the term "consultation" as an expression, conveying primacy in the matter under consideration, to the view expressed by the Chief Justice. The solitary departure from the above interpretation, was recorded by this Court in the First Judges case, wherein it came to be concluded, that the meaning of the term "consultation" could not be understood as "concurrence". In other words, it was held, that the opinion tendered by the Chief Justice of India, would not be binding on the executive. The function of appointment of Judges to the higher judiciary, was described as an executive function, and it was held by the majority, that the ultimate power of appointment, unquestionably rested with the President. The opinion expressed by this Court in the First Judges case, was doubted in the Subhash Sharma case MANU/SC/0643/1990 : 1991 Supp (1) SCC 574, which led to the matter being re-examined in the Second Judges case, at the hands of a nine-Judge Bench, which while setting aside the judgment rendered in the First Judges case, expressed its opinion in consonance with the judgments rendered in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831 and the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193. This Court expressly concluded, in the Second Judges case, that the term "consultation" expressed in Articles 124, 217 and 222 had to be read as vesting primacy with the opinion expressed by the Chief Justice of India, based on a participatory consultative process. In other words, in matters involving Articles 124, 217 and 222, primacy with reference to the ultimate power of appointment (or transfer) was held, to be vesting with the judiciary. The above position came to be reconsidered in the Third Judges case, by a nine-Judge Bench, wherein the then learned Attorney General for India, made a statement, that the Union of India was not seeking a review, or reconsideration of the judgment in the Second Judges case, and further, that the Union of India had accepted the said judgment, and would treat the decision of this Court in the Second Judges case as binding. It is therefore apparent, that the judiciary would have primacy in matters regulated by Articles 124, 217 and 222, was conceded, by the Union of India, in the Third Judges case.

79. We have also delineated hereinabove, the views of the Judges recorded in the First Judges case, which was rendered by a majority of 4:3. Not only, that the margin was extremely narrow, but also, the views expressed by the Judges were at substantial variance, on all the issues canvassed before the Court. The primary reason for recording the view of each of the Judges in the First Judges case hereinbefore, was to demonstrate differences in the deductions, inferences and the eventual outcome. As against the above, on a reconsideration of the matters by a larger Bench in the Second Judges case, the decision was rendered by a majority of 7:2. Not only was the position clearly expressed, there was hardly any variance, on the issues canvassed. So was the position with the Third Judges case, which was a unanimous and unambiguous exposition of the controversy. We, therefore, find ourselves not inclined to accept the prayer for a review of the Second and Third Judges cases.

80. Having given pointed and thoughtful consideration to the proposition canvassed at the hands of the learned Counsel for the Respondents, we are constrained to conclude, that the issue of primacy of the judiciary, in the matter of appointment and transfer of Judges of the higher judiciary, having been repeatedly examined, the prayer for a re-look/reconsideration of the same, is just not made out.

This Court having already devoted so much time to the same issue, should ordinarily not agree to re-examine the matter yet again, and spend more time for an issue, already well thrashed out. But time has not been the constraint, while hearing the present cases, for we have allowed a free debate, and have taken upon ourselves the task of examining the issues canvassed. Yet, the remedy of review must have some limitations. Mr. Fali S. Nariman, learned senior Counsel, is right, in his submission, that the power of review was exercised and stood expended when the First Judges case was reviewed by a larger Bench in the Second Judges case. And for sure, it was wholly unjustified for the Union of India, which had conceded during the course of hearing of the Third Judges case, that it had accepted as binding, the decision rendered in the Second Judges case, to try and reagitate the matter all over again. The matter having been revisited, and the position having been conceded by the Union of India, it does not lie in the mouth of the Union of India, to seek reconsideration of the judicial declaration, in the Second and Third Judges cases. Therefore, as a proposition of law, we are not inclined to accept the prayer of the Union of India and the other Respondents, for a re-look or review of the judgments rendered in the Second and Third Judges cases. All the same, as we have indicated at the beginning of this order, because the matter is of extreme importance and sensitivity, we will still examine the merits of the submissions advanced by learned Counsel.

II.

81. The most forceful submission advanced by the learned Attorney General, was premised on the Constituent Assembly debates. In this behalf, our attention was invited to the views expressed by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar, Ananthasayanam Ayyangar and Dr. B.R. Ambedkar. It was pointed out by the learned Attorney General, that the Members of the Constituent Assembly feared, that the process of selection and appointment of Judges to the higher judiciary should not be exclusively vested with the judiciary. The process of appointment of Judges by Judges, it was contended, was described as *Imperium in Imperio*, during the Constituent Assembly debates. In responding to the above observations, Dr. B.R. Ambedkar while referring to the contents of Article 122 (which was renumbered as Article 124 in the Constitution), had assured the Members of the Constituent Assembly, that the drafted Article had adopted the middle course, while refusing to create an *Imperium in Imperio*, in such a manner, that the "independence of the judiciary" would be fully preserved. The exact text of the response of Dr. B.R. Ambedkar, has been extracted in paragraph 30 above.

82. It was the contention of the learned Attorney General, that despite the clear intent expressed during the Constituent Assembly debates, not to create an Imperium in Imperio, the Second and Third Judges cases had done just that. It was submitted, that in the process of selection and appointment of Judges to the higher judiciary, being followed since 1993, Judges alone had been appointing Judges. It was also contended, that the Constitution contemplates a system of checks and balances, where each pillar of governance is controlled by checks and balances, exercised by the other two pillars. It was repeatedly emphasized, that in the present system of selection and appointment of Judges to the higher judiciary, the executive has no role whatsoever. It was accordingly the contention of the Respondents, that the manner in which Articles 124, 217 and 222 had been interpreted in the Second and Third Judges cases, fell foul of the intent of the Constituent Assembly. This, according to the learned Counsel for the Respondents, was reason enough, to revisit and correct, the view expressed in the Second and Third Judges cases.

83. It is not possible for us to accept the contention advanced at the hands of the learned Counsel for the Respondents. Consequent upon the pronouncement of the judgments in the Second and Third Judges cases, a Memorandum of Procedure for Appointment of Judges and Chief Justices to the Higher Judiciary was drawn by the Ministry of Law, Justice and Company Affairs on 30.6.1999. The Memorandum of Procedure aforementioned, is available on the website of the above Ministry. The above Memorandum of Procedure has been examined by us. In our considered view, the Memorandum of Procedure provides for a participatory role, to the judiciary as well as the political-executive. Each of the above components are responsible for contributing information, material and data, with reference to the individual under consideration. While the judicial contribution is responsible for evaluating the individual's professional ability, the political-executive is tasked with the obligation to provide details about the individual's character and antecedents. Our analysis of the Memorandum of Procedure reveals, that the same contemplates *inter alia* the following steps for selection of High Court Judges:

Step 1: The Chief Justice of the concerned High Court has the responsibility of communicating, to the Chief Minister of the State concerned, names of persons to be selected for appointment. Details are furnished to the Chief Minister, in terms of the format appended to the memorandum. Additionally, if the Chief Minister desires to recommend name(s) of person(s) for such appointment, he must forward the same to the Chief Justice for his consideration.

Step 2: Before forwarding his recommendations to the Chief Minister, the Chief Justice must consult his senior colleagues comprised in the High Court collegium, regarding the suitability of the names proposed. The entire consultation must be in writing, and these opinions must be sent to the Chief Minister along with the Chief Justice's recommendation. Step 3: Copies of recommendations made by the Chief Justice of the High Court, to the Chief Minister of the concerned State, require to be endorsed, to the Union Minister of Law and Justice, to the Governor of the concerned State, and to the Chief Justice of India.

Step 4: Consequent upon the consideration of the names proposed by the Chief Justice, the Governor of the concerned State, as advised by the Chief Minister, would forward his recommendation along with the entire set of papers, to the Union Minister for Law and Justice.

Step 5: The Union Minister for Law and Justice would, at his own, consider the recommendations placed before him, in the light of the reports, as may be available to the Government, in respect of the names under consideration. The proposed names, would be subject to scrutiny at the hands of the Intelligence Bureau, through the Union Ministry of Home Affairs. The Intelligence Bureau would opine on the integrity of the individuals under consideration.

Step 6: The entire material, as is available with the Union Minister for Law and Justice, would then be forwarded to the Chief Justice of India for his advice. The Chief Justice of India would, in consultation with his senior colleagues comprised in the Supreme Court collegium, form his opinion with regard to the persons recommended for appointment.

Step 7: Based on the material made available, and additionally the views of Judges of the Supreme Court (who were conversant with the affairs of the concerned High Court), the Chief Justice of India in consultation with his collegium of Judges, would forward his recommendation, to the

Union Minister for Law and Justice. The above noted views of Judges of the Supreme Court, conversant with the affairs of the High Court, were to be obtained in writing, and are to be part of the compilation incorporating the recommendation.

Step 8: The Union Minister for Law and Justice would then put up the recommendation made by the Chief Justice of India, to the Prime Minister, who would examine the entire matter in consultation with the Union Minister for Law and Justice, and advise the President, in the matter of the proposed appointments.

84. We shall venture to delineate the actual consideration at the hands of the executive, in the process of selection and appointment of High Court Judges, in terms of the Memorandum of Procedure, as well as, the actual prevailing practice.

85. Steps 1 to 3 of the Memorandum of Procedure reveal, that names of persons to be selected for appointment are forwarded to the Chief Minister and the Governor of the concerned State. On receipt of the names, the Chief Minister discharges the onerous responsibility to determine the suitability of the recommended candidate(s). Specially the suitability of the candidate(s), pertaining to integrity, social behaviour, political involvement and the like. Needless to mention, that the Chief Minister of the concerned State, has adequate machinery for providing such inputs. It would also be relevant to mention, that the consideration at the hands of the Governor of the concerned State, is also not an empty formality. For it is the Governor, through whom the file processed by the Chief Minister, is forwarded to the Union Minister for Law and Justice. There have been occasions, when Governors of the concerned State, have recorded their own impressions on the suitability of a recommended candidate, in sharp contrast with the opinion expressed by the Chief Minister. Whether or not the Governors participate in the above exercise, is quite a separate matter. All that needs to be recorded is, that there are instances where Governors have actively participated in the process of selection of Judges to High Courts, by providing necessary inputs. Record also bears testimony to the fact, that the opinion expressed by the Governor, had finally prevailed on a few occasions.

86. The participation of the executive, with reference to the consideration of a candidate recommended by the Chief Justice of High Court, continues further at the level of the Government of India. The matter of suitability of a candidate, is also independently examined at the hands of the Union of Minister for Law and Justice. The Ministry of Law and Justice has a standard procedure of seeking inputs through the Union Ministry of Home Affairs. Such inputs are made available by the Union Ministry for Home Affairs, by having the integrity, social behaviour, political involvement and the like, examined through the Intelligence Bureau. After the receipt of such inputs, and the examination of the proposal at the hands of the Union Minister for Law and Justice, the file proceeds to the Chief Justice of India, along with the details received from the quarters referred to above.

87. After the Chief Justice of India, in consultation with his collegium of Judges recommends the concerned candidate for elevation to the High Court, the file is processed for a third time, by the executive. On this occasion, at the level of the Prime Minister of India. During the course of the instant consideration also, the participation of the executive is not an empty formality. Based on the inputs available to the Prime Minister, it is open to the executive, to yet again return the file to

the Chief Justice of India, for a reconsideration of the proposal, by enclosing material which may have escaped the notice of the Chief Justice of India and his collegium of Judges. There have been occasions, when the file returned to the Chief Justice of India for reconsideration, has resulted in a revision of the view earlier taken, by the Chief Justice of India and his collegium of Judges. It is therefore clear, that there is a complete comity of purpose between the judiciary and the political-executive in the matter of selection and appointment of High Court Judges. And between them, there is clear transparency also. As views are exchanged in writing, views and counter-views, are in black and white. Nothing happens secretly, without the knowledge of the participating constitutional functionaries.

88. It is not necessary for us to delineate the participation of the judiciary in the process of selection and appointment of Judges to the High Courts. The same is apparent from the steps contemplated in the Memorandum of Procedure, as have been recorded above. Suffice it to state, that it does not lie in the mouth of the Respondents to contend, that there is no executive participation in the process of selection and appointment of Judges to High Courts.

89. The Memorandum of Procedure, for selection of Supreme Court Judges, provides for a similar participatory role to the judiciary and the political-executive. The same is not being analysed herein, for reasons of brevity. Suffice it to state, that the same is also a joint exercise, with a similar approach.

90. For the reasons recorded by us hereinabove, it is not possible for us to accept, that in the procedure contemplated under the Second and Third Judges cases, Judges at their own select Judges to the higher judiciary, or that, the system of Imperium in Imperio has been created for appointment of Judges to the higher judiciary. It is also not possible for us to accept, that the judgment in the Second Judges case, has interfered with the process of selection and appointment of Judges to the higher judiciary, by curtailing the participatory role of the executive, in the constitutional scheme of checks and balances, in view of the role of the executive fully described above. We find no merit in the instant contention advanced at the hands of the Respondents.

III.

91. The learned Attorney General placed emphatic reliance on the Constituent Assembly debates. It was sought to be asserted, that for an apposite understanding of the provisions of the Constitution, it was imperative to refer to the Constituent Assembly debates, which had led to formulating and composing of the concerned Article(s). Reliance was accordingly placed on the debates, which had led to the drafting of Article 124. It was submitted, that the conclusions drawn by this Court, in the Second Judges case, overlooked the fact, that what had been expressly canvassed and raised by various Members of the Constituent Assembly, and rejected on due consideration, had been adopted by the judgment in the Second Judges case. It was, therefore, the contention of the learned Attorney General, that the judgments rendered in the Second and Third Judges cases recorded a view, diagonally opposite the intent and resolve of the Constituent Assembly.

92. For reasons of brevity, it is not essential for us to extract herein the amendments sought by some of the eminent Members of the Constituent Assembly in the draft provision (to which our

attention was drawn). At this stage, we need only to refer to paragraph 772 (already extracted above), from the Indra Sawhney case MANU/SC/0104/1993 : 1992 Supp (3) SCC 217, in order to record, that it is not essential to refer to individual views of the Members, and that, the view expressed at the end of the debate by Dr. B.R. Ambedkar, would be sufficient to understand what had prevailed, and why. Suffice it to state, that during the course of the Constituent Assembly debates, it was expressly proposed that the term "consultation" engaged in Articles 124 and 217, be substituted by the word "concurrence". The proposed amendment was however rejected by Dr. B.R. Ambedkar. Despite the above, this Court in the Second and Third Judges cases had interpreted the word "consultation" in Clause (2) of Article 124, and Clause (1) of Article 217, as vesting primacy in the judiciary, something that was expressly rejected, during the Constituent Assembly debate. And therefore, the contention advanced on behalf of the Respondents was, that this Court had interpreted the above provisions, by turning the Constituent Assembly's intent and resolve, on its head. It was submitted, that the erroneous interpretation recorded in the Second Judges case, was writ large, even on a cursory examination of the debates.

93. We are of the view, that it would suffice, for examining the above contention, to extract herein a relevant part of the response of Dr. B.R. Ambedkar, to the above noted amendments, in the provisions noted above:

Now, Sir, with regard to the numerous amendments that have been moved, to this article, there are really three issues that have been raised. The first is, how are the Judges of the Supreme Court to be appointed? Now, grouping the different amendments which are related to this particular matter, I find three different proposals. The first proposal is that the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. That is one view. The other view is that the appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States. With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, offices of the Supreme Court as well as other offices of the State shall be made only with the concurrence of the Senate in the United States. It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment. With regard to the question of

the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent, person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition.

The first paragraph extracted hereinabove reveals, that there were three proposals on the issue of appointment of Judges to the Supreme Court. The first proposal was, that the Judges of the Supreme Court should not be appointed by the President in "consultation" with the Chief Justice of India, but should be appointed with the "concurrence" of the Chief Justice of India. The second proposal was, that like in the United States, appointments of Judges to the Supreme Court, should be made by the President, subject to confirmation by the Parliament, through a two-thirds majority. The third proposal was, that Judges of the Supreme Court, should be appointed by the President in "consultation" with the Rajya Sabha.

94. The response of Dr. B.R. Ambedkar to all the suggestions needs a very close examination, inasmuch as, even though rightfully pointed out by the Attorney General, and the learned Counsel representing the Respondents, all the issues which arise for consideration in the present controversy, were touched upon in the above response. Before dwelling upon the issue, which strictly pertained to the appointment of Judges, Dr. B.R. Ambedkar expressed in unequivocal terms, that the unanimous opinion of the Constituent Assembly was, that "our judiciary must be independent of the executive". The same sentiment was expressed by Dr. B.R. Ambedkar while responding to K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar and Anathasayanam Ayyangar (extracted in paragraph 30 above) wherein he emphasized, that "...there is no doubt that the House in general, has agreed that the independence of the Judiciary, from the Executive should be made as clear and definite as we could make it by law..." The above assertion made while debating the issue of appointment of Judges to the Supreme Court, effectively acknowledges, that the appointment of Judges to the higher judiciary, has a direct nexus to the issue of "independence of the judiciary". It therefore, does not lie in the mouth of the Respondents to assert, that the subject of "appointment" would not fall within the domain/realm of "independence of the judiciary".

95. While responding to the second and third proposals referred to above, Dr. B.R. Ambedkar, cited the manner of appointment of Judges in Great Britain, and pointed out, that in the United Kingdom appointments were made by the Crown, without any kind of limitation, and as such, fell within the exclusive domain of the executive. Referring to the system adopted in the United States, he noted, that Judges of the Supreme Court in the United States, could only be appointed with the "concurrence" of the Senate. Suffice it to state, that the latter reference was to a process of appointment which fell within the domain of the legislature (because the Senate is a legislative chamber in the bicameral legislature of the United States, which together with the U.S. House of Representatives, make up the U.S. Congress). It is important to notice, that he rejected both the systems, where appointments to the higher judiciary were made by the executive, as well as, by the legislature. Dr. B.R. Ambedkar therefore, very clearly concluded the issue by expressing, that

it would be improper to leave the appointments of Judges to the Supreme Court, to be made by the President-the executive (i.e., on the aid and advice of the Council of Ministers, headed by the Prime Minister). In the words of Dr. B.R. Ambedkar, it would be dangerous to leave such appointments in the hands of the executive of the day, without any kind of reservation and limitation. We are therefore satisfied, that the word "consultation" expressed in Articles 124 and 217, was contemplated by the Constituent Assembly, to curtail the free will of the executive. If that was the true intent, the word "consultation" could never be assigned its ordinary dictionary meaning. And Article 124 (or Article 217) could never be meant to be read with Article 74. It is therefore not possible for us to accept, that the main voice in the matter of selection and appointment of Judges to the higher judiciary was that of the President (expressed in the manner contemplated Under Article 74). Nor is it possible to accept that primacy in the instant matter rested with the executive. Nor that, the judiciary has been assigned a role in the matter, which was not contemplated by the provisions of the Constitution. It is misconceived for the Respondents to assert, that the determination of this Court in the Second and Third Judges cases was not interpretative in nature, but was factually legislative. Dr. B.R. Ambedkar, therefore rejected, for the same reasons, the proposal that appointments of Judges to the Supreme Court should be made by the legislature. But the reason he expressed in this behalf was most apt, namely, the procedure of appointing Judges, by seeking a vote of approval by one or the other (or both) House(s) of Parliament would be cumbersome. More importantly, Dr. B.R. Ambedkar was suspicious and distrustful of the possibility of the appointments being directed and impacted by "political pressure" and "political consideration", if the legislature was involved. We are therefore satisfied, that when the Constituent Assembly used the term "consultation", in the above provisions, its intent was to limit the participatory role of the political-executive in the matter of appointments of Judges to the higher judiciary.

96. It was the view of Dr. B.R. Ambedkar, that the draft article had adopted a middle course, by not making the President-the executive "the supreme and absolute authority in the matter of making appointments" of Judges. And also, by keeping out the legislators for their obvious political inclinations and biases, which render them unsuitable for shouldering the responsibility. We are therefore of the view, that the judgments in the Second and Third Judges cases cannot be blamed, for not assigning a dictionary meaning to the term "consultation". If the real purpose sought to be achieved by the term "consultation" was to shield the selection and appointment of Judges to the higher judiciary, from executive and political involvement, certainly the term "consultation" was meant to be understood as something more than a mere "consultation".

97. It is clear from the observations of Dr. B.R. Ambedkar, that the President-the executive was required by the provisions of the draft article, to consult "...persons, who were *ex hypothesi*, well qualified to give proper advice on the matter of appointment of Judges to the Supreme Court." The response of Dr. B.R. Ambedkar in a singular paragraph (extracted above), leaves no room for any doubt that Article 124, in the manner it was debated, was clearly meant to propound, that the matter of "appointments of Judges was an integral part of the "independence of the judiciary". The process contemplated for appointment of Judges, would therefore have to be understood, to be such, as would be guarded/shielded from political pressure and political considerations.

98. The paragraph following the one, that has been interpreted in the foregoing paragraphs, also leaves no room for any doubt, that the Constituent Assembly did not desire to confer the Chief

Justice of India, with a veto power to make appointments of Judges. It is therefore that a consultative process was contemplated Under Article 124, as it was originally drafted. The same mandated consultation not only with the Chief Justice of India, but with other Judges of the Supreme Court and the High Courts. Viewed closely, the judgments in the Second and Third Judges cases, were rendered in a manner as would give complete effect to the observations made by Dr. B.R. Ambedkar with reference to Article 124 (as originally incorporated). It is clearly erroneous for the Respondents to contend, that the consultative process postulated between the President with the other Judges of the Supreme Court or the High Courts in the States, at the discretion of the President, had been done away with by the Second and Third Judges cases. Nothing of the sort. It has been, and is still open to the President, in his unfettered wisdom, to the consultation indicated in Article 124. Additionally, it is open to the President, to rely on the same, during the course of the mandatory "consultation" with the Chief Justice of India. The above, further demonstrates the executive role in the selection of Judges to the higher judiciary, quite contrary to the submission advanced on behalf of the Respondents. We are satisfied, that the entire discussion and logic expressed during the debates of the Constituent Assembly, could be given effect to, by reading the term "consultation" as vesting primacy with the judiciary, on the matter being debated. We are also of the view, that the above debates support the conclusions drawn in the judgments of which review is being sought. For the reasons recorded hereinabove, we find no merit in the submissions advanced by the learned Counsel for the Respondents based on the Constituent Assembly debates.

IV.

99. The consideration in hand, also has a historic perspective. We would venture to examine the same, from experiences gained, after the Constitution became operational i.e., after the people of this country came to govern themselves, in terms of the defined lines, and the distinctiveness of functioning, set forth by the arrangement and allocation of responsibilities, expressed in the Constitution. In this behalf, it would be relevant to highlight the discussion which took place in Parliament, when the Fourteenth Report of the Law Commission on Judicial Reform (1958) was tabled for discussion, in the Rajya Sabha on 24-25.11.1959. Replying to the debate on 24.11.1959, Govind Ballabh Pant, the then Union Home Minister's remarks, as stand officially recorded, were *inter alia* as under:

Sir, so far as appointments to the Supreme Court go, since 1950 when the Constitution was brought into force, nineteen Judges have been appointed and everyone of them was so appointed on the recommendation of the Chief Justice of the Supreme Court. I do not know if any other alternative can be devised for this purpose. The Chief Justice of the Supreme Court is, I think, rightly deemed and believed to be familiar with the merits of his own colleagues and also of the Judges and advocates who hold leading positions in different States. So we have followed the advice of the most competent, dependable and eminent person who could guide us in this matter.

Similarly, Sir, so far as High Courts are concerned, since 1950, 211 appointments have been made and out of these except one, i.e., 210 out of 211 were made on the advice, with the consent and concurrence of the Chief Justice of India. And out of the 211, 196 proposals which were accepted by Government had the support of all persons who were connected with this matter. As Hon. Members are aware, under, I think, Article 217, the Chief Justice of the High Court; the Chief

Minister of the State concerned and the Governor first deal with these matters. Then they come to the Home Ministry and are referred by the Ministry to the Chief Justice of India and whatever suggestions or comments he makes are taken into consideration and if necessary, a reference is again made to the Chief Minister and the High Court. But as I said, these 196 appointments were made in accordance with the unanimous advice of the Chief Justice of the High Court, the Chief Minister of the State, the Governor and the Chief Justice of India....

The remarks made by Ashoke Kumar Sen, the then Union Law Minister on 25.11.1959, during the course of the debate pertaining to the Law Commission Report, also need a reference:

...it is my duty to point out to the honourable House again, as I did in the Lok Sabha when the Law Commission first sent an interim report-call it an interim report or some report before the final one-pointing out that Judges have been appointed on extraneous considerations, we gave them the facts and figures concerning all the appointments made since 1950. We drew their pointed attention to the fact that, as the Home Minister pointed out yesterday, except in the case of one Judge out of the 176 odd Judges appointed since 1950, all were appointed on the advice of the Chief Justice. With regard to the one there was difference of opinion between the local Chief Justice and the Chief Justice of India and the Government accepted the advice of the local Chief Justice rather than the Chief Justice of India. But it was not their nominee. We should have expected the Law Commission, in all fairness, to have dealt with the communication from the Government giving facts of all the appointments not only of the High Courts but of the Supreme Court. I am not saying that they were obliged to do so, but it is only a fair thing to do, namely, when you bring certain accusation in a solemn document like the Law Commission's Report, you should deal with all the arguments for and against. We should have expected in all fairness that these facts ought to have been dealt with. Unfortunately, no facts are set out so that it is impossible to deal with. If it was said that this had been the case with A, this had been the case with B or C, it would have been easy for us to deal with them. Especially when we had given all the facts concerning the appointment of each and every Judge since 1950.

100. If one were to draw an inference, from the factual numbers indicated in the statements of the Home Minister and the Law Minister, and the inferences drawn therefrom, it is more than apparent, that the understanding of those in-charge of working the provisions of the Constitution, relating to the appointment of Judges to the higher judiciary, was that, the advice of the Chief Justice of India was to be, and was actually invariably accepted, by the President (or whosoever, exercised the power of appointment).

101. Historically again, from the perspective of judicial declarations, the practice adopted on the issue in hand, came to be so understood, in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, wherein this Court through a seven-Judge Bench held as under:

In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by

the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue.

102. Ever since 1974, when the above judgment was rendered, the above declaration, has held the field, as the above judgment has neither been reviewed nor set aside. It cannot be overlooked, that the observations extracted from the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, were reaffirmed by another five-Judge Bench, in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, as under:

This then, in my judgment, is the true meaning and content of consultation as envisaged by Article 222(1) of the Constitution. After an effective consultation with the Chief Justice of India, it is open to the President to arrive at a proper decision of the question whether a Judge should be transferred to another High Court because, what the Constitution requires is consultation with the Chief Justice, not his concurrence with the proposed transfer. But it is necessary to reiterate what Bhagwati and Krishna Iyer, JJ., said in Shamsher Singh (supra) that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the executive if it departs from the counsel given by the Chief Justice of India: "In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." (page 873). It is hoped that these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive and the judiciary will be resolved by mutual deliberation, each party treating the views of the other with respect and consideration.

103. Even in the First Judges case, P.N. Bhagwati, J., corrected his own order through a corrigendum, whereby his order, inter alia, came to be recorded, as under:

Even if the opinion given by all the constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion, though being a unanimous opinion of all three constitutional functionaries, it would have great weight and if an appointment is made by the Central Government in defiance of such unanimous opinion, it may prima facie be vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. The same position would obtain if an appointment is made by the Central Government contrary to the unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India.

From the above extract, it is apparent, that the observations recorded by this Court in paragraph 149 in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, were endorsed in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, and were also adopted in the First Judges case. The position came to be expressed emphatically in the Second

and Third Judges cases, by reading the term "consultation" as vesting primacy with the judiciary, in the matter of appointments of Judges to the higher judiciary. This time around, at the hands of two different nine-Judge Benches, which reiterated the position expressed in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831.

104. The above sequence reveals, that the executive while giving effect to the procedure, for appointment of Judges to the higher judiciary (and also, in the matter of transfer of Chief Justices and Judges from one High Court, to another), while acknowledging the participation of the other constitutional functionaries (referred to in Articles 124, 217 and 222), adopted a procedure, wherein primacy in the decision making process, was consciously entrusted with the judiciary. This position was followed, from the very beginning, after the promulgation of the Constitution, by the executive, at its own. Insofar as the legislature is concerned, it is apparent, that the issue came up for discussion, in a responsive manner when the Fourteenth Report of the Law Commission on Judicial Reforms (1958), was discussed by the Parliament, as far back as in 1959, just a few years after the country came to be governed by the Constitution. It is apparent, that when the two Houses of the Parliament, reflected inter alia on Articles 124, 217 and 222, in the matter of appointment of Judges to the higher judiciary, the unanimous feeling which emerged was, that "... the advice of the most competent dependent and eminent person..."-the Chief Justice of India, had been followed rightfully. Two aspects of the parliamentary discussion, which were kept in mind when the issue was deliberated, need to be highlighted. First, that the President meant (for all practical purposes), the concerned Minister, or the Council of Ministers headed by the Prime Minister. And second, that the provisions in question envisaged only a participatory role, of the other constitutional authorities. Therefore, the above affirmation, to the primacy of the judiciary, in the matter of appointment of Judges to the higher judiciary, was consciously recorded, after having appreciated the gamut of the other participating constitutional authorities. In the matter of judicial determination, the issue was examined by a Constitution Bench of the Supreme Court as far back, as in 1974 in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, wherein keeping in mind the cardinal principle-the "independence of the judiciary", it was concluded, that consultation with the highest dignitary in the judiciary-the Chief Justice of India, in practice meant, that the last word must belong to the Chief Justice of India i.e., the primacy in the matter of appointment of Judges to the higher judiciary, must rest with the judiciary. The above position was maintained in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193 in 1977, by a five-Judge Bench, only to be altered in the First Judges case, by a seven-Judge Bench in 1981, wherein it was held, that the term "consultation" could not be read as "concurrence". The position expounded even in this case by P.N. Bhagwati, J. (as he then was), extracted above, must necessarily also be kept in mind. The earlier position was restored in 1993 by a nine-Judge Bench in the Second Judges case (which overruled the First Judges case). The position was again reaffirmed by a nine-Judge Bench, through the Third Judges case. Historically, therefore, all the three wings of governance, have uniformly maintained, that while making appointments of Judges to the higher judiciary, "independence of the judiciary" was accepted as an integral component of the spirit of the Constitution, and thereby, the term "consultation" used in the provisions under consideration, had to be understood as vesting primacy with the judiciary, with reference to the subjects contemplated Under Articles 124, 217 and 222. In view of the above historical exposition, there is really no legitimate reason for the Respondents to seek a review of the judgments in the Second and Third Judges cases.

V.

105. Whilst dwelling on the subject of the intention expressed by the Members of the Constituent Assembly, it is considered just and expedient, also to take into consideration the views expressed in respect of the adoption of "separation of powers" in the Constitution. When the draft prepared by the Constituent Assembly came up for debate, Dr. B.R. Ambedkar proposed an amendment of Article 39A. It would be relevant to mention, that the aforesaid amendment, on being adopted, was incorporated as Article 50 in the Constitution (as originally enacted). It is also necessary to notice, that the Government had already commenced to function, with Jawaharlal Nehru as the Prime Minister, when the draft of the Constitution was being debated before the Constituent Assembly. His participation in the debates of the Constituent Assembly, therefore, was not only in his capacity as a Member of the Constituent Assembly, but also, as a representative of the Government of India. It is necessary to extract hereunder, the views expressed by Jawaharlal Nehru, Bakshi Tek Chand and Loknath Misra, in the above debates, relating to "separation of powers". Relevant extracts are being reproduced hereunder:

The Honourable Pandit Jawaharlal Nehru (United Provinces: General): .....Coming to this particular matter, the honourable speaker, Pandit Kunzru, who has just spoken and opposed the amendment of Dr. Ambedkar seems to me; if I may say so with all respect to him, to have gone off the track completely, and to suspect a sinister motive on the part of Government about this business. Government as such is not concerned with this business, but it is true that some members of Government do feel rather strongly about it and would like this House fully to consider the particular view point that Dr. Ambedkar has placed before the House today. I may say straight off that so far as the Government is concerned, it is entirely in favour of the separation of judicial and executive functions (Cheers). I may further say that the sooner it is brought about the better (Hear, hear) and I am told that some of our Provincial Governments are actually taking steps to that end now. If anyone asked me, if anyone suggested the period of three years or some other period, my first reaction would have been that this period is too long. Why should we wait so long for this? It might be brought about, if not all over India, in a large part of India, much sooner than that. At the same time, it is obvious that India at the present moment, specially during the transitional period, is a very mixed country politically, judicially, economically and in many ways, and any fixed rule of thumb to be applied to every area may be disadvantageous and difficult in regard to certain areas. On the one hand, that rule will really prevent progress in one area, and on the other hand, it may upset the apple-cart in some other area. Therefore, a certain flexibility is desirable. Generally speaking, I would have said that in any such directive of policy, it may not be legal, but any directive of policy in a Constitution must have a powerful effect. In any such directive, there should not be any detail or time-limit etc. It is a directive of what the State wants, and your putting in any kind of time-limit therefore rather lowers it from that high status of a State policy and brings it down to the level of a legislative measure, which it is not in that sense. I would have preferred no time-limit to be there, but speaking more practically, any time-limit in this, as Dr. Ambedkar pointed out, is apt on the one hand to delay this very process in large parts of the country, probably the greater part of the country; on the other hand, in some parts where practically speaking it may be very difficult to bring about, it may produce enormous confusion. I think, therefore, that Dr. Ambedkar's amendment, far from lessening the significance or the importance of this highly desirable change that we wish to bring about, places it on a high level before the country. And I do not see myself how any Provincial or other Government can forget this Directive or delay it

much. After all, whatever is going to be done in the future will largely depend upon the sentiment of the people and the future Assemblies and Parliaments that will meet. But so far as this Constitution is concerned, it gives a strong opinion in favour of this change and it gives it in a way so as to make it possible to bring it about in areas where it can be brought about-the provinces, etc.-and in case of difficulty in any particular State, etc., it does not bind them down. I submit, therefore, that this amendment of Dr. Ambedkar should be accepted. (Cheers).

Dr. Bakshi Tek Chand (East Punjab: General): Mr. Vice-President, Sir, I rise to lend my whole hearted support to the amendment which has been moved by Dr. Ambedkar today. The question of the separation of executive and judicial functions is not only as old as the Congress itself, but indeed it is much older. It was in the year 1852 when public opinion in Bengal began to express itself in an organised form that the matter was first mooted. That was more than thirty years before the Congress came into existence. After the Mutiny, the movement gained momentum and in the early seventies, in Bengal, under the leadership of Kisto Das Pal and Ram Gopal Ghosh, who were the leaders of public opinion in those days, definite proposals with regard to the separation of judicial and executive functions were put forward. Subsequently, the late Man Mohan Ghosh took up this matter and he and Babu Surendranath Bannerji year in and year out raised this question in all public meetings. When the Congress first met in the session in Bombay in 1885, this reform in the administration was put in the forefront of its programme. Later on, not only politicians of all schools of thought, but even retired officers who had actually spent their lives in the administration, took up the matter and lent their support to it. I very well remember the Lucknow Congress of 1899 when Romesh Chunder Dutt, who had just retired from the Indian Civil Service, presided. He devoted a large part of his presidential address to this subject and created a good deal of enthusiasm for it. Not only that: even retired High Court Judges and Englishmen like Sir Arthur Hobhouse and Sir Arthur Wilson, both of whom subsequently became members of the Judicial Committee of the Privy Council, lent their support to this and they jointly with many eminent Indians submitted a representation to the Secretary of State for India to give immediate effect to this reform.

In the year 1912, when the Public Service Commission was appointed, Mr. Abdur Rahim, who was a Judge of the Madras High Court and was for many years the President of the Central Legislature, appended a long Minute of Dissent and therein he devoted several pages to this question. Therefore, Sir, the matter has been before the country for nearly a century and it is time that it is given effect to immediately. One of the Honourable Members who spoke yesterday, observed that this matter was of great importance when we had a foreign Government but now the position has changed, and it may not be necessary to give effect to it. Well, an effective reply to this has been given by the Honourable the Prime Minister today. He has expressly stated that it is the policy of the Government, and it is their intention to see that this reform is given immediate effect to.

xxx

I am glad to hear that he confirms it. This gives the quietus to these two objections which have been raised, that because of the changed circumstances, because we have attained freedom, it is no longer necessary and that the financial burden will be so heavy that it might crush provincial Governments. Both these objections are hollow.

One word more I have to say in this connection and that is, that with the advent of democracy and freedom, the necessity of this reform has become all the greater. Formerly it was only the district magistrate and a few members of the bureaucratic Government from whom interference with the judiciary was apprehended, but now, I am very sorry to say that even the Ministers in some provinces and members of political parties have begun to interfere with the free administration of justice. Those of you, who may be reading news paper reports of judicial decisions lately, must have been struck with this type of interference which has been under review in the various High Courts lately. In one province we found that in a case pending in a Criminal Court, the Ministry sent for the record and passed an order directing the trying Magistrate to stay proceedings in the case. This was something absolutely unheard of. The matter eventually went up to the High Court and the learned Chief Justice and another Judge had to pass very strong remarks against such executive interference with the administration of justice.

In another province a case was being tried against a member of the Legislative Assembly and a directive went from the District Magistrate to the Magistrate trying the case not to proceed with it further and to release the man. The Magistrate who was a member of the Judicial Service and was officiating as a Magistrate had the strength to resist this demand. He had all those letters put on the record and eventually the matter went up to the High Court and the Chief Justice of the Calcutta High Court made very strong remarks about this matter.

Again in the Punjab, a case has recently occurred in which a Judge of the High Court, Mr. Justice Achu Ram, heard a habeas corpus petition and delivered a judgment of 164 pages at the conclusion of which he observed that the action taken by the District Magistrate and the Superintendent of Police against a member of the Congress Party was mala fide and was the result of a personal vendetta. These were his remarks.

In these circumstances, I submit that with the change of circumstances and with the advent of freedom and the introduction of democracy, it has become all the more necessary to bring about the separation of the judiciary from the executive at the earliest possible opportunity.

106. A perusal of the statements made before the Constituent Assembly, which resulted in the adoption of Article 50 of the Constitution reveals, that the first Prime Minister of this country, was entirely in favour of the separation of judicial and executive "functions". On the subject of separation, it was pointed out, that it was a directive which the Government itself wanted. The statement of Dr. Bakshi Tek Chand in the Constituent Assembly projects the position, that the idea of separating the judiciary from the executive was mooted for the first time as far back as in 1852, and that thereafter, the political leadership and also public opinion, were directed towards ensuring separation of judicial and executive functioning. He pointed out, that "year in and year out", the late Man Mohan Ghosh and Bapu Surendranath Banerji had raised the instant question, in all public meetings. And when the Congress first met in Bombay in 1885, the matter of separating the judiciary from the executive, was placed above all other issues under consideration. Thereafter, not only the politicians of all schools of thought, but even retired officers, who had actually spent their lives in administration, had supported the issue of "separation of powers". He also highlighted, that in 1899, Romesh Chunder Dutt had devoted a large part of his presidential address to the issue. And that, retired High Court Judges and Englishmen like Sir Arthur Hobhouse and Sir Arthur Wilson (both of whom, subsequently became Members of the Judicial Committee of

the Privy Council), also supported the above reform. The debate, it was pointed out, had been on going, to accept the principle of "separation of powers", whereby, the judiciary would be kept apart from the executive. He also pointed to instances, indicating interference by Ministers and members of the administration, which necessitated a complete separation of powers between the judiciary and the executive. Loknath Misra fully supported the above amendment, as a matter of principle. It is, therefore, imperative to conclude that the framers of the Constitution while drafting Article 50 of the Constitution, were clear and unanimous in their view, that there need to be a judiciary, separated from the influences of the executive.

107. Based on the consideration recorded in the immediately preceding paragraphs also, it seems to us, that the necessity of making a detailed reference to the Constituent Assembly debates in the Second Judges case, may well have been regarded, as of no serious consequence, whether it was on the subject of appointment of Judges to the higher judiciary, as a component of "independence of the judiciary", or, on the subject of "separation of powers", whereby the judiciary was sought to be kept apart, and separate, from the executive. This Court having concluded, that the principle of "separation of powers" was expressly ingrained in the Constitution, which removes the executive from any role in the judiciary, the right of the executive to have the final word in the appointment of Judges to the higher judiciary, was clearly ruled out. And therefore, this Court on a harmonious construction of the provisions of the Constitution, in the Second and Third Judges cases, rightfully held, that primacy in the above matter, vested with the judiciary, leading to the inference, that the term "consultation" in the provisions under reference, should be understood as giving primacy to the view expressed by the judiciary, through the Chief Justice of India.

VI.

108. It is imperative to deal with another important submission advanced by the learned Attorney General, namely, that the issue of "independence of the judiciary" has nothing to do with the process of "appointment" of Judges to the higher judiciary. It was submitted, that the question of independence of a Judge arises, only after a Judge has been appointed (to the higher judiciary), for it is only then, that he is to be shielded from the executive/political pressures and influences. It was sought to be elaborated, that Judges of the higher judiciary, immediately after their appointment were so well shielded, that there could be no occasion of the "independence of the judiciary" being compromised, in any manner, either at the hands of the executive, or of the legislature.

109. Whilst advancing the instant contention, it was the pointed assertion of the learned Attorney General, that neither of the judgments rendered in the Second and Third Judges cases had held, that the "selection and appointment" of Judges, to the higher judiciary, would fall within the purview of "independence of the judiciary". It was therefore his contention, that it was wrongful to assume, on the basis of the above two judgments, that the question of "appointment" of Judges to the higher judiciary would constitute a component of the "basic structure" of the Constitution. It was the contention of the learned Attorney General, that the Parliament, in its wisdom, had now amended the Constitution, admittedly altering the process of "selection and appointment" of Judges to the higher judiciary (including their transfer). It was further contended, that the process contemplated through the Constitution (99th Amendment) Act, coupled with the NJAC Act, was such, that it cannot be considered to have interfered with, or impinged upon, the "independence of

the judiciary", and thus viewed, it would not be rightful to conclude, that the impugned constitutional amendment, as also the NJAC Act, were per se violative of the "basic structure".

110. We may preface our consideration by noticing, that every two years since 1985, a conference of Supreme Court Chief Justices from the Asia Pacific region, has been held by the Judicial Section of the Law Association for Asia and the Pacific. Since its inception, the conference has served as a useful forum for sharing information and discussing issues of mutual concern among Chief Justices of the region. At its 6th Conference held in Beijing in 1997, 20 Chief Justices adopted a joint Statement of Principles of the "Independence of the Judiciary". This statement was further refined during the 7th Conference of Chief Justices held in Manila, wherein it was signed by 32 Chief Justices from the Asia Pacific region. The Beijing Statement of Principles of the "Independence of the Judiciary" separately deals with appointment of Judges. The position expressed in the above statement with reference to "appointment" of Judges is extracted hereunder:

Appointment of Judges

11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13. In the selection of judges there must no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, expect that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, difference procedures and safeguards may be adopted to ensure the proper appointment of judges.

15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

Therefore to contend, that the subject of "appointment" is irrelevant to the question of the "independence of the judiciary", must be considered as a misunderstanding of a well recognized position.

111. Whilst dealing with the instant contention, we will also examine if this Court in the Second and Third Judges cases, had actually dealt with the issue, whether "appointment" of Judges to the higher judiciary, was (or, was not) an essential component of the principle of "independence of the judiciary"? Insofar as the instant aspect of the matter is concerned, reference in the first instance, may be made to the Second Judges case, wherein S. Ratnavel Pandian, J., while recording his concurring opinion, supporting the majority view, observed as under:

47. The above arguments, that the independence of judiciary is satisfactorily secured by the constitutional safeguard of the office that a judge holds and guarantees of the service conditions alone and not beyond that, are in our considered opinion, untenable. In fact we are unable even to conceive such an argument for the reason to be presently stated.

In addition to the above extract, it is necessary to refer to the following observations of Kuldip Singh, J.:

335. Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical....

From the above it is clear, that the issue canvassed by the learned Attorney General, was finally answered by the nine-Judge Bench, which disposed of the Second Judges case by holding, that if the power of "appointment" of Judges, was left to the executive, the same would breach the principle of the "independence of the judiciary". And also conversely, that providing safeguards after the appointment of a Judge to the higher judiciary, would not be sufficient to secure "independence of the judiciary". In the above view of the matter, it is necessary to conclude, that the "manner of selection and appointment" of Judges to the higher judiciary, is an integral component of "independence of the judiciary". The contentions advanced on behalf of the Union of India, indicating the participation of the President and the Parliament, in the affairs of the judiciary, would have no bearing on the controversy in hand, which primarily relates to the issue of "appointment" of Judges to the higher judiciary. And, extends to transfer of Chief Justices and Judges from one High Court, to another. The fact that there were sufficient safeguards, to secure the independence of Judges of the higher judiciary after their "appointment", and therefore, there was no need to postulate, that in the matter of "appointment" also, primacy need not be in the hands of the judiciary, is also not acceptable. It is quite another matter, whether the manner of selection and appointment of Judges, introduced through the Constitution (99th Amendment) Act coupled with the NJAC Act, can indeed be considered to be violative of "independence of the judiciary". This aspect, shall be examined and determined independently, while examining the merits of the challenge raised by the Petitioners.

VII.

112. A perusal of the provisions of the Constitution reveals, that in addition to the appointment of the Chief Justice of India and Judges of the Supreme Court, Under Article 124, the President has also been vested with the authority to appoint Judges and Chief Justices of High Courts Under Article 217. In both the above provisions, the mandate for the President, inter alia is, that the Chief Justice of India "shall always be consulted", (the first proviso, Under Article 124(2), as originally enacted), and with reference to Judges of the High Court, the language engaged in Article 217 was, that the President would appoint Judges of High Courts "after consultation with the Chief Justice of India" (per sub-Article (1) of Article 217).

113. To understand the term "consultation" engaged in Articles 124 and 217, it is essential to contrast the above two provisions, with other Articles of the Constitution, whereunder also, the President is mandated to appoint different constitutional authorities. Reference in this behalf may be made to the appointment of the Comptroller and Auditor-General of India, Under Article 148. The said provision vests the authority of the above appointment with the President, without any consultative process. The position is exactly similar with reference to appointment of Governors of States, Under Article 155. The said provision also contemplates appointments, without any consultative process. The President is also vested with the authority, to appoint the Chairman and four Members of the Finance Commission, Under Article 280. Herein also, the power is exclusively vested with the President, without any consultative process. The power of appointment of Chairman and other Members of the Union Public Service Commission, is also vested with the President Under Article 316. The aforesaid appointment also does not contemplate any deliberation, with any other authority. Under Article 324, the power of appointment of Chief Election Commissioner and Election Commissioners is vested with the President exclusively. Likewise, is the case of appointment of Chairperson, Vice-Chairperson and Members of the National Commission for Scheduled Castes Under Article 338, and Chairperson, Vice-Chairperson and other Members of the National Commission for Scheduled Tribes Under Article 338A. Under the above stated provisions, the President has the exclusive authority to make appointments, without any deliberation with any other authority. Under Article 344, the President is also vested with the authority to appoint Chairman and other Members to the Commission of Parliament on Official Languages. The instant provision also does not provide for any consultative process before such appointment. The same position emerges from Article 350B, whereunder the President is to appoint a Special Officer for Linguistic Minorities. Herein too, there is no contemplation of any prior consultation.

114. It is apparent that the Council of Ministers, with the Prime Minister as its head, is to "aid and advise" the President in the exercise of his functions. This position is not disputed by the learned Counsel representing the Respondents. Interpreted in the above manner, according to the learned Attorney General, in exercising his responsibilities Under Articles 124, 217, 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, the President is only a figurative authority, whereas truthfully, the authority actually vests in the Council of Ministers headed by the Prime Minister. And as such, for all intents and purposes, the authority vested in the President for appointing different constitutional authorities, truly means that the power of such appointment is vested in the executive.

115. If one were to understand the words, as they were expressed in Article 74, in our considered view, it would be difficult to conclude, that "aid and advice" can be treated synonymous with a binding "direction", an irrevocable "command" or a conclusive "mandate". Surely, the term "aid

and advice" cannot individually be construed as an imperative dictate, which had to be obeyed under all circumstances. In common parlance, a process of "consultation" is really the process of "aid and advice". The only distinction being, that "consultation" is obtained, whereas "aid and advice" may be tendered. On a plain reading therefore, neither of the two ("aid and advice" and "consultation") can be understood to convey, that they can be of a binding nature. We are of the view, that the above expressions were used, keeping in mind the exalted position which the President occupies (as the first citizen, of the country). As the first citizen, it would have been discourteous to provide, that he was to discharge his functions in consonance with the directions, command, or mandate of the executive. Since, both the expressions ("aid and advice" and "consultation"), deserve the same interpretation, if any one of them is considered to be mandatory and binding, the same import with reference to the other must follow. Through the Constitution (Forty-second Amendment) Act, 1976, Article 74 came to be amended, and with the insertion of the words "shall ... act in accordance with such advice", the President came to be bound, to exercise his functions, in consonance with the "aid and advice" tendered to him, by the Council of Ministers headed by the Prime Minister. The instant amendment, in our view, has to be considered as clarificatory in character, merely reiterating the manner in which the original provision ought to have been understood.

116. If "aid and advice" can be binding and mandatory, surely also, the term "consultation", referred to in Articles 124 and 217, could lead to the same exposition. The President of India, being the first citizen of the country, is entitled to respectability. Articles 124 and 217, were undoubtedly couched in polite language, as a matter of constitutional courtesy, extended to the first citizen of the country. It is important to notice, that the first proviso Under Article 124(2) clearly mandates, that the Chief Justice of India "shall always" be consulted. It was a reverse obligation, distinguishable from Article 74. Herein, the President was obliged to consult the Chief Justice of India, in all matters of appointment of Judges to the Supreme Court. The process of "consultation" contemplated therein, has to be meaningfully understood. If it was not to be so, the above provision could have been similarly worded as those relating to the appointment of the Comptroller and Auditor-General of India, Governors of States, Chairman and Members of the Finance Commission, Chairman and Members of the Union Public Service Commission, Chief Election Commissioner and Election Commissioners, Chairperson and Vice Chairperson and Members of the National Commission for Scheduled Castes, as also, those of the National Commission for Scheduled Tribes. This contrast between Articles 124 and 217 on the one hand, and the absence of any "consultation", with reference to the appointments contemplated Under Articles 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, leaves no room for any doubt, that the above "consultation" was not a simpliciter "consultation". And since, the highest functionary in the judicial hierarchy was obliged to be consulted, a similar respectability needed to be bestowed on him. What would be the worth of the mandatory "consultation", with the Chief Justice of India, if his advice could be rejected, without any justification? It was therefore, concluded by this Court, that in all conceivable cases, consultation with the highest dignitary in the judiciary-the Chief Justice of India, will and should be accepted. And, in case it was not so accepted, it would be permissible to examine whether such non acceptance was prompted by any oblique consideration. Rightfully therefore, the term "consultation" used in Articles 124 and 217, as they were originally enacted meant, that primacy had to be given to the opinion tendered by the Chief Justice of India, on the issues for which the President was obliged to seek such "consultation". The submission advanced on behalf of the Respondents, cannot be accepted, also for the reason, that the interpretation placed

by them on the term "consultation", would result in an interpretation of Articles 124 and 217, as at par with Articles 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, wherein the term "consultation" had not been used. Such an interpretation, would be clearly unacceptable. Since the manner of appointment of Judges to the higher judiciary, is in contrast with that of the constitutional authorities referred to by the learned Attorney General, the submission advanced on behalf of the Respondents with reference to the other constitutional authorities cannot have a bearing on the present controversy.

117. We would unhesitatingly accept and acknowledge the submission made by the learned Attorney General, as has been noticed hereinabove, but only limited to situations of appointment contemplated under various Articles of the Constitution, where the power of appointment is exclusively vested with the President. As such, there is no room for any doubt that the provisions of the Constitution, with reference to the appointment of Judges to the higher judiciary, contemplated that the "aid and advice" (-the "consultation") tendered by the Chief Justice of India, was entitled to primacy, on matters regulated Under Articles 124 and 217 (as also, Under Article 222).

VIII.

118. In continuation with the conclusions drawn in the foregoing analysis, the matter can be examined from another perspective as well. The term "consultation" (in connection with, appointments of Judges to the higher judiciary) has also been adopted in Article 233 on the subject of appointment of District Judges. Under Article 233, the power of appointment is vested with the Governor of the concerned State, who is empowered to make appointments (including promotions) of District Judges. This Court, through a five-Judge Bench, in Registrar (Admn.), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy MANU/SC/0573/1999 : (1999) 7 SCC 725, has held, that recommendations made by the High Court in the consultative process envisaged Under Article 233, is binding on the Governor. In the face of the aforestated binding precedent, on a controversy, which is startlingly similar to the one in hand, and has never been questioned, it is quite ununderstandable how the Union of India, desires to persuade this Court, to now examine the term "consultation" differently with reference to Articles 124 and 217, without assailing the meaning given to the aforesaid term, with reference to a matter also governing the judiciary.

VI. <u>CONCLUSION:</u>

119. Based on the conclusions drawn hereinabove, while considering the submissions advanced by the learned Counsel for the rival parties, as have been recorded in "V-The Consideration", we are of the view, that the prayer made at the hands of the learned Counsel for the Respondents, for revisiting or reviewing the judgments rendered by this Court, in the Second and Third Judges cases, cannot be acceded to. The prayer is, accordingly, hereby declined.

<u>THE ORDER ON MERITS</u>

I. <u>PREFACE:</u>

120. It is essential to begin the instant order by a foreword, in the nature of an explanation. For, it would reduce the bulk of the instant order, and obviate the necessity to deal with issues which have been considered and dealt with, while hearing the present set of cases.

121. The question which arises for consideration in the present set of cases pertains to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 [hereinafter referred to as the Constitution (99th Amendment) Act], as also, that of the National Judicial Appointments Commission Act, 2014 (hereinafter referred to as, the NJAC Act). The core issue that arises for consideration, relates to the validity of the process of selection and appointment of Judges to the higher judiciary (i.e., Chief Justices and Judges of the High Courts and the Supreme Court), and transfer of Chief Justices and Judges of one High Court, to another.

122. This is the third order in the series of orders passed by us, while adjudicating upon the present controversy. The first order, dealt with the prayer made at the Bar, for the "recusal" of one of us (J.S. Khehar, J.) from hearing the present set of cases. As and when a reference is made to the above first order, it would be adverted to as the "Recusal Order". The second order, considered the prayer made by the learned Attorney General and some learned Counsel representing the Respondents, seeking a "reference" of the present controversy, to a nine-Judge Bench (or even, to a further larger Bench) for re-examining the judgment rendered in Supreme Court Advocates-on-Record Association v. Union of India MANU/SC/0073/1994 : (1993) 4 SCC 441 (hereinafter referred to as, the Second Judges case), and the advisory opinion in Re: Special Reference No. 1 of 1998 MANU/SC/1146/1998 : (1998) 7 SCC 739 (hereinafter referred to, as the Third Judges case), for the alleged object of restoring and re-establishing, the declaration of the legal position, expounded by this Court in S.P. Gupta v. Union of India MANU/SC/0080/1981 : 1981 (Supp) SCC 87 (hereinafter referred to as, the First Judges case). As and when a reference is made to the above second order, it would be mentioned as the "Reference Order".

123. We would, therefore, not examine the issues dealt with in the Recusal Order and/or in the Reference Order, even though they may arise for consideration yet again, in the process of disposal of the present controversy on merits. As and when a reference is made to the instant third order, examining the "merits" of the controversy, it would be adverted to as the "Order on Merits".

II. PETITIONERS' CONTENTIONS, ON MERITS:

124. On the subject of amending the Constitution based on the procedure provided for in Article 368, it was submitted by Mr. Fali S. Nariman, Senior Advocate, that the power of amendment of the Constitution is not a plenary power. It was pointed out, that the above power was limited, inasmuch as, the power of amendment did not include the power of amending the "core" or the "basic structure" of the Constitution. In this behalf, learned Counsel placed reliance on Minerva Mills Ltd. v. Union of India MANU/SC/0075/1980 : (1980) 3 SCC 625, wherein majority view was expressed through Y.V. Chandrachud, CJ., as under:

17. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot,

Under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

In the above judgment, the minority view was recorded by P.N. Bhagwati, J., (as he then was), as under:

88. That takes us to Clause (5) of Article 368. This clause opens with the words "for the removal of doubts" and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament Under Article 368. It is difficult to appreciate the meaning of the opening words "for the removal of doubts" because the majority decision in Kesavananda Bharati case: MANU/SC/0445/1973 : AIR 1973 SC 1461 clearly laid down and left no doubt that the basic structure of the Constitution was outside the competence of the amendatory power of Parliament and in Indira Gandhi case: [1976] 2 SCR 341, all the judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329-A(4) was to be judged. Therefore, after the decisions in Kesavananda Bharati case and Indira Gandhi case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and Clause (5) could not remove the doubt which did not exist. What Clause (5), really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure. That would clearly be in excess of the limited amending power possessed by Parliament. The Constitution has conferred only a limited amending power on Parliament so that it cannot damage or destroy the basic structure of the Constitution and Parliament cannot by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. It is difficult to appreciate how Parliament having a limited power of amendment can get rid of the limitation by exercising that very power and convert it into an absolute power. Clause (5) of Article 368 which sought to remove the limitation on the amending power of Parliament by making it absolute must therefore be held to be outside the amending power of Parliament. There is also another ground on which the validity of this clause can be successfully assailed. This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure. I would in the circumstances hold Clause (5) of Article 368, to be unconstitutional and void.

With reference to the same proposition, learned Counsel placed reliance on Kihoto Hollohan v. Zachillhu MANU/SC/0753/1992 : 1992 Supp (2) SCC 651. It was submitted, that the acceptance of the principle of "basic structure" of the Constitution, resulted in limiting the amending power postulated in Article 368.

125. According to the learned Counsel, it is now accepted, that "independence of the judiciary", "rule of law", "judicial review" and "separation of powers" are components of the "basic structure" of the Constitution. In the above view of the matter, provisions relating to appointment of Judges to the higher judiciary, would have to be such, that the above principles would remain unscathed and intact. It was submitted, that any action which would have the result of making appointment of the Judges to the Supreme Court, and to the High Courts, subservient to an agency other than the judiciary itself, namely, by allowing the executive or the legislature to participate in their selection and appointment, would render the judiciary subservient to such authority, and thereby, impinge on the "independence of the judiciary".

126. Learned Counsel invited the Court's attention to the 1st Law Commission Report on "Reform of Judicial Administration" (14th Report of the Law Commission of India, chaired by M.C. Setalvad), wherein it was debated, that by enacting Articles 124 and 217, the framers of the Constitution had endeavoured to put the Judges of the Supreme Court "above executive control". Paragraph 4 of the said Report is being extracted hereunder:

(Appointment and removal of Judges)

4. Realizing the importance of safeguarding the independence of the judiciary, the Constitution has provided that a Judge of the Supreme Court shall be appointed by the President in consultation with the Chief Justice of India and after consultation with such of the other Judges of the Supreme Court and the High Courts as he may deem necessary. He holds office till he attains the age of 65 years and is irremovable except on the presentation of an address by each House of Parliament passed by a specified majority on the ground of proved misbehaviour or incapacity. Thus has the Constitution endeavoured to put Judges of the Supreme Court above executive control.

127. It was submitted, that "independence of the judiciary" had been held to mean and include, insulation of the higher judiciary from executive and legislative control. In this behalf, reference was made to Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977 : (1977) 4 SCC 193, wherein this Court had observed:

50. Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great Judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise. But this has been accomplished after a long fight culminating in the Act of Settlement, 1688. Prior to the enactment of that Act, a Judge in England held tenure at the pleasure of the Crown and the Sovereign could dismiss a Judge at his discretion, if the Judge did not deliver judgments to his liking. No less illustrious a Judge than Lord Coke was dismissed by Charles I for his glorious and courageous refusal to obey the King's writ de *non procedendo rege inconsulto* commanding him to step or to delay proceedings in his Court. The Act of Settlement, 1688 put it out of the power of the Sovereign to dismiss a Judge at pleasure by substituting 'tenure during good behaviour' for 'tenure at pleasure'. The Judge could then say, as did Lord Bowen so eloquently:

These are not days in which any English Judge will fail to assert his right to rise in the proud consciousness that justice is administered in the realms of Her Majesty the Queen, immaculate, unspotted, and unsuspected. There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English Judge upon the Bench, or move by one hair's breadth the even equipoise of the scales of justice.

The framers of our Constitution were aware of these constitutional developments in England and they were conscious of our great tradition of judicial independence and impartiality and they realised that the need for securing the independence of the judiciary was even greater under our Constitution than it was in England, because ours is a federal or quasi-federal Constitution which confers fundamental rights, enacts other constitutional limitations and arms the Supreme Court and the High Courts with the power of judicial review and consequently the Union of India and the States would become the largest single litigants before the Supreme Court and the High Courts. Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab MANU/SC/0073/1974 : (1974) 2 SCC 831, can become "fearless and free only if institutional immunity and autonomy are guaranteed". The Constitution-makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control. I shall briefly refer to these provisions to show how great was the anxiety of the constitution-makers to ensure the independence of the superior judiciary and with what meticulous care they made provisions to that end.

In continuation of the instant submission, learned Counsel placed reliance on the Second Judges case, and drew our attention to the following observations recorded by S. Ratnavel Pandian, J.:

54. Having regard to the importance of this concept the Framers of our Constitution having before them the views of the Federal Court and of the High Court have said in a memorandum:

We have assumed that it is recognised on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive ... in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent and efficient judiciary has been steadily kept in view. (vide B. Shiva Rao: The Framing of India's Constitution, Volume I-B, p. 196)

55. In this context, we may make it clear by borrowing the inimitable words of Justice Krishna Iyer, "Independence of the judiciary is not genuflexion, nor is it opposition of Government". Vide Mainstream-November 22, 1980 and at one point of time Justice Krishna Iyer characterised this concept as a "Constitutional Religion".

56. Indisputably, this concept of independence of judiciary which is inextricably linked and connected with the constitutional process related to the functioning of judiciary is a "fixed-star" in our constitutional consultation and its voice centres around the philosophy of the Constitution. The basic postulate of this concept is to have a more effective judicial system with its full vigour and vitality so as to secure and strengthen the imperative confidence of the people in the administration of justice. It is only with the object of successfully achieving this principle and salvaging much of

the problems concerning the present judicial system, it is inter alia, contended that in the matter of appointment of Judges to the High Courts and Supreme Court 'primacy' to the opinion of the CJI which is only a facet of this concept, should be accorded so that the independence of judiciary is firmly secured and protected and the hyperbolic executive intrusion to impose its own selectee on the superior judiciary is effectively controlled and curbed.

And from the same judgment, reference was made to the following observations of Kuldip Singh, J.:

335. Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the Framers of the Constitution could have never intended to give this power to the executive. Even otherwise the Governments-Central or the State-are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex Court. The executive-in one form or the other-is the largest single litigant before the courts. In this view of the matter the judiciary being the mediator-between the people and the executive-the Framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the executive. This Court in S.P. Gupta v. Union of India MANU/SC/0080/1981 : 1981 Supp SCC 87 proceeded on the assumption that the independence of judiciary is the basic feature of the Constitution but failed to appreciate that the interpretation, it gave, was not in conformity with broader facets of the two concepts-'independence of judiciary' and 'judicial review'-which are interlinked.

Based on the above conclusions, it was submitted, that "independence of the judiciary" could be maintained, only if appointments of Judges to the higher judiciary, were made by according primacy to the opinion of the Chief Justice, based on the decision of a collegium of Judges. Only then, the executive and legislative intrusion, could be effectively controlled and curbed.

128. Learned Counsel, then ventured to make a reference to the frequently quoted speech of Dr. B.R. Ambedkar (in the Constituent Assembly on 24.5.1949). It was submitted, that the above speech was duly considered in the Second Judges case, wherein this Court concluded as under:

389. Having held that the primacy in the matter of appointment of Judges to the superior courts vests with the judiciary, the crucial question which arises for consideration is whether the Chief Justice of India, under the Constitution, acts as a "persona designata" or as the leader-spokesman for the judiciary.

390. The constitutional scheme does not give primacy to any individual. Article 124(2) provides consultation with the Chief Justice of India, Judges of the Supreme Court and Judges of the High Courts. Likewise Article 217(1) talks of Chief Justice of India and the Chief Justice of the High Court. Plurality of consultations has been clearly indicated by the Framers of the Constitution. On first reading one gets the impression as if the Judges of the Supreme Court and High Courts have not been included in the process of consultation Under Article 217(1) but on a closer scrutiny of

the constitutional scheme one finds that this was not the intention of the Framers of the Constitution. There is no justification, whatsoever, for excluding the puisne Judges of the Supreme Court and of the High Court from the "consultee zone" Under Article 217(1) of the Constitution.

391. According to Mr. Nariman it would not be a strained construction to construe the expressions "Chief Justice of India" and "Chief Justice of the High Courts" in the sense of the collectivity of Judges, the Supreme Court as represented by the Chief Justice of India and all the High Courts (of the States concerned) as represented by the Chief Justice of the High Court. A bare reading of Articles 124(2) and 217(1) makes it clear that the Framers of the Constitution did not intend to leave the final word, in the matter of appointment of Judges to the superior Courts, in the hands of any individual howsoever high he is placed in the constitutional hierarchy. Collective wisdom of the consultees is the sine qua non for such appointments. Dr. B.R. Ambedkar in his speech dated May 24, 1949 in the Constituent Assembly explaining the scope of the draft articles pertaining to the appointment of Judges to the Supreme Court....

xxx

392. Dr. Ambedkar did not see any difficulty in the smooth operation of the constitutional provisions concerning the appointment of Judges to the superior Courts. Having entrusted the work to high constitutional functionaries the Framers of the Constitution felt assured that such appointments would always be made by consensus. It is the functioning of the Constitution during the past more than four decades which has brought the necessity of considering the question of primacy in the matter of such appointments. Once we hold that the primacy lies with the judiciary, then it is the judiciary as collectivity which has the primal say and not any individual, not even the Chief Justice of India. If we interpret the expression "the Chief Justice of India" as a "persona designata" then it would amount "to allow the Chief Justice practically veto upon the appointment of Judges" which the Framers of the Constitution in the words of Dr. Ambedkar never intended to do. We are, therefore, of the view that the expressions "the Chief Justice of India" and the "Chief Justice of the High Court" in Articles 124(2) and 217(1) of the Constitution mean the said judicial functionaries as representatives of their respective courts.

In conjunction with the observations extracted hereinabove, the Court's attention was also invited to the following further conclusions:

466. It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution; and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice of India, in the context of primacy, must be ascertained. A homogenous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' which is given greater significance or primacy in the matter of appointments. In other words, the view of the Chief Justice of India is to be expressed in the consultative process as truly reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation. In actual practice, this is how the Chief Justice of India does, and is expected to function so that the final opinion expressed by him is not

merely his individual opinion, but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function.

467. In view of the primacy of judiciary in this process, the question next, is of the modality for achieving this purpose. The indication in the constitutional provisions is found from the reference to the office of the Chief Justice of India, which has been named for achieving this object in a pragmatic manner. The opinion of the judiciary 'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy.

468. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be he the Chief Justice of India or the Prime Minister.

129. It was the emphatic contention of the learned Counsel, that the conclusions recorded by this Court in the Second Judges case, had been accepted by the executive and the legislature. It was acknowledged, that in the matter of appointment of Judges to the higher judiciary, primacy would vest with the judiciary, and further that, the opinion of the judiciary would have an element of plurality. This assertion was sought to be further established, by placing reliance on the Third Judges case. It was submitted, that the conclusions of the majority judgment, in the Second Judges case, were reproduced in paragraph 9 of the Third Judges case, and thereupon, this Court recorded the statement of the then Attorney General, that through the Presidential Reference, the Union of India was not seeking, a review or reconsideration, of the judgment in the Second Judges case. And that, the Union of India had accepted the above majority judgment, as binding. In this context, paragraphs 10 to 12 of the Third Judges case, which were relied upon, are being reproduced below:

10. We have heard the learned Attorney General, learned Counsel for the interveners and some of the High Courts and the Advocates General of some States.

11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case MANU/SC/0073/1994 : (1993) 4 SCC 441 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

12. The majority view in the Second Judges case MANU/SC/0073/1994 : (1993) 4 SCC 441 is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other Judges who are traditionally associated with this function". The opinion of the Chief Justice of India "so given has primacy in the matter of all appointments". For an appointment to be made, it has to be "in conformity with the final opinion of the Chief Justice of India formed in the manner indicated". It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon.

130. Learned Counsel invited the Court's attention, to the third conclusion drawn in Madras Bar Association v. Union of India MANU/SC/0875/2014 : (2014) 10 SCC 1, which is placed below:

136. (iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.

Learned Counsel then asserted, that the "basic structure" of the Constitution would stand violated if, in amending the Constitution and/or enacting legislation, Parliament does not ensure, that the body newly created, conformed with the salient characteristics and the standards of the body sought to be substituted. It was asserted, that the salient features of the existing process of appointment of Judges to the higher judiciary, which had stood the test of time, could validly and constitutionally be replaced, but while substituting the prevailing procedure, the salient characteristics which existed earlier, had to be preserved. By placing reliance on Articles 124 and 217, it was asserted, that the above provisions, as originally enacted, were explained by decisions of this Court, starting from 1974 in Samsher Singh v. State of Punjab MANU/SC/0073/1974 : (1974) 2 SCC 831, followed by the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193 in 1977, and the Second Judges case in 1993, and finally endorsed in 1998 by the Third Judges case. It was submitted, that four Constitution Benches of the Supreme Court, had only affirmed the practice followed by the executive since 1950 (when the people of this country, agreed to be governed by the Constitution). It was pointed out, that the process of appointment of Judges to the higher judiciary, had continued to remain a participatory consultative process, wherein the initiation of the proposal for appointment of a Judge to the Supreme Court, was by the Chief Justice of India; and in the case of appointment of Judges to High Courts, by the Chief Justice of the concerned High Court. And that, for transfer of a Judge/Chief Justice of a High Court, to another High Court, the proposal was initiated by the Chief Justice of India. It was contended, that in the process of taking a decision on the above matters (of appointment and transfer), the opinion of the judiciary was symbolized through the Chief Justice of India, and the same was based on the decision of a collegium of Judges, since 1993-when the Second Judges case was decided. The only exception to the above rule, according to learned Counsel, was when the executive, based on stated strong cogent reasons (disclosed to the Chief Justice of India), felt otherwise. However, if the stated reasons, as were disclosed to the Chief Justice of India, were not accepted, the decision of a collegium of Judges on reiteration, would result in the proposed appointment/transfer. This,

according to learned Counsel, constituted the earlier procedure Under Articles 124 and 217. The aforesaid procedure, was considered as sufficient, to preserve the "independence of the judiciary".

131. According to learned Counsel, it needed to be determined, whether the NJAC now set up, had the same or similar characteristics, in the matter of appointments/transfers, which would preserve the "independence of the judiciary"? Answering the query, learned Counsel was emphatic, that the primacy of the judiciary, had been totally eroded through the impugned constitutional amendment. For the above, learned Counsel invited our attention to Article 124A inserted by the Constitution (99th Amendment) Act. It was submitted, that the NJAC contemplated Under Article 124A would comprise of six Members, namely, the Chief Justice of India, two senior Judges of the Supreme Court (next to the Chief Justice), the Union Minister in charge of Law and Justice, and two "eminent persons". It was submitted, that the judges component, which had the primacy (and in a manner of understanding-unanimity), under the erstwhile procedure, had now been reduced to half-strength, in the selecting body-the NJAC. It was pointed out, that the Chief Justice of India, would now have an equivalent voting right, as the other Members of the NJAC. It was submitted, that even though the Chief Justice of India would be the Chairman of the NJAC, he has no casting vote, in the event of a tie. It was submitted, that under the substituted procedure, even if the Chief Justice of India, and the two other senior Judges of the Supreme Court (next to the Chief Justice of India), supported the appointment/transfer of an individual, the same could be negatived, by any two Members of the NJAC. Even by the two "eminent persons" who may have no direct or indirect nexus with the process of administration of justice. It was therefore submitted, that the primacy vested with the Chief Justice of India had been fully and completely eroded.

132. With reference to the subject of primacy of the judiciary, it was asserted, that under the system sought to be substituted, the proposal for appointment of Judges to the Supreme Court, could only have been initiated by the Chief Justice of India. And likewise, the proposal for transfer of a Judge or the Chief Justice of a High Court, could only have been initiated by the Chief Justice of India. And likewise, the proposal for appointment of a Judge to a High Court, could only have been initiated by the Chief Justice of the concerned High Court. In order to demonstrate the changed position, learned Counsel placed reliance on Article 124B introduced by the Constitution (99th Amendment) Act, whereunder, the authority to initiate the process, had now been vested with the NJAC. Under the new dispensation, the NJAC alone would recommend persons for appointment as Judges to the higher judiciary. It was also apparent, according to learned Counsel, that the NJAC has now been bestowed with the exclusive responsibility to recommend transfers of Chief Justices and Judges of High Courts. Having described the aforesaid alteration as a total subversion of the prevailing procedure, which had stood the test of time, and had secured the independence of the process of appointment and transfer of Judges of the higher judiciary, it was pointed out, that the Parliament had not disclosed the reasons, why the primacy of the Chief Justice of India and the other senior Judges, had to be dispensed with. Or for that matter, why the prevailing procedure needed to be altered. It was further the contention of learned Counsel, that the non-disclosure of reasons, must inevitably lead to the inference, that there were no such reasons.

133. Dr. Rajeev Dhavan, learned senior Counsel, also advanced submissions, with reference to the "basic structure", and the scope of amending the provisions of the Constitution. Dwelling upon the power of Parliament to amend the Constitution, it was submitted, that this Court in Kesavananda Bharati v. State of Kerala MANU/SC/0445/1973 : (1973) 4 SCC 225, had declared, that the "basic

structure" of the Constitution, was not susceptible or amenable to amendment. Inviting our attention to Article 368, it was submitted, that the power vested with the Parliament to amend the Constitution, contemplated the extension of the constituent power, which was exercised by the Constituent Assembly, while framing the Constitution. It was pointed out, that in exercise of the above power, the Parliament had been permitted to discharge the same role as the Constituent Assembly. The provisions of the Constitution, it was asserted, could be amended, to keep pace with developments in the civil society, so long as the amendment was not in violation of the "basic structure" of the Constitution. It was submitted, that it was not enough, in the facts and circumstances of the present case, to determine the validity of the constitutional amendment in question, by limiting the examination to a determination, whether or not the "independence of the judiciary" stood breached, on a plain reading of the provisions sought to be amended. It was asserted, that it was imperative to take into consideration, judgments rendered by this Court, on the subject. It was asserted, that this Court was liable to examine the declared position of law, in the First, Second and Third Judges cases, insofar as the present controversy was concerned. According to learned Counsel, if the enactments under challenge, were found to be in breach of the "basic structure" of the Constitution, as declared in the above judgments, the impugned constitutional amendment, as also, the legislation under reference, would undoubtedly be constitutionally invalid.

134. In the above context, learned Counsel pointed out, that with reference to an amendment to the fundamental right(s), enshrined in Part III of the Constitution, guidelines were laid down by this Court in M. Nagaraj v. Union of India MANU/SC/4560/2006 : (2006) 8 SCC 212, as also, in the Kihoto Hollohan case MANU/SC/0753/1992 : 1992 Supp (2) SCC 651. It was submitted, that the change through the impugned amendment to the Constitution, (and by the NJAC Act) was not a peripheral change, but was a substantial one, which was also seemingly irreversible. And therefore, according to learned Counsel, its validity would have to be determined, on the basis of the width and the identity tests. It was submitted, that the width and the identity tests were different from the tests applicable for determining the validity of ordinary parliamentary legislation, or a constitutional amendment relating to fundamental rights. The manner of working out the width and the identity tests, it was submitted, had been laid down in the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, wherein this Court held:

9. On behalf of the Respondents, the following arguments were advanced. The power of amendment Under Article 368 is a "constituent" power and not a "constituted power"; that, that there are no implied limitations on the constituent power Under Article 368; that, the power Under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure. In such process of amendment, if it destroys the basic feature of the Constitution, the amendment will be unconstitutional. The Constitution, according to the Respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment Under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment Under Article 368. Such change of the law so declared by the Supreme Court will not merely for that reason alone violate the basic structure of the Constitution or amount to usurpation of judicial power. This is how the Constitution becomes dynamic. Law has to change.

It requires amendments to the Constitution according to the needs of time and needs of society. It is an ongoing process of judicial and constituent powers, both contributing to change of law with the final say in the judiciary to pronounce on the validity of such change of law effected by the constituent power by examining whether such amendments violate the basic structure of the Constitution. On every occasion when a constitutional matter comes before the Court, the meaning of the provisions of the Constitution will call for interpretation, but every interpretation of the article does not become a basic feature of the Constitution. That, there are no implied limitations on the power of Parliament Under Article 368 when it seeks to amend the Constitution. However, an amendment will be invalid, if it interferes with or undermines the basic structure. The validity of the amendment is not to be decided on the touchstone of Article 13 but only on the basis of violation of the basic features of the Constitution.

135. It was submitted, that whilst the Parliament had the power to amend the Constitution; the legislature (-or the executive), had no power to either interpret the Constitution, or to determine the validity of an amendment to the provisions of the Constitution. The power to determine the validity of a constitutional amendment, according to learned Counsel, exclusively rests with the higher judiciary. Every amendment had to be tested on the touchstone of "basic structure"-as declared by the judiciary. It was submitted, that the aforesaid power vested with the judiciary, could not be withdrawn or revoked. This, according to learned Counsel, constituted the fundamental judicial power, and was no less significant/weighty than the legislative power of Parliament. The importance of the power of judicial review vested with the higher judiciary (to examine the validity of executive and legislative actions), bestowed superiority to the judiciary over the other two pillars of governance. This position, it was pointed out, was critical to balance the power surrendered by the civil society, in favour of the political and the executive sovereignty.

136. In order to determine the validity of the submissions advanced on behalf of the Petitioners, we were informed, that the interpretation placed by the Supreme Court on Articles 124 and 217 (as they existed, prior to the impugned amendment), would have to be kept in mind. It was submitted, that the term "consultation" with reference to Article 124, had been understood as conferring primacy with the judiciary. Therefore, while examining the impugned constitutional amendment to Article 124, it was imperative for this Court, to understand the term "consultation" in Article 124, and to read it as, conferring primacy in the matter of appointment of Judges, with the judiciary. Under Article 124, according to learned Counsel, the President was not required to merely "consult" the Chief Justice of India, but the executive was to accede to the view expressed by the Chief Justice of India. Insofar as the term "Chief Justice of India" is concerned, it was submitted, that the same had also been understood to mean, not the individual opinion of the Chief Justice of India, but the opinion of the judiciary symbolized through the Chief Justice of India. Accordingly, it was emphasized, that the individual opinion of the Chief Justice (with reference to Articles 124 and 217) was understood as the institutional opinion of the judiciary. Accordingly, whilst examining the impugned constitutional amendment, under the width and the identity test(s), the above declared legal position, had to be kept in mind while determining, whether or not the impugned constitutional amendment, and the impugned legislative enactment, had breached the "basic structure" of the Constitution.

137. It was contended, that the judgment in the Second Judges case, should be accepted as the touchstone, by which the validity of the impugned constitutional amendment (and the NJAC Act),

must be examined. It was submitted, that the power exercised by the Parliament Under Article 368, in giving effect to the impugned constitutional amendment (and by enacting the NJAC Act), will have to be tested in a manner, that will allow an organic adaptation to the changing times, and at the same time ensure, that the "basic structure" of the Constitution was not violated. Relying on the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, the Court's attention was drawn to the following observations:

18. The key issue, which arises for determination in this case is-whether by virtue of the impugned constitutional amendments, the power of Parliament is so enlarged so as to obliterate any or all of the constitutional limitations and requirements?

Standards of judicial review of constitutional amendments

19. The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges.

Learned senior Counsel, also drew the Court's attention to similar observations recorded in the Second Judges case.

138. Learned Counsel was emphatic, that the impugned constitutional amendment (and the provisions of the NJAC Act), if approved, would remain in place for ten..., twenty..., thirty or even forty years, and therefore, need to be viewed closely and objectively. The provisions will have to be interpreted in a manner, that the "independence of the judiciary" would not be compromised. It was submitted, that if the impugned provisions were to be declared as constitutionally valid, there would be no means hereafter, to restore the "independence of the judiciary".

139. According to learned Counsel, the question was of the purity of the justice delivery system. The question was about the maintenance of judicial standards. All these questions emerged from the fountainhead, namely, the manner of appointment of Judges to the higher judiciary. The provisions of Article 124, it was pointed out, as it existed prior to the impugned amendment, had provided for a system of trusteeship, wherein institutional predominance of the judiciary was the hallmark. It was submitted, that the aforesaid trusteeship should not be permitted to be shared by those, whose rival claims arose for consideration before Courts of law. The judicial responsibility in the matter of appointment of Judges, according to learned Counsel, being the most important trusteeship, could not be permitted to be shared, with either the executive or the legislature.

140. Referring to the amendment itself, it was contended, that merely changing the basis of the legislation, would not be the correct test to evaluate the actions of the Parliament, in the present controversy. It was likewise submitted, that reasonableness and proportionality were also not the correct test(s) to be applied. According to learned Counsel, in order to determine the validity of

the impugned constitutional amendment (and the NJAC Act), the Union of India and the ratifying States will have to bear the onus of satisfactorily establishing, that the amended provisions, could under no circumstances, be used (actually misused) to subvert the "independence of the judiciary". Placing reliance on the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, the Court's attention was invited to the following observations:

22. The question which arises before us is regarding the nature of the standards of judicial review required to be applied in judging the validity of the constitutional amendments in the context of the doctrine of basic structure. The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings.

23. .....In S.R. Bommai MANU/SC/0444/1994 : (1994) 3 SCC 1 the Court clearly based its conclusion not so much on violation of particular constitutional provisions but on this generalised ground i.e. evidence of a pattern of action directed against the principle of secularism. Therefore, it is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as "essential features" or part of the "basic structure" of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

xxx

25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

xxx

30. Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities, and because of the good sense of the judges when

interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance.

xxx

35. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged.

141. Referring to the position expressed by this Court, learned Counsel submitted, that the overarching principle for this Court, was to first keep in its mind, the exact nature of the amendment contemplated through the Constitution (99th Amendment) Act. And the second step was, to determine how fundamental the amended provision was. For this, reliance was again placed on the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, and our attention was drawn to the following conclusions:

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in Clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality Under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from Clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is--whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the Petitioners that the Statement of Objects and Reasons indicates that the impugned

amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in Union of India v. Virpal Singh Chauhan MANU/SC/0113/1996 : (1995) 6 SCC 684..., Ajit Singh Januja v. State of Punjab MANU/SC/0306/1996 : (1996) 2 SCC 7 15..., Ajit Singh (II) v. State of Punjab MANU/SC/0575/1999 : (1999) 7 SCC 209... and Indra Sawhney v. Union of India MANU/SC/0104/1993 : 1992 Supp (3) SCC 217... were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets--"formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

Yet again referring to the width and the identity tests, learned Counsel emphasized, that it was imperative for this Court, in the facts and circumstances of the present case, to examine whether the power of amendment exercised by the Parliament, was so wide as to make it excessive. For the above, reference was made to the Madras Bar Association case MANU/SC/0875/2014 : (2014) 10 SCC 1, wherein this Court recorded the following conclusions:

134. (i) Parliament has the power to enact legislation and to vest adjudicatory functions earlier vested in the High Court with an alternative court/tribunal. Exercise of such power by Parliament would not per se violate the "basic structure" of the Constitution.

135. (ii) Recognised constitutional conventions pertaining to the Westminster model do not debar the legislating authority from enacting legislation to vest adjudicatory functions earlier vested in a superior court with an alternative court/tribunal. Exercise of such power by Parliament would per se not violate any constitutional convention.

136. (iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.

137. (iv) Constitutional conventions pertaining to the Constitutions styled on the Westminster model will also stand breached, if while enacting legislation, pertaining to transfer of judicial

power, conventions and salient characteristics of the court sought to be replaced are not incorporated in the court/tribunal sought to be created.

138. (v) The prayer made in Writ Petition (C) No. 621 of 2007 is declined. Company Secretaries are held ineligible for representing a party to an appeal before NTT.

139. (vi) Examined on the touchstone of Conclusions (iii) and (iv) (contained in paras 136 and 137, above) Sections 5, 6, 7, 8 and 13 of the NTT Act (to the extent indicated hereinabove), are held to be unconstitutional. Since the aforesaid provisions constitute the edifice of the NTT Act, and without these provisions the remaining provisions are rendered ineffective and inconsequential, the entire enactment is declared unconstitutional.

Based on the above, it was asserted, that this Court had now clearly laid down, that on issues pertaining to the transfer of judicial power, the salient characteristics, standards and conventions of judicial power, could not be breached. It was also submitted, that evaluated by the aforesaid standards, it would clearly emerge, that the "independence of the judiciary" had been seriously compromised, through the impugned constitutional amendment (and the NJAC Act).

142. It was the submission of Mr. Ram Jethmalani, learned Senior Advocate, that the defect in the judgment rendered by this Court in the First Judges case, was that, Article 50 of the Constitution had not been appropriately highlighted, for consideration. It was submitted, that importance of Article 50 read with Articles 12 and 36, came to be examined in the Second Judges case, wherein the majority view, was as follows:

80. From the above deliberation, it is clear that Article 50 was referred to in various decisions by the eminent Judges of this Court while discussing the principle of independence of the judiciary. We may cite Article 36 which falls under Part IV (Directive Principles of State Policy) and which reads thus:

36. In this Part, unless the context otherwise requires, 'the State' has the same meaning as in Part III.

81. According to this article, the definition of the expression "the State" in Article 12 shall apply throughout Part IV, wherever that word is used. Therefore, it follows that the expression "the State" used in Article 50 has to be construed in the distributive sense as including the Government and Parliament of India and the Government and the legislature of each State and all local or other authorities within the territory of India or under the control of the Government of India. When the concept of separation of the judiciary from the executive is assayed and assessed that concept cannot be confined only to the subordinate judiciary, totally discarding the higher judiciary. If such a narrow and pedantic or syllogistic approach is made and a constricted construction is given, it would lead to an anomalous position that the Constitution does not emphasise the separation of higher judiciary from the executive. Indeed, the distinguished Judges of this Court, as pointed out earlier, in various decisions have referred to Article 50 while discussing the concept of independence of higher or superior judiciary and thereby highlighted and laid stress on the basic principle and values underlying Article 50 in safeguarding the independence of the judiciary.

xxx

85. Regrettably, there are some intractable problems concerned with judicial administration starting from the initial stage of selection of candidates to man the Supreme Court and the High Courts leading to the present malaise. Therefore, it has become inevitable that effective steps have to be taken to improve or retrieve the situation. After taking note of these problems and realising the devastating consequences that may flow, one cannot be a silent spectator or an old inveterate optimist, looking upon the other constitutional functionaries, particularly the executive, in the fond hope of getting invigorative solutions to make the justice delivery system more effective and resilient to meet the contemporary needs of the society, which hopes, as experience shows, have never been successful. Therefore, faced with such a piquant situation, it has become imperative for us to solve these problems within the constitutional fabric by interpreting the various provisions of the Constitution relating to the functioning of the judiciary in the light of the letter and spirit of the Constitution.

xxx

141. Mr. Ram Jethmalani, learned senior Counsel expressed his grievance that the principles laid down in Chandra Mohan case MANU/SC/0052/1966 : (1967) 1 SCR 77, 83... were not appreciated by the learned Judges while dealing with Samsher Singh v. State of Punjab MANU/SC/0073/1974 : (1974) 2 SCC 831 who in his submission, have ignored the principle of harmonious construction which was articulated in K.M. Nanavati v. State of Bombay MANU/SC/0063/1960 : (1961) 1 SCR 497... According to him, the judgment in Gupta case MANU/SC/0080/1981 : 1981 Supp SCC 87 may be regarded as per incuriam. He articulates that the expression 'consultation' is itself flexible and in a certain context capable of bearing the meaning of 'consent' or 'concurrence'.

xxx

154. The controversy that arises for scrutiny from the arguments addressed boils down with regard to the construction of the word 'consultation'.

xxx

170. Thus, it is seen that the consensus of opinion is that consultation with the CJI is a mandatory condition precedent to the order of transfer made by the President so that non-consultation with the CJI shall render the order unconstitutional i.e. void.

171. The above view of the mandatory character of the requirement of consultation taken in Sankalchand has been followed and reiterated by some of the Judges in Gupta case Fazal Ali, J. has held in Gupta case: (SCC p. 483, para 569)

(3) If the consultation with the CJI has not been done before transferring a Judge, the transfer becomes unconstitutional.

Venkataramiah, J. in Gupta case has also expressed the same view.

172. In the light of the above view expressed in Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977 : (1977) SCC 4 193... and some of the Judges in Gupta case MANU/SC/0080/1981 : 1981 Supp SCC 87... it can be simply held that consultation with the CJI under the first proviso to Article 124(2) as well as Under Article 217 is a mandatory condition, the violation of which would be contrary to the constitutional mandate.

xxx

181. It cannot be gainsaid that the CJI being the head of the Indian Judiciary and paterfamilias of the judicial fraternity has to keep a vigilant watch in protecting the integrity and guarding the independence of the judiciary and he in that capacity evaluates the merit of the candidate with regard to his/her professional attainments, legal ability etc. and offers his opinion. Therefore, there cannot be any justification in scanning that opinion of the CJI by applying a superimposition test under the guise of overguarding the judiciary.

xxx

183. One should not lose sight of the important fact that appointment to the judicial office cannot be equated with the appointment to the executive or other services. In a recent judgment in All India Judges' Association v. Union of India MANU/SC/0391/1993 : (1993) 4 SCC 288... rendered by a three-Judge Bench presided over by M.N. Venkatachaliah, C.J. and consisting of A.M. Ahmadi and P.B. Sawant, JJ., the following observations are made: (SCC pp. 295 e-h, 296 a and c-d, 297 b, paras 7 and 9)

The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the Council of Ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the ministers, the legislators and the judges, and not the members of the their staff who implement or assist in implementing their decisions. The Council of Ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the judges from the judicial staff. The parity is between the political executive, the legislators and the judges and not between the judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of other services. The members of the other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally.

Whereupon, this Court recorded its conclusions. The relevant conclusions are extracted hereunder:

(1) The 'consultation' with the CJI by the President is relatable to the judiciary and not to any other service.

(2) In the process of various constitutional appointments, 'consultation' is required only to the judicial office in contrast to the other high-ranking constitutional offices. The prior 'consultation' envisaged in the first proviso to Article 124(2) and Article 217(1) in respect of judicial offices is a reservation or limitation on the power of the President to appoint the Judges to the superior courts.

xxx

(4) The context in which the expression "shall always be consulted" used in the first proviso of Article 124(2) and the expression "shall be appointed ... after consultation" deployed in Article 217(1) denote the mandatory character of 'consultation', which has to be and is of a binding character.

(5) Articles 124 and 217 do not speak in specific terms requiring the President to consult the executive as such, but the executive comes into play in the process of appointment of Judges to the higher echelons of judicial service by the operation of Articles 74 and 163 of the Constitution. In other words, in the case of appointment of Judges, the President is not obliged to consult the executive as there is no specific provision for such consultation.

(6) The President is constitutionally obliged to consult the CJI alone in the case of appointment of a Judge to the Supreme Court as per the mandatory proviso to Article 124(2) and in the case of appointment of a Judge to the High Court, the President is obliged to consult the CJI and the Governor of the State and in addition the Chief Justice of the High Court concerned, in case the appointment relates to a Judge other than the Chief Justice of that High Court. Therefore, to place the opinion of the CJI on a par with the other constitutional functionaries is not in consonance with the spirit of the Constitution, but against the very nature of the subject-matter concerning the judiciary and in opposition to the context in which 'consultation' is required. After the observation of Bhagwati, J. in Gupta case that the 'consultation' must be full and effective there is no conceivable reason to hold that such 'consultation' need not be given primary consideration.

xxx

196. In the background of the above factual and legal position, the meaning of the word 'consultation' cannot be confined to its ordinary lexical definition. Its contents greatly vary according to the circumstances and context in which the word is used as in our Constitution.

xxx

207. No one can deny that the State in the present day has become the major litigant and the superior courts particularly the Supreme Court, have become centres for turbulent controversies, some of which with a flavour of political repercussions and the Courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to

continue, the independence of judiciary in the long run will sink without any trace. By going through various Law Commission Reports (particularly Fourteenth, Eightieth and One Hundred and Twenty-first), Reports of the Seminars and articles of eminent jurists etc., we understand that a radical change in the method of appointment of Judges to the superior judiciary by curbing the executive's power has been accentuated but the desired result has not been achieved even though by now nearly 46 years since the attainment of independence and more than 42 years since the advent of the formation of our constitutional system have elapsed. However, it is a proud privilege that the celebrated birth of our judicial system, its independence, mode of dispensation of justice by Judges of eminence holding nationalistic views stronger than other Judges in any other nations, and the resultant triumph of the Indian judiciary are highly commendable. But it does not mean that the present system should continue for ever, and by allowing the executive to enjoy the absolute primacy in the matter of appointment of Judges as its 'royal privilege'.

208. The polemics of the learned Attorney-General and Mr. Parasaran for sustaining the view expressed in Gupta case MANU/SC/0080/1981 : 1981 Supp SCC 87... though so distinguished for the strength of their ratiocination, is found to be not acceptable and falls through for all the reasons aforementioned because of the inherent weakness of the doctrine which they have attempted to defend.

Insofar as the minority judgment authored by A.M. Ahmadi, J., (as he then was) is concerned, it is only relevant to highlight the first conclusion recorded in paragraph 313, which is reproduced hereunder:

313. We conclude:

(*i*) The concept of judicial independence is deeply ingrained in our constitutional scheme and Article 50 illuminates it. The degree of independence is near total after a person is appointed and inducted in the judicial family....

143. Insofar as the instant aspect of the matter is concerned, learned Counsel invited our attention to the preamble of the NJAC Act, which is reproduced below:

An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.

The statement of objects and reasons is also being extracted hereunder:

Statement of Objects and Reasons

xxx

2. The Supreme Court in the matter of the Supreme Court Advocates-on-Record Association v. Union of India in the year 1993, and in its Advisory Opinion in the year 1998 in the Third Judges case, had interpreted Clause (2) of Article 124 and Clause (1) of Article 217 of the Constitution

with respect to the meaning of "consultation" as "concurrence". Consequently, a Memorandum of Procedure for appointment of Judges to the Supreme Court and High Courts was formulated, and is being followed for appointment.

3. After review of the relevant constitutional provisions, the pronouncements of the Supreme Court and consultations with eminent Jurists, it is felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of Judges of the Supreme Court and High Courts. The said Commission would provide a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process.

4. The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is an enabling constitutional amendment for amending relevant provisions of the Constitution and for setting up a National Judicial Appointments Commission. The proposed Bill seeks to insert new articles 124A, 124B and 124C after Article 124 of the Constitution. The said Bill also provides for the composition and the functions of the proposed National Judicial Appointments Commission. Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by Regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary.

5. The proposed Bill seeks to broad base the method of appointment of Judges in the Supreme Court and High Courts, enables participation of judiciary, executive and eminent persons and ensures greater transparency, accountability and objectivity in the appointment of the Judges in the Supreme Court and High Courts.

6. The Bill seeks to achieve the above objectives.

Ravi Shankar Prasad

New Delhi;
The 8th August, 2014.

Based on the non-disclosure of reasons, why the existing procedure was perceived as unsuitable, it was contended, that the only object sought to be achieved was, to dilute the primacy, earlier vested with the Chief Justice of India (based on a decision of a collegium of Judges), provided for Under Articles 124 and 217, as originally enacted. This had been done away, it was pointed out, by substituting the Chief Justice of India, with the NJAC.

144. The primary submission advanced at the hands of Mr. Fali S. Nariman, Senior Advocate, was with reference to the violation of the "basic structure", not only through the Constitution (99th Amendment) Act, but also, by enacting the NJAC Act. It was pointed out, that since the commencement of the Constitution, whenever changes were recommended in respect of the appointment of Judges, the issue which remained the focus of attention was, the primacy of the Chief Justice of India. Primacy, it was contended, had been recognized as the decisive voice of the judiciary, based on a collective decision of a collegium of Judges, representing its collegiate

wisdom. It was submitted, that the Chief Justice of India, as an individual, as well as, Chief Justices of High Courts, as individuals, could not be considered as persona designate. It was pointed out, that the judgment rendered in the Second Judges case, had not become irrelevant. This Court, in the above judgment, provided for the preservation of the "independence of the judiciary". The aforesaid judgment, as also, the later judgment in the Third Judges case, re-established and reaffirmed, that the Chief Justice of India, represented through a body of Judges, had primacy. According to learned Counsel, the individual Chief Justice of India, could not and did not, represent the collective opinion of the Judges. It was asserted, that the Constitution (99th Amendment) Act, and the NJAC Act, had done away with, the responsibility vested with the Chief Justice of India, represented through a collegium of Judges (Under Articles 124 and 217-as originally enacted). Accordingly, it was submitted, that till the system adopted for selection and appointment of Judges, established and affirmed, the unimpeachable primacy of the judiciary, "independence of the judiciary" could not be deemed to have been preserved.

145. Insofar as the issue in hand is concerned, it was the pointed contention of the learned Counsel, that the decision rendered by this Court in Sardari Lal v. Union of India MANU/SC/0656/1971 : AIR 1971 SC 1547, came to be overruled in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831. Referring to the judgment in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, he invited this Court's attention to the following observations recorded therein:

147. In J.P. Mitter v. Chief Justice, Calcutta MANU/SC/0053/1964 : AIR 1965 SC 961 this Court had to consider the decision of the Government of India on the age of a Judge of the Calcutta High Court and, in that context, had to ascertain the true scope and effect of Article 217(3) which clothes the President with exclusive jurisdiction to determine the age of a Judge finally. In that case the Ministry of Home Affairs went through the exercise prescribed in Article 217(3). "The then Home Minister wrote to the Chief Minister, West Bengal, that he had consulted the Chief Justice of India, and he agreed with the advice given to him by the Chief Justice, and so he had decided that the date of birth of the Appellant was....It is this decision which was, in due course communicated to the Appellant". When the said decision was attacked as one reached by the Home Minister only and not by the President personally, the Court observed:

The alternative stand which the Appellant took was that the Executive was not entitled to determine his age, and it must be remembered that this stand was taken before Article 217(3) was inserted in the Constitution; the Appellant was undoubtedly justified in contending that the Executive was not competent to determine the question about his age because that is a matter which would have to be tried normally, in judicial proceedings instituted before High Courts of competent jurisdiction. There is considerable force in the plea which the Appellant took at the initial stages of this controversy that if the Executive is allowed to determine the age of a sitting Judge of a High Court, that would seriously affect the independence of the Judiciary itself.

Based on this reasoning, the Court quashed the order, the ratio of the case being that the President himself should decide the age of the Judge, uninfluenced by the Executive, i.e. by the Minister in charge of the portfolio dealing with justice.

148. This decision was reiterated in Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 : (1971) 1 SCC 396. Although an argument was made that the President was guided in that case

by the Minister of Home Affairs and by the Prime Minister, it was repelled by the Court which, on the facts, found the decision to be that of the President himself and not of the Prime Minister or the Home Minister.

149. In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article-making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue.

146. It was pointed out, that the decision in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, came to be rendered well before the decision in the First Judges case, wherein this Court felt, that Judges could be fearless only if, institutional immunity was assured, and institutional autonomy was guaranteed. The view expressed in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831 in 1974 was, that the final authority in the matter of appointment of Judges to the higher judiciary, rested with the Chief Justice of India. It was pointed out, that the above position had held the field, ever since. It was submitted, that "independence of the judiciary" has always meant and included independence in the matter of appointment of Judges to the higher judiciary.

147. Mr. Arvind P. Datar, learned Senior Advocate contended, that the NJAC had been created by an amendment to the Constitution. It therefore was a creature of the Constitution. Power had been vested with the NJAC to make recommendations of persons for appointment as Judges to the higher judiciary, including the power to transfer Chief Justices and Judges of High Courts, from one High Court to another. The above constitutional authority, it was submitted, must be regulated by a constitutional scheme, which must flow from the provisions of the Constitution itself. Therefore, it was asserted, that the manner of functioning of the NJAC must be contained in the Constitution itself. It was submitted, that the method of functioning of the NJAC, could not be left to the Parliament, to be regulated by ordinary law. In order to support his aforestated contention, reliance was placed on entries 77 and 78, contained in the Union List of the Seventh Schedule. It was submitted, that the power to frame legislation, with reference to entries 77 and 78 was not absolute, inasmuch as, Article 245 authorized the Parliament, to legislate on subjects falling within its realm, subject to the substantive provisions contained in the Constitution. For the above reason, it was asserted, that the activities of the NJAC could not be made subject to, or subservient to, the power vested in the Parliament, under entries 77 and 78.

148. It was contended by Mr. Ram Jethmalani, learned Senior Advocate, that there was sufficient circumstantial evidence to demonstrate, that the present political establishment felt, that the judiciary was an obstacle for the implementation of its policies. It was contended, that the entire effort, was to subdue the judiciary, by inducting into the selection process, those who could be politically influenced. In order to project, the concerted effort of the political dispensation, in subverting the "independence of the judiciary", learned Counsel, in the first instance, pointed out, that the first Bill to constitute a National Judicial Commission [the Constitution (67th Amendment) Bill, 1990] was introduced in the Lok Sabha on 18.5.1990. The statement of its "Objects and Reasons", which was relied upon, is extracted below:

The Government of India have in the recent past announced their intention to set up a high level judicial commission, to be called the National Judicial Commission for the appointment of Judges of the Supreme Court and of the High Courts and the transfer of Judges of the High Courts so as to obviate the criticisms of arbitrariness on the part of the Executive in such appointments and transfers and also to make such appointments without any delay. The Law Commission of India in their One Hundred and Twenty-first Report also emphasised the need for a change in the system.

2. The National Judicial Commission to make recommendations with respect to the appointment of Judges of the Supreme Court will consist of the Chief Justice of India and two other Judges of the Supreme Court next in seniority to the Chief Justice of India. The Commission to make recommendations with respect to the appointment of the Judges of the High Courts will consist of the Chief Justice of India, one senior-most Judge of the Supreme Court, the Chief Minister of the State concerned, Chief Justice of the concerned High Court and one senior-most Judge of that High Court.

3. The Bill seeks to achieve the above object.

NEW DELHI;
The 11th May, 1990;

The proposed National Judicial Commission in the above Bill, was to be made a component of Part XIIIA of the Constitution, by including therein Article 307A. The Chief Justice of India, and the next two senior most Judges of the Supreme Court, were proposed to comprise of the contemplated Commission, for making appointments of Judges to the Supreme Court, Chief Justices and Judges to High Courts, and for transfer of High Court Judges from one High Court to another. The above Commission, omitted any executive and legislative participation. The proposed composition of the Commission, for appointing High Court Judges, included the Chief Justice of India, the Chief Minister or the Governor of the concerned State, the senior most Judge of the Supreme Court, the Chief Justice of the concerned High Court, and the senior most Judge of that Court. The above Bill also provided for, an independent and separate secretarial staff for the contemplated Commission. It was submitted, that the above amendment to the Constitution, was on account of the disillusionment and incredulity with the legal position, expounded by this Court in the First Judges case. It was submitted, that the necessity to give effect to the proposed Constitution (67th Amendment) Bill, 1990, stood obviated when this Court rendered its judgment in the Second Judges case. All this, according to learned Counsel for the Petitioners, has been forgotten and ignored.

149. Historically, the next stage, was when the Constitution (98th Amendment) Bill, 2003 was placed before the Parliament for its consideration. In the above Bill, the executive participation in the process of selection and appointment of Judges to the higher judiciary, was introduced by making the Union Minister of Law and Justice, an ex officio Member of the Commission. Two eminent citizens (either eminent jurists, or eminent lawyers, or legal academicians of high repute) would also be Members of the Commission. One of them was to be appointed by the President in consultation with the Chief Justice of India, and the other, in consultation with the Prime Minister. Yet another effort was made (by the previous U.P.A. Government), in the same direction, through the Constitution (120th Amendment) Bill, 2013, on similar lines as the 2003 Bill. It was sought to be pointed out, that there was a consensus amongst all the parties, that the aforesaid Bill should be approved. And that, learned Counsel personally, as a Member of the Rajya Sabha, had strongly contested the above move. Learned Counsel invited this Court's attention to the objections raised by him, during the course of the debate before the Rajya Sabha. He emphasized, that he had submitted to the Parliament, that the Constitution Amendment Bill, needed to be referred to the Select Committee of the Parliament, as the same in his opinion was unconstitutional. An extract of the debate was also brought to our notice (by substituting the vernacular part thereof, with its English translation), it is being reproduced hereunder:

My suggestion is: Let the Judicial Appointments Commission Bill go to the Standing Committee. The rest of the business we should pass today. Thank you.

Shri Ram Jethmalali: Madam, thank you; better late than never.

Sir, I wish to make two preliminary suggestions. If there is an assurance that the Constitution (Amendment) Bill as well as the subsidiary Bill will both be referred to a Select Committee of Parliament, I do not propose to address this House at all. But, I do not consider it suitable or proper that only the second Bill should be referred to a Select Committee. Both should be sent. And, I will give my reasons.

Sir, the second suggestion that I have to make is this. My main contention, which I am going to make, is that the Constitution (Amendment) Bill is wholly unconstitutional and, if passed, it will undoubtedly be set aside by the Supreme Court, because it interferes with the basic feature of the Constitution. Such amendments of the Constitution are outside the jurisdiction of this House. The amendment process prescribed by the Constitution requires 2/3rd majority and so on and so forth. That applies only to those amendments of the Constitution which do not touch what are called the basic features of the Constitution as understood in the Kesavananda Bharati case. This Constitutional amendment, certainly, interferes with a basic feature of the Indian Constitution and it will not be sustained ever. But, if it is said that even if you pass it, it will not be brought into force until a Reference is made to the Supreme Court and the Supreme Court answers the question of the validity of this Constitution amendment in the affirmative. If that is done, I, again, need not speak. But, Sir, since I don't expect both these reasonable suggestions to be accepted, I intend to speak and speak my mind.

xxx

Kapil is my great friend and is one of the Ministers in the Government whose work as the Law Minister I keep supervising and I am happy the manner in which he conducts his Ministry. But, Sir, I must declare today that my conscience, understanding and my duty towards the people of this country, which I regard as my paramount obligation, do not permit me to submit to this kind of legislation. Both the Bills, according to me are evil. The evil, first of all, consists in the misleading Statement of Objects-and-Reasons. You ought to have said with complete honesty that what you are trying to demolish is the Collegium System, which seems to be the object, and which is apparent to anyone. Some of the persons who have spoken have spoken on the assumption that that is the purpose of this particular piece of legislation.

Sir, the first point that I propose to make is that the 1993 judgment of Nine Judges is a judgment based upon the discovery of the basic feature of the Constitution, and upon devising a system to sustain that basic feature. Madam, I have myself appeared in that litigation and I claim that I had a tremendous contribution to make to the success of that judgment. In a sense, I claim to be the founder of the Collegium System. But that does not mean that I am an unmixed admirer of the Collegium System. The Collegium System has, doubtless, some faults. But the Collegium System came into existence on the basis of one main argument. That one main argument that we advance, and advance with great vigour and force, is that there is one article of the Constitution, Article 50 of the Constitution, which is the shortest article in the Constitution, consisting of only one sentence. That article says that the Government shall strive to keep the Judiciary separate from the Executive.

Sir, we argued before the Supreme Court that this article does not mean that Judges and Ministers should not socially meet. This does not mean that they should live in separate towns, or that they should not live even in adjoining bungalows. The purpose of this article is to ensure that in the appointment of Judges, the Executive has no role to play, except the advisory role. In other words, the doctrine of primacy of the Executive in the appointment process was irksome to us because the whole nation of India has been the victim of the Judges appointed in the earlier system. I have been a refugee from my own country during the Emergency. Why was it? It was because four Supreme Court Judges-I am not talking of the fifth who earned the New York Times praise that the Indian nation will have to build a monument to his memory; I am talking of the other four who-disgraced the Judiciary, disgraced the Supreme Court and were parties to the destruction of Indian democracy and the demolition and the debasement of the whole Constitution of India. Sir, of which system were they the product? They were the product of that system which, in 1981, was ultimately supported by the Gupta judgment but, after some time, there were people, intellectuals, who spoke up that this system would not work; the system requires change. Sir, the Indian democracy has been saved not by intellectuals; Indian democracy at its most crucial hour has been saved by the poor illiterates of this country.

In times of crises, it is only the brave hearted who matter. On those which one had pride remained tongue tied (Two sentences translated).

That is the tragedy of our country. Sir, the intellectuals of this country have continuously failed, and I regret to say that they are failing even today. Collegium may be the creation of the Judiciary, it is the creation of judicial interpretation, again, of the Constitution, but whatever be the faults of the Collegium, the Collegium today represents some system which is consistent with the basic

features of the Constitution, namely, the supremacy of the Judiciary and its freedom from any influence of the Executive in the appointment process.

xxx

Sir, I am speaking for those who are not irrevocably committed to voting for this amendment. There are some people who must have kept their minds still open. I am appealing to those minds today only. Those who are irrevocably committed are committed to the destruction of Indian democracy.

Sir, the key passage in the judgment of the Supreme Court of 1993 is the passage which I wish to share with the House. The question of primacy to the opinion of the Chief Justice of India in the matters of appointment and transfer and their justifiability should be considered in the context of the independence of the Judiciary as a part of the basic structure of the Constitution to secure the rule of law essential for preservation of the democratic system. The broad scheme of separation of powers adopted in the Constitution together with the Directive Principles of separation of the Judiciary from the Executive, even at the lowest strata, provides some insight to the true meaning of the relevant provisions of the Constitution relating to the composition of the Judiciary. The construction of these provisions must accord with these fundamental concepts in the Constitutional scheme to preserve the vitality and promote the growth of the essential of retaining the Constitution as a vibrant organism".

Sir, the Constitution cannot survive, human freedom cannot survive, citizens' human rights cannot survive, no development can take place unless, of course, the judges are independent first of the Executive power because don't forget that every citizen has a grievance against the corrupt members of the Executive, or, errant bureaucracy, public officers misusing power, indulging in corruption, making wrong and illegal orders. The citizen goes to the court, knocks the door of the court and says, "Please give me a mandamus against this corrupt official, against this corrupt Minister". And, Sir, the judges are supposed to decide upon the claims of the poorest who go to the Supreme Court..... (Interruptions).....and to the judges. It may be, and I am conscious..... (Interruptions)... Sir, this is not a laughing matter. Please listen, and then decide for yourself....

xxx

Sir, first of all, let me say this now that the whole judgment of nine Judges is based upon this principle that in the appointment process, the Executive can never have primacy. This is principle number one. It has now become the basic feature of India's Constitution. My grievance today against this Constitution (Amendment) Bill is that you are slowly, slowly now creating a new method by which ultimately you will revert to the system which existed prior to 1993. In other words, the same system would produce those four Judges who destroyed the Indian democracy, human rights and freedom. Sir, kindly see, why. The Constitution Amendment looks very innocent. All that it says is that we shall have a new Article 124(a) in the Constitution and Article 124(a) merely says that there shall be a Judicial Appointments Commission. It lays down that the Judicial Appointments Commission will have these functions. It leaves at that. But, kindly see that after the first sentence, everything is left to a Parliamentary will. After saying that there will be a Judicial Appointments Commission, everything will be left, according to the second part of 124(a),

to a parliamentary legislation which is capable of being removed if the ruling party has one Member majority in both Houses of Parliament. Not only that, I understand that Parliament is not likely to do it, but it can do it and by a majority of one in both Houses, you can demolish the whole thing and substitute it with a Judicial Commission which will consist of only the Law Minister.

xxx

So, Sir, my first objection is that this Bill is a Bill which is intended to deal with the basic structure of the Constitution and, therefore, this Bill is void. (Time-bell) Second, if a Constitutional Amendment is not good enough for this purpose, surely, an ordinary piece of legislation cannot do it, which ordinary piece of legislation can be removed only by a majority of one in each House. It can be removed like the 30th July Food Security Ordinance and you can pass an Ordinance on that day and say that the whole Act is repealed and now the system will be that Judges will be appointed for the next six months by only the Law Minister of India. If there was Mr. Kapil Sibal,...(Interruptions)... If Mr. Kapil Sibal becomes the Law Minister for ever, Sir, I will allow this Bill to go. (Time-bell) But I am not prepared to accept it for the future Law Ministers....(Interruptions)... Sir, let me take two more minutes and tell all those Members that this Bill is not intended to ensure the judicial character. This Bill has nothing to do with the improvement of the judicial character. So long as the Judges are also human, there will be some Judges who will go wrong, who may go wrong. But a great Bar can control them....

xxx

Sir, I hope, people will avoid this kind of a tragedy in the life of this country. You are today digging the grave of the Constitution of India and the freedom of this country....(Interruptions)... That's all I wished to say....(Interruptions)....

It was submitted, that in the Rajya Sabha 131 votes were cast in affirmation of the proposed Bill, as against the solitary vote of the learned Counsel, against the same on 5.9.2013. It was however pointed out, that the effort did not bear fruit, on account of the intervening declaration for elections to the Parliament.

150. Learned Counsel thereafter, invited our attention to the statement of "Objects and Reasons" for the promulgation of the Constitution (121st Amendment) Bill, 2014. The Bill which eventually gave rise to the impugned Constitution (99th Amendment) Act, was taken up for consideration by the Lok Sabha on 13.8.2014, and was passed without much debate. It was submitted, that on the following day i.e., 14.8.2014, the same was placed before the Rajya Sabha, and was again passed, without much discussion. It was pointed out, that an issue, as serious as the one in hand, which could have serious repercussions on the "independence of the judiciary", was sought to be rushed through.

151. It was submitted, that the "Objects and Reasons" of the Constitution (99th Amendment) Act were painfully lacking, in the expression of details, which had necessitated the proposed/impugned constitutional amendment. It was submitted, that it was imperative to have brought to the notice of the Parliament, that the Supreme Court had declared, that the "rule of law", the "separation of powers" and the "independence of the judiciary", were "salient and basic features" of the

Constitution. And that, the same could not be abrogated, through a constitutional amendment. And further that, the Supreme Court had expressly provided for the primacy of the Chief Justice of India, based on a decision of a collegium of Judges, with reference to the appointments and transfers of Judges of the higher judiciary.

152. It was submitted by Mr. Ram Jethmalani, that the impugned constitutional amendment, so as to introduce Article 124A, ought to be described as a fraud on the Constitution itself. It was pointed out, that the first effort of introducing Article 124A was made by the previous Government, through the Constitution (120th Amendment) Bill, 2013. In the above Bill, Article 124A alone (as against Articles 124A to 124C, presently enacted) was introduced. It was submitted, that the Rajya Sabha passed the above Bill on 5.9.2013, when 131 Members of the Rajya Sabha supported the Bill (with only one Member opposing it). Learned Counsel submitted, that he alone had opposed the Bill. It was asserted, that the above fraud was sought to be perpetuated, through the passing of the Constitution (121st Amendment) Bill, 2014, by the Lok Sabha on 13.8.2014, and by the Rajya Sabha on 14.8.2014. It was pointed out, that Parliamentarians from different political parties had joined hands. It was submitted, that as a Parliamentarian, he was in a position to assert, that the merits and demerits of the impugned amendment to the Constitution, were not debated, when the Bill was passed, because of the universal bias entertained by the legislature, against the judiciary. It was submitted, that prejudice and intolerance had arisen, because of the fact that the judiciary often interfered with, and often effaced legislative action(s), as also, executive decision(s).

153. Learned senior Counsel also asserted, that the Constitution (99th Amendment) Act, was wholly *ultra vires*, as it seriously infringed the "basic structure/feature" of the Constitution i.e., the "independence of the judiciary". It was submitted, that the veracity of the above constitutional amendment, had to be examined in the light of Article 50. According to learned Counsel, the politicization of the process of selection and appointment of Judges to the higher judiciary, would lead to a dilution of the "independence of the judiciary". It was submitted, that the inclusion of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, had the effect of politicization of the process of appointment of Judges to the higher judiciary. It was pointed out, that the inclusion of the Union Minister in charge of Law and Justice within the framework of the NJAC, meant the introduction of the Government of the day, into the selection process. It was asserted, that the Union Minister's inclusion, meant surrendering one-sixth of the power of appointment, to the Government. It was submitted, that in order to understand the true effect of the inclusion of the Union Minister, into the process of selection and appointment of Judges to the higher judiciary, one had to keep in mind the tremendous amount of patronage, which the Union Minister for Law and Justice carries, and as such, it would be within the inference of the Union Minister in charge of Law and Justice, to make the process fallible, by extending his power of patronage to support or oppose candidates, who may be suitable or unsuitable, to the Government of the day. Even though the Union Minister had been assigned only one vote, it was submitted, that he could paralyse the whole system, on the basis of the authority he exercised. To drive home his contention, learned Counsel made a reference to the introduction of the book "Choosing Hammurabi-Debates on Judicial Appointments", edited by Santosh Paul. In the introduction to the book, the thoughts of H.L. Mencken are expressed in the following words:

<u>But when politicians talk thus, or act thus without talking, it is precisely the time to watch them most carefully. Their usual plan is to invade the constitution stealthily, and then wait to see what</u>

happens. If nothing happens they go on more boldly; if there is a protest they reply hotly that the constitution is worn out and absurd, and that progress is impossible under the dead hand. This is the time to watch them especially. They are up to no good to anyone save themselves. They are trying to whittle away the common rights of the rest of us. Their one and only object, now and always, is to get more power in to their hands that it may be used freely for their advantage, and to the damage of everyone else. Beware of all politicians at all times, but beware of them most sharply when they talk of reforming and improving the constitution.

154. Learned Senior Advocate also contended, that the inclusion of two "eminent persons" in the six-Member NJAC, as provided for, Under Article 124A(1) of the Constitution (99th Amendment) Act, was also clearly unconstitutional. It was contended, that there necessarily had to be, an indication of the positive qualifications required to be possessed by the two "eminent persons", to be nominated to the NJAC. Additionally, it was necessary to stipulate disqualifications. Illustratively, it was pointed out, that an individual having a conflict of interest, should be disqualified. And such conflict would be apparent, when the individual had a political role. A politician has to serve his constituency, he has to nourish and sustain his vote bank, and above all, he has to conform with the agenda of his political party. Likewise, a person with ongoing litigation, irrespective of the nature of such litigation, would render himself ineligible for serving as an "eminent person" within the framework of the NJAC, because of his conflict of interest.

155. With reference to the inclusion of two "eminent persons" in the NJAC, Mr. Arvind P. Datar, learned Senior Advocate, invited our attention to Article 124A, whereunder, the above two "eminent persons" are to be nominated by a committee comprising of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of People, or, where there is no such Leader of Opposition, then, leader of the single largest opposition party in the House of the People. Learned Counsel submitted, that neither Article 124A, nor any other provision, and not even the provisions of the NJAC Act, indicate the qualifications, of the two "eminent persons", who have been included amongst the six-Member NJAC. It was sought to be asserted, that in approximately 70 Statutes and Rules, the expression "eminent person" has been employed. Out of the 70 Statutes, in 67, the field in which such persons must be eminent, has been clearly expressed. Only in three statutes, the term "eminent person" was used without any further qualification. It was asserted, that the term "eminent person" had been left vague and undefined, in Article 124A. It was submitted, that the vagueness of the term "eminent person" was itself, good enough to justify the striking down of the provision. It was emphasized, that the determinative role assigned to the two "eminent persons", included amongst the six-Member NJAC, was so important, that the same could not be left to the imagination of the nominating committee, which comprised of just men "...with all the failings, all the sentiments and all prejudices which we as common people have..." (relying on the words of Dr. B.R. Ambedkar).

156. Referring to the second proviso Under Section 5(2), as well as, Section 6(6) of the NJAC Act, it was submitted, that a recommendation for appointment of a Judge, could not be carried out, if the two "eminent persons" did not accede to the same. In case they choose to disagree with the other Members of the NJAC, the proposed recommendation could not be given effect to, even though the other four Members of the NJAC including all the three representatives of the Supreme Court approved of the same. It was pointed out, that the two "eminent persons", therefore would have a decisive say. It was further submitted, that the impact of the determination of the two

"eminent persons", would be such, as would negate the primacy hitherto before vested in the Chief Justice of India. It was pointed out, that a positive recommendation by the Chief Justice of India, supported by two other senior Judges of the Supreme Court (next to the Chief Justice of India), could be frustrated by an opposition at the hands of the two "eminent persons". The above implied veto power, according to the learned Counsel, could lead to structured bargaining, so as to persuade the other Members of the NJAC, to accede to the names of undesirable nominees (just to avoid a stalemate of sorts). It was submitted, that such a composition had been adversely commented upon by this Court in Union of India v. R. Gandhi MANU/SC/0378/2010 : (2010) 11 SCC 1. In the judgment, the provision, which was subject matter of consideration, was Section 10-FX. Under the above provision, the Selection Committee for appointing the Chairperson and Members of the Appellate Tribunal, and the President and Members of the Tribunal was to be comprised of the Chief Justice of India (or his nominee), besides four Secretaries from different Ministries of the Union Government. This Court recorded its conclusions with reference to the aforesaid provision in paragraph 120(viii), which is being extracted hereunder:

120(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee-Chairperson (with a casting vote);

(b) A Senior Judge of the Supreme Court or Chief Justice of High Court-Member;

(c) Secretary in the Ministry of Finance and Company Affairs-Member; and

(d) Secretary in the Ministry of Law and Justice-Member.

It was submitted, that the purpose sought to be achieved, was not exclusivity, but primacy. It is further submitted, that if primacy was considered to be important for selection of Members to be appointed to a tribunal, primacy assumed a far greater significance, when the issue under consideration was appointment and transfer of Judges of the higher judiciary. It was accordingly contended, that the manner in which the composition of the NJAC had been worked out in Article 124A, and the manner in which the NJAC is to function with reference to the provisions of the NJAC Act, left no room for any doubt, that the same was in clear violation of the law laid down by this Court, and therefore, liable to be set aside.

157. Learned Counsel on the above facts, contested not only the constitutional validity of Clauses (c) and (d) of Article 124A(1), but also emphatically assailed the first proviso Under Article 124A(1)(d), which postulates, that one of the "eminent persons" should belong to the Scheduled Castes, Scheduled Tribes, Other Backward Classes, Minorities or Women. It was submitted, that these sort of populistic measures, ought not to be thought of, while examining a matter as important as the higher judiciary. It was submitted, that it was not understandable, what the choice of including a person from one of the aforesaid categories was aimed at. In the opinion of learned Counsel, the above proviso was farcical, and therefore, totally unacceptable. While members of a

particular community may be relevant for protecting the interest of their community, yet it could not be conceived, why such a measure should be adopted, for such an important constitutional responsibility. In the opinion of the learned Counsel, the inclusion of such a Member in the NJAC, was bound to lead to compromises.

158. It was also the contention of Mr. Arvind P. Datar, that Article 124C introduced by the Constitution (99th Amendment) Act, was wholly unnecessary. It was pointed out, that in the absence of Article 124C, the NJAC would have had the inherent power to regulate its own functioning. It was submitted, that Article 124C was a serious intrusion into the above inherent power. Now that, the Parliament had been authorized to regulate the procedure for appointments by framing laws, it would also result in the transfer of control over the appointment process (-of Judges to the higher judiciary), to the Parliament. It was submitted, that there could not be any legislative control, with reference to appointment of Judges to the higher judiciary. Such legislative control, according to learned Counsel, would breach "independence of the judiciary". It was submitted, that the Parliament having exercised its authority in that behalf, by framing the NJAC Act, and having provided therein, the ultimate control with the Parliament, must be deemed to have crossed the line, and transgressed into forbidden territory, exclusively reserved for the judiciary. Learned Counsel contended, that the duties and responsibilities vested in a constitutional authority, could only be circumscribed by the Constitution, and not by the Parliament through legislation. It was submitted, that the NJAC was a creature of the Constitution, as the NJAC flows out of Article 124A. Likewise, the Parliament, was also a creature of the Constitution. It was submitted, that one entity which was the creation of the Constitution, could not regulate the other, owing its existence to the Constitution.

159. It was pointed out by Mr. Ram Jethmalani, learned Senior Advocate, that the statement of "Objects and Reasons", as were projected for the instant legislation, indicated *inter alia*, that the NJAC would provide "a meaningful role to the judiciary". It was submitted, that what was meant by the aforesaid affirmation, was not comprehendible to him. It was further highlighted, that it also asserted in the "Objects and Reasons", that "the executive and the eminent persons to present their viewpoints and make the participants accountable", was likewise unintelligible to him. It was submitted, that a perusal of the Constitution (99th Amendment) Act (as also, the NJAC Act) would not reveal, how the Members of the NJAC were to be made responsible. It was further submitted, that the statement of "Objects and Reasons" also indicate, that the manner of appointment of Judges to the higher judiciary, would introduce transparency in the selection process. It was contended, that the enactments under reference, amounted to commission of a fraud by Parliament, on the people of the country. As it was not possible to understand, how and who was to be made accountable-the executive,-the "eminent persons",-the judiciary itself. It was accordingly sought to be asserted, that the Parliament seemed to be asserting one thing, while it was doing something else. Learned Counsel also placed reliance on Shreya Singhal v. Union of India MANU/SC/0329/2015 : 2015 (4) SCALE 1, wherefrom the following observations were brought to our notice:

50. Counsel for the Petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall.

Based on the above submissions, it was asserted, that the statement of "Objects and Reasons", could not have been more vague, ambiguous, and fanciful than the ones in the matter at hand.

160. Mr. Anil B. Divan, Senior Advocate, while appearing for the Petitioner in the petition filed by the Bar Association of India (Writ Petition (C) No. 108 of 2015), first and foremost pointed out, that the Bar Association of India represents the High Court Bar Association, Kolkata (West Bengal), The Awadh Bar Association, Lucknow (Uttar Pradesh), the Madras Bar Association, Chennai (Tamil Nadu), the Supreme Court Bar Association, New Delhi, the Gujarat High Court Advocates' Association, Gandhinagar (Gujarat), the Advocates' Association, Chennai (Tamil Nadu), the Andhra Pradesh High Court Advocates' Association, Hyderabad (Andhra Pradesh), the Delhi High Court Bar Association, New Delhi, the Bar Association Mumbai (Maharashtra), the Gauhati High Court Bar Association, Guwahati (Assam), the Punjab & Haryana High Court Bar Association, Chandigarh (Punjab & Haryana), the Bombay Incorporated Law Society, Mumbai (Maharashtra), the Madhya Pradesh High Court Bar Association, Jabalpur (Madhya Pradesh), the Advocates' Association Bangalore (Karnataka), the Central Excise, Customs (Gold) Control Bar Association, New Delhi, the Advocates' Association, Allahabad (Uttar Pradesh), the Karnataka Advocates' Federation, Bangalore (Karnataka), the Allahabad High Court Bar Association (Uttar Pradesh), the Goa High Court Bar Association, Panaji (Goa), the Society of India Law of Firms, New Delhi, the Chhattisgarh High Court Bar Association, Bilaspur (Chhattisgarh), the Nagpur High Court Bar Association, Nagpur (Maharashtra), the Madurai Bench of Madras High Court Bar Association, Madurai (Tamil Nadu), the Jharkhand High Court Bar Association, Ranchi (Jharkhand), the Bar Association of National Capital Region, New Delhi, and the Gulbarga High Court Bar Association, Gulbarga (Karnataka). It was submitted, that all the aforementioned Bar Associations were unanimous in their challenge, to the Constitution (99th Amendment) Act, and the NJAC Act. It was submitted, that the challenge to the former was based on the fact that it violated the "basic structure" of the Constitution, and the challenge to the latter, was based on its being *ultra vires* the provisions of the Constitution.

161. Learned Counsel had adopted a stance, which was different from the one adopted by others. The submissions advanced by the learned senior Counsel, were premised on the fact, that under the constitutional power of judicial review, the higher judiciary not only enforced fundamental rights, but also restricted the legislature and the executive, within the confines of their jurisdiction(s). It was pointed out, that it was the above power, which was the source of tension and friction between the judiciary on the one hand, and the two other pillars of governance i.e., the legislature and the executive, on the other. This friction, it was pointed out, was caused on account of the fact, that while discharging its responsibility of judicial review, executive backed actions of the legislature, were sometimes invalidated, resulting in the belief, that the judiciary was influencing and dominating the other two pillars of governance. Illustratively, it was pointed out, that in the beginning of independent governance of the country, judicial review led to the setting aside of legislations, pertaining to land reforms and zamindari abolition. This had led to the adoption of inserting legislations in the Ninth Schedule of the Constitution, so as to exclude them from the purview of judicial review.

162. It was submitted, that the first manifestation of a confrontation between the judiciary and the other two wings of governance, were indicated in the observations recorded in State of Madras v. V.G. Row MANU/SC/0013/1952 : (1952) SCR 597, wherein, as far back as in 1952, the Supreme

Court observed, that its conclusions were recorded, not out of any desire to a tilt at the legislative authority in a crusader's spirit, but in discharge of the duty plainly laid upon the Courts, by the Constitution.

163. It was submitted, that the legislations placed in the Ninth Schedule of the Constitution, from the original 13 items (relating to land reforms and zamindari abolition), multiplied at a brisk rate, and currently numbered about 284. And many of them, had hardly anything to do with land reforms. It was contended, that the decision rendered by this Court in I.C. Golak Nath v. State of Punjab MANU/SC/0029/1967 : AIR 1967 SC 1643, was a judicial reaction to the uninhibited insertions in the Ninth Schedule, leading to completely eclipsing fundamental rights. It therefore came to be held in the I.C. Golak Nath case MANU/SC/0029/1967 : AIR 1967 SC 1643, that Parliament by way of constitutional amendment(s) could not take away or abridge fundamental rights.

164. To project his contention, pertaining to tension and friction between the judiciary and the other two wings of governance, it was submitted, that from 1950 to 1973, there was virtually no attempt by the political-executive, to undermine or influence or dominate over the judiciary. It was pointed out, that during the aforesaid period, when Jawaharlal Nehru (upto 27th May, 1964), Gulzari Lal Nanda (upto 9th June, 1964), Lal Bahadur Shastri (upto 11th January, 1966), Gulzari Lal Nanda (upto 24th January, 1966) and Indira Gandhi (upto 1972) were running the executive and political governance in India, in their capacity as Prime Minister, had not taken any steps to dominate over the judiciary. Thereafter, two facts could not be digested by the political-executive leadership. The first, the abolition of the Privy Purses by an executive fiat, which was invalidated by the Supreme Court in Madhavrao Scindia Bahadur v. Union of India MANU/SC/0050/1970 : (1971) 1 SCC 85. And the second, the fundamental rights case, namely, the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, wherein the Supreme Court by a majority of 7:6, had propounded the doctrine of "basic structure" of the Constitution, which limited the amending power of the Parliament, Under Article 368. As a sequel to the above judgments, the executive attempted to intimidate the judiciary, by the first supersession in the Supreme Court on 25.4.1973. Thereafter, internal emergency was declared on 25.06.1975, which continued till 21.03.1977. It was submitted, that during the emergency, by way of constitutional amendment(s), the power of judicial review vested in the higher judiciary, was sought to be undermined. It was submitted, that the intrusion during the emergency came to be remedied when the Janata Party came to power on 22.03.1977, through the 43rd and 44th Constitutional Amendments, which restored judicial review, to the original position provided for by the Constituent Assembly.

165. It was submitted, that in the recent past also, the exercise of the power of judicial review had been inconvenient for the political-executive, as it resulted in exposing a series of scams. In this behalf, reference was made to two judgments rendered by this Court, i.e., Centre for Public Interest Litigation v. Union of India MANU/SC/0089/2012 : (2012) 3 SCC 1, and Manohar Lal Sharma v. Principal Secretary MANU/SC/1306/2013 : (2014) 2 SCC 532. It was submitted, that the executive and the legislature can never appreciate that the power of judicial review has been exercised by the higher judiciary, as a matter of public trust. As a sequel to the above two judgments, it was pointed out, that an amount of approximately Rupees two lakh crores (Rs. 20,00,00,00,00,000/-) was gained by the public exchequer, for just a few coal block allocations (for which reliance was placed on an article which had appeared in the Indian Express dated 10.3.2015). And an additional

amount of Rupees one lakh ten thousand crores (Rs. 11,00,00,00,00,000/-) was gained by the public exchequer from the spectrum auction (for which reliance was placed on an article in the Financial Express dated 25.03.2015). It was submitted, that the embarrassment faced by the political-executive, has over shadowed the monumental gains to the nation. It was contended, that the Constitution (99th Amendment) Act, and the NJAC Act, were truthfully a political-executive device, to rein in the power of judicial review, to avoid such discomfiture.

166. It was also contended, that while adjudicating upon the present controversy, it was imperative for this Court, to take into consideration the existing socio-political conditions, the ground realities pertaining to the awareness of the civil society, and the relevant surrounding circumstances. These components, according to learned Counsel, were described as relevant considerations, for a meaningful judicial verdict in the V.G. Row case MANU/SC/0013/1952 : (1952) SCR 597. Referring to Shashikant Laxman Kale v. Union of India MANU/SC/0696/1990 : (1990) 4 SCC 366, it was contended, that for determining the purpose or the object of the legislation, it was permissible for a Court to look into the circumstances which had prevailed at the time when the law was passed, and events which had necessitated the passing of the legislation. Referring to the judgment rendered by this Court, in Re: the Special Courts Bill 1978 MANU/SC/0039/1978 : (1979) 1 SCC 380, learned Counsel placed emphatic reliance on the following:

106. The greatest trauma of our times, for a developing country of urgent yet tantalising imperatives, is the dismal, yet die-hard, poverty of the masses and the democratic, yet graft-riven, way of life of power-wielders. Together they blend to produce gross abuse geared to personal aggrandizement, suppression of exposure and a host of other horrendous, yet hidden, crimes by the summit executives, pro tem, the para-political manipulators and the abetting bureaucrats. And the rule of law hangs limp or barks but never bites. An anonymous poet sardonically projected the social dimension of this systemic deficiency:

The law locks up both man and woman
Who steals the goose from off the common,
But lets the greater felon loose
Who steals the common from the goose.

107. The impact of 'summit' crimes in the Third World setting is more terrible than the Watergate syndrome as perceptive social scientists have unmasked. Corruption and repression-cousins in such situations-hijack developmental processes. And, in the long run, lagging national progress means ebbing people's confidence in constitutional means to social justice. And so, to track down and give short shrift to these heavy-weight criminaloids who often mislead the people by public moral weight-lifting and multipoint manifestoes is an urgent legislative mission partially undertaken by the Bill under discussion. To punish such super-offenders in top positions, sealing off legalistic escape routes and dilatory strategies and bringing them to justice with high speed and early finality, is a desideratum voiced in vain by Commissions and Committees in the past and is a dimension of the dynamics of the Rule of Law. This Bill, hopefully but partially, breaks new ground contrary to people's resigned cynicism that all high-powered investigations, reports and recommendations end in legislative and judicative futility, that all these valiant exercises are but sound and fury signifying nothing, that 'business as usual' is the signature tune of public business, heretofore, here and hereafter. So this social justice measure has my broad assent in moral principle

and in constitutional classification, subject to the serious infirmities from which it suffers as the learned Chief Justice has tersely sketched. Whether this remedy will effectively cure the malady of criminal summitry is for the future to tell.

108. All this serves as a backdrop. Let me unfold in fuller argumentation my thesis that the Bill, good so far as it goes, is bad so far as it does not go-saved though by a pragmatic exception I will presently explain. Where the proposed law excludes the pre-and post-emergency crime-doers in the higher brackets and picks out only 'Emergency' offenders, its benign purpose perhaps becomes a crypto cover up of like criminals before and after. An 'ephemeral' measure to meet a perennial menace is neither a logical step nor national fulfilment. The classification, if I may anticipate my conclusion, is on the brink of constitutional break-down at that point and becomes almost vulnerable to the attack of Article 14.

xxx

114. The crucial test is 'All power is a trust', its holders are 'accountable for its exercise', for 'from the people, and for the people, all springs, and all must exist'. By this high and only standard the Bill must fail morally if it exempts non-Emergency criminals about whom prior Commission Reports, now asleep in official pigeon holes, bear witness and future Commission Reports (who knows?) may, in time, testify. In this larger perspective, Emergency is not a substantial differentia and the Bill nearly recognises this by ante-dating the operation to February 27, 1975 when there was no 'Emergency'. Why ante-date if the 'emergency' was the critical criterion?

xxx

117. Let us take a close look at the 'Emergency', the vices it bred and the nexus they have to speedier justice, substantial enough to qualify for reasonable sub-classification. Information flowing from the proceedings and reports of a bunch of high-powered judicial commissions shows that during that hushed spell, many suffered shocking treatment. In the words of the Preamble, civil liberties were withdrawn to a great extent, important fundamental rights of the people were suspended, strict censorship on the press was placed and judicial powers were curtailed to a large extent.

xxx

128. Let us view the problem slightly differently. Even if liberty had not been curtailed, press not gagged or writ jurisdiction not cut down, criminal trials and appeals and revisions would have taken their own interminable delays. It is the forensic delay that has to be axed and that has little to do with the vices of the Emergency. Such crimes were exposed by judicial commissions before, involving Chief Ministers and Cabinet Ministers at both levels and no criminal action followed except now and that of a select group. It was lack of will-not Emergency-that was the villain of the piece in non-prosecution of cases revealed by several Commissions like the Commission of Enquiry appointed by the Government of Orissa in 1967 (Mr. Justice Khanna), the Commission of Enquiry appointed by the Government of J&K in 1965 (Mr. Justice Rajagopala Ayyangar), the Mudholkar Commission against 14 ex-United Front Ministers appointed by the Government of Bihar in 1968 and the T.L. Venkatarama Aiyar Commission of Inquiry appointed by the

Government of Bihar, 1970-to mention but some. We need hardly say that there is no law of limitation for criminal prosecutions. Somehow, a few manage to be above the law and the many remain below the law. How?-I hesitate to state.

Last of all, reliance was placed on the decision of this Court in Subramanian Swamy v. Director, Central Bureau of Investigation MANU/SC/0417/2014 : (2014) 8 SCC 682, wherein this Court extensively referred to the conditions regarding corruption which prevailed in the country. For the above purpose, it took into consideration the view expressed by the N.N. Vohra Committee Report, bringing out the nexus between the criminal syndicates and mafia.

167. Reliance was, then placed on the efforts made by the executive on the death of the first Chief Justice of India (after the promulgation of the Constitution), when Patanjali Sastri, J., who was the senior most Judge, was sought to be overlooked. Relying on recorded texts in this behalf, by Granville Austin, George H. Gadbois Jr. and M.C. Chagla, it was submitted, that all the six Judges, at that time, had threatened to resign, if the senior most Judge was overlooked for appointment as Chief Justice of India.

168. Referring to the first occasion, when the convention was broken, by appointing A.N. Ray, J., as the Chief Justice of India, it was submitted, that the supersession led to public protest, including speeches by former Judges, former Attorneys General, legal luminaries and members of the Bar, throughout the country. M. Hidayatullah, CJ., in a public speech, complimented the three Judges, who were superseded, for having resigned from their office, immediately on the appointment of A.N. Ray, as Chief Justice of India. In the speech delivered by M. Hidayatullah, CJ., he made a reference about rumors being afloat, that the senior most Judge after him, namely, J.C. Shah, J., would not succeed him as the Chief Justice of India. And that, an outsider was being brought to the Supreme Court, as its Chief Justice. His speech highlighted the fact, that all except one sitting Judge of the Supreme Court had agreed to resign in the event of supersession of J.C. Shah, J.. He had also pointed out, in his speech, that if the decision was taken by the executive, even a day before his retirement, he too would join his colleagues in resigning from his position as the Chief Justice of India. It was accordingly submitted, that the constitutional convention, that the senior most Judge of the Supreme Court would be appointed as the Chief Justice of India, was truly and faithfully recognized as an impregnable convention. To support the aforesaid contention, it was also pointed out, that even in situations wherein the senior most puisne Judge would have a very short tenure, the convention had remained unbroken, despite the inefficacy of making such appointments. In this behalf, the Court's attention was drawn to the fact that J.C. Shah, CJ. (had a tenure of 35 days), K.N. Singh, CJ. (had a tenure of 18 days) and S. Rajendra Babu, CJ. (had a tenure of 29 days).

169. It was also the contention of the learned senior Counsel, that the executive is an important litigant and stakeholder before the higher judiciary, and as such, the executive ought to have no role, whatsoever, in the matter of appointments/transfers of Judges to the higher judiciary. In this behalf, learned Counsel placed reliance on a number of judgments rendered by this Court, wherein the participation of the executive in the higher judiciary, had been held to be unconstitutional, in the matter of appointments of Judges and other Members of tribunals, vested with quasi judicial functions. It was submitted, that the inclusion of the Union Minister in charge of Law and Justice in the NJAC, was a clear breach of the judgments rendered by this Court. Additionally, it was

pointed out, that two "eminent persons", who were to be essential components of the NJAC, were to be selected by a Committee, wherein the dominating voice was that of the political leadership. It was pointed out, that in the three-Member Committee authorised to nominate "eminent persons" included the Prime Minister and the Leader of the Opposition in the Lok Sabha, besides the Chief Justice of India. It was therefore submitted, that in the six-Member NJAC, three Members would have political-executive lineage. This aspect of the matter, according to the learned Counsel, would have a devastating affect. It would negate primacy of the higher judiciary, and the same would result in undermining the "independence of the judiciary". Based on the above foundation, learned senior Counsel raised a number of contentions. Firstly, it was submitted, that through the impugned constitutional amendment and the NJAC Act, the constitutional convention in this country, that the senior most Judge of the Supreme Court would be appointed as the Chief Justice of India, had been breached. It was submitted, that the above convention had achieved the status of a constitutional axiom-a constitutional principle. To substantiate the above contention, it was submitted, that right from 26.01.1950, the senior most puisne Judge of the Supreme Court has always been appointed as the Chief Justice of India except on two occasions. Firstly, the above convention was breached, when A.N. Ray, J., was appointed as Chief Justice of India on 25.4.1973, by superseding three senior most Judges. It was submitted, that the aforesaid supersession was made on the day following the Supreme Court delivered the judgment in the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225. Secondly, the supersession took place during the internal emergency declared by Prime Minister, Indira Gandhi. At that juncture, M.H. Beg, J., was appointed as Chief Justice of India on 29.1.1977, by superseding his senior H.R. Khanna, J.. It was contended, that the aforesaid two instances should be considered as aberrations, in the convention pertaining to appointment of Chief Justice of India.

170. Mr. Arvind P. Datar also assailed the constitutional validity of Article 124C, introduced by the Constitution (99th Amendment) Act. It was submitted, that the Parliament was delegated with the authority to "regulate the procedure for the appointment of the Chief Justice of India and other Judges of the Supreme Court, and the Chief Justices and other Judges of the High Courts". And the NJAC was empowered to lay down, by Regulation, "the procedure of discharging its own functions, the manner of selection of persons for appointment, and such other matters, as may be considered necessary by it". It was the contention of the learned Counsel, that the delegation of power contemplated Under Article 124C, amounted to vesting the NJAC, with what was earlier vested with the Chief Justice of India. In this behalf, reference was also made to Sections 11, 12 and 13 of the NJAC Act. The power to make rules, has been vested with the Central Government Under Section 11, and the power to make Regulations has been entrusted to the NJAC Under Section 12. The aforementioned rules and Regulations, as drawn by the Central Government/NJAC, are required to be placed before the Parliament Under Section 13, and only thereafter, the rules and Regulations were to be effective (or not to have any effect, or to have effect as modified). It was submitted, that the entrustment of the procedure of appointment of Judges to the higher judiciary, and also, the action of assigning the manner in which the NJAC would discharge its functions (of selecting Judges to the higher judiciary), with either the executive or the legislature, was unthinkable, if "independence of the judiciary" was to be maintained. It was pointed out, that the intent behind Article 124C, in the manner it had been framed, stood clearly exposed, by the aforesaid provisions of the NJAC Act.

171. Reference was also made to Section 12 of the NJAC Act, to highlight, that the NJAC had been authorized to notify in the Official Gazette, Regulations framed by it, with the overriding condition, that the Regulations so framed by the NJAC were to be consistent with the provisions of the NJAC Act, as also, the rules made thereunder (i.e., Under Section 11 of the NJAC Act). Having so empowered the NJAC (Under Sections 11 and 12 referred to above), and having delineated in Section 12(2), the broad outlines with reference to which the Regulations could be framed, it was submitted, that the power to delegate the authority to frame Regulations clearly stood exhausted. In that, the Parliament had no jurisdiction thereafter, to interfere in the matter of framing Regulations. In fact, according to the learned Counsel, consequent upon the empowerment of the NJAC to frame Regulations, the Parliament was rendered *functus officio*, on the issue of framing Regulations. According to learned Counsel, the above also established, the inference drawn in the foregoing paragraph.

172. It was also the contention of the learned Counsel, that the NJAC constituted, by way of the Constitution (99th Amendment) Act, would be sustainable, so long as it did not violate the "basic structure" of the Constitution. It was emphasized, that one of the recognized features of the "basic structure" of the Constitution was, the "independence of the judiciary". The procedure which the NJAC could adopt for discharging its functions, and the procedure it was liable to follow while holding its meetings, and the ambit and scope with reference to which the NJAC was authorized to frame its Regulations, had to be left to the exclusive independent will of an independent NJAC. That, according to learned Counsel, would have ensured the "independence of the NJAC". It was accordingly contended, that Article 124C breached the "independence of the judiciary", and also, undermined the independence of the NJAC.

173. The next contention advanced at the hands of the learned Counsel, was with reference to Clause (2) of Article 124A, whereby judicial review was barred, with reference to actions or proceedings of the NJAC, on the ground of the existence of a vacancy or defect in the constitution of the NJAC. Learned Counsel then invited this Court's attention to the exclusion of the power of judicial review, contemplated Under Articles 323A(2)(d) and 323B(3)(d), wherein the power of judicial review was similarly excluded. It was submitted, that this Court struck down a similar provision in the aforesaid Articles, holding that the same were violative of the "basic structure" of the Constitution. In this behalf, learned Counsel placed reliance on the decision of this Court in the Kihoto Hollohan case MANU/SC/0753/1992 : 1992 Supp (2) SCC 651, and referred to the following observations recorded therein:

129. The unanimous opinion according to the majority as well as the minority is that Paragraph 7 of the Tenth Schedule enacts a provision for complete exclusion of judicial review including the jurisdiction of the Supreme Court Under Article 136 and of the High Courts Under Articles 226 and 227 of the Constitution and, therefore, it makes in terms and in effect a change in Articles 136, 226 and 227 of the Constitution which attracts the proviso to Clause (2) of Article 368 of the Constitution; and, therefore, ratification by the specified number of State legislatures before the Bill was presented to the President for his assent was necessary, in accordance therewith. The majority view is that in the absence of such ratification by the State legislatures, it is Paragraph 7 alone of the Tenth Schedule which is unconstitutional; and it being severable from the remaining part of the Tenth Schedule, Paragraph 7 alone is liable to be struck down rendering the Speakers' decision under Paragraph 6 that of a judicial tribunal amenable to judicial review by the Supreme

Court and the High Courts Under Articles 136, 226 and 227. The minority opinion is that the effect of invalidity of Paragraph 7 of the Tenth Schedule is to invalidate the entire Constitution (Fifty-second Amendment) Act, 1985 which inserted the Tenth Schedule since the President's assent to the Bill without prior ratification by the State legislatures is non est. The minority view also is that Paragraph 7 is not severable from the remaining part of the Tenth Schedule and the Speaker not being an independent adjudicatory authority for this purpose as contemplated by a basic feature of democracy, the remaining part of the Tenth Schedule is in excess of the amending powers being violative of a basic feature of the Constitution. In the minority opinion, we have held that the entire Constitution (Fifty-second Amendment) Act, 1985 is unconstitutional and an abortive attempt to make the constitutional amendment indicated therein.

Reliance was also placed on the following conclusions recorded by this Court in Dr. Kashinath G. Jalmi v. The Speaker MANU/SC/0293/1993 : AIR 1993 SC 1873.

43. In Kihoto Hollohan there was no difference between the majority and minority opinions on the nature of finality attaching to the Speaker's order of disqualification made under para 6 of the Tenth Schedule, and also that para 7 therein was unconstitutional in view of the non-compliance of the proviso to Clause 2 of Article 368 of the Constitution, by which judicial review was sought to be excluded. The main difference in the two opinions was, that according to the majority opinion this defect resulted in the constitution standing amended from the inception with insertion of the Tenth Schedule minus para 7 therein, while according to the minority the entire exercise of constitutional amendment was futile and an abortive attempt to amend the constitution, since Para 7 was not severable. According to the minority view, all decisions rendered by the several Speakers under the Tenth Schedule were, therefore, nullity and liable to be ignored. According to the majority view, para 7 of the Tenth Schedule being unconstitutional and severable, the Tenth Schedule minus para 7 was validly enacted and, therefore, the orders made by the Speaker under the Tenth Schedule were not nullity but subject to judicial review. On the basis of the majority opinion, this Court has exercised the power of judicial review over the orders of disqualification made by the speakers from the very inception of the Tenth Schedule, and the exercise of judicial review has not been confined merely to the orders of disqualification made after 12th November, 1991 when the judgment in Kihoto Hollohan (MANU/SC/0713/1991 : 1992(1) SCC 309...) was rendered. Venkatachaliah, J. (as he then was) wrote the majority opinion and, thereafter, on this premise, exercised the power of judicial review over orders of disqualification made prior to 12.11.1991. The basic fallacy in the submission made on behalf of the Respondents that para 7 must be treated as existing till 12th November, 1991 is that on that view there would be no power of judicial review against an order of disqualification made by the Speaker prior to 12th November, 1991 since para 7 in express terms totally excludes judicial review.

It was, therefore, the vehement contention of the learned Counsel, that Clause (2) of Article 124A should be struck down, as being violative of the "basic structure" of the Constitution.

174. Mr. Fali S. Nariman, learned senior Counsel, also raised a purely technical plea. It was his contention, that 121st Constitution Amendment Bill, now the Constitution (99th Amendment) Act, was introduced in the Lok Sabha on 11th of August, 2014 and was passed by the Lok Sabha on 13th of August, 2014. It was further submitted, that the 121st Constitution Amendment Bill was discussed and passed by Rajya Sabha on 14.8.2014. Thereupon, the said Amendment Bill, which

envisaged a constitutional amendment, was sent to the State Legislatures for ratification. Consequent upon its having been ratified by 16 State Legislatures, it was placed before the President for his assent. It was pointed out, that the President accorded his assent on 31.12.2014, whereupon, it became the Constitution (99th Amendment) Act. Learned Counsel then invited our attention to Section 1 of the Constitution (99th Amendment) Act, which reads as under:

1(1) This Act may be called the Constitution (Ninety-ninth Amendment) Act, 2014.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Based on the aforesaid provision, it was contended, that in spite of having received the assent of the President on 31.12.2014, the Constitution (99th Amendment) Act, would not come into force automatically. And that, the same would come into force in terms of the mandate contained in Section 1(2),-"... on such date as the Central Government may, by notification in the Official Gazette, appoint." It was submitted, that the Central Government notified the Constitution (99th Amendment) Act, in the Gazette of India Extraordinary on 13.4.2015. Based on the aforesaid factual position, the Constitution (99th Amendment) Act, came into force with effect from 13.4.2015.

175. In conjunction with the factual position noticed in the foregoing paragraph, learned Counsel pointed out, that the NJAC Bill, was also introduced in the Lok Sabha on 11.8.2014. The Lok Sabha passed the Bill on 13.8.2014, whereupon, it was passed by the Rajya Sabha on 14.8.2014. Thereafter, the NJAC Bill received the assent of the President on 31.12.2014, and became the NJAC Act. It was contended, that the enactment of the NJAC Act was based/founded on the Constitution (99th Amendment) Act. It was submitted, that since the Constitution (99th Amendment) Act, was brought into force on 13.4.2015, the consideration of the NJAC Bill and the passing of the NJAC Act prior to the coming into force of the Constitution (99th Amendment) Act, would render it stillborn and therefore nugatory. The Court's attention was also invited to the fact, that the aforesaid legal infirmity, was noticed and raised during the course of the parliamentary debate pertaining to the NJAC Bill, before the Rajya Sabha. Learned Counsel invited this Court's attention to the following questions and answers, which are recorded on pages 442 to 533 with reference to the debates in the Rajya Sabha on 13.8.2014, and at pages 229 to 375 on 14.8.2014 (Volume 232 No. 26 and 27), as under:

that Mr. Sitaram Yechury, Member of Parliament, (Rajya Sabha) raised a constitutional objection (on August 13, 2014) to the NJAC Bill saying:

.... till the Constitution Amendment (121st Bill) comes into effect, the Legislature, I would like to humbly submit, does not have the right to enact a Bill for the creation of a Judicial Commission for appointments. (page 488)

...I am only asking you to seriously consider we are creating a situation where this proposal for creation of a Judicial Appointments Commission will become *ultra vires* of the Indian Constitution because our right to bring about a Bill to enact such a provision comes only after the Constitution Amendment Bill becomes effective. (page 489)

...Therefore, you please consider what I am saying with seriousness. I want also the law Minister to consider it. Let it not be struck down later as *ultra vires*. So, let us give it a proper consideration. (Page-490)

• The Leader of the Opposition (Shri Ghulam Nabi Azad) then said:

The leader of the opposition (Shri Ghulam Nabi Azad): Sir, I just want to say that Mr. Yechury has given a totally different dimension to the entire thing. It is quite an eye opener for all of us that the entire legislation will become *ultra vires*. So, my suggestion is that before my colleague, Mr. Anand Sharma, speaks, I would request one thing. of course, we have great lawyers from all sides here but I think one of the oldest luminaries in the legal profession is Mr. Parasaran. Before we all decide what to do, can we request him to throw light on what Mr. Yechury has said? (Page-490)

• Mr. K. Parasaran (Nominated Member) then gave his views saying:

Shri K. Parasarn (contd.)...Before ratification, if you take up the Bill and pass the Bill, today, it will be unconstitutional and *ultra vires*. Because the power to make enactment, as we see, is only in the Articles. The Article 368 gives the power to ....

xxx

Mr. Deputy Chairman: What I want to know is this. You have mentioned that there are two provisions. Number one, if it is amended in a particular way, it can directly go to the President. If the amendment involves Chapter IV, part 5, or Chapter V, etc., etc., it has to be ratified by half in the Assemblies. Okay. I accept both of them. But do any of these objections object us from considering this Bill now? That is my question.

Shri K. Parasaran: No. We don't have the legislative competence. (Page-492)

• The Minister of Law and Justice then said:

.....This Bill will become effective after ratification but the separate Bill is for guidance to the Legislatures as to how the entire structure has come into existence. Therefore, it is not unconstitutional. We have got summary power Under Article 246 read with Entries 77 and 78, which is not a limited power. It is a plenary power, exhaustive power. This Parliament can pass any law with regard to composition and organization of the Supreme Court; this Parliament can pass any law with regard to High Court composition. That is not a limited power....(Page-495)

Mr. Deputy Chairman: Yes, I will come ....(interruptions)....

Now, Mr. Minister, the point is that you yourself admit that only after 50 per cent of the Assemblies have endorsed it by a Resolution can your Bill come into force, and after the President has given assent. And then, you are saying that the Bill was passed along with this only as a guideline, so that Members of the Assemblies know what you are going to do. Shri Ravi Shankar Prasad: But it would become effective after assent. That is all.

Mr. Deputy Chairman: That's what I am saying. It will become effective after six months.

Now, I would like to know one thing from Mr. Parasaran. Article 246, according to him, (the Minister) gives absolute powers to Parliament to pass a legislation. Is there any provision in the Constitution, which prevents passing of such a Bill before the Constitutional Amendment is endorsed by the President? Is there any such provision? ...(interruptions) .... I will come to you. Yes, Mr. Parasaran. (Page-495)

• In response Mr. K. Parasaran then said:

Shri K. Parasaran: Sir, I would explain this. Now, we are concerned with Article 124 and a legislation Under Article 246 read with the relevant entries in the Seventh Schedule, pointed out by the Hon. Minister. Now, the Supreme Court has interpreted Article 124. We cannot pass an Act contrary to that judgment and, therefore, the need for amendment to the constitution. If the Constitution is not amended, then we lack the legislative competence. There is no good of going to Article 246 and reading the entries. Had we the legislative competence, Under Article 246 read with the entries....

(Emphasis supplied) page 495.

Mr. Deputy Chairman: Then, how do you explain Article 246?

Shri K. Parasaran: Suppose the Constitutional Amendment is passed, then can this Bill be introduced and discussed as it is? As a hypothetical case, if this Amendment Bill is not passed, can we introduce this Bill and pass it? We will not be able to do it.

(Emphasis supplied) (Page-496).

176. In other words, it was the contention of the learned Counsel, that the NJAC Bill was passed by both Houses of Parliament, when Parliament had no power, authority or jurisdiction to consider such a Bill, in the teeth of Articles 124(2) and 217(1), as enacted in the original Constitution. It was submitted, that the passing of the said Bill, was in itself unconstitutional, ultra vires and void, because the amended provisions contained in the Constitution (99th Amendment) Act, had not come into play. It was submitted, that the passing by the Lok Sabha, as also, by the Rajya Sabha of the 121st Constitution Amendment Bill on 13/14.8.2014, and the ratification thereof by 16 State Legislatures, as also, the assent given thereto by the President on 31.12.2014, would not bestow validity on the NJAC Act. This, for the simple reason, that the Constitution (99th Amendment) Act, was brought into force only on 13.4.2015. In the above view of the matter, according to the learned Counsel, till 13.4.2015, Articles 124(2) and 217(1) of the Constitution of India were liable to be read, as they were originally enacted. In the aforesaid context, it was submitted, that the NJAC Act could not have been passed, till the unamended provisions of the Constitution were in force. And that, the mere assent of the President to the NJAC Act on 31.12.2014, could not infuse validity thereon.

177. In order to substantiate the aforesaid contention, learned Counsel placed reliance on A.K. Roy v. Union of India MANU/SC/0051/1981 : (1982) 1 SCC 271, and invited our attention to the following:

45 The argument arising out of the provisions of Article 368(2) may be considered first. It provides that when a Bill whereby the Constitution is amended is passed by the requisite majority, it shall be presented to the President who shall give his assent to the Bill, "and thereupon the Constitution shall stand amended in accordance with the terms of the Bill." This provision shows that a constitutional amendment cannot have any effect unless the President gives his assent to it and secondly, that nothing more than the President's assent to an amendment duly passed by the Parliament is required, in order that the Constitution should stand amended in accordance with the terms of the Bill. It must follow from this that the Constitution stood amended in accordance with the terms of the 44th Amendment Act when the President gave his assent to that Act on April 30, 1979. We must then turn to that Act for seeing how and in what manner the Constitution stood thus amended. The 44th Amendment Act itself prescribes by Section 1(2) a pre-condition which must be satisfied before any of its provisions can come into force. That pre-condition is the issuance by the Central Government of a notification in the official gazette, appointing the date from which the Act or any particular provision thereof will come into force, with power to appoint different dates for different provisions. Thus, according to the very terms of the 44th Amendment, none of its provisions can come into force unless and until the Central Government issues a notification as contemplated by Section 1(2).

46. There is no internal contradiction between the provisions of Article 368(2) and those of Section 1(2) of the 44th Amendment Act. Article 368(2) lays down a rule of general application as to the date from which the Constitution would stand amended in accordance with the Bill assented to by the President. Section 1(2) of the Amendment Act specifies the manner in which that Act or any of its provisions may be brought into force. The distinction is between the Constitution standing amended in accordance with the terms of the Bill assented to by the President and the date of the coming into force of the Amendment thus introduced into the Constitution. For determining the date with effect from which the Constitution stands amended in accordance with the terms of the Bill, one has to turn to the date on which the President gave, or was obliged to give, his assent to the Amendment. For determining the date with effect from which the Constitution, as amended, came or will come into force, one has to turn to the notification, if any, issued by the Central Government Under Section 1(2) of the Amendment Act.

47. The Amendment Act may provide that the amendment introduced by it shall come into force immediately upon the President giving his assent to the Bill or it may provide that the amendment shall come into force on a future date. Indeed, no objection can be taken to the constituent body itself appointing a specific future date with effect from which the Amendment Act will come into force; and if that be so, different dates can be appointed by it for bringing into force different provisions of the Amendment Act. The point of the matter is that the Constitution standing amended in accordance with the terms of the Bill and the amendment thus introduced into the Constitution coming into force are two distinct things. Just as a law duly passed by the legislature can have no effect unless it comes or is brought into force, similarly, an amendment of the Constitution can have no effect unless it comes or is brought into force. The fact that the constituent body may itself specify a future date or dates with effect from which the Amendment Act or any

of its provisions will come into force shows that there is no antithesis between Article 368(2) of the Constitution and Section 1(2) of the 44th Amendment Act. The expression of legislative or constituent will as regards the date of enforcement of the law or Constitution is an integral part thereof. That is why it is difficult to accept the submission that, contrary to the expression of the constituent will, the amendments introduced by the 44th Amendment Act came into force on April 30, 1979 when the President gave his assent to that Act. The true position is that the amendments introduced by the 44th Amendment Act did not become a part of the Constitution on April 30, 1979. They will acquire that status only when the Central Government brings them into force by issuing a notification Under Section 1(2) of the Amendment Act.

178. It was also the contention of Mr. Fali S. Nariman, that just as a constitutional amendment was liable to be declared as *ultra vires*, if it violated and/or abrogated, the "core" or the "basic structure" of the Constitution; even a simple legislative enactment, which violated the "basic structure" of the Constitution, was liable to be declared as unconstitutional. For the instant proposition, learned Counsel referred to the Madras Bar Association case MANU/SC/0875/2014 : (2014) 10 SCC 1, and placed reliance on the following observations recorded therein:

109. Even though we have declined to accept the contention advanced on behalf of the Petitioners, premised on the "basic structure" theory, we feel it is still essential for us, to deal with the submission advanced on behalf of the Respondents in response. We may first record the contention advanced on behalf of the Respondents. It was contended, that a legislation (not being an amendment to the Constitution), enacted in consonance of the provisions of the Constitution, on a subject within the realm of the legislature concerned, cannot be assailed on the ground that it violates the "basic structure" of the Constitution. For the present controversy, the Respondents had placed reliance on Articles 245 and 246 of the Constitution, as also, on entries 77 to 79, 82 to 84, 95 and 97 of the Union List of the Seventh Schedule, and on entries 11-A and 46 of the Concurrent List of the Seventh Schedule. Based thereon it was asserted, that Parliament was competent to enact the NTT Act. For examining the instant contention, let us presume it is so. Having accepted the above, our consideration is as follows. The Constitution regulates the manner of governance in substantially minute detail. It is the fountainhead distributing power, for such governance. The Constitution vests the power of legislation at the Centre, with the Lok Sabha and the Rajya Sabha, and in the States with the State Legislative Assemblies (and in some States, the State Legislative Councils, as well). The instant legislative power is regulated by "Part XI" of the Constitution. The submission advanced at the hands of the learned Counsel for the Respondents, insofar as the instant aspect of the matter is concerned, is premised on the assertion that the NTT Act has been enacted strictly in consonance with the procedure depicted in "Part XI" of the Constitution. It is also the contention of the learned Counsel for the Respondents, that the said power has been exercised strictly in consonance with the subject on which the Parliament is authorized to legislate. Whilst dealing with the instant submission advanced at the hands of the learned Counsel for the Respondents, all that needs to be stated is, that the legislative power conferred under "Part XI" of the Constitution has one overall exception, which undoubtedly is, that the "basic structure" of the Constitution, cannot be infringed, no matter what. On the instant aspect some relevant judgments rendered by Constitutional Benches of this Court, have been cited hereinabove. It seems to us, that there is a fine difference in what the Petitioners contend, and what the Respondents seek to project. The submission advanced at the hands of the learned Counsel for the Petitioners does not pertain to lack of jurisdiction or inappropriate exercise of jurisdiction. The submission advanced at the

hands of the learned Counsel for the Petitioners pointedly is, that it is impermissible to legislate in a manner as would violate the "basic structure" of the Constitution. This Court has repeatedly held that an amendment to the provisions of the Constitution would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable. Such submissions advanced at the hands of the learned Counsel for the Respondents are, therefore, liable to be disallowed, and are accordingly declined.

179. Mr. Arvind P. Datar, learned senior Counsel, assailed the constitutional validity of various provisions of the NJAC Act, by advancing the same submissions, as were relied upon by him while assailing the constitutional validity of Articles 124A, 124B and 124C. For reasons of brevity, the aforestated submissions noticed with reference to individual provisions of the NJAC Act are not being repeated again.

180. A challenge was also raised, to the different provisions of the NJAC Act. First and foremost, a challenge was raised to the manner of selection of the Chief Justice of India. Section 5(1) of the NJAC Act, it was submitted, provides that the NJAC would recommend the senior most Judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he was considered "fit" to hold the office. It was contended, that the procedure to regulate the appointment of the Chief Justice of India, was to be determined by Parliament, by law Under Article 124C. It was contended, that the term "fit", expressed in Section 5 of the NJAC Act, had not been elaborately described. And as such, fitness would have to be determined on the subjective satisfaction of the Members of the NJAC. It was submitted, that even though the learned Attorney General had expressed, during the course of hearing, that fitness meant "...mental and physical fitness alone...", it was always open to the Parliament to purposefully define fitness, in a manner as would sub-serve the will of the executive. It was submitted, that even an ordinance could be issued without the necessity, of following the procedure, of enacting law. It was asserted, that the criterion of fitness could be defined and redefined. It was submitted, that it was a constitutional convention, that the senior most Judge of the Supreme Court would always be appointed as Chief Justice of India. And that, the aforesaid convention had remained unbroken, even though in some cases the tenure of the appointee, had been short, and as such, may not have enured to the advantage, of the judicial organization as a whole. Experience had shown, according to learned Counsel, that adhering to the practice of appointing the senior most Judge as the Chief Justice of India, had resulted in institutional harmony amongst Judges, which was extremely important for the health of the judiciary, and also, for the "independence of the judiciary". It was submitted, that it would be just and appropriate, at the present juncture, to understand the width of the power, so as to prevent any likelihood of its misuse in future. It was submitted, that various ways and means could be devised to supersede Judges, and also, to bring in favourites. Past experience had shown, that the executive had abused its authority, when it departed from the above rule in April 1973, by superseding J.M. Shelat, J., the senior most Judge and even the next two Judges in the order of seniority after him, namely, K.S. Hegde and A.N. Grover, and appointed the fourth senior most Judge A.N. Ray, as the Chief Justice of India. Again in January 1977 on the retirement of A.N.

Ray, CJ., the senior most Judge H.R. Khanna, was ignored, and the next senior most Judge, M.H. Beg, was appointed as the Chief Justice of India. Such control in the hands of the executive would cause immense inroads, in the decision making process. And could result in, Judges trying to placate and appease the executive, for personal gains and rewards.

181. The submission noticed above was sought to be illustrated through the following instance. It was pointed out, that it would be genuine and legitimate for the Parliament to enact, that a person would be considered fit for appointment as Chief Justice of India, only if he had a minimum remaining tenure of at least two years. Such an enactment would have a devastating effect, even though it would appear to be innocuously legitimate. It was contended, that out of the 41 Chief Justices of India appointed till date, only 12 Chief Justices of India, had a tenure of more than two years. Such action, at the hands of the Parliament, was bound to cause discontentment to those, who had a legitimate expectation to hold the office of Chief Justice of India. It was submitted, that similar instances can be multiplied with dimensional alterations by prescribing different parameters. It was submitted, that the Parliament should never be allowed the right to create uncertainty, in the matter of selection and appointment of the Chief Justice of India, because the office of the Chief Justice of India was pivotal, as it shouldered extremely serious and onerous responsibilities. The exercise of the above authority, it was pointed out, could/would seriously affect the "independence of the judiciary". In the above context, reference was also made, to the opinion expressed by renowned persons, having vast experience in the judicial institution, effectively bringing out the veracity of the contention advanced. Reference in this regard was made to the observations of M.C. Chagla, in his book, "Roses in December-An Autobiography", wherein he examined the impact of supersession on Judges, who by virtue of the existing convention, were in line to be the Chief Justice of India, but were overlooked by preferring a junior. Reference was also made to the opinion expressed by H.R. Khanna, J., (in his book-"Neither Roses Nor Thorns"). Finally, the Court's attention was drawn to the view expressed by H.M. Seervai (in "Constitutional Law of India-A Critical Commentary'). It was submitted, that leaving the issue of determination of fitness with the Parliament, was liable to fan the ambitions of Judges, and would make them loyal to those who could satisfy their ambitions. It was therefore the contention of the learned Counsel, that Section 5, which created an ambiguity in the matter of appointment of the Chief Justice of India, and could be abused to imperil "independence of the judiciary", was liable to be declared as unconstitutional.

182. It was also the contention of the learned Counsel for the Petitioners, that on the issue of selection and appointment of Judges to the higher judiciary, the NJAC was liable to take into consideration ability, merit and suitability (as may be specified by Regulations). It was submitted, that the above criteria could be provided through Regulations framed Under Section 12(2)(a), (b) and (c). It was pointed out, that the Regulations framed for determining the suitability of a Judge (with reference to ability and merit), would be synonymous with the conditions of eligibility. Inasmuch as, a candidate who did not satisfy the standards expressed in the Regulations, would also not satisfy, the prescribed conditions of appointment. It was asserted, that it would be a misnomer to treat the same to be a matter of mere procedure. Thus viewed, it was contended, that the provisions of the NJAC Act, which laid down (or provided for the laying down) substantive conditions for appointment, was clearly beyond the purview of Article 124C, inasmuch as, under the above provision, Parliament alone had been authorised by law, to regulate the procedure for appointment of Judges of the Supreme Court, or to empower the NJAC to lay the same down by

Regulations, inter alia the manner of selection of persons for appointment, as Judges of the Supreme Court. It was submitted, that the NJAC Act, especially in terms of Section 5(2), had travelled far beyond the jurisdictional parameters contemplated Under Article 124C.

183. It was also contended, that while recommending names for appointment of a Judge to the Supreme Court, seniority in the cadre of Judges, was liable to be taken into consideration, in addition to ability and merit. It was submitted, that the instant mandate contained in the first proviso Under Section 5(2) of the NJAC Act, clearly breached the "federal structure" of governance, which undoubtedly required regional representation in the Supreme Court. Since the "federal structure" contemplated in the Constitution was also one of the "basic structures" envisioned by the framers of the Constitution, the same could not have been overlooked.

184. Besides the above, the Court's attention was invited to the second proviso, Under Section 5(2) of the NJAC Act, which mandates that the NJAC would not make a favourable recommendation, if any two Members thereof, opposed the candidature of an individual. It was contended, that placing the power of veto, in the hands of any two Members of the NJAC, would violate the recommendatory power expressed in Article 124B. In this behalf, it was contended, that the second proviso Under Section 5(2), would enable two eminent persons (-lay persons, if the submission advanced by the learned Attorney General is to be accepted) to defeat a unanimous opinion of the Chief Justice of India and the two senior most Judges of the Supreme Court. And thereby negate the primacy vested in the judiciary, in the matter of appointment of Judges to the higher judiciary.

185. It was submitted, that the above power of veto exercisable by two lay persons, or alternatively one lay person, in conjunction with the Union Minister in charge of Law and Justice, would cause a serious breach in the "independence of the judiciary". Most importantly, it was contended, that neither the impugned constitutional amendment, nor the provisions of the NJAC Act, provide for any quorum for holding the meetings of the NJAC. And as such (quite contrary to the contentions advanced at the hands of the learned Attorney General), it was contended, that a meeting of the NJAC could not be held, without the presence of the all Members of the NJAC. In order to support his above contention, he illustratively placed reliance on the Constitution (122nd Amendment) Bill, 2014 [brought before the Parliament, by the same ruling political party, which had successfully amended the Constitution by tabling the Constitution (121st Amendment) Bill, 2014]. The objective sought to be achieved through the Constitution (122nd Amendment) Bill, 2014, was to insert Article 279A. The proposed Article 279A intended to create the Goods and Services Tax Council. Sub-Article (7) of Article 279A postulated, that "... One-half of the total number of Members of the Goods and Services Tax Council..." would constitute the quorum for its meetings. And furthermore, that "... Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting ...". Having laid down the above parameters, in the Bill which followed the Bill that led to the promulgation of the Constitution (99th Amendment) Act, it was submitted, that the omission of providing for a quorum for the functioning of the NJAC, and the omission to quantify the strength required for valid decision making, was not innocent. And that, it vitiated the provision itself.

III. RESPONDENTS' RESPONSE, ON MERITS:

186. The learned Attorney General commenced his response on merits by asserting, that there was no provision in the Constitution of India, either when it was originally drafted, or at any stage thereafter, which contemplated, that Judges would appoint Judges to the higher judiciary. It was accordingly asserted, that the appointment of Judges by Judges was foreign to the provisions of the Constitution. It was pointed out, that there were certain political upheavals, which had undermined the "independence of the judiciary", including executive overreach, in the matter of appointment and transfer of Judges of the higher judiciary, starting with supersession of senior Judges of the Supreme Court in 1973, followed by, the mass transfer of Judges of the higher judiciary during the emergency in 1976, and thereafter, the second supersession of a senior Judge of the Supreme Court in 1977. It was acknowledged, that there was continuous interference by the executive, in the matter of appointment of Judges to the higher judiciary during the 1980's. Despite thereof, whilst adjudicating upon the controversy in the First Judges case rendered in 1981, this Court, it was pointed out, had remained unimpressed, and reiterated the primacy of the executive, in the matter of appointment of Judges to the higher judiciary.

187. It was pointed out, that the issue for reconsideration of the decision rendered in the First Judges case arose in Subhash Sharma v. Union of India MANU/SC/0643/1990 : 1991 Supp (1) SCC 574, wherein the questions considered were, whether the opinion of the Chief Justice of India, in regard to the appointment of Judges to the Supreme Court and High Courts, as well as, transfer of High Court Judges, was entitled to primacy, and also, whether the matter of fixation of the judge-strength in High Courts, was justiciable? It was asserted, that the aforesaid two questions were placed for determination by a Constitution Bench of nine Judges (keeping in view the fact that the First Judges case, was decided by a seven-Judge Bench). It was asserted, that the decision rendered by this Court in the Second Judges case, was on the suo motu exercise of jurisdiction by this Court, wherein this Court examined matters far beyond the scope of the reference order. It was contended, that the Second Judges case was rendered, without the participation of all the stakeholders, inasmuch as, the controversy was raised at the behest of practicing advocates and associations of lawyers, and there was no other stakeholder involved during its hearing.

188. It was asserted, that the judiciary had no jurisdiction to assume to itself, the role of appointment of Judges to the higher judiciary. It was pointed out, that it is the Parliament alone, which represents the citizenry and the people of this country, and has the exclusive jurisdiction to legislate on matters. Accordingly, it was asserted, that the decisions in the Second and Third Judges cases, must be viewed as legislation without any jurisdictional authority.

189. It was pointed out, that the issue relating to the amendment of the Constitution, pertaining to the subject of appointment of Judges to the higher judiciary, through a Judicial Commission commenced with the Constitution (67th Amendment) Bill, 1990. The Bill however lapsed. On the same subject, the Constitution (82nd Amendment) Bill, 1997 was introduced. The 1997 Bill, however, could not be passed. This was followed by the Constitution (98th Amendment) Bill, 2003 which was introduced when the present Government was in power. In 2003 itself, a National Commission was set up to review the working of the Constitution, followed by the Second Administrative Reforms Commission in 2007. Interspersed with the aforesaid events, were a number of Law Commission's Reports. The intention of the Parliament, since the introduction of the Bill in 1990, it was submitted, was aimed at setting up a National Judicial Commission, for appointment and transfer of Judges of the higher judiciary. It was pointed out, that no positive

achievement was made in the above direction, for well over two decades. Mr. Justice M.N. Venkatachaliah, who headed the National Commission to review the working of the Constitution, had also recommended a five-Member National Judicial Commission, whereby, a wide consultative process was sought to be introduced, in the selection and appointment of Judges. It was submitted, that all along recommendations were made, for a participatory involvement of the executive, as well as the judiciary, in the matter of appointment of Judges to the higher judiciary. It was also pointed out, that the Constitution (98th Amendment) Bill, 2003 proposed a seven-Member National Judicial Commission. Thereafter, the Administrative Reforms Commission, proposed a eight-Member National Judicial Commission, to be headed by the Vice-President, and comprising of the Prime Minister, the Speaker, the Chief Justice of India, the Law Minister and two leaders of the Opposition. The aforesaid recommendation, was made by a Commission headed by Veerappa Moily, the then Union Law Minister. The present Constitution (99th Amendment) Act, 2014, whereby Article 124 has been amended and Articles 124A to 124C have been inserted in the Constitution, contemplates a six-Member National Judicial Commission. It was submitted, that there was no justification in finding anything wrong, in the composition of the NJAC. To point out the safeguards against entry of undesirable persons into the higher judiciary, it was emphasized, that only if five of the six Members of the NJAC recommended a candidate, he could be appointed to the higher judiciary. It was submitted, that the aforestated safeguards, postulated in the amended provisions, would not only ensure transparency, but would also render a broad based consideration.

190. As a counter, to the submissions advanced on behalf of the Petitioners, it was asserted, that the Parliament's power to amend the Constitution was plenary, subject to only one restriction, namely, that the Parliament could not alter the "basic structure" of the Constitution. And as such, a constitutional amendment must be presumed to be constitutionally valid (unless shown otherwise). For the instant proposition, reliance was placed on Charanjit Lal Chowdhury v. Union of India MANU/SC/0009/1950 : AIR 1951 SC 41, Ram Krishna Dalmia v. Justice S.R. Tendolkar MANU/SC/0024/1958 : AIR 1958 SC 538, the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, (specifically the view expressed by K.S. Hegde and A.K. Mukherjea, JJ.), B. Banerjee v. Anita Pan MANU/SC/0449/1974 : (1975) 1 SCC 166, and Government of Andhra Pradesh v. P. Laxmi Devi MANU/SC/1017/2008 : (2008) 4 SCC 720.

191. It was asserted, that the Parliament was best equipped to assess the needs of the people, and to deal with the changing times. For this, reliance was placed on Mohd. Hanif Quareshi v. State of Bihar MANU/SC/0027/1958 : AIR 1958 SC 731, State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952 : 1952 SCR 284. It was contended, that while enacting the Constitution (99th Amendment) Act, and the NJAC Act, the Parliament had discharged a responsibility, which it owed to the citizens of this country, by providing for a meaningful process for the selection and appointment of Judges to the higher judiciary.

192. Referring to the decisions rendered by this Court in the Second and Third Judges cases, it was asserted, that the way he saw it, there was only one decipherable difference introduced in the process of selection contemplated through the NJAC. Under the system introduced, the judiciary could not "insist" on the appointment of an individual. But the judiciary continued to retain the veto power, to stop the appointment of an individual considered unworthy of appointment. According to him, the nomination of a candidate, for appointment to the higher judiciary, under

the above judgments, could also not fructify, if any two members of the collegium, expressed an opinion against the nominated candidate. It was pointed out, that the above position had been retained in the impugned provisions. According to the learned Attorney General, the only difference in the impugned provisions was, that the right of the judiciary to "insist" on the appointment of a nominee, was no longer available to the judiciary. Under the collegium system, a recommendation made for appointment to the higher judiciary, could be returned by the executive for reconsideration. However, if the recommendation was reiterated, the executive had no choice, but to appoint the recommended nominee. It was pointed out, that the instant right to "insist" on the appointment of a Judge, had now been vested in the NJAC. It was vehemently contended, that the denial to "insist", on the appointment of a particular nominee, would surely not undermine the "independence of the judiciary". The "independence of the judiciary", according to the learned Attorney General, would be well preserved, if the right to "reject" a nominee was preserved with the judiciary, which had been done.

193. Based on the aforesaid submission, it was asserted, that the process initiated by the Parliament in 1990 (for the introduction of a Commission, for appointment of Judges to the higher judiciary), had taken twenty-four years to fructify. The composition of the NJAC introduced through the Constitution (99th Amendment) Act, according to him, meets with all constitutional requirements, as the same is neither in breach of the rule of "separation of powers", nor that of "the independence of the judiciary". It was contended, that the impugned provisions preserve the "basic structure" of the Constitution.

194. It was submitted, that the assailed provisions had only introduced rightful checks and balances, which are inherent components of an effective constitutional arrangement. The learned Attorney General also cautioned this Court, by asserting, that it was neither within the domain of the Petitioners, nor of this Court, to suggest an alternative combination of Members for the NJAC, or an alternative procedure, which would regulate its functioning more effectively. Insofar as the present petitions are concerned, it was asserted, that the challenge raised therein, could only be accepted, if it was shown, that the Parliament while exercising its plenary power to amend the Constitution, had violated the "basic structure" of the Constitution.

195. It was submitted, that it was not the case of any of the Petitioners before this Court, either that the Parliament was not competent to amend Article 124, or that the procedure prescribed therefor Under Article 368 had not been followed. In the above view of the matter, it was submitted, that the only scope for examination with reference to the present constitutional amendment was, whether while making the aforestated constitutional amendment, the Parliament had breached, any of the "basic features" of the Constitution.

196(i). For demonstrating the validity of the impugned constitutional amendment, reliance in the first instance was placed on the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225. Reference was made to the observations of S.M. Sikri, CJ., to contend, that the extent of the amending power Under Article 368 was duly adverted to. Reading the preamble to the Constitution, it was pointed out, that the fundamental importance expressed therein was, the freedom of the individual, and the inalienability of economic, social and political justice, as also, the importance of the Directive Principles (paragraph 282). In this behalf, it was also submitted, that the "fundamental features" of the Constitution, as for instance, secularism, democracy and the

freedom of the individual would always subsist in a welfare State (paragraph 283). Leading to the conclusion, that even fundamental rights could be amended in public interest, subject to the overriding condition, that the same could not be completely abrogated (paragraph 287). In this behalf, it was also pointed out, that the wisdom of the Parliament to amend the Constitution could not be the subject matter of judicial review (paragraph 288), leading to the overall conclusion, that by the process of amendment, it was open to the Parliament to adjust fundamental rights, in order to secure the accomplishment of the Directive Principles, while maintaining the freedom and dignity of every citizen (paragraph 289). Thus viewed, it was felt, that the rightful legal exposition would be, that even though every provision of the Constitution could be amended, the contemplated amendment should ensure, that the "basic foundation and structure" of the Constitution remained intact. In this behalf, an illustrative reference was made to the features, which constituted the "basic structure" of the Constitution. According to the learned Attorney General, they included, the supremacy of the Constitution, the republican and democratic form of Government, the secular character of the Constitution, the "separation of powers" between the legislature, the executive and the judiciary, and the federal character of the Constitution (paragraph 292). In addition to the above, it was asserted, that India having signed the Universal Declaration of Human Rights, had committed itself to retaining such of the fundamental rights, as were incorporated in the above declaration (paragraph 299). In the above view, according to the Attorney General, the expression "amendment of this Constitution" would restrain the Parliament, from abrogating the fundamental rights absolutely, or from completely changing the "fundamental features" of the Constitution, so as to destroy its identity. And that, within the above limitation, the Parliament could amend every Article of the Constitution (paragraph 475). It was insisted, that the impugned provisions had not breached any of the above limitations.

(ii). Reference was then made to the common opinion expressed by J.M. Shelat and A.N. Grover, JJ., (in the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225) to assert, that one of the limitations with reference to the amendment to the Constitution was, that it could not be amended to such an extent, as would denude the Constitution of its identity (paragraph 537). It was submitted, that the power to amend, could not result in the abrogation of the Constitution, or lead to the framing of a new Constitution, or to alter or change the essential elements of the constitutional structure (paragraph 539). It was pointed out, that it was not proper, to give a narrow meaning to the power vested in the Parliament to amend the Constitution, and at the same time, to give it such a wide meaning, so as to enable the amending body, to change the structure and identity of the Constitution (paragraph 546). With reference to the power of judicial review, it was contended, that there was ample evidence in the Constitution itself, to indicate that a system of "checks and balances" was provided for, so that none of the pillars of governance would become so predominant, as to disable the others, from exercising and discharging the functions entrusted to them. It was submitted, that judicial review, provided expressly through Articles 32 and 226, was an incident of the aforestated system of checks and balances (paragraph 577). Based on the historical background, the preamble, the entire scheme of the Constitution, and other relevant provisions thereof, including Article 368, it was submitted that it could be inferred, that the supremacy of the Constitution, the republican and democratic form of Government, sovereignty of the country, the secular and federal character of the Constitution, the demarcation of powers between the legislature, the executive and the judiciary, the dignity of the individual secured through the fundamental rights, and the mandate to build a welfare State (contained in Parts III and IV), and the unity and the integrity of the nation, could be regarded as the "basic elements" of

the constitutional structure (paragraph 582). It was also asserted, that as a society grows, its requirements change, and accordingly, the Constitution and the laws have to be changed, to suit the emerging needs. And accordingly, the necessity to amend the Constitution, to adapt to the changing needs, arises. Likewise, in order to implement the Directive Principles, it could be necessary to abridge some of the fundamental rights vested in the citizens. The power to achieve the above objective needed, a broad and liberal interpretation of Article 368. Having so held, it was concluded, that even the fundamental rights could be amended (paragraph 634). Reference was made to the fact, that the founding fathers were aware, that in a changing world, there would be nothing permanent, and therefore, they vested the power of amendment in the Parliament through Article 368, so as to keep the Constitution in tune with, the changing concepts of politics, economics and social ideas, and to so reshape the Constitution, as would meet the requirements of the time (paragraph 637). With reference to the above, it was contended, that the Parliament did not have the power to abrogate or emasculate the "basic elements" or "fundamental features" of the Constitution, such as the sovereignty of India, the democratic character of our polity, the unity of the country, and the essential elements of the individual freedoms secured to the citizens. Despite the above limitations, it was pointed out, that the amending power Under Article 368 was wide enough, to amend every Article of the Constitution, so as to reshape the Constitution to fulfill the obligations imposed on the State (paragraph 666). And accordingly, it was pointed out, that while recording conclusions, this Court had observed, that the power to amend the Constitution Under Article 368 was very wide, yet did not include the power to destroy, or emasculate the "basic elements" or the "fundamental features" of the Constitution (paragraph 744).

(iii). Reference was then made to the observations of H.R. Khanna, J. (in the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225). It was pointed out, that from 1950 to 1967 till this Court rendered the judgment in the I.C. Golak Nath case MANU/SC/0029/1967 : AIR 1967 SC 1643, the accepted position was, that the Parliament had the power to amend Part III of the Constitution, so as to take away or abridge the fundamental rights. Having noticed the fact, that no attempt was made by the Parliament to take away or abridge the fundamental rights, relating to the liberty of a person, and the freedom of expression, it was recorded, that even in future it could not be done. Accordingly, with reference to Article 368, it was sought to be concluded, that the Parliament had the power to amend Part III of the Constitution, as long as the "basic structure" of the Constitution was retained (paragraph 1421). If the "basic structure" of the original Constitution was retained, inasmuch as had the original Constitution continued to subsist, even though some of its provisions were changed, the power of amendment would be considered to have been legitimately exercised (paragraph 1430). And therefore, the true effect of Article 368 would be, that the Constitution did not vest with the Parliament, the power or authority for drafting a new and radically changed Constitution, with a different structure and framework (paragraph 1433). Accordingly, subject to the retention of the "basic structure or framework" of the Constitution, the power vested with the Parliament to amend the Constitution was treated as plenary, and would include the power to add, alter or repeal different Articles of the Constitution, including those relating to fundamental rights. All the above measures were included in the Parliament's power of amendment, and the denial of such a broad and comprehensive power, would introduce rigidity in the Constitution, as would break the Constitution itself (paragraph 1434). As such, it was held, that the amending power conferred by Article 368, would include the power to amend the fundamental rights, contained in Part III of the Constitution (paragraph 1435). In this behalf, it was asserted, that the issue, whether the amendment introduced would (or would not) be an improvement over

the prevailing position, was not justiciable. It was asserted, whether the amendment would be an improvement or not, was for the Parliament alone to determine. And Courts, could not substitute the wisdom of the legislature, by their own foresight, prudence and understanding (paragraph 1436). It was asserted, that the amending power of the Parliament must contain the right to enact legislative provisions, for experiment and trial, so as to eventually achieve the best results (paragraph 1437). In the ultimate analysis, it was held, that the amendment of the Constitution had a wide and broad connotation, and would embrace within itself, the total repeal of some of the Articles, or their substitution by new Articles, which may not be consistent, or in conformity with other Articles. And a Court while judging the validity of an amendment, could only concern itself with the question, as to whether the constitutional requirements for making the amendment had been satisfied? And accordingly, an amendment, made in consonance with the procedure prescribed, could not be struck down, on the ground that it was a change for the worst (paragraph 1442). While examining the question, whether the right to property could be included in the "basic structure or framework" of the Constitution, the answer rendered was in the negative. It was held, that in exercising the power of judicial review, Courts could not be oblivious of the practical needs of the Government. And that, the power of amendment could be exercised even for trial and error, inasmuch as opportunity had to be allowed for vindicating reasonable belief by experience (paragraph 1535). It was contended, that no generation had a monopoly to wisdom, nor the right to place fetters on future generations, nor to mould the machinery of Government, keeping in mind eternal good. The possibility, that the power of amendment may be abused, furnished no ground for denial of its existence. According to the Attorney General, it was therefore not correct to assume, that if the Parliament was held entitled to amend Part III of the Constitution, it would automatically and necessarily result in abrogation of the fundamental rights. Whilst concluding, that the right to property did not pertain to the "basic structure or framework" of the Constitution, it was held, that power of amendment Under Article 368 did not include the power to abrogate the Constitution, or to alter the "basic structure or framework" of the Constitution. Despite having so concluded, it was held, that no part of the fundamental rights could claim immunity, from the power of amendment (paragraph 1537).

197. Reference was then made to the judgments rendered by this Court in Indira Nehru Gandhi v. Raj Narain MANU/SC/0304/1975 : (1975) Supp SCC 1, Waman Rao v. Union of India MANU/SC/0091/1980 : (1981) 2 SCC 362, and the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, to contend, that the "basic structure" of the Constitution was to be determined, on the basis of the features which existed in the text of the original enactment of the Constitution, on the date of its coming into force. It was therefore pointed out, that the subsequent amendments to the Constitution, could not be taken into consideration, to determine the "basic features" of the Constitution.

198. Having laid down the aforestated foundation, the learned Attorney General submitted, that that reference could only be made to Articles 124 and 217, as they originally existed, when the Constitution was promulgated. If the original provisions were to be taken into consideration, according to the learned Attorney General, it would be apparent that the above Articles, expressed that the right to make appointments of Judges to the higher judiciary, being limited only to a "consultative" participation of the judiciary, was in the determinative domain of the executive. It was pointed out, that on the subject of appointment of Judges to the higher judiciary, the primacy of the Chief Justice of India, through the collegium process, was an innovation of the judiciary

itself (in the Second Judges case). The above primacy, was alien to the provisions of the Constitution, as originally enacted. And as such, the amendment to Article 124, and the insertion of Articles 124A to 124C therein, could not be examined on the touchstone of material, which was in stark contrast with the plain reading of Articles 124 and 217 (as they were originally enacted). It was accordingly asserted, that the present challenge to the Constitution (99th Amendment) Act, would not fall within the defined parameters of the "basic structure" concept, elaborated extensively by him (as has been recorded by us, above). The prayers made by the Petitioners on the instant ground were therefore, according to the learned Attorney General, liable to be rejected.

199. Having traveled thus far, it was pointed out, that it was important to understand the true purport and effect of the term "independence of the judiciary". In this behalf, in the first instance, the Court's attention was invited to, the First Judges case, wherein reference was made to the opinion expressed by E.S. Venkataramiah, J. (as he then was), who had taken the view, that it was difficult to hold, that merely because the power of appointment was with the executive, the "independence of the judiciary" would be compromised. In stating so, it was emphasized, that the true principle was, that after such appointment, the executive should have no scope, to interfere with the work of a Judge (paragraph 1033). Based thereon, it was asserted, that the independence of a Judge would not stand compromised, if after his appointment, the role of the executive, to deal with him, is totally excluded. Reference was then made to the opinion expressed by P.N. Bhagwati, J. (as he then was) (in the same judgment), to the effect, that the concept of "independence of the judiciary", was not limited only to independence from executive pressure/influence, but was relatable to many other pressures and prejudices. And in so recording, it was held, that "independence of the judiciary" included fearlessness of the other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belonged (paragraph 1037). Based thereon, it was asserted, that "independence of the judiciary", included independence from the influence of other Judges as well. And as such, it was concluded, that the composition of the NJAC was such, as would ensure the independence of the Judges appointed to the higher judiciary, as contemplated in the First Judges case.

200. In conjunction with the issue of "independence of the judiciary", which flows out of the concept of "separation of powers", it was pointed out, that the scheme of the Constitution envisaged a system of checks and balances. Inasmuch as, each organ of governance while being allowed the freedom to discharge the duties assigned to it, was subjected to controls, at the hands of one of the other organs, or both of the other organs. Illustratively, it was sought to be contended, that all executive authority, is subject to scrutiny through judicial review (at the hands of the judiciary). Likewise, legislation enacted by the Parliament, or the State legislatures, is also subject to judicial review, (at the hands of the judiciary). Even though, the executive and the legislature have the freedom to function and discharge their individual responsibilities, without interference by the other organ(s) of governance, yet the judiciary has been vested with the responsibility to ensure, that the exercise of executive and legislative functions, is in consonance with law. Likewise, it was submitted, that in the matter of appointment of Judges, Articles 124 and 217 provided for executive control, under the scheme of checks and balances. It was submitted, that the instant scheme of checks and balances, was done away with, by the Second and Third Judges cases, in the matter of appointment of Judges to the higher judiciary. It was asserted, that the position of checks and balances has been restored by the Constitution (99th Amendment) Act, by reducing the role of the executive, from the position which existed at the commencement of the

Constitution. Referring to the decisions in the Kesavananada Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, the Indira Nehru Gandhi case MANU/SC/0304/1975 : (1975) Supp SCC 1, the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, Asif Hameed v. State of Jammu and Kashmir MANU/SC/0036/1989 : 1989 Supp (2) SCC 364, State of Bihar v. Bihar Distillery Limited MANU/SC/0354/1997 : (1997) 2 SCC 453, and Bhim Singh v. Union of India MANU/SC/0327/2010 : (2010) 5 SCC 538, it was submitted, that this Court had recognized, that the concept of checks and balances, was inherent in the scheme of the Constitution. And that, even though the legislature, the executive and the judiciary were required to function within their own spheres demarcated through different Articles of the Constitution, yet their attributes could never be in absolute terms. It was submitted, that each wing of governance had to be accountable, and till the principle of accountability was preserved, the principle of "separation of powers" would not be achievable. It was therefore contended, that the concept of "independence of the judiciary", could not be gauged as an absolute end, overlooking the checks and balances, provided for in the scheme of the Constitution.

201. Having so asserted, it was contended, that in the matter of appointment of Judges to the higher judiciary, the most important and significant feature was, that no unworthy or doubtful appointment should go through, even though at times, the candidature of a seemingly good candidate, may not be accepted. It was asserted, that the NJAC had provided for a complete protection, in the sense noticed hereinabove, by providing in the procedure of appointment, that a negative view expressed by any of the two Members of the NJAC, would result in the rejection of the concerned candidate. Therefore, merely two Members of the NJAC, would be sufficient to veto a proposal for appointment. It was submitted, that since three Members of the NJAC were Judges of the Supreme Court, their participation in the NJAC would ensure, that "independence of the judiciary" remained completely safeguarded and secured. It was therefore contended, that not only the Constitution (99th Amendment) Act, but also the NJAC Act fully satisfied the independence criterion, postulated as a "basic structure" of the Constitution.

202. In order to reiterate the above position, it was asserted, that primacy in the matter of appointment of Judges to the higher judiciary, was not contemplated in the Constitution, as originally framed. In this behalf, reference was made to Articles 124 and 217. And in conjunction therewith, adverting to the debates on the subject, by Members of the Constituent Assembly. Thereupon, it was asserted, that the issue of primacy of the Chief Justice, based on a decision by a collegium of Judges, was a judicial innovation, which required reconsideration. Moreover, it was submitted, that the Second and Third Judges cases, were founded on the interpretation of Articles of the Constitution, which had since been amended, and as such, the very basis of the Second and Third Judges cases, no longer existed. Therefore, the legal position declared in the above judgments, could not constitute the basis, of the contentions advanced at the hands of the Petitioners. Furthermore, even if the ratio recorded by this Court in the Second and Third Judges cases, was still to be taken into consideration, conclusions (5), (6) and (7) recorded by J.S. Verma, J. (who had transcripted the majority view), show that the primacy of the judiciary was to ensure, that no appointment could be made to the higher judiciary, unless it had the approval of the collegium. It was submitted, that the instant aspect, which constituted the functional basis for ensuring "independence of the judiciary", had been preserved in the impugned constitutional amendment, and the NJAC Act. It was accordingly contended, that if the right to insist on the appointment of a candidate proposed by the judiciary, was taken away, from the Chief Justice of

India (based on a decision of a collegium of Judges), the same would not result, in the emasculation of the "basic structure" of the Constitution. In other words, the same would not violate the "essential and fundamental features" of the Constitution, nor in the least, the "independence of the judiciary".

203. Based on the above submissions, the learned Attorney General invited the Court's attention to the primary contention advanced by the Petitioners, namely, that even if all the three Judges of the Supreme Court who are now *ex officio* Members of the NJAC, collectively recommended a nominee, such recommendation could be annulled, by the non-Judge Members of the NJAC. Learned Attorney General submitted, that the above contention was limited to the right to "insist" on an appointment. And that, the right to "insist" did not flow from the conclusions recorded in the Second and Third Judges cases. And further, that the same cannot, by itself, be taken as an incident to establish a breach of the "independence of the judiciary".

204. Insofar as the Second and Third Judges cases are concerned, it was submitted, that the same may have been the need of the hour, on account of the fact that in 1976, sixteen Judges were transferred (from the High Courts in which they were functioning), to other High Courts. In the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, one of the transferred Judges challenged his transfer, *inter alia*, on the ground, that his non-consensual transfer was outside the purview of Article 222, as the same would adversely affect the "independence of the judiciary". Irrespective of the determination rendered, on the challenge raised in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193, it was pointed out, the very same question came to be re-agitated in the First Judges case. It was held by the majority, while interpreting Article 222, that the consent of the Judge being transferred, need not be obtained. It was also pointed out, that ever since the inception of the Constitution, the office of the Chief Justice of India, was occupied by the senior most Judge of the Supreme Court. The above principle was departed from in April 1973, as the next senior most Judge-J.M. Shelat, was not elevated to the office of the Chief Justice of India. Even the next two senior most Judges, after him-K.S. Hegde and A.N. Grover, were also ignored. The instant supersession by appointing the fourth senior most Judge-A.N. Ray, as the Chief Justice of India, was seen as a threat to the "independence of the judiciary". Again in January 1977, on the retirement of A.N. Ray, CJ., the senior most Judge immediately next to him-H.R. Khanna, was ignored and the second senior most Judge-M.H. Beg, was appointed, as the Chief Justice of India. In the above background, the action of the executive, came to be portrayed as a subversion of the "independence of the judiciary". It was in the above background, that this Court rendered the Second and Third Judges cases, but the implementation of the manner of appointment of Judges to the higher judiciary, in consonance therewith, had been subject to, overwhelming and all around criticism, including being adversely commented upon by J.S. Verma, CJ., the author of the majority view in the Second Judges case, after his retirement. In this behalf, the Court's attention was invited to his observations, extracted hereunder:

My 1993 Judgment, which holds the field, was very much misunderstood and misused. It was in this context, that I said that the working of the judgment, now, for some time, is raising serious questions, which cannot be called unreasonable. Therefore, some kind of re-think is required. My judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise, between the Executive and the Judiciary, both taking part in it.

It was therefore contended, that in the changed scenario, this Court ought to have, at its own, introduced measures to negate the accusations leveled against the prevailing system, of appointment of Judges to the higher judiciary. Since no such remedial measures were adopted by the judiciary of its own, the legislature had brought about the Constitution (99th Amendment) Act, supplemented by the NJAC Act, to broad base the process of selection and appointment, of Judges to the higher judiciary, to make it transparent, and to render the participants accountable.

205. Having dealt with the constitutional aspect of the matter, the learned Attorney General invited the Court's attention, to the manner in which judicial appointments were being made in fifteen countries. It was submitted, that in nine countries Judges were appointed either through a Judicial Appointment Commission (Kenya, Pakistan, South Africa and U.K.), or Committee (Israel), or Councils (France, Italy, Nigeria and Sri Lanka). In four countries, Judges were appointed directly by the Governor General (Australia, Canada and New Zealand), or the President (Bangladesh). It was submitted, that in Germany appointment of Judges was made through a multistage process of nomination by the Minister of Justice, and confirmation by Parliamentary Committees, whereupon, the final order of appointment of the concerned individual, is issued by the President. In the United States of America, Judges were appointed through a process of nomination by the President, and confirmation by the Senate. It was submitted, that in all the fifteen countries referred to above, the executive was the final determinative/appointing authority. Insofar as the appointments made by the Judicial Appointments Commissions/Committees/Councils (referred to above) were concerned, out of nine countries with Commissions, in two countries (South Africa and Sri Lanka) the executive had overwhelming majority, in four countries (France, Israel, Kenya and U.K.) there was a balanced representation of stakeholders including the executive, in three countries (Italy, Nigeria and Pakistan) the number of Judges was in a majority. In the five countries without Commissions/Committees/Councils (Canada, Australia, New Zealand, Bangladesh and the United States of America), the decision was taken by the executive, without any formal process of consultation with the judiciary. It was pointed out, that in Germany, the appointment process was conducted by the Parliament, and later confirmed by the President. It was pointed out, that the judiciary in all the countries referred to above, was totally independent. Based on the above submissions, it was contended, that the manner of selection and appointment of Judges, could not be linked to the concept of "independence of the judiciary". It was submitted, that the judicial functioning in the countries referred to above, having been accepted as more than satisfactory, there is no reason, that the system of appointment introduced in India, would be adversely impacted by a singular representative of the executive in the NJAC. It was therefore asserted, that the submissions advanced at the hands of the Petitioners, were not acceptable, even with reference to the experience of other countries, governed through a constitutional framework (some of them, of the Westminster Model).

206. It was further asserted, that the absence of the absolute majority of Judges in the NJAC, could not lead to the inference, that the same was violative of the "basic structure" of the Constitution, so as to conclude, that it would impinge upon the "independence of the judiciary". It was asserted, that the representation of the judiciary in the NJAC, was larger than that of the other two organs of the governance, namely, the executive and the legislature. In any case, given the representation of the judiciary in the NJAC, it was fully competent, to stall the appointment of a candidate to the higher judiciary, who was considered by the judicial representatives, as unsuitable. Any two, of

the three representatives of the judiciary, were sufficient to veto any appointment supported by others.

207. It was further submitted, that the NJAC was broad based with representatives from the judiciary, the executive and the "two eminent persons", would not fall in the category of jurists, eminent legal academicians, or eminent lawyers. It was contended, that the intention to include "eminent persons", who had no legal background was to introduce, in the process of selection and appointment of Judges, lay persons in the same manner, as has been provided for in the Judicial Appointments Commission, in the United Kingdom.

208. It was also the contention of the learned Attorney General, that this would not be the first occasion, when such an exercise has been contemplated by parliamentary legislation. The Court's attention was drawn to the Consumer Protection Act, 1986, wherein the highest adjudicatory authority is, the National Consumer Disputes Redressal Commission. It was pointed out, that the above Redressal Commission, comprised of Members, with and without a judicial background. The President of the National Consumer Disputes Redressal Commission has to be a person, who has been a Judge of the Supreme Court. Illustratively, it was contended, where a matter is being adjudicated upon by a three-Member Bench, two of the Members may not be having any judicial background. These two non-judicial Members, could overrule the view expressed by a person, who had been a former Judge in the higher judiciary. It was submitted, that situations of the above nature, do sometimes take place. Yet, such a composition for adjudicatory functioning, where the Members with a judicial background are in a minority, is legally and constitutionally valid. If judicial independence cannot be held to be compromised in the above situation, it was asserted, that it was difficult to understand how the same could be considered to be compromised in a situation, wherein the NJAC has three out of its six Members, belonging to the judicial fraternity.

209. It was sought to be suggested, that the primacy of the judiciary, in the matter of appointment of Judges to the higher judiciary, could not be treated as a part of the "basic structure" of the Constitution. Furthermore, the lack of absolute majority of Judges in the NJAC, would also not tantamount to the constitutional amendment being rendered violative of the "basic structure". In the above view of the matter, it was asserted, that the submissions advanced at the hands of the learned Counsel representing the Petitioners, on the aspect of violation of the "basic structure" of the Constitution, by undermining the "independence of the judiciary", were liable to be rejected.

210. With reference to the inclusion of two "eminent persons", in the six-Member NJAC, it was submitted, that the general public was the key stakeholder, in the adjudicatory process. And accordingly, it was imperative to ensure their participation in the selection/appointment of Judges to the higher judiciary. Their participation, it was submitted, would ensure sufficient diversity, essential for rightful decision making. It was submitted, that in the model of the commission suggested by M.N. Venkatachaliah, CJ., the participation of one eminent person was provided. He was to be nominated by the President, in consultation with the Chief Justice of India. In the 2003 Bill, which was placed before the Parliament, the proposed Judicial Commission was to include one eminent person, to be nominated by the executive. The 2013 Bill, which was drafted by the previous political dispensation-the U.P.A. Government, the Judicial Commission proposed, was to have two eminent persons, to be selected by the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha. The 2014 Bill, which was drafted by the present

political dispensation-the N.D.A. Government, included two eminent persons, to be selected in just about the same manner as was contemplated under the 2013 Bill. The variation being, that one of the eminent persons was required to belong to the Scheduled Castes, or the Scheduled Tribes, or Other Backward Classes, or Minorities, or Women, thereby fulfilling the obvious social obligation. It was submitted, that their participation in the deliberations, for selection of Judges to the higher judiciary, could not be described as adversarial to the judicial community. Their participation would make the process of appointment, more broad based.

211. While responding to the submissions, advanced at the hands of the learned Counsel for the Petitioners, to the effect that the Constitution (99th Amendment) Act, did not provide any guidelines, reflecting upon the eligibility of the "eminent persons", to be nominated to the NJAC, and as such, was liable to be struck down, it was submitted, that the term "eminent person" was in no way vague. It meant-a person who had achieved distinction in the field of his expertise. Reference was also made to the debates of the Constituent Assembly, while dealing with the term "distinguished jurist", contained in Article 124(3), it was pointed out, that the term "distinguished person" was not vague. In the present situation, it was submitted, that since the selection and nomination of "eminent persons", was to be in the hands of high constitutional functionaries (no less than the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha), it was natural to assume, that the person(s) nominated, would be chosen, keeping in mind the obligation and the responsibility, that was required to be discharged. Reliance in this behalf, was placed on the Centre for Public Interest Litigation case MANU/SC/0089/2012 : (2012) 3 SCC 1, to assert, that it was sufficient to assume, that such a high profile committee, as the one in question, would exercise its powers objectively, and in a fair and reasonable manner. Based on the above, it was contended, that it was well settled, that mere conferment of wide discretionary powers, would not vitiate the provision itself.

212. Referring to the required qualities of a Judge recognized in the Indian context, as were enumerated in the "Bangalore Principles of Judicial Conduct", and thereupon accepted the world over, as revised at the Round Table Meeting of Chief Justices held at The Hague, in November 2002, it was submitted, that the two "eminent persons" would be most suited, to assess such matters, with reference to the nominees under consideration. Whilst the primary responsibility of the Members from the judiciary would be principally relatable to, ascertaining the judicial acumen of the candidates concerned, the responsibility of the executive would be, to determine the character and integrity of the candidate, and the inputs, whether the candidate possessed the values, expected of a Judge of the higher judiciary, would be that of "eminent persons" in the NJAC. It was therefore asserted, that the two "eminent persons" would be "lay persons" having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualifications. It was submitted, that the instant broad based composition of the NJAC, was bound to be more suitable, than the prevailing system of appointment of Judges. Relying upon the R. Gandhi case MANU/SC/0378/2010 : (2010) 11 SCC 1, it was submitted, that it would not be proper to make appointments, by vesting the process of selection, with an isolated group, or a selection committee dominated by representatives of a singular group-the judiciary. In a matter of judicial appointments, it was submitted, the object ought to be, to pick up the best legally trained minds, coupled with a qualitative personality. For this, according to the Attorney General, a collective consultative process, would be the most suitable. It was pointed out, that "eminent persons", having no nexus to judicial activities, would

introduce an element of detachment, and would help to bring in independent expertise, to evaluate non-legal competencies, from an ordinary citizen's perspective, and thereby, represent all the stakeholders of the justice delivery system. It was contended, that the presence of "eminent persons" was necessary, to ensure the representative participation of the general public, in the selection and appointment of Judges to the higher judiciary. Their presence would also ensure, that the selection process was broad based, and reflected sufficient diversity and accountability, and in sync with the evolving process of selection and appointment of Judges, the world over.

213. The learned Attorney General, then addressed the issue of inclusion of the Union Minister in charge of Law and Justice, as an *ex officio* Member in the NJAC. Reference was first made to Articles 124 and 217, as they were originally enacted in the Constitution. It was submitted, that originally, the power of appointment of Judges to the higher judiciary, was exclusively vested with the President. In this behalf reliance was placed on Article 74, whereunder the President was obliged to act on the aid and advice of the Council of Ministers, headed by the Prime Minister. It was pointed out, that the above position, was so declared, by the First Judges case. And as such, from the date of commencement of the Constitution, the executive had the exclusive role, in the selection and appointment of Judges to the higher judiciary. It was asserted, that the position was changed, for the first time, in 1993 by the Second Judges case, wherein the term "consultation", with reference to the Chief Justice of India, was interpreted as "concurrence". Having been so interpreted, primacy in the matter of appointment of Judges to the higher judiciary, came to be transferred from the executive, to the Chief Justice of India (based on a collective decision, by a collegium of Judges). Despite the above, the Union Minister in charge of Law and Justice, being a representative of the executive, continued to have a role in the selection process, though his involvement was substantially limited, as against the responsibility assigned to the executive Under Articles 124 and 217, as originally enacted. It was pointed out, that by including the Union Minister in charge of Law and Justice, as a Member of the NJAC, the participatory role of the executive, in the matter of selection and appointment of Judges to the higher judiciary, had actually been diminished, as against the original position. Inasmuch as, the executive role in the NJAC, had been reduced to one out of the six Members of the Commission. In the above view of the matter, it was asserted, that it was unreasonable for the Petitioners to grudge, the presence of the Union Minister in charge of Law and Justice, as a Member of the NJAC.

214. Insofar as the inclusion of the Union Minister in the NJAC is concerned, it was submitted, that there could be no escape from the fact, that the Minister in question, would be the connect between the judiciary and the Parliament. His functions would include, the responsibility to inform the Parliament, about the affairs of the judicial establishment. It was submitted, that his exclusion from the participatory process, would result in a lack of coordination between the two important pillars of governance. Furthermore, it was submitted that the Minister in question, as a member of the executive, will have access to, and will be able to, provide the NJAC with all the relevant information, about the antecedents of a particular candidate, which the remaining Members of the NJAC are unlikely to have access to. This, according to the learned Attorney General, would ensure, that the persons best suited to the higher judiciary, would be selected. Moreover, it was submitted, that the executive was a key stakeholder in the justice delivery system, and as such, it was imperative for him to have, a role in the process of selection and appointment of Judges, to the higher judiciary.

215. The learned Attorney General allayed all fears, with reference to the presence of Union Minister, in the NJAC, by asserting that he would not be in a position to politicize the appointments, as he was just one of the six-Members of the NJAC. And that, the other Members would constitute an adequate check, even if the Minister in question, desired to favour a particular candidate, on political considerations. This submission was made by the learned Attorney General, keeping in mind the assumed fear, which the Petitioners had expressed, on account of the political leanings of the Union Minister, with the governing political establishment. It was accordingly asserted, that the presence of one member of the executive, in a commission of six Members, would not impact the "independence of the judiciary", leading to the clear and unambiguous conclusion, that the presence of the Union Minister in charge of Law and Justice in the NJAC, would not violate the "basic structure" of the Constitution.

216. Referring to the judgment rendered by this Court, in the Madras Bar Association case MANU/SC/0875/2014 : (2014) 10 SCC 1, it was submitted that, for the tribunal in question, the participation of the executive in the selection of its Members, had been held to be unsustainable, because the executive was a stakeholder in each matter, that was to be adjudicated by the tribunal. It was submitted, that the above position did not prevail insofar as the higher judiciary was concerned, since the stakeholders before the higher judiciary were diverse. It was, therefore, submitted, that the validity of the NJAC could not be assailed, merely on the ground of presence of the Union Minister, as an *ex officio* Member of the NJAC.

217. The manner of appointment of Judges to the higher judiciary, through the NJAC, it was asserted, would have two major advantages. It would introduce transparency in the process of selection and appointments of Judges, which had hitherto before, been extremely secretive, with the civil society left wondering about, the standards and the criterion adopted, in determining the suitability of candidates. Secondly, the NJAC would diversify the selection process, which would further lead to accountability in the matter of appointments. It was submitted, that not only the litigating public, or the practicing advocates, but also the civil society, had the right to know. It was pointed out, that insofar as the legislative process was concerned, debates in the Parliament are now in the public domain. The rights of individuals, determined at the hands of the executive, have been transparent under the Right to Information Act, 2005. It was submitted that likewise, the selection and appointment of Judges to the higher judiciary, must be known to the civil society, so as to introduce not only fairness, but also a degree of assurance, that the best out of those willing, were being appointed as Judges.

218. Referring to Article 124A(2) inserted through the Constitution (99th Amendment) Act, it was asserted, that a constitutional process could not be held up, due to the unavailability (and/or the disability) of one or more Members of the NJAC. So that a defect in the constitution of the NJAC, or any vacancy therein, would not impact the process of selection and appointment of Judges to the higher judiciary. Article 124A(2) provided, that the proceedings of the NJAC would not be questioned or invalidated on account of a vacancy or a defect in the composition of the NJAC. It was contended, that it was wrongful for the Petitioners to frown on Article 124A(2), as there were a number of statutory enactments with similar provisions. In this behalf, the Court's attention was inter alia drawn to Section 4(2), of the Central Vigilance Commission Act 2003, Section 4(2), of the Lokpal and Lokayuktas Act 2013, Section 7, of the National Commission for Backward Classes Act 1993, Section 29A, of the Consumer Protection Act 1986, Section 7, of the Advocates

Welfare Act 2001, Section 8, of the University Grants Commission Act 1956, Section 9, of the Protection of Human Rights Act 1993, Section 7, of the National Commission for Minorities Act 1993, Section 8, of the National Commission for Minority Educational Institutions Act 2004, Section 24, of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, and a host of other legislative enactments of the same nature. Relying on the judgments in Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. Corporation of the City of Bangalore MANU/SC/0093/1961 : (1961) 3 SCR 707, Khadim Hussain v. State of U.P. MANU/SC/0527/1975 : (1976) 1 SCC 843, B.K. Srinivasan v. State of Karnataka MANU/SC/0094/1987 : (1987) 1 SCC 658, and People's Union for Civil Liberties v. Union of India MANU/SC/0336/2005 : (2005) 5 SCC 363, it was asserted, that on an examination of provisions of similar nature, this Court had repeatedly held, that modern legislative enactments ensured, that the defects of procedure, which do not lead to any substantial prejudice, are statutorily placed beyond the purview of challenge. It was accordingly asserted, that invalidity on account of a technical irregularity, being excluded from judicial review, the submissions advanced on behalf of the Petitioners, on the constitutional validity of Clause (2) of Article 124A, deserved an outright rejection.

219. It was the contention of the learned Attorney General, that the NJAC did not suffer from the vice of excessive delegation. It was sought to be reiterated, that the power of nomination of "eminent persons" was securely and rightfully left to the wisdom of the Prime Minister of India, the Chief Justice of India and the Leader of the Opposition in the Parliament. It was submitted, that the parameters expressed in Sections 5 and 6 of the NJAC Act, delineating the criterion for selection, by specifically providing, that ability, merit and suitability would expressly engage the attention of the NJAC, while selecting Judges for appointment to the higher judiciary, clearly laid out the parameters for this selection and appointment process. It was submitted, that the modalities to determine ability, merit and suitability would be further detailed through rules and Regulations. And that, factors such as, the minimum number of years of practice at the Bar, the number and nature of cases argued, academic publications in reputed journals, the minimum and maximum age, and the like, would be similarly provided for. All these clearly defined parameters, it was contended, would make the process of selection and appointment of Judges to the higher judiciary transparent, and would also ensure, that the candidates to be considered, were possessed of the minimum desired standards. It was submitted, that the Memorandum of Procedure for Appointment and Transfer of Chief Justices and Judges of the High Courts, as also, for elevation of Judges to the Supreme Court, were bereft of any such particulars, and the absence of any prescribed criterion, had resulted in the appointment of Judges, even to the Supreme Court, which should have ordinarily been avoided. The learned Attorney General made a reference to three instances, which according to him, were universally condemned, by one and all. One of the Judges appointed to this Court, according to him, was a non-performer as he had authored just a few judgments as a Judge of the High Courts of Delhi and Kerala, and far lesser judgments as the Chief Justice of the Uttarakhand and Karnataka High Courts, and less than ten judgments during his entire tenure as a Judge of the Supreme Court. The second Judge, according to him, was notoriously late in commencing Court proceeding, a habit which had persisted with the said Judge even as a Judge of the Patna and Rajasthan High Courts, and thereafter, as the Chief Justice of the Jharkhand High Court, and also as a Judge of the Supreme Court. The third Judge, according to the learned Attorney General, was notoriously described as a tweeting Judge, because of his habit of tweeting his views, after he had retired. Learned Counsel for the Respondents, acknowledged

having understood the identity of the Judges from their above description by the learned Attorney General, and also affirmed the factual position asserted in respect of the Judges mentioned. The learned Attorney General also handed over to us a compilation (in a sealed cover) about appointments of Judges made to different High Courts, despite the executive having expressed an adverse opinion. The compilation made reference to elevation of five Judges to High Courts (-two Judges to the Jammu and Kashmir High Court, one Judge to the Punjab and Haryana High Court, one Judge to the Patna High Court, and one Judge to the Calcutta High Court) and three Judges to the Supreme Court. It may be clarified that the objection with reference to the Supreme Court Judges was not related to their suitability, but for the reason that some High Courts were unrepresented in the Supreme Court. We would therefore understand the above position as covering the period from 1993 till date. But it was not his contention, that these elevations had proved to be wrongful. We may only notice, that two of the three Supreme Court Judges referred to, were in due course elevated to the high office of Chief Justice of India.

220. The learned Attorney General vehemently contested the assertion made by the learned Counsel representing the Petitioners, that the power to frame rules and Regulations for the functioning of the NJAC was unguided, inasmuch as, neither the constitutional amendment nor the legislative enactment, provided for any parameters for framing the rules and Regulations, pertaining to the criterion of suitability. In this behalf, it was submitted, that sufficient guidelines were ascertainable from Articles 124B and 124C. Besides the aforesaid, the Court's attention was drawn to Sections 5(2), 6(1) and 6(3) of the NJAC Act, wherein the parameters of suitability for appointment of Judges had been laid down. In this behalf, it was also asserted, that Article 124, as originally enacted, had laid down only basic eligibility conditions, for appointment of Judges to the higher judiciary, but no suitability criteria had been expressed. It was also asserted, that the procedure and conditions for appointment of Judges, were also not prescribed. As against the above, it was pointed out, that Articles 124B and 124C and Sections 5(2), 6(1) and 6(3) of the NJAC Act, clearly laid down conditions and guidelines for determining the suitability of a candidate for appointment as a Judge. On the basis of the aforementioned analysis, it was submitted, that neither the constitutional amendment was violative of the "basic structure", nor the NJAC Act, was constitutionally invalid. For the above reasons, it was asserted, that the challenge raised by the Petitioners was liable to be rejected.

221. In response to the technical submission advanced by Mr. Fali S. Nariman, namely, that since the Constitution (99th Amendment) Act, was brought into force, consequent upon the notification issued by the Central Government in the Official Gazette on 13.4.2015, the consideration of the NJAC Bill and the passing of the NJAC Act, prior to the coming into force of the Constitution (99th Amendment) Act, would render it null and void, the learned Attorney General invited our attention to Article 118, which authorizes, each House of Parliament, to make rules for regulating their procedure, in the matter of conducting their business. It was pointed out, that Rules of Procedure and the Conduct of Business of the Lok Sabha, had been duly enacted by the Lok Sabha. A relevant extract of the aforesaid rules was handed over to us. Rule 66 thereof, is being extracted hereunder:

66. A Bill, which is dependent wholly or partly upon another Bill pending before the House, may be introduced in the House in anticipation of the passing of the Bill on which it is dependent:

Provided that the second Bill shall be taken up for consideration and passing in the House only after the first Bill has been passed by the Houses and assented to by the President.

Referring to the proviso Under Rule 66, it was acknowledged that the rule read independently, fully justified the submissions of Mr. Fali S. Nariman. It was however pointed out, that it was open to the Parliament to seek a suspension of the above rule Under Rule 388. Rule 388 is also extracted hereunder:

388. Any member may, with the consent of the Speaker, move that any rule may be suspended in its application to a particular motion before the House and if the motion is carried the rule in question shall be suspended for the time being.

The learned Attorney General then handed over to us, the proceedings of the Lok Sabha dated 12.8.2014, inter alia, including the Constitution (121st Amendment) Bill, and the NJAC Bill. He invited our attention to the fact, that while moving the motion, the then Union Minister in charge of Law and Justice had sought, and was accorded approval, for the suspension of the proviso to Rule 66 of the Rules of Procedure and Conduct of Business of the Lok Sabha. Relevant extract of the Motion depicting the suspension of Rule 388 is being reproduced hereunder:

Motion Under Rule 388

Shri Ravi Shankar Prasad moved the following motion:

That this House do suspend the proviso to Rule 66 of the Rules of Procedure and Conduct of Business in Lok Sabha in its application to the motions for taking into consideration and passing the National Judicial Appointments Commission Bill, 2014 in as much as it is dependent upon the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014.

The motion was adopted.

The motions for consideration of the Bills viz. (i) The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 (Insertion of new Articles 124A, 124B and 124C); and (ii) The National Judicial Appointments Commission Bill, 2014 were moved by Shri Ravi Shankar Prasad.

Premised on the strength of the Rules framed Under Article 118, learned Attorney General, also placed reliance on Article 122, which is being reproduced below:

122. Courts not to inquire into proceedings of Parliament.--(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

Based on Article 122, it was submitted, that the Constitution itself contemplated, that the validity of the proceedings in the Parliament, could not be called in question, on the ground of alleged

irregularity in procedure. While reiterating, that the procedure laid down by the Parliament Under Article 118, had been duly complied with, it was submitted, that even if that had not been done, as long as the power of Parliament to legislate was not questioned, no challenge could be premised on the procedural defects in enacting the NJAC Act. In this behalf, reference was also made to Article 246, so as to contend, that the competence of the Parliament to enact the NJAC Act was clearly and unambiguously vested with the Parliament. In support of the above contention, reliance was placed on in re: Hindu Women's Rights to Property Act, 1937 MANU/FE/0003/1941 : AIR 1941 FC 72, rendered by the Federal Court, wherein it had observed as under:

One of the provisions included in Schedule 9 is that a bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that the Hindu Women's Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act (Schedule 9, para. 68(2)). Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor. General's assent. But it does not appear to the Court that the form, content or subject-matter of a bill at the time of its introduction into, or of its consideration by either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the bill after it has become an Act. In the opinion of this Court, therefore, it is immaterial that the powers of the Legislature changed during the passage of the bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is 14th April 1937, the date on which the Governor General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other.

Reliance was also placed on Pandit M.S.M. Sharma v. Dr. Shree Krishna Sinha MANU/SC/0020/1960 : 1961 (1) SCR 96, wherefrom the following observations were brought to our notice:

It now remains to consider the other subsidiary questions raised on behalf of the Petitioner. It was contended that the procedure adopted inside the House of the Legislature was not regular and not strictly in accordance with law. There are two answers to this contention, firstly, that according to the previous decision of this Court, the Petitioner has not the fundamental right claimed by him. He is, therefore, out of Court. Secondly, the validity of the proceedings inside the Legislature of a State cannot be called in question on the allegation that the procedure laid down by the law had not been strictly followed. Article 212 of the Constitution is a complete answer to this part of the contention raised on behalf of the Petitioner. No Court can go into those questions which are within

the special jurisdiction of the Legislature itself, which has the power to conduct its own business. Possibly, a third answer to this part of the contention raised on behalf of the Petitioner is that it is yet premature to consider the question of procedure as the Committee is yet to conclude its proceedings. It must also be observed that once it has been held that the Legislature has the jurisdiction to control the publication of its proceedings and to go into the question whether there has been any breach of its privileges, the Legislature is vested with complete jurisdiction to carry on its proceedings in accordance with its rules of business. Even though it may not have strictly complied with the requirements of the procedural law laid down for conducting its business, that cannot be a ground for interference by this Court Under Article 32 of the Constitution. Courts have always recognised the basic difference between complete want of jurisdiction and improper or irregular exercise of jurisdiction. Mere non-compliance with rules of procedure cannot be a ground for issuing a writ Under Article 32 of the Constitution vide Janardan Reddy v. The State of Hyderabad MANU/SC/0027/1951 : (1951) SCR 344.

Based on the aforesaid submissions, it was the vehement contention of the learned Attorney General, that there was no merit in the technical objections raised by the Petitioners while assailing the provisions of the NJAC Act.

222. Mr. K.K. Venugopal, learned Senior Advocate, entered appearance on behalf of the State of Madhya Pradesh. While reiterating a few of the legal submissions canvassed by the learned Attorney General, he emphasized, that the judgments rendered by this Court, in the Second and Third Judges cases, turned the legal position, contemplated under the original Articles 124 and 217, on its head. It was submitted, that this Court has been required to entertain a public interest litigation, in an unprecedented exercise of judicial review, wherein it is sought to be asserted, that the "independence of the judiciary", had been encroached by the other two organs of governance. It was contended by learned Counsel, that the instant assertion was based on a misconception, as primacy in the matter of appointment of Judges to the higher judiciary, was never vested with the judiciary. It was pointed out, that primacy in the matter of appointment of Judges to the higher judiciary, was vested with the executive Under Articles 124 and 217, as originally enacted. Furthermore, this Court through its judgments culminating in the First Judges case, while correctly interpreting the aforesaid provisions of the Constitution, had rightly concluded, that the interaction between the executive and the Chief Justice of India (as well as, the other Judges of the higher judiciary) was merely "consultative", and that, the executive was entirely responsible for discharging the responsibility of appointment of Judges including Chief Justices, to the higher judiciary. It was submitted, that the Second Judges case, by means of a judicial interpretation, vested primacy, in the matter of appointment of Judges to the higher judiciary, with the Chief Justice of India, and his collegium of Judges. It was pointed out, that after the rendering of the Second Judges case, appointments of Judges commenced to be made, in the manner expressed by the above Constitution Bench. It was asserted, that there had been, an all around severe criticism, of the process of appointment of Judges to the higher judiciary, as contemplated by the Second and Third Judges cases. It was contended, that the selection process was now limited to Judges selecting Judges, without any external participation. It was also asserted, that the exclusion of the executive from the role of selection and appointment of Judges was so extensive, that the executive has got no right to initiate any candidature, for appointment of Judges/Chief Justices to the higher judiciary. Such an interpretation of the provisions of the Constitution, it was pointed out, had not only resulted in reading the term "consultation" in Articles 124 and 217 as "concurrence", but has

gone far beyond. It was sought to be asserted, that in the impugned amendment to the Constitution, the intent contained in the original Articles 124 and 217, has been retained. The amended provisions, it was pointed out, have been tilted in favour of the judiciary, and the participatory role, earlier vested in the executive, has been severely diluted. It was submitted, that even though no element of primacy had been conferred on the judiciary by Article 124, as originally enacted, primacy has now been vested in the judiciary, inasmuch as, the NJAC has the largest number of membership from the judicial fraternity. It was highlighted, that the Union Minister in charge of Law and Justice, is the sole executive representative, in the selection process, contemplated under the amended provisions. It was therefore asserted, that it was a far cry, for anyone to advocate, that the role of the judiciary in the manner of appointment of Judges to the higher judiciary having been diluted, had impinged on its independence.

223. It was contended, that the author of the majority view in the Second Judges case (J.S. Verma, J., as he then was), had himself found fault with the manner of implementation of the judgments in the Second and Third Judges cases. It was submitted that Parliament, being the voice of the people, had taken into consideration, the criticism levelled by J.S. Verma, J. (besides others), to revise the process of appointment of Judges contemplated under the Second and Third Judges cases. Having so contended, learned Counsel asserted, that if this Court felt that any of the provisions, with reference to selection and appointment of Judges to the higher judiciary, would not meet the standards and norms, which this Court felt sacrosanct, it was open to this Court to read down the appropriate provisions, in a manner as to round off the offending provisions, rather than quashing the impugned constitutional and legislative provisions in their entirety.

224. Mr. Ranjit Kumar, learned Solicitor General of India submitted, that the entire Constitution had to be read as a whole. In this behalf, it was contended, that each provision was an integral part of the Constitution, and as such, its interpretation had to be rendered holistically. For the instant proposition, reliance was placed on the Kihoto Hollohan case MANU/SC/0753/1992 : 1992 Supp (2) SCC 651, T.M.A. Pai Foundation v. State of Karnataka MANU/SC/0905/2002 : (2002) 8 SCC 481, R.C. Poudyal v. Union of India 1994 Supp (1) SCC 324, the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, and the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225. Based on the above judgments, it was asserted, that the term "President", as it existed in Articles 124 and 217, if interpreted holistically, would lead to the clear and unambiguous conclusion, that the President while discharging his responsibility with reference to appointment of Judges/Chief Justices to the higher judiciary, was bound by the aid and advice of the Council of Ministers, as contemplated Under Article 74. It was contended, that the aforesaid import was rightfully examined and interpreted with reference to Article 124, in the First Judges case. But had been erroneously overlooked, in the subsequent judgments. Accordingly, it was asserted, that there could be no doubt whatsoever, while examining the impugned constitutional amendment, as also, the impugned legislative enactment, that Parliament had not breached any component of the "basic structure" of the Constitution.

225. It was also contended, that in case the challenge raised to the impugned constitutional amendment, was to be accepted by this Court, and the legal position declared by this Court, was to be given effect to, the repealed provisions would not stand revived, merely because the amendment/legislation which were being assailed, were held to be unconstitutional. Insofar as the

instant aspect of the matter is concerned, learned Solicitor General raised two independent contentions.

226. Firstly, that the issue whether a constitutional amendment once struck down, would revive the original/substituted Article, was a matter which had already been referred to a nine-Judge Constitutional Bench. In order to support the aforesaid contention, and to project the picture in its entirety, reliance was placed on, Property Owners' Association v. State of Maharashtra MANU/SC/1160/1996 : (1996) 4 SCC 49, Property Owners' Association v. State of Maharashtra MANU/SC/0214/2001 : (2001) 4 SCC 455, and Property Owners' Association v. State of Maharashtra MANU/SC/0214/2001 : (2013) 7 SCC 522. It was submitted, that the order passed by this Court, wherein the reference to a nine-Judge Constitution Bench had been made, was a case relating to the constitutionality of Article 31C. It was pointed out that Article 31C, as originally enacted provided, that "...notwithstanding anything contained in Article 13, no law giving effect to the policy of the State, towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it was inconsistent with, the rights conferred by Articles 14 and 19". It was submitted, that the latter part of Article 31C, which provided "...and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy..." had been struck down by this Court in the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225. It was contended, that when the matter pertaining to the effect of the striking down of a constitutional amendment, had been referred to a nine-Judge Bench, it would be improper for this Court, sitting in its present composition, to determine the aforesaid issue.

227. The second contention advanced at the hands of the learned Solicitor General, was based on Sections 6, 7 and 8 of the General Clauses Act. It was contended, that an amendment which had deleted some part of the erstwhile Article 124 of the Constitution, and substituted in its place something different, as in the case of Article 124, by the Constitution (99th Amendment) Act, would not result in the revival of the original Article which was in place, prior to the constitutional amendment, even if the amendment itself was to be struck down. It was submitted, that if a substituted provision was declared as unconstitutional, for whatever ground or reason(s), the same would not automatically result in the revival of the repealed provision. In order to support the aforesaid contention, reliance was placed on Ameer-un-Nissa Begum v. Mahboob Begum MANU/SC/0093/1955 : AIR 1955 SC 352, Firm A.T.B. Mehtab Majid and Co. v. State of Madras MANU/SC/0352/1962 : AIR 1963 SC 928, B.N. Tewari v. Union of India MANU/SC/0312/1964 : AIR 1965 SC 1430, Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. MANU/SC/0036/1968 : (1969) 1 SCC 255, Mulchand Odhavji v. Rajkot Borough Municipality MANU/SC/0348/1969 : (1971) 3 SCC 53, Mohd. Shaukat Hussain Khan v. State of Andhra Pradesh MANU/SC/0057/1974 : (1974) 2 SCC 376, State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd. MANU/SC/0417/1976 : (1977) 1 SCC 643, India Tobacco Co. Ltd. v. Commercial Tax Officer, Bhavanipore MANU/SC/0353/1974 : (1975) 3 SCC 512, and Kolhapur Canesugar Works Ltd. v. Union of India MANU/SC/0060/2000 : (2000) 2 SCC 536. It was submitted, that the general rule of construction was, that a repeal through a repealing enactment, would not revive anything repealed thereby. Reliance was also placed on, State of U.P. v. Hirendra Pal Singh MANU/SC/1030/2010 : (2011) 5 SCC 305, Joint Action Committee of Air Line Pilots' Association of India v. Director General of Civil Aviation MANU/SC/0543/2011 : (2011) 5 SCC 435, and State of Tamil Nadu v. K. Shyam Sunder MANU/SC/0915/2011 : (2011) 8 SCC 737, to

contend, that the settled legal proposition was, whenever an Act was repealed, it must be considered as if it had never existed. It was pointed out, that consequent upon the instant repeal of the earlier provisions, the earlier provisions must be deemed to have been obliterated/abrogated/wiped out, wholly and completely. The instant contention was sought to be summarized by asserting, that if a substituted provision was to be struck down, the question of revival of the original provision (which had been substituted, by the struck down provision) would not arise, as the provision which had been substituted, stood abrogated, and therefore had ceased to exist in the statute itself. It was therefore submitted, that even if the challenge raised to the impugned constitutional amendment was to be accepted by this Court, the originally enacted provisions of Articles 124 and 217 would not revive.

228. The learned Solicitor General additionally contended, that the present challenge at the hands of the Petitioners should not be entertained, as it has been raised prematurely. It was submitted, that the challenge raised by the Petitioners was based on assumptions and presumptions, without allowing the crystallization of the impugned amendment to the Constitution. It was asserted, that the position would crystalise only after rules and Regulations were framed under the NJAC Act. It was submitted, that the question of "independence of the judiciary", with reference to the amendments made, could be determined only after the NJAC Act was made operational, by laying down the manner of its functioning. Since the pendency of the present litigation had delayed the implementation of the provisions of the amendment to the Constitution, as also to the NJAC Act, it would be improper for this Court, to accede to a challenge based on conjectures and surmises.

229. Mr. K. Parasaran, Senior Advocate, entered appearance on behalf of the State of Rajasthan. He submitted, that he would be supporting the validity of the impugned constitutional amendment, as also, the NJAC Act, and that, he endorsed all the submissions advanced on behalf of the Union of India. It was his contention, that Judges of the higher judiciary were already burdened with their judicial work, and as such, they should not be seriously worried about the task of appointment of Judges, which by the impugned amendment, had been entrusted to the NJAC. In his view, the executive and the Parliament were accountable to the people, and therefore, they should be permitted to discharge the onerous responsibility, of appointing Judges to the higher judiciary. It was asserted, that the executive and the legislature would then be answerable, to the people of this country, for the appointments they would make.

230. On the issue of inclusion of two "eminent persons" in the six-Member NJAC, it was asserted, that the nomination of the "eminent persons" was to be made by the Prime Minister, the Chief Justice of India, and the Leader of the Opposition in the Lok Sabha. All these three individuals, being high ranking constitutional functionaries, should be trusted, to discharge the responsibility bestowed on them, in the interest of the "independence of the judiciary". It was submitted, that if constitutional functionaries, and the "eminent persons", could not be trusted, then the constitutional machinery itself would fail. It was pointed out, that this Court had repeatedly described, that the Constitution was organic in character, and it had an inbuilt mechanism for evolving, with the changing times. It was asserted, that the power vested with the Parliament, Under Article 368 to amend the provisions of the Constitution, was a "constituent power", authorizing the Parliament to reshape the Constitution, to adapt with the changing environment. It was contended, that the above power vested in the Parliament could be exercised with the sole exception, that "the basic structure/features" of the Constitution, as enunciated by the Supreme Court in the Kesavananda

Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, could not be altered/changed. According to the learned senior Counsel, the Constitution (99th Amendment) Act was an exercise of the aforestated constituent power, and that, the amendment to the Constitution introduced thereby, did not in any manner, impinge upon the "independence of the judiciary".

231. Referring to Article 124A, it was asserted, that the NJAC was a six-Member Commission for identifying, selecting and appointing Judges to the higher judiciary. It could under no circumstances, be found wanting, with reference to the assertions made by the Petitioners. It was pointed out, that the only executive representative thereon being the Union Minister in charge of Law and Justice, it could not be inferred, that the executive would exert such influence through him, as would undermine the independence of the five other Members of the Commission. It was submitted, that the largest representation of the Commission, was that of Judges of the Supreme Court, inasmuch as, the Chief Justice of India, and the two senior most Judges of the Supreme Court were ex officio Members of the NJAC.

232. With reference to the two "eminent persons" on the NJAC, it was his contention, that they could not be identified either with the executive or the legislature. For the nomination of the two "eminent persons", the Selection Committee comprises of one member of the executive, one member of the legislature, and one member of the judiciary. In the above view of the matter, it was asserted, that the contention, that the two "eminent persons" in the Commission would support the executive/the legislature, was preposterous. It was therefore the submission of the learned senior Counsel, that the "independence of the judiciary" could not be considered to have been undermined, keeping in mind the composition of the NJAC.

233. It was also contended, that the proceedings before the NJAC would be more transparent and broad based, and accordingly, more result oriented, and would ensure, that the best candidates would be selected for appointment as Judges to the higher judiciary.

234. It was asserted, that the NJAC provided for a consultative process with persons who were *ex-hypothesi*, well qualified to give proper advice in the matter of appointment of Judges to the higher judiciary. It was accordingly the assertion of learned Counsel, that the determination rendered by this Court, in the Second and Third Judges cases, was not in consonance with the intent, with which Articles 124 and 217 were originally enacted. It was therefore submitted, that the subject of "independence of the judiciary", with reference to the impugned constitutional amendment, should not be determined by relying on the Second and Third Judges cases, but only on the basis of the plain reading of Articles 124 and 217, in conjunction with, the observations expressed by the Members of the Constituent Assembly while debating on the above provisions. It was submitted, that whilst the Union Minister in charge of Law and Justice, would be in an effective position to provide necessary inputs, with reference to the character and antecedents of the candidate(s) concerned (in view of the governmental machinery available at his command), the two "eminent persons" would be in a position to participate in the selection process, by representing the general public, and thereby, the selection process would be infused with all around logical inputs, for a wholesome consideration.

235. It was submitted, that since any two Members of the NJAC, were competent to veto the candidature of a nominee, three representatives of the Supreme Court of India, would be clearly in

a position to stall the appointment of unsuitable candidates. It was therefore contended, that the legislations enacted by the Parliament, duly ratified in terms of Article 368, should be permitted to become functional, with the constitution of the NJAC, and should further be permitted to discharge the responsibility of appointing Judges to the higher judiciary. It was submitted, that in case of any deficiency in the discharge of the said responsibility, this Court could *suo motu* negate the selection process, or exclude one or both of the "eminent persons" from the selection process, if they were found to be unsuitable or unworthy of discharging their responsibility. Or even if they could not establish their usefulness. It was submitted, that this Court should not throttle the contemplated process of selection and appointment of Judges to the higher judiciary, through the NJAC, without it's even having been tested.

236. Mr. T.R. Andhyarujina, Senior Advocate, entered appearance on behalf of the State of Maharashtra. It was his contention, while endorsing the submissions advanced on behalf of the Union of India, that the impugned Constitution (99th Amendment) Act, was a rare event, inasmuch as, the Parliament unanimously passed the same, with all parties supporting the amendment. He asserted, that there was not a single vote against the amendment, even though it was conceded, that there was one Member of Parliament, who had abstained from voting. Besides the above, it was asserted, that even the State legislatures ratified the instant constitutional amendment, wherein the ruling party, as also, the parties in opposition, supported the amendment. Based on the above, it was contended, that the instant constitutional amendment, should be treated as the unanimous will of the people, belonging to all sections of the society, and therefore the same could well be treated, as the will of the nation, exercised by all stakeholders.

237. It was submitted, that the amendment under reference should not be viewed with suspicion. It was pointed out, that Articles 124 and 217 contemplated a dominating role for the executive. It was contended, that the judgment in the Second Judges case, vested primacy in the matter of appointment of Judges to the higher judiciary, with the Chief Justice of India and his collegium of Judges. This manner of selection and appointment of Judges to the higher judiciary, according to learned Counsel, was unknown to the rest of the world, as in no other country, the appointment of Judges is made by Judges themselves. Indicating the defects of the collegium system, it was asserted, that the same lacked transparency, and was not broad based enough. Whilst acknowledging, the view expressed by J.S. Verma, CJ., that the manner of appointment of Judges contemplated by the Second and Third Judges cases was very good, it was submitted, that J.S. Verma, CJ., himself was disillusioned with their implementation, as he felt, that there had been an utter failure on that front. Learned senior Counsel submitted, that the questions that needed to be answered were, whether there was any fundamental illegality in the constitutional amendment? Or, whether the appointment of Judges contemplated through the NJAC violated the "basic structure" of the Constitution? And, whether the "independence of the judiciary" stood subverted by the impugned constitutional amendment? It was asserted, that it was wrong to assume, that the manner of appointment of Judges, had any impact on the "independence of the judiciary". In this behalf, it was pointed out, that the independence of Judges, did not depend on who appointed them. It was also pointed out, that independence of Judges depended upon their individual character. Learned Counsel reiterated the position expounded by Dr. B.R. Ambedkar, during the Constituent Assembly debates. He submitted, that the concept of "independence of the judiciary" should not be determined with reference to the opinion expressed by this Court in the Second and Third Judges

cases, but should be determined with reference to the debates in the Constituent Assembly, which led to the crystallization of Articles 124 and 217, as originally enacted.

238. Learned Counsel placed reliance on Lord Cooke of Thorndon in his article titled "Making the Angels Weep", wherein he scathingly criticized the Second Judges case. Reference was also made to his article "Where Angels Fear to Tread", with reference to the Third Judges case. The Court's attention was also drawn to the criticism of the Second and Third Judges cases, at the hands of H.M. Seervai, Fali S. Nariman and others especially the criticism at the hands of Krishna Iyer and Ruma Pal, JJ., and later even the author of the majority judgment in the Second Judges case-J.S. Verma, CJ.. It was, accordingly, the contention of the learned senior Counsel, that whilst determining the issue of "independence of the judiciary", reference should not be made to either of the above two judgments, but should be made to the plain language of Articles 124 and 217. Viewed in the above manner, it was asserted, that there would be no question of arriving at the conclusion, that the impugned constitutional amendment, violated the basic concepts of "separation of powers" and "independence of the judiciary".

239. Even though, there were no guidelines, for appointment of the two "eminent persons", emerging from the Constitution (99th Amendment) Act, and/or the NJAC Act, yet it was submitted, that it was obvious, that the "eminent persons" to be chosen, would be persons who were well versed in the working of courts. On the Court's asking, learned senior Counsel suggested, that "eminent persons" for the purpose could only be picked out of eminent lawyers, eminent jurists, and even retired Judges, or the like. Insofar as the instant aspect of the matter is concerned, it is obvious that learned senior Counsel had adopted a position, diametrically opposite to the one canvassed by the learned Attorney General. Another aspect, on which we found a little divergence in the submission of Mr. T.R. Andhyarujina was, that in many countries the executive participation in the matter of appointment of Judges to the higher judiciary, was being brought down. And in some countries it was no longer in the hands of the executive. In this behalf, the clear contention advanced by the learned senior Counsel was, that the world over, the process of appointment of Judges to the higher judiciary was evolving, so as to be vested in Commissions of the nature of the NJAC. And as such, it was wholly unjustified to fault the same, on the ground of "independence of the judiciary", when the world over Commissions were found to have been discharging the responsibility satisfactorily.

240. Mr. Tushar Mehta, Additional Solicitor General of India, entered appearance on behalf of the State of Gujarat. He adopted the submissions advanced by the learned Attorney General, as also, Mr. Ranjit Kumar, the learned Solicitor General. It was his submission, that the system innovated by this Court for appointment of Judges to the higher judiciary, comprising of the Chief Justice and his collegium of Judges, was a judicial innovation. It was pointed out, that since 1993 when the above system came into existence, it had been followed for appointment of Judges to the higher judiciary, till the impugned constitutional amendment came into force. It was asserted that, in the interregnum, some conspicuous events had taken place, depicting the requirement of a change in the method and manner of appointment of Judges to the higher judiciary. Learned Counsel invited our attention to the various Bills which were introduced in the Parliament for the purpose of setting up a Commission for appointments of Judges to the higher judiciary, as have already been narrated hereinbefore. It was pointed out, that several representations were received by the Government of the day, advocating the replacement of the "collegium system", with a broad based National

Judicial Commission, to cater to the long standing aspiration of the citizens of the country. The resultant effect was, the passing of the Constitution (99th Amendment) Act, and the NJAC Act, by the Parliament. It was submitted, that the same came to be passed almost unanimously, with only one Member of Rajya Sabha abstaining. It was asserted, that this was a rare historical event after independence, when all political parties, having divergent political ideologies, voted in favour of the impugned constitutional amendment. In addition to the above, it was submitted, that as of now 28 State Assemblies had ratified the Bill. It was asserted, that the constitutional mechanism for appointment of Judges to the higher judiciary, had operated for a sufficient length of time, and learning from the experience emerging out of such operation, it was felt, that a broad based Commission should be constituted. It was contended, that the impugned constitutional amendment, satisfied all the parameters for testing the constitutional validity of an amendment. Learned Additional Solicitor General similarly opposed, the submissions advanced at the hands of the Petitioners challenging the inclusion of the Union Minister in charge of Law and Justice, as a Member of the NJAC. He also found merit in the inclusion of two "eminent persons", in the NJAC. It was contended, that the term "eminent persons", with reference to appointment of Judges to the higher judiciary, was by itself clear and unambiguous, and as and when, a nomination would be made, its authenticity would be understood. He distanced himself from the submission advanced by Mr. T.R. Andhyarujina, who represented the State of Maharashtra, while advancing submission about the identity of those who could be nominated as "eminent persons" to the NJAC. It was submitted, by placing reliance on Municipal Committee, Amritsar v. State of Punjab MANU/SC/0050/1969 : (1969) 1 SCC 475, K.A. Abbas v. Union of India MANU/SC/0053/1970 : (1970) 2 SCC 780, and the A.K. Roy case MANU/SC/0051/1981 : (1982) 1 SCC 271, that similar submissions advanced before this Court, with reference to vagueness and uncertainty of law, were consistently rejected by this Court. According to learned Counsel, with reference to the alleged vagueness in the term "eminent persons", in case the nomination of an individual was assailed, a court of competent jurisdiction would construe it, as far as may be, in accordance with the intention of the legislature. It was asserted, that it could not be assumed, that there was a political danger, that if two wrong persons were nominated as "eminent persons" to the NJAC, they would be able to tilt the balance against the judicial component of the NJAC. It was submitted, that the appointment of the two "eminent persons" was in the safe hands, of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha. In the above view of the matter, the learned Additional Solicitor General, concluded with the prayer, that the submissions advanced at the hands of the learned Counsel for the Petitioners deserved to be rejected.

241. Mr. Ravindra Srivastava, Senior Advocate, entered appearance on behalf of the State of Chhattisgarh. He had chosen to make submissions divided under eleven heads. However, keeping in view the fact, that detailed submissions had already been advanced by counsel who had entered appearance before him, he chose to limit the same. It was the primary contention of the learned senior Counsel, that the impugned constitutional amendment, as also the NJAC Act, did not in any manner violate the "basic structure" of the Constitution. According to the learned senior Counsel, the impugned constitutional amendment, furthers and strengthens the "basic structure" principle, of a free and independent judiciary. It was his submission, that the assertions made at the hands of the Petitioners, to the effect that the impugned constitutional amendment, impinges upon the "basic structure" of the Constitution, and the "independence of the judiciary", were wholly misconceived. It was submitted, that this Court had not ever held, that the primacy of the judiciary through the Chief Justice of India, was an essential component of the "independence of the judiciary". It was

asserted, that while considering the challenge raised by the Petitioners to the impugned constitutional amendment, it would be wholly unjustified to approach the challenge by assuming, that the primacy of the judiciary through the Chief Justice of India, would alone satisfy the essential components of "separation of power" and "independence of the judiciary". It was submitted, that the introduction of plurality, in the matter of appointment of Judges to the higher judiciary, was an instance of independence, rather than an instance of interference. With reference to the Members of the NJAC, it was submitted, that the same would ensure not only transparency, but also a broad based selection process, without any ulterior motives. It was asserted, that the adoption of the NJAC for selection of Judges to the higher judiciary, would result in the selection of the best out of those willing to be appointed. With reference to the participation of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, it was submitted, that the mere participation of one executive representative, would not make the process incompatible, with the concept of "independence of the judiciary". In this behalf, emphatic reliance was placed on the observations of E.S. Venkataramiah, J., from two paragraphs of the First Judges case, which are being extracted hereunder:

1033. As a part of this very contention it is urged that the Executive should have no voice at all in the matter of appointment of Judges of the superior courts in India as the independence of the judiciary which is a basic feature of the Constitution would be in serious jeopardy if the executive can interfere with the process of their appointment. It is difficult to hold that merely because the power of appointment is with the executive, the independence of the judiciary would become impaired. The true principle is that after such appointment the executive should have no scope to interfere with the work of a Judge.

1038. The foregoing gives a fairly reliable picture of the English system of appointments of Judges. It is thus seen that in England the Judges are appointed by the Executive. "Nevertheless, the judiciary is substantially insulated by virtue of rules of strict law, constitutional conventions, political practice and professional tradition, from political influence.

It was finally submitted by learned Counsel, that a multi-member constitutional body, was expected to act fairly and independently, and not in violation of the Constitution. It was contended, that plurality by itself was an adequate safeguard. Reliance in this behalf was placed on T.N. Seshan v. Union of India MANU/SC/2271/1995 : (1995) 4 SCC 611, so as to eventually conclude, that the constitutional amendment did not violate the "basic structure" of the Constitution, and that, it was in consonance with the concept of a free and independent judiciary, by further strengthening the "basic structure" of the Constitution.

242. Mr. Ajit Kumar Sinha, Senior Advocate, entered appearance on behalf of the State of Jharkhand. He asserted, that he should be taken as having adopted all the submissions addressed, on behalf of the Union of India. While commencing his submissions, he placed reliance on Article 124(4) and proviso (b) Under Article 217(1) to contend, that Judges of the higher judiciary, could not be removed except by an order passed by the President, after an address by each House of Parliament, supported by a majority of the total membership of that House, and by a majority of not less than 2/3rd of the Members of the House present and voting, had been presented to the President, on the ground of proved misbehaviour or incapacity. In this behalf, learned senior Counsel placed reliance on Section 16 of the General Clauses Act, 1897, which provides that the

power to appoint includes the power to suspend or dismiss. Read in conjunction with Article 367, which mandates, that unless the context otherwise required, the provisions of the General Clauses Act 1897, would apply to the interpretation of the provisions of the Constitution, in the same manner as they applied to the interpretation of an Act of the legislature. Based on the aforesaid, it was sought to be asserted, that in the absence of any role of the judiciary in the matter of removal of a Judge belonging to the higher judiciary, the judiciary could not demand primacy in the matter of appointment of Judges of the higher judiciary, as an integral component of the "independence of the judiciary". It was submitted, on the issue of "independence of the judiciary", the question of manner of appointment was far less important, than the question of removal from the position of Judge. Adverting to the manner of removal of Judges of the higher judiciary, in accordance with the provisions referred to hereinabove, it was asserted, that in the matter of removal of a Judge from the higher judiciary, there was no judicial participation. It was solely the prerogative of the legislature. That being so, it was contended, that the submissions advanced at the behest of the Petitioners, that primacy in the matter of appointment of Judges, should be vested in the judiciary, was nothing but a fallacy.

243. The second contention advanced by learned senior Counsel was, that it should not be assumed as if the NJAC, would take away the power of appointment of Judges to the higher judiciary, from the judiciary. It was submitted, that three of the six Members of the NJAC belonged to the judiciary, and that, one of them, namely, the Chief Justice of India was to preside over the proceedings of the NJAC, as its Chairperson. Thus viewed, it was submitted, that it was wholly misconceived on the part of the Petitioners to contend, that the power of appointment of Judges, had been taken away from the judiciary, and vested with the executive. It was submitted, that there was nothing fundamentally illegal or unconstitutional in the manner of appointment of Judges to the higher judiciary, as contemplated by the impugned constitutional amendment. It was also contended, that the manner of appointment of Judges, contemplated through the NJAC, could not be perceived as violative of the "basic structure" of the Constitution, by the mere fact, that any two Members of the NJAC can veto a proposal of appointment of a Judge to the higher judiciary. And that, the above would result in the subversion of the "independence of the judiciary". In support of the aforestated submissions, it was highlighted, that the manner of appointment of Judges, which was postulated in the judgments rendered in the Second and Third Judges cases, do not lead to the inference, that if the manner of appointment as contemplated therein was altered, it would violate the "basic structure" of the Constitution.

244. Mr. Yatindra Singh, learned Senior Advocate, entered appearance as an intervener. He contended, that the preamble to the Constitution of India, Article 50 (which provides for separation of the judiciary from the executive), the oath of office of a Judge appointed to the higher judiciary, the security of his tenure including the fixed age of retirement, the protection of the emoluments payable to Judges including salary and leave, etc., the fact that the Judges appointed to the higher judiciary served in Courts of Record, having the power to punish for contempt, and the provisions of the Judicial Officers Protection Act, 1850, and the Judges (Protection) Act, 1985, which grant immunity to them from civil as well as criminal proceedings, are incidents, which ensured "independence of the judiciary". It was submitted, that the manner of appointment of Judges to the higher judiciary, had nothing to do with "independence of the judiciary". It was pointed out, that insofar as the determination of the validity of the impugned constitutional amendment was concerned, it was not essential to make a reference to the judgments rendered by this Court in the

Second and Third Judges cases. It was submitted, that the only question that needed to be determined insofar as the present controversy is concerned, was whether, the manner of appointment postulated through the NJAC, would interfere with "independence of Judges". In this behalf, it was firstly asserted, that neither the Second nor the Third Judges case had concluded, that the manner of appointment of Judges would constitute the "basic structure" of the Constitution. Nor that, the manner of appointment of Judges to the higher judiciary as postulated in the Second and Third Judges cases, if breached, would violate the "basic structure" of the Constitution. It was submitted, that the judgments rendered in the Second and Third Judges cases merely interpreted the law, as it then existed. It was asserted, that the above judgments did not delve into the question, whether any factor(s) or feature(s) considered, were components of the "basic structure" of the Constitution.

245. Learned senior Counsel, also placed reliance on the manner of appointment of Judges in the United States of America, Australia, New Zealand, Canada, and Japan to contend, that in all these countries Judges appointed to the higher judiciary, were discharging their responsibilities independently, and as such, there was no reason or justification for this Court to infer, if the manner of appointment of Judges was altered from the position contemplated in the Second and Third Judges cases, to the one envisaged by the impugned constitutional amendment, it would affect the "independence of the Judges". It was submitted, that different countries in the world had adopted different processes of selection for appointment of Judges. Each country had achieved "independence of the judiciary", and as such, it was presumptuous to think that Judges appointed by Judges alone, can discharge their duties independently.

246. Learned senior Counsel also pointed out, that the "collegium system" was not the only process of appointment of Judges, which could achieve the "independence of the judiciary". Had it been so, it would have been so concluded in the judgments rendered in the Second and Third Judges cases. It was the submission of the learned senior Counsel, that "independence of the judiciary" could be achieved by other methods, as had been adopted in other countries, or in a manner, as the Parliament deemed just and proper for India. It was asserted, that the manner of appointment contemplated by the impugned constitutional amendment had no infirmity, with reference to the issue of "independence of the judiciary", on account of the fact, that there was hardly any participation in the NJAC, at the behest of organs other than the judiciary.

247. Last of all, learned senior Counsel contended, that the "collegium system" did not serve the purpose of choosing the best amongst the available. The failure of the "collegium system", according to the learned senior Counsel, was apparent from the opinion expressed by V.R. Krishna Iyer, J. in the foreword to the book "Story of a Chief Justice", authored by U.L. Bhat, J. The "collegium system" was also adversely commented upon, by Ruma Pal, J., while delivering the 5th V.M. Tarkunde Memorial Lecture on the topic *"An Independent Judiciary"*. Reference in this behalf, was also made to the observations made by S.S. Sodhi, J., a former Chief Justice of the Allahabad High Court, in his book "The Other Side of Justice", and the book authored by Fali S. Nariman, in his autobiography "Before Memory Fades". It was contended, that the aforesaid experiences, and the adverse all around comments, with reference to the implementation of the "collegium system", forced the Parliament to enact the Constitution (99th Amendment) Act, which provided for a far better method for selection and appointment of Judges to the higher judiciary, than the procedure contemplated under the "collegium system". It was submitted, that whilst the

NJAC did not exclude the role of the judiciary, it included two "eminent persons" with one executive nominee, namely, the Union Minister in charge of Law and Justice, as Members of the NJAC. Since the role of the executive/Government in the NJAC was minimal, it was preposterous to assume, that the executive would ever be able to have its way, in the matter of appointment of Judges to the higher judiciary. It was submitted, that the NJAC would fulfill the objective of transparency, in the matter of appointment of Judges, and at the same time, would make the selection process broad based. While concluding his submissions, it was also suggested by the learned Counsel, that the NJAC should be allowed to operate for some time, so as to be tested, before being scrapped at its very inception. And that, it would be improper to negate the process even before the experiment had begun.

248. Mr. Dushyant A. Dave, Senior Advocate and President of the Supreme Court Bar Association, submitted that the only question that needed to be adjudicated upon, with reference to the present controversy was, whether the manner of appointment of Judges to the higher judiciary, through the NJAC, would fall within the constitutional frame work? Learned senior Counsel commenced his submissions by highlighting the fact, that parliamentary democracy contemplated through the provisions of the Constitution, was a greater basic concept, as compared to the "independence of the judiciary". It was submitted, that the manner in which submissions had been advanced at the behest of the Petitioners, it seemed, that the matter of appointment of Judges to the higher judiciary, is placed at the highest pedestal, in the "basic structure doctrine". Learned senior Counsel seriously contested the veracity of the aforesaid belief. It was submitted, that if those representing the Petitioners, were placing reliance on the judgment rendered in the Second Judges case, to project the aforesaid principle, it was legally fallacious, to do so. The reason, according to learned senior Counsel was, that the judgment in the Second Judges case, was not premised on an interpretation of any constitutional provision(s), nor was it premised on an elaborate discussion, with reference to the subject under consideration, nor was reliance placed on the Constituent Assembly debates. It was pointed out, that the judgment in the Second Judges case was rendered, on the basis of the principles contemplated by the authors of the judgment, and not on any principles of law. It was accordingly asserted, that the Petitioners' contentions, deserved outright rejection.

249. Learned senior Counsel invited this Court's attention to the fact, that the judgments rendered in the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, the Minerva Mills Ltd. Case MANU/SC/0075/1980 : (1980) 3 SCC 625, and I.R. Coelho v. State of Tamil Nadu MANU/SC/0595/2007 : (2007) 2 SCC 1, wherein the concept of "basic structure" of the Constitution was formulated and given effect to, were all matters wherein on different aspects, the power of judicial review had been suppressed/subjugated. It was submitted, that none of the aforesaid judgments could be relied upon to determine, whether the manner of appointment of the Judges to the higher judiciary, constituted a part of the "basic structure" of the Constitution. It was therefore, that reliance was placed on Article 368 to contend, that the power to amend the Constitution, had been described as a "constituent power", i.e., a power similar to the one which came to be vested in the Constituent Assembly, for drafting the Constitution. It was submitted, that no judgment could negate or diminish the "constituent power" vested with the Parliament, Under Article 368. Having highlighted the aforesaid factual position, learned senior Counsel advanced passionate submissions with reference to various appointments made, on the basis of the procedure postulated in the Second and Third Judges cases. Reference was pointedly made to the appointment of a particular Judge to this Court as well. It was pointed out, that the concerned Judge had decided

a matter, by taking seisin of the same, even though it was not posted for hearing before him. Thereafter, even though a review petition was filed to correct the anomaly, the same was dismissed by the concerned Judge. While projecting his concern with reference to the appointment of Judges to the higher judiciary under the collegium system, learned senior Counsel emphatically pointed out, that the procedure in vogue before the impugned constitutional amendment, could be described as a closed-door process, where appointments were made in a hush-hush manner. He stated that the stakeholders, including prominent lawyers with unimpeachable integrity, were never consulted. It was submitted, that inputs were never sought, from those who could render valuable assistance, for the selection of the best, from amongst those available. It was pointed out, that the process of appointment of Judges under the collegium system, was known to have been abused in certain cases, and that, there were certain inherent defects therein. It was submitted, that the policy of selection, and the method of selection, were not justiciable, being not amenable to judicial review, and as such, no challenge could be raised to the wrongful appointments made under the "collegium system".

250. On the subject of the manner of interpreting the Constitution, with reference to appointments to the higher judiciary, reliance was placed on Registrar (Admn), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy MANU/SC/0573/1999 : (1999) 7 SCC 725, to contend, that in spite of having noticed the judgments rendered in the Second Judges case, this Court struck a note of caution, with reference to the control, vested in the High Courts, over the subordinate judiciary. It was pointed out, that it had been held, that control had to be exercised without usurping the power vested with the executive, especially the power Under Articles 233, 234 and 235. It is submitted, that the power of the executive in the matter of appointments of Judges to the higher judiciary, could not be brushed aside, without any justification. It was contended, that it was improper to assume, that only the judiciary could appoint the best Judges, and the executive or the legislature could not.

251. Learned senior Counsel also made an impassioned reference, to the failure of the judiciary, to grant relief to the victims of the 1984 riots in Delhi, and the 2003 riots in Gujarat. It was also asserted, that justice had been denied to those who deserved it the most, namely, the poor citizenry of this country. It was pointed out, that the manner of appointment of Judges, through the "collegium system", had not produced Judges of the kind who were sensitive to the rights of the poor and needy. It was the assertion of the learned senior Counsel, that the new system brought in for selection and appointment of Judges to the higher judiciary, should be tried and tested, and in case, certain parameters had to be provided for, to ensure its righteous functioning to achieve the best results, it was always open to this Court to provide such guidelines.

V. THE DEBATE AND THE DELIBERATION:

I.

252. The Union Government, as also, the participating State Governments, were all unanimous in their ventilation, that the impugned constitutional amendment, had been passed unanimously by both the Lok Sabha and the Rajya Sabha, wherein parliamentarians from all political parties had spoken in one voice. The Lok Sabha had passed the Bill with 367 Members voting in favour of the Bill, and no one against it (the Members from the AIADMK-37 in all, had however abstained from

voting). The Rajya Sabha passed the Bill with 179 Members voting in favour of the Bill, and one of its Members-Ram Jethmalani, abstaining. It was submitted, that on account of the special procedure prescribed under the proviso to Article 368(2), the Bill was ratified in no time by half the State Legislatures. Mr. Tushar Mehta, learned Additional Solicitor General of India, had informed the Court, that as many as twenty-eight State Assemblies, had eventually ratified the Bill. It was assented to by the President on 31.12.2014. It was therefore asserted, that the Constitution (99th Amendment) Act manifested, the unanimous will of the people, and therefore, the same must be deemed to be expressive of the desire of the nation. Based on the fact, that impugned constitutional amendment reflected the will of the people, it was submitted, that it would not be appropriate to test it through a process of judicial review, even on the touchstone of the concept of "basic structure".

253. Learned Counsel representing the Petitioners, described the aforesaid assertion as misplaced. The contention was repulsed by posing a query, whether the same was the will of the nation of the "haves", or the will of the nation of the "have-nots"? Another question posed was, whether the impugned constitutional amendment represented the desire of the rich, the prosperous and the influential, or the poor and the needy, whose conditions, hopes and expectations had nothing to do with the impugned constitutional amendment? It was submitted, that the will of the nation, could only be decided by a plebiscite or a referendum. It was submitted, that the Petitioners would concede, that it could certainly be described as the overwhelming will of the political-executive. And no more. It was asserted, that the impugned constitutional amendment had an oblique motive. The amendment was passed unanimously, in the opinion of the Petitioners, for the simple reason, that the higher judiciary corrects the actions of the executive and the legislatures. This, it was pointed out, bothers the political-executive.

254. With reference to the will of the people, it was submitted, that the same could easily be ascertainable from the decision rendered in the L.C. Golak Nath case MANU/SC/0029/1967 : AIR 1967 SC 1643, wherein a eleven-Judge Bench declared, that a constitutional amendment was "law" with reference to Part III of the Constitution, and therefore, was subject to the constraint of the fundamental rights, in the said part. It was pointed out, that the Parliament, had invoked Article 368, while passing the Constitution (25th Amendment) Act, 1971. By the above amendment, a law giving effect to the policy of the State Under Articles 39(b) and 39(c) could not be declared void, on the ground that it was inconsistent with the fundamental rights expressed through Articles 14, 19 and 31. Article 31C also provided, that a legislative enactment containing such a "declaration", namely, that it was for giving effect to the above policy of the State, would not be called in question on the ground, that it did not factually gave effect to such policy. It was pointed out, that this Court in the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, had overruled the judgment in the I.C. Golak Nath case MANU/SC/0029/1967 : AIR 1967 SC 1643. This Curt, while holding as unconstitutional the part of Article 31C, which denied judicial review, on the basis of the "declaration" referred to above, also held, that the right of judicial review was a part of the "basic structure" of the Constitution, and its denial would result in the violation of the "basic structure" of the Constitution.

255. Proceeding further, it was submitted, that on 12.6.1975, the election of Indira Gandhi to the Lok Sabha was set aside by the Allahabad High Court. That decision was assailed before the Supreme Court. Pending the appeal, the Parliament passed the Constitution (39th Amendment) Act,

1975. By the above amendment, election to the Parliament, of the Prime Minister and the Speaker could not be assailed, nor could the election be held void, or be deemed to have ever become void, on any of the grounds on which an election could be declared void. In sum and substance, by a deeming fiction of law, the election of the Prime Minister and the Speaker would continue to be valid, irrespective of the defect(s) and illegalities therein. By the above amendment, it was provided, that any pending appeal before the Supreme Court would be disposed of, in conformity with the provisions of the Constitution (39th Amendment) Act, 1975. The aforesaid amendment was struck down by this Court, by declaring that the same amounted to a negation of the "rule of law", and also because, it was "anti-democratic", and as such, violated the "basic structure" of the Constitution. It was submitted, that as an answer to the striking down of material parts of Article 39A of the Constitution, the Parliament while exercising its power Under Article 368, had passed the Constitution (42nd Amendment) Act, 1976, by an overwhelming majority. Through the above amendment, the Parliament added Clauses (4) and (5) to Article 368, which read as under:

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The aforesaid amendment was set aside, as being unconstitutional, by a unanimous decision, in the Minerva Mills Ltd. Case MANU/SC/0075/1980 : (1980) 3 SCC 625. It was held, that the amending power of the Parliament Under Article 368 was limited, inasmuch as, it had no right to repeal or abrogate the Constitution, or to destroy its "basic or essential features".

256. Learned senior Counsel pointed out, that over the years, yet another stratagem was adopted by the Parliament, for avoiding judicial interference in the working of the Parliament. In this behalf, reference was made to the Constitution (45th Amendment) Bill, 1978, wherein it was provided, that even the "basic structure" of the Constitution could be amended, on its approval through a referendum. The amendment added a proviso to Article 368(2) postulating, that a law compromising with the "independence of the judiciary" would require ratification by one half of the States, and thereupon, would become unassailable, if adopted by a simple majority vote in a referendum. Through its aforesaid action, the Government of the day, revealed its intention to compromise even the "independence of the judiciary". Though the above Bill was passed by an overwhelming majority in the Lok Sabha, it could not muster the two-thirds majority required in the Rajya Sabha. It was pointed out, that the propounder of the Bill was the then Janata Party Government, and not the Congress Party Government (which was responsible for the emergency, and the earlier constitutional amendments). It was therefore asserted, that it should not surprise anyone, if all political parties had spoken in one voice, because all political parties were united in their resolve, to overawe and subjugate the judiciary.

257. It was submitted, that the intention of the legislature and the executive, irrespective of the party in power, has been to invade into the "independence of the judiciary". It was further

submitted, that attempts to control the judiciary have been more pronounced in recent times. In this behalf, the Court's attention was drawn to the judgments in Lily Thomas v. Union of India MANU/SC/0687/2013 : (2013) 7 SCC 653, and Chief Election Commissioner v. Jan Chaukidar MANU/SC/0689/2013 : (2013) 7 SCC 507. It was pointed out, that in the former judgment, this Court held as invalid and unconstitutional, Section 8(4) of the Representation of the People Act, 1951, which provided inter alia, that a Member of Parliament convicted of an offence and sentenced to imprisonment for not less than two years, would not suffer the disqualification contemplated under the provision, for a period of three months from the date of conviction, or if the conviction was assailed by way of an appeal or revision-till such time, as the appeal or revision was disposed of. By the former judgment, convicted Members became disqualified, and had to vacate their respective seats, even though, the conviction was under challenge. In the latter judgment, this Court upheld the order passed by the Patna High Court, declaring that a person who was confined to prison, had no right to vote, by virtue of the provisions contained in Section 62(2) of the Representation of the People Act, 1951. Since he/she was not an elector, therefore it was held, that he/she could not be considered as qualified, to contest elections to either House of Parliament, or to a Legislative Assembly of a State.

258. It was pointed out, that Government (then ruled by the U.P.A.) introduced a series of Bills, to invalidate the judgment rendered by this Court in the Jan Choukidar case MANU/SC/0689/2013 : (2013) 7 SCC 507. This was sought to be done by passing the Representation of the People (Amendment and Validation) Act, 2013, within three months of the rendering of the above judgment. It was submitted, that it was wholly misconceived for the learned Counsel representing the Union of India, and the concerned States to contend, that the determination by the Parliament and the State Legislatures, with reference to constitutional amendments, could be described as actions which the entire nation desired, or represented the will of the people. It was submitted, that what was patently unconstitutional, could not constitute either the desire of the nation, or the will of the people.

259. Referring to the "collegium system" of appointing Judges to the higher judiciary, it was pointed out, that the same was put in place by a decision rendered by a nine-Judge Bench, in the Second Judges case, through which the "independence of the judiciary" was cemented and strengthened. This could be achieved, by vesting primacy with the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. It was further pointed out, that the collegium system has been under criticism, on account of lack of transparency. It was submitted, that taking advantage of the above criticism, political parties across the political spectrum, have been condemning and denouncing the "collegium system". Yet again, it was pointed out, that the Parliament in its effort to build inroads into the judicial system, had enacted the impugned constitutional amendment, for interfering with the judicial process. This oblique motive, it was asserted, could not be described as the will of the people, or the will of the nation.

260. In comparison, while making a reference to the impugned constitutional amendment and the NJAC Act, it was equally seriously contended, that the constitutional amendment compromised the "independence of the judiciary", by negating the "primacy of the judiciary". With reference to the insinuations levelled by the Union of India and the concerned State Governments, during the course of hearing, reference was made to an article bearing the title "Structure Matters: The Impact

of Court Structure on the Indian and U.S. Supreme Courts", authored by Nick Robinson. Reference was made to the following expositions made therein:

Given their virtual self-selection, judges on the Indian Supreme Court are viewed as less politicised than in the United States. The panel structure of the Court also prevents clear ideological blocks from being perceived (even if there are more "activist" or "conservative" judges) there is not the sense that all the judges have to assemble together for a decision to be legitimate or fair in the eyes of the public. Quite the opposite, judges are viewed as bringing different skills or backgrounds that should be selectively utilized.

261. It was submitted, that the method of appointment, evolved through the Second and Third Judges cases, had been hailed by several jurists, who had opined that the same could be treated as a precedent worthy of emulation by the United Kingdom. Reference in this behalf was also made to, the opinion of Lord Templeman, a Member of the House of Lords in the United Kingdom.

262. Having given our thoughtful consideration to the position assumed by the learned Counsel representing the rival parties, it is essential to hold, that every constitutional amendment passed by the Parliament, either by following the ordinary procedure contemplated Under Article 368(2), or the special procedure contemplated in the proviso to Article 368(2), could in a sense of understanding, by persons not conversant with the legal niceties of the issue, be treated as the will of the people, for the simple reason, that parliamentarians are considered as representatives of the people. In our view, as long as the stipulated majority supports a constitutional amendment, it would be treated as a constitutional amendment validly passed. Having satisfied the above benchmark, it may be understood as an expression of the will of the people, in the sense noticed above. The strength and enforceability of a constitutional amendment, would be just the same, irrespective of whether it was passed by the bare minimum majority postulated therefor, or by a substantial majority, or even if it was approved unanimously. What is important, is to keep in mind, that there are declared limitations, on the amending power conferred on the Parliament, which cannot be breached.

263. An ordinary legislation enacted by the Parliament with reference to subjects contained in the Union List or the Concurrent List, and likewise, ordinary legislation enacted by State Legislatures on subjects contained in the State List and the Concurrent List, in a sense of understanding noticed above, could be treated as enactments made in consonance with the will of the people, by lay persons not conversant with the legal niceties of the issue. Herein also, there are declared limitations on the power of legislations, which cannot be violated.

264. In almost all challenges, raised on the ground of violation of the "basic structure" to constitutional amendments made Under Article 368, and more particularly, those requiring the compliance of the special and more rigorous procedure expressed in the proviso Under Article 368(2), the repeated assertion advanced at the hands of the Union, has been the same. It has been the contention of the Union of India, that an amendment to the Constitution, passed by following the procedure expressed in the proviso to Article 368(2), constituted the will of the people, and the same was not subject to judicial review. The same argument had been repeatedly rejected by this Court by holding, that Article 368 postulates only a "procedure" for amendment of the Constitution, and that, the same could not be treated as a "power" vested in the Parliament to amend

the Constitution, so as to alter, the "core" of the Constitution, which has also been described as, the "basic features/basic structure" of the Constitution. The above position has been projected, through the judgments cited on behalf of the Petitioners, to which reference has been made hereinabove.

265. Therefore, even though the Parliament may have passed the Constitution (121st Amendment) Bill, with an overwhelming majority, inasmuch as, only 37 Members from the AIADMK had consciously abstained from voting in the Lok Sabha, and only one Member of the Rajya Sabha- Ram Jethmalani, had consciously abstained from voting in favour thereof, it cannot be accepted, that the same is exempted from judicial review. The scope of judicial review with reference to a constitutional amendment and/or an ordinary legislation, whether enacted by the Parliament or a State Legislature, cannot vary, so as to adopt different standards, by taking into consideration the strength of the Members of the concerned legislature, which had approved and passed the concerned Bill. If a constitutional amendment breaches the "core" of the Constitution or destroys its "basic or essential features" in a manner which was patently unconstitutional, it would have crossed over forbidden territory. This aspect, would undoubtedly fall within the realm of judicial review. In the above view of the matter, it is imperative to hold, that the impugned constitutional amendment, as also, the NJAC Act, would be subject to judicial review on the touchstone of the "basic structure" of the Constitution, and the parameters laid down by this Court in that behalf, even though the impugned constitutional amendment may have been approved and passed unanimously or by an overwhelming majority, and notwithstanding the ratification thereof by as many as twenty-eight State Assemblies. Accordingly, we find no merit in the contention advanced by the learned Counsel for the Respondents, that the impugned constitutional amendment is not assailable, through a process of judicial review.

II.

266. It was the submission of the learned Attorney General, that the "basic features/basic structure" of the Constitution, should only be gathered from a plain reading of the provision(s) of the Constitution, as it/they was/were originally enacted. In this behalf, it was acknowledged by the learned Counsel representing the Petitioners, that the scope and extent of the "basic features/basic structure" of the Constitution, was to be ascertained only from the provisions of the Constitution, as originally enacted, and additionally, from the interpretation placed on the concerned provisions, by this Court. The above qualified assertion made on behalf of the Petitioners, was unacceptable to the learned Counsel representing the Respondents.

267. The above disagreement, does not require any detailed analysis. The instant aspect, stands determined in the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, wherein it was held as under:

...The question is-whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the Petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land.

268. The cause, effect and the width of a provision, which is the basis of a challenge, may sometimes not be apparent from a plain reading thereof. The interpretation placed by this Court on a particular provision, would most certainly depict a holistic understanding thereof, wherein the plain reading would have naturally been considered, but in addition thereto, the vital silences hidden therein, based on a harmonious construction of the provision, in conjunction with the surrounding provisions, would also have been taken into consideration. The mandate of Article 141, obliges every court within the territory of India, to honour the interpretation, conclusion, or meaning assigned to a provision by this Court. It would, therefore be rightful, to interpret the provisions of the Constitution relied upon, by giving the concerned provisions, the meaning, understanding and exposition, assigned to them, on their interpretation by this Court. In the above view of the matter, it would neither be legal nor just, to persist on an understanding of the concerned provision(s), merely on the plain reading thereof, as was suggested on behalf of the Respondents. Even on a plain reading of Article 141, we are obligated, to read the provisions of the Constitution, in the manner they have been interpreted by this Court.

269. The manner in which the term "consultation" used in Articles 124, 217 and 222 has been interpreted by the Supreme Court, has been considered at great length in the "Reference Order", and therefore, there is no occasion for us, to re-record the same yet again. Suffice it to notice, that the term "consultation" contained in Articles 124, 217 and 222 will have to be read as assigning primacy to the opinion expressed by the Chief Justice of India (based on a decision, arrived at by a collegium of Judges), as has been concluded in the "Reference Order". In the Second and Third Judges cases, the above provisions were interpreted by this Court, as they existed in their original format, i.e., in the manner in which the provisions were adopted by the Constituent Assembly, on 26.11.1949 (-which took effect on 26.01.1950). Thus viewed, we reiterate, that in the matter of appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to any other High Court, Under Articles 124, 217 and 222, primacy conferred on the Chief Justice of India and his collegium of Judges, is liable to be accepted as an integral constituent of the above provisions (as originally enacted). Therefore, when a question with reference to the selection and appointment (as also, transfer) of Judges to the higher judiciary is raised, alleging that the "independence of the judiciary" as a "basic feature/structure" of the Constitution has been violated, it would have to be ascertained whether the primacy of the judiciary exercised through the Chief Justice of India (based on a collective wisdom of a collegium of Judges), had been breached. Then alone, would it be possible to conclude, whether or not, the "independence of the judiciary" as an essential "basic feature" of the Constitution, had been preserved (-and had not been breached).

III.

270. We have already concluded in the "Reference Order", that the term "consultation" used in Articles 124, 217 and 222 (as originally enacted) has to be read as vesting primacy in the judiciary, with reference to the decision making process, pertaining to the selection and appointment of Judges to the higher judiciary, and also, with reference to the transfer of Chief Justices and Judges of one High Court, to another. For arriving at the above conclusion, the following parameters were taken into consideration:

(i) Firstly, reference was made to four judgments, namely, the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831, rendered in 1974 by a seven-Judge Bench, wherein keeping in mind the cardinal principle-the "independence of the judiciary", it was concluded, that consultation with the highest dignitary in the judiciary-the Chief Justice of India, in practice meant, that the last word must belong to the Chief Justice of India, i.e., the primacy in the matter of appointment of Judges to the higher judiciary must rest with the judiciary. The above position was maintained in the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193 in 1977 by a five-Judge Bench, wherein it was held, that in all conceivable cases, advice tendered by the Chief Justice of India (in the course of his "consultation"), should principally be accepted by the Government of India, and that, if the Government departed from the counsel given by the Chief Justice of India, the Courts would have an opportunity to examine, if any other extraneous circumstances had entered into the verdict of the executive. In the instant judgment, so as to emphasize the seriousness of the matter, this Court also expressed, that it expected, that the above words would not fall on deaf ears. The same position was adopted in the Second Judges case rendered in 1993 by a nine-Judge Bench, by a majority of 7:2, which also arrived at the conclusion, that the judgment rendered in the First Judges case, did not lay down the correct law. M.M. Punchhi, J., (as he then was) one of the Judges on the Bench, who supported the minority opinion, also endorsed the view, that the action of the executive to put off the recommendation(s) made by the Chief Justice of India, would amount to an act of deprival, "violating the spirit of the Constitution". In sum and substance therefore, the Second Judges case, almost unanimously concluded, that in the matter of selection and appointment of Judges to the higher judiciary, primacy in the decision making process, unquestionably rested with the judiciary. Finally, the Third Judges case, rendered in 1998 by another nine-Judge Bench, reiterated the position rendered in the Second Judges case.

(ii) Secondly, the final intent emerging from the Constituent Assembly debates, based *inter alia* on the concluding remarks expressed by Dr. B.R. Ambedkar, maintained that the judiciary must be independent of the executive. The aforesaid position came to be expressed while deliberating on the subject of "appointment" of Judges to the higher judiciary. Dr. B.R. Ambedkar while responding to the sentiments expressed by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar and Ananthasayanam Ayyangar, noted the view of the Constituent Assembly, that the Members were generally in agreement, that "independence of the judiciary", from the executive "should be made as clear and definite as it could be made by law". The above assertion made while debating on the issue of appointment of Judges to the Supreme Court, effectively resulted in the acknowledgement, that the issue of "appointment" of the Judges to the higher judiciary, had a direct nexus with "independence of the judiciary". Dr. B.R. Ambedkar declined the proposal of adopting the manner of appointment of Judges, prevalent in the United Kingdom and in the United States of America, and thereby, rejected the subjugation of the process of selection and appointment of Judges to the higher judiciary, at the hands of the executive and the legislature respectively. While turning down the latter proposal, Dr. B.R. Ambedkar was suspicious and distrustful, that in such an eventuality, appointments to the higher judiciary, could be impacted by "political pressure" and "political considerations".

(iii) Thirdly, the actual practice and manner of appointment of Judges to the higher judiciary, emerging from the parliamentary debates, clearly depict, that absolutely all Judges (except in one case) appointed since 1950, had been appointed on the advice of the Chief Justice of India. It is

therefore clear, that the political-executive has been conscious of the fact, that the issue of appointment of Judges to the higher judiciary, mandated the primacy of the judiciary, expressed through the Chief Justice of India. In this behalf, even the learned Attorney General had conceded, that the supersession of senior Judges of the Supreme Court, at the time of the appointment of the Chief Justice of India in 1973, the mass transfer of Judges of the higher judiciary during the emergency in 1976, and the second supersession of a Supreme Court Judge, at the time of the appointment of the Chief Justice of India in 1977, were executive aberrations.

(iv) Fourthly, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary drawn in 1950, soon after India became independent, as also, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary redrawn in 1999, after the decision in the Second Judges case, manifest that, the executive had understood and accepted, that selection and appointment of Judges to the higher judiciary would emanate from, and would be made on the advice of the Chief Justice of India.

(v) Fifthly, having adverted to the procedure in place for the selection and appointment of Judges to the higher judiciary, the submission advanced on behalf of the Respondents, that the Second and Third Judges cases had created a procedure, where Judges select and appoint Judges, or that, the system of *Imperium in Imperio* had been created for appointment of Judges, was considered and expressly rejected (in the "Reference Order"). Furthermore, the submission, that the executive had no role, in the prevailing process of selection and appointment of Judges to the higher judiciary was also rejected, by highlighting the role of the executive in the matter of appointment of Judges to the higher judiciary. Whilst recording the above conclusions, it was maintained (in the "Reference Order"), that primacy in the matter of appointment of Judges to the higher judiciary, was with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges.

(vi) Sixthly, the contention advanced at the behest of the Respondents, that even in the matter of appointment of Judges to the higher judiciary (and in the matter of their transfer) Under Articles 124, 217 (and 222), must be deemed to be vested in the executive, because the President by virtue of the constitutional mandate contained in Article 74, had to act in accordance with the aid and advice tendered to him by the Council of Ministers, was rejected by holding, that primacy in the matter of appointment of Judges to the higher judiciary, continued to remain with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges. In recording the above conclusion, reliance was placed on Article 50. Reliance was also placed on Article 50, for recording a further conclusion, that if the power of appointment of Judges was left to the executive, the same would breach the principles of "independence of the judiciary" and "separation of powers".

271. In view of the above, it has to be concluded, that in the matter of appointment of Judges to the higher judiciary, as also, in the matter of their transfer, primacy in the decision making process, inevitably rests with the Chief Justice of India. And that, the same was expected to be expressed, on the basis of the collective wisdom, of a collegium of Judges. Having so concluded, we reject all the submissions advanced at the hands of the learned Counsel for the Respondents, canvassing to the contrary.

IV.

272. The next question which arises for consideration is, whether the process of selection and appointment of Judges to the higher judiciary (i.e., Chief Justices, and Judges of the High Courts and the Supreme Court), and the transfer of Chief Justices and Judges of one High Court to another, contemplated through the impugned constitutional amendment, retains and preserves primacy in the decision making process, with the judiciary? It was the emphatic contention of the learned Attorney General, the learned Solicitor General, the learned Additional Solicitor General, and a sizeable number of learned senior Counsel who represented the Respondents, that even after the impugned constitutional amendment, primacy in the decision making process, Under Articles 124, 217 and 222, has been retained with the judiciary. Insofar as the instant aspect of the matter is concerned, it was contended on behalf of the Respondents, that three of the six Members of the NJAC were ex officio Members drawn from the judiciary-the Chief Justice of India, and two other senior Judges of the Supreme Court, next to the Chief Justice. In conjunction with the aforesaid factual position, it was pointed out, that there was only one nominee from the political-executive-the Union Minister in charge of Law and Justice. It was submitted, that the remaining two Members, out of the six-Member NJAC, were "eminent persons", who were expected to be politically neutral. Therefore, according to learned Counsel representing the Respondents, primacy in the matter of selection and appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to another, even under the impugned constitutional amendment, continued to remain, in the hands of the judiciary.

273. In conjunction with the aforesaid submission, it was emphatically pointed out, that the provisions of the NJAC Act postulate, that the NJAC would not recommend a person for appointment as a Judge to the higher judiciary, if any two Members of the NJAC, did not agree with such recommendation. Based on the fact, that the Chief Justice of India and the two other senior Judges of the Supreme Court, were ex officio Members of the NJAC, it was asserted, that the veto power for rejecting an unsuitable recommendation by the judicial component of the NJAC, would result in retaining primacy in the hands of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to another. This according to learned Counsel for the Respondents, was because the judicial component would be sufficient, in preventing the other Members of the NJAC, from having their way.

274. Having given our thoughtful consideration to the above contention, there can be no doubt, that in the manner expressed by the learned Counsel, the suggested inference may well be justified on paper. The important question to be considered is, whether as a matter of practicality, the impugned constitutional amendment can be considered to have sustained, primacy in the matter of decision making, under the amended provisions of Articles 124, 217 and 222, in conjunction with the inserted provisions of Articles 124A to 124C, with the judiciary?

275. The exposition made by the learned Attorney General and some of the other learned Counsel representing the Respondents, emerges from an over simplified and narrow approach. The primacy vested in the Chief Justice of India based on the collective wisdom of a collegium of Judges, needs a holistic approach. It is not possible for us to accept, that the primacy of the judiciary would be considered to have been sustained, merely by ensuring that the judicial component in the

membership of the NJAC, was sufficiently capable, to reject the candidature of an unworthy nominee. We are satisfied, that in the matter of primacy, the judicial component of the NJAC, should be competent by itself, to ensure the appointment of a worthy nominee, as well. Under the substituted scheme, even if the Chief Justice of India and the two other senior most Judges of the Supreme Court (next to the Chief Justice of India), consider a nominee to be worthy for appointment to the higher judiciary, the concerned individual may still not be appointed, if any two Members of the NJAC opine otherwise. This would be out-rightly obnoxious, to the primacy of the judicial component. The magnitude of the instant issue, is apparent from the fact that the two "eminent persons" (-lay persons, according to the learned Attorney General), could defeat the unanimous recommendation made by the Chief Justice of India and the two senior most Judges of the Supreme Court, favouring the appointment of an individual under consideration. Without any doubt, demeaning primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. The reason to describe it as being obnoxious is this-according to the learned Attorney General, "eminent persons" had to be lay persons having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification, such lay persons would have the collective authority, to override the collective wisdom of the Chief Justice of India and two Judges of the Supreme Court of India. The instant issue, is demonstrably far more retrograde, when the Union Minister in charge of Law and Justice also supports the unanimous view of the judicial component, because still the dissenting voice of the "eminent persons" would prevail. It is apparent, that primacy of the judiciary has been rendered a further devastating blow, by making it extremely fragile.

276. When the issue is of such significance, as the constitutional position of Judges of the higher judiciary, it would be fatal to depend upon the moral strength of individuals. The judiciary has to be manned by people of unimpeachable integrity, who can discharge their responsibility without fear or favour. There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary (as also, in the matter of transfer of Chief Justices and Judges of High Courts, to other High Courts). In the above stated position, it is not possible to conclude, that the combination contemplated for constitution of the NJAC, is such, that would not be susceptible to an easy breach of the "independence of the judiciary".

277. Articles 124A(1)(a) and (b) do not provide for an adequate representation in the matter, to the judicial component, to ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary, and therefore, the same are liable to be set aside and struck down as being violative of the "basic structure" of the Constitution of India. Thus viewed, we are satisfied, that the "basic structure" of the Constitution would be clearly violated, if the process of selection of Judges to the higher judiciary was to be conducted, in the manner contemplated through the NJAC. The impugned constitutional amendment, being ultra vires the "basic structure" of the Constitution, is liable to be set aside.

V.

278. It is surprising, that the Chief Justice of India, on account of the position he holds as *pater familias* of the judicial fraternity, and on account of the serious issues, that come up for judicial adjudication before him, which have immeasurable political and financial consequences, besides

issues of far reaching public interest, was suspected by none other than Dr. B.R. Ambedkar, during the course of the Constituent Assembly debates, when he declined to accept the suggestions made by some Members of the Constituent Assembly, that the selection and appointment of Judges to the higher judiciary should be made with the "concurrence" of the Chief Justice of India, by observing, that even though the Chief Justice of India was a very eminent person, he was after all just a man with all the failings, all the sentiments, and all the prejudices, which common people have. And therefore, the Constituent Assembly did not leave it to the individual wisdom of the Chief Justice of India, but required consultation with a plurality of Judges, by including in the consultative process (at the discretion of the President of India), not only Judges of the Supreme Court of India, but also Judges of High Courts (in addition to the mandatory consultation with the Chief Justice of India). One would also ordinarily feel, that the President of India and/or the Prime Minister of India in the discharge of their onerous responsibilities in running the affairs of the country, practically all the time take decisions having far reaching consequences, not only in the matter of internal affairs of the country on the domestic front, but also in the matter of international relations with other countries. One would expect, that vesting the authority of appointment of Judges to the higher judiciary with any one of them should not ordinarily be suspect of any impropriety. Yet, the Constituent Assembly did not allow any of them, any defined participatory role. In fact the debate in the Constituent Assembly, removed the participation of the political-executive component, because of fear of being impacted by "political-pressure" and "political considerations". Was the view of the Constituent Assembly, and the above noted distrust, legitimate?

279. A little personal research, resulted in the revelation of the concept of the "legitimate power of reciprocity", debated by Bertram Raven in his article-"The Bases of Power and the Power/Interaction Model of Interpersonal Influence" (this article appeared in Analyses of Social Issues and Public Policy, Vol. 8, No. 1, 2008, pp. 1-22). In addition to having dealt with various psychological reasons which influenced the personality of an individual, reference was also made to the "legitimate power of reciprocity". It was pointed out, that the reciprocity norm envisaged, that if someone does something beneficial for another, the recipient would feel an obligation to reciprocate ("I helped you when you needed it, so you should feel obliged to do this for me."-Goranson and Berkowitz, 1966; Gouldner, 1960). In the view expressed by the author, the inherent need of power, is universally available in the subconscious of the individual. On the satisfaction and achievement of the desired power, there is a similar unconscious desire to reciprocate the favour.

280. The psychological concept of the "legitimate power of reciprocity", was also highlighted by Dennis T. Regan of the Cornell University in his article-"Effects of a Favour and Liking on Compliance". It was pointed out, that there was sufficient evidence to establish, that favours do generate feelings of obligation, and the desire to reciprocate. According to the author, the available data suggested, that a favour would lead to reported feelings of obligation, on the part of its recipient.

281. In his book "Influence: The Psychology of Persuasion"-Robert Cialdini, Regent's Professor Emeritus of Psychology and Marketing at Arizona State University, in Chapter II titled-"Reciprocation", expressed the view, that "possibly one of the most potent compliance techniques, was the rule of reciprocation, which prompts one to repay, what someone has given to him. When

a gift is extended, the recipient feels indebted to the giver, often feels uncomfortable with this indebtedness, and feels compelled to cancel the debt...often against his/her better judgment". It was pointed out, that the rule of reciprocation, was widespread across the human cultures, suggesting that it was fundamental to creating interdependencies on which societies, cultures, and civilizations were built. It was asserted, that in fact the rule of reciprocation assured, that someone who had given something away first, has a relative assurance, that this initial gift will eventually be repaid. In the above view of the matter, nothing would be lost. Referring to Marcel Nauss, who had conducted a study on gift giving, it was emphasised, that "there is an obligation to give, an obligation to receive, and an obligation to repay". According to the author, it was in the above network of indebtedness, that the first giver could exploit the favour, and would rightfully assume the role of a compliance practitioner. And accordingly it was concluded, that although the obligation to repay constituted the essence of the reciprocity rule, it was the obligation to receive, that made the rule so easy to exploit. Describing the power of reciprocity, Cialdini in his article expressed, that the person who gives first remains, in control; and the person who was the recipient, always remained in debt. It is pointed out, that the above situation was often deliberately created, and psychologically maintained. It was also the view of the author, that the more valuable, substantial and helpful the original favour, the more indebted the recipient would continue to feel. In the above article, a reference was made to Alvin Gouldner, in whose opinion, there was no human society on earth, that does not follow the rule of reciprocity. Referring also to the views of the renowned cultural anthropologists-Lionel Tiger and Robin Fox, it was affirmed, that humans lived in a "web of indebtedness". Therefore it was felt, that reciprocity was a debt and a powerful psychological tool, which was all, but impossible to resist.

282. Under the constitutional scheme in place in the United States of America, federal Judges are nominated by the President, and confirmed by the Senate. The issue being debated, namely, the concept of "the legitimate power of reciprocity", therefore directly arises in the United States, in the matter of appointment of federal Judges. The first favour to the federal Judge is extended by the President, who nominates his name, and further favours are extended by one or more Member(s) of the Senate, with whose support the Judge believes he won the vote of confirmation. An article titled as "Loyalty, Gratitude, and the Federal Judiciary", written by Laura E. Little (Associate Professor of Law, Temple University School of Law, as far back as in 1995), deals with the issue in hand, pointedly with reference to appointment of Judges. The article reveals, that the issue of reciprocity has been a subject of conscious debate, with reference to the appointment of Judges for a substantial length of time. The conclusions drawn in the above article are relevant to the present controversy, and are being extracted hereunder:

On the issue of impartiality, an individual undertaking a federal judgeship confronts a difficult task. Contemporary lawyers commonly agree that the law is not wholly the product of neutral principles and that a judge must choose among values as she shapes the law. Yet, the standards governing impartiality in federal courts largely assume that total judicial neutrality and dispassion are possible. The process of mapping out a personal framework for decision making is therefore apt to create considerable discordance for the judge. Added to this burden are the special pulls of gratitude and loyalty toward the individuals who made possible the judge's job.

I have sought to show both that gratitude and loyalty can have a powerful influence for a federal judge undertaking to decide a case. The problem is complex because loyalty and gratitude pose a

greater potential problem for some judges than for others. This complexity emerges to a great degree from the process of nomination and confirmation, which often generates, or at least reinforces, a judge's sense of loyalty and gratitude to her benefactors.

In the last few years, we have witnessed a wave of dissatisfaction with the selection process for federal judges. Legal scholarship in particular has offered frequent critique and constructive suggestions for change. As it must, this scholarship recognizes that any change ventured must weigh the impact of nomination and confirmation on a number of segments of American life, including the constitutional balance of powers and public perception of the judiciary.

To omit from these concerns the effect of any change on the ultimate quality of judicial decision making would, of course, be a mistake. Thus, in studying any new selection procedure, we must contemplate the procedure's potential for creating and invigorating a judge's feelings of loyalty and gratitude to her benefactors. The foregoing should, therefore, not only shed light on the process of federal court decision making in general, but also give much needed guidance for evaluating proposed changes to judicial selection.

283. It is however pertinent to mention, that in her article, Laura E. Little has expressed, what most moral philosophers believed, that gratitude has significant moral components. And further, that gratitude has a ready place in utilitarian moral systems, which were designed to ensure the greatest good for the greatest number of individuals. The concept of gratitude was however intertwined with loyalty by Laura E. Little, as in her view, gratitude and loyalty, were closely related. A beneficiary could show gratitude to a benefactor, through an expression of loyalty. The point sought to be made was, that in understanding loyalty one understands, who we are in our friendships, loves, family bonds, national ties, and religious devotion. Insofar as the patterns of behaviour in the Indian cultural system is concerned, a child is always obligated to his parents for his upbringing, and it is the child's inbuilt moral obligation, to reciprocate to his parents by extending unimpeachable loyalty and gratitude. The above position finds replication in relationships of teacher and taught, master and servant, and the like. In the existing Indian cultural scenario, an act of not reciprocating towards a benefactor, would more often than not, be treated as an act of grave moral deprivation. When the favour extended is as important as the position of judgeship in the higher judiciary, one would best leave it to individual imagination, to determine the enormity of the reciprocal gratitude and loyalty.

284. The consideration recorded hereinabove, endorses the view, that the political-executive, as far as possible, should not have a role in the ultimate/final selection and appointment of Judges to the higher judiciary. Specially keeping in mind the enormity of the participation of the political-executive, in actions of judicial adjudication. Reciprocity, and feelings of pay back to the political-executive, would be disastrous to "independence of the judiciary". In this, we are only reiterating the position adopted by Dr. B.R. Ambedkar. He feared, that with the participation of the political-executive, the selection of Judges, would be impacted by "political pressure" and "political considerations". His view, finds support from established behavioural patterns expressed by Psychologists. It is in this background, that it needs to be ensured, that the political-executive dispensation has the least nexus, with the process of finalization of appointments of Judges to the higher judiciary.

VI.

285. The jurisdictions that have to be dealt with, by Judges of the higher judiciary, are large and extensive. Within the above jurisdictions, there are a number of jurisdictions, in which the executive is essentially a fundamental party to the lis. This would inter alia include cases arising out of taxing statutes which have serious financial implications. The executive is singularly engaged in the exploitation of natural resources, often through private entrepreneurs. The sale of natural resources, which also, have massive financial ramifications, is often subject to judicial adjudication, wherein also, the executive is an indispensable party. Challenges arising out of orders passed by Tribunals of the nature of the Telecom Disputes Settlement & Appellate Tribunal and the Appellate Tribunal for Electricity, and the like, are also dealt with by the higher judiciary, where also the executive has a role. Herein also, there could be massive financial implications. The executive is also a necessary party in all matters relating to environmental issues, including appeals from the National Green Tribunals. Not only in all criminal matters, but also in high profile scams, which are no longer a rarity, the executive has an indispensable role. In these matters, sometimes accusations are levelled against former and incumbent Prime Ministers and Ministers of the Union Cabinet, and sometimes against former and incumbent Chief Ministers and Ministers of the State Cabinets. Even in the realm of employment issues, adjudication rendered by the Central Administrative Tribunal, and the Armed Forces Appellate Tribunal come up before the Judges of the higher judiciary. These adjudications also sometimes include, high ranking administrators and armed forces personnel. Herein too, the executive is an essential constituent. This is only a miniscule part of the extensive involvement of the political-executive, in litigation before the higher judiciary.

286. Since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, would be clearly questionable. In today's world, people are conscious and alive to the fact, that their rights should be adjudicated in consonance of the rules of natural justice. One of the rules of natural justice is, that the adjudicator should not be biased. This would mean, that he should neither entertain a prejudice against either party to a lis, nor should he be favourably inclined towards any of them. Another component of the rule of bias is, that the adjudicator should not have a conflict of interest, with the controversy he is to settle. When the present set of cases came up for consideration, a plea of conflict of interest was raised even against one of the presiding Judges on the Bench, which resulted in the recusal of Anil R. Dave, J. on 15.4.2015. A similar prayer was again made against one of us (J.S. Khehar, J.), on 21.4.2015, on the ground of conflict of interest. What needs to be highlighted is, that bias, prejudice, favour and conflict of interest are issues which repeatedly emerge. Judges are careful to avoid adjudication in such matters. Judges are not on one or the other side of the adjudicatory process. The political-executive in contrast, in an overwhelming majority of cases, has a participatory role. In that sense, there would/could be an impact/effect, of a decision rendered one way or the other. A success or a defeat-a win or a loss. The plea of conflict of interest would be available against the executive, if it has a participatory role in the final selection and appointment of Judges, who are then to sit in judgment over matters, wherever the executive is an essential and mandatory party. The instant issue arose for consideration in the Madras Bar Association case MANU/SC/0875/2014 : (2014) 10 SCC 1. In the above case a five-Judge Bench considered the legality of the participation of Secretaries of Departments of the Central Government in the selection and appointment of the

Chairperson and Members of the National Tax Tribunal. On the above matter, this Court held, as under:

131. Section 7 cannot even otherwise be considered to be constitutionally valid, since it includes in the process of selection and appointment of the Chairperson and Members of NTT, Secretaries of Departments of the Central Government. In this behalf, it would also be pertinent to mention that the interests of the Central Government would be represented on one side in every litigation before NTT. It is not possible to accept a party to a litigation can participate in the selection process whereby the Chairperson and Members of the adjudicatory body are selected....

The position herein is no different. The Attorney General however attempted to distinguish the matter in hand, from the controversy decided in the cited case by asserting, that in cases adjudicated upon by the National Tax Tribunal the "...Central Government would be represented on one side in every litigation ..." which is not the case before the higher judiciary. The rebuttal, clearly avoids the issue canvassed. One would assume from the response, that the position was conceded to the extent of matters, where the executive was a party to the lis. But that itself would exclude the selected Judges from hearing a large majority of cases. One would therefore reject the response of the Union of India.

287. We are of the view, that consequent upon the participation of the Union Minister in charge of Law and Justice, a Judge approved for appointment with the Minister's support, may not be able to resist or repulse a plea of conflict of interest, raised by a litigant, in a matter when the executive has an adversarial role. In the NJAC, the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest (if such a plea was to be raised, and pressed), where the political-executive is a party to the lis. The above, would have the inevitable effect of undermining the "independence of the judiciary", even where such a plea is repulsed. Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Therefore, merely the participation of the Union Minister in charge of Law and Justice, in the final process of selection, as an ex officio Member of the NJAC, would render the amended provision of Article 124A(1)(c) as *ultra vires* the Constitution, as it impinges on the principles of "independence of the judiciary" and "separation of powers".

VII.

288. The learned Attorney General had invited our attention to the manner in which judicial appointments were being made in fifteen countries. It was submitted, that in nine countries Judges were appointed either through a Judicial Appointments Commission, or through a Judicial Appointments Committee, or through a Judicial Appointments Council. It was highlighted, that in four countries, Judges were appointed directly by the executive, i.e., by the Governor General or the President. We were informed, that in one European country, Judges were nominated by the Minister of Justice and confirmed by the Parliamentary Committee. In the United States of America, Judges were appointed through a process of nomination by the President and confirmation by the Senate. It was highlighted, that in all the fifteen countries, the executive was the final determinative/appointing authority. And further that, in all the countries, the executive

had a role to play in the selection and appointment of Judges. The foresaid factual position was brought to our notice for the singular purpose of demonstrating, that executive participation in the process of selection and appointment of Judges had not made the judiciary in any of the fifteen countries, subservient to the political-executive. It was asserted, that the countries referred to by him were in different continents of the world, and there was no complaint with reference to the "independence of the judiciary". The point sought to be driven home was, that the mere participation of the executive in the selection and appointment of Judges to the higher judiciary, did not impinge upon the "independence of the judiciary".

289. The aforestated submission does not require an elaborate debate. Insofar as the instant aspect of the matter is concerned, as the same was examined in the Second Judges case, wherein S. Ratnavel Pandian, J., one of the Judges who passed a separate concurring order, supporting the majority view. He had rejected the submission of the nature advanced by the learned Attorney General, with the following observations:

194. Nevertheless, we have, firstly to find out the ails from which our judicial system suffers; secondly to diagnose the root cause of those ailments under legalistic biopsies, thirdly to ascertain the nature of affliction on the system and finally to evolve a new method and strategy to treat and cure those ailments by administering and injecting a 'new invented medicine' (meaning thereby a newly-developed method and strategy) manufactured in terms of the formula under Indian pharmacopoeia (meaning thereby according to national problems in a mixed culture etc.) but not according to American or British pharmacopoeia which are alien to our Indian system though the system adopted in other countries may throw some light for the development of our system. The outcry of some of the critics is when the power of appointment of Judges in all democratic countries, far and wide, rests only with the executive, there is no substance in insisting that the primacy should be given to the opinion of the CJI in selection and appointment of candidates for judgeship. This proposition that we must copy and adopt the foreign method is a dry legal logic, which has to be rejected even on the short ground that the Constitution of India itself requires mandatory consultation with the CJI by the President before making the appointments to the superior judiciary. It has not been brought to our notice by any of the counsel for the Respondents that in other countries the executive alone makes the appointments notwithstanding the existence of any existing similar constitutional provisions in their Constitutions.

290. Despite our having dealt with the submission canvassed at the hands of the learned Attorney General based on the system of appointment of Judges to the higher judiciary in fifteen countries, we consider it expedient to delve further on the subject. During the hearing of the present controversy, a paper written in November 2008, by Nuno Garoupa and Tom Ginsburg of the Law School, University of Chicago, came to hand. The paper bore the caption-"Guarding the Guardians: Judicial Councils and Judicial Independence". The paper refers to comparative evidence, of the ongoing debate, about the selection and discipline of Judges. The article proclaims to aim at two objectives. Firstly, the theory of formation of Judicial Councils, and the dimensions on which they differ. And secondly, the extent to which different designs of Judicial Council, affect judicial quality. These two issues were considered as of extreme importance, as the same were determinative of the fact, whether Judges would be able to have an effective role in implementing social policy, as broadly conceived. It was observed, that Judicial Councils had come into existence to insulate the appointment, promotion and discipline of Judges from partisan political influence,

and at the same time, to cater to some level of judicial accountability. It was the authors' view, that the Judicial Councils lie somewhere in between the polar extremes of letting Judges manage their own affairs, and the alternative of complete political-executive control of appointments, promotions and discipline.

291. According to the paper, France established the first High Council of the Judiciary in 1946. Italy's Judicial Council was created in 1958. Italy was the first to fully insulate the entire judiciary from political control. It was asserted, that the Italian model was, thereupon, followed in other countries. The model established in Spain and Portugal comprised of a significant proportion of Members who were Judges. These models were established, after the fall of dictatorship in these countries. Councils created by these countries, are stated to be vested with, final decision making authority, in matters pertaining to judicial promotion, tenure and removal. According to the paper, the French model came into existence as a consequence of concerns about excessive politicization. Naturally, the process evolved into extensive independence of judicial power. Yet, judicial concern multiplied manifolds in the judiciary's attempt to give effect to the European Convention of Human Rights. And the judiciary's involvement in the process of judicial review, in the backdrop of surmounting political scandals. The paper describes the pattern in Italy to be similar. In Italy also, prominent scandals led to investigation of businessmen, politicians and bureaucrats (during the period from 1992 to 1997), which resulted in extensive judicial participation, in political activity. The composition of the Council in Italy, was accordingly altered in 2002, to increase the influence of the Parliament.

292. The paper noted, that the French-Italian models had been adopted in Latin America, and other developing countries. It was pointed out, that the World Bank and other similar multilateral donor agencies, insist upon Judicial Councils, to be associated with judicial reform, for enforcement of the rule of law. The Elements of European Statute on the Judiciary, was considered as a refinement of the Judicial Council model. The perceived Supreme Council of Magistracy, requires that at least half of the Members are Judges, even though, some of the Members of the Supreme Council are drawn from the Parliament. It was the belief of the authors of the paper, that the motivating concern for adoption of the Supreme Councils, in the French-Italian tradition, was aimed at ensuring "independence of the judiciary" after periods of undemocratic rule. Perhaps because of concerns over structural problems, it was pointed out, that external accountability had emerged as a second goal for these Supreme Councils. Referring to the Germany, Austria and Netherlands models, it was asserted, that their Councils were limited to playing a role in selection (rather than promotion and discipline) of Judges. Referring to Dutch model, it was pointed out, that recent reforms were introduced to ensure more transparency and accountability.

293. It was also brought out, that Judicial Councils in civil law jurisdictions, had a nexus to the Supreme Court of the country. Referring to Costa Rica and Austria, it was brought out, that the Judicial Councils in these countries were a subordinate organ of the Supreme Court. In some countries like Brazil, Judicial Councils were independent bodies with constitutional status, while in others Judicial Councils governed the entire judiciary. And in some others, like Guatemala and Argentina, they only governed lower courts.

294. Referring to recruitment to the judiciary in common law countries, it was pointed out, that in the United Kingdom, the Constitutional Reform Act, 2005 created a Judicial Appointments

Commission, which was responsible for appointments solely based on merit, had no executive participation. It was pointed out, that New Zealand and Australia were debating whether to follow the same. The above legislation, it was argued, postulated a statutory duty on Government Members, not to influence judicial decisions. And also, excluded the participation of the Lord Chancellor in all such activities, by transferring his functions to the President of the Courts of England and Wales, (formerly designated as Lord Chief Justice of England and Wales).

295. Referring to the American experience, it was noted, that concern over traditional methods of judicial selection (either by politicians or by election) had given way to "Merit Commissions" so as to base selection of Judges on merit. Merit Commissions, it was felt, were analogous to Judicial Councils. The system contemplated therein, was non-partisan. The Judicial Selection Commission comprised of judges, lawyers and political appointees.

296. Referring to the works of renowned jurists on the subject, it was sought to be concluded, that in today's world, there was a strong consensus, that of all the procedures, the merit plan insulated the judiciary from political pressure. In their remarks, emerging from the survey carried out by them, it was concluded, that it was impossible to eliminate political pressure on the judiciary. Judicial Commissions/Councils created in different countries were, in their view, measures to enhance judicial independence, and to minimize political influence. It was their view that once given independence, Judges were more useful for resolving a wider range of more important disputes, which were considered essential, given the fact that more and more tasks were now being assigned to the judiciary.

297. In analyzing the conclusions drawn in the article, one is constrained to conclude, that in the process of evolution of societies across the globe, the trend is to free the judiciary from executive and political control, and to incorporate a system of selection and appointment of Judges, based purely on merit. For it is only then, that the process of judicial review will effectively support nation building. In the subject matter, which falls for our consideration, it would be imperative for us, to keep in mind, the progression of the concepts of "independence of the judiciary" and "judicial review" were now being recognized the world over. The diminishing role of executive and political participation, on the matter of appointments to the higher judiciary, is an obvious reality. In recognition of the above trend, there cannot be any greater and further participation of the executive, than that which existed hitherto before. And in the Indian scenario, as is presently conceived, through the judgments rendered in the Second and Third Judges cases.

It is therefore imperative to conclude, that the participation of the Union Minister in charge of Law and Justice in the final determinative process vested in the NJAC, as also, the participation of the Prime Minister and the Leader of the Opposition in the Lok Sabha (and in case of there being none-the Leader of the single largest Opposition Party in the House of the People), in the selection of "eminent persons", would be a retrograde step, and cannot be accepted.

VIII.

298. The only component of the NJAC, which remains to be dealt with, is with reference to the two "eminent persons" required to be nominated to the NJAC. It is not necessary to detail the rival submissions on the instant aspect, as they have already been noticed extensively, hereinbefore.

299. We may proceed by accepting the undisputed position, that neither the impugned constitutional amendment, nor the NJAC Act postulate any positive qualification to be possessed by the two "eminent persons" to be nominated to the NJAC. These constitutional and legislative enactments do not even stipulate any negative disqualifications. It is therefore apparent, that the choice of the two "eminent persons" would depend on the free will of the nominating authorities. The question that arises for consideration is, whether it is just and appropriate to leave the issue, to the free will and choice, of the nominating authorities?

300. The response of the learned Attorney General was emphatic. Who could know better than the Prime Minister, the Chief Justice of India, or the Leader of Opposition in the Lok Sabha (and when there is no such Leader of Opposition, then the Leader of the single largest Opposition Party in the Lok Sabha)? And he answered the same by himself, that if such high ranking constitutional authorities can be considered as being unaware, then no one in this country could be trusted, to be competent, to take a decision on the matter-neither the legislature, nor the executive, and not even the judiciary. The Attorney General then quipped-surely this Court would not set aside the impugned constitutional amendment, or the NJAC Act, on such a trivial issue. He also suggested, that we should await the outcome of the nominating authorities, and if this Court felt that a particular individual nominated to discharge the responsibility entrusted to him as an "eminent person" on the NJAC, was inappropriate or unacceptable or had no nexus with the responsibility required to be shouldered, then his appointment could be set aside.

301. Having given our thoughtful consideration to the matter, we are of the view, that the issue in hand is certainly not as trivial, as is sought to be made out. The two "eminent persons" comprise of 1/3rd strength of the NJAC, and double that of the political-executive component. We could understand the import of the submission, only after hearing learned Counsel. The view emphatically expressed by the Attorney General was that the "eminent persons" had to be "lay persons" having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification. Mr. T.R. Andhyarujina, learned senior Counsel who represented the State of Maharashtra, which had ratified the impugned constitutional amendment, had appeared to support the impugned constitutional amendment, as well as, the NJAC Act, expressed a diametrically opposite view. In his view, the "eminent persons" with reference to the NJAC, could only be picked out of, eminent lawyers, eminent jurists, and even retired Judges, or the like, having an insight to the working and functioning of the judicial system. It is therefore clear, that in the view of the learned senior Counsel, the nominated "eminent persons" would have to be individuals, with a legal background, and certainly not lay persons, as was suggested by the learned Attorney General. We have recorded the submissions advanced by Mr. Dushyant A. Dave, learned senior Counsel-the President of the Supreme Court Bar Association, who had addressed the Bench in his usual animated manner, with no holds barred. We solicited his view, whether it would be proper to consider the inclusion of the President of the Supreme Court Bar Association and/or the Chairman of the Bar Council of India, as ex officio Members of the NJAC in place of the two "eminent persons". His response was spontaneous "Please don't do that !!" and then after a short pause, "... that would be disastrous !!". Having examined the issue with the assistance of the most learned and eminent counsel, it is imperative to conclude, that the issue of description of the qualifications (-perhaps, also the disqualifications) of "eminent persons" is of utmost importance, and cannot be left to the free will and choice of the nominating authorities, irrespective of the high constitutional positions held by them. Specially so,

because the two "eminent persons" comprise of 1/3rd strength of the NJAC, and double that of the political-executive component, and as such, will have a supremely important role in the decision making process of the NJAC. We are therefore persuaded to accept, that Article 124A(1)(d) is liable to be set aside and struck down, for having not laid down the qualifications of eligibility for being nominated as "eminent persons", and for having left the same vague and undefined.

302. It is even otherwise difficult to appreciate the logic of including two "eminent persons", in the six-Member NJAC. If one was to go by the view expressed by the learned Attorney General, "eminent persons" had been included in the NJAC, to infuse inputs which were hitherto not available with the prevailing selection process, for appointment of Judges to the higher judiciary. Really a submission with all loose ends, and no clear meaning. He had canvassed, that they would be "lay persons" having no connection with the judiciary, or even with the profession of advocacy, perhaps individuals who did not even have any law related academic qualification. It is difficult to appreciate what inputs the "eminent persons", satisfying the qualification depicted by the learned Attorney General, would render in the matter of selection and appointment of Judges to the higher judiciary. The absurdity of including two "eminent persons" on the NJAC, can perhaps be appreciated if one were to visualize the participation of such "lay persons", in the selection of the Comptroller and Auditor-General, the Chairman and Members of the Finance Commission, the Chairman and Members of the Union Public Service Commission, the Chief Election Commissioner and the Election Commissioners and the like. The position would be disastrous. In our considered view, it is imprudent to ape a system prevalent in an advanced country, with an evolved civil society.

303. The sensitivity of selecting Judges is so enormous, and the consequences of making inappropriate appointments so dangerous, that if those involved in the process of selection and appointment of Judges to the higher judiciary, make wrongful selections, it may well lead the nation into a chaos of sorts. The role of "eminent persons" cannot be appreciated in the manner expressed through the impugned constitutional amendment and legislative enactment. At best, to start with, one or more "eminent persons" (perhaps even a committee of "eminent persons"), can be assigned an advisory/consultative role, by allowing them to express their opinion about the nominees under consideration. Perhaps, under the judicial component of the selection process. And possibly, comprising of eminent lawyers, eminent jurists, and even retired Judges, or the like having an insight to the working and functioning of the judicial system. And by ensuring, that the participants have no conflict of interest. Obviously, the final selecting body would not be bound by the opinion experienced, but would be obliged to keep the opinion tendered in mind, while finalizing the names of the nominated candidates.

304. It is also difficult to appreciate the wisdom of the Parliament, to introduce two lay persons, in the process of selection and appointment of Judges to the higher judiciary, and to simultaneously vest with them a power of veto. The second proviso Under Section 5(2), and Section 6(6) of the NJAC Act, clearly mandate, that a person nominated to be considered for appointment as a Judge of the Supreme Court, and persons being considered for appointment as Chief Justices and Judges of High Courts, cannot be appointed, if any two Members of the NJAC do not agree to the proposal. In the scheme of the selection process of Judges to the higher judiciary, contemplated under the impugned constitutional amendment read with the NJAC Act, the two "eminent persons" are sufficiently empowered to reject all recommendations, just by themselves. Not just that, the two

"eminent persons" would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would obviously include the power to reject, the unanimous recommendation of the entire judicial component of the NJAC. In our considered view, the vesting of such authority in the "eminent persons", is clearly unsustainable, in the scheme of "independence of the judiciary". Vesting of such authority on persons who have no nexus to the system of administration of justice is clearly arbitrary, and we hold it to be so. The inclusion of "eminent persons", as already concluded above (refer to paragraph 156), would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). For the reasons recorded hereinabove, it is apparent, that Article 124A(1)(d) is liable to be set aside and struck down as being violative of the "basic structure" of the Constitution.

IX.

305. During the course of hearing, the learned Attorney General, made some references to past appointments to the Supreme Court, so as to trumpet the accusation, that the "collegium system" had not functioned efficiently, inasmuch as, persons of the nature referred to by him, came to be selected and appointed as Judges of the Supreme Court. In a manner as would be in tune with the dignity of this Court, he had not referred to any of the Judge(s) by name. His reference was by deeds. Each and every individual present in the Court-hall, was aware of the identity of the concerned Judge, in the manner the submissions were advanced. The projection by the learned Attorney General was joyfully projected by the print and electronic media, extensively highlighting the allusions canvassed by the learned Attorney General.

306. If our memory serves us right, the learned Attorney General had made a reference to the improper appointment of three Judges to the Supreme Court. One would have felt, without going into the merits of the charge, that finding fault with just three Judges, despite the appointment of over a hundred Judges to the Supreme Court, since the implementation of the judgment rendered in the Second Judges case (pronounced on 6.10.1993)-M.K. Mukherjee, J., being the first Judge appointed under the "collegium system" on 14.12.1993, and B.N. Kirpal, CJ., the first Chief Justice thereunder, having been appointed as Judge of the Supreme Court on 11.9.1995, under the "collegium system", should be considered as no mean achievement.

307. The first on the list of the learned Attorney General was a Judge who, according to him, had hardly delivered any judgments, both during the period he remained a Judge and Chief Justice of different High Courts in the country, as also, the period during which he remained a Judge of this Court. The failure of the "collegium system", was attributed to the fact, that such a person would have been weeded out, if a meaningful procedure had been in place. And despite his above disposition, the concerned Judge was further elevated to the Supreme Court. The second instance cited by him was, in respect of a Judge, who did not abide by any time schedule. It was asserted, that the Judge, was inevitably late in commencing court proceedings. It was his contention, that past experience with reference to the said Judge, indicated a similar demeanour, as a Judge of different High Courts and as Chief Justice of one High Court. It was lamented, that the above behaviour was not sufficient, in the process adopted under the "collegium system", to reject the Judge from elevation to the Supreme Court. The third Judge was described as an individual, who was habitually tweeting his views, on the internet. He described him as an individual unworthy of

the exalted position of a Judge of the Supreme Court, and yet, the "collegium system" had supported his appointment to the Supreme Court.

308. Just as it was impossible to overlook a submission advanced by the Attorney General, so also, it would be improper to leave out submissions advanced on a similar note, by none other than the President of the Supreme Court Bar Association. Insofar as Mr. Dushyant A. Dave, Senior Advocate, is concerned, his pointed assertion of wrongful appointments included a reference to a Judge of this Court, who had allegedly taken on his board a case, which was not assigned to his roster. It was alleged, that he had disposed of the case wrongfully. Before, we dwell on the above contention, it is necessary to notice, that the charge leveled, does not relate to an allegedly improper selection and appointment. The accusation is limited to a wrongful determination of "one" case. Insofar as the instant aspect of the matter is concerned, it is necessary for us to notice, that a review petition came to be filed against the alleged improper order, passed by the said Judge. The same was dismissed. After the Judge demitted office, a curative petition was filed, wherein the alleged improper order passed by the concerned Judge, was assailed. The same was also dismissed. Even thereafter, a petition was filed against the concerned Judge, by impleading him as a party-Respondent. The said petition was also dismissed. We need to say no more, than what has been observed hereinabove, with reference to the particular case, allegedly wrongly decided by the concerned Judge.

309. It is imperative for us, while taking into consideration the submissions advanced by the learned Attorney General, to highlight, that the role of appointment of Judges in consonance with the judgment rendered in the Second Judges case, envisages the dual participation of the members of the judiciary, as also, the members of the executive. Details in this behalf have been recorded by us in the "Reference Order". And therefore, in case of any failure, it is not only the judicial component, but also the executive component, which are jointly and equally responsible. Therefore, to single out the judiciary for criticism, may not be a rightful reflection of the matter.

310. It is not within our realm to express our agreement or disagreement with the contentions advanced at the hands of the learned Attorney General. He may well be right in his own perception, but the misgivings pointed out by him may not be of much significance in the perception of others, specially those who fully appreciate the working of the judicial system. The misgivings pointed out by the learned Attorney General, need to be viewed in the background of the following considerations: Firstly, the allegations levelled against the Judges in question, do not depict any lack of ability in the discharge of judicial responsibility. Surely, that is the main consideration to be taken into account, at the time of selection and appointment of an individual, as a Judge at the level of the higher judiciary.

Secondly, none of the misgivings expressed on behalf of the Respondents, are referable to integrity and misdemeanor. Another aspect, which cannot be compromised, at the time of selection of an individual, as a Judge at the level of the higher judiciary. Nothing wrong at this front also.

Thirdly, not in a single of the instances referred to above, the political-executive had objected to the elevation of the Judges referred to. We say so, because on our asking, we were furnished with the details of those who had been elevated, despite objections at the hands of the Union-executive. None of the Judges referred to, figured in that list.

Fourthly, no allegation whatsoever was made by the Attorney General, with reference to Judges, against whom objections were raised by the political-executive, and yet, they were appointed at the insistence of the Chief Justice, under the "collegium system".

Fifthly, that the political-executive disposition, despite the allegations levelled by the learned Attorney General, chose to grant post-retirement assignments, to three of the four instances referred to, during the course of hearing. A post-retirement assignment was also allowed by the political-executive, to the Judge referred to by Mr. Dushyant A. Dave. In the above factual scenario, either the learned Attorney General had got it all wrong. And if he is right, the political-executive got it all wrong, because it faltered despite being aware of the factual position highlighted. Lastly, it has not been possible for us to comprehend, how and why, a Judge who commenced to tweet his views after his retirement, can be considered to be unworthy of elevation. The fact that the concerned Judge started tweeting his views after his retirement, is not in dispute. The inclusion of this instance may well demonstrate, that all in all, the functioning of the "collegium system" may well not be as bad as it is shown to be.

311. The submissions advanced by Mr. Dushyant A. Dave were not limited just to the instance of a Judge of the Supreme Court. He expressed strong views about persons like Maya Kodnani, a former Gujarat Minister, convicted in a riots case, for having been granted relief, while an allegedly renowned activist Teesta Setalvad, had to run from pillar to post, to get anticipatory bail. He also made a reference to convicted politicians and film stars, who had been granted relief by two different High Courts, as also by this Court. It was his lament, that whilst film stars and politicians were being granted immediate relief by the higher judiciary, commoners suffered for years. He attributed all this, to the defective selection process in vogue, which had resulted in the appointment of "bad Judges". He repeatedly emphasized, that victims of the 1984 anti-Sikh riots in Delhi, and the 2002 anti-Muslim riots in Gujarat, had not got any justice. It was his contention, that Judges selected and appointed through the process presently in vogue, were to blame. He also expressed the view, that the appointed Judges were oblivious of violations of human rights. It was submitted, that it was shameful, that courts of law could not deliver justice, to those whose fundamental and human rights had been violated.

312. It is necessary to emphasise, that under every system of law, there are two sides to every litigation. Only one of which succeeds. The question of how a matter has been decided would always be an issue of debate. The party, who succeeds, would feel justice had been done. While the party that loses, would complain that justice had been denied. In the judicial process, there are a set of remedies, that are available to the parties concerned. The process contemplates, culmination of proceedings at the level of the Supreme Court. Once the process has run the full circle, it is indeed futile to allege any wrong doing, except on the basis of adequate material to show otherwise. Not that, the Supreme Court is right, but that, there has to be a closure. Most of the instances, illustratively mentioned by the President of the Supreme Court Bar Association, pertained to criminal prosecutions. The adjudication of such controversies is dependent on the adequacy of evidence produced by the prosecution. The nature of the allegations (truthful, or otherwise), have an important bearing, on the interim relief(s) sought, by the parties. The blame for passing (or, not passing) the desired orders, does not therefore per se, rest on the will of the adjudicating Judge, but the quality and authenticity of the evidence produced, and the nature of the allegations. Once all remedies available stand exhausted, it does not lie in the mouth of either

the litigant, or the concerned counsel to imply motives, without placing on record any further material. It also needs to be recorded, that while making the insinuations, learned senior Counsel, did not make a pointed reference to any High Court Judge by name, nor was it possible for us to identify any such Judge, merely on the basis of the submissions advanced, unlike the instances with reference to Judges of the Supreme Court. In the above view of the matter, it is not possible for us to infer, that there are serious infirmities in the matter of selection and appointment of Judges to the higher judiciary, under the prevailing "collegium system", on the basis of the submissions advanced before us.

313. It is apparent that learned Counsel had their say, without any limitations. That was essential, to appreciate the misgivings in the prevailing procedure of selection and appointment of Judges to the higher judiciary. We have also recorded all the submissions (hopefully) in terms of the contentions advanced, even in the absence of supporting pleadings. We will be failing in discharging our responsibility, if we do not refer to the parting words of Mr. Dushyant A. Dave- the President of the Supreme Court Bar Association, who having regained his breath after his outburst, did finally concede, that still a majority of the Judges appointed to the High Courts and the Supreme Court, were/are outstanding, and a miniscule minority were "bad Judges". All in all, a substantial emotional variation, from how he had commenced. One can only conclude by observing, that individual failings of men who are involved in the actual functioning of the executive, the legislature and the judiciary, do not necessarily lead to the inference, that the system which selects them, and assigns to them their role, is defective.

X.

314. It must remain in our minds, that the Indian Constitution is an organic document of governance, which needs to change with the evolution of civil society. We have already concluded, that for far more reasons than the ones, recorded in the Second Judges case, the term "consultation", referred to selection of Judges to the higher judiciary, really meant, even in the wisdom of the framers of the Constitution, that primacy in the matter, must remain with the Chief Justice of India (arrived at, in consultation with a plurality of Judges). Undoubtedly, it is open to the Parliament, while exercising its power Under Article 368, to provide for some other alternative procedure for the selection and appointment of Judges to the higher judiciary, so long as, the attributes of "separation of powers" and "independence of the judiciary", which are "core" components of the "basic structure" of the Constitution, are maintained.

315. That, however, will depend upon the standards of the moral fiber of the Indian polity. It cannot be overlooked, that the learned Attorney General had conceded, that there were certain political upheavals, which had undermined the "independence of the judiciary", including an executive overreach, at the time of appointment of the Chief Justice of India in 1973, followed by the mass transfer of Judges of the higher judiciary during the emergency in 1976, and thereafter a second supersession, at the time of appointment of another Chief Justice of India in 1977. And further, the interference by the executive, in the matter of appointment of Judges to the higher judiciary during the 1980's.

316. An important issue, that will need determination, before the organic structure of the Constitution is altered, in the manner contemplated by the impugned constitutional amendment,

would be, whether the civil society, has been able to maneuver its leaders, towards national interest? And whether, the strength of the civil society, is of a magnitude, as would be a deterrent for any overreach, by any of the pillars of governance? At the present juncture, it seems difficult to repose faith and confidence in the civil society, to play any effective role in that direction. For the simple reason, that it is not yet sufficiently motivated, nor adequately determined, to be in a position to act as a directional deterrent, for the political-executive establishment. It is therefore, that the higher judiciary, which is the savior of the fundamental rights of the citizens of this country, by virtue of the constitutional responsibility assigned to it Under Articles 32 and 226, must continue to act as the protector of the civil society. This would necessarily contemplate the obligation of preserving the "rule of law", by forestalling the political-executive, from transgressing the limits of their authority as envisaged by the Constitution.

317. Lest one is accused of having recorded any sweeping inferences, it will be necessary to record the reasons, for the above conclusion. The Indian Express, on 18.6.2015, published an interview with L.K. Advani, a veteran BJP Member of Parliament in the Lok Sabha, under the caption "Ahead of the 40th anniversary of the imposition of the Emergency on 25.6.1975". His views were dreadfully revealing. In his opinion, forces that could crush democracy, were now stronger than ever before. He asserted, "I do not think anything has been done that gives me the assurance that civil liberties will not be suspended or destroyed again. Not at all"!! It was also his position, that the emergency could happen again. While acknowledging, that the media today was more alert and independent, as compared to what it was, when emergency was declared by the then Prime Minister Indira Gandhi, forty years ago. In his perception, the media did not have any real commitment to democracy and civil liberties. With reference to the civil society, he pointed out, that hopes were raised during the Anna Hazare mobilization against corruption, which according to him, ended in a disappointment, even with reference to the subject of corruption. This when the poor and downtrodden majority of this country, can ill afford corruption. of the various institutions, that could be held responsible, for the well functioning of democracy in this country, he expressed, that the judiciary was more responsible than the other institutions.

318. On the above interview, Mani Shankar Aiyar, a veteran Congress Member of Parliament in the Rajya Sabha, while expressing his views noticed, that India could not be "emergency proof", till the Constitution provided for the declaration of emergency, at the discretion of an elected Government. He pointed out, that it should not be forgotten, that in 1975, emergency had been declared within the framework of the Constitution. It was therefore suggested, that one of the solutions to avoid a declaration of emergency could be, to remove Part XVIII of the Constitution, or to amend it, and "to provide for only an external emergency". He however raised a poser, whether it would be practical to do so? One would venture to answer the same in the negative. And in such situation, to trust, that the elected Government would act in the interest of the nation.

319. The stance of L.K. Advani was affirmed by Sitaram Yechury, a veteran CPI (Marxist) Member of Parliament in the Rajya Sabha, who was arrested, like L.K. Advani, during the emergency in 1975.

320. The present N.D.A. Government was sworn in, on 26.5.2014. One believes, that thereafter thirteen Governors of different States and one Lieutenant Governor of a Union Territory tendered their resignations in no time. Some of the Governors demitted their office shortly after they were

appointed, by the previous U.P.A.-dispensation. That is despite the fact, that a Governor under the Constitutional mandate of Article 156(3) has a term of five years, from the date he enters upon his office. A Governor is chosen out of persons having professional excellence and/or personal acclaim. Each one of them, would be eligible to be nominated as an "eminent person" Under Article 124A(1)(d). One wonders, whether all these resignations were voluntary. The above depiction is not to cast any aspersion. As a matter of fact, its predecessor-the U.P.A. Government, had done just that in 2004.

321. It is necessary to appreciate, that the Constitution does not envisage the "spoils system" (also known as the "patronage system"), wherein the political party which wins an election, gives Government positions to its supporters, friends and relatives, as a reward for working towards victory, and as an incentive to keep the party in power.

322. It is also relevant to indicate, the images of the "spoils system" are reflected from the fact, that a large number of persons holding high positions, in institutions of significance, likewise resigned from their assignments, after the present N.D.A. Government was sworn in. Some of them had just a few months before their tenure would expire-and some, even less than a month. Those who left included bureaucrats from the All India Services occupying coveted positions at the highest level, Directors/Chairmen of academic institutions of national acclaim, constitutional authorities (other than Governors), Directors/Chairmen of National Research Institutions, and the like. Seriously, the instant narration is not aimed at vilification, but of appreciation of the ground reality, how the system actually works.

323. From the above, is one to understand, that all these individuals were rank favorites, approved by the predecessor political-executive establishment? Or, were the best not chosen to fill the slot by the previous dispensation? Could it be, that those who get to hold the reins of Government, introduce their favourites? Or, whether the existing incumbents, deserved just that? Could it be, that just like its predecessor, the present political establishment has now appointed its rank favourites? What emerges is, trappings of the spoils system, and nothing else. None of the above parameters, can be adopted in the matter of appointment of Judges to the higher judiciary. For the judiciary, the best out of those available have to be chosen. Considerations cannot be varied, with a change in Government. Demonstrably, that is exactly what has happened (repeatedly?), in the matter of non-judicial appointments. It would be of utmost importance therefore, to shield judicial appointments, from any political-executive interference, to preserve the "independence of the judiciary", from the regime of the spoils system. Preserving primacy in the judiciary, in the matter of selection and appointment of Judges to the, higher judiciary would be a safe way to do so.

324. In conclusion, it is difficult to hold, in view of the factual position expressed above, that the wisdom of appointment of Judges, can be shared with the political-executive. In India, the organic development of civil society, has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance. In our considered view, the present status of the evolution of the "civil society" in India, does not augur the participation of the political-executive establishment, in the selection and appointment of Judges to the higher judiciary, or in the matter of transfer of Chief Justices and Judges of one High Court, to another.

XI.

325. It may be noticed, that one of the contentions advanced on behalf of the Petitioners was, that after the 121st Constitution Amendment Bill was passed by the Lok Sabha and the Rajya Sabha, it was sent to the State Legislatures for ratification. Consequent upon the ratification by the State Legislatures, in compliance of the mandate contained in Article 368, the President granted his assent to the same on 31.12.2014, whereupon it came to be enacted as the Constitution (99th Amendment) Act. Section 1(2) thereof provides, that the provisions of the amendment, would come into force from such date as may be notified by the Central Government, in the Official Gazette. And consequent upon the issuance of the above notification, the amendment was brought into force, through a notification, with effect from 13.4.2015. It was the submission of the Petitioners, that the jurisdiction to enact the NJAC Act, was acquired by the Parliament on 13.4.2015, for the simple reason, that the same could not have been enacted whilst the prevailing Articles 124(2) and 217(1) were in force, as the same, did not provide for appointments to be made by a body such as the NJAC. It was submitted, that the NJAC Act was promulgated, to delineate the procedure to be followed by the NJAC while recommending appointments of Judges and Chief Justices, to the higher judiciary. It was contended, that procedure to be followed by the NJAC could not have been legislated upon by the Parliament, till the Constitution was amended, and the NJAC was created, as a constitutional entity for the selection and appointment (as also, transfer) of Judges at the level of the higher judiciary. The NJAC, it was asserted, must be deemed to have been created, only when the Constitution (99th Amendment) Act, was brought into force, with effect from 13.4.2015. It was submitted, that the NJAC Act received the assent of the President on 31.12.2014 i.e., on a date when the NJAC had not yet come into existence. For this, learned Counsel had placed reliance on the A.K. Roy case MANU/SC/0051/1981 : (1982) 1 SCC 271, to contend, that the constitutional amendment in the instant case would not come into force on 13.12.2014, but on 13.4.2015.

326. A complementary additional submission was advanced on behalf of the Petitioners, by relying upon the same sequence of facts. It was contended, that the power of veto vested in two Members of the NJAC, through the second proviso Under Section 5(2) of the NJAC Act (in the matter of appointment of the Chief Justice and Judges of the Supreme Court), and Section 6(6) of the NJAC Act (in the matter of appointment of Chief Justices and Judges of High Courts) could not be described as laying down any procedure. It was submitted, that the above provisions clearly enacted substantive law. Likewise, it was contended, that the amendment of the words "after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose", on being substituted by the words "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A", as also, the deletion of the first proviso Under Article 124(2) which mandated consultation with the Chief Justice of India, and the substitution of the same with the words, "on the recommendation of the National Judicial Appointments Commission referred to Under Article 124A", would result in the introduction of an absolutely new regimen. It was submitted, that such substitution would also amount to an amendment of the existing provisions of the Constitution, and as such, the same would also require the postulated ratification provided in respect of a constitutional amendment, under the proviso to Article 368(2). And since the NJAC Act, had been enacted as an ordinary legislation, the same was liable to be held as non est on account of the fact, that the procedure

contemplated Under Article 368, postulated for an amendment to the Constitution, had not been followed.

327. Since it was not disputed, that the Parliament had indeed enacted Rules of Procedure and the Conduct of Business of Lok Sabha Under Article 118, which contained Rule 66 postulating, that a Bill which was dependent wholly or partly on another Bill could be "introduced" in anticipation of the passing of the Bill, on which it was dependent. Leading to the inference, that the 121st Constitution Amendment Bill, on which the NJAC Bill was dependent, could be taken up for consideration (by introducing the same in the Parliament), but could not have been passed till after the passing of the Constitution (99th Amendment) Act, on which it was dependent.

328. Whilst there can be no doubt, that viewed in the above perspective, we may have unhesitatingly accepted the above submission, and in fact the same was conceded by the Attorney General to the effect, that the dependent Bill can "...be taken up for consideration and passing in the House, only after the first Bill has been passed by the House...". But our attention was invited by the Attorney General to Rule 388, which authorises the Speaker to allow the suspension, of a particular rule (which would include Rule 66). If Rule 66 could be suspended, then Rule 66 would not have the impact, which the Petitioners seek through the instant submission. It is not a matter of dispute, that the then Union Minister in charge of Law and Justice had sought (Under Rule 388 of the Rules of Procedure and Conduct of Business of the Lok Sabha) the suspension of the proviso to Rule 66. And on due consideration, the Lok Sabha had suspended the proviso to Rule 66, and had taken up the NJAC Bill for consideration. Since the validity of Rule 388 is not subject matter of challenge before us, it is apparent, that it was well within the competence of the Parliament, to have taken up for consideration the NJAC Act, whilst the Constitution (121st Amendment) Bill, on which the NJAC Act was fully dependent, had still not been passed, in anticipation of the passing of the Constitution (121st Amendment) Bill.

329. The principle contained in Rule 66, even if the said rule had not been provided for, would always be deemed to have been impliedly there. In the absence of a foundation, no superstructure can be raised. The instant illustration is relatable to Rule 66, wherein the pending Bill would constitute the foundation, and the Bill being introduced in anticipation of the passing of the pending Bill, would constitute the superstructure. Therefore, in the absence of the foundational Bill (-in the instant case, the 121st Constitution Amendment Bill), there could be no question of raising the infrastructure (-in the instant case, the NJAC Act). In our considered view, it was possible in terms of Rule 388, to introduce and pass a Bill in the Parliament, in anticipation of the passing of the dependent Bill-the Constitution (121st Amendment) Bill. But, it is still not possible to contemplate, that a Bill which is dependent wholly (or, in part) upon another Bill, can be passed and brought into operation, till the dependent Bill is passed and brought into effect.

330. It is however necessary to record, that even though the position postulated in the preceding paragraphs, as canvassed by the Attorney General, was permissible, the passing of the dependent enactment i.e., the NJAC Bill, could not have been given effect to, till the foundational enactment had become operational. In the instant case, the NJAC Act, would have failed the test, if it was given effect to, from a date prior to the date on which, the provisions of the enactment on which it was dependent-the Constitution (99th Amendment) Act, became functional. In other words, the NJAC Act, would be stillborn, if the dependent provisions, introduced by way of a constitutional

amendment, were yet to come into force. Stated differently, the contravention of the principle contemplated in Rule 66, could not have been overlooked, despite the suspension of the said rule, and the dependent enactment could not come into force, before the depending/controlling provision became operational. The sequence of facts narrated hereinabove reveals, that the dependent and depending provisions, were brought into force simultaneously on the same date, i.e., on 13.4.2015. It is therefore apparent, that the foundation-the Constitution (99th Amendment) Act, was in place, when the superstructure-the NJAC Act, was raised. Thus viewed, we are satisfied, that the procedure adopted by the Parliament at the time of putting to vote the NJAC Bill, or the date on which the NJAC Act received the assent of the President, cannot invalidate the enactment of the NJAC Act, as suggested by the learned Counsel for the Petitioners.

331. One is also persuaded to accept the contention advanced by the learned Attorney General, that the validity of any proceeding, in Parliament, cannot be assailed on the ground of irregularity of procedure, in view of the protection contemplated through Article 122. Whilst accepting the instant contention, of the learned Attorney General, it is necessary for us to record, that in our considered view, the aforestated irregularity pointed out by the learned Counsel, would be completely beyond the purview of challenge, specially because it was not the case of the Petitioners, that the Parliament did not have the legislative competence to enact the NJAC Act. For the reasons recorded hereinabove, it is not possible for us to accept, that the NJAC Act was stillborn, or that it was liable to be set aside, for the reasons canvassed by the learned Counsel for the Petitioners.

332. It is also not possible for us to accept, that while enacting the NJAC Act, it was imperative for the Parliament to follow the procedure contemplated Under Article 368. Insofar as the instant aspect of the matter is concerned, the Constitution (99th Amendment) Act, amended Articles 124 and 217 (as also, Articles 127, 128, 222, 224, 224A and 231), and Articles 124A to 124C were inserted in the Constitution. While engineering the above amendments, the procedural requirements contained in Article 368 were admittedly complied with. It is therefore apparent, that no procedural lapse was committed while enacting the Constitution (99th Amendment) Act. Article 124C, authorized the Parliament to enact a legislation in the nature of the NJAC Act. This could validly be done, by following the procedure contemplated for an ordinary legislation. It is not disputed, that such procedure, as was contemplated for enacting an ordinary legislation, had indeed been followed by the Parliament, after the NJAC Bill was tabled in the Parliament, inasmuch as, both Houses of Parliament approved the NJAC Bill by the postulated majority, and thereupon, the same received the assent of the President on 31.12.2014. For the above reasons, the instant additional submission advanced by the Petitioners, cannot also be acceded to, and is accordingly declined.

XII.

333. Mr. Mukul Rohatgi, learned Attorney General for India, repulsed the contentions advanced at the hands of the Petitioners, that vires of the provisions of the NJAC Act, could be challenged, on the ground of being violative of the "basic structure" of the Constitution.

334. The first and foremost contention advanced, at the hands of the learned Attorney General was, that the constitutional validity of an amendment to the Constitution, could only be assailed on the

basis of being violative of the "basic structure" of the Constitution. Additionally it was submitted, that an ordinary legislative enactment (like the NJAC Act), could only be assailed on the grounds of lack of legislative competence and/or the violation of Article 13 of the Constitution. Inasmuch as, the State cannot enact laws, which take away or abridge rights conferred in Part III of the Constitution, or are in violation of any other constitutional provision. It was acknowledged, that law made in contravention of the provisions contained in Part III of the Constitution, or of any other constitutional provision, to the extent of such contravention, would be void. Insofar as the instant aspect of the matter is concerned, the learned Attorney General, placed reliance on the Indira Nehru Gandhi case MANU/SC/0304/1975 : (1975) Supp SCC 1, State of Karnataka v. Union of India MANU/SC/0144/1977 : (1977) 4 SCC 608, and particularly to the following observations:

238. Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental backbone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of Smt. Indira Nehru Gandhi v. Shri Raj Narain such an argument was expressedly rejected by this Court. We may rest content by referring to a passage from the judgment of our learned brother Chandrachud, J., ... which runs thus:

The constitutional amendments may, on the ratio of the Fundamental Rights case be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the Legislature as defined and specified in Chapter I, Part 11 of the Constitution and (2) it must not offend against the provisions of Articles 13(1) and (2) of the Constitution. 'Basic structure', by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features'--this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution.

The Court's attention was also drawn to Kuldip Nayar v. Union of India MANU/SC/3865/2006 : (2006) 7 SCC 1, wherein it was recorded:

107. The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution Under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the Petitioners.

Last of all, learned Attorney General placed reliance on Ashoka Kumar Thakur v. Union of India MANU/SC/1397/2008 : (2008) 6 SCC 1, and referred to the following observations:

116. For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution.

Based on the afore-quoted judgments, it was the assertion of the learned Attorney General, that the validity of a legislative enactment, i.e., an ordinary statute, could not be assailed on the ground, that the same was violative of the "basic structure" of the Constitution. It was therefore asserted, that reliance placed at the hands of the learned Counsel, appearing for the Petitioners, on the Madras Bar Association case MANU/SC/0875/2014 : (2014) 10 SCC 1, was not acceptable in law.

335. The above contention, advanced by the learned Attorney General, has been repulsed. For this, in the first instance, reliance was placed on Public Services Tribunal Bar Association v. State of U.P. MANU/SC/0062/2003 : (2003) 4 SCC 104 In the instant judgment, it is seen from the observations recorded in paragraph 26, that this Court concluded, that the constitutional validity of an ordinary legislation could be challenged on only two grounds, namely, for reasons of lack of legislative competence, and on account of violation of any fundamental rights guaranteed in Part III of the Constitution, or of any other constitutional provision. The above determination supports the contention advanced by the learned Attorney General, who seeks to imply from the above conclusion, that an ordinary legislation cannot be assailed on the ground of it being violative of the "basic structure" of the Constitution. Despite having held as above, in its final conclusion recorded in paragraph 44, it was observed as under:

44. For the reasons stated above, we find that the State Legislature was competent to enact the impugned provisions. Further, that the provisions enacted are not arbitrary and therefore not violative of Articles 14, 16 or any other provisions of the Constitution. They are not against the basic structure of the Constitution of India either. Accordingly, we do not find any merit in these appeals and the same are dismissed with no order as to costs.

It was pointed out, that it was apparent, that even while determining the validity of an ordinary legislation, namely, the U.P. Public Services (Tribunals) Act, 1976, this Court in the aforestated judgment had examined, whether the provisions of the assailed legislation, were against the "basic structure" of the Constitution, and having done so, it had rejected the contention. Thereby implying, that it was open for an aggrieved party to assail, even the provisions of an ordinary legislation, based on the concept of "basic structure". In addition to the above, reliance was placed on the Kuldip Nayar case MANU/SC/3865/2006 : (2006) 7 SCC 1 (also relied upon by the learned Attorney General), and whilst acknowledging the position recorded in the above judgment, that an ordinary legislation could not be challenged on the ground of violation of the "basic structure" of the Constitution, the Court, in paragraph 108, had observed thus:

108. As stated above, "residence" is not the constitutional requirement and, therefore, the question of violation of basic structure does not arise.

It was submitted, that in the instant judgment also, this Court had independently examined, whether the legislative enactment in question, namely, the Representation of the People (Amendment) Act 40 of 2003, indeed violated the "basic structure" of the Constitution. And in so determining, concluded that the question of residence was not a constitutional requirement, and therefore, the question of violation of the "basic structure" did not arise. Learned Counsel then placed reliance on the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, wherein it was concluded as under:

124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case.

336. It was submitted by Dr. Rajeev Dhavan, learned senior Counsel, that this Court in the M. Nagaraj case MANU/SC/4560/2006 : (2006) 8 SCC 212, while upholding the constitutional validity of the impugned constitutional amendment, by testing the same by applying the "width test", extended the aforesaid concept to State legislations. It was accordingly sought to be inferred, that State legislations could be assailed, not only on the basis of the letter and text of constitutional provisions, but also, on the basis of the "width test", which was akin to a challenge raised to a legislative enactment based on the "basic structure" of the Constitution.

337. Reliance was then placed on Uttar Pradesh Power Corporation Limited v. Rajesh Kumar MANU/SC/0334/2012 : (2012) 7 SCC 1, wherein the issue under reference had been raised, as is apparent from the discussion in paragraph 61, which is extracted below:

61. Dr. Rajeev Dhavan, learned senior Counsel, supporting the decision of the Division Bench which has declared the Rule as ultra vires, has submitted that if M. Nagaraj is properly read, it does clearly convey that social justice is an overreaching principle of the Constitution like secularism, democracy, reasonableness, social justice, etc. and it emphasises on the equality code and the parameters fixed by the Constitution Bench as the basic purpose is to bring in a state of balance but the said balance is destroyed by Section 3(7) of the 1994 Act and Rule 8-A inasmuch as no exercise has been undertaken during the post M. Nagaraj period. In M. Nagraj, there has been emphasis on interpretation and implementation, width and identity, essence of a right, the equality code and avoidance of reverse discrimination, the nuanced distinction between the adequacy and proportionality, backward class and backwardness, the concept of contest specificity as regards equal justice and efficiency, permissive nature of the provisions and conceptual essence of guided power, the implementation in concrete terms which would not cause violence to the constitutional mandate; and the effect of accelerated seniority and the conditions prevalent for satisfaction of the conditions precedent to invoke the settled principles.

The matter was adjudicated upon as under:

86. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.

In addition to the above judgment, reliance was also placed on State of Bihar v. Bal Mukund Sah MANU/SC/0195/2000 : (2000) 4 SCC 640, wherein a Constitution Bench of this Court, while examining the power of the State legislature, to legislate on the subject of recruitment of District Judges and other judicial officers, placed reliance on the judgment rendered by this Court in the Kesavananda Bharati case MANU/SC/0445/1973 : (1973) 4 SCC 225, which took into consideration five of the declared "basic features" of the Constitution, and examined the subject matter in question, by applying the concept of "separation of powers" between the legislature, the executive and the judiciary, which was accepted as an essential feature of the "basic structure" of the Constitution. Finally, reliance was placed on Nawal Kishore Mishra v. High Court of Judicature of Allahabad MANU/SC/0164/2015 : (2015) 5 SCC 479, wherefrom reliance was placed on conclusion No. 20.11, which is extracted below:

20.11 Any such attempt by the legislature would be forbidden by the constitutional scheme as that was found on the concept relating to separation of powers between the legislature, the executive and the judiciary as well as the fundamental concept of an independent judiciary as both the concepts having been elevated to the level of basic structure of the Constitution and are the very heart of the constitutional scheme.

It was therefore the contention of the learned senior Counsel, that it was not justified for the Respondents to raise the contention, that the validity of the provisions of the NJAC Act could not be tested on the touchstone of the concept of the "basic structure" of the Constitution.

338. It needs to be highlighted, that the issue under reference arose on account of the fact, that learned Counsel for the Petitioners had placed reliance on the judgment of this Court, in the Madras Bar Association case MANU/SC/0875/2014 : (2014) 10 SCC 1, wherein this Court had examined the provisions of the National Tax Tribunal Act, 2005, and whilst doing so, had held the provisions of the above legislative enactment as ultra vires the provisions of the Constitution, on account of their being violative of the "basic structure" of the Constitution. It is therefore quite obvious, that the instant contention was raised, to prevent the learned Counsel for the Petitioners, from placing reliance on the conclusions recorded in the Madras Bar Association case MANU/SC/0875/2014 : (2014) 10 SCC 1.

339. We have given our thoughtful consideration to the above contentions. The "basic structure" of the Constitution, presently inter alia includes the supremacy of the Constitution, the republican and democratic form of Government, the "federal character" of distribution of powers, secularism, "separation of powers" between the legislature, the executive, and the judiciary, and "independence of the judiciary". This Court, while carving out each of the above "basic features", placed reliance on one or more Articles of the Constitution (some times, in conjunction with the preamble of the Constitution). It goes without saying, that for carving out each of the "core" or "basic features/basic structure" of the Constitution, only the provisions of the Constitution are relied upon. It is therefore apparent, that the determination of the "basic features" or the "basic structure", is made exclusively from the provisions of the Constitution. Illustratively, we may advert to "independence of the judiciary" which has been chosen because of its having been discussed and debated during the present course of consideration. The deduction of the concept of "independence of the judiciary" emerged from a collective reading of Articles 12, 36 and 50. It is sometimes not possible, to deduce the concerned "basic structure" from a plain reading of the provisions of the Constitution. And at times, such a deduction is made, from the all-important silences hidden within those Articles, for instance, the "primacy of the judiciary" explained in the Samsher Singh case MANU/SC/0073/1974 : (1974) 2 SCC 831 the Sankalchand Himatlal Sheth case MANU/SC/0065/1977 : (1977) 4 SCC 193 and the Second Judges case, wherein this Court while interpreting Article 74 along with Articles 124, 217 and 222, in conjunction with the intent of the framers of the Constitution gathered from the Constituent Assembly debates, and the conventions adhered to by the political-executive authority in the matter of appointment and transfer of Judges of the higher judiciary, arrived at the conclusion, that "primacy of the judiciary" was a constituent of the "independence of the judiciary" which was a "basic feature" of the Constitution. Therefore, when a plea is advanced raising a challenge on the basis of the violation of the "basic structure" with reference to the "independence of the judiciary", its rightful understanding is, and has to be, that Articles 12, 36 and 50 on the one hand, and Articles 124, 217 and 222 on the other, (read collectively and harmoniously) constitute the basis thereof. Clearly, the "basic structure" is truly a set of fundamental foundational principles, drawn from the provisions of the Constitution itself. These are not fanciful principles carved out by the judiciary, at its own. Therefore, if the conclusion drawn is, that the "independence of the judiciary" has been transgressed, it is to be understood, that rule/principle collectively emerging from the above provisions, had been breached, or that the above Articles read together, had been transgressed.

340. So far as the issue of examining the constitutional validity of an ordinary legislative enactment is concerned, all the constitutional provisions, on the basis whereof the concerned "basic feature" arises, are available. Breach of a single provision of the Constitution, would be sufficient to render the legislation, ultra vires the Constitution. In such view of the matter, it would be proper to accept a challenge based on constitutional validity, to refer to the particular Article(s), singularly or collectively, which the legislative enactment violates. And in cases where the cumulative effect of a number of Articles of the Constitution is stated to have been violated, reference should be made to all the concerned Articles, including the preamble, if necessary. The issue is purely technical. Yet, if a challenge is raised to an ordinary legislative enactment based on the doctrine of "basic structure", the same cannot be treated to suffer from a legal infirmity. That would only be a technical flaw. That is how, it will be possible to explain the observations made by this Court, in the judgments relied upon by the learned Counsel for the Petitioners. Therefore, when a challenge is raised to a legislative enactment based on the cumulative effect of a number of Articles of the

Constitution, it is not always necessary to refer to each of the concerned Articles, when a cumulative effect of the said Articles has already been determined, as constituting one of the "basic features" of the Constitution. Reference to the "basic structure", while dealing with an ordinary legislation, would obviate the necessity of recording the same conclusion, which has already been scripted while interpreting the Article(s) under reference, harmoniously. We would therefore reiterate, that the "basic structure" of the Constitution is inviolable, and as such, the Constitution cannot be amended so as to negate any "basic features" thereof, and so also, if a challenge is raised to an ordinary legislation based on one of the "basic features" of the Constitution, it would be valid to do so. If such a challenge is accepted, on the ground of violation of the "basic structure", it would mean that the bunch of Articles of the Constitution (including the preamble thereof, wherever relevant), which constitute the particular "basic feature", had been violated. We must however credit the contention of the learned Attorney General by accepting, that it would be technically sound to refer to the Articles which are violated, when an ordinary legislation is sought to be struck down, as being ultra vires the provisions of the Constitution. But that would not lead to the inference, that to strike down an ordinary legislative enactment, as being violative of the "basic structure", would be wrong. We therefore find no merit in the contention advanced by the learned Attorney General, but for the technical aspect referred to hereinabove.

XIII.

341. Various challenges were raised to the different provisions of the NJAC Act. First and foremost, a challenge was raised to the manner of selection and appointment of the Chief Justice of India. Section 5(1) of the NJAC Act, it was submitted, provides that the NJAC would recommend the senior most Judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he is considered "fit" to hold the office. It was contended, that the Parliament had been authorized by law to regulate the procedure for the appointment of the Chief Justice of India, Under Article 124C. It was submitted, that the NJAC should have been allowed to frame Regulations, with reference to the manner of selection and appointment of Judges to the higher judiciary including the Chief Justice of India.

342. It was submitted, that the term "fit", expressed in Section 5(1) of the NJAC Act, had not been elaborately described. And as such, fitness would be determined on the subjective satisfaction of the Members of the NJAC. It was acknowledged, that even though the learned Attorney General had expressed, during the course of hearing, that fitness only meant "....mental and physical fitness....", a successor Attorney General may view the matter differently, just as the incumbent Attorney General has differed with the concession recorded on behalf of his predecessor (in the Third Judges case), even though they both represent the same ruling political party. And, it was always open to the Parliament to purposefully define the term "fit", in a manner which could sub-serve the will of the executive. It was pointed out, that even an ordinance could be issued without the necessity, of following the procedure of enacting law, to bring in a person of the choice of the political-executive. It was contended, that the criterion of fitness could be defined or redefined, as per the sweet will of the non-judicial authorities.

343. It was pointed out, that there was a constitutional convention, whereunder the senior most Judge of the Supreme Court, has always been appointed as Chief Justice of India. And that, the aforesaid convention had remained unbroken, even though in some cases the tenure of the

appointee had been extremely short, and may not have enured to the advantage of the judiciary, as an institution. Experience had shown, according to learned Counsel, that adhering to the practice of appointing the senior most Judge as the Chief Justice of India, had resulted in institutional harmony and collegiality amongst Judges, which was extremely important for the health of the judiciary, and also, for the independence of the judiciary. It was submitted, that it would be just and appropriate, at the present juncture, to understand the width of the power, so as to prevent any likelihood of its misuse in future.

344. It was suggested, that various ways and means could be devised to supersede senior Judges, to bring in favourites. Past experience had shown, that the executive had abused its authority, when it departed from the above seniority rule in April 1973, by superseding J.M. Shelat, the senior most Judge, and even the next two Judges in the order of seniority after him, namely, K.S. Hegde and A.N. Grover, while appointing the fourth senior most Judge A.N. Ray, as the Chief Justice of India. Again in January 1977 on the retirement of A.N. Ray, CJ., the senior most Judge H.R. Khanna, was ignored, and the next senior most Judge M.H. Beg, was appointed as the Chief Justice of India. Such control in the hands of the executive, according to learned Counsel, would cause immense inroads in the decision making process. And could result in, Judges trying to placate and appease the political-executive segment, aimed at personal gains and rewards.

345. The submission noticed above, was sought to be illustrated through the following instance. It was contended, that it would be genuine and legitimate, for the Parliament to enact by law, that a person would be considered "fit" for appointment as Chief Justice of India, only if he had a minimum left over tenure of two years. Such an enactment would have a devastating effect, even though it would appear to be innocuously legitimate. It was pointed out, that out of the 41 Chief Justices of India appointed till date, only 12 Chief Justices of India had a tenure of more than two years. If such action, as has been illustrated above, was to be taken at the hands of the Parliament, it was bound to cause discontent to those who had a legitimate expectation to hold the office of Chief Justice of India, under the seniority rule, which had been in place for all this while.

346. It was asserted, that the illustration portrayed in the foregoing paragraph, could be dimensionally altered, by prescribing different parameters, tailor-made for accommodating a favoured individual. It was submitted, that the Parliament should never be allowed the right to create uncertainty, in the matter of selection and appointment of the Chief Justice of India, as the office of the Chief Justice of India was pivotal, and shouldered extremely onerous responsibilities. The exercise of the above authority by the Parliament, it was pointed out, could/would seriously affect the "independence of the judiciary".

347. In the above context, reference was also made, to the opinion expressed by renowned persons, having vast experience in judicial institutions, effectively bringing out the veracity of the contention advanced. Reference in this regard was made to the observations of M.C. Chagla, in his book, "Roses in December-An Autobiography", wherein he described the impact of supersession on Judges, who by virtue of the existing convention, were in line to be the Chief Justice of India, but were overlooked by preferring a junior. The position was expressed thus:

The effect of these supersessions was most deleterious on the judges of the Supreme Court who were in the line of succession to the Chief Justiceship. Each eyed the other with suspicion and tried

to outdo him in proclaiming his loyalty to the Government either in their judgments or even on public platforms. If a judge owes his promotion to the favour of Government and not to his own intrinsic merit, then the independence of the judiciary is inevitably lost.

H.R. Khanna, J., (in his book-"Neither Roses Nor Thorns") expressed the position as under:

A couple of days before the pronouncement of judgment the atmosphere of tension got aggravated because all kinds of rumours started circulating and the name of the successor of the Chief Justice was not being announced. The announcement came on the radio after the judgment was pronounced and it resulted in the supersession of the three senior judges.

I felt extremely perturbed because in my opinion it was bound to generate fear complex or hopes of reward and thus undermine the independence of the judiciary. Immediately on hearing the news I went to the residence of Justice Hegde. I found him somewhat tense, as anyone in that situation would be, but he was otherwise calm. He told me that he, as well as Justice Shelat and Justice Grover who had been superseded, were tendering their resignations.

After the resignation of Shelat, Hegde and Grover, the court acquired a new complexion and I found perceptible change in the atmosphere. Many things happened which made one unhappy and I thought the best course was to get engrossed in the disposal of judicial work. The judicial work had always an appeal for me and I found the exclusive attention paid to it to be rewarding as well as absorbing.

One of the new trends was the change in the approach of the court with a view to give tilt in favour of upholding the orders of the government. Under the cover of highsounding words like social justice the court passed orders, the effect of which was to unsettle settled principles and dilute or undo the dicta laid down in the earlier cases.

In this behalf, reference was also made to the observations of H.M. Seervai (in "Constitutional Law of India-A Critical Commentary"), which are as follows:

In Sankalchand Sheth's Case, Bhagwati J. after explaining why the Chief Justice of India had to be consulted before a judge could be transferred to the High Court of another State, said: "I think it was Mr. Justice Jackson who said 'Judges are more often bribed by their ambition and loyalty rather than by money'.... In my submission in quoting the above passage Bhagwati J. failed to realize that his only loyalty was to himself for, as will appear later, he was disloyal, inter alia, to his Chief, Chandrachud C.J. in order to fulfil his own ambition to be the Chief Justice of India as soon as possible. That Bhagwati J. was bribed by that ambition will be clear when I deal with his treatment in the Judges' Case of Chief Justice Chandrachud's part in the case of Justice Kumar and Singh C.J. It will interest the reader to know that the word "ambition" is derived from "ambit, canvass for votes.",... Whether Bhagwati J. canvassed the votes of one or more of his brother judges that they should disbelieve Chief Justice Chandrachud's affidavit in reply to the affidavit of Singh C.J. is not known; but had he succeeded in persuading one or more of his brother judges to disbelieve that affidavit, Chandrachud C.J. would have resigned, and Justice Bhagwati's ambition to be the next Chief Justice of India, would, in all probability, have been realised. However, his attempt to blacken the character and conduct of Chandrachud C.J. proved futile because 4 of his

brother judges accepted and acted upon the Chief Justice's affidavit and held that the transfer of Singh C.J. to Madras was valid.

348. It was submitted, that leaving the issue of determination of fitness, with the Parliament, was liable to fan ambitions of Judges, and was likely to make the Judges loyal, to those who could satisfy their ambitions. It was therefore emphasized, that Section 5(1), which created an ambiguity, in the matter of appointment to the office of Chief Justice of India, had the trappings of being abused to imperil "independence of the judiciary", and therefore, could not be permitted to remain on the statute-book, irrespective of the assurance of the Attorney General, that for the purpose in hand, the term "fit" meant ".... mental and physical fitness....".

349. It was also contended, that while recommending names for appointment of a Judge to the Supreme Court, the concerned Judges' seniority in the cadre of Judges (of High Courts), was liable to be taken as the primary consideration, coupled with his ability and merit. It was submitted, that the instant mandate contained in the first proviso Under Section 5(2) of the NJAC Act, clearly breached the convention of regional representation in the Supreme Court. Since the "federal character", of distribution of powers, was also one of the recognized "basic structures", it was submitted, that regional representation could not have been overlooked.

350. Besides the above, the Court's attention was invited to the second proviso Under Section 5(2), which forbids the NJAC from making a favourable recommendation, if any two Members thereof, opposed the nomination of a candidate. It was contended, that placing the power of veto, in the hands of two Members of the NJAC, would violate the recommendatory power expressed in Article 124B. In this behalf, it was contended, that the above position would entitle two "eminent persons"-lay persons (if the submission advanced by the learned Attorney General is to be accepted), to defeat a unanimous recommendation of the Chief Justice of India and the two senior most Judges of the Supreme Court. And would also, negate the primacy vested in the judiciary, in the matter of appointment of Judges, to the higher judiciary.

351. It was submitted, that the above power of veto exercisable by two lay persons, or alternatively one lay person, in conjunction with the Union Minister in charge of Law and Justice, would cause serious inroads into the "independence of the judiciary". Most importantly, it was contended, that neither the impugned constitutional amendment, nor the provisions of the NJAC Act, provided for any quorum for holding meetings of the NJAC. And as such, quite contrary to the contentions advanced at the hands of the learned Attorney General, a meeting of the NJAC could not be held, without the presence of the all Members of the NJAC. In order to support his above contention, he illustratively placed reliance on the Constitution (122nd Amendment) Bill, 2014 (brought before the Parliament, by the same ruling political party, which had amended the Constitution, by tabling the Constitution (121st Amendment) Bill, 2014. The objective sought to be achieved under the above Bill was, to insert a new Article 279A. The new Article 279A created the Goods and Services Tax Council. Sub-Article (7) of Article 279A postulates, that ".... One-half of the total number of Members of the Goods and Services Tax Council...." would constitute the quorum for its meetings. And furthermore, that ".... Every decision of the Goods and Services Tax Council would be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting....". Having laid down the above parameters, in the Bill which followed the Bill, that led to the promulgation of the impugned Constitution (99th Amendment)

Act, it was submitted, that the omission of a quorum for the functioning of the NJAC, and the omission of quantifying the strength required for valid decision making, vitiated the provision itself.

352. The contention advanced at the hands of the learned Counsel for the Petitioners, as has been noticed in the foregoing paragraph, does not require any detailed examination, as the existing declared legal position, is clear and unambiguous. In this behalf, it may be recorded, that in case a statutory provision vests a decision making authority in a body of persons without stipulating the minimum quorum, then a valid meeting can be held only if the majority of all the members of the body, deliberate in the process of decision making. On the same analogy therefore, a valid decision by such a body will necessitate a decision by a simple majority of all the members of the body. If the aforesaid principles are made applicable to the NJAC, the natural outcome would be, that a valid meeting of the NJAC must have at least four Members participating in a six-Member NJAC. Likewise, a valid decision of the NJAC can only be taken (in the absence of any prescribed prerequisite), by a simple majority, namely, by at least four Members of the NJAC (three Members on either side, would not make up the simple majority). We are satisfied, that the provisions of the NJAC Act which mandate, that the NJAC would not make a recommendation in favour of a person for appointment as a Judge of the High Court or of the Supreme Court, if any two Members thereof did not agree with such recommendation, cannot be considered to be in violation of the rule/principle expressed above. As a matter of fact, the NJAC Act expressly provides, that if any two Members thereof did not agree to any particular proposal, the NJAC would not make a recommendation. There is nothing in law, to consider or treat the aforesaid stipulations in the second proviso to Section 5(2) and Section 6(6) of the NJAC Act, as unacceptable. The instant submission advanced at the hands of the learned Counsel for the Petitioners is therefore liable to be rejected, and is accordingly rejected.

353. We have also given our thoughtful consideration to the other contentions advanced at the hands of the learned Counsel for the Petitioners, with reference to Section 5 of the NJAC Act. We are of the view, that it was not within the realm of Parliament, to subject the process of selection of Judges to the Supreme Court, as well as, to the position of Chief Justice of India, in uncertain and ambiguous terms. It was imperative to express, the clear parameters of the term "fit", with reference to the senior most Judge of the Supreme Court Under Section 5 of the NJAC Act. We are satisfied, that the term "fit" can be tailor-made, to choose a candidate far below in the seniority list. This has been adequately demonstrated by the learned Counsel for the Petitioners.

354. The clear stance adopted by the learned Attorney General, that the term "fit" expressed in Section 5(1) of the NJAC Act, had been accepted by the Government, to mean and include, only "....mental and physical fitness....", to discharge the onerous responsibilities of the office of Chief Justice of India, and nothing more. Such a statement cannot, and does not, bind successor Governments or the posterity for all times to come.

The present wisdom, cannot bind future generations. And, it was exactly for this reason, that the Respondents could resile from the statement made by the then Attorney General, before the Bench hearing the Third Judges case, that the Union of India was not seeking a review or reconsideration of the judgment in the Second Judges case (that, it had accepted to treat as binding, the decision in

the Second Judges case). And yet, during the course of hearing of the present case, the Union of India did seek a reconsideration of the Second Judges case.<mpara>

355. Insofar as the challenge to Section 5(1) of the NJAC Act is concerned, we are satisfied to affirm and crystalise the position adopted by the Attorney General, namely, that the term "fit" used in Section 5(1) would be read to mean only ".... mental and physical fitness....". If that is done, it would be legal and constitutional. However, if the position adopted breached the "independence of the judiciary", in the manner suggested by the learned Counsel for the Petitioners, the same would be assailable in law.

356. We will now endeavour, to address the second submission with reference to Section 5 of the NJAC Act. Undoubtedly, postulating "seniority" in the first proviso Under Section 5(2) of the NJAC Act, is a laudable objective. And if seniority is to be supplemented and enmeshed with "ability and merit", the most ideal approach, can be seen to have been adopted. But what appears on paper, may sometimes not be correct in practice. Experience shows, that Judges to every High Court are appointed in batches, each batch may have just two or three appointees, or may sometimes have even ten or more individuals. A group of Judges appointed to one High Court, will be separated from the lot of Judges appointed to another High Court, by just a few days, or by just a few weeks, and sometimes by just a few months. In the all India seniority of Judges, the complete batch appointed on the same day, to one High Court, will be placed in a running serial order (in seniority) above the other Judges appointed to another High Court, just after a few days or weeks or months. Judges appointed later, will have to be placed en masse below the earlier batch, in seniority. If appointment of Judges to the Supreme Court, is to be made on the basis of seniority (as a primary consideration), then the earlier batch would have priority in the matter of elevation to the Supreme Court. And hypothetically, if the batch had ten Judges (appointed together to a particular High Court), and if all of them have proved themselves able and meritorious as High Court Judges, they will have to be appointed one after the other, when vacancies of Judges arise in the Supreme Court. In that view of the matter, Judges from the same High Court would be appointed to the Supreme Court, till the entire batch is exhausted. Judges from the same High Court, in the above situation where the batch comprised of ten Judges, will occupy a third of the total Judge positions in the Supreme Court. That would be clearly unacceptable, for the reasons indicated by the learned Counsel for the Petitioners. We also find the position, unacceptable in law.

357. Therefore, insofar as Section 5(2) of the NJAC Act is concerned, there cannot be any doubt, that consideration of Judges on the basis of their seniority, by treating the same as a primary consideration, would adversely affect the present convention of ensuring representation from as many State High Courts, as is possible. The convention in vogue is, to maintain regional representation. For the reasons recorded above, the first proviso Under Section 5(2) is liable to be struck down and set aside. Section 6(1) applies to appointment of a Judge of a High Court as Chief Justice of a High Court. It has the same seniority connotation as has been expressed hereinabove, with reference to the first proviso Under Section 5(2). For exactly the same reasons as have been noticed above, based on seniority (as a primary consideration), ten High Courts in different States could have Chief Justices drawn from one parent High Court. Section 6(1) of the NJAC Act was therefore liable to meet the same fate, as the first proviso Under Section 5(2).

358. We are also of the considered view, that the power of veto vested in any two Members of the NJAC, would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). Details in this behalf have already been recorded in part VIII hereinabove. Section 6(6) of the NJAC Act, has the same connotation as the second proviso Under Section 5(2), and Section 6(6) of the NJAC Act would therefore meet the same fate, as Section 5(2). For the reasons recorded hereinabove, we are satisfied, that Sections 5(2) and 6(6) of the NJAC Act also breach the "basic structure" of the Constitution, with reference to the "independence of the judiciary" and the "separation of powers". Sections 5(2) and 6(6), in our considered view, are therefore, also liable to be declared as ultra vires the Constitution.

359. A challenge was also raised by the learned Counsel for the Petitioners to Section 7 of the NJAC Act. It was asserted, that on the recommendation made by the NJAC, the President was obliged to appoint the individual recommended as a Judge of the High Court Under Article 217(1). It was submitted, that the above position was identical to the position contemplated Under Article 124(2), which also provides, that a candidate recommended by the NJAC would be appointed by the President, as a Judge of the Supreme Court. It was submitted, that neither Article 124(2) nor Article 217(1) postulate, that the President could require the NJAC to reconsider, the recommendation made by the NJAC, as has been provided for under the first proviso to Section 7 of the NJAC Act. It was accordingly the contention of the learned Counsel for the Petitioners, that the first proviso to Section 7 was ultra vires the provisions of Articles 124(2) and 217(1), by providing for reconsideration, and that, the same was beyond the pale and scope of the provisions referred to above.

360. Having considered the submission advanced by the learned Counsel for the Petitioners in the foregoing paragraph, it is not possible for us to accept that Section 7 of the NJAC Act, by providing that the President could require the NJAC to reconsider a recommendation made by it, would in any manner violate Articles 124(2) and 217(1) (which mandate, that Judges would be appointed by the President on the recommendation of the NJAC). It would be improper to infer, that the action of the President, requiring the NJAC to reconsider its proposal, amounted to rejecting the proposal made by the NJAC. For, if the NJAC was to reiterate the proposal made earlier, the President even in terms of Section 7, was bound to act in consonance therewith (as is apparent from the second proviso Under Section 7 of the NJAC Act). In our considered view, the instant submission advanced at the hands of the Petitioners deserves to be rejected, and is accordingly rejected.

361. Learned Counsel for the Petitioners had also assailed the validity of Section 8 of the NJAC Act, which provides for the Secretary to the Government of India, in the Department of Justice, to be the convener of the NJAC. It was contended, that the function of a convener, with reference to the NJAC, would entail the responsibility of inter alia preparing the agenda for the meetings of the NJAC, namely, to decide the names of the individuals to be taken up for consideration, in the next meeting. This would also include, the decision to ignore names from being taken up for consideration in the next meeting. He may include or exclude names from consideration, at the behest of his superior. It would also be the responsibility of the convener, to compile data made available from various quarters, as contemplated under the NJAC Act, and in addition thereto, as may be required by the Union Minister in charge of Law and Justice, and the Chief Justice of India. It was submitted, that such an onerous responsibility, could not be left to the executive alone,

because material could be selectively placed by the convener before the NJAC, in deference to the desire of his superior-the Union Minister in charge of Law and Justice, by excluding favourable material, with reference to a candidate considered unsuitable by the executive, and by excluding unfavourable material, with reference to a candidate who carried favour with the executive.

362. It was additionally submitted, that it was imperative to exclude all executive participation in the proceedings of the NJAC for two reasons. Firstly, the executive was the largest individual litigant, in matters pending before the higher judiciary, and therefore, cannot have any discretionary role in the process of selection and appointment of Judges to the higher judiciary (in the manner expressed in the preceding paragraph). And secondly, the same would undermine the concepts of "separation of powers" and "independence of the judiciary", whereunder the judiciary has to be shielded from any possible interference, either from the executive or the legislature.

363. We have given our thoughtful consideration to the above two submissions, dealt with in the preceding two paragraphs. We have already concluded earlier, that the participation of the Union Minister in charge of Law and Justice, as a Member of the NJAC, as contemplated Under Article 124A(1), in the matter of appointment of Judges to the higher judiciary, would breach the concepts of "separation of powers" and the "independence of the judiciary", which are both undisputedly components of the "basic structure" of the Constitution of India. For exactly the same reasons, we are of the view, that Section 8 of the NJAC Act which provides, that the Secretary to the Government of India, in the Department of Justice, would be the convener of the NJAC, is not sustainable in law. In a body like the NJAC, the administrative functioning cannot be under executive or legislative control. The only remaining alternative, is to vest the administrative control of such a body, with the judiciary. For the above reasons, Section 8 of the NJAC Act would likewise be unsustainable in law.

364. Examined from the legal perspective, it was unnecessary for us to examine the individual provisions of the NJAC Act. Once the constitutional validity of Article 124A(1) is held to be unsustainable, the impugned constitutional amendment, as well as, the NJAC Act, would be rendered a nullity. The necessity of dealing with some of the issues was prompted by the consideration, that broad parameters should be expressed.

V. THE EFFECT OF STRIKING DOWN THE IMPUGNED CONSTITUTIONAL AMENDMENT:

365. Would the amended provisions of the Constitution revive, if the impugned constitutional amendment was to be set aside, as being violative of the "basic structure" of the Constitution? It would be relevant to mention, that the instant issue was not adverted to by the learned Counsel for the Petitioners, possibly on the assumption, that if on a consideration of the present controversy, this Court would strike down the Constitution (99th Amendment) Act, then Articles 124, 127, 128, 217, 222, 224, 224A and 231, as they existed prior to the impugned amendment, would revive. And on such revival, the judgments rendered in the Second and Third Judges cases, would again regulate selections and appointments, as also, transfer of Judges of the higher judiciary.

366. A serious objection to the aforesaid assumption, was raised on behalf of the Respondents by the Solicitor General, who contended, that the striking down of the impugned constitutional

amendment, would not result in the revival of the provisions, which had been amended by the Parliament. In order to canvass the aforesaid proposition, reliance was placed on Article 367, which postulates, that the provisions of the General Clauses Act, 1897 had to be applied, for an interpretation of the Articles of the Constitution, in the same manner, as the provisions of the General Clauses Act, are applicable for an interpretation of ordinary legislation. Insofar as the instant submission is concerned, we have no hesitation in affirming, that unless the context requires otherwise, the provisions of the General Clauses Act, can be applied, for a rightful and effective understanding of the provisions of the Constitution.

367. Founded on the submission noticed in the foregoing paragraph, the Solicitor General placed reliance on Sections 6, 7 and 8 of the General Clauses Act, which are being extracted hereunder:

6. Effect of repeal.-Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

7. Revival of repealed enactments.-(1) In any Central Act or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

8. Construction of references to repealed enactments.-(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

368. Relying on Section 6, it was submitted, that the setting aside of the impugned constitutional amendment, should be considered as setting aside of a repealing provision. And as such, the acceptance of the claim of the Petitioners, would not lead to the automatic revival of the provisions as they existed prior to the amendment. Relying on Section 7 it was asserted, that if a repealed provision had to be revived, it was imperative for the legislature to express such intendment, and unless so expressly indicated, the enactment wholly or partly repealed, would not stand revived. Finally relying on Section 8 of the General Clauses Act, it was submitted, that when an existing provision was repealed and another provision was re-enacted as its replacement, no further reference could be made to the repealed enactment, and for all intents and purposes, reference must mandatorily be made, only to the re-enacted provision. Relying on the principles underlying Sections 6, 7 and 8, it was submitted, that even if the prayers made by the Petitioners were to be accepted, and the impugned constitutional amendment was to be set aside, the same would not result in the revival of the unamended provisions.

369. Learned Solicitor General also referred to a number of judgments rendered by this Court, to support the inference drawn by him. We shall therefore, in the first instance, examine the judgments relied upon:

(i) Reliance in the first instance was placed on the Ameer-un-Nissa Begum case MANU/SC/0093/1955 : AIR 1955 SC 352. Our pointed attention was drawn to the observations recorded in paragraph 24 thereof, which is reproduced hereunder:

24 The result will be the same even if we proceed on the footing that the various 'Firmans' issued by the Nizam were in the nature of legislative enactments determining private rights somewhat on the analogy of private Acts of Parliament. We may assume that the 'Firman' of 26-6-1947 was repealed by the 'Firman' of 24-2-1949, and the latter 'Firman' in its turn was repealed by that of 7-9-1949. Under the English Common Law when a repealing enactment was repealed by another statute, the repeal of the second Act revived the former Act 'ab initio'. But this rule does not apply to repealing Acts passed since 1850 and now if an Act repealing a former Act is itself repealed, the last repeal does not revive the Act before repealed unless words are added reviving it: vide Maxwell's Interpretation of Statutes, p. 402 (10th Edition).

It may indeed be said that the present rule is the result of the statutory provisions introduced by the Interpretation Act of 1889 and as we are not bound by the provisions of any English statute, we can still apply the English Common Law rule if it appears to us to be reasonable and proper. But even according to the Common Law doctrine, the repeal of the repealing enactment would not revive the original Act if the second repealing enactment manifests an intention to the contrary....

Having given our thoughtful consideration to the conclusions recorded in the judgment relied upon, we are satisfied, that the same does not support the cause of the Respondents, because in the judgment relied upon, it was clearly concluded, that under the English Common Law when a

repealing enactment was repealed by another law, the repeal of the second enactment would revive the former "ab initio". In the above view of the matter, based exclusively on the English Common Law, on the setting aside of the impugned constitutional amendment, the unamended provision, would stand revived. It also needs to be noticed, that the final position to the contrary, expressed in the judgment relied upon, emerged as a consequence of subsequent legislative enactment, made in England, which is inapplicable to India. Having taken the above subsequent amendments into consideration, it was concluded, that the repeal of the repealing enactment would not revive the original enactment, except ".... if the second repealing enactment manifests an intention to the contrary....." In other words, the implication would be, that the original Act would revive, but for an intention to the contrary expressed in the repealing enactment. It is however needs to be kept in mind, that the above judgment, did not deal with an exigency where the provision enacted by the legislation had been set aside by a Court order.

(ii) Reliance was then placed on the Firm A.T.B. Mehtab Majid & Company case MANU/SC/0352/1962 : AIR 1963 SC 928, and more particularly, the conclusions drawn in paragraph 20 thereof. A perusal of the above judgment would reveal, that this Court had recorded its conclusions, without relying on either the English Common Law, or the provisions of the General Clauses Act, which constituted the foundation of the contentions advanced at the hands of the Respondents, before us. We are therefore satisfied, that the conclusions drawn in the instant judgment, would not be applicable, to arrive at a conclusion one way or the other, insofar as the present controversy is concerned.

(iii) Reference was thereafter made to the B.N. Tewari case MANU/SC/0312/1964 : AIR 1965 SC 1430, and our attention was drawn to the following observations:

6. We shall first consider the question whether the carry forward rule of 1952 still exists. It is true that in Devadasan's case MANU/SC/0270/1963 : AIR 1964 SC 179, the final order of this Court was in these terms:

In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid.

That however does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. We are therefore of opinion that after the judgment of this Court in Devadasan's case MANU/SC/0270/1963 : AIR 1964 SC 179 there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place. But it must be made clear that the judgment of this Court in Devadasan's case MANU/SC/0270/1963 : AIR 1964 SC 179, is only concerned with that part

of the instructions of the Government of India which deal with the carry forward rule; it does not in any way touch the reservation for scheduled castes and scheduled tribes at 12-1/2% and 5%, respectively; nor does it touch the filling up of schedule tribes vacancies by scheduled caste candidates where sufficient number of scheduled tribes are not available in a particular year or vice versa. The effect of the judgment in Devadasan's case MANU/SC/0270/1963 : AIR 1964 SC 179, therefore is only to strike down the carry forward rule and it does not affect the year to year reservation for scheduled castes and scheduled tribes or filling up of scheduled tribe vacancies by a member of scheduled castes in a particular year if a sufficient number of scheduled tribe candidates are not available in that year of vice versa. This adjustment in the reservation between scheduled castes and tribes has nothing to do with the carry forward rule from year to year either of 1952 which had ceased to exist or of 1955 which was struck down by this Court. In this view of the matter it is unnecessary to consider whether the carry forward rule of 1952 would be unconstitutional, for that rule no longer exists.

The non-revival of the carry-forward-rule of 1952, which was sought to be modified in 1955, determined in the instant judgment, was not on account of the submissions, that have been advanced before us in the present controversy. But, on account of the fact, that the Government of India had itself cancelled the carry-forward-rule of 1952. Moreover, the issue under consideration in the above judgment, was not akin to the controversy in hand. As such, we are satisfied that reliance on the B.N. Tewari case MANU/SC/0312/1964 : AIR 1965 SC 1430 is clearly misplaced.

(iv) Relying on the Koteswar Vittal Kamath case MANU/SC/0036/1968 : (1969) 1 SCC 255, learned Solicitor General placed reliance on the following observations recorded therein:

8. On that analogy, it was argued that, if we hold that the Prohibition Order of 1950, was invalid, the previous Prohibition Order of 1119, cannot be held to be revived. This argument ignores the distinction between supersession of a rule, and substitution of a rule. In the case of Firm A.T.B. Mehtab Majid & Company (supra), the new Rule 16 was substituted for the old Rule 16. The process of substitution consists of two steps. First, the old rule it made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist comes into effect, and it was for this reason that the court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived. In the case before us, there was no substitution of the Prohibition Order of 1950, for the Prohibition Order of 1119. The Prohibition Order of 1950, was promulgated independently of the Prohibition Order of 1119 and because of the provisions of law it would have had the effect of making the Prohibition Order of 1119 inoperative if it had been a valid Order. If the Prohibition Order of 1950 is found to be void ab initio, it could never make the Prohibition Order of 1119 inoperative. Consequently, on the 30th March, 1950, either the Prohibition Order of 1119 or the Prohibition Order of 1950 must be held to have been in force in Travancore-Cochin, so that the provisions of Section 73(2) of Act 5 of 1950 would apply to that Order and would continue it in force. This further continuance after Act 5 of 1950, of course, depends on the validity of Section 3 of Act 5 of 1950, because Section 73(2) purported to continue the Order in force under that section, so that we proceed to examine the argument relating to the validity of Section 3 of Act 5 of 1950.

A perusal of the conclusion drawn hereinabove, apparently supports the contention advanced at the hands of the Respondents, that if the amendment to an erstwhile legislative enactment,

envisages the substitution of an existing provision, the process of substitution must be deemed to comprise of two steps. The first step would envisage, that the old rule would cease to exist, and the second step would envisage, that the new rule had taken the place of the old rule. And as such, even if the new rule was to be declared as invalid, the first step depicted above, namely, that the old rule has ceased to exist, would remain unaltered. Thereby, leading to the inference, that in the present controversy, even if the impugned constitutional amendment was to be set aside, the same would not lead to the revival of the unamended Articles 124, 127, 128, 217, 222, 224, 224A and 231. In our considered view, the observations made in the judgment leading to the submissions and inferences recorded above, are not applicable to the present case. The highlighted portion of the judgment extracted above, would apply to the present controversy. In the present case the impugned constitutional amendment was promulgated independently of the original provisions of the Constitution. In fact, the amended provisions introduce a new scheme of selection and appointment of Judges to the higher judiciary, directionally different from the prevailing position. And therefore, the original provisions of the Constitution would have been made inoperative, only if the amended provisions were valid. Consequently, if reliance must be placed on the above judgment, the conclusion would be against the proposition canvassed. It would however be relevant to mention, that the instant judgment, as also, some of the other judgments relied upon by the learned Counsel for the Respondents, have been explained and distinguished in the State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd. MANU/SC/0417/1976 : (1977) 1 SCC 643, which will be dealt with chronologically hereinafter.

(v) The learned Solicitor General then placed reliance on, the Mulchand Odhavji case MANU/SC/0348/1969 : (1971) 3 SCC 53, and invited our attention to the observations recorded in paragraph 8 thereof. Reliance was even placed on, the Mohd. Shaukat Hussain Khan case MANU/SC/0057/1974 : (1974) 2 SCC 376, and in particular, the observations recorded in paragraph 11 thereof. We are satisfied, that the instant two judgments are irrelevant for the determination of the pointed contention, advanced at the hands of the learned Counsel for the Respondents, as the subject matter of the controversy dealt with in the above cases, was totally different from the one in hand.

(vi) Reference was then made to the Central Provinces Manganese Ore Company Ltd. Case MANU/SC/0417/1976 : (1977) 1 SCC 643, and our attention was drawn to the following observations recorded therein:

18. We do not think that the word substitution necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. Indeed, the natural meaning of the word "substitution" is to indicate that the process cannot be split up into two pieces like this. If the process described as substitution fails, it is totally ineffective so as to leave intact what was sought to be displaced. That seems to us to be the ordinary and natural meaning of the words "shall be substituted". This part could not become effective without the assent of the Governor-General. The State Governor's assent was insufficient. It could not be inferred that, what was intended was that, in case the substitution failed or proved ineffective, some repeal, not mentioned at all, was brought about and remained effective so as to create what may be described as a vacuum in the statutory law on the subject-matter. Primarily, the question is one of gathering, the intent from the use of words in the enacting provision seen in the light of the procedure gone through. Here, no intention to repeal, without a substitution, is deducible. In other

words, there could be no repeal if substitution failed. The two were a part and parcel of a single indivisible process and not bits of a disjointed operation.

19. Looking at the actual procedure which was gone through, we find that, even if the Governor had assented to the substitution, yet, the amendment would have been effective, as a piece of valid legislation, only when the assent of the Governor-General had also been accorded to it. It could not be said that what the Legislature intended or what the Governor had assented to consisted of a separate repeal and a fresh enactment. The two results were to follow from one and the same effective Legislative process. The process had, therefore, to be so viewed and interpreted.

20. Some help was sought to be derived by the citation of B.N. Tewari v. Union of India MANU/SC/0312/1964 : [1965] 2 SCR 421 and the case of Firm A.T.B. Mehtab Majid and Co. v. State of Madras. Tewari's case related to the substitution of what was described as the "carry forward" rule contained in the departmental instruction which was sought to be substituted by a modified instruction declared invalid by the court. It was held that when the rule contained in the modified instruction of 1955 was struck down the rule contained in a displaced instruction did not survive. Indeed, one of the arguments there was that the original "carry forward" rule of 1952 was itself void for the very reason for which the "carry forward" rule, contained in the modified instructions of 1955, had been struck down. Even the analogy of a merger of an order into another which was meant to be its substitute could apply only where there is a valid substitution. Such a doctrine applies in a case where a judgment of a subordinate court merges in the judgment of the appellate court or an order reviewed merges in the order by which the review is granted. Its application to a legislative process may be possible only in cases of valid substitution. The legislative intent and its effect is gathered, inter alia, from the nature of the action of the authority which functions. It is easier to impute an intention to an executive rule-making authority to repeal altogether in any event what is sought to be displaced by another rule. The cases cited were of executive instructions. We do not think that they could serve as useful guides in interpreting a Legislative provision sought to be amended by a fresh enactment. The procedure for enactment is far more elaborate and formal. A repeal and a displacement of a Legislative provision by a fresh enactment can only take place after that elaborate procedure has been followed in toto. In the case of any rule contained in an executive instruction, on the other hand, the repeal as well as displacement are capable of being achieved and inferred from a bare issue of fresh instructions on the same subject.

21. In Mehtab Majid & Company's case a statutory role was held not to have revived after it was sought to be substituted by another held to be invalid. This was also a case in which no elaborate legislative procedure was prescribed for a repeal as it is in the case of statutory enactment of statutes by legislatures. In every case, it is a question of intention to be gathered from the language as well as the acts of the rule-making or legislating authority in the context in which these occur.

22. A principle of construction contained now in a statutory provision made in England since 1850 has been:

Where an Act passed after 1850 repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted

provisions come into operation. (See: Halsbury's Laws of England, Third Edn. Vol. 36, P. 474; Craies on "Statute Law", 6th Edn. p. 386).

Although, there is no corresponding provision in our General Clauses Acts, yet, it shows that the mere use of words denoting a substitution does not ipso facto or automatically repeal a provision until the provision, which is to take its place becomes legally effective. We have as explained above, reached the same conclusion by considering the ordinary and natural meaning of the term "substitution" when it occurs without anything else in the language used or in the context of it or in the surrounding facts and circumstances to lead to another inference. It means, ordinarily, that unless the substituted provision is there to take its place, in law and in effect, the pre-existing provision continues. There is no question of a "revival".

It would be relevant to mention, that the learned Solicitor General conceded, that the position concluded in the instant judgment, would defeat the stance adopted by him. We endorse the above view. The position which is further detrimental to the contention advanced on behalf of the Respondents is, that in recording the above conclusions, this Court in the above cited case, had taken into consideration, the judgments in the Firm A.T.B. Mehtab Majid case MANU/SC/0352/1962 : AIR 1963 SC 928, the B.N. Tewari case MANU/SC/0312/1964 : AIR 1965 SC 1430, the Koteswar Vittal Kamath case MANU/SC/0036/1968 : (1969) 1 SCC 255, and the Mulchand Odhavji case MANU/SC/0348/1969 : (1971) 3 SCC 53. The earlier judgments relied upon by the learned Counsel for the Respondents would, therefore, be clearly inapplicable to the controversy in hand. In this view of the matter, there is hardly any substance in the pointed issue canvassed on behalf of the Respondents.

(vii) The learned Solicitor General, then placed reliance on Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India MANU/SC/0406/1984 : (1985) 1 SCC 641, and invited our attention to the following observations recorded therein:

107. In the cases before us we do not have rules made by two different authorities as in Mulchand case MANU/SC/0348/1969 : (1971) 3 SCC 53 and no intention on the part of the Central Government to keep alive the exemption in the event of the subsequent notification being struck down is also established. The decision of this Court in Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. MANU/SC/0036/1968 : (1969) 3 SCR 40) does not also support the Petitioners. In that case again the question was whether a subsequent legislation which was passed by a legislature without competence would have the effect of reviving an earlier rule which it professed to supersede. This case again belongs to the category of Mohd. Shaukat Hussain Khan case MANU/SC/0057/1974 : AIR 1974 SC 1480. It may also be noticed that in Koteswar Vittal Kamath case MANU/SC/0036/1968 : AIR 1969 SC 504, the ruling in the case of Firm A.T.B. Mehtab Majid and Company MANU/SC/0352/1962 : AIR 1963 SC 928 has been distinguished. The case of State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd. MANU/SC/0417/1976 : AIR 1977 SC 879 is again distinguishable. In this case the whole legislative process termed substitution was abortive, because, it did not take effect for want of the assent of the Governor-General and the Court distinguished that case from Tiwari case MANU/SC/0312/1964 : AIR 1965 SC 1430. We may also state that the legal effect on an earlier law when the later law enacted in its place is declared invalid does not depend merely upon the use of words like, 'substitution', or 'supersession'. It depends upon the totality of circumstances and the context in which they are used.

What needs to be noticed from the extract reproduced above is, that this Court in the above judgment clearly concluded, that the legal effect on an earlier law, when the later law enacted in its place was declared invalid, did not depend merely upon the use of the words like 'substitution' or, 'supersession'. And further, that it would depend on the totality of the circumstances, and the context, in which the provision was couched. If the contention advanced by the learned Solicitor General is accepted, it would lead to a constitutional breakdown. The tremors of such a situation are already being felt. The retiring Judges of the higher judiciary, are not being substituted by fresh appointments. The above judgment, in our considered view, does not support the submission being canvassed, because on consideration of the "....totality of circumstances and the context...." the instant contention is just not acceptable. We are therefore of the considered view, that even the instant judgment can be of no avail to the Respondents, insofar as the present controversy is concerned.

(viii) Reliance was next placed on the judgment rendered by this Court in Bhagat Ram Sharma v. Union of India MANU/SC/0611/1987 : 1988 (Supp) SCC 30. The instant judgment was relied upon only to show, that an enactment purported to be an amendment, has the same qualitative effect as a repeal of the existing statutory provision. The aforesaid inference was drawn by placing reliance on Southerland's Statutory Construction, 3rd Edition, Volume I. Since there is no quarrel on the instant proposition, it is not necessary to record anything further. It however needs to be noticed, that we are not confronted with the effect of an amendment or a repeal. We are dealing with the effect of the striking down of a constitutional amendment and a legislative enactment, through a process of judicial review.

(ix) Reliance was then placed on State of Rajasthan v. Mangilal Pindwal MANU/SC/0549/1996 : (1996) 5 SCC 60, and particularly on the observations/conclusions recorded in paragraph 12 thereof. All that needs to be stated is, that the issue decided in the above judgment, does not arise for consideration in the present case, and accordingly, the conclusions drawn therein cannot be made applicable to the present case.

(x) Next in order, reliance was placed on the India Tobacco Company Ltd. Case MANU/SC/0353/1974 : (1975) 3 SCC 512, and our attention was invited to the following observations recorded therein:

15. The general rule of construction is that the repeal of a repealing Act does not revive anything repealed thereby. But the operation of this rule is not absolute. It is subject to the appearance of a "different intention" in the repealing statute. Again, such intention may be explicit or implicit. The questions, therefore, that arise for determination are: Whether in relation to cigarettes, the 1941 Act was repealed by the 1954 Act and the latter by the 1958 Act? Whether the 1954 Act and 1958 Act were repealing enactments? Whether there is anything in the 1954 Act and the 1958 Act indicating a revival of the 1941 Act in relation to cigarettes?

16. It is now well settled that "repeal" connotes abrogation or obliteration of one statute by another, from the statute book as completely "as if it had never been passed"; when an Act is repealed, "it must be considered (except as to transactions past and closed) as if it had never existed". (Per Tindal, C.J. in Kay v. Goodwin (1830) 6 Bing 576, 582 and Lord Tenterdon in Surtees v. Ellison

(1829) 9 B and C 750, 752 cited with approval in State of Orissa v. M.A. Tulloch and Co. MANU/SC/0021/1963 : AIR 1964 SC 1284).

17. Repeal is not a matter of mere from but one of substance, depending upon the intention of the Legislature. If the intention, indicated expressly or by necessary implication in the subsequent statute, was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal-(see Craies on statute Law, 7th Edn. pp. 349, 353, 373, 374 and 375; Maxwell's Interpretation of Statutes, 11th Edn. pp. 164, 390 based on Mount v. Taylor (1868) L.R. 3 C.P. 645; Southerland's Statutory Construction 3rd Edn. Vol. I, paragraphs 2014 and 2022, pp. 468 and 490). Broadly speaking, the principal object of a Repealing and Amending Act is to 'excise dead matter, prune off superfluities and reject clearly inconsistent enactments'-see Mohinder Singh v. Mst. Harbhajan Kaur.

What needs to be kept in mind, as we have repeatedly expressed above is, that the issue canvassed in the judgments relied upon, was the effect of a voluntary decision of a legislature in amending or repealing an existing provision. That position would arise, if the Parliament had validly amended or repealed an existing constitutional provision. Herein, the impugned constitutional amendment has definetly the effect of substituting some of the existing provisions of the Constitution, and also, adding to it some new provisions. Naturally substitution connotes, that the earlier provision ceases to exist, and the amended provision takes its place. The present situation is one where, the impugned constitutional amendment by a process of judicial review, has been set aside. Such being the position, whatever be the cause and effect of the impugned constitutional amendment, the same will be deemed to be set aside, and the position preceding the amendment will be restored. It does not matter what are the stages or steps of the cause and effect of the amendment, all the stages and steps will stand negated, in the same fashion as they were introduced by the amendment, when the amended provisions are set aside.

(xi) In addition to the above judgment, reliance was also placed on the Kolhapur Canesugar Works Ltd. Case MANU/SC/0060/2000 : (2000) 2 SCC 536, West U.P. Sugar Mills Association v. State of U.P. MANU/SC/0088/2002 : (2002) 2 SCC 645, Gammon India Ltd. v. Special Chief Secretary MANU/SC/8025/2006 : (2006) 3 SCC 354, the Hirendra Pal Singh case MANU/SC/1030/2010 : (2011) 5 SCC 305, the Joint Action Committee of Air Line Pilots' Associations of India case MANU/SC/0543/2011 : (2011) 5 SCC 435, and the K. Shyam Sunder case MANU/SC/0915/2011 : (2011) 8 SCC 737. The conclusions drawn in the above noted judgments were either based on the judgments already dealt with by us hereinabove, or on general principles. It is not necessary to examine all the above judgments, by expressly taking note of the observations recorded in each of them.

370. Even though we have already recorded our determination with reference to the judgments cited by the learned Solicitor General, it is imperative for us to record, that it is evident from the conclusions returned in the Central Provinces Manganese Ore Company Ltd. Case MANU/SC/0417/1976 : (1977) 1 SCC 643, that in the facts and circumstances of the present case, it would have to be kept in mind, that if the construction suggested by the learned Solicitor General

was to be adopted, it would result in the creation of a void. We say so, because if neither the impugned constitutional provision, nor the amended provisions of the Constitution would survive, it would lead to a breakdown of the constitutional machinery, inasmuch as, there would be a lacuna or a hiatus, insofar as the manner of selection and appointment of Judges to the higher judiciary is concerned. Such a position, in our view, cannot be the result of any sound process of interpretation. Likewise, from the observations emerging out of the decision rendered in the Indian Express Newspapers (Bombay) Pvt. Ltd. Case MANU/SC/0406/1984 : (1985) 1 SCC 641, we are satisfied, that the clear intent of the Parliament, while enacting the Constitution (99th Amendment) Act, was to provide for a new process of selection and appointment of Judges to the higher judiciary by amending the existing provisions. Naturally therefore, when the amended provision postulating a different procedure is set aside, the original process of selection and appointment under the unamended provisions would revive. The above position also emerges from the legal position declared in the Koteswar Vittal Kamath case MANU/SC/0036/1968 : (1969) 1 SCC 255.

371. It is not possible for us to accept the inferential contentions, advanced at the hands of the learned Counsel for the Respondents by placing reliance on Sections 6, 7 and 8 of the General Clauses Act. We say so, because the contention of the learned Solicitor General was based on the assumption, that a judicial verdict setting aside an amendment, has the same effect as a repeal of an enactment through a legislation. This is an unacceptable assumption. When a legislature amends or repeals an existing provision, its action is of its own free will, and is premised on well founded principles of interpretation, including the provisions of the General Causes Act. Not so when an amendment/repeal is set aside through a judicial process. It is not necessary to repeat the consideration recorded in paragraph 250(ix) above. When a judgment sets aside, an amendment or a repeal by the legislature, it is but natural that the status quo ante, would stand restored.

372. For the reasons recorded hereinabove, we are of the view, that in case of setting aside of the impugned Constitution (99th Amendment) Act, the provisions of the Constitution sought to be amended thereby, would automatically revive.

VI. CONCLUSIONS:

373. Article 124A constitutes the edifice of the Constitution (99th Amendment) Act, 2014. The striking down of Article 124A would automatically lead to the undoing of the amendments made to Articles 124, 124B, 124C, 127, 128, 217, 222, 224, 224A and 231. This, for the simple reason, that the latter Articles are sustainable only if Article 124A is upheld. Article 124A(1) provides for the constitution and the composition of the National Judicial Appointments Commission (NJAC). Its perusal reveals, that it is composed of the following:

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

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

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

(d) two eminent persons, to be nominated-Members.

If the inclusion of anyone of the Members of the NJAC is held to be unconstitutional, Article 124A will be rendered nugatory, in its entirety. While adjudicating upon the merits of the submissions advanced at the hands of the learned Counsel for the rival parties, I have arrived at the conclusion, that Clauses (a) and (b) of Article 124A(1) do not provide an adequate representation, to the judicial component in the NJAC, Clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to the higher judiciary (as also transfer of Chief Justices and Judges, from one High Court to another). The same are accordingly, violative of the principle of "independence of the judiciary". I have independently arrived at the conclusion, that Clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an *ex officio* Member of the NJAC. Clause (c) of Article 124A(1), in my view, impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". It has also been concluded by me, that Clause (d) of Article 124A(1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is *ultra vires* the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the "basic structure" of the Constitution. In the above view of the matter, I am of the considered view, that all the Clauses (a) to (d) of Article 124A(1) are liable to be set aside. The same are, accordingly struck down. In view of the striking down of Article 124A(1), the entire Constitution (99th Amendment) Act, 2014 is liable to be set aside. The same is accordingly hereby struck down in its entirety, as being ultra vires the provisions of the Constitution.

374. The contention advanced at the hands of the Respondents, to the effect, that the provisions of the Constitution which were sought to be amended by the impugned constitutional amendment, would not revive, even if the challenge raised by the Petitioners was accepted (and the Constitution (99th Amendment) Act, 2014, was set aside), has been considered under a separate head, to the minutest detail, in terms of the submissions advanced. I have concluded, that with the setting aside of the impugned Constitution (99th Amendment) Act, 2014, the provisions of the Constitution sought to be amended thereby, would automatically revive, and the status quo ante would stand restored.

375. The National Judicial Appointments Commission Act, 2014 inter alia emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted Under Article 124A(1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 is also liable to be set aside, the same is accordingly hereby struck down. In view of the above, it was not essential for us, to have examined the constitutional vires of individual provisions of the NJAC Act. I have all the same, examined the challenge raised to Sections 5, 6, 7 and 8 thereof. I have concluded, that Sections 5, 6 and 8 of the NJAC Act are ultra vires the provisions of the Constitution.

VII. ACKNOWLEDGEMENT:

376. Before parting with the order, I would like to record my appreciation for the ablest assistance rendered to us, by the learned Counsel who addressed us from both the sides. I would also like to extend my deepest sense of appreciation to all the assisting counsel, who had obviously whole heartedly devoted their time and energy in the preparation of the case, and in instructing the arguing counsel. I would be failing in my duty, if I do not express my gratitude to my colleagues

on the Bench, as also, learned Counsel who agreed to assist the Bench, during the summer vacation. I therefore, express my gratefulness and indebtedness to them, from the bottom of my heart.

ORDER OF THE COURT

377. The prayer for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases [MANU/SC/0073/1994 : (1993) 4 SCC 441, and MANU/SC/1146/1998 : (1998) 7 SCC 739, respectively], is rejected.

378. The Constitution (Ninety-ninth Amendment) Act, 2014 is declared unconstitutional and void.

379. The National Judicial Appointments Commission Act, 2014, is declared unconstitutional and void.

380. The system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief Justices and Judges of High Courts from one High Court, to another, as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the "collegium system"), is declared to be operative.

381. To consider introduction of appropriate measures, if any, for an improved working of the "collegium system", list on 3.11.2015.

Jasti Chelameswar, J.

382. Very important and far reaching questions fall for the consideration of this Court in this batch of matters. The constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 are under challenge.

383. When these matters were listed for preliminary hearing on 21.04.2015, an objection was raised by Shri Fali S. Nariman, learned senior Counsel appearing for one of the Petitioners, that it is inappropriate for Justice Jagdish Singh Khehar to participate in the proceedings as the Presiding Judge of this Bench. The objection is predicated on the facts: Being the third senior most Puisne Judge of this Court, Justice Khehar is a member of the collegium propounded under the ***Second Judges case***[1] exercising "significant constitutional power" in the matter of selection of Judges, of this Court as well as High Courts of this country; by virtue of the impugned legislation, until he attains the position of being the third senior most Judge of this Court, Justice Khehar would cease to enjoy such power; and therefore, there is a possibility of him not being impartial.

384. When the objection was raised, various counsel appearing on behalf of either side expressed different viewpoints regarding the appropriateness of participation of Justice Khehar in these proceedings. We, therefore, called upon learned Counsel appearing in this matter to precisely state their respective points of view on the question and assist the Court in identifying principles of law which are relevant to arrive at the right answer to the objection raised by Shri Fali S. Nariman.

385. The matter was listed again on 22.04.2015 on which date Shri Nariman filed a brief written statement[2] indicating reasons which according to him make it inappropriate for Justice Khehar to preside over the present Bench.

386. On the other hand, Shri Arvind P. Datar, learned senior Counsel appearing for one of the Petitioners made elaborate submissions explaining the legal principles which require a Judge to recuse himself from hearing a particular case and submitted that in the light of settled principles of law in this regard there is neither impropriety in Justice Khehar hearing these matters nor any need for him to do so.

387. Shri Mukul Rohatgi, learned Attorney General very vehemently opposed the suggestion of Shri Nariman and submitted that there is nothing in law which demands the recusal of Justice Khehar nor has the Union of India any objection to Justice Khehar hearing these batch of matters.

388. Shri Harish N. Salve and Shri K.K. Venugopal, learned senior Counsel who proposed to appear on behalf of different States also supported the stand of the learned Attorney General and made independent submissions in support of the conclusion.

389. After an elaborate hearing of the matter, we came to the unanimous conclusion that there is no principle of law which warrants Justice Khehar's recusal from the proceedings. We recorded the conclusion of the Bench in the proceedings dated 22.04.2015 and indicated that because of paucity of time, the reasons for the conclusion would follow later[3].

390. At the outset, we must record that each of the learned Counsel who objected to the participation of Justice Khehar in these proceedings anchored this objection on distinct propositions of law. While Shri Nariman put it on the ground of inappropriateness, Shri Santosh Paul invoked the principle of bias, on the ground of him having conflicting interests-one in his capacity as member of the Collegium and the other in his capacity as a Judge to examine the constitutional validity of the provisions which seek to displace the Collegium system. In substance, some of the Petitioners are of the opinion that Justice Khehar should recuse[4].

391. It is one of the settled principles of a civilised legal system that a Judge is required to be impartial. It is said that the hallmark of a democracy is the existence of an impartial Judge.

392. It all started with a latin maxim *Nemo Judex In Re: Sua* which means literally-that no man shall be a judge in his own cause. There is another rule which requires a Judge to be impartial. The theoretical basis is explained by Thomas Hobbes in his Eleventh Law of Nature. He said "If a man be trusted to judge between man and man, it is a precept of the law of Nature that he deal equally between them. For without that, the controversies of men cannot be determined but by war. He therefore, said that is partial in judgment doth what in him lies, to deter men from the use of judges and arbitrators; and consequently, against the fundamental law of Nature, is the cause of war."

393. Grant Hammond, a former Judge of the Court of Appeal of New Zealand and an academician, in his book titled "Judicial Recusal"[5] traced out principles on the law of recusal as developed in England in the following words:

The central feature of the early English common law on recusal was both simple and highly constrained: a judge could only be disqualified for a direct pecuniary interest. What would today be termed 'bias', which is easily the most controversial ground for disqualification, was entirely rejected as a ground for recusal of judges, although it was not completely dismissed in relation to jurors.

This was in marked contrast to the relatively sophisticated canon law, which provided for recusal if a judge was suspected of partiality because of consanguinity, affinity, friendship or enmity with a party, or because of his subordinate status towards a party or because he was or had been a party's advocate.

He also pointed out that in contrast in the United States of America, the subject is covered by legislation.

394. ***Dimes** v. **Proprietors of Grand Junction Canal*** (1852) 10 ER 301, is one of the earliest cases where the question of disqualification of a Judge was considered. The ground was that he had some pecuniary interest in the matter. We are not concerned with the details of the dispute between the parties to the case. Lord Chancellor Cottenham heard the appeal against an order of the Vice-Chancellor and confirmed the order. The order went in favour of the Defendant company. A year later, ***Dimes*** discovered that Lord Chancellor Cottenham had shares in the Defendant company. He petitioned the Queen for her intervention. The litigation had a long and chequered history, the details of which are not material for us. Eventually, the matter reached the House of Lords. The House dismissed the appeal of ***Dimes*** on the ground that setting aside of the order of the Lord Chancellor would still leave the order of the Vice-Chancellor intact as Lord Chancellor had merely affirmed the order of the Vice-Chancellor. However, the House of Lords held that participation of Lord Cottenham in the adjudicatory process was not justified. Though Lord Campbell observed:

No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest..... This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.

395. Summing up the principle laid down by the abovementioned case, ***Hammond*** observed as follows:

The 'no-pecuniary interest' principle as expressed in Dimes requires a judge to be automatically disqualified when there is neither actual bias nor even an apprehension of bias on the part of that judge. The fundamental philosophical underpinning of Dimes is therefore predicated on a conflict of interest approach.

396. The next landmark case on the question of "bias" is ***Regina** v. **Gough*** (1993) AC 646. Gough was convicted for an offence of conspiracy to rob and was sentenced to imprisonment for fifteen years by the Trial Court. It was a trial by Jury. After the conviction was announced, it was brought to the notice of the Trial Court that one of the jurors was a neighbour of the convict. The convict

appealed to the Court of Appeal unsuccessfully. One of the grounds on which the conviction was challenged was that, in view of the fact that one of the jurors being a neighbour of the convict presented a possibility of bias on her part and therefore the conviction is unsustainable. The Court of Appeal noticed that there are two lines of authority propounding two different tests for determining disqualification of a Judge on the ground of bias:

(1) "real danger" test; and

(2) "reasonable suspicion" test.

The Court of Appeal confirmed the conviction by applying the "real danger" test.

397. The matter was carried further to the House of Lords.

398. Lord Goff noticed that there are a series of authorities which are "not only large in number but bewildering in their effect". After analyzing the judgment in ***Dimes*** (supra), Lord Goff held:

In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

In other words, where a Judge has a pecuniary interest, no further inquiry as to whether there was a "real danger" or "reasonable suspicion" of bias is required to be undertaken. But in other cases, such an inquiry is required and the relevant test is the "real danger" test.

But in other cases, the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include..... cases in which the member of the tribunal has an interest in the outcome of the proceedings, which falls short of a direct pecuniary interest. Such interests may vary widely in their nature, in their effect, and in their relevance to the subject matter of the proceedings; and there is no rule..... that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts.

399. The learned Judge examined various important cases on the subject and finally concluded:

Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

400. Lord Woolf agreed with Lord Goff in his separate judgment. He held:

There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in ***Dimes v. Proprietors of Grand Junction Canal*** 3 H.L. Case 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist.

401. In substance, the Court held that in cases where the Judge has a pecuniary interest in the outcome of the proceedings, his disqualification is automatic. No further enquiry whether such an interest lead to a "real danger" or gave rise to a "reasonable suspicion" is necessary. In cases of other interest, the test to determine whether the Judge is disqualified to hear the case is the "real danger" test.

402. The ***Pinochet***[6] case added one more category to the cases of automatic disqualification for a judge. Pinochet, a former Chilean dictator, was sought to be arrested and extradited from England for his conduct during his incumbency in office. The issue was whether Pinochet was entitled to immunity from such arrest or extradition. Amnesty International, a charitable organisation, participated in the said proceedings with the leave of the Court. The House of Lords held that Pinochet did not enjoy any such immunity. Subsequently, it came to light that Lord Hoffman, one of the members of the Board which heard the Pinochet case, was a Director and Chairman of a company (known as A.I.C.L.) which was closely linked with Amnesty International. An application was made to the House of Lords to set aside the earlier judgment on the ground of bias on the part of Lord Hoffman.

403. The House of Lords examined the following questions;

• Whether the connection of Lord Hoffman with Amnesty International required him to be **automatic disqualified**?

• Whether an enquiry into the question whether cause of Lord Hoffman's connection with Amnesty International posed a real danger or caused a reasonable apprehension that his judgment is biased- is necessary?

• Did it make any difference that Lord Hoffman was only a member of a company associated with Amnesty International which was in fact interested in securing the extradition of Senator Pinochet?

404. Lord Wilkinson summarised the principles on which a Judge is disqualified to hear a case. As per Lord Wilkinson-

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a

party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure.

And framed the question;

...the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

He opined that although the earlier cases have "all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification."

405. Lord Wilkinson concluded that Amnesty International and its associate company known as A.I.C.L., had a non-pecuniary interest established that Senator Pinochet was not immune from the process of extradition. He concluded that, ".....the matter at issue does not relate to money or economic advantage but is concerned with the **promotion of the cause**, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties"

406. After so concluding, dealing with the last question, whether the fact that Lord Hoffman was only a member of A.I.C.L. but not a member of Amnesty International made any difference to the principle, Lord Wilkinson opined that even though a judge may not have financial interest in the outcome of a case, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial and held that if the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions. This aspect of the matter was considered in ***P.D. Dinakaran case***[7].

407. From the above decisions, in our opinion, the following principles emerge;

1. If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.

2. In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest

disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.

3. The ***Pinochet case*** added a new category i.e. that the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case.

408. It is nobody's case that, in the case at hand, Justice Khehar had any pecuniary interest or any other interest falling under the second of the above-mentioned categories. By the very nature of the case, no such interest can arise at all.

409. The question is whether the principle of law laid down in ***Pinochet case*** is attracted. In other words, whether Justice Khehar can be said to be sharing any interest which one of the parties is promoting. All the parties to these proceedings claim to be promoting the cause of ensuring the existence of an impartial and independent judiciary. The only difference of opinion between the parties is regarding the process by which such a result is to be achieved. Therefore, it cannot be said that Justice Khehar shares any interest which any one of the parties to the proceeding is seeking to promote.

410. The implication of Shri Nariman's submission is that Justice Khehar would be pre-determined to hold the impugned legislation to be invalid. We fail to understand the stand of the Petitioners. If such apprehension of the Petitioners comes true, the beneficiaries would be the Petitioners only. The grievance, if any, on this ground should be on the part of the Respondents.

411. The learned Attorney General appearing for the Union of India made an emphatic statement that the Union of India has no objection for Justice Khehar hearing the matter as a presiding Judge of the Bench.

412. No precedent has been brought to our notice, where courts ruled at the instance of the beneficiary of bias on the part of the adjudicator, that a judgment or an administrative decision is either voidable or void on the ground of bias. On the other hand, it is a well established principle of law that an objection based on bias of the adjudicator can be waived. Courts generally did not entertain such objection raised belatedly by the aggrieved party.

The right to object to a disqualified adjudicator may be waived, and this may be so even where the disqualification is statutory.[8] The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisers know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged.[9]

In our opinion, the implication of the above principle is that only a party who has suffered or likely to suffer an adverse adjudication because of the possibility of bias on the part of the adjudicator can raise the objection.

413. The significant power as described by Shri Nariman does not inhere only to the members of the Collegium, but inheres in every Judge of this Court who might be called upon to express his

opinion regarding the proposals of various appointments of the High Court Judges, Chief Justices or Judges of this Court, while the members of the Collegium are required to exercise such "significant power" with respect to each and every appointment of the above-mentioned categories, the other Judges of this Court are required to exercise such "significant power", at least with respect to the appointments to or from the High Court with which they were earlier associated with either as judges or Chief Justices. The argument of Shri Nariman, if accepted would render all the Judges of this Court disqualified from hearing the present controversy. A result not legally permitted by the "doctrine of necessity".

414. For the above-mentioned reasons, we reject the submission that Justice Khehar should recuse from the proceedings.

415. We the members of the judiciary exult and frolic in our emancipation from the other two organs of the State. But have we developed an alternate constitutional morality to emancipate us from the theory of checks and balances, robust enough to keep us in control from abusing such independence? Have we acquired independence greater than our intelligence maturity and nature could digest? Have we really outgrown the malady of dependence or merely transferred it from the political to judicial hierarchy? Are we nearing such ethical and constitutional disorder that frightened civil society runs back to Mother Nature or some other less wholesome authority to discipline us? Has all the independence acquired by the judicial branch since 6th October, 1993 been a myth-a euphemism for nepotism enabling inter alia promotion of mediocrity or even less occasionally-are questions at the heart of the debate in this batch of cases by which the Petitioners question the validity of the Constitution (99th Amendment) Act, 2014 and The National Judicial Appointments Commission Act, 2014 (hereinafter referred to as the "AMENDMENT" and the "ACT", for the sake of convenience).

416. To understand the present controversy, a look at the relevant provisions of the Constitution of India, as they stood prior to and after the impugned AMENDMENT, is required.

Prior to the AMENDMENT

Article 124. Establishment and constitution of Supreme Court

(1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than thirty other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:

Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:

xxx

Article 217. Appointment and conditions of the office of a Judge of a High Court

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court,....

xxx

417. The pre AMENDMENT text stipulated that the President of India shall appoint Judges of this Court and High Courts of this country (hereinafter the CONSTITUTIONAL COURTS) in consultation with the Chief Justice of India (hereinafter CJI) and other constitutional functionaries indicated in Article 124 and 217. In practice, the appointment process for filling up vacancies was being initiated by the Chief Justice of the concerned High Court or the CJI, as the case may be. Such a procedure was stipulated by a memorandum of the Government of India[10].

After the AMENDMENT

418. Articles 124 and 217 insofar as they are relevant for our purpose read

Article 124 xxx

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in Article 124A and shall hold office until he attains the age of sixty-five years.

Article 217. Appointment and conditions of the office of a Judge of a High Court-(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in Article 124A, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.

419. The AMENDMENT inserted Articles 124A, 124B and 124C. These provisions read:

124A(1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:

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

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

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

(*d*) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is

no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People-Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women;

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

124B. It shall be the duty of the National Judicial Appointments Commission to-

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

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

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

124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by Regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.

Consequent amendments to other Articles are also made, details are not necessary.

420. The crux of the AMENDMENT is that the institutional mechanism by which selection and appointment process of the Judges of CONSTITUTIONAL COURTS was undertaken came to be substituted by a new body called the National Judicial Appointments Commission (hereinafter referred to as NJAC). It consists of six members. The CJI is its ex-officio Chairperson. Two senior Judges of the Supreme Court next to the CJI and the Union Law Minister are also ex-officio members, apart from two eminent persons to be nominated by a Committee contemplated in Article 124A(1)(d).

421. Under Article 124B, the NJAC is charged with the duty of recommending persons of ability and integrity for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts and of recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court.

422. Article 124C authorizes Parliament to regulate by law, the procedure for the appointment of Chief Justice and other Judges of the Supreme Court etc. It also empowers the NJAC to make Regulations laying down the procedure for the discharge of its functions.

423. Pursuant to the mandate of Article 124C, Parliament made the ACT. For the present, suffice it to note that though the amended text of the Constitution does not so provide, Section 6(6)[11] of the ACT provides that the NJAC shall not recommend a person for appointment, if any two members of the Commission do not agree for such recommendation.

424. The AMENDMENT made far reaching changes in the scheme of the Constitution, insofar as it relates to the selection process of Judges of the CONSTITUTIONAL COURTS. The President is no more obliged for making appointments to CONSTITUTIONAL COURTS to consult the CJI, the Chief Justices of High Courts and Governors of the States but is obliged to consult the NJAC.

425. The challenge to the AMENDMENT is principally on the ground that such substitution undermines the independence of the judiciary. It is contended that independence of judiciary is a part of the basic structure of the Constitution and the AMENDMENT is subversive of such independence. Hence, it is beyond the competence of the Parliament in view of the law declared by this Court in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. MANU/SC/0445/1973 : (1973) 4 SCC 225 (hereinafter referred to as Bharati case).

426. Fortunately there is no difference of opinion between the parties to this *lis* regarding the proposition that existence of an independent judiciary is an essential requisite of a democratic Republic. Nor is there any difference of opinion regarding the proposition that an independent judiciary is one of the basic features of the Constitution of India.

427. The only issue is what is the permissible procedure or mechanism which would ensure establishment of an independent judiciary. The resolution of the issue requires examination of the following questions;

Whether the mechanism established by the Constituent Assembly for the appointment of Judges of the CONSTITUTIONAL COURTS is the only permissible mode for securing an independent judiciary or can there be alternatives?

If there can be alternatives, whether the mechanism (NJAC) sought to be established by the AMENDMENT transgresses the boundaries of the constituent power?

428. In the last few weeks, after the conclusion of hearing in this batch of matters, I heard many a person-say that the whole country is awaiting the judgment. Some even said the whole world is awaiting. There is certainly an element of hyperbole in those statements. Even those who are really waiting, I am sure, have concerns which vary from person to person. Inquisitiveness regarding the jurisprudential and political correctness, impact on the future of the judiciary, assessment of political and personal fortunes etc. could be some of those concerns. I am only reminded of Justice Fazal Ali's view in *S.P. Gupta v. Union of India and Ors.* [12] MANU/SC/0080/1981 : AIR 1982 SC 149 (for short S.P. Gupta case) that the issue is irrelevant for the masses and litigants. They only want that their cases should be decided quickly by judges who generate confidence. The question

is-what is the formula by which judges-who can decide cases quickly and also generate confidence in the masses and litigants-be produced. What are the qualities which make a Judge decide cases quickly and also generate confidence?

429. Deep learning in law, incisive and alert mind to quickly grasp the controversy, energy and commitment to resolve the problem are critical elements which make a Judge efficient and enable him to decide cases quickly. However, every Judge who has all the above-mentioned qualities need not automatically be a Judge who can generate confidence in the litigants unless the litigant believes that the Judge is absolutely fair and impartial.

430. Belief regarding the impartiality of a Judge depends upon the fact that Judge shares no relationship with either of the parties to the litigation. Relationship in the context could be personal, financial, political or even philosophical etc. When one of the parties to the litigation is either the State or one of its instrumentalities, necessarily there is a relationship. Because, it is the State which establishes the judiciary. Funds required to run the judicial system including the salaries and allowances of Judges necessarily flow from the State exchequer.

431. Democratic societies believe that the State not only has authority to govern but also certain legally enforceable obligations to its subjects. The authority of judicial fora to command the State to discharge its obligations flows from the existence of such enforceable obligations. To generate confidence that the judicial fora decide controversies brought to their consideration impartially, they are required to be independent. Notwithstanding the fact that they are established and organized by the State as a part of its larger obligation to govern.

432. Judiciary is the watchdog of the Constitution and its fundamental values. It is also said to be the lifeblood of constitutionalism in democratic societies. At least since Marbury v. Madison 5 U.S. 137 (1803) the authority of courts functioning under a written democratic constitution takes within its sweep the power to declare unconstitutional even laws made by the legislature. It is a formidable authority necessarily implying an awesome responsibility. A wise exercise of such power requires an efficient and independent Judge (Judicial System). In the context, wisdom is to perceive with precision whether the legislative action struck the constitutionally demanded balance between the larger interests of society and liberties of subjects.

433. Independence of such fora rests on two integers-independence of the institution and of individuals who man the institution.

(Judicial independence) connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

***

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides,

as reflected in its institutional or administrative relationships to the executive and legislative branches of Government.[13]

434. It is not really necessary for me to trace the entire history of development of the concept independence of the judiciary in democratic societies. It can be said without any fear of contradiction that all modern democratic societies strive to establish an independent judiciary. The following are among the most essential safeguards to ensure the independence of the judiciary- Certainty of tenure, protection from removal from office except by a stringent process in the cases of Judges found unfit to continue as members of the judiciary, protection of salaries and other privileges from interference by the executive and the legislature, immunity from scrutiny either by the Executive or the Legislature of the conduct of Judges with respect to the discharge of judicial functions except in cases of alleged misbehaviour, immunity from civil and criminal liability for acts committed in discharge of duties, protection against criticism to a great degree. Such safeguards are provided with a fond hope that so protected, a Judge would be absolutely independent and fearless in discharge of his duties.

435. Democratic societies by and large recognize the necessity of the abovementioned protections for the judiciary and its members. Such protections are either entrenched in the Constitution or provided by legislation. A brief survey of the constitutions of a few democratic Republics to demonstrate the point;

436. Prior to 1701, the **British Crown** had the power to dismiss the judges at will. The Act of Settlement, 1701 [14] removed from the Crown the power to dismiss Judges of the Superior Courts at will. It enabled the Monarch to remove Judges from office upon address of both Houses of Parliament. Interestingly till 1720 Judges ceased to hold office on the death of the Monarch who issued Commissions. A 1720 enactment provided that Judges should continue in office for six months after demise of the monarch. In 1761 a statute provided that commissions of the Judges shall remain in full force and effect during good behaviour notwithstanding the demise of His Majesty or of any of his heirs and successors-thus granting a life tenure. According to Blackstone,

(I) In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any State unless the administration of common justice be in **some degree separated both from the legislative** and from **the executive power.**[15]

437. Article III (1)[16] of the **American** Constitution stipulates that Judges of the Supreme Court and also the inferior Courts established by Congress shall hold their office during good behavior and they cannot be removed except through the process of impeachment[17]. It also stipulates that they shall receive a compensation for their services which shall not be diminished during their continuance in office.

438. Section 72 [18] of the Constitution of **Australia** stipulates that Judges of the High Court and other Courts created by Parliament shall be appointed for a term expiring upon the Judge attaining the age of seventy years and shall not be removed except on an address from both Houses of the Parliament in the same session praying for removal of the Judge on the ground of proved

misbehaviour or incapacity. It also stipulates that remuneration of Judges shall not be diminished during their continuance in office.

439. When India became a Sovereign Republic, we did not adopt the British Constitutional system in its entirety-though India had been a part of the British Empire Ever since, the British Crown started asserting sovereignty over the territory of India, the British Parliament made Acts which provided legal framework for the governance of India from time to time known as Government of India Acts. The last of which was of 1935. Canada[19] and Australia[20] which were also part of the British Empire continue to be governed by Constitutions enacted by the British Parliament. We framed a new Constitution through a Constituent Assembly.

440. Members of the Constituent Assembly in general and the Drafting Committee in particular were men and women of great political experience, deep insight into human nature, and a profound comprehension of the complex problems of Indian Society. They spearheaded the freedom movement. They were well versed in history, law, political sciences and democratic practices. They examined the various constitutional systems in vogue in different democratic societies inter alia American, Australian, British and Canadian and adopted different features from different constitutional systems after suitably modifying them to the needs of Indian society.

441. Framers of the Constitution had the advantage of an intimate knowledge of the functioning of the Federal Court, the High Courts and the Subordinate Courts of this country under the Government of India Act, 1935 [21]. Though there several distinctions in the architecture of the judicial systems under each of the above-mentioned regimes, one feature common to all of them is that appointment of Judges is by the Executive. Such constitutional design is essentially a legacy of the British constitutional system where the Executive had (till 2006) the absolute authority to appoint Judges.

442. Judges, in any country, are expected to maintain a higher degree of rectitude compared to the other public office holders. The expectation with respect to the Indian Judiciary is no different. The Constitution therefore provides extraordinary safeguards and privileges for Judges of CONSTITUTIONAL COURTS to insulate them substantially from the possibility of interference by the political-executive as well as elected majorities of the people's representatives[22].

I. a Judge's appointment and continuance in office is not subject to any election process;

II. the termination of judicial appointment (during subsistence of the tenure) is made virtually impossible.

The Constitution prescribes that a Judge of CONSTITUTIONAL COURT shall not be removed from office except by following an elaborate procedure of impeachment prescribed Under Article 124(4)[23] which is applicable even for High Court Judges by virtue of Article 217(1)(b)[24].

III. The salaries, privileges, allowances and rights in respect of leave of absence and pension of Judges of the CONSTITUTIONAL COURTS may be determined by or under law made by Parliament. But, they cannot be varied to the disadvantage of the Judge[25] after the appointment.

IV. The salary, allowances and pension payable to Judges of CONSTITUTIONAL COURTS are charged on the Consolidated Fund of India or the Consolidated Fund of the concerned State[26]. Further Under Articles 113(1)[27] and 203(1)[28], the expenditure charged upon the Consolidated Fund of India or the State as the case may be shall not be submitted to vote.

443. Unscrupulous litigants constantly keep searching for ways to influence judges. Attitude of the State or its instrumentalities (largest litigants in modern democracies) would be no different[29]. Such temptation coupled with the fact that the State has the legal authority to make laws including the laws that determine the process of selection of judges and their service conditions can pose the greatest threat to the independence of the judiciary if such law making authority is without any limitations. Therefore, extraordinary safeguards to protect the tenure and service conditions of the members of the judiciary are provided in the Constitution; with a fond hope that men and women, who hold judicial offices so protected will be able to discharge their functions with absolute independence and efficiency.

444. However, any amount of legal and institutional protection will not supply the necessary independence and efficiency to individuals if inherently they are lacking in them. Where every aspect of judge's service is protected by the Constitution, the only way governments can think of gaining some control over the judiciary is by making an effort to appoint persons who are inherently pliable. There are various factors which make a Judge pliable. Some of the factors are-individual ambition, loyalty-based on political, religious or sectarian considerations, incompetence and lack of integrity. Any one of the above-mentioned factors is sufficient to make a Judge pliable. A combination of more than one of them makes a Judge more vulnerable. Combination of incompetence and ambition is the worst. The only way an ambitious incompetent person can ascend a high public office is by cringing before men in power. It is said that men in power promote the least of mankind with a fond hope that those who lack any accomplishment would be grateful to their benefactor. History is replete with examples-though proof of the expected loyalty is very scarce. Usually such men are only loyal to power but not to the benefactor.

445. In order to ensure that at least in the matter of appointment of Judges, such aberrations are avoided, democracies all over the world have adopted different strategies for choosing the 'right people' as Judges. The procedures adopted for making such a choice are widely different. To demonstrate the same, it is useful to examine the judicial systems of some of the English speaking countries.

446. The Constitution of the United States of America empowers the President to appoint Judges of the Supreme Court[30] with the advice and consent of the Senate[31]. Insofar as the appointment of the Judges of the highest court in United States is concerned, neither the Chief Justice of America nor the Supreme Court is assigned any role. The Head of the Executive is conferred with exclusive power to make the choice of the Judges of the highest court subject to the advice and consent of the Senate. A check on the possibility of arbitrary exercise of the power by the President.

447. The Canadian legal system depicts another interesting model. The Supreme Court of Canada is not established by the Constitution i.e. the Constitution Act of 1867. Chapter VII of the Act deals with the judicature. Section 101[32] only authorises the Parliament of Canada to provide for the constitution, maintenance and organisation of a general court of appeal of Canada and for the

establishment of any additional courts for the better administration of the laws of Canada. It is in exercise of such power, the Parliament of Canada in 1875 by a statute, (the Supreme and Exchequer Courts Act, 1875 [33]) established the Supreme Court of Canada. The Supreme Court of Canada's existence, its composition and jurisdiction depend upon an ordinary federal statute and these underwent many changes over time. In theory, the Court could be abolished by unilateral action of the Federal Parliament. Judges of the Supreme Court are appointed by the Governor in Council (the federal cabinet) in exercise of the power conferred Under Section 2 of the Supreme Court Act (supra). There is no requirement in Canada that such appointments be ratified by the Senate or the House of Commons.

448. In Australia, the highest Federal Court is called the High Court of Australia established Under Section 71 [34] of the Australian Constitution. It consists of a Chief Justice and other Judges not less than two as the Parliament prescribes. Judges of the High Court are appointed by the Governor General in Council.

449. Neither Canada nor Australia provide the Chief Justice or Judges of the highest court any role in the choice of Judges of the Constitutional Courts. In Australia, unlike the American model, there is no provision in the Constitution requiring consent of the federal legislature for such appointments.

450. England is unique in these matters. It has no written constitution as understood in India, US, Canada and Australia. Till 2006, appointments of Judges were made exclusively by the Lord Chancellor of the Exchequer who is a member of the Cabinet.

451. The makers of the Indian Constitution after a study of the various models mentioned above among others, provided that in making appointment of the Judges of the CONSTITUTIONAL COURTS, the CJI and the Chief Justices of the concerned High Court are required to be consulted by the President who is the appointing authority of Judges of these Courts. The text of the Constitution clearly excluded any role either for the Parliament or for the State Legislatures.

452. Dr. Ambedkar explained the scheme of the Constitution insofar as it pertains to appointment of Judges of the CONSTITUTIONAL COURTS and the competing concerns which weighed with the drafting committee for adopting such model:

There can be no difference of opinion in the House that our **judiciary must both be independent** of the executive and must also **be competent in itself**. And the question is how these two objects could be secured. There are two different ways in which this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, officers of the Supreme Court as well as other offices of the State shall be made only with the concurrence of the Senate in the United States. **It seems to me in the circumstances in which we live today**, where the sense of responsibility has not grown to the same extent to which we find it in the United States, **it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation**, that is to say, **merely on the advice of the executive of the day**. Similarly, it seems **to me that to make every appointment** which the executive wishes to make **subject to the concurrence of the**

Legislature is also not a very suitable provision. Apart from its being cumbrous, **it also involves the possibility of the appointment being influenced by political pressure and political considerations.** The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded **as sufficient for the moment**.

With regard to **the question of the concurrence of the Chief Justice**, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, **to allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day.** I therefore, think that that is also a dangerous proposition[35].

(Emphasis supplied)

The following are salient features of Dr. Ambedkar's statement:

1. That the judiciary must be both independent and competent.

2. It is dangerous to confer an unchecked power of choosing or appointing Judges on the executive. The concurrence of the legislature is also not desirable as it leads to a possibility of appointments being influenced by political considerations or under political pressure.

3. (a) Requiring concurrence of the Chief Justice is also a dangerous proposition.

(b) That, the Chief Justice is also a human being and is a man with all the failings, sentiments and prejudices which common people are supposed to have[36].

(c) Providing for the concurrence of CJI would be conferring a power of veto on the CJI which in substance means transferring the power of appointment to the CJI without any limitation, which the Constituent Assembly thought it imprudent to confer on the President.

4. That, the Drafting Committee thought the arrangements, specified Under Articles 124 and 217 (as they stood prior to the AMENDMENT), would ensure requisite independence and competence of the judiciary and such arrangements would be sufficient for the "moment".

453. Till 1977, the true meaning and amplitude of the expression consultation occurring in Articles 124 and 217 of the Constitution of India troubled neither the executive nor the judiciary. There had always been a consultation between the constitutional functionaries. Appointments were made without much controversy. This Court in *Supreme Court Advocates-on-Record Association v.*

Union of India MANU/SC/0073/1994 : (1993) 4 SCC 441 (hereinafter referred to as the Second Judges case) recorded so[37].

454. Article 222[38] authorises the President to transfer High Court Judges in consultation with the CJI. Till 1975, that power was very rarely exercised by the President. In 1976 [39], the power Under Article 222 was invoked to make a mass transfer of 16 High Court Judges[40]. One of the 16 Judges, though complied with the order of transfer but challenged the transfer by filing a petition pro bono publico to assert and vindicate the independence of the Judiciary[41]. It was in the context of that case, for the first time, the true meaning of the expression consultation occurring Under Article 222(1) fell for the consideration of this Court. The matter, Union of India v. Sankalchand Himatlal Sheth and Anr. MANU/SC/0065/1977 : (1977) 4 SCC 193 (for short Sankalchand case) was heard by five Judges. Four separate judgments were delivered by Chandrachud, Bhagwati, Krishna Iyer, and Untwalia, JJ. Justice Chandrachud opined that "consultation" in the context means an effective consultation and sharing of complete data on the basis of which transfer is sought to be effected but concluded that-After an effective consultation with the Chief Justice of India, it is open to the President to arrive at a proper decision of the question whether a Judge should be transferred to another High Court because, what the Constitution requires is consultation with the Chief Justice, not his concurrence with the proposed transfer[42].

After recording such a conclusion, His Lordship went on to observe as follows:

41..... But it is necessary to reiterate what Bhagwati and Krishna Iyer JJ. said in Shamsher Singh (supra) that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the executive if it departs from the counsel given by the Chief Justice of India. "In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." (page 873). It is hoped that these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive and the judiciary will be resolved by mutual deliberation each, party treating the views of the other with respect and consideration.

455. Justice Bhagwati, was entirely in agreement with what has been said by Krishna Iyer in his judgment.[43]

456. Justice Krishna Iyer spoke for himself and for Justice Fazal Ali. Justice Krishna Iyer, while reiterating the views expressed by this Court in two earlier judgments, i.e. *Chandramouleshwar Prasad v. Patna High Court and Ors.* MANU/SC/0495/1969 : (1969) 3 SCC 56 and *Samsher Singh v. State of Punjab* MANU/SC/0073/1974 : AIR 1974 SC 2192, opined that although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government.....[44] with a caveat:

115..... It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India. It seems to us that the word 'consultation' has

been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries are concerned in the matter, namely, the President and the Chief Justice of India. of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly.

Justice Untwalia agreed with the views expressed by Justice Chandrachud on the question of consultation with the Chief Justice of India and added:

125..... The Government, however, as rightly conceded by Mr. Seervai, is not bound to accept and act upon the advice of the Chief Justice. It may differ from him and for cogent reasons may take a contrary view. In other words, as held by this Court in the case of *Chandramouleshwar Prasad* v. *Patna High Court and Ors.* MANU/SC/0495/1969 : [1970] 2 SCR 666, the advice is not binding on the Government invariably and as a matter of compulsion in law. Although the decision of this Court in Chandramouleshwar Prasad's case was with reference to the interpretation of Articles 233 and 235 of the Constitution, on principle there is hardly any difference.

457. One interesting factor that is required to be noted from the abovementioned case is that all the 16 transfers were made in consultation with the then CJI. Within a year thereafter, in March 1977, general elections took place and a new political party came to power. The Government on a re-examination of the matter opined that there was no justification for transferring Justice Sheth from Gujarat. It is a matter of history that all 16 Judges who were transferred during emergency, were sent back to their parent High Courts along with Justice Sheth[45]. This fact is significant in the context of the argument that permitting the executive to have any say in the matter of appointment of Judges to Constitutional Courts would be destructive of independence of the judiciary.

458. Within three years thereafter, another significant event in the constitutional history of this country occurred. The then Law Minister of the Government of India sent a circular dated 18th March 1981 to Chief Ministers of various States. Chief Ministers were requested to obtain from all the Additional Judges (working in the concerned High Courts) consent to be appointed as permanent Judges in any other High Court in the country. It also advised Chief Ministers to obtain similar consent letters from persons who have already been or may in future be proposed for initial appointment as Judges of the High Court. The said letter was challenged in S.P. Gupta case on the ground it was a direct attack on the independence of the judiciary which is a basic feature of the Constitution[46] (Para 2). The matter was heard by seven Judges of this Court. Seven separate judgments were delivered. One of the questions before this Court was whether the opinion of CJI be given primacy over the opinion of other constitutional functionaries. Substantially, this Court took the same view as was taken in *Sankalchand case*[47].

459. Growth of population, increasing awareness of legal rights in the population, expansion of the scope of judicial review as a consequence of a change in the understanding of the amplitude of various fundamental rights and their inter-relationship, a sea change in the law on the procedural limitations in the exercise of the jurisdiction Under Article 32 and 226 led to the explosion of dockets of the CONSTITUTIONAL COURTS of this country. But, the Judge strength remained relatively stagnant. By 80s, the problem became more acute and complex. Government of India did not undertake the requisite exercise to make a periodic assessment of the need to increase the

judge strength. In the case of some High Courts, there was even a reduction[48]. Even, the appointment process of High Court Judges was taking unreasonably long periods on legally untenable grounds[49]. A three Judge Bench of this Court in *Subhash Sharma v. Union of India* MANU/SC/0643/1990 : (1991) Supp. 1 SCC 574 (for short *Subhash Sharma case*) took note of such a situation.

460. There was a turmoil with regard to appointment of Judges of CONSTITUTIONAL COURTS in 1970s and 1980s. Senior Judges were superseded for appointment to the office of CJI. Perhaps, emboldened by judgments of this Court in Sankalchand and S.P. Gupta the executive (at the National as well as the State level) resorted to unhealthy manipulation of the system. **The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India[50]** records some instances of such manipulations based on news items published in print media of some reputation by Commentators of well established credentials on Contemporary issues and scholars. It appears that out of 53 appointments of Judges to some High Courts made in 1984-85, 32 were made on the recommendations of acting Chief Justices. It is believed that the senior most Judges of some High Courts (from where the said 32 recommendations had originated) who initiated those recommendations as acting Chief Justices, were made permanent Chief Justices only after they agreed to recommend names suggested by the Executive. A particular Additional Judge was not confirmed as a permanent Judge for several years notwithstanding the recommendations for his confirmation by three successive Chief Justices of the High Court and three CJIs allegedly on the ground that the Judge had delivered a judgment not palatable to the State Government. It appears that the Government headed by Prime Minister V.P. Singh had stalled appointments of 67 persons recommended by the Chief Justices of various High Courts. Charges were freely traded against each other by the constitutional functionaries who are part of the appointment process of the CONSTITUTIONAL COURTS. It appears that a Law Minister for the Union of India complained that State Governments were trying to pack High Courts with their 'own men'[51]. The basic facts are verifiable, inferences therefrom are perhaps contestable. Unfortunately, the correspondence between the Government and the CJI and the record of the consultation process are some of the best guarded secrets of this country.

461. The question is not whether the various statements made in the above-mentioned book are absolutely accurate. The observations made by this Court in Subhash Sharma case can lead to a safe conclusion, that there must be some truth in the various statements made in the book. The above scenario whether true or partially true formed the backdrop of the observations made in *Subhash Sharma case* (supra). As a consequence, the Bench thought it fit that the correctness of S.P. Gupta case should be considered by a larger Bench.

49..... majority view in S.P. Gupta's case should be considered by a larger Bench we direct the papers of W.P. No. 1303 of 1987 to be placed before the learned Chief Justice for constituting a Bench of nine Judges to examine the two questions we have referred to above, namely, the position of the Chief Justice of India with reference to primacy and, secondly, justiciability of fixation of Judge strength.....

462. This led to the Second Judges case. The matter was heard by nine Judges. Five separate judgments were delivered. Justice Verma spoke for five of them. Justice Pandian and Justice Kuldip Singh wrote separate judgments but agreed with the conclusions of Justice Verma, but

Justice Ahmadi and Justice Punchhi did not. One proposition on which all nine Judges were unanimous is that under the scheme of the Constitution, independence of judiciary is indispensable. Justice Verma categorically held that it is a part of the basic structure of the Constitution[52]. The point of disagreement between the majority and minority is only regarding the mode by which the establishment and continuance of such an independent judiciary can be achieved.

463. Textually, provisions which indicate that the judiciary is required to be independent of the executive are Article 50[53] and the form of oath required to be taken by the Judges of CONSTITUTIONAL COURTS prescribed in Forms IV[54] and VIII[55] under the Third Schedule to the Constitution of India.

464. However, structurally there are many indications in the scheme of the Constitution which lead to an unquestionable inference that the Framers of the Constitution desired to have a judiciary which is absolutely independent of the Executive and insulated from vagaries of transient and shifting majoritarian dynamics. Under the scheme of the Constitution, State Legislatures have absolutely no role in matters pertaining to the establishment of CONSTITUTIONAL COURTS of this country. Parliament alone is authorized to deal with certain aspects of the establishment of the CONSTITUTIONAL COURTS and their administration such as fixation of the strength of the courts, salaries and other service conditions of the judges etc. Termination of an appointment made to a CONSTITUTIONAL COURT can be done only through the process of impeachment by Parliament, the only legislative body authorised to impeach by following a distinct legislative process only on the ground of 'proved misbehaviour or incapacity'. Such a process is made more stringent by a constitutional stipulation Under Article 124(5)[56] that the procedure for investigation and proof of misbehaviour or incapacity of a Judge must be regulated by law. Even after misbehaviour or incapacity is established removal of a Judge is not automatic but subject to voting and approval by a special majority of the Parliament specified Under Article 124(4)[57]. Prior to the AMENDMENT, the power to appoint Judges of CONSTITUTIONAL COURTS vested in the President to be exercised in consultation with the various constitutional functionaries mentioned under Articles 124 and 217, as the case may be. Consultation with the CJI was mandatory for the appointment of Judges of all CONSTITUTIONAL COURTS. Consultation with the Chief Justices of High Courts was mandatory for appointment of Judges of High Courts.

465. In the backdrop of such scheme, a question arose whether the appointment process, in any way, impacts independence of the judiciary, which, admittedly, formed a part of the basic structure of the Constitution. Majority of the Judges opined that it does[58]. Their Lordships drew support for such conclusion from history and debates in the Constituent Assembly apart from the observations made in the cases of *Sankalchand* and *S.P. Gupta*. Their Lordships also took note of the fact that the Constituent Assembly consciously excluded any role to the Parliament in the process of appointments, a conscious departure from the American Constitutional model where Federal Judicial appointments are subject to consent of the Senate.

466. In the background of such an analysis, consultation with the Chief Justice of India in Articles 124 and 217 was interpreted as conferring primacy to the opinion of CJI. Consultation with the CJI was part of a design of the Constituent Assembly to deny unfettered authority (to the union executive) to appoint Judges of the CONSTITUTIONAL COURTS. The Constituent Assembly did not choose to vest such controlling power in the Parliament to which the Executive is otherwise

accountable under the scheme of the Constitution. This Court, therefore, concluded that without primacy to the opinion of CJI the whole consultation process contemplated Under Articles 124 and 217 would only become ornamental enabling the executive to make appointments in its absolute discretion, most likely based on considerations of political expediency. Such a process would be antithetical to the constitutional goal of establishing an independent judiciary. However, Justice Verma categorically declared-

438. **The debate on primacy is intended** to determine, who amongst the constitutional functionaries involved in the **integrated process of appointments** is best equipped to discharge the greater burden attached to the role of primacy, **of making the proper choice; and this debate is not to determine who between them is entitled to greater importance or is to take the winner's prize at the end of the debate.** The task before us has to be performed with this perception.

450. ..... The indication is, that in the choice of a candidate suitable for appointment, **the opinion of the Chief Justice of India should have the greatest weight**; the selection should be made as a result of a **participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose.** Thus, the **executive element** in the appointment process is **reduced to the minimum** and any **political influence is eliminated**. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely **to indicate** that **absolute discretion was not given to any one, not even to the Chief Justice of India** as individual, **much less to the executive**, which earlier had absolute discretion under the Government of India Acts.

(Emphasis supplied)

467. This Court also indicated the circumstances on which the President of India would be constitutionally justified in not acting in accordance with the opinion expressed by the CJI. This Court never held that consultation means concurrence as is sought to be interpreted in some quarters and I regret to say even in the stated objects and reasons for the AMENDMENT.

As regards the appointment of Judges of the Supreme Court and High Courts, the Supreme Court, in the matters of the Supreme Court Advocates-on-Record Association v. Union of India and its Advisory Opinion 1998 in Third Judges case, **had interpreted** articles 124(2) and 217(1) of the Constitution **with respect to the meaning** of "**consultation**" as "**concurrence**". It was also held that the consultation of the Chief Justice of India means collegium consisting of the Chief Justice and two or four Judges, as the case may be. This has resulted in a Memorandum of Procedure laying down the process which is being presently followed for appointment of Judges to both the High Courts and the Supreme Court. The Memorandum of Procedure confers upon the Judiciary itself the power for appointment of Judges.

(Emphasis supplied)

468. There are conflicting opinions[59] regarding the jurisprudential soundness of the judgment of Second Judges case. I do not think it necessary to examine that aspect of the matter for the purpose of determining the present controversy.

469. After some 20 years of the working of the regime created under the *Second Judges case*, serious questions arose whether the regime emanating as a consequence of the interpretation placed by this Court in the *Second Judges case*, yielded any constitutionally aspired result of the establishment of an independent and efficient judiciary - the CONSTITUTINONAL COURTS. Answer regarding the independence can be subjective, and efficiency perhaps may not be very pleasant.

470. Within a few years doubts arose regarding the true purport of the *Second Judges case*. The President of India invoked Article 143 and sought certain clarifications on the judgment of the *Second Judges case* leading to the opinion of this Court reported in *Special Reference No. 1 of 1998*, MANU/SC/1146/1998 : (1998) 7 SCC 739 (hereinafter referred to as *'Third Judges case'*). Unfortunately, the factual matrix on which doubts were entertained by the Government of India are not recorded in the opinion. But para 41 of the Third Judges case records:

41. ...We take the optimistic view that successive Chief Justices of India shall henceforth act in accordance with the *Second Judges case* and this opinion.

471. No wonder, gossip and speculations gather momentum and currency in such state of affairs. If a nine-Judge Bench of this Court takes an optimistic view that successive Chief Justices of India **shall henceforth** act in accordance with the ***Second Judges case***, the only logical inference that can be drawn is that the law laid down by the *Second Judges case* was not faithfully followed by the successive Chief Justices, if not in all at least in some cases attracting comments. Instead of Ministers, Judges patronised.[60]

472. In the next one and a half decade, this nation has witnessed many unpleasant events connected with judicial appointments-events which lend credence to the speculation that the system established by the *Second* and *Third Judges cases* in its operational reality is perhaps not the best system for securing an independent and efficient judiciary.[61]

473. Two events are part of the record of this Court and can be quoted without attracting the accusation of being irresponsible and unconcerned about the sanctity of the institution. These events led to the decisions reported in *Shanti Bhushan and Anr. v. Union of India and Anr.* MANU/SC/8425/2008 : (2009) 1 SCC 657, *P.D. Dinakaran (1) v. Judges Inquiry Committee and Ors.* MANU/SC/0727/2011 : (2011) 8 SCC 380, *P.D. Dinakaran (2) v. Judges Inquiry Committee and Anr.* MANU/SC/0727/2011 : (2011) 8 SCC 474. While the 1st of the said two events pertains to the appointment of a Judge of the Madras High Court, the 2nd pertains to the recommendation made by the CJI (Collegium) regarding elevation of the Chief Justice of a High Court to this Court.

474. The dispute in Shanti Bhushan case (supra) was regarding appointment of a permanent Judge to the Madras High Court. The allegation appears to be that the procedure indicated in the *Second* and *Third Judges cases* had not been followed. I use the expression appears to be because it is difficult to identify what was the exact pleading in the case[62]. It is only by inference such a conclusion can be reached. Even the conclusion recorded by this Court does not really throw any light. In para 22 of the judgment of this Court it is recorded as follows:

22. The position is almost undisputed that on 17.3.2005 the then Chief Justice of India recommended for extension of term of 8 out of 9 persons named as Additional Judges for a further period of four months w.e.f. 3.4.2005. On 29.4.2005 the collegium including the then Chief Justice of India was of the view that name of Respondent 2 cannot be recommended along with another Judge for confirmation as permanent Judge. Since it is crystal clear that the **Judges are not concerned with any political angle** if there be any in the matter of appointment as Additional Judge or permanent Judge; the then Chief Justice should have stuck to the view expressed by the collegium and **should not have been swayed by the views of the Government** to recommend extension of the term of Respondent 2 for one year; as it amounts to surrender of primacy by jugglery of words.

(Emphasis supplied)

Even if I choose to ignore the controversial statements made (in the recent past) with regard to the appointment in question in the case, by persons who held high constitutional offices and played some role in the appointment process including former Members of this Court, the judgment leaves sufficient scope for believing that all did not go well with the appointment. It appears to have been a joint venture in the subversion of the law laid down by the Second and Third Judges cases by both the executive and the judiciary which neither party is willing to acknowledge.

475. The grievance of the Petitioners in that case appears to be that ".... Collegium was not consulted. ...." Unfortunately, there is no precise finding in this regard in the said judgment. On the other hand, the content of para 22 of the judgment leaves me with an uncomfortable feeling that there was some departure from the law perhaps under some political pressure. I wish that I were wrong.

476. The second event is a recommendation made by the then CJI apparently with the concurrence of the Collegium for elevation of the Petitioner. [See: *P.D. Dinakaran (1)* (supra); *P.D. Dinakaran (2)* (supra)]. The recommendation did not fructify. Serious allegations of unsuitability of the candidate whose name was recommended surfaced leading to a great deal of public debate. It is unpleasant to recount those allegations. They are recorded in the abovementioned two judgments. There is no allegation of any failure on the part of the Collegium to comply with the procedure laid down in *Second* and *Third Judges cases* in making the ill-fated recommendation. But, the recommendation certainly exposed the shallowness (at least for once) of the theory propounded by this Court in the trilogy of cases commencing from S.P. Gupta and ending with the *Third Judges case* that the CJI and the Collegium are the most appropriate authorities to make an assessment of the suitability of candidates for appointment as Judges of CONSTITUTIONAL COURTS in this country. A few more instances were mentioned at the bar during the course of hearing to demonstrate not only the shallowness of the theory but also the recommendations by the Collegium have not necessarily always been in the best interests of the institution and the nation. It is not really necessary to place on record all the details but it is sufficient to mention that the earlier mentioned two cases are not certainly the only examples of the inappropriate exercise of the power of the Collegium.

477. I am aware that a few bad examples of the improper exercise of the power does not determine the character of the power. Such inappropriate exercise of the power was resorted to also by the

Executive already noticed earlier. Both branches of government are accusing each other of not being worthy of trust.[63] At least a section of the civil society believes that both are right. The impugned AMENDMENT came in the backdrop of the above-mentioned experience.

478. Independence of the judiciary is one of the basic features of the Constitution. A seven-Judge Bench of this Court in *L. Chandra Kumar* v. *Union of India and Ors.* MANU/SC/0261/1997 : (1997) 3 SCC 261 already held that the power of judicial review of legislative action by the CONSTITUTIONAL COURTS is part of the basic structure of the constitution and the exercise of such important function demands the existence of an independent judiciary.

78. The legitimacy of **the power of courts** within constitutional democracies **to review legislative action** has been questioned since the time it was first conceived. **The Constitution of India**, being alive to such criticism, has, **while conferring such power upon the higher judiciary, incorporated important safeguards**. An analysis of the manner in which the **Framers of our Constitution** incorporated provisions relating to the judiciary would indicate that they **were very greatly concerned with securing the independence of the judiciary**. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While **the Constitution** confers the power to strike down laws upon the High Courts and the Supreme Court, it also **contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions**. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. **The constitutional safeguards which ensure the independence of the Judges of the superior judiciary**, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. **We, therefore, hold that the power of judicial review over legislative action vested in the High Courts Under Article 226 and in this Court Under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded**.

(Emphasis supplied)

This aspect of the matter is not in issue. None of the Respondents contested that proposition. The text of the Constitution bears ample testimony for the proposition that the Constitution seeks to establish and nurture an independent judiciary. The makers of the Constitution were eloquent about it. Various Articles of the Constitution seek to protect independence of the judiciary by providing

appropriate safeguards against unwarranted interference either by the Legislature or the Executive, with the Judges conditions of service and privileges incidental to the membership of the CONSTITUTIONAL COURTS, such as, salary, pension, security of tenure of the office etc. The scheme of the Constitution in that regard is already noticed.[64] Such protections are felt necessary not only under our Constitution, but also several other democratic Constitutions (the details of some of them are already noticed in paras 25 to 27). Such protections are incorporated in the light of the experience and knowledge of history. Various attempts made by Governments to subvert the independence of the judiciary were known to the makers of those Constitutions and also the makers of our Constitution.

479. Articles 124 and 217 deal with one of the elements necessary to establish an independent judiciary-the appointment process. The Constituent Assembly was fully conscious of the importance of such an element in establishing and nurturing an independent judiciary. It examined various models in vogue in other countries. Dr. Ambedkar's speech dated 24th May 1949 [65] (quoted supra) is proof of such awareness. The Constituent Assembly was fully appraised of the dangers of entrusting the power of appointment of members of the CONSTITUTIONAL COURTS exclusively to the Executive. At the same time, the Constituent Assembly was also sensitised to the undesirability of entrusting such a power exclusively to the CJI or allowing any role to the Parliament in the matter of the judicial appointments. The probable consequences of assigning such a role were also mentioned by Dr. Ambedkar. The Constituent Assembly was informed of the various models and institutional mechanisms in vogue under various democratic Constitutions for appointment of the members of the superior judiciary. The Constituent Assembly was told by Dr. Ambedkar that the model, such as the one contained in Articles 124 and 217 (as they stood prior to the AMENDMENT)-may be regarded as sufficient for the moment. Various alternative models suggested by the members were not accepted.[66] The legislative history clearly indicates that the members of the Constituent Assembly clearly refused to vest an absolute and unfettered power to appoint Judges of the CONSTITUTIONAL COURTS in any one of the 3 branches of the Constitution. Constituent Assembly declined to assign any role to the Parliament. It declined to vest an unbridled power in the executive. At the same time did not agree with the proposal that the CJI's concurrence is required for any appointment.

480. The system of Collegium the product of an interpretative gloss on the text of Articles 124 and 217 undertaken in the *Second* and *Third Judges case* may or may not be the best to establish and nurture an independent and efficient judiciary. There are seriously competing views expressed by eminent people[67], both on the jurisprudential soundness of the judgments and the manner in which the Collegium system operated in the last two decades.

481. Neither the jurisprudential correctness of the concept of Collegium nor how well or ill the Collegium system operated in the last two decades is the question before us. The question is-whether such a system is immutable or is Parliament competent to amend the Constitution and create an alternative mechanism for selection and appointment of the members of CONSTITUTIONAL COURTS of this country.

482. The basic objection for the impugned AMENDMENT is that it is destructive of the Constitutional objective of establishment of an independent judiciary, and consequently the basic

structure of the Constitution. Therefore, it falls foul of the law laid down by this Court in Bharati case.

483. To decide the correctness of the submission, it is necessary:

(1) to identify the *ratio decidendi* of *Bharati case* where the theory of "basic structure" and "basic features" originated.

(2) Whether the expressions "basic features" and "basic structure" of the Constitution are synonyms or do they convey different ideas or concepts? If so, what are the ideas they convey?

(3) Have they been clearly identified by earlier decisions of this Court?

(4) Are there any principles of law laid down by this Court to identify the basic features of the Constitution?

(5) If the two expressions "basic features" and "basic structure" mean two different things, is it the destruction of any one of them which renders any Constitutional amendment void or should such an amendment be destructive of both of them to become void.

(6) When can a Constitutional amendment be said to destroy or abrogate either a "basic feature" of the Constitution or the "basic structure" of the Constitution?

484. In *Bharati case*, one of the questions was-whether Article 368 confers unbridled power on the Parliament to amend the Constitution. That question arose in the background of an earlier decision of this Court in *I.C. Golak Nath and Ors. v. State of Punjab and Anr.* MANU/SC/0029/1967 : (1967) 2 SCR 762 [68] wherein it was held that Article 368 conferred on Parliament a limited power to amend the Constitution. A Constitutional amendment is 'law' within the meaning of Article 13(3)(a)[69]. Any Constitutional amendment which seeks to take away or even abridge any one of the rights guaranteed under Part-III of the Constitution would be violative of the mandate contained Under Article 13(2)[70] and therefore illegal.

485. The correctness of *I.C. Golak Nath* was one of the questions which fell for consideration of the larger Bench of this Court in *Bharati case*. Eleven opinions were rendered. This Court by majority held that every Article of the Constitution including the articles incorporating fundamental rights are amenable to the amendatory power of the Parliament[71] Under Article 368 which is a constituent power but such power does not enable Parliament to alter the basic structure or framework of the Constitution.[72]

486. That is the origin of the theory of basic structure of the Constitution. Justice Shelat and Grover, J. used the expression basic elements and held that they cannot be abrogated or denuded of their identity. Justice Hegde and Mukherjea, J. used the expression basic elements or fundamental features and held that they cannot be abrogated or emasculated. Justice Jaganmohan Reddy used the expression essential elements of the basic structure and held that they cannot be abrogated thereby destroying the identity of the Constitution. Justice Sikri and Khanna, J. employed the expressions basic structure or framework, foundation, the basic institutional pattern,

which is beyond the power of the Parliament Under Article 368 of the Constitution. Some of the learned Judges mentioned certain features which according to them constitute basic or essential features etc. of the Constitution. All of them were cautious to make it explicit that such features or elements mentioned by them are only illustrative but not exhaustive. In *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* MANU/SC/0075/1980 : (1980) 3 SCC 625, Justice Chandrachud, speaking for the majority of the Constitution Bench, observed that para No. 2 of the summary signed by the nine Judges correctly reflects the majority view.

12. **The summary of** the various judgments in Kesavananda **Bharati** (Supra) was signed by nine out of the thirteen Judges. Paragraph 2 of the summary reads to say that according to the majority, **"Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution"**. Whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it **correctly reflects the majority view**.

(Emphasis supplied)

487. Again in *Waman Rao and Ors. etc. etc. v. Union of India and Ors.* MANU/SC/0091/1980 : (1981) 2 SCC 362, Chief Justice Chandrachud speaking for another Constitution Bench observed:

The judgment of the majority to which seven out of the thirteen Judges were parties, struck a bridle path by holding that in the exercise of the power conferred by Article 368, the Parliament cannot amend the Constitution so as to **damage or destroy the basic structure** of the **Constitution**. (Para 15)

(Emphasis supplied)

By then Justice Chandrachud had already expressed his opinion in *Indira Nehru Gandhi v. Raj Narain* MANU/SC/0304/1975 : (1975) Supp SCC 1 as follows:

663. There was some discussion at the Bar as to which features of the Constitution form the basic structure of the Constitution according to the majority decision in the *Fundamental Rights case*. That, to me, is an inquiry both fruitless and irrelevant. **The ratio of the majority decision is not that some named features of the Constitution are a part of its basic structure but that the power of amendment cannot be exercised so as to damage or destroy the essential elements or the basic structure of the Constitution**, whatever **these expressions may comprehend**.

(Emphasis supplied)

The above passages, indicate that it is not very clear from *Bharati case* whether the expression basic structure, basic features and essential elements convey the same idea or different ideas. Therefore, it is necessary to examine some decisions where the legality of the constitutional amendments was considered by this Court subsequent to *Bharati case*.

488. The earliest of them is *Indira Nehru Gandhi case* (supra). By the Constitution 39th Amendment Article 329A was inserted. Clauses (4) and (5) of the said Article sought to exclude

the complaints of violation of the provisions of The Representation of the People Act, 1951 from scrutiny of any forum whatsoever in so far as such complaints pertain to the election of the Prime Minister or the Speaker of the Lok Sabha. The question whether such an amendment violated any one of the basic features of the Constitution arose. It was argued that the amendment was violative of four basic features of the Constitution. They are: (1) Democratic form of Government; (2) Separation of Powers between the legislature, the executive and the judiciary; (3) the principle of Equality of all before the law; and (4) the concept of the rule of law. A Constitution Bench of this Court held that the impugned clauses were beyond the competence of the Parliament's power Under Article 368.[73]

489. Four out of the five Judges agreed upon the conclusion that the impugned amendment was destructive of the basic structure of the Constitution. Each one of the Judges opined that the impugned provision violated a distinct basic feature of the Constitution leading to the destruction of the basic structure of the Constitution.

490. In *Minerva Mills case* (supra), this Court once again was confronted with the problem of "basic structure of the Constitution".[74] By the Constitution (42nd Amendment) Act among other things, Clauses (4) and (5) came to be added in Article 368 and Article 31-C came to be amended by substituting certain words in the original Article. Chief Justice Chandrachud spoke for the majority of the Court and declared Sections 4 and 55 of the Constitution (42nd Amendment) Act to be violative of the basic structure of the Constitution. Dealing with the amendment to Article 368, this Court held:

Para 16..... The majority (in ***Bharati case***) conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. And what fears can that judgment raise or misgivings generate if it only means this and no more. The **preamble assures** to the people of India a **polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments** to the Constitution as it deems expedient **so long as they do not damage or destroy India's sovereignty and its democratic, republican character.** Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice--social, economic and political; Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of "fraternity assuring the dignity of the individual and the unity of the nation". The newly introduced Clause (5) of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever". No constituent power can conceivably go higher than the sky-high power conferred by Clause (5), for it even empowers the Parliament to "repeal the provisions of this Constitution", that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend.

(Emphasis supplied)

The issue arising from the amendment to Article 31-C was identified to be-whether the directive principles of the State Policy contained in Part-IV can have primacy over the fundamental rights contained in Part-III of the Constitution-because the 42nd amendment sought to subordinate the fundamental rights conferred by Articles 14 and 19 to the directive principles. This Court formulated the question-whether such an amendment was within the amendatory power of the Parliament in view of the law laid down by this Court in Bharati case. The Court propounded that:

41..... It is only if the rights conferred by these two Articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. If they are a part of the basic structure, they cannot be obliterated out of existence in relation to a category of laws described in Article 31-C or, for the matter of that, in relation to laws of any description whatsoever, passed in order to achieve any object or policy whatsoever. This will serve to bring out the point that a total emasculation of the essential features of the Constitution is, by the ratio in Kesavananda Bharati, not permissible to the Parliament.

The Court finally reached the conclusion that the Parts III and IV of the Constitution are like two wheels of a chariot both equally important and held:

56..... To give absolute primacy to one over the other is to disturb the harmony of the **Constitution**. This harmony and balance between the fundamental rights and directive principles is an **essential feature of the basic structure of the Constitution**.

(Emphasis supplied)

This Court concluded that the amendment to Article 31C is destructive of the basic structure as it abrogated the protection of Article 14 & 19 against laws which fall within the ambit of the description contained in Article 31C.

491. In *Waman Rao case* (supra), Article 31-A(1)(a) which came to be introduced by the Constitution (First Amendment) Act was challenged on the ground that it damages the basic structure of the Constitution. The said Article made a declaration that no law providing for acquisition by the State of any 'estate' or of 'any rights therein' etc. shall be deemed to be void on the ground that such law violated Articles 14, 19 and 31 of the Constitution. In other words, though Articles 14, 19 and 31 remain on the statute book, the validity of the category of laws described in Article 31-A(1)(a) cannot be tested on the anvil of Articles 14, 19 and 31. Dealing with the permissibility of such an amendment, the Court held as follows:

In any given case, what is decisive is whether, insofar as the impugned law is concerned, the rights available to persons affected by that law under any of the articles in Part III are totally or substantially withdrawn and not whether the articles, the application of which stands withdrawn in regard to a defined category of laws, continue to be on the statute book so as to be available in respect of laws of other categories. We must therefore conclude that the withdrawal of the application of Articles 14, 19 and 31 in respect of laws which fall Under Clause (a) is total and complete, that is to say, the application of those Articles stands abrogated, not merely abridged, in respect of the impugned enactments which indubitably fall within the ambit of Clause (a). We would like to add that every case in which the protection of a fundamental right is withdrawn will

not necessarily result in damaging or destroying the basic structure of the Constitution. **The question as to whether the basic structure is damaged or destroyed** in any given case would **depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution**. (Para 14)

(Emphasis supplied)

But this Court finally reached the conclusion that the Amendment did not damage or destroy the basic structure and, therefore, upheld the Amendment[75]. Such a conclusion was reached on the basis of the logic-

29. The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution. It is impossible for any government, howsoever expertly advised, socially oriented and prudently managed, to remove every economic disparity without causing some hardship or injustice to a class of persons who also are entitled to equal treatment under the law....

This Court held that though the protection of Articles 14 and 19 is totally abrogated, the withdrawal or abrogation of such protection does not necessarily result in damage or destruction of the basic structure of the Constitution. In other words, this Court held that if in the process of seeking to achieve a larger constitutional goal of removing social and economic disparities in the agricultural sector and effectuating the twin principles contained in Article 39(b) and (a) if new inequalities result marginally and incidentally they cannot be said to be destructive of the basic structure of the Constitution.

492. Both *Minerva Mills* and *Waman Rao* dealt with the abrogation of Articles 14 and 19 or absolute withdrawal of the protection of those fundamental rights with reference to certain classes of legislation. This Court held in the first of the above mentioned cases that such withdrawal amounted to abrogation of a basic feature and, therefore, destructive of the basic structure of the Constitution and in the second case this Court carved out an exception to the rule enunciated in Minerva Mills and held that such abrogation insofar as the law dealing with agrarian reforms did not destroy the basic structure. These cases only indicate that; (i) the expressions 'basic structure' and 'basic features' convey two different ideas, (ii) the basic features are COMPONENTS of basic structure. It also follows from these cases that either a particular Article or set of Articles can constitute a basic feature of the Constitution. Amendment of one or some of the Articles constituting a basic feature may or may not result in the destruction of the basic structure of the Constitution. It all depends on the context.

493. This Court in *S.R. Bommai v. Union of India* MANU/SC/0444/1994 : (1994) 3 SCC 1, recognised the concept of secularism as one of the basic features of the Constitution not because any one of the Articles of the Constitution made any express declaration to that effect but such a conclusion followed from the scheme of the various provisions of the Constitution.[76]

494. This Court in *M. Nagaraj and Ors. v. Union of India and Ors.*[77], MANU/SC/4560/2006 : (2006) 8 SCC 212, deduced the principle that the process of identifying the basic features of the Constitution lies in the identification of some concepts which are beyond the words of any particular provision but pervade the scheme of the Constitution. Some of these concepts may be so important and fundamental as to qualify to be called essential features of the Constitution or part of the basic structure of the Constitution therefore not open to the amendment.

This Court specified the process by which the basic features of the Constitution are to be identified. The Court held:

23...Therefore, **it is important to note that the recognition of a basic structure** in the context of amendment **provides an insight that there are**, beyond the words of particular provisions, **systematic principles underlying and connecting the provisions of the Constitution**. These principles give coherence to the Constitution and make it an organic whole. These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as "essential features" or part of the "basic structure" of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

24. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. **To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature**. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

(Emphasis supplied)

495. In *I.R. Coelho (Dead) By L.Rs. v. State of T.N.* MANU/SC/0595/2007 : (2007) 2 SCC 1, this Court ruled;

129. **Equality, rule of law, judicial review and separation of powers form parts of the basic structure** of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was

not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

130. Realising that it is necessary to secure the enforcement of the fundamental rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether **any particular feature of the Constitution is part of the basic structure-rule of law, separation of powers**-the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure.

(Emphasis supplied)

496. An analysis of the judgments of the abovementioned cases commencing from *Bharati case* yields the following propositions:

(i) Article 368 enables the Parliament to amend any provision of the Constitution;

(ii) The power Under Article 368 however does not enable the Parliament to destroy the basic structure of the Constitution;

(iii) None of the cases referred to above specified or declared what is the basic structure of the Constitution;

(iv) The expressions "basic structure" and "basic features" convey different ideas though some of the learned Judges used those expressions interchangeably.

(v) The basic structure of the Constitution is the sum total of the basic features of the Constitution;

(vi) Some of the basic features identified so far by this Court are democracy, secularism, equality of status, independence of judiciary, judicial review and some of the fundamental rights;

(vii) The abrogation of any one of the basic features results normally in the destruction of the basic structure of the Constitution subject to some exceptions;

(viii) As to when the abrogation of a particular basic feature can be said to destroy the basic structure of the Constitution depends upon the nature of the basic feature sought to be amended and the context of the amendment. There is no universally applicable test vis-à-vis all the basic features.

497. Most of the basic features identified so far in the various cases referred to earlier are not emanations of any single Article of the Constitution. They are concepts emanating from a

combination of a number of Articles each of them creating certain rights or obligations or both (for the sake of easy reference I call them "ELEMENTS"). For example,

(a) when it is said that the democracy is a basic feature of our Constitution, such a feature, in my opinion, emerges from the various articles of the Constitution which provide for the establishment of the legislative bodies[78] (Parliament and the State Legislatures) and the Articles which prescribe a periodic election to these bodies[79] based on adult franchise[80]; the role assigned to these bodies, that is, to make laws for the governance of this Country in their respective spheres[81]; and the establishment of an independent machinery[82] for conducting the periodic elections etc.;

(b) the concept of secularism emanates from various articles contained in the fundamental rights chapter like Articles 15 and 16 which prohibits the State from practicing any kind of discrimination on the ground of religion and Articles 25 to 30 which guarantee certain fundamental rights regarding the freedom of religion to every person and the specific mention of such rights with reference to minorities.

498. The abrogation of a basic feature may ensue as a consequence of the amendment of a single Article in the cluster of Articles constituting the basic feature as it happened in *Minerva Mills case* and *Indira Nehru Gandhi case*.

499. On the other hand, such a result may not ensue in the context of some basic features. For example, Article 326 prescribes that election to Lok Sabha and the Legislative Assemblies shall be on the basis of adult suffrage. Adult suffrage is explained in the said Article as:

...that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

One of the components is that the prescription of the minimum age limit of 18 years. Undoubtedly, the right created Under Article 326 in favour of citizens of India to participate in the election process of the Lok Sabha and the Legislative Assemblies is an integral part (for the sake of convenience, I call it an ELEMENT) of the basic feature i.e. democracy. However, for some valid reasons, if the Parliament were to amend Article 326 fixing a higher minimum age limit, it is doubtful whether such an amendment would be abrogative of the basic feature of democracy thereby resulting in the destruction of the basic structure of the Constitution. It is worthwhile remembering that the minimum age of 18 years occurring Under Article 326 as on today came up by way of the Constitution (Sixty-first Amendment) Act, 1988. Prior to the amendment, the minimum age limit was 21 years.

500. As held by this Court in *Minerva Mills case*, the amendment of a single article may result in the destruction of the basic structure of the Constitution depending upon the nature of the basic feature and the context of the abrogation of that article if the purpose sought to be achieved by the Article constitutes the quintessential to the basic structure of the Constitution.

501. In my opinion, these cases also are really of no help for determining the case on hand as they do not lay down any general principle by which it can be determined as to when can a constitutional amendment be said to destroy the basic structure of the Constitution. In the case on hand, the identity of the basic feature is not in dispute. The question is whether the AMENDMENT is abrogative of the independence of judiciary-(a basic feature) resulting in the destruction of the basic structure of the Constitution.

502. By the very nature of the basic feature with which we are dealing, it does not confer any fundamental or constitutional right in favour of individuals. It is only a means for securing to the people of India, justice, liberty and equality. It creates a collective right in favour of the polity to have a judiciary which is free from the control of the Executive or the Legislature in its essential function of decision making.

503. The challenge to the AMENDMENT is required to be examined in the light of the preceding discussion. The Petitioners argued that (i) Independence of the judiciary is a basic feature (COMPONENT) of the basic structure of the Constitution; (ii) the process of appointment of members of constitutional courts is an essential ingredient (ELEMENT) of such COMPONENT; (iii) the process prescribed under unamended Articles 124 and 217, as interpreted by this Court in the *Second* and *Third Judges cases*, is a basic feature and was so designed by framers of the Constitution for ensuring independence of the judiciary, by providing for primacy of the opinion of the CJI (Collegium); and not of the opinion of the President (the Executive); (iv) the AMENDMENT dilutes such primacy and tilts the balance in favour of the Executive, thereby abrogating a basic feature, leading to destruction of the basic structure.

504. The prime target of attack by the Petitioners is Section 2(a) of the AMENDMENT by which the institutional mechanism for appointment of judges of constitutional courts is replaced. According to the Petitioners, the AMENDMENT is a brazen attempt by the Executive branch to grab the power of appointing Judges to CONSTITUTIONAL COURTS. Such shift of power into the hands of Executive would enable packing of the CONSTITUTIONAL COURTS with persons who are likely to be less independent.

505. It is further argued that the principles laid down in the Second and Third Judges cases are not based purely on the interpretation of the text of the Constitution as it stood prior to the impugned AMENDMENT but also on the basis of a fundamental Constitutional principle that an independent judiciary is one of the basic features of the Constitution. The procedure for appointment of the Judges of the CONSTITUTIONAL COURTS is an important element in the establishment and nurturing of an independent judiciary. Such conclusion not only flows from the text of the Articles 124 and 217 as they stood prior to the impugned AMENDMENT but flow from a necessary implication emanating from the scheme of the Constitution as evidenced by Articles 32, 50, 112(3)(d), 113(1), 203(1), 125(2), 221(2) etc.

506. Mr. Nariman, learned senior Counsel appearing for one of the Petitioners emphatically submitted that he is not against change of the mechanism provided Under Articles 124 and 217. He submitted that this aspect of the matter fell for consideration of Justice M.N. Venkatachaliah Commission[83], which also recommended creation of a National Judicial Appointments Commission but with a slightly different composition[84]. If really Parliament wanted to change in

the mechanism for the selection of the members of the superior judiciary, the model recommended by the Justice M.N. Venkatachaliah Commission could well have been adopted. According to Mr. Nariman the model identified by Venkatachaliah Commission is more suitable for preservation of independence of the judiciary than the model adopted in the AMENDMENT. Mr. Nariman further argued that no reasons are given by the Union of India explaining why recommendations of the Justice M.N. Venkatachaliah Commission were not accepted.

507. On the other hand, it is submitted by the learned Attorney General and other senior counsel appearing for various Respondents;

(i) Parliament's power to amend the Constitution is plenary subject only to the limitation that cannot abrogate the basic structure of the Constitution. The AMENDMENT in no way abrogates the basic structure of the Constitution.

(ii) Independence of judiciary is not the only objective envisaged by the Constitution, it also envisages an efficient judiciary. To achieve such twin objects, Parliament in its wisdom thought that the selection process of the members of the CONSTITUTIONAL COURTS as it existed prior to the AMENDMENT required modification. The wisdom of Parliament is not amenable to the scrutiny of this Court, even in the context of ordinary legislation. Logically, a constitutional amendment therefore should enjoy a greater degree of immunity.

In other words, where the goal sought to be achieved by Parliament is constitutionally legitimate, the legislation by which such a goal is sought to be achieved can be questioned only on limited grounds. They are (i) lack of legislative competence, (ii) the legislation violates any one of the fundamental rights enumerated in Part III of the Constitution, or is in contravention of some other express prohibition of the Constitution. Absent such objectionable features, the possibility that the goal sought to be achieved by the legislation can be achieved through modes other than the one chosen by the legislation can never be a ground for invalidating even an ordinary legislation as has been consistently held by this Court. In the case of a constitutional amendment question of legislative competence in the above-mentioned sense and conflict with the other provisions of the Constitution are irrelevant and does not arise.

(iii) Checks and balances of powers conferred by the Constitution on the three great branches of governance-Legislature, Executive and Judiciary is the most basic feature of all democratic constitutions. Absolute independence of any one of the three branches is inconsistent with core democratic values and the scheme of our Constitution. This Court by an interpretative process of the Constitution as it stood prior to the AMENDMENT disturbed such balance. The AMENDMENT only seeks to restore such balance and therefore cannot be said to be destructive of the basic structure of the Constitution.

(iv) That the law laid down by this Court in Second and *Third Judges case* is no more relevant in view of the fact that the text of the Constitution which was the subject matter of interpretation in the said cases stands amended. In the light of well settled principles of interpretation of statutes the law laid down in those two cases is no more a good law. It is further argued that in the event this Court comes to the conclusion that the law laid down in the abovementioned two judgments has some relevance for determining the constitutional validity of the AMENDMENT and also the

correctness of the principles laid down in those judgments requires reconsideration by a Bench of appropriate strength. According to the Attorney General and other learned Counsel for Respondents, the abovementioned two judgments are contrary to the text of the Constitution as it stood then and in complete disregard of the constitutional history and background of the relevant provisions. It is further submitted that under the scheme of the Constitution, neither this Court nor High Courts are conferred unqualified autonomy though a large measure of autonomy is conferred under various provisions. For example the salaries, privileges and allowances, pension etc. could still be regulated by law made by Parliament Under Article 125 and 221, 137, 140, 145 etc.

(v) It is submitted that independence of the judiciary is indisputably a basic feature of the Constitution. An essential element of this basic feature is that the President (Executive) should not have an unfettered discretion in such appointment process but not that the opinion of the CJI (Collegium) should have primacy or dominance. The judgments of this Court in the Second and *Third Judges cases* are not only counter textual but also plainly contrary to the intent of the Constituent Assembly and clearly beyond limits of judicial power, it is an exercise of constituent authority in the disguise of interpretation. Under the AMENDMENT, the President has **no** discretion in the matter of appointment of Judges of **CONSTITUTIONAL COURTS**. He is bound by the recommendation of the NJAC wherein members of the judiciary constitute the single largest group. Parliament exercising constituent power (Under Article 368) considered it appropriate that representatives of the Civil Society should be accorded a participatory role in the process of appointments to CONSTITUTIONAL COURTS and that their presence would be a check on potential and consequently ruinous 'trade offs'; (i) between and amongst the three members representing the judiciary and (ii) between the judiciary and the executive; and would accentuate transparency to what had hitherto been an opaque process. Such wisdom of the Parliament in not open to question. It is an established and venerated principle that the Court would not sit in judgment over the wisdom of Parliament **even** in respect of an ordinary legislation; a constitutional amendment invites a greater degree of deference.

(vi) Even under the scheme of the AMENDMENT, judiciary has a pre-dominant role. The apprehension that, under the new dispensation, Executive would have the opportunity of packing the CONSTITUTIONAL COURTS of this country with cronies is illogical and baseless. The presence of three senior most Judges of this Court in the NJAC is a wholesome safeguard against such possibility. Any two of the three Judges can stall such an effort, if ever attempted by the Executive.

(vii) The fact that a Commission headed by Justice M.N. Venkatachaliah made certain recommendations need not necessarily mean that the model suggested by the Commission is the only model for securing independence of the judiciary or the best model. At any rate, the choice of the appropriate model necessarily involves a value judgment. The model chosen by the Parliament in exercise of its constituent powers cannot be held to be unconstitutional only on the ground that in the opinion of some, there are better models or alternatives. Such a value judgment is exclusively in the realm of the Parliament's constituent powers. It is also argued that the mechanism for selection of members of the constitutional courts as expounded in the *Second* and the *Third Judges cases*, even according to Mr. Nariman's opinion is not the best. Mr. Nariman is on record stating so in one of the books authored by him "Before Memory Fades: An Autobiography"[85].

508. Any appointment process established under the Constitution must necessarily be conducive for establishment of not only an independent judiciary but also ensure its efficiency. Two qualities essential for preservation of liberty.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be **essential to the preservation of liberty**, it is evident that **each department** should have a will of its own, and consequently **should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others**. Were this principle rigorously adhered to, **it would require that all the appointments** for the supreme executive, legislative, and judiciary magistracies **should be drawn from the same fountain of authority, the people**, through channels having no communication whatever with one another. Some difficulties, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. **In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications**.[86]

(Emphasis supplied)

Judges who could decide causes brought before them expeditiously and consistent with applicable principles of jurisprudence, generate confidence, in litigants and the polity that they indeed dispense justice. Whether the appointment process prior to the AMENDMENT yielded such appointments has been deeply contentious. As submitted by the learned Attorney General, the history of appointments to CONSTITUTIONAL COURTS in our Republic could be divided into two phases-pre and post Second Judges case. No doubt during both phases, the appointment process yielded mixed results, on the index of both independence and efficiency. Some outstanding and some not so outstanding persona came to be appointed in both phases. Allegations of seriously unworthy appointments abound but our system provides for no mechanism for audit or qualitative analysis. Such systemic deficit has pathological consequences.

509. Parliament representing the majoritarian will was satisfied that the existing process warrants change and acted in exercise of its constituent power and concomitant discretion. Such constituent assessment of the need is clearly off limits to judicial review. Whether curative ushered in by the AMENDMENT transgresses the permissible limits of amendatory power is certainly amenable to Judicial Review because of the law declared in *Bharati case* and followed consistently thereafter.

510. The text and scheme of the **AMENDMENT** excludes discretion to the President in making appointments to CONSTITUTIONAL COURTS and the President is required to accept recommendations by the NJAC. The amended Articles stipulate that judges of CONSTITUTIONAL COURTS shall be appointed by the President..... on the recommendation of the NJAC.

511. Prior to the AMENDMENT, there were **only** two parties to the appointment process, the Executive and the Judiciary. The relative importance of their roles varied from time to time. The AMENDMENT makes three important changes-(i) primacy of judiciary is whittled down; (ii) role

of the executive is also curtailed; and (iii) representatives of civil society are made part of the mechanism.

512. Primacy of the opinion of judiciary in the matter of judicial appointments is not the only means for the establishment of an independent and efficient judiciary. There is abundance of opinion (in discerning and responsible quarters of the civil society in the legal fraternity, jurists, political theorists and scholars) that primacy to the opinion of judiciary is not a normative or constitutional fundamental for establishment of an independent and efficient judiciary. Such an assumption has been proved to be of doubtful accuracy. It is Parliament's asserted assumption that induction of civil society representation will bring about critically desirable transparency, commitment and participation of the ultimate stakeholders-the people. The fountain of all constitutional authority, to ensure appointment of the most suitable persons with due regard to legitimate aspirations of the several competing interests. Various democratic societies have and are experimenting with models involving association of civil society representation in such selection process. Assessment of the product of such experiments are however inconclusive. The question is not whether the model conceived by the AMENDMENT would yield a more independent and efficient judiciary. The question is whether Parliament's wisdom and authority to undertake such an experiment by resort to constituent power is subject to curial audit.

513. As rightly pointed out by the Attorney General, the basic feature of the Constitution is not primacy of the opinion of the CJI (Collegium) but lies in non investiture of absolute power in the President (Executive) to choose and appoint judges of **CONSTITUTIONAL COURTS**. That feature is not abrogated by the AMENDMENT. The Executive may at best only make a proposal through its representative in the NJAC, i.e. the Law Minister. Such proposal, if considered unworthy, can still be rejected by the other members of the NJAC. The worth of a candidate does not depend upon who proposes the name nor the candidate's political association, if any, should be a disqualification.

...,even party men can be fiercely independent after being appointed judges, as has been proved by some judges who were active in politics. Justice K.S. Hegde served as a member of Rajya Sabha from 1952 to 1957 and was elevated as a High Court judge directly from Rajya Sabha. Though he was a congress MP, he proved to be so independent that he was superseded in 1973 in the appointment of the CJI by his own party's government. Justice Tekchand was also a member of Rajya Sabha before becoming a judge. He was appointed when he was a sitting MP, but he proved to be a fine judge whose report on prohibition is a landmark. Another prominent example is Justice V.R. Krishna Iyer who was made a judge of the Kerala High Court in 1968, though he had not only been an MLA but also a minister in the Namboodiripad government (1957-59) in Kerala. In 1973, Justice S.M. Sikri, the CJI, was totally opposed to the elevation of Justice Iyer to the apex court on the ground that he had been a politician who held the office of a cabinet minister in Kerala. It was A.N. Ray who cleared his elevation, and Justice Iyer proved to be a luminous example of what a judge ought to be. He was one of the finest judges who ever sat on the bench of the Supreme Court who tried to bridge the gap between the Supreme Court and the common people. There is also the example of Justice Bahrul Islam who served as a member of Rajya Sabha for 10 years before being appointed a High Court judge. He was subsequently elevated to the Supreme Court. He absolved Jagannath Mishra, the Chief Minister of Bihar, in the urban cooperative bank scandal, and immediately thereafter resigned to contest the Lok Sabha election as a Congress(I) candidate

from Barpeta-he never enjoyed a clean reputation. So, it is not proper to make any generalization. People of impeccable rectitude have to be handpicked. [87]

514. Critical analysis of Articles 124, 217 and 124-A and 124-B leads to the position that the Executive Branch of Government cannot push through an 'undeserving candidate' so long as at least two members representing the Judicial Branch are united in their view as to unsuitability of that candidate. Even one eminent person and a single judicial member of NJAC could effectively stall entry of an unworthy appointment. Similarly, the judicial members also cannot push through persons of their choice unless at least one other member belonging to the non-judicial block supports the candidate proposed by them.

515. A democratic form of government is perhaps the best institution invented for preservation of liberties. At least that is the belief of societies which adopt this model of governance. True, there are many variants of democracy. Analysis of the variants is outside the scope of this judgment. Under any constitutional model, primary responsibility to preserve liberties of the people is entrusted to the legislative and executive branches. Such entrustment is predicated on the structural and empirical assumption that legislators chosen periodically would strive to protect the liberties of their "only masters-the people". This is for two reasons operating in tandem. They are the obligation to discharge the trust reposed and the fear of losing the glory of being the chosen representative. An in built possibility in the system of periodic elections.

516. To assume or assert that judiciary alone is concerned with the preservation of liberties and does that job well, is an assumption that is dogmatic, bereft of evidentiary basis and historically disproved. Eminent constitution jurist and teacher Laurence H. Tribe has the following to say in the context of the American experience.

No one should assume that the Supreme Court need always strike down laws and executive actions in order to protect our liberties. On the contrary, sometimes the Court best guarantees our rights by deferring to, rather than overruling, the political branches. When the Supreme Court, from 1900 to 1937, struck down dozens of child labor laws, minimum wage laws, working condition Regulations, and laws protecting workers; rights to organize unions, on the ground that such rules infringed on property rights and violated "liberty of contract," the only rights the Court really vindicated were the rights to be overworked, underpaid, or unemployed. The Court eventually reversed itself on these issues when it recognized that, in twentieth-century America, such laws are not intrusions upon human freedom in any meaningful sense, but are instead entirely reasonable and just ways of combating economic subjugation. In upholding a minimum wage law in the watershed case of West Coast Hotel v. Parrish, the Supreme Court concluded in 1937 that, in the light of "recent economic experience", such statutes were justified because they prevent "the exploitation of a class of workers in ways detrimental to their health and well being."

Naturally, in this imperfect world, the Supreme Court has not always guarded our liberties as jealously as it should. During the First World War and again in the McCarthy era, the Court often shrank from the affirmation of our rights to think and speak as we believe. And in the war hysteria following bombing of Pearl Harbor, the Supreme Court in *Korematsu v. United States* upheld the imprisonment of thousands of Americans of Japanese ancestry who had committed no crime. In light of such lapses, some have argued that when it comes to protecting fundamental rights, the

Supreme Court is essentially redundant: on most occasions the Congress and the President will adequately safeguard our rights, and in those difficult times when the political branches cannot be counted on, neither can the Court.[88]

517. Our experience is not dissimilar. Judgments in *A.K. Gopalan*[89], *Sankalchand*[90] and *ADM Jabalpur*[91] (to mention a few) should lead to an identical inference that in difficult times when political branches cannot be counted upon, neither can the Judiciary. The point sought to be highlighted is that judiciary is not the ONLY constitutional organ which protects liberties of the people. Accordingly, primacy to the opinion of the judiciary in the matter of judicial appointments is not the only mode of securing independence of judiciary for protection of liberties. Consequently, the assumption that primacy of the Judicial Branch in the appointments process is an essential element and thus a basic feature is empirically flawed without any basis either in the constitutional history of the Nation or any other and normatively fallacious apart from being contrary to political theory.

518. I now deal with the submission that presence of the law minister in the NJAC undermines independence of judiciary. According to the Petitioners, the presence of a member of the Executive invariably has the effect of shifting the power dynamics. The presence of the Law Minister in the NJAC which confers 1/6 of the voting power per se undermines the independence of the judiciary. The submission is untenable. The Executive with a vast administrative machinery under its control is capable of making enormous and valuable contribution to the selection process. The objection is justified to some extent on the trust deficit in the Executive Branch in the constitutional sense[92], to be a component of the NJAC. The same logic applies a fortiari to the Judicial branch, notwithstanding the belief that it is the least dangerous branch. The Constituent Assembly emphatically declined to repose exclusive trust even in the CJI. To wholly eliminate the Executive from the process of selection would be inconsistent with the foundational premise that government in a democracy is by chosen representatives of the people. Under the scheme of our Constitution, the Executive is chartered clear authority to administer critical areas such as defence of the realm, internal security, maintenance of public order, taxation, management of fiscal policies and a host of other aspects, touching every aspect of the administration of the Nation and lives of its people. In this context, to hold that it should be totally excluded from the process of appointing judges would be wholly illogical and inconsistent with the foundations of the theory of democracy and a doctrinal heresy. Such exclusion has no parallel in any other democracy whose models were examined by the Constituent Assembly and none other were brought to our notice either. Established principles of constitutional government, practices in other democratic constitutional arrangements and the fact that the Constituent Assembly provided a role for the Executive clearly prohibit the inference that Executive participation in the selection process abrogates a basic feature. The Attorney General is right in his submission that exclusion of the Executive Branch is destructive of the basic feature of checks and balances-a fundamental principle in constitutional theory.

519. That takes me to the second provision which is under challenge. Article 124A(1)(d) which stipulates that the NJAC should consist of two eminent persons[93]. Considerable debate took place during the course of hearing regarding validity of this provision, the gist of which is captured in the judgment of Khehar, J. The attack is again on the ground that the provision is utterly without guidance regarding the choice of eminent persons. Petitioners argued that (i) there could be

bipartisan compromise between the party in power and the opposition, resulting in sharing the two slots earmarked for eminent persons. Such possibility would eventually enable political parties to make appointments purely on political considerations, thereby destroying independence of judiciary; (ii) even assuming that the two eminent persons nominated are absolute political neutrals, but are strangers to the judicial system, they would not be able to make any meaningful contribution to the selection process, as they would have no resources to collect appropriate data relevant for the decision making process; (iii) the possibility of two eminent persons vetoing the candidature of a person approved unanimously by the three judicial members of the NJAC itself is destructive of the basic structure.

520. Transparency is a vital factor in constitutional governance. This Court in innumerable cases noted that constitutionalism demands rationality in every sphere of State action. In the context of judicial proceedings, this Court held in *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr.* MANU/SC/0044/1966 : AIR 1967 SC 1, para 20:

20...Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open and must permit the public admission to the court-room. As Bentham has observed:

In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity.

Transparency is an aspect of rationality. The need for transparency is more in the case of appointment process. Proceedings of the collegium were absolutely opaque and inaccessible both to public and history, barring occasional leaks. Ruma Pal, J. is on record-

Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system.[94]

One beneficial purpose the induction of representatives of civil society would hopefully serve is that it acts as a check on unwholesome trade-offs within the collegium and incestuous accommodations between Judicial and Executive branches. To believe that members of the judiciary alone could bring valuable inputs to the appointment process requires great conceit and disrespect for the civil society. Iyer, J. cautioned-

74...And when criteria for **transfers** of Judges are put forward by the **President** which may upset past practices we must, as democrats, remember Learned Hand who once said that the spirit of liberty is "the spirit which is not too sure that it is right". That great Judge was fond of recalling Cromwell's statement: "I beseech ye in the bowels of Christ, think that ye may be mistaken." He told a Senate Committee. "**I should like to have that written over the portals of every church, every school and every courthouse, any may I say, of every legislative body in the United States. I should like to have every court begin "I beseech ye in the bowels of Christ, think that we may be mistaken**." (Yale Law Journal: Vol. 71: 1961, November part).[95]

(Emphasis supplied)

Replace "transfers" and "President" with "appointments" and "Parliament" and Iyer, J's admonition is custom made to answer the objections (ii) and (iii) of the Petitioners.

521. There is a possibility that the apprehension expressed by the Petitioners might come true. The possibility of abuse of a power conferred by the Constitution is no ground for denying the authority to confer such power. Bachawat, J. in I.C. Golak Nath (supra) opined as follows:

235. It is said that the Parliament is abusing its power of amendment by making too many frequent changes. If the Parliament has the power to make the amendments, the choice of making any particular amendment must be left to it. Questions of policy cannot be debated in this Court. The possibility of abuse of a power is not the test of its existence. In Webb v. Outrim [1907] A.C. 81, Lord Hobhouse said, "If they find that on the due construction of the Act a legislative power falls within Section 92, it would be quite wrong of them to deny its existence because by some possibility it may of be abused, or limit the range which otherwise would be open to the Dominion Parliament". With reference to the doctrine of implied prohibition against the exercise of power ascertained in accordance with ordinary rules of construction, Knox C.J., in the Amalgamated Society of Engineers v. The Adelaide Steamship Co. Limited 129 C.L.R. 151, said, "It means the necessity of protection against the aggression of some outside and possibly hostile body. It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of power is no reason in British law for limiting the natural force of the language creating them.

However, it was a dissenting opinion. But this Court in *I.R. Coelho* (supra), Sabharwal, J. speaking for a unanimous Bench of nine Judges, held as follows:

76. It is also contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31B is not in question before us. **Further, mere possibility of abuse is not a relevant test to determine the validity of a provision**. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power.

(Emphasis supplied)

In the final analysis, all power could be misused including judicial power. The remedy is not to deny grant of power but to structure it so as to eliminate the potential for abuse. The power to nominate two eminent persons is conferred upon three high constitutional functionaries-the Prime Minister, the Leader of the Opposition and the CJI. It is elementary political knowledge that the Prime Minister and the Leader of Opposition would always have conflicting political interests and would rarely agree upon any issue. Nonetheless, possibility of a bipartisan compromise cannot be ruled out. Though, the presence of CJI in the Committee should normally be a strong deterrent, the possibility of the CJI failing to perceive a political compromise or helplessness in the event of such compromise, cannot be ruled out.

522. It is incontestable that nomination of eminent persons is not immune to judicial review. There is thus possibility of delay in functioning of NJAC and inevitably the process of appointments to CONSTITUTIONAL COURTS. It is, therefore, essential that there must be an entrenched process of nomination of eminent persons which eliminates risk of possible bipartisan compromises. The only conceivable curative is to incorporate another tier of scrutiny in the process of nomination. In my considered view, the following safeguard would bring this process within permissible contours of the basic feature simultaneously eliminating the 'delay factor'. The Committee contemplated Under Article 124-A(1)(a) should prepare a panel of three members for each of the two categories of the nominees (for eminent persons)-in all a panel of six persons. Such panel should be placed before the full house of the Supreme Court for voting. Nominees securing the highest vote in each of the two categories should eventually be nominated as eminent members of the NJAC. Such procedure would still preserve the choice of eminent persons primarily with the Committee contemplated Under Article 124-A, while incorporating sufficient safeguard against possible abuse of the power by the Committee.

523. The third provision whose validity is under attack is Article 124B(c), which obligates NJAC to ensure that the person recommended is of ability and integrity. The challenge is on the ground that the AMENDMENT does not lay down any guidelines to be followed by the NJAC for assessing ability and integrity. Even in the absence of any express declaration, such an obligation is inherent and implied, having regard to functional responsibilities entrusted to the NJAC. The precision is only an *abundanti cautela*. Perhaps prompted by certain bad experiences of the past, both pre and post Second Judges case.

524. Having regard to the nature (i) of the document by which such obligation is created; (ii) the composition of the body (NJAC) upon which the obligation is cast; and (iii) the nature of the assignment, the argument is required to be rejected. NJAC is a constitutional authority created to perform an important constitutional function. Its charter is the Constitution itself. Notwithstanding, the prolixity of our Constitution, a constitution is not expected or required to spell out every minute detail regarding administration of the State. In the context of the American Constitution, it is said that the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices. Constitutions enumerate structural arrangements of Government and specify the outer limits of powers of each organ of the State. Within such limits, how the various organs of the State ought to discharge their allocated

functions is a matter of detail, either to be provided by law or convention. All written democratic Constitutions are full of abstract moral commands!

525. Three members of the highest judicial body of this country, a member of the Union Cabinet and two eminent persons chosen by a Committee consisting of three exalted office holders under the Constitution constitute the NJAC. To suggest that the NJAC requires detailed guidelines expressly spelt out in the text of the Constitution amounts to judicially mandating inflexible standards for constitutional drafting. The task of expounding a Constitution is crucially different from that of construing a statute.

526. Provisions of the Constitution are not to be interpreted in a broad and liberal way. They are not to be construed in the manner in which a piece of subordinate legislation or, for that matter, even a statute is required to be interpreted. This Court in *S.R.* Bommai had an occasion to consider this question. Dealing with the authority of the President Under Article 356 of the Constitution of India and whether the exercise of such authority by the President is amenable to judicial review on the parameters enunciated by this Court in *Barium Chemicals Ltd.* v. *Co. Law Board* MANU/SC/0037/1966 : AIR 1967 SC 295, rejected the submission.

35...The test laid down by this Court in *Barium Chemicals Ltd.* v. *Co. Law Board* and subsequent decisions for adjudging the validity of administrative action can have no application for testing the satisfaction of the President Under Article 356. It must be remembered that the power conferred by Article 356 is of an extraordinary nature to be exercised in grave emergencies and, therefore, the exercise of such power cannot be equated to the power exercised in administrative law field and cannot, therefore, be tested by the same yardstick....

255...The exercise of the power Under Article 356 is a constitutional exercise of the power. The normal subjective satisfaction of an administrative decision on objective basis applied by the courts to administrative decisions by subordinate officers or quasi-judicial or subordinate legislation does not apply to the decision of the President Under Article 356.

373....So far as the approach adopted by this Court in *Barium Chemicals* MANU/SC/0905/2002 : (2002) 8 SCC 481 is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot *ipso facto* be extended to the exercise of a constitutional power Under Article 356. Having regard to the fact that this is a high constitutional power exercised by the highest constitutional functionary of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities--nor at any rate, in their entirety.

527. Such a test is relevant only for bodies created by statutes and subordinate legislation. The functioning of any constitutional body is only disciplined by appropriate legislation. Constitution does not lay down any guidelines for the functioning of the President and Prime Minister nor the Governors or the Chief Ministers. Performance of constitutional duties entrusted to them is structured by legislation and constitutional culture. The provisions of the Constitution cannot be read like a last will and testament lest it becomes one. Even prior to the AMENDMENT, the constitutional text had no express guidelines for the President and the CJI to follow. It is however nobody's case that the pre-AMENDMENT selection scenario conferred any uncanalised discretion

and therefore resulted in some undesirable judicial appointments. If in practice, occasionally personal preferences outweighed concerns of public interest resulting in undesirable appointments, it is not because of constitutional silences in this area but because of shortcomings in the ethical standards of the participants in the selection process. After the AMENDMENT, the obligation is unvaried. The only change is in the composition of the players to whom the task is entrusted and the mode of performing the task is altered with a view to achieve greater degree of transparency in the selection process. To contend that the AMENDMENT is destructive of the basic structure since it does not lay down any guidelines tantamounts to holding that the design of the Constitution as originally enacted is defective!

528. The next submission which is required to be dealt is that Section 6(6) of the ACT which stipulates that if any two members of the NJAC do not agree with the recommendation proposed by the NJAC, the NJAC shall not recommend such candidate. In the opinion of the Petitioners, it is a provision which confers veto power on two members of the NJAC to scuttle proposals. It is submitted that though the provision is facially innocuous, in practice, this would result in giving the Executive a power of veto to reject the proposals made by the three judicial members of the NJAC. Such a provision is violative of the basic structure of the Constitution. It is further argued that though the provision is not part of the AMENDMENT, since the AMENDMENT and the ACT are made simultaneously and the ACT being complementary to the AMENDMENT, the ACT must be understood to be a part of the design of the AMENDMENT and, therefore, Section 6(6) is required to be struck down on the ground it is violative of the basic structure of the Constitution.

529. The Respondents submitted that Section 6(6) of the ACT only prescribes a special majority for sanctifying the recommendations of NJAC. Prescription of special majorities in law is a known phenomenon. The Constitution itself prescribes special majorities in certain cases. For example, Article 368(2) prescribes a special majority for amending the Constitution. Similarly, Article 124(4) prescribes a special majority for the impeachment of judges of the CONSTITUTIONAL COURTS. It is argued that the Petitioners presumption that only Government could take advantage of the prescription Under Section 6(6) is totally baseless. In a given case it may happen that two judicial members of the NJAC can turn down the proposal of the NJAC. Learned Attorney General also submitted that such a prescription of a special majority is also a part of the regime created under Second Judges case and, therefore, there is nothing constitutionally objectionable in such a prescription.

530. The question whether the content of Section 6(6) confers a power of veto or prescribes a special majority is only of semantic relevance. Whatever name we call it, the result is the same. The two members of the NJAC can override the opinion of the other four and stall the recommendation. I do not find anything inherently illegal about such a prescription. For the purpose of the present case, I do not even want to embark upon an enquiry whether the constitutional fascination for the basic structure doctrine be made a Trojan horse to penetrate the entire legislative camp. For my part, I would like to examine the question in greater detail before answering the question. There are conflicting views of this Court on this proposition.[96] In my opinion, such an enquiry is not required in this case in view of the majority decision that the AMENDMENT is unsustainable. Some of the learned Counsel for the Petitioners placed reliance on *S.R. Bommai case* as a justification for the invocation of the doctrine of basic structure.

531. Only to indicate but not determine conclusively the scope of the enquiry to answer the submission of the Petitioners, I examine *S.R. Bommai case*. The question before this Court was whether the action of the President in invoking the powers Under Article 356 was constitutionally tenable? In other words, whether the material on which the President acted was constitutionally relevant for the invocation of powers Under Article 356. The submission of the Petitioners before this Court was that the exercise of powers Under Article 356 was inconsistent with two features of the Constitution, i.e. the democracy and federalism, therefore, destructive of the basic structure, as the Presidential action Under Article 356 resulted in the super session of the democratically elected State Governments by the Union Government.

532. Repelling the contention, this Court held that secularism is also one of the basic features of the Constitution. The conscious inaction of the various State Governments and consequential failure to prevent certain activities which in the opinion of the Petitioners (endorsed by this Court by the judgment) would ultimately result in the destruction of the secular fabric of the Constitution has certainly a relevant consideration for the exercise of extraordinary powers vested in the President Under Article 356. Because Article 356 obligates the President to resort to the action contemplated thereunder only if the President is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Failure of the State Government to prevent activities which are bound to destroy the communal harmony between people following different religions is certainly inconsistent with the constitutional obligation of the State to upheld the Constitution of which secularism is a basic feature. *S.R. Bommai case* is no authority for the proposition that the validity of a legislation is amenable to judicial review on the ground of the basic structure doctrine.

533. The fiasco created in *Dinakaran case* (supra) and Shanti *Bhushan case* (supra) would justify the participation of the members of the civil society in the process to eliminate from the selection process the maladies involved in the process pointed out by Ruma Pal, J. The abovementioned two are not the only cases where the system failed. It is a matter of public record that in the last 20 years, after the advent of the collegium system, number of recommendations made by the collegia of High Courts came to be rejected by the collegium of the Supreme Court. There are also cases where the collegium of this Court quickly retraced its steps having rejected the recommendations of a particular name made by the High Court collegium giving scope for a great deal of speculation as to the factors which must have weighed with the collegium to make such a quick volteface. Such decisions may be justified in some cases and may not in other cases. There is no accountability in this regard. The records are absolutely beyond the reach of any person including the judges of this Court who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or good for the people of this country.

534. For all the abovementioned reasons, I would upheld the AMENDMENT. However, in view of the majority decision, I do not see any useful purpose in examining the constitutionality of the ACT.

535. Only an independent and efficient judicial system can create confidence in the society which it serves. The ever increasing pendency of matters before various CONSTITUTIONAL COURTS of this country is clearly not a certificate of efficiency. The frequency with which the residuary

jurisdiction of this Court Under Article 136 is invoked seeking correction of errors committed by the High Courts, some of which are trivial and some profound coupled with bewildering number of conflicting decisions rendered by the various benches of this Court only indicate that a comprehensive reform of the system is overdue. Selection process of the Judges to the CONSTITUTIONAL COURTS is only one of the aspect of such reforms. An attempt in that direction, unfortunately, failed to secure the approval of this Court leaving this Court with the sole responsibility and exclusive accountability of the efficiency of the legal system. I only part with this case recollecting the words of Macaulay-"reform that you may preserve"[97]. Future alone can tell whether I am rightly reminded of those words or not.

Madan B. Lokur, J.

536. I have had the benefit of going through the draft order prepared by my learned brothers Justice Khehar, Justice Chelameswar and Justice Kurian Joseph. While endorsing the view expressed by my learned brothers Justice Khehar and Justice Chelameswar, I would like to add a few words on the procedural aspect of dealing with an application for recusal.

537. Justice Khehar has mentioned in Paragraph 17 of the draft order as follows:

The decision to remain as a member of the reconstituted Bench was mine, and mine alone.

538. In my respectful opinion, when an application is made for the recusal of a judge from hearing a case, the application is made to the concerned judge and not to the Bench as a whole. Therefore, my learned brother Justice Khehar is absolutely correct in stating that the decision is entirely his, and I respect his decision.

539. In a detailed order pronounced in ***Court on its own motion*** **v.** ***State and Ors.*** MANU/DE/9073/2007 reference was made to a decision of the Supreme Court of the United States in ***Jewell Ridge Coal Corporation*** **v.** ***Local No. 6167, United Mine Workers of America*** MANU/USSC/0149/1945 : 325 US 897 (1945), wherein it was held that a complaint as to the qualification of a justice of the Supreme Court to take part in the decision of a cause cannot properly be addressed to the Court as a whole and it is the responsibility of each justice to determine for himself the propriety of withdrawing from a case.

540. This view was adverted to by Justice Rehnquist in **Hanrahan v. Hampton** MANU/USSC/0082/1980 : 446 US 1301 (1980) in the following words:

Plaintiffs-Respondents and their counsel in these cases have moved that I be recused from the proceedings in this case for the reasons stated in their 14-page motion and their five appendices filed with the Clerk of this Court on April 3, 1980. The motion is opposed by the state-Defendant Petitioners in the action. Since generally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer, see Jewell Ridge Coal Corporation v. Mine Workers MANU/USSC/0082/1980 : 325 U.S. 897 (1945) (denial of petition for rehearing) (Jackson, J., concurring), I shall treat the motion as addressed to me individually. I have considered the motion, the Appendices, the response of the state

Defendants, 28 U.S.C. 455 (1976 ed. And Supp. II), and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly denied.

541. The issue of recusal may be looked at slightly differently apart from the legal nuance. What would happen if, in a Bench of five judges, an application is moved for the recusal of Judge A and after hearing the application Judge A decides to recuse from the case but the other four judges disagree and express the opinion that there is no justifiable reason for Judge A to recuse from the hearing? Can Judge A be compelled to hear the case even though he/she is desirous of recusing from the hearing? It is to get over such a difficult situation that the application for recusal is actually to an individual judge and not the Bench as a whole.

542. As far as the view expressed by Justice Kurian Joseph that reasons should be given while deciding an application for recusal, I would prefer not to join that decision. In the first place, giving or not giving reasons was not an issue before us. That reasons are presently being given is a different matter altogether. Secondly, the giving of reasons is fraught with some difficulties. For example, it is possible that in a given case, a learned judge of the High Court accepts an application for his/her recusal from a case and one of the parties challenges that order in this Court. Upon hearing the parties, this Court comes to the conclusion that the reasons given by the learned judge were frivolous and therefore the order is incorrect and is then set aside. In such an event, can this Court pass a consequential order requiring the learned judge to hear the case even though he/she genuinely believes that he/she should not hear the case?

543. The issue of recusal from hearing a case is not as simple as it appears. The questions thrown up are quite significant and since it appears that such applications are gaining frequency, it is time that some procedural and substantive rules are framed in this regard. If appropriate rules are framed, then, in a given case, it would avoid embarrassment to other judges on the Bench.

544. The questions for consideration are: Firstly, whether the Constitution (Ninety-ninth Amendment) Act, 2014 which substitutes and replaces the extant procedure for the appointment of judges of the Supreme Court and the High Courts with a radically different procedure impinges on the independence of the judiciary and violates the basic structure of the Constitution; Secondly, whether the National Judicial Appointments Commission Act, 2014 is a constitutionally valid legislation.

545. In my opinion, the Constitution (Ninety-ninth Amendment) Act, 2014 (for short the 99th Constitution Amendment Act) alters the basic structure of the Constitution by introducing substantive changes in the appointment of judges to the Supreme Court and the High Courts and rewriting Article 124(2) and Article 217(1) of the Constitution, thereby seriously compromising the independence of the judiciary. Consequently, the 99th Constitution Amendment Act is unconstitutional. Since the 99th Constitution Amendment Act is unconstitutional, the National Judicial Appointments Commission Act, 2014 (for short the NJAC Act) which is the child of the 99th Constitution Amendment Act cannot independently survive on the statute books. Even otherwise, it violates Article 14 of the Constitution by enabling substantive arbitrariness in the appointment of judges to the Supreme Court and the High Courts.

556. Having had the benefit of reading the draft judgment of Justice Khehar, Justice Kurian Joseph and Justice Adarsh Kumar Goel, I am in respectful agreement with the conclusions arrived at with regard to the constitutional validity of the 99th Constitution Amendment Act but prefer to supplement them with additional reasons. I am in respectful disagreement with the view of Justice Chelameswar. I believe all the submissions made by various learned Counsel led by Mr. Fali S. Nariman on behalf of the Petitioners and by Mr. Mukul Rohatgi the learned Attorney-General on behalf of the Respondents have been noted and dealt with by Justice Khehar in his draft judgment and in respect of some of them, I have nothing to add to what has already been said.

Historical background

547. George Santayana, philosopher, essayist, poet and novelist is believed to have said something to the effect that: 'Those who do not remember their past are condemned to repeat their mistakes.' Keeping this in mind, it is essential to appreciate the evolution of the process for the appointment of judges in the Indian judiciary, the various alternatives discussed and debated and then to consider and analyze the solution given by the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014. This is important for another reason-some of the 'mistakes' made before Constituent Assembly accepted the Constitution of India, have been revived and enacted, even though the Constituent Assembly debated and rejected them.

548. Section 101 of the **Government of India Act, 1919** provided for the appointment of the Chief Justice and judges of the High Court and Section 102 provided for their tenure. It was provided that the appointment shall be made by His Majesty and the judge shall hold office 'during His Majesty's pleasure.' Since the appointment process and the tenure of a judge depended upon the Crown's pleasure, perhaps the issue of the independence of the judiciary was not the subject of discussion in India. In any event, nothing was pointed out in this regard one way or the other during the submissions made by learned Counsel.

549. The **Government of India Act, 1935** partially changed the procedure for the appointment of judges to the High Courts and introduced a procedure for the appointment of judges to the Federal Court constituted by the said Act. Section 200 and 201 dealt with the appointment of judges of the Federal Court and while the Crown continued to make the appointments (apparently without any formal consultation process), their tenure was fixed at the age of 65 years. Removal of a judge was possible only on the ground of misbehavior or of infirmity of mind or body. Section 201 provided for the salary, allowances, leave and pension of a judge and this could not be varied to his/her disadvantage after appointment. Section 220 and 221 related to the appointment of a judge of the High Court and the provisions thereof were more or less similar to the appointment of a judge of the Federal Court.

550. The Government of India Act, 1935 gave a semblance of an independent judiciary in that it provided some basic requirements of independence such as eligibility for appointment, security of tenure including the removal process, assurance of salary, allowances and pension etc. Again, nothing specific was shown to us, one way or the other, which could throw light on the contemporaneous practice regarding the appointment process or the independence of the judiciary. A general practice on the appointment of judges was, however, subsisting and this has been

adverted to by the Supreme Court of Pakistan in ***Al-Jehad Trust v. Federation of Pakistan*** 202 PLD 1996 SC 324 (Five Judges Bench). It was observed that ever since 1911 when the Indian High Courts Act was enacted and certainly from 1915/1919 onwards when the Government of India Act was enacted, the recommendation of the Chief Justice for the appointment of a judge was accepted even though the appointment of a judge was a matter of the pleasure of the Crown. It was said:

Act of appointment of a Chief Justice or a Judge in the superior Court is an executive act. No doubt this power is vested in the Executive under the relevant Articles of the Constitution, but the question is, as to how this power is to be exercised. Conventions can be pressed into service while construing a provision of the Constitution and for channelising and regulating the exercise of power under the Constitution: whereas under the Islamic Jurisprudence, a convention which is termed as Urf has a binding force on the basis of various Islamic sources, it has been a consistent practice which has acquired the status of convention during pre-partition days of India as well as post-partition period that the recommendations of the Chief Justice of a High Court and the Chief Justice of the Supreme Court in India as well as in Pakistan have been consistently accepted and acted upon except in very rare cases. The practice of consultation of the Chief Justice of a High Court and the Indian Federal Court was obtaining even under the Indian High Courts Act [1911] as well as under the Government of India Act 1915, though the appointment of Judges of superior Courts in India was a matter of pleasure vested in the Crown. The recommendations of the Chief Justices even in those days were accepted as a matter of course.

Sapru Committee

551. The issue of the appointment of judges (for Independent India) first came up for discussion (as it appears) before the Sapru Committee. A Report prepared by this Committee in 1945 dealt with the Legislature, the Executive and the Judiciary in Chapter V thereof. The relevant paragraphs pertaining to the appointment of judges are paragraphs 259, 261 and 268.[98] The Committee was of the opinion that the independence of the judiciary is of 'supreme importance for the satisfactory working of the Constitution and nothing can be more detrimental to the well-being of a Province or calculated to undermine public confidence than the possibility of executive interference with the strength and independence of the highest tribunal of the Province.' It was clear that it desired to secure the 'absolute independence' of the High Court and to put the judges above party politics or influences. The Committee proposed a limited consultative system of appointment of judges completely leaving out the Legislature and the Executive. The Committee proposed consultation only between the Head of the State and the Chief Justice of India for appointments to the Supreme Court and for the High Courts, in addition, the Head of the Unit (Province) and the Chief Justice of the High Court. The relevant paragraphs of the Report read as follows:

259. In our Recommendation No. 13 we first recommend that there shall be a Supreme Court for the Union and a High Court in each of the units. Then in the second clause we recommend that the strength of judges in each of these Courts at the inception of the Union as well as the salaries to be paid to them shall be fixed in the Constitution Act and no modification in either shall be made except on the recommendation of the High Court, the Government concerned and the Supreme Court and with the sanction of the Head of the State, provided, however, that the salary of no judge shall be varied to his disadvantage during his term of office. In Sub-clause (3) we recommend:

(a) The Chief Justice of India shall be appointed by the Head of the State and the other judges of the Supreme Court shall be appointed by the Head of the State in consultation with the Chief Justice of India.

(b) The Chief Justice of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit and the Chief Justice of India.

(c) Other judges of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit, the Chief Justice of the High Court concerned and the Chief Justice of India.

261. Our main object in making these recommendations is to secure the absolute independence of the High Court and to put them above party politics or influences. Without some such safeguards, it is not impossible that a Provincial Government may under political pressure affect prejudicially the strength of the High Court within its jurisdiction or the salary of its Judges. If it is urged that the High Court and the Government concerned will be more or less interested parties in the matter, the intervention of the Supreme Court and of the Head of the State would rule out all possibility of the exercise of political or party influences. The imposition of these conditions, may, on a superficial view, seem to be inconsistent with the theoretical autonomy of the Provinces, but, in our opinion, the independence of the High Court and of the judiciary generally is of supreme importance for the satisfactory working of the Constitution and nothing can be more detrimental to the well-being of a Province or calculated to undermine public confidence than the possibility of executive interference with the strength and independence of the highest tribunal of the Province.

268. We now come to the method of appointment of Judges. Under the existing law Judges of High Courts and of the Federal Court are appointed by the Crown. We have recommended that the Chief Justice of India should be appointed by the Head of the State. In this connection we would refer to our discussion of the phrase 'Head of the State' in Chapter VI. Similarly we have recommended that the other Judges of the Supreme Court shall be appointed by the Head of the State in consultation with the Chief Justice of India. The Chief Justice of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit and the Chief Justice of India, and the other judges of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit, the Chief Justice of the High Court concerned and the Chief Justice of India. We have deliberately placed the appointment of these Judges, including Judges of the Provincial High Courts outside the purview of party politics, and we make the same observations as above in justification of this provision notwithstanding its seeming interference with the theoretical autonomy of the Provinces.

552. As mentioned, 'Head of State' was discussed in Chapter VI of the Report and in so far as the judiciary is concerned, the Head of State was expected to act 'on his own' as the occupant of the office of Head of State and not on the advice of the Federal Ministry. More specifically, the Head of State was to act on his/her own in the matter of appointment and removal of judges. This is what was said in the Report:

The Union will be a democratic federal State and the Head of the State who will replace both the Governor-General and the Crown Representative and might be given a suitable indigenous

designation, if necessary should exercise such functions as are given to him only on the advice of his Federal Ministry, barring a few very exceptional cases, to be specifically mentioned in the Constitution Act, where discretion is given to him to act on his own or on advice other than that of the Federal Ministry (1) for avoiding political or communal graft, or (2) for taking the initiative in the national interest, especially in exceptional and fast moving situations such as exist at the present day. Under exception (1) will fall the suggestions we have made under paragraph 13 of our recommendations as regard the alteration of the strength of High Courts and the appointment and removal of judges of the Supreme Court and the High Courts.[99]

Ad hoc Committee on the Supreme Court

553. After the Constituent Assembly was formed, an Ad hoc Committee on the Supreme Court was set up which presented its Report of 21st May, 1947 to the Constituent Assembly. Paragraph 14 of the Report is of relevance to the issue of appointment of judges of the Supreme Court. It accepted, in principle, the qualification for the appointment of judges to the Supreme Court, as mentioned in the Government of India Act, 1935 but found it inexpedient 'to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Union.' It made two suggestions in the appointment procedure, both of which necessitated consultation between the President and the Chief Justice of India and the opinion of a panel of 11 (eleven) persons comprising of, inter alia, some Chief Justices of the High Courts, some members of both the Houses of the Central Legislature and some law officers of the Union. It was proposed that the executive be kept out of the appointment process. The said paragraph reads as follows:

14. The qualifications of the judges of the Supreme Court may be laid down on terms very similar to those in the Act of 1935 as regards the judges of the Federal Court, the possibility being borne in mind (as in the Act of 1935) that judges of the superior courts even from the States which may join the Union may be found fit to occupy a seat in the Supreme Court. We do not think that it will be expedient to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Union. We recommend that either of the following methods may be adopted. One method is that the President should in consultation with the Chief Justice of the Supreme Court (so far, as the appointment of puisne judges is concerned) nominate a person whom he considers fit to be appointed to the Supreme Court and the nomination should be confirmed by a majority of at least 7 out of a panel of 11 composed of some of the Chief Justices of the High Courts of the constituent units, some members of both the Houses of the Central Legislature and some of the law officers of the Union. The other method is that the panel of 11 should recommend three names out of which the President, in consultation with the Chief Justice, may select a judge for the appointment. The same procedure should be followed for the appointment of the Chief Justice except of course that in this case there will be no consultation with the Chief Justice. To ensure that the panel will be both independent [and] command confidence the panel should not be an ad hoc body but must be one appointed for a term of years.[100]

554. There was clearly a divergence of opinion between the Sapru Committee and the Ad hoc Committee on the consultation process for the appointment of judges. The Sapru Committee felt that the appointment of judges should be left to the Head of State acting on his/her own while the Ad hoc Committee did not approve of the appointment process being left to the 'unfettered discretion of the President' but suggested it to be broad-based involving a panel.

555. However, what is apparent from both the Report of the Sapru Committee and the Report of the Ad hoc Committee is that the executive was not to be involved at all in the process of appointment of judges. This is of considerable significance.[101]

Memorandum on the Union Constitution and Draft Clauses

556. On 30th May, 1947 the Constitutional Advisor to the Constituent Assembly, Sir B.N. Rau submitted a Memorandum on the Union Constitution and Draft Clauses. The Memorandum provided in Chapter VI (The Union Judicature) that there shall be a Supreme Court 'with powers and jurisdiction as recommended by the ad hoc Committee on the Union Judiciary.'[102] In the draft clauses of the Union Constitution appended to the Memorandum, it was provided that every judge of the Supreme Court shall be appointed by the President with the approval of not less than 2/3rd of the members of the Council of State.[103] In this regard, the Law Commission of India notes in its 80th Report as follows:

The Constitutional Adviser, in his memorandum dated May 30th, 1947 suggested that the appointment of Judges should be made by the President with the approval of at least two-thirds of the Council of State. The Council of State, according to him, was to be a body in the nature of a Privy Council for advising the President on certain matters on which decisions were required on independent non-party lines. The Council of State was to include the Chief Justice of India among its members and its composition was to be such as to secure freedom from party bias. Such a Council of State, it was suggested by the Constitutional Adviser, would be a satisfactory substitute for the panel recommended by the Special Committee.

The Union Constitution Committee did not accept the proposal of the Constitutional Adviser for setting up of a Council of State, and suggested that the procedure for the appointment of judges should be that the President should consult the Chief Justice and such other judges of the Supreme Court as might be necessary.[104]

557. It appears that by this time, the independence of the judiciary was taken for granted, the only question being the procedure for the appointment of judges-whether it should be the exclusive responsibility of the President or it should be broad-based involving a panel or a Council of State. In any event, the exclusion of the executive in the appointment process appears to have been taken as accepted.

Union Constitution Committee

558. The Union Constitution Committee which presented a Report to the Constituent Assembly on 4th July, 1947 did not adopt the proposal for setting up a Council of State. Consequently, an alternative procedure for the appointment of a judge of the Supreme Court was suggested, namely, for the appointment by consultation between the President and the Chief Justice of the Supreme Court and such other judges of the Supreme Court and judges of the High Court as may be necessary. In other words, the limited consultative process as originally envisaged by the Sapru Committee (between the President and the Chief Justice of India) was accepted though with modifications. Chapter IV paragraph 18 of the Report concerns itself with the appointment of judges of the Supreme Court and this reads as follows:

18. Supreme Court.--There shall be a Supreme Court with the constitution, powers and jurisdiction recommended by the ad hoc Committee on the Union Judiciary, except that a judge of the Supreme Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also judges of the High Courts as may be necessary for the purpose.

[NOTE-The ad hoc Committee on the Supreme Court has observed that it will not be expedient to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Federation. They have suggested two alternatives, both of which involve the setting up of a special panel of eleven members. According to one alternative, the President, in consultation with the Chief Justice, is to nominate a person for appointment as puisne judge and the nomination has to be confirmed by at least seven members of the panel. According to the other alternative, the panel should recommend three names, out of which the President, in consultation with the Chief Justice, is to select one for the appointment. The provision suggested in the above clause follows the decision of the Union Constitution Committee.][105]

Again, the executive had no role to play in the appointment of judges, specifically of the Supreme Court.

Provincial Constitution Committee

559. With regard to the High Courts, a Report of 27th June, 1947 was submitted to the Constituent Assembly by the Provincial Constitution Committee. Part II thereof pertained to the Provincial Judiciary and the recommendations made for the appointment of judges of the High Court incorporated the provisions of the Government of India Act, 1935 and the recommendations made by the Union Constitution Committee. These read as follows:

The Provincial Judiciary

1. The provisions of the Government of India Act, 1935, relating to the High Court should be adopted mutatis mutandis; but judges should be appointed by the President of the Federation in consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court of the Province (except when the Chief Justice of the High Court himself is to be appointed).

2. The judges of the High Court shall receive such emoluments and allowances as may be determined by Act of the Provincial Legislature and until then such as are prescribed in Schedule.....

3. The emoluments and allowances of the judges shall not be diminished during their term of office.[106]

The above discussion indicates that the executive was to be kept out of the process of appointing judges to the Supreme Court and the High Courts. This is clear from the views of: (1) The Sapru Committee; (2) The Ad hoc Committee on the Supreme Court; (3) The Union Constitution

Committee, and (4) The Provincial Constitution Committee. This will have some bearing when the composition of the National Judicial Appointments Commission is examined.

560. In this background pertaining to the judiciary, the first draft of the Constitution was placed before the Drafting Committee in October, 1947. This was followed by another (revised) draft submitted to the President of the Constituent Assembly on 21st February, 1948. There was no significant change between these two drafts as far the appointment process for the Federal Judicature (or the High Courts in the Provinces/States) is concerned. But, it is important to note that the Drafting Committee did not throw overboard the view of any of the committees mentioned above, that is, to keep the executive out of the process of appointment of judges.

Conference of Chief Justices

561. Wide publicity was given to the Draft Constitution to enable interested persons to express their views through comments and suggestions. The views expressed by the Conference of Chief Justices (the Chief Justice of the Federal Court and Chief Justices of the High Courts), the Minorities Sub-Committee and the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas are important since they explain the interplay between the Executive and the Judiciary in the matter of appointment of judges.

562. These views also make it clear that almost immediately after Independence (or thereabouts) the executive began to interfere in the appointment of judges of the High Courts. This interference by the executive (or in the present day language, the political executive) is the genesis of the problem that we are grappling with even today.

563. The Conference of Chief Justices was held on 26th and 27th March, 1948 to consider the proposals in the Draft Constitution concerning the judiciary. A Memorandum representing the views of the Federal Court and of the Chief Justices representing all the Provincial High Courts of the Union of India was prepared and submitted by the Conference.[107] This Memorandum is of immense importance in understanding the prevailing appointment process.

564. Very briefly, in what may be described as the 'preamble' to the Memorandum, a few salient points were assumed and noticed. It was assumed that the independence and integrity of the judiciary is of the 'highest importance' not only to the judges but to the citizens seeking resort from a court of law against the high handed and illegal exercise of power by the executive. It was noticed that there is a tendency to whittle down the powers, rights and authority of the judiciary which, if allowed to continue, would be 'most unfortunate'. Therefore, there was a need to counteract this tendency which was likely to grow with greater power being placed in the hands of the political parties. It was said:

We have assumed that it is recognized on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive. Thanks to the system of administration of justice established by the British in this country, the judiciary until now has, in the main, played and independent role in protecting the rights of the individual citizen

against encroachment and invasion by the executive power. Unfortunately, however, a tendency has, of late, been noticeable to detract from the status and dignity of the judiciary and to whittle down their powers, rights an authority which if unchecked would be most unfortunate. While we recognize that the Draft Constitution proposes to liberalize in some respects the existing safeguards against executive interference and to enlarge their present powers, it is felt that further provision should be made in the same direction in order effectively to counteract the aforesaid tendency which is bound to become more pronounced as more power passes into the hands of political parties who will control and dominate the governmental machinery in the years to come. In making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent, incorruptible and efficient judiciary has been steadily kept in view.

The Memorandum specifically pointed out (sadly) that after 15th August, 1947 the appointment of judges to the High Courts, on merit, was not always assured in view of the practice followed (by some States). Also, recommendations by the Chief Justice of the High Court were not always forwarded to the Central Government, implying thereby that some other recommendations were forwarded. In this regard it was said:

Discussions at the conference revealed that the procedure followed after 15th August 1947 does not in practice always ensure appointment being made purely on merit without political, communal and party considerations being imported into the matter. Though it is acknowledged readily enough in principle that such considerations should not influence the appointment, this is not always kept in view in working the procedure in practice. The Chief Justice sends his recommendation to the Premier who consults his Home Minister. The recommendation of the Premier is then forwarded to the Home Ministry at the Centre without even sending the recommendation of the Chief Justice along with it, the prescribed procedure being apparently understood as not rendering it obligatory for the Premier to do so.

565. Consequently, a modified procedure for making recommendations was unanimously recommended by the Conference which would ensure that the recommendation of the Chief Justice reaches the President and that the appointment be made with the concurrence of the Chief Justice of India to avoid any political pressures. It was said:

The Chief Justice should send his recommendation in that behalf directly to the President. After consultation with the Governor the President should make the appointment with the concurrence of the Chief Justice of India. This procedure would obviate the need for the Chief Justice of the High Court discussing the matter with the Premier and his Home Minister and "justifying" his recommendations before them. It would also ensure the recommendation of the Chief Justice of the High Court being always placed before the appointing authority, namely, the President. The necessity for obtaining the "concurrence" of the Chief Justice of India would provide a safeguard against political and party pressure at the highest level being brought to bear in the matter.

566. Significantly, the Memorandum tacitly and implicitly acknowledged that apart from a recommendation for the appointment of a judge of a High Court originating from the Chief Justice of the High Court, recommendations were being made by or at the instance of the political executive. Whether such a procedure was right or wrong was not considered but it was suggested that in the event of such a recommendation being made, the concurrence of the Chief Justice of

India should be obtained before the appointment is made. The Memorandum proposed that Article 193(1) of the Draft Constitution concerning the appointment of a judge of a High Court should read as under:

Every judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India....

The Memorandum acknowledged that a recommendation for the appointment of a judge of the High Court could also be made by the President (in an individual capacity). In the event of such a proposal (by the President), there was no likelihood of the Chief Justice of India not accepting it and, therefore, the concurrence of the Chief Justice of India was not required to be incorporated in the Constitution. It was, therefore, noted:

We do not think it necessary to make any provision in the Constitution for the possibility of the Chief Justice of India refusing to concur in an appointment proposed by the President. Both are officers of the highest responsibility and so far no case of such refusal has arisen although a convention now exists that such appointments should be made after referring the matter to the Chief Justice of India and obtaining his concurrence. If per chance such a situation were ever to arise it could of course be met by the President making a different proposal, and no express provision need, it seems to us, be made in that behalf.

The foregoing applies *mutatis mutandis* to the appointment of the judges of the Supreme Court, and Article 103(2) may also be suitably modified....

567. The significance of this Memorandum cannot be overemphasized and it can be summarized as follows: (1) The independence and integrity of the judiciary was of the highest importance. (2) A tendency had developed in the executive to whittle down the power and authority of the judiciary. (3) It was noted that recommendations for the appointment of a judge of a High Court originate from the Chief Justice of the High Court. Occasionally, such recommendations are suppressed by the executive at the provincial level. It was proposed that recommendations made by the Chief Justice ought to be forwarded directly to the President for being processed so that the political executive at the provincial level cannot suppress it. (4) It was acknowledged that the political executive at the provincial level also makes recommendations (though not always on merits) directly to the Central Government, without the knowledge of the Chief Justice of the High Court. Such recommendations ought to be accepted only with the concurrence of the Chief Justice of India, and this should be taken care of in the Draft Constitution. (5) It was acknowledged that a recommendation for the appointment of a judge of a High Court (or the Supreme Court) could be made by the President (personally-'Both are officers of the highest responsibility.....'). This would normally be accepted by the Chief Justice of India and therefore no provision for the concurrence of the Chief Justice of India was required to be made in this regard in the Draft Constitution. However, if the Chief Justice of India were to refuse to accept the recommendation, the situation could be met by the President making a different proposal. This is because, it was noted, that 'a convention now exists that such appointments should be made after referring the matter to the Chief Justice of India and obtaining his concurrence.'

Amendments to Article 61 and Article 62 of the Draft Constitution

568. The Minorities Sub-Committee and the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas adverted to and considered Article 61 and Article 62 (amongst others) of the Draft Constitution. Article 61 and Article 62 of the Draft Constitution pertain to the Council of Ministers to aid and advice the President and other provisions as to Ministers. In this regard, Shiva Rao mentions in his excellent effort 'The Framing of India's Constitution-A Study' as follows:

There was considerable discussion in the Minorities Sub-Committee and in the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas on the need for the inclusion of minority representatives in the Union and State Cabinets..... They considered that it would be sufficient if, following the precedent furnished by the Government of India Act of 1935, an Instrument of Instructions was drawn up, to be included as a schedule to the Constitution, enjoining the Governors and the President as far as practicable to include members of the minority communities in their Ministries. In the Draft Constitution of February 1948, however, an Instrument of Instructions for this purpose was drawn up only for Governors but not for the President. Possibly in order to rectify this omission, the Drafting Committee decided, on further consideration of the articles relating to the Council of Ministers, that an Instrument of Instructions for the President would also be necessary"[108]

569. Apparently, pursuant to this, the Drafting Committee gave a notice in October 1948 of an amendment to Article 62 proposing to add the following clause:

In the choice of his Ministers and the exercise of his other functions under this Constitution, the President shall be generally guided by the Instructions set out in Schedule III-A, but the validity of anything done by the President shall not be called in question on the ground that it was done otherwise than in accordance with such Instructions.

570. Schedule III-A incorporated the Instrument of Instructions to the President and this is important and it reads as follows:

New Schedule III-A
[Article 62(5a)]

INSTRUCTIONS TO THE PRESIDENT

(3) In these instructions, unless the context otherwise requires, the term "President" shall include every person for the time being discharging the functions, of, or acting as, the President according to the provisions of this Constitution.

(4) xxx

(5) xxx

(1) The President shall make rules for the constitution of an Advisory Board consisting of not less than fifteen members of the Houses of Parliament to be elected by both Houses in accordance with the system of proportional representation by means of the single transferable vote for the purpose of advising the President in the matter of making certain appointments under this Constitution and shall take all necessary steps for the due constitution of such Board as soon as may be after the commencement of this Constitution.

(2) Such rules shall provide that the Leader of the Opposition, if any, in either House of Parliament shall, if he is not elected to the Advisory Board, be nominated to the Board by the President.

(3) Such rules shall also define the terms of office of the members of the Advisory Board and its procedure and may contain such ancillary provisions as the President may consider necessary.

5. (1) In making any appointment of-

(a) the Chief Justice of India or any other judge of the Supreme Court;

(b) the Chief Justice or any other judge of a High Court;

(c) an Ambassador in a foreign State;

(d) the Auditor-General of India;

(e) the Chairman or any other member of the Union Public Service Commission;

(f) any member of the Commission to superintend, direct and control all elections to Parliament and elections to the offices of President and Vice-President,

The President shall consult the Advisory Board constituted under paragraph 4.

(2) The President shall also consult the Advisory Board so constituted in making appointment by virtue of the powers conferred on him by this Constitution to any other office under the Government of India or the Government of a State other than the office of Governor of a State, if Parliament by resolutions passed by both Houses recommend to the President that the Advisory Board shall be consulted in making appointment to such office.

6. (1) In making appointment of judges of the Supreme Court and of the High Courts, the President shall before obtaining the advice of the Advisory Board shall follow the following procedure:

(a) In the case of appointment of the Chief Justice of India, he shall consult the judges of the Supreme Court and the Chief Justices of the High Courts within the territory of India except the States for the time being specified in Part III of the First Schedule.

(b) In the case of appointment of a judge of the Supreme Court other than the Chief Justice of India, he shall consult the Chief Justice of India and the other judges of the Supreme Court and

also the Chief Justices of the High Courts within the territory of India except the States for the time being specified in Part III of the First Schedule.

(c) In the case of appointment of the Chief Justice of a High Court, he shall consult the Governor of the State in which the High Court has its principal seat, and the Chief Justice of India.

(d) In the case of appointment of a judge of a High Court other than the Chief Justice, he shall consult the Governor of the State in which the High Court has its principal seat, the Chief Justice of India and the Chief Justice of the High Court.

(2) The President shall place the recommendations of the authorities consulted by him under sub-paragraph (1) before the Advisory Board at the time of obtaining the advice of that Board with regard to any appointment referred to in that sub-paragraph.

7. xxx

8. xxx[109]

571. It is significant that the Instrument of Instructions also kept the executive completely out of the picture in so far as the appointment of judges is concerned. No one from the executive was to be consulted or involved in the appointment process.

572. The Drafting Committee also proposed, apparently in view of the insertion of Schedule III-A that Article 103(2) of the Draft Constitution (relating to the appointment of judges of the Supreme Court and corresponding to Article 124(2) of the Constitution of India)[110] be modified as follows:

(i) the words "after consultation with such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose" be deleted in Clause (2); and

(ii) the first proviso to Clause (2) be deleted.[111]

573. In other words, the President was not expected to consult the Council of Ministers at all or to act on its advice but was to consult the Chief Justice of India and other judges and then take the advice of the Advisory Board. This was a mixture of the Sapru Committee recommendation of the Head of State (or President as the high office came to be designated) acting on his/her own and yet the President not having 'unfettered discretion' in the appointment of judges.

574. All the proposals, including those given by the Conference of Chief Justices, the Minorities Sub-Committee and the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas, were considered by the Drafting Committee and on 4th November, 1948 the second draft of the Constitution was introduced in the Constituent Assembly by Dr. B.R. Ambedkar, Chairman of the Drafting Committee. However, the decision of the Drafting Committee taken in October, 1948 was not incorporated in the Draft Constitution. Therefore, Dr. Ambedkar moved an amendment in the Constituent Assembly on 31st December, 1948 to insert Clause (5)a in Article 62 of the Draft Constitution. The amendment proposed by Dr. Ambedkar reads as follows:

That after Clause 5 of Article 62 the following new clause be inserted: (5)a In the choice of his Ministers and the exercise of his other functions under this Constitution, the President shall be generally guided by the instructions set out in Schedule III-A, but the validity of anything done by the President shall not be called in question on the ground that it was done otherwise than in accordance with such instructions.

575. The amendment was discussed briefly and adopted by the Constituent Assembly on the same day. Although the decision of the Drafting Committee was to insert Clause (5)a in Article 62 of the Draft Constitution and simultaneously delete a part of Clause (2) of Article 103 of the Draft Constitution, the amendment relating to the deletion of Clause (2) of Article 103 of the Draft Constitution was apparently not moved by Dr. Ambedkar. It is not clear why. As far as the Instrument of Instructions is concerned, it is pointed out by Granville Austin that it was not actually, but implicitly, adopted by the Constituent Assembly.[112]

576. A combined reading of the views of the Drafting Committee read with the Instrument of Instructions and the insertion of Clause (5)a in Article 62 of the Draft Constitution indicates that the thinking at the time was that in the matter of appointment of judges the President was to act in his/her individual capacity. This is very significant otherwise there was absolutely no need for an Instrument of Instructions or an Advisory Board to be set up or for the complete exclusion of the Council of Ministers or the executive in the appointment of judges. However, this thinking was later on given up.

Constituent Assembly Debates

577. This historical background has an impact on understanding the subsequent debate in the Constituent Assembly that took place on 23rd and 24th May, 1949 when Article 103 of the Draft Constitution was considered and debated in the Constituent Assembly. It needs to be emphasized at this stage that when the debate took place on 23rd and 24th May, 1949 it was in the backdrop of the fact that Clause (5)a had already been inserted in Article 62 of the Draft Constitution to the effect that in respect of several matters, including the appointment of judges, the President would act in his/her individual capacity and the Council of Ministers was not even in the picture. The debate will be referred to a little later.

578. After a few months, on 11th October, 1949 the President of the Constituent Assembly was informed by Mr. T.T. Krishnamachari that Schedule III-A is not being moved and that it could be taken out of the list. He also moved for the deletion of Schedule IV from the Draft Constitution. Explaining the move to delete Schedule IV from the Draft Constitution it was stated that the matter should be left entirely to convention rather than be put in the body of the Constitution as a Schedule in the shape of an Instrument of Instructions and that there is a fairly large volume of opinion which favours that idea.

579. Dr. Ambedkar added as follows:

Sir, with regard to the Instrument of Instructions, there are two points which have to be borne in mind. The purpose of the Instrument of Instructions as was originally devised in the British Constitution for the Government of the colonies was to give certain directions to the head of the

States as to how they should exercise their discretionary powers that were vested in them. Now the Instrument of Instructions were effective in so far as the particular Governor or Viceroy to whom these instructions were given was subject to the authority of the Secretary of State. If in any particular matter which was of a serious character, the Governor for instance, persistently refused to carry out the Instrument of Instructions issued to him, it was open to the Secretary of State to remove him, and appoint another and thereby secure the effective carrying out of the Instrument of Instructions. So far as our Constitution is concerned, there is no functionary created by it who can see that these Instruments of Instructions is carried out faithfully by the Governor.

Secondly, the discretion which we are going to leave with the Governor under this Constitution is very meagre. He has hardly any discretion at all. He has to act on the advice of the Prime Minister in the matter of the selection of Members of the Cabinet. He has also to act on the advice of the Prime Minister and his Ministers of State with respect to any particular executive or legislative action that he takes. That being so, supposing the Prime Minister does not propose, for any special reason or circumstances, to include in his Cabinet members of the minority community, there is nothing which the Governor can do, notwithstanding the fact that we shall be charging him through this particular Instrument of Instructions to act in a particular manner. It is therefore felt, having regard under the Constitution who can enforce this, that no such directions should be given. They are useless and can serve no particular purpose. Therefore, it was felt in the circumstances it is not desirable to have such Instrument of Instructions which really can be effective in a different set of circumstances which can by no stretch of imagination be deemed to exist after the new Constitution comes into existence. That is the principal reason why it is felt that this Instrument of Instructions is undesirable.[113]

580. On the basis of the above discussion, Schedule IV to the Draft Constitution was deleted and a motion to that effect was adopted.

581. Thereafter on 14th October, 1949 an amendment was moved by Mr. T.T. Krishnamachari to omit Clause (5)a of Article 62 of the Draft Constitution. It was stated that since Schedule III-A was not moved, this clause becomes superfluous and therefore its omission was moved. The amendment to omit Clause (5)a of Article 62of the Draft Constitution was adopted. In support of this, Dr. Ambedkar [perhaps the main advocate of Clause (5)a] had this to say, while emphasizing constitutional obligations and constitutional conventions:

Every Constitution, so far as it relates to what we call parliamentary democracy, requires three different organs of the State, the executive, the judiciary and the legislature. I have not anywhere found in any Constitution a provision saying that the executive shall obey the legislature, nor have I found anywhere in any Constitution a provision that the executive shall obey the judiciary. Nowhere is such a provision to be found. That is because it is generally understood that the provisions of the Constitution are binding upon the different organs of the State. Consequently, it is to be presumed that those who work the Constitution, those who compose the Legislature and those who compose the executive and the judiciary know their functions, their limitations and their duties. It is therefore to be expected that if the executive is honest in working the Constitution, then the executive is bound to obey the Legislature without any kind of compulsory obligation laid down in the Constitution.

Similarly, if the executive is honest in working the Constitution, it must act in accordance with the judicial decisions given by the Supreme Court. Therefore my submission is that this is a matter of one organ of the State acting within its own limitations and obeying the supremacy of the other organs of the State. In so far as the Constitution gives a supremacy to that is a matter of constitutional obligation which is implicit in the Constitution itself.

I remember, Sir, that you raised this question and I looked it up and I had with me two decisions of the King's Bench Division which I wanted one day to bring here and refer in the House so as to make the point quite clear. But I am sorry I had no notice today of this point being raised. But this is the answer to the question that has been raised.

No constitutional Government can function in any country unless any particular constitutional authority remembers the fact that its authority is limited by the Constitution and that if there is any authority created by the Constitution which has to decide between that particular authority and any other authority, then the decision of that authority shall be binding upon any other organ. That is the sanction which this Constitution gives in order to see that the President shall follow the advice of his Ministers, that the executive shall not exceed in its executive authority the law made by Parliament and that the executive shall not give its own interpretation of the law which is in conflict with the interpretation of the judicial organ created by the Constitution.

Shri H V. Kamath: If in any particular case the President does not act upon the advice of his Council of Ministers, will that be tantamount to a violation of the Constitution and will he be liable to impeachment?

The Honourable Dr. B.R. Ambedkar: There is not the slightest doubt about it.[114]

Referring to this extremely important exposition, Granville Austin concludes:

From this, one is forced to deduce that Ambedkar and the members of the Drafting Committee, perhaps under pressure from Nehru or Patel, had come to the conclusion that the written provisions of a non-justiciable Instrument of Instructions and the tacit conventions of cabinet government had equal value: both were legally unenforceable, but both provided a mechanism by which the legislature could control the Executive; and of the two, conventions were the tidiest and the simplest way of limiting Executive authority.[115]

Transposing this to the relationship between the Judiciary and the Executive, it is quite clear that Dr. Ambedkar and indeed the Constituent Assembly was of the view that constitutional obligations and constitutional conventions must be respected, unwritten though they may be. And, one of these constitutional obligations and constitutional conventions is that the view of the judiciary must be respected by the executive not only with respect to judicial decisions but also in other matters that directly impact on the independence of the judiciary.

Debates on 23rd and 24th May, 1949

582. It is important to appreciate that the Constituent Assembly Debates (for short the CAD) to which our attention was drawn refer to the appointment of a judge of the Supreme Court and not

specifically to the appointment of a judge of a High Court. But the sum and substance of the debate is equally applicable to the appointment of a judge of a High Court.

583. On 23rd and 24th May, 1949 three significant amendments to Article 103(2) of the Draft Constitution relating to the appointment of judges of the Supreme Court were considered in the Constituent Assembly. The first was moved by Prof. K.T. Shah (Bihar: General) who suggested that the appointment of a judge of the Supreme Court should be after consultation with the Council of State. This suggestion was intended to avoid political influence, party maneuvers and pressures in the appointment process. The second was moved by Prof. Shibban Lal Saksena (United Provinces: General) who suggested that the appointment of the Chief Justice of India be subject to confirmation by two-thirds majority of the total number of Members of Parliament assembled in a joint session of both the Houses of Parliament. The third was moved by Mr. B. Pocker Sahib (Madras: Muslim) who suggested that the appointment of a judge of the Supreme Court should have the concurrence of the Chief Justice of India. In support of his amendment Mr. B. Pocker Sahib extensively referred to and relied on the Memorandum submitted by the Conference of Chief Justices. As he put it:

I submit, Sir, the views expressed by the Federal Court and the Chief Justice of the various High Courts assembled in conference are entitled to the highest weight before this Assembly, before this provision is passed. It is of the highest importance that the Judges of the Supreme Court should not be made to feel that their existence or their appointment is dependent upon political considerations or on the will of the political party. Therefore, it is essential that there should be sufficient safeguards against political influence being brought to bear on such appointments. of course, if a Judge owes his appointment to a political party, certainly in the course of his career as a Judge, also as an ordinary human being, he will certainly be bound to have some consideration for the political views of the authority that has appointed him. That the Judges should be above all these political considerations cannot be denied. Therefore, I submit that one of the chief conditions mentioned in the procedure laid down, that is the concurrence of the Chief Justice of India in the appointment of the Judges of the Supreme Court, must be fulfilled. This has been insisted upon in this memo and that is a very salutary principle which should be accepted by this House. I submit, Sir, that it is of the highest importance that the President must not only consult the Chief Justice of India, but his concurrence should be obtained before his colleagues, that is the Judges of the Supreme Court, are appointed. It has been very emphatically stated in this memo that it is absolutely necessary to keep them above political influences. No doubt, it is said in this procedure that the Governor of the State also may be consulted; but that is a matter of minor importance. It is likely that the Governor may also have some political inclinations. Therefore, my amendment has omitted the name of the Governor. That the judiciary should be above all political parties and above all political consideration cannot be denied. I do not want to enter into the controversy at present, which was debated yesterday, as to the necessity for the independence of the judiciary so far as the executive is concerned. It is a matter which should receive very serious consideration at the hands of this House and I hope the Honourable the Law Minister will also pay serious attention to this aspect of the question, particularly in view of the fact that this recommendation has been made by the Federal Court and the Chief Justice of the other High Court assembled in conference. I do not think, Sir, that there can be any higher authority on this subject than this conference of the Federal Court and the Chief Justices of the various High Courts in India.[116]

Mr. Mahboob Ali Baig Sahib (Madras: Muslim) moved a somewhat similar amendment. The reason given by Mr. Mahboob Ali Baig Sahib was:

Under our proposed constitution the President would be the constitutional Head of the executive. And the constitution envisages what is called a parliamentary democracy. So the President would be guided by the Prime Minister or the Council of Ministers who are necessarily drawn from a political party. Therefore the decision of the President would be necessarily influenced by party considerations. It is therefore necessary that the concurrence of the Chief Justice is made a pre-requisite for the appointment of a Judge of the Supreme Court in order to guard ourselves against party influences that may be brought to bear upon the appointment of Judges.[117]

584. It is clear that both these Hon'ble Members made the 'concurrence' suggestion since they desired the appointment of a judge of the Supreme Court to be free from any sort of political or executive interference. It appears that these amendments were moved unmindful of the insertion of Clause (5)a in Article 62 of the Draft Constitution and Schedule III-A thereto.

585. Be that as it may, there appears to have been some discordance in the views and perception of different persons on the exact role of the President in the process of appointment of judges. Is the President expected to act on the advice of the Council of Ministers or in his/her personal capacity?

586. One view, as expressed by Dr. Ambedkar was that the President would be guided by the Council of Ministers. The other view or perception was that with the insertion of Clause (5)a in Article 62 of the Draft Constitution and Schedule III-A the President was to act in his/her individual capacity and not be guided by the Council of Ministers since the executive was to be kept completely out of the appointment process. It is not clear which of the two views found favour with Mr. B. Pocker Sahib and Mr. Mahboob Ali Baig Sahib-but both were clear that the President could be put under political or party pressure in the recommendation of a person for appointment and that this should be avoided and the pressure could be negated by the requirement of the concurrence of the Chief Justice of India, an impartial person.

587. But what is more significant is that Mr. B. Pocker Sahib and Mr. Mahboob Ali Baig Sahib adverted only to a recommendation for the appointment of a judge by the President-hence the necessity of concurrence by the Chief Justice of India. They did not, quite obviously, advert to the recommendation for the appointment of a judge by the Chief Justice of India.

588. It is in this background of divergence of perceptions that the speech of Dr. Ambedkar on 24th May, 1949 should be appreciated. Replying to the debate, Dr. Ambedkar stated:

Now, Sir, with regard to the numerous amendments that have been moved, to this article, there are really three issues that have been raised. The first is, how are the Judges of the Supreme Court to be appointed? Now grouping the different amendments which are related to this particular matter, I find three different proposals. The first proposal is that the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. That is one view. The other view is that the appointments made by the President should be subject to the confirmation of two-thirds vote

by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States.

With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, officers of the Supreme Court as well as other officers of the State shall be made [appointed] only with the concurrence of the Senate in the United States. It seems to me in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.

With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that is also a dangerous proposition.[118]

589. Dr. Ambedkar was quite clear that there could be no difference of opinion that the judiciary should be independent of the executive, yet competent. He was of the view that it would be 'dangerous' to leave the appointment of judges to the President without any reservation or limitation, that is to say, merely on the advice of the executive of the day. Dr. Ambedkar seems to have lost sight of the existence of the Instrument of Instructions (or it was 'given up' by him) since that document mentioned the advice of the Advisory Board and not the executive and also that that document enabled the President to act on his/her own, and not on the advice of the executive.

590. If this dichotomy between the role of the President and the executive and the binding or non-binding effect of the advice of the executive on the President is appreciated, the views of Dr. Ambedkar become very clear. He was quite clear that the executive was not to have primacy in the appointment process nor did he want the President to have unfettered discretion to accept or reject the advice of the executive or act on his/her own. As far as the concurrence of the Legislature

is concerned, Dr. Ambedkar felt that the process would be cumbrous with the possibility of political pressure and considerations. It is in this context that Dr. Ambedkar said that he was steering a middle course and was not prepared to grant a veto to the President (rejecting the advice of the executive or acting on his/her own) in the appointment of judges, executive primacy having already been rejected by him. Under the circumstances, he felt that 'this sort of provision [consultation with the Chief Justice of India] may be regarded as sufficient for the moment.'

591. With regard to the 'concurrence' of the Chief Justice of India (as against consultation with the Chief Justice of India) in the appointment of a judge of the Supreme Court, Dr. Ambedkar was of the opinion that the Chief Justice, despite his eminence, had all the failings, sentiments and prejudices of common people and to confer on him a power of veto, which is not vested in the President or the Government of the day (that is the executive), would be a 'dangerous proposition'.

592. Dr. Ambedkar was of the view that neither the President nor the Government of the day (the executive) nor the Chief Justice of India should have the final word in the matter of the appointment of judges. Who then would have the final say in the event of a difference of opinion between the President or the Government of the day or the Chief Justice of India on the appointment of a particular person as a judge? Dr. Ambedkar did not directly address this question since he did not visualize a stalemate arising in this regard.

593. A small diversion-apart from the reasons already mentioned for keeping the executive out of the decision-taking process in the appointment of judges, it would be of interest to know that, on a different topic altogether, while replying to the debate 'on acceptance of office by members of the judiciary after retirement' Dr. Ambedkar observed that the judiciary is very rarely engaged in deciding issues between citizens and the Government. He said:

The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government. Consequently the chances of influencing the conduct of a member of the judiciary by the Government are very remote, and my personal view, therefore, is that the provisions which are applied to the Federal Public Services Commission have no place so far as the judiciary is concerned.[119]

594. Times have changed dramatically since then and far from disputes 'very rarely' arising between citizens and the Government, today the Government is unashamedly the biggest litigant in the country. It has been noticed in ***Supreme Court Advocates on Record Association v. Union of India*** MANU/SC/0073/1994 : (1993) 4 SCC 441 (Nine Judges Bench) that:

No one can deny that the State in the present day has become the major litigant and the superior courts particularly the Supreme Court, have become centres for turbulent controversies, some of which with a flavour of political repercussions and the Courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace.[120]

595. Given this fact situation, since there was this reason in 1949 to insulate the judiciary and the appointment process from the direct or indirect influence of the executive and political or party pressures, there is all the more reason to do so today if the independence of the judiciary is to be maintained.

596. In England too the executive is the 'most frequent litigator' and the position seems to be no better than in our country. In a lecture on Judicial Independence, Lord Phillips[121] had this to say:

In modern society the individual citizen is subject to controls imposed by the executive in respect of almost every aspect of life. The authority to impose most of those controls comes, directly or indirectly, from the legislature. The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that judges require particularly to be protected.[122]

Summation

597. The discussion leading up to the Constituent Assembly Debates and relating to the appointment of judges clearly brings out that:

(1) The independence of the judiciary was unflinchingly accepted by all policy and decision makers;

(2) The appointment of judges of the Supreme Court and the High Courts was to be through a consultative process between the President and the Chief Justice of India, neither of whom had unfettered discretion in the matter;

(3) In any event, the political executive had no role or a very little role to play in the decision-taking process. Notwithstanding this, the political executive did interfere in the appointment process as evidenced by the Memorandum prepared in the Conference of Chief Justices by, inter alia, recommending persons for appointment as judges of the High Court. Resultantly, the appointment of judges to the High Courts was not always on merit and sometimes without the recommendation of the Chief Justice of the High Court;

(4) A constitutional convention existed that the appointment of judges should be made in conformity with the views of the Chief Justice of India;

(5) The proposal for the appointment of a judge of the Supreme Court or a High Court could originate from the President (although it never did) or the Chief Justice of India and regardless of the origin, it would normally be accepted. However, the possibility of the President giving in to political or party pressures was not outside the realm of imagination.

(6) Historically, the Chief Justice of India was always consulted in the matter of appointment of judges, and conventionally his concurrence was always taken regardless of whether a recommendation for appointment originated from the Chief Justice of the High Court or the

political executive. It is in this light that the discussion in the Constituent Assembly on the issue of appointment of judges to the Supreme Court and the High Courts deserves to be appreciated.

(7) It remained a grey area whether in the appointment of judges, the President was expected to act on his/her own or on the advice of the political executive.

Views of the Law Commission of India

598. The issue of the appointment of judges of the Supreme Court and the High Courts was first addressed, after Independence, in the 14th Report of the Law Commission of India (for short the LCI), then in the 80th Report and finally in the 121st Report. (A reference was made in the 214th Report and the 230th Report but they are of no immediate consequence). The issue also came to be addressed in ***S.P. Gupta v. Union of India*** MANU/SC/0080/1981 : 1981 (Supp) SCC 87 (Seven Judges Bench) and in ***Subhash Sharma v. Union of India*** MANU/SC/0643/1990 : 1991 Supp (1) SCC 574. It was also the subject matter of three Constitution amendment Bills and two other pronouncements of this Court rendered by larger Benches. This is mentioned only to highlight the complexity of the issue and the constant search for some stability and certainty in the appointment process in relation to the independence of the judiciary. It has been said with regard to the selection of judges in the United States, and this would equally apply to our country:

It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection.[123]

(a) 14th Report-26.9.1958

Appointment of judges of the Supreme Court

599. Within less than a decade of the promulgation of the Constitution, the process of appointment of judges of the Supreme Court and the High Courts came in for sharp criticism from the LCI. Chapter 5 and Chapter 6 of the 14th Report of the LCI relating, inter alia, to the appointment of judges to the Supreme Court and judges to the High Courts respectively makes for some sad reading, more particularly since the Attorney-General for India was the Chair of the LCI.[124] It must be noted here that the LCI travelled through the length and breadth of the country for about one year and examined as many as 473 witnesses from a cross-section of society before giving its Report. It also adopted a novel procedure of co-opting two members from the States that were visited so as to understand the local problems. The monumental and authoritative work can only be admired.

600. The LCI observed that the Constitution endeavored to put judges of the Supreme Court 'above executive control'. It very specifically acknowledged the importance of safeguarding the independence of the judiciary and observed that 'It is obvious that the selection of the Judges constituting a Court of such pivotal importance to the progress of the nation must be a responsibility to be exercised with great care.'[125]

601. Thereafter three central issues were adverted to-(1) Communal and regional considerations had prevailed in making the selection of judges. (2) The general impression was that executive

influence was exerted now and again from the highest quarters in respect of some appointments to the Bench. (3) The best talent among the judges of the High Courts did not find its way to the Supreme Court.

602. The Report said:

It is widely felt that communal and regional considerations have prevailed in making the selection of the Judges. The idea seems to have gained ground that the component States of India should have, as it were, representation on the Court. Though we call ourselves a secular State, ideas of communal representation, which were viciously planted in our body politic by the British, have not entirely lost their influence. What perhaps is still more to be regretted is the general impression, that now and again executive influence exerted from the highest quarters has been responsible for some appointments to the Bench. It is undoubtedly true, that the best talent among the Judges of the High Courts has not always found its way to the Supreme Court. This has prevented the Court from being looked upon by the subordinate Courts and the public generally with that respect and indeed, reverence to which it by its status entitled.[126]

603. On the basis of its findings, the LCI recommended, inter alia, that 'communal and regional considerations should play no part in the making of appointments to the Supreme Court.' However, the LCI did not proffer any solution to the vexed issue of making more satisfactory appointments to the Supreme Court.

Appointment of judges of the High Courts

604. Similarly, Chapter 6 of the Report concerning the appointment of judges to the High Courts makes for equally sad reading. The inadequacies in the appointments made were pointed out as: (1) The selections have been unsatisfactory and induced by executive influence. (2) There is no recognizable principle for making the appointments and considerations of political expediency or regional or communal sentiments have played a role. (3) Merit has been ignored in making appointments.

605. It was said that these inadequacies were well founded and there was acute public dissatisfaction with the appointments made:

We have visited all the High Court centres and on all hands we have heard bitter and reviling criticism about the appointments made to High Court judiciary give in recent years. This criticism has been made by Supreme Court Judges, High Court Judges, Retired Judges, Public Prosecutors numerous representatives, associations of the Bar, principals and professors of Law Colleges and very responsible members of the legal profession all over the country. One of the State Governments had to admit that some of the selections did not seem to be good and that careful scrutiny was necessary. The almost universal chorus of comment is that the selections are unsatisfactory and that they have been induced by executive influence. It has been said that these selections appears to have proceeded on no recognizable principle and seem to have been made out of consideration of political expediency or regional or communal sentiments. Some of the members of the Bar appointed to the Bench did not occupy the front rank in the profession either in the matter of legal equipment or of the volume of their practice at the bar. A number of more

capable and deserving persons appear to have been ignored for reasons that can stem only from political or communal or similar grounds. Equally forceful or even more unfavourable comments have been made in respect of persons selected form the services. We are convinced that the views expressed to us show a well founded and acute public dissatisfaction at these appointments.[127]

606. On the procedure followed for the appointment of a judge of the High Court and the administrative working of Article 217 of the Constitution, the LCI had this to say:

The Chief Justice forwards his recommendation to the Chief Minister who in turn forwards this recommendation in consultation with the Governor to the Minister of Home Affairs in the Central Government. If, however, the Chief Minister does not agree with the recommendation of the Chief Justice, he makes his own recommendation. It appears that in such a case, the Chief Justice is given an opportunity for making his comments on the recommendation made by the Chief Minister. This practice is not, however, invariably followed so that, in some cases it happens that the recommendation made by the Chief Minister does not come to the knowledge of the Chief Justice. The rival recommendations are then forwarded to the Minister of Home Affairs who, in consultation with the Chief Justice of India, advises the President as to the selection to be made. The person recommended by the Chief Minister may be, and occasionally is, selected in preference to the person recommended by the Chief Justice.[128]

607. The LCI recorded that no less a personage than the Chief Justice of India had this to say about executive interference in the appointment of judges to the High Courts (for reasons other than merit):

The Chief Minister now has a hand direct or indirect in the matter of the appointment to the High Court Bench. The inevitable result has been that the High Court appointments are not always made on merit but on extraneous considerations of community, caste, political affiliations, and likes and dislikes have a free play. This necessarily encourages canvassing which, I am sorry to say, has become the order of the day. The Chief Minister holding a political office dependent on the goodwill of his party followers may well be induced to listen and give way to canvassing. The Chief Justice on the other hand does not hold his office on sufferance of any party and he knows the advocates and their merits and demerits and a recommendation by the Chief Justice is therefore more likely to be on merit alone that the one made by the Chief Minister who may know nothing about the comparative legal acumen of the advocates.[129]

608. To conclude this aspect, the Report observes that extraneous factors have influenced the appointments and that there seems to be canvassing for appointment as a judge of the High Court:

This indeed is a dismal picture and would seem to show that the atmosphere of communalism, regionalism and political patronage, have in a considerable measure influenced appointments to the High Court Judiciary.

Apart from this very disquieting feature, the prevalence of canvassing for judgeships is also a distressing development. Formerly, a member of the Bar was invited to accept a judgeship and he considered it a great privilege and honour. Within a few years of Independence, however, the judgeship of a High Court seems to have become a post to be worked and canvassed for.[130]

609. Based on its findings, the LCI reached the following conclusions, amongst others:

(8) Many unsatisfactory appointments have been made to the High Courts on political regional and communal or other grounds with the result that the fittest men have not been appointed. This has resulted in a diminution in the out-turn of work of the Judges.

(9) These unsatisfactory appointments have been made notwithstanding the fact that in the vast majority of cases, appointments have been concurred in by the Chief Justice of the High Court and the Chief Justice of India.

(10) Consultation with the State executive is necessary before appointments are made to the High Court.

(11) While it should be open to the State executive to express its own opinion on a name proposed by the Chief Justice, it should not be open to it to propose a nominee of its own and forward it to the Centre.

(12) The role of the State executive should be confined to making its remarks about the nominee proposed by the Chief Justice and if necessary asking the Chief Justice to make a fresh recommendation.

(14) Article 217 of the Constitution should be amended to provide that a Judge of a High Court should be appointed only on the recommendation of the Chief Justice of that State and with the *concurrence* of the Chief Justice of India.[131]

610. Unlike in the appointment of judges to the Supreme Court, the LCI suggested, for the High Courts, that Article 217 of the Constitution ought to be amended to incorporate the concurrence of the Chief Justice of India to the appointment. This recommendation was made so that, in future, no appointment could be made without the concurrence of the Chief Justice of India.

611. The Report was considered in Parliament on 23rd, 24th and 25th November, 1959 and the Government of the day gave its point of view, as did several Hon'ble Members. But what is more important is that in the debate on 24th November, 1959 it was stated by Shri Govind Ballabh Pant, Hon'ble Minister of Home Affairs that since 1950, as many as 211 judges were appointed to the High Courts and out of these except one 'were made on the advice, with the consent and concurrence of the Chief Justice of India. And out of the 211, 196 proposals which were accepted by the Government had the support of all persons who were connected with this matter.'[132]

612. A little later it was stated:

But as I said, these 196 appointments were made in accordance with the unanimous advice of the Chief Justice of the High Court, the Chief Minister of the State, the Governor and the Chief Justice of India. There were fifteen cases in which there was a difference of opinion between the Chief Justice and the Chief Minister or the Governor. So, these cases also were referred to the Chief Justice of India. In some of these he accepted the proposal made by the Chief Minister and in others he accepted the advice or the suggestion received from the Chief Justice of the High Court.

But we on our part had his advice along with that of the Chief Justice of the High Court concerned and of the Chief Minister concerned. So, these cases do not even come to five per cent. But even there, so far as we are concerned, out of these 211 cases, as I said, except in one case where there was a difference of opinion between the Chief Minister and the Chief Justice, we had accepted in 210 cases the advice of the Chief Justice of India.[133]

613. On the next day, that is, 25th November, 1959 Shri A.K. Sen, Minister of Law reiterated the statement made by the Home Minister. He clarified that in one case where there was a difference of opinion, the Government accepted the advice of the Chief Justice of the High Court (not the Chief Minister) rather than the advice of the Chief Justice of India.

614. The discussion ended with an Hon'ble Member suggesting that the recommendations of the LCI be taken note of and implemented as quickly as possible.

615. What is of importance in this Report (apart from several other conclusions) is that there had been instances where a recommendation for appointment as a judge of the High Court was made by the Chief Minister without the knowledge of the Chief Justice and that canvassing had begun to take place for appointment as a judge of the High Court. But in all cases, except one, the concurrence of the Chief Justice of India was taken.

(b) 80th Report-10.8.1979

Appointment of judges of the Supreme Court

616. The 80th Report of the LCI was submitted on 10th August, 1979 and it was mainly prepared by Justice H.R. Khanna when he was its Chair.[134]

617. It was observed that an independent judiciary is absolutely indispensable for ensuring the Rule of Law. Generally in regard to appointment of judges, it was observed that wrong appointments have affected the image of the Courts and have undermined the confidence of the people in them. Further, it was observed that an appointment not made on merit but because of favouritism or other ulterior considerations can hardly command real and spontaneous respect of the Bar and that the effect of an improper appointment is felt not only for the time being but its repercussions are felt long thereafter.[135]

618. In this background, and in relation to the appointment of judges of the Supreme Court, it was concluded that (1) Only persons who enjoy the highest reputation for independence, dispassionate approach and detachment should be elevated to the Supreme Court. (2) No one should be appointed a judge of the Supreme Court unless he has severed affiliations with political parties for at least 7 (seven) years. (3) A person should be appointed as a judge if he has distinguished himself for his independence, dispassionate approach and freedom from political prejudice, bias or leaning.[136]

619. Significantly, the LCI recommended adopting a consultative process in that the Chief Justice of India should consult his three senior-most colleagues while making a recommendation for an appointment. He should reproduce their views while making the recommendation. This would minimize the chances of any possible arbitrariness or favouritism.[137]

620. These recommendations were incorporated by the LCI in its summary of recommendations. I am concerned with the following recommendation:

(32) The Chief Justice of India, while recommending the name of a person for appointment as a Judge of the Supreme Court should consult his three senior most colleagues and should in the communication incorporating his recommendation specify the result of such consultation and reproduce the views of each of his colleagues so consulted regarding his recommendation. The role of these colleagues would be confined to commenting on the recommendation of the Chief Justice. Such consultation would minimize possible arbitrariness or favoritism.[138]

Appointment of judges of the High Court

621. In relation to the appointment of judges of the High Court, it was generally observed by the LCI in Chapter 6 of the Report that the prevailing impression was that their appointment 'has not been always made on merit and that this has affected the image of the High Courts.' [139]

622. The LCI suggested a consultation process for the appointment of a judge of the High Court. It was suggested that the Chief Justice should, when making a recommendation, consult his two senior-most colleagues and indicate their views in writing. This would have a 'healthy effect' and considerably minimize the chances of possible favoritism. It was opined that any recommendation of the Chief Justice which is concurred with by the two senior-most judges should normally be accepted. The LCI was, in principle, against the selection of persons as judges of the High Court on grounds or considerations of religion, caste or region.

623. With regard to the recommendations originating from the political executive it was said:

Another question which has engaged attention is as to whether the role of the Chief Minister should be that of commenting on the name recommended by the Chief Justice, or whether, in case he disagrees with the recommendation of the Chief Justice, he (the Chief Minister) can also suggest another name. This question was agitated in the past, and after due consideration it was decided that the Chief Minister would be entitled, in case he disagrees with the recommendation of the Chief Justice to suggest another name. The Chief Minister in such an event has to invite the comments of the Chief Justice and send the matter thereafter along with the comments of the Chief Justice, to the Union Minister of Law and Justice. In view of the fact that a decision referred to above has already been taken after due consideration, we need not say anything further in the matter.[140]

624. Keeping all these factors in mind, some of the recommendations made by the LCI were as follows:

(3) When making a recommendation for appointment of a judge of a High Court, the Chief Justice should consult his two senior most colleagues. The Chief Justice, in his letter recommending the appointment, should state the fact of such consultation and indicate the views of his two colleagues so consulted.

(4) Any recommendation of the Chief Justice which carries the concurrence of his two senior most colleagues should normally be accepted.

(7) The Commission is, in principle, against selection to the High Court Bench on ground of religion, caste or region. Merit should be the only consideration. Even when matters of State policy make it necessary to give representation to persons belonging to some religion, caste or region, every effort should be made to select the best person. The number of such appointments should be as few as possible.

(12) On the question whether the role of the Chief Minister should be that only of commenting on the name recommended by the Chief Justice, or whether the Chief Minister can also suggest another name, a decision has already been taken and nothing further need be said in the matter.[141]

625. Generally speaking, the LCI was of the view that the constitutional scheme of appointment of judges was basically sound, had worked satisfactorily and did not call for any radical change, though some aspects needed improvement. The recommendations mentioned above were made in that light.

(c) 121st Report-31.7.1987

A new forum for judicial appointments

626. It is important to note that this Report was prepared after the decision of this Court in ***S.P. Gupta***. In its 121st Report, the LCI noted that over the last four decades, mounting dissatisfaction has been voiced over the method and strategy of selection and the selectees to man the superior judiciary.[142] Further, in paragraph 7.1 of its Report, the LCI noted that 'Everyone is agreed that the present scheme or model or mechanism for recruitment to superior judiciary has failed to deliver the goods.' This was with reference to the executive primacy theory in the appointment of judges propounded in ***S.P. Gupta***. In view of this the LCI recommended a new broad-based model called a National Judicial Service Commission.[143]

627. The LCI observed that two models were available for the appointment of judges. The first was the existing model which conferred overriding powers on the executive in selecting and appointing judges. But, Article 50 of the Constitution mandates a separation between the Executive and the Judiciary. The second model involved diluting (not excluding) the authority of the executive by associating more people in the decision making process and setting up a body in which the judiciary has a pre-eminent position. This participatory model was called by the LCI as the National Judicial Service Commission.

628. The Commission was envisaged as a multi-member body headed by the Chief Justice of India whose 'pre-eminent position should not be diluted at all', his predecessor in office, three senior-most judges of the Supreme Court, three Chief Justices of the High Courts in order of their seniority, the Law Minister, the Attorney-General for India and an outstanding law academic. Thus, an 11 (eleven) member body was proposed by the LCI for the selection and appointment of judges of the Supreme Court and the High Courts. To give effect to the recommendation, it was proposed to suitably amend the Constitution.[144]

629. The recommendation of the LCI was partially accepted by the government of the day and the Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced in Parliament. This will be adverted to a little later.

Arrears Committee-1989-90

630. Between 11th and 13th December, 1987 a Conference of Chief Justices was held with the Chief Justice of India in the Chair. The Conference discussed, inter alia, issues relating to arrears of cases in the High Courts and the District Courts in the country. Grave concern was expressed over the problem of arrears and it was pointed out by most Chief Justices that delay in the appointment of judges is responsible for the arrears. Even after recommendations are sent, the Chief Justice has to wait for a long time for the Government to make the appointment with the result that for a number of years Courts have been working with about 50% of their strength.

631. After a detailed discussion of the matter, it was decided to appoint a committee of Chief Justices to thoroughly examine the issues raised and a Resolution was passed appointing such a committee. The composition of the committee called the Arrears Committee changed over a period of time but finally it consisted of Chief Justice V.S. Malimath (Kerala High Court), Chief Justice P.D. Desai (Calcutta High Court) and Chief Justice Dr. A.S. Anand (Madras High Court). The Arrears Committee gave its Report in two volumes to the Conference of Chief Justices held between 31st August and 2nd September, 1990 which accepted the Reports, subject to a few modifications.

632. Chapter 5 of Volume 2 of the Report deals with the unsatisfactory appointment of judges to the High Courts. It was observed by the Arrears Committee that unsatisfactory appointments have contributed in a large measure to the accumulation of arrears in the High Courts. It was observed that merit and merit alone, coupled with a reputation for integrity, suitability and capability has to be the criterion for selection of judges and judges not selected on that basis or who are appointed on considerations other than merit, may not be able to act impartially and fairly. It was noted that for this reason the selection of judges should be made with utmost care and concern.[145]

633. The Arrears Committee also considered the Report given in the recent past by the Satish Chandra Committee which was of the confirmed view that some judges have not been directly recommended by the Chief Justice of the High Court but have been foisted on the High Court and that if this trend continued, it would be very difficult for the Chief Justice to effectively transact the judicial business of the Court.[146]

634. Thereafter, the selection of a judge of the High Court for reasons other than merit was discussed and it was observed as follows:

The selection of a person, on considerations other than merit, has far reaching consequences and does more damage than what apparently meets the eye. Such an appointee does not even receive from the members of the Bar the measure of respect and co-operation which is imperative for proper administration of justice. He may not have confidence even in himself and a command over the proceedings of the Court. All this would be at the cost of proper administration of justice. The effect would be felt not only on the quality but also on the quantity of the work turned out.

According to Satish Chandra Committee, the sea change which has gradually come into the political process is directly responsible for the grave deterioration and the fall in the high standards of appointments to the High Court Bench previously maintained. Barring exceptions, the Chief Ministers to-day have come to think that even filling up vacancies on the High Court Bench is a matter of patronage, political or otherwise. It noticed that formerly members of the Bar were invited to accept judge-ship. Now, the judge-ship of the High Court seems to have become a post to be canvassed for. It was found that as long as the State executive has an effective hand in such appointments, this disquieting feature would continue and that it could be remedied only by providing the safeguard of the executive having no final say in the matter of appointment and that the last word in the matter should be of the Chief Justice of the High Court concerned and the Chief Justice of India. The Committee, therefore, suggested amendment of the Constitution, as a guarantee for ensuring the quality, that an appointment to the High Court must have the concurrence of the Chief Justice of India and should not be made merely in consultation with him. An amendment was suggested to Article 217(1) of the Constitution on those lines.[147]

635. It was concluded that for the judicial system to function effectively and for the people to have faith and confidence in it, the appointment of judges should be made only on considerations of merit, suitability, integrity and capability and not on political expediency or regional or communal sentiments. It was observed in this regard as follows:

This Committee is of the firm view that to ensure that the judicial system functions effectively and to maintain both the quality and quantity of judicial work, as well as the faith and confidence of the public, the appointments be made only on considerations of merit, suitability, integrity and capability and not of political expediency or regional or communal sentiments. The apprehension that the recommendation made by him may not meet with the approval of the executive, may sometimes induce a Chief Justice to propose the name of a person who does not measure upto the requisite standard, which is rather unfortunate. It is fundamental for the preservation of the independence of the judiciary that it be free from threats and pressures from any quarter. It is the duty of the State to ensure that the judiciary occupies, and is seen to occupy, such position in the polity that it can effectively perform the functions entrusted to it by the Constitution and that can be done only if the process of appointment is left unpolluted.[148]

636. Commenting on the existing system of appointment of judges, the Arrears Committee reviewed the system in Chapter 6 of the Report. Amongst other things it was observed that the system of appointment of judges had been prevailing for four decades and it was functioning satisfactorily so long as well-established conventions were honoured and followed and that it is not the system that has failed but those operating it had failed it by allowing it to be perverted. It was observed as follows:

The present system of appointment of Judges to the High Courts has been in vogue for about four decades. It functioned satisfactorily as long as the well-established conventions were honoured and followed. The gradual, but systematic violation and virtual annihilation of the conventions over the past two decades or so is essentially responsible for the present unfortunate situation. Has the system, therefore, failed or have the concerned failed the system is an all important question. It is apparent that the system has not failed, but all those concerned with operating the system have failed it by allowing it to be perverted.[149]

637. While dealing with the Memorandum of Procedure in existence at that time for the appointment of judges, the Arrears Committee was rather scathing in its observations to the effect that there had been cases where there was agreement between the Chief Justice of India, the Chief Justice of the concerned High Court and the Governor of the State but the Union Law Minister either choose not to make the appointment or inordinately delayed the appointment. It was observed that sometimes the Union Law Minister adopted a pick and choose policy to appoint judges or disturb the order in which the recommendations were made. There had been political interference in this regard and undesirable influence of extra-constitutional authorities in the appointment of judges. The appointment process therefore was undermined leaving the executive to appoint judges not on excellence but on influence. It was observed as follows:

There are cases that even where the Chief Justice of India on being consulted, agrees with the recommendation made by the Chief Justice of the concerned High Court which is also concurred to by the Governor of the State and forwards his recommendation to the Union Law Minister, appointments are either not made or made after inordinate delay. Sometimes, the Union Law Minister even adopts the "pick and choose" policy to appoint Judges out of the list of selectees recommended by the Chief Justice of the High Court duly concurred in by the Chief Justice of India or makes appointments by disturbing the order in which the recommendations have been made. The malady has become more acute in view of the political interference and undesirable influence of "extra constitutional authorities" in the appointment of judges. Thus, the authority of the Chief Justice of India and the role of the Chief Justice of the High Courts in the matter of appointment of superior judiciary have, to a great extent, been undermined, leaving to the executive to appoint Judges not on "excellence" but on "influence". Thus, merit, ability and suitability which undoubtedly the Chief Justice of the High Court is the most proper person to judge, are sacrificed at the altar of political or other expediency. This attitude is essentially responsible for the deterioration and the fall in the high standards of appointments to the High Court Benches. It is unfortunate, but absolutely true, that the Chief Ministers have come to think and the Union Law Minister has come to believe that the vacancy in the High Court Bench is a matter of political patronage which they are entitled to distribute or dole out to their favourites. This veto power with the executive has played havoc in the matter of appointment of Judges.[150]

638. In its recommendations, the Arrears Committee recommended dilution of the role of the executive and measures to avoid the existing system of appointment from being perverted. It was recommended as follows:

The role of the executive in the matter of appointment of judges should be diluted and that the cause for most of the ills in the functioning of the present system could be traced back to the veto power of the executive. This, indeed, is capable of being remedied by making certain amendments to Article 217 providing for concurrence of the Chief Justice of India, instead of consultation with him, in the matter of appointment of Judges of the High Courts.[151]

The Committee is of the view that the present constitutional scheme which was framed by the founding fathers after great deliberation and much reflection is intrinsically sound and that it worked in the true spirit it does not require any radical change. In order to guard against and obviate the perversion revealed in the operation of the scheme, the Committee has made suitable

recommendations. The Committee believes that if these recommendations are given effect to, there would not be any need to substitute it by a different mechanism.[152]

639. In view of the scathing indictment of the system of appointment of judges where the executive had the 'ultimate power'[153] which was being abused and perverted to take away the independence of the judiciary, contrary to the intention of the Constituent Assembly, there was no option but to have a fresh look into the entire issue of appointment of judges and that eventually led to the issue being referred in the early 1990's to a Bench of 9 (nine) judges of this Court. Quite clearly, the executive had made a mess of the appointment of judges, taken steps to subvert the independence of the judiciary, gone against the grain of the views of the Constituent Assembly and acted in a manner that a responsible executive ought not to.

640. Post Independence till the early 1990s, the judiciary saw the slow but sure interference of the executive in the appointment of judges. This was in the form of the executive recommending persons to the Chief Justice of the High Court for appointment as a judge of the High Court. There were occasions when the executive completely by-passed the Chief Justice of the High Court and directly recommended persons to the Union Government for appointment as judges. The third stratagem adopted by the executive was to withhold recommendations made by the Chief Justice and instead forward its own recommendation to the Union Government. The fourth method was to reopen approved recommendations on some pretext or the other. The fifth method was to delay processing a recommendation made by the Chief Justice.

641. Tragically, almost all the appointments made during this period had the concurrence (as a constitutional convention) of the Chief Justice of India and yet, there was criticism of some of the appointments made. While the independence of the judiciary was maintained at law, it was being slowly eroded both from within and without through the appointment of 'unsuitable' judges with merit occasionally taking a side seat. The 14th Report of the LCI was generally critical of the appointments made to the High Courts and in this regard reliance was placed by the LCI on information collected from various sources including judges of the Supreme Court. It is true that the 80th Report of the LCI found nothing seriously wrong with the system of appointment of judges, but it still needed a change. The Arrears Committee, however, was derisive of the existing system of appointment of judges and made some positive recommendations within the existing system, while the 121st Report of the LCI suggested wholesale changes.

642. This discussion in the historical perspective indicates that the appointment of judges plays a crucial and critical role in the independence of the judiciary in the real sense of the term. If judges can be influenced by political considerations and other extraneous factors, the judiciary cannot remain independent only by securing the salary, allowances, conditions of service and pension of such judges. The meat lies in the caliber of the judges and not their perks.

643. In his concluding address to the Constituent Assembly on 26th November, 1949 Dr. Rajendra Prasad referred to the independence of the judiciary and had this to say:

We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower

judiciary independent of any outside or extraneous influence. One of our articles makes it easy for the State Governments to introduce separation of executive from judicial functions and placing the magistracy which deals with criminal cases on similar footing as civil courts. I can only express the hope that this long overdue reform will soon be introduced in the States.[154]

644. Providing for an independent judiciary is not enough-access to quality justice achieved through the appointment of independent judges is equally important. It has been said of the judges during apartheid in South Africa:

Now during apartheid judges had the formal guarantees of independence-life tenure, salary, administrative autonomy-that judges in the United States of America, Canada, the United Kingdom, New Zealand or Australia had. It is in seeing why it was the case that apartheid-era judges for the most part lacked independence even though they had its formal trappings that we see that judicial independence is also a kind of dependence; it depends on something positive-the judicial pursuit of the justice of the law. One has to ask not only what judges have to be shielded from in order to be independent, but what we want them to be independent for.[155]

645. This review indicates that one of the important features of the Rule of Law and the independence of the judiciary is the appointment process. It is, therefore, necessary to objectively appreciate the evolution of the appointment process post Independence and how the Judiciary understood it.

Judicial pronouncements

646. The question of the appointment of judges (mainly of the High Courts) came up for consideration in this Court on three occasions. The decision rendered in each of these cases is not only of considerable importance but also indicates the complexity in the appointment of judges and the struggle by the Bar to maintain the independence of the judiciary from executive interference and encroachment. These three cases are referred to as the ***First Judges case***,[156] the ***Second Judges case***[157] and the ***Third Judges case***.[158] There have been other significant pronouncements on the subject and they will be considered at the appropriate stage.

First judges case-30.12.1981

647. The ***First Judges case*** is important for several reasons, but I am concerned with a few of them. These are: (1) The independence of the judiciary was held to be a part of the basic feature of the Constitution.[159] This was the first judgment to so hold.

(2) The appointment of a judge is serious business and is recognized as a very vital component of the independence of the judiciary. 'What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half-hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear

from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. This has to be the broad blueprint of the appointment project for the higher echelons of judicial service. It is only if appointments of Judges are made with these considerations weighing predominantly with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India.'[160] Justice Venkataramiah, however, was of the view that the independence of the judiciary is relatable only to post-appointment and that 'It is difficult to hold that merely because the power of appointment is with the executive, the independence of the judiciary would become impaired. The true principle is that after such appointment the executive should have no scope to interfere with the work of a Judge.'[161]

(3) In the appointment of a judge of the Supreme Court or the High Court, the word 'consultation' occurring in Article 124(2) and in Article 217(1) of the Constitution does not mean 'concurrence'.[162] However, for the purposes of consultation, each constitutional functionary must have full and identical facts relating to the appointment of a judge and the consultation should be based on this identical material.[163]

(4) In the event of a disagreement between the constitutional functionaries required to be consulted in the appointment of a judge, the Union Government would decide whose opinion should be accepted and whether an appointment should be made or not. In such an event, the opinion of the Chief Justice of India has no primacy.[164] The 'ultimate power' of appointment of judges to the superior Courts rests with the Union Government.[165] (This is completely contrary to the view of the Constituent Assembly and Dr. Ambedkar).

(5) The extant system of appointment of judges is not an ideal system of appointment. The idea of a consultative panel (called a collegium or Judicial Commission) was floated as a replacement. This body was to consist of persons expected to have knowledge of persons who might be fit for appointment on the Bench and possessed of qualities required for such an appointment. Countries like Australia and New Zealand 'have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary.'[166] Incidentally, we were informed during the course of hearing that even about 35 years after the decision in the ***First Judges case*** neither Australia nor New Zealand have established a Judicial Commission as yet.

648. On the meaning of 'consultation' for the purposes of Article 124(2) and Article 217(1) of the Constitution, Justice Bhagwati who spoke for the majority relied upon ***Union of India v. Sankalchand Himmatlal Sheth*** (1977) 4 SCC 1993 (Five Judges Bench) and ***R. Pushpam v. State of Madras*** MANU/TN/0194/1953 : AIR 1953 Mad 392 to hold that:

Each of the constitutional functionaries required to be consulted under these two articles must have for his consideration full and identical facts bearing upon appointment or non-appointment of the person concerned as a Judge and the opinion of each of them taken on identical material must be considered by the Central Government before it takes a decision whether or not to appoint the person concerned as a Judge.[167]

649. The majority view in the ***First Judges case*** was overruled in the ***Second Judges case*** and it was held that 'consultation' in Article 217 and Article 124 of the Constitution meant that 'primacy'

in the appointment of judges must rest with the Chief Justice of India.[168] The evolution of the collegium system and a Judicial Commission will be discussed a little later, although it must be noted that the seeds thereof were sown (apart from the Reports of the LCI) in the ***First Judges case***.

650. I do not think it necessary to further discuss the ***First Judges case*** since it has been elaborately considered by Justice Khehar.

Subhash Sharma's case

651. In a writ petition filed in this Court praying for filling up the vacancies of judges in the Supreme Court and several High Courts of the country, a three judge Bench was of the view that the ***First Judges case*** required reconsideration.[169] It was observed that the decision of the majority not only rejects the primacy of the Chief Justice of India but also whittles down the significance of 'consultation'.

652. It was noted that the Constitution (Sixty-seventh Amendment) Bill, 1990 was pending consideration in Parliament and that the Statement of Objects and Reasons for the Amendment Act acknowledged that there was criticism of the existing system of appointment of judges (where the executive had the primacy) and that this needed change, hence the need for an Amendment Act.[170]

653. On the issue of executive interference in the appointment of judges, the Bench found that interference went to the extent of impermissibly re-opening the appointment process even though a recommendation for the appointment of a judge had been accepted by the Chief Justice of India. It was observed:

From the affidavits filed by the Union of India and the statements made by learned Attorney General on the different occasions when the matter was heard we found that the Union Government had adopted the policy of reopening recommendations even though the same had been cleared by the Chief Justice of India on the basis that there had in the meantime been a change in the personnel of the Chief Justice of the High Court or the Chief Minister of the State. The selection of a person as a Judge has nothing personal either to the Chief Justice of the High Court or the Chief Minister of the State. The High Court is an institution of national importance wherein the person appointed as a Judge functions in an impersonal manner. The process of selection is intended to be totally honest and upright with a view to finding out the most suitable person for the vacancy. If in a given case the Chief Justice of the High Court has recommended and the name has been considered by the Chief Minister and duly processed through the Governor so as to reach the hands of the Chief Justice of India through the Ministry of Justice and the Chief Justice of India as the highest judicial authority in the country, on due application of his mind, has given finality to the process at his level, there cannot ordinarily be any justification for reopening the matter merely because there has been a change in the personnel of the Chief Justice or the Chief Minister of the State concerned.[171]

654. Apart from the above, the Bench was of the view that the interpretation given by the majority in the ***First Judges case*** to 'consultation' was not correctly appreciated in the constitutional

scheme. It was also felt that the role of the institution of the Chief Justice of India in the constitutional scheme had been denuded in the ***First Judges case***. Keeping all these factors in mind, particularly the functioning of the appointment process and the acknowledgement of the Union Government that a change was needed, it was observed:

The view taken by Bhagwati, J., Fazal Ali, J., Desai, J., and Venkataramiah, J., to which we will presently advert, in our opinion, not only seriously detracts from and denudes the primacy of the position, implicit in the constitutional scheme, of the Chief Justice of India in the consultative process but also whittles down the very significance of "consultation" as required to be understood in the constitutional scheme and context. This bears both on the substance and the process of the constitutional scheme..... Consistent with the constitutional purpose and process it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court and the High Courts of the States. We are of the view that this aspect dealt with in *Gupta case* requires reconsideration by a larger bench.[172]

655. The issues for consideration of a larger Bench were then formulated in the following words:

The points which require to be reconsidered relate to and arise from the views of the majority opinion touching the very status of "consultation" generally and in particular with reference to "consultation" with Chief Justice of India and, secondly, as to the primacy of the role of the Chief Justice of India. The content and quality of consultation may perhaps vary in different situations in the interaction between the executive and the judicial organs of the State and some aspects may require clarification.[173]

656. It was also observed that a view was expressed in the ***First Judges case*** that the government of the State could initiate a proposal for the appointment of a judge but that the proposal could not be sent directly to the Union Government, but should first be sent to the Chief Justice of the High Court.[174] Notwithstanding this clear exposition, the procedure was being distorted by the executive and a proposal for the appointment of judge of the High Court was being sent directly to the Union Government. It was said in this regard:

But it has been mentioned that a practice is sought to be developed where the executive government of the State sends up the proposals directly to the Centre without reference to the Chief Justice of the State. This is a distortion of the constitutional scheme and is wholly impermissible. So far as the executive is concerned, the 'right' to initiate an appointment should be limited to suggesting appropriate names to the Chief Justice of the High Courts or the Chief Justice of India. If the recommendation is to emanate directly from a source other than that of the Chief Justices of the High Courts in the case of the High Courts and the Chief Justice of India in the case of both the High Courts and the Supreme Court it would be difficult for an appropriate selection to be made. It has been increasingly felt over the decades that there has been an anxiety on the part of the government of the day to assert its choice in the ultimate selection of Judges. If the power to recommend would vest in the State Government or even the Central Government, the picture is likely to be blurred and the process of selection ultimately may turn out to be difficult.[175]

657. By-passing the Chief Justice of the High Court in the matter of recommending a person for appointment as a judge of the High Court was an unhealthy practice that the political executive of the State was trying to establish since around the time of Independence. This 'subterfuge' was deprecated on more than one occasion, as noticed above.

658. Another practice that the political executive was trying to establish was to recommend persons for appointment as a judge of the High Court to the Chief Justice of that High Court. In this context, it was also stated ***in Subhash Sharma*** (as quoted above) that: 'It has been increasingly felt over the decades that there has been an anxiety on the part of the government of the day to assert its choice in the ultimate selection of Judges.'[176] This unequivocally indicates that the malaise of executive interference in appointing judges to the superior judiciary, first highlighted in the Memorandum emanating from the Chief Justices Conference and then by the LCI in its 14th Report, continued in some form or the other through the entire period from Independence till the early 1990s. In addition, the recommendation given in the 14th Report of the LCI in Chapter 6 regarding the executive not being entitled to 'propose a nominee of its own and forward it to the Centre' was not given the due weight and consideration that it deserved from the executive.

659. Quite clearly, some complex issues arose in the matter of appointment of judges primarily due to the interference of the political executive and these needed consideration by a larger Bench. Well established and accepted constitutional conventions were sought to be disregarded by the political executive. If the independence of the judiciary was to be maintained and parliamentary democracy was to be retained, the First Judges case and the appointment process needed a fresh look.

Second Judges case-6.10.1993

660. As mentioned above, the ***Second Judges case*** was the result of an acknowledgement that: (1) The existing system of appointment of judges in which the executive had the 'ultimate power' needed reconsideration since that 'ultimate power' was being abused; (2) The existing system of appointment of judges resulted in some appointments in which merit was overlooked due to executive interference or for extraneous considerations. The Chief Justice of the High Court was occasionally by-passed by the political executive and a recommendation for the appointment of a person as a judge of the High Court was made directly to the Union Government. This unfortunate situation had continued for more than 40 years and an attempt to bring about a change was made and so a Constitution Amendment Bill was introduced in Parliament, but it lapsed.

661. In the ***Second Judges case*** it was held by **Justice Pandian:** (1) The selection and appointment of a proper and fit candidate to the superior judiciary is one of the inseparable and vital conditions for securing the independence of the judiciary.[177] 'The erroneous appointment of an unsuitable person is bound to produce irreparable damage to the faith of the community in the administration of justice and to inflict serious injury to the public interest...'[178] (2) Yet another facet of the independence of the judiciary is the separation between the executive and the judiciary (including the superior judiciary)[179] postulated by Article 50 of the Constitution.[180] (3) The Memorandum of Procedure for the selection and appointment of judges filed by the Union of India along with the written submissions relating to the pre ***First Judges case*** period and the extant procedure as mentioned in the 121st Report of the LCI relating to the post ***First Judges case*** period are more or

less the same. They indicate that the recommendation for filling up a vacancy in the Supreme Court is initiated by the Chief Justice of India and the recommendation for filling up a vacancy in the High Court is initiated by the Chief Justice of the High Court. The Chief Minister of a State may recommend a person for filling up a vacancy in the High Court, but that is to be routed only through the Chief Justice of the High Court.[181] (4) Reiterating the view expressed in ***Sankalchand Sheth*** and the ***First Judges case*** it was held that for the purposes of consultation, the materials before the President and the Chief Justice of India must be identical.[182] (5) For the appointment of a judge of the Supreme Court (Under Article 124(2) of the Constitution) or a judge of a High Court (Under Article 217(1) of the Constitution) consultation with the Chief Justice of India is mandatory.[183] (6) In the process of constitutional consultation in selecting judges to the Supreme Court or the High Court and transfer of judges of the High Court, the opinion of the Chief Justice of India is entitled to primacy.[184] (7) Agreeing with the majority opinion written by Justice J.S. Verma, it was held that if there are weighty and cogent reasons for not accepting the recommendation of the Chief Justice of India for the appointment of a judge, then the appointment may not be made. However, if the 'weighty and cogent' reasons are not acceptable to the Chief Justice of India, and the recommendation is reiterated, then the appointment shall be made.[185] (8) The majority opinion in the ***First Judges case*** regarding the primacy of the executive in the matter of appointment of judges was overruled.[186]

662. **Justice Ahmadi** dissented with the opinion of the majority and concluded: (1) Judicial independence is ingrained in our constitutional scheme and Article 50 of the Constitution 'illuminates it'.[187] (2) The ***First Judges case*** was not required to be overruled but on the question of primacy in the matter of appointment of judges, the opinion of the Chief Justice of India is entitled to 'graded weight'.[188]

663. **Justice Kuldip Singh** agreed with the majority and laid great stress on constitutional conventions that had evolved over several decades. The learned judge held: (1) Security of tenure is not the only source of independence of the judiciary but 'there has to be an independent judiciary as an institution.'[189] (2) Independence of the judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. There cannot be an independent judiciary when the power of appointment of judges vests in the executive.[190] (3) The President is bound by the advice given by the Council of Ministers.[191] (4) A constitutional convention is established since the Government of India Act, 1935 (I would add the words 'at least') that the appointment of judges was invariably made with the concurrence of the Chief Justice of India. The opinion and recommendation of the Chief Justice of India in the matter of appointment of judges binds the executive.[192] (5) In the matter of appointment of judges, consultation with the Chief Justice of India is mandatory.[193] (6) In the consultation process Under Article 124(2) and 217(1) of the Constitution, the advice and recommendation of the Chief Justice of India is binding on the executive and must be the final word. The majority view in the ***First Judges case*** does not lay down the correct law.[194]

(7) For the purposes of Article 124(2) and 217(1) of the Constitution, the Chief Justice of India and the Chief Justice of the High Court mean the functionaries representing their respective Court.[195]

664. One of the more interesting facts pointed out by Justice Kuldip Singh is that from 1st January, 1983 (after the decision in the ***First Judges case***) till 10th April, 1993 (that is during a period of ten years) the opinion of the Chief Justice of India was not accepted by the President in as many as seven cases. This is worth contrasting with a part of the period before the 'ultimate power' theory was propounded when the opinion of the Chief Justice of India was not accepted by the President only in one case and in that case, the opinion of the Chief Justice of the High Court (not the political executive) was accepted. This is what the learned judge had to say:

Mr. S.K. Bose, Joint Secretary, Department of Justice, Ministry of Law and Justice has filed an affidavit dated April 22, 1993 before us. In para 6 of the said affidavit it is stated as under:

As regards the appointments of Judges made, not in consonance with the views expressed by the Chief Justice of India, it is respectfully submitted that since January 1, 1983 to April 10, 1993, there have been only seven such cases, five of these were in 1983 (2 in January 1983, 2 in July 1983, 1 in August 1983); one in September 1985 and one in March 1991, out of a total of 547 appointments made during this period.

It is thus obvious from the facts and figures given by the executive itself that in actual practice the recommendations of the Chief Justice of India have invariably been accepted.[196]

665. **Justice Verma** speaking for the majority held: (1) Independence of the judiciary has to be safeguarded not only by providing security of tenure and other conditions of service, but also by preventing political considerations in making appointments of judges to the superior judiciary.[197]

(2) In the matter of appointment of judges, primacy was given to the executive in the Government of India Act, 1919 and the Government of India Act, 1935 but in the constitutional scheme, primacy of the executive is excluded.[198]

(3) The Chief Justice of India and the Chief Justice of the High Court are 'best equipped to know and assess the worth of a candidate, and his suitability for appointment as a superior judge.' In the event of a difference of opinion between the executive and the judiciary, the opinion of the Chief Justice of India should have the greatest weight. [This echoed Dr. Ambedkar's view that consultation would be between persons who are well qualified to give advice in matters of this sort.] Therefore, since primacy is not with the executive, then in such a situation, it must lie with the Chief Justice of India.[199] This certainly does not exclude the executive from the appointment process. The executive might be aware (unlike a Chief Justice) of some antecedents or some information relatable to the personal character or trait of a lawyer or a judge which might have a bearing on the potential of a person becoming a good judge.[200] This might form the basis for rejecting a recommendation for the appointment of a person as a judge by the Chief Justice of India.[201]

(4) Primacy of the opinion of the Chief Justice of India is not to his/her individual opinion but to the collective opinion of the Chief Justice of India and his/her senior colleagues or those who are associated with the function of appointment of judges.[202] Therefore, the President may not accept the recommendation of a person for appointment as a judge, if the recommendation of the Chief Justice of India is not supported by the unanimous opinion of the other senior judges.[203] The

President may return for reconsideration a unanimous recommendation for good reasons. However, in the latter event, if the Chief Justice of India and the other judges consulted by him/her, unanimously reiterate the recommendation 'with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made.'[204] (The key word here is unanimous-both at the stage of the initial recommendation and at the stage of reiteration).

(5) For appointing a judge of the Supreme Court or the High Court, consultation with the Chief Justice of India or the Chief Justice of the High Court is mandatory.[205]

(6) The President in Articles 124(2) and 217(1) of the Constitution means the President acting in accordance with the advice of the Council of Ministers with the Prime Minister at the head.[206]

(7) The advice given by the Council of Ministers to the President should be in accord with the Constitution. Such an advice is binding on the President. Since the opinion of the Chief Justice of India (representing the Judiciary) has finality, the advice of the Council of Ministers to the President must be in accordance with the opinion of the Chief Justice of India.[207]

(8) The convention is that the appointment process is initiated by the Chief Justice of India for the appointment of a judge to the Supreme Court and by the Chief Justice of the High Court for the appointment of a judge to the High Court. There is no reason to depart from this convention.[208]

(9) The law laid down in the ***First Judges case*** is not the correct view.[209]

666. In his otherwise dissenting opinion, **Justice Punchhi** supported the view taken by Justice Verma to the extent that the executive could not disapprove the views of the Chief Justice of India or the views of the Chief Justice of the High Court (as the case may be) when a recommendation is made for the appointment of a judge to a superior court.[210]

667. The most significant feature of the ***Second Judges case*** is that it introduced what has come to be called a 'collegium system' of consultation for the appointment of judges of the Supreme Court and the High Courts. As far as the Chief Justice of India is concerned, the collegium system broad-based his/her role in the appointment of judges of the High Courts and the Supreme Court and (in one sense) diluted his/her role in the appointment process by taking it out of the individualized or personalized role of the Chief Justice of India as thought of by Dr. Ambedkar. The consultative role of the Chief Justice of India in Article 124 of the Constitution was radically transformed through a pragmatic interpretation of that provision. How did this happen?

668. In the ***Second Judges case*** certain norms were laid down by Justice Verma in the matter of appointment of judges. These norms were: For the appointment of judges in the Supreme Court, the Chief Justice of India must ascertain the views of the two senior-most judges of the Supreme Court and of the senior-most judge in the Supreme Court from the High Court of the candidate concerned. Through this process, the individual opinion of the Chief Justice of India was substituted by the collective opinion of several judges. In this sense the opinion of the Chief Justice of India in the consultative process was made broad-based and ceased to be individualized. At this stage it is worth recalling the words of Dr. Ambedkar that 'the Chief Justice, despite his eminence, had all the failings, sentiments and prejudices of common people.' The apprehension or fear that

Dr. Ambedkar had in this regard in case the Chief Justice of India were to act in an individual or personal capacity was now buried.[211] A somewhat similar norm was laid down for consultation for the appointment of a judge of the High Court. This is what was said:

This opinion has to be formed in a pragmatic manner and past practice based on convention is a safe guide. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two senior most Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior-most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124(2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.

In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two senior most Judges of the High Court.[212]

669. The importance of the role of the Chief Justice of India was acknowledged in that it was observed that the constitutional convention was that no appointment should be made by the President Under Article 124(2) and Article 217(1) of the Constitution unless it was in conformity with the final opinion of the Chief Justice of India. It was said:

The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(1), so given, has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated.[213]

670. The 'manner indicated' was that if a recommendation is returned by the executive (for cogent reasons) to the Chief Justice of India and the Chief Justice of India reiterates the recommendation with the unanimous agreement of the judges earlier consulted, then the appointment should be made 'as a matter of healthy convention'. This is what was said in this context:

Non-appointment of anyone recommended, on the ground of unsuitability, must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to

withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person, for reasons to be recorded, may be permissible in the public interest. If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment. However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made.[214]

671. The norms took the form of conclusions that became binding on the Judiciary and the Executive. It is not necessary to reproduce the conclusions arrived at.

672. An important aspect of the appointment process, which was adverted to by Justice Verma, is the constitutional convention that the recommendation must be initiated by and must originate from the Chief Justice of the High Court (for appointment to the High Court) and from the Chief Justice of India (for appointment to the Supreme Court). In the event the Chief Minister of a State recommends a person for appointment as a judge of the High Court, it must be routed only through the Chief Justice of the High Court. It is then for the said Chief Justice to consult his colleagues (and others, if necessary) and decide whether or not the person should be formally recommended. If the Chief Justice of the High Court recommends that person, the procedure as mentioned in the ***Second Judges case*** would thereafter follow. If the Chief Justice of the High Court decides not to recommend that person for appointment, the matter stands closed and, therefore, the question of making an appointment without the consent of the Chief Justice of India simply does not and cannot arise. It is this constitutionally and conventionally accepted procedure, which is apparently not acceptable to the political executive, that has led to the political executive by-passing the Chief Justice of a High Court and directly recommending to the Union Government a person for appointment as a judge of the High Court. Be that as it may, the majority view expressed in the ***Second Judges case*** restored the constitutional position envisaged by Dr. Ambedkar by diluting the individual authority of the Chief Justice of India and conferring it on a collegium of judges, which is perhaps in consonance with the views of Dr. Ambedkar.

673. According to the learned Attorney-General, these conclusions turned Article 124(2) and Article 217(1) of the Constitution 'on their head' and even Justice Verma, the author of the judgment felt that the decision required a rethink. The reference was to an interview given by Justice Verma post his retirement. In that, it was said by Justice Verma:

My 1993 judgment which holds the field, was very much misunderstood and misused. It was in that context that I said the working of the judgment now for some time is raising serious questions, which cannot be called unreasonable. Therefore some kind of rethink is required.[215]

674. It appears that the misunderstanding of the decision in the ***Second Judges case*** continues even today, especially by the political executive. The misunderstanding is not due to any lack of clarity in the decision rendered by this Court but due to the discomfort in the 'working of the judgment'. I say this because it was submitted by the learned Attorney-General and learned Counsel for some States that the ***Second Judges case*** left the executive with no role (or no effective

role) to play in the appointment of a judge of the Supreme Court or the High Court particularly since the opinion of the executive is now rendered meaningless. Nothing can be further from the truth. The executive continues to have a vital role to play and in some cases, the final say in the appointment of a judge-the misunderstanding of the judgment is due to the completely and regrettably defeatist attitude of the Union of India and the States or their view that in the matter of appointment of judges, it is their way or the highway. The Constitution of India is a sacred document and not a Rubik's cube that can be manipulated and maneuvered by the political executive any which way only to suit its immediate needs.

675. In an article found on the website of the Tamil Nadu State Judicial Academy, Justice Verma adverted to the appointment process in the ***Second Judges case*** and the role of the executive and said:

The clear language of the decision leaves no room for any doubt that the executive has a participatory role in these appointments; the opinion of the executive is weightier in the area of antecedents and personal character and conduct of the candidate; the power of non-appointment on this ground is expressly with the executive, notwithstanding the recommendation of the CJI; and that doubtful antecedents etc. are alone sufficient for non-appointment by the executive. The decision also holds that the opinion of the judicial collegium, if not unanimous does not bind the executive to make the appointment.

Some reported instances in the recent past of the executive failing to perform its duty by exercise of this power even when the recommendation of the judicial collegium was not unanimous and the then President of India had returned it for reconsideration, are not only inexplicable but also a misapplication of the decision, which the CJI, Balakrishnan rightly says is binding during its validity. Such instances only prove the prophecy of Dr. Rajendra Prasad that the Constitution will be as good as the people who work it. Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability.[216]

A little later in the article Justice Verma says (and this is also adverted to in the interview referred to by the learned Attorney-General):

The recent aberrations are in the application of the Second Judge's case in making the appointments, and not because of it. This is what I had pointed out in my letter of 5 December 2005 to CJI, Y.K. Sabharwal with copy to the two senior most judges, who included the present CJI, K.G. Balakrishnan.

676. The misunderstanding is, therefore, of the political executive and no one else. However, as pointed out by the learned Attorney-General, the merits or demerits of the ***Second Judges case*** is not in issue after the 99th Constitution Amendment Act and therefore no further comment is made, although it must be said, quite categorically, that the political executive has completely misunderstood the scope and impact of the ***Second Judges case*** and the working of the collegium system.

Third Judges case-28.10.1998

677. ***Special Reference No. 1 of 1998*** is commonly referred to as the ***Third Judges case***. The President sought the advisory opinion of this Court Under Article 143 of the Constitution on the following, amongst other, questions:

(1) whether the expression 'consultation with the Chief Justice of India' in Articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said articles.

(3) whether Article 124(2) as interpreted in the said judgment [***Second Judges case***] requires the Chief Justice of India to consult only the two senior most Judges or whether there should be wider consultation according to past practice.

(4) whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment;

678. At the outset, it must be noted that the learned Attorney-General stated at the hearing of the Presidential Reference that the Central Government was neither seeking a review nor a reconsideration of the ***Second Judges case***. Therefore, the answers to the Presidential Reference do not depart from the conclusions arrived at by this Court in the ***Second Judges case***. In that sense, this opinion did not take the substantive discussion much further though it substantially resolved some procedural issues and filled in the gaps relating to the process of appointment of judges to the superior judiciary. In any event, the answers to the three questions mentioned above are:

1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior most puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two senior most puisne Judges of the Supreme Court.

4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.[217]

679. The decision in the ***Second Judges case*** read with the opinion given by this Court to the various questions raised in the Presidential Reference or the ***Third Judges case*** fully settled the controversies surrounding the procedure to be adopted in the appointment of judges to the superior

judiciary. Issues of primacy of views and consultation with the Chief Justice of India were all answered by the decision and the opinion.

680. It is important to note that the ***Third Judges case*** modified one important norm or conclusion of the ***Second Judges case***. The modification was that the 'collegium' for appointment of judges in the Supreme Court was expanded to consist of the Chief Justice of India and four senior-most judges rather than the two senior-most judges as concluded in the ***Second Judges case***. In this manner, the consultation with the Chief Justice of India was further broad-based. It was clarified in conclusion 9 as follows:

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India.

This conclusion is important, but seems to have been ignored or overlooked by the President.

Samsher Singh's case

681. For a complete picture of the judicial pronouncements on the subject, it is also necessary to refer to the decision rendered by this Court in ***Samsher Singh v. State of Punjab*** MANU/SC/0073/1974 : (1974) 2 SCC 831 (Seven Judges Bench).

682. This case related to the termination of the services of two officers of the subordinate judicial service by the Governor of the State. The issue was whether the Governor could exercise his discretion in the matter personally or should act on the advice of the Council of Ministers. The judicial officers contended that the Governor was obliged to exercise his personal discretion and reliance was placed on ***Sardari Lal v. Union of India*** MANU/SC/0656/1971 : (1971) 1 SCC 411 (Five Judges Bench) in which it was held that for invoking the 'pleasure doctrine' Under Article 311(2) of the Constitution, the personal satisfaction of the President is necessary for dispensing with an inquiry Under Clause (c) of the proviso to Article 311(2) of the Constitution. On the other hand, the State contended that the Governor was obliged to act only on the advice of the Council of Ministers.

683. This Court speaking through Chief Justice A.N. Ray (for himself and four other learned judges) overruled ***Sardari Lal*** and held that the decision did not correctly state the law. It was held that under the Rules of Business, the decision of the concerned Minister or officer is the decision of the President or the Governor as the case may be. It was then concluded:

For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the Executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. The present appeals concern the appointment of persons other than District Judges to the Judicial Services of the State which is to be made by the Governor as contemplated in Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons

belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution."[218]

684. In a separate but concurring judgment authored by Justice Krishna Iyer (for himself and Justice Bhagwati) the view expressed by Chief Justice Ray was accepted in the following words:

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House;

(b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step.[219]

685. An additional reason was given by the two learned judges for coming to this conclusion and that is also important for our present purposes. The additional reason relates to the independence of the judiciary. For this, reference was made to ***Jyoti Prakash Mitter v. Chief Justice, Calcutta*** MANU/SC/0053/1964 : [1965] 2 SCR 53 (Five Judges Bench) The question in that case related to the determination of the age of a sitting judge of the High Court Under Article 217(3) of the Constitution.[220] This Court held that the age determination should be by the President uninfluenced by the views of the executive. This was on the ground that were the executive to make the determination of the age of a sitting judge, it would 'seriously affect the independence of the Judiciary.' This view was subsequently reiterated in ***Union of India v. Jyoti Prakash Mitter*** MANU/SC/0061/1971 : (1971) 1 SCC 396 (Five Judges Bench).

686. The learned judges then held, on the basis of the scheme of the Constitution that had already been adverted to, that the President means the Council of Ministers and the independence of the judiciary has been safeguarded by Article 217(3) of the Constitution by making mandatory the consultation with the Chief Justice of India in regard to age determination. This would prevent the possibility of extraneous considerations entering into the decision of the Minister if he/she departs from the views of the Chief Justice of India. It was held that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the executive and if there is a departure from the views of the Chief Justice of India, the Court can examine the issue in the light of the available facts. In such a 'sensitive subject' the last word should be with the Chief Justice of India. On this interpretation, it becomes irrelevant who formally decides the issue. This is what was held:

In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a

cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue.[221]

687. This decision is important for three key reasons: (1) It recognized, judicially, the independence of the judiciary. (This was before the ***First Judges case*** which recognized that the independence of the judiciary was a basic feature of the Constitution). (2) It cleared the air by concluding that the President was obliged to act on the advice of the Council of Ministers, even on the issue of appointment of judges. This was 'formalized' by the Constitution (Forty-second Amendment) Act, 1976. (3) In a sense, this decision was a precursor to the primacy conclusion in the ***Second Judges case*** with the last word on the subject being with the Chief Justice of India.

688. There are two observations that need to be made at this stage. Firstly, Justice Krishna Iyer penned the decision in ***Samsher Singh*** on behalf of Justice Bhagwati as well. Surprisingly, Justice Bhagwati did not refer to this decision in the ***First Judges case***. The significance of this failure is that while in ***Samsher Singh*** it was held by Justice Bhagwati that the 'last word' must belong to the Chief Justice of India, in the ***First Judges case*** it was held by Justice Bhagwati that the 'ultimate power' is with the executive. This completely divergent view, though in different circumstances, is inexplicable since the underlying principle is the same, namely, the status of the Chief Justice of India with reference to the affairs concerning the judiciary. The second observation is that the 'last word' theory was not and has not been questioned by the executive in any case, even in the ***Second Judges case***. Therefore, the 'last word' principle having been accepted, there is now no reason to go back on it or to repudiate it. It may be mentioned in the 'last word' context that ever since the Constitution came to be enacted, writes Granville Austin, quoting from Chief Justice Mehr Chand Mahajan's 'A Pillar of Justice':

Nehru 'has always acted in accordance with the advice of the CJI', he recalled, except in rare circumstances, despite efforts by state politicians with 'considerable pull' to influence him.[222]

Sankalchand Sheth's case

689. Another decision of considerable significance is ***Union of India v. Sankalchand Himatlal Sheth*** MANU/SC/0065/1977 : (1977) 4 SCC 193 (Five Judges Bench). That case pertained to the transfer of judges from one High Court to another and the interpretation of Article 222(1) of the Constitution.[223] Referring to the independence of the judiciary as also Article 50 of the Constitution it was said by Justice Y.V. Chandrachud:

Having envisaged that the judiciary, which ought to act as a bastion of the rights and freedom of the people, must be immune from the influence and interference of the executive, the Constituent Assembly gave to that concept a concrete form by making various provisions to secure and

safeguard the independence of the judiciary. Article 50 of the Constitution, which contains a Directive Principle of State Policy, provides that the State shall take steps to separate the judiciary from the executive in the public services of the State.

690. On the meaning of consultation by the President with the Chief Justice of India in the context of Article 222 of the Constitution, it was held that it has to be full and effective consultation and not formal or unproductive. It was said:

Article 222(1) which requires the President to consult the Chief Justice of India is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought to be taken by the executive without obtaining the views of the Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively. But there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President, of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive, consultation.

224

691. It was observed that though 'consultation' did not mean 'concurrence' yet, as held in ***Samsher Singh*** consultation with the Chief Justice of India should be accepted and in such a sensitive subject the last word must belong to the Chief Justice of India. It was noted that if there is a departure from the counsel of the Chief Justice of India, the Court would have the opportunity to examine if any extraneous considerations entered into the decision.[225]

692. This view was reiterated by Justice Krishna Iyer (for himself and Justice Fazl Ali).[226] Significantly, it was added that: 'It seems to us that the word, 'consultation' has been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries are concerned in the matter, namely, the President and the Chief Justice of India.'[227]

693. The greater significance of ***Sankalchand Sheth*** lies in the conclusion, relying upon ***R. Pushpam***, that for a meaningful consultation, both parties must have for consideration full and identical facts. It was said:

The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution".

In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision.[228]

694. This view was accepted in the ***First Judges case*** by Justice Bhagwati,[229] Justice Fazal Ali,[230] Justice V.D. Tulzapurkar[231] and Justice D.A. Desai.[232] It was also accepted in the ***Second Judges case*** by Justice Pandian.[233]

Memorandum of Procedure-30.6.1999

695. Following up on the decision and opinion rendered in the ***Second Judges case*** and the ***Third Judges case***, the Minister for Law in the Government of India framed and prepared one Memorandum of Procedure for the appointment of a judge of the Supreme Court and another for the appointment of a judge of the High Court. These were shared with the Chief Justice of India. None of the each successive Chief Justices of India have complained or criticized any of the Memoranda or adversely commented on them, or at least we have not been told of any such complaint or objection. No one, including any successive Law Minister of the Government of India, complained that the Memoranda were unworkable or caused any hindrance or delay in the appointment of judges or did not correctly reflect the views of this Court in the two decisions mentioned above or that they did not conform to any provision of the Constitution, either in letter or in spirit or even otherwise, or at least we have not been told of any such constraint. These Memoranda remained operational and the appointment of judges to the superior judiciary made subsequent thereto has been in conformity with them. No one complained about the inability to effectively work any Memorandum of Procedure.

696. We were invited by Mr. Fali S. Nariman to mention the procedure for the appointment of judges both in public interest and for reasons of transparency. The Memorandum of Procedure for the appointment of judges of the Supreme Court and the High Court are available on the website of the Department of Justice of the Government of India[234] and therefore it is not necessary to make a detailed mention of the procedure. Similar Memoranda have been referred to in the Second Judges case by Justice Pandian.[235]

697. A reading of the Memoranda makes it explicit that a proposal recommending the appointment of a judge of a High Court shall be initiated by the Chief Justice of the High Court. However, if the Chief Minister desires to recommend the name of any person he should forward the same to the Chief Justice for his consideration. Although it is not clearly spelt out, it is implicit that the Chief Justice is not obliged to accept the suggestion of the Chief Minister.

698. It is also significant and important to note that in the Memoranda, consultation by the judges in the collegium with 'non-judges' for making an appointment to the Supreme Court is postulated and it is not prohibited for making an appointment to the High Court. That is to say, a 'collegium judge' is not prohibited from taking the opinion of any person, either connected with the legal profession or otherwise for taking an informed decision regarding the suitability or otherwise of a person for appointment as a judge of the High Court or the Supreme Court. That this is not unknown is clear from a categorical statement of Justice Verma in an interview that:

For every Supreme Court appointment, I consulted senior lawyers like Fali S. Nariman and Shanthi Bhushan. I used to consult five or six top lawyers. I used to consult even lawyers belonging to the middle level. Similar consultation took place in the case of High Courts. I recorded details of every consultation. I wish all my correspondence is made public.

699. Therefore, during the evolution of the system of appointment of judges four cobwebs were cleared. They were: (1) The role of the President-he/she was expected to act on the advice of the Council of Ministers even in the appointment of judges; (2) The initial recommendation for the appointment of a judge of a High Court was to originate from the Chief Justice of the High Court and for the appointment of a judge of the Supreme Court from the Chief Justice of India; (3) Consultation between the President and the Chief Justice of India is an integrated participative process with the result that the President has the final say in the appointment of a judge under certain circumstances and the Chief Justice of India (in consultation with and on the unanimous view of the other judges consulted by him/her) has the final say under certain circumstances; and (4) The Union of India accepted these propositions without hesitation in the ***Third Judges case***.

Amendments to the Constitution

700. Apart from judicial discourses on the appointment of judges, Parliament too has had its share of discussions. On as many as four occasions, it was proposed to amend the Constitution in relation to the procedure for the appointment of judges of the Supreme Court and the High Courts. These proposed amendments are considered below.

(a) The Constitution (Sixty-seventh Amendment) Bill, 1990

701. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced in the Lok Sabha on 18th May, 1990 and it proposed to set up a National Judicial Commission (for short the NJC), though not in line with the recommendations of the LCI. The composition of the NJC was to vary with the subject matter of concern, namely, the appointment of a judge of the Supreme Court or the appointment of a judge of the High Court.

702. For the appointment of a judge of the Supreme Court, in terms of the proposed Article 307A of the Constitution, the NJC was to consist of the Chief Justice of India and two other judges of the Supreme Court next in seniority to the Chief Justice of India. For the appointment of a judge of the High Court, the NJC was to consist of the Chief Justice of India, the Chief Minister or Governor (as the case may be) of the concerned State, one other judge of the Supreme Court next in seniority to the Chief Justice of India, the Chief Justice of the High Court and the judge of the High Court next in seniority to the Chief Justice of the High Court. There was no provision for the appointment of the Chief Justice of India or the Chief Justice of the High Court.

703. The procedure for the transaction of business of the NJC was to be determined by the President in consultation with the Chief Justice of India and was subject to any law made by Parliament.

704. The Amendment Act also provided that in the event the recommendation of the NJC is not accepted, the reasons therefor shall be recorded in writing.

705. The Bill was criticized (in part) by the Arrears Committee which stated that:

The Committee is unable to find any logic or justification for different commissions....Keeping in view the objects and reasons for the constitution of the commission, namely, to obviate the criticism of executive arbitrariness in the matter of appointment and transfer of High Court judges and to prevent delay in making appointments, there is no justification for the executive through the Chief Minister to be on the commission. Instead of removing the vice of executive interference which has vitiated the working of the present system the presence of the Chief Minister on the recommendatory body actual alleviates him from the status of a mere consultee to the position of an equal participant in the selection process of the recommendatory body. By making the Chief Minister an equal party when he is not equipped to offer any view in regard to the merit, ability, competency, integrity and suitability of the candidates for appointments, the scope of executive interference is enhanced.[236]

706. The Bill was not taken up for consideration due to the dissolution of the Lok Sabha in May, 1991.

(b) The Constitution (Ninety-eighth Amendment) Bill, 2003

707. On 22nd February, 2000-barely 8 months after the issuance of the (Revised) Memorandum of Procedure mentioned above-the Government of India issued a notification setting up a **National Commission to Review the Working of the Constitution** (for short the NCRWC), including the procedure for the appointment of judges of the superior judiciary. The terms of reference of the NCRWC were as follows:

The Commission shall examine, in the light of the experience of the past 50 years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of parliamentary democracy and to recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features.

708. On 26th September, 2001 an Advisory Panel of the NCRWC issued a Consultation Paper on Superior Judiciary.[237] This Paper dealt with the procedure for appointment of judges of the Supreme Court and the High Courts, the age of retirement of judges, the transfer of judges of the High Courts and the procedure for dealing with 'deviant' behavior of a judge and for his/her removal.

709. In the context of appointment of judges of the superior judiciary, paragraph 8.20 of the Paper is significant since it tacitly acknowledges that the procedure evolved over the years particularly as a result of the ***Second Judges case*** and the ***Third Judges case*** was quite satisfactory. Paragraph 8.20 reads as follows:

8.20 **Purpose of 67th Amendment Bill served by the judgment in SCAORA:** We have set out hereinabove the several methods of appointment (to Supreme Court and High Courts) suggested by the various bodies, committees and organizations. We have also set out the method and procedure of appointment devised by the 1993 decision of the Supreme Court in SCAORA[238] and

in the 1998 opinion rendered Under Article 143. It would be evident therefrom that the 1993 decision gives effect to the substance of the Constitution (Sixty-seventh Amendment) Bill, without of course calling it a 'National Judicial Commission', and without the necessity of amending the Constitution as suggested by the said Amendment Bill. Indeed, it carries forward the object underlying the Amendment Bill by making the recommendations of the Chief Justice of India and his colleagues binding on the President. The 1998 opinion indeed enlarges the 'collegium'. In this sense, the purpose of the said Amendment Bill evidenced by the proviso to Article 124(2) and the Explanation appended thereto, is served, speaking broadly. The method of appointment evolved by these decisions has indeed been hailed by several jurists and is held out as a precedent worthy of emulation by U.K. and others. (See the opinion of Lord Templeman, a member of the House of Lords, cited hereinabove.) The said decisions lay down the proposition that the "consultation" contemplated by Articles 124 and 217 should be a real and effective consultation and that having regard to the concept of Judicial independence, which is a basic feature of the Constitution, the opinion rendered by the Chief Justice of India (after consulting his colleagues) shall be binding upon the Executive. In this view of the matter, much of the expectations from a National Judicial Commission (N.J.C) have been met. The said Constitution Amendment Bill was, it would appear, prepared after a wide and elaborate consultation with all the political parties and other stakeholders. However, the aspect of disciplinary jurisdiction remains unanswered. We may however discuss the concept of an N.J.C. which may cover both appointments and matters of discipline.

710. The Paper acknowledged that the ***Second Judges case*** and the ***Third Judges case*** 'speaking broadly' served the purpose of the Constitution (Sixty-seventh Amendment) Bill and that 'much of the expectations from a National Judicial Commission (N.J.C) have been met.' The shortfalls in expectations were not specified in the Paper except that of the disciplinary jurisdiction which did not arise and was not dealt with in the ***Second Judges case*** or the ***Third Judges case***. However, it is important to note that a dispassionate jurist Lord Templeman, a member of the House of Lords held the view that the system of appointment of judges in India ought to be followed in England as well. Apart from him, the system of appointment of judges laid down by these decisions 'has been hailed by several jurists and is held out as a precedent worthy of emulation'.

711. Be that as it may, the NCRWC submitted its Report to the Prime Minister on 31st March, 2002. In Chapter 7 of the Report relating to the judiciary, the NCRWC recommended in paragraph 7.3.7 thereof the establishment of a National Judicial Commission (for short the NJC). It was observed that such a commission was necessary for 'the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges' in line with the integrated participatory consultative process suggested by this Court in the ***Second Judges case*** and the ***Third Judges case***. This is what the NCRWC had to say:

The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18th May, 1990 (9th Lok Sabha) providing for the institutional frame work of National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. Further, it appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work

whereunder consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already available in Japan, Israel and the UK. The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for a collegium of the Chief Justice of India and two other judges of the Supreme Court for making appointment to the Supreme Court. However, it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.

The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

The Chief Justice of India: Chairman

Two senior most judges of the Supreme Court: Member The Union Minister for Law and Justice: Member

One eminent person nominated by the President after consulting the Chief Justice of India: Member

The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary.[239]

712. Pursuant to the recommendations of the NCRWC, the **Constitution (Ninety-eighth Amendment) Bill, 2003** was introduced in Parliament on or about 8th May, 2003. The Statement of Objects and Reasons of the Bill states, inter alia, that the Government of India has been committed to the setting up of an NJC for appointment of judges of the Supreme Court, Chief Justices and Judges of the High Courts as well as their transfer so as to provide for the effective participation of both the executive and the judicial wings of the Government. It is mentioned that the NCRWC also considered this matter and recommended the establishment of an NJC.

713. The Statement of Objects and Reasons refers to the composition of the NJC and while the NCRWC had recommended the nomination in the NJC of one eminent person by the President of India after consulting the Chief Justice of India, the Constitution (Ninety-Eighth Amendment) Bill modified this recommendation and proposed that one eminent citizen be nominated by the President of India in consultation with the Prime Minister of India for a period of three years.

714. The Constitution (Ninety-eighth Amendment) Bill proposed the insertion of Chapter IVA in the Constitution consisting of one Article namely Article 147A. This Article related to the establishment of the NJC in terms of the Statement of Objects and Reasons.

715. The Bill was not passed in any House of Parliament due to the dissolution of the Lok Sabha in March 2004 and the general elections being called.

(c) The Constitution (One Hundred and Twentieth Amendment) Bill, 2013

716. A third attempt was made to amend the Constitution for the purposes of appointment of judges of the superior judiciary. This was by the introduction of the Constitution (One Hundred and Twentieth Amendment) Bill, 2013 introduced in the Rajya Sabha on 24th August 2013.

717. The Statement of Objects and Reasons to the Bill referred to the ***Second Judges case*** and the ***Third Judges case*** as well as the Memorandum of Procedure. It was mentioned that the Memorandum confers upon the judiciary itself the power of appointment of judges of the superior judiciary.[240] It was further stated that after a review of the pronouncements of this Court and relevant constitutional provisions, a broad based judicial appointment commission could be established for making recommendations for the selection of judges. This commission would provide a meaningful role to the executive and the judiciary to present their viewpoint and make the participants accountable while introducing transparency in the selection process. The Statement of Objects and Reasons also mentioned that the proposed Bill would enable equal participation of the judiciary and the executive in the appointment of judges to the superior judiciary and also make the system more accountable and thereby increase the confidence of the public in the judiciary.

718. The Constitution (One Hundred and Twentieth Amendment) Bill proposed the insertion of Article 124A in the Constitution establishing a commission known as the National Judicial Appointments Commission (for short the NJAC). The composition of the NJAC, the appointment of its Chairperson and Members, their qualifications, conditions of services, tenure, functions and the procedure as well as the manner of selection of persons for appointment as Chief Justice of India, judges of the Supreme Court, Chief Justices and other judges of the High Courts was to be provided by law made by Parliament.

719. The Constitution (One Hundred and Twentieth Amendment) Bill was passed by the Rajya Sabha on 5th September 2013 but the Lok Sabha was dissolved in May 2014 before the Bill could be sent to it and the general elections called.

720. Strangely, the Statement of Objects and Reasons completely overlooked the fact that there already was 'equal participation of the judiciary and the executive in the appointment of judges to the superior judiciary.' In the ***Second Judges case*** it was clearly, explicitly and unequivocally stated that:

The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.[241]

However, in the event of a difference of opinion, one of the constitutional authorities must have the final say and given the constitutional convention over the decades the final say ought to be with the Chief Justice of India, the head of the judiciary in India under certain circumstances and with the President under certain circumstances. Otherwise, a stalemate or deadlock situation could

arise which the Constituent Assembly obviously did not anticipate from two constitutional functionaries. The ***Second Judges case*** and the ***Third Judges case*** gave this shared responsibility to the President and the Chief Justice of India.[242] For the appointment of a judge of the Supreme Court, the collegium of 5 (five) judges must make a unanimous recommendation. The President is entitled to turn down a 4-1 or 3-2 recommendation. If the unanimous recommendation does not find favour with the President for strong and cogent reasons and is returned to the collegium for reconsideration, and it is unanimously reiterated, then the President is obliged to accept the recommendation. However, if the reiteration is not unanimous, then the President is entitled to turn down the recommendation. The theory which the Constitution (One Hundred and Twentieth Amendment) Bill, 2013 [and subsequently the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014] sought to demolish that 'judges appoint judges' is non-existent.

(d) The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014

721. The fourth and final attempt (presently successful and under challenge in these petitions) to amend the Constitution was by the introduction on 11th August, 2014 of the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014. This Bill was passed by the Lok Sabha on 13th August, 2014 and by the Rajya Sabha on 14th August, 2014. It received the ratification of more than one half of the States as required by Article 368(2) of the Constitution and received the assent of the President on 31st December, 2014 when it became the Constitution (Ninety-ninth Amendment) Act 2014.

722. It may be mentioned *en passant* that the learned Solicitor General was requested to place on record the procedure adopted by the State Legislatures for ratification of the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 but that information was not forthcoming, for reasons that are not known. The intention was not to question the factum of ratification but only to understand the process and to add transparency to the process, since there have been instances in the United States where the courts have examined the issue of the ratification of an amendment to the Constitution.[243] Transparency is not a one-way street.

723. Section 1(2) of the Constitution (Ninety-ninth Amendment) Act 2014 provides that it shall come into force on such date as the Central Government may by notification in the official gazette, appoint. The appointed date is 13th April, 2015.

724. Simultaneous with the passage of the Constitution (One Hundred and Twenty-First Amendment) Bill, Parliament also considered the National Judicial Appointment Commission Bill, 2014. The Bill was introduced in Parliament on 11th August, 2014. It was passed by the Lok Sabha on 13th August, 2014 and by the Rajya Sabha on 14th August, 2014. The National Judicial Appointments Commission Act also received the assent of the President on 31st December, 2014 and it was brought into force by a gazette notification issued on 13th April, 2015.

725. Both the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 are challenged in this and a batch of connected writ petitions.

Conclusions on the factual background

726. The conclusions that can be drawn from the background historical facts are as follows:

(1) The independence of the judiciary has been always recognized and acknowledged by all concerned.

(2) Prior to Independence, the appointment of a judge to a superior court was entirely the discretion of the Crown. The Constituent Assembly felt that such a 'supreme and absolute' power should not vest in the President or the government of the day or the Chief Justice of India (as an individual) and therefore a fetter was placed on that power by requiring the President to mandatorily consult the Chief Justice of India (with the discretion to consult other judges) for the appointment of a judge to the Supreme Court. For the appointment of a judge of the High Court also, consultation with the Chief Justice of India was mandatory. In addition, consultation with the Chief Justice of the High Court and the Governor of the State was mandatory. Significantly, there is no mention of consultation with anybody from civil society.

(3) Any doubt about the individual role of the President in the process of appointment of judges came to rest and it was clear that the President was expected to act only on the advice of the Council of Ministers.

(4) Similarly, the Chief Justice of India is not expected to act in an individual or personal capacity but must consult his/her senior judges before making a recommendation for the appointment of a judge.

(5) Dr. Ambedkar and the Constituent Assembly did not accept the 'unfettered discretion' theory in the CAD but this view was subsequently rejected in the ***First Judges case*** which brought in the 'ultimate power' theory propounded by Justice Bhagwati and Justice Desai.

(6) Executive interference in the appointment process (with perhaps an informal method of 'take over') had started around the time of Independence and got aggravated post Independence, peaking towards the end of the 1980s.

(7) Not a single instance was given to us where the President recommended a person for appointment as a judge of the Supreme Court or the High Court. The Chief Minister of a State might have made a recommendation (although no instance was given to us) but that was required to be routed through the Chief Justice of the High Court, as per the Memorandum of Procedure.

(8) Only one instance was given to us, pre the ***First Judges case*** where an appointment as a judge of the High Court was made without the concurrence of the Chief Justice of India. Post the ***First Judges case*** as many as seven such appointments were made. This is a clear indication that the 'ultimate power' theory propounded in the ***First Judges case*** translated into 'absolute executive primacy'. The dream of Dr. Ambedkar became a nightmare, thanks to the political executive.

(9) The 'ultimate power' theory or the 'absolute executive primacy' theory is now diluted and the last word in the appointment of a judge of the Supreme Court is shared between the President and the Chief Justice of India in terms of the ***Second Judges case*** and the ***Third Judges case***. Historically, giving the last word to the executive has been criticized by no less than the Attorney-

General Shri M.C. Setalvad who chaired the Law Commission of India when the 14th Report was given. That system has not worked well at all as noted from time to time.

(10) The National Commission to Review the Working of the Constitution as well as a responsible judge from the House of Lords were of the opinion that the procedure for appointment of judges as laid down in the ***Second Judges case*** and the ***Third Judges case*** broadly serves the purpose of maintaining the independence of the judiciary and providing a suitable method for appointment of judges of the superior Courts.

727. This is not to say that the 'collegium system' is perfect. Hardly so. During the course of hearing, some critical comments were made with regard to the appointment of some judges to this Court which, it was submitted by the learned Attorney-General would not have been possible were it not for the failure of the collegium system. Even the Petitioners were critical of the collegium system. However, I must express my anguish at the manner in which an 'attack' was launched by some learned Counsel appearing for the Respondents. It was vitriolic at times, lacking discretion and wholly unnecessary. Denigrating judges is the easiest thing to do-they cannot fight back-and the surest way to ensure that the judiciary loses its independence and the people lose confidence in the judiciary, which is hardly advisable. The Bar has an equal (if not greater) stake in the independence of the judiciary and the silence of the Bar at relevant moments is inexplicable. The solution, in the larger canvas, is a democratic audit, an audit limited to the judiciary and the Rule of Law. If some positive developments can be incorporated in the justice delivery system (in the larger context) they should be so incorporated.

728. In this context, it is interesting to recall the words of Dr. Ambedkar on the working of the Constitution:

...however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution.[244]

729. Both the 'absolute executive primacy' system or the 'ultimate power' theory and the 'collegium system' of appointment of judges of the Supreme Court and the High Courts were acceptable systems in their time. The 'executive primacy' system was, unfortunately, abused by the executive and the judiciary could do precious little about it, bound as the judges are by the Rule of Law. It is because of this abuse that the constitutional provisions were revisited at the instance of the Bar of this Court and the revisit gave the correct interpretational insight into our constitutional history and the constitutional provisions. It is this insight that resulted in the ***Second Judges case*** and a meaningful and pragmatic interpretation of the Constitution.

730. That the ***Second Judges case*** was correctly decided by the majority was accepted in the ***Third Judges case*** by the Attorney-General and, what is more important, by the President (aided and advised by the Council of Ministers) who did not seek a reversal of the dicta laid down in the ***Second Judges case***.

731. To say, as was conveyed to us during the hearing of the case, that the collegium system has failed and that it needs replacement would not be a correct or a fair post mortem. It is true that there has been criticism (sometimes scathing) of the decisions of the collegium, but it must not be forgotten that the executive had an equally important participative role in the integrated process of the appointment of judges. That the executive adopted a defeatist or an I-don't-care attitude is most unfortunate. The collegium cannot be blamed for all the ills in the appointment of judges-the political executive has to share the blame equally if not more, since it mortgaged its constitutional responsibility of maintaining a check on what may be described as the erroneous decisions of the collegium.

732. To say that the executive had no role to play (as was suggested to us) is incorrect to say the least, as is clear from a close reading of the ***Second Judges case*** and the ***Third Judges case***. Even the President did not think so. In fact, the President was clearly of the opinion that the executive or at least the Head of State had a role to play in the appointment of judges. This evident from an article titled "Merit" in the Appointment of Judges'[245] which quotes from an issue of India Today magazine of 25th January, 1999 the following noting made by the President concerning the appointment of judges of the Supreme Court:

I would like to record my views that while recommending the appointment of Supreme Court judges, it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs, who comprise 25 per cent of the population, and women are given due consideration. Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable. Keeping vacancies unfilled is also not desirable given the need for representation of different sections of society and the volume of work the Supreme Court is required to handle.

The Chief Justice of India is reported to have responded as follows:

I would like to assert that merit alone has been the criterion for selection of Judges and no discrimination has been done while making appointments. All eligible candidates, including those belonging to the Scheduled Castes and Tribes, are considered by us while recommending names for appointment as Supreme Court Judges. Our Constitution envisages that merit alone is the criterion for all appointments to the Supreme Court and High Courts. And we are scrupulously adhering to these provisions. An unfilled vacancy may not cause as much harm as a wrongly filled vacancy.

733. All that was needed to keep the collegium system on the rails was the unstinted cooperation of the executive and an effective implementation strategy, with serious and meaningful introspection and perhaps some fine tuning and tweaking to make it more effective. Unfortunately, the executive did not respond positively, perhaps due to its misunderstanding of the decisions of this Court.

734. On the other hand, an independent and impartial jurist, Lord Templeman praised the integrated consultative collegium system and recommended it as a method that the British could follow with advantage. The learned judge wrote:

However, having regard to the earlier experience in India of attempts by the executive to influence the personalities and attitudes of members of the judiciary, and having regard to the successful attempts made in Pakistan to control the judiciary, and having regard to the unfortunate results of the appointment of Supreme Court judges of the United States by the President subject to approval by Congress, the majority decision of the Supreme Court of India in the *Advocates on Record* case marks a welcome assertion of the independence of the judiciary and is the best method of obtaining appointments of integrity and quality, a precedent method which the British could follow with advantage.[246]

While others shower praise on our system of appointment of judges, we can only heap scorn!

Preliminary issue-reconsideration of the Second Judges case and the Third Judges case

735. With this rather detailed history, the preliminary objections raised by the learned Attorney-General need consideration. The learned Attorney-General raised three preliminary issues: (1) The writ petitions are premature and not maintainable since the 99th Constitution Amendment Act and the NJAC Act have not come into force; (2) The writ petitions are premature and not maintainable since the National Judicial Appointments Commission has not been constituted and so there is no adverse impact of the 99th Constitution Amendment Act and the NJAC and no facts have been pleaded by the Petitioners in this regard; (3) This batch of cases ought to be heard by a Bench of 9 (nine) or more judges since the decision of this Court in the ***Second Judges case***[247] and the ***Third Judges case***[248] do not lay down the correct law but require reconsideration. It was submitted that the decisions have the effect of usurping the powers of the President under Article 124(2) and Article 217(1) of the Constitution and that the judiciary has effectively converted the appointment of judges to the Supreme Court and the High Courts from 'consultation' between the President and the Chief Justice of India (as occurring in Article 124(2) of the Constitution) into 'concurrence' of the Chief Justice of India and giving birth to a 'right to insist' on the acceptance of a recommendation of the Chief Justice of India. Moreover, the doctrine of separation of powers between the Legislature, the Executive and the Judiciary has been thrown overboard as also the system of checks and balances inherent in the Constitution. To decide this particular preliminary issue, the learned Attorney-General referred to the separation of powers in our Constitution, the law and the principles on which this Court should proceed to decide whether an earlier or prior decision rendered requires to be reconsidered.

736. As far as the first preliminary objection is concerned, it was raised before the 99th Constitution Amendment Act and the NJAC Act came into force. Now the preliminary objection does not survive since the 99th Constitution Amendment Act and the NJAC Act have in fact been brought into force. The second preliminary objection has no substance since the question in these petitions relates to the basic structure of the Constitution and the independence of the judiciary. It would be facetious to say that the writ petitions should have been filed after an adverse impact is felt by the alteration of the basic structure of the Constitution and after the independence of the judiciary is bartered away. If the Petitioners were expected to wait that long it would perhaps be too late. That apart, since we have heard these petitions at length, it is advisable to pronounce on the substantive issues raised. Really speaking, it is only the third preliminary objection that needs consideration.

The third preliminary objection and the separation of powers

737. The issue of the separation of powers has been the subject matter of discussion in several cases. Broadly, the consistent view of this Court has been that while the Constitution recognizes the separation of powers, it is not a rigid separation and there is some overlap.

738. In ***Ram Jawaya Kapur v. State of Punjab*** MANU/SC/0011/1955 : [1955] 2 SCR 225 (Five Judges Bench) it was held by Chief Justice Mukherjea speaking for this Court:

It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law.[249]

739. The separation of powers in our Constitution is not as rigid as in the United States. One of the elements of the separation of powers is the system of checks and balances. This too is recognized by our Constitution and Article 226 and Article 32 (judicial review) is one of the features of checks and balances. It was so held in ***Kesavananda Bharati v. State of Kerala*** MANU/SC/0445/1973 : (1973) 4 SCC 225 (Thirteen Judges Bench) where it was said by Justice Shelat and Justice Grover as follows:

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in *Ranasinghe case* 1965 AC 172. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances.[250]

740. In ***Indira Nehru Gandhi v. Raj Narain*** MANU/SC/0304/1975 : 1975 Supp SCC 1 (Five Judges Bench) the constitutional validity of the Constitution (Thirty-ninth Amendment) Act, 1975 was challenged. By this Amendment Act, Article 39-A was inserted in the Constitution and the challenge was, inter alia, to Clause (4) thereof.[251] While striking down the offending clause, it was held by Justice H.R. Khanna:

A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the legislature to encroach upon the judicial sphere. It has accordingly been held that a legislature while it is entitled to change with retrospective effect the

law which formed the basis of the judicial decision, it is not permissible to the legislature to declare the judgment of the court to be void or not binding (see *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality*, *Janapada Sabha, Chhindwara* v. *Central Provinces Syndicate Ltd.*, *Municipal Corporation of the City of Ahmedabad* v. *New Shorock Spg. and Wvg. Co. Ltd. and State of Tamil Nadu* v. *M. Rayappa Gounder*).[252] (Internal citations omitted).

741. Justice Mathew held that ours is a cooperative federalism that does not contain any rigid separation of powers and there exists a system of checks and balances. Harold Laski was quoted as saying that 'Separation of powers does not mean the equal balance of powers.'[253] In that context it was held that the exercise of judicial power by the Legislature is impermissible. The learned judge expressed the view that:

Montesquieu was the first to conceive of the three functions of Government as exercised by three organs, each juxtaposed against others. He realised that the efficient operation of Government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers. As Holdsworth says, Montesquieu convinced the world that he had discovered a new constitutional principle which was universally valid. The doctrine of separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have us think, three watertight compartments. Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation.[254]

742. Justice Y.V. Chandrachud made a distinction between the separation of powers as understood in the United States and Australia and as understood in India and expressed the following view in this regard:

The American Constitution provides for a rigid separation of governmental powers into three basic divisions, the executive, legislative and judicial. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. As observed by Cardozo, J. in his dissenting opinion in *Panama Refining Co.* v. *Ryan* MANU/USSC/0240/1935 : 293 U.S. 388 (1935) the principle of separation of powers "is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of Government which cannot foresee today the developments of tomorrow in their nearly infinite variety". Thus, even in America, despite the theory that the legislature cannot delegate its power to the executive, a host of rules and Regulations are passed by non-legislative bodies, which have been judicially recognized as valid.[255]

743. In ***Minerva Mills Ltd. v. Union of India*** MANU/SC/0075/1980 : (1980) 3 SCC 625 (Five Judges Bench) Justice Bhagwati opined that the Constitution has devised a structure for the separation of powers and checks and balances and held:

It is clear from the majority decision in *Kesavananda Bharati case* that our Constitution is a controlled Constitution which confers powers on the various authorities created and recognised by it and defines the limits of those powers. The Constitution is suprema lex, the paramount law of the land and there is no authority, no department or branch of the State which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority.[256]

744. A little later, it was observed by the learned judge:

It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of government are divided; the executive, the legislature and the judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J., (as he then was) in Indira Gandhi case 'by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged'.[257]

745. In ***I.R. Coelho v. State of Tamil Nadu*** MANU/SC/0595/2007 : (2007) 2 SCC 1 (Nine Judges Bench) it was held by Chief Justice Sabharwal speaking for the Court that the doctrine of separation of powers is a part of the basic structure of the Constitution. It was held:

The separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in Kesavananda Bharati case by the majority. Later, it was reiterated in Indira Gandhi case. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution.[258]

746. In ***Bhim Singh v. Union of India*** MANU/SC/0327/2010 : (2010) 5 SCC 538 (Five Judges Bench) it was held that separation of powers is an essential feature of the Constitution and in modern governance strict separation is neither possible nor desirable. There is no violation of the principle of separation of powers if there is an overlap of the function of one branch of governance with another, but if one branch takes over an essential function of another branch, then there is a violation of the principle. It was observed by Justice Sathasivam speaking for the Court, while

considering the constitutional validity of the Members of Parliament Local Area Development Scheme:

The concept of separation of powers, even though not found in any particular constitutional provision, is inherent in the polity the Constitution has adopted. The aim of separation of powers is to achieve the maximum extent of accountability of each branch of the Government.

While understanding this concept [of separation of powers], two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability.

Thus, the test for the violation of separation of powers must be precisely this. A law would be violative of separation of powers not if it results in some overlap of functions of different branches of the State, but if it takes over an essential function of the other branch leading to lapse in constitutional accountability.[259]

747. Finally, in ***State of Tamil Nadu v. State of Kerala*** MANU/SC/0425/2014 : (2014) 12 SCC 696 (Five Judges Bench) there is an elaborate discussion on the separation of powers with reference to several cases decided by this Court.[260] It was held therein that in view of the doctrine of the separation of powers (and for other reasons as well) the Kerala Irrigation and Water Conservation (Amendment) Act, 2006 passed by the Kerala Legislature is unconstitutional since it seeks to nullify the decision of this Court in ***Mullaperiyar Environmental Protection Forum v. Union of India*** MANU/SC/8074/2006 : (2006) 3 SCC 643 (Five Judges Bench).

748. The submission of the learned Attorney-General was that the appointment of a judge of the Supreme Court or a High Court is an executive function and this has been so held even in the ***Second Judges case***. Justice Ahmadi held that the appointment of judges is an executive function[261] as did Justice Verma.[262] By an unsustainable interpretation of the Constitution (an interpretation which, according to the learned Attorney-General must have made Dr. Ambedkar turn in his grave), this executive function has been taken over or usurped by the judiciary and that is the reason why the Second Judges case requires to be reconsidered and the correct constitutional position deserves to be restored. In other words, by a process of judicial encroachment, the separation of power theory has been broken down by this Court, in violation of the basic structure of the Constitution.

Constituent Assembly Debates and the third preliminary issue

749. In further support of his contention that the ***Second Judges case*** and the ***Third Judges case*** do not lay down the correct law and need reconsideration, the learned Attorney-General placed great reliance on the CAD. It is necessary, therefore, to consider the law on the subject and then the debates.

750. In ***Administrator-General of Bengal v. Prem Lal Mullick*** (1894-95) 22 I.A. 107, 118 the Privy Council did not approve of a reference to debates in the Legislature as a legitimate aid to the construction of a statute. It was held:

Their Lordships observe that the two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgment upon them, refer to the proceedings of the Legislature which resulted in the passing of the Act of 1874 [Administrator-General's Act] as legitimate aids to the construction of Section 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction are equally cogent in the case of an Indian statute.

751. This view was partially accepted, with reference to the CAD in ***A.K. Gopalan v. State of Madras*** MANU/SC/0012/1950 : 1950 SCR 88 (6 Judges Bench) by Chief Justice Harilal Kania who held that reference may be made to the CAD with great caution and only when 'latent ambiguities are to be resolved.'[263] The learned Chief Justice observed:

Our attention was drawn to the debates and report of the drafting committee of the Constituent Assembly in respect of the wording of this clause. The report may be read not to control the meaning of the article, but may be seen in case of ambiguity. In *Municipal Council of Sydney* v. *The Commonwealth* (1904) 1 Com LR 208 it was thought that individual opinion of members of the Convention expressed in the debate cannot be referred to for the purpose of construing the Constitution. The same opinion was expressed in *United States* v. *Wong Kim Ark* 169 US 649, 699. The result appears to be that while it is not proper to take into consideration the individual opinions of Members of Parliament or Convention to construe the meaning of the particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. In the present case the debates were referred to show that the expression "due process of law" was known to exist in the American Constitution and after a discussion was not adopted by the Constituent Assembly in our Constitution. In *Administrator General of Bengal* v. *Premlal Mullick* a reference to the proceedings of the legislature which resulted in the passing of the Act was not considered legitimate aid in the construction of a particular section. The same reasons were held as cogent for excluding a reference to such debates in construing an Indian statute. Resort may be had to these sources with great caution and only when latent ambiguities are to be resolved.[264]

752. This view was endorsed by Fazl Ali, J who referred to the expression 'due process of law' which was originally interpreted by the United States Supreme Court as referring to matters of procedure but was subsequently widened to cover substantive law as well. The learned judge held:

In the course of the arguments, the learned Attorney-General referred us to the proceedings in the Constituent Assembly for the purpose of showing that the article as originally drafted contained the words "without due process of law" but these words were subsequently replaced by the words "except according to procedure established by law". In my opinion, though the proceedings or discussions in the Assembly are not relevant for the purpose of construing the meaning of the expressions used in Article 21, especially when they are plain and unambiguous, they are relevant to show that the Assembly intended to avoid the use of the expression "without due process of

law"..... In the earliest times, the American Supreme Court construed "due process of law" to cover matters of procedure only, but gradually the meaning of the expression was widened so as to cover substantive law also, by laying emphasis on the word "due".[265]

753. Justice Patanjali Sastri was of the same opinion and so the learned judge held as follows:

Learned Counsel drew attention to the speeches made by several members of the Assembly on the floor of the House for explaining, as he put it, the "historical background". A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord. The Court could only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles etc. I attach no importance, therefore, to the speeches made by some of the members of the Constituent Assembly in the course of the debate on Article 15 (now Article 21).[266]

754. Justice Mukherjea noted the concession of the learned Attorney-General that the CAD are not admissible to explain the meaning of the words used-a position quite the opposite from what is now taken by the learned Attorney-General. The learned judge then observed that such extrinsic evidence is best left out of account and held as follows:

The learned Attorney-General has placed before us the debates in the Constituent Assembly centering round the adoption of this recommendation of the Drafting Committee and he has referred us to the speeches of several members of the Assembly who played an important part in the shaping of the Constitution. As an aid to discover the meaning of the words in a Constitution, these debates are of doubtful value. "Resort can be had to them"' says Willoughby, "with great caution and only when latent ambiguities are to be solved. The proceedings may be of some value when they clearly point out the purpose of the provision. But when the question is of abstract meaning, it will be difficult to derive from this source much material assistance in interpretation.

The learned Attorney-General concedes that these debates are not admissible to explain the meaning of the words used and he wanted to use them only for the purpose of showing that the Constituent Assembly when they finally adopted the recommendation of the Drafting Committee, were fully aware of the implications of the differences between the old form of expression and the new. In my opinion, in interpreting the Constitution, it will be better if such extrinsic evidence is left out of account. In matters like this, different members act upon different impulses and from different motives and it is quite possible that some members accepted certain words in a particular sense, while others took them in a different light.[267]

755. Justice S.R. Das specifically stated that he expresses no opinion on the question of admissibility or otherwise of the CAD to interpret the Constitution.

756. In ***State of Travancore-Cochin v. The Bombay Co. Ltd.*** MANU/SC/0068/1952 : 1952 SCR 1112 (5 Judges Bench) it was unanimously held that reference to the CAD is unwarranted and such an extrinsic aid to the interpretation of statutes is not admissible. Speaking for the Court, Chief Justice Patanjali Sastri held:

It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes--see *Administrator-General of Bengal* v. *Prem Lal Mallick*. The reason behind the rule was explained by one of us in *Gopalan case* thus:

A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord,

or, as it is more tersely put in an American case-

Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other--*United States* v. *Trans-Missouri Freight Association* 169 US 290, 318 [268]

757. In ***Golak Nath v. State of Punjab*** MANU/SC/0029/1967 : (1967) 2 SCR 762 (11 Judges Bench) Chief Justice Subba Rao noted the submissions of the Petitioners, one of which was:

The debates in the Constituent Assembly, particularly the speech of Mr. Jawahar Lal Nehru, the first Prime Minister of India, and the reply of Dr. Ambedkar, who piloted the Bill disclose clearly that it was never the intention of the makers of the Constitution by putting in Article 368 to enable the Parliament to repeal the fundamental rights; the circumstances under which the amendment moved by Mr. H.V. Kamath, one of the members of Constituent Assembly, was withdrawn and Article 368 was finally adopted, support the contention that amendment of Part III is outside the scope of Article 368.[269]

758. The submissions of the learned Attorney-General were also noted and one of which was, again, diametrically opposed to the submission made before us by the learned Attorney-General:

Debates in the Constituent Assembly cannot be relied upon for construing Article 368 of the Constitution and even if they can be, there is nothing in the debates to prove positively that fundamental rights were excluded from amendment.[270]

759. The learned Chief Justice (speaking for the majority) referred to the CAD and observed:

We have referred to the speeches of Pandit Jawaharlal Nehru and Dr. Ambedkar not with a view to interpret the provisions of Article 368, which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution.[271]

760. Justice Wanchoo dealt with the issue a bit more elaborately and on a consideration of the law (drawing support from ***Prem Lal Mullick*** and ***A.K. Gopalan***) held that the CAD could not be looked into for interpreting Article 368 of the Constitution and that the said Article 'must be interpreted on the words thereof as they finally found place in the Constitution.' It was said:

Copious references were made during the course of arguments to debates in Parliament and it is urged that it is open to this Court to look into the debates in order to interpret Article 368 to find out the intention of the Constitution-makers. We are of opinion that we cannot and should not look into the debates that took place in the Constituent Assembly to determine the interpretation of Article 368 and the scope and extent of the provision contained therein. It may be conceded that historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed, may be taken into account in finding out the scope and extent of Article 368. But we have no doubt that what was spoken in the debates in the Constituent Assembly cannot and should not be looked into in order to interpret Article 368.....

We are therefore of opinion that it is not possible to read the speeches made in the Constituent Assembly in order to interpret Article 368 or to define its extent and scope and to determine what it takes in and what it does not. As to the historical facts, namely, what was accepted or what was avoided in the Constituent Assembly in connection with Article 368, it is enough to say that we have not been able to find any help from the material relating to this. There were proposals for restricting the power of amendment Under Article 368 and making fundamental rights immune therefrom and there were counter proposals before the Constituent Assembly for making the power of amendment all-embracing. They were all either dropped or negatived and in the circumstances are of no help in determining the interpretation of Article 368 which must be interpreted on the words thereof as they finally found place in the Constitution, and on those words we have no doubt that there are no implied limitations of any kind on the power to amend given therein.[272]

761. Justice Bachawat concluded his judgment by referring to the issue of the CAD being an aid to interpreting the Constitution. In rather terse words, the learned judge rejected the submission made in this regard and relied upon ***State of Travancore-Cochin***. This is what was said:

Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft constitution. These speeches cannot be used as aids for interpreting the Constitution. See *State of Travancore-Cochin and Ors.* v. *Bombay Co. Ltd.* Accordingly, I do not rely on them as aids to construction.[273]

762. Justice Bachawat also makes a rather interesting reference to a special article written by Sir B.N. Rau (Constitutional Adviser) on 15th August, 1948. Sir Benegal remarked:

It seems rather illogical that a constitution should be settled by simple majority by an assembly elected indirectly on a very limited franchise and that it should not be capable of being amended in the same way by a Parliament elected-and perhaps for the most part elected directly by adult suffrage.[274]

This is mentioned, without any comment, only to throw open the thought whether the interpretation of the Constitution can be tied down forever to the views expressed by a few Hon'ble Members of the Constituent Assembly, who were undoubtedly extremely learned and visionary but who nevertheless constituted 'an assembly elected indirectly on a very limited franchise'.

763. In ***Kesavananda Bharati*** it was held by Chief Justice Sikri that 'speeches made by members of the legislature in the course of debates relating to the enactment of a statute cannot be used as

aids for interpreting any provisions of the statute.' The learned Chief Justice held that the same rule is applicable to provisions of the Constitution as well and for this reliance was placed, inter alia, on ***Prem Lal Mullick***, ***A.K. Gopalan***, ***State of Travancore-Cochin*** and ***Golak Nath***. Explaining ***Union of India*** v. ***H.S. Dhillon*** MANU/SC/0062/1971 : (1972) 2 SCR 331 the learned Chief Justice said:

In *Union of India* v. *H.S. Dhillon* I, on behalf of the majority, before referring to the speeches observed at p. 58 that "we are however, glad to find from the following extracts from the debates that our interpretation accords with what was intended". There is no harm in finding confirmation of one's interpretation in debates but it is quite a different thing to interpret the provisions of the Constitution in the light of the debates.[275]

764. Apart from relying on case law, the learned Chief Justice gave an additional reason for concluding that reliance on the CAD was not advisable for interpreting the provisions of the Constitution. This is best understood in the words of the learned Chief Justice:

There is an additional reason for not referring to debates for the purpose of interpretation. The Constitution, as far as most of the Indian States were concerned, came into operation only because of the acceptance by the Ruler or Rajpramukh. This is borne out by the following extract from the statement of Sardar Vallabhbhai Patel in the Constituent Assembly on October 12, 1949, (CAD, Vol. X, pp. 161-63):

Unfortunately we have no properly constituted legislatures in the rest of the States (apart from Mysore, Saurashtra and Travancore and Cochin Union) nor will it be possible to have legislatures constituted in them before the Constitution of India emerges in its final form. We have, therefore, no option but to make the Constitution operative in these States on the basis of its acceptance by the Rulers or the Rajpramukh, as the case may be, who will no doubt consult his Council of Ministers.

In accordance with this statement, declarations were issued by the Rulers or Rajpramukhs accepting the Constitution.

It seems to me that when a Ruler or Rajpramukh or the people of the State accepted the Constitution of India in its final form, he did not accept it subject to the speeches made during the Constituent Assembly debates. The speeches can, in my view, be relied on only in order to see if the course of the progress of a particular provision or provisions throws any light on the historical background or shows that a common understanding or agreement was arrived at between certain sections of the people.[276]

765. Justice Hegde and Justice A.K. Mukherjea also held that reliance could not be placed on the CAD to interpret any provision of the Constitution. Reference was made to ***State of Travancore-Cochin*** and it was held:

For finding out the true scope of Article 31(2) as it stands now, the learned Advocate-General of Maharashtra as well as the Solicitor-General has taken us through the history of this article. According to them the article as it stands now truly represents the intention of the Constitution-

makers. In support of that contention, we were asked to go through the Constituent Assembly debates relating to that article. In particular we were invited to go through the speeches made by Pandit Nehru, Sir Alladi Krishnaswami Ayyar, Dr. Munshi and Dr. Ambedkar. In our opinion, it is impermissible for us to do so. It is a well-settled rule of construction that speeches made by members of a Legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any of the provisions of the statute. The same rule is applicable when we are called upon to interpret the provisions of a Constitution.[277]

The learned judges observed that no decision was brought to their notice dissenting with the view mentioned above.

766. Justice H.R. Khanna was also of the opinion that the CAD could be referred only for the limited purpose of determining the history of the constitutional provision. The CAD 'cannot form the basis for construing the provisions of the Constitution.' The learned judge further said that the intention of the draftsman of a statute would have to be gathered from the words used. The learned judge said:

The speeches in the Constituent Assembly, in my opinion, can be referred to for finding the history of the Constitutional provision and the background against which the said provision was drafted. The speeches can also shed light to show as to what was the mischief which was sought to be remedied and what was the object which was sought to be attained in drafting the provision. The speeches cannot, however, form the basis for construing the provisions of the Constitution. The task of interpreting the provision of the Constitution has to be done independently and the reference to the speeches made in the Constituent Assembly does not absolve the court from performing that task. The draftsmen are supposed to have expressed their intentions in the words used by them in the provisions. Those words are final repositories of the intention and it would be ultimately from the words of the provision that the intention of the draftsmen would have to be gathered.[278]

767. Justice Y.V. Chandrachud relied upon ***State of Travancore-Cochin***, ***A.K. Gopalan*** and ***Golak Nath*** to conclude:

Debates of the Constituent Assembly and of the First Provisional Parliament were extensively read out to us during the course of arguments. I read the speeches with interest, but in my opinion, the debates are not admissible as aids to construction of constitutional provisions.[279]

A little later it was said:

It is hazardous to rely upon parliamentary debates as aids to statutory construction. Different speakers have different motives and the system of "Party Whip" leaves no warrant for assuming that those who voted but did not speak were of identical persuasion. That assumption may be difficult to make even in regard to those who speak. The safest course is to gather the intention of the legislature from the language it uses. Therefore, parliamentary proceedings can be used only for a limited purpose as explained in Gopalan case.[280]

768. A contrary view was rhetorically expressed by Justice Jaganmohan Reddy but it was eventually held that the CAD could aid in interpretation, being 'valuable material' unlike legislative

debates which could be motivated by partisan views and party politics. Constituent Assembly Debates were not motivated by such partisan considerations. It was said:

Speaking for myself, why should we not look into them [CAD] boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned..... In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a Constituent Assembly have no such partisan nuances and their only concern is to give the national a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly.[281]

769. Justice K.K. Mathew supported the view of Justice Jaganmohan Reddy and observed that: 'Logically, there is no reason why we should exclude altogether the speeches made in the Constituent Assembly by individual members if they throw any light which will resolve latent ambiguity in a provision of Constitution.' The learned judge went on to hold in a subsequent paragraph of the decision:

If the debates in the Constituent Assembly can be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading up to and attending its enactment, to ascertain the intention of the makers of the Constitution, it is difficult to see why the debates are inadmissible to throw light on the purpose and general intent of the provision. After all, legislative history only tends to reveal the legislative purpose in enacting the provision and thereby sheds light upon legislative intent. It would be drawing an invisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent in case of latent ambiguity in the provision.[282]

770. In ***Samsher Singh*** in their concurring opinion, Justice Krishna Iyer (for himself and Justice P.N. Bhagwati) extensively referred to the CAD for arriving at their conclusion, while Chief Justice Ray (for himself and four other learned judges) made no reference to the CAD.

771. Be that as it may, reference to the CAD again came up for consideration in ***Indra Sawhney v. Union of India*** MANU/SC/0104/1993 : 1992 Supp (3) SCC 217 (9 Judges Bench) Speaking for the learned Chief Justice, Justice M.N. Venkatachaliah, Justice Ahmadi and himself, Justice B.P. Jeevan Reddy clarified that though the CAD or the speeches of Dr. Ambedkar cannot be ignored, they are not conclusive or binding on the Court but can be relied upon as an aid to interpreting a constitutional provision. The CAD were referred to for 'furnishing the context and the objective' to be achieved by Clause (4) of Article 16 of the Constitution. Reference was made, inter alia, to ***Golaknath***, ***Dhillon*** and ***Kesavananda Bharati*** and it was held:

We are aware that what is said during these debates is not conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr. Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft Clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court..... Since the expression "backward" or "backward class of citizens" is not defined in the Constitution, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable.[283]

772. In ***S.R. Chaudhuri v. State of Punjab*** MANU/SC/0457/2001 : (2001) 7 SCC 126 it was held that it is settled that the CAD may be relied upon 'as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution.' This view was followed by me in ***Manoj Narula v. Union of India*** MANU/SC/0736/2014 : (2014) 9 SCC 1 (5 Judges Bench).

773. In ***T.M.A. Pai Foundation v. State of Karnataka*** MANU/SC/0905/2002 : (2002) 8 SCC 481 (11 Judges Bench) Justice Khare referred to ***Kesavananda Bharati*** and observed therein that though the CAD are not conclusive, yet they can throw light into the intention of the framers in enacting provisions of the Constitution. On this basis the learned judge held:

Thus, the accepted view appears to be that the report of the Constituent Assembly debates can legitimately be taken into consideration for construction of the provisions of the Act or the Constitution.[284]

774. Justice Variava (for himself and Justice Bhan) also referred to ***Kesavananda Bharati*** and held that though the CAD are not conclusive, but 'in a constitutional matter where the intent of the framers of the Constitution is to be ascertained, the Court should look into the proceedings and the relevant data, including the speeches, which throw light on ascertaining the intent.'

775. Justice Syed Shah Quadri stated an interesting principle in the following words:

The correct way to interpret an article is to go by its plain language and lay bare the meaning it conveys. It would no doubt be useful to refer to the historical and political background which supports the interpretation given by the court and in that context the debates of the Constituent Assembly would be the best record of understanding all those aspects. *A host of considerations might have prompted the people of India through Members of Constituent Assembly to adopt, enact and to give to themselves the Constitution. We are really concerned with what they have adopted, enacted and given to themselves in these documents.* We cannot and we should not cause scar on it which would take years for the coming generations to remove from its face.[285]

776. The learned judge then went on to hold, relying on ***Prem Lal Mullick***, ***A.K. Gopalan***, ***State of Travancore-Cochin***, ***Kesavananda Bharati*** and ***Indra Sawhney*** that 'admissibility of speeches made in the Constituent Assembly for interpreting provisions of the Constitution is not permissible' and that 'The preponderance of opinion appears to me not to rely on the debates in the Constituent Assembly or the Parliament to interpret a constitutional provision although they may be relevant for other purposes.' The learned judge quoted a sentence from ***Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft*** ANU/UKHL/0006/1975 : [1975] AC 591 to the following effect:

We are seeking not what Parliament meant but the true meaning of what Parliament said.[286]

777. In re: ***Special Reference No. 1 of 2002*** (Gujarat Assembly Election Matter) MANU/SC/0891/2002 : (2002) 8 SCC 237 the issue of relying on the CAD again came up for consideration. Justice Khare (for the Chief Justice, Justice Bhan and himself) referred to ***Kesavananda Bharati*** and held:

Constituent Assembly Debates although not conclusive, yet show the intention of the framers of the Constitution in enacting provisions of the Constitution and the Constituent Assembly Debates can throw light in ascertaining the intention behind such provisions.[287]

778. In a decision rendered by the Constitutional Court of the Republic of South Africa in ***The State v. T. Makwanyane*** 1995 (3) SA 391 (CC) (Eleven Judges Bench) paragraph 16 a brief survey of the law in the United States Supreme Court, German Constitutional Court, Canadian Supreme Court, this Court, European Court of Human Rights and the United Nations Committee on Human Rights was carried out and it was held (per Justice Chaskalson):

In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process. The United States Supreme Court pays attention to such matters, and its judgments frequently contain reviews of the legislative history of the provision in question, including references to debates, and statements made, at the time the provision was adopted. The German Constitutional Court also has regard to such evidence. The Canadian Supreme Court has held such evidence to be admissible, and has referred to the historical background including the pre-confederation debates for the purpose of interpreting provisions of the Canadian Constitution, although it attaches less weight to such information than the United States Supreme Court does. It also has regard to ministerial statements in Parliament in regard to the purpose of particular legislation. In India, whilst speeches of individual members of Parliament or the Convention are apparently not ordinarily admissible, the reports of drafting committees can, according to Seervai, "be a helpful extrinsic aid to construction." Seervai cites Kania CJ in A.K. Gopalan v. The State for the proposition that whilst not taking "...into consideration the individual opinions of Members of Parliament or Convention to construe the meaning of a particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to debates may be permitted." The European Court of Human Rights and the United Nations Committee on Human Rights all allow their deliberations to be informed by travaux preparatoires."[288] (Internal citations omitted)

779. Earlier, on a consideration of the law in England it was held (per Justice Chaskalon):

Debates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new bills have not been admitted as background material. It is, however, permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining "the mischief aimed at the statutory enactment in question." These principles were derived in part from English law. In England, the courts have recently relaxed this exclusionary rule and have held, in Pepper (Inspector of Taxes) v. Hart that, subject to the privileges of the House of Commons:

...reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.[289] (Internal citations omitted)

780. It is quite clear that the overwhelming view of the various learned judges in different decisions rendered by this Court and in other jurisdictions as well is that: (1) A reference may be made to the CAD or to Parliamentary debates (as indeed to any other 'relevant material') to understand the context in which the constitutional or statutory provisions were framed and to gather the intent of the law makers but only if there is some ambiguity or uncertainty or incongruity or obscurity in the language of the provision. A reference to the CAD or the Parliamentary debates ought not to be made only because they are there;[290] (2) The CAD or Parliamentary debates ought not to be relied upon to interpret the provisions of the Constitution or the statute if there is no ambiguity in the language used. These provisions ought to be interpreted independently-or at least, if reference is made to the CAD or Parliamentary debates, the Court should not be unduly influenced by the speeches made. Confirmation of the interpretation may be sought from the CAD or the Parliamentary debates but not vice versa.

781. This discussion has been necessitated by the submission of the learned Attorney-General that the Constituent Assembly did not intend that for the appointment of a judge of the Supreme Court or of the High Court the concurrence of the Chief Justice of India is necessary. The word 'consultation' in Article 124 of the Constitution and in Article 217 of the Constitution did not and could not mean 'concurrence'. This, according to the learned Attorney-General is specifically and clearly borne out from the CAD. In fact, the learned Attorney-General drew our attention to the discussion that took place in the Constituent Assembly on 23rd and 24th May, 1949.

782. It was submitted that under the circumstances there was no ambiguity in the meaning of the word 'consultation' and a reference to the CAD was necessary, applying the dictum of Chief Justice Sikri, only to confirm the interpretation of 'consultation' as not meaning 'concurrence'. It is for this reason, apart from others that the ***Second Judges case*** and the ***Third Judges case*** required reconsideration.

783. The learned Attorney-General also drew our attention to the following expression of opinion by Mr. T.T. Krishnamachari in the Constituent Assembly on 27th May, 1949 in relation to Clause (3) of the draft Article 122 concerning the officers and servants and expenses of the Supreme

Court.[291] The contention was that it was not the intention of the Constituent Assembly to make the Chief Justice of India or the Supreme Court above the executive or the Legislature thereby discarding the theory of separation of powers, and if 'consultation' is interpreted to mean 'concurrence', then that would be the inevitable result. Reliance was placed on the following speech:

While I undoubtedly support the amendment moved by Dr. Ambedkar, I think it should be understood by the Members of this House, and I do hope by those people who will be administering justice and also administering the country in the future that this is a safeguard rather than an operative provision. The only thing about it is that a matter like the employment of staff by the Judges should be placed ordinarily outside the purview of the Executive which would otherwise have to take the initiative to include these items in the budget for the reason that the independence of the Judiciary should be maintained and that the Judiciary should not feel that they are subject to favours that the Executive might grant to them from time to time and which would naturally influence their decision in any matter they have to take where the interests of the Executive of the time being happens to be concerned. At the same time, Sir, I think it should be made clear that it is not the intention of this House or of the framers of this Constitution that they want to create specially favoured bodies which in themselves becomes an *Imperium in Imperio,* completely independent of the Executive and the Legislature and operating as a sort of superior body to the general body politic. If that were so, I think we should be rather chary of introducing a provision of this nature, not merely in regard to the Supreme Court but also in regard to the Auditor-General, in regard to the Union Public Service Commission, in regard to the Speaker and the President of the two House of Parliament and so on, as we will thereby be creating a number of bodies which are placed in such a position that they are bound to come into conflict with the Executive in every attempt they make to display their superiority. In actual practice, it is better for all these bodies to more or less fall in line with the Regulations that obtain in matters of recruitment to the public services, conditions of promotion and salaries paid to their staff.[292]

Replying to this debate, Dr. Ambedkar clarified the position that there was no question of creating an *Imperium in Imperio*. Dr. Ambedkar said:

Mr. President, Sir, I would just like to make a few observations in order to clear the position. Sir, there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creating, what my Friend Mr. T.T. Krishnamachari very aptly called an "*Imperium in Imperio*". We do not want to create an Imperium in Imperio, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive. My friend, if they will carefully examine the provisions of the new amendment which I have proposed in place of the original Article 122, will find that the new article proposes to steer a middle course. It refuses to create an Imperium in Imperio, and I think it gives the Judiciary as much independence as is necessary for the purpose of administering justice without fear or favour. I need not therefore, dilate on all the provisions contained in this new Article 122....[293]

784. It is quite clear from the above that the endeavour of Dr. Ambedkar was to ensure the independence of the judiciary from the executive without creating any power imbalance and this,

therefore, needed steering a middle course whether in the appointment of judges or the officers of the Supreme Court. There can be no doubt about this at all. But what is the 'independence of the judiciary' and how can it be maintained and does the 99th Constitution Amendment Act impact on that independence? These are some troubling questions that need an answer with reference to the issue before us, namely, the constitutional validity of the 99th Constitution Amendment Act.

Judicial pronouncements and the third preliminary issue

785. The learned Attorney-General submitted that in any event the ***Second Judges case*** requires reconsideration. There is large volume of case law which gives guidance on the circumstances when an earlier decision of this Court should be reconsidered. It is necessary to consider these cases before deciding whether a platform for reconsideration of the ***Second Judges case*** has been made.

786. ***Bengal Immunity Co. Ltd. v. State of Bihar and Ors.*** MANU/SC/0083/1955 : AIR 1955 SC 661 (7 Judges Bench) concerned the interpretation of Article 286 of the Constitution which, it was contended, had been incorrectly interpreted in ***State of Bombay v. The United Motors (India) Ltd.*** MANU/SC/0095/1953 : (1953) 4 SCR 1069 (5 Judges Bench). This Court addressed the issue of reconsideration of a previous decision rendered by it. Chief Justice Das (speaking for himself, Justice Vivian Bose and Justice Syed Jafer Imam) discussed the judgments delivered in England, Australia, the United States and by the Privy Council and was of the view (for several reasons) that a previous decision rendered by this Court could be departed from. It was observed that it was not easy to amend the Constitution and if an erroneous interpretation was put upon a provision thereof it could 'conceivably be perpetuated or may at any rate remain uncertified for a considerable time to the great detriment to public well being.' It was held, inter alia, that if this Court was convinced of its error and 'baneful effect' on the general interests of the public of an erroneous interpretation of a provision of the Constitution, then there is nothing in the Constitution that prevents this Court in departing from its earlier decision. It could also depart from a previous decision if it was vague or inconsistent or plainly erroneous. It was held that the doctrine of *stare decisis* 'is not an inflexible rule of law and cannot be permitted to perpetuate our errors to the detriment to the general welfare of the public or a considerable section thereof.'

787. In a significant passage (one that will have a bearing on this subject), it was observed:

The majority decision does not merely determine the rights of the two contending parties to the Bombay appeal. Its effect is far reaching as it affects the rights of all consuming public. It authorises the imposition and levying of a tax by the State on an interpretation of a constitutional provision which appears to us to be unsupportable. To follow that interpretation will result in perpetuating what, with humility we say, is an error and in perpetuating a tax burden imposed on the people which, according to our considered opinion, is manifestly and wholly unauthorised.

It is not an ordinary pronouncement declaring the rights of two private individuals inter se. It involves an adjudication on the taxing power of the States as against the consuming public generally. If the decision is erroneous, as indeed we conceive it to be, we owe it to that public to protect them against the illegal tax burdens which the States are seeking to impose on the strength of that erroneous recent decision.[294]

788. Justice N.H. Bhagwati also reviewed several decisions from various jurisdictions and agreed with Chief Justice Das but drew a distinction between reconsideration of a previous decision concerning the interpretation of a provision of a legislative enactment and the interpretation of a provision of the Constitution. While an erroneous interpretation of the former by the Court could be corrected by the Legislature, it was not easy to amend the Constitution to correct its erroneous interpretation by the Court. It is for this reason that Justice N.H. Bhagwati held that if the previous decision interpreting the provisions of the Constitution was 'manifestly wrong or erroneous' and that 'public interest' demanded its reconsideration then the Court should have no hesitation in doing so.

789. Justice Jagannadhadas also held that this Court is competent to reconsider its earlier decisions. It was added that: 'But, it does not follow that such power can be exercised without restriction or limitation or that a prior decision can be reversed on the ground that, on later consideration, the Court disagrees with the prior decision and thinks it erroneous.' It was held that though the power to reconsider a prior decision does exist, the actual exercise of that power should be confined 'within very narrow limits.' The learned Judge preferred to adopt the view expressed by Justice Dixon of the High Court of Australia in ***Attorney-General for N.S.W.*** **v.** ***The Perpetual Trustee Co. Ltd.*** 85 CLR 237 to the effect that a prior decision should not be reconsidered simply because an opposite conclusion is to be preferred.

790. Justice Venkatarama Aiyar also held the view that this Court could reconsider an earlier decision rendered by it. However, the learned Judge was of the opinion that the power to reconsider should be 'exercised very sparingly and only in exceptional circumstances, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based, turns out to be mistaken.' Agreeing with the view canvassed by Justice Jagannadhadas (and Justice Dixon) the learned Judge posed the following question and also answered it: 'Can we differ from a previous decision of this Court, because a view contrary to the one taken therein appears to be preferable? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other.'

791. Justice B.P. Sinha agreed with Justice Jagannadhadas and Justice Venkatarama Aiyar and held that a previous judgment of this Court ought not to be reviewed simply because another view may be taken of the points in controversy. This Court should review its previous decisions only in exceptional circumstances. It was observed that 'Definiteness and certainty of the legal position are essential conditions for the growth of the rule of law.'

792. ***Lt. Col. Khajoor Singh v. Union of India*** MANU/SC/0039/1960 : AIR 1961 SC 532 (7 Judges Bench) concerned the interpretation of Article 226 of the Constitution and Article 32(2-A) of the Constitution (as applicable to Jammu & Kashmir). Though Justice Subba Rao (dissenting) and Justice Das Gupta (concurring) delivered separate judgments, they did not advert to the question of reconsideration of a decision of this Court. Chief Justice B.P. Sinha speaking for the remaining learned judges took the view that a previous decision rendered by this Court may be reconsidered if there are 'clear and compelling reasons' to do so or if there is a fair amount of unanimity that the previous decision is 'manifestly wrong' or if it is demonstrated that the earlier

decision was erroneous 'beyond all reasonable doubt' particularly on a constitutional issue. If any inconvenience is felt on the interpretations of the provisions of the Constitution under consideration, then the remedy 'seems to be a constitutional amendment.'

793. In ***Keshav Mills v. CIT*** MANU/SC/0102/1965 : AIR 1965 SC 1636 (7 Judges Bench) the question for consideration was the scope of the High Court's powers Under Section 66(4) of the Income Tax Act, 1922. It was submitted by the learned Attorney-General that two earlier decisions on the subject, that is, ***New Jehangir Vakil Mills Ltd. v. CIT*** MANU/SC/0074/1959 : (1960) 1 SCR 249 and ***Petlad Turkey Red Dye Works Co. Ltd., Petlad v. CIT*** MANU/SC/0201/1962 : (1963) Supp 1 SCR 871 needed reconsideration. In considering this submission, it was held that when this Court interprets a statutory provision, merely because an alternative view different from an opinion earlier expressed by this Court is more reasonable is not necessarily an adequate reason for reconsidering the earlier opinion. This Court should ask itself the question whether in the interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. This Court held:

When this Court decides questions of law, its decisions are, Under Article 141 binding on all courts within the territory of India and so it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country.....That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified.[295]

794. ***Maganlal Chhaganlal v. Municipal Corporation of Greater Bombay*** MANU/SC/0052/1974 : (1974) 2 SCC 402 (7 Judges Bench) concerned the validity of proceedings under Chapter V-A of the Bombay Municipal Corporation Act, 1888 and the Bombay Government Premises (Eviction) Act, 1955 in the context of the decision of this Court in ***Northern India Caterers v. State of Punjab*** MANU/SC/0283/1967 : AIR 1967 SC 1581. Justice H.R. Khanna alone considered the question of overruling an earlier decision of this Court, namely, in ***Northern India Caterers***. It was observed that certainty in law would be eroded if a decision that 'held the field' for several years is readily overruled-'certainty and continuity are essential ingredients of rule of law.' It was held that if two views are possible then, simply because the earlier decision does not take a view that is more acceptable would not be a ground for overruling the earlier decision. An earlier decision ought to be overruled only for compelling reasons otherwise it would create 'uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law.' Justice Khanna observed that new ideas and developments in the field of law and that the fullness of experience and indeed subsequent experience cannot be wished away. The learned judge held:

As in life so in law things are not static. Fresh vistas and horizons may reveal themselves as a result of the impact of new ideas and developments in different fields of life. Law, if it has to satisfy human needs and to meet the problems of life, must adapt itself to cope with new situations. Nobody is so gifted with foresight that he can divine all possible human events in advance and prescribe proper rules for each of them. There are, however, certain verities which are of the

essence of the rule of law and no law can afford to do away with them. At the same time it has to be recognized that there is a continuing process of the growth of law and one can retard it only at the risk of alienating law from life itself. There should not be much hesitation to abandon an untenable position when the rule to be discarded was in its origin the product of institutions or conditions which have gained a new significance or development with the progress of years. It sometimes happens that the rule of law which grew up in remote generations may in the fullness of experience be found to serve another generation badly. The Court cannot allow itself to be tied down by and become captive of a view which in the light of the subsequent experience has been found to be patently erroneous, manifestly unreasonable or to cause hardship or to result in plain iniquity or public inconvenience.[296]

795. ***Ganga Sugar Corporation v. State of Uttar Pradesh*** MANU/SC/0397/1979 : (1980) 1 SCC 223 (5 Judges Bench) related to the constitutional validity of a levy under the U.P. Sugarcane (Purchase Tax) Act, 1961. The decision does not contain any detailed discussion on the subject of reconsideration of an earlier decision of this Court. But it was nevertheless held that decisions of a Constitution Bench must be accepted as final unless the subject is of fundamental importance to national life or the reasoning of the previous decision is so plainly erroneous that 'it is wiser to be ultimately right rather than to be consistently wrong. *Stare decisis* is not a ritual of convenience but a rule with limited exceptions. Pronouncements by Constitution Benches should not be treated so cavalierly as to be revised frequently.'

796. A rather exhaustive reference to the cases and the law laid down in different jurisdictions was adverted to in ***Union of India v. Raghubir Singh*** MANU/SC/0619/1989 : (1989) 2 SCC 754 (5 Judges Bench). This decision concerned itself with the grant of solatium under the Land Acquisition Act, 1894 as amended by the Land Acquisition (Amendment) Act, 1984. Reference was made to the 'guidelines' culled out from the decisions of the House of Lords[297] which suggest that the freedom to reconsider an earlier decision ought to be exercised sparingly; a decision ought not to be overruled if it upsets the legitimate expectation of persons who have made arrangements based on the earlier decision or causes great uncertainty in the law; decisions involving the interpretation of statutes or documents ought not to be overruled except in rare or exceptional circumstances; if the consequences of departing from an earlier decision are not foreseeable; merely because an earlier decision was wrongly taken is not a good enough justification for overruling it. On the other hand, a prior decision ought to be overruled 'if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy.'

797. Reference was also made to several decisions earlier rendered by this Court (including those mentioned above) and though no new or different principles or guidelines were laid down, the law as stated by this Court was iterated, and it was observed: 'It is not necessary to refer to all the cases on the point. The broad guidelines are easily deducible from what has gone before. The possibility of further defining these guiding principles can be envisaged with further juridical experience, and when common jurisprudential values linking different national systems of law may make a consensual pattern possible. But that lies in the future.'

798. Echoing the views expressed in ***Maganlal Chhaganlal*** and ***Raghubir Singh*** with regard to acknowledging changes with the passage of time and modern conceptions of public policy, it was said:

Not infrequently, in the nature of things there is a gravity-heavy inclination to follow the groove set by precedential law. Yet a sensitive judicial conscience often persuades the mind to search for a different set of norms more responsive to the changed social context. The dilemma before the Judge poses the task of finding a new equilibrium prompted not seldom by the desire to reconcile opposing mobilities. The competing goals, according to Dean Roscoe Pound, invest the Judge with the responsibility "of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires". The reconciliation suggested by Lord Reid in *The Judge as Law Maker* lies in keeping both objectives in view, "that the law shall be certain, and that it shall be just and shall move with the times".[298] (Internal citations have been omitted).

799. In ***Gannon Dunkerley and Co. v. State of Rajasthan*** MANU/SC/0437/1993 : (1993) 1 SCC 364 the question related to 'the imposition of tax on the transfer of property in goods involved in the execution of works contracts. The power to impose this tax became available to the State Legislatures as a result of the amendments introduced in the Constitution by the Constitution (Forty-sixth Amendment) Act, 1982.' The constitutional validity of this Amendment Act had been upheld in ***Builders' Association of India v. Union of India*** MANU/SC/0085/1989 : (1989) 2 SCC 645. One of the issues raised was whether ***Builders' Association*** had been correctly decided or not. This Court did not add to the discourse on the subject but concluded, relying upon ***Khajoor Singh***, ***Keshav Mills*** and ***Ganga Sugar Corporation*** that there was no occasion to reconsider the decision in ***Builders' Association***.

800. Another decision (which is rather interesting) on the subject of reconsideration of an earlier decision is ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*** MANU/SC/0330/2002 : (2002) 5 SCC 111 (7 Judges Bench). The question before this Court was whether the Council for Scientific and Industrial Research was 'the State' as 'defined' in Article 12 of the Constitution. The answer to this question required consideration of an earlier unanimous decision of this Court in ***Sabhajit Tewary v. Union of India*** MANU/SC/0059/1975 : (1975) 1 SCC 485 (5 Judges Bench). which had stood undisturbed for about 25 years. While answering this question, this Court did not detail the law on the subject of reconsideration of an earlier decision of this Court, but on a consideration of the facts (and the law) concluded that ***Sabhajit Tewary*** had been wrongly decided and was overruled. This Court referred to ***Maganlal Chhaganlal*** and ***Raghubir Singh*** and held:

From whichever perspective the facts are considered, there can be no doubt that the conclusion reached in *Sabhajit Tewary* was erroneous. .....

In the assessment of the facts, the Court had assumed certain principles, and sought precedential support from decisions which were irrelevant and had "followed a groove chased amidst a context which has long since crumbled."[299] Had the facts been closely scrutinised in the proper perspective,

it could have led and can only lead to the conclusion that CSIR is a State within the meaning of Article 12.

Should Sabhajit Tewary still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the facts leading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and

[T]here is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public.

Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake.[300] (Internal citations have been omitted).

801. One of the more interesting aspects of ***Pradeep Kumar Biswas*** is that out of the 7 (seven) learned judges constituting the Bench, 5 learned judges overruled the unanimous decision of another set of 5 learned judges in ***Sabhajit Tewary***. Two of the learned judges in ***Pradeep Kumar Biswas*** found that ***Sabhajit Tewary*** had been correctly decided. In other words, while a total of 7 learned judges took a particular view on an issue of fact and law, that view was found to be incorrect by 5 learned judges, whose decision actually holds the field today. Is the weight of numbers irrelevant? Is it that only the numbers in a subsequent Bench are what really matters? What would have been the position if only 4 learned judges in ***Pradeep Kumar Biswas*** had decided to overrule ***Sabhajit Tewary*** while the remaining 3 learned judges found no error in that decision? Would a decision rendered unanimously by a Bench of 5 learned judges stand overruled by the decision of 4 learned judges in a subsequent Bench of 7 learned judges? ***Pradeep Kumar Biswas*** presents a rather anomalous situation which needs to be addressed by appropriate rules of procedure. If this anomaly is perpetuated then the unanimous decision of 9 learned judges in the ***Third Judges case*** can be overruled (as sought by the learned Attorney-General) by 6 learned judges in a Bench of 11 learned judges, with 5 of them taking a different view, bringing the total tally of judges having one view to 14 and having another view to 6, with the view of the 6 learned judges being taken as the law!

802. Be that as it may, two other decisions of importance on the subject of reconsidering a prior decision of this Court are ***Kesavananda Bharati*** and the ***Second Judges case***.

803. In ***Kesavananda Bharati*** it was pithily stated by Chief Justice S.M. Sikri that the question before the Court was whether ***Golak Nath*** was correctly decided. The learned Chief Justice observed:

However, as I see it, the question whether *Golak Nath* case was rightly decided or not does not matter because the real issue is different and of much greater importance, the issue being: what is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2), on Parliament?[301]

804. It follows from this that where a matter is of 'great importance', this Court may refer the issue to a larger Bench to reconsider an earlier decision of this Court.

805. In the ***Second Judges case*** it was observed by Justice Pandian that an earlier decision rendered by this Court may be reconsidered if, amongst others, 'exceptional and extraordinarily compelling' circumstances so warrant. It was observed that 'no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception grown along with the passage of time.'[302] Recalling the observations in ***Maganlal Chhaganlal***, ***Raghubir Singh*** and ***Pradeep Kumar Biswas*** it was held that:

Therefore, in exceptional and extraordinarily compelling circumstances or under new set of conditions, the court is on a fresh outlook and in the light of the development of innovative ideas, principles and perception grown along with the passage of time, obliged by legal and moral forces to reconsider its earlier ruling or decision and if necessitated even to overrule or reverse the mistaken decision by the application of the 'principle of retroactive invalidity'. Otherwise even the wrong judicial interpretation that the Constitution or law has received over decades will be holding the field for ages to come without that wrong being corrected. Indeed, no historic precedent and long-term practice can supply a rule of unalterable decision.[303]

806. There is absolutely no dispute or doubt that this Court can reconsider (and set aside) an earlier decision rendered by it. But what are the circumstances under which the reconsideration can be sought? This Court has debated and discussed the issue on several occasions as mentioned above and the broad principles that can be culled out from the various decisions suggest that:

(1) If the decision concerns an interpretation of the Constitution, perhaps the bar for reconsideration might be lowered a bit (as in ***Kesavananda Bharati***). Although the remedy of amending the Constitution is available to Parliament, not all amendments are easy to carry out. Some amendments require following the procedure of ratification by the States. Nevertheless, where a constitutional issue is involved, the necessity of reconsideration should be shown beyond all reasonable doubt, the remedy of amending the Constitution always being available to Parliament.

(2) If the decision concerns the imposition of a tax, then too the bar might be lowered a bit since the tax burden would affect a large section of the public. However, the general principles for requiring reconsideration do not necessarily fall by the wayside.

(3) If the decision concerns the fundamental rights of the people, then too the bar might be lowered for obvious reasons. However again, the general principles for requiring reconsideration must be adhered to.

(4) In other cases, the Court must be convinced that the earlier decision is plainly erroneous and has a baneful effect on the public; that it is vague or inconsistent or manifestly wrong.

(5) If the decision only concerns two contending private parties or individuals, then perhaps it might not be advisable to reconsider it. Each and every error of law cannot obviously be corrected by this Court.

(6) The power to reconsider is not unrestricted or unlimited, but is confined within narrow limits and must be exercised sparingly and under exceptional circumstances for clear and compelling reasons. Therefore, merely because a view different from or contrary to what has been expressed earlier is preferable is no reason to reconsider an earlier decision. The endeavour of this Court must always be to ensure that the law is definite and certain and continuity in the interpretation of the law is maintained.

In this regard, ***Raghubir Singh*** presents an interesting picture. Section 23(2) of the Land Acquisition Act, 1894 (as amended in 1984) was interpreted by this Court on 14th February, 1985 in ***K. Kamalajammanniavaru v. Special Land Acquisition Officer*** MANU/SC/0281/1985 : (1985) 1 SCC 582. That decision was overruled six months later on 14th August, 1985 in ***Bhag Singh v. Union Territory of Chandigarh*** MANU/SC/0265/1985 : (1985) 3 SCC 737. That decision was in turn overruled on 16th May, 1989 in ***Raghubir Singh*** and the law laid in ***Kamalajammanniavaru*** was reiterated. It is this uncertainly and absence of continuity in the law that is required to be avoided.

(7) An earlier decision may be reconsidered if a material provision of law is overlooked[304] or a fundamental assumption is found to be erroneous or if there are valid and compulsive or compelling reasons or if the issue is of fundamental importance to national life. However, it might not be wise to overrule a decision if people have changed their position on the basis of the existing law. This is because it might upset the legitimate expectation of persons who have made arrangements based on the earlier decision and also because the consequences of such a decision might not be foreseeable.

(8) Whether a decision has held the field for a long time or not is not of much consequence. In ***Bengal Immunity*** a recent decision delivered by the Constitution Bench was overruled; in ***Pradeep Kumar Biswas*** a decision holding the field for a quarter of a century was overruled.

(9) Significantly, this Court has taken note of and approved the view that the changing times might require the interpretation of the law to be readjusted keeping in mind the 'infinite and variable human desires' and changed conditions due to 'development with the progress of years.' The interpretation of the law, valid for one generation may not necessarily be valid for subsequent generations. This is a reality that ought to be acknowledged as has been done by this Court in ***Maganlal Chhaganlal*** and by Chief Justice Dickson of the Canadian Supreme Court in ***The Queen v. Beauregard*** [305] Similarly, the social context or 'contemporary social conditions or modern conceptions of public policy' cannot be overlooked. Oliver Wendell Holmes later a judge of the Supreme Court of the United States put it rather pithily when he said that: 'But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.'[306]

807. It is trite that the Constitution is a living document[307] and it is also wise to remember, in this context, what was said in ***R.C. Poudyal v. Union of India*** 1994 Supp (1) SCC 324 that:

In the interpretation of a constitutional document, 'words are but the framework of concepts and concepts may change more than words themselves'. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that 'the intention of a Constitution is rather to outline principles than to engrave details'.[308]

808. On the basis of the law as laid down by this Court and considering the historical developments over the last six decades, it was submitted by the learned Attorney-General that a fundamental and significant question as to the interpretation of the Constitution has arisen; that the ***Second Judges case*** and the ***Third Judges case*** did not correctly appreciate the Constituent Assembly Debates on the Judiciary and that the time has now come to make a course correction.

Conclusions on the preliminary issue

809. It is quite clear that there is a distribution of power through a system of checks and balances rather than a classical separation of power between the Legislature, the Executive and the Judiciary. These three organs of the State are not in a silo and therefore there is an occasional overlap-but every overlap does not necessarily lead to a violation of the separation of powers theory. [309]

810. There are several examples of this 'overlap' and the learned Attorney-General has taken us through the various provisions of the Constitution in this regard: Article 124(1) of the Constitution enables Parliament to pass a law prescribing the composition of the Supreme Court as consisting of more than seven judges. Pursuant to this the Supreme Court (Number of Judges) Act, 1956 was passed; Article 124(4) provides for the impeachment process for the removal of a judge; Article 124(5) enables Parliament to legislate for regulating the procedure for the presentation of an address in the impeachment process and in the investigation and proof of the misbehavior or incapacity of a judge; Article 125(1) enables Parliament by law to determine the salary of a judge while Article 125(2) enables Parliament to pass a law with regard to the privileges, allowances, etc. of a judge. Pursuant to this the Supreme Court Judges (Conditions of Service) Act, 1958 has been enacted; Article 134(2) enables Parliament to confer on the Supreme Court by legislation, further powers to entertain and hear appeals and criminal proceedings. Pursuant to this, Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970; Article 135 enables Parliament to make a law with regard to the jurisdiction and power of the Supreme Court with respect of any matter to which the provisions of Article 133 and Article 134 do not apply; Article 137 provides that subject to any law made by Parliament the Supreme Court shall have the power to review any judgment pronounced or order made by it; Article 138 enables Parliament by law to enlarge the jurisdiction of the Supreme Court with respect to any matter as the Government of India and the Government of any State may by special agreement confer and Article 139 enables Parliament to make a law to issue writs other than those mentioned in Article 32 of the Constitution; Article 140 enables Parliament to make a law conferring upon the Supreme Court supplementary powers; Article 142 enables Parliament to make a law for the enforcement of a decree or order of the Supreme Court and the exercise of power by the Supreme Court to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt, Article 145 enables Parliament to make any law for regulating the practice and procedure of Supreme Court while

Article 146(2) enables Parliament to lay down the conditions of service of officers and servants of the Supreme Court. Article 130 of the Constitution permits the Supreme Court to sit at any place other than Delhi with the approval of the President while Article 145 enables the Supreme Court to make rules for regulating the practice and procedure of the Court with the approval of the President.

811. There is quite clearly an entire host of parliamentary and legislative checks placed on the judiciary whereby its administrative functioning can be and is controlled, but these do not necessarily violate the theory of separation of powers or infringe the independence of the judiciary as far as decision making is concerned. As has been repeatedly held, the theory of separation of powers is not rigidly implemented in our Constitution, but if there is an overlap in the form of a check with reference to an essential or a basic function or element of one organ of State as against another, a constitutional issue does arise. It is in this context that the 99th Constitution Amendment Act has to be viewed-whether it impacts on a basic or an essential element of the independence of the judiciary, namely, its decisional independence.

812. The learned Attorney-General is not right in his submission that the ***Second Judges case*** overlooked the separation of powers and the CAD and incorrectly interpreted the provisions of the Constitution particularly Article 124(2) thereof. This is a rather narrow understanding of the ***Second Judges case*** which, amongst others, considered the interpretation of Article 50 of the Constitution, constitutional history and conventions, the entire spectrum of issues relating to the appointment of judges in the context of the independence of the judiciary, transparency and sharing of information between the constitutional authorities, the primacy of the President or the Judiciary in the appointment process (depending on the circumstances), the importance of the President in the integrated consultative process derived from the debates in the Constituent Assembly and several other related aspects. All this involved a pragmatic and workable interpretation of the Constitution, which is the task only of the judiciary and there can be no doubt about this. This was pithily stated in ***Marbury v. Madison*** 5 U.S. (1 Cranch) 137, 177 (1803): 'It is emphatically the province and duty of the Judicial Department to say what the law is.' It was also explicitly held in ***Re: Powers, Privileges and Immunities of State Legislatures*** [1965] 1 SCR 413 (Seven Judges Bench) where it was said:

[W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves.[310]

813. The learned Attorney-General is also not right in reducing the ***Second Judges case*** to only one aspect-the decision of this Court has to be appreciated as a part of the larger constitutional scheme relating to the independence of the judiciary. The learned Attorney-General may or may not agree with the interpretation given by this Court to the constitutional scheme but that is no indication that the theory of the separation of powers has broken down. If there is an interpretational error, it can be corrected only by the judiciary, or by a suitable amendment to the Constitution that does not violate its basic structure.

814. No one thought that this Court, in the ***Second Judges case***, had erroneously interpreted or misunderstood the constitutional scheme concerning the appointment of judges and the independence of the judiciary. There were some problem areas and these were referred to this Court in the form of questions raised by the President seeking the advisory opinion of this Court in the ***Third Judges case***. The correctness of the decision rendered in the ***Second Judges case*** was not in doubt and to remove any misunderstanding in this regard the learned Attorney-General categorically stated in the ***Third Judges case*** that 'the Union of India is not seeking a review or reconsideration of the judgment in the ***Second Judges case***.' Therefore, neither the President nor the Union of India nor anybody else for that matter sought a reconsideration of the ***Second Judges case***. There is no reason (apart from an absence of a reason at law) why such a request should be entertained at this stage, except on a fanciful misunderstanding of the law by the Union of India.

815. The contention of the learned Attorney-General is that the appointment of a judge of the Supreme Court or a High Court is an executive function and that has been taken over by the judiciary by a process of judicial encroachment through a 'right to insist' thereby breaking down the separation of power theory. It is not possible to accept this line of thought. The appointment of a judge is an executive function of the President and it continues to be so. However, the constitutional convention established even before Independence has been that a judge is appointed only if the Chief Justice of India or the Chief Justice of the High Court gives his/her nod to the appointment. This position continued even after Independence. Justice Kuldip Singh summarized the appointments position in the ***Second Judges case*** in the following words:

(i) The executive had absolute power to appoint the Judges under the Government of India Act, 1935. Despite that all the appointments made thereunder were made with the concurrence of the Chief Justice of India.

(ii) A convention had come to be established by the year 1948 that appointment of a Judge could only be made with the concurrence of the Chief Justice of India.

(iii) All the appointments to the Supreme Court from 1950 to 1959 were made with the concurrence of the Chief Justice of India. 210 out of 211 appointments made to the High Courts during that period were also with the concurrence of the Chief Justice of India.

(iv) Mr. Gobind Ballabh Pant, Home Minister of India, declared on the floor of the Parliament on November 24, 1959 that appointment of Judges were virtually being made by the Chief Justice of India and the executive was only an order-issuing authority.

(v) Mr. Ashoke Sen, the Law Minister reiterated in the Parliament on November 25, 1959 that almost all the appointments made to the Supreme Court and the High Courts were made with the concurrence of the Chief Justice of India.

(iv) Out of 547 appointments of Judges made during the period January 1, 1983 to April 10, 1993 only 7 were not in consonance with the views expressed by the Chief Justice of India.[311]

816. These facts and figures clearly indicate that at least since 1935, if not earlier, the appointment of judges was made in accordance with the view of the Chief Justice of India or the Chief Justice of the High Court as the case may be. There were aberrations but these appear to have mainly taken place only after Independence, as mentioned above. But even in those cases where there were aberrations pre-1959 (with the Chief Justice of the High Court having been by-passed) the concurrence of the Chief Justice of India was taken. The executive, therefore, never had real primacy in the matter of appointment of judges. But, post the ***First Judges case*** the executive exerted its newly given absolute primacy in the appointment of judges and the aberrations increased. Surely, the executive cannot take advantage of the aberrations caused at its instance and then employ them as an argument that no constitutional convention existed regarding the concurrence of the Chief Justice of India. On the contrary, the aberrations indicate the stealthy attempt of the political executive to subvert the independence of the judiciary through appointments that were not necessarily merit-based, and the submissions advanced before us suggest that henceforth the independence of the judiciary may not necessarily be sacrosanct. It is for this reason that the Bar has fought back to preserve and protect the existing conventions and practices and will, hopefully maintain its vigil.

817. In ***The Pocket Veto case*** MANU/USSC/0137/1929 : 279 U.S. 655, 689 (1929) the US Supreme Court referred to a long standing practice as an interpretation to a constitutional provision, which would be equally applicable to India. It was said:

The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. *Compare Missouri Pac. Ry. Co. v. Kansas* 248 U.S. 276; *Myers v. United States* 272 U.S. 52; and *State v. South Norwalk* 77 Conn. 257 in which the court said that a practice of at least twenty years' duration on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.

818. By claiming absolute executive primacy, the learned Attorney-General is, in effect, propagating the view that the President can exercise a veto on the proposal to appoint a judge, even if that proposal has the approval of all other constitutional authorities. Such a view was not acceptable to Dr. Ambedkar and the Constituent Assembly and it is impermissible to introduce it through the back door. The Chief Justice of India has no 'right to insist' on an appointment nor does the President have the 'right to reject' or a veto. The Constitution postulates a consultative and participatory process between the constitutional functionaries for appointing the 'best' possible

person as a judge of a High Court or the Supreme Court. In this consultative process the final word is given, by a constitutional convention and practice developed over the years, to the Chief Justice of India since that constitutional functionary is best equipped to appreciate the requirements of effective justice delivery, to maintain the independence of the judiciary, to keep at bay external influences, 'eliminate political influence even at the stage of initial appointment of a Judge'[312] and as the head of the judiciary, his/her judgment ought to be trusted in this regard. That this could be characterized as a 'right to insist' is not at all justified, nor can any voice of disagreement by the executive be construed as a 'right to reject' or a veto. These expressions do not gel with the constitutional scheme or the responsibilities of constitutional functionaries.

819. What did the ***Second Judges case*** and the ***Third Judges case*** decide that should lead the political executive to misunderstand the views expressed and misunderstand the law interpreted or call for a reconsideration of the law laid down? In essence, all that was decided was that the Chief Justice of India (in an individual capacity) could not recommend a person for appointment as a judge, but must do so in consultation with the other judges (and if necessary with non-judges). Such a recommendation of the Chief Justice of India, if made unanimously, ought normally to be accepted by the President. However, the President can return the recommendation for reconsideration for strong and cogent reasons. If the Chief Justice of India (in consultation with the other judges and unanimously) reiterates the recommendation, it should be accepted. On the other hand, a recommendation made by the Chief Justice of India, which is initially not unanimous, may not be accepted by the President. As pointed out by Justice Verma, the President occasionally failed to exercise this particular constitutional power, for unknown reasons or due to a misunderstanding of the dicta laid down by this Court. The path taken by this Court was in consonance with the views of the Constituent Assembly, in that in the appointment of judges, no constitutional functionary could act in an individual capacity but the Chief Justice of India and other judges were well qualified to give the correct advice to the President in a matter of this sort, and that ought to be accepted as long as it was unanimous.

820. The debate on 24th May, 1949 discloses that a variety of options were available before the Constituent Assembly with regard to the procedure for the appointment of judges of the Supreme Court and the High Court.

821. One of the available methods was to have the appointment of a judge approved by the Council of State. This was opposed by Mr. R.K. Sidhwa (C.P. & Berar: General) who was of the opinion that if the appointment is left to the Council of State then there is a possibility of canvassing in which event the issue of ability etc. of a person recommended for appointment as a judge will cease to be relevant. Mr. Sidhwa was of the opinion that this method would be the same as an election, although Prof. K.T. Shah thought otherwise. The proposal was also opposed by Mr. Biswanath Das (Orissa: General) who referred to this method of appointment as laying down a very dangerous principle.

822. Another method of appointment discussed was to leave the process entirely to the President. Mr. Rohini Kumar Chaudhari (Assam: General) apparently supported that view and went on to suggest that the amendment proposed by Dr. Ambedkar for deletion of consultation by the President with judges of the Supreme Court and the High Court should be accepted. He was of the opinion that the matter should be dealt with only by the President who could consult anybody, why

only judges of the Supreme Court and the High Court. If the President knew a person to be of outstanding ability, it might not be necessary for him/her to consult anybody for making the appointment. This view was supported by Mr. M. Ananthasayanam Ayyangar (Madras: General) who also felt that it should be left to the President to decide whom to consult, if necessary.

823. Yet another method of appointment was the British system where appointments were made by the Crown without any kind of limitation whatsoever, that is, by the political executive. A fourth method discussed was that prevailing in the United States where appointments were made with the concurrence of the Senate.

824. Dr. Ambedkar was of the view that none of the methods proposed was suitable for a variety of reasons and therefore a middle path was taken which required the President to consult the Chief Justice of India and other judges. Dr. Ambedkar felt that consultation with the Chief Justice of India and other judges was necessary since they were ex hypothesi well qualified to give advice in a matter of this nature.

825. The Chief Justice of India and other judges are undoubtedly well qualified to give proper advice with regard to the knowledge, ability, competence and suitability of a person to be appointed as a judge of a High Court of the Supreme Court. There is no reason, therefore, why the opinion of the Chief Justice of India taken along with the opinion of other judges should not be accepted by the executive, which is certainly not better qualified to make an assessment in this regard. However, it is possible that the executive may be in possession of some information about some aspect of a particular person which may not be known to the Chief Justice of India and as postulated in ***Sankalchand Himatlal Sheth*** and in the ***Second Judges case*** the entire material should be made available to the Chief Justice of India leaving it to him/her to decide whether the person recommended for appointment meets the requirement for being appointed a judge or not, despite any antecedents, peculiarities and angularities. If the Chief Justice of India and others with whom he/she has discussed the matter conclude-unanimously-that the person ought to be appointed as a judge of a High Court or the Supreme Court despite the antecedents, peculiarities and angularities, there can be no earthly reason why that collective view should not be accepted. The Chief Justice of India is in a sense the captain of the ship as far as the judiciary is concerned and his/her opinion (obtained collectively and unanimously) should be accepted rather than the opinion of someone who is a passenger (though an important one) in the ship. Dr. Ambedkar was of the confirmed view that the judiciary should be independent and impartial and if the Chief Justice of India does not have the final say in the matter then the judiciary is, in a sense, under some other authority and therefore not independent to that extent. This would be a rejection of the views of Dr. Ambedkar and a negation of the views of the Constituent Assembly.

826. From the debates of the Constituent Assembly it is evident that Dr. Ambedkar's objection was to the suggestion that only the Chief Justice of India (as an individual) should have the final say in the matter. There is nothing to suggest that the Constituent Assembly had any objection to an integrated consultative participatory process as mentioned in the ***Second Judges case*** and the ***Third Judges case*** or, as Dr. Rajeev Dhavan described it as 'institutional participation' in the matter of appointment of judges. The objection only was to one person (the President or the Chief Justice of India) having a final say in the matter and that one person (the Chief Justice of India) could possibly suffer from the same frailties as any one of us and this is what Dr. Ambedkar sought to

emphasize in his objection. It must be appreciated that when the debate took place (on 24th May, 1949) the appointment of judges was, due to the insertion of Clause (5)a in Article 62 of the Draft Constitution[313] considered to be the responsibility of the President acting on his own and not through the Council of Ministers. That this theory was in the process of being given up (and was actually given up) is a different matter altogether. Alternatively, if the thinking at that time was that the President was to act only the advice of the Council of Ministers (and not as an individual having unfettered discretion) there can today possibly be no objection to the Chief Justice of India acting institutionally on the views of his/her colleagues and not, as desired by Dr. Ambedkar, as an individual. In other words, constitutionalism in India has undergone a positive transformation and the objection that Dr. Ambedkar had to any individual having the final say is rendered non-existent. In view of ***Samsher Singh*** the President cannot act in an individual capacity (except to a limited extent) and in view of the ***Second Judges case*** and the ***Third Judges case*** the Chief Justice of India cannot act in an individual capacity (except to a limited extent). The Constitution being an organic and living document must be and has been interpreted positively and meaningfully.

827. It is this philosophy, of the Constitution being an organic and living document that ought to be positively and meaningfully interpreted, that is to be found in ***Samsher Singh***. It is this constructive interpretation read with the CAD that made the advice of the Council of Ministers binding on the President and not a 'take it or leave it' advice. Similarly, 'consultation' with the Chief Justice of India has to be understood in this light and not as a 'consulted and opinion rejected' situation.

828. It is not correct to suggest, as did the learned Attorney-General, that the theory of separation of powers in the Constitution has been torpedoed by the interpretation given to Article 124(2) of the Constitution in the ***Second Judges case***. On the contrary, the constitutional convention, the constitutional scheme and the constitutional practice recognize the responsibility of the judiciary in the appointment of judges and this was merely formalized in the ***Second Judges case***. The theory of the separation of powers or the distribution of powers was maintained by the Second Judges case rather than thrown overboard. To rephrase Justice Jackson of the US Supreme Court in ***Youngstown Sheet and Tube Co. v. Sawyer*** MANU/USSC/0109/1952 : 343 U.S. 579, 635 (1952) the Constitution enjoins upon its branches 'separateness but interdependence, autonomy but reciprocity' and the ***Second Judges case*** has effectively maintained this equilibrium between the judiciary and the political executive, keeping the independence of the judiciary in mind, including the appointment of judges.

829. Taking all these factors and the CAD into account, all of which were discussed in the ***Second Judges case*** it is difficult to accept the contention of the learned Attorney General that the ***Second Judges case*** requires reconsideration on merits. While the various decisions referred to dealt with the issue of reconsideration of an earlier decision of this Court, it is difficult to conclude that a decision rendered by 8 out of 9 judges who decided the ***Second Judges case*** (Justice Punchhi also concurred on the primacy of the Chief Justice of India) ought to be rejected only because there could be a change of opinion or a change of circumstances. The ***Second Judges case*** was accepted by the Attorney-General as mentioned in the ***Third Judges case*** and also by the President who did not raise any question about the interpretation given to Article 124(2) and Article 217(1) of the Constitution. These constitutional authorities having accepted the law laid down in the ***Second Judges case***, there is no reason to reconsider that decision on the parameters repeatedly laid down

by the Court. There are no exceptional circumstances, clear and compelling reasons for reconsideration, nor can it be said that the ***Second Judges case*** was plainly erroneous or that it has a baneful effect on the public. On the contrary, the decision restored the independence of the judiciary in real terms and eliminated the baneful effect of executive controls.

830. It may also be mentioned that it was categorically laid down in ***Samsher Singh*** that the last word in matters pertaining to judiciary should be with the Chief Justice of India. ***Samsher Singh*** was decided by a Bench of seven learned judges and no one has said that that decision requires reconsideration or that it does not lay down the correct law. The ***Second Judges*** case merely reiterates the 'last word' view in a limited sense.

831. The consensus of opinion across the board is quite clear that the ***Second Judges case*** has been correctly decided and that the conventions and the principles laid down therein flow from our constitutional history and these do not need any reconsideration.

832. This is not to say that the Second Judges case and the ***Third Judges case*** do not leave any gaps. Perhaps better institutionalization and fine tuning of the scheme laid down in these decisions is required, but nothing more. But, in view of the submission made by the learned Attorney-General that the only question for consideration is the constitutional validity of the 99th Constitution Amendment Act and the NJAC Act the issue of reconsideration becomes academic and it is not at all necessary at present to express any further view on this. By the 99th Constitution Amendment Act the word 'consultation' has been deleted from Article 124(2) and Article 217(1) of the Constitution. Therefore the question whether that word has been correctly interpreted in the ***Second Judges case*** or not is today completely academic. A new constitutional regime has been put in place and that has to be tested as it is. It is only if the 99th Constitution Amendment Act is held as violating the basic structure of the Constitution and is declared unconstitutional that the fine tuning and filling in the gaps in the ***Second Judges case*** and the ***Third Judges case*** would arise.

833. Hence the only question now is whether the 99th Constitution Amendment Act violates the basic structure of the Constitution and to decide this question it is not necessary to reconsider the ***Second Judges case*** or the ***Third Judges case***. This is apart from the fact that reconsideration is not warranted at law, even on merits.

Rule of Law

834. On the merits of the controversy before us, it is necessary to proceed on the basis that there is no doubt that the CAD, the Constitution and judicial pronouncements guarantee the independence of the judiciary. Does the independence of the judiciary include the appointment of a judge? According to the learned Attorney-General, the appointment of judges is a part of the independence of the judiciary, but not a predominant part.

835. Before considering these issues, it is necessary to appreciate the role of the Rule of Law in our constitutional history. It has been said: 'Ultimately, it is the rule of law, not the judges, which provides the foundation for personal freedom and responsible government.'[314]

836. The Rule of Law is recognized as a basic feature of our Constitution. It is in this context that the aphorism, 'Be you ever so high, the law is above you' is acknowledged and implemented by the Judiciary. If the Rule of Law is a basic feature of our Constitution, so must be the independence of the judiciary since the 'enforcement' of the Rule of Law requires an independent judiciary as its integral and critical component.

837. Justice Mathew concluded in ***Indira Nehru Gandhi*** that according to some judges constituting the majority in ***Kesavananda Bharati*** the Rule of Law is a basic structure of the Constitution.[315]

838. In ***Samsher Singh*** the independence of the judiciary was held to be a cardinal principle of the Constitution by Justice Krishna Iyer speaking for himself and Justice Bhagwati.[316] That it is a part of the basic structure of the Constitution was unequivocally stated for the first time in the ***First Judges case*** by Justice Bhagwati,[317] by Justice A.C. Gupta[318] and by Justice V.D. Tulzapurkar.[319]

839. In the ***Second Judges case*** Justice Pandian expressed the view that independence of the judiciary is 'inextricably linked and connected with the judicial process.'[320] This was also the view expressed by Justice Kuldip Singh who held that the independence of the judiciary is a basic feature of the Constitution.[321] Justice J.S. Verma speaking for the majority and relying upon a few decisions held that the Rule of Law is a basic feature of the Constitution.[322] Similarly, Justice Punchhi (dissent) held that the Rule of Law is a basic feature of the Constitution and the independence of the judiciary is its essential attribute:

It is said that Rule of Law is a basic feature the Constitution permeating the whole constitutional fabric. I agree. Independence of the judiciary is an essential attribute of Rule of Law, and is part of the basic structure of the Constitution. To this I also agree.[323]

840. In ***Sub-Committee on Judicial Accountability v. Union of India*** MANU/SC/0060/1992 : (1991) 4 SCC 699 (Five Judges Bench) it was held by Justice B.C. Ray speaking for the majority that the Rule of Law is a basic feature of the Constitution and an independent judiciary is an essential attribute thereof. It was said:

Before we discuss the merits of the arguments it is necessary to take a conspectus of the constitutional provisions concerning the judiciary and its independence. In interpreting the constitutional provisions in this area the Court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. Rule of law is a basic feature of the Constitution which permeates the whole of the constitutional fabric and is an integral part of the constitutional structure. Independence of the judiciary is an essential attribute of rule of law.[324]

841. Similarly, in ***Kartar Singh v. State of Punjab*** MANU/SC/1597/1994 : (1994) 3 SCC 569 (Five Judges Bench) it was said by Justice K. Ramaswamy (dissent) that an independent judiciary is the most essential attribute of the Rule of Law:

Independent judiciary is the most essential attribute of rule of law and is indispensable to sustain democracy. Independence and integrity of the judiciary in a democratic system of Government is

of the highest importance and interest not only to the judges but to the people at large who seek judicial redress against perceived legal injury or executive excesses.[325]

842. This view was reiterated by the learned judge in yet another dissent, that is, in ***Krishna Swami v. Union of India*** MANU/SC/0222/1993 : (1992) 4 SCC 605 paragraph 66.

843. In ***Union of India v. Madras Bar Association*** MANU/SC/0378/2010 : (2010) 11 SCC 1 (Five Judges Bench) speaking for the Court, Justice Raveendran held:

The rule of law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the executive.[326]

844. Finally, in ***State of Tamil Nadu*** it was unanimously held by the Bench speaking through Chief Justice Lodha that the independence of the judiciary is fundamental to the Rule of Law:

Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.[327]

845. The view that the Rule of Law and the independence of the judiciary go hand in hand and are a part of the basic structure of the Constitution has been acknowledged in several other decisions as well and is no longer in dispute, nor was it disputed by any of the learned Counsel before us. It is, therefore, not necessary to cite a train of cases in this regard, except to conclude that the Rule of Law and the independence of the judiciary are intertwined and inseparable and a part of the basic structure of our Constitution.

Independence of the judiciary-its nature and content

846. What are the attributes of an independent judiciary? It is impossible to define them, except illustratively. At this stage, it is worth recalling the words of Sir Ninian Stephen, a former Judge of the High Court of Australia who memorably said: '[An] independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed.'[328] It is this fragile bastion that needs protection to maintain its independence and if this fragile bastion is subject to a challenge, constitutional protection is necessary.

847. The independence of the judiciary takes within its fold two broad concepts: (1) Independence of an individual judge, that is, decisional independence; and (2) Independence of the judiciary as an institution or an organ of the State, that is, functional independence. In a lecture on Judicial Independence, Lord Phillips[329] said: 'In order to be impartial a judge must be independent; personally independent, that is free of personal pressures and institutionally independent, that is free of pressure from the State.'

848. As far as individual independence is concerned, the Constitution provides security of tenure of office till the age of 65 years for a judge of the Supreme Court.[330] However, the judge may resign earlier or may be removed by a process of impeachment on the ground of proved

misbehavior or incapacity.[331] To give effect to this, Parliament has enacted the Judges (Inquiry) Act, 1968. The procedure for the impeachment of a judge is that a motion may be passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than 2/3rd members of that House present and voting in the same session. To maintain the integrity and independence of the judiciary, the impeachment process is not a cake walk.

849. A judge's salary, privileges, allowances, leave of absence and pension and such other privileges, allowances and rights mentioned in the Second Schedule of the Constitution are protected and will not be varied to his/her disadvantage after appointment.[332] To give effect to this, Parliament has enacted the Supreme Court Judges (Conditions of Service) Act, 1958.

850. The salary, allowances and pension payable to or in respect of a judge of the Supreme Court is charged to the Consolidated Fund of India.[333] The estimate of this expenditure may be discussed but shall not be submitted to the vote of Parliament.[334]

851. As far as this subject is concerned in respect of a judge of the High Court, there is an extensive reference in ***Sankalchand Sheth***. Broadly, the constitutional protections and provisions for a judge of the High Court are the same as for a judge of the Supreme Court.

852. A judge of the High Court has security of tenure till the age of 62 years[335] and the removal process is the same as for a judge of the Supreme Court.[336] The salary, privileges, allowances, right of leave of absence and pension etc. are protected by Article 221 of the Constitution. While the salary and allowances are charged to the Consolidated Fund of the State,[337] the pension payable is charged to the Consolidated Fund of India.[338] As in the case of the Supreme Court, the estimate of this expenditure may be discussed but shall not be submitted to the vote of the Legislative Assembly.[339] The conditions of service of a High Court judge are governed by the High Court Judges (Salaries and Conditions of Service) Act, 1954 in terms of Article 221 of the Constitution.

853. The entire package of rights and protections ensures that a judge remains independent and is free to take a decision in accordance with law unmindful of the consequences to his/her continuance as a judge. This does not mean that a judge may take whatever decision he/she desires to take. The parameters of decision making and discretion are circumscribed by the Constitution, the statute and the Rule of Law. This is the essence of decisional independence, not that judges can do as they please.

854. In this context, Justice Anthony M. Kennedy of the US Supreme Court had this to say before the United States Senate Committee on the Judiciary (Judicial Security and Independence) on 14th February, 2007:

Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must. A judiciary with permanent tenure, with a sufficient degree of separation from other branches of government, and with the undoubted obligation to resist improper influence is essential to the Rule of Law as we have come to understand that term.[340]

855. As far as decisional independence is concerned, a good example of the protection is to be found in ***Anderson v. Gorrie*** [1895] 1 Q.B. 668, 670 where it was said by Lord Esher M.R.:

the question arises whether there can be an action against a judge of a court of record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie.

Explaining this, Lord Bridge of Harwich said in ***McC (A Minor), Re*** [1985] A.C. 528, 540:

The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.

856. As far as institutional independence is concerned, our Constitution provides for it as well. For the Supreme Court, institutional independence is provided for in Article 129 which enables the institution to punish for contempt of itself. A similar provision is made for the High Court in Article 215. The law declared by the Supreme Court shall be binding on all courts within the territory of India.[341] All authorities, civil and judicial are obliged to act in aid of the Supreme Court.[342] The Supreme Court is entitled to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it and such decree or order shall also be enforceable throughout the territory of India.[343] Subject to a law made by Parliament, the Supreme Court is entitled to frame rules to regulate its practice and procedure.[344] The Chief Justice of India is empowered to appoint officers and 'servants' of the Supreme Court but their conditions of service shall be regulated by rules made by the Supreme Court (subject to approval by the President) or by law made by Parliament. [345] The administrative expenses of the Supreme Court, including expenses related to its officers and 'servants' shall be charged upon the Consolidated Fund of India.[346]

857. Significantly, no discussion shall take place in Parliament with respect to the conduct of a judge of the Supreme Court or the High Court, except in proceedings for impeachment.[347] Similarly, the Legislature of a State shall not discuss the conduct of a judge of the Supreme Court or the High Court in the discharge of his or her duties.[348]

858. In addition to the above, there are other general protections available to an individual judge or to the institution as such. Through Article 50[349] which is a provision in Part IV of the Constitution (Granville Austin in 'The Constitution: Cornerstone of a Nation' describes Part III and Part IV of the Constitution as 'the conscience of the Constitution')[350] the judiciary shall be insulated from executive interference. Justice Krishna Iyer speaking for himself and Justice Fazl Ali pointed out in ***Sankalchand Sheth*** that:

Under the general law of civil liability (Tort) words spoken or written in the discharge of his judicial duties by a Judge of the High Court are absolutely privileged and no action for defamation can lie in respect of such words. This absolute immunity is conferred on the Judges on the ground of public policy, namely, that they can thereby discharge their duty fearlessly.[351]

859. Similarly, Section 3 of the Judges (Protection) Act, 1985 provides, inter alia, that no court shall entertain or continue any civil or criminal proceeding against any person who is or was a judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function. This is in addition to the protection given by Section 77 of the Indian Penal Code which provides that: 'Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.'

860. In the overall conspectus and structure of the independence of the judiciary, it was stated in the ***First Judges case*** by Justice D.A. Desai that: 'Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters of the Constitution.'[352] It may be added that the framework and parameters of the law are also required to be taken into consideration. Justice Bhagwati put it quite succinctly when he said:

The concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong.[353]

861. Generally speaking, therefore, the independence of the judiciary is manifested in the ability of a judge to take a decision independent of any external (or internal) pressure or fear of any external (or internal) pressure and that is 'decisional independence'. It is also manifested in the ability of the institution to have 'functional independence'. A comprehensive and composite definition of 'independence of the judiciary' is elusive but it is easy to perceive.

862. The Constituent Assembly fully appreciated the necessity of having an independent judiciary and perhaps devoted more time to discussing this than any other issue. Granville Austin points out the following:

The subjects that loomed largest in the minds of Assembly members when framing the Judicial provisions were the independence of the courts and two closely related issues, the powers of the Supreme Court and judicial review. The Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect of the provisions. If the beacon of the judiciary was to remain bright, the courts must be above reproach, free from coercion and from political influence.[354]

Separation between the judiciary and the executive

863. Another facet of the discussion relating to the independence of the judiciary can be resolved by considering Article 50 of the Constitution.[355] This Article was referred to in the ***Second Judges case*** and, according to learned Counsel for the Petitioners, overlooked in the ***First Judges case***. It was urged that that Article is of great importance in as much as the Constituent Assembly was quite explicit that there should be a separation between the executive and the judiciary. The learned Attorney-General submitted, on the other hand, that the separation postulated by Article 50 of the Constitution was only limited to the public services of the State and not the judiciary as a whole.

864. Article 50 was incorporated in the Constitution in the chapter on Directive Principles of State Policy at the instance of Dr. Ambedkar who moved a proposal on 24th November, 1948 to insert Article 39A in the Draft Constitution.[356]

865. Explaining the necessity of inserting Article 39A in the Draft Constitution, Dr. Ambedkar said that it had been the desire for a long time that there should be a separation of the judiciary from the executive and a demand for this had been continuing ever since the Congress (party) was founded. The British Government, however, did not give any effect to this demand. Dr. Ambedkar moved for the insertion of Article 39A in the Draft Constitution in the following words:

I do not think it is necessary for me to make any very lengthy statement in support of the amendment which I have moved. It has been the desire of this country from long past that there should be separation of the judiciary from the executive and the demand has been continued right from the time when the Congress was founded. Unfortunately, the British Government did not give effect to the resolutions of the Congress demanding this particular principle being introduced into the administration of the country. We think that the time has come when this reform should be carried out. It is, of course, realized that there may be certain difficulties in the carrying out of this reform; consequently this amendment has taken into consideration two particular matters which may be found to be matters of difficulty. One is this: that we deliberately did not make it a matter of fundamental principle, because if we had made it a matter of fundamental principle it would have become absolutely obligatory instantaneously on the passing of the Constitution to bring about the separation of the judiciary and the executive. We have therefore deliberately put this matter in the chapter dealing with directive principles and there too we have provided that this reform shall be carried out within three years, so that there is no room left for what might be called procrastination in a matter of this kind. Sir, I move.[357]

866. Mr. B. Das (Orissa: General) opposed the amendment on the ground that when the people were harassed by the British Government, the feeling was that no justice was given and that is why there was a demand for the separation of the judiciary from the executive. After Independence that suspicion did not exist and therefore it was essential to examine whether separation was necessary.

867. The debate continued the next day on 25th November, 1948 when, as soon as the Constituent Assembly met, Dr. Ambedkar moved an amendment for the deletion of certain words from Article 39A of the Draft Constitution. As a result of this proposed amendment, Article 39A would read as follows:

The State shall take steps to separate the judiciary from the executive in the public services of the State.

868. During the course of the debate on 25th November, 1948 a self-evident truth came into focus. It was pointed out by Pandit Jawaharlal Nehru (United Provinces: General) that the Constitution is expected to last a long time and that it should not be rigid. As far as the 'basic nature' of the Constitution is concerned it must deal with fundamental aspects of the political, social, economic and other spheres and not with the details which are matters for legislation. It was stated in this context as follows:

Coming to this present amendment, if I may again make some general observations with all respect to this House, it is this: that I have felt that the dignity of a Constitution is not perhaps maintained sufficiently if one goes into too great detail in that Constitution. A Constitution is something which should last a long time, which is built on a strong foundation, and which may of course be varied from time to time-it should not be rigid-nevertheless, one should think of it as something which is going to last, which is not a transitory Constitution, a provisional Constitution, a something which you are going to change from day to day, a something which has provisions for the next year or the year after next and so on and so forth. It may be necessary to have certain transitory provisions. It will be necessary, because there is a change to have some such provisions, but so far as the basic nature of the Constitution is concerned, it must deal with the fundamental aspects of the political, the social, the economic and other spheres, and not with the details which are matters for legislation. You will find that if you go into too great detail and mix up the really basic and fundamental things with the important but nevertheless secondary things, you bring the basic things to the level of the secondary things too. You lose them in a forest of detail. The great trees that you should like to plant and wait for them to grow and to be seen are hidden in a forest of detail and smaller trees. I have felt that we are spending a great deal of time on undoubtedly important matters, but nevertheless secondary matters-matters which are for legislation, not for a Constitution. However, that is a general observation.[358]

869. The significance of the view expressed by Pandit Jawaharlal Nehru is that the existence of the 'basic nature' of the Constitution was recognized and it appears that this is what we call today as the basic structure or basic features of the Constitution. Undoubtedly there was an acknowledgement of certain fundamental aspects of the Constitution but it was not possible to go into details in respect of each and every one of them. Explaining this in the context of the 'matters of extreme moment' Pandit Jawaharlal Nehru said that India is a very mixed country 'politically, judicially, economically and in many ways and any fixed rule of thumb to be applied to every area may be disadvantageous and difficult in regard to certain areas. On the one hand, that rule will really prevent progress in one area, and on the other hand, it may upset the apple-cart in some other area. Therefore, a certain flexibility is desirable.'[359]

870. The views expressed by Dr. Bakshi Tek Chand (East Punjab: General) are extremely important in this regard. The Hon'ble Member gave a detailed historical background for the demand of separation of the executive and the judiciary and expressed the view that as far back as in 1852 when public opinion in Bengal began to express itself in an organized manner that the matter of separation was first mooted. In other words, the separation of the executive from the judiciary had been in demand for almost 100 years.

871. Dr. Bakshi Tek Chand was of the view that with Independence, the necessity of this reform had become greater. The Hon'ble Member cited three illustrative instances of interference with the judiciary by Ministers of some Provinces and members of political parties in the fair administration of justice. Dr. Bakshi Tek Chand gave these extremely telling examples and it is best to quote what was said:

One word more I have to say in this connection and that is, that with the advent of democracy and freedom, the necessity of this reform has become all the greater. Formerly it was only the district magistrate and a few members of the bureaucratic Government from whom interference with the

judiciary was apprehended, but now, I am very sorry to say that even the Ministers in some provinces and members of political parties have begun to interfere with the administration of justice. Those of you, who may be reading news paper reports of judicial decisions lately, must have been struck with this type of interference which has been under review in the various High Courts lately. In one province we found that in a case pending in a Criminal Court, the Ministry sent for the record and passed an order directing the trying Magistrate to stay proceedings in the case. This was something absolutely unheard of. The matter eventually went up to the High Court and the learned Chief Justice and another Judge had to pass very strong remarks against such executive interference with the administration of justice.

In another province a case was being tried against a member of the Legislative Assembly and a directive went from the District Magistrate to the Magistrate trying the case not to proceed with it further and to release the man. The Magistrate who was a member of the Judicial Service and was officiating as a Magistrate had the strength to resist this demand. He had all those letters put on the record and eventually the matter went to the High Court and the Chief Justice of the Calcutta High Court made very strong remarks about this matter.

Again in the Punjab, a case has recently occurred in which a Judge of the High Court, Mr. Justice Achru Ram, heard a habeas corpus petition and delivered a judgment of 164 pages at the conclusion of which he observed that the action taken by the District Magistrate and the Superintendent of Police against a member of the Congress Party was mala fide and was the result of a personal vendetta. These were his remarks.

In these circumstances, I submit that with the change of circumstances and with the advent of freedom and the introduction of democracy, it has become all the more necessary to bring about the separation of the judiciary from the executive at the earliest possible opportunity.[360]

872. The debate concluded on 25th November, 1948 with the Constituent Assembly eventually accepting the insertion of Article 39A in the Draft Constitution. This is now Article 50 in our Constitution.

873. The importance of the debate must be looked at not only from a historical perspective but also what was intended for the future by the Constituent Assembly. In the past there had been unabashed interference by the executive in the administration of justice by the subordinate judiciary and this definitely needed to be checked. In that sense, the debate on 24th and 25th November, 1948 was a precursor to the debate on Article 103 of the Draft Constitution held on 23rd and 24th May, 1949. By that time it was becoming clear (if it was not already clear) to the Constituent Assembly that there should be no interference by the executive in the administration of justice and that it was not necessary to provide for every detail in the Draft Constitution. That constitutional conventions existed prior to Independence were known, but that they were required to be continued after Independence was of equal significance.

874. With the need for avoiding details in the Constitution, the Draft Constitution did not specifically provide for the independence of the judiciary other than the subordinate judiciary. If this is looked at quite plainly, it would appear anachronistic to hold a view that Article 39A of the Draft Constitution required the subordinate judiciary to be independent and separate from the

executive but it was not necessary for the superior judiciary to be independent or separate. Such an obvious anachronism cannot be attributed to the Constituent Assembly. One must, therefore, assume that either the superior judiciary was already independent (and this needed no iteration) or that if it was not independent then, like the subordinate judiciary, it must be made independent, with the executive not being permitted to interfere in the administration of justice. Either way, separation between the judiciary and the executive with the intention of having an independent judiciary was a desirable objective.

875. No one can doubt and, indeed, even the learned Attorney-General did not doubt that the independence of the judiciary is absolutely necessary. But, the independence of the judiciary is not an end in itself. 'Instead, the aim is to secure an independent judiciary that will discharge its fundamental responsibilities, which include a crucial role in upholding the rule of law.'[361] In addition, the judiciary should clearly be separate from the executive.

876. By way of digression, a word may also be said about the financial independence of the judiciary. In a letter of 15th June, 2008 forwarding the Report of the Task Force on 'Judicial Impact Assessment' it was pointed out by Justice M. Jagannadha Rao (Retired) to the Minister for Law and Justice that 'the Planning Commission and Finance Commission must make adequate provision in consultation with the Chief Justice of India, for realization of the basic human rights of 'access to justice' and 'speedy justice' both civil and criminal. The present allocation of 0.071%, 0.078% and 0.07% of the Plan outlay in the 9th, 10th and 11th Plan are wholly insufficient.' Financial independence is one area which is also critical to the independence of the judiciary but is among the least discussed.

Independence of the judiciary and the appointment process

877. We must proceed on the basis that the independence of the judiciary is vital to democracy and there ought to be a separation between the executive and the judiciary. The independence of the judiciary begins with the appointment of a judge. Granville Austin says: 'An independent judiciary begins with who appoints what calibre of judges.'[362] It must be appreciated and acknowledged that methodological independence, namely, the recommendation and appointment of judges to a superior Court is an important facet of the independence of the judiciary.[363] If a person of doubtful ability or integrity is appointed as a judge, there is a probability of his/her succumbing to internal or external pressure and delivering a tainted verdict. This will strike at the root of the independence of the judiciary and destroy the faith of the common person in fair justice delivery. Therefore, there is a great obligation and responsibility on all constitutional functionaries, including the Chief Justice of India and the President, to ensure that not only are deserving persons appointed as judges, but that deserving persons are not denied appointment.[364]

878. Chief Justice Marshall in **Marbury v. Madison** observed that in respect of the commissioning of all officers of the United States, the clauses in the Constitution and the laws of the United States 'seem to contemplate three distinct operations', namely:

1. The nomination. This is the sole act of the president, and is completely voluntary.

2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States.[365]

879. Transposing this to the appointment of judges in our country, the first step is a recommendation (or nomination) of persons for appointment as judges. Historically, the recommendation is made by the Chief Justice of India for the appointment of a judge of the Supreme Court and by the Chief Justice of a High Court for appointment of a judge to the High Court. Occasionally, the Chief Minister of a State also makes a recommendation, but that is required to be routed through the Chief Justice of the High Court. There is no instance of the President recommending any person for appointment as a judge of the Supreme Court.

880. The second step is the appointment of a judge and this is possible only through a consultative participatory process between the President and the Chief Justice of India. It is in this process that there has been some interpretational disagreement, but the **Second Judges** case and the ***Third Judges case*** have laid that to rest with a shared primacy and responsibility between the President and the Chief Justice of India. This has already been discussed above.

881. The third step is the issuance of a warrant of appointment (or commission). It is quite clear that the warrant of appointment can be issued only by the President. There is not and cannot be any dispute about this. Under the circumstances it is clear that the executive function of the President remains intact, unlike what the learned Attorney-General says and there is no scope for the recitation of the 'judges appointing judges'mantra.

882. It is perhaps this simple three-step process that the Constituent Assembly intended. But this got distorted over the years, thanks to the interference by the political executive in the first and second steps.

883. In a Report entitled 'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights'[366] the interplay between the Rule of Law, the independence of the judiciary and the appointment of judges is commented upon and in a reference to international standards, it is said that the appointment of judges plays a key role in safeguarding the independence of the judiciary. This is what was said:

The independence of the judiciary is one of the cornerstones of the rule of law. Rather than being elected by the people, judges derive their authority and legitimacy from their independence from political or other interference. It is clear from the existing international standards that the selection and appointment of judges plays a key role in the safeguarding of judicial independence and ensuring the most competent individuals are selected.

884. India is a part of the Commonwealth and The Commonwealth Principles on the accountability of and the relationship between the three branches of government[367] provide, inter alia, with regard to the appointment of judges, as follows:

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country. To secure these aims: (a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure: equality of opportunity for all who are eligible for judicial office; appointment on merit; and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;[368]

885. Jack Straw was the Lord Chancellor in the United Kingdom from 2007 to 2010. He delivered the 64th series of Hamlyn Lectures in 2012 titled 'Aspects of Law Reform-An Insider's Perspective'. The 3rd lecture in that series was delivered by him on 4th December, 2012 on 'Judicial Appointments'. In that lecture, he says:

The appointment of judges-by whom, according to what standards and process, and with what outcome-is of critical importance. To maintain a judiciary that is independent, which makes good decisions, and in whom the public can continue to have confidence, we need to appoint the most meritorious candidates and secure a judiciary that is as reflective as possible of the society it is serving.

And we need to get it right first time, every time, because, once appointed to a full-time salaried position, judges may not be removed from office other than in the most extreme of circumstances.[369]

886. Therefore, in the appointment of a judge, it is not only (negatively expressed) that a 'wrong person' should not be appointed but (positively expressed) the best talent, amongst lawyers and judicial officers should be appointed as judges of the High Court and the best amongst the judges of the High Courts or amongst advocates or distinguished jurists should be appointed to the Supreme Court. It has been stated in the 14th Report of the LCI that the selection of judges is of pivotal importance to the progress of the nation and that responsibility must be exercised with great care.

887. In the Report on Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, great emphasis was laid on the procedure for the appointment of judges and the criteria for appointment. It was said:

The issue of how judges are appointed is important in two respects. First, appointment procedures impact directly upon the independence and impartiality of the judiciary. Since the legitimacy and credibility of any judicial institution depends upon public confidence in its independence, it is imperative that appointment procedures for judicial office conform to--and are seen to conform to--international standards on judicial independence. It would be anomalous and unacceptable if the Court [European Court of Human Rights] failed to meet the international human rights standards that it is charged with implementing, including the requirement that cases are heard by an independent and impartial court of law.

Second, without the effective implementation of 'objective and transparent criteria based on proper professional qualification,' there is the very real possibility that the judges selected will not have the requisite skills and abilities to discharge their mandate. Declining standards will ultimately impact negatively on the standing of the Court [European Court of Human Rights], as well as on the application and development of human rights law on the international and (ultimately) national level.

888. In the ***First Judges case***, the question of appointment of judges as being integral to the independence of the judiciary was not an issue but Justice Venkataramiah expressed the view that it is difficult to hold that if the appointment of judges is left to the executive, it will impair the independence of the judiciary. The learned judge was of the view that it is only 'after such appointment the executive should have no scope to interfere with the work of a judge.'[370] This view is, with respect, far too narrow and constricted. However, Justice D.A. Desai held a different view which was expressed in the following words:

Now, the independence of the judiciary can be fully safeguarded not by merely conferring security on the Judges during their term of office but by ensuring in addition that persons who are independent, upright and of the highest character are appointed as Judges. Moreover, there is always the fear that appointments left to the absolute discretion of the appointing executive could be influenced by party considerations.[371]

889. In the ***Second Judges case*** Justice Pandian was quite explicit and expressed the view that the selection and appointment of a proper and fit candidate to the superior judiciary is inseparable from the independence of the judiciary and a vital condition in securing it.[372] Similarly, Justice Kuldip Singh also held that there cannot be an independent judiciary when the power of appointment of judges rests with the executive and that the independence of the judiciary is 'inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary.'[373] Justice Verma, speaking for the majority, expressed the view that all constitutional authorities involved in the process of appointing judges of the superior courts 'should be fully alive to the serious implications of their constitutional obligation and be zealous in its discharge in order to ensure that no doubtful appointment can be made.'[374] The learned judge further said that the independence of the judiciary can be safeguarded by preventing the influence of political consideration in making appointment of judges to the superior judiciary.[375]

890. There is, therefore, no doubt that the appointment of a judge to the Supreme Court or the High Court is an integral part of the independence of the judiciary. It is not possible to agree with the learned Attorney-General when he says that though the appointment of a judge is a part of the independence of the judiciary, it is but a small part and certainly not a predominant part. I would say that it is really the foundational part of the independence of the judiciary.

891. Shimon Shetreet has this to say on the appointment of judges:

In any system, the methods of appointment have direct bearing on both the integrity and independence of the judges. Weak appointments lower the status of the judiciary in the eyes of the public and create a climate in which the necessary independence of the judiciary is likely to be undermined. Similarly, political appointments that are seen by the public as not based on merit

may arouse concern about the judge's independence and impartiality on the bench. The quality of judicial appointments depends upon the process and standards applied by the appointing authorities, yet every appointment system has its limitation. It is difficult to predict what sort of judge a man or woman will be and irreversible mistakes in judicial appointments are bound to occur, even when the method of appointment is fair and efficient and the standards are high, as they are in England. Such errors in selection apply equally to appointing persons who were unfit for occupying a judicial office as well as failing to appoint a person who might have been a good judge.[376]

892. How do international conventions look at this issue? The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region[377] provides, inter alia, as follows:

Independence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.[378]

To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.[379]

The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.[380]

This document was signed by Justice S.C. Agrawal of this Court representing Chief Justice A.M. Ahmadi.

893. The Bangalore Principles of Judicial Conduct, 2002 which lay down six essential values for a judge (and which are accepted world-wide both in civil law and common law countries) would be totally unworkable if a person appointed as a judge, at the time of appointment, lacks basic competence and independence.[381] Given all these considerations, it must be held and is held that the process for appointment and the actual appointment of a judge to a High Court or the Supreme Court is a predominant part of the independence of the judiciary and, therefore, an integral part of the basic structure of the Constitution.

894. Therefore, the procedure for the appointment of judges of the Supreme Court or the High Courts can impact on the independence of the judiciary and the basic structure of the Constitution.

The recommendation process

895. How can the President ensure that the most deserving persons are appointed as judges or that they are not denied appointment? This is the nub of the controversy before us and this is the problem that has vexed the executive, the judiciary, academia, the legal fraternity and civil society over several decades. Since justice delivery is undoubtedly the responsibility of the judiciary,

therefore, the judiciary (symbolized as it were by the Chief Justice of India) is obliged to ensure that only the most deserving persons are considered for appointment as judges.[382]

896. The process of consideration of a person for appointment as a judge is important both at a stage prior to the recommendation being made by the Chief Justice of India in consultation with his/her colleagues, constituting a 'collegium' and also after the recommendation is sent by the Chief Justice of India to the executive. At both stages, the process is participatory. In the pre-recommendation stage, it is a participatory process involving the Chief Justice of India and his/her colleagues, constituting the collegium.[383] It is at this stage that the Chief Justice of India takes the opinion of the other judges and anybody else, if deemed necessary. This stage also includes the participation of the executive because it is at this stage that the Chief Justice of India receives inputs from the executive about the frailties, if any, of a person who may eventually be appointed a judge. In the post-recommendation stage also the process is participatory but primarily with the executive in the event the executive has some objection to the appointment of a particular person for strong and cogent reasons to be recorded in writing.[384] Therefore, when a person is considered for appointment as a judge, there is extensive and intensive participatory consultation within the judiciary before the Chief Justice of India actually recommends a person for appointment as a judge; and after the recommendation is made, there is consultation between the executive and the judiciary before the process is carried further. What can be a more meaningful consultation postulated by Article 124(2) of the Constitution?

897. If a person is not recommended for appointment by the Chief Justice of India or the Chief Justice of a High Court, the chapter of his/her appointment closes at that stage. And, if there is no difference of opinion between the constitutional functionaries about the suitability of a person for appointment then, of course, there are no hurdles to the issuance of a warrant of appointment.

898. The difficulty in considering and accepting a recommendation arises only if there is a difference of opinion during consultations between the executive and the judiciary. The ***Second Judges case*** effectively resolves this controversy.

899. At the pre-recommendation stage, it is quite possible that the executive is in possession of material regarding some personal trait or weakness of character of a lawyer or a judge that is not known to the Chief Justice of India or the Chief Justice of the High Court and which may potentially disentitle that person from being appointed a judge. It is then for the executive, as a consultant, to bring this information or material to the notice of the Chief Justice of India.[385] Since the judiciary has the responsibility of recommending an appropriate candidate for appointment as a judge, primacy is accorded to the view of the judiciary (symbolized by the view of the Chief Justice of India) that will weigh and objectively consider the material or information and take a final decision on the desirability of the appointment.[386] The Chief Justice of India may, for good reason, accept the view of the executive or may, also for good reason, not accept the view of the executive. It is in this sense that 'consultation' occurring in Article 124(2) and Article 217(1) of the Constitution has to be understood. Primacy to the judiciary is accorded only to this limited extent, but subject to a proviso which will be discussed a little later.

900. Why is it that limited primacy has been accorded to the judiciary? That the judiciary is the best suited to take a decision whether a person should be appointed a judge or not is implicit in

Article 124(2) and Article 217(1) of the Constitution. In Article 124(2) of the Constitution, the President is mandated to consult the Chief Justice of India and 'such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary.' That the President may choose to consult eminent persons from the legal fraternity or civil society is another matter, but the President is not required to do so. One of the possible reasons for this could be that the Constitution framers were of the opinion that ultimately what is important is the opinion of judges and not necessarily of others. Similarly, for the appointment of a judge of the High Court Under Article 217(1) of the Constitution, the President is required to consult the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court-again not anybody else from the legal fraternity or civil society.

901. Similarly, limited primacy is accorded to the political executive. In the event the judiciary does not make a unanimous recommendation for the appointment of a judge of the Supreme Court or the High Courts, the President is entitled to turn down the recommendation. But if the recommendation is unanimous but returned for reconsideration by the President and thereafter unanimously reiterated by the judiciary, then the Council of Ministers is bound by the decision of the judiciary and must advise the President accordingly.

902. Since the Constitution is a flexible document, neither the President nor the Chief Justice of India is precluded from taking the advice of any person, lay or professional. In fact, Justice Verma stated in an interview in this regard as follows:

Can you throw light on how, during your tenure as the CJI, appointments took place?

For every Supreme Court appointment, I consulted senior lawyers like Fali S. Nariman and Shanthi Bhushan. I used to consult five or six top lawyers. I used to consult even lawyers belonging to the middle level. Similar consultation took place in the case of High Courts. I recorded details of every consultation. I wish all my correspondence is made public. After the appointment, why should it be secret? If there is a good reason to appoint the Judges, then at least the doubts people cast on them even now will not be there. And if there is a good reason why they should not have been appointed, then it would expose the persons who were responsible for their appointment.[387]

903. It is this pragmatic interpretation of the Constitution that was postulated by the Constituent Assembly, which did not feel the necessity of filling up every detail in the document, as indeed it was not possible to do so.

904. Leaving aside the discussion on the textual interpretation of the constitutional provisions and the Constituent Assembly debates, a constitutional convention has evolved over the last more than seven decades of accepting the opinion of the Chief Justice in the appointment of a person as a judge of a superior Court. This constitutional convention has existed, if not from the days of the Government of India Act, 1919 then certainly from the days of the Government of India Act, 1935. This constitutional convention has been exhaustively dealt with by Justice Kuldip Singh in the ***Second Judges case*** and it was concluded that a constitutional convention is as binding as constitutional law.[388] In any event, there is no cogent reason to discard a constitutional convention if it is working well. At this stage, it is useful to recall the comment of Chief Justice Beg in ***State of Rajasthan v. Union of India*** MANU/SC/0370/1977 : (1977) 3 SCC 592 at paragraph 56 that:

'... constitutional practice and convention become so interlinked with or attached to constitutional provisions and are often so important and vital for grasping the real purpose and function of constitutional provisions that the two cannot often be viewed apart.' This is precisely what has happened in the present case where constitutional conventions and practices are so interlinked to the constitutional provisions that they are difficult to disassemble.

905. It is this constitutional interpretation and constitutional convention that results in binding the recommendation of the Chief Justice of India on the executive that is objected to by the learned Attorney-General as being contrary to the Constitution as framed and it is this that is sought to be 'corrected' by the 99th Constitution Amendment Act.

906. The issue may be looked at from yet another angle. Assuming, the executive rejects the recommendation of the Chief Justice of India even after its unanimous reiteration, what is the solution to the impasse that is created? The answer is to be found in ***Samsher Singh*** and reiterated in ***Sankalchand Sheth***. It was held in ***Samsher Singh*** that in such an event, the decision of the executive is open to judicial scrutiny. It was said:

In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India.[389]

This view was reiterated in ***Sankalchand Sheth***.[390] of course, it is another matter that no one has a right to be appointed as a judge, but certainly if the unanimous recommendation of the judiciary through the Chief Justice of India is not accepted by the President, if nothing else, at least the record will be put straight and the possible damage to the dignity, reputation and honour of the person who was recommended by the Chief Justice of India will be restored, at least to some extent. 364. But is judicial review necessarily the only answer to a problem of this nature? Should the executive and the judiciary ever be on a collision course in the appointment of a judge? Not only did Dr. Ambedkar think that such a situation would not occur, he never visualized it. Dr. Ambedkar made provision for virtually every contingency, except a stalemate or deadlock situation-he never imagined that such an eventuality would ever arise.

907. That there would be no difference or little difference or a manageable difference of opinion between the President and the Chief Justice of India or that the judiciary should have a final say in the matter so as not to make the consultation process a mere formality, is quite apparent from the fact that the Constituent Assembly deliberately drew a distinction between the appointment by the President of a judge of the Supreme Court and a judge of the High Court (on the one hand) and the appointment by the President of other constitutional authorities. For the appointment of a judge, it is mandated in the Constitution that the President must consult the Chief Justice of India. However, to appoint the Comptroller and Auditor General Under Article 148 of the Constitution (for example), the President is under no such obligation to consult anybody even though the position is one of vital importance. Dr. Ambedkar had said in this regard:

I cannot say I am very happy about the position which the Draft Constitution, including the amendments which have been moved to the articles relating to the Auditor-General in this House,

assigns to him. Personally speaking for myself, I am of opinion that this dignitary or officer is probably the most important officer in the Constitution of India. He is the one man who is going to see that the expenses voted by Parliament are not exceeded, or varied from what has been laid down by Parliament in what is called the Appropriation Act. If this functionary is to carry out the duties-and his duties, I submit, are far more important than the duties even of the judiciary-he should have been certainly as independent as the Judiciary. But, comparing the articles about the Supreme Court and the articles relating to the Auditor-General, I cannot help saying that we have not given him the same independence which we have given to the Judiciary, although I personally feel that he ought to have far greater independence than the Judiciary itself.[391]

Similarly, the appointment of the Chief Election Commissioner and the Election Commissioners Under Article 324 of the Constitution does not require the President to consult anybody, even though free and fair elections are undoubtedly vital to our democracy. Since the consultation provision was incorporated only for the appointment of judges, surely, the Constituent Assembly had good reasons for making this distinction. Justice Khehar has referred to other Presidential appointments in his draft judgment and it is not necessary to repeat them. What is important is the 'message' sought to be conveyed by the Constituent Assembly and the sanctity given to a recommendation by the Chief Justice of India for the appointment of a judge of the Supreme Court or the High Court.

908. It is trite that the Constitution is a living document.[392] Keeping this in mind, could it be said that a strained interpretation has been given to Article 124(2) and Article 217(1) of the Constitution particularly when the substitution of 'consultation' with 'concurrence' in the draft of Article 124 was discussed in the Constituent Assembly and not accepted?[393] Definitely not, particularly if one looks at the context in which 'consultation' is used and the purpose for which it is used, namely, to fetter the discretion of the President by someone who knows what is in the best interests of the judiciary.

909. But, as mentioned earlier, it is not necessary to dwell at length upon the correctness or otherwise of the procedure for the appointment of a judge as laid down in the ***Second Judges case*** and the ***Third Judges case***. The question really is whether the change in the procedure of appointment of judges violates the basic structure of the Constitution. Can the Judiciary be independent if the appointment process is in the hands of the National Judicial Appointments Commission?

Amendment of the Constitution through Article 368

910. Proceeding on the basis, as we should, that the independence of the judiciary is a part of the basic structure of the Constitution, and that the appointment of a judge to the Supreme Court or a High Court is an integral and foundational part of the independence of the judiciary, the question that arises is to what extent, if at all, can the appointment process be tinkered with by Parliament.

911. Article 368 of the Constitution provides for the 'Power of Parliament to amend the Constitution and procedure therefor'. While the power is vast, empowering Parliament to add, vary or repeal any provision of the Constitution, the breadth of that power has inherent limitations as explained in ***Kesavananda Bharati***. which is that the basic structure of the Constitution cannot be

altered. What constitutes the basic structure of the Constitution has been considered in several decisions of this Court and democracy (for example) or free and fair elections or judicial review of legislative action or separation (or distribution) of powers between the Legislature, the Executive and the Judiciary have all been held to be a part of the basic structure of the Constitution. There is no doubt, and no one has disputed it, that the independence of the judiciary is also a part of the basic structure of the Constitution.

912. The constitutional requirement for amending the Constitution is: (a) The amendment may be initiated only by the introduction of a Bill for the purpose;

(b) The Bill may be moved in either House of Parliament; (c) The Bill ought to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting; (d) The Bill shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of that Bill.

913. There is a proviso to Article 368 of the Constitution and for the present purposes, the further requirement is that 'if such amendment seeks to make any change' in Chapter IV of Part V. (The Union Judiciary) and Chapter V of Part VI (The High Courts in the States) the amendment 'shall also require to be ratified by the Legislatures of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.'

914. As far the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is concerned, there is no doubt or dispute that the procedure mentioned above was followed and that it received the assent of the President on 31st December, 2014. To that extent the Constitution (Ninety-ninth) Amendment Act, 2014 is a procedurally valid legislation.

Limitations to amending the Constitution

915. To appreciate the inherent limitations placed on Parliament with regard to an amendment to the Constitution, it is necessary to consider the views constituting the majority in ***Kesavananda Bharati***. In that case, the question before this Court (as framed by Chief Justice Sikri) was: What is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2) on Parliament?

916. The learned Chief Justice noted that the word 'amendment' has not been defined in the Constitution. In some provisions of the Constitution it has a narrow meaning, while in other provisions it has an expansive meaning. This view was expressed by Justice Shelat and Justice Grover as well, who observed that the words 'amendment' and 'amend' have been used to convey different meanings in different provisions of the Constitution. In some Articles these words have a narrow meaning while in others the meaning is much larger or broader. The word is not one of precise import and has not been used in different provisions of the Constitution to convey the same meaning. This is of some significance since it is on this basis that this Court referred to the CAD to interpret the words 'amendment' and 'amend'.

917. On a reading of various provisions of the Constitution the learned Chief Justice concluded that the expression 'amendment of this Constitution' occurring in Article 368 thereof would mean any addition or change in any provision of the Constitution 'within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the directive principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated, reasonable abridgments of fundamental rights can be effected in the public interest.'[394] In this context, the learned Chief Justice referred to the Universal Declaration of Human Rights to conclude that certain rights of individuals are inalienable.[395]

918. The learned Chief Justice concluded by holding, inter alia:

The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.[396]

919. Justice Shelat and Justice Grover looked at the text of Article 368 as it stood prior to its amendment by the 24th Constitution Amendment Act and observed that there is intrinsic evidence to suggest that the amending power of Parliament is limited. However widely worded the power might be, it cannot be used to render the Constitution to lose its character or nature or identity and it has to be exercised within the framework of the Constitution. It was observed that an unlimited power of amendment cannot be conducive to the survival of the Constitution. On this basis, it was concluded that:

The meaning of the words "amendment of this Constitution" as used in Article 368 must be such which accords with the true intention of the Constitution-makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various articles including Article 368. It is neither possible to give it a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution.[397]

920. Justice Hegde and Justice Mukherjea observed that Article 368 cannot be interpreted in a narrow and pedantic manner but must be given a broad and liberal interpretation. It was observed that the word 'amendment' has no precise meaning and that it is a 'colourless' word. In fact, the words 'amendment' and 'amend' have been used in the Constitution in different places with different connotations. Notwithstanding this, the learned judges were of the view that the meaning of these expressions cannot be as expansive as to enable Parliament to change the 'personality' of the Constitution since its scheme and structure proceed 'on the basis that there are certain basic features which are expected to be permanent.' Therefore, the amending power Under Article 368 of the Constitution is subject to implied limitations.

921. Having considered all these factors, the learned judges concluded that:

On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the

Parliament the power to revoke the mandate to build a welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligation imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. We are unable to agree with the contention that in order to build a welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution.[398]

922. Justice Khanna dwelt on the basic structure of the Constitution and expressed the view that 'amendment' postulates the survival of the 'old' Constitution without loss of its identity and the retention of the basic structure or framework of the 'old' Constitution. It was held:

Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution.

923. Thereafter, Justice Khanna travelled much further than necessary and held that as long as the basic structure and framework of the Constitution is retained, the plenary power of amendment 'would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights.' The rationale for this was given a little later in the judgment in the following words:

The word "amendment" in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental right, and the scope and width of that power when it deals with provisions not concerned with fundamental rights.[399]

924. The conclusion arrived at by Justice Khanna is stated by the learned judge in the following words:

The power of amendment Under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence, or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.[400]

925. It may be mentioned en passant that the aforesaid view expressed by Justice Khanna generated much controversy. That was adverted to by the learned judge in ***Indira Nehru Gandhi*** and it was clarified in paragraphs 251 and 252 of the Report that the 'offending' passages were in the context of the extent of the amending power and not in the context of the basic structure of the Constitution. The learned judge clarified that fundamental rights were a part of the basic structure of the Constitution but the right to property was not.[401]

926. Simplistically put, the sum and substance of the decision in ***Kesavananda Bharati*** is that it recognized that the Constitution has a basic structure and that the basic structure of the Constitution is unalterable. Perhaps to avoid any doubts and since as many as nine judgments were delivered by the thirteen judges constituting the Bench, a summary of the conclusions was prepared. This summary was signed by nine of the thirteen judges. Among the nine signatories were two learned judges who were in the minority. One of the conclusions agreed upon by the nine learned judges who signed the summary was: 'Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.'

Judicial review of an amendment to the Constitution

927. In ***Indira Nehru Gandhi*** it was held that an amendment to the Constitution can be challenged only on the ground of violation of the basic structure, while a statute cannot be so challenged. A statute can be challenged only if it is passed by a Legislature beyond its legislative competence or if it offends Article 13 of the Constitution.[402]

The constitutional amendments may, on the ratio of the Fundamental Rights case,[403] be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. "Basic structure", by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features--this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution.

928. A similar view was taken in ***State of Karnataka v. Union of India*** MANU/SC/0144/1977 : (1977) 4 SCC 608 paragraph 238 (Seven Judges Bench) wherein the above passage from ***Indira Nehru Gandhi*** was quoted with approval. It was said by Justice Untwalia in a concurring judgment for himself, Justice Shinghal and Justice Jaswant Singh:

Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental backbone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the

case of *Smt. Indira Nehru Gandhi* v. *Shri Raj Narain* such an argument was expressly rejected by this Court. We may rest content by referring to a passage from the judgment of our learned brother Chandrachud, J. which runs thus....

929. In ***Kuldip Nayar v. Union of India*** MANU/SC/0203/1996 : (1996) 7 SCC 1 paragraph 107 (Five Judges Bench) a Constitution Bench reiterated the above view in the following words:

The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution Under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the Petitioners.

930. Finally, in ***Ashoka Kumar Thakur v. Union of India*** MANU/SC/1397/2008 : (2008) 6 SCC 1 paragraph 116 (Five Judges Bench) it was held that a law can be challenged if it violates a provision of the Constitution but an amendment to the Constitution can be challenged only if it violates a basic feature of the Constitution which is a part of its basic structure. It was held:

For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution.

931. A different opinion was expressed in ***Madras Bar Association v. Union of India*** MANU/SC/0875/2014 : (2014) 10 SCC 1 paragraph 109 (Five Judges Bench) wherein it was held that the view that an amendment to the Constitution can be challenged on the ground of violation of the basic structure of the Constitution is made applicable to legislation also. This was assumed to be a logical extension of a principle. It was held:

This Court has repeatedly held that an amendment to the provisions of the Constitution would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable.

932. For the purposes of the present discussion, I would prefer to follow the view expressed by a Bench of seven learned judges in ***State of Karnataka v. Union of India*** that it is only an amendment of the Constitution that can be challenged on the ground that it violates the basic structure of the Constitution-a statute cannot be challenged on the ground that it violates the basic structure of the Constitution. [The only exception to this perhaps could be a statute placed in the

Ninth Schedule of the Constitution]. The principles for challenging the constitutionality of a statute are quite different.

Challenge to the 99th Constitution Amendment Act-the preliminaries

(a) Limitations to the challenge

933. The first submission made by the learned Attorney-General for upholding the constitutionality of the 99th Constitution Amendment Act was on the basis of ***Kesavananda Bharati***. It was submitted that a Constitution Amendment Act can be challenged as violating the basic structure of the Constitution within limited parameters, that is, only if it 'emasculates' the Constitution, or 'abrogates' it or completely changes its fundamental features so as to destroy its identity or personality or shakes the pillars on which it rests. While accepting that the independence of the judiciary is one such pillar, it was submitted that a change in the method and procedure in the appointment of a judge of the Supreme Court or a High Court does not emasculate, abrogate or shake the foundations or the pillars of the independence of the judiciary. Consequently the 99th Constitution Amendment Act does not fall foul of the basic structure of the Constitution.

934. This argument fails to appreciate that a majority of the learned judges constituting the Bench that decided ***Kesavananda Bharati*** were of the opinion that it is enough to declare a constitutional amendment as violating the basic structure if it alters the basic structure. Undoubtedly, some of the learned judges have used very strong words in the course of their judgment- emasculate, destroy, abrogate, and substantially change the identity etc. but when it came to stating what is the law actually laid down, the majority decided that 'Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.'[404]

935. This was reiterated and explained by Justice Khanna in ***Indira Nehru Gandhi***. The words 'destroy' and 'abrogate' etc. were used with reference to the words 'amendment' and 'amendment of the Constitution' which is to say that 'amendment' and 'amendment of the Constitution' cannot be interpreted expansively as meaning 'destroy' or 'abrogate' etc. but have a limited meaning. The words 'destroy' and 'abrogate' etc. were not used in the context of destroying or abrogating the basic structure of the Constitution. The learned judge clearly said that 'the power of amendment Under Article 368 [of the Constitution] does not enable the Parliament to alter the basic structure of [or] framework of the Constitution....' In fact, this was the precise submission of learned Counsel for the election Petitioner, namely, that the constitutional amendment 'affects the basic structure or framework of the Constitution and is, therefore, beyond the amending power Under Article 368 [of the Constitution].'[405] The learned judge explained this crucial distinction in the following words:

The proposition that the power of amendment Under Article 368 does not enable Parliament to alter the basic structure of framework of the Constitution was laid down by this Court by a majority of 7 to 6 in the case of *His Holiness Kesavananda Bharati* v. *State of Kerala*. Apart from other reasons which were given in some of the judgments of the learned Judges who constituted the majority, the majority dealt with the connotation of the word "amendment". It was held that the words "amendment of the Constitution" in Article 368 could not have the effect of destroying or abrogating the basic structure of the Constitution. Some of us who were parties to that case took a

different view and came to the conclusion that the words "amendment of the Constitution" in Article 368 did not admit of any limitation. Those of us who were in the minority in Kesavananda case may still hold the same view as was given expression to in that case. For the purpose of the present case, we shall have to proceed in accordance with the law as laid down by the majority in that case.[406]

936. While dealing with the constitutional validity of Clause (4) of Article 329-A of the Constitution as introduced by the 39th Constitution Amendment Act, Justice Khanna expressed the view that if a principle, imperative rule or postulate of the basic structure of the Constitution is violated, then the constitutional amendment loses its immunity from attack.

The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution, can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion, should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases. If an amendment striking at the basic structure of the Constitution is not permissible, it would not acquire validity by being related only to one case. To accede to the argument advanced in support of the validity of the amendment would be tantamount to holding that even though it is not permissible to change the basic structure of the Constitution, whenever the authority concerned deems it proper to make such an amendment, it can do so and circumvent the bar to the making of such an amendment by confining it to one case. What is prohibited cannot become permissible because of its being confined to one matter.[407]

In conclusion it was said by Justice Khanna as follows:

As a result of the above, I strike down Clause (4) of Article 329-A on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution inasmuch as (1) it abolishes the forum without providing for another forum for going into the dispute relating to the validity of the election of the Appellant and further prescribes that the said dispute shall not be governed by any election law and that the validity of the said election shall be absolute and not consequently be liable to be assailed, and (2) it extinguishes both the right and the remedy to challenge the validity of the aforesaid election.[408]

937. Similarly, Justice K.K. Mathew who was in the minority in ***Kesavananda Bharati*** expressed the view (in ***Indira Nehru Gandhi***) that the majority decision was that by an amendment, the basic structure of the Constitution cannot be damaged or destroyed, and the learned judge proceeded on that basis and held that Clause (4) of Article 329-A of the Constitution as introduced by the 39th Constitution Amendment Act damaged or destroyed the basic structure of the Constitution.[409]

938. Justice Y.V. Chandrachud who too was in the minority in ***Kesavananda Bharati*** took the view that according to the majority opinion in that decision the principle that emerged was that Article 368 of the Constitution 'does not confer power on Parliament to alter the basic structure or

framework of the Constitution.'[410] The learned judge further said that the ratio decidendi in ***Kesavananda Bharati*** was that 'the power of amendment [in Article 368 of the Constitution] cannot be exercised to damage or destroy the essential elements or basic structure of the Constitution, whatever these expressions may comprehend.'[411]

939. The issue again came up for consideration in ***Minerva Mills v. Union of India*** MANU/SC/0075/1980 : (1980) 3 SCC 625 (Five Judges Bench). The question in that case was whether Section 4 and Section 55 of the 42nd Constitution Amendment Act transgress the limitation of the amending power of Article 368 of the Constitution. Speaking for himself and the other learned judges in the majority (Justice A.C. Gupta, Justice N.L. Untwalia and Justice P.S. Kailasam) it was held by Chief Justice Chandrachud that:

In *Kesavananda Bharati*, this Court held by a majority that though by Article 368 Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure. The question for consideration in this group of petitions Under Article 32 is whether Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 transgress that limitation on the amending power.[412]

A little later in the judgment, it was held as follows:

The summary of the various judgments in *Kesavananda Bharati* was signed by nine out of the thirteen Judges. Para 2 of the summary reads to say that according to the majority, "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". Whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view.

The question which we have to determine on the basis of the majority view in *Kesavananda Bharati* is whether the amendments introduced by Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements.[413]

It appears from the above exposition of the ratio decidendi in ***Kesavananda Bharati*** that the words 'alter' and 'damage' are used interchangeably. Similarly, 'damage the basic features' and 'destroy the basic structure' are used interchangeably with 'damage the basic structure' and 'destroy the basic features'.[414] The bottom line is what is contained in the 'summary' of ***Kesavananda Bharati***, namely: Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. There are two reasons for this. Firstly, it is a contemporaneous exposition of the views of the majority in ***Kesavananda Bharati*** and there is no other or different exposition and secondly, the exposition is by the majority of judges themselves (including two in the minority) and by no other.

940. It may be mentioned that some misgivings were expressed 'about' Minerva Mills in ***Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd.*** MANU/SC/0040/1982 : (1983) 1 SCC 147 (Five Judges Bench). The misgivings were not spelt out by the Bench except that it is stated that the case 'has left us perplexed' seemingly for the reason that no question had arisen regarding the constitutional validity of Section 4 and Section 55 of the 42nd Constitution Amendment Act.[415]

This is rather odd since the majority decision in Minerva Mills begins by stating: 'The question for consideration in this group of petitions Under Article 32 is whether Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 transgress that limitation on the amending power.' Justice Bhagwati who partly dissented from the views of the majority also stated that the constitutional validity of Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 were under challenge.[416] However, it is not necessary to enter into this thicket, but it must be noted that ***Sanjeev Coke*** did not disagree with ***Minerva Mills*** in its understanding of ***Kesavananda Bharati***.

941. More recently, in ***M. Nagaraj v. Union of India*** MANU/SC/4560/2006 : (2006) 8 SCC 212 (Five Judges Bench) it was held (rephrasing Justice Khanna in ***Indira Nehru Gandhi***) that the basic structure doctrine is really a check on the amending power of Parliament. The basic structure of the Constitution consists of constitutional principles that are so fundamental that they limit the amending power of Parliament. It was concluded that the basic structure theory is based on the concept of constitutional identity (rephrasing Justice Bhagwati in ***Minerva Mills***). It was then said:

The basic structure jurisprudence is a preoccupation with constitutional identity. In *Kesavananda Bharati* v. *State of Kerala* it has been observed that "one cannot legally use the Constitution to destroy itself". It is further observed "the personality of the Constitution must remain unchanged". Therefore, this Court in *Kesavananda Bharati* while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in Kesavananda Bharati. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty..... The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day.

942. The 'controversy' is now set at rest with the decision rendered in ***I.R. Coelho*** where alteration of the basic structure has been accepted as the test to determine the constitutional validity of an amendment to the Constitution. It was said:

The decision in *Kesavananda Bharati* case was rendered on 24-4-1973 by a thirteen-Judge Bench and by majority of seven to six Golak Nath case MANU/SC/0029/1967 : [1967] 2 SCR 762 (Eleven Judges Bench) was overruled. The majority opinion held that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution.[417]

And again,

In *Kesavananda Bharati* case the majority held that the power of amendment of the Constitution Under Article 368 did not enable Parliament to alter the basic structure of the Constitution.[418]

The attack, therefore, is not on the basic structure of the Constitution but on the amending power of Parliament.

943. The learned Attorney-General placed reliance on the following passage from the judgment of Justice Krishna Iyer in ***Bhim Singhji v. Union of India*** MANU/SC/0509/1980 : (1981) 1 SCC

166 (Five Judges Bench) to contend that for a constitutional amendment to violate the basic structure, it must be shocking, unconscionable or an unscrupulous travesty of the quintessence of equal justice. That case dealt with the constitutional validity of the Urban Land (Ceiling and Regulation) Act, 1976 which was placed in the Ninth Schedule to the Constitution by the 40th Constitution Amendment Act, 1976 and therefore had the protection of Article 31-B and Article 31-C of the Constitution. In that context, it was held that the question of the basic structure of the Constitution does not arise if the constitutional validity of legislation (as distinguished from a constitutional amendment) is under challenge. It was then said:

The question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment. *Kesavananda Bharati* cannot be the last refuge of the proprietariat when benign legislation takes away their "excess" for societal weal. Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalisation processes are put into action. If all the Judges of the Supreme Court in solemn session sit and deliberate for half a year to produce a legislation for reducing glaring economic inequality their genius will let them down if the essay is to avoid even peripheral inequalities. Every large cause claims some martyr, as sociologists will know. Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty.[419]

944. This decision dealt with a statute placed in the Ninth Schedule of the Constitution and is, therefore, a class apart as far as the present discussion is concerned.

945. From this analysis, it must be concluded that if a constitutional amendment alters the basic structure of the Constitution, then it can and should be declared unconstitutional. What is of importance is the 'width of power' test propounded by Mr. Palkhivala in ***Kesavananda Bharati*** and adopted in ***M. Nagaraj*** and now rechristened in ***I.R. Coelho*** as the direct impact and effect test 'which means the form of an amendment is not relevant, its consequence would be [the] determinative factor.'[420]

946. In the light of the above discussion the question, therefore, is this: How does the 99th Constitution Amendment Act alter the basic structure of the Constitution, if at all? There is no doubt or dispute that the independence of the judiciary is a basic structure of the Constitution. I have already held that the appointment of a judge to the Supreme Court and a High Court is an integral part of the independence of the judiciary. Therefore, has the introduction of the National Judicial Appointments Commission by the 99th Constitution Amendment Act so altered the appointment process as to impact on the independence of the judiciary thereby making the 99th Constitution Amendment Act unconstitutional? The learned Attorney-General answered this in the negative.

(b) Presumption of constitutionality

947. The learned Attorney-General submitted that there is a presumption in law that the 99th Constitution Amendment Act is constitutionally valid and that the Petitioners have not been able to rebut that presumption.

948. In ***Charanjit Lal Chowdhuri v. Union of India*** MANU/SC/0009/1950 : [1950] SCR 869 (Five Judges Bench) Justice Fazal Ali expressed the view that 'the presumption is always in favour of the constitutionality of an enactment.'

949. Similarly, in ***Ram Krishna Dalmia v. Justice S.R. Tendolkar*** MANU/SC/0024/1958 : [1959] SCR 279 (Five Judges Bench) it was held, on a consideration of the decisions of this Court by Chief Justice S.R. Das that 'there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgressions of the constitutional principles.'

950. In ***Kesavananda Bharati*** it was held by Justice Hegde and Justice Mukherjea that:

But the courts generally proceed on the presumption of constitutionality of all legislations. The presumption of the constitutional validity of a statute will also apply to constitutional amendments.[421]

951. Finally, in ***R.K. Garg v. Union of India*** MANU/SC/0074/1981 : (1981) 4 SCC 675 (Five Judges Bench) it was held by Justice Bhagwati, speaking for the Court as follows:

Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.[422]

952. It is not possible to disagree with the learned Attorney-General in this regard. A statute or a constitutional amendment must always be deemed to be constitutionally valid and it is for those challenging the validity to demonstrate a violation of the Constitution or an alteration of the basic structure of the Constitution, as the case may be. As far as the Petitioners are concerned, it is for them to conclusively show that the 99th Constitution Amendment Act alters the basic structure of the Constitution in that it replaces a well thought-out and fully-discussed method of appointment of judges with another wherein the constitutional role giving significant value to the opinion of the Chief Justice of India is substantively diminished or perhaps eliminated and substituted by the NJAC. The question is not whether the alternative model is good or not good but whether it is constitutionally valid or not.

(c) Basis of judgment is removed

953. The third submission was that Article 124(2) of the Constitution has been amended by the 99th Constitution Amendment Act and, therefore, the basis of the judgment delivered by this Court in the ***Second Judges case*** has been completely taken away or that the Constitution has been amended with the result that that judgment cannot now be used to interpret Article 124(2) of the Constitution as it is today. In other words, the challenge to the 99th Constitution Amendment Act will have to be adjudicated independently and regardless of the law laid down in the ***Second Judges case*** or the ***Third Judges case***.

954. In ***Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*** MANU/SC/0057/1969 : (1969) 2 SCC 283 (Five Judges Bench) it was said by Chief Justice Hidayatullah that granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. It was said:

Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation.[423]

955. Similarly, in ***Indira Nehru Gandhi*** it was held by Chief Justice Ray as follows:

The effect of validation is to change the law so as to alter the basis of any judgment, which might have been given on the basis of old law and thus make the judgment ineffective. A formal declaration that the judgment rendered under the old Act is void, is not necessary. If the matter is pending in appeal, the appellate court has to give effect to the altered law and reverse the judgment. The rendering of a judgment ineffective by changing its basis by legislative enactment is not an encroachment on judicial power but a legislation within the competence of the Legislature rendering the basis of the judgment non est.

956. In ***K. Sankaran Nair v. Devaki Amma Malathy Amma*** MANU/SC/1748/1996 : (1996) 11 SCC 428 it was observed as follows:

It is now well settled that the legislature cannot overrule any judicial decision without removing the substratum or the foundation of that judgment by a retrospective amendment of the legal provision concerned.[424]

It was further stated, relying upon ***Shri Prithvi Cotton Mills Ltd.*** as follows:

It is now well settled by a catena of decisions of this Court that unless the legislature by enacting a competent legislative provision retrospectively removes the substratum or foundation of any judgment of a competent court the said judgment would remain binding and operative and in the absence of such a legislative exercise by a competent legislature the attempt to upset the binding effect of such judgments rendered against the parties would remain an incompetent and forbidden exercise which could be dubbed as an abortive attempt to legislatively overrule binding decisions of courts.[425]

957. Similarly, in ***Bhubaneshwar Singh v. Union of India*** MANU/SC/0844/1994 : (1994) 6 SCC 77 reliance was placed on ***Shri Prithvi Cotton Mills Ltd.*** and a host of other decisions rendered by this Court and a similar conclusion arrived at in the following words:

From time to time controversy has arisen as to whether the effect of judicial pronouncements of the High Court or the Supreme Court can be wiped out by amending the legislation with retrospective effect. Many such Amending Acts are called Validating Acts, validating the action taken under the particular enactments by removing the defect in the statute retrospectively because of which the statute or the part of it had been declared ultra vires. Such exercise has been held by this Court as not to amount to encroachment on the judicial power of the courts. The exercise of rendering ineffective the judgments or orders of competent courts by changing the very basis by legislation is a well-known device of validating legislation. This Court has repeatedly pointed out that such validating legislation which removes the cause of the invalidity cannot be considered to be an encroachment on judicial power. At the same time, any action in exercise of the power under any enactment which has been declared to be invalid by a court cannot be made valid by a Validating Act by merely saying so unless the defect which has been pointed out by the court is removed with retrospective effect. The validating legislation must remove the cause of invalidity. Till such defect or the lack of authority pointed out by the court under a statute is removed by the subsequent enactment with retrospective effect, the binding nature of the judgment of the court cannot be ignored.[426]

958. In ***Re: Cauvery Water Disputes Tribunal*** MANU/SC/0097/1992 : (1993) Supp (1) SCC 96 it was pithily stated, on a review of several decisions of this Court that:

The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.[427]

959. More recently, in ***State of Tamil Nadu*** this Court approved the following conclusion arrived at in ***Indian Aluminium Co. v. State of Kerala*** MANU/SC/0370/1996 : (1996) 7 SCC 637:

In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.[428]

960. Without commenting on the view canvassed by the learned Attorney-General that the 99th Constitution Amendment Act has actually removed the basis of the judgment delivered by this Court in the ***Second Judges case*** the constitutional validity of the said amendment will nevertheless need to be tested on that assumption, keeping in mind the above decisions.

(d) Wisdom of an amendment to the Constitution

961. The next submission of the learned Attorney-General was that the wisdom of Parliament in enacting the 99th Constitution Amendment Act cannot be disputed. Hence, this Court ought not to substitute its own views on the necessity or otherwise of the 99th Constitution Amendment Act over the law laid down in the ***Second Judges case***.

962. In ***Lochner v. New York*** MANU/USSC/0253/1905 : 198 US 45 Justice Oliver Wendell Holmes famously stated (in dissent) almost a century ago:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

In other words, one may or may not agree with the content or wisdom of a legislation, but that has nothing to do with the correctness or otherwise of the majority decision taken by a Legislature. This view has been followed in our country as well.

963. The Courts in our country do not question the wisdom or expediency of the Legislature enacting a statute, let alone a constitutional amendment.

964. In one of the earliest cases relating to the wisdom of Parliament in enacting a law, it was contended in ***A.K. Gopalan v. The State of Madras*** MANU/SC/0012/1950 : [1950] 1 SCR 88 (Five Judges Bench) that the Preventive Detention Act, 1950 was unconstitutional. Justice Das expressed the view that:

The point to be noted, however, is that in so far as there is any limitation on the legislative power, the Court must, on a complaint being made to it, scrutinise and ascertain whether such limitation has been transgressed and if there has been any transgression the Court will courageously declare the law unconstitutional, for the Court is bound by its oath to uphold the Constitution. But outside the limitations imposed on the legislative powers our Parliament and the State Legislatures are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature.

965. The Payment of Bonus Act, 1965 and the scheme for payment of minimum bonus were under challenge in ***Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha Union*** MANU/SC/0185/1966 : [1967] 1 SCR 15 (Five Judges Bench) Speaking for the Court, Justice J.C. Shah observed that the wisdom of the scheme selected by the Legislature may be open to debate but it would not be invalid merely because some fault can be found with the scheme. It was said:

Whether the scheme for payment of minimum bonus is the best in the circumstances, or a more equitable method could have been devised so as to avoid in certain cases undue hardship is irrelevant to the enquiry in hand. If the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. With a view to secure a particular object a scheme may be selected by the Legislature, wisdom whereof may be open to debate; it may even be demonstrated that the scheme is not the best in the circumstances and the choice of the legislature may be shown to be erroneous, but unless the enactment fails to satisfy the dual test of intelligible classification and rationality of the relation with the object of the law, it will not be subject to judicial interference Under Article 14. Invalidity of legislation is not established by merely finding faults with the scheme adopted by the Legislature to achieve the purpose it has in view.

966. In ***Kesavananda Bharati*** it was observed by Chief Justice Sikri that: 'It is of course for Parliament to decide whether an amendment [to the Constitution] is necessary. The Courts will not be concerned with the wisdom of the amendment.'[429] The learned Chief Justice further observed: 'If Parliament has power to pass the impugned amendment acts, there is no doubt that I have no right to question the wisdom of the policy of Parliament.'[430]

967. Similarly, Justice Shelat and Justice Grover held:

It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution-makers or for the Parliament or the legislature.[431]

968. Justice A.N. Ray expressed his view in the following words: 'Courts are not concerned with the wisdom or policy of legislation. The Courts are equally not concerned with the wisdom and policy of amendments to the Constitution.'[432]

969. Justice Jaganmohan Reddy expressed the same sentiments when the learned judge said:

The citizen whose rights are affected, no doubt, invokes the aid of the judicial power to vindicate them, but in discharging its duty, the Courts have nothing to do with the wisdom or the policy of the Legislature.[433]

970. On the question of the wisdom of a constitutional amendment which ostensibly improves an existing situation, Justice Khanna expressed the view that this was not justiciable. The Court cannot substitute its opinion for that of Parliament in this regard. It was held:

Whether the amendment is in fact, an improvement or not, in my opinion, is not a justiciable matter, and in judging the validity of an amendment the courts would not go into the question as to whether the amendment has in effect brought about an improvement. It is for the special majority in each House of Parliament to decide as to whether it constitutes an improvement; the courts would not be substituting their own opinion for that of the Parliament in this respect. Whatever may be the personal view of a judge regarding the wisdom behind or the improving quality of an amendment, he would be only concerned with the legality of the amendment and this, in its turn, would depend upon the question as to whether the formalities prescribed in Article 368 have been complied with.[434]

971. With reference to the ***Lochner*** dissent, Justice Khanna noted that the view was subsequently accepted by the US Supreme Court in ***Ferguson v. Skrupa*** MANU/USSC/0067/1963 : 372 US 726 in the following words:

In the face of our abandonment of the use of the 'vague contours' of the Due Process clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* MANU/USSC/0223/1917 : 244 U.S. 590 (1917) is as mistaken as would be adherence to *Adkins* v. *Children's Hospital* MANU/USSC/0294/1923 : 261 U.S. 525 (1923) overruled by *West Coast Hotel Co.* v. *Parrish* MANU/USSC/0190/1937 : 300 U.S. 379 (1937) .....
We refuse to sit as a 'super legislature to weigh the wisdom of legislation', and we emphatically refuse to go back to the time when courts used the Due Process clause 'to strike down State laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought'.[435]

972. Justice Khanna reiterated his views in ***Indira Nehru Gandhi*** wherein the learned judge held:

Before dealing with the question as to whether the impugned amendment affects the basic structure of the Constitution, I may make it clear that this Court is not concerned with the wisdom behind or the propriety of the impugned constitutional amendment. These are matters essentially for those who are vested with the authority to make the constitutional amendment. All that this Court is concerned with is the constitutional validity of the impugned amendment.[436]

973. Justice Chandrachud also expressed the same view, that is to say:

The subject-matter of constitutional amendments is a question of high policy and courts are concerned with the interpretation of laws, not with the wisdom of the policy underlying them.[437]

974. A similar view was expressed in ***Karnataka Bank Ltd. v. State of Andhra Pradesh*** MANU/SC/0406/2008 : (2008) 2 SCC 254 wherein it was specifically observed by this Court that:

In pronouncing on the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a court may think of it.[438]

975. In view of the judicial pronouncements, there is absolutely no difficulty in accepting this proposition canvassed by the learned Attorney-General. The constitutional validity of the 99th Constitution Amendment Act has to be tested on its own merit. The question of any Court substituting its opinion for that of the Legislature simply cannot and does not arise. A judge may have a view one way or the other on the collegium system of appointment of judges and on the manner of its implementation-but that opinion cannot colour the application and interpretation of the law or the reasoning that a judge is expected to adopt in coming to a conclusion whether the substitute introduced by the 99th Constitution Amendment Act is constitutionally valid or not. Similarly, a judge may have an opinion about the National Judicial Appointments Commission-but again that view cannot replace a judicial interpretation of the 99th Constitution Amendment Act or the NJAC Act.

976. The collegium system of appointment of judges has undoubtedly been the subject of criticism. In fact, Mr. Fali Nariman who led the submissions on behalf of the Advocates on Record Association was quite critical of the collegium system of appointments. Some of the learned Counsel for the Respondents went overboard in their criticism. But personal opinions do not matter. Lord Templeman of the House of Lords was of the view that the collegium system of appointments is best suited to ensure the independence of the judiciary-but there are other eminent persons who are critical of the ***Second Judges case***.

977. In the final analysis, therefore, the Courts must defer to the wisdom of the Legislature and accept their views, as long as they are within the parameters of the law, nothing more and nothing less. The constitutional validity of the 99th Constitution Amendment Act cannot be tested on opinions, however strong they may be or however vividly expressed.

(e) Needs of the people

978. It was also submitted by the learned Attorney-General that Parliament is aware of the needs of the people and the people want a change from the collegium system of appointment of judges. Parliament has responded to this demand and this Court should not reject this demand only because it believes that the collegium system is working well and that the 99th Constitution Amendment Act introduces a different system which reduces the role of the judiciary in making appointments by taking away its primacy in this regard.

979. Apart from the presumption that an enactment is constitutionally valid, there is also a presumption that the Legislature understands and correctly appreciates the needs of the people. This was observed in ***Charanjit Lal Chowdhuri*** and reliance was placed on the following passage from ***Middleton v. Texas Power and Light Co.*** 249 US 152, 157 paragraph 11:

It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds.

980. Similarly, in ***Ram Krishna Dalmia*** the presumption that the Legislature understands and correctly appreciates the needs of the people was reiterated.

981. Finally in ***Mohd. Hanif Quareshi v. State of Bihar*** MANU/SC/0027/1958 : [1959] SCR 629 (Five Judges Bench) this view was endorsed by Chief Justice S.R. Das speaking for this Court (though it may be mentioned that this decision was subsequently overruled on another issue) in the following words:

The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

982. It was observed (on an issue relating to the constitutionality of the death penalty) in ***Makwanyane***[439] as follows:

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution....

This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public. Justice Powell's comment in his dissent in *Furman v. Georgia* bears repetition:

...the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery-not the core-of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function. 408 U.S. 238, 290 (1972)

So too does the comment of Justice Jackson in *West Virginia State Board of Education v. Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. 319 U.S. 624, 638 (1943)

To put it differently: 'The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.'[440] Public opinion, manifested through Parliament or otherwise, really pales into insignificance over the law that is interpreted impartially and in a non-partisan manner.

983. It must be appreciated that the debate cannot be reduced to the acceptance of an unconstitutional but popular decision v. a constitutional but unpopular decision. All of us are bound by the Constitution and judges have to abide by the oath of office to uphold the Constitution and the laws, even if the decision is unpopular or unacceptable to Parliament. This is the essence of judicial review otherwise no law passed by Parliament (obviously having a popular mandate) could be struck down as unconstitutional.

(f) Passage of time

984. Finally, it was submitted by the learned Attorney-General that the passage of time over the last over sixty years has shown that the system of appointment of judges that was originally operational (in which the executive has the 'ultimate power') and the collegium system (in which the judiciary had shared responsibility) had both yielded some negative results. It was submitted that millions of cases are pending, persons who should have been appointed as judges were not recommended for appointment and persons who did not deserve to be judges were not only appointed but were brought to this Court. The 99th Constitution Amendment Act seeks to correct the imbalances created over a period of time and since constitutional experiments are permissible, the 99th Constitution Amendment Act should be allowed to pass muster.

985. There is no doubt that with the passage of time changes take place in society and in the development of the law. In fact, the only constant is change. In ***State of West Bengal v. Anwar Ali Sarkar*** MANU/SC/0033/1952 : [1952] SCR 284 (Seven Judges Bench) it was acknowledged by Justice Mehr Chand Mahajan that good faith and knowledge of existing conditions on the part of the Legislature has to be presumed. Appreciating this, it was later observed in ***Ram Krishna Dalmia*** that:

In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

986. In ***Kesavananda Bharati*** Justice Hegde and Justice Mukherjea observed that: 'The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of the generation to come.'[441]

987. Justice Khanna expressed the view (and this was relied on by the learned Attorney-General) that the Constitution is also intended for the future and must contain ample provision for experiment and trial. This is what Justice Khanna said:

It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must

therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. It had its roots in the past, its continuity is reflected in the present and it is intended for the unknown future.[442]

988. A little later on in the judgment, the learned judge cited ***Abrams v. United States*** MANU/USSC/0180/1919 : 250 US 616 (1919) and quoting Justice Holmes said:

The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment." If the experiment fails, there must be provision for making another.[443]

989. Fortunately for the people of the country, the independence of the judiciary is not a 'task of administration' nor is the Constitution of India a failed experiment nor is there any need for 'making provision for another'. If the basic structure of the Constitution is to be changed, through experimentation or otherwise, then its overthrow is necessary. It is not a simple document that can be experimented with or changed through a cut and paste method. Even though the independence of the judiciary is a basic structure of the Constitution and being a pillar of democracy it can be experimented with, but only if it is possible without altering the basic structure. The independence of the judiciary is a concept developed over centuries to benefit the people against arbitrary exercise of power. If during experimentation, the independence of the judiciary is lost, it is gone forever and cannot be regained by simply concluding that the loss of independence is a failed experiment. The independence of the judiciary is not physical but metaphysical. The independence of the judiciary is not like plasticine that it can be moulded any which way.

990. This is not to say that the Constitution must recognize only physical changes with the passage of time-certainly not. New thoughts and ideas are generated with the passage of time and a line of thinking that was acceptable a few decades ago may not be acceptable today and what is acceptable today may not be acceptable a decade hence. But basic concepts like democracy, secularism, Rule of Law, independence of the judiciary, all of which are constituents of the basic structure of our Constitution are immutable as concepts, though nuances may change. A failed experiment of these basic concepts would lead to disastrous consequences. It is not possible as an experiment to try out a monarchy or a dictatorship or to convert India into a religious State for about ten or fifteen years and see how the experiment works. Nor is it possible to suspend the Rule of Law or take away the independence of the judiciary for about ten or fifteen years and see how the experiment works. These concepts are far too precious for experimentation.

991. Yes, the Constitution has to be interpreted as a living organic document for years and years to come, but within accepted parameters. It was said by Chief Justice Dickson of the Canadian Supreme Court in ***The Queen v. Beauregard*** MANU/SCCN/0017/1986 : [1986] 2 SCR 56 paragraph:

The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Accordingly, if the Constitution can accommodate, as it has, many subjects unknown in 1867--airplanes, nuclear energy, hydroelectric power--it is surely not straining Section 100 too much to say that the word

'pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of 'pensions'.[444]

992. It is this that Justice Khanna possibly had in mind when the learned judge spoke of the 'unknown future'.

Challenge to a statute and the package deal

993. The learned Attorney-General also adverted to the legal bases for challenging a statute. This was necessary since he desired to segregate the challenge to the 99th Constitution Amendment Act and the NJAC Act. In principle, the segregation would be justified, but as far as this case is concerned, the learned Attorney-General had argued that the 99th Constitution Amendment Act and the NJAC Act were a 'package deal' and in this he is correct. Both were discussed and debated in both Houses of Parliament almost at the same time, both were sent to the President for assent at the same time and were in fact assented to at the same time and finally both were notified at the same time. The only difference was that while the 99th Constitution Amendment Act had to undergo the ratification process, the NJAC Act did not. It was therefore a 'package deal' presented to the country in which the 99th Constitution Amendment Act and the NJAC Act were so interlinked that one could not operate without reference to the other. In fact, Mr. Nariman submitted that the NJAC Act should also have undergone the ratification process, but he was unable to support his argument with any law, judicial precedent, convention or practice. This question is left open for greater discussion at an appropriate stage should the occasion arise.

994. Be that as it may, in the context of a challenge to a statute, it was submitted by the learned Attorney-General that the principles for such a challenge are quite different from a challenge to a constitutional amendment. He is right in this submission.

995. The accepted view is that a Parliamentary statute can be struck down only if it is beyond legislative competence or violates Article 13 or the fundamental rights. The basic structure doctrine is not available for striking down a statute. It was held in ***State of A.P. v. McDowell and Co.*** MANU/SC/0427/1996 : (1996) 3 SCC 709 paragraph 43 that:

The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.

996. This view was followed in ***Public Services Tribunal Bar Assn v. State of U.P.*** MANU/SC/0062/2003 : (2003) 4 SCC 104 paragraph 26 in the following words:

The constitutional validity of an Act can be challenged only on two grounds viz. (*i*) lack of legislative competence; and (*ii*) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provisions. In *State of A.P.* v. *McDowell and Co.* this Court has opined that except the above two grounds there is no third ground on the basis of

which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds.

997. Earlier, this Court had taken a much broader view of the issue of a challenge to a statute in Chhotabhai Jethabhai Patel v. Union of India MANU/SC/0224/1961 : 1962 Supp (2) SCR 1 : AIR 1962 SC 104 (Five Judges Bench) It was held therein that apart from the question of legislative competence and violation of Article 13 of the Constitution, a statute could be challenged if its enactment was prohibited by a provision of the Constitution. It was held as follows:

If by reason of Article 265 every tax has to be imposed by "law" it would appear to follow that it could only be imposed by a law which is valid by conformity to the criteria laid down in the relevant Articles of the Constitution. These are that the law should be (*1*) within the legislative competence of the legislature being covered by the legislative entries in Schedule VII of the Constitution; (*2*) the law should not be prohibited by any particular provision of the Constitution such as for example, Articles 276(2), 286 etc., and (*3*) the law or the relevant portion thereof should not be invalid Under Article 13 for repugnancy to those freedom which are guaranteed by Part III of the Constitution which are relevant to the subject-matter of the law.

998. This view was taken forward in ***Kihoto Hollohan v. Zachillhu*** MANU/SC/0753/1992 : 1992 Supp (2) SCC 651 paragraph 61 and 62 (Five Judges Bench) wherein it was held that the procedure for enacting a 'law' should be followed. Although it is not expressly stated, but it appears that if the procedure is not followed then the 'law' to that extent will have no effect. In this case, it was held that Paragraph 7 of the Tenth Schedule to the Constitution needed ratification in terms of Clause (b) of the proviso to Article 368(2) of the Constitution. It was held:

That having regard to the background and evolution of the principles underlying the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to Sub-Article (2) of Article 368 of the Constitution of India.

999. Strictly speaking, therefore, an amendment to the Constitution can be challenged only if it alters the basic structure of the Constitution and a law can be challenged if: (1) It is beyond the competence of the Legislature; (2) It violates Article 13 of the Constitution; (3) It is enacted contrary to a prohibition in the Constitution; and (4) It is enacted without following the procedure laid down in the Constitution.

1000. At the same time, it has been emphasized by this Court that the possibility of abuse of a provision of a statute is not a ground for striking it down. An abuse of power can always be checked through judicial review of the action complained of. In ***D.K. Trivedi and Sons v. State of Gujarat*** MANU/SC/0636/1986 : 1986 Supp SCC 20 in paragraph 50 it was said:

Where a statute confers discretionary powers upon the executive or an administrative authority, the validity or constitutionality of such power cannot be judged on the assumption that the executive or such authority will act in an arbitrary manner in the exercise of the discretion

conferred upon it. If the executive or the administrative authority acts in an arbitrary manner, its action would be bad in law and liable to be struck down by the courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power or the power which has been conferred by it.

1001. Similarly, Justice B.P. Jeevan Reddy (speaking for Justice J.S. Verma, Justice S.C. Agrawal, Justice A.S. Anand, Justice B.N. Kirpal and himself) held in ***Mafatlal Industries Ltd. v. Union of India*** MANU/SC/1203/1997 : (1997) 5 SCC 536 in paragraph 88:

It is equally well-settled that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding the provision procedurally or substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty, this Court observed: "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in State of Rajasthan v. Union of India, "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief". (Also see Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt. (Internal citations omitted)

Article 122 of the Constitution

1002. Before dealing with the substantive issue of the challenge before us, it may be mentioned that Mr. Fali S. Nariman contended that Parliament did not have the competence to pass the NJAC Act until the 99th Constitution Amendment Act was brought into force or at least it had the assent of the President. It is not possible to accept this submission since the passage of the 99th Constitution Amendment Act and the NJAC Act was contemporaneous, if not more or less simultaneous. In view of Article 122(1) of the Constitution which provides that the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure, it is not possible to delve into the proceedings in Parliament.

1003. In ***Babulal Parate v. State of Bombay*** [MANU/SC/0008/1959 : 1960 (1) SCR 605 (Five Judges Bench) this Court added, by way of a post-script, its view on Article 122(1) of the Constitution. It was observed that in a given hypothetical situation the question will not be the validity of proceedings in Parliament but the violation of a constitutional provision. It was said as follows:

It is advisable, perhaps, to add a few more words about Article 122(1) of the Constitution. Learned Counsel for the Appellant has posed before us the question as to what would be the effect of that Article if in any Bill completely unrelated to any of the matters referred to in Cls. (a) to (e) of Article 3 an amendment was to be proposed and accepted changing (for example) the name of a State. We do not think that we need answer such a hypothetical question except merely to say that if an amendment is of such a character that it is not really an amendment and is clearly violative of Article 3, the question then will be not the validity of proceedings in Parliament but the violation of a constitutional provision.

1004. In ***Raja Ram Pal v. Lok Sabha*** MANU/SC/0241/2007 : (2007) 3 SCC 184 (Five Judges Bench) the question of the extent of judicial review of parliamentary matters came up for consideration. Speaking for Justices K.G. Balakrishnan, D.K. Jain and himself, it was held by Chief Justice Sabharwal, with reference to the CAD that procedural irregularities in Parliament cannot undo or vitiate what happens within its four walls, that is, internal parliamentary proceedings. However, proceedings that are substantively illegal or unconstitutional, as opposed to irregular are not protected from judicial scrutiny by Article 122(1) of the Constitution.[445]

1005. Insofar as the NJAC Act is concerned, nothing has been shown by way of any substantive illegality in its passage or anything unconstitutional in its passage in the sense that any provision of the Constitution or any substantive rule regulating parliamentary activity has been violated. At best, it can be argued that procedurally there was a violation but our attention was drawn to the rules of procedure and the decision taken in accordance with the rules which indicate that there was no procedural violation in the introduction of the NJAC Act and its passage. Justice Khehar has elaborately dealt with this issue in substantial detail in his draft judgment and it is not necessary to repeat what has been said.

The amendments that are challenged-discussion

1006. Though no one has a right to be appointed a judge either of the Supreme Court or a High Court, it does not mean that the President can decline to appoint a person as a judge without any rhyme or reason nor does it mean that the President can appoint any eligible person as a judge. Under the Government of India Act, 1919 and the Government of India Act, 1935 the Crown had the unfettered discretion to do both or either. The Constituent Assembly did not give this unfettered power to the President and, therefore, mandated consultation between the President and the Chief Justice of India for the appointment of a judge of the Supreme Court. There were reasons for this as mentioned above. Prior to the 99th Constitution Amendment Act, Under Article 124(2) of the Constitution, the President had the discretion to consult some other judges of the Supreme Court or the High Courts, as the President thought necessary for the purpose. The same constitutional position prevailed (mutatis mutandis) so far as the appointment of a judge of a High Court Under Article 217(1) of the Constitution was concerned. Article 124(2) of the Constitution had three basic ingredients: The power of the President to appoint a judge of the Supreme Court; a mandatory requirement of consultation with the Chief Justice of India; a discretionary consultation with other judges of the Supreme Court and the High Courts.

1007. The 99th Constitution Amendment Act has completely changed this constitutional position and has changed the role of the President in the appointment process as also substantially modified the mandatory consultation with the Chief Justice of India and substituted or replaced the entire process by a recommendation of the NJAC. The table below gives the textual changes made in Article 124(2) of the Constitution.

Pre- Amendment provisions	Post-Amendment provisions
124. *Establishment and constitution of Supreme Court.* - (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.	124. *Establishment and constitution of Supreme Court.* - (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal **after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose** and shall hold office until he attains the age of sixty-five years:	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal **on the recommendation of the National Judicial Appointments Commission referred to in article 124A** and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:	**omitted**
Provided further that— (a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from his office in the manner provided in clause (4).	**Provided that**- (a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from his office in the manner provided in clause (4).

1008. The composition of the NJAC is provided for in Article 124A of the Constitution. Therefore, Article 124A of the Constitution and Article 124(2) are required to be read in conjunction with each other. The Chief Justice of India is the Chairperson of the NJAC. The members of the NJAC are two other judges of the Supreme Court next to the Chief Justice of India, the Union Minister in charge of Law and Justice and two eminent persons to be nominated by a Committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha, failing which the leader of the single largest Opposition Party in the Lok Sabha.

1009. The duty of the NJAC as provided for in Article 124B of the Constitution is to recommend persons for appointment as the Chief Justice of India, judges of the Supreme Court, Chief Justices of High Courts and other judges of High Courts and to recommend the transfer of Chief Justices and other judges of a High Court from one High Court to any other High Court. The NJAC has the duty to ensure that the person recommended has ability and integrity.

1010. Article 124C of the Constitution provides that Parliament may by law regulate the procedure for the appointment of the Chief Justice of India and other judges of the Supreme Court, the Chief Justice and other judges of the High Courts. The Article empowers the NJAC to lay down, by Regulations, the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary.

1011. Simultaneous with the above amendments in the Constitution, the NJAC Act was passed by Parliament. The NJAC Act provides for recommending the senior-most judge of the Supreme Court as the Chief Justice of India 'if he is considered fit to hold the office' and for recommending names for appointment as a judge of the Supreme Court persons who are eligible to be so appointed. Interestingly, the NJAC 'shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation' (Section 5 of the NJAC Act). A somewhat similar procedure has been provided for recommending the appointment of the Chief Justice of a High Court and a judge of a High Court (Section 6 of the NJAC Act).

1012. The President may accept the recommendation of the NJAC for the appointment of a particular person as a judge, but may also require the NJAC to reconsider its recommendation. If the NJAC affirms its earlier recommendation the President shall issue the warrant of appointment (Section 7 of the NJAC Act).

1013. The officers and employees of the NJAC shall be appointed by the Central Government in consultation with the NJAC and the convener of the NJAC shall be the Secretary to the Government of India in the Department of Law and Justice (Section 8 of the NJAC Act).

1014. The procedure for the transfer of judges from one High Court to another has been left to be determined by Regulations to be framed by the NJAC (Section 9 of the Act). Similarly, the NJAC shall frame Regulations with regard to the procedure for the discharge of its functions (Section 10 of the Act).

1015. The Central Government is empowered to make Rules to carry out the provisions of the NJAC Act (Section 11 thereof) and the Commission may make Rules to carry out the provisions of the NJAC Act (Section 12 thereof). The Rules and Regulations framed by the Central Government and by the NJAC shall be laid before Parliament and these may be modified if both the Houses of Parliament agree to the modification and Parliament may also provide that a Rule or Regulation shall have no effect (Section 13 thereof).

1016. The sum and substance of the controversy is this: If the establishment of the NJAC by the 99th Constitution Amendment Act alters the basic structure of the Constitution, the 99th Constitution Amendment Act and the NJAC Act must be declared unconstitutional. Since the establishment of the NJAC by Article 124A of the Constitution is integral to the 99th Constitution Amendment Act and the NJAC Act and they are not severable and cannot stand alone, they too must be declared unconstitutional.

1017. While considering the constitutional validity of the 99th Constitution Amendment Act and the NJAC Act it is necessary to deal with a submission made with reference to the Constitutional Reform Act 2005 (CRA) passed by the British Parliament. This is because it was referred, in the course of submissions, on more than one occasion. It was sought to be suggested that judges in the UK Supreme Court are appointed by the Judicial Appointments Commission constituted in terms of the CRA and there is nothing wrong if a somewhat similar procedure is adopted by our Parliament where judges of the High Courts and the Supreme Court are recommended by the NJAC.

1018. The CRA and its working was adverted to by Jack Straw, the Lord Chancellor from 2007 to 2010. At that time the Lord Chief Justice was the head of the judiciary in the UK but the Lord Chancellor was nevertheless responsible 'for upholding the independence of the judiciary'. In the 3rd lecture on 'Judicial Appointments' delivered on 4th December, 2012 of the 64th series of Hamlyn Lectures titled 'Aspects of Law Reform-An Insider's Perspective' he said:

The CRA provided for the establishment of an independent Judicial Appointments Commission (JAC).

The JAC was made responsible for operating the appointments process and making recommendations to the Lord Chancellor for all but the most senior appointments. For these very senior appointments (to the Court of Appeal, and the offices of Head of Division, Lord Chief Justice, and the president, deputy president and members of the UK Supreme court), separate provision was made for recommendations to be made to the Lord Chancellor by specially constituted selection panels.

For each appointment, the JAC, or the specially constituted selection panel, was required to make one recommendation to the Lord Chancellor.[446]

In practice, as I found out through painful experience, there were a number of problems with this set-up.[447]

I accept that the role of the Lord Chancellor in relation to High Court and Court of Appeal appointments should be limited. But for the two groups of our most senior judges, and for different reasons, in my view the Lord Chancellor should have a greater role than is provided for by the Constitutional Reform Act, or than is likely to be provided for by the current Crime and Courts Bill.

The two groups of judges I am talking about are, first, the most senior members of the Court of Appeal-that is, the Heads of Division and Lord Chief Justice-and, second, the members of the UK Supreme Court. The conclusion is the same, but the arguments are different.[448]

The 'specially constituted selection panel' for the appointment of judges of the UK Supreme Court (for example) is provided for in Section 26(5) of the CRA read with Schedule 8 thereof and the selection panel consists of (a) the President of the Supreme Court, (b) the Deputy President of the Supreme Court, (c) one member each of (i) the Judicial Appointments Commission, (ii) the Judicial Appointments Board for Scotland, (iii) the Northern Ireland Judicial Appointments Commission. At least one member in category (c) must be 'non-legally qualified'. With this sort of a composition of the 'specially constituted selection panel' Jack Straw could not go against the wishes of the judiciary in respect of one appointment, as obliquely referred to by him below:

All of this is already recognized, in principle at least, by the Constitutional Reform Act, which provides that these two groups of very senior appointments should not be made by the normal Judicial Appointments Commission process.

The reality of a connection between the senior judiciary and the executive is also recognized in almost every other jurisdiction. By far the most usual approach elsewhere in the world, including in well-functioning common-law jurisdictions, is for the relevant minister to be recommended three to five names, and for that minister then to be able to choose from among these nominees. In the United Kingdom we are very unusual in insisting that the minister receives one name alone. This is explicable only in the context of where we have come from: the untrammeled discretion of the Lord Chancellor until the mid 1990s, the non-statutory nature of the pre-2005 arrangements, the opaque decision-making process and the mounting criticism of it.

But these literally peculiar arrangements for these very senior appointments, intended to create a partnership approach between the judiciary and the Lord Chancellor in recognition of the requirements of the offices in question, have proved to be unsatisfactory. Both the detailed wording and the expectation in practice make it very difficult for the Lord Chancellor to exercise even his limited powers to reject or request a reconsideration of a recommendation. As is a matter of record in the press, there was one occasion when, as Lord Chancellor, I sought to use these powers.

Since I have always observed the confidentiality necessary for the consideration of such appointments, I am not here going into any detail. I hope, however, that it will be accepted that I would not have sought to exercise these powers unless I believed that I had good grounds within the Act for doing so I did-good grounds, as many can now see. I went to considerable lengths to ensure that my actions could not be construed, which they were not remotely, as party political. In the event, the matter was not seen through to a conclusion. Partisans to the appointment-not anyone directly involved in the process-leaked extensive detail to the press, an election was looming; I confirmed the appointment.[449]

1019. Adverting to this lecture and the actual working of the CRA, it is said that for making senior level judicial appointments, it is 'impossible for the Lord Chancellor to against the wishes of the judiciary'. In a recent article published in Public Law it is said:

Judicial appointments are the next biggest change, responsibility for which has shifted from the executive in the form of the Lord Chancellor, to the judiciary. Formally the process is managed by the independent Judicial Appointments Commission (JAC), but in practice the process is heavily influenced by the judiciary at every stage. The Lord Chief Justice is consulted at the start of each competition. Judges prepare case studies and qualifying tests. Judges write references. A judge sits on the panels that interview candidates; and judges are consulted in statutory consultation. On the JAC, 7 of the 15 commissioners are judges. Once the JAC has completed its selection, at lower levels (Circuit judges and below) all judicial appointments are now formally made by the Lord Chief Justice, and tribunal appointments are made by the Senior President of Tribunals. The Lord Chief Justice and SPT are now responsible for 97 per cent of all judicial appointments. At more senior levels appointments are still formally decided by the Lord Chancellor; but in practice it has proved impossible for the Lord Chancellor to go against the wishes of the judiciary.[450]

So much for the appointment process in the UK and the 'judges appointing judges' criticism in India!

1020. It is not possible for any one of us to comment (one way or another) on the CRA except to say that it is not advisable to rely on values of judicial independence and conventions and systems of the appointment of judges in other countries without a full understanding of their problems and issues. We ought to better understand the situation in our country (and the decisions rendered by this Court) and how best to protect and preserve judicial independence in the circumstances that exist in our country and not have grand illusions of the systems in place in other countries.

Validity of Articles 124A and 124(2) of the Constitution-the package deal

1021. The submission of the learned Attorney-General (as mentioned above) is that the 99th Constitution Amendment Act and the NJAC Act are a 'package deal' and one cannot be appreciated without the other. The discussion will be in the light of this submission.

1022. At the outset, it is important to note that the package is incomplete. The 99th Constitution Amendment Act and the NJAC Act raise a series of unanswered questions. For example, how is the NJAC expected to perform its duties? Will there be any transparency in the working of the NJAC and if so to what extent? Will privacy concerns of the 'candidates' be taken care of? Will issues of accountability of the NJAC be addressed? The learned Attorney-General submitted that a large number of hypothetical issues and questions have been raised not only by the Petitioners but also by the Bench and it is not possible to answer all of them in the absence of a composite law and Regulations being framed in accordance with the postulates of the 99th Constitution Amendment Act. This submission of the learned Attorney-General cannot be appreciated particularly in view of his contention, raised on more than one occasion, that what is enacted by the 99th Constitution Amendment Act is a package deal. Unless all eventualities are taken care of, the package deal presented to the country is an empty package with the wrapping paper in the form of the NJAC Act and a ribbon in the form of the 99th Constitution Amendment Act. If it is not possible to answer all the questions in the absence of a composite law, rules and Regulations, what was the hurry in bringing the 99th Constitution Amendment Act and the NJAC Act into force as a half-baked measure?

1023. It is true that the Constitution cannot specify and incorporate each and every detail, particularly procedural details.[451] But the same time, the substantive requirements of the NJAC scheme must be apparent from the 99th Constitution Amendment Act read with the NJAC Act, particularly when it seeks to overthrow an existing method of appointment of judges that maintains the independence of the judiciary. Vital issues cannot be left to be sorted out at a later date through supplementary legislation or supplementary subordinate legislation, otherwise an unwholesome hiatus would be created, making matters worse.

1024. The package deal must survive as whole or fall as a whole-there cannot be piecemeal existence.

1025. Viewed in this light, the constitutional validity of Article 124(2) read with Article 124A of the Constitution as introduced by the 99th Constitution Amendment Act is suspect for several reasons.

(a) The NJAC and the role of the President

1026. Article 124(2) of the Constitution requires the NJAC constituted Under Article 124A thereof to make a recommendation to the President for the appointment of a judge of the Supreme Court or a High Court. Mr. Fali S. Nariman pointed out that as far as the NJAC is concerned, it is not clear whether the President means the President acting in his/her individual capacity or the Council of Ministers. The President certainly cannot mean the individual otherwise the procedure for appointment of judges postulated by the 99th Constitution Amendment Act and the NJAC Act would be creating an Imperium in Imperio which the Constituent Assembly deliberately avoided. On the other hand, if the President means the Council of Ministers, then on what basis can the Council of Ministers/President ask the NJAC (under the proviso to Section 7 of the NJAC Act) to reconsider its view? The Council of Ministers/President is already represented as a 'voting member' in the NJAC through the Law Minister. Can the President/Council of Ministers/Prime Minister ask for reconsideration of a recommendation made by the NJAC to which the Law Minister (a member of the Cabinet) is a party? Would this be permissible particularly since the Law Minister represents the Union Government/President in the NJAC and would it not go against the well established principle of Cabinet responsibility? Alternatively, would it not undermine the authority of the Law Minister if in a given case the Law Ministers agrees to an appointment but the Council of Ministers does not accept it? More importantly, is the Council of Ministers/President an oversight body as far as the NJAC is concerned?

1027. Assuming (despite the above doubts) that the Council of Ministers/President requires the NJAC to reconsider its recommendation and on reconsideration the NJAC reiterates its recommendation, the President will be bound thereby even if it means overruling the objections of the Chief Justice of India. The objection to this process of appointment of judges is two-fold. Firstly, the authority that is statutorily conferred on the NJAC to bind the President by the NJAC Act is well beyond the power conferred by Article 124(2) of the Constitution or the 99th Constitution Amendment Act. Secondly, in the event of such a reiteration, the opinion of the Chief Justice of India eventually counts for nothing, contrary to the intention of the Constituent Assembly and the constitutional conventions followed over decades. Historically, no appointment (except perhaps one) has been made without the consent of the Chief Justice of India. Is the 99th Constitution Amendment Act intended, wittingly or unwittingly, to give a short shrift to the views of the Constituent Assembly and constitutional conventions and to sublimate the views of the Chief Justice of India? This procedure may be contrasted with the collegium system of appointment in which the President could turn down a recommendation made by the collegium if it was not unanimous. In the present dispensation, this entitlement of the President is taken away, even if the recommendation is not unanimous, and thereby the importance of the President is considerably downsized.

1028. Additionally, the decision of the President is, in one sense, made to depend upon the opinion of two members of the NJAC, who may in a given case be the two eminent persons nominated to the NJAC in terms of Article 124A(1)(d) of the Constitution. These two eminent persons can actually stymie a recommendation of the NJAC for the appointment of a judge by exercising a veto conferred on each member of the NJAC by the second proviso to Sub-section (2) of Section 5 of the NJAC Act, and without assigning any reason. In other words, the two eminent persons (or any two members of the NJAC) can stall the appointment of judges without reason. That this may not necessarily happen with any great frequency is not relevant-that such a situation can occur is disturbing. As a result of this provision, the responsibility of making an appointment of a judge

effectively passes over, in part, from the President and the Chief Justice of India to the members of the NJAC, with a veto being conferred on any two unspecified members, without any specific justification. This is a very significant constitutional change brought about by the 99th Constitution Amendment Act which not only impinges upon but radically alters the process of appointment of judges, by shifting the balance from the President and the Chief Justice of India to the NJAC. To make matters worse, the President cannot even seek the views of anybody (other judges or lawyers or civil society) which was permissible prior to the 99th Constitution Amendment Act and a part of Article 124(2) of the Constitution prior to its amendment. It may be recalled that Article 124(2) of the Constitution enables the President to consult judges of the Supreme Court and the High Court but that entitlement is now taken away by the 99th Constitution Amendment Act. The President, in the process, is actually reduced to a dummy.

1029. It may also be recalled that the President (as an individual) had expressed a viewpoint as reported in *India Today* magazine of 25th January, 1999 concerning the appointment of judges of the Supreme Court. The existence of such a possibility is now not possible since the President (as an individual) has really no role to play in the appointment process except issuing a warrant of appointment when asked to do so.

1030. The sum and substance of this discussion is that there is no clarity on the role of the President. In any event, the discretion available to the President to consult judges of the Supreme Court in the matter of appointment of judges is taken away; the decision of the President is subject to the opinion of two eminent persons neither of whom is constitutionally accountable; there is a doubt on the well established principle of Cabinet responsibility; a statute-the NJAC Act, not the Constitution binds the President contrary to the constitutional framework; the 99th Constitution Amendment Act makes serious and unconstitutional inroads into Article 124(2) of the Constitution, as originally framed.

(b) Role of the Chief Justice of India and the Judiciary

1031. The Chief Justice of India is undoubtedly the Chairperson of the NJAC. However, the participation of the Chief Justice of India as an individual and the participation of the judiciary as an institution in the NJAC is made farcical by the 99th Constitution Amendment Act and the NJAC Act. Even though the opinion of the Chief Justice of India, a pre-eminent constitutional authority in the judiciary, regarding the suitability of a person for appointment as a judge is acceptable to a majority of members of the NJAC, it can be thumbed down by two of its other members in terms of Section 5 of the NJAC Act. These two persons might be the Law Minister (representing the President) and an eminent person or two eminent persons neither of whom represent or purport to represent the President, the other pre-eminent constitutional authority in the appointment process Under Article 124(2) of the Constitution prior to its amendment.

1032. The 99th Constitution Amendment Act reduces the Chief Justice of India, despite being the head of the judiciary, to one of six in the NJAC making a recommendation to the President thereby denuding him/her of conventional, historical and legitimate constitutional significance and authority and substantially skewing the appointment process postulated by the Constituent Assembly and the Constitution. The opinion of the Chief Justice of India had 'graded weight' or the 'greatest weight' prior to the 99th Constitution Amendment Act. But now with the passage of

the 99th Constitution Amendment Act and the NJAC Act the Chief Justice of India is reduced to a mere voting statistic. Designating the Chief Justice of India as the Chairperson of the NJAC is certainly not a solace or a solution to downsizing the head of the Judiciary.

1033. The participation of the judiciary as an institution in the NJAC is also farcical. The 99th Constitution Amendment Act does not postulate a 'veto' being conferred on any person in the NJAC. But the NJAC Act effectively gives that power to all members of the NJAC despite the 99th Constitution Amendment Act. This is evident from the provisions of the NJAC Act which enable two persons, one of them being the Law Minister to veto the unanimous opinion of the three participating judges (including the Chief Justice of India). Therefore, even if the Judiciary as a whole and as an institution (that is the three participating judges) is in favour of a particular appointment, that unanimous opinion can be rendered worthless by any two other members of the NJAC, one of whom may very well include the Law Minister representing the political executive and another having perhaps nothing to do with justice delivery. This is certainly not what the Constitution, as framed, postulated or intended.

1034. To get over this outlandish situation it was suggested (as an alternative argument) by Mr. K.K. Venugopal appearing for the State of Madhya Pradesh that the unanimous opinion of the three participating judges should have overriding weight, that is a veto over a veto or a 'tie break vote'. Mr. Venugopal puts this Court in a Catch-22 situation. The alternative suggested would clearly amount to judicial overreach and the judiciary rewriting the statute. The only rational course is to interpret the law as it is and if it is constitutionally valid so be it and if it is constitutionally invalid so be it. It is not advisable or possible to rewrite the law when the language of the statute is express.

1035. As mentioned above in considerable detail, the independence of the judiciary took up so much discussion time of several Committees, the Constituent Assembly and various other bodies and institutions. Several legal luminaries have also devoted considerable effort and given a thoughtful study to the independence of the judiciary. There was a purpose to it, namely, that the independence should not be subverted via external or internal pressures. Through the medium of the 99th Constitution Amendment Act and the NJAC Act, this independence is subtly put to jeopardy. The President has virtually no role to play in the appointment of judges, the Chief Justice of India is sidelined in the process and a system that is subject to possible erosion is put in place. Justice O'Connor said: 'Judicial independence doesn't happen all by itself..... It's tremendously hard to create, and easier than most people imagine to destroy.' The 99th Constitution Amendment Act and the NJAC Act puts us face to face with this truism in respect of the fragile bastion.

1036. The sum and substance of this discussion is that the unanimous opinion of the Judiciary can be rejected by two eminent persons or one eminent person and the Law Minister (whose opinion is subject to the opinion of the Council of Ministers, whom he/she represents); the unanimous opinion of the judiciary as an institution, an opinion that was respected (and deservedly so) counts for virtually nothing with the passage of the 99th Constitution Amendment Act and the NJAC Act; the Chief Justice of India is rendered, by the 99th Constitution Amendment Act to a mere voting statistic and one among six in the NJAC virtually stripping him/her of the constitutional responsibility of appointing judges to the superior courts and denuding him/her of the authority conferred by history, constitutional convention and the Constitution; the Chief Justice of India and

the institution of the judiciary is now subject to a veto by civil society in its decisions. The entire scheme of appointment of judges postulated by the Constituent Assembly is made topsy-turvy by the 99th Constitution Amendment Act and the NJAC Act. If this does not alter the basic structure of the Constitution, what does?

(c) Eminent persons and the veto

1037. The inspiration for having eminent persons in the NJAC comes from the Report of the NCRWC which made this recommendation as a part of the democratic process of selecting a judge of the Supreme Court or the High Court. Article 124A(1)(d) of the Constitution provides for two eminent persons to be nominated as members of the NJAC. The nomination is by a Committee consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha or where there is no such Leader, then the Leader of the single largest Opposition Party in the Lok Sabha. The first proviso mandates that one of the eminent persons shall be nominated from amongst persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women.

1038. The apprehension expressed by some learned Counsel appearing for the Petitioners is that since no guidelines have been laid down for the nomination of the two eminent persons, there is a possibility that persons who are not really eminent may be nominated to the NJAC or that their appointment will be politically motivated. So also, acknowledged eminent persons might not be nominated to the NJAC. But then, who is an eminent person?

1039. In ***A.K. Roy v. Union of India*** MANU/SC/0051/1981 : (1982) 1 SCC 271 (Five Judges Bench) reference was made to the difficulty in framing precise definitions. Although the decision pertained to preventive detention and criminal law, the following observation is pertinent in the context of the present discussion:

The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature. But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined.[452]

1040. It is also necessary to notice the view expressed in the ***Second Judges case*** by Justice Verma speaking for the majority. The learned judge was of the opinion that arbitrariness in the exercise of discretion can be minimized through a collective decision. It was observed as follows:

The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior

judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be he the Chief Justice of India or the Prime Minister.[453]

1041. Justice Pandian in a separate but concurring opinion held the same view and expressed it in the following words:

It is essential and vital for the establishment of real participatory democracy that all sections and classes of people, be they backward classes or Scheduled Castes or Scheduled Tribes or minorities or women, should be afforded equal opportunity so that the judicial administration is also participated in by the outstanding and meritorious candidates belonging to all sections of the society and not by any selective or insular group.[454]

1042. In ***Centre for PIL v. Union of India*** MANU/SC/0179/2011 : (2011) 4 SCC 1 the question related to the appointment of the Central Vigilance Commissioner and the Vigilance Commissioners under the Central Vigilance Commission Act, 2003. The relevant provision was to the effect that a Selection Committee consisting of the Prime Minister, the Minister of Home Affairs and the Leader of the Opposition in the Lok Sabha would make a recommendation to the President who would then appoint the Central Vigilance Commissioner or the Vigilance Commissioners, as the case may be, by warrant under his or her hand and seal. In this context, this Court held that Parliament had put its faith in a High Powered Committee and it is presumed that the High Powered Committee entrusted with wide discretion would exercise its powers in accordance with the Act objectively and in a fair and reasonable manner.

1043. It was pointed out by Mr. Arvind Datar, learned senior Counsel appearing for one of the Petitioners that a large number of statutes mention the presence of eminent persons in a body, including some that are subject specific. However, it was pointed out by the learned Attorney-General that in a random sampling of some of these statutes, it has been found that none of them has such a High Powered Committee as in the Central Vigilance Commission Act for nominating or recommending a person for appointment to a post.

1044. Apart from anything else, it was submitted by the learned Attorney-General that the presence of eminent persons in the NJAC would lend diversity in the composition of the 'selection panel' and that this would necessarily reflect the views of society. Reference in this context was made to ***Registrar General, High Court of Madras v. R. Gandhi*** MANU/SC/0185/2014 : (2014) 11 SCC 547 wherein it was held as follows:

Appointments cannot be exclusively made from any isolated group nor should it be pre-dominated by representing a narrow group. Diversity therefore in judicial appointments to pick up the best legally trained minds coupled with a qualitative personality, are the guiding factors that deserve to be observed uninfluenced by mere considerations of individual opinions. It is for this reason that

collective consultative process as enunciated in the aforesaid decisions has been held to be an inbuilt mechanism against any arbitrariness.[455]

1045. Under these circumstances, there can be little objection to the participation by eminent persons as consultants in the appointment process. In fact, Justice Verma acknowledged that he had sought the views of eminent lawyers while considering recommendations for the appointment of judges. If the Committee cannot be trusted to nominate 'eminent' persons, perhaps no other committee can. The trust placed on the Committee is not a simple or statutory trust but a constitutional trust. In this regard, it is worth recalling the words of Justice Krishna Iyer in ***Bhim Singhji***:

The confusion between the power and its oblique exercise is an intellectual fallacy we must guard against. Fanciful possibilities, freak exercise and speculative aberrations are not realistic enough for constitutional invalidation. The legislature cannot be stultified by the suspicious improvidence or worse of the Executive.[456]

1046. It is, therefore, not advisable to be alarmist, as some learned Counsel for the Petitioners were, but at the same time possible abuse of power cannot be wished away, as our recent history tells us. Perhaps far better and precise legislative drafting coupled with a healthy debate is a solution, but, what is of significance is the decision-taking (as distinguished from decision-making) process of the Committee. It was pointed out in ***Centre for PIL*** that in a situation such as the present, where no procedure in the functioning of the Committee is laid out, the nomination of eminent persons will be through a majority decision of the members of the Committee.[457] What this means is that the Chief Justice of India would have a subsidiary role in the nomination process if he/she is in the minority. What this also means is that an executive cum legislative influence would sneak in the process of nomination of eminent persons. In other words, from the word 'go' the Chief Justice of India is sidelined, directly or indirectly, in the process of appointment of judges of the High Courts and the Supreme Court. 505. It is also not possible to accept the contention that the presence of eminent persons with a voting right in the NJAC would have no impact on the independence of the judiciary, but would be beneficial in terms of bringing about diversity. The same result could very well be achieved, as suggested by Justice Verma without altering the basic structure of the Constitution, without conferring a veto on the consultants.

1047. What makes matters worse is that in the absence of a quorum or unanimity in the nomination of eminent persons, the Committee could make the nomination without consulting the Chief Justice of India. Therefore, if for some valid reason, the Chief Justice of India is unable to attend a meeting, the Committee could nominate eminent persons (perhaps believing in the concept of a committed judiciary) to the NJAC and influence its decisions to accept a committed judiciary rather than an independent judiciary.[458] It is unlikely that this would happen, but if the political executive is determined, at some point of time, to have a committed judiciary, the nomination of politically active eminent persons to the NJAC disregarding the view of the Chief Justice of India is a real possibility.

1048. Another objection raised to the 'eminent person' category is that such a person might not have any knowledge of the requirements of the judiciary and would not be able to make any effective contribution in the selection of a judge. It was submitted that the eminent person must

have some background of law and the judiciary. In principle this argument is quite attractive, but really has little substance. Several members of the Constituent Assembly had no training or background in law and yet they contributed in giving us a glorious Constitution. One of the finest minds that we have today-Professor Amartya Sen-has had no training or background in law and yet has given us The Idea of Justice an important contribution to jurisprudence, the idea of justice in an organizational sense (niti) and the idea of realized justice (nyaya). Therefore, it would not be correct to say that an eminent person in the NJAC (or as an outside consultant) must have some connection with the law or justice delivery. If the eminent person does have that 'qualification' it might be useful, but it certainly need not be absolutely necessary.

1049. Finally, it was argued that the requirement that one eminent person should be from a specified category as mentioned in the first proviso to Article 124A(1)(d) of the Constitution is discriminatory and serves no purpose at all. In response, the learned Attorney-General submitted that the presence of an eminent person, outside the field of law would bring about a much needed diversity in the appointment of judges. The experience in the United Kingdom, as explained by Jack Straw, does not seem to bear out this assumption. In his lecture, he stated: 'The assumption on diversity-naive as it turned out-was that if we changed the process, we would change the outcome.' In any event, which category should or should not be represented in the NJAC through an eminent person is essentially a matter of policy and that policy does not appear to be perverse in any manner, but does require a rethink.

1050. The real cause for unhappiness is the second proviso to Section 5(2) of the NJAC Act which effectively confers a veto on each member of the NJAC. What is objectionable about the veto (a part of the package deal referred to by the learned Attorney-General) is that it can also be exercised by two eminent persons whose participation in the appointment process was not even imagined by the Constituent Assembly. Article 124(2) of the Constitution (prior to its amendment) had only two constitutional authorities involved in the appointment process-the President and the Chief Justice of India. The 99th Constitution Amendment Act has introduced a third and a previously non-constitutional 'authority' namely an eminent person. Two eminent persons who had no role to play in the appointment process prior to the 99th Constitution Amendment Act have suddenly assumed Kafkaesque proportions and together they can paralyze the appointment process, reducing the President and the Chief Justice of India to ciphers for reasons that might have nothing to do with the judicial potential or fitness and suitability of a person considered for appointment as a judge. That they might not do so is another matter altogether but in a constitutional issue as grave as the appointment of judges, all possibilities require to be taken into consideration since it affects the independence of the judiciary and eventually the rights, including the fundamental rights, of the people. The conferment of a veto to any member of the NJAC, eminent person or otherwise, is clearly an unconstitutional check on the authority of the President and the Chief Justice of India.

1051. The sum and substance of this discussion is that in principle, there can be no objection to consultation with eminent persons from all walks of life in the matter of appointment of judges, but that these eminent persons can veto a decision that is taken unanimously or otherwise by the Chief Justice of India (in consultation with other judges and possibly other eminent persons) is unthinkable-it confers virtually a monarchical power on the eminent persons in the NJAC, a power without any accountability; the categories of eminent persons ought not to be limited to scheduled

castes, scheduled tribes, other backward classes, minorities or women but that is a matter of policy and nothing more can be said about this, except that a rethink is necessary; there can be no guidelines for deciding who is or is not an eminent person for the purposes of nomination to the NJAC, but that the choice is left to a high powered committee is a sufficient check, provided the decision of the committee is unanimous.

(d) Law Minister

1052. The presence of the Law Minister in the NJAC was objected to by the Petitioners for several reasons. Principally, it was contended that the Union of India is the biggest litigant in the courts and to have the Law Minister as a member of the NJAC might prove detrimental to a fair selection, if not counter-productive.

1053. It is true that the Union of India is the largest litigant in the country and that was recognized in the ***Second Judges case***. It was said by Justice Pandian as follows:

No one can deny that the State in the present day has become the major litigant and the superior courts particularly the Supreme Court, have become centres for turbulent controversies, some of which with a flavour of political repercussions and the Courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace.[459]

1054. Similarly, Justice Kuldip Singh also mentioned that the Union of India is the single largest litigant in the country. The learned judge said:

In *S.P. Gupta case* this Court construed the words in Articles 124(2) and 217(1) of the Constitution by taking the clock back by forty years. The functioning of the Apex Judiciary during the last four decades, the expanding horizon of, 'judicial review', the broader concept of 'independence of judiciary', practice and precedents in the matter of appointment of judges which ripened into conventions and the role of the executive being the largest single litigant before the courts, are some of the vital aspects which were not adverted to by this Court while interpreting the constitutional provisions.[460]

1055. The learned judge expressed the same sentiment far more emphatically in the following words:

Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the Framers of the Constitution could have never intended to give this power to the executive. Even otherwise the Governments-Central or the State-are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication

before the Apex Court. The executive-in one form or the other-is the largest single litigant before the courts. In this view of the matter the judiciary being the mediator-between the people and the executive-the Framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the executive. This Court in *S.P. Gupta case* proceeded on the assumption that the independence of judiciary is the basic feature of the Constitution but failed to appreciate that the interpretation, it gave, was not in conformity with broader facets of the two concepts-'independence of judiciary' and 'judicial review'-which are interlinked.[461]

In view of this, there can be no doubt that the Government of India is a major litigant and for a Cabinet Minister to be participating (and having a veto) in the actual selection of a judge of a High Court or the Supreme Court is extremely anomalous.[462]

1056. Historically, and I have quoted chapter and verse from virtually every relevant committee in this regard, the executive was always intended to be kept out of the decision-taking process in the matter of appointment of judges. What is sought to be achieved by including the Law Minister in the NJAC is to cast a doubt on the wisdom of legal luminaries, Dr. Ambedkar and the Constituent Assembly in keeping the executive out of the decision-taking process in the appointment of judges.

1057. Nevertheless, it is true that inputs from the executive are important in the process of taking a decision whether a person should or should not be appointed as a judge of a High Court or the Supreme Court. But providing inputs by the executive is quite different from the process of taking a decision by the executive or the executive being involved in the process of taking a decision. While it must be acknowledged that the Law Minister is only one of six in the NJAC but being a Cabinet Minister representing the entire Cabinet and the Government of India in the NJAC, the Law Minister is undoubtedly a very important and politically powerful figure whose views can, potentially, have a major impact on the views that other members of the NJAC may hold. Since the Law Minister is, by virtue of the office held, potentially capable of influencing the decision of a member of the NJAC, it would be inappropriate for the Law Minister to be a part of the decision-taking process. The selection process must not only be fair but must appear to be fair.

1058. It must be realized and appreciated that the tectonic shift in several countries towards constituting a judicial appointment commission is taking place only to ensure that the executive does not have a role in the appointment of judges. The learned Attorney-General supported the shift but if the trend is to be taken seriously, the Law Minister can have no place in any commission or, as in the present case, in the NJAC. Therefore, while the 99th Constitution Amendment Act and the NJAC Act attempt to set up a body intended to be independent of the executive, the NJAC that has been set up has an important member of the political executive as a part of this body, which is rather anachronistic.

1059. It must also be realized that as mentioned in the ***First Judges case*** two countries Australia (today having a total of about 200 judges in the High Court and the State Supreme Courts) and New Zealand (today having a total of about 20 judges [in the Supreme Court and in the Court of Appeal]) were veering round to having a judicial appointment commission for the higher judiciary.[463] We were informed during the hearing of these petitions that these countries have not,

even after four decades, established such commissions, while our country seems to be in a great rush to do so. The issues, debates, discussions and considerations in these countries would be different from ours, but merely because these and other countries are looking towards a judicial appointment commission is no reason for India to do so. A reference was also made to South Africa but, as everyone knows, diversity issues in that country are of great concern post apartheid. It is, therefore, odious to compare the judicial appointment systems in other countries with our country and to lift ideas and concepts that might be workable in those countries without considering whether they could be adopted or adapted in our country.

1060. In Australia, an article suggesting adoption of the UK Judicial Appointments Commission introduced by the CRA has this to say about judicial appointments and political patronage (which might be possible in the NJAC as established):

While the collective strength and quality of the Australian judiciary is not in doubt, it is the case that particular appointments have attracted criticism, either in relation to the character and ability of the individual chosen or their conduct while in office. It is a notorious fact that judicial officers have been appointed, including to the High Court, whose character and intellectual and legal capacities have been doubted and whose appointments have been identified as instances of political patronage.

.....

What is essential is that *decisional* independence be guaranteed to judicial officers. The core of judicial independence is freedom from influence in the central judicial task of adjudicating disputes about legal rights that arise between private parties, between the State and private parties, and (in a federation) between components of the State. The core is protected through institutional arrangements such as tenure, remuneration and the jurisdictional separation of powers. As we have already noted, it is inescapable that politics will have a role to play in the appointment process. However, if appointments are perceived to be made on the basis of political patronage there is a threat to (at least the appearance of) decisional independence. It is impossible--and undesirable--to remove the political entirely from the appointments process. Indeed, in our view, 'political' considerations, *in the sense of responsibility and accountability for appointments*, need to be intensified rather than obscured. What an appointments model should attempt to do is attenuate the direct influence of the political branch on the appointment process and subject its involvement in the appointment process to greater transparency and accountability, while preserving all the existing constitutional arrangements for ensuring decisional independence. [464]

1061. In South Africa, while dealing with judicial appointments, Justice Yvonne Mokgoro, former judge of the Constitutional Court had this to say:

Thus, judicial transformation in South Africa must include a new judicial appointments procedure which is open and independent of external influence; changing the demographics of the Bench, in particular with regards to race and gender as critical aspects of shaping the form of a judiciary which serves an open and democratic society; appreciating that judicial competence and how judges manage their judicial power and independence are major aspects of enhancing access to justice and judicial accountability. Enforcing and embracing the principles and values of a

fundamentally new legal order is also a critical attitudinal change that will have substantive implications for the judicial interpretation of the law and the creation of a new constitutional jurisprudence. These reforms are all no doubt necessary considerations for judicial transformation. Courts must therefore function efficiently so that judges can dispense justice to all, most competently. Fundamental to this principle is that when appointing judges consideration must be given to the need for the judiciary to reflect *broadly* the racial and gender composition of South Africa.

In a society such as ours, where patriarchy is so deeply entrenched, affecting adversely the everyday lives of so many women, including women in the law, the strategic value of women's participation on the Bench and positions of power and authority should not be underestimated. Their development management style, the influence of the unique perspectives they bring to the adjudicative task and even the mere symbolism of their presence there could bring enormous returns for the transformation process itself and respect for women in society at large. The need for women both in the judiciary as a whole and in leadership positions in particular cannot be exaggerated. Although, we have come a long way, we must agree that we have just scratched the surface. We must step up our efforts. Some things must change.[465]

The considerations in different countries are, to put it simply, different. We need to have our own indigenous system suited to our environment and our own requirements.

1062. In a Position Paper of 11th December, 2011 on the Appointment of Judges, the Law Society of Botswana emphasized that different legal systems require different responses in the appointment of judges. It was said:

Throughout the region, the relevance of judicial independence to the rule of law, democracy and the protection and promotion of human rights is undisputed. This acknowledgment notwithstanding, judicial independence continues to face threats that compromise not only individual judges but more so the institutions vested with the responsibility of dispensing justice. To that end, judicial independence remains one of the cornerstones of democracy and constitutionalism the world over, remaining the central goal of most legal systems. It has been noted that the independence of the judiciary necessitates that there should be freedom from influence or control from the executive and legislative branches of the Government.

To achieve this important goal, systems of appointment of judicial officers are seen as crucial to ensuring that the independence of the judiciary is achieved. Whilst there is general consensus on the importance of judicial independence, different legal systems have utilized various methods of appointing occupants of judicial office. These include; a) appointment by political institutions; b) appointment by the judiciary itself; c) appointment by a judicial council (which may include non-judge members) and sometimes d) selection through an electoral system. This diversity at the very least indicates that there exists no general consensus on the best approach to guarantee judicial independence. That notwithstanding, the mechanisms for the appointment of judges remain crucial in maintaining judicial independence and public confidence in the judiciary.[466]

1063. It was pointed out by the learned Attorney-General that at all times since Independence, the Law Minister has been a part of the process in the appointment of judges. In fact it is through the Law Minister that important inputs are placed before the Chief Justice of India particularly with regard to matters that the Chief Justice of India may not be aware of, such as the antecedents and personal traits of the person being considered for appointment as a judge. There is, therefore, no reason to now exclude the Law Minister from this process.

1064. There is a distinction, as mentioned above, between the Law Minister providing inputs to the Chief Justice of India and the Law Minister having a say in the final decision regarding the appointment of a judge of a High Court or the Supreme Court. While the former certainly cannot be objected to and in fact would be necessary, it is the participation in the decision-taking process that is objectionable. In other words, the Law Minister might be a part of the decision-making process (as the position was prior to the 99th Constitution Amendment Act) but ought not to be a part of the decision-taking process. This distinction is quite crucial. The voting participation of the Law Minister in the decision-taking process goes against the grain of the debates in the Constituent Assembly and clearly amounts to an alteration of the basic structure of the Constitution.

1065. It was faintly contended by Mr. Nariman that having only the Law Minister of the Government of India as a member of the NJAC and not having his/her counterpart from the State Government as a member of the NJAC may have an impact on federalism in our Constitution. Apart from mentioning it, no serious argument was advanced in this regard, perhaps because the principal objection is to the representation of the Government of India in the NJAC. In view of the fact that no detailed submissions were made in this regard, I would not like to express any opinion on this contention.

1066. The sum and substance of this discussion is that the struggle for the independence of the judiciary has always been pivoted around the exclusion of the executive in decision-taking, but the inclusion of the Law Minister in the NJAC is counter-productive, historically counter-majoritarian and goes against the grain of various views expressed in various committees-more so since the Law Minister can exercise a veto in the decision-taking body; the presence of the Law Minister in the NJAC is totally unnecessary and ill-advised; the presence of the Law Minister in the NJAC casts a doubt on the principle of Cabinet responsibility.

(e) The NJAC and the impact on mandatory consultation

1067. Article 124(2) of the Constitution as originally framed made it mandatory for the President to consult the Chief Justice of India in the appointment of judges. The rationale behind this has already been discussed. The 99th Constitution Amendment Act completely does away with the mandatory consultation. The President is not expected to consult anybody in the appointment process-he/she is expected to act only on the recommendation of the NJAC. The authority that the President had to turn down a recommendation made by the collegium, if it was not unanimous, is now taken away from the President who is obliged to accept a recommendation from the NJAC even if it is not unanimous. This is a considerable whittling down of the authority of the President and a drastic change in the appointment process and in a sense reduces the President (as an individual) to a rubber stamp.[467] Similarly, as mentioned above the Chief Justice of India is reduced to just another number in the NJAC.

1068. Mandatory consultation between the President and the Chief Justice of India was well thought out by the Drafting Committee and the Constituent Assembly but has now been made farcical by the 99th Constitution Amendment Act, for the reasons mentioned above. Article 124(2) of the Constitution (prior to its amendment) placed the President and the Chief Justice of India on an equal pedestal. It is this that made the consultation between these two constitutional authorities meaningful and made one constitutional authority act as a check on the other. This was the 'partnership approach' that the Constituent Assembly had in mind and this was given flesh and blood through, what Dr. Rajeev Dhavan referred to as 'institutional participation' in the ***Second Judges case***. The importance of the ***Second Judges case*** lies not so much in the shared responsibility but the 'institutional participation' of the judiciary in the appointment process integrated with the participation of the President. This is now missing.

1069. What is the importance of the mandatory consultation? There are two crucial factors to be carefully considered before a person is appointed as a judge of the Supreme Court or a High Court. These are: (1) The professional skills, judicial potential, suitability and temperament of a person to be a good judge, and (2) The personal strengths, weaknesses, habits and traits of that person. As far as the professional skills, judicial potential, suitability and temperament of a person being a good judge is concerned, the most appropriate person to make that assessment would be the Chief Justice of India (in consultation with the other judges) and not somebody from outside the legal fraternity. On the other hand, as far as the personal strengths, weaknesses, habits and traits of a person are concerned, appropriate inputs can come only from the executive, since the Chief Justice of India and other judges may not be aware of them. It is for this reason that the Constituent Assembly made it mandatory for consultation between the Chief Justice of India (as the head of the Judiciary) having vital inputs on the potential of a person being a good judge and the President (as the Head of State acting through the Council of Ministers with the Prime Minister as the head of the Executive) being the best judge to assess the personal traits of a person being considered for appointment as a judge. In other words, the Chief Justice of India is the 'expert' with regard to potential while the executive is the 'expert' with regard to the antecedents and personal traits. Since these two facets of the personality of a would-be judge are undoubtedly distinct, there cannot be a difference of opinion between the judiciary and the executive in this regard since they both express an opinion on different facets of a person's life. The Chief Justice of India cannot comment upon the 'expert opinion' of the executive nor can the executive comment upon the 'expert opinion' of the Chief Justice of India.

1070. It is for the Chief Justice of India as the head of the judiciary to manage the justice delivery system and it is for him/her to take the final call whether the antecedents or personal traits of a person will or will not interfere in the discharge of functions as a judge or will, in any manner, impact on the potential of becoming a good judge. As stated by Jack Straw, what is important is that it is necessary to get it right the first time and every time. There can be a situation where the personal traits of a person may be such as to disqualify that person from being appointed as a judge and there can be a situation where the personal traits, though objected to, would not have any impact whatsoever on the potential of that person becoming a good judge. For example, in the recent past, there has been considerable debate and discussion, generally but not relating to the judiciary, with regard to issues of sexual orientation. It is possible that the executive might have an objection to the sexual orientation of a person being considered for appointment as a judge but the Chief Justice of India may be of the opinion that that would have no impact on his/her ability

to effectively discharge judicial functions or the potential of that person to be a good judge.[468] In situations such as this, it is the opinion of the Chief Justice of India that should have greater weight since, as mentioned earlier, it is for the Chief Justice of India to efficiently and effectively manage the justice delivery system and, therefore, the last word should be with the Chief Justice of India, unanimously expressed.

1071. The 99th Constitution Amendment Act and the NJAC Act not only reduce the Chief Justice of India to a number in the NJAC but also convert the mandatory consultation between the President and the Chief Justice of India to a dumb charade with the NJAC acting as an intermediary. On earlier occasions, Parliament enhanced its power through constitutional amendments, which were struck down, inter alia, in ***Indira Nehru Gandhi*** and ***Minerva Mills***.[469] The 99th Constitution Amendment Act unconstitutionally minimizes the role of the Chief Justice of India and the judiciary to a vanishing point in the appointment of judges. It also considerably downsizes the role of the President. This effaces the basic structure of the independence of the judiciary by sufficiently altering the process of appointment of judges to the Supreme Court and the High Court, or at least alters it unconstitutionally thereby striking at the very basis of the independence of the judiciary.

1072. The entire issue may be looked at in another light: Why did the Constituent Assembly make it mandatory for the President to consult the Chief Justice of India for the appointment of judges of the Supreme Court or the High Court when equally important, if not more important constitutional authorities could be appointed by the President without consulting anybody and in his/her 'unfettered discretion'? The reason for the 'special' treatment in the case of appointments to the judiciary is because the Constituent Assembly appreciated and acknowledged and, therefore, accepted the necessity of preserving and protecting the independence of the judiciary, a significant pillar of parliamentary democracy. It also acknowledged that the most appropriate person to guide and advice the President in the appointment of judges would be none other than the Chief Justice of India. It was known to the Constituent Assembly that the rights of the people, including their fundamental rights, need protection against arbitrary executive power and excessive legislative action and unless the judiciary steps in and grants that protection, such arbitrary power or excessive action can be misused and abused. This had happened in pre Independent India and has happened in our recent history. The 99th Constitution Amendment Act and the NJAC Act positively indicate (unconstitutionally) that now the Chief Justice of India and the other judges are not necessarily the best persons to advise the President on the appointment of judges.

1073. Underscoring the importance of the appointment of independent judges (to Americans, and this would equally apply to Indians) it has been said that:

Judicial appointments are important because judges matter, not just to academics, politicians, and practitioners, but to all Americans. Judges play an increasingly significant role in everyday life decisions. It follows that the process by which they are selected matters. It likewise follows that because of the perceived importance of appointing judges, the appointments process breeds contention.[470]

1074. Without an independent judiciary, not only 'everyday life decisions' are affected but a dominant executive can ensure that the statutory rights would have no meaning and the

fundamental rights of the people of the country can be easily trampled upon. Highlighting the impact of the judiciary (generally) on the Rule of Law and particularly on the rights and interests of individuals, Chief Justice Mason of Australia had this to say:

Another factor relevant to the mode of selection of judges is the judiciary's position as an important branch or institution of government. The judges exercise public power in a way that has substantial impact upon the rights and interests of individuals and upon the making of important decisions by government, government agencies and other organisations.[471]

1075. The Constituent Assembly was well aware of the misuse and abuse of power by the executive, having fought for our freedom and knew and understood the value of an independent judiciary. It is for this reason that the Constituent Assembly gave prime importance to the independence of the judiciary and perhaps spent more time debating it than any other topic.

1076. In this regard, it is worth recalling the submission of Mr. Palkhivala in ***Kesavananda Bharati*** while laying the basis for the 'width of power' test (later adopted in ***M. Nagaraj***) that:

...the test of the true width of a power is not how probable it is that it may be exercised but what can possibly be done under it; that the abuse or misuse of power is entirely irrelevant; that the question of the extent of the power cannot be mixed up with the question of its exercise and that when the real question is as to the width of the power, expectation that it will never be used is as wholly irrelevant as an imminent danger of its use. The court does not decide what is the best and what is the worst. It merely decides what can possibly be done under a power if the words conferring it are so construed as to have an unbounded and limitless width, as claimed on behalf of the Respondents.[472]

1077. Now, consider this-given the width of the power available under the 99th Constitution Amendment Act if committed judges are appointed (as was propagated at one point of time and it can get actualized after the 99th Constitution Amendment Act) then no one can expect impartial justice as commonly understood from a 'committed' Supreme Court or a High Court. The Constituent Assembly wished to completely avoid this and that is why considerable importance was given to the process of appointing judges and the independence of the judiciary. 'Common to all forms of judicial function is independent, impartial and neutral adjudication, though there is a question as to the possibility of achieving completely neutral adjudication.'[473] The 99th Constitution Amendment Act and the NJAC Act lead to the clear possibility of a committed judiciary being put in place. If this does not violate the basic structure of the Constitution, what does?

1078. The sum and substance of this discussion is that mandatory consultation between the President and the Chief Justice of India postulated in the Constitution is by-passed-bringing about a huge alteration in the process of appointment of judges; the 99th Constitution Amendment Act and the NJAC Act have reduced the consultation process to a farce-a meaningful participatory consultative process no longer exists; the shared responsibility between the President and the Chief Justice of India in the appointment of judges is passed on to a body well beyond the contemplation of the Constituent Assembly; the possibility of having committed judges and the consequences of having a committed judiciary, a judiciary that might not be independent is unimaginable.

(f) The NJAC and the appointment of High Court judges

1079. As far as the appointment of a judge of a High Court is concerned, the 99th Constitution Amendment Act and the NJAC Act have made two extremely significant changes in the process of appointment. Firstly, the mandatory requirement for consultation with the Chief Justice of the High Court has been completely dispensed with. Article 217(1) of the Constitution as it was originally enacted made it mandatory for the President to consult the Governor of the State and the Chief Justice of the High Court in the appointment of a judge of a High Court. The Chief Justice has now been left out in the cold. Secondly, the constitutional obligation and constitutional convention that has developed over the last several decades is that a recommendation for the appointment of a judge of the High Court originates from the Chief Justice of the High Court. This has now been given a go-bye by the 99th Constitution Amendment Act and the NJAC Act. The entire initiation of the appointment process has now been overhauled.

1080. In terms of Section 6(2) of the NJAC Act, the recommendation for the appointment of a judge of a High Court cannot originate from the Chief Justice of the High Court but the NJAC will seek a nomination for that purpose from the Chief Justice of the High Court. In other words, the initiative for the appointment of a judge of the High Court is wrested from the Chief Justice of the High Court by the NJAC. There is a qualitative difference between the Chief Justice of a High Court nominating a person for appointment as a judge of a High Court on the initiative of the NJAC (Section 6(2) of the NJAC Act) and the Chief Justice of a High Court recommending a person for appointment as a judge of a High Court (Article 217(1) of the Constitution). With such a major departure from the constitutional obligation and the constitutional convention established over the last several decades, the dispensation might encourage canvassing support for a nomination-a somewhat similar occurrence was looked down upon by the LCI in its 14th Report.

1081. However, what is more disturbing and objectionable is that the consultation process with the Chief Justice of the High Court after a nomination is made by him/her of a person for appointment as a judge of that High Court has been done away with. The process of consultation is an integrated and participatory process but by virtue of the 99th Constitution Amendment Act and the NJAC Act only a nomination is sought from the Chief Justice of a High Court by the NJAC. Thereafter, the Chief Justice has no role to play. This is clear from Section 6(7) of the NJAC Act which mandates the NJAC to elicit in writing the views of the Governor and the Chief Minister of the State before recommending a person for appointment as a judge of the High Court, but not the views of the Chief Justice, who is reduced to a mere nominating officer, whose assigned task is over as soon as the nomination is made.

1082. The combined effect of the 99th Constitution Amendment Act and Section 6 of the NJAC Act is that the entire control over the appointment of a judge of a High Court is taken over by the NJAC and the paradigm is completely altered with the Chief Justice of a High Court downgraded from a mandatory consultant, and the originator of a recommendation for appointment as postulated by Article 217(1) of the Constitution as conventionally understood, to someone who merely makes a nomination and thereafter is not required to be consulted one way or the other with respect to the nomination made. This drastic change in the process of appointment of a judge of a High Court obviously has a very long term impact since it is ultimately from the 'cadre' of High Court judges that most Supreme Court judges would be appointed, if the existing practice is

followed. This in turn will obviously have a long term impact on the independence of the judiciary apart from completely altering the process for appointment of a judge of a High Court.

1083. The appointment of judges is a very serious matter and it is difficult to understate its importance. Referring to a view expressed by Shimon Shetreet[474] it is stated by Sarkar Ali Akkas of the University of Rajshahi, Bangladesh that:

The appointment of judges is an important aspect of judicial independence which requires that in administering justice judges should be free from all sorts of direct or indirect interference or influences. The principle of the independence of the judiciary seeks to ensure the freedom of judges to administer justice impartially, without any fear or favour. This freedom of judges has a close relationship with judicial appointment because the appointment system has a direct bearing on the impartiality, integrity and independence of judges.[475]

1084. Essentially, the 99th Constitution Amendment Act replaces or substitutes the collegium system of appointment of judges by the NJAC. It must be realized that a judicial appointments commission (by whatever name called) is a worldwide reaction to the executive taking over and appointing judges. No system following the Rule of Law would like to retain a system of appointment of judges where the executive plays a major role or has the last word on the subject, hence the occasional clamour for a judicial appointments commission. As the Hamlyn lecture of Jack Straw illustrates, the executive desires greater control in the appointment of judges but the judiciary eventually has the upper hand, as it should-but not so with the NJAC.

1085. The decision of this Court in ***Kumar Padma Prasad v. Union of India*** MANU/SC/0227/1992 : (1992) 2 SCC 428 is an example of how wrong the executive can be in the matter of appointment of judges. In that case, a judicial officer was recommended for appointment as a judge of the Gauhati High Court at the instance of the Chief Minister of Mizoram. The recommendation was agreed to by the Chief Justice of India and the warrant of appointment of the recommended person was issued by the President but it was subsequently not given effect to since the person was found not qualified to be appointed as a judge of the High Court. Recently, the Canadian Supreme Court answered a reference made by the Governor General in Council as a result of which the appointment and swearing in of a judge of the Supreme Court was declared void ab initio since he did not possess the eligibility requirement.[476] Instances of this nature, fortunately few and far between have shaken public confidence in a system of appointment of judges where primacy is with the executive, hence the desire to shift to an efficacious alternative. While there might be a need for a more efficient or better system of appointment of judges, the NJAC is not the stairway to Heaven, particularly in view of the various gaps in its functioning, the NJAC system downgrading the President and the Chief Justice of India and incorporating a host of other features that severely impact on the appointment of judges and thereby on the independence of the judiciary and thereby on the basic structure of the Constitution.

1086. It was submitted by the learned Attorney-General that there is a disenchantment with the collegium system of appointment of judges and that is why it needs to be replaced or substituted and that is precisely what the 99th Constitution Amendment Act has achieved. The learned Attorney-General referred to the NJAC as the third chapter in the appointment of judges-the first chapter being one in which the executive had the 'ultimate power' in the appointment process and

the second chapter being one in which the Executive and the Judiciary have a shared responsibility with the judiciary having institutional participation. This may be so, but through the 99th Constitution Amendment Act the NJAC takes away the responsibility not only of the executive but also the shared responsibility of the judiciary and the executive, completely decapitating the appointment system given to us by the Constituent Assembly-a system that ensures the independence of the judiciary.

1087. Working within the parameters suggested by the learned Attorney-General, namely, the presumption of constitutionality of the 99th Constitution Amendment Act, that the basis of the judgment in the ***Second Judges case*** has been removed, the wisdom of Parliament and the needs of the people cannot be questioned and that this Court must recognize that society and its requirements have changed with the passage of time, it is not possible to uphold the constitutional validity of the 99th Constitution Amendment Act. The recipe drastically alters the process of appointment of judges of the Supreme Court and the High Courts by taking away its essential ingredients leading to a constitutional challenge that must be accepted.

1088. Taking an overall and composite view of the 99th Constitution Amendment Act and the NJAC Act, rather than a piecemeal discussion or a dissection of each provision, there can be little doubt that Article 124A of the Constitution (as amended) is unconstitutional. Article 124A of the Constitution having been declared unconstitutional, there is nothing of substance left in Article 124B and Article 124C of the Constitution and the other provisions of the 99th Constitution Amendment Act, which are not severable and therefore these provisions must be and are declared unconstitutional being in violation of and altering the basic structure of the Constitution.

1089. The sum and substance of this discussion is that the process of initiating a recommendation for the appointment of a judge, generally accepted since Independence, has been radically changed, with well entrenched constitutional conventions being given short shrift; the Chief Justice of the High Court has been reduced to the role of a nominating officer, whose opinion is taken only for nomination purposes but not taken as a consultant in so vital a matter as the appointment of a judge; the constitutional importance given to the Chief Justice of a High Court has been completely whittled down virtually to a vanishing point.

Convenor of the NJAC

1090. There are some peripheral issues that need to be discussed. The involvement of the executive in the NJAC does not stop with the Law Minister being one of its members. The Secretary to the Government of India in the Department of Justice is the convenor of the NJAC in terms of Section 8(3) of the NJAC Act. The duties and responsibilities of the convenor have not been delineated in the NJAC Act and, as mentioned above, the rules and Regulations under the Act have not been framed. It is therefore difficult to appreciate the functions that the convenor is expected to perform.

1091. That apart, the Secretary is an officer of the government and is not answerable to the NJAC. The Secretary is paid a salary and allowances from the government coffers. This is quite unlike officers of the High Courts or the Supreme Court who are directly answerable to their respective Chief Justice. Moreover, their salary and allowances are charged upon the Consolidated Fund of India. The 'independence' of these officers is maintained while that of the Secretary to the

Government of India in the Department of Justice is not. Moreover, the Secretary holds a transferable position and can be changed at the whims and fancies of the executive, depriving the NJAC of continuity and, in a sense, leaving it high and dry whenever it pleases the executive. This is clearly objectionable. However, to be fair to the learned Attorney-General, it was submitted that if necessary a Registrar in the Supreme Court may be appointed as the convenor, but with respect that is not at all an answer to the issue raised.

Transparency

1092. In the context of confidentiality requirements, the submission of the learned Attorney-General was that the functioning of the NJAC would be completely transparent. Justifying the need for transparency it was submitted that so far the process of appointment of judges in the collegium system has been extremely secret in the sense that no one outside the collegium or the Department of Justice is aware of the recommendations made by the Chief Justice of India for appointment of a judge of the Supreme Court or the High Courts. Reference was made to ***Renu v. District Judge*** MANU/SC/0096/2014 : (2014) 14 SCC 50 to contend that in the matter of appointment in all judicial institutions 'complete darkness in the light house has to be removed.'[477]

1093. In addition to the issue of transparency a submission was made that in the matter of appointment of judges, civil society has the right to know who is being considered for appointment. In this regard, it was held in ***Indian Express Newspapers v. Union of India*** MANU/SC/0406/1984 : (1985) 1 SCC 641 that the people have a right to know. Reliance was placed on ***Attorney General v. Times Newspapers Ltd.*** 1973 3 All ER 54 where the right to know was recognized as a fundamental principle of the freedom of expression and the freedom of discussion.

1094. In ***State of U.P. v. Raj Narain*** MANU/SC/0032/1975 : (1975) 4 SCC 428 the right to know was recognized as having been derived from the concept of freedom of speech.

1095. Finally, in ***Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd.*** MANU/SC/0412/1988 : (1988) 4 SCC 592 it was held that the right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land Under Article 21 of our Constitution.

1096. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney-General that the proceedings of the NJAC will be completely transparent and any one can have access to information that is available with the NJAC. This is a rather sweeping generalization which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a judge of the High Court or in the first instance as a judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.

1097. It is possible to argue that information voluntarily supplied by a person who is recommended for appointment as a judge might not have a right to privacy, but at the same time, since the information is supplied in confidence, it is possible to argue that it ought not to be disclosed to third party unconcerned persons. Also, if the recommendation is not accepted by the President, does the recommended person have a right to non-disclosure of the adverse information supplied by the President? These are difficult questions to which adequate thought has not been given and merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat.

Doctrine of Revival

1098. The learned Solicitor-General submitted that when a law is amended and the amendment is declared unconstitutional, the pre-amendment law does not revive. Therefore, even if the 99th Constitution Amendment Act is declared as altering the basic structure of the Constitution, Article 124(2) of the Constitution as it existed prior to the 99th Constitution Amendment Act will not automatically revive and the collegium system will not resurface.

1099. An interesting discussion is to be found in this regard in ***West U.P. Sugar Mills Assn. v. State of U.P.*** MANU/SC/0088/2002 : (2002) 2 SCC 645. This Court referred to ***B.N. Tewari v. Union of India*** MANU/SC/0312/1964 : AIR 1965 SC 1430 (Five Judges Bench) and ***Firm A.T.B. Mehtab Majid and Co.*** **v.** ***State of Madras*** MANU/SC/0352/1962 : AIR 1963 SC 928 (Five Judges Bench) in both of which it was held that if a statutory rule substitutes a rule and the new rule is struck down or declared invalid, the substituted or old rule does not revive since it ceased to exist on its substitution. The same rationale was applied to a notification in ***Indian Express Newspapers (Bom) (P) Ltd.*** **v.** ***Union of India*** MANU/SC/0406/1984 : (1985) 1 SCC 641.

1100. However, it was further held that if a subsequent law is held to be void such as in a case where the Legislature had no competence to enact the law, then the earlier or the old law would revive. It was held:

It would have been a different case where a subsequent law which modified the earlier law was held to be void. In such a case, the earlier law shall be deemed to have never been modified or repealed and, therefore, continued to be in force. Where it is found that the legislature lacked competence to enact a law, still amends the existing law and subsequently it is found that the legislature or the authority was denuded of the power to amend the existing law, in such a case the old law would revive and continue.[478]

1101. In ***State of T.N.*** **v.** ***K. Shyam Sunder*** MANU/SC/0915/2011 : (2011) 8 SCC 737 the two extant views on the subject have been noted. In paragraph 56 of the Report, it is pointed out that on the repeal of a statute it is effectively obliterated from the statute books and even if the amending [repealing] statute is declared unconstitutional on the ground of lack of legislative competence in the Legislature, the repealed statute will not revive. This is what was said:

In *State of U.P.* v. *Hirendra Pal Singh* this Court held: (SCC p. 314, para 22)

22. It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided Under Section 6 of the General Clauses Act, 1897. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly i.e. pro tanto repeal....

Thus, undoubtedly, submission made by the learned senior Counsel on behalf of the Respondents that once the Act stands repealed and the amending Act is struck down by the Court being invalid and ultra vires/unconstitutional on the ground of legislative incompetence, the repealed Act will automatically revive is preponderous [preposterous] and needs no further consideration. This very Bench in *State of U.P.* v. *Hirendra Pal Singh*, after placing reliance upon a large number of earlier judgments particularly in *Ameer-un-Nissa Begum* v. *Mahboob Begum*, *B.N. Tewari* v. *Union of India*, *India Tobacco Company Ltd.* v. *CTO*, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, *West U.P. Sugar Mills Assn.* v. *State of U.P.*, *Zile Singh* v. *State of Haryana*, *State of Kerala* v. *Peoples Union for Civil Liberties* and *Firm A.T.B. Mehtab Majid and Co.* reached the same conclusion. (Internal citations omitted)

On the other hand, it is pointed out in paragraph 57 of the Report that if a statute is repealed and the new statute is declared unconstitutional on the ground that it violates the fundamental rights chapter, then the repealed statute revives. It was said:

There is another limb of this legal proposition, that is, where the Act is struck down by the Court being invalid, on the ground of arbitrariness in view of the provisions of Article 14 of the Constitution or being violative of fundamental rights enshrined in Part III of the Constitution, such Act can be described as void ab initio meaning thereby unconstitutional, stillborn or having no existence at all. In such a situation, the Act which stood repealed, stands revived automatically. (See *Behram Khurshid Pesikaka* and *Mahendra Lal Jaini*.) (Internal citations omitted)

There does appear to be a doubt (if not a subtle conflict of views) that needs to be resolved in the sense that if a statute is repealed and obliterated from the statute books, under what circumstances does the obliteration vanish, if at all. However, none of these decisions make any reference to an amendment of the Constitution, and for the present it is not necessary to dive into that controversy. This is for the simple reason that the issue requires considerable debate, of which we did not have the benefit. Justice Khehar has elaborately dealt with this issue in his draft judgment but I would like to leave the question open for debate on an appropriate occasion.

1102. But, quite apart from this, if the contention of the learned Solicitor-General is accepted, then on the facts of this case, the result would be calamitous. The simple reason is that if the 99th Constitution Amendment Act is struck down as altering the basic structure of the Constitution and if Article 124(2) in its original form is not revived then Article 124(2) of the Constitution minus the words deleted (by the 99th Constitution Amendment Act) and minus the words struck down (those inserted by the 99th Constitution Amendment Act) would read as follows:

Article 124(2) as it was originally	Article 124(2) after the 99th Constitution Amendment Act	Article 124(2) after the 99th Constitution Amendment is struck down and the original Article 124(2) is not revived
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A and shall hold office until he attains the age of sixty-five years:	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal and shall hold office until he attains the age of sixty-five years:

1103. This would give absolute power to the President to appoint a judge to the Supreme Court without consulting the Chief Justice of India (and also to appoint a judge to a High Court). The result of accepting his submission would be to create a tyrant, as James Madison put it in the Federalist Papers No. 47:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

1104. This was put to the learned Solicitor-General and it was also put to him that if his submissions are correct, then it would be better for the Union of India to have the 99th Constitution Amendment Act struck down so that absolute power resides in the President making him/her an Imperium in Imperio as far as the appointment of judges is concerned. The learned Solicitor-General smiled but obviously had no answer to give. It must, therefore, be held that the constitutional provisions amended by the 99th Constitution Amendment Act spring back to life on the declaration that the 99th Constitution Amendment Act is unconstitutional.

Conclusions

1105. Very briefly, Dr. Ambedkar was of the view that the President should have some discretion but not unfettered discretion in the appointment of judges. The ***Second Judges case*** acknowledged that the President has the discretion to turn down a recommendation made by the Chief Justice of India, but only under certain circumstances. This was the fetter on the discretion of the President. However, the 99th Constitution Amendment Act and the NJAC Act have completely taken away the discretion of the President to turn down a recommendation for the appointment of a judge, reducing the constitutional significance of the President.

1106. Dr. Ambedkar was of the view that the President should have the discretion to consult judges of the Supreme Court and the High Courts in respect of a recommendation for appointment by the Chief Justice of India. The President was presented, by ***Second Judges case*** and the ***Third Judges case***, with the result of the consultation exercise carried out by the Chief Justice of India which the Chief Justice of India was mandated to do. It is over and above this that the President was entitled to consult other judges of the Supreme Court or the High Courts. However, the 99th Constitution Amendment Act and the NJAC Act have taken away this freedom of consultation from the President, who has no option but to take into account only the recommendation of the NJAC and not travel beyond that. Once again, the constitutional significance and importance of the President is considerably reduced, if not taken away.

1107. Dr. Ambedkar was opposed to the concurrence of the Chief Justice of India (as an individual) in respect of every appointment of a judge. The ***Second Judges case*** made it mandatory for the Chief Justice of India to take the opinion of other judges and also left it open to the Chief Justice of India to consult persons other than judges in this regard. The opinion of the Chief Justice of India ceased to be an individual opinion (as per the 'desire' of Dr. Ambedkar) but became a collective or institutional opinion, there being a great deal of difference between the two. However, the 99th Constitution Amendment Act and the NJAC Act have considerably limited and curtailed the authority of the Chief Justice of India (both individually as well as institutionally) and the Chief Justice of India is now precluded from taking the opinion of other judges or of any person outside the NJAC. The Chief Justice of India has been reduced to an individual figure from an institutional head.

1108. Dr. Ambedkar was not prepared to accept the opinion of the Chief Justice of India (as an individual) as the final word in the appointment of judges. This is because the Chief Justice of India has frailties like all of us. The apprehension of Dr. Ambedkar was allayed by the ***Second Judges case*** and the ***Third Judges case*** which made it mandatory for the Chief Justice of India to express a collective opinion and not an individual opinion. The collective and unanimous opinion (duly reiterated if necessary) would bind the President being the collective and unanimous opinion of persons who were ex hypothesi 'well qualified to give proper advice in matters of this sort.' However, the 99th Constitution Amendment Act and the NJAC Act reversed the process well thought out in the ***Second Judges case*** and the ***Third Judges case*** and have taken away the constitutional authority of the Chief Justice of India and placed it on a platter for the NJAC to exploit.

1109. Given our constitutional history, the established conventions, the views of various committees over the last seventy years and the views of scores of legal luminaries beginning with Mr. Motilal Setalvad, the throes through which the judiciary has gone through over several decades and the provisions of our Constitution, I hold that the Article 124A as introduced in the Constitution by the Constitution (Ninety-ninth Amendment) Act, 2014 impinges on the independence of the judiciary and in the matter of appointment of judges (which is a foundational and integral part of the independence of the judiciary) and alters the basic structure of the Constitution. It is accordingly declared unconstitutional. The other provisions of the Constitution (Ninety-ninth Amendment) Act, 2014 cannot stand by themselves and are therefore also declared unconstitutional. Similarly, the National Judicial Appointments Commission Act, 2014 confers arbitrary and unchartered powers on various authorities under the statute and it violates Article 14

of the Constitution and is declared unconstitutional. Even otherwise, the National Judicial Appointments Commission Act, 2014 cannot stand alone in the absence of the Constitution (Ninety-ninth Amendment) Act, 2014.

1110. The result of this declaration is that the 'collegium system' postulated by the ***Second Judges case*** and the ***Third Judges case*** gets revived. However, the procedure for appointment of judges as laid down in these decisions read with the (Revised) Memorandum of Procedure definitely needs fine tuning. We had requested learned Counsel, on the close of submissions, to give suggestions on the basis that the petitions are dismissed and on the basis that the petitions are allowed. Unfortunately, we received no response, or at best a lukewarm response. Under the circumstances, in my opinion, we need to have a 'consequence hearing' to assist us in the matter for steps to be taken in the future to streamline the process and procedure of appointment of judges, to make it more responsive to the needs of the people, to make it more transparent and in tune with societal needs, and more particularly, to avoid a fifth judges case! I would, therefore, allow the petitions but list them for a 'consequence hearing' on an appropriate date.

Kurian Joseph, J.

1111. I wholly agree with the view taken by my esteemed brother, Chelameswar, J. that there is no situation warranting recusal of Justice Khehar in this case. Now, that we have to pass a detailed and reasoned order as to why a Judge need not recuse from a case, I feel it appropriate also to deal with the other side of the coin, whether a Judge should state reasons for his recusal in a particular case.

1112. One of the reasons for recusal of a Judge is that litigants/the public might entertain a reasonable apprehension about his impartiality. As Lord Chief Justice Hewart said:

It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[479]

1113. And therefore, in order to uphold the credibility of the integrity institution, the Judge recuses from hearing the case.

1114. A Judge of the Supreme Court or the High Court, while assuming Office, takes an oath as prescribed under Schedule III to the Constitution of India, that:

...I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws.

1115. Called upon to discharge the duties of the Office without fear or favour, affection or ill-will, it is only desirable, if not proper, that a Judge, for any unavoidable reason like some pecuniary interest, affinity or adversity with the parties in the case, direct or indirect interest in the outcome of the litigation, family directly involved in litigation on the same issue elsewhere, the Judge being aware that he or someone in his immediate family has an interest, financial or otherwise that could

have a substantial bearing as a consequence of the decision in the litigation, etc., to recuse himself from the adjudication of a particular matter. No doubt, these examples are not exhaustive.

1116. Guidelines on the ethical conduct of the Judges were formulated in the Chief Justices' Conference held in 1999 known as "Restatement of Judicial Values of Judicial Life". Those principles, as a matter of fact, formed the basis of "The Bangalore Principles of Judicial Conduct, 2002" formulated at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague. It is seen from the Preamble that the Drafting Committee had taken into consideration thirty two such statements all over the world including that of India. On Value 2 "Impartiality", it is resolved as follows:

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

1117. The simple question is, whether the adjudication by the Judge concerned, would cause a reasonable doubt in the mind of a reasonably informed litigant and fair-minded public as to his impartiality. Being an institution whose hallmark is transparency, it is only proper that the Judge discharging high and noble duties, at least broadly indicate the reasons for recusing from the case so that the litigants or the well-meaning public may not entertain any misunderstanding that the recusal was for altogether irrelevant reasons like the cases being very old, involving detailed consideration, decision on several questions of law, a situation where the Judge is not happy with the roster, a Judge getting unduly sensitive about the public perception of his image, Judge wanting not to cause displeasure to anybody, Judge always wanting not to decide any sensitive or controversial issues, etc. Once reasons for recusal are indicated, there will not be any room for attributing any motive for the recusal. To put it differently, it is part of his duty to be accountable to the Constitution by upholding it without fear or favour, affection or ill-will. Therefore, I am of the view that it is the constitutional duty, as reflected in one's oath, to be transparent and accountable, and hence, a Judge is required to indicate reasons for his recusal from a particular case. This would help to curb the tendency for forum shopping.

1118. In **Public Utilities Commission of District of Columbia et al. v. Pollak et al** MANU/USSC/0066/1952 : 343 U.S. 451 (1952), the Supreme Court of United States dealt with a question whether in the District of Columbia, the Constitution of the United States precludes a street railway company from receiving and amplifying radio programmes through loudspeakers in its passenger vehicles. Justice Frankfurter was always averse to the practice and he was of the view that it is not proper. His personal philosophy and his stand on the course apparently, were known to the people. Even otherwise, he was convinced of his strong position on this issue. Therefore, stating so, he recused from participating in the case. To quote his words,

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it. I am explicit as to the reason for my non-participation in this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case.

1119. According to Justice Mathew in **S. Parthasarathi v. State of A.P.** MANU/SC/0059/1973 : (1974) 3 SCC 459, in case, the right-minded persons entertain a feeling that there is any likelihood of bias on the part of the Judge, he must recuse. Mere possibility of such a feeling is not enough. There must exist circumstances where a reasonable and fair-minded man would think it probably or likely that the Judge would be prejudiced against a litigant. To quote:

The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that Justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, H.R. in (Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and Ors. etc. [MANU/UKWA/0011/1968 : (1968) 3 WLR 694 at 707]). We should not, however, be understood to deny that the Court might with greater propriety apply the "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings.

1120. There may be situations where the mischievous litigants wanting to avoid a Judge may be because he is known to them to be very strong and thus making an attempt for forum shopping by raising baseless submissions on conflict of interest. In the Constitutional Court of South Africa in **The President of the Republic of South Africa etc. v. South African Rugby Football Union etc.** 1999 (4) SA 147, has made two very relevant observations in this regard:

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.

1121. Ultimately, the question is whether a fair-minded and reasonably informed person, on correct facts, would reasonably entertain a doubt on the impartiality of the Judge. The reasonableness of the apprehension must be assessed in the light of the oath of Office he has taken as a Judge to administer justice without fear or favour, affection or ill-will and his ability to carry out the oath by reason of his training and experience whereby he is in a position to disabuse his mind of any irrelevant personal belief or pre-disposition or unwarranted apprehensions of his image in public or difficulty in deciding a controversial issue particularly when the same is highly sensitive.

1122. These issues have been succinctly discussed by the Constitutional Court in **The President of the Republic of South Africa** (supra), on an application for recusal of four of the Judges in the Constitutional Court. After elaborately considering the factual matrix as well as the legal position, the Court held as follows:

While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

(Emphasis supplied)

1123. The above principles are universal in application. Impartiality of a Judge is the sine qua non for the integrity institution. Transparency in procedure is one of the major factors constituting the integrity of the office of a Judge in conducting his duties and the functioning of the court. The litigants would always like to know though they may not have a prescribed right to know, as to why a Judge has recused from hearing the case or despite request, has not recused to hear his case. Reasons are required to be indicated broadly. of course, in case the disclosure of the reasons is likely to affect prejudicially any case or cause or interest of someone else, the Judge is free to state that on account of personal reasons which the Judge does not want to disclose, he has decided to recuse himself from hearing the case.

1124. *Entia Non Sunt Multiplicanda Sine Necessitate* (Things should not be multiplied without necessity). This is the first thought which came to my mind after reading the judgments authored by my noble brothers Khehar, Chelameswar, Lokur and Goel, JJ., exhaustively dealing with the subject. The entire gamut of the issue has been dealt with from all possible angles after referring extensively to the precedents, academic discourses and judgments of various other countries. Though I cannot, in all humility, claim to match the level of such masterpieces, it is a fact that I too had drafted my judgment. However, in view of the principle enunciated above on unnecessary multiplication, I decided to undo major portion of what I have done, also for the reason that the judgment of this Bench should not be accused of **Bharati** fate (**His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.** MANU/SC/0445/1973 : (1973) 4 SCC 225 has always been criticized on that account).

1125. Leaving all legal jargons and using a language of the common man, the core issue before us is the validity of the Constitution 99th amendment. It is to be tested on the touchstone of the theory of the basic structure. The amendment has introduced a new constitutional scheme for appointment of Judges to the High Courts and the Supreme Court. During the first phase of the working of the Constitution, the Executive claimed an upper hand in the appointment and the Chief Justice of India or the Chief Justices of the High Courts concerned were only to be 'consulted', the expression

often understood in its literal sense. In other words, the decision was taken by the Executive with the participation of the Chief Justice. This process fell for scrutiny in one of the celebrated decisions of this Court in **Samsher Singh v. State of Punjab and Anr.** MANU/SC/0073/1974 : (1974) 2 SCC 831.

1126. In **Samsher Singh** case (supra), a seven-Judge Bench of this Court, in unmistakable terms, held at paragraph 149 as follows:

149. ... The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue.

(Emphasis supplied)

1127. This principle, settled by a Bench of seven Judges, should have been taken as binding by the Bench dealing with the First Judges Case which had a coram only of seven. Unfortunately, it held otherwise, though with a majority of four against three. Strangely, the presiding Judge in the First Judges case and author of the majority view, was a member who concurred with the majority in **Samsher Singh** case (supra) and yet there was not even a reference to that judgment in the lead judgment! Had there been a proper advertence to **Samsher Singh** case (supra), probably there would not have been any need for the Second Judges Case.

1128. It appears, the restlessness on the incorrect interpretation of the constitutional structure and position of judiciary in the matter of appointments with the super voice of the Executive, as endorsed in the First Judges Case, called for a serious revisit leading to the Second Judges Case. Paragraph 85 of the judgment gives adequate reference to the background. To quote:

85. Regrettably, there are some intractable problems concerned with judicial administration starting from the initial stage of selection of candidates to man the Supreme Court and the High Courts leading to the present malaise. Therefore, it has become inevitable that effective steps have to be taken to improve or retrieve the situation. After taking note of these problems and realising the devastating consequences that may flow, one cannot be a silent spectator or an old inveterate optimist, looking upon the other constitutional functionaries, particularly the executive, in the fond hope of getting invigorative solutions to make the justice delivery system more effective and resilient to meet the contemporary needs of the society, which hopes, as experience shows, have never been successful. Therefore, faced with such a piquant situation, it has become imperative for us to solve these problems within the constitutional fabric by interpreting the various provisions of the Constitution relating to the functioning of the judiciary in the light of the letter and spirit of the Constitution.

(Emphasis supplied)

1129. The nine-Judges Bench in the Second Judges Case overruled the First Judges Case, after a threadbare analysis of the relevant provisions 'in the light of the letter and spirit of the Constitution', holding that appointment of Judges to the High Courts and the Supreme Court forms an integral part of the independence of judiciary, that independence of judiciary is part of the basic structure of the Constitution of India, and therefore, the Executive cannot interfere with the primacy of the judiciary in the matter of appointments. Third Judges Case, in 1998, is only an explanatory extension of the working of the principles in the Second Judges Case by institutionalizing the procedure of appointment, introducing the Collegium.

1130. Thus, the structural supremacy of the judiciary in the constitutionally allotted sphere was restored by the Second and Third Judges Cases.

1131. Apparently, on account of certain allegedly undeserving appointments, which in fact affected the image of the judiciary, the politico Executive started a new campaign demanding reconsideration of the procedure of appointment. It was clamoured that the system of Judges appointing Judges is not in the spirit of the Constitution, and hence, the whole process required a structural alteration, and thus, the Constitution 99th Amendment whereby the selection is left to a third body, the National Judicial Appointments Commission (NJAC). The Parliament also passed the National Judicial Appointments Commission Act, 2014, which is only a creature of Constitution 99th Amendment. The validity of the Act is also under challenge.

1132. 'What is the big deal about it?', has been the oft made observation of my esteemed brother Khehar, J., the presiding Judge, in the thirty days of the hearing of the case, which included an unusual two weeks long sitting during the summer vacations with the hearing in three different Courts, viz., Court Nos. 3, 4 and 6. When it is held, and rightly so, that there is no requirement for reconsideration of the Second Judges Case, the fate of the case is sealed; there is no need for any further deal, big or small. Though I generally agree with the analysis and statement of law, in the matter of discussion and summarization of the principles on reconsideration of judgments made by Lokur, J. at paragraph 263, I would like to add one more, as the tenth. Once this Court has addressed an issue on a substantial question of law as to the structure of the Constitution and has laid down the law, a request for revisit shall not be welcomed unless it is shown that the structural interpretation is palpably erroneous. None before us could blur the graphic picture on the scheme of appointment of Judges and its solid structural base in the Constitution portrayed in the Second Judges Case. This Bench is bound by the ratio that independence of judiciary is part of the basic structure of Constitution and that the appointment of Judges to the High Courts and the Supreme Court is an integral part of the concept of independence of judiciary. And for that simple reason, the Constitution 99th Amendment is bound to be declared unconstitutional and I do so. Thus, I wholly agree with the view taken by Khehar, Lokur and Goel, JJ., that the amendment is unconstitutional and I respectfully disagree with the view taken by Chelameswar, J. in that regard. Since it is being held by the majority that the amendment itself is bad, there is no point in dealing with the validity of the creature of the amendment, viz., the National Judicial Appointments Commission Act, 2014. It does not exist under law. Why then write the horoscope of a stillborn child! However, I would like to provide one more prod. Professor Philip Bobbit in his famous book 'Constitutional Fate Theory of the Constitution', has dealt with a typology of constitutional

arguments. To him, there are five archetypes: historical, textual, structural, prudential and doctrinal. To quote from Chapter 1:

Historical argument is argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution. Such arguments begin with assertions about the controversies, the attitudes, and decisions of the period during which the particular constitutional provision to be construed was proposed and ratified.

The second archetype is textual argument, argument that is drawn from a consideration of the present sense of the words of the provision. At times textual argument is confused with historical argument, which requires the consideration of evidence extrinsic to the text. The third type of constitutional argument in *structural argument*. Structural arguments are claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments. The fourth type of constitutional argument is *prudential argument*. Prudential argument is self-conscious to the reviewing institution and need not treat the merits of the particular controversy (which itself may or may not be constitutional), instead advancing particular doctrines according to the practical wisdom of using the courts in a particular way.

Finally, there is *doctrinal argument*, argument that asserts principles derived from precedent or from judicial or academic commentary on precedent.

1133. Professor (Dr.) Upendra Baxi has yet another tool-'episodic', which according to him, is often wrongly used in interpreting the Constitution. To Dr. Baxi, 'structural' is the most important argument while interpreting the Constitution.

Structural argument is further explained in Chapter 6. To quote a few observations:

Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures. They are to be distinguished from textual and historical arguments, which construe a particular constitutional passage and then use that construction in the reasoning of an opinion.

xxx

Structural arguments are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts. At the same time, they embody a macroscopic prudentialism drawing not on the peculiar facts of the case but rather arising from general assertions about power and social choice.

xxx

Notice that the structural approach, unlike much doctrinalism, is grounded in the actual text of the Constitution. But, unlike textualist arguments, the passages that are significant are not those of express grants of power or particular prohibitions but instead those which, by setting up structures of a certain kind, permit us to draw the requirements of the relationships among structures.

1134. Professor Bobbit has also dealt with a sixth approach-ethical, which according to him, is seldom used in constitutional law. In interpreting the Constitution, all the tools are to be appropriately used, and quite often, in combination too. The three constitutional wings, their powers and functions under the Constitution, and their intra relationship being the key issues to be analysed in the present case, I am of the view that the 'structural tool' is to be prominently applied for resolving the issues arising in the case. In support, I shall refer to a recent judgment of the U.S. Supreme Court in **State v. Arizona Independent Redistricting Commission** MANU/USSC/0060/2015, decided on 29.06.2015. It is an interesting case, quite relevant to our discussion. U.S. Constitution Article I, Section 4, Clause 1 (Election Clause) reads as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations,
except as to the Places of chusing Senators.

1135. Arizona Constitution, Article IV, Part 1, to the extent relevant, reads as follows:

Section 1. (1) Senate; house of representatives; reservation of power to people. The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

1136. Thus, Under Section 1, people are involved in direct legislation either by the process known as 'initiative' or 'referendum'. While the initiative allows the electorate to adopt positive legislation, referendum is meant as a negative check. Popularly, the process of initiative is said to correct 'sins of omission' by the Legislature while the referendum corrects 'sins of commission' by the Legislature.

1137. In 2000, Arizona voters adopted Proposition 106, an initiative aimed at the problem of gerrymandering. Proposition 106 amended Arizona's Constitution, removing redistricting authority from the Arizona Legislature and vesting it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts. The Arizona Legislature challenged the map which the Commission adopted in 2012 for congressional districts arguing that the AIRC and its map violated the "Elections Clause" of the U.S. Constitution.

1138. Justice Ginsburg and four other Justices formed the majority and held that the independent commission is competent to provide for redistricting. To quote the main reasoning:

The Framers may not have imagined the modern initiative process in which the people's legislative powers is coextensive with the state legislature's authority, but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.

1139. However, Chief Justice Roberts and three other Justices dissented. Chief Justice Roberts pointed out that the majority position has no basis in the text, structure, or history of the Constitution and it contradicts precedents from both Congress and the Supreme Court. The Constitution contains seventeen provisions referring to the 'Legislature' of a State, many of which cannot possibly be read to mean 'the people'. To quote further:

The majority largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy. Nowhere does the majority explain how a constitutional provision that vests redistricting authority in "the Legislature" permits a State to wholly exclude "the Legislature" from redistricting. Arizona's Commission might be a "noble endeavor" although it does not seem so "independent" in practice but the "fact that a given law or procedure is efficient, convenient, and useful...
will not save it if it is contrary to the Constitution" INS v. Chadha MANU/USSC/0055/1983 : 462 U.S. 919, 944 (1983).

xxx

The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election Regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be exclusive in congressional districting, but neither may it be excluded.

xxx

The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. See Vieth v. Jubelirer MANU/USSC/0031/2004 : 541 U.S. 267 (2004); ante, at 1. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law's virtues as a policy innovation cannot redeem its inconsistency with the Constitution.

(Emphasis supplied)

1140. While wholly agreeing with the historic, textual, prudential and doctrinal approaches made by Khehar and Lokur, JJ., my additional stress is on the structural part. The minority in **Arizona** case (supra), to me, is the correct approach to be made in this case.

1141. Separation of powers or say distribution of powers, as brother Lokur, J. terms it, is the tectonic structure of the Constitution of India. The various checks and balances are provided only for maintaining a proper equilibrium amongst the structures and that is the supreme beauty of our Constitution. Under our constitutional scheme, one branch does not interfere impermissibly with the constitutionally assigned powers and functions of another branch. The permissible areas of interference are the checks and balances. But there are certain exclusive areas for each, branch which Khehar, J. has stated as 'core functions', and which I would describe as powers central.

There shall be no interference on powers central of each branch. What the Constitution is, is only for the court to define; whereas what the constitutional aspirations are for the other branches to detail and demonstrate. As held in **Samsher Singh** case (supra) and the Second and Third Judges Cases, selection of Judges for appointment in High Courts and the Supreme Court belongs to the powers central of the Judiciary and the permissible checks and balances are provided to other branches lie in the sphere of appointment. If the alignment of tectonic plates on distribution of powers is disturbed, it will quake the Constitution. Once the constitutional structure is shaken, democracy collapses. That is our own painful history of the Emergency. It is the Parliament, in post-Emergency, which corrected the constitutional perversions and restored the supremacy of rule of law which is the cornerstone of our Constitution. As guardian of the Constitution, this Court should vigilantly protect the pristine purity and integrity of the basic structure of the Constitution. Direct participation of the Executive or other non-judicial elements would ultimately lead to structured bargaining in appointments, if not, anything worse. Any attempt by diluting the basic structure to create a committed judiciary, however remote be the possibility, is to be nipped in the bud. According to Justice Roberts, court has no power to gerrymander the Constitution. Contextually, I would say, the Parliament has no power to gerrymander the Constitution. The Constitution 99th amendment impairs the structural distribution of powers, and hence, it is impermissible.

1142. One word on the consequence. Though elaborate arguments have been addressed that even if the constitutional amendment is struck down, the Collegium does not resurrect, according to me, does not appeal even to common sense. The 99th Amendment sought to 'substitute' a few provisions in the Constitution and 'insert' a few new provisions. Once the process of substitution and insertion by way of a constitutional amendment is itself held to be bad and impermissible, the pre-amended provisions automatically resurface and revive. That alone can be the reasonably inferential conclusion. Legal parlance and common parlance may be different but there cannot be any legal sense of an issue which does not appeal to common sense.

1143. All told, all was and is not well. To that extent, I agree with Chelameswar, J. that the present Collegium system lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the Collegium system, as sometimes observed by the civic society. Quite often, very serious allegations and many a time not unfounded too, have been raised that its approach has been highly subjective. Deserving persons have been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the less patronised, selection of patronised or favoured persons were made in blatant violation of the guidelines resulting in unmerited, if not, bad appointments, the dictatorial attitude of the Collegium seriously affecting the self-respect and dignity, if not, independence of Judges, the court, particularly the Supreme Court, often being styled as the Court of the Collegium, the looking forward syndrome affecting impartial assessment, etc., have been some of the other allegations in the air for quite some time. These allegations certainly call for a deep introspection as to whether the institutional trusteeship has kept up the expectations of the framers of the Constitution. Though one would not like to go into a detailed analysis of the reasons, I feel that it is not the trusteeship that failed, but the frailties of the trustees and the collaborators which failed the system. To me, it is a curable situation yet.

1144. There is no healthy system in practice. No doubt, the fault is not wholly of the Collegium. The active silence of the Executive in not preventing such unworthy appointments was actually one of the major problems. The Second and Third Judges Case had provided effective tools in the hands of the Executive to prevent such aberrations. Whether 'Joint venture', as observed by Chelameswar, J., or not, the Executive seldom effectively used those tools.

1145. Therefore, the Collegium system needs to be improved requiring a 'glasnost' and a 'perestroika', and hence the case needs to be heard further in this regard.

Adarsh Kumar Goel, J.

Introduction

1146. Articles 124,127, 128, 217, 222, 224 and 231 of the Constitution of India ('the Constitution') deal with the appointment of the judges of the Supreme Court and the High Courts ('the Constitutional courts'), and other allied matters. The Constitution (Ninety-Ninth Amendment) Act, 2014 ('the Amendment Act') inter alia seeks to amend these constitutional provisions. The National Judicial Appointments Commission Act, 2014 ('the NJAC Act'), enacted simultaneously, purports to regulate the procedure of the National Judicial Appointments Commission (NJAC). The present batch of petitions challenge the constitutional validity of the Amendment Act and the NJAC Act.. The Supreme Court Advocates-on-Record Association has filed Writ Petition (Civil) No. 13 of 2015, which has been treated as the lead petition.

1147. I have perused the erudite opinions of my esteemed brothers. While I respectfully agree with the conclusions arrived at by Khehar J., Lokur J. and Kurian Joseph J., and respectfully disagree with the view of Chelameswar J. I prefer to record my own reasons.

Pre-Amendment Scheme of Appointment and Transfer of Judges

1148. The scheme of appointment and transfer of Judges in force prior to the amendment is set out in two memoranda dated 30th June, 1999 issued by the Government of India-first for appointment of Chief Justice of India (CJI) and judges of the Supreme Court and second for appointment and transfer of Chief Justices and the judges of the High Courts.

1148.1. Broadly the procedure laid down in the first memorandum is that appointment to the office of the CJI should be of the senior most judge of the Supreme Court considered ft to hold the office. For this purpose, recommendation is sought from the outgoing CJI and if there is doubt about the fitness of the senior most judge, consultation is made with the other judges Under Article 124(2). Thereafter, the Law Minister puts up the matter to the Prime Minister (PM) who advises the President. After approval of the President, the appointment is notified. For appointment as judges of the Supreme Court, the CJI initiates the proposal and forwards his recommendation to the Union Minister of Law who puts up the matter to the PM, who in turn advises the President. Opinion of the CJI is formed in consultation with four senior most judges and if successor CJI is not in the said four senior most judges, he is also made part of the collegium. CJI also ascertains the views of the senior most judge in the Supreme Court who hails from the High Court from where a person recommended comes. Opinions in respect of the recommendation are in writing and are

transmitted to the Government of India for record. If the views of non-judges are solicited, a memorandum thereof and its substance is conveyed to the Government of India. Once appointment is approved by the President of India, certificate of physical fitness is obtained and after the warrant of appointment is signed by the President, the appointment is announced and a notification issued in the Gazette of India.

1148.2. The procedure laid down in the second memorandum deals with the appointments to the High Courts and transfers. The Chief Justices of High Courts are appointed from outside. Inter se seniority in a particular High Court is considered for appointment as Chief Justice from that High Court. Initiation of proposal for appointment of Chief Justice of a High Court is by the CJI. The CJI consults two senior most Judges of the Supreme Court and also ascertains the views of his senior most colleague in the Supreme Court who is conversant with the affairs of the High Court in which the recommendee has been functioning and whose opinion is likely to be significant in adjudging the suitability of the candidate. The views of the Judges are sent along with the proposal of the Union Minister of Law who obtains the views of the concerned State Government and then submits the proposal to the PM who advises the President. As soon as appointment is approved by the President, notification is issued in the Gazette of India. As regards the appointment of a Judge of the High Court, the Chief Justice of the High Court communicates to the Chief Minister his views, after consulting two of his senior most colleagues regarding suitability of the person to be selected. All consultations must be in writing and these opinions are sent to the Chief Minister, along with the recommendation. If the Chief Minister desires to recommend a name, he has to forward the same to the Chief Justice for his consideration. A copy of the recommendation is also sent to the CJI and the Union Law Minister. The Chief Minister advises the Governor who forwards his recommendation to the Law Minister. The Law Minister considers the recommendation in the light of such other reports (such as I.B. report) as may be available to the Government and then forwards the material to the CJI. CJI consults two senior most Judges and also takes into account the views of the Chief Justice and Judges of the High Court (consulted by the Chief Justice) and those Judges of the Supreme Court who are conversant with the affairs of the candidate. Thereafter the CJI sends the recommendation to the Union Law Minister along with the correspondence with his colleagues. If the Law Minister considers it expedient to refer back the name for opinion of the State Constitutional Authorities, opinion of the CJI must be obtained. The Law Minister then puts up the recommendation to the PM who advises the President. The correspondence between the Chief Justice, the Chief Minister and Governor inter se is in writing. As soon as the appointment is approved by the President, physical fitness is ascertained and as soon as warrant of appointment is signed by the President, notification is issued in the Gazette of India.

1148.3. Proposal for transfer is initiated by the CJI. Consent of the Judge concerned is not necessary. The CJI consults four senior most Judges of the Supreme Court and takes into account the views of the Chief Justice of the High Court from which the Judge is to be transferred and Chief Justice of the High Court to which the transfer is to be effected. CJI also takes into account the views of one or more Supreme Court Judges who are in a position to offer his/their views. The views are expressed in writing, and are considered by the CJI and four senior most Judges. The personal facts relating to the Judge and his response to the proposal are invariably taken into account. The proposal is then referred to the Government. The Law Minister submits the

recommendation to the PM who advises the President. After the President approves the transfer, a notification is issued in the Official Gazette.

1148.4. The above memoranda were issued by the Government of India in the light of unamended Constitutional provisions and the judgment of this Court dated 28th October, 1998 in ***Special Reference No. 1 of 1998*** MANU/SC/1146/1998 : (1998) 7 SCC 739 (***Third Judges' case***) which in substance reiterates the earlier Nine Judge Bench judgment in ***SCAORA v. Union of India*** MANU/SC/0073/1994 : (1993) 4 SCC 441 (***Second Judges' case***).

1148.5. Reference may also be made to the unamended constitutional provisions. Article 124(2) provides that a Judge of the Supreme Court shall be appointed by the President after consultation with such Judges of the Supreme Court and the High Courts as are deemed necessary. However, the CJI is always to be consulted. Article 217 provides that a Judge of the High Court shall be appointed by the President after consultation with CJI, Governor of the State and in case of a Judge other than the Chief Justice, the Chief Justice of the High Court. The question arose before this Court on several occasions as to the value of the opinion of the CJI in the process of 'consultation'. This Court held that under the scheme of the Constitution a proposal for appointment to the Supreme Court must emanate from the CJI and for appointment to the High Court it should emanate from the Chief Justice of the High Court and the last word on appointment must rest with the CJI[480]. This Court noted that by convention proposals for appointments were always initiated by the judiciary and appointments were made with the concurrence of the CJI. This view was reiterated in ***Third Judges***' case on the basis of which the above memoranda were issued by the Government of India.

Scheme under the Amendment

1149. Reference may now be made to the impugned Amendment. It amends Article 124 and provides that such appointments and transfers will now be on the recommendation of the NJAC (Section 2). Requirement of mandatory consultation with the CJI and consultation with such Judges as may be considered necessary has been deleted. Convention of initiation of proposal by Chief Justice for the High Courts and CJI for the Supreme Court and other scheme as reflected in the memoranda earlier mentioned and as laid down in decisions of this Court has been replaced. The amendment inserts a new Article 124A, under which the NJAC is to be constituted. It will comprise the CJI, two senior most judges of Supreme Court next to the CJI, Union Law Minister and two eminent persons to be nominated by the Committee comprising of the PM, the CJI and the Leader of the Opposition in the House of the People/Leader of single largest Opposition Party in the House of the People. The nomination of one of these eminent persons is reserved for persons belonging to the Scheduled Castes, the Scheduled Tribes, OBC, minorities or women. Under the new scheme, for any proposal five out of six members must concur. If any two members disagree, no proposal can be made.

1150. The Amendment Act also provides for the Parliament to enact law to regulate the procedure for appointment of judges of higher courts and to empower the Commission to lay down, by Regulations, the procedure for discharge of its functions, the manner of selection of its members and such other matters, as may be considered necessary (Section 3).

1151. The NJAC Act provides for the appointment of the senior most judge of the Supreme Court as CJI, if considered ft to hold the office; and for recommendation for appointment as judge of the Supreme Court (Section 5). The Second proviso to Section 5(2) of the NJAC Act states that the Commission shall not recommend a person if two members of the Commission do not agree. Apart from its other functions, the Commission would also recommend appointments of Chief Justice and judges of High Courts (Section 6(1), (3)). Alternatively, the Commission can seek a nomination from the Chief Justice of the High Court for recommending appointment as judge of the High Court (Section 6(2)). For appointment of judges of High Courts, however, the Commission must seek prior consultation with the Chief Justice of the concerned High Court, who in turn has to consult two senior most judges of the said High Court and such other judges and eminent advocates as may be specified. (Section 6(4)). The Commission is also to seek views of the Governor and Chief Minister of the concerned State. The power of appointment of officers and employees of the Commission is with the Central Government. The Convener of the Commission is the Secretary, Government of India, in the Department of Justice. Central Government is authorised to make rules for carrying out the provisions of the Act (Section 11). The Commission is authorised to make Regulations consistent with the Act and the Rules. The Rules and the Regulations framed under the Act are required to be placed before the Parliament, which may modify such rules or Regulations (Sections 12, 13).

1152. The statement of objects and reasons of the amendment mentions that this Court had interpreted the word "consultation" as "concurrence" in Articles 124(2) and 217(2) of the Constitution (Section 2). It further states that after review of the constitutional provisions, pronouncements of this Court and consultation with eminent jurists, it was felt that a broad based National Judicial Appointments Commission should be established for making recommendation for appointment of judges of the Supreme Court and the High Courts. The Commission will provide meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable while also introducing transparency in the selection process (Section 3).

1152.1. Though by notification dated 13th April, 2015, the Amendment and the Act have been brought into force, the Commission has not been constituted so far, as two eminent persons have not been so far appointed.

1152.2. Key Constitutional unamended provisions and the provisions of the Amendment and the Act are as follows:

Unamended Provisions	Provisions of the Amendment
Article 124 xxxx xxxx xxxx *(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal* ***after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary*** *for the purpose and shall hold office until he attains the age of sixty-five years.* ***Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:*** ***Article 217. Appointment and conditions of the office of a Judge of a High Court -*** *Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal* ***after consultation with the Chief***	*"**124A.** (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:--* *(a) the Chief Justice of India, Chairperson, ex officio;* *(b two other senior Judges of the Supreme Court next to the Chief Justice of India --Members, ex officio;* *(c) the Union Minister in charge of Law and Justice--Member, ex officio;* *(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People -- Members:* *Provided that one of the eminent person shall be nominated from*

***Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High court**, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years:*	*amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:* *Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.* *(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.* ***124B.**It shall be the duty of the National Judicial Appointments Commission to—* *(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;* *(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and* *(c) ensure that the person recommended is of ability and integrity.* ***124C.** Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.".*

1152.3. The relevant constitutional and statutory provisions are set out separately in an Appendix to this opinion.

Rival Contentions

1153. The Amendment Act is challenged as ultra vires, inter alia for being beyond the competence of the Parliament as it alters and destroys the basic structure of the Constitution, as embodied in the independence of judiciary in the context of appointment of judges of the higher judiciary. The Petitioners submit that the power of the Parliament to amend the Constitution Under Article 368 is limited and does not extend to altering or destroying the basic structure or basic features of the Constitution. The independence of the judiciary is a constitutional concept, regarded as a basic feature of the Constitution, and includes insulating the judiciary from executive or legislative control, primacy of higher judiciary in the matter of appointment of judges to the High Courts and the Supreme Court, non-amendability of conditions of service of judges of the Supreme Court and the High Court to their disadvantage. The Amendment takes away the primacy of the collective opinion of the CJI and the senior most Supreme Court judges by stalling an appointment unanimously proposed by them if the same is not concurred by two non-judge Commission members [second proviso to Section 5(2) and Section 6(6)]. This endows unchecked veto power to non-judges in appointing judges to higher courts, compromising the judiciary's independence. The Amendment also dilutes the judiciary's constitutionally-conferred power by granting unbridled power on the Parliament to control, by ordinary law, the manner of selection of a person for appointment to higher judiciary, which also damages the independence of judiciary. This power enables the Parliament to substitute judiciary's primacy with that of the executive. If allowed to stand, the provision could easily be further amended thereby denying any effective role for the senior most judges of the higher judiciary in appointment of judges of the Supreme Court and the High Courts. Thus, the Amendment does not envisage predominant voice for the judges and makes the executive element in appointment of judges dominant which alters and damages the basic structure of the Constitution. It is also contended that the NJAC Act was void as it was passed by the Parliament before the Amendment Act became operative.

1154. Thus, the contentions on behalf of the Petitioners are:

(i) Constitution is supreme and powers of all organs are defined and controlled thereunder;

(ii) Amending power of Parliament is limited by the concept of basic structure as judicially interpreted;

(iii) Final interpreter of the Constitution and the scope of powers thereunder is this Court;

(iv) Independence of judiciary and separation of powers are part of basic structure;

(v) Primacy of judiciary in appointment of judges is crucial part of independence of judiciary and separation of powers and thus part of basic structure;

(vi) Role of executive and legislature in appointment of judges being kept at minimum was also part of basic structure;

(vii) The composition of the Commission in the impugned Amendment severally damages the basic structure of the Constitution by destroying primacy of judiciary in appointment of judges and giving controlling role to the executive and legislature in such appointments;

(viii) The impugned amendment enables stalling of appointment of judges proposed by the judiciary unless candidates suggested by the executive are appointed thereby compromising independence of judiciary;

(ix) The impugned amendment expands the power of amendment by delegating crucial issues of appointment of judges to Parliament which is against the basic structure of the Constitution;

(x) The composition of the Commission will shake confidence of people in Judiciary if Executive or Legislature have dominant voice; and

(xi) The impugned Act is beyond legislative competence of the Parliament.

1155. The Joint Secretary, Department of Justice has filed a counter affidavit on behalf of the Union of India (UOI), defending the Amendment and the Act. UOI's case is that independence of judiciary is only post appointment. Appointment is an executive act and the judiciary's independence has no relevance with the executive act of appointment. UOI submits that judicial independence is to be coupled with checks and balances and that a contextual reading of Articles 124(2) and 217(1) with the Constituent Assembly Debates (CAD) makes it evident that there is no primacy of the CJI in appointment of judges. Consultation with the CJI was only by way of a check on executive, which had the final say in the matter. Further, provision for consultation with other judges does not justify creation of a collegium. UOI's submission refers to impeachment provisions for removal of judges (Article 124(4); Parliament's power to regulate procedure for presentation of an address and investigation and proof of misbehaviour or incapacity of a judge (Article 124(5)) and to determine salary of judges and provisions pertaining to other aspects of judicial functioning conferring power on Parliament to legislate (Article 125). UOI submits that the decisions of this Court in ***Second Judges***' case and ***Third Judges***' case laying down primacy of the judiciary in the context of consultative process under Articles 124(1) and 217(1) have no relevance to test the validity of the impugned Ninety Ninth Amendment by which provisions of Articles 124(2) and 217(1) stand amended. However, it is contended that the view taken in the said judgments that the judiciary has primacy in appointment is erroneous, and needs to be revisited. In any case, the UOI contends that the primacy of judiciary in the matter of appointment of judges of the higher judiciary has no connection with independence of judiciary and is not the basic feature of the Constitution. In several countries, such as Australia, independence of judiciary exists without primacy of the judiciary in appointments of judges to the higher judiciary. UOI submits that the power conferred on Parliament to enact law to regulate the procedure of the NJAC or to modify the Regulations framed by the NJAC is valid. The NJAC is accountable to Parliament in framing Regulations. The presence of Law Minister as a member of the NJAC ensures accountability to public. The presence of two eminent persons is a check and balance on the functioning of other members. Diversity of members will ensure greater accountability of each member to the other. This will ensure greater public confidence in the functioning of the judiciary. The NJAC will fall under the purview of Right to Information Act, 2005 which will ensure transparency. Even if the Amendment was struck down, original provisions could not be revived as doctrine of revival does not apply to Constitutional Amendments. The issue was raised in ***Property Owners' Association v. State of Maharashtra*** MANU/SC/1160/1996 : (1996) 4 SCC 49 with respect to Article 31C of the Constitution which is pending before a nine-judge Bench. It is also submitted that the writ petition

is pre-mature as the new system has not been given a chance to operate and no rights have been affected.

1156. The contentions on behalf of the Respondents can be summed up as follows:

(a) Power of appointment of judges rests with the executive and role of judiciary is confined to consultation which may or may not be accepted by the executive;

(b) Primacy of judiciary in appointments was recognised by erroneous interpretation of unamended provisions of the Constitution and by way of amendment such interpretation has been corrected and thus there is no violation of basic structure. Alternatively larger Bench be constituted to correct the earlier interpretation;

(c) Primacy of judiciary in appointments was not inalienable and in changed situation, in the light of experiences gained, the primacy could be done away with or modified;

(d) Wisdom of constituent body in making a choice was not open to judicial review;

(e) Taking the Constitution as a whole, value of independence of judiciary could be balanced with other constitutional values of democracy, accountability and checks and balances;

(f) Power of amendment was plenary and could not be questioned unless it results in destruction of a pillar of Constitution;

(g) Even with power being with executive or power of veto being with executive, independence of judiciary could survive so long as there was protection of tenure and service conditions of judges;

(h) Accountability and transparency in functioning of every constitutional organ was part of democracy in which case exclusive power of appointment of judges with the judiciary was undemocratic;

(i) The impugned amendment retains primacy by having three out of six members, out of which two could stop an undesirable appointment. The executive did not have predominant role as two eminent persons were appointed by a committee having the Prime Minister, the CJI and the Leader of Opposition thereby role of Prime Minister being limited. Law Minister and eminent persons as members ensured giving of relevant feedback and ensuring accountability and transparency.;

(j) The impugned amendment in conferring power on Parliament and the Central Government in procedural matters did not violate independence of judiciary; and

(k) The impugned Act was within legislative competence of Parliament.

1157. Shri Fali S. Nariman, learned senior Counsel led the arguments on behalf of the Petitioners in the lead petition followed by S/Shri Ram Jethmalani, Anil B. Divan, K.N. Bhat, Arvind Datar, Dr. Rajeev Dhawan, learned senior Counsel and other counsel appearing either in person or as intervenor or otherwise. They have been opposed by learned Attorney General Shri Mukul

Rohtagi, learned Solicitor General Shri Ranjit Kumar and S/Shri K. Parasaran, Soli J. Sorabjee, K.K. Venugopal, Harish N. Salve, T.R. Andhyarujina, Dushyant Dave learned senior Counsel and other learned Counsel for various States and intervenors or otherwise. I record my gratitude to learned Counsel for their painstaking assistance to the Court with their exceptional ability and skill for deciding important issues arising for consideration. Their contentions will be referred to at appropriate stage to the extent necessary.

1158. While generally learned Counsel on either side have taken identical stand, Shri Venugopal, appearing for the State of M.P., which is otherwise supporting the amendment, in his alternative submission, filed on 14th July, 2015 by way of additional propositions, inter alia submitted as follows:

3. *Looking at the scheme of the 99th Amendment and the National Judicial Commission Appointments Act, 2014 (NJAC Act), the scheme evolved provides for the constitution of a 6 member Commission and Under Article 124-C, for the procedure to be provided under a law made by the Parliament. The NJAC Act has certain salient features that includes under the second proviso to Section 5(2), a provision in the nature of a 'veto', as no appointment can be made if two members of the Commission do not agree to that appointment. This provision is challenged by the Petitioners as the 99th Amendment Act does not make any such provision and to provide for a 'veto', as it were, by two out of six members, is stated to be ultra vires the Amendment Act or, in any event, not a matter of procedure.*

4. *This submission appears to be correct for the following reasons:*

a. The principle of 'primacy' of the judiciary, which is a part of judicial independence, must necessarily be read into the NJAC Act as well. Any Act providing for procedure would be ultra vires the Constitutional provision if it does not satisfy the requirement of primacy. The 'veto' provision, therefore, is clearly antithetical to the concept of 'primacy' and must be struck down as being ultra vires the amendment.

xxx

6. Irrespective of the nine Judges' Bench judgment, certain concepts in law exist in the matter of the functioning of the judiciary in a democracy. The existence of an independent judiciary is a sine qua non for democracy to flourish. Here, we are concerned with the issue of appointment of judges to the higher judiciary. Whether, the power is executive or not, it cannot be gainsaid that it impinges on the independence of the judiciary in case the executive were to exclusively have the power to appoint the judges. Such a system of appointment could result in brining into existence judges who are subservient to the will of the Government, which would be a major litigant in the Courts. Independence therefore, would stand affected.

7. If the 'veto' is invalid, then the common law principle of majority would apply. The Chief Justice of India and the two other judges have expertise in the matter of selection of judges to the higher judiciary and also have full knowledge of the functioning of the potential candidates. However, the unanimous view of the three judges would not carry the day if opposed by the other three members. In every other case, where all six are in agreement on a candidate, no problem in making

the right decision would arise. The real question, therefore, is what would be the position if a deadlock arises when the unanimous decision of the three judges is opposed by the other three members. Needless to state, that if the three judges are not ad idem on a candidate, no 'issue of primacy' would arise and the majority would prevail.

8. It is true that the nine judges case can no more hold the field for the purpose of nullifying the 99th amendment, which, obviously, is inconsistent with the Collegium system evolved by the nine judges judgment. But that does not mean that the principles enunciated by the said judgment could not be relied upon as being a juristic principle that would be applicable in such cases. In other words, these principles can be said to be relevant for all time to come because of the following reasons:

a. The power of appointment can be used to affect or subvert the independence of the appointees when functioning as members of the superior judiciary.

b. A system of appointment where the executive voice predominates would affect such independence.

c. If however, the voice of the Chief Justice of India, representing the judiciary prevails, even in a system where the executive or anyone else has a minor part to play, this will nevertheless not affect the independence and on the other hand would sub-serve independence. In other words, primacy in the matter of appointment has to be with the judiciary.

xxx

11. These are general principles enunciated by the Supreme Court based on the concept of independence of the judiciary. That concept is all pervasive and whenever that situation arises, the Court would, in the same manner as it did in the ***Second Judges' case****, interpret the present Article 124-A. This would mean that the principle of independence underlying the appointment of judges of the higher judiciary would require that the views of the three judges of the Commission, speaking with a single voice would have primacy. This would be the result not because the judgment in the* ***Second Judges' case*** *would bind the Court but because the concept of judicial independence applicable in the case of appointment of judges to the higher judiciary would be applicable wherever and whenever a situation arose where no explicit provision in the Constitution gave primacy to the judicial wing. In such cases, the validity of the constitutional provision would be upheld and legitimized exactly on the same basis as the concept was evolved in the* ***Second Judges' case****. As a result, the 99th amendment to the Constitution, would always be deemed to have been a valid exercise of Constituent power. In the absence of the existence of a 'veto', if the three Judges speak with a single voice, their decision would prevail. The President would then have to issue the warrant of appointment.*

xxx

16. Apart from the above, Petitioners have also contended that the term 'eminent person' is too broad and that the appointment of eminent persons who have nothing to do with the law and who are not aware of the working of the judicial system would result in a violation of the principle of

judicial independence. 'The rule of purposive interpretation' can be applied to this provision. By application of this rule, the Court can interpret eminent persons to mean only 'persons trained in law' or 'eminent jurists' (see in this regard, P. Vaikunta Shenoy v. P. Hari Sharma MANU/SC/8080/2007 : (2007) 14 SCC 297 @ Paras 11-13 and V.C. Shukla v. State (Delhi Amn.) (MANU/SC/0545/1980 : 1980 Supp. SCC 249 @ para 28)

The Issue

1159. There being no dispute that a Constitutional Amendment can be valid only if it is consistent with the basic structure of the Constitution, the core issue for consideration is whether the impugned amendment alters or damages the said basic structure and is void on that ground. According to the Petitioners the primacy of judiciary in appointment of judges and absence of interference by the Executive therein is by itself a part of basic feature of the Constitution being integral part of independence of judiciary and separation of judiciary from the Executive. According to the Respondents primacy of judiciary in appointment of judges is not part of independence of judiciary. Even when appointments are made by Executive, independence of judiciary is not affected. Alternatively in the amended scheme, primacy of judiciary is retained and independence of judiciary is strengthened. The amendment promotes transparency and accountability and is a part of needed reform without affecting the basic structure of the Constitution. To determine the question one has to look at the concept of basic feature which controls the amending power of the Parliament. This understanding will lead to the decision whether primacy of judiciary and absence of Executive interference in appointment of judges is part of such basic structure.

Discussion

A. Concept of Basic Features-As Limitation on Power of the Parliament to amend the Constitution

1160. Article 368 of the Constitution provides for power to amend the Constitution and procedure therefor. In ***Kesavananda Bharti v. State of Kerala*** MANU/SC/0445/1973 : 1973 (4) SCC 225 (***Kesavananda Bharti case***), the scope of amending power was gone into by a bench of 13-Judges. In the concluding para signed by 9-Judges it was held that *"Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution"*. The conclusion was based on interpretation of the word 'amendment'. It was observed that the word was capable of wide as well as narrow meaning and while wide meaning was to be preferred but consistent with the intention of Constitution makers and the context. It could not be given too wide meaning so as to permit damage to the constitutional values which depict the identity of the Constitution.[481]

1160.1. The basic structure or framework was not exhaustively defined but some of the features of the Constitution were held to be the illustrations of the basic structure by the majority of seven Judges-Sikri CJ, Shelat, Grover, Hegde, Mukherjea, Reddy and Khanna, JJ. Illustrations by them include Supremacy of the Constitution, democratic form of Government, secular character of the Constitution, separation of powers between the Judiciary, the Executive and the Legislature, federal character of the Constitution, dignity of the individual secured by basic rights in accordance with Parts III and IV, unity and integrity of the nation.[482]

1160.2. It was held that the power of the Parliament to amend the Constitution was limited by the requirement that basic foundation and structure of the Constitution remains the same. Power of amendment was envisaged to meet the challenge of the problems which may arise in the course of socio economic progress of the country but it was never contemplated that in exercise of the power of amendment certain inalienable features of the Constitution will be changed. The court referred to various decisions in different jurisdictions dealing with the scope of amendment of the Constitution. Sikri, CJ. observed that having regard to importance of freedom of the individual and the importance of economic, social and political justice, mentioned in the preamble the word "amendment" could not be read in its widest sense. The Fundamental Rights could not be amended out of existence. Fundamental features of secularism, democracy and freedom of individual should always subsist. The expression "amendment" had a limited meaning. Otherwise a political party with two-third majority could so amend the Constitution as to debar any other party from functioning, establish totalitarianism and enslave the people and thereafter make the Constitution unamendable. Thus, the appeal to democratic principles to justify absolute amending power, if accepted, could damage the very democratic principles. Thus, the amendment meant addition or change within the broad contours of the preamble of the Constitution. The Parliament could adjust the Fundamental Rights to secure the objectives of the Directive Principles while maintaining freedom and dignity of every citizen. The dignity and freedom of the individual was held to be of supreme importance. The basic features were held to be discernible not only from the preamble but the whole scheme of the Constitution. Shelat & Grover, JJ. observed that the Constitution makers did not desire that the citizens will not enjoy the basic freedoms, equality, freedom of religion etc. so that dignity of an individual is maintained. The economic and social changes were to be made without taking away dignity of the individual. The vital provisions of Part III or Part IV could not be cut out or denuded of their identity. Hegde and Mukherjea, JJ. observed that the power of amendment was conferred on the Parliament. People as such were not associated with the amendment. The Constitution was given by the people to themselves. The voice of the members of the Constituent Assembly was of the voice of the people. Two-third members of the two Houses of Parliament did not necessarily represent even the majority of the people. Thus, the two-third members of the two Houses of Parliament could not speak on behalf of the entire people of the country[483]. Even best of the Government was not averse to have more and more powers to carry out their plans and programmes which they believe to be in public interest, but freedom once lost could hardly be regained. Every encroachment of freedom sets a pattern for further encroachment. The development was envisaged without destruction of individual freedoms. Reddy, J. observed if any of the essential features was altered, the Constitutional structure could not maintain its identity. There could be no justice, liberty or equality without democracy. There could be no democracy without justice, equality and liberty. The structure of the Constitution was an organic instrument. The core commitment to social revolution lies in Parts III and IV. They are the conscience of the Constitution. They had roots deep in the struggle for independence. They were included with the hope that one day victory of people would bloom in India. They connect India's future, present and past. The demand for Fundamental Rights had its inspiration in Magna Carta, the English Bill of Rights, the French Revolution, the American Bill of Rights incorporated in the US Constitution. Referring to the statement of Dr. Ambedkar, that Article 32 was the soul of the Constitution and the very heart of it, it was observed that such an article could not be abrogated by an amendment. Khanna, J. observed that as a result of amendment, the old Constitution could not be done away with. Basic structure of framework must be retained. It was not permissible to touch the foundation or to alter the basic institutional pattern. What can be

amended is the existing Constitution and what must emerge as a result of amendment is not a new and different Constitution but the existing Constitution. What was contemplated by amendment was varying of the Constitution here and there and not elimination of its basic structure resulting in losing its identity.

1160.3. One of the questions considered was validity of Section 3 of the Twenty-Fifth Amendment Act, 1971 adding Article 31-C as follows:

416. Section 3 of the twenty-fifth amendment, reads thus:

3. After Article 31B of the Constitution, the following article shall be inserted, namely:

31. C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

The highlighted part was held by majority to be unconstitutional, for granting immunity from challenge thereby affecting the basic feature of judicial review[484].

1160.4 The scope of amending power was again considered by this Court in the course of challenge to Thirty-Ninth Amendment which debarred any challenge to the election of PM and Speaker of the Lok Sabha in ***Indira Nehru Gandhi v. Raj Narain*** MANU/SC/0304/1975 : (1975) Supp. SCC 1. Chandrachud, J. (later the Chief Justice) observed that it is not that only certain named features of the Constitution are part of its basic structure. The features named by individual judges in ***Kesavananda Bharti case*** were merely illustrations and were not intended to be exhaustive. Having regard to its place in the scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution, a feature of the Constitution could be held to be a basic feature[485]. He added that undoubted unamendable basic features are:

(i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the Nation shall be governed by a Government of laws not of men.

39th Amendment debarring challenge to election inter alia of PM was struck down as being against the basic features of the Constitution.[486] Article 329A, Clause (4) (added by way of Amendment) provided that election law will not apply to a person holding office of PM and Speaker and election of such persons shall not be deemed to be void under any such law. It was held that the democracy was the part of the basic structure which contemplated free and fair election. Without there being

machinery for resolving an election dispute, the elections could not be free and fair which in turn will damage the basic feature of democracy. In absence of any law to deal with validity of election of PM, the basic feature of rule of law will be violated. Referring to the writing of Madison in *"The Federalist"*, it was observed that all powers of the Government could not be vested in one Department. No Constitution could survive without adherence to checks and balances. "Just as courts ought not to enter into problems entwined in the "political thicket", Parliament must also respect the preserve of the courts[487]."

1160.5. Validity of Forty-Second Amendment was considered by this Court in ***Minerva Mills Ltd. v. Union of India*** MANU/SC/0075/1980 : (1980) 3 SCC 625. The court considered the validity of Sections 4 and 55 of the 42nd Amendment Act. By Section 4, Article 31C was sought to be amended to provide that a law giving effect to Part IV of the Constitution could not be deemed to be void for being inconsistent with Articles 14, 19 and 31 and could not be challenged on the ground that the said law was not for giving effect to the said Part IV. By Section 55, it was provided that no amendment of the Constitution could be challenged on any ground and that there will be no limitation on the constituent power of Parliament to amend the Constitution. This Court observed that the Constitution had conferred limited amending power on the Parliament which itself was a basic feature of the Constitution. The Parliament could not expand its amending power so as to destroy the said basic feature of the Constitution. The limited power could not be converted into unlimited one. Clauses 4 and 5 of Article 368 added by Forty-Second Amendment were struck down as violative of basic structure of the Constitution. It was observed that the balance between Part III and Part IV of the Constitution was basic feature of the Constitution[488]. Limited amending power of Parliament was also part of basic structure.[489] It was also held that judicial review to determine whether a law was to give effect to Part IV could not be excluded as judicial review was part of the basic structure.[490] It was also observed that though there is no rigid separation of powers in three departments of the State-the Executive, the Legislature and the Judiciary, there is broad demarcation. Fine balance between the three organs could not be upset as it will destroy the fundamental premise of a democratic government. The judiciary is entrusted with the duty to keep the Executive and the Legislature within the limits of power conferred on them which is also a basic feature of the Constitution.[491]

1160.6. In ***L. Chandra Kumar v. Union of India*** MANU/SC/0261/1997 : (1997) 3 SCC 261, part of Article 323-A(2)(d) and 323-B(3)(d) to the extent it excluded the jurisdiction of High Courts in respect of specified matters for which jurisdiction was conferred on Tribunals was struck down as violative of basic structure. Power of judicial review conferred on this Court and the High Courts was held to be integral to constitutional scheme in view of earlier decisions and conferment of power of judicial review on another judicial body could not justify exclusion of jurisdiction of the High Courts.[492]

1160.7. In ***I.R. Coelho v. State of Tamil Nadu*** MANU/SC/0595/2007 : (2007) 2 SCC 1, bench of nine Judges, considered the scope of judicial review of inclusion of a law in Ninth Schedule by a constitutional amendment thereby giving immunity from challenge in view of Article 31Bof the Constitution. It was held that every such amendment shall have to be tested on the touchstone of essential features of the Constitution which included those reflected in Articles 14, 19 and 21 and principles underlying them. Such amendments are not immune from the attack on the ground they destroy or damage the basic structure. The Court will apply the *'rights test'* and the 'essence of the

rights' test taking synoptic view of Articles in Part III of the Constitution. It was further observed that the Court has to be guided by the *'impact test'* in determining whether a basic feature was violated. The Court will first determine if there is violation of rights in Part III by impugned Amendment, its impact on the basic structure of the Constitution and the consequence of invalidation of such Amendment[493].

1160.8. In ***M. Nagaraj v. Union of India*** MANU/SC/4560/2006 : (2006) 8 SCC 212, Eighty-Fifth and allied amendments to the Constitution were called in question on the ground of violation of right of equality as a basic feature of the Constitution. While considering the challenge, it was observed that the Constitution sets out principles for an expanding future. This called for a purposive approach to the interpretation. It was observed that a constitutional provision must not be construed in a narrow sense but in a wide and liberal sense so as to take into account changing conditions and emerging problems and challenges. The content of the rights is to be defined by the Courts. Some of the concepts like federalism, secularism, reasonableness and socialism reasonableness are beyond the words of a particular provision. They give coherence to the Constitution and make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules. To qualify as essential feature, a principle has to be established as part of constitutional law and as such binding on the legislature. Only then, it could be examined whether it was a part of basic feature. Theory of basic feature was based on concept of constitutional identity. The personality of the Constitution must remain unchanged. The word 'amendment' postulated that the Constitution survived without loss of identity despite the change.[494]

Conclusion:

1160.9. It can safely be held that a constitutional amendment has to pass the test of basic structure. Whether or not the basic structure was violated has to be finally determined by this Court from case to case.

B. Whether Primacy of Judiciary in Appointment of Judges is Part of Basic Structure

1161. Whether a feature of the Constitution is basic feature or part of basic structure is to be determined having regard to its place in the scheme of the Constitution and consequence of its denial on the working of the Constitution.

1161.1. The judiciary has been assigned the role of determining powers of every Constitutional organ as also the rights of individuals. The disputes may arise between the Government of India and the States, between a citizen and the State or between a citizen and a citizen. Disputes relating to the powers of Union Legislature and the State Legislature or the exercise of the executive power may involve issues of constitutionality or legality. It may involve allegations of malafides even against highest constitutional dignitaries. This requires an impartial and independent judiciary. The judiciary is required to be separate from the executive control. Judiciary has to inspire confidence of the people for its impartiality and competence. It has not been disputed by learned Attorney General that independence of judiciary is part of the basic structure. It is also undisputed that judicial review is part of basic structure. The decisions of this Court expressly lay down that independence of judiciary and judicial review are part of basic structure. Broad separation of

powers between the three departments of the State is a part of doctrine of checks and balances. It is also a part of democracy. Independence of judiciary is integral to the entire scheme of the Constitution without which neither primacy of the Constitution nor Federal character, Social Democracy nor rights of equality and liberty can be effective.

1161.2. The judiciary has apolitical commitment in its functioning. Once independence of judiciary is acknowledged as a basic feature of the Constitution, question is whether power of appointing Judges can be delinked from the concept of independence of judiciary or is integral part of it. Can the independence of judiciary be maintained even if the appointment of Judges is controlled directly or indirectly by the executive?

1161.3 To what extent primacy of judiciary in appointment of judges is part of unamendable basic feature of the Constitution. Since the issue has been gone into in earlier binding precedents, reference to such decisions is apt. As already mentioned, it remains undisputed that power of judicial review, independence of judiciary, broad separation of powers in three departments of the State, federalism and democracy are the basic features of the Constitution. Stand of the Respondents is that power of appointment of judges does not have impact on such basic features as independence of judges is envisaged post appointment. By an amendment, process of appointment of judges can be altered to reduce the role of judiciary and to increase the role of Executive and Legislature. Alternatively, it is submitted that no substantial change has taken place in the said roles.

1161.4 In ***Second Judge's case***, a Bench of 9-Judges of this Court examined the question of interpretation of unamended constitutional scheme dealing with the appointment of judges of the Constitution case. The issue was referred to the Bench of 9-Judges on account of doubts having arisen as to the correctness of the view expressed in ***S.P. Gupta v. Union of India***[495] (First Judges' case), laying down that primacy in the matter of appointment of judges rested with the Central Government[496]. The basis of the said decision was that the word 'consultation' used in Articles 124, 217 etc. implied that the views of the consultee need not be treated as binding as the ultimate power of appointment rested with the Central Government. It was held that the views of the CJI or other Judges who were consulted may be entitled to great weight but the final view in case of difference of opinion could be taken by the Central Government. The word 'consultation' could not be read as 'concurrence'.

1161.5 The view taken was doubted in ***Subhash Sharma v. Union of India*** MANU/SC/0643/1990 : 1991 Supp (1) SCC 574-Paras 31-34, 42-46. The question whether opinion of CJI with regard to appointment of Judges was entitled to primacy was referred for consideration of a larger bench, as already mentioned. This Court observed that Constitutional phraseology was required to be read and expounded in the context of Constitutional philosophy of separation of powers and the cherished values of judicial independence. The role of the CJI was required to be recognised as of crucial importance for which the view taken in ***First Judges***' case required reconsideration by a larger Bench. It was noted that there was an anxiety on the part of the Government of the day to assert choice in selection of Judges and if the power to recommend appointment of Judges was vested in the State Government or the Central Government, the picture was likely to be blurred and process of selection may turn out to be difficult. It was also observed that the judiciary had apolitical commitment and the assurance of non-political complexion of judiciary should not be

divorced from the process of appointment. The phrase "consultation" had to be understood consistent with and to promote the constitutional spirit. The constitutional values could not be whittled down by calling the appointment of judges as an executive act. The appointment was rather the result of collective constitutional process. It could not be said that power to appoint solely vested with the executive or that the executive was free to take such decision as it deems ft after consultation with the judiciary. The word "consultation" was used in recognition of the status of high constitutional dignitary and could not be interpreted literally. Moreover, the appointment not recommended by Chief Justice of the State and the CJI would be inappropriate and arbitrary exercise of power. The CJI should have preponderant role. Primacy of CJI will improve the quality of selection. The view of the Chief Justices of States and CJI should be decisive unless the executive had material indicating that the appointee will be undesirable. The view of the majority in ***First Judges' case*** did not recognise the said pivotal position of the institution of the CJI and correctness of the said opinion required reconsideration. It was noted that the Union Government had often stated before Parliament and outside that as a matter of policy it had not made any appointment without the name being given by the CJI and the executive must be held to the standard by which it professed its actions to be judged. Upon reference to larger Bench, the view taken in ***First Judges case*** was overruled in ***Second Judges' case*** which was reiterated in the ***Third Judges case***. It held that the term "consultation" in Article 124 should not be literally construed. It was to be construed in the constitutional background of its purpose and to maintain and uphold independence of judiciary. So interpreted, it was held that in the event of conflicting opinions of the constitutional functionaries, the opinion of the judiciary as symbolized by the view of the CJI and formed in the manner indicated, would have primacy.

1161.6 Pandian, J. held that the requirement of consultation was not relatable to any other service and only applied to appointment of judges in contrast to other high ranking offices. The consultation with the CJI was condition precedent for appointment and advice given by the judiciary in the process had sanctity. The executive power of appointment comes into play by virtue of Articles 74 and 163 though it was not specifically provided for in Articles 124 and 217. The State was major litigant. The superior courts were faced with controversies with political favour and in such a situation if the executive had absolute say in appointment of judges, the independence of judiciary will be damaged. The Law Commission Reports and opinion of jurists suggested radical change in appointment of judges by curbing the executive power[497].

1161.7 Kuldip Singh, J. observed that the concept of judicial independence did not only mean the security of tenure to individual judges. There has to be independence of judiciary as an institution so that it could effectively act as an impartial umpire between the Governments and the individuals or between the Governments inter se. It would be illogical to say that the judiciary could be independent when power of appointment vested in the Executive. The framers of the Constitution never intended to give this power to the Executive which was the largest litigant before the courts[498]. There was established constitutional convention recognising the primal and binding opinion of CJI in the matter of appointment of judges. All appointments since the commencement of the Constitution were made with the concurrence of the CJI. The 14th Report of the Law Commission and discussion in the Parliament on 23rd and 24th November, 1959 were referred to[499]. With regard to the statement of Dr. Ambedkar on 24th May, 1949 before the Constituent Assembly that the CJI could not be given a veto on appointment of judges, it was observed that primacy of

the CJI acting in representative as against individual capacity would not be against the objective of the said statement[500].

1161.8 Verma, J. observed that the scheme of the Constitution of separation of powers, with the Directive Principles of separation of judiciary from Executive, and role of the judiciary to secure rule of law required that appointment of judges in superior judiciary could not be left to the discretion of the Executive. Independence of judges was required even at the time of their appointment instead of confining it to the provisions for security of tenure and conditions of service. It was necessary to prevent influence of political consideration on account of appointments by the Executive. In choice of a candidate, opinion of CJI should have greatest weight. The role of the Executive in the participatory consultative process was intended to be by way of a check on the exercise of power by the CJI. The Executive element was to be the minimum to eliminate political influence[501].

1161.9 Accordingly, conclusions were recorded in para 486 to the effect that initiation of proposal for appointment and transfer could be initiated by the judiciary and in case of conflicting opinions, the opinion of the CJI had the primacy. In exceptional cases the appointment could be declined by disclosing the reasons but if the reasons were not accepted by the CJI acting in representative capacity, the appointment was required to be made as a healthy convention. The CJI was to be appointed by seniority. The senior most judge, considered ft to hold the office, was to be the CJI.

1161.10 Conclusions in ***Third Judges'*** case in para 44 reiterated this view with only slight modification. On that basis, memoranda of procedure mentioned in earlier part of this opinion were issued. The National Commission to Review the Working of the Constitution (NCRWC) headed by Justice M.N. Venkatachaliah, in its report dated 31st March, 2002, observed that appointment of judges was part of independence of judiciary. It was observed that the Executive taking over the power of appointment and playing a dominant role will be violative, of basic structure of the Constitution, of independence of judiciary[502].

1161.11 Contention of the Petitioners is that the said decisions conclusively recognise primacy of judiciary in appointment of judges inferred from the scheme of the Constitution and such primacy was part of basic structure.

1161.12 It is submitted that if the Executive has primacy, the power of appointment of Judges can be used to affect or subvert the independence of the appointees as members of the Constitutional Courts. This would be against the intention of the Constitution makers. The unamended provision could not be replaced by the new mechanism unless the new mechanism ensured that a role of the Judiciary was not decreased and the role of the Executive was not increased and the change made had no adverse impact on the functioning of the Constitution. If this contention is upheld, the impugned amendment will have to be struck down unless it could be held that the amended provisions also retained the said primacy. If primacy of judiciary is held not to be a part of basic structure of the Constitution or it is held that the same is still retained, the amendment will have to be upheld.

C. Plea of the Respondents for re-visiting earlier binding precedents

1162. The correctness of the view taken in the above decisions was sought to be challenged by learned Counsel for the Respondents. The ground on which reconsideration of the earlier view is sought is that the interpretation in ***Second and Third Judges cases*** is patently erroneous. Members of the Constituent Assembly never intended that the CJI should have last word on the subject of appointment of Judges. The text which was finally approved and which became part of the Constitution did not provide for concurrence of the CJI as has been laid down by this Court. It is also submitted that the interpretation taken by this Court may have been justified on account of the abuse of powers by the Executive specially during emergency (as noticed in ***Union of India v. Sankalchand Himatlal Sheth*** MANU/SC/0065/1977 : 1977 (4) SCC 193 (referred to in Paras 125 to 130 Second Judges' case)) and in the Law Commission Reports (particularly 14th and 121st Reports), the same situation no longer continues. More over there is global trend for Judicial Appointment Commissions. Even without primacy of the judiciary in appointment of judges, the judiciary could function independently. Judicial Appointment Commission was suggested even earlier. The eminent jurists had criticized the existing mechanism for appointment of Judges and particularly the working of the collegium system.

1161.1 Referring to the scheme of Chapter IV of the Constitution, learned Attorney General submitted that Executive and the Legislature had the role in the working of the judiciary. Salary and Conditions of Service of Judges are fixed by the Parliament. The Rules for functioning of the Supreme Court are framed with the approval of the President and are subject to the law made by the Parliament. Parliament could confer supplementary powers on the Supreme Court. Conditions of service of officers and servants of the Supreme Court are subject to law made by the Parliament. The rules framed by the CJI require approval of the President. There was inter play of Executive and Legislature in the functioning of the judiciary. Independence of judges was in respect of their security of tenure and service conditions. Manner of appointment did not affect independence of judiciary. Executive appointing Comptroller General of India or Election Commission did not affect their independence. Power of appointment of judges is the Executive power to be exercised by the President with the advice of the Council of Ministers after consultation with the judiciary. The doctrine of separation of powers or separation of judiciary from Executive does not require that the Executive could have no role in appointment of judges. Primacy of judiciary in appointment of judges ignores the principles of checks and balances. The interpretation placed in the earlier decisions ignores the principles of transparency and accountability. Even without there being manifest error in earlier decisions, having regard to the sensitive nature of the issue and also the fact that an amendment has now been brought about, the earlier decisions need to be revisited.

1162.2 The stand of learned Attorney General and other learned Counsel appearing for the Respondents was contested by learned Counsel for the Petitioners. It was submitted that all issues sought to be raised by the Respondents were duly considered by the Bench of nine-judges. The Central Government sought opinion of this Court Under Article 143. A statement was made by the then learned Attorney General that the ***Second Judges' case*** was not sought to be reconsidered. The view of the nine-Judge Bench was based on earlier binding decisions in ***Shamsher Singh v. State of Punjab*** MANU/SC/0073/1974 : 1974 (2) SCC 831 and Sankalchand case (supra) laying down that the last word on such matters was of the CJI. The expert studies and the Constituent Assembly Debates ruled out pre-dominant role for the Executive or Legislature in appointment of judges. The constitutional scheme did not permit interference of the Executive in appointment of judges. The Executive could give feed back and carry out the Executive functions by making

appointments but the proposal had to be initiated and finalised by the judiciary. Frequent reconsideration of opinions by larger Benches of this Court was not desirable in absence of any doubt about the correctness of the earlier view.

1162.3 Parameters for determining as to when earlier binding decisions ought to be reopened have been repeatedly laid down by this Court. The settled principle is that court should not, except when it is demonstrated beyond all reasonable doubts that its previous ruling given after due deliberation and full hearing was erroneous, revisit earlier decisions so that the law remains certain.[503] In exceptional circumstances or under new set of conditions in the light of new ideas, earlier view, if considered mistaken, can be reversed. While march of law continues and new systems can be developed whenever needed, it can be done only if earlier systems are considered unworkable[504].

1162.4 No such situation has arisen. On settled principles, no case for revisiting earlier decisions by larger Benches is made out. As regards the contention that there was patent error in the earlier decisions, the ***Second Judges' case*** shows that the Constituent Assembly Debates are exhaustively quoted and considered. Neither the debates nor the text adopted by the Constitution show that the power of appointment of Judges was intended to be conferred on the Executive or the Legislature. The word 'consultation' as interpreted and understood meant that the final word on the subject of appointment of Judges was with the CJI. The practice and convention ever since the commencement of the Constitution showed that proposal for appointment was always initiated by the Judiciary and the last word on the subject belonged to the CJI. This scheme was consistent with the intention of the Constitution makers. All the points now sought to be raised by learned Attorney General have been exhaustively considered in the ***Second Judges case***. The contention that earlier situation of Executive interference has now changed also does not justify reconsideration of the earlier view. If the situation has changed, there can be no reason for change of the system which is functioning as per the intention of the Constitution makers when such change will be contrary to basic structure which is not constitutionally permissible. The objection as to deficiencies in the working of the collegium system will be subject matter of discussion in the later part of this judgment. Individual failings may never be ruled out in functioning of any system. The Judicial Appointment Commissions earlier considered were not on the same pattern. Initially proposal to set up Judicial Commission was made prior to ***Second Judges case***, with the object of doing away with the primacy of the Executive as laid down in ***First Judges case***. In Sixty-Seventh Amendment Bill, in the Statement of Objects and Reasons, it is mentioned that the object of setting up of Commission was to 'obviate the criticism of arbitrariness on the part of the Executive'[505]. Ninety-Eighth Amendment Bill, 2003 was introduced with a different composition on recommendation of National Commission to review the working of the Constitution. One-Twentieth Amendment Bill, 2013 did not provide for any composition and left the composition to be provided for by the Parliament. Validity of such proposed Commissions was never tested as such Commissions never came into existence.

1162.5 The Judicial Commissions in other countries and provisions of Constitutions of other countries conferring power on the Executive to appoint Judges may also not call for reconsideration of the ***Second Judges' case*** as many of such and similar provisions were duly considered in the ***Second Judges' case*** to which reference will be made. No case is thus made out for revisiting the earlier decisions in ***Second and Third Judges' cases***.

D. <u>Consequential consideration of issue of primacy of judiciary in appointment of judges as part of basic structure</u>.

1163. The earlier decisions in ***Second and Third Judges' case*** have to be taken as binding precedents. Once it is so, it has to be held that primacy of the judiciary in appointment of judges is part of the basic structure. Appointment of judges is part of independence of judiciary. It is also essential to uphold balance of powers between Legislature, Executive and Judiciary which by itself is key to the functioning of the entire Constitution. The judiciary is entrusted the power to control the power of the Executive and the Legislature whenever it is alleged that the said organs have exceeded their constitutionally assigned authority. This is the essence of the democracy. Learned Counsel for the Petitioners highlighted that at times exercise of powers of Judicial Review by the Constitutional Courts may not be to the liking of the Executive or the Legislature. Particular instances have been given of decisions of this Court in ***2G Spectrum case***[506] and ***Coal Scam case***[507] where actions of the Executive were found to be violative of constitutional obligations causing huge loss to public exchequer. It was submitted that arbitrary distribution of State largess by way of giving scarce resources or contracts or jobs or positions of importance akin to 'spoil system' have been held by this Court to be in violation of the Constitution. Policies of the State for arbitrary acquisition of land or in violation of environmental laws have been struck down by this Court. Dissolution of State Assemblies and dismissal of State Governments have also been struck down by this Court[508]. This Court also had to deal with the issues arising out of decisions of Speakers in recognizing or otherwise the defections in Central or State Legislatures[509]. There are enumerable instances when the Courts have to deal with validity of Legislative or Executive decisions of far reaching nature. It is the faith of the people in the impartiality and competence of judiciary which sustains democracy. If appointment of judges, which is integral to functioning of judiciary is influenced or controlled by the Executive, it will certainly affect impartiality of judges and their functioning. Faith of people in impartiality and effectiveness of judiciary in protecting their constitutional rights will be eroded.

1163.1 Submissions of learned Attorney General are that even if appointment of judges is held to be part of independence of judiciary, choice of a particular model is not part of basic structure. The role of the Executive cannot be denied altogether nor there can be any objection to members of civil society being included in the process of appointment. The primacy of judiciary in appointment of judges is not an absolutist ideal. Power of appointment has to be seen in the light of need for checks and balances. Independence of judiciary is not a uni-dimensional test. There could be inter mingling of other wings in the process of appointment of judges. After repeal of Articles 124 and 217, basis of ***Second Judges' case*** did not survive. Primacy of judiciary in appointment of judges is only in the context of stopping wrong appointment or preventing pre-dominance of the Executive. Even if primacy of judiciary was recognized at a given point of time, the same could apply only till the Constitution is amended. Two eminent persons could be laymen to give societal view point. The Law Minister was made a member of the Commission for accountability and transparency. As laid down in ***I.R. Coelho case***, inspite of separation of powers, different branches of the Government could have overlapping functions[510]. In ***Sahara India Real Estate Corporation Ltd. v. SEBI*** MANU/SC/0735/2012 : (2012) 10 SC 603, it was observed that under the Constitution there are different values which must be balanced. Thus, independence of judiciary, checks and balances, democracy and separation of powers are to be considered as a whole. He referred to the background of supersession of judges in the year 1973 and 1977 and selective

transfer of judges during emergency as noted in 121st Report of the Law Commission[511]. The report records that in 1976, sixteen judges were transferred from the respective High Courts in which they were functioning to other High Courts. This was perceived to be an act of interference with the judiciary. Circular of the then Law Minister providing for transfer and short term appointment of judges considered in ***First Judges***' case was taken in the said report as the executive interference. The report also mentioned the concern arising out of supersession in appointment of CJI, non confirmation of additional judges, transfer of judges giving rise to apprehension of erosion of independence of judiciary at the hands of the Executive. It was concluded that the model then prevalent (with the primacy of the Executive) had failed to deliver the goods. This led to introduction of 67th Amendment Bill, 1990.

1163.2 The contentions of learned Attorney General cannot be accepted. The matter having been gone into in great details in above binding precedents which do not require reconsideration, I do not consider it necessary to repeat in detail the discussion which has been recorded in the said decisions.

1163.3 In ***Second Judges' case***, following findings have been recorded:

(i) The word 'consultation' used in Articles 124, 217 and 222 of the Constitution meant that the opinion of consultee was normally to be accepted thereby according primacy to the judiciary;

The Executive being major litigant and role of judiciary being to impartially decide disputes between citizen and the State, the Executive could not have decisive say in appointing judges;

Doctrine of separation of powers under the Constitution required primacy of judiciary in appointing judges;

Since traits of candidates could be better assessed by the Chief Justice, the view of the Chief Justice as to suitability and merit of the candidate had higher weight;

The Chief Justice of India was not to make a recommendation individually but as representing the judiciary in the manner laid down, that is, after consulting the collegium; and Primacy of judiciary in appointment of judges is part of independence of judiciary and separation of powers under the Constitution.

1163.4 Referring to the constitutional scheme, its background and interpretation, irrespective of the literal meaning of the language employed in Articles 214 and 217 of the Constitution, it was observed that initiation of proposal must always emanate from the Chief Justice of the High Court/CJI (in representative capacity as laid down) and last word on any objection thereto should be normally of the CJI.[512]

1163.5 Reference was made to the interpretation of the word 'consultation' in the context of appointment of judges in earlier judgments in ***Chandra Moulishwar Prasad v. Patna High Court*** MANU/SC/0495/1969 : 1969 (3) SCC 56, Shamsher Singh and Sankalchand cases. It was held that "in practice, the last word in such sensitive subject must belong to CJI, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order."

1163.6 Reference was also made to the statement of Dr. Ambedkar that it was dangerous to give power to appoint judges to the Executive or with concurrence of the Legislature.[513] Further statement that it was dangerous to give veto power to CJI was explained to mean that the CJI must act not in individual capacity but after consulting senior judges.[514]

1163.7 Needless to say that the Constitution of India is unique. While reference to other Constitutions can be made for certain purposes[515], the basic features of Indian Constitution (which may be distinctly different from other Constitutions) have to be retained and cannot be given a go bye. In the above judgment, in the context of working of Indian Constitution, it was held that the role of Executive and Legislature in appointment of judges could not be predominant. Even in the Constituent Assembly, models of other countries were not found to be suitable to be followed in India[516]. As already mentioned the Government of India appointed First Law Commission headed by Shri M.C. Stealvad to review the system of judicial administration and all its aspects. The Commission expressly mentioned that the Executive interference in appointment of Judges has not been congenial to independence of judiciary. The Commission noted that the Chief Ministers were having direct or indirect hand in appointment of Judges which results in appointments being made not on merit but on considerations of community, caste, political affiliations. The Chief Minister holding a political office is dependent on the goodwill of his party followers. The recommendation of the CJI is more likely to be on merit. An opinion noted in the report mentions that if the Executive continued to have powerful role, the independence of judiciary will disappear and the Courts will be filled with Judges who owe from appointments to politicians[517]. It was recommended that the hands of CJI should be strengthened and instead of requiring consultation it should require recommendation by the CJI[518]. There should be requirement of concurrence of the CJI[519]. The Report was discussed in the Parliament and the then Home Minister declared that the Executive was only an order issuing authority and appointments were virtually being made by the CJI. This statement was reiterated by the then Law Minister[520]. Again in 121st Report, it was observed that appointment of Judges with Executive influence was not conducive to healthy growth of judicial review. Trends all over the world indicate that power of the Executive in appointment of Judges was required to be diluted[521]. The ***Second Judges' case*** took care of the ground realities in the light of constitutional convention. It held that the CJI was better equipped to select the best and for appointments being free from Executive domination to inspire public confidence in impartiality and consistent with the principle of separation of Judiciary from Executive and also consistent with the spirit of Constitution makers. The principle of primacy was recognised and appointment of Judges was held to be integral to the independence of judiciary[522]. To check arbitrary exercise of power by any individual, it was made mandatory that the Chief Justices consult senior Judges. Thus, primacy of judiciary was recognized in initiating proposal as well as in taking final decision[523]. However, participation of the Executive in giving inputs by suggesting names before the proposal was initiated or giving feedback even after the proposal was initiated was permissible. It was noted that right from beginning of the Constitution, all the proposals for appointments were always initiated by the Chief Justices[524]. View in ***First Judges' case*** that primacy in appointment of Judges was of the Central Government was held to be erroneous by larger Bench inter alia for following reasons:

(i) The judiciary has apolitical commitment and if power of appointment of judges is given to the Executive, this will affect independence of judiciary[525];

(ii) Rule of law requires that justice is impartial and people have confidence in judiciary being separate and independent of the Executive so that it can discharge its functions of keeping vigilant watch for protection of rights even against the Executive[526];

(iii) Judiciary has key role in working of the democracy and for upholding the rule of law[527];

(iv) The constitutional scheme provides for mandatory consultation with the CJI since the CJI was better equipped to assess the merit of the candidate which consultation was not provided for in respect of other high constitutional appointments[528].

(v) The appointment of judges was inextricably linked with the independence of judiciary and even in the matter of appointment of district judges, the conclusive say was of the High Courts and not of the Government[529].

(vi) Even in countries where power of appointment of judges was with the Executive, there is demand/proposal for minimizing the role of the Executive[530].

(vii) The effort of the Executive to have say in appointment of judges was found by expert studies to be not congenial to the independence of judiciary[531]. Reference was made to the 14th Report of the Law Commission that if the Executive had powerful voice in appointment of judges, the independence of judiciary will disappear and the courts will be filled with judges who owe their appointments to the politicians. Reference was also made to 121st Report of the Law Commission to the effect that even in UK there was thinking to create a check on the power of the Executive to select and appoint judges.

(viii) Consultation with the CJI was not envisaged by the Constitution makers to be of formal nature but implied that great weight was to be given so that the last word belonged to the CJI[532].

(ix) Article 50 and the background of its enactment spells out the mandate for appointment of judges being taken away from the Executive and its transference to the judiciary.[533]

1163.8 In the above background, the forceful contention of learned Attorney General that the scheme of the Constitution did not envisage primacy of judiciary but only mandatory consultation with the CJI and optional consideration with such other judges as may be considered necessary cannot be accepted, even if it is so suggested by the literal meaning of the words used in the text of the provision. It may be mentioned that the word 'consultation', on account of the scheme of the Constitution, was held to carry special meaning, on a purposive interpretation. The interpretation was not based solely on the word 'consultation' but on scheme of independence of judiciary. The contention that independence of judiciary was not affected even when the Executive made the appointment is contrary to the expert studies and well considered decisions of this Court. The acknowledged scheme of the Constitution and its working is not to allow domination of the Executive in appointment of Judges. Such domination affects independence of judiciary, public faith in its impartiality (when the Government is major litigant), brings in extraneous considerations, compromises merit, weakens the principles of checks and balances and separation of judiciary from the Executive. Thus, by substitution of the words, the Parliament could not interfere with the primacy of judiciary in appointment of judges and thereby interfere with the

basic feature of the Constitution. It may be mentioned that use of similar expression in Article 74 of the Constitution in the context of Executive power of the President to act on "aid and advice" of Council of Ministers was held to mean that the President was only a formal head.[534] It cannot be suggested that by amendment of the expression used, constitutional scheme of the President being formal head can be changed as such amendment will be repugnant to the basic structure of the Constitution. Likewise, even by amendment primacy of judiciary in appointment of judges cannot be excluded. Such primacy existed not merely by word 'consultation' but by virtue of role of judiciary in working of the Constitution, by CJI being better suited to assess merit of the candidate and on account of Executive being major litigant. There is no change in these factors even after amendment. It is not thus a question of change of model or of available choice with the Parliament. Plea of presumption of constitutionality can be of no avail where an established basic feature of the Constitution is sought to be damaged. Similarly, the plea that Parliament is best equipped to assess the needs of the people is not enough reason to extend the power of Parliament to amend the basic feature of the Constitution. The change of time does not justify greater role for the Executive in appointment of judges. The plea of overlapping role of different Departments of the Government is against the basic structure as far as appointment of judges is concerned.

1163.9 While it is true that the Legislature can even retrospectively clarify its intention and thereby bring about a change in law[535], in the present context meaning of the unamended provision was not based merely on the words used but also the entire scheme of the Constitution particularly the independence of judiciary. It has been held that in the context of the Indian Constitution, having regard to the consistent past practice and to avoid political interference in appointment of judges, and also on account of the CJI/CJ being better equipped to assess the merit of a candidate, proposal must always be initiated by the CJI/CJ and the CJI must also have final word on the subject. It can hardly be doubted that the Constitution is a dynamic document and has to be interpreted to meet the felt needs of times and cannot bind all future generations. At the same time, it is also now well settled that the amending power is limited to non essential/non basic features and does not extend to altering the basic features and framework of the Constitution. Primacy of judiciary is certainly a part of the basic feature of the Constitution. If primacy of judiciary in the appointment of judges is held to be not a part of basic feature, the Parliament may be free to confer the said power on the Executive or the Legislature or to any other authority which can certainly compromise the independence of judiciary. It will also in turn disturb the doctrine of separation of powers and other basic features like rule of law, democracy and federalism and working of the Constitution as a whole. Independence of judiciary is key element in the entire functioning of the Constitution and such independence is integrally linked with the appointment of judges free from Executive interference. The alternative submission of Shri Venugopal, learned senior Counsel appearing for the State of Madhya Pradesh in Paras 4 and 8 (reproduced in para 13 above) also supports the conclusion that appointment of judges is part of independence of judiciary and primacy of judiciary in appointment of judges is required to be retained. The power of appointment of judges cannot be exercised by the Executive as the same will affect independence of judiciary. Even after the original provisions are amended, this principle is still applicable.

1163.10 At this stage, it may be mentioned that any perceived shortcoming in the working of existing mechanism of appointment of judges cannot by itself justify alteration or damage of the existing scheme once it is held to be part of basic feature. As Dr. Ambedkar observed[536]:

The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics.

To the same effect Dr. Rajendra Prasad said:

If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.

Even a good system may have shortcomings in its working on account of individual failures. It may be mentioned that criticism of working may be leveled against working of every organ of the Constitution including the Executive and the Legislature and while all efforts must be continuously made to bring about improvement in every sphere, the basic scheme set up by the Constitution cannot be given a go bye on that ground. It is not necessary to comment upon how good or bad any constitutional authorities have performed in discharge of their duties or how good or bad the judiciary has performed, as the limited question for consideration of the Court is to identify and retain the basic structure of the Constitution in appointment of judges. The improvement in working of existing system of appointment of judges can be the subject matter of separate consideration which is being proposed but certainly without giving a go bye to the basic features of the Constitution of independence of judiciary. In ***Manoj Narula v. Union of India*** MANU/SC/0736/2014 : 2014 (9) SCC 1, question considered was how persons with criminal antecedents could be prevented from being appointed as Ministers. There was also reference to the concern as to how persons with such antecedents could be prevented from being legislators. This Court held that the issue has to be dealt with by those to whom the Constitution has entrusted the responsibility and this Court could only enforce the constitutional scheme.

1163.11 At this stage, it may be mentioned that the claim of learned Attorney General that the Parliament represented the will of the people or that the amendment represented the will of the people and interference therewith will be undesirable is contrary to the law laid down in ***Kesavananda Bharti case*** (supra)[537]. The will of the people is the Constitution while the Parliament represents the will of the majority at a given point of time which is subordinate to the Constitution, that is, the will of the people. The Constitution was supreme and even Parliament has no unlimited amending power. Learned Attorney General rightly submitted that the last word on the validity of a constitutional amendment is of this Court. Even if the judiciary is not an elected body, it discharges the constitutional functions as per the will of the people reflected in the Constitution and the task of determining the powers of various constitutional organs is entrusted to the judiciary[538].

Conclusion:

1163.12 Accordingly, I hold that primacy of judiciary and limited role of the Executive in appointment of judges is part of the basic structure of the Constitution. The primacy of judiciary

is in initiating a proposal and finalising the same. The CJI has the last word in the matter. The Executive is at liberty to give suggestions prior to initiation of proposal and to give feedback on character and antecedents of the candidates proposed and object to the appointment for disclosed reasons as held in ***Second and Third Judges'*** cases.

E. <u>Whether the Impugned Amendment alters or damages the basic structure</u>

1164. In the above background, the only question which remains to be considered is whether under the impugned amendment the basic feature of primacy of judiciary in appointment of judges has been altered or damaged.

1164.1. Learned Attorney General submitted that basic structure comprises many features like several pillars in a foundation, some of which are enumerated in opinions rendered in Kesavananda Bharti case. In judging the validity of a constitutional amendment, test is whether the amendment would lead to collapse of the Constitution. Merely affecting or impinging upon an Article embodying a feature that is part of the basic structure was not sufficient to declare an amendment unconstitutional. Violation of basic structure of the constitution must be such that the structure itself would collapse. He also relied upon the observations in ***Bhim Singh Ji v. Union of India*** MANU/SC/0509/1980 : (1981) 1 SCC 166 particularly the following observations:

Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty. But to permit the Bharati ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function. Nor can the constitutional fascination for the basic structure doctrine be made a trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the 'basic structure' missile.

and following observations in ***Ashoka Kumar Thakur v. Union of India*** MANU/SC/1397/2008 : (2008) 6 SCC 1:

There are large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs.

1164.2. Applying the above tests it was submitted that the Ninety-Ninth Amendment was consonant with and strengthens the independence of judiciary while upholding the democracy, rule of law and checks and balances. NJAC is in sync with the needs of time and is modelled on checks and balances to ensure a democratic process with plurality of views. NJAC dilutes power of executive in favour of the judiciary. He submitted that identity test was required to be applied which means that after the amendment the amended Constitution loses the identity of the original Constitution. There is no bar to making changes and to adopt the Constitution to the requirements

of changing times without touching the foundation or altering the basic constitutional pattern. He further relied upon the observations in the ***Indira Gandhi*** and ***Minerva Mills Ltd. cases*** (supra).

1164.3. The learned Attorney General further submitted that the object of the amendment is to broad base the collegiate body so as to provide for participatory and collective role to the judiciary, the executive and the civil society. The executive has only one member, the Law Minister. The object of having the Law Minister is to provide information about the candidates which information the other members may not have. The eminent persons will be independently appointed by a committee comprising of the PM, the CJI and the Leader of Opposition. In this way there is no abrogation of independence of judiciary. Moreover, three of the six members are from the judiciary and thus, the right to reject was available to the judges, while the executive alone cannot exercise the right to reject. Even in ***Second Judges' case*** it is observed that the process of appointment is a participatory process. An area relating to suitability of candidates such as his antecedents and personal character may be better known to consultees other than the CJI. The expression, 'eminent person' is well known and it means distinguished in character or attainments or by success in any walk of life. The expression 'distinguished' is used in Article 124(3) providing for eligibility criteria for judges of the Supreme Court. Since the high powered committee comprising three high functionaries is to appoint an eminent person, there is sufficient safeguard against any uncanalised power. The principles of constitutional trust apply to the high powered committee which can be trusted to select the most appropriate persons. Such eminent persons shall provide inputs for the qualities which make a person suitable for appointment as a judge. Diversity in composition of the Commission will mitigate the danger of cloning. In other bodies also there are provisions for non judges. For example, Consumer Protection Act. Reservation in favour of minorities, women, Scheduled Castes, Scheduled Tribes and OBC will have the effect of sensitizing other members for the problems to be faced by these sections. Even in the report of National Commission to Review the Working of the Constitution (NCRWC), also known as Venkatachalliah Commission, a provision for an eminent person was made without prescribing any criteria. The eminent person will be guided by the CJI, who will be the Chairman and best placed to access the legal merit of the candidates. The executive is a key stake holder in justice delivery system for which it is accountable to the Parliament and it cannot be denied role in appointment of judges. Mere possibility of abuse of provision cannot be a ground for holding a provision unreasonable. Reliance has been placed on ***Mafat Lal Industries Ltd. v. Union of India*** MANU/SC/1203/1997 : (1997) 5 SCC 536 which reads as under:

To the same effect are the observations by Khanna, J. in Kesavananda Bharati v. State of Kerala (SCR at p. 755: SCC p. 669). The learned Judge said: (SCC p. 821, para 1535)

In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience.

To the same effect are the observations in T.N. Education Deptt. Ministerial and General Subordinate Services Assn. v. State of T.N. [MANU/SC/0480/1979 : (1980) 3 SCC 97] (SCR at p. 1031) (Krishna Iyer, J.). It is equally well-settled that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding the provision procedurally or

substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty [MANU/SC/0089/1961 : 1962 (3) SCR 786], this Court observed: "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in State of Rajasthan v. Union of India [MANU/SC/0370/1977 : (1977) 3 SCC 592] (SCR at p. 77), "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief". (Also see Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [MANU/SC/0136/1954 : (1954) SCR 1005] (SCR at p. 1030).

Transparency and accountability in the matter of appointment are essential for public confidence in the judiciary. In this connection reference has been made to ***Inderpreet Singh Kahlon v. State of Punjab*** MANU/SC/2433/2006 : (2006) 11 SCC 356 which reads as under:

This unfortunate episode teaches us an important lesson that before appointing the constitutional authorities, there should be a thorough and meticulous inquiry and scrutiny regarding their antecedents. Integrity and merit have to be properly considered and evaluated in the appointments to such high positions. It is an urgent need of the hour that in such appointments absolute transparency is required to be maintained and demonstrated. The impact of the deeds and misdeeds of the constitutional authorities (who are highly placed), affect a very large number of people for a very long time, therefore, it is absolutely imperative that only people of high integrity, merit, rectitude and honesty are appointed to these constitutional positions.

1164.4. These submissions cannot be accepted. It is obvious that pre-dominant role of the judiciary, as it exists in light of original Constitutional scheme in taking a final decision on the issue of appointment of judges of the Supreme Court and appointment and transfer of judges of the High Courts, has been given a go bye. Under the unamended scheme of appointment of judges, which is a basic feature of the Constitution, the President is to make appointment, after consultation with the CJI representing the judiciary. Disregarding the views of the CJI is permissible in exceptional situations for recorded reasons having bearing on character and antecedents of a candidate and if such reasons are found to be acceptable to the CJI. Under the amended scheme, no such final view can be taken by the CJI. Without giving any reason, the Minister or the nominated members can reject the unanimous view of the judges. Chief Justice of the High Court is not a member of the Commission and has no Constitutional role in appointment/transfer of the judges of the High Courts. Mere fact that without the judges, the Minister and the nominated members cannot make an appointment is not at par with the situation where a decision itself is taken by the CJI representing the judiciary. The Constitutional power of the Chief Justice of the High Court to initiate proposal for appointment as judge of the High Court has been done away with, at least as far as the Constitutional provisions are concerned.

1164.5. The contention that the amendment strengthens the independence of judiciary or the democracy or brings about transparency or accountability is not shown to be based on any logic beyond the words. Even if in appointing two eminent members CJI is also a member of the Committee, the fact remains that the PM and the Leader of the Opposition have significant role in appointing such members, who will have power not only equal to the CJI and two senior most judges of the Supreme Court in making appointment of judges of the Supreme Court and

appointment/transfer of judges of the High Courts but also right to reject the unanimous proposal of the CJI and the two senior most judges. Such composition of the Commission cannot be held to be conducive to the independence of judiciary. Appointment of judges of the Supreme Court and appointment/transfer of judges of the High Courts, can certainly be influenced to a great extent by the Law Minister and two nominated members, thereby affecting the independence of judiciary.

1164.6. Contention of learned Attorney General that there is a presumption that the Law Minister and the nominated members will conduct themselves independently and will make value addition in selecting the judges in a better way cannot be accepted. The views of the Constitution makers and eminent expert committees clearly show that role of the Executive in appointment of judges has to be minimum and by and large limited to check the character and antecedents of the candidates and not to finally assess the merit and suitability of such candidates. In this view of the matter, even if the contention that no guideline was required for criteria for appointment of eminent persons when the Committee will be comprised of high dignitaries is accepted the fact remains that such persons will play not merely supporting but pre-dominant role in appointing Supreme Court and High Court judges which will not be congenial to the independence of judiciary. There is no justification for reservation for one of the nominated members being from specified categories. Such provision is against the scheme of the Constitution and contrary to the object of selecting judges purely by merit. The nature of appointment does not justify any affirmative action for advancement of any socially and educationally backward classes or for the Scheduled Castes or Scheduled Tribes or women. The appointment of judges has to be on evaluation of merits and suitability of the candidates. Religion, caste or sex of the evaluator has no relevance. The plea that the Law Minister and the nominated members will provide feed back also does not provide any justification for their being members of the Commission and thereby participating in evaluation and suitability of a candidate for appointment as judge of the Supreme Court or High Courts and having power to overrule unanimous view of judges. The appointment of a judge of the Supreme Court is normally made out of Chief Justices of High Courts or senior judges or eminent lawyers or eminent jurists whose merit is better known to senior judges. Their evaluation has to be impartial and free from any political or other considerations. Persons making selection are required to be best placed to assess their merit and suitability. Pre-dominant and decisive role of the judiciary is a requirement not only of independence of judiciary and separation of powers but also for inspiring confidence of the people at large necessary for strength of the Democracy. The citizens having a grievance of violation of their fundamental and legal rights against the Executive or the Legislature expect that their grievance is considered by persons whose appointments are not influenced by the Executive or the Legislature. If an appointment is perceived as being influenced by political consideration or any other extraneous influence, faith in impartiality, which is hall mark of independence of judiciary, will be eroded. The scheme in other countries cannot be mechanically followed when it is in conflict with the basic scheme of the Indian Constitution.

1164.7. In this regard, it may be recalled that the word amendment literally means betterment or improvement and sponsor of amendment may always claim improvement. Such claim has to be tested by applying the 'identity test' and the 'impact test'. The said tests have already been mentioned in the earlier part of its opinion. The amendment should not affect the identity of an essential feature of the Constitution. The impact of the amendment on the working of the scheme of the Constitution has to be taken into account[539]. This brings to some extent subjective element which is unavoidable even while testing any legislation which is alleged to be violative of

fundamental rights and justified on the concept of 'reasonable restrictions'[540]. In this regard, effect of Executive interference which has been documented by expert studies cannot be held to be irrelevant or ignored on the ground that this is a subject of wisdom of Parliament. As already mentioned, the working of the Judiciary has affected the Executive and Legislature on several occasions, including (by way of illustration) ***Privy Purses case***[541], ***Bank Nationalisation Case***[542], ***Freedom of Press case***[543], ***Kesavananda Bharati case*** (supra), ***Indira Gandhi case*** (supra), ***Minerva Mills case*** (supra), ***L. Chandrakumar case*** (supra), ***M. Nagaraj case*** (supra), ***I.R. Coelho case*** (supra), ***S.R. Bommai case***[544].

1164.8. The new structure provides for decisive voice with the Commission which apart from judges comprises of Law Minister and two eminent persons to be nominated by a specified committee. Before examining the said structure, it may be noted that it is not merely the text of the amendment but also its impact and potential which has to be kept in mind on 'identity' of the original scheme and the 'width' of the power under the new scheme[545]. In a similar context when an alternative judicial forum was sought to be created to deal with the company matters in place of High Courts, this Court held that the concept of rule of law required that the new mechanism should, as nearly as possible, have same standards[546]. Same view was taken in the context of setting up of National Tax Tribunals to substitute the jurisdiction of the High Courts in tax matters[547]. The new scheme may iron out the creases but the mechanism should be comparable to the substituted scheme.

1164.9. As already mentioned under the unamended scheme, as authoritatively interpreted by this Court, power of initiating a proposal was always with the judiciary. At the time of making of the Constitution, the draft of the Constitution was circulated to the Federal Court and High Courts to elicit views of the judges. In the memorandum representing the views of the judges, it was mentioned that the existing convention was that appointment of judges was made after referring the matter to the Chief Justice and obtaining his concurrence[548].

1164.10. In CAD, various models were considered but the system applicable in other countries providing for final say of the Executive or concurrence of Legislature (as in UK and USA) were found to be unsuitable. It was stated by Dr. Ambedkar that the power could not be left to be exercised on the advice of the Executive or be made subject to concurrence of the Legislature. It was further stated that the Chief Justice could also not be given a veto upon the appointment of judges[549]. The Law Commission in its 14th Report criticised the interference by the Executive in appointment of judges. The matter came up for discussion before the Parliament and the Home Minister and the Law Minister made a statement that all appointments were made on the recommendation of the CJI as the CJI was familiar with the merits of the candidates. Out of 211, 210 appointments were made with the consent and concurrence of the CJI[550]. It was noted that the procedure for appointment of judges applicable prior to ***Second Judge's case*** was that a proposal for appointment was initiated by the CJI in case of the Supreme Court and by Chief Justice of the High Court in case of the High Court Judges[551]. This mechanism was held to be a part of the convention[552].

1164.11. In ***Shamsher Singh case*** (supra) this Court observed that in practice the last word in matters of judiciary must belong to the CJI. The same view was expressed in ***Sankalchand case*** (supra) in the context of transfer of judges[553]. In 80th Report of the Law Commission headed by

Justice H.R. Khanna, J. (1979), a Commission was proposed with a pre-dominant voice of judiciary to deal with the appointment and transfer of judges. The Report was significant in the background of supersession of judges in appointment of the CJI and selective transfer of judges which were perceived to be interference with the independence of judiciary. However, contrary to the said recommendations, a circular was issued by the Law Minister in 1981 proposing transfer of judges and making appointment of judges for short period which itself was perceived to be interference with the independence of judiciary and was challenged in ***First Judges' case***. As already mentioned, the majority held that primacy in such matters rested with the Central Government[554]. The said view was subject matter of severe criticism. Eminent constitutional expert Seervai commented that the Executive was not qualified to assess the merits or demerits of a candidate. Initiation of a proposal by the Executive was against the intention of the framers of the Constitution. Political, Executive or Legislative pressure should not enter into the appointment of a judge[555]. The Law Commission headed by Justice D.A. Desai in its 121st Report also criticised the system where the Executive had overriding powers in the matter of appointment of judges. He stated that power to appoint and transfer judges of superior courts by the Executive affects independence of judiciary and is not conducive to its healthy growth. He recommended a Judicial Commission to check the arbitrariness on the part of the Executive in such appointments and transfers[556].

1164.12. The interpretation in the Second Judge's case was in the above historical background. In the context of working of the Indian Constitution, the dominant role of the Executive in appointment of judges adversely affected the independence of judiciary. The judiciary is assigned important role for upholding the rule of law and democracy. Its independence and its power of judicial review are part of basic structure. Primacy of judiciary in appointment of judges is part of basic structure. In this background question is whether the new scheme retains the said primacy of judiciary in appointment of judges.

1164.13. Under the new scheme, the Law Minister has been given role equal to the CJI. Right from the commencement of the Constitution, this role of the Law Minister was never envisaged while initiating the process and finalizing it. Law Minister, in participatory scheme, could at best suggest a name or give his comments on the names proposed but the proposal could and was always initiated by the CJI. At the stage of initiation, if equal authority is conferred, this will erode the primacy of judiciary as declared by this Court authoritatively. Any deviation in the past was always adversely commented upon and held to be undesirable amounting to interference with the independence of judiciary[557]. Other two persons to be nominated by a Committee which also has predominant political voice to be placed at par with the CJI in initiating and finalizing a proposal destroys the original scheme beyond its identity. Any suggestion before initiation of a name or feedback even after initiation may be useful and may not affect independence of judiciary but equal participation by the Law Minister and two outsiders in final decision for initiation or appointment can be detrimental to the independence of judiciary. It cannot be wished away by presuming that the Law Minister and the two distributors will not be influenced by any extraneous consideration. Such a presumption will be contrary to the acknowledged factual experience. It will also be against the concept of separation of judiciary from the Executive. More over this will be contrary to the basic intention of the Constitution makers. The amendment is not an insignificant amendment and is not within the basic framework of the working of the Constitution. The very premise and object of the amendment as reflected in the Statement of Objects and Reasons and the

stand of the Union of India in its pleadings and during the course of arguments is that the primacy of judiciary was evolved by erroneous interpretation which is sought to be corrected. It is stated that the primacy of judiciary was undemocratic and denied the Executive a meaningful role. These reasons are untenable for reasons already discussed. As regards the plea of transparency and accountability, the same has to be achieved without compromising independence of judiciary. If on the perceived plea of transparency and accountability, the independence of judiciary is sought to be adversely affected by the Amendment, this will cause severe damage to the functioning of the Constitution. The primacy of judiciary, as already noticed, is integral to the independence of judiciary, separation of powers, federalism and democracy, rule of law and supremacy of the Constitution. The amendment does away with the primacy of even unanimous opinion of the judicial members as such opinion is not enough to finalise an appointment. While Shri Venugopal has rightly stated in his alternative submission that primacy of judiciary is part of judicial independence and if Executive has pre-dominant voice, it could subvert independence of judiciary, his submission that the situation could be retrieved by giving the suggested interpretation cannot be accepted. Such interpretation is not warranted by the text of the amendment or by the principles of interpretation. It is difficult to hold that primacy of judiciary is still retained as a wrong proposal can still be stalled by any two members, including two judges. The primacy of judiciary as always understood in binding judicial precedents comprises of initiation of name and taking a final call[558]. These two core features constitute identity of the primacy of judiciary. Subject to these two features, any amendment could have been made and if these two features are compromised, the basic identity of the Constitution can be held to have been altered or damaged.

1164.14. There can be no doubt about the propositions forcefully canvassed by the Respondents that the legislative wisdom of the choice of the Parliament was not open to question and that possibility of abuse of power could not affect the existence and exercise of power but these submissions cannot ignore the limitation of basic features. Examining whether basic feature was sought to be altered, is different from questioning the wisdom of the Parliament. It is testing the power of Parliament conferred by the Constitution. Similarly determining whether the new mechanism complied with the framework of the Constitution is different from the issue of possibility of abuse. In the present case, question is of independence of judiciary which implies having judges not influenced by any political consideration as per the intention of framers of the Constitution. Even assuming the best of intention, can the power of judicial review by the constitutional courts be subjected to scrutiny by any 'eminent persons' on the ground that working of the judiciary was perceived to be unsatisfactory. Obviously it will be clear interference with independence of judiciary[559]. Same way, constitutionally conferred judicial primacy in appointment of judges cannot be whittled down or sought to be controlled by those who are not given or allowed to take over such functions. Even granting the best of intentions, the Parliament could not act beyond the authority conferred on it by the Constitution. Thus, taking away primacy of judiciary or conferring such primacy on a body which is not at par with the said concept is certainly not a choice available with the Parliament. As already mentioned, the concept of primacy of judiciary comprises of initiating the proposal and taking a final decision in case any adverse feed back is received after the proposal is initiated. This concept of primacy is compromised if the judiciary is unable to initiate a proposal in the first instance or if such proposal can be effectively rejected. The impact thereof being that the appointment of judges could be made under the influence of the Executive represented by the Law Minister or the non-judge members in whose appointment the pre-dominant voice is not of the judiciary. The impact of such appointments will

be that the judges appointed will owe their appointments to the Executive which may be destructive of the public confidence and impartiality of judiciary and adversely affect the role of the judiciary as an important impartial constitutional organ. As already noted, the role of the judiciary is to define and regulate working of other constitutional authorities within the scope of roles assigned to them[560].

1164.15. If the amendment had merely provided for advisory or recommendatory role to the Law Minister or the non-judicial members with the professed object of transparency and accountability, the situation may have been different. It may not have, in that case, interfered with the primacy of the judiciary in appointment of judges which is the mandate of the Constitution. Such power cannot be justified under the doctrine of wisdom of Parliament nor on the principles of trust once such power is in violation of principle of primacy of judiciary in appointment of judges. No individual instance either of working of the Executive or Legislature or the existing system of appointment of judges need be discussed as the issue involved here is of interpretation of the Constitution and not of success or failure of any individual or persons. As already mentioned, the shortcomings in working of every institution may need to be removed by constant efforts constitutionally permissible but cannot justify the altering of the framework of the Constitution or the same being damaged.

1165. Reference may now be made to the submission of learned Counsel for the Respondents that in many countries without primacy of judiciary in appointment of judges, independent judiciary is functioning and thus unfettered judicial primacy was inconsistent with the international trend. Particular mention has been made of 15 countries, namely, Kenya, Pakistan, South Africa, UK, Israel, France, Italy, Nigeria, Sri Lanka, Australia, Canada, New Zealand, Bangladesh, Germany and United States.

1165.1 The submission of learned Attorney General in relation to judicial appointments in the said 15 countries is as follows:

a. 9 countries conduct appointment of judges through either judicial appointment commissions (Kenya, Pakistan, South Africa and UK), committees (Israel) or councils (France, Italy, Nigeria and Sir Lanka); 4 countries appoint judges through a direct order of the Governor General (Australia, Canada, New Zealand) or the President (Bangladesh), where applicable; 1 (Germany) follows a multi-stage process of nomination by the Minister of Justice, confirmation by Parliamentary Committees and final appointment by the President; and 1 (United States) follows a process of nomination by the President (executive) and confirmation by the Senate (legislature).

b. In all 15 countries, the executive is the final or determinative appointing authority. Out of the 9 countries with commissions, in 2 countries (South Africa and Sri Lanka) the executive has absolute majority in comparison with members of other groups (judiciary, legislature and independent persons). In 4 countries (France, Israel, Kenya and UK) there is a balanced representation of various stakeholders, including the executive. Out of 3 countries where the number of judges are in a majority (Italy, Nigeria and Pakistan), in 2 countries (Nigeria and Pakistan) the decision of the commission is subject to the vote of a parliamentary committee/Senate, while in 1 (Italy), the President of the Republic is the final appointing authority and the chairman of the judicial appointment body. In 5 of the countries without commissions (Canada, Australia, New Zealand,

Bangladesh and United States of America), the decision is taken by the Executive without any formal process of consultation with the judiciary, while in 1 (Germany), the appointment process is conducted by the Parliament, and later confirmed by the President.

c. In 8 countries (France, Israel, Italy, Kenya, Nigeria, Pakistan, South Africa and UK) with bodies for judicial appointments, independent members have a mandated role in the selection process through representation on the said bodies. In 4 countries where independent members do not play a formal role in the appointment process (Canada, USA, Australia and New Zealand), the appointing authority (body or person) consults independent members at various stages of the appointment process for their feedback on the selection or recommendation of a prospective candidate. In 3 countries (Bangladesh, Germany and Sri Lanka) no documented process of consultation with independent members is provided for.

1165.2 Learned Counsel for the Respondents also referred to criticism of the collegium system by some jurists including the eminent jurist Shri Nariman, appearing in the present case for the Petitioners.

1165.3 On the other hand, Shri Nariman opposed the above submissions and referred to decisions of this Court particularly ***Kesavananda Bharti case***, ***Indira Gandhi case*** and ***Minerva Mills case***, where the Constitution amendments were struck down. He also referred to expert studies including reports of the 14th and 121st Law Commissions and the National Commission to Review the Working of the Constitution (NCRWC), headed by Justice M.N. Venkatachaliah (retired CJI), wherein it was observed that independence of judiciary was basic feature of the Constitution and composition of a National Commission was required to be consistent with the concept of independence of judiciary. Method of appointment of judges could not be altered in such a way as may impinge upon the independence of judiciary. Composition of a Judicial Commission has to uphold the primacy of judiciary.[561]

1165.4 Shri Nariman also submitted that the impugned amendment was introduced in response to decisions of this Court affecting certain legislators. He submitted that independent functioning of the judiciary often comes in conflict with the Executive and the Legislature but mandate of the Constitution of upholding the independence of judiciary was necessary to inspire faith of citizens in impartial justice and to uphold the constitutional values like the Rule of law and the Democracy, by upholding protection of fundamental rights even against the State. He particularly made reference to the history of proposed Forty-Fifth Amendment vide Bill 88 of 1978 to provide in Article 368 that an Amendment compromising the independence of judiciary could be made by approval by majority at a referendum. The same was brought about by the Janta Government led by leaders who were arrested during emergency. It was not approved for want of majority in Rajya Sabha. He also referred to decisions of this Court ***Lily Thomas v. Union of India*** MANU/SC/0687/2013 : 2013 (7) SCC 653 and ***Chief Election Commissioner v. Jan Chaukidar*** MANU/SC/0689/2013 : 2013 (7) SCC 507 holding that a member of a Legislature will stand qualified on conviction and that a person confined in jail could not contest an election and efforts to undo such decisions. He also referred to the treatise, ***Constitutional Law of India by Seervai, 4th Edition***, to the effect that the decision of ***First Judges'*** case put the judicial independence at the mercy of the Executive[562].

1165.5 He also gave a personal note, in response to reliance on behalf of the Respondents on his own biography "Before Memory Fades" as follows:

I have been, and I continue to be, a supporter of the "Judicial-Appointment-Commission-system" and so are my clients whom I represent (this is so stated in the Writ Petition at page 26 to 31, and 44 to 45). BUT I am definitely opposed to a pretence of a Judicial Appointments Commission-which in reality is not judicial, only partly or quasi judicial. The "Judicial Appointments Commission system" (so called) as embodied in the 99th Constitutional Amendment, 2014 and along with the NJAC Act, 2014, is opposed BECAUSE is not in accordance with and does not conform to the Beijing Principles on Independence of the Judiciary (by which we in India are governed). The principles were formulated after long deliberation by Heads of the Judiciary in the LAWASIA region (including India's Chief Justice)-who are all signatories to the Beijing Principle. Principles No. 15 reads as follows:

15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

Note-*NOT OUTSIDERS, not representatives of the EXECUTIVE: because this is not helpful in the interests of maintaining the INDEPENDENCE of THE JUDICIARY.* ***Text of Beijing Principles are annexed as Exhibit-II.***

The then Law Minister had stated in Parliament, when these measures were first introduced, that he had consulted named persons including myself-and as to what I said is accurately recorded in the Minutes of the Meeting prepared by the office of the Law Minister. This is what the minutes record:

• Constitutional Expert and Senior Advocate, Shri Fali Nariman stated that it is important to remember the independence of the judiciary and the separation of powers. The basic structure doctrine as laid down by the Supreme Court in the Keshavananda Bharti case could not be violated and any proposal for appointment of judges must be in conformity with the basic structure. He felt that the Government should consider following the model of the Appointments Commission as suggested by the Justice Venkatchaliah Commission that gave dominance to the judiciary in the appointment process. He stated that composition of the Commission is the basic issue, and a Commission with non-Judge domination would not be viable in India.

....

1166. As already mentioned, the Constitution of India has its own background and personality[563]. Models of other countries could not be blindly followed so as to damage the identity and personality of the Indian Constitution. The Judicial Commissions referred to by learned Attorney General do not show the trend of reducing the pre-existing role of judiciary. In fact, the trend is for reducing the pre-existing role of the Executive. In the impugned amendment it is the reverse. Thus, the contention of working of other Constitutions or setting up of judicial Commissions with

varying compositions in other countries does not justify the impugned amendment which is contrary to the basic structure of the Indian Constitution.

1167. There is also no merit in the contention that in the present case mere alteration in a constitutional provision does not amount to damage of a basic feature. It is not a case of simple amendment to iron out creases. Its impact clearly affects the independence of judiciary. As already mentioned, appointment of judges has always been considered in the scheme of the working of the Indian Constitution to be integral to the independence of judiciary. It is for this reason that primacy in appointment of judges has always been intended to be of the judiciary. Pre-dominant role of the Executive is not permissible. Such primacy comprises of initiating the proposal by the judiciary and final word being normally with the CJI (in representative capacity). This scheme is beyond the power of amendment available to the Parliament.

1167.1. In the new scheme, the Chief Justices of the High Courts have not been provided any constitutional say. The Chief Justice of the High Court is in a better position to initially assess the merit of a candidate for appointment as judge of the High Court. The constitutional amendment does not provide for any role to the Chief Minister of the State. This may affect the quality of the candidate selected and thereby the independence of judiciary. The statutory provision in the NJAC Act will be gone into separately.

1167.2. The contention of learned Attorney General that the amendment was justified to uphold the principles of checks and balances and transparency which were equally important constitutional values cannot be accepted. Even assuming that there is a scope for improvement in the working of the collegium system, it cannot be held that under the existing system there is no transparency or checks and balances. The procedure laid down in memoranda issued by the Central Government has been noted in the earlier part of this opinion. All proceedings in initiating a proposal are in writing and are forwarded to the constitutional functionaries. The Chief Minister, the Governor, the Law Minister, the PM and the President have opportunity to give their views in the matter of appointment of Chief Justices and Judges of High Courts apart from judges and non-judges involved in the process. The Law Minister, the PM and the President also have opportunity to give their comment on appointment of CJI and the Judges of the Supreme Court. There is also an opportunity to suggest names before initiation of proposal. There is no bar to an expert feedback from the civil society through the constitutional functionaries involved. Thus, there is transparency as well as checks and balances. These considerations do not justify interference with the final initiation of proposal by the judiciary or in taking a final view in the matter by the judiciary, consistent with the mandate of the Constitution.

1167.3. Learned Attorney General sought to compare the existing provision for veto by two members of collegium in appointment of Supreme Court Judges as per ***Third Judges' case*** to justify veto Under Section 6(6). As already mentioned, the role of the Law Minister and the non-judge members cannot be placed at par with the Chief Justice and Judges of the Supreme Court. They cannot be compared for obvious reasons. The veto power with the Law Minister or with a non-judge members, as against a Supreme Court Judge who is the member of the collegium, may involve interference with the independence of judiciary. Similarly, requirement of special majority in any other ordinary situation was not comparable with the scheme of appointment of judges which is *sui generis*. Similarly, the plea of giving vital inputs does not justify participation of the

non-judge members with the Chief Justice and the Judges in discharging their functions of initiating a proposal or taking a final view. Though, formal act of appointment of judges may be an executive function, there is a unique judicial element in the process of appointment of judges of constitutional courts. The criticism against perceived short comings in the working of the collegium also does not justify the impugned provisions. As already observed, there may be criticism even against discharging of judicial functions by the aggrieved parties or otherwise. But that does not justify interference with the judicial decisions[564]. Needless to say that criticism can be against the working of any system but the systems can be changed only as per the Constitution. Efforts to improve all systems have to be continuously made.

Conclusion:

1167.4. I would conclude that the new scheme damages the basic feature of the Constitution under which primacy in appointment of judges has to be with the judiciary. Under the new scheme such primacy has been given a go-bye. Thus the impugned amendment cannot be sustained.

F. Validity of the NJAC Act

1168. In view of my conclusion about the amendment being beyond the competence of the Parliament, I do not consider it necessary to discuss the validity of the NJAC Act in great detail as the said Act cannot survive once the amendment is struck down. However, consistent with my earlier view that primacy of judiciary in appointment of judges cannot be compromised and on that ground not only Section 2 of the Amendment dispensing with the mandatory consultation with the judiciary as contemplated under the unamended provisions, Section 3 conferring power on the NJAC (Under Article 124B) and providing for composition of the Commission Under Article 124A giving a role to the Law Minister and two eminent persons equal to the CJI in recommending appointments as CJI, Judges of Supreme Court, Chief Justices and other Judges of the High Courts and recommending transfer of Chief Justices and Judges of the High Courts are unconstitutional but also Article 124C giving power to the Parliament to regulate the procedure and to lay down the manner of selection was also unconstitutional, the impugned Act has to be struck down. It goes far beyond the procedural aspects. In Section 5(2) 'suitability criteria' is left to be worked out by Regulations. Second proviso to Section 5(2) and Section 6(6) give veto to two members of the Commission which is not contemplated by the Amendment. Section 5(3) and Section 6(8) provide for conditions for selection to be laid down by Regulations which are not mere procedural matters. Section 6 authorises the recommendations for appointment as judges of the High Courts without the proposal being first initiated by the Chief Justice of the High Court. Section 6(1) provides for recommendation for appointment of Chief Justice of a High Court on the basis of inter se seniority of High Court Judges. This may affect giving representation to as many High Courts as viable as, in inter se seniority, many judges of only one High Court may be senior most. Section 6(2) provides for seeking nomination from Chief Justices of High Courts, but Section 6(3) empowers the Commission itself to make recommendation for appointment as Judge of the High Court and seek comments from Chief Justice after short listing the candidates by itself. Section 8 enables the Central Government to appoint officers and employees of the Commission and to lay down their conditions of service. The Secretary of the Government is the Convenor of the Commission. Section 13 requires all Regulations to be approved by the Parliament. These provisions in the Act impinge upon the independence of judiciary. Even if the doctrine of basic structure is not applied

in judging the validity of a parliamentary statute, independence of judiciary and rule of law are parts of Articles 14, 19 and 21 of the Constitution and absence of independence of judiciary affects the said Fundamental Rights. The NJAC Act is thus liable to be struck down.

G. Effect of Amendment being struck down

1169. The contention that even if Amendment is held to be void, the pre-existing system cannot be restored has no logic. In exercise of power of judicial review, a provision can be declared void in which case the legal position as it stands without such void provision can be held to prevail. It is not a situation when position has not been made clear while deciding an issue. Power of this Court to declare the effect of its order cannot be doubted nor the decisions relied upon by the Respondents show otherwise. I hold that on amendment being struck down, the pre-existing system stands revived.

H. Review of Working of the Existing System

1170. Since the system existing prior to amendment will stand revived on the amendment being struck down and grievances have been expressed about its functioning, I am of the view that such grievances ought to be considered. It is made clear that grievances have not been expressed by the Petitioners about the existence of the pre-existing system of appointment but about its functioning in practice. It has been argued that this Court can go into this aspect without re-visiting the earlier decisions of the larger Benches. I am of the view that such grievances ought to be gone into for which the matter needs to be listed for hearing.

Conclusion

1171. The impugned Amendment and the Act are struck down as unconstitutional. Pre-existing scheme of appointment of judges stands revived. The matter be listed for consideration of the surviving issue of grievances as to working of pre-existing system.

APPENDIX

(I) Key Provisions of the Unamended Constitution

124. Establishment and constitution of Supreme Court-*(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.*

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that--

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in Clause (4).

xxx

***217. Appointment and conditions of the office of a Judge of a High Court**-Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years:*

xxx

***222. Transfer of a Judge from one High Court to another**-The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.*

xxx

(II) The 99th Amendment Act

THE CONSTITUTION (NINETY-NINTH AMENDMENT) ACT, 2014

[31st December, 2014]

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Sixty-fifth Year of the Republic of India as follows:

***1.** (1) This Act may be called the Constitution (Ninety-ninth Amendment) Act, 2014.*

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

***2.** In Article 124 of the Constitution, in Clause (2),-*

(a) for the words "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose", the words, figures and letter "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A" shall be substituted;

(b) the first proviso shall be omitted;

(c) in the second proviso, for the words "Provided further that", the words "Provided that" shall be substituted.

3. *After Article 124 of the Constitution, the following articles shall be inserted, namely:*

124A. *(1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:*

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

(b) two other senior Judges of the Supreme Court next to the Chief Justice of India--Members, ex officio;

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

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People--Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

124B. *It shall be the duty of the National Judicial Appointments Commission to-*

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

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

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

124C. *Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by Regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.*

4. *In Article 127 of the Constitution, in Clause (1), for the words "the Chief Justice of India may, with the previous consent of the President", the words "the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India, may with the previous consent of the President" shall be substituted.*

5. *In Article 128 of the Constitution, for the words "the Chief Justice of India", the words "the National Judicial Appointments Commission" shall be substituted.*

6. *In Article 217 of the Constitution, in Clause (1), for the portion beginning with the words "after consultation", and ending with the words "the High Court", the words, figures and letter "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A" shall be substituted.*

7. *In Article 222 of the Constitution, in Clause (1), for the words "after consultation with the Chief Justice of India", the words, figures and letter "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A" shall be substituted.*

8. *In Article 224 of the Constitution,--*

(a) in Clause (1), for the words "the President may appoint", the words "the President may, in consultation with the National Judicial Appointments Commission, appoint" shall be substituted;

(b) in Clause (2), for the words "the President may appoint", the words "the President may, in consultation with the National Judicial Appointments Commission, appoint" shall be substituted.

9. *In Article 224A of the Constitution, for the words "the Chief Justice of a High Court for any State may at any time, with the previous consent of the President", the words "the National Judicial Appointments Commission on a reference made to it by the Chief Justice of a High Court for any State, may with the previous consent of the President" shall be substituted.*

10. *In Article 231 of the Constitution, in Clause (2), Sub-clause (a) shall be omitted.*

(II) The NJAC Act

THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014 No. 40 of 2014

[31st December, 2014]

An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Sixty-fifth Year of the Republic of India as follows:

1. *(1) This Act may be called the National Judicial Appointments Commission Act, 2014.*

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. *In this Act, unless the context otherwise requires,--*

(a) "Chairperson" means the Chairperson of the Commission;

(b) "Commission" means the National Judicial Appointments Commission referred to in Article 124A of the Constitution;

(c) "High Court" means the High Court in respect of which recommendation for appointment of a Judge is proposed to be made by the Commission;

(d) "Member" means a Member of the Commission and includes its Chairperson;

(e) "prescribed" means prescribed by the rules made under this Act;

(f) "Regulations" means the Regulations made by the Commission under this Act.

3. *The Headquarters of the Commission shall be at Delhi.*

4. *(1) The Central Government shall, within a period of thirty days from the date of coming into force of this Act, intimate the vacancies existing in the posts of Judges in the Supreme Court and in a High Court to the Commission for making its recommendations to fill up such vacancies.*

(2) The Central Government shall, six months prior to the date of occurrence of any vacancy by reason of completion of the term of a Judge of the Supreme Court or of a High Court, make a reference to the Commission for making its recommendation to fill up such vacancy.

(3) The Central Government shall, within a period of thirty days from the date of occurrence of any vacancy by reason of death or resignation of a Judge of the Supreme Court or of a High Court, make a reference to the Commission for making its recommendations to fill up such vacancy.

5. *(1) The Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India if he is considered ft to hold the office: Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting.*

(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by Regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such Under Clause (3) of Article 124 of the Constitution:

Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered:

Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.

(3) The Commission may, by Regulations, specify such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary.

6. *(1) The Commission shall recommend for appointment a Judge of a High Court to be the Chief Justice of a High Court on the basis of inter se seniority of High Court Judges and ability, merit and any other criteria of suitability as may be specified by Regulations.*

(2) The Commission shall seek nomination from the Chief Justice of the concerned High Court for the purpose of recommending for appointment a person to be a Judge of that High Court.

(3) The Commission shall also on the basis of ability, merit and any other criteria of suitability as may be specified by Regulations, nominate name for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such Under Clause (2) of Article 217 of the Constitution and forward such names to the Chief Justice of the concerned High Court for its views.

(4) Before making any nomination Under Sub-section (2) or giving its views Under Sub-section (3), the Chief Justice of the concerned High Court shall consult two senior-most Judges of that High Court and such other Judges and eminent advocates of that High Court as may be specified by Regulations.

(5) After receiving views and nomination Under Sub-sections (2) and (3), the Commission may recommend for appointment the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by Regulations.

(6) The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation.

(7) The Commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before making such recommendation in such manner as may be specified by Regulations.

(8) The Commission may, by Regulations, specify such other procedure and conditions for selection and appointment of a Chief Justice of a High Court and a Judge of a High Court as it may consider necessary.

7. *The President shall, on the recommendations made by the Commission, appoint the Chief Justice of India or a Judge of the Supreme Court or, as the case may be, the Chief Justice of a High Court or the Judge of a High Court:*

Provided that the President may, if considers necessary, require the Commission to reconsider, either generally or otherwise, the recommendation made by it:

Provided further that if the Commission makes a recommendation after reconsideration in accordance with the provisions contained in Sections 5 or 6, the President shall make the appointment accordingly.

8. *(1) The Central Government may, in consultation with the Commission, appoint such number of officers and other employees for the discharge of functions of the Commission under this Act.*

(2) The terms and other conditions of service of officers and other employees of the Commission appointed Under Sub-section (1) shall be such as may be prescribed.

(3) The Convenor of the Commission shall be the Secretary to the Government of India in the Department of Justice.

9. *The Commission shall recommend for transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court, and for this purpose, specify, by Regulations, the procedure for such transfer.*

10. *(1) The Commission shall have the power to specify, by Regulations, the procedure for the discharge of its functions.*

(2) The Commission shall meet at such time and place as the Chairperson may direct and observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meeting), as it may specify by Regulations.

11. *(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.*

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the fees and allowances payable to the eminent persons nominated Under Sub-clause (d) of clause (1) of Article 124A of the Constitution;

(b) the terms and other conditions of service of officers and other employees of the Commission Under Sub-section (2) of Section 8;

(c) any other matter which is to be, or may be, prescribed, in respect of which provision is to be made by the rules.

12. *(1) The Commission may, by notification in the Official Gazette, make Regulations consistent with this Act, and the rules made thereunder, to carry out the provisions of this Act.*

(2) In particular, and without prejudice to the generality of the foregoing power, such Regulations may provide for all or any of the following matters, namely:

(a) the criteria of suitability with respect to appointment of a Judge of the Supreme Court Under Sub-section (2) of Section 5;

(b) other procedure and conditions for selection and appointment of a Judge of the Supreme Court Under Sub-section (3) of Section 5;

(c) the criteria of suitability with respect to appointment of a Judge of the High Court Under Sub-section (3) of Section 6;

(d) other Judges and eminent advocates who may be consulted by the Chief Justice Under Sub-section (4) of Section 6;

(e) the manner of eliciting views of the Governor and the Chief Minister Under Sub-section (7) of Section 6;

(f) other procedure and conditions for selection and appointment of a Judge of the High Court Under Sub-section (8) of Section 6;

(g) the procedure for transfer of Chief Justices and other Judges from one High Court to any other High Court Under Section 9;

(h) the procedure to be followed by the Commission in the discharge of its functions Under Sub-section (1) of Section 10;

(i) the rules of procedure in regard to the transaction of business at the meetings of Commission, including the quorum at its meeting, Under Sub-section (2) of Section 10;

(j) any other matter which is required to be, or may be, specified by Regulations or in respect of which provision is to be made by Regulations.

13. *Every rule and Regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or Regulation or both Houses agree that the rule or Regulation should not be made, the rule or Regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or Regulation.*

14. *(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, after consultation with the Commission, by an order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:*

Provided that no such order shall be made after the expiry of a period of five years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

(III) The Statement of Objects and Reasons of the Amendment Act

Statement of Objects and Reasons

The Judges of the Supreme Court are appointed Under Clause (2) of Article 124 and the Judges of the High Courts are appointed Under Clause (1) of Article 217 of the Constitution, by the President. The Ad-hoc Judges and retired Judges for the Supreme Court are appointed Under Clause (1) of Article 127 and Article 128 of the Constitution respectively. The appointment of Additional Judges and Acting Judges for the High Court is made Under Article 224 and the appointment of retired Judges for sittings of the High Courts is made Under Article 224A of the Constitution. The transfer of Judges from one High Court to another High Court is made by the President after consultation with the Chief Justice of India Under Clause (1) of Article 222 of the Constitution.

2. The Supreme Court in the matter of Supreme Court Advocates-on-Record Association v. Union of India in the year 1993, and in its Advisory Opinion in the year 1998 in the Third Judges case, had interpreted Clause (2) of Article 124 and Clause (1) of Article 217 of the Constitution with respect to the meaning of "consultation" as "concurrence". Consequently, a Memorandum of Procedure for appointment of Judges to the Supreme Court and High Courts was formulated, and is being followed for appointment.

3. After review of the relevant constitutional provisions, the pronouncements of the Supreme Court and consultations with eminent Jurists, it is felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of Judges of the Supreme Court and High Courts. The said Commission would provide a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process.

4. The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is an enabling constitutional amendment for amending relevant provisions of the Constitution and for setting up a National Judicial Appointments Commission. The proposed Bill seeks to insert new Articles 124A, 124B and 124C after Article 124 of the Constitution. The said Bill also provides for the composition and the functions of the proposed National Judicial Appointments Commission. Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by Regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary.

5. The proposed Bill seeks to broad base the method of appointment of Judges in the Supreme Court and High Courts, enables participation of judiciary, executive and eminent persons and

ensures greater transparency, accountability and objectivity in the appointment of the Judges in the Supreme Court and High Court.

6. The Bill seeks to achieve the above objectives.

1172. Hon'ble Mr. Justice Jagdish Singh Khehar, Hon'ble J. Chelameswar, Hon'ble Madan B. Lokur, Hon'ble Kurian Joseph and Hon'ble Adarsh Kumar Goel, JJ. Pronounced the separate judgments, the prayer for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases [MANU/SC/0073/1994 : (1993) 4 SCC 441, and MANU/SC/1146/1998 : (1998) 7 SCC 739, respectively] is rejected; the Constitution (Ninety-ninth Amendment) Act, 2014 is declared unconstitutional and void; the National Judicial Appointments Commission Act, 2014, is declared unconstitutional and void; the system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief Justices and Judges of High Courts from one High Court, to another, as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the "collegium system"), is declared to be operative; and to consider introduction of appropriate measures, if any, for an improved working of the "collegium system", list on 3.11.2015.

---

[1]Supreme Court Advocates-on-Record Association and Ors. v. Union of India MANU/SC/0073/1994 : (1993) 4 SCC 441

[2]The position of the Presiding Judge on this Bench hearing these cases of constitutional challenge is not consistent with (and apparently conflicts with) his position as a member of the 'Collegium'; and is likely to be seen as such; always bearing in mind that if the Constitution Amendment and the statute pertaining thereto are held constitutionally valid and are upheld, the present Presiding Judge would no longer be part of the Collegium-The Collegium, it must be acknowledged exercises significant constitutional power.

[3]Order dated 22.04.2015 insofar as it is relevant reads thus:

"A preliminary objection, whether Justice Jagdish Singh Khehar should preside over this Bench, by virtue of his being the fourth senior most Judge of this Court, also happens to be a member of the collegium, was raised by the Petitioners. Elaborate submissions were made by the Learned Counsel for the Petitioners and the Respondents. After hearing all the Learned Counsel, we are of the unanimous opinion that we do not see any reason in law requiring Justice Jagdish Singh Khehar to recuse himself from hearing the matter. Reasons will follow.

Issue rule. "

[4]The expression 'recuse' according to the New Oxford Dictionary English means-(the act of a Judge) to excuse himself from a case because of possible conflict of interest for lack of impartiality.

[5]R. Grant Hammond, *Judicial Recusal: Principles, Process and Problems,* (Hart Publishing, 2009).

[6]***Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte*** (1999) 1 All E.R. 577

[7]*P.D. Dinakaran (1) v. Judges Inquiry Committee* MANU/SC/0727/2011 : (2011) 8 SCC 380, paras 49 to 53.
[8]Wakefield Local Board of Health v. West Riding and Grimsby Rly Co. (1865) 1 Q.B. 84.
[9]R v. Byles ex p. Hollidge (1912) 77 J.P. 40; R. v. Nailsworth Licensing Justices ex p. Bird [1953] 1 W.L.R. 1046; R v. Lilydale Magistrates Court ex p. Ciccone [1973] V.R. 122; and see R. v. Antrim Justices [1895] 2 I.R. 603; Tolputt (H.) and Co. Ltd. v. Mole [1911] 1 K.B. 836; Corrigan v. Irish Land Commission [1977] I.R. 317.
[10]The details of which are already noted in the judgment of my brother Khehar, J.
[11]**Section 6(6).** "The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation."
[12]"Para 520. There is another fact of life which, however unpleasant, cannot be denied and this is that precious little are our masses or litigants concerned with which Judge is appointed or not appointed or which one is continued or not continued. The high sounding concept of independence of judiciary or primacy of one or the other of the Constitutional functionaries or the mode of effective consultation are matters of academic interest in which our masses are least interested. On the other hand, they are mainly concerned with dangerous forces at work and evils reflected in economic-pressures, inflationary tendencies, gruelling poverty, emancipation of women, maintenance of law and order, food and clothing, bread and butter, and above all the serious problem of unemployment,
521. It is only a sizeable section of the intellectuals consisting of the press and the lawyers who have made a prestigious issue of the independence of judiciary. I can fully understand that lawyers or other persons directly connected with the administration of justice may have a grievance however ill-founded that proper selection of Judges or interference with the appointment of Judges strictly according to constitutional provisions may mar the institution of judiciary and therefore they may to some extent be justified in vindicating their rights. But at the same time, however biting or bitter, distasteful and diabolical it may seem to be, the **fact remains that the masses** in general are not at all concerned with these legal niceties and so far as administration of justice is concerned they **merely want that their cases should be decided quickly by Judges who generate confidence."**
[13]Supreme Court of Canada in ***Valente v. Queen*** MANU/SCCN/0018/1985 : (1985) 2 SCR 673
[14]**".... judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them." This clause has been repealed by ____**
[15]Sir William Blackstone's, *Commentaries on the Laws of England*, (1765) Vol. I p. 269
[16]**Article III Section I.** The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall **hold their offices during good behaviour,** and shall, at stated times, receive for their services, a compensation, which **shall not be diminished during their continuance in office.**
[17]**Article II Section 4.** The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.
[18]**Section 72.** Judges' appointment, tenure, and remuneration:
The Justices of the High Court.....
(ii) **shall not be removed except..... on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or**

incapacity;
(iii) **shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.**
[19]The British North America Act, 1867 renamed by the Amendment in 1982 as the Constitution Act, 1867
[20]Commonwealth of Australia Constitution Act, 1900.
[21]The existing constitution and organization of constitutional courts in this country is discussed in some detail by Justice Verma in the Second Judges case at paras 444, 445, 446.
444. The Government of India Act, 1919 provided in Section 101 for the Constitution of High Courts; and the appointment of the Chief Justice and the permanent Judges was in the absolute discretion of the Crown, subject only the prescribed conditions of eligibility. The tenure of their office, according to Section 102, was dependent entirely on the Crown's pleasure.
xxxxx xxxxxx xxxxxx xxxxx
445. Then, in the Government of India Act, 1935, provision for the establishment and Constitution of the Federal Court was made in Section 200, while the Constitution of High Courts was provided for in Section 220.
xxxxx xxxxxx xxxxxx xxxxx
446. Thus, even under the Government of India Act, 1935, appointments of Judges of the Federal Court and the High Courts were in the absolute discretion of the Crown or, in other words, of the executive, with no specific provision for consultation with the Chief Justice in the appointment process.
[22]*L. Chandra Kumar and Ors.* v. *Union of India and Ors.* MANU/SC/0261/1997 : (1997) 3 SCC 261, para 78
[23]**Article 124(4)** A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
[24]**Article 217(1)(b)** A Judge may be removed from his office by the President in the manner provided in Clause (4) of Article 124 for the removal of a Judge of the Supreme Court;
[25]Under the proviso to Article 125(2) and proviso to Article 221(2) respectively.
[26]**Article 112(3)(d)-(3)** The following expenditure shall be expenditure charged on the Consolidated Fund of India-
***** ***** ***** ***** ******
(i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court;
Article 202(3)(d)-(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State-
***** ***** ***** ***** ******
(d) expenditure in respect of the salaries and allowances of Judges of any High Court;
[27]**113(1)**-So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.
[28]**203(1)**-So much of the estimates as relates to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed as preventing the discussion in the Legislature of any of those estimates.

[29]Fali S. Nariman, *Before Memory Fades: An Autobiography*, [First Edition Hay House (2010), p. 348]
"I once knew a fine, independent judge in South Africa during the days of apartheid-Judge-President John Milne of the Natal Supreme Court. We used to correspond, and Milne said something similar. Milne wrote to me on one occasion (in despair):
It seems that however much they may pay lip service to the idea that the Judiciary is totally independent of the Executive, politicians throughout the ages and throughout the world would actually much prefer to have executive minded lackeys and are considerably irritated by independent Judges functioning in an independent manner."
[30]**Article II Section 2**
The President "shall have power.... to.. nominate and by and with the advise and consent of the Senate.. appoint.. Judges of the Supreme Court.."
In the case of the appointment of Judges of the other Statutory Federal Courts, the Congress can by law entrust the power to the Supreme Court itself.
[31]The Federal Legislature of America is called the Congress of the United States consisting of two chambers-Senate and House of Representatives.
[32]**Section 101**. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.
[33]Now replaced by Supreme Court Act, 1985.
[34]**Section 71. Judicial power and Courts**
The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.
[35]Constituent Assembly Debates, 24th May 1949 (Vol. VIII)
[36]Recall the words of Jackson, J. in *Sacher v. United States* 343 US 1(1952) "Men who make their way to the Bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."
[37]Para 371
"....
(iii) All the appointments to the Supreme Court from 1950 to 1959 were made with the concurrence of the Chief Justice of India. 210 out of 211 appointments made to the High Courts during that period were also with the concurrence of the Chief Justice of India.
(iv) Mr. Gobind Ballabh Pant, Home Minister of India, declared on the floor of the Parliament on November 24, 1959 that appointment of Judges were virtually being made by the Chief Justice of India and the Executive was only an order-issuing authority.
(v) Mr. Ashok Sen, the Law Minister reiterated in the Parliament on November 25, 1959 that almost all the appointments made to the Supreme Court and the High Courts were made with the concurrence of the Chief Justice of India.
(vi) Out of 547 appointments of Judges made during the period January 1, 1983 to April 10, 1993 only 7 were not in consonance with the views expressed by the Chief Justice of India."
[38]Article 222-Transfer of a Judge from one High Court to another
(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix

[39]During the subsistence of a (partially controversial) declaration of emergency.

[40]*Union of India v. Sankalchand Himatlal Sheth and Anr.* MANU/SC/0065/1977 : (1977) 4 SCC 193 (Bhagwati, J.-para 46)

[41]Para 47 of *Sankalchand case*, Bhagwati, J.

[42]Para 41 of *Sankalchand case*-Chandrachud, J.

[43]Para 62 of *Sankalchand case*-Bhagwati, J.

[44]Para 115 of *Sankalchand case*-Krishna Iyer, J.

[45]Per Fazal Ali, J.-*S.P. Gupta case*, p. 403-"It is true that there were, quite a few transfers during the emergency which were not in consonance with the spirit of Article 222 and that is why the Government had conceded this fact and took steps to revoke the transfers by retransferring, almost all the Judges to the High Courts from where they had been transferred."

[46]Para 2 of *S.P. Gupta case*-Bhagwati, J.

[47]See paras 30 & 31-Bhagwati, J.; Para 134-Gupta, J., Para 632-Tulzapurkar, J.; Para 726-Desai, J.

Paras 890 & 891-Pathak, J.; Paras 1031 & 1032-E S Venkataramaiah, J

[48]*Subhash Sharma v. Union of India* MANU/SC/0643/1990 : 1991 Supp (1) SCC 574, at page 586:

Para 18. "We gather that the Kerala High Court where the sanctioned strength has been reduced by 2, has a sanctioned strength of 22 while its pendency as on January 1, 1990 being 34,330 cases justifies a Judge strength of almost 50 on the basis of the measure of 650 cases per Judge per year. We intend to indicate that there was no justification for reduction of the sanctioned strength."

[49]**Para 19.** "For the present we suggest to government that the matter should be reviewed from time to time and steps should be taken for determining the sanctioned strength in a pragmatic way on the basis of the existing need. If there be no correlation between the need and the sanctioned strength and the provision of Judge-manpower is totally inadequate, the necessary consequence has to be backlog and sluggish enforcement of the Rule of Law....."

[50]Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*, (Oxford University Press, United Kingdom 2014) See Pages 113 to 120

[51]From 1978, Governments at the State level and the Union level ceased to be necessarily of the same political party. Regional parties in parts of the country had captured power putting an end to one party rule at both the levels.

[52]**Para 421**-These questions have to be considered in the context of the independence of the judiciary, as a part of the basic structure of the Constitution, to secure the 'rule of law', essential for the preservation of the democratic system. The broad scheme of separation of powers adopted in the Constitution, together with the directive principle of 'separation of judiciary from executive' even at the lowest strata, provides some insight to the true meaning of the relevant provisions in the Constitution relating to the composition of the judiciary. The construction of these provisions must accord with these fundamental concepts in the constitutional scheme to preserve the vitality and promote the growth essential for retaining the Constitution as a vibrant

organism.
[53]Article 50. Separation of judiciary from executive-"The State shall take steps to separate the judiciary from the executive in the public services of the State."
[54]**Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India:**
"I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do swear in the name of God that I will bear true faith and solemnly affirm faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill will and that I will uphold the Constitution and the laws."
[55]**Form of oath or affirmation to be made by the Judges of a High Court:**
"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of)..... do swear in the name of God that I will bear solemnly affirm true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."
[56]**Article 124(5).** Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge Under Clause (4).
[57]**Article 124(4).** A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
[58]**(per Hon. Pandian, J.)-Para 49.** "one other basic and inseparable vital condition is absolutely necessary for timely securing the independence of judiciary; and that concerns the methodology followed in the matter of sponsoring, selecting and appointing a proper and fit candidate to the (Supreme Court or High Court) higher judiciary. The holistic condition is a major component that goes along with other constitutionally guaranteed service conditions in securing a complete independence of judiciary. To say differently, a healthy independent judiciary can be said to have been firstly secured by accomplishment of the increasingly important condition in regard to the method of appointment of judges and, secondly, protected by the fulfilment of the rights, privileges and other service conditions. The resultant inescapable conclusion is that only the consummation or totality of all the requisite conditions beginning with the method and strategy of selection and appointment of judges will secure and protect the independence of the judiciary. Otherwise, not only will the credibility of the judiciary stagger and decline but also the entire judicial system will explode which in turn may cripple the proper functioning of democracy and the philosophy of this cherished concept will be only a myth rather than a reality."
(per Hon. Kuldip Singh, J.)-Para 335. "Then the question which comes up for consideration is, **can there be an independent judiciary when the power of appointment of judges vests in the executive?** To say yes, would be illogical. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the Framers of the Constitution could have never intended to give

this power to the executive. Even otherwise the Governments--Central or the State--are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex Court. The executive--in one form or the other--is the largest single litigant before the courts. In this view of the matter the judiciary being the mediator--between the people and the executive--the Framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the executive."
(per **Hon. Verma, J.)-Para 447. "When the Constitution was being drafted,** there was **general agreement that the appointments of Judges in the superior judiciary should not be left to the absolute discretion** of the **executive**, and this was the reason for the provision made in the Constitution imposing the obligation to consult the Chief Justice of India and the Chief Justice of the High Court. This was done to achieve independence of the Judges of the superior judiciary even at the time of their appointment, instead of confining it only to the provision of security of tenure and other conditions of service after the appointment was made. It was realised that the independence of the judiciary had to be safeguarded not merely by providing security of tenure and other conditions of service after the appointment, **but also by preventing the influence of political considerations in making the appointments**, if left to the absolute discretion of the executive as the appointing authority. It is this reason which impelled the incorporation of the obligation of consultation with the Chief Justice of India and the Chief Justice of the High Court in Articles 124(2) and 217(1). The Constituent Assembly Debates disclose this purpose in prescribing for such consultation, even though the appointment is ultimately an executive act."
[59]See the articles of Lord Templeman's favourable opinion and the critical view of Lord Cooke of Thorndon published in the book titled Supreme but not Infallible - Oxford University Press - 2000 A.D.
"Article 124 of the Constitution empowers the President (acting on the advice of the Prime Minister and Cabinet) to appoint the judges of the Supreme Court. The President is given a discretion about consulting judges of the Supreme Court and High Courts but in the case of appointments of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. Similarly, Article 217 requires the Chief Justice of India to be consulted concerning the appointment of a judge of the High Court of a state. In 1993, in the *Supreme Court Advocates on Record Association* case the Supreme Court by a majority held that, having regard to the independence of the judiciary and the separation of powers which the Court held to be implicit in the Constitution, the views of the Chief Justice of India expressed when he was consulted must be supreme. The Court also laid down guidelines governing the appointment and duration of office of temporary acting judges. The majority decision has been criticized as an extension of the meaning of the word 'consultation'. However, having regard to the earlier experience in India of attempts by the executive to influence the personalities and attitudes of members of the judiciary, and having regard to the successful attempts made in Pakistan to control the judiciary and having regard to the unfortunate results of the appointment of Supreme Court judges of the United States by the President subject to approval by Congress, the majority decision of the Supreme Court of India in the Advocates on Record case marks a welcome assertion of the independence of the judiciary and is the best method of obtaining appointments of integrity and quality, a precedent method which the British could follow such advantage." ---- Lord Templeman
"All in all, the opinion of the Supreme Court in the third *Judges* case must be one of the most

remarkable rulings ever issued by a supreme national appellate court in the common law world. Since, in some respects, I have had to voice respectful doubts about the soundness of the constitutional foundations of that opinion...." ---- Lord Cooke of Thorndon

[60]Iyer, V.R. Krishna, Judiciary: *A reform agenda* -II, The Hindu (online edition) 15.08.2002

[61]"An Independent Judiciary" - speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture on 10th November 2011.

"As I have said elsewhere 'the process by which a judge is appointed to a superior court is one of the best kept secrets in this country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system."

[62]*Shanti Bhushan* (supra) - Para 2. The primary ground urged is that the opinion of the Chief Justice of India has to be formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of opinion and no appointment can be made unless it is in conformity with the final opinion of the Chief Justice of India formed in the aforesaid manner. .... It is, therefore, submitted that the appointment of Respondent No. 2 as a permanent Judge as notified on 2.2.2007 has no sanctity in law.

[63]Mehta, Pratap Bhanu, *'Whom do you trust', The Indian Express*, May 14, 2015 - "The implicit constitutional accusation is this. The judiciary had, through improvisation, created a method of appointing judges that effectively sidelined other branches of government. This arrangement was tolerated, not because it conformed to a constitutional text or some hallowed principle, but because it seemed to maintain judicial independence. The experience of the 1970s made the prospect of political packing of the judiciary a live fear. This arrangement is being challenged, not because we have discovered a new principle, but because the credibility of the judiciary has declined. We are, in effect, saying that any arrangement that relies solely on the judiciary has proved untrustworthy. Those challenging the NJAC are relying on the ghost of the 1970s: Do you really want the political class to have a greater say in appointments? Both branches of government are accusing each other of not being worthy of trust. In the process, they have dragged each other down. The problem is that both are right."

[64]See para 31 (supra)

[65]Constituent Assembly Debates, 24th May 1949 (Vol. VIII)

[66]On 24th May 1949 while draft Article 103 of the draft Constitution was being discussed corresponding to present Article 124, four members, Prof. Shibban Lal Saksena and Prof. K.T. Shah, who represented the United Provinces of Bihar and Mr. B. Pocker Sahib and Mr. Mahboob Ali Beig Sahib, who represented Madras Provinces suggested amendments to Article 103, the relevant portions of which read as follows:

"Prof. Shibban Lal Saksena:

That for Clause (2) of Article 103, the following clauses be substituted-

(2) The Chief Justice of Bharat, who shall be the Chief Justice of the Supreme Court, shall be appointed by the President subject to confirmation by two-thirds majority of Parliament assembled in a joint session of both the Houses of Parliament."

"Prof. K.T. Shah:

Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with the Council of States and such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose and shall hold office until he attains the age of sixty-five years."

"Mr. B. Pocker Sahib:

That for Clause (2) and the first proviso of Clause (2) of Article 103, the following be substituted-(2) Every judge of the Supreme Court other than the Chief Justice of India shall be appointed by the President by warrant under his hand and seal after consultation with the concurrence of the Chief Justice of India; and the Chief Justice of India shall be appointed by the President by a warrant under his hand and seal after consultation with the judges of the Supreme Court and the Chief Justices of the High Court in the States and every judge of the Supreme Court."

"Mr. Mahboob Ali Beig Sahib:

That in the first proviso to Clause (2) of Article 103, for the words 'the Chief Justice of India shall always be consulted' the words 'it shall be made with the concurrence of the Chief Justice of India' be substituted."

[67]See Footnote 50 (supra)

[68]Heard by a Bench of 11 Judges and decided by a majority of 6:5

[69]**Article 13(3)(a).** "law" includes any Ordinance, order, bye-law, rule, Regulation, notification, custom or usage having in the territory of India the force of law.

[70]**Article 13(2).** The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

[71](Per Sikri, CJ)-Para 292, "fundamental rights cannot be abrogated but reasonable abridgements of fundamental rights can be effected in public interest"..... "That every provision of the Constitution can be amended provided in the result the **basic foundation** and **structure of the Constitution** remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;
(2) Republican and Democratic form of Government;
(3) Secular character of the Constitution;
(4) Separation of powers between the legislature, the executive and the judiciary;
(5) Federal character of the Constitution."

(Per Shelat, J. who spoke for himself and Grover, J.)-Paras 582, 583, "there can be no difficulty in discerning that the following can be regarded as the **basic elements** of the constitutional structure. These cannot be catalogued but can only be illustrated:

(1) The supremacy of the Constitution.
(2) Republican and Democratic form of government and sovereignty of the country.
(3) Secular and federal character of the Constitution.
(4) Demarcation of power between the Legislature, the executive and the judiciary.
(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
(6) The unity and the integrity of the Nation."

and, therefore, "the power Under Article 368 is wide enough to permit amendment of each and every article.... so long as its basic elements are not abrogated or denuded of their identity".

(Per Hegde, J, who also spoke for Mukherjea, J.)-Para 666, "Parliament has no power to abrogate

or emasculate the **basic elements** or **fundamental features** of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the **essential features of the individual freedoms secured** to the citizens."..... and "mandate to build a welfare State and egalitarian society."
(Per P. Jaganmohan Reddy, J.)-paras 1159, 1162, "A sovereign democratic republic. Parliamentary democracy, the three organs of the State... constitute the basic structure." He further held that "without either the fundamental rights or directive principles it cannot be democratic republic. Therefore, the power of amendment Under Article 368..... is not wide enough to totally abrogate..... any one of the fundamental rights or other **essential elements of the basic structure** of the Constitution and destroy its identity".
(Per Khanna, J.)-para 1426, "the power Under Article 368 does not take within its sweep the power to destroy the old Constitution"..... means "the retention of the **basic structure** or **framework** of the old Constitution".... "it is not permissible to touch the foundation or to alter the basic institutional pattern." According to Justice Khanna, "such limitations are inherent and implicit in the word "amendment"."
[72]See the summary of the majority of the judgment signed by 9 Judges, p. 1007 of MANU/SC/0445/1973 : (1973) 4 SCC 225.
[73]The judgment in *Indira Nehru Gandhi case* (supra) is neatly summarised by Chandrachud, J. in Waman Rao case at para 15:
"15..... in *Indira Gandhi* v. *Raj Narain Article* 329-A(4) was held by the Court to be beyond the amending competence of the Parliament since, by making separate and special provisions as to elections to Parliament of the Prime Minister and the speaker, it destroyed the basic structure of the Constitution. Ray, C.J. based his decision on the ground that the 39th Amendment by which Article 329-A was introduced violated the Rule of Law (p. 418) (SCC p. 44); Khanna, J. based his decision on the ground that democracy was a basic feature of the Constitution, that democracy contemplates that elections should be free and fair and that the clause in question struck at the basis of free and fair elections (pp. 467 and 471) (SCC pp. 87 and 91); Mathew, J. struck down the clause on the ground that it was in the nature of legislation ad hominem (p. 513) (SCC p. 127) and that it damaged the democratic structure of the Constitution (p. 515) (SCC p. 129); while one of us, Chandrachud, J., held that the clause was bad because it violated the Rule of Law and was an outright negation of the principle of equality which is a basic feature of the Constitution (pp. 663-65) (SCC p. 257)."
[74]Para **13.** The question which we have to determine on the basis of the majority view in Kesavananda Bharati is whether the amendments introduced by Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 **damage the basic structure of the Constitution** by **destroying any** of its **basic features** or **essential elements**.
[75]**Para 31.** For these reasons, we are of the view that the Amendment introduced by Section 4 of the Constitution (First Amendment) Act, 1951 does not damage or destroy the basic structure of the Constitution. The Amendment must, therefore, be upheld on its own merits.
[76]See paras 25 to 29-Ahmadi, J., para 145-Sawant, J., paras 183 to 186-Ramaswamy, J., para 304-Jeevan Reddy, J.
[77]In this case, this Court had to decide the validity of the Constitution (Eighty Fifth) Amendment Act 2001 by which Article 16(4A) was amended in the Constitution with retrospective effect. It provided a rule of reservation in the context of the promotion in the Government service. Such an amendment was challenged to be violative of the basic structure of the Constitution.
[78]Articles 79-84 and 168-173

[79]Articles 83 and 172
[80]Article 326
[81]Articles 245 and 246 etc.
[82]Article 324
[83]The National Commission to Review the Working of the Constitution (NCRWC), 2002 chaired by Justice M.N. Venkatachaliah
[84]**7.3.7** "The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18th May, 1990 (9th Lok Sabha) providing for the institutional frame work of National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. Further, it appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work whereunder consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already it available in Japan, Israel and the UK. The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for a collegium of the Chief Justice of India and two other judges of the Supreme Court for making appointment to the Supreme Court. However, it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.
The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:
1. The Chief Justice of India Chairman
2. Two senior most judges of the Supreme Court: Member
3. The Union Minister for Law and Justice: Member
4. One eminent person nominated by the President after consulting the CJI Member
The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary."
[85]Fali S. Nariman, *Before Memory Fades-An Autobiography,*
p. 389-"If there is one important case decided by the Supreme Court of India in which I appeared and won, and which I have lived to regret, it is the decision that goes by the title-*Supreme Court Advocates-on-Record Association* v. *Union of India*. It is a decision of the year 1993 and is better known as the *Second Judges Case*."
p.400-"I don't see what is so special about the first five judges of the Supreme Court. They are only the first five in seniority of appointment-not necessarily in superiority of wisdom or competence. I see no reason why all the judges in the highest court should not be consulted when a proposal is made for appointment of a high court judge (or an eminent advocate) to be a judge of the Supreme Court. I would suggest that the closed-circuit network of five judges should be disbanded. They invariably hold their 'cards' close to their chest. They ask no one. They consult no one but themselves."
[86]See Federist No. 51-(Hamilton or Madison) (1788)
[87]Sudhanshu Ranjan, '*Justice, Judocracy and Democracy in India: Boundaries and Breaches*',

p.185-186
[88]Laurence H. Tribe, God Save this Honorable Court, First Edition, p.10-11
[89]*A.K. Gopalan v. State of Madras* MANU/SC/0012/1950 : AIR 1950 SC 27
[90]Union of India v. Sankalchand Himatlal Sheth and Anr. MANU/SC/0065/1977 : (1977) 4 SCC 193
[91]ADM Jabalpur v. S.S. Shukla Etc. Etc. MANU/SC/0062/1976 : AIR 1976 SC 1207
[92]Laurence H. Tribe (American Constitutional Law) Second Edition, Page 2 of Chapter 1 "Approaches to Constitutional Analysis"-**"That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet** of American **constitutionalism**. At the outset, only a small number of explicit substantive limitations on the exercise of governmental authority were thought essential; in the main, it was believed that personal freedom could be secured more effectively by decentralization than by express command. From the **thought of seventeenth century English liberals**, particularly, as elaborated in **eighteenth century France by Montesquieu**, the Constitution's framers had derived **the conviction** that **human rights could best be preserved** by inaction and indirection-shielded **behind the lay of deliberately fragmented centers of countervailing power**, in a vision almost Newtonian in its inspiration. In this first model, **the centralized accumulation of power in any man or single group of men meant tyranny; the division and separation of powers, both vertically (along the axis of federal, state and local authority) and horizontally (along the axis of legislative, executive and judicial authority) meant liberty. It was thus essential that no department, branch, or level of government be empowered to achieve dominance on its own.** If the legislature would punish, it must enlist the cooperation of the other branches-the executive to prosecute, the judicial to try and convict. So too with each other center of governmental power; exercising the mix of functions delegated to it by the people **in the social compact that was the Constitution, each power center would remain dependent upon the others for the final efficacy of the social designs."**
[93]Article **124A**. National Judicial Appointments Commission.-(1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely-
xxx xxx xxx xxx
(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People-Members.
Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women.
Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.
[94]"*An Independent Judiciary*"-speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture on 10.11.2011
[95]Sankalchand case (supra) para 78.
[96]*Maharao Sahib Shri Bhim Singhji* v. *Union of India and Ors.* MANU/SC/0509/1980 : (1981) 1 SCC 166, Krishna Iyer, J.-
"20. The question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment."
[97]Thomas Babington Macaulay's address on 2nd March 1831 in the House of Commons on

Parliamentary Reforms
[98]https://archive.org/stream/saprucommittee035520mbp/saprucommittee035520mbp_djvu.txt
[99]Paragraph 288
[100]http://164.100.47.132/LssNew/constituent/vol4p6. html
[101]Lay persons were also not included in the consultation process.
[102]B. Shiva Rao: 'The Framing of India's Constitution' Select Documents, Volume II page 486
[103]B. Shiva Rao: 'The Framing of India's Constitution' Select Documents, Volume II page 519
[104]Paragraphs 4.4 and 4.5
[105]B. Shiva Rao: 'The Framing of India's Constitution' Select Documents, Volume II page 583
[106]B. Shiva Rao: 'The Framing of India's Constitution'-Select Documents, Volume II page 662
[107]The text of the Memorandum is available in B. Shiva Rao: 'The Framing of India's Constitution'-Select Documents, Volume IV page 193
[108]Page 373-374
[109]The Framing of India's Constitution-Select Documents, Volume-IV, Page 84.
[110]Article 103(2) of the Draft Constitution reads: "Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a judge, other than the Chief Justice, the Chief Justice of India shall always be consulted."
[111]The Framing of India's Constitution-Select Documents, Volume-IV, Page 147.
[112]Indian Constitution-Cornerstone of a Nation by Granville Austin at page 126, footnote 39
[113]http://parliamentofindia.nic.in/ls/debates/vol10p4. htm
[114]http://parliamentofindia.nic.in/ls/debates/vol10p7c.htm
[115]Indian Constitution-Cornerstone of a Nation, pages 138-139
[116]http://parliamentofindia.nic.in/ls/debates/vol8p7a.htm
[117]http://parliamentofindia.nic.in/ls/debates/vol8p7a.htm
[118]http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm
[119]http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm
[120]Paragraph 207 (Justice Pandian). A similar view was expressed by Justice Kuldip Singh in paragraph 327.
[121]Former President of the Supreme Court of the United Kingdom and Lord Chief Justice of England and Wales
[122]https://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf
[123]Lee Epstein, Jack Knight & Olga Shvetsova, Comparing Judicial Selection Systems, 10 WM & MARY BILL RTS J. 7, n.9 (2001) (quoting Philip Dubois).
[124]The Report is titled 'Reforms of the Judicial Administration'
[125]Chapter 5 paragraph 5
[126]Chapter 5 paragraph 6
[127]Chapter 6 paragraph 8
[128]Chapter 6 paragraph 11
[129]Chapter 6 paragraph 14
[130]Chapter 6 paragraph 14 and 15
[131]Chapter 6 paragraph 82
[132]Page 287

[133]Page 288-289
[134]Although Justice H.R. Khanna did not sign the Report, it had his full concurrence
[135]Paragraphs 2.2 to 2.5 are relevant in this context
[136]Chapter 7
[137]This later on became what is commonly called the 'collegium system' of appointment of judges
[138]Chapter 9
[139]Paragraph 5.9
[140]Paragraph 6.14
[141]Chapter 9
[142]Chapter 1 paragraph 1.4
[143]Paragraph 7.8
[144]Paragraph 7.10 and 7.15
[145]Paragraph 5.1
[146]Paragraph 5.4
[147]Paragraphs 5.5 and 5.6
[148]Paragraph 5.8
[149]Paragraph 6.11
[150]Paragraph 6.9
[151]Paragraph 124
[152]Paragraph 130
[153]This expression was used by Justice Bhagwati and by Justice D.A. Desai in paragraph 719 of S.P. Gupta v. Union of India.
[154]http://parliamentofindia.nic.in/ls/debates/vol11p12. htm
[155]Judicial Independence, Transitional Justice and the Rule of Law by David Dyzenhaus, (2001-2004) 10 Otago L Rev 345 at 345-346
[156]S.P. Gupta v. Union of India MANU/SC/0080/1981 : 1981 Supp SCC 87 (Seven Judges Bench)
[157]Supreme Court Advocates-on-Record Association v. Union of India, MANU/SC/0073/1994 : (1993) 4 SCC 441 (Nine Judges Bench)
[158]Special Reference No. 1 of 1998, MANU/SC/1146/1998 : (1998) 7 SCC 739 (Nine Judges Bench)
[159]Paragraphs 27, 320 and 634. This view has been upheld in several decisions thereafter.
[160]Paragraph 27
[161]Paragraph 1033
[162]Paragraph 30 and paragraph 890
[163]Paragraphs 30, 632 and 848
[164]Paragraph 30
[165]Paragraph 30
[166]Paragraph 30 and 31
[167]Paragraph 30
[168]I entirely agree with Justice Chelameswar when he says that the Second Judges case did not hold that consultation means concurrence.
[169]Subhash Sharma v. Union of India, MANU/SC/0643/1990 : (1991) Supp. 1 SCC 574
[170]Paragraph 27
[171]Paragraph 28

[172]Paragraph 31
[173]Paragraph 32
[174]Paragraph 728 of the First Judges case
[175]Paragraph 34
[176]Paragraph 34
[177]Paragraph 49
[178]Paragraph 63
[179]Paragraph 81
[180]50. Separation of judiciary from executive-The State shall take steps to separate the judiciary from the executive in the public services of the State.
[181]Paragraphs 95 to 99. Though such a practice exists and is accepted, there have been some aberrations in this regard as mentioned in the 14th Report of the LCI and in the Conference of Chief Justices.
[182]Paragraph 164
[183]Paragraph 172
[184]Paragraph 197 and 209
[185]Paragraph 212
[186]Paragraph 254
[187]Paragraph 313
[188]Paragraph 303 and 313. It was observed in paragraph 303: "If the President has to act on the aid and advice of the Council of Ministers it is difficult to hold that he is bound by the opinion of the Chief Justice of India unless we hold that the Council of Ministers including the Prime Minister would be bound by the opinion of the Chief Justice of India, a construction which to our mind is too artificial and strained to commend acceptance."
[189]Paragraph 334
[190]Paragraph 335
[191]Paragraph 277, 356, 383 and 411
[192]Paragraph 359, 371, 373 and 376. The figures relating to the appointment of judges have been mentioned in paragraphs 367 and 369.
[193]Paragraph 377 and 411
[194]Paragraph 385, 387 and 411
[195]Paragraph 392 and 411
[196]Paragraphs 369 and 370
[197]Paragraph 447
[198]Paragraph 444, 446, 448 and 450
[199]Paragraph 450, 451, 455, 478 and 486
[200]Paragraph 462
[201]Paragraph 478(7)
[202]Paragraph 456 and 466
[203]Paragraph 478(8)
[204]Paragraph 478(7)
[205]Paragraph 448
[206]Paragraph 457
[207]Paragraph 457 and 476
[208]Paragraph 478(10) and 486(2)
[209]Paragraph 486

[210]Paragraph 500
[211]According to the learned Attorney-General, this would have made Dr. Ambedkar turn in his grave. Not so and quite to the contrary.
[212]Paragraph 478(1)
[213]Paragraph 478(5)
[214]Paragraph 478(7)
[215]The Frontline, Volume 25 Issue 20 September 27, 2008 to October 10, 2008
[216] http://www.tnsja.tn.nic.in/article/Judicial%20Independence%20JSVJ.pdf
[217]Paragraph 44
[218]Paragraph 88
[219]Paragraph 154
[220]**217. Appointment and conditions of the office of a Judge of a High Court.-**
(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.
[221]Paragraph 149
[222]Granville Austin: Working a Democratic Constitution page 131
[223]**222. Transfer of a Judge from one High Court to another.--**(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.
(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.
[224]Paragraph 37
[225]Paragraph 41
[226]Paragraph 115
[227]Paragraph 115
[228]Paragraph 39
[229]Paragraph 30
[230]Paragraph 563, 564 and 569
[231]Paragraph 632 and 663
[232]Paragraph 848 and 849
[233]Paragraphs 129 to 133 and 164
[234]http://doj.gov.in/sites/default/files/memohc.pdf (for High Court Judges)
http://doj.gov.in/sites/default/files/memosc.pdf (for Supreme Court judges)
[235]Paragraph 96 and 97
[236]Paragraph 7.8
[237]The Consultation Paper can be found on the website of the Law Ministry. This was accessed on 2nd May, 2015: http://lawmin.nic.in/ncrwc/finalreport/v2b1-14. htm
[238]Second Judges case
[239]Paragraph 7.3.7
[240]This is factually incorrect. The Memorandum was drawn up by the Law Minister and did not confer any power upon the judiciary.
[241]Paragraph 486(1)

[242]I am somewhat uncomfortable with the word 'primacy' while dealing with the President and the Chief Justice of India. In the context of the appointment of judges, the word 'responsibility' used by the LCI in its 14th Report seems more appropriate.
[243]See for example: Hammond v. Clark 136 Ga. 313 (1911), Fahey v. Hackmann 291 Mo. 351 (1922), Associated Industries of Oklahoma v. Oklahoma Tax Commission 176 Okla. 120 (1936), State of Wisconsin v. Adam S. Gonzales 253 Wis. 2d 134 (2002), The State v. Swift 69 Ind. 505 (1880) etc.
[244]http://parliamentofindia.nic.in/ls/debates/vol11p11. htm
[245]By Professor M.P. Singh, (1999) 8 SCC (Jour) 1
[246]Supreme But Not Infallible, Essays in Honour of the Supreme Court of India page 48, 53
[247]Supreme Court Advocates-on-Record Association v. Union of India, MANU/SC/0073/1994 : (1993) 4 SCC 441 (Nine Judges Bench)
[248]Special Reference No. 1 of 1998, MANU/SC/1146/1998 : (1998) 7 SCC 739 (Nine Judges Bench)
[249]Paragraph 12
[250]Paragraph 577
[251](4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, insofar as it relates to election petitions and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void, or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.
[252]371 Paragraph 190
[253]A Grammar of Politics (Works of Harold J. Laski), 297
[254]Paragraph 318
[255]Paragraph 87
[256]Paragraph 86
[257]Paragraph 87
[258]Paragraph 63. This has been reiterated in paragraphs 67, 125 and 129.
[259]Paragraphs 77 and 78
[260]Paragraphs 98 to 126.7. The conclusions are stated in paragraphs 126.1 to 126.7.
[261]Paragraph 298 and 304
[262]Paragraph 443
[263]Quoted from Willoughby on the Constitution of the United States, page 64
[264]Page 110 and 111
[265]Page 158 and 159
[266]Page 201 and 202
[267]Page 273 and 274
[268]Page 1121
[269]Page 782
[270]Page 783
[271]Page 792

[272]Page 836, 837 and 838
[273]Page 922
[274]Page 917
[275]Paragraph 183
[276]Paragraph 184 to 186
[277]Paragraph 683
[278]Paragraph 1368
[279]Paragraph 2137
[280]Paragraph 2140
[281]Paragraph 1088
[282]Paragraph 1598
[283]Paragraph 772
[284]This conclusion appears to be doubtful
[285]Paragraph 286
[286]Paragraph 297
[287]Paragraph 16
[288]Paragraph 16
[289]Paragraph 14
[290]With due apologies to George Mallory who is famously quoted as having replied to the question "Why do you want to climb Mount Everest?" with the retort "Because it's there."
[291](3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the revenues of India, and any fees or other moneys taken by the court shall form part of those revenues.
[292]http://parliamentofindia.nic.in/ls/debates/vol8p10b.htm
[293]http://parliamentofindia.nic.in/ls/debates/vol8p10b.htm
[294]Paragraph 17
[295]Paragraph 23
[296]Paragraph 22
[297]Reference was made to Dr. Alan Paterson's *Law Lords.* This reference is not at all clear and is simply stated as '1982 at pp. 156-157'
[298]Paraph 13
[299]Sabhajit Tewary was a unanimous decision of 5 learned judges of this Court. To conclude that it "sought precedential support from decisions which were irrelevant" is, with respect, rather uncharitable.
[300]Paragraph 59 to 61
[301]Paragraph 10
[302]Paragraph 17
[303]Paragraph 19
[304]How is this to be ascertained?
[305]MANU/SCCN/0017/1986 : [1986] 2 SCR 56 wherein it is stated: With respect to the first of these arguments, I do not think Section 100 [of the Constitution Act, 1867] imposes on Parliament the duty to continue to provide judges with precisely the same type of pension they received in 1867. The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Accordingly, if the Constitution can accommodate, as it has, many subjects unknown in

1867--airplanes, nuclear energy, hydroelectric power--it is surely not straining Section 100 too much to say that the word 'pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of 'pensions'.
[306]"The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."
"Learning and Science", speech at a dinner of the Harvard Law School Association in honor of Professor C.C. Langdell (June 25, 1895); reported in Speeches by Oliver Wendell Holmes (1896). p. 67-68
[307]I.R. Coelho v. State of Tamil Nadu MANU/SC/0595/2007 : (2007) 2 SCC 1 paragraph 42
[308]1994 Supp (1) SCC 324 paragraph 124
[309]In his concluding speech, Br. Rajendra Prasad used the expression 'distribution of powers' and not 'separation of powers'. See: http://parliamentofindia.nic.in/ls/debates/vol11p12. htm
[310]Page 446
[311]Paragraph 371
[312]Second Judges case, paragraph 450
[313]Clause 5(a) of Article 62 reads:
"(5)a In the choice of his Ministers and the exercise of his other functions under this Constitution, the President shall be generally guided by the instructions set out in Schedule III-A, but the validity of anything done by the President shall not be called in question on the ground that it was done otherwise than in accordance with such instructions."
[314]Judicial Independence and the Rule of Law by Jonathan K. Van Patten, Volume 2 Benchmark page 117, 129 (1986)
[315]Paragraph 335
[316]Paragraph 149
[317]Paragraph 27 and paragraph 83
[318]Paragraph 320
[319]Paragraph 634
[320]Paragraph 56
[321]Paragraph 331
[322]Paragraph 421
[323]Paragraph 502
[324]Paragraph 16
[325]Paragraph 412
[326]Paragraph 101
[327]Paragraph 126.2
[328]Southey Memorial Lecture, 1981
[329]Former President of the Supreme Court of the United Kingdom and Lord Chief Justice of England and Wales
[330]Article 124(2)
[331]Article 124(4)
[332]Article 125

[333]Article 112(2)(d)
[334]Article 113
[335]Article 217
[336]Article 218
[337]Article 202
[338]Article 112(3)(d)
[339]Article 203
[340]http://www.judiciary.senate.gov/imo/media/doc/kennedy_testimony_02_14_07. pdf
[341]Article 141. There is no corresponding constitutional provision for the High Court.
[342]Article 144. There is no corresponding constitutional provision for the High Court.
[343]Article 142. There is no corresponding constitutional provision for the High Court.
[344]Article 145. There is no corresponding constitutional provision for the High Court.
[345]Article 146. The corresponding constitutional provision for the High Court is Article 229.
[346]Article 146. The corresponding constitutional provision for the High Court is Article 229.
[347]Article 121
[348]Article 211
[349]Article 50: The State shall take steps to separate the judiciary from the executive in the public services of the State.
[350]Page 50
[351]Paragraph 77
[352]Paragraph 709
[353]Paragraph 27
[354]Granville Austin-"Indian Constitution: Cornerstone of a Nation" pages 164-164
[355]50. Separation of judiciary from executive.-The State shall take steps to separate the judiciary from the executive in the public services of the State.
[356]39-A. That State shall take steps to secure that, within a period of three years from the commencement of this Constitution, there is separation of the judiciary from the executive in the public services of the State.
[357]http://parliamentofindia.nic.in/ls/debates/vol7p12. htm
[358]http://parliamentofindia.nic.in/ls/debates/vol7p13. htm
[359]http://parliamentofindia.nic.in/ls/debates/vol7p13. htm
[360]http://parliamentofindia.nic.in/ls/debates/vol7p13. htm
[361]J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law) paragraph 0.2.9
[362]Granville Austin-"Working a Democratic Constitution: The Indian Experience" page 124
[363]Second Judges case, paragraph 49, 335 and 447.
[364]14th Report of the LCI, Chapter 5
[365]Pages 155 and 156
[366]Contributors: Professor Dr. Jutta Limbach, Professor Dr. Pedro Villalon, Roger Errera, The Rt Hon Lord Lester of Herne Hill QC, Professor Dr. Tamara Morschakova, The Rt Hon Lord Justice Sedley, Professor Dr. Andrzej Zoll. Available at http://www.interights.org/document/142/index.html
[367]As agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003
[368]http://thecommonwealth.org/sites/default/files/history-

items/documents/LatimerHousePrinciples.pdf
[369]Page 52
[370]Paragraph 1033
[371]Paragraph 886
[372]Paragraph 49
[373]Paragraph 335
[374]Paragraph 431
[375]Paragraph 447
[376]Judges on Trial: The Independence and Accountability of the English Judiciary, Chapter 4
[377]As amended at Manila on 28th August, 1997. This has been referred to in Vishaka v. State of Rajasthan MANU/SC/0786/1997 : (1997) 6 SCC 241 in paragraph 11 of the Report.
[378]Clause 3
[379]Clause 11
[380]Clause 12
[381]The six values are: Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence
[382]It is not necessary, for the purposes of this discussion, to get into the controversy whether the recommendation of a person to be considered for appointment should originate from the executive or the judiciary.
[383]Second Judges case, paragraph 293 and 428
[384]Second Judges case, paragraph 442, 450, 461, 486 and 509
[385]Second Judges case paragraph 462 and 478(6)
[386]Second Judges case paragraph 467, 468 and 478(6)
[387]Frontline, Volume 25-Issue 20: September 27-October 10, 2008
[388]Second Judges case paragraph 353 and 376
[389]Paragraph 149
[390]Paragraph 41
[391]http://parliamentofindia.nic.in/ls/debates/vol8p11a.htm
[392]I.R. Coelho v. State of Tamil Nadu MANU/SC/0595/2007 : (2007) 2 SCC 1 paragraph 42
[393]Foot Note 16
[394]Paragraph 287
[395]Article 8 and 10 of the UDHR are relevant in this regard:
Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
[396]Paragraph 475
[397]Paragraph 546
[398]Paragraph 666
[399]Paragraph 1435
[400]Paragraph 1537
[401]Paragraphs 251 and 252. Justice Bhagwati also adverts to this in Minerva Mills v. Union of India MANU/SC/0075/1980 : (1980) 3 SCC 625.
[402]**13. Laws inconsistent with or in derogation of the fundamental rights**--(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so

far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,--
(a) "law" includes any Ordinance, order, bye-law, rule, Regulation, notification, custom or usage having in the territory of India the force of law;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) Nothing in this article shall apply to any amendment of this Constitution made Under Article 368.

[403]Kesavananda Bharati
[404]Justice Khanna refers to this conclusion in paragraph 198 in the decision rendered in ***Indira Nehru Gandhi***
[405]Paragraph 173
[406]Paragraphs 175 and 176
[407]Paragraph 210
[408]Paragraph 213
[409]Paragraph 264 and 265
[410]Paragraph 651
[411]Paragraph 663
[412]Paragraph 1
[413]Paragraphs 12 and 13
[414]I am unable to agree with Justice Chelameswar when he says that the 'basic structure' and 'basic features' convey different ideas. Lexicographically-yes, but constitutionally speaking-no they are two dimensions of the same picture. In any event, for the present discussion, the distinction, if any, is not relevant.
[415]Paragraph 11
[416]Paragraph 77-A
[417]Paragraph 21
[418]Paragraph 119
[419]Paragraph 20
[420]Paragraph 70 and 151
[421]Paragraph 661
[422]Paragraph 7
[423]Paragraph 4
[424]Paragraph 5
[425]Paragraph 5
[426]Paragraph 11
[427]Paragraph 76
[428]Paragraph 111
[429]Paragraph 288
[430]Paragraph 317

[431]Paragraph 532
[432]Paragraph 909
[433]Paragraph 1106
[434]Paragraph 1436. This view was reiterated in paragraph 1534.
[435]Paragraph 1442
[436]Paragraph 176
[437]Paragraph 661
[438]Paragraph 19
[439]Per Chaskalon, J paragraphs 88 and 89
[440]Mistretta v. United States 488 U.S. 361, 407 (1989)
[441]Paragraph 634
[442]Paragraph 1437
[443]Paragraph 1563
[444]Paragraph 46
[445]Paragraphs 360 (Two), 366
[446]Page 54
[447]Page 55
[448]Page 56
[449]Page 57-59
[450]Public Law (2015): Judicial Independence and Accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005 by Robert Hazell
[451]See State of Punjab v. Salil Sablok MANU/SC/0166/2013 : (2013) 5 SCC 1 paragraph 115 of the Report.
[452]Paragraph 61
[453]Paragraph 468
[454]Paragraph 216(3)
[455]Paragraph 16
[456]Paragraph 20
[457]The discussion in paragraphs 79 to 86 of the Report is quite useful.
[458]It was held in Ishwar Chandra v. Satyanarain Sinha MANU/SC/0592/1972 : (1972) 3 SCC 383 in paragraph 10 of the Report:
"... where there is no rule or Regulation or any other provision for fixing the quorum, the presence of the majority of the members would constitute it a valid meeting and matters considered thereat cannot be held to be invalid."
[459]Paragraph 207
[460]Paragraph 327
[461]Paragraph 335
[462]The position that the State is a major litigant in the country remains the same even today.
[463]Justice Bhagwati: "We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary. As recently as July 1977 the Chief Justice of Australia publicly stated that the time had come for such a commission to be appointed in Australia. So also in New Zealand, the Royal Commission on the Courts chaired by Mr. Justice Beattle, who has now become the Governor-General of New Zealand, recommended that a Judicial Commission should consider all judicial appointments including appointments of High Court Judges." [Paragraph 31]
[464]Appointing Australian Judges: A New Model by Simon Evans and John Williams, [2008]

Sydney Law Review Volume 30 page 295. See http://sydney.edu.au/law/slr/slr30_2/Evans.pdf
[465]http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf
[466]http://www.lawsociety.org.bw/news/Position%20Paper%20on%20Appointment%20of%20Judges %20Final%2014%20june%202012%20'Final'.pdf
[467]This may be contrasted with the direct exchange of views between the President and the Chief Justice of India referred to earlier.
[468]Australia and South Africa have had a gay judge on the Bench. The present political executive in India would perhaps not permit the appointment of a gay person to the Bench.
[469]In I.R. Coelho v. State of Tamil Nadu MANU/SC/0595/2007 : (2007) 2 SCC 1 this Court observed in paragraph 138 of the Report: "The relevance of *Indira Gandhi case*, *Minerva Mills case* and *Waman Rao case* [MANU/SC/0091/1980 : (1981) 2 SCC 362] lies in the fact that every improper enhancement of its own power by Parliament, be it Clause (4) of Article 329-A or Clauses (4) and (5) of Article 368 or Section 4 of the 42nd Amendment has been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. They made directive principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms."
[470]Carly Van Orman, *Introduction to the Symposium: The Judicial Process Appointments Process*, 10 Wm. & Mary Bill Rts. J. 1 (2001),
http://scholarship.law.wm.edu/wmborj/vol10/iss1/2
[471]'The Appointment and Removal of Judges' by Sir Anthony Mason AC KBE, formerly Chief Justice of Australia http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm
[472]Paragraph 531
[473]'The Appointment and Removal of Judges' by Sir Anthony Mason AC KBE, formerly Chief Justice of Australia http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm
[474]Shimon Shetreet, *Judges on Trial* (North-Holland Publishing Company, Amsterdam, (1976), p. 46.
[475]Akkas, Sarkar Ali (2004) "Appointment of Judges: A Key Issue of Judicial Independence," Bond Law Review: Vol. 16: Iss. 2, Article 8. Available at:
http://epublications.bond.edu.au/blr/vol16/iss2/8
[476]Reference Re Supreme Court Act, Sections 5 and 6, [2014] 1 SCR 433
[477]Paragraph 4
[478]Paragraph 15
[479]R v. Sussex Justices, *Ex parte McCarthy* [1924] 1KB 256 : [1923] All ER Rep. 233
[480]Paras 210, 214, Pandian, J., Paras 361 to 376, Kuldip Singh, J., Para 486, Verma, J., Para 505, Punchhi, J. in Second Judges' case
[481](Para 284, Sikri, CJ.); (Para 583, Shelat & Grover, JJ.); (Para 651 Hegde & Mukherjea, JJ.); (Para 1162, Reddy, J.) and (Para 1426, Khanna, J.)
[482]Paras 292, 582, 666, 1159, 1426
[483]Paras 652 and 653
[484]Para 1535 A. (Khanna, J.) In my opinion, the second part of Article 31-C is liable to be quashed on the following grounds:

(1) It gives a carte blanche to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution.
(2) The Legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment Under Article 368.
The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31-C:
"and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."
[485]Para 663-For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance. But it is needless for the purpose of these appeals to ransack every nook and cranny of the Constitution to discover the bricks of the basic structure. Those that are enumerated in the majority judgments are massive enough to cover the requirements of Shri Shanti Bhushan's challenge.
[486]Khanna and Mathew, JJ held that free and fair election was essential for democracy and was part of basic structure. Chandrachud, J. held that right of equality was part of basic structure which was violated. Ray, CJ held that rule of law was basic structure of the Constitution which was violated.
[487]Para 688
[488]Para 56
[489]Paras 17 and 88
[490]Paras 12, 88
[491]Paras 21, 86 and 87
[492]Judicial review by constitutional courts was held to be part of basic structure. (Paras 77, 78)
[493]Fundamental Rights Under Articles 14, 15, 19 and 21 were held to be part of basic structure. (Paras 109 and 147)
[494]Identity test discussed in M. Nagaraj case (supra) (Para 28)
[495]1981 Supp. SCC 87, Para 30 (Primacy in appointment of judges is held to be of Central Government by holding that obligation of the President (the Central Government) was only to consult the judiciary which could not be treated as binding)
[496]Para 25, Pandian J. (Second Judges Case): Reasons which led to reconsideration of First Judges' case
[497]Paras 195 and 207
[498]Paras 334, 335
[499]Para 357
[500]Para 392

[501]Paras 421, 422, 447 and 450
[502]Paras 9.6 and 9.7
[503]Gannon Dunkerly v. State of Rajasthan MANU/SC/0437/1993 : 1993 (1) SCC 364, paras 28 to 31
[504]2nd Judges' case, Paras 19 to 22
[505]The Bill was introduced in the light of 121st Report of the Law Commission.
[506]Centre for Public Interest Litigation v. UOI MANU/SC/0089/2012 : (2012) 3 SCC 1
[507]Manohar Lal Sharma v. UOI MANU/SC/1306/2013 : (2014) 2 SCC 532
[508]S.R. Bommai v. UOI MANU/SC/0444/1994 : (1994) 3 SCC 1; Rameshwar Prasad v. UOI MANU/SC/0399/2006 : (2006) 2 SCC 1; M.C. Mehta v. Kamal Nath MANU/SC/1007/1997 : (1997) 1 SCC 388
[509]Kihoto Hollohan v. Zachillhu MANU/SC/0753/1992 : (1992) Supp. (2) 651
[510]Para 64
[511]Paras 1.21 to 1.23, 7.1 and 7.2
[512]Reasons for holding the primacy in appointment of judges to be with the judiciary have been summarized by Pandian, J. in Para 195 (Second Judges' case)
[513]Para 25(5), Pandian, J.
[514]Para 392, Verma, J. (Second Judges' case)
[515]Such as power of Judicial Review, content of right to life etc.
[516]Paras 184 & 192, Second Judges' case (In para 192 reference is made to famous statement of Dr. Ambedkar about unsuitability of UK and US models in this regard)
[517]Para 14
[518]Para 19
[519]Para 20
[520]Paras 362-371 (Second Judges' case)
[521]Paras 7.5-7.11 (121st Law Commission Report)
[522]Paras 333-335, Kuldip Singh, J., Paras 47, 49, 63, Pandian, J.
[523]Para 486
[524]Para 505, Punchhi, J.; 210, 214, Pandian, J.; Paras 361 to 376, Kuldip Singh, J.
[525]Paras 84 and 197, Pandian, J; Paras 428 and 439, Verma, J; Para 334, Kuldip Singh, J
[526]Paras 56, 72 to 74 and 207, Pandian, J.
[527]Paras 55 to 57, Pandian, J.
[528]Para 195 Pandian, J and Para 450, Verma, J.;
[529]Paras 447 to 463, Verma, J.; Paras 195 to 197, Pandian, J.; Paras 335 and 380, Kuldip Singh, J. (Para 215, Pandian, J.-Appointments and control of district judges is with the High Courts)
[530]Para 25(6), Pandian, J.
[531]14th Report of the Law Commission is referred to in paras 64 and 65 by Pandian, J.; 121st Report of Law Commission is referred to in Paras 184 to 191 and 204, Pandian, J.
[532]Paras 383 to 387, Kuldip Singh, J. (However, CJI was not to be the persona designata but as spokesman of the judiciary in the manner laid down in the judgment.)
[533]Second Judges' case (Paras 74 to 81)
[534]Paras 48 and 57, Shamsher Singh case
[535]Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality MANU/SC/0057/1969 : 1969 (2) SCC 283
[536]In speech dated 25.11.1949 on conclusion of proceedings of the Constituent Assembly (Page 975 of the CAD).

*In his speech as President of the Constituent Assembly quoted in Para 429 of the Second Judges' case)
[537]Paras 652 and 653
[538]Paras 328 and 334, Kuldip Singh, J. (Second Judges' case)
[539]Kesavananda Bharati case-Para 531; Maneka Gandhi v. UOI MANU/SC/0133/1978 : (1978) 1 SCC 248-Para 19; I.R. Coelho case-Para 149
[540]V.G. Row v. State of Madras MANU/SC/0013/1952 : (1952) SCR 597
[541]Madhav Rao Jivaji Rao Scindia v. UOI [MANU/SC/0050/1970 : 1971 (1) SCC 85],
[542]Rustom Cavasjee Cooper v. Union of India [MANU/SC/0011/1970 : 1970 (1) SCC 248]
[543]Bennett Coleman and Co. Ltd. v. Union of India [MANU/SC/0038/1972 : 1972 (2) SCC 788]
[544]S.R. Bommai v. UOI [MANU/SC/0444/1994 : (1994) 3 SCC 1]
[545]Kesavananda Bharati case-Para 531; Maneka Gandhi v. UOI MANU/SC/0133/1978 : (1978) 1 SCC 248-Para 19; I.R. Coelho case-Para 149
[546]Union of India v. Madras Bar Asson. MANU/SC/0378/2010 : (2010) 11 SCC 1-Para 108
[547]Madras Bar Asson. v. UOI MANU/SC/0875/2014 : (2014) 10 SCC 1-Pars 136 and 137
[548]Second Judges' case-Paras 360 and 361
[549]Statement of Dr. Ambedkar referred in Para 192 in Second Judges' case
[550]Debates reproduced in Paras 362-368 in Second Judges' case
[551]Para 98 Second Judges' case
[552]Para 370, Kuldip Singh, J. and Para 505, Punchhi, J. in Second Judges' case
[553]Paras 39, 41 Chandrachud, J.; 50-52 Bhagwati, J.; 103, 115 Krishna Iyer, J.,
[554]Para 30-First Judges' case
[555]Seervai, 4th Edition, Constitutional Law of India-Paras 25.350, 25.353 and 25.354
[556]Para 7.5 and 7.8-121st Report of the Law Commission
[557]Para 505, Punchhi, J.; Paras 210, 214, Pandian, J.; Paras 361 to 376, Kuldip Singh, J. in Second Judges' case
[558]Paras 471, 478, 486(2), 486(3), 486(4 and 5), Verma, J.
[559]By way of illustration: P. Sambamurthy v. State of A.P. [MANU/SC/0444/1994 : (1994) 3 SCC 1]; Amrik Singh Lyallpuri v. UOI MANU/SC/0456/2011 : (2011) 6 SCC 535; Union of India v. Madras Bar Asson. MANU/SC/0378/2010 : (2010) 11 SCC 1; Madras Bar Asson. v. UOI MANU/SC/0875/2014 : (2014) 10 SCC 1
[560]Special Reference No. 1 (1965) 1 SCC 413 at 446
[561](Paras 9.6 and 9.7 of the Report dated 26.9.2001 as included in Vol. II of the Report of the NCRWC, 2002)
[562]Paras 25.350 to 25.354
[563]R.C. Poudyal v. UOI (1994) Supp. 1 SCC 324, para 53
[564]P. Sambamurthy v. State of A.P. (1987) 1 SCC 362-Paras 3 and 4, striking down Article 371D(5), Amrik Singh Lyallpuri v. UOI MANU/SC/0456/2011 : (2011) 6 SCC 535-Para 15-17, striking down Section 347D of the Delhi Municipal Corporation Act, 1957 (66 of 1957)
[*] Related order MANU/SC/1452/2015

Back to Index

MANU/SC/0100/2020

Neutral Citation: 2020/INSC/106

IN THE SUPREME COURT OF INDIA

SLP (Crl.) Nos. 7281-7282/2017

Decided On: 29.01.2020

Appellants: Sushila Aggarwal and Ors. **Vs.** Respondent: State (NCT of Delhi) and Ors.

Hon'ble Judges/Coram:

Arun Mishra, Indira Banerjee, Vineet Saran, M.R. Shah and S. Ravindra Bhat, JJ.

For Respondents/Defendant: Harin P. Raval and K.V. Vishwanathan, Sr. Advs.

Subject: Criminal

Relevant Section:

Code of Criminal Procedure, 1973 (CrPC) - Section 438

Prior History:

From the Judgment and Order dated 25.07.2017 and 02.08.2017 of the High Court of Delhi in Bail Application No. 1415 of 2017 (MANU/DE/7827/2017)

Authorities Referred:

Wharton's Law Lexicon

Cases Overruled/Partly Overruled:

Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors. MANU/SC/1021/2010; Salauddin Abdulsamad Shaikh v. State of Maharashtra MANU/SC/0280/1996; K.L. Verma v. State and Anr. MANU/SC/1493/1998; Sunita Devi v. State of Bihar and Anr. MANU/SC/1032/2004; Nirmal Jeet Kaur v. State of M.P. MANU/SC/0695/2004; HDFC Bank Ltd. v. J.J. Mannan @ J.M. John Paul and Anr. MANU/SC/1923/2009; Adri Dharan Das v. State of West Bengal MANU/SC/0120/2005; Naresh Kumar Yadav v. Ravindra Kumar and Ors. MANU/SC/8067/2007; Satpal Singh v. State of Punjab MANU/SC/0413/2018

Case Note:

Criminal - Anticipatory bail - Determination of duration - Sections 167(2), 437(2),437(3), 438, 438(1), 438(2) and 439(2) of Code of Criminal Procedure, 1973 - Present reference filed to determine duration of protection granted to person under Section 438 of Code should be limited to fixed period so as to enable person to surrender before Trial Court and seek regular bail - Whether anticipatory bail under Section 438 of Code should be limited to fixed period so as to enable person to surrender before Trial Court and seek regular bail and life of anticipatory bail should end at time and stage when Accused was summoned by court.

Facts:

In the light of the conflicting views of the different Benches of varying strength, the present reference had been filed to determine duration of protection granted to person under Section 438 of Code should be limited to fixed period so as to enable the person to surrender before Trial Court and seek regular bail.

Held, while answering the reference:

M.R. Shah, J.

(i) The decision of the Constitution Bench in the case of Gurbaksh Singh Sibbia holds the field for number of years and the same has been followed by all the Courts in the country. While granting anticipatory bail, normally conditions were imposed by the court/courts which as such are in consonance with the decision of the Constitution Bench in the case of Gurbaksh Singh Sibbia and Section 438(2) read with Section 437(3) of the Code of Criminal Procedure. If breach of any of the above conditions is committed, the order of anticipatory bail would be cancelled. It would be open to the Investigating Officer to file an application for remand, and the concerned Magistrate would decide it on merits, without influenced by the grant of anticipatory bail order. However, in the case of Siddharam Satlingappa Mhetre, despite the specific observations by the Constitution Bench of this Court in Gurbaksh Singh Sibbia that the normal Rule should be not to limit the operation of the order in relation to a period of time, in other words in an appropriate case and looking to the facts and circumstances of the case and the stage at which the pre-arrest bail application was made, the court concerned can limit the operation of the order in relation to a period of time, on absolute misreading of the judgment in the case of Gurbaksh Singh Sibbia and just contrary to the observations made, an absolute proposition of law was laid down that the life of the order under Section 438, Code of Criminal Procedure granting bail cannot be curtailed. Despite the clear cut observations made by the Constitution Bench in Gurbaksh Singh Sibbia, in the case of Salauddin Abdulsamad Shaikh, this Court had observed and held that the order of anticipatory bail has to be necessarily limit in time frame. In many cases subsequently the decision in the case of Salauddin Abdulsamad Shaikh had been followed, despite the specific observations made by the Constitution Bench in Gurbaksh Singh Sibbia which, as such, were just contrary to the view taken in subsequent decisions in the cases of Siddharam Satlingappa Mhetre and Salauddin Abdulsamad Shaikh. At this stage, it was

required to be noted that in the case of Salauddin Abdulsamad Shaikh, this Court had not at all considered the decision of the Constitution Bench in the case of Gurbaksh Singh Sibbia. It could not be disputed that the decision of this Court in the case of Gurbaksh Singh Sibbia was a Constitution Bench decision which was binding unless it was upset by a larger Bench than the Constitution Bench. Therefore, considering the decision of the Constitution Bench of this Court in the case of Gurbaksh Singh Sibbia and the relevant observations, the decision of this Court in the case of Siddharam Satlingappa Mhetre to the extent it takes the view that the life of the order under Section 438 Code of Criminal Procedure cannot be curtailed was not a correct law in light of the observations made by the Constitution Bench in Gurbaksh Singh Sibbia. The decision of this Court in the case of Salauddin Abdulsamad Shaikh which takes an extreme view that the order of anticipatory bail had to be necessarily limited in time frame was also not a good law and is against and just contrary to the decision of this Court in the case of Gurbaksh Singh Sibbia, which was a Constitution Bench judgment. [7.4]

(ii) Thus, considering the observations made by the Constitution Bench of this Court in the case of Gurbaksh Singh Sibbia, the court may, if there are reasons for doing so, limit the operation of the order to a short period only after filing of an FIR in respect of the matter covered by order and the applicant may in such case be directed to obtain an order of bail under Sections 437 or 439 of the Code within a reasonable short period after the filing of the FIR. The Constitution Bench had further observed that the same need not be followed as an invariable rule. It was further observed and held that normal Rule should be not to limit the operation of the order in relation to a period of time. The conditions could be imposed by the concerned court while granting pre-arrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the anticipatory bail application was moved, namely, whether the same was at the stage before the FIR was filed or at the stage when the FIR was filed and the investigation was in progress or at the stage when the investigation was complete and the charge sheet was filed. However, the normal Rule should be not to limit the order in relation to a period of time. [7.5]

S. Ravindra Bhat, J.

(i) Where the Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, Accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon-that would amount to judicial legislation. [63]

(ii) There was no offence, per se, which stands excluded from the purview of Section 438, - except the offences mentioned in Section 438(4). In other words, anticipatory bail could be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there were indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory offences should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, was a matter

of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice, likelihood of co-operation or non-co-operation with the investigating agency or police, etc. There could be no inflexible time frame for which an order of anticipatory bail can continue. [75]

(iii) It was held in Gursharan Singh that the release by grant of bail of an Accused under Section 167(2) amounts to deemed bail. This was borne out by Section 167(2) which states that anyone released on bail under its provision shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter. The judgment in Aslam Babalal Desai had clarified that when an Accused is released by operation of Section 167(2) and subsequently, a charge-sheet is filed, there is no question of the cancellation of his bail. In these circumstances, the mere fact that an Accused was given relief under Section 438 at one stage, per se did not mean that upon the filing of a charge-sheet, he is necessarily to surrender or/and apply for regular bail. The analogy to deemed bail under Section 167(2) with anticipatory bail leads this Court to conclude that the mere subsequent event of the filing of a charge-sheet could not compel the Accused to surrender and seek regular bail. As a matter of fact, interestingly, if indeed, if a charge-sheet was filed where the Accused is on anticipatory bail, the normal implication would be that there was no occasion for the investigating agency or the police to require his custody, because there would have been nothing in his behavior requiring such a step. In other words, an Accused, who was granted anticipatory bail would continue to be at liberty when the charge sheet was filed, the natural implication is that there is no occasion for a direction by the Court that he be arrested and further that he had cooperated with the investigation. At the same time, however, at any time during the investigation were any occasion to arise calling for intervention of the court for infraction of any of the conditions imposed under Section 437(3) read with Section 438(2) or the violation of any other condition imposed in the given facts of a case, recourse can always be had under Section 439(2). [77]

(iv) Therefore, it was held that the protection granted under Section 438 Code of Criminal Procedure should not always or ordinarily be limited to a fixed period, it should inure in favour of the Accused without any restriction as to time. Usual or standard conditions under Section 437(3) read with Section 438(2) should be imposed if there were peculiar features in regard to any crime or offence (such as seriousness or gravity etc.), it was open to the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event or time bound) etc. The life of an anticipatory bail did not end generally at the time and stage when the Accused was summoned by the court, or after framing charges, but could also continue till the end of the trial. However, if there were any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it was open for it to do so. [84]

JUDGMENT

M.R. Shah, J.

1. In the light of the conflicting views of the different Benches of varying strength, more particularly in the cases of *Shri Gurbaksh Singh Sibbia and Ors. v. State of Punjab* MANU/SC/0215/1980 : (1980) 2 SCC 565; *Siddharam Satlingappa Mhetre v. State of Maharashtra* MANU/SC/1021/2010 : (2011) 1 SCC 694; *Bhadresh Bipinbhai Sheth v. State of Gujarat* MANU/SC/0949/2015 : (2016) 1 SCC 152 on one side and in the cases of *Salauddin Abdulsamad Shaikh v. State of Maharashtra* MANU/SC/0280/1996 : (1996) 1 SCC 667, subsequently followed in the case of *K.L. Verma v. State and Anr.* MANU/SC/1493/1998 : (1998) 9 SCC 348; *Sunita Devi v. State of Bihar* MANU/SC/1032/2004 : (2005) 1 SCC 608; *Nirmal Jeet Kaur v. State of M.P.* MANU/SC/0695/2004 : (2004) 7 SCC 558; *HDFC Bank Limited v. J.J. Mannan* MANU/SC/1923/2009 : (2010) 1 SCC 679; *and Satpal Singh v. State of Punjab* MANU/SC/0413/2018 : (2018) 4 SCC 303, the following questions are referred for consideration by a larger Bench:

(1) Whether the protection granted to a person Under Section 438 Code of Criminal Procedure should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the Accused is summoned by the court.

2. Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae relying upon the decision of this Court in the case of *Balchand Jain v. State of M.P.* MANU/SC/0172/1976 : (1976) 4 SCC 572 has submitted that though the expression "anticipatory bail" has not been defined in the Code, as observed by this Court in the aforesaid decision, "anticipatory bail" means "bail in anticipation of arrest". It is submitted that in the aforesaid decision, this Court has further observed that the expression "anticipatory bail" is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. It is submitted that when a competent court grants "anticipatory bail", it makes an order that in the event of arrest, a person shall be released on bail. It is submitted that there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting "anticipatory bail" becomes operative.

2.1. Shri Raval, learned Amicus Curiae has taken us to the historical perspective on the inclusion of Section 438 of the Code of Criminal Procedure. It is submitted that on the recommendation of the Law Commission of India in its 41st Report dated 24.09.1969, the Parliament introduced a new provision in the form of "anticipatory bail" Under Section 438 of the Code of Criminal Procedure. It is submitted that the Law Commission of India in its 41st Report stated in paragraph 39.9 the justification for power to grant "anticipatory bail". It is submitted that as per the Law Commission the necessity for granting "anticipatory bail" arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. It is submitted that the Law Commission further observed that with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person Accused of an offence is not likely to abscond, or otherwise misuse his liberty, while on bail, there seems to be no justification to require him to first submit to custody, remain in prison for some days, and then apply for bail.

2.2. It is further submitted that power to grant "anticipatory bail" vests only in the High Courts or the Courts of Sessions. It is submitted that the "anticipatory bail" can be applied at different stages. It is submitted that even in a case where no FIR is lodged and a person is apprehending his arrest in case the FIR is lodged, in that case, he can apply for "anticipatory bail" and after notice to the Public Prosecutor the Court can grant "anticipatory bail". It is submitted that even in a case where the FIR is lodged but the investigation has not yet begun, i.e., pre investigation stage, the "anticipatory bail" can be applied. It is submitted that "anticipatory bail" can also be applied at post investigation stage. It is submitted that after exercising the discretion judiciously, the High Court or the Sessions Court grants "anticipatory bail" and that too after hearing the Public Prosecutor. It is submitted that therefore once the bail is granted in anticipation of the arrest, there is no reason to limit the same till the summon is issued by the Court and/or there is no reason to limit the period of bail in anticipation granted.

2.3. Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae has further submitted that in the case of *Gurbaksh Singh Sibbia (supra),* a Constitution Bench of this Court has observed and held that the facility which Section 438, Code of Criminal Procedure affords is generally referred to as "anticipatory bail", an expression which was used by the Law Commission in its 41st Report. Neither the Section nor its marginal note so describes it but, the expression "anticipatory bail" is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. It is submitted that any order of bail can, of course, be effective only from the date of arrest because to grant bail as stated in Wharton's Law Lexicon, is to "set at liberty a person arrested or imprisoned, on security being taken for his appearance". It is submitted that thus, bail is basically release from restraint, more particularly, release from the custody of the police. It is submitted that the act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the Accused that freedom on condition that he will appear to take his trial. Taking a surety, bonds and such other modalities are the means by which an assurance is secured from the Accused that though he has been released on bail, he will present himself at the trial of the offence or offences of which he is charged and for which he was arrested. It is submitted that the distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. It is submitted that in other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail.

2.4. Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae has further submitted that however the core questions before this Court are, (a) what is the life or currency of an anticipatory bail once the same has been granted by the competent court?; (b) once an order granting anticipatory bail has been passed, whether the said anticipatory bail only survives till the stage of filing of charge sheet/challan/final report or whether it subsists during the entire duration of trial?. It is further submitted by Shri Raval that one another question may arise, namely, in a case where if new incriminating materials are found during the course of investigation, whether they could be relied on by the Court to cancel anticipatory bail which has already been granted?

2.5. It is submitted that, as such, the aforesaid questions are not *res integra* in view of the decision of the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)*. It is submitted that in the case of *Gurbaksh Singh Sibbia (supra)*, a Constitution Bench of this Court has held that there is no limit to the currency of an order of anticipatory bail. The Court is vested with absolute discretion to direct the duration of the trial which can vary from a few weeks to even such duration until charge sheet has been filed and which may also extend to the entire duration of the trial. It is submitted that it is further observed that the sole consideration must be with a view to balance the two competing interests, viz., protecting the liberty of the Accused and the sovereign power of the police to conduct a fair investigation. Shri Raval, learned Amicus Curiae has heavily relied upon the observations made by the Constitution Bench of this Court in paragraphs 42 & 43 of *Gurbaksh Singh Sibbia (supra).*

2.6. It is further submitted by Shri Raval that in the subsequent decision of this Court in the case of *Siddharam Satlingappa Mhetre (supra)*, this Court has taken the view that the order of anticipatory bail once granted ordinarily subsists during the entire duration of the trial. It is submitted that it is further observed that by that the power of the Sessions Court or that of the High Court to re-visit its order granting anticipatory bail is curtailed, in case circumstances exist or new exigencies arise which merit interference. Heavy reliance is placed upon observations made by this Court in the case of *Siddharam Satlingappa Mhetre (supra)* in paragraphs 94, 95, 98, 100, 122 and 123.

It is submitted by Shri Raval that however, the judgment rendered in *Siddharam Satlingappa Mhetre (supra)* particularly in paragraphs 95, 108, 122 and 123 does not take into consideration the observations of the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* in paragraphs 42 & 43, which clearly cull out that the discretion of the Sessions Court or a High Court is wide enough to limit as well as specify the duration of the anticipatory bail taking into account all relevant factors which may persuade the discretion of the Court. It is submitted that *Siddharam Satlingappa Mhetre (supra)* proceeded to hold that the anticipatory bail shall subsists during the entire currency of the trial and specifically rejected the notion that anticipatory bail could be for a limited time as well, on the expiry of which the Accused must surrender and apply for a regular bail. It is submitted that in view of the conflicting approach, the decision rendered in the case of *Siddharam Satlingappa Mhetre (supra)* particularly the observations made in paragraphs 95, 108, 122 & 123 need to be revisited.

2.7. It is further submitted by Shri Raval, learned Amicus Curiae that the discretion of the Sessions Court and the High Court is absolute, and no limitations whatsoever have been imposed by the legislature. It is submitted that the discretion therefore can be exercised to even limit the duration of the anticipatory bail, in order to ensure that the Accused also cooperates with the investigation, or that relevant discoveries to secure incriminating material could be made Under Section 27 of the Evidence Act, or in view of new incriminating circumstances which establish complicity of the Accused. It is submitted that therefore the view taken by this Court in *Siddharam Satlingappa Mhetre (supra)* that the anticipatory bail to subsist for the entire duration of the trial, curtails the discretion of the Sessions Court or the High Court to limit such duration of anticipatory bail. It is submitted that such an interpretation is in absolute contravention of the law declared by the Constitution Bench in the case of *Gurbaksh Singh Sibia (supra).*

2.8. Making the above submissions and relying upon the aforesaid decisions of the Constitution Bench of this Court, Shri Raval, learned Amicus Curiae has concluded as under:

1) that the power vested by the Parliament on superior criminal courts in the order of hierarchy, such as Sessions Court and High Court, is a power entailing conferment of absolute discretion in deciding whether an application for anticipatory bail may be allowed or rejected, and also inheres in this discretion, the additional power to limit the duration of anticipatory bail to any point in time, or to any stage as the Courts may deem fit in the facts and circumstances of the case, and in view of all the attending circumstances;

2) that the order granting anticipatory bail will not interdict the power of the investigating agency to continue investigation of the case or would prevent the investigating agency to ask for and be granted, respectively, Police Custody of the Accused for the purposes of the investigation and where the investigating officer feels that the custody of the Accused is necessary. Further since police custody can be granted only in the first 14 days of the arrest, the decision to restrict the duration of the bail would balance the twin competing interest, viz., the individual liberty and the sovereign power of the police to investigate the case;

3) that the life of the order granting anticipatory bail can be restricted, which may be at a stage till either the FIR is filed in cases where such order is granted on an reasonable apprehension of being arrested in relation to a cognizable case, where the FIR or Complaint is yet not filed; in cases where FIR or complaint is filed, it may be restricted to a period of ten days after arrest (since it leaves a period of 4 days for the investigation agency to get police custody, within the outer limit of 14 days) and then leave it open for the Accused so released on anticipatory bail to apply for regular bail Under Section 437/439; alternatively such order may endure till filing of charge sheet which has to be filed within 90 days of the arrest. It may be remembered here that non-filing of charge sheet within 90 days of arrest entitles the Accused, statutory bail or default bail, as a matter of right, in view of express stipulation contained in Section 167 of the Code of Criminal Procedure, 1973. Also, in case where an Accused is released on anticipatory bail, the investigation authorities may not be subjected to adherence to filing of charge sheet within 90 days as there would be no consequence as the Accused is already enlarged on bail. It may therefore be safer to adhere to the earlier practice evolved by judicial precedents to restrict the operation of life of the order granting anticipatory bail for 10 days of arrest, leaving it open to the Accused to apply for regular bail Under Section 437/439 of the Code and equally leaving it open for the Court to consider such an application without in any way being influenced by the fact of grant of anticipatory bail, as at that stage the considerations are at a very early stage where the investigation itself may be in nascent stage or the materials are yet to be gathered and the Accused is yet to be interrogated; and

4) that anticipatory bail once granted can also be cancelled, either in appeal to a superior forum on challenge being made or by the same court on establishment of well accepted and legally enshrined principles relating to cancellation of bail.

3. Shri K.V. Vishwanathan, learned Senior Advocate who was also requested to assist us as an Amicus Curiae has submitted that the exercise of power Under Section 438 is exactly like the exercise of power Under Sections 437 and 439 of the Code of Criminal Procedure It is submitted therefore, the pre-arrest bail granted in anticipation of arrest Under Section 438 ought to operate

like any other order granting bail till an order of conviction or till an affirmative direction is passed Under Section 439(2) of the Code of Criminal Procedure It is submitted that therefore the law laid down by this Court in the cases of *Gurbaksh Singh Sibbia (supra)* and *Siddharam Satlingappa Mhetre (supra)* lay down the correct law. It is submitted that the exceptions carved out in *Gurbaksh Singh Sibbia (supra)* particularly in paras 19, 42 and 43 are well within the scheme of the Code.

3.1. It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the power of arrest of the police is Under Section 41 of the Code of Criminal Procedure. It is submitted that this Section has two essential parts. One, relating to offences in which the maximum punishment can extend to imprisonment for seven years. Second, relating to offences in which the maximum punishment can extent to imprisonment above seven years or death penalty. It is submitted that though they have different conditions and thresholds, in both cases it is clear from a bare reading of the Section that the power of arrest cannot be exercised in every FIR that is registered Under Section 154 Code of Criminal Procedure. It is submitted that this power is circumscribed by the conditions laid down in this Section. Moreover, this principle that the power of arrest is not required to be exercised in every case was recognised in the cases of *Joginder Kumar v. State of U.P.* MANU/SC/0311/1994 : (1994) 4 SCC 260 (para 20); *Lalitha Kumari v. State of U.P.* MANU/SC/1166/2013 : (2014) 2 SCC 1 (paras 107-108); *and Arnesh Kumar v. State of Bihar* MANU/SC/0559/2014 : (2014) 8 SCC 273 (paras 5 and 6). It is submitted that, in fact, this Court in the case of *M.C. Abraham v. State of Maharashtra* MANU/SC/1190/2002 : (2003) 2 SCC 649 (para 15) has held that it was not mandatory for the police to arrest a person only because his/her anticipatory bail had been rejected.

3.2. It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the power of arrest is then further circumscribed by Section 438 Code of Criminal Procedure It is submitted that as recognized by the Law Commission, there are cases where the power of arrest is not required or allowed to be exercised. It is submitted that exercising power of arrest in such cases would be a grave violation of a person's right and liberty. It is submitted that such exercise of power would amount to misuse of Section 41. It is submitted that the check on the power of arrest and custody provided by Sections 437 or 439 is limited as the check is only *post facto*. It is submitted that by then the person arrested has already suffered the trauma and humiliation of arrest.

3.3. It is further submitted that to safeguard this situation, Section 438 was introduced so as to provide for judicial intervention in necessary cases. It is submitted that this judicial intervention is to ensure that the power of arrest is regulated under the scrutiny of the courts. It is submitted that to strike a further balance between the power of arrest and the rights of the Accused, this power was specifically given to the Court of Session and the High Court so as to ensure that this judicial intervention is done at the supervisory level and not at the magisterial level. It is submitted that it is in this light that the two questions raised in the present reference need to be addressed.

3.4. Taking us to the recommendations in the 41st Report of the Law Commission and the observations made in the Report of the Committee on Reforms of the Criminal Justice system, headed by Dr. Justice V.S. Malimath, it is submitted by Shri Vishwanathan that Section 438 is a check on the power of arrest of the police. It is submitted that as stated in the above Law Commission Report, it is a check not only against false cases, but also in cases where the need to arrest does not arise.

3.5. It is further submitted that even otherwise a bare reading of the Section shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted Under Section 438 has to be time-bound. It is submitted that the position is the same as in Sections 437 and 439. It is submitted that at this stage Section 438(3) is relevant to be taken into consideration. It is submitted that there are two very important aspects in Section 438(3) Code of Criminal Procedure which are relevant to be considered to understand the scheme of the Code, viz., (a) a person in whose favour a pre-arrest bail order has been made Under Section 438 has first to be arrested. Such a person is then released on bail on the basis of the pre-arrest bail order. For such release the person has to comply with the requirement of Section 441 of giving a bond or surety; and (b) where the magistrate taking cognizance Under Section 204 is of the view that a warrant is required to be issued at the first instance, such magistrate is only empowered to issue only a bailable warrant and not a non-bailable warrant. This curtailment of power of the magistrate clearly shows the intent of the legislature that a person who has been granted bail Under Section 438 ought not to be arrested at the stage of cognizance because of the said pre-arrest bail order. It is submitted that in light of this express provision, no other interpretation is possible to be given to the said section. It is submitted that the second question referred herein is squarely covered by this Sub-section.

3.6. It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the order passed Under Section 438, which is in the nature of a pre-arrest bail order, is however subject to the power granted to the Court of Session and the High Court Under Section 439(2), Code of Criminal Procedure, which gives power to the Court of Session or the High Court to direct the arrest of the Accused at any time. It is submitted that this ensures that through judicial intervention the balance between the two competing principles can again be revisited if the need arises. It is submitted that the only difference is that the power of arrest in these cases is exercised only after judicial scrutiny. It is submitted that in any case and as observed by this Court in *Gurbaksh Singh Sibbia (supra)*, the orders once passed Under Section 438 will continue till the trial unless in exercise of judicial discretion the Sessions Court or the High Court limits the same, looking to the facts and circumstances of the case and the stages at which the power Under Section 438 Code of Criminal Procedure is exercised. It is submitted that the Code presupposes that the order passed Under Sections 438 or 439 are not or cannot be temporary time bound. It is submitted that a person in whose favour an order of pre-arrest bail is passed can be taken into custody thereafter only when a specific direction is passed Under Section 439(2) of the Code.

3.7. Shri Vishwanathan, learned Amicus Curiae, while making the aforesaid submissions and relying upon the aforesaid decisions of this Court, has concluded that the pre-arrest bail granted Under Section 438 of the Code is exactly like the orders of bail passed Under Sections 437 and 439 of the Code; the Code does not contemplate any power in the hands of the Courts to pass time-bound orders Under Section 438 for good reason; on the other hand, the investigating agency can approach the Court Under Section 439(2) and in the event of the police making out a case, the Court has all the powers to direct the Accused to be taken into custody.

4. Shri Tushar Mehta, learned Solicitor General of India has heavily relied upon paras 42 and 43 of *Gurbaksh Singh Sibbia (supra)* and has submitted that as observed and held by the Constitution Bench of this Court that the Court can in a given case and for justifiable reasons limit the period of anticipatory bail. It is submitted that this Court in the case of *Siddharam Satlingappa Mhetre*

(supra) has misread the judgment in *Gurbaksh Singh Sibbia (supra)* to a limited extent. It is submitted that to the extent *Siddharam Satlingappa Mhetre (supra)* states that "in view of the clear declaration of the law by the Constitution Bench, the life of the order Under Section 438 Code of Criminal Procedure granting bail cannot be curtailed", may not be correct law in light of the observations made in para 42 by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)*. It is submitted that the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* has not categorically barred anticipatory bail order for limited time period, and at the same time, merely stated that "normal rule" should be not to limit the time period. It is submitted that at the same time, the decision of this Court in the case of *Salauddin Abdulsamad Shaikh (supra)*, to the extent it states that the order of the anticipatory bail has to be necessarily limited in time frame is against the decision of the Constitution Bench in *Gurbaksh Singh Sibbia (supra)*, which specifically states that the "normal rule" to not limit the order of anticipatory bail. It is submitted that therefore the extreme views on both side in *Siddharam Satlingappa Mhetre (supra)* and *Salauddin Abdulsamad Shaikh (supra)*, to that limited extent, do not consider the observations in *Gurbaksh Singh Sibbia (supra)*, in the correct light. It is submitted that in a case, with justifiable reasons, to be recorded in writing, indicating reasons to deviate from the "normal rule", the anticipatory bail can be granted for a limited time period, the life of which, would extinguish accordingly.

4.1. It is further submitted by Shri Tushar Mehta, learned Solicitor General of India that so far as the second reference, namely, whether the life of an anticipatory bail should end at the time and stage when the Accused is summoned by the court is concerned, it is submitted that there cannot be a straightjacket formula. It is submitted that in a case wherein the anticipatory bail is granted for a limited time period, the life would extinguish accordingly. It is submitted that in a case wherein the anticipatory bail is granted without conditions, the life may terminate upon the circumstances warranting cancellation of such bail or such interference. It is submitted that the statute does not contemplate an automatic cancellation upon filing of charge sheet and therefore the judgment of this Court in the case of *HDFC Bank Limited (supra)*, to that extent, may not lay down the correct law. It is submitted that, at the same time, the Hon'ble Courts have deprecated the practice of blanket orders of bail/anticipatory bail. It is submitted that there are eventualities arising in every case may be different and thberefore are required to be dealt with accordingly, in the facts and circumstances of each case. It is submitted that even while granting the anticipatory bail, the right of the investigating agency to seek custodial interrogation cannot be hampered mechanically.

5. Relying upon the decisions of this Court in the cases of *HDFC Bank Ltd. (supra)* and *Satpal Singh (supra)*, it is submitted by Shri Vikramjit Banerjee, learned Additional Solicitor General of India that as held by this Court in the aforesaid decisions, the purpose of Section 438 is providing protection only during the process of investigation and the Accused should seek regular bail upon submission of the charge sheet against him from the court where entire material is placed. It is submitted that in any case grant of the pre-arrest bail Under Section 438 Code of Criminal Procedure shall not affect the right of the investigating agency to seek custodial interrogation and in conducting further investigation.

5.1. It is further submitted by Shri Banerjee, learned ASG that as held by this Court in the case of *Uday Mohanlal Acharya v. State of Maharashtra* MANU/SC/0222/2001 : (2001) 5 SCC 453, that even when Accused is found to be on bail at the stage of committal proceedings, the committing

Magistrate has the power to cancel the bail and commit him to custody, if he considers it necessary to do so. It is submitted that as observed and held by this Court in the aforesaid decisions that an interpretation that an order of protection from arrest Under Section 438 will remain operational till the end of the trial will effectively make Section 209 (b) of Code of Criminal Procedure otiose.

5.2. At the end, Shri Banerjee, learned ASG has submitted that there should necessarily be conditions imposed in granting a pre-arrest bail order and it cannot be a blanket order; in terms of the Code of Criminal Procedure Under Section 209(b) and Section 240(2), the Accused can be remanded to custody by the Magistrate during the stage of inquiry, if he considers it necessary to do so at the stage of the submission of the final report/charge sheet or committal proceedings. It is submitted that it is imperative therefore that if the Accused takes pre-arrest bail during the earlier state of criminal investigation, the power of the Magistrate under the said provisions of Code of Criminal Procedure should be maintained including the power of the Magistrate to send the Accused to the custody.

6. Shri C.S.N. Mohan Rao, learned Advocate appearing on behalf of Respondent No. 2 has vehemently submitted that the Constitution Bench judgment in *Gurbaksh Singh Sibbia (supra)* has dealt with various aspects of anticipatory bail and preserved the discretionary power granted by the legislature on the courts while considering application for anticipatory bail. It is submitted that the Constitution Bench has refused to impose any limitation or conditions, which are not imposed by the Parliament.

6.1. It is further submitted by the learned Counsel appearing on behalf of Respondent No. 2 that the decision of the Constitution Bench regarding duration of anticipatory bail is not called in question by any judgment. It is submitted that there is a clear conflict regarding the duration of anticipatory bail as enunciated by the Constitution Bench and the order in *Salauddin Abdulsamad Shaikh (supra)*, which was followed in number of subsequent judgments. It is submitted that the decision of this Court in *Salauddin Abdulsamad Shaikh (supra)* and subsequent judgments following *Salauddin Abdulsamad Shaikh (supra)* are all *per incuriam*.

6.2. It is further submitted by the learned Counsel appearing on behalf of Respondent No. 2 that as a normal rule, it is not required to limit the duration of anticipatory bail. It is submitted that however, court while granting anticipatory bail may, keeping in view the peculiar facts and circumstances of the case, limit the duration of anticipatory bail. It is submitted that the life of anticipatory bail would not end on filing of charge sheet.

6.3. It is further submitted by the learned Counsel appearing on behalf of Respondent No. 2 that both the questions of law framed for consideration by the larger Bench does not arise for consideration. It is submitted that considering the elaborate reasons given by the Constitution Bench in not putting any fetters or limitations on the discretionary power of a court to grant anticipatory bail and as there is no ambiguity in the judgment of the Constitution Bench, this Court may reiterate the judgment of the Constitution Bench in *Gurbaksh Singh Sibbia (supra)*.

7. We have heard the learned Counsel for the respective parties at length.

In the light of the conflicting views of the different Benches of varying strength, the following questions are referred for consideration by a larger Bench:

(1) Whether the protection granted to a person Under Section 438 Code of Criminal Procedure should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the Accused is summoned by the court.

7.1. At the outset, it is required to be noted that as such the expression "anticipatory bail" has not been defined in the Code. As observed by this Court in the case of *Balchand Jain (supra)*, "anticipatory bail" means "bail in anticipation of arrest". As held by this Court, the expression "anticipatory bail" is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. An application for "anticipatory bail" in anticipation of arrest could be moved by the Accused at a stage before an FIR is filed or at a stage when FIR is registered but the charge sheet has not been filed and the investigation is in progress or at a stage after the investigation is concluded. Power to grant "anticipatory bail" Under Section 438 of the Code of Criminal Procedure vests only with the Court of Sessions or the High Court. Therefore, ultimately it is for the concerned court to consider the application for "anticipatory bail" and while granting the "anticipatory bail" it is ultimately for the concerned court to impose conditions including the limited period of "anticipatory bail", depends upon the stages at which the application for anticipatory bail is moved. A person in whose favour a pre-arrest bail order is made Under Section 438 of the Code of Criminal Procedure has to be arrested. However, once there is an order of pre-arrest bail/anticipatory bail, as and when he is arrested he has to be released on bail. Otherwise, there is no distinction or difference between the pre-arrest bail order Under Section 438 and the bail order Under Section 437 & 439 of the Code of Criminal Procedure The only difference between the pre-arrest bail order Under Section 438 and the bail order Under Sections 437 and 439 is the stages at which the bail order is passed. The bail order Under Section 438 of the Code of Criminal Procedure is prior to his arrest and in anticipation of his arrest and the order of bail Under Sections 437 and 439 is after a person is arrested. A bare reading of Section 438 of the Code of Criminal Procedure shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted Under Section 438 has to be time bound. The position is the same as in Section 437 and Section 439 of the Code of Criminal Procedure.

7.2. While considering the issues referred to a larger Bench, referred to hereinabove, the decision of the Constitution Bench of this Court in *Gurbaksh Singh Sibbia (supra)* is required to be referred to and considered in detail. The matter before the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)* was arising out of the decision of the Full Bench of the Punjab and Haryana High Court. The High Court rejected the application for bail after summarising, what according to it was the true legal position, thus,

(1) The power Under Section 438, Code of Criminal Procedure, is of an extraordinary character and must be exercised sparingly in exceptional cases only;

(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.

(3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.

(4) In addition to the limitations mentioned in Section 437, the Petitioner must make out a special case for the exercise of the power to grant anticipatory bail.

(5) Where a legitimate case for the remand of the offender to the police custody Under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender Under Section 27 of the Evidence Act can be made out, the power Under Section 438 should not be exercised.

(6) The discretion Under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion Under Section 438 of the Code should not be exercised; and

(8) Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless.

7.3. After considering the scheme of "anticipatory bail" Under Section 438, Code of Criminal Procedure and while not agreeing with the Full Bench, this Court has observed and held as under:

12. *.....By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code: Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail.....*

The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific

purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in Clauses (i) to (iv) of Sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

***13.** This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though Sub-section (1) of that Section says that the court "may, if it thinks fit" issue the necessary direction for bail, Sub-section (2) confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in Clauses (i) to (iv) of that Sub-section. The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the*

negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant Under Section 439 of the Code.

xxx xxx xxx xxx xxx xxx xxx xxx

18. *According to the sixth proposition framed by the High Court, the discretion Under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted Under Section 437(1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person Accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in Section 437(1) should govern the grant of relief Under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter Section a similar provision. We have already pointed out the basic distinction between these two sections. Section 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it, must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of bail is that in cases falling Under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling Under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in Section 437(1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the first information report. In the majority of cases falling Under Section 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in Section 437 are to be read into the provisions of Section 438, the transplantation shall have to be done without amputation. That is to say, on the reasoning of the High Court, Section 438(1) shall have to be read as containing the Clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life". In this process one shall have overlooked that whereas, the power Under Section 438(1) can be exercised if the High Court or the Court of Session "thinks fit" to do so, Section 437(1) does not confer the power to grant bail in the same wide terms The expression "if it thinks fit", which occurs in Section 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1).*

We see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

19. *A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power Under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender Under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. ..... An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued Under Section 438(1) are those recommended in Sub-section (2)(i) and (ii) which require the applicant to cooperate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery Under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [MANU/SC/0060/1960 : AIR 1960 SC 1125 : (1961) 1 SCR 14, 26 : 1960 Cri. LJ 1504] to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this Rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody Under Section 167(2) of the Code is made out by the investigating agency.*

20. *It is unnecessary to consider the third proposition of the High Court in any great details because we have already indicated that there is no justification for reading into Section 438 the limitations mentioned in Section 437. The High Court says that such limitations are implicit in Section 438 but, with respect, no such implications arise or can be read into that section. The plenitude of the Section must be given its full play.*

21. *The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the Petitioner must make out a "special case" for the exercise of the power to grant*

anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

22. *By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for Under Section 437 or Section 439. These Sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.*

xxx xxx xxx xxx xxx xxx

25. *..... We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in Balchand Jain [*MANU/SC/0172/1976 : (1976) 4 SCC 572 : 1976 SCC (Cri.) 689 : (1977) 2 SCR 52*] in an altogether different context on an altogether different point.*

xxx xxx xxx xxx xxx xxx

33. *We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction Under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible Rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may*

usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.

xxx xxx xxx xxx xxx

35. *Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief", for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.*

36. *Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned Under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.*

37. *Thirdly, the filing of a first information report is not a condition precedent to the exercise of the power Under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.*

38. *Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.*

39. *Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the Accused. The grant of "anticipatory bail" to an Accused who is under arrest involves a contradiction in terms, insofar as the offence or offences for which he is arrested, are concerned. After arrest, the Accused must seek his remedy Under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.*

40. *We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the Section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may*

be arrested is genuine. That is why, normally, a direction should not issue Under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction Under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

41. *Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction Under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.*

42. *There was some discussion before us on certain minor modalities regarding the passing of bail orders Under Section 438(1). Can an order of bail be passed under the Section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed Under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail Under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule.* ***The normal Rule should be not to limit the operation of the order in relation to a period of time.***

43. *During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made Under Section 27 of the Evidence Act or that he should be deemed to have surrendered*

himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The Appellants who were refused anticipatory bail by various courts have long since been released by this Court Under Section 438(1) of the Code.

7.4. The aforesaid decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)* holds the field for number of years and the same has been followed by all the Courts in the country. While granting anticipatory bail, normally following conditions are imposed by the court/courts which as such are in consonance with the decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)* and Section 438(2) read with Section 437(3) of the Code of Criminal Procedure:

1. the applicant namely _____ shall furnish personal bond of Rs. _____ with his recent self-attested photograph and surety of the like amount on the following conditions at the satisfaction of the Investigating Officer;

2. the applicant shall remain present before the concerned police station on _____ between _____;

3. the applicant shall co-operate with the investigation and make himself available for interrogation whenever required;

4. the applicant shall not directly or indirectly make any inducement, threat or promise to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;

5. the applicant shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;

6. the applicant shall not leave the territory of _____, without prior permission of the court, till trial is over;

7. the applicant shall mark his presence before concerned police station on _____ between _____ for the period of six months, from the date of this order;

8. the applicant shall maintain law and order;

9. the applicant shall, at the time of execution of the Bond, furnish his address and mobile number to the Investigating Officer, and the Court concerned, and shall not change the residence till the final disposal of the case;

10. the applicant shall surrender his passport, if any, before the Investigating Officer within a week and, if he does not possess any passport, he shall file an affidavit to that effect before the Investigating Officer;

11. the applicant shall regularly remain present during the trial, and co-operate the Honourable Court to complete the trial for the above offences.

If breach of any of the above conditions is committed, the order of anticipatory bail would be cancelled. It would be open to the Investigating Officer to file an application for remand, and the concerned Magistrate would decide it on merits, without influenced by the grant of anticipatory bail order.

However, in the case of *Siddharam Satlingappa Mhetre (supra)*, despite the specific observations by the Constitution Bench of this Court in *Gurbaksh Singh Sibbia (supra)* that the normal Rule should be not to limit the operation of the order in relation to a period of time, in other words in an appropriate case and looking to the facts and circumstances of the case and the stage at which the pre-arrest bail application was made, the court concerned can limit the operation of the order in relation to a period of time, on absolute misreading of the judgment in the case of *Gurbaksh Singh Sibbia (supra)* and just contrary to the observations made in paragraphs 42 and 43, an absolute proposition of law is laid down that the life of the order Under Section 438, Code of Criminal Procedure granting bail cannot be curtailed. Despite the clear cut observations made by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* made in paragraphs 42 and 43, in the case of *Salauddin Abdulsamad Shaikh (supra)*, a three Judge Bench of this Court has observed and held that the order of "anticipatory bail" has to be necessarily limit in time frame. In many cases subsequently the decision in the case of *Salauddin Abdulsamad Shaikh (supra)* has been followed, despite the specific observations made by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* made in paragraphs 42 and 43 which, as such, are just contrary to the view taken in subsequent decisions in the cases of *Siddharam Satlingappa Mhetre (supra) and Salauddin Abdulsamad Shaikh (supra)*. At this stage, it is required to be noted that in the case of *Salauddin Abdulsamad Shaikh (supra)*, this Court had not at all considered the decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)*. It cannot be disputed that the decision of this Court in the case of *Gurbaksh Singh Sibbia (supra)* is a Constitution Bench decision which is binding unless it is upset by a larger Bench than the Constitution Bench. Therefore, considering the decision of the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)* and the relevant observations, reproduced hereinabove, the decision of this Court in the case of *Siddharam Satlingappa Mhetre (supra)* to the extent it takes the view that the life of the order Under Section 438 Code of Criminal Procedure cannot be curtailed is not a correct law in light of the observations made by the Constitution Bench in paragraphs 42 and 43 in *Gurbaksh Singh Sibbia (supra)*. The decision of this Court in the case of *Salauddin Abdulsamad Shaikh (supra)* which takes an extreme view that the order of "anticipatory bail" has to be necessarily limited in time frame is also not a good law and is against and just contrary to the decision of this Court in the case of *Gurbaksh Singh Sibbia (supra)*, which is a Constitution Bench judgment.

7.5. Thus, considering the observations made by the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)*, the court may, if there are reasons for doing so, limit the operation of the order to a short period only after filing of an FIR in respect of the matter covered

by order and the applicant may in such case be directed to obtain an order of bail Under Sections 437 or 439 of the Code within a reasonable short period after the filing of the FIR. The Constitution Bench has further observed that the same need not be followed as an invariable rule. It is further observed and held that normal Rule should be not to limit the operation of the order in relation to a period of time. We are of the opinion that the conditions can be imposed by the concerned court while granting pre-arrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the "anticipatory bail" application is moved, namely, whether the same is at the stage before the FIR is filed or at the stage when the FIR is filed and the investigation is in progress or at the stage when the investigation is complete and the charge sheet is filed. However, as observed hereinabove, the normal Rule should be not to limit the order in relation to a period of time.

S. Ravindra Bhat, J.

8. I have gone through the reasoning and conclusions of Justice M.R. Shah. I am in agreement with his judgment. However, I am supplementing the conclusions arrived at by Shah, J with this separate judgment since I am of the view that while there is no disagreement on the essential reasoning, some aspects need to be discussed, in addition.

9. The following questions have been referred to this larger bench of five judges:

(1) Whether the protection granted to a person Under Section 438 Code of Criminal Procedure should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the Accused is summoned by the court.

Background

10. First, a background. The judgment of a five-judge bench of this Court in *Shri Gurbaksh Singh Sibbia and Ors. v. State of Punjab* MANU/SC/0215/1980 : 1980 (2) SCC 565 considered the available views on the provision for anticipatory bail (a concept not in existence till the enactment of the Code of Criminal Procedure, 1973- hereafter "Cr.PC" or "the Code"). Section 438 enables two classes of courts - a Court of Sessions and High Court, to issue directions not to arrest a person, who apprehends arrest. *Sibbia* comprehensively dealt with the history of the provision, the felt need which resulted in its enactment, the observations and comments of the 41st Report of the Law Commission, which had suggested introduction of such a provision, and the efficacy of prevailing practices. In brief, *Sibbia* (which this Court would analyze in greater detail later) held that the power (to grant anticipatory bail) is cast in wide terms and should not be hedged in through narrow judicial interpretation. At the same time, the larger bench (of five judges, which decided *Sibbia*) ruled that in given individual cases, courts could impose conditions which were appropriate, having regard to the circumstances.

11. This reference is necessitated, because in the present case, a bench of three judges, on 15th May 2018, noticed conflicting views regarding interpretation of the provision - Section 438. The court

noticed, *prima facie*, that one line of judgments (*Salauddin Abdulsamad Shaikh v. State of Maharashtra* (MANU/SC/0280/1996 : 1996 (1) SCC 667); *K.L. Verma v. State and Anr.* MANU/SC/1493/1998 : 1998 (9) SCC 348; *Sunita Devi v. State of Bihar and Anr.* MANU/SC/1032/2004 : 2005 (1) SCC 608.; *Adri Dharan Das v. State of West Bengal* MANU/SC/0120/2005 : 2005 (4) SCC 303; *Nirmal Jeet Kaur v. State of M.P. and Anr.* MANU/SC/0695/2004 : 2004 (7) SCC 558.; *HDFC Bank Limited v. J.J. Mannan* MANU/SC/1923/2009 : 2010 (1) SCC 679; *Satpal Singh v. the State of Punjab* MANU/SC/0413/2018 and *Naresh Kumar Yadav v. Ravindra Kumar* MANU/SC/8067/2007 : 2008 (1) SCC 632 held that anticipatory bail orders should invariably contain conditions, either with reference to time, or occurrence of an event, such as filing of a charge sheet, in criminal proceedings, that would define its time of operation, after which the individual concerned would have to secure regular bail, Under Section 439 Code of Criminal Procedure. The court also noticed, that on the other hand, the observations in *Sibbia* did not suggest such an inflexible approach. The second line of cases included *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.* MANU/SC/1021/2010 : 2011 (1) SCC 694 and *Bhadresh Bipinbhai Sheth v. State of Gujarat and Anr.* MANU/SC/0949/2015 : 2016 (1) SCC 152; these held that no conditions ought to be imposed by the court, whilst granting anticipatory bail, which was to inure and protect the individual indefinitely-even when charges were framed in a given criminal case, leading to trial-till the end of the trial.

12. The court, in *Sibbia*, elaborately dealt with the background which led to the introduction of the provision for anticipatory bail. It took note of the forty first report of the Law Commission, on whose recommendations the provision was introduced. Sibbia traced the history of the provision, from the stage of the recommendation, to the draft bill and later its enactment, observing as follows:

4. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail, in anticipation of arrest, the preponderance of view being that it did not have such power. The need for extensive amendments to the Code of Criminal Procedure was felt for a long time and various suggestions were made in different quarters in order to make the Code more effective and comprehensive. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed put the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipate; bail". It observed in paragraph 39.9 of its report (Volume I):

39.9. The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to-grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to' implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person Accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail,

there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

In order to settle the details of this suggestion, the following draft of a, new Section is placed for consideration:

497A. (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps Under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the Court Under Sub-section (1).

(3) if any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that; offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion, of the; court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the Accused.'

5. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced Clause 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to conferring an express power on the High Court and the Court of Session to grant anticipatory bail. That Clause read thus:

447. (1) When any person has reason to believe that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the lime of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of

such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court Under Sub-section (1).

6. The Law Commission, in paragraph 31 of its 48th Report (1972), made the following comments on the aforesaid Clause.

31. The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous Petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant Section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith.'

Clause 447 of the Draft Bill of 1970 was enacted with certain modifications and became Section 438 of the Code of Criminal Procedure, 1973 which we have extracted at the outset of this judgment.

13. The context of *Sibbia* was the correctness of a decision of the Full Bench of the Punjab and Haryana High Court, which restrictively interpreted Section 438 and held that the power Under Section 438, "*is extra-ordinary*" and must be exercised sparingly in exceptional cases only; that it does not empower the grant of anticipatory bail in a blanket manner, in respect of offences not yet committed or with regard to accusations not yet levelled; that it is not an unguided power, but subject to limitations in Section 437 - which are implicit and must be read into Section 438. The Full Bench also held that the Petitioner must "*must make out a special case for the exercise of the power to grant anticipatory bail*"; and further that where a legitimate case for remand to police custody is made or a reasonable claim to secure incriminating material from information likely to be received from the offender "*Under Section 27 of the Evidence Act can be made out, the power Under Section 438 should not be exercised.*" The full bench held that Section 438 cannot be availed in respect of offences punishable with death or life imprisonment "*unless the court at that very stage is satisfied that such a charge appears to be false or groundless.*" Likewise, in larger public interest and the state's interest Section 438 cannot be resorted to in "*economic offences involving blatant corruption at the higher rungs of the executive and political power*" and that

(8) Mere general allegation of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless.

14. *Sibbia* discussed this issue and held that the narrow, restricted interpretation of Section 438 was not warranted. The court disapproved the Punjab High Court Full Bench decision; the five judge Bench ruled as follows:

...The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in Clauses (i) to (iv) of Sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

***13.** This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though Sub-section (1) of that Section says that the court "may, if it thinks fit" issue the necessary direction for bail, Sub-section (2) confers on the court the power to include such conditions in the direction as it may*

think fit in the light of the facts of the particular case, including the conditions mentioned in Clauses (i) to (iv) of that Sub-section. The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant Under Section 439 of the Code.

14. *Generalizations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by Rules of general application.*

-------- ---------- ------

19. *A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power Under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender Under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the judiciary and the police are in a sense complementary and not overlapping. And, as observed by the Privy Council in King-Emperor v. Khwaja Nazir Ahmed* [MANU/PR/0007/1944 : AIR 1945 PC 18 : (1943-44) 71 IA 203 : 46 Cri. LJ 413]:

Just as it is essential that every one Accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry.... The

functions of the judiciary and the police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function,...

But these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561-A of the Code of Criminal Procedure, to quash all proceedings taken by the police in pursuance of two first information reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the court cannot, in the exercise of its inherent powers, virtually direct that the police shall not investigate into the charges contained in the FIR. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued Under Section 438(1) are those recommended in Sub-section (2)(i) and (ii) which require the applicant to cooperate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery Under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [MANU/SC/0060/1960 : AIR 1960 SC 1125: (1961) 1 SCR 14, 26: 1960 Cri. LJ 1504] *to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this Rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody Under Section 167(2) of the Code is made out by the investigating agency.*

---------- --------- -------

21. *The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the Petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled*

with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

--- --- ---

22. *By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for Under Section 437 or Section 439. These Sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.*

--- --- ---

26. *We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi [Maneka Gandhi v. Union of India,* MANU/SC/0133/1978 : (1978) 1 SCC 248]*, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.*

--- --- ---

33. *We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction Under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by*

trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible Rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.

34. *This should be the end of the matter, but it is necessary to clarify a few points which have given rise to certain misgivings.*

35. *Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely*

36. *Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned Under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.*

37. *Thirdly, the filing of a first information report is not a condition precedent to the exercise of the power Under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.*

38. *Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.*

39. *Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the Accused. The grant of "anticipatory bail" to an Accused who is under arrest involves a contradiction in terms, insofar as the offence or offences for which he is arrested, are concerned. After arrest, the Accused must seek his remedy Under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.*

40. *We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the Section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue Under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction Under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.*

41. *Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction Under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.*

42. *There was some discussion before us on certain minor modalities regarding the passing of bail orders Under Section 438(1). Can an order of bail be passed under the Section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed Under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail Under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal Rule should be not to limit the operation of the order in relation to a period of time.*

43. *During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made Under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The Appellants who were refused anticipatory bail by various courts have long since been released by this Court Under Section 438(1) of the Code.*

15. The judgment in *Sibbia* was understood and no apprehensions were reflected about the duration of anticipatory bail orders, in the next decade and a half. While so, in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, MANU/SC/0280/1996 : (1996) 1 SCC 667 for the first time, a discordant note appears to have been struck. It was stated in *Salauddin* (supra) that grant of anticipatory bail should not mean that the regular court, which is to try the offender, would be "*bypassed*". This Court approved the approach of the High Court, which had fixed the outer date for the continuance of the bail and further directed that the Petitioner, upon expiry, should move the regular court of bail. *Saluddin* further held that the procedure followed by the High Court was correct, because:

it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. <u>It is therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.</u>

16. The approach and reasoning in Salauddin was applied and reiterated by this Court, in *K.L. Verma v. State* MANU/SC/1493/1998 : 1998 (9) SCC 348. That decision (*K.L. Verma*) further explained the scope of the provision that till the regular bail application of an Accused, enjoying protection Under Section 438 is pending before the regular court he need not surrender and his protection will continue till the disposal of the regular bail application Under Section 437 or Section 439, and that she or he has to move an application (for regular bail) after expiry of a certain duration as directed by the Court or if the Charge-sheet is submitted because regular courts cannot be bypassed. It was held, in *K.L. Verma* that:

3....This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed...<u>By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be</u>

bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the Accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the Accused to remain on anticipatory bail. ..... This decision was not intended to convey that as soon as the Accused persons are produced before the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in Salauddin case [MANU/SC/0280/1996 : (1996) 1 SCC 667] *has to be so understood.*

17. Again, *Sunita Devi*; *Nirmal Jeet Kaur* and *Adri Dharan Das* (supra) are three later decisions where this Court applied the *ratio* in *Salauddin* and echoed the concern that the " protective umbrella" of Section 438 cannot be extended beyond the time period indicated in the previous case (*Salauddin*) or *till the applicant avails remedies up to high courts* and that doing so would mean that the regular court would be bypassed. The court reiterated that Section 439 would be rendered a dead letter if the applicant is allowed the benefit of an order Under Section 438 till, he avails the remedy of regular bail up to higher courts. In *HDFC Bank Ltd. v. J.J. Mannan*, MANU/SC/1923/2009 : 2010 (1) SCC 679 this Court followed and applied the reasoning in *Salauddin*, to the extent that certain limitations must be imposed, while granting anticipatory bail. A new axiom too was added, that if the police "made out" a case against the applicant and his name was included as an "*Accused in the charge-sheet, the Accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an Accused against whom charge has been framed, cannot avoid appearing before the trial court*.." The court observed that:

19. *The object of Section 438 Code of Criminal Procedure has been repeatedly explained by this Court and the High Courts to mean that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. But at the same time the provisions of Section 438 Code of Criminal Procedure cannot also be invoked to exempt the Accused from surrendering to the court after the investigation is complete and if charge-sheet is filed against him. Such an interpretation would amount to violence to the provisions of Section 438 Code of Criminal Procedure, since even though a charge-sheet may be filed against an Accused and charge is framed against him, he may still not appear before the court at all even during the trial.*

20. *Section 438 Code of Criminal Procedure contemplates arrest at the stage of investigation and provides a mechanism for an Accused to be released on bail should he be arrested during the period of investigation. Once the investigation makes out a case against him and he is included as an Accused in the charge-sheet, the Accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an Accused against whom charge has been framed, cannot avoid appearing before the trial court.*

18. In the light of these decisions, which narrowed the scope and jurisdiction Under Section 438, the judgment in *Mhetre* noticed that *Sibbia* was by a Bench of five judges, which indicated that imposition of restrictions for granting anticipatory bail was not always necessary. The court, in *Mhetre* observed as follows:

... Those orders are contrary to the law laid down by the judgment of the Constitution Bench in Sibbia's case (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined Under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the Accused. The courts considering the bail application should try to maintain fine balance between the societal interest vis-a-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the Accused that the Accused is presumed to be innocent till he is found guilty by the competent court.

94. *The complaint filed against the Accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the Accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.*

95. *The gravity of charge and exact role of the Accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the Accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.*

96. *It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the Accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.*

97. *A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the Accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage. Whether the powers Under Section 438 Code of Criminal Procedure are subject to limitation of Section 437 Code of Criminal Procedure?*

98. *The question which arises for consideration is whether the powers Under Section 438 Code of Criminal Procedure are unguided or uncanalised or are subject to all the limitations of Section 437 Code of Criminal Procedure? The Constitution Bench in Sibbia's case (supra) has clearly observed that there is no justification for reading into Section 438 Code of Criminal Procedure and the limitations mentioned in Section 437 Code of Criminal Procedure The Court further observed that the plentitude of the Section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing that the Accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 Code of Criminal Procedure to a dead letter. The Court observed that "We do not see why the provisions of Section 438 Code of Criminal Procedure*

should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."

99. *As aptly observed in Sibbia's case (supra) that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.*

100. *The Constitution Bench in the same judgment also observed that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall enlarged on bail.*

101. *The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.*

102. *The order granting anticipatory bail for a limited duration and thereafter directing the Accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in Sibbia's case (supra).*

103. *It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the Accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.*

104. *The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in Sibbia's case (supra) has clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the Legislature entrusting this power to the superior courts namely, the High Court and the Court of Session. The Constitution Bench observed as under:*

We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction Under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognized over the years, than by divesting them of their discretion which the

legislature has conferred upon them, by laying down inflexible Rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all "the legislature in, its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.

GRANT OF BAIL FOR LIMITED PERIOD IS CONTRARY TO THE LEGISLATIVE INTENTION AND LAW DECLARED BY THE CONSTITUTION BENCH:

***105.** The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the public prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case.*

***106.** The judgment in Salauddin Abdulsamad Shaikh (supra) is contrary to legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.*

***107.** The restriction on the provision of anticipatory bail Under Section 438 Code of Criminal Procedure limits the personal liberty of the Accused granted Under Article 21 of the constitution. The added observation is nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in Maneka Gandhi's case (supra) in which the court observed that in order to meet the challenge of Article 21 of the Constitution the procedure established by law for depriving a person of his liberty must be fair, just and reasonable.*

***108.** Section 438 Code of Criminal Procedure does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the Accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the Accused and he is released on bail, the concerned court would be fully justified in imposing conditions including direction of joining investigation.*

***109.** The court does not use the expression 'anticipatory bail' but it provides for issuance of direction for the release on bail by the High Court or the Court of Sessions in the event of arrest. According to the aforesaid judgment of Salauddin's case, the Accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the Accused only after he has surrendered.*

***110.** In pursuance to the order of the Court of Sessions or the High Court, once the Accused is released on bail by the trial court, then it would be unreasonable to compel the Accused to surrender before the trial court and again apply for regular bail.*

111. *The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this Court in Sibbia's case (supra).*

112. *The validity of the restrictions imposed by the Apex Court, namely, that the Accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic intention and spirit of Section 438 Code of Criminal Procedure It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit Under Article 21 of the Constitution of India. Directing the Accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.*

113. *It is a settled legal position crystallized by the Constitution Bench of this Court in Sibbia's case (supra) that the courts should not impose restrictions on the ambit and scope of Section 438 Code of Criminal Procedure which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.*

114. *It is unreasonable to lay down strict, inflexible and rigid Rules for exercise of such discretion by limiting the period of which an order under this Section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this Court in the Sibbia's case (supra)...*

********** **********

121. *No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under Section 438 Code of Criminal Procedure by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.*

122. *The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:*

i. The nature and gravity of the accusation and the exact role of the Accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the Accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the Accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the Accused very carefully. The court must also clearly comprehend the exact role of the Accused in the case. The cases in which Accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the Accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the Accused is entitled to an order of bail.

123. *The arrest should be the last option and it should be restricted to those exceptional cases where arresting the Accused is imperative in the facts and circumstances of that case.*

124. *The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the Accused and these allegations are corroborated by other material and circumstances on record.*

125. *These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only*

illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

19. These seemingly incongruent strands of reasoning-stemming from the two distinct line of precedents, spawning divergent approaches to the scope of jurisdiction Under Section 438 have impelled the reference to this larger Bench.

The provisions

20. For completeness, it is essential to set out the relevant provisions: to wit, Sections 437, 438 and 439 of the Code of Criminal Procedure, 1973 (hereafter variously "Cr.PC" and "the Code"). They are reproduced in the footnote below.[1]

Contentions of parties

21. Mr. Abhay Kumar, for the Petitioner, argued that it is not correct to find any limitation on the life span of an order of anticipatory bail in terms of its duration by reading the para 42 of *Sibbia Case;* and that the life of anticipatory bail is coterminous with the life of criminal case, whether the criminal case gets over either at the stage of trial or before it, in a given case. He further urged that personal liberty is a cherished freedom, even more important than the other freedoms guaranteed under the Constitution. The Constitution framers therefore enacted safeguards in Article 22 in the Constitution to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty.

22. It is submitted, therefore that the substantive constitutional right of personal liberty can be denied or curtailed only in accordance with the procedure established by a law that is fair, just and reasonable. That substantial right is procedurally enforced, apart from others, in terms of grant of Bail to an Accused in a criminal case. Chapter XXXIII of the Code contains elaborate provisions relating to grant of bail. Bail is granted to one who is arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the Accused from internment though the court would still retain constructive control over him through the sureties. In case the Accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. "Bail" literally means surety.

23. The literal meaning of the word "bail" is surety. Counsel referred to the meaning of "bail" in *Halsbury's Laws of England (Halsbury's Laws of England, 4th Edn., Vol. 11, para 166),* and submitted that it is aimed at placing the Accused in the custody of his sureties who are bound to produce him to appear at his trial.[2] Upon grant of bail, the Accused is mandated to furnish bond and bail-bond for attendance before officer in charge of police station or Court in terms of

prescribes format of Form No. 45 of Schedule 2 of the Code by giving necessary details. Bail, it was highlighted, can be given at any stage: pre-trial, during trial and even after completion of trial. Counsel submitted that apart from provisions in Chapter XXXII of Code of Criminal Procedure (Sections 436-450), there are other provisions relevant on the issue, i.e. Section 360 (Order to release on probation of good conduct or after admonition, a post-conviction stage and Section 389 (Suspension of sentence pending the appeal and release of Appellant on bail - post conviction and during pendency of Appeal). Section 438 manifests the principle of liberty.

24. Counsel highlighted that anticipatory bail is panacea for apprehension of arrest in false case. Anticipatory bail protects from trauma and stigma of arrest of an innocent (in most of the cases, full of various responsibilities and even being sole bread earner of her/his family members), consequently prohibiting in creating reverse victims by way of dependent upon the said Accused. An elementary postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus is placed on an Accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general Rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Counsel relied on *Dataram Singh v. State of U.P*. MANU/SC/0085/2018 : (2018) 3 SCC 22).

25. Counsel submitted that the provision in Section 438 read with Section 439(2) of the Code, contain clear guidelines and limitations. It was highlighted that the discretion to impose (or not impose) condition is left to the concerned court and the Code therefore cannot be interpreted to cut short its duration either till filing of charge-sheet or unearthing of alleged fresh materials during investigation. It is submitted that the power to curtail or to diminish, the duration of anticipatory bail, in a suitable case, is governed by Section 439(2) of the Code in the same manner which is enumerated in Section 437 of the Code (which is applicable to a Court other than High Court or Court of Session). The counsel urged that there have been instances of courts passing orders, including in some of the orders/judgments of this Court, wherein denial of anticipatory bail is followed by direction to Accused to surrender and seek regular bail. This, counsel highlighted, is not based on any sound *rationale.*

26. Mr. C.S.N. Mohan Rao, learned Counsel, emphasized that arrest of an Accused, is governed, by Sections 41-46 of the Code. The arrest of an Accused, is required, if at all, broadly for unearthing the truth of the case during investigation (a choice of the investigating agency) and to secure the presence of Accused during trial, for free and fair trial including exclusion of any possibility of influencing of witnesses/and tampering of evidence or aborting a trial by absconding (prerogative of the trial court) or any other means or method known or unknown. Therefore, whether an Accused has to be arrested and kept in custody and remains in that state of physical confinement, ideally is to be the domain of the prosecuting agency and/or of trying Court. There are sufficient methods enlisted in the Code to ensure this end by both i.e. the prosecuting agency including complainant/victim and also to the concerned court-by filing of cancellation of bail by former and issuance of bailable and non-bailable warrant by the latter. Counsel argued that in any case, rejection of an application for anticipatory bail, at first instance, does not automatically give rise to evil consequences for an Accused to surrender and seek regular bail. The filing of

subsequent anticipatory bail and grant of the relief by a competent court of law in a suitable case, upon showing proper and inspiring subsequent chance in circumstances in favour of Accused, is sufficient indicative factor of the proposition that a rejection of anticipatory will generate no automatic warrant for an Accused to surrender and seek regular bail. If subsequent and material change or circumstance can be a plausible reason for cancellation of bail, is should definitely, considering the valuable right of an Accused, equally there can be a reason for applying fresh application for anticipatory bail in a suitable case. Having regard to all these factors, counsel urged this Court to endorse the reasoning in *Mhetre* which according to him is conformity with the larger bench ruling in *Sibbia*, and accommodates the flexibilities in the Code.

27. Mr. Rao relied on the observations in *Gurcharan Singh v. State (Delhi Admn.)*[3] to say that cancellation of anticipatory bail, when warranted by the facts, is the answer where the fact situation requires the applicant (who is beneficiary of an order Under Section 438 Code of Criminal Procedure) rather than limiting the order of anticipatory bail. He also pointed out observations in *Gurcharan Singh* (supra) to say that statutory bail (i.e. where charge sheet is not filed in a case within the prescribed period of 60 or 90 days, leading to release by operation of Section 167(2) of the Code[4]) amounts to deemed bail under Chapter XXXIII of the Code:

Under the first proviso to Section 167(2) no Magistrate shall authorise the detention of an Accused in custody under that Section for a total period exceeding 60 days on the expiry of which the Accused shall be released on bail if he is prepared to furnish the same - This type of release under the proviso shall be deemed to be a release under the provisions of Chapter XXXIII relating to bail.

28. It was submitted that the decisions in *Aslam Babalal Desai v. State of Maharashtra* MANU/SC/0001/1993 : 1992 (4) SCC 272 is an authority for the proposition that there can be no cancellation of the bail granted, or deemed to be granted, Under Section 167(2) merely upon the later filing of a charge sheet. The court had observed as follows, in *Aslam Babalal Desai* (supra) in this context:

It will thus be seen that once an Accused person has been released on bail by the thrust of the proviso to Section 167(2), the mere fact that subsequent to his release a challan has been filed is not sufficient to cancel his bail. In such a situation his bail can be cancelled only if considerations germane to cancellation of bail Under Section 437(5) or for that matter Section 439(2) exist. That is because the release of a person Under Section 167(2) is equated to his release under Chapter XXXIII of the Code.

It was submitted that therefore, the mere filing of a charge sheet per se cannot be an event which compels an Accused who has the benefit of anticipatory bail, to surrender and seek regular bail. The grounds for cancellation of bail are to be made out, separately.

29. Mr. K.V. Vishwanathan, learned Senior Counsel emphasised that the exercise of power Under Section 438 is identical to the exercise of power Under Sections 437 and 439 Code of Criminal Procedure Consequently, pre arrest bail granted in anticipation of arrest - Under Section 438, in his submission, operates like any other order of bail i.e. till an order of conviction or affirmative direction is passed to arrest the individuals, is made under Section 439(2). Mr. Vishwanathan

highlighted that Section 438 has an intrinsic link with Article 21 in as much as it seeks to balance state's power and responsibility to investigate offence, with its duty to protect individual rights and liberties of citizens. It was submitted that Article 21 raises the presumption of innocence in favour of other Accused; consequently, this has to be at the centre of every consideration of penal statutes and their interpretation.

30. It was also submitted that Section 438 being part of procedure established by law is to be construed in a fair, just and reasonable manner. Learned Counsel reiterated that this was what the Court highlighted in *Sibbia.* Mr. Vishwanathan, after outlining the background of Section 438 - in the context of the observations of the 41st Law Commission Report submitted that those comments should also be considered in the light of the observations made in the *Report of the Committee on Reforms of the Criminal Justice System* by Dr. Justice V.S. Malimath. Reliance on para 7.26.3.[5]

31. It was urged that the power of arrest with the police is Under Section 41 of the Code of Criminal Procedure. That provision is in two parts. One, relating to offences in which the maximum punishment can extend to imprisonment for seven year. Second, relating to offences in which the maximum punishment can extend to imprisonment to above seven years or death penalty. Though they have different conditions and thresholds, in both cases it is clear from a bare reading of the Section that the power of arrest cannot be exercised in ever FIR that is registered Under Section 154 Code of Criminal Procedure. This power is circumscribed by the conditions laid down in this section. Moreover, this principle that the power of arrest is not required to be exercised in every case was recognized in the case of *Joginder Kumar v. State of U.P.* MANU/SC/0311/1994 : 1994 (4) SCC 260; *Lalitha Kumari v. State of U.P.* MANU/SC/1166/2013 : 2014 (2) SCC 1; and *Arnesh Kumar v. State of Bihar* MANU/SC/0559/2014 : 2014 (8) SCC 273. This Court in *M.C. Abraham v. State of Maharashtra* MANU/SC/1190/2002 : 2003 (2) SCC 649 held that it was not mandatory for the police to arrest a person only because his/her anticipatory bail had been rejected. It was further stated that the power of arrest is then further circumscribed by Section 438. As recognized by the Law Commission, there are cases where the power of arrest is not required or allowed to be exercised. Exercising power of arrest in such cases would be a grave violation of a person's right and liberty. Such exercise of power would amount to misuse of Section 41. The check on the power of arrest and custody provided by Sections 437 or 439 is limited as the check is only *post facto*. By then the person arrested has already suffered the trauma and humiliation of arrest.

32. Counsel submitted to strike a further balance between the power of arrest and the rights of the Accused, the power Under Section 438 is specifically given to the Court of Session and the High Court so as to ensure that this judicial intervention is done at the supervisory level and not at the magisterial level. It is in this light that the two questions raised in the present reference need to be addressed. It was urged that a bare reading of Section 438 shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted under this Section has to be time-bound. The position is the same as in Sections 437 and 439. Counsel pointed to Section 438(3) and submitted that two important aspects of this provision highlight the understanding the scheme of the Code:

a) A person in whose favour a pre-arrest bail order has been made Under Section 438 has to first be arrested. Such person is then released on bail on the basis of the pre-arrest bail order. For such

release the person has to comply with the requirement of Section 441 of giving a bond or surety; and

b) Where the magistrate taking cognizance Under Section 204 is of the view that a warrant is required to be issued at the first instance, such magistrate is only empowered to issue only a *bailable warrant* and not a non-bailable warrant.

33. This curtailment of power of the magistrate clearly shows Parliamentary intent that one who is granted relief Under Section 438 ought not to be arrested at the stage of cognizance because of the said pre-arrest bail order. Considering this express provision, no other interpretation can be given to the said section. The second question referred here squarely covered by this Sub-section. This order passed Under Section 438, is a pre-arrest direction (to release on bail, in the event of arrest), is subject to the power granted to the Court of Session and the High Court Under Section 439(2) Code of Criminal Procedure It is clear from the provision that a bail granted Under Section 438 is further governed by Section 439(2) which gives the power to the Court of Session or the High Court to direct the arrest of the Accused at any time. This ensures that through judicial intervention the balance between the two competing principles can again be revisited if the need arises. In other words, considering any relevant change in circumstances the prosecution can seek the arrest of the Accused. The only difference is that the power of arrest in these cases is exercised only after judicial scrutiny. This provision envisions that the Code presupposes that orders once passed Under Sections 438 and 439 will continue till a contrary order is passed Under Section 439(2). The order passed Under Sections 438 or 439 are not and temporary or time bound. Therefore, a person enjoying the benefit of orders under these Sections can be taken into custody only when a specific direction is passed Under Section 439(2). This direction for arrest Under Section 439(2) is different from seeking cancellation of bail.

34. It was argued that undoubtedly violation of a condition imposed in an order passed Under Section 438 can lead to a direction of arrest Under Section 439(2). However, the scope of Section 439(2) is not limited to only cancellation of bail. Counsel stated that this proposition of law was considered by this Court in *Pradeep Ram v. State of Jharkhand* MANU/SC/0881/2019. In this case, this Court while considering an earlier judgment in *Mithabhai Pashabhai Patel v. State of Gujarat* MANU/SC/0858/2009 : 2009 (6) SCC 332, held that by virtue of Sections 437(5) and 439(2), a direction to take a person into custody could be passed despite his being released on bail, by a previous order. The court held that Under Sections 437(5) and 439(2) a person could be directed to be taken into custody without necessarily cancelling his earlier bail. The difference between cancellation of bail and a direction to take a person into custody Under Section 439(2) was recognised. It was also held in this case that if a graver offence is added to the FIR or to the case after the person has been granted bail, a direction Under Section 439(2) or 437(5) is required before such person can be arrested again for the new offences added to the case. Therefore, this Court recognized the need for court's supervision after the bail had been granted.

35. Mr. Hiren Raval, learned *amicus curiae*, highlighted that while there are passages in *Sibbia (supra)*, which support the arguments of the Petitioners, that orders Under Section 438 can be unconditional and not limited by time, the court equally struck a note of caution, and wished courts to be circumspect while making orders of anticipatory bail. In this regard, learned senior Counsel highlighted paragraphs 42 and 43 of the decisions in *Sibbia*.

36. Elaborating on his submissions, the *amicus* submitted that whether to impose any conditions or limit the order of anticipatory bail in point of time undoubtedly falls within the discretion of the court seized of the application. He however submitted that this discretion should be exercised with caution and circumspection. Counsel submitted that there could be three situations when anticipatory bail applications are to be considered: one, when the application is filed in anticipation of arrest, before filing FIR; two, after filing FIR, but before the filing of the charge sheet; and three, after filing charge sheet. It was submitted that as a matter of prudence and for good reasons, articulated in *Salauddin, K.L. Verma, Adri Dharan Das* and decisions adopting their reasoning, it would be salutary and in public interest for courts to impose time limits for the life of orders of anticipatory bail. Counsel submitted that if anticipatory bail is sought before filing of an FIR the courts should grant relief, limited till the point in time, when the FIR is filed. In the second situation, i.e. after the FIR is filed, the court may limit the grant of anticipatory bail till the point of time when a charge sheet is filed; in the third situation, if the application is made after filing the charge sheet, it is up to the court, to grant or refuse it altogether, looking at the nature of the charge. Likewise, if arrest is apprehended, the court should consider the matter in an entirely discretionary manner, and impose such conditions as may be deemed appropriate.

37. Mr. Raval submitted that in every contingency, the court is not powerless after the grant of an order of anticipatory bail; it retains the discretion to revisit the matter if new material relevant to the issue, is discovered and placed on record before it. He highlighted Section 439(2) and argued that that provision exemplified the power of the court to modify its previous approach and even revoke altogether an earlier order granting anticipatory bail. It was submitted that the bar Under Section 362 of the Code (against review of an order by a criminal court) is inapplicable to matters of anticipatory bail, given the nature and content of the power Under Section 439(2).

38. Mr. Raval also submitted that power Under Section 438 cannot be exercised to undermine any criminal investigation. He highlighted the concern that an unconditional order of anticipatory bail, would be capable of misuse to claim immunity in a blanket manner, which was never the intent of Parliament. Counsel submitted that besides, the discretion of courts empowered to grant anticipatory bail should be understood as balancing the right to liberty and the public interest in a fair and objective investigation. Therefore, such orders should be so fashioned as to ensure that Accused individuals co-operate during investigations and assist in the process of recovery of suspect or incriminating material, which they may lead the police to discover or recover and which is admissible, during the trial, *per* Section 27 of the Evidence Act. He submitted that if these concerns are taken into account, the declaration of law in *Mhetre* - particularly in Paras 122 and 123 that no condition can be imposed by court, in regard to applications for anticipatory bail, is erroneous; it is contrary to Para 42 and 43 of the declaration of law in *Sibbia's* case (supra). It was emphasized that ever since the decision in *Salauddin* and other subsequent judgments which followed it, the practise of courts generally was to impose conditions while granting anticipatory bail: especially conditions which required the applicant/Accused to apply for bail after 90 days, or surrender once the charge sheet was filed, and apply for regular bail. Counsel relied on Section 437(3) to say that the conditions spelt out in that provision are to be considered, while granting anticipatory bail, by virtue of Section 438(2).

39. Mr. Tushar Mehta, learned Solicitor General and Mr. Vikramjit Banerjee, learned Additional Solicitor General, submitted that the decision in *Mhetre (supra)* is erroneous and should be

overruled. It was submitted that though Section 438 does not *per se* pre-suppose imposition of conditions for grant of anticipatory bail, nevertheless, given Section 438(2) and Section 437(3), various factors must be taken into account. Whilst exercising power to grant (or refuse) a direction in the nature of anticipatory bail, the court is bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For this purpose, in granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) to ensure an unimpeded investigation. The object of imposing conditions is to avoid the possibility of the person or Accused hampering investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. Consequently, courts should exercise their discretion in imposing conditions with care and restraint.

40. The law presumes an Accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed Under Article 21 of the Constitution. Counsel stated that at the same time, while granting anticipatory bail, the courts are expected to consider and keep in mind the nature and gravity of accusation, antecedents of the applicant, namely, about his previous involvement in such offence and the possibility of the applicant to flee from justice. It is also the duty of the Court to ascertain whether accusation has been made with the object of injuring or humiliating him by having him so arrested. It is needless to mention that the Courts are duty bound to impose appropriate conditions as provided Under Section 438(2) of the Code.

41. Counsel argued that there is no substantial difference between Sections 438 and 439 of the Code as regards appreciation of the case while granting or refusing bail. Neither anticipatory bail nor regular bail, however, can be granted as a matter of rule. Being an extraordinary privilege, should be granted only in exceptional cases. The judicial discretion conferred upon the court must be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail. In this regard, counsel relied on *Jai Prakash Singh v. State of Bihar* MANU/SC/0224/2012 : 2012 (4) SCC 325. Counsel relied on *State of M.P. and Anr. v. Ram Kishna Balothia and Anr.* 1995 Supp (3) SCC 419 where this Court considered the nature of the right of anticipatory bail and observed that:

We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Code of Criminal Procedure..... Also anticipatory hail cannot he granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot he considered as an essential ingredient of Article 21 of the Constitution. and its non-application to a certain special category of offences cannot he considered as violative of Article 21.

42. The decisions in *Savitri Agarwal v. State of Maharashtra and Anr.* MANU/SC/1193/2009 : 2009 (8) SCC 325, and *Sibbia* were referred to, to argue that before granting an order of anticipatory bail, the court should be satisfied that the applicant seeking it has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief; it is insufficient for an applicant to show that he has some sort of vague apprehension that someone is going to accuse him, for committing an offence

pursuant to which he may be arrested. An applicant's grounds on which he believes he may be arrested for a non-bailable offence, must be capable of examination by the Court objectively. Specific events and facts should be disclosed to enable the Court to judge of the reasonableness of his belief, the existence of which is the *sine qua non* of the exercise of power conferred by the Section. It was pointed out that the provisions of Section 438 cannot be invoked after the arrest of the Accused. After arrest, the Accused must seek his remedy Under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested. The following passages in *Savitri Agarwal* (supra) were relied upon:

24. While cautioning against imposition of unnecessary restrictions on the scope of the section, because, in its opinion, overgenerous infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution, cannot be made to depend on compliance with unreasonable restrictions, the Constitution Bench laid down the following guidelines, which the courts are required to keep in mind while dealing with an application for grant of anticipatory bail:

********** **********

(iv) No blanket order of bail should be passed and the court which grants anticipatory bail must take care to specify the offence or the offences in respect of which alone the order will be effective. While granting relief Under Section 438(1) of the Code, appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the event of the police making out a case of a likely discovery Under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the recovery. Otherwise, such an order can become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possible be predicated when the order was passed.

********** **********

(ix) Though it is not necessary that the operation of an order passed Under Section 438(1) of the Code be limited in point of time but the court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of FIR in respect of the matter covered by the order. The applicant may, in such cases, be directed to obtain an order of bail Under Section 437 or 439 of the Code within a reasonable short period after the filing of the FIR.

43. It was also argued on behalf of the Govt. of NCT - and the Union, that this Court had expressed a serious concern, time and again, that if Accused or applicants who seek anticipatory bail are equipped with an unconditional order before they are interrogated by the police it would greatly harm the investigation and would impede the prospects of unearthing all the ramifications involved in a conspiracy. Public interest also would suffer as consequence. Reference was invited to *State of A.P. v. Bimal Krishna Kundu* MANU/SC/0892/1997 : 1997 (8) SCC 104 in this context. Likewise, attention of the court was invited to *Muraleedharan v. State of Kerala* MANU/SC/0269/2001 : 2001 (4) SCC 638 which held that "*Custodial interrogation of such an Accused is indispensably necessary for the investigating agency to unearth all the links involved*

in the criminal conspiracies committed by the person which ultimately led to the capital tragedy." It was highlighted that statements made during custodial interrogation are qualitatively more relevant to those made otherwise. Granting an unconditional order of anticipatory bail would therefore thwart a complete and objective investigation.

44. Mr. Aman Lekhi, learned Additional Solicitor General, urged that the general drift of reasoning in *Sibbia* was not in favour of a generalized imposition of conditions-either as to the period (in terms of time, or in terms of a specific event, such as filing of charge sheet) limiting the grant of anticipatory bail. It was submitted that the text of Section 439(2) applied *per se* to all forms of orders-including an order or direction to release an applicant on bail (i.e. grant of anticipatory bail), upon the court's satisfaction that it is necessary to do so. Such order (of cancellation, Under Section 439(2) or direction to arrest) may made be where the conditions made applicable at the time of grant of relief, are violated or not complied with, or where the larger interests of a fair investigation necessitate it.

Analysis and Conclusions

Re Point No. 1: Whether the protection granted to a person Under Section 438, Code of Criminal Procedure should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail

45. The concept of bail, i.e. preserving the liberty of citizen - even Accused of committing offences, but subject to conditions, dates back to antiquity. Justinian I in the collections of laws and interpretations which prevailed in his times, *Codex Justinianus* (or '*Code Jus*') in Book 9 titled Title 3(2) stipulated that "*no Accused person shall under any circumstances, be confined in prison before he is convicted*". The second example of a norm of the distant past is the *Magna Carta* which by Clause 44 enacted that "*people who live outside the forest need not in future appear before the Royal Justices of the forest in answer to the general summons unless they are actually involved in proceedings or are sureties for someone who has been seized for a forest offence.*" Clear Parliamentary recognition of bail took shape in later enactments in the UK through the Habeas Corpus Act 1677 and the English Bill of Rights, 1689 which prescribed that "*excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted*".

46. Bail *ipso facto* has not been defined under the Code. It is now widely recognized as a norm which includes the governing principles enabling the setting of Accused person on liberty subject to safeguards, required to make sure that he is present whenever needed. The justification for bail (to one Accused of commission or committing a crime is that it preserves a person who is under cloud of having transgressed law but not convicted for it, from the rigors of a detention.

47. Section 438 of the Code of Criminal Procedure provides for the issuance of directions for the grant of bail to a person apprehending arrest. The Code of Criminal Procedure of 1973 replaced the old code of 1898. The old code did not provide for any corresponding provision to Section 438 of the code of 1973. Under the old code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail in anticipation of arrest. The predominant position was that courts did not have such a

power. Subsequently, the need for various amendments to make the code more comprehensive resulted in the enactment of the Code of Criminal Procedure in 1973. Interestingly, Section 438 does not expressly use the term "anticipatory bail"; its language instead empowers the concerned to court to *issue directions for grant of bail.*

48. The Law Commission of India, in its 41st Report of 1969, noted that the necessity for granting anticipatory bail arises mainly due to influential persons attempting to implicate their rivals in false cases, or disgracing them by getting them detained in jail. The report further noted that apart from false cases, where there are reasonable grounds for holding that a person Accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems to be no justification to require him first to submit to custody, remain in prison for some days and then apply for bail. The report recommended that a provision be included for the direction to grant bail in such cases, and that this power vest in the High Courts and Courts of Session only. The report, however, did not include the conditions for grant of anticipatory bail in the suggested language for the provision. Certain conditions that courts *may* include were, however included in the provision that was enacted as Section 438 of the Code of Criminal Procedure, 1973.

49. The term 'anticipatory bail' finds no place in the Code of Criminal Procedure itself but was used by the Law Commission of India in its 41st Report. The term was used to convey that it was an application for bail in anticipation of arrest, i.e., before the arrest itself is made. Grant of bail, according to Wharton's Law Lexicon, and as noticed in *Sibbia (supra)*, means to "*set at liberty a person arrested or imprisoned, on security being taken for his appearance". Sibbia,* observed thus:

The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail, constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction Under Section 438 is intended to confer conditional immunity from this 'touch' or confinement.

50. In *Sibbia (supra)*, this Court considered the specific question of whether the power to grant anticipatory bail Under Section 438 is limited to contingencies such as the possibility that the police may use their investigative powers to humiliate the person sought to be arrested, or pervert the course of justice and abuse their powers of investigation. One of the arguments raised in *Sibbia*, as also in the present case, was that the power to grant anticipatory bail ought to be left to the discretion of the court concerned, depending on the facts and circumstances of each case. The State, on the other hand, argued that the grant of anticipatory bail should at least be conditional upon the bail applicant showing that he is likely to be arrested for an ulterior motive-that the proposed charges are baseless or motivated by *malafides*. The State also argued that anticipatory

bail is an extraordinary remedy and therefore, whenever it appears that the proposed accusations are prima *facie* plausible, the applicant should be left to the ordinary remedy of applying for bail Under Section 437 or Section 439 of the Code of Criminal Procedure, after being arrested.

51. Counsel for the Appellants in *Sibbia*, on the other hand, argued that since the denial of bail amounts to deprivation of personal liberty, courts should lean against the imposition of unnecessary restrictions on the scope of Section 438, when no such restrictions are prescribed by the legislature under that provision. The Court observed that Section 438(1) is couched in broad and unqualified terms and was of the opinion that such broad language ought not to be infused with restraints and conditions which the legislature itself did not think proper or necessary to impose. The court laid emphasis on the primacy of the presumption of innocence in criminal jurisprudence, and observed that Section 438 was not enacted on a clean slate, but rather within the context of the existing provisions, Sections 437 (dealing with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases) and Section 439 (which deals with the "*special powers*" of the High Court and the Court of Session regarding bail). In the light of the relevant extracts of *Sibbia*, it would now be worthwhile to recount the relevant observations on the issue. The discussion and conclusions in *Sibbia* are summarized as follows:

52. (i) Grant of an order of unconditional anticipatory bail would be "*plainly contrary to the very terms of Section 438.*" Even though the terms of Section 438(1) confer discretion, Section 438(2) *"confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in Clauses (i) to (iv) of that Sub-section."*

(ii) Grant of an order Under Section 438(1) does not *per se* hamper investigation of an offence; Section 438(1)(i) and (ii) enjoin that an Accused/applicant should co-operate with investigation. *Sibbia (supra)* also stated that courts can fashion appropriate conditions governing bail, as well. One condition can be that if the police make out a case of likely recovery of objects or discovery of facts Under Section 27 (of the Evidence Act, 1872), the Accused may be taken into custody. Given that there is no formal method prescribed by Section 46 of the Code if recovery is made during a statement (to the police) and pursuant to the Accused volunteering the fact, it would be a case of recovery during "deemed arrest" (Para 19 of *Sibbia*).

(iii) The Accused is not obliged to make out a special case for grant of anticipatory bail; reading an otherwise wide power would fetter the court's discretion. Whenever an application (for relief Under Section 438) is moved, discretion has to be always exercised judiciously, and with caution, having regard to the facts of every case. (Para 21, *Sibbia*).

(iv) While the power of granting anticipatory bail is not ordinary, at the same time, its use is not confined to exceptional cases (Para 22, *Sibbia*).

(v) It is not justified to require courts to only grant anticipatory bail in special cases made out by Accused, since the power is extraordinary, or that several considerations - spelt out in Section 437- or other considerations, are to be kept in mind. (Para 24-25, *Sibbia*).

(vi) Overgenerous introduction (or reading into) of constraints on the power to grant anticipatory bail would render it Constitutionally vulnerable. Since fair procedure is part of Article 21, the court should not throw the provision (i.e. Section 438) open to challenge *"by reading words in it which are not to be found therein."* (Para 26).

(vii) There is no "inexorable rule" that anticipatory bail cannot be granted unless the applicant is the target of *mala fides*. There are several relevant considerations to be factored in, by the court, while considering whether to grant or refuse anticipatory bail. Nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the Accused's presence not being secured during trial; a reasonable apprehension that the witnesses might be tampered with, and "the larger interests of the public or the state" are some of the considerations. A person seeking relief (of anticipatory bail) continues to be a man presumed to be innocent. (Para 31, *Sibbia*).

(viii) There can be no presumption that any class of Accused- i.e. those Accused of particular crimes, or those belonging to the poorer sections, are likely to abscond. (Para 32, Sibbia).

(ix) Courts should exercise their discretion while considering applications for anticipatory bail (as they do in the case of bail). It would be unwise to divest or limit their discretion by prescribing *"inflexible Rules of general application."*. (Para 33, Sibbia).

(x) The apprehension of an applicant, who seeks anticipatory bail (about his imminent or possible arrest) should be based on reasonable grounds, and rooted on objective facts or materials, capable of examination and evaluation, by the court, and not based on vague un-spelt apprehensions. (Para 35, *Sibbia*).

(xi) The grounds for seeking anticipatory bail should be examined by the High Court or Court of Session, which should not leave the question for decision by the concerned Magistrate. (Para 36, *Sibbia*).

(xii) Filing of FIR is not a condition precedent for exercising power Under Section 438; it can be done on a showing of reasonable belief of imminent arrest (of the applicant). (Para 37, *Sibbia*).

(xiii) Anticipatory bail can be granted even after filing of an FIR-as long as the applicant is not arrested. However, after arrest, an application for anticipatory bail is not maintainable. (Para 38-39, *Sibbia*).

(xiv) A blanket order Under Section 438, directing the police to not arrest the applicant, *"wherever arrested and for whatever offence"* should not be issued. An order based on reasonable apprehension relating to specific facts (though not spelt out with exactness) can be made. A blanket order would seriously interfere with the duties of the police to enforce the law and prevent commission of offences in the future. (Para 40-41, *Sibbia*).

(xv) The public prosecutor should be issued notice, upon considering an application Under Section 438; an *ad interim* order can be made. The application *"should be re-examined in the light of the respective contentions of the parties."* The *ad interim* order too must conform to the requirements

of the Section and suitable conditions should be imposed on the applicant even at that stage. *"Should the operation of an order passed Under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail Under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal Rule should be not to limit the operation of the order in relation to a period of time."* (Para 42, *Sibbia*).

53. It is quite evident, therefore, that the pre-dominant thinking of the larger, Constitution Bench, in *Sibbia (supra),* was that given the premium and the value that the Constitution and Article 21 placed on liberty-and given that a tendency was noticed, of harassment - at times by unwarranted arrests, the provision for anticipatory bail was made. It was not hedged with any conditions or limitations-either as to its duration, or as to the kind of alleged offences that an applicant was Accused of having committed. The courts had the discretion to impose such limitations (like co-operation with investigation, not tampering with evidence, not leaving the country etc) as were reasonable and necessary in the peculiar circumstances of a given case. However, there was no invariable or inflexible Rule that the applicant had to make out a special case, or that the relief was to be of limited duration, in a point of time, or was unavailable for any particular class of offences.

54. At this stage, it would be essential to clear the air on the observations made in some of the later cases about whether Section 438 is an essential element of Article 21. Some judgments, notably *Ram Kishna Balothia and Anr. (supra) and Jai Prakash Singh v. State of Bihar* MANU/SC/0224/2012 : 2012 (4) SCC 379 held that the provision for anticipatory bail is not an essential ingredient of Article 21, particularly in the context of imposition of limitations on the discretion of the courts while granting anticipatory bail, either limiting the relief in point of time, or some other restriction in respect of the nature of the offence, or the happening of an event. We are afraid, such observations are contrary to the broad terms of the power declared by the Constitution Bench of this Court in *Sibbia (supra)*. The larger bench had specifically held that an *"over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions."*

55. In *Gudikanti Narasimhulu* v. *Public Prosecutor* MANU/SC/0089/1977 : 1978 (1) SCC 240 this Court observed that

. ... Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised Under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an Accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law".

56. The reason for enactment of Section 438 in the Code was Parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal

jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature. In *Sibbia*, it was observed that:

Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

57. The interpretation of Section 438- that it *does not encapsulate* Article 21, is erroneous. This Court is of the opinion that the issue is not whether Section 438 is an intrinsic element of Article 21: it is rather whether that provision is part of fair procedure. As to that, there can be no doubt that the provision for anticipatory bail is pro-liberty and enables one anticipating arrest, a facility of approaching the court for a direction that he or she not be arrested; it was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police, which Parliament itself recognized as a widespread malaise on the part of the police.

58. The forty first and forty-eight reports of the Law Commission were noticed by this Court in *Sibbia (supra)*. Thereafter, the Law Commission, in its 154th report had occasion to deal with the subject; it recommended no substantial change, - except procedural additions to Section 438 and observed as follows:

18. In the various workshops diverse views were expressed regarding the retention or deletion of the provision of anticipatory bail. One view is that it is being misused by affluent and influential Sections of Accused in society and hence, be deleted from the Code. The other view is that it is a salutary provision to safeguard the personal liberty and therefore be retained. Misuse of the same in some instances by itself cannot be a ground for its deletion. However, some restraints may be imposed in order to minimise such misuse. We are, however, of the opinion that the provision contained Under Section 438 regarding anticipatory bail should remain in the Code but subject to the amendments suggested in Clause 43 of the Code of Criminal Procedure (Amendment) Bill, 1994 which lays down adequate safeguards.[6]

Interestingly, the 177th report of the Law Commission lamented that the power of arrest was being misused by police in a widespread manner.[7]

59. The persistence of the phenomena unwarranted arrests was sharply criticised by this Court in *Arnesh Kumar (supra)*, saying that the approach of the police continued to be colonial despite six decades of independence, that the power of arrest is

...is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with

the rest is despicable. It has become a hand tool to the police officers who lack sensitivity or act with oblique motive.

The latest report of the Law Commission[8] notes that *"67 per cent of the prison population is awaiting trial in India"*. Therefore, the need for a provision to ensure anticipatory bail, is as crucial, as it was at the time of its introduction, and at the time *Sibbia (supra)* was decided.

60. Various reasons - given in judgments, rendered after *Sibbia (supra)*, starting with *Salauddin (supra)*, have highlighted that anticipatory bail orders have to be constrained by conditions, notably with reference to time (i.e. three months, etc) or till the happening of a certain event. The reasons, and observations, limiting the duration of grant of anticipatory bail are outlined below:

(1) *"such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted"*. (*Saluddin* and *K.L. Verma*, supra).

(2) An order of anticipatory bail can be granted in cases of *"serious nature as for example murder"*. Consequently, its duration should *"be limited and ordinarily the Court granting anticipatory bail should not substitute itself for the original Court which is expected to deal with the offence." (Salauddin [supra])*

(3) Custodial interrogation of *"Accused is indispensably necessary for the investigating agency"* to unearth materials in criminal conspiracies (Ref. *to unearth all the links involved in the criminal conspiracies" (Bimal Krishna Kundu and Muraleedharan,* [supra])

(4) Imposing time limits (till filing of FIR, or filing of charge-sheet etc) would enable the court-which is seized of the main case and monitors it, to consider the nature and gravity of the offence, having regard to the fresh materials unearthed and included as prosecution evidence. Therefore, it would be salutary and in public interest to require courts to impose time limits for the life of orders of anticipatory bail the event of filing of FIR or charge sheet, are essential ingredients to an order Under Section 438. (*Salauddin, K.L. Verma*, and *Adri Dharan Das*). Some decisions have also stressed that economic offences need a different approach and therefore, anticipatory bail should not be granted readily.[9]

61. A fuller consideration of the various decisions cited earlier, especially those which emphasized the need to limit the life of an order of anticipatory bail, are premised on the understanding that the grant of an unconditional order of bail would thwart investigation. In the first place, this premise is unfounded, given that *Sibbia (supra)* stated (in para 13, SCC reports) that such an order would be *"contrary to the terms"* of Section 438; and furthermore, that conditions mentioned in Section 438(2) could be imposed while granting anticipatory bail. Here, one is conscious of the fact that the requirement of imposing conditions is not compulsive (noticing the use of the term "may" which precedes the requirement of imposing conditions). Nevertheless, an unconditional order, in the sense of an order not even imposing conditions mentioned in Section 438(2) can

impede or hamper investigation, *Sibbia (supra)* held that the conditions mentioned in that provision should be imposed. This requirement is more a matter of prudence, while granting relief.

62. This Court cannot lose sight of the fact that the Law Commission's 41st and 48th report focused on the need to introduce the provision (for anticipatory bail) as a preventive, or curative measure, to deal with a particular problem, i.e. unwarranted arrests. *Sibbia (supra)* noticed this fact, and also that significantly, Section 438 is not hedged with any obligation on the court's power, to impose conditions. That situation remains unchanged: the provision remains unaltered-at least substantially (barring an amendment in 2005 which obliged the issuance of notice to the public prosecutor before issuing any order for anticipatory bail)[10]. The 203rd Report of the Law Commission, which reviewed the entire law on the subject and noticed later decisions, such as *Salauddin, Adari Narain Das*, etc, recommended no change in law on this aspect relating to conditions. In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction, i.e. in the case where Accused are alleged to have committed offences punishable Under Section 376(3) or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code. In other words, Parliament has now denied jurisdiction of the courts (i.e. Court of Session and High Courts) from granting anticipatory bail to those Accused of such offences. The amendment (Code of Criminal Procedure Amendment Act, 2018) introduced Section 438(4)) reads as follows:

(4) Nothing in this Section shall apply to any case involving the arrest of any person on accusation of having committed an offence Under Sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code.

63. Clearly, therefore, where the Parliament wished to exclude or restrict the power of courts, Under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, Accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon-that would amount to judicial legislation.

64. Turning now to the various concerns that impelled this Court in Salauddin, *K.L. Verma, Sunita Devi*; *Nirmal Jeet Kaur* and *Adri Dharan Das, HDFC Bank, J.J. Manan (supra)* and other decisions which outlined the various concerns and problems faced by the prosecuting agency, or the police, or that competent courts would be deprived of oversight, thus, leading to directions that courts should impose time restrictions, or grant temporary or limited bail (e.g. filing of charge sheet etc.), this Court proposes to deal with such reasoning hereafter.

65. The various reasons which led to the imposition of restrictions or limitations by the decisions noted previously, hinge upon factors such as: addition of graver offences which the applicant is alleged to have committed after the grant of anticipatory bail; unearthing of facts disclosing his or her complicity in serious offences, as for instance, a conspirator or kingpin; the Accused's non-cooperation in the course of investigation, (such as, for example, difficulty in securing his person, evasion by him, reluctance to answer questions during the investigation or providing statements for purposes of recovery of articles in terms of Section 27 of the Evidence Act); involvement in

very serious or grave offences such as murder, kidnapping, causing death under unusual circumstances and offences which undermine the economy; disclosure of information that the offence involves large scale fraud and several individuals or victims, and, the filing of charge-sheet. Each of or all of them put together, in the opinion of the court, neither hold insurmountable problem, nor are unforeseen situations or not anticipated in *Sibbia (supra)*.

66. The controlling expressions Under Section 438(2) spell out three distinct conditions, which the court granting anticipatory bail can include as directions. These are - that the applicant makes himself available for interrogation by police officer, as and when required; that such applicant should not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer; a condition that the person should not leave India without the permission of the court. Further conditions as may be deemed essential, may also be imposed by the court, Under Section 437(3). The Court in *Sibbia (supra)* was alive to the necessity of imposing conditions as is evident from para 13 of its judgment. The court observed that there was nothing in law which stated that whenever anticipatory bail is granted, it should be without imposing any of those conditions. *Sibbia (supra)* went on to state that such unconditional orders would be plainly contrary to the very terms of Section 438. The court also noted that though couched in discretionary terms, which means that the courts could impose those conditions, perhaps viewed pragmatically, they should do so. What this Court in *Sibbia (supra)* was concerned with, and cautioned other courts against was that the process of construction and interpretation ought not to compel the courts to *"cut down by reading into the statute conditions which are not to be found therein."*

67. The context and nature which *Sibbia (supra)* considered is that discretion ought to be exercised by the Full Bench judgment of the Punjab and Haryana High Court which cautioned that the power to grant anticipatory bail should be used sparingly and in exceptional cases and that all conditions Under Section 437 should be read into in Section 438. Furthermore, the High Court had required that an applicant ought to make out a special case for grant of anticipatory bail; it was also stated that in cases wherever remand was sought, or a reasonable cause to secure incriminating material in terms of Section 27 of the Evidence Act could be made out, anticipatory bail ought not to be granted and that it could not be granted in regard to offences punishable with death or imprisonment for life unless the court is satisfied that the charge was false or groundless. The court in *Sibbia (supra)* frowned upon imposition of such Rules after interpreting and in the course of the judgment held that the power to grant anticipatory bail is wide and that the discretion is not limited in the manner that the High Court suggested. At the same time, this Court also emphasized that the discretion had to be exercised while granting or refusing to grant in given cases on due application of mind and in a judicious manner.

68. The imposition of conditions Under Section 438(2) with reference to Section 437(3), in the opinion of this Court, is enough safeguard for the authorities - including the police and other investigating agencies, who have to investigate into crimes and the possible complicity of the applicants who seek such relief. Taking each concern, i.e. the addition of more serious offences; presence of a large number of individuals or complainants; possibility of non-cooperation-non-cooperation in the investigation or the requirement of the Accused's statement to aid the recovery of articles and incriminating articles in the course of statements made during investigations - it is noticeable, significantly, that each of these is contemplated as a condition and is invariably

included in every order granting anticipatory bail. In the event of violation or alleged violation of these, the concerned authority is not remediless; recourse can be had to Section 438(2) read with Section 437(3). Any violation of these terms would attract a direction to arrest him. This power or direction to arrest is found in Section 437(5). However, that provision has no textual application to regular bail granted by the Court of Sessions or High Courts Under Section 439 or directions not to arrest, i.e. order of anticipatory bail Under Section 438. Secondly, Section 439(2) which is cast in wide terms, adequately covers situations when an Accused does not cooperate during the investigation or threatens to, or intimidates witness[es] or tries to tamper with other evidence.

69. It is important to notice, here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref *Chandra Mohan v. State of Uttar Pradesh and Ors.* MANU/SC/0052/1966 : 1967 (1) SCR 77.). In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors.* MANU/SC/0073/1987 : 1987 (1) SCC 424, the relevance of text and context was emphasized in the following terms:

Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then Section by section, Clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

70. Likewise, in *Directorate of Enforcement v. Deepak Mahajan* MANU/SC/0422/1994 : 1994 (3) SCC 440 this Court referred to *Maxwell on Interpretation of Statutes, Tenth Edn.*, to the effect that if the ordinary meaning and grammatical construction, *"leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words..."*

71. This Court, long back, in *State of Haryana and Ors. v. Sampuran Singh and Ors.* MANU/SC/0521/1975 : 1975 (2) SCC 810 observed that by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. The cardinal principle of construction of statute is that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the

enactment is directed. It is sufficient, therefore to notice that when Section 438 - in the form that exists today, (which is not substantially different from the text of what was introduced when *Sibbia* was decided, except the insertion of Sub-section (4)) was enacted, Parliament was aware of the objective circumstances and prevailing facts, which impelled it to introduce that provision, without the kind of conditions that the state advocates to be intrinsically imposed in every order under it.

72. The narrower interpretation preferred by this Court - in line of decisions starting with *Salauddin (supra)* highlighting the concerns with respect to the stages of investigation and enquiry and the nature and seriousness of the offence, in the opinion of the Court, ought not to lead one to cutting down the amplitude and the power and discretion otherwise available with the Courts. The danger of this Court prescribing the limitations is that they become inflexible Rules or edicts incapable of deviation. Instead, it would be safer to say that where there are circumstances or facts which pose peculiar problems or complexities pointing to the seriousness of an offence which the Accused is implicated in, it is always open to courts (which have to deal with applications Under Section 438) to impose the needed restrictions - be that in point of time or at the stage of investigation or enquiry. Each of these peculiar conditions *may be imposed in the given circumstances of any case, which has those distinctive or special features.* But they should not always be imposed invariably in all cases. In other words, if this Court were to weave conditions to impose and read into Section 438 that are not expressly provided, the danger would be that several applicants who might otherwise be entitled to relief, would be denied it altogether. For example, the classification of an offence or a category of offences as one wanting special treatment where the Courts should not grant relief, would mean that regardless of the role of the Accused and the nature of materials shown (whether adequate or not), the courts would be rendered powerless and denuded of the otherwise amplitude of discretion provided by the statute.

73. As regards the concern expressed on behalf of the state and the Union-that unconditional orders (i.e. those unrelated to a particular time frame) would result in non-co-operation of the Accused, with the investigating officer or authority, or that there would be reluctance to make statements to the prosecution, to assist in the recovery of articles that incriminate the Accused (and therefore can be used under Section 27, Evidence Act), this Court perceives such views to be vague and based apparently pre-conceived notions. If there is non-cooperation by an Accused - in the course of investigation, the remedy of seeking assistance of the court exists. Moreover, on this aspect too, Sibbia had envisioned the situation; the court had cited *State of U.P. v. Deoman Upadhyaya* MANU/SC/0060/1960 : 1961 (1) SCR 14, where this Court had observed as follows:

When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person in sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of Section 27 of the Indian Evidence Act: Legal Remembrancer v. Lalit Mohan Singh (MANU/WB/0391/1921 : (1921) I.L.R. 49 Cal. 167), *Santokhi Beldar v. King Emperor* (MANU/BH/0088/1932 : (1933) I.L.R. 12 Pat. 241). *Exceptional cases may certainly be imagined in which a person may give information without presenting himself before*

a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer.

This view was reiterated and applied in *Vallabhdas Liladhar v. Asst. Collector of Customs* MANU/SC/0096/1964 : 1965 (3) SCR 854. The observations in *Sibbia* (supra) are relevant, and are reproduced again, for facility of reference:

One of such conditions can even be that in the event of the police making out a case of a likely discovery Under Section 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya.

Therefore, the "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the Accused to separately surrender and seek regular bail.

74. Now, coming to the instruction in some decisions that anticipatory bail should not be given, or granted with stringent conditions, upon satisfaction that the Accused is not involved, *Sibbia*, clearly disapproved the imposition of such restrictions, or ruling out of certain offences or adoption of a cautious or special approach. It was held that:

A close look at some of the Rules in the eight-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says:

The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion Under Section 438 of the Code should not be exercised.

How can the Court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail? And will it be correct to say that blatantness of the accusation will suffice for rejecting bail, even if the applicant's conduct is painted in colours too lurid to be true? The eighth proposition Rule framed by the High Court says:

Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fide are substantial and the accusation appears to be false and groundless.

Does this Rule mean, and that is the argument of the learned Additional Solicitor-General, that the anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusations are mala fide? It is understandable that if mala fides are shown anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the

accusation is shown to be mala fide. This, truly, is the risk involved in framing Rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse.

According to the sixth proposition framed by the High Court, the discretion Under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted Under Section 437(1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person Accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in Section 437(1) should govern the grant of relief Under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter Section a similar provision. We have already pointed out the basic distinction between these two sections. Section 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it, must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of bail is that in cases falling Under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling Under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in Section 437(1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the First Information Report.

75. For the above reasons, the answer to the first question in the reference made to this bench is that there is no offence, per se, which stands excluded from the purview of Section 438, - except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief Under Section 438(1) they would have to be duly considered. Also, whether anticipatory offences should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice); likelihood of co-operation or non-co-operation with the investigating agency or police, etc. There can be no inflexible time frame for which an order of anticipatory bail can continue.

76. Therefore, this Court holds that the view expressed in *Salauddin Abdulsamad Shaikh, K.L. Verma, Nirmal Jeet Kaur, Satpal Singh, Adri Dharan Das, HDFC Bank, J.J. Manan* and *Naresh Kumar Yadav* (supra) about the Court of Sessions, or the High Court, being obliged to grant anticipatory bail, for a limited duration, or to await the course of investigation, so as the "normal court" not being "bye passed" or that in certain kinds of serious offences, anticipatory bail should not be granted normally-including in economic offences, etc are not good law. The observations - which indicate that such time related or investigative event related conditions, should invariably be imposed at the time of grant of anticipatory bail are therefore, overruled. Similarly, the observations in *Mhetre* that *"the courts should not impose restrictions on the ambit and scope of Section 438 Code of Criminal Procedure which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it"* is too wide and cannot be considered good law. It is one thing to say that as a matter of law, ordinarily special conditions (not mentioned in Section 438(2) read with Section 437(3) should not be imposed; *it is an entirely different thing to say that in particular instances, having regard to the nature of the crime, the role of the Accused, or some peculiar feature, special conditions should not be imposed.* The judgment in Sibbia itself is an authority that such conditions can be imposed, but not in a routine or ordinary manner and that such conditions then become an inflexible "formula" which the courts would have to follow. Therefore, courts and can, use their discretion, having regard to the offence, the peculiar facts, the role of the offender, circumstances relating to him, his likelihood of subverting justice (or a fair investigation), likelihood of evading or fleeing justice-to impose special conditions. Imposing such conditions, would have to be on a case to case basis, and upon exercise of discretion by the court seized of the application Under Section 438. In conclusion, it is held that imposing conditions such as those stated in Section 437(2) while granting bail, are normal; equally, the condition that in the event of the police making out a case of a likely discovery Under Section 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Other conditions, which are restrictive, are not mandatory; nor is there any invariable Rule that they should necessarily be imposed or that the anticipatory bail order would be for a time duration, or be valid till the filing of the FIR, or the recording of any statement Under Section 161, Code of Criminal Procedure, etc. Other conditions may be imposed, if the facts of the case so warrant.

Re Question No. 2: Whether the life of an anticipatory bail should end at the time and stage when the Accused is summoned by the court.

77. The question here is whether there is anything in the law which *per se* requires that upon filing of the charge-sheet, or the summoning of the Accused, by the court - (or even the addition of an offence in the charge-sheet, of which an applicant on bail is Accused of freshly), his liberty ought to be forfeited and that he should be asked to surrender and apply for regular bail. The observations about the width and amplitude of the power Under Section 438, made in answer to the first question, are equally relevant here too. In the present context, further, the judgment and observations of this Court in its interpretation of Section 167(2) are telling. It was held in *Gursharan Singh (supra),* the release by grant of bail of an Accused Under Section 167(2) amounts to "deemed bail". This is borne out by Section 167(2) which states that anyone released on bail under its provision *"shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter."* The judgment in *Aslam Babalal Desai (supra)* has clarified that when an Accused is released by operation of Section 167(2) and subsequently, a charge-sheet is

filed, there is no question of the cancellation of his bail. In these circumstances, the mere fact that an Accused is given relief Under Section 438 at one stage, *per se* does not mean that upon the filing of a charge-sheet, he is necessarily to surrender or/and apply for regular bail. The analogy to 'deemed bail' Under Section 167(2) with anticipatory bail leads this Court to conclude that the mere subsequent event of the filing of a charge-sheet cannot compel the Accused to surrender and seek regular bail. As a matter of fact, interestingly, if indeed, if a charge-sheet is filed where the Accused is on anticipatory bail, the normal implication would be that there was no occasion for the investigating agency or the police to require his custody, because there would have been nothing in his behavior requiring such a step. In other words, an Accused, who is granted anticipatory bail would continue to be at liberty when the charge sheet is filed, the natural implication is that there is no occasion for a direction by the Court that he be arrested and further that he had cooperated with the investigation. At the same time, however, at any time during the investigation were any occasion to arise calling for intervention of the court for infraction of any of the conditions imposed Under Section 437(3) read with Section 438(2) or the violation of any other condition imposed in the given facts of a case, recourse can always be had Under Section 439(2).

78. Section 438(3) states that when a person is granted anticipatory bail, is later arrested without warrant by an officer in charge of a police station *"on such accusation"*, and is willing to give bail, *"he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person he shall issue a bailable warrant in conformity with the direction of the Court Under Sub-section (1)"*. The order granting anticipatory bail, is also-as noticed earlier, and in several previous decisions, a *"direction"* under this Section 438 *"that in the event of such arrest"* the applicant be released on bail. Therefore, when an Accused in fact is granted bail, and the conditions outlined in Section 438(2) are included as part of the direction "to release" him in the event of arrest, all the necessary conditions which he is obliged to follow exist. Section 438(3) outlines the steps to be taken, *in the event of arrest of one who has been granted relief Under Section 438(1)*. In the event of non-compliance with any or all conditions, imposed by the court, the concerned agency or the police, a direction can be sought from the court Under Section 439(2).

79. The view that this Court expresses about the prosecution's option to apply for a direction to arrest the Accused, finds support in *Pradeep Ram (supra)* where this Court held as follows:

21. Both Sections 437(5) and 439(2) empowers the Court to arrest an Accused and commit him to custody, who has been released on bail under Chapter XXXIII. There may be numerous grounds for exercise of power under 437(5) and 439(2). The principles and grounds for cancelling a bail are well settled, but in the present case, we are concerned only with one aspect of the matter, i.e., a case where after Accused has been granted the bail, new and serious offences are added in the case. A person against whom serious offences have been added, who is already on bail can very well be directed to be arrested and committed to custody by the Court in exercise of power under 437(5) and 439(2). Cancelling the bail granted to an Accused and directing him to arrest and taken into custody can be one course of the action, which can be adopted while exercising power under 437(5) and 439(2), but there may be cases where without cancelling the bail granted to an Accused, on relevant consideration, Court can direct the Accused to be arrested and committed to custody. The addition of serious offences is one of such circumstances, under which the Court can

direct the Accused to be arrested and committed to custody despite the bail having been granted with regard to the offences with which he was charged at the time when bail was considered and granted.

******** ******** ********

25. We may have again to look into provisions of Sections 437(5) and 439(2) of Code of Criminal Procedure Sub-section (5) of Sections 437 of Code of Criminal Procedure uses expression 'if it considers it necessary so to do, direct that such person be arrested and commit him to custody'. Similarly, Sub-section (2) of Section 439 of Code of Criminal Procedure provides: 'may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody'. A plain reading of the aforesaid provisions indicates that provision does not mandatorily provide that the Court before directing arrest of such Accused who has already been granted bail must necessary cancel his earlier bail. A discretion has been given to the Court to pass such orders to direct for such person be arrested and commit him to the custody which direction may be with an order for cancellation of earlier bail or permission to arrest such Accused due to addition of graver and non-cognizable offences. Two Judge Bench judgment in Mithabhai Pashabhai Patel (supra) uses the word 'ordinarily' in paragraph 18 of the judgment which cannot be read as that mandatorily bail earlier granted to the Accused has to be cancelled before Investigating Officer to arrest him due to addition of graver and non-cognizable offences.

********* ******** ********

27. Relying on the above said order, learned Counsel for the Appellant submits that Respondent State ought to get first the order dated 10.03.2016 granting bail to Appellant cancelled before seeking custody of the Appellant. It may be true that by mere addition of an offence in a criminal case, in which Accused is bailed out, investigating authorities itself may not proceed to arrest the Accused and need to obtain an order from the Court, which has released the Accused on the bail. It is also open for the Accused, who is already on bail and with regard to whom serious offences have been added to apply for bail in respect of new offences added and the Court after applying the mind may either refuse the bail or grant the bail with regard to new offences. In a case, bail application of the Accused for newly added offences is rejected, the Accused can very well be arrested. In all cases, where Accused is bailed out Under Orders of the Court and new offences are added including offences of serious nature, it is not necessary that in all cases earlier bail should be cancelled by the Court before granting permission to arrest an Accused on the basis of new offences. The power Under Sections 437(5) and 439(2) are wide powers granted to the court by the Legislature under which Court can permit an Accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences. Sections 437(5) and 439(2) cannot be read into restricted manner that order for arresting the Accused and commit him to custody can only be passed by the Court after cancelling the earlier bail.

28. Coming back to the present case, the Appellant was already into jail custody with regard to another case and the investigating agency applied before Special Judge, NIA Court to grant production warrant to produce the Accused before the Court. The Special Judge having accepted the prayer of grant of production warrant, the Accused was produced before the Court on 26.06.2018 and remanded to custody. Thus, in the present case, production of the Accused was

with the permission of the Court. Thus, the present is not a case where investigating agency itself has taken into custody the Appellant after addition of new offences rather Accused was produced in the Court in pursuance of production warrant obtained from the Court by the investigating agency. We, thus do not find any error in the procedure which was adopted by the Special Judge, NIA Court with regard to production of Appellant before the Court. In the facts of the present case, it was not necessary for the Special Judge to pass an order cancelling the bail dated 10.03.2016 granted to the Appellant before permitting the Accused Appellant to be produced before it or remanding him to the judicial custody.

29. In view of the foregoing discussions, we arrive at following conclusions in respect of a circumstance where after grant of bail to an Accused, further cognizable and non-bailable offences are added:

(i) The Accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the Accused can certainly be arrested.

(ii) The investigating agency can seek order from the court Under Sections 437(5) or 439(2) for arrest of the Accused and his custody.

(iii) The Court, in exercise of power Under Sections 437(5) or 439(2) of Code of Criminal Procedure, can direct for taking into custody the Accused who has already been granted bail after cancellation of his bail. The Court in exercise of power Under Sections 437(5) as well as 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) In a case where an Accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the Accused, but for arresting the Accused on such addition of offence or offences it need to obtain an order to arrest the Accused from the Court which had granted the bail.

80. Earlier, in the decision reported as *Dolat Ram v. State of Haryana* MANU/SC/0547/1995 : 1995 (1) SCC 349 this Court had observed that

bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the Accused to retain his freedom by enjoying the concession of bail during the trial.

81. This decision was followed, and its *ratio* applied, in *Hazari Lal Das v. State of West Bengal and Anr.* MANU/SC/1614/2009 : 2009 (10) SCC 652. The decision in *Bhadresh Bipinbhai Sheth v. State of Gujarat* MANU/SC/0949/2015 : 2016 (1) SCC 152 stated, after culling out the principles in *Mhetre*, as follows:

25.6. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the

Accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

25.7. In pursuance of the order of the Court of Session or the High Court, once the Accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the Accused to surrender before the trial court and again apply for regular bail.

25.8. Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court Under Section 438 Code of Criminal Procedure should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

25.9. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of the anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

82. The three-judge decision in *Sudhir v. Maharashtra*MANU/SC/1095/2015 : 2016 (1) SCC 146 noticed the decision in *Bipin Bhadresh Sheth* (supra) and did not disapprove it. However, the court did not grant relief, given that anticipatory bail was declined initially, and the application to the High Court was withdrawn, after which a second anticipatory bail was granted. The High Court cancelled the grant of relief. This Court affirmed the High Court's view. In that judgment, *Bipin Bhadresh Sheth* was noticed, while considering the scope of the power Under Section 439(2). In another decision, *Arvind Tiwary v. State of Bihar* MANU/SC/0848/2018 : 2018 (8) SCC 475 the issue was whether the anticipatory bail, granted subject to certain conditions, earlier, which had been considered by this Court, could be cancelled. The conditions included, *inter alia*, that sums were to be secured by bank guarantee. The aggrieved corporation directed that the "defalcated sum" specified in respect of every Accused should be secured through such guarantee. Upon failure to comply with that demand, an order of cancellation was sought. This Court held that cancellation could not be resorted to on the assumption that the applicants were guilty. Similarly, in *Mahant Chand Yogi v. State of Haryana*, 2003 (1) SCC 236 *Padmakar Tukaam Bhavnagare v. State of Maharashtra*, MANU/SC/1016/2012 : 2012 (13) SCC 720 *X v. State of Telangana*, MANU/SC/0583/2018 : (2018) 16 SCC 511 and several other judgments the same views were expressed.

83. Therefore, unless circumstances to the contrary: in the form of behaviour of the Accused suggestive of his fleeing from justice, or evading the authority or jurisdiction of the court, or his intimidating witnesses, or trying to intimidate them, or violate any condition imposed while granting anticipatory bail, the law does not require the person to surrender to the court upon summons for trial being served on him. Subject to compliance with the conditions imposed, the anticipatory bail given to a person, can continue till end of the trial. This answers question No. 2 referred to the present Bench.

Conclusions

84. This Court answers the reference in the following manner:

(1) Regarding question No. 1, it is held that the protection granted Under Section 438 Code of Criminal Procedure should not always or ordinarily be limited to a fixed period; it should inure in favour of the Accused without any restriction as to time. Usual or standard conditions Under Section 437(3) read with Section 438(2) should be imposed; if there are peculiar features in regard to any crime or offence (such as seriousness or gravity etc.), it is open to the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event or time bound) etc.

(2) The second question referred to this Court is answered, by holding that the life of an anticipatory bail does not end generally at the time and stage when the Accused is summoned by the court, or after framing charges, but can also continue till the end of the trial. However, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

85. Having regard to the above discussion, it is clarified that the court should keep the following points as guiding principles, in dealing with applications Under Section 438, Code of Criminal Procedure:

(*a*) As held in *Sibbia*, when a person apprehends arrest and approaches a court for anticipatory bail, his apprehension (of arrest), has to be based on concrete facts (and not vague or general allegations) relatable a specific offence or particular of offences. Applications for anticipatory bail should contain clear and essential facts relating to the offence, and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts. These are important for the court which considering the application, to extent and reasonableness of the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not a necessary condition that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

(*b*) The court, before which an application Under Section 438, is filed, depending on the seriousness of the threat (of arrest) as a measure of caution, may issue notice to the public prosecutor and obtain facts, even while granting *limited interim anticipatory bail.*

(*c*) Section 438 Code of Criminal Procedure does not compel or oblige courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While weighing and considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified - and ought to impose conditions spelt out in Section 437(3), Code of Criminal Procedure [by virtue of Section 438(2)]. The necessity to impose other restrictive conditions, would have to be weighed on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise,

conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(*d*) Courts ought to be generally guided by the considerations such nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while assessing whether to grant anticipatory bail, or refusing it. Whether to grant or not is a matter of discretion; equally whether, and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(*e*) Anticipatory bail granted can, depending on the conduct and behavior of the Accused, continue after filing of the charge sheet till end of trial. Also orders of anticipatory bail should not be "blanket" in the sense that it should not enable the Accused to commit further offences and claim relief. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(*f*) Orders of anticipatory bail do not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(*g*) The observations in *Sibbia* regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the Accused to separately surrender and seek regular bail. *Sibbia* (supra) had observed that *"if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya."*

(*h*) It is open to the police or the investigating agency to move the court concerned, which granted anticipatory bail, in the first instance, for a direction Under Section 439(2) to arrest the Accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc. The court - in this context is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(*i*) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See *Prakash Kadam & Etc. Etc v. Ramprasad Vishwanath Gupta and Anr.* MANU/SC/0616/2011 : (2011) 6 SCC 189; *Jai Prakash Singh (supra) State through C.B.I. v. Amarmani Tripathi* MANU/SC/0677/2005 : (2005) 8 SCC 21). This does not amount to "cancellation" in terms of Section 439(2), Code of Criminal Procedure.

(*j*) The judgment in *Mhetre* (and other similar decisions) restrictive conditions cannot be imposed at all, at the time of granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin* and subsequent decisions (including *K.L. Verma, Nirmal Jeet Kaur*) which state that such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

86. In conclusion, it would be useful to remind oneself that the rights which the citizens cherish deeply, are fundamental-it is not the restrictions that are fundamental. Joseph Story, the great jurist and US Supreme Court judge, remarked that *"personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice."*

87. The history of our republic - and indeed, the freedom movement has shown how the likelihood of arbitrary arrest and indefinite detention and the lack of safeguards played an important role in rallying the people to demand independence. Witness the Rowlatt Act, the nationwide protests against it, the Jallianwala Bagh massacre and several other incidents, where the general public were exercising their right to protest but were brutally suppressed and eventually jailed for long. The specter of arbitrary and heavy-handed arrests: too often, to harass and humiliate citizens, and oftentimes, at the interest of powerful individuals (and not to further any meaningful investigation into offences) led to the enactment of Section 438. Despite several Law commission reports and recommendations of several committees and commissions, arbitrary and groundless arrests continue as a pervasive phenomenon. Parliament has not thought it appropriate to curtail the power or discretion of the courts, in granting pre-arrest or anticipatory bail, especially regarding the duration, or till charge sheet is filed, or in serious crimes. Therefore, it would not be in the larger interests of society if the court, by judicial interpretation, limits the exercise of that power: the danger of such an exercise would be that in fractions, little by little, the discretion, advisedly kept wide, would shrink to a very narrow and unrecognizably tiny portion, thus frustrating the objective behind the provision, which has stood the test of time, these 46 years.

88. The reference is hereby answered in the above terms.

Arun Mishra, Indira Banerjee and Vineet Saran, JJ.

89. We have seen the drafts of Justice M.R. Shah and Justice S. Ravindra Bhat and are in agreement with them. Since there is no difference of opinion between the two, we are in agreement with the reasoning of Justice M.R. Shah and Justice S. Ravindra Bhat that the conclusions in *Shri Gurbaksh Singh Sibbia and Ors. v. State of Punjab* MANU/SC/0215/1980 : 1980 (2) SCC 565 needs reiteration and further that the restrictive manner in which Section 438 of the Code of Criminal Procedure has been interpreted in *Salauddin Abdulsamad Shaikh v. State of Maharashtra* MANU/SC/0280/1996 : 1996 (1) SCC 667 is incorrect. Therefore, we agree that *Salauddin (supra)* and other cases which have followed it needs to be overruled. Similarly, the wide interpretation in *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.* MANU/SC/1021/2010 : 2011 (1) SCC 694, i.e. that no conditions can be imposed while granting an order of anticipatory bail, is incorrect. *Mhetre (supra)* to that extent and other judgments which have followed it are accordingly overruled.

90. In view of the said conclusions, we are in agreement with the answers to the reference made to the larger Bench.

Arun Mishra, Indira Banerjee, Vineet Saran, M.R. Shah and S. Ravindra Bhat, JJ.

FINAL CONCLUSIONS:

In view of the concurring judgments of Justice M.R. Shah and of Justice S. Ravindra Bhat with Justice Arun Mishra, Justice Indira Banerjee and Justice Vineet Saran agreeing with them, the following answers to the reference are set out:

(1) Regarding Question No. 1, this Court holds that the protection granted to a person Under Section 438 Code of Criminal Procedure should not invariably be limited to a fixed period; it should inure in favour of the Accused without any restriction on time. Normal conditions Under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc.

(2) As regards the second question referred to this Court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the Accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

91. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications Under Section 438, Code of Criminal Procedure:

(1) Consistent with the judgment in *Shri Gurbaksh Singh Sibbia and Ors. v. State of Punjab* MANU/SC/0215/1980 : 1980 (2) SCC 565, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

(2) It may be advisable for the court, which is approached with an application Under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting *limited interim anticipatory bail.*

(3) Nothing in Section 438 Code of Criminal Procedure, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for

grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified - and ought to impose conditions spelt out in Section 437(3), Code of Criminal Procedure [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(4) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(5) Anticipatory bail granted can, depending on the conduct and behavior of the Accused, continue after filing of the charge sheet till end of trial.

(6) An order of anticipatory bail should not be "blanket" in the sense that it should not enable the Accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(7) An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(8) The observations in *Sibbia* regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the Accused to separately surrender and seek regular bail. *Sibbia* (supra) had observed that *"if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya.*

(9) It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction Under Section 439(2) to arrest the Accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.

(10) The court referred to in para (9) above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(11) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See *Prakash Kadam & Etc. Etc v. Ramprasad Vishwanath Gupta and Anr.* MANU/SC/0616/2011 : (2011) 6 SCC 189; *Jai Prakash Singh* (supra) *State through C.B.I. v. Amarmani Tripathi* MANU/SC/0677/2005 : (2005) 8 SCC 21). This does not amount to "cancellation" in terms of Section 439(2), Code of Criminal Procedure.

(12) The observations in *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.* MANU/SC/1021/2010 : 2011 (1) SCC 694 (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin Abdulsamad Shaikh v. State of Maharashtra* (MANU/SC/0280/1996 : 1996 (1) SCC 667) and subsequent decisions (including *K.L. Verma v. State and Anr.* MANU/SC/1493/1998 : 1998 (9) SCC 348; *Sunita Devi v. State of Bihar and Anr.* MANU/SC/1032/2004 : 2005 (1) SCC 608; *Adri Dharan Das v. State of West Bengal* MANU/SC/0120/2005 : 2005 (4) SCC 303; *Nirmal Jeet Kaur v. State of M.P. and Anr* MANU/SC/0695/2004 : 2004 (7) SCC 558.; *HDFC Bank Limited v. J.J. Mannan* MANU/SC/1923/2009 : 2010 (1) SCC 679; *Satpal Singh v. the State of Punjab* MANU/SC/0413/2018 and *Naresh Kumar Yadav v. Ravindra Kumar* MANU/SC/8067/2007 : 2008 (1) SCC 632) which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

92. The reference is hereby answered in the above terms.

---

[1]*"437.* ***When bail may be taken in case of non-bailable offence.***
(1) When any person Accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-
(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
1
Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm.
Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.
Provided also that the mere fact that an Accused person may be required for being identified by

witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.
Provided also that no person shall if the offence alleged to have been committed by him is punishable with death imprisonment for life or imprisonment for seven years or more be released on bail by the Court under this Sub-section without giving an opportunity of hearing to the public prosecutor.
(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the Accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt the Accused shall, subject to the provisions of Section 446A and pending such inquiry, be released on bail or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.
(3) When a person Accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail Under Sub-section (1), the Court shall impose the conditions-
(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or
(b) that such person shall not commit an offence similar to the offence of which he is Accused or suspected of the commission of which he is suspected, and
(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him for disclosing such facts to the Court or to any police officer or tamper with the evidence,
and may also impose in the interest of justice such other conditions as it considers necessary.
(4) An officer or a Court releasing any person on bail Under Sub-section (1) or Sub-section (2), shall record in writing his or its reasons or special reasons for so doing.
(5) Any Court which has released a person on bail Under Sub-section (1) or Sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.
(6) If, in any case triable by a Magistrate, the trial of a person Accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.
(7) If, at any time after the conclusion of the trial of a person Accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the Accused is not guilty of any such offence, it shall release the Accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

438. Direction for grant of bail to person apprehending arrest.

*(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.**

* **By amendment, made in 2005, Sub-section (1) has been substituted as follows (the amended portion is brackets; <u>the amendment has not yet been brought into force):</u>**

---------- ----*["(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; that in the event of such arrest, he shall be released on bail and the Court may after taking into consideration inter-alia the following factors namely.*

(i) the nature and gravity of the accusation

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence

(iii) the possibility of the applicant to flee from justice and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail. Provided that where the High Court or as the case may be the Court of Session has not passed any interim order under this Sub-section or has rejected the application for grant of anticipatory bail it shall be open to an officer in charge of police station to arrest without warrant the applicant on the basis of the accusation apprehended in such application

(IA) Where the Courts grants an interim order Under Sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with the copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court (IB) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.]

---------- --------

The unamended portion-Section 438(2) and (3), and the newly introduced Sub-section (4) read as follows:

(2) When the High Court or the Court of Session makes a direction Under Sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed Under Sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person he shall issue a bailable warrant in conformity with the direction of the Court Under Sub-

section (1).
(4) Nothing in this Section shall apply to any case involving the arrest of any person on accusation of having committed an offence Under Sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code, (45 of 1860).
439. Special powers of High Court or Court of Session regarding bail.
(1) A High Court or Court of Session may direct-
(a) that any person Accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that Sub-section;
(b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified:
Provided that the High Court or the Court of Session shall, before granting bail to a person who is Accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.
Provided further that the High Court or the Court of Session shall before granting bail to a person who is an Accused of an offence triable Under Sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code (45 of 1860) give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.
(IA) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person Under Sub-section (3) of the Section 376 or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code (45 of 1860)
(2). A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."
[2]**Halsbury's Laws of England (4th Edn., Vol. 11, para 166):** *"The effect of granting bail is not to set the Defendant (Accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned."*
[3]MANU/SC/0420/1978 : 1978 (1) SCC 118. The observations are as follows:
"under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an Accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an Accused person to bail, the State has two options. it may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court Under Section 439(2) to commit the Accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that leave copied up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

[4]Section 167(2) Code of Criminal Procedure reads as follows:
"(2) The Magistrate to whom an Accused person is forwarded under this Section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the Accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the Accused to be forwarded to a Magistrate having such jurisdiction: Provided that-
(a) the Magistrate may authorise the detention of the Accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the Accused person in custody under this paragraph for a total period exceeding,-
(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the Accused person shall be released on bail if he is prepared to and does furnish bail, and ***every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;.."***
[5]The Report remarked - after considering 3rd Report of the National Police Commission that the *"power of arrest was one of the chief sources of corruption in the police. The report suggested that by and large nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the prison department".*
[6]The relevant extract of Clause 43 of the proposed 1994 amendment read as follows:
"In Section 438 of the principal Act for Sub-section (1), the following Sub-sections shall be substituted, namely:
(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this Section that in the event of such arrest, he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:
(i) the nature and gravity of the accusation;
(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
(iii) the possibility of the applicant to flee from justice; and
(iv) where the accusation has been made with the objection of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:
Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this Sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant, if there are reasonable grounds for such arrest.
(1-A) Where the Court grants an interim order Under Sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.
(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of

final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice."

[7]One hundred and seventy seventh [177th] Report, submitted in December 2001 (Law Commission of India, 177th Report, Annexure-III para 1.8 said that:

"Misuse of power of arrest: Notwithstanding the safeguards contained in the Code of Criminal Procedure and the Constitution referred to above, the fact remains that the power of arrest is wrongly and illegally exercised in a large number of cases all over the country. Very often this power is utilized to extort monies and other valuable property or at the instance of an enemy of the person arrested. Even in case of civil dispute, this power is being resorted to on the basis of a false allegation against a party to a civil dispute at the instance of his opponent. The vast discretion given by the Code of Criminal Procedure to arrest a person even in the case of a bailable offence (not only where the bailable offence is cognizable but also where it is non-cognizable) and the further power to make preventive arrests (e.g. Under Section 151 of the Code of Criminal Procedure and the several city police enactments), clothe the police with extraordinary power which can easily be abused. Neither there is any in-house mechanism in the police department to check such misuse or abuse nor does the complaint of such misuse or abuse to higher police officers bear fruit except in some exceptional cases. We must repeat that we are not dealing with the vast discretionary powers of the members of a service which is provided with firearms, which are becoming more and more sophisticated with each passing day (which is technically called a civil service for the purposes of Service Jurisprudence) and whose acts touch upon the liberty and freedom of the citizens of this country and not merely their entitlements and properties.

[8]268th Report, 2017.

[9]In *P. Chidambaram v. Directorate of Enforcement*, MANU/SC/1209/2019 : (2019) 9 SCC 24 it was held as follows:

"*However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights--safeguarding the personal liberty of an individual and the societal interest.....*

83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the Accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the Accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the Respondent Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail."

The court cited other previous decisions, i.e. *State v. Anil Sharma* MANU/SC/0947/1997 : (1997) 7 SCC 187; *Sudhir v. State of Maharashtra* MANU/SC/1095/2015 : 2016 (1) SCC 146; and *Directorate of Enforcement v. Hassan Ali Khan* MANU/SC/0446/2011 : (2011) 12 SCC 684.

[10]The amendment, i.e. Code of Criminal Procedure (Amendment) Act, 2005 - which has till now, not been brought into force, reads as follows:

["(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; that in the event of such arrest, he shall be released on bail and the

Court may after taking into consideration inter-alia the following factors namely.
(i) the nature and gravity of the accusation
(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence
(iii) the possibility of the applicant to flee from justice and
(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,
either reject the application forthwith or issue an interim order for the grant of anticipatory bail. Provided that where the High Court or as the case may be the Court of Session has not passed any interim order under this Sub-section or has rejected the application for grant of anticipatory bail it shall be open to an officer in charge of police station to arrest without warrant the applicant on the basis of the accusation apprehended in such application
(IA) Where the Courts grants an interim order Under Sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with the copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court
(IB) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.]

Back to Index

MANU/SC/0079/2019

Neutral Citation: 2019/INSC/95

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, 1221 of 2018, SLP (C) No. 28623 of 2018 and Writ Petition (Civil) No. 37 of 2019 (Under Article 32 of the Constitution of India)

Decided On: 25.01.2019

Appellants: Swiss Ribbons Pvt. Ltd. and Ors. **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Rohinton Fali Nariman and Navin Sinha, JJ.

Subject: Insolvency

Subject: Constitution

Relevant Section:

Constitution of India - Article 14

Case Category:

COMPANY LAW, MRTP AND ALLIED MATTERS

Case Note:

Insolvency - Validity of provisions - Sections 12A, 29A, 240A, 60, 53, 30 and 31 of Insolvency and Bankruptcy Code, 2016 [Code], Article 14 of Constitution of India and Section 433(e) of Companies Act, 1956 - Present petitions assailed constitutional validity of various provisions of Code - Whether members of National Company Law Tribunal [NCLT] and certain members of National Company Law Appellate Tribunal [NCLAT], apart from President, had been appointed contrary to present Court's judgment in Madras Bar Association (III) - Whether classification between financial creditor and operational creditor was discriminatory or violative of Article 14 of Constitution of India - Whether Section 12A was

not violative of Article 14 of Constitution - Whether vested rights of erstwhile promoters to participate in recovery process of a corporate debtor had been impaired by retrospective application of Section 29A of Code - Whether Section 53 of Code violated Article 14 of Constitution.

Facts:

Constitutional validity of various provisions of Code was subject matter in present appeal. First and foremost argument in present case was that, members of National Company Law Tribunal [NCLT] and certain members of National Company Law Appellate Tribunal [NCLAT], apart from President, had been appointed contrary to this Court's judgment in Madras Bar Association v. Union of India, [Madras Bar Association (III)], and that therefore, this being so, all orders that were passed by such members, being passed contrary to judgment of this Court in aforesaid case, ought to be set aside. Further, such members ought to be restrained from passing any orders in future. Administrative support for all tribunals should be from Ministry of Law and Justice. Since the NCLAT, as an appellate court, had a seat only at New Delhi, this would render remedy inefficacious as persons would have to travel from Tamil Nadu, Calcutta, and Bombay to New Delhi, whereas earlier, they could have approached respective High Courts in their States. This again is directly contrary to Madras Bar Association v. Union of India, [Madras Bar Association (II)]. Apart from aforesaid technical objection, it had assailed legislative scheme that was contained in Section 7 of Code, stating that there was no real difference between financial creditors and operational creditors. According to him, both types of creditors would give either money in terms of loans or money's worth in terms of goods and services. Thus, there was no intelligible differentia between the two types of creditors, regard being had to object sought to be achieved by Code, namely, insolvency resolution, and if that is not possible, then ultimately, liquidation. It was argued that, assuming that a valid distinction existed between financial and operational creditors, there was hostile discrimination against operational creditors. First and foremost, unless they amount to 10% of aggregate of amount of debt owed, they had no voice in committee of creditors. In any case, Sections 21 and 24 of Code were discriminatory and manifestly arbitrary in that operational creditors did not have even a single vote in committee of creditors which had very important functions to perform in resolution process of corporate debtors. Further, establishment of information utilities that were set up under Code were also assailed. Next argument was that Section 12A of Code was contrary to the directions of this Court in its order in Uttara Foods and Feeds Pvt. Ltd. v. Mona Pharmachem. Lastly, a four-fold attack was raised against Section 29A, in particular, Clause (c) thereof. First and foremost, Shri Rohatgi stated that the vested rights of erstwhile promoters to participate in the recovery process of a corporate debtor have been impaired by retrospective application of Section 29A. Another argument that was made was that under Section 29A(c), a person's account might be classified as a non-performing asset [NPA] in accordance with guidelines of Reserve Bank of India [RBI], despite him not being a wilful defaulter. Also, period of one year referred to in Clause (c) was again wholly arbitrary and without any basis either in rationality or in law.

Held, while disposing of the appeal

1. On 3rd January, 2018, Companies Amendment Act, 2017 was brought into force by which Section 412 of Companies Act, 2013 was amended regarding Selection of Members of Tribunal and Appellate Tribunal. Members of the Tribunal and Technical Members of Appellate Tribunal shall be appointed on recommendation of a Selection Committee consisting of-- (a) Chief Justice of India or his nominee-- Chairperson; (b) a senior Judge of the Supreme Court or Chief Justice of High Court--Member;(c) Secretary in the Ministry of Corporate Affairs--Member; and (d) Secretary in the Ministry of Law and Justice--Member. Where in a meeting of Selection Committee, there was equality of votes on any matter, Chairperson shall have a casting vote. This was brought into force by a Notification dated 9th February,2018. However, an additional affidavit had been filed during course of these proceedings by Union of India. This affidavit made it clear that, acting in compliance with directions of Supreme Court in judgments of Madras Bar Association (I) and Madras Bar Association (III), a Selection Committee was constituted to make appointments of Members of the NCLT in year 2015 itself. [14]

2. Regarding submission that, NCLAT Bench only at Delhi , learned Attorney General had assured that, judgment in case of Madras Bar Association (II) would be followed and Circuit Benches would be established as soon as it was practicable. Union of India was directed to set up Circuit Benches of NCLAT within a period of 6 months from today. [16]

3. Regarding argument that, Tribunals were functioning under wrong ministry, even though eight years have passed since date of judgment in Madras Bar Association (I), administrative support for these tribunals continued to be from Ministry of Corporate Affairs. This was required to be rectified at earliest. [17]

4. With regard to classification between financial creditor and operational creditor, since equality was only among equals, no discrimination resulted if Court could be shown that, there was an intelligible differentia which separated two kinds of creditors so long as there was some rational relation between creditors so differentiated, with object sought to be achieved by legislation. [20]

5. Argument of learned Counsel on behalf of Petitioners was that in point of fact, there was no intelligible differentia having relation to objects sought to be achieved by Code between financial and operational creditors and indeed, nowhere in world had this distinction been made. [25]

6. Most financial creditors, particularly banks and financial institutions, were secured creditors whereas most operational creditors were unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and like. Distinction between secured and unsecured creditors was a distinction which had obtained since earliest of Companies Acts both in United Kingdom and in India. Nature of loan agreements with financial creditors was different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enabled corporate debtor to either set up and/or operate its business. On other hand, contracts with operational creditors were relatable to supply of goods and services in operation of business. Financial contracts generally involve large sums

of money. By way of contrast, operational contracts had dues whose quantum was generally less. In running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors had specified repayment schedules, and defaults entitled financial creditors to recall a loan in totality. Contracts with operational creditors did not have any such stipulations. Also, forum in which dispute resolution took place was completely different. [27]

7. Most importantly, financial creditors were, from very beginning, involved with assessing viability of corporate debtor. They could, and therefore did, engage in restructuring of loan as well as reorganization of corporate debtor's business when there was financial stress, which were things operational creditors did not and could not do. Thus, preserving corporate debtor as a going concern, while ensuring maximum recovery for all creditors being objective of Code, financial creditors were clearly different from operational creditors and therefore, there was an intelligible differentia between two which had a direct relation to objects sought to be achieved by Code. [28]

8. Trigger for a financial creditor's application was non-payment of dues when they arose under loan agreements. It was for this reason that, Section 433(e) of Companies Act, 1956 had been repealed by Code and a change in approach had been brought about. Legislative policy now was to move away from concept of "inability to pay debts" to "determination of default". Said shift enabled financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay debt and that debtor had failed in such obligation. [37]

9. Since, financial creditors were in business of money lending, banks and financial institutions were best equipped to assess viability and feasibility of business of corporate debtor. Even at time of granting loans, these banks and financial institutions undertake a detailed market study which included a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study had already been undertaken before sanctioning a loan, and since financial creditors had trained employees to assess viability and feasibility, they were in a good position to evaluate contents of a resolution plan. On other hand, operational creditors, who provide goods and services, were involved only in recovering amounts that were paid for such goods and services, and were typically unable to assess viability and feasibility of business. [44]

10. NCLAT had, while looking into viability and feasibility of resolution plans that were approved by committee of creditors, always gone into whether operational creditors were given roughly same treatment as financial creditors, and if they were not, such plans were either rejected or modified so that, operational creditors' rights were safeguarded. A resolution plan could not pass muster under Section 30(2)(b) read with Section 31, unless a minimum payment was made to operational creditors, being not less than liquidation value. [46]

11. Operational creditors were not discriminated against or that Article 14 had not been infracted either on ground of equals being treated unequally or on ground of manifest arbitrariness. [48]

12. Main thrust against provision of Section 12A was fact that, ninety per cent of committee of creditors had to allow withdrawal. This high threshold had been explained in Insolvency Law Committee (ILC) Report as all financial creditors had to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought to be entered into. This explained why ninety per cent, which was substantially all financial creditors, had to grant their approval to an individual withdrawal or settlement. In any case, figure of ninety per cent, in absence of anything further to show that it was arbitrary, must pertain to domain of legislative policy, which had been explained by Report. If committee of creditors arbitrarily rejected a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT could always set aside such decision under Section 60 of Code. Section 12A of Code also passed constitutional muster. [53]

13. It was settled law that, a statute was not retrospective merely because it affected existing rights; nor was it retrospective merely because a part of requisites for its action was drawn from a time antecedent to its passing. In ArcelorMittal, present Court had observed that, a resolution applicant had no vested right for consideration or approval of its resolution plan. [64]

14. No vested right was taken away by application of Section 29A. A resolution applicant who applied under Section 29A(c) had no vested right to apply for being considered as a resolution applicant. [65]

15. According to Petitioners, when immovable and movable property was sold in liquidation, it ought to be sold to any person, including persons who were not eligible to be resolution applicants as, often, it was erstwhile promoter who alone might purchase such properties piecemeal by public auction or by private contract. There was no vested right in an erstwhile promoter of a corporate debtor to bid for immovable and movable property of corporate debtor in liquidation. Further, given categories of persons who were ineligible under Section 29A, which included persons who were malfeasant, or persons who had fallen foul of law in some way, and persons who were unable to pay their debts in grace period allowed, were further, by this proviso, interdicted from purchasing assets of corporate debtor whose debts they had either wilfully not paid or had been unable to pay. Legislative purpose which permeated Section 29A continued to permeate Section when it applied not merely to resolution applicants, but to liquidation also. [69]

16. Section 29A goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with guidelines of RBI, would be a person who though able to pay, did not pay. An NPA, on other hand, referred to account belonging to a person that was declared as such under guidelines issued by RBI. Legislative policy, therefore, was that a person who was unable to service its own debt beyond grace period referred to above, was unfit to be eligible to become a resolution applicant. This policy could not be found fault with. Neither could period of one year be found fault with, as this was a policy matter decided by the RBI and which emerges from its Master Circular, as during relevant period, an NPA was classified as a substandard asset. Ineligibility attached only after this one year period was over as NPA now got classified as a doubtful asset. [70]

17. Persons who act jointly or in concert with others were connected with business activity of resolution applicant. Similarly, all categories of persons mentioned in Section 5(24A) show that such persons must be "connected" with resolution applicant within meaning of Section 29A(j). This being case, said categories of persons who were collectively mentioned under caption "relative" obviously need to have a connection with business activity of resolution applicant. In absence of showing that, such person was "connected" with business of activity of resolution applicant, such person could not possibly be disqualified under Section 29A(j). All categories in Section 29A(j) dealt with persons, natural as well as artificial, who were connected with business activity of resolution applicant. Expression "related party", therefore, and "relative" contained in definition Sections must be read noscitur a sociis with categories of persons mentioned in Explanation I, and so read, would include only persons who were connected with business activity of resolution applicant. [75]

18. An argument was also made that, expression "connected person" in Explanation I, Clause (ii) to Section 29A(j) could not possibly refer to a person who might be in management or control of business of corporate debtor in future. This would be arbitrary as explanation would then apply to an indeterminate person. This contention also required to be repelled as Explanation I sought to made it clear that, if a person was otherwise covered as a "connected person", this provision would also cover a person who was in management or control of business of the corporate debtor during implementation of a resolution plan. Therefore, any such person was not indeterminate at all, but was a person who was in saddle of business of corporate debtor either at an anterior point of time or even during implementation of resolution plan. [76]

19. Regarding exemption of micro, small, and medium enterprises from Section 29A of Code, ILC Report of March 2018 found that micro, small, and medium enterprises formed foundation of economy and were key drivers of employment, production, economic growth, entrepreneurship, and financial inclusion. [77]

20. Section 7 of Micro, Small and Medium Enterprises Development Act, 2006 classified enterprises depending upon whether they manufacture or produce goods, or were engaged in providing and rendering services as micro, small, or medium, depending upon certain investments made. [78]

21. Rationale for excluding such industries from eligibility criteria laid down in Section 29A(c) and 29A(h) was because qua such industries, other resolution applicants might not be forthcoming, which then would inevitably lead not to resolution, but to liquidation. Following upon Insolvency Law Committee's Report, Section 240A had been inserted in Code with retrospective effect from 6th June, 2018. [80]

22. When Code had worked hardship to a class of enterprises, Committee constituted by Government, in overseeing working of Code, had been alive to such problems, and Government in turn had followed recommendations of Committee in enacting Section 240A. This was an important instance of how executive continued to monitor application of Code, and exempted a class of enterprises from application of some of its provisions in deserving

cases. **[81]**

23. Repayment of financial debts infused capital into economy as banks and financial institutions were able, with money that had been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale created an intelligible differentia between financial debts and operational debts, which were unsecured, which was directly related to object sought to be achieved by Code. In any case, workmen's dues, which were also unsecured debts, had traditionally been placed above most other debts. Thus, unsecured debts were of various kinds, and so long as there was some legitimate interest sought to be protected, having relation to object sought to be achieved by statute in question, Article 14 did not get infracted. Challenge to Section 53 of Code must also fail. [84]

Ratio Decidendi:
A resolution applicant had no vested right for consideration or approval of its resolution plan

Insolvency Category:
CIRP Process - I - Initiation of Proceedings: Claim - Definition; CIRP Process - I - Initiation of Proceedings: Debt - Definition; CIRP Process - I - Initiation of Proceedings: Default - Definition; CIRP Process - I - Initiation of Proceedings: Financial Debt and Financial Creditor - Definition; CIRP Process - I - Initiation of Proceedings: Operational Debt and Operational Creditor - Definition; CIRP Process - I - Initiation of Proceedings: Suspension and Withdrawal of Application (Section 10A & 12A); CIRP Process - III - Committee of Creditors and Resolution Professional: Commercial Wisdom/Judicial Review; CIRP Process - III - Committee of Creditors and Resolution Professional: Constitution and Authorised Representative of CoC; CIRP Process - III - Committee of Creditors and Resolution Professional: Meeting & Voting of CoC; CIRP Process - III - Committee of Creditors and Resolution Professional: Power/Duties/Role/Code of Conduct of RP; CIRP Process - III - Committee of Creditors and Resolution Professional: Withdrawal of Application - Compliance of Regulation 30A; CIRP Process - IV - Resolution Plan: Ineligible Resolution Applicant (Section 29A); CIRP Process - IV - Resolution Plan: Submission and Approval of Resolution Plan (Section 30 & 31); Liquidation: Adjudicating Authority for Corporate Persons (Section 60); Liquidation: Distribution of Assets (Section 53); Liquidation: Liquidator - Apointment/Tenure/ Removal/Power and Duties; Liquidation: Preferential Transaction/Order in case of Preferential Transactions/Relevant Time; Offence and Penalties: Offence - Fraudulent/Malicious Proceedings (Section 65); Offence and Penalties: Offence - Fraudulent Trading or Wrongful Trading (Section 66); Offence and Penalties: Punishment -False Information (Section 75); Undervalued/Defrauding/Extortionate Credit Transaction: Extortionate Credit Transaction - Scope and Remedy (Sections 50 and 51); Undervalued/Defrauding/Extortionate Credit Transaction: Undervalued Transaction - Avoidance and Validity (Sections 45 and 47)

Disposition:
Disposed of

JUDGMENT

Rohinton Fali Nariman, J.

1. The present petitions assail the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 [**"Insolvency Code"** or **"Code"**]. Since we are deciding only questions relating to the constitutional validity of the Code, we are not going into the individual facts of any case.

2. Shri Mukul Rohatgi, learned Senior Advocate, appearing in Writ Petition (Civil) No. 99 of 2018, has first and foremost argued that the members of the National Company Law Tribunal [**"NCLT"**] and certain members of the National Company Law Appellate Tribunal [**"NCLAT"**], apart from the President, have been appointed contrary to this Court's judgment in **Madras Bar Association v. Union of India**, MANU/SC/0610/2015 : (2015) 8 SCC 583 [**"Madras Bar Association (III)"**], and that therefore, this being so, all orders that are passed by such members, being passed contrary to the judgment of this Court in the aforesaid case, ought to be set aside. In any case, even assuming that the *de facto* doctrine would apply to save such orders, it is clear that such members ought to be restrained from passing any orders in future. In any case, until a properly constituted committee, in accordance with the aforesaid judgment, reappoints them, they ought not to be allowed to function. He also argued that the administrative support for all tribunals should be from the Ministry of Law and Justice. However, even today, NCLT and NCLAT are functioning under the Ministry of Corporate Affairs. This again needs to be corrected immediately. A further technical violation also exists in that if the powers of the High Court are taken away, the NCLAT, as an appellate forum, should have the same convenience and expediency as existed prior to appeals going to the NCLAT. Since the NCLAT, as an appellate court, has a seat only at New Delhi, this would render the remedy inefficacious inasmuch as persons would have to travel from Tamil Nadu, Calcutta, and Bombay to New Delhi, whereas earlier, they could have approached the respective High Courts in their States. This again is directly contrary to **Madras Bar Association v. Union of India**, MANU/SC/0875/2014 : (2014) 10 SCC 1 [**"Madras Bar Association (II)"**], and to paragraph 123 in particular. Apart from the aforesaid technical objection, Shri Rohatgi assailed the legislative scheme that is contained in Section 7 of the Code, stating that there is no real difference between financial creditors and operational creditors. According to him, both types of creditors would give either money in terms of loans or money's worth in terms of goods and services. Thus, there is no intelligible differentia between the two types of creditors, regard being had to the object sought to be achieved by the Code, namely, insolvency resolution, and if that is not possible, then ultimately, liquidation. Relying upon **Shayara Bano v. Union of India**, MANU/SC/1031/2017 : (2017) 9 SCC 1 [**"Shayara Bano"**], he argued that such classification will not only be discriminatory, but also manifestly arbitrary, as Under Sections 8 and 9 of the Code, an operational debtor is not only given notice of default, but is entitled to dispute the genuineness of the claim. In the case of a financial debtor, on the other hand, no notice is given and the financial debtor is not entitled to dispute the claim of the financial creditor. It is enough that a default as defined occurs, after which, even if the claim is disputed and even if there be a set-off and counterclaim, yet, the Code gets triggered at the behest of a financial creditor, without the corporate debtor being able to justify the fact that a genuine dispute is raised, which ought to be left for adjudication before ordinary courts and/or tribunals. Shri Rohatgi then argued that assuming that a valid distinction exists between financial and operational creditors, there is hostile discrimination against operational creditors. First and foremost, unless they amount to 10% of the aggregate of the amount of debt owed, they have no voice in the committee of creditors. In any case, Sections 21 and 24 of

the Code are discriminatory and manifestly arbitrary in that operational creditors do not have even a single vote in the committee of creditors which has very important functions to perform in the resolution process of corporate debtors. Shri Rohatgi then went on to assail the establishment of information utilities that are set up under the Code. According to him, Under Section 210 of the Code, there can be private information utilities whose sole object would be to make a profit. Further, the said information utility is not only to collect financial data, but also to check whether a default has or has not occurred. Certification of such agency cannot substitute for adjudication. Thus, the certificate of an information utility is in the nature of a preliminary decree issued without any hearing and without any process of adjudication. Shri Rohatgi next argued that Section 12A of the Code is contrary to the directions of this Court in its order in **Uttara Foods and Feeds Pvt. Ltd. v. Mona Pharmachem**, Civil Appeal No. 18520/2017 [decided on 13.11.2017], and that instead of following the said order, Section 12A now derails the settlement process by requiring the approval of at least ninety per cent of the voting share of the committee of creditors. Unbridled and uncanalized power is given to the committee of creditors to reject legitimate settlements entered into between creditors and the corporate debtors. Shri Rohatgi then argued that the resolution professional, having been given powers of adjudication under the Code and Regulations, grant of adjudicatory power to a non-judicial authority is violative of basic aspects of dispensation of justice and access to justice. Lastly, a four-fold attack was raised against Section 29A, in particular, Clause (c) thereof. First and foremost, Shri Rohatgi stated that the vested rights of erstwhile promoters to participate in the recovery process of a corporate debtor have been impaired by retrospective application of Section 29A. Section 29A, in any case, is contrary to the object sought to be achieved by the Code, in particular, speedy disposal of the resolution process as it will inevitably lead to challenges before the Adjudicating Authority and Appellate Authority, which will slow down and delay the insolvency resolution process. In particular, so far as Section 29A(c) is concerned, a blanket ban on participation of all promoters of corporate debtors, without any mechanism to weed out those who are unscrupulous and have brought the company to the ground, as against persons who are efficient managers, but who have not been able to pay their debts due to various other reasons, would not only be manifestly arbitrary, but also be treating unequals as equals. Also, according to Shri Rohatgi, maximization of value of assets is an important goal to be achieved in the resolution process. Section 29A is contrary to such goal as an erstwhile promoter, who may outbid all other applicants and may have the best resolution plan, would be kept out at the threshold, thereby impairing the object of maximization of value of assets. Another argument that was made was that Under Section 29A(c), a person's account may be classified as a non-performing asset [**"NPA"**] in accordance with the guidelines of the Reserve Bank of India [**"RBI"**], despite him not being a wilful defaulter. Also, the period of one year referred to in Clause (c) is again wholly arbitrary and without any basis either in rationality or in law. Shri Rohatgi then trained his gun on Section 29A(j), and stated that persons who may be related parties in the sense that they may be relatives of the erstwhile promoters are also debarred, despite the fact that they may have no business connection with the erstwhile promoters who have been rendered ineligible by Section 29A.

3. Shri K.V. Viswanathan, learned Senior Advocate, appearing in Writ Petition No. 822 of 2018, strongly supported Shri Rohatgi and argued the same points with great clarity and with various nuances of his own, which will be reflected in our judgment. Followed by Shri Viswanathan, Shri A.K. Gupta, Shri Pulkit Deora, Shri Devanshu Sajlan and Shri Deepak Joshi also made submissions with particular regard to discrimination against operational creditors.

4. As against these submissions, Shri K.K. Venugopal, the learned Attorney General for India, and Shri Tushar Mehta, learned Solicitor General for India, appearing for the Union of India, and Shri Rakesh Dwivedi, learned Senior Advocate, appearing for the Reserve Bank of India, countered all the aforesaid submissions. They argued with reference to our judgments and Committee Reports that till the Insolvency Code was enacted, the regime of previous legislation had failed to maximize the value of stressed assets and had focused on reviving the corporate debtor with the same erstwhile management. All these legislations had failed, as a result of which, the Code was enacted to reorganize insolvency resolution of corporate debtors in a time bound manner to maximize the value of assets of such person. They further argued that there is a paradigm shift from the erstwhile management of a corporate debtor being in possession of stressed assets to creditors who now assume control from the erstwhile management and are able to approve resolution plans of other better and more efficient managers, which would not only be in the interest of the corporate debtor itself but in the interest of all stakeholders, namely, all creditors, workers, and shareholders other than shareholdings of the erstwhile management. They referred to the Statement of Objects and Reasons, the Preamble, and various provisions of the Code, and to the Rules and Regulations made thereunder, to buttress their submissions. In particular, they referred to judgments which mandated a judicial hands-off when it came to laws relating to economic Regulation. They argued that the legislature must get the maximum free play in the joints to experiment and come up with solutions to problems that have seemed intractable earlier. In particular, in combating the individual points made by the learned Counsel appearing on behalf of the Petitioners, they argued that none of the members of the NCLT or the NCLAT had been appointed contrary to the judgments of this Court in **Union of India v. R. Gandhi, President, Madras Bar Association** MANU/SC/0378/2010 : (2010) 11 SCC 1 [**"Madras Bar Association (I)"**] and **Madras Bar Association (III)** (supra). They referred to affidavits filed before this Court to show that all such members had been appointed by a Committee consisting of two Supreme Court Judges and two bureaucrats, in conformity with the aforesaid judgments. When it came to classification between financial and operational creditors, they argued that the differentiation between the two types of creditors occurs from the nature of the contracts entered into with them. Financial contracts involve large sums of money given by fewer persons, whereas operational creditors are much larger in number and the quantum of dues is generally small. Financial creditors have specified repayment schedules and agreements which entitle such creditors to recall the loan in totality on defaults being made, which the operational creditors do not have. Further, financial creditors are, from the start, involved with the assessment of viability of corporate debtors and are, therefore, better equipped to engage in restructuring of loans as well as reorganization of the corporate debtor's business in the event of financial stress. All these differentiae are not only intelligible, but directly relate to the objects sought to be achieved by the Code. Insofar as Section 7, relatable to financial creditors, and Sections 8 and 9, which relate to operational creditors are concerned, it is a fallacy to say that no notice is issued to the financial debtor on defaults made, as financial debtors are fully aware of the loan structure and the defaults that have been made. Further, this Court's judgment in **Innoventive Industries Ltd. v. ICICI Bank and Anr.,** MANU/SC/1063/2017 : (2018) 1 SCC 407 [**"Innoventive Industries"**] has made it clear that Under Section 7(5) of the Code, the Adjudicating Authority, in being "satisfied" that there is a default, has to issue notice to the corporate debtor, hear the corporate debtor, and then adjudicate upon the same. The reason why disputes raised by financial debtors are not gone into at the stage of triggering the Code is because the evidence of financial debts are contained in the documents of information utilities, banks, and financial institutions. Disputes which may be raised can be raised at the stage of filing of claims

once the resolution process is underway. Also, by the very nature of financial debts, set-off and counterclaims by financial debtors are very rare and, in any case, wholly independent of the loan that has been granted to them. Insofar as operational creditors having no vote in the committee of creditors is concerned, this is because operational creditors are typically interested only in getting payment for supply of goods or services made by them, whereas financial creditors are typically involved in seeing that the entirety of their loan gets repaid, for which they are better equipped to go into the viability of corporate enterprises, both at the stage of grant of the loan and at the stage of default. Also, the interests of operational creditors, when a resolution plan is to be approved, are well looked-after as the minimum that the operational creditors are to be paid is the liquidation value of assets. Apart from this, their interests are to be placed at par with the interests of financial creditors, and if this is not done, then the Adjudicating Authority intervenes to reject or modify resolution plans until the same is done. In the 80 cases that have been resolved since the Code has come into force, figures were also shown to this Court to indicate that not only are the operational creditors paid before the financial creditors under the resolution plan, but that the initial recovery of what is owed to them is slightly higher than what is owed to financial creditors. Insofar as Section 12A is concerned, they argued that once an application by a creditor is admitted by the Adjudicating Authority, the proceeding becomes a proceeding in rem and is no longer an individual proceeding but a collective proceeding. This being the case, it is important that when a resolution process is to begin and a committee of creditors is formed, it is that committee that is best equipped to deal with applications for withdrawal or settlement after admission of an insolvency petition. Ninety per cent of such creditors have been given this task as once the proceeding is in rem, to halt such proceeding, which is for the benefit of all creditors generally, can only be if all or most of them agree to the same. They argued that the resolution professional has no adjudicatory powers under the Code or the Regulations, but is only to collate information. Even when he exercises his discretion to exercise his best judgment in certain situations, he does so administratively, and is subject to an adjudicatory body overseeing the same. When it comes to Section 29A of the Code, they argued that Section 29A does not disturb any vested or existing rights, as a resolution applicant does not have any vested or existing rights that can be disturbed, as has been held in **ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors.,** Civil Appeal Nos. 9402-9405/2018 [decided on 04.10.2018] [**"ArcelorMittal"**]. Further, merely because this Section relies on antecedent facts for its application, does not mean that it is retrospective. Also, Section 29A subserves a very important object of the Code, which is to see that undesirable persons who are mentioned in all its clauses are rendered ineligible to submit resolution plans so that such persons may not come into the management of stressed corporate debtors. They also argued that Section 29A is not aimed at only persons who have committed acts of malfeasance, but also persons who are otherwise unfit to be put in the saddle of the management of the corporate debtor, such as undischarged insolvents and persons who have been removed as directors Under Section 164 of the Companies Act, 2013 (for not filing financial statements or annual returns for any continuous period of 3 financial years, for example). They further argued that a period of one year is sufficient period within which a person, whose account has been declared NPA, should clear its dues. They referred to the RBI Regulations dealing with NPAs and stated that even before a person's account is declared NPA, a long rope is given for such person to clear off its debts. It is only when it does not do so, that its account is declared NPA in the first instance. Also, once the said guidelines are perused, it is clear that an account, which has been NPA for one year, is declared as substandard asset and it is for this reason that the one year period is given in Section 29A(c), which is based on reason, and is not arbitrary.

5. Shri C.U. Singh, appearing on behalf of the Asset Reconstruction Company of India Limited, referred to the pre-existing state of legislation before the Code was enacted, and referred in detail to how all such legislations had failed to produce the necessary results. He also relied upon extracts from the Insolvency Act, 1986 of the United Kingdom to buttress his point that worldwide, Insolvency Acts have moved away from mere liquidation so as to first concentrate on reconstruction of corporate debtors. Also, according to him, Section 29A is not a Section aimed at malfeasance; it is aimed at rendering ineligible persons who are undesirable in the widest sense of the term, i.e., persons who are unfit to take over the management of a corporate debtor.

Prologue: the pre-existing state of the law

6. Having heard the rival contentions, it is important to first clear the air on what was the background which led to the enactment of the Insolvency Code. The erstwhile regime which led to the enactment of the Insolvency Code was discussed by the Bankruptcy Law Reforms Committee [**"BLRC"**] in its Report dated 04.11.2015 as follows:

The current state of the bankruptcy process for firms is a highly fragmented framework. Powers of the creditor and the debtor under insolvency are provided for under different Acts. Given the conflicts between creditors and debtors in the resolution of insolvency as described in Section 3.2.2, the chances for consistency and efficiency in resolution are low when rights are separately defined. It is problematic that these different laws are implemented in different judicial fora. Cases that are decided at the tribunal/BIFR often come for review to the High Courts. This gives rise to two types of problems in implementation of the resolution framework. The first is the lack of clarity of jurisdiction. In a situation where one forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor, the decisions are readily appealed against and either stayed or overturned in a higher court. Ideally, if economic value is indeed to be preserved, there must be a single forum that hears both sides of the case and makes a judgment based on both. A second problem exacerbates the problems of multiple judicial fora. The fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving at an outcome, and increases the vulnerability to appeals of the outcome.

The uncertainty that these problems give rise to shows up in case law on matters of insolvency and bankruptcy in India. Judicial precedent is set by "case law" which helps flesh out the statutory laws. These may also, in some cases, pronounce new substantive law where the statute and precedent are silent. (Ravi, 2015) reviews judgments of the High Courts on BIFR cases, the DRTs and DRATs, as well as a review of important judgments of the Supreme Court that have had a significant impact on the interpretation of existing insolvency legislation. The judgments reviewed are those after June 2002 when the SARFAESI Act came into effect. It is illustrative of both debtor and creditor led process of corporate insolvency, and reveals a matrix of fragmented and contrary outcomes, rather than coherent and consistent, being set as precedents.

In such an environment of legislative and judicial uncertainty, the outcomes on insolvency and bankruptcy are poor. World Bank (2014) reports that the average time to resolve insolvency is four years in India, compared to 0.8 years in Singapore and 1 year in London. Sengupta and Sharma,

2015 compare the number of new cases that file for corporate insolvency in the U.K., which has a robust insolvency law, to the status of cases registered at the BIFR under SICA, 1985, as well as those filed for liquidation under Companies Act, 1956. They compare this with the number of cases files in the UK, and find a significantly higher turnover in the cases that are filed and cleared through the insolvency process in the UK. If we are to bring financing patterns back on track with the global norm, we must create a legal framework to make debt contracts credible channels of financing.

This calls for a deeper redesign of the entire resolution process, rather than working on strengthening any single piece of it. India is not unusual in requiring this. In all countries, bankruptcy laws undergo significant changes over the period of two decades or more. For example, the insolvency resolution framework in the UK is the Insolvency Act of 1986, which was substantially modified with the Insolvency Act of 2000, and the Enterprise Act of 2002. The first Act for bankruptcy resolution in the US that lasted for a significant time was the Bankruptcy Act of 1889. This was followed by the Act of 1938, the Reform Act of 1978, the Act of 1984, the Act of 1994, a related consumer protection Act of 2005. Singapore proposed a bankruptcy reform in 2013, while there are significant changes that are being proposed in the US and the Italian bankruptcy framework this year in 2015. Several of these are structural reforms with fundamental implications on resolving insolvency....

The BLRC went on to state:

[.....] India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India.

xxx xxx xxx

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the 'calm period' can help keep an organization afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

This same idea is found in FSLRC's (Financial Sector Legislative Reforms Commission) treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed.

The pre-existing scenario has been noticed in some of our judgments. In **Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors.**, MANU/SC/0088/2016 : (2016) 4 SCC 1, this Court found:

40......The Eradi Committee Report relating to insolvency and winding up of companies dated 31-7-2000, observed that out of 3068 cases referred to BIFR from 1987 to 2000 all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases were under negotiation for revival process, 741 cases were recommended for winding up, and 626 cases were dismissed as not maintainable. These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985. The Committee further pointed out that effectiveness of the Sick Industrial Companies (Special Provisions) Act, 1985 as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. (See Paras 5.8, 5.9 and 5.15 of the Report.) Consequently, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and the provisions thereunder for revival and rehabilitation should be telescoped into the structure of the Companies Act, 1956 itself.

xxx xxx xxx

43......In fact, another interesting document is the Report on Trend and Progress of Banking in India 2011-2012 for the year ended 30-6-2012 submitted by Reserve Bank of India to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949. In Table IV. 14 the Report provides statistics regarding trends in non-performing assets bank-wise, group-wise. As per the said Table, the opening balance of non-performing assets in public sector banks for the year 2011-2012 was Rs. 746 billion but the closing balance for 2011-2012 was Rs. 1172 billion only. The total amount recovered through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 during 2011-2012 registered a decline compared to the previous year, but, even then, the amounts recovered under the said Act constituted 70% of the total amount recovered. The amounts recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 constituted only 28%. All this would go to show that the amounts that public sector banks and financial institutions have to recover are in staggering figures and at long last at least one statutory measure has proved to be of some efficacy. This Court would be loathe to give such an interpretation as would thwart the recovery process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which Act alone seems to have worked to some extent at least.

Similarly, in **Innoventive Industries** (supra), this Court found:

13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and

South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia.

Further, this Court in **ArcelorMittal** (supra) observed:

62. Previous legislation, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which made provision for rehabilitation of sick companies and repayment of loans availed by them, were found to have completely failed. This was taken note of by our judgment in *Madras Petrochem Ltd.* v. *Board for Industrial and Financial* Reconstruction, MANU/SC/0088/2016 : (2016) 4 SCC 1.....

xxx xxx xxx

63. These two enactments were followed by the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. As has been noted hereinabove, amounts recovered under the said Act recorded improvement over the previous two enactments, but this was yet found to be inadequate.

Judicial hands-off qua economic legislation

7. In the United States, at one point of time, Justice Stephen Field's dissents of the 19th Century were translated into majority opinions in the early 20th Century. This was referred to as the Lochner era, in which the U.S. Supreme Court, over a period of 40 years, consistently struck down legislation which was economic in nature as such legislation did not, according to the Court, square with property rights. As a result, a large number of minimum wage laws, maximum hours of work in factories laws, child labour laws, etc. were struck down. The result, as is well known, is that President Roosevelt initiated a court-packing plan in which he sought to get authorization from Congress to appoint additional judges to the Supreme Court, who would have then overruled the Lochner line of precedents. As it turned out, that became unnecessary as Justice Roberts switched his vote so that a 5:4 majority from 1937 onwards upheld economic legislation. It is important to note that the dissents of Justice Holmes and Justice Brandeis now became the law. Justice Holmes had, in his dissent in **Lochner v. New York**, MANU/USSC/0253/1905 : 198 U.S. 45 (1905), stated:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his

money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, MANU/USSC/0257/1905 : 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this Court. *Northern Securities Co. v. United States*, MANU/USSC/0257/1904 : 193 U.S. 197. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker*, 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy*, MANU/USSC/0088/1898 : 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.

It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general Regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.[1]

Similarly, in **New State Ice Co. v. Liebman**, MANU/USSC/0161/1932 : 285 U.S. 262 (1932), Justice Brandeis echoed Justice Holmes as follows:

The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as

a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process Clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[2]

The Lochner doctrine was finally buried in **Ferguson v. Skrupa**, MANU/USSC/0067/1963 : 372 U.S. 726 (1962), where the Supreme Court held:

Both the District Court in the present case and the Pennsylvania court in Stone adopted the philosophy of *Adams v. Tanner*, and cases like it, that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and, by so doing, violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner, the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York*, MANU/USSC/0253/1905 : 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage v. Kansas*, MANU/USSC/0294/1915 : 236 U.S. 1 (1915), setting minimum wages for women, *Adkins v. Children's Hospital*, MANU/USSC/0294/1923 : 261 U.S. 525 (1923), and fixing the weight of loaves of bread, Jay *Burns Baking Co. v. Bryan*, MANU/USSC/0239/1924 : 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,

I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

And, in an earlier case, he had emphasized that, The criterion of constitutionality is not whether we believe the law to be for the public good' [*Adkins v. Children's Hospital*, MANU/USSC/0294/1923 : 261 U.S. 525, 567, 570 (1923) (dissenting opinion)].

The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases-that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely-has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned... with the wisdom, need, or appropriateness of the legislation. [*Olsen*

v. Nebraska ex rel. Western Reference & Bond Assn., MANU/USSC/0070/1941 : 313 U.S. 236, 246 (1941)]

Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to, "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general Clause of the Fourteenth Amendment was intended to secure" [*Sproles v. Binford*, 286 U.S. 374, 388 (1932)]. It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law" [*Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co.*, MANU/USSC/0061/1949 : 335 U.S. 525, 536 (1949)].

In the face of our abandonment of the use of the "vague contours" [*Adkins v. Children's Hospital*, MANU/USSC/0294/1923 : 261 U.S. 525, 535 (1923)] of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on Adams v. Tanner is as mistaken as would be adherence to *Adkins v. Children's Hospital*, overruled by *West Coast Hotel Co. v. Parrish*, MANU/USSC/0190/1937 : 300 U.S. 379 (1937). Not only has the philosophy of Adams been abandoned, but also this Court, almost 15 years ago, expressly pointed to another opinion of this Court as having "clearly undermined" Adams. [*Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co.*, MANU/USSC/0061/1949 : 335 U.S. 525 (1949)]. We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "superlegislature to weigh the wisdom of legislation," [*Day-Brite Lighting Inc., v. Missouri*, 342 U.S. 421, 423 (1923)] and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought" [*Williamson v. Lee Optical Co.*, MANU/USSC/0028/1955 : 348 U.S. 483, 488 (1955)]. Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us, but with the body constituted to pass laws for the State of Kansas.

Nor is the statute's exception of lawyers a denial of equal protection of the laws to non-lawyers. Statutes create many classifications which do not deny equal protection; it is only "invidious discrimination" which offends the Constitution. The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act-advice which a non-lawyer cannot lawfully give him. If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it. We also find no merit in the contention that the Fourteenth Amendment is violated by the failure of the Kansas statute's title to be as specific as appellate thinks it ought to be under the Kansas Constitution.[3]

8. In this country, this Court in **R.K. Garg v. Union of India**, MANU/SC/0074/1981 : (1981) 4 SCC 675 has held:

8. Another Rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic Regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud* [MANU/USSC/0152/1957 : 351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style:

In the utilities, tax and economic Regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic Regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events -- self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaptation of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Roig Refining Co.* [MANU/USSC/0055/1950 : 94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

xxx xxx xxx

19. It is true that certain immunities and exemptions are granted to persons investing their unaccounted money in purchase of Special Bearer Bonds but that is an inducement which has to be offered for unearthing black money. Those who have successfully evaded taxation and concealed their income or wealth despite the stringent tax laws and the efforts of the tax department are not likely to disclose their unaccounted money without some inducement by way of immunities and exemptions and it must necessarily be left to the legislature to decide what immunities and exemptions would be sufficient for the purpose. It would be outside the province of the Court to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ. The Court must while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States in Munn v. Illinois [MANU/USSC/0207/1876 : 94 US 13], namely, "that courts do not substitute their social and economic beliefs for the judgment of legislative bodies". The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary. The Court should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theater Co. v. City of Chicago [MANU/USSC/0080/1913 : 57 L Ed 730 : 228 US 61 (1912)]:

The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere error of government are not subject to our judicial review.

It is true that one or the other of the immunities or exemptions granted under the provisions of the Act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax. But that cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to frame tax legislation which cannot be abused. Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilized for tax evasion or avoidance not intended by the legislature, the Act can always be amended and the abuse terminated. We are accordingly of the view that none of the provisions of the Act is violative of Article 14 and its constitutional validity must be upheld.

Likewise, in **Bhavesh D. Parish v. Union of India**, MANU/SC/0392/2000 : (2000) 5 SCC 471, this Court held:

26. The services rendered by certain informal sectors of the Indian economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organized system, capable of better Regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalization of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

xxx xxx xxx

30. Before we conclude there is another matter which we must advert to. It has been brought to our notice that Section 45-S of the Act has been challenged in various High Courts and a few of them have granted the stay of provisions of Section 45-S. When considering an application for staying the operation of a piece of legislation, and that too pertaining to economic reform or change, then the courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same. Merely because a statute comes up for examination and some arguable point is raised, which persuades the courts to consider the controversy, the legislative will should not normally be put under suspension pending such consideration. It is now well settled that there is always a presumption in favour of the constitutional validity of any legislation, unless the same is set aside after final hearing and, therefore, the tendency to grant stay of legislation relating to economic reform, at the interim stage, cannot be understood. The system of checks and balances has to be utilized in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself.

In **DG of Foreign Trade v. Kanak Exports**, MANU/SC/1258/2015 : (2016) 2 SCC 226, this Court has held:

109. Therefore, it cannot be denied that the Government has a right to amend, modify or even rescind a particular scheme. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula. In *Balco Employees' Union* v. *Union of India* [MANU/SC/0779/2001 : (2002) 2 SCC 333], the Supreme Court held that laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature.....

It is with this background, factual and legal, that the constitutional validity of the Insolvency and Bankruptcy Code, 2016 has to be viewed.

The Raison D'etre for the Insolvency and Bankruptcy Code

9. The Statement of Objects and Reasons for the Code have been referred to in **Innoventive Industries** (supra) which states:

12. .....The Statement of Objects and Reasons of the Code reads as under:

Statement of Objects and Reasons.--There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. *The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.*

2. *The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.*

3. The Code seeks to provide for designating NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for Regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives.

10. The Preamble of the Code states as follows:

An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

11. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See **ArcelorMittal** (supra) at paragraph 83, footnote 3].

12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests.

The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.

Appointment of members of the NCLT and the NCLAT not contrary to this Court's judgments.

13. Shri Rohatgi has argued that contrary to the judgments in **Madras Bar Association (I)** (supra) and **Madras Bar Association (III)** (supra), Section 412(2) of the Companies Act, 2013 continued on the statute book, as a result of which, the two Judicial Members of the Selection Committee get outweighed by three bureaucrats.

14. On 03.01.2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended as follows:

412. Selection of Members of Tribunal and Appellate Tribunal.--

xxx xxx xxx

(2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of--

(*a*) Chief Justice of India or his nominee-- Chairperson;

(*b*) a senior Judge of the Supreme Court or Chief Justice of High Court--Member;

(*c*) Secretary in the Ministry of Corporate Affairs--Member; and

(*d*) Secretary in the Ministry of Law and Justice--Member.

(2-A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote.

This was brought into force by a notification dated 09.02.2018. However, an additional affidavit has been filed during the course of these proceedings by the Union of India. This affidavit is filed by one Dr. Raj Singh, Regional Director (Northern Region) of the Ministry of Corporate Affairs. This affidavit makes it clear that, acting in compliance with the directions of the Supreme Court in the aforesaid judgments, a Selection Committee was constituted to make appointments of Members of the NCLT in the year 2015 itself. Thus, by an Order dated 27.07.2015, (i) Justice Gogoi (as he then was), (ii) Justice Ramana, (iii) Secretary, Department of Legal Affairs, Ministry of Law and Justice, and (iv) Secretary, Corporate Affairs, were constituted as the Selection Committee. This Selection Committee was reconstituted on 22.02.2017 to make further appointments. In compliance of the directions of this Court, advertisements dated 10.08.2015 were

issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of the NCLT

and NCLAT have been appointed. This being the case, we need not detain ourselves any further with regard to the first submission of Shri Rohatgi.

NCLAT Bench only at Delhi.

15. It has been argued by Shri Rohatgi that as per our judgment in **Madras Bar Association (II)** (supra), paragraph 123 states as follows:

123. We shall first examine the validity of Section 5 of the NTT Act. The basis of challenge to the above provision has already been narrated by us while dealing with the submissions advanced on behalf of the Petitioners with reference to the fourth contention. According to the learned Counsel for the Petitioners, Section 5(2) of the NTT Act mandates that NTT would ordinarily have its sittings in the National Capital Territory of Delhi. According to the Petitioners, the aforesaid mandate would deprive the litigating Assessee the convenience of approaching the jurisdictional High Court in the State to which he belongs. An Assessee may belong to a distant/remote State, in which eventuality, he would not merely have to suffer the hardship of travelling a long distance, but such travel would also entail uncalled for financial expense. Likewise, a litigant Assessee from a far-flung State may find it extremely difficult and inconvenient to identify an Advocate who would represent him before NTT, since the same is mandated to be ordinarily located in the National Capital Territory of Delhi. Even though we have expressed the view, that it is open to Parliament to substitute the appellate jurisdiction vested in the jurisdictional High Courts and constitute courts/tribunals to exercise the said jurisdiction, we are of the view, that while vesting jurisdiction in an alternative court/tribunal, it is imperative for the legislature to ensure that redress should be available with the same convenience and expediency as it was prior to the introduction of the newly created court/tribunal. Thus viewed, the mandate incorporated in Section 5(2) of the NTT Act to the effect that the sittings of NTT would ordinarily be conducted in the National Capital Territory of Delhi, would render the remedy inefficacious, and thus unacceptable in law. The instant aspect of the matter was considered by this Court with reference to the Administrative Tribunals Act, 1985 in *S.P. Sampath Kumar case* [*S.P. Sampath Kumar v. Union of India*, MANU/SC/0851/1987 : (1987) 1 SCC 124: (1987) 2 ATC 82] *and L Chandra Kumar case* [*L. Chandra Kumar v. Union of India*, MANU/SC/0261/1997 : (1997) 3 SCC 261: 1997 SCC (L & S) 577], wherein it was held that permanent Benches needed to be established at the seat of every jurisdictional High Court. And if that was not possible, at least a Circuit Bench required to be established at every place where an aggrieved party could avail of his remedy. The position on the above issue is no different in the present controversy. For the above reason, Section 5(2) of the NTT Act is in clear breach of the law declared by this Court.

16. The learned Attorney General has assured us that this judgment will be followed and Circuit Benches will be established as soon as it is practicable. In this view of the matter, we record this submission and direct the Union of India to set up Circuit Benches of the NCLAT within a period of 6 months from today.

The tribunals are functioning under the wrong ministry

17. Shri Mukul Rohatgi argued that in **Madras Bar Association (I)** (supra), paragraph 120(xii) specifically reads as follows:

120 We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:

xxx xxx xxx

(*xii*) The administrative support for all Tribunals should be from the Ministry of Law and Justice. Neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned.

xxx xxxxxx

Even though eight years have passed since the date of this judgment, the administrative support for these tribunals continues to be from the Ministry of Corporate Affairs. This needs to be rectified at the earliest.

18. However, the learned Attorney General pointed out Article 77(3) of the Constitution of India and **Delhi International Airport Limited v. International Lease Finance Corporation and Ors.,** MANU/SC/0282/2015 : (2015) 8 SCC 446, which state that once Rules of business are allocated among various Ministries, such allocation is mandatory in nature. According to him, therefore, the Rules of business, having allocated matters which arise under the Insolvency Code to the Ministry of Corporate Affairs, are mandatory in nature and have to be followed.

19. It is obvious that the Rules of business, being mandatory in nature, and having to be followed, are to be so followed by the executive branch of the Government. As far as we are concerned, we are bound by the Constitution Bench judgment in **Madras Bar Association (I)** (supra). This statement of the law has been made eight years ago. It is high time that the Union of India follow, both in letter and spirit, the judgment of this Court.

Classification between financial creditor and operational creditor neither discriminatory, nor arbitrary, nor violative of Article 14 of the Constitution of India.

20. The tests for violation of Article 14 of the Constitution of India, when legislation is challenged as being violative of the principle of equality, have been settled by this Court time and again. Since equality is only among equals, no discrimination results if the Court can be shown that there is an intelligible differentia which separates two kinds of creditors so long as there is some rational relation between the creditors so differentiated, with the object sought to be achieved by the legislation. This aspect of Article 14 has been laid down in judgments too numerous to cite, from the very inception.

21. Another development of the law is that legislation can be struck down as being manifestly arbitrary. This has been laid down by the recent Constitution Bench decision in **Shayara Bano** (supra) as follows:

95. On a reading of this judgment in *Natural Resources Allocation case* [*Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, MANU/SC/0793/2012 : (2012) 10 SCC 1], it is clear that this Court did not read *McDowell* [*State of A.P.* v. *McDowell and Co.*, MANU/SC/0427/1996 : (1996) 3 SCC 709] as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and *Ajay Hasia* [*Ajay Hasia* v. *Khalid Mujib Sehravardi*, MANU/SC/0498/1980 : (1981) 1 SCC 722: 1981 SCC (L & S) 258] in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" Under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary" i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

96. Another Constitution Bench decision in *Subramanian Swamy* v. *CBI* [MANU/SC/0417/2014 : (2014) 8 SCC 682: (2014) 6 SCC (Cri.) 42: (2014) 3 SCC (L & S) 36] dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This Section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been made to the Constitution Bench by the reference order in *Subramanian Swamy* v. *CBI* [MANU/SC/0083/2005 : (2005) 2 SCC 317: 2005 SCC (L & S) 241] and after referring to several judgments including *Ajay Hasia* [*Ajay Hasia* v. *Khalid Mujib Sehravardi*, MANU/SC/0498/1980 : (1981) 1 SCC 722: 1981 SCC (L & S) 258], *Mardia Chemicals* [*Mardia Chemicals Ltd.* v. *Union of India*, MANU/SC/0323/2004 : (2004) 4 SCC 311], *Malpe Vishwanath Acharya* [*Malpe Vishwanath Acharya* v. *State of Maharashtra*, MANU/SC/0905/1998 : (1998) 2 SCC 1] and *McDowell* [*State of A.P.* v. *McDowell and Co.*, MANU/SC/0427/1996 : (1996) 3 SCC 709], the reference, inter alia, was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

97. After referring to the submissions of the counsel, and several judgments on the discrimination aspect of Article 14, this Court held: (*Subramanian Swamy case* [*Subramanian Swamy* v. *CBI*, MANU/SC/0417/2014 : (2014) 8 SCC 682: (2014) 6 SCC (Cri.) 42: (2014) 3 SCC (L & S) 36], SCC pp. 721-22, paras 48-49)

48. In *E.P. Royappa* [*E.P. Royappa* v. *State of T.N.*, MANU/SC/0380/1973 : (1974) 4 SCC 3 : 1974 SCC (L & S) 165], it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)

85.... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16.

Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders--if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.

xxx xxx xxx

100. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In *Cellular Operators Assn. of India* v. *TRAI* [MANU/SC/0551/2016 : (2016) 7 SCC 703], this Court referred to earlier precedents, and held: (SCC pp. 736-37, paras 42-44)

Violation of fundamental rights

42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. [See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [MANU/SC/0406/1984 : (1985) 1 SCC 641: 1985 SCC (Tax) 121], SCC at p. 689, para 75.]

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of Karnataka* [MANU/SC/0242/1996 : (1996) 10 SCC 304], this Court held: (SCC p. 314, para 13)

13. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(*g*) may not be available to the Appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind

that what is being challenged here Under Article 14 is not executive action but delegated legislation.

The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* [MANU/SC/0406/1984 : (1985) 1 SCC 641: 1985 SCC (Tax) 121], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned Under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'*. Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, "Parliament never intended the authority to make such rules; they are unreasonable and ultra vires". *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.*

44. Also, in *Sharma Transport* v. *State of A.P.* [MANU/SC/0759/2001 : (2002) 2 SCC 188], this Court held: (SCC pp. 203-04, para 25)

25.... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [MANU/SC/0406/1984 : (1985) 1 SCC 641: 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge Under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.

This judgment has since been followed in **Gopal Jha v. The Hon'ble Supreme Court of India**, Writ Petition (Civil) No. 745/2018 [decided on 25.10.2018] (at paragraph 27); **Indian Young Lawyers Associations and Ors. v. State of Kerala and Ors.**, Writ Petition (Civil) No. 373/2006 [decided on 28.09.2018]; **Joseph Shine v. Union of India**, Writ Petition (Criminal) No. 194/2017

[decided on 27.09.2018] (at paragraphs 110, 195, 197); **K.S. Puttaswamy v. Union of India**, Writ Petition (Civil) No. 494/2012 [decided on 26.09.2018] (at paragraphs 77, 78, 416, 724, 725, 1160); **Navtej Singh Johar and Ors. v. Union of India**, MANU/SC/0947/2018 : (2018) 10 SCC 1 (at paragraphs 253, 353, 411, 637.9); **Lok Prahari v. State of Uttar Pradesh and Ors.**, MANU/SC/0507/2018 : (2018) 6 SCC 1 (at paragraph 35); and **Nikesh Tarachand Shah v. Union of India and Ors.**, MANU/SC/1480/2017 : (2018) 11 SCC 1 (at paragraph 23).

22. Sections 5(7) and 5(8) of the Code define "financial creditor" and "financial debt" as follows:

5. Definitions.--In this Part, unless the context otherwise requires --

xxx xxx xxx

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes--

(*a*) money borrowed against the payment of interest;

(*b*) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(*c*) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(*d*) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(*e*) receivables sold or discounted other than any receivables sold on non-recourse basis; (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation.--For the purposes of this sub-clause--

(*i*) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(*ii*) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in Clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(*g*) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(*i*) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in Sub-clauses (a) to (h) of this clause;

xxx xxx xxx

Section 5(20) defines "operational creditor" as follows:

5. Definitions.--In this Part, unless the context otherwise requires --

xxx xxx xxx

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

xxx xxx xxx

Section 7 of the Code states:

7. Initiation of corporate insolvency resolution process by financial creditor--(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.--For the purposes of this Sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application Under Sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish--

(*a*) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(*b*) the name of the resolution professional proposed to act as an interim resolution professional; and

(*c*) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application Under Sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor Under Sub-section (3).

(5) Where the Adjudicating Authority is satisfied that--

(*a*) a default has occurred and the application Under Sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(*b*) default has not occurred or the application Under Sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under Clause (b) of Sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application Under Sub-section (5).

(7) The Adjudicating Authority shall communicate--

(*a*) the order under Clause (*a*) of Sub-section (5) to the financial creditor and the corporate debtor;

(*b*) the order under Clause (*b*) of Sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

23. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.

24. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a "default" occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the Adjudicating Authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and Under Section 7(5), the Adjudicating

Authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, Under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the Adjudicating Authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.

25. The argument of learned Counsel on behalf of the Petitioners is that in point of fact, there is no intelligible differentia having relation to the objects sought to be achieved by the Code between financial and operational creditors and indeed, nowhere in the world has this distinction been made. The BLRC Report presents what according to it is the rationale for the reason to differentiate between financial and operational creditors. The Report states as follows:

While both types of creditors can trigger the IRP under the Code, the evidence presented to trigger varies. Since financial creditors have electronic records of the liabilities filed in the Information Utilities of Section 4.3, incontrovertible event of default on any financial credit contract can be readily verifiable by accessing this system. The evidence submitted of default by the debtor to the operational creditor may be in either electronic or physical form, since all operational creditors may or may not have electronic filings of the debtors' liability. Till such time that the Information Utilities are ubiquitous, financial creditors may establish default in a manner similar to operational creditors.

Similarly, the Insolvency and Bankruptcy Bill in the Notes on Clause 8 states:

Clause 8 lays down the procedure for the initiation of the corporate insolvency resolution process by an operational creditor. This procedure differs from the procedure applicable to financial creditors as operational debts (such as trade debts, salary or wage claims) tend to be small amounts (in comparison to financial debts) or are recurring in nature and may not be accurately reflected on the records of information utilities at all times. The possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors such as banks and financial institutions. Accordingly, the process for initiation of the insolvency resolution process differs for an operational creditor..... This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It may also facilitate informal negotiations between such creditors and the corporate debtor, which may result in a restructuring of the debt outside the formal proceedings.

However, the Insolvency Law Committee [**"ILC"**], in its Report of March 2018 dealt with debenture holders and fixed deposit holders, who are also financial creditors, and are numerous. The Report then went on to state:

10.6 For certain securities, a trustee or an agent may already be appointed as per the terms of the security instrument. For example, a debenture trustee would be appointed if debentures exceeding 500 have been issued [Section 71(5), Companies Act, 2013] or if secured debentures are issued [Rule 18(1)(c), Companies (Share Capital and Debenture) Rules, 2014]. Such creditors may be

represented through such pre-appointed trustees or agents. For other classes of creditors which exceed a certain threshold in number, like home buyers or security holders for whom no trustee or agent has already been appointed under a debt instrument or otherwise, an insolvency professional (other than the IRP) shall be appointed by the NCLT on the request of the IRP. It is to be noted that as the agent or trustee or insolvency professional, i.e. the authorised representative for the creditors discussed above and executors, guarantors, etc. as discussed in paragraph 9 of this Report, shall be a part of the CoC, they cannot be related parties to the corporate debtor in line with the spirit of proviso to Section 21(2).

xxx xxx xxx

10.8 In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security holders, deposit holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done by adding a new provision to Section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by the NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditor to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through Regulations to enable efficient voting by the representative. Also, Regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time.

Given this Report, the Code was amended and Section 21 (6A) and 21(6B) were added, which are set out hereinbelow:

21. Committee of creditors --

xxx xxx xxx

(6-A) Where a financial debt--

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under Clause (a) or Sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional,

to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under Clause (*a*) or Clause (*b*) or Clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative--

(*i*) under Clauses (*a*) and (*c*) of Sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under Clause (*b*) of Sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.

Also, Regulations 16A and 16B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 [**"CIRP Regulations"**] were added, with effect from 04.07.2018, as follows:

16A. Authorised representative--(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received Under Sub-Regulation (1) of Regulation 12, to act as the authorised representative of the creditors of the respective class:

Provided that the choice for an insolvency professional to act as authorised representative in Form CA received Under Sub-Regulation (2) of Regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected Under Sub-Regulation (1) within two days of the verification of claims received Under Sub-Regulation (1) of Regulation 12.

(3) Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(4) The interim resolution professional shall provide the list of creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.

(5) The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated.

Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.

(6) The interim resolution professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely:

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	15,000
101-1000	20,000
More than 1000	25,000

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

16B. Committee with only creditors in a class.--

Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s).

26. It is obvious that debenture holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However, as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.

27. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to

supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable.

28. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

Notice, hearing, and set-off or counterclaim qua financial debts.

29. This Court, in **Innoventive Industries** (supra) stated as follows:

27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes nonpayment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined Under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt Under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to *any* financial

creditor of the corporate debtor -- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made Under Sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part v. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the Adjudicating Authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the Adjudicating Authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the Adjudicating Authority. Under Sub-section (7), the Adjudicating Authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme Under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing--i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the Adjudicating Authority that the Adjudicating Authority may reject an application and not otherwise.

30. Section 3(9)(c) read with Section 214(e) of the Code are important and are set out as under:

3. Definitions.--In this Code, unless the context otherwise requires --

xxx xxx xxx

(9) "core services" means services rendered by an information utility for--

xxx xxx xxx

(c) authenticating and verifying the financial information submitted by a person; and xxx xxx xxx

214. Obligations of information utility--For the purposes of providing core services to any person, every information utility shall--

xxx xxx xxx

(*e*) get the information received from various persons authenticated by all concerned parties before storing such information;

xxx xxx xxx

31. It is clear from these Sections that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 [**"Information Utilities Regulations"**], are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.

32. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:

(a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;

(b) Certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company);

(c) Order of a court, tribunal or arbitral panel adjudicating on the default;

(d) Record of default with the information utility;

(e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;

(f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;

(g) A record of default as available with any credit information company;

(h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891.

33. Rule 4 (3) of the aforesaid Rules states as follows:

4. Application by financial creditor --

xxx xxx xxx

(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

xxx xxx xxx

Section 420 of the Companies Act, 2013 states as follows:

420. Orders of Tribunal--(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) The Tribunal shall send a copy of every order passed under this Section to all the parties concerned.

Rules 11, 34, and 37 of the National Company Law Tribunal Rules, 2016 [**"NCLT Rules"**] state as follows:

11. Inherent Powers.--Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

xxx xxx xxx

34. General Procedure.--(1) In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.

(2) The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT 4.

(3) Every petition or application or reference shall be filed in form as provided in Form No. NCLT 1 with attachments thereto accompanied by Form No. NCLT 2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT 1 accompanied by such attachments thereto along with Form No. NCLT 3.

(4) Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT 6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT 5.

xxx xxx xxx

37. Notice to Opposite Party.- (1) The Tribunal shall issue notice to the Respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT 5 shall be accompanied by a copy of the application with supporting documents.

(2) If the Respondent does not appear on the date specified in the notice in Form No. NCLT 5, the Tribunal, after according reasonable opportunity to the Respondent, shall forthwith proceed ex-parte to dispose of the application.

(3) If the Respondent contests to the notice received Under Sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the Petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record.

A conjoint reading of all these Rules makes it clear that at the stage of the Adjudicating Authority's satisfaction Under Section 7(5) of the Code, the corporate debtor is served with a copy of the application filed with the Adjudicating Authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process *malafide*, the Code prescribes penalties. Thus, Section 65 of the Code reads as follows:

65. Fraudulent or malicious initiation of proceedings.--(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

34. Also, punishment is prescribed Under Section 75 for furnishing false information in an application made by a financial creditor which further deters a financial creditor from wrongly invoking the provisions of Section 7. Section 75 reads as under:

75. Punishment for false information furnished in application.--Where any person furnishes information in the application made Under Section 7, which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material, such person shall be

punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees.

35. Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way-amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the Adjudicating Authority Under Section 60. Section 60(5)(c) reads as follows:

60. Adjudicating Authority for corporate persons.--

xxx xxx xxx

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of--

xxx xxx xxx

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

36. Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan. Also, there is nothing in the Code which interdicts the corporate debtor from pursuing such counterclaims in other judicial fora. Form C dealing with submission of claims by financial creditors in the CIRP Regulations states thus:

Form C
SUBMISSION OF CLAIM BY FINANCIAL CREDITORS
[***Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016***]

[Date]

From

[Name and address of the financial creditor, including address of its registered office and principal office]

To

The Interim Resolution Professional/Resolution Professional,

[Name of the Insolvency Resolution Professional/Resolution Professional]

[Address as set out in public announcement]

Subject: Submission of claim and proof of claim.

Madam/Sir,

[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:

Relevant Particulars		
	Name of the financial creditor	
	Identification number of the financial creditor (If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)	
	Address and email address of the financial creditor for correspondence	
	Total amount of claim (including any interest as at the insolvency commencement date)	
	Details of documents by reference to which the debt can be substantiated	
	Details of how and when debt incurred	
	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
	Details of any security held, the value of the security, and the date it was given	
	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
	List of documents attached to this claim in order to prove the existence and non-payment of claim due to the financial creditor	
(Signature of financial creditor or person authorised to act on his behalf) [Please enclose the authority if this is being submitted on behalf of the financial creditor]		
Name in BLOCK LETTERS		
Position with or in relation to creditor		
Address of person signing		

* PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

DECLARATION

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows:

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the ..... day of ..... 20....., actually indebted to me for a sum of Rs. [insert amount of claim].

2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below:

[Please list the documents relied on as evidence of claim].

3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.

4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].

5. I am/I am not a related party of the corporate debtor, as defined Under Section 5(24) of the Code.

6. I am eligible to join committee of creditors by virtue of proviso to Section 21(2) of the Code even though I am a related party of the corporate debtor.

Date:

Place:

(Signature of the claimant)

VERIFICATION

I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this ..... day of ....., 20...

(Signature of claimant)

[*Note:* In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity.]

37. The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation.
Four policy reasons have been stated by the learned Solicitor General for this shift in legislative policy. *First* is predictability and certainty. *Secondly*, the paramount interest to be safeguarded is that of the corporate debtor and admission into the insolvency resolution process does not prejudice such interest but, in fact, protects it. *Thirdly*, in a situation of financial stress, the cause of default is not relevant; protecting the economic interest of the corporate debtor is more relevant. *Fourthly*, the trigger that would lead to liquidation can only be upon failure of the resolution process.

38. In this context, it is important to differentiate between "claim", "debt" and "default". Each of these terms is separately defined as follows:

3. Definitions.--In this Code, unless the context otherwise requires --

xxx xxx xxx

(6) "claim" means--

(*a*) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(*b*) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

xxx xxx xxx

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;

xxx xxx xxx

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely

"claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process

by financial creditors Under Section 7 and by operational creditors Under Sections 8 and 9 of the Code becomes clear.

Sections 21 and 24 and Article 14: operational creditors have no vote in the committee of creditors.

39. Section 21 of the Code reads as follows:

21. Committee of creditors--(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in Sub-section (6) or Sub-section (6-A) or Sub-section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

(3) Subject to Sub-sections (6) and (6-A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor,--

(*a*) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(*b*) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may--

(*a*) authorize the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(*b*) represent himself in the committee of creditors to the extent of his voting share;

(*c*) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(*d*) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(6-A) Where a financial debt--

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under Clause (*a*) or Sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under Clause (*a*) or Clause (*b*) or Clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative--

(*i*) under Clauses (*a*) and (*c*) of Sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under Clause (*b*) of Sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.

(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered Under Sub-sections (6) and (6-A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors Under Sub-section (9) within a period of seven days of such requisition.

40. Section 24(3), 24(4), and Section 28, which are also material, read as follows:

24. Meeting of committee of creditors --

xxx xxx xxx

(3) The resolution professional shall give notice of each meeting of the committee of creditors to--

(*a*) members of-[committee of creditors, including the authorised representatives referred to in Sub-sections (6) and (6-A) of Section 21 and Sub-section (5)];

(*b*) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(*c*) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in Sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

xxx xxx xxx

xxx xxx xxx

28. Approval of committee of creditors for certain actions.--(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely--

(*a*) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(*b*) create any security interest over the assets of the corporate debtor;

(*c*) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(*d*) record any change in the ownership interest of the corporate debtor;

(*e*) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(*f*) undertake any related party transaction;

(*g*) amend any constitutional documents of the corporate debtor;

(*h*) delegate its authority to any other person;

(*i*) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(*j*) make any change in the management of the corporate debtor or its subsidiary;

(*k*) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(*l*) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(*m*) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions Under Sub-section (1).

(3) No action Under Sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action Under Sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional Under Sub-section (4) to the Board for taking necessary actions against him under this Code. Approval of committee of creditors for certain actions.

41. In this regard, the BLRC Report states:

The creditors committee will have the power to decide the final solution by majority vote in the negotiations. The majority vote requires more than or equal to 75 percent of the creditors committee by weight of the total financial liabilities.....The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors.

The second is that any proposed solution must explicitly account for the IRP costs and the liabilities of the operational creditors within a reasonable period from the approval of the solution if it is approved. The Committee argues that there must be a counterbalance to operational creditors not having a vote on the creditors committee. Thus, they concluded that the dues of the operational creditors must have priority in being paid as an explicit part of the proposed solution. This must be ensured by the RP in evaluating a proposal before bringing it to the creditors committee. If there is ambiguity about the coverage of the liability in the information memorandum that the RP presents to garner solutions, then the RP must ensure that this is clearly stated and accounted for in the proposed solution.

The Joint Parliamentary Committee Report of April, 2016 [**"Joint Parliamentary Committee Report"**] on the Insolvency and Bankruptcy Code also agreed with these observations but modified Section 24 so as to permit operational creditors to be present at the meetings of the committee of creditors, albeit without voting rights, if operational creditors aggregate to 10% or more of the total debts owed by the corporate debtor.

The Joint Parliamentary Committee Report also opined as follows:

21. Role of Operational Creditors-Clause 24

Some of the stakeholders in the memorandum/views furnished before the Committee were of the opinion that whereas operation creditor has right to make application for initiation of corporate insolvency resolution process, operational creditors like workmen, employees, suppliers have not been given any representation in the committee of creditors which is pivotal in whole resolution process. In this regard, one of the stakeholders has suggested that committee of creditors may contain operational creditors as well, with some thresholds.

In this context, while appreciating that the operational creditors are important stakeholders in a company, the Committee took note of the rationale of not including operational creditors in the committee of creditors as indicated in notes on Clause 21 appended with the Bill which states as under:

The committee has to be composed of members who have the capability to assess the commercial viability of the corporate debtor and who are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor. Operational creditors are typically not able to decide on matters relating to commercial viability of the corporate debtor, nor are they typically willing to take the risk of restructuring their debts in order to make the corporate debtor a going concern. Similarly, financial creditors who are also operational creditors will be given representation on the committee of creditors only to the extent of their financial debts. Nevertheless, in order to ensure that the financial creditors do not treat the operational creditors unfairly, any resolution plan must ensure that the operational creditors receive an amount not less than the liquidation value of their debt (assuming the corporate debtor were to be liquidated).

All decisions of the Committee shall be taken by a vote of not less than seventy-five per cent of the voting share. In the event there are no financial creditors for a corporate debtor, the composition and decision-making processes of the corporate debtor shall be specified by the Insolvency and Bankruptcy Board. The Committee shall also have the power to call for information from the resolution professional.

The Committee after due deliberations are of the view that, if not voting rights, operational creditors at least should have presence in the committee of creditors to present their views/concerns on important issues considered at the meetings so that their views/concerns are taken into account by the committee of creditors while finalizing the resolution plan.

The original Insolvency and Bankruptcy Bill did not allow operational creditors to attend the committee of creditors at all. This Bill was amended whilst in the form of a Bill, the Joint Parliamentary Committee deciding as follows:

The Committee, therefore, decided to modify Clause 24(3) and (4) as given under:

Modified Clause 24(3)--

The resolution professional shall give notice of each meeting of the committee of creditors to-

(a) members of committee of creditors;

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

Modified Clause 24(4)--

The directors, partners and one representative of operational creditors as referred to in Sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

42. What is also of importance is the fact that Expert Committees have been set up by the Government to oversee the working of the Code. Thus, the report of the Insolvency Law Committee of March, 2018, after examining the working of the Code, thought it fit not to amend the Code so as to give operational creditors the right to vote. This was stated as follows:

This rationale still holds true, and thus it was deemed fit not to amend the constitution of the CoC. Further, operational creditors whose aggregate dues are not less than ten percent of the debt have a right to attend the meetings of the CoC. Also, under the resolution plan, they are guaranteed at least the liquidation value.

...The Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code.

43. Under the Code, the committee of creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The committee of creditors is required to evaluate the resolution plan on the basis of feasibility and viability. Thus, Section 30(4) states:

30. Submission of resolution plan.--

xxx xxx xxx

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible Under Section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under Clause (c) of Section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to Clause (c) of Section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to Sub-section (3) of Section 12, and the corporate insolvency resolution process shall be completed within the period specified in that Sub-section.

Provided also that the eligibility criteria in Section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

xxx xxx xxx

It is important to bear in mind that once the resolution plan is approved by the committee of creditors and thereafter by the Adjudicating Authority, the aforesaid plan is binding on all stakeholders as follows:

31. Approval of resolution plan--(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors Under Sub-section (4) of Section 30 meets the requirements as referred to in Sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this Sub-section, satisfy that the resolution plan has provisions for its effective implementation.

xxx xxx xxx

44. Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

45. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law [**"UNCITRAL Guidelines"**] recognizes the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

Ensuring equitable treatment of similarly situated creditors

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim

in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by 12 UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.

46. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster Under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

38. Mandatory contents of the resolution plan --

(1) A resolution plan shall identify specific sources of funds that will be used to pay the--

(*a*) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;

(*b*) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(*c*) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

Post amendment, Regulation 38 reads as follows:

38. Mandatory contents of the resolution plan --

(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

xxx xxx xxx

47. The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors.

48. For all the aforesaid reasons, we do not find that operational creditors are discriminated against or that Article 14 has been infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness.

Section 12A is not violative of Article 14

49. Section 12A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 06.06.2018. It reads as follows:

12-A. Withdrawal of application admitted Under Section 7, 9 or 10.--The Adjudicating Authority may allow the withdrawal of application admitted Under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

50. The ILC Report of March 2018, which led to the insertion of Section 12A, stated as follows:

29.1 Under Rule 8 of the CIRP Rules, the NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted [*Lokhandwala Kataria Construction Pvt. Ltd. v. Ninus Finance & Investment Manager LLP*, Civil Appeal No. 9279 of 2017*; Mothers Pride Dairy India Private Limited v. Portrait Advertising and Marketing Private Limited*, Civil Appeal No. 9286/2017; *Uttara Foods and Feeds Private Limited v. Mona Pharmacem*, Civil Appeal No. 18520/2017]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that "*all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*" Thus, it was agreed that once the CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.

29.2 On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor,

for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant Rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage (as observed by the Hon'ble Supreme Court in the case of *Uttara Foods and Feeds Private Limited v. Mona Pharmacem*, Civil Appeal No. 18520/2017) and even otherwise, as the issue can be specifically addressed by amending Rule 8 of the CIRP Rules.

51. Before this Section was inserted, this Court, Under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by the NCLT or the NCLAT.

Regulation 30A of the CIRP Regulations states as under:

30A. Withdrawal of application--(1) An application for withdrawal Under Section 12-A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest Under Regulation 36A.

(2) The application in sub-Regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of Clauses (c) and (d) of Regulation 31 till the date of application.

(3) The committee shall consider the application made Under Sub-Regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.

(4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application Under Sub-Regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(5) The Adjudicating Authority may, by order, approve the application submitted Under Sub-Regulation (4).

This Court, by its order dated 14.12.2018 in **Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal and Ors.**, SLP (Civil) No. 31557/2018, has stated that Regulation 30A(1) is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest Under Regulation 36A.

52. It is clear that once the Code gets triggered by admission of a creditor's petition Under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within

30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers Under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case.

53. The main thrust against the provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that Under Section 60 of the Code, the committee of creditors do not have the last word on the subject. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision Under Section 60 of the Code. For all these reasons, we are of the view that Section 12A also passes constitutional muster.

Evidence provided by private information utilities: only prima facie evidence of default

54. A frontal attack was made by Shri Mukul Rohatgi on the ground that private information utilities that have been set up are not governed by proper norms. Also, the evidence by way of loan default contained in the records of such utility cannot be conclusive evidence of what is stated therein. The BLRC Report had stated:

Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court..... Hence, the Committee envisions a competitive industry of "information utilities" who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay.

55. The setting up of information utilities was preceded by a regime of information companies which were referred to as credit information companies [**"CICs"**], as recommended by the Siddiqui Working Group in 1999. The Attorney General pointed out, in his written submission, that:

In 2013, the RBI constituted another Committee under the chairmanship of Aditya Puri, MD, HDFC Bank to examine reporting formats used by CICs and other related issues. The Committee's report led to the standardization of data formats for reporting corporate, consumer and MFI data by all credit institutions and streamlining the process of data submission by credit institutions to CICs. In 2015, all credit institutions were directed by RBI to become members of all the CICs and submit current and historical data about specified borrower to them and to update it regularly.

The purpose of setting up the above regime of information utilities was to reduce information asymmetry for improved credit risk assessment and to improve recovery processes.

The setting up of IUs marks a shift in the above position as not only is the information with IUs used to reduce information asymmetry, but it is also to be treated as prima facie evidence of the transaction for the purpose of IBC proceedings. This assists in improving the timelines for the resolution process.

56. The Information Utilities Regulations, in particular Regulations 20 and 21, make it clear that on receipt of information of default, an information utility shall expeditiously undertake the process of authentication and verification of information. Regulations 20 and 21 read as follows:

20. Acceptance and receipt of information--(1) An information utility shall accept information submitted by a user in Form C of the Schedule.

(2) On receipt of the information submitted Under Sub-Regulation (1), the information utility shall--

(*a*) assign a unique identifier to the information, including records of debt;

(*b*) acknowledge its receipt, and notify the user of--

(*i*) the unique identifier of the information;

(*ii*) the terms and conditions of authentication and verification of information; and

(*iii*) the manner in which the information may be accessed by other parties.

21. Information of default--(1) On receipt of information of default, an information utility shall expeditiously undertake the processes of authentication and verification of the information.

(2) On completion of the processes of authentication and verification Under Sub-Regulation (1), the information utility shall communicate the information of default, and the status of authentication to registered users who are--

(*a*) creditors of the debtor who has defaulted;

(*b*) parties and sureties, if any, to the debt in respect of which the information of default has been received.

57. The aforesaid Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, as has been conceded by the learned Attorney General,

is only *prima facie* evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail.

Resolution professional has no adjudicatory powers.

58. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:

18. Duties of interim resolution professional.--(1) The interim resolution professional shall perform the following duties, namely--

(*a*) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to--

(*i*) business operations for the previous two years;

(*ii*) financial and operational payments for the previous two years;

(*iii*) list of assets and liabilities as on the initiation date; and

(*iv*) such other matters as may be specified;

(*b*) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made Under Sections 13 and 15;

(*c*) constitute a committee of creditors;

(*d*) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(*e*) file information collected with the information utility, if necessary; and

(*f*) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including--

(*i*) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(*ii*) assets that may or may not be in possession of the corporate debtor;

(*iii*) tangible assets, whether movable or immovable;

(*iv*) intangible assets including intellectual property;

(*v*) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(*vi*) assets subject to the determination of ownership by a court or authority;

(*g*) to perform such other duties as may be specified by the Board.

Explanation.--For the purposes of this section, the term "assets" shall not include the following, namely--

(*a*) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(*b*) assets of any Indian or foreign subsidiary of the corporate debtor; and

(*c*) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

59. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows:

10. Substantiation of claims.--The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

xxx xxx xxx

12. Submission of proof of claims.--(1) Subject to sub-Regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-Regulation (2) is a financial creditor Under Regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

13. Verification of claims.--(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be -

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

14. Determination of amount of claim.--(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him. (2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made Under Sub-Regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.

It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a "determination" Under Regulation 35A, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination made as follows:

35A. Preferential and other transactions.--(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered Under Sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered Under Sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination Under Sub-Regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.

60. As opposed to this, the liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims Under Sections 38 to 40 of the Code. Sections 41 and 42, by way of contrast between the powers of the liquidator and that of the resolution professional, are set out hereinbelow:

41. Determination of valuation of claims--The liquidator shall determine the value of claims admitted Under Section 40 in such manner as may be specified by the Board.

42. Appeal against the decision of liquidator--A creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision.

It is clear from these Sections that when the liquidator "determines" the value of claims admitted Under Section 40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the Adjudicating Authority Under Section 42 of the Code.

61. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the committee of creditors Under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority.

Constitutional validity of Section 29A.

62. Section 29A reads as follows:

29A. Persons not eligible to be resolution applicant.--A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person--

(*a*) is an undischarged insolvent;

(*b*) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(*c*) at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan:

Provided further that nothing in this Clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.--For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution

of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.--For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this Clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(*d*) has been convicted for any offence punishable with imprisonment--

(*i*) for two years or more under any Act specified under the Twelfth Schedule; or

(*ii*) for seven years or more under any other law for the time being in force:

Provided that this Clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this Clause shall not apply in relation to a connected person referred to in Clause (*iii*) of Explanation I;

(*e*) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

Provided that this Clause shall not apply in relation to a connected person referred to in Clause (iii) of Explanation I;

(*f*) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(*g*) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

Provided that this Clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(*h*) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(*i*) is subject to any disability, corresponding to Clauses (*a*) to (*h*), under any law in a jurisdiction outside India; or

(*j*) has a connected person not eligible under Clauses (*a*) to (*i*).

Explanation I.--For the purposes of this clause, the expression "connected person" means--

(*i*) any person who is the promoter or in the management or control of the resolution applicant; or

(*ii*) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(*iii*) the holding company, subsidiary company, associate company or related party of a person referred to in Clauses (*i*) and (*ii*):

Provided that nothing in Clause (*iii*) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

Explanation II.--For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely--

(*a*) a scheduled bank;

(*b*) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(*c*) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in Regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(*c*) an asset reconstruction company registered with the Reserve Bank of India Under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(*e*) an Alternate Investment Fund registered with the Securities and Exchange Board of India;

(*f*) such categories of persons as may be notified by the Central Government.

63. This Section was first introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, which amended the Insolvency and Bankruptcy Code on 23.11.2017. The Finance Minister while moving the Amendment Bill stated as follows:

The core and the soul of this new Ordinance is really Clause 5, which is Section 29A of the original Bill. I may just explain that once a company goes into the resolution process, then applications would be invited with regard to the potential resolution proposals as far as the company is concerned or the enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act, and, therefore, Clause 29A introduces those who are not eligible to apply. For instance, there is a Clause with regard to an undischarged insolvent who is not eligible to apply; a person who has been disqualified under the Companies Act to act as a Director cannot apply; and a person who is prohibited under the SEBI Act cannot apply. So these are statutory disqualifications. And, there is also a disqualification in Clause (c) with regard to those who are corporate debtors and who, as on the date of the application making a bid, do not operationalize the account by paying the interest itself, i.e., you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively, this Clause will mean that those, who are in management and on account of whom this insolvent or the non-performing asset has arisen, will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational, and yet I would like to apply and get the same enterprise back at a discounted value, for this is not the object of this particular Act itself. So Clause 5 has been brought in with that purpose in mind.

The Statement of Objects and Reasons for the aforesaid amendment states:

2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.

This Court has held in **ArcelorMittal** (supra):

27. A purposive interpretation of Section 29A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with Sub-clauses (c), (f), (i) and (j) thereof.

28. It will be noticed that the opening lines of Section 29A contained in the Ordinance of 2017 are different from the opening lines of Section 29A as contained in the Amendment Act of 2017. What

is important to note is that the phrase "*persons acting in concert*" is conspicuous by its absence in the Ordinance of 2017. The concepts of "*promoter*", "*management*" and "*control*" which were contained in the opening lines of Section 29A under the Ordinance have now been transferred to Sub-clause (c) in the Amendment Act of 2017. It is, therefore, important to note that the Amendment Act of 2017 opens with language which is of wider import than that contained in the Ordinance of 2017, evincing an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.

29. The opening lines of Section 29A of the Amendment Act refer to a de facto as opposed to a de jure position of the persons mentioned therein. This is a typical instance of a "*see through provision*", so that one is able to arrive at persons who are actually in "*control*", whether jointly, or in concert, with other persons. A wooden, literal, interpretation would obviously not permit a tearing of the corporate veil when it comes to the "*person*" whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as Section 29A, alone governs. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in *Salomon* v. *A Salomon and Co. Ltd.* [1897] AC 22 will not apply. For it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan.

Similarly in **Chitra Sharma v. Union of India**, Writ Petition (Civil) No. 744 of 2017 [decided on 09.08.2018], this Court observed as follows:

31. Parliament has introduced Section 29A into the IBC with a specific purpose. The provisions of Section 29A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process.....

32..... The Court must bear in mind that Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a backdoor entry to erstwhile managements in the CIRP. Section 30 of the IBC, as amended, also clarifies that a resolution plan of a person who is ineligible Under Section 29A will not be considered by the CoC.....

Retrospective application

64. It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing [See State Bank's Staff Union (Madras Circle) v. Union of India and Ors., MANU/SC/0564/2005 : (2005) 7 SCC 584 (at paragraph 21)]. In **ArcelorMittal** (supra), this Court has observed that a resolution applicant has no vested right for consideration or approval of its resolution plan as follows:

79. Take the next stage Under Section 30. A Resolution Professional has presented a resolution plan to the committee of creditors for its approval, but the committee of creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.

65. This being the case, it is clear that no vested right is taken away by application of Section 29A. However, Shri Viswanathan pointed out the judgments in **Ritesh Agarwal and Anr. v. SEBI and Ors.,** MANU/SC/7687/2008 : (2008) 8 SCC 205 (at paragraph 25), **K.S. Paripoornan v. State of Kerala and Ors.,** MANU/SC/0200/1995 : (1994) 5 SCC 593 (at paragraphs 60-66), **Darshan Singh v. Ram Pal Singh and Anr.,** MANU/SC/0378/1991 : 1992 Supp (1) SCC 191 (at paragraph 35), **Pyare Lal Sharma v. Managing Director and Ors.,** MANU/SC/0428/1989 : (1989) 3 SCC 448 (at paragraph 21), **P.D. Aggarwal and Ors. v. State of U.P. and Ors.,** MANU/SC/0671/1987 : (1987) 3 SCC 622 (at paragraph 18), and **Govind Das and Ors. v. Income Tax Officer and Anr.,** MANU/SC/0248/1975 : (1976) 1 SCC 906 (at paragraphs 6 and 11), to argue that if a Section operates on an antecedent set of facts, but affects a vested right, it can be held to be retrospective, and unless the legislature clearly intends such retrospectivity, the Section should not be construed as such. Each of these judgments deals with different situations in which penal and other enactments interfere with vested rights, as a result of which, they were held to be prospective in nature. However, in our judgment in **ArcelorMittal** (supra), we have already held that resolution applicants have no vested right to be considered as such in the resolution process. Shri Mukul Rohatgi, however, argued that this judgment is distinguishable as no question of constitutional validity arose in this case, and no issue as to the vested right of a promoter fell for consideration. We are of the view that the observations made in **ArcelorMittal** (supra) directly arose on the facts of the case in order to oust the Ruias as promoters from the pale of consideration of their resolution plan, in which context, this Court held that they had no vested right to be considered as resolution applicants. Accordingly, we follow the aforesaid judgment. Since a resolution applicant who applies Under Section 29A(c) has no vested right to apply for being considered as a resolution applicant, this point is of no avail.

Section 29A(c) not restricted to malfeasance

66. According to learned Counsel for the Petitioners, Section 29A(c) treats unequals as equals. A good erstwhile manager cannot be lumped with a bad erstwhile manager. Where an erstwhile manager is not guilty of malfeasance or of acting contrary to the interests of the corporate debtor, there is no reason why he should not be permitted to take part in the resolution process. After all, say the counsel for the Petitioners, maximization of value of the assets of the corporate debtor is an important objective to be achieved by the Code. Keeping out good erstwhile managers from the resolution process would go contrary to this objective.

67. This objection by the Petitioners was countered by the learned Attorney General and Solicitor General, stating that the various clauses of Section 29A would show that a person need not be a criminal in order to be kept out of the resolution process. For example, Under Section 29A(a), it is clear that a person may be an undischarged insolvent for no fault of his. Equally, Under Section 29A(e), a person may be disqualified to act as a director under the Companies Act, 2013, say, where he has not furnished the necessary financial statements on time [see Section 164(2)(a)[4] of the Companies Act, 2013].

68. The learned Counsel for some of the Petitioners have also argued that the proviso to Section 35(1)(f) that was added by the Insolvency and Bankruptcy Code (Amendment) Act, 2017 [dated 19.01.2018] with retrospective effect from 23.11.2017 is manifestly arbitrary and violative of Article 14 of the Constitution of India. The proviso to Section 35(1)(f) reads as follows:

35. Powers and duties of liquidator--(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:

xxx xxx xxx

(*f*) subject to Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

xxx xxx xxx

69. According to the learned Counsel for the Petitioners, when immovable and movable property is sold in liquidation, it ought to be sold to any person, including persons who are not eligible to be resolution applicants as, often, it is the erstwhile promoter who alone may purchase such properties piecemeal by public auction or by private contract. The same rationale that has been provided earlier in this judgment will apply to this proviso as well - there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation. Further, given the categories of persons who are ineligible Under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the Section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected.

<u>The one-year period in Section 29A(c) and NPAs</u>

70. It is clear that Section 29A goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with the guidelines of the RBI, would be a person who though able to pay, does not

pay. An NPA, on the other hand, refers to the account belonging to a person that is declared as such under guidelines issued by the RBI. It is important at this juncture to advert to the aforesaid guidelines. The RBI's Master Circular on *Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances* dated 01.07.2015 [**"RBI Master Circular"**] consolidates instructions issued upto 30.06.2015 on NPAs. Clause 2.1 defines NPAs as under:

2. DEFINITIONS

2.1 Non-performing Assets

2.1.1 An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank.

2.1.2 A non-performing asset (NPA) is a loan or an advance where;

i. interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,

ii. the account remains 'out of order' as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC),

iii. the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,

iv. the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops,

v. the instalment of principal or interest thereon remains overdue for one crop season for long duration crops,

vi. the amount of liquidity facility remains outstanding for more than 90 days, in respect of a securitization transaction undertaken in terms of guidelines on securitization dated February 1, 2006.

vii. in respect of derivative transactions, the overdue receivables representing positive mark-to-market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.

2.1.3 In case of interest payments, banks should, classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter.

2.1.4 In addition, an account may also be classified as NPA in terms of paragraph 4.2.4 of this Master Circular.

Clause 4 of the RBI Master Circular deals with asset classification as follows:

4. ASSET CLASSIFICATION

4.1 Categories of NPAs

Banks are required to classify non-performing assets further into the following three categories based on the period for which the asset has remained non-performing and the realisability of the dues:

. Substandard Assets

. Doubtful Assets

. Loss Assets

4.1.1 Substandard Assets

With effect from March 31, 2005, a substandard asset would be one, which has remained NPA for a period less than or equal to 12 months. Such an asset will have well defined credit weaknesses that jeopardize the liquidation of the debt and are characterized by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.

4.1.2 Doubtful Assets

With effect from March 31, 2005, an asset would be classified as doubtful if it has remained in the substandard category for a period of 12 months. A loan classified as doubtful has all the weaknesses inherent in assets that were classified as substandard, with the added characteristic that the weaknesses make collection or liquidation in full - on the basis of currently known facts, conditions and values - highly questionable and improbable.

4.1.3 Loss Assets

A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value.

xxx xxx xxx

71. What is clear from the aforesaid circular is that accounts are declared NPA only if defaults made by a corporate debtor are not resolved (for example, interest on and/or instalment of the principal remaining overdue for a period of more than 90 days in respect of a term loan). Post declaration of such NPA, what is clear is that a substandard asset would then be NPA which has remained as such for a period of twelve months. In short, a person is a defaulter when an instalment and/or interest on the principal remains overdue for more than three months, after which, its account is declared NPA. During the period of one year thereafter, since it is now classified as a substandard asset, this grace period is given to such person to pay off the debt. During this grace

period, it is clear that such person can bid along with other resolution applicants to manage the corporate debtor. What is important to bear in mind is also the fact that, prior to this one-year-three-month period, banks and financial institutions do not declare the accounts of corporate debtors to be NPAs. As a matter of practice, they first try and resolve disputes with the corporate debtor, after which, the corporate debtor's account is declared NPA. As a matter of legislative policy therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the corporate debtor and its financial creditors sit together to resolve defaults that continue), it is stated to be ineligible to become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the aforesaid period is obviously a person who is ailing itself. The saying of Jesus comes to mind - "if the blind lead the blind, both shall fall into the ditch." The legislative policy, therefore, is that a person who is unable to service its own debt beyond the grace period referred to above, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with. Neither can the period of one year be found fault with, as this is a policy matter decided by the RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset. The ineligibility attaches only after this one year period is over as the NPA now gets classified as a doubtful asset.

72. The Committee set up by the Government to oversee the working of the Code has, in its Report of March 2018, also considered this aspect of the matter and has opined as follows:

14.8 In regards to the disqualification under Clause (c) for having an NPA account, it was also stated to the Committee that the time period for existence of the NPA account must be increased from one year to three years. The reason provided was that a downturn in a typical business cycle was most likely to extend over a year. However, in the absence of any concrete data, the Committee felt that there is no conclusive way to determine what the ideal time period for existence of an NPA should be for the disqualification to apply. *The Committee felt that the Code was a relatively new legislation and therefore, it would be prudent to wait and allow industry experience to emerge for a few years before any amendment is made to the NPA holding period Under Section 29A(c). In relation to applicability of Section 29A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to Section 29A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP.*

Related party

73. A constitutional challenge has been raised against Section 29A(j) read with the definition of "related party". "Related party" is defined in the Code as follows:

5. Definitions.--In this Part, unless the context otherwise requires --

xxx xxx xxx

(24) "related party", in relation to a corporate debtor, means--

(*a*) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(*b*) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(*c*) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(*d*) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital;

(*e*) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital;

(*f*) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(*g*) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(*h*) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(*i*) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(*j*) any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;

(*k*) any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;

(*l*) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(*m*) any person who is associated with the corporate debtor on account of--

(*i*) participation in policy-making processes of the corporate debtor; or

(*ii*) having more than two directors in common between the corporate debtor and such person; or

(*iii*) interchange of managerial personnel between the corporate debtor and such person; or

(*iv*) provision of essential technical information to, or from, the corporate debtor;

(24A) "related party", in relation to an individual, means--

(*a*) a person who is a relative of the individual or a relative of the spouse of the individual;

(*b*) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(*c*) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(*d*) a private company in which the individual is a director and holds along with his relatives, more than two per cent of its share capital;

(*e*) a public company in which the individual is a director and holds along with relatives, more than two per cent of its paid-up share capital;

(*f*) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(*g*) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(*h*) a person on whose advice, directions or instructions, the individual is accustomed to act;

(*i*) a company, where the individual or the individual along with its related party, own more than fifty per cent of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.--For the purposes of this Clause --

(*a*) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely--

(*i*) members of a Hindu Undivided Family,

(*ii*) husband,

(*iii*) wife,

(*iv*) father,

(*v*) mother,

(*vi*) son,

(*vii*) daughter,

(*viii*) son's daughter and son,

(*ix*) daughter's daughter and son,

(*x*) grandson's daughter and son,

(*xi*) granddaughter's daughter and son,

(*xii*) brother,

(*xiii*) sister,

(*xiv*) brother's son and daughter,

(*xv*) sister's son and daughter,

(*xvi*) father's father and mother,

(*xvii*) mother's father and mother,

(*xviii*) father's brother and sister,

(*xix*) mother's brother and sister, and

(*b*) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;

74. What is argued by the Petitioners is that the mere fact that somebody happens to be a relative of an ineligible person cannot be good enough to oust such person from becoming a resolution applicant, if he is otherwise qualified. We were urged, by Shri Viswanathan in particular, to apply the doctrine of nexus that is well known and that has been applied by this Court in several judgments in other legal contexts, more particularly, in **Attorney General for India and Ors. v. Amratlal Prajivandas and Ors.,** MANU/SC/0774/1994 : (1994) 5 SCC 54. Paragraph 44 reads as under:

44. It is contended by the counsel for the Petitioners that extending the provisions of SAFEMA to the relatives, associates and other 'holders' is again a case of overreaching or of over-breadth, as it may be called -- a case of excessive Regulation. It is submitted that the relatives or associates of a person falling under Clause *(a)* or Clause *(b)* of Section 2(2) of SAFEMA may have acquired properties of their own, may be by illegal means but there is no reason why those properties be forfeited under SAFEMA just because they are related to or are associates of the detenu or convict, as the case may be. It is pointed out that the definition of 'relative' in Explanation (2) and of

'associates' in Explanation (3) are so wide as to bring in a person even distantly related or associated with the convict/detenu, within the net of SAFEMA, and once he comes within the net, all his illegally acquired properties can be forfeited under the Act. In our opinion, the said contention is based upon a misconception. SAFEMA is directed towards forfeiture of "illegally acquired properties" of a person falling under Clause *(a)* or Clause *(b)* of Section 2(2). The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu -- whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu -- whether in his own name or in the name of his relatives and associates. It is to counteract the several devices that are or may be adopted by persons mentioned in Clauses *(a)* and *(b)* of Section 2(2) that their relatives and associates mentioned in Clauses *(c)* and *(d)* of the said Sub-section are also brought within the purview of the Act. The fact of their holding or possessing the properties of convict/detenu furnishes the link between the convict/detenu and his relatives and associates. Only the properties of the convict/detenu are sought to be forfeited, wherever they are. The idea is to reach his properties in whosoever's name they are kept or by whosoever they are held. The independent properties of relatives and friends, which are not traceable to the convict/detenu, are not sought to be forfeited nor are they within the purview of SAFEMA [That this was the object of the Act is evident from para 4 of the preamble which states: "And whereas such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants." We are not saying that the preamble can be utilized for restricting the scope of the Act, we are only referring to it to ascertain the object of the enactment and to reassure ourselves that the construction placed by us accords with the said object.]. We may proceed to explain what we say. Clause *(c)* speaks of a relative of a person referred to in Clause *(a)* or Clause *(b)* (which speak of a convict or a detenu). Similarly, Clause *(d)* speaks of associates of such convict or detenu. If we look to Explanation (3) which specifies who the associates referred to in Clause *(d)* are, the matter becomes clearer. 'Associates' means -- *(i)* any individual who had been or is residing in the residential premises (including outhouses) of such person ['such person' refers to the convict or detenu, as the case may be, referred to in Clause *(a)* or Clause *(b)*]; *(ii)* any individual who had been or is managing the affairs or keeping the accounts of such convict/detenu; *(iii)* any association of persons, body of individuals, partnership firm or private company of which such convict/detenu had been or is a member, partner or director; *(iv)* any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm or private company referred to in Clause *(iii)* at any time when such person had been or is a member, partner or director of such association of persons, body of individuals, partnership firm or private company; *(v)* any person who had been or is managing the affairs or keeping the accounts of any association of persons, body of individuals, partnership firm or private company referred to in Clause *(iii)*; *(vi)* the trustee of any trust where *(a)* the trust has been created by such convict/detenu; or *(b)* the value of the assets contributed by such convict/detenu to the trust amounts, on the date of contribution not less than 20% of the value of the assets of the trust on that date; and *(vii)* where the competent authority,

for reasons to be recorded in writing, considers that any properties of such convict/detenu are held on his behalf by any other person, such other person. It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf". All such property is liable to be forfeited. The language of this Section is indicative of the ambit of the Act. Clauses *(c)* and *(d)* in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties. By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate -- it does not matter whether he intends such a person to be a mere name-lender or whether he really intends that such person shall be the real owner and/or possessor thereof -- or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates -- in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3*(c)*. In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)*(e)* are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property -- even though purchased from a convict/detenu -- is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued Under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict. We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu. There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associate. In this view of the matter, the apprehension and contention of the Petitioners in this behalf must be held to be based upon a mistaken premise. The bringing in of the relatives and associates or of the persons mentioned in Clause (e) of Section 2(2) is thus neither discriminatory nor incompetent apart from the protection of Article 31-B.

75. We are of the view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24A) show that such persons must be "connected" with the resolution applicant within the meaning of Section 29A(j). This being the case, the said categories of persons who are

collectively mentioned under the caption "relative" obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person cannot possibly be disqualified Under Section 29A(j). All the categories in Section 29A(j) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression "related party", therefore, and "relative" contained in the definition Sections must be read *noscitur a sociis* with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant.

76. An argument was also made that the expression "connected person" in Explanation I, Clause (ii) to Section 29A(j) cannot possibly refer to a person who may be in management or control of the business of the corporate debtor in future. This would be arbitrary as the explanation would then apply to an indeterminate person. This contention also needs to be repelled as Explanation I seeks to make it clear that if a person is otherwise covered as a "connected person", this provision would also cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan. Therefore, any such person is not indeterminate at all, but is a person who is in the saddle of the business of the corporate debtor either at an anterior point of time or even during implementation of the resolution plan. This disposes of all the contentions raising questions as to the constitutional validity of Section 29A(j).

Exemption of micro, small, and medium enterprises from Section 29A

77. The ILC Report of March 2018 found that micro, small, and medium enterprises form the foundation of the economy and are key drivers of employment, production, economic growth, entrepreneurship, and financial inclusion.

78. Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 classifies enterprises depending upon whether they manufacture or produce goods, or are engaged in providing and rendering services as micro, small, or medium, depending upon certain investments made, as follows:

7. Classification of enterprises.--(1) Notwithstanding anything contained in Section 11-B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of Sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, associations of persons, co-operative society, partnership firm, company or undertaking, by whatever name called --

(*a*) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as--

(*i*) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;

(*ii*) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(*iii*) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(*b*) in the case of the enterprises engaged in providing or rendering of services, as--

(*i*) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;

(*ii*) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

(*iii*) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

xxx xxx xxx

79. The ILC Report of 2018 exempted these industries from Section 29A(c) and 29A(h) of the Code, their rationale for doing so being contained in paragraph 27.4 of the Report, which reads as follows:

27.4 Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or operational creditors of MSMEs may take it to insolvency under the Code. However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of MSMEs, the Committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for the MSME in insolvency. The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants.

80. Thus, the rationale for excluding such industries from the eligibility criteria laid down in Section 29A(c) and 29A(h) is because qua such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but to liquidation. Following upon the Insolvency Law Committee's Report, Section 240A has been inserted in the Code with retrospective effect from 06.06.2018 as follows:

240-A. Application of this Code to micro, small and medium enterprises--(1) Notwithstanding anything to the contrary contained in this Code, the provisions of Clauses (c) and (h) of Section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

(2) Subject to Sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall--

(*a*) not apply to micro, small and medium enterprises; or

(*b*) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

(3) A draft of every notification proposed to be issued Under Sub-section (2), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(4) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(5) The period of thirty days referred to in Sub-section (3) shall not include any period during which the House referred to in Sub-section (4) is prorogued or adjourned for more than four consecutive days.

(6) Every notification issued under this Section shall be laid, as soon as may be after it is issued, before each House of Parliament.

Explanation.--For the purposes of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such Under Sub-section (1) of Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006).

81. It can thus be seen that when the Code has worked hardship to a class of enterprises, the Committee constituted by the Government, in overseeing the working of the Code, has been alive to such problems, and the Government in turn has followed the recommendations of the Committee in enacting Section 240A. This is an important instance of how the executive continues to monitor the application of the Code, and exempts a class of enterprises from the application of some of its provisions in deserving cases. This and other amendments that are repeatedly being made to the Code, and to subordinate legislation made thereunder, based upon Committee Reports which are looking into the working of the Code, would also show that the legislature is alive to serious anomalies that arise in the working of the Code and steps in to rectify them.

Section 53 of the Code does not violate Article 14.

82. An argument has been made by counsel appearing on behalf of the Petitioners that in the event of liquidation, operational creditors will never get anything as they rank below all other creditors, including other unsecured creditors who happen to be financial creditors. This, according to them, would render Section 53 and in particular, Section 53(1)(f) discriminatory and manifestly arbitrary and thus, violative of Article 14 of the Constitution of India.

Section 53(1) reads as follows:

53. Distribution of assets.--(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from

the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely--

(*a*) the insolvency resolution process costs and the liquidation costs paid in full;

(*b*) the following debts which shall rank equally between and among the following--

(*i*) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(*ii*) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;

(*c*) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(*d*) financial debts owed to unsecured creditors;

(*e*) the following dues shall rank equally between and among the following:

(*i*) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(*ii*) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(*f*) any remaining debts and dues;

(*g*) preference shareholders, if any; and

(*h*) equity shareholders or partners, as the case may be.

xxx xxx xxx

83. The BLRC Report, which led to the enactment of the Insolvency Code, in dealing with this aspect of the matter, has stated:

The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value

capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer.

xxx xxx xxx

For the remaining creditors who participate in the collective action of Liquidation, the Committee debated on the waterfall of liabilities that should hold in Liquidation in the new Code. Across different jurisdictions, the observation is that secured creditors have first priority on the realizations, and that these are typically paid out net of the costs of insolvency resolution and Liquidation. In order to bring the practices in India in-line with the global practice, and to ensure that the objectives of this proposed Code is met, the Committee recommends that the waterfall in Liquidation should be as follows:

1. Costs of IRP and liquidation.

2. Secured creditors and Workmen dues capped up to three months from the start of IRP.

3. Employees capped up to three months.

4. Dues to unsecured financial creditors, debts payable to workmen in respect of the period beginning twelve months before the liquidation commencement date and ending three months before the liquidation commencement date;

5. Any amount due to the State Government and the Central Government in respect of the whole or any part of the period of two years before the liquidation commencement date; any debts of the secured creditor for any amount unpaid following the enforcement of security interest

6. Remaining debt

7. Surplus to shareholders.

84. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail.

Epilogue

85. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated 'errors', ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the Petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the Petitioners.

86. We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have been disposed of by the Adjudicating Authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. Eighty cases have since been resolved by resolution plans being accepted. Of these eighty cases, the liquidation value of sixty-three such cases is INR 29,788.07 crores. However, the amount realized from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, the Reserve Bank of India has come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016-2017, to INR 9161.09 crores in 2017-2018, and to INR 13195.20 crores for the first six months of 2018-2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14530.47 crores in 2016-2017, to INR 18469.25 crores in 2017-2018, and to INR 18798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs.

---

[1]**Lochner v. New York**, MANU/USSC/0253/1905 : 198 U.S. 45, 75-76 (1905).

[2]**New State Ice Co. v. Liebman**, MANU/USSC/0161/1932 : 285 U.S. 262, 310-311 (1932).

[3]**Ferguson v. Skrupa**, MANU/USSC/0067/1963 : 372 U.S. 726, 728-733 (1962).

[4]**164. Disqualifications for appointment of director --**

xxx xxx xxx

(2) No person who is or has been a director of a company which--

(*a*) has not filed financial statements or annual returns for any continuous period of three financial years; or

(*b*) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so:
Provided that where a person is appointed as a director of a company which is in default of Clause (*a*) or Clause (*b*), he shall not incur the disqualification for a period of six months from the date of his appointment.

Back to Index

MANU/SC/0385/2005

Neutral Citation: 2005/INSC/272

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 9258-9265 and 10092-10098 of 2003

Decided On: 11.05.2005

Appellants: Technip S.A. **Vs.** Respondent: SMS Holding (Pvt.) Ltd. and Ors.

Hon'ble Judges/Coram:

Ruma Pal, Dr. Arijit Pasayat and C.K. Thakker, JJ.

Subject: Company

Subject: Law of Evidence

Authorities Referred:

Cheshire and Norths Private International Law (12th Edn.)

Prior History:

From the Judgment and Order dated 27.10.2003 of the Securities Appellate Tribunal, Bombay in A. Nos. 79, 80, 85, 91, 104, 105 and 119/2002 and 1 of 2003

Disposition:
Appeal Allowed

Case Note:

Company - take over - Regulations 2, 3, 10, 11 and 12 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997, Sections 15Z and 356I of Securities and Exchange Board of India Act, 1992, Section 7 (1) of Foreign Awards Act, Foreign Exchange Regulations Act, 1973, Section 45 of Evidence Act, 1972, Section 23A of Income Tax Act, 1922 and Monopolies and Restrictive Trade Practices Act, 1969 - whether Technip acquired control of SEAMEC through Coflexip in April 2000 or in July 2001 - admittedly both Coflexip and Technip incorporated according to and under laws of France thus domiciled in France - issue relating to their internal affairs to be resolved by applying

law of their domiciled - no evidence that Technip obtained de facto control of Coflexip in April 2000 - evidence adduced suggested nothing more than strategic alliance - mere fact that in two annual general meetings of Coflexip former was in majority cannot by itself establish its control over Coflexip - Technip never exerted its influence over any policy matters of Coflexip - Technip obtained control of Coflexip in July 2001 and violated Regulations 10 and 12 by acquiring 58.24% of shares/voting rights and control in SEAMEC in July 2001 without making any public offer - Technip rightly directed by SEBI to make public announcement as required under Regulations within 45 days of its order taking 03.07.2001 as specified date for calculation of offered price - Technip also directed to pay interest at rate of 15% per annum to willing minority shareholders of SEAMEC for delayed public announcement.

Case Category:

ORDINARY CIVIL MATTER - CIVIL MATTERS ARISING OUT OF SECURITIES ACT, 1992

Industry: Services Sector

JUDGMENT

Ruma Pal, J.

1. There are five main protagonists in these appeals, the appellant, Technip, a company incorporated in France, Coflexip, also incorporated in France, the *Institut Francais du Petrol* (referred to as IFP) which through its subsidiary ISIS, a company incorporated in France, was a shareholder in Technip and Coflexip, South East Asia Marine Engineering and Construction Ltd. (referred to as SEAMEC), a company incorporated and registered in India and finally the respondents who are the shareholders of SEAMEC. SEAMEC is a subsidiary of Coflexip in the sense that Coflexip through a chain of wholly owned subsidiaries controls the majority shareholding in SEAMEC.

2. The question which arises for consideration in these appeals is whether Technip acquired control of SEAMEC through Coflexip in April, 2000, or in July, 2001? There is no dispute that if Technip controls Coflexip then it also controls SEAMEC and if there has been a change of control of SEAMEC then Technip would be bound to offer to purchase the shares of the minority shareholders in SEAMEC in accordance with the provisions of the Securities And Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred to as the Regulations). The importance of the date of control/acquisition is because of the price of the shares payable on such public offer. In this case the price of SEAMEC shares in April 2000 was Rs. 238 per share which was much higher than the price of Rs. 43.12 per share in July, 2001. Technip had not made any public announcement at all, either in April 2000 or in July, 2001.

3. On the complaint of certain shareholders of SEAMEC before the Securities and Exchange Board of India (SEBI), proceedings were initiated against Technip under the Securities and Exchange Board of India Act, 1992 (referred as 'the Act'). SEBI held that French law applied to the takeover

of Coflexip and consequently SEAMEC by Technip for the purpose of determining when such takeover was effected. It found that the Technip had obtained control of Coflexip in July 2001 and had violated Regulations 10 and 12 of the Regulations thereby acquiring 58.24% of the shares/voting rights and control in SEAMEC in July 2001 without making any public offer. Technip was accordingly directed by SEBI to make a public announcement as required under the Regulations within 45 days of its order taking 3rd July, 2001 as the specified date for calculation of the offered price. Technip was also directed to pay interest at the rate of 15% per annum to the willing minority shareholders of SEAMEC, for the delayed public announcement.

4. The minority shareholders of SEAMEC preferred an appeal from SEBI's order before the Securities Appellate Tribunal (SAT) constituted under the Act. Their grievance was that the date of control of Coflexip by Technip was 12.4.2000 and not 3rd July, 2001 as held by SEBI. While the appeal was pending, pursuant to an interim order passed by the Tribunal, Technip implemented the order of SEBI by making a public announcement to acquire the shares of SEAMEC by taking 3rd July, 2001 as the specified date. Technip has also made payment of the share consideration together with the interest thereon to the shareholders of SEAMEC who accepted the public offer.

5. The Tribunal held that the applicable law to the question as to when control of SEAMEC had been taken over by Technip, was Indian Law. The Tribunal affirmed SEBI's conclusion that the Regulations had been violated by Technip by its failure to make a public announcement but decided that the relevant date on which the control of SEAMEC was taken over by Technip was April, 2000. The Tribunal accordingly directed Technip to treat the relevant date for calculating the offer price as 12th April, 2000 and to pay SEAMEC shareholders the difference between the price of the shares between 3.7.2001 and 12th April, 2000 together with the interest on such difference at the rate of 15%. One of the grounds on which the Tribunal came to the conclusion that Technip had taken over Coflexip in April, 2000 was based on the fact that both the companies had been promoted by IFP and that IFP through ISIS acting in concert with Technip had brought about the takeover of Coflexip by Technip.

6. According to Technip, since Technip and Coflexip are both registered in France and the takeover of Coflexip by Technip also took place in France, the applicable law is French. In terms of French Law, according to Technip, there was no control of Coflexip by Technip in April, 2000 and as such there was no change in control of SEAMEC on that date but in July 2001. It is further submitted that in any event Regulation 12 did not apply to the takeover because SEAMEC was not the target company and that while taking over Coflexip, Technip neither had the common objective nor was there any agreement between Technip and Coflexip with regard to SEAMEC. The rate of interest has also been challenged. It is said that although there was no challenge to the rate which was fixed by SEBI, if the Tribunal's order is upheld, then the impact of interest would be much greater. It is submitted that in any event, the dividend paid must be adjusted against the interest claimed. It is the final submission of Technip that if April 2000 is to be taken as the date of control, then only those shareholders who were shareholders of SEAMEC on the specified date and continued as such till the offer was made are entitled to the benefit of the Tribunal's order.

7. A separate appeal has been preferred by IFP from the decision of the Tribunal being CA No. 10092/98. The grievance of IFP is that it is a professional body created by decree of the French Government and has been set up as a center for research and industrial development, education,

professional training and information for the oil and gas and automotive industries in France. IFP does not carry on any industry or commercial activities nor does it manage or control any listed company. It promotes companies to apply the results of its own research. IFP says that an unnecessary stigma has been cast by the Tribunal's decision on a Government organization even though the show cause notice issued by SEBI did not make any allegation against IFP.

8. The respondents have on the other hand argued that the law applicable to SEAMEC was Indian Law and to determine if there was a change in the management and control of SEAMEC the provisions of the Regulations would apply. In terms of Regulations 10, 11 and 12 read with Regulation 2, any person, who acquires shares or voting rights in a registered company (described as a target company under the Regulations) above 15% or acquires control over the target company is required to make a public announcement offering to purchase the shares of the other shareholders in the target company. It is the submission of the respondents that according to Indian and French Law *de facto* control of Coflexip and therefore SEAMEC was taken over by Technip in April, 2000. The respondents also claim that Technip had in fact applied to SEBI to exempt them from the operation of the Regulations. The application had been rejected. This issue according to the respondent could not, therefore be reopened. It is said that SEAMEC was very much in the contemplation of

9. Technip when it decided to take over Coflexip. It is asserted that therefore Regulations 10, 11 and 12 applied in full measure. Technip had not only acted in concert with ISIS, another shareholder of Coflexip, but even by itself was in a position to exercise and in fact exercised control over Coflexip and therefore SEAMEC in April 2000.

10. The shareholders of SEAMEC may be classified into three groups;

a) Those, who were shareholders of SEAMEC in April, 2000 and continued as such;

b) Those, who were not shareholders in April, 2000 but were shareholders during the public offer having purchased the shares of SEAMEC before July, 2001.

c) Those shareholders, who were shareholders on the date of the public offer holding shares purchased in April 2000 and more shares after April, 2000 but before July, 2001.

11. The respondents who belong to group (b) have said that the public offer made by Technip after SEBI's order was unconditional. It was made to the shareholders who were shareholders as on the date of the public offer. On the question of interest it is said that it was not open to Technip to question either its liability to pay interest or the rate of interest and that Technip had already paid interest to the present shareholders without protest. Finally it is said that the finding of fact by the Tribunal should not be interfered with unless this Court came to the conclusion under Section 15Z of the Act that it was perverse.

12. We will start with this final submission. Section 15Z of the SEBI Act, 1992 allows any person aggrieved by the decision or the order of the Securities Appellate Tribunal to file an appeal to the Supreme Court on any question of law arising out of such order. Now the primary dispute in this appeal is whether the impugned transaction is to be judged according to French Law or Indian

Law. That is a question of law. Furthermore, the determination as to what French Law is, is doubtless a question of fact but it is "a question of fact of a peculiar kind". As has been commented in Cheshire and North's Private International Law (12th Edn.)

"To describe it (foreign law) as one of fact is no doubt apposite, in the sense that the applicable law must be ascertained according to the evidence of witnesses, yet there can be no doubt that what is involved is at bottom a question of law. This has been recognized by the courts".

13. Admittedly both Coflexip and Technip were incorporated according to and under the laws of France; They are therefore 'domiciled' in France. Normally, we would resolve any issue relating to their internal affairs by applying the law of their domiciled, in this case French Law (See: Hazard Brothers & Co. v. Midland Bank Ltd. 1933 AC 289, 297; Metliss v. National Bank of Greece & Athens, SA: [1961] AC 255). But by that token it is equally true that SEAMEC which was incorporated in India would be governed by Indian law and that is what SAT held:

"SEBI has viewed (sic) that since Technip and Coflexip are French companies, matters relating to them should be decided in accordance with French law. To the said extent SEBI is correct. SEBI has no jurisdiction to regulate takeovers and acquisitions taking place outside India. But certainly SEBI has jurisdiction to regulate substantial acquisition and takeovers of companies in India".

14. But then it came to the conclusion that even the question "whether Technip acquired control over Coflexip on 12.4.2000 and consequently over SEAMEC need be tested in the light of 2(c) definition". In other words Indian law would apply to determine whether the control of Coflexip was taken over by Technip. According to SAT any view to the contrary would "lead to absurd consequences even defeating the very objective of the Takeover Regulations".

15. SAT's conclusion as to the applicable law is questioned by the appellant and that cannot be considered as a question of fact. As held in **Dalmia Dairy Industries Ltd. v. National Bank of Pakistan**, **Prakasho v. Singh**, 1968 Probate Division LR 250; the role of the appellate Court is such cases is:

".....to examine the evidence of foreign law which was before the justices and to decide for ourselves whether that evidence justifies the conclusion to which they came **Dalmia Dairy Industries Ltd. v. National Bank of Pakistan** [1978] 2 Lloyd's Rep 223 at 286; and see Webb (1967) 16 ICLQ 1152, 1155-1156".

16. The respondent's preliminary objection to the maintainability of the appeal is accordingly rejected.

17. The jurisdiction of SEBI or SAT or indeed this Court to apply foreign law has not been questioned at any stage. What is referred to as "private international law" by some authorities (See Cheshire & North's Private International Law)is referred to as conflict of laws by others (Dicey & Morris : The Conflict of Laws). Whatever the nomenclature, it is based on the 'just disposal of proceedings having a foreign element'. To quote from **Kuwait Airways Corporation v. Iraqi Airways Co.** (2002) UKHL 19.

"The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court."

18. We have already said and it must be taken to be a generally accepted rule of private international law, that questions of status of a person's domiciled ought in general to be recognized in other countries unless it is contrary to public policy. Questions of status of an individual would include matters such as legal competence, marriage and custody. (See in re Langley's Settlement Trusts (1962) Ch. 541); Russ v. Russ (1962) 3 All E.R.; Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu MANU/SC/0184/1984 : [1984]3SCR422 ; Oppenheimer v. Cattermole (1975) 1 All ER 538). Questions as to the status of a corporation are to be decided according to the laws of its domiciled or incorporation subject to certain exceptions including the exception of domestic public policy. This is because "a corporation is a purely artificial body created by law. It can act only in accordance with the law of its creation". Therefore, if it is a corporation, it can be so only by virtue of the law by which it was incorporated and it is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred unless it is contrary to public policy. [**See**: In the matter of American Fibre Chair Seat Corporation. William Daum et al. v. Arthur J Kinsman 265 N.Y. 416; 193 N.E. 253; McDermott Inc. v. Harry Lewis, 531 A.2d 206; Richard Reid Rogers v. Guaranty Trust Company of New York (288 US 123-151 (S.C.(U.S.) Carl Zeiss Stiftung v. Rayner and Keller Ltd. (1966) 2 ALL ER 536; Gaudiya Mission and Ors. v. Brahmachari and Ors. 1998 Ch. 341; Kuwait Airways Corporation v. Iraqi Airways Co. (No. 3) 2002 UKHL 19; Lazard Brothers & Co. v. Midland Bank Ltd. (1933) AC 289 at 297; Cheshire and North's Private International Law (12th Edn.) p.174].

19. This general rule regarding determination of status by the lex incorporations will not apply when the issue relates to the discharge of obligations or assertion of rights by a corporation in another country whether such obligation is imposed by or right arises under statute or contract which is governed by the law of such other country.

20. The distinction is brought out in the case of **National Bank of Greece and Athens S.A. and Metliss:** 58 A.C. 509. A Greek Bank had issued mortgage bonds to persons in U.K. in pounds sterling. The bonds were guaranteed by another bank. Both the issuing bank and the guaranteeing bank were incorporated under Greek Law. The guaranteeing bank was subsequently amalgamated with a third Greek company and a new company was formed. A bond holder sued the new company seeking to enforce the guarantee. Under the Greek law there was a moratorium imposed on payments by the new bank. It was held by the House of Lords that the status of the new bank would be decided according to the law of the of the original guarantor company and the new company which was Greek law. It was found that according to Greek law the new company succeeded to the assets and liabilities of the guarantor company. The question then was whether the English Courts would recognize the moratorium as debarring the bond holder from enforcing his rights under the bond. It was not in dispute that the bond was governed by English law. It was held that the evidence of the effect of the Greek moratorium in Greece was therefore irrelevant.

"This was an English debt and the obligation to pay it, its quantum and the date of payment, are all governed by English law which will not give effect to the Greek Moratorium," (pg. 529)

21. The claim of the bond holder was accordingly allowed.

22. Consequent upon the decision of the House of Lords a new Greek law was passed retrospectively modifying the terms of the amalgamation, so that the new bank was no longer required to discharge the original guarantor's dues to the bond holders. The House of Lords in **Adams v. National Bank of Greece S.A.** 1961 A.C. 255, 282 again rejected the new bank's submission that it was not liable on the bonds. It was held that what was sought to be enforced was not "a Greek right, but a right arising under a contract under English law". It was held:

"It is well settled that English law cannot give effect to a foreign law which discharges an English liability to pay money in England and the appellants' contracts were English contracts under which they were to be paid in England".

23. Although the law of the Bank's domiciled determined its status as a debtor, it could not determine the liability of the defendant on a contract subject expressly to English law.

24. The relationship of Technip to Coflexip whether one of control or not is really a question of their status. The applicable law would therefore be the law of their domiciled, namely, French law. Having determined their status according to French Law, the next question as to their obligation under the Indian Law vis a vis SEAMEC would have to be governed exclusively by Indian law (in this case the Act and the Regulations). SATs error lay in not differentiating between the two issues of status and the obligation by reason of the status and in seeking to cover both under a single system of law.

25. But, contend the respondents, the French law even if applicable, was contrary to the Act and Regulations and is thereby contrary to the public policy underlying the Indian enactment. In our view, domestic public policy which can justify a disregard of the applicable foreign law must relate to basic principles of morality and justice and the foreign law amount to a flagrant or gross breach of such principles.

26. As far back as in 1918, Cardozo J, speaking for the Bench in **Fannie F. Loucks et al., as Administrators of the Estate of Everett A. Loucks, Deceased, Appellants, v. Standard Oil Company of New York, Respondent** 224 N.Y.99; said:

"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal".

27. Similarly the House of Lords in **Kuwait Airways Corporation v. Iraqi Airways Co.(No. 3):** (2002) UKHL 19 said:

".....Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court".

28. In other words the power to disregard a provision in the foreign law must be exercised exceptionally and with the greatest circumspection "when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such provision". (ibid)

29. The issue in the latter case arose out of an Iraqi law which confiscated Kuwaiti aeroplanes and vested them in the Iraqi Airlines Corporation. The Court refused to recognize the Iraqi law because:

"a legislative act by a foreign state which is an flagrant breach of clearly established rules of international law ought not to be recognized by the courts of this country as forming part of the lex situs of that state".

30. This Court in **Renusagar Power Co. Ltd. v. General Electric Co.** MANU/SC/0195/1994 : AIR1994SC860 while construing Section 7(1)(b) of the Foreign Awards Act which allows Indian Courts the power to refuse to enforce foreign awards which are contrary to public policy, has held that:-

"....defence of public policy which is permissible under Section 7(1) (b) (ii) should be construed narrowly.... It must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality, (pg.682)

31. In that case it had been argued by the appellant that the expression "public policy" in Section 7(1) (b) (ii) of the Act has to be construed in a liberal sense and not narrowly and it would include within its ambit disregard of the provisions of the Foreign Exchange Regulations Act, 1973. This Court accepted the argument on the ground that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(b)(ii) of the Act. However on the facts it was held that the enforcement of the award would not involve violation of any of the provisions of FERA and for that reason it not would be contrary to public policy of India so as to render the award unenforceable in view of Section 7(1)(b)(ii) of that Act.

32. In a sense all statutes enacted by Parliament or the States can be said to be part of Indian public policy. But to discard a foreign law only because it is contrary to an Indian statute would defeat the basis of private international law to which India undisputedly subscribes. [**See: Surinder Kaur Sandhu v. Harbax Singh Sandhu** (supra)]. To quote again from the **Kuwait Airways** case (supra).

"The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reasons why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform there would be no 'conflict' of laws".

33. The Bhagwati Committee Report on Takeovers (1997) which was prepared after examining the principles and practices and the regulatory framework governing takeovers in as many as fourteen countries noted that while the practice and procedures vary from country to country, the principles and the concerns- cardinal among which are equality of opportunity to all shareholders, protection of minority interest, transparency and fairness-have remained more or less common. The aim of French Law like Indian Law is to ensure that all parties to a public tender offer respect the principles of shareholder equality, market transparency and integrity, fair trading and fair competition. All this is culled from the opinions of the experts relied upon by all the parties. Under Section 45 of the Evidence Act, 1972, the Court can take the admitted position into consideration in order to form an opinion as to the text of the relevant French law. [See: **De Beeche and Ors. v. The South American Stores (Gath and Chaves Limited and the Chilian Stores Gath and Chaves Limited)** 1934 LR A.C. 148]

34. Undisputedly, in April 2000, the relevant law in force in France was Article 355-1 of the French Companies Act 1966 (LOI No. 66-537, du 24 Juillet 1966, Sur les Societas Commerciales). It read as follows:-

"I. A company shall be regarded as controlling another:

(1) When it directly or indirectly holds a percentage of the capital conferring on it the majority of the voting rights in the general meetings of this company;

(2) When it alone holds the majority of the voting rights in this company pursuant to an agreement concluded with other members or shareholders and which is not contrary to the interests of the company;

(3) When it actually makes, due to the voting rights which it holds, the decisions in the general meetings of this company.

"II. It shall be presumed to exercise this control when it directly or indirectly holds a percentage of the voting rights higher than 40% and when no other member or shareholder directly or indirectly holds a percentage higher than its own."

35. Sub-clauses (1) and (2) of Clause (1) of Article 355-1, deal with *de jure* acquisition of control by one company of another. The third sub-clause deals with de facto control. All three sub-sections deal with the position of a company acting on its own. Clause II of Article 355. 1 provided for statutory presumption of control when the acquiring company directly or indirectly held more than 40% of the voting rights and was the largest shareholder.

36. In May, 2001, Article 355-1 of the 1996 Act was amended to include the following Sub-section:-

"III. In order to apply the same sections of this chapter, two or more persons acting in concert shall be regarded as jointly controlling another when they actually make, under an agreement to implement a common policy, the decisions taken in the general meetings of the latter."

36. Clause III provides for control being acquired by persons acting in concert under an agreement to implement a common policy if they actually take decisions in furtherance of such agreement at general meetings of the "controlled company". The entire Article was incorporated in the French Commercial Code as Article L 233-3 in 2002.

37. The second relevant Article is Article 356-1. Roughly translated it provided:-

"Any individual or legal entity, acting alone or in concert, that becomes the owner of a number of shares representing more than one twentieth, one tenth, one fifth, one third, one half or two thirds of the capital or the voting rights of a company having its registered office in France and whose shares are admitted for trading on a regulated market or are traded on the over-the-counter market as stated in article 34 of law No. 96-597 dated July 2nd, 1996 relating to the modernization of financial activities, shall inform such company in a period of 15 days as of the crossing upwards of the threshold of the total number of shares that such person holds.

The owner also informs the Council de Marches Financiers (CMF) within a period of 5 trading days as of the day of crossing upwards of the threshold when the shares are listed on a regulated market. The CMF makes public such information.

The notifications referred to in the two proceeding paragraphs are also to be provided in the same period when the equity interest falls below the thresholds provided in the first paragraph.

The owner who is required to disclose the information in accordance with the first paragraph above specifies the number of securities that it possesses giving access to the capital of the company as well as the voting rights attached thereto.

The by-laws of the company can provide for additional disclosure obligations relating to holdings of fractions of the capital or voting rights that are less than the one-twentieth mentioned in the preceding paragraph. The obligation relates to holding each such fraction, which cannot be less than 0.5% of the capital or voting rights.

In the event of a failure to satisfy the disclosure obligations mentioned in the preceding paragraph the by-laws of the company may stipulate that the provisions of the first two paragraphs of article 356-4 shall apply only if requested and duly recorded in the minutes of the general meeting, by one or more shareholders holding a fraction of the capital or the voting rights of the issuing company at least equal to the smallest fraction of the capital held which must be declared. This percentage shall nevertheless not be greater than 5%.

The owner who is required to disclose according to the first paragraph must declare upon exceeding the thresholds of one tenth or one fifth of the capital or the voting rights the objectives that he intends to pursue over the coming twelve months. This declaration shall state whether the acquirer is acting alone or in concert, whether he intends to make further purchases, whether he intends to acquire control of the company, and whether he intends to seek his appointment or that of one or more other persons to the board of directors, management committee or surveillance committee. It is sent to the company whose shares have been acquired and to the CMF who publishes it, and to the Commission des Operations de Bourse (COB), within fifteen trading days

of surpassing the threshold. Should those intentions change, and this is admissible only in the event of substantial changes in the environment, the financial situation or the shareholder base of the persons concerned, a new declaration must be made and published in the same way.

38. The last paragraph of Section 356-I provides that, upon crossing the thresholds of 10% of share capital or voting rights in the target company, and again of 20% of share capital or voting rights in the target company, the purchaser is required to file with the Stock Exchange Authorities, with copy to the target company, a Statement of Intent, specifying (i) whether the purchaser acts alone or in concert with third parties, (ii) whether the purchaser intends to continue acquiring shares in the target company, (iii) whether the purchaser intends to acquire control of the target company and (iv), whether the purchaser intends to seek representation on the Board of Directors of the target.

39. The Section has been re-enacted as L 233-7 of the 2002, French Commercial Code.

40. Therefore, French Law at the relevant time provided that a company holds control over another (the Target Company) in the following cases.

(i) the Company holds, directly or indirectly, title to a number of shares granting to such holder a majority of voting rights in the general meetings of shareholders of the Target.

(ii) the Company holds the majority of voting rights in the Target pursuant to an agreement with a third party or as a result of acting in concert with such third party.

(iii) the Company in effect determines, through the votes it holds, the decisions taken in the general meetings of shareholders of the Target (what is known as '*de facto*' control).

41. The Stock Exchange authorities in France are the Council des Marches Financiers or the French Financial Markets Authority (referred to as the 'CMF') and the Commission des Operations de Bourse viz, the French Stock Exchange Authority (referred to as the 'COB'). They are regulatory bodies with powers of inspection, supervision and disciplinary action. The supervisory role of CMF is itself subject to the Commission Bancaire or the French Banking Commission and the COB. Article 1 and Article 2 of Decree No. 96-869 dated October 3, 1996 also provide for appeals from the decisions taken by the CMF before the Paris Courts of Appeals. Article 33 of Chapter-I Title-II provides that the CMF shall set forth the Rules governing public offers including the conditions under which a natural or legal person, acting alone or in concert within the meaning of Article 356-1-3 of Law 66-37 dated July 24, 1966 aforesaid and who directly or indirectly comes to hold a certain percentage of the capital stock or voting rights in a company whose shares are traded on a regulated market to forthwith inform the CMF and file a proposed tender offer with a view to acquiring a specified quantity of the company's securities. If this filing is not made, the securities that the person holds in excess of the aforementioned percentage of the capital stock or voting rights shall be deprived of voting rights.

42. The provisions in French law relating to takeovers as we see them are, therefore, rigorous. The Indian law is no less rigorous and differs only marginally with the French law on the subject.

43. The three relevant Regulations which were alleged to have been violated by Technip are Regulations 10, 11 and 12. Regulations 10, 11 and 12 are contained in Chapter III of the Regulations which deals with substantial acquisition of shares or voting rights in and acquisition of control over a listed company:-

"10. No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights if any, held by him or by persons acting in concert with him), entitle such acquirer or exercise fifteen percent or more of the voting right in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations.

11(1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, not less than 15% not more than 75% of the shares or voting rights in a company, shall acquire either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 2% of the voting rights, in any period of 12 months, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.

(2) No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise more than 51% of the voting rights in a company, unless such acquirer makes a public announcement to acquire share of such company in accordance with the Regulations.

Explanation: For the purposes of Regulation 10 and Regulation 11, acquisition shall mean and include;

(b) direct acquisition in a listed company to which the Regulations apply;

(c) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad.

12. Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations.

'Explanation.

Where any person or persons has given joint control, such control shall not be deemed to be a change in control so long as the control given is equal as the control given is equal to or less than the control exercises by person(s) presently having control over the company."

44. The difference between the French law and their regulations relates to the prescribed limits of share holding for control by one company over another. This cannot conceivably make the French law violative of any public policy underlying the Acts and Regulations so as to persuade us to disregard the French Law.

45. Thus it is the French law which we must apply to decide whether Technip took over the control of Coflexip in April 2000 or July 2001. Incidentally, the opinions of various persons claiming to be experts in French Commercial Law have expressed diametrically opposing views as to whether Technip could be said to have taken control of Coflexip applying the relevant French law, in April 2000. We do not propose to rely upon either of the views expressed as none of them was subjected to cross examination. According to Technip their expert affirmed an affidavit and was offered for cross examination by SEBI and that SEBI declined to do so. But the affidavit unlike the opinion expressed by the same firm earlier to Technip on 15th November 2001 did not express any opinion as to whether Technip did or did not acquire control of Coflexip either in April or July 2001 but only gave evidence of the applicable French law and highlighted the consequences of failure to comply with the statement of intent which was required to be filed with CMF. Therefore, ultimately it is for this Court to resolve the conflict by looking at the admitted text of the French law and the material on record to decide the proper application of the provisions. According to the show cause notice issued by SEBI to Technip, Technip had acquired control of Coflexip by acting in concert with ISIS, Technip has said that in April, 2000 there was no concept of acting in concert under French Law since the extended meaning of 'controlled company' was introduced by amendment to Article 355-1 only in May, 2001. The submission ignores Article 356-1. The concept of a takeover by acting in concert was there in 2000. In fact Article 355-1 of the French Companies Act merely sets out factors determining when a company could be said to hold control over another. It does not, as Article 356. 1 does, speak of the method for acquiring such control.

46. At this stage and before we apply the law to the facts we may note one aspect that has been lost sight of by SAT and that is that irrespective of the status of Coflexip and Technip to each other, in order to trigger Regulations 10 to 12, it would have to be established that the purchase of the 29.68% shares by Technip in Coflexip was with the object of taking control of SEAMEC. That is what the relevant Regulations provide and also what is alleged in the Show Cause Notice issued to Technip by SEBI. The allegation in the show cause notice was that Technip, the acquirer and ISIS as a shareholder of Coflexip acted in concert to acquire control over Coflexip and therefore SEAMEC treating SEAMEC as the target company. The emphasis is on the target company whether the case is of direct or indirect acquisition under the Regulations. Thus Regulation 2(b) of the Regulations defines 'acquirer' as meaning any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company and 'acquirer' also means a person who acquire or agrees to acquire control over the target company either by himself or with any person acting in concert with the acquirer.

47. The word 'control' has been defined in Regulation 2(c) in the following manner:

"control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner".

48. The other definition which is relevant is Regulation 2(e) defining the phrase 'person acting in concert'. We are concerned with Sub-section (i) which says that it comprises "persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly

or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company". Finally is the definition of the word 'target company' in Regulation 2(o) as meaning a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired. If the Indian Law were to be invoked in April 2000 it would have to be shown that Technip acquired or agreed to acquire the right to control SEAMEC (in this case the alleged target company) either by itself or acting in concert with any other shareholder or Coflexip.

49. According to the Bhagwati Committee Report to be acting in concert with an acquirer, persons must fulfill certain 'bright line' tests. They must have commonality of objectives and a community of interest and their act of acquiring the shares or voting rights in company must serve this common objective. The commonality of objective which should be established between the acquirer and a shareholder in order to trigger off Regulations 10, 11 and 12 with respect to a subsidiary company is referred to as the "chain principle" in the Report which enunciates that an offer should be made to the shareholders of such a target company if

(a) the shareholding in the second company constitutes a substantial part of the assets of the first company; or

(b) one of the main purposes of acquiring control of the first company was to secure control of the second company.

50. This is evident also reading the definitions of 'acquirer' 'control' 'acting in concert' and 'target company' in Regulations 2 (b)(c) (e) and (o) together.

51. A similar position obtains in England where Note 7 to Rule 9.1 of the City Code on Takeovers and Mergers likewise provides:-

"Occasionally, a person or group of persons requiring statutory control of a company (which need not be a company to which the Code applies) will thereby acquire or consolidate control, as defined in the Code, of a second company because the first company itself holds a controlling block of shares in the second company, or holds shares which, when aggregated with those already held by the person or group, secure or consolidate control of the second company. The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:

a) the shareholding in the second company constitutes a substantial part of the assets of the first company; or

b) one of the main purposes of acquiring control of the first company was to secure control of the second company".

52. The "second company" both under the 'chain principle' referred to in the Bhagwati Committee Report as well as in the City Code on Takeovers and Mergers is the target company and the first company is the medium or vessel or vehicle for attaining control on the target company. In the present case Coflexip would be the 'first company' and SEAMEC the actual target and the liability to make an exit offer to the shareholders of SEAMEC would arise only if either one of the two

conditions prescribed is fulfilled, it would therefore have to be proved by the shareholders of SEAMEC that Coflexip was taken over (if at all) in April 2000 by Technip with the assistance of ISIS so that control of SEAMEC could be obtained or that Coflexip's shareholding of SEAMEC constituted a substantial part of Coflexip's assets.

53. The standard of proof required to establish such concert is one of probability and may be established "if having regard to their relation etc., their conduct, and their common interest, that it may be inferred that they must be acting together: evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon" Commissioner of Income tax, West Bengal v. East Coast Commercial Co. Ltd. MANU/SC/0133/1966 : [1967]1SCR821 . While deciding whether a company was one in which the public were substantially interested within the meaning of Section 23A of the Income Tax Act, 1922 this Court said:-

"The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted actings. Each case must necessarily be decided on its own
facts" Commissioner of Income Tax v. Jubilee Mills Ltd. MANU/SC/0191/1962.

54. In **Guinness PLC and Distillers Company PLC** the question before the Takeover Panel was whether Guinness had acted in concert with Pipetec when Pipetec purchased shares in Distillers Company PLC. Various factors were taken into consideration to conclude that Guinness had acted in concert with Pipetec to get control over Distillers Company. The Panel said :-

"The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to co-operation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a "nod or a wink"..... Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and commonsense to determine whether those involved in any dealings have some form of understanding and are acting in co-operation with each other" Guinness PLC, The Distillers Company PLC (Panel hearing on 25th August 1987 and 2nd September, 1987 at page 10052 - Reasons for Decisions of the Panel.

55. According to the Dictionaire Permanent du Droit des Affairs French law does not make proof of the concerted action dependant upon the existence of a written document. "However, given the serious consequences linked to the existence of a concerted action, only serious presumptions drawn from factual date can lead to a qualification of a concerted action. The mere observation of similarity of behaviors cannot constitute such a proof. Even the common position of certain shareholders is not necessarily indicative of the existence of a concerted action. Such shareholders may have adopted legitimately a similar position, independently, because of their own strategic interest". (Extract from the 1989 French Securities and Exchange Commission Report).

56. In this background of the law we may consider briefly the relevant facts.

57. IFP had promoted Technip and Coflexip in 1958 and 1971 respectively. In 1975 IFP promoted ISIS as a wholly owned subsidiary to hold its investments. It is the admitted position that IFP retained majority control of ISIS until October, 2001.

58. The main shareholders of Technip at all material times were ISIS, Gaz de France and Sogerap (which later came to be known as Fina Total Elf and is hereafter referred to as 'Elf). They held 11.8%, 10.9% and 6.4% of the shareholding whereas 65.9% of the shareholding was held by the public. In 1994 ISIS, Gaz de France, Elf and Technip entered into an agreement inter alia granting a right of preemption to each other in respect of their respective shareholdings.

59. The shareholders of Coflexip till April 2000 were ISIS, Elf and Stena (incorporated in the Netherlands), apart from American investors who held 50% of the shareholding. The first three shareholders had entered into a similar shareholders agreement with a right of preemption.

60. Coflexip through a chain of subsidiaries purchased 49.85% of the shareholding in SEAMEC on 25th October, 1999. In December, 1999, the Chairman CEO of Coflexip made a proposal to the Chairman/CEO of Technip to examine the merits of a merger between Coflexip and Technip. In January, 2000 Stena intimated that it would not support a merger of Coflexip and Technip as it was not part of Stena's strategy to hold an equity stake in an engineering and construction company.

61. On 31st March, 2000, Stena offered to sell its shares in Coflexip held by it and its associates J.P. Morgan, being 29.7% of the shareholding of Coflexip, to Technip.

62. ISIS had three representatives on Coflexip's Board of 11 Directors, who also had two Directors in Technip.

63. On 7th April, 2000, the Board of Technip approved the deal with Stena to purchase its 29.68% shares in Coflexip. (SIS and Elf abstained from voting as they were shareholders in both Coflexip and Technip.

64. On 11th April, 2000, several events took place. ISIS wrote a letter to Stena renouncing its preemptive rights under the shareholders agreement in favour of Technip. There is no binding that it would have been financially possible for ISIS to have exercised its preemptive rights given the financial implications particularly the necessity to make a further public offer to purchase the balance shares of Coflexip as it would have crossed the threshold as prescribed under French Law. On the same date Elf also renounced its preemptive rights under the shareholders agreement in favour of Technip. An agreement was then entered into between Technip and Stena for the acquisition of Stena's 29.68% shares in Coflexip at the rate of Euros 119 per share. Statements of intent were filed by Technip with Stock Exchange Authorities and with Coflexip. Coflexip in turn wrote a letter to Technip on the same date agreeing not to acquire equity shares in a competing company without prior written consent of Technip.

65. The declaration required by French law was made to the CMF by Technip on 28th April, 2000 that Technip.

a) did not directly or indirectly hold any other shares in Coflexip;

b) it was not acting in concert with any other and had no plans for any such action;

c) it had no intention to increase its equity stake within 12 months after acquisition;

d) undertaking not to acquire new equity shares in other companies involved in Coflexip's scope of activities except with the prior written approval of Coflexip;

e) agreeing that violation of any of the aforesaid stipulation would entitle Coflexip to claim damages.

66. This was published by CMF on 4th May, 2000. A similar declaration or statement of intent was given to COB. Both the authorities accepted the declaration and there was no protest to the publication by any member of Coflexip or anyone else for that matter. There is thus no dispute that Technip agreed to acquire 29.68% shares in Coflexip on 11.4.2000. Nor is it disputed that it complied with the requirements of Art 356-1.

67. Clearly a purchase of 29.68% shares in a company would not by itself give the purchase *de jure* control of the company under French Law. The acceptance of the statement of intent filed by Technip before the Stock Exchange Authorities would not however be conclusive of the matter. It may be that the Market Authorities agree to the publication of a statement or a notice or a financial publication. It may also be that those professional independent bodies have professionally verified the contents of such communications and have been satisfied with their accuracy. However, there is no adjudicatory process and there was no judicial decision of any authority which we could recognize as a foreign judgment on any principle of judicial comity or conflict of laws. To return to the narration of facts:-

On the same date i.e. 11th April 2000 three appointees of Technip were co-opted on the Board of Coflexip. According to Technip there was in fact no change in the daily management of Coflexip. Coflexip's Board of Directors consisted of eleven Directors, of which Technip's Directors were only three. The President of the Board and the Managing Director continued to be the same. The respondents have argued that there was in fact an effective change in the management. Of the 11 Directors of Coflexip, three belonged to ISIS. Therefore, ISIS and Technip together had a total of six out of the eleven Directors on Coflexip's Board. Additionally, Technip's Directors were appointed to the Strategic Committee as well as the Audit Committee of the Board. The respondents point out that all these appointments were made even before payment of the purchase price of the shares by Technip to Stena. The purchase of shares between Stena and Technip was completed on 19th April, 2000, on which date and Stena's 29.68% shares in Coflexip was registered in favour of Technip.

68. Technip has argued that the effect of the purchase of the Stena's shares was merely a strategic alliance between Coflexip and Technip and Technip did not control Coflexip. On the other hand there was evidence of a possible acquisition of Technip by Coflexip. This position continued till January, 2001 when IFP agreed to sell its entire interest in ISIS to Technip. According to Technip and IFP this was the first time IFP had come into the picture.

69. In February, 2001 the Chairman of Coflexip expressed his reservation about the proposed sale of ISIS's shares in Coflexip to Technip. Coflexip continued to act independently of Technip with regard to various policy decisions. Technip offered to purchase the balance shares of Coflexip at a premium of 25% on 3rd July, 2001. The price offered by Technip was not immediately acceptable to the Board of Coflexip. A Special Committee was set up to consider whether the price was adequate. ISIS voted in favour of setting up of the committee. As it happened, the Special Committee recommended a higher price, so that the Technip had to improve its offer to purchase Coflexip's share. These facts according to Technip showed that ISIS was not acting in concert with Technip.

70. Technip has said that the purchase of 100% shareholding was duly approved by Regulatory Authorities of USA, Finland and Netherlands and on 11th October, 2001 Technip acquired control of 99.04% of the share capital of ISIS and 98.36% of the share capital of Coflexip. Coflexip's shares were registered in the name of Technip on 19th October, 2001.

71. We are of the opinion that having regard to the balance of probabilities there was no evidence that Technip obtained de facto control of Coflexip in April 2000. The evidence would rather suggest that it was nothing more than a strategic alliance. The mere fact that in two Annual General Meetings of Coflexip Technip was in the majority cannot by itself establish its control over Coflexip. It may be that in a company with a large and dispersed membership, a comparatively small proportion of the total shares, if held in one hand, may enable actual control to be exercised Hindustan Motors Ltd. v. Monopolies and Restrictive Trade Practices Commission MANU/WB/0105/1973 : AIR1973Cal450 . But the obtaining of a majority in a shareholders' meeting may have been the outcome of absenteeism or some other factor. It is not as if Technip exerted its influence over any policy matters of Coflexip. Besides this was not the case in the Show Cause Notice. The allegation was that ISIS and Technip acted in concert in the matter of purchase of Stena's shares in Coflexip by Technip. That has not been established.

72. Technip's explanation for ISIS not exercising its preemptive right under the shareholders agreement is plausible. The explanation was that ISIS was a subsidiary of IFP and it is not the policy of IFP to manage companies in which it invests. ISIS therefore was not interested in acquiring further shares in Coflexip nor did it have the financial means to do so. ISIS was a Government controlled company and was holding shares on behalf of IFP, a Government body, and its failure to exercise its rights of preemption could be a Government decision should IFP have caused ISIS to proceed with such a huge investment, it could have been in breach of the relevant EU regulations as intervention of the State in Private Industry.

73. In any event there is no evidence that Technip acquired Coflexip if it at all did so in April 2000, so as to gain control of SEAMEC. Yet that is the aspect with which we are concerned. SEBI said that on the material before it, it was difficult to hold that IFP along with ISIS was acting in concert with Technip for the purpose of acquiring shares/voting rights/control of Coflexip so as to indirectly acquire control over SEAMEC in April 2000. But in view of the admitted takeover of Coflexip by Technip in July 2001 directed the publication of an offer to SEAMEC's taking that as the effective date.

74. In reversing this judgment, SAT held that ISIS and Technip had acted in concert to gain control over Coflexip in April, 2000. We are of the opinion that the approach of the SAT was entirely wrong. For the purposes of determining Technip's obligations under the Regulation it should have addressed itself as SEBI had done to the question whether ISIS and Technip were acting in conceit to obtain control over the target company, namely, SEAMEC. In other words, did the shareholding of Coflexip in SEAMEC constitute a substantial part of the assets of Coflexip, or was the main purpose of acquiring control of Coflexip the acquisition of control over SEAMEC?

75. According to the SAT, the reasons which established that ISIS and Technip were acting in concert in April 2000 were as follows:

(i) "... there was shareholders agreement dated 2.11.1994 between Stena group on one side and ISIS and others on the other to control Coflexip..... It is also noted that ISIS group had not exercised its preemptive right to block Technip's entry."

(ii) "..... (it was clear)from the shareholding pattern of Technip, Coflexip and ISIS that IFP was having common Interest."

(iii) "Whether these companies belonged to one "group" or that they were companies under the same management" may be in dispute. But no one can dispute that they belonged to one family in the real sense.....ISIS and IFP had one lineage - the common parenthood in IFP.....Gaz de France and Total Fina Elf- both associated with IFP family."

(iv) "Coflexip and Technip are having interest in the Petroleum sector, IPF could be interested in these 2 entities joining together and forming a combine and that having regard to their common interest, it may be inferred that they must be acting together."

(v) "Technip Chairman's letter that they were ultimately planning to take over Coflexip and they "were on this merger, passing through a number of necessary stages: which included "the acquisition of 30% of Coflexip in April 2000..."

(vi) "ISIS has its nominees on the Board of Technip. ISIS has its nominees of Coflexip. .....Thus in a 11 member Board of Coflexip Technip ISIS combine had a majority."

(vii) "From the material available on record there is every justification to infer that the plan was to combine Technip and Coflexip and form a strong combined entity to be a business leader in the petroleum sector and that it was with this end in view Technip in which ISIS had interest acquired Coflexip in which also ISIS had interest."

(viii) "... total holding of these two companies were around 47% sufficient enough to control Coflexip in view of its 48% shares widely held by public. It is also noted that in fact in the annual general meeting of Coflexip held in May 2000 and May 2001 (before the merger effected on 3.7.2001) Technip had exercised 54% and 57% of the voting rights, that this itself is indicative of the fact that Technip had more than 50% voting rights at its command, even though on record it was holding only 29%."

(ix) "ISIS objecting to the setting up of a committee to revise the offer price, is but natural as an increase in offer price was to its advantage and by doing so it was not in any way acting against its objective of helping Technip to acquire control over Coflexip. Adding a little more financial burden on Technip by asking for higher offer price can not be viewed as a hostile action from ISIS or as evidence of non co-operation."

(x) "Technip possibly wanted to strengthen its position demure as well with 99% and they acquired shares to that level through the public offer in July, 2001. In my view the acquisition raising the shareholding to 99% in Coflexip was the final act whereas the process started on 12.4.2000."

(xi) " ...in my view Technip had decided to take over control of Coflexip and to achieve the said objective, acquired 29.68% shares of Coflexip on 12.4.2000, the evidence before me leads to the conclusion that ISIS had acted in concert for the said purpose."

76. We need not go into the reasons separately although we must say that we disapprove of the introduction of the concept of a joint family into corporate law when the statutory provisions, particularly Regulation 2(e) exhaustively defines what would amount to 'acting in concert'. More particularly when Regulation 3(1)(e)(i) provides that-

(1) "Nothing contained in Regulations 10, 11 and 12 of Regulations 10, 11 and 12 these Regulations shall apply to;

(e) Interse transfer of shares amongst:-

(i) group companies, coming within the definition of group as defined in the Monopolies and Restrictive Trade Practices Act, 1969 (25 of 1969)".

77. The 'IFP family' if any would be nothing more than such a group. Furthermore, it is abundantly clear that even the name of SEAMEC does not feature in any of the several reasons put forward by SAT whereas that, as we must emphasise, should have been the primary point of focus. The respondents have sought to adduce further evidence before us to the effect that SEAMEC was in the contemplation of Technip when it purchased Stena's shares in Coflexip. There is no question of allowing any fresh evidence to be adduced at this stage. Besides we do not think that any evidence of mere contemplation of SEAMEC's assets would do. That should have been the principal objective in order to trigger the Regulations as it was not the respondent's case before SAT that the shareholding of Coflexip in SEAMEC constituted a substantial part of the assets of Coflexip nor has SAT so found. SEBI had noted that the takeover of SEAMEC was only an incidental fall out of the control of Coflexip and that SEAMEC formed a 'small and insignificant portion of the total business of Coflexip' contributing merely 2% of the total asset base of Coflexip as on December, 2000. The finding was not reversed by SAT.

78. We are thus of the opinion that SEBI's order must prevail and the order of SAT must be set aside. The other issues as to the rate of interest, the adjustment of dividend and the identification of the shareholders of SEAMEC would arise only if SAT's order had been upheld. As we are allowing the appeals of both Technip and IFP it is unnecessary to determine them.

79. Consequent upon our decision to allow the appeals the bank guarantees furnished by Technip to secure the difference in amounts between the share prices which would be payable by Technip had SAT's view prevailed must be and are hereby discharged.

80. The appeals are for these reasons allowed without costs.

Back to Index

MANU/SC/0905/2002

Neutral Citation: 2002/INSC/454

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) 317 of 1993

Decided On: 31.10.2002

Appellants: T.M.A. Pai Foundation and Ors. **Vs.** Respondent: State of Karnataka and Ors.

Hon'ble Judges/Coram:

B.N. Kirpal, C.J., G.B. Pattanaik, S. Rajendra Babu, K.G. Balakrishnan, P. Venkatarama Reddi, Dr. Arijit Pasayat V.N. Khare, S.S.M. Quadri, Ruma Pal, S.N. Variava and Ashok Bhan, JJ.

Subject: Constitution

Relevant Section:

CONSTITUTION OF INDIA - Article 19; CONSTITUTION OF INDIA - Article 26

Authorities Referred:

Webster's Third New International Dictionary; Corpus Juris Secundum, Volume LXVII

Cases Overruled/Partly Overruled:

St. Stephen's College v. University of Delhi MANU/SC/0319/1992; Rev. Sidhajbhai Sabhai and Ors. v. State of Bombay and Anr. MANU/SC/0076/1962 ; Unni Krishnan, J.P. and Ors. v. State of Andhra Pradesh and Ors. MANU/SC/0333/1993; Mohini Jain v. State of Karnataka, MANU/SC/0357/1992 1992 3 SCC 666

Case Note:

Constitution of India - Articles 14, 15, 25, 26, 28, 29 (2) and 30--Education--Right of minorities to establish and administer educational institutions of their choice--Scope of Article 30 (1)--Meaning of 'minority'--Whether Article 29 (2) and Article 30 (1) applies to aided/ unaided minority educational institutions?--How and when State can regulate minority educational institutions?--Majority answering questions as follows -- S. S. Mohammed Quadri, J. concurring with majority except on interplay between Articles 29

(2) and 30 (1) and concurring with Ruma Pal, J.--Ruma Pal, J. differing from majority on its view on Articles 29 (2) and 30 (1) and also on determination of 'minority status' with reference to State--S. N. Variava, J. concurring with majority, differing from S. S. Mohammed Quadri and Ruma Pal, JJ. and also from majority on final conclusion on balancing.

B. N. Kirpal, C.J.I. (Majority view) :

(1) Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution. Since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered State-wise.

(2) Article 30 (1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

(3) Admission of students to unaided minority educational institutions, viz., schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the concerned State or university, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.

The right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more so in the matter of admissions to professional institutions.

A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of non-minority students, so that the rights under Article 30 (1) are not substantially impaired and further the citizens' rights under Article 29 (2) are not infringed. What would be a reasonable extent, would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The concerned State Government has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of inter se merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the State agency followed by counselling wherever it exists.

(4) A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to mal-administration. Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.

(5) While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State qua non-minority students. The merit may be determined either through a common entrance test conducted by the concerned university or the Government followed by counselling, or on the basis of an entrance test conducted by individual institutions - the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the university to provide that consideration should be shown to the weaker sections of the society.

(6) So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to an university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.

(7) The basic ratio laid down by the Supreme Court in the St. Stephen's College case, (1992) 1 SCC 558, is correct, as indicated in this judgment. However, rigid percentage cannot be stipulated. It has to be left to authorities to prescribe a reasonable percentage having regard to the type of institution, population and educational needs of minorities.

(8) The scheme framed by the Supreme Court in Unni Krishnan's case, (1993) 1 SCC 645 and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

(9) The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level upto the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19 (1) (g) and 26, and to minorities specifically under Article 30.

All citizens have a right to establish and administer educational institutions under Articles 19 (1) (g) and 26, but this right is subject to the provisions of Articles 19 (6) and 26 (a).

Ruma Pal, J. (Minority view) :

(1) The protection under Article 30 is against any measure, legislative or otherwise, which infringes the rights granted under that Article. The right is not claimed in a vacuum - it is claimed against a particular legislative or executive measure and the question of minority status must be judged in relation to the offending piece of legislation or executive order. If the source of the infringing action is the State, then the protection must be given against the State and the status of the individual or group claiming the protection must be determined with reference to the territorial limits of the State. If however the protection is limited to State action, it will leave the group which is otherwise a majority for the purpose of State Legislation, vulnerable to Union Legislation which operates on a national basis. When the entire nation is sought to be affected, surely the question of minority status must be determined with reference to the country as a whole.

(2) The right to admit minority students to a minority educational institution is an intrinsic part of Article 30 (1). To say that Article 29 (2) prevails over Article 30 (1) would be to infringe and to a large extent wipe out this right. There would be no distinction between a minority educational institution and other institutions and the rights under Article 30 (1) would be rendered wholly in-operational. It is no answer to say that the rights of unaided minority institutions would remain untouched because Article 29 (2) does not relate to unaided institutions at all. Whereas, if one reads Article 29 (2) as subject to Article 30 (1) then effect can be given to both. And it is the latter approach which is to be followed in the interpretation of constitutional provisions. In other words, as long as the minority

educational institution is being run for the benefit of and catering to the needs of the members of that community under Article 30 (1), Article 29 (2) would not apply. But once the minority educational institution travels beyond the needs in the sense of requirements of its own community, at that stage it is no longer exercising rights of admission guaranteed under Article 30 (1). To put it differently, when the right of admission is exercised not to meet the need of the minorities, the rights of admission given under Article 30 (1) is to that extent removed and the institution is bound to admit students for the balance in keeping with the provisions of Article 29 (2).

Article 29 (2) pertains to the right of an individual and is not a class right. It would, therefore, apply when an individual is denied admission into any educational institution maintained by the State or receiving aid from the State funds, solely on the basis of the ground of religion, race, caste, language or any of them. It does not operate to create a class interest or right in the sense that any educational institution has to set apart for non-minorities as a class and without reference to any individual applicant, a fixed percentage of available seats. Unless Articles 30 (1) and 29 (2) are allowed to operate in their separate fields then what started with the voluntary 'sprinkling' of outsiders, would become a major inundation and a large chunk of the right of an aided minority institution to operate for the benefit of the community it was set up to serve, would be washed away. Whether there has been a violation of Article 29 (2) in refusing admission to a non-minority student in a particular case must be resolved as it has been in the past by recourse to the Courts. It must be emphasised that the right under Article 29 (2) is an individual one. If the non-minority student is otherwise eligible for admission, the decision on the issue of refusal would depend on whether the minority institution is able to establish that the refusal was only because it was satisfying the requirements of its own community under Article 30 (1). I cannot, therefore, subscribe to the view expressed by the majority that the requirement of the minority community for admission to a minority educational institution should be left to the State or any other Governmental authority to determine. If the executive is given the power to determine the requirements of the minority community in the matter of admission to its educational institutions, we would be subjecting the minority educational institution in question to an "intolerable encroachment" on the right under Article 30 (1) and let in by the back door as it were, what should be denied entry altogether.

S. N. Variava, J. :

(1) Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution. Since re-organization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered State-wise.

(2) Article 30 (1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

(3) Admission of students to unaided minority educational institutions, viz., schools where

scope for merit based selection is practically nil, cannot be regulated by the State or the university (except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards).

Right to admit students being an essential facet of right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right in respect of unaided minority institutions provided however that the admission to the unaided educational institutions is on transparent basis and the merit is the criteria. The right to administer, not being an absolute one, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof and it is more so, in the matter of admissions to undergraduate colleges and professional institutions.

The moment aid is received or taken by a minority educational institution, it would be governed by Article 29 (2) and would then not be able to refuse admission on grounds of religion, race, caste, language or any of them. In other words it cannot then give preference to students of its own community. Observance of inter se merit amongst the applicants must be ensured. In the case of aided professional institutions, it can also be stipulated that passing of common entrance test held by the State agency is necessary to seek admission.

(4) A minority institution may have its own procedure and method of admission as well as selection of students, but such procedure must be fair and transparent and selection of students in professional and higher educational colleges should be on the basis of merit. The procedure adopted or selection made should not tantamount to mal-administration. Even an unaided minority institution, ought not to ignore merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.

(5) Whilst giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State. The merit may be determined either through a common entrance test conducted by the university or the Government followed by counselling, or on the basis of an entrance test conducted by individual institutions - the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the university to provide that consideration should be shown to the weaker sections of the society.

(6) So far as the statutory provisions regulating the facets of administration is concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as conditions of affiliation to an university or board have to be complied with, but in the matter of day-to-day management, like appointment of staff, teaching and non-teaching and administrative control over them, the management should have the freedom and there should not be any external controlling

agency. However, a rational procedure for selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. For redressing the grievances of such employees who are subjected to punishment or termination from service, a mechanism will have to be evolved and in our opinion, appropriate tribunals could be constituted, and till then, such tribunal could be presided over by a judicial officer of the rank of District Judge. The State or other controlling authorities, however, can always prescribe the minimum qualifications, salaries, experience and other conditions bearing on the merit of an individual for being appointed as a teacher of an educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with overall administrative control of management over the staff, Government/university representative can be associated with the selection committee and the guidelines for selection can be laid down. In regard to unaided minority educational institutions such regulations, which will ensure a check over unfair practices and general welfare, of teachers could be framed.

There could be appropriate mechanism to ensure that no capitation fee is charged and profiteering is not resorted to.

The extent of regulations will not be the same for aided and unaided institutions.

(7) The ratio laid down in St. Stephen's College case (supra) is not correct. Once State aid is taken and Article 29 (2) comes into play, then no question arises of trying to balance Articles 29 (2) and 31. Article 29 (2) must be given its full effect.

(8) The scheme framed by this Court in Unni Krishnan's case (supra) means institutions that impart education and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

(9) The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institution that impart education. The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19 (1) (g) and 26, and to minorities specifically under Article 30. All citizens have a right to establish and administer educational institutions under Articles 19 (1) (g) and 26, but this right will be subject to the provisions of Articles 19 (6) and 26 (a). However, minority institutions will have a right to admit students belonging to the minority group.

Per Syed Shah Mohammed Quadri, J. (Minority view) In his separate judgment--See p. 3427, infra :

The right conferred on the student community under Article 29(2) is a truncated right

though it is available to each student and against all the institutions maintained by the State or receiving aid from the State funds. Nevertheless, the right under Article 30(1) is a special right conferred on minorities, whether based on religion or language, to establish and to administer educational institutions of their choice and with that goes the special right of the minority students to seek admission in such institutions. Article 29(2) even if regarded as a special right in regard to the student community is of general application in regard to all the institutions maintained by the State or receiving aid from the State funds when compared to special right conferred on minorities under Article 30. A provision may be special in one aspect and general in other aspect.

The minority educational institutions established and administered under Article 30(1) for the benefit of the students of their community have the right to admit the students of their choice of their community and without prejudice to the right of the minority students to admit students of the non-minority. They have a right to claim aid under clause (2) of Article 30, if the State decides to grant aid to other educational institutions in the State. The grant of aid by the State cannot alter the character of a minority institution, including its choice of the students. Unlike Article 337, there is nothing in clause (2) of Article 30 to suggest that grant of aid will result in making a percentage of seats available for non-minority students or be subject to Article 29(2). From the point of view of the minority students who seek admission in the minority educational institutions, it hardly makes a difference whether the institution is an aided institution or an unaided institution. In the case of a rich minority not getting aid under clause (2) of Article 30 for the minority educational institution established and administered under clause (1) of Article 30, the right of the minority students seeking admission therein cannot be different from the right of poor minority students seeking admission in educational institutions established and administered by poor minorities which are aided. On the institutions deciding to take aid from the State, the right of minority students to seek admission in such institutions cannot be affected.

It follows that the concomitant special right of students who belong to minority community which established the institution and is administering it under Article 30(1), to seek admission in such an institution has precedence over the general right of non-minority students under Article 29(2). So having regard to the right of the minority educational institutions to admit the students of their choice as well as the right of the students of the minority community to seek admission in such institutions, it is difficult to comprehend that merely on the ground that the institution is receiving aid out of State funds, their rights can be set at naught with reference to Article 29(2). Therefore, it appears that on grant of aid by the State, Article 29(2) does not control Article 30(1).

The right conferred under Article 29(2) is an individual right. The difficulty is arising because it is sought to be converted into a collective right of non-minority students vis-a-vis minority educational institutions so as to take away a slice of the seats available in such institutions. In an institution established and administered under Article 30(1), the need of minority students is foremost as it is for their benefit that the institution exists. The grant of aid to the institution is to fulfil its objective and not to deviate from the object and barter the right of the minority students. It is only when the need of the minority students is over

that in regard to the remaining seats that the institution can admit students of non-minority. In each year in a given course the same number of minority students may not apply. The minority educational institutions can admit non-minority students of their choice in the left over seats in each year as Article 29(2) does not override Article 30(1). If the need of the minority is to be given its due, the question of determining the need cannot be left to the State. Article 30 is intended to protect the minority educational institutions from interference of the State so they cannot be thrown at the mercy of the State. The State cannot be conferred with the power to determine the need of each minority institution in the country which will be both unrealistic and impracticable apart from abridging the right under Article 30(1). The best way to ensure compliance with Article 29(2) as well as Article 30(1) is to consider individual cases where denial of admission of a non-minority student by a minority educational institution is alleged to be in violation of Article 29(2) and provide appropriate relief.

To create inroads into the constitutional protection granted to minority educational institutions by forcing students of dominant groups of the choice of the State or agency of the State for admission in such institutions in preference to the choice of minority educational institutions will amount to a clear violation of the right specifically guaranteed under Article 30(1) of the Constitution and will turn the fundamental right into a promise of unreality which will be impermissible. Right of minorities to admit students of non-minority of their choice in their educational institutions set up under Article 30 is one thing but thrusting students of non-minority on minority educational institutions, whatever may be the percentage, irrespective of and prejudicial to the need of the minority in such institution, is entirely another. It is the former and not the latter course of action which will be in conformity with the scheme of clause (2) of Article 29 and clauses (1) and (2) of Article 30 of the Constitution.

JUDGMENT

B.N. Kirpal, C.J.

1. India is a land of diversity -- of different castes, peoples, communities, languages, religions and culture. Although these people enjoy complete political freedom, a vast part of the multitude is illiterate and lives below the poverty line. The single most powerful tool for the upliftment and progress of such diverse communities is education. The state, with its limited resources and slow-moving machinery, is unable to fully develop the genius of the Indian people very often the impersonal education that is imparted by the state, devoid of adequate material content that will make the students self-reliant only succeeds in producing potential pen-pushers, as a result of which sufficient jobs are not available.

2. It is in this scenario where there is a lack of quality education and adequate number of schools and colleges that private educational institutions have been established by educationists, philanthropists and religious and linguistic minorities. Their grievance is that the necessary and unproductive load on their back in the form of governmental control, by way of rules and regulations, has thwarted the progress of quality education. It is their contention that the government must get off their back, and that they should be allowed to provide quality education

uninterrupted by unnecessary rules and regulations, laid down by the bureaucracy for its own self-importance. The private educational institutions, both aided and unaided, established by minorities and non-minorities, in their desire to break free of the unnecessary shackles put on their functioning as modern educational institutions and seeking to impart quality education for the benefit of the community for whom they were established, and others, have filed the present writ petitions and appeals asserting their right to establish and administer educational institutions of their choice unhampered by rules and regulations that unnecessarily impinge upon their autonomy.

3. The hearing of these cases has had a chequered history. Writ Petition No. 350 of 1993 filed by the Islamic Academy of Education and connected petitions were placed before a Bench of 5 Judges. As the Bench was *prima facie* of the opinion that Article 30 did not clothe a minority educational institution with the power to adopt its own method of selection and the correctness of the decision of this Court in ***St. Stephen's College v. University of Delhi*** MANU/SC/0319/1992 : AIR1992SC1630 was doubted, it was directed that the questions that arose should be authoritatively answered by a larger Bench. These cases were then placed before a Bench of 7 Judges. The questions framed were recast and on 6th February, 1997, the Court directed that the matter be placed a Bench of at least 11 Judges, as it was felt that in view of the Forty-Second Amendment to the Constitution, whereby "education" had been included in Entry 25 of List III of the Seventh Schedule, the question of who would be regarded as a "minority" was required to be considered because the earlier case laws related to the pre-amendment era, when education was only in the State List. When the cases came up for hearing before an eleven Judge Bench, during the course of hearing on 19th March, 1997, the following order was passed:-

"Since a doubt has arisen during the course of our arguments as to whether this Bench would feel itself bound by the ratio propounded in -- In Re Kerala Education Bill 1959 SCR 955 and the Ahmedabad St. Xaviers College Society v. State of Gujarat, MANU/SC/0088/1974 : [1975]1SCR173 , it is clarified that this sized Bench would not feel itself inhibited by the views expressed in those cases since the present endeavour is to discern the true scope and interpretation of Article 30(1) of the Constitution, which being the dominant question would require examination in its pristine purity. The factum is recorded."

4. When the hearing of these cases commended, some questions out of the eleven referred for consideration were reframed. We propose to give answers to these questions after examining the rival contentions on the issues arising therein.

5. On behalf of all these institutions, the learned counsels have submitted that the Constitution provides a fundamental right to establish and administer educational institutions. With regard to non-minorities, the right was stated to be contained in Article 19(1)(g) and/or Article 26, while in the case of linguistic and religious minorities, the submission was that this right was enshrined and protected by Article 30. It was further their case that private educational institutions should have full autonomy in their administration. While it is necessary for an educational institution to secure recognition or affiliation, and for which purpose rules and regulations or conditions could be prescribed pertaining to the requirement of the quality of education to be provided, e.g., qualifications of teachers, curriculum to be taught and the minimum facilities which should be available for the students, it was submitted that the state should not have a right to interfere or lay down conditions with regard to the administration of those institutions. In particular, objection was

taken to the nominations by the state on the governing bodies of the private institutions, as well as to provisions with regard to the manner of admitting students, the fixing of the fee structure and recruitment of teachers through state channels.

6. The counsels for these educational institutions, as well as the Solicitor General of India, appearing on behalf of the Union of India, urged that the decision of this Court in ***Unni Krishnan, J.P. and Ors. v. State of Andhra Pradesh and Ors.*** MANU/SC/0333/1993 : [1993]1SCR594 case required reconsideration. It was submitted that the scheme that had been framed in ***Unni Krishnan's*** case had imposed unreasonable restrictions on the administration of the private educational institutions, and that especially in the case of minority institutions, the right guaranteed to them under Article 30(1) stood infringed. It was also urged that the object that was sought to be achieved by the scheme was, in fact, not achieved.

7. On behalf of the private minority institutions, it was submitted that on the correct interpretation of the various provisions of the Constitution, and Articles 29 and 30 in particular, the minority institutions have a right to establish and administer educational institutions of their choice. The use of the phrase "of their choice" in Article 30(1) clearly postulated that the religious and linguistic minorities could establish and administer any type of educational institution, whether it was a school, a degree college or a professional college; it was argued that such an educational institution is invariably established primarily for the benefit of the religious and linguistic minority, and it should be open to such institutions to admit students of their choice. While Article 30(2) was meant to ensure that these minority institutions would not be denied aid on the ground that they were managed by minority institutions, it was submitted that no condition which curtailed or took away the minority character of the institution while granting aid could be imposed. In particular, it was submitted that Article 29(2) could not be applied or so interpreted as to completely obliterate the right of the minority institution to grant admission to the students of its own religion or language. It was also submitted that while secular laws relating to health, town planning, etc., would be applicable, no other rules and regulations could be framed that would in any way curtail or interfere with the administration of the minority educational institution. It was emphasized by the learned counsel that the right to administer an educational institution included the right to constitute a governing body, appoint teachers and admit students. It was further submitted that these were the essential ingredients of the administration of an educational institution, and no fetter could be put on the exercise of the right to administer. It was conceded that for the purpose of seeking recognition, qualifications of teachers could be stipulated, as also the qualification of the students who could be admitted; at the same time, it was argued that the manner and mode of appointment of teachers and selection of students had to be within the exclusive domain of the autochthones institution.

8. On behalf of the private non-minority unaided educational institutions, it was contended that since secularism and equality were part of the basic structure of the Constitution the provisions of the Constitution should be interpreted so that the right of the private non-minority unaided institutions were the same as that of the minority institutions. It was submitted that while reasonable restrictions could be imposed under Article 19(6), such private institutions should have the same freedom of administration of an unaided institution as was sought by the minority unaided institutions.

9. The learned Solicitor General did not dispute the contention that the right in establish an institution had been confined on the non-minorities by Articles 19 and 26 and on the religious and linguistic minorities by Article 30. He agreed with the submission of the counsels for the appellants that the Unni Krishnan decision required reconsideration, and that the private unaided educational institutions were entitled to greater autonomy. He, however, contended that Article 29(2) was applicable to minority institutions, and the claim of the minority institutions that they could preferably admit students of their own religion or language to the exclusion of the other communities was impermissible. In other words, he submitted that Article 29(2) made it obligatory even on the minority institutions not to deny admission on the ground of religion, race, caste, language or any of them.

10. Several States have totally disagreed with the arguments advanced by the learned Solicitor General with regard to the applicability of Article 29(2) and 30(1). The States of Madhya Pradesh, Chattisgarh and Rajasthan have submitted that the words "their choice" in Article 30(1) enabled the minority institutions to admit members of the minority community, and that the inability of the minority institutions to admit others as a result of the exercise of "their choice" would not amount to a denial as contemplated under Article 29(2). The State of Andhra Pradesh has not expressly referred to the inter-play between Article 29(2) and Article 30(1), but has stated that *"as the minority educational institutions are intended to benefit the minorities, a restriction that at least 50 per cent of the students admitted should come from the particular minority, which has established the institution should be stipulated as a working rule"*, and that an institution which fulfilled the following conditions should be regarded as minority educational institutions:

1. All the office bearers, members of the executive committee of the society must necessarily belong to the concerned religious/linguistic minority without exception.

2. The institution should admit only the concerned minority candidates to the extent of sanctioned intake permitted to be filed by the respective managements.

and that the Court "*ought to permit the State to regulate the intake in minority educational institutions with due regard to the need of the community in the area which the institution is intended to serve. In no case should such intake exceed 50% of the total admissions every year*."

11. The State of Kerala has submitted, again without express reference to Article 29(2), "*that the constitutional right of the minorities should be extended to professional education also, but while limiting the right of the minorities to admit students belonging to their community to 50% of the total intake of each minority institution*".

12. The State of Karnataka has submitted that "aid is not a matter of right but receipt thereof does not in any way dilute the minority character of the institution. Aid can be distributed on non-discriminatory conditions but in so far as minority institutions are concerned, their core rights will have to be protected.

13. On the other hand, the States of Tamil Nadu, Punjab, Maharashtra, West Bengal, Bihar and Uttar Pradesh have submitted that Article 30(1) is subject to Article 29(2), arguing that a minority

institution availing of state aid loses the right to admit members of its community on the basis of the need of the community.

14. The Attorney General, pursuant to the request made by the court, made submissions on the constitutional issues in a fair and objective manner. We recorded our appreciation for the assistance rendered by him and the other learned counsel.

15. We may observe here that the counsels were informed that it was not necessary for this Bench to decide four of the questions framed relating to the issue of who could be regarded as religious minorities; no arguments were addressed in respect thereto.

16. From the arguments aforesaid, five main issues arise for consideration in these cases, which would encompass all the eleven questions framed that are required to be answered.

17. We will first consider the arguments of the learned counsels under these heads before dealing with the questions now remaining to be answered.

1. IS THERE A FUNDAMENTAL RIGHT TO SET UP EDUCATIONAL INSTITUTION AND IF SO, UNDER WHICH PROVISION?

18. With regard to the establishment of educational institutions, three Articles of the Constitution come into play. Article 19(1)(g) gives the right to all the citizens to practice any profession or to carry on any occupation, trade or business; this right is subject to restrictions that may be placed under Article 19(6). Article 26 gives the right to every religious denomination to establish and maintain an institution for religious purposes, which would include an educational institution. Article 19(1)(g) and Article 26, therefore, confer rights on all citizens and religious denominations to establish and maintain educational institutions.
There was no serious dispute that the majority community as well as linguistic and religious minorities would have a right under Article 19(1)(g) and 26 to establish educational institutions. In addition, Article 30(1), in no uncertain terms, gives the right to the religious and linguistic minorities to establish and administer educational institutions of their choice.

19. We will first consider the right to establish and administer an educational institution under Article 19(1)(g) of the Constitution and deal with the right to establish educational institutions under Article 26 and 30 in the next part of the judgment while considering the rights of the minorities.

20. Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business.

Their fields may overlap, but each of them does have a content of its own. Education is *per se* regarded as an activity that is charitable in nature [See ***The State of Bombay v. R.M.D. Chamarbaugwala,*** MANU/SC/0019/1957]. Education has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation".

Article 19(1)(g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6). In *Webster's Third New International Dictionary* at page 1650, "occupation" is, *inter alia* , defined as "an activity in which one engages" or "a craft, trade, profession or other means of earning a living".

21. In *Corpus Juris Secundum*, Volume LXVII, the word "occupation" is defined as under:-

"The word "occupation" also is employed as referring to that which occupies time and attention; a calling; or a trade; and it is only as employed in this sense that the word is discussed in the following paragraphs.

There is nothing ambiguous about the word "occupation" as it is used in the sense of employing one's time. It is a relative term, in common use with a well-understand meaning, and very broad in its scope and significance. It is described as a generic and very comprehensive term, which includes every species of the genus, and compasses the incidental, as well as the main, requirements of one's vocation., calling, or business. The word "occupation" is variously defined as meaning the principal business of one's life; the principal or usual business in which a man engages; that which principally takes up one's time, thought, and energies; that which occupies or engages the time and attention; that particular business, profession, trade, or calling which engages the time and efforts of an individual; the employment in which one engages, or the vocation of one's life; the state of being occupied or employed in any way; that activity in which a person, natural or artificial, is engaged with the element of a degree of permanency attached."

22. A Five Judge Bench in ***Sodan Singh and Ors. v. New Delhi Municipal Committee and Ors.*** MANU/SC/0521/1989 : [1989]3SCR1038 at page 174, para 28, observed as follows:

".....The word occupation has a wide meaning such as any regular work, profession, job, principal activity, employment, business or a calling in which an individual is engaged.....
The object of using four analogous and overlapping words in Article 19(1)(g) is to make the guaranteed right as comprehensive as possible to include all the avenues and modes through which a man may earn his livelihood. In a nutshell the guarantee takes into its fold any activity carried on by a citizen of India to earn his living....".

23. In ***Unni Krishnan's*** case, at page 687, para 63, while referring to education, it was observed as follows:-

".....It may perhaps fall under the category of occupation provided no recognition is sought from the State or affiliation from the University is asked on the basis that its a fundamental right....."

24. While the conclusion that "occupation" comprehends the establishment of educational institutions is correct, the proviso in the aforesaid observation to the effect that this is so provided no recognition is sought from the state or affiliation from the concerned university is, with the utmost respect, erroneous. The fundamental right to establish an educational institution cannot be confused with the right to ask for recognition of affiliation. The exercise of a fundamental right may be controlled in a variety of ways. For example, the right to carry on a business does not entail

the right to carry on a business at a particular place. The right to carry on a business may be subject to licensing laws so that a denial of the licence presents a person from carrying on that particular business. The question of whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject matter of controls.

25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehended that education, *per se*, will not fall under any of the four expressions in Article 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life.

The above quoted observations in ***Sodan Singh's*** case correctly interpret the expression "occupation" in Article 19(1)(g).

26. The right to establish and maintain educational institutions may also be sourced to Article 26(a), which grants, in positive terms, the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity. therefore, religious denominations or sections thereof, which do not fall within the special categories carved out in Article 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow members belonging to any religious denomination, including the majority religious community, to set up an educational institution. Given this, the phrase "private educational institution" as used in this judgment would include not only those educational institutions set up by the secular persons or bodies, but also educational institutions set up by religious denominations; the word "private" is used in contradistinction to government institutions.

2. DOES UNNIKRISHNAN'S CASE REQUIRE RECONSIDERATION?

27. In the case of ***Mohini Jain (Miss) v. State of Karnataka and Ors.*** MANU/SC/0357/1992 : [1992]3SCR658 , the challenge was to a notification of June 1989, which provided for a fee structure, whereby for government seats, the tuition fee was Rs. 2, 000 per annum, and for students from Karnataka, the fee was Rs. 25,000 per annum, while the fee for Indian students from outside Karnataka, under the payment category, was Rs. 60,000 per annum. It had been contended that charging such a discriminatory and high fee violated constitutional guarantees and rights. This attack was sustained, and it was held that there was a fundamental right to education in every citizen, and that the state was duty bound to provide the education, and that the private institutions that discharge the state's duties were equally bound not to charge a higher fee than the government institutions. The Court then held that any prescription of fee in excess of what was payable in government colleges was a capitation fee and would, therefore, be illegal. The correctness of this decision was challenged in ***Unni Krishnan's*** case, where it was contended that if ***Mohini Jain's*** ratio was applied the educational institutions would have to be closed down, as they would be wholly unviable without appropriate funds, by way of tuition fees, from their students.

28. We will now examine the decision in Unni Krishnan's case. In this case, this Court considered the conditions and regulations, if any, which the state could impose in the running of private

unaided/aided recognized or affiliated educational institutions conducting professional courses such a medicine, engineering, etc. The extent to which the fee could be charged by such an institution, and the manner in which admissions could be granted was also considered. This Court held that private unaided recognized/affiliated educational institutions running professional courses were entitled to charge a fee higher than that charged by government institutions for similar courses, but that such a fee could not exceed the maximum limit fixed by the state. It held that commercialization of education was not permissible, and "*was opposed to public policy and Indian tradition and therefore charging capitation fee was illegal.*" With regard to private aided recognized/affiliated educational institutions, the Court upheld the power of the government to frame rules and regulations in matter of admission and fees, as well as in matters such a recruitment and conditions of service of teachers and staff. Though a question was raised as to whether the setting up of an educational institution could be regarded as a business, profession or vocation under Article 19(1)(g), this question was not answered. Jeevan Reddy, J., however, at page 751, para 197, observed as follows:-

".....While we do not wish to express any opinion on the question whether the right to establish an educational institution can be said to be carrying on any "occupation" within the meaning of Article 19(1)(g), - perhaps, it is -- we are certainly of the opinion that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country....."

29. Reliance was placed on a decision of this Court in ***Bangalore Water Supply and Sewerage Board v. A. Rajappa and Ors.*** MANU/SC/0257/1978 : (1978)ILLJ349SC , wherein it had been held that educational institutions would come within the expression "industry" in the Industrial Disputes Act, and that, therefore, education would come under Article 19(1)(g). But the applicability of this decision was distinguished by Jeevan Reddy, J., observing that "*we do not think the said observation (that education as industry) in a different context has any application here*". While holding, on an interpretation of Articles 21, 41, 45 and 46, that a citizen who had not completed the age of 14 years had a right to free education, it was held that such a right was not available to citizens who were beyond the age of 14 years. It was further held that private educational institutions merely supplemented the effort of the state in educating the people. No private educational institution could survive or subsist without recognition and/or affiliation granted by bodies that were the authorities of the state. In such a situation, the Court held that it was obligatory upon the authority granting recognition/affiliation to insist upon such conditions as were appropriate to ensure not only an education of requisite standard, but also fairness and equal treatment in matter of admission of students. The Court then formulated a scheme and directed every authority granting recognition/affiliation to impose that scheme upon institutions seeking recognition/affiliation, even if they were unaided institutions. The scheme that was framed, *inter alia*, postulated (a) that a professional college should be established and/or administered only by a Society registered under the Societies Registration Act, 1860, or the corresponding Act of a State, or by a Public Trust registered under the Trusts Act, or under the Wakfs Act, and that no individual, firm, company or other body of individuals would be permitted to establish and/or administer a professional college (b) that 50% of the seats in every professional college should be filed by the nominees of the Government or University, selected on the basis of merit determined by a common entrance examination, which will be referred to as "free seats"; the remaining 50% seats ("payment

seats") should be filled by those candidates who pay the fee prescribed therefore, and the allotment of students against payment seats should be done on the basis of *inter se* merit determined on the same basis as in the case of free seats (c) that there should be no quota reserved for the management or for any family, caste or community, which may have established such a college (d) that it should be open to the professional college to provide for reservation of sets for constitutionally permissible classes with the approval of the affiliating university (e) that the fee chargeable in each professional college should be subject to such a ceiling as may be prescribed by the appropriate authority or by a competent court (f) that every state government should constitute a committee to fix the ceiling on the fees chargeable by a professional college or class of professional colleges, as the case may be. This committee should, after hearing the professional colleges, fix the fee once every three years or at such longer intervals, as it may think appropriate(g) that it would be appropriate for the University Grants Commission to frame regulators under its Act regulating the fees that the affiliated colleges operating on a no grant-in-aid basis were entitled to charge. The AICTE, the Indian Medical Council and the Central Government were also given similar advice. The manner in which the seats to be filled on the basis of the common entrance test was also indicated.

30. The counsel for the minority institutions, as well as the Solicitor General, have contended that the scheme framed by this Court in ***Unni Krishnan's*** case was not warranted. It was represented to us that the cost incurred on educating a student in an unaided professional college was more than the total fee, which is realized on the basis of the formula fixed in the scheme. This had resulted in revenue shortfalls. This Court, by interim orders subsequent to the decision in ***Unni Krishnan's*** case, had permitted, within the payment seats, some percentage of seats to be allotted to Non-Resident Indians, against payment of a higher amount as determined by the authorities. Even thereafter, sufficient funds were not available for the development of those educational institutions. Another infirmity which was pointed out was that experience has shown that most of the "free seats" were generally occupied by students from affluent families, while students from less affluent families were required to pay much more to secure admission to "payment seats". This was for the reason that students from affluent families had had better school education and the benefit of professional coaching facilities and were, therefore, able to secure higher merit positions in the common entrance test, and thereby secured the free seats. The education of these more affluent students was in a way being cross-subsidized by the financially poorer students who because of their lower position in the merit list, could secure only "payment seats". It was also submitted by the counsel for the minority institutions that ***Unni Krishnan's*** case was not applicable to the minority institutions, but that notwithstanding this, the scheme to evolved had been made applicable to them as well.

31. Counsel for the institutions, as well as the Solicitor General, submitted that the decision in ***Unni Krishnan's*** case, insofar as it had framed the scheme relating to the grant of admission and the fixing of the fee, was unreasonable and invalid. However, its conclusion that children below the age of 14 had a fundamental right to free education did not call for any interference.

32. It has been submitted by the learned counsel for the parties that the implementation of the scheme by the States, which have amended their rules and regulations, has shown a number of anomalies. As already noticed, 50% of the seats are to be given on the basis of merit determined after the conduct of a common entrance test, the rate of fee being minimal. The "payment seats"

which represent the balance number, therefore, cross-subsidize the "free seats". The experience of the educational institutions has been that students who come from private schools, and who belong to more affluent families, are able to secure higher positions in the merit list of the common entrance test, and are thus able to seek admission to the "free seats". Paradoxically, it is the students who come from less affluent families, who are normally able to secure, on the basis of the merit list prepared after the common entrance test, only "payment seats".

33. It was contended by petitioned counsel that the implementation of the ***Unni Krishnan*** scheme has in fact (1) helped the privileged from richer urban families, even after they ceased to be comparatively meritorious, and (2) resulted in economic losses for the educational institutions concerned, and made them financially unviable. Data in support of this contention was placed on record in an effort to persuade this Court to hold that the scheme had failed to achieve its object.

34. Material has also been placed on the record in an effort to show that the total fee realized from the fee fixed for "free seats" and the "payment seats" is actually less than the amount of expense that is incurred on each student admitted to the professional college. It is because there was a revenue shortfall that this Court had permitted in NRI quota to be carved out of the 50% payment seats for which charging higher fee was permitted. Directions were given to UGC, AICTE, Medical Council of India and Central and State governments to regulate or fix a ceiling on fees, and to enforce the same by imposing conditions of affiliation/permission to establish and run the institutions.

35. It appears to us that the scheme framed by this Court and thereafter followed by the governments was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution. Normally, the reason for establishing an educational institution is to impart education. The institution thus needs qualified and experienced teachers and proper facilities and equipment, all of which require capital investment. The teachers are required to be paid properly. As pointed out above, the restrictions imposed by the scheme, in ***Unni Krishnan's*** case, made it difficult, if not impossible, for the educational institutions to run efficiently. Thus, such restrictions cannot be said to be reasonable restrictions.

36. The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, *inter alia*, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfills the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution.

37. The ***Unni Krishnan*** judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. **When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the**

education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.

38. The scheme in ***Unni Krishnan's*** case has the effect of nationalizing education in respect of important features, viz., the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme the private institutions are undistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable. Even in the decision in ***Unni Krishnan's*** case, it has been observed by Jeevan Reddy, J., at page 749, para 194, as follows:

"The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Governments are in no position to meet the demand - particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no *monopoly therein. Private educational institutions - including* minority educational institutions - too have a role to play."

39. That private educational instructions are a necessity becomes evident from the fact that the number of government-maintained professional colleges has more or less remained stationary, while more private institutions have been established. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 government-maintained medical colleges. Similarly, out of 14 Dental Colleges in Karnataka, only one has been established by the government, while in the same State, out of 51 Engineering Colleges, only 12 have been established by the government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and non-minority, which cater to the needs of students seeking professional education.

40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness.

41. Surrendering the total process of selection to the state is unreasonable, as was sought to be done in the Unni Krishnan scheme. Apart from the decision in *St. Stephen's College v. University of Delhi MANU/SC/0319/1992 : AIR1992SC1630* , which recognized and upheld the right of a minority aided institution to have a rational admission procedure of its own, earlier Constitution Bench decision of this Court have, in effect, upheld such a right of an institution devising a rational manner of selecting and admitting students.

42. In ***R. Chitralekha and Anr. v. State of Mysore and Ors.*** MANU/SC/0030/1964 : [1964]6SCR368 , while considering the validity of a viva-voce test for admission to a government

medical college, it was observed at page 380 that colleges run by the government, having regard to financial commitments and other relevant considerations, would only admit a specific number of students. It had devised a method for screening the applicants for admission. While upholding the order so issued, it was observed that

"*once it is conceded, and it is not disputed before us, that the State Government can run medical and engineering colleges, it cannot be denied the power to admit such qualified students as pass the reasonable tests laid down by it.* ***This is a power which every private owner of a College will have, and the Government which runs its own Colleges cannot be denied that power."*** *(emphasis added).*

43. Again, in ***Minor P. Rajendran v. State of Madras and Ors.*** MANU/SC/0025/1968 : [1968]2SCR786 , it was observed at page 795 that "

so far as admission is concerned, it has to be made by those who are in control of the Colleges, and in this case the Government, because the medical colleges are Government colleges affiliated to the University. In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the university as to eligibility and qualifications.
" The aforesaid observations clearly underscore the right of the colleges to frame rules for admission and to admit students. The only requirement or control is that the rules for admission must be *subject to the rules of the university as to eligibility and qualifications.* The Court did not say that the university could provide the manner in which the students were to be selected.

44. In ***Kumari Chitra Ghosh and Anr. v. Union of India and Ors.*** *MANU/SC/0042/1969 : [1970]1SCR413* , dealing with a government run medical college at pages 232-33, para 9, it was observed as follows:

"It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility....."

45. In view of the discussion hereinabove, we hold that the decision in ***Unni Krishnan's*** case, insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct, and to that extent, the said decision and the consequent direction given to UGC, AICTE, Medical Council of India, Central and State Government, etc., are overruled.

3. IN CASE OF PRIVATE INSTITUTIONS, CAN THERE BE GOVERNMENT REGULATIONS AND, IF SO, TO WHAT EXTENT?

46. We will now examine the nature and extent of the regulations that can be framed by the State, University or any affiliating body, while granting recognition or affiliation to a private educational institution.

47. Private educational institutions, both aided and unaided, are established and administered by religious and linguistic minorities, as well as by non-minorities. Such private educational institutions provide education at three levels, viz., school, college and professional level. It is

appropriate to first deal with the case of private unaided institutions and private aided institutions that are not administered by linguistic or religious minorities. Regulations that can be framed relating to minority institutions will be considered while examining the merit and effect of Article 30 of the Constitution.

Private Unaided Non-Minority Educational Institutions

48. Private education is one of the most dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

49. Not only has demand overwhelmed the ability of the governments to provide education, there has also been a significant change in the way that higher education is perceived. The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of today's economics and an ideology of privatization have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before.

50. The right to establish and administer broadly comprises of the following rights:-

(a) to admit students:

(b) to set up a reasonable fee structure:

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees.

51. A University Education Commission was appointed on 4th November, 1948, having Dr. S. Radhakrishnan as its Chairman and nine other renowned educationists as its members. The terms of reference, *inter alia*, included matters relating to means and objects of university education and research in India and maintenance of higher standards of teaching and examining in universities and colleges under their control. In the report submitted by this Commission, in paras 29 and 31, it referred to autonomy in education which reads as follows:-

"***University Autonomy.*** -- Freedom of individual development is the basis of democracy. Exclusive control of education by the State has been an important factor in facilitating the maintenance of *totalitarian tyrannies.* In such States institutions of higher learning controlled and managed by governmental agencies act like mercenaries, promote the political purposes of the State, make them acceptable to an increasing number of their populations and supply then with the weapons

they need. We must resist, in the interests of our own democracy, the trend towards the governmental domination of the educational process.

Higher educational is, undoubtedly, an obligation of the State but State aid is not to be confused with State control over academic policies and practices. Intellectual progress demands the maintenance of the spirit of free inquiry. The pursuit and practice of truth regardless of consequences has been the ambition of universities. Their prayer is that of the dying Goethe: "More light," or that Ajax in the mist "Light, though I perish in the light.

xxxxx xxx xxx

The respect in which the universities of Great Britain are held is due to the freedom from governmental interference which they enjoy constitutionally and actually. Our universities should be released from the control of politics.

Liberal Education. -- All education is expected to be liberal. It should free us from the shackles of ignorance, prejudice and unfounded belief. If we are incapable of achieving the good life, it is due to faults in our inward being, to the darkness in us. The process of education is the slow conquering of this darkness. To lead us from darkness to light, to free us from every kind of domination except that of reason, is the aim of education."

52. There cannot be a better exposition than what has been observed by these renowned educationists with regard to autonomy in education. The aforesaid passage clearly shows that the governmental domination of the educational process must be resisted. Another pithy observation of the Commission was that state aid was not to be confused with state control over academic policies and practices. The observations referred to hereinabove clearly contemplate educational institutions soaring to great heights in pursuit of intellectual excellence and being free from unnecessary governmental controls.

53. With regard to the core components of the rights under Article 19 and 26(a), it must be held that while the state has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance of conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them feeships or scholarships, if not granted by the Government.
Furthermore, in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. In any event, a private institution will have the right to constitute its own governing body, for which qualifications may be prescribed by the state or the concerned university. It will, however, be objectionable if the state retains the power to nominate specific individuals on governing bodies. Nomination by the state, which could be on a political basis, will be an inhibiting factor for private enterprise to embark upon the occupation of establishing and administering educational institutions. For the same reasons, nomination of teachers either directly by the department or

through a service commission will be an unreasonable inroad and an unreasonable restrictions on the attorney of the private unaided educational institution.

54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of mal-administration by those in charge of management.

The fixing of a rigid fee structure, dictating the formation and composition of a government body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

55. The Constitution recognizes the right of the individual or religious denomination, or a religious or linguistic minority to establish an educational institution. If aid or financial assistance is not sought, then such institution will be a private unaided institution. Although, in ***Unni Krishnan's*** case, the Court emphasized the important role played by private unaided institutions and the need for private funding, in the scheme that was framed, restrictions were placed on some of the important ingredients relating to the functioning of an educational institution. There can be no doubt that in seeking affiliation or recognition, the Board or the university or the affiliating or recognizing authority can lay down conditions consistent with the requirement to ensure the excellence of education. It can, for instance, indicate the quality of the teachers by prescribing the minimum qualifications that they must possess, and the courses of study and curricula. It can, for the same reasons, also stipulate the existence of infrastructure sufficient for its growth, as a pre-requisite. But the essence of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence. While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognized educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings, it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged.

56. An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense a prospective students

has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the government.

57. We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution.

58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

60. Education is taught at different levels from primary to professional. It is, therefore, obvious that government regulations for all levels or types of educational institutions cannot be identical; so also, the extent of control or regulation could be greater vis-a-vis aided institutions.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged.

At the school level, it is not possible to grant admission on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that state-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtaining the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the state has to provide the difference which, therefore, brings us back in a vicious

circle to the original problem, viz., the lack of state funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of state-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

62. There is a need for private enterprise in non-professional college education as well. At present, insufficient number of undergraduate colleges are being and have been established, one of the inhibiting factors being that there is a lack of autonomy due to government regulations. It will not be wrong to presume that the numbers of professional colleges are growing at a faster rate than the number of undergraduate and non-professional colleges. While it is desirable that there should be a sufficient number of professional colleges, it should also be possible for private unaided undergraduate colleges that are non-technical in nature to have maximum autonomy similar to a school.

63. It was submitted that for maintaining the excellence of education, it was important that the teaching faculty and the members of the staff of any educational institution performed their duties in the manner in which it is required to be done, according to the rules or instructions. There have been cases of misconduct having been committed by the teachers and other members of the staff. The grievance of the institution is that whenever disciplinary action is sought to be taken in relation to such misconduct, the rules that are normally framed by the government or the university are clearly loaded against the Management. It was submitted that in some cases, the rules require the prior permission of the governmental authorities before the intimation of the disciplinary proceeding, while in other cases, subsequent permission is required before the imposition of penalties in the case of proven misconduct. While emphasizing the need for an independent authority to adjudicate upon the grievance of the employee or the Management in the event of some punishment being imposed, it was submitted that there should be no role for the government or the university to play in relation to the imposition of any penalty on the employee.

64. An educational institution is established only for the purpose of imparting education to the students. In such an institution, it is necessary for all to maintain discipline and abide by the rules and regulations that have been lawfully framed. The teachers are like foster-parents who are required to look after, cultivate and guide the students in their pursuit of education. The teachers and the institution exist for the students and not *vice versa.* Once this principle is kept in mind, it must follow that it becomes imperative for the teaching and other staff of an educational institution to perform their duties properly, and for the benefit of the students. Where allegations of misconduct are made, it is imperative that a disciplinary enquiry is conducted, and that a decision is taken. In the case of a private institution, the relationship between the Management and the employees is contractual in nature. A teacher, if the contract so provides, can be proceeded against, and appropriate disciplinary action can be taken if the misconduct of the teacher is proved. Considering the nature of the duties and keeping the principle of natural justice in mind for the

purposes of establishing misconduct and taking action thereon, it is imperative that a fair domestic enquiry is conducted. It is only on the basis of the result of the disciplinary enquiry that the management will be entitled to take appropriate action. We see no reason why the Management of a private unaided educational should seek the consent or approval of any governmental authority before taking any such action. In the ordinary relationship of master and servant, governed by the terms of a contract of employment, anyone who is guilty of breach of the terms can be proceeded against and appropriately relief can be sought. Normally, the aggrieved party would approach a court of law and seek redress. In the case of educational institutions, however, we are of the opinion that requiring a teacher or a member of the staff to go to a civil court for the purpose of seeking redress is not in the interest of general education. Disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs. It would, therefore, be appropriate that an educational Tribunal be set up in each district in a State, to enable the aggrieved teacher to file an appeal, unless there already exists such an educational tribunal in a State -- the object being that the teacher should not suffer through the substantial costs that arise because of the location of the tribunal; if the tribunals are limited in number, they can hold circuit/camp sittings in different districts to achieve this objective. Till a specialized tribunal is set up, the right of filing the appeal would lie before the District Judge or Additional District Judge as notified by the government. It will not be necessary for the institution to get prior permission or *ex post facto* approval of a governmental authority while taking disciplinary action against a teacher or any other employee. The State Government shall determine, in consultation with the High Court, the judicial forum in which an aggrieved teacher can file an appeal against the decision of the management concerning disciplinary action or termination of service.

65. The reputation of an educational institution is established by the qualify of its faculty and students, and the educational and other facilities that the colleges has to offer. The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. If is for this reason that in the ***St. Stephen's College*** case, this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to say their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons.

66. In the case of private unaided educational institution, the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation; these conditions must pertain broadly to academic and educational matters and welfare of students and teachers - but how the private unaided institutions are to run is a matter of administration to be taken care of by the Management of those institutions.

Private Unaided Professional Colleges

67. We now come to the regulations that can be framed relating to private unaided professional institutions.

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the Management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the state agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the government according to the local needs and different percentage can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz., graduation and post-graduation non-professional colleges or institutes.

69. In such professional unaided institutions, the Management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/University subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the Management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the state or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers.

70. It is well established all over the world that those who seek professional education must pay for it. The number of seats available in government and government-aided colleges is very small, compared to the number of persons seeking admission to the medical and engineering colleges. All those eligible and deserving candidates who could not be accommodated in government colleges would stand deprived of professional education. This void in the field of medical and technical education has been filled by institutions that are established in different places with the aid of donations and the active part taken by public-minded individuals. The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture. In order that this intention is meaningful, the institution must be recognized. At the school level, the recognition or affiliation has to be sought from the educational authority or the body that conducts the school-leaving examination. It is only on the basis of that examination that a school-leaving certificate is granted, which enables a student to seek admission in further courses of study after school. A college or a professional educational institution has to get recognition from the concerned university, which normally requires certain conditions to be fulfilled before recognition. It has been held that conditions of

affiliation or recognition, which pertain to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational courses are valid, and that they do not violate even the provisions of Article 30 of the Constitution; but conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions.

Private Aided Professional Institutions (non-minority)

71. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the state. The merit may be determined either through a common entrance test conducted by the University or the Government followed by counseling, or on the basis of an entrance test conducted by individual institutions - the method to be followed is for the university or the government to decide. The authority may also device other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the government or the university to provide that consideration should be shown to the weaker sections of the society.

72. Once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The state, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state. The state would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many states, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The state, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since ***In Re The Kerala Education Bill, 1957*** MANU/SC/0029/1958 : [1959]1SCR995 this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent mal-administration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions. At the same time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the Management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by government or as a wholly owned and controlled government institution and interfere with Constitution of the governing bodies or thrusting the staff without reference to Management.

Other Aided Institutions

73. There are a large number of educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the state. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the state. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed. in other words, the autonomy of a private aided institution would be less than that of an unaided institution.

4. IN ORDER TO DETERMINE THE EXISTENCE OF A RELIGIOUS OR LINGUISTIC MINORITY IN RELATION TO ARTICLE 30, WHAT IS TO BE THE UNIT - THE STATE OR THE COUNTRY AS A WHOLE?

74. We now consider the question of the unit for the purpose of determining the definition of "minority" within the meaning of Article 30(1).

75. Article 30(1) deals with religious minorities and linguistic minorities. The opening words of Article 30(1) make it clear that religious and linguistic minorities have been put at par, insofar as that Article is concerned. therefore, whatever the unit - whether a state or the whole of India - for determining a linguistic minority, it would be the same in relation to a religious minority. India is divided into different linguistic states. The states have been carved out on the basis of the language of the majority of persons of that region. For example, Andhra Pradesh was established on the basis of the language of that region. viz., Telugu. "Linguistic minority" can, therefore, logically only be in relation to a particular State. If the determination of "linguistic minority" for the purpose of Article 30 is to be in relation to the whole of India, then within the State of Andhra Pradesh, Telugu speakers will have to be regarded as a "linguistic minority". This will clearly be contrary to the concept of linguistic states.

76. If, therefore, the state has to be regarded as the unit for determining "linguistic minority" vis-a-vis Article 30, then with "religious minority" being on the same footing, it is the state in relation to which the majority or minority status will have to be determined.

77. In the ***Kerala Education Bill*** case, the question as to whether the minority community was to be determined on the basis of the entire population of India, or on the basis of the population of the State forming a part of the Union was posed at page 1047. It had been contended by the State of Kerala that for claiming the status of minority, the persons must numerically be a minority in the particular region in which the education institution was situated, and that the locality or ward or town where the institution was to be situated had to be taken as the unit to determine the minority community. No final opinion on this question was expressed, but it was observed at page 1050 that as the Kerala Education Bill "***extends to the whole of the State of Kerala and consequently the minority must be determined by reference to the entire population of that State.***"

78. In two cases pertaining to the DAV College, this Court had to consider whether the Hindus were a religious minority in the State of Punjab. In ***D.A.V. College v. State of Punjab and Ors.*** MANU/SC/0039/1971 : 1971 (Supp.) SCR 688 the question posed was as to what constituted a religious or linguistic minority, and how it was to be determined. After examining the opinion of this Court in the Kerala Education Bill case, the Court held that the Arya Samajis, who were Hindus, were a religious minority in the State of Punjab, even though they may not have been so in relation to the entire country. In another case, ***D.A.V. College Bhatinda v. State of Punjab and Ors.*** MANU/SC/0038/1971 : AIR1971SC1731 , the observations in the first *D.A.V. College* case were explained, and at page 681, it was stated that "

what constitutes a linguistic or religious minority must be judged in relation to the State inasmuch as the impugned Act was a State Act and not in relation to the whole of India.
" The Supreme Court rejected the contention that since Hindus were a majority in India, they could not be a religious minority in the state of Punjab, as it took the state as the unit to determine whether the Hindus were a minority community.

79. There can, therefore, be little doubt that this Court has consistently held that, with regard to a state law, the unit to determine a religious or linguistic minority can only be the state.

80. The Forty-Second Amendment to the Constitution included education in the Concurrent List under Entry 25. Would this in any way change the position with regard to the determination of a "religious" or "linguistic minority" for the purposes of Article 30

81. As a result of the insertion of Entry 25 into List III, Parliament can now legislate in relation to education, which was only a state subject previously. The jurisdiction of the Parliament is to make laws for the whole or a part of India. It is well recognized that geographical classification is not violative of Article 14. It would, therefore, be possible that, with respect to a particular State or group of States, Parliament may legislate in relation to education. However, Article 30 gives the right to a linguistic or religious minority of a State to establish and administer educational institutions of their choice. The minority for the purpose of Article 30 cannot have different meanings depending upon who is legislating. Language being the basis for the establishment of different states for the purposes of Article 30 a "linguistic minority" will have to be determined in relation to the state in which the educational institution is sought to be established. The position with regard to the religious minority is similar, since both religious and linguistic minorities have been put at par in Article 30.

5. TO WHAT EXTENT CAN THE RIGHTS OF AIDED PRIVATE MINORITY INSTITUTIONS TO ADMINISTER BE REGULATED?

82. Article 25 give to all persons the freedom of conscience and the right to freely profess, practice and propagate religion. This right, however, is not absolute. The opening words of Article 25(1) make this right subject to public order, morality and health, and also to the other provisions of Part III of the Constitution. This would mean that the right given to a person under 25(1) can be curtailed or regulated if the exercise of that right would violate other provisions of Part III of the Constitution, or if the exercise thereof is to in consonance with public order, morality and health. The general law made by the government contains provisions relating to public order, morality

and health; these would have to be complied with, and cannot be violated by any person in exercise of his freedom of conscience or his freedom to profess, practice and propagate religion. For example, a person cannot propagate his religion in such a manner as to denigrate another religion or bring about dissatisfaction amongst people.

83. Article 25(2) gives specific power to the state to make any law regulating or restricting any economic, financial, political or other secular activity, which may be associated with religious practice as provided by Sub-clause (a) of Article 25(2). This is a further curtailment of the right to profess, practice and propagate religion conferred on the persons under Article 25(1). Article 25(2)(a) covers only a limited area associated with religious practice, in respect of which a law can be made. A careful reading of Article 25(2)(a) indicates that it does not prevent the State from making any law in relation to the religious practice as such. The limited jurisdiction granted by Article 25(2) relates to the making of a law in relation to economic, financial, political or other secular activities associated with the religious practice.

84. The freedom to manage religious affairs is provided by Article 26. This Article gives the right to every religious denomination, or any section thereof, to exercise the rights that it stipulates. However, this right has to be exercised in a manner that is in conformity with public order, morality and health. Clause (a) of Article 26 gives a religious denomination the right to establish and maintain institutions for religious and charitable purposes. There is no dispute that the establishment of an educational institution comes within the meaning of the expression "charitable purpose". therefore, while Article 25(1) grants the freedom of conscience and the right to profess, practice and propagate religion, Article 26 can be said to be complementary to it, and provides for every religious denomination, or any section thereof, to exercise the rights mentioned therein. This is because Article 26 does not deal with the right of an individual, but is confined to a religious denomination. Article 26 refers to a denomination of any religion, whether it is a majority or a minority religion, just as Article 25 refers to all persons, whether they belong to the majority or a minority religion. Article 26 gives the right to majority religious denominations, as well as to minority religious denominations, to exercise the rights contained therein.

85. Secularism being one of the important basic features of our Constitution, Article 27 provides that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated for the payment of expenses for the promotion and maintenance of any particular religion or religious denomination. The manner in which the Article has been framed does not prohibit the state from enacting a law to incur expenses for the promotion or maintenance of any particular religion or religious denomination, but specifies that by that law, no person can be compelled to pay any tax, the proceeds of which are to be so utilized. In other words, if there is a tax for the promotion or maintenance of any particular religion or religious denomination, no person an be compelled to pay any such tax.

86. Article 28(1) prohibits any educational institution, which is wholly maintained out of state funds, to provide for religious instruction. Moral education dissociation from any demon national doctrine is not prohibited; but, as the state is intended to be secular, an educational institution wholly maintained out of state funds cannot impart or provide for any religious instruction.

87. The exception to Article 28(1) is contained in Article 28(2). Article 28(2) deals with cases where, by an endowment or trust, an institution is established, and the terms of the endowment or the trust require the imparting of religious instruction, and where that institution is administered by the state. In such a case, the prohibition contained in Article 28(1) does not apply. If the administration of such an institution is voluntarily given to the government, or the government, for a good reason and in accordance with law, assumes or takes over the management of that institution, say on account of mal-administration, then the government, on assuming the administration of the institution, would be obliged to continue with the imparting of religious instruction as provided by the endowment or the trust.

88. While Article 28(1) and Article 28(2) relate to institutions that are wholly maintained out of state funds, Article 28(3) deals with an educational institution that is recognized by the state or receives aid out of state funds. Article 28(3) gives the person attending any educational institution the right not to take part in any religious instruction, which may be imparted by an institution recognized by the state, or receiving aid from the state. Such a person also has the right not to attend any religious worship that may be conducted in such an institution, or in any premises attached thereto, unless such a person, or if he/she is a minor, his/her guardian, has given his/her consent. The reading of Article 28(3) clearly shows that no person attending an educational institution can be required to take part in any religious instruction or any religious worship, unless the person or his/her guardian has given his/her consent thereto, in a case where the educational institution has been recognized by the state or receives aid out of its funds. We have seen that Article 26(a) gives the religious denomination the right to establish an educational institution, the religious denomination being either of the majority community or minority community. In any institution, whether established by the majority or a minority religion, if religious instruction in imparted, no student can be compelled to take part in the said religious instruction or in any religious worship. An individual has the absolute right not to be compelled to take part in any religious instruction or worship. Article 28(3) thereby recognizes the right of an individual to practice or profess his own religion. In other words, in matters relating to religious instruction or worship, there can be no compulsion where the educational institution is either recognized by the state or receives aid from the state.

89. Articles 29 and 30 are a group of articles relating to cultural and educational rights. Article 29(1) gives the right to any section of the citizens residing in India or any part thereof, and having a distinct language, script or culture of its own, to conserve the same. Article 29(1) does not refer to any religion, even though the marginal note of the Article mentions the interests of minorities. Article 29(1) essentially refers to sections of citizens who have a distinct language script or culture, even though their religion may not be the same. The common thread that runs through Article 29(1) in language, script or culture, and not religion. For example, if in any part of the country, there is a section of society that has a distinct language, they are entitled to conserve the same, even though the persons having that language may profess different religions. Article 29(1) gives the right to all sections of citizens, whether they are in a minority or the majority religions, to conserve their language, script or culture.

90. In the exercise of this right to converse the language, script or culture, that section of the society can set up educational institutions. The right to establish and maintain institutions of its choice is a necessary concomitant to the right conferred by Article 30. The right under Article 30 is not

absolute. Article 29(2) provides that, where any educational institution is maintained by the state or receives aid out of state funds no citizen shall be denied admission on the grounds only of religion, race, caste, language or any of them. The use of the expression "any educational institution" in Article 29(2) would refer to any educational institution established by anyone, but which is maintained by the state or receives aid out of state funds. In other words, on a plain reading, state-maintained or aided educational institutions, whether established by the Government or the majority or a minority community cannot deny admission to a citizen on the grounds only of religion, race, caste or language.

91. The right of the minorities to establish and administer educational institutions is provided for by Article 30(1). To some extent, Article 26(1)(a) and Article 30(1) overlap, insofar as they relate to the establishment of educational institutions but whereas Article 26 gives the right both to the majority as well as minority communities to establish and maintain institutions for charitable purposes, which would *inter alia*, include educational institutions, Article 30(1) refers to the right of minorities to establish and maintain educational institutions of their choice. Another difference between Article 26 and Article 30 is that whereas Article 26 refers only to religious denominations, Article 30 contains the right of religious as well as linguistic minorities to establish and administer educational institutions of their choice.

92. Article 30(1) bestows on the minorities, whether based on religion or language, the right to establish and administer educational institution of their choice. Unlike Article 25 and 26, Article 30(1) does not specifically state that the right under Article 30(1) is subject to public order, morality and health or to other provisions of Part III. This Sub-Article also does not specifically mention that the right to establish and administer a minority educational institution would be subject to any rules or regulations.

93. Can Article 30(1) be so read as to mean that it contains an absolute right of the minorities, whether based on religion or language, to establish and administer educational institutions in any manner they desire, and without being obliged to comply with the provisions of any law? Des Article 30(1) give the religious or linguistic minorities a right to establish an educational institution that propagates religious or racial bigotry or ill will amongst the people? Can the right under Article 30(1) be so exercised that it is opposed to public morality or health? In the exercise of its right, would the minority while establishing educational institutions not be bound by town planning rules and regulations? Can they construct and maintain buildings in any manner they desire without complying with the provisions of the building by-laws or health regulations?

94. In order to interpret Article 30 and its interplay, it any, with Article 29, our attention was drawn to the Constituent Assembly Debates. While referring to them, the learned Solicitor General submitted that the provisions of Article 29(2) were intended to be applicable to minority institutions seeking protection of Article 30. He argued that if any educational institution sought aid, it could not deny admission only on the ground of religion, race, caste or language and, consequently giving a preference to the minority over more meritorious non- minority students was impermissible. It is now necessary to refer to some of the decisions of this Court insofar as they interpret Articles 29 and 30, and to examine whether any creases therein need ironing out.

95. In ***The State of Madras v. Srimathi Champakam Dorairajan*** MANU/SC/0007/1951 : [1951]2SCR525 the State had issued an order, which provided that admission to students to engineering and medical colleges in the State should be decided by the Selection Committee strictly on the basis of the number of seats fixed for different communities. While considering the validity of this order this Court interpreted Article 29(2) and held that if admission was refused only on the grounds of religion, race, caste, language or any of them, then there was a clear breach of the fundamental right under Article 29(2). The said order was construed as being violative of Article 29(2), because students who did not fall in the particular categories were to be denied admission. In this connection it was observed as follows:-

".....So far as those seats are concerned, the petitioners are denied admission into any of them, not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom those reservations were made....."

96. This government order was held to be violative of the Constitution and constitutive of a clear breach of Article 29(2). Article 30 did not come up for consideration in that case.

97. In ***The State of Bombay v. Bombay Education Society and Ors.*** MANU/SC/0029/1954 : [1955]1SCR568 : [1955]1SCR568 , the State had issued a circular, the operative portion of which directed that no primary or secondary school could, from the date of that circular admit to a class where English was used as a medium of instruction, any pupil other than pupils belonging to a section of citizens, the language of whom was English, viz, Anglo-Indians and citizens of non-Asiatic descent. The validity of the circular was challenged while admission was refused, *inter alia*, to a member of the Gujarati Hindu Community. A number of writ petitions were filed and the High Court allowed them. In an application filed by the State of Bombay, this Court had to consider whether the said circular was *ultra vires* Article 29(2). In deciding this question, the Court analyzed the provisions of Articles 29(2) and 30, and repelled the contention that Article 29(2) guaranteed the right only to the citizens of the minority group. It was observed, in this connection, at page 579, as follows:

".....The language of Article 29(2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15 protects all citizens against the State whereas the protection of Article 29(2) extends against the State or anybody who denies the right conferred by it. Further Article 15 protects all citizens against discrimination generally but Article 29(2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind. In the next place Article 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29(2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination. The heading under which Articles 29 and 30 are grouped together - namely "Cultural and Educational Rights" is quite general and does not in terms contemplate such differentiation. If the fact that the institution is maintained or aided out of State

funds is the basis of this guaranteed right then all citizens, irrespective of whether they belong to the majority or minority groups; are alike entitled to the protection of this fundamental right....."

98. It is clear from the aforesaid discussion that this Court came to the conclusion that in the case of minority educational institutions to which protection was available under Article 30, the provisions of Article 29(2) were indeed applicable. But, it may be seen that the question in the present from i.e., whether in the matter of admissions into aided minority educational institutions, minority students could be preferred to a reasonable extent, keeping in view the special protection given under Article 30(1), did not arise for consideration in that case.

99. In the ***Kerala Education Bill*** case, this Court again had the occasion to consider the interplay of Articles 29 and 30 of the Constitution. This case was a reference under Article 143(1) of the Constitution made by the President of India to obtain the opinion of this Court on certain questions relating to the constitutional validity of some of the provisions of the kerala Education Bill, 1957, which had been passed by the Kerala Legislative Assembly, but had been reserved by the Governor for the consideration of the President. Clause 3(5) of the Bill, made the recognition of new schools subject to the other provisions of the Bill and the rules framed by the Government under Clause (36); Clause (15) authorized the Government to acquire any category of schools; Clause 8(3) made it obligatory on all aided schools to hand over the fees to the Government; Clauses 9 to 13 made provisions for the regulation and management of the schools, payment of salaries to teachers and the terms and conditions of their appointment, and Clause (33) forbade the granting of temporary injunctions and interim orders in restraint of proceedings under the Act.

100. With reference to Article 29(2), the Court observed at page 1055, while dealing with an argument based on Article 337 that "*likewise Article 29(2) provides, inter alia, that no citizen shall be denied admission into any educational institution receiving did out of State funds on grounds only of religion, race, caste, language or any of them*". Referring to Part III of the Constitution and to Articles 19 and 25 to 28 in particular, the Court said:-

".....Under Article 25 all persons are equally entitled, subject to public order, morality and health and to the other provisions of Part III, to freedom of conscience and the right freely to profess, practise and propagate religion. Article 26 confers the fundamental right to every religious denomination or any section thereof, subject to public order, morality and health, to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to acquire property and to administer such property in accordance with law. The ideal being to constitute India into a secular State, no religious instruction is, under Article 28(1), to be provided in any educational institution wholly maintained out of State funds and under Clause (3) of the same Article no person attending any educational institution recognized by the State or receiving aid out of State funds is to be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto. Article 29(1) confers on any section of the citizens having a distinct language, script or culture of its own to have the right of conserving the same. Clause (2) of that Article provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

101. Dealing with Articles 29 and 30 at page 1046, it was observed as follows:-

"Articles 29 and 30 are set out in Part III of our Constitution which guarantees our fundamental rights. They are grouped together under the sub-head "Cultural and Educational Rights". The text and the marginal notes of both the Articles show that their purpose is to confer those fundamental rights on certain sections of the community which constitute minority communities. Under clause (1) of Article 29 any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Article 30(1) which has hereinbefore been quoted in full. This right, however, is subject to Clause 2 or Article 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

102. It had been, *inter alia*, contended on behalf of the state that if a single member of any other community is admitted in a school establish for a particular minority community, then the education institution would cease to be an educational institution established by that particular minority community. It was contended that because of Article 29(2), when an educational institution established by a minority community gets aid, it would be precluded from denying admission to members of other communities because of Article 29(2), and that as a consequence thereof, it would cease to be an educational institution of the choice of the minority community that established it. Repelling this argument, it was observed at pages 1051-51, as follows:-

".....This argument does not appear to us to be warranted by the language of the Article itself. There is no such limitation in Article 30(1) and to accept this limitation will necessarily involve the addition of the words "for their own community" in the Article which is ordinarily not permissible according to well established rules of interpretation. Nor is it reasonable to assume that the purpose of Article 29(2) was to deprive minority educational institutions of the aid they receive from the State. To say that an institution which receives aid on account of its being minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institution admit such an outsider it will cease to be a minority institution is tentamount to saying that minority institutions will not, as minority institutions, be entitled to any aid. The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community. In our opinion, it is not possible to read this condition into Article 30(1) of the Constitution."

103. It will be seen that the use of the expression "sprinkling of outsiders" in that case clearly implied the applicability of Article 29(2) to Article 30(1); the Court held that when a minority educational institution received aid, outsiders would have to be admitted. This part of the state's

contention was accepted, but what was rejected was the contention that by taking outsiders, a minority institution would cease to be an educational institution of the choice of the minority community that established it. The Court concluded at page 1062, as follows:-

"...We have already observed that Article 30(1) gives two rights to the minorities, (1) to establish and (2) to administer, educational institutions of their choice. The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided....."

104. While noting that Article 30 referred not only to religious minorities but also to linguistic minorities, it was held that the Article gave those minorities the right to establish educational institutions of their choice, and that no limitation could be placed on the subjects to be taught at such educational institutions and that general secular education is also comprehended within the scope of Article 30(1). It is to be noted that the argument addressed and answered in that case was whether a minority aided institution loses its character as such by admitting non-minority students in terms of Article 29(2). It was observed that the admission of 'sprinkling of outsiders' will not deprive the institution of its minority status. The opinion expressed therein does not really go counter to the ultimate view taken by us in regard to the inter-play of Articles 30(1) and 29(2)

105. In ***Rev. Sidhajbhai Sabhai and Ors. v. State of Bombay and Anr.*** MANU/SC/0076/1962 : [1963]3SCR837 , this Court had to consider the validity of an order issued by the Government of Bombay whereby from the academic year 1955-56, 80% of the seats in the training colleges for teachers in non-government training colleges were to be reserved for the teachers nominated by the Government. The petitioner, who belonged to the minority community, were, *inter alia*, running a training college for teachers, as also primary schools. The said primary schools and college were conducted for the benefit of the religious denomination of the United Church of Northern India and Indian Christians generally, though admission was not denied to students belonging to other communities. The petitioners challenged the government order requiring 80% of the seats to be filled by nominees of the government, *inter alia*, on the ground that the petitioners were members of a religious denomination and that they constituted a religious minority, and that the educational institutions had been established primarily for the benefit of the Christian community. It was the case of the petitioners that the decision of the Government violated their fundamental rights guaranteed by Articles 30(1), 26(a), (b), (c) and (d), and 19(1)(f) and (g). While interpreting Article 30, it was observed by this Court at pages 849-850 as under:-

"....All minorities, linguistic or religious have by Article 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent to void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right. The fundamental freedom is to establish and to administer educational institutions: it is a

right to establish and administer what are in truth educational institutions, institutions which cater to the educational needs of the citizens, or sections thereof. Regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institution, in matters educational."

106. While coming to the conclusion that the right of the private training colleges to admit students of their choice was severely restricted, this Court referred to the opinion in the ***Kerala Education Bill*** case, but distinguished it by observing that the Court did not, in that case, lay down any test of reasonableness of the regulation. No general principle on which the reasonableness of a regulation may be tested was sought to be laid down in the ***Kerala Education Bill*** case and, therefore, it was held in ***Sidhajbhai Sabhai's*** case that the opinion in that case was not an authority for the proposition that all regulative measures, which were not destructive or annihilative of the character of the institution established by the minority, provided the regulations were in the national or public interests, were valid. In this connection it was further held at page 856, as follows:-

"The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interests, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

107. The aforesaid decision does indicate that the right under Article 30(1) is not so absolute as to prevent the government from making any regulation whatsoever. As already noted hereinabove, in ***Sidhajbhai Sabhai's*** case, it was laid down that regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality and public order could be imposed. If this is so, it is difficult to appreciate how the government can be prevented from framing regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the government from framing regulations in that behalf. It is, of course, true that government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law. It will further be seen that in ***Sidhajbhai Sabhai's*** case, no

reference was made to Article 29(2) of the Constitution. This decision, therefore, cannot be an authority for the proposition canvassed before us.

108. Out attention was invited to the decision in ***Rev. Father W. Proost and Ors. v. The State of Bihar and Ors.*** MANU/SC/0248/1968 : [1969]2SCR73 , but the said case has no application here. In that case, it was contended, on behalf of the State of Bihar, that as the protection to the minority under Article 29(1) was only a right to conserve a distinct language, script or culture of its own, the college did not qualify for the protection of Article 30(1) because it was not founded to conserve them and that consequently, it was open to all sections of the people. The question, therefore, was whether the college could claim the protection of Section 48-B of the Bihar Universities Act read with Article 30(1) of the Constitution, only if it proved that the educational institution was furthering the rights mentioned in Article 29(1). Section 48-B of the Bihar Universities Act exempted a minority educational institution based on religion or language from the operation of some of the other provisions of that Act. This Court, while construing Article 30, held that its width could not be cut down by introducing in it considerations on which Article 29(1) was based. Article 29(1) and 30(1) were held to create two separate rights, though it was possible that they might meet in a given case. While dealing with the contention of the state that the college would not be entitled to the protection under Article 30(1) because it was open to all sections of the people, the Court referred to the observations in the ***Kerala Education Bill*** case, wherein it had been observed that the real import of Article 29(2) and Article 30(1) was that they contemplated a minority institution with a sprinkling of outsiders admitted into it. The Court otherwise had no occasion to deal with the applicability of Article 29(2) to Article 30(1).

109. In ***State of Kerala, Etc. v. Very Rev. Mother Provincial, Etc.*** MANU/SC/0065/1970 : [1971]1SCR734 the challenge was to various provisions of the Kerala University Act, 1969, whose provisions effected private colleges, particularly those founded by minority communities in the State of Kerala. The said provisions, *inter alia*, sought to provide for the manner in which private colleges were to be administered through the constitution of the governing body or managing councils in the manner provided by the Act. Dealing with Article 30, it was observed at pages 739-40 as follows:-

"Article 30(1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection.

The next part of the right relates to the administration of such institutions. Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their

ideas of how the interest of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."

The Court, however, pointed out that an exception to the right under Article 30 was the power with the state to regulate education, educational standards and allied matters. It was held that the minority institutions could not be allowed to fall below the standards of excellence expected of educational institutions or under guise of the exclusive right of management, allowed to decline to follow general pattern. The Court stated that while the management must be left to minority, they may be compelled to keep in step with others.

110. The interplay of Article 29 and Article 30 came up for consideration again before this Court in the ***D.A.V. College*** case MANU/SC/0039/1971 : 1971 (Supp.) SCR 688. Some of the provisions of the Guru Nanak University Act established after the reorganization of the State of Punjab in 1969 provided for the manner in which the governing body was to be constituted; the body was to include a representative of the University and a member of the College. These and some other provisions were challenged on the ground that they were violative of Article 30. In this connection at page 695, it was observed as follows:-

"It will be observed that Article 29(1) is wider than Article 30(1), in that, while any Section of the citizens including the minorities, can invoke the rights guaranteed under Article 29(1), the rights guaranteed under Article 30(1) are only available to the minorities based on religion or language. It is not necessary for Article 30(1) that the minority should be both a religion minority as well as a linguistic minority. It is sufficient if it is one or the other or both. A reading of these two Articles together would lead us to conclude that a religious or linguistic minority has a right to establish and administer educational institutions of its choice for effectively conserving its distinctive language, script or culture, which right however is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. This right is further subject to Clause (2) of Article 29 which provides that no citizen shall be denied admission into any educational institution which is maintained by the State or receives aid out of State funds, on grounds only of religion, race, caste, language or any of them. While this is so these two articles are not inter-linked nor does it permit of their being always read together."

Though it was observed that Article 30(1) is subject to 29(2), the question whether the preference to minority students is altogether excluded, was not considered.

111. One of the questions that arose in this case was as to whether the petitioner was a minority institution. In this case, it was also observed that the Hindus of Punjab were a religion minority in the State of Punjab and that, therefore, they were entitled to the protection of Article 30(1). Three of the provisions, which were sought to be challenged as being violative of Article 30, were Clauses 2(1), 17 and 18 of the Statutes framed by the University under Section 19 of the University Act. Clause 2(1)(a) provided that, for seeking affiliation, the college was to have a governing body of not more than 20 persons approved by the Senate and including, amongst others, two representatives of the University and a member of the College. Clause 17 required the approval of the Vice-Chancellor for the staff initially appointed by the College. The said provision also provided that all subsequent changes in the staff were to be reported to the Vice-Chancellor for

his/her approval. Clause 18 provided that non-government colleges were to comply with the requirements laid down in the ordinances governing the service and conduct of teachers in non-government colleges, as may be framed by the University. After referring to ***Kerala Education Bill, Sidhajbhai (SIC) Sabhai and Rev. Father W. Proost,*** this Court held that there was no justification for the provisions contained in Clause 2(1)(a) and Clause 17 of the statutes as the interfered with the rights of management of the minority educational institutions, P. Jaganmohan Reddy, J., observed that "*these provisions cannot, therefore, be made as conditions of affiliation, the non-compliance of which would involved disaffiliation and consequently they will have to be struck down as offending Article 30(1).*"

112. Clause 18, however, was held not to suffer from the same vice as Clause 17 because the provision, insofar as it was applicable to the minority institutions, empowered the University to prescribe by-regulations governing the service and conduct of teachers, and that this was in the larger interest of the institutions, and in order to ensure their efficiency and excellence. In this connection, it was observed at page 709, that:-

"Uniformity in the conditions of service and conduct of teachers in all non-Government Colleges would make for harmony and avoid frustration. Of course while the power to make ordinances in respect of the matters referred to is unexceptional the nature of the infringement of the right, if any, under Article 30(1) will depend on the actual purpose and import of the ordinance when made and the manner in which it is likely to affect the administration of the educational institution, about which it is not possible now to predicate."

113. In ***The Ahmedabad St. Xaviers College Society and Anr. Etc. v. State of Gujarat and Anr.*** MANU/SC/0088/1974 : [1975]1SCR173 , this Court had to consider the constitutional validity of certain provisions of the Gujarat University Act, 1949, insofar as they were made to apply to the minority Christian institution. The impugned provisions, *inter alia*, provided that the University may determine that all instructions, teaching and training in courses of studies, in respect of which the University was competent to hold examinations, would be conducted by the University and would be imparted by the teachers of the University. Another provision provided that new colleges that may seek affiliation, were to be the constituent colleges of the University. The Court considered the scope and ambit of the rights of the minorities, whether based on religion or language, to establish and administer educational institutions of their choice under Article 30(1) of the Constitution. In dealing with this aspect, Ray, C.J., at page 192, while considering Article 25 to 30, observed as follows:-

"Every section of the public, the majority as well as minority has rights in respect of religion as contemplated in Articles 25 and 26 and rights in respect of language, script, culture as contemplated in Article 29. The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality."

114. Elaborating on the meaning and intent of Article 30, the learned Chief Justice further observed as follows:-

"The real reason embodied in Article 30(1) of the Constitution is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of the country. The minorities are given this protection under Article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education is intended to develop the commonness of boys and girls of our country. This is in the true spirit of liberty, equality and fraternity through the medium of education. If religious or linguistic minorities are not given protection under Article 30 to establish and administer educational institutions of their choice, they will feel isolated and separate. General secular education will open doors of perception and act as the natural light of mind for our countrymen to live in the whole."

115. The Court then considered whether the religious and linguistic minorities, who have the right to establish and administer educational institutions of their choice, had a fundamental right to affiliation. Recognizing that the affiliation to a University consisted of two parts, the first part relating to syllabi, curricula, courses of instruction, the qualifications of teachers, library, laboratories, conditions regarding health and hygiene of students (aspects relating to establishment of educational institutions), and the second part consisting of terms and conditions regarding the management of institutions, it was held that with regard to affiliation, a minority institution must follow the statutory measures regulating educational standards and efficiency, prescribed courses of study, courses of instruction, the principles regarding the qualification of teachers, educational qualifications for entry of students into educational institutions, etc.

116. While considering the right of the religious and linguistic minorities to administer their educational institutions, it was observed by Ray, C.J., at page 194, as follows:-

".....The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."

117. While considering this right to administer,it was held that the same was not an absolute right and that the right was not free from regulation. While referring to the observations of Das, C.J., in the ***Kerala Education Bill*** case, it was reiterated in the ***St. Xaviers College*** case that the right to administer was not a right to mal-administer. Elaborating the minority's right to administer at page 196, it was observed as follows:-

".....The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be

tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character."

118. Ray, C.J., concluded by observing at page 200, as follows:-

"The ultimate goal of a minority institution too imparting general secular education is advancement of learning. This Court has consistently held that it is not only permissible but also desirable to regulate everything in educational and academic matters for achieving excellence and uniformity in standards of education.

In the field of administration it is not reasonable to claim that minority institutions will have complete autonomy. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institution. The right of a minority to administer its educational institution involves, as part of it, a correlative duty of good administration."

119. In a concurrent judgment, while noting that "*Clause (2) of Article 29 forbids the denial of admission to citizens into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of then*", Khanna, J. then examined Article 30, and observed at page 222, as follows:-

"Clause (1) of Article 30 gives right to all minorities, whether based on religion or language, to establish and administer educational institutions of their choice Analyzing that clause it would follow that the right which has been conferred by the clause is no two types of minorities. Those minorities may be based either on religion or on language. The right conferred upon the said minorities is to establish and administer educational institutions of their choice. The word "establish" indicates the rights to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. The words "of their choice" qualify the educational institutions and show that the educational institutions established and administered by the minorities need not be of some particular class; the minorities have the right and freedom to establish and administer such educational institutions as they choose. Clause (2) of Article 30 prevents the State from making discrimination in the matter of grant of aid to any educational institution on the ground that the institution is under the management of a minority whether based on religion or language.

120. Explaining the rationale behind Article 30, it was observed at page 224, as follows:-

"The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. The great leaders of India since time immemorial had preached the doctrine of tolerance and catholicity of outlook. Those noble ideas were enshrined in the Constitution. Special

rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of these institutions. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality an equality not merely in theory but also in fact."

121. While advocating that provisions of the Constitution should be construed according to the liberal, generous and sympathetic approach, and after considering the principles which could be discerned by him from the earlier decisions of this Court, Khanna, J., observed at page 234, as follows:-

"...The minorities are as much children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution. The same generous, liberal and sympathetic approach should weigh with the courts in construing Articles 29 and 30 as marked the deliberations of the Constitution-makers in drafting those articles and making them part of the fundamental rights. The safeguarding of the interest of the minorities amongst sections of population is as important as the protection of the interest amongst individuals of persons who are below the age of majority or are otherwise suffering from some kind of infirmity. the Constitution and the laws made by civilized nations, therefore, generally contain provisions for the protection of those interests. It can, indeed, be said to be an index of the level of civilization and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression."

122. The learned Judge then observed that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of these institutions. Recognizing that the right to administer educational institutions could not include the right to mal-administer, it was held that regulations could be lawfully imposed, for the receiving of grants and recognition, while permitting the institution to retain its character as a minority institution. The regulation "*must satisfy a dual test -- the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conductive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.*" It was permissible for the authorities to prescribes regulations, which must be complied with, before a minority institution could seek or retain affiliation and recognition. But it was also stated that the regulations made by the authority should not impinge upon the minority character of the institution. therefore, a balance has to be kept between the two objectives -- that of ensuring the standard of excellence of the institution, and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations that embraced and reconciled the two objectives could be considered to be reasonable. This, in our view, is the correct approach to the problem.

123. After referring to the earlier cases in relation to the appointment of teachers, it was noted by Khanna, J., that the conclusion which followed was that a law which interfered with a minority's choice of qualified teachers, or its disciplinary control over teachers and other members of the staff

of the institution, was void, as it was violative of Article 30(1). While it was permissible for the state and its educational authorities to prescribe the qualifications of teachers, it was held that once the teachers possessing the requisite qualifications were selected by the minorities for their educational institutions, the state would have no right to veto the selection of those teachers. The selection and appointment of teachers for an educational institution was regarded as one of the essential ingredients under Article 30(1). The Court's attention was drawn to the fact that in the ***Kerala Education Bill*** case, this Court has opined that Clauses (11) and (12) made it obligatory for all aided schools to select teachers from a panel selected from each district by the Public Service Commission and that no teacher of an aided school could be dismissed, removed or reduced in rank without the previous sanction of the authorized officer. At page 245, Khanna, J., observed that in cases subsequent to the opinion in the ***Kerala Education Bill*** case, this Court had held similar provisions as Clause (11) and Clause (12) to be violative of Article 30(1) of the minority institution. He then observed as follows:-

"...The opinion expressed by this Court in Re ***Kerala Education Bill*** (supra) was of an advisory character and though great weight should be attached to it because of its persuasive value, the said opinion cannot override the opinion subsequently expressed by this Court in contested cases. It is the law declared by this Court in the subsequent contested cases which would have a binding effect. The words "as at present advised" as well as the preceding sentence indicate that the view expressed by this Court in ***Re Kerala Education Bill*** in this respect was hesitant and tentative and not a final view in the matter...."

124. In ***Lilly Kurian v. Sr. Lewina and Ors.*** MANU/SC/0041/1978 : [1979]1SCR820 , this Court struck down the power of the Vice-Chancellor to veto the decision of the management to impose a penalty on a teacher. It was held that the power of the Vice-Chancellor, while hearing an appeal against the imposition of the panel was uncanalized and unguided. In ***Christian Medical College Hospital Employees' Union and Anr. v. Christian Medical College Vellore Association and Ors.*** MANU/SC/0433/1987 : (1988)ILLJ263SC , this Court upheld the application of industrial law to minority colleges, and it was held that providing a remedy against unfair dismissals would not infringe Article 30. In ***Gandhi Faizeam College Shahajhanpur v. University of Agra and Anr.*** MANU/SC/0070/1975 : [1975]3SCR810 a law which sought to regulate the working of minority institutions by providing that a broad-based management committee could be re-constituted by including therein the Principal and the senior-most teacher, was valid and not violative of the right under Article 30(1) of the Constitution. In ***All Saints High School, Hyderabad Etc. Etc. v. Government of A.P. and Ors. Etc.*** MANU/SC/0059/1980 : [1980]2SCR924 , a regulation providing that no teacher would be dismissed, removed, or reduced in rank, or terminated otherwise except with the prior approval of the competent authority, was held to be invalid, as it sought to confer an unqualified power upon the competent authority. In ***Frank Anthony Public School Employees Association v. Union of India and Ors.*** MANU/SC/0076/1986 : [1987]1SCR238 , the regulation providing for prior approval for dismissal was held to be invalid, while the provision for an appeal against the order of dismissal by an employee to a Tribunal was upheld. The regulation requiring prior approval before suspending an employee was held to be valid, but the provision, which exempted unaided minority schools from the regulation that equated the pay and other benefits of employees of recognized schools with those in schools run by the authority, was held to be invalid and violative of the equality clause. It was held by this Court that the regulations regarding pay and allowances for teachers and staff would not violate Article 30.

125. In the ***St. Stephen's College*** case, the right of minorities to administer educational institutions and the applicability of Article 29(2) to an institution to which Article 30(1) was applicable came up for consideration. St. Stephen's College claimed to be a minority institution, which was affiliated to Delhi University, the College had its own provisions with regard to the admission of students. This provision postulated that applications would be invited by the college by a particular date. The applications were processed and a cut-off percentage for each subject was determined by the Head of the respective Departments and a list of potentially suitable candidates was prepared on the basis of 1:4 and 1:5 ratios for Arts and Science students respectively, and they were then called for an interview (i.e., for every available seat in the Arts Department, four candidates were called for interviews; similarly, for every available seat in the Science Department, five candidates were called for interviews). In respect of Christian Students, a relaxation of upto 10% was given in determining the cut-off point. Thereafter, the interviews were conducted and admission was granted. The Delhi University, however, had issued a circular, which provided that admission should be granted to the various courses purely on the basis of merit, i.e., the percentage of marks secured by the students in the qualifying examination. The said circular did not postulate any interview. Thereafter, the admission policy of St. Stephen's College was challenged by a petition under Article 32. It was contended by the petitioners that the College was bound to follow the University policy, rules and regulations regarding admission, and further argued that it was not a minority institution, and in the alternative, it was not entitled to discriminate against students on the ground of religion, as the college was receiving grant-in-aid from the government, and that such discrimination was violative of Article 29(2). The College had also filed a writ petition in the Supreme Court taking the stand that it was a religious minority institution, and that the circular of the University regarding admission violated its fundamental right under Article 30. This Court held that St. Stephen's College was a minority institution. With regard to the second question as to whether the college was bound by the University circulars regarding admission, this Court, by a majority of 4-1, upheld the admission procedure used by the College, even though it was different from the one laid down by the University. In this context, the contention of the College was that it had been following its own admission programme for more than a hundred years and that it had built a tradition of excellence in a number of distinctive activities. The College challenged the University circular on the ground that it was not regulatory in nature, and that it violated its right under Article 30. Its submission was that if students were admitted purely on the basis of marks obtained by them in the qualifying examination, it would not be possible for any Christian student to gain admission. The college had also found that unless a concession was afforded, the Christian students could not be brought within the zone of consideration as they generally lacked merit when compared to the other applicants. This Court referred to the earlier decisions, and with regard to Article 30(1), observed at page 596, paragraph 54, as follows:-

"The minorities whether based on religion or language have the right to establish and administer educational institutions of their choice. The administration of educational institutions of their choice under Article 30(1) means 'management of the affairs of the institution'. This management must be free from control so that the founder or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. But the standards of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people. Such regulations do not bear directly upon management although they may indirectly affect it. The State, therefore has the right to regulate

the standard of education and allied matters. Minority institutions cannot be permitted to fall below the standards of excellence expected of educational institutions. They cannot decline to follow the general pattern of education under the guise of exclusive right of management. While the management must be left to them, they may be compelled to keep in step with others...."

126. It was further noticed that the right under Article 30(1) had to be read subject to the power of the state to regulate education, educational standards and allied matters. In this connection, at pages 598-99, paragraph 59, it was observed as follows:-

"The need for a detailed study on this aspect is indeed not necessary. The right to minorities whether religious or linguistic, to administer educational institutions and the power of the State to regulate academic matters and management is now fairly well settled. The right to administer does not include the right to maladminister. The State being the controlling authority has right and duty to regulate all academic matters. Regulations which will serve the interests of students and teachers, and to preserve the uniformity in standards of education among the affiliated institutions could be made. The minority institutions cannot claim immunity against such general pattern and standard or against general laws such as laws relating to law and order, health, hygiene, labor relations, social welfare legislations, contracts, torts etc. which are applicable to all communities. So long as the basic right of minorities to manage educational institution is not taken away, the State is competent to make regulatory legislation. Regulations, however, shall not have the effect of depriving the right of minorities to educate their children in their own institution. That is a privilege which is implied in the right conferred by Article 30(1).

127. Dealing with the question of the selection of students, it was accepted that the right to select students for admission was a part of administration, and that this power could be regulated, but it was held that the regulation must be reasonable and should be conducive to the welfare of the minority institution or for the betterment of those who resort to it. Bearing this principle in mind, this Court took note of the fact that if the College was to admit students as per the circular issued by the University, it would have to deny admissions to the students belonging to the Christian community because of the prevailing situation that even after the concession, only a small number of minority applicants would gain admission. It was the case of the College that the selection was made on the basis of the candidate's academic record, and his/her performance at the interview keeping in mind his/her all round competence, his/her capacity to benefit from attendance at the College, as well as his/her capacity to benefit from attendance at the College, as well as his/her potential to contribute to the life of the College. While observing that the oral interview as a supplementary test and not as the exclusive test for assessing the suitability of the candidates for college admission had been recognized by this Court, this Court observed that the admission programme of the college "*based on the test of promise and accomplishment of candidates seems to be better than the blind method of selection based on the marks secured in the qualifying examinations.*" The Court accordingly held that St. Stephen's College was not bound by the impugned circulars of the University. This Court then dealt with the question as to whether a preference in favour of, or a reservation of seats for candidates belonging to, its own community by the minority institutions would be invalid under Article 29(2) of the Constitution. After referring to the Constituent Assembly Debates and the proceedings of the Draft Committee that led to the incorporation of Articles 29 and 30, this Court proceeded to examine the question of the true import and effect of Articles 29(2) and 30(1) of the Constitution. On behalf of the institutions,

it was argued that a preference given to minority candidates in their own educational institutions, on the ground that those candidates belonged to that minority community, was not violative of Article 29(2), and that in the exercise of Article 30(1), the minorities were entitled to establish and administer educational institutions for the exclusive advantage of their own community's candidates. This contention was not accepted by this Court on two grounds. Firstly, it was held that institutional preference to minority candidates based on religion was apparently an institutional discrimination on the forbidden ground of religion -- the Court stated that "*if an educational institution says yes to one candidate but says no to other candidate on the ground of religion, it amounts to discrimination on the ground of religion. The mandate of Article 29(2) is that there shall not be any such discrimination.*" It further held that, as pointed out in the ***Kerala Education Bill*** case, the minorities could not establish educational institutions for the benefit of their own community alone. For if such was the aim, Article 30(1) would have been differently worded and it would have contained the words "*for their own community*". In this regard, it would be useful to bear in mind that the Court at page 607, paragraph 81, noticed that:-

"Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have a relatively homogeneous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with secular character sectarian schools or colleges, segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develop respect for, and tolerance of, the cultures and beliefs of others. It is essential therefore, that there should be proper mix of students of different communities in all educational institutions.

128. The Court then dealt with the contention on behalf of the University that the minority institutions receiving government aid were bound by the mandate of Article 29(2), and that they could not prefer candidates from their own community. The Court referred to the decision in the case of ***Champakam Dorairajan*** (supra), but observed as follows:

".....the fact that Article 29(2) applied to minorities as well as non-minorities did not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1). Article 29(2) deals with non-discrimination and is available only to individuals. General equality by non-discrimination is not the only need of minorities. Minority rights under majority rule implies more than non-discrimination; indeed, it begins with non-discrimination. Protection of interests and institutions and the advancement of opportunity are just as important. Differential treatment that distinguishes them from the majority is a must to preserve their basic characteristics."

129. Dealing with the submission that in a secular democracy the government could not be utilized to promote the interest of any particular community, and that the minority institution was not entitled to state aid as of right, this Court, at page 609, paragraph 87, held as follows:-

"It is quite true that there is no entitlement to State grant for minority educational institutions. There was only a stop-gap arrangement under Article 337 for the Anglo-Indian community to receive State grants. There is no similar provision for other minorities to get grant from the State.

But under Article 30(2), the State is under an obligation to maintain equality of treatment in granting aid to educational institutions. Minority institutions are not to be treated differently while giving financial assistance. They are entitled to get the financial assistance much the same way as the institutions of the majority communities."

130. It was further held that the state could lay down reasonable conditions for obtaining grant-in-aid and for its proper utilization, but that the state had no power to compel minority institutions to give up their rights under Article 30(1). After referring to the ***Kerala Education Bill*** case and ***Sidhajbhai Sabhai's*** case, the Court observed at page 609, paragraph 88, as follows:-

"....In the latter case this court observed at SCR pages 856-57 that the regulation which may lawfully be imposed as a condition of receiving grant must be directed in making the institution an effective minority educational institution. The regulation cannot change the character of the minority institution. Such regulations must satisfy a dual test; the test of reasonableness, and the test that it is regulative of the educational character of the institution. It must be conducive to making the institution and effective vehicle of education for the minority community or other persons who resort to it. It is thus evident that the rights under Article 30(1) remain unaffected even after securing financial assistance from the government."

131. After referring to the following observations in ***D.A.V. College*** case,

"...The right of a religious or linguistic minority to establish and administer educational institutions of its choice under Article 30(1) is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. This right is further subject to Article 29(2), which provides that no citizen shall be denied admission into any educational institution which is maintained by the State or receives aid out of State funds, on grounds only of religion, race, caste, language or any of them...."

the learned Judges remarked at page 610 (para 91) that in the said case, the Court was not deciding the question that had arisen before them.

132. According to the learned Judges, the question of the interplay of Article 29(2) with Article 30(1) had arisen in that case (***St. Stephen's*** case) for the first time, and had not been considered by the Court earlier, they observed that "*we are on virgin soil, not on trodden ground*". Dealing with the interplay of these two Articles, it was observed, at page 612, paragraph 96, as follows:-

"The collective minority right is required to be made functional and is not to be reduced to useless lumber. A meaningful right must be shaped, moulded and created under Article 30(1), while at the same time affirming the right of individuals under Article 29(2). There is need to strike a balance between the two competing rights. It is necessary to mediate between Article 29(2) and Article 30(1), between letter and spirit of these articles, between traditions of the past and the convenience of the present, between society's need for stability and its need for change."

133. The two competing rights are the right of the citizen not to be denied admission granted under Article 29(2), and right of the religious or linguistic minority to administer and establish an institution of its choice granted under Article 30(1). While treating Article 29(2) as a facet of

equality, the Court gave a contextual interpretation to Articles 29(2) and 30(1) while rejecting the extreme contention on both sides, i.e., on behalf of the institutions that Article 29(2) did not prevent a minority institution to preferably admit only members belonging to the minority community, and the contention on behalf of the State that Article 29(2) prohibited any preference in favour of a minority community for whose benefit the institution was established. The Court concluded, at pages 613-14, para 102, as follows:-

"In the light of all these principles and factors, and in view of the importance which the Constitution attaches to protective measures to minorities under Article 30(1), the minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of the institutions subject of course to conformity with the University standard. The State may regulate the intake in this category with due regard to the need of the community in the area which the institution is intended to serve. But in no case such intake shall exceed 50 per cent of the annual admission. The minority institutions shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. The admission of other community candidates shall be done purely on the basis of merit."

134. If we keep these basic features, as highlighted in ***St. Stephen's*** case, in view, then the real purposes underlying Articles 29(2) and 30 can be better appreciated.

135. We agree with the contention of the learned Solicitor General that the Constitution in Part III does not contain or give any absolute right. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part. It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minority which would enable them to establish and administer educational institutions in manner so as to be in conflict with the other Parts of the Constitution. We find difficult to accept that in the establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land, even the Constitution, is to apply to them.

136. Decisions of this Court have held that the right to administer does not include the right to mal-administer. It has also been held that the right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also -- for example, laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality.

137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).

138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-a-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination. It was observed in ***St. Xaviers College*** case, at page 192, that "*the whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection, they will be dented equality.*" In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do.

139. Like any other private unaided institutions, similar unaided educational institutions administered by linguistic or religious minorities are assured maximum autonomy in relation thereto; e.g., method of recruitment of teachers, charging of fees and admission of students. They will have to comply with the conditions of recognition, which cannot be such as to whittle down the right under Article 30.<mpara>

140. We have now to address the question of whether Article 30 gives a right to ask for a grant or aid from the state, and secondly, if it does get aid, to examine to what extent its autonomy in administration, specifically in the matter of admission to the educational institution established by the community, can be curtailed or regulated.

141. The grant of aid is not a constitutional imperative. Article 337 only gives the right to assistance by way of grant to the Anglo-Indian community for a specified period of time. If no aid is granted to anyone, Article 30(1) would not justify a demand for aid, and it cannot be said that the absence of aid makes the right under Article 30(1). The founding fathers have not incorporated the right to grants in Article 30, whereas they have done so under Article 337; what, then, is the meaning, scope and effect of Article 30(2)? Article 30(2) only means what it states, viz that a minority institution shall not be discriminated against when aid to educational institutions is granted. In other words the state cannot, when it chooses to grant aid to educational institutions, deny aid to a religious or linguistic minority institution only on the ground that the management of that institution is with the minority. We would, however, like to clarify that if an object surrender of the right to management is made a condition of aid, the denial of aid would be violative of Article 30(2). However, conditions of aid that do not involve a surrender of the substantial right of management would not be inconsistent with constitutional guarantees, even if they indirectly impinge upon some fact of administration. If, however, aid were denied on the ground that the educational institution is under the management of a minority, then such a denial would be completely invalid.

142. The implication of Article 30(2) is also that it recognizes that the minority nature of the institution should continue, notwithstanding the grant of aid. In other words, when a grant is given to all institutions for imparting secular education, a minority institution is also entitled to receive it subject to the fulfillment of the requisite criteria, and the state gives the grant knowing that a linguistic or minority educational institution will also receive the same. Of course, the state cannot be compelled to grant aid, but the receipt of aid cannot be a reason for altering the nature of character of the incipient educational institution.

143. This means that the right under Article 30(1) implies that any grant that is given by the state to the minority institution cannot have such conditions attached to it, which will in any way dilute or abridge the rights of the minority institution to establish and administer that institution. The conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper utilization of the grant and fulfillment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilization of the funds and the manner in which the funds are to be utilized, will be applicable and would not dilute the minority status of the educational institutions. Such conditions would be valid if they are also imposed on other educational institutions receiving the grant.

144. It cannot be argued that no conditions can be imposed while giving aid to a minority institution. Whether it is an institution run by the majority or the minority, all conditions that have relevance to the proper utilization of the grant-in-aid by an educational institution can be imposed. All that Article 30(2) states is that on the ground that an institution is under the management of a minority, whether based on religion or language, grant of aid to that educational institution cannot be discriminated against, if other educational institutions are entitled to received aid. The conditions for grant or non-grant of aid to educational institutions have to be uniformly applied, whether it is a majority-run institution or a minority-run institution.

As in the case of a majority-run institution, the moment a minority institution obtains a grant of aid, Article 28 of the Constitution comes into play. When an educational institution is maintained out of State funds, no religious institution can be provided therein. Article 28(1) does not state that it applies only to educational institutions that are not established or maintained by religious or linguistic minorities. Furthermore, upon the receipt of aid, the provisions of Article 28(3) would apply to all educational institutions whether run by the minorities or the non-minorities. Article 28(3) is the right of a person studying in a state recognized institution or in an educational institution receiving aid from state funds, not to take part in any religious instruction, if imparted by such institution, without his/her consent (or his/her guardian's consent if such a person is a minor). Just as Article 28(1) and (3) become applicable the moment any educational institution takes aid, likewise, Article 29(2) would also be attracted and become applicable to an educational institution maintained by the state or receiving aid out of state funds. It was strenuously contended that the right to give admission is one of the essential ingredients of the right to administer conferred on the religious or linguistic minority, and that this right should not be curtailed in any manner. It is difficult to accept this contention. If Article 23(1) and (3) apply to a minority institution that receives aid out of state funds, there is nothing in the language of Article 30 that would make the provisions of Article 29(2) inapplicable. Like Article 28(1) and Article 28(3), Article 29(2) refers to "*any educational institution maintained by the State or receiving aid out of State funds*". A minority institution would fall within the ambit of Article 29(2) in the same manner

in which Article 28(1) and Article 28(3) would be applicable to an aided minority institution. it is true that one of the rights to administer an educational institution is to grant admission to the students. As long as an educational institution, whether belonging to the minority or the majority community, does not receive aid, it would, in our opinion, be its right and discretion to grant admission to such students as it chooses or selects subject to what has been clarified before. Out of the various rights that the minority institution has in the administration of the institution, Article 29(2) curtails the right to grant admission to a certain extent. By virtue of Article 29(2), no citizen can be denied admission by an aided minority institution on the grounds only of religion, race, caste, language or any of them. It is no doubt true that Article 29(2) does curtail one of the powers of the minority institution, but on receiving aid, some of the rights that an unaided minority institution has are also curtailed by Article 28(1) and 28(3). A minority educational institution has a right to impart religious instruction - this right is taken away by Article 28(1), if that minority institution is maintained wholly out of state funds. Similarly on receiving aid out of state funds or on being recognized by the state, the absolute right of a minority institution requiring a student to attend religious instruction is curtailed by Article 28(3). If the curtailment of the right to administer a minority institution on receiving aid or being wholly maintained out of state funds as provided by Article 28 is valid, there is no reason why Article 29(2) should not be held to be applicable. There is nothing in the language of Article 28(1) and (3), Article 29(2) and Article 30 to suggest that on receiving aid, Article 28(1) and (3) will apply, but Article 29(2) will not. therefore, the contention that the institutions covered by Article 30 are outside the injunction of Article 29(2) cannot be accepted.

145. What is the true scope and effect of Article 29(2)? Article 29(2) is capable of two interpretations--one interpretation, which is put forth by the Solicitor General and the other counsel for the different States, is that a minority institution receiving aid cannot deny admission to any citizen on the grounds of religion, race, caste, language or any of them. In other words, the minority institution, once it takes any aid, cannot make any reservation for its own community or show a preference at the time of admission, i.e., if the educational institution was a private unaided minority institution, it is free to admit all students of its own community, but once aid is received, Article 29(2) makes it obligatory on the institution not to deny admission to a citizen just because he does not belong to the minority community that has established the institution.

146. The other interpretation that is put forth is that Article 29(2) is a protection against discrimination on the ground of religion, race, caste or language, and does not in any way come into play where the minority institution prefers students of its choice. To put it differently, denying admission, even though seats are available, on the ground of the applicant's religion, race, caste or language, is prohibited, but preferring students of minority groups does not violate Article 29(2).

147. It is relevant to note that though Article 29 carries the head note "Protection of interests of minorities" it does not use the expression "minorities" in its text. The original proposal of the Advisory Committee in the Constituent Assembly recommended the following:-

""(1) Minorities in every unit shall be protected in respect of their language, script and culture and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect" [B. Siva Rao, "Select Documents" (1957) Vol. 2 page 281]

But after the clause was considered by the drafting Committee on 1st November, 1947, it emerged with substitute of 'section of citizen'. [B. Siva Rao, Select Documents (1957) Vol. 3, pages 525-26. Clause 23, Draft Constitution]. It was explained that the intention had always been to use 'minority' in a wide sense, so as to include (for example) Maharashtrians who settled in Bengal. (7 C.A.D. pages 922-23)"

148. Both Articles 29 and 30 from a part of the fundamental rights Chapter in Part III of the Constitution. Article 30 is confined to minorities, be it religious or linguistic, and unlike Article 29(1), the right available under the said Article cannot be availed by any section of citizens. The main distinction between Article 29(1) and Article 30(1) is that in the former, the right is confined to conservation of language, script or culture. As was observed in the ***Father W. Proost*** case, the right given by Article 29(1) is fortified by Article 30(1), insofar as minorities are concerned. In the ***St. Xaviers College*** case, it was held that the right to establish an educational institution is not confined to conservation of language, script or culture. When constitutional provisions are interpreted, it has to be borne in mind that the interpretation should be such as to further the object of their incorporation. They cannot be read in isolation and have to be read harmoniously to provide meaning and purpose. They cannot be interpreted in a manner that renders another provision redundant. If necessary, a purposive and harmonious interpretation should be given.

149. Although the right to administer includes within it a right to grant admission to students of their choice under Article 30(1), when such a minority institution is granted the facility of receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the right of administration of the minorities would be eroded to some extent. Article 30(2) is an injunction against the state not to discriminate against the minority educational institution and prevent it from receiving aid on the ground that the institution is under the management of a minority. While, therefore, a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29(2) of the Constitution by no stretch of imagination can the rights guaranteed under Article 30(1) be annihilated. It is this context that some interplay between Article 29(2) and Article 30(1) is required. As observed quite aptly in ***St. Stephen's*** case "*the fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1).*" The word "only" used in Article 29(2) is of considerable significance and has been used for some avowed purpose. Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be <u>only</u> on grounds of religion etc., but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1). The best possible way is to hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any specific percentage. The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with students of the minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority

group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted. It is for this reason that a variable percentage of admission of minority students depending on the type of institution and education is desirable, and indeed, necessary, to promote the constitutional guarantee enshrined in both Article 29(2) and Article 30.

150. At this stage, it will be appropriate to refer to the following observations of B.P. Jeevan Reddy, J., in ***Indra Sawhney v. Union of India and Ors.*** MANU/SC/0664/1992 : [1992]6SCR321 at page 657, paragraph 683, as follows:-

"Before we proceed to deal with the question, we may be permitted to make a few observations: The questions arising herein are not only of great moment and consequence, they are also extremely delicate and sensitive. They represent complex problems of Indian society, wrapped and presented to us as constitutional and legal questions. On some of these questions, the decisions of this Court have not been uniform. They speak with more than one voice. Several opposing points of view have been pressed upon us with equal force and passion and quite often with great emotion. We recognize that these viewpoints are held genuinely by the respective exponents. Each of them feels his own point of view is the only right one. We cannot, however, agree with all of them. We have to find--and we have tried our best to find--answers which according to us are the right ones constitutionally and legally. Though, we are sitting in a larger Bench, we have kept in mind the relevance and significance of the principle of stare decisis. We are conscious of the fact that in law certainty, consistency and continuity are highly desirable features. Where a decision has stood the test of time and has never been doubted, we have respected it--unless, of course, there are compelling and strong reasons to depart from it. Where, however, such uniformity is not found, we have tried to answer the question on principle keeping in mind the scheme and goal of our Constitution and the material placed before us."

151. The right of the aided minority institution to preferably admit students of its community, when Article 29(2) was applicable, has been clarified by this Court over a decade ago in the ***St. Stephen's College*** case. While upholding the procedure for admitting students, this Court also held that aided minority educational institutions were entitled to preferably admit their community candidates so as to maintain the minority character of the institution, and that the state may regulate the intake in this category with due regard to the area that the institution was intended to serve, but that this intake should not be more than 50% in any case. Thus, ***St. Stephen's*** endeavoured to strike a balance between the two Articles. Though we accept the ratio of ***St. Stephen's***, which has held the field for over a decade, we have compelling reservations in accepting the rigid percentage stipulated therein. As Article 29 and Article 30 apply not only to institutions of higher education but also to schools, a ceiling of 50% would not be proper. It will be more appropriate that depending upon the level of the institution, whether it be a primary or secondary or high school or a college, professional or otherwise, and on the population and educational needs of the area in which the institution is to be located the state properly balances the interests of all by providing for such a percentage of students of the minority community to be admitted, so as to adequately serve the interest of the community for which the institution was established.

152. At the same time, the admissions to aided institutions, whether awarded to minority or non-minority students, cannot be at the absolute sweet will and pleasure of the management of minority

educational institutions. As the regulations to promote academic excellence and standards do not encroach upon the guaranteed rights under Article 30, the aided minority educational institutions can be required to observe *inter se* merit amongst the eligible minority applicants and passage of common entrance test by the candidates, where there is one, with regard to admissions in professional and non-professional colleges. If there is no such test, a rational method of assessing comparative merit has to be evolved. As regards the non-minority segment, admission may be on the basis of the common entrance test and counselling by a state agency. In the courses for which such a test and counselling are not in vogue, admission can be on the basis of relevant criteria for the determination of merit. It would be open to the state authorities to insist on allocating a certain percentage of seats to those belonging to weaker sections of society, from amongst the non-minority seats.

153. We would, however, like to clarify one important aspect at this stage. The aided linguistic minority educational institution is given the right to admit students belonging to the linguistic minority to a reasonable extent only to ensure that its minority character is preserved and that the objective of establishing the institution is not defeated. If so, such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. therefore, the students of that group residing in the state in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that state is concerned. In other words, the predominance of linguistic students hailing from the state in which the minority educational institution is established should be present. The management bodies of such institution cannot resort to the device of admitting the linguistic students of the adjoining state in which they are in a majority, under the facade of the protection given under Article 30(1). If not, the very objective of conferring the preferential right of admission by harmoniously constructing Articles 30(1) and 29(2), which we have done above, may be distorted.

154. We are rightly proud of being the largest democracy in the world. The essential ingredient of democracy is the will and the right of the people to elect their representatives from amongst a government is formed.

155. It will be wrong to presume that the government or the legislature will act against the Constitution or contrary to the public or national interest at all times. Viewing every action of the government with skepticism, and with the belief that it must be invalid unless proved otherwise, goes against the democratic form of government. It is no doubt true that the Court has the power and the function to see that no one including the government acts contrary to the law, but the cardinal principle of our jurisprudence is that it is for the person who alleges that the law has been violated to prove it to be so. In such an event, the action of the government or the authority may have to be carefully examined, but it is improper to proceed on the assumption that, merely because an allegation is made, the action impugned or taken must be bad in law. Such being the position, when the government frames rules and regulations or lays down norms, specially with regard to education, one must assume that unless shown otherwise, the action taken is in accordance with law. therefore, it will not be in order to so interpret a Constitution, and Article 29 and 30 in particular, on the presumption that the state will normally not act in the interest of the general public or in the interest of concerned sections of the society.

CONCLUSION

Equality and Secularism

156. Our country is often depicted as a person in the form of ***"Bharat Mata -- Mother India".*** The people of India are regarded as her children with their welfare being in her heart. Like and loving mother, the welfare of the family is of paramount importance for her.

157. For a healthy family, it is important that each member is strong and healthy. But then, all members do not have the same constitution, whether physical and/or mental. For harmonious and healthy growth, it is natural for the parents, and the mother in particular, to give more attention and food to the weaker child so as to help him/her become stronger. Giving extra food and attention and ensuring private tuition to help in his/her studies will, in a sense, amount to giving the weaker child preferential treatment. Just as lending physical support to the aged and the infirm, or providing a special diet, cannot be regarded as unfair or unjust, similarly, conferring certain rights on a special class, for good reasons, cannot be considered inequitable. All the people of India are not alike, and that is why preferential treatment to a special section of the society is not frowned upon. Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instill in them a sense of security and confidence, even though the minorities cannot be *per se* regarded as weaker sections or underprivileged segments of the society.

158. The one billion population of India consists of six main ethnic groups and fifty-two major tribes; six major religions and 6,400 castes and sub-castes; eighteen major languages and 1,600 minor languages and dialects. The essence of secularism in India can best be depicted if a relief map of India is made in mosaic, where the aforesaid one billion people are the small pieces of marble that go into the making of a map. Each person, whatever his/her language, caste, religion has his/her individual identity, which has to be preserved, so that when pieced together it goes to form a depiction with the different geographical features of India. These small pieces of marble, in the form of human beings, which may individually be dissimilar to each other, when placed together in a systematic manner, produce the beautiful map of India. Each piece, like a citizen of India, plays an important part in making of the whole. The variations of the colours as well as different shades of the same colour in a map is the result of these small pieces of different shades and colours of marble, but even when one small piece of marble is removed, the whole map of India would be scarred, and the beauty would be lost.

159. Each of the people of India has an important place in the formation of the nation. Each piece has to retain its own colour. By itself, it may be an insignificant stone, but when placed in a proper manner, goes into the making of a full picture of India in all its different colours and hues.

160. A citizen of India stands in a similar position. The Constitution recognizes the differences among the people of India, but it gives equal importance to each of them, their differences notwithstanding, for only then can there be a unified secular nation. Recognizing the need for the preservation and retention of different pieces that go into the making of a whole nation, the Constitution, while maintaining, *inter alia*, the basic principle of equality, contains adequate provisions that ensure the preservation of these different pieces.

161. The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India. Articles 29 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation.

ANSWERS TO ELEVEN QUESTIONS:

162. Q.1. What is the meaning and content of the expression "minorities" in Article 30 of the Constitution of India?

A. Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution. Since reorganisation of the State in India has been on linguistic lines, therefore, for the purpose of determining the minority the unit will be the State and note the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered State-wise.

162-A. Q.2. What is meant by the expression "religion" in Article 30(1)? Can the followers of a sect or denomination of a particular religion claim protection under Article 30(1) on the basis that they constitute a minority in the State, even though the followers of that religion are in majority in that State?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

162-B. Q.3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

162-C. Q3(b) To what extent can professional education be treated as a matter coming under minorities rights under Article 30?

A. Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

162-D. Q.4 Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated?

A. Admission of students to unaided minority educational institutions, viz., schools and undergraduates colleges where the scope for merit-based selection is practically nil, cannot be regulated by the concerned State or University, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.

The right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the state government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more so in the matter of admissions to professional institutions.

A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of non-minority students, so that the rights under Article 30(1) are not substantially impaired and further the citizens rights under Article 29(2) are not infringed. What would be a reasonable extent, would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The concerned State Government has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of inter se merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the state agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the state agency followed by counselling wherever it exists.

162-E. Q5(a) Whether the minority's rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?

A. A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not tantamount to mal-administration. Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.

162-F. Q5(b) Whether the minority institutions' right of admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of State aid?

A. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the state qua non-minority students. The merit may be determined either through a common entrance test conducted by the concerned University or the Government followed by counselling, or on the basis of an entrance test conducted by individual institutions--the method to be followed is for the university or the government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such

institutions, it will be permissible for the government or the university to provide that consideration should be shown to the weaker sections of the society.

162-G. Q5(c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and Principal including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to an university or board have to be complied with, but in the matter of day-to-day management like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a Judicial Officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the state, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.

162-H. Q6(a) Where can a minority institution be operationally located? Where a religious or linguistic minority in State 'A" establishes an educational institution in the said State, can such educational institution grant preferential admission/reservations and other benefits to members of the religious/linguistic group from other States where they are non-minorities?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

162-I. Q6(b) Whether it would be correct to say that only the members of that minority residing in State 'A' will be treated as the members of the minority vis-à-vis such institution?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

16-J. Q.7 Whether the member of a linguistic non-minority in one State can establish a trust/society in another State and claim minority status in that State?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

162-K. Q.8 Whether the ratio laid down by this Court in the St. Stephen's case(***St. Stephen's College v. University of Delhi*** MANU/SC/0319/1992 : AIR1992SC1630 is correct? If no, what order?

A. The basic ratio laid down by this Court in the ***St. Stephen's College*** case is correct, as indicated in this judgment. However, rigid percentage cannot be stipulated. It has to be left to authorities to prescribe a reasonable percentage having regard to the type of institution, population and educational needs of minorities.

162-L. Q.9 Whether the decision of this Court in ***Unni Krishnan J.P. v. State of A.P.*** MANU/SC/0333/1993 : [1993]1SCR594 (except where it holds that primary education is a fundamental right) and the scheme framed there under required reconsideration/modification and if yes, what?

A. The scheme framed by this Court in ***Unni Krishnan's case*** case and the direct to impose the same, except where it holds that primary education is fundamental right, is unconstitutional. However, the principle should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

162-M. Q.10 Whether the non-minorities have the right to establish and administer educational institution under Article 21 and 29(1) read with Articles 14 and 15(1), in the same manner and to the same extent as minority institutions?And

162-N. Q.11 What is the meaning of the expressions "Education" and "Educational Institutions" in various provisions of the Constitution? Is the right to establish and administer educational institutions guaranteed under the Constitution?

A. The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level upto the post-graduate level. It includes professional education. The expression"educational institutions" means institutions that impart education, where"education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, to minorities specifically under Article 30.

All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment.

V.N. Khare, J.

163. It is interesting to note that Shri K.M. Munshi, one of the members of the Constituent Assembly while intervening in the debate in the Constituent Assembly with regard to the kind of religious education to be given in governmental aided institution stated thus:

"if the proposed amendment is accepted, the matter has to be taken to Supreme Court and eleven worthy Judges have to decide whether the kind of education given is of a particular religion or in the nature of elementary philosophy of comparative religion. Then, after having decided that, the second point which the learned Judges will have to direct their attention to will be whether this elementary philosophy is calculated to broaden the minds of the pupils or to narrow their minds. Then they will have to decide upon the scope of every word, this being a justiciable right which has to be adjudicated upon by them. I have no doubt members of my profession will be very glad to throw considerable light on what is and is not a justiciable right of this nature (A Member: For a fee). Yes, for very good fee too." (See -- Constitutional Assembly Debates Official Report. Reprinted by Lok Sabha Secretariat)

164. It may be noted that at the time when the Constituent Assembly was framing the Constitution of India the strength of Judges of Supreme Court was not contemplated as eleven Judges. It appears what Shri Munshi stated was prophetic or a mere co-incidence. Today eleven Judges of the Supreme Court have assembled to decide the question of rights of the minorities.

Question No. 1. What is the meaning and content of the expression of "minorities in Article 30 of the Constitution of India?

165. The first question that is required to be answered by this Bench is who is a minority. The expression "minority" has been derived from the Latin word "minor" and the suffix "ity" which means "small in number".According tot Encyclopaedia Britannica 'minorities' means "groups held together by ties of common descent, language or religious faith and feeling different in these respects from the majority of the inhabitants of a given political entity". J.A. Laponee in his book "The Protection to Minority"describes 'Minority' as a group of persons having different race, language or religion from that of majority of inhabitants. In the Year Book on Human Rights U.N. Publication 1950 ed. minority has been described as non dominant groups having different religion or linguistic traditions than the majority population.

166. The expression minority has not been defined in the Constitution. As a matter of fact when Constitution was being drafted Shri T.T. Krishanamachari one of the members of the Constituent Assembly proposed an amendment which runs as under:

"That in Part XVI of the Constitution, for the word "minorities" where it occurs, the word "certain classes" be substitued."

167. We find that expression `minorities' has been employed only at four places in the Constitution of India. Head note of Article 29 uses the word minorities. Then again the expressions Minorities or minority have been employed in head note of Article 30 and sub clauses (1) and (2) of Article 30. However, omission to define minorities in the Constitution does not mean that the employment of words `minorities' or `minority' in Article 30is of less significance. At this stage it may be noted that the expression minorities' has been used in Article 30 in two senses - one based on religion

and other on basis of language. However prior to coming into force of the Constitution the expression minority was understood in terms of a class based on religion having different electorates. When India attained freedom,the framers of the Constitution threw away the idea of having separate electorates based on religion and decided to have a system of joint electorates so that every candidate in an election would have to seek support of all sections of the constituency. In turn special safeguards were provided to minorities and they were made part of Chapter III of the Constitution with a view to instill a sense of confidence and security to the minorities.

168. But the question arises what is the test to determine minority status based on religion or language of a group of persons residing in a State or Union Territory. Whether minority status of a given group of persons has to be determined in relation to the population of the whole of India or population of the State where the said group of persons is residing. When the Constitution of India was being framed it was decided that India would be Union of States and Constitution to be adopted would be of federal character. India is a country where many ethnic or religious and multi language people reside. Shri K.M. Munshi one of the members of Constituent Assembly in his Note and Draft Article on (Right to Religion and Cultural Freedom) referred to minorities as national minorities. The said draft Article VI (3) runs as under:

"(3) Citizens belonging to national minorities in a State whether based on religion or language have equal rights with other citizens in forming controlling and administering at their own expense; charitable, religiousand social institutions, schools and other educational establishments with the free use of their language and practice of their religions."

169. Dr. B.R. Ambedkar while intervening in debate in regard to amendment to draft Article 23 which related to the rights of religious and linguistic minorities stated that "the term `minority' was used therein not in the technical sense of the word minority as we have been accustomed to us for the purposes of certain political safeguards, such as representation in the legislature, representation in the services and so on". According to him, the word minority is used not merely to indicate, the minority in technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense but which are nonetheless minorities in the cultural and linguistic sense. Dr. Ambedkar cited following example which runs asunder:

"For instance, for the purposes of this Article 23, if a certain number of people from Madras came and settled in Bombay for certain purposes,they would be, although not a minority in the technical sense, cultural minorities. Similarly, if a certain number of Maharashtrians went from Maharashtra and settled in Bengal, although they may not be minorities in technical true sense, they would be cultural and linguistic minorities in Bengal.

The Article intends to give protection in the matter of culture, language and script not only to a minority technically, but also to a minority in the wider sense of the term as I have explained just now. That is the reason why we dropped the word minority because we felt that the word might be interpreted in the narrow sense of the term when the intention of this House, when it passed Article 18, was to use the word "minority" in a much wider sense, so as to give cultural protection to those who were technically not minorities but minorities nonetheless." (*See Constitutional Assembly Debates Official Report reprinted by Lok Sabha Secretariat*)

170. The draft article and the Constituent Assembly Debates in unambiguous terms show that minority status of a group of persons has to be determined on the basis of population of a State or Union Territory.

171. Further a perusal of Articles 350A and 350B which were inserted by the Constitution (7th Amendment) Act 1956 indicates that the status of linguistic minorities has to be determined as state-wise linguistic minorities/groups. Thus the intention of the framers of the Constitution and subsequent amendments in the Constitution indicate that protection was conferred not only to religious minorities but also to linguistic minorities on basis of their number in a State (unit) where they intend to establish an institution of their choice. It was not contemplated that status of linguistic minority has to be judged on basis of population of the entire country. If the status of linguistic minorities has to be determined on basis of the population of the country, the benefit of Article 30 has to be extended to those who are in majority in their own States.

172. The question who are minorities arose for the first time in the case of Kerala Education Bill case 1959 SCR P.995 at 1047-50. In the said decision it was contended by the State of Kerala that in order to constitute a minority who may claim protection of Article 30(1) persons or group of persons must numerically be minority in the particular region in which the educational institution in question is or is intended to be situated. Further according to State of Kerala, Anglo-Indians or Christians or Muslims of that locality taken as a unit, will not be a minority within the meaning of the Article and will not, therefore, be entitled to establish and maintain educational institutions of their choice in that locality, but if some of the members belonging to the Anglo Indian or Christians community happen to reside in another ward of the same municipality and their number be less than that of the members of other communities residing there, then those numbers of Anglo-Indian or Christians community will be a minority with in the meaning of Article 30 and will be entitled to establish and maintain educational institution of their choice in that locality. Repelling the argument this Court held thus:-

"We need not however, on this occasion go further into the matter and enter upon a discussion and express a final opinion as to whether education being a State subject being item 11 of List II of the Seventh Schedule to the Constitution subject only to the provisions of entries 62,63, 64 and 66 of List land entry 25 of List 111, the existence of a minority community should in all circumstances and for purposes of all laws of that State be determined on the basis of the population of the whole State or whether it should be determined on the State basis only when the validity of a law extending to the whole State is in question or whether it should be determined on the basis of the population of a particular locality when the law under attack applies only to that locality, for the Bill before us extends to the whole of the State of Kerala and consequently the minority must be determined by reference to the entire population of that State. By this test Christians, Muslims and Anglo-Indians will certainly be minorities in the State of Kerala."

173. In **A.M. Patroni** v. **E.C. Kesavan** MANU/KE/0032/1965 : AIR1965Ker75 it was held as this:

"6. The contention of the petitioners is that they have an exclusive right to administer the institution under Article 30(1) of the Constitution andthat the order of the Director of Public Instruction constitutes violation of that right. Clause (1) of Article 30 provides that all minorities, whether

based on religion of language, shall have the right to establish and administer educational institutions of their choice; and clause (2) that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. The word "minority" is not defined in the Constitution; and in the absence of any special definition we must hold that any community, religious or linguistic, which is numerically less than fifty per cent of the population of the State is entitled to the fundamental right guaranteed by the article."

174. The view that in a state where a group of persons having distinct language is numerically less than fifty per cent of population of that state are to be treated as linguistic minority was accepted by the Government of India and implemented while determining the minority status of persons or group of persons and the same is evident from the views expressed by Government of India before the Special Reporter of the U.N. Sub- Commission on Prevention of Discrimination and Protection of Minorities, when he was collecting information relating to the study on the concept of Minority and scope of the ICCPR 1966.

175. The Special Rapporteur in his report "Study on the Rights of Persons Belonging to Ethnic Religious and Linguistic Minorities" published by the center for Human Rights. Geneva states on the interpretation of the term"Minority" as thus:

"For the purposes of the study, an ethnic, religious or linguistic minority is a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population."

176. In the said report, views of the Government of India which was based on decision of Kerala High Court in the case of **A.M. Paatroni** was referred to which runs as under:

"(39) In India, the Kerala High Court, after observing that the Constitution granted specific rights to minorities, declared that "in the absence of any special definition we must hold that any community religious or linguistic, which is numerically less than 50% of the population of the State is entitled to the rights guaranteed by the Constitution ".

177. However in the case of **D.A.V. College** v. **State of Punjab** 1971 Suppl. S.C.R. p.688 at 697, an argument was raised that minority status of a person or group of persons either religious or linguistic is to be determined by taking into consideration the entire population of the country. While dealing with the said argument this Court held as follow:

"Though, there was a faint attempt to canvas the position that religious or linguistic minorities should be minorities in relation to the entire population of the country, in our view they are to be determined only in relation to the particular legislation which is sought to be impugned,namely that if it is the State legislature these minorities have to be determined in relation to the population of the State".

178. It may be noted that in the case of **D.A.V.College** (supra), this Courtwas dealing with the State legislation and in that context observed that if it is the state legislation, minority status has to

be determined in relation to the population of the State. However, curiously enough, there is no discussion that if the particular legislation sought to be impugned is a central legislation, minority status has to be tested in relation to the population of the whole of the country. In the absence of any such discussion it cannot be inferred that if there is a central legislation, the minority status of a group of persons has to be determined in relation to the entire population of the country.

179. In the year 1976 by Forty-Second Amendment Act, the Entries 11and 25 of List II of Seventh Schedule relating to Education and Vocational and Technical Training Labour respectively were transferred to the Concurrent List as Entry No. 25. In the Constitution of India as enacted Entries 11 and 25 of List II were as under:

Entry 11

"Education including Universities subject to the provisions of Entries 63,64, 65 and 66 of List I and Entry 25 of List III".

Entry 25

"Vocational or Technical training of labour".

By the Constitution (42nd Amendment) Act, 1976 Entry 25 of List III was substituted by the following entry viz:

Entry 25

"Education including technical education, medical education and universities subject to the provisions of Entries 63, 64, 65 and 66 of List I;vocational and technical training of Labour".

And Entry 11 of List II was omitted.

180. On 6.2.1997 when these matters came up before a Bench of seven Judges of this court, the Bench passed an order which runs as under:

"In view of the 42nd Amendment to the Constitution placing with effect from 3.1.1977 the subject "Education in Entry 25 List III of the 7thSchedule to the Constitution and the quoted decisions of the Larger Benches of this Court being of the pre amendment era, the answer to the brooding question, as to who in the context constitutes a minority, has become one of the utmost significance and therefore, it is appropriate that these matters are placed before a Bench of at least 11 Hon'ble Judges for determining the questions involved".

181. It is for the aforesaid reasons this question has been placed before this Bench.

182. In view of the referring order the question that arises for consideration is whether the transposition of the subject Education from List II to List III has brought change to the test determining who are minorities for the purposes of Article 30 of the Constitution.

183. It may be remembered that various entries in three lists of the Seventh Schedule are not powers of legislation but field of legislation. These entries are mere legislative heads and demarcate the area over which the appropriate legislatures are empowered to enact law. The power to legislate is given to the appropriate legislature by Article 246 and other articles. Article 245provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for whole or any part of the State Under Article 246 Parliament has exclusive power to make law with respect to any of the matters enumerated in List I in the Seventh Schedule. Further under clause (2) of Article 246 Parliament and subject to clause (1) the legislature of any State are empowered to make law with respect to any of the matters enumerated in List III Seventh Schedule and under clause (3) of Article 246, the legislature of any State is empowered to enact law with respect to any of the matters enumerated in List II in the Seventh Schedule subject to clauses (1) and (2). From the aforesaid provisions it is clear that it is Article 246 and other Articles which either empower Parliament or State Legislature to enact law and not the Entries finding place in three Lists of Seventh Schedule. Thus the function of entries in three lists of the Seventh Schedule is to demarcate the area over which the appropriate legislatures can enact laws but do not confer power either on Parliament or State Legislatures to enact laws. It may be remembered, by transfer of Entries, the character of entries is not lost or destroyed. In this view of the matter by transfer of contents of entry 11 of List II to List III as entry 25 has not denuded the power of State Legislature to enact law on the subject 'Education' but has also conferred power on Parliament to enact law on the subject "Education". Article 30 confers fundamental right to linguistic and religious minorities to establish and administer educational institutions of their choice. The test who are linguistic or religious minorities within the meaning of Article 30 would be one and the same either in relation to a State legislation or Central legislation. There cannot be two tests one in relation to Central legislation and other in relation to State legislation. therefore, the meaning assigned to linguistic or religious minorities would not be different when the subject "Education" has been transferred to the Concurrent List from the State List. The test who are linguistic or religious minorities as settled in Kerala Education Bill's case continues to hold good even after the subject "Education" was transposed into Entry 25 List III of Seventh Schedule by the 42nd Amendment Act. If we give different meaning to the expression "minority" occurring in Article 30 in relation to a central legislation, the very purpose for which protection has been given to minority would disappear. The matter can be examined from another angle. It is not disputed that there can be only one test for determining minority status of either linguistic or religious minority. It is, therefore, not permissible to argue that the test to determine the status of linguistic minority would be different than the religious minorities. If it is not so, each linguistic State would claim protection of Article 30 in its own State in relation to a central legislation which was not the intention of framers of the Constitution nor the same is borne out from language of Article 30. I am, therefore, of the view that the test for determining who are the minority, either linguistic or religious, has to be determined independently of which is the law, Central or State.

184. In view of what has been stated above, my conclusion on the question who are minorities either religious or linguistic within the meaning of Article 30 is as follows:

The person or persons establishing an educational institution who belong to either religious or linguistic group who are less than fifty per cent of total population of the state in which educational institutional is established would be linguistic or religious minorities.

Conflict between ARTICLE 29(2) AND ARTICLE 30(1) - whether Article 30(1) is subject to Article 29(2). What are the contents of Article 30(1)?

185. The issue in hand is full of complexities and an answer is not simple. Under Article 30(1), linguistic or religious minorities' fundamental rights to establish and administer educational institution of their choice have been protected. Such institutions are of three categories. First category of institutions are the institutions which neither take government aid nor are recognized by the State or by the University. Second category of institutions are those which do not take financial assistance from the government but seek recognition either from the State or the University or bodies recognized by the government for that purpose and the third category of institutions which seek both government aid as well as recognition from the State or the University.

186. Here, I am concerned with the third category of minority institutions and my answer to the question is confined to the said category of minority educational institutions.

187. It is urged on behalf of the minority institutions that Article 30(1)confers an absolute right on linguistic or religious minorities to establish and administer educational institutions of their choice. According to them, the expression `choice' indicates that one of the purposes of establishing educational institutions is to give secular education to the children of minority communities and, therefore, such institutions are not precluded from denying admission to members of non-minority communities on grounds only of religion, race, caste, language or any of them. In nutshell,the argument is that Article 30(1) is not subject to Article 29(2). Whereas,the argument of learned Solicitor General and other learned counsel is that any minority institution receiving government aid is bound by the mandate of Article 29(2) and such a minority institution cannot discriminate between the minority and majority while admitting students in such institutions. According to them, Article 30(1) does not confer an absolute right on the institutions set up by the linguistic or religious minorities receiving government aid and such institutions cannot extend preference to the members of their own community in the matter of admission of students in the institutions.

188. The question, therefore, arises whether minority institutions receiving government aid are subject to provisions of Article 29(2).

189. Learned counsel for the parties has pressed into service various rules of constructions for interpreting Article 29(2) and Article 30(1) in their own way. No doubt, various rules of construction laid down by the courts have been of considerable assistance as they are based on human experience. The precedents show that by taking assistance from rule of interpretations, the courts have solved many problems. We, therefore, propose to take assistance of judicial decisions as well as settled rules of interpretation while interpreting Articles 29(2) and 30(1) of the Constitution.

190. After the Constitution of India came into force, Articles 29 and 30came up for interpretation before various High Courts and the Apex Court. There appears to be no unanimity amongst the judicial decisions rendered by the courts as regards the extent of right conferred by Article 30(1). One line of decisions is that minority institutions receiving government aid are bound by constitutional mandate enshrined in article 29(2). The second line of decisions is that minority institutions receiving government aid while admitting students from their own communities in the

institutions established by them are free to admit students from other communities --belonging to majority, and such admission of students in the institution do not destroy the minority character of the institution. The third line of decisions is that under Article 30(1) fundamental right declared in terms is absolute although it was not decided whether Article 30(1) is subject to Article 29(2) or not. However, the view in the said decisions is that the right conferred under Article 30(1) is an absolute right. The fourth line of decision is that there can be no communal reservation for admission in Govt. or government aided institutions. The aforesaid categories of decisions shall hereinafter be referred to as first, second, third and fourth category of decisions.

191. The first decision in first category of decisions of this Court is **The State of Bombay v. Bombay Education Society & Ors.** - MANU/SC/0029/1954 : [1955]1SCR568 . In this case, a Society consisting of members of Anglo-Indian community whose mother tongue was English set up an institution in the State of Bombay. The State of Bombay in the year 1955 issued an Order that no school shall admit to class where English is used as a medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English namely, Anglo-Indians and citizens of non-Asiatic descent. One of the members of the Christian community sought admission in the school on the premise that his mother tongue was English. He was refused admission in view of the aforesaid Government Order, as the student was neither an Anglo-Indian whose mother tongue was English nor a citizen of non-Asiatic descent. This was challenged by means of a petition under Article 226 before the Bombay High Court and the Govt. order was struck down. On appeal to the Apex Court, this Court held thus:

"Article 29(1) gives protection to any section of the citizens having a distinct language, script or culture by guaranteeing their right to conserve the same. Article 30(1) secures to all minorities whether based on religion or language, the right to establish and administer educational institutions of their choice. Now, suppose the State maintains an educational institution to help conserving the distinct language, script or culture of section of the citizens or makes grants-in-aid of an educational institution established by a minority community based on religion or language to conserve their distinct language, script or culture who can claim the protection of Article 29(2) in the matter of admission into any such institution.? Surely, the citizens of the very section whose language, script or culture is sought to be conserved by the institution or the citizen who belonged to the minority group which has established and is administering the institution, do not need any protection against themselves and therefore, Article 29(2) is not designed for the protection of this section or this minority. Nor do we see any reason to limit article 29(2) to citizens belonging to a minority group other than the section or the minoritiesreferred to in article 29(1) or article 30(1), for the citizens, who do notbelong to any minority group, may quite conceivably need this protection just as much as the citizens of such other minority groups. If it is urged that the citizens of the majority group are amply protected by article 15and do not require the protection of article 29(2), then there are several obvious answers to that argument. The language of article 29(2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15 protects all citizens against the State whereas the protection of article 29(2) extents against the State or any body who denies the right conferred by it. Further article 15 protects all citizens against discrimination generally, but article 29(2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind. In the next place article 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the

citizens against discrimination by the State on certain specific grounds. Article 29(2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of aright to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination.

(emphasis supplied)

192. In **Re Kerala Education Bill, 1957** - 1959 SCR 995, it was held thus:

"Under clause (1) of Article 29 any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Article 30(1) which has hereinbefore been quoted in full. This right however, is subject to clause2 of Article 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

(emphasis supplied)

After holding that Article 30(1) is subject to clause (2) of Article 29, this Court further held thus:

"There is no such limitation in Article 30(1) and to accept this limitation will necessarily involve the addition of the words "for their own community"in the Article which is ordinarily not permissible according to well established rules of interpretation. Nor is it reasonable to assume that the purpose of Article 29(2) was to deprive minority educational institutions of the aid they receive from the State. To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institutionadm its such an outsider it will cease to be a minority institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid. The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institutionwith a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution."

(emphasis supplied)

193. In **D.A.V. College etc.** v. **Punjab State & Ors.** 1971 (suppl.) S.C.R.p.688 it was held thus:

"A reading of these two Articles together would lead us to conclude that are ligious or linguistic minority has a right to establish and administer educational institutions of its choice for effectively

conserving its distinctive language, script or culture, which right however is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. This right is further subject to clause (2) of Article 29 which provides that no citizen shall be denied admission into any educational institution which is maintained by the State or receives aid out of State funds. on grounds only of religion, race, caste, language or any of them. While this is so these two articles are not inter-linked nor does it permit of their being always read together."

194. In **St. Stephen's College** v. **University of Delhi** MANU/SC/0319/1992 : AIR1992SC1630 , Shetty J. speaking for the majority held that Article 29(2) applies to minority as well as non-minority institutions.

195. From the decisions referred to above, the principles that emerge are these:

(1) Article 29(2) confers right on the citizens for admission into educational institution maintained or aided by the State without discrimination. To limit this right only to citizens belonging to minority group will be to provide double protection for such citizens and to hold that citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for maintenance of which they make contribution by way of taxes. There is no reason for such discrimination;

(2) Article 30(1) is subject to Article 29(2); and

(3) the real import of Articles 29(2) and 30(1) is that they clearly contemplate minority institutions with the sprinkling of the outsiders admitted into it and by admitting the non-minority into it, the minority institutions do not shed its character and cease to be minority institutions.

196. The first decision in the second category of cases is in **Fev. FatherW. Proost & Ors.** v. **The State of Bihar & Ors.** - MANU/SC/0248/1968 : [1969]2SCR73 . It was held therein that the right of minority to establish educational institutions of their choice under Article 30(1) is not so limited as not to admit members of other communities. Such minority institutions while admitting members from their own community are free to admit members of non-minority communities. The expression `choice' includes to admit members from other communities. In the **State of Kerala etc.** v. **Very Rev. Mother Provincial etc.** - MANU/SC/0065/1970 : [1971]1SCR734 it was held that it is permissible that a minority institution while admitting students from its community may also admit students from majority community. Admission of such non-minority students would bring income and the institution need not be turned away to enjoy the protection.

197. The legal principle that emerges from the aforesaid decisions is that a minority institution while admitting members from its own community is free to admit students from non-minority community also.

198. The first decision in the third category of cases is **Rev. Sidhajbhai Sabhai & Ors.** v. **State of Bombay & Anr.** MANU/SC/0076/1962 : [1963]3SCR837 . In the said decision. although the question as to whether Article 30(1) is subject to Article 29(2) was not considered, yet it was held that under Article 30(1)fundamental right declared in terms absolute. It was also held that unlike fundamental freedoms guaranteed under Article 19 it is not subject to reasonable restrictions. It is

intended to be a real right for the protection of minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and not to be whittled down by so-called regulatory measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole.

199. In **Rt. Rev. Magr. Mark Netto** v. **Government of Kerala & ors.** - MANU/SC/0044/1978 : [1979]1SCR609 , a question arose whether Regional Deputy Director of Public Instructions can refuse permission to a minority institution to admit girl students. This Court while held that refusal to grant permission was violative of Article 30(1).

200. The legal principles that emerges from the aforesaid category of decisions are these:

(1) that article 30(1) is absolute in terms and the said right cannot be whittled by down regulatory measures conceived in the interest not of minority institutions but of public or the nation as a whole; and

(2) the power of refusal to admit a girl student in a boy's minority institution is violative of Article 30(1).

201. The fourth category of cases is the decision in the **State of Madras** v. **Srimathi Champakam Dorairajan etc.** 1951 SCR 525 wherein it was held thus:

"This Court in the context of communal reservation of seats in medical colleges run by the government was of the view that the intention of the Constitution was not to introduce communal consideration in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. However, it may be noted that this case was in relation to an institution referred to in Article 30(1) but has been cited for the purpose that there cannot be communal reservation in the educational institution receiving aid out of State funds."

(emphasis supplied)

202. From the aforesaid four categories of decisions, it appears that there is not a single decision of this Court where it has been held that Article 30(1) is not subject to Article 29(2). On the contrary there are bulk of decisions of this Court holding that minority institution cannot refuse admission of members of non-minority community and Article 30(1) is subject to Article 29(2). If I go by precedent, it must be held that Article 30(1) is subject to Article 29(2). However, learned counsel for minority institutions strongly relied upon the decision in the case of Rev. Sidhajbai (supra) and argued that once Article 30(1) is fundamental right declared absolute in terms, it cannot be subjected to Article 29(2). Since this Bench is of eleven Judges and decisions of this Court holding that Article 30(1) is subject to Article 29(2) are by lesser number of Judges I shall examine the question independently.

203. One of the known methods to interpret a provision of an enactment of the Constitution is to look into the historical facts or any document preceding the legislation.

204. Earlier, to interpret a provision of the enactment or the Constitution on the basis of historical facts or any document preceding the legislation was very much frowned upon, but by passage of time, such injunction has been relaxed.

205. In **His Holiness Kesavananda Bharati Sripadagalvaru etc.** v.**State of Kerala & Anr. Etc.** - MANU/SC/0445/1973 : AIR1973SC1461 : AIR1973SC1461 , it was held that the Constituent Assembly debates although not conclusive, yet the intention of framers of the Constitution in enacting provisions of the Constitution can throw light in ascertaining the intention behind such provision.

206. In **R.S. Nayak** v. **A.R. Antulay** - MANU/SC/0102/1984 : 1984CriLJ613 , it was held thus:

"Reports of the Committee which preceded the enactment of a legislation,reports of Joint Parliament Committee, report of a commission set up for collecting information leading to the enactment are permissible external aids to construction. If the basic purpose underlying construction of legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a Special Committee preceding the enactment, existing state of Law, the environment necessitating enactment of legislation, and the object sought to be achieved, be denied to Court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the Court of a substantial and illuminating aid to construction.

The modern approach has to a considerable extent corded the exclusionary rule even in England."

207. Thus, the accepted view appears to be that the report of the Constituent Assembly debates can legitimately be taken into consideration for construction of the provisions of the Act or the Constitution. In that view of the matter, it is necessary to look into the Constituent Assembly debates which led to enacting Articles 29 and 30 of the Constitution.

208. The genesis of the provisions of Articles 29 and 30 needs to be looked into in their two historical stages to focus them in their true perspective. The first stage relates to pre-partition deliberations in the Committees and Constituent Assembly and the second stage after the partition of the country. On 27th of February, 1947, several Committees were formed for the purpose of drafting Constitution of India and on the same day, the Advisory Committee appointed a Sub-Committee on minorities with a view to submit its report with regard to the rights of the minorities. Before the Fundamental Rights Sub-Committee, Shri K.M. Munshi - one of its members wanted certain rights for minorities being incorporated in the fundamental rights. He was advised by the Fundamental Rights Committee that the said report regarding rights of minorities may be placed before the Minority Sub-Committee. On April 16, 1947, Shri K.M. Munshi circulated a letter to the members of the Sub-Committee on minorities recommending that certain fundamental rights of minorities be incorporated in the Constitution. There commendations contained in the said letter run as under:

"1. All citizens are entitled to the use of their mother tongue and the script thereof and to adopt, study or use any other language and script of his choice.

2. Citizens belonging to national minorities in a State whether based on religion or language have equal rights with other citizens in forming,controlling and administering at their own expense, charitable, religious and social institutions, schools and other educational establishment with the free use of their language and practice of their religion.

(emphasis supplied)

3. Religious instruction shall not be compulsory for a member of a community which does not profess such religion.

4. It shall be the duty of every unit to provide in the public educational system in towns and districts in which a considerable proportion of citizens of other than the language of the unit are residents, adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such citizens through the medium of their own language.

Nothing in this clause shall be deemed to prevent the unit from making the teaching of the national language in the variant and script of the choice of the pupil obligatory in the schools.

5. No legislation providing state aid for schools shall discriminate against schools under the management of minorities whether based on religion or language.

6. (a) Notwithstanding any custom or usage or prescription, all Hindus without any distinction of caste or denomination shall have the right of access to and worship in all public Hindu temples, choultries, *dharmasalas*, bathing ghats, and other religious places.

(b) Rules of personal purity and conducted prescribed for admission to and worship in these religious places shall in no way discriminate against or impose any disability on any person on the ground that he belongs to impure or inferior caste or menial class.

209. One of the reasons for recommendation of the aforesaid rights was the Polish Treaty forming part of Poland's Constitution which was a reaction to an attempt in Europe and elsewhere to prevent minorities from using or studying their own language. The aforesaid recommendations were then placed before the Minority Sub-Committee. The Minority Sub-Committee submitted its report amongst other subjects on cultural, educational and fundamental rights of minorities which may be incorporated at the appropriate places in the Constitution of India. The recommendations of the said Sub-Committee were these:

(i) All citizens are entitled to use their mother tongue and the scrip thereof, and to adopt, study or use any other language and script of their choice;

(ii) Minorities in every unit shall be adequately protected in respect of their language and culture, and no government may enact any laws or regulations that may act oppressively or prejudicially in this respect;

(iii) No minority whether of religion, community or language shall be deprived of its rights or discriminated against in regard to the admission into State educational institutions, nor shall any religious instruction be compulsorily imposed on them;

(iv) All minorities whether of religion, community or language shall be free in any unit to establish and administer educational institutions of their choice and they shall be entitled to State aid in the same manner and measure as is given to similar State-aided institutions;

(v) Notwithstanding any custom, law, decree or usage, presumption or terms of dedication, no Hindu on grounds of caste, birth or denomination shall be precluded from entering in educational institutions dedicated or intended for the use of the Hindu community or any section thereof;

(vi) No disqualification shall arise on account of sex in respect of public serve or professions or admission to educational institutions save and except that this shall not prevent the establishment of separate educational institutions for boys and girls."

210. Initially, Shri G.B. Pant was of the view that these minority rights should be made to form part of unjusticiable Directive Principles, but on intervention of Shri K.M. Munshi those minority rights were included in the fundamental rights chapter. On 22nd April, 1947, the report of Minority Sub-Committee was placed before the Advisory Committee. The Advisory Committee, inter alia, recommended that Clause 16 which corresponds to Article 28 of the Constitution should be re-drafted as follows:

"All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion subject order, morality or health, and to the other provisions of this chapter."

211. The Advisory Committee then considered the recommendations of the Sub-Committee and it was resolved to insert the following clauses among the justiciable fundamental rights:

"(1) Minorities in every unit shall be protected in respect of their language script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect;

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State educational institutions, nor shall any religious instruction be compulsorily imposed on them;

(3)(a) All minorities whether based on religion, community or language shall be free in any unit to establish and administer educational institutions of then choice;

(b) The State shall not while providing State aid to schools discriminate against schools under the management of minorities whether based on religion, community or language."

212. This became Clause 18.

213. The recommendations of the Advisory Committee were then placed before the Constituent Assembly which met on 1st May, 1947. When Clause 18 was moved by Shri Sardar Vallabhbhai Patel for adoption by the House, several members were of the view that Clause 18 may be referred back to the Advisory Committee for reconsideration in the light of discussion that took place on that day. However, Shri K.M. Munshi--another member of the Constituent Assembly suggested that only Sub-clause (2) of Clause 18 be referred back to the Advisory Committee for reconsideration. Ultimately, the amendment moved by Shri K.M. Munshi was adopted and Sub-clause (2) of Clause 18 was referred back to the Advisory Committee for reconsideration. Thereafter Clause 18(1) and Clause 18(3) were accepted without any amendment.

214. The Advisory Committee re-considered Clause 18(2) and recommended that Clause 18(2) be retained after deleting the words "nor shall any religious instruction be compulsorily imposed on them" as the said provision was already covered by Clause 16. Thus, Sub-clause (2) was placed before the House on 30th August, 1947 for being adopted along with the recommendation of the Advisory Committee. When the matter was taken up Mrs. Purnima Banerji proposed the following amendments that after the word 'State' the words 'and State-aided' be inserted. While proposing the said amendment, Mrs. Banerji stated thus:

"The purpose of the amendment is that no minority, whether based on community or religion shall be discriminated against in regard to the admission into State-aided and State educational institutions. Many of the provinces, e.g. U.P., have passed resolutions laying down that no educational institution will forbid the entry of any members of any community merely on the ground that they happened to belong to a particular community--even if that institution is maintained by a donor who has specified that that institution should only cater for members of his particular community. If that institution seeks State aid, it must allowmembers of other communities to enter into it. In the olden days, in the Anglo-Indian schools (it was laid down that though those schools would be given to Indians. In the latest report adopted by this House it is laid down at 40 per cent. I suggest Sir, that if this clause is included without the amendment in the Fundamental Rights, it will be a step backward and many provinces who have taken a step forward will have to retrace their steps. We have many institutions conducted by very philanthropic people,who have left large sums of money at their disposal. While we welcome such donations, when a principle has been laid down that, if any institution receives State aid, it cannot discriminate or refuse admission to members of other communities, then it should be follow. We know, Sir, that many a Province has got provincial feelings. If this provision is included as a fundamental right, I suggest it will be highly detrimental. The Honourable Mover has not told us what was the reason why he specifically excluded State-aided institutions from this clause. If he had explained it, probably the House would have been convinced. I hop that all the educationist and other members of this House will support my amendment."

(emphasis supplied)

215. The amendment proposed by Mrs. Banerji was supported by Pandit Hirday Nath Kunzra and other members. However, on intervention of Shri Vallabhbhai Patel, the following Clause 18(2) as proposed by the Advisory Committee was adopted:

"18(2). No minority whether based on religion, community or language shall be discriminated against in regard to the admission into state educational institutions."

216. After Clause 18(2) was adopted by the Constituent Assembly, the same was referred to the Constitution Drafting Committee of which Dr. B.R. Ambedkar was the Chairman. The Drafting Committee while drafting Clause 18 deleted the word 'minority' from Clause 18(1) and the same was substituted by the words 'any section of the citizens". However, rest of the clause as adopted by the Constituent Assembly was retained. Clause 18(1),(2) and (3) (a) & (b) were transposed in Article 23 of the Draft Constitution of India. Article 23 of the Draft Constitution of India runs as under:

Cultural and Educational Rights

"23. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State.

(3) (a) All minorities whether based on religion, community or language shall have the right to establish and administer educational institutions of their choice.

(b) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion community or language."

217. On 8.12.1948, the aforesaid draft Article 23 was placed before the Constituent Assembly. When draft Article 23 was taken up for debate, Shri M. Ananthasayanam Ayyangar stated that for the words "no minority"occurring in Clause 2 of draft Article 23, the words "no citizen or minority"be substituted. He stated thus:

"I want that all citizens should have the right to enter any public educational institution. This ought not to be confined to minorities. That is the object with which I have moved this amendment."

218. It is at that stage, Shri Thakur Dass Bhargava moved amendment No. 26 to amendment No. 687. According to him, for amendment No. 687 of the List of amendment, the following be substituted:

"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion race, caste, language or any of them."

219. He further stated thus:

"Sir, I find there are three points of difference between this amendment and the provisions of the section which it seeks to amend. The first is to put in the words 'no citizen' for the words 'no

minority'. Secondly that not only the institutions which are maintained by the State will be included in it, but also such institutions as are receiving aid out of state funds. Thirdly, we have, instead of the words "religion, community of language", the words, "religion, race, caste, language or any of them."

Now, Sir, it so happens that the words "no minority" seek to differentiate the minority from the majority, whereas you would be pleased to see that in the Chapter the words of the heading are "cultural and educational rights", so that the minority rights as such should not find any place under this Section. Now if we read Clause (2) it would appear as if the minority had been given certain definite rights in this clause, whereas the national interest requires that no majority also should be discriminated again in this matter. Unfortunately, there is in some matters a tendency that the minorities as such posses and are given certain special rights which are denied to the majority. It was the habit of our English masters that they wanted to create discriminations of this sort between the minority and the majority. Sometimes the minority said they were discriminated against and on the other occasions the majority felt the same thing. The amendment brings the majority and the minority on an equal status.

In educational matters, I cannot understand, from the national point of view, how any discrimination can be justified in favour of a minority or a majority. therefore, what this amendment seeks to do is that the majority and the minority are brought on the same level. There will be no discrimination between any member of the minority or majority in so far as admission to educational institutions are concerned. So I should say that this is a charter of the liberties for the student-world of the minority and the majority communities equally.

Now, Sir, the word "community" is sought to be removed from this provision because "community" has no meaning. If it is a fact that the existence of a community is determined by some common characteristic and all communities are covered by the words religion or language, then"community" as such has no basis. So the word "community" is meaningless and the words substituted are "race or caste". So this provision is so broadened that on the score of caste, race, language or religion no discrimination can be allowed.

My submission is that considering the matter from all the standpoints, this amendment is one which should be accepted unanimously by this House."

220. After Dr. B.R. Ambedkar gave clarification as to why the words "no minority" were deleted and its place "no section of the citizen" were substituted in Clause (1) of Draft Article 23. Amendment as proposed by Shri Thakur Dass Bhargava was put to motion and the same was adopted. Thus the word 'minority' was deleted and the same was substituted by the word 'citizen' and for the words "religion, community or language", the words "religion, race, caste, language or any of them were substituted. Thus, Article 23 was split into two Articles-Article 23 containing Clause (1)and Clause (2) of Article 23 and Sub-clause (a) and (b) of Clause (3) of Article 23 was numbered as Article 23-A. Subsequently Articles 23 and23-A became Articles 29 and 30 respectively. Thus, Article 23, as amended, became part of the Constitution on 9th December, 1948.

221. The deliberations of the Constituent Assembly show that initially Shri K.M. Munshi recommended that citizens belonging to national minority in the State whether based on religion

or language have equal rights with other citizens in setting up and administering at their own expense charitable,religious and social institutions, schools and other educational establishments with the free use of their language and practice of their religion for being incorporated in the proposed Constitution of India. This was with a view that the members of the majority community who are more in number may not at any point of time take away the rights of minorities to establish and administer educational institution of their choice. It was very much clear that there was a clear intention that the rights given to minorities under Article 30(1) were to be exercised by them if the institution established is administered at their own cost and expense. It is for that reason we find that no educational institution either minority or majority has any common law right or fundamental right to receive financial assistance from the government. Non-discriminatory Clause (2) of Article 30 only provides that the State while giving grant-in-aid to the educational institutions shall not discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. The subsequent deliberations of the Constituent Assembly further shows that there was thinking in the minds of the framers of the Constitution that equality and secularism be given paramount importance while enacting Article 30(1). It is evident that amendment proposed by Shri Thakur Dass Bhargava which is now Article 29(2) was a conscious decision taken with due deliberations. The Constituent Assembly was of the view that originally Clause (2) of draft Article 23 sought to distinguish the minority from majority, whereas in the chapter the words are cultural and educational rights' and as such the words 'minority' ought not to have found place in that Article. The reason for omission of words in Clause (2) of draft Article 23 was that minorities were earlier given certain rights under that clause where national interest required that no member of majority also should be discriminated against in educational matters. It also shows that by the aforesaid amendment discrimination between minority and majority was done away with and the amendment has brought the minority and majority in equal footing. The debate also shows what was originally proposed either in Clause 18(2) or Article 23(2). The debate further shows that the post partition stage members of the Constituent Assembly intended to broaden the scope of Clause (2) of draft Article 23 and never wanted to confine the rights only to the minorities. The views of the members of the Constituent Assembly were that if any institution takes aid from the government for establishing and administering educational institutions it cannot discriminate while admitting students on the ground of religion, race and caste. It may be seen that by accepting the amendment proposed by Shri Thakur Dass Bhargava the scope of Article 29(2) was broadened in as much as the interest of minority - either religious or linguistic was secured and, therefore, the intention of the framers of the Constitution for enacting Clause(2) of Article 29(2) was that once a minority institution takes government aid, it becomes subject to Clause (2) of Article 29.

222. It was then urged that if the intention of the framers of the Constitution was to make Article 30(1) subject to Article 29(2), the appropriate place where it should have found place was Article 30(1) itself rather than in Article 29 and, therefore, Article 29(2) cannot be treated as an exception to Article 30(1). There is no merit in the contention. It is earlier noticed that Clause (18) when was placed before the Constituent Assembly contained the provisions of Article 29(1)(2) and 30(1)(2) and all were numbered as Clause 18(1) (2) (3)(a) (b). Again when Clause (18) was transposed in draft Article 23, Article 29(1)(2) and Article 30(1)(2)--both were together in draft Article 23. Shri Thakur Dass Bhargava's amendment which was accepted was in relation to Clause (2) of Article 23 which ultimately has become Article 29(2). It is for that reason Article 29(2) finds place in Article 29.

223. It was also urged that if the framers of the Constitution intended to carve out a exception to Article 30(1), they could have used the words"subject to the provisions contained in Article 29(2)" in the beginning ofArticle 30(1) or could have used the expression "notwithstanding" in the beginning of Article 29(2) and in absence of such words it cannot be held that Article 29(2) is an exception to Article 30(1). Reference in this regard was made to Articles 25 and 26 which contained qualifying words. In fact,the structural argument was based on the absence of qualifying words either in Article 29(2) or 30(1). This argument based on structure of Articles 29(2)and 30(1) has no merit. In fact, it overlooks that the intention of the framers of the Constitution was to confer rights consistent with the other members of society and to promote rather than imperil national interest. it may be noted that there is a difference in the language of Articles 25 and 26. The qualifying words of Article 25 are "subject to public order, morality and health and to the other provisions of this part". The opening words of Article 26 are "subject to public order, morality and health". The absence of words "to the other provisions of this part" as occurring in Article 25 in Article 26 does not mean that Article 26 is over and above other rights conferred in Part-III of the Constitution. In **The Durgah Committee, Ajmer and Anr.v. Syed Hussain Ali and Ors.** - MANU/SC/0063/1961 : [1962]1SCR383 : [1962]1SCR383 and **Tilkayat Shri Govindlalji Maharaj v. The State of Rajasthan and Ors.** - MANU/SC/0028/1963 : [1964]1SCR561 , it has been held that Article 26 is subject to Article 25 irrespective of the fact that the words "subject to other provisions of this part" occurring in Article 25 is absent in Article 26. For these reasons, it must be held that even if there are no qualifying expression "subject to other provisions of this part" and "notwithstanding anything" either in Article 30(1) or Article 29(2), Article 30(1) is subject to Article 29(2) of the Constitution.

224. There is another factor which shows that Article 30(1) is subject to Article 29(2). If Article 29(2) is meant for the benefit of minority, there was no sense in using the word 'caste' in Article 29(2). The word 'caste' is unheard of in religious minority communities and, therefore, Article 29(2)was never intended by the framers of the Constitution to confer any exclusive rights to the minorities.

225. Although Article 30(1) strictly may not be subject to reasonable restrictions, it cannot be disputed that Article 30(1) is subject to Article 28(3) and also general laws and the laws made in the interests of national security, public order, morality and the like governing such institutions will have to be necessarily read into Article 30(1). In that view of the matter the decision by this Court in **Rev. Sidhajbhai** (supra) that under Article 30(1)fundamental right conferred on minorities is in terms absolute is not borne out of that Article. It, therefore, cannot be held that the fundamental right guaranteed under Article 30(1) is absolute in terms. Thus, looking into the precedents, historical fact and Constituent Assembly debates and also interpreting Articles 29(2) and 30(1) contextually and textually, the irresistible conclusion is that Article 30(1) is subject to Article 29(2) of the Constitution .

226. The question then arises for what purpose the celebrated Article 30(1)has been incorporated in the Constitution if the linguistic or religious minorities who establish educational institutions cannot admit their own students or are precluded from admitting members of their own communities in their own institution. It is urged that the rights under Article 30(1)conferred on the minorities was in return to minorities for giving up demand for separate electorate system in the country. It is also urged that an assurance was given to the minorities that they would have a

fundamental right to establish and administer educational institution of their choice and incase the minority cannot admit their own students or members of their own community it would be breach of the assurance given to the minorities. There is no denial of the fact that in a democracy the rights and interest of minorities have to be protected. In the year 1919, President Wilson stated that nothing is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities. Lord Acton emphasized that the most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities. It is also not disputed that in the field of international law in respect of minorities it is an accepted view that the minorities on account of their non dominance are in a vulnerable position in the society and in addition to the guarantee of non-discrimination available to all the citizens,require special and preferential treatment in their own institutions. The Sub-Committee in its report to the Commission on Human Rights reported thus:

"Protection of minorities is the protection of non-dominant groups, which,while wishing in general for equality of treatment with the minority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. The protection applied equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups or of individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole."

(cited in St. Xavier's College, MANU/SC/0088/1974 : [1975]1SCR173 : [1975]1SCR173 .)

227. The aforesaid report was accepted by the Permanent Court of International Justice in a case relating to minority school in Albania which arose out of the fact that Albania signed a Declaration relating to the position of minorities in the State. Article 4 of the Declaration provided that all Albanian nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as the race, language or religion. Article 5 further provided that all Albanian nationals who belong to racial,religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future charitable, religious and social institutions, schools and other educational establishments with the right to use their own language and to exercise their religion freely therein. Subsequently, the Albanian Constitution was amended and a provision was made for compulsory primary education for the Albanian nationals in State schools and all private schools were to be closed. The question arose before the Permanent Court of International Justice as to whether Albanian Government was right to abolish the private schools run by the Albanian minorities. The Court was of the view that the object of Declaration was to ensure that nationals belonging to the racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the State. The second was to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements were indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being a minority. The Court was of the further view that"there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law. Equality in law precludes

discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations." (St. Xavier Colleges case - MANU/SC/0088/1974 : [1975]1SCR173 : [1975]1SCR173 (*per Khanna, Mathew, JJ.*)

228. Article 27 of the International Covenant on civil and Political Rights1966 (CCPR) guarantee minority rights in the following terms:

"In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture to profess and practice their own religions or to use their own language."

229. **Prof. Francesco Capotorti** in his celebrated study on the **Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities** stated as follows:

"Article 27 of the Covenant must, therefore, be placed in its proper context. To enable the objectives of this article to be achieved, it is essential that States should adopt legislative and administrative measures. It is hard to imagine how the culture and language of a group can be conserved without, for example, a special adaptation of the educational system of the country. The right accorded to members of minorities would quite obviously be purely theoretical unless adequate cultural institutions were established. This applies equally in the linguistic field,and even where the religion of a minority is concerned a purely passive attitude on the part of the State would not answer the purposes of Article 27. However, whatever the country, groups with sufficient resources to carry out tasks of this magnitude are rare, if not non-existent. Only the effective exercise of the rights set forth in Article 27 can guarantee observance of the principle of the real, and not only formal, equality of persons belonging to minority groups. The implementation of these rights calls for active and sustained intervention by States. A passive attitude on the part of the latter would render such rights inoperative."

230. The Human Rights Committee functioning under the Optional Protocol of ICCPR in its General Comment adopted by the Committee on06th April, 1994 stated thus:

"The Committee points out that Article 27 establishes and recognizes a right, which is conferred on individuals belonging to minority groups and which is distinct from, and additional to,all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant."

From the aforesaid report it is clear that in certain circumstances rights conferred to minority groups are distinct from and additional to, all the other rights which as an individuals are entitled to enjoy under the covenant. The political thinkers have recognized the importance of minority rights as well as for ensuring such rights. According to them the rights conferred on linguistic or religious minorities are not in the nature of privilege or concession, but heir entitlement flows from the doctrine of equality, which is the real *de facto* equality. Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations. Where there is a plurality in a society, the object of law should be not to split the minority group

which makes up the society, but to find out political social and legal means of preventing them from falling apart and so destroying the society of which they are members. The attempt should be made to assimilate the minorities with majority. It is a matter of common knowledge that in some of the democratic countries where minority rights were not protected, those democracies acquired status of theocratic States.

231. In India, the framers of the Constitution of India with a view to in still a sense of confidence and security in the mind of minority have conferred rights to them under the Constitution. One of such rights is embodied in Article 30 of the Constitution. Under Article 30 the minorities either linguistic or religious have right to establish and administer educational institutions of their choice. However, under the Constitution every citizen is equal before law, either he may belong to minority group or minority community. But right conferred on minority under Article 30(1) would serve no purpose when they cannot admit students of their own community in their own institutions. In order to make Article 30(1) workable and meaningful, such rights must be interpreted in the manner in which they serve the minorities as well as the mandate contained in Article 29(2). Thus, where minorities are found to have established and administering their own educational institutions, the doctrine of the real *de facto* equality has to be applied. The doctrine of the real *de facto* equality envisages giving a preferential treatment to members of minorities in the matter of admission in their own institutions. On application of doctrine of the real *de facto* equality in such a situation not only Article 30(1) would be workable and meaningful, but it would also serve the mandate contained in Article 29(2). Thus, while maintaining the rule of non-discrimination envisaged by Article 29(2), the minorities should have also right to give preference to the students of their own community in the matter of admission in their own institution. Otherwise, there would be no meaningful purpose of Article 30(1) in the Constitution. True, receipt of State aid makes it obligatory for educational institution to keep the institution open to non-minority students without discrimination on the specified grounds. But, to hold that the receipt of State aid completely disentitles the management of minority educational institutions from admitting students of their community to any extent will be to denude the essence of Article 30 of the Constitution. It is, therefore, necessary that minority be given preferential rights to admit students of their own community in their own institutions in a reasonable measure otherwise there would be no meaningful purpose of Article 30 in the Constitution.

232. Article 337 of the Constitution provides that grants or government aid has to be given to the Anglo-Indian Institution provided they admit 40% of members from other community. Taking the clue from Article 337 and spirit behind Article 30(1) it appears appropriate that minority educational institutions be given preferential rights in the matter of admission of children of their community in their own institutions while admitting students of non-minorities which, advisedly, may be upto 50% based on inter se merits of such students. However, it would be subject to assessment of the actual requirement of the minorities the types of the institutions and the course of education for which admission is being sought for and other relevant factors.

233. Before concluding the matter, it is necessary to deal with few more aspects which relate to the regulatory measures taken by the government with regard to government aided minority institution. In that connection,the State must see that regulatory measures of control of such institutions should be minimum and there should not be interference in the internal or day-to-day working of the management. However, the State would be justified in enforcing the standard of

education in such institutions. In case of minority professional institutions, it can also be stipulated that passing of common entrance test held by the State agency is necessary to seek admission. It is for the reason that the products of such professional institutions are not only going to serve the minorities but also to majority community. So far as the redressal of grievances of staff and teachers of minority institutions are concerned, a mechanism has to be evolved. Past experience shows that setting up a Tribunal for particular class of employees is neither expedient nor conducive to the interest of such employee. In that view of the matter each District Judge which includes the Addl. District Judge of the respective district be designated as Tribunal for redressal of the grievances of the employee and staff of such institutions.

234. Another question that arises in this connection as to on what grounds the staff and teachers, if aggrieved, can challenge the arbitrary decisions of the management. One of the learned senior counsel suggested that such decisions be tested on the grounds available under the labour laws. However, seeing the nature of the minority institutions the grounds available under labour laws are too wide and it would be appropriate if adverse decisions of the Management are tested on grounds of breach of principles of natural justice and fair play or any regulation made in that respect.

235. Subject to what have been stated above, I concur with the judgment of Hon'ble the Chief Justice.

S.S.M. Quadri, J.

236. I have perused the majority judgment prepared by Hon'ble the Chief Justice, the concurring opinion of my learned brother, Khare, J. and the dissenting opinions given by our learned sister Ruma Pal, J. and learned brother S.N. Variava, J.

237. Though the questions referred to and re-framed are eleven, the Bench deemed it fit not to answer four of them. On the contentions advanced by the learned counsel who argued these cases in regard to the remaining seven questions, the learned Chief Justice has formulated the following five issues which encompass the entire field:

1. IS THERE A FUNDAMENTAL RIGHT TO SET UP EDUCATIONAL INSTITUTIONS AND IF SO, UNDER WHICH PROVISION?

2. DOES UNNIKRISHNAN'S CASE REQUIRE RE-CONSIDERATION?

3. IN CASE OF PRIVATE INSTITUTIONS (UNAIDED ANDAIDED), CAN THERE BE GOVERNMENT REGULATIONS AND,IF SO, TO WHAT EXTENT?

4. IN ORDER, TO DETERMINE THE EXISTENCE OF A RELIGIOUSOR LINGUISTIC MINORITY IN RELATION TO ARTICLE 30,WHAT IS TO BE THE UNIT, THE STATE OR THE COUNTRYAS A WHOLE?

5. TO WHAT EXTENT CAN THE RIGHTS OF AIDED PRIVATEMINORITY INSTITUTIONS TO ADMINISTER BE REGULATED?

238. Before I advert to these issues, it would be appropriate to record that there was unanimity among the learned counsel appearing for the parties,institutions, States and the learned Solicitor General appearing for the Union of India on two aspects; the first is that all the citizens have the right to establish educational institutions under Article 19(1)(g) and Article 26 of the Constitution and the second is that the judgment of the Constitution Bench of this Court in Unni krishnan J.P. and Ors., v. State of Andhra Pradesh and Ors. MANU/SC/0333/1993 : [1993]1SCR594 requires re-consideration, though there was some debate with regard to the aspects which require re-consideration.

1. IS THERE A FUNDAMENTAL RIGHT TO SET UP EDUCATIONAL INSTITUTIONS AND IF SO, UNDER WHICH PROVISION?

239. On this issue I respectfully agree with the view expressed by Hon'ble the Chief Justice speaking for the majority.

240. Part III of the Constitution which embodies fundamental rights does not specify such a right vis-a-vis all citizens as such. However, we shall refer to Articles 19, 26 and 30 having a bearing on this issue.

241. Article 19 of the Constitution, insofar as it is relevant for the present discussion, is as under:

"**19. Protection of certain rights regarding freedom of speech, etc. - (1) All citizensshall have the right -**

(a) to (f) xxx xxx xxx

(g) to practise any profession, or to carryon any occupation, trade or business.

(2) to (5) xxx xxx xxx

(6) Nothing in Sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to,--

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion,complete or partial, of citizens or otherwise."

Article 19 confers on all citizens rights specified in Sub-clauses (a) to (g). The fundamental rights enshrined in Sub-clause (g) of Clause (1) of Article 19of the Constitution are to practise any profession, or to carry on any occupation, trade or business. We are concerned here with the right

to establish educational institution to impart education at different levels,primary, secondary, higher, technical, professional,etc. Education is essentially a charitable object and imparting education is, in my view, a kind of service to the community, therefore, it cannot be brought under trade or business' nor can it fall under 'profession'.Nevertheless, having regard to the width of the meaning of the terms 'occupation' elucidated in the judgment of Hon'ble the Chief Justice, the service which a citizen desires to render by establishing educational institutions can be read in 'occupation'. This right,like other rights enumerated in Sub-clause (g), is controlled by Clause (6) of Article 19. The mandate of Clause (6) is that nothing is Sub-clause (g) shall affect the operation of any existing law, insofar it imposes or prevent the State from making any law imposing, in the interests of general public,reasonable restrictions on the exercise of right conferred by the said sub-clause and, in particular,nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to or prevent the State from making any law relating to:(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business; or (ii) the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business,industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. therefore, it may be concluded that the right of a citizen to run educational institutions can be read into "occupation"falling in Sub-clause (g) of Clause (1) of Article 19which would be subject to the discipline of Clause (6)thereof.

242. Every religious denomination or a section thereof is conferred the right, inter alia, to establish and maintain institution for religious and charitable purpose, incorporated in Clause (a) of Article 26,which reads thus:

"26. Freedom to manage religious affairs -Subject to public order, morality and health,every religious denomination or any section thereof shall have the right--

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to (d) xxx xxx xxx"

The right under Clause (a) is a group right and is available to every religious denomination or any section thereof, be it of majority or any section thereof. It is evident from the opening words of Article 26 that this right is subject to public order, morality and health.

243. The Constitution protects the cultural and educational rights of such minorities as are specified in Articles 29 and 30.

244. Article 29 deals with the protection of interests of minorities. If affords protection to minorities who have a distinct language, script or culture of their own and declares that they shall have the right to conserve the same provided they form a section of citizens residing in the territory of India. Sub-clause (1) of Section 29is in the following terms:

"**29. Protection of interests of minorities -** (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."

We shall advert to Clause (2) of Article 29separately;

245. Article 30 of the Constitution confers a special right on the minorities to establish and administer educational institutions. For the purposes of this Article, religious or linguistic minorities alone are recognized for conferring rights under Article 30. Article 30 reads asunder:

"**30. Right of minorities to establish and administer educational institutions -**(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions,discriminate against any educational institution on the ground that it is under the management of a minority,whether based on religion or language."

Clause (1) of Article 30 provides that all minorities, whether based on religion on language,shall have the right (i) to establish and (ii)administer educational institutions of their choice. The amplitude of the right is couched in very wide language. It is also a group right but any individual belonging to minorities, linguistic or religious, may exercise this right for the benefit of his own group. It is significant to note that the right conferred under Article 30 is not subjected to any limitations. The Article speaks of "their choice". The right to establish and administer educational institutions is of the choice of the minorities. The expression"institutions of their choice" means institutions for the benefit of the minorities; the word 'choice' encompasses both of the students as well as of the type of education to be imparted in such educational institutions.

246. It has been settled by a catena of decisions of this Court [In Re The Kerala Education Bill,1957 MANU/SC/0029/1958 : [1959]1SCR995 Rev. Sidhajbhai Sabhjai and Ors.v. State of Bombay and Anr. MANU/SC/0076/1962 : [1963]3SCR837 : [1963]3SCR837 , The Ahmedabad St. Xavier's College Society and Anr. Etc.v. State of Gujarat and Anr. MANU/SC/0088/1974 : [1975]1SCR173 : [1975]1SCR173 andSt. Stephen's College v. University of Delhi MANU/SC/0319/1992 : AIR1992SC1630 that Article 30 of the Constitution conferred special rights on the minorities(linguistic or religious). The word 'minority' is not defined in the Constitution but literally it means 'a non-dominant' group. It is a relative term and is referred to, to represent the smaller of two members, sections or group called 'majority'. In that sense, there may be political minority, religious minority, linguistic minority,etc.

247. The other clauses of this Article will be discussed separately.

248. With these few comments, I am in respectful agreement with the majority judgment on issue No. 1.

2. DOES UNNIKRISHNAN'S CASE REQUIRE RE-CONSIDERATION?

3. IN CASE OF PRIVATE INSTITUTION (UNAIDED ANDAIDED) CAN THERE BE GOVERNMENT REGULATIONSAND, IS SO, TO WHAT EXTENT?

4. IN ORDER TO DETERMINE THE EXISTENCE OF ARELIGIOUS OR LINGUISTIC MINORITY IN RELATION TO ARTICLE 30, WHAT IS TO BE THE UNIT, THE STATE OR THE COUNTRY AS A WHOLE?

On these issues, I respectfully agree with the reasoning and conclusion of the majority.

5. TO WHAT EXTENT CAN THE RIGHTS OF AIDEDPRIVATE MINORITY INSTITUTIONS TO ADMINISTERBE REGULATED?

In regard to this issue and particularly on the interpretation of Article 29(2) vis-a-vis, clauses(1) and (2) of Article 30 and the conclusion recorded by the majority, I have some reservations. I could not persuade myself to agree with the majority judgment as well as the opinions of my learned brethren Khare, J. and more so with the dissenting opinion of Variava, J. with which Ashok Bhan, J. agreed. On this aspect, I agree with the reasoning and conclusion of our learned sister Ruma Pal, J. I would give my reasons for this conclusion later.

249. In the result I am in respectful agreement with the answer recorded in the majority judgment on question Nos. 1, 2, 3(a), 3(b) and 4 except to the extent of reasoning and interpretation of Articles 29(2) and 30(1) on which the answer is based. I agree, with respect, with answers to questions 3(a), 5(c), 6(a), 6(b) and 7. In regard to question No. 8, reconsideration of the judgment of the Constitution Bench of this Court inSt. Stephen's College (supra) which relates to aided minority institutions, I agree with the answer recorded in the majority judgment, except to the extent of interplay between Article 29(2)and 30(1) and giving to the authorities power to prescribe a percentage having regard to the type of institution and educational needs of minorities. I agree also with the answer to question No. 9.

250. With regard to answer to question No. 5(b) and the common answer to question Nos. 10 and 11, in the light of the comments made above, I would answer that all the citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26. The minorities have an additional right to establish and administer educational institution 'of their choice' under Article 30(1). The extent of these rights are, therefore, different. A comparison of Articles 18, 26 and 30 would show that whereas the educational institutions established and run by the citizens under Article 19(1)(g) and Article 26(a) are subject to the discipline of Articles 19(6) and 26 there are no such limitations in Article 30 of the Constitution, so in that the right conferred there under is absolute. However,the educational institutions established by the minorities under Article 30(1) will be subject only to the regulatory measures which should be consistent with Article 30(1) will be subject only to the regulatory measures which should be consistent with Article 30(1) of the Constitution. My answer to question 5(b) is that the right of the minority institutions to admit students of the minority, in any, would not be affected in any way by receipt of State and, I intend to dilate on this aspect of the matter in my separate reasoned opinion later. It is sufficient to state at this stage that subject to this., I agree with the common answer to question Nos. 10 and 11.

251. On October 31, 2002, while recording my answers to the eleven questions referred to the Bench of eleven learned Judges of this Court, I noted in a separate judgment, concurring with the majority except in regard to answers to question Nos. 5(b), 8, 10 and 11, that I would give my reasons later for agreeing on those aspects with the opinion of our learned sister Ruma Pal. J. and dissenting with the majority opinion as well as the opinion of learned brother Variava, J., with whom learned brother Bhan, J. agreed. Here follow the reasons.

252. The difference of opinion mainly relates to the true interpretation of clause (2) of Article 29 and clauses (1) and (2) of Article 30 of the Constitution and their interaction.

253. Article 30 is a much discussed provision in Courts. It has been the subject matter of consideration by various High Courts as well as by this Court. I have already quoted clauses (1) and (2) of Article 30 and clause (1) of Article 29 In the said judgment. To appreciate various rival contentions, first I shall examine the extent of the right conferred by clauses (1) and (2) of Article 30. It is a common ground that all minorities, whether based on religion or language, are bestowed the right to establish and to administer educational institutions of their choice in clause (1) of Article 30. The following aspects of the right conferred therein on the minorities need to be noticed: (1) to establish educational institutions; (2) which are of their choice and (3) to administer them.

254. The choice of educational institutions may vary from religious instruction to temporal education or a combination of both. Having regard to the width of Entry 25 of the Concurrent List Substituted by the Constitution (Forty Second Amendment) Act, 1976 w.e.f. 3-1-1977 as follows: [Education, including technical education, medical education and universities subject to the provisions of Entries 63, 64 and 65 and 66 of List I; vocational and technical training of labour.], the choice of educational institutions may be understood to include places for imparting education of their choice and at all levels - primary, secondary, university, vocational and technical, medical, etc.

255. The expression 'of their choice' includes not only the choice of the institution to be established and administered by the minorities, like institution for elementary, primary, secondary, university, vocational and technical and medical education, but also the choice of the students who have to be imparted education in such institutions. [See: The State of Bombay v. Bombay Education Society and Ors. (1955 (1) SCR 568); In Re: The Kerala Education Bill, 1957 (1959 SCR 995); D.A.V. College, Jullunder etc. v. The State of Punjab and Ors. (AIR 1971 SC 1737) and The Ahmedabad St. Xaviers College Society & Anr. etc. v. State of Gujarat & Anr. (1975 (1) SCR 173).

256. The expression 'to establish' means to set up on permanent basis. The expression to administer' means to manage or to attend to the running of the affairs. A lucid connotation of this expression was given by Ray, C.J., in St.. Xavier's case (supra) as under:

"The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to

refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."

257. In none of the subsequent decisions of this Court, this exposition was departed from.

258. The Kerala Education Bill (supra) is the first important case in which the right of the minorities (based on religion or language) under Article 29 and Article 30 of the Constitution was exhaustively considered by this Court in its advisory opinion given in a reference under Article 143 of the Constitution. After explaining the content of the fundamental right to establish and administer educational institution of their choice contained in clause (1) of Article 30, it was observed, inter alia, that it could not obviously include the right "to mal-administer". This qualification is implicit in Article 30(1) and cannot be treated as a limitation on the right conferred thereunder.

259. There is virtual unanimity about the import of Article 30. Conferment of the right to establish and administer educational institutions would become an empty formality unless education imparted in such institutions yields fruitful results by enabling the students/trainees of such institutions to join the mainstream and to settle in life whether by pursuing higher studies or seeking employment or otherwise. In the system prevalent in almost all countries, the State or universities prescribe syllabi in different courses, conduct examinations for awarding certificates and degrees which enable the students/trainees to pursue higher education or secure employment or practice any profession or carry on any occupation or business. The State or its agencies run the educational institutions which impart instructions or training. The State also recognises educational institutions run by private management for imparting education or training in accordance with the prescribed syllabus. It is only the recognised institutions that can send up their students to appear in the examinations conducted for that purpose as per the prescribed syllabus; the only exception in regard to recognition of the institutions being distance education which for sometime past has been gaining ground. Though, no specific fundamental right for obtaining recognition is conferred in the Constitution, it cannot, however, be disputed that recognition of private educational institutions, including minority educational institutions, is an essential concomitant of the right under Articles 19(1)(g), 26(a) and 30(1) of the Constitution. Further, it is widely accepted that a lot of educational institutions (whether of non-minorities or of minorities) will not be able to impart instructions without financial aid of the State. For this purpose, each State in discharging its constitutional obligation under Articles 45 and 46, subject to its economic capacity, formulated policy for grant of aid to educational institutions and framed regulations.

260. The directive contained in clause (2) of Article 30 is that State shall not in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. It is a non-discriminatory clause. The right conferred under this clause on a minority educational institution is that if a State chooses to grant aid to the educational institutions, it should not be discriminated against on the ground of being under the management of a minority. However, the aid, if any, has to be granted to the minority educational institutions without infringing their constitutional right. It is not in issue that for the purpose of ensuring proper utilisation of aid, the State has power to make regulations which may include audit of accounts of recipient institutions and other allied

matters. Nonetheless, if in complying with the regulations of grant-in-aid, the minority educational institutions are required to shed their character as such institutions in any of the matters which directly fall under their administration, the State would be violating both clauses (1) and (2) of Article 30 of the Constitution.

261. In regard to the minorities seeking recognition and/or aid it was observed in The Kerala Educational Bill (supra) that the minorities cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. In such matters. "the State can insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided". (Emphasis supplied) Thus, it is clear that regulations postulated for granting recognition or aid ought to be with regard to excellence of education and efficiency of administration, viz., to make certain healthy surroundings for the institutions, existence of competent teachers possessing requisite qualifications and maintaining fair standard of teaching. Such regulations are not restrictions on the right but merely deal with the aspects of proper administration of an educational institution, to ensure excellence of education and to avert mal-administration in minority educational institutions and will, therefore, be permissible. This is on the principle that when the Constitution confers a right, any regulation framed by the State in that behalf should be to facilitate exercise of that right and not to frustrate it.

262. Justice Mathew in St. Xavier's case (supra) (at page 266) observed:

"It sounds paradoxical that a right which the Constitution makers wanted to be absolute can be subjected to regulations which need only satisfy the nebulous and elastic test of State necessity. The very purpose of incorporating this right in Part III of the Constitution in absolute terms in marked contrast with the other fundamental rights was to withdraw it from the reach of the majority. To subject the right today to regulations dictated by the protean concept of State necessity as conceived by the majority would be to subvert the very purpose for which the right was given."

263. The sine qua non of a good and efficient administration is that it is fair and transparent. Therefore, it will be in the fitness of things and in the interest of good administration of the minority educational institutions (whether aided or unaided) to frame their own regulations in regard to admission of students to various courses taught in their institutions, notify fees to be charged and concessions provided for poor students, like granting total and/or half exemption from payment of fees, scholarships, etc., service conditions of teachers and non-teaching staff and other allied matters. This will inspire confidence in both the State and its agencies as well as the public and the student community. The most damaging allegation against non-Government educational institutions is charging of capitation fee which has become the talk of the town throughout the length and breadth of the country. So much so that the term 'capitation fee' has become synonymous with crime. The concept of capitation has its origin in taxation; earlier there used to be capitation tax per person. Educational institutions, it is stated, oblige guardians/students to pay, in addition to the notified fees, varying amounts depending upon the courses in which admission is sought: such amounts are nothing but per capita collection for admission to a given course in an educational institution and can properly be termed as capitation fee. This is reprehensible and cannot be tolerated. Now, In view of the majority judgment different institutions may notify

different fee for the same course and the same institution may notify different fees structure for different courses. If the evil of collection of capitation fee is done away with by the private educational institutions (both non-minority and minority) much of the controversy about intervention by the State and complaints by citizens could be avoided. Collection of capitation fee being the worst part of maladministration can properly be the subject-matter of regulatory control of a State. Receiving donations by an educational institution, unconnected with admission of students, could not obviously be treated as an equivalent of collection of capitation fee.

264. Before proceeding further, it will not be out of place to mention here that there is a perceptible shift in the stand of the Union of India as could be discerned from the written submission filed by the then learned Attorney-General on behalf of the Union of India when these cases were heard earlier by another Bench and the contentions now urged by the learned Solicitor General appearing for the Union of India. He opened his arguments by conceding, inter alia, that in regard to important constitutional questions stare decisis principle would apply; that the following propositions laid down in The Kerala Education Bill's case and St. Xavier's case (supra) do not require reconsideration, that: (i) Article 29(1) does not govern Article 30(1) textually, historically and conceptually; (ii) minority institutions need not confine admission of students to their members; (iii) in the process of grant-in-aid, minority educational institutions cannot be denuded of their minority character: and (iv) the extent of regulatory measures implicit in Article 30(1) and the tests relating thereto have been correctly laid down. He, however, contended that the right conferred under Article 25 in regard to freedom of conscience and freely to profess, practice and propagate religion, is certainly a greater right; so also the right conferred under Article 26 to manage religious affairs; when these rights are subject to the limitation contained therein, surely the rights under Articles 29 and 30 would also be subject to the same limitations. According to him, presence or absence of the limitations specified in Articles 25 and 26 would make no difference when the question of exercise of those rights arises. It was further urged that in regard to Article 25 which deals with core right when the secular activities associated with it could be regulated and restricted, the right to establish an educational institution to impart secular education, being in itself a secular activity, should also be amenable to the same regulatory power of the State and that the limitations contained in Articles 25 and 26 could be read in Article 30(1) of the Constitution.

265. These contentions appear to be attractive but, on a careful scrutiny, they are found to lack any substance. The framers of the Constitution, who have subjected the fundamental rights under Articles 25 and 26 to limitations contained therein, chose not to subject Article 30(1) to any such limitation. In incorporating the right of the minorities, whether based on religion or language, to establish and administer educational institutions of their choice' which obviously postulates secular education, they were not unmindful of the fact that the right which was conferred under Article 30 was also in respect of a secular aspect. It would be erroneous to assume that in placing limitations on certain fundamental rights and omitting to do so on certain others, if as contended by the learned Solicitor General they are inconsequential, they carried on the exercise in futility. Such an assumption cannot be made in respect of any legislation, much less can it be assumed in regard to the Constituent Assembly. These contentions are, therefore, untenable as being opposed to the well-settled principles of interpretation of a Constitution. So also, the contention that though the Constitution itself has not subjected the right under Article 30 to the regulatory control of the State or to other limitations as in Articles 19, 25 and 26, the State's regulatory power and other limitations incorporated in the aforementioned articles should be read in Article 30 of the

Constitution or that incorporating limitations in Articles 19, 25. 26 and not incorporating them in Article 30 is of no significance, cannot but be rejected. It needs no emphasis to bring home the point that when the Constitution itself has designedly not imposed or permitted imposition of any limitation or restriction by the State on a fundamental right under Article 30, neither the Court by process of interpretation nor legislation much less an executive regulation can be permitted to cut down the width of the constitutional right termed as a fundamental right. The following observation of Das, C.J.I. in The Kerala Education Bill (supra), will be apposite here.

"It is not for this Court to question the wisdom of the supreme law of the land. We the people of India have given unto ourselves the Constitution which is not for any particular community or section but for all. Its provisions are intended to protect all, minority as well as the majority communities. There can be no manner of doubt that our Constitution has guaranteed certain cherished rights of the minorities concerning their language, culture and religion. These concessions must have been made to them for good and valid reasons."

266. The legislative power of a State or Union is subject to the fundamental rights and the legislature cannot indirectly take away or abridge fundamental rights which it could not do directly for granting either recognition or aid. It is in that context this Court also observed:

"So long as the Constitution stands as it is and is not altered, it Is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own."

267. Having extracted sub-clause (g) of clause (1) and clause (6) of Article 19. Article 26 and Article 30. I had pointed out that a comparison of these provisions would show, whereas the rights conferred in Article 19(1)(g) and Article 26(a) were made subject to the discipline of Articles 19(6) and 26 respectively, that no such limitations were to be found in Article 30 of the Constitution and held, no such limitation could be read in Article 30(1) by any process of interpretation, therefore, in that the right conferred under the last mentioned provision would be absolute. If I may say so, it has been so treated rightly in catena of decisions of this Court. This fact is evident from a plain reading of those provisions and admits of no debate. Indeed, the same fact is presented with difference in phraseology by this Court in many judgments. Even the majority judgment in these cases observed as follows:

"Unlike Articles 25 and 26, Article 30(1) does not specifically state that the right under Article 30(1) is subject to public order, morality and health or to other provisions of Part III. This sub-Article also does not specifically mention that the right to establish and administer a minority educational institution would be subject to any rules or regulations."

268. There is, however, divergence of opinion in the dicta of a few judgments of this Court on some facets of the right conferred by the Constitution under clause (1) of Article 30 of the Constitution. The difference relates not merely to terminology--whether to call it in absolute right subject to reasonable regulation to achieve excellence and prevent mal-administration or not to name as an absolute right because it can be subject to regulation--but extends to the scope and the nature of the regulatory control by the State.

269. The contention urged by the Union of India also raises the issue of subjecting the minority educational institutions to regulatory control of the State by regulations.

270. I have expressed the opinion that the right conferred under Article 30(1) is absolute as no such limitations as are placed on rights conferred under Articles 19, 25 and 26, are to be found in Article 30(1); this is, however, not to deny the power to the State to frame regulations in the interest of minority educational institutions with regard to excellence of standard of education and check mal-administration.

271. Another important case in which the question of interpretation of Article 30 came up for consideration before this Court is Rev. Sidhajbhai Sabhaj and Ors. v. State of Bombay and Anr. (1963 (3) SCR 837). In that case the complaint of the petitioners, representing an aided institution Imparting education in teachers training, in a petition under Article 32 of the Constitution, before a Constitution Bench of six learned Judge's, was against the order of the 'Government of Maharashtra requiring the institution to reserve 80 per cent of the seats available in it on the pain of losing the aid and recognition for non-compliance with the directive. The right of the minority institution that was affected was to admit the students of their choice. Justice Shah (as he then was) speaking for the Court held.

"Unlike Article 19, the fundamental freedom under clause (1) of Article 30, is absolute in terms: It is not made subject to any reasonable restrictions of the nature of the fundamental freedoms enunciated in Article 19 may be subjected to. All minorities, linguistic or religious have by Article 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void."

272. Neither in that case nor in any of the cases before us did the minority educational institutions pitch their claim so high as was commented upon by the learned Solicitor General and reflected in the majority judgment. He, on his own, formulated hypothetical contentions as if they were urged by minority institutions, too unrealistic to be sustained, and shot them down one by one. It was never the case of minority educational institutions that they were above the law of the land; no one contended that the building regulations or municipal laws or other laws of the land, civil or criminal, would not apply to them. Veritably what all was contended before the said Constitution Bench, was summed up thus : the absolute term in which Article 30(1) is enunciated, would not deprive the State, especially when it pays grant and affords recognition to it as an educational institution, to impose reasonable regulations but such regulations can only be in the interest of the institution to make it an effective educational institution so as to secure excellence of the training imparted therein and that they could not be in the interest of outsiders, (Emphasis supplied) This submission in Rev. Sidhajbhai's case (supra) found favour from the Court and it was held (at page Nos. 856-857):

The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority

educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test-- the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

(Emphasis supplied)

273. To make the right under Article 30 real and effective, the regulatory measures have to be consistent with that right. Regulations could be aimed at excellence of education and efficient administration of such institutions as that would be in the interest of the educational institutions of the minorities. Any regulation which is not in the interest of the minority educational institutions but is in the interest of an outside agency would whittle down the right of the minority to administer the institution and would be violative of Article 30 of the Constitution. In my respectful view the true test to judge the validity of any regulations imposed by the State for granting recognition and/or aid is the dual test laid down in Rev. Sidhajbhai's case (supra), viz., (i) the regulations must be reasonable; and (ii) it must be regulative of the educational character of the institution and conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. To the same effect are the following observations of Mathew. J, in St. Xavier's case (at page 267):

"In every case, when the reasonableness of a regulation comes up for consideration before the Court, the question to be asked and answered is whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation namely, the excellence of the institution as a vehicle for general secular education of the minority community and to other persons who resort to it. The question whether a regulation is in the general interest of the public has no relevance, if it does not advance the excellence of the institution as a vehicle for general secular education as. ex-hypothesi the only permissible regulations are those which secure the effectiveness of the purpose of the facility, namely, the excellence of the educational institutions in respect of their educational standards."

(Emphasis supplied)

274. The right under Article 30, submitted the learned Solicitor General, could not be placed so high as to be above the public interest' and the 'national interest'. A scathing criticism was made on the use of the said expressions to contend that the right could not be above the law of the land. A few learned Counsel also expressed their concern for employing those expressions in regard to the right of the minorities.

275. At the outset. I may mention that it will not be correct to ask whether the constitutional right is above the law. The proper question to ask would be whether a law could be above the

Constitution so as to contravene a fundamental right. The answer, in my view cannot but be in the negative.

276. To appreciate the contention and concern, it will be necessary to unravel the connotation of those expressions. They are not technical words, so they have to be understood like any other ordinary English words. The expression public interest' means : of concern or advantage to people as a whole; the meanings of that expression are given in the Law Lexicon, 2nd Edn.. Reprint 2000 at p. 1557 as follows:

"Public interest means those interest which concern the public at large.

Matter of public interest 'does not mean that which is interesting as gratifying curiosity or love of information or amusement: but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected' (per Campbell. C.J.R. V. Bedfordshire, 4E and B. 541, 542J.

The expression 'public interest' is not capable of precise definition and has not a rigid meaning and is elastic and takes its colours from the statute in which it occurs, the concept varying with the time and State for society and its needs. Thus what is 'public interest' today may not be so considered a decade later. State of Bihar v. Kameshwar Singh (AIR 1952 SC 252) (Companies Act (1 of 1956). Sec. 397).

That which concerns welfare and rights of the community or a class thereof (S. 124. Indian Evidence Act and Art. 302. Constitution).

The words 'public interest' in S. 47 mean interest of the public which uses the stage carriage and not the public in general. Mohammad Rahihan v. State of Uttar Pradesh. AIR 1956 All 594. 595. (Motor Vehicles Act. 1939. S. 47.)

A subject, in which the public or a section of the public is interested, becomes one of public interest. Kuttisankaran Nair v. Kumaran Nair, AIR 1965 Ker 161, 165 (Penal Code (1860). S. 499, Exception 1.)"

The expressions "interest of the nation" means something which concerns or is of advantage to the nation. "Public interest' is a very wide expression, so also the national interest; their correct meaning has to be ascertained in the context in which they are used. They cover matters of little significance as well as matters of moment. These expressions will have to be distinguished from public safety', 'national security' and 'national integrity* which are paramount and are undoubtedly matters of public/national interest. But every public/national interest does not fall within the realism of public safety, national security and national integrity. For example, a legislation conceived to give effect to the policy of nationalisation of primary/elementary schools imparting education up to level Xth by any State or the Union of India may convincingly be in public interest but it would not be consistent with Article 30 as it is annihilative of the interest of the minorities. In the same way. the policy of requiring Hindi' to be the medium of instruction throughout the country, may conceivably be in the national interest but not in the interest of linguistic minority institutions as it would destroy their character of being minority institutions, Such examples can

be multiplied. If the expressions employed by. Shah, J. in Sidhajbhai's case (supra) are properly understood in the context in which they are employed, there can be no legitimate apprehension and consequential grievance against them. No reasonable person, in my view, can interpret them as authorising the minority educational institutions to resort to activities which would be detrimental or subversive of public safety or national security or national integrity. Such exaggerated and out of proportion contentions urged to challenge the correctness of test laid down by Shah. J. in Sidhajbhai's case (supra) cannot but be rejected as being wholly misconceived and devoid of merit.

277. In this connection, it would be useful to quote the following comment of a great expert on Constitutional Law--H.M. Seervai *Constitutional Law of India by H. M. Seervai. 3rd Edn.. para 13.53 at pp. 971-972.:

The reference to the absolute terms of Article 30(1) was not meant to negative all regulation of the right, but to indicate the nature of the regulations which were permissible. Our discussion of Article 19 has shown that restrictions which can be imposed in the public interest on the rights conferred by Article 19(1) may not only restrict the enjoyment of those rights but may totally prohibit the exercise of those rights. The absolute language of Article 30(1) precludes restrictions of such a character being imposed on the right conferred by Article 30(1). But. as stated earlier, rights conferred even in absolute terms have to be exercised in an organized society governed by law. and this involves regulation of rights which do not hinder, but help, the effective exercise of those rights. It follows from this, that Shah, J. was right when he held that regulations which can be imposed on minority institutions must be conceived in the interest of those institutions and not in the interest of the public or the nation as a whole."

278. For all these reasons, I am. with great respect, unable to subscribe to the view in the majority judgment, "any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf.

279. There can be no demur to the dicta that Government regulations cannot destroy the minority character of the institution or to make the right to establish and administer a mere illusion but to say that the right under Article 30 is not so absolute as to be above the law, would, in my respectful view, amount to conferring supremacy to the ordinary law over the provisions of the Constitution which would be contrary to Article 13 of the Constitution, as the laws whether existing or made in exercise of power conferred by the Constitution have to be consistent with the provisions of the Constitution and Part III which includes Article 30 and not vice versa.

280. While the law declared by the Constitution Bench of this Court in Rev. Sidhajbhai's case (supra) was holding the field for about 12 years, it appears that in the case of St. Xavier's (supra), the attention of this Court was invited to the opinion expressed by Dr. Justice P.B. Gajendragadkar, former Chief Justice of this Court, to the effect that the decisions of the Supreme Court on the interpretation of Articles 29 and 30 required reconsideration. Taking note of the comment of the learned former Chief Justice, the said case was referred to the Constitution Bench of nine learned Judges. After exhaustive discussion of historical background, provisions of the Constitution and

surveying various judgments of the High Courts and this Court, the majority followed the law declared in Rev. Sidhajbhai's case (supra). In that case, Xavier's College and the College Society challenged the validity of certain sections particularly Section 33-A(1)(a) (providing for selection of Governing Body, etc.). Sections 40. 41. 51(A)(1) and (2) and 52(A) of the Gujarat University (Amendment) Act, 1972, principally on the ground that they violated the petitioners" rights under Article 30. It was held, inter alia, that Section 33-A(1)(a) did not apply to minority institutions and that Sections 40, 41. 51(A)(1) and (2) and 52-A were violative of Article 30(1). The Court also held that the grant, recognition or affiliation of an educational institution which was protected by Article 30(1) could not be made dependent on the religious and linguistic minorities accepting conditions which would involve the surrender by such minorities of the rights conferred on them under Article 30(1). Among the decisions referred to and approved in that case is the decision in D.A.V. College case (supra), wherein it was held that the directive for the exclusive use of the Punjabi language in the Gurmukhi script as the medium for instruction in all Colleges of the University directly infringed the petitioners right to conserve their script and administer their institutions. The Court approved the judgment in State of Kerala v. Very Rey Mother Provincial Etc. (1971 (1) SCR 734). In that case, the necessity and importance of regulatory measures for affiliation intended towards securing uniformity, efficiency and excellence was explained. In Rev. Father W. Proost & Ors. v. State of Bihar & Ors. (1969 (2) SCR 73). Section 48-A of the Bihar State Universities Act, 1960 was struck down for completely removing the autonomy of Xavier's College (a different college) which was protected under Article 30, holding that the scope of Article 30 could not be restricted with reference to Article 29. The case of Rt. Rev. Bishop S. K. Patro & Ors. v. State of Bihar & Ors. (1970 (1) SCR 172). was also referred to with approval. The decision in the case of Bishop S. K. Patro (supra) was that the State of Bihar could not require a minority school to constitute a Managing Committee for the School in accordance with the Government's wishes.

281. In All Saints High School, Hyderabad etc. etc. v. Govt. of Andhra Pradesh & Ors. etc. (1980 (2) SCR 924). this Court struck down the regulation providing that no teacher would be dismissed, removed or reduced in rank, or terminated otherwise except with the prior approval of the competent authority under the Andhra Pradesh Private Education (Control) Act, 1975 as being violative of Article 30(1). It was held that the regulation conferred an unqualified power upon the competent authority and the appellate authority to enable the views of the management being substituted by the views of the appellate authority. Chandrachud, C.J. observed, in his judgment, that the law was settled in St. Xavier's case (supra) and Lilly Kurian v. Sr. Lewina (1979 (1) SCR 820), and that they had merely to apply the law laid down in the said cases to the facts of that case.

282. The above discussion leads to the conclusion that the limitations incorporated in Articles 19, 25 and 26 cannot be read into Article 30. What Article 30 predicates is institutional autonomy on the educational institutions established and administered in exercise of the right conferred thereunder, which cannot be interfered with by the State except to the extent of framing reasonable regulations in the interest of excellence of education and to prevent mal-administration.

283. I shall now advert to Clause (2) of Article 29, which may be quoted here:

"29. Protection of interests of minorities.--

(1) xx xx xx

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

284. The mandate contained in this clause is that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. It is obvious that the mandate does not apply to a private educational institution which is not receiving aid out of State funds. Article 29 (2) confers an individual right on every citizen to seek admission into any educational institution maintained by the State or receiving aid of State funds. It embodies the principle of equality in a truncated form and. therefore, a citizen can be denied admission by an educational institution whether maintained by the State or receiving aid out of State funds on ground other than the prohibited grounds--religion, race, caste, language or any one of them. Thus, a citizen can be denied admission on the ground that all the seats in the institution are already filled; the antecedents of the citizen seeking admission in the institution are not good, or his presence in the educational institution will not be conductive to proper administration of the institution; his merit as disclosed in the qualifying examination or in an examination conducted by such educational institution, or merit as ascertained on the basis of interview conducted by such educational institution, falls short of minimum fixed by such a institution and the like. The word 'only' suggests that if it is found that the denial of admission by any educational institutions maintained by the State or receiving aid out of State funds is not merely on any of the prohibited grounds but also on some additional grounds, not being irrelevant or fanciful, the mandate of Clause (2) of Article 29 is not violated.

285. In Bombay Education Society's case (supra), a Constitution Bench of this Court applying the test formulated by Lord Thankerton in the case of Punjab Province v. Daulat Singh. (1946 LR 73 IA 59) : held,

"Whatever the object, the immediate ground and direct cause for the denial is that the mothertongue of the pupil is not English. Adapting the language of Lord Thankerton. it may be said that the laudable object of the impugned order does not obviate the prohibition of Article 29 (2) because the effect of the order involves an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language."

It follows that the denial of admission by an institution directly based only on one of the forbidden grounds specified in Article 29 (2) is impermissible.

286. This clause is a qualified extension of the principle enshrined in Articles 14 and 15 (1) of the Constitution. It affords a limited protection to citizens against discrimination on the enumerated grounds of religion, race, caste, language or any one of them. The right to equality contained in Article 14 and not to be discriminated against in Article 15 (1) is general and is available only against the State. The limited right conferred on the student community under Clause (2) of Article 29 is available not only against the educational institutions maintained by the State but also against the private educational institutions receiving aid out of State funds. In contradistinction to Article 14, which is an all pervading general provision and Article 15 (1), Clause (2) of Article 29 has a

limited scope. The opening words of this clause show that the directive contained therein is expressed in the negative and is addressed to 'any educational institution'. That expression is general in nature and in its ordinary meaning embraces all educational institutions. The educational institutions can be conveniently classified into:- State maintained institutions, private aided institutions and private unaided institutions: unaided minority institutions and aided minority institutions. The expression any educational institution' is a genus of which an aided minority educational institution is a species. Having regard to the provisions of Clauses (1) and (2) of Article 30. the classification has nexus with the object sought to be achieved by Clause (2) of Article 29.

287. The pertinent question that remains to be considered is the interaction of Clause (2) of Article 29 and Article 30 of the Constitution in regard to minority educational institutions established and administered thereunder and receiving aid from a State.

288. Before proceeding to consider the interaction of Clause (2) of Article 29 and Clauses (1) and (2) of Article 30 of the Constitution, it will be well to bear in mind the following principle :

"The correct way to interpret an Article is to go by its plain language and lay bare the meaning it conveys. It would no doubt be useful to refer to the historical and political background which supports the interpretation given by the Court and in that context the debates of the constitutional assembly would be the best record of understanding all those aspects. A host of considerations might have prompted the people of India through members of constituent assembly to adopt, enact and to give to themselves the Constitution. We are really concerned with what they have adopted, enacted and given to themselves in these documents. We cannot and we should not cause scar on it which would take years for the coming generations to remove from its face."

(Emphasis supplied)

289. Education plays a cardinal role in transforming a society into a civilised nation. It accelerates the progress of the country in every sphere of national activity. No section of the citizens can be ignored or left behind because it would hamper the progress of the country as a whole. It is the duty of the State to do all it could to educate every section of citizens who need a helping hand in marching ahead along with others.

290. I shall now examine the case put forth on behalf of aided minority educational institutions that Clause (2) of Article 29 does not apply to institutions established under Article 30 (1) of the Constitution so as to deprive them of their choice to admit students of their community for whose benefit the institutions exist. Minority educational institutions receiving aid from the State can no longer be regarded as 'other authorities' within the meaning of 'State' in Article 12 of the Constitution in view of the judgment of the Constitution Bench of seven learned Judges in Pradeep Kumar Biswas St ors. v. Indian Institute of Chemical Biology & Ors., (2002 (5) SCC 111). They form a special class of educational institutions because they have the protection of Article 30 (1) under which they are established and administered by minorities, whether based on religion or language. Clause (2) of Article 30 is also a pointer to the fact that the institutions falling under Clause (1) of Article 30 form a separate class. I have noticed above that the mandate of Clause (2) of Article 29 is addressed to all educational institutions maintained by the State or receiving aid out of State funds. It is. therefore, a general mandate applicable to all the categories of institutions.

It has been settled by a long line of decisions of this Court with which I am in respectful agreement that granting of aid to such institutions cannot be such as to denude them of their character as minority institutions. Even after receiving aid. they remain minority educational institutions in all their attributes.

291. The right conferred on the student community under Article 29 (2) is a truncated right though it is available to each student and against all the institutions maintained by the State or receiving aid from the State funds. Nevertheless, the right under Article 30 (1) is a special right conferred on minorities, whether based on religion or language, to establish and to administer educational institutions of their choice and with that goes the special right of the minority students to seek admission in such institutions. Article 29 (2] even if regarded as a special right in regard to the student community is of general application in regard to all the institutions maintained by the State or receiving aid from the State funds when compared to special right conferred on minorities under Article 30. A provision may be special in one aspect and general in other aspect.

292. In The Life Insurance Corporation of India v. D. J. Bahadur & Ors., AIR 1980 SC 2181. Krishna Iyer. J. speaking for a three-Judge Bench observed :

"For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law. we have a cosmos of relativity not absolutes - so too in life."

This was approved by a Constitution Bench of this Court in Ashoka Marketing Ltd. & Anr. v. Punjab National Bank. (AIR 1991 SC 855).

293. In the light of the above discussion on the principle of generalia specialibus non-derogant. I have no hesitation in concluding that the general right of the students under Article 29 (2) of the Constitution available in respect of all educational institutions in general does not prevail over the special right conferred on the minority educational institutions established and administered under Article 30 (1) and receiving aid by virtue of Article 30 (2) of the Constitution.

294. The minority educational institutions established and administered under Article 30 (1) for the benefit of the students of their community have the right to admit the students of their choice of their community and without prejudice to the right of the minority students to admit students of the non-minority. They have a right to claim aid under Clause (2) of Article 30. if the State decides to grant aid to other educational institutions in the State. The grant of aid by the State cannot alter the character of a minority institution, including its choice of the students. Unlike Article 337. there is nothing in Clause (2) of Article 30 to suggest that grant of aid will result in making a percentage of seats available for non-minority students or be subject to Article 29 (2). From the point of view of the minority students who seek admission in the minority educational institutions, it hardly makes a difference whether the institution is an aided institution or an unaided institution. In the case of a rich minority not getting aid under Clause (2) of Article 30 for the minority educational institution established and administered under Clause (1) of Article 30, the right of the minority students seeking admission therein cannot be different from the right of poor minority students seeking admission in educational institutions established and administered by poor

minorities which are aided. On the institutions deciding to take aid from the State, the right of minority students to seek admission in such institutions cannot be affected.

295. It follows that the concomitant special right of students who belong to minority community which established the institution and is administering it under Article 30 (1), to seek admission in such an institution has precedence over the general right of non-minority students under Article 29 (2). So having regard to the right of the minority educational institutions to admit the students of their choice as well as the right of the students of the minority community to seek admission in such institutions, it is difficult to comprehend that merely on the ground that the institution is receiving aid out of State funds, their rights can be set at naught with reference to Article 29 (2). Therefore, it appears to me that on grant of aid by the State. Article 29 (2) does not control Article 30 (1).

296. Even the historical background in which Clause (2) of Article 29 came to be inserted would support this interpretation.

297. The pre-cursor of Article 29 (2) was Clause 18(2). which read as under :

"18 (2). No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State educational institutions."

This clause was intended to ensure that minority students are not discriminated against in regard to admission into State educational institutions on the ground that the minorities are conferred special right to establish and administer educational institutions of their choice. To enlarge this right, an amendment was suggested by Smt. Purnima Banerji proposing that after the words 'State educational institutions' the words 'State aided' be inserted so that they could avail of the same right against State aided educational institutions as well. But the proposed amendment to that clause moved by her was initially not accepted and the clause, quoted above, was adopted. It later became Article 23 (2). which read thus :

"23 (2). Cultural and Educational Rights-

(1) XXX XXX XXX

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State.

(3) xxx xxx xxx

When this Article was debated again, an amendment was suggested that for the words no minority' the words 'no citizen' be substituted. At that point. Shri Thakur Das Bhargava moved an amendment and the following clause was substituted :

"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only on religion, race, caste, language or any of them."

This was ultimately adopted and that clause became Clause (2) of Article 29. From this background, it is clear that the benefit which was intended only For minorities - not to be denied admission into any educational institution maintained by the State - was extended in two aspects; the first is that 'all the citizens' were brought in the class of beneficiaries and the second is that in addition to the institutions maintained by the State, 'the institutions receiving aid out of the State funds' were also included. In my view, the intention in extending the scope of Clause (2) of Article 29 could never have been to deprive the minorities of the benefit which they were otherwise having under Clauses (1) and (2) of Article 30. A clause which was intended mainly to further protect the minorities could not be so construed as to stultify their right conferred under Article 30 of the Constitution.

298. Admission of the Constituent Assembly debates for purposes of interpretation of the provisions of the Constitution is of doubtful authority. I do not propose to delve into the question of admissibility of the debates of the Constituent Assembly for interpreting a constitutional provision. Suffice it to mention that in view of the speeches of the Law Lords in the case of Black-Clawson v. Papierwerke AG, (1975 AC 591) and of the Privy Council in Administrator-General of Bengal v. Prem Nath Mullick. (1895 (22) IA 107) and of this Court in A. K. Gopalan v. State of Madras. AIR 1950 SC 27 (para 112) and State of Trav-Cochin Trav-Cochin v. Bombay Company Ltd., AIR 1952 SC 366. I am of the view that admissibility of speeches made in the Constituent Assembly for interpreting provisions of the Constitution is not permissible. The decisions of this Court in His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala. 1973 (4) SCC 225; R. S. Nayak v. A. R. Antulay. AIR 1984 SC 684: Indra Sawhney etc. etc. v. Union of India & Ors. etc. etc.. AIR 1993 SC 477; K. S. Paripoornan v. State of Kerala. AIR 1995 SC 1012 and P. V. Narasimha Rao v. State (CBI/ SPE), AIR 1998 SC 2120 do not alter that position nor do they lay down a different proposition. The preponderance of opinion appears to me not to rely on the debates in the Constituent Assembly or the Parliament to interpret a constitutional provision although they may be relevant for other purposes.

299. It would be interesting to notice the following observations of Lord Wilberforce in Black-Clawson's case (supra) in this context :

"It would be degradation of that process if Courts were to be a reflecting mirror of what the interpreting agency would say."

A glaring example of a debate leading astray is the contention urged that the cultural and educational rights sanctified in Articles 29 and 30 were intended to be only temporary. Unlike Article 334 in regard to reservation of seats and special representation, there is nothing in the Constitution itself to support such an impish and novel contention. Lest we forget, we should remind ourselves that compromises were made. pledges and assurances were held out to build a strong united sovereign secular nation. In the rhetoric of the age the spirit in which constitutional provisions were formulated cannot be lost sight of and interpretation divorced from the words employed, cannot be resorted to, to undo what our founding fathers did to enact and give to ourselves this great Constitution. Such contentions do little service to the letter or spirit of the Constitution in preserving the delicate balance. For these reasons. I am of the view that interpretation of constitutional provision cannot be founded on the speeches made in the Constituent Assembly because as Lord Reid in Black Clawson's case (supra) observes :

"We are seeking not what Parliament meant but the true meaning of what Parliament said."

300. Insofar as historical matters are concerned, it is an accepted position that they are admissible for the purpose of interpretation of a constitutional provision and to that extent, I referred to that aspect.

301. In any event, there is nothing specific in the debates to suggest that Article 29 (2) was intended to cut down the rights conferred under Clauses (1) and (2) of Article 30 of the Constitution.

302. The next aspect which needs to be looked into is. whether the interpretation put by me is in consonance with the principles of equality and secularism which are the basic features of our Constitution.

303. The principle of equality has two facets; (i) equality in law and (ii) equality in fact. Just a provision for equality in law would be of no consequence unless the provision also take care to bring about equality in fact. Securing equality of status and of opportunity is a constitutional mandate enshrined in Article 14 of the Constitution which directs that the State shall not deny to any person equality before the law or equal protection of the law within the territory of India. Article 14 prohibits unequal treatment or discrimination against any person within the territory of India by State. The great objective of equality before law. guaranteed under Article 14 of the Constitution, cannot be achieved if unequals are treated alike as that would only result in inequality.

The founding fathers of the Constitution were alive to the ground realities and the existing inequalities in various sections of the society for historical or other reasons and provided for protective discrimination in the Constitution with regard to women, children, socially and educationally backward classes of citizen, scheduled castes and scheduled tribes by enabling the State to make special provision for them by way of reservation as is evident from Clauses (3) and (4) of Article 15 and Clauses (4) and (4A) of Article 16 of the Constitution. The apprehensions of religious minorities and their demand for separate electorates, were settled by providing freedom of conscience and free profession, practice and propagation of religion for all the citizens under Articles 25, 26 and 28 which take care of their religious rights of minorities equally; by special provisions their right to conserve a distinct language, script or culture is guaranteed as a fundamental right in Article 29; further, all minorities, whether based on religion or language, are conferred an additional fundamental right to establish and administer educational institution of their choice as enshrined in Article 30 of the Constitution. The right under Article 30 (1) is regarded so sacrosanct by the Parliament in its constituent capacity that when by operation of the law of the land - Land Acquisition Act - compensation awarded for acquisition of a minority educational institution was to result in restricting or abrogating the right guaranteed under Clause (1) of Article 30. it by the Constitution (Forty Fourth Amendment) Act) inserted Clause (1-A) in Article 30. It provides that the Parliament in the case of a Central legislation or a State legislature in the case of State legislation shall make a specific law to ensure that the amount payable to the minority educational institutions for the acquisition of their property will not be such as will in any manner impair their functioning. A Constitution Bench of this Court in interpreting Clause (1-A) of Article 30 in Society of St. Joseph' College v. Union of India & Ors. (2002 (1) SCC 273) observed thus :

"Plainly, Parliament in its constituent capacity apprehended that minority educational institutions could be compelled to close down or curtail their activities by the expedient of acquiring their property and paying them inadequate amounts in exchange. To obviate the violation of the right conferred by Article 30 in this manner, Parliament introduced the safeguard provision in the Constitution, first in Article 31 and then in Article 30."

304. The problems of minority rights are not peculiar to India which is a multi-religious, multi-linguistic and multi-cultural nation. Recognition of rights of minorities. their preservation by skilful tackling of the problems became evident in Europe after the First World War. It will be useful to refer to the opinion of the Permanent Court of International Justice (for short. 'International Court") in regard to minority schools in Albania (known as the Albanian' case) which would illustrate how equality in fact is an essential requisite to achieve equality in law and for that purpose preferential treatment of minority is inherent. At the time of Albania's accession to the League of Nations, it signed a declaration which, inter alia, protected the rights of minorities to establish educational institutions. It appears that by the amendment of the Albanian Constitution, a provision was made for compulsory primary education for all the Albanian nationals in State Schools as a result of which all private schools whether run by the majority or minority were to be closed. On a complaint by the minority of Albanian nationals, the case was referred to the International Court. The Albanian Government took the plea that the abolition of private schools was a measure of general application to both majority was well as minority schools and as such there was no violation of minority rights. This plea was rejected and it was observed that the object of the declaration was,

"first to ensure that nationals belonging to racial religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State and the second to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics."

It was held that these two requirements were indeed closely overlapping for, there would be no true equality between a majority and a minority, if the latter were deprived of its own institutions and was consequently compelled to renounce that which constitutes the very essence of its being a minority. It was also observed that equality in law precludes discrimination of any kind whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations. (Emphasis supplied) The abolition of institutions which alone would satisfy the special requirements of the minority and their replacement by Government institutions would destroy the equality of treatment for. its effect would be to deprive the minority of the institutions, appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State. It is this principle that is given effect to in guaranteeing minority rights under Article 30(1) which is nothing but a differential treatment for proper application of the principle of equality enshrined In Article 14 of the Constitution and this cannot be lost sight of when dealing with Article 29(2).

305. The principle decided in Albanian case was followed by Reddy. J., Khanna. J. and Mathew. J. in St. Xavier"s case (supra).

306. We have nothing in common in application of principle of equality embodied in Article 14 to various social groups including minorities under our Constitution and the process of affirmative action which is an offshoot of the 14th Amendment to the Constitution of the United States of America. The 14th Amendment to the American Constitution does not make any allowance for the deprived classes of the society unlike the approach adopted by the Indian Constitution to equality and secularism, which is loaded with favourable discrimination clauses. Even so, in the case of Regents of the University of California v. Bakke. 438 US 265 (1978). Justice Powell suggested some measures which would be consistent with the equality clause, viz. extra remedial training and education for minorities (however expensive), aggressive recruitment of minorities and even the consideration of an applicant's minority status as an 'equitable plus factor' in conjunction with his other merits. In that case, adoption of quota system for the minority groups in that country was rejected which is in tune with City of Richmond v. J. A. Croson Co., (488 US 469. Another example of preferential treatment to attain equality in fact is to be found in United Steelworker v. Weber. 443. US 193 (1979). In that case, the Court upheld the double standards In minorities as justified by legislative history and intent.

307. The Canadian Constitution, by Section 23. specifically provides for minority language educational rights.

308. We find no substance in the contention that granting aid to minority educational institutions under Article 30. which cater to the needs of the minorities, will infringe the principle of secularism. There can be no doubt that secularism is a basic feature of our Constitution. It needs to be noted that the State aid. if any. is not to the religious institutions of the minorities or for imparting religious instructions to them though our Constitution is not lacking in providing grants to such religious institutions in India. The State aid. if any. may be given to educational institutions established and administered by minorities based on religion or language. Those who advocate this contention ignore the fact that India is a multi-religious, multi-cultural and multi linguistic nation and the Constitution guarantees preservation of their peculiarities. Both before as well as after the re-organisation of States, each State was and is now having various linguistic minorities. Linguistic minorities have become more vulnerable after the re-organisation of States on the basis of language. If, in a State, aid is given to the institutions of linguistic minority, the State is nontheless helping the citizens of India in coming up in life and joining the mainstream. No national Interest or public interest will be served by denying the aid to linguistic minority institutions for not throwing it open to the students of linguistic majority. On reciprocal basis, each State would be prone to adopt the same attitude with reference to linguistic minority groups and would either deny aid or Insist that the institutes be thrown open to the linguistic majority of the State which, to say the least, would frustrate the very purpose of the protection of the linguistic minority right. Further, if each State adopts this view of not giving aid to the minority institutions or insisting that they be thrown open for the majority groups, it would only encourage bitter feeling among the various groups in the States and that would only hamper assimilating of linguistic majority and linguistic: minority which will weaken the process of national Integration rather than strengthen it. By and large, the same logic would apply to religious minority institutions as different religious communities are in majority in different States though a few only. Having pondered over this aspect. I have unhesitatingly come to the conclusion that by serving their own linguistic minorities and throwing their institution open to the majority groups only on fulfilment of the need of minorities in a Slate . is not in violation of the scheme of Art. 29(2) and Art. 30 of

the Constitution. I am, therefore, convinced that by not applying Art. 29(2) of the Constitution to minority educational institutions based on religion or language, the principle of equality or secularism will not in any way be violated.

309. The first case in which the ground of challenge was based on Article 29(2). is The State of Madras v. Srimathi Champakam Dorairajan etc. (1951 SCR 525), which is popularly known as 'the Communal G.O.' case. In that case, for the purpose of admission of students to the engineering and medical colleges, maintained by the State, a unit of 14 seats was fixed in which specified number of seats were allocated among various groups on the basis of religion and caste. The challenge to the G.O. was upheld by the High Court. On appeal to this Court a Constitution Bench of seven learned Judges of this Court took the view that the Communal G.O. constituted a violation of fundamental right guaranteed to the citizens of India by Art. 29(2) of the Constitution and was void. As on that date, clause (4) of Art. 16 enabled the State of make a provision for the reservation of appointments or posts in favour of any backward class of citizens which was not adequately represented in services under the State but no such provision was made In regard to seats in educational institutions maintained by the Stale. There was no such provision in regard to admission into educational institution in Art. 15(1) of the Constitution which prohibited discrimination on grounds of religion, race, caste, sex, place of birth or any of them. Be that as it may, it was not a case where right of the students belonging to minorities to seek admission in an educational institution established under Art. 30(1) of the Constitution vis-a-vis the claim of non-minorities under Art, 29(2) was considered.

310. The next case in which Art. 29 came lo for consideration of this Court is the Bombay Education Society (supra). There, the respondent society was running an Anglo Indian school which was recognised and aided by the State. The medium of instruction in the school was English. The State of Bombay issued a circular to the effect that thereafter only children of Anglo-Indians or of non-Asiatic descent could secure admission in the schools administered by the respondent society. Both the Society as well as the students who were precluded from seeking admission in the school, by the impugned order, challenged the said order in a writ petition under Art. 226 before the High Court at Bombay. Against the judgment of the High Court quashing the impugned circular and allowing the writ petition, the State came up in appeal before this Court. It was held by the Constitution Bench of five learned Judges of this Court that in view of the fundamental right guaranteed to a minority, like the Anglo-Indian community. under Art. 29(1) to conserve its own language, script or culture and the right to establish and administer educational institutions of its own choice under Art. 30(1). there is implicit therein the right to impart instruction in its own institutions to the children of its own community in its own language and that the State by its police power cannot determine the medium of instruction in opposition to such fundamental right and, therefore, the Government order was violative of Arts. 29(2) and 30(1) of the Constitution. The question with which we are faced now was not addressed in that case.

311. It is true that while rendering its advisory opinion in The Kerala Education Bill (supra), on question No. 2. this Court considered the scope of Arts. 29 and 30 and observed, inter alia, that the right under Art. 30(1) however, was subject to clause (2) of Art. 29 which provided that no citizen should be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds of religion, race, caste, language or any one of them. It must also be pointed out that In that case speaking for six of the learned Judges. Das C.J. laid down.

"To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds there mentioned (Art. 29(2)) and then to say that as soon as such Institution admits such an outsider it will cease to be a minority Institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid. The real Import of Art. 29(2) and Art. 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it."

(Emphasis supplied).

312. In that case, the Court was answering the plea that in an institution under Art. 30(1), if a non-minority students is admitted, it will lose its character as a minority institution. This case also did not deal with the question whether denial of admission to a non-minority student by an aided minority educational institution protected under Art. 30(1) in order to provide admission in a course of study to a minority student would be in violation of Art. 29(2) of the Constitution.

313. The only case in which the right of non minority students to secure admission in a minority educational institution under Art. 29(2) came up for consideration of this Court is St. Stephen's College V. University of Delhi (1992 (1) SCC 558). The case revolved around the validity of St. Stephen's college's admission policy to interview candidates for admission into the college, in addition to marks obtained by them in the qualifying examination . in order to assess the merit of students. The Delhi University provided that merit for the purpose of admission was to be assessed solely on the basis of the marks obtained by candidates In the qualifying examination. It was contended by counsel for non minority students that denial of admission to a non-minority student by an Institution under Art. 30 was violative of Art. 29(2). St. Stephen's College was receiving state aid. The Court, by majority, held that the admission policy of the college was not arbitrary or violative of any fundamental right and that the right to admit students of their choice is an essential part of the right to administer under Article 30(1); that such an institutional preference (as practiced by Stephens) for minority candidates would not be violative of Art. 29(2): that although Article 29 and Art. 30 are distinct and separate, they do overlap and competing interests under Art. 29(2) and Art. 30 must be balanced in order to harmoniously construe both articles and give effect to both of them. It was held that although minorities were entitled to accord preference in favour of, or reserve seats for candidates belonging to their own community, yet preferential admission of candidates could be only up to 50% of the annual admissions to their institution in order to maintain the minority character of their institution. With respect to the other 50% seats, admission should be open to all the students based on merit, and in that no preferential admission by the institution was permissible.

314. The right conferred under Art. 29(2) is an individual right. The difficulty is arising because it is sought to be converted into a collective right of non-minority students vis-a-vis minority educational institutions so as to take away a slice of the seats available in such institutions. In an institution established and administered under Art. 30(1). the need of minority students is foremost as it is for their benefit that the institution exists. The grant of aid to the institution is to fulfil its objective and not to deviate from the object and barter the right of the minority students. It is only when the need of the minority students is over that in regard to the remaining seats that the institution can admit students of non-minority. In each year in a given course the same number of

minority students may not apply. The minority educational institutions can admit non-minority students of their choice in the left over seats in each year as Art. 29(2) does not override Article 30(1). If the need of the minority is to be given its due, the question of determining the need cannot be left to the State. Article 30 is intended to protect the minority educational institutions from interference of the State so they cannot be thrown at the mercy of the State. The State cannot be conferred with the power to determine the need of each minority Institution in the country which will be both unrealistic and Impracticable apart from abridging the right under Art. 30(1). It is for this and the other reasons mentioned above, in my respectful view, fixing a percentage for intake of minority students in minority educational institutions would impinge upon the right under Art. 30 as it would amount to cutting down that right. The best way to ensure compliance with Art. 29(2) as well as Art. 30(1) is to consider Individual cases where denial of admission of a non-minority student by a minority educational institution is alleged to be in violation of Art. 29(2) and provide appropriate relief.

315. Another contention that is pressed is when Art. 28 applies to institutions established and administered under Art. 30(1). why Article 29(2) should not also be applicable ?

Article 28 reads as follows:

"28. Freedom as to attendance at religious institution or religious worship in certain educational institutions-- (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires the religious instruction shall be Imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be Imparted in such Institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or. if such person is a minor, his guardian has given his consent thereto."

A perusal of the said Article makes it clear that the mandate of clause (1) there is that in any educational institution wholly maintained out of Stale, funds, no religious instruction shall be provided. It obviously applies to State educational institutions and not to private educational institutions including minority educational institutions under Art. 30. Clause (2) of Art. 28 which is in the nature of a proviso to clause (1). excludes application of clause (1) to an educational institution established under any endowment or trust requiring imparting of religious instructions therein, and is administered by the State. Sub-clause (3) gives liberty to a person attending any educational institution recognised by the Slate or receiving aid out of State funds not to be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, the guardian has given his consent thereto. It may be noticed that imparting of religious instruction or conducting of religious worship in an educational institution which is recognised by the State or which is receiving aid of the State funds

is not prohibited. It is only the Individual freedom of consistence of those who attend such an institution that is protected. In contradistinction to the mandate in respect of an institution which is wholly maintained out of the Slate funds, postulated under clause (1). the injunction contained in clause (3) is that an educational institution recognised by the State or receiving aid out of the State funds cannot oblige any person attending the educational institution to take part in any religious instruction or to attend any religious worship being imparted therein. Obviously, the right conferred under any provision of the Constitution including Art. 30 does not either expressly or by necessary implication empower any educational institution including a minority educational institution to compel anybody to have instructions in the educational institution established and administered thereunder much less religious instructions or to attend any religious worship. Article 28 forms part of the group of articles placed under the caption 'Right to freedom of Religion' and not part of 'Cultural and Educational Rights'. But that apart, clause (3) of Art. 28 is a personal right. It is a species of the principle of freedom of religion enshrined in Art, 25. Article 28(3) stands in the same position to Art. 25(1) as Article 29(2) to Art. 15(1). The premise of the contention, therefore, appears to be inappropriate and the logic inapplicable to substantiate that Art. 29(2) overrides Art. 30(1) of the Constitution.

316. I found no support from the decisions of this Court in The Dargah Committee. Ajmer and another v. Syed Hussain All and others (1962 (1) SCR 383) and Tilkayat Shri Govindlalji Maharaj v. The State of Rajasthan and others (1964 (1) SCR 561) for the contention that just as Art. 26 was held to be subject to Art. 25. so also Art. 30 should be read subject to Art. 29(2).

317. For all these reasons, in my view, to create inroads into the constitutional protection granted to minority educational Institutions by forcing students of dominant groups of the choice of the State or agencies of the State for admission in such institutions in preference to the choice of minority educational institutions will amount to a clear violation of the right specifically guaranteed under Art. 30(1) of the Constitution and will turn the fundamental right into a promise of unreality which will be impermissible. Right of minorities to admit students of non-minority of their choice in their educational institutions set up under Art. 30 is one thing but thrusting students of non-minority on minority educational institutions, whatever may be the percentage, irrespective of and prejudicial to the need of the minority in such institution, is entirely another. It is the former and not the latter course of action will be in conformity with the scheme of clause (2) of Art. 29 and clauses (1) and (2) of Art. 30 of the Constitution.

Ruma Pal, J.

318. I have had the privilege of reading the opinion of Hon'ble the Chief Justice. Although I am in broad agreement with most of the conclusions arrived at in the judgment, I have to record my respectful dissent with the answer to Question 1 and Question 8in so far as it holds that Article 29(2) is applicable to Article 30(1). I consequently differ with the conclusions as stated in answer to Questions 4, 5(b) and 11 to the extent mentioned in this opinion.

Re: Question 1

What is the meaning and content of the expression 'minorities" in Article 30 of the Constitution of India?

319. Article 30 affords protection to minorities in respect of limited rights, namely, the setting up and administration of an educational institution. The question of protection raises three questions : (1)protection to whom? (2) against whom? and (3) against what? The word minority means "numerically less". The question then is numerically less in relation to the country or the State or some other political or geographical boundary?

320. The protection under Article 30 is against any measure,legislative or otherwise, which infringes the right's granted under that article. The right is not claimed in a vacuum -- it is claimed against a particular legislative or executive measure and the question of minority status must be judged in relation to the offending piece of legislation or executive order. If the source of the infringing action is the State, then the protection must be given against the State and the status of the individual or group claiming the protection must be determined with reference to the territorial limits of the State. If however the protection is limited to State action, it will leave the group which is otherwise a majority for the purpose of State legislation, vulnerable to Union legislation which operates on a national basis. When the entire nation is sought to be affected, surely the question of minority status must be determined with reference to the country as a whole.

321. In **Re: Kerala Education Bill MANU/SC/0029/1958 : [1959]1SCR995** ,the contention of the State of Kerala was that in order to constitute a minority for the purposes of Articles 29(1) and 30(1),persons must be numerically in the minority in the particular area or locality in which educational institution is or is intended to be constituted. The argument was negatived as being held inherently fallacious (p.1049) and also contrary to the language of Article 350A. However, the Court expressly refrained from finally opining as to whether the existence of a minority community should in circumstances and for the purposes of law of that State be determined on the basis of the population of the whole State or whether it should be determined on the State basis only when the validity of a law extending to the whole State is in question or whether it should be determined on the basis of the population of a particular locality when the law under attack applies only to that locality. In other words the issue was - should the minority status be determined with reference to the source of legislation viz., the State legislature or with reference to the extent of the law's application. Since in that case the Bill in question wasadmittedly a piece of State legislation and also extended to the whole of the State of Kerala it was held that "minority must be determined by reference to the entire population of that State." (p.1050)

322. In the subsequent decision in **DAV College v. State of Punjab (I)** 1971 SCR (Supp) 688 this Court opted for the first principle namely that the position of minorities should be determined in relation to the source of the legislation in question and it was clearly said:

"Though there was a faint attempt to canvas the position that religious or linguistic minorities should be minorities in relation to the entire population of the country in our view they are to be determined only in relation to the particular legislation which is sought to be impugned, namely that if it is the State legislature these minorities have to be determined in relation to the population of the State."

323. In **D.A.V. College v. State of Punjab (II),** 1971 SCR (Supp) 677 Punjabi had been sought to be enforced as the sole medium of instruction and for examinations on the ground that it was the national policy of the Government of India to energetically develop Indian languages and

literature. The College in question used Hindi as the medium of instruction and Devnagri as the script. Apart from holding that the State Legislature was legislatively incompetent to make Punjabi the sole medium of instruction,the Court reaffirmed the fact that the College although run by the Hindu community which represents the national majority,in Punjab it was a religious minority with a distinct script and therefore the State could not compel the petitioner-College to teach in Punjabi or take examinations in that language with Gurmukhi script.

324. But assuming that Parliament had itself prescribed Hindi as the compulsory medium of instruction in all educational institutions throughout the length and breadth of the country. If a minority's status is to be determined only with respect to the territorial limits of a State, non-Hindi speaking persons who are in a majority in their own State but in a minority in relation to the rest of the country, would not be able to impugn the legislation on the ground that it interferes with their right to preserve a distinct language and script. On the other hand a particular institution run by members of the same group in a different State would be able to challenge the same legislation and claim protection in respect of the same language and culture.

325. Apart from this incongruity, such an interpretation would be contrary to Article 29(1) which contains within itself an indication of the 'unit' as far as minorities are concerned when it says that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. Merely because persons having a distinct language, script or culture are resident within the political and geographical limits of a State within which they may be in a majority, would not take them out of the phrase "section of citizens residing in the territory of India". It is a legally fortuitous circumstances that states have been created along linguistic lines after the framing of the Constitution.

326. In my opinion, therefore, the question whether a group is a minority or not must be determined in relation to the source and territorial application of the particular legislation against which protection is claimed and I would answer question 1 accordingly.

Re: Question 8

Whether the ratio laid down by this Court in the St. Stephen's case (St. Stephen's College v. University of Delhi MANU/SC/0319/1992 : AIR1992SC1630 is correct ? If no, what order?

327. In **St. Stephen's College** MANU/SC/0319/1992 : AIR1992SC1630 : AIR1992SC1630 , the Court decided (a) that the minorities right to admit students under Article 30(1) had to be balanced with the rights conferred under Article 29(2). therefore the State could regulate the admission of students of the minority institutions so that not more than 50% of the available seats were filled in by the children of the minority community and (b) the minority institution could evolve its own procedure for selecting students for admission in the institutions. There can no be quarrel with the decision of the court on the second issue. However, as far as the first principle is concerned, in my view the decision is erroneous and does not correctly state the law.

328. Article 30(1) of the Constitution provides that "All minorities,whether based on religion or language, shall have the right to establish and administer educational institutions of their

choice".Article 29(2) on the other hand says that "no citizen shall be denied admission into any education institution, maintained by the State or receiving aid out of State funds on grounds only of religion,race, caste, language or any of them."

329. Basically, the question is whether Article 30(1) is subject to Article 29(2) or is Article 29(2) subject to Article 30(1). If Article 30(1) does not confer the right to admit students then of course there is no question of conflict with Article 29(2)which covers the field of admission into "any education institution". The question, therefore, assumes that the right granted to minorities under Article 30(1) involves the right to admit students. Is this assumption valid? The other assumption on which the question proceeds is that minority institutions not receiving aid are outside the arena of this apparent conflict. therefore the issue should be more appropriately framed as:- does the receipt of State aid and consequent admission of non-minority students affect the rights of minorities to establish and administer educational institution of their choice? I have sought to answer the question on an interpretation of the provisions of the Constitution so that no provision is rendered nugatory orredundant Sri Venkataramana Devaru and Ors. v. The State of Mysore and Ors. MANU/SC/0026/1957 : [1958]1SCR895 ; Pandit M.S.M. Sharma v. Shri Sri Krishna Sinha ; 1959 Suppl. 1 SCR 806,; on an interpretation of the provisions in the context of the objects which were sought to be achieved by the framers of the Constitution; and, finally on a consideration of how this Court has construed these provisions in the past.

330. Both Articles 29 and 30 are in Part III of the Constitution which deals with 'Fundamental Rights'. The fundamental rights have been grouped and placed under separate headings. For the present purposes, it is necessary to consider the second, fourth and fifth groups. The other Articles in the other groups are not relevant. The second group consists of Articles 14 to 18 which have been clubbed under 'Right to Equality'. Articles 25 to 28 are placed under the fourth heading 'Right to Freedom of Religion'. Articles 29and 30 fall within the fifth heading 'Cultural and Educational Rights'.

331. The rights guaranteed under the several parts of Part III of the Constitution overlap and provide different facets of the objects sought to be achieved by the Constitution. These objectives have been held to contain the basic structure of the Constitution which cannot be amended in exercise of the powers under Article 368 of the Constitution Keshvananda Bharti v. State of Kerala MANU/SC/0445/1973 : AIR1973SC1461 . Amongst these objectives are those of Equality and Secularism. According to those who have argued in favour of a construction by which Article 29(2) prevails order Article 30, Article 29(2) ensures the equal right to education to all citizens, whereas if Article 30 is given predominance it would not be in keeping with the achievement of this equality and would perpetuate differences on the basis of language and more importantly, religion,which would be contrary to the secular character of the Constitution . Indeed the decision in ***St. Stephens*** in holding that Article 29(2) applies to Article 30(1) appears to haveproceeded on similar considerations. Thus it was said that unless Article 29(2) applied to Article 30(1) it may lead to"religious bigotry"; that it would be "inconsistent with the central concept of secularism" and "equality embedded in the Constitution" and that an "educational institution irrespective of community to which it belongs is a melting pot in our national life". MANU/SC/0319/1992 : AIR1992SC1630 : AIR1992SC1630). Although Article 30(1) is not limited to religious minorities, having regard to the tenor of the arguments and the reasoning in ***St. Stephens*** in support of the first principle, I propose to consider the argument on 'Secularism" first.

Article 30 and Secularism

332. The word 'secular' is commonly understood in contradiction to the word 'religious'. The political philosophy of a secular Government has been developed in the west in the historical context of the pre-eminence of the established church and the exercise of power by it over society and its institutions. With the burgeoning presence of diverse religious groups and the growth of liberal and democratic ideas, religious intolerance and the attendant violence and persecution of "non-believers" was replaced by a growing awareness of the right of the individual to profession of faith, or non-profession of any faith. The democratic State gradually replaced and marginalized the influence of the church. But the meaning of the word 'secular State' in its political context can and has assumed different meanings indifferent countries, depending broadly on historical and social circumstances, the political philosophy and the felt needs of a particular country. In one country, secularism may mean an actively negative attitude to all religions and religious institutions; in another it may mean a strict "wall of separation" between the State and religion and religious institutions. In India the State is secular in that there is no official religion, India is not a theocratic State. However the Constitution does envisage the involvement of the State in matters associated with religion and religious institutions, and even indeed with the practice, profession and propagation of religion in its most limited and distilled meaning.

333. Although the idea of secularism may have been borrowed in the Indian Constitution from the west. It has adopted its own unique brand of secularism based on its particular history and exigencies which are far removed in many ways from secularism as it is defined and followed in European countries,the United States of America and Australia.

334. The First Amendment to the American Constitution is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

335. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'. '***Reynolds v. United States' (1878) 98 U S 145.***

336. The Australian Constitution has adopted the First Amendment in Section 116 which is based on that Amendment. It reads: "The Commonwealth shall not make any laws for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion,and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."Kidangazhi Manakkal Narayanan Nambudiripad v. State of Madras MANU/TN/0241/1954 : AIR1954Mad385 .

337. Under the Indian Constitution there is no such "wall of separation" between the State and religious institutions. Article 16(5) recognises the validity of laws relating to management of religious and denominational institutions. Article 28(2)contemplates the State itself managing educational institutions wherein religious instructions are to be imparted. And among the subjects over which both the Union and the States have legislative competence as set out in List No. III of the Seventh Schedule to the Constitution Entry No. 28 are:

"Charitable and charitable institutions,charitable and religious endowments and religious institutions".

338. Although like other secular Governments, the Indian Constitution in Article 25(1) provides for freedom of conscience and the individual's right freely to profess, practice and propagate religion, the right is expressly subject to public order, morality and health and to the other provisions in Part III of the Constitution. The involvement of the State with even the individual's right under Article 25(1) is exemplified by Article 25(2) by which the State is empowered to make any law.

"a) regulating or restricting any economic,financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

339. As a result the courts have upheld laws which may regulate or restrict matters associated with religious practices if such practice does not form an integral part of the particular religion Ramanuja v. State of Tamil Nadu MANU/SC/0631/1972 : [1972]3SCR815 Quareshi v. State of Bihar MANU/SC/0027/1958 : [1959]1SCR629 .

340. Freedom of religious groups or collective religious rights are provided for under Article 26 which says that:

"Subject to public order, morality and health,every religious denomination or any section thereof shall have the right-

(a) to establish and maintain institutions for religious and charitable purposes.

(b) To manage and acquire movable and immovable property; and

(c) To own and acquire movable and immovable property; and

(d) To administer such property in accordance with law.

341. The phrase "matters of religion" has been strictly construed so that matters not falling strictly within that phrase may be subject to control and regulation by the State. The phrase 'subject to public order, morality and health' and "in accordance with law" also envisages extensive State control over religious institutions. Article 26(a) allows all persons of any religious denomination to set up an institution for a charitable purpose, and undisputedly the advancement of education is a charitable purpose. Further, the right to practise,profess and propagate religion under Article 25 if read with Article 26(a) would allow all citizens to exercise such rights through an educational institution. These rights are not limited to minorities and are available to 'all persons'. therefore, the Constitution does not consider the setting up of educational institutions by religious denominations or sects to impart the theology of that particular denomination as anti-secular. Having regard to the structure of the Constitution and its approach to 'Secularism', the observation

in **St. Stephens** noted earlier is clearly not in keeping with 'Secularism' as provided under the Indian Constitution. The Constitution as it stands does not proceed on the 'melting pot theory. The Indian Constitution, rather represents a 'salad bowl' where there is homogeneity without an obliteration of identity.

342. The ostensible separation of religion and the State in the field of the States revenue provided by Article 27 (which prohibits compulsion of an individual to pay any taxes which are specifically appropriated for the expenses for promoting or maintaining any particular religious or religious denomination) does not, however, in terms prevent the State from making payment out of the proceeds of taxes generally collected towards the promotion or maintenance of any particular religious or religious denomination. Indeed, Article 290(A) of the Constitution provides for annual payment to certain Devaswom funds in the following terms. " A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Tamil Nadu every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore Cochin." This may be compared with the decision of the **U.S. Supreme Court in Everson v. Board of Education (330 IUS 1)**where it was held that the State could not reimburse transportation charges of children attending a Roman Catholic School.

343. Article 28 in fact brings to the fore the nature of the word 'secular' used in the preamble to the Constitution and indicates clearly that there is no wall of separation between the State and religious institutions under the Indian Constitution. No doubt Article 28(1) provides that if the institution is an educational one and it is wholly maintained by the State funds, religious instruction cannot be provided in such institution. However, Article 28(1) does not for bid the setting up of an institution for charitable purposes by any religious denomination nor does it prohibit the running of such institution even though it may be wholly maintained by the State. What it prohibits is the giving of religious instruction. Even, this prohibition is not absolute. It is subject to the extent of Sub-Article (2) of Article 28 which provides that if the educational institution has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution, then despite the prohibition in Article 28(1) and despite the fact that the education institution is in fact administered by the State,religious instruction can be imparted in such institution. Article 28(2) thus in no uncertain terms envisages that an educational institution administered by the State and wholly maintained by the State can impart religious instruction. It recognises in Article 28(3) that there may be educational institutions imparting religious instruction according to whichever faith and conducting religious worship which can be recognized by the State and which can also receive aid out of State funds.

344. Similarly, Article 28(3) provides that no individual attending any educational institution which may have been recognized by the State or is receiving State aid can be compelled to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution without such person's consent. Implicit in this prohibition is that acknowledgement that the State can recognize and aid an educational institution giving religious instruction or conducting religious worship. In the United States, on the other hand

it has been held that State maintained institutions cannot give religious instruction even if such instruction is not compulsory. (See. ***Tiiinois v. Board of Education 1947 (82) LEd. 649***.

345. In the ultimate analysis the Indian Constitution does not unlike the United States, subscribe to the people of non-interference of the State in religious organisations buy it remains secular in that it strives to respect all religion sequally, the equality being understood in its substantive sense as is discussed in the subsequent paragraphs.

Article 30(1) and Article 14

346. 'Equality' which has been referred to in the Preamble is provided for in a group of Articles led by Article 14 of the Constitution which says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Although stated in absolute terms Article 14 proceeds on the premise that such equality of treatment is required to be given to persons who are equally circumstanced. Implicit in the concept of equality is the concept that persons who are in fact unequally circumstanced cannot be treated on par. The Constitution has itself provided for such classification in providing for special or group or class rights. Some of these are in Part III itself [Article 26, Article 29(1) and Article 30(1)] Other such Articles conferring group rights or making special provision for a particular class include Articles 336 and 337 where special provision has been made for the Anglo-Indian Community. Further examples are to be found in Articles 122, 212 and other Articles giving immunity from the ordinary process of the law to persons holding certain offices. Again Articles 371 to 371(H) contain special provisions for particular States.

347. The principles of non-discrimination which form another fact of equality are provided for under the Constitution under Articles 15(1), 16(1) and 29(2). The first two articles arequalified by major exceptions under Articles 15(3) and (4), 16(3), (4), (4A) and Article 335 by which the Constitution has empowered the Executive to enact legislation or otherwise specially provide for certain classes of citizens. The fundamental principle of equality is not compromised by these provisions as they are made on a consideration that the person so 'favoured' are unequals to begin with whether socially, economically or politically. Furthermore, the use of the word 'any person' in Article 14 in the context of legislation in general or executive action affecting group rights is construed to mean persons who are similarly situated. The classification of such persons for the purposes of testing the differential treatment must, of course, be intelligible and reasonable the reasonableness being determined with reference to the object for which the action is taken. This is the law which has been settled by this Court in a series of decisions, the principle having been enunciated as early as in 1950 in ***Chiranjit Lal Chowdhury v. Union of India and Ors. MANU/SC/0009/1950 : [1950]1SCR869*** .

348. The equality, therefore, under Article 14 is not indiscriminate. Paradoxical as it may seem, the concept of equality permits rational or discriminating discrimination. Conferment of special benefits or protection or rights to a particular group of citizens for rational reasons is envisaged under Article 14 and is implicit in the concept of equality. There is no abridgment of the content of Article 14 thereby--but an exposition and practical application of such content.

349. The distinction between classes created by Parliament and classes provided for in the Constitution itself, is that the classification under the first may be subjected to judicial review and tested against the touchstone of the Constitution. But the classes originally created by the Constitution itself are not so subject as opposed to constitutional amendments. See Keshavananda Bharati v. State of Kerala AIR 1973 1461

350. On a plain reading of the provisions of the Article, all minorities based on religion or language, shall have the right to (1) establish and (2) administer educational institutions oftheir choice. The emphasized words unambiguously and in mandatory terms grant the right to all minorities to establish and administer educational institutions. I would have thought that it is self evident and in any event, well settled by a series of decisions of this Court that Article 30(1) creates a special class in the field of educational institutions -- a class which is entitled to special protection in the matters of setting up and administering educational institutions of their choice. This has been affirmed in the decisions of this Court where the right has been variously described as "a sacred obligation" In re Kerala Education Bill MANU/SC/0029/1958 : [1959]1SCR995 "am absolute right" Rev. Sidhajbhai Sabhai v. State of Bombay MANU/SC/0076/1962 : [1963]3SCR837 , "a special right" Rev Father W. Proost and Ors. v. State of Bihar 1969 (2) SCR 173"a guaranteed right" State of Kerala v. Very Rev. Mother Provincial MANU/SC/0065/1970 : [1971]1SCR734 "the conscience of the nation" St. Xaviers College v. Gujarat MANU/SC/0088/1974, 192, "a befitting pledge" ibid 223, " a special right" ibid 224 and an "article of faith" Lily Kurain v. Lewi a MANU/SC/0041/1978 : [1979]1SCR820 .

351. The question then is -- does this special right in an admitted linguistic or religious minority to establish and administer an educational institution encompass the right to admit students belonging to that particular community.

352. Before considering the earlier decision on this, a semantic analysis of the word used in Article 30(1) of indicates that the right to admit students is an intrinsic part of Article 30(1).

353. First -- Article 30(1) speaks of the right to set up an educational institution. An educational institution is not a structure of bricks and mortar. It is the activity which is carried on in the structure which gives it its character as an educational institution. An educational institution denotes the process or activity of education not only involving the educators but also those receiving education. It follows that the right to set up an educational institution necessarily includes not only the selection of teachers or educators but also the admission of students.

354. Second -- Article 30(1) speaks of the right to "administer"an educational institution. If the administration of an educational institution includes and means its organisation then the organisation cannot be limited to the infrastructure for the purposes of education and exclude the persons for whom the infrastructure is set up, namely, the students. The right to admit students is, therefore, part of the right to administer an educational institution.

355. Third, - the benefit which has been guaranteed under Article 30 is a protection of benefit guaranteed to all members of the minority as a whole. What is protected is thecommunity right which includes the right of children of the minority community to receive education and the right of parents to have their children educated in such institution. The content of the right lies not in

merely managing an educational institution but doing so for the benefit of the community. Benefit can only lie in the education received. It would be meaningless to give the minorities the right to establish and set up an organisation for giving education as an end in itself, and deny them the benefit of the education. This would render the right a mere form without any content. The benefit to the community and the purpose of the grant of the right is in the actual education of the members of the community.

356. Finally, - the words 'of their choice' is not qualified by any words of limitation and would include the right to admit students of the minority's choice. Since the primary purpose of Article 30(1) is to give the benefit to the members of the minority community in question that 'choice' cannot be exercised in a manner that deprives that community of the benefit. therefore, the choice must be directed towards fulfilling the needs of the community . How that need is met,whether by general education or otherwise, is for the community to determine.

357. The interpretation is also in keeping with what this Court has consistently held. In ***state of Bombay v. Bombay Education Society,*** MANU/SC/0029/1954 : [1955]1SCR568 , the Court said:

"..... surely then there must be implicit in such fundamental right the right to impart instruction in their own institutions to the children of their own Community in their own language. To hold otherwise will be to deprive Article 29(1) and Article 30(1) of the greater part of their contents."

358. In ***Kerala Education Bill, 1957,*** it was said:

"The minorities, quite understandably,regard it as essential that the education of their children should be in accordance with the teachings of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture. The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognized the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above."

359. The issue of admission to minority institutions under Article 30 arose in the decision of ***Rev. Sidhajbhai Sabhai*** where the State's order reserving 80 per cent of the available seats in a minority Institution for admission of persons nominated by the Government under threat of de recognition if the reservation was not complied with, was struck down as being violative of Article 30(1). It was said that although the right of the minority may be regulated to secure the proper functioning of the institution, the regulations must be in the interest of institution and not 'in the interest of outsiders'. The view was reiterated in ***St. Xaviers College*** when it was said:

-The real reason embodied in Article 30(1) of the Constitution is the conscience of the nation that the minorities religious as well as linguistic,are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of the country."

360. In ***St. Stephen's College,*** the Court recognized that:

"The right to select students for admission is a part of administration. It is indeed an important facet of administration. This power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institution or for the betterment of those who resort to it."

361. However, in a statement which is diametrically opposed to the earlier decisions of this Court, it was held:

"The choice of institution provided in Article 30(1) does not mean that the minorities could establish educational institution for the benefit of their own community people. Indeed they cannot. It was pointed out in Re, Kerala Educational Bill that the minorities cannot establish educational institution only for the benefit of their community. If such was the aim, Article 30(1) would have been differently worded and it would have contained the words "for their own community". In the absence of such words it is legally impermissible to construe the article as conferring the right on the minorities to establish educational institution for their own benefit...." (P. 607)

361-A. This conclusion, in my respectful view, is based on a misreading of the decision of this Court in ***Kerala Educational Bill.*** In that case, there was no question of the non-minority students being given admission overlooking the needs of the minority community. The Court was not called upon to consider the question. The underlying assumption in that case was that the only obstacle to the non-minority student getting admission into the minority institution was the State's order to that effect and not the"choice" of the minority institution itself and a minority institution may choose to admit students not belonging to the community without shedding its minority character, provided the choice was limited to a 'sprinkling'. In fact the learned Judges in **St. Stephens** case have themselves in a subsequent portion of the judgment (p.611) taken a somewhat contradictory stand to the view quoted earlier when they said:

".....the minorities have the right to admit their own candidates to maintain the minority character of their institutions. <u>That is a necessary concomitant right which flows from the right to establish and administer educational institution in Article 30(1).</u> There is also a related right to the parents in the minority communities. The parents are entitled to have their children educated in institutions having an atmosphere congenial to their own religion."

362. The conclusion, therefore, is that the right to admission being an essential part of the constitutional guarantee under Article 30(1)a curtailment of that fundamental right in so far as it affect benefit of the minority community would amount to the an infringement of that guarantee.

363. An Institution set up by minorities for educating members of the minority community does not cease to be a minority institution merely because it takes aid. There is nothing in Article 30(1) which allows the drawing of a distinction in the exercise of the right under that Article between needy minorities and affluent ones. Article 30(2) of the Constitution reinforces this when it says,"The State shall not, in granting aid to educational institutions,discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language". This assumes that even after the grant of aid by the State to an educational

institution under the management of the minority, the educational institution continues to be a minority educational institution. According to some, Article 30(2) merely protects the minority's right of management of the educational institution and not the students who form part of such institution. Such a reading would be contrary to Article 30(1) itself. The argument is based on the construction of the word 'management'.'Management' may be defined as 'the process of managing' and is not limited to the people managing the institution. Concise Oxford Dictionary (10th Edition) 864. In the context of Article 30(1) and having regard to the content of the right, namely, the education of the minority community, the word 'management' in Article 30(2) must be construed to mean the 'process and not the 'persons' in management 'Aid' by definition means to give support or to held or assist. It cannot be that by giving 'aid' one destroys those to whom 'aid' is given. The obvious purpose of Article 30(2) is to forbid the State from refusing aid to a minority educational institution merely because it is being run as a minority educational institution. Besides Article 30(2) is an additional right conferred on minorities under Article 30(1). It cannot be construed in a manner which is destructive of or as a limitation on Article 30(1). As has been said earlier by this Court in ***Rev. Sidhabhai Sabhai,*** supra Clause (2) of Article 30 is only another non-discriminatory clause in the Constitution. It is aright in addition to the rights under Article 30(1) and does not operate to derogate from the provisions in Clause (1). When in decision after decision, this Court has held that aid in whatever form is necessary for an educational institution to survive, it is a specious argument to say that a minority institution can preserve its rights under Article 30(1) by refusing aid.

364. I would, therefore, respectfully agree with the conclusion expressed in the majority opinion that grant of aid under Article 30(2) cannot be used as a lever to take away the rights of the minorities under Article 30(1).

Articles 29(2) and 30(1)

365. Article 29(2) says that "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, case, language or any of them".

366. It is because Article 30(1) covers the right to admit students that there is an apparent conflict between Article 29(2)and Article 30(1). There are two ways of considering the relationship between Article 30(1) and Article 29(2), the first in the context of Article 14, the second by an interpretation of Article 29(2) itself.

367. Article 29(2) has not been expressed as a positive right. Nevertheless in substance it confers a right on a person not to be denied admission into an aided institution only on the basis of religion, race etc. The language of Article 29(2) reflects the language used in other non-discriminatory Articles in the Constitution namely, Clauses (1) and (2) of Article 15 and Clauses (1) and (2) of Article 16. As already noted both the Articles contain exceptions which permit laws being made which make special provisions on the basis of sex, caste and race. Even in the absence of Clauses (3) and (4) of Article 15and Clauses (3), (4) and 4(A) of Article 16, Parliament could have made special provisions on the forbidden bases of race,caste or sex, provided that the basis was not the only reason for creating a separate class. There would have to be an additional rational factor qualifying such basis to bring it within the concept of 'equality in fact' on the principle of 'rational

classification'. For example when by law a reservation is made in favour of a member of a backward class in the matter of appointment, the reservation is no doubt made on the basis of caste. It is also true that to the extent of the reservation other citizens are discriminated against on one of the bases prohibited under Article 16(1). Nevertheless such legislation would be valid because the reservation is not only on the basis of caste/race but because of the additional factor of their backwardness. Clauses (3) and (4) of Article 15 like Clause 3, 4and 4(A) of Article 16 merely make explicit what is otherwise implicit in the concept of equality under Article 14.

368. By the same token, Article 29(2) does not create an absolute right for citizens to be admitted into any educational institution maintained by the State or receiving aid out of State funds. It does not prohibit the denial of admission on grounds other than religion, race, caste or language. therefore,reservation of admissions on the grounds of residence,occupation of parents or other bases has been held to be a valid classification which does not derogate from the principles of equality under Article 14. [See: ***Kumari Chitra Ghosh v. Union of India : MANU/SC/0042/1969***] D.N. Chanchala v. State of Mysore: 1971 SCR (Supp.) 608. Even in respect of the "prohibited" bases, like the other non-discriminatory Articles, Article 29(2) is constitutionally subject to the principle of 'rational classification'. If a person is denied admission on the basis of a constitutional right, that is not a denial only on the basis of religion, race etc. This is exemplified in Article 15(4)which provides for:

"Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Tribes."

369. To the extent that legislation is enacted under Article 15(4) making special provision in respect of a particular caste,there is a denial of admission to others who do not belong to the caste. Nevertheless, Article 15(4) does not contradict the right under Article 29(2). This is because of the use of the word 'only' in Article 29(2). Article 15(4) is based on the rational that Schedule Castes and Tribes are not on par with other members of society in the matter of education and, therefore, special provision is to be made for them. It is not, therefore, only caste but this additional factor which prevents clause15(4) from conflicting with Article 29(2) and Article 14.

370. Then again, under Article 337, grants are made available for the benefit of the Anglo-Indian community in respect of education,provided that any educational institution receiving such grant makes available at least 40% of the annual admission for members of communities other than the Anglo-Indian community. Hence 60% of the admission to an aided Anglo-Indian School is constitutionally resolvable for members of the Anglo-Indian community. To the extent of such reservation, there is necessarily a denial of admission to non-Anglo Indians on the basis of race.

371. Similarly, the Constitution has also carved out a further exception to Article 29(2) in the form of Article 30(1) by recognising the rights of special classes in the form of minorities based on language or religion to establish and administer educational institutions of their choice. The right of the minorities under Article 30(1) does not operate as discrimination against other citizens only on the ground of religion or language. The reason for such classification is not only religion or language per se but minorities based on religion and language. Although, it is not necessary to justify a classification made by the Constitution, this fact of 'minorityship' is the obvious rationale

for making a distinction, the underlying assumption being that minorities by their very numbers are in a politically disadvantaged situation and require special protection at least in the field of education.

372. Articles 15(4), 337 and 30 are therefore facets of substantive quality by making special provision for special classes on special considerations.

373. Even on general principles of interpretation, it cannot beheld that Article 29(2) is absolute and in effect wipes out Article 30(1). Article 29(2) refers to ' any educational institution' -- the word"any" signifying the generality of its application. Article 30(1) on the other hand refers to 'educational institutions established and administered by minorities'. Clearly, the right under Article 30(1) is the more particular right and on the principle of ' *generalia speciaiibusnon derogent*, it must be held that Article 29(2) does not over ride the educational institutions even if they are aided under Article 30(1) Pandit M.S.M. Sharma v. Shri Sri Krishna Sinha: 1959 Suppl. 1 SCR 806 1939 FCR 18.

374. Then again Article 29(2) appears under the heading 'Protection of interests of minorities'. Whatever the historical reasons for the placement of Article 29(2) under this head, it is clear that no general principles of interpretation, the heading is at least a pointer or aid in construing the meaning of Article 29(2). As Subba Rao, J said "if there is any doubt in the interpretation of the words in the section,the heading certainly helps us to resolve that doubt." Bhinka v. Charan Singh, MANU/SC/0165/1959 : 1959CriLJ1223 therefore, if two interpretations of the words of Article 29(2) are possible, the one which is in keeping with the heading of the Article must be preferred. It would follow that Article 29(2) must be construed in a manner protective of minority interests and not destructive of them.

375. When 'aid' is sought for by the minority institution to run its institution for the benefit of students belonging to that particular community, the argument on the basis of Article 29(2) is that if such an institution asks for aid it does so at the peril of depriving the very persons for whom aid was asked for in the first place. Apart from this anomalous result, if the taking of aid implies that the minority institution will be forced to give up or waive its right under Article 30(1), then on the principle that it is not permissible to give up or waive fundamental rights, such an interpretation is not possible. It has then been urged that Article 29(2) applies to minority institutions under Article 30(1) much in the same way that Article 28(1) and 28(3) do. The argument proceeds on the assumption that an educational institution set up under Article 30(1) is set up for the purposes and with the sole object of giving religious instruction. The assumption is wrong. At the outset, it may also be noted that Article 28(1) and (3) do not in terms apply to linguistic minority educational institutions at all. Furthermore, the right to set up an educational institution in which religious instruction is to be imparted is a right which is derived from Article 26(a) which provides that every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes, and not under Article 30(1). Educational institutions set up under Article 26(a) are, therefore, subject to Clauses (1)and (3) of Article 28. Article 30(1) is a right additional to Article 26(a). This follows from the fact that it has been separately and expressly provided for and there is nothing in the language of Article 30(1) making the right there under subject to Articles 25 and 26. Unless it is so construed Article 30(1) would be rendered redundant St. Xaviers College, MANU/SC/0088/1974 : [1975]1SCR173 :

[1975]1SCR173 , paras 7 to 12. therefore, what Article 30 does is to secure the minorities the additional right to give general education. Although in a particular case a minority educational institution may combine general education with religious instruction that is done in exercise of the rights derivable from Article 26(a) and Article 30(1) and not under Article 30(1) alone. Clauses (1) and (3) of Article 28, therefore, do not apply to Article 30(1). The argument in support of reading Article 30(1) as being subject to Article 29(2) on the analogy of Article 28(1) and 28(3) is, I would think, erroneous.

376. For the reasons already stated I have held the right to admit minority students to a minority educational institutions is an intrinsic part of Article 30(1). To say that Article 29(2)prevails over Article 30(1) would be to infringe and to a large extent wipe out this right. There would be no distinction between a minority educational institution and other institutions and the rights under Article 30(1) would be rendered wholly in operational. It is no answer to say that the rights of unaided minority institutions would remain untouched because Article 29(2) does not relate to unaided institution sat all. Whereas if one reads Article 29(2) as subject to Article 30(1) then effect can be given to both. And it is the latter approach which is to be followed in the interpretation of constitutional provisions. Sri Venkataramane Dev Aru v. State of Mysore, 1958 SCR 895, 918. In other words, as long as the minority educational institution is being run for the benefit of and catering to the needs of the members of that community under Article 30(1), Article 29(2) would not apply. But once the minority educational institution travels beyond the needs in the sense of requirements of its own community, at that stage it is no longer exercising rights of admission guaranteed under Article 30(1). To put it differently, when the right of admission is exercised not to meet the need of the minorities,the rights of admission given under Article 30(1) is to that extent removed and the institution is bound to admit students for the balance in keeping with the provisions of Article 29(2).

377. A simple illustration would make the position clear. 'Aid' is given to a minority institution. There are 100 seats available in that institution. There are 150 eligible candidates according to the procedure evolved by the institution. Of the150, 60 candidates belong to that particular community and 90 to other communities. The institution will be entitled, under Article 30(1) to admit all 60 minority students first and then fill the balance 40 seats from the other communities without discrimination in keeping with Article 29(2).

378. I would, therefore, not subscribe to the view that Article 29(2) operates to deprive aided minority institutions the right to admit members of their community to educational institutions established and administered by them either on any principle of interpretation or on any concept of equality or secularism.

379. The next task is to consider whether this interpretation of Article 29(2) and 30(1) is discordant with the historical context in which these Articles came to be included in the Constitution. Before referring to the historical context, it is necessary to keep in mind that what is being interpreted are constitutional provisions which "have a content and a significance that vary from age to age".Cardozo: Nature of Judicial Process, p.17. Of particular significance is the content of the concept of equality which has been developed by a process of judicial interpretation over the years as discussed earlier. It is also necessary to be kept in mind that reports of the various Committees appointed by the Constituent Assembly and speeches made in the Constituent Assembly and the

record of other proceedings of the Constituent Assembly are admissible, if at all, merely as extrinsic aids to construction and do not as such bind the Court. Ultimately it is for this Court to say what is meant by the words of the Constitution.

380. The proponents of the argument that Article 29(2) over-rides Article 30(1) have referred to excerpts from the speeches made by members of Constituent Assembly which have been quoted in support of their view. Apart from the doubtfulness as to the admissibility of the speeches, K.P. Verghese v. Income Tax Officer MANU/SC/0300/1981 : [1981]131ITR597(SC) : Sanjeev Coke v. Bharat Coking Coal Ltd. MANU/SC/0040/1982 : [1983]1SCR1000 and PV Narasimha Rao MANU/SC/0293/1998 : 1998CriLJ2930 : 1998CriLJ2930 , in my opinion, there is nothing in the speeches which shows an intention on the part of the Constituent Assembly to abridge in any way the special protection afforded to minorities under Article 30(1). The intention indicated in the speeches relating to the framing of Article 29(2) appears to be an extension of the right of non-discrimination to members of the non-minority in respect of State aided or State maintained educational institutions. It is difficult to find in the speeches any unambiguous statement which points to a determination on the part of the Constituent Assembly to curtail the special rights of the minorities under Article 30(1). Indeed if one scrutinizes the broad historical context and the sequence of events preceding the drafting of the Constitution it is clear that one of the primary objectives of the Constitution was to preserve, protect and guarantee the rights of the minorities unchanged by any rule or regulation that may be enacted by Parliament or any State legislature.

381. The history which precluded the independence of this country and the framing of the Constitution highlights the political context in which the Constitution was framed and the political content of the "special" rights given to minorities. I do not intend to burden this judgment with a detailed reference to the historical run-up to the Constitution as ultimately adopted by the Constituent Assembly vis-a-vis the rights of the minorities and the importance that was placed on enacting effective and adequate constitutional provisions to safe guardtheir interests. This has been adequately done by Sikri, C.J. in ***Keshavanand Bharati v. State of Kerala,*** MANU/SC/0445/1973 : AIR1973SC1461 , on the basis ofwhich the learned Judge came to the conclusion that the rights of the minorities under the Constitution formed part of the basic structure of the Constitution and were un-amendable and inalienable.

382. I need only add that the rights of linguistic minorities assumed special significance and support when, much after independence, the imposition of a 'unifying language' led not to unity but to an assertion of differences. States were formed on linguistic bases showing the apparent paradox that allowing for and protecting differences leads to unity and integrity and enforced assimilation may lead to disaffection and unrest. The recognition of the principle of "unity in diversity" has continued to be the hall mark of the Constitution - a concept which has been further strengthened by affording further support to the protection of minorities on linguistic bases in 1956 byway of Articles 350A and 350B and in 1978 by introducing Clause(1-A) in Article 30 requiring "the State, that is to say, Parliament in the case of a Central legislation or a State legislature in the case of State legislation, in making a specific law to provide for the compulsory acquisition of the property of minority educational institutions, to ensure that the amount payable to the educational institution for the acquisition of its property will not be such as will in any manner impair the functioning of the educational institution". Society of St. Joseph's College v. Union of India MANU/SC/0735/2001 : AIR2002SC195. Any judicial interpretation of the provisions of the

Constitution whereby this constitutional diversity is diminished would be contrary to this avowed intent and the political considerations which under lie this intention.

383. The earlier decisions of this Court show that the issue of admission to a minority educational institution almost invariably arose in the context of the State claiming that a minority institution had to be 'purely' one which was established and administered by members of the minority community concerned, strictly for the members of the minority community, with the object only of preserving of the minority religion, language, script or culture. The contention on the part of the executive then was that a minority institution could not avail of the protection of Article 30(1) if there was any non-minority element either in the establishment, administration,admission or subjects taught. It was in that context that the Court in ***Kerala Education Bill*** held that a 'sprinkling of outsiders' being admitted into a minority institution did not result in the minority institution shedding its character and ceasing to be a minority institution. p.1052. It was also in that context that the Court in ***St. Xaviers College*** (supra) came to the conclusion that a minority institution based on religion and language had the right to establish and administer educational institution for imparting general secular education and still not lose its minority character. While the effort of the Executive was to retain the 'purity' of a minority institution and thereby to limit it. "the principle which can be discerned in the various decisions of this Court is that the catholic approach which led to the drafting of the provisions relating to minority rights should not be set at naught by narrow judicial interpretation". MANU/SC/0088/1974 : [1975]1SCR173 : [1975]1SCR173.

384. The 'liberal, generous and sympathetic approach' of this Court towards the rights of the minorities has been somewhat reversed in the ***St. Stephens case.*** Of course, this was the first decision of this Court which squarely dealt with the inter-relationship of Article 29(2) and Article 30(1). None of the earlier cited decisions did.

385. The decision of this Court in ***Champakam Dorairajan v. State of Madras,*** MANU/SC/0007/1951 : [1951]2SCR525 cannot be construed as an authority for the proposition that Article 29(2) overrides the constitutional right guaranteed to the minorities under Article 30(1), as Article 30(1) was not at all mentioned in the entire course of the judgment. Similarly, the Court in ***State of Bombay v. Bombay Education Society,*** MANU/SC/0029/1954 : [1955]1SCR568 was not called upon to consider a situation of conflict between Article 30(1)and 29(2). The ***Bombay Education Society,*** was in fact directly concerned with Article 337 and an Anglo-Indian educational institution. In that background, when it was suggested that Article 29(2) was intended to benefit minorities only, the Court negatived the submission as it would amount to a 'double protection', "double" because an Anglo-Indian citizen would then have not only the protection of Article 337 by way of a60% reservation but also the benefit of Article 29(2). It was not held by the Court that Article 29(2) would override Article 337.

386. There is thus no question of striking a balance between Article 29(2) and 30(1) as if they were two competing rights. Where once the Court has held:

"Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the Constitution al permissible objects."

and where Article 29(2) is nothing more than a principle ofequality, and when "the whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority, if the minorities do not have such special protection they will be denied equality", it must follow that Article 29(2) is subject to the constitutional classification of minorities under Article 30(1).

387. Finally, there appears be an inherent contradiction in the statement of the Court in ***St. Stephens*** that:

"the minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of the institutions subject of course to conformity with the University standard. The State may regulate the intake in this category with*due regard to the need* of the community in the area which the institution is intended to serve. But in no case such intake shall exceed 50 percent of the annual admission. The minority institutions shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. The admission of other community candidates shall be done purely on the basis of merit." (p.614)

388. I agree with the view as expressed by the Learned Chief Justice that there is no question of fixing a percentage when the need may be variable. I would only add that in fixing a percentage, the Court in ***St. Stephens*** in fact "reserved" 50%of available seats in a minority institution for the general category ostensible under Article 29(2). Article 29(2) pertains to the right of an individual and is not a class right. It would therefore apply when an individual is denied admission into any educational institution maintained by the State or receiving aid from the State funds, solely on the basis of the ground of religion, race, caste,language or any of them. It does not operate to create a class interest or right in the sense that any educational institution has to set apart for non-minorities as a class and without reference to any individual applicant, a fixed percentage of available seats. Unless Articles 30(1) and 29(2) are allowed to operate in their separate fields then what started with the voluntary 'sprinkling' of outsiders,would become a major inundation and a large chunk of the right of an aided minority institution to operate for the benefit of the community it was set up to serve would be washed away.

389. Apart from this difference with the view expressed by the majority view on the interpretation of Article 29(2) and Article 30(1). I am also unable to concur in the mode of determining the need of a minority community for admission to an educational institution set up by such community. Whether there has been a violation of Article 29(2) in refusing admission to a non minority student in a particular case must be resolved as it has been in the past by recourse to the Courts. It must be emphasised that the right under Article 29(2) is an individual one. If the non-minority student is otherwise eligible for admission, the decision on the issue of refusal would depend on whether the minority institution is able to establish that the refusal was only because it was satisfying the requirements of its own community under Article 30(1). I cannot therefore subscribe to the view expressed by the majority that the requirement of the minority community for admission to a minority educational institution should be left to the State or any other Governmental authority to determine. If the Executive is given the power to determine the requirements of the minority community in the matter of admission to its educational institutions, we would be subjecting the

minority educational institution in question to an"intolerable encroachment" on the right under Article 30(1)and let in by the back door as it were, what should be denied entry altogether.

S.N. Variava, J.

390. We have had the advantage of going through the judgment of the learned Chief Justice of India, brother justice Khare, brother Justice Quadri and sister Justice Ruma Pal. We are unable to agree with the views expressed by brother Justice Quadri and sister Justice Ruma Pal. The learned Chief Justice has categorised the various questions into the following categories.

1) Is there a fundamental right to set up educational institutions and, if so, under which provision;

2) Does the judgment in Unni krishnan's case require reconsideration?

3) In case of private unaided institutions can there be Government regulations and if so the what extent?

4) In determining the existence of a religious or linguistic minority, in relation to Article 30, what is to be the unit, the State or Country as a whole; and

5) To what extent the rights of aided minority institutions to administer be regulated.

391. Justice Khare has dealt with categories 4 and 5 above. On other aspects he has agreed with the learned Chief Justice.

392. We are in agreement with the reasoning and conclusion of the learned Chief Justice on categories 1 and 4. In respect of category 2 we agree with the learned Chief Justice that the cost incurred on educating a student in an unaided professional college was more than the total fee which is realized on the basis of the formula fixed in the scheme. This had resulted in revenue shortfalls. As pointed out by the learned Chief Justice even though by a subsequence decision (to ***Unni Krishnan's)*** this Court had permitted some percentage of seats within the payment seats to be allotted to Non-Resident Indians, against payment of a higher amount as determined by the authorities,sufficient funds were still not available for the development of those educational institutions. As pointed out by the learned Chief Justice experience has shown that most of the "free seats" were occupied by students from affluent families, while students from less affluent families were required to pay much more to secure admission to "payment seats". As pointed out by the learned Chief Justice the reason for this was that students from affluent families had had better school education and the benefit of professional coaching facilities and were, therefore, able to secure higher merit positions in the common entrance test, and thereby secured the free seats. The education of these more affluent students was in a way being cross-subsidized by the financially poorer students who, because of their lower position in the merit list, could secure only "Payment seats". Thus we agree with the conclusion of the learned Chief Justice that the scheme cannot be considered to be a reasonable restriction and requires reconsideration and that the regulations must be minimum. However we cannot lose sight of the ground realities in our country. The majority of our population come from the poorer section of our society. They cannot and will not be able to afford the fees which will now be fixed pursuant to the judgment. There must

therefore be an attempt, not just on the part of the Government and the State, but also by the educational institutions to ensure that students from the poorer section of society get admission. One method would be by making available scholarships or free seats. If the educational institution is willing to provide free seats then the costs of such free seats could also be partly covered by the fees which are now to be fixed. There should be no harm in the rich subsidising the poor.

393. The learned Chief Justice has repeatedly emphasised that capitation fees cannot be charged and that there must be no profiteering. We clarify that the concerned authorities will always be entitled to prevent by enactment or by regulations the charging of exorbitant fees or capitation fees. There are many such enactments already in force. We have not gone not the validity or otherwise of any such enactment. No arguments regarding the validity of any such enactment have been submitted before us. Thus those enactments will not be deemed to have been set aside by this judgment. Of course now by virtue of this judgment the fee structure fixed under any regulation or enactment will have to be reworked so as to enable educational institutions not only to break even but also to generate some surplus for future development/expansion and to provide for free seats.

394. We also wish to emphasis, what has already been stated by the learned Chief Justice, that an educational institution must grant admission on some identifiable and acceptable manner. It is only in exceptional cases, that the management may refuse admission to a student. However, such refusal must not be whimsical or for extraneous reasons meaning thereby that the refusal must be based on some cogent and justifiable reasons.

395. In respect of categories 3 and 5 we wish to point out that this Court has been constantly taking the view that these aided educational institutions (whether majority or minority) should not have unfettered freedom in the matter of administration and management. The State which gives aid to educational institution including minority educational institution can impose such conditions as are necessary for the proper maintenance for the higher standards of education. State is also under an obligation to protect the interests of the teaching and non-teaching staff. In many States, there are various statutory provisions to regulate the functioning of these educational institutions. Every educational institution should have basic amenities. If it is a school, it should have healthy surroundings for proper education; it should have a playground, a laboratory, a library and other requisite facilities that are necessary for a proper functioning of the school. The teachers who are working in the schools should be governed by proper service conditions. In States where the entire pay and allowances for the teaching staff and non-teaching staff are paid by the State, the State has got ample power to regulate the method of selection and appointment of teachers. State can also prescribe qualifications for the teachers to be appointed in such schools. Similarly in an aided schools, State sometimes provides aid for some of the teachers only while denying the aid to other teachers. Sometimes the State does not provide aid for the non-teaching staff. The State could, when granting aid, provides for the age and qualifications or recruitment of a teacher, the age of retirement and even for the manner in which an enquiry has to be held by the institution. In other words there could be regulations which ensure that service conditions for teachers and staff receiving aid of the State and the teachers or the staff for which no aid is being provided are the same. Pre-requisite to attract good teachers is to have good service conditions. To bring about an uniformity in the service conditions State should be put at liberty to prescribe the same without intervening in the process of selection of the teachers or their removal, dismissal etc. We agree

that there need not be either prior and subsequent approval from any functionaries of the State/University/Board (as the case may be) for disciplinary action, removal or dismissal. However principles of natural justice must be observed and as already provided, by the learned Chief Justice all such action can be scrutinised by the education Tribunal. The provisions contained in the various enactments are not specially challenged before us. The constitutional validity of the statutory provisions vis-a-vis the rights under Articles 19(1)(g), Article 26, Article 29 and Article 30(1) of the Constitution can be examined only if a specific case is brought before the Court. Educational Institution receiving State aid cannot claim to have complete autonomy in the matter of administration. They are found by various statutory provisions which are enacted to protect the interests of the education, students and teachers. Many of the Statutes were enacted long back and stood the test of time. Nobody has ever challenged the provisions of these enactments. The regulations made by the State, to a great extent, depend on the extent of the aid given to institutions including minority institutions. In some States, a lumpsum amount is paid as grant for maintenance of schools. In such cases, the State may not be within its right to impose various restrictions, specially regarding selection and appointment of teachers. But in some States the entire salary of the teaching and non-teaching staff are paid, and these employees are given pension and other benefits, the State may then have a right and an obligation to see that the selection and appointment of teachers are properly made. Similarly the State could impose conditions to the effect that in the matter of appointments, preference shall be given to weaker sections of the community, specially physically handicapped or dependents of employees who died in harness. All such regulations may not be said to be bad and/or invalid and may not even amount to infringing the rights of the minority conferred under Article 30(1) of the Constitution. Statutory provisions such as labour laws and welfare legislations etc. would be applicable to minority educational institutions. As this decision is being rendered by a larger bench consisting of eleven judges, we feel that it is not advisable and we should not be taken to have laid down extensive guidelines in respect of myriads of legal questions that may arise for consideration. In our view in this case the battle lines were not drawn up in the correct perspective and many of the aggrieved or affected parties were not before us.

396. As regards category 5, we agree with the conclusion of both the learned Chief Justice as well as Justice Khare that Article 29(2) applies to Article 30. However, we are unable to agree with the final reasoning that there must be a balancing between Articles 29(2) and 30(1). We, therefore, give our reasons for dis-agreeing with the final conclusion that there must be a balancing between Articles 29(2) and 30.

397. We are conscious of the fact that the learned Chief Justice and Justice Khare have exhaustively dealt with the authorities. However, in our view there is need to emphasise the same. We are here called upon to interpret Articles 29(2) and 30. Submissions have been made that in interpreting these Articles the historical background must be kept in mind and that a contextual approach should be taken. We must, therefore, a) look at the history which led to incorporation of these Articles. The intention of the framers will then disclose how the contextual approach must be based; b) apply the well settled principles of interpretation; and c) keep the doctrine of "State Devises" in mind.

398. In the case of *Kesavananda Bharati v. State of Kerala* MANU/SC/0445/1973 : AIR1973SC1461 , it has been held that in interpreting the provisions of a Statute or the Constitution it is the duty of the Court to find out the legislative intent. It has been held that

Constituent Assembly debates are not conclusive but that, in a Constitutional matter where the intent of the framers of the Constitution is to be ascertained, the Court should look into the proceedings and the relevant data, including the speeches, which throw light on ascertaining the intent. In considering the nature and extent of rights conferred on minorities one must keep in mind the historical background and see how and for what purpose Article 30 was framed.

399. In the case of *R.S. Nayak v. A.R. Antulay* reported in MANU/SC/0102/1984 : 1984CriLJ613 it has been held as follows:

"Reports of the Committee which preceded the enactment of a legislation, reports of Joint Parliament Committee,report of a Commission set up for collecting information leading to the enactment are permissible external aid to construction. If the basic purpose underlying construction of legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a Special Committee preceding the enactment, existing state of Law, the environment necessitating enactment of legislation, and the objects ought to be achieved, be denied to Court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the Court of a substantial and illuminating aid to construction.

The modern approach has to a considerable extent eroded the exclusionary rule even in England."

400. The partition of India caused great anguish, pain, bitterness and distrust amongst the various communities residing in India. Initially there was a demand for separate electorate and reservation of seats. However the principle of unity and equality for all prevailed. In return it was agreed that minorities would be given special protections.

401. The reason why Article 30(1) was embodied in the Constitutionhas been set out by Chief Justice Ray (as he then was) in the case of *St. Xaviers College v. State of Gujarat* MANU/SC/0088/1974 : [1975]1SCR173 . The relevant portion reads as follows:

"The right to establish and administer educational institutions of their choice has been conferred on religious and linguistic minorities so that the majority who can always having their rights by having proper legislation do not pass a legislation prohibiting minorities to establish and administer educational institutions of their choice.

xxx xxx xxx
xxx xxx xxxxxx xxx xxx

Every section of the public, the majority as well as minority has rights in respect of religion as contemplated in Articles 25 and 26 and rights in respect of language,script, culture as contemplated in Article 29. The whole object of conferring the right on minorities under Article 30is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality.

xxx xxx xxx
xxx xxx xxxxxx xxx xxx

The real reason embodied in Article 30(1) of the Constitution is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of the country. The minorities are given this protection under Article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education is intended to develop the commonness of boys and girls of our country. this is in the true spirit of liberty, equality and fraternity through the medium of education. If religious or linguistic minorities are not given protection under Article 30 to establish and administer educational institutions of their choice, they will feel isolated and separate. General secular education will open doors of perception and act as the natural light of mind for our countrymen to live in the whole." (emphasis supplied)

In the same Judgment, Justice Khanna has held as follows:

"Before we deal with the contentions advanced before us and the scope and ambit of Article 30 of the Constitution, it may be pertinent to refer to the historical background. India is the second most populous country of the world. The people inhabiting this vast land profess different religions and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on the Indian polity and India today represents a synthesis of them all. The closing years of the British rule were marked by communal riots and dissentions. There was also a feeling of distrust and the demand was made by a section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for independence in India always laid great stress on communal amity and accord. They wanted the establishment of a secular State wherein people belonging to the different religions should all have a feeling of equality and non-discrimination. Demand had also been made before the partition by sections of people belonging to the minorities for reservation of seats and separate electorates. In order to bring about integration and fusion of the different sections of the population, the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in an election should have to look for support of all sections of the citizens. Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to in still a sense of confidence and security in the minorities. Those provisions were a king of a Charter of rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. (emphasis supplied)

402. This was the basis on which minority rights were guaranteed. The rights were created so that minorities need have no apprehension that they would not be able, either in the religious or in the educational fields, to do what the politically powerful majority could do. In matters of education what the politically powerful majority could do was to establish and administer educational institutions of their choice at their own expense. Principles of equality required that the minorities be given the same rights. The protection/special right was to ensure that the minorities could also establish and administer educational institutions of their choice at their own expense. The demand for separatism and separate electorates was given up as principles of secularism and equality were considered more important. The principle of secularism and equality meant that State would not discriminate on grounds of religion, race, caste, language or any of them. Thus once State aid was

given and/or taken then, whether majority or minority, all had to adhere to principles of equality and secularism. There never was any intention or desire to create a special or privileged class of citizens.

403. With this background, it is necessary to see how Articles 29 and 30 came to be framed/incorporated in the Constitution. Mr. Munshi was a strong advocate for minority rights. Mr. Munshi sent to the Advisory Committee a Note with which he forwarded a draft Constitution. This draft Constitution clearly indicates what rights were contemplated in framing, what is now, Article 30(1) Draft Article VI read as follows:

"The Right to Religious and Cultural Freedom

(1) All citizens are equally entitled to freedom of conscience and to the right freely to profess and practise religion in a manner compatible with public order, morality or health :

Provided that the economic, financial or political activities associated with religious worship shall not be deemed to be included in the right to profess or practise religion.

(2) All citizens are entitled to cultural freedom, to the use of their mother tongue and the script thereof, and to adopt, study or use any other language and script of their choice.

(3) Citizens belonging to national minorities in a State whether based on religion or language have equal rights with other citizens in forming, controlling and administering at their own expense, charitable, religious and social institutions, schools and other educational establishments with the free use of their language and practice of their religion. (emphasis supplied.

(4) No person may be compelled to pay taxes the proceeds of which are specifically appropriated in payment of religious requirements of any community of which he is not a member.

(5) Religious instruction shall not be compulsory for a member of a community which does not profess such religion.

(6) No person under the age of eighteen shall be free to change his religious persuasion without the permission of his parent or guardian.

(7) Conversion from one religion to another brought about by coercion, undue influence or the offering of material inducement is prohibited and is punishable by the law of the Union.

(8) It shall be the duty of every unit to provide, in the public educational system in towns and districts in which a considerable proportion of citizens of other than the language of the unit are residents, adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such citizens through the medium of their own language.

Nothing in this clause shall be deemed to prevent the unit from making the teaching of the national language in the variant and script of the choice of the pupil obligatory in the schools.

(9) No legislation providing State-aid for schools shall discriminate against schools under the management of minorities whether based on religion or language.

Every monument of artistic or historic interest or place of natural interest throughout the Union is guaranteed immunity from spoliation, destruction, removal, disposal or export except under a law of the Union, and shall be preserved and maintained according to the law or the Union."

This shows that the intention was to give to the minorities the right to form, control and administer, amongst others educational institutions,at their own expense. It is also to be noted that Article (9) is similar to what is now Article 30(2). As the educational institutions were to beat their own expense, State aid was not made compulsory.

404. At this stage it must be remembered that the minorities to whom rights were being given, were not minorities who were socially and/or economically backward. There was no fear that economically, these religious or linguistic minorities, would not be able to establish and administer educational institution. There was also no fear that, in educational Institutions established for the benefit of all citizens, the children of these religious or linguistic minorities would not be able to compete. These rights were being conferred only to ensure that the majority, who due to their numbers would be politically powerful, did not prevent the minorities from establishing and administering their own educational institutions. In so providing, the basic feature of the Constitution, namely, secularism and equality for all citizens, whether majority or minority was being kept in mind.

405. In this behalf, an extract from *Kesavananda's case* is very relevant. It reads as follows:

"It may be recalled that as regards the minorities the Cabinet Mission had recognized in their report to the British Cabinet on May 6, 1946, only three main communities: general, Muslims and Sikhs. General community included all those who were non-Muslims or non-Sikhs. The Mission had recommended an Advisory Committee to be set up by the Constituent Assembly which was to frame the rights of citizens, minorities, tribals and excluded areas. The Cabinet Mission statement had actually provided for the cession of sovereignty to the Indian people subject only to two matters which were: (1)willingness to conclude a treaty with His Majesty's Government to cover matters arising out of transfer of power and (2) adequate provisions for the protection of the minorities. Pursuant to the above and Paras 5 and 6of the Objectives Resolution the Constituent Assembly setup an Advisory Committee on January 24, 1947. The Committee was to consist of representatives of muslims,the depressed classes or the scheduled castes, the Sikhs,Christians, Parsis, Anglo-Indians, tribals and excluded areas besides the Hindus. As a historical fact it is safe to say that at a meeting held on May 11, 1949, a resolution for the abolition of all reservations for minorities other than the scheduled castes found whole-hearted support from an overwhelming majority of the members of the Advisory Committee. So far as the schedule castes were concerned it was felt that their peculiar position would necessitate special reservation for them for a period of ten years. It would not be wrong to say that the separate presentation of minorities which had been the feature of the previous Constitutions and which had witnesses so much of communal tension and strife was given up infavour of joint electorates in consideration of the guarantee of fundamental rights and minorities' rights which it was decided to incorporate into the new Constitution. The Objectives Resolution can be taken into account as a historical fact which

moulded its nature and character. Since the language of the Preamble was taken from the resolution itself the declaration in the Preamble that India would be a Sovereign Democratic Republic which would secure to all its citizens justice, liberty and equality was implemented in Parts III and IV and other provisions of Constitution. These formed not only the essential features of the Constitution but also the fundamental conditions upon and the basis on which the various groups and interest adopted the Constitution as the Preamble hoped to create one unified integrated community.(*emphasis supplied*)"

406. The draft Articles were then forwarded by the Advisory Committee to a Committee for fundamental rights. They were also forwarded to another Committee known as the Committee of Minorities. These two Committees thereafter revised the draft and the revised draft was then forwarded to the Constituent Assembly for discussion. The relevant portion of the revised draft read as follows:

"*Rights relating to Religion*

(13). All persons are equally entitled to freedom of conscience, and the right freely to profess, practise and propagate religion subject to public order, morality or health and to the other provisions of this Part.

Explanation 1. - The wearing the carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation 2. - The above rights shall not include any economic, financial, political or other secular activities that may be associated with religious practice.

Explanation 3. - The freedom of religious practice guaranteed in this clause shall not debar the State from enacting laws for the purpose of social welfare and reform and for throwing open Hindu religious institutions of a public character to any class or section of Hindus.

(14). Every religious denomination or a section thereof shall have the right to manage its own affairs in matters of religion and, subject to law, to own, acquire and administer property, movable and immovable, and to establish and maintain institutions for religious or charitable purposes.

(15). No person may be compelled to pay taxes, the proceeds of which are specifically appropriated to further or maintain any particular religion or denomination.

(16). No person attending any school maintained or receiving aid out of public funds shall be compelled to take part in the religious instruction that may be given in the school or to attend religious worship held in the school or in premises attached thereto.

(17). Conversion from one religion to another brought about by coercion or undue influence shall not be recognized by law.

Cultural and Educational Rights

(18). (1) Minorities in every unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State educational institutions, nor shall any religious instruction be compulsorily imposed on them.

(3)(a). All minorities whether based on religion,community or language shall be free in any unit to establish and administer educational institutions of their choice.

(b) The State shall not, while providing State aid to schools, discriminate against schools under the management or minorities whether based on religion,community or language."

Thus under Clause 18(3)(a) minorities based on religion, community and language were to be free to establish and administer educational institutions. The Constituent Assembly Debates, of 30th August,1947, indicate that it was understood and clear that the right to establish and administer educational institutions was to be at their own expense. During the Debate on 30th August 1947, Mr. K.T.M. Ahmed Ibrahim Sahib Bahadur proposed an amendment in Clause 18(2). The suggested amendment read as follows:

"Provided that this clause does not apply to state Educational institutions maintained mainly for the benefit of any particular community or section of the people."

407. Similarly Mrs. Purnima Banerji proposed an amendment to the effect that under Clause 18(2) after the words "state" the words "and State-aided" be inserted. To be noted that both Mr. K.T.M. Ahmedand Mrs. Purnima Banerji were, by their proposed amendments,seeking to enhance rights of minorities. The discussions which follow these proposed amendments are very illustrative and informative. These discussions read as follows:

"**Mrs. Purnima Banerji:** Sir, my amendment is to clause18(2). It reads as follows:-

"That after the word 'State', the words 'and State-aided' be inserted."

The purpose of the amendment is that no minority,whether based on community or religion shall be discriminated against in regard to the admission into State-aided and State educational institutions. Many of the provinces, e.g., U.P., have passed resolutions laying down that no educational institution will forbid the entry of any members of any community merely on the ground that they happened to belong to a particular community - even if that institution is maintained by a donor who has specified that that institution should only cater for members of his particular community. If that institution seeks State aid, it must allow members of other communities to enter into it. In the olden days, in the Anglo-Indian schools (it was laid down that, though those school were specifically intended for Anglo-Indians, 10 percent of the seats should be given to Indians. In the latest report adopted by this House, it is laid down at 40 percent. I suggest Sir, that if this clause is included without the amendment in the Fundamental Rights, it will be a step backward and many Provinces who have taken a step forward will have to retract

their steps. We have many institutions conducted by very philanthropic people, who have left large sums of money at their disposal. While we welcome such donations, when a principle has been laid down that, if any institution receives State aid, it cannot discriminate or refuse admission to members of other communities, then it should be followed. We know, Sir,that many a Province has got provincial feelings. If this provision is included as a fundamental right, I suggest that it will be highly detrimental. The Honourable Mover has not told us what was the reason why he specifically excluded State-aided institutions from this clause. If he had explained it, probably the House would have been convinced. I hope that all the educationists and other members of this House will support my amendment (emphasis supplied).

408. Even though Mrs. Purnima Banerji is seeking to give further protection to students of minority community, her speech indicates the principle, accepted by all, that if an institute receives State aid it cannot discriminate or refuse admission to members of other communities. the reply of Mr. Munshi is as follows:-

Mr. K.M. Munshi: Mr. President, Sir, the scope of this Clause 18(2) is only restricted to this, that where the State has got an educational institution of its own, no minority shall be discriminated against. Now, this does recognise to some extent the principle that the State cannot own an institution from which a minority is excluded. As a matter of fact, this to some extent embodies the converse proposition over which discussion took place on Clause 16,namely no minority shall be excluded from any school maintained by the State. That being so, it secures the purpose which members discussed a few minutes ago. This is the farthest limit to which I think, a fundamental right can go.

Regarding Ibrahim Sahib's amendment, I consider that it practically destroys the whole meaning and content of this fundamental right. This minority right is intended to prevent majority control legislatures from favouring their own community to the exclusion of other communities. The question therefore is : Is it suggested that the States should be at liberty to endow schools for minorities? Then it will come to this that the minority will be a favoured Section of the public. This destroys the very basis of a fundamental right. I submit that it should rejected.(emphasis supplied)

xxx xxx xxx

Then comes Mrs. Banerji's amendment. it is wider than the clause itself. As I pointed out, Clauses 16 to 18 are really two different propositions. This is with regard to communities. Through the medium of a fundamental right, not by legislation, not by administrative action this amendment seeks to close down thousands of institutions in this country.

I can mention one thing so far as my province is concerned there are several hundreds of Hindu Schools and several dozens of Muslim Schools. Many of them are run by charities which are exclusively Hindu or Muslim. Still the educational policy of the State during the Congress regime has been that as far as possible no discrimination should be permitted against any pupil by administrative action in these schools. Whenever a case of discrimination is found, the Educational Inspector goes into it; particularly with regard to Harijans it has been drastically done in the Province of Bombay. Now if you have a fundamental right like this, a school which has go to

thousand students and receives Rs. 500 by way of grant from Government, becomes a State aided School. A trust intended for one community maintains the School and out of Rs. 50,000 spent for the School Rs. 500 only comes from Government as grant. But immediately the Supreme Court must hold that this right comes into operation as regards this School. Now this, as I said, can best be done by legislation in the provinces, through the administrative action of the Government which takes into consideration susceptibilities and sometimes makes allowances for certain conditions. How can you have a Fundamental law about this? How can you divert crores of rupees of trust for some other purpose by a stroke of the pen? The idea seems to be that by placing these two lines in the constitution everything in this country has to be changed without even consulting the people or without even allowing the legislatures to consider it. I submit that looking into the present conditions it is much better that these things should be done by the normal process of educating the people rather than by putting in a Fundamental Right. This clause is intended to be restrictive that neither the Federation nor a unit shall maintain an institution from which minorities are excluded. If we achieve this, this will be a very great advance that we would have made and the House should be content with this much advance."

Thus to be seen that Mr. Munshi echoed the sentiment so often expressed by Counsel before us i.e. that by securing a small amount of aid, the right to administer educational institutions cannot be given up. This was immediately answered as follows:

"**Mr. Hussain Imam** : I will not take more than two minutes of the time of the House. I think there is nothing wrong with the amendment which has been moved by Mrs. Banerji. She neither wants those endowed institutions to be closed, nor their funds to be diverted to purposes for which they were not intended. What she does ask is thatthe State being a secular State, must not ge a party to exclusion. It is open to the institutions which want to restrict admission to particular communities or particular classes, to refuse State aid and thereby, after they have refused to State aid, they are free to restrict their admission of the students to any class they like. The State will have no say in the matter. Here the word 'recognize' has not been put in. In Clause 16 we put the all embracing word 'recognize'. therefore all this trouble arose that we had to refer that to a small Committee. In this clause the position is very clear. And Mr. Munshi, as a clever lawyer,has tried to cloud this. It is open to the institution which has spent Rs. 40,000 from its funds not to receive Rs. 500as grant from the State but it will be open to the State to declare that as a matter of State policy exclusiveness must not be accepted and this would apply equally to the majority institutions as well as minority institutions. No institution receiving State aid should close its door to any other class of persons in India merely because its donor has originally so desired to restrict. They are open to refuse the State aid and they can have any restriction theylike. (emphasis supplied)

xxx xxx xxx

Pandit Hirday Nath Kunzru : Mr. President, I support the amendment moved by Mrs. Banerji. I followed with great interest Mr. Munshi's exposition. His view was that if we accepted the principle that educational institutions maintained by the State shall be bound to admit boys of all communities, it would be a great gain and that we should not mix up this matter with other matters howsoever important they may be. I appreciate his view point. Nevertheless I think that it is desirable in view of the importance that we have attached to various provisions accepted by us regarding the development of a feeling of unity in the country that we should today accept the

principle that a boy shall be at liberty to join any school whether maintained by the State or by any private agency which receives aid from State funds. No school should be allowed to refuse to admit a boy on the score of his religion. This does not mean, Sir, as Mr. Munshi seems to think, that the Headmaster of any school would be under a compulsion to admit any specified number of boys belonging to any particular community. Take for instance an Islamia School. If 200 Hindu boys offer themselves for admission to that School, the Headmaster will be under no obligation to admit all of them. But the boys will not be debarred, from seeking admission to it simply because they happen to be Hindus. The Headmaster will lay down certain principles in order to determine which boys should be admitted.

xxx xxx xxx

Sir, we have decided not to allow separate representation in order to create a feeling of oneness throughout the country. We have even disallowed cumulative voting because, as Sardar Vallabhabhai Patel truly stated the other day, its acceptance would mean introduction by the back door of the dangerous principle of communal electorates which we threw out of the front door. So great being the importance that we attach to the development of a feeling of nationalism, is it not desirable and it is not necessary that our educational institutions which are maintained or aided by the State should not cater exclusively for boys belonging to any particular religion or community? If it is desirable in the case of adults that a feeling of unity should be created, is it not much more desirable where immature children and boys are concerned that no principle should be accepted which would allow the dissemination, directly or indirectly, of anti-national ideas or feelings?

Sir, since the future welfare of every State depends on education, it is I think very important that we should to day firmly lay down the principle that a school, even though it may be a private school, should be open to the children of all communities if it receives aid from Government. This principle will be in accordance with the decisions that we have arrived at on other matters so far. Its non-acceptance will be in conflict with the general view regarding the necessity of unity which we have repeatedly and emphatically expressed in this House. (emphasis supplied)

These discussions clearly indicate that the main emphasis was on unity and equality. The protection which was being given to the minorities was merely to ensure that the politically strong majority did not prevent the minorities from having educational institutions at their own expense. It is clear that the framers always intended that the principles of secularism and equality were to prevail over even minorities' rights. If the State aid was taken then there could be no discrimination or refusal to admit members of other communities. On this basis the amendments moved by Mr. K.T.M. Ahmed Ibrahim Sahib Bahadur and Mrs. Purnima Banerji (which sought to create additional rights in favour of minorities) were rejected.

409. The draft was taken sent back to the Committee. When it came back to the Constituent Assembly the relevant Articles read as follows:

"22. (1) No religious instruction shall be provided by the State in any educational institution wholly maintained out of State funds:

Provided that nothing in this clause shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(2) No person attending any education Institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person, or if such person is a minor, his guardian has given his consent thereto.

(3) Nothing in this article shall prevent any community or denomination from providing religious instruction for pupils of that community or denomination in an educational institution outside its working hours.

Cultural and educational rights

(23). (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same.

(2) No minority whether based on religion, community or language shall be discriminated against the regard to the admission of any person belonging to such minority into any educational institution maintained by the State.

(3)(a) All minorities whether based on religion,community or language shall have the right to establish and administer educational institutions of their choice.

(b) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion, community or language.

410. These were discussed in the Constituent Assembly on 7th and 8thDecember, 1948. It must be noted that there was a practice to circulate in advance, any proposed amendment, which a Member desired to move. The proposed amendment was circulated in advance for sound reasons, namely that every body else would have notice of it and be prepared to express views for or against the proposed amendment. On 7th December, 1948 Clause 22 was being considered, Mr. H.V. Kamath proposed as follows:

"**Shri H.V. Kamath** (C.P. and Berar : General). Mr. Vice President, I move-

"That in Clause (2) of Article 22, the words "recognized by the State or" be deleted."

I move this amendment with a view to obtaining some clarification on certain dark corners of these two articles - Articles 22 and 23. I hope that my learned Friend Dr. Ambedkar will not, in his reply, merely toe the line of least resistance and say "I oppose this amendment", but will be good enough to give some reasons why he opposes or rejects my amendment, and I hope he will try his best to throw some light on the obscure corners of this article. If we scan the various clauses of this article

carefully and turn a sidelong glance at the next articles too, we will find that there are some inconsistencies or at least an inconsistency. Clause (1) of Article 22 imposes an absolute ban on religious instruction in institutions which are wholly maintained out of State funds. The proviso,however, excludes such institutions as are administered by the State which have been established under an endowment or trust - that is, under the proviso those institutions which have been established under an endowment or trust and which require, under the conditions of the trust, that religious instruction must be provided in those institutions, about those, when the State administers then, there will not be any objection to religious instruction. Clause (2) lays down that no person attending an institution recognized by the State or receiving aid out of State funds shall be required to take part in religious instruction. The means, it would not be compulsory. I am afraid I will have to turn to Clause 23,Sub-clause (3) (a) where it is said that all minorities,whether based on religion, community or language, shall have the right to establish and administer educational institutions of their choice. Now, is it intended that the institutions referred to in the subsequent clause which minorities may establish and conduct and administer according to their own choice, is it intended that in these institutions the minorities would not be allowed to provide religious instruction? There may be institutions established by minorities, which insist on students' attendance at religious classes in those institutions and which are otherwise unobjectionable. There is no point about State aid, but I cannot certainly understand why the State should refuse recognition to those institutions established by minorities where they insist on compulsory attendance at religious classes. Such interference by the State I feel is unjustified and unnecessary. Besides, this conflicts with the next article to a certain extent. If minorities have the right to establish and administer educational institutions of their own choice, is it contended by the Honourable Dr. Ambedkar that the State will say"You can have institutions, but you should not have religious instructions in them if you want our recognition'.Really it beats me how you can reconcile these two points of view in Articles 22 and 23. The minority, as I have already said, may establish such a school or its own pupils and make religious instruction compulsory in that school. If you do not recognise that institution, then certainly that school will not prosper and it will fail at attract pupils. Moreover, we have guaranteed certain rights to the minorities and, it may be in a Christian School, they may teach the pupils the Bible and in a Muslim school the Koran. If the minorities, Christians and Muslims, can administer those institutions according to their choice and manner, does the House mean to suggest that the State shall not recognize such institutions? Sir, to my mind, if you pursue such a course, the promises we have made to the minorities in our country, the promises we have made to the ear we shall have broken to the heart. therefore Ido not see any point why, in institutions that are maintained and conducted and administered by the minorities for pupils of their own community the State should refuse to grant recognition, in case religious instruction is compulsory. When once you have allowed them to establish schools according to their choice, it is inconsistent that you should refuse recognition to them on that ground. I hope something will be done to rectify this inconsistency."

Thus it is to be seen that Shri H.V. Kamath is referring not just to draft Article 22 but also to draft Article 23(3)(a). He is pointing out that there is an apparent conflict between these two Articles. Draft Articles 22 and 23(3)(a) are, with minor changes, what are now Articles 28(3) and 30(1). Dr. Ambedkar opposed the amendments proposed by Shri H.V. Kamath for various reasons, one of which is as follows:

"We have accepted the proposition which is embodied in Article 21, that public funds raised by taxes shall not be utilised for the benefit of any particular community."

Shri H.V. Kamath then asked for a clarification as follows:

"On a point of clarification, what about institutions and schools run by a community or a minority for its own pupils - not a school where all communities are mixed but a school run by the community for its own pupils?"

411. Thus Shri H.V. Kamath is again emphasising that there could be minority educational institutions run for their own pupils. The answer to this, by Dr. Ambedkar, is as follows:

The Honourable Dr. B.R. Ambedkar: If my Friend Mr. Kamath will read the other article he will see that once an institution, whether maintained by the community or not, gets a grant, the condition is that it shall keep the school open to all communities, that provision he has not read." (emphasis supplied)

412. To be noted that in the draft Articles there is no clause which provided that if an institution, whether maintained by the community or not, gets a grant, it shall keep the school open to all communities. The next clause which Dr. Ambedkar referred to, was the proposed amendment moved by Pandit Thakur Dass Bhargava. As stated above this proposed amendment had already been circulated to all. It is clear that Dr. Ambedkar had already accepted the proposal of Pandit Thakur Dass Bharvava.

413. On 8th December, 1948, when Pandit Thakur Dass Bhargava moved his amendment, the debate read as follows:

"**Pandit Thakur Das Bhargava:** Sir, I beg to move.

That for amendment No. 687 of the List of amendments, the following be substituted:-

"That for Clause (2) of Article 23, the following be substituted :-

"(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds of grounds only of religion, race,caste, language or any of them."

and Sub-clauses (a) and (b) of Clause (3) of Article 23 be renumbered and new Article 23-A".

Sir, I find there are three points of difference between this amendment and the provisions of the section which it seeks to amend. The first is to put in the words 'no citizen' for the words 'no majority'. Secondly that not only the institutions which are maintained by the State will be included in it, but also such institutions as are receiving aid out of state funds. Thirdly, we have, instead of the words"religion, community or language", the words, "religion,race, caste, language or any of them".

Now, Sir, it is happens that the words "no minority"seeks to differentiate the minority from the majority,whereas you would be pleased to see that in the Chapter the words of the heading are "cultural and educational rights", so that the minority rights as such should not find any place under this section. Now if we read Clause (2) it would appear as if the minority had been given certain definite rights in this clause, whereas the national interests require that no majority also should be discriminated against in this matter. Unfortunately, there is in some matters a tendency that the minorities as such possess and are given certain special rights which are denied to the majority. It was the habit of our English masters that they wanted to create discriminations of this sort between the minority and the majority. Sometimes the minority said that they were discriminated against and on other occasions the majority felt the same thing. This amendment brings the majority and the minority on an equal status.

In educational matters, I cannot understand, from the national point of view, how any discrimination can be justified in favour of a minority or a majority. therefore,what this amendment seeks to do is that the majority and the minority are brought on the same level. There will be no discrimination between any member of the minority or majority in so far as admission to educational institutions are concerned. So I should say that this is a charter of the liberties for the student-world of the minority and the majority communities equally.

The second change which is amendment seeks to make is in regard to the institutions which will be governed by this provision of law. Previously only the educational institutions maintained by the State were included. This amendment seeks to include such other institutions as are aided by State funds. There are a very large number of such institutions, and in future, by this amendment the rights of the minority have been broadened and the rights of the majority have been secured. So this is a very healthy amendment and it is a kind of nation-building amendment.

Now, Sir, the word "community" is sought to be removed from this provision because "community" has no meaning. If it is a fact that the existence of a community is determined by some common characteristic and all communities are covered by the words religion or language, then "community" as such has no basis. So the word "community" is meaningless and the words substituted are "race or caste". So this provision is so broadened that on the score of caste, race, language, or religion no discrimination can be allowed.

My submission is that considering the matter from all the standpoints, this amendment is one which should be accepted unanimously by this House." (emphasissupplied)

414. To be noted that the proposed Article 23(2) is now Article 29(2).It is being incorporated in Article 23 which also contained what is now Article 30(1). Pandit Thakur Dass Bhargava was proposing this amendment with the clear intention that it should apply to minority educational institutions under, what is now Article 30(1). The whole purpose is to further principles of secularism and to see that in State maintained and State aided educational institutions there was no distinction between majority or minority communities. At this stage it must be noted that no contrary view was expressed at all. Dr. Ambedkar then replied as follows:

"**The Honourable Dr. B.R. Ambedkar:** Sir, of the amendments which have been moved to Article 23, I can accept amendment No. 26 to amendment No. 687 by Pandit Thakur Dass

Bhargava. I am also prepared to accept amendment No. 31 to amendment No. 690, also moved by Pandit Thakur Dass Bhargava."

415. The amendment proposed by Pandit Thakur Dass Bhargava was unanimously accepted by the Constituent Assembly. This is how and why, what is now Article 29(2) was framed and incorporated. Clearly it was to govern all educational institutions including minority educational institutions under what is now Article 30(1). The final resolution is as follows:

"**Mr. Vice-President:** The question is:

That for Clause (2) of Articles 23, the following be substituted:-

"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste,language or any of them";

and Sub-clause (a) and (B) of Clause (3) of Article 23 be renumbered as new Article 23-A.

The motion was adopted."

416. A reading of the Constituent Assembly debates clearly show that the intention of the framers of the Constitution was that Article 29(2)was to apply to all educational institutions, including minority educational institutions under Article 30.

417. This being the historical background and the intention of the framers, the contextual approach must also be one which gives effect to the minority rights but which does not elevate them into a special or privileged class of citizens. The contextual approach must there fore be that minorities have full rights to establish and administer educational institution at their own costs, but if they choose to take State aid they must then abide by the Constitutional mandate of Article 29(2) and with principles of equality and secularism.

418. The same result follows if well settled principles of interpretation are applied. It is settled law that if the language of the provision,being considered, is plain and unambiguous the same must be given effect to, irrespective of the consequences that may result or arise. It is also settled law that while interpreting provisions of a Statute, if two interpretations are possible, one which leads to no conflict between the various provisions and another which leads to a conflict between the various provisions, then the interpretation which leads to no conflict must always be accepted. As already been seen, the intention of the framers of the Constitution is very clear. The framers unambiguously and unanimously intended that rights given under Article 30(1) could be fully enjoyed so long as the educational institutions were established and administered at their own costs and expense. Once State aid was taken, then principles of equality and secularism, on which our Constitution is based, were to prevail and admission could not be denied to any student on grounds of religion, race, caste,language or any of them.

419. A plain reading of Article 29(2) shows that it applies to "any educational institution" maintained by the State or receiving aid out of State funds. The words "any educational institution" takes within its ambit an educational institution established under Article 30(1). It is to be

remembered that when Article 29(2) [i.e. Article 23(2)] was framed it was part of the same Article which contained what is now Article 30(1). Thus it was clearly meant to apply to Article 30(1) as well. Significantly Article 30 nowhere provides that the provisions of Article 29(2) would not apply to it. Article 30(1) does not exclude the applicability of the provisions of Article 29(2) to educational institutions established under it. A plain reading of the two Articles indicates that the rights given under Article 30(1) can be fully exercised so long as no aid is taken from the State. It is for this reason that Article 30 does not make it compulsory for a minority educational institution to take aid or for the State to give it. All that Article 30(2) provides is that the State in granting aid to educational institutions shall not discriminate against any educational institution on the ground that it is under the management of a minority. In cases where the State gives aid to educational institutions the State would be bound by the Constitutional mandate of Article 29(2) to ensure that no citizen is denied admission into the educational institution on grounds of religion, race, caste, language or any of them. By so insisting the State would not be discriminating against a minority educational institution. It would only be performing the obligation cast upon it by the Constitution of India.

420. This interpretation is also supported by the wording of Article 30(2). Article 30(2) merely provides that the State shall not discriminate on the ground that it is under the management of a minority. To be noted that Article 30(2) does not provide that State shall not in granting aid impose any condition which would restrict or abridge the rights guaranteed under Article 30(1). The framers were aware that when State aid was taken the principles of equality and secularism, which are the basis of our Constitution, would have to prevail. Clearly the framers of the Constitution considered the principle of equality and secularism to be more important than the rights under Article 30(1). Thus in Article 30(2) it was advisedly not provided that rights under Article 30(1) could not be restricted or abridged whilst granting aid. A plain reading of Article 30(2) shows that the framers of the Constitution envisaged that certain rights would get restricted and/or abridged when a minority educational institute chose to receive aid. It must also be noted that when property rights were deleted [by deletion of Article 19(1)(f)] the framers of the Constitution realised that rights under Article 30(1)would get restricted or abridged unless specifically protected. Thus Article 30(1A) was introduced. Article 30(1A), unlike Article 30(2),specifically provides the acquisition of property of a minority educational institute must be in a manner which does not restrict or abrogate the rights under Article 30(1). When the framers so intended they have specifically so provided. Significantly even after Judgments of this Court (set out hereafter) which laid down that Article 29(2)applied to Article 30(1), the framers have not amended Article 30 to provide to the contrary.

421. Even though a plain reading of Articles 29(2) and Article 30leads to no clash between the two Articles, it has been submitted by counsel on behalf of minorities that the right to establish and administer educational institutions be considered an absolute right and that by giving aid the State cannot impose conditions which would restrict or abrogate and/or abridge, in any manner, the right under Article 30(1). It has been submitted that the right to administer educational institutions includes the right to admit students. It has been submitted that the minorities, whether based on religion or language, have a right to admit students of their community. It is submitted that this right is not taken away or abridged because State aid is taken. It is submitted that notwithstanding the plain language of Articles 29(2) and 30 it must be held that the rights under Article 30(1) prevail over Article 29(2).

422. To accept such an argument one would have to read into Article 30(2) words to the effect "state cannot in granting aid lay down conditions which would restrict, abridge or abrogate rights under Article 30(1)" or to read into Article 30(1) words to the effect"notwithstanding the provisions of Article 29(2)". Purposely no such words are used. A clash is sought to be created between Article 30(1)and 29(2) when no such clash exists. The interpretation sought to be given is on presumption that rights under Article 30(1) are absolute. As is set out in greater detail hereafter, every single authority of this Court, for the past over 50 years, has held that the rights under Article 30(1) are subject to restrictions. All counsel appearing for the minority educational institutions conceded that rights under Article 30(1) are subject to general secular laws of the country. If rights under Article 30(1) are subject to other laws of the country it can hardly be argued that they are not subject to a constitutional provision.

423. The interpretation sought to be placed not only creates a clash between Articles 29(2) and 30 but also between Article 30 and Article 15(1). Article 15(1) prohibits the State from discriminating against citizens on grounds only of religion, race, caste, sex, place of birth or any of them. If the State were to give aid to a minority educational institution which only admits students of its community then it would be discriminating against other citizens who cannot get admission to such institutions. Such an interpretation would also lead to clash between Article 30 and Article 28(3). There may be a religious minority educational institute set up to teach their own religion. Such an institute may, if it is unaided, only admit students who are willing to say their prayers. Yet once aid is taken such an institution cannot compel any student to take part in religious instructions unless the student or his parent consents. If Article 30(1) were to be read in a manner which permits State aided minority educational institutions to admit students as per their choice, then they could refuse to admit students who do not agree to take part in religious instructions. The prohibition prescribed in Article 28(2) could then be rendered superfluous and/or nugatory. Apart from rendering Article 28(2)nugatory such an interpretation would set up a very dangerous trend. All minority educational institutions would then refuse to admit students who do not agree to take part in religious instructions. In all fairness to all the counsels appearing for minority educational institutions, it must be stated that not a single counsel argued that Article 28(2) would not govern Article 30(1). All counsel fairly conceded that Article 30(1) would be governed by Article 28(2). One fails to understand how Article 30(1) can be held to be subject to Article 28(2) but not subject to Article 29(2).

424. Accepting such an interpretation would also lead to an anomalous situation. As is being held all citizens have a fundamental right to establish and carry on an educational institution under Article 19(1)(g). An educational institution can also be established and maintained under Article 26(a). An educational institution could also be established under Article 29(1) for purposes of conserving a distinct language, script or culture. All such educational institutions would be governed by Article 29(2). Thus if a religious educational institution is established under Article 26(a) it would on receipt of State aid have to comply with Article 29(2). Similarly an educational institute established for conserving a distinct language, script or culture would,if it is receive State aid, have to comply with Article 29(2). Such institution would also have been established for benefit of their own community or language or script or culture. If such educational institutions have to comply with Article 29(2) it would be anomalous to say that a religion or linguistic educational institution, merely because it is set up by a minority need not comply with Article 29(2). The anomaly would be greater because an educational institute set up under Article 26(a)

would be for teaching religion and an educational institute set up under Article 29(1) would be for conserving a distinct language. On the other hand an educational institute set up under Article 30(1) may be to give general secular education. It would be anomalous to say that an educational institute set up to teach religion or to conserve a distinct language, script or culture has to comply with Article 29(2) but an educational institute set up to give general secular education does not have to comply with Article 29(2). It must again be remembered that Article 30 was not framed to create a special or privileged class of citizens. It was framed only for purposes of ensuring that the politically powerful majority did not prevent the minority from having their educational institute. We cannot give to Article 30(1) a meaning which would result in making the minorities,whether religious or linguistic, a special or privileged class of citizens. We should give to Article 30(1) a meaning which would further the basic and overriding principles of our Constitution viz. equality and secularism. The interpretation must not be one which would create a further divide between citizen and citizen.

425. It has also been submitted that a minority educational institute would have been established only for the purpose of giving education to students of that particular religious or linguistic community. It has been submitted that if Article 29(2) were to apply then the very basis of establishing such an educational institution would disappear once State aid is taken. Whilst considering such a submission one must keep in mind that the desire to establish educational or other institutions for the benefit of students of their own community would be there not only in minority communities. Such a desire would be there in all citizens and communities, whether majority or minority. If the majority communities, whether religious or linguistic, can establish and administer educational institutions for their own community at their own costs why should the position be different for minorities. If an educational institute established by a majority community for members of that community only, takes States aid, it would then lose the right to admit only students of its own community. it would have to comply with the Constitutional mandate of Article 29(2). The position is no different for an educational institute established by a minority. The basic feature of our Constitution is equality and secularism. It follows that the minority cannot be a more privileged class or section of citizen. At the cost of repetition it is again emphasised that Article 30 does not deal with minorities who are economically or socially backward. These are not communities whose children are not capable of competing on merit, e.g. a Tamilian in Tamil competes with others and gets admission on merit. Even when he/she shifts to Maharashtra he/she continues to be able to compete openly and get admission on merit. Merely because a Tamilian shifts to Maharashtra or some other State does not mean that Tamilian becomes a citizen entitled to special privilege or rights not available to other citizens. This was not the purpose or object of Article 30.Article 30 was framed only to ensure that the Maharashtrians, by reason of their being politically powerful, do not prevent the Tamilian from establishing an educational institution at their own cost. Article 20 merely protects the right of the minority to establish and administer an educational institution, i.e. to have the same rights as those enjoyed by majority. Article 30 gives no right to receive State aid. It is for the institution to decide whether it wants to received aid. If it decides to take State aid then Article 30(2) merely provides that the State will not discriminate against it. When State, whilst giving aid, asks the minority educational institute to comply with a constitutional mandate, it can hardly be said that the State is discriminating against that institute. The State is bound to ensure that all educational institutes, whether majority or minority, comply with the constitutional mandate.

426. Another respect to be kept in mind is that in practical terms,throwing open admission to all, does not affect rights under Article 30(1). If the educational institution is for purposes of teaching the religion or language of the concerned minority, then even though admission is thrown open to all very few students of other communities will take admission in such an educational institution. If the educational institution is giving general secular education, then the minority character of that institution does not get affected by having a majority of students from other communities. Even though the majority of students may be from other communities the institution will still be under the management of the minority. Further if the educational institution is a school, then the management will, in spite of Article 29(2), still be able to take a sizable number of students from their own community into the school. Article 29(2) precludes reservations on grounds of religion, race, caste or language. But it does not preclude giving of preference, if everything else is equal. Admission into schools generally are by interview. At this stage there is no common entrance test which determines merit. Undoubtedly children of the minority communities, contemplated by Article 30(1),would be as bright or capable as children of other communities. Thus whilst admitting at this stage preference can always be given to members of their own community so long as some students of other communities are also admitted and denial is not on basis of religion,race, caste, language or any of them. Thus for admissions in schools,Article 29(2) will pose no difficulty to minority institutions. However, Article 29(2) will require, if State aid is taken, that admissions into college, either under graduate or post graduate and admission into professional course, be not denied to any citizen on grounds of religion, race, caste, language or any of them. This would mean that admissions must be on merit from the common entrance test prescribed by the University or State. Here also if two students have equal merit, preference can be given to a student of their own community. Also Article 29(2) does not preclude minority (or even other educational institutions) admitting or denying admission on grounds other than religion, race, caste, language or any of them. Thus e.g. preferential admission could be given to those students who are willing to serve the community or work in a particular region, for a particular period of time after passing out. Also in such cases marks not exceeding 15% can be allotted for interviews. This will ensure that a sufficient number of students of their own community are admitted. More importantly there is no reason to believe that students of these minority communities will not be able to compete on merit. A sizable number will be available on merit also.

427. Most importantly we are interpreting the Constitution. As the language of Articles 29(2) and 30 is clear and unambiguous the Court has to give effect to it, irrespective of the consequences. This is all the more necessary as the same is in consonance with the intention of the framers. Court cannot give an interpretation which creates a clash where none exits. Court cannot add words which the framers purposely omitted to use/add. Courts cannot give an interpretation,not supported by a plain reading, on considerations, such as minority educational institutions not being able to admit their own students. To be remembered that there is no compulsion to receive State aid. As was mentioned during the Constituent Assembly Debates the management can refuse to take aid. But if they choose to take State aid, then even a minority educational institution must abide by the Constitution al mandate of Article 29(2) just as they have to comply with the Constitutional mandate of Article 28(2) and comply with general secular laws of the country.

428. Thus looked at either from the historical point of view and/or the intention of the framers and/or from the contextual viewpoint and/or from principles of interpretation it is clear that Article

29(2) fully applies to Article 30. If a minority educational institute chooses to take State aid, it cannot then refuse to admit students on grounds of religion, race, case, language or any of them.

429. Now let us see whether the principles of "stare Devises" require us to take a different view. A large number of authorities have been cited and one has to consider these authorities.

430. The first case, which was decided as far back as on 9th April,1951, was the case of The State of Madras v. Srimathi Champakam Dorairajan. It is reported in MANU/SC/0007/1951 : [1951]2SCR525 . In this case the State of Madras was maintaining Engineering and Medical Colleges. In those colleges, for many years before the commencement of the Constitution , the seats used to be filled up in a proportion, set forth in what was called "the Communal G.O.". The allocation of seats was as follows:

"Non-Brahmin (Hindus) 6
Backward Hindus 2
Brahmins 2
Harijans 2
Anglo-Indians and Indian Christians 1
Muslims 1"

After the Constitution was framed a Writ Petition under Article 226came to be filed by Srimathi Champakam Dorairajan and one another in the High Court of Madras. She complained that this Communal G.O. affected her fundamental rights, inter alia, under Article 29(2). On behalf of the State it was argued that there was no discrimination and no infringement of fundamental rights. It was argued that it was the duty of the State to take care of and promote educational and economic interest of the weaker section of the people. It was argued that giving preferences and/or reservations did not violate Article 29(2). This argument was repelled and it was held as follows:

"It will be noticed that while Clause (1) protects the language, script or culture of a section of the citizens,Clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in Clause (2)is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under this article. But, on the other hand, if he has the academic qualifications but is refused admission only on ground of religion, race, caste, language or any of them,then there is a clear breach of his fundamental rights.

xxx xxx xxx
xxx xxx xxx

Take the case of the petitioner Srinivasan. It is not disputed that he secured a much larger number of marks than the marks secured by many of the Non-Brahmin candidates and yet the Non-

Brahmin candidates who secured less number of marks will be admitted into six out of every 14 seats but the petitioner Srinivasan will not be admitted into any of them. What is the reason for this denial of admission except that he is a Brahmin and not a Non-Brahmin. He may have secured higher marks than the Anglo-Indian and Indian Christians or Muslim candidates but nevertheless, he cannot get any of the seats reserved for the last mentioned communities for no fault of his except that he is a Brahmin and not a member of the aforesaid communities. Such denial of admission can not but be regarded as made on ground only of his caste.

It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reasons, e.g., (a) they are Brahmins, (b)Brahmins have an allotment of only two seats out of 14and (c) the two seats have already been filled up by more meritorious Brahmin candidates. This may be true so far as these two seats reserved for the Brahmin are concerned but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for so far as those seats are concerned, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom these reservations have been made. The classification in the Communal G.O. proceeds on the basis of the religion, race and caste. In our view, the classification made in the Communal G.O. is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Article29(2). In this view of the matter, we do not find it necessary to consider the effect of Articles 14 or 15 on the specific articles discussed above."

Thus as far back as in 1951 it has been held that Article 29(2) does not permit reservation in favour of any caste, community or class of people. An argument based on the word "only" in Article 29(2), to the effect that admitting students of their own community did not amount to refusing admission on grounds of religion, race, caste, language or any of them was rejected. Undoubtedly, this was a case pertaining to educational institutions maintained by the State. But the interpretation of Article 29(2) would remain the same even in respect of "educational institutions aided by the State". In all such institutions there can be no reservations based on religion, race, caste, language or any of them. The term "any educational Institution" in Article 29(2)would also include a minority educational institution under Article 30.Thus the interpretation of Article 29(2) would remain the same even in respect of a minority educational institution under Article 30(1).

431. In *Champakam Dorairajan's* case the reservations were not just for economically or socially backward communities. There were reservations for Anglo Indians, Indian Christians, Muslims, Brahmins and Non-Brahmins. After this Court struck down the reservation the framers of the Constitution amended Article 15 by adding Article 15(4)which reads as follows:

"15(4). Nothing in this article or in Clause (2) of Article 29shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

Thus when the framers of the Constitution did not want Article 29(2)to apply they have specially so provided. Significantly no such amendment was made in Article 30(1) even though reservations infavour of minority communities was also held to be violative of Article 29(2).

432. In the case of the *State of Bombay v. Bombay Education Society and Ors.* reported in (1955) 1 SCC 568 an Anglo-Indian School,called Barnes High Court at Deolali, received aid from the State of Bombay. The State of Bombay issued a circular order on 6th January,1954 which enjoined that no primary or secondary school could admit to a class where English is used as the medium of instruction, any pupil other than the pupil whose mother tongue was English. This was challenged in a Writ Petition under Article 226 in the High Court of Bombay. The Petition having been allowed, the State filed an Appeal to this Court. This Court held as follows:

"Assuming, however, that under the impugned order a section of citizens, other than Anglo-Indian and citizens of non-Asiatic descent, whose language is English, may also get admission, even then citizens, whose language is not English, are certainly debarred by the order from admission to a School where English is used as a medium of instruction in all the classes. Article 29(2) ex facie puts no limitation or qualification on the expression "citizen". therefore, the construction sought to be put upon Clause 5does not apparently help the learned Attorney-General, for even on that construction the order will contravene the provisions of Article 29(2).

The learned Attorney-General then falls back upon two contentions to avoid the applicability of Article 29(2).In the first place he contends that Article 29(2) does not confer any fundamental right on all citizens generally but guarantees the rights of citizens of minority groups by providing that they must not be denied admission to educational institutions maintained by the State or receiving aid out of the State funds on grounds only of religion, race, caste, language or any of them and he refers us to the marginal note to the article. This is certainly a new contention put forward before us for the first time. It does not appear to have been specifically taken in the affidavits in opposition filed in the High Court and there is not indication in the judgment under appeal that it was advanced in this form before the High Court. Nor was this point specifically made a ground of appeal in the petition for leave to appeal to this Court. Apart from this, the contention appears to us to be devoid of merit. Article 29(1) gives protection to any section of the citizen shaving a distinct language, script or culture by guaranteeing their right to conserve the same. Article 30(1) secures to all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. Now suppose the State maintains an educational institution to help conserving the distinct language, script or culture of section of the citizens or makes grants in aid to an educational institution established by a minority community based on religion or language to conserve their distinct language, script or culture, who can claim the protection of Article 29(2) in the matter of admission into any such institution? Surely the citizens of the very section whose language, script or culture is sought to be conserved by the institution or the citizens who belong to the very minority group which has established and is administering the institution, do not need any protection against themselves and therefore Article 29(2) is not designed for the protection of this section or this minority. Nor do we see any reason to limit Article 29(2) to citizens belonging to a minority group other than the section or the minorities referred to in Article 29(1) or Article 30(1), for the citizens, who do no belong to any minority group, may quite conceivably need this protection just as much as the citizens of such other minority groups. If it is urged that the citizens of the majority group are amply protected by Article 15 and do not require the protection of Article 29(2), then there are several obvious answers to that argument. The language of Article 29(2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15protects all citizens against the State whereas the protection of Article 29(2) extends against the State or anybody who denies the right conferred by it. Further Article 15

protects all citizens against discrimination generally but Article 29(2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind. In the next place Article 15 (SIC) quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29(2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination. The heading under which articles 29 and 30 are grouped together -- namely "Cultural and Educational Rights" -- is quite general and does not in terms contemplate such differentiation. If the fact that the institution is maintained or aided out of State funds is the basis of this guaranteed right then all citizens, Irrespective of whether they belong to the majority or minority groups,are alike entitled to the protection of this fundamental right. In view of all these considerations the marginal note alone, on which the Attorney-General relies, cannot be read as controlling the plain meaning of the language in which Article 29(2) has been couched. Indeed in *The State of Madras v. Srimathi Champakam Dorairajan* MANU/SC/0007/1951 : [1951]2SCR525 this Court has already held as follows:

"It will be noticed that while Clause (1) protects the language, script or culture or a section of the citizens,Clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in Clause (2)is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens."

In our judgment this part of the contention of the learned Attorney-General cannot be sustained."(emphasis supplied)

In this case it was also argued that the word "only" in Article 29(2)had to be given some meaning and that the circular order did not deny citizens admission only on ground of religion, race, caste, language or any of them. It was submitted that the object of the circular order was to secure advancement of Hindi which was ultimately to be the National language. It was submitted that thus there was no denial"only" on the ground of religion, race, caste, language or any of them. It was submitted that the denial was for the purposes of promoting the advancement of the national language and to facilitate imparting of education through the medium of the pupils mother tongue. This argument was repelled in the following terms:

"Granting that the object of the impugned order before us was what is claimed for it by the learned Attorney-General,the question still remains as to how that object has been sought to be achieved. Obviously that is sought to be done by denying to all pupils, whose mother tongue is not English, admission into any School where the medium of instruction is English. Whatever the object, the immediate ground and direct cause for the denial is that the mother-tongue of the pupil is not English. Adapting the language of Lord Thankerton, it may be said that the laudable object of the impugned order does not obviate the prohibition of Article 29(2) because the effect of the order involved an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language. The same principle is implicit in the decision of this

Court in *The State of Madras v. Srimathi Champakam Dorairajan* MANU/SC/0007/1951 : [1951]2SCR525 . There also the object of the impugned communal G.O. was to advance the interest of educationally backward classes of citizens but, that object notwithstanding, this Court struck down the order as unconstitutional because the *modus operandi* to achieve that object was directly based only on one of the forbidden grounds specified in the article. In our opinion the impugned order offends against the fundamental right guaranteed to all citizens by Article 29(2)."

It may be mentioned, even though not relevant for the purposes of this judgment, that in this case it has also been submitted that the rights under Article 30(1) are only for the purposes of conserving language, script or culture as set out in Article 29(1). This argument was also repelled by this Court.

433. Thus, as far back in 1955, a Constitution Bench of this Court has held that Article 29(2) is applicable to Article 30. It has been held that even in a minority educational institution all citizens of India are entitled to admission. It has been held that a citizen cannot be denied admission in a minority educational institution on ground "only" of religion, race, caste, language or any of them. To be noted that one of the petitions was from the Gujarati Hindu community and she was seeking admission into an Anglo-Indian School. Her right to be admitted was upheld. It has been categorically held that Article 29(2)applied to an Article 30 educational institute. The framers of the Constitution did not and have not amended the Constitution to provide otherwise.

434. In *Re The Kerala Education Bill, 1957* reported in MANU/SC/0029/1958 : [1959]1SCR995 the President of India made a Reference under Article 143(1) of the Constitution of India for obtaining opinion of this Court upon certain questions relating to the constitutional validity of some of the provisions of the Kerala Education Bill which had been Passed by the Kerala Legislative Assembly, but had been reserved by the Governor for consideration of the President of India. The questions which were referred to this Court for consideration were as follows:

"(1) Does Sub-clause (5) of Clause 3 of the Kerala Education Bill, read with Clause 36 thereof, or any of the provisions of the said sub-clause, offend Article 14 of the Constitution in any particulars or to any extent?

(2) Do Sub-clause (5) of Clause 3, Sub-clause (3) of Clause8 and Clauses 9 to 13 of Kerala Education Bill, or any provision thereof, offend Clause (1) of Article 30 of the Constitution in any particulars or to any extent.

(3) Does Clause 15 of the Kerala Education Bill, or any provisions thereof, offend Article 14 of the Constitution in any particulars or to any extent?

(4) Does Clause 33 of the Kerala Education Bill, or any provisions thereof, offend Article 226 of the Constitution in any particulars or to any extent?"

435. Only question No. 2 is relevant for our purposes. Whilst answering question No. 2 this Court, inter alia, observed as follows:

"Re. Question 2: Articles 29 and 30 are set out in Part III of our Constitution which guarantees our fundamental rights. They are grouped together under the sub-head"Cultural and Educational Rights". The text and the marginal notes of both the Articles show that their purpose is to confer those fundamental rights on certain sections of the community which constitute minority communities. Under Clause (1) Article 29 and section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. It is obvious that a minority community can effectively conserve its language, script or culture by and though educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Article 30(1)which has hereinbefore been quoted in full. This right,however, is subject to Clause 2 of Article 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste,language or any of them.

xxx xxx xxx
xxx xxx xxx

The second proviso imposes the condition that at least 40per cent of the annual admissions must be made available to the members of communities other than the Anglo-Indian community. Likewise Article 29(2) provides, inter alia,that no citizen shall be denied admission into any educational institution receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. These are the only constitutional limitations to the right of the Anglo-Indian educational institutions to receive aid. Learned counsel appearing for two Anglo-Indian schools contends that the State of Kerala is bound to implement the provisions of Article 337. Indeed it is stated in the statement of case filed by the State of Kerala that all Christian schools are aided by that State and, therefore,the Anglo-Indian schools, being also Chiristian schools,have been so far getting from the State of Kerala the grant that they are entitled to under Article 337. Their grievance is that by introducing this Bill the State of Kerala is now seeking to impose besides the constitutional limitation smentioned in the second proviso to Article 337 and Article 29(2), further and more onerous conditions on this grant to the Anglo-Indian educational institutions although their constitutional right to such grant still subsist." (emphasis supplied)

436. In this case it was argued on behalf of the State that as the minority instate received State aid it was bound, by virtue of Article 29(2), to admit students of all communities and thus did not retain its minority character. That Article 29(2) applied to a minority educational institute was not denied. The argument that, it lost its minority character because it admitted students of other communities, was repelled in the following terms.

"By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community. In our opinion, it is not possible to read this condition into Article 30(1) of the Constitution."

Thus even in this case it has been accepted and held that Article 26(2)applies to minority educational institutions established under Article 30. It has been held that merely because students of other communities are admitted, the institute does not lose its minority character. In this case it was also held that State can prescribe reasonable regulations. In this case regulations which provided for qualifications of teachers and which provided for State Public Service Commission to select teachers in aide schools were upheld. Thus even in this case it is accepted that Article 29(2) would govern Article 30(1).

437. In Rev. Sidharjbahi Sabhai v. State of Bombay MANU/SC/0076/1962 : [1963]3SCR837 , the petitioners belonged to the United Church of Northern India. They maintained educational institutions primarily for the benefit of the Christian community. Admittedly these institutions did not receive State aid. therefore, the question of Article 29(2) and its applicability to Article 30 did not arise. On the contrary (as is set out on page 840 of the Report) it was an admitted position that these institutions did not deny admissions to students belonging to other communities. The Government of Bombay issued an order directing all private training colleges to reserve 60% of the seats for trainee teachers of the schools maintained by the Board. It was held that this Order violated rights under Article 30. All observations made in this case are in this context. They cannot be drawn out of context to hold that even where a minority institute receives aid the Constitutional mandate of Article 29(2) would not apply. In this case also it is held that the rights under Article 30(1) are subject to reasonable restrictions and regulations. It was held that restrictions in the interest of efficiency, discipline, health, sanitation, public order etc. could be imposed.

438. In *Rev. Father W. Proost v. State of Bihar* MANU/SC/0248/1968 : [1969]2SCR73 , the petitioners maintained St. Xavier's College which was affiliate to the Patan University. With effect form 1st March, 1962Section 48-A was introduced. Under this Section a University Service Commission was established for affiliated colleges. Sub-clause (e) of Section 48-A provided that appointments, dismissals, removals,termination of service or education in rank teachers of an affiliated college should be made by the Governing body of the college on there commendation of the Commission. Further, Sub-clause (11) provided that all disciplinary actions could be taken only in consultation with the Commission. The petitioners challenged the virus of the provision and claimed that it affected their rights under Article 30(1) of the Constitution. Whilst the Petition was pending in this Court; Section 48-B was introduced in the Bihar State Universities Act, which provided that appointments, dismissals, removals,termination of service or education in rank of teachers or disciplinary measures could only be taken with the approval of the Commission and the Syndicate of the University. This was also challenged. Thus in this case the interplay of Sections 29(2) and 30(1) did not come into questions at all. In this case it was an admitted position that the college was open to non-Catholics also. One of the arguments raised on behalf of the State was that since the admissions were not reserved only for students of the Jesuits community the college did not qualify for protection under Article 30(1). This argument was negatived by holding that merely because members of other communities were admitted to the institution did not mean the institution lost its minority character. This case thus shows that even if members of other community are admitted into the institution the institution would still remain a minority institution which is under the management of the minority.

439. In *Rev. Bishop S.K. Patro v. State of Bihar* MANU/SC/0071/1969 : [1970]1SCR172 , an educational institute was started by a Christian with the help of funds received from London

Missionary Society. The question was whether the institute was not entitled to protection of Article 30(1) merely because funds were obtained from United Kingdom and the management was carried on by some persons who may not have been born in India. This Court held that rights under Article 29 could only be claimed by Indian citizens, but Article 30 guarantees the rights of minority. It was held that the said Article does not refer to citizenship as the qualification for members of the minority. This case therefore does not deal with the question of the interplay between Articles 29(2) and 30(1).

440. In the case of *State of Kerala v. Very Rev. Mother Provincial* reported in MANU/SC/0065/1970 : [1971]1SCR734 the Constitutional validity of Sections 48, 49, 53, 56, 58 and 63 of the Kerala University Act was challenged as violation the rights under Section 30(1). In this case there is no discussion regarding the effect of Article 29(2) on Article 30. In this case also it was held that rights under Article 30(1) are subject to reasonable restrictions.

441. The case of *D.A.V. College v. Punjab* reported in MANU/SC/0038/1971 : (1971) Supp.SCR 677does not deal with Article 29(2) and its effect on Article 30.In this case Punjabi was made the sole medium of instruction and examination under the Punjab University Act. It was held that this violated the rights under Article 29(1) as well as Article 30(1)inasmuch as the right to have an educational institution of a choice includes the right to have a choice of the medium of instruction also.

442. In the second case of *D.A.V. College v. State of Punjab* reported in MANU/SC/0039/1971 : (1971) Supp. SCR 688 the Dayan and Anglo Vedic College Trust was formed to perpetuate the memory of the founder of the Arya Samaj. It ran various institutions in the country. The collages managed and administered by the Trust were, before the Punjab Reorganisation Act,affiliated to the Punjab University. After the reorganisation of the State of Punjab in 1969, the Punjab Legislative passed the Guru Nank University (Amritsar) Act (21 of 1969). Colleges in the districts specified ceased to be affiliated to the Punjab University and were to be associated with and admitted to the privileges of the new university. Sub-section (2) of Section 4 of the Act provided that the university "shall make provision for study and research on the life and teaching of Guru Nanka and their cultural and religious impact in the context of Indian and World Civilisation; and Sub-section (3) enjoined the University "to promote studies to provide for research in Punjabi language and literature and to undertake measures for the development of Punjabi language, literature and culture". By Clause2(1)(a) of the Statutes framed under the Act, the colleges were required to have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate including, among others, two representatives of the University and the principal of the College. Under Clause (1)(3) if these requirements were not complied with the affiliation was liable to be withdrawn. By Clause 18 the staff initially appointed were to be approved by the Vice Chancellor and subsequent changes had to be reported to the University for the Vice-Chancellor's approval. And by Clause 18 non-government colleges were to comply with the requirements laid down in the ordinance governing service and conduct of teachers. It was held that Clause2(1)(a) interfered with the right of the religious minority to administer their educational institutions, but that Clause 18 did not suffer from the same vice. It was held that ordinances prescribing regulations governing the conditions of service and conduct of teachers must be considered to be one enacted in the larger interest of the institution to ensure their efficiency and excellence. It was similarly held that Sub-sections (2) and (3) of Section 4 do not offend any of

the rights under Articles 29(1) and 30(1). It must be observed that, whilst dealing with the Articles 29 and 30, this Court observed as follows:

"It will be observed that Article 29(1) is wider than Article 30(1), in that, while any Section of the citizens including the minorities, can invoke the rights guaranteed under Article 29(1), the rights guaranteed under Article 30(1) are only available to the minorities based on religion or language. It is not necessary for Article 30(1) that the minority should be both a religious minority as well as linguistic minority. It is sufficient if it is one or the other or both. A reading of these two Articles together would lead us to conclude that a religious or linguistic minority has aright to establish and administer educational institutions of its choice for effectively conserving its distinctive language,script or culture, which right however is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. This right is further subject to Clause (2) of Article 29 which provides that no citizen shall be denied admission into any educational institution which is maintained by the State or receives aid out of State funds, on grounds only of religion, race, caste, language or any of them." (emphasis supplied)

443. Thus, even in 1971, this Court has held that Article 29(2)governs Article 30(1). The law laid down in *Champakam Dorairajan's*case, in *Bombay Education Society's* case and in *Kerala Education Bill's*case has been reaffirmed. Till this date no contrary view has been taken. Not a single case has held that rights under Article 30(1) would not be governed by Article 29(2).

444. The authority on which strong reliance has been placed by the counsel of the minority is *St. Xaviers College's* case (supra). St. Xaviers College was affiliated to the Gujarat University. A resolution was Passed by the Senate of the University that all instruction,teaching and training in courses of studies in respect of which the University was competent to hold examinations shall be conducted by the university and shall be imported by teachers of the University. Section 5 of the Act provided that no educational institution situated within the University shall, save with the sanction of the State Government, be associated in any way with or seek admission to any privilege of any other University established by law. Section 33A(1)(a)of the Act provided that every College other than a Government College or a College maintained by the Government, shall be under the management of a governing body which included among others, the Principal of the College and a representative of the University nominated by the Vice-Chancellor. Section 33A(1)(b)(I) provided that in the case of recruitment of the Principal, a selection committee is required to be constituted consisting of, among others, a representatives of the University nominated by the Vice-Chancellor and (ii) in the case of selection of a member of the teaching staff of the College a selection committee consisting of the Principal and are presentative of the university nominated by the Vice-Chancellor. Sub-section (3) of the Section stated that the provisions of Sub-section(1) of Section 33A shall be deemed to be a condition of affiliation of every college referred to in that sub-section. Section 39 provided that within the University area all post-graduate instruction, teaching and training shall be conducted by the University or by such affiliated College or institution and in such subjects as may be prescribed by statutes. Section 40(1) enacted that the Court of the University may determine that all instructions, teaching and training in courses of studies in respect of which the University is competent to hold examinations shall be conducted by the University and shall be imparted by the teachers of the University. Sub-section (2) of Section40 stated that the State Government shall issue a notification declaring that the provisions of Section 41 shall come into force on such date as may be specified in the notification.

Section 41(1) of the Act stated that all colleges within the University area which are admitted to the privilege of the university under Section 5(3) and all colleges within the said area which may hereafter be affiliated to the University shall be constituent colleges of the University. Sub-section(4) stated that the relations of the constituent colleges and other institutions within the University area shall be governed by statutes to be made in that behalf. Section 51A(a)(b) enacted that no member of the teaching other academic and non-teaching staff of an affiliated college shall be dismissed or removed or reduced in rank except after an enquiry in accordance with the procedure prescribed in Clause (a)and the penalty to be inflicted on him is approved by the Vice-Chancellor or any other Officer of the University authorised by the Vice-Chancellor in this behalf. Similarly Clause (b) of Sub-section (2)required that such termination should be approved by the Vice-Chancellor or any officer of the University authorised by the Vice-Chancellor in this behalf. Section 52A(1) enacted that any dispute between the governing body and any member of the teaching and other staff shall, on a request of the governing body or of the member concerned be referred to a tribunal of arbitration consisting of one member nominated by the governing body of the college, one member nominated by the member concerned and an umpire appointed by the Vice-Chancellor. The Petitioner Society contended that they had a fundamental right to establish and administer educational institutions of their choice and that such a right included the right of affiliation. They therefore challenged the constitutional validity of the above Sections. It is in this context that various observations have been made. These observations cannot be drawn out of context. In this case it was an admitted position, as set out by Justice Khanna, that children of all classes and creeds were admitted to the college provided they met the qualifying standards. Thus the College never claimed the right to only admit students of its own community. It acknowledged the fact that it had to admit students of all classes and creeds. The majority Judgment, therefore, did not deal with the question or interplay between Articles 29(2) and 30. Even though itdid not deal with the interplay of Articles 29(2) and 30, it was clear that reasoning of the majority is based on the fact that the College did not deny admissions to the students of other communities. This is clearly indicated by the test which had been laid down by the majority. This test reads as follows:

"Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."(emphasis supplied)

Thus it is held by the majority that the institute is to be made an effective vehicle of education not just for the minority community but also for other persons who resort to do. This indicates that the majority made the observations on the understanding that admissions were not restricted only to students of minority community once State aid was received. This aspect is clearly brought out in the Judgment of Justice Dwivedi who, whilst dealing with the various provisions of the Constitution , held as follows:

"A glance at the context and scheme of Part III of the Constitution would show that the Constitution makers did not intend to confer absolute rights on a religious or linguistic minority to establish and administer educational institutions. The associate Article 29(2) imposes onerestriction on the right in Article 30(1). No religious or linguistic minority establishing and administering an educational institution which receives aid from the State funds shall deny admission to any citizen to the institution on grounds only of religion, race, caste, language or any of them. The right to admit a

student to an educational institution is admittedly comprised in the right to administer it. This right is partly curtailed by Article 29(2).

The right of admission is further curtailed by Article 15(4) which provides an exception to Article 29(2). Article 15(4) enables the State to make any special provision for the advancement of any socially and educationally backward class of citizens or for the scheduled caste and scheduled tribes in the matter of admission in the educational institutions maintained by the State or receiving aid from the State.

Article 28(3) imposes a third restriction on the right in Article 30(1). It provides that no person attending any educational institution recognized or receiving aid by the State shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto. Obviously, Article 28(3) prohibits a religious minority establishing and administering an educational institution which receives aid or is recognized by the State from compelling any citizen reading in the institution to receive religious instruction against his wishes or if minor against the wishes of his guardian. It cannot be disputed that the right of a religious minority to impart religious instruction in an educational institution forms part of the right to administer the institution. And yet Article 28(3) curtails that right to a certain extent.

To sum up Articles 29(2), 15(4) and 28(3) place certain express limitations on the right in Article 30(1).There are also certain implied limitations on this right. The right should be read subject to those implied limitations." (emphasis supplied)

Thus even in this authority the principle that Article 29(2) applies to Article 30(1) has been recognized and upheld. This case also holds that reasonable restrictions can be placed on the rights under Article 30(1) subject to the test set out hereinabove.

445. In the case of *Gandhi Faizeam College v. Agra University* reported in (1975) 3 SCR 810 the minority college was affiliated to the University of Agra. It applies for permission to start teaching in certain courses of study. The University, as a condition of permitting the additional subjects, insisted that the Managing Committee must be re-constituted in line with Statute 14-A which provided that the principal of the College and senior-most staff member should be part of the Managing Committee. The Petitioners filed a Writ Petition in the High Court challenging the imposition of such a condition on the ground that it was violative of their rights under Article 30(1). The High Court dismissed the Writ Petition. therefore the Petitioners came to this Court. The majority of Judges upheld the order of the High Court, inter alia, on the ground that the right under Article 30(1)is not the absolute right and that it is a right which can be restricted. After considering the various authorities (including some of those setout hereinabove) it was held that reasonable regulations are desirable,necessary and constitutional, provided they shape but not cut out of shape the individual personality of the minority. It was held as follows:

"In all these cases administrative autonomy is imperilled transgressing purely regulatory limits. In our case autonomy is virtually left intact and refurbishing, not restructuring, is prescribed. The

core of the right is not gouged out at all and the regulation is at once reasonable and calculated to promote excellence of the institution - a text book instance of constitutional conditions."

Thus a condition that the Managing Committee be reconstituted is upheld. To be noted that the directly affects the right of administration. Now compulsory the principal and one of the staff members would be part of the Managing Committee. Yet it has been held that this is not violative of rights under Article 30(1).

446. In the case of *St. Stephen's College v. University of Delhi* MANU/SC/0319/1992 : AIR1992SC1630, one of the questions was the applicability of Article 29(2) to Article 30(1). Even in this case it has been accepted that Article 29(2) applies to Section 30(1). However,the majority of the Judges, after noting that Article 29(2) applies to Article 30(1), sought to compromise and/or strike a balance between Articles 29(2) and 30(1). They therefore prescribed a ratio of 50% to be admitted on merits and 50% to be admitted by the College from their own community. All Counsel, whether appearing for the minorities or for the States/local authorities attacked this judgment and submitted that it is not correct. Of course Counsel for the minorities were claiming a right to admit students of their own community even to the extent of 100%. On the other hand the submission was that once State aid is taken Article 29(2) applied and not even a single student could be admitted on basis of religion, race,caste, language or any of them. Thus all counsel attacked the judgment as being not correct. In matters of interpretation, there can be no compromise. As stated above if the language and meaning are clear then Courts must give effect to it irrespective of the consequence. With the greatest of respect to the learned Judges concerned, once it was held that Article 29(2) applied to Article 30,there was no question of trying to balance rights or to seek a compromise.

447. Justice Kasliwal dissented from the majority view. It must be noted that in *St. Stephen's case*, in his minority judgment, he has held that Article 29(2) governs Article 30(1) and that if the minority educational institute chooses to take aid it must comply with the Constitution al mandate of Article 29(2). The Judgment in *St. Stephens case* is of recent origin. It therefore cannot form the basis for applying the principles of "State Devises".

448. Thus, from any point of view i.e. historical or contextual or on principles of pure interpretation or on principles of "stare Devises" the only interpretation possible is that the rights under Article 30(1) are conferred on minorities to establish and administer educational institutions of their choice at their own cost. The right is a special right which is given by way of protection so that the majority, which is politically powerful, does not prevent the minorities from establishing their educational institutions. This right was not created because the minorities were economically and socially backward or that their children would not be able to compete on merit with children of other communities. This right was not conferred in order to create a special category of the citizens. What has been granted to them is a right which was equal to the rights enjoyed by the majority community,namely, to establish and administer educational institutions of their choice at their own cost. As the institution was to be established and maintained at their own expense no right to receive aid has been conferred on the minority institute. All that Article 30(2) provides is that the State while granting aid would not discriminate merely on the ground that an educational institute was under the management of a minority. Article 30(2) has been so worded as the framers were aware that once State aid was taken some aspects of the right of administration would have to be

compromised and given up. The minority educational institute have a choice. They need not take State aid. But if they choose to take State aid then they have to comply with constitutional mandates which are based on principles which areas important as if not more important than the rights given to the minorities. Our Constitution mandates that the State cannot discriminate on grounds only of religion, race, caste, language or any of them. Our Constitution mandates that all citizens are equal and that no citizen can be denied admission into educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Thus if State aid is taken the minority educational institution must then not refuse admission to students of other communities on any of those grounds. In other words, they cannot then insist that they would admit students only of their community. Of course, as stated above, preferences could always be given to students of their own community. But preference necessarily implies that all other things are equal, i.e. That on merit the student of their community is equal to the merit of the student of other community. As stated above, in para 37, in schools the minority community would have a larger amount of leeway and so long as the school admits a sufficient number of outsiders Article 29(2)would not be violated if the refusal is not made on the basis of the religion, race, caste, language or any of them. Of course, at the under-graduate and post-graduate stages merit would have to be the criteria. At these stages there are common entrance examinations by which inter se merit can be assessed. But even here, the minority educational institute can admit students of its own community on grounds like those set out in para 37 above. They could give some preference to students coming from their own schools. There could be inter views wherein not more than 15% marks can be allotted. Students of their community will be able to compete on merit also. All these would ensure that a sufficient number of students of their own community receive admissions. But the minority institute, once it receives State aid, cannot refuse to abide by the constitutional mandate of Article 29(2). It would be paradoxical to unsettle settled law at such a late stage. It would be paradoxical to hold that the rights under Article 30(1) are subject to municipal and other laws, but that they are not subject to the constitutional mandate under Article 29(2). It would be paradoxical to held that Article 30(1) is subject to Article 28(3) but not to Article 29(2). It must be remembered that when Article 29(2) was introduced it was part of the same Article (viz. Article 23) which also included what is now Article 30(1). Not only the Constituent Assembly Debates but also the fact that they were part of the same Article shows that Article 29(2) was intended by the framers of the Constitution to apply even to institutions established under Article 30(1). Thus Article 29(2) governs educational institutions established under Article 30(1). The language is clear and unambiguous. It is clear that Article 30(1) has full play so long as the educational institution is established and maintained and administered by the minority at their own costs. Article 30(2) purposely and significantly does not make taking or granting of aid compulsory. The minority educational institution need not take aid. However, it is chooses to take aid then it can hardly claim that it would not abide by the Constitutional mandate of Article 29(2). Once the language is clear and unambiguous full effect must be given to Article 29(2)irrespective of the consequences. This can be the only interpretation. The only interplay between Articles 29(2) and 30(1) is that once State aid is taken, then students of all communities must be admitted. In others words, no citizen can be refused admission on grounds of religion, race, caste or creed or any of them. Reserving seats for students of one's own community would in effect be refusing admission on grounds of religion, race, caste, or creed. As there is no conflict the question of balancing rights under Article 30(1) and Article 29(2) of the Constitution does not arise. As stated by the US Supreme Court in the case of *San Antonio Independent School District v.Demerit P. Rudriguez*

(411 US 1), it is not the province of this Court to create substantive Constitutional rights in the name of guaranteeing equal protection.

449. In view of above discussion we answer the questions as follows:

Q.1. What is the meaning and content of the expression "minorities"in Article 30 of the Constitution of India?

A. Linguistic and religious minorities are covered by the expression"minority" under Article 30 of the Constitution. Since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered state wise.

449A. Q.2. What is meant by the expression "religion" in Article 30(1)? Can the followers of a sect or denomination of a particular religion claim protection under Article 30(1) on the basis that they constitute a minority in the State, even though the followers of that religion are in majority in that State?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

449-B. Q.3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to are ligious or linguistic minority?

A. This question need not be answered by this Bench, it will be dealt with by a regular Bench.

449-C. Q.3(b) To what extent can professional education be treated as a matter coming under minorities rights under Article 30?

A. Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice", indicates that professional educational institutions would be covered by Article 30.

449-D. Q.4. Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated?

A. Admission of students to unaided minority educational institutions,viz., Schools where scope for merit based selection is practically nil, cannot be regulated by the State or the University (except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards).

Right to admit students being an essential facet of right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the

University may not be entitled to interfere with that right in respect of unaided minority institutions provided however that the admission to the unaided educational institutions is on transparent basis and the merit is the criteria. The right to administer, not being an absolute one, there could be regulator measures for ensuring educational standards and maintain expectance thereof and it is more so, in the matter of admission to undergraduate Colleges and professional institutions.

The moment aid is received or taken by a minority educational institution it would be governed by Article 29(2) and would then not be able to refuse admission on grounds of religion, race, caste, language or any of them. In other words it can not then give preference to students of its own community. Observance of inter se merit amongst the applicants must be ensured. In the case of aided professional institutions, it can also be stipulated that passing of common entrance test held by the State agency is necessary to seek admission.

449-E. Q.5(a) Whether the minority's rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?

A. A minority institution may have its own procedure and method of admission as well as selection of students, but such procedure must be fair and transparent and selection of students in professional and higher educational colleges should be on the basis of merit. The procedure adopted or selection made should not tantamount to mal-administration. Even an unaided minority institution, ought not to ignore merit of the students for admission, while exercising its right to admit students to the colleges, aforesaid, as in that event. The institution will fail to achieve excellence.

449-F. Q.5(b) Whether the minority institutions' right of admission of students and to lay down procedure and method of admission, if any,would be affected in any way by the receipt of State aid?

A. Further to what is stated in answer to question No. 4, it must be stated that whilst giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit,coupled with the reservation policy of the state. The merit maybe determined either through a common entrance test conducted by the University or the Government followed by counselling, or on the basis of an entrance test conducted by individual institutions - the method to be followed is for the university or the government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the government or the university to provide that consideration should be shown to the weaker sections of the society.

449-G. Q.5

(c) Whether the statutory Provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of state employees, teachers and Principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets administration is concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as conditions of affiliation to an University or Board have to be complied with, but in the matter of day-to-day Management, like appointment of staff, teaching and non-teaching and administrative control over them, the Management should have the freedom and there should not be any external controlling agency. However, a rational procedure for selection of teaching staff and for taking disciplinary action has to be evolved by the Management itself. For redressing the grievances of such employees who are subjected to punishment or termination from service, a mechanism will have to be evolved and in our opinion,appropriate tribunals could be constituted, and till then, such tribunal could be presided over by a Judicial officer of the rank of District Judge. The state or other controlling authorities,however, can always prescribe the minimum qualifications,salaries, experience and other conditions bearing on the merit of an individual for being appointed as a teacher of an educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with overall administrative control of Management over the staff, Government/University representative can be associated with the selection committee and the guidelines for selection can be laid down. In regard to un-aided minority educational institutions such regulations,which will ensure a check over unfair practices and general welfare, of teachers could be framed.

There could be appropriate mechanism to ensure that no capitation fee is charged and profiteering is not restored to.

The extent of regulations will not be the same for aided and un-aided institutions.

449-H. Q.6(a) Where can minority institution be operationally located? Where a religious or linguistic minority in State 'A' establishes an educational institution in the said State, can such educational institution grant preferential admission/reservations and other benefits to members of the religious/linguistic group from other States where they are non-minorities?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

449-I. Q.6(b) Whether it would be correct to say that only the members of that minority residing in State 'A' will be treated as the members of the minority vis-a-vis such institution?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

449-J. Q.7. Whether the member of a linguistic non-minority in one State can establish a trust/society in another State and claim minority status in that State?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

449-K. Q.8 Whether the ratio laid down by this Court in the St. Stephen's case (St. Stephen's College v. University of Delhi MANU/SC/0319/1992 : AIR1992SC1630 is correct? If no, what order?

A. The ratio laid down in St. Stephen's College case is not correct. Once State aid is taken and Article 29(2) comes into play, then no question arises of trying to balance Article 29(2) and 31.Article 29(2) must be given its full effect.

449-L. Q.9 Whether the decisions of this Court in Unni Krishnan J.P. v. State of A.P. MANU/SC/0333/1993 : [1993]1SCR594 : [1993]1SCR594 (except where it holds that primary education is a fundamental right) and the scheme framed there under require reconsideration/modification and if yes, what?

A. The scheme framed by this Court in Unni Krishnan's case and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

449-M. Q.10 Whether the non-minorities have the right to establish and administer educational institution under Articles 21 and 29(1)read with Article 14 and 15(1), in the same manner and to the same extent as minority institutions? and

449-N. Q.11 What is the meaning of the expressions "Education" and"Educational Institutions" in various provisions of the Constitution ? Is the right to establish and administer educational institutions guaranteed under the Constitution?

A. The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level up to the post-graduate level. It includes professional education. The expression "educational institutions"means institutions that impart education, where "education" is as understood hereinabove.

450. The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Article 19(1)(g) and 26, and to minorities specifically under Article 30.

451. All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right will be subject to the provisions of Articles 19(6) and 26(a).However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment.

Back to Index

MANU/SC/1377/2015

Neutral Citation: 2015/INSC/886

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) Nos. 48, 185, 150, 66/2014 and 1215/2011 (Under Article 32 of the Constitution of India)

Decided On: 02.12.2015

Appellants: Union of India (UOI) **Vs.** Respondent: V. Sriharan and Ors.

Hon'ble Judges/Coram:

H.L. Dattu C.J.I., F.M. Ibrahim Kalifulla, Pinaki Chandra Ghose, Abhay Manohar Sapre and U.U. Lalit, JJ.

Subject: Criminal

Relevant Section:

Code of Criminal Procedure, 1973 (CrPC) - Section 433A; Code of Criminal Procedure, 1973 (CrPC) - Section 432; Code of Criminal Procedure, 1973 (CrPC) - Section 435(1)

Disposition:
Disposed of

Case Note:

Constitution - Executive power of centre and state - Articles 72(1)(b), 73(1)(a), Article 161 and 162 of the Constitution of India; Sections 432 and 433 of the Code of Criminal Procedure, 1973 - Appropriate government - Cases concerning murder under purview of State executive - Tamil Nadu accorded authority to investigate assassination of Prime Minister Rajiv Gandhi to Central Government - Investigation conducted by Central Bureau of Investigation - Respondents convicted and sentenced to death - Death sentence later commuted to life imprisonment - Mercy petitions before Governor of Tamil Nadu and President of India unsuccessful - Tamil Nadu government issued statement considering release of Respondents - Whether the Central or State government is the Appropriate Government for the purpose of Section 432 CrPC - Whether on the facts the State or Central government has primacy on

matters under List III of the Seventh Schedule to the Constitution - Whether Appropriate Government can exercise power under Section 432 CrPC after exercise of power under Article 72 and 161 of the Constitution

Criminal - Life imprisonment - Sections 45 and 55 of the Indian Penal Code, 1860 - Respondents' death sentence commuted to life imprisonment - Duration of imprisonment beyond 14 years - Whether courts can impose life imprisonment for over 14 years - Whether such imprisonment can be placed beyond remission - Whether court can rely on the decision in Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka

Criminal - Grant of remission - Sections 432, 433 and 435 of the Code of Criminal Procedure, 1973 - Government of Tamil Nadu initiate process to remit Respondents - Whether power of remission under Section 432 can be exercised suo moto - Whether the expression 'Consultation' in Section 435(1) CrPC implies 'Concurrence'

Civil - Maintainability of petition - Article 32 Constitution of India - Whether substantial questions of law raised constitutional concerns - Whether the petition is maintainable under Article 32 of the Constitution

Facts

On 21.05.1991 Rajiv Gandhi, former Prime Minister of India was assassinated by a human bomb at Sriperumbudur in Tamil Nadu. Fifteen others also died and forty three suffered injuries. The incident was recorded at the local police station. On 22.05.1991 a notification was issued by Governor of Tamil Nadu under Section 6 of Delhi Special Police Establishment Act, 1946 extending powers and jurisdiction of the members of the Delhi Police to the whole of Tamil Nadu for investigation in relation to the crime. Another notification dated 23.05.1991 by Central Government under Section 5 read with Section 6 of the Delhi Special Police Establishment Act, 1946 extended such powers and jurisdiction to the whole of Tamil Nadu for investigation. Persons were arrested, charged and tried, with all being convicted and sentenced to death. Trial court's reference to the High Court for the same concluded with death penalties confirmed for some, while others' sentences were altered to imprisonment. After various legal proceedings, sentence of another convict, Nalini, was altered from one of death to that of life imprisonment. Remaining convicts', Respondents, mercy petitions to Governor of Tamil Nadu were rejected on 27.10.1999. Such was challenged before Madras High Court, which order reconsideration of mercy petitions. Upon reconsideration Nalini's mercy petition was allowed while others were rejected. Further mercy petitions to the President of India were also rejected. Subsequent petitions to courts resulted in commuting death sentences to life imprisonment.

Government of Tamil Nadu proposed remitting sentence of life imprisonment of convicts, having served 23 years in prison. Central Government was consulted with, as required under the Code of Criminal Procedure. Petitions were filed before the Supreme Court seeking refrain on Tamil Nadu from releasing the convicts. The Court order status quo be maintained and a Referral Order was passed formulating and referring questions for the Constitution Bench. Hence, the present reference. Following are the questions framed:

1) Whether imprisonment for life in terms of Section 53 read with Section 45 IPC meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether principles enunciated in Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of Fourteen years and to put that category beyond application of remission?

2) Whether the "Appropriate Government" is permitted to exercise the power of remission Under Section 432 or 433 CrPC after the parallel power has been exercised by the President under Article 72 of the Constitution or the Governor under Article 161 or by this Court in its Constitutional power Under Article 32 as in this case?

3) Whether Section 432(7) CrPC gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is co-extensive?

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

5) Whether there can be two Appropriate Governments in a given case under Section 432(7) CrPC?

6) Whether suo motu exercise of power of remission under Section 432(1) CrPC is permissible in the scheme of the section, if yes, whether the procedure prescribed in Sub-clause (2) of the same Section is mandatory or not?

7) Whether the term "'Consultation'" stipulated in Section 435(1) CrPC implies "'Concurrence'"?

Held,

1. Answer to questions referred would involve substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162 of the Constitution, various Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of the IPC and CrPC and serious public interest would arise for consideration. Reference was not to be rejected on the narrow technical ground of maintainability.[5]

2. In State of Madhya Pradesh v. Ratan Singh and ors., the court had followed the law laid down in Gopal Vinayak Godse v. The State of Maharashtra and Ors. and held that: "A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure". Along with Section 53 read with Section 45 IPC, it affirmed the legal position that life imprisonment only means the entirety of the life unless it is curtailed by remissions granted under the CrPC by the Appropriate Government or under Articles 72 and 161 of the Constitution by the

Executive Head, the President of India or Governor of the State.[55],[57] and[61]

3. Relying on legal precedent laid down by the Supreme Court and the principles relayed in Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka, the Court determined that in exceptional cases death penalty altered to life sentence would only mean the rest of one's life span. Therefore, to ensure that such punishment imposed, legally provided for in the IPC read with the CrPC, to operate without any interruption the inherent power of the Court concerned should empower it in public interest to make certain that such punishment imposed will operate as imposed by stating that no remission or other such liberal approach should not come into effect to nullify such imposition.[73],[76] and[78]

4. It is not prescribed in the IPC, or any of the provisions where death penalty or life imprisonment is provided for, any prohibition that the imprisonment cannot be imposed for any specific period within the life span. When life imprisonment means the whole life span of the person convicted, it can be said, that the Court empowered to impose the said punishment can specify the period up to which sentence of life should remain befitting the nature of the crime committed. By doing so, it cannot be said that the Court has carved out a new punishment. It is only within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, when considering the nature of punishment to be imposed. The ratio laid down in Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka that a special category of sentence, instead of death, for a term exceeding 14 years and put that category beyond application of remission is well founded and upheld.[87] and[105]

5. In Maru Ram etc. etc. v. Union of India and Anr. the Court held that Sections 432 and 433 CrPC were not merely statutory expressions and modus operandi of constitutional power rather a similar, separate power, the nullification of which would not affect the exercise of power under Articles 72 or 161 of the Constitution. There is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 CrPC even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor; power under Sections 432 and 433 CrPC is to be exercised by the Appropriate Government statutorily, it is not for the Court.[110] and[111]

6. The definition in Section 55A IPC, expresses "Appropriate Government" in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the Executive Power of the Union extends, the Central Government; therefore, it makes clear that as it relates to commutation of death sentence, the Appropriate Government is the Central Government. That apart, if the sentence of death or life is for an offence against any law relating to a matter to which the Executive Power of the Union extends, then again, the "Appropriate Government" is the Central Government. Where by virtue of law passed by Parliament or any of the provisions of the Constitution empowering the Central Government to act by specifically conferring Executive Authority, then in all those situations, the Executive Power of the Central Government will remain even if the State Government is also empowered to pass legislations under the Constitution. By virtue of the Constitutional provision contained in proviso to Article 73(1)(a) of the Constitution, if the

Executive Power of the Central Government remains, applying Section 55A IPC, it can be stated that the Central Government would be the Appropriate Government in those cases, where the sentence is of death or is for an offence relating to a matter wherein the Executive Power of the Union gets extended.[123]

7. In G.V. Ramanaiah v. The Superintendent of Central Jail Rajahmundry and Ors. the court noted that though the offences fell under the provisions of the IPC, covered by Entry 1 of List III of the Seventh Schedule to the Constitution, enabling both the Centre as well as the State Government to pass any law, having regard to the special feature in that case, it was held that the power of remission fell exclusively within the competence of the Union. Where the law came to be enacted by the Union in exercise of its powers under Articles 248, 249, 250, 251 and 252 of the Constitution, though the legislative power of the States would remain, the combined effect of these read with Article 73(1)(a) of the Constitution will give primacy to the Union Government in the event of any laws passed by the Centre prescribe the Executive power to vest with it to the exclusion of the Executive Power of the State then such power will remain with the Centre. Co-extensive power of the State to enact any law would be present, but having regard to the Constitutional prescription under Articles 248 to 252 of the Constitution. Where the authority to bring about a law may be available both to the Union as well as the State, that the law made by the Parliament may invest the Executive Power with the Centre while, the State may also enjoy similar such Executive Power by virtue of a law which State Legislature was also competent to make. In these situations, the ratio laid down in G.V. Ramanaiah v. The Superintendent of Central Jail Rajahmundry and Ors. will have to be applied to ascertain which of the two, State or Union would gain primacy to pass any order of remission, or other. If proviso to Article 162 of the Constitution applies to a case, Executive Power of the State should yield to the Executive Power of the Centre expressly conferred by the Constitution or by any law made by Parliament upon the Union or its authorities.[131],[132] and[133]

8. The power of Appropriate Government under Section 432(1) CrPC cannot be suo motu for it is only an enabling provision. Procedure to be followed under Section 432(2) CrPC is mandatory. Such power can only be initiated based on an application of the persons convicted and the ultimate order of suspension or remission should be guided by the opinion to be rendered by the presiding officer of the concerned court. Notification of the Government of Tamil and Government of India notification extending power and jurisdiction of the members of the Delhi Special Police Establishment to the whole led to the case being covered under Section 435(1)(a) CrPC. Therefore, per Section 435(1) CrPC power of State Government to remit or commute the sentence under Sections 432 and 433 CrPC should not be exercised except after due 'Consultation' with the Central Government. [143],[148] and[149]

9. "Consultation" may mean differently in different situations, depending on the nature and purpose of the statute. When more than one authority or functionary participate together in the performance of a function who assumes significance, it must be determined who would be best equipped and likely to be more correct for achieving the purpose and performing the task satisfactorily in safeguarding the interest of the entire community. Primacy in one who qualifies to be treated as in know of things far better than any other, then comparatively

greater weight to their opinion and decision to be attached. In the instant case, it should necessarily be taken as coming within the category of internal or external aggression or disturbance and thereby casting a duty on the Centre to act in the interest of the nation as a whole and also ensure that the Government of every State is carried in accordance with the provisions of the Constitution. Such cannot held to be interfering with the independent existence of the State concerned. Similar test should be applied where application of Section 435(1)(b) or (c). With the vast conspectus of knowledge available with the Central Government, it cannot be said that the nature of 'Consultation' will be a mere formality.[160]

10. The nature of requirement contemplated and prescribed in Section 435(1) and (2) CrPC is distinct and different. The expression "concurrence" used in Sub-section (2), it cannot be held that the expression "consultation" used in Sub-section (1) is lesser in force. The situations arising under Section 435(1)(a), (b) and (c) will have far greater consequences if allowed to be operated upon without proper check. Thus, even though the expression used in Section 435(1) is 'consultation', in effect, the said requirement is to be expressed far more strictly and with utmost care and caution. Consequently the process of "Consultation" should in reality be held as the requirement of "Concurrence".[161]

11. Justice U.U. Lalit dissenting. Except such matters under Section 435(2) CrPC, Section 432(7) does not give primacy to the executive power of the Union. In respect of matters in List III of the 7th Schedule to the Constitution, ordinarily the executive power of the State alone must extend; in the absence of any express provision in the Constitution itself or in any law made by Parliament, it is the executive power of the State which alone must extend. There can possibly be two appropriate Governments in a situation contemplated under Section 435(2) CrPC. Additionally, in respect of cases of death sentence, even when the offence is one to which the executive power of the State extends, Central Government can also be appropriate Government as stated in Section 434 of Code of Criminal Procedure. Except these two cases as dealt with in Section 434 and 435(2) of Code of Criminal Procedure there cannot be two appropriate Governments.[193]

12. Though similar the powers under Section 432 and 433 CrPC on one hand and those under Article 72 and 161 of the Constitution on the other, are distinct and different. An exercise of remission under section 432 and 433 CrPC may be required and called for depending upon exigencies and fact situation. The matter cannot be put in any straight jacket or be made subject to any guidelines. The aspects whether "the convict had lost his potentiality in committing the crime and whether there was any fruitful purpose of confining the convict any more" could possibly yield different assessment after certain period and can never be static. Every case will depend on its individual facts and circumstances. However, if the repeated exercise is not for any genuine or bona fide reasons, the matter can be corrected by way of judicial review.[206],[207] and[210]

13. The sentence of life imprisonment means imprisonment for the rest of life or the remainder of life of the convict. Such convict can always apply for obtaining remission either under Articles 72 or 161 of the Constitution or Under Section 432 CrPC and the authority would be obliged to consider the same reasonably. But that cannot be a justification to create a new form of punishment putting the matter completely beyond remission. Parliament

having stipulated mandatory minimum actual imprisonment at the level of 14 years, in law a prisoner would be entitled to apply for remission under the statute. If the case is made out, it is for the executive to consider and pass appropriate orders. Such orders would consider not only the gravity of the crime but also other circumstances including whether the prisoner has now been de-sensitized and is ready to be assimilated in the society. It would not be proper to prohibit such consideration by the executive. While doing so and putting the matter beyond remissions, the court would in fact be creating a new punishment. As such punishment was not envisioned in statute the Court is not permitted to create the same. A special category of sentence in substitution of death penalty and put that category beyond application of remission, nor would it be permissible to stipulate any mandatory period of actual imprisonment inconsistent with the one prescribed Under Section 433A of Code of Criminal Procedure.[218],[236] and[240]

JUDGMENT

F.M. Ibrahim Kalifulla, J.

1. The Petitioner has challenged the letter dated 19.02.2014 issued by the Chief Secretary, Government of Tamil Nadu to the Secretary, Government of India wherein the State of Tamil Nadu proposed to remit the sentence of life imprisonment and to release the Respondent Nos. 1 to 7 in the Writ Petition who were convicted in the Rajiv Gandhi assassination case. As far as Respondent Nos. 1 to 3 are concerned, originally they were imposed with the sentence of death. In the judgment reported as **V. Sriharan alias Murugan v. Union of India and Ors.** MANU/SC/0104/2014 : (2014) 4 SCC 242, the sentence of death was commuted by this Court. Immediately thereafter, the impugned letter came to be issued by the State of Tamil Nadu which gave rise for the filing of the present Writ Petition. While dealing with the said Writ Petition, the learned Judges thought it fit to refer seven questions for consideration by the Constitution Bench in the judgment reported as **Union of India v. v. Sriharan @ Murugan and Ors.** MANU/SC/0363/2014 : 2014 (11) SCC 1 and that is how this Writ Petition has now been placed before us. In paragraph 52, the questions have been framed for consideration by this Bench. The said paragraph reads as under:

52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of **Swamy Shraddananda(2)**, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

52.2 Whether the "Appropriate Government" is permitted to exercise the power of remission Under Section 432/433 of the Code after the parallel power has been exercised by the President Under Article 72 or the Governor Under Article 161 or by this Court in its Constitutional power Under Article 32 as in this case?

52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is co-extensive?

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

52.5 Whether there can be two Appropriate Governments in a given case Under Section 432(7) of the Code?

52.6 Whether suo motu exercise of power of remission Under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in Sub-clause (2) of the same Section is mandatory or not?

52.7 Whether the term '"Consultation"' stipulated in Section 435(1) of the Code implies '"Concurrence"'?

2. It was felt that the questions raised were of utmost critical concern for the whole of the country, as the decision on the questions would determine the procedure for awarding sentence in criminal justice system. When we refer to the questions as mentioned in paragraph 52 and when we heard the learned Solicitor General for the Petitioner and the counsel who appeared for the State of Tamil Nadu as well as Respondent Nos. 1 to 7, we find that the following issues arise for our consideration:

(a) Maintainability of this Writ Petition Under Article 32 of the Constitution by the Union of India.

(b) (i) Whether imprisonment for life means for the rest of one's life with any right to claim remission?

(ii) Whether as held in **Shraddananda** case a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?

(c) Whether the Appropriate Government is permitted to grant remission Under Sections 432/433 Code of Criminal Procedure after the parallel power was exercised Under Article 72 by the President and Under Article 161 by the Governor of the State or by the Supreme Court under its Constitutional power(s) Under Article 32?

(d) Whether Union or the State has primacy for the exercise of power Under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission?

(e) Whether there can be two Appropriate Governments Under Section 432(7) of the Code?

(f) Whether the power Under Section 432(1) can be exercised suo motu, if yes, whether the procedure prescribed Under Section 432(2) is mandatory or not?

(g) Whether the expression '"Consultation"' stipulated in Section 435(1) of the Code implies "Concurrence"?

3. On the question of maintainability of the Writ Petition by the Union of India, according to learned Solicitor General, the same cannot be permitted to be raised in this Reference since the said question was not raised and considered in the order of Reference reported as **Union of India v. V. Sriharan alias Murugan and Ors.** (supra), and that when notice was issued in the Writ Petition to all the States on 09.07.2014 then also this question was not considered, that the scheme of Code of Criminal Procedure was to protect the interest of victims at the hands of accused which onerous responsibility is cast on the agency of the Central Government, namely, the CBI which took over the investigation on the very next day of the crime and, therefore, the Union of India has every locus to file the writ petition, that since the issue raised in the Writ Petition cannot be worked out by way of suit Under Article 131 of the Constitution since the accused are private parties, Writ Petition is the only remedy available, that after the questions of general importance are answered, the individual cases will go before the Regular Benches and, therefore, the Union of India is only concerned about the questions of general importance and lastly if Union of India is held to be the Appropriate Government in a case of this nature, then the State will be denuded of all powers Under Sections 432/433 Code of Criminal Procedure and consequently any attempted exercise will fall to the ground.

4. Mr. Rakesh Dwivedi, learned Senior Counsel who appeared for the State of Tamil Nadu would, however, contend that the Writ Petition does not reflect any violation of fundamental right for invoking Article 32, that the maintainability question was raised as could be seen from the additional grounds raised by the Union of India in the Writ Petition itself though the question was not considered in the order of Reference. Mr. Ram Jethmalani, learned Senior Counsel who appeared for the private Respondent(s) by referring to Articles 143 and 145(3) read along with the proviso to the said Sub-article submitted that when no question of law was likely to arise, the referral itself need not have been made and, therefore, there is nothing to be answered. By referring to each of the sub-paragraphs in paragraph 52 of the Reference order, the learned Senior Counsel submitted that none of them would fall under the category of Constitutional question and, therefore, the Writ Petition was not maintainable. The learned Senior Counsel by referring to the correspondence exchanged between the State and the Union of India and the judgment reported as **V. Sriharan alias Murugan v. Union of India and Ors.** (supra) by which the sentence was commuted by this Court as stated in particular paragraph 32 of the said judgment, contended that in that judgment itself while it was held that commutation was made subject to the procedural checks mentioned in Section 432 and further substantive check in Section 433-A of the Code there is nothing more to be considered in this Writ Petition.

5. Having considered the objections raised on the ground of maintainability, having heard the respective counsel on the said question and having regard to the nature of issues which have been referred for consideration by this Constitution Bench, as rightly contended by the learned Solicitor General, we are also convinced that answer to those questions would involve substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162, various Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of Indian Penal Code and Code of Criminal Procedure and thereby serious public interest would arise for consideration and, therefore, we do not find it appropriate to reject the Reference on the narrow technical ground

of maintainability. We, therefore, proceed to find an answer to the questions referred for consideration by this Constitution Bench.

6. Having thus steered clear of the preliminary objections raised by the Respondents on the ground of maintainability even before entering into the discussion on the various questions referred, it will have to be stated that though in the Writ Petition the challenge is to the letter of State of Tamil Nadu dated 19.02.2014, by which, before granting remission of the sentences imposed on the private Respondent Nos. 1 to 7, the State Government approached the Union of India by way of 'Consultation' as has been stipulated in Section 435(1) of Code of Criminal Procedure, the questions which have been referred for the consideration of the Constitution Bench have nothing to do with the challenge raised in the Writ Petition as against the letter dated 19.02.2014. Therefore, at this juncture we do not propose to examine the correctness or validity or the power of the State of Tamil Nadu in having issued the letter dated 19.02.2014. It may be, that depending upon the ultimate answers rendered to the various questions referred for our consideration, we ourselves may deal with the challenge raised as against the letter of the State Government dated 19.02.2014 or may leave it open for consideration by the appropriate Bench which may deal with the Writ Petition on merits.

7. In fact in this context, the submission of Learned Solicitor General that the answers to the various questions referred for consideration by the Constitution Bench may throw light on individual cases which are pending or which may arise in future for being disposed of in tune with the answers that may be rendered needs to be appreciated.

8. Keeping the above factors in mind, precisely the nature of questions culminates as follows:

(i) As to whether the imprisonment for life means till the end of convict's life with or without any scope for remission?

(ii) Whether a special category of sentence instead of death for a term exceeding 14 years can be made by putting that category beyond grant of remission?

(iii) Whether the power Under Sections 432 and 433 Code of Criminal Procedure by Appropriate Government would be available even after the Constitutional power Under Articles 72 and 161 by the President and the Governor is exercised as well as the power exercised by this Court Under Article 32?

(iv) Whether State or the Central Government have the primacy Under Section 432(7) of Code of Criminal Procedure?

(v) Whether there can be two Appropriate Governments Under Section 432(7)?

(vi) Whether power Under Section 432(1) can be exercised *suo motu* without following the procedure prescribed Under Section 432(2)?

(vii) Whether the expression "Consultation" stipulated in 435(1) really means "Concurrence"?

9. In order to appreciate the various contentions raised on the above questions by the respective parties and also to arrive at a just conclusion and render an appropriate answer, it is necessary to note the relevant provisions in the Constitution, the Indian Penal Code and the Code of Criminal Procedure The relevant provisions of the Constitution which require to be noted are Articles 72, 73, 161, 162, 246(4), 245(2), 249, 250 as well as some of the Entries in List I, II and III of the Seventh Schedule. In the Indian Penal Code the relevant provisions required to be stated are Sections 6, 7, 17, 45, 46, 53, 54, 55, 55A, 57, 65, 222, 392, 457, 458, 370, 376A, 376-B and 376E. In the Code of Criminal Procedure, the provisions relevant for our purpose are Sections 2(y), 4, 432, 433, 434, 433A and 435. The said provisions can be noted as and when we examine those provisions and make an analysis of its application in the context in which we have to deal with those provisions in the case on hand.

10. Keeping in mind the above perception, we proceed to examine the provisions contained in the Constitution. Articles 72, 73, 161 and 162 of the Constitution read as under:

Article 72.-Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.-(1) the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-

(a) In all cases where the punishment or sentence is by a Court Martial;

(b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends;

(c) In all cases where the sentence is a sentence of death.

(2) Nothing in Sub-clause (a) of Clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.

(3) Nothing in Sub-clause (c) of Clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

Article 73. Extent of executive power of the Union

(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend--

(*a*) to the matters with respect to which Parliament has power to make laws; and

(*b*) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in Sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Article 161.-Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

Article 162.-Extent of executive power of State

Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

11. Under Article 72, there is all pervasive power with the President as the Executive Head of the Union as stated Under Article 53, to grant pardons, reprieves, respite and remission of punishments apart from the power to suspend, remit or commute the sentence of any person convicted of any offence. Therefore, the substantive part of Sub-article (1), when read, shows the enormous Constitutional power vested with the President to do away with the conviction imposed on any person of any offence apart from granting the lesser relief of reprieve, respite or remission of punishment. The power also includes power to suspend, remit or commute the sentence of any person convicted of any offence. Sub-article (1), therefore, discloses that the power of the President can go to the extent of wiping of the conviction of the person of any offence by granting a pardon apart from the power to remit the punishment or to suspend or commute the sentence.

12. For the present purpose, we do not find any need to deal with Article 72(1)(a). However, we are very much concerned with Article 72(1)(b) which has to be read along with Article 73 of the Constitution. Reading Article 72(1)(b) in isolation, it prescribes the power of the President for the grant of pardon, reprieve, remission, commutation etc. in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends. In this context when we refer to Sub-article (1) (a) of Article 73 which has set out the extent of Executive Power of the Union, it discloses that the said power is controlled only by the proviso contained therein. Therefore, reading Article 72(1)(b) along with Article 73(1)(a) in respect of a matter in which the absolute power of the President for grant of pardon etc. will remain in the event of express provisions in the Constitution or in any law made by the Parliament specifying the Executive Power of the Centre so prescribed. When we refer to Article 72(1)(c) the power of the President extends to all cases where the sentence is a sentence of death.

13. When we examine the above all pervasive power vested with the President, a small area is carved out Under Article 72(3), wherein, in respect of cases where the sentence is a sentence of death, it is provided that irrespective of such enormous power vested with the President relating to cases where sentence of death is the punishment, the power to suspend, remit or commute a sentence of death by the Governor would still be available under any law for the time being in force which fall within the Executive Power exercisable by the Governor of the State. Article 72(1)(c) read along with Article 72(3) is also referable to the proviso to Article 73(1) as well as Articles 161 and 162.

14. When we read the proviso, while making reference to the availability of the Executive Power of the Union Under Article 73(1)(a), we find a restriction imposed in the exercise of such power in any State with reference to a matter with respect to which the Legislature of the State has also power to make laws, save as expressly provided in the Constitution or any law made by the Parliament conferment of Executive Power with the Centre. Therefore, the exercise of the Executive Power of the union Under Article 73(1)(a) would be subject to the provisions of the said saving clause vis-a-vis any State. Therefore, reading Article 72(1)(a) and (3) along with the proviso to Article 73(1)(a) it emerges that wherever the Constitution expressly provides as such or a law is made by the Parliament that empowers all pervasive Executive Power of the Union as provided Under Article 73(1)(a), the same could be extended in any State even if the dual power to make laws are available to the States as well.

15. When we come to Article 161 which empowers the Governor to grant pardon etc. which is more or less identical to the power vested with the President Under Article 72, though not to the full extent, the said Article empowers the Governor of a State to grant pardon, respite, reprieve or remission or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State extends. It will be necessary to keep in mind while reading Article 161, the nature and the extent to which the extended Executive Power of the Union is available Under Article 73(1)(a), as controlled under the proviso to the said Article.

16. Before deliberating upon the extent of Executive power which can also be exercised by the State, reference should also be made to Article 162 which prescribes the extent of Executive Power of the State. The Executive Power of the State under the said Article extends to the matters with respect to which the Legislature of the State has power to make laws. The proviso to Article 162 which is more or less identical to the words expressed in the proviso to Article 73(1)(a) when applied would result in a situation where the result of the consequences that would follow by applying the proviso to Article 73(1)(a) would be the resultant position.

17. Pithily stated under the proviso to Article 73(1)(a) where there is an express provision in the Constitution or any law is made by the Parliament, providing for specific Executive Power with the Centre, then the Executive Power referred to in Sub-clause (a) of Sub-article (1) of Article 73 would be available to the Union and would also extend in any State to matters with respect to which the Legislature of the State has also powers to make laws. In other words, it can be stated that, in the absence of any such express provision in the Constitution or any law made by the Parliament in that regard, the enormous Executive Power of the Union stipulated in Article 73(1)(a), would not be available for the Union to be extended to any State to matters with respect

to which the Legislature of the State has also powers to make laws. To put it differently, in order to enable the Executive Power of the Union to extend to any State with respect to which the Legislature of a State has also got power to make laws, there must be an express provision providing for Executive Power in the Constitution or any law made by the Parliament. Therefore, the said prescription, namely, the saving clause provided in the proviso to Article 73(1)(a) will be of paramount consideration for the Union to exercise its Executive Power while examining the provision providing for the extent of Executive Power of the State as contained in Article 162.

18. Before examining the questions referred for consideration, it will be necessary to make a detailed analysis of the Constitutional and statutory provisions that would be required to be applied. When we refer to Article 161, that is the power of the Governor to grant pardon etc., as well as to suspend, remit etc., the last set of expressions contained in the said Article, namely, "to a matter to which the Executive Power of the State extends", makes it clear that the exercise of such power by the Governor of State is restricted to the sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State is extended. In other words, such power of the Governor is regulated by the Executive Power of the State as has been stipulated in Article 162. In turn, we have to analyze the extent, to which the Executive Power of the Union as provided Under Article 73(1)(a) regulated by the proviso to the said Sub-article (1), which stipulates that the overall Executive Power of the Union is regulated to the extent to which the legislature of State has also got the power to make laws subject, however, to the express provisions in the Constitution or in any law made by Parliament. The proviso to Article 162 only re-emphasizes the said extent of coextensive legislative power of the State to make any laws at par with the Parliament which again will be subject to, as well as, limited by the express provision providing for Executive Power with the Centre in the Constitution or in any law made by Parliament upon the Union or its authorities. In respect of the punishments or convictions of any offence against any law relating to a matter to which the Executive Power of the State extends, the power of pardon etc. or power to suspend or remit or commute etc., available to the Governor of a State Under Article 161 would be available as has been stipulated therein.

19. In this respect, when we examine the opening set of expressions in Article 73(1), namely:

subject to the provisions of this Constitution, the Executive Power of the Union extend....

It will be appropriate to refer to Articles 246(4), 245(2), 249 and 250. Each of the said Articles will show the specific power conferred on the Union in certain extraordinary situations as well as, in respect of areas which remain untouched by any of the States. Such powers referred to in these Articles are de hors the specific power provided Under Article 73(1)(a), namely, with respect to matters for which Parliament has power to make laws.

20. In this context, it will also be relevant to analyze the scope of Article 162 which prescribes the extent of Executive Power of the State. Proviso to Article 162 in a way slightly expands the Executive Power of the Union with respect to matters to which the State Legislature as well as the Parliament has power to make laws. In such matters the Executive Power of the State is limited and controlled to the extent to which the power of the Union as well as its authorities are expressly conferred by the Constitution or the laws made by Parliament.

21. I we apply the above Constitutional prescription of the Executive Power of the Union vis-a-vis the Executive Power of the State in the present context with which we are concerned, namely, the power of remission, commutation etc., it is well known that the powers relating to those actions are contained, governed and regulated by the provisions under the Code of Criminal Procedure, which is the law made by Parliament covered by Entry 1 in List III (viz.), Concurrent List of the Seventh Schedule of the Constitution. What is prescribed in the proviso to Article 73(1)(a) is in relation to "matters with respect to which the legislature of the State has also power to make laws" (Emphasis supplied). In other words, having regard to the fact that 'criminal law is one of the items prescribed in List III, Under Article 246(2), the State Legislature has also got power to make laws in that subject. It is also to be borne in mind that The Indian Penal Code and The Code of Criminal Procedure are the laws made by the Parliament.

22. Therefore, the resultant position would be that, the Executive Power of the Union and its authorities in relation to grant of remission, commutation etc., are available and can be exercised by virtue of the implication of Article 73(1)(a) read along with its proviso and the exercise of such power by the State would be controlled and limited as stipulated in the proviso to Article 162 to the extent to which such control and limitations are prescribed in the Code of Criminal Procedure.

23. On an analysis of the above-referred Constitutional provisions, namely, 72, 73, 161 and 162 what emerges is:

(a) The President is vested with the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends as has been provided Under Article 73(1)(a) subject, however, to the stipulations contained in the proviso therein.

(b) Insofar as cases where the sentence is sentence of death such power to suspend, remit or commute the sentence provided Under Article 72(1) would be available even to the Governor of a State wherever such sentence of death came to be made under any law for the time being in force.

(c) The Executive Power of the Union as provided Under Article 73(1)(a) will also extend to a State if such Executive Power is expressly provided in the Constitution or in any law made by the Parliament even with respect to matters with respect to which the Legislature of a State has also got the power to make laws.

(d) The power of the Governor of any State to grant pardon etc., or to suspend, remit or commute sentence etc., would be available in respect of sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State extends and not beyond.

(e) The extent of Executive Power of the State which extend to all matters with respect to which the legislature of the State has power to make laws is, however, subject to and limited by the Executive Power expressly conferred under the Constitution or by any law made by Parliament upon the Union or the authorities of the Union.

24. Keeping the above legal principles that emerge from a reading of Articles 72, 73, 161 and 162, further analysis will have to be made as to the extent to which any such restrictions have been made providing for exclusive power of the Union or co-extensive power of the State under the Constitution as well as the laws made by the Parliament with reference to which the Legislature of the State has also got the power to make laws.

25. The express provision contained in the Constitution prescribing the Executive Power of the Union as well as on its authorities can be found in Article 53. However, the nature of power stated therein has nothing to do with the one referred to either in Article 73(1)(a) or 162 of the Constitution. Under Articles 53 and 156 of the Constitution, the Executive Power of the Union and the State are to be exercised in the name of the President and the Governor of the State respectively. Though, Under Articles 123, 213 and 239B of the Constitution, the power to issue Ordinance is vested with the President, the Governor and the Administrator of the Union, the State and the Union Territory of Puducherry respectively by way of an executive action, this Court has clarified that the exercise of such power would be on par with the Legislative action and not by way of an administrative action. Reference can be had to the decisions reported as **K. Nagaraj and Ors. v. State of Andhra Pradesh and Anr.** MANU/SC/0343/1985 : 1985 (1) SCC 523 @ 548 paragraph 31 and **T. Venkata Reddy and Ors. v. State of Andhra Pradesh** MANU/SC/0372/1985 : 1985 (3) SCC 198 paragraph 14.

26. Under Article 246(2) of the Constitution, Parliament and the State have equal power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule. Under Article 246(4), the Parliament is vested with the power to make laws for any part of the territory of India which is not part of any State. Article 247 of the Constitution is referable to Entry 11A of List III of Seventh Schedule. The said Entry is for administration of justice, Constitution and organization of all Courts, except the Supreme Court and the High Courts. Under Article 247, Parliament is empowered to provide for establishment of certain additional Courts. Whereas Under Articles 233, 234 and 237 falling under Chapter VI of the Constitution appointment of District Judges, recruitment of persons other than District Judges, their service conditions and application of the provisions under the said Chapter are all by the Governor of the State as its Executive Head subject, however in 'Consultation' with the High Court exercising jurisdiction in relation to such State. Here and now it can be noted that having regard to the specific provisions contained in Article 247 of the Constitution, the Central Government may enact a law providing for establishment of additional Courts but unless the Executive Power of the Union to the specific extent is expressly provided in the said Article or in the Statute if any, enacted for making the appointments then the saving clause under the proviso to Article 73(1)(a) will have no application.

27. Under Articles 249 and 250 of the Constitution, Parliament is empowered to legislate with respect to a matter in the State List in the National Interest and if a Proclamation of Emergency is in operation. Therefore, in exercise of said superscriptive power any law is made, it must be stated that exercise of any action by way of executive action would again be covered by the proviso to Article 73(1)(a) of the Constitution. Similarly, Under Article 251 of the Constitution where any inconsistency between the laws made by Parliament Under Articles 249 and 250 and the laws made by State Legislature, the laws made by the Parliament whether made before or after the laws made by the State would to the extent of repugnancy prevail so long as the law made by the Parliament continues to have effect. Under Article 252 of the Constitution, de hors the powers

prescribed Under Articles 249 and 250, with the express resolution of two or more of State Legislatures, the Parliament is empowered to make laws applicable to such States. Further any such laws made can also be adopted by such other States whose Legislature passes necessary resolution to the said effect. Here again in the event of such situations governed by Articles 251 and 252 of Constitution emerge, the saving clause prescribed in the proviso to Article 73(1)(a) will have application.

28. Irrespective of special situations under which the laws made by the Parliament would prevail over any State to the extent of repugnancy, as stipulated in Articles 249, 250 and 251 of the Constitution, Article 254 provides for supervening power of the laws made by the Parliament by virtue of its competence, in respect of Entries found in the Concurrent List if any repugnancy conflicting with the such laws of Parliament by any of the laws of the State is found, to that extent such laws of the State would become inoperative and the laws of the Parliament would prevail, subject, however, to stipulations contained in Sub-article (2) of Article 254 and the proviso.

29. Article 256 of the Constitution is yet another *superscriptus (Latin)* Executive Power of the Union obligating the Executive Power of the State to be subordinate to such power. Under the head Administrative relations falling under Chapter II of Part XI of the Constitution, Articles 256, 257, 258 and 258A are placed. Article 257(1) prescribes the Executive Power of the State to ensure that it does not impede or prejudice the exercise of the Executive Power of the Union apart from the authority to give such directions to State as may appear to the Government of India to be necessary for that purpose. Under Article 258, the Executive Head of the Union, namely, the President is empowered to confer the Executive Power of the Union on the States in certain cases. A converse provision is contained in Article 258A of the Constitution by which, the Executive Head of the State, namely, the Governor can entrust the Executive Power of the State with the Centre. Here again, we find that all these Articles are closely referable to the saving clause provided under the proviso to Article 73(1)(a) of the Constitution.

30. The saving clause contained in Article 277 of the Constitution is yet another provision, whereunder, the authority of the Union in relation to levy of taxes can be allowed to be continued to be levied by the States and the local bodies, having regard to such levies being in vogue prior to the commencement of the Constitution. However, the Union is empowered to assert its authority by making a specific law to that effect by the Parliament under the very same Article.

31. Under the head 'Miscellaneous Financial Provisions' the Union or the State can make any grant for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislative of the State, as the case may be, can make laws.

32. Article 285 of the Constitution is yet another provision where the power of the Union to get its properties lying in a State to be exempted from payment of any tax. Similarly, Under Article 286 restrictions on the State as to imposition of tax on the sale or purchase of goods outside the State is prescribed, which can be ascribed by a law of the Parliament.

33. Article 289 prescribes the extent of the executive and legislative power of the Union and the Parliament in relation to exemption of property and income of a State from Union taxation.

34. The Executive Power of the Union and of each State as regards carrying on of any trade or business as to the acquisition, holding and disposal of property and the making of contracts for any purpose is prescribed Under Article 298.

35. The above Articles 277, 282, 285, 286 and 289 fall under Part XII, Chapter I and Article 298 under Chapter III.

36. Articles 302, 303, 304 and 307 falling under Part XIII of the Constitution read along with Entry 42 of List I, Entry 26 of List II and Entry 33 of List III provides the relative and corresponding executive and legislative power of the Union and the States with reference to Trade, Commerce and intercourse within the territory of India.

37. Articles 352 and 353 of the Constitution falling under Part XVIII of the Constitution prescribe the power of the President to declare Proclamation of Emergency under certain contingencies and the effect of proclamation of emergency. Under Article 355 of the Constitution, the duty has been cast on the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution.

38. Article 369 of the Constitution falling under Part XXI empowers the Parliament to make laws with respect to certain matters in the State Lists for a limited period of five years and to cease after the said period by way of temporary and transitional measure.

39. Thus a close reading of the various Constitutional provisions on the Executive Power of the Centre and the State disclose the Constitutional scheme of the framers of the Constitution to prescribe different types of such Executive Powers to be exercised befitting different situations. However, the cardinal basic principle which weighed with the framers of the Constitution in a democratic federal set up is clear to the pointer that it should be based on "a series of agreements as well as series of compromises". In fact, the temporary Chairman of the Constituent Assembly, the Late Dr. Sachidananda Sinha, the oldest Parliamentarian in India, by virtue of his long experience, advised; "that reasonable agreements and judicious compromises are nowhere more called for than in framing a Constitution for a country like India". His ultimate request was that; "the Constitution that you are going to plan, may similarly be reared for 'immortality', if the rule of man may justly aspire to such a title, and it may be a structure of adamantine strength, which will outlast and overcome all present and future destructive forces". With those lofty ideas, the Constitution came to be framed.

40. We are, therefore, able to discern from a reading of the various provisions of the Constitution referred to above, to be read in conjunction with Articles 72, 73, 161 and 162, which disclose the dichotomy of powers providing for segregation, combination, specific exclusion (temporary or permanent), interrelation, voluntary surrender, one time or transitional or temporary measures, validating, *superscriptus*, etc. We are also able to clearly note that while the Executive Power of the State is by and large susceptible to being controlled by the Executive Power of the Union under very many circumstances specifically warranting for such control, the reverse is not the case. It is quite apparent that while the federal fabric of the set up is kept intact, when it comes to the question of National Interest or any other emergent or unforeseen situations warranting control in the nature

of a super-terrestrial order (celestial) the Executive Power of the Union can be exercised like a bull in the China shop.

41. At the risk of repetition we can even quote some of such provisions in the Constitution which by themselves expressly provide for such supreme control, as well as, some other provisions which enable the Parliament to prescribe such provisions by way of an enactment as and when it warrants. For instance, Under Article 247 of the Constitution, by virtue of Entry 11A of List III of the Seventh Schedule, the Parliament is empowered to provide for establishment of certain additional Courts at times of need. In fact, it can be validly stated that the establishment of Fast Track Courts in the various States and appointment of *ad hoc* Judges at the level of Entry level District Judges though not in the cadre strength, came to be made taking into account the enormous number of undertrial prisoners facing Sessions cases of grievous offences in different States. This is one such provision which expressly provided for remedying the situation in the Constitution itself specifically covered by the proviso to Article 73(1)(a) and the proviso to Article 162 of the Constitution. Similar such provisions in the Constitution containing express powers can be noted in Articles 256, 257, 258, 285 and 286 of the Constitution. We can quote any number such Articles specifically and expressly providing for higher Executive Power of the Union governed by Article 73(1)(a) of the Constitution.

42. Quite apart, we can also cite some of the Articles under which the Parliament is enabled to promulgate laws which can specifically provide for specific Executive Power vesting with the Union to be exercisable in supersession of the Executive Power of the State. Such provisions are contained in Articles 246(2), 249, 250, 277, 286 and 369 of the Constitution.

43. Having thus made an elaborate analysis of the Constitutional provisions relating to the relative Executive Power of the Union and the State as it exists and exercisable by the respective authorities in the given situations, we wish to examine the provisions specifically available in the Indian Penal Code, Code of Criminal Procedure, as well as the Special enactment, namely, the Delhi Special Police Establishment Act under which the CBI operates, to understand the extent of powers exercisable by the State and the Centre in order to find an answer to the various questions referred for our consideration.

44. In the Indian Penal Code, the provisions for our purpose can be segregated into two categories, namely, those by which various terms occurring in the Penal Code are defined or explained and those which specifically provide for particular nature of punishments that can be imposed for the nature of offence involved. Sections 17, 45, 46, 53, 54, 55, 55A are some of the provisions by which the expressions occurring in the other provisions of the Code are defined or explained. Under Section 17, the word 'Government' would mean the 'Central Government' or the 'State Government'. Under Section 45, the expression 'life' would denote the life of a human being, unless the contrary appears from the context. Similarly, the expression 'death' would mean death of a human being unless the contrary appears from the context. Section 53 prescribes five kinds of punishments that can be imposed for different offences provided for in the Penal Code which ranges from the imposition of 'fine' to the capital punishment of 'death'. Section 54 empowers the Appropriate Government to commute the punishment of death imposed on an offender for any other punishment even without the consent of the offender. Similar such power in the case of life imprisonment is prescribed Under Section 55 to be exercised by the Appropriate Government, but

in any case for a term not exceeding fourteen years. Section 55A defines the term "Appropriate Government" with particular reference to Sections 54 and 55 of the Penal Code.

45. Having thus noted those provisions which highlight the various expressions used in the Penal Code to be understood while dealing with the nature of offences committed and the punishments to be imposed, the other provisions which specify the extent of punishment to be imposed are also required to be noted. For many of the offences, the prescribed punishments have been specified to be imposed upto a certain limit, namely, number of years or fine or with both. There are certain offences for which it is specifically provided that such punishment of imprisonment to be either life or a specific term, namely, seven years or ten years or fourteen years and so on. To quote a few, Under Section 370(5), (6) and (7) for the offence of trafficking in person, such punishments shall not be less than fourteen years, imprisonment for life to mean imprisonment for the remainder of that person's natural life apart from fine. Similar such punishments are provided Under Sections 376(2), 376A, 376D and 376E.

46. At this juncture, without going into much detail, we only wish to note that the Penal Code prescribes five different punishments starting from fine to the imposition of capital punishment of Death depending upon the nature of offence committed. As far as the punishment of life imprisonment and death is concerned, it is specifically explained that it would mean the life of a human being or the death of a human being, with a rider, unless the contrary appears from the context, which means something written or spoken that immediately precede or follow or that the circumstances relevant to something under consideration to be seen in the context. For instance, when we refer to the punishment provided for the offence Under Section 376A or 376D while prescribing life imprisonment as the maximum punishment that can be imposed, it is specifically stipulated that such life imprisonment would mean for the remainder of that person's natural life. We also wish to note that Under Sections 54 and 55 of the Penal Code, the power of the Appropriate Government to commute the Death sentence and life sentence is provided which exercise of power is more elaborately specified in the Code of Criminal Procedure. While dealing with the provisions of Code of Criminal Procedure on this aspect we will make reference to such of those provisions in the Penal Code which are required to be noted and considered. In this context, it is also relevant to note the provisions in the Penal Code wherein the punishment of death is provided apart from other punishments. Such provisions are Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307, 376A, 376E, 396 and 364A. The said provisions are required to be read along with Sections 366 to 371 and 392 of Code of Criminal Procedure. We will make a detailed reference to the above provisions of Penal Code and Code of Criminal Procedure while considering the second part of the first question referred for our consideration.

47. When we come to the provisions of Code of Criminal Procedure, for our present purpose, we may refer to Sections 2(y), 432, 433, 433A, 434 and 435. Section 2(y) of the Code specifies that words and expressions used in the Code and not defined but defined in the Indian Penal Code (45 of 1860) will have the same meaning respectively assigned to them in that Code. Section 432 prescribes the power of the Appropriate Government to suspend or remit sentences. Section 432(7) defines the expression 'Appropriate Government' for the purpose of Sections 432 and 433. Section 433 enumerates the power of the Appropriate Government for commutation of sentences, namely, fine, simple imprisonment, rigorous imprisonment, life imprisonment as well as the punishment of death. Section 433A which came to be inserted by Act 45 of 1978 w.e.f. 18.12.1978, imposes a

restriction on the power of Appropriate Government for remissions or suspensions or commutation of punishments provided Under Sections 432 and 433 by specifying that exercise of such power in relation to the punishment of death or life imprisonment to ensure at least fourteen years of imprisonment. Under Section 434 in regard to sentences of death, concurrent powers of Central Government are prescribed which is provided for in Sections 432 and 433 upon the State Government. Section 435 of the Code imposes a restriction upon the State Government to consult the Central Government while exercising its powers Under Sections 432 and 433 of the Code under certain contingencies.

48. In the case on hand, we are also obliged to refer to the provisions of the Delhi Special Police Establishment Act of 1946 (hereinafter referred to as the "Special Act") as the Reference which arose from the Writ Petition was dealt with under the said Act. The Special Act came to be enacted to make provision for the Constitution of special force in Delhi for the investigation of certain offences in the Union Territory. Under Section 3 of the Special Act, the Central Government can, by Notification in the official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment. Under Section 4, the superintendence of the Delhi Special Police Establishment vests with the Central Government. Section 5 of the Special Act, however, empowers the Central Government to extend the application of the said Act to any area of any State other than Union Territories, the powers and jurisdiction of the members of the Special Police Establishment for the investigation of any offences or classes of offences specified in a Notification Under Section 3. However, such empowerment on the Central Government is always subject to the consent of the concerned State Government over whose area the Special Police Establishment can be allowed to operate.

49. Having noted the scope and ambit of the said Special Act, it is also necessary for our present purpose to refer to the communication of the Principal Secretary (Home) to Government of Tamil Nadu addressed to the Joint Secretary to Government of India, Department of Personal and Training dated 22.05.1991 forwarding the order of Government of Tamil Nadu, conveying its consent Under Section 6 of the Special Act for the extension of the powers and jurisdiction of members of Special Police Establishment to investigate the case in Crime No. 329/91 Under Sections 302, 307, 326 Indian Penal Code and Under Sections 3 and 5 of The Indian Explosive Substances Act, 1908 registered in Sriperumbudur P.S., Changai Anna (West) District, Tamil Nadu relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. Pursuant to the said communication and order of State of Tamil Nadu dated 22.05.1991, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training issued the Notification dated 23rd May, 1991 extending the powers and jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Tamil Nadu for investigation of the offences registered in Crime No. 329/91 in Sriperumbudur Police Station of Changai Anna (West) District of Tamil Nadu. Relevant part of the said Notification reads as under:

a) Offences punishable Under Section 302, 307, 326 of the Indian Penal Code, 1860 (Act No. 45 of 1860) and Under Sections 5 and 6 of the Indian Explosive Substances Act 1908 (Act No. 6 of 1903) relating to case in Crime No. 329/91 registered in Sriperumbudur Police Station Changai-Anna (West) District, Tamil Nadu;

b) Attempts, abetments and conspiracies in relation to or in connection with the offences mentioned above and any other offence or offences committed in the course of the same transaction arising out of the same facts.

50. Having thus noted the relevant provisions in the Constitution, the Penal Code, Code of Criminal Procedure and the Special Act, we wish to deal with the question referred for our consideration in seriatim. The first question framed for the consideration of the Constitution Bench reads as under:

'Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of **Swamy Shraddananda** (supra), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission'.

51. This question contains two parts. The first part poses a question as to whether life imprisonment as a punishment provided for Under Section 53 of the Penal Code and as defined Under Section 45 of the said Code means imprisonment for the rest of one's life or a convict has a right to claim remission. The second part is based on the ruling of **Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka** reported in MANU/SC/3096/2008 : (2008) 13 SCC 767.

52. Before answering the first part of this question, it will be worthwhile to refer to at least two earlier Constitution Bench decisions which cover this very question. The first one is reported as **Gopal Vinayak Godse v. The State of Maharashtra and Ors.** MANU/SC/0156/1961 : (1961) 3 SCR 440. The first question that was considered in that decision was:

whether, under the relevant statutory provisions, an accused who was sentenced to transportation for life could legally be imprisoned in one of the jails in India; and if so what was the term for which he could be so imprisoned.

We are concerned with the second part of the said question, namely, as to what was the term for which a life convict could be imprisoned. This Court answered the said question in the following words:

A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

The learned Judges also took note of the various punishments provided for in Section 53 of the Penal Code before rendering the said answer. However, we do not find any reference to Section 45 of the Penal Code which defines life' to denote the life of a human being unless the contrary appears from the context.

53. Having noted the ratio of the above said decision in this question, we can also profitably refer to a subsequent Constitution Bench decision reported as **Maru Ram etc., etc. v. Union of India and Anr.** MANU/SC/0159/1980 : 1981 (1) SCR 1196. At pages 1222-1223, this Court while endorsing the earlier ratio laid down in **Godse** (supra) held as under:

A possible confusion creeps into this discussion by equating life imprisonment with 20 years imprisonment. Reliance is placed for this purpose on Section 55 Indian Penal Code and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totaled upto 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoners cannot claim his liberty. The reason is that life sentence is nothing less than life-long imprisonment. Moreover, the penalty then and now is the same-life term. And remission vests no right to release when the sentence is life imprisonment. No greater punishment is inflicted by Section 433A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14 years jail life once we realize the truism that a life sentence is a sentence for a whole life. See Sambha Ji Krishan Ji. v. State of Maharashtra MANU/SC/0162/1973 : AIR 1974 SC 147 and State of Madhya Pradesh v. Ratan Singh and Ors. MANU/SC/0184/1976 : [1976] Supp. SCR 552

(Emphasis added)

Again at page 1248 it is held as under:

We follow **Godse's** case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government.

54. In an earlier decision of this Court reported as **Sambha Ji Krishan Ji v. State of Maharashtra** MANU/SC/0162/1973 : AIR 1974 SC 147, in paragraph 4 it is held as under:

4.... As regards the third contention, the legal position is that a person sentenced to transportation for life may be detained in prison for life. Accordingly, this Court cannot interfere on the mere ground that if the period of remission claimed by him is taken into account, he is entitled to be released. It is for the Government to decide whether he should be given any remissions and whether he should be released earlier.

55. Again in another judgment reported as **State of Madhya Pradesh v. Ratan Singh and Ors.** MANU/SC/0184/1976 : (1976) 3 SCC 470, it was held as under in paragraph 9:

9. From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following proposition emerge:

(i) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A

sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence Under Section 401 of the Code of Criminal Procedure;

(Emphasis added)

It will have to be stated that Section 401 referred to therein is the corresponding present Section 432.

56. We also wish to make reference to the statement of law made by the Constitution Bench in **Maru Ram** (supra) at pages 1221 and 1222. At page 1221, it was held:

Here, again, if the sentence is to run until life lasts, remissions, quantified in time cannot reach a point of zero. This is the ratio of Godse.

57. In the decision reported as **Ranjit Singh alias Roda v. Union Territory of Chandigarh** MANU/SC/0139/1983 : (1984) 1 SCC 31 while commuting the death to life imprisonment, it was held that:

the two life sentences should run consecutively, to ensure that even if any remission is granted for the first life sentence, the second one can commence thereafter.

It is quite apparent that this Court by stating as above has affirmed the legal position that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Code of Criminal Procedure by the Appropriate Government or Under Articles 72

and 161 of the Constitution by the Executive Head viz., the President or the Governor of the State, respectively.

58. In the decision reported as **Ashok Kumar alias Golu v. Union of India and Ors.** MANU/SC/0406/1991 : (1991) 3 SCC 498, it was specifically ruled that the decision in **Bhagirath** (supra) does not run counter to **Godse** (supra) and **Maru Ram** (supra), paragraph 15 is relevant for our purpose, which reads as under:

15. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted Under Section 432, in which case the remission would be subject to limitation of Section 433-A of the Code, or Constitutional power has been exercised Under Article 72/161 of the Constitution. In Bhagirath case the question which the Constitution Bench was required to consider was whether a person sentenced to imprisonment for life can claim the benefit of Section 428 of the Code which, inter alia, provides for setting off the period of detention undergone by the accused as an undertrial against the sentence of imprisonment ultimately awarded to him. Referring to Section 57, Indian Penal Code, the Constitution Bench reiterated the legal position as under:

The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose.

These observations are consistent with the ratio laid down in Godse and Maru Ram cases. Coming next to the question of set off Under Section 428 of the Code, this Court held:

The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority Under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse. imprisonment for the remainder of life.

We fail to see any departure from the ratio of Godse case; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the court while allowing the appeal/writ petition. The court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433-A and, 'provided that orders have been passed by the appropriate authority Under Section 433 of the Code of Criminal Procedure'. These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set off the period of detention as undertrial would enure to the benefit of the convict provided the Appropriate Government has chosen to pass an order Under Sections 432/433 of the Code. The ratio of Bhagirath case, therefore, does not run counter to the ratio of this Court in the case of Godse or Maru Ram.

(Underlining is ours)

59. In **Subash Chander v. Krishan Lal and Ors.** MANU/SC/0230/2001 : (2001) 4 SCC 458, this Court followed **Godse** (supra) and **Ratan Singh** (supra) and held that a sentence for life means a sentence for entire life of the prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence Under Section 401 of Code of Criminal Procedure.

60. Paragraphs 20 and 21 can be usefully referred to which read as under:

20. Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It does not say that the transportation for life shall be deemed to be for 20 years. The position at law is that unless the life imprisonment is commuted or remitted by appropriate authority under the relevant provisions of law applicable in the case, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. In *Gopal Vinayak Godse* v. *State of Maharashtra* the Petitioner convict contended that as the term of imprisonment actually served by him exceeded 20 years, his further detention in jail was illegal and prayed for being set at liberty. Repelling such a contention and referring to the judgment of the Privy Council in *Pandit Kishori Lal* v. *King Emperor* this Court held: (SCR pp. 444-45)

If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by Appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to Section 57 of the Indian Penal Code, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p.10:

Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission.

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

21. In *State of M.P.* v. *Ratan Singh* this Court held that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions. "A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence Under Section 401 of the Code of Criminal Procedure", observed the Court (at SCC p. 477, para 9). To the same effect are the judgments in *Sohan Lal* v. *Asha Ram, Bhagirath* v. *Delhi Admn.* and the latest judgment in *Zahid Hussein* v. *State of W.B.*.

(Emphasis added)

61. Having noted the above referred to two Constitution Bench decisions in **Godse** (supra) and **Maru Ram** (supra) which were consistently followed in the subsequent decisions in **Sambha Ji Krishan Ji** (supra), **Ratan Singh** (supra), **Ranjit Singh** (supra), **Ashok Kumar** (supra) and **Subash Chander** (supra). The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided Under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided Under Section 432 of the Code of Criminal Procedure.

62. As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant Rules based on his/her good behavior

or such other stipulations prescribed therein. The other remission is the grant of it by the Appropriate Government in exercise of its power Under Section 432 Code of Criminal Procedure Therefore, in the latter case when a remission of the substantive sentence is granted Under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again depend upon an answer to the second part of the first question based on the principles laid down in **Swamy Shraddananda** (supra).

63. With that when we come to the second part of the first question which pertains to the special category of sentence to be considered in substitute of Death Penalty by imposing a life sentence i.e., the entirety of the life or a term of imprisonment which can be less than full life term but more than 14 years and put that category beyond application of remission which has been propounded in paragraphs 91 and 92 of **Swamy Shraddananda** (supra) and has come to stay as on this date.

64. To understand and appreciate the principle set down in the said decision, it will be necessary to note the special features analysed by this Court in the said judgment. At the very outset, it must be stated that the said decision was a well thought out one. This Court before laying down the principles therein noted the manner in which the Appellant in that case comprehended a scheme with a view to grab the wealth of the victim, who was a married woman and who was seduced by the Appellant solely with a view to make an unholy accumulation of the wealth at the cost of the victim, who went all out to get separated from her first husband by getting a divorce, married the Appellant whole heartedly reposing very high amount of faith, trust and confidence and went to the extent of executing a Power of Attorney in favour of the Appellant for dealing with all her valuable properties. This Court has stated that when the victim at some point of time realized the evil designs of the Appellant and found total mistrust in him, the Appellant set the clock for her elimination. It will be more appropriate to note the observation made in the said judgment after noting the manner in which the process of elimination was schemed by the Appellant. Paragraphs 28, 29 and 30 of the **Swamy Shraddananda(2)** (supra) judgment gives graphic description of the 'witch crafted' scheme formulated and executed with all perfection by the Appellant and the said paragraphs can be extracted herein which are as under:

28. These are, in brief, the facts of the case. On these facts, Mr. Sanjay Hegde, learned Counsel for the State of Karnataka, supported the view taken by Katju, J. (as indeed by the High Court and the trial court) and submitted that the Appellant deserved nothing less than death. In order to bring out the full horror of the crime Mr. Hegde reconstructed it before the Court. He said that after five years of marriage Shakereh's infatuation for the Appellant had worn thin. She could see through his fraud and see him for what he was, a lowly charlatan. The Appellant could sense that his game was up but he was not willing to let go of all the wealth and the lavish lifestyle that he had gotten used to. He decided to kill Shakereh and take over all her wealth directly.

29. In furtherance of his aim he conceived a terrible plan and executed it to perfection. He got a large pit dug up at a "safe" place just outside their bedroom. The person who was to lie into it was told that it was intended for the construction of a soak pit for the toilet. He got the bottom of one of the walls of the bedroom knocked off making a clearing to push the wooden box through; God only knows saying what to the person who was to pass through it. He got a large wooden box (7 x

2 x 2 ft) made and brought to 81, Richmond Road where it was kept in the guest house, mercifully out of sight of the person for whom it was meant. Having thus completed all his preparations he administered a very heavy dose of sleeping drugs to her on 28-5-1991 when the servant couple, on receiving information in the morning regarding a death in their family in a village in Andhra Pradesh asked permission for leave and some money in advance. However, before giving them the money asked for and letting them go, the Appellant got the large wooden box brought from the guest house to the bedroom by Raju (with the help of three or four other persons called for the purpose) where, according to Raju, he saw Shakereh (for the last time) lying on the bed, deep in sleep. After the servants had gone away and the field was clear the Appellant transferred Shakereh along with the mattress, the pillow and the bed sheet from the bed to the box, in all probability while she was still alive. He then shut the lid of the box and pushed it through the opening made in the wall into the pit, dug just outside the room, got the pit filled up with earth and the surface cemented and covered with stone slabs.

30. What the Appellant did after committing murder of Shakereh was, according to Mr. Hegde even more shocking. He continued to live, like a ghoul, in the same house and in the same room and started a massive game of deception. To Sabah, who desperately wanted to meet her mother or at least to talk to her, he constantly fed lies and represented to the world at large that Shakereh was alive and well but was simply avoiding any social contacts. Behind the facade of deception he went on selling Shakereh's properties as quickly as possible to convert those into cash for easy appropriation. In conclusion, Mr. Hegde submitted that it was truly a murder most foul and Katju, J. was perfectly right in holding that this case came under the first, second and the fifth of the five categories, held by this Court as calling for the death sentence in *Machhi Singh* v. *State of Punjab*.

65. After noting the beastly character of the Appellant, this Court made a detailed reference to those decisions in which the "rarest of rare case" principle was formulated and followed subsequently, namely, **Machhi Singh and Ors. v. State of Punjab** reported in MANU/SC/0211/1983 : (1983) 3 SCC 470, **Bachan Singh v. State of Punjab** reported in MANU/SC/0055/1982 : (1980) 2 SCC 684, **Jag Mohan Singh v. State of U.P.** reported in MANU/SC/0139/1972 : (1973) 1 SCC 20. While making reference to the said decisions and considering the submissions made at the Bar that for the sake of saving the Constitutional validity of the provision providing for "Death Penalty" this Court must step in to clearly define its scope by unmistakably making the types of grave murders and other capital offence that would attract death penalty rather than the alternative punishment of imprisonment for life. His Lordship Justice Aftab Alam, the author of the judgment has expressed the impermissibility of this Court in agreeing to the said submission in his own inimitable style in paragraphs 34, 36, 43, 45 and 47 in the following words:

34. As on the earlier occasion, in Bachan Singh too the Court rejected the submission. The Court did not accept the contention that asking the Court to state special reasons for awarding death sentence amounted to leaving the Court to do something that was essentially a legislative function. The Court held that the exercise of judicial discretion on well-established principles and on the facts of each case was not the same as to legislate. On the contrary, the Court observed, any attempt to standardise or to identify the types of cases for the purpose of death sentence would amount to taking up the legislative function. The Court said that a "standardisation or sentencing discretion

is a policy matter which belongs to the sphere of legislation" and "the Court would not by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do".

36. Arguing against standardisation of cases for the purpose of death sentence the Court observed *that even within a single category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. The Court further observed that standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity.*

43. In *Machhi Singh* the Court crafted the categories of murder in which "the community" should demand death sentence for the offender with great care and thoughtfulness. But the judgment in *Machhi Singh* was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the *Machhi Singh* categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of *Machhi Singh*. Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in *Bachan Singh*, therefore, we respectfully wish to say that even though the categories framed in *Machhi Singh* provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in *Bachan Singh* itself.

45. But the relative category may also be viewed from the numerical angle, that is to say, by comparing the case before the Court with other cases of murder of the same or similar kind, or even of a graver nature and then to see what punishment, if any was awarded to the culprits in those other cases. What we mean to say is this, if in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether, it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The Court is in a position to judge "the rarest of rare cases" or an "exceptional case" or an "extreme case" only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison.

47. We are not unconscious of the simple logic that in case five crimes go undetected and unpunished that is no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence.

(underlining is ours)

66. After noting the above principles, particularly culled out from the decision in which the very principle namely "the rarest of rare cases", or an "exceptional case" or an "extreme case", it was noted that even thereafter, in reality in later decisions neither the rarest of rare case principle nor **Machhi Singh** (supra) categories were followed uniformly and consistently. In this context, the learned Judges also noted some of the decisions, namely, **Aloke Nath Dutta and Ors. v. State of West Bengal** reported in MANU/SC/8774/2006 : (2007) 12 SCC 230. This Court in **Swamy Shraddananda** (supra) also made a reference to a report called "Lethal Lottery, the Death Penalty in India" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu, and Puducherry wherein a study of the Supreme Court judgments in death penalty cases from 1950 to 2006 was referred and one of the main facets made in the report (Chapters 2 to 4) was about the Court's lack of uniformity and consistency in awarding death sentence. This Court also noticed the ill effects it caused by reason of such inconsistencies and lamented over the same in the following words in paragraph 52:

52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied.

67. We fully endorse the above anguish expressed by this Court and as rightly put, the situation is a matter of serious concern for this Court and wish to examine whether the approach made thereafter by this Court does call for any interference or change or addition or mere confirmation. After having expressed its anguish in so many words this Court proceeded to examine the detailed facts of the Appellant's role in that case and noted the criminal magnanimity shown by him in killing the victim by stating that he devised a plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most and that the way of killing appears quite ghastly it may be said that it did not cause any mental or physical pain to the victim and that at least before the High Court he confessed his guilt. It must be stated that the manner in which the victim was sedated and buried while she was alive in the chamber no one would knew whether at all she regained her senses and if so what amount of torments and trauma she would have undergone before her breath came to a halt. Nevertheless, nobody had the opportunity ever to remotely imagine the amount of such ghastly, horrendous gruesome feeling

the victim would have undergone in her last moments. In these circumstances, it was further expressed by this Court that this Court must not be understood to mean that the crime committed by the Appellant in that case was not grave or the motive behind the crime was not highly depressed. With these expressions, it was held that this Court was hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The hangman's noose was thus taken off the Appellant's neck.

68. If one were to judge the case of the said Appellant in the above background of details from the standpoint of the victim's side, it can be said without any hesitation that one would have unhesitatingly imposed the death sentence. That may be called as the human reaction of anyone who is affected by the conduct of the convict of such a ghastly crime. That may even be called as the reaction or reflection in the common man's point of view. But in an organized society where the Rule of Law prevails, for every conduct of a human being, right or wrong, there is a well set methodology followed based on time tested, well thought out principles of law either to reward or punish anyone which was crystallized from time immemorial by taking into account very many factors, such as the person concerned, his or her past conduct, the background in which one was brought up, the educational and knowledge base, the surroundings in which one was brought up, the societal background, the wherewithal, the circumstances that prevailed at the time when any act was committed or carried out whether there was any preplan prevalent, whether it was an individual action or personal action or happened at the instance of anybody else or such action happened to occur unknowingly, so on so forth. It is for this reason, we find that the criminal law jurisprudence was developed by setting forth very many ingredients while describing the various crimes, and by providing different kinds of punishment and even relating to such punishment different degrees, in order to ensure that the crimes alleged are befitting the nature and extent of commission of such crimes and the punishments to be imposed meets with the requirement or the gravity of the crime committed.

69. Keeping the above perception of the Rule of Law and the settled principle of Criminal Law Jurisprudence, this Court expressed its concern as to in what manner even while let loose of the said Appellant of the capital punishment of death also felt that any scope of the Appellant being let out after 14 years of imprisonment by applying the concept of remission being granted would not meet the ends of justice. With that view, this Court expressed its well thought out reasoning for adopting a course whereby such heartless, hardened, money minded, lecherous, paid assassins though are not meted out with the death penalty are in any case allowed to live their life but at the same time the common man and the vulnerable lot are protected from their evil designs and treacherous behavior. Paragraph 56 can be usefully referred to understand the lucidity with which the whole issue was understood and a standard laid down for others to follows:

56. But this leads to a more important question about the punishment commensurate to the Appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the Appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in

breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years: in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh v. State of Punjab*. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad* case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, *at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large.* This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

We think that it is time that the course suggested in *Dalbir Singh* should receive a formal recognition by the Court.

(underlining is ours)

70. Even after stating its grounds for the above conclusion, this Court also noticed the earlier decisions of this Court wherein such course was adopted, namely, in **Dalbir Singh and Ors. v. State of Punjab** MANU/SC/0099/1979 : (1979) 3 SCC 745, **Subash Chander** (supra), **Shri Bhagavan v. State of Rajasthan** MANU/SC/0296/2001 : (2001) 6 SCC 296, **Ratan Singh** (supra), **Bhagirath v. Delhi Administration** MANU/SC/0062/1985 : (1985) 2 SCC 580, **Prakash Dhawal Khairnar (Patil) v. State of Maharashtra** MANU/SC/0788/2001 : (2002) 2 SCC 35, **Ram Anup Singh and Ors. v. State of Bihar** MANU/SC/0648/2002 : (2002) 6 SCC 686, **Mohd. Munna v. Union of India and Ors.** MANU/SC/0566/2005 : (2005) 7 SCC 417, **Jayawant Dattatraya Suryarao v. State of Maharashtra** MANU/SC/0710/2001 : (2001) 10 SCC 109, **Nazir Khan and Ors. v. State of Delhi** MANU/SC/0622/2003 : (2003) 8 SCC 461, **Ashok Kumar** (supra) and **Satpal alias Sadhu v. State of Haryana and Ors.** MANU/SC/0531/1992 : (1992) 4 SCC 172.

71. Having thus noted the need for carrying out a special term of imprisonment to be imposed, based on sound legal principles, this Court also considered some of the decisions of this Court wherein the mandate of Section 433 Code of Criminal Procedure was considered at length wherein it was held that exercise of power Under Section 433 was an executive discretion and the High Court in its review jurisdiction had no power to commute the sentence imposed where a minimum sentence was provided. It was a converse situation which this Court held has no application and the submissions were rejected as wholly misconceived. Thereafter, a detailed reference was made

to Sections 45, 53, 54, 55, 55A, 57 and other related provisions in the Indian Penal Code to understand the sentencing procedure prevalent in the Code and after making reference to the provisions relating to grant of remission in Sections 432, 433, 433A, 434 and 435 of Code of Criminal Procedure concluded as under in paragraphs 91 and 92:

91. The legal position as enunciated in *Pandit Kishori Lai, Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan* and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an Appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

(Emphasis added)

72. Thus on a detailed reference to **Swamy Shraddananda** (supra) judgment, it can be straight away held in our view, that no more need be stated. But we wish to make reference to certain paragraphs from the concurring judgment of Justice Fazal Ali in **Maru Ram** (supra), pages 1251, 1252 and 1256 are relevant which are as under:

The dominant purpose and the avowed object of the legislature in introducing Section 433-A in the Code of Criminal Procedure unmistakably seems to be to secure a deterrent punishment for heinous offences committed in a dastardly, brutal or cruel fashion or offences committed against the defence or security of the country. It is true that there appears to be a modern trend of giving punishment a colour of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective. At the same time, it cannot be gainsaid that such an objective cannot be achieved without mustering the necessary facilities, the requisite education and the appropriate climate which must be created to foster a sense of repentance and penitence in a criminal so that he may undergo such a mental or psychological revolution that he realizes the consequences of playing with human lives. In the world of today

and particularly in our country, this ideal is yet to be achieved and, in fact, with all our efforts it will take us a long time to reach this sacred goal.

xxx

The question, therefore, is--should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be. will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible.

xxx

XXX

Taking into account the modern trends in penology there are very rare cases where the courts impose a sentence of death and even if in some cases where such sentences are given, by the time the case reaches this Court, a bare minimum of the cases are left where death sentences are upheld. Such cases are only those in which imposition of a death sentence becomes an imperative necessity having regard to the nature and character of the offences, the antecedents of the offender and other factors referred to in the Constitution Bench judgment of this Court in *Bachan Singh* v. *State of Punjab*. In these circumstances, I am of the opinion that the Parliament in its wisdom chose to act in order to prevent criminals committing heinous crimes from being released through easy remissions or substituted form of punishments without undergoing at least a minimum period of imprisonment of fourteen years which may in fact act as a sufficient deterrent which may prevent criminals from committing offences. In most parts of our country, particularly in the north, cases are not uncommon where even a person sentenced to imprisonment for life and having come back after earning a number of remissions has committed repeated offences. The mere fact that a long-term sentence or for that matter a sentence of death has not produced useful results cannot support the argument either for abolition of death sentence or for reducing the sentence of life imprisonment from 14 years to something less. The question is not what has happened because of the provisions of the Penal Code but what would have happened if deterrent punishments were not given. In the present distressed and disturbed atmosphere we feel that if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its hands, it will be difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose and deterrent punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. Where one person commits three murders it is illogical to plead for the criminal and to argue that his life should be spared, without at all considering what has happened to the victims and their family. A person who has deprived another person completely of his liberty forever and has endangered the liberty of his family has no right to ask the court to uphold his liberty. Liberty is not a one-sided concept, nor does Article 21 of the Constitution contemplate such a concept. If a person commits

a criminal offence and punishment has been given to him by a procedure established by law which is free and fair and where the accused has been fully heard, no question of violation of Article 21 arises when the question of punishment is being considered. Even so, the provisions of the Code of Criminal Procedure of 1973 do provide an opportunity to the offender, after his guilt is proved, to show circumstances under which an appropriate sentence could be imposed on him. These guarantees sufficiently comply with the provisions of Article 21. Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals.

(Emphasis added)

73. The above chiseled words of the learned Judge throw much light on the sentencing aspect of different criminals depending upon the nature of crimes committed by them. Having noted the above observations of the learned Judge which came to be made about three and a half decades ago, we find that what was anticipated by the learned Judge has now come true and today we find that criminals are let loose endangering the lives of several thousand innocent people in our country. Such hardened criminals are in the good books of several powerful men of ill-gotten wealth and power mongers for whom they act as paid assassins and Goondas. Lawlessness is the order of the day. Having got the experience of dealing with cases involving major crimes, we can also authoritatively say that in most of the cases, even the kith and kin, close relatives, friends, neighbours and passersby who happen to witness the occurrence are threatened and though they initially give statements to the police, invariably turn hostile, apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. As was anticipated by the learned Judge, it is the hard reality that the State machinery is not able to protect or guarantee the life and liberty of common man. In this scenario, if any further lenience is shown in the matter of imposition of sentence, at least in respect of capital punishment or life imprisonment, it can only be said that that will only lead to further chaos and there will be no Rule of Law, but only anarchy will rule the country enabling the criminals and their gangs to dictate terms. Therefore, any sympathy shown will only amount to a misplaced one which the courts cannot afford to take. Applying these well thought out principles, it can be said that the conclusions drawn by this Court in **Swamy Shraddananda** (supra) is well founded and can be applied without anything more, at least until as lamented by Justice Fazal Ali the necessary facilities, the requisite education and the appropriate climate created to foster a sense of repentance and penitence in a criminal is inducted so that he may undergo such a mental or psychological revolution that he realizes the consequence of playing with human lives. It is also appropriate where His Lordship observed that in the world of today and particularly in our country, this ideal is yet to be achieved and that it will take a long time to reach that goal.

74. Therefore, in the present juncture, when we take judicial notice of the crime rate in our country, we find that criminals of all types of crimes are on the increase. Be it white collar crimes, vindictive crimes, crimes against children and women, hapless widow, old aged parents, sexual offences, retaliation murder, planned and calculated murder, through paid assassins, gangsters operating in the developed cities indulging in killing for a price, kidnapping and killing for ransom, killing by terrorists and militants, organized crime syndicates, etc., are the order of the day. While on the one side peace loving citizens who are in the majority are solely concerned with their peaceful existence by following the Rule of Law and aspire to thrive in the society anticipating every

protection and support from the governance of the State and its administration, it is common knowledge, as days pass on it is a big question mark whether one will be able to lead a normal peaceful life without being hindered at the hands of such unlawful elements, who enjoy in many cases the support of very many highly placed persons. In this context, it will be relevant to note the PRECEPTS of LAW which are: to live honourably, to injure no other man and to render everyone his due. There are murders and other serious offences orchestrated for political rivalry, business rivalry, family rivalry, etc., which in the recent times have increased manifold and in this process, the casualty are the common men whose day to day functioning is greatly prejudiced and people in the helm of affairs have no concern for them. Even those who propagate for lessening the gravity of imposition of severe punishment are unmindful of such consequences and are only keen to indulge in propagation of rescuing the convicts from being meted out with appropriate punishments. We are at a loss to understand as to for what reason or purpose such propagation is carried on and what benefit the society at large is going to derive.

75. Faced with the above situation prevailing in the Society, it is also common knowledge that the disposal of cases by Courts is getting delayed for variety of reasons. Major among them are the disproportionate Judges: population ratio and lack of proper infrastructure for the institution of judiciary. Sometime in 2009 when the statistics was taken it was found that the Judges: population ratio was 8 Judges for 1 million population in India, whereas it was 50 Judges per million population in western countries. The above factors also added to the large pendency of criminal and civil cases in the Courts which results in abnormal delay in the guilty getting punished then and there. In the normal course, it takes a minimum of a year for a murder case being tried and concluded, while the appeal arising out of such concluded trial at the High Court level takes not less than 5 to 10 years and when it reaches this Court, it takes a minimum of another 5 years for the ultimate conclusion. Such enormous delay in the disposal of cases also comes in handy for the criminals to indulge in more and more of such heinous crimes and in that process, the interest of the common man is sacrificed.

76. Keeping the above hard reality in mind, when we examine the issue, the question is 'whether as held in **Shraddananda** (supra), a special category of sentence; instead of death; for a term exceeding 14 years and putting that category beyond application of remission is good in law? When we analyze the issue in the light of the principles laid down in very many judgments starting from **Godse** (supra), **Maru Ram** (supra), **Sambha Ji Krishan Ji** (supra), **Ratan Singh** (supra), it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's life span.

77. In this context, the principles which weighed with this Court in **Machhi Singh** (supra) to inflict the capital punishment of death were the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and the targeted personality of victim of murder. The said five categories cannot be held to be exhaustive. It cannot also be said even if a convict falls under one or the other of the categories, yet, this Court has in numerable causes by giving adequate justification to alter the punishment from 'Death' to 'Life'. Therefore, the law makers entrusted the task of analyzing and appreciating the gravity of the offence committed in such cases with the institution of judiciary reposing very high amount of confidence and trust. Therefore, when in a case where the judicial mind after weighing the pros and cons of the crime committed, in a golden scale and keeping in mind the paramount interest of

the society and to safeguard it from the unmindful conduct of such offenders, takes a decision to ensure that such offenders don't deserve to be let loose in the society for a certain period, can it be said that such a decision is impermissible in law. In the first instance, as noted earlier, life sentence in a given case only means the entirety of the life of a person unless the context otherwise stipulates. Therefore, where the life sentence means, a person's life span in incarnation, the Court cannot be held to have in anyway violated the law in doing so. Only other question is how far the Court will be justified in stipulating a condition that such life imprisonment will have to be served by an offender in jail without providing scope for grant of any remission by way of statutory executive action.

As has been stated by this Court in **Maru Ram** (supra) by the Constitution Bench, that the Constitutional power of remission provided Under Articles 72 and 161 of the Constitution will always remain untouched, inasmuch as, though the statutory power of remission, etc., as compared to Constitution power Under Articles 72 and 161 looks similar, they are not the same. Therefore, we confine ourselves to the implication of statutory power of remission, etc., provided under the Code of Criminal Procedure entrusted with the Executive of the State as against the well thought out judicial decisions in the imposition of sentence for the related grievous crimes for which either capital punishment or a life sentence is provided for. When the said distinction can be clearly ascertained, it must be held that there is a vast difference between an executive action for the grant of commutation, remission etc., as against a judicial decision. Time and again, it is held that judicial action forms part of the basic structure of the Constitution. We can state with certain amount of confidence and certainty, that there will be no match for a judicial decision by any of the authority other than Constitutional Authority, though in the form of an executive action, having regard to the higher pedestal in which such Constitutional Heads are placed whose action will remain unquestionable except for lack of certain basic features which has also been noted in the various decisions of this Court including **Maru Ram** (supra).<mpara>

78. Though we are not attempting to belittle the scope and ambit of executive action of the State in exercise of its power of statutory remission, when it comes to the question of equation with a judicial pronouncement, it must be held that such executive action should give due weight and respect to the latter in order to achieve the goals set in the Constitution. It is not to be said that such distinctive role to be played by the Executive of the State would be in the nature of a subordinate role to the judiciary. In this context, it can be said without any scope of controversy that when by way of a judicial decision, after a detailed analysis, having regard to the proportionality of the crime committed, it is decided that the offender deserves to be punished with the sentence of life imprisonment (i.e.) for the end of his life or for a specific period of 20 years, or 30 years or 40 years, such a conclusion should survive without any interruption. Therefore, in order to ensure that such punishment imposed, which is legally provided for in the Indian Penal Code read along with Code of Criminal Procedure to operate without any interruption, the inherent power of the Court concerned should empower the Court in public interest as well as in the interest of the society at large to make it certain that such punishment imposed will operate as imposed by stating that no remission or other such liberal approach should not come into effect to nullify such imposition.

79. In this context, the submission of the learned Solicitor General on the interpretation of Section 433-A assumes significance. His contention was that Under Section 433-A what is prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and

upto the end of one's life span. We find substance in the said submission. When we refer to Section 433-A, we find that the expression used in the said Section for the purpose of grant of remission relating to a person convicted and directed to undergo life imprisonment, it stipulates that "such person shall not be released from prison unless he had served at least fourteen years of imprisonment." Therefore, when the minimum imprisonment is prescribed under the Statute, there will be every justification for the Court which considers the nature of offence for which conviction is imposed on the offender for which offence the extent of punishment either death or life imprisonment is provided for, it should be held that there will be every justification and authority for the Court to ensure in the interest of the public at large and the society, that such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission. In fact, going by the caption of the said Section 433-A, it imposes a restriction on powers of remission or commutation in certain cases.
For a statutory authority competent to consider a case for remission after the imposition of punishment by Court of law it can be held so, then a judicial forum which has got a wider scope for considering the nature of offence and the conduct of the offender including his mens rea to bestow its judicial sense and direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, it should be held that there will be no dearth in the Authority for exercising such power in the matter of imposition of the appropriate sentence befitting the criminal act committed by the convict. In this context, the concurring judgment of Justice Fazal Ali in **Maru Ram** (supra), as stated in pages 1251, 1251 and 1258 on the sentencing aspect noted in earlier paragraphs requires to be kept in view.

80. There is one other valid ground for our above conclusion. In paragraph 46 of this judgment, we have noted the provision in the Penal Code which provides for imposing the punishment of death. There are also several dimensions to this view to be borne in mind. In this context, it will be worthwhile to refer to the fundamental principles which weighed with our Constitution makers while entrusting the highest power with the head of the State, namely, the President in Article 72 of the Constitution. In the leading judgment of the Constitution Bench in **Kehar Singh v. Union of India** MANU/SC/0240/1988 : (1989) 1 SCC 204, this Court prefaced its judgment in paragraph 7 highlighting the said principle in the following words:

7. The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:

We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic... do hereby adopt, enact and give to ourselves this Constitution.

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary

are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr. Justice Holmes, speaking for the Court in *W.I. Biddle* v. *Vuco Perovich* enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by learned Counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the Petitioners that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in *Maru Ram* v. *Union of India*, that the power Under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State.

(Underlining is ours)

81. Again in paragraphs 8 and 10, this Court made a detailed analysis of the effect of the grant of pardon or remission vis-a-vis the judicial pronouncement and explained the distinguishing features in their respective fields in uncontroverted terms. Paragraphs 8 and 10 can also be usefully extracted which are as under:

8. To what areas does the power to scrutinise extend? In *Ex parte William Wells* the United States Supreme Court pointed out that it was to be used "particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice". And in *Ex parte Garland* decided shortly after the Civil War, Mr. Justice Field observed:

The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the

guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence... if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights....

The classic exposition of the law is to be found in *Ex parte Philip Grossman* where Chief Justice Taft explained:

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.

10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In *U.S.* v. *Benz* Sutherland, J., observed:

The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In *Sarat Chandra Rabha* v. *Khagendranath Nath,* Wanchoo, J., speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect of reducing the sentence imposed on the Appellant in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by a trial court, and after discussing the law relating to the power to grant pardon, he said:

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the Appellant was released from jail before he had served the full sentence of three

years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was.

and again:

Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by a court; but where a sentence imposed by a court is remitted in part Under Section 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court. The order of remission affects the execution of the sentence imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission.

It is apparent that the power Under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

(Underlining is ours)

82. Having thus noted the well thought out principles underlying the exercise of judicial power and the higher Executive power of the State without affecting the core of the judicial pronouncements, we wish to refer to some statistics noted in that very judgment in paragraph 17 as to the number of convicts hanged as compared to the number of murders that had taken place during the relevant period, namely, between 1974 to 1978. It was found that there were 29 persons hanged during that period while the number of murders was noted as 85,000. It reveals that in a period of almost four years as against the huge number of victims, the execution of death penalty was restricted to the minimal i.e. it was 0.034%. We only point out that great care and caution weighed with the Courts and the Executive to ensure that under no circumstance an innocent is subjected to the capital punishment even if the real culprit may in that process be benefited. After all in a civilized society, the rule of law should prevail and the right of a human being should not be snatched away even in the process of decision making which again is entrusted with another set of human beings as they are claimed to be experts and well informed legally as well as are men in the know of things.

83. Keeping the above principles in mind, when we make a study of the vexed question, we find that the law makers have restricted the power to impose death sentence to only 12 Sections in the Penal Code, namely, Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307 (2nd para), 376A, 376E, 396 and 364A. Apart from the Penal Code such punishments of death are provided in certain other draconian laws like TADA, MCOCA etc. Therefore, it was held by this Court in umpteen numbers of judgments that death sentence is an exception rather than a rule. That apart, even after applying such great precautionary prescription when the trial Courts reach a conclusion to impose the maximum punishment of death, further safe guards are provided under the Code of Criminal Procedure and the Special Acts to make a still more concretized effort by the higher Courts to ensure that no stone is left unturned for the imposition of such capital punishments.

84. In this context, we can make specific reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure wherein Sections 366 to 371, are placed for the relevant consideration to be mandatorily made when a death penalty is imposed by the trial Court. Under Section 366, whenever a Sessions Court passes a sentence of death, the proceedings should be mandatorily submitted to the High Court and the sentence of death is automatically suspended until the same is confirmed by the High Court. Under Chapter XXVIII of the Code, even while exercising the process of confirmation by the High Court, very many other safe guards such as, further enquiries, letting in additional evidence, ordering a new trial on the same or amended charge or amend the conviction or convict the accused of any other offence of lesser degree is provided for. Further in order to ensure meticulous and high amount of precaution to be undertaken, the consideration of such confirmation process is to be carried out by a minimum of two Judges of the High Court. In the event of difference of opinion amongst them, the case is to be placed before a third Judge as provided Under Section 392 of the Code. Statutory prescriptions apart, by way of judicial pronouncements, it has been repeatedly held that imposition of death penalty should be restricted to in the rarest of rare cases again to ensure that the Courts adopt a precautionary principle of very high order when it comes to the question of imposition of death penalty.

85. Again keeping in mind the above statutory prescriptions relating to imposition of capital punishment or the alternate punishment of life imprisonment, meaning thereby till the end of the convict's life, we wish to analyze the scope and extent to which such alternate punishment can be directed to be imposed. In the first place, it must be noted that the law makers themselves have bestowed great care and caution when they decided to prescribe the capital punishment of death and its alternate to life imprisonment, restricted the scope for such imposition to the least minimum of 12 instances alone. As has been noted by us earlier, by way of interpretation process, this Court has laid down that such imposition of capital punishment can only be in the rarest of rare cases. In the later decisions, as the law developed, this Court laid down and quoted very many circumstances which can be said to be coming within the four corners of the said rarest of rare principle, though such instances are not exhaustive. The above legal principle come to be introduced in the first instance in the decision reported as **Bachan Singh v. State of Punjab** MANU/SC/0055/1982 : AIR 1980 SC 898. It was held as under:

151...A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence.....

207: There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It

is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

Subsequently, it was elaborated in the decision reported as **Machhi Singh and Ors. v. State of Punjab** MANU/SC/0211/1983 : AIR 1983 SC 957 it was held as under:

32: The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the antisocial or abhorrent nature of the crime, such as for instance:

I. Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

(*a*) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (*b*) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

33: In this background the guidelines indicated in **Bachan Singh's** case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the

option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

34: In order to apply these guidelines inter-alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

(Emphasis added)

These revered principles were subsequently adopted or explained or upheld in following cases reported as **Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra** MANU/SC/0801/2009 : 2009 (6) SC 498, **Aloke Nath Dutta** (supra), **Prajeet Kumar Singh v. State of Bihar** MANU/SC/1795/2008 : (2008) 4 SCC 434, **B.A. Umesh v. Registrar General, High Court of Karnataka** MANU/SC/0082/2011 : (2011) 3 SCC 85, **State of Rajasthan v. Kashi Ram** MANU/SC/8632/2006 : (2006) 12 SCC 254 and **Atbir v. Government of NCT of Delhi** MANU/SC/0576/2010 : (2010) 9 SCC 1 and also in a peculiar case of **D.K. Basu v. State of West Bengal** MANU/SC/0157/1997 : AIR 1997 SC 610 where this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying the reasons in support of such decision, the Court awarded death penalty in that case.

86. In a recent decision of this Court reported as **Vikram Singh alias Vicky and Anr. v. Union of India and Ors.** MANU/SC/0901/2015 : AIR 2015 SC 3577 this Court had occasion to examine the sentencing aspect. That case arose out of an order passed by the High Court in a writ petition moved before the High Court of Punjab and Haryana praying for a Mandamus to strike down Section 364A of Indian Penal Code and for an order restraining the execution of death sentence awarded to the Appellant therein. A Division Bench of the High Court of Punjab and Haryana while dismissing the writ petition took the view that the question whether Section 364A of Indian Penal Code was attracted to the case at hand and whether a person found guilty of an offence punishable under the provision could be sentenced to death was not only raised by the Appellant therein as an argument before the High Court in an appeal filed by them against their conviction

and sentence imposed which was noticed and found against them. The High Court dismissed the writ petition by noting the regular appeal filed earlier by the Appellant therein against the conviction and sentence which was also upheld by this Court while dismissing the subsequent writ petition. While upholding the said judgment of the High Court on the sentencing aspect, this Court has noticed as under in paragraph 49:

49. To sum up:

(a) Punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed.

(b) Prescribing punishments is the function of the legislature and not the Courts.

(c) The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that are necessary to meet those needs.

(d) Courts show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences.

(e) Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency.

(f) Absence of objective standards for determining the legality of the prescribed sentence makes the job of the Court reviewing the punishment difficult.

(g) Courts cannot interfere with the prescribed punishment only because the punishment is perceived to be excessive.

(h) In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentences of imprisonment being held disproportionate.

When we are on the question of sentencing aspect we feel it appropriate to make a reference to the principles culled out in the said judgment.

87. Having thus noted the serious analysis made by this Court in the imposition of Death sentence and the principle of rarest of rare cases formulated in the case of **Bachan Singh** (supra) which was subsequently elaborated in **Machhi Singh** (supra), followed in the later decisions and is being applied and developed, we also wish to note some of the submissions of the counsel for the Respondents by relying upon the report of Justice Malimath Committee on Reform in Criminal Justice System submitted in 2003 and the report of Justice Verma's Committee on Amendment to Criminal Law and the introduction of some of the punishments in the Penal Code, namely, Sections 370(6), 376A, 376D and 376E which prescribe the punishment of imprisonment for life which

shall mean imprisonment for the remainder of that persons' natural life. It was further contended that some special Acts like TADA specifically prescribe that the imposition of such punishment shall remain and no remission can be considered. The submission was made to suggest that in law when a punishment is prescribed it is only that punishment that can be inflicted and nothing more. In other words, when the penal provision prescribes the punishment of Death or Life, the Court should at the conclusion of the trial or at its confirmation, should merely impose the punishment of Death or Life and nothing more. Though the submission looks attractive, on a deeper scrutiny, we find that the said submission has no force. As has been noted by us in the earlier paragraphs where we have discussed the first part of this question, namely, what is meant by life imprisonment, we have found an answer based on earlier Constitution Bench decisions of this Court that life imprisonment means rest of one's life who is imposed with the said punishment. In the report relied upon and the practices followed in various other countries were also highlighted to support the above submission. Having thus considered the submissions, with utmost care, we find that it is nowhere prescribed in the Penal Code or for that matter any of the provisions where Death Penalty or Life Imprisonment is provided for, any prohibition that the imprisonment cannot be imposed for any specific period within the said life span. When life imprisonment means the whole life span of the person convicted, can it be said, that the Court which is empowered to impose the said punishment cannot specify the period upto which the said sentence of life should remain befitting the nature of the crime committed, while at the same time apply the rarest of rare principle, the Court's conscience does not persuade it to confirm the death penalty. In such context when we consider the views expressed in **Shraddananda** (supra) in paragraphs 91 and 92, the same is fully justified and needs to be upheld. By stating so, we do not find any violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code. It cannot also be said that by stating so, the Court has carved out a new punishment. What all it seeks to declare by stating so was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed. We also note that when the report of Justice Malimath Committee was submitted in 2003, the learned Judge and the members did not have the benefit of the law laid down in **Swamy Shraddananda** (supra). Insofar as Justice Verma Committee report of 2013 was concerned, the amendments introduced after the said report in Sections 370(6), 376A, 376D and 376E, such prescription stating that life imprisonment means the entirety of the convict's life does not in any way conflict with the well thought out principles stated in **Swamy Shraddananda** (supra). In fact, Justice Verma Committee report only reiterated the proposition that a life imprisonment means the whole of the remaining period of the convict's natural life by referring to **Mohd. Munna** (supra), **Rameshbhai Chandubhai Rathod v. State of Gujarat** MANU/SC/0075/2011 : 2011 (2) SCC 764 and **State of Uttar Pradesh v. Sanjay Kumar** MANU/SC/0693/2012 : 2012 (8) SCC 537 and nothing more. Further, the said Amendment can only be construed to establish that there should not be any reduction in the life sentence and it should remain till the end of the convict's life span. As far as the reference to prescription of different type of punishments in certain other countries need not dissuade us to declare the legal position based on the punishment prescribed in the Penal Code and the enormity of the crimes that are being committed in this country. For the very same reasons, we are not able to subscribe to the submissions of Mr. Dwivedi and Shri Andhyarujina that by awarding such punishment of specified period of life imprisonment, the Court would be entering the domain of the Executive or violative of the principle of separation of

powers. By so specifying, it must be held that, the Courts even while ordering the punishment prescribed in the Penal Code only seek to ensure that such imposition of punishment is commensurate to the nature of crime committed and in that process no injustice is caused either to the victim or the accused who having committed the crime is bound to undergo the required punishment. It must be noted that the highest executive power prescribed under the Constitution in Articles 72 and 161 remains untouched for grant of pardon, suspend, remit, reprieve or commute any sentence awarded. As far as the apprehension that by declaring such a sentencing process, in regard to the offences falling Under Section 302 and other offences for which capital punishment or in the alternate life imprisonment is prescribed, such powers would also be available to the trial Court, namely, the Sessions Court is concerned, the said apprehension can be sufficiently safeguarded by making a detailed reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure which we shall make in the subsequent paragraphs of this judgment. As far as the other apprehension that by prohibiting the consideration of any remission the executive power Under Sections 432 and 433 are concerned, it will have to be held that such prohibition will lose its force the moment, the specified period is undergone and the Appropriate Government's power to consider grant of remission will automatically get revived. Here again, it can be stated at the risk of repetition that the higher executive power provided under the Constitution will always remain and can be exercised without any restriction.

88. As far as the argument based on ray of hope is concerned, it must be stated that however much forceful, the contention may be, as was argued by Mr. Dwivedi, the learned Senior Counsel appearing for the State, it must be stated that such ray of hope was much more for the victims who were done to death and whose dependents were to suffer the aftermath with no solace left. Therefore, when the dreams of such victims in whatever manner and extent it was planned, with reference to oneself, his or her dependents and everyone surrounding him was demolished in an unmindful and in some cases in a diabolic manner in total violation of the Rule of Law which is prevailing in an organized society, they cannot be heard to say only their rays of hope should prevail and kept intact. For instance, in the case relating to the murder of the former Prime Minister, in whom the people of this country reposed great faith and confidence when he was entrusted with such great responsible office in the fond hope that he will do his best to develop this country in all trusts, all the hope of the entire people of this country was shattered by a planned murder which has been mentioned in detail in the judgment of this Court which we have extracted in paragraph No. 147. Therefore, we find no scope to apply the concept of ray of hope to come for the rescue of such hardened, heartless offenders, which if considered in their favour will only result in misplaced sympathy and again will be not in the interest of the society. Therefore, we reject the said argument outright.

89. Having thus noted the various submissions on this question, we have highlighted the various prescriptions in the cited judgments to demonstrate as to how the highest Court of this land is conscious of the onerous responsibility reposed on this institution by the Constitution makers in order to ensure that even if there is a Penal provision for the imposition of capital punishment of death provided for in the statute, before deciding to impose the said sentence, there would be no scope for anyone to even remotely suggest that there was any dearth or deficiency or lack of consideration on any aspect in carrying out the said onerous duty and responsibility. When the highest Court of this land has thus laid down the law and the principles to be applied in the matter of such graver punishments and such principles are dutifully followed by the High Courts, when

the cases are placed before it by virtue of the provisions contained in Chapter XXVIII of Code of Criminal Procedure, it must be held that it will also be permissible for this Court to go one step further and stipulate as to what extent such great precautionary principle can be further emphasized.

90. Before doing so, we also wish to note each one of the 12 crimes for which, the penalty of death and life is prescribed. Under Section 120B, when prescribing the penalty for criminal conspiracy in respect of offence for which death penalty or life imprisonment is provided for in the Penal Code, every one of the accused who was a party to such criminal conspiracy in the commission of the offence is to be treated as having abetted the crime and thereby liable to be punished and imposed with the same punishment as was to be imposed on the actual offender. Under Section 121 the provision for capital punishment is for the offence of waging or attempting to wage a war or abetting the waging of war against the Government of India. In other words, in the event of such offence found proved, such a convict can be held to have indulged in a crime against the whole of the NATION meaning thereby against every other Indian citizen and the whole territory of this country. Under Section 132, the punishment of death is provided for an offender who abets the committing of MUTINY by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India and in the event of such MUTINY been committed as a sequel to such abetment. MUTINY in its ordinary dictionary meaning is an open revolt against Constitutional authority, especially by soldiers or sailors against their officers. It can be, therefore, clearly visualized that in the event of such MUTINY taking place by the Army personnel what would be plight of this country and the safety and interest of more than 120 million people living in this country. Under the later part of Section 194 whoever tenders or fabricates false evidence clearly intending thereby that such act would cause any innocent person be convicted of capital punishment and any such innocent person is convicted of and executed of such capital punishment, the person who tendered such fake and fabricated evidence be punished with punishment of death. Under the Second Part of Section 195A if any person threatens any other person to give false evidence and as a consequence of such Act any other person is though innocent, but convicted and sentenced to death in consequence of such false evidence, the person at whose threat the false evidence came to be tendered is held to be liable to be meted out with the same punishment of death.

91. Under Section 302, whoever commits murder of another person is liable to be punished with death or life imprisonment. Under Section 305, whoever abets the commission of suicide of a person under 18 years of age i.e. a minor or juvenile, any insane person, any idiot or any person in a state of intoxication is liable to be punished with death or life imprisonment. It is relevant to note that the categories of persons whose suicide is abetted by the offender would be persons who in the description of law are supposedly unaware of committing such act which they actually perform but for the abetment of the offender.

92. Under the Second Part of Section 307, if attempt to murder is found proved against an offender who has already been convicted and sentenced to undergo life imprisonment, then he is also liable to be inflicted with the sentence of death. Under Section 376A whoever committed the offence of rape and in the course of commission of such offence, also responsible for committing the death of the victim or such injury caused by the offence is such that the victim is in a persistent vegetative state, then the minimum punishment provided for is 20 years or life imprisonment or death.

93. Under Section 376E whoever who was once convicted for the offence Under Sections 376, 376A or 376D is subsequently convicted of an offence under any of the said Sections would be punishable for life imprisonment meaning thereby imprisonment for the remainder of his life span or with death. Under Section 376D for the offence of gang rape, the punishment provided for is imprisonment for a minimum period of 20 years and can extend upto life imprisonment meaning thereby the remainder of that person's life.

94. Under Section 364A kidnapping for ransom, etc. in order to compel the Government or any foreign State or international, intergovernmental organization or another person to do or abstain from doing any act to pay a ransom shall be punishable with death or life imprisonment.

95. Under Section 396, if any one of five or more persons conjointly committed decoity, everyone of those persons are liable to be punished with death or life imprisonment.

96. Thus, each one of the offences above noted, for which the penalty of death or life imprisonment or specified minimum period of imprisonment is provided for, are of such magnitude for which the imposition of anyone of the said punishment provided for cannot be held to be excessive or not warranted. In each individual case, the manner of commission or the modus operandi adopted or the situations in which the act was committed or the situation in which the victim was situated or the status of the person who suffered the onslaught or the consequences that ensued by virtue of the commission of the offence committed and so on and so forth may vary in very many degrees. It was for this reason, the law makers, while prescribing different punishments for different crimes, thought it fit to prescribe extreme punishments for such crimes of grotesque (monstrous) nature.

97. While that be so it cannot also be lost sight of that it will be next to impossible for even the law makers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeon hole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the law makers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary who is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists and judicial pronouncements revealed earlier, to determine from the nature of such grave offences found proved and depending upon the facts noted what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the Courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae.

98. The said process of determination must be held to be available with the Courts by virtue of the extent of punishments provided for such specified nature of crimes and such power is to be derived from those penal provisions themselves. We must also state, by that approach, we do not find any

violation of law or conflict with any other provision of Penal Code, but the same would be in compliance of those relevant provisions themselves which provide for imposition of such punishments.

99. That apart, as has been noted by us earlier, while the description of the offences and the prescription of punishments are provided for in the Penal Code which can be imposed only through the Courts of law, under Chapter XXVIII of Code of Criminal Procedure, at least in regard to the confirmation of the capital punishment of death penalty, the whole procedure has been mandatorily prescribed to ensure that such punishment gets the consideration by a Division Bench consisting of two Hon'ble Judges of the High Court for its approval. As noted earlier, the said Chapter XXVIII can be said to be a separate Code by itself providing for a detailed consideration to be made by the Division Bench of the High Court, which can do and undo with the whole trial held or even order for retrial on the same set of charges or of different charges and also impose appropriate punishment befitting the nature of offence found proved.

100. Such prescription contained in the Code of Criminal Procedure, though procedural, the substantive part rests in the Penal Code for the ultimate Confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Code of Criminal Procedure and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in the Penal Code and the Code of Criminal Procedure, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment.

101. Once we steer clear of such distinctive features in the two enactments, one substantive and the other procedural, one will have no hurdle or difficulty in working out the different provisions in the two different enactments without doing any violence to one or the other. Having thus noted the above aspects on the punishment prescription in the Penal Code and the procedural prescription in the Code of Criminal Procedure, we can authoritatively state that the power derived by the Courts of law in the various specified provisions providing for imposition of capital punishments in the Penal Code such power can be appropriately exercised by the adjudicating Courts in the matter of ultimate imposition of punishments in such a way to ensure that the other procedural provisions contained in the Code of Criminal Procedure relating to grant of remission, commutation, suspension etc. on the prescribed authority, not speaking of similar powers Under Articles 72 and 162 of the Constitution which are untouchable, cannot be held to be or can in any manner overlap the power already exercised by the Courts of justice.

102. In fact, while saying so we must also point out that such exercise of power in the imposition of death penalty or life imprisonment by the Sessions Judge will get the scrutiny by the Division Bench of the High Court mandatorily when the penalty is death and invariably even in respect of life imprisonment gets scrutinized by the Division Bench by virtue of the appeal remedy provided in the Code of Criminal Procedure. Therefore, our conclusion as stated above can be reinforced by stating that the punishment part of such specified offences are always examined at least once after

the Sessions Court's verdict by the High Court and that too by a Division Bench consisting of two Hon'ble Judges.

103. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial Court and confirmed by the Division Bench of the High Court, the concerned convict will get an opportunity to get such verdict tested by filing further appeal by way of Special Leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

104. We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court.

105. Viewed in that respect, we state that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of Death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in **Sangeet and Anr. v. State of Haryana** MANU/SC/0989/2012 : 2013 (2) SCC 452 that the deprival of remission power of the Appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.

106. With that we come to the next important question, namely:

Whether the Appropriate Government is permitted to grant remission Under Section 432/433 of Code of Criminal Procedure after the pardon power is exercised Under Article 72 by the President and Under Article 161 by the Governor of the State or by the Supreme Court of its Constitutional Power Under Article 32.

For the above discussion the relevant provisions of Code of Criminal Procedure, 1973 are extracted as under:

Section 432.-Power to suspend or remit sentences-(1) when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,-

(a) Where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) Where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above Sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in Sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government:

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

Section 433.-Power to commute sentence-The appropriate Government may, without the consent of the person sentenced commute-

(a) A sentence of death, for any other punishment provided by the Indian Penal Code

(b) A sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) A sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) A sentence of simple imprisonment, or fine.

107. Last part of the second question refers to the exercise of power by this Court Under Article 32 of the Constitution pertaining to a case of remission. To understand the background in which the said part of the question was framed, we can look into paragraphs 29 to 31 of the Order of Reference. On behalf of the Union of India, it was contended that once the power of commutation/remission has been exercised in a particular case of a convict by a Constitutional forum particularly this Court, then there cannot be a further exercise of the Executive Power for the purpose of commuting/remitting the sentence of the said convict in the same case by invoking Sections 432 and 433 of Code of Criminal Procedure.

108. While stoutly resisting the said submission made on behalf of the Union of India, Mr. Dwivedi, learned Senior Counsel, who appeared for the State of Tamil Nadu contended that in the case on hand, this Court while commuting the death sentence of some of the convicts did not exercise the Executive Power of the State, and that it only exercised its judicial power in the context of breach of Article 21 of the Constitution. It was further contended that if the stand of Union of India is accepted then in every case where this Court thought it fit to commute sentence for breach of Article 21 of the Constitution, that would foreclose even the right of a convict to seek for further commutation or remission before the Appropriate Government irrespective of any precarious situation of the convict, i.e., even if the physical condition of the convict may be such that he may be vegetable by virtue of his old age or terminal illness. It was also pointed out that in **V. Sriharan alias Murugan v. Union of India and Ors.** MANU/SC/0104/2014 : (2014) 4 SCC 242 dated 18.02.2014, this Court while commuting the sentence of death into one of life also specifically observed that such commutation was independent of the power of remission under the Constitution, as well as, the Statute. In this context, when we refer the power of commutation/remission as provided under Code of Criminal Procedure, namely, Sections 432, 433, 433A, 434 and 435, it is quite apparent that the exercise of power Under Article 32 of the Constitution by this Court is independent of the Executive Power of the State under the Statue. As rightly pointed out by Mr. Dwivedi, learned Senior Counsel in his submissions made earlier, such exercise of power was in the context of breach of Article 21 of the Constitution. In the present case, it was so exercised to commute the sentence of death into one of life imprisonment. It may also arise while considering wrongful exercise or perverted exercise of power of remission by the Statutory or Constitutional authority. Certainly there would have been no scope for this Court to consider a case of claim for remission to be ordered Under Article 32 of the Constitution. In other words, it has been consistently held by this Court that when it comes to the question of reviewing order of remission passed which is patently illegal or fraught with stark illegality on Constitutional violation or rejection of a claim for remission, without any justification or colourful exercise of power, in either case by the Executive Authority of the State, there may be scope for reviewing

such orders passed by adducing adequate reasons. Barring such exceptional circumstances, this Court has noted in numerous occasions, the power of remission always vests with the State Executive and this Court at best can only give a direction to consider any claim for remission and cannot grant any remission and provide for premature release. It was time and again reiterated that the power of commutation exclusively rest with the Appropriate Government. To quote a few, reference can be had to the decisions reported as **State of Punjab v. Kesar Singh** MANU/SC/0631/1996 : (1996) 5 SCC 495, **Delhi Administration (now NCT of Delhi) v. Manohar Lal** MANU/SC/0713/2002 : (2002) 7 SCC 222 which were followed in **State (Government of NCT of Delhi) v. Prem Raj** MANU/SC/0548/2003 : (2003) 7 SCC 121. Paragraph 13 of the last of the decision can be quoted for its lucid expression on this issue which reads as under:

13. An identical question regarding exercise of power in terms of Section 433 of the Code was considered in *Delhi Admn. (now NCT of Delhi)* v. *Manohar Lal*. The Bench speaking through one of us (Doraiswamy Raju, J.) was of the view that exercise of power Under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In *State of Punjab* v. *Kesar Singh* this Court observed as follows [though it was in the context of Section 433(*b*)]: (SCC pp. 495-96, para 3)

The mandate of Section 433 Code of Criminal Procedure enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts..... That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the Respondent itself. The right to exercise the power Under Section 433 Code of Criminal Procedure vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside.

(Underlining is ours)

109. The first part of the said question pertains to the power of the Appropriate Government to grant remission after the parallel power is exercised Under Articles 72 and 161 of the Constitution by the President and the Governor of the State respectively. In this context, a reference to Articles 72 and 161 of the Constitution on the one hand and Sections 432 and 433 of Code of Criminal Procedure on the other needs to be noted. When we refer to Article 72, necessarily a reference will have to be made to Articles 53 and 74 as well. Under Article 53 of the Constitution the Executive Power of the Union vests in the President and such power should be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 74, the exercise of the functions of the President should always be based on the aid and advise of the Council of Ministers headed by the Prime Minister. Under the proviso to the said Article, the President can at best seek for reconsideration of any such advice and should act based on such reconsidered advice. Article 74(2) in fact, has insulated any such advice being enquired into by any Court. Identical provisions are contained in Articles 154, 161 and 163 of the Constitution relating to the Governor of the State. Reading the above provisions, it is clear that the president of the Union and the Governor of the State while functioning as the Executive Head of the respective

bodies, only have to act based on the advice of the Council of Ministers of the Union or the State. While so, when we look into the statutory prescription contained in Sections 432 and 433 of the Code of Criminal Procedure though the exercise of the power under both the provisions vests with the Appropriate Government either State or the Centre, it can only be exercised by the Executive Authorities headed by the President or the Governor as the case may be. In the first blush though it may appear that exercise of such power Under Sections 432 and 433 is nothing but the one exercisable by the same authority as the Executive Head, it must be noted that the real position is different. For instance, when we refer to Section 432, the power is restricted to either suspend the execution of sentence or remit the whole or any part of the punishment. Further under Sub-section (2) of Section 432, it is stipulated that exercise of power of suspension or remission may require the opinion of the presiding Judge of the Court before or by which the conviction was held or confirmed. There is also provision for imposing conditions while deciding to suspend or remit any sentence or punishment. There are other stipulations contained in Section 432. Likewise, when we refer to Section 433 it is provided therein that the Appropriate Government may without the consent of the persons sentenced commute any of the sentence to any other sentence which ranges from Death sentence to fine. One significant feature in the Constitutional power which is apparent is that the President is empowered Under Article 72 of the Constitution to grant pardons, reprieves, respites or remission, suspend or commute the sentence. Similar such power is also vested with the Governor of the State. Whereas Under Sections 432 and 433 of the Code of Criminal Procedure the power is restricted to suspension, remission and commutation. It can also be noted that there is no specific provision prohibiting the execution of the power Under Sections 432 and 433 of Code of Criminal Procedure when once similar such power was exercised by the Constitutional Authorities Under Articles 72 and 161 of the Constitution. There is also no such implied prohibition to that effect.

110. In this context, learned Solicitor General submitted that while the power Under Articles 72 and 161 of the Constitution can be exercised more than once, the same is not the position with Sections 432 and 433 of Code of Criminal Procedure. The learned Solicitor General contended that since the exercise of power Under Articles 72 and 161 is with the aid of the Council of Ministers, it must be held that Sections 432 and 433 of Code of Criminal Procedure are only enabling provisions for exercise of power Under Articles 72 and 161 of the Constitution. In support of the said submission, the learned Solicitor General, sought to rely upon the passage in **Maru Ram** (supra) to the effect that:

since Sections 432 and 433(a) are statutory expression and *modus operandi* of the Constitutional power....

Though the submission looks attractive, we are not convinced. We find that the said set of expression cannot be strictly stated to be the conclusion of the Court. In fact, if we read the entire sentence, we find that it was part of the submission made which the Court declined. On the other hand, in the ultimate analysis, the Majority view was summarized wherein it was held at page 1248 as under:

4. We hold that Sections 432 and 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power, and Section 433A, by nullifying wholly or

partially these prior provisions does not violate or detract from the full operation of the Constitutional power to pardon, commute and the like.

111. Therefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission Under Sections 432 and 433 of the Code of Criminal Procedure even if such consideration was earlier made and exercised Under Article 72 by the President and Under Article 161 by the Governor.

As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power Under Sections 432 and 433 is to be exercised by the Appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government, even if someone approaches this Court Under Article 32 of the Constitution.
We answer the said question on the above terms.

112. The next questions for consideration are:

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

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

Whether there can be two Appropriate Governments in a given case Under Section 432(7) of the Code?

113. According to the Respondents, it is the State Government which is the Appropriate Government in a case of this nature, unless it is specifically taken over by way of a Statute from the State Government. Reference was made to proviso to Article 162 of the Constitution as well as Section 432(7) of Code of Criminal Procedure where the expression used is "subject to and limited by" which has got greater significance. It was also contended on behalf of the Respondents that Penal Code is a compilations of offences, in different situations for which different consequence will follow. By way of an analysis it was pointed out that Penal Code is under the concurrent list and when the conviction is one Under Section 302 simpliciter, then, the jurisdiction for consideration of remission would be with the State Government and that if the said Section also attracted the provisions of TADA, then the Centre would get exclusive jurisdiction. By making reference to Section 55A(a) of the Penal Code and Section 434 of Code of Criminal Procedure it was contended that when the conviction and sentence is Under Section 302 Indian Penal Code, without the aid of TADA or any other Central Act, State Government gets jurisdiction which will be the Appropriate Government. In this context, our attention was drawn to the fact that in the Rajiv Gandhi murder case, Respondents Santhan, Murugan, Nalini and Arivu @ Perarivalan were awarded death sentence, while 3 other accused, namely, Ravichandran, Robert Payas and Jayakumar were given life imprisonment and that Nalini's death sentence was commuted by the Governor of the State in the year 2000, while the claim of 3 others was rejected.

114. Later, by the judgment dated 18.02.2014, the death sentence of three others was also commuted to life by this Court. In support of the submission reliance was placed upon the decisions of this Court in **Ratan Singh** (supra), **State of Madhya Pradesh v. Ajit Singh and Ors.** MANU/SC/0183/1976 : (1976) 3 SCC 616, **Hanumant Dass v. Vinay Kumar and Ors.** MANU/SC/0071/1982 : (1982) 2 SCC 177 and **Govt. of A.P. and Ors. v. M.T. Khan** MANU/SC/0997/2003 : (2004) 1 SCC 616.

115. Reference was also made to the Constituent Assembly debates on Article 59 which corresponds to Article 72 in the present form and Article 60 which correspondents to Article 73(1)(a) of the present form. In the course of the debates, an amendment was sought to be introduced to Article 59(3) and in this context, the member who moved the amendment stated thus:

Sir, in my opinion, the President only should have power to suspend, remit or commute a sentence of death. He is the supreme Head of the State. It follows therefore that he should have the supreme powers also. I am of opinion that rulers of States or Provincial Government should not be vested with this supreme power....

116. Dr. Ambedkar while making his comment on the amendment proposed stated thus:

Yes: Sir: It might be desirable that I explain in a few words in its general outline the scheme embodied in Article 59. It is this: the power of commutation of sentence for offences enacted by the Federal Law is vested in the President of the Union. The power to commute sentences for offences enacted by the State Legislatures is vested in the Governors of the State. In the case of sentences of death, whether it is inflicted under any law passed by Parliament or by the law of the States, the power is vested in both, the President as well as the State concerned. This is the scheme.

(Underlining is ours)

117. After the above discussions on the proposed amendments, when it was put to vote, the amendment was negatived.

118. Similarly the amendment to the proviso to Article 60 was preferred by a member who in his address stated thus:

The object of my amendment is to preserve the Executive Power of the States or provinces at least in so far as the subjects which are included in the concurrent list. It has been pointed out during the general discussions that the scheme of the Draft Constitution is to whittle down the powers of the States considerably and, though the plan is said to be a federal one, in actual fact it is a unitary form of Government that is sought to be imposed in the Country by the Draft Constitution....

(Emphasis added)

119. After an elaborate discussion, when the opinion of Dr. Ambedkar was sought, he addressed the Assembly and stated thus:

The Hon'ble Dr. B.R. Ambedkar (Bombay: General): Mr. Vice-President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so, I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that generally the authority to executive laws which relate to what is called the concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the provincial or State Legislature, shall ordinarily apply to the province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government. Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the concurrent list is concerned will rest with the union, the provinces as well as the States. It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre.

(Emphasis added)

Thereafter further discussions were held and ultimately when the amendment was put to vote, the same was negatived.

120. It was, therefore, contended that in the absence of a specific law pertaining to the exercise of power Under Sections 432 and 433, the States will continue to exercise their power of remission and commutation and that cannot be prevented. As against the above submissions, learned Solicitor General contended that a reference to the relevant provision of the Penal Code and the Code of Criminal Procedure read along with the Constitutional provisions disclose that Entry I of List III of the Seventh Schedule makes a clear specification of the jurisdiction of the Centre and the State and any overlapping is taken care of in the respective entries themselves. The learned Solicitor General also brought to our notice the incorporation of Section 432(7) in the Code of Criminal Procedure providing for a comprehensive definition of 'Appropriate Government' based on the recommendations of the Law Commission in its Forty First Report. By the said report, the law Commission indicated that the definition of 'Appropriate Government' as made in Sections 54, 55 and 55A needs to be omitted in the Indian Penal Code as redundant while making a comprehensive provision in Section 402 (now the corresponding present Section 433). Paragraphs 29.10, 29.11 and 29.12 of the said report can be noted for the purpose for which the amendment was suggested and its implications:

29.10. Power to commute sentences.-Sub-section (1) of Section 402 enables the Appropriate Government to commute sentences without the consent of the person sentenced. This general provision has, however, to be read with Sections 54 and 55 of the Indian Penal Code which contain special provisions in regard to commutation of sentences of death and of imprisonment for life. The definition of "Appropriate Government" contained in Sub-section (3) of Section 402 is substantially the same as that contained in Section 55A of the Indian Penal Code. It would obviously be desirable to remove this duplication and to state the law in one place. In the present definition of "Appropriate Government" in Section 402(3), the reference to the State Government

is somewhat ambiguous. It will be noticed that Clause (b) of Section 55A of the Indian Penal Code specifies the particulars State Government which is competent to order commutation as "the Government of the State within which the offender is sentenced".

29.11. Section 402 revised: Sections 54, 55 and 55A of Indian Penal Code to be omitted.-We, therefore, propose that Sections 54, 55 and 55A may be omitted from the Indian Penal Code and their substance incorporated in Section 402 of the Code of Criminal Procedure. This section may be revised as follows:

402. Power to commute sentence.-(1) The Appropriate Government may, without the consent of the person sentenced,-

(a) commute a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) commute a sentence of imprisonment for life, for imprisonment of either description for a term, not exceeding fourteen years or for fine;

(c) commute a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced or for fine;

(d) commute a sentence of simple imprisonment, for fine.

(2) In this section and in Section 401, the expression "Appropriate Government" means-

(a) in cases where the sentence is for an offence against, or the order referred to in Sub-section (4A) of Section 401 is passed under, any law relating to a matter to which the Executive Power of the Union extends, the Central Government; and

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

29.12. The power to suspend or remit sentences Under Section 401 and the power to commute sentences Under Section 402 are thus divided between the Central Government and the State Government on the Constitutional lines indicated in Articles 72 and 161. If, for instance, a person is convicted at the same trial for an offence punishable under the Arms Act or the Explosives Act and for an offence punishable under the Indian Penal Code and sentenced to different terms of imprisonment but running concurrently, both Governments will have to pass orders before the sentences are effectively suspended, remitted or commuted. Cases may occur where the State Government's order simply mentions the nature of the sentence remitted or commuted and is treated as sufficient warrant by the prison authorities though strictly under the law, a corresponding order of the Central Government is required in regard to the sentence for the offence falling within the Union List. The legal provisions are, however, clear on the point and we do not consider that any clarification is required.

121. The learned Solicitor General also relied upon the judgment of this Court in **G.V. Ramanaiah v. The Superintendent of Central Jail, Rajahmundry and Ors.** MANU/SC/0439/1973 : AIR

1974 SC 31 and contended that where the offence is dealt with by the prosecuting agency of the Central Government, by virtue of the proviso to Article 73 of the Constitution, the Executive Power of the Central Government is saved and, therefore, in such cases, it is the Central Government which is the Appropriate Government.

122. Having noted the respective submissions of the parties, the sum and substance of the submission of the Respondent State as well as other Respondents is that a conspectus consideration of the definition of the "Appropriate Government" under the Penal Code read along with Section 432(7) of Code of Criminal Procedure, where the conviction was under the penal provision of Indian Penal Code and was not under any Central Act, the whole authority for consideration of suspension of sentence or remission of sentence or commutation rests solely with the State Government within whose jurisdiction, the conviction came to be imposed. It was, however, submitted that if the conviction was also under any of the Central Act, then and then alone the Central Government becomes the 'Appropriate Government' and not otherwise. It was in support of the said submission, reliance was placed upon the decisions of this Court in **Ratan Singh** (supra), **Ajit Singh** (supra), **Hanumant Dass** (supra) and **M.T. Khan** (supra). The Constituent Assembly debates on the corresponding Articles viz., Articles 72 and 73 were also highlighted to show the intention of the Constituent Assembly while inserting the above said Articles to show the primacy of the State Government under certain circumstances and that of the Central Government under certain other circumstances which the Members of the Assembly wanted to emphasis.

123. The question posed for our consideration is whether there can be two Appropriate Governments Under Section 432(7) of the Code of Criminal Procedure and whether Union or the State has primacy for the exercise of the power Under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission as a co-extensive power. To find an answer to the combined questions, we can make reference to Section 55A of the Penal Code which defines "Appropriate Government" referred to in Sections 54 and 55 of the Penal Code. Sections 54 and 55 of the Penal Code pertain to commutation of sentence of death and imprisonment for life respectively by the Appropriate Government. In that context, in Section 55A, the expressions "Appropriate Government" has been defined to mean in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the Executive Power of the Union extends, the Central Government. The definition, therefore, makes it clear that insofar as it relates to commutation of death sentence, the Appropriate Government is the Central Government. That apart, if the sentence of death or life is for an offence against any law relating to a matter to which the Executive Power of the Union extends, then again, the 'Appropriate Government' is the Central Government. We have dealt with in extenso while examining Section 73(1)(a) with particular reference to the proviso as to under what circumstance the Executive Power of the Central Government will continue to remain as provided Under Article 73(1)(a). We can make a reference to that part of our discussion, where we have explained the implication of the proviso to Article 73(1)(a) in order to note the extent of the Executive Power of the Central Government under the said Article. Therefore, in those cases, where by virtue of any law passed by the Parliament or any of the provisions of the Constitution empowering the Central Government to act by specifically conferring Executive Authority, then in all those situations, the Executive Power of the Central Government will remain even if the State Government is also empowered to pass legislations under the Constitution. By virtue of the said Constitutional provision contained

in the proviso to Article 73(1)(a), if the Executive Power of the Central Government remains, applying Section 55A(a) of the Penal Code, it can be stated without any scope of controversy that the Central Government would be the Appropriate Government in those cases, where the sentence is of death or is for an offence relating to a matter wherein the Executive Power of the Union gets extended. This is one test to be applied for ascertaining as who will be the Appropriate Government for passing order of commutation of sentence of death as well as life imprisonment in the context of Sections 54 and 55 of Penal Code.

124. Keeping it aside for a while, when we refer to Section 55A(b), it is provided therein that in cases where the sentence, whether of death or not, is for an offence against any law relating to a matter to which the Executive Power of the State extends, the Government of the State within which the offender is sentenced will be the Appropriate Government. Sub-clause (b) of Section 55A postulates different circumstances viz., the sentence whether of death or not is for an offence relating to a matter to which the Executive Power of the State extends, then if the imposition of such sentence was within the four corners of the State concerned, then the Appropriate Government would be the State Government. In fact in this context, the submission made on behalf of the Respondents needs to be appreciated that if there was a conviction for an offence Under Section 302 Indian Penal Code simpliciter, even if the prosecuting agency was the Central Government, the State Government would be the Appropriate Government within whose jurisdiction the imposition of sentence came to be made either of death or not. While analyzing Section 55A, vis-à-vis Sections 54 and 55 of the Penal Code, wherever the Executive Power of the Union extends, the Appropriate Government would be the Central Government and in all other cases, the Appropriate Government would be the concerned State within whose jurisdiction the sentence came to be imposed.

125. With that analysis made with reference to Section 55 of the Penal Code, when we refer to Section 432(7) of Code of Criminal Procedure, here again, we find the definition "Appropriate Government" is made with particular reference to and in the context of Sections 432 and 433 of Code of Criminal Procedure. Under Section 432(1) to (6) the prescription is relating to the power to suspend or remit sentences, the procedure to be followed, the conditions to be imposed and the consequences in the event of breach of any conditions imposed. Similarly, Section 433 pertains to the power of the Appropriate Government to commute the sentence of death, imprisonment for life, sentence of rigorous imprisonment and sentence of simple imprisonment to some other lesser punishment up to imposition of fine. The power Under Section 433 can be exercised only by the Appropriate Government. It is in the above context of the prescription contained in Sections 432(1) to (6) and 433(a) to (d), the definition of 'Appropriate Government' Under Section 432(7) has to be analysed. Section 432(7) defines the 'Appropriate Government' to mean; in cases where the sentence is for an offence against or the order referred to in Sub-section (6) of Section 432 is passed under any law relating to a matter to which the Executive Power of the Union extends, it is the Central Government. Therefore, what is to be seen is whether the sentence passed is for an offence against any law relating to a matter to which the Executive Power of the Union extends. Here again, our elaborate discussion on Article 73(1)(a) and its proviso need to be read together. It is imperative and necessary to refer to the discussions on Articles 72, 73, 161 and 162 of the Constitution, inasmuch as how to ascertain the Executive Power of the Centre and the State has been basically set out only in those Constitutional provisions. In other words, only by applying the said Constitutional provisions, the Executive Power of the Centre and the State can be precisely

ascertained. To put it differently, Section 432(7) does not prescribe or explain as to how to ascertain the Executive Power of the Centre and the State, which can be ascertained only by analyzing the above said Articles 72, 73, 161 and 162 of the Constitution. If the offence falls under any such law which the Parliament is empowered to enact as such law has been enacted, on which subject law can also be enacted by any of the States, then the Executive Power of the Centre by virtue of such enactment passed by the Parliament providing for enforcement of such Executive Power, would result in the Central Government becoming the Appropriate Government in respect of any sentence passed against such law. At the risk of repetition, we can refer to Article 73(1)(a) with its proviso to understand the Constitutional prescription vis-a-vis its application for the purpose of ascertaining the Appropriate Government Under Section 432(7) of the Code. When we read the proviso to Article 73(1)(a) closely, we note that the emphasis is on the 'Executive Power' which should have been expressly provided in the Constitution or in any law made by the Parliament in order to apply the saving Clause under the proviso. Once the said prescription is clearly understood, what is to be examined in a situation where any question arises as to who is the 'Appropriate Government' in any particular case, then if either under the law in which the prosecution came to be launched is exclusively under a Central enactment, then the Centre would be the 'Appropriate Government' even if the situs is in any particular State. Therefore, if the order passed by a Criminal Court covered by Sub-section (6) of Section 432 was under any law relating to a matter where the Executive Power of the Union extends by virtue of enactment of such Executive Power under a law made by the Parliament or expressly provided in the Constitution, then, the Central Government would be the Appropriate Government. Therefore, what is to be noted is, whether the sentence passed under a law relating to a matter to which the Executive Power of the Union extends, as has been stipulated in the proviso to Article 73(1)(a). In this context, it will be worthwhile to make reference to what Dr. Ambedkar explained, when some of the Members of the Assembly moved certain amendments to enhance the powers of the State with particular reference to Article 60 of the Draft Constitution which corresponds to Article 73 as was ultimately passed. In the words of Dr. Ambedkar himself it was said:

The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so.....It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre.

If the said prescription is satisfied than it would be the Central Government who will be the Appropriate Government.

126. For the purpose of ascertaining which Government would be the Appropriate Government as defined Under Section 432(7), what is to be seen is the sentence imposed by the criminal court under the Code of Criminal Procedure or any other law which restricts the liberty of any person or imposes any liability upon him or his property. If such sentence imposed is under any of the Sections of the Penal Code, for which the Executive Power of the Central Government is specifically provided for under a Parliament enactment or prescribed in the Constitution itself then the 'Appropriate Government' would be the Central Government. To understand this position more explicitly, we can make reference to Article 72(1)(a) of the Constitution which while specifying the power of the Executive head of the country, namely, the President it is specifically provided

that the power to grant pardons, etc. or grant of remissions etc. or commutation of sentence of any person convicted of any offence in all cases where the punishment or sentence is by a Court Martial, then it is clear to the effect that under the Constitution itself the Executive Power is specifically conferred on the Centre. While referring to various Constitutional provisions, we have also noted such express Executive Power conferred on the Centre in respect of matters with reference to which the State is also empowered to make laws. If under the provisions of the Code the sentence is imposed, within the territorial jurisdiction of the State concerned, then the 'Appropriate Government' would be the State Government. Therefore, to ascertain who will be Appropriate Government whether the Centre or the State, the first test should be under what provision of the Code of Criminal Procedure the criminal Court passed the order of sentence. If the order of sentence is passed under any other law which restricts the liberty of a person, then which is that law under which the sentence was passed to be ascertained. If the order of sentence imposed any liability upon any person or his property, then again it is to be verified under which provision of the Code of Criminal Procedure or any other law under which it was passed will have to be ascertained. In the ascertainment of the above questions, if it transpires that the implication to the proviso to Article 73(1)(a) gets attracted, namely, specific conferment of Executive Power with the Centre, then the Central Government will get power to act and consequently, the case will be covered by Section 432(7)(a) of the Code and as a sequel to it, Central Government will be the 'Appropriate Government' to pass orders Under Sections 432 and 433 of the Code of Criminal Procedure.

127. In order to understand this proposition of law, we can make a reference to the decision relied upon by the learned Solicitor General in **G.V. Ramanaiah** (supra). That was a case where the offence was dealt with and the conviction was imposed Under Sections 489A to 489D of the Penal Code. The convicts were sentenced to rigorous imprisonment for a period of ten years. The conviction came to be made by the criminal Court of the State of A.P. The question that came up for consideration was as to who would be the 'Appropriate Government' for grant of remission as was provided Under Section 401 of the Code of Criminal Procedure which is the corresponding Section for 432 of Code of Criminal Procedure. In that context, this Court noted that the four sections, viz., Sections 489(A) to 489(D) were added to the Penal Code under the caption "of currency notes and Bank notes" by the Currency Notes Forgery Act, 1899. This Court noted that the bunch of those Sections were the law by itself and that the same would be covered by the expression "currency coinage and legal tender" which are expressly included in Entry 36 of the Union List in the Seventh Schedule of the Constitution. Entry No. 93 of the Union List in the same Schedule conferred on the Parliament the power to legislate with regard to offences against laws with respect to any of the matter in the Union List. It was, therefore, held that the offenses for which those persons were convicted were offences relating to a matter to which the Executive Power of the Union extended and the Appropriate Government competent to remit the sentence would be the Central Government and not the State Government. The said decision throws added light on this aspect.

128. Therefore, whether under any of the provisions of the Code of Criminal Procedure or under any Special enactment enacted by the Central Government by virtue of its enabling power to bring forth such enactment even though the State Government is also empowered to make any law on that subject, having regard to the proviso to Article 73(1)(a), if the conviction is for any of the offences against such provision contained in the Code of Criminal Procedure or under such special

enactments of the Centre if the Executive Power is specified in the enactment with the Central Government then the Appropriate Government would be the Central Government. Under Section 432(7)(b) barring cases falling under 432(7)(a) in all other cases, where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, then alone the Appropriate Government would be the State.

129. Therefore, keeping the above prescription in mind contained in Section 432(7) and Section 55A of the Indian Penal Code, it will have to be ascertained whether in the facts and circumstances of a case, where the Criminal Court imposes the sentence and if such sentence pertains to any Section of the Penal Code or under any other law for which the Executive Power of the center extends, then in those cases the Central Government would be the 'Appropriate Government'. Again in respect of cases, where the sentence is imposed by the Criminal Court under any law which falls within the proviso to Article 73(1)(a) of the Constitution and thereby the Executive Power of the Centre is conferred and gets attracted, then again, the Appropriate Government would be the Centre Government. In all other cases, if the sentence order is passed by the Court within the territorial jurisdiction of the concerned State, the concerned State Government would be the Appropriate Government for exercising its power of remission, suspension as well as commutation as provided Under Sections 432 and 433 of the Code of Criminal Procedure. Keeping the above prescription in mind, every case will have to be tested to find out which is the Appropriate Government State or the Centre.

130. However, when it comes to the question of primacy to the Executive Power of the Union to the exclusion of the Executive Power of the State, where the power is co-extensive, in the first instance, it will have to be seen again whether, the sentence ordered by the Criminal Court is found under any law relating to which the Executive Power of the Union extends. In that respect, in our considered view, the first test should be whether the offence for which the sentence was imposed was under a law with respect to which the Executive Power of the Union extends. For instance, if the sentence was imposed under TADA Act, as the said law pertains to the Union Government, the Executive Power of the Union alone will apply to the exclusion of the State Executive Power, in which case, there will be no question of considering the application of the Executive Power of the State.

131. But in cases which are governed by the proviso to Article 73(1)(a) of the Constitution, different situations may arise. For instance, as was dealt with by this Court in **G.V. Ramanaiah** (supra), the offence was dealt with by the criminal Court Under Section 489(A) to 489(D) of the Penal Code. While dealing with the said case, this Court noted that though the offences fell under the provisions of the Penal Code, which law was covered by Entry 1 of List III of the Seventh Schedule, namely, the Concurrent List which enabled both the Centre as well as the State Government to pass any law, having regard to the special feature in that case, wherein, currency notes and bank notes to which the offences related, were all matters falling under Entries 36 and 93 of the Union List of the Seventh Schedule, it was held that the power of remission fell exclusively within the competence of the Union. Therefore, in such cases the Union Government will get exclusive jurisdiction to pass orders Under Sections 432 and 433 Code of Criminal Procedure.

132. Secondly, in yet another situation where the law came to be enacted by the Union in exercise of its powers Under Articles 248, 249, 250, 251 and 252 of the Constitution, though the legislative power of the States would remain, yet, the combined effect of these Articles read along with Article 73(1)(a) of the Constitution will give primacy to the Union Government in the event of any laws passed by the Centre prescribes the Executive Power to vest with it to the exclusion of the Executive Power of the State then such power will remain with the Centre. In other words, here again, the co-extensive power of the State to enact any law would be present, but having regard to the Constitutional prescription Under Articles 248 to 252 of the Constitution by which if specific Executive Power is conferred then the Union Government will get primacy to the exclusion of State.

133. Thirdly, a situation may arise where the authority to bring about a law may be available both to the Union as well as the State, that the law made by the Parliament may invest the Executive Power with the Centre while, the State may also enjoy similar such Executive Power by virtue of a law which State Legislature was also competent to make. In these situations, the ratio laid down by this Court in the decision in **G.V. Ramanaiah** (supra) will have to be applied and ascertain which of the two, namely, either the State or the Union would gain primacy to pass any order of remission, etc. In this context, it will be relevant to note the proviso to Article 162 of the Constitution, which reads as under:

Article 162.-Extent of executive power of State

xxx

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

If the proviso applies to a case, the Executive Power of the State should yield to the Executive Power of the Centre expressly conferred by the Constitution or by any law made by Parliament upon the Union or its authorities.

134. Therefore, the answer to the question should be to the effect that where the case falls under the first test noted herein, it will be governed by Section 432(7)(a) of the Code of Criminal Procedure in which event, the power will be exclusive to the Union. In cases which fall under the situation as was dealt with by this Court in **G.V. Ramanaiah** (supra), there again the power would exclusively remain with the Centre. Cases falling under second situation like the one covered by Articles 248 to 252 of the Constitution, wherein, the competence to legislate laws was with the State, and thereby if the Executive Power of the State will be available, having regard to the mandate of these Articles which empowers the Union also to make laws and thereby if the Executive Power of the Union also gets extended, though the power is co-extensive, it must be held that having regard to the special features set out in the Constitution in these situations, the Union will get the primacy to the exclusion of the State.

135. Therefore, we answer the question Nos. 52.3, 52.4 and 52.5 to the above extent leaving it open for the parties concerned, namely, the Centre or the State to apply the test and find out who will be the 'Appropriate Government' for exercising the power Under Sections 432 and 433 of the Code of Criminal Procedure.

136. Next, we take up the question:

Whether *suo motu* exercise of power of remission Under Section 432(1) is permissible in the scheme of the Section, if yes, whether the procedure prescribed in Sub-section (2) of the same section is mandatory or not?

Section 432(1) and (2) reads as under:

432. Power to suspend or remit sentences.-(1) When any person has been sentenced to punishment for an offence, the Appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Appropriate Government for the suspension or remission of a sentence, the Appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

137. Sub-section (1) of Section 432 empowers the Appropriate Government either to suspend the execution of a sentence or remit the whole or any part of the punishment to which he has been sentenced. While passing such orders, it can impose any conditions or without any condition. In the event of imposing any condition such condition must be acceptable to the person convicted. Such order can be passed at any time.

138. Sub-section (2) of Section 432 pertains to the opinion to be secured from the presiding Judge of the Court who convicted the person and imposed the sentence or the Court which ultimately confirmed such conviction. Whenever any application is made to the Appropriate Government for suspension or remission of sentence, such opinion to be rendered must say whether the prayer made in the application should be granted or refused. It should also contain reasons along with the opinion, certified copy of the record of the trial or such other record which exists should also be forwarded.

139. Before making an analysis on the question referred for our consideration, certain observations of the Constitution Bench of this Court in **Maru Ram** (supra) which was stated in the context of the power exercisable Under Articles 72 and 161 of the Constitution needs to be noted. Such observations relating to the Constitutional power of the President and Governor, of course with the aid and advice of the Council of Ministers, is on a higher plane and are stated to be 'untouchable' and 'unapproachable'. It was also held that the Constitutional power, as compared to the power exercisable Under Sections 432 and 433 looks similar but not the same, in the sense that the

statutory power Under Sections 432 and 433 is different in source, substance and strength and it is not as that of the Constitutional power. Such statement of law was made by the Constitution Bench to hold that notwithstanding Sections 433A which provides for minimum of 14 years incarnation for a lifer to get the benefit of remission, etc., the President and the Governor can continue to exercise the power of Constitution and release without the requirement of the minimum period of imprisonment. But the significant aspect of the ruling is a word of caution even to such exercise of higher Constitutional power with high amount of circumspection and is always susceptible to be interfered with by judicial forum in the event of any such exercise being demonstrated to be fraught with arbitrariness or mala fide and should act in trust to our Great Master, the Rule of Law. In fact the Bench quoted certain examples like the Chief Minister of a State releasing everyone in the prison in his State on his birthday or because a son was born to him and went to the extent of stating that it would be an outrage on the Constitution to let such madness to survive.

140. We must state that such observations and legal principles stated in the context of Articles 72 and 161 of the Constitution will have greater force and application when we examine the scope and ambit of the power exercisable by the Appropriate Government Under Section 432(1) and (2) of Code of Criminal Procedure.

141. Keeping the above principles in mind, when we analyze Section 432(1), it must be held that the power to suspend or remit any sentence will have to be considered and ordered with much more care and caution, in particular the interest of the public at large. In this background, when we analyze Section 432(1), we find that it only refers to the nature of power available to the Appropriate Government as regards the suspension of sentence or remission to be granted at any length. Extent of power is one thing and the procedure to be followed for the exercise of the power is different thing. There is no indication in Section 432(1) that such power can be exercised based on any application. What is not prescribed in the statute cannot be imagined or inferred. Therefore, when there is no reference to any application being made by the offender, cannot be taken to mean that such power can be exercised by the authority concerned on its own. More so, when a detailed procedure to be followed is clearly set out in Section 432(2). It is not as if by exercising such power Under Section 432(1), the Appropriate Government will be involving itself in any great welfare measures to the public or the society at large. It can never be held that such power being exercised *suo motu* any great development act would be the result. After all such exercise of power of suspension or remission is only going to grant some relief to the offender who has been found to have committed either a heinous crime or at least a crime affecting the society at large.

Therefore, when in the course of exercise of larger Constitutional powers of similar kind Under Articles 72 and 161 of the Constitution it has been opined by this Court to be exercised with great care and caution, the one exercisable under a statute, namely, Under Section 432(1) which is lesser in degree should necessarily be held to be exercisable in tune with the adjunct provision contained in the same section. Viewed in that respect, we find that the procedure to be followed whenever any application for remission is moved, the safeguard provided Under Section 432(2) should be the sine-quo-non for the ultimate power to be exercised Under Section 432(1).

142. By following the said procedure prescribed Under Section 432(2), the action of the Appropriate Government is bound to survive and stand the scrutiny of all concerned including judicial forum. It must be remembered, barring minor offences, in cases involving heinous crimes

like, murder, kidnapping, rape robbery, dacoity, etc., and such other offences of such magnitude, the verdict of the trial Court is invariably dealt with and considered by the High Court and in many cases by the Supreme Court. Thus, having regard to the nature of opinion to be rendered by the presiding officer of the concerned Court will throw much light on the nature of crime committed, the record of the convict himself, his background and other relevant factors which will enable the Appropriate Government to take the right decision as to whether or not suspension or remission of sentence should be granted. It must also be borne in mind that while for the exercise of the Constitutional power Under Articles 72 and 161, the Executive Head will have the benefit of act and advice of the Council of Ministers, for the exercise of power Under Section 432(1), the Appropriate Government will get the valuable opinion of the judicial forum, which will definitely throw much light on the issue relating to grant of suspension or remission.

143. Therefore, it can safely be held that the exercise of power Under Section 432(1) should always be based on an application of the person concerned as provided Under Section 432(2) and after duly following the procedure prescribed Under Section 432(2). We, therefore, fully approve the declaration of law made by this Court in **Sangeet** (supra) in paragraph 61 that the power of Appropriate Government Under Section 432(1) Code of Criminal Procedure cannot be *suo motu* for the simple reason that this Section is only an enabling provision. We also hold that such a procedure to be followed Under Section 432(2) is mandatory. The manner in which the opinion is to be rendered by the Presiding Officer can always be regulated and settled by the concerned High Court and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the Appropriate Government. We, therefore, answer the said question to the effect that the suo motu power of remission cannot be exercised Under Section 432(1), that it can only be initiated based on an application of the persons convicted as provided Under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

144. We are now left with the question namely:

Whether the term '"Consultation"' stipulated in Section 435(1) of the Code implies '"Concurrence"'?

It is relevant to extract Section 435(1) of Code of Criminal Procedure, which reads as under:

Section 435. State Government to act after consultation with Central Government in certain cases.-(1) the powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence.

(a) Which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) Which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, of

(c) Which was committed by a person in the service of the Central Government, while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government.

Answer to this question depends wholly on the interpretation of Section 435 of Code of Criminal Procedure. After referring to the said Section, learned Solicitor General referred to the convictions imposed on the accused/Respondents in the Late Rajiv Gandhi Murder case. Learned Solicitor General pointed out that though 26 accused were convicted by the Special Court, this Court confirmed the conviction only as against the 7 Respondents in that Writ Petition and the rest of the accused were all acquitted, namely, 19 of them. He also pointed out that the conviction of the Special Court under TADA Act was set aside by this Court. While the conviction of the Respondents Under Sections 212 and 216 ofIndian Penal Code, Section 14 of Foreigners Act, Section 25(1-B) of Arms Act, Section 5 of Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of The Wireless Telegraph Act were all confirmed by this Court. That apart conviction Under Section 120B Indian Penal Code read with Section 302 Indian Penal Code against all the seven Respondents was also confirmed by this Court. In the ultimate conclusion, this Court confirmed the death sentence against A-1 Nalini, A-2 Santhan, A-3 Murugan and A-18 Arivu and the sentence of Death against A-9 Robert Payas, A-10 Jayakumar and A-16 Ravichandran was altered as imprisonment for life. Subsequently in the judgment in **V. Sriharan** (supra) even the death sentence against A-2 Santhan, A-3 Murugan and A-18 Arivu was also commuted into imprisonment for life meaning thereby end of one's life, subject to remission granted by the Appropriate Government Under Section 432 of the Code of Criminal Procedure, 1973, which in turn, subject to the procedural checks mentioned in the said provision and further substantive checks in Section 433A of the Code.

145. As far as the remission provided Under Section 432 is concerned, the same will consist of the remission of the sentence of a prisoner by virtue of good behavior, etc., under the Jail Manual, Prisoners' Act and Rules and other Regulations providing for earning of such remission and remission of the sentence itself by imposing conditions. Keeping the above factual matrix in the Rajiv Gandhi Murder case, vis-à-vis the 7 Respondents therein as a sample situation, we proceed to analyze these questions arising Under Section 435 Code of Criminal Procedure Learned Solicitor General in his submissions contended that since the punishments imposed on the Respondents under the various Central Acts such as Foreigners Act, Passport Act, etc., have all been completed by the Respondents, the requirement of Section 435(2) does not arise and, therefore, there will be no impediment for the State Government to exercise its power Under Section 435(2) of the Code of Criminal Procedure According to the learned Solicitor General, since the period of imprisonment under various Central Acts has already been suffered by the Respondents, the requirement of passing order of suspension, remission or commutation by the Central Government does not arise and it is for the State Government to pass order of suspension, remission or commutation Under Section 435(2) Code of Criminal Procedure The learned Solicitor General, however, contended that by virtue of the fact that whole investigation right from the beginning was entrusted with the C.B.I. under the Delhi Police Establishment Act and the ultimate conviction of the Respondents under the provisions of Indian Penal Code came to be made by the Special Court and commutation of the same with certain modifications as regards the sentence part alone by this Court, by virtue of the proviso to Article 73(1)(a) of the Constitution, the Executive Authority of the Union gets the power to pass order either Under Article 72 of the Constitution or

Under Sections 432 to 435 of Code of Criminal Procedure and to that extent the scope and ambit of the power of the State Government gets restricted and, therefore, in the event of the State Government, in its right as the Appropriate Government seeks to exercise its power Under Section 435(1) Code of Criminal Procedure such exercise of power in the present context can be exercised only with the 'Concurrence' of the Central Government and the expression 'Consultation' made in Section 435(1) should be held as such. In support of his submissions the learned Solicitor General relied upon **Lalu Prasad Yadav and Anr. v. State of Bihar and Anr.** MANU/SC/0214/2010 : (2010) 5 SCC 1, **Supreme Court Advocates on Record Association and Ors. v. Union of India** MANU/SC/0073/1994 : (1993) 4 SCC 441, **State of Gujarat and Anr. v. Justice R.A. Mehta (Retired) and Ors.** MANU/SC/0001/2013 : (2013) 3 SCC 1 and **N. Kannadasan v. Ajoy Khose and Ors.** MANU/SC/0926/2009 : (2009) 7 SCC 1.

146. As against the above submissions, Mr. Dwivedi, learned Senior Counsel for the State of Tamil Nadu prefaced his submissions by contending that while proposing to grant remission to the Respondents, the State Government did not undermine the nature of crime committed and the impact of the remission that may be caused on the society, as well as, the concern of the State Government in this case. The learned Senior Counsel also submitted that the State Government is not going to act in haste and is very much alive to the fact that the person murdered was a former Prime Minister of this country and the State cannot take things lightly while considering the remission to be granted to the Respondents. The learned Senior Counsel, therefore, contended that in the process of 'Consultation', the views of the Central Government will be duly considered before passing final orders on the proposed remission. According to learned Senior Counsel Under Section 435(1), the act of 'Consultation' prescribed is a rider to the exercise of Executive Power of the State to be exercised Under Sections 432 and 433 in respect of cases falling Under Sections 435(1)(a) to (c). By referring to Sections 435(2) the learned Senior Counsel contended that in the said Sub-section cautiously the Parliament has used the expression 'Concurrence' while in Section 435(1) the expression used is 'Consultation'. It is, therefore, pointed out that the distinctive idea of 'Consultation' and 'Concurrence' has been clearly disclosed. The learned Senior Counsel then pointed out that while acting Under Section 435(1), what is relevant is the Sentence and not the Conviction, which can be erased only by grant of pardon and grant of remission will have no implication on the conviction. By referring to Section 435(1)(b) & (c), the learned Senior Counsel pointed out that with reference to those offences where the investigation can be carried out entirely by the State Government and the offence would only relate to the property of the Central Government and the services of person concerned in the services of the Centre what is contemplated is only 'Consultation'. It was contended that when the 'Consultation' process is invoked by the State Government, Union of India can suggest whatever safeguards to be made to ensure that even while granting remission, necessary safeguard is imposed. The learned Senior Counsel also submitted that paramount consideration should be the interest of the Nation which is the basic feature of the Constitution and, therefore, 'Consultation' means effective and meaningful 'Consultation' and that the State cannot act in an irresponsible manner keeping the Nation at peril. The learned Senior Counsel contended that though the CBI conducted the investigation and all the materials were gathered by the CBI, after the conviction, every material is open and, therefore, it cannot be said that the State Government had no material with it. The learned Senior Counsel also pointed out that the jail representation is with the State Government and it will be open to the State to consider the recorded materials by the Court and invoke its power Under Sections 432 and 433 of Code of Criminal Procedure. The learned Senior Counsel further contended that in the process

of 'Consultation', the Union Government will be able to consider any other material within its knowledge and make an effective report. If such valuable materials reflected in the 'Consultation' process are ignored by the State, then the Court's power of Review can always be invoked. The learned Senior Counsel relied upon the decisions reported in **State of U.P. and Anr. v. Johri Mal** MANU/SC/0396/2004 : (2004) 4 SCC 714, **Justice Chandrashekaraiah (Retired) v. Janekere C. Krishna and Ors.** MANU/SC/0023/2013 : (2013) 3 SCC 117 and **S.R. Bommai and Ors. v. Union of India and Ors.** MANU/SC/0444/1994 : (1994) 3 SCC 1 in support of his submissions.

147. In order to appreciate the respective submissions, it will be necessary to refer to the relevant Government orders passed by the State of Tamil Nadu and the consequential Notification issued by the Government of India after the gruesome murder of Late Rajiv Gandhi, the former Prime Minister of India on 21.05.1991 at 10.19 p.m. at Sriperumbudur in Tamil Nadu. It will be worthwhile to trace back the manner by which the accused targeted their killing as has been succinctly narrated in the judgment reported in State through Superintendent of Police, **CBI/SIT v. Nalini and Ors.** MANU/SC/0945/1999 : (1999) 5 SCC 253. Paragraphs 23 to 29 are relevant which read as under:

23. On 21-5-1991, Haribabu bought a garland made of sandalwood presumably for using it as a camouflage (for murdering Rajiv Gandhi). He also secured a camera. Nalini (A-1) wangled leave from her immediate boss (she was working in a company as PA to the Managing Director) under the pretext that she wanted to go to Kanchipuram for buying a saree. Instead she went to her mother's place. Padma (A-21) is her mother. Murugan (A-3) was waiting for her and on his instruction Nalini rushed to her house at Villiwakkam (Madras). Sivarasan reached the house of Jayakumar (A-10) and he got armed himself with a pistol and then he proceeded to the house of Vijayan (A-12).

24. Sivarasan directed Suba and Dhanu to get themselves ready for the final event. Suba and Dhanu entered into an inner room. Dhanu was fitted with a bomb on her person together with a battery and switch. The loosely stitched salwar-kameez which was purchased earlier was worn by Dhanu and it helped her to conceal the bomb and the other accessories thereto. Sivarasan asked Vijayan (A-12) to fetch an auto-rickshaw.

25. The auto-rickshaw which Vijayan (A-12) brought was not taken close to his house as Sivarasan had cautioned him in advance. He took Suba and Dhanu in the auto-rickshaw and dropped them at the house of Nalini (A-1). Suba expressed gratitude of herself and her colleagues to Nalini (A-1) for the wholehearted participation made by her in the mission they had undertaken. She then told Nalini that Dhanu was going to create history by murdering Rajiv Gandhi. The three women went with Sivarasan to a nearby temple where Dhanu offered her last prayers. They then went to "Parry's Corner" (which is a starting place of many bus services at Madras). Haribabu was waiting there with the camera and garland.

26. All the 5 proceeded to Sriperumbudur by bus. After reaching there they waited for the arrival of Rajiv Gandhi. Sivarasan instructed Nalini (A-1) to provide necessary cover to Suba and Dhanu so that their identity as Sri Lankan girls would not be disclosed due to linguistic accent. Sivarasan further instructed her to be with Suba and to escort her after the assassination to the spot where Indira Gandhi's statue is situate and to wait there for 10 minutes for Sivarasan to reach.

27. Nalini (A-1), Suba and Dhanu first sat in the enclosure earmarked for ladies at the meeting place at Sriperumbudur. As the time of arrival of Rajiv Gandhi was nearing Sivarasan took Dhanu alone from that place. He collected the garland from Suba and escorted Dhanu to go near the rostrum. Dhanu could reach near the red carpet where a little girl (Kokila) and her mother (Latha Kannan) were waiting to present a poem written by Kokila on Rajiv Gandhi.

28. When Rajiv Gandhi arrived at the meeting place Nalini (A-1) and Suba got out of the enclosure and moved away. Rajiv Gandhi went near the little girl Kokila. He would have either received the poem or was about to receive the same, and at that moment the hideous battery switch was clawed by the assassin herself. Suddenly the pawn bomb got herself blown up as the incendiary device exploded with a deadening sound. All human lives within a certain radius were smashed to shreds. The head of a female, without its torso, was seen flinging up in the air and rolling down. In a twinkle, 18 human lives were turned into fragments of flesh among which was included the former Prime Minister of India Rajiv Gandhi and his personal security men, besides Dhanu and Haribabu. Many others who sustained injuries in the explosion, however, survived.

29. Thus the conspirators perpetrated their prime target achievement at 10.19 p.m. on 21-5-1991 at Sriperumbudur in Tamil Nadu.

148. Closely followed, after the above occurrence, the Principal Secretary to the Government of Tamil Nadu addressed a D.O. letter dated 22.05.1991 to the Joint Secretary to the Government of India, conveying the order of the Government of Tamil Nadu expressing its consent Under Section 6 of the Delhi Special Police Establishment Act 1946 to the extension of powers and jurisdiction of members of the Delhi Special Police Establishment to investigate the case in Crime No. 329/91 Under Sections 302, 307 and 326 Indian Penal Code and Under Section 3 & 5 of The Explosive Substances Act, registered in Sriperumbudur police station, Changai Anna (West) District, Tamil Nadu, relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. The Notification of the Government of Tamil Nadu Under Section 6 of the 1946 Act mentioned the State of Tamil Nadu's consent to the extension of powers to the members of Delhi Special Police Establishment in the WHOLE of the State of Tamil Nadu for the investigation of the crime in Crime No. 329/91. In turn, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training passed its Notification dated 23.05.1991 extending power and jurisdiction of the members of the Delhi Special Police Establishment to the WHOLE of the State of Tamil Nadu for investigation in respect of crime No. 329/91. That is how the Central Government came into the picture in the investigation of the crime, the conviction by the Special Court of 26 persons and the ultimate confirmation insofar as it was against the present Respondents alone setting aside the conviction as against the 19 accused.

149. The above noted facts disclose that the case is covered by Section 435(1)(a) of Code of Criminal Procedure. Therefore, as per Section 435(1) the power of State Government to remit or commute the sentence Under Sections 432 and 433 Code of Criminal Procedure should not be exercised except after due 'Consultation' with the Central Government. Since the expression 'shall' is used in the said Sub-section, it is mandatory for the State Government to resort to the 'Consultation' process without which, the power cannot be exercised. As rightly submitted by the learned Senior Counsel for the State of Tamil Nadu, such 'Consultation' cannot be an empty formality and it should be an effective one. While on the one hand the power to grant remission

Under Section 432 and commute the sentence Under Section 433 conferred on the Appropriate Government is available, as we have noted, the exercise of such power insofar as it related to remission or suspension Under Section 432 is not *suo motu*, but can be made only based on an application and also circumscribed by the other provisions, namely, Section 432(2), whereby the opinion of the Presiding Judge who imposed or confirmed the conviction should be given due consideration. Further, we have also explained how to ascertain as to who will be the Appropriate Government as has been stipulated Under Section 432(7) of Code of Criminal Procedure which applied to the exercise of power both Under Section 432 and as well as 433 Code of Criminal Procedure In this context, we have also analyzed as to how far the proviso to Article 73(1)(a) of the Constitution will ensure greater Executive Power on the Centre over the State wherever the State Legislature has also got power to make laws. Having analyzed the implication of the said proviso, vis-à-vis, Articles 161, 162 and Entry 1 and 2 of List III of the Seventh Schedule, by virtue of which, the Central Government gets primacy as an Appropriate Government in matter of this kind. Having regard to our above reasoning on the interpretation of the Constitutional provisions read along with the provisions of Code of Criminal Procedure, our conclusion as to who will be the Appropriate Government has to be ascertained in every such case. In the event of the Central Government becoming the Appropriate Government by applying the tests which we have laid based on Section 432(7) read along with the proviso to Article 73(1)(a) of the Constitution and the relevant entries of List III of the Seventh Schedule of the Constitution, then in those cases there would be no scope for the State Government to exercise its power at all Under Section 432 Code of Criminal Procedure In the event of the State Government getting jurisdiction as the Appropriate Government and after complying with the requirement, namely, any application for remission being made by the person convicted and after obtaining the report of the concerned Presiding Officer as required Under Section 432(2), if Section 435(1)(a) or (b) or (c) is attracted, then the question for consideration would be whether the expression "Consultation" is mere 'Consultation' or to be read as "Concurrence" of the Central Government.

150. In this context, it will be advantageous to refer to the Nine-Judge Constitution Bench decision of this Court reported in **Supreme Court Advocates on Record Association** (supra). In the majority judgment authored by Justice J.S. Verma, the learned Judge while examining the question referred to the Bench on the interpretation of Articles 124(2) and 217(1) of the Constitution as it stood which related to appointment of Judges to the Supreme Court and High Courts quoted the precautionary statement made by Dr. Rajendra Prasad in his speech as President of the Constituent Assembly while moving for adoption of the Constitution of India. A portion of the said quote relevant for our purpose reads as under:

429...There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. *It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups* and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance. ... In India today I feel that the work that confronts us is even more difficult than the work which we had when we were engaged in the struggle. We did not have then any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share. We have all these now, and the temptations are really great. *Would to God that we shall have the wisdom and the strength to rise above them and to serve the country which we have succeeded in liberating.*

151. Again in paragraph 432, the principle is stated as to how construction of a Constitutional Provision is to be analyzed which reads as under:

432. ...A fortiori any construction of the Constitutional provisions which conflicts with this Constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and, therefore, an alien concept.

(Emphasis added)

152. By thus laying down the broad principles to be applied, considered the construction of the expression "Consultation" to be made with the Chief Justice of India for the purpose of composition of higher judiciary as used in Article 124(2) and 217(1) of the Constitution and held as under in paragraph 433:

433. It is with this perception that the nature of primacy, if any, of the Chief Justice of India, in the present context, has to be examined in the Constitutional scheme. The hue of the word "Consultation", when the 'Consultation' is with the Chief Justice of India as the head of the Indian Judiciary, for the purpose of composition of higher judiciary, has to be distinguished from the colour the same word "Consultation" may take in the context of the executive associated in that process to assist in the selection of the best available material.

153. Thereafter tracing the relevant provisions in the pre-Constitutional era, namely, the Government of India Act, 1919, and the Government of India Act, 1935, wherein the appointment of Judges of the Federal Court and the High Courts were in the absolute discretion of the Crown or in other words, of the Executive with no specific provision for 'Consultation' with the Chief Justice in the appointment process, further noted, the purpose for which the obligation of "Consultation" with the Chief Justice of India and the Chief Justice of the High Court in Articles 124(2) and 217(1) came to be incorporated was highlighted. Thereafter, the Bench expressed its reasoning as to why in the said context, the expression "Consultation" was used instead of "Concurrence". Paragraph 450 of the said judgment gives enough guidance to anyone dealing with such issue which reads as under:

450. It is obvious, that the provision for 'Consultation' with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is, that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the Constitutional purpose. Thus, the executive element in the appointment process is reduced to

the minimum and any political influence is eliminated. It was for this reason that the word "Consultation" instead of "Concurrence" was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts.

(Emphasis added)

154. We must state that in the first place, whatever stated by the said larger Constitution Bench while interpreting an expression in a Constitutional provision, having regard to its general application can be equally applied while interpreting a similar expression in any other statute. We find that the basic principles set out in the above quoted paragraphs of the said decision can be usefully referred to, relied upon and used as a test while examining a similar expression used, namely, in Section 435(1) of Code of Criminal Procedure. While quoting the statement of Dr. Rajendra Prasad, what was highlighted was the various differences that exist in our country including 'provincial differences', the necessity to ensure that men will not sacrifice the interests of the country at large for the sake of smaller groups and areas, the existence of conflicting claims to reconcile after our liberation, and the determination to save the country rather than yielding to the pressure of smaller groups. It was also stated in the context of Articles 124(2) and 217(1) as to how the independence of judiciary to be the paramount criteria and any construction that conflict with such said avowed object of the Constitution to be eschewed. Thereafter, while analyzing the primacy of the Chief Justice of India for the purpose of appointment of Judges, analyzed as to how our Constitutional functionary qua the others who together participate in the performance of the function assumes significance only when they cannot reach an agreed conclusion. It was again stated as to see who would be best equipped and likely to be more correct for achieving the purpose and perform the task satisfactorily. It was stated that primacy should be in one who qualifies to be treated as the 'expert' in the field and comparatively greater weight to his opinion may then to be attached. We find that the above tests indicated in the larger Constitution Bench judgment can be applied in a situation like the one which we are facing at the present juncture.

155. Again in a recent decision of this Court reported in **R.A. Mehta (Retired)** (supra) to which one of us was a party (Fakkir Mohamed Ibrahim Kalifulla, J.) it was held as under in paragraph 32:

32. Thus, in view of the above, the meaning of "*Consultation*'" varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, 'Consultation' means a free and fair discussion on a particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has *primacy* of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, 'Consultation' may mean '*Concurrence*'. The court must examine the fact situation in a given case to determine whether the process of 'Consultation' as required under the particular situation did in fact stand complete.

(Emphasis added)

156. The principles laid down in the larger Constitution Bench decision reported in **Supreme Court Advocates on Record Association** (supra) was also followed in **N. Kannadasan** (supra).

157. While noting the above principles laid down in the larger Constitution Bench decision and the subsequent decisions on the interpretation of the expression, we must also duly refer to the reliance placed upon the decision in **S.R. Bommai** (supra), **Johri Mal** (supra) and **Justice Chandrashekaraiah (Retired)** (supra). The judgment in **S.R. Bommai** (supra) is again a larger Constitution Bench of Nine-Judges known as Bommai case (supra), in which our attention was drawn to paragraphs 274 to 276, wherein, Justice B.P. Jeevan Reddy pointed out that 'federation' or 'federal form of Government' has no fixed meaning, that it only broadly indicates a division of powers between the Centre and the States, and that no two federal Constitutions are alike. It was stated that, therefore, it will be futile to try to ascertain and fit our Constitution into any particular mould. It was also stated that in the light of our historical process and the Constitutional evolution, ours is not a case of independent States coming together to form a federation as in the case of U.S.A. The learned judge also explained that the founding fathers of our Constitution wished to establish a strong Centre and that in the light of the past history of this Sub-continent such a decision was inevitably taken perforce. It was also stated that the establishment of a strong Centre was a necessity. It will be appropriate to extract paragraph 275 to appreciate the analysis of the scheme of the Constitution made by the learned Judge which reads as under:

275. A review of the provisions of the Constitution shows unmistakably that while creating a federation, the Founding Fathers wished to establish a strong Centre. In the light of the past history of this Sub-continent, this was probably a natural and necessary decision. In a land as varied as India is, a strong Centre is perhaps a necessity. This bias towards Centre is reflected in the distribution of legislative heads between the Centre and States. All the more important heads of legislation are placed in List I. Even among the legislative heads mentioned in List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain entries in List I to some or the other extent. Even in the Concurrent List (List III), the parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the Centre. By the 42nd Amendment, quite a few of the entries in List II were omitted and/or transferred to other lists. Above all, Article 3 empowers Parliament to form new States out of existing States either by merger or division as also to increase, diminish or alter the boundaries of the States. In the process, existing States may disappear and new ones may come into existence. As a result of the Reorganisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty-seven States and one area. Even the names of the States can be changed by Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the legislatures of the affected States. There is single citizenship, unlike USA. The judicial organ, one of the three organs of the State, is one and single for the entire country--again unlike USA, where you have the federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a Proclamation of emergency, Parliament can make laws with respect to any matter in List II (Article 250). Similarly, Parliament has power to make laws for giving effect to International Agreements

(Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the States and the proponents of the States' autonomy. Several taxes are collected by the Centre and made over, either partly or fully, to the States. Suffice it to say that Centre has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the Centre including the one in Article 355--the duty to protect every State against external aggression and internal disturbance. Indeed, this very article confers greater power upon the Centre in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power.

158. After making reference to the division of powers set out in the various Articles as well as the Lists I to III of Seventh Schedule and its purported insertion in the Constitutional provisions, highlighted the need for empowering the Centre on the higher side as compared with the States while also referring to the corresponding obligations of the Centre. While referring to Article 355 of the Constitution in that context, it was said "the duty to protect every State against external aggression and internal disturbance. Indeed this very Article confers greater power upon the Centre in the name of casting an obligation upon it (viz.) to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power. Simultaneously, in paragraph 276, the learned Judge also noted that while under the Constitution, greater power is conferred upon the Centre vis-à-vis the States, it does not mean that States are mere appendages of the Centre and that within the sphere allotted to them, States are supreme. It was, therefore, said that Courts should not adopt and approach, an interpretation which has the effect of or tend to have the effect of whittling down the powers reserved to the States. Ultimately, the learned Judge noted a word of caution to emphasize that Courts should be careful not to upset the delicately crafted Constitutional scheme by a process of interpretation.

159. In **Johri Mal** (supra), this Court considered the effect of the expression "Consultation" contained in The Legal Remembrancer's Manual, in the State of Uttar Pradesh which provides in Clause 7.03 the requirement of 'Consultation' by the District Officer with the District Judge before considering anyone for being appointed as District Government council. In the said judgment it was noticed that in Uttar Pradesh, the State government by way of amendment omitted Sub-sections (1), (4) (5) and (6) of Section 24 which provided for "Consultation" with the High Court for appointment of Public Prosecutor for the High Court and with District Judge for appointment of such posts at the District level. Therefore, the only proviso akin to such prescription was made only in The Legal Remembrancer's Manual which is a compilation of executive order and not a 'Law' within the meaning of Article 13 of the Constitution. In the light of the said situation, this Court while referring to **Supreme Court Advocates on Record Association** (supra) made a distinction as to how the appointment of District Government counsel cannot be equated with the appointment of High Court Judges and Supreme Court Judges in whose appointment this Court held that the expression "Consultation" would amount to "Concurrence". It was, however, held that even in the case of appointment of District Government counsel, the 'Consultation' by the District Magistrate with the District Judge should be an effective one. Similarly, in the judgment reported in **Justice Chandrasekaraiah (Retd.)** (supra) this Court considered the expression "Consultation" occurring in Section 3(2)(a)(b) of the Karnataka Lok Ayukta Act, 1984 relating to appointment of Lokayukta and Upa-Lokayukta, took the view that while 'Consultation' by the Chief Minister with the Chief Justice as one of the consultees is mandatory, since the appointment

to those positions is not a judicial or Constitutional authority but is a sui generis quasi judicial authority, 'Consultation' will not amount to "Concurrence". Therefore, the said judgment is also clearly distinguishable.

160. Having considered the submissions of the respective counsel for the Union of India, State of Tamil Nadu and the other counsel and also the larger Constitution Bench decisions and the subsequent decisions of this Court as well as the specific prescription contained in Section 435(1)(a) read along with Articles 72, 73(i)(a), 161 and 162 of the Constitution, the following principles can be derived to note how and in what manner the expression "Consultation" occurring in Section 435(1)(a) can be construed:

(a) Section 435(1) mandatorily requires the State Government, if it is the 'Appropriate Government' to consult the Central Government if the consideration of grant of remission or commutation Under Section 432 or 433 in a case which falls within any of the three Sub-clauses (a)(b)(c) of Section 435(1).

(b) The expression "Consultation" may mean differently in different situation depending on the nature and purpose of the statute.

(c) When it came to the question of appointment of judges to the High Court and the Supreme Court, since it pertains to high Constitutional office, the status of Chief Justice of India assumed greater significance and primacy and, therefore, in that context, the expression "Consultation" would only mean "Concurrence".

(d) While considering the appointment to the post of Chairman of State Consumer Forum, since the said post comes within four corners of judicial post having regard to the nature of functions to be performed, 'Consultation' with the Chief Justice of the High Court would give primacy to the Chief Justice.

(e) The founding fathers of our Nation wished to establish a strong Centre taking into account the past history of this subcontinent which was under the grip of very many foreign forces by taking advantage of the communal differences, caste differences, language differences, provincial differences and so on which necessitated men of strong character, men of vision, men who will not sacrifice the interest of the Nation for the sake of smaller groups and areas and who will rise above the prejudices which are born of these differences, as visualized by the first President of this Nation Dr. Rajendra Prasad.

(f) Again in the golden words of that great personality, in the pre-independence era while we were engaged in the struggle we did not have any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share and we have all these now and the temptations are really great. Therefore, we should rise above all these, have the wisdom and strength and save the country which we got liberated after a great struggle.

(g) The ratio and principles laid down by this Court as regards the interpretation and construction of Constitutional provisions which conflicts with the Constitutional goal to be achieved should be eschewed and interest of the Nation in such situation should be the paramount consideration. Such

principles laid down in the said context should equally apply even while interpreting a statutory provision having application at the National, level in order to achieve the avowed object of National integration and larger public interest.

(h) The nature of 'Consultation' contemplated in Section 435(1)(a) has to be examined in the touchstone of the above principles laid down by the larger Bench judgment in **Supreme Court Advocates on Record Association** (supra). In this context, the specific reference made therein to the statement of Dr. Rajendra Prasad, namely, where various differences that exist, in our country including provincial differences, the necessity to ensure that men will not sacrifice the interest of the country at large, for the sake of smaller groups and areas assumes significance.

(i) To ascertain, in this context, when more than one authority or functionary participate together in the performance of a function, who assumes significance, keeping in mind the various above principles and objectives to be achieved, who would be best equipped and likely to be more correct for achieving the purpose and perform the task satisfactorily in safeguarding the interest of the entire community of this Great Nation. Accordingly, primacy in one who qualifies to be treated as in know of things far better than any other, then comparatively greater weight to their opinion and decision to be attached.

(j) To be alive to the real nature of Federal set up, we have in our country, which is not comparable with any other country and having extraordinarily different features in different States, say different religions, different castes, different languages, different cultures, vast difference between the poor and the rich, not a case of independent States coming together to form a Federation as in the case of United States of America. Therefore, the absolute necessity to establish a strong Centre to ensure that when it comes to the question of Unity of the Nation either from internal disturbance or any external aggression, the interest of the Nation is protected from any evil forces. The establishment of a strong Centre was therefore a necessity as felt by our founding fathers of the Nation. In this context Article 355 of the Constitution requires to be noted under which, the Centre is entrusted with the duty to protect every State against external aggression and internal disturbance and also to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. However, within the spheres allotted to the respective States, they are supreme.

(k) In the light of the above general principles, while interpreting Section 435(1)(a) which mandates that any State Government while acting as the 'Appropriate Government' for exercising its powers Under Sections 432 and 433 of Code of Criminal Procedure and consider for remission or commutation to necessarily consult the Central Government. In this context the requirement of the implication of Section 432(7)(a) has to be kept in mind, more particularly in the light of the prescription contained in Article 73(1)(a) and Article 162 read along with its proviso, which asserts the status of the Central Government Authorities as possessing all pervasive right to hold the Executive Power by virtue of express conferment under the Constitution or under any law made by the Parliament though the State Legislature may also have the power to make laws on those subjects.

(l) In a situation as the one arising in the above context, it must be stated, that by virtue of such status available with the Central Government possessing the Executive Power, having regard to

the pronouncement of the larger Constitution Bench decision of this Court in **Supreme Court Advocates on Record Association** (supra) and **S.R. Bommai** (supra), the Executive Power of the Center should prevail over the State as possessing higher Constitutional power specifically adorned on the Central Government Under Article 73(1)(a).

(m) Cases, wherein, the investigation is held by the agencies under the Delhi Special Police Establishment Act, 1946 or by any other agency engaged to make investigation into an offence under the Central Act other than the Code of Criminal Procedure, and where such offences investigated assumes significance having regard to the implication that it caused or likely to cause in the interest of the Nation or in respect of National figures of very high status by resorting to diabolic criminal conduct at the instance of any person whether such person belong to this country or of any foreign origin, either individually or representing anybody of personnel or an organization or a group, it must be stated that such situation should necessarily be taken as the one coming within the category of internal or external aggression or disturbance and thereby casting a duty on the Centre as prescribed Under Article 355 of the Constitution to act in the interest of the Nation as a whole and also ensure that the Government of every State is carried in accordance with the provisions of the Constitution. Such situation cannot held to be interfering with the independent existence of the State concerned.

(n) Similar test should be applied where application of Section 435(1)(b) or (c). It can be visualized that where the property of the Central Government referred to relates to the security borders of this country or the property in the control and possession of the Army or other security forces of the country or the warships or such other properties or the personnel happen to be in the services of the Centre holding very sensitive positions and in possession of very many internal secrets or other vulnerable information and indulged in conduct putting the interest of the Nation in peril, it cannot be said that in such cases, the nature of 'Consultation' will be a mere formality. It must be held that even in those cases the requirement of 'Consultation' will assume greater significance and primacy to the Center.

161. It must also be noted that the nature of requirement contemplated and prescribed in Section 435(1) and (2) is distinct and different. As because the expression "Concurrence" is used in Sub-section (2) it cannot be held that the expression "Consultation" used in Sub-section (1) is lesser in force. As was pointed out by us in Sub-para 'n', the situations arising Under Sub-section (1) (a) to (c) will have far more far reaching consequences if allowed to be operated upon without proper check. Therefore, even though the expression used in Sub-section (1) is 'Consultation', in effect, the said requirement is to be expressed far more strictly and with utmost care and caution, as each one of the Sub-clauses (a) to (c) contained in the said Sub-section, if not properly applied in its context may result in serious violation of Constitutional mandate as has been set out in Article 355 of the Constitution. It is therefore imperative that it is always safe and appropriate to hold that in those situations covered by Sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of Central Government, it will assume primacy and consequently the process of "Consultation" should in reality be held as the requirement of "Concurrence".

162. For our present purpose, we can apply the above principles to the cases which come up for consideration, including the one covered by the present Writ Petition. Having paid our detailed analysis as above on the various questions, we proceed to answer the questions in seriatim.

163. Answer to the preliminary objection as to the maintainability of the Writ Petition:

Writ Petition at the instance of Union of India is maintainable.

Answers to the questions referred in seriatim

Question 52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda* (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Ans. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided Under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the Court.

We hold that the ratio laid down in **Swamy Shraddananda** (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative.

Question No. 52.2 Whether the "Appropriate Government" is permitted to exercise the power of remission Under Sections 432/433 of the Code after the parallel power has been exercised by the President Under Article 72 or the Governor Under Article 161 or by this Court in its Constitutional power Under Article 32 as in this case?

Ans. The exercise of power Under Sections 432 and 433 of Code of Criminal Procedure will be available to the Appropriate Government even if such consideration was made earlier and exercised Under Article 72 by the President or Under Article 161 by the Governor. As far as the application of Article 32 of the Constitution by this Court is concerned, it is held that the powers Under Sections 432 and 433 are to be exercised by the Appropriate Government statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government.

Question Nos. 52.3, 52.4 and 52.5

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

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

52.5 Whether there can be two Appropriate Governments in a given case Under Section 432(7) of the Code?

Ans. The status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in **G.V. Ramanaiah** (supra) should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling Under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government.

Question 52.6 Whether suo motu exercise of power of remission Under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in Sub-section (2) of the same section is mandatory or not?

Ans. No suo motu power of remission is exercisable Under Section 432(1) of Code of Criminal Procedure It can only be initiated based on an application of the person convicted as provided Under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

Question No. 52.7 Whether the term "Consultation" stipulated in Section 435(1) of the Code implies "Concurrence"?

Ans. Having regard to the principles culled out in paragraph 160 (a) to (n), it is imperative that it is always safe and appropriate to hold that in those situations covered by Sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of the Central Government it will assume primacy and consequently the process of "Consultation" in reality be held as the requirement of "Concurrence".

We thus answer the above questions accordingly.

U.U. Lalit, J.

WRIT PETITION (CRL.) No. 48 of 2014

164. This Writ Petition has been placed before the Constitution Bench pursuant to reference made by a Bench of three learned Judges of this Court in its order dated 25.04.2014[1], hereinafter referred to as the Referral Order.

Background Facts:

165. On the night of 21.05.1991 Rajiv Gandhi, former Prime Minister of India was assassinated by a human bomb at Sriperumbudur in Tamil Nadu. With him fifteen persons including nine policemen died and forty three persons suffered injuries. Crime No. 329 of 1991 of Sriperumbudur Police Station was immediately registered. On 22.05.1991 a notification was issued by the Governor of Tamil Nadu Under Section 6 of Delhi Special Police Establishment Act (Act No. 25 of 1946) according consent to the extension of the powers and jurisdiction of the members of the Delhi Police Establishment to the whole of the State of Tamil Nadu for the investigation of the offences in relation to Crime No. 329 of 1991. This was followed by a notification issued by the Government of India on 23.05.1991 Under Section 5 read with Section 6 of Act No. 25 of 1946 extending such powers and jurisdiction to the whole of the State of Tamil Nadu for investigation of offences relating to Crime No. 329 of 1991. After due investigation, a charge of conspiracy for offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA for short), Indian Penal Code (Indian Penal Code for short), Explosive Substances Act, 1908, Arms Act, 1959, Passport Act, 1967, Foreigners Act, 1946 and the Indian Wireless Telegraphy Act, 1933 was laid against forty-one persons, twelve of whom were already dead and three were marked as absconding. Remaining twenty six persons faced the trial before the Designated Court which found them guilty of all the charges and awarded punishment of fine of varying amounts, rigorous imprisonment of different periods and sentenced all of them to death. The Designated Court referred the case to this Court for confirmation of death sentence of all the convicts. The convicts also filed appeals against their conviction and the sentence awarded to them. These cases were heard together.

166. In the aforesaid Death Reference Cases and the appeals, this Court rendered its judgment on 11.05.1999, reported in ***State through Superintendent of Police, CBI/SIT*** *v.* ***Nalini and Ors.*** MANU/SC/0945/1999 : 1999 (5) SCC 253. At the end of the judgment, the following order was passed by this Court:

732. The conviction and sentence passed by the trial court of the offences of Section 3(3), Section 3(4) and Section 5 of the TADA Act are set aside in respect of all those Appellants who were found guilty by the trial court under the said counts.

733. The conviction and sentence passed by the trial court of the offences Under Sections 212 and 216 of the Indian Penal Code, Section 14 of the Foreigners Act, 1946, Section 25(1-B) of the Arms Act, Section 5 of the Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of the Wireless Telegraphy Act, 1933, in respect of those accused who were found guilty of those offences, are confirmed. If they have already undergone the period of sentence under those counts it is for the jail authorities to release such of those against whom no other conviction and sentence exceeding the said period have been passed.

734. The conviction for the offence Under Section 120B read with Section 302 Indian Penal Code as against A-1 (Nalini), A-2 (Santhan @ Raviraj), A-3 (Murugan @ Thas), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran @ Ravi) and A-18 (Perarivalan @ Arivu) is confirmed.

735. We set aside the conviction and sentence of the offences Under Section 302 read with Section 120-B passed by the trial court on the remaining accused.

736. The sentence of death passed by the trial court on A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed. The death sentence passed on A-9 (Robert), A-10 (Jayakumar) and A-16 (Ravichandran) is altered to imprisonment for life. The Reference is answered accordingly.

737. In other words, except A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu), all the remaining Appellants shall be set at liberty forthwith.

167. Two sets of Review Petitions were preferred against the aforesaid judgment dated 11.05.1999. One was by convicts A-1, A-2, A-3 and A-18 on the question of death sentence awarded to them. These convicts did not challenge their conviction. The other was by the State through Central Bureau of Investigation (CBI for short), against that part of the judgment which held that no offence Under Section 3(3) of TADA was made out. These Review Petitions were dismissed by order dated 08.10.1999[2]. Wadhwa, J. with whom Quardi J. concurred, did not find any error in the judgment sought to be reviewed and therefore dismissed both sets of Review Petitions. Thomas J. opined that the Review Petition filed in respect of A-1 (Nalini) alone be allowed and her sentence be altered to imprisonment for life. Thus, in the light of the order of the majority, these Review Petitions were dismissed.

168. The convicts A-1, A-2, A-3 and A-18 then preferred Mercy Petitions before the Governor of Tamil Nadu on 17.10.1999 which were rejected on 27.10.1999. The rejection was challenged before Madras High Court which by its order dated 25.11.1999 set-aside the order of rejection and directed reconsideration of those Mercy Petitions. Thereafter Mercy Petition of A-1 (Nalini) was allowed while those in respect of the convicts A-2, A-3 and A-18 were rejected by the Governor on 25.04.2000. Said convicts A-2, A-3 and A-18 thereafter preferred Mercy Petitions on 26.4.2000 to the President of India Under Article 72 of the Constitution. The Mercy Petitions were rejected by the President on 12.08.2011 which led to the filing of Writ Petitions in Madras High Court. Those Writ Petitions were transferred by this Court to itself by order dated 01.05.2012[3]. By its judgment dated 18.02.2014 in ***V. Sriharan @ Murugan*** v. ***Union of India and Ors.*** MANU/SC/0104/2014 : 2014 (4) SCC 242 a Bench of three learned Judges of this Court commuted the death sentences awarded to convicts A-2, A-3 and A-18 to that of imprisonment for life and passed certain directions. Paragraph 32 of the judgment is quoted hereunder:

32.8 In the light of the above discussion and observations, in the cases of V. Sriharan alias Murugan, T. Suthendraraja alias Santhan and A.G. Perarivalan alias Arivu, we commute their death sentence into imprisonment for life. Life imprisonment means end of one's life, subject to any remission granted by the appropriate Government Under Section 432 of the Code of Criminal Procedure, 1973 which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code. All the writ petitions are allowed on the above terms and the transferred cases are, accordingly, disposed of.

169. On the next day i.e. 19.02.2014 Chief Secretary, Government of Tamil Nadu wrote to the Secretary, Government of India, Ministry of Home Affairs that Government of Tamil Nadu

proposed to remit the sentence of life imprisonment imposed on convicts A-2, A-3 and A-18 as well as on the other convicts namely A-9, A-10 and A-16. It stated that these six convicted accused had already served imprisonment for 23 years, that since the crime was investigated by the CBI, as per Section 435 of Code of Criminal Procedure the Central Government was required to be consulted and as such the Central Government was requested to indicate its views within three days on the proposal to remit the sentence of life imprisonment and release those six convicts.

170. Union of India immediately filed Crl. M.P. Nos. 4623-25 of 2014 on 20.02.2014 in the cases which were disposed of by the judgment dated 18.02.2014 praying that the State of Tamil Nadu be restrained from releasing the convicts. On 20.02.2014 said Crl. M.P. Nos. 4623-25 of 2014 were taken up by this Court and the following order was passed:

Taken on Board.

Issue notice to the State of Tamil Nadu; Inspector General of Prisons, Chennai; the Superintendent, Central Prison, Vellore and the convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu returnable on 6th March, 2014.

Mr. Rakesh Dwivedi, learned senior Counsel accepts notice on behalf of the State of Tamil Nadu and other two officers.

Till such date, both parties are directed to maintain status quo prevailing as on date in respect of convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu.

List on 6th March, 2014.

171. On 20.02.2014 Union of India filed Review Petitions being R.P. (Crl.) Nos. 247-249 of 2014 against the judgment dated 18.02.2014 which were later dismissed on 01.04.2014. It also filed Writ Petition No. 48 of 2014 i.e. the present writ petition on 24.02.2014 with following prayer:

(a) Issue an appropriate writ in the nature of a mandamus, or certiorari, and quash the letter No. 58720/Cts IA/2008 dated 19.02.2014 and the Decision of the Respondent No. 8, Government of Tamil Nadu to consider commutation/remission of the sentences awarded to the Respondents No. 1 to 7;

172. After hearing rival submissions in the present writ petition, the Referral Order was passed which formulated and referred seven questions for the consideration of the Constitution Bench. Paragraph Nos. 49 and 52 to 54 of the Referral Order were to the following effect:

49. The issue of such a nature has been raised for the first time in this Court, which has wide ramification in determining the scope of application of power of remission by the executives, both the Centre and the State. Accordingly, we refer this matter to the Constitution Bench to decide the issue pertaining to whether once power of remission Under Articles 72 or 161 or by this Court exercising constitutional power Under Article 32 is exercised, is there any scope for further consideration for remission by the executive.

52. The following questions are framed for the consideration of the Constitution Bench:

52.1. Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of ***Swamy Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

52.2. Whether the "appropriate Government" is permitted to exercise the power of remission Under Sections 432/433 of the Code after the parallel power has been exercised by the President Under Article 72 or the Governor Under Article 161 or by this Court in its constitutional power Under Article 32 as in this case?

52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive?

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

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

52.6. Whether suo motu exercise of power of remission Under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in Sub-section (2) of the same section is mandatory or not?

52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

53. All the issues raised in the given case are of utmost critical concern for the whole of the country, as the decision on these issues will determine the procedure for awarding sentences in the criminal justice system. Accordingly, we direct to list Writ Petition (Crl.) No. 48 of 2014 before the Constitution Bench as early as possible, preferably within a period of three months.

54. All the interim orders granted earlier will continue till a final decision is taken by the Constitution Bench in Writ Petition (Crl.) No. 48 of 2014.

173. In terms of the Referral Order, this petition came up before the Constitution Bench on 09.03.2014 which issued notices to all the State Governments and pending notice the State Governments were restrained from exercising power of remission to life convicts. This order was subsequently varied by this Court on 23.07.2015 and the order so varied is presently in operation. While the present writ petition was under consideration by this Court, Curative Petitions Nos. 22-24 of 2015 arising out of the dismissal of the review petition vide order dated 01.04.2014 came up before this Court which were dismissed by order dated 28.07.2015.

PRELIMINARY OBJECTIONS

174. At the outset when the present writ petition was taken up for hearing, Mr. Rakesh Dwivedi, learned Senior Advocate appearing for the State of Tamil Nadu and Mr. Ram Jethmalani, learned Senior Advocate appearing for the Respondents convicts raised preliminary objections regarding maintainability of this writ petition at the instance of Union of India. It was argued that in the petition as originally filed, nothing was indicated about alleged violation of any fundamental right of any one and it was only when the State had raised preliminary submissions, that additional grounds were preferred by Union of India seeking to espouse the cause of the victims. It was submitted that the issues sought to be raised by Union of India as regards the powers and jurisdiction of the State of Tamil Nadu were essentially federal in nature and that the only remedy available for agitating such issues could be through a suit Under Article 131 of the Constitution. In response, it was submitted by Mr. Ranjit Kumar, learned Solicitor General that neither at the stage when the Referral Order was passed, nor at the stage when notices were issued to various State Governments, such preliminary objections were advanced and that the issue had now receded in the background. It was submitted that after Criminal Law Amendment Act 2013, rights of victims stand duly recognized and that the instant crime having been investigated by the CBI, Union of India in its capacity as parens patriae was entitled to approach this Court Under Article 32. It was submitted that since private individuals, namely the convicts were parties to this lis, a suit Under Article 131 would not be a proper remedy. We find considerable force in the submissions of the learned Solicitor General. Having entertained the petition, issued notices to various State Governments, entertained applications for impleadment and granted interim orders, it would not be appropriate at this stage to consider such preliminary submissions. At this juncture, the following passage from the judgment of the Constitution Bench in ***Mohd. Aslam alias Bhure*** v. ***Union of India and Ors.*** MANU/SC/0259/2003 : (2003) 4 SCC 1 would guide us:

10. On several occasions this Court has treated letters, telegrams or postcards or news reports as writ petitions. In such petitions, on the basis of pleadings that emerge in the case after notice to different parties, relief has been given or refused. Therefore, this Court would not approach matters where public interest is involved in a technical or a narrow manner. Particularly, when this Court has entertained this petition, issued notice to different parties, new parties have been impleaded and interim order has also been granted, it would not be appropriate for this Court to dispose of the petition on that ground.

In the circumstances, we reject the preliminary submissions and proceed to consider the questions referred to us.

DISCUSSION

175. We have heard Mr. Ranjit Kumar, learned Solicitor General, assisted by Ms. V. Mohana, learned Senior Advocate for Union of India. The submissions on behalf of the State Governments were led by Mr. Rakesh Dwivedi, learned Senior Advocate who appeared for the States of Tamil Nadu and West Bengal, Mr. Ram Jethmalani, learned Senior Advocate and Mr. Yug Mohit Chaudhary, learned Advocate appeared for Respondents - convicts, namely, A-2, A-3, A-18, A-9, A-10 and A-16. We have also heard Mr. Ravi Kumar Verma, learned Advocate General for Karnataka, Mr. A.N.S. Nadkarni, learned Advocate General for Goa, Mr. v. Giri, learned Senior

Advocate for State of Kerala, Mr. Gaurav Bhatia, learned Additional Advocate General for State of Uttar Pradesh, Mr. T.R. Andhyarujina, learned Senior Advocate for one of the intervenors and other learned Counsel appearing for other State Governments, Union Territories and other intervenors. We are grateful for the assistance rendered by the learned Counsel.

176. The Challenge raised in the instant matter is principally to the competence of the State Government in proposing to remit or commute sentences of life imprisonment of the Respondents-convicts and the contention is that either the State Government has no requisite power or that such power stands excluded. The questions referred for our consideration in the Referral Order raise issues concerning power of remission and commutation and as to which is the "appropriate Government" entitled to exercise such power and as regards the extent and ambit of such power. It would therefore be convenient to deal with questions 3, 4 and 5 as stated in Paras 52.3, 52.4 and 52.5 at the outset.

Re: Question Nos. 3, 4 and 5 as stated in para Nos. 52.3, 52.4 and 52.5 of the Referral Order

52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive?

52.4. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission?

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

177. Powers to grant pardon and to suspend, remit or commute sentences are conferred by Articles 72 and 161 of the Constitution upon the President and the Governor. Articles 72 and 161 are quoted here for ready reference:

72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.-

(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in Sub-clause (a) of Clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in Sub-clause (c) of Clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

161. Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases.-The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

178. Before we turn to the matters in issue, a word about the nature of power Under Articles 72 and 161 of the Constitution. In ***K.M. Nanavati*** v. ***State of Bombay*** MANU/SC/0063/1960 : (1961) 1 SCR 497 at 516 it was observed by Constitution Bench of this Court, "..... Pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty may lie...."

In ***Kehar Singh and Anr.*** v. ***Union of India and Anr.*** MANU/SC/0240/1988 : (1989) 1 SCC 204 at 213 Constitution Bench of this Court quoted with approval the following passage from U.S. v. Benz [75 Lawyers Ed. 354, 358]

The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The Constitution Bench further observed:

It is apparent that the power Under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

In ***Epuru Sudhakar and Anr.*** v. ***Government of Andhra Pradesh and Ors.*** MANU/SC/4440/2006 : (2006) 8 SCC 161 Pasayat J. speaking for the Court observed:

16. The philosophy underlying the pardon power is that "every civilised country recognises, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy.

17. The rationale of the pardon power has been felicitously enunciated by the celebrated Holmes, J. of the United States' Supreme Court in *Biddle* v. *Perovich* [MANU/USSC/0052/1927 : 71 L Ed 1161 : 274 US 480 (1927)] in these words (L Ed at p. 1163): *"A pardon in our days is not a private*

act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

In his concurring judgment Kapadia J. (as the learned Chief Justice then was) stated:

65. Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations.

66. Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the Defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is *ipso facto* immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future.

179. The power conferred upon the President Under Article 72 is under three heads. The Governor on the other hand is conferred power under a sole head i.e. in respect of sentence for an offence against any law relating to the matter to which the executive power of the State extends. Apart from similar such power in favour of the President in relation to matter to which the executive power of the Union extends, the President is additionally empowered on two counts. He is given exclusive power in all cases where punishment or sentence is by a Court Martial. He is also conferred power in all cases where the sentence is a sentence of death. Thus, in respect of cases of sentence of death, the power in favour of the President is regardless whether it is a matter to which the executive power of the Union extends. Therefore a person convicted of any offence and sentenced to death sentence under any law relating to a matter to which the executive power of the

State extends, can approach either the Governor by virtue of Article 161 or the President in terms of Article 72(1)(c) or both. To this limited extent there is definitely an overlap and powers stand conferred concurrently upon the President and the Governor.

180. Articles 73 and 162 of the Constitution delineate the extent of executive powers of the Union and the State respectively. Said Articles 73 and 162 are as under:

73. Extent of executive power of the Union-(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in Sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer of authority thereof could exercise immediately before the commencement of this Constitution.

162. Extent of executive power of State.-Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

181. As regards Clause (b) of Article 73(1) there is no dispute that in such matters the executive power of the Union is absolute. The area of debate is with respect to Clause (a) of Article 73(1) and the Proviso to Article 73(1) and the inter-relation with Article 162. Clause (a) of Article 73(1) states that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Parliament has exclusive power in respect of legislative heads mentioned in List I of the 7th Schedule whereas in respect of the entries in the Concurrent List namely List III of the 7th Schedule, both Parliament and the State have power to legislate in accordance with the scheme of the Constitution. The Proviso to Article 73(1) however states, subject to the saving clause therein, that the executive power so referred to in Sub-clause (a) shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. The expression "also" is significant. Under the Constitution the State has exclusive power to make laws with respect to List II of the 7th Schedule and has also concurrent power with respect to entries in Concurrent List namely List III of the Constitution. The Proviso thus deals with situations where the matter relates to or is with respect to subject where both Parliament and

the Legislature of the State are empowered to make laws under the Concurrent List. Subject to the saving clause mentioned in the Proviso, it is thus mandated that with respect to matters which are in the Concurrent List namely where the Legislature of the State has also power to make laws, the executive power of the Union shall not extend. The saving clause in the Proviso deals with two exceptions namely, where it is so otherwise expressly provided in the Constitution or in any law made by Parliament. In other words, only in those cases where it is so expressly provided in the Constitution itself or in any law made by Parliament, the executive power of the Union will be available. But for such express provision either in the Constitution or in the law made by Parliament which is in the nature of an exception, the general principle which must govern is that the executive power Under Sub-clause (a) of Article 73 shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. In the absence of such express provision either in the Constitution or in the law made by Parliament, the normal rule is that the executive power of the Union shall not extend in a State to matters with respect to which the legislature of the State has also power to make laws.

182. It will be instructive at this stage to see the debates on the point in the Constituent Assembly. The proceedings dated 30th December, 1948 in the Constituent Assembly[4] show that while draft Article 60 which corresponds to present Article 73 was being discussed, an Hon'ble Member voiced his concern in following words:

B. Pocker Sahib Bahadur (Madras: Muslim): Mr. Vice-President, this clause as it stands is sure to convert the Federation into an entirely unitary form of Government. This is a matter of very grave importance. Sir, we have been going on under the idea, and it is professed, that the character of the Constitution which we are framing is a federal one. I submit, Sir, if this article, which gives even executive powers with reference to the subjects in the Concurrent List to the Central Government, is to be passed as it is, then there will be no justification at all in calling this Constitution a federal one. It will be a misnomer to call it so. It will be simply a camouflage to call this Constitution a federal one with provisions like this. It is said that it is necessary to give legislative powers to the Centre with regard to certain subjects mentioned in the Concurrent List, but it is quite another thing, Sir, to give even the executive powers with reference to them to the Centre. These provisions will have the effect of practically leaving the provinces with absolutely nothing. Even in the Concurrent List there is a large number of subjects which ought not to have found place in it. We shall have to deal with them when the time comes. But this clause gives even executive powers to the Centre with reference to the subjects which are detailed in the Concurrent List....

After considerable debate on the point the clarification by Hon'ble Member Dr. B.R. Ambedkar is noteworthy. His view was as under:

The Honourable Dr. B.R. Ambedkar (Bombay: General): Mr. Vice-President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so I think I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that generally the authority to execute laws which relate to what is called the

Concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the Provincial or State Legislature, shall ordinarily apply to the Province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing a law which relates to the Concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the Concurrent List is concerned will rest with the units, the Provinces as well as the States. It is only in exceptional cases that the Centre may prescribe that the execution of a Concurrent law shall be with the centre.

The first proposition as stated by Dr. Ambedkar was that generally the authority to execute laws which relate to subjects in the Concurrent field, whether the law was passed by the Central Legislature or by the State Legislature, was ordinarily to be with the State. The second proposition pertaining to the Proviso was quite eloquent in that if in any particular case Parliament thinks the execution ought to be retained by the Centre, Parliament shall have the power to do so and that save and except such express provision, in all cases, the authority to execute insofar as the Concurrent List is concerned shall rest with the States.

183. In ***Rai Sahib Ram Jawaya Kapur and Ors.*** v. ***State of Punjab*** MANU/SC/0011/1955 : 1955 (2) SCR 225 this Court while dealing with Article 162 of the Constitution, observed as under:

...Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on Clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

(Emphasis added)

184. The same principle as regards the extent of Executive Power of the Union and the State as stated in Articles 73 and 162 of the Constitution finds echo in Section 55A of the Indian Penal Code which defines appropriate Government as under:

55A. Definition of "appropriate Government".--In Sections 54 and 55 the expression "appropriate Government" means:

(a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced.

185. At this stage we may quote Sections 432 to 435 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Code of Criminal Procedure):

432. Power to suspend or remit sentences. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, In the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above Sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in Sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

433A. Restriction on powers of remission or Commutation in certain cases. Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted Under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

434. Concurrent power of Central Government in case of death sentences. The powers conferred by Sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.

435. State Government to act after consultation with Central Government in certain cases. (1) The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence Is for an offence-

(a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government.

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.

186. As regards definition of appropriate Government, Section 432(7) of Code of Criminal Procedure adopts a slightly different approach. It defines Central Government to be the appropriate Government in cases where the sentence is for an offence against any law relating to a matter to which the executive power of the Union extends. In that sense it goes by the same principle as in Article 73 of the Constitution and Section 55A of the Indian Penal Code. The residuary area is then left for the State Government and it further states that in cases other than those where the Central Government is an appropriate Government, the Government of the State within which the offender is sentenced shall be the appropriate Government. In other words, it carries the same essence and is not in any way different from the principle in Article 73 read with Article 162 on one hand and Section 55A of the Indian Penal Code on the other. The specification as to the State where the offender is sentenced serves an entirely different purpose and helps in finding amongst more than one State Governments which is the appropriate Government as found in ***State of Madhya Pradesh*** v. ***Ratan Singh and Ors.*** MANU/SC/0184/1976 : (1976) 3 SCC 470, ***State of Madhya Pradesh*** v. ***Ajit Singh and Ors.*** MANU/SC/0183/1976 : (1976) 3 SCC 616, ***Hanumant Dass*** v. ***Vinay Kumar and Ors.*** MANU/SC/0071/1982 : (1982) 2 SCC 177 and ***Govt. of A.P. and Ors.*** v. ***M.T. Khan*** MANU/SC/0997/2003 : (2004) 1 SCC 616. According to this provision, even if an offence is committed in State A but if the trial takes place and the sentence is passed in State B, it is the latter State which shall be the appropriate Government.

187. There is one more provision namely Section 435(2) of Code of Criminal Procedure which needs to be considered at this stage. It is possible that in a given case the accused may be convicted and sentenced for different offences, in respect of some of which the executive power of the Union may extend and to the rest the executive power of the State may extend. Since the executive power either of the Union or the State is offence specific, both shall be appropriate Governments in respect of respective offence or offences to which the executive power of the respective government extends. For instance, an offender may be sentenced for an offence punishable under an enactment relatable to subject under List I of the Constitution and additionally under the Indian Penal Code. Such eventuality is taken care of by Sub-section (2) of Section 435 and it is stipulated that even if the State Government in its capacity as an appropriate Government in relation to an offence to which the executive power of the State Government extends, were to order suspension, remission or commutation of sentence in respect of such offence, the order of the State Government shall not have effect unless an appropriate order of suspension, remission or commutation is also passed by the Central Government in relation to the offence(s) with respect to which executive power of the Union extends. Relevant to note that it is not with respect to a specific offence that

both the Central Government and State Government have concurrent power but if the offender is sentenced on two different counts, both could be the appropriate governments in respect of that offence to which the respective executive power extends.

188. It was submitted on behalf of the Petitioner that if the Executive Power is co-extensive with the Legislative Power and the law making power of the State must yield to the Legislative Power of the Union in respect of a subject in the Concurrent List, reading of these two principles would inevitably lead to the conclusion that the executive power of the Union takes primacy over that of the State thereby making it i.e. the Central Government the appropriate Government Under Section 432(7) of Code of Criminal Procedure It was further submitted that it was Parliament which made law contained in Code of Criminal Procedure in exercise of power relatable to Entry 1 and 2 of List III and that the provisions in the Indian Penal Code (existing law Under Article 13) and under the Code of Criminal Procedure, both relatable to the powers of Parliament, which provide for "appropriate Government" as prescribed in Section 55A of the Indian Penal Code and 432(7) of the Code of Criminal Procedure without any validity enacted conflicting or amending law by the State, would clearly show that it is the Union which has the primacy. In our considered view, that is not the correct way to approach the issue. For the purposes of Article 73(1) it is not material whether there is Union law holding the field but what is crucial is that such law made by Parliament must make an express provision or there must be such express provision in the Constitution itself as regards executive power of the Union, in the absence of which the general principle as stated above must apply. If the submission that since the Indian Penal Code and Code of Criminal Procedure are relatable to the powers of Parliament, it is the executive power of the Union which must extend to aspects covered by these legislations is to be accepted, the logical sequitor would be that for every offence under Indian Penal Code the appropriate Government shall be the Central Government. This is not only against the express language of Article 73(1) but would completely overburden the Central Government.

189. In the instant case as the order passed by this Court in ***State v. Nalini and Ors.*** MANU/SC/0945/1999 : 1999 (5) SCC 253, the Respondents-convicts were acquitted of the offences punishable Under Section 3(3), 3(4) and 5 of the TADA. Their conviction under various central laws like Explosive Substances Act, Passport Act, Foreigners Act and Wireless Telegraphy Act were all for lesser terms which sentences, as on the date, stand undergone. Consequently, there is no reason or occasion to seek any remission in or commutation of sentences on those counts. The only sentence remaining is one Under Section 302 Indian Penal Code which is life imprisonment. It was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that Section 302 Indian Penal Code falls in Chapter XVI of the Indian Penal Code relating to offences affecting the human body. In his submission, Sections 299 to 377 Indian Penal Code involve matters directly related to "public order" which are covered by Entry 1 List II.

It being in the exclusive executive domain of the State Government, the State Government would be the appropriate Government. It was further submitted that assuming Sections 302 read with Section 120B Indian Penal Code are relatable to Entry 1 of List III being part of the Indian Penal Code itself, then the issue may arise whether Central Government or the State Government shall be the appropriate Government and resort has to be taken to provisions of Articles 73 and 162 of the Constitution to resolve the issue.

190. At this stage it would be useful to consider the decision of this Court in ***G.V. Ramanaiah*** v. ***The Superintendent of Central Jail Rajahmundry and Ors.*** MANU/SC/0439/1973 : (1974) 3 SCC 531. In that case the Appellant was convicted of offences punishable Under Section 489-A to 489-D of Indian Penal Code and sentenced to imprisonment for 10 years. On a question whether the State Government would be competent to remit the sentence of the Appellant, this Court observed as under:

9. The question is to be considered in the light of the above criterion. Thus considered, it will resolve itself into the issue: Are the provisions of Sections 489-A to 489-D of the Penal Code, under which the Petitioner was convicted, a law relating to a matter to which the legislative power of the State or the Union extends?

10. These four Sections were added to the Penal Code under the caption, "Of Currency Notes and Bank Notes", by Currency Notes Forgery Act, 1899, in order to make better provisions for the protection of Currency and Bank Notes against forgery. It is not disputed; as was done before the High Court in the application Under Section 491(1), Code of Criminal Procedure, that this bunch of Sections is a law by itself. "Currency, coinage and legal tender" are matters, which are expressly included in Entry No. 36 of the Union List in the Seventh Schedule of the Constitution. Entry No. 93 of the Union List in the same Schedule specifically confers on the Parliament the power to legislate with regard to "offences against laws with respect to any of the matters in the Union List". Read together, these entries put it beyond doubt that Currency Notes and Bank Notes, to which the offences Under Sections 489-A to 489-D relate, are matters which are exclusively within the legislative competence of the Union Legislature. It follows therefrom that the offences for which the Petitioner has been convicted, are offences relating to a matter to which the executive power of the Union extends, and the "appropriate Government" competent to remit the sentence of the Petitioner, would be the Central Government and not the State Government.

This Court went on to observe that the Indian Penal Code is a compilation of penal laws, providing for offences relating to a variety of matters, referable to the various entries in the different lists of the 7th Schedule to the Constitution and that many of the offences in the Penal Code related to matters which are specifically covered by entries in the Union list. Since the offences in question pertained to subject matter in the Union list, this Court concluded that the Central Government was the appropriate Government competent to remit the sentence of the Appellant. The decision in ***G.V. Ramanaiah*** thus clearly lays down that it is the offence, the sentence in respect of which is sought to be commuted or remitted, which determines the question as to which Government is the appropriate Government.

191. In ***Zameer Ahmed Latifur Rehman Sheikh*** v. ***State of Maharashtra and Ors.*** MANU/SC/0289/2010 : (2010) 5 SCC 246 challenge was raised to the competence of the State Legislature to enact Maharashtra Control of Organised Crime Act, 1999. While rejecting the challenge, it was observed by this Court as under:

48. From the ratio of the judgments on the point of public order referred to by us earlier, it is clear that anything that affects public peace or tranquillity within the State or the Province would also affect public order and the State Legislature is empowered to enact laws aimed at containing or preventing acts which tend to or actually affect public order. Even if the said part of MCOCA

incidentally encroaches upon a field under Entry 1 of the Union List, the same cannot be held to be ultra vires in view of the doctrine of pith and substance as in essence the said part relates to maintenance of public order which is essentially a State subject and only incidentally trenches upon a matter falling under the Union List. Therefore, we are of the considered view that it is within the legislative competence of the State of Maharashtra to enact such a provision under Entries 1 and 2 of List II read with Entries 1, 2 and 12 of List III of the Seventh Schedule of the Constitution.

While considering the ambit of expression "public order" as appearing in Entry 1 List II of the 7th Schedule to the Constitution this Court referred to earlier decisions on the point and arrived at the aforesaid conclusion. Similarly in ***People's Union for Civil Liberties and Anr.*** v. ***Union of India*** MANU/SC/1036/2003 : (2004) 9 SCC 580 the validity of Prevention of Terrorism Act, 2002 and in ***Kartar Singh*** v. ***State of Punjab*** MANU/SC/1597/1994 : (1994) 3 SCC 569 validity of TADA were questioned. In both the cases it was observed that the Entry "public order" in List II empowers the State to enact the legislation relating to public order or security insofar as it affects or relates to a particular State and that the term has to be confined to disorder of lesser gravity having impact within the boundaries of the State and that activity of more serious nature which threatens the security and integrity of the country as a whole would not be within the field assigned to Entry 1 of List II. In both these cases the validity of Central enactments were under challenge on the ground that they in pith and substance were relatable to the subject under Entry 1 of List II. In both the cases the challenges were negatived as the legislations in question dealt with "terrorism" in contra-distinction to the normal issues of "public order".

192. We are however concerned in the present case with offence Under Section 302 Indian Penal Code simpliciter. The Respondents-convicts stand acquitted insofar as offences under the TADA are concerned. We find force in the submissions of Mr. Rakesh Dwivedi, learned Senior Advocate that the offence Under Section 302 Indian Penal Code is directly related to "public order" under Entry 1 of List II of the 7th Schedule to the Constitution and is in the exclusive domain of the State Government. In our view the offence in question is within the exclusive domain of the State Government and it is the executive power of the State which must extend to such offence. Even if it is accepted for the sake of argument that the offence Under Section 302 Indian Penal Code is referable to Entry 1 of List III, in accordance with the principles as discussed hereinabove, it is the executive power of the State Government alone which must extend, in the absence of any specific provision in the Constitution or in the law made by Parliament. Consequently, the State Government is the appropriate Government in respect of the offence in question in the present matter. It may be relevant to note that right from ***K.M. Nanavati*** v. ***State of Bombay*** MANU/SC/0063/1960 : (1961) 1 SCR 497 at 516 (supra) in matters concerning offences Under Section 302 Indian Penal Code it is the Governor Under Article 161 or the State Government as appropriate Government under the Code of Criminal Procedure who have been exercising appropriate powers.

193. In the light of the aforesaid discussion our answers to questions 3, 4 and 5 as stated in paragraph 52.3, 52.4 and 52.5 are as under:

Our answer to Question 52.3 in Para 52.3 is:

Question 52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive?

Answer: The executive powers of the Union and the State normally operate in different fields. The fields are well demarcated. Keeping in view our discussion in relation to Articles 73 and 162 of the Constitution, Section 55A of the Indian Penal Code and Section 432(7) of Code of Criminal Procedure it is only in respect of sentence of death, even when the offence in question is referable to the executive power of the State, that both the Central and State Governments have concurrent power Under Section 434 of Code of Criminal Procedure If a convict is sentenced under more than one offences, one or some relating to the executive power of the State Government and the other relating to the Executive Power of the Union, Section 435(2) provides a clear answer. Except the matters referred herein above, Section 432(7) of Code of Criminal Procedure does not give primacy to the executive power of the Union.

Our Answer to Question posed in Para 52.4. is:

Question 52.4. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission?

Answer: In respect of matters in list III of the 7th Schedule to the Constitution, ordinarily the executive power of the State alone must extend. To this general principle there are two exceptions as stated in Proviso to Articles 73(1) of the Constitution. In the absence of any express provision in the Constitution itself or in any law made by Parliament, it is the executive power of the State which alone must extend.

Our Answer to Question posed in Para 52.5. is:

Question 52.5. Whether there can be two appropriate Governments in a given case Under Section 432(7) of the Code?

Answer: There can possibly be two appropriate Governments in a situation contemplated Under Section 435(2) of Code of Criminal Procedure Additionally, in respect of cases of death sentence, even when the offence is one to which the executive power of the State extends, Central Government can also be appropriate Government as stated in Section 434 of Code of Criminal Procedure Except these two cases as dealt with in Section 434 and 435(2) of Code of Criminal Procedure there cannot be two appropriate Governments.

Re: Question No. 6 as stated in para 52.6 of the Referral Order

52.6. Whether suo motu exercise of power of remission Under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in Sub-section (2) of the same section is mandatory or not?

194. We now turn to the exercise of power of remission Under Section 432(1) of Code of Criminal Procedure Remissions are of two kinds. The first category is of remissions under the relevant Jail

Manual which depend upon the good conduct or behavior of a convict while undergoing sentence awarded to him. These are generally referred to as 'earned remissions' and are not referable to Section 432 of Code of Criminal Procedure but have their genesis in the Jail Manual or any such Guidelines holding the field. In **Shraddananda(2)** MANU/SC/3096/2008 : (2008) 13 SCC 767 this aspect was explained thus:

80. From the Prisons Acts and the Rules it appears that for good conduct and for doing certain duties, etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an undertrial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. The way in which remission is allowed, it can only apply to a fixed term and life imprisonment, being for the rest of life, is by nature indeterminate.

The exercise of power in granting remission Under Section 432 is done in a particular or specific case whereby the execution of the sentence is suspended or the whole or any part of the punishment itself is remitted. The effect of exercise of such power was succinctly put by this Court in ***Maru Ram etc. etc.*** v. ***Union of India and Anr.*** (1981) 1 SCC 106 in following words:

...In the first place, an order of remission does not wipe out the offence it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power of grant remission is executive power and cannot have the effect of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court....

...Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched.

195. The difference between earned remissions "for good behaviour" and the remission of sentence Under Section 432 is clear. The first depends upon the Jail Manual or the Policy in question and normally accrues and accumulates to the credit of the prisoner without there being any specific order by the appropriate Government in an individual case while the one Under Section 432 requires specific assessment in an individual matter and is case specific. Could such exercise be undertaken Under Section 432 by the appropriate Government on its own, without there being any application by or on behalf of the prisoner? This issue has already been dealt with in following cases by this Court.

A]. In ***Sangeet and Anr.*** v. ***State of Haryana*** MANU/SC/0989/2012 : (2013) 2 SCC 452, it was observed in paras 59, 61 and 62 as under:

59. There does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power Under Section 432 Code of Criminal Procedure. But it does appear to us that Sub-section (2) to Sub-section (5) of Section 432 Code of Criminal Procedure lay down the basic procedure, which is making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. In fact, this is what was suggested in *Samjuben Gordhanbhai Koli* v. *State of Gujarat* when it was observed that since remission can only be granted by the executive authorities, the Appellant therein would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 Code of Criminal Procedure.

61. It appears to us that an exercise of power by the appropriate Government Under Sub-section (1) of Section 432 Code of Criminal Procedure cannot be suo motu for the simple reason that this Sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfilment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 Code of Criminal Procedure cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the Presiding Judge of the court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable inasmuch as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.

62. It must be remembered in this context that it was held in *State of Haryana* v. *Mohinder Singh* that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 Code of Criminal Procedure does provide this check on the possible misuse of power by the appropriate Government.

B] In ***Mohinder Singh*** v. ***State of Punjab*** MANU/SC/0069/2013 : (2013) 3 SCC 294 the observations in para 27 were to the following effect:

27. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government Under Sub-section (1) of Section 432 of the Code cannot be suo motu for the simple reason that this is only an enabling provision and the same would be possible subject to fulfilment of certain

conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. As rightly observed by this Court in *Sangeet* v. *State of Haryana*, there is a misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years' or 20 years' imprisonment. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government Under Section 432 of the Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code.

C] In ***Yakub Abdul Razak Memon*** v. ***State of Maharashtra through CBI, Bombay*** MANU/SC/0268/2013 : (2013) 13 SCC 1, it was observed in paras 921 and 922 as under:

921. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government Under Sub-section (1) of Section 432 of the Code cannot be automatic or claimed as a right for the simple reason, that this is only an enabling provision and the same would be possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court, in various decisions, has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government.

922. As rightly observed by this Court in *Sangeet* v. *State of Haryana*, there is misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years or 20 years' imprisonment. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government Under Section 432 of the Code, which in turn is subject to the procedural checks mentioned in the said provision and to further substantive check in Section 433-A of the Code.

196. Relying on the aforesaid decisions of this Court, it was submitted by the learned Solicitor General that there cannot be suo motu exercise of power Under Section 432 and that even when the power is to be exercised on an application made by or on behalf of the prisoner, opinion of the Presiding Judge of the Court before or by which the conviction was confirmed, must be sought. In the submission of Mr. Rakesh Dwivedi, learned Senior Advocate, power Under Section 432(1) can be exercised suo motu and that Section 432(2) applies only when an application is made and not where power is exercised suo motu.

197. We find force in the submission of the learned Solicitor General. By exercise of power of remission, the appropriate Government is enabled to wipe out that part of the sentence which has not been served out and over-ride a judicially pronounced sentence. The decision to grant remission must, therefore, be well informed, reasonable and fair to all concerned. The procedure

prescribed in Section 432(2) is designed to achieve this purpose. The power exercisable Under Section 432(1) is an enabling provision and must be in accord with the procedure Under Section 432(2).

Thus, our answer to question posed in para 52.6 is:

Question 52.6. Whether suo motu exercise of power of remission Under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in Sub-section (2) of the same section is mandatory or not?

Answer: That suo motu exercise of power of remission Under Section 432(1) is not permissible and exercise of power Under Section 432(1) must be in accordance with the procedure Under Section 432(2) of Code of Criminal Procedure

Re: Question No. 7 as stated in Para 52.7 of the Referral Order:

52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

198. Section 435(1) of Code of Criminal Procedure sets out three categories under Clauses (a), (b) and (c) thereof and states inter alia that the powers conferred by Sections 432 and 433 of Code of Criminal Procedure upon the State Government shall not be exercised except after consultation with the Central Government. The language used in this provision and the expressions "... shall not be exercised" and "except after consultation", signify the mandatory nature of the provision. Consultation with the Central Government must, therefore, be mandatorily undertaken before the State Government in its capacity as appropriate Government intends to exercise powers Under Sections 432 and 433. This is an instance of express provision in a law made by Parliament as referred to in proviso to Article 73(1) of the Constitution. The question is whether such consultation stipulated in Section 435(1) implies concurrence on part of the Central Government as regards the action proposed by the State Government. Relying on the decisions of this Court in ***L and T McNeil Ltd.*** v. ***Govt. of Tamil Nadu*** MANU/SC/0754/2001 : (2001) 3 SCC 170, ***State of U.P. and Anr.*** v. ***Johri Mal*** MANU/SC/0396/2004 : (2004) 4 SCC 714, ***State of Uttar Pradesh and Ors.*** v. ***Rakesh Kumar Keshari and Anr.*** MANU/SC/0556/2011 : (2011) 5 SCC 341, ***Justice Chandrashekaraiah (Retd.)*** v. ***Janekere C. Krishna and Ors.*** MANU/SC/0023/2013 : (2013) 3 SCC 117. Mr. Rakesh Dwivedi, learned Senior Advocate submitted that the term consultation as appearing in Section 435 ought not to be equated with concurrence and that the action on part of the State of Tamil Nadu in seeking views of the Central Government as regards the proposed action did satisfy the requirement Under Section 435. On the other hand, the learned Solicitor General relied upon ***Supreme Court Advocates-on-Record Association and Ors.*** v. ***Union of India*** MANU/SC/0073/1994 : (1993) 4 SCC 441 and ***State of Gujarat and Anr.*** v. ***Justice R.A. Mehta (Retd.) and Ors.*** MANU/SC/0001/2013 : (2013) 3 SCC 1 to submit that the consultation referred to in the provision must mean concurrence on part of the Central Government. In his submission without such concurrence, no action could be undertaken.

199. Speaking for the majority in ***Supreme Court Advocates-on-Record Association*** (supra) J.S. Verma, J (as the learned Chief Justice then was) considered the effect of the phrase "consultation

with the Chief Justice of India " appearing in Article 222 of the Constitution. The observations in paragraphs 438 to 441 are quoted hereunder:

438. The debate on primacy is intended to determine who amongst the constitutional functionaries involved in the integrated process of appointments is best equipped to discharge the greater burden attached to the role of primacy, of making the proper choice; and this debate is not to determine who between them is entitled to greater importance or is to take the winner's prize at the end of the debate. The task before us has to be performed with this perception.

439. The primacy of one constitutional functionary qua the others, who together participate in the performance of this function assumes significance only when they cannot reach an agreed conclusion. The debate is academic when a decision is reached by agreement taking into account the opinion of everyone participating together in the process, as primarily intended. The situation of a difference at the end, raising the question of primacy, is best avoided by each constitutional functionary remembering that all of them are participants in a joint venture, the aim of which is to find out and select the most suitable candidate for appointment, after assessing the comparative merit of all those available. This exercise must be performed as a pious duty to discharge the constitutional obligation imposed collectively on the highest functionaries drawn from the executive and the judiciary, in view of the great significance of these appointments. The common purpose to be achieved, points in the direction that emphasis has to be on the importance of the purpose and not on the comparative importance of the participants working together to achieve the purpose. Attention has to be focussed on the purpose, to enable better appreciation of the significance of the role of each participant, with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector.

440. The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the joint venture will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate.

441. For this reason, it must be seen who is best equipped and likely to be more correct in his view for achieving the purpose and performing the task satisfactorily. In other words, primacy should be in him who qualifies to be treated as the 'expert' in the field. Comparatively greater weight to his opinion may then be attached.

The principle which emerges is that while construing the term 'consultation' it must be seen who is the best equipped and likely to be more correct in his view for achieving the purpose and performing the tasks satisfactorily and greater weight to his opinion may then be attached.

While considering the phrase "after consultation of the Chief Justice of the High Court", this Court in ***State of Gujarat v. R.A. Mehta*** (supra) stated the principles thus:

32. Thus, in view of the above, the meaning of *"consultation"* varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, consultation means a free and

fair discussion on a particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has *primacy* of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean *concurrence*. The court must examine the fact situation in a given case to determine whether the process of consultation as required under the particular situation did in fact stand complete.

It is thus clear that the meaning of consultation varies from case to case depending upon the fact situation and the context of the statute as well as the object it seeks to achieve.

200. In the light of the aforesaid principles, we now consider the object that Sub-clauses (a), (b) and (c) of Section 435(1) of the Code of Criminal Procedure seek to achieve. Clause (a) deals with cases which are investigated by the Delhi Special Police Establishment i.e. the Central Bureau of Investigation or by any other agency empowered to make investigation into an offence under any Central Act.

The investigation by CBI in a matter may arise as a result of express consent or approval by the concerned State Government Under Sections 5 and 6 of the Delhi Special Police Establishment Act or as a result of directions by a Superior Court in exercise of its writ jurisdiction in terms of the law laid down by this Court in ***State of West Bengal and Ors. v. Committee for Protection of Democratic Rights, West Bengal and Ors.*** MANU/SC/0121/2010 : (2010) 3 SCC 571. For instance, in the present case the investigation into the crime in question i.e. Crime No. 3 of 1991 was handed over to the CBI on the next day itself. The entire investigation was done by the CBI who thereafter carried the prosecution right up to this Court.

201. In a case where the investigation is thus handed over to the CBI, entire carriage of the proceedings including decisions as to who shall be the public prosecutor, how the prosecution be conducted and whether appeal be filed or not are all taken by the CBI and at no stage the concerned State Government has any role to play. It has been laid down by this Court in ***Lalu Prasad Yadav and Anr.*** v. ***State of Bihar and Anr.*** MANU/SC/0214/2010 : (2010) 5 SCC 1 that in matters where investigation was handed over to the CBI, it is the CBI alone which is competent to decide whether appeal be filed or not and the State Government cannot even challenge the order of acquittal on its own. In such cases could the State Government then seek to exercise powers Under Sections 432 and 433 on its own?

202. Further, in certain cases investigation is transferred to the CBI under express orders of the Superior Court. There are number of such examples and the cases could be of trans-border ramifications such as stamp papers scam or chit fund scam where the offence may have been committed in more than one States or it could be cases where the role and conduct of the concerned State Government was such that in order to have transparency in the entirety of the matter, the Superior Court deemed it proper to transfer the investigation to the CBI. It would not then be appropriate to allow the same State Government to exercise power Under Sections 432 and 433 on its own and in such matters, the opinion of the Central Government must have a decisive status. In cases where the investigation was so conducted by the CBI or any such Central Investigating Agency, the Central Government would be better equipped and likely to be more correct in its view. Considering the context of the provision, in our view comparatively greater weight ought to

be attached to the opinion of the Central Government which through CBI or other Central Investigating Agency was in-charge of the investigation and had complete carriage of the proceedings.

203. The other two clauses, namely, Clauses (b) and (c) of Section 435 deal with offences pertaining to destruction of any property belonging to the Central Government or where the offence was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty. Here again, it would be the Central Government which would be better equipped and more correct in taking the appropriate view which could achieve the purpose satisfactorily. In such cases, the question whether the prisoner ought to be given the benefit Under Section 432 or 433 must be that of the Central Government. Merely because the State Government happens to be the appropriate Government in respect of such offences, if the prisoner were to be granted benefit Under Section 432 or 433 by the State Government on its own, it would in fact defeat the very purpose.

Our Answer to Question post in Para 52.7 is:

Question 52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

Answer: In the premises as aforesaid, in our view the expression "consultation" ought to be read as concurrence and primacy must be accorded to the opinion of the Central Government in matters covered under Clauses (a), (b) and (c) of Section 435(1) of the Code of Criminal Procedure

Re: Question No. 2 as stated in para 52.2 of the Referral Order

52.2. Whether the "appropriate Government" is permitted to exercise the power of remission Under Sections 432/433 of the Code after the parallel power has been exercised by the President Under Article 72 or the Governor Under Article 161 or by this Court in its constitutional power Under Article 32 as in this case?

204. As regards this question, the submissions of the learned Solicitor General were two-fold. According to him the Governor while exercising power Under Article 161 of the Constitution, having declined remission in or commutation of sentences awarded to the Respondents-convicts, second or subsequent exercise of executive power Under Section 432/433 by the State Government was not permissible and it would amount to an over-ruling or nullification of the exercise of constitutional power vested in the Governor. In his submission, the statutory power Under Section 432/433 Code of Criminal Procedure could not be exercised in a manner that would be in conflict with the decision taken by the constitutional functionary Under Article 161 of the Constitution. It was his further submission that Sections 432 and 433 of Code of Criminal Procedure only prescribe a procedure for remission, while the source of substantive power of remission is in the Constitution. According to him Sections 432 and 433, Code of Criminal Procedure are purely procedural and in aid of constitutional power Under Article 72 or 161. He further submitted that as laid down in ***Maru Ram*** (supra), while exercising powers Under Articles 72 and 161, the President or the Governor act on the aid and advice of the Council of Ministers and thus the Council of Ministers, that is to say the executive having already considered the matter and rejected the

petition, a subsequent exercise by the same executive is impermissible. On the other hand, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that there was nothing in the statute which would bar or prohibit exercise of power on the second or subsequent occasion and in fact Section 433A of Code of Criminal Procedure itself gives an indication that such exercise is permissible. It was further submitted that the power conferred upon an authority can be exercised successively from time to time as occasion requires.

205. We would first deal with the submission of the learned Solicitor General that the provisions of Section 432/433 Code of Criminal Procedure are purely procedural and in aid of the constitutional power. This Court had an occasion to deal with the issue, though in a slightly different context, in ***Maru Ram*** (supra). We may quote paragraphs 58 and 59 of the decision, which are as under:

58. ...What is urged is that by the introduction of Section 433-A, Section 432 is granted a permanent holiday for certain classes of lifers and Section 433(a) suffers eclipse. Since Sections 432 and 433(a) are a statutory expression and modus operandi of the constitutional power, Section 433-A is ineffective because it detracts from the operation of Sections 432 and 433(a) which are the legislative surrogates, as it were, of the pardon power under the Constitution. We are unconvinced by the submissions of counsel in this behalf.

59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(a) is within the legislative power of Parliament.

206. The submission that Sections 432 and 433 are a statutory expression and modus operandi of the constitutional power was not accepted in ***Maru Ram*** (supra). In fact this Court went on to observe that though these two powers, one constitutional and the other statutory, are co-extensive, the source is different, the substance is different and the strength is different. This Court saw the two powers as far from being identical. The conclusion in para 72(4) in Maru Ram (supra) was as under:

72. *(4)* We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.

It is thus well settled that though similar, the powers Under Section 432/433 Code of Criminal Procedure on one hand and those Under Article 72 and 161 on the other, are distinct and different.

Though they flow along the same bed and in same direction, the source and substance is different. We therefore reject the submission of the learned Solicitor General.

207. Section 433A of Code of Criminal Procedure inter alia states, "..... where a sentence of death imposed on a person has been commuted Under Section 433 into one of imprisonment for life", such person shall not be released from prison unless he had served at least 14 years of imprisonment. It thus contemplates an earlier exercise of power of commuting the sentence Under Section 433 Code of Criminal Procedure It may be relevant to note that Under Section 433 a sentence of death can be commuted for any other punishment including imprisonment for life. A prisoner having thus been granted a benefit Under Section 433 Code of Criminal Procedure can certainly be granted further benefit of remitting the remainder part of the life sentence, subject of course to statutory minimum period of 14 years of actual imprisonment. We therefore accept the submission of Mr. Rakesh Dwivedi, learned Senior Advocate that there is nothing in the statute which either expressly or impliedly bars second or subsequent exercise of power. In fact Section 433A contemplates such subsequent exercise of power. At this stage, the observations in ***G. Krishta Goud and J. Bhoomaiah*** v. ***State of Andhra Pradesh and Ors.*** MANU/SC/0116/1975 : (1976) 1 SCC 157 in the context of constitutional power of clemency are relevant:

10. ... The rejection of one clemency petition does not exhaust the power of the President or the Governor.

This principle was re-iterated in para 7 of the decision in ***Krishnan and Ors. v. State of Haryana and Ors.*** MANU/SC/0471/2013 : (2013) 14 SCC 24 as follows:

In fact, Articles 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the authorities concerned to exercise such power even after rejection of one clemency petition and even in the changed circumstances.

208. In ***State of Haryana and Ors.*** v. ***Jagdish*** MANU/SC/0188/2010 : (2010) 4 SCC 216 it was observed by this Court as under:

46. At the time of considering the case of premature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances.

In ***Kehar Singh*** v. ***Union of India*** (supra) it was observed, "..... the power Under Article 72 is of the widest amplitude, can contemplate myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of States may be profoundly assisted by prevailing occasion and passing of time". Having regard to its wide amplitude and the status of the functions to be discharged thereunder, it was found unnecessary to spell out any specific guidelines for exercise of such power. The observations made in the context of power Under Article 72 will also be relevant as regards exercise Under Section 432/433 Code of Criminal Procedure

In ***State (Govt. of NCT of Delhi***) v. ***Prem Ram*** MANU/SC/0548/2003 : (2003) 7 SCC 121 it was observed thus:

14. The powers conferred upon the appropriate Government Under Section 433 have to be exercised reasonably and rationally keeping in view the reasons germane and relevant for the purpose of law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest.

209. We see no hindrance or prohibition in second or subsequent exercise of power Under Section 432/433 Code of Criminal Procedure As stated above, such exercise is in fact contemplated Under Section 433A. An exercise of such power may be required and called for depending upon exigencies and fact situation. A person may be on the death bed and as such the appropriate Government may deem fit to grant remission so that he may breathe his last in the comfort and company of his relations. Situations could be different. It would be difficult to put the matter in any straight jacket or make it subject to any guidelines, as was found in ***Kehar Singh***. The aspects whether "the convict had lost his potentiality in committing the crime and whether there was any fruitful purpose of confining the convict any more" as stated in ***State of Haryana*** v. ***Jagdish*** (supra) could possibly yield different assessment after certain period and can never be static. Every case will depend on its individual facts and circumstances. In any case, if the repeated exercise is not for any genuine or bona fide reasons, the matter can be corrected by way of judicial review. Further, in the light of our decision as aforesaid, in any case an approach would be required to be made Under Section 432(2) Code of Criminal Procedure to the concerned court which would also result in having an adequate check.

210. In the instant case, A-1 Nalini and other convicts A-2, A-3 and A-18 who were awarded death sentence had initially preferred mercy petition Under Article 161 of the Constitution. The petition preferred by A-1 Nalini was allowed, while those of other three were rejected. Those three convicts then preferred mercy petition Under Article 72 of the Constitution which was rejected after considerable delay. On account of such delay in disposal of the matters, this Court commuted the sentence of those three convicts to that of life imprisonment. The other convicts namely A-9, A-10 and A-16 had not preferred any petition Under Article 161 against their life imprisonment. Thus the Governor while exercising power Under Article 161 on the earlier occasion had considered the cases of only three of the convicts and that too when they were facing death sentence. The cases of other three were not even before the Governor. In the changed scenario namely the death sentence having been commuted to that of the imprisonment for life under the orders of this Court, the approach would not be on the same set of circumstances. Each of the convicts having undergone about 23 years of actual imprisonment, there is definitely change in circumstances. An earlier exercise of power Under Article 72 or 161 may certainly have taken into account the gravity of the offence, the effect of such offence on the society in general and the victims in particular, the age, capacity and conduct of the offenders and the possibility of any retribution. Such assessment would naturally have been as on the day it was made. It is possible that with the passage of time the very same assessment could be of a different nature. It will therefore be incorrect and unjust to rule out even an assessment on the subsequent occasion.

211. While commuting the death sentence to that of imprisonment for life, on account of delay in disposal of the mercy petition, this Court in its jurisdiction Under Article 32 concentrates purely

on the factum of delay in disposal of such mercy petition as laid down by this Court in ***Shatrughan Chauhan and Anr.*** v. ***Union of India and Ors.*** MANU/SC/0043/2014 : (2014) 3 SCC 1. The merits of the matter are not required and cannot be gone into. The commutation by this Court in exercise of power Under Article 32 is therefore completely of a different nature. On the other hand, the consideration Under Section 432/433 is of a different dimension altogether.

Our Answer to Question posed in Para 52.2 is:

Question 52.2. Whether the "appropriate Government" is permitted to exercise the power of remission Under Sections 432/433 of the Code after the parallel power has been exercised by the President Under Article 72 or the Governor Under Article 161 or by this Court in its constitutional power Under Article 32 as in this case?

Answer: In the circumstances, in our view it is permissible to the appropriate Government to exercise the power of remission Under Section 432/433 Code of Criminal Procedure even after the exercise of power by the President Under Article 72 or the Governor Under Article 161 or by this Court in its constitutional power Under Article 32.

Re: Question No. 1 as stated in para 52.1 of the Referral Order

212. Question No. 1 as formulated in the Referral Order comprises of two Sub-questions, as set out hereunder:

(a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission? And

(b) Whether as per the principles enunciated in paragraphs 91 to 93 of ***Swamy Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Re: Sub-question (a) of question No. 1 in Para 52.1

(a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission?

213. In ***Gopal Vinayak Godse*** v. ***The State of Maharashtra and Ors.*** MANU/SC/0156/1961 : (1961) 3 SCR 440, the Petitioner was convicted on 10.02.1949 and given sentences including one for transportation for life. According to him, he had earned remissions to the tune of 2893 days upto 30.09.1960 and if such earned remissions were added, his actual term of imprisonment would exceed 20 years and therefore he prayed that he be set at liberty forthwith. Repelling these submissions, it was observed by the Constitution Bench of this Court that in order to get the benefit of earned remissions the sentence of imprisonment must be for a definite and ascertainable period,

from and out of which the earned remissions could be deducted. However, transportation for life or life imprisonment meant that the prisoner was bound in law to serve the entire life term i.e. the remainder of his life in prison. Viewed thus, unless and until his sentence was commuted or remitted by an appropriate authority under the relevant provisions, the prisoner could not claim any benefit. It was observed:

...As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death.

214. In ***Maru Ram*** (supra) while considering the effect of Section 433A of Code of Criminal Procedure this Court summed up the issue as under:

...Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant-release at that point where the subtraction results in zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of the sentence which has been highlighted in Godse's case Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration. Godse was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment a la Section 55 Indian Penal Code. On the basis of a rule which did make that equation, Godse sought his release through a writ petition Under Article 52 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao, J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order Under Section 401 of the Code of Criminal Procedure, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power Under Article 72 or 161 of the Constitution. **Godse** (supra) is authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life.

Conclusion No. 6 in ***Maru Ram*** was to the following effect:

We follow Godse's case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government.

215. Section 53 of the Indian Penal Code envisages different kinds of punishments while Section 45 of the Indian Penal Code defines the word 'life' as the life of a human being unless the contrary appears from the context. The life of a human being is till he is alive that is to say till his last breath, which by very nature is one of indefinite duration. In the light of the law laid down in Godse and Maru Ram, which law has consistently been followed the sentence of life imprisonment

as contemplated Under Section 53 read with Section 45 of the Indian Penal Code means imprisonment for rest of the life or the remainder of life of the convict. The terminal point of the sentence is the last breath of the convict and unless the appropriate Government commutes the punishment or remits the sentence such terminal point would not change at all. The life imprisonment thus means imprisonment for rest of the life of the prisoner.

216. In paras 27 and 38 of the decision in ***State of Haryana*** v. ***Mahender Singh and Ors.*** MANU/SC/4337/2007 : 2007 (13) SCC 606, this Court observed:

27. It is true that no convict has a fundamental right of remission or shortening of sentences. It is also true that the State in exercise of its executive power of remission must consider each individual case keeping in view the relevant factors. The power of the State to issue general instructions, so that no discrimination is made, is also permissible in law.

38. A right to be considered for remission, keeping in view the constitutional safeguards of a convict Under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, he in view of the policy decision itself must be held to have a right to be considered therefor. Whether by reason of a statutory rule or otherwise if a policy decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally. (*State of Mysore* v. *H. Srinivasmurthy*)

217. The convict undergoing the life imprisonment can always apply to the concerned authority for obtaining remission either Under Articles 72 or 161 of the Constitution or Under Section 432 Code of Criminal Procedure and the authority would be obliged to consider the same reasonably. This was settled in the case of Godse which view has since then been followed consistently in ***State of Haryana v. Mahender Singh*** (supra), **State of Haryana v. Jagdish** (supra), **Sangeet v. State of Haryana** (supra) and **Laxman Naskar v. Union of India and Ors.** MANU/SC/0084/2000 : (2000) 2 SCC 595. The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in Godse. All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the concerned authorities, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner.

Our Answer to sub question (a) of Question in Para 52.1 is:

(a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission?

Answer: The sentence of life imprisonment means imprisonment for the rest of life or the remainder of life of the convict. Such convict can always apply for obtaining remission either

Under Articles 72 or 161 of the Constitution or Under Section 432 Code of Criminal Procedure and the authority would be obliged to consider the same reasonably.

Re: sub-question (b) of Question No. 1 in Para 52.1

(b) Whether as per the principles enunciated in paragraphs 91 to 93 of ***Swamy Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

218. In ***Swamy Shraddananda(1)*** the Appellant was convicted for the offence of murder and given death sentence, which conviction and sentence was under appeal in this Court. A Bench of two learned Judges of this Court affirmed the conviction of the Appellant but differed on the question of sentence to be imposed. **Sinha J.** was of the view that instead of death sentence, life imprisonment would serve the ends of justice. He however, directed that the Appellant would not be released from the prison till the end of his life. **Katju J.** was of the view that the Appellant deserved death sentence. The matter therefore came up before a Bench of three learned Judges. While dealing with the question of sentence to be imposed, this Court was hesitant in endorsing the death penalty awarded by the trial court and confirmed by the High Court. Paragraph Nos. 55 and 56 of the judgment in ***Swamy Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 may be quoted here:

55. We must not be understood to mean that the crime committed by the Appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court. The hangman's noose is thus taken off the Appellant's neck.

56. But this leads to a more important question about the punishment commensurate to the Appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the Appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment *when awarded as a substitute for death penalty* would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty

years ago in *Dalbir Singh* v. *State of Punjab*. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad* case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, *at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large.* This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

We think that it is time that the course suggested in *Dalbir Singh* should receive a formal recognition by the Court.

219. The discussion in aforesaid paragraph 56 shows the concern that weighed with this Court was the standardization rendering the sentence of life imprisonment in practice as equal to imprisonment for a period of no more than fourteen years. Relying on ***Dalbir Singh and Ors.*** v. ***State of Punjab*** MANU/SC/0099/1979 : (1979) 3 SCC 745 which in turn had considered ***Rajendra Prasad*** v. ***State of U.P.*** MANU/SC/0212/1979 : (1979) 3 SCC 646, it was observed that the Court must in appropriate cases put the punishment of life imprisonment awarded as a substitute for death penalty, beyond any remission and direct it to be carried out as directed by the Court. Paragraphs 91 to 93 of the decision in ***Shraddananda(2)*** which gives rise to sub-question (b) of the first question in the Referral Order were as under:

91. The legal position as enunciated in *Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan* and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate.* When an Appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years'

imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology.

220. Finally, in paragraph 95 of its judgment in ***Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 this Court substituted the death sentence given to the Appellant to that of imprisonment for life and directed that he would not be released from the prison till the rest of his life. While doing so, this Court made it clear that it was not dealing with powers of the President and the Governor Under Article 72 and 161 of the Constitution but only with provisions of commutation, remission etc. as contained in the Code of Criminal Procedure and the Prison Acts, as would be evident from paragraph 77 of the judgment which was to the following effect:

77. This takes us to the issue of computation and remission, etc. of sentences. The provisions in regard to computation, remission, suspension, etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the States respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the constitutional provisions that are in the nature of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission, etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the rules framed by the different States.

221. The decision in ***Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 is premised on the following:

(a) The life imprisonment, though in theory is till the rest of the life or the remainder of life of the prisoner, in practice it is equal to imprisonment for a period of no more than 14 years.

(b) Though in a given case, in the assessment of the Court the case may fall short of the "rarest of rare" category to justify award of death sentence, it may strongly feel that a sentence of life imprisonment which normally works out to a term of fourteen years may be grossly disproportionate and inadequate.

(c) If the options are limited only to these two punishments the Court may feel tempted and find itself nudged into endorsing the death penalty, which course would be disastrous.

(d) The Court may therefore take recourse to the expanded option namely the hiatus between imprisonment for fourteen years and the death sentence, if the facts of the case justify.

(e) The unsound way in which remissions are granted in cases of life imprisonment makes out a strong case to make a special category for the very few cases where the death penalty is substituted for imprisonment of life.

(f) While awarding life imprisonment the Court may specify that the prisoner must actually undergo minimum sentence of period in excess of fourteen years or that he shall not be released till the rest of his life and/or put such sentence beyond the application of remission.

The view so taken in ***Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 has been followed in some of the later Bench decisions of this Court. It is the correctness of this view and more particularly whether it is within the powers of the Court to put the sentence of life imprisonment so awarded beyond application of remissions, which is presently in question.

222. We must at the outset state that while commuting the death sentence to that of imprisonment for life, this Court in ***V. Sreedhar*** v. ***Union of India*** MANU/SC/0104/2014 : 2014 (4) SCC 242 (supra) had not put any fetters or restrictions on the power of commutation and/or remission. In fact paragraph 32 of the decision expressly mentions that the sentence so awarded is subject to any remission granted by the Appropriate Government Under Section 432 of Code of Criminal Procedure Strictly speaking, sub-question (b) of the first question does not arise for consideration insofar as the present writ petition is concerned and that precisely was the submission of Mr. Rakesh Dwivedi, learned Senior Advocate. However since the question has been referred for our decision we proceed to deal with said sub-question (b) of question No. 1. Further a doubt has been expressed in ***Sangeet*** v. ***State of Haryana*** (supra) regarding correctness of the decision in ***Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 in following words:

55. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in *Swamy Shraddananda* and several other cases, by giving a sentence in a capital offence of 20 years' or 30 years' imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason.

We therefore deal with the question.

223. The decision of this Court in ***Maru Ram*** (Supra) refers to the background which preceded the introduction of Section 433A in Code of Criminal Procedure The Joint Committee which went into the Indian Penal Code (Amendment) Bill had suggested that a long enough minimum sentence should be suffered by both classes of lifers namely, those guilty of offence where death sentence was one of the alternatives and where the death sentence was commuted to imprisonment for life. Paragraph 5 of the decision in ***Maru Ram*** sets out the objects and reasons, relevant notes on clauses and the recommendations and was to the following effect:

5. The Objects and Reasons throw light on the "why" of this new provision:

The Code of Criminal Procedure, 1973 came into force on the 1st day of April, 1974. The working of the new Code has been carefully watched and in the light of the experience, it has been found necessary to make a few changes for removing certain difficulties and doubts. The notes on clauses explain in brief the reasons for the amendments.

The notes on clauses give the further explanation:

Clause 33.--Section 432 contains provision relating to powers of the appropriate Government to suspend or remit sentences. The Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, had suggested the insertion of a proviso to Section 57 of the Indian Penal Code to the effect that a person who has been sentenced to death and whose death sentence has been commuted into that of life imprisonment and persons who have been sentenced to life imprisonment for a capital offence should undergo actual imprisonment of 14 years in jail. Since this particular matter relates more appropriately to the Code of Criminal Procedure, a new section is being inserted to cover the proviso inserted by the Joint Committee.

This takes us to the Joint Committee's recommendation on Section 57 of the Penal Code that being the inspiration for Clause 33. For the sake of completeness, we may quote that recommendation:

Section 57 of the Code as proposed to be amended had provided that in calculating fractions of terms of punishment, imprisonment for life should be reckoned as equivalent to rigorous imprisonment for twenty years. In this connection attention of the Committee was brought to the aspect that sometimes due to grant of remission even murderers sentenced or commuted to life imprisonment were released at the end of 5 to 6 years. The Committee feels that such a convict should not be released unless he has served at least fourteen years of imprisonment.

Thus, as against the then prevalent practice or experience where murderers sentenced or commuted to life imprisonment, were being released at the end of 5-6 years, period of 14 years of actual imprisonment was considered sufficient.

224. **Shraddananda(2)** MANU/SC/3096/2008 : (2008) 13 SCC 767 referred to earlier decision of this Court in ***Dalbir Singh and Ors. v. State of Punjab*** (supra). In that decision, taking cue from English Legislation on abolition of death penalty, a suggestion was made in following words:

14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

225. Committee of Reforms on Criminal Justice System under the Chairmanship of Dr. Justice Malimath in its report submitted in the year 2003 recommended suitable amendments to introduce a punishment higher than life imprisonment and lesser than death penalty, similar to that which exists in USA namely "Imprisonment for life without commutation or remission". The relevant paragraphs of Malimath Committee Report namely paragraphs 14.7.1 and 14.7.2 were as under:

ALTERNATIVE TO DEATH PENALTY

14.7.1 Section 53 of the Indian Penal Code enumerates various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and the second being the sentence of imprisonment for life. At present there is no sentence that can be awarded higher than imprisonment for life and lower than death penalty. In USA a higher punishment called "Imprisonment for life without commutation or remission" is one of the punishments. As death penalty is harsh and irreversible the Supreme Court has held that death penalty should be awarded only in the rarest of rare cases, the Committee considers that it is desirable to prescribe a punishment higher than that of imprisonment for life and lower than death penalty. Section 53 be suitably amended to include "Imprisonment for life without commutation or remission" as one of the punishments.

14.7.2 Wherever imprisonment for life is one of the penalties prescribed under the Indian Penal Code, the following alternative punishment be added namely "Imprisonment for life without commutation or remission". Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of "Imprisonment for life without remission or commutation" is awarded. This however cannot affect the Power of Pardon etc of the President and the Governor Under Articles 72 and 161 respectively.

226. In its report submitted in January 2013, Committee on Amendment to Criminal Law under the chairmanship of Justice J.S. Verma made following recommendations on life imprisonment:

On Life Imprisonment

13. Before making our recommendation on this subject, we would like to briefly examine the meaning of the expression "life" in the term "life imprisonment", which has attracted considerable judicial attention.

14. *Mohd. Munna v. Union of India* reported in MANU/SC/0566/2005 : 2005 (7) SCC 417 reiterates the well settled judicial opinion that a sentence of imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convict's natural life. This opinion was recently restated in ***Rameshbhai Chandubhai Rathode v. State of Gujarat*** reported in MANU/SC/0075/2011 : 2011 (2) SCC 764, and State of U.P. v. Sanjay Kumar reported in MANU/SC/0693/2012 : 2012 (8) SCC 537, where the Supreme Court affirmed that life imprisonment cannot be equivalent to imprisonment for 14 or 20 years, and that it actually means (and has always meant) imprisonment for the whole natural life of the convict.

15. We therefore recommend a legislative clarification that life imprisonment must always mean imprisonment "for 'the entire natural life of the convict'.

Pursuant to these recommendations, certain Sections were added in the Indian Penal Code while other Sections were substantially amended by Criminal Law Amendment Act of 2013 (Act 13 of 2013). As a result Sections 370(6), 376-A, 376-D and 376-E now prescribe a punishment of "with imprisonment for life which shall mean imprisonment for the remainder of that persons natural life". Thus what was implicit in the sentence for imprisonment of life as laid down in Godse and followed since then has now been made explicit by the Parliament in certain Sections of the Indian Penal Code. However, none of the amendments reflected the introduction of punishment suggested by Malimath Committee.

227. Thus despite recommendations of Justice Malimath Committee to introduce a punishment higher than life imprisonment and lesser than death penalty similar to the one which exists in USA, Parliament has chosen not to act in terms of recommendations for last 12 years. In this backdrop, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that in Shraddananda(2) MANU/SC/3096/2008 : (2008) 13 SCC 767 this Court in fact carved out and created a new form of punishment and resorted to making a legislation on the point. It was further submitted that Section 433A of Code of Criminal Procedure prescribes minimum actual imprisonment which must be undergone in cases of life imprisonment on two counts, where death sentence is one of the alternatives or where death sentence is commuted to imprisonment for life. Even the prisoner who at one point of time was awarded a death sentence is entitled, upon his death sentence being commuted to life imprisonment, to be considered Under Section 433A. In his submission, it would not be within the powers of the court to put the sentence of life imprisonment in such cases beyond application of remissions, in the teeth of the Statute. Mr. T.R. Andhyarujina, learned Senior Advocate appearing for one of the intervenors submitted that what is within the domain of the judiciary is power to grant or award sentence as prescribed and when it comes to its execution the domain is that of the executive. In his submission howsoever strong be the temptation on account of gravity of the crime, there could be no trenching into the power of the executive. He submitted that it is not for the judiciary to say that there could be no commutation at all, which would be violative of the concept of separation of powers. Reliance was placed on Section 32A of NDPS Act to contend that wherever the Parliament intended that there be no remissions in respect of any offence, it has chosen to say so in specific terms.

228. In a recent decision of this Court in ***Vikram Singh @ Vicky and Anr.*** v. ***Union of India and Ors.*** MANU/SC/0901/2015 : AIR 2015 SC 3577, while considering challenge to the award of death sentence for an offence Under Section 364A of the Indian Penal Code this Court considered various decisions on the issue of punishment. It considered some American decisions holding that fixing of prison terms for specific crimes involves a substantive penalogical judgment which is properly within the province of legislatures and not courts and that the responsibility for making fundamental choices and implementing them lies with the legislature. In the end, the conclusions (b), (c) and (d) as summed up by this Court were as under:

(b) Prescribing punishment is the function of the legislature and not the Courts.

(c) The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that the necessary to meet those needs.

(d) Court show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences.

229. Section 302 Indian Penal Code prescribes two punishments, the maxima being the death sentence and the minima to be life sentence. ***Shraddananada(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 proceeds on the footing that the court may in certain cases take recourse to the expanded option namely the hiatus between imprisonment for 14 years and the death sentence, if the facts of the case so justify. The hiatus thus contemplated is between the minima i.e. 14 years and the maxima being the death sentence. In fact going by the punishment prescribed in the statute there is no such hiatus between the life imprisonment and the death sentence. There is nothing that can stand in between these two punishments as life imprisonment, going by the law laid down in Godse's case is till the end of one's life. What ***Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 has done is to go by the practical experience of the life imprisonment getting reduced to imprisonment for a period of not more that 14 years and assess that level to be the minima and then consider a hiatus between that level and the death sentence. In our view this assumption is not correct. What happens on the practical front cannot be made basis for creating a sentence by the Courts. That part belongs specifically to the legislature. If the experience in practice shows that remissions are granted in unsound manner, the matter can be corrected in exercise of judicial review. In any case in the light of our discussion in answer to Question in Para 52.6, in cases of remissions Under Section 432/433 of Code of Criminal Procedure an approach will necessarily have to be made to the Court, which will afford sufficient check and balance.

230. It may be relevant to note at this state that in England and Wales, the mandatory life sentence for murder is contained in Section 1(1) of the Murder (Abolition of the Death Penalty) Act, 1965. The Criminal Justice Act, 2003 empowers a trial judge, in passing a mandatory life sentence, to determine the minimum term which the prisoner must serve before he is eligible for early release on licence. The statute allows the trial judge to decide that because of the seriousness of the offence, the prisoner should not be eligible for early release (in effect to make a "whole life order" that is to say till the end of his life.

In effect, the recommendations of Malimath Committee were on similar lines to add a new form of punishment which could similarly empower the Courts to impose such punishment and state that the prisoner would not be entitled to remissions. Section 32A of the NDPS Act is also an example in that behalf.

What is crucial to note is the specific empowerment under the Statute by which a prisoner could be denied early release or remissions.

231. ***Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 does not proceed on the ground that upon interpretation of the concerned provision such as Section 302 of the Indian Penal Code, such punishment is available for the court to impose. If that be so it would be available to even the first court i.e. Sessions Court to impose such sentence and put the matter beyond any remissions. In a given case the matter would not go before the superior court and it is possible that

there may not be any further assessment by the superior court. If on the other hand one were to say that the power could be traceable to the power of confirmation in a death sentence which is available to the High Court under Chapter XXVIII of Code of Criminal Procedure, even the High Court while considering death reference could pass only such sentence as is available in law. Could the power then be traced to Article 142 of the Constitution?

232. In ***Prem Chand Garg and Anr. v. Excise Commissioner, U.P. and Ors.*** MANU/SC/0082/1962 : AIR 1963 SC 996, Constitution Bench of this Court observed:

...The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws....

(Emphasis added)

In ***Supreme Court Bar Association*** *v.* ***Union of India and Anr.*** MANU/SC/0291/1998 : 1998 (4) SCC 409 while dealing with exercise of powers Under Article 142 of Constitution, it was observed:

47. The plenary powers of this Court Under Article 142 of the Constitution are inherent in the Court and are *complementary* to those powers which are *specifically conferred on the Court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of *supplementary* powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, *to prevent injustice* in the process of litigation and *to do complete justice between the parties*. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary *whenever it is just and equitable to do so* and in particular to ensure the observance of the due process of law, *to do complete justice between the parties*, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available *only* to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction Under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., *to do complete justice between the parties*. It

cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

(Emphasis added)

233. Further, in theory it is possible to say that even in cases where court were to find that the offence belonged to the category of "rarest of rare" and deserved death penalty, such death convicts can still be granted benefit Under Section 432/433 of Code of Criminal Procedure In fact, Section 433A contemplates such a situation. On the other hand, if the court were to find that the case did not belong to the "rarest of rare" category and were to put the matter beyond any remissions, the prisoner in the latter category would stand being denied the benefit which even the prisoner of the level of a death convict could possibly be granted Under Section 432/433 of the Code of Criminal Procedure The one who in the opinion of the Court deserved death sentence can thus get the benefit but the one whose case fell short to meet the criteria of "rarest of rare" and the Court was hesitant to grant death sentence, would languish in Jail for entirety of his life, without any remission. If absolute 'irrevocability of death sentence' weighs with the Court in not awarding death sentence, can the life imprisonment ordered in the alternative be so directed that the prospects of remissions on any count stand revoked for such prisoner. In our view, it cannot be so ordered.

234. We completely share the concern as expressed in ***Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767 that at times remissions are granted in extremely unsound manner but in our view that by itself would not and ought not to nudge a judge into endorsing a death penalty. If the offence in question falls in the category of the "rarest of rare" the consequence may be inevitable. But that cannot be a justification to create a new form of punishment putting the matter completely beyond remission. Parliament having stipulated mandatory minimum actual imprisonment at the level of 14 years, in law a prisoner would be entitled to apply for remission under the statute. If his case is made out, it is for the executive to consider and pass appropriate orders. Such orders would inter alia consider not only the gravity of the crime but also other circumstances including whether the prisoner has now been de-sensitized and is ready to be assimilated in the society. It would not be proper to prohibit such consideration by the executive. While doing so and putting the matter beyond remissions, the court would in fact be creating a new punishment. This would mean-though a model such a Section 32A was available before the Legislature and despite recommendation by Malimath Committee, no such punishment was brought on the Statute yet the Court would create such punishment and enforce it in an individual case. In our view, that would not be permissible.

235. In ***Pravasi Bhalai Sangathan*** v. ***Union of India and Ors.*** MANU/SC/0197/2014 : 2014 (11) SCC 477, while emphasizing that the court cannot rewrite, recast or reframe the legislation it was observed as under:

20. Thus, it is evident that the legislature had already provided sufficient and effective remedy for prosecution of the authors who indulge in such activities. In spite of the above, the Petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the Judges should only reflect the law regardless of the anticipated consequences, considerations of

fairness or public policy and the Judge is simply not authorised to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India has raised public eyebrows time and again.

Similarly in ***Sushil Kumar Sharma*** v. ***Union of India and Ors.*** MANU/SC/0418/2005 : (2005) 6 SCC 281, it was observed that if the provision of law is misused and subjected to the abuse, it is for the legislation to amend modify or repeal it, if deemed necessary.

236. The power Under Section 432/433 Code of Criminal Procedure and the one exercisable Under Articles 72 and 161 of the Constitution, as laid down in ***Maru Ram*** (supra) are streams flowing in the same bed. Both seek to achieve salutary purpose. As observed in ***Kehar Singh*** (supra) in Clemency jurisdiction it is permissible to examine whether the case deserves the grant of relief and cut short the sentence in exercise of executive power which abridges the enforcement of a judgment. Clemency jurisdiction would normally be exercised in the exigencies of the case and fact situation as obtaining when the occasion to exercise the power arises.

Any order putting the punishment beyond remission will prohibit exercise of statutory power designed to achieve same purpose Under Section 432/433 Code of Criminal Procedure In our view Courts cannot and ought not deny to a prisoner the benefit to be considered for remission of sentence. By doing so, the prisoner would be condemned to live in the prison till the last breath without there being even a ray of hope to come out. This stark reality will not be conducive to reformation of the person and will in fact push him into a dark hole without there being semblance of the light at the end of the tunnel.

237. As stated in ***Prem Chand Garg*** (supra) an order in exercise of power Under Article 142 of the Constitution of India must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. In ***A.R. Antulay*** v. ***R.S. Naik*** MANU/SC/0002/1988 : (1988) 2 SCC 602 a direction by which the Petitioner was denied a statutory right of appeal was recalled. A fortiorari, a statutory right of approaching the authority Under Section 432/433 Code of Criminal Procedure which authority can, as laid down in ***Kehar Singh*** (supra) and ***Epuru Sudhakar*** (supra) eliminate the effect of conviction, cannot be denied under the orders of the Court.

238. The law on the point of life imprisonment as laid down in Godse's case (supra) is clear that life imprisonment means till the end of one's life and that by very nature the sentence is indeterminable. Any fixed term sentence characterized as minimum which must be undergone before any remission could be considered, cannot affect the character of life imprisonment but such direction goes and restricts the exercise of power of remission before the expiry of such stipulated period. In essence, any such direction would increase or expand the statutory period prescribed Under Section 433A of Code of Criminal Procedure Any such stipulation of mandatory minimum period inconsistent with the one in Section 433A, in our view, would not be within the powers of the Court.

Our answer to Sub Question (b) of Question in Para 52.1 is:

Question b: Whether as per the principles enunciated in paragraphs 91 to 93 of ***Swamy Shraddananda(2)*** MANU/SC/3096/2008 : (2008) 13 SCC 767, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Answer. In our view, it would not be open to the Court to make any special category of sentence in substitution of death penalty and put that category beyond application of remission, nor would it be permissible to stipulate any mandatory period of actual imprisonment inconsistent with the one prescribed Under Section 433A of Code of Criminal Procedure

239. Reference answered accordingly.

W.P (CRL.) Nos. 185, 150, 66 of 2014 & Crl. Appeal No. 1215 of 2011

These Writ Petitions and Criminal Appeal are disposed of in terms of the decision in Writ Petition (Criminal) No. 48 of 2014.

240. Our conclusions in respect of Questions referred in the Referral Order, except in respect of sub question (b) of Question in Para 52.1 of the Referral Order, are in conformity with those in the draft judgment of Hon'ble Kalifulla J. Since our view in respect of sub question (b) of Question in Para 52.1 of the Referral Order is not in agreement with that of Hon'ble Kalifulla J., while placing our view we have dealt with other questions as well.

Abhay Manohar Sapre, J.

241. I have had the benefit of reading the elaborate, well considered and scholarly written two separate draft opinions proposed to be pronounced by my learned Brothers Justice Fakkir Mohamed Ibrahim Kalifulla and Justice Uday Umesh Lalit.

242. Having gone through the opinions of both the learned Brothers very carefully and minutely, with respect, I am in agreement with the reasoning and the conclusion arrived at by my Brother Justice Uday Umesh Lalit in answering the reference.

243. Since I agree with the line of reasoning and the conclusion arrived at by my Brother Justice Uday Umesh Lalit while answering the questions referred to this Bench, I do not consider it necessary to give my separate reasoning nor do I wish to add anything more to what has been said by Brother Lalit J. in his opinion.

244. In my view, it is only when some issues are not dealt with or though dealt with but requires some elaboration, the same can be supplemented while concurring. I, however, do not find any scope to meet such eventuality in this case and therefore no useful purpose would be served in writing an elaborate concurring opinion.

245. Now that we have answered the Reference in the matters, the matters will now be listed before an appropriate three learned Judges' Bench for appropriate orders and directions in the light of the majority judgment of this Court.

---

[1]MANU/SC/0363/2014 : 2014 (11) SCC 1
[2]Suthendraraja alias Suthenthira Raja alias Santhan and Ors. v. State through DSP/CBI, SIT, Chennai MANU/SC/0640/1999 : (1999) 9 SCC 323
[3]*L.K. Venkat* v. *Union of India and Ors.* MANU/SC/0371/2012 : (2012) 5 SCC 292
[4]Constituent Assembly Debate Vol. 7 Page 1129

Back to Index

MANU/SC/0686/1996

Neutral Citation: 1996/INSC/952

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 914 of 1991

Decided On: 28.08.1996

Appellants: Vellore Citizens Welfare Forum **Vs.** Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
Kuldip Singh, Faizanuddin and K. Venkataswami, JJ.

Subject: Environment

Disposition:
Case Remanded

Relevant Section:
ENVIRONMENT (PROTECTION) ACT, 1986 - Section 3

Authorities Referred:
Laws of England; (Commentaries on the Laws of England of Sir William Blackstone) Vol. III, fourth edition published in 1876. Chapter XIII, "Of Nuisance" depicts the law on the subject

Case Note:

Environment - Public interest Litigation(PIL) - Section 63 of the Water Prevention and Control of Pollution Act 1974 - PIL filled under Article 32 of the Constitution of India by Vellore Citizens Welfare Forum - Directed against the environmental degradation

Issues :

Whether right to fresh air is a constitutional and a right which is statutory recognized?

Holding :

It is the Constitutional and statutory provisions to protect a persons right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common

law right of clean environment. Article 21 of the Constitution of India guarantees protection of life and personal liberty which includes right to fresh air.

Ratio Decidendi:

The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

Cases Referred:
Addl. Distt. Magistrate Jabalpur v. Shivakant Shukla MANU/SC/0062/1976; Joly George Varghese's case MANU/SC/0014/1980; Gramophone Company's case MANU/SC/0187/1984

ORDER

Kuldip Singh, J.

1. This petition - public interest - under Article 32 of the Constitution of India has been filed by Vellore Citizens Welfare Forum and is directed against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. It is stated that the tanneries are discharging untreated effluent into agricultural fields, road-sides, waterways and open lands. The untreated effluent is finally discharged in river Palar which is the main source of water supply to the residents of the area. According to the petitioner the entire surface and sub-soil water of river Palar has been polluted resulting in non-availability of potable water to the residents of the area. It is stated that the tanneries in the State of Tamil Nadu have caused environmental degradation in the area. According to the preliminary survey made by the Tamil Nadu Agricultural University Research center Vellore nearly 35,000 hectares of agricultural land in the Tanneries Belt, has become either partially or totally unfit for cultivation. It has been further stated in the petition that the tanneries used about 170 types of chemicals in the chrome tanning processes. The said chemicals include sodium chloride, lime, sodium sulphate, chromium sulphate, fat liquor Ammonia and sulphuric acid besides dyes which are used in large quantities. Nearly 35 litres of water is used for processing one kilogram of finished leather, resulting in dangerously enormous quantities of toxic effluents being let out in the open by the tanning industry. These effluents have spoiled the physico-chemical properties of the soil, and have contaminated ground water by percolation. According to the petitioner an independent survey conducted by Peace Members, a non-governmental organisation, covering 13 villages of Dindigal and Peddiar Chatram Anchayat Unions, reveals that 350 well out of total of 467 used for drinking and irrigation purposes have been polluted. Women and children have to walk miles to get drinking water. Legal Aid and Advice Board of Tamil Nadu requested two lawyers namely, M.R. Ramanan and P.S. Subramanium to visit the area and submit a report indicating the extent of pollution caused by the tanneries. Relevant part of the report is as under:

As per the Technical Report dated 28.5.1983 of the Hydrological Investigations carried out in Solur village near Ambur it was noticed that 176 chemicals including acids were contained in the

Tannery effluents. If 40 litres of water with chemicals are required for one Kilo of leather with the production of 200 tons of Leather per day at present and likely to be increased multifold in the next four to five years with the springing up of more tanneries like mushroom in and around Ambur Town, the magnitude of the effluent water used with chemical and acids let out daily can be shockingly imagined....The effluents are let out from the tanneries in the nearby lands, then to Goodar and Palar rivers. The lands, the rivulet and the river receive the effluents containing toxic chemicals and acids. The sub soil water is polluted ultimately affecting not only arable lands, wells used for agriculture but also drinking water wells. The entire Ambur Town and the villages situated nearby do not have good drinking water. Some of the influential and rich people are able to get drinking water from a far off place connected by a few pipes. During rainy days and floods, the chemicals deposited into the rivers and lands spread out quickly to other lands, the effluents thus let out, affect cultivation, either crops do not come up at all or if produced the yield is reduced abnormally too low....The Tanners have come to stay. The industry is a Foreign Exchange Earner. But one moot point is whether at the cost of the lives of lakhs of people with increasing human population the activities of the tanneries should be encouraged on monetary considerations. We find that the tanners have absolutely no regard for the healthy environment in and around their tanneries. The effluents discharged have been stored like a pond openly in the most of the places adjacent to cultivable lands with easy access for the animals and the people. The Ambur Municipality, which can exercise its powers as per the provisions of the Madras District Municipalities Act (1920) more particularly under Sections 226 to 231, 249 to 253 and 338 to 342 seems to be a silent spectator probably it does not want to antagonise the highly influential and stupendously rich tanners. The powers given under Section 63 of the Water Prevention and Control of Pollution Act 1974 (6 of 1974) have not been exercised in the case of tanneries in Ambur and the surrounding areas.

2. Alongwith the affidavit dated July 21, 1992 filed by Deputy Secretary to Government, Environment and Forest Department of Tamil Nadu, a list of villages affected by the tanneries has been attached. The list mentions 59 villages in the three Divisions of Thirupathur, Vellore and Ranipath. There is acute shortage of drinking water in these 59 villages and as such alternative arrangements were being made by the Government for the supply of drinking water.

3. In the affidavit dated January 9, 1992 filed by Member Secretary, Tamil Nadu Pollution Control Board (the Board), it has been stated as under :

It is submitted that there are 584 tanneries in North Arcot Ambedkar District vide annexure 'A' and 'D'. Out of which 443 Tanneries have applied for consent of the Board. The Government were concerned with the treatment and disposal of effluent from tanneries. The Government gave time upto 31.7.1985 to tanneries to put up Effluent Treatment Plant (E.T.P.). So far 33 tanneries in North Arcot Ambedkar District have put up Effluent Treatment Plant. The Board has stipulated standards for the effluent to be disposed by the tanneries.

4. The affidavits filed on behalf of State of Tamil Nadu and the Board clearly indicate that the tanneries and other polluting industries in the State of Tamil Nadu are being persuaded for the last about 10 years to control the pollution generated by them. They were given option either to construct common effluent treatment plants for a cluster of industries or to set up individual pollution control devices. The Central Government agreed to give substantial subsidy for the

construction of common effluent treatment plants (CETPs). It is a pity that till date most of the tanneries operating in the State of Tamil Nadu have not taken any step to control the pollution caused by the discharge of effluent. This Court on May 1, 1995 passed a detailed order. In the said order this Court noticed various earlier orders passed by this Court and finally directed as under :

Mr. R. Mohan, learned senior counsel for the Tamil Nadu Pollution Control Board has placed before us a consolidated statement dividing the 553 industries into three parts. The first part in Statement No. 1 and the second part in Statement No. 2 relate to those tanneries who have set up the Effluent Treatment Plants either individually or collectively to the satisfaction of the Tamil Nadu Pollution Control Board. According to the report placed on the record by the Board, these industries in Statements 1 and 2 have not achieved the standard or have not started functioning to the satisfaction of the Board. So far as the industries in Statements 1 and 2 are concerned, we give them three months notice from today to complete the setting up of Effluent Treatment Plant (either individually or collectively) failing which they shall be liable to pollution fine on the basis of their past working and also liable to be closed. We direct the Tamil Nadu Pollution Control Board to issue individual notices to all these industries within two weeks from today. The Board is also directed to issue a general notice on three consecutive days in a local newspaper which has circulation in the District concerned.

So far as the 57 tanneries listed in Statement III (including 12 industries who have filed writ petition, Nos. of which have been given above) are concerned, these units have not installed and commissioned the Effluent Treatment Plants despite various orders issued by this Court from time to time. Mr. R. Mohan, learned senior counsel appearing for Tamil Nadu Pollution Control Board states that the Board has issued separate notices to these units directing them to set up the Effluent Treatment Plants. Keeping in view the fact that this Court has been monitoring the matter for the last about four years and various orders have been issued by this Court from time to time, there is no justification to grant any further time to these industries. We, therefore, direct the 57 industries listed hereunder to be closed with immediate effect.... We direct the District Collector and the Senior Superintendent of Police of the District to have our orders complied with immediately. Both these Officers shall file a report in this Court within one week of the receipt of the order.

We give opportunity to these 57 industries to approach this Court as and when any steps towards the setting up of Effluent Treatment Plants and their commissioning have been taken by these industries. If any of the industries wish to be re-located to some other area, they may come out with a proposal in that respect.

5. On July 28, 1995 this Court suspended the closure order in respect of seven industries mentioned therein for a period of eight weeks. It was further observed as under :

Mr. G. Ramaswamy, learned senior advocate appearing for some of the tanneries in Madras states that the setting up of the effluent treatment plants is progressing satisfactorily. According to him several lacs have already been spent and in a short time it would start operating. Mr. Mohan, learned counsel for the Tamil Nadu Pollution Control Board, states that the team of the Board will inspect the project and file a report by 3rd August, 1995.

6. This Court on September 8, 1995 passed the following order :

The Tamil Nadu Pollution Control Board has filed its report. List No. 1 relates to about 299 industries. It is stated by Mr. G. Ramaswamy, Mr. Kapil Sibal and Mr. G.L. Sanghi, learned senior advocates appearing for these industries, that the setting up of the projects is in progress. According to the learned counsel Tamil Nadu Leather Development Corporation (TALCO) is in charge of the project. The learned counsel state that the project shall be completed in every respect within 3 months from today. The details of these industries and the projects undertaken by TALCO as per list No. I is as under.... We are of the view that it would be in the interest of justice to give a little more time to these industries to complete the project. Although the industries have asked time for three months, we give them time till 31st December, 1995. We make it clear that in case the projects are not completed by that time, the industries shall be liable to be closed forthwith. Apart from that, these industries shall also be liable to pollution fine for the past period during which they had been operating.

We also take this opportunity to direct TALCO to take full interest in these projects and have the projects completed within the time granted by us.

Mr. Kapil Sibal, learned counsel appearing for the tanneries, stated that Council for Indian Finished Leather manufactures Export Association is a body which is collecting 5% on all exports. This body also helps the tanneries in various respect. We issue notice to the Association to be present in this Court and assist this Court in all the matters pertaining to the leather tanneries in Madras. Mr. Sampath takes notice.

So far as List No. II is concerned, it relates to about 163 tanneries (except M/s. Vibgyor Tanners & Co., Kailasagiri Road, Mittalam 635 811, Ambur (via). The Pollution Control Board has inspected all these tanneries and placed its report before us. According to the report most of these tanneries have not even started primary work at the spot. Some of them have not even located the land. The tanneries should have themselves set up the pollution control devices right at the time when they started working. They have not done so. They are not even listening to various orders passed by this Court from time to time during the last more than 2 years. It is on the record that these tanneries are polluting the area. Even the water around the area where they are operating is not worth drinking. We give no further time to these tanneries. We direct all the following tanneries which are numbering about 162 to be closed with immediate effect.

It may be mentioned that this Court suspended the closure orders in respect of various industries from time to time to enable the said industries to install the pollution control devices.

7. This Court by the order dated October 20, 1995 directed the National Environmental Engineering Research Institute, Nagpur (NEERI) to send a team of experts to examine, in particular, the feasibility of setting up of CETPs for cluster of tanneries situated at different places in the State of Tamil Nadu where the work of setting up of the CETPs has not started and also to inspect the existing CETPs including those where construction work was in progress. NEERI submitted its first report on December 9, 1995 and the second report on February 12, 1996. This Court examined the two reports and passed the following order on April 9, 1996 :

Pursuant to this Court's order dated December 15, 1995, NEERI has submitted Final Examination Report dated February 12, 1996, regarding CETPs constructed/under construction by the Tanneries

in various districts of the State of Tamil Nadu. A four member team constituted by the Director, NEERI inspected the CETPs from January 27 to February 12, 1996. According to the report, at present 30 CETPs sites have been identified for tannery clusters in the five districts of Tamil Nadu viz., North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. All the 30 CETPs were inspected by the Team. According to the report, only 7 CETPs are under operation, while 10 are under construction and 13 are proposed. The following 7 ETPs are under operation :

1. M/s. TALCO Ranipet Tannery Effluent Treatment Co. Ltd. Ranipet, Dist. North Arcot Ambedkar.

2. M/s. TALCO Ambur Tannery Effluent Treatment Co. Ltd., Thuthipet Sector, Ambur Dist. North Arcot Ambedkar.

3. M/s. TALCO Vaniyambadi Tanners Enviro Control Systems Ltd., Vaniyambattu, Vaniyambadi, Dt. North Arcot.

4. M/s. Pallavaram Tanners Industrial Effluent Treatment Co., Chrompet Area, Dist. Chengai MGR.

5. M/s. Ranipet SIDCO Finished Leather Effluent Treatment Co. Pvt. Ltd., Ranipet, Dist. North Arcot Ambedkar.

6. M/s. TALCO Vaniyambadi Tanners Enviro Control Systems Ltd., Udayandiram, Vaniyambadi, Dist. North Arcot Ambedkar.

7. M/s. TALCO Pernambut Tannery Effluent Treatment Co. Ltd., Bakkalapalli, Pernambut, Dist. North Arcot Ambedkar.

The CETPs mentioned at Sl. Nos. 5, 6 & 7 were commissioned in January, 1996 and were on the date of report passing through stabilization period. The report indicates that so far as the above CETPs are concerned, although there is improvement in the performance, they are still not operating at their optimal level and are not meeting the standards as laid down by the Ministry of Environment and Forests and the Tamil Nadu Pollution Control Board for inland surface water discharge. The NEERI has given various recommendations to be followed by the above mentioned units. We direct the units to comply with the recommendations of NEERI within two months from today. The Tamil Nadu Pollution Control Board Shall monitor the directions and have the recommendations of the NEERI Complied with. So far as the three units which are under stabilization, the NEERI Team may inspect the same and place a final report before this Court within the period of two months.

Apart from the tanneries which are connected with the above mentioned 7 units, there are large number of other tanneries operating in the 5 districts mentioned above which have not set up any satisfactory pollution control devices. Mr. Mohan, learned counsel for the Tamil Nadu Pollution Control Board states that notices were issued to all those tanneries from time to time directing them to set up the necessary pollution control devices. It is mandatory for the tanneries to set up the pollution control devices. Despite notices it has not been done. This Court has been monitoring

these matters for the last about 4 year. There is no awakening or realisation to control the pollution which is being generated by these tanneries.

The NEERI has indicated the physico-chemical characteristics of ground water from dug wells near tannery clusters. According to the report, water samples show that well-waters around the tanneries are unfit for drinking. The report also shows that the quality of water in Palar river down stream from the place where effluent is discharged, is highly polluted. We, therefore, direct that all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. which are not connected with the seven CETPs mentioned above, shall be closed with immediate effect. None of these tanneries shall be permitted to operate till the time the CETPs are constructed to the satisfaction of the Tamil Nadu Pollution control Board. We direct the District Magistrate and the Superintendent of Police of the area concerned, to have all these tanneries closed with immediate effect. Mr. Mehta has placed on record the report of Tamil Nadu Pollution Control Board. In Statement I of the Index, there is a list of 30 industries which have also not been connected with any CETPs. According to the report, these industries have not, till date set up pollution control devices. We direct the closure of these industries also. List is as under.... The Tamil Nadu Pollution Control Board has filed another report dated January 18, 1996 pertaining to 51 Tanneries. There is dispute regarding the permissible limit of the quantity of total dissolved solids (TDS). Since the NEERI team is visiting these tanneries, they may examine the TDS aspect also and advise this Court accordingly. Meanwhile, we do not propose to close any of the tannery on the ground that it is discharging more than 2001 TDS.

The report indicates that except the 17 units, all other units are non-complaint units in the sense that they are not complying with the BOD standards. Excepting these 17 industries, the remaining 34 tanneries listed hereunder are directed to be closed forthwith.... We direct the District Magistrate and the Superintendent of the police of the area concerned to have also these industries mentioned above close forthwith. The tanneries in the 5 districts of Tamil Nadu referred to in this order have been operating for a long time. Some of the tanneries are operating for a period of more than two decades. All this period, these tanneries have been polluting the area. Needles to say that the total environment in the area has been polluted. We issue show cause notice to these industries through their learned counsel who are present in Court, why they be not subjected to heavy pollution fine. We direct the State of Tamil Nadu through the Industry Ministry, the Tamil Nadu Pollution Control Board and all other authorities concerned and also the Government of India through the Ministry of Environment and Forests, not to permit the setting up of further tanneries in the State of Tamil Nadu.

Copy of this order be communicated to the concerned authorities within three days. To come up for further consideration after the replies to the show cause. There are large number of tanneries in the State of Tamil Nadu which have set up individual pollution control devices and which according to the Tamil Nadu Pollution Control Board, are operating satisfactorily. The fact, however, remains that all these tanneries are discharging the treated effluents within the factory precinct itself. We direct NEERI Team which is visiting this area to find out as to whether the discharge of the effluent on the land within the factory premises is permissible environmentally. M/s. Nandeem Tanning Company, Valayampet Vaniyambadi is one of such industries. Copy of the report submitted by the Tamil Nadu Pollution Control Board be forwarded to the NEERI.

NEERI may inspect this industry within ten days and file a report in this Court. Copy of this order be communicated to NEERI.

Matters regarding Distilleries in the State of Tamil Nadu.

The Tamil Nadu Pollution Control Board has placed on record the factual report regarding 6 Distilleries mentioned in page 4 of the Index of its Report dated April 5, 1996. Learned counsel for the Board states that the Board shall issue necessary notices to these industries to set up pollution control devices to the satisfaction of the Board, failing which these distilleries shall be closed. The Pollution Control Board shall place a status report before this Court.

The NEERI submitted two further reports on May 1, 1996 and June 11, 1996 in respect of CETPs set up by various industries. The NEERI reports indicate that the physico-chemical characteristics of ground water from dug wells in Ranipath, Thuthipath, Valayambattu, Vaniyambadi and various other places do not conform to the limits prescribed for drinking purposes.

8. This Court has been monitoring this petition for almost five years. The NEERI, Board and the Central Pollution Control Board (Central Board) have visited the tanning and other industries in the State of Tamil Nadu for several times. These expert bodies have offered all possible assistance to these industries. The NEERI reports indicate that even the seven operational CETPs are not functioning to its satisfaction. NEERI has made several recommendations to be followed by the operational CETPs. Out of the 30 CETP-sites which have been identified for tannery clusters in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Thrichi and Chengai MGR. 7 are under operation 10 are under construction and 13 are proposed. There are large number of tanneries which are not likely to be connected with with any CETP and are required to set up pollution control devices on their own. Despite repeated extension granted by this Court during the last five years and prior to that by the Board the tanneries in the State of Tamil Nadu have miserably failed to control the pollution generated by them.

9. It is no doubt correct that the leather industry in India has become a major foreign exchange earner and at present Tamil Nadu is the leading exporter of finished leather accounting for approximately 80% of the country's export. Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry.

10. The traditional concept that development and ecology are opposed to each other, is no longer acceptable. "Sustainable Development" is the answer. In the International sphere "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972.
Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "Our Common Future". The Commission was chaired by the then Prime Minister of Norway Ms. G.N. Brundtland and as such the report is popularly known as "Brundtland Report". In 1991 the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, jointly came out with a document

called "Caring for the Earth" which is a strategy for sustainable living. Finally, came the Earth Summit held in June, 1992 at Rio which saw the largest gathering of world leaders ever in the history - deliberating and chalking out a blue print for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution.

During the two decades from Stockholm to Rio "Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems.

"Sustainable Development" as defined by the Brundtland Report means "development that meets the needs of the present without compromising the ability of the future generations to meet their won needs".

We have no hesitation in holding that "Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the Customary International Law though its salient features have yet to be finalised by the International Law jurists.

11. Some of the salient principles of "Sustainable Development", as culled-out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries.

We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development". The "Precautionary Principle" - in the context of the municipal law - means :

(i) Environmental measures - by

the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The "Onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign.

12. "The Polluter Pays" principle has been held to be a sound principle by this Court in Indian Council for Enviro - Legal Action v. Union of India, J.T. (1996) 2 196. The Court observed, "We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country". The Court ruled that "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable

care while carrying on his activity. The rule is premised upon the very nature of the activity carried on". Consequently the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

13. The precautionary principle and the polluter pays principle have been accepted as part of the law of the land.

Article 21 of the Constitution of India guarantees protection of life and personal liberty. Article 47 48A and 51A(g) of the Constitutional are as under :

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health. - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except from medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48A. Protection and improvement of environment and safeguarding of forests and wild life. - The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

51A(g). To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Apart from the constitutional mandate to protect and improve the environment there are plenty of post independence legislations on the subject but more relevant enactments for our purpose are : The Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), The Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment Protection Act 1986 (the Environment Act). The Water Act provides for the Constitution of the Central Pollution Control Board by the Central Government and the Constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. Also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the later part of this judgment.

14. In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country.

15. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. To support we may refer to Justice H.R. Khanna's opinion in Addl. Distt. Magistrate Jabalpur v. Shivakant Shukla MANU/SC/0062/1976 : 1976CriLJ945 , Jolly George Varghese's case MANU/SC/0014/1980 : [1980]2SCR913 and Gramophone Company's case MANU/SC/0187/1984 : 1984(2)ECC142 .

16. The Constitutional and statutory provisions protect a persons right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment.
It would be useful to quote a paragraph from Blackstone's commentaries on the Laws of England (Commentaries on the Laws of England of Sir William Blackstone) Vol. III, fourth edition published in 1876. Chapter XIII, "Of Nuisance" depicts the law on the subject in the following words :
Also, if a person keeps his hogs, or other noisome animals, 'or allows filth to accumulate on his premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of this house. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, sic utere "tuo, ut alienum non laedas;" this therefore is an actionable nuisance. And on a similar principle a constant ringing of bells in one's immediate neighbourhood may be a nuisance;.... With regard to other corporeal heriditaments; it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit, for the use of trade, in the upper part of the stream; 'to pollute a pond, from which another is entitled to water his cattle; to obstruct a drain; or in short to do any act in common property, that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel-morality, of "doing to others, as we would they should do upto ourselves.

17. Our legal system having been founded on the British Common Law the right of a person to pollution free environment is a part of the basic jurisprudence of the land.<mpara>

18. The Statement of Objects and Reasons to the Environment Act, inter alia, states as under :

The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems. The world community's resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972. Government of India participated in the Conference and strongly

voiced the environmental concerns. While several measures have been taken for environmental protection both before and after the Conference, the need for a general legislation further to implement the decisions of the Conference has become increasingly evident....Existing laws generally focus on specific types of pollution or on specific categories of hazardous substances. Some major areas of environmental hazardous are not covered. There also exist uncovered gaps in areas of major environmental hazards. There are inadequate linkages in handing matters of industrial and environmental safety. Control mechanisms to guard against slow, insidious build up of hazardous substances, especially new chemicals, in the environment are weak. Because of a multiplicity of regulatory agencies, there is need for an authority which can assume the lead role for studying, planning and implementing long-term requirement of environmental safety and to give direction to, and co-ordinate a system of speedy and adequate response to emergency situations threatening the environment.... In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable co-ordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening environment and deterrent to those who endanger human environment, safety and health.

19. Sections 3 4 5 7 and 8 of the Environment Act which are relevant are as under :

3. Power of Central Government to take measures to protect and improve environment. - (1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quantity of the environment and preventing controlling and abating environmental pollution.

(2) In particular, and without prejudice to the generality of the provisions of Section (1), such measures may include measures with respect to all or any of the following matters, namely:

(i) co-ordination of actions by the State Governments, officers and other authorities-

(a) under this Act, or the rules made thereunder, or

(b) under any other law for the time being in force which is relatable to the objects of this Act;

(ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;

(iii) laying down standards for the quality of environment in its various aspects;

(iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever :

Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;

(v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

(vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

(vii) laying down procedures and safeguards for the handling of hazardous substances;

(viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;

(ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;

(xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;

(xii) collection and dissemination of information in respect of matters relating to environmental pollution;

(xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;

(xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5) of the Central Government under this Act and for taking measures with respect such of the matters referred to in Sub-section (2) as ma)' be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

4. Appointment of officers and their powers and functions (1) Without prejudice to the provisions of Sub-section (3) of Section 3, the Central Government may appoint officers with such designations as it thinks fit for the purposes of this Act and may entrust to them such of the powers and functions under this Act as it may deem fit. (2) The officers appointed under Sub-section (1)

shall be subject to the general control and direction of the Central Government or, if so directed by that Government, also of the authority or authorities, if any, constituted under Sub-section (3) of Section 3 or of any other authority or officer.

5. Power to give directions. - Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its power and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

Explanation. - for the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct-

(a) the closure, prohibition or regulation of any industry, operation or process; or

(b) stoppage or regulation of the supply of electricity or water or any other service.

7. Persons carrying on industry, operation etc., not to allow emission or discharge of environmental pollutants in excess of the standards. - No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.

8. Persons handling hazardous substances to comply with procedural safeguards. - No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed.

20. Rule 3(1), 3(2), and 5(1) of the Environment (Protection) Rules 1986 (the Rules) are as under :

3. Standards for emission or discharge of environmental pollutants. - (1) For the purposes of protecting and improving the quality of the environment and preventing and abating environmental pollution the standards for emission or discharge of environmental pollutants from the industries, operations or processes shall be as specified in (Schedule I to IV).

3.(2) Notwithstanding anything contained in Sub-rule (1), the Central Board or a State Board may specify more stringent standards from those provided in (Schedule I to IV) in respect of any specific industry, operation or process depending upon the quality of the recipient system and after recording reasons, therefore, in writing.

5. Prohibition and restriction on the location of industries and the carrying on processes and operations in different areas - (1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas :

(i) Standards for quality of environment in its various aspect laid down for an area.

(ii) The maximum allowable limits of concentration of various environment pollutants (including noise) for an area.

(iii) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.

(iv) The topographic and climatic features of an area.

(v) The biological diversity of the area which, in the opinion of the Central Government, needs to be preserved.

(vi) Environmentally compatible land use.

(vii) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.

(viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified, as such under the Wild Life (Protection) Act, 1972, or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.

(ix) Proximity to human settlements.

(x) Any other factors as may be considered by the Central Government to be relevant to the protection of the environment in an area.

21. It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under Section 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of Section 3(3) read with other provisions of the Act is being done by this Court and the other Courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where tanneries are operating, are permitted to continue then in the near future all rivers/canals shall be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act.

22. There are more than 900 tanneries operating in the five districts of Tamil Nadu. Some of them may, by now, have installed the necessary pollution control measures, they have been polluting the environment for over a decade and in some cases even for a longer period. This Court has in various orders indicated that these tanneries are liable to pay pollution fine. The polluters must compensate the affected persons and also pay the cost of restoring the damaged ecology.

23. Mr. M.C. Mehta, learned counsel for the petitioner has invited our attention to the Notification GOMs No. 213 dated March 30, 1989 which reads as under :

Order :

In the Government Order first read above, the Government have ordered, among other things, that no industry causing serious water pollution should be permitted within one kilometre from the embankments of rivers, streams, dams etc. and that the Tamil Nadu Pollution Control Board should furnish a list of such industries to all local bodies. It has been suggested that it is necessary to have a sharper definition for water sources so that ephemeral water collections like rain water ponds, drains, sewerages (biodegradable) etc. may be excluded from the purview of the above order. The Chairman, Tamil Nadu Pollution Control Board has stated that the scope of the Government Order may be restricted to reservoirs, rivers and public drinking water sources. He has also stated that there should be a complete ban on location of highly polluting industries within 1 Kilometre of certain water sources.

2. The Government have carefully examined the above suggestions. The Government impose a total ban on the setting up of the highly polluting industries mentioned in Annexure-I to this order within one Kilometre from the embankments of the water sources mentioned in Annexure-II to this order.

3. The Government also direct that under any circumstance if any highly polluting industry is proposed to be set up within one kilometre from the embankments of water sources other than those mentioned in Annexure-II to this order, the Tamil Nadu Pollution Control Board should examine the case and obtain the approval of the Government for it.

24. Annexure-I to the notification includes Distilleries, tanneries, fertilizer, steel plants and foundries as the highly polluting industries. We have our doubts whether the above quoted government order is being enforced by the Tamil Nadu Government. The order has been issued to control pollution and protect the environment. We are of the view that the order should be strictly enforced and no industry listed in Annexure-1 to the order should be permitted to be set up in the prohibited area.

25. Learned counsel for the tanneries raised an objection that the standard regarding total dissolved solids (TDS) fixed by the Board was not justified. This Court by the order dated April 9, 1996 directed the NEERI to examine this aspect and give its opinion. In its report dated June 11, 1996 NEERI has justified the standards stipulated by the Board. The reasoning of the NEERI given in its report dated June 11, 1996 is as under :

The total dissolved solids in ambient water have physiological, industrial and economic significance. The consumer acceptance of mineralized water decreases in direct proportion to increased mineralization as indicated by Bruvold (1). High Total dissolved solids (TDS), including chlorides and sulphates, are objectionable due to possible physiological effects and mineral taste that they impart to water. High levels of total dissolved solids produce laxative/cathartic/purgative effect in consumers. The requirement of soap and other detergents in household and industry is directly related to water hardness as brought out by Deboer and Larson (2). High concentration of

mineral salts, particularly sulphates and chlorides, are also associated with costly corrosion damage in wastewater treatment systems, as detailed by Patterson and Banker (3). Of particular importance is the tendency of scale deposits with high TDS thereby resulting in high fuel consumption in boilers.

The Ministry of Environment and forests (MEF) has not categorically laid down standards for inland surface water discharge for total dissolved solids (TDS), sulphates and chlorides. The decision on these standards rests with the respective State Pollution Control Boards as per the requirements based on local site conditions. The standards stipulated by the TNPCB are justified on the afore referred considerations.

The prescribed standards of the TNPCB for inland surface water discharge can be met for tannery wastewaters cost-effectively through proper implant control measures in tanning operation, and rationally designed and effectively operated wastewater treatment plants (ETPs & CETPs). Tables 3 and 5 depict the quality of groundwater in some areas around tanneries during peak summer period (June 3-5, 1996). Table 8 presents the date collected by TNPCB at individual ETPs indicating that TDS, sulphates and chlorides concentrations are below the prescribed standards for inland surface water discharge. The quality of ambient waters needs to be maintained through the standards stipulated by TNPCB.

26. The Board has the power under the Environment Act and the Rules to lay down standards for emissions or discharge of environmental pollutants. Rule 3(2) of the Rules even permit the Board to specify more stringent standards from those provided under the Rules. The NEERI having justified the standards stipulated by the Board, we direct that these standards are to be maintained by the tanneries and other industries in the State of Tamil Nadu.

27. Keeping in view the scenario discussed by us in this judgment, we order and direct as under :

1. The Central Government shall constitute an authority under Section 3(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The Authority shall be headed by a retired judge of the High Court and it may have other members - preferably with expertise in the field of pollution control and environment protection - to be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under Section 5 of the Environment Act and for taking measures with respect to the matters referred to in Clauses (v), (vi) (vii) (viii) (ix) (x) and (xii) of sub-Section (2) of Section 3. The Central Government shall constitute the authority before September 30, 1996.

2. The authority so constituted by the Central Government shall implement the "precautionary principle" and the "polluter pays" principle. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters assess the loss to the ecology/environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

3. The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrate of the area concerned. The Collector/District Magistrate shall recover the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.

4. The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refuse to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.

5. An industry may have set up the necessary pollution control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the residents of the area.

6. We impose pollution fine of Rs. 10,000 each on all the tanneries in the districts of North Arcot Ambedkar, Erode periyar, Dindigul Anna, Trichi and Chengai M.G.R. The fine shall be paid before October 31, 1996 in the office of the Collector/District Magistrate concerned. We direct the Collectors/District Magistrates of these districts to recover the fines from the tanneries. The money shall be deposited, alongwith the compensation amount recovered from the polluters, under a separate head called "Environment protection Fund" and shall be utilised for compensating the affected persons as identified by the authorities and also for restoring the damaged environment. The pollution fine is liable to be recovered as arrears of land revenue. The tanneries which fail to deposit the amount by October 31, 1996 shall be closed forthwith and shall also be liable under the Contempt of Courts Act.

7. The authority, it consultation with expert bodies like NEERI, Central Board, Board shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu. The scheme/schemes so framed shall be executed by the State Government under the supervision of the Central Government. The expenditure shall be met from the "Environment Protection fund" and from other sources provided by the State Government and the Central Government.

8. We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. We direct all the tanneries in the above five districts to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETPs shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries who are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith.

9. We direct the Superintendent of Police and the Collector/District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect who fail

to obtain the consent from the Board by the said date. Such tanneries shall not be reopened unless the authority permits them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.

10. The Government Order No. 213 dated March 30, 1989 shall be enforced forthwith. No new industry listed in Annexure-I to the Notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries which are already operating in the prohibited area and it would be open to authority to direct the relocation of any of such industries.

11. The standards stipulated by the Board regarding total dissolved solids (TDS) and approved by the NEERI shall be operative. All the tanneries and other industries in the State of Tamil Nadu shall comply with the said standards. The quality of ambient waters has to be maintained through the standards stipulated by the Board.

28. We have issued comprehensive directions for achieving the end result in this case. It is not necessary for this Court to monitor these matters any further. We are of the view that the Madras High Court would be in a better position to monitor these matters hereinafter. We, therefore, request the Chief Justice of the Madras High Court to constitute a special Bench "Green Bench" to deal with this case and other environmental matters. We make it clear that it would be open to the Bench to pass any appropriate order/orders keeping in view the directions issued by us. We may mention that "Green Benches" are already functioning in Calcutta, Madhya Pradesh and some other High Courts. We direct the Registry of this Court to send the records to the registry of the Madras High Court within one week. The High Court shall treat this matter as a petition under Article 226 of the Constitution of India and deal with it in accordance with law and also in terms of the directions issued by us. We give liberty to the parties to approach the High Court as and when necessary.

29. Mr. M.C. Mehta has been assisting this Court to our utmost satisfaction. We place on record our appreciation for Mr. Mehta. We direct the State of Tamil Nadu to pay Rs. 50,000 towards legal fees and other out of pocket expenses incurred by Mr. Mehta.

Back to Index

MANU/SC/0786/1997

Neutral Citation: 1997/INSC/604

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) Nos. 666-70 of 1992

Decided On: 13.08.1997

Appellants: Vishaka and Ors. **Vs.** Respondent: State of Rajasthan and Ors.

Hon'ble Judges/Coram:
J.S. Verma C.J.I., S.V. Manohar and B.N. Kirpal, JJ.

Subject: Constitution

Subject: Criminal

Relevant Section:
Constitution of India - Article 51A; Constitution of India - Article 73, Constitution of India - Article 141; Protection of Human Rights Act, 1993 - Section 2

Disposition:
Disposed of

Cases Referred:
Nilabati Behera v. State of Orissa MANU/SC/0307/1993

Case Note:

Constitution - gender justice - Articles 14 and 21 of Constitution of India and Section 2 of Protection of Human Rights Act, 1993 - petition for preservation and enforcement of right to gender equality and fundamental rights of working women - Court framed various guidelines including disciplinary action, complaint mechanism and complaints committee - Court directed that guidelines and norms would be strictly observed in all work places for preservation and enforcement of right to gender equality of working women.

ORDER

J.S. Verma, C.J.I.

1. This writ petition has been filed for the enforcement of the fundamental rights of working women under Articles 14 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aim of focusing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject-matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

3. Each such incident results in violation of" the fundamental rights of 'Gender Equality' and the 'Right to Life and Liberty'. It is a clear violation of the rights under Articles 14 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

4. The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment. Shri Fali S. Nariman appeared as Amicus Curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provisions which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14 19(1)(g) and 21, which have relevance are:

Article 15:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-

(1) The State shall not discriminate against any citizen on only of religion, race, caste, sex, place of birth or any of them.

(2) xxx xxx xxx

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) xxx xxx xxx Article 42:

42. Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 51A:

51 A. Fundamental duties.- It shall be the duty of every citizen of India;-

(a) to abide by the Constitution and respect its ideals and institutions....

xxx xxx xxx

(c) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

xxx xxx xxx

6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51:

51. Promotion of international peace and security.- The State shall endeavour to-

xxx xxx xxx

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another; and

xxx xxx xxx

Article 253:

253. Legislation for giving effect to international agreements.- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Seventh Schedule:

List I - Union List:

xxx xxx xxx

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

xxx xxx xxx

7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil.

8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

9. The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behavior of the employers and all others at the work places to curb this social evil.

10. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

Objectives of the Judiciary:

10. The objectives and functions of the judiciary include the following:

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.

12. Some provisions in the 'Convention on the Elimination of All Forms of Discrimination against Women', of significance in the present context are:

Article 11:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

xxx xxx xxx

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction

xxx xxx xxx

Article 24:

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.

13. The general recommendations of CEDAW in this context in respect of Article 11 are:

Violence and equality in employment:

22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.

23. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place.

The Government of India has ratified the above resolution on June 25, 1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India has also made an official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's to act as a public defender of women's human rights; to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them
and there is a void in the domestic law.
The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Tech 128 ALR 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.<mpara>

15. In Nilabati Behera v. State of Orissa MANU/SC/0307/1993 : 1993CriLJ2899 , a provision in the ICCPR was referred to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. In view of the above, and the absence of enacted law

to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

The guidelines and norms pre-scribed herein are as under:

Having regard to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time.

It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as:

a) physical contact and advances;

b) a demand or request for sexual favours;

c) sexually coloured remarks;

d) showing pornography;

e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment:

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.